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SENTENCING

Highlights and Lowlights From the New Report On Mandatory Minimums From the U.S. Sentencing Commission



BY MARY PRICE AND JAMES FELMAN

On Oct. 31, the U.S. Sentencing Commission issued a comprehensive report, “Mandatory Minimum Penalties in the Criminal Justice System.” There is much to commend in this exhaustive overview of the history and use of mandatory minimums and their impact on prisoners and prisons. We especially welcome a number of the findings and recommendations. For example, the study confirms that “certain mandatory minimum provisions apply too broadly, are set too high, or both . . . [leading] to inconsistencies in [their] application.”¹ At the same time, we take exception with sev-

eral aspects of the report, especially one that seeks legislation that would impair the ability of judges to exercise their discretion at sentencing. And we are disappointed that the commissioners believe that mandatory minimums can be improved. The commission urges Congress, should it choose to enact new mandatory minimums, to ensure they are “narrowly tailored,” not “excessively severe,” and “applied consistently.” This conclusion is striking, given its inherent unenforceability and the widespread condemnation of mandatory minimums by numerous stakeholders in the criminal justice system, including our own organizations.²

While we cannot hope to do justice here to this extensive research project (amounting to 645 pages), we have selected from the report the information, findings, and recommendations that strike us as most significant (including those with which we disagree) and that we believe compel our conclusion that there is no place for mandatory minimums in a modern criminal justice system.

Sentencing: Divided Systems

Federal sentencing is ruled by two regimes that could hardly be more different. One is governed by the nuanced inquiries required by the principal sentencing statute, 18 U.S.C. § 3553(a), which provides judges significant, albeit guided, discretion. The other is dominated by the crudest of measures: mandatory minimums, which strip judges of discretion.

The first system directs judges to use the advisory federal Sentencing Guidelines to calculate a recommended sentence and then consult a series of factors in

¹ U.S. SENTENCING COMMISSION, REPORT TO CONGRESS: MANDATORY MINIMUM PENALTIES IN THE CRIMINAL JUSTICE SYSTEM, 345 (Oct. 31, 2011) (2011 Mandatory Minimum Report), available at: http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Mandatory_Minimum_Penalties/20111031_RtC_Mandatory_Minimum.cfm.

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² The American Bar Association has opposed mandatory minimums for more than 40 years. Families Against Mandatory Minimums was founded 20 years ago to eliminate their use.

Section 3553(a). Judges must assess, among other things, the nature and circumstances of the offense, the history and characteristics of the defendant, and his role in the offense, and then impose a sentence that must be sufficient, but no longer than necessary, to meet the purposes of punishment.

Where the advisory guideline system exalts rationality and studied inquiry, sentencing by mandatory minimums is the logical equivalent of a temper tantrum. Statutes that use mandatory minimums to punish conduct (primarily for drug and gun offenses) jettison the entire array of indisputably relevant considerations in Section 3553(a) in favor of a single fact—usually a quantity of something—that may bear no relationship to the defendant’s culpability. Mandatory minimum sentencing declares that we do not care even a little about a defendant’s personal circumstances and we are utterly uninterested in the nature or circumstances of the crime. These sentences blind the courts to the defendant’s role in the offense and are uniformly indifferent to whether the sentence furthers all or, for that matter, any of the purposes of punishment.

Overview of the Mandatory Minimum Report

The mandatory minimum report responds to a directive from Congress.³ It recounts the long history of mandatory minimums, assesses their impact on sentencing, prisoners and prisons, and evaluates their operation both standing alone and when viewed in light of the U.S. Supreme Court’s decision in *United States v. Booker*, 543 U.S. 220, 76 CrL 251 (2005), which transformed the federal sentencing guidelines from mandatory to advisory. The report also relates a variety of opinions about the system from stakeholders and presents findings and conclusions based on a series of in-depth interviews with judges, prosecutors, and defense attorneys conducted in 13 selected federal districts. Finally, the report closes with a set of conclusions and policy recommendations.

