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Public Hearing Before the
United States Sentencing Commission

"Improving the Advisory Guideline System"
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I thank the Sentencing Commission for inviting me to testify, and I am honored to speak on behalf of the Federal Defenders regarding the Commission's proposals for significant legislative amendments to the current federal sentencing system.

The Commission has said that it intends to propose that Congress enact legislation that would (1) require judges to give the guidelines "substantial weight" or "due regard" at sentencing; (2) require judges to consider all policy statements and official commentary, including those restricting consideration of offender characteristics and grounds for departure and setting forth the standard in excised 18 U.S.C. § 3553(b), before considering 18 U.S.C. § 3553(a) "taken as a whole"; (3) require a presumption of reasonableness for guideline sentences on appeal; (4) require "greater justifications" the further a variance is from the guideline range, to be enforced on appeal; (5) require a "heightened standard of review" for sentences imposed as the result of the district court's decision to reject and vary from a guideline range based on a policy disagreement, or alternatively deem such a variance to be a "conclusion of law and reviewed without deference," or alternatively prohibit such variances; and (6) either amend § 3553(a)(1) to reflect the interpretation of 28 U.S.C. § 994(e) set forth in the Commission's policy statements, or amend or strike § 994(e).

The Defenders oppose these changes. As my colleague Ray Moore has demonstrated, there is no need for legislative change. The great weight of the reliable evidence shows that the current statutory system is working quite well, and the Commission should report that evidence to Congress. Judicial variances under the advisory guidelines system have reduced unwarranted disparities caused by prosecutorial decisions, probation office policy, and the guidelines themselves, and have reduced unwarranted uniformity by permitting judges to account for relevant circumstances not taken into account in the guidelines. Judicial variances have provided the Commission with much-needed and long-overdue feedback regarding problems with the guidelines, which has assisted the Commission in beginning to revise unsound guidelines.

The Commission's proposals also raise serious constitutional issues. The Commission has suggested that its proposals would simply codify what the Supreme Court has already said and what the courts are already doing. If that were so, the proposals would be unnecessary. In fact, the Commission's proposals are contrary to the Supreme Court's decisions, and would result in Sixth Amendment violations. If enacted, the proposals would cause disruptive litigation and needless unfairness pending resolution by the Supreme Court, at the conclusion of which the entire guidelines system could well be struck down. The Commission should not pursue this course.

If the Commission wants a stronger and more effective guidelines system, the way is clear: Continue to fix broken guidelines to better reflect the purposes and factors set forth in 18 U.S.C. § 3553(a), and to educate Congress about the need to reconsider policies that adversely impact the guidelines. By restricting judicial discretion and shielding the guidelines from judicial review, the Commission's proposals would not reduce unwarranted disparities, but would foster them.

I. Proposals to Alter Sentencing in the District Court

A. "Substantial Weight" or "Due Regard"

The Commission proposes that Congress enact a statute requiring district courts to give the guidelines either "substantial weight" or "due regard."[1] Both would be directly contrary to the Supreme Court's holdings. The "Guidelines are only one of the factors to consider when imposing sentence."[2] There is no "legal presumption that the Guidelines sentence should apply."[3] "The Guidelines are not only *not mandatory* on sentencing courts; they are also not to be *presumed* reasonable."[4] Policy statements that disapprove of relevant facts under § 3553(a) may be freely disregarded and are entitled to no weight.[5] Only Justice Alito believes that the guidelines and policy statements can be given "some significant weight."[6]

The Commission appears to believe that "substantial weight" or "due regard" are equivalent to "respectful consideration." If that were so, the Commission's proposal would be superfluous. The Supreme Court has said that the guidelines must be considered as one of a "number of factors" under § 3553(a), and thus, "while the statute still requires a court to give respectful consideration to the Guidelines . . . *Booker* 'permits the court to tailor the sentence in

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[1] Prepared Testimony of U.S. Sentencing Commission [USSC] Chair Judge Patti B. Saris Before the Subcommittee on Crime Terrorism, and Homeland Security Testimony at 58-59 (Oct. 12, 2011) [Commission Testimony]; USSC, Additional Questions for Roundtable 1, Question 5.

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

[3] *Rita v. United States*, 551 U.S. 338, 351 (2007).

[4] *Nelson v. United States*, 555 U.S. 350, 352 (2009) (emphasis in original).

[5] *See Gall*, 552 U.S. at 53-60 (upholding variance based on factors that were relevant under § 3553(a)(1) and (2), yet deemed by policy statements to be never or not ordinarily relevant; making no mention of policy statements and not requiring courts to consider such policy statements); *Pepper v. United States*, 131 S. Ct. 1229, 1242-43, 1249-50 (2010) (policy statement prohibiting consideration of factors that were highly relevant to the purposes of sentencing could not be elevated above such relevant factors; court must give "appropriate weight" to the relevant factors).

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

light of other statutory concerns as well.'"[7] This "respectful consideration" is reflected in the requirement that the guidelines be treated as the "starting point and the initial benchmark."[8] This does not mean, however, that the guidelines are "due" more "weight" or "regard" than other considerations. Indeed, the guidelines are not the only factors that must be given "respectful consideration." It is significant procedural error to fail to consider all of the § 3553(a) purposes and factors,[9] including the "overarching *duty* under § 3553(a) to 'impose a sentence sufficient, but not greater than necessary' to comply with the sentencing purposes set forth in § 3553(a)(2)."[10]

The Commission appears to believe that "due regard" may fare better than "substantial weight." But it would not. "Due" means "belonging or falling to by right," "belonging or incumbent as a duty," "owing by right of circumstances or condition; that ought to be given or rendered; proper to be conferred, granted, or inflicted," "merited, appropriate; proper, right," "such as ought to be, to be observed, or to be done; fitting; proper; rightful."[11] The guidelines are not "due" any more regard than other § 3553(a) factors.

The Commission, however, claims that the guidelines are "due" special "weight" or "regard" because it "has considered the factors listed in section 3553(a)," and because all of its 750-plus amendments, "many of which were promulgated in response to congressional directives, have withstood congressional scrutiny." There is scant evidence that, until recently, the Commission has taken the purposes and factors set forth in § 3553(a) into account in writing the guidelines. Indeed, the Commission's own reports make clear that it often did not do so, when acting pursuant to congressional directives without an empirical basis (*e.g.*, child pornography[12]), when exceeding a congressional directive contrary to empirical evidence (*e.g.*, career offender[13]), and when acting without either a directive or an empirical basis (*e.g.*, drugs[14]). As the Court has recognized, not all guidelines comply with § 3553(a), and not all guidelines are based on empirical data and national experience,[15] as required by the Sentencing Reform Act.[16]

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[7] *Kimbrough v. United States*, 552 U.S. 85, 101 (2007) (citations omitted).

[8] *Gall*, 552 U.S. at 49.

[9] *Id.* at 51.

[10] *Pepper*, 131 S. Ct. at 1242-43 (emphasis supplied); *see also Kimbrough*, 552 U.S. at 101.

[11] Oxford English Dictionary, Second edition, 1989; online version December 2011, http://www.oed.com/view/Entry/58238?rskey=qrbxUW&result=2&isAdvanced=false#eid.

[12] USSC, *The History of the Child Pornography Guidelines* at 17-25 (Oct. 2009).

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

[14] *Id*. at 47-55.

[15] *Gall*, 552 U.S. at 46 n.2; *Kimbrough*, 552 U.S. at 96.

The Commission's theory is not only unjustified as a matter of fact. A presumption that all § 3553(a) purposes and factors are incorporated in the guidelines would "make the guidelines more mandatory than before *Booker*, . . . and thus clearly unconstitutional."[17] As one appellate judge warned even before the Court decided *Rita*, *Gall*, *Kimbrough*, *Nelson*, *Spears* and *Pepper*:

> There are some who contend that the advisory guidelines largely account for all of the relevant sentencing factors. [citing Commission testimony] . . .That being so, the argument goes, there must still be primary reliance on the guidelines in sentencing. This argument is too facile. . . . [T]he guidelines are inescapably generalizations. . . . [T]he guidelines prohibit consideration of certain individualized factors [and] also discourage—except in "exceptional cases"—consideration of other individualized factors . . . . *The guidelines are no longer self-justifying*. . . . [I]f district courts *assume* that the guidelines sentence complies with the sentencing statute, [they] will effectively give the guidelines a controlling weight and a presumptive validity that is difficult to defend under the constitutional ruling in *Booker*. [I]t would be *foolhardy to ignore the constitutional dangers of adopting an approach* to the guidelines post-*Booker that approximates, in a new guise, the mandatory guidelines*.[18]

The Commission would do well to heed this warning now.

