ARTICLE

BOOKER RULES

AMY BARON-EVANS & KATE STITH†

† Amy Baron-Evans, Sentencing Resource Counsel, Federal Public and Community Defenders; Kate Stith, Lafayette S. Foster Professor of Law, Yale Law School. The authors thank Daniel L. Kaplan for editorial advice on a previous draft, Jennifer Niles Coffin for research assistance, Paul J. Hofer for statistical analyses, and Yale Law School students Ravi Ramanathan, Jonathan Siegel, and Dana Stern for editorial assistance.

INTRODUCTION

In *United States v. Booker*, the Supreme Court excised two provisions of the Sentencing Reform Act of 1984 (SRA)[1] that had made the Sentencing Guidelines binding on sentencing judges: 18 U.S.C. § 3553(b), the provision that had confined departures to specified, limited circumstances, and 18 U.S.C. § 3742(e), the standard of review under which courts of appeals had enforced those limitations.[2] The Court made the law of sentencing the purposes and factors set forth in 18 U.S.C. § 3553(a), and the standard of review for all sentences, inside or outside the guideline range, the "reasonableness" of the sentencing judge's application of that law.[3]

The mandatory guidelines system *Booker* replaced was badly out of balance in ways never contemplated by the framers of the SRA or the Supreme Court when it upheld the U.S. Sentencing Commission against separation-of-powers challenges.[4] Yet *Booker* was initially met

[1] Sentencing Reform Act of 1984 (SRA), Pub. L. No. 98-473, tit. II, ch. 2, 98 Stat. 1987.

[2] 543 U.S. 220, 259 (2005). *Booker* made clear that sentencing judges would still consider the guideline range as one of the factors in 18 U.S.C. § 3553(a), and the Court instructed judges in a subsequent decision to begin the sentencing determination by calculating the guideline range. Gall v. United States, 552 U.S. 38, 49-50 (2007).

[3] *Booker*, 543 U.S. at 261, 264.

[4] *See* Mistretta v. United States, 488 U.S. 361 (1989) (rejecting several constitutional challenges to the Commission, its composition, and its delegated authority).

with resistance by the Commission and the Department of Justice,[5] and many lower courts continued to treat the guidelines as "virtually mandatory."[6] In subsequent decisions, the Supreme Court firmly insisted that the guidelines are—and must be—advisory only.[7] The result has been a gradual but marked improvement in the quality, transparency, and rationality of federal sentencing, in both the sentencing of individual defendants and the Commission's rulemaking. The advisory guidelines system has broad support: the vast majority of federal judges believe that advisory guidelines achieve the purposes of sentencing better than any kind of mandatory guidelines system or no guidelines at all,[8] the Criminal Law Committee of the Judicial Conference of the United States supports the advisory guidelines system,[9] prosecutors

---

[5] The Commission promptly instituted a "standard training program" that explained "how the sentencing guidelines reflect Congress' objectives in the SRA and that the guidelines accordingly should be given substantial weight in fashioning sentences . . . post-*Booker*." U.S. SENTENCING COMM'N, FINAL REPORT ON THE IMPACT OF *UNITED STATES V. BOOKER* ON FEDERAL SENTENCING 42 (2006) [hereinafter *BOOKER* REPORT]. The Department of Justice initially directed prosecutors to "actively seek sentences within the [guideline] range . . . in all but extraordinary cases . . . involving circumstances that were not contemplated by the Sentencing Commission." Memorandum from James B. Comey, Deputy Att'y Gen., to All Fed. Prosecutors 2 (Jan. 28, 2005), *available at* http://www.justice.gov/dag/readingroom/memo-01282005.pdf.

[6] Rita v. United States, 551 U.S. 338, 366 (2007) (Stevens, J., concurring).

[7] *See, e.g.*, *Gall*, 552 U.S. at 51 (stating that a district court commits "significant procedural error" by "treating the Guidelines as mandatory"). For a further discussion of the Court's post-*Booker* decisions, see *infra* Part II.

[8] *See* U.S. SENTENCING COMM'N, RESULTS OF SURVEY OF UNITED STATES DISTRICT JUDGES JANUARY 2010 THROUGH MARCH 2010 tbl.19 (2010) (reporting that when asked which system "best achieves the purposes of sentencing," 75% of district court judges selected the current advisory guidelines system, 8% selected no guidelines, 3% selected the mandatory guidelines in effect before *Booker*, and 14% selected mandatory guidelines with broader ranges and jury factfinding, if coupled with fewer mandatory minimums).

[9] *See* Theodore McKee, Chief U.S. Circuit Judge, U.S. Court of Appeals for the Third Circuit, Statement Before the U.S. Sentencing Commission (Feb. 16, 2012), http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20120215-16/Testimony_16_McKee.pdf; Paul J. Barbadoro, U.S. Dist. Judge, Dist. of N.H., Statement Before the United States Sentencing Commission (Feb. 16, 2012), http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20120215-16/Testimony_16_Barbadoro.pdf; *see also* Letter from Hon. Myron H. Bright, U.S. Circuit Judge, to Hon. Patti B. Saris, Chair, U.S. Sentencing Comm'n (Jan. 10, 2012), http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20120215-16/Testimony_16_Bright.pdf.

prefer advisory guidelines to other available options,[10] and the organized public and private defense bars support the advisory guidelines system.[11]

Nevertheless, a former Chair of the Sentencing Commission and the current Commission itself have each proposed that Congress enact a *Booker* "fix." Former Commission Chair Judge William K. Sessions III proposes "the resurrection of presumptive (formerly called 'mandatory') guidelines," with enhancing facts to be charged in an indictment and proved to a jury beyond a reasonable doubt or admitted by the defendant.[12] The Commission proposes codification of a variety of

---

[10] *See* Lanny A. Breuer, *The Attorney General's Sentencing and Corrections Working Group: A Progress Report*, 23 FED. SENT'G REP. 110, 112 (2010) (noting that prosecutors, defense attorneys, and judges "were not enthusiastic" about a return to a mandatory guidelines structure, and that the Department of Justice "does not plan to seek legislative reinstatement of a mandatory Guidelines system"); Matthew Axelrod, Assoc. Deputy Att'y Gen., Statement Before the U.S. Sentencing Commission 88-89 (Feb. 16, 2012) (transcript available at http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20120215-16/Hearing_Transcript_20120216.pdf) (noting that "any change is going to result in lots of litigation and be disruptive" and that "uncertainty is not good for prosecutors or . . . the justice system").

[11] *See, e.g.*, *Uncertain Justice: The Status of Federal Sentencing and the U.S. Sentencing Commission Six Years After* Booker*: Hearing Before the Subcomm. on Crime, Terrorism, & Homeland Sec. of the H. Comm. on the Judiciary*, 112th Cong. (2011) (statement of James E. Felman, Member, Am. Bar Ass'n) [hereinafter *Felman Testimony*], *available at* http://judiciary.house.gov/hearings/pdf/Felman%2010112011.pdf; Letter from Thomas W. Hillier, II, Fed. Pub. Defender, to the Hon. F. James Sensenbrenner, Chair, Subcommittee on Crime, Terrorism, & Homeland Sec. of the House Committee on the Judiciary, and the Hon. Robert C. (Bobby) Scott, Ranking Member, Subcommittee on Crime, Terrorism, & Homeland Sec. of the House Committee on the Judiciary (Oct. 11, 2011), *available at* http://democrats.judiciary.house.gov/sites/democrats.judiciary.house.gov/files/Hillier111011.pdf.

Several representatives of the defense bar testified at the U.S. Sentencing Commission Hearing on "Federal Sentencing Options After *Booker*," including Federal Public Defenders Raymond Moore, Henry J. Bemporad, and Michael Nachmanoff; James E. Felman, Co-Chair of the American Bar Association's Criminal Justice Section Committee on Sentencing; David Debold, Chair of the Practitioners Advisory Group; and Lisa Wayne, President of the National Association of Criminal Defense Lawyers. The written and oral testimony of all witnesses is available on the Sentencing Commission's website. *See Public Hearing Meeting—February 16, 2012*, U.S. SENT'G COMMISSION, http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20120215-16/Agenda_16.htm (last visited Mar. 15, 2012).

[12] William K. Sessions III, *At the Crossroads of the Three Branches: The U.S. Sentencing Commission's Attempts to Achieve Sentencing Reform in the Midst of Inter-Branch Power Struggles*, 26 J.L. & POL. 305, 346, 350 (2011). For an in-depth analysis of Judge Sessions's proposal, see *infra* Section IV.A.

devices designed to give its guidelines, as well as its restrictions on non-guideline sentences, increased weight at sentencing, and to more strictly enforce the guidelines on appeal.[13] These proposals—seeking to fix a system that, far from being broken, is actually working properly for the first time—are unwise, unworkable, and likely unconstitutional.

This Article proceeds in four parts. Part I explores the history and failings of the former mandatory guidelines system. Some of the history we set forth has not previously been examined, yet is critical to understanding how the Supreme Court came to the conclusion that the Sentencing Commission's policy statements and commentary, as well as its guidelines, were binding on judges—a conclusion that was essential to the Court's recognition in *Booker* that the guidelines regime was "mandatory."[14] Part II describes the improvements made by the advisory guidelines system, drawing primarily upon new data and recent cases. Part III examines the flawed justifications that have been offered for a *Booker* "fix." Most importantly, we carefully examine and refute the claim that judges have exercised their increased discretion after *Booker* in a racially biased manner. Drawing on a variety of evidence including empirical analyses by others, we conclude that (1) increased judicial discretion after *Booker* has mitigated racial disparity built into the guidelines; (2) racial disparity after *Booker* is driven primarily by the increased impact of mandatory minimums that constrain judicial discretion and apply most frequently to black offenders; and (3) if it were possible to devise a study controlling for all legally relevant factors, a finding of racial disparity in judicial decisionmaking would be unlikely. Part IV sets forth practical, policy, and constitutional reasons for rejecting both Judge Sessions's and the Commission's proposals. We conclude that these proposals would likely violate *Booker* and its progeny, and that Judge Sessions's proposal would violate fundamental principles of separation of powers.

---

[13] *Uncertain Justice: The Status of Federal Sentencing and the U.S. Sentencing Commission Six Years After* Booker*: Hearing Before the Subcomm. on Crime, Terrorism, & Homeland Sec. of the H. Comm. on the Judiciary*, 112th Cong. 55-60(2011) (statement of Judge Patti B. Saris, Chair, U.S. Sentencing Comm'n) [hereinafter *Commission Testimony*], *available at* http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Testimony/20111012_Saris_Testimony.pdf. For an in-depth discussion of the Commission's proposal, see *infra* Section IV.B.

[14] United States v. Booker, 543 U.S. 220, 233-35 (2005).

I. THE FAILURE OF THE MANDATORY GUIDELINES SYSTEM

A. *The Vision of the Sentencing Reform Act's Framers: An Expert Judicial Branch Agency Insulated from Political Influence*

Congress could have enacted a set of statutory sentencing guidelines. But the framers of the SRA[15] recognized that Congress lacked the expertise and political neutrality required for this task, and chose instead to delegate the job to a sentencing commission.[16] As envisioned by Congress, the Commission was to be a politically neutral expert body that would promulgate guidelines based on empirical research and judicial experience.[17] The Commission would be guided by the "intelligible principles" set forth in the SRA,[18] which required it to develop guidelines on the basis of sentencing data, empirical research, and consultation with frontline participants.[19] The Commission would

---

[15] Pub. L. No. 98-473, tit. II, ch. 2, 98 Stat. 1987.

[16] *See* Kenneth R. Feinberg, *Federal Criminal Sentencing Reform: Congress and the United States Sentencing Commission*, 28 WAKE FOREST L. REV. 291, 297 (1993) (describing the considerations that "commanded" the decision to delegate promulgation of guidelines to a sentencing commission). Kenneth Feinberg served as Special Counsel to the Senate Judiciary Committee from 1975 through 1980.

[17] Expertise and political neutrality were to be the core features of a sentencing commission since sentencing reform was conceived. *See, e.g.*, MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER 53-60, 118-23 (1973); Edward M. Kennedy, *Toward a New System of Criminal Sentencing: Law with Order*, 16 AM. CRIM. L. REV. 353, 380 (1979).

[18] *See* Mistretta v. United States, 488 U.S. 361, 371-79 (1989) (holding that Congress did not grant the Commission excessive legislative discretion in violation of the nondelegation doctrine because Congress directed the Commission to comply with sufficiently detailed "intelligible principle[s]" in promulgating the guidelines).

[19] *See* SRA, sec. 217(a), § 991(b)(1), 98 Stat. at 2017-18 (codified at 28 U.S.C. § 991(b)(1) (2006)) (directing the Commission to "establish 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"); *id.* § 991(b)(2), 98 Stat. at 2018 (codified at 28 U.S.C. § 991(b)(2)) (directing the Commission to "develop means of measuring the degree to which the sentencing . . . practices are effective in meeting the purposes of sentencing as set forth in section 3553(a)(2)"); *id.* § 994(n), 98. Stat. at 2022 (codified at 28 U.S.C. § 994(o)) (directing the Commission to "periodically . . . review and revise" the guidelines "in consideration of comments and data coming to its attention," and to "consult with authorities on, and individual and institutional representatives of, various aspects of the Federal criminal justice system"); *id.* § 995(a)(12)–(16), 98 Stat. at 2024-25 (codified at

be engaged in an "essentially neutral endeavor"[20] and would not be coerced or co-opted by the political branches.[21] Because the SRA's framers intended for the new Commission to be insulated from political influence, the judicial branch was the natural place to put it.[22]

There were other compelling reasons for locating the Commission within the judicial—and not the executive—branch. One was Congress's "strong feeling" that sentencing was "within the province of the judiciary" and "should remain primarily a judicial function."[23] Another was that the executive branch had no constitutional or historical authority to make sentencing policy or to impose sentences.[24] Another was Congress's related concern that placing sentencing authority within the executive branch would violate constitutional separation of powers principles (a concern that, as noted below, the Supreme Court shared).[25] Congress had no expectation that the Department of Justice would dominate the Commission. The SRA gave the Department only an ex officio, nonvoting seat,[26] and placed the Department on the same footing as other institutional actors in the rulemaking process.[27]

---

28 U.S.C. § 995(a)(12)–(16)) (empowering the Commission to establish a research and development program and to collect, study, and disseminate sentencing data and other empirical research).

[20] *Mistretta*, 488 U.S. at 407.

[21] *See id.* at 408 ("[W]here the subject lies so close to the heart of the judicial function and where purposes of the Commission are not inherently partisan, such enlistment [of judges in the creation of sentencing rules] is not coercion or co-optation, but merely assurance of judicial participation."); *id.* at 411 ("[P]recisely to ensure that they would not be subject to coercion [by the President] . . . Congress insulated the members from Presidential removal except for good cause.").

[22] SRA § 991(a), 98 Stat. at 2017-18 (codified at 28 U.S.C. § 991(a)).

[23] S. REP. NO. 98-225, at 54, 159 (1983).

[24] *See, e.g.*, *Ex parte* United States, 242 U.S. 27, 41-42 (1916).

[25] "Traditionally, the courts and Congress have shared responsibility for establishing Federal sentencing policy. Congress defines criminal conduct and sets maximum sentences, while the courts impose sentences in individual cases. Any suggestion that the Executive Branch should be responsible for promulgating the guidelines would present troubling constitutional problems." H.R. REP. NO. 98-1017, at 95 (1984) (footnote omitted). *See also infra* notes 36-44 and accompanying text.

[26] SRA § 991(a), 98 Stat. at 2017-18 (codified at 28 U.S.C. § 991(a)).

[27] The Commission was to "review and revise" the guidelines based on, inter alia, consultation with and regular reports from the Judicial Conference, the Department of Justice, the Federal Public Defenders, the United States Probation System, and the Bureau of Prisons. *Id.* § 994(n), 98 Stat. at 2022-23 (codified at 28 U.S.C. § 994(o)).

Moreover, aware that ex ante sentencing rules might have the effect of transferring sentencing power to prosecutors,[28] Congress directed the Commission to issue policy guidance to judges to avoid that result.[29]

The expectation was that the judicial branch would have the greatest ongoing influence over the development of the guidelines, not only because at least three voting Commissioners had to be judges,[30] but also because judges were to be the primary source of information regarding whether and how the guidelines needed to be revised. To determine whether the guidelines were effective in meeting the purposes of sentencing—and to revise them if they were not[31]—the Commission was to systematically collect and study data regarding sentences imposed, the relationship between the factors set forth in § 3553(a) and sentences imposed, and the effectiveness of sentences imposed in meeting the purposes of sentencing.[32] District courts were required to state their reasons for departure,[33] and appellate courts were to uphold "reasonable" departures having regard for the sentenc-

---

[28] According to a 1979 study by the Federal Judicial Center, reducing judicial discretion was likely to increase prosecutorial control over sentencing and consequently unwarranted disparity. *See* 1 STEPHEN J. SCHULHOFER, FED. JUDICIAL CTR., PROSECUTORIAL DISCRETION AND FEDERAL SENTENCING REFORM 3, 8-13 (1979).

[29] In response to the 1979 study, Congress directed the Commission to promulgate policy statements for judges to use in deciding whether to accept plea agreements. SRA § 994(a)(2)(D), 98 Stat. at 2019 (codified at 28 U.S.C. § 994(a)(2)(E)); *see also* Stephen J. Schulhofer & Ilene H. Nagel, *Negotiated Pleas Under the Federal Sentencing Guidelines: The First Fifteen Months*, 27 AM. CRIM. L. REV. 231, 241 (1989). Moreover, the guideline range would be determined by the judge, based on aggravating and mitigating factors identified by the parties and by the probation officer in the presentence report, and the judge would have the power to depart from the guideline range. *See* SRA § 991(b)(1)(B), 98 Stat. at 2018 (codified at 28 U.S.C. § 991(b)(1)(B)); *id.* § 994(c)–(d) (codified at 28 U.S.C. § 994(c)–(d)); *id.* sec. 212(a), § 3553(a)–(b), 98 Stat. at 1989-90 (codified at 18 U.S.C. § 3553(a)–(b) (Supp. II 1984)).

[30] SRA, sec. 217(a), § 991(a), 98 Stat. at 2017 (codified at 28 U.S.C. § 991(a) (1998)).

[31] *See id.* § 991(b), 98 Stat. at 2018 (codified at 28 U.S.C. § 991(b)(1)–(2) (2006)) (enumerating the foundational purposes and duties of the Commission); *id.* § 994(n), 98 Stat. at 2022-23 (codified at 28 U.S.C. § 994(o)) (directing the Commission to review and revise the guidelines in light of data and comments coming to its attention).

[32] *Id.* § 995(a)(13)–(16), 98 Stat. at 2024-25 (codified at 28 U.S.C. § 995(a)(13)–(16)).

[33] SRA, sec. 212(a), § 3553(c), 98 Stat. at 1990 (codified at 18 U.S.C. § 3553(c)).

ing court's reasons and the factors set forth in § 3553(a).[34] The Commission would study the district courts' reasons and the appellate courts' decisions, and revise the guidelines based on what it learned. As then–Chief Judge Breyer stated:

> [T]he very theory of the Guidelines system is that when courts, drawing upon experience and informed judgment in such cases, decide to depart, they will explain their departures. The courts of appeals, and the Sentencing Commission, will examine, and learn from, those reasons. And, the resulting knowledge will help the Commission to change, to refine, and to improve, the Guidelines themselves.[35]

The Commission's placement within the judicial branch proved critical in *Mistretta v. United States*; largely for this reason, the Supreme Court rejected a separation of powers challenge to the SRA.[36] Emphasizing the "consistent responsibility of federal judges to pronounce sentence within the statutory range established by Congress,"[37] the Court noted that it was proper to delegate to the judicial branch rulemaking power related to the "conduct of its own business."[38] Sentencing rules, the Court reasoned, were "attendant to a central element of the historically acknowledged mission of the Judicial Branch"[39] and were "not more appropriate for another Branch."[40] The Court recognized that the Commission had been placed "in the Judicial Branch precisely because of the Judiciary's special knowledge and expertise" in making "substantive" policy judgments in sentencing individual cases.[41] Because "substantive judgment in the field of sentencing has been and remains appropriate to the Judicial Branch," Congress's decision to locate the Commission "within the Judicial Branch simply leaves with the Judiciary what long has belonged to it."[42] The Court therefore rejected the Solicitor General's argument that the Commission did not violate sep-

---

[34] *Id.* sec. 213(a), § 3742(d)(3), (e)(3), 98 Stat. at 2011-13 (codified at 18 U.S.C. § 3742(d)(3), (e)(3) (Supp. II 1984)).

[35] United States v. Rivera, 994 F.2d 942, 949-50 (1st Cir. 1993).

[36] 488 U.S. 361, 380-408 (1989).

[37] *Id.* at 391.

[38] *Id.* at 388.

[39] *Id.* at 391.

[40] *Id.* at 390.

[41] *Id.* at 395-96.

[42] *Id.* at 396-97.

aration of powers principles because its power to promulgate enforceable sentencing guidelines was executive in nature, despite its "judicial branch" label.[43] Indeed, the Court noted that "had Congress decided to confer responsibility for promulgating sentencing guidelines on the Executive Branch, we might face the constitutional questions whether Congress unconstitutionally had assigned judicial responsibilities to the Executive or unconstitutionally had united the power to prosecute and the power to sentence within one Branch."[44]

The SRA, as written and as construed by the Court in *Mistretta*, thus envisioned an expert judicial branch commission insulated from undue influence by the political branches. But the *Mistretta* Court's rosy view of the Commission's independence and of its "judicial" role was based on a number of assumptions—some grounded in the SRA and others purely speculative—that later proved to be false.[45] As Professor Frank Bowman has observed, "[T]he architects of the [SRA] miscalculated and created a sentencing structure almost perfectly designed for capture and manipulation by the political branches."[46] The framers miscalculated by failing to place sufficient checks—particularly a judicial check—on the Commission.

---

[43] Brief for the United States 33-43, *Mistretta*, 488 U.S. 361 (Nos. 87-1904, 87-7028), 1998 WL 1026050. The Solicitor General went on to suggest that the Supreme Court could "sever[]" the "'judicial branch' label," leaving the Commission designated as an "independent agency." *Id.* at 40-42.

[44] *Mistretta*, 488 U.S. at 391 n.17.

[45] *See, e.g.*, Kate Stith, United States v. Mistretta*: The Constitution and the Sentencing Guidelines* ("If the [Sentencing Commission is] indeed in the judicial branch, then the political branches commandeered that branch, obscuring who is responsible for the [sentencing] rules . . . and who is really exercising sentencing authority in criminal cases." (footnote omitted)), *in* CRIMINAL PROCEDURE STORIES 455, 482 (Carol S. Steicker ed., 2006); *id.* at 476-82 (discussing a number of false assumptions made by the *Mistretta* Court); Ronald F. Wright, *Sentencers, Bureaucrats, and the Administrative Law Perspective on the Federal Sentencing Commission*, 79 CALIF. L. REV. 1, 28-40 (1991) (contending that the *Mistretta* Court upheld the Commission and its guidelines based on a number of assumptions—including (1) an optimistic assessment that granting judges such legislative and executive powers would not compromise their impartiality, (2) a presumption that substantive judicial rulemaking would not stray too far from acceptable past precedent, and (3) a belief that the President could exercise little influence over the judges on the Commission—and did not address whether the Commission and its guidelines would be constitutional if those assumptions proved to be ill-founded).

[46] Frank O. Bowman, III, *Mr. Madison Meets a Time Machine: The Political Science of Federal Sentencing Reform*, 58 STAN. L. REV. 235, 236 (2005).

B. *The Breakdown of the Framers' Vision: Insufficient Checks on the Commission*

Although Congress's desire to insulate the Commission from political pressures was sound in theory, it was as unrealistic for this federal agency as it would be for other prominent agencies that issue rules regarding politically contentious matters.[47] Given this reality, Congress's decision to exempt the Commission's work from the judicial review applicable to other federal agencies caused the framers' vision to quickly unravel. The only functionally similar mechanism under the SRA was judicial authority to depart based on circumstances not "adequately taken into consideration" by the Commission in formulating the guidelines,[48] and the Commission's responsibility to review and revise the guidelines based on what it learned from these departures.[49] But the departure power never operated as intended. The Commission acted forcefully to prevent judicial departures and judicial scrutiny of the guidelines even before, and repeatedly after, the guidelines went into effect.

1. The Commission's Exemption from Judicial Review and Related Transparency and Explanation Requirements

The SRA required that the notice, comment, and hearing requirements of § 553 of the Administrative Procedures Act (APA) be applied to the Commission's "guidelines"[50] in order to ensure that the Commission took into account "all relevant views."[51] Congress also required the Commission to consult with experts and representatives of each of the primary institutional actors in the federal criminal justice system.[52]

---

[47] *See* KATE STITH & JOSÉ A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 48-51 (1998) (noting that from its inception, the Commission has been both "acutely sensitive to the political environment in which it operates, and controversial"); *see also infra* notes 166-72 and accompanying text.

[48] SRA, Pub. L. No. 98-473, tit. II, ch. 2, sec. 212(a), § 3553(b), 98 Stat. 1987, 1990 (codified at 18 U.S.C. § 3553(b) (Supp. II 1984)).

[49] *Id.* sec. 217(a), § 994(n), 98 Stat. at 2022 (codified at 28 U.S.C. § 994(o) (2006)).

[50] *Id.* § 994(w), 98 Stat. at 2024 (codified at 28 U.S.C. § 994(x)).

[51] *See* S. REP. NO. 98-225, at 181 (1983).

[52] *See supra* note 27.

Significantly, however, the Commission was not subject to the most important procedures and constraints designed to ensure honesty, transparency, and accountability in rulemaking by federal agencies.[53] The failure to provide for judicial review of the Commission's rulemaking is a major reason that the framers' vision was never realized. The APA subjects other federal agencies to this judicial check, whereby the reviewing court must "hold unlawful and set aside" agency action found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," contrary to constitutional right or statute, or "without observance of procedure required by law."[54] Moreover, other federal agencies must hold "every portion of every meeting . . . open to public observation,"[55] and may not engage in ex parte communications regarding matters subject to a public hearing.[56] When promulgating regulations, they must follow the "logical outgrowth" principle, which requires a second notice and comment period if a regulation under consideration differs significantly from a version previously published for comment.[57] They must provide a statement of "basis and purpose" for their rules[58] that includes a thorough explanation in light of the factors made relevant by the enabling legislation, factual evidence supporting the rule, a reasoned response to com-

---

[53] The Commission was subject only to § 553 of the APA. For other agencies, the APA, 5 U.S.C. §§ 551–559, 701–706, the Freedom of Information Act (FOIA), *id.* § 552, and the Government in the Sunshine Act, *id.* § 552b, require additional procedures. "The openness these acts require reflects what is perhaps a peculiarly American political idea, that publicity can serve as an effective constraint on government action—that 'sunlight is the best disinfectant.'" PETER L. STRAUSS, AN INTRODUCTION TO ADMINISTRATIVE JUSTICE IN THE UNITED STATES 195 (1989).

[54] 5 U.S.C. § 706(2). While the APA provides that this judicial review provision is not applicable to "the courts of the United States," *id.* § 551(1)(B), it is not clear that this exclusion should apply to the Commission, even if one accepts its "judicial branch" label. *See* Mistretta v. United States, 488 U.S. 361, 393 (1989) ("[T]he Commission is not a court.").

[55] 5 U.S.C. § 552b(b).

[56] *Id.* § 557(d)(1).

[57] Long Island Care at Home, Ltd. v. Coke, 551 U.S. 158, 174 (2007).

[58] 5 U.S.C. § 553(c).

ments opposing the rule, and a "rational connection between the facts found and the choice[s] made."[59]

None of these requirements was made applicable to the Commission. Although the Commission might have voluntarily adopted open and rigorous procedures, it chose not to do so. Pursuant to its Rules of Practice and Procedure, it deliberates in private meetings closed to all but the Justice Department's ex officio commissioner,[60] engages in unrecorded ex parte communications with Department staff, law enforcement officials, and others,[61] and excludes these and all internal communications from its public comment file.[62] The Commission provides reasons in connection with its notices of proposed amendments only "to the extent appropriate and practicable" and information relevant to the issues only if such information is "publicly available."[63]

Without enforceable constraints, the Commission failed to take into account the views and evidence presented by the judiciary, the defense bar, and others who advised against its proposals.[64] It promulgated amendments materially different from those originally proposed for comment, to which stakeholders had no opportunity to respond.[65] And

---

[59] Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 42-43 & n.9 (1983); *see also* 1 RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 7.1, at 559 (5th ed. 2010); *id.* § 7.4, at 592-94, 599.

[60] *See* U.S. SENTENCING COMM'N, RULES OF PRACTICE AND PROCEDURE r.3.2 (2007) (stating that only meetings "with outside parties shall be conducted in public").

[61] *See id.* r.3.3 (declaring that the Commission may hold nonpublic meetings to receive information from and participate in discussions with any person designated by an ex officio commissioner as support staff, or to receive or share information deemed inappropriate for public disclosure); *id.* r.3.5 (requiring that only public meetings be recorded).

[62] *Id.* r.5.1.

[63] *Id.* r.4.4.

[64] *See* Joseph W. Luby, *Reining in the "Junior Varsity Congress": A Call for Meaningful Judicial Review of the Federal Sentencing Guidelines*, 77 WASH. U. L.Q. 1199, 1276 (1999).

[65] *See, e.g.*, Fred W. Bennett, *A Direct Participant's Perspective on the Guideline Amendment Process*, 3 FED. SENT'G REP. 148, 148 & 151 n.5 (1990) (noting that at least eighteen of the fifty-three final amendments had materially different language than that published for comment); *id.* at 149 ("In some instances it was impossible to discern what prompted options to proposed amendments and what empirical study or research, if any, supported final language sent to Congress but not originally published in the *Federal Register* . . . ."); Samuel J. Buffone, *The Federal Sentencing Commission's Proposed Rules of Practice and Procedure*, 9 FED. SENT'G REP. 67, 69 (1996) (noting that the Com-

while the SRA required the Commission to include with amendments sent to Congress a "statement of the reasons therefor,"[66] the Commission typically provided little or no explanation for its amendments.[67] Neither a failure to explain nor an arbitrary result was reviewable under the APA or otherwise.[68] And under the departure standard promulgated by the Commission, discussed below, courts were required to follow unexplained and unjustified guidelines.[69] The Commission was therefore under no pressure to base its actions on reasons, evidence, or a sound empirical foundation, and frequently acted instead on the basis of political pressure or the Commissioners' personal policy views.[70]

Shortly before leaving the Commission, then-Judge Breyer reportedly warned his colleagues against acting on the basis of their personal views[71] and advised the Commission to "revise the present version of the Guidelines in light of its information-based analyses and sugges-

---

mission failed to provide notice and a second comment period for final guidelines regarding environmental crimes and organizational sanctions that were not a logical outgrowth of its initial proposals).

[66] 28 U.S.C. § 994(p) (2006).

[67] The typical "reason for amendment" simply stated that the amendment increased base offense levels or enhancements by specified levels, *see, e.g.*, U.S. SENTENCING GUIDELINES MANUAL, app. C, amend. 189, reason for amend. (Nov. 1, 1989), or that the amendment "sets forth the Commission's position" that certain factors "are not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range," *id.* amend. 386, reason for amend. (Nov. 1, 1991).

[68] *See, e.g.*, United States v. Wimbush, 103 F.3d 968, 969-70 (11th Cir. 1997) ("Federal courts do not have authority to review the Commission's actions for compliance with APA provisions, at least insofar as the adequacy of the statement of the basis and purpose of an amendment is concerned."); United States v. Lopez, 938 F.2d 1293, 1296-97 (D.C. Cir. 1991) (holding that, because Congress did not subject the Commission to judicial review under the APA, "this court lacks authority to review the adequacy of the Commission's statement of reasons in support of its conclusion that age is not ordinarily relevant to sentencing").

[69] *See infra* notes 120-39 and accompanying text.

[70] *See* Samuel J. Buffone, *Control of Arbitrary Sentencing Guidelines: Is Administrative Law the Answer?*, 4 FED. SENT'G REP. 137, 139 (1991).

[71] *See* Michael K. Block, *Emerging Problems in the Sentencing Commission's Approach to Guideline Amendments*, 1 FED. SENT'G REP. 451, 453 (1989) (quoting Commissioner Breyer as warning that "this [Commission] will not last if the answer to the question 'How did you choose that level?' is that what happened was seven people sat around in a room and they decided on the basis of what they thought was somehow appropriately severe" (alteration in original)).

tions from judges, probation officers and others in the field."[72] Just before resigning, Commissioner Michael Block put the matter more bluntly: "At times it appears that a majority of the Commission is actively seeking an 'information free' environment in which to make sentencing policy."[73] Early on, the Judicial Conference made a serious effort to convince the Commission to explain its proposals, forego further increases in severity and restrictions on departures, and adopt moderating changes to the guidelines, all to no avail.[74] Judges and practitioners watched with alarm as the Commission ignored the views and evidence presented to it and set about implementing an unexplained agenda that profoundly altered federal sentencing in ways the SRA's framers clearly did not intend.[75] The Department of Justice took full advantage of this environment and its position as an ex officio member to advocate its desired results behind closed doors.[76]

---

[72] *What Are the Two Most Important Tasks Facing the Sentencing Commission, Through Modification Either of the Existing Guidelines or the Process by Which the Commission Relates to Judges and Practitioners?*, 1 FED. SENT'G REP. 365, 366 (response of Stephen G. Breyer) (1989).

[73] Block, *supra* note 71, at 453.

[74] *See* Hon. Vincent L. Broderick, Chairman, Comm. on Criminal Law & Probation Admin. of the Judicial Conference of the U.S., & Hon. Mark Wolf, Chairman, Subcomm. on Sentencing Guidelines & Procedures, Statement Before the U.S. Sentencing Commission (Mar. 5, 1991), *in* 3 FED. SENT'G REP. 276, 278-81 (1991); Judge Mark Wolf & Judge Vincent L. Broderick, Testimony Before the U.S. Sentencing Commission (Mar. 5, 1991), *in* 3 FED. SENT'G REP. 287, 287-88 (1991); *What Are the Two Most Important Tasks Facing the Sentencing Commission, Through Modification Either of the Existing Guidelines or the Process by Which the Commission Relates to Judges and Practitioners?*, *supra* note 72, at 365 (response of Marvin E. Frankel); Letter from Hon. Vincent L. Broderick, to Hon. Avern Cohn (June 13, 1991), *in* 4 FED. SENT'G REP. 48, 48-49 (1991).