The first—and only other—time the Sentencing Commission examined mandatory minimums in 1991, it reported to Congress that:

- the “lack of uniform application [of mandatory minimums] creates unwarranted disparity in sentencing”;

- “honesty and truth in sentencing . . . is compromised [because] the charging and plea negotiation processes are neither open to public view nor generally reviewable by the courts”;

- the “disparate application of mandatory minimum sentences . . . appears to be related to the race of the defendant”;

- “offenders seemingly not similar nonetheless receive similar sentences,” thus creating “unwarranted sentencing uniformity”; and

- “[s]ince the power to determine the charge of conviction rests exclusively with the prosecution for the 85

³ The directive was included in Section 4713 of the Matthew Shepherd and James Byrd Jr. Hate Crimes Prevention Act of 2009, Pub. L. No. 111-84.

percent of the cases that do not proceed to trial,⁴ mandatory minimums transfer sentencing power from the court to the prosecution.”⁵

The current report reaches similar conclusions:

- “certain mandatory minimum provisions apply too broadly, are set too high, or both to warrant the prescribed mandatory minimum penalty for the full range of offenders who could be prosecuted under the particular criminal statute,”⁶

- mandatory minimums are applied inconsistently;⁷

- “different charging and plea practices have developed in various districts that result in disparate application of certain mandatory minimum penalties, particularly those provisions that require substantial increases in sentence length,”⁸

- the “structure and severity of mandatory minimum penalties” do not account for mitigating circumstances that might justify a lower sentence, and⁹

- “factors triggering the mandatory minimum” do not always “warrant the prescribed mandatory minimum penalty” when considered in light of “the individualized circumstances of the offense or the offender.”¹⁰

Here are some of the most important takeaways, in our opinion, from the commission’s latest report. We discuss the various recommendations for changes at the end of each “takeaway” section.

Takeaway: *Mandatory minimums have played an overbearing role in the rapidly burgeoning federal prison population.*

Despite the significant criticisms contained in the first mandatory minimum report and the growing number of mandatory minimum critics,¹¹ “[a] proliferation of mandatory minimum penalties has occurred over the past 20 years. Since 1991, the number of mandatory minimum penalties has more than doubled, from 98 to 195 today.”¹²

⁴ Today, 96.8 percent of all federal defendants plead guilty. U.S. SENTENCING COMMISSION’S 2010 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS (2010 Sourcebook), tbl. 19, p. 22, available at: http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2010/SBTOC10.htm.

⁵ U.S.S.C., SPECIAL REPORT TO CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM at ii-iv (1991) (1991 Mandatory Minimum Report).

⁶ 2011 Mandatory Minimum Report at 345.

⁷ Id.

⁸ Id. at 346

⁹ Id.

¹⁰ Id.

¹¹ See *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 House of Representatives, for the Hearing on “The Status of Federal Sentencing and the U.S. Sentencing Commission Six Years After U.S. v. Booker,”* 19-21 (Oct. 12, 2011) (Felman Testimony), available at: <http://judiciary.house.gov/hearings/pdf/Felman%2010112011.pdf> (collecting individuals and organizations that have publicly criticized mandatory sentencing).

¹² 2011 Mandatory Minimum Report at 71-72.

Statutes carrying mandatory minimum penalties have increased in number, apply to more offense conduct, require longer terms, and are used more often than they were 20 years ago. These changes have occurred amid other systemic changes to the federal criminal justice system, including expanded federalization of criminal law, increased size and changes in the composition of the federal criminal docket, high rates of imposition of sentences of imprisonment, and increasing average sentence lengths. The changes to mandatory minimum penalties and these co-occurring systemic changes have combined to increase the federal prison population significantly.¹³

Partly as a result of the increase in mandatory minimum sentences, the number of inmates housed by the Federal Bureau of Prisons (BOP) almost tripled from 71,608 on Dec. 31, 1991, to 208,188 on Dec. 31, 2009.¹⁴ The resulting increase in the size of the federal prison population has caused other changes to the federal prison system. The number of federal prisons has increased from 72 to 116.¹⁵ Federal prison appropriations have increased from \$1.36 billion for fiscal year 1991 to \$6.09 billion for fiscal year 2010.¹⁶ The 2012 appropriation tops \$6.5 billion, including \$90 million for new prisons.¹⁷

Despite these increases in prison facilities and federal spending, the report notes that the BOP is currently operating at 35 percent over its rated capacity.¹⁸ “Crowding is of special concern at higher security facilities with 50 percent overcrowding at high security facilities and 39 percent at medium security facilities.”¹⁹

