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### EMPOWERING THE SENTENCING COMMISSION: A DIFFERENT RESOLUTION TO THE COCAINE SENTENCING DRAMA

KIP NELSON

#### I INTRODUCTION

Cocaine sentencing policy has been the source of vociferous debate for more than twenty years. Under the traditional sentencing scheme, criminal defendants convicted of crack cocaine offenses (who were usually black) were disproportionately sentenced to longer prison terms than defendants convicted of powder cocaine offenses (who were usually not). Despite decades of criticisms toward this disparity, Congress did not change the sentencing law until August 2010. On the other hand, the United States Sentencing Commission was an unlikely hero that affirmatively acted to reduce the disparity between crack and powder cocaine sentences. That role is largely underappreciated. Based on the Commission's 2007 retroactive amendment that reduced the sentencing guideline ranges for crack convictions, Congress should recognize the value of the Commission and grant it additional power.

Much has been said about the crack/powder disparity and the harshness of drug laws in general. Rather than evaluate these policy decisions, this article is an attempt to address a deeper problem of political unresponsiveness. It does not express an opinion on whether drug sentences are too severe or how the equal protection concerns should be resolved. Instead, this article's focus is on a potential solution to Congress's unwillingness to address the concerns that others have raised. Rather than focusing on what should be done, this article attempts to answer the question of who should do it.

Every good drama has three integral parts: an exposition, a climax, and a denouement. As exposition, Part II of this article will explore the history of the Sentencing Commission and the crack/powder disparity as well as the role of the Commission in federal cocaine sentencing policy. Part II will also address the effects of *United States v. Booker* and its progeny on criminal sentences. For the climax, Part III will discuss the Commission's 2007 amendment regarding crack cocaine, and its aftermath in federal criminal sentences, and the implications of the Fair Sentencing Act of 2010.

Finally, the denouement in Part IV will argue that despite the recent legislative reform, Congress is unlikely to eliminate the crack/powder disparity any time soon. As a more palatable and realistic solution, Congress should grant the Commission additional power over federal sentencing policy. Such an increase in delegation has the potential to not only satisfy much of the criticism against the current sentencing regime but should also be attractive to a legislature that is concerned about reelection.

## II THE EXPOSITION

In the nation's criminal justice history, two major strands of plot converged in the 1980s. Within a few years of each other, Congress overhauled both federal sentencing policy and federal drug laws. The newly created United States Sentencing Commission was forced to deal with the resultant statutory disparity between crack and powder cocaine sentences. In addition, the Supreme Court entered the sentencing debate through the *Booker* case and its subsequent decisions.

### A. THE SENTENCING COMMISSION

“Federal judges are not responsive to the pulsations of humanity.”<sup>1</sup> Such was a common perception of the status of federal sentencing in the early twentieth century. Judges had wide discretion to sentence convicted criminals anywhere between the statutory minimum and maximum sentences.<sup>2</sup> The trial court's sentencing decision was, “for all practical purposes, not reviewable on appeal.”<sup>3</sup> Furthermore, the imposed sentence was usually not the sentence that the convicted defendant actually served.<sup>4</sup> Because of the lack of uniformity in sentences across the nation,<sup>5</sup> the federal sentencing regime was in serious need of reform.

To that end, Congress overhauled the nation's sentencing policies in the Sentencing Reform Act of 1984 (“the SRA”).<sup>6</sup> Among other things, Congress created the United States Sentencing Commission (“the Commission”).<sup>7</sup> The two general purposes of the Commission, as dictated by Congress, were to “establish sentencing policies and practices for the Federal criminal justice system” and to “develop means of measuring the degree to which the sentencing, penal, and correctional practices are effective.”<sup>8</sup>

Congress intended the Commission to be unique in its composition. Seven members of the general population are appointed for six-year terms.<sup>9</sup> The current law requires at least three federal judges,<sup>10</sup> although the law traditionally limited the Commission to *no more than* three judges.<sup>11</sup>

<sup>1</sup> U.S. SENTENCING COMM'N, FIFTEEN YEARS OF GUIDELINES SENTENCING, 2 (2004), available at [http://www.ussc.gov/15\\_year/15year.htm](http://www.ussc.gov/15_year/15year.htm).