[75] *See* Thomas W. Hillier, II, *The Commission's Departure from an Evolutionary Amendment Process*, 4 FED. SENT'G REP. 45, 45 (1991) (observing that the Commission had "all but ignored the input of 'outsiders'" in favor of its "internal agenda," which was "not a matter of public record or debate and, as a result, Congress's view that the guidelines evolve from a community of ideas [was] left unrealized"); *Guideline Amendments*, 2 FED. SENT'G REP. 238 (1990) (including critical responses to proposed amendments and the Commission's failure to justify or explain them by Judge Becker on behalf of the Judicial Conference, Samuel Buffone on behalf of the American Bar Association, Benson Weintraub on behalf of the National Association of Criminal Defense Lawyers, and Professors Daniel J. Freed and Marc Miller, among others).

[76] *See, e.g.*, Jeffery S. Parker & Michael K. Block, *The Sentencing Commission, P.M. (Post-*Mistretta*): Sunshine or Sunset?*, 27 AM. CRIM. L. REV. 289, 319-20 (1989) (explaining that the Department's ex officio representative convinced four of six Commission-

2. The Eradication of Reasoned Departures

The one mechanism under the SRA that would have placed pressure on the Commission to base its guidelines on reason and evidence was the district courts' authority to depart from the guidelines and to explain their reasons for doing so. But the Commission, aided by the Supreme Court, virtually eradicated the judicial departure power except as explicitly authorized by the Commission itself.

Departures were intended to serve two important functions: first, to permit individualized sentences based on circumstances not adequately taken into account in the guidelines,[77] and second, to provide systematic feedback to the Commission to assist it in reviewing and revising the guidelines.[78] Section 3553(b) of Title 18, as enacted in the SRA in 1984, provided that sentencing courts "shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4)"—which referenced the Commission's authority to create "guidelines"[79]—"unless the court finds that an aggravating or mitigating circumstance exists that was not adequately taken into consideration by the Sentencing Commission in formulating the guidelines and that

---

ers to increase fraud penalties with a "fallacious" argument "that recent congressional enactments had given oblique 'signals' to the Commission" to do so and "despite the absence of any empirical proof that an increase would improve the effectiveness of sentencing"); *cf.* Hon. Edward R. Becker, *Suggestions for the New Sentencing Commission*, 8 FED. SENT'G REP. 10, 10-11 (1995) (arguing against the inclusion of the DOJ as an ex officio member because it raises separation of powers issues and "creates the appearance that the interest of the government . . . is favored in the promulgation of the guidelines"); David J. Gottlieb, *The Sentencing Commission's Administrative Reforms: Two Cheers, and Some Suggestions*, 9 FED. SENT'G REP. 71, 76 (1996) (arguing that the Commission's work should be more open to the public, especially in light of the DOJ's "unusual position" as both an "interested party" and an ex officio member).

[77] *See* SRA, Pub. L. No. 98-473, tit. II, ch. 2, sec. 217(a), § 991(b)(1), 98 Stat. 1987, 2018 (codified at 28 U.S.C. § 991(b)(1)(B) (2006)) (directing the Commission to "maintain[] sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices").

[78] *See supra* notes 31-35 and accompanying text.

[79] *See* SRA, sec. 211(a), § 3553(a)(4), 98 Stat. at 1989-90 (codified at 18 U.S.C. § 3553(a)(4) (Supp. II 1984)) (directing the court to consider "the kinds of sentence and the sentencing range . . . as set forth in the guidelines that are issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(1)").

should result in a sentence different from that described."[80] The SRA also directed the courts, in section 3553(a), to "impose a sentence sufficient, but not greater than necessary to comply with the purposes" of sentencing[81]—that is, "just punishment," "adequate deterrence," protection of the public against "further crimes of the defendant," and rehabilitation "in the most effective manner."[82] In determining the "particular sentence to be imposed," judges were to consider "the nature and circumstances of the offense and the history and characteristics of the defendant," "the need for the sentence imposed" to satisfy the purposes of sentencing, the "kinds of sentences available" by statute, the kinds and range of sentences set forth in the "guidelines," "any pertinent policy statement," and the "need to avoid unwarranted sentence disparities" among similarly situated defendants.[83]

The Senate Judiciary Committee Report explained how subsections (a) and (b) would work together. The judge would *first* consider the nature and circumstances of the offense, the history and characteristics of the defendant, and the purposes of sentencing, as required by § 3553(a).[84] This consideration would inform the judge's decision as to whether the guideline range "adequately" reflected the circumstances of the case and whether a different sentence "should result," as required by § 3553(b).[85] The judge would *then* determine the guideline range, and either sentence within the guideline range because it appropriately reflected the relevant factors, or sentence outside the guideline range because it did not.[86] The standard of appellate review for departures was also tied to § 3553(a) and the facts of the case: the court of appeals was to determine whether a sentence outside the guideline range was "unreasonable, having regard for . . . the factors to be considered in imposing a sentence" as set forth in § 3553(a), and

---

[80] *Id.* § 3553(b), 98 Stat. at 1990 (codified at 18 U.S.C. § 3553(b) (Supp. II 1984)).

[81] *Id.* § 3553(a), 98 Stat. at 1989 (codified at 18 U.S.C. § 3553(a) (Supp. II 1984)).

[82] *Id.* § 3553(a)(2)(A)–(D), 98 Stat. at 1989 (codified at 18 U.S.C. § 3553(a)(2)(A)–(D) (Supp. II 1984)).

[83] *Id.* § 3553(a)(1)–(6), 98 Stat. at 1989-90 (codified as amended at 18 U.S.C. § 3553(a)(1)–(6) (Supp. II 1984)) .

[84] S. REP. NO. 98-225, at 52 (1983).

[85] *Id.* at 51-52.

[86] *Id.* at 52, 75.

"the reasons for the imposition of the particular sentence, as stated by the district court."[87]

Congress did not intend to eliminate judges' "thoughtful imposition of individualized sentences."[88] To the contrary, Congress's goal was to "enhance the individualization of sentences,"[89] and it believed that "the sentencing judge has an obligation to consider all the relevant factors in a case and to impose a sentence outside the guidelines in an appropriate case."[90] To this end, the SRA directed the Commission to consider for inclusion in the guidelines nonexhaustive lists of aggravating and mitigating offense and offender characteristics,[91] and to "maintain[] sufficient flexibility to permit individualized sentencing when warranted by mitigating and aggravating factors not taken into account" in the guidelines.[92] Congress recognized that it was not possible to write all relevant factors into general rules, and that "some variation [was] not only inevitable but desirable."[93]

The Commission, however, read the SRA differently. In commentary issued in April 1987, before the guidelines went into effect, it took the position that § 3553(b) meant that, "in principle, the Commission, by specifying that it had adequately considered a particular factor, could *prevent* a court from using it as grounds for departure."[94] The commentary also described a departure standard quite unlike that described in § 3553; in the Commission's view, departures were permissible only in "atypical" cases that "significantly differ[]" from the "heartland" of "typical cases embodying the conduct that each guideline describes."[95] The Commission simultaneously issued policy statements declaring, without explanation, that the mitigating factors Congress had directed it to consider for inclusion in the guidelines, as

---

[87] SRA sec. 213(a), § 3742(d)(3), 98 Stat. at 2012 (codified at 18 U.S.C. § 3742(d)(3) (Supp. II 1984)).

[88] S. REP. NO. 98-225, at 52.

[89] *Id.* at 52-53, 161.

[90] *Id.* at 52.

[91] SRA sec. 217(a), § 994(c)–(d), 98 Stat. at 2020 (codified at 28 U.S.C. § 994(c)–(d)).

[92] *Id.* § 991(b)(1)(B), 98 Stat. at 2018 (codified at 28 U.S.C. § 991(b)(1)(B)).

[93] S. REP. NO. 98-225, at 150.

[94] 52 Fed. Reg. 18,046, 18,050 (May 13, 1987) (emphasis added).

[95] *Id.*; U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A(1)(4)(b) (2011).

well as others, were prohibited or "not ordinarily relevant" as grounds for departure.[96]

Notably, the original version of § 3553(b) did not direct the courts to consider the Commission's "policy statements" or "commentary" in deciding whether to depart. Indeed, the SRA did not even authorize the Commission to issue "commentary," and while it did authorize the Commission to issue "policy statements," restricting departures was not among their specified purposes.[97] Nevertheless, the Commission secured an amendment to § 3553(b) as part of the Sentencing Act of 1987[98] that came to mean that its "policy statements" and "commentary" were binding on the courts.[99]

On October 22, 1987, the Chair of the Sentencing Commission, Judge William W. Wilkins, complained to the Senate Judiciary Committee that the departure standard under § 3553(b) was too "indefinite, subjective, and impractical" because courts would have to "wrestle with" whether a factor had been "adequately considered" by the Commission and, in doing so, might feel the need to subpoena the

---

[96] *See* 52 Fed. Reg. at 18,102-05; U.S. SENTENCING GUIDELINES MANUAL § 5H1.1 policy statement (1987) (age); *id.* § 5H1.2 policy statement (educational and vocational skills); *id.* § 5H1.3 policy statement (mental and emotional conditions); *id.* § 5H1.4 policy statement (physical condition, drug dependence, alcohol abuse); *id.* § 5H1.5 policy statement (employment record); *id.* § 5H1.6 policy statement (family ties and responsibilities); *id.* § 5K2.12 policy statement (personal financial difficulties, economic pressures on a trade or business).

[97] SRA, sec. 217(a), § 994(a)(2), 98 Stat. at 2019 (codified as amended at 28 U.S.C. § 994(a)(2)).

[98] Pub. L. No. 100-182, § 3, 101 Stat. 1266, 1266 (codified as amended at 18 U.S.C. § 3553(b) (1988)).

[99] Some analyses of the legislative history of the SRA have noted the 1987 amendment to § 3553(b). *See, e.g.*, Luby, *supra* note 64, at 1256-57; Marc Miller & Daniel J. Freed, *Honoring Judicial Discretion Under the Sentencing Reform Act*, 3 FED. SENT'G REP. 235, 236-37 (1991); Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223, 270 (1993); Marc L. Miller & Ronald F. Wright, *Your Cheatin' Heart(land): The Long Search for Administrative Sentencing Justice*, 2 BUFF. CRIM. L. REV. 723, 786-87 (1999). This Article, however, is the first (as far as we are aware) to explain its significance to the subsequent decisions of the Supreme Court that held, inexplicably and contrary to the usual canons of administrative law, that Commission policy statements and commentary were as binding on courts as the guidelines themselves.

Commission to enable them to "make the necessary determinations."[100] To remedy these asserted problems, the Commission proposed that § 3553(b) be amended to permit departure only on a ground that provides "a compelling reason" and that "is not expressly addressed in the guidelines, policy statements, and official commentary" of the Sentencing Commission,[101] unless "specifically invited" therein.[102] In addition, the Commission proposed that the courts be directed, in making this determination, to "consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission."[103] The purpose of this request to "limit [the courts'] focus to the 'four corners' of the officially promulgated guidelines, policy statements, and commentary of the Sentencing Commission" was to "definitively preclude the possibility of any legal process directed at the Commission . . . in an effort to look behind or beyond those official Commission pronouncements in order to discover intent or resolve matters in dispute."[104]

Congress declined to confine departures to circumstances that provided "a compelling reason," or to circumstances "not expressly addressed" unless "specifically invited" by the Commission. Further, it added language to § 3553(b), as proposed by the House, clarifying that even if a factor appeared in some form in the guidelines, the sentencing judge was authorized to depart if he determined that the factor was "of a kind, or to a degree" not adequately taken into consideration by the Commission.[105] But Congress did address the

---

[100] *Sentencing Commission Guidelines: Hearing Before the S. Comm. on the Judiciary*, 100th Cong. 29-30 (1987) (statement of William W. Wilkins, Chairman, U.S. Sentencing Commission).

[101] *See id.* app. at 158-59 (setting forth proposed amendments).

[102] *Id.* at 31 (statement of William W. Wilkins, Chairman, U.S. Sentencing Commission).

[103] *Id.* app. at 158-59.

[104] *Id.* at 32-33 (statement of William W. Wilkins, Chairman, U.S. Sentencing Commission). Chairman Wilkins explained that the amendment was necessary to protect the Commission from "repetitive, time-consuming, and unnecessary legal process." *Id.* at 30.

[105] Sentencing Act of 1987, Pub. L. No. 100-182, § 3, 101 Stat. 1266, 1266 (codified as amended at 18 U.S.C. § 3553(b) (1988)); 133 CONG. REC. 31,947 (1987).

Commission's fear of being subpoenaed[106] by also inserting the following sentence in § 3553(b): "In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission."[107]

The plain language of the 1987 amendments appeared to mean that a court should determine whether the factors it found to be relevant in a case were adequately reflected, in kind and degree, in the guidelines, and that, in doing so, it could not subpoena the Commission or its records to examine the adequacy of its actual deliberations. Subsections (a) and (b) of § 3553 would work together as described in the Senate Judiciary Committee Report that accompanied the SRA.[108]

The legislative history of the 1987 amendments generally pointed to the same conclusion. The House of Representatives stated that the purpose of the sentence confining the inquiry to the guidelines, policy statements, and commentary was to address the Commission's fear that it would be subpoenaed.[109] The House firmly rejected the Commission's assertion that "in principle" it could "prevent" departure by specifying that it had adequately considered a factor.[110] Instead, courts would first ascertain as, "an objective matter," whether "the guidelines take into account at all the circumstance in question."[111] If so, "the court must then decide whether the guidelines 'adequately' take the circumstance into account, a subjective determination," made by looking "to whether the circumstance in the case differs in kind or degree

---

[106] 133 CONG. REC. 31,947 (explaining that the bill adopted the Commission's suggested amendment to address its "fear[] that its members and records will frequently be subpoenaed"); *see also id.* at 33,110 (statement of Sen. Thurmond) (noting that the sentence was added to address "concern that failure to specifically designate the materials that may be used in determining the appropriateness of departure could result in members of the Commission, or their notes and other internal work products, being subpoenaed").

[107] Sentencing Act of 1987 § 3, 101 Stat. at 1266 (codified as amended at 18 U.S.C. § 3553(b) (1988)). The Act was enacted on December 7, 1987, after the guidelines went into effect on November 1, 1987.

[108] *See supra* notes 84-86 and accompanying text.

[109] 133 CONG. REC. 31,947 (1987).

[110] *Id.* at 31,947 & 31,949 n.12; *see also supra* note 94 and accompanying text.

[111] 133 CONG. REC. 31,947.

from the circumstance as accounted for by the guidelines."[112] In deciding whether the guidelines took a circumstance into account "at all" or whether it "differs in kind or degree from the circumstance as accounted for by the guidelines," the court could consider only "the guidelines themselves, the official commentary to the guidelines, and the policy statements of the Sentencing Commission"[113]—i.e., it could not subpoena the Commission. The court would then determine, as a subjective matter, whether a different sentence "should result."[114] The House also noted that § 3553(a) provided grounds for departure when the guideline sentence was greater than necessary to serve the purposes of sentencing.[115]

A "Joint Explanation" issued by four of the SRA's original Senate sponsors muddied the waters a bit. The statement acknowledged that the new sentence was added to protect the Commission from subpoenas, but asserted that § 3553(a) provided no ground for departure, and that if the Commission stated "that it had adequately considered a factor in formulating the guidelines . . . the court would be precluded from departing unless, as a threshold matter, the court reasonably determined that the factor was *not meant to be covered* by the commission's statement."[116] Although their individual statements are ambiguous, the four Senators appeared to abandon the position stated in their Senate Judiciary Committee Report that judges would *independently* evaluate whether the guidelines adequately reflected a given circumstance in light of the factors and purposes set forth in § 3553(a).[117]

Whatever the Senators' statement meant, it could not amend the plain language of the statute.[118] A statutory provision directing the

---

[112] *Id.*

[113] *Id.*

[114] *Id.*

[115] *Id.*

[116] *Id.* at 33,109 (joint statement of Sens. Biden, Thurmond, Kennedy, and Hatch) (emphasis added).

[117] *See id.* at 33,109-10; *see also* S. REP. NO. 98-225, at 52-53, 75 (1983); *supra* notes 84-86 and accompanying text.

[118] *See* Barnhart v. Sigmon Coal Co., 534 U.S. 438, 457 (2002) ("Floor statements from two Senators cannot amend the clear and unambiguous language of a statute."); Regan v. Wald, 468 U.S. 222, 236-37 (1984) (expressing "grave doubts" that statements of individual congressmen could overcome clear statutory language).

courts to determine whether potential grounds for departure were "adequately taken into consideration" by the Commission could not reasonably be read to grant the *Commission* the power to dictate the answer to this question. Moreover, the standard of appellate review for sentences outside the guideline range was whether the sentence "is unreasonable, having regard for . . . the factors to be considered in imposing a sentence" set forth in § 3553(a).[119] Because the reasonableness of a departure depended on the § 3553(a) factors, those factors must necessarily have guided the district court in determining whether and to what extent to depart.

Thus, after the 1987 amendments, it should have been clear that while the Commission was relieved of having to respond to subpoenas, it was obliged to provide explanations in the Guidelines Manual itself to demonstrate that it had "adequately taken into consideration" all relevant factors in formulating the guidelines.[120] Unfortunately, in a trio of misguided cases, the Supreme Court effectively read the statutory departure standard, as well as the reasonableness standard of review for departures, out of existence, and allowed the Commission to dictate limits on departure through policy statements and commentary. In each of these cases, the fateful sentence added to § 3553(b) in December 1987 to prevent the Commission from being subpoenaed played a substantial—and questionable—role.

In 1992, the Court in *Williams v. United States*, over a vigorous dissent but in agreement with both parties, cited that sentence in holding that a court's use of a ground for departure that was prohibited by a "policy statement" was reversible as "an incorrect application of the sentencing guidelines," and that such a departure could not be upheld as reasonable.[121] The majority rejected the dissent's reliance on the distinction drawn by the SRA between binding guidelines and nonbinding policy statements,[122] and failed to recognize the appellate re-

---

[119] *See* 18 U.S.C. § 3742(d)(3) (1988).

[120] *See* Miller & Freed, *supra* note 99, at 236 ("[T]he Commission must now shoulder the burden of demonstrating adequate consideration of each circumstance. Evidence of its thinking process—not just its conclusion—must be spelled out in the text of its Guidelines Manual.").

[121] 503 U.S. 193, 200-02 (1992).

[122] *Id.* at 200-01.

view provision's clear language directing that guideline sentences were to be reviewed for correctness, while departures were to be reviewed only for unreasonableness.[123] In doing so, the majority noted that, under § 3553(b), "in determining whether a circumstance was adequately taken into consideration, a court must consider . . . 'policy statements.'"[124]

In *Stinson v. United States*, the Court took *Williams* a step further, holding that policy statements and commentary, though not subject to notice, comment, or congressional approval requirements, were "binding" on the courts.[125] The Court acknowledged that the SRA "does not in express terms authorize the issuance of commentary," but, pointing to the new language adopted in 1987, noted that "the Act does refer to it" in § 3553(b).[126]

The Court went still further in its 1996 decision in *Koon v. United States*, where it adopted the Commission's policy statements and commentary as the *sole* framework for review of departures.[127] The Court again relied on the sentence added in 1987 for the purpose of shielding the Commission from subpoenas: "To determine whether a circumstance was adequately taken into consideration by the Commission, Congress instructed courts to 'consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission.'"[128] Turning its attention, "as instructed," to official commentary in the Guidelines Manual, the Court "learn[ed] that the Commission

---

[123] *Cf. id.* at 210-11, 217 (White, J., dissenting). The dissent highlighted the separate and distinct standards set forth in § 3742(e). *Id.* at 210-11. Section 3742 provided:

> [T]he court of appeals shall determine whether the sentence . . . (2) was imposed as a result of an incorrect application of the sentencing guidelines; [or] (3) is outside the applicable guideline range, and is unreasonable, having regard for—(A) the factors to be considered in imposing a sentence, as set forth in [§ 3553(a)] of this title; and (B) the reasons for the imposition of the particular sentence, as stated by the district court pursuant to the provisions of section 3553(c) . . . .

18 U.S.C. § 3742(e) (1988).

[124] *Williams*, 503 U.S. at 201 n.2 (quoting 18 U.S.C. § 3553(b) (1988)).

[125] 508 U.S. 36, 42-43 (1993).

[126] *Id.* at 41.

[127] 518 U.S. 81, 92-96 (1996).

[128] *Id.* at 92-93 (quoting 18 U.S.C. § 3553(b) (1988)).

did not adequately take into account cases that are, for one reason or another, 'unusual,'" as compared to cases falling within the "'heartland . . . of typical cases.'"[129] The courts were not "left adrift," however, because the Commission had specified which factors were within or outside the "heartland" through policy statements forbidding, discouraging, or encouraging their consideration.[130] While the Court in *Koon* adopted an "abuse of discretion" standard of review for departures,[131] this was meaningless in most cases because the areas within which district courts *had* discretion were demarcated by the Commission's pronouncements. And the district court's interpretation of *those* pronouncements was reviewed de novo.[132] Further, the Court made clear that judges were not permitted to "test potential departure factors against" the purposes of sentencing set forth in § 3553(a).[133] Remarkably, the Court made no mention of the standard of review for departures stated in the statute itself: unreasonableness with regard to the factors set forth in § 3553(a).[134]

---

[129] *Id.* at 92-93 (quoting U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A, introductory cmt. 4(b) (1995)).

[130] *Id.* at 94-96. Relying on the Commission's commentary, the Court said that if a factor was "forbidden" by the Commission, "the sentencing court cannot use it as a basis for departure." *Id.* at 95-96. If a factor was "encouraged," the court was "authorized to depart if the applicable Guideline does not already take it into account." *Id.* at 96. If a factor was a "discouraged factor" or an "encouraged factor already taken into account," the court "should depart only if the factor is present to an exceptional degree or in some other way makes the case different from the ordinary case where the factor is present." *Id.* If a factor was "unmentioned," the court "must, after considering the 'structure and theory of both relevant individual guidelines and the Guidelines taken as a whole,'" *id.* (quoting United States v. Rivera, 994 F.2d 942, 949 (1st Cir. 1993) (Breyer, C.J.)), then "decide whether it is sufficient to take the case out of the Guideline's heartland . . . bear[ing] in mind the Commission's expectation that departures based on grounds not mentioned in the Guidelines will be 'highly infrequent.'" *Id.* (quoting U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. 4, introductory cmt. 4(b) (1995)).

[131] *Id.* at 91.

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

[133] *Koon*, 518 U.S. at 108.

[134] *See* 18 U.S.C. § 3742(e)(3) (1994) (stating that the standard of review for sentences "outside the applicable guideline range" was whether the sentence "is unreasonable, having regard for . . . the factors to be considered in imposing a sentence, as set forth in [§ 3553(a)] of this title; and . . . the reasons for the imposition of the particular sentence, as stated by the district court").

Through the status it gave to the Commission's commentary and policy statements in *Williams*, *Stinson*, and *Koon*, the Court "enhanced the role of the Sentencing Commission vis-à-vis the sentencing court and probably vis-à-vis Congress."[135] The result was to virtually nullify the statutory language giving courts the power to depart based on circumstances "not adequately taken into consideration" by the Commission in the guidelines, to make that determination in light of the factors and purposes set forth in § 3553(a), and to have that decision reviewed for "unreasonableness" with regard to § 3553(a). Pursuant to these decisions, any factor mentioned in the Guidelines Manual, or even implicitly considered through omission, was deemed to be adequately considered and within the "heartland."[136] The Commission instructed sentencing courts that they could depart from the guideline range only based on a circumstance that was "atypical," and that they were not permitted to disagree with the policy judgments of the Commission.[137] Courts acted at their peril in forthrightly expressing dissatisfaction with the guidelines in the course of explaining a depar-

---

[135] THOMAS W. HUTCHISON ET AL., FEDERAL SENTENCING LAW AND PRACTICE § 1B1.7 (2011 ed.).

[136] *See, e.g.*, United States v. Rodriguez, 107 F. App'x 295, 298 (3d Cir. 2004) (holding that "nothing about" an eighteen-year-old girl's age "removes her situation from the heartland of cases involving comparable drug crimes," since drug importers often use "young, naive men and women without extensive criminal experience"); United States v. Bristow, 110 F.3d 754, 755, 757-58 (11th Cir. 1997) (holding that a departure would have been impermissible for a young man who pled guilty to being a felon in possession of a firearm based on his brief possession of an unloaded handgun lawfully owned by his father, solely to pawn it in order to pay child support, because, although these circumstances were not taken into account in the guideline range, the defendant was motivated by financial difficulties, a factor prohibited as a ground for departure); United States v. Webb, 49 F.3d 636 (10th Cir. 1995) (concluding that the case of a single father convicted of manufacturing and failing to register a "silencer"—here, a toilet paper roll filled with toy animal stuffing—that he attached to a legally owned rifle that he intended to use to shoot animals in his yard, was within the "heartland" contemplated by the guideline).

[137] *See* U.S. SENTENCING GUIDELINES MANUAL § 5K2.0 policy statement (1995) ("In the absence of a characteristic or circumstance that distinguishes a case as sufficiently atypical to warrant a sentence different from that called for under the guidelines, a sentence outside the guideline range is not authorized. For example, dissatisfaction with the available sentencing range or a preference for a different sentence than that authorized by the guidelines is not an appropriate basis for a sentence outside the applicable guideline range." (citation omitted)).

ture[138] and were not permitted to correct for the most egregious problems in the guidelines because they were, or were assumed to have been, intended by the Commission to be within the "heartland."[139]

3. Unexplained and Imbalanced Guidelines

The impact of giving an unaccountable agency unchecked power over federal sentencing was quickly felt. The first Commission made key choices that were not required by any specific directive in the SRA, that were not the product of empirical study as required by the SRA, and that diverged dramatically from sentences imposed before the SRA, upon which the Commission claimed the guidelines were largely based.[140]

For example, the SRA directed the Commission to include both aggravating and mitigating factors in the guidelines[141] and to maintain

---

[138] *See, e.g.*, United States v. Tucker, 386 F.3d 273, 275, 277-78 (D.C. Cir. 2004) (reversing a departure based on a variety of grounds in part because the judge stated that he was "not going to be the instrument of injustice in this case" and "[t]o the extent the district court based the departure on its belief that the sentence was unjust, it relied on a factor that is clearly impermissible under the Guidelines").

[139] *See In re* Sealed Case, 292 F.3d 913, 915-16 (D.C. Cir. 2002) (disallowing a departure based on the "crack/powder disparity" because this disparity was not "atypical" and therefore was in the "heartland"); *see also, e.g.*, United States v. Ortega, 358 F.3d 1278, 1280 (11th Cir. 2003) (holding that a departure was not permitted where a prior drug trafficking offense led to the same 16-level enhancement that would ensue from a prior murder because the Commission determined it was "serious enough to warrant [the] enhancement," and thus it "was adequately taken into account by the Sentencing Commission in formulating" the guideline); United States v. Jared, 50 F. App'x 259, 261 (6th Cir. 2002) (holding that a departure based on "first offender" status was not permitted because the Commission had instructed that such a departure "cannot be appropriate" (quoting U.S. SENTENCING GUIDELINES MANUAL § 4A1.3 policy statement (2001))); United States v. Weaver, 126 F.3d 789, 792-94 (6th Cir. 1997) (holding that a departure based on "disproportionate results between high and low-level" theft and fraud offenders was not permitted because such results were "squarely within the norm contemplated" by the guidelines).

[140] *See* U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A(1)(3) introductory cmt. (2011) (noting that in the first set of guidelines, the Commission took an "empirical approach that used as a starting point data estimating pre-guidelines sentencing practice").

[141] *See* SRA, Pub. L. No. 98-473, tit. II, ch. 2, sec. 217(a), § 994(c), 98 Stat. 1987, 2020 (codified at 28 U.S.C. § 994(c)(2006)) (listing offense circumstances); *id.* § 994(d) (codified at 28 U.S.C. § 994(d)) (listing offender characteristics).

"sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in" the guidelines.[142] But while the Commission included a vast array of aggravating factors in the guidelines,[143] it omitted all but one of the mitigating factors Congress directed it to consider[144] and issued policy statements prohibiting or discouraging downward departure based on these and other mitigating factors.[145] The Commission gave no reasons for its restrictions on downward departures. Later, it claimed that some, but not all, of these policy statements were "require[d]" by a provision of the SRA.[146] That provision, however, directed only that the Commission was not to recommend imprisonment instead of probation or a longer prison term based on the defendant's lack of education, employment, or stabilizing ties.[147] But the SRA made clear that

---

[142] *Id.* § 991(b)(1)(B), 98 Stat. at 2018 (codified at 28 U.S.C. § 991(b)(1)(B)).

[143] *See* U.S. SENTENCING GUIDELINES MANUAL ch. 2 (Offense Conduct); *id.* ch. 3 (Adjustments); *id.* ch. 4 (Criminal History and Criminal Livelihood).

[144] Of the mitigating factors specified in 28 U.S.C. § 994(d), the Commission included only "role in the offense" in the guideline rules. *See* U.S. SENTENCING GUIDELINES MANUAL § 3B1.2 (1987) (allowing a downward adjustment for "minimal" or "minor" participation in the criminal activity). The Commission included one other mitigating factor in the guideline rules, acceptance of responsibility, which in practice has meant pleading guilty. *See id.* § 3E1.1.

[145] *See, e.g.*, U.S. SENTENCING GUIDELINES MANUAL § 5H1.5 policy statement ("Employment record is not ordinarily relevant in determining whether a departure is warranted."); *see also supra* note 96 and accompanying text.

[146] The Commission amended the commentary in 1990 to "clarif[y]" that certain policy statements were "require[d]" by § 994(e). U.S. SENTENCING GUIDELINES MANUAL app. C, amend. 357 (Nov. 1, 1990).

[147] *See* SRA § 994(e), 98 Stat. at 2021 (codified at 28 U.S.C. § 994(e)) ("The Commission shall assure that the guidelines and policy statements, in recommending a term of imprisonment or length of a term of imprisonment, reflect the general inappropriateness of considering the education, vocational skills, employment record, family ties and responsibilities, and community ties of the defendant."). As the Senate Report explained, the purpose of § 994(e) 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). Section 994(e) was one of three provisions of the SRA that reflected Congress's judgment that prison was not an appropriate means of rehabilitation and that a term of imprisonment should therefore not be imposed or lengthened solely on the theory that prison might be rehabilitative. The other two provisions were 28 U.S.C. § 994(k) and 18 U.S.C. § 3582(a). *See* S. REP. NO. 98-225, at 67 n.140, 76, 119 (explaining that § 994(k) and § 3582(a) recognize that imprisonment is not an appropriate means of promoting rehabilitation). Interpreting these two provisions, the Supreme Court recently explained:

those and other factors were appropriate considerations in mitigation of a sentence.[148] Then-Commissioner Breyer explained that the Commission had omitted from the guidelines most of the mitigating factors Congress directed it to consider as one of several "'trade-offs' among Commissioners with different viewpoints."[149] Later, Justice Breyer, who had hoped that the guidelines would evolve, said that the exclusion of these factors was "intended to be provisional" and "subject to revision in light of Guideline implementation experience."[150] That revision did not materialize. Moreover, when courts sought to depart on grounds not already disapproved, the Commission responded by adding those grounds to its disfavored list, frequently overruling the courts of appeals.[151]

> Section 994(k) bars the Commission from recommending a "term of imprisonment"—a phrase that again refers both to the fact and to the length of incarceration—based on a defendant's rehabilitative needs. And § 3582(a) prohibits a court from considering those needs to impose or lengthen a period of confinement when selecting a sentence from within, or choosing to depart from, the Guidelines range.

Tapia v. United States, 131 S. Ct. 2382, 2390 (2011).

[148] Congress directed the Commission to consider the relevance of eleven characteristics, "among others," in establishing categories of offenders in the guidelines and policy statements regarding the type, length, and conditions of sentences. SRA § 994(d), 98 Stat. at 2020 (codified at 28 U.S.C. § 994(d)). These included the five factors identified in § 994(e). *Id.* In other words, Congress considered all eleven offender characteristics to be relevant to all aspects of the sentencing decision, with the exception that the factors listed in § 994(e) could not be a basis for imposing or lengthening a term of imprisonment. As the Senate Report explained, "[E]ach of these factors may play other roles in the sentencing decision." S. REP. NO. 98-225, at 174. For example, "they may, in an appropriate case, call for the use of a term of probation instead of imprisonment." *Id.* The Senate Report gave several examples suggesting how the Commission might recommend that these and other offender characteristics be considered to mitigate the kind or length of sentences. *See id.* at 171-74 & nn.410-11.

[149] Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises upon Which They Rest*, 17 HOFSTRA L. REV. 1, 19-20 (1988).

[150] Stephen Breyer, *Federal Sentencing Guidelines Revisited*, 11 FED. SENT'G REP. 180, 182 (1999).

