

## TABLE OF CONTENTS

### Preliminary Statement

- I. The Question For Sentencing Judges Is Not How Much “Weight” To Afford A Guideline, But Whether A Particular Guideline’s Recommendation Complies With The Factors Congress Directed Judges To Consider When Imposing Sentence.
  - A. The district judge’s duty is to impose a sentence that complies with 18 U.S.C. § 3553(a).
  - B. The likelihood that a guideline recommendation complies with 18 U.S.C. § 3553(a) depends on whether it was designed to do so.
  - C. Judges are authorized to engage in wide-ranging fact finding to determine if a guideline recommendation is likely to comply with 18 U.S.C. § 3553(a).
  - D. The fact that a congressional directive may have a “rational basis,” for purposes of constitutional scrutiny, is insufficient to establish that sentences within a guideline range based on that policy will comply with 18 U.S.C. § 3553(a).
  - E. Judicial scrutiny of whether a guideline recommendation complies with 18 U.S.C. § 3553(a) is not limited to crack cocaine offenses.
- III. The Government’s Position Would Make Many Guidelines Mandatory And Would Once Again Cut Judicial Feedback Out Of The Guideline Development Process, In Contravention Of The Statutory Scheme.
  - A. The government’s position would make many, if not all, guidelines more mandatory than they were prior to *Booker*, and thus unconstitutional under the Sixth Amendment.
  - B. The government’s position would also suppress judicial input into the development of the guidelines, also in contravention of the statute.
  - C. The government’s position ignores the breadth of the Commission’s mandate and the parallel mandate of district courts to conduct the 18 U.S.C. § 3553(a) inquiry.
  - D. The government’s theory raises a separation of powers problem.
- IV. The Commission Failed To Exercise Its Characteristic Institutional Role In Developing This Guideline, Leaving The Court Ample Room To Conclude That The Mechanically Calculated Range Is A Poor Guide To The Minimally Sufficient Sentence.

## PRELIMINARY STATEMENT

Nothing in the government's brief undermines the conclusions reached in *United States v Baird*, slip op., 2008 WL 151258 (D. Neb. Jan. 11, 2008), or *United States v. Shipley*, 560 F. Supp. 2d 739 (S.D. Iowa 2008), or the overarching point of the paper written by Assistant Federal Public Defender Troy Stabenow ("the Stabenow paper"). Overall, the government's account of the history of § 2G2.2 effectively proves a central component of these conclusions, namely, that some guidelines reflect little more than exclusive conversations between Congress and the Commission. Such guidelines reflect a distortion, not a fulfillment, of the Commission's mandate, which was, and is, to formulate guidelines (1) based on independent research and input from a wide range of sources, including judges, and (2) that serve all of the purposes of sentencing. And, contrary to the government's position, a district court is well within its discretion to critically evaluate a guideline that results from this partial implementation of the Commission's mandate.

In support of his position that the district court is authorized – indeed, obligated – to consider the underpinnings of § 2G2.2, and his position that the range produced by the mechanical application of that range is not a useful guide to the statutorily mandated minimally sufficient sentence, and in response to the government's contrary positions, Mr. Doe respectfully submits this brief.

**I. The Question For Sentencing Judges Is Not How Much “Weight” To Afford A Guideline, But Whether A Particular Guideline’s Recommendation Complies With The Factors Congress Directed Judges To Consider When Imposing Sentence.**

**A. The district judge’s duty is to impose a sentence that complies with 18 U.S.C. § 3553(a).**

In the Sentencing Reform Act of 1984 (the SRA), Congress gave specific directions to district court judges, as well as to the United States Sentencing Commission and the courts of appeals. The central directive to sentencing judges includes “an overarching provision instructing district courts to ‘impose a sentence sufficient, but not greater than necessary,’ to accomplish the goals of sentencing.” *Kimbrough v. United States*, 128 S. Ct. 558, 570 (2007). In *United States v. Booker*, the Supreme Court excised portions of the SRA that had previously limited courts’ ability to sentence outside the guideline range except in extraordinary circumstances, and reiterated that 18 U.S.C. § 3553(a) provides the remaining criteria for determining the sentence. 543 U.S. 220, 259 (2005). A judge’s job is thus to evaluate independently whether a sentence recommended by the guidelines best complies with the statute. In addition, unlike sentencing policies enacted by the legislature in the abstract and for general application, “[i]t has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue.” *Gall v. United States*, 128 S. Ct. 586, 598 (2007) (citing *Koon v. United States*, 518 U.S. 81, 113 (1996)).

Judges are also directed to consider the factors set forth in § 3553(a)(1) and (3)-(7), which include the guidelines and policy statements of the United States Sentencing Commission.

Under the terms of the statute, judges must consider the guidelines in order to glean from them the benefit of any advice they may offer for how best to achieve the statutory goals. In this consideration, there can be no thumb on the scales for the guidelines. *Gall*, 128 S. Ct. at 602; *Kimbrough*, 128 S. Ct. at 564, 570. The sentencing judge may “hear arguments by prosecution or defense that the Guidelines should not apply[.]” *Rita*, 127 S. Ct. at 2465. Those arguments may be that the case falls outside the “heartland” and thus warrants a departure, or that the guidelines range “fails properly to reflect § 3553(a) considerations,” or simply that “the case warrants a different sentence *regardless*.” *Rita*, 127 S. Ct. at 2465 (emphasis added). The sentencing judge may not apply “a legal presumption that the Guidelines sentence should apply,” *id.*, and “may not presume . . . that the Guidelines range is reasonable,” *Gall*, 128 S. Ct. at 596-97. The court of appeals may not adopt a presumption of unreasonableness for a non-guideline sentence. *Rita*, 127 S. Ct. at 2467.