B. The Three-Step Process

The Commission has asked Congress to enact into a mandatory law its three-step process, now set forth in an advisory guideline, stating that "most circuits agree on a three-step approach," and with the stated goal of "ensur[ing] that the federal sentencing guidelines are afforded . . . the proper weight to which they are due."[19] We oppose this proposal.

We again urge the Commissioners to look at the language of its three-step process *as written* in § 1B1.1.[20] As written, it is *not* an instruction to calculate the guideline range, and then consider grounds for departure if raised. It states:

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[16] *See* 28 U.S.C. § 991(b)(1)(A), (C), § 991(b)(2), § 994(o), § 995(a)(13)-(16).

[17] Paul J. Hofer, *Beyond the "Heartland": Sentencing Under the Advisory Federal Guidelines*, 49 Duq. L. Rev. 675, 703 (2011).

[18] *United States v. Jimenez-Beltre*, 440 F.3d 514, 526-27, 528 & n.11 (1st Cir. 2006) (Lipez, J., dissenting) (emphasis supplied).

[19] Commission Testimony at 57-58.

[20] *See* Letter from Marjorie Meyers and Miriam Conrad to Hon. Patti B. Saris regarding Public Comment on Notice of Proposed Priorities for Amendment Cycle Ending May 1, 2012 – Proposed Priority # 7 (Review of Departures), at 12-18 (Aug. 30, 2011).

(a) The court shall determine the kinds of sentence and the guideline range as set forth in the guidelines . . .
(b) *The court shall then 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*. . . .
(c) The court shall then consider the applicable factors in 18 U.S.C. § 3553(a) *taken as a whole*.

This is a *recent* change in response to *Booker*.[21] The courts *do not* follow this three-step process because it purports to require deference to policy statements that, taken literally, would reinstate a mandatory guidelines system.

The Supreme Court excised § 3553(b) because that provision, including the "policy statements and official commentary" referenced therein, made the guidelines mandatory. The Court stated: "The availability of departure in specified circumstances does not avoid the constitutional issue."[22] "Because 'departures are not available in every case, and in fact are unavailable in most,' we held that remedying the Sixth Amendment problem required invalidation of § 3553(b)(1)." [23] Despite these clear statements from the Supreme Court, the "three-step" would demand that courts consider a policy statement that purports to require application of invalidated § 3553(b).[24] Other policy statements and commentary that § 1B1.1 says the court "shall" consider before considering the valid sentencing law include the Commission's "heartland" interpretation of § 3553(b) requiring an "exceptional case" or presence to an "exceptional degree"; forbid or discourage judges from imposing non-guideline sentences on a variety of grounds; state that courts are not intended to "substitute their policy judgments for those of Congress and the Sentencing Commission";[25] 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."[26] By their terms, these

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[21] Until § 1B1.1 was amended in 2010, it stated that "the provisions of this manual are to be applied in the following order," and listed, as the last step: "Refer to 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." In 2010, the guideline was amended to state that the court "*shall* then consider" the Manual's restrictions on sentences outside the guideline range, and "*shall*" do so before considering the sentencing law "taken as a whole" (emphasis added).

[22] *United States v. Booker*, 543 U.S. 220 233-35 (2005); *see also id*. at 245, 259.

[23] *Pepper*, 131 S. Ct. at 1245; *see also id*. at 1243-44.

[24] USSG §5K2.0(a), p.s.

[25] USSG § 5K2.0(a)-(d), comment. (nn. 2(A), 3, 4, backg'd.); USSG §§ 5H1.1, 5H1.2, 5H1.3, 5H1.4. 5H1.5, 5H1.6, 5H1.7, 5H1.11, 5H1.12, 5K2.12, 5K2.13, 5K2.19, p.s.

provisions would violate the Sixth Amendment and the Court's policy against one-way upward levers.

The Supreme Court has directed district courts to follow a procedure quite different from the Commission's three-step process. The judge must first calculate the guideline range, and then "giv[e] both parties an opportunity to argue for whatever sentence they deem appropriate."[27] The court may hear arguments for a sentence outside the guideline range in "*either* of two forms," a departure "*within the Guidelines framework*," *or* that "application of the sentencing factors set forth in 18 U.S.C. § 3553(a) warrants a lower [or higher] sentence."[28] The judge "should then consider all of the § 3553(a) factors to determine whether they support the sentence requested by a party. In doing so, he may not presume that Guidelines range is reasonable," and "must make an individualized assessment based on the facts presented."[29]

Since a party may seek a departure *or* a variance, policy statements or commentary relating to departures need not be considered unless a party raises a ground for "departure." The Court has demonstrated through its own analysis that in considering a variance, the question is whether the factors brought to the court's attention are relevant to the purposes of sentencing; the question is *not* whether the Commission permits, prohibits, or discourages the factor.[30] Policy statements and commentary that conflict with factors that are relevant to the purposes of sentencing need not be considered, and, if raised in opposition to a variance, may not be elevated above relevant factors described in § 3553(a) or used to deny a variance.[31] Accordingly, the courts of appeals have held that departure provisions in the Guidelines Manual need not be considered unless a party seeks a departure, and that even when a party does seek a departure, courts may instead consider a variance under § 3553(a).[32] And the courts of appeals have

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[26] USSG Ch.5, Pt. H, intro. comment.

[27] *Gall*, 552 U.S. at 49.

[28] *Rita*, 551 U.S. at 344 (first emphasis added, second emphasis in original); *see also id.* at 351, 357.

[29] *Gall*, 552 U.S. at 49-50; *id*. n.6 ("The first factor is a broad command to consider 'the nature and circumstances of the offense and the history and characteristics of the defendant. The second factor requires the consideration of the general purposes of sentencing," and so on, and "[p]receding this list is a general directive to 'impose a sentence sufficient, but not greater than necessary . . .").

[30] *See Gall*, 552 U.S. at 53-60; *Pepper*, 129 S. Ct. at 1242-43.

[31] *Ibid.*; *Pepper*, 129 S. Ct. at 1249-50.

[32] *See, e.g.*, *United States v. Diosdado-Star*, 630 F.3d 359, 362-66 (4th Cir. 2011) (where presentence report identified grounds for departure but district court did not consider a departure and instead proceeded directly to the § 3553(a) analysis, earlier decision suggesting that courts must "first look to whether a departure is appropriate based on the Guidelines Manual or relevant case law" before considering a variance was overruled by *Rita* and *Gall*); *United States v. Mejia-Huerta*, 480 F.3d 713, 716, 721, 723 (5th Cir. 2007) (where government did not request an upward departure, district court did not err by failing to consider an applicable departure provision before varying upward); *United States v.*

reversed when judges have declined to consider relevant circumstances in deference to policy statements,[33] and have rejected challenges to variances based on policy statements that restrict departures.[34]

Requiring judges to search the Guidelines Manual for provisions that no one has raised would be contrary to the principle that sentencing is an adversary process in which the court acts as a neutral arbiter to resolve arguments raised by the parties.[35]

C. Purported "Tension" Between "28 U.S.C. §§ 991, et seq." and 18 U.S.C. § 3553(a)

The Commission claims that there is a "tension" between its enabling legislation, 28 U.S.C. §§ 991, *et seq.*, and the statute governing the district court's imposition of sentence, 18 U.S.C. § 3553(a). It states in its Additional Question 4 that it intends to seek one of two options: to "make the more restrictive approach found at 28 U.S.C. §§ 991, et seq., applicable to the district courts," or to "make the broader approach found in 18 U.S.C. § 3553(a) applicable to the

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Martinez-Barragan, 545 F.3d 894, 901 (10th Cir. 2008) (when a defendant seeks both departure and variance, "[a]s long as the court takes into account all of the relevant considerations, the order in which it does so is unimportant"); *United States v. McGowan*, 315 Fed. App'x 338, 341-42 (2d Cir. 2009) (where neither party requested a departure, rejecting defendant's argument that court should have *sua sponte* considered potentially available departures: "That some of the facts considered by the court could also have been potential bases for Guidelines departures, and that the court chose to impose a non-Guidelines sentence without determining precisely which departures hypothetically could apply, does not create procedural error."); *United States v. Colon*, 474 F.3d 95 99 & n.8 (3d Cir. 2009) (where government requested upward departure based on criminal history, but court imposed upward variance without following ratcheting requirement for departures, court "need not rely on upward departures to sentence a defendant above the applicable guidelines range," and was "not bound by the ratcheting procedure").