<sup>2</sup> Frank O. Bowman III, *The Failure of the Federal Sentencing Guidelines: A Structural Analysis*, 105 COLUM. L. REV. 1315, 1322 (2005).

<sup>3</sup> *Koon v. United States*, 518 U.S. 81, 96 (1996).

<sup>4</sup> Bowman, *supra* note 2, at 1322.

<sup>5</sup> See, e.g., U.S. SENTENCING COMM'N, *supra* note 1, at 11 (“The ‘first and foremost’ goal of sentencing reform is avoiding unwarranted sentencing disparity.”) (citation omitted).

<sup>6</sup> Pub. L. No. 98-473, 98 Stat. 1987 (codified as amended at 18 U.S.C. §§ 3551-3626, 28 U.S.C. §§ 991-998 (2006)).

<sup>7</sup> 28 U.S.C. § 992(a) (2006).

<sup>8</sup> *Id.* § 991(b).

<sup>9</sup> *Id.* § 992(a).

<sup>10</sup> 28 U.S.C.S. § 991(a) (2009).

Members are appointed by the President “by and with the advice and consent of the Senate.”<sup>12</sup> Furthermore, only four members of the Commission can be of the same political party.<sup>13</sup> Finally, the Attorney General is statutorily deemed “an ex officio, nonvoting member of the Commission.”<sup>14</sup>

The original Commission had the responsibility to promulgate sentencing guidelines (“Guidelines”) “for use of a sentencing court in determining the sentence to be imposed in a criminal case.”<sup>15</sup> Congress dictated that “for each category of offense involving each category of defendant,” the Commission was to establish a “sentencing range.”<sup>16</sup> In establishing the guideline ranges, the Commission was not bound by contemporary sentencing practices.<sup>17</sup> However, the Guidelines were to be commensurate with the overarching policy to impose a sentence “sufficient, but not greater than necessary” to accomplish Congress’s penological objectives listed in the federal criminal code.<sup>18</sup> Specifically, those objectives include the need to reflect the seriousness of the offense, to promote respect for the law, to provide just punishment, to afford adequate deterrence, to protect the public from future crimes, and to provide the defendant with needed correctional treatment.<sup>19</sup>

Because of the passage of the Guidelines, judges purportedly have greater direction in determining a “proper” (or at least more uniform) sentence for convicted defendants. To oversimplify, a sentencing judge first determines the defendant’s “offense level,” which considers not only the crime actually committed but also attendant circumstances such as the presence of a weapon or involvement of a minor.<sup>20</sup> Then, the judge determines the defendant’s “criminal history category.”<sup>21</sup> Using a table printed at the beginning of every annual guidelines manual, the judge determines the proper “guideline range.”<sup>22</sup> The range, listed in terms of months, gives the judge guidance on an appropriate sentence.

Despite the guideline ranges, however, judges are still bound by statutory mandatory sentences. Particularly in the drug arena, Congress has clearly delineated minimum sentences for specific amounts of drugs.<sup>23</sup> The statute has a limited exception for defendants who provide “substantial assistance” to the government.<sup>24</sup> Congress has also created a limited exception (known as the “safety valve”) for drug offenses for seemingly less-culpable defendants.<sup>25</sup> In general, though, a judge is bound by mandatory minimum sentences, regardless of the applicable guideline range.

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<sup>11</sup> 28 U.S.C. § 991(a) (2006).

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* § 994(a).

<sup>16</sup> *Id.* § 994(b).

<sup>17</sup> *Id.* § 994(m).

<sup>18</sup> 18 U.S.C. § 3553(a) (2006).

<sup>19</sup> *Id.*

<sup>20</sup> U.S. SENTENCING GUIDELINES MANUAL § 1B1.1 (2009).

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *See* 21 U.S.C. § 841 (2006) (mandating minimum sentences for several drug types).

<sup>24</sup> 18 U.S.C. § 3553(e) (2006).