**B. The likelihood that a guideline recommendation complies with 18 U.S.C. § 3553(a) depends on whether it was designed to do so.**

Guidelines were considered likely to provide useful advice regarding what sentence would best comply with 18 U.S.C. § 3553(a) because, as originally conceived in the SRA, they were to be designed for this purpose. (Notably, however, the Commission was not charged with ensuring that its recommend sentences are “no greater than necessary” to achieve the statutory purposes. That duty was left to sentencing judges.) The SRA directed the Commission to develop guidelines that “assure the meeting of the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code.” 28 U.S.C. § 991(b)(1)(A). It authorized the Commission to engage in research and wide-ranging consultation with other participants in the

criminal justice process. It gave the Commission powers to “develop means of measuring the degree to which the sentencing, penal, and correctional practices are effective in meeting the purposes of sentencing.” 28 U.S.C. § 991(b)(2).

Whether a guideline recommendation is likely to comply with the § 3553(a) factors thus crucially depends on whether the Commission acted in this “characteristic institutional role” When a guideline has been developed using the powers and procedures given to the Commission by the SRA, it is “fair to assume” they represent a “rough approximation” of sentences that “might achieve 3553(a) objectives.” *Rita*, 127 S. Ct. at 2464-65. The guidelines can serve as a starting point and initial benchmark because the Commission has the “capacity” to base the guidelines on “empirical data and national experience, guided by a professional staff with appropriate expertise.” *Kimbrough*, 128 S. Ct. at 574.

When the guidelines are not so developed, however, they cannot be relied upon for sound advice regarding what sentence best complies with 18 U.S.C. § 3553(a). The Supreme Court noted that “not all of the Guidelines are tied to this empirical evidence. For example, the Sentencing Commission departed from the empirical approach when setting the Guidelines range for drug offenses, and chose instead to key the Guidelines to the statutory mandatory minimum sentences.” *Gall*, 128 S. Ct. at 594 n.2. When a guideline is not the product of “empirical data and national experience,” it is not an abuse of discretion to conclude that it “yields a sentence ‘greater than necessary’ to achieve § 3553(a)’s purposes, even in a mine-run case.” *Id.* at 575.

Despite the Supreme Court’s clear demotion of the guidelines from the dispositive sentencing factor to one among all of the sentencing factors, the government asserts that the guideline at issue in this case, § 2G2.2, should be afforded “great weight.” Gov. Mem. at 2, 8. It

cites no authority for this proposition, but argues that it should be afforded this weight in part because it reflects Congressional judgments communicated to the Commission in a variety of ways and dutifully incorporated by the Commission into the guideline. Ignoring that sentencing courts are statutorily mandated to conduct an entirely independent inquiry under the sentencing statute, the government argues that courts must defer to guidelines that reflect such congressional directives.

As a preliminary but still significant matter, the Supreme Court's decisions nowhere instruct judges to afford "weight," much less "great weight" to the guidelines. Notably, it was the dissenting Justices in *Gall* and *Kimbrough* who argued the guidelines should be accorded "weight." See *Gall*, 128 S. Ct. at 603 (Alito, J., dissenting); *Kimbrough*, 128 S. Ct. at 578-79 (Alito, J., dissenting). The only "weight" the Court *approved* was the "weight" the judge accorded the fact that the "crack/powder disparity" embedded in the guidelines "is at odds with § 3553(a)" in *Kimbrough*, see 128 S. Ct. at 576, and the "great weight" the judge gave "self-motivated rehabilitation" in *Gall*, see 128 S. Ct. at 600, 602.

More broadly, evidence that a guideline was not developed according to the research and consultation procedures set forth in the SRA, but is instead the result of directives to the Commission, or changes in statutory maximums or minimums, or other Congressional action that was not guided by the statutory factors, can shed light on whether a particular guideline recommendation is likely to conform to 18 U.S.C. § 3553(a). Contrary to the government's assertion, Mr. Doe does not argue that a guideline recommendation deserves less deference *because* it was directed by Congress. Gov. Mem. at 1. He argues only that a Congressional pedigree does not offer the same assurance that a guideline recommendation complies with §

3553(a) as do recommendations specifically designed to comply with § 3553(a). Congress is neither under the same obligations nor subject to the same research and consultation procedures to which that the Commission is subject to under the SRA. Indeed, as demonstrated in the Stabenow paper, Congress has frequently taken actions resulting in increases to § 2G2.2 without carefully considering the statutory obligations imposed on district court judges by 18 U.S.C. § 3553(a). When the SRA's carefully designed procedures are bypassed, the need for judicial inquiry into the empirical basis and justification for the guideline recommendation is clear.

**C. Judges are authorized to engage in wide-ranging fact finding to determine if a guideline recommendation is likely to comply with 18 U.S.C. § 3553(a).**

In evaluating whether a guideline recommendation is likely to comply with § 3553(a), judges are free to consider a wide variety of evidence. This includes the legislative pedigree of a particular guideline provision, *see Kimbrough*, 128 S. Ct. at 566 (legislative background to the Anti-Drug Abuse Act of 1986), Commission reports, *see Kimbrough*, 128 S. Ct. at 5567-68 (crack reports), and relevant materials from other sources, *see Gall*, 128 S. Ct. at 601 (studies on brain development). *See also, e.g., United States v. Politano*, 522 F.3d 69 (1st Cir. 2008) (upholding judge's reliance on news accounts of impact of firearms trafficking on the local community).