[33] *See United States v. Powell*, 576 F.3d 482, 499 (7th Cir. 2009); *United States v. Simmons*, 568 F.3d 564, 567-70 (5th Cir. 2009); *United States v. Harris*, 567 F.3d 846, 854-55 (7th Cir. 2009); *United States v. Chase*, 560 F.3d 828, 830-32 (8th Cir. 2009); *United States v. Hamilton*, 323 Fed. App'x 27, 31 (2d Cir. 2009).

[34] *See United States v. Howe*, 543 F.3d 128, 137-39 (3d Cir. 2008) (recognizing that departure policy statements do not control variances, and that there is no requirement that a factor be present to an "extraordinary" or "exceptional" degree to support a variance under § 3553(a); affirming district court's consideration of factors discouraged by policy statements); *United States v. Martin*, 520 F.3d 87, 93 (1st Cir. 2008). One court of appeals, however, recently indicated that a variance based on factors disfavored by policy statements may render a variance unreasonable. *United States v. Bistline*, 665 F.3d 758 (6th Cir. 2012), *pet. for reh'g en banc filed*, No. 10-3106 (Feb. 6, 2012).

[35] *See Greenlaw v. United States*, 554 U.S. 237, 243-44 (2008) ("In our adversary system, . . . in the first instance and on appeal, . . . we rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present."); *see also Rita*, 551 U.S. at 344, 351 (describing different arguments the sentencing judge may hear).

Commission's work."[36] That "broader approach" is *already* applicable to the Commission's work. The Commission should not seek legislation to constrain district courts' discretion based on policy views that are inconsistent with its enabling legislation.

The Commission states that it could ask Congress to "make the more restrictive approach found at 28 U.S.C. §§ 991, et seq., applicable to the district courts" as follows:

> 18 U.S.C. § 3553(a)(1) could be amended to provide that when considering the nature and circumstances of the defendant, courts *shall* recognize that the education, vocational skills, employment record, family ties and responsibilities, and community ties of the defendant [1] *are not ordinarily relevant to the determination of whether to impose a sentence outside the applicable guideline range*; and [2] *are generally not appropriate reasons to impose or lengthen a term of imprisonment*.[37]

The first italicized phrase is not found in, and has no basis in, any statute directed to the Commission; it is found *only* in the Commission's policy statements. The second italicized phrase is an accurate statement of 28 U.S.C. § 994(e). The Commission should therefore amend its policy statements to correctly reflect 28 U.S.C. § 994(e).

The pertinent law is found in 28 U.S.C. § 991(b)(1)(B), § 994(d) and § 994(e), 18 U.S.C. § 3553(a), and 18 U.S.C. § 3661, as well as 28 U.S.C. § 994(k), and 18 U.S.C. § 3582(a).[38] To review:

- Congress directed the Commission, in establishing categories of offenders in the guidelines and policy statements regarding the type, length, and conditions of sentences, to consider the relevance of eleven offender characteristics, "among others." 28 U.S.C. § 994(d). Congress considered all eleven offender characteristics listed in § 994(d) to be relevant to all aspects of the sentencing decision, with one exception: the five factors also listed in § 994(e) should be "generally inappropriate" reasons for imposing or lengthening a term of imprisonment.

- 28 U.S.C. § 994(e) states that 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." The Senate Report explained: "The purpose of the subsection is, of

[36] USSC, Additional Questions for Roundtable 1, Question 4 (attached).

[37] *Id*.

[38] Letter from Marjorie Meyers and Miriam Conrad to Hon. Patti B. Saris regarding Public Comment on Notice of Proposed Priorities for Amendment Cycle Ending May 1, 2012 – Proposed Priority # 7 (Review of Departures), at 3-9 (Aug. 30, 2011).

course, to guard against the inappropriate use of incarceration for those defendants who lack education, employment, and stabilizing ties,"[39] but "each of these factors may play other roles in the sentencing decision."[40]

- Section 994(e) is one of three provisions in the SRA reflecting Congress's judgment that prison is not an effective means of rehabilitation and that the disadvantaged should not be incarcerated on the theory that prison might be rehabilitative.[41] Interpreting the other two provisions, 28 U.S.C. § 994(k) and 18 U.S.C. § 3582(a), the Supreme Court explained: "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."[42]

- Congress also recognized that it was not possible to write all relevant factors into general rules, and that some variation was "not only inevitable but desirable."[43] It therefore directed the Commission to "maintain[] sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors *not* taken into account" in the guidelines.[44]

- At the same time, Congress directed judges in § 3553(a)(1) to consider "the nature and circumstances of the offense and the history and characteristics of the defendant." Referring specifically to § 3553(a)(1), the Senate Report stated: "All of these considerations and others the judge believed to be appropriate would . . . help the judge to determine whether there were circumstances or factors that were not taken into account in the sentencing guidelines and that call for the imposition of a sentence outside the applicable guideline."[45] Congress further directed in 18 U.S.C. § 3661: "No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence."

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[39] S. Rep. No. 98-225, at 175 (1983).

[40] *Id.* at 174. The Senate Report gave several examples suggesting how the Commission might recommend that these and other offender characteristics be considered to mitigate sentences. *See id.* at 171-74 & nn.531-32.

[41] *See* 28 U.S.C. § 994(k); 18 U.S.C. § 3582(a); S. Rep. No. 98-225, at 31, 38, 40, 67 n.262, 76-77, 95, 119, 171 & n.531 (1983).

[42] *Tapia v. United States*, 131 S. Ct. 2382, 2390 (2011).

[43] S. Rep. No. 98-225, at 150 (1983).

[44] 28 U.S.C. § 991(b)(1)(B) (emphasis added).

[45] S. Rep. No. 98-225, at 75 (1983).

As shown by this review, there is no "tension" among these statutes. Congress recognized that all of the factors set forth in 28 U.S.C. § 994(d) and (e), and in 18 U.S.C. § 3553(a)(1) and 18 U.S.C. § 3661, are relevant to all aspects of sentencing with one exception: the factors listed in § 994(e) are "generally not appropriate reasons to impose or lengthen a term of imprisonment," as the Commission correctly states in the second phrase set out in Additional Question 4. There is *no* statutory basis for the first phrase set out in Additional Question 4.

Nor is there any "doctrinal tension" between the Supreme Court's decisions in *Pepper v. United States*, 131 S. Ct. 1229 (2011), and *Tapia v. United States*, 131 S. Ct. 2382 (2011), as the Department of Justice recently claimed in a letter to the Commission.[46] These decisions are entirely consistent with each other and are a correct interpretation of the Sentencing Reform Act. They reflect a simple concept. Lack of education, vocational skills, or stabilizing ties may not be used to choose prison over probation or a longer prison term, as the Court found in *Tapia*, interpreting 18 U.S.C. § 3582(a) and 28 U.S.C. § 994(k). But education, vocational skills, employment record, family ties, community ties, or the lack thereof, may be considered to choose probation over imprisonment or a shorter prison term, as the Court held in *Pepper*, interpreting 18 U.S.C. §§ 3553(a) and 3661. The statements in the Department's letter are curious, given that in both *Tapia* and *Pepper*, the Court reached the result urged by the Solicitor General.