Mandatory minimums contribute to overcrowding in part because more people are serving mandatory sentences and those sentences are longer than ever before. Specifically, the commission reported:

■ “Since fiscal year 1990, not only has there been an increased reliance on statutes carrying mandatory minimum penalties (excluding immigration offenses), but defendants now are convicted of violating statutes that carry longer mandatory minimum penalties.”²⁰

■ While the percentage of offenders convicted of violating a statute carrying a mandatory minimum penalty of five years’ imprisonment declined between 1990 and 2010, the percentage of offenders convicted under laws carrying 10 years of imprisonment increased from 34.4 percent to 40.7 percent during that period.²¹

■ “There also has been a slight increase in the percentage of offenders convicted of violating a statute car-

rying a mandatory minimum penalty greater than ten years of imprisonment, from 9.0 percent in fiscal year 1990 to 11.9 percent in fiscal year 2010.”²²

What do all these increases mean in real terms? The report reveals how many people are affected by mandatory minimums today and for what offenses:

■ In FY 2010, 19,896 people were convicted of a crime that carries a mandatory minimum sentence.²³

■ As of Sept. 30, 2010, 111,545 offenders in BOP custody were convicted of an offense carrying a mandatory minimum penalty, a 178.1 percent increase from 1995.²⁴

■ Though not everyone who gets convicted of a crime carrying a mandatory minimum ultimately serves the mandatory sentence, the commission found that, in 2009, 39.4 percent of all federal inmates are serving mandatory minimum terms.²⁵ Fully 75,579 people in federal prison in late 2010 were serving mandatory minimum terms.²⁶

■ The majority of those receiving mandatory minimums were convicted of drug possession, conspiracy, or trafficking offenses (77.2 percent) and firearm offenses (11.9 percent).

We observe that at a time of deepening concerns about the federal deficit and extraordinary efforts to cut and contain budgets, and given that it costs \$28,284.16 per year to house a federal prisoner,²⁷ to the extent mandatory minimums have increased sentences and at least some of the time keep the wrong people far too long in a system without the benefit of parole, lawmakers should enact no new mandatory minimums and should repeal existing ones. Barring that, we support the commission’s more modest recommendation that:

Congress request prison impact analyses from the commission as early as possible in its legislative process whenever it considers enacting or amending criminal penalties. These analyses may assist Congress in focusing increasingly strained federal prison resources on the offenders who commit the most serious offenses.²⁸

Takeaway: *Mandatory minimums lead to unwarranted disparity and unwarranted uniformity.*

1. Disparity. In its new report, as in its 1991 report, the Sentencing Commission found that the inflexibility and harshness of mandatory sentences can produce distorted outcomes. First, the commission found that how and whether prosecutors charge mandatory minimums can lead to similar offenders being punished very differently. Second, and conversely, mandatory minimums

¹³ Id. at 63.

¹⁴ Id. at 76. According to the Bureau of Prisons, as of Nov. 24, the federal prison population stood at 216,762. FEDERAL BUREAU OF PRISONS, WEEKLY POPULATION REPORT, available at: http://www.bop.gov/locations/weekly_report.jsp. (last visited Nov. 30, 2011).

¹⁵ 2011 Mandatory Minimum Report at 82-83.

¹⁶ Id. at 82-83.

¹⁷ Consolidated and Continuing Appropriations Act of 2012, Pub. L. No. 112-55, 112th Cong., H.R. 1112-60, available at: <http://www.gpo.gov/fdsys/pkg/BILLS-112hr2112enr/pdf/BILLS-112hr2112enr.pdf>.

¹⁸ Id. at 83.

¹⁹ Id. (quoting Prepared Statement of Harley G. Lappin, Director, Fed. Bureau of Prisons, to the Commission, at 2-3 (March 17, 2011), available at http://www.uscourts.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20110317/Testimony_BOP_Lappin.pdf).

²⁰ Id. at 75.

²¹ Id. at 75.

²² Id.

²³ Id. at 121.

²⁴ Id. at 81.

²⁵ Id. at 82.

²⁶ Id. at 81.