<sup>25</sup> *Id.* § 3553(f). To be eligible for the safety valve, a defendant must have limited criminal history and provide relevant information to the government. *Id.* Additionally, the defendant cannot use violence or possess a firearm in connection with the offense, injure another person, or act as a leader or supervisor. *Id.* For an empirical examination of the safety valve’s application to cocaine offenses, *see* Celesta A. Albonetti, *The Effects of the “Safety Valve” Amendment on Length of*

Additionally, the SRA mandated that the Commission “periodically shall review and revise . . . the guidelines . . . .”<sup>26</sup> Congress recognized that the original Guidelines would need adjustment. With that recognition, the Commission was given authority to “promulgate . . . and submit to Congress amendments to the guidelines,” which would “take effect on a date specified by the Commission . . . except to the extent that the effective date is revised or the amendment is otherwise modified or disapproved by Act of Congress.”<sup>27</sup>

In some ways, the Commission was given extraordinary power. It could enter into contracts, request information from any federal agency, monitor probation officers, and hold hearings.<sup>28</sup> In addition, Congress delegated to the Commission “such other powers and duties . . . as may be necessary to carry out the purposes of [the SRA].”<sup>29</sup>

Challenges to the constitutionality of the Commission quickly ensued. Although lower courts disagreed on the authority of Congress to delegate such power,<sup>30</sup> the Supreme Court determinatively settled the issue in *Mistretta v. United States*.<sup>31</sup> John Mistretta was sentenced for drug offenses under the recently enacted sentencing guidelines.<sup>32</sup> He challenged the constitutionality of the Guidelines under excessive delegation and separation of powers theories.<sup>33</sup> The Supreme Court, however, upheld the SRA.

The Court began with a lengthy description of sentencing history and the establishment of the Commission.<sup>34</sup> Admittedly, the majority of the Court found some aspects of the Commission “somewhat troublesome”<sup>35</sup> and noted that the Commission “give[s] rise to serious concerns about a disruption of the appropriate balance of governmental power among the coordinate Branches.”<sup>36</sup>

In the end, however, the Court “harbor[ed] no doubt that Congress' delegation of authority to the Sentencing Commission is sufficiently specific and detailed to meet constitutional requirements.”<sup>37</sup> The Court specifically approved of Congress's decision to place the Commission within the judicial branch, to allow judges to serve on the Commission, and to allow the President influence over its composition.<sup>38</sup> The majority concluded that Congress had appropriately and carefully circumscribed the breadth of the Commission's authority and established the general

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*Imprisonment for Cocaine Trafficking/Manufacturing Offenders: Mitigating the Effects of Mandatory Minimum Penalties and Offender's Ethnicity*, 87 IOWA L. REV. 401 (2002).

<sup>26</sup> 28 U.S.C. § 994(o) (2006).

<sup>27</sup> *Id.* § 994(p).

<sup>28</sup> *Id.* § 995(a).

<sup>29</sup> *Id.* § 995(b).

<sup>30</sup> Compare *Gubiensio-Ortiz v. Kanahale*, 857 F.2d 1245 (9th Cir. 1988) (holding the SRA unconstitutional), with *United States v. Frank*, 864 F.2d 992 (3d Cir. 1988) (holding the SRA constitutional).

<sup>31</sup> 488 U.S. 361 (1989).

<sup>32</sup> *Id.* at 370.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 362-70.

<sup>35</sup> *Id.* at 397.

<sup>36</sup> *Id.* at 384.

<sup>37</sup> *Id.* at 374.

<sup>38</sup> *Id.* at 380-411.

contours of the guidelines system.<sup>39</sup> The Court ultimately explained, “Congress simply cannot do its job absent an ability to delegate power under broad general directives.”<sup>40</sup>

## B. THE CRACK/POWDER DISPARITY

Around the same time, Congress faced another concern: drugs. The use of drugs, and their attending market, grew to national attention in the 1980s. Congress, ever wanting to be seen as tough on crime, therefore enacted the comprehensive Anti-Drug Abuse Act of 1986 (“the ADAA”).<sup>41</sup> The ADAA established mandatory minimum sentences for several types of drug offenses, based on the quantity of drug for which the defendant was charged.