Asking Congress to order the courts that they "shall recognize that the education, vocational skills, employment record, family ties and responsibilities, and community ties of the defendant are not ordinarily relevant to the determination of whether to impose a sentence outside the applicable guideline range" would be a needless retrenchment from the Sentencing Reform Act of 1984. It was the Commission's choice *alone* to deem these factors "not ordinarily relevant to the determination of whether to impose a sentence outside the applicable guideline range." The Commission is free to rectify that choice. It can do so by revising its policy statements to accurately reflect the law: (1) deleting the "not ordinarily relevant" language, (2) stating that these factors "are generally not appropriate reasons to impose or lengthen a term of imprisonment," and (3) stating that otherwise they "may be relevant."

The Commission's own research and substantial other research shows that these factors are highly relevant to mitigate sentences. We are disappointed to say the least that the Commission is even considering continuing to seek to prevent judges from considering relevant mitigating factors in the face of the empirical research and the law.

D. Prohibition of Policy Disagreements

In Additional Question 3, the Commission asks: "[U]nder an advisory guidelines system could, Congress prohibit variances based on policy disagreements?" Congress could not prohibit variances based on policy disagreements under an advisory guidelines system. As the Solicitor

[46] *See* Letter from Lanny A. Breuer and Jonathan Wroblewski to Hon. Patti B. Saris, Chair, U.S. Sent'g Comm'n at 3-4 (Sept. 2, 2011).

General has stated, "[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)."[47] As the Supreme Court has consistently made clear, variances based on policy disagreements are a constitutionally required component of the advisory guidelines system.[48] The only way Congress could eliminate policy disagreements would be to make the guidelines mandatory, and to require aggravating facts to be charged in an indictment and proved to a jury beyond a reasonable doubt.

II. Proposals to Alter Appellate Review

In *Booker* and its progeny, the Supreme Court established a single, deferential, abuse-of-discretion standard of review for all sentences imposed under the advisory guidelines system. Seeking greater enforcement of the guidelines on appeal, the Commission proposes that Congress create different standards of review for non-guideline and guideline sentences. For non-guideline sentences, the Commission proposes (1) to require "heightened" review of sentencing decisions based on policy disagreements with the guideline sentence, and (2) to require proportionately "greater" justifications the farther a sentence is from the guideline range. For guideline sentences, the Commission proposes that Congress require that a presumption of substantive reasonableness be applied by all courts of appeals. These proposals are unwise as a matter of policy and raise serious constitutional concerns. They are contrary to the Court's decisions, and they would leave unwarranted disparities and unwarranted uniformity that are inherent in the guidelines hidden and uncorrected. They should not be adopted.

A. The Supreme Court Has Held that One Deferential Abuse-of-Discretion Standard Must Apply to All Sentences.

Supreme Court law is clear: Courts of appeals must afford the same deference to sentencing courts' decisions to impose sentence outside the guideline range as to their decisions to impose sentences inside the guideline range. In *Booker*, the Court excised a statutory standard of review designed to enforce the mandatory guidelines by treating guideline and non-guideline sentences differently.[49] The Court replaced the statute with one deferential standard of review for all sentences: reasonableness with regard to the purposes and factors set forth in § 3553(a).[50] Under this single standard, "courts of appeals must review *all* sentences—whether inside, just

[47] Brief for the United States at *11, *Vazquez v. United States*, No. 09-5370 (Nov. 16, 2009).

[48] *See Cunningham v. California*, 549 U.S. 270, 278-81, 286-87 & n.12 (2007); *Rita*, 551 U.S. at 351, 357; *Kimbrough*, 552 U.S. at 91, 101-02, 110; *Spears v. United States*, 555 U.S. 261 (2009).

[49] *Booker* excised § 3742(e), which (1) required reversal of a sentence imposed as "an incorrect application of the guidelines"; (2) required reversal of a sentence outside the guideline range if "not authorized by § 3553(b)"; and (3) required *de novo* review of sentences outside the guideline range, except with respect to whether a departure was unreasonable in degree. 18 U.S.C. § 3742(e) (as amended by the PROTECT Act).

[50] *Booker*, 543 U.S. at 261; *Rita*, 551 U.S. at 351; *Gall*, 552 U.S. at 46.

outside, or significantly outside the Guidelines range—under a deferential abuse-of-discretion standard."[51] When reviewing sentences outside the guideline range, a court of appeals may not apply a presumption of unreasonableness,[52] may not apply *de novo* review, explicitly or implicitly,[53] and may not apply a "heightened" standard of review, as that would be "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."[54]

The Court has permitted, but not required, courts of appeals to apply a rebuttable presumption of substantive reasonableness to sentences imposed within the guideline range. "[T]he presumption is not binding," does not "reflect strong judicial 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."[55] It is based on the premise that it is possible for a judge, after considering all of the § 3553(a) purposes and factors, to independently arrive at a sentence that coincides with the guideline range; when that "double determination" occurs, it increases the "likelihood that the sentence is a reasonable one."[56]

At the same time, it is "significant procedural error" for a district court, in imposing a sentence within a correctly calculated guideline range, to "treat[] the Guidelines as mandatory, to fail[] to consider the § 3553(a) factors," or to "fail[] to adequately explain the chosen sentence,"[57] including a failure to adequately address non-frivolous arguments for a different sentence.[58] Review of guideline sentences for procedural error thus provides an appellate safeguard against the guidelines being treated as mandatory.[59]

B. If Enacted Into Law, the Commission's Proposals for Stricter Review of Non-Guideline Sentences Would Result in Sixth Amendment Violations.

Although the Commission's proposed standards of review are apparently intended to

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[51] *Gall*, 552 U.S. at 41 (emphasis added).

[52] *Id*. at 51; *Rita*, 551 U.S. at 354-55.

[53] *Booker*, 543 U.S. at 220, 262; *Gall*, 552 U.S. at 56, 60.

[54] *Gall*, 552 U.S. at 49.

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

[56] *See id.* at 347, 350-51; *Gall*, 552 U.S. at 40.

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

[58] *Rita*, 551 U.S. at 357.

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

require greater appellate scrutiny of below-guideline sentences, the most significant Sixth Amendment concerns they raise involve above-guideline sentences, and guideline sentences that have been increased based on judge-found facts. The relevant "statutory maximum," for Sixth Amendment purposes, is the maximum sentence that a judge may impose solely on the basis of facts established by a jury verdict or a plea of guilty.[60] A sentencing system violates the Sixth Amendment if it mandates, or even authorizes, a sentence above that maximum based solely on additional case-specific facts found by a judge.[61]

Sixth Amendment concerns triggered by judge-found facts rarely present an issue under the deferential abuse-of-discretion standard of review currently applicable in the advisory guidelines system. That is because, even without those facts, the judge is free to impose the same sentence based merely on her disagreement with the guideline range. As the Supreme Court has explained, the judge may find that "the Guidelines sentence itself fails properly to reflect § 3553(a) considerations," or that "the case warrants a different sentence regardless."[62] And when she does, "appellate 'reasonableness' review merely asks whether the trial court abused its discretion."[63]

The Commission's proposals would significantly alter these circumstances. A sentencing judge's disagreement with the guidelines would no longer be afforded deference. Instead, under the Commission's proposal for *de novo* review of policy disagreements,[64] a court of appeals would be required to substitute its own judgment for that of the district court. Each time it reversed a policy disagreement with the guideline sentence, in that case (and in all similar cases to follow), the district judge would have to base any above-guideline sentence on fact findings individual to the defendant's case. The Commission's proposed requirement that courts of appeals demand "greater justifications" the further the sentence varies from the guideline range would exacerbate this constitutional infirmity. The greater the variance, the more difficult it would be to demonstrate on appeal that the sentence would be reasonable if the judge had relied on nothing but facts found by the jury. By reducing or eliminating the judge's discretion to impose a higher sentence based on anything other than case-specific fact findings, the Commission's proposals would make such findings necessary to authorize the sentence imposed.