**D. The fact that a congressional directive may have a "rational basis" for purposes of constitutional scrutiny, is insufficient to establish that sentences within a guideline range based on that policy comply with 18 U.S.C. § 3553(a).**

The government also cites *Gregg v. Georgia*, 428 U.S. 153 (1976), in support of its argument that courts may not critically evaluate guidelines that reflect congressional directives. The citation is inapposite on two levels. First, *Gregg* involved an Eighth Amendment challenge to a

state's death penalty statute. The Court cautioned that in assessing the constitutionality of a punishment selected "by a democratically elected legislature," it must presume its validity. *See Gregg*, 428 S. Ct. at 175. The instant case, in contrast, does not involve a constitutional challenge to a punishment selected by a legislature. Mr. Doe is asking the Court to evaluate whether a sentencing guideline, formulated by the Sentencing Commission under direction from Congress, complies with 18 U.S.C. § 3553(a). The subjects of this inquiry (a statute and a guideline) are qualitatively different, as are the ways courts must view those subjects. While courts must presume the validity of statutes (to some extent and with exceptions), the Supreme Court has explicitly and repeatedly instructed that district courts may *not* presume the reasonableness of the guideline range in a particular case.

Whether Congress has a "rational basis" for setting mandatory minimum penalties, or for directing the Commission to promulgate higher (or lower) guideline penalties, does not answer the question of whether the Commission met its overall statutory mandate in fashioning a particular guideline. The policy underpinnings of a congressional directive to the Commission are relevant to a district court's evaluation of a guideline because the Commission is required to consider feedback and directives from Congress. The Commission's incorporation of those wishes, however, will not, in and of itself, satisfy the Commission's mandate to formulate guidelines based on independent research and input from a wide range of sources and that serve all of the purposes of sentencing, and congressional directives to the Commission do *not* bind the courts.



**E. Judicial scrutiny of whether a guideline recommendation complies with 18 U.S.C. § 3553(a) is not limited to crack cocaine offenses.**

To overcome the precedent set by the Supreme Court’s decision in *Kimbrough* – where the Court upheld a sentence below the guideline range in an ordinary case and where the guideline recommendation was clearly based on Congressional judgments – the government attempts to limit judicial scrutiny of the guidelines to instances in which the Sentencing Commission “indicated that it was unable to identify appropriate penalties without further direction from Congress.” Gov. Mem. at 4. Aside from the fact that the assertion is incorrect as a matter of fact,<sup>1</sup> and that it dramatically misconstrues the Commission’s institutional role, there is no basis in § 3553(a) or in Supreme Court precedent for this limitation. The Court’s holding, reasoning, and instructions to the lower courts apply not only to “the cocaine Guidelines,” but to “all other Guidelines.” *Kimbrough*, 128 S. Ct. at 564.

If any such limitations existed prior to *Kimbrough*, the courts of appeals now “must re-examine [their] case law” holding that “courts were not authorized to find that the guidelines themselves, or that the statutes on which they are based, are unreasonable.” *United States v. Marshall*, slip op., 2008 WL 55989 at \*\*7-8 (7th Cir. Jan. 4, 2008); *see also United States v. Jones*, 531 F.3d 163 (2d Cir. 2008); *United States v. Smart*, 518 F.3d. 800, 808-09 (10th Cir. 2008); *United States v. Barsumyan*, 517 F.3d 1154, 1158-59 (9th Cir. 2008) (*Kimbrough* analysis applicable to all guidelines). Sentencing judges are critically scrutinizing and rejecting a variety

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<sup>1</sup> The government does not offer a citation for this remarkable claim, and indeed, the Commission repeatedly identified appropriate penalties for crack cocaine offenses without further guidance from Congress. In 1996 it proposed treating crack cocaine the same as powder cocaine. In 2007 it revised the guidelines for crack cocaine by lowering the base offense level by two levels.

of guideline recommendations based on Congressional judgments, including the child pornography guidelines, and the courts of appeals are affirming the authority of district courts' discretion to do so.<sup>2</sup>

By its own rationale, the scrutiny in which the Supreme Court engaged in *Kimbrough* clearly applies to any guideline that “does not exemplify the Commission’s exercise of its characteristic institutional role.” *Kimbrough*, 128 S. Ct. at 575. This follows directly from the reasons why guidelines that *are* promulgated and amended by the Commission in its characteristic institutional role may be more likely to comply with the statutory factors: designing guidelines for that purpose, using research, consultation, and specialized expertise, was the task given the Commission in the SRA. Under §3553(a), however, it is sentencing judges who must

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<sup>2</sup> See *United States v. Vanvliet*, 542 F.3d 259, 271 (1st Cir. 2008) (*Kimbrough* permits disagreement with use-of-computer enhancement); *United States v. Liddell*, 2008 WL 4149750 at \*\*5-6 (7th Cir. Sept. 10, 2008) (career offender); *United States v. Tankersley*, 537 F.3d 1100, 1112 (9th Cir. 2008) (*Kimbrough* analysis applicable to all guidelines); *United States v. Jones*, 531 F.3d 163, 172-73 (2d Cir. 2008) (*Kimbrough* analysis applicable to all guidelines); *United States v. Boardman*, 528 F.3d 86, 87 (1st Cir. 2008) (career offender); *United States v. Rodriguez*, 527 F.3d 221, 226-30 (1st Cir. 2008) (fast track and all guidelines); *United States v. Smart*, 518 F.3d 800, 808-09 (10th Cir. 2008) (*Kimbrough* analysis applicable to all guidelines); *United States v. Sanchez*, 517 F.3d 651, 662-65 (2d Cir. 2008) (career offender); *United States v. Barsumyan*, 517 F.3d 1154, 1158-59 (9th Cir. 2008) (*Kimbrough* analysis applicable to all guidelines); *United States v. Moreland*, 568 F.Supp.2d 674 (S.D. W. Va. 2008) (career offender); *United States v. Malone*, slip op., 2008 U.S. Dist. LEXIS 13648 (E.D. Mich. Feb. 22, 2008) (career offender); *United States v. Cabrera*, 567 F. Supp. 2d 271 (D. Mass. 2008) (over-emphasis on drug quantity, under-emphasis on minimal role); *United States v. Grant*, slip op., 2008 WL 2485610 (D. Neb. June 16, 2008) (second-degree murder guideline); *United States v. Shipley*, 560 F. Supp. 2d 739 (S.D. Iowa 2008) (child pornography); *United States v. Rausch*, 570 F. Supp. 2d 1295 (D. Colo. 2008) (child pornography); *United States v. Hanson*, 561 F. Supp. 2d 1004 (E.D. Wis. June 20, 2008) (child pornography); *United States v. Ontiveros*, 2008 WL 2937539 (E.D. Wis. July 24, 2008) (child pornography); *United States v. Taylor*, 2008 WL 2332314 (S.D.N.Y. June 2, 2008) (child pornography); *United States v. McClelland*, 2008 WL 1808364 (D. Kan. April 21, 2008) (child pornography); *United States v Baird*, slip op., 2008 WL 151258 (D. Neb. Jan. 11, 2008) (child pornography).

ultimately determine whether the Commission succeeded in its task. Given the statutory framework that Congress itself put in place, and that remains the governing law of federal sentencing, defendants receiving sentences within the guideline range should be able to expect that their sentences reflect the Commission's thoughtful exercise of the role for which it was established. Every defendant should be able to expect that his or her sentence reflects the sentencing judge's independent and individualized determination that the sentence is "sufficient, but no greater than necessary" to achieve the purposes of sentencing. All of the Supreme Court's post-*Booker* guidelines cases reiterate the importance of the Commission's statutory mission as envisioned in the SRA. If the Commission was unable or unwilling to complete this mission in formulating the guidelines applicable to a defendant, it is not an abuse of discretion to conclude that the guidelines recommendation yields a sentence greater than necessary to achieve the statutory purposes, even in a "mine-run case." *Kimbrough*, 128 S. Ct. at 575.

**III. The Government’s Position Would Make Many Guidelines Mandatory And Would Once Again Cut Judicial Feedback Out Of The Guideline Development Process, In Contravention Of The Statutory Scheme.**

Ignoring the clear and repeated instructions in *Gall*, *Rita*, and *Kimbrough*, and the structure of the sentencing statute, the government presses a position that would effectively render many guidelines mandatory once again. In addition, the government’s theory, if adopted, would thwart the evolutionary process originally envisioned by Congress, and would also present a separation of powers problem.

**A. The government’s position would make many, if not all, guidelines more mandatory than they were prior to *Booker*, and thus unconstitutional under the Sixth Amendment.**

The government takes the astonishing position that “[n]either *Kimbrough* nor any other decision by the Supreme Court justifies rejection of a Guideline . . . when the Guideline is substantially the result of congressional directives.” Gov. Mem. 2. In the government’s view, courts must accept that guidelines shaped largely by congressional directives necessarily reflect an exercise of the Commission’s characteristic role. Indeed, the government argues, courts “lack the institutional authority and competency, to consider whether a Guideline represents the goals of sentencing identified by Congress.” Gov. Mem. at 3. For these reasons, the government concludes, courts must refrain from basing sentencing decisions based on policy disagreements with a particular guideline, but must limit themselves to the “circumstances of an individual case.” *Id.*

The government’s position, if adopted, would make many, if not all, guidelines, more mandatory than they were before *Booker*. Imagine how a sentencing involving a congressionally-driven guideline would proceed. In accordance with the procedure set forth in *United States v.*

*Gunter*, 462 F.3d 237, 247 (3d Cir. 2006), a court would first calculate the applicable range. It would then rule on any departure motions, holding such motions to the exceedingly high standard and ever-increasing restrictions established by the Commission over the years. Then it would turn to the § 3553(a) inquiry, but that inquiry would be stunted by the court’s inability (or, in the government’s words, its lack of “institutional authority and competence”) to consider whether the range was a useful recommendation in light of all of the § 3553(a) factors. Rather, the court would be required to accept that the range was a useful recommendation because, by incorporating congressional directives and not repudiating their underlying policy, the Commission indicated that the guideline satisfied the overall purposes of sentencing and, therefore, acted in its characteristic institutional role. The government maintains that a defendant could argue that one or another § 3553(a) factor warranted a non-guideline sentence, but such an argument would bump up against the presumption urged by the government that the guideline took all of the relevant § 3553(a) factors into account. A court’s finding otherwise would necessarily constitute a “rejection” of the policy. Because courts would be precluded from rejecting such policies, any sentence that resulted from such disagreement would be infirm. *Voilà*, we have a mandatory guideline, in direct violation of the Sixth Amendment holding of *Booker*.

The Supreme Court has made plain that judges can reject guidelines that reflect unsound judgments regardless of their source. This is precisely what the court permitted in *Kimbrough*. Whether the guideline emanates from a congressional directive or not, it is not an abuse of discretion to disagree with it based on § 3553(a) policy considerations even in an “unremarkable” “mine-run” case. *Kimbrough*, 128 S. Ct. at 574-75; *Rita*, 127 S. Ct. at 2465, 2468.

As for the government’s warning to district judges to be mindful of their “institutional competency,” the government appears to mean that district courts are *in*competent to assess whether a guideline recommendation complies with §3553(a) based on anything but specific facts about the case being sentenced. Gov. Mem. at 18. It urges the court to read *United States v. Ricks*, 494 F.3d 394, 401 (3d Cir 2007), as limiting judges to sentencing within a guideline range unless “circumstances of an individual case” justify a non-guidelines sentence. Gov. Mem. at 21. But this is identical to the limitation on sentences outside the range that was rejected in *Booker* as making the guidelines too mandatory to avoid the constitutional issue. *Booker*, 543 U.S. at 233-34 . As described above, in the government’s view, the guideline range would have taken into account all of the relevant sentencing factors and purposes in the vast majority of cases. There would be no “circumstances of an individual case” that could reasonably justify a non-guidelines sentence other than “aggravating or mitigating circumstances of a type, or to a degree, not adequately taken into consideration by the Commission when formulating the guideline that should result in a sentence different than that described.” See 18 U.S.C. § 3553(b)(1) (now excised). Thus, the guidelines would be at least as mandatory under the government’s theory as the guidelines held mandatory, and thus unconstitutional, in *Booker*.

Beginning with *Rita*, the Court has specifically indicated that judges’ authority to disregard guideline recommendations now extends beyond the individual facts of a case. Indeed, if courts were required to find a fact about the case in order to depart upward, a Sixth Amendment violation would clearly occur. (The Court held in *Cunningham v. California*, 127 S. Ct. 856, 862-70 (2007), that a system that does not permit judges to sentence outside a recommended range based on “general objectives of sentencing” alone without a “factfinding

anchor” violates the Sixth Amendment.) The Court laid out types of challenges to sentences within the guideline range in *Rita*. A party may rely on individual characteristics or circumstances, arguing that “the case at hand falls outside the ‘heartland’ to which the Commission intends individual Guidelines to apply,”<sup>3</sup> or that the Guidelines “do not generally treat certain defendant characteristics in the proper way.”<sup>4</sup> In addition – and here is where the Court’s analysis most clearly breaks from the pre-*Booker* era – a party can argue that a non-guideline sentence is appropriate “because the Guidelines sentence itself fails properly to reflect the § 3553(a) considerations,” and thus “reflects an unsound judgment.”<sup>5</sup> Finally, the court leaves the types of arguments courts might hear open-ended, adding that a non-guideline sentence may be appropriate “regardless.”<sup>6</sup>

The government goes so far as to claim that every guideline reflects Congressional judgment because Congress has ultimate authority over sentencing based on 28 U.S.C. § 994(p), which provides that Congress can modify or disapprove guideline amendments within 180 days. Gov. Mem. at 8, 12, 16. This argument also proves too much as it would mean that *all* of the guidelines are mandatory. Moreover, if 28 U.S.C. § 994(p) converted the guidelines into congressional enactments, the Supreme Court would have had to conclude in *United States v. LaBonte*, 520 U.S. 751 (1997), that an amendment to the career offender guideline that post-dated 28 U.S.C. § 994(h) that Congress did not disapprove was consistent with congressional intent, instead of holding, as it did, that the amendment violated congressional intent as expressed in 28 U.S.C. § 994(h). And the Court would have had to find in *Kimbrough* that the

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<sup>3</sup> *Rita* at 2465.

<sup>4</sup> *Id.* at 2468.

<sup>5</sup> *Id.* at 2465

<sup>6</sup> *Id.* at 2468.

drug guidelines were required by Congress, instead of holding that they were not. *See Kimbrough*, 128 S. Ct. at 571-73.

**B. The government’s position would also suppress judicial input into the development of the guidelines, also in contravention of the statute.**

In addition to violating the Sixth Amendment, the government’s position would thwart the development of a sentencing “common law” just as surely as it was thwarted before *Booker*. As already discussed, the statute envisioned the Commission reviewing and revising the Guidelines, not only in accordance with input from Congress, but in accordance with feedback from judges. This feedback, along with the Commission’s “continuing research, experience and analysis,” would help to develop a sentencing “common law.” Stephen Breyer, *Justice Breyer: Federal Sentencing Guidelines Revisited*, 14 *Crim. Just.* 28, 29-30 (1999); *see also Booker*, 543 U.S. at 263. Conversely, the absence of such feedback, or the Commission’s refusal to take such feedback into account, would stunt the development of this common law.

This common law never developed under the mandatory guideline system. As one commentator noted, “the idea that feedback from front-line sentencing actors is an important component of the federal sentencing model has somehow been lost. Instead, . . . sentences outside the otherwise applicable guideline range have come to be viewed as illegitimate, even deviant.” Frank O. Bowman, *The Year of Jubilee . . . Or Maybe Not: Some Preliminary Observations About the Operation of the Federal Sentencing System After Booker*, 43 *Hous. L. Rev.* 279, 321 (2006). Rather than adapting and becoming more flexible, the guidelines became increasingly rigid and unjustifiably exalted. And rather than feeling free to depart from the guidelines, with the reasons for those departures informing the Commission of deficiencies in the



guidelines, judges were discouraged in numerous ways from varying from guideline ranges. Even where research and feedback indicated that flexibility was needed, the Commission often curtailed, or eliminated altogether, sentence reductions based on the cited factors. One of many examples occurred with respect to courts' ability to consider family circumstances in determining sentences. In 2003, a majority of district court judges indicated in a survey that more emphasis was needed on family ties and responsibilities. *See* Linda Drazga Maxfield, Office of Policy Analysis, United States Sentencing Commission, *Final Report: Survey of Article III Judges on the Federal Sentencing Guidelines, Chapter II* (March 2003), available at [www.ussc.gov](http://www.ussc.gov). The same year the survey was issued, however, the Commission made the family ties and circumstances departure more *restrictive*. *See* USSG App. C. Amend. 651 (Oct. 27, 2003) (as part of the PROTECT Act amendments, limiting "the availability of departures pursuant to § 5H1.6 . . . by requiring the court to conduct certain more rigorous analyses"). Judges' perspectives were thus not only ignored, but directly contravened. This was repeated in numerous ways, resulting in a guideline system that reflected nominal judicial input and disproportionate congressional influence.

**C. The government's position ignores the breadth of the Commission's mandate and the parallel mandate of district courts to conduct the 18 U.S.C. § 3553(a) inquiry.**

The government's position is flawed on several additional levels. First, it ignores that courts have always had the institutional authority and competence to decide if an agency followed its organic principles and to strike down the rule if not. *See, e.g., Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44 (1984) (providing for judicial review of agency rules when Congress has delegated to the agency the authority to "elucidate"

the statute by regulation); *Schweiker v. Gray Panthers*, 453 U.S. 34, 44 (1981) (the courts “do not abdicate review” of agency action when Congress entrusts to agency “the primary responsibility for interpreting the statutory term”); *see also* Part I.D.

Second, it ignores the other components of the Commission’s mandate, namely, those involving the Commission’s consultation with other players in the criminal justice system and its review and revision based on, *inter alia*, feedback from judges, feedback that would accompany courts’ disagreement with particular guidelines. It also ignores the explicit explanation of sentencing courts’ parallel and independent role in the statutory scheme. That scheme, as already explained, envisions courts attempting to satisfy the same statutory objectives as the Commission, but at the “retail,” rather than the “wholesale” level. The government’s position would once again reduce courts to calculating and mechanically applying the guidelines in a vast range of cases.

Another flaw in the government’s argument is the implicit assertion that a congressional directive to the *Commission* also binds *sentencing courts*. Of course, the Commission must follow an express directive from Congress, but the resulting guideline is not a mandate for the courts. If Congress wants to bind courts directly, it has the authority to enact mandatory minimum penalties. *See Shipley*, 560 F. Supp. 2d 739, 744 (S. D. Iowa 2008) (“[A] guideline is not a statute. The statute here provides a broad range of punishment for this crime, and if Congress does not want the courts to try and sentence individual defendants throughout that range based on the facts and circumstances of each case, then Congress should amend the statute, rather than manipulate an advisory guideline and blunt the effectiveness and reliability of the work of the Sentencing Commission.”). But Congress cannot bind courts with directives issued

to the Commission that are then incorporated into advisory guidelines, which are in turn only one factor in the overall sentencing inquiry that courts must conduct. Indeed, the government has conceded as much in other contexts. See Letter Stating the Government’s Position on the Career Offender Guideline, docketed March 17, 2008, *United States v. Funk*, No. 05-3708, 3709 (6th Cir.) (“*Kimbrough*’s reference to [§ 994(h)] reflected the conclusion that Congress intended *the Guidelines* to reflect the policy stated in Section 994(h), not that the guidelines implementing that policy binds federal courts.”) (emphasis in original), available at [http://www.fd.org/pdf\\_lib/Funk\\_aua\\_Letter.pdf](http://www.fd.org/pdf_lib/Funk_aua_Letter.pdf). And, as already noted, judges and courts of appeals have found that the *Kimbrough* analysis is applicable to any of the guidelines, including guidelines that are the result of congressional directives, such as the career offender guideline.<sup>7</sup>

In support of its position that guidelines involving congressional directives are distinguishable from the guideline at issue in *Kimbrough*, and are exempt from judicial disagreement, the government cites *United States v. Funk*, 534 F.3d 522 (6th Cir. 2008), a split decision with Chief Judge Boggs dissenting. See Gov. Mem. 16. Significantly, however, in responding to Mr. Funk’s petition for rehearing en banc, the government has requested that the court “delete” the language deeming disagreement with a guideline (specifically, the career offender guideline) resulting from a congressional directive to be an “improper” basis for a below-guideline sentence:

Congress’s direction to the Commission in Section 994(h) does not, however, preclude sentencing courts from varying based on policy disagreements with the career offender guideline. See *United States v. Liddell*, 2008 WL 4149750, at \*5 (7th Cir. Sept. 10, 2008); *United States v. Boardman*, 528 F.3d 86, 87 (1st Cir. 2008); *United States v. Sanchez*, 517 F.3d 651, 663-65 (2d Cir.

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<sup>7</sup> See *supra* note 2.

2008). The Court in *Kimbrough* did not say that Congress had directed *sentencing courts* to impose sentences for serious recidivist offenders “at or near” the maximum (which Congress had not done); rather, the Court emphasized that the direction was to the Commission. 128 S. Ct. at 571. Thus, as with other guidelines, courts may vary from the range recommended by the career offender guideline based on policy considerations, including “disagreements” with the guideline. 128 S. Ct. at 570 (quoting U.S. Br. 16 and citing *Rita*, 127 S. Ct. at 2465 (district court may consider arguments that “the Guidelines sentence itself fails properly to reflect § 3553(a) considerations”)).

Although the panel acknowledged that the Supreme Court had “refuted” its prior holding that a district court’s disagreement with the career offender guideline is an “impermissible” sentencing consideration, 534 F.3d at 526-527, it also stated that Section 994(h) is a “clear direction by Congress \*\*\* that offenders such as Funk be sentenced as [career offenders],” *id.* at 530, and that disagreement with the policy of the career offender guideline is an “improper” basis for a variance, *ibid.* For the reasons set forth above, those statements are inconsistent with *Kimbrough* and *Rita*, and should be deleted from the panel’s opinion.

Resp. to Def.’s Pet. for Reh’g En Banc at 8-9, *United States v. Funk*, 534 F.3d 522 (6th Cir.

2008) (No. 05-3708). The government’s position in *Funk* is consistent with *Kimbrough*; the government’s position here is not.

The government also cites the Third Circuit’s statements in *United States v. Goff*, 501 F.3d 250, 257 (3d Cir. 2007), for general propositions that are, frankly, not in dispute. The Court in *Goff* stated, as a very general matter, that “[b]ecause the Guidelines reflect the collected wisdom of various institutions, they deserve careful consideration,” and that “[b]ecause they have been produced at Congress’s direction, they cannot be ignored.” *See* Gov. Mem. at 12. Of course, Mr. Doe is not suggesting that the district court *ignore* the guideline at issue in this case. And the *Goff* Court’s general statement about the guidelines implicitly frames the question courts must answer in considering the usefulness of a particular guideline in a particular case, namely,

*whether* the particular guideline reflects the “collected wisdom of various institutions.” Where such a guideline does not, either because the “collected wisdom” was faulty at the inception, or because the Commission has ignored the input of one party while permitting another to dominate the development of the policy, then a court may determine that the particular guideline does not provide useful guidance in a particular case.