Congress differentiated mandatory sentences among many different drugs, including a notable distinction between “cocaine” and “cocaine base.”<sup>42</sup> Both drugs come from the coca plant,<sup>43</sup> but the two forms have somewhat differing characteristics. For example, ordinary powder cocaine can be injected, snorted, or ingested, while cocaine base (commonly referred to as crack) can only be smoked.<sup>44</sup> “The two forms of the drug also have the same physiological and psychotropic effects, but smoking crack cocaine allows the body to absorb the drug much faster than inhaling powder cocaine, and thus produces a shorter, more intense high.”<sup>45</sup>

At the time the ADAA was enacted, crack cocaine was a relatively recent newcomer to the drug scene.<sup>46</sup> Congress feared that crack users and distributors were infiltrating urban settings, corrupting the nation’s youth, and dramatically increasing the use of violence in crimes.<sup>47</sup> Because of those concerns, Congress established sentences for crack convictions that were significantly higher than their powder counterparts.<sup>48</sup> While five kilograms of powder cocaine triggered a mandatory ten-year minimum sentence, only fifty grams of crack had the same result.<sup>49</sup> Similarly, five hundred grams of powder cocaine triggered a mandatory five-year sentence, but only five grams of crack produced the same minimum sentence.<sup>50</sup> This distinction has since been known as the “100 to 1” or “crack/powder” disparity.<sup>51</sup>

The reasons for such a significant disparity are not entirely clear. According to one congressional staff worker, the proposed ratio of 50-to-1 in the subcommittee’s bill was “arbitrarily doubled simply to symbolize redoubled congressional seriousness.”<sup>52</sup> In other words, the actually-

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<sup>39</sup> *Id.* at 371-79.

<sup>40</sup> *Id.* at 372.

<sup>41</sup> Pub. L. No. 99-570, 100 Stat. 3207 (codified as amended in scattered sections of 18 U.S.C. and 21 U.S.C.).

<sup>42</sup> *See, e.g.*, 21 U.S.C. § 841(b)(1)(A) (2006).

<sup>43</sup> U.S. SENTENCING COMM’N, SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 9 (1995), available at <http://www.ussc.gov/crack/exec.htm> [hereinafter 1995 report].

<sup>44</sup> *Id.* at 7.

<sup>45</sup> *Kimbrough v. United States*, 552 U.S. 85, 94 (2007) (citation omitted).

<sup>46</sup> *Id.* at 95.

<sup>47</sup> David A. Sklansky, *Cocaine, Race, and Equal Protection*, 47 STAN. L. REV. 1283, 1293-95 (1995).

<sup>48</sup> Notably, the sentences for crack cocaine are not higher than every other drug. Mandatory minimum sentences for methamphetamine convictions are imposed for the same quantity of crack; LSD convictions require even less. 21 U.S.C. § 841(b)(1) (2006).

<sup>49</sup> *Id.* § 841(b)(1)(A).

<sup>50</sup> *Id.* § 841(b)(1)(B).

<sup>51</sup> *See, e.g.*, Sklansky, *supra* note 47, at 1287.

<sup>52</sup> *Id.* at 1297 n.69.

enacted 100-to-1 ratio “reflects no actual calculation of the relative harmfulness to society or an individual of a given number of doses of an illegal drug.”<sup>53</sup>

Not surprisingly, criticism of the crack/powder disparity arose shortly after the ADAA was enacted. Because of the statutory disparity and its incorporation into the Guidelines, the 100-to-1 ratio yielded sentences for crack offenses three to six times longer than those for powder offenses involving equal amounts of drugs.<sup>54</sup> Importantly, those longer sentences were also imposed disproportionately on African Americans. As far back as 1992, a writer for the Los Angeles Times explained that white defendants usually violated powder cocaine laws, rather than crack cocaine laws, and thus received shorter sentences.<sup>55</sup>

Legal scholars also found fresh fodder in the crack/powder disparity and its constitutional implications. David Sklansky, for example, noted that “[t]he particularly harsh federal penalties for trafficking in crack cocaine . . . have a particularly disproportionate impact on black defendants.”<sup>56</sup> Professor Sklansky explained:

[T]he arbitrary nature of the 100:1 ratio between the quantities of powder cocaine and crack that trigger federal mandatory sentences, combined with the dramatically disproportionate impact federal crack penalties have on black defendants, and the striking manner in which those penalties depart from the overall logic of federal narcotics sentences, does raise serious concerns of equal protection.<sup>57</sup>