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[60] *See Booker*, 543 U.S. at 227, 232, 235, 244; *Blakely v. Washington*, 542 U.S. 296, 299-300, 303-04 (2004); *Apprendi v. New* Jersey, 530 U.S. 466, 490 (2000).

[61] *See Blakely*, 542 U.S. at 305 n.8; *Cunningham*, 549 U.S. at 274-75.

[62] *Rita*, 551 U.S. at 351.

[63] *Id*.

[64] There are only two standards of review for discretionary determinations involving mixed questions of law and fact such as the determination of the appropriate sentence: abuse-of-discretion and *de novo* review. *See* Harry T. Edwards & Linda A. Elliott, Federal Courts — Standards of Review: Appellate Court Review of District Court Decisions and Agency Actions, ch.1, pts. B, E (2007). Thus, I refer to the Commission's proposal for "heightened" review of policy disagreements as *de novo* review. And the Supreme Court has described a standard of review calling for proportionately "greater justification" for greater variances as *de novo* review. *See Gall*, 552 U.S. at 59-60.

If, as is typical, the necessary facts were not found by the jury, the sentence would violate the Sixth Amendment.

For example, suppose a judge varied upward in a first-offense involuntary manslaughter case involving reckless driving, from a guideline maximum of 51 months to the statutory maximum of 96 months, based on its policy disagreement with the guideline.[65] A court of appeals, exercising *de novo* review, could make its own judgment that the involuntary manslaughter guideline was sufficient to serve the purposes of sentencing. If so, the only way the judge could impose the same sentence (or any sentence above the guideline range) on remand would be to find specific facts about the offense or the defendant. Moreover, since the court of appeals' ruling would be circuit law, judges in that circuit would be authorized to impose above-guideline sentences in future similar cases only on case-specific facts. And, depending on the extent of the variance, the court's fact findings would have to be sufficiently elaborate to withstand appellate scrutiny. Such sentences would violate the Sixth Amendment.[66]

Sixth Amendment violations would also arise when judicial fact-finding supported an upward guideline adjustment (*e.g.*, for multiple manslaughter victims).[67] If the same sentence could not be imposed based on a policy disagreement with the guideline, then absent the fact finding that increased the guideline range, the higher guideline sentence would not be authorized.

It is no stretch to say that the Supreme Court would find such a system unconstitutional. It already has. In *Cunningham v. California*, the Court invalidated a three-tiered state sentencing system that required the judge to sentence the defendant to the middle-tier sentence unless he found aggravating "facts" about the offense or the offender.[68] The system violated the Sixth Amendment because the judge was authorized to impose a sentence above the middle tier based only on such case-specific facts, and was not permitted to impose a higher sentence based on a

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[65] Courts vary upward from the involuntary manslaughter guideline more often than any other guideline. USSC, 2010 Sourcebook of Federal Sentencing Statistics, tbl. 27A.

[66] *See Kimbrough*, 552 U.S. at 113-14 (Scalia, J., concurring) ("[T]he '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."); *Rita*, 552 U.S. at 352 ("The Sixth Amendment question . . . is whether the law *forbids* a judge to increase a defendant's sentence *unless* the judge finds facts that the jury did not find."); *id*. at 353 (The Sixth Amendment is not violated 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."); *cf. Blakely*, 542 U.S. at 304 ("Had the judge imposed the 90-month sentence [above the standard range] solely on the basis of the plea, he would have been reversed.").

[67] *See* USSG § 2A1.4(b)(1) (requiring special multiple-count increase for involuntary manslaughter of more than one person, even if the defendant is convicted of only one offense).

[68] 549 U.S. at 274.

"policy judgment" in light of the "general objectives of sentencing."[69] The Court found that the system violated the Sixth Amendment even though the state appellate courts, in reviewing the sentencing court's findings, employed a "reasonableness" standard of review.[70]

Of course, because judges far more often find that particular guidelines recommend punishment that is greater than necessary to satisfy § 3553(a)'s purposes, courts of appeals would most often reverse those decisions. This would raise the question whether judges were also precluded from finding that the punishment recommended by those guidelines was *less* than sufficient.[71] If so, a great many sentences would violate the Sixth Amendment. If not, appellate review would function as a one-way upward ratchet, creating the unfairness, unwarranted disparity, and administrative difficulties the Supreme Court found to be untenable.[72]

C. Contrary to the Commission's View, Neither Supreme Court Precedent Nor Sound Policy Support the Standards of Review It Proposes for Non-Guideline Sentences.

1. *Gall* and Greater Justifications for Variances

The Commission proposes that Congress "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.[73] It states that such legislation would ensure "transparency" and that "review remains robust."[74] But the Commission provides no evidence that such a revision is necessary. The reasons for a sentence outside the guideline range must

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[69] 549 U.S. at 278-81, 286-87 & n.12; *see also id*. at 300, 304-05 & n.6, 307-08 (Alito, J., dissenting) (arguing that the California system, like the federal system under § 3553(a), permitted courts to sentence outside the specified term based on "policy considerations" such as the purposes of sentencing).

[70] 549 U.S. at 291-93.

[71] *See* 18 U.S.C. § 3553(a) (sentence must be sufficient, but not greater than necessary, to achieve the purposes of sentencing).

[72] *See Booker*, 543 U.S. at 266 (rejecting as incompatible with congressional intent a "'one way lever[]'" that "would impose mandatory Guidelines-type limits upon a judge's ability to *reduce* sentences, but . . . would not impose those limits upon a judge's ability to *increase* sentences"); *see also Pepper*, 131 S. Ct. at 1244 ("we rejected that two-track proposal"); *Dillon v. United States*, 130 S. Ct. 2683, 2693 (2010) ("The incomplete remedy that we rejected in *Booker* would have required courts to treat the Guidelines differently in similar proceedings, leading to unfair results and considerable administrative challenges."); *Rita*, 551 U.S. at 373 n.2 (Scalia, J., concurring) ("reasonableness review should not function as a one-way ratchet").

[73] Commission Testimony at 56.

[74] *Id.*

already be stated in open court and with "specificity.[75] In fact, judges give greater attention to the reasons for *every* sentence than they did when the guidelines were mandatory, because the reasons entail much more than a guideline calculation. Judges are now required to do what Congress originally intended: "The intent of [section 3553](a)(2) is to recognize the four purposes that sentencing in general is designed to achieve, and to require that the judge consider what impact, if any, each particular purpose should have on the sentence in each case."[76] "[T]he sentencing judge has an obligation to consider all the relevant factors in a case and to impose a sentence outside the guidelines in an appropriate case."[77] Judges are required to explain all sentences, inside or outside the guideline range, in light of all of the purposes and factors set forth in § 3553(a) and the arguments made by the parties. Failure to do so adequately is significant procedural error, and the courts of appeals readily reverse on that basis.[78]

Rather than encourage "greater justification," the heightened scrutiny the Commission proposes would in many cases discourage judges from varying (upward or downward) in appropriate cases. Congress has never gone that far. Even the excised PROTECT Act standard required "due deference" when deciding whether "the sentence departs to an unreasonable degree from the applicable guideline range, having regard for the factors to be considered in imposing a sentence, as set forth in section 3553(a)."[79] The Commission seeks a standard that would go further in enforcing the guideline range on appeal.

In proposing this standard, the Commission relies on the Supreme Court's decision in *Gall*. That reliance is misplaced. In *Gall*, the Court invalidated an appellate rule, adopted by several circuits after *Booker*, under which courts of appeals measured the extent of variance in percentages, purported to assign percentages to justifications, and required an "extraordinary" justification if they found the percentage to be "substantial" or "extraordinary."[80] The Court held that "requiring 'proportional' justifications for departures from the Guidelines range is not consistent with our remedial opinion in [*Booker*]."[81] It emphasized 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."[82] The Court found that the

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[75] 18 U.S.C. § 3553(c)(2).

[76] S. Rep. No. 98-225, at 77 (1983).

[77] *Id*. at 52.

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

[79] 18 U.S.C. § 3742(e) (excised).

[80] *Gall*, 552 U.S. at 47-49.