²⁷ UNITED STATES COURTS, Newly Available: Costs of Incarceration and Supervision in FY 2010, available at: http://www.uscourts.gov/News/NewsView/11-06-23/Newly_Available_Costs_of_Incarceration_and_Supervision_in_FY_2010.aspx (last visited Nov. 30, 2011).

²⁸ 2011 Mandatory Minimum Report at 348-49.

can lead to very different offenders getting the same sentence.

Statistical analysis and a series of in-depth interviews reveal that the government is responsible for “disparate application of certain mandatory minimum penalties, particularly those provisions that require substantial increases in sentence length.”²⁹ The disparity is the result of “different charging and plea practices” in different districts.³⁰ The differences are especially acute in cases involving the extreme sentence outcomes required for recidivist drug and gun offenders. Prosecutors choose whether to charge these cases in a way that triggers the enhancements in 18 U.S.C. § 924(c) and 21 U.S.C. § 851. The commission reported “widely disparate”³¹ and “notably different” practices among prosecutors in their approach to these cases.³² This is due to the fact that sometimes prosecutors decline to charge crimes that carry extra-long mandatory sentencing provisions because they believe they are unwarranted and/or unduly harsh.³³ In other cases, some prosecutors reported that they used their discretion, for example, to charge multiple gun mandatory minimum offenses in cases where guns were associated with crimes and others did not, or they based their decision on the type of offense the gun was used in connection with.³⁴ The commission “learned that inconsistencies in application of mandatory minimum penalties exist between districts, and often within districts, where individual prosecutors exercise their discretion differently.”³⁵

We observe that the use of mandatory minimums in particular throws into high relief the impact of prosecutorial discretion to make fact-driven distinctions between offenders that have preset sentencing outcomes. Discretion remains in the system, but it has simply been transferred from judges to prosecutors, who essentially determine the sentence in such cases. These acts of discretion necessarily lead to disparity as otherwise similarly situated defendants are treated differently.

We are not critical of the prosecutors who choose to exercise their discretion not to charge a crime that would otherwise result in an unduly long mandatory minimum; rather, prosecutors should not be forced into such extreme decisions by crimes that carry unconscionably long mandatory sentences.

2. Uniformity. Furthermore, the commission report found that “certain mandatory minimum provisions apply too broadly, are set too high, or both, to warrant the prescribed minimum penalty for the full range of offenders who could be prosecuted under the particular criminal statute.”³⁶

This inequality occurs frequently with drug mandatory minimums, which comprise the bulk of all mandatory minimums imposed. Congress intended the five- and 10-year mandatory minimum structure to apply to “serious” and “major” kingpins, yet it chose drug quantity to serve as the proxy for determining who the “serious” and “major” players were. The commission found, however, that “the quantity of drugs involved in

an offense was not closely related to the offender’s function in the offense.”³⁷ This is because “mandatory minimum provisions typically use a limited number of aggravating factors to trigger the prescribed penalty, without regard to the possibility that mitigating circumstances surrounding the offense or the offender may justify a lower sentence.”³⁸ As a result, mandatory minimums do not allow distinctions to be made between a simple drug courier involved in a conspiracy to handle a quantity of drugs and the supervisor or kingpin who directs the operation and is charged with the same quantity of drugs.

In short, the mandatory sentence will be applied to offenders who do not deserve it, causing unwarranted uniformity.

The report makes a number of suggestions to address the severity, unwarranted disparity, and unwarranted uniformity that plague mandatory minimum sentencing. Here are some of them.

◆ “Congress should consider whether a statutory ‘safety valve’ mechanism similar to the one available for certain drug trafficking offenders . . . may be appropriately tailored for low-level, non-violent offenders convicted of other offenses carrying mandatory minimum penalties. Congress should consider marginally expanding the safety valve at 18 U.S.C. § 3553(f) to include certain non-violent offenders who receive two, or perhaps three, criminal history points under the federal sentencing guidelines.”³⁹

The federal safety valve has been one of the success stories in an otherwise bleak mandatory minimum narrative. In 2010, more than half of all drug defendants, 54.4 percent, convicted of a crime carrying a mandatory minimum were sentenced below the mandatory minimum due to the safety valve.⁴⁰ The safety valve, found at 18 U.S.C. § 3553(f), relieves the court’s obligation to impose the mandatory minimum in drug cases if the court finds the defendant meets certain criteria. The defendant must essentially have no—or a very limited—history of crime, have committed the crime without violence, have not organized or led others in the offense (which itself cannot have resulted in harm to another), and have truthfully provided the government all information about the offense or related offenses.⁴¹

The safety valve assesses criminal history by using a Sentencing Guidelines device: criminal history points. Defendants can be eligible for the relief only if they have zero or at most one criminal history point.⁴² While this might sound all right on its face, in fact, criminal history calculations can be unrepresentative of the offender’s culpability and danger of recidivism. Offenders can earn criminal history points for minor offenses that include contempt of court, reckless driving, or trespassing.⁴³ Criminal history points so frequently overstate one’s actual history that this is the number one reason by far that judges give for sentencing below the calculated guideline range.⁴⁴

²⁹ Id. at 346.

³⁰ Id. at 345.

³¹ Id. at 112.

³² Id. at 113.

³³ Id. at 112.

³⁴ Id. at 113.

³⁵ Id. at xxvii.

³⁶ Id. at 345.

³⁷ Id. at 168.

³⁸ Id. at 346.

³⁹ Id. at xxx-xxxi.

⁴⁰ Id. at 158.

⁴¹ Section 3553(f).

⁴² Section 3553(f)(1) (2006).

⁴³ ROGER W. HAINES JR., FRANK O. BOWMAN III, & JENNIFER C. WOLL, FEDERAL SENTENCING GUIDELINES HANDBOOK 1282 (2009).

⁴⁴ 2010 Sourcebook at 67.

Given the commission's finding that mandatory minimums do not fit every offender, there is good reason to extend relief in all offenses that carry mandatory minimums and include people with more calculated criminal history, given how frequently the criminal history score overstates actual history of crime.

Another set of recommendations encourages Congress to ameliorate the very severe punishment structures for repeat offenders in the gun and drug statutes.

◆ "Congress should reassess the scope and severity of the recidivist provisions in" the drug statutes.⁴⁵

Mandatory minimum penalties are doubled if a defendant has already been convicted of and been punished for a "felony drug offense," and a third offense triggers a life sentence.⁴⁶ These unduly long sentences sometimes deter prosecutors from seeking them, leading to inconsistent application.

◆ "Congress should amend 18 U.S.C. § 924(c) to give the sentencing court discretion to impose sentences for multiple violations of section 924(c) concurrently with each other."⁴⁷

◆ "Congress should consider amending [the gun statute] 18 U.S.C. § 924(c) so that the enhanced mandatory minimum penalties for a 'second or subsequent' offense apply only to prior convictions, and should consider amending the penalties for such offenses to lesser terms."⁴⁸

Section 924(c) criminalizes various gun offenses and establishes increased mandatory minimums based on how a gun is used in connection with an underlying offense and what type of gun it is.⁴⁹ The lowest sentence for a first offender is five years and, depending on the type of weapon, can be as long as 30 years. Additionally, the recidivist enhancement is unconscionably severe. The law mandates 25-year sentences for second and subsequent offenses, even if the defendant has never been previously convicted and served time for a Section 924(c) offense. And, if that were not enough, all Section 924(c) mandatory minimum sentences must be served consecutive to each other and to all underlying sentences.

This leads to extraordinarily long mandatory minimums, even for first-time offenders. Take the example of a drug offender picked up for making three sales of marijuana to an undercover agent. It is later discovered that he had a gun concealed (but never displayed or used or even alluded to) in the glove compartment of the car from which he distributed the marijuana. If the government charges him with three counts of possessing a gun in connection with a drug trafficking offense and he is convicted, he faces a mandatory minimum sentence no shorter than 55 years on top of whatever sentence is imposed for distributing the marijuana. This is because the Section 924(c) penalty for the first sale from the car is five years and the next two convictions of the second and third sale trigger the 25-year recidivist provisions. No wonder prosecutors sometimes choose not to charge the second and third counts.

These sensible reform suggestions would permit judges to run those sentences concurrently (though the first-time defendant would still receive 25 years—still

way too long, in our opinion) and, even better, they suggest making the sentences for second and successive violations both shorter and usable only for real repeat offenders.

Takeaway: Mandatory minimums disproportionately impact minorities.

"Sentencing data and interviews with prosecutors and defense attorneys indicate that mandatory minimum penalties that are considered excessively severe tend to be applied inconsistently," the new report states.⁵⁰ The starkest differences exist in the application of drug mandatory minimum penalties among demographic groups, the report notes. It cites the fact that 75.6 percent of black drug offenders convicted of a mandatory minimum penalty offense in fiscal 2010 were excluded from safety valve penalty reduction eligibility due to criminal history scores of more than one point triggered by even some misdemeanors, such as trespassing or driving without a license, or due to violence associated with the offense.⁵¹

The commission's analysis of 73,239 offenders sentenced before a federal court during fiscal 2010 found that of offenders convicted of a mandatory minimum-bearing offense who were sentenced to a mandatory minimum, 38.5 percent were black, 31.8 percent were Hispanic, and 27.5 percent were white.⁵² While the commission attributes many of the differences to legally relevant factors, or demographics of particular offenses, it acknowledges that the disparity may create perceptions of unfairness that can undermine the effectiveness of the criminal justice system.⁵³

We agree that changes to the criminal history prong of the safety valve, discussed above, will ameliorate some, but not all, of the disparity and perceptions of unfairness.

General Recommendations We Cannot Get Behind

The Sentencing Commission uses this mandatory minimum report to advance a request it first made to Congress at a House Judiciary Committee hearing in October. The hearing, ominously titled "Uncertain Justice: The Status of Federal Sentencing and the U.S. Sentencing Commission Six Years after *U.S. v. Booker*," examined federal sentencing trends since the Supreme Court's opinion in *Booker* rendered the previously mandatory sentencing guidelines advisory and breathed new life into the nuanced inquiry in Section 3553(a).

According to the commission, inconsistencies have increased in sentencing since the *Booker* decision, with more below-guideline sentences after the ruling than before it.⁵⁴ The report pointed out commission conclusions that nationally, offenders receiving non-government-sponsored below-guideline sentences have increased to 17.8 percent in FY 2010 from 12.1 percent in FY 2006.⁵⁵ The report also asserts that geographical differences in the rate of non-government-sponsored

⁴⁵ Id. at 356

⁴⁶ Id. at 356.

⁴⁷ Id.

⁴⁸ Id. at xxxi

⁴⁹ Section 924(c).

⁵⁰ 2011 Mandatory Minimum Report at 368.

⁵¹ Id. at 354.

⁵² Id. at 123.

⁵³ Id. at 101-102.

⁵⁴ Id. at 346.

⁵⁵ Id. at 347.

below-range sentences varies from a low of 12 percent in the Tenth Circuit to a high of 25.3 percent in the Second Circuit.

The commission also, relying on a demographic study it published earlier this year,⁵⁶ states that “[b]lack male offenders received longer sentences than White male offenders, and . . . those differences in sentence length have increased steadily since *Booker*.”⁵⁷

Based on those assertions, the “Commission is concerned about these developments and stands ready to work with Congress on possible legislative reforms to strengthen and improve the sentencing guideline system.”⁵⁸ While the Mandatory Minimum Report is not explicit about how it would “strengthen and improve” federal sentencing, the commission’s testimony to Congress sets out five ways Congress could do so:

- enact an appellate review standard that requires appellate courts to apply a presumption of reasonableness to sentences within the properly calculated guidelines range;
- require that the greater the variance from a guideline, the greater should be the sentencing court’s justification for the variance;
- create a heightened standard of review for sentences imposed as a result of a “policy disagreement” with the guidelines;
- clarify statutory directives that the commission believes are currently in tension; and
- require that sentencing courts give substantial weight to the guidelines at sentencing, and codify the three-part sentencing process (i.e., calculate the guideline range, consider any grounds for departure, and consider any grounds for a variance).⁵⁹

We are frankly disappointed that the commission made these recommendations and based them on such slender grounds. First, we do not agree that the raw statistics bear out that the differences in sentencing under advisory guidelines are sufficient to warrant the radical solutions promoted by the commission. As should be expected under a system embracing meaningful consideration for the purposes of sentencing and individualized circumstances, the percentage of below-range sentences for reasons not directly sponsored by the government has modestly increased as the commission reports. Fourth-quarter statistics for 2010, however, show a decline in such below-range sentences, down from a high of 18.7 percent in the last quarter of 2010 to 17.1 percent in the last quarter of FY 2011.⁶⁰ Mean-

while, the rate of below-range sentences sponsored by the government is dramatically higher than non-government rates, averaging 26.4 percent in FY 2011.⁶¹

All this focusing on raw statistics, however, obscures another statistic: the extent of variances. Sentences 10 percent and 100 percent below the guidelines range look the same when viewed only from the perspective of whether they are in fact variances. The median downward departure not sponsored by the government was 12 months before *Booker*; today it is 13 months.⁶²

Next, while the commission claims that regional and inter-district disparity has increased since the guidelines became advisory, this claim assumes that regional differences are inappropriate.

First, prosecutors play a huge role in sentencing outcomes that vary from district to district. How? By selecting which cases to prosecute and which charges to bring. They also affect outcomes by recommending sentences that vary from the guidelines or by not objecting to—and not appealing—below-guideline sentences. The government exerts a tremendous gravitational pull on sentences and sentencing practices. But much of prosecutors’ impact cannot be assessed. Plea and charge bargaining occurs behind closed doors. Meanwhile, prosecutors’ nod-and-wink acquiescence in below-guideline sentences is buried in sentencing transcripts but shows up in statistics looking like judge-caused disparity.

It turns out the government owns the lion’s share of below-guideline sentences. Since *Booker*, prosecutors have requested below-guideline sentences in more than 107,000 cases to reward substantial assistance, to speed up immigration cases, and for other reasons. Judges are responsible for only 60,800 below-guideline sentences.⁶³

Moreover, prosecutors cause inter-district disparity in how, where, and how often they seek below-guideline sentences. For example, in 2010, the government asked courts to impose below-guideline sentences in more than 60 percent of cases they prosecuted in the Southern District of California,⁶⁴ a difference of 56.7 percentage points, but in only 3.7 percent of cases in the District of South Dakota,⁶⁵ a difference of 56.7 percentage points.

No two federal districts are alike, and prosecutors treat their different caseloads differently—often at the behest of the attorney general.

For example, the attorney general decides in which districts prosecutors can ask the judge to impose below-guideline sentences in certain immigration cases. A defendant who quickly pleads guilty to an immigration violation is rewarded with a lower sentence recommendation (“fast track”) from the government. Here is where disparity comes in: the attorney general authorizes such fast-track disposition in some, but not all, districts. Illegal immigration cases in other districts do not get the benefit of a government recommendation. So the department’s sentencing policy produces built-in

⁵⁶ U.S.S.C., DEMOGRAPHIC DIFFERENCES IN FEDERAL SENTENCING: AN UPDATE OF THE BOOKER REPORT’S MULTIVARIATE REGRESSION ANALYSIS (Multivariate Study) (March 2010), available at: http://www.ussc.gov/Research/Research_Publications/2010/20100311_Multivariate_Regression_Analysis_Report.pdf

⁵⁷ Id. at 347.

⁵⁸ Id. at 347.

⁵⁹ See *Prepared Testimony of Judge Patti B. Saris, Chair, United States Sentencing Commission, before the Subcomm. on Crime, Terrorism and Homeland Security, Comm. on the Judiciary, United States House of Representatives* (Oct. 12, 2011), available at: http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Testimony/20111012_Saris_Testimony.pdf

⁶⁰ U.S.S.C., PRELIMINARY QUARTERLY DATA REPORT, 12, tbl. 4 (Oct. 31, 2011).

⁶¹ Id.

⁶² Felman Testimony at 9.

⁶³ U.S.S.C., 2010 Sourcebook, tbl. 26.

⁶⁴ 2010 Sourcebook. Appendix B, California Southern Table, available at: http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2010/Stats_CAS.pdf.

⁶⁵ Id. at North Dakota Table, available at: http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2010/Stats_ND.pdf.

sentencing disparity among similarly situated defendants. Their only difference? The district in which they are prosecuted and whether the AG has authorized a lower sentence.

We are also disturbed by the Mandatory Minimum Report's reliance on its earlier demographic study in stating that the gap in sentence lengths between black and white male defendants is growing. The Mandatory Minimum Report neglects to mention the caveats about the reliability of the demographic study's findings that the commission included in the demographic report. In that study, the commission wrote, "The results presented in this reports should be interpreted with caution."⁶⁶

Why? Because data that the commission does not collect and cannot account for is missing from its study. This missing data includes legally relevant information that judges use when sentencing defendants. This missing data, according to the commission, calls its own findings into question. "Judges make decisions when sentencing offenders based on many legal and other legitimate considerations that are not or cannot be measured," the commission stated, and "[t]he omission of one or more important variables usually causes the value of the variables that are included in the model to be overstated."⁶⁷

Researchers at Pennsylvania State University have questioned the methods employed by the Sentencing Commission in its study and found that their choices affected the outcomes, including the race-effect finding.⁶⁸

In fact, the greatest sentencing gap between black and white defendants was during the mandatory guideline era. The commission's report revealed that, using a more comprehensive analysis assessing sentencing between 1999 and 2009, the greatest difference in the length of sentences between black and white offenders occurred in 1999, when sentencing was mandatory.⁶⁹

Among the chief causes of racial disparity are sentencing rules, such as mandatory minimums, that judges can do nothing to ameliorate. In fact, some of them are described in the Mandatory Minimum report. For example, the commission's analysis of 73,239 offenders sentenced before a federal court during 2010 found that black offenders convicted of an offense bearing a mandatory minimum penalty were sentenced to a mandatory minimum in 65.1 percent of their cases, the

highest rate of any racial group, followed by white (53.5 percent) and Hispanic (44.3 percent) defendants.⁷⁰

In fact, advisory guidelines have enabled judges to ameliorate the impact of the most unfair sentencing guideline rules, including the universally condemned crack cocaine sentencing guideline. In 2010, judges sentenced crack cocaine offenders (the vast majority of whom are black) below the guidelines in 60 percent of cases, compared with only 37 percent of cases in 2004. Judges were able to do real justice in these cases, shaving an average of five years from the sentences of 1,000 defendants, who were predominantly African American men.⁷¹

Unproven allegations of racial bias under advisory guidelines divert attention from proven sources of unwarranted racial disparity that cannot be corrected in a mandatory system. All defendants, regardless of race, are treated more fairly when their individual characteristics are taken into account as permitted under an advisory system.

The various reforms to the sentencing guidelines proposed by the commission, besides being unnecessary and in some cases unconstitutional, would transform what are currently advisory guidelines that judges must consult before turning their attention to the studied inquiry of Section 3553(a) into "mandatory-light" guidelines that judges would be required to follow in most cases. We think such a course is ill considered.

Conclusion

We don't think Congress can write a mandatory minimum that will comply with the report's recommendations that "Congress, should it choose to enact new mandatory minimums, ensure they are 'narrowly tailored,' not 'excessively severe,' and 'applied consistently.'" For the reasons laid out in the report, there will always be someone for whom a mandatory minimum will reach too broadly and be excessively severe. As to consistency, the power to ensure consistency lies in the hands of prosecutors. We do not believe that more consistent application of mandatory minimums, given how flawed and inherently unjust they are, is an answer, notwithstanding the fact that Congress cannot write a mandatory minimum with a consistency requirement. Better to do as we and so many of our colleagues in the criminal justice system have urged for many years: establish no new mandatory minimums and eliminate those now in existence.

⁶⁶ Multivariate Study at 4.

⁶⁷ Id. at 9.

⁶⁸ Jeffrey T. Ulmer, Michael T. Light & John Kramer, *Racial Disparity in the Wake of the Booker Fanfan Decision: An Alternative Analysis to the USSC 2010 Report*. CRIMINOLOGY AND PUBLIC POLICY, Vol. 10, No. 4, 2010, available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1675117

⁶⁹ Multivariate Study at 3.

⁷⁰ Mandatory Minimum Study at 148.

⁷¹ FEDERAL PUBLIC AND COMMUNITY DEFENDERS, FACT SHEET: RACIAL FAIRNESS IN THE ADVISORY GUIDELINES SYSTEM, 2 (2011), available at: http://www.fd.org/pdf_lib/Bookerfix_factsheet_3.pdf