Judges expressed similar concerns. In *United States v. Moore*, the Second Circuit noted that the defendant’s equal protection arguments “raise[d] troublesome questions about the fairness of the crack cocaine sentencing policy.”<sup>58</sup> Similarly, the First Circuit said that the defendant’s arguments “raised important questions about the efficacy and fairness of our current sentencing policies for offenses involving cocaine substances.”<sup>59</sup>

However, despite these concerns, and perhaps motivated by the doctrine of constitutional avoidance, the courts generally concluded that the crack/powder disparity did not violate the Constitution’s equal protection clause.<sup>60</sup> In summarizing the constitutional challenges, Professor Sklansky explained that “[t]he results . . . have been remarkably consistent: the defendants always

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<sup>53</sup> *Id.*

<sup>54</sup> *Kimbrough v. United States*, 552 U.S. 85, 94 (2007).

<sup>55</sup> Jim Newton, *Harsher Crack Sentences Criticized as Racial Inequality*, L.A. TIMES, Nov. 23, 1992, at A1, available at [http://articles.latimes.com/1992-11-23/news/mn-724\\_1\\_crack-cocaine](http://articles.latimes.com/1992-11-23/news/mn-724_1_crack-cocaine).

<sup>56</sup> Sklansky, *supra* note 47, at 1289. For additional early responses to the 100-to-1 ratio, see Matthew F. Leitman, *A Proposed Standard of Equal Protection Review for Classifications Within the Criminal Justice System that Have a Racially Disparate Impact: A Case Study of the Federal Sentencing Guidelines’ Classification Between Crack and Powder Cocaine*, 25 U. TOL. L. REV. 215 (1994); William Spade, Jr., *Beyond the 100:1 Ratio: Towards a Rational Cocaine Sentencing Policy*, 38 ARIZ. L. REV. 1233 (1996); The Committee on Federal Legislation, *Reevaluating the 100-to-1 Quantity Ratio for the Sentencing of Crack Versus Powder Cocaine Offenses*, 51 THE RECORD 490 (1996).

<sup>57</sup> Sklansky, *supra* note 47, at 1298.

<sup>58</sup> 54 F.3d 92, 102 (2d Cir. 1995).

<sup>59</sup> *United States v. Singleterry*, 29 F.3d 733, 741 (1st Cir. 1994).

<sup>60</sup> U.S. CONST. amend. XIV, § 1 (dictating that a state cannot deprive any person “the equal protection of the laws”); *Moore*, 54 F.3d at 102; *Singleterry*, 29 F.3d at 741.

have lost, and the opinions generally have been both unanimous and short.”<sup>61</sup> Similarly, the Supreme Court imposed a demanding standard for black defendants to prove that prosecutors were specifically targeting them.<sup>62</sup> For any significant change, the ball was back in Congress’s court.

### C. THE COMMISSION AND CRACK

The ADAA was passed before the Commission had completed the initial set of sentencing guidelines. Therefore, the mandatory minimum sentences for both crack and powder cocaine convictions were included in the original Guidelines. For cocaine offenses, the Commission based the sentencing ranges with the statutory mandatory minimum as the lowest point of the range.<sup>63</sup> Those ranges included, of course, the 100-to-1 disparity between crack and powder cocaine sentences.<sup>64</sup>

Because of the criticisms mentioned above, the Commission later sought to undo some of the damage that the crack/powder disparity had caused. In 1995, the Commission submitted a report to Congress recommending that the 100-to-1 ratio be “re-examined and revised.”<sup>65</sup> The Commission unanimously recommended that changes be made, and a majority of the Commission voted to amend the Guidelines to eliminate any sentencing disparity between crack and powder cocaine convictions.<sup>66</sup>

Despite the overwhelming criticism toward the disparity, however, Congress took a bold move. For the first time in the Commission’s history, Congress rejected the Commission’s proposal.<sup>67</sup> Instead of explaining its decision to reject the amendment, Congress simply requested more information from the Commission.<sup>68</sup>

Two years later, the Commission tried again. In its 1997 report, the Commission again stated that a “100-to-1 quantity ratio cannot be justified.”<sup>69</sup> Instead of proposing the elimination of the disparity altogether, the Commission attempted to gain congressional approval by recommending a decrease in the amount of powder cocaine required to trigger the mandatory minimum sentence while simultaneously increasing the required levels for crack.<sup>70</sup> The concurring commissioner Michael Gelacak premised his thoughts with the admission, “We have jointly failed in our approach toward crack cocaine sentences.”<sup>71</sup> However, he ultimately placed the blame on Congress when he explained that “[t]he congressional mandate that penalties for crack cocaine must be higher than