[81] *Id*. at 46.

[82] *Id*. at 41.

proportional justifications standard amounted to *de novo* review,[83] and came "too close to creating an impermissible presumption of unreasonableness for sentences outside the Guidelines range."[84] 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."[85]

In providing guidance to the district court, the 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"; it followed "that a major departure should be supported by a more significant justification than a minor one."[86] But this guidance to the district court had no legal effect on the standard of review required to be employed by the appellate court. The court of appeals (1) must apply a deferential abuse-of-discretion standard of review to the district court's sentencing decision, whether inside, just outside, or significantly outside the guideline range; (2) may not substitute its judgment for that of the district court regarding the extent of a variance; and (3) may not enforce the guidelines on appeal. The court of appeals "may consider the extent of the deviation" as part of "the totality of the circumstances," but it "may not apply a presumption of unreasonableness," and it "must give due deference to the district court's decision that the § 3553(a) factors, on a whole, justify the extent of the variance.[87] The fact that the appellate court might reasonably have concluded that a different sentence was appropriate is insufficient to justify reversal of the district court."[88] "[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."[89]

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[83] *Id*. at 56, 60.

[84] *Id*. at 41, 47.

[85] *Id*. at 49.

[86] *Id*. at 50. The Court's rationale for why the "district court judge must give serious consideration to the extent of any departure . . . and must explain his conclusion that an unusually lenient or harsh sentence is appropriate in a particular case" was that, "even though the Guidelines are advisory rather than mandatory, they are . . . the product of careful study," *Gall*, 552 U.S. at 46. This statement was immediately followed by the caveat that "not all of the Guidelines are tied to this empirical evidence." *Gall*, 552 U.S. at 46 & n.2; *see also Kimbrough*, 552 U.S. at 96 ("The Commission did not use this empirical approach in developing the Guidelines for drug trafficking offenses."). Accordingly, to accurately reflect the Court's decisions, any requirement to give "greater justifications" the further from the guideline range could not apply when the district court finds that the guideline in question is not the product of careful study of empirical evidence.

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

[88] *Id*.

[89] *Id*. at 59.

Today, courts of appeals understand the division of authority made clear by *Gall*; they apply deferential abuse-of-discretion review to the *district court's* determination that the extent of the variance is justified by the purposes and factors set forth in § 3553(a), and in doing so, they do not treat the guideline range as the definitive benchmark.[90] A statute 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" would replace the discretion of the district court with that of the court of appeals, and would make the guideline range not just one consideration in the "totality of circumstances" under a deferential abuse-of-discretion standard, but the primary consideration.

The Commission claims that it seeks this change in order to improve the feedback loop between sentencing courts and the Commission. This reason is unconvincing. Under the law already in place, judges are required to explain all sentences, inside or outside the guideline range, in light of all of the purposes and factors set forth in § 3553(a) and the arguments made by the parties; failure to adequately explain or to adequately address the arguments of the parties is significant procedural error, and the courts of appeals do not hesitate to reverse on that basis.[91]

If the Commission wishes to receive greater feedback, it should revise the statement of reasons form to match law and practice.[92] Although the current form was revised after *Booker*, it is designed as if the departure framework were still the law. It begins with a multitude of check boxes corresponding to "departures authorized by the advisory sentencing guidelines." It then provides one check box for each broad paragraph of § 3553(a) and a small space for "*facts* justifying a sentence *outside the advisory system.*" By failing to provide an appropriate way or adequate space in which to identify and explain grounds for variances, the revised statement of reasons form "has discouraged rather than captured specific feedback about problems with the guidelines."[93] The Commission should revise the form to reflect the reasons judges actually give under current law. The Commission could, for example, list the twenty-five most common reasons for variances under § 3553(a), and provide a space for "other" reasons, with enough room to explain. The form should also have a space *inviting* explanation when the judge finds the guideline itself fails to advance § 3553(a)'s objectives. That would ensure greater feedback

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[90] *See, e.g.*, *United States v. Friedman*, 658 F.3d 342 (3d Cir. 2011); *United States v. Townsend*, 618 F.3d 915, 918-19 (8th Cir. 2010); *United States v. Key*, 599 F.3d 469 (5th Cir. 2010); *United States v. Feemster*, 572 F.3d 455, 464 (8th Cir. 2009); *United States v. Cavera*, 550 F.3d 180, 189-90, 193 (2d Cir. 2008) (*en banc*); *United States v. Gardellini*, 545 F.3d 1089, 1093 & n.4 (D.C. Cir. 2008); *United States v. Carty*, 520 F.3d 984, 991-93 (9th Cir. 2008); *United States v. Martin*, 520 F.3d 87, 91-93 (1st Cir. 2008); ; *United States v. Smart*, 518 F.3d 800, 805-10 (10th Cir. 2008); *United States v. Grossman*, 513 F.3d 592, 595-96 (6th Cir. 2008); *United States v. Pauley*, 511 F.3d 468, 473-474 (4th Cir. 2007).

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

[92] 28 U.S.C. § 994(w)(1) (authorizing the Commission to "approve[] and require[]" the format of sentencing information it receives, including the statement of reasons).

[93] Paul J. Hofer, *Beyond the "Heartland": Sentencing Under the Advisory Federal Guidelines*, 49 Duq. L. Rev. 675, 700 (2011).

to the Commission, without enacting a constitutionally vulnerable statutory revision.

2. *Kimbrough* and Policy Disagreements

Under Supreme Court law, the judge may impose a sentence within, above or below the guideline range for reasons other than case-specific facts. The judge may find that "the Guidelines sentence itself fails properly to reflect § 3553(a) considerations," or that "the case warrants a different sentence regardless."[94] She may impose a sentence above or below the guideline range "based solely on policy considerations, including disagreements with the Guidelines."[95] "The only fact *necessary* to justify such a variance is the sentencing court's disagreement with the guidelines," and a "categorical disagreement with and variance from the Guideline is not suspect" on appeal.[96] Since the guidelines "are advisory only," it is "not . . . an abuse of discretion for a district court to conclude . . . that [a guideline] yields a sentence 'greater than necessary' [or less than sufficient] to achieve § 3553(a)'s purposes, even in a mine-run case."[97] As noted above, it is this ability to disagree with the guidelines in any case – whether the court does so or not – that protects the system from unconstitutionality.

The Commission claims that subjecting policy disagreements to *de novo* review would be consistent with *dicta* in the Supreme Court's decision in *Kimbrough*. This is not correct. There, the Court considered, but rejected, a suggestion that "closer review may be in order" for a variance "based solely on the judge's view" that the guideline itself fails properly to reflect § 3553(a) considerations.[98] In rejecting that suggestion, the Court did not reach the question whether it would be constitutional, much less hold that it would be constitutional. It rejected the suggestion because the justification offered for it — that the Commission has the capacity to "base its determinations on empirical data and national experience"[99] — did not apply to the guideline before it. "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. [It] did not take account of 'empirical data and national experience.'"[100]

Since *Kimbrough*, the Court rejected the Eighth Circuit's application of "less respect" to

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[94] *Rita*, 551 U.S. at 351.

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

[96] *Spears*, 555 U.S. at 264 (citation omitted) (emphasis added).

[97] *Kimbrough*, 552 U.S. at 91, 109-10.

[98] *Id*. at 109.

[99] *Id*.

[100] *Id*.

a disagreement with the crack guidelines in *Spears*,[101] and it ignored a renewed suggestion to adopt a "closer review" standard in *Pepper*.[102] What the Court said in *Spears* about the Eighth Circuit's approach applies equally to the Commission's proposal: It would lead the courts either to "treat the Guidelines . . . as mandatory," which would "contradict[] [the] holding in *Kimbrough*," or to "continue to vary, masking their categorical policy disagreements as 'individualized determinations,'" which would be "institutionalized subterfuge. . . . Neither is an acceptable sentencing practice."[103] In light of the Supreme Court's repeated re-affirmance of a unitary, deferential abuse-of-discretion standard of review, its firm rejection of heightened review of policy disagreements in *Spears*, and the important role that policy disagreements play in ensuring that the advisory guidelines are constitutional, it would be foolhardy for Congress to enact the Commission's proposal.