**D. The Government’s Theory Raises A Separation of Powers Problem.**

In addition to violating the Sixth Amendment, contravening recent Supreme Court precedent and the structure of the statute, and suppressing judicial input into the development of the guidelines, the government’s theory raises the separation of powers problem that most troubled the Supreme Court in *Mistretta v. United States*, 488 U.S. 361, 407-08 (1989). While it is true that defining crimes and setting the range of penalties is exclusively a legislative function, the balance of power upheld in *Mistretta* proves that sentencing necessarily remains primarily a judicial function. “Congress, of course, has the power to fix the sentence for a federal crime, and the scope of judicial discretion with respect to a sentence is subject to congressional control.” *Id.* at 364 (internal citation omitted). However, “*federal sentencing – the function of determining the scope and extent of punishment* – never has been thought to be assigned by the Constitution to the exclusive jurisdiction of any one of the three Branches of Government.” *Id.* at 364 (emphasis added). By placing the Commission within the Judicial Branch, Congress recognized that “sentencing has been and should remain ‘primarily a judicial function.’” *Id.* at 390.

The government fails to acknowledge that, while defining crimes and assigning the range of permissible penalties within minimum and maximum statutory limits is a legislative power, these actions constitute “lawmaking,” which is vested exclusively in Congress and may not be

delegated to the Commission or the Judicial Branch where the Commission is “located.”<sup>8</sup> *Id.* at 386 n.14, 387-88. Indeed, the Supreme Court concluded that the Guidelines do not involve “a degree of political authority inappropriate for a nonpolitical Branch” only because “they do not bind or regulate the primary conduct of the public or vest in the Judicial Branch the legislative responsibility for establishing minimum and maximum penalties for every crime.” *Id.* at 397. Rather, “judicial participation on the Commission ensures that judicial experience and expertise will inform the promulgation of rules for the exercise of the Judicial Branch’s own business – that of passing sentence on every criminal defendant.” *Id.* at 408. In addition, independent judicial feedback to the Commission regarding its policy choices is an integral part of the vision of the Sentencing Reform Act. *See* 28 U.S.C. § 994(o).

Although the Court upheld judicial participation on the Commission in *Mistretta*, it was troubled by the possibility that the judiciary’s “entanglement in the political work of the Commission undermines public confidence in the disinterestedness of the Judicial Branch.” *Id.* at 407. There, the Court made clear that Congress may not cloak its political actions in the neutral garb of the judiciary: “The legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship. That reputation may not be borrowed by the political Branches to cloak their work in the neutral colors of judicial action.” *Id.* But this is

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<sup>8</sup> *See United States v. Evans*, 333 U.S. 483, 486 (1948) (observing that “as concerns the federal powers, defining crimes and fixing penalties are legislative, not judicial, functions”); *Ex parte United States*, 242 U.S. 27, 41-42 (1916) (stating that “the authority to define and fix the punishment for crime is legislative,” while the “right . . . to impose the punishment provided by law, is judicial”); *United States v. Wiltberger*, 18 U.S. (1 Wheat) 76, 95 (1820) (“It is the legislature, not the Court, which is to define a crime, and ordain its punishment.”); *United States v. Hudson*, 11 U.S. (1 Cranch) 32, 34 (1812) (“The legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the Court that shall have jurisdiction of the offence.”).

precisely what the government wants to do. Specifically, it wants judges to apply congressionally-directed guidelines without critically evaluating or questioning them, thereby stamping guidelines that originated in the political branches with the judicial branch's imprimatur of neutrality and independence. This Court should reject the government's efforts to improperly unite the power of judging with the legislative power.

The Sentencing Reform Act sets forth "intelligible principles" for the Commission to follow. *See Mistretta*, 488 U.S. at 374-77 & nn. 8-10. As a general rule, courts have always had the authority to decide if an agency followed such intelligible principles and to strike down the rule if not. *See, e.g., Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44 (1984) (providing for judicial review of agency rules when Congress has delegated to the agency the authority to "elucidate" the statute by regulation); *Schweiker v. Gray Panthers*, 453 U.S. 34, 44 (1981) (the courts "do not abdicate review" of agency action when Congress entrusts to agency "the primary responsibility for interpreting the statutory term"). With *Rita* and *Kimbrough*, the Court has provided a specific framework for judicial review of the Commission's guidelines in the context of an individual case. Under this framework, courts are not required to defer to a guideline that is not the product of the Commission's characteristic institutional role, but instead are empowered to decline to follow that guideline. *See supra*, Part I(C). Further, unlike ordinary agency review, a court does not decide whether to strike down the Commission's rule for all times and for all purposes, but whether to apply the rule in the individual case before it.

If, as the government argues, Congress can use directives to control when a guideline is subject to empirical review and criticism by the courts, then Congress has created a system that

blurs the line between the legislative and judicial branches and improperly insulates its own work from the framework of judicial review accorded to district courts by *Rita* and *Kimbrough*, and required by separation of powers principles.



**IV. The Commission Failed To Exercise Its Characteristic Institutional Role In Developing This Guideline, Leaving The Court Ample Room To Conclude That The Mechanically Calculated Range Is A Poor Guide To The Minimally Sufficient Sentence.**

Turning from its general position that district courts are not authorized to critically evaluate guidelines that result from congressional directives, the government argues specifically that § 2G2.2 is such a guideline. Thus, it does not seriously contest the extremely heavy influence of Congress in the development of this guideline. In fact, a great deal of the government's brief is spent recounting Congress's hearings, findings, and enactments regarding child pornography and child exploitation, and the Commission's compliance with Congress's directives. By and large, then, Mr. Doe and the government agree on this point – Congress has influenced the development of the child pornography guideline to an extraordinary degree. Of course, Mr. Doe also agrees that it is well within Congress's purview to enact legislation addressing these issues, including by setting minimum and maximum penalties and issuing directives to the Commission. And, contrary to the government's position, Mr. Doe does not view Congress's input as an "intrusion" into the process. Gov. Mem. 23. He merely notes that Congress's input is one, but only one, component of the process. When it becomes nearly the exclusive voice to which the Commission responds, however, that is a distortion of the process.

The government's argument is that it is precisely the heavy hand of Congress in the development of this guideline that insulates the guidelines from judicial disagreement. For the reasons already discussed, this argument is without merit. The Commission's characteristic institutional role is not satisfied by marching only to the drumbeat of Congress. In order to fulfill its mandate, the Commission must gather, review, assess and, if appropriate, incorporate

feedback from a variety of sources, including judges. As the following will demonstrate, the Commission failed in this regard. It ignored consistent feedback from judges that the guideline ranges were too severe, and repeatedly and steadily revised the guidelines to make them even more severe, leading eventually to the phenomenon noted by this Court, whereby the guideline regularly produces ranges that exceed the statutory maximum.

Perhaps the best evidence that the Commission abdicated its obligation to consider judicial experience and practice may be found in data collected by the Commission regarding (1) the rate of downward departures and, later, below-range sentences in cases sentenced under § 2G2.2 over the years and (2) the steady, dramatic increase in average sentence length in the pornography/prostitution category.<sup>9</sup> Nearly every year since 1997, judges have granted downward departures in significant numbers in § 2G2.2 cases.<sup>10</sup> In 1997, for example, judges granted downward departures in 24% of the 154 cases sentenced under § 2G2.2, compared with a 3.2% upward departure rate. In 1998, the downward departure rate was 30%. After that, the rates steadily decreased, from 21.2% in 1999 to 6.25% in 2005 (two years after passage of the PROTECT Act), but throughout much of that time period, it remained in the mid-to-high teens.<sup>11</sup> Even a departure rate in the high teens should have alerted the Commission to a significant measure of judicial dissatisfaction with the ranges. For purposes of comparison, it should be noted that the Firearms and Explosive Materials Working Group recommended changes to the

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<sup>9</sup> While the rate of departures is displayed according to primary offense guideline, the average sentence length is displayed according to broader categories. In this case, the relevant category is pornography/prostitution.

<sup>10</sup> The numbers discussed do not include government-initiated requests for downward departures or below-range sentences.

<sup>11</sup> These data are drawn from Table 28 of the relevant fiscal year's *Sourcebook of Federal Sentencing Statistics*, published by the Sentencing Commission and posted on its website, [ussc.gov](http://ussc.gov).

firearms guidelines based on an 8.4% upward departure rate in firearms cases, compared with an overall guideline average of 3.5%. See USSC *Firearms and Explosive Materials Working Group Report*, at 8 (Dec. 11, 1990). This high rate of upward departures, plus the significant numbers of sentences imposed at the high end of the ranges, suggested to the working group “a general insufficiency of these guidelines.” *Id.* at 10. The downward departure rate in child pornography cases, therefore, which eventually reached 30%, should have alerted the Commission to extreme unwarranted severity of these guidelines.

Rather than responding by ameliorating the severity of the guidelines, the Commission repeatedly responded by increasing their severity. And the effects were dramatic. Whereas the mean sentence in the pornography/prostitution category was 29.1 months in fiscal year 1996, it was 109.6 in fiscal year 2007. See USSC, *Sourcebook of Federal Sentencing Statistics*, tbl. 13 (Fiscal Year 1996 & 2007, respectively). In so doing, the Commission failed to implement an absolutely critical component of its statutory mandate. It chose, in essence, to develop guidelines that disproportionately reflected congressional wishes while ignoring judicial feedback, in the form of departures and the reasons for them, about the efficacy of those guidelines in serving the statutory purposes of sentencing. As developed, then, the guidelines represent the Commission’s attention to only a portion of its mandate.

Compounding the distorted development of the guideline is the extent to which Congressional action stifled the departure numbers. As this court is well aware, the Feeney Amendment, passed as part of the PROTECT Act in 2003, restricted the grounds for departures in child sex offenses. While the Commission was forced to abide by this congressional directive, its effect must be noted. The restrictions both contravened the feedback the Commission was

receiving from judges about the efficacy of the guidelines *and* effectively repressed continuing feedback. Since courts were severely restricted in granting departures in these cases, the Commission would necessarily receive less feedback in the form of departures, thus artificially suggesting judicial satisfaction with the guideline ranges. The rate of departures in § 2G2.2 cases dropped from 18.4% in 2002 (before the PROTECT Act), to 13.6% in 2003, 11.5% in 2004, and 6.25% in 2005. After *Booker*, departures and below-range sentences rebounded, to 22% in 2006, 27.2% in 2007. In the most recent post-Gall and post-Kimbrough report, the rate climbed to 39%. See USSC, *Preliminary Post-Kimbrough/Gall Data Report*, tbl. 4 (Sept. 2008).

These consistently high downward departure rates should have alerted the Commission to judicial dissatisfaction with the child pornography guidelines. Alerted or not, however, the Commission continued to respond nearly exclusively to Congress, repeatedly revising the guidelines in ways that produced ever-harsher sentences. The result is a guideline structure that serves Congress's repeatedly expressed political wishes, but represents a complete abdication of the Commission's broader mandate, not only to formulate guidelines that reflect input from a variety of sources, but also to formulate guidelines that serve all of the purposes of sentencing. In light of that abdication, this Court has ample grounds for determining that the guideline calculation in this case is not a useful guide to determining the minimally sufficient sentence.