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<sup>61</sup> Sklansky, *supra* note 47, at 1303. For a discussion of one of the well-known cases, *United States v. Jackson*, see Cristian M. Stevens, Note, *Criticism of Crack Cocaine Sentences Is Not What it Is Cracked up to Be: A Case of First Impression Within the Ongoing Crack vs. Cocaine Debate*, 62 MO. L. REV. 869 (1997).

<sup>62</sup> *United States v. Armstrong*, 517 U.S. 456 (1996).

<sup>63</sup> U.S. SENTENCING GUIDELINES MANUAL (1987). For example, the mandatory minimum sentence for possession of five grams of crack cocaine was sixty months. 21 U.S.C. § 841(b)(1)(B) (2006). The corresponding sentencing range for a first-time offender was 63-78 months. U.S. SENTENCING GUIDELINES MANUAL, *supra*, at § 2D1.1.

<sup>64</sup> *Id.*

<sup>65</sup> 1995 report, *supra* note 43, at 197.

<sup>66</sup> *Id.* at 198.

<sup>67</sup> THE SENTENCING PROJECT, FEDERAL CRACK COCAINE SENTENCING 6 (2009).

<sup>68</sup> Pub. L. No. 104-38, 109 Stat. 334.

<sup>69</sup> U.S. SENTENCING COMM’N, SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 2 (1997), available at [http://www.ussc.gov/r\\_congress/NEWCRACK.PDF](http://www.ussc.gov/r_congress/NEWCRACK.PDF) [hereinafter 1997 report].

<sup>70</sup> *Id.* at 9-10.

<sup>71</sup> *Id.* at 1 (Vice Chairman Michael S. Gelacak concurring).

those for a similar quantity of powder cocaine . . . makes it impossible for the Commission alone to accomplish that goal at the present time.”<sup>72</sup> Congress did not respond.

Years passed as the Commission gathered not only data but also the gumption to once again suggest a need for change. The Commission’s 2002 report was an attempt “to bring light rather than heat to this subject in order to seek appropriate change.”<sup>73</sup> The Commission stated that “at this juncture its role under the Sentencing Reform Act is to first advise Congress on necessary statutory changes.”<sup>74</sup> In a significant change from the 1997 report, the Commission recommended increasing the amount required to trigger the mandatory minimum for crack convictions but declined to change the amount required for powder convictions.<sup>75</sup> Again, Congress did not respond.

In 2007, the Commission issued another report recommending the same solution as the 2002 report.<sup>76</sup> However, the Commission was also more vocal in its criticisms. And, once again, the Commission pleaded for “prompt and appropriate legislative action by Congress.”<sup>77</sup>

#### D. THE OVERHAUL TO SENTENCING

Meanwhile, the Supreme Court took at least a portion of sentencing policy into its own hands. In the landmark decision of *United States v. Booker*,<sup>78</sup> the Court decided that the congressional attempt at making the Guidelines’ sentences mandatory was unconstitutional. However, rather than invalidating the entire SRA, the Court held that the Guidelines were “effectively advisory.”<sup>79</sup> In other words, the SRA now “requires a sentencing court to consider Guidelines ranges . . . but it permits the court to tailor the sentence in light of other statutory concerns as well.”<sup>80</sup>

The effects of *Booker* entered the cocaine debate in particular. Even after the Commission amended the sentencing guidelines,<sup>81</sup> the Supreme Court decided that a sentencing judge “may consider the disparity between the Guidelines’ treatment of crack and powder cocaine offenses.”<sup>82</sup> Instead of focusing on congressional action or inaction, the Court persisted in identifying the Commission as the primary source of sentencing policy: “Although the Commission immediately used the 100-to-1 ratio to define base offense levels for all crack and powder offenses, it later determined that the crack/powder sentencing disparity is generally unwarranted.”<sup>83</sup> According to the Court, the Commission, rather than Congress, “has several times sought to achieve a reduction in

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<sup>72</sup> *Id.* at 5.