In answer to one of the Commission's Additional Questions, a policy disagreement is not a "conclusion of law" that may be reviewed "without deference."[104] When a district court varies from a guideline range based on a policy disagreement, it makes two discretionary determinations: it (1) concludes that the guideline yields a sentence that is greater than necessary, or insufficient, to achieve § 3553(a)'s purposes, and (2) chooses a sentence that in its judgment best serves the purposes of sentencing.[105] Courts often find facts *about* the guideline in making the first determination,[106] and they usually (but are not *required* to) rely on case-specific

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[101] *Spears*, 555 U.S. at 264 ("*Kimbrough* thus holds that with respect to the crack cocaine Guidelines, a categorical disagreement with and variance from the [crack] Guidelines is not suspect.").

[102] *See Pepper*, 131 S. Ct. at 1254 (Breyer, J., concurring). The Court did not respond to this suggestion.

[103] *Spears*, 555 U.S. at 266.

[104] USSC, Additional Questions for Roundtable 1, Question 3.

[105] *See Spears*, 555 U.S. at 264-65 (government's position that a district court "may vary from the 100:1 ratio if it does so based on the individualized circumstances of a particular case understated the extent of district courts' sentencing discretion") (internal punctuation omitted).

[106] *See, e.g.*, *Kimbrough*, 552 U.S. at 94-100 (reviewing research showing that assumptions regarding the relative harmfulness of crack and powder and the prevalence of harmful conduct associated with their use were not supported; that the crack/powder disparity led to retail crack dealers getting longer sentences than wholesale distributors of powder cocaine; that the disparity fostered disrespect for law; and that it promoted unwarranted racial disparity); *United States v. Steward*, 339 Fed. App'x 650, 653-54 (7th Cir. 2009) (district court erred in passing over in silence defendant's non-frivolous argument based on Commission research showing that recidivism rates for defendants who qualify as career offenders based on prior drug convictions are much lower than others in Criminal History Category VI, and that the guideline does not deter drug crime because retail drug traffickers are easily replaced); *United States v. Grober*, 624 F.3d 592 (3d Cir. 2010) (upholding district court's disagreement with child pornography guideline which was based on extensive hearings, including expert witness testimony, and an article summarizing a variety of evidence about the guideline, including Commission reports); *United States v. McCarthy*, slip op., 2011 WL 1991146 (S.D.N.Y. May 19, 2011) (concluding that guidelines recommend punishment for MDMA offenses that is greater than justified, and that MDMA should not be punished

facts in making the second determination. In other words, a variance based on a policy disagreement is a discretionary decision involving a mixed question of law and fact. Accordingly, the Supreme Court has already held that such variances must be reviewed under the deferential abuse-of-discretion standard: "It would not be an abuse of discretion for a district court to conclude when sentencing a particular defendant that [the guideline] yields a sentence 'greater than necessary' to achieve § 3553(a)'s purposes, even in a mine-run case."[107]

D. A Mandatory Presumption of Reasonableness is Unwarranted and May Operate Unconstitutionally.

The Commission proposes to require courts of appeals to apply a presumption of reasonableness to guideline sentences — to "promote more consistent outcomes" and to "assist in ensuring" that the guidelines are "given substantial weight."[108] The latter objective, as we have explained, is not a legitimate one in an advisory guidelines system. As for the former objective, a presumption of substantive reasonableness would not advance it. Guideline sentences are almost invariably affirmed on appeal as substantively reasonable, with or without such a presumption being applied; only four guideline sentences have been reversed as substantively unreasonable since *Gall* was decided.[109]

The only thing that would ensure that more guideline sentences are upheld on appeal would be to require a presumption of substantive reasonableness even when there was procedural error, or to eliminate review for procedural error. Procedural errors are considered before the substantive reasonableness of a sentence is considered; they include "treating the Guidelines as mandatory, failing to consider the § 3553(a) factors," and "failing to adequately explain the chosen sentence."[110] Any provision that would require, invite, or allow a guideline sentence to be presumed reasonable when the district court treated the Guidelines as mandatory or failed to consider the § 3553(a) factors would violate *Gall*, and it would violate the Sixth Amendment in any case in which the guideline range was calculated based on judicial factfinding. If a guideline sentence was required to be presumed reasonable even if the district court "fail[ed] to adequately explain the chosen sentence,"[111] including a failure to address non-frivolous arguments for a

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more severely than powder cocaine, based on testimony of four expert witnesses, Commission reports, and data concerning health risks).

[107] *Kimbrough*, 552 U.S. at 110.

[108] Commission Testimony at 55-56.

[109] *See United States v. Dorvee*, 616 F.3d 174 (2d Cir. 2010); *United States v. Amezcua-Vasquez*, 567 F.3d 1050 (9th Cir. 2009); *United States v. Paul*, 561 F.3d 970 (9th Cir. 2009); *United States v. Wright*, 426 Fed. App'x 412 (6th Cir. 2011).

[110] 552 U.S. at 51.

[111] *Id.*

different sentence,[112] it would allow mandatory application of the guidelines to go unexamined and uncorrected. Guideline sentences are frequently reversed for failure to adequately explain, or failure to address the parties' non-frivolous arguments for a different sentence. This prevents error, including constitutional error, ensures that the parties' arguments are fully considered, promotes fairness, and results in a different sentence on remand more than half the time.[113]

As with the Commission's other appellate review proposals, a presumption of substantive reasonableness for guideline sentences may well operate unconstitutionally. As noted above, the non-binding presumption of substantive reasonableness that the Supreme Court has permitted rests on deference to the sentencing judge, not the guidelines. It is subject to limitations that would be quite 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 appellate courts to grant greater factfinding leeway to an expert agency than to a district judge," and has no "independent legal effect."[114] Without those limitations, a presumption of reasonableness for guideline sentences could function as an impermissible presumption of *unreasonableness* for non-guideline sentences.[115] And when combined with the Commission's proposals that non-guideline sentences be reviewed more strictly, the proposed presumption could lead to sentences being upheld on appeal only on the basis of judge-found facts supporting a guideline enhancement. Such sentences would violate the Sixth Amendment.

Finally, the Commission has received valuable feedback from two courts of appeals in circuits that do not have a presumption of reasonableness, reversing guideline sentences as substantively unreasonable. It has already revised the illegal re-entry guideline based on *United States v. Amezcua-Vasquez*, 567 F.3d 1050 (9th Cir. 2009), and will undoubtedly include *United States v. Dorvee*, 616 F.3d 174 (2d Cir. 2010), in its report on child pornography. Congress expected that the "case law that is developed from . . . appeals" would be "used" by the Commission "to further refine the guidelines."[116] Echoing Congress, the Supreme Court encouraged the Commission to "modify its Guidelines in light of what it learns" from "appellate court decision-making."[117] If the Commission wishes to obtain more feedback from appellate courts, it should be seeking to eliminate, not expand, a presumption of reasonableness for guideline sentences. It should be calling for more "robust" review of guideline sentences, not less.

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[112] *Rita*, 551 U.S. at 357.

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

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

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

[116] S. Rep. No. 98-225, at 52 (1983).

[117] *Booker*, 543 U.S. at 263.

CONCLUSION

The Commission's proposed legislative changes are unwise, unnecessary and unconstitutional. Instead of seeking legislative change, the Commission should expand and accelerate its review and revision of guidelines that recommend punishment which is greater than necessary to serve the purposes of sentencing and guidelines that promote unwarranted disparities. Among those are the following, the needed changes to which we have detailed in previous testimony and public comment:

- § 1B1.3 – Relevant Conduct[118]
- § 1B1.8 – Use Immunity[119]
- § 2B1.1 – Fraud[120]
- § 2D1.1 – Drugs[121]

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[118] *See* Statement of Alan Dubois & Nicole Kaplan Before the U.S. Sent'g Comm'n, Atlanta, Ga., at 26 (Feb. 10, 2009); Statement of Alexander Bunin Before the U.S. Sent'g Comm'n, New York, N.Y., at 12-13 (July 9, 2009); Joint Statement of Thomas W. Hillier II & Davina Chen Before the U.S. Sent'g Comm'n, Stanford, Calif., at 24-26 (May 27, 2009); Statement of Jacqueline A. Johnson Before the U.S. Sent'g Comm'n, Chicago, Ill., at 21-25 (Sept. 10, 2009); Statement of Jason D. Hawkins Before the U.S. Sentencing Comm'n, Austin, Tex., at 4-6 (Nov. 19, 2009); *see also* Letter from Marjorie Meyers and Miriam Conrad to Hon. Patti Saris, Chair, U.S. Sent'g Comm'n Re: Public Comment on USSC Notice of Proposed Priorities for Amendment Cycle Ending May 1, 2012, at 29-33 (Aug. 26, 2011) ["Defender Priorities Letter 2011-2012"].

[119] *See* Statement of Alan Dubois & Nicole Kaplan Before the U.S. Sent'g Comm'n, Atlanta, Ga., at 33 (Feb. 10, 2009); Statement of Alexander Bunin Before the U.S. Sent'g Comm'n, New York, N.Y., at 18 (July 9, 2009); Statement of Jacqueline A. Johnson Before the U.S. Sent'g Comm'n, Chicago, Ill., at 28-29 (Sept. 10, 2009); Statement of Nicholas T. Drees Before the U.S. Sent'g Comm'n, Denver, Colo., at 9-10 (Oct. 21, 2009); Statement of Henry J. Bemporad Before the U.S. Sent'g Comm'n, Phoenix, Ariz., at 8-9 (2010).

[120] *See* Statement of Alan Dubois & Nicole Kaplan Before the U.S. Sent'g Comm'n, Atlanta, Ga., at 30 (Feb. 10, 2009); Statement of Alexander Bunin Before the U.S. Sent'g Comm'n, New York, N.Y., at 17 (July 9, 2009); Statement of Jason D. Hawkins Before the U.S. Sentencing Comm'n, Austin, Tex., at 20-21 (Nov. 19, 2009); *see also* Defender Priorities Letter 2011-2012, at 1-3.

[121] *See* Statement of Alan Dubois & Nicole Kaplan Before the U.S. Sent'g Comm'n, Atlanta, Ga., at 26 (Feb. 10, 2009); Joint Statement of Thomas W. Hillier II & Davina Chen Before the U.S. Sent'g Comm'n, Stanford, Calif., at 15-16, 20-24 (May 27, 2009); Statement of Alexander Bunin Before the U.S. Sent'g Comm'n, New York, N.Y., at 12 (July 9, 2009); Statement of Jacqueline A. Johnson Before the U.S. Sent'g Comm'n, Chicago, Ill., at 16-17 (Sept. 10, 2009); Statement of Carol A. Brook Before the U.S. Sent'g Comm'n, Chicago, Ill. at 6 (Sept. 10, 2009); Statement of Nicholas T. Drees Before the U.S. Sent'g Comm'n, Denver, Colo., at 21-25 (Oct. 21, 2009); Statement of Julia O'Connell Before the U.S. Sent'g Comm'n, Austin, Tex., at 14-15 (Nov. 19, 2009); Statement of Henry J. Bemporad Before the U.S. Sent'g Comm'n, Phoenix, Ariz., at 9-14 (Jan. 21, 2010); Statement of Heather E. Williams Before the

- § 2G2.2 – Child Pornography[122]
- § 2L1.2 – Illegal Reentry[123]
- § 2K2.1 – Firearms[124]
- § 4B1.2 – Career Offender[125]
- § 5C1.2 –Safety Valve.[126]

U.S. Sent'g Comm'n, Phoenix, Ariz., at 48-52 (Jan. 21, 2010); *see also* Written Statement of James Skuthan Before the U.S. Sent'g Comm'n Re: Proposed Amendments: Drugs (Mar. 17, 2011); Defender Priorities Letter 2011-2012, at 3-6.

[122] *See* Statement of Alan Dubois & Nicole Kaplan Before the U.S. Sent'g Comm'n, Atlanta, Ga., at 28-29 (Feb. 10, 2009); Joint Statement of Thomas W. Hillier II & Davina Chen Before the U.S. Sent'g Comm'n, Stanford, Calif., at 30-31 (May 27, 2009); Statement of Alexander Bunin Before the U.S. Sent'g Comm'n, New York, N.Y., at 16 (July 9, 2009); Statement of Jacqueline A. Johnson Before the U.S. Sent'g Comm'n, Chicago, Ill., at 27 (Sept. 10, 2009); Statement of Nicholas T. Drees Before the U.S. Sent'g Comm'n, Denver, Colo., at 25-26 (Oct. 21, 2009) Statement of Julia O'Connell Before the U.S. Sent'g Comm'n, Austin, Tex., at 15 (Nov. 19, 2009); Statement of Jason D. Hawkins Before the U.S. Sentencing Comm'n, Austin, Tex., at 15-17 (Nov. 19, 2009); *see also* Defender Priorities Letter 2011-2012, at 6-11.

[123] *See* Statement of Alan Dubois & Nicole Kaplan Before the U.S. Sent'g Comm'n, Atlanta, Ga., at 27 (Feb. 10, 2009); Joint Statement of Thomas W. Hillier II & Davina Chen Before the U.S. Sent'g Comm'n, Stanford, Calif., at 27-28 (May 27, 2009); Statement of Alexander Bunin Before the U.S. Sent'g Comm'n, New York, N.Y., at 15-16 (July 9, 2009); Statement of Jacqueline A. Johnson Before the U.S. Sent'g Comm'n, Chicago, Ill., at 21-25 (Sept. 10, 2009); Statement of Carol A. Brook Before the U.S. Sent'g Comm'n, Chicago, Ill. at 7 (Sept. 10, 2009); Statement of Raymond Moore Before the U.S. Sent'g Comm'n, Denver, Colo., at 29-32 (Oct. 21, 2009); Statement of Jason D. Hawkins Before the U.S. Sentencing Comm'n, Austin, Tex., at 9-11 (Nov. 19, 2009).

[124] *See* Statement of Jacqueline A. Johnson Before the U.S. Sent'g Comm'n, Chicago, Ill., at 19-21 (Sept. 10, 2009).

[125] *See* Statement of Alan Dubois & Nicole Kaplan Before the U.S. Sent'g Comm'n, Atlanta, Ga., at 26 (Feb. 10, 2009); Joint Statement of Thomas W. Hillier II & Davina Chen Before the U.S. Sent'g Comm'n, Stanford, Calif., at 29-30 (May 27, 2009); Statement of Alexander Bunin Before the U.S. Sent'g Comm'n, New York, N.Y., at 14 (July 9, 2009); Statement of Jacqueline A. Johnson Before the U.S. Sent'g Comm'n, Chicago, Ill., at 17-18 (Sept. 10, 2009); Statement of Carol A. Brook Before the U.S. Sent'g Comm'n, Chicago, Ill. at 5-6 (Sept. 10, 2009); Statement of Julia O'Connell Before the U.S. Sent'g Comm'n, Austin, Tex., at 18-19 (Nov. 19, 2009).

[126] *See* Joint Statement of Thomas W. Hillier II & Davina Chen Before the U.S. Sent'g Comm'n, Stanford, Calif., at 30 (May 27, 2009); Statement of Michael Nachmanoff Before the U.S. Sent'g Comm'n, New York, N.Y., at 7 (July 9, 2009); Statement of Nicholas T. Drees Before the U.S. Sent'g

Revising these guidelines would do far more to promote fairness in sentencing, to eliminate unwarranted disparities, and to ensure a strong and effective advisory guidelines system, than the Commission's legislative proposals.

Comm'n, Denver, Colo., at 7-8 (Oct. 21, 2009); *see also* Written Statement of James Skuthan Before the U.S. Sent'g Comm'n Re: Proposed Amendments: Drugs, at 19-22 (Mar. 17, 2011); Defender Priorities Letter 2011-2012, at 19-22.