

**Statement of Michael Nachmanoff
Federal Public Defender for the Eastern District of Virginia**

**Public Hearing Before the
United States Sentencing Commission**

**“Restoring Mandatory Guidelines”
February 16, 2012**

Thank you for the opportunity to testify on behalf of the Federal Public and Community Defenders on the topic of “Restoring Mandatory Guidelines.” In addition to the evidence that no *Booker* fix is necessary, we oppose mandatory guidelines for the following reasons.

I. Broad Mandatory Ranges Based on Facts Charged in an Indictment and Proved to a Jury Beyond a Reasonable Doubt or Admitted by the Defendant, Containing Sub-Ranges or Advisory Guidelines Based on Facts Found by the Judge

Judge Sessions and Professor Bowman propose that the current statutory system be replaced with mandatory guidelines, the complicated details of which I review below. Judge Sessions observes that most sentences are within the guideline range, that average sentence length has not changed, and that the extent of downward adjustments has been slightly less than before *Booker*.¹ Judge Sessions justifies his proposal as a political “compromise” but the other side of the bargain is not apparent. Professor Bowman contends both that judges are now completely free to “ignore” the guidelines, and that they do not do so frequently enough.² Neither offers a convincing argument for replacing the system we have now — in which judges determine sentences under a statute enacted by Congress to sensibly guide discretion — with a system in which sentences are mandatory on judges but are determined by prosecutors, defense lawyers, and juries.

This proposal, due to the width of the mandatory ranges, would invite more variation in sentencing outcomes than exists today. In order to avoid that result, Judge Sessions proposes a sub-range system strikingly similar to that struck down in *Cunningham v. California*,³ and Professor Bowman proposes advisory guidelines within mandatory guidelines. These complications should be enough to end the discussion, but there are further serious problems. The proposal would create a set of mandatory sentencing ranges that would be the functional equivalent of mandatory minimums (or near-mandatory minimums) in all cases. As forthrightly

¹ 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, 316, 329 & n.126 (2011) [Sessions].

² Testimony of Professor Frank O. Bowman, III, Hearing before the U.S. Sent’g Comm’n (Feb. 16, 2012).

³ 549 U.S. 270 (2007).

described by Judge Sessions, the system would virtually eliminate individualized sentencing outside the range, and would even limit individualized sentencing inside the range. Disparities would abound, and they would be hidden and unreviewable. Because judges would not find the facts in any case, and would have little if any authority to sentence outside the guideline range for any reason (except cooperation), there would be no judicial input on the content of the guidelines. There would be no transparent check on the politically-driven one-way upward ratchet in severity. Congressional directives would continue, but with a more extreme, and mandatory, effect. The proposal would also violate the Separation of Powers.

A. Summary of Sessions/Bowman Proposals

Judge Sessions' proposal aims to "resurrect[] presumptive (formerly called 'mandatory') guidelines."⁴ I will use the term "mandatory" rather than "presumptive" as there is no practical or constitutional difference between the two terms.

Mandatory Ranges. Judge Sessions proposes a table containing thirty-six mandatory cells (at the intersection of nine offense levels and four criminal history categories) that would be based on the offense of conviction and aggravating circumstances of the offense (selected from the current guidelines) and criminal history; these would be assigned numerical values. 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. Criminal history would be found by the judge by a preponderance of the evidence or admitted by the defendant.⁵ Professor Bowman has previously proposed a table with nine offense levels and six criminal history categories, for a total of fifty-four ranges.⁶

Strictly Limited Authority to Depart. Judge Sessions' proposal would permit no "variances" from the mandatory cells based on the purposes and factors set forth in 18 U.S.C. § 3553(a), but only "departures" if permitted by the Commission.⁷ Judicial downward departures would be "infrequent" and based on "truly extraordinary mitigating circumstances,"⁸ which would be "relatively few."⁹ "[T]he presumptive nature of the guidelines would be undermined if

⁴ 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 (2011) [Sessions].

⁵ *Id.* at 342-48 & nn.176, 179, 351-52, 356.

⁶ See Frank O. Bowman III, *Beyond Band-Aids: A Proposal for Reconfiguring Federal Sentencing After Booker*, 2005 U. Chi. Legal F. 149, 202 (2005).

⁷ Sessions at 350, 354 n.205 ("[U]nder the system that I propose, the 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.").

⁸ *Id.* at 351.

⁹ *Id.* at 351 n.192.

courts had discretion to depart based on anything but truly extraordinarily [sic] offender characteristics.”¹⁰ Restrictions on downward departures would be enforced through appellate review with “teeth,”¹¹ with the “threat of reversal,”¹² under “relatively strict scrutiny.”¹³ Cooperation against others, however, would be an encouraged basis for departure, and would require a government motion.¹⁴

Professor Bowman states that the judge “must have substantial discretionary departure authority,” and that this should be “no more restrictive” than under *Koon v. United States*, 518 U.S. 81 (1996).

Regulation of Discretion Within Mandatory Ranges. Judges Sessions proposes that twenty-eight of the mandatory cells be divided into three sub-ranges each, with the middle sub-range for “heartland” cases; that is, the prosecutor’s charge and the jury’s verdict or the defendant’s admissions would place the defendant in the middle sub-range. Judges would be required to consider aggravating (and possibly mitigating) facts designated by the Commission (but not assigned numerical values) before sentencing in the upper or lower sub-range.¹⁵ There is no mention of considering anything other than facts designated by the Commission in moving from the middle sub-range, such as the parsimony principle, the purposes of sentencing, the need to avoid unwarranted disparities, or any facts not designated by the Commission.

Within the mandatory range, consideration of offender characteristics would be subject to the Commission’s policies regarding offender characteristics.¹⁶ These largely discourage consideration of offender characteristics except for a few that “may be relevant” if “present to an unusual degree and distinguish the case from typical cases covered by the guidelines.”

A sentence within the range “would be essentially unreviewable,” *except* that such a sentence would be reversed if the judge did not “consider[] all of the relevant aggravating and mitigating factors identified in the application notes and all other factors in the Guidelines Manual,” presumably including the Commission’s restrictions on consideration of mitigating factors.¹⁷

¹⁰ *Id.* at 351.

¹¹ *Id.*

¹² *Id.* at 353.

¹³ *Id.* at 354.

¹⁴ *Id.* at 352.

¹⁵ *Id.* at 343, 347, 348-49.

¹⁶ *Id.* at 336-37.

¹⁷ *Id.* at 353-54.

Professor Bowman proposes “advisory guidelines enumerating aggravating and mitigating factors that judges should consider in exercising their discretion to sentence near the bottom, in the middle, or towards the top of the range” to be considered within the mandatory ranges.

Elimination of Appellate Review. There would be no “substantive reasonableness” review of any sentence.¹⁸ A jury’s findings of fact would be reversible only if, “after viewing the evidence in the light most favorable to the prosecution, [no] rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.”¹⁹ A jury verdict in favor of the defendant would not be appealable by the government.²⁰ If Judge Sessions is correct that there would not be many more jury trials,²¹ most sentences would not be appealable at all, because they would be conclusively determined by plea bargains.²²

B. Constructive Evolution of the Guidelines Would Cease.

The mandatory guideline range in each case would be set by the prosecutor’s charges and the jury’s fact-finding or the defendant’s negotiated admissions. Judges would have no role in determining the broader mandatory range, and little authority to sentence outside that range. Judges would have virtually no opportunity to provide reasoned criticism of any guideline (and would not likely be permitted to do so), and there would be little or no data to indicate that any guideline may be in need of revision.