<sup>73</sup> News Release, U.S. Sentencing Comm’n, Change in Federal Cocaine Sentencing Policy Recommended Findings to Be Submitted to Congress (Apr. 5, 2002), *available at* <http://www.ussc.gov/PRESS/rel0402.htm>.

<sup>74</sup> *Id.*

<sup>75</sup> U.S. SENTENCING COMM’N, REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 92 (2002), *available at* [http://www.ussc.gov/r\\_congress/02crack/2002crackrpt.htm](http://www.ussc.gov/r_congress/02crack/2002crackrpt.htm) [hereinafter 2002 report].

<sup>76</sup> U.S. SENTENCING COMM’N, REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 8 (2007), *available at* [http://www.ussc.gov/r\\_congress/cocaine2007.pdf](http://www.ussc.gov/r_congress/cocaine2007.pdf) [hereinafter 2007 report].

<sup>77</sup> *Id.* at 2.

<sup>78</sup> 543 U.S. 220 (2005).

<sup>79</sup> *Id.* at 245.

<sup>80</sup> *Id.*

<sup>81</sup> *See infra* Part III.A.

<sup>82</sup> *Kimbrough v. United States*, 552 U.S. 85, 90 (2007).

<sup>83</sup> *Id.* at 97.



the crack/powder ratio.”<sup>84</sup> The Commission’s “consistent and emphatic position [is] that the crack/powder disparity is at odds with § 3553(a).”<sup>85</sup>

The Court went even further the next term. In a per curiam opinion, the Court held that “with respect to the crack cocaine Guidelines, a categorical disagreement with and variance from the Guidelines is not suspect.”<sup>86</sup> The Court was very specific, stating that “district courts are entitled to reject and vary categorically from the crack-cocaine Guidelines based on a policy disagreement with those Guidelines.”<sup>87</sup>

The Supreme Court’s direction had a measurable effect on cocaine sentencing policy. In 2005, the percentage of cases in which judges, without a motion from the government, sentenced crack offenders to prison terms below the guidelines range increased from 4.3 percent to 14.7 percent.<sup>88</sup> Generally, judges initially “made limited use of *Booker* to fashion non-government-sponsored, below-range sentences in crack cocaine cases.”<sup>89</sup>

Still, the post-*Booker* advisory nature of the Guidelines did not eliminate the crack/powder disparity. Statutory mandatory minimum sentences continued to require significantly higher sentences for crack convictions than powder cocaine convictions. Furthermore, despite the Court’s strong language in *Kimbrough* and *Spears* and the early spike in below-range sentences, after 2005 the number of within-range sentences for crack convictions actually increased while the number of below-range sentences decreased.<sup>90</sup>

### III THE CLIMAX

Thus, the *Booker* line of cases did not completely solve the problem.<sup>91</sup> African-American crack cocaine defendants were still receiving higher sentences than similar Caucasian powder cocaine defendants. Criticisms, launched at Congress, the courts, and the Commission, grew louder and louder. Eventually, something had to change. The only question was who would be the one to take the next step.

#### A. THE COMMISSION’S 2007 AMENDMENT

By 2007, the Commission decided to act of its own accord. While in 2002 the Commission had asserted that “Congress and the Commission now have improved tools” to address the disparity,<sup>92</sup> five years later the Commission was apparently ready to take things into its own hands.

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<sup>84</sup> *Id.* at 99.

<sup>85</sup> *Id.* at 111.

<sup>86</sup> *Spears v. United States*, 129 S. Ct. 840, 843 (2009).

<sup>87</sup> *Id.* at 843-44. For a discussion of these cases and their effect on cocaine sentencing policy, see generally Michael B. Cassidy, *Examining Crack Cocaine Sentencing in a Post-Kimbrough World*, 42 AKRON L. REV. 105 (2009).

<sup>88</sup> U. S. SENTENCING COMM’N, FINAL REPORT ON THE IMPACT OF UNITED STATES V. BOOKER ON FEDERAL SENTENCING 126-28 (2006).

<sup>89</sup> *Id.* at 130.

<sup>90</sup> 2007 report, *supra* note 76, at 53.

<sup>91</sup> For more information on the post-*Booker* “muddle,” see Steven L. Chanenson, *Booker on Crack: Sentencing’s Latest Gordian Knot*, 15 CORNELL J.L. & PUB. POL’Y 551 (2006).