[151] For example, in *United States v. Lara*, the Second Circuit upheld a departure based on the defendant's "diminutive size [and] immature appearance," after he was sexually victimized and subsequently placed in solitary confinement for his protection. 905 F.2d 599, 601-02 (2d Cir. 1990). The Commission responded by immediately issuing an amended policy statement asserting that "[p]hysical appearance, including physique, is not ordinarily relevant" in deciding whether to depart. U.S. SENTENCING

The first Commission also created unnecessarily severe rules. Though not required by statute to do so, the Commission linked guideline ranges for drug offenses to the two mandatory minimum punishment levels specified in the Anti-Drug Abuse Act of 1986,[152] added two severity levels to induce defendants to "plead guilty or otherwise cooperate with authorities,"[153] and spread the quantity-based punishment scheme across seventeen levels.[154] The effect was to more than double the average time served by federal drug offenders and to massively expand the federal prison population over the next twenty years.[155] The Commission also created a "relevant conduct" guideline that required punishment for separate uncharged, dismissed, and acquitted crimes at the same rate as if charged in an indictment and

---

GUIDELINES MANUAL § 5H1.4 policy statement (1991). In response to the Ninth Circuit's ruling in *United States v. Floyd* that a disadvantaged childhood could justify a downward departure, 945 F.2d 1096, 1099-100 (9th Cir. 1991), the Commission issued a policy statement asserting that a defendant's "[l]ack of guidance as a youth and similar circumstances indicating a disadvantaged upbringing are not relevant grounds" for departure. U.S. SENTENCING GUIDELINES MANUAL § 5H1.12 policy statement (1992). The Commission also prohibited departure based on post-sentencing rehabilitation. *Id.* § 5K2.19 policy statement (2000). In doing so, it effectively overruled seven courts of appeals. *See* United States v. Bradstreet, 207 F.3d 76, 82 (1st Cir. 2000); United States v. Rudolph, 190 F.3d 720, 722 (6th Cir. 1999); United States v. Roberts, No. 98-8037, 1999 WL 13073, at *6-7 (10th Cir. Jan. 14, 1999); United States v. Green, 152 F.3d 1202, 1207 (9th Cir. 1998); United States v. Rhodes, 145 F.3d 1375, 1379 (D.C. Cir. 1998); United States v. Core, 125 F.3d 74, 77 (2d Cir. 1997); United States v. Sally, 116 F.3d 76, 79 (3d Cir. 1997). Additionally, employment-related contributions, prior good works, and military, civic, charitable and public service were all deemed "not ordinarily relevant." U.S. SENTENCING GUIDELINES MANUAL § 5H1.11 policy statement (1991). This amendment was also a "response to court decisions." *Simplification Draft Paper: Departures and Offender Characteristics*, U.S. SENT'G COMMISSION (Nov. 1996), http://www.ussc.gov/Research/Working_Group_Reports/Simplification/depart.htm.

[152] *See* U.S. SENTENCING COMM'N, FIFTEEN YEARS OF GUIDELINE SENTENCING: AN ASSESSMENT OF HOW WELL THE FEDERAL CRIMINAL JUSTICE SYSTEM IS ACHIEVING THE GOALS OF SENTENCING REFORM 49 (2004) [hereinafter FIFTEEN YEAR REVIEW]; *see also* Pub. L. No. 99-570, 100 Stat. 3207.

[153] *See* U.S. SENTENCING COMM'N, SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 148 (1995).

[154] U.S. SENTENCING GUIDELINES MANUAL § 2D1.1(c) (2011).

[155] *See* FIFTEEN YEAR REVIEW, *supra* note 152, at 47-48, 53-54, 76. The federal prison population, not including those in community corrections centers or home confinement, grew from 35,781 in 1985 to 179,220 in 2005, a 400% increase. BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS ONLINE tbl. 6.13.2009 (2009), http://www.albany.edu/sourcebook/pdf/t6132009.pdf.

proved to a jury beyond a reasonable doubt.[156] This rule, which arguably is contrary to the SRA's most basic instructions,[157] provided prosecutors with the power to obtain or threaten to obtain enormous sentences, to pursue or avoid in their sole discretion, causing unwarranted and hidden disparities.[158] In addition, the Commission recommended that the facts driving the decades-long sentences often mandated by the guidelines be easy to prove, announcing its "belie[f]" that the preponderance of the evidence standard was "appropriate to meet due process requirements."[159] This recommendation was adopted over the objection of the Judicial Conference, which advised the Commission that setting minimum constitutional standards was beyond its authority.[160] The Commission also created a severe guideline for third-time offenders (the "career offender" guideline),[161] as directed by Congress,[162] but much broader in scope than the statute required.[163]

---

[156] U.S. SENTENCING GUIDELINES MANUAL § 1B1.3 (2011).

[157] The Commission was to take into account "the circumstances under which *the offense* was committed" and "the nature and degree of the harm caused by *the offense*." SRA, Pub. L. No. 98-473, tit. II, ch. 2, sec. 217(a), § 994(c)(2)–(3), 98 Stat. 1987, 2020 (codified at 28 U.S.C. § 994(c)(2)–(3) (2006)) (emphasis added).

[158] *See* FIFTEEN YEAR REVIEW, *supra* note 152, at 86-87 (noting that the relevant conduct rule is applied inconsistently because of "discomfort with the role of law enforcement in establishing relevant conduct, and discomfort with the severity of sentences that often result"); Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE L.J. 1681, 1714-15 (1992) (arguing that the relevant conduct rule, "contrary to the Commission's rationale, . . . *enhances* rather than reduces the power of the prosecutor," allows "a prosecutor to increase an offender's sentence more easily by *dropping* charges than by bringing them," results in "presentencing guideline manipulation," "*reduces* visibility and candor in sentencing," and is a "disaster for guidelines that purport to reduce unwarranted disparity"); Ilene H. Nagel & Stephen J. Schulhofer, *A Tale of Three Cities: An Empirical Study of Charging and Bargaining Practices Under the Federal Sentencing Guidelines*, 66 S. CAL. L. REV. 501, 535, 540, 557 (1992) (describing the key role the relevant conduct rule plays in plea negotiations and noting that Commission's study found "circumvention" of the guidelines based on prosecutors' personal sense of justice that "produces arguably just results" in some cases but is "hidden and unsystematic" and "obscures accountability").

[159] U.S. SENTENCING GUIDELINES MANUAL § 6A1.3 policy statement cmt. (2011).

[160] *See* Wolf & Broderick, *supra* note 74, at 278 ("We suggest that the development of sentencing procedures are beyond the Commission's statutory authority, and that difficult questions of procedural fairness are best left to resolution through traditional case-by-case adjudication.").

[161] U.S. SENTENCING GUIDELINES MANUAL §§ 4B1.1, 4B1.2 (1989).

[162] SRA § 994(h), 98 Stat. at 2021 (codified as amended at 28 U.S.C. § 994(h)).

The Commission ignored Congress's directive to recommend probation for first offenders not convicted of a violent or otherwise serious offense,[164] and instead required imprisonment in the vast majority of cases, contrary to Congress's intent that probation and intermediate sanctions be broadly available under the guidelines.[165]

The environment in which these radical measures were instituted was not only "information free,"[166] but also highly politicized and far from neutral.[167] In the very first amendment cycle, the Justice Department's ex officio Commissioner persuaded four of six voting Commis-

---

[163] *See* Amy Baron-Evans et al., *Deconstructing the Career Offender Guideline*, 2 CHARLOTTE L. REV. 39, 51 (2010).

[164] *See* SRA § 994(j), 98 Stat. at 2022 (codified at 28 U.S.C. § 994(j)).

[165] Congress directed the Commission to promulgate a guideline for the use of the courts in determining "*whether* to impose a sentence of probation, a fine, *or* a term of imprisonment." *Id.* § 994(a)(1)(A), 98 Stat. at 2019 (codified at 28 U.S.C. § 994(a)(1)(A)) (emphasis added). The Commission was also to ensure that the guidelines recommended a "sentence other than imprisonment" for first offenders not convicted of a violent or otherwise serious offense. *Id.* § 994(j), 98 Stat. at 2022 (codified at 28 U.S.C. § 994(j)). Congress required judges to consider the "kinds of sentences available" by statute, *id.* sec. 212(a), § 3553(a)(3), 98 Stat. at 1989 (codified at 18 U.S.C. § 3553(a)(3) (Supp. II 1984)), authorized them to impose probation for most offenses, *id.* §§ 3559(a), 3561(a), 98 Stat. at 1991-92 (codified at 18 U.S.C. §§ 3559(a), 3561(a) (2006)), and directed them to consider probation, fines, imprisonment, and any combination thereof. *See id.* §§ 3551, 3561(a), 3562–3564, 98 Stat. at 1988, 1992-94 (codified at 18 U.S.C. §§ 3551, 3561(a), 3562–3564).

The Commission did not promulgate a guideline for courts to use to determine *whether* to impose prison, probation, or a fine, and did not implement the first offender directive. Instead, it implemented a zone system requiring straight prison for the vast majority of offenders, requiring some confinement for offenders with a guideline range greater than 0-6 months and up to 10-16 months, and permitting straight probation only for offenders with a guideline range of 0-6 months. U.S. SENTENCING GUIDELINES MANUAL ch. 5, pt. A sentencing tbl. (1992); *id.* § 5C1.1.

[166] Block, *supra* note 71, at 453.

[167] *See* Rachel E. Barkow, *Administering Crime*, 52 UCLA L. REV. 715, 765 (2005) ("[T]he Sentencing Commission was a highly politicized agency from the outset."); Breyer, *supra* note 149, at 8 ("Some compromises were forced upon the Commission . . . by the fact that the Commission was appointed by politically responsible officials and is therefore, at least to some degree, a 'political' body."); Michael Tonry, *Federal Sentencing Can Be Made More Just, if the Sentencing Commission Wants to Make It So*, 12 FED. SENT'G REP. 83, 83 (1999) (noting that the Commission "chose . . . to view the Department of Justice and conservative members of Congress as its primary constituency," while "federal judges were not well-integrated into the federal [guideline] development process").

sioners to increase fraud penalties—a move described by former Commissioner Block as inflicting "gratuitous punishment" for reasons that were "overtly political and inexpert."[168] At the same time, the Commission sought to suppress reasoned criticism of its policies by the judges who applied them, going so far as to prohibit "dissatisfaction" with the guidelines as a ground for departure.[169]

Without the balancing influence of the views of Article III judges (or line prosecutors) who had to apply the Commission's policies in real cases, "Main Justice" in Washington, backed by its allies in Congress, dominated the Commission's agenda and specific outcomes.[170] By failing to act neutrally or expertly, the Commission undermined its own legitimacy and invited ongoing political interference.[171] Thus, until recently, nearly all of the Commission's amendments increased the severity of punishment or restricted judicial departures, many in response to congressional directives, but most initiated by the Commission itself, frequently at the instance of the Department of Justice.[172]

---

[168] Parker & Block, *supra* note 76, at 318-20.

[169] *See* U.S. SENTENCING GUIDELINES MANUAL § 5K2.0 policy statement cmt. (1995); *see also* U.S. SENTENCING GUIDELINES MANUAL § 5K2.0 policy statement cmt. background (2003) ("Departures were never intended to permit sentencing courts to substitute their policy judgments for those of Congress and the Sentencing Commission.").

[170] *See* Frank O. Bowman, III, *The Failure of the Federal Sentencing Guidelines: A Structural Analysis*, 105 COLUM. L. REV. 1315, 1319-20 (2005) ("[T]he power to make and influence sentencing rules has migrated away from the judiciary, from the U.S. Sentencing Commission, and even from local federal prosecutors, toward political actors in Congress and the central administration of the Department of Justice."); *see also* Kate Stith, *The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion*, 117 YALE L.J. 1420, 1440-43 (2008) (discussing how Main Justice used mandatory guidelines to centralize control over sentencing).

[171] *See* Kate Stith & Karen Dunn, *A Second Chance for Sentencing Reform: Establishing a Sentencing Agency in the Judicial Branch*, 58 STAN. L. REV. 217, 221 (2005); *see also* Jeffrey S. Parker & Michael K. Block, *The Limits of Federal Criminal Sentencing Policy; or, Confessions of Two Reformed Reformers*, 9 GEO. MASON L. REV. 1001, 1025 (2001) (noting that had the Commission "developed a guidelines system based upon coherent principles, then Congress may not have perceived the need to intervene so frequently and in such minute detail"); Aaron J. Rappaport, *Unprincipled Punishment: The U.S. Sentencing Commission's Troubling Silence About the Purposes of Punishment*, 6 BUFF. CRIM. L. REV. 1043, 1044, 1103-04 (2003) (contending that "the Commission's failure to confront sentencing purposes" has rendered it a "weak institution" susceptible to political influence and "Congressional meddling" and without "independent legitimacy").

[172] Through 2009, the Commission promulgated 737 amendments, set forth in an appendix spanning nearly 1400 pages, with the large majority making substantive

The concentration of power over sentencing in the executive branch increased with the 2003 enactment of the PROTECT Act.[173] On March 11, 2003, an Associate Deputy Attorney General appeared before the House Subcommittee on Crime, Terrorism, and Homeland Security to complain that the rate of downward departures not sponsored by the government had increased as the result of the Supreme Court's decision in *Koon*.[174] Justice Department officials drafted legislation to implement their twin goals of reducing judicial discretion and increasing prosecutorial power and enlisted freshman Congressman Tom Feeney to introduce it.[175] On March 27, 2003, Congressman Feeney, who said he was just the "messenger,"[176] introduced the amendment along with the Department's message: judges were "arbitrarily deviating from the sentencing guidelines . . . based on their personal biases and prejudices, resulting in wide disparity in sentencing,"[177] as shown by an alleged fifty percent increase in downward departures not based on substantial assistance to the government over the preceding five years.[178]

---

changes, often to several guidelines or policy statements at once. U.S. SENTENCING GUIDELINES MANUAL app. C (2011). During this same period, Congress issued ninety-eight directives suggesting or requiring increased severity. Sentencing Res. Counsel Project, *Congressional Directives to Sentencing Commission 1988–2011*, OFF. DEFENDER SERVICES, 1-203 (Nov. 2011), http://www.fd.org/pdf_lib/SRC%20directives%20Table%20November%202011.pdf. Until recently, nearly all substantive amendments increased severity or removed grounds for departure. *See* U.S. SENTENCING GUIDELINES MANUAL app. C. For recent notable exceptions to this trend of increasing severity, see *infra* notes 222-36 and accompanying text.

[173] Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003 (PROTECT Act), Pub. L. No. 108-21, 117 Stat. 650 (codified as amended in scattered sections of 18, 21, 28, 42, and 47 U.S.C.).

[174] *See The Child Abduction Prevent Act and the Child Obscenity and Pornography Prevention Act of 2003: Hearing on H.R. 1104 and H.R. 1161 Before the H. Subcomm. on Crime, Terrorism, & Homeland Sec. of the H. Comm. on the Judiciary*, 108th Cong. 15-18 (2003) (statement of Daniel P. Collins, Associate Deputy Att'y Gen.).

[175] *See* H. REP. NO. 108-66, at 58-59 (2003) (Conf. Rep.); *see also* Daniel Richman, *Federal Sentencing in 2007: The Supreme Court Holds—The Center Doesn't*, 117 YALE L.J. 1374, 1388 (2008).

[176] Laurie P. Cohen & Gary Fields, *U.S. Prosecutors to Report, Appeal Short Sentences by Federal Judges*, WALL ST. J., Aug. 6, 2003, at A1.

[177] 149 CONG. REC. 7643 (2003).

[178] *Id.* at 9081.

On April 30, 2003, a version of the Feeney Amendment to the PROTECT Act was enacted into law.[179] The new provision ordered the Commission to "substantially reduce[]" the incidence of judicial downward departures.[180] At the same time, it required the Commission to create a new "early disposition" (or "fast track") downward departure, solely in districts designated by the Attorney General and solely upon motion of the prosecutor, to induce defendants to swiftly waive a variety of rights and plead guilty.[181] The Feeney Amendment also replaced the by-now-vestigial "unreasonableness" standard of review for departures with a stricter standard that fortified and codified the holdings in *Williams* and *Koon*.[182] The new standard required reversal if the basis for departure was "not authorized under section 3553(b)" and also required de novo review of the district court's application of the guidelines to the facts.[183] The Feeney Amendment had its intended result: "a transfer of even more plea-bargaining power from judges to prosecutors, resulting in higher sentences on prosecutors' terms."[184]

Later, it came to light that the Department's claim that *Koon* had caused a significant increase in judicial departures was false. In October 2003, the Commission reported that while there had been an increase in the rate of non-substantial assistance downward departures, this began well before *Koon* was decided and was primarily attributable to an increase in government sponsored downward departures, mainly in immigration and drug cases on the border.[185] Excluding border

---

[179] PROTECT Act, Pub. L. No. 108-21, § 401(m), 117 Stat. 650, at 675.

[180] *Id.*

[181] *Id.*; *see also* Memorandum from John Ashcroft, U.S. Att'y Gen., to All U.S. Att'ys, Department Principles for Implementing an Expedited Disposition or "Fast-Track" Prosecution Program in a District (Sept. 22, 2003) (stating that in order to qualify for a fast track disposition, a defendant must enter into an expedited agreement to plead guilty and waive his rights to file pretrial motions, to appeal, and to challenge the legality of his conviction under 28 U.S.C. § 2255 "except on the issue of ineffective assistance of counsel"), *in* 16 FED. SENT'G REP. 134, 135 (2003).

[182] PROTECT Act § 401(d), 117 Stat. at 670 (amending 18 U.S.C. § 3742(e)); *see also supra* notes 121-34 and accompanying text.

[183] PROTECT Act § 401(d), 117 Stat. at 670.

[184] Stephanos Bibas, *The Feeney Amendment and the Continuing Rise of Prosecutorial Power to Plea Bargain*, 94 J. CRIM. L. & CRIMINOLOGY 295, 308 (2004).

[185] *See* U.S. SENTENCING COMM'N, DOWNWARD DEPARTURES FROM THE FEDERAL SENTENCING GUIDELINES 53-65 (2003).

districts, the rate of downward departures was the same before and after *Koon* and had even declined in recent years.[186] From the early 1990s until 2003, the Commission had reported a large and growing number of government sponsored departures in the same category with judge-initiated departures; the only departures it identified as government sponsored were those for cooperation with authorities.[187] This gave the impression that the increasing rate of "other" downward departures was the result of judicial discretion, when in fact it was the result of prosecutorial discretion.[188] Unfortunately, while the Commission had become aware at some point that the rate of "other" downward departures had been increasing since 1992 due to government-initiated departures,[189] it did not correct the way in which it publicly reported departure data until after the PROTECT Act was passed.[190]

---

[186] *Id.* at 54-56, 60.

[187] Through 2002, the Commission reported only two categories of downward departures: "substantial assistance departure[s]" and "other downward departure[s]." *See, e.g.*, U.S. SENTENCING COMM'N, 2002 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl.26 (2002) [hereinafter 2002 SOURCEBOOK]. The Sentencing Commission publishes annual Sourcebooks, which are available on the Commission's website. *Data and Statistics*, U.S. SENT'G COMMISSION, http://www.ussc.gov/Data_and_Statistics/ (last visited Mar. 15, 2012).

[188] After receiving comments from the Judicial Conference expressing concern that the Commission's "approach to reporting the data has resulted in confusion, misinformation, and misuse by some who mistakenly infer that all 'other downward' departures are attributable to judges" and "may have prompted the enactment of the PROTECT Act," the U.S. Government Accountability Office reported that the Commission's "data are not recorded, coded, or reported in ways that clearly delineate other downward departures due to judicial discretion from those due to prosecutorial discretion" and that the Commission's "other" departure category, which had been "generally thought to represent judicial discretion," included a significant proportion of government sponsored departures, and suggested that changes to the way the Commission reports "other" departures would be beneficial. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-04-105, FEDERAL DRUG OFFENSES: DEPARTURES FROM SENTENCING GUIDELINES AND MANDATORY MINIMUM SENTENCES, FISCAL YEARS 1999–2001, at 4, 11, 22-23, 24, 26, 64, app. IV at 67, app. VI at 78-79 (2003).

[189] *See Oversight of the United States Sentencing Commission: Are the Guidelines Being Followed? Hearing Before the Subcomm. on Criminal Justice Oversight of the S. Comm. on the Judiciary*, 106th Cong. 20-22, 38 (2002) (statement of John R. Steer, Vice-Chair, U.S. Sentencing Commission).

[190] Following the enactment of the PROTECT Act, the Commission reported that after subtracting government-initiated downward departures, the 2001 rate of "other" downward departures was reduced from 18.1% to 10.9%. *See* U.S. SENTENCING COMM'N, *supra* note 185, at 60. In 2003 and 2004, the Commission separated the "other downward

To one astute and long-time observer, the PROTECT Act simply "followed the pattern of the previous twenty years—jeering disparities created by judges while cheering those created by prosecutors," and confirmed that "[i]ncreasing prosecutorial power and the severity of criminal punishments was not the *unintended consequence* of Guidelines designed to reduce sentencing disparity," but "*the point all along*."[191] This may have pleased key factions within the Department of Justice in the short term, but it damaged respect for law and ignited widespread suspicion about the bona fides of the entire project of mandatory federal sentencing guidelines.

II. THE SUCCESS OF THE ADVISORY GUIDELINES SYSTEM

In *United States v. Booker* and subsequent decisions, the Supreme Court has "reset the balance of authority in federal sentencing."[192] The Court has dismantled not only the provisions of the PROTECT Act,[193] but also the Commission's previous restrictions on judicial discretion that were contrary to or not required by the SRA.[194] It has encouraged

departures" category into "government sponsored" and "other" downward departures. *See* U.S. SENTENCING COMM'N, 2004 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl.26A (2004) [hereinafter 2004 SOURCEBOOK]; U.S. SENTENCING COMM'N, 2003 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl.26A (2003) [hereinafter 2003 SOURCEBOOK]. Since *Booker*, the Commission has reported government sponsored below-guideline sentences as § 5K1.1 (substantial assistance), § 5K3.1 (fast track), or "other." *See, e.g.*, U.S. SENTENCING COMM'N, 2010 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl.26 (2010) [hereinafter 2010 SOURCEBOOK].

[191] Albert W. Alschuler, *Disparity: The Normative and Empirical Failure of the Federal Guidelines*, 58 STAN. L. REV. 85, 116 (2005) (emphasis added).

[192] Stith, *supra* note 170, at 1477.

[193] *See* United States v. Booker, 543 U.S. 220, 259-60 (2005) (severing and excising § 3553(b) and § 3742(e)); *see also* Pepper v. United States, 131 S. Ct. 1229, 1243-46 (2011) (severing and excising § 3742(g)(2)).

[194] *See* Rita v. United States, 551 U.S. 338, 357 (2007) (stating that courts may find that "the Guidelines reflect an unsound judgment, or . . . do not generally treat certain defendant characteristics in the proper way"); *id.* at 364-65 (Stevens, J., concurring) (noting that offender characteristics "not ordinarily considered under the Guidelines" are "matters that § 3553(a) authorizes the sentencing judge to consider"); *see also Pepper*, 131 S. Ct. at 1241-44, 1247-50 (holding that district courts may consider evidence of post-sentencing rehabilitation in varying from the guideline range, despite a policy statement prohibiting departure on that ground); Gall v. United States, 552 U.S. 38, 56-60 (2007) (upholding a variance based on offender characteristics that are relevant to the purposes of sentencing, though disapproved by policy statements).

the Commission to act as the neutral expert body it was created to be[195] and to review and revise its guidelines based on what it learns from the courts that apply them in practice.[196] The Court has limited the ways in which the political branches and the Commission can restrict, should they wish to do so, the sentencing authority of Article III judges and has brought greater balance and transparency to the Commission's rulemaking.

Judges must treat the advisory guideline range as the "starting point and the initial benchmark," but must also consider all relevant circumstances of the offense and characteristics of the defendant, including factors the guidelines omit, prohibit, or discourage.[197] Policy statements that disapprove consideration of individualized circumstances relevant under § 3553(a) may not be elevated over such relevant factors and may be freely disregarded.[198]

Judges may also vary from the guideline range based on a policy disagreement, that is, a decision that the guideline recommendation embodies a policy judgment that fails to achieve the purposes of sentencing, apart from any case-specific facts that might otherwise justify a variance.[199] The Court made clear in *Cunningham v. California* that the

---

[195] *See* Kimbrough v. United States, 552 U.S. 85, 109 (2007) (describing the Commission's "characteristic institutional role" as its capacity to "base its determinations on empirical data and national experience" (quoting United States v. Pruitt, 502 F.3d 1154, 1171 (10th Cir. 2007) (McConnell, J., concurring))).

[196] The major theme of *Booker* and its progeny is that sentencing judges may impose sentences outside the guideline range where doing so would better achieve the purposes of sentencing set forth in 18 U.S.C. § 3553(a), and that the courts' reasoned judgments will assist the Commission in reviewing and revising the guidelines.

[197] *Gall*, 552 U.S. at 49-50; *see also id.* at 53-60 (reviewing the factors considered by the district court and concluding that based on these factors the sentence was reasonable).

[198] *See Pepper*, 131 S. Ct. at 1247-50 (explaining that policy statements that prohibit consideration of factors that are highly relevant to the purposes of sentencing cannot be elevated above such relevant factors, and that instead the court must give "appropriate weight" to the factors); *Gall*, 552 U.S. at 53-60 (upholding a variance based on factors relevant to the purposes of sentencing that had been deemed never or not ordinarily relevant by policy statements, without addressing the policy statements or requiring courts to address them). Justice Alito has expressed a view that judges should give "some significant weight" to policy statements, *id.* at 68 (Alito, J., dissenting), but no other member of the Court has agreed with this view.

[199] *Kimbrough*, 552 U.S. at 101-02.

availability of this type of variance is constitutionally required.[200] In *Rita v. United States*, meanwhile, the Court held that courts may not employ a "legal presumption" that the guidelines should apply and hence may consider arguments that "the Guidelines sentence itself fails properly to reflect § 3553(a) considerations."[201] In *Kimbrough v. United States*, the Court reiterated that "courts may vary [from Guidelines ranges] based solely on policy considerations, including disagreements with the Guidelines."[202] The Court held that, since "the cocaine Guidelines, like all other Guidelines, are advisory only," it "would not be an abuse of discretion for a district court to conclude when sentencing a particular defendant that the crack/powder disparity yields a sentence 'greater than necessary' to achieve § 3553(a)'s purposes, even in a mine-run case."[203] Similarly, the Court held in *Pepper v. United States* that a district court may "disagree[] with the Commission's views" regarding the relevance of offender characteristics, particularly where those "views rest on wholly unconvincing policy rationales not reflected in the sentencing statutes Congress enacted."[204]

The judicial check on the Commission that has arisen from *Booker* and subsequent decisions resembles judicial review of the rules of other federal agencies,[205] but it differs in important respects. Under the

---

[200] *See* 549 U.S. 270, 278-81, 292-93 (2007) (invalidating California's guidelines system because, unlike the federal system, it required a sentence to a specified term unless the court found case-specific "facts" about the offense or the offender and did not authorize a sentence outside the specified term based on a "policy judgment" in light of the "[g]eneral objectives of sentencing"); *see also id.* at 304-08 (Alito, J., dissenting) (disputing the majority's conclusion that the California system did not allow courts to sentence outside the specified term based on "policy considerations" such as the purposes of sentencing).

[201] 551 U.S. 338, 351 (2007).

[202] 552 U.S. at 101-02 (citing *Rita*, 551 U.S. at 351).

[203] *Id.* at 91, 109-10; *see also* Spears v. United States, 555 U.S. 261, 267 (2009) ("[D]istrict courts are entitled to vary from the crack cocaine Guidelines in a mine-run case where there are no 'particular circumstances' that would otherwise justify a variance from the Guidelines' sentencing range.").

[204] 131 S. Ct. 1229, 1247 (2011).

[205] For example, in a recent APA decision invalidating as "arbitrary and capricious" a rule promulgated by the Bureau of Immigration Appeals, the Court used language similar to that in *Kimbrough* and *Pepper* in holding that the rule was "unmoored from the purposes and concerns of the immigration laws," and stated that it could not "discern a reason for it." Judulang v. Holder, 132 S. Ct. 476, 490 (2011).

judicial review afforded by the APA, an agency's interpretation of a relevant statute is given "controlling weight" in some circumstances.[206] In contrast, district courts may never assume that a guideline sentence complies with § 3553(a),[207] and neither district courts nor courts of appeals may presume that a non-guideline sentence is unreasonable.[208] A court of appeals may apply a rebuttable presumption of reasonableness to a guideline sentence, but this is rooted in deference to the district court, not to the Commission,[209] and it does not reflect the sort of deference "that leads appeals courts to grant greater factfinding leeway to an expert agency than to a district judge."[210] If it were otherwise, the guidelines would again have a mandatory character and hence would be unconstitutional. On the other hand, a court's conclusion that a guideline is unsound does not (as it would under APA review) result in the guideline being held "unlawful and set aside."[211] District courts must still treat the guideline range as the "starting point and the initial benchmark" in each case[212] but may vary from that range to reach a

---

[206] Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-44 (1984).

[207] *See* Nelson v. United States, 555 U.S. 350, 352 (2009) ("The Guidelines are not only *not mandatory* on sentencing courts; they are also not to be *presumed* reasonable."); Gall v. United States, 552 U.S. 38, 49-50 (2007) ("[T]he district judge . . . may not presume that the Guidelines range is reasonable.").

[208] *See Gall*, 552 U.S. at 47 ("[T]he approaches we reject come too close to creating an impermissible presumption of unreasonableness for sentences outside the Guidelines range."); Rita v. United States, 551 U.S. 338, 354-55 (2007) ("The fact that we permit courts of appeals to adopt a presumption of reasonableness does not mean that courts may adopt a presumption of unreasonableness.").

[209] In *Rita*, the Court explained that

> the presumption reflects the fact that, by the time an appeals court is considering a within-Guidelines sentence on review, both the sentencing judge and the Sentencing Commission will have reached the same conclusion as to the proper sentence in the particular case. That double determination significantly increases the likelihood that the sentence is a reasonable one.

551 U.S. at 347; *see also Gall*, 552 U.S. at 40 (noting that *Rita* permitted the appeals court to presume reasonableness "when a district judge's *discretionary decision* in a particular case accords with the sentence the [Commission] deems appropriate" (emphasis added)).

[210] *Rita*, 551 U.S. at 347.

[211] 5 U.S.C. § 706(2) (2006).

[212] Kimbrough v. United States, 552 U.S. 85, 108 (2007) (quoting *Gall*, 552 U.S. at 49).

sentence that they find better achieves the purposes of sentencing,[213] subject to review for procedural and substantive reasonableness.[214]

Booker has thus created a dialogue between the courts and the Commission that has, for the first time in the Commission's history, made possible the "continuous evolution helped by the sentencing courts and courts of appeals"[215] that the SRA's framers envisioned.[216] The Commission can persuade the courts to follow the guidelines through "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."[217] And the courts can persuade the Commission to revise guidelines that they find to be unsound by varying from them and explaining why.[218]

Recall that, before *Booker*, judges were not permitted to depart based on dissatisfaction with the guidelines, no matter how well-founded their dissatisfaction or how ill-considered the guideline.[219] Thus, for example, judges were not permitted to depart based on disagreement with the crack guidelines, even after the Commission itself found that the 100-to-1 powder-to-crack ratio required excessive punishment and created unwarranted disparity, because these problems were "typical"

---

[213] *See* Pepper v. United States, 131 S. Ct. 1229, 1242-43 (2011); *Kimbrough*, 552 U.S. at 110-11; *Gall*, 552 U.S. at 53-60; United States v. Booker, 543 U.S. 220, 245 (2005).

[214] *Gall*, 552 U.S. at 51.

[215] *Rita*, 551 U.S. at 350.

[216] *See supra* notes 30-35 and accompanying text.

[217] *See* Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944) (describing the bases on which courts may accord deference to an agency's nonlegislative rules); *cf.* Stith & Dunn, *supra* note 171, at 232 ("*Booker* makes the Sentencing Guidelines nonlegislative, and *Mead* uses broad language in holding that nonlegislative agency rules are entitled to less deference [under *Skidmore*] than regulations that have the force of law.").

[218] *See Rita*, 551 U.S. at 357-58 ("[T]he sentencing judge['s] . . . reasoned sentencing judgment, resting upon an effort to filter the Guidelines' general advice through § 3553(a)'s list of factors . . . should help the Guidelines constructively evolve over time."); *Booker*, 543 U.S. at 264 ("[T]he Sentencing Commission remains in place, writing Guidelines, collecting information about actual district court sentencing decisions, undertaking research, and revising the Guidelines accordingly.").

[219] *See supra* notes 136-39 and accompanying text.

of all crack cases and thus within the guidelines' "heartland."[220] If a judge disagreed with the punishment required by a guideline based on the Commission's own research or based on her experience in sentencing hundreds of defendants every year, she was unable to act upon that disagreement. Although the courts of appeals occasionally called upon the Commission to amend unsound guidelines, they nonetheless enforced those guidelines and thus were easily ignored.[221]

Booker has been transformative simply by permitting the courts to communicate with the Commission (and with each other) in a transparent and effective manner. Supreme Court and lower court decisions have moved the Commission to revise a number of guidelines and to use its expertise to persuade Congress to revise its own unsound policies. The most well-known example is the reform of penalties for crack cocaine. The Commission began exposing the excessive harshness and unwarranted disparity built into the crack cocaine guidelines in 1995.[222] The courts were nonetheless required to follow those guidelines because the unjust disparity was not a permissible ground for departure under the Commission's departure standard.[223] After *Booker*, judges more frequently imposed reduced sentences in crack cases, some based on individualized circumstances and others on the

---

[220] *See In re* Sealed Case, 292 F.3d 913, 914-16 (D.C. Cir. 2002); United States v. Canales, 91 F.3d 363, 369-70 (2d Cir. 1996); United States v. Lewis, 90 F.3d 302, 304-06 (8th Cir. 1996); United States v. Fike, 82 F.3d 1315, 1326 (5th Cir. 1996).

[221] *See, e.g.*, United States v. Parson, 955 F.2d 858, 874-75 (3d Cir. 1992) (upholding a career offender sentence predicated on a "pure recklessness" crime, but "recommend[ing] that the Commission consider a return to the original Guideline definition of 'crime of violence,' adopted by Congress in 18 U.S.C. § 16, or else in some other way exclude pure recklessness crimes from the category of predicate crimes for career offender status"); *see also id.* at 875 (Alito, J., concurring) ("I fully agree that the broad definition of a 'crime of violence' in [guideline] § 4B1.2(1) merits reexamination by the Sentencing Commission."); United States v. Rutherford, 54 F.3d 370, 377 (7th Cir. 1995) (sharing *Parson*'s concerns and calling upon Commission to reevaluate the guideline); United States v. Stubler, 271 F. App'x 169, 171 (3d Cir. 2008) (reluctantly following *Parson* in a case involving reckless endangerment and noting that while *Parson* had "questioned the wisdom of the possibly inadvertent adoption of a definition for 'crime of violence' that can include offenses that do not involve the intentional use of force . . . neither Congress nor the Sentencing Commission has seen fit to revise that definition" (citation omitted)).

[222] *See generally* U.S. SENTENCING COMM'N, *supra* note 153.

[223] *See supra* note 220 and accompanying text.

unjustified severity of the guideline itself.[224] The circuits split on whether the latter was permissible,[225] and the Supreme Court granted certiorari.[226] In January 2007, two of the original sponsors of the SRA, Senators Kennedy and Hatch, along with Senator Feinstein, filed an amicus brief in the Supreme Court, urging the Court to permit judges to disagree with unsound policies reflected in the guidelines, including the crack/powder disparity.[227] Citing these developments,[228] the Commission took the next step: it voted to reduce the crack guidelines by two levels (to include but no longer to exceed mandatory minimum punishment levels) and urged Congress to take further action because it considered the amendment an incomplete solution to an "urgent and compelling" problem.[229] The Supreme Court then decided *Kimbrough v. United States*,[230] and courts began varying from the crack guidelines more often.[231] On April 29, 2009, the Administration urged

---

[224] *See BOOKER* REPORT, *supra* note 5, at 126-31, 131 n.343 (explaining that, as of 2006, below-range sentences for crack cocaine increased from 4.3% of cases in the year before *Booker* to 14.7% after *Booker*).

[225] *See* U.S. SENTENCING COMM'N, REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 115-22 (2007) (noting the circuit split, that several cases were pending on petition for certiorari, and that certiorari had been granted in *Claiborne v. United States*).

[226] Claiborne v. United States, 549 U.S. 1016 (2006).

[227] Brief of Amici Curiae Senators Edward M. Kennedy, Orrin G. Hatch, and Dianne Feinstein in Support of Affirmance, Claiborne v. United States, 551 U.S. 87 (2007) (No. 06-5618), 2007 WL 197103. After petitioner Mario Claiborne died, thus mooting the case, the Court granted review in *Gall v. United States*, 552 U.S. 38, 41 (2007), and *Kimbrough v. United States*, 552 U.S. 85 (2007).

[228] U.S. SENTENCING COMM'N, *supra* note 225, at 115-22.

[229] 72 Fed. Reg. 28,558, 28,572-73 (May 21, 2007).

[230] 552 U.S. 85; *see also supra* notes 202-03 and accompanying text.

[231] *See* Paul J. Hofer, *Has* Booker *Restored Balance? A Look at Data on Plea Bargaining and Sentencing*, 23 FED. SENT'G REP. 326, 331 (2011) (reporting that, in fiscal year 2009, 57.1% of crack defendants without trumping mandatory minimums were sentenced below the guideline range); 2008–2010 USSC Monitoring Datasets (revealing that the rate of below-range sentences in all crack cases increased from 43.8% in 2008, to 51% in 2009, to 60.4% in 2010). For a description of the Commission's annual Monitoring Datasets, see FIFTEEN YEAR REVIEW, *supra* note 152, app. D at 1, and U.S. SENTENCING COMM'N, 2010/2011 GUIDE TO PUBLICATIONS AND RESOURCES 26-28 (2010), *available at* http://www.ussc.gov/Publications/2010_Guide_to_Publications_and_Resources.pdf. Datasets for each fiscal year can be obtained from the Commission eighteen to twenty-four months after the conclusion of the fiscal year, and can be analyzed with a specialized software package.

Congress to eliminate the crack/powder disparity, and noted that until a comprehensive solution was implemented in the form of legislation and amended guidelines, prosecutors would "inform courts that they should act within their discretion to fashion a sentence that is consistent with the objectives of 18 U.S.C. § 3553(a)."[232] On August 3, 2010, Congress enacted the Fair Sentencing Act of 2010, which reduced the 100-to-1 powder-to-crack quantity ratio to 18-to-1 and directed the Commission to reduce guideline penalties accordingly.[233] Thus, *Booker* and what followed in the courts prompted the Commission to take direct action in 2007, and contributed to the confluence of events that led Congress to take further action in 2010—fifteen years after the Commission first sought to amend the crack guidelines.

The Commission has revised other guidelines in response to sentencing data and reasons in recent amendment cycles.[234] The Commission is planning a report to Congress regarding the guideline applicable to possession of child pornography, a guideline that both courts and prosecutors find to be highly problematic.[235] And the Commission recently announced that it intends to address problems with the fraud guideline in response to high rates of below-guideline sentences, both non-government sponsored and government sponsored, in certain kinds of cases.[236]

---

[232] *Restoring Fairness to Federal Sentencing: Addressing the Crack-Powder Disparity: Hearing Before Subcomm. on Crime & Drugs of the S. Comm. on the Judiciary*, 111th Cong. 101 (2009) (statement of Lanny A. Breuer, Assistant Att'y Gen.).

[233] Pub. L. No. 111-220, § 2, 124 Stat. 2372, 2372; *id.* § 8, 124 Stat. at 2374.

[234] *See, e.g.*, U.S. SENTENCING GUIDELINES MANUAL app. C, amend. 742 (Nov. 1, 2010) (eliminating "recency" points from the criminal history score, citing frequent below-guideline sentences in cases in which recency points were added to the criminal history score); *id.* amend. 738 (Nov. 1, 2010) (expanding slightly the availability of alternatives to straight imprisonment, citing judicial feedback); *id.* amend. 754 (Nov. 1, 2011) (reducing large increases under the illegal reentry guideline based on stale prior convictions, citing appellate decisions finding unwarranted uniformity in requiring the same increase regardless of the age of the conviction).

[235] *See* 76 Fed. Reg. 58,564, 58,564 (Sept. 21, 2011); U.S. SENTENCING COMM'N, THE HISTORY OF THE CHILD PORNOGRAPHY GUIDELINES 1 n.4, 8, 41-54 (2009); Letter from Jonathan J. Wroblewski, Dir., Office of Policy & Legislation, Dep't of Justice, to Chief Judge William K. Sessions III, Chair, U.S. Sentencing Comm'n 6 (June 28, 2010).

[236] *See* 77 Fed. Reg. 2778, 2780, 2783 (Jan. 19, 2012); Public Meeting Minutes, U.S. SEN'T COMMISSION (Jan. 10, 2012), *available at* http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20120110/Meeting_Minutes.pdf.

Booker has also allowed the courts to share "principles of general applicability" with each other, and in turn, to communicate more effectively with the Commission regarding whether the guidelines fulfill the purposes of sentencing.[237] Freed of the stunted departure standard and the restrictive standard of review, district courts consider well-reasoned decisions of other district courts and courts of appeals in other circuits regarding the soundness of particular guidelines.[238] And courts of appeals have held that district courts must consider nonfrivolous arguments raised by a party based on relevant analysis provided by other courts.[239] In this manner, courts are now engaged in an ongoing, national conversation regarding sentencing policy and practice, and are providing valuable feedback to the Commission in the process.[240] Sentencing in cases involving the guideline for possession of child pornography illustrates the enormously influential effect of reasoned judicial decisions across districts and circuits,[241] which has produced aggregate data that the Commission is taking into account.[242]

---

[237] *See* Brief of Amici Curiae Senators Edward M. Kennedy, Orrin G. Hatch, and Dianne Feinstein, *supra* note 227, at 22-25.

[238] *See, e.g.*, United States v. Shull, 793 F. Supp. 2d 1048, 1064 (S.D. Ohio 2011) (agreeing with the analysis from the Northern District of Iowa regarding the unsoundness of the current crack guidelines, and adopting a one-to-one ratio in crack cases (citing United States v. Williams, 788 F. Supp. 2d 847, 891-92 (N.D. Iowa 2011))).

[239] *See, e.g.*, United States v. Henderson, 649 F.3d 955, 958, 963 & n.4 (9th Cir. 2011) (reversing for failure to address a challenge to the child pornography guideline after setting forth an extensive analysis and agreeing with principles stated by other courts of appeals); United States v. Davy, 433 F. App'x 343, 349-52 (6th Cir. 2011) (reversing for failure to consider a challenge to the stolen-gun enhancement under § 2K2.1, with reference to a decision from the Eastern District of New York (citing United States v. Handy, 570 F. Supp. 2d 437, 478-80 (E.D.N.Y. 2008))).

[240] As Professor Berman observed five years before *Booker*, the SRA's framers expected that "judges would share—with each other and with the Sentencing Commission—case-specific insights on sentencing policy and practice and thereby contribute to the development of principled and purposeful sentencing law." Douglas A. Berman, *Balanced and Purposeful Departures: Fixing a Jurisprudence that Undermines the Federal Sentencing Guidelines*, 76 NOTRE DAME L. REV. 21, 88 (2000). But "the 'heartland' and 'abuse of discretion' standards," as described in *Koon*, "devalued departure authority as a means for judicial contribution to the evolution of the sentencing law under the Guidelines." *Id.* "Lost along the way was an appreciation of departures as a mechanism through which judges could provide meaningful feedback concerning the Guidelines as they related to the fundamental purposes of punishment." *Id.* at 71.

[241] *See, e.g.*, United States v. Cameron, No. 09-0024, 2011 WL 890502, at *5, *16 (D. Me. Mar. 11, 2011) (citing nonbinding decisions from other circuits and districts re-

As the Commission improves the guidelines, judges follow them more often,[243] as the Supreme Court predicted they would.[244] Moreover, as transparency has increased, the Justice Department's influence on the Commission has lessened somewhat, and *Booker* has had a salutary influence on some of the Department's own policies. Attorney General Eric Holder has recognized that "equal justice depends on individualized justice," and accordingly has authorized prosecutors to request variances based on the purposes and factors set forth in § 3553(a), with supervisory approval.[245] Further, the Department has now required United States Attorneys in all districts to implement an early disposition ("fast track") program for illegal reentry cases, noting that the availability of such departures in some districts but not others had

---

flecting "judicial disquiet" with the child pornography guideline, and quoting the First Circuit's "cautionary coda" in *United States v. Stone* that the child pornography "guidelines . . . are in our judgment harsher than necessary" (quoting 575 F.3d 83, 97 (1st Cir. 2009))); United States v. Riley, 655 F. Supp. 2d 1298, 1304 (S.D. Fla. 2009) (citing eight decisions from districts in other circuits in support of its conclusion that the child pornography guideline produces sentences greater than necessary to achieve sentencing purposes); United States v. McElheney, 630 F. Supp. 2d 886, 892, 901 (E.D. Tenn. 2009) (relying on the analyses of "[c]ourts across the country" and deciding to sentence the defendant below the guideline range because "the child pornography Guidelines do not fully describe the current sentencing practices of district courts or adequately differentiate between the least and worst offenders").

[242] *See supra* note 235 and accompanying text.

[243] After increasing nearly every quarter through fiscal year 2010, the overall rate of non-government sponsored below-guideline sentences began to drop during the first quarter of fiscal year 2011, concurrent with the reduction in the crack guidelines on November 1, 2010. *See* U.S. SENTENCING COMM'N, PRELIMINARY QUARTERLY DATA REPORT: 1ST QUARTER RELEASE 12 tbl.4 (2012) [hereinafter 2012 QUARTERLY DATA REPORT] (showing a decrease from 18.7% in the fourth quarter of 2010 to 17.5% in the first quarter of 2012).

[244] *See* Kimbrough v. United States, 552 U.S. 85, 107 (2007) ("[A]dvisory Guidelines combined with appellate review for reasonableness and ongoing revision of the Guidelines in response to sentencing practices will help to 'avoid excessive sentencing disparities.'" (quoting United States v. Booker, 543 U.S. 220, 264 (2005))). Justice Scalia explained in *Rita v. United States* that as the Commission "perform[s] its function of revising the Guidelines to reflect the desirable sentencing practices of the district courts . . . district courts will have less reason to depart from the Commission's recommendations." 551 U.S. 338, 382-83 (2007) (Scalia, J., concurring); *see also supra* note 218.

[245] Memorandum from Eric H. Holder, Jr., Att'y Gen., to All Fed. Prosecutors (May 19, 2010), *available at* http://www.justice.gov/oip/holder-memo-charging-sentencing.pdf.

generated concern about unwarranted disparity.[246] That concern had been raised by the courts through variances made possible by *Booker*.[247]

And what effect has loosening the hold of the guidelines had on sentencing outcomes? In our judgment, no one can honestly say that judges have been unduly lenient. One year after *Booker*, when the guidelines were still being widely enforced, judges sentenced below the guideline range in 12.5% of cases,[248] an increase from 10.9% in 2001 when the guidelines were mandatory.[249] In fiscal year 2011—four years after the Supreme Court made clear in *Gall* that judges may consider all relevant circumstances, including those placed off limits by the Commission's policy statements, and in *Rita* and *Kimbrough* that judges may discount unsound guidelines[250]—the rate of sentences below the guideline range had risen to only 17.4%.[251] The low rate of below-range sentences is even more remarkable in light of the near absence of mitigating factors in the guidelines and the one-way upward ratchet in guideline penalties over the years, which the Commission has just begun to address. When judges do depart or vary, the median decrease remains, as it was before *Booker*, exceedingly modest—about twelve months.[252] And average sentence length for all cases is, and has remained since *Booker*, about ten months below the average guideline range.[253] Average sentence length was roughly forty-six

---

[246] Memorandum from James M. Cole, Deputy Att'y Gen., to All U.S. Att'ys 2 (Jan. 31, 2012), *available at* http://www.justice.gov/dag/fast-track-program.pdf.

[247] *See, e.g.*, United States v. Lopez-Macias, 661 F.3d 485 (10th Cir. 2011); United States v. Jimenez-Perez, 659 F.3d 704, 707-10 (8th Cir. 2011); United States v. Camacho-Arellano, 614 F.3d 244 (6th Cir. 2010); United States v. Arrelucea-Zamudio, 581 F.3d 142 (3d Cir. 2009); United States v. Rodriguez, 527 F.3d 221, 228 (1st Cir. 2008).

[248] *BOOKER* REPORT, *supra* note 5, at 47.

[249] *See* U.S. SENTENCING COMM'N, REPORT TO THE CONGRESS: DOWNWARD DEPARTURES FROM THE FEDERAL SENTENCING GUIDELINES 60 (2003).

[250] *See supra* notes 194, 197-99.

[251] U.S. SENTENCING COMM'N, 2011 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, tbl.N (2011) [hereinafter 2011 SOURCEBOOK].

[252] *See, e.g.*, 2003 SOURCEBOOK, *supra* note 190, tbl.31A; 2004 SOURCEBOOK, *supra* note 190, tbl.31A; U.S. SENTENCING COMM'N, 2006 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbls.31A-31D (2006); 2008 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbls.31A-31D (2008); 2010 SOURCEBOOK, *supra* note 190, tbls.31A-31D; 2012 QUARTERLY DATA REPORT, *supra* note 243, tbls.10-13.

[253] *See* U.S. SENTENCING COMM'N, FINAL QUARTERLY DATA REPORT 32 fig.C (2010) [hereinafter 2010 FINAL QUARTERLY DATA REPORT]; 2012 QUARTERLY DATA

months before *Booker*[254] and was forty-three months in the most recent fiscal year.[255] This small decrease is primarily attributable to variances and lowered guideline ranges for crack cases and a large increase in the number of immigration cases prosecuted under 8 U.S.C. § 1326(a), which has a statutory maximum of two years and a correspondingly low guideline range.[256] Average sentence length has remained the same or slightly increased for all other important categories of offenses,[257] except that it has slightly decreased for marijuana offenses,[258] and has substantially increased for fraud offenses[259] and child pornography offenses.[260]

It appears that prosecutors, too, generally view the guidelines as unduly harsh. The government moved for sentences below the guideline range in 26.3% of all cases in fiscal year 2011.[261] Additionally, the government either agreed to or did not oppose more than half of sentences the Commission classifies as "non-government sponsored below

---

REPORT, *supra* note 243, at 32 fig.C. Figures C through I of the quarterly data reports graph average sentence length and average guideline minimum from fiscal year 2005 through the first quarter of fiscal year 2012.

[254] The average sentence length was 46.8 months in 2001, 46.9 months in 2002, 47.9 months in 2003, 50.1 months in 2004 (pre-*Blakely*), 45 months in 2004 (post-*Blakely*), and 46.3 months in 2005 (pre-*Booker*). *See* U.S. SENTENCING COMM'N, 2001 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl.13 (2001); 2002 SOURCEBOOK, *supra* note 187, tbl.13; 2003 SOURCEBOOK, *supra* note 190, tbl.13; 2004 SOURCEBOOK, *supra* note 190, tbl.13; U.S. SENTENCING COMM'N, 2005 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl.13 (2005) [hereinafter 2005 SOURCEBOOK].

[255] 2011 SOURCEBOOK, *supra* note 251, tbl.13.

[256] *See* 2010 FINAL QUARTERLY DATA REPORT, *supra* note 253, at 32 fig.C, 36 fig.G, 38 fig.I; 2012 QUARTERLY DATA REPORT, *supra* note 243, at 32 fig.C, 36 fig.G, 38 fig.I.

[257] *See* 2010 QUARTERLY DATA REPORT, *supra* note 253, at 32-38 figs.C-I; 2012 QUARTERLY DATA REPORT, *supra* note 243, at 32-38 figs.C-I. Average sentence length has increased slightly for firearms offenses, alien smuggling offenses, and powder cocaine offenses; has increased somewhat significantly for heroin offenses; and has remained the same for methamphetamine offenses.

[258] *See* 2010 QUARTERLY DATA REPORT, *supra* note 253, at 38 fig.I; 2012 QUARTERLY DATA REPORT, *supra* note 243, at 38 fig.I.

[259] *See* 2010 QUARTERLY DATA REPORT, *supra* note 253, at 33 fig.D; 2012 QUARTERLY DATA REPORT, *supra* note 243, at 33 fig.D.

[260] *Compare* 2011 SOURCEBOOK, *supra* note 251, tbl.13 (reporting a mean sentence of 119.1 months), *with* 2005 SOURCEBOOK, *supra* note 254, § 2 tbl.13 (reporting a mean sentence of 75 months before *Booker*), *and id.* § 3 tbl.13 (reporting a mean sentence of 78.6 months after *Booker*).

[261] 2011 SOURCEBOOK, *supra* note 251, tbl.N.

range."[262] And, although the government's success rate on appeal is roughly the same or better than before *Booker*, it appeals about the same number of below-guideline sentences as it did before *Booker*.[263] Further, since the Attorney General's May 2010 announcement that prosecutors may request variances consistent with § 3553(a), the government has sought sentences below the guideline range for reasons other than cooperation or fast track at an increasing rate, particularly in cases in which the guidelines are most in need of revision.[264] Indeed, the decrease in recent years in government sponsored downward departures for cooperation may well be due to the ability of

[262] This statistical inference is based on the following facts. First, the government did not object to 44.5% of defense motions (3334 of 7488) for a below-range sentence classified as non-government sponsored in fiscal year 2011. *Id.* tbl.28A. Second, because the statement-of-reasons form does not provide a checkbox for the court to indicate the government's position regarding reasons not addressed in a plea agreement or motion by a party, there is no information regarding the government's position on another 4664 below-range sentences, all of which are classified as non-government sponsored. *Id.* Since defense attorneys generally raise all nonfrivolous grounds for below-range sentences and judges do not raise meritless grounds sua sponte, it is likely that the government did not object to a significant portion of these sentences. Third, in 3030 other cases classified as non-government sponsored below-range, the Commission did not receive sufficient information to determine the government's position or whether the source was a plea agreement, a motion by a party, or something else. *Id.* Since a large majority of cases for which information was available were sponsored or agreed to by the government, it is reasonable to assume that the government sponsored or acquiesced in a significant portion of cases where information was not available. Together, these cases easily exceed 50% of sentences classified as "non-government sponsored below range."

[263] In fiscal year 2011, the government raised 92 issues on appeal; the government prevailed in 65% of the 26 of those that involved § 3553(a) or a claim of unreasonableness. 2011 SOURCEBOOK, *supra* note 251, tbl.58. In 1998, the government raised 122 issues on appeal; for the 41 of those that related to departures, it prevailed 63% of the time. U.S. SENTENCING COMM'N, 1998 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, tbl.56 (1998). In 1999, the government raised 54 issues on appeal; for the 25 related to departures, it prevailed 28% of the time. U.S. SENTENCING COMM'N, 1999 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl.58 (1999). In 2003, under the strict PROTECT Act standard of review, the government raised 176 issues on appeal; for the 63 related to departures, it prevailed 73% of the time. 2003 SOURCEBOOK, *supra* note 190, tbl.58.

[264] The government sponsored below-guideline sentences for reasons other than cooperation or fast track in 2.9% of cases in 2005 and in 4.4% of cases in 2011. *Compare* 2005 SOURCEBOOK, *supra* note 254, § 3 tbl.26, *with* 2011 SOURCEBOOK, *supra* note 251, tbl.N. The rate was 14.7% in child pornography possession cases. *Id.* tbl.27.

prosecutors to use other mechanisms to mitigate the harshness of guideline sentences.[265]

The observation of Professor Kevin Reitz, an expert on guidelines systems, made soon after *Booker* still holds:

> No member of Congress should work to overhaul the post-*Booker* Guidelines on the theory that they herald a return to the bad old days of fully discretionary judicial sentencing or on the theory that the new "advisory" Guidelines are extremely permissive compared with norms in guidelines sentencing systems nationwide. . . . [T]he *Booker*-ized Guidelines . . . remain as restrictive of judicial sentencing discretion as any system in the United States.[266]

Three-fourths of federal judges express agreement with the statement that the post-*Booker* advisory guidelines system "best achieves the purposes of sentencing," with only three percent preferring the pre-*Booker* mandatory guidelines.[267] Prosecutors also prefer advisory guidelines to other possible options, and the Department of Justice has thus far followed their lead.[268] The organized public and private defense bars support the advisory guidelines system,[269] as do organizations dedicated to fair and rational sentencing policy.[270]

---

[265] While the rate of cooperation departures has fallen from 15.5% in 2004 (before *Blakely v. Washington*, 542 U.S. 296 (2004)) to 11.2% in 2011, the rate of government sponsored fast track and other departures has grown from 6.4% in 2004 (before *Blakely*) to 15.1% in 2011. *See* 2004 SOURCEBOOK, *supra* note 190, § 2 tbl.26A; 2011 SOURCEBOOK, *supra* note 251, tbl.27.

[266] Kevin R. Reitz, *The Enforceability of Sentencing Guidelines*, 58 STAN. L. REV. 155, 171 (2005).

[267] *See supra* note 8. Fourteen percent believe the purposes of sentencing would be best achieved by a system along the lines of Judge Sessions's proposal, if coupled with fewer mandatory minimums, which we analyze in Section IV.A, *infra*, while eight percent believe that having no guidelines at all would best achieve these purposes. *Id.*

[268] Breuer, *supra* note 10, at 112 (noting that prosecutors "were not enthusiastic" about a return to a mandatory guidelines structure and that the Department of Justice "does not plan to seek legislative reinstatement of a mandatory Guidelines system"); *cf.* Stephanos Bibas & Susan Klein, *The Sixth Amendment and Criminal Sentencing*, 30 CARDOZO L. REV. 775, 793 (2008) (noting that some line prosecutors welcome *Booker*, as "a fair number of these assistants chafe at the Department's insistence on draconian penalties").

[269] *See supra* note 11 and accompanying text.

[270] Supporters include Families Against Mandatory Minimums, the ACLU, and the Sentencing Project. *See Uncertain Justice: The Status of Federal Sentencing and the U.S. Sentencing Commission Six Years After* Booker*: Hearing Before the Subcomm. on Crime, Terrorism,*

In sum, *Booker* and its progeny have established a measure of balance for the first time since the guidelines' inception. Judges have been remarkably restrained in exercising their discretion, and the Commission—working with, instead of against, judges and educating rather than automatically bowing to the harshest voices in Congress—is beginning to fix broken guidelines. The Attorney General has directed federal prosecutors to comply with the new law of sentencing by seeking sentences outside the guideline range when appropriate.[271] Thus far, Congress has enacted fewer mandatory minimums and issued fewer specific directives to the Commission after *Booker* than in any other seven-year period since the guidelines went into effect.[272]

To state the matter succinctly, there is no need for a *Booker* fix. *Booker* was the fix.

III. THE UNCONVINCING RATIONALES FOR A *BOOKER* "FIX"

Judge Sessions observes that most sentences are within the guideline range; that average sentence length has remained relatively constant; and that, when judges depart or vary, the extent of the adjustments has been "modest" and, indeed, slightly less than before *Booker*.[273] Similarly, the Commission observes that over eighty percent of sentences are within the guideline range or pursuant to a government motion for a

---

& Homeland Sec. of the H. Comm. on the Judiciary, 112th Cong. (2011) (statement of Mary Price, Vice President and General Counsel, Families Against Mandatory Minimums), *available at* http://www.famm.org/Repository/Files/FAMM%20Testimony%20Booker%20Hearing%2010-12-11.pdf; *Uncertain Justice: The Status of Federal Sentencing and the U.S. Sentencing Commission Six Years After* Booker*: Hearing Before the Subcomm. on Crime, Terrorism, & Homeland Sec. of the H. Comm. on the Judiciary*, 112th Cong. (2011) (statement of American Civil Liberties Union), *available at* http://www.fd.org/pdf_lib/ACLU%20Sentencing%20Hearing%20Testimony%2010-12-11final.pdf; Mary Price, Vice President and Gen. Counsel, Families Against Mandatory Minimums, Statement Before the U.S. Sentencing Commission (Feb. 16, 2012), http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20120215-16/Testimony_16_FAMM.pdf; Marc Mauer, Exec. Dir., The Sentencing Project, Statement Before the U.S. Sentencing Commission (Feb. 16, 2012), http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20120215-16/Testimony_16_Mauer.pdf.

[271] *See supra* note 245 and accompanying text.

[272] *See* Study of Mandatory Minimums and Specific Directives (2011) (on file with authors). The study, completed by the authors, catalogues mandatory minimum statutes and specific directives enacted from 1987 through 2011.

[273] Sessions, *supra* note 12, at 316, 329.

sentence outside the guideline range,[274] and that the "clear linkage" between guideline ranges and sentences imposed "demonstrates that the guidelines . . . continue to work to guide the sentencing decisions of federal judges."[275] Yet, Judge Sessions and the Commission both call for a legislative fix. In support of their proposals, they claim that judges create unwarranted disparities. These claims, however, rest on flawed and incomplete data analyses. Moreover, Judge Sessions and the Commission fail to acknowledge that much more troubling forms of unwarranted disparity have been reduced as a result of *Booker* and would be reintroduced by their proposals.

A. *Disparities Under the Mandatory Guidelines*

The SRA was largely motivated by the perception that the "unfettered discretion" the law conferred on judges in imposing sentences, and on parole authorities in setting release dates, had resulted in wide, unwarranted disparities.[276] Yet reexamination of the studies that purported to show significant disparity in judicial sentencing decisions before the guidelines revealed both that the data and methodologies upon which these claims were based were flawed and that sentencing outcomes generally corresponded to relevant differences in offenses and offenders.[277] The most sophisticated studies of sentencing under the mandatory guidelines found that interjudge disparity in average sentence length fell by one month or less.[278] The Commission viewed

---

[274] The precise rate is 82.6%, including 54.5% within the range, 26.3% below the range based on a government motion, and 1.8% above the range. 2011 SOURCEBOOK, *supra* note 251, tbl.N.

[275] *Commission Testimony*, *supra* note 13, at 22.

[276] S. REP. NO. 98-225, at 38-49, 74-75 (1983).

[277] *See* DOUGLAS C. MCDONALD & KENNETH E. CARLSON, U.S. DEP'T OF JUSTICE, SENTENCING IN THE FEDERAL COURTS: DOES RACE MATTER? THE TRANSITION TO SENTENCING GUIDELINES, 1986–90, at 25-26 (1993) ("Differences clearly thought to be unwarranted (e.g., by the offender's race or ethnicity) were found to be uniformly small or statistically insignificant."); STITH & CABRANES, *supra* note 47, at 107 ("[T]he more sophisticated the study, the less clear the evidence of unwarranted disparities." (emphasis omitted)); *id.* at 107-12 (discussing the flaws of the studies that most influenced Congress).

[278] *See* James M. Anderson, Jeffrey R. Kling & Kate Stith, *Measuring Interjudge Sentencing Disparity: Before and After the Federal Sentencing Guidelines*, 42 J.L. & ECON. 271, 294 (1999) (finding that the average difference in sentence length fell from 4.9 months

this reduction as "significant progress,"[279] but others considered it to be a sign of failure and not sufficiently beneficial to outweigh the more problematic kinds of disparity that the guidelines introduced.[280] The Commission itself recognized that interjudge disparity is only one form of disparity and that reducing interjudge disparity created and left unchecked other kinds of disparity.[281]

In fact, the guidelines created—and masked—much more troubling disparities. The new, harsher rules had a disproportionate impact on black offenders, and some of these rules were not necessary to satisfy the legitimate purposes of sentencing.[282] Offenders who differed significantly in their culpability, danger to the public, risk of recidivism, and rehabilitative needs were treated the same.[283] Moreover, *the* guideline range—assumed by many to be identical for similar offenders convicted of similar offenses—can be, and is, calculated very differently for any number of reasons, including happenstance,[284] lack of clarity in the guidelines,[285] different interpretations of the guidelines,[286]

---

before the guidelines to 3.9 months after the guidelines); Paul J. Hofer et al., *The Effect of the Federal Sentencing Guidelines on Inter-Judge Sentencing Disparity*, 90 J. CRIM. L. & CRIMINOLOGY 239, 286-89 (1999) (finding that the average difference in sentence length fell from 7.87 months before the guidelines to 7.61 months after the guidelines).

[279] FIFTEEN YEAR REVIEW, *supra* note 152, at 99.

[280] *See, e.g.*, Alschuler, *supra* note 191, at 89-100; *see also* Anderson, Kling & Stith, *supra* note 278, at 301-04.

[281] FIFTEEN YEAR REVIEW, *supra* note 152, at 79-92, 131-35.

[282] *See id.* at 131-34 (finding that the guidelines and mandatory minimums for crack offenses as well as the use of prior drug trafficking convictions in the career offender guideline have an adverse impact on black defendants and "serve no clear sentencing purpose").

[283] Stephen J. Schulhofer, *Assessing the Federal Sentencing Process: The Problem Is Uniformity, Not Disparity*, 29 AM. CRIM. L. REV. 833, 851-70 (1992).

[284] *See, e.g.*, United States v. Emmenegger, 329 F. Supp. 2d 416, 427 (S.D.N.Y. 2004) ("To a considerable extent, the amount of loss caused by this crime is a kind of accident, dependent as much on the diligence of the victim's security procedures as on [the defendant's] cupidity."); Robert L. Hinkle, Dist. Judge, Statement Before the U.S. Sentencing Commission (Feb. 11, 2009), http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20090210-11/Hinkle_statement.pdf ("By happenstance, one defendant provides information to the prosecutor first and benefits from § 1B1.8, but a codefendant comes in later and thus faces a markedly higher offense level.").

[285] *See* FIFTEEN YEAR REVIEW, *supra* note 152, at 50, 87 (explaining that the relevant conduct rule is inconsistently applied, in part because of "ambiguity in the language of the rule"); Pamela B. Lawrence & Paul J. Hofer, *An Empirical Study of the Application of*

different views of the evidence,[287] and varying prosecutorial practices.[288] The Commission's "statistics showing the number of sentences within the guideline range do not pick up these disparities, because they are disparities in the calculation of the guideline range."[289] Furthermore, measuring disparity solely with reference to judicial decisionmaking ignores disparities inevitably created by differing prosecutorial charging and plea-bargaining policies and strategies across cases and dis-

---

the Relevant Conduct Guideline § 1B1.3, 10 FED. SENT'G REP. 16, 17-20 (1997) (reporting that, in an empirical study of the relevant conduct rule, forty-six probation officers assigned the same "typical drug distribution case" widely varying base offense levels, and hypothesizing based on the results that officers interpreted the rule in three different ways).

[286] *See* Hinkle, *supra* note 284, at 2-3 ("In one district a defendant is tagged only with the drugs involved in a specific transaction; in another the concept of relevant conduct is applied more broadly, and the offense level skyrockets."); *see also* Panel Discussion, Federal Sentencing Under "Advisory" Guidelines: Observations by District Judges (Mar. 7, 2006) (statement of Judge Gerard E. Lynch) (remarking that, "in perfect good faith," it is often possible to interpret a guideline in more than one way), *in* 75 FORDHAM L. REV. 1, 16 (2006).

[287] For example, in *United States v. Quinn*, at the sentencing of one codefendant, the prosecutor and probation officer argued for a guideline range of 37-46 months based only on the drugs found on her person and at her and her codefendant's residences on the date of arrest. 472 F. Supp. 2d 104, 105-06 (D. Mass. 2007). At the later sentencing of the other codefendant, the same prosecutor and a different probation officer urged a guideline range of 151-188 months, based primarily on additional drugs he allegedly sold over the previous five years. *Id.* at 106-07. Although there was hearsay information indicating that the first codefendant was involved in these uncharged sales as well, the prosecutor explained that the information was more reliable with respect to the second codefendant. *Id.* at 109. To avoid a very substantial disparity, the judge sentenced the second codefendant based on the same amount of drugs as the first codefendant, observing that "it is more likely in a Guidelines calculation than in a formal trial that different evaluators of particular information will form different conclusions about it" and that "inconsistent resolutions of essentially the same question with respect to two separate but similar defendants is a structural problem within the Guidelines' manner of addressing 'relevant conduct.'" *Id.* at 110-11.

[288] *See* Hinkle, *supra* note 284, at 3 ("In one district the government files a notice of the defendant's prior convictions under 21 U.S.C. § 851 and the defendant thus faces a long minimum mandatory sentence; in another district the government chooses not to file the notice."). The severity of the career offender guideline range also depends on whether prosecutors file a notice under § 851. *See* U.S. SENTENCING GUIDELINES MANUAL § 4B1.1(b) & cmt. 2 (2011); 21 U.S.C. §§ 841(b), 851(a) (2006).

[289] Hinkle, *supra* note 284, at 3.

tricts.[290] Moreover, it is standard practice in some quarters for law enforcement officers to manipulate the guideline range by determining, for instance, the quantity or type of drugs bought, sold, or agreed upon before an arrest is made.[291]

B. *Racial Disparity*

Perhaps the most inflammatory claim by some proponents of the guidelines was that judicial discretion led to racial disparity in sentencing in federal court.[292] But, as noted earlier, subsequent reanalysis of the studies relied upon belied that claim.[293] Judge Sessions and the

---

[290] *See* FIFTEEN YEAR REVIEW, *supra* note 152, at 82-85 (listing and describing prosecutorial "decision points" that affect the ultimate sentence). Prosecutors, with or without guidelines, treat similar offenders differently for reasons of administrative efficiency. *See id.* at 86. They also exercise their charging and plea bargaining authority and control over sentencing facts to induce guilty pleas, and to seek higher sentences for similarly situated offenders after trial. *See id.* at 83-84; Nagel & Schulhofer, *supra* note 158, at 539-40; *see also* United States v. Rodriguez, 162 F.3d 135, 150-53 (1st Cir. 1998) (holding that a sentencing disparity of more than twenty-one years between codefendants who went to trial and those who pled guilty was a permissible consequence of prosecutorial plea bargaining discretion under the guidelines).

[291] *See* Jon O. Newman, *The New Commission's Opportunity*, 10 FED. SENT'G REP. 44, 44 (1997) ("[T]he guidelines permit undercover drug enforcement agents to determine the ultimate punishment by shaping the conversation with a suspect concerning the extent of future deliveries."); Eda Katharine Tinto, *Undercover Policing, Overstated Culpability*, 34 CARDOZO L. REV. (forthcoming 2013) (manuscript at 49-54), *available at* http://ssrn.com/abstract=2016362 (describing "fictional stash house operations" in which informants recruit suspects to engage in fictitious robberies of quantities of drugs invented by the informants).

[292] *See* Stith & Koh, *supra* note 99, at 227-28 (describing "unwarranted disparity," including "alleged bias against minorities," as one of the fundamental concerns motivating Congress to enact the SRA); Michael Tonry, *Obsolescence and Immanence in Penal Theory and Policy*, 105 COLUM. L. REV. 1233, 1246 (2005) (recounting that some early reformers were "convinced that racial discrimination was a driving force behind imprisonment disparities and that the only way to ameliorate or eliminate it was to remove judges' and parole boards' discretion to discriminate"); Tom Wicker, *Judging the Judges*, N.Y. TIMES, Feb. 6, 1976, at A29 (discussing Judge Frankel's view that the "pervasive racial discrimination that mars American justice" is a problem caused by judicial discretion); *cf.* Joseph C. Howard, *Racial Discrimination in Sentencing*, 59 JUDICATURE 121, 121, 126 (1975) (arguing in regard to sentencing in state court that racial discrimination "is widely perceived in our communities and clearly supported by statistics" and calling for reform to "correct the procedural and systematic defects involved in the sentencing process").

[293] *See supra* note 277 and accompanying text.

Commission now claim that racial disparity has increased as a result of the Supreme Court's decision to make the guidelines advisory.[294] This claim is based on a multivariate study the Commission conducted, which reports a growing difference in sentence length between black and white males after *Booker* and *Gall*, as compared to the period following the PROTECT Act, when judicial discretion was most constrained.[295] Rather than implement a *Booker* "fix" and only then reanalyze the basis for this claim, we should carefully examine the basis for the claim right now. We undertake a thorough examination of the Commission's multivariate study in the second section below. To set the stage for that examination, we first consider more generally how the presence or absence of judicial discretion has affected racial disparity in federal sentencing.

1. Improvements in Racial Fairness Through Increased Judicial Discretion

It is now apparent that "the degree of capriciousness or prejudice evident in the sentencing behavior of federal judges before the establishment of the guidelines [has been] often overstated."[296] At the same time, the advent of mandatory guidelines and mandatory minimums created a new kind of racial unfairness that did not previously exist. As shown in Figure 1 below, the average time served by defendants of different racial groups varied little before the guidelines and mandatory minimums went into effect in the late 1980s. But when these laws were fully implemented, average time served by black offenders soared above the others.

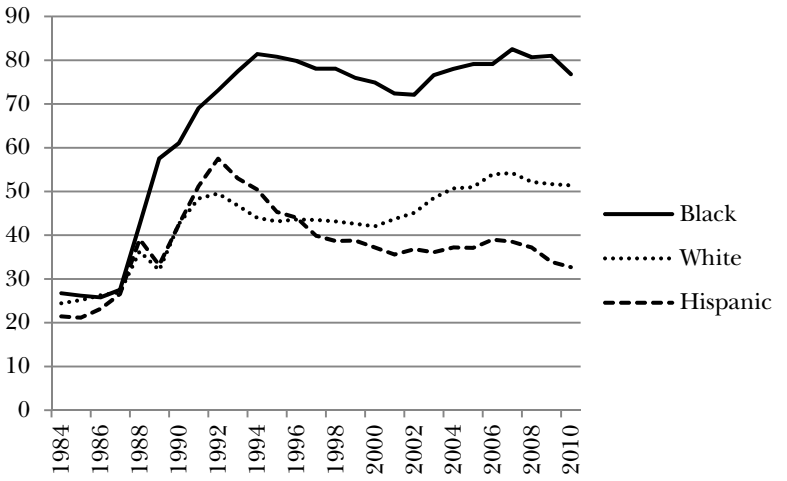
---

[294] *See* Sessions, *supra* note 12, at 329-30 & n.127; *Commission Testimony*, *supra* note 13, at 1, 53-55.

[295] *See Commission Testimony*, *supra* note 13, at 53-55.

[296] David Weisburd, *Sentencing Disparity and the Guidelines: Taking a Closer Look*, 5 FED. SENT'G REP. 149, 149 (1992); *see also supra* note 277 and accompanying text.

Figure 1: Average Time Served in Months by Black, White, and Hispanic Offenders from FY 1984–2010[297]



This racial gap was the result of new and harsher mandatory sentencing rules, including statutes mandating minimum sentences for drug trafficking and other offenses, that applied more frequently to black offenders than to offenders of other races.[298] To the extent that these rules required punishment that was greater than necessary to achieve the legitimate purposes of sentencing, they created unwarranted racial disparity.[299] Most notable in this regard were mandatory

[297] A version of this graph first appeared in the Commission's 2004 assessment of fifteen years of guidelines sentencing. *See* FIFTEEN YEAR REVIEW, *supra* note 152, at 116 fig.4.2. It has been expanded by its designer, Paul J. Hofer, former Special Projects Director for the Commission, to include data through 2010. The source of the data is 1984–1990 USSC AO FPSSIS Datafiles and 1991–2010 USSC Monitoring Datafiles. The 2011 Monitoring Datafile has not yet been made available. Time served is estimated from the sentence imposed. In the Commission's Monitoring Datafile, TIMESERV assumes good time credits will be applied. Offenders receiving no term of imprisonment are excluded.

[298] *See* MCDONALD & CARLSON, *supra* note 277, at 1, 15; FIFTEEN YEAR REVIEW, *supra* note 152, at 117, 135; John Scalia, Jr., *The Impact of Changes in Federal Law and Policy on the Sentencing of, and Time Served in Prison by, Drug Defendants Convicted in U.S. District Courts*, 14 FED. SENT'G REP. 152, 155-57 (2001–2002).

[299] *See* FIFTEEN YEAR REVIEW, *supra* note 152, at 113-14, 131-35; *see also* Rodney Engen, *Racial Disparity in the Wake of* Booker/Fanfan*: Making Sense of "Messy" Results and Other Challenges for Sentencing Research*, 10 CRIMINOLOGY & PUB. POL'Y 1139, 1144-45

minimums and sentencing guidelines applicable to crack cocaine offenses[300] and the so-called "career offender" guideline. The Commission concluded that the career offender guideline—as applied to those who qualify based on prior drug convictions, which most defendants subject to this guideline do—vastly overstates the risk of recidivism, has no general deterrent effect, and has a disproportionate impact on black offenders.[301] Other guideline provisions and mandatory enhancements that result in excessively severe sentences apply disproportionately to black offenders as well.[302]

Only after *Booker* have judges been able to mitigate such unwarranted racial disparity. By imposing below-guideline sentences that they could not have imposed under the mandatory guidelines, in fiscal year 2010 alone, judges spared more than 860 black defendants sentenced under the crack or career offender guidelines over 3300 years of unnecessary incarceration. More than 230 defendants of other races were likewise spared over 900 years of unnecessary incarceration under these two guidelines.[303] Moreover, contrary to the suggestion that judges exercise discretion in a biased manner, in cases in which a mandatory minimum did not constrain judicial discretion, black and white offenders received below-guideline sentences at the same rate.[304]

(2011) (noting that "[r]acial disparity may be built into the guidelines," and citing as examples the drug guidelines and the career offender guideline).

[300] *See generally* U.S. SENTENCING COMM'N, *supra* note 225.

[301] FIFTEEN YEAR REVIEW, *supra* note 152, at 133-34.

[302] *See* U.S. SENTENCING COMM'N, MANDATORY MINIMUM PENALTIES IN THE CRIMINAL JUSTICE SYSTEM 352-54 (2011) [hereinafter MANDATORY MINIMUM PENALTIES] (finding that the "cumulative impacts" of broadly defined "felony drug offense[s]" under 21 U.S.C. § 851, criminal history score, and ineligibility for safety valve relief "can result in disproportionate and excessively severe sentences," and that these cumulative impacts are "particularly acute for Black drug offenders"); *id.* at 359-64 (finding that sentences for certain firearms offenses can be "unduly severe" and "these effects fall on Black offenders to a greater degree than on offenders of other racial groups").

[303] These estimates were made using the Monitoring Datasets for fiscal years 2003 and 2010. *See supra* note 231. They are based on the increase in the rate of non-government sponsored below-guideline sentences for crack and career offenders in fiscal year 2010 as compared to the rate in 2003 and the average extent of these reductions. Fiscal year 2003 was used as the comparison year because it preceded the Supreme Court's decision in *Blakely v. Washington*, 542 U.S. 296 (2004), which affected how cases were handled in anticipation of *Booker*.

[304] According to the 2010 USSC Monitoring Dataset, in cases where a mandatory minimum did not trump or truncate the guideline range, 24.1% of black defendants

Judges have also reduced unwarranted racial disparity stemming from the exercise of discretion by prosecutors and law enforcement agents. As the Commission has found, prosecutors and agents can control sentencing outcomes in at least three ways: (1) by controlling the quantity or type of drugs used to determine the guideline range or a mandatory minimum, (2) through charging and plea bargaining decisions, and (3) through their sole authority to move for certain types of departures.[305] Research has revealed unexplained racial disparities resulting from the exercise of these forms of discretion,[306] and that much of the gap in average sentence length can be traced to charging decisions, particularly decisions to bring charges carrying mandatory minimums.[307]

---

and 24% of white defendants received a below-guideline sentence. *See* 2010 USSC Monitoring Dataset, *supra* note 231.

[305] *See* FIFTEEN YEAR REVIEW, *supra* note 152, at 82-87.

[306] *See id.* at 90-91, 131 (finding that among offenders who possessed or used a gun during a drug offense, black offenders are more likely to be charged with a mandatory minimum of five or more years under 18 U.S.C. § 924(c) rather than receive a two-level increase under the guidelines); MANDATORY MINIMUM PENALTIES, *supra* note 302, at 359-60, 363-64 (finding that "stacking" § 924(c) counts results in sentences that are "excessively severe and disproportionate to the offense committed," and that black defendants are charged with such stacked offenses at a greater rate than defendants of other races); *id.* at 257-58 (reporting that 29.9% of eligible black drug offenders received an increased mandatory minimum under 21 U.S.C. § 851, while only 25% of eligible white offenders, 19.9% of eligible Hispanic offenders, and 24.8% of offenders of "other" races received such an increase); *id.* at 159-60, 179, 214-15, 221, 291 (reporting that black offenders receive government sponsored substantial assistance departures less often than defendants of other races); FIFTEEN YEAR REVIEW, *supra* note 152, at 104-05 (same).

[307] *See* M. Marit Rehavi & Sonja B. Starr, *Racial Disparity in Federal Criminal Charging and its Sentencing Consequences* (Univ. of Mich. Law & Econ. Working Paper No. 12-002, 2012), *available at* http://ssrn.com/abstract=1985377. In a study comparing offenders who were similar based on arrest offense, Rehavi and Starr found that "compared to white men, black men face charges that are on average about seven to ten percent more severe . . . and are more than twice as likely to face charges carrying mandatory minimum sentences" and that "[t]hese disparities persist after charge bargaining and, ultimately, are a major contributor to the large black-white disparities in prison sentence length." *Id.* at 46. While only 12% of defendants in the sample were charged with mandatory minimums, "disparities in their application appear capable of explaining virtually all of the aggregate racial disparity in case outcomes" in the entire sample. *Id.* at 42. The authors cautioned that the disparities they found "could reflect unobserved differences in case characteristics." *Id.* at 24. The authors did not have data, for instance, on differences in eligibility for a charge carrying a mandatory minimum. Moreover, their analysis excluded drug, child pornography, and immigration offend-

As the mandatory guidelines era came to a close, the Commission noted that "[d]isparate effects of charging and plea bargaining are a special concern in a tightly structured sentencing system like the federal sentencing guidelines, because the ability of judges to compensate for disparities in presentence decisions is reduced."[308] After *Booker*, judges are better able to compensate for some of these disparate effects.[309]

The gap in time served between black and white offenders was largest in 1994, at 37.7 months.[310] It narrowed to 25.4 months in 2010, the smallest since 1992.[311] This is in part due to judicial variances made possible by *Booker*, and in part due to the two-level reduction in

---

ers, who compose more than half of the federal docket, *see* 2011 SOURCEBOOK, *supra* note 251, fig.A, because of limitations and complications in the data. Rehavi & Starr, *supra*, at 12-13. Their conclusions, however, are consistent with the Commission's research on mandatory minimums. *See supra* note 306. A second recent study concluded that the increased impact of the differential imposition of mandatory minimums accounts for racial disparity after *Rita, Gall, and Kimbrough*. *See* Joshua B. Fischman & Max M. Schanzenbach, *Racial Disparities, Judicial Discretion, and the United States Sentencing Guidelines* 3 (Univ. of Va. Sch. of Law Pub. Law & Legal Theory Research Paper Series No. 2012-02, 2012), *available at* http://ssrn.com/abstract=1636419.

[308] FIFTEEN YEAR REVIEW, *supra* note 152, at 92.

[309] *See, e.g.*, United States v. Briggs, 397 F. App'x 329, 332-33 (9th Cir. 2010) (holding that the court varied appropriately from 235-293 months to 132 months where the drug quantity used to calculate guideline range was based on nonexistent drugs in a "'reverse sting' operation," thus "overstating [the] defendant's culpability"); United States v. Beltran, 571 F.3d 1013, 1019 (10th Cir. 2009) ("[A] defendant's claim of sentencing factor manipulation may also be considered as request for a variance from the applicable guideline range under the § 3553(a) factors [rather than under] . . . the stricter standard for a departure . . . ."); United States v. Angelos, 345 F. Supp. 2d 1227, 1231-32, 1260 (D. Utah 2004) (imposing a sentence of one day for drug counts to partially compensate for a fifty-five year mandatory sentence produced by stacked charges under 18 U.S.C. § 924(c) brought by the prosecutor after the defendant declined to plead guilty), *aff'd*, 433 F.3d 738 (10th Cir. 2006). In addition, courts may now impose below-guideline sentences based on cooperation when the government fails to make the motion. *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 F. App'x 408, 409 (5th Cir. 2008); United States v. Doe, 218 F. App'x 801, 805 (10th Cir. 2007); United States v. Fernandez, 443 F.3d 19, 33 (2d Cir. 2006); United States v. Lazenby, 439 F.3d 928, 933-34 (8th Cir. 2006); *see also* 2011 SOURCEBOOK, *supra* note 251, tbls.25-25B (reporting 589 downward variances or departures based on cooperation in absence of a § 5K1.1 motion).

[310] *See supra* Figure 1 and note 297.

[311] *See supra* Figure 1 and note 297.

the crack guidelines in fiscal year 2008 prompted by *Booker*.[312] The precise effect of the more substantial reduction in the crack guidelines under the Fair Sentencing Act of 2010, which was also prompted in part by *Booker*,[313] will not be known until the fiscal year 2011 data are available.[314] It is likely to be substantial.[315]

2. The Commission's Study

The Commission recently testified that a *Booker* fix is needed because, according to its most recent multivariate regression study,[316] increased judicial discretion had resulted in growing demographic disparities.[317] Judge Sessions, referring to the same study, asserts that "[r]eliable evidence suggests that, as a result of the decreasing adherence to the sentencing guidelines since the Supreme Court rendered them 'advisory' in 2005, . . . demographic disparities . . . have been increasing steadily."[318]

Multivariate regression studies like the Commission's measure differences among demographic groups, in average sentence lengths or

---

[312] *See supra* notes 224-31 and accompanying text.

[313] *See supra* notes 222-33 and accompanying text.

[314] The reduction in the crack guidelines directed by the Fair Sentencing Act took effect on November 1, 2010, during the first quarter of fiscal year 2011. U.S. SENTENCING GUIDELINES MANUAL, app. C, amend. 748 (Nov. 1, 2010).

[315] *See* FIFTEEN YEAR REVIEW, *supra* note 152, at 132 ("Revising the crack cocaine thresholds would better reduce the gap [in average prison sentences between black and white offenders] than any other single policy change . . . ."); *cf.* Memorandum from Office of Research & Data, U.S. Sentencing Comm'n, to Chair Saris 19 & tbl.4, 28 (May 20, 2011), *available at* http://www.ussc.gov/Research/Retroactivity_Analyses/Fair_Sentencing_Act/20110520_Crack_Retroactivity_Analysis.pdf (estimating that defendants sentenced under the guidelines in effect before November 1, 2010 and eligible for a retroactive reduction in their sentences would receive an average reduction of thirty-seven months, and that eighty-five percent of these defendants would be black).

[316] Since 2004, the Commission has conducted three different multiple regression studies and has updated two of them. *See* FIFTEEN YEAR REVIEW, *supra* note 152, at 118-27; BOOKER REPORT, *supra* note 5, at 105-09; U.S. SENTENCING COMM'N, DEMOGRAPHIC DIFFERENCES IN FEDERAL SENTENCING PRACTICES: AN UPDATE OF THE *BOOKER REPORT*'S MULTIVARIATE REGRESSION ANALYSIS 14, 16, 22 (2010) [hereinafter DEMOGRAPHIC DIFFERENCES REPORT].

[317] *Commission Testimony*, *supra* note 13, at 1; *see also* DEMOGRAPHIC DIFFERENCES REPORT, *supra* note 316.

[318] Sessions, *supra* note 12, at 329-30 (citing DEMOGRAPHIC DIFFERENCES REPORT, *supra* note 316).

in rates of imprisonment, after adjusting for some "legally relevant" differences among the groups.[319] Researchers conducting this type of study make statistical adjustment for applicable guidelines, mandatory minimums, and other legally relevant factors, and any differences in sentences remaining after these adjustments are reported as race effects in the decisions of judges.[320] Statistical adjustment, however, is made only with respect to those factors (1) for which data are available and (2) that researchers choose to include in their statistical model. For several reasons previously identified by the Commission itself and discussed below, its multivariate study does not constitute evidence that judges discriminate against racial minorities.

In addition, the Commission's study ignores racial disparities that are built into the rules or that result from presentencing decisions of investigative agents or prosecutors, because it treats the guidelines, statutes, and charging decisions as "legally relevant."[321] That is, including mandatory minimums and guidelines as control variables fails to capture racial disparity resulting from their application. Yet, as shown above, these rules and decisions "are no more or less fallible than the actions of the judges."[322] Indeed, viewing all of the procedures and considerations that affect sentencing leads us inexorably to the conclusion that judges are the institutional actors least likely to exercise racial bias. Judges determine sentences after adversarial testing by opposing parties (and a probation officer), impose sentences in open court, explain their decisions in public, and are subject to appellate review. At each of these points, judges are challenged to act only on the basis of relevant factors and to avoid any biases they might have. There are no such external checks on the decisions of prosecutors or law enforcement agents. Multivariate research has focused on judges not because judges are a likely source of disparity, but because their decisions are made on the record and result in accessible data.[323]

---

[319] *See* Hofer et al., *supra* note 278, at 243-45.

[320] *Cf.* FIFTEEN YEAR REVIEW, *supra* note 152, at 118-19; Hofer et al., *supra* note 278, at 242-44.

[321] *See* FIFTEEN YEAR REVIEW, *supra* note 152, at xiv.

[322] Shawn D. Bushway & Anne Morrison Piehl, *Social Science Research and the Legal Threat to Presumptive Sentencing Guidelines*, 6 CRIMINOLOGY & PUB. POL'Y 461, 463 (2007).

[323] *See* FIFTEEN YEAR REVIEW, *supra* note 152, at 135 ("[D]iscrimination by judges has been exaggerated by the existing research, while other stages of the criminal justice

The Commission reported that, according to its study, "differences in sentence length" between black and white male offenders "have increased steadily since *Booker*."[324] But the same study also found that black females received increasingly shorter sentences than white or Hispanic females after *Booker* and *Gall*, and that differences associated with educational level decreased after *Gall*.[325] Noncitizens reportedly received increasingly longer sentences than citizens after *Gall*, even though Hispanic males and females, who compose the vast majority of noncitizens prosecuted in federal court, reportedly received increasingly shorter sentences.[326] And the Commission, using a different statistical model spanning the entire ten-year period from 1999 through 2009, previously found the greatest difference in sentence length between black and white offenders in 1999, when the guidelines were mandatory.[327]

As these varying results suggest, and as the Commission previously warned, multivariate studies provide an unreliable basis from which to conclude that judges exercise discretion in a racially biased manner. The Commission has used three different methodologies over the years (the Fifteen Year model, the *Booker* model, and the "refined" model used in its most recent study).[328] Its methodological choices for the refined model produced a greater reported race effect than previous models.[329] Significantly, peer-reviewed academic research using

process have been relatively neglected, in part because of the paucity of data that can be used to investigate them."). The recent research by Rehavi and Starr seeks to overcome this problem by directly studying prosecutorial decisionmaking through available data from arrest through sentencing. *See* Rehavi & Starr, *supra* note 307, at 10-12, 15.

[324] *Commission Testimony*, *supra* note 13, at 54.

[325] *See id.* app. E.

[326] *Compare id.*, *with* DEMOGRAPHIC DIFFERENCES REPORT, *supra* note 316, at 22 fig.C.

[327] Using the *Booker* model, the Commission reported a 14.2% difference in sentence length between all black and white offenders in 1999, as compared to a 7.4% difference after *Booker*, and a 10% difference after *Gall* through fiscal year 2009. DEMOGRAPHIC DIFFERENCES REPORT, *supra* note 316, at 14 fig.13, 16 fig.B.

[328] *See supra* note 316.

[329] *Compare* DEMOGRAPHIC DIFFERENCES REPORT, *supra* note 316, at 22 fig.C (reporting a difference in sentence length for black and white males of 15.2% after *Booker* and 23.3% after *Gall* through fiscal year 2009 under the refined model), *and Commission Testimony*, *supra* note 13, app. E (reporting a difference in sentence length for black and white males of 20% after *Gall* through fiscal year 2010 under the refined model), *with* DEMOGRAPHIC DIFFERENCES REPORT, *supra* note 316, at 16 fig.B (report-

different methodologies reached results that conflict with, and explain, the Commission's results.[330]

a. *Missing and Excluded Variables*

The Commission sought to identify how much racial disparity, if any, results from the exercise of judicial discretion, by controlling for all "legally relevant" factors. A problem with this approach is that the Commission does not collect, and its datasets therefore do not include, many relevant factors that legitimately and legally affect judges' sentencing decisions and that would change the results if they were included.[331] The Commission has previously warned against drawing a conclusion of discrimination from its analyses because relevant factors are missing from its datasets, and because other factors may have been erroneously omitted.[332] As the Commission explained, "judges make decisions when sentencing offenders based on many legal and other legitimate considerations that are not or cannot be measured."[333] "The omission of one or more important variables usually causes the value of the variables that are included in the model [such as race] to be overstated."[334] "[O]ne or more unmeasured factors . . . potentially could change the results of the analysis if they were included."[335]

Among the factors that are missing from the Commission's datasets are criminal history not taken into account by the guidelines, including violent criminal history events and crimes not included in the criminal history score; seriousness of the offense not taken into consideration by the guidelines, including in some instances violence that was part of the present crime; employment history, current employ-

---

ing a difference for all black and white defendants of 7.4% after *Booker* and 10% after Gall through fiscal year 2009 under the *Booker* model), *and* *BOOKER* REPORT, *supra* note 5, at 109 fig.13 (reporting a difference of 4.9% for all black and white defendants after *Booker* through January 11, 2006 under the *Booker* model).

[330] *See infra* subsection III.B.2.c.

[331] *See* FIFTEEN YEAR REVIEW, *supra* note 152, at 119, 125, 131; *BOOKER* REPORT, *supra* note 5, at 84, 105-06, 108; DEMOGRAPHIC DIFFERENCES REPORT, *supra* note 316, at 4, 9-10 & nn.35-39, app. A at 3.

[332] *See* DEMOGRAPHIC DIFFERENCES REPORT, *supra* note 316, at 4, 9-10 & nn.35-39.

[333] *Id.* at 4.

[334] *Id.* at 9.

[335] *Id.* at 9 n.35.

ment, or employment prospects; any other mitigating or aggravating factors not incorporated into the guideline rules; and any reason for a departure or variance other than substantial assistance to the government.[336] When a relevant factor is not accounted for in the Commission's data, and that factor is correlated with race (i.e., it appears more frequently in some racial groups than others), the effect is erroneously attributed to consideration of race. For example, the Commission has found that black offenders are about twice as likely as offenders of other races to have had violent criminal history events.[337] And while the Commission does not collect or report data on the employment status of defendants, African Americans in the general population have a higher unemployment rate than members of other races.[338] Violent criminal history events and employment status legitimately influence sentencing decisions, but because these factors are not included in the analysis, their effect is erroneously attributed to race.

Another problem, particular to the Commission's most recent study, is the failure to include variables that have been shown to impact sentencing decisions beyond their contribution to the guideline calculation. The Commission excluded from its refined model several such variables that it had included in previous models, including criminal history, classification as a "Career Offender" or "Armed Career Criminal," and meeting the requirements for the "safety valve."[339] These factors have been shown to influence sentencing decisions beyond their

---

[336] DEMOGRAPHIC DIFFERENCES REPORT, *supra* note 316, at 4, 9-10 & nn.35-39, app. A at 3; FIFTEEN YEAR REVIEW, *supra* note 152, at 119, 125.

[337] *See BOOKER* REPORT, *supra* note 5, at 105 n.317 (reporting that in a review of a "25% random sample of cases" from fiscal year 2000, "24.4 percent of white offenders had violent criminal history events, as did 43.7 percent of black offenders, 18.9 percent of Hispanic offenders, and 23.7 percent of 'other' offenders").

[338] *See* U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2012, at 378 tbl.588 (2012), *available at* http://www.census.gov/compendia/statab/2012edition.html (reporting that 16% of blacks were unemployed in 2010 compared with 8.7% of whites).

[339] *See* DEMOGRAPHIC DIFFERENCES REPORT, *supra* note 316, at 19-20 (enumerating factors excluded from the refined model); *BOOKER* REPORT, *supra* note 5, app. B at 23 (explaining that the model included criminal history points, Career Offender status, Armed Career Criminal status, and the safety valve adjustment); FIFTEEN YEAR REVIEW, *supra* note 152, app. D at 12 (noting that the model included criminal history category classified as low, medium, or high).

contribution to the guideline range, for example with respect to choosing the type of sentence, placement within the range, or the extent of a departure.[340] Because these factors are correlated with race,[341] excluding them inflates the weight that the model assigns to race.[342]

These missing and excluded factors are one reason the Commission's study found an increase in sentence length differences between black and white males from the PROTECT Act period to the post-*Booker* period to the post-*Gall* period.[343] Sentencing decisions were most rigidly controlled by guidelines that excluded relevant sentencing considerations during the PROTECT Act period. *Booker* made § 3553(a) the sentencing law, but this holding was not fully implemented until after *Gall* and *Kimbrough* were decided. The import of the Commission's study is that judges are taking greater account not of

---

[340] *See* DEMOGRAPHIC DIFFERENCES REPORT, *supra* note 316, app. B at 5-6 & n.81; *BOOKER* REPORT, *supra* note 5, app. B at 23-24; FIFTEEN YEAR REVIEW, *supra* note 152, at 108-09, 130.

[341] *See* MANDATORY MINIMUM PENALTIES, *supra* note 302, at 354 (noting that only 14.4% of black drug offenders received safety valve relief compared to 39.5% of white offenders, 46.3% of Hispanic offenders, and 48.4% of other race offenders, because many black offenders are disqualified by having more than one criminal history point); *id.* at 363 (explaining that black offenders constitute a large majority of offenders subject to the Armed Career Criminal Act, which applies on the basis of criminal history); 2010 USSC Monitoring Dataset, *supra* note 231 (revealing that black defendants comprised 20.7% of all defendants but 32.6% of defendants in three highest criminal history categories and 64.4% of defendants classified as career offenders).

[342] The Commission stated that it omitted these factors from the refined model because they "directly contribute to or are highly correlated with the value of another variable that is already included in the analysis, *i.e.*, the presumptive sentence." DEMOGRAPHIC DIFFERENCES REPORT, *supra* note 316, at 19. Other researchers disagreed with the Commission's decision to omit a control variable for criminal history from its refined model. *See* Jeffery T. Ulmer et al., *Racial Disparity in the Wake of the* Booker/Fanfan *Decision: An Alternative Analysis to the USSC's 2010 Report*, 10 CRIMINOLOGY & PUB. POL'Y 1077, 1086 (2011). These researchers conducted statistical tests to ensure that multicollinearity was within acceptable limits. *Id.* Their study and other studies they relied on "did not report severe multicollinearity" with criminal history and presumptive sentence, but they did find that "criminal history was notably correlated with race." *Id.* They found it important to control for criminal history beyond its influence on the presumptive sentence because "sentencing variation explained by criminal history is not variation explained by race." *Id.* at 1087; *see also infra* notes 376-79 and accompanying text.

[343] The more frequent application of mandatory minimum sentences to black offenders appears to be another reason. *See infra* notes 383-88 and accompanying text.

race, but of legally relevant factors that are missing or excluded from its study.

b. *Failure to Report Fluctuations That Would Undermine the Discrimination Hypothesis*

Under its earlier Fifteen Year and *Booker* models, the Commission found race effects for all offenses combined in some years but not in other years, and found race effects only for drug offenses in some years and only for non-drug offenses in other years.[344] The Commission concluded that these fluctuations were "difficult to reconcile with theories of enduring stereotypes . . . or overt discrimination" on the part of judges.[345]

Fluctuations continue in the refined model, but they are concealed by aggregating years and offense types. Each iteration of the refined model aggregates years into periods defined by changes in the law—post–PROTECT Act, post-*Booker*, and post-*Gall*.[346] This aggregation, which assumes that changes in disparity are caused by changes in the law, masks yearly fluctuations that would undermine the discrimination hypothesis. For example, during a twenty-one-month period after *Gall* through 2009, black males reportedly received sentences 23.3% longer than white males, and Hispanic males reportedly received sentences 6.8% longer than white males.[347] But during the longer thirty-three-month period through 2010, these reported differences dropped to 20% for black males and to statistical insignificance for Hispanic males.[348] We are left to wonder what the results were for 2010 alone.

Similarly, in its congressional testimony, the Commission included a new "post-*Koon*" period, during which black males reportedly received sentences 11.2% longer than white males.[349] This period, which, in the

---

[344] *See* BOOKER REPORT, *supra* note 5, at 108-09, app. B, at 31; FIFTEEN YEAR REVIEW, *supra* note 152, at 121-27.

[345] FIFTEEN YEAR REVIEW, *supra* note 152, at 125; *see also* BOOKER REPORT, *supra* note 5, at 108 & n.320 (cautioning against inferring discrimination in light of fluctuations by year and offense type).

[346] *See* DEMOGRAPHIC DIFFERENCES REPORT, *supra* note 316, at 22.

[347] *Id.* at 22 fig.C.

[348] *Commission Testimony*, *supra* note 13, at app. E.

[349] *Id.*

Commission's testimony, begins over three years after *Koon* was decided and ends with enactment of the PROTECT Act,[350] aggregates three-and-a-half individual years for which the *Booker* model yielded no statistically significant difference or greater differences than in the post-*Booker* and post-*Gall* periods.[351] Fluctuations by offense type also undoubtedly continue, but the "refined model" provides no separate analysis by offense type.

c. *Different Methodologies; Different Results*

Divergent findings in multivariate regression analyses are commonplace due to methodological differences among researchers, random fluctuations, and other sources of error.[352] The Commission's own studies have reached conflicting conclusions, primarily due to changes in methodology.[353] As reviewers of research before the guidelines warned: "Any findings that are sensitive to minor changes in model specifications such as these must be interpreted with caution."[354] The Commission has acknowledged this concern.[355]

Peer-reviewed research authored by academic criminologists at the Pennsylvania State University, including a former Staff Director of the Commission (the "Penn State study"),[356] replicated the Commission's refined model, tested different models, and reached different conclu-

---

[350] *See id.* at 53 n.164 (stating that "the Post-*Koon* Period" covers October 1, 1999 through April 30, 2003).

[351] *See* DEMOGRAPHIC DIFFERENCES REPORT, *supra* note 316, at 14 fig.13 (showing, under the *Booker* model, a black/white difference of 10.2% in fiscal year 2000 (October 1, 1999 through September 2000), 8.2% in 2001 (October 1, 2000 through September 2001), no statistically significant difference in 2002 (October 1, 2001 through September 2002) or "pre-PROTECT Act" (October 1, 2002 through April 30, 2003) and 4.9% post-*Booker* (January 12, 2005 through November 1, 2006); *id.* at 16 fig.B (showing a 7.4% difference post-*Booker* (January 12, 2005 through December 10, 2007) and a 10% difference post-*Gall* (December 11, 2007 through September 30, 2009).

[352] *See* FIFTEEN YEAR REVIEW, *supra* note 152, at 118-19, 125, 127.

[353] *See id.* at 121-27; *BOOKER* REPORT, *supra* note 5, at 108-09, app B, at 31; DEMOGRAPHIC DIFFERENCES REPORT, *supra* note 316, at 2, 14-16, 22-24; *Commission Testimony*, *supra* note 13, at 53-54, app. E.

[354] MCDONALD & CARLSON, *supra* note 277, at 106.

[355] *See* FIFTEEN YEAR REVIEW, *supra* note 152, at 127; *BOOKER* REPORT, *supra* note 5, at 108.

[356] Ulmer et al., *supra* note 342, at 1133.

sions.[357] Like the Commission, the academic researchers sought to identify racial disparity caused by judicial discretion. However, their methodology differed from the Commission's in several respects. The authors of the Penn State study questioned several methodological choices made by the Commission in its refined model, and found that these choices had affected the Commission's results.[358]

First, the Commission modeled the sentencing decision as a single decision of how long to imprison, counting probation as zero months and treating months of home or community detention the same as months of imprisonment.[359] As the Commission's own research suggests, certain factors—including criminal history, employment status, and citizenship—have a greater influence on the decision whether to imprison than on the decision how long to imprison.[360] The Penn State study separately analyzed the decisions *whether* to imprison, and if so, *how long* to imprison, and concluded that the Commission's combination of these two variables into one variable largely explained its finding of increased sentence length disparity after *Booker* and again after *Gall*.[361] Analyzing the sentence length decision over five periods,[362] the Penn State study found that the difference in sentence length between black and white males had been considerably reduced after *Booker* and *Gall*.[363] The difference in sentence length between black and white males was: (1) significantly less after *Booker* and *Gall* than before *Koon*, when judicial discretion was more constrained than at any time other than after the PROTECT Act;[364] (2) "nearly identical"

---

[357] *Id.* at 1077-78.

[358] *Id.* at 1081-87.

[359] *Id.* at 1086, 1093-94. In the Fifteen Year Review, the Commission modeled the decisions whether to imprison and how long to imprison both separately and as one decision. FIFTEEN YEAR REVIEW, *supra* note 152, at 121-26, app. D at 12.

[360] FIFTEEN YEAR REVIEW, *supra* note 152, at 108-09,130; U.S. Sentencing Comm'n, Sentencing Options Under the Guidelines 15-17 (Staff Discussion Paper, 1996).

[361] Ulmer et al., *supra* note 342, at 1094-96, 1105.

[362] The time periods are (1) pre-*Koon* (October 1, 1993 through September 30, 1995), (2) pre–PROTECT Act (October 1, 2001 through April 30, 2003), (3) post–PROTECT Act (May 1, 2003 through June 24, 2004), (4) post-*Booker* (January 2005 through November 2007), and (5) post-*Gall* (December 2007 through September 2009). *See id.* at 1087-88, 1099.

[363] *Id.* at 1100, 1105.

[364] *Id.* at 1099-100.

in the pre–PROTECT Act, post-*Booker*, and post-*Gall* periods;[365] and (3) significantly less post-*Booker* and post-*Gall* than pre–PROTECT Act when immigration cases are excluded from the analysis.[366] The Penn State study thus examined a broader historical context than the Commission's refined model, and reached results contrary to the Commission's with respect to sentence length.[367]

The Penn State study did find an increased difference in sentencing between black and white males, but only with respect to the odds of incarceration and only after *Gall* (through fiscal year 2009).[368] As noted above, the decision whether to impose probation or a term of imprisonment is highly sensitive to certain factors.[369] Some of those factors are missing from the Commission's datasets, which the Penn State study also used. For example, employment status is missing from the datasets,[370] and, at least in the general population, employment status correlates with race.[371] Employment status strongly influences judges' decisions to impose probation rather than a prison term, in order to permit defendants who are employed to remain employed;[372] this promotes the purposes of sentencing[373] by reducing the risk of recidivism.[374] In other words, the Penn State study's finding of an increased difference in the odds of incarceration between black and white males may well be the result of missing but relevant variables.[375]

---

[365] *Id.* at 1094-96.

[366] *Id.* at 1106.

[367] *Id.* at 1104-05.

[368] *Id.* at 1100, 1105.

[369] *See supra* note 360 and accompanying text.

[370] *See* DEMOGRAPHIC DIFFERENCES REPORT, *supra* note 316, at 4, 10.

[371] *See supra* note 338 and accompanying text.

[372] *See* U.S. Sentencing Comm'n, *supra* note 360, at 16-17 (finding that employed defendants were twenty-one percent more likely to receive an alternative sentence).

[373] 18 U.S.C. § 3553(a)(2)(C) (2006).

[374] *See* MILES D. HARER, FED. BUREAU OF PRISONS, RECIDIVISM AMONG FEDERAL PRISONERS RELEASED IN 1987, at 4-5, 54 (1994), *available at* http://www.bop.gov/news/research_projects/published_reports/recidivism/oreprrecid87.pdf; U.S. SENTENCING COMM'N, MEASURING RECIDIVISM: THE CRIMINAL HISTORY COMPUTATION OF THE FEDERAL SENTENCING GUIDELINES 12, 29 exhibit 10 (2004).

[375] The more frequent application of mandatory minimum sentences to black offenders appears to be another reason for racial disparity in the odds of incarceration. *See infra* notes 383-88 and accompanying text. Because the Penn State study and the Commission's study both controlled for mandatory minimums, neither could identify

The Penn State researchers also questioned the Commission's decision, unlike in both its Fifteen Year and *Booker* models, to exclude criminal history as a control variable except with respect to its influence on the presumptive sentence.[376] The Penn State study found that criminal history has significant and substantial effects beyond the presumptive sentence,[377] and that it was important to control for these effects because "sentencing variation explained by criminal history is not variation explained by race."[378] The Penn State researchers concluded that "Black male disparity is more than 30% larger when a measure of criminal history is not included in the analysis."[379]

Finally, the Penn State study excluded immigration offenses because noncitizens are handled uniquely in many districts—for instance, with fast track dispositions—and most noncitizens are subject to deportation, making probation impossible.[380] The Commission excluded noncitizens from its Fifteen Year Review analysis for the same reasons.[381] Employing a model to evaluate the effect of immigration offenses, the Penn State study found that immigration offenses accounted for forty percent of the effect on sentence length for black males.[382]

Other recent empirical studies conclude that racial disparity in sentencing after *Booker* is driven by mandatory minimums that constrain judicial discretion and are applied most frequently to black offenders.[383] The most thorough of these studies, by Professors Joshua Fischman and Max Schanzenbach, takes an entirely different approach than the Commission or the authors of the Penn State study. Specifically, it does not seek to control for all "legally relevant" factors; instead,

---

the impact of such mandatory sentences on racial disparity. *See supra* text accompanying notes 321-22.

[376] Ulmer et al., *supra* note 342, at 1086.

[377] *Id.* at 1086, 1093.

[378] *Id.* at 1087.

[379] *Id.* at 1093.

[380] *Id.* at 1085-86.

[381] *See* FIFTEEN YEAR REVIEW, *supra* note 152, app. D at 12; *see also* U.S. Sentencing Comm'n, *supra* note 360, at 16 ("Non-citizens are less likely to receive an alternative [sentence] than are U.S. citizens, reflecting perhaps the impending deportation of the defendant and the absence of a local residence suitable for home confinement.").

[382] Ulmer et al., *supra* note 342, at 1098.

[383] *See* Fischman & Schanzenbach, *supra* note 307, at 3, 14-19; Rehavi & Starr, *supra* note 307, at 46.

it includes only control variables that the authors conclude would not have been influenced by doctrinal changes, such as *Booker*, in order to best isolate the direct effect of these changes on racial disparities.[384] This study finds that racial disparities were reduced during periods of greater judicial discretion after *Koon* and *Booker*,[385] but had increased after the more recent decisions in *Rita*, *Gall*, and *Kimbrough*, as a consequence not of judicial bias but of mandatory minimums that prevent judges from reducing black offenders' sentences as often and to the degree that they otherwise would.[386] The authors state that their findings "suggest that judicial discretion does not contribute to, and may in fact mitigate, racial disparities in Guidelines sentencing."[387] This conclusion appears to be confirmed by the Commission's own data showing that when judicial discretion is not hindered by a mandatory minimum, black offenders receive reduced sentences at least as often as white offenders.[388]

In sum, the Commission's study, standing alone and in light of contrary findings, does not support a *Booker* fix. Indeed, as the data show, offenders of *all* races are treated more fairly when judges can effectively take into account their individualized circumstances and the purposes of sentencing in ways the guidelines do not.[389] Examining only judicial decisions as a source of possible racial disparity in sentencing diverts attention from disparities built into the guidelines and

---

[384] Fischman & Schanzenbach, *supra* note 307, at 11-12.

[385] *Id.* at 3, 18.

[386] *Id.* at 16-18. The authors found that "disparity in departure rates and prison sentences [for black offenders] relative to whites narrows in periods of deferential review" because "when judges are freer to depart, they do so more proportionally more often for blacks than whites, resulting in lower prison sentences," but "judges appear to be constrained more frequently by mandatory minimums when sentencing black defendants." *Id.* at 14.

[387] *Id.* at 19; *see also* Rehavi & Starr, *supra* note 307, at 46.

[388] *See supra* note 304 and accompanying text.

[389] *See* Raymond Moore, Fed. Pub. Defender for the Dists. of Colo. and Wyo., Statement Before the U.S. Sentencing Commission 23-25 (Feb. 16, 2012), http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/2012021516/Testimony_16_Moore.pdf (showing through data and case law that judges exercise their discretion after *Booker* to take into account the individual strengths and rehabilitative needs of black offenders); *see also supra* notes 303-11 and accompanying text (demonstrating that judges impose below-guideline sentences to compensate for unwarranted disparities built into the guidelines and disparities stemming from presentence decisions).

mandatory minimums as well as disparities arising at the charging and plea bargaining stages.[390]

C. *Interdistrict Disparity*

The Commission also offered in its testimony before Congress a "troubling trend[]" of "growing disparities" in rates of judicial below-range sentences "among circuits and districts" as grounds for constraining judicial discretion.[391] As the only evidence of this claim, the Commission noted the difference between the highest and lowest rates of non-government sponsored below-range sentences by district for certain types of offenses during the "post-*Gall* period,"[392] and provided a list, from highest to lowest, of rates of non-government sponsored below-range sentences for each district in fiscal year 2010.[393] These data are misleading and incomplete. They do not begin to establish that geographic differences are unwarranted, that they are growing in a meaningful way, or that they call for greater constraint on judicial discretion.

Congress directed the Commission to consider local conditions in promulgating the guidelines[394] and directed judges to consider purposes and factors that necessarily take local conditions into account.[395] While the Commission did not take local conditions into account in the guidelines, prosecutors and judges always have, and quite appropriately so. Regional differences remained under the mandatory guidelines and even increased in drug and immigration cases, as compared to the pre-guidelines period.[396] More recently, Attorney General Holder has adopted a policy of "district-wide consistency," in accord-

---

[390] *See* FIFTEEN YEAR REVIEW, *supra* note 152, at 135; Engen, *supra* note 299, at 1143-46.

[391] *Commission Testimony*, *supra* note 13, at 1.

[392] *Id.* at 26, 28, 31, 33, 36, 38, 41, 43, 46, 48, 50, 53.

[393] *Id.* app. D.

[394] *See* 28 U.S.C. § 994(c)(4)–(5), (7) (2006) (directing the Commission to consider "the community view of the gravity of the offense," "the public concern generated by the offense," and "the current incidence of the offense in the community").

[395] *See* 18 U.S.C. § 3553(a)(2) (requiring judges to consider the need for deterrence, just punishment, respect for law, and protection of the public); *cf. id.* § 3553(a)(3) (requiring judges to consider the kinds of sentences available).

[396] *See* FIFTEEN YEAR REVIEW, *supra* note 152, at 98-103, 110-12.

ance with "district-specific policies, priorities, and practices," and "the needs of the communities we serve."[397]

As judges, prosecutors, and defense lawyers well know, comparing rates of below-guideline sentences tells us nothing about whether there is unwarranted disparity.[398] As the Commission has previously acknowledged, "The causes of variation in the rates of departure, and their potential effect on unwarranted sentencing disparity, is a complicated issue that cannot be resolved through simple examination of the reported rates."[399] Indeed, it would seem more pertinent to know whether interdistrict variation in sentencing *outcomes* has increased since *Booker*. The Commission has not addressed that question, but the authors of the Penn State study have. In another article, they reported that variation in sentence length among districts after *Gall* is less than it was before the PROTECT Act and only slightly greater than after the PROTECT Act.[400]

Moreover, determining whether interdistrict variation constitutes unwarranted disparity is exceedingly complex because, as the Commission once put it, the "potential sources are so many, varied, and interacting."[401] The most important of these interacting sources are the

---

[397] Memorandum from Eric H. Holder, *supra* note 245, at 1, 3.

[398] *See, e.g.*, Samuel A. Alito, *Reviewing the Sentencing Commission's 1991 Annual Report*, 5 FED. SENT'G REP. 166, 167 (1992) (arguing that "[c]omparisons of the departure rates of different circuits and districts seem . . . unsound," because "no reliable inter-district comparisons can be made without controlling for differences in the mix of offenses prosecuted" and "for inter-district differences in the magnitude of cases within particular offense categories"); John Gleeson, *The Sentencing Commission and Prosecutorial Discretion: The Role of the Courts in Policing Sentence Bargains*, 36 HOFSTRA L. REV. 639, 656 & n.66 (2008) (demonstrating that regional variations in charging and sentencing appropriately reflect different local priorities and needs); Alexander Bunin, Fed. Pub. Defender for the N. Dist. of N.Y., Statement Before the U.S. Sentencing Commission 7-11 (July 9, 2009), *available at* http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20090709-10/Bunin_testimony.pdf (discussing how types of cases and government policies and practices affect rates of below-range sentences and sentence lengths among districts in five different circuits).

[399] FIFTEEN YEAR REVIEW, *supra* note 152, at 111.

[400] *See* Jeffery Ulmer et al., *The "Liberation" of Federal Judges' Discretion in the Wake of the Booker/Fanfan Decision: Is There Increased Disparity and Divergence Between Courts?*, 28 JUSTICE Q. 799, 816 (2011) (finding that interdistrict variation was 6.6% before the PROTECT Act, 5.8% after the PROTECT Act, 5.2% after *Booker*, and 6.3% after *Gall*).

[401] FIFTEEN YEAR REVIEW, *supra* note 152, at 93.

government's practices and policies. Government sponsored departures have always contributed more to interdistrict variation than judge-initiated departures.[402] In 2011, for example, the difference between the highest and lowest rates of government sponsored below-range sentences by district was 12.5 percentage points higher than the difference between the highest and lowest non-government sponsored rates.[403] But the Commission has thus far failed to mention this fact to Congress or, indeed, to provide any information regarding rates of government sponsored below-range sentences by district. This is a serious omission, given that government sponsored rates often have a direct impact on non-government sponsored rates.

Indeed, the Commission's presentation fails to shed meaningful light on the question of whether any differences among districts are unwarranted. To begin to answer that question, it would be necessary to examine, for each district, the kinds of cases prosecuted, prosecutorial practices and policies, and interactions between prosecutorial and judicial practices. At the most rudimentary level, this would require a comparison of government sponsored below-range sentences, judicial below-range sentences, and sentence length.

For example, Arizona's low rate of non-government sponsored below-range sentences in immigration cases (4.2%) is explained by a high rate of government sponsored below-range sentences (64.7%), the vast majority of which are imposed under the government-controlled fast track program.[404] In contrast, the Southern District of New York's high rate of *non*-government sponsored below-range sentences in immigration cases (63.9%) is explained by the *absence* of a fast track program in the district and a resulting 2.5% rate of govern-

---

[402] *See id.* at 102-07.

[403] Prosecutors sought downward departures and variances in 60.6% of cases in the Southern District of California and in 4.4% of cases in the District of South Dakota, a difference of 56.2 percentage points. 2011 SOURCEBOOK, *supra* note 251, tbl.26. By comparison, judges imposed downward departures and variances in 49% of cases in the Southern District of New York and in 5.3% of cases in the Middle District of Georgia, a difference of 43.7 percentage points. *Id.*

[404] U.S. SENTENCING COMM'N, STATISTICAL INFORMATION PACKET: FISCAL YEAR 2010 ARIZONA 19 tbl.10 (2010). Fast track departures accounted for 63.8%. *Id.*

ment sponsored below-range sentences.[405] The end result is that average sentence length for immigration cases in the Southern District of New York is slightly higher (23.5 months)[406] than that in Arizona (20.5 months).[407] The Commission has previously found that the presence of fast track programs in some districts and not in others constitutes unwarranted geographic disparity.[408] Judges appropriately correct for this disparity.[409] The Commission's presentation to Congress omitted these details and left the impression of wide and unexplained disparities among districts.[410]

Similar circumstances explain low rates of judicial below-range sentences in the Western and Southern Districts of Texas, compared with a high rate—the highest in the country—in the Southern District of New York.[411] A large majority of prosecutions in the Texas districts are low-level immigration and marijuana smuggling cases with guideline ranges so low (typically 0-6 months and 10-16 months, respectively) that offenders have already served the guideline sentence, or have little left of it to serve, by the time a judge imposes sentence.[412] There is little need for judges to vary downward in these districts.

The Southern District of New York, by contrast, has a large number of cases with high guideline ranges. These high ranges result from the operation of the guidelines in fraud cases, in which the "loss" amount, together with multiple enhancements, often vastly overstates

---

[405] U.S. SENTENCING COMM'N, STATISTICAL INFORMATION PACKET: FISCAL YEAR 2010 SOUTHERN DISTRICT OF NEW YORK 19 tbl.10 (2010).

[406] *Id.* at 10 tbl.7.

[407] U.S. SENTENCING COMM'N, *supra* note 404, at 10 tbl. 7.

[408] *See* U.S. SENTENCING COMM'N, *supra* note 185, at 66-67.

[409] *See supra* notes 246-47 and accompanying text.

[410] *See Commission Testimony*, *supra* note 13, at 26 (stating only that "[i]n the post-*Gall* Period," there was a "range of 65.6 percentage points" between the lowest and highest rates of "non-government sponsored below range sentences" in illegal entry cases).

[411] The rates in the Western and Southern Districts of Texas are 11.1% and 14.9%, respectively, while the rate in the Southern District of New York is 49%. *See* 2010 SOURCEBOOK, *supra* note 190, tbl.26.

[412] *See* Letter from Margy Meyers, Henry Bemporad & David Patton, Fed. Pub. Defenders, to Lanny A. Breuer, Assistant Att'y Gen., U.S. Dep't of Justice 2 (Nov. 22, 2011), *available at* http://sentencing.typepad.com/files/letter-to-lanny-breuer-from-defenders.pdf.

the seriousness of the offense;[413] multi-defendant drug conspiracies, in which the least and most culpable defendants are often subject to similar guideline ranges;[414] and illegal reentry cases subject to a 16-level enhancement,[415] which overpunishes in most cases.[416] Judges in the

[413] In the Southern District of New York, 26% of cases are fraud or other white collar cases, compared to 13.3% nationwide. U.S. SENTENCING COMM'N, *supra* note 405, at 1 fig.A (2010). The fraud guideline recommends remarkably severe sentences in many cases in this district. For example, in *United States v. Adelson*, the government sought a guideline sentence of life imprisonment in a securities fraud case. 441 F. Supp. 2d 506, 507 (S.D.N.Y. 2006). The court explained that in such cases, the guidelines place an "inordinate emphasis" on the "amount of actual or intended loss." *Id.* at 509. Because these cases can involve "public companies [that] typically issue millions of publically traded shares," "the precipitous decline in stock prices that typically accompanies a revelation of fraud generates a multiplier effect that may lead to guidelines offense levels that are, quite literally, off the chart." *Id.* Finding that "the guidelines have so run amok that they are patently absurd on their face," the court instead imposed a non-guideline sentence of 42 months plus restitution. *Id.* at 507, 515. *See also* Frank O. Bowman, III, *Sentencing High-Loss Corporate Insider Frauds After* Booker, 20 FED. SENT'G REP. 167, 169 (2008) ("[S]ince *Booker*, virtually every judge faced with a top-level corporate fraud defendant in a very large fraud has concluded that sentences called for by the Guidelines were too high."); Alan Ellis et. al, *At a "Loss" for Justice: Federal Sentencing for Economic Offenses*, CRIM. JUST., Winter 2011, at 34, 37 (noting that the fraud guideline, focusing primarily on monetary loss, "fails to measure a host of other factors that may be important, and may be a basis for mitigating punishment, in a particular case").

[414] Over 36% of cases in the Southern District of New York are drug cases, compared to 29% nationwide. U.S. SENTENCING COMM'N, *supra* note 405, at 1 fig.A. Sentences are based on drug quantity, which is a poor measure of offense seriousness, particularly for low- and mid-level offenders. *See, e.g.*, Catharine M. Goodwin, *Sentencing Narcotics Cases Where Drug Amount is a Poor Indicator of Relative Culpability*, 4 FED. SENT'G REP. 226, 226-27 (1992) (explaining that because of the way in which the drug amount is determined under the guidelines, "minimal participants" in a conspiracy can receive a sentence "very close to the sentence received by the more culpable offenders"); Eric L. Sevigny, *Excessive Uniformity in Federal Drug Sentencing*, 25 J. QUANTITATIVE CRIMINOLOGY 155, 171 (2009) (finding "robust support" for the claim of unwarranted uniformity in drug sentencing because drug quantity "is not significantly correlated with role in the offense"). The Supreme Court has made clear that it is proper to avoid unwarranted similarities in sentences among drug conspirators. *See* Gall v. United States, 552 U.S. 38, 55 (2007).

[415] U.S. SENTENCING GUIDELINES MANUAL § 2L1.2(b)(1)(A) (2011).

[416] In the Southern District of New York, 57.8% of illegal reentry cases in 2010 were subject to the 16-level increase, in contrast to only 21.6% and 14.4% in the Southern and Western Districts of Texas respectively. *See* 2010 USSC Monitoring Dataset, *supra* note 231. The 16-level enhancement has consistently and frequently been criticized since its adoption. *See, e.g.*, Doug Keller, *Why the Prior Conviction Sentencing Enhancements in Illegal Re-Entry Cases Are Unjust and Unjustified (and Unreasonable Too)*, 51 B.C. L. REV. 719, 760-62 (2010).

Southern District of New York correct for these often-criticized aspects of the guidelines. Further, prosecutors in this district seek below-guideline sentences at a lower rate than the national average.[417] As a consequence, while judges in the Southern District of New York impose below-range sentences at the highest rate in the nation, the average sentence length in this district is higher than the national average—and nearly double the average in the Texas districts.[418]

As should be clear from these few examples,[419] what kinds of differences among districts exist, what causes them, and whether they are unwarranted are complex questions which the Commission's bare listing of rates of below-guideline sentences does not begin to answer. If interdistrict variation is to be considered seriously as a basis for greater constraints on judicial discretion, the issue requires meaningful analysis and proof. The Commission has not carried its burden.

D. *Interjudge Disparity*

Judge Sessions cites increasing interjudge disparity "as a result of the decreasing adherence to the sentencing guidelines" as a justification for resurrecting mandatory guidelines,[420] claiming that allowing judges to "assess the merits of particular guidelines provisions can only lead to a system in disarray."[421] The Commission makes a similar argument in support of its request for "heightened" review of policy disagreements.[422]

---

[417] *See* U.S. SENTENCING COMM'N, *supra* note 405, at 19 tbl.10 (reporting that government sponsored departures and variances were 17.8% in the Southern District of New York, compared to 25.3% nationwide).

[418] *Compare* U.S. SENTENCING COMM'N, STATISTICAL INFORMATION PACKET: FISCAL YEAR 2010 SOUTHERN DISTRICT OF TEXAS 10 tbl.7 (2010) (reporting a mean sentence of 17.3 months), *and* U.S. SENTENCING COMM'N, STATISTICAL INFORMATION PACKET: FISCAL YEAR 2010 WESTERN DISTRICT OF TEXAS 10 tbl.7 (2010) (reporting a mean sentence of 13 months), *with* U.S. SENTENCING COMM'N, *supra* note 405, at 10 tbl.7 (reporting a mean sentence of 36 months in the Southern District of New York and 30 months nationwide).

[419] For other examples, see Letter from Thomas W. Hillier, II, *supra* note 11, at 8-10, add. 2-7.

[420] Sessions, *supra* note 12, at 329-30 & n.127.

[421] *Id.* at 335.

[422] *Commission Testimony*, *supra* note 13, at 56.

The government had advanced a related argument in *Kimbrough*. The Solicitor General's brief noted that if judges could vary based on their disagreement with the crack/powder disparity, defendants involved with the same quantity of drugs would receive different sentences depending on the particular judge.[423] The Supreme Court responded that some variation among judges was a "necessary cost" of the remedy it had adopted in *Booker* and held that the "proper solution" was "not to treat the crack/powder disparity as mandatory."[424] Instead, the Court emphasized, *district courts* must consider the need to avoid unwarranted disparities, along with other § 3553(a) factors, in individual cases and, in so doing, must weigh sentencing practices in other courts against any disparity created by the guidelines themselves.[425] The *Commission*, the Court explained, would "help to 'avoid excessive sentencing disparities'" through "ongoing revision of the Guidelines in response to sentencing practices."[426]

The system is working as the Court expected. After *Kimbrough*, many, but not all, judges varied from the crack guidelines to avoid the unjust crack/powder disparity.[427] After recent amendments to the crack guidelines, prompted in part by judicial variances, judges follow the guidelines more often.[428] Permitting judges to sentence the individuals before them fairly, and giving judges a voice in the evolution of the guidelines, leads to gradual and well-informed change and less disparity overall.

Further, after *Booker* and its progeny, judges properly consider not only the need to avoid unwarranted disparities, but also the need to avoid unwarranted uniformity.[429] There will always be individualized circumstances of the offense or characteristics of the offender that cannot be included in general rules because they cannot, as a practical

---

[423] Kimbrough v. United States, 552 U.S. 85, 106-07 (2007).

[424] *Id.* at 107-08.

[425] *Id.* at 108.

[426] *Id.* at 107 (quoting United States v. Booker, 543 U.S. 220, 264 (2005)).

[427] *See supra* note 231 and accompanying text.

[428] *See supra* note 243 and accompanying text.

[429] *See* Gall v. United States, 552 U.S. 38, 55-56 (2007) (approving the district court's differential treatment of coconspirators who were not similarly situated).

matter, be described and assigned numerical values in the abstract.[430] As the Senate Judiciary Report recognized,

> [E]ach offender stands before a court as an individual, different in some ways from other offenders. The offense, too, may have been committed under highly individual circumstances. Even the fullest consideration and the most subtle appreciation of the pertinent factors—the facts in the case; the mitigating or aggravating circumstances; the offender's characteristics and criminal history; and the appropriate purposes of the sentence to be imposed in the case—cannot invariably result in a predictable sentence being imposed. Some variation is not only inevitable but desirable.[431]

Since the mandatory guidelines excessively curtailed judicial discretion, it is not surprising that the transition to advisory guidelines has resulted in an increase in differences among judges. A "first look" at post-*Booker* sentencing by judges in one federal courthouse found such an increase.[432] A study of 2262 sentences imposed by ten judges in the District of Massachusetts from October 1, 2001, through September 30, 2008,[433] found that the identity of the judge accounted for 6.1% of variation in sentence length in the nine months after *Gall* and *Kimbrough*, compared to 3.1% during the 33 months from October 1, 2001 through June 23, 2004,[434] and 4.7% during the 14 months from enactment of the PROTECT Act through June 23, 2004.[435] The study also found that the identity of the judge accounted for 6.6% of the variation in distance from the guideline range in the nine months after *Gall* and *Kimbrough*, compared to 2.4% during the 14 months from enactment of the PROTECT Act through June 23, 2004.[436]

---

[430] *See* U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A(1)(4)(b) (2011) ("[I]t is difficult to prescribe a single set of guidelines that encompasses the vast range of human conduct potentially relevant to a sentencing decision.").

[431] S. REP. NO. 98-225, at 150 (1983).

[432] Ryan W. Scott, *Inter-Judge Sentencing Disparity After* Booker*: A First Look*, 63 STAN. L. REV. 1 (2010).

[433] *Id.* at 24-27.

[434] *Id.* at 32 tbl.1. On June 24, 2004 the Supreme Court handed down *Blakely v. Washington*, 542 U.S. 296, 303-04 (2004).

[435] Scott, *supra* note 432, at 65 tbl.A9.

[436] *Id.* at 40 tbl.3.

The author of the study, Professor Ryan Scott, concluded that "the effect of the judge remains relatively modest."[437] He emphasized that "inter-judge sentencing disparity is but one consideration among many in evaluating the federal sentencing system" and recognized that it "is entirely possible to conclude that *Booker*, *Kimbrough*, and *Gall* have improved federal sentencing, on balance, by allowing judges greater flexibility to reject unjust guidelines and impose just sentences."[438] In seeking to explain judges' "unexpectedly mild reaction to *Booker*,"[439] Professor Scott posited that the reason for the persistent high rate of sentences within the guideline range (and for differences among judges) was that some "business as usual" judges agree with the guidelines more than others or believe that the Commission is more competent to decide sentences than they are.[440]

An increase in differences among judges after *Booker*, in one district or in the nation as a whole, must also be understood in the context in which it occurs. Most importantly, in contrast to the pre-guidelines system, judicial discretion is intricately guided by 18 U.S.C. § 3553(a), the statute Congress enacted to ensure reasonable consistency in sentencing.[441] And the Supreme Court has given the guidelines more primacy than does the plain language of the statute, by directing judges to treat the guideline range as "the starting point and the initial benchmark."[442] Moreover, the government agrees to or does not oppose more than half of non-government sponsored below-range sentences.[443] Sentences are subject to appeal by both parties and, as we have noted, the government's success rate on appeal is roughly the same or better than before *Booker*.[444]

---

[437] *Id.* at 41.

[438] *Id.* at 41-42.

[439] *Id.* at 42. Indeed, the study found that six of the ten judges (judges A, C, D, E, H, and I) imposed below-range sentences *less often* in the ten-month period after *Gall* and *Kimbrough* than in the two years immediately following *Booker*, two judges (judges F and G) imposed below-range sentences at about the *same* rate, and two judges (judges B and J) imposed below-range sentences at a greater rate. *Id.* at 35-36 & nn.180-182.

[440] *Id.* at 47, 50-51.

[441] *See* S. REP. NO. 98-225, at 50-52, 74-75 (1983).

[442] Gall v. United States, 552 U.S. 38, 49 (2007).

[443] *See supra* note 262 and accompanying text.

[444] *See supra* note 263 and accompanying text.

Further, as the Supreme Court suggested in *Kimbrough*, the Commission itself can avoid excessive disparities among judges by revising guidelines that most judges (and many prosecutors) find to be problematic.[445] As the Commission improves the guidelines, judges who previously exercised their discretion to reject flawed guidelines follow them more often, and judges who followed the guidelines in any event continue to do so. In fact, there has been a notable decrease in below-range sentences in the District of Massachusetts, the subject of Professor Scott's study, since the crack amendments went into effect in fiscal year 2011.[446]

Finally, we reiterate that there will always be individual characteristics of the defendant and circumstances of the offense that are not and cannot be included in general rules. If some judges believe it is their duty to impose individualized sentences, while others assume (incorrectly) that the Commission has included all relevant factors in the guidelines and rejected all irrelevant factors, there will be an increase in interjudge disparity, but a decrease in unwarranted uniformity.

In sum, the components of a system to avoid *unwarranted* disparity are in place. While *Booker* may indeed lead to increased interjudge disparity, as some judges adjust to their greater sentencing responsibility differently or more slowly than others,[447] it simultaneously decreases more troubling kinds of disparity, including unwarranted uniformity, and inspires long term improvement. In the meantime, it is "better to have five good sentences and five bad ones than to have ten bad but consistent sentences."[448]

---

[445] *See supra* notes 195-96, 426 and accompanying text.

[446] *Compare* 2010 SOURCEBOOK, *supra* note 190, tbl.26 (reporting that 35.7% of sentences were non-government sponsored below range in the District of Massachusetts in fiscal year 2010), *with* 2011 SOURCEBOOK, *supra* note 251, tbl.26 (reporting that 30.8% of sentences were non-government sponsored below range in fiscal year 2011).

[447] *Cf., e.g.*, United States v. Johnson, 635 F.3d 983, 987, 989 (7th Cir. 2011) (reversing a life sentence under the crack guidelines and remanding for resentencing because the district court judge did not properly consider whether, per *Kimbrough*, the life sentence was "'greater than necessary' to comply with § 3553(a)(2)" and instead opted to wait for congressional action); United States v. Montague, 438 F. App'x 478, 479-80 (6th Cir. 2011) (reversing a guideline sentence and remanding for resentencing where the district court "repeatedly expressed its view that it is not the district court's job to 'figure out whether the Guidelines are justified or not'").

[448] Hinkle, *supra* note 284.

IV. THE PROPOSED FIXES

Accepting for the sake of argument the assertion of the Commission and Judge Sessions that a *Booker* "fix" is needed, the question would still remain whether either of their proposals would give rise to a fair, workable, and constitutional system of federal sentencing. Close scrutiny of their proposals demonstrates that they would not.

A. *Judge Sessions's Proposal*

1. The Details

The current sentencing table consists of 258 cells at the intersection of forty-three offense levels on a vertical axis and six criminal history categories on a horizontal axis.[449] Judge Sessions proposes a table consisting of thirty-six cells at the intersection of nine offense levels on a vertical axis and four criminal history categories on a horizontal axis.[450] The thirty-six "broader cells" would contain ninety-two "sub-ranges."[451] The Sessions proposal would not "discard" the current forty-three offense levels; rather, they would be "associated with" and "tie[d]" in groups to the broader cells in the new table, to assist in determining severity and proportionality and to facilitate data analysis.[452]

The thirty-six cells would be based on the offense of conviction and aggravating factors relating to offense conduct and criminal history.[453] The Commission would choose these aggravating factors from among those in the current Guidelines Manual and assign them new numeric values.[454] The sentencing ranges in the broad cells would be "mandatory" but would not violate *Booker* because aggravating facts concerning offense conduct would be charged in an indictment and proved to a jury beyond a reasonable doubt or admitted by the defendant.[455]

---

[449] U.S. SENTENCING GUIDELINES MANUAL, ch. 5, pt. A sentencing tbl. (2011).
[450] Sessions, *supra* note 12, at 342-45.
[451] *Id.* at 345.
[452] *Id.* at 342-43.
[453] *Id.* at 347-48 & nn.176 & 179, 351-52.
[454] *Id.* at 347-49.
[455] *Id.* 346, 348.

Criminal history would be found by the judge by a preponderance of the evidence or admitted by the defendant.[456]

Twenty-eight of the thirty-six broader ranges would each contain three sub-ranges,[457] with the middle sub-range for "heartland" cases.[458] Upon conviction, the defendant would be assigned to the middle sub-range of the broader range.[459] In order to impose a sentence in the upper or lower sub-range, the judge would be required to consider (1) a series of aggravating and mitigating factors identified in application notes (if found by the judge by a preponderance of the evidence)[460] and (2) "all other relevant factors" in the Guidelines Manual.[461] The factors in the application notes would consist of those factors in the current Guidelines Manual not chosen by the Commission to be charged in an indictment and proved to a jury or admitted by the defendant, and would not be assigned numeric values.[462]

The few mitigating factors used to calculate the current guideline range, such as the defendant's minor or minimal role in the offense, could be considered only in choosing a sub-range within the mandatory cell (and in sentencing within that sub-range).[463] Acceptance of responsibility (i.e., pleading guilty) would "ordinarily" reduce the sentence by "at least one sub-range below where the judge would otherwise have sentenced the defendant" but "not necessarily" to the next lower cell.[464]

There would be no variances from the broader cells based on the purposes and factors set forth in § 3553(a), but instead only limited departures from the otherwise-mandatory cells if permitted by the

---

[456] *Id.* at 351-52; *see also* Almendarez-Torres v. United States, 523 U.S. 224, 226-27 (1998) (holding that the Fifth Amendment does not require the fact of a prior conviction to be charged in an indictment).

[457] Sessions, *supra* note 12, at 345.

[458] *See id.* at 343 ("[M]id-range . . . would serve as an advisory range for a typical or 'heartland' case.").

[459] *Id.* at 347.

[460] *Id.* at 348-49, 350-52.

[461] *Id.* at 348-49, 353-54.

[462] *Id.* at 348-49.

[463] *Id.*

[464] *Id.* at 349.

Commission.[465] Judicial downward departures would be "infrequent" and based on "truly extraordinary mitigating circumstances."[466] Departures for cooperation in the investigation or prosecution of others, however, would be encouraged and would require a government motion.[467] Judge Sessions's proposal would permit upward departures based on criminal history,[468] but not on other grounds because upward departures would be "virtually unnecessary" given the breadth of the mandatory ranges and would pose constitutional problems.[469]

Restrictions on downward departures would be enforced through appellate review with "teeth."[470] In Judge Sessions's view, the "threat of reversal"[471] would "promote the legitimacy of the new presumptive guidelines."[472] Downward departures challenged on appeal by the government would be subject to "relatively strict scrutiny," while review of guideline sentences would be virtually eliminated.[473] There would be no "'substantive reasonableness'" review of any sentence,[474] "just as there was no such review in the pre-*Booker* era."[475] Appellate courts would review jury fact findings used to set the mandatory cell for sufficiency of the evidence under *Jackson v. Virginia*,[476] reversing only if the court, "after viewing the evidence in the light most favorable to the prosecution, [concluded that no] rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."[477] A jury finding in favor of the defendant could not be

---

[465] *Id.* at 350-51; *see also id.* at 354 n.205 ("[T]he guidelines would be binding on district judges, who would not be free to 'vary' from them as judges can currently do from the advisory guidelines pursuant to *Booker*.").

[466] *Id.* at 351.

[467] *Id.* at 352.

[468] *Id.* at 351-52.

[469] *Id.* at 350.

[470] *Id.* at 351.

[471] *Id.* at 353 (quoting Stephanos Bibas et al., *Policing Politics of Sentencing*, 103 NW. U. L. REV. 1371, 1371 (2009)).

[472] *Id.*

[473] *Id.* at 354.

[474] *Id.* (quoting Gall v. United States, 552 U.S. 38, 51 (2007)).

[475] *Id.*

[476] *Id.* at 354 & n.204 (citing Jackson v. Virginia, 443 U.S. 307 (1979)).

[477] *Jackson*, 443 U.S. at 319.

appealed by the government.[478] If Judge Sessions is correct that there would not be a significant increase in jury trials,[479] most sentences would not be appealable at all because they would be conclusively determined by plea agreements.

Those who value judicial discretion should be satisfied with this scheme, Judge Sessions maintains, because judges would have "greater discretion" within the mandatory "broad ranges."[480] Judge Sessions asserts that another selling point for judges is that uncharged and acquitted "relevant conduct" would play a "more limited role."[481]

2. The Flaws

Perhaps the most serious flaw of the Sessions proposal is that judicial feedback to the Commission and constructive evolution of the guidelines would virtually cease. The guideline range in each case would be set by the prosecutor's charges and the jury's factfinding or the defendant's negotiated admissions. Judges would have no role in determining the broader cell range, quite limited authority to sentence outside that range, and no opportunity to provide reasoned criticism of the guidelines. While Judge Sessions acknowledges that the Department of Justice and Congress undermined the Commission's neutrality during the mandatory guidelines era—creating a one-way upward ratchet, undue severity, and lack of proportionality in the guidelines[482]—his proposal would eliminate the only known antidote, which is transparent feedback from Article III judges applying the sentencing statute in real cases. The Commission cannot claim to be "at the crossroads" of all three branches[483] without hearing from, and listening to, the members of the branch in which it is "located."[484]

---

[478] *See* United States v. Martin Linen Supply Co., 430 U.S. 564, 574-75 (1977) (holding that the Double Jeopardy Clause bars appeals from acquittals).

[479] Sessions, *supra* note 12, at 353.

[480] *Id.* at 351.

[481] *Id.* at 350.

[482] *Id.* at 306, 317-23, 334-36.

[483] *Id.* at 305; *see also Commission Testimony*, *supra* note 13, at 2; *Implications of the Booker/Fanfan Decisions for the Federal Sentencing Guidelines: Hearing Before the Subcomm. on Crime, Terrorism, & Homeland Sec. of the H. Comm. on the Judiciary*, 109th Cong. 17 (2005) (statement of Ricardo H. Hinojosa, Chair, U.S. Sentencing Commission).

[484] *See supra* notes 36-42 and accompanying text.

Judge Sessions offers his proposal as a political "compromise" that would significantly constrain judicial discretion in return for the hope that statutory mandatory minimums might be "repealed or at least curtailed."[485] But even if one were to assume that Congress would repeal and foreswear all mandatory minimums if it enacted the Sessions proposal, the cure would be worse than the disease. Judge Sessions explains that his proposal would "mak[e] mandatory minimum statutory penalties unnecessary."[486] If this is true, the reason is that the proposal itself would create the equivalent of mandatory minimums, or near-mandatory minimums, across the board.[487] Moreover, in reality, the threat of new mandatory minimums would always be present. Mandatory minimums are a function of politics, not changes in the law regarding judicial discretion. Congress enacted mandatory minimums throughout the mandatory guidelines era, as Judge Sessions acknowledges.[488] Since 1987, there has been only one election year—2010, when the guidelines were advisory—in which Congress did not enact or expand mandatory minimums.[489] Nor does Judge Sessions explain why, under his system, the Commission would not feel "compelled," as it has in the past, to increase guideline sentences to "ward off" mandatory minimum penalties.[490]

Judge Sessions also asserts that if his proposal were adopted, "Congress would have less of an incentive to issue directives" to the Commission to add new aggravators.[491] This argument posits that, in a system with wider mandatory ranges, Congress would be less inclined

---

[485] Sessions, *supra* note 12, at 340.

[486] *Id.* at 309-10.

[487] *See* Memorandum from Mary Price, Vice President & Gen. Counsel, Families Against Mandatory Minimums, to Spencer Overton, Acting Assistant Att'y Gen., Office of Legal Policy 7 (Aug. 14, 2009) (on file with authors) (opposing such a compromise as it "would abandon mandatory sentences that apply to some crimes and replace them with mandatory or near-mandatory guidelines across the criminal code").

[488] *See* Sessions, *supra* note 12, at 331 ("Since 1991, the number of criminal statutes that have mandatory minimum sentences has increased by more than 78%. There are now over 170 provisions that bear mandatory minimum sentences." (citations omitted)).

[489] *See* Study of Mandatory Minimums and Specific Directives, *supra* note 272.

[490] Sessions, *supra* note 12, at 318 (quoting R. Barry Ruback & Jonathan Wroblewski, *The Federal Sentencing Guidelines: Psychological and Policy Reasons for Simplification*, 7 PSYCHOL. PUB. POL'Y & L. 739, 752 (2001)).

[491] *Id.* at 348.

to issue directives because it would recognize that increasing the range by even one or two cell levels would be "unduly harsh"; moreover, "should [Congress] elect to" issue directives anyway, "it would effectively bar itself from inserting any further upward adjustments in the future" because guideline sentences would quickly reach life imprisonment.[492] The implications of this argument are alarming. Congress has not hesitated in the past to direct guideline increases for offenses, such as drug trafficking and child pornography possession, that were already treated severely under the guidelines; like mandatory minimums, directives are a function of politics. The fact that congressional directives would quickly reach the stopping point of life sentences—and mandatory life sentences at that—hardly recommends the Sessions proposal.

Judge Sessions claims that his system of wider ranges would simultaneously (1) reduce disparity among judges and (2) provide greater judicial discretion within the broad cell ranges.[493] As a practical, if not logical, matter, it would be difficult to achieve both these ends, and Judge Sessions's attempt to avoid this conundrum leads him to propose a system of sub-ranges that would be unconstitutional, as we explain below.

Judge Sessions, like others who have discussed a jury-driven system, recognizes that to be workable in practice, such a system would require relatively few aggravating facts for the jury to find, and therefore proposes fewer and consequently wider ranges than exist under the current sentencing table.[494] But the wider ranges would invite much greater

---

[492] *See* Bowman, *supra* note 170, at 1343-44. Judge Sessions adopts Professor Bowman's argument. *See Sessions*, *supra* note 12, at 348 & n.178.

[493] Sessions, *supra* note 12, at 354.

[494] *Id.* at 355; *see also* Frank O. Bowman, III, *Beyond Band-Aids: A Proposal for Reconfiguring Federal Sentencing After* Booker, 2005 U. CHI. LEGAL F. 149, 199 ("As a practical matter, a system that gives juries a larger sentencing role requires that the number of facts juries are asked to decide be fairly small."); James Felman, *How Should the Congress Respond if the Supreme Court Strikes Down the Federal Sentencing Guidelines?*, 17 FED. SENT'G REP. 97, 97 (2004) ("The number of culpability factors is a trade-off related to both complexity and the width of the sentencing ranges which result . . . ."); *cf. Felman Testimony*, *supra* note 11, at 22 (noting that "the ranges under a jury-driven system would almost certainly have to be significantly wider than the ranges under the present guidelines," and opposing such a system in part because it "could actually increase variations among sentences because the ranges would be so much wider").

variation in sentences than exists under the advisory guidelines system. The current sentencing table consists of 258 ranges that are overlapping and narrow; nearly half of the ranges are 12 months or less in width, and only 10% are more than 80 months wide.[495] Under the current advisory guidelines system, the median decrease from these narrow ranges for non-government sponsored below-range sentences is about 12 months.[496] Viewed another way, 22% of these below-range sentences are 6 months or less below the guideline range, 48% are no more than one year below the range, and 72.4% are no more than two years below.[497] In contrast, under Judge Sessions's proposal the mandatory cells would vary in width from a low of 16 months to a high of 286 months, with 67% of the ranges 80 months or wider.[498] Even at the middle of the Sessions table, the four ranges would vary in width from 80 months to 105 months to 136 months to 226 months.[499] This or any similar reduction in the number of ranges and corresponding expansion of widths would produce ranges that are wider than the vast majority of judicial departures and variances today.

Thus, the proposed rejiggering of ranges would not please those who wish to constrain judicial discretion. Anticipating this objection, Judge Sessions proposes to regulate judges' sentencing choices through the introduction of three sub-ranges within each mandatory range, the middle of which would be an "advisory range for a typical or heartland" case.[500] The jury's verdict or the defendant's guilty plea would, standing alone, result in a sentence in the middle sub-range. In order to move from that sub-range to a higher or lower sub-range, the judge would be required to consider a series of factors chosen by

---

[495] About 48% of the current ranges are 12 months or less in width; 15% are 12-24 months in width; 8% are 25-35 months in width, 7% are 37-47 months in width; 4% are 52-58 months in width, 7% are 65-81 months in width; 8% are 110 months, and 2% are life. *See* U.S. SENTENCING GUIDELINES MANUAL ch. 5, pt. A sentencing tbl. (2011).

[496] *See supra* note 252 and accompanying text.

[497] 2010 USSC Monitoring Dataset, *supra* note 231.

[498] None of the ranges would be less than 16 months wide, and twenty-four (or 66.6%) would be 80 months wide or more. Only eight of the ranges (or 22%) would be less than 36 months wide, and only ten (or 28%) would be less than 48 months wide. Sessions, *supra* note 12, at 345.

[499] *Id.* at 345.

[500] *Id.* at 343, 347.

the Commission from among the existing guideline factors, nearly all of which are aggravating.[501] Critically, a judge who imposed a sentence in an upper or lower sub-range would be reversed unless it was clear from the record that he considered "*all* of the relevant aggravating and mitigating factors identified in the application notes and *all other* relevant factors in the *Guidelines Manual* before imposing a particular sentence."[502] Reversal would also be required if the judge "considered a prohibited factor."[503] This appears to mean that, in order to sentence outside the middle range of the mandatory cell, judges would be required to consider aggravating facts (and a small number of mitigating facts) designated by the Commission, as well as the restrictions on mitigating facts set forth in policy statements and commentary—and *only* those facts and restrictions. There is, at least, no mention in Judge Sessions's proposal of sentencing factors *not* designated by the Commission, or of *any* sentencing principles, such as parsimony, the purposes of punishment, or the need to avoid unwarranted disparities.

The proposal thus evidently contemplates that the only lawful bases for imposing a sentence above the middle sub-range would be judicial factfinding of aggravating factors specified by the Commission. Yet such a system would violate the fundamental commands of *Booker*. A sentencing range is advisory only if the judge is authorized to sentence above or below it based on facts and principles *not* specified by the Commission.[504] If we have understood Judge Sessions's proposal correctly, the top of the middle sub-range would be the "maximum" for Sixth Amendment purposes.[505] Accordingly, sentences above this maximum may not be authorized solely on the basis of aggravating

---

[501] *Id.* at 347-49.

[502] *Id.* at 353-54 (emphasis added).

[503] *Id.*

[504] What made the guidelines mandatory before *Booker* was that departures were available only under circumstances specified by the Commission. United States v. Booker, 543 U.S. 220, 234-35 (2005).

[505] The "maximum" for Sixth Amendment purposes is the "maximum authorized by the facts established by a plea of guilty or a jury verdict." *Id.* at 244; *see also* Blakely v. Washington, 542 U.S. 296, 303-04 (2004) ("[T]he relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings.").

facts found by the judge by a preponderance of the evidence.[506] But this is exactly what the Sessions proposal, as we read it, contemplates.[507]

The constitutional problem is best illustrated by the Supreme Court's invalidation, in *Cunningham v. California,* of a sentencing system strikingly similar to the one Judge Sessions proposes.[508] The California system provided for an upper term, a middle term, and a lower term.[509] The judge was directed to start with the middle term and to move from that term only if the judge found and placed on the sentencing record aggravating or mitigating facts related to the offense or the offender, beyond the facts of which the defendant was convicted.[510] The system made no provision for the judge to impose a sentence above the middle term based on anything other than facts.[511] The Court made plain that the system would have been constitutional if it had authorized the judge to sentence above the middle term based solely on a "policy judgment" in light of the "general objectives of sentencing," or the judge's subjective belief regarding the appropriate sentence.[512] Because California's sentencing rules referred only to "facts" in aggravation,[513] the system violated the Sixth Amendment.[514]

In contrast, the federal advisory guidelines system is constitutional because, "[a]s far as the law is concerned, the judge could disregard the Guidelines and apply the same sentence (higher than . . . the bottom of the unenhanced Guidelines range) in the absence of the special facts . . . which, in the view of the Sentencing Commission, would warrant a higher sentence."[515] Moreover, "courts are entitled to vary

---

[506] *See* Cunningham v. California, 549 U.S. 270, 274-75 (2007) ("[T]he Federal Constitution's jury-trial guarantee proscribes a sentencing scheme that allows a judge to impose a sentence above the statutory maximum based on a fact, other than prior conviction, not found by a jury or admitted by the defendant."); *Blakely*, 542 U.S. at 305 n.8 ("Whether the judicially determined facts *require* a sentence enhancement or merely *allow* it, the verdict alone does not authorize the sentence.").

[507] *See* Sessions, *supra* note 12, at 348-49, 350, 351-52.

[508] 549 U.S. 270.

[509] *Id.* at 275.

[510] *Id.* at 279.

[511] *Id.* at 279-80.

[512] *Id.* at 279-81; *see also id.* at 292-93.

[513] *Id.* at 279.

[514] *Id.* at 292-93.

[515] Rita v. United States, 551 U.S. 338, 353 (2007).

from the . . . guidelines in a mine-run case where there are no 'particular circumstances' that would otherwise justify a variance from the Guidelines' sentencing range."[516] Because "the Guidelines are now advisory[,] . . . courts may vary [from Guidelines ranges] based solely on policy considerations, including disagreements with the Guidelines."[517] Indeed, it is this ability to sentence outside the guideline range based on a policy judgment alone that makes the guidelines advisory and thus constitutional. As stated by then–Solicitor General Kagan, "[T]he very essence of an advisory guideline is that a sentencing court may, subject to appellate review for reasonableness, disagree with the guideline in imposing sentencing under Section 3553(a)."[518] While Judge Sessions states that the middle sub-range would serve as an "advisory" range,[519] this appears not to be so, because there is no provision for the judge to sentence above or below it based on policy considerations alone.

Judge Sessions's discussion of offender characteristics further reveals that the promise of "greater discretion" within the broad, mandatory ranges is illusory.[520] The Judge states that under his proposed sys-system, "the vast majority of offender characteristics," while rarely permissible as grounds for departure, "would be relevant to deciding where a defendant falls within the broader cells."[521] It appears, however, that this exercise of judicial discretion within the mandatory cells would be subject to the Commission's restrictions regarding offender characteristics.[522] As assurance that the Commission would not continue to seek to constrain judges from considering offender character-

---

[516] Spears v. United States, 555 U.S. 261, 267 (2009).

[517] Kimbrough v. United States, 552 U.S. 85, 101-02 (2007) (internal quotation marks omitted); *see also Rita*, 551 U.S. at 351 ("The sentencing judge . . . may hear arguments . . . that the Guidelines sentence should not apply . . . because the Guidelines sentence itself fails properly to reflect § 3553(a) considerations, or perhaps because the case warrants a different sentence regardless . . . .").

[518] Brief for the United States at 11, Vazquez v. United States, 130 S. Ct. 1135 (2010) (No. 09-5370), 2009 WL 5423020.

[519] Sessions, *supra* note 12, at 343.

[520] *Id.* at 336-37, 351.

[521] *Id.* at 351.

[522] *See id.* at 353-54 (stating that the judge would be required to consider "all of the relevant aggravating and mitigating factors identified in the application notes and *all other* relevant factors in the *Guidelines Manual* before imposing a particular sentence" within the broad cell (emphasis added)).

istics, Judge Sessions points to recent amendments as "signaling at least some change in direction."[523] It is true that in 2010, when Judge Sessions was Chair, he and Vice Chair Ruben Castillo sought to revise the offender-characteristics policy statements to make them consistent with § 3553(a) and other provisions of the SRA. But other Commissioners resisted, and the changes were marginal at best. The Commission received voluminous empirical evidence and public comment demonstrating that mitigating offender characteristics are highly relevant to the purposes of sentencing.[524] In response, the Commission changed a few characteristics from "not ordinarily relevant" to "may be relevant," but only if they are "present to an unusual degree and distinguish the case from the typical cases covered by the guidelines"[525]—essentially the same standard for characteristics deemed "not ordinarily relevant."[526] The Commission simultaneously amended the introductory commentary to state that the "most appropriate use" of offender characteristics is in choosing a sentence within the guideline range,

---

[523] *Id.* at 336.

[524] *See, e.g.*, Comment of Philip Miller, Chief U.S. Probation Officer, E. Dist. of Mich. 3-4 (2010); Letter from Probation Officers Advisory Grp. to Hon. William K. Sessions, III, Chair, U.S. Sentencing Comm'n 3 (Feb. 3, 2010); Letter from Jon Conyers, Jr., Chair, H. Comm. on the Judiciary, and Robert C. "Bobby" Scott, Chair, H. Subcomm. on Crime, Terrorism, & Homeland Sec., to Hon. William K. Sessions III, Chair, U.S. Sentencing Comm'n 2-3 (Apr. 6, 2010); Margy Meyers & Marianne Mariano, Fed. Pub. & Cmty. Defenders, Statement Before the U.S. Sentencing Comm'n 19, 43-80 (Mar. 17, 2010); Letter from Practitioners Advisory Grp. to Hon. William K. Sessions, III, Chair, U.S. Sentencing Comm'n 6-10 (Mar. 22, 2010); Letter from Carissa Byrne Hessick, Assoc. Professor, Ariz. State Univ., to the U.S. Sentencing Comm'n 1-5 (Mar. 17, 2010).

[525] *Compare* U.S. SENTENCING GUIDELINES MANUAL §§ 5H1.1, 5H1.3, 5H1.4, 5H1.11 (2011), *with* U.S. SENTENCING GUIDELINES MANUAL §§ 5H1.1, 5H1.3, 5H1.4, 5H1.11 (2001). *See also id.* app. C, amend. 739 (Nov. 1, 2010). The Commission also changed drug or alcohol dependence or abuse from a prohibited ground to one that "ordinarily is not a reason for a downward departure." *Compare* U.S. SENTENCING GUIDELINES MANUAL § 5H1.4 policy statement (2011), *with* U.S. SENTENCING GUIDELINES MANUAL § 5H1.4 policy statement (2001). *See also id.* app. C, amend. 739 (Nov. 1, 2010).

[526] *See* U.S. SENTENCING GUIDELINES MANUAL § 5K2.0(a)(4) policy statement (2011) (stating that circumstances deemed "not ordinarily relevant" may be considered "only if . . . present to an exceptional degree"); U.S. SENTENCING GUIDELINES MANUAL §5K2.0 policy statement (2001) ("[A]n offender characteristic or other circumstance that is, in the Commission's view, 'not ordinarily relevant' . . . may be relevant . . . if such characteristic or circumstance is present to an unusual degree and distinguishes the case from the 'heartland' cases covered by the guidelines.").

rather than varying from it.[527] Meanwhile, the Commission continues to deem a large number of mitigating factors to be never or not ordinarily relevant.[528] The Commission's recent actions with respect to offender characteristics are not cause for optimism.

Judge Sessions also asserts that under his proposed scheme, uncharged and acquitted crimes would play a "more limited role."[529] It appears, however, that the use of unconvicted conduct under the proposal would either violate the Sixth Amendment or have a very substantial impact on sentence length. The proposal would require judges to consider uncharged and acquitted crimes established by a preponderance of the evidence in choosing a sub-range within the mandatory cell.[530] As we have already noted, consideration of unconvicted conduct in sentencing above the maximum of the middle subrange would be unconstitutional because it would elevate the sentence above the maximum authorized by the jury's verdict or the defendant's guilty plea.[531] If our constitutional argument misunderstands the Sessions proposal—perhaps because he means to allow a sentence above the top of the mid-range solely on the basis of policy considerations—then the breadth of the mandatory cells would permit uncon-

---

[527] U.S. SENTENCING GUIDELINES MANUAL ch. 5, pt. H, introductory cmt. (2011); *id.* app. C, amend. 739 (Nov. 1, 2010).

[528] Factors deemed "not ordinarily relevant" include: education and vocational skills; drug or alcohol dependence or abuse; employment record; family ties and responsibilities; civic, charitable, or public service; employment-related contributions; and prior good works. U.S. SENTENCING GUIDELINES MANUAL §§ 5H1.2, 5H1.4, 5H1.5, 5H1.6, 5H1.11 (2011). Prohibited grounds for a departure include: gambling addiction; lack of guidance as a youth and similar circumstances indicating a disadvantaged upbringing; personal financial difficulties; economic pressures on a trade or business; diminished capacity if caused by the voluntary use of drugs or other intoxicants or if the defendant was convicted of a sex offense; fulfillment of restitution obligations as required by law; acceptance of responsibility; role in the offense; and decision to plead guilty. *Id.* §§ 5H1.4, 5H1.7, 5H1.12, 5K2.12, 5K2.13, 5K2.0(d).

[529] Sessions, *supra* note 12, at 350.

[530] *See id.* ("Uncharged relevant conduct could only be used to sentence *within* a larger cell on the simplified grid (and then only if found by the court by a preponderance of the evidence). Acquitted conduct . . . could not increase a defendant's offense level."); *id.* at 351-52 ("Uncharged prior criminal conduct, if proven by a preponderance of the evidence, would remain a valid consideration for an increase in a defendant's sentence within the relevant sentencing cell on the grid.").

[531] *See* United States v. Booker, 543 U.S. 220, 234-35 (2005); *see also supra* note 506 and accompanying text.

victed conduct to have an enormous impact on sentence length. For example, under the broader cell ranges, a defendant convicted of a drug trafficking offense placing him in the fifth offense level and with a Criminal History Category of III could, on the basis of unconvicted conduct (including reasonably foreseeable conduct of others in furtherance of "jointly undertaken" activity[532]), face a sentence up to 271 months, twice the 135-month sentence at the bottom of the range.[533]

The solution to the unjustified use of unconvicted conduct to increase the severity of punishment is not to create broad, mandatory sentencing ranges. The solution is much closer at hand. The Commission can correct the misguided relevant conduct rule right now, as practitioners and judges have urged for years.[534] The Commission could, for example, adopt the proposal of former Commissioner John Steer, a one-time supporter of the relevant conduct rule, to eliminate acquitted conduct from the guideline calculation and substantially limit the weight of uncharged conduct.[535]

At the same time, the Sessions proposal would introduce unwarranted disparities that would be hidden and impervious to correction. The mandatory guideline range would be determined by the prosecutor's charges and the parties' negotiations (in cases that do not go to trial), and those decisions would not be explained in open court or subject to judicial review. The advisory guidelines system has significantly ameliorated hidden disparities arising from plea bargaining and other presentencing decisions.[536] The Sessions proposal would reverse these gains.

---

[532] U.S. SENTENCING GUIDELINES MANUAL § 1B1.3(a)(1)(B).

[533] Sessions, *supra* note 12, at 345. In the eight cells in the two rows at the top of the grid, the impact of relevant conduct would be relatively limited, with increases ranging from 16 to 46 months. *Id.* But the remaining twenty-eight cells range from 33 to 286 months in width. *Id.*

[534] Nearly seventy percent of judges responding to a Commission survey believe that neither dismissed conduct nor uncharged conduct referenced only in a presentence report (and not presented at trial or admitted by the defendant) should be considered at sentencing, and eighty-four percent believe that acquitted conduct should not be considered at sentencing. U.S. SENTENCING COMM'N, *supra* note 8, tbl.5.

[535] *See An Interview with John Steer*, CHAMPION, Sept. 2008, at 40, 42.

[536] *See supra* Sections III.A-B.

Judge Sessions's proposal also raises separation of powers concerns that would appear to make the Sentencing Commission itself unconstitutional. When the Supreme Court upheld the initial guidelines system in *Mistretta*, the Court found it significant that the Commission would be making rules to be applied exclusively by judges to facts found exclusively by judges, rather than defining crimes and setting the outer limits of punishment.[537] Under a system of mandatory guidelines with jury factfinding, in contrast, the Commission's primary task would be to determine what conduct must be charged in an indictment and proved to a jury beyond a reasonable doubt in order for a defendant then to be sentenced within the resulting range. The prosecutor's charges and the jury's factfinding (or the defendant's admissions), not the judge, would determine that range. Making rules for that purpose is not "the Judicial Branch's own business—that of passing sentence on every criminal defendant."[538] It is the business of Congress.

To be sure, the Court in *Booker* rejected the government's argument that the power of *the judiciary* would be improperly expanded to include the legislative function of defining crimes were the Commission to make binding rules that determine sentences based on jury factfinding.[539] But the Court has never addressed whether a delegation of political and substantive functions to a Commission whose members are subject to removal by the President for "good cause"[540] and whose mandatory guidelines would be directly implemented by the prosecutor's charges (as opposed to judicial factfinding) would improperly expand the power of *the executive*.

---

[537] *See* Mistretta v. United States, 488 U.S. 361, 407 (1989); *see also id.* at 396-97 (finding that Congress's decision "to locate th[e] Commission within the Judicial Branch does not violate the principle of separation of powers," in part because the guidelines "do not bind or regulate the primary conduct of the public or vest in the Judicial Branch the legislative responsibility for establishing minimum and maximum penalties for every crime," but rather pertain to "the special role of the Judicial Branch in the field of sentencing," and "leave[] with the Judiciary what long has belonged to it").

[538] *Id.* at 408.

[539] *See* United States v. Booker, 543 U.S. 220, 241-42 (2005) (relying on *Mistretta* as "premised on an understanding that the Commission, rather than performing adjudicatory functions, instead makes political and substantive decisions"); Reply Brief for the United States at 9-10, 17-19, *Booker*, 543 U.S. 220 (Nos. 04-0104, 04-0105), 2004 WL 2190496.

[540] 28 U.S.C. § 991(a) (2006).

The Court has recognized that even limited removal power over an "independent" agent may "dictate that [the officers subject to that power] will be subservient" to the branch holding the removal power.[541] Judge Sessions's proposed system would therefore create an agency whose officers are, at least in constitutional terms, "subservient" to the executive. Unlike the system considered in *Mistretta*, this agency would exercise broad policymaking discretion to create rules that give prosecutors—agents and employees of the executive branch—power to set the sentencing range of individual defendants, effectively cutting out the judicial factfinding so crucial to the outcome in *Mistretta*. Thus, whatever branch the Commission is said to be "located" in, and whether or not there are judges on the Commission, such a system would unconstitutionally assign to the executive direct control over the traditionally judicial function of sentencing[542] and would unconstitutionally unite the power to prosecute with the power to sentence.[543] As the Supreme Court recently emphasized in the context of statutory interpretation, it is not "natural" to read the law as giving an executive agent "what amounts to sentencing authority,"[544] and "our tradition of judicial sentencing" is ever-accompanied by the "desideratum that sentencing [is]

---

[541] Bowsher v. Synar, 478 U.S. 714, 730 (1986); *see also* Morrison v. Olson, 487 U.S. 654, 692-93 (1988) (recognizing that the President's "good cause" removal power over an independent agency in the executive branch, though limited, nevertheless allows some "power to control or supervise" the agency to ensure that it does not take action that "interfere[s] impermissibly with [the President's] constitutional obligation to ensure faithful execution of the laws," and that, under such circumstances, the President "retains ample authority to assure that the [independent executive official] is competently performing his or her statutory responsibilities in a manner that comports with the provisions of the Act"); PIERCE, *supra* note 59, § 2.5, at 84 (arguing that a "cause" requirement for removal "must include failure to comply with any valid policy decision made by the President or his agent").

[542] *Ex parte* United States, 242 U.S. 27, 41 (1916) ("Indisputably under our constitutional system the right . . . to impose the punishment provided by law, is judicial . . . .").

[543] *See Mistretta*, 488 U.S. at 391 n.17 ("[H]ad Congress decided to confer responsibility for promulgating sentencing guidelines on the Executive Branch, we might face the constitutional questions whether Congress unconstitutionally had assigned judicial responsibilities to the Executive or unconstitutionally had united the power to prosecute and the power to sentence within one Branch."); *see also* Stith, *supra* note 45, at 480-81 (concluding that uniting prosecutorial and sentencing authority would be unconstitutional).

[544] Setser v. United States, 132 S. Ct. 1463, 1470 (2012).

not to be left to employees of the same Department of Justice that conducts the prosecution."[545]

Even if the President's removal power in this context would not mean that the executive branch has actual control over the Commission's policymaking and implementation of the SRA,[546] the constitutional difficulty would be altered but not eliminated. If, despite the material transformations in its duties and despite the President's removal power, the Commission would not really be controlled by the executive (and thus not accountable to the people through the executive branch), the question becomes in what branch this Commission may constitutionally be located. The Supreme Court acknowledged in *Mistretta* that the Commission is "not controlled by or accountable to members of the Judicial Branch,"[547] but nonetheless found the Commission to be part of the judicial branch because its primary task was to write sentencing rules for judges to implement.[548] But under the Sessions proposal, as we have noted, that would no longer be the primary task of the Commission; the guidelines would be implemented through the prosecutor's charges and jury factfinding or the parties' negotiations. In these circumstances, it would be mere pretense to assert that the Commission is a judicial branch agency either functionally or formally.

If the Commission may not be located in either the executive branch or the judicial branch, then its political and substantive powers—as materially transformed by Judge Sessions's proposal—would be subject only to Congress's control. Congress, however, may not circumvent the constitutional requirements of bicameralism and presentment by delegating its fundamental policymaking authority to its

---

[545] *Id.* at 1471-72.

[546] *See* Humphrey's Ex'r v. United States, 295 U.S. 602, 628 (1935) (holding that Congress may constitutionally limit executive removal power over members of an "independent" agency performing quasi-legislative functions so that the agency operates "free from executive control"); *cf. Mistretta*, 488 U.S. at 411 ("[W]e see no risk that the President's limited removal power will compromise the impartiality of Article III judges serving on the Commission . . . .").

[547] *Mistretta*, 488 U.S. at 393.

[548] *Id.* at 392-93.

own agent.[549] Setting mandatory punishment ranges based on factors charged in an indictment, and either admitted in a guilty plea or proven to a jury beyond a reasonable doubt, is undeniably "the making of laws."[550]

This leaves no constitutionally permissible location for a Commission exercising the power that Judge Sessions's proposal would assign to it.[551] It thus appears that only Congress itself could enact the kind of guidelines Judge Sessions proposes. But Congress lacks the time, expertise, and political impartiality to do so—which is why it delegated this function to a commission in the first place.

---

[549] *See* INS v. Chadha, 462 U.S. 919, 951 (1983) (invalidating a one-House veto of executive action because it was "legislative in purpose and effect," and thus an exercise of "legislative power," but had not been passed in both Houses and presented to the President, as required by Article I, Section 7 of the Constitution). As Justice Stevens stated in *Bowsher v. Synar*, "Congress may not exercise its fundamental power to formulate national policy by delegating that power to one of its two Houses, to a legislative committee, or to an individual agent of the Congress." 478 U.S. 714, 737 (1986) (Stevens, J., concurring in the judgment). Congress also may not reserve control over the execution of the laws, if it could be said that the Commission would assume an executive rather than legislative function. *See id.* at 726 (majority opinion).

[550] *See* Stith, *supra* note 45, at 481-82 (noting that, while Congress may legislate sentencing rules, it may not create and command an agency "to do its bidding," while "pretending . . . that the agency . . . is part of the same 'branch' of government as the Article III judges whose sentencing authority Congress has decided to take away"); *cf. Mistretta*, 488 U.S. at 413 (Scalia, J., dissenting) (finding "no place within our constitutional system for an agency created by Congress to exercise no governmental power other than the making of laws").

[551] We note that Judge Sessions's proposal bears a strong structural resemblance to the remedy proposed by Justice Stevens in dissent in *Booker*. *See* 543 U.S. 220, 285 (2005) (Stevens, J., dissenting). But Justice Stevens's remedy garnered only four votes, *see id.*; *id.* at 313 (Thomas, J., dissenting in part), and Justice Stevens did not address the separation-of-powers argument that we raise here. As noted earlier, Justice Stevens's majority opinion in *Booker* addressed the question whether the Commission's political or quasi-legislative power would unconstitutionally aggrandize the judicial branch if guideline factors were charged in an indictment and proved to a jury beyond a reasonable doubt. *See supra* text accompanying note 539. It was apparently in that limited context that Justice Stevens stated, "We have thus always recognized the fact that the Commission is an independent agency that exercises policymaking authority delegated to it by Congress." *Booker*, 543 U.S. at 243. To the extent that the Stevens majority opinion in *Booker* might be read as approving an independent Commission *outside of either the judicial or executive branches* with the primary task of writing substantive provisions of criminal law, we submit that the majority in *Booker* was, in this respect, in error.

B. *The Commission's Proposal*

The Commission has described several proposed legislative changes, but as of this writing, it has proposed language for only some of them.[552] The discussion that follows is therefore to some extent provisional.

The Commission has asked Congress to enact legislation requiring that sentencing courts accord the guidelines "substantial weight."[553] The proposed legislation would also codify what the Commission has recently asserted in the form of a guideline: that sentencing is a "three-step" process beginning with calculation of the guideline range, immediately followed by required consideration of the Commission's policy statements and commentary, which primarily seek to restrict sentences outside the guideline range.[554] Only after these steps would the judge consider the § 3553(a) factors "taken as a whole."[555] In a related vein, the Commission has asked Congress to resolve an alleged "tension" between the Commission's interpretation of directives to the Commission at 28 U.S.C. §§ 991, et seq. and Congress's directive to judges in 18 U.S.C. § 3553(a) to consider the "history and characteristics of the defendant."[556] The Commission suggests, for example, that Congress codify the Commission's policy statements deeming the defendant's education, vocational skills, employment record, family ties and responsibilities, and community ties to be "not ordinarily relevant to the determination of whether to impose a sentence outside the applicable guideline range."[557] The Commission has also asked Congress

---

[552] *See Commission Testimony*, *supra* note 13, at 55-59.

[553] *Id.* at 58-59.

[554] *Id.* at 57-58; *see also* U.S. SENTENCING GUIDELINES MANUAL § 1B1.1 (2011); *id.* app. C, amend. 741 (Nov. 1, 2010).

[555] U.S. SENTENCING GUIDELINES MANUAL § 1B1.1 (2011).

[556] *See Commission Testimony*, *supra* note 13, at 57.

[557] The Commission posed this formulation to panelists at a recent hearing. *See* Henry Bemporad, Fed. Pub. Defender for the W. Dist. of Tex., Statement Before the U.S. Sentencing Commission app. question 4 (Feb. 16, 2012), *available at* http://www.fd.org/pdf_lib/bemporad_statement_2_16_12.pdf. Similarly, Department of Justice officials have suggested that judges should be limited to considering the offense and criminal history in determining the length of a prison term, and that offender characteristics should be taken into account, if at all, through "prison credits" administered by the executive branch. *See* Letter from Jonathan Wroblewski, Dir., Office of Policy & Legislation, Dep't of Justice, to Hon. Patti B. Saris, Chair, U.S. Sentencing Comm'n 33-34 (Mar. 12, 2012); Matthew Axelrod, Assoc. Deputy Att'y Gen., Statement Before the U.S.

to require the courts of appeals, in reviewing sentences, to (1) apply a "presumption of reasonableness" to within-guideline sentences, (2) demand a "greater justification" of the district court the further the sentence imposed is from the guideline range, and (3) apply a "heightened standard of review" to sentences that result from a policy disagreement with the Commission.[558]

It is clear that these proposals are intended to undo the holdings of the Supreme Court in *Booker* and its progeny and to reestablish the Commission's guidelines and policy statements as the "law" of sentencing without, however, crossing the line into unconstitutionality by making the guidelines too mandatory. We have previously explained why we conclude that the post-*Booker* sentencing system is far preferable to any regime of mandatory guidelines.[559] Here we limit ourselves to the constitutional question: do the Commission's proposals violate *Booker*'s command, as repeated and strengthened in subsequent decisions, that in order to be constitutional the guidelines must be "advisory" only? We believe that the answer is "yes," although we recognize that at least as to one proposal the question is close,[560] and hence we invite others to consider our analysis and draw their own conclusions.

The Commission's rationale for giving "substantial weight" to the guidelines is that the Commission itself already took into account the § 3553(a) factors in writing the guidelines.[561] Quite apart from the lack of evidence that the Commission has based the guidelines on the § 3553(a) factors in any systematic way—and substantial evidence that

---

Sentencing Commission 10-13 (Feb. 16, 2012), http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20120215-16/Testimony_16_Axelrod.pdf; Letter from Lanny A. Breuer, Assistant Att'y Gen., and Jonathan Wroblewski, Dir., Office of Policy & Legislation, Dep't of Justice, to Hon. Patti B. Saris, Chair, U.S. Sentencing Comm'n 3-4 (Sept. 2, 2011).

[558] *See Commission Testimony*, *supra* note 13, at 55-56.

[559] *See supra* Part II.

[560] *See infra* notes 583-89 and accompanying text.

[561] *See Commission Testimony*, *supra* note 13, at 57-58. This is the same implausible and legally flawed theory the Commission urged upon the courts in the immediate wake of *Booker*. *See* BOOKER REPORT, *supra* note 5, at 42 (stating that "[i]mmediately after the *Booker* decision, the Commission developed a post-*Booker* guidelines training program" which "explains how the sentencing guidelines reflect Congress' objectives in the SRA and that the guidelines accordingly should be given substantial weight" and "describes federal sentencing under *Booker* as a 3-step process").

it has not[562]—this proposal would violate the holdings of *Booker* and subsequent decisions concerning the role of the guidelines in the sentencing determination. Specifically, the "Guidelines are only one of the factors to consider when imposing sentence,"[563] there is no "legal presumption that the Guidelines sentence should apply,"[564] and "they are also not to be *presumed* reasonable."[565] Policy statements that conflict with § 3553(a) need not be considered and are not entitled to weight.[566] As we have noted, only Justice Alito holds the view that the guidelines and policy statements can and should be given "some significant weight."[567]

The Commission's proposal that Congress codify its new "three-step" guideline, especially in conjunction with the "substantial weight" proposal and the proposals involving the standard of appellate review, is also constitutionally suspect. The Commission forthrightly acknowledges that the purpose of its three-step process is to "ensure[]" that the guideline sentence is given "proper weight."[568] The three-step guideline directs courts that they "shall" in each case "consider Parts H and K of Chapter Five, Specific Offender Characteristics and Departures, and any other policy statements or commentary in the guidelines that might warrant consideration in imposing sentence" and that

---

[562] *See, e.g.*, STITH & CABRANES, *supra* note 47, at 51-74 (describing the work of the original Commission and presenting substantial evidence that the guidelines it produced, and as amended by subsequent Commissions, do not take the purposes of sentencing into account).

[563] Gall v. United States, 552 U.S. 38, 59 (2007).

[564] Rita v. United States, 551 U.S. 338, 351 (2007). The court of appeals may, on the other hand, apply a rebuttable presumption of reasonableness to a district court's discretionary decision to impose a guideline sentence. *Id.* at 347.

[565] Nelson v. United States, 555 U.S. 350, 352 (2009).

[566] *See* Pepper v. United States, 131 S. Ct. 1229, 1242-43, 1247 (2011) (holding that a court of appeals could not, on the basis of a policy statement, prohibit a district court from considering factors that were "highly relevant" under § 3553(a), especially where the policy statement "rest[s] on wholly unconvincing policy rationales not reflected in the sentencing statutes Congress enacted"); *id.* at 1249 (refusing to "elevate" policy statements above other factors); *Gall*, 552 U.S. at 53-60 (upholding a variance from the guideline range based on circumstances relevant under § 3553(a) but disapproved by policy statements); *see also supra* notes 197-98 and accompanying text.

[567] *Gall*, 552 U.S. at 68 (Alito, J., dissenting).

[568] *Commission Testimony*, *supra* note 13, at 57.

they "shall" do so before considering § 3553(a) "taken as a whole."[569] But the referenced policy statements explicitly forbid or discourage judges from imposing a non-guideline sentence, as did § 3553(b), which *Booker* excised.[570] Indeed, these provisions not only deem many factors to be never or not ordinarily relevant to sentencing,[571] but also quote from and cite excised § 3553(b),[572] state that courts are not intended "to substitute their policy judgments for those of the . . . Sentencing Commission,"[573] and inform courts that "the most appropriate use" of the "history and characteristics of the defendant" under § 3553(a) is "to consider them not as a reason for a sentence outside the applicable guideline range but . . . in determining the sentence within the applicable guideline range."[574]

Yet the Supreme Court excised § 3553(b) because that provision, including the "policy statements and official commentary" referenced therein, made the guidelines mandatory.[575] Accordingly, after *Booker*, sentencing courts need not consider policy statements unless raised by a party as a basis for "departure," as the Court has made clear in subsequent decisions.[576] The Court has further held that the Commis-

---

[569] U.S. SENTENCING GUIDELINES MANUAL § 1B1.1(b)–(c) (2011).

[570] *See* United States v. Booker, 543 U.S. 220, 245 (2005).

[571] *See* U.S. SENTENCING GUIDELINES MANUAL §§ 5H1.2, 5H1.4. 5H1.5, 5H1.6, 5H1.7, 5H1.11, 5H1.12, 5K2.0(d), 5K2.12, 5K2.13.

[572] *Id.* § 5K2.0(a)–(b); *id.* cmt. nn.2-4.

[573] *See id.* § 5K2.0 cmt. background.

[574] *Id.* ch. 5, pt. H, introductory cmt.

[575] *See Booker*, 543 U.S. at 234-35, 245, 259; Pepper v. United States, 131 S. Ct. 1229, 1245 (2011); *see also supra* Part I.B.2.

[576] Under the procedure set forth by the Court, after calculating the guideline range, the sentencing court must "giv[e] both parties an opportunity to argue for whatever sentence they deem appropriate." Gall v. United States, 552 U.S. 38, 49 (2007). Arguments for a sentence outside the guideline range may take "*either* of two forms": for departure "*within the Guidelines framework*" *or* for "application of the sentencing factors set forth in 18 U.S.C. § 3553(a) (2000 ed. and Supp. IV) warrant[ing] a lower [or higher] sentence." Rita v. United States, 551 U.S. 338, 344 (2007) (first emphasis added). Accordingly, the courts of appeals have held that district courts need not consider policy statements regarding departures unless a party seeks a departure, and even then may instead consider a variance under § 3553(a). *See* United States v. Ball, 418 F. App'x 107, 108-09 (3d Cir. 2011); United States v. Diosdado-Star, 630 F.3d 359, 362-66 (4th Cir. 2011); United States v. McGowan, 315 F. App'x 338, 341-42 (2d Cir. 2009); United States v. Martinez-Barragan, 545 F.3d 894, 901 (10th Cir. 2008); United States v. Moton,

sion's restrictions on consideration of particular factors may not be elevated above the general sentencing factors described in § 3553(a) or used to deny a variance based on such factors where relevant.[577] What the Supreme Court said about early efforts by some courts of appeals to thwart *Kimbrough*'s holding is also true of the Commission's "three-step" process: it is a "smuggled-in dish that is indigestible."[578]

The Commission's related proposal that Congress resolve a purported "tension" between directives to the Commission and 18 U.S.C. § 3553(a) by directing the courts that certain offender characteristics are "not ordinarily relevant" in deciding whether to impose a non-guideline sentence[579] rests on a misinterpretation of directives to the Commission.[580] Moreover, a statutory prohibition on judges considering virtually all personal characteristics of the offender about to be sentenced would raise additional constitutional concerns both by making the guidelines functionally mandatory,[581] and by offensively interfering with the fundamental judicial function of sentencing.[582]

The Commission also proposes that Congress require courts of appeals to apply a presumption of reasonableness to guideline sen-

---

226 F. App'x 936, 939-40 (11th Cir. 2007); United States v. Mejia-Huerta, 480 F.3d 713, 723 (5th Cir. 2007).

[577] *See Pepper*, 131 S. Ct. at 1242-43, 1249-50; *Gall*, 552 U.S. at 53-60. Accordingly, the courts of appeals have reversed when judges have declined to consider relevant circumstances in deference to policy statements. *See* United States v. Powell, 576 F.3d 482, 499 (7th Cir. 2009); United States v. Simmons, 568 F.3d 564, 567-70 (5th Cir. 2009); United States v. Hamilton, 323 F. App'x 27, 31 (2d Cir. 2009); United States v. Chase, 560 F.3d 828, 830-32 (8th Cir. 2009). Courts of appeals have also rejected challenges to variances based on policy statements that restrict departures. *See, e.g.*, United States v. Martin, 520 F.3d 87, 93 (1st Cir. 2008). *But see* United States v. Bistline, 665 F.3d 758, 766-67 (6th Cir. 2012) (requiring—even after *Booker*, *Gall*, *Rita*, and *Pepper*—that the district court take into account policy statements on departures in applying § 3553(a)).

[578] Spears v. United States, 555 U.S. 261, 267 (2009).

[579] *See supra* notes 556-57 and accompanying text.

[580] *See supra* notes 147-48 and accompanying text.

[581] *See* United States v. Booker, 543 U.S. 220, 234 (2005) (holding that the guidelines were mandatory and thus unconstitutional because "departures are not available in every case, and in fact are not available in most").

[582] *Cf.* Setser v. United States, 132 S. Ct. 1463, 1471-72 (2012) (noting that "our tradition of judicial sentencing" is accompanied by the "desideratum that sentencing [is] not [to] be left to employees of the same Department of Justice that conducts the prosecution").

tences, again to "assist in ensuring" that the guidelines are "given substantial weight" and also to "promote more consistent sentencing outcomes."[583] The first purpose is contrary to the Court's holdings as explained above, and the second is puzzling since guideline sentences are rarely reversed for substantive unreasonableness.[584] A presumption of reasonableness might be thought constitutional standing alone, as the Court in *Rita* permitted the courts of appeals to apply a rebuttable presumption of reasonableness when the sentencing judge imposes a guideline sentence.[585] For Congress to legislate such a presumption, however, is a very different proposition. First, *Rita* permitted a presumption of *substantive* reasonableness only. A presumption of *procedural* reasonableness would clearly be unconstitutional.[586] Moreover, as we have noted, the nonbinding presumption of substantive reasonableness that the Supreme Court has permitted rests on deference to the sentencing judge, not to the guidelines.[587] The presumption is subject to limitations that make this clear but would be difficult to write into a statute; the "presumption is not binding," "does not . . . insist that [either side] shoulder a particular burden of persuasion or proof," does not reflect "deference of the kind that leads appeals courts to grant greater factfinding leeway to an expert agency than to a district judge," and has no "independent legal effect."[588] Without these limitations, a presumption of reasonableness for guideline sentences

---

[583] *Commission Testimony*, *supra* note 13, at 55-56.

[584] At the time of this writing, only four guideline sentences have been reversed as substantively unreasonable since *Gall* was decided, one from a circuit that has adopted a presumption of reasonableness, *see* United States v. Wright, 426 F. App'x 412, 414-15 (6th Cir. 2011), and the others from circuits that have not. *See* United States v. Dorvee, 616 F.3d 174, 183 (2d Cir. 2010); United States v. Amezcua-Vasquez, 567 F.3d 1050, 1055 (9th Cir. 2009); United States v. Paul, 561 F.3d 970, 973 (9th Cir. 2009).

[585] *Rita*, 551 U.S. at 347.

[586] Review for procedural error precedes review for substantive reasonableness and prevents constitutional error. *See Gall*, 552 U.S. at 51. It is "significant procedural error" if, in imposing a sentence within a correctly calculated guideline range, the district court "treat[s] the Guidelines as mandatory, fail[s] to consider the § 3553(a) factors, . . . or fail[s] to adequately explain the chosen sentence." *Id.* One study found that reversal for procedural error results in a different sentence on remand more than half the time. *See* Jennifer Niles Coffin, *Where Procedure Meets Substance: Making the Most of the Need for Adequate Explanation in Federal Sentencing*, CHAMPION, Mar. 2012, at 36.

[587] *See supra* notes 209-10 and accompanying text.

[588] *Rita*, 551 U.S. at 347, 350.

may function as an impermissible presumption of *unreasonableness* for non-guideline sentences.[589]

The Commission's other proposals, which would require stricter review of non-guideline sentences, clearly go too far toward resurrecting the previous mandatory guidelines regime. Preliminarily, it is important to understand that the Supreme Court has recognized only two standards of review for discretionary decisions involving mixed questions of law and fact, which includes the determination of the appropriate sentence under § 3553(a): de novo and abuse of discretion.[590] In the federal sentencing context, *Booker* and subsequent decisions have repeatedly rejected de novo review for sentences outside the guideline range, including the euphemistically named "heightened" or "closer" review.[591] The Court has emphasized that *all* sentences must be reviewed only for abuse of discretion, "whether inside, just outside, or significantly outside the Guidelines range,"[592] and whether based on individualized circumstances or on a conclusion that the guideline itself fails to achieve § 3553(a) objectives.[593]

The Commission nonetheless proposes two kinds of intensified review for sentences outside the guideline range. The first would "direct sentencing courts to provide greater justification for sentences imposed the further the sentence is from the . . . applicable advisory guidelines sentence," to be enforced on appeal.[594] But in *Gall*, the Court squarely held that an appellate rule, adopted in several circuits after *Booker*, "requiring 'proportional' justifications for departures from the Guidelines range is not consistent with our remedial opinion in *United States v. Booker*."[595]

---

[589] *See Gall*, 552 U.S. at 47, 51; *Rita*, 551 U.S. at 354-55.

[590] HARRY T. EDWARDS & LINDA A. ELLIOTT, FEDERAL COURTS STANDARDS OF REVIEW: APPELLATE COURT REVIEW OF DISTRICT COURT DECISIONS AND AGENCY ACTIONS 4-6, 16-17 (2007).

[591] *See* Spears v. United States, 555 U.S. 261, 264 (2009); Kimbrough v. United States, 552 U.S. 85, 109-11 (2007); *Gall*, 552 U.S. at 56, 59-60; United States v. Booker, 543 U.S. 220, 262 (2005).

[592] *Gall*, 552 U.S. at 41; *see also Kimbrough*, 552 U.S. at 110; *Rita*, 551 U.S. at 351; *Booker*, 543 U.S. at 261.

[593] *Kimbrough*, 552 U.S. at 110; *Gall*, 552 U.S. at 51-53, 59-60.

[594] *Commission Testimony*, *supra* note 13, at 56.

[595] *Gall*, 552 U.S. at 46.

The Court framed the analysis by emphasizing that "courts of appeals must review all sentences—whether inside, just outside, or significantly outside the Guidelines range—under a deferential abuse-of-discretion standard"[596] and that review of sentencing decisions is "limited to determining whether they are 'reasonable.'"[597] Under the rule at issue in *Gall*, courts of appeals would measure the extent of variance in percentages, and then would require an "extraordinary" justification if the percentage was "extraordinary."[598] As *Gall* explained, this approach was not only logistically dubious,[599] but also amounted to de novo review[600] and came "too close to creating an impermissible presumption of unreasonableness for sentences outside the Guidelines range."[601] The Court thus concluded that the "practice—common among courts that have adopted 'proportional review'—of applying a heightened standard of review to sentences outside the Guidelines range . . . is inconsistent with the rule that the abuse-of-discretion standard of review applies to appellate review of all sentencing decisions—whether inside or outside the Guidelines range."[602]

To be sure, the Court, in providing guidance to the *district court*, stated that the judge "must consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of the variance" and that "a major departure should be supported by a more significant justification than a minor one."[603] But the *appellate court* is in a different position. The court of appeals "*may* consider the extent" of a variance as part of the "totality of the circumstances" 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" and *may not* substitute its judgment for that of the district judge.[604]

---

[596] *Id.* at 41.
[597] *Id.* at 46.
[598] *Id.* at 45.
[599] *See id.* at 47-49.
[600] *Id.* at 56, 59-60.
[601] *Id.* at 47.
[602] *Id.* at 49.
[603] *Id.* at 50.
[604] *Id.* at 51 (emphasis added).

"[I]t is not for the Court of Appeals to decide *de novo* whether the justification for a variance is sufficient or the sentence reasonable."[605]

The Commission's proposed rule would cross the line laid down in *Gall* by requiring appellate courts to enforce a rule "direct[ing] sentencing courts to provide greater justification for sentences imposed the further the sentence is from the . . . applicable advisory guidelines sentence."[606] This proposed double directive, from Congress to the courts of appeal to the district courts, is different from the Supreme Court's instructions to sentencing courts in *Gall*. By transforming the latter into a standard of appellate review, the requirement would, contrary to *Gall*'s explicit directions to the courts of appeals, have those courts substitute their judgments for those of sentencing judges. Moreover, the Commission's proposal would make the extent of a variance from the guideline range not just one consideration in the totality of circumstances under a deferential abuse-of-discretion standard, as *Gall* directed, but the primary consideration. The proposal is thus functionally equivalent to the "proportional justifications" approach that *Gall* held to be inconsistent with the abuse-of-discretion (or "unreasonableness") standard that *Booker* required.[607]

The Commission's second proposal for stricter review of non-guideline sentences—a "heightened standard of review for sentences imposed as a result of a 'policy disagreement' with the guidelines"[608]—is also inconsistent with critical aspects of the Court's *Booker* jurisprudence. The Supreme Court has forbidden a de novo standard of review, whether explicit or de facto,[609] and has specifically rejected "a height-

---

[605] *Id.* at 59.

[606] *Commission Testimony*, *supra* note 13, at 56.

[607] Most courts of appeals have adopted the analysis we present here. *See* United States v. Friedman, 658 F.3d 342, 360 (3d Cir. 2011); United States v. Townsend, 618 F.3d 915, 919 (8th Cir. 2010); United States v. Key, 599 F.3d 469, 475-76 (5th Cir. 2010); United States v. Cavera, 550 F.3d 180, 189-90, 193 (2d Cir. 2008) (en banc); United States v. Gardellini, 545 F.3d 1089, 1093-94 & n.4 (D.C. Cir. 2008); United States v. Carty, 520 F.3d 984, 993 (9th Cir. 2008) (en banc); United States v. Martin, 520 F.3d 87, 91-93 (1st Cir. 2008); United States v. Smart, 518 F.3d 800, 806-07 (10th Cir. 2008); United States v. Grossman, 513 F.3d 592, 595-96 (6th Cir. 2008); United States v. Pauley, 511 F.3d 468, 473-74 (4th Cir. 2007).

[608] *Commission Testimony*, *supra* note 13, at 56.

[609] *Gall*, 552 U.S. at 56; United States v. Booker, 543 U.S. 220, 262 (2005).

ened standard of review" for sentences outside the guideline range.[610] Moreover, to avoid a Sixth Amendment violation and to ensure that the guidelines are truly advisory, sentencing judges must be permitted to sentence outside the range based on a policy disagreement, subject to review for reasonableness under the abuse-of-discretion standard.[611] The Commission claims that a "heightened" standard of review would nonetheless be "consistent" with certain dicta in *Kimbrough*.[612] There, the Court dismissed a suggestion that "closer review" might be appropriate for a variance "based solely on the judge's view" that the guideline itself "fails properly to reflect § 3553(a) considerations."[613] The Court rejected that suggestion because the justification offered for it—that the Commission has the capacity to "base its determinations on empirical data and national experience"[614]—did not apply in that case: "The crack cocaine Guidelines . . . present no occasion for elaborative discussion of this matter because those Guidelines do not exemplify the Commission's exercise of its characteristic institutional role."[615] Although the Court did not reach the question of whether "closer review" would always violate the Constitution, Justice Scalia's concurring opinion presented a powerful argument that it would.[616] Moreover, in *Spears*, the Court rejected a court of appeals' later application of

---

[610] *Gall*, 552 U.S. at 49.

[611] *See* Kimbrough v. United States, 552 U.S. 85, 91, 101-02, 110 (2007); Rita v. United States, 551 U.S. 338, 351 (2007); Cunningham v. California, 549 U.S. 270, 278-81, 286-87 & n.12 (2007).

[612] *See Commission Testimony*, *supra* note 13, at 56.

[613] *Kimbrough*, 552 U.S. at 109 (quoting *Rita*, 551 U.S. at 351).

[614] *Id.* (quoting United States v. Pruitt, 502 F.3d 1154, 1171 (10th Cir. 2007)).

[615] *Id.*

[616] Justice Scalia wrote separately to say that he joined the opinion because he did not take the discussion of "closer review" to be "an unannounced abandonment" of the principle "that the district court is free to make its own reasonable application of the § 3553(a) factors, and to reject (after due consideration) the advice of the Guidelines." *Id.* at 112-13 (Scalia, J., concurring). Justice Scalia continued:

> [I]f the Guidelines *must* be followed even where the district court's application of the § 3553(a) factors is entirely reasonable; then the "advisory" Guidelines would, over a large expanse of their application, *entitle* the defendant to a lesser sentence *but for* the presence of certain additional facts found by judge rather than jury. This, as we said in *Booker*, would violate the Sixth Amendment.

Id. at 113-14.

heightened review to a district court's disagreement with the crack guidelines,[617] and in *Pepper*, it ignored a renewed suggestion that it adopt the "closer review" standard rejected in *Kimbrough*'s dicta.[618]

Both the Commission and Judge Sessions also suggest that non-guideline sentences based on "policy disagreements" are an affront to Congress's authority to issue directives to the Commission.[619] This complaint mischaracterizes the Court's decisions.[620] It also mistakenly equates directives to the Commission, which do not bind the courts, with statutes directed to the courts, which do unless they are unconstitutional. In *Kimbrough*, the Court rejected the government's argument that the Commission and the courts were required to apply the Anti-Drug Abuse Act's 100-to-1 powder-to-crack cocaine quantity ratio to all sentences between the statutory minimum and maximum sentences.[621] The Court rejected this interpretation because the statute said "nothing about the appropriate sentences within these brackets."[622] To illustrate its point that the Anti-Drug Abuse Act did not direct the Commission to incorporate the ratio into the guidelines, the Court contrasted that statute with 28 U.S.C. § 994(h), a directive that "specifically required *the Sentencing Commission* to set Guidelines sentences for serious recidivist offenders 'at or near' the statutory maximum."[623] When the Eleventh Circuit later interpreted this directive to the Commission as binding on the courts, the Solicitor General argued, in support of the defendant's petition for certiorari, that the "premise that congressional directives

---

[617] Spears v. United States, 555 U.S. 261, 264 (2009).

[618] *See* Pepper v. United States, 131 S. Ct. 1229, 1254 (2011) (Breyer, J., concurring) (indicating that, unlike the majority, he "would decide the question *Kimbrough* left open"). The Court did not respond to this suggestion.

[619] *See Commission Testimony*, *supra* note 13, at 17; Sessions, *supra* note 12, at 327.

[620] The Court's decisions permit policy-disagreement variances for guidelines that fail to properly reflect § 3553(a) considerations; these decisions do not discuss, and are not limited to, guidelines stemming from congressional directives. *See Kimbrough*, 552 U.S. at 101-02; Rita v. United States, 551 U.S. 338, 351 (2007). While some of the guidelines with which courts have disagreed were largely driven by congressional directives (e.g., the child pornography guideline), others were not (e.g., the crack and illegal reentry guidelines). Still others exceeded a congressional directive (e.g., the career offender guideline).

[621] *Kimbrough*, 552 U.S. at 102-03.

[622] *Id.* at 103.

[623] *Id.* (emphasis added).

to the Sentencing Commission are equally binding on the sentencing courts . . . is incorrect."[624] If it were otherwise, a great many guidelines would be mandatory and thus unconstitutional.[625] The Court granted the petition, vacated the judgment, and remanded for further consideration in light of the Solicitor General's position.[626] The lesson is clear: the Supreme Court has recognized the authority of sentencing judges to vary from guideline ranges based on a "policy disagreement" *not* as a challenge to Congress but as a legal principle necessary to avoid a Sixth Amendment violation.[627]

CONCLUSION

The history of federal sentencing since the SRA has proved that a neutral and rational sentencing system is not possible without the balancing influence of the judiciary. The SRA included several procedural mechanisms intended to achieve both reduced sentencing disparity and increased sentencing fairness in individual cases. Momentously, however, Congress exempted the Commission from judicial review. The honor system did not work. The Commission, with the misguided assistance of the Supreme Court, nullified the departure mechanism intended to allow individualized sentences and constructive evolution of the guidelines.

As a result, the judicial feedback mechanism for which the SRA provided did not function until the post-*Booker* era. As Judge Sessions put it, "In an advisory guidelines system, the Commission's acceptance by the criminal justice community depends upon respect for the exercise of its expertise in sentencing policy."[628] Indeed, for the first time, the frontline actors in sentencing—most importantly, the Article III judges called upon to begin their sentencing deliberations by calculating the guideline range—are informing the Commission of the nature

---

[624] Brief for the United States, *supra* note 518, at 9.

[625] *See id.* at 10-11 & n.1; *see also* Petition for Writ of Certiorari at 19 n.5, Vazquez v. United States, 130 S. Ct. 1135 (2010) (No. 09-5370), 2009 WL 543301 (identifying at least seventy-five "distinct guidelines and policy statements [that] have been promulgated or amended . . . in response to congressional directives").

[626] *Vazquez*, 130 S. Ct. at 1135.

[627] *See supra* notes 199-204, 508-14 and accompanying text.

[628] Sessions, *supra* note 12, at 335.

and extent of problems with the guidelines. The political branches remain an influence on the Commission's work, but they are no longer the only significant influence. The relatively mild countervailing force of judges themselves has encouraged the Commission to perform as the expert body Congress intended.

The sentencing process has also changed for the better, as judges are permitted to consider all relevant facts about the offense and the offender. Allowing judges to consider factors and purposes of sentencing that are not adequately taken into account in the guidelines has avoided thousands of years of unnecessary incarceration under guidelines that the Commission itself had found to be unjustified by any legitimate purpose and to have an adverse racial impact. At the same time, judges have not been unduly lenient. Indeed, they have responded to the increase in their discretionary authority with restraint and moderation. It is hardly surprising, then, that other front-line actors—including federal prosecutors—also support the advisory guidelines system. The Commission has made incremental changes to the guidelines in consideration of the sentencing data and reasons it receives. We expect that the current system will be stable and enduring as the Commission further revises broken or ill-conceived guidelines.[629]

Proposals advanced by Judge Sessions and the Sentencing Commission are not only unnecessary, but would substantially undo the balance that *Booker* has achieved. Judge Sessions and the Commission acknowledge that judges have not been unduly lenient and that the guidelines continue to exert a strong gravitational pull on sentences, as they have since *Booker*. Their claim of increased racial disparity stems from an unreliable study, which has been contradicted and explained by different studies, and the claim of a troubling increase in regional disparity is simply unsupported. At the same time, Judge Sessions and the Commission fail to acknowledge that *Booker* has alleviated proven

[629] If, however, the Commission at some point comes under so much political pressure that it abandons its efforts to fix broken guidelines or even returns to the one-way upward ratchet, the frequency of non-guideline sentencing can be expected to increase, for the fundamental rule of *Booker* and its progeny is that judges are not required to impose guideline sentences that fail to account for relevant sentencing purposes and factors.

forms of unwarranted disparity and that their proposals would revive these problems.

Judge Sessions's proposal to establish a system of mandatory guidelines would abruptly halt judicial feedback and constructive evolution of the guidelines, transfer sentencing power from the judge to the parties, and virtually eliminate appellate review. At the same time, there is no reason to think that his proposal could achieve the legislative compromises he predicts. It would also invite greater variation in sentencing than exists today (under one reading) or require judicial factfinding in a manner that would violate the Sixth Amendment (under another reading). Finally, the Sessions proposal raises serious constitutional issues relating to separation of powers—issues that the pre-*Booker* guidelines did not raise and that neither *Mistretta* nor *Booker* addressed.

The Commission's proposals to establish a highly constraining guidelines regime would similarly interfere with individualized sentencing and constructive evolution of the guidelines. They would also appear to violate the requirements of the Sixth Amendment as laid down in *Booker* and its progeny because, especially taken together, they would give significant weight to the guidelines and in practical effect would entail a presumption of unreasonableness for sentences not in accord with the Commission's policies. In the meantime, the proposals would spawn years of disruptive litigation.

We repeat: *Booker* was the fix.