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 disproportionality in the guidelines,²³ and Professor Bowman continues to forcefully argue the same. Judge Sessions’ proposal offers no solution to this problem. Professor Bowman acknowledges that Congress would continue to interfere with the Commission’s work, but suggests that it could do so through the advisory guidelines within the mandatory guidelines, thus creating more complexity, and more severity within the broad ranges. Neither offers any mechanism that would promote, or even allow, constructive evolution of the sentencing rules.

¹⁸ *Id.* at 354.

¹⁹ *Id.* at 354 & n.204; *Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

²⁰ *United States v. Martin Linen Supply Co.*, 430 U.S. 564 (1977).

²¹ Sessions, at 353.

²² I am not aware of a basis for defendants to “challenge the sufficiency of the evidence to establish any factors . . . admitted in a plea,” as suggested in the Commission’s Abstract.

²³ Sessions, at 306-07, 311, 317-21, 322-23, 335.

Judge Sessions' proposal does not mention the positive influence of judicial feedback on the Commission's work in recent years, or the fact that this would no longer be possible. Professor Bowman denies that judicial feedback has had any influence on the Commission's work, or that it possibly could. He contends that (1) "there was *never* an absence of feedback from judges (or any of the other system actors) about their concerns with the guidelines," but rather the Commission was simply "unable or unwilling to change the rules"; (2) the Commission's recent "strides" have to do with the political climate (Democrats took control of Congress in January 2007, and assumed the presidency in January 2009) rather than with "any *Booker*-generated increase in the volume or quality of judicial feedback to the Commission"; (3) the Commission "has been unable" even in this hospitable political environment to address "glaringly obvious" problems like the fraud guideline as applied to high-end white collar offenders; and (4) because judicial decisions are not "binding" on other courts or the Commission, they are "nothing more than data points in an opinion poll."

Professor Bowman thus appears simply to reject the idea that the feedback mechanism created by Congress to ensure that the guidelines could evolve based on feedback regarding their operation in real cases could possibly work.²⁴ But an accurate view of past and recent history shows that it can, but only when judges are not required to follow guidelines that are unsound.

Before *Booker*, judges were not permitted to express or act upon dissatisfaction with the guidelines,²⁵ even when the Commission itself had determined that a guideline required punishment that was excessive to achieve the purposes of sentencing. Thus, when a judge departed in a crack case in part because he was "not going to be the instrument of injustice in this case," the court of appeals reversed: "To 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."²⁶ When judges attempted to depart based on their conclusion that the crack/powder disparity had not been "adequately considered" by the Commission, as shown by its later reports, the courts of appeals held that the disparity was an impermissible basis for departure because it was "typical" of all crack cases and within the "heartland."²⁷

Thus, if a judge disagreed with the punishment required by a guideline, based on his experience in sentencing hundreds of people a year or based on empirical research, he had two options: follow the guideline anyway, or consciously or subconsciously mask his disagreement

²⁴ See 28 U.S.C. § 991(b)(1)(A), (C), § 991(b)(2), § 995(a)(13)-(16), § 994(o).

²⁵ See USSG § 5K2.0, comment. (backg'd.), p.s. ("[D]issatisfaction 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.") (effective Nov. 1, 1995); USSG § 5K2.0, comment. (backg'd.), p.s. ("Departures were never intended to permit sentencing courts to substitute their policy judgments for those of Congress and the Commission.") (effective Nov. 1, 2003).

²⁶ *United States v. Tucker*, 386 F.3d 273, 275, 277 (D.C. Cir. 2004).

²⁷ See *In re Sealed Case*, 292 F.3d 913, 916 (D.C. Cir. 2002); *United States v. Canales*, 91 F.3d 363, 369-70 (2d Cir. 1996); *United States v. Fike*, 82 F.3d 1315, 1326 (5th Cir. 1996); *United States v. Tucker*, 386 F.3d 273, 277 (D.C. Cir. 2004); *United States v. Lewis*, 90 F.3d 302, 304-05 (8th Cir. 1996).

with a departure on a ground not prohibited by the Commission that also met the “atypicality” requirement of the “heartland” standard. In 2001, judicial downward departures (not including government-sponsored departures) reached at most 11%.²⁸ In 2003, judges departed in 7.5% of cases (the additional 6.3% Professor Bowman cites were government-sponsored departures, primarily fast track departures, before they were given their own category).²⁹ When judges did depart, they did not discuss problems with the guidelines because that was grounds for reversal. The courts of appeals occasionally called upon the Commission to amend unsound guidelines, but they were ignored.³⁰ Why? Judges were required to follow the guidelines, and the courts of appeals were required to enforce them, no matter how unsound.³¹ As Professor Bowman observes, “the Commission’s rule-making process [was] a one-way upward ratchet which raised sentences often and lowered them virtually never.”

Booker changed this dynamic. The difference is that courts are not simply shouting into the void. Judges need not follow unsound guidelines, and the courts of appeals need not enforce them. After *Booker*, judges began to frequently impose reduced sentences in crack cases. The circuits split on whether disagreement with the crack guidelines was permissible, and the Supreme Court granted certiorari.³² On May 21, 2007, the Commission voted to reduce the crack guidelines by two levels, and urged Congress to take further action to address the “urgent and compelling problem.”³³ In support of its amendment and its argument to Congress to take

²⁸ USSC, *Report to Congress: Downward Departures from the Federal Sentencing Guidelines* 60 (2003).

²⁹ USSC, 2003 Sourcebook of Federal Sentencing Statistics, tbl. 26A.

³⁰ See, e.g., *United States v. Parson*, 955 F.2d 858, 874-75 (3d Cir. 1992) (“recommend[ing] that the Commission consider a return to the original Guideline definition of ‘crime of violence,’ that 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,” but upholding career offender sentence based on a pure recklessness crime); see also *id.* at 875 (Alito, J., concurring) (“I fully agree that the broad definition of a ‘crime of violence’ in U.S.S.G. § 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 re-evaluate); *United States v. McQuilken*, 97 F.3d 723, 728-29 (3d Cir. 1996) (renewing request that Commission reexamine its position in including purely reckless crimes as career offender predicates); *United States v. Stubler*, 2008 WL 821071 *2 (3d Cir. 2008) (reluctantly following *Parson* in a case involving reckless endangerment; though *Parson* “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”).

³¹ *Ibid.*

³² On January 22, 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, such as the crack/powder disparity. Brief of *Amici Curiae* Senators Edward M. Kennedy, Orrin G. Hatch, and Dianne Feinstein in Support of Affirmance, *Claiborne v. United States* (No. 06-5618), Jan. 22, 2007. The *Claiborne* case was later replaced by *Gall v. United States* when Mario Claiborne died.

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

further action, the Commission specifically relied on the fact that courts were disagreeing with the powder/crack disparity and the litigation in the lower courts and the Supreme Court.³⁴ The Supreme Court then decided *Kimbrough*,³⁵ and courts varied from the crack guidelines more often.³⁶ On August 3, 2010 (when the Republicans controlled the House and the Democrats had a bare majority in the Senate), Congress enacted the Fair Sentencing Act of 2010.³⁷ Thus, contrary to Professor Bowman’s perception, *Booker* and what followed in the courts created the sense of urgency in the Commission to take action, and provided it with evidence it could use to persuade Congress to take further action.

The Commission has also revised other guidelines, explicitly citing sentencing data and case law.³⁸ The Commission is planning a report to Congress on the guideline applicable to possession of child pornography, in response to rates of below-range sentences (including those sought by prosecutors) and judicial opinions.³⁹ An issue for comment this amendment cycle is how to limit “the impact of the loss table in §2B1.1(b)(1) and the victims table in §2B1.1(b)(2) in cases involving relatively large loss amounts.” The Commission explains:

The Commission has observed that cases sentenced under §2B1.1 involving relatively large loss amounts have relatively high rates of below-range sentences (both government sponsored and non-government sponsored), particularly in the context of securities fraud and similar offenses. The Commission also . . . reviewed judicial opinions suggesting that the impact of the loss table or the victims table (or the combined impact of the loss table and the victims table) may overstate the culpability of certain offenders in such cases. In response to these concerns, the Commission is studying whether it should limit the impact of the

³⁴ USSC, *Report to Congress: Cocaine and Federal Sentencing Policy*, 1, 115-22 (May 2007).

³⁵ *Kimbrough v. United States*, 552 U.S. 85 (2007).

³⁶ See Paul J. Hofer, *Has Booker Restored Balance? A Look at Data on Plea Bargaining and Sentencing*, 5 Fed. Sent’g Rep. 326, 331 (in FY 2009, among crack defendants without trumping mandatory minimums, 57.9% were sentenced below the guideline range); USSC Monitoring Dataset (rate of below-range sentences in all crack cases increased from 43.8% in 2008, to 51% in 2009, to 60.4% in 2010).

³⁷ Pub. L. No. 111-220 (2010).

³⁸ See USSG, amend. 742 (Nov. 1, 2010) (eliminating “recency” points from the criminal history score, citing below-guideline sentences); USSG, amend. 738 (Nov. 1, 2010) (slightly expanding the availability of alternatives to straight imprisonment, citing judicial feedback); USSG, amend. 754 (Nov. 1, 2011) (reducing large increases in immigration guideline based on stale prior convictions, citing appellate decisions finding unwarranted uniformity in requiring same increase regardless of age of conviction).

³⁹ See USSC, *The History of the Child Pornography Guidelines* at 1 n.4, 8 (October 2009); USSC, Notice of Final Priorities, 76 Fed. Reg. 58,564 (Sept. 21, 2011); Letter from Jonathan Wroblewski to Hon. William K. Sessions III, Chair, U.S. Sent’g Comm’n at 6 (June 28, 2010) (urging the Commission to review and revise the child pornography guideline).

loss table or the victims table (or both) in cases sentenced under §2B1.1 involving relatively large loss amounts and, if so, how it should limit the impact.

Professor Bowman’s perception that sentencing decisions are essentially useless because they are not “binding” on other courts or the Commission is not correct. The ordinary influence of non-binding judicial decisions in any context is even more influential under the advisory guideline system by its very non-binding nature. Courts of appeals may not prevent district courts from considering non-binding decisions from other districts or circuits regarding the soundness of a particular guideline policy, and through procedural review effectively *require* district courts to consider them whenever raised by a party.⁴⁰ Sentencing in cases involving the guideline for child pornography illustrate the enormously influential effect of reasoned but non-binding judicial decisions,⁴¹ which has produced aggregate data⁴² that the Commission is taking into account.

If Professor Bowman is complaining that the Commission should act more quickly, we agree. But we also recognize that measured improvement is better than no improvement. Moreover and importantly, judges are not bound to follow unjust guidelines while awaiting change that, under the Sessions/Bowman proposals, would never come, just as it never came before *Booker*.

⁴⁰ See, e.g., *United States v. Henderson*, 649 F.3d 955 (9th Cir. 2011) (reversing for failure to address challenge to the child pornography guideline, with extensive references in a concurring opinion to the analysis in the non-binding decision in *United States v. Dorvee*, 616 F.3d 174 (2d Cir. 2010)); *United States v. Davy*, 2011 WL 2711045 (6th Cir. July 12, 2011) (reversing for failure to consider challenge to stolen-gun enhancement under § 2K2.1, with reference to the non-binding decision in *United States v. Handy*, 570 F.Supp.2d 437, 478–80 (E.D.N.Y.2008) (Weinstein, J.)).

⁴¹ See, e.g., *United States v. Cameron*, 2011 WL 890502 (D. Me. Mar. 11, 2011) (citing non-binding decisions from other circuits and other districts reflecting “judicial disquiet” with the child pornography guideline, and “tak[ing] seriously the First Circuit’s non-binding “cautionary coda” in *United States v. Stone*, 575 F.3d 83, 97 (1st Cir. 2009) (stating its “view that the sentencing guidelines at issue [§ 2G2.2] are in our judgment harsher than necessary,” that “first-offender sentences of this duration are usually reserved for crimes of violence and the like,” and that if “sitting as the district court, we would have used our *Kimrough* power to impose a somewhat lower sentence”), and imposing a below-guideline sentence); *United States v. McElheney*, 630 F. Supp. 2d 886, 892 (2009) (relying on the non-binding analyses of “[c]ourts across the country,” noting that based on these analyses, “courts are increasingly issuing non-Guidelines sentences in child pornography cases,” and concluding that it would sentence the defendant below the guideline range “[s]ince the child pornography Guidelines do not fully describe the current sentencing practices of district courts or adequately differentiate between the least and worst offenders”); *United States v. Riley*, 655 F. Supp. 2d 1298 (S.D. Fla. 2009) (citing eight non-binding decisions from districts in other circuits in support of its conclusion that § 2G2.2 produces sentences greater than necessary to achieve sentencing purposes).

⁴² In FY 2011, only 35% of sentences for child pornography offenses fell within the guideline range, compared with 54.6% for all cases. USSC, *Preliminary Quarterly Data Report – Fourth Quarter Release* tbl. 3.

C. There Would Be No Check on Growing Severity.

Judge Sessions suggests, and Professor Bowman argues, that penalties might be reduced if this system were adopted, because somehow the political actors would reach a reasonable compromise to reduce severity. Nothing in history supports this supposition. But even if we imagine that an initial set of mandatory sentencing rules could hypothetically be set low enough to provide punishment not greater than necessary for the least culpable offender convicted of the least serious offense and somehow permitted judges to take proper account of individualized mitigating circumstances, reasonable punishment levels would not be sustainable.

Judge Sessions states that Congress would have “less of an incentive to issue directives” to the Commission to add new aggravators.⁴³ For this, he cites to an argument once made by Professor Bowman, suggesting that Congress would be less inclined to issue directives if ranges were wider because an increase of even one or two levels would be seen as unduly harsh and would reach a point where no further directives could be issued because the sentence would already be life.⁴⁴ That Congress would continue to issue directives until it could no longer do so because every sentence would be life, and mandatory life, does not recommend the proposal.

Professor Bowman appears to have abandoned this particular argument. He admits that congressional directives would continue, but suggests that directives could be aimed at the advisory guidelines within the mandatory guidelines. Why Congress would do this rather than dictate increases in mandatory ranges is not explained. Moreover, this would defeat the supposed simplification. The broad ranges would soon be crammed with advisory guidelines ratcheting sentences up to the top of the (wide) mandatory ranges.⁴⁵

D. Judge Sessions and Professor Bowman Propose Complex Devices to Avoid More Variation in Sentencing Outcomes than Exists Today. Judge Sessions’ Sub-Range System Appears to Be Unconstitutional. Professor Bowman’s May or May Not Be Constitutional, and Would Create Increased Complexity.

The wider ranges would invite greater variation in sentences than under the advisory guidelines system today. The current sentencing table consists of 258 ranges that are overlapping and narrow, with nearly half 12 months or less in width and only 10 percent greater than 80 months in width.⁴⁶ The median decrease from these narrow ranges for non-government

⁴³ Sessions, at 348.

⁴⁴ Frank O. Bowman III, *Failure of the Federal Sentencing Guidelines*, *supra* note 132, at 1343.

⁴⁵ Professor Bowman adds that the Commission should also be subject to the Administrative Procedures Act and other sunshine laws that require open procedures and direct judicial review of agency rulemaking. Since Professor Bowman does not elaborate, we cannot comment.

⁴⁶ 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.

sponsored departures and variances is about 12 months.⁴⁷ Under Judge Sessions' proposal, the mandatory cells would range in width from a low of 16 months to a high of 286 months, with 67 percent of the ranges 80 months or wider.⁴⁸ At the middle of the table, the four ranges would vary in width from 80 months, to 105 months, to 136 months, to 226 months. This, or any similar reduction in the number of ranges and corresponding expansion of widths, would produce ranges that are much wider than the extent of judicial departures and variances today.

This demonstrates that this "fix" is entirely unnecessary. The devices proposed to control variation in sentencing outcomes (which are not in need of control under the current system) would create complexity (in the name of simplicity) and cause a host of problems.

1. Judges Sessions' sub-range system

"[A]s a means of reducing unwarranted disparities within each cell," Judge Sessions proposes three sub-ranges within each mandatory range, the middle of which would be an "advisory," but also called "heartland," sub-range.⁴⁹ Before moving from the middle sub-range, the judge would be required to consider a series of *facts* chosen by the Commission from among the current guideline facts, nearly all of which are aggravating.⁵⁰ A judge's failure 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," as well as his "consider[ation of] a prohibited factor," would constitute reversible error.⁵¹

There is no mention of considering anything other than facts designated by the Commission in moving from the middle sub-range, such as the parsimony command, the purposes of sentencing, the need to avoid unwarranted disparities, or any facts not designated by the Commission. This appears to mean that judges would be required to consider the aggravating facts (and a few mitigating facts) designated by the Commission, and only those facts.

Requiring judges to consider aggravating facts specified by the Commission as the only basis for a sentence above the "heartland" sub-range would violate *Booker*. A guideline range is "advisory" only if the judge is authorized to sentence above or below it based on facts and

⁴⁷ See USSC, Preliminary Quarterly Data Report, Fourth Quarter Release, tbls. 10-13 (Oct. 31, 2011) (median decrease was 13 months for 77% of below-range sentences, 11 months for 14% of below-range sentences, 18 months for 6% of below-range sentences, and 6 months for 3% of below-range sentences).

⁴⁸ None of the ranges would be less than 16 months wide, and twenty-four (66.6%) would be 80 months wide or more. Only eight of the ranges (22%) would be less than 36 months wide, and only ten (28%) would be less than 48 months wide.

⁴⁹ Sessions, at 347.

⁵⁰ *Id.* at 347-49, 353-54.

⁵¹ *Id.* at 353-54 (emphasis supplied).

principles *not* specified by the Commission,⁵² including a “policy judgment” in light of the “general objectives of sentencing.”⁵³ As stated by then-Solicitor General Kagan, “the 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).”⁵⁴

2. Professor Bowman’s advisory guidelines within mandatory guidelines

Professor Bowman would replace the advisory guidelines system, which he seems to believe has too much gravitational pull, with a system of wider mandatory ranges, which would, as noted above, allow more sentencing variation than exists today. As a means for “constraining or guiding judicial discretion within the wider presumptive ranges,” he proposes “advisory guidelines enumerating aggravating and mitigating factors that judges should consider in exercising their discretion to sentence near the bottom, in the middle, or towards the top of the range.”

This could hypothetically comply with the Sixth Amendment, but only if it complied with the principles noted in the previous subsection, *i.e.*, if the judge was authorized to sentence above or below the advisory guideline range based on a “policy judgment” in light of the “general objectives of sentencing,” and based on facts *not* enumerated by the Commission.

But even if constitutional, it is hard to see what purpose would be served by replacing advisory guidelines with narrow ranges with gravitational pull, with advisory guidelines within broad mandatory guidelines. And the complexity would grow. Professor Bowman states that “congressional suggestions and directives would undoubtedly continue,” but that the Commission could “respond to most expressions of congressional concern by altering the advisory guidelines directed at judicial discretion within ranges.” This would have “less of an upward ratchet effect.” Less than what? Presumably, less than if Congress directed the Commission, or more likely directly legislated, an upward ratchet in the mandatory range, which Congress would be free to do.

E. Judge Sessions’ Proposal Would Prevent Individualized Sentencing Outside the Guideline Range, and Would Even Impose the Commission’s Restrictions on Individualized Sentencing Inside the Guideline Range.

In *Pepper v. United States*, 131 S. Ct. 1229 (2011), the Supreme Court reminded us of the centuries-old principle that the sentence must fit not only the offense but the offender, and not only the criminal history of the offender but his mitigating history and characteristics as well.

⁵² What made the guidelines mandatory before *Booker* was that departures were available only under circumstances specified by the Commission. *Booker*, 543 U.S. 234-35.

⁵³ *Cunningham*, 549 U.S. at 278-81, 286-87 & n.12. *See also Rita v. United States*, 551 U.S. 338, 351 (2007); *Kimbrough*, 552 U.S. at 91, 110.

⁵⁴ Brief for the United States at *11, *Vazquez v. United States*, No. 09-5370 (Nov. 16, 2009).

The Court also reminded us that Congress intended for this to continue when it enacted the Sentencing Reform Act.

These proposals would return us to a sentencing system based primarily, if not solely, on aggravating facts of the offense and that ignores or demotes the characteristics of the offender. Judge Sessions states: “Although the vast majority of offender characteristics would be relevant to deciding where a defendant falls within the broader cells, the presumptive nature of the guidelines would be undermined if courts had discretion to depart based on anything but truly extraordinarily [sic] offender characteristics.”⁵⁵ We fail to see why an offender’s life and personal characteristics that are relevant to the purposes of sentencing should be off limits, while departures for cooperating against others, which is not relevant to the purposes of sentencing, would be granted special status.⁵⁶ In our view, this would be indefensible.

Judge Sessions asserts that judges would have “greater discretion” within the mandatory “broad ranges,”⁵⁷ but on closer inspection, this is not the case. Offender characteristics would be subject to the Commission’s restrictive policy statements even within the broader ranges, apparently because, in Judge Sessions’ view, judges themselves do not have “sufficient understanding of the relevance of those factors to proper sentencing objectives.”⁵⁸ It appears that even the promise of “greater discretion” within broader ranges is illusory.

Professor Bowman rightly recognizes that there would have to be “substantial discretionary departure authority.” But at best, this would be “no more restrictive” than under *Koon v. United States*, 518 U.S. 81 (1996). The *Koon* standard was quite restrictive. Under it, judges were permitted to depart only to the extent and under the standard set forth in the Commission’s policy statements and commentary. *Koon* adopted an abuse-of-discretion standard of review, but the areas within which district courts had discretion were cabined by the Commission’s pronouncements.⁵⁹ The courts of appeals reviewed the district court’s

⁵⁵ Sessions, at 351.

⁵⁶ *Id.* at 352.

⁵⁷ *Id.* at 351.

⁵⁸ *Id.* at 336-37.

⁵⁹ If a factor was forbidden by the Commission, the court “cannot use it.” If a factor was “encouraged,” the court could depart but only “if the applicable Guideline does not already take it into account,” explicitly or implicitly. As to “discouraged” factors or “encouraged” factors already taken into account explicitly or implicitly, the court could depart if the factor was “present to an exceptional degree or in some other way makes the case different from the ordinary case where the factor is present.” Departure based on an “unmentioned” factor was permissible only if, after considering the “structure and theory of both the relevant individual guidelines and the Guidelines taken as a whole” — which were unstated by the Commission — the factor is “sufficient to take the case out of the Guideline’s heartland.” *Koon*, 518 U.S. at 95-96.

interpretation of those pronouncements *de novo*.⁶⁰ Thus, *Koon* did not increase the judicial departure rate.⁶¹

F. The Equivalent of Mandatory Minimums for All Cases is Not a Compromise.

Judge Sessions suggests that if this proposal were enacted, Congress might curtail some existing mandatory minimums or not enact new ones.⁶² The sentencing range in every case would have a mandatory bottom, except the judge could sentence below it “infrequently” based on “extraordinary” circumstances, or based on a government motion for a cooperation departure. It is difficult to see how this would be a “compromise,” even if every mandatory minimum were repealed. That the proposal would “mak[e] mandatory minimum statutory penalties unnecessary,”⁶³ only reveals its flaws: It “would abandon mandatory sentences that apply to some crimes and replace them with mandatory or near-mandatory guidelines across the criminal code.”⁶⁴

Moreover, the threat of mandatory minimums would always be present (as it is now). Congress enacted mandatory minimums throughout the mandatory guidelines era.⁶⁵ There has been only one election year since the guidelines went into effect (2010, when the guidelines were advisory) in which Congress did not enact or expand mandatory minimums.⁶⁶ There is no reason this would not continue, and no reason the Commission would not continue to feel “compelled to add additional aggravating factors and thereby increase guideline sentences to ‘ward off mandatory minimum penalties.’”⁶⁷ But the rules would be mandatory.

⁶⁰ See, e.g., *United States v. Roberts*, 313 F.3d 1050, 1053 (8th Cir. 2002); *United States v. Bayles*, 310 F.3d 1302, 1314 (10th Cir. 2002); *United States v. Harris*, 293 F.3d 863, 871 (5th Cir. 2002).

⁶¹ USSC, *Report to Congress: Downward Departures from the Federal Sentencing Guidelines* 54-56, 60 (2003).

⁶² Sessions, at 310, 333, 340, 351.

⁶³ *Id.* at 309-10.

⁶⁴ Memorandum from Families Against Mandatory Minimums to Spencer Overton, Jonathan Wroblewski and Stephanie Baucus, Extension of Remarks Listening Session at 7 (Aug. 14, 2009).

⁶⁵ *Id.* at 331.

⁶⁶ This analysis is available upon request.

⁶⁷ Sessions, at 318 (internal citation omitted)

G. Unwarranted Disparities Would Substantially Increase.

Plea bargaining inevitably leads to hidden disparities. Sentencing is more transparent under the advisory guidelines system. The rate at which defendants plead guilty remains high, but defendants plead guilty without entering into a plea agreement more frequently.⁶⁸

Under the Sessions and Bowman proposals, the guideline range would be set by the prosecutor's charge in every case, and the defendant's negotiated admissions or a jury's finding. Juries compromise, deadlock, and nullify, and their decisions would be virtually unreviewable on appeal. The judge would have very little authority to depart based on relevant individualized factors, but the prosecutor would have authority to move for the only type of departure (*i.e.*, cooperation) that would be immune from appeal.

Mandatory, charge-driven guidelines would cause increased racial disparity. The Commission's report on mandatory minimums,⁶⁹ its previous research on mandatory minimums,⁷⁰ and a new study by researchers at the University of Michigan,⁷¹ show unexplained racial disparity in charging decisions. As Ray Moore explained in his testimony:

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

⁶⁸ Jeffery Ulmer & Michael Light, *Beyond Disparity: Changes in Federal Sentencing After Booker and Gall?*, 23 Fed. Sent. Rep. 333, 338 (2011) (results of survey of practitioners and judges showed 12% increase in open guilty pleas).

⁶⁹ See USSC, *Mandatory Minimum Penalties in the Criminal Justice System* 359-60, 363-64 (2011) ("stacked" § 924(c)s result in sentences that are "excessively severe and disproportionate to the offense committed," and African Americans are charged with stacked § 924(c)s at a greater rate than defendants off other races); *id.* at 257-58 (29.9% of African American drug offenders eligible for § 851 received it, while only 25% of Whites, 19.9% of Hispanics, and 24.8% of defendants of "other" races were eligible and received it).

⁷⁰ See USSC, *Fifteen Years of Guideline Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* at 90, 91, 131 (2004) [Fifteen Year Review] (among offenders who possessed or used a gun during a drug offense, African American offenders are more likely to be charged with a mandatory minimum of five or more years under 18 U.S.C. § 924(c) rather than receive the two-level increase under the guidelines).

⁷¹ M. Marit Rehavi & Sonja B Starr, *Racial Disparity in Federal Criminal Charging and Its Sentencing Consequences*, U. of Mich. Law and Econ. Empirical Legal Studies Research Paper, at 46 (Jan. 15, 2012), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1985377&download=yes##.

agents. Their decisions are made out of public view, not subjected to adversarial testing, and not subject to judicial review.

The Commission has previously explained that “[d]isparate effects of charging and plea bargaining are a special concern in a tightly structured sentencing system like the [mandatory] federal sentencing guidelines, because the ability of judges to compensate for disparities in presentence decisions is reduced.”⁷²

H. The Commission Can Fix the Relevant Conduct Guideline Without Resort to This Extreme Measure.

Judge Sessions argues that judges should accept his proposal because “relevant conduct” would play a “more limited role.”⁷³ Under Judge Sessions’ proposal, the judge would still be required to consider uncharged and acquitted conduct established by a preponderance of the evidence in choosing a sub-range within the mandatory cell.⁷⁴ That relevant conduct might have less of an impact in some cases is no reason to adopt this proposal. Because of the breadth of the cells, uncharged and acquitted crimes would still have an enormous impact.⁷⁵ The answer to relevant conduct is for the Commission to eliminate acquitted conduct from the guideline calculation, and eliminate or at least limit the weight of uncharged conduct.⁷⁶

I. A Commission Making Rules to Be Charged in an Indictment and Proved to a Jury Beyond a Reasonable Doubt Would Violate the Separation of Powers.

In *Mistretta v. United States*, the Supreme Court said that it “discern[ed] no separation-of-powers impediment” to “locating” the Commission in the Judicial Branch because the Commission makes rules for judges to apply to facts found by judges.⁷⁷ These are “nonadjudicatory functions” that are “central to the mission of the Judiciary.”⁷⁸ If, however, the Commission were in the business of determining what conduct must be charged in an indictment

⁷² Fifteen Year Review at 92.

⁷³ Sessions, at 350.

⁷⁴ *Id.*

⁷⁵ Under Judge Sessions’ table, a defendant convicted of a drug trafficking offense placing him in the fifth offense level with a Criminal History Category III could, on the basis of unconvicted conduct (including conduct of others in “jointly undertaken” activity), face a sentence almost twelve years longer than the nominal bottom of the cell as determined by facts found by a jury or admitted by the defendant. In the eight cells in the two rows at the top of the grid, the impact of relevant conduct would be relatively limited, ranging from 16 to 46 months, but the remaining 28 cells range from 54 to 286 months in width.

⁷⁶ See *An Interview with John Steer, Former Vice Chair of the U.S. Sentencing Commission*, *The Champion* at 42 (Sept. 2008).

⁷⁷ *Mistretta v. United States*, 488 U.S. 361, 385-85 (1989).

⁷⁸ *Id.* at 388.

and proved to a jury beyond a reasonable doubt, as it would be if it were promulgating mandatory guidelines in a system that conforms with the Sixth Amendment, it could not be “located” in the Judicial Branch. The Commission would no longer be making rules to be applied by judges to facts found by judges – the “Judicial Branch’s own business”⁷⁹ – but would be making rules to be applied solely as a function of the prosecutor’s charges and the facts found by a jury (or admitted by defendants).

In the exercise of its new functions, the Commissioners would be, at least in constitutional terms, “subservient to” the Executive Branch, because they are subject to the President’s removal power.⁸⁰ In effect, the Commission would be defining crimes and setting punishment – a task falling outside “the Judiciary’s own business” – through mandatory guidelines that operate solely as a function of the Executive’s charges. If this arrangement would not improperly expand the power of the Judiciary,⁸¹ it would surely improperly expand the power of the Executive by uniting the power to prosecute with the power to sentence. Even under the current system, the Commission may not constitutionally be located in the Executive Branch.⁸²

The Commission certainly may not be located in the Legislative Branch, as Congress may not circumvent the bicameralism and presentment requirements by delegating its “fundamental power to formulate national policy” to its agent.⁸³ This leaves no constitutional location for a Commission that would make binding rules the application of which would be

⁷⁹ *Id.* at 408.

⁸⁰ *Bowsher v. Synar*, 478 U.S. 714, 730 (1986); *see also Morrison v. Olson*, 487 U.S. 654, 692-93 (1988) (once policymaking discretion is vested in an “independent agency” of the executive, the executive power to remove “for cause” requires that the President retain some control to ensure that the agency does not take action that “interfere[s] impermissibly with [the President’s] constitutional obligation to ensure faithful execution of the laws”); *see also* Richard J. Pierce, Jr., *Administrative Law Treatise* § 2.5 (arguing that a “cause” requirement for removal “must be interpreted to include failure to follow valid policy directives from the President or his agent”).

⁸¹ *See Booker*, 543 U.S. at 241-43 (rejecting 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, but not addressing whether the power of the *Executive* would be improperly expanded).

⁸² *See Mistretta*, 488 U.S. at 391 n.17 (noting 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”).

⁸³ *See INS v. Chadha*, 462 U.S. 919 (1983) (Congress may act only through legislation passed in both Houses and presented to the President); *Bowsher*, 478 U.S. at 726 (by keeping for itself limited removal power over an agent assigned executive duties, Congress unconstitutionally reserved control over the execution of the laws); *id.* at 737 (Stevens, J., concurring) (“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 Congress.”).

controlled by the prosecutor's charges and jury factfinding, and that cut "the Judicial Branch's own business" out of the process.

J. The Proposal Lacks Support.

Seventy-five percent of district court judges believe that the advisory guidelines system best serves the purposes of sentencing, and 86 percent do not believe that a mandatory guidelines system with broader ranges and jury factfinding would best serve the purposes of sentencing, even if coupled with fewer mandatory minimums.⁸⁴ Prosecutors also prefer the current statutory system.⁸⁵ The Federal Defenders, the American Bar Association, and the National Association of Criminal Defense Lawyers support the advisory guidelines system,⁸⁶ as do Families Against Mandatory Minimums and the American Civil Liberties Union.⁸⁷

⁸⁴ USSC, *Results of Survey of United States District Judges January 2010 through March 2010*, tbl.19. Several judges were asked at the regional hearings if they would support a "trade" of a mandatory system with aggravating facts charged in an indictment and proved to a jury beyond a reasonable doubt in return for the possibility of fewer mandatory minimums. The answer was overwhelmingly "no." See Transcript of Hearing Before U.S. Sent'g Comm'n, Atlanta, Ga., at 150-51, 159-61 (Feb. 10-11, 2009) (Judges Conrad, Hinkle, Presnell); Transcript of Hearing Before the U.S. Sent'g Comm'n, Stanford, Cal., at 40-44, 60, 65, 84-85 (May 28, 2009) (Judges Walker, Shea, Winmill); Transcript of Hearing Before the U.S. Sent'g Comm'n, New York, N.Y., at 145-49, 380-84 (July 9-10, 2009) (Judges Woodcock, Chin, Arcara, Gertner, Dearie); Transcript of Hearing Before the U.S. Sent'g Comm'n, Chicago, Ill., at 73-79 (Sept. 9-10, 2009) (Judges Rosen, Carr); Transcript of Hearing Before the U.S. Sent'g Comm'n, Denver, Colo., at 304-07 (Oct. 20-21, 2009) (Judges Pratt, Gaitan). Judge Jon. O. Newman of the Second Circuit said that such a system might be viable *if* the guidelines "ma[de] sound penological sense" and "the departure authority is adequate." Transcript of Public Hearing Before the U.S. Sent'g Comm'n, New York, NY, at 94 (July 9, 2009).

⁸⁵ Lanny A. Breuer, *The Attorney General's Sentencing and Corrections Working Group: A Progress Report*, 23 Fed. Sent'g Rep. 110, 112 (2010) (reporting that prosecutors "were not enthusiastic" about a return to a mandatory guidelines structure, and that Department supported current advisory guidelines system).

⁸⁶ See Letter from Thomas W. Hillier, II on behalf of the Federal Public and Community Defenders to the Hon. F. James Sensenbrenner and the Hon. Robert C. (Bobby) Scott (Oct. 11, 2011); Testimony of James E. Felman on behalf of the American Bar Association before the Subcomm. on Crime, Terrorism, and Homeland Security, Comm. on the Judiciary of the U.S. House of Representatives at 21-23 (Oct. 12, 2011); Letter from Lisa Monet Wayne on behalf of the National Association of Criminal Defense Lawyers to the Hon. Jim Sensenbrenner and the Hon. Bobby Scott (Oct. 11, 2011).

⁸⁷ See Testimony of Mary Price, Vice President and General Counsel, Families Against Mandatory Minimums, Hearing on "Uncertain Justice: The Status of Federal Sentencing and the U.S. Sentencing Commission Six Years after *U.S. v. Booker*," Subcomm. on Crime, Terrorism and Homeland Security House Committee on the Judiciary (Oct. 12, 2011); Written Statement of the American Civil Liberties Union, submitted to the House of Representatives, Comm. on the Judiciary, Subcomm. on Crime, Terrorism and Homeland Security, Hearing on "Uncertain Justice: The Status of Federal Sentencing and the U.S. Sentencing Commission Six Years after *U.S. v. Booker*" (Oct. 12, 2011).

It is worth noting that whatever interest there was in this proposal in theory several years ago has waned in light of experience and more careful consideration. The first iteration of this kind of proposal, without the complication of sub-ranges or advisory guidelines within mandatory guidelines, was suggested by Jim Felman soon after the Supreme Court's decision in *Blakely v. Washington*, 542 U.S. 296 (2004), and before its decision in *United States v. Booker*, 543 U.S. 220 (2005).⁸⁸ For reasons he explains in his testimony for this hearing, Mr. Felman now rejects this proposal.

The Constitution Project's Sentencing Initiative also discussed this option soon after *Booker* was decided. In June 2006, it recommended that "Congress should take no action at the present time to enact sentencing legislation in response to the Supreme Court's decision in *United States v. Booker*," but that *if* the advisory guidelines system was no longer sufficiently supported by Congress and criminal justice actors, "the Committee proposes a simplified guidelines system conforming to the constitutional limits announced in *Booker*."⁸⁹ Several members of the group have since voiced opposition to this "fix."⁹⁰ The President of the Constitution Project recently wrote to members of Congress urging them "to oppose any law that would increase undue rigidity in federal sentencing," and stating that rather than "automatically accept the premise that an increased rate of downward departures is problematic," they should recognize that "[d]eparture patterns provide important evidence on the question of whether those most familiar with the federal sentencing system feel that particular guidelines are properly calibrated for most cases."⁹¹

Other lawyers who have looked closely at the proposal have rejected it.⁹²

⁸⁸ Memorandum from James Felman to the United States Sentencing Commission dated September 16, 2004, resubmitted as a prepared statement for the Public Hearing before the Commission on November 16, 2004.

⁸⁹ See *The Constitution Project Sentencing Initiative Recommendations for Federal Criminal Sentencing in a Post-Booker World*, 18 Fed. Sent. Rep. 310 (June 1, 2006).

⁹⁰ See Transcript of Hearing Before the U.S. Sent' Comm'n on Mandatory Minimums, at 373 (May 27, 2010) (testimony of Thomas W. Hillier II); Testimony of James E. Felman on behalf of the American Bar Association before the Subcomm. on Crime, Terrorism, and Homeland Security, Comm. on the Judiciary of the U.S. House of Representatives at 21-23 (Oct. 12, 2011); Transcript of Hearing Before the U.S. Sent'g Comm'n, New York, N.Y., at 383-84 (July 9-10, 2009) (testimony of Judge Nancy Gertner); Judge Nancy Gertner, *Supporting Advisory Guidelines*, 3 Harv. J. L. Pol'y Rev. 261 (2009).

⁹¹ Letter from Virginia Sloan, The Constitution Project, to the Hon. James Sensenbrenner and the Hon. Robert Scott (Oct. 11, 2011).

⁹² In 2006, Professor Bowman organized a group of lawyers and academics to see if it was possible to write a set of guidelines that could be charged and proved to a jury, without taking a position on whether such a system should be adopted. See Frank O. Bowman, III, *'Tis a Gift to be Simple: A Model Reform of Federal Sentencing Guidelines*, 18 Fed. Sent. Rep. 300, 306 (June 1, 2006). As suggested in the resulting article, there were significant disagreements about severity and structure among this group, and these were left unresolved. Several members of this group oppose this framework, including Mary Price, General Counsel of Families Against Mandatory Minimums, Beverly Dyer and Amy Baron-Evans of the

II. *Blakely*ization of Current Guidelines

Leaving the guidelines as is and requiring that guideline facts be charged in an indictment and proved to a jury beyond a reasonable doubt would not be feasible. It would be burdensome and expensive, and it would suffer from most of the same problems noted above.

In fiscal year 2010, 49,325 specific offense characteristics or increased base offense levels under Chapter Two, and another several thousand adjustments under Chapter Three, were applied in 77,374 cases.⁹³ These would all have to be charged in an indictment and proved to a jury or admitted by the defendant. Those who have argued in favor of this approach previously have cited the high percentage of guilty pleas, assuming that defendants would plead guilty at the same rate and would admit the aggravating facts at the same rate. We doubt it. People may plead guilty, but would surely insist on trials on aggravating facts.

III. “Topless” Guidelines

When the Supreme Court struck down the Washington state guidelines in *Blakely v. Washington*, 542 U.S. 296 (2004), it was clear that the federal guidelines were next, and many believed that Congress would quickly legislate. Professor Bowman proposed so-called “topless” guidelines as an interim solution to *Blakely*, to sunset after 18 months.⁹⁴ “Topless” guidelines would convert the existing guidelines into ranges with tops at the statutory maximum for the offense of conviction and hard or presumptive bottoms that could be increased based on judicial factfinding, that is, a mandatory minimum for every permutation of every crime. Judges could sentence up to the statutory maximum without constraint, but could sentence below the range, if at all, under the narrow departure authority in effect before *Booker*.

The topless guidelines proposal rested on *Harris v. United States*, 536 U.S. 545 (2002), in which a plurality of four justices ruled that judicial factfinding to increase a mandatory minimum did not violate the Sixth Amendment. While some members of the Department of Justice commented favorably on this approach at the time,⁹⁵ and a bill adopting it was later introduced in

Federal Public and Community Defenders, and James Felman. I do not know the positions of Steven Chanenson, Nora Demleitner, or Michael O’Hear.

⁹³ USSC, Use of Guidelines and Specific Offense Characteristics, Fiscal Year 2010; Chapter Three Adjustments, Fiscal Year 2010.

⁹⁴ Frank O. Bowman, III, *Beyond Band-Aids: A Proposal for Reconfiguring Federal Sentencing After Booker*, 2005 U. Chi. Legal F. 149, 194-96 (2005).

⁹⁵ See Testimony of Christopher A. Wray, Deputy Attorney General Before the U.S. Sent’g Comm’n, *The Future of Federal Sentencing* (Nov. 17, 2004); Testimony of Christopher A. Wray, Deputy Attorney General, *Implications of the Booker/Fanfan Decision for the Federal Sentencing Guidelines*, H. Subcomm. on Crime, Terrorism & Homeland Security, H. Comm. on the Judiciary (2005); Oversight Hearing, *Chaos or Status Quo?* (statement of William W. Mercer).

the House of Representatives,⁹⁶ its policy merits were never seriously defended by anyone. It was roundly condemned even as an interim solution,⁹⁷ and was abandoned by its author.⁹⁸

Harris would almost surely be overruled if used to evade *Booker*. The tortured *Harris* plurality opinion asserted that mandatory minimums simply “channel” judicial discretion within a range, defined only by its top, by “dictat[ing] the precise weight” to facts judges had always considered in their discretion.⁹⁹ This notion first appeared in *McMillan v. Pennsylvania*, a decision that pre-dated *Apprendi*. *McMillan* coined the phrase “sentencing factor,” and deferred to a legislature’s choice to label a fact a “sentencing factor” (the “weight” of which could be “dictated” by the legislature without offending the Due Process Clause) rather than an “element,” absent purposeful evasion of constitutional requirements, possibly shown by a sentencing “tail” that “wags the dog” of the offense of conviction.¹⁰⁰ Later cases flagged *McMillan* as problematic, rejected legislative labels as irrelevant for constitutional purposes, and rejected the tail wagging dog exception as unworkable.¹⁰¹

⁹⁶ Sentencing Fairness and Equity Restoration Act of 2006, H.R. 6254, 109th Cong, 2d Sess. (Sept. 29, 2006).

⁹⁷ See, e.g., Oversight Hearing on *United States v. Booker: One Year Later—Chaos or Status Quo?*, Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary, 109th Cong. (Mar. 16, 2006) [“Oversight Hearing, *Chaos or Status Quo?*”] (testimony of Judge Paul G. Cassell); Testimony of Ronald Weich, *Blakely v. Washington and the Future of the Federal Sentencing Guidelines*, Hearing Before the S. Comm. on the Judiciary (2004); Testimony of Rachel Barkow, *Blakely v. Washington and the Future of the Federal Sentencing Guidelines*, Hearing Before the Sen. Comm. on the Judiciary (2004).

⁹⁸ See Testimony of Frank O. Bowman, III, *A Counsel of Caution*, Hearing Before the Subcommittee on Crime, Terrorism, and Homeland Security, Committee on the Judiciary, U.S. House of Representatives (Feb 10, 2005).

⁹⁹ *Harris*, 536 U.S. at 567-68.

¹⁰⁰ 477 U.S. 79 (1986).

¹⁰¹ See *Jones v. United States*, 526 US 227, 242, 243-44 (1999) (*McMillan* did not adequately address jury issue); *Apprendi v. New Jersey*, 530 U.S. 466, 476, 478, 487 n.13, 490 (2000) (holding that it is “unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is expose,” rejecting “sentence enhancement” label as irrelevant, and reserving for another day whether to overrule *McMillan*); *Blakely v. Washington*, 542 U.S. 296, 306-08 & 311 n.13 (2004) (“facts essential to punishment” must be charged and proved to a jury beyond a reasonable doubt, and criticizing as absurd and unworkable the idea that Sixth Amendment rights should depend on legislative labels or the tail that wags the dog); *Ring v. Arizona*, 536 U.S. 584, 602 (2002); *id.* at 610 (Scalia, J., concurring) (“[T]he fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to imposition of the level of punishment that the defendant receives—whether the statute calls them elements of the offense, sentencing factors, or Mary Jane—must be found by the jury beyond a reasonable doubt.”).

The *Harris* dissent, authored by Justice Thomas and joined by Justice Ginsburg (as well as Justices Souter and Stevens), straightforwardly argued: “Whether one raises the floor or raises the ceiling it is impossible to dispute that the defendant is exposed to greater punishment than is otherwise prescribed. . . . [T]he principles upon which [*Apprendi*] relied apply with equal force to those facts that expose the defendant to a higher mandatory minimum. . . . There are no logical grounds for treating facts triggering mandatory minimums any differently than facts that increase the statutory maximum.”¹⁰² Justice Breyer agreed that *Apprendi* applies to facts that increase a mandatory minimum “in terms of logic,” but concurred in the judgment because he did not “yet” accept *Apprendi*.¹⁰³

Justice Breyer now accepts *Apprendi* “because it’s the law and has been for some time.”¹⁰⁴ Justice Sotomayor, as a Second Circuit Judge, joined an opinion expressing the same unfavorable view of the *Harris* plurality’s logic.¹⁰⁵ All members of the Court would have to agree that “topless” guidelines are the quintessential legislative evasion of constitutional rights. In the words of the *Harris* plurality: “The Constitution permits legislatures to make the distinction between elements and sentencing factors, but it imposes some limitations as well. For if it did not, legislatures could evade the indictment, jury, and proof requirements by labeling almost every relevant fact a sentencing factor.”¹⁰⁶ That is exactly what “topless” guidelines would do.

IV. Mandatory Minimums

For all of the reasons stated in our prior testimony and comments, many of the same reasons stated in previous sections of this testimony, and the unwarranted severity of mandatory minimums and their disproportionate impact on African Americans acknowledged in the Commission’s recent report, Congress should not increase the use of mandatory minimums. It should abolish mandatory minimums. We are pleased that the Commission recommended some amelioration of mandatory minimums under 18 U.S.C. § 924(c), § 924(e), and 21 U.S.C. § 851, but we are disappointed that the Commission recommended no change to the mandatory minimums for drug offenses other than a minor expansion of the safety valve, which “would have little effect on the demographic differences observed in the application of mandatory minimum penalties to drug offenders.”¹⁰⁷

¹⁰² *Harris*, 536 U.S. at 579 (Thomas, J., dissenting).

¹⁰³ *Id.*, at 569-71 (Breyer, J., concurring).

¹⁰⁴ See Transcript of Oral Argument at 19-20, *United States v. O’Brien*, No. 08-1569, 19-20 (Feb. 23, 2010).

¹⁰⁵ *United States v. Gonzalez*, 420 F.3d 111, 126 (2d Cir. 2005) (“The logic of the distinction drawn in *Harris* between facts that raise only mandatory minimums and those that raise statutory maximums is not easily grasped.”).

¹⁰⁶ *Harris*, 536 U.S. at 550.

¹⁰⁷ USSC, *Mandatory Minimum Penalties in the Criminal Justice System* 356 (2011).

CONCLUSION

Mandatory guidelines should not be “restored” in any form, and the use of mandatory minimums should not be expanded. The current statutory system is working well.