<sup>92</sup> 2002 report, *supra* note 75, at 93.

Less than one week before its statutory deadline,<sup>93</sup> the Commission proposed an amendment to the Guidelines.<sup>94</sup>

Based on its understanding that the crack/powder disparity was “under almost universal criticism,”<sup>95</sup> and using the plenary authority described above, the Commission reduced the sentencing range for crack cocaine convictions. Because of what the Commission viewed as “urgent and compelling” problems with the crack/powder disparity, the Commission enacted the amendment as an “interim measure” until Congress took action.<sup>96</sup> Instead of adjusting the 100-to-1 ratio or using any of the previously-reported suggestions, the Commission used a novel, and apparently unexplained, approach: it adjusted the base offense level for those convicted of crack downward by two levels.<sup>97</sup> The Commission subsequently made the amendment retroactive.<sup>98</sup>

Because of the two-level decrease, a significant number of defendants in the federal prison system were eligible for reduced sentences. The Commission predicted that almost 20,000 defendants would be affected, and their sentences would be reduced by twenty-seven months on average.<sup>99</sup> Preliminary data shows that the amendment had some effect on the 100-to-1 ratio, at least insofar as the Guidelines control it.<sup>100</sup>

This amendment was not the first decision that the Commission had made to address the crack/powder disparity. In 1993, the Commission limited the Guidelines definition of “cocaine base” to include crack only; everything else was included within the more lenient sentences of powder cocaine.<sup>101</sup> Despite its attempts to spur congressional action through its yearly reports, the Commission recognized its role in proactively effectuating change in federal sentencing policy.

Similarly, the 2007 amendment was a brilliant move. Instead of waiting for Congress to act affirmatively, the Commission handed Congress a temporary solution on a silver platter: Congress simply had to sit back and do nothing. As a result, the Commission’s proposed amendment came into effect on March 3, 2008.<sup>102</sup> Congress, “with virtually no debate or opposition,” allowed the amendments to become effective.<sup>103</sup> Prosecutors, defense attorneys, and judges then scrambled to deal with the aftermath of the Commission’s decision.

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<sup>93</sup> 28 U.S.C. § 994(p) (2006).

<sup>94</sup> U.S. SENTENCING GUIDELINES MANUAL, App. C, Amdt. 706 (2007).

<sup>95</sup> 2007 report, *supra* note 76, at 2.

<sup>96</sup> Sentencing Guidelines for United States Courts, 72 Fed. Reg. 28,558, 28,573 (May 21, 2007).

<sup>97</sup> *Id.* For a first-time offender with 5 grams of crack cocaine, the applicable Guidelines range now placed the sentence between 51 and 60 months. U.S. SENTENCING GUIDELINES MANUAL § 2D1.1 (2009). Of course, the mandatory minimum sentence was still 60 months. 21 U.S.C. § 841(b)(1)(B) (2006).

<sup>98</sup> U.S. SENTENCING GUIDELINES MANUAL, App. C, Amdt. 713 (2008).

<sup>99</sup> U.S. SENTENCING COMM’N, ANALYSIS OF THE IMPACT OF THE CRACK COCAINE AMENDMENT IF MADE RETROACTIVE 23 (2007), available at [http://www.ussc.gov/general/Impact\\_Analysis\\_20071003\\_3b.pdf](http://www.ussc.gov/general/Impact_Analysis_20071003_3b.pdf).

<sup>100</sup> U.S. SENTENCING COMM’N, PRELIMINARY CRACK COCAINE RETROACTIVITY DATA REPORT (Sept. 2009).

<sup>101</sup> U.S. SENTENCING GUIDELINES MANUAL, App. C, Amdt. 487 (1994). For additional discussion of this issue and an argument that “cocaine base” should be limited to crack, see Spencer A. Stone, Note, *Federal Drug Sentencing—What Was Congress Smoking? The Uncertain Distinction Between “Cocaine” and “Cocaine Base” in the Anti-Drug Abuse Act of 1986*, 30 W. NEW ENG. L. REV. 297 (2007).

<sup>102</sup> U.S. SENTENCING GUIDELINES MANUAL, App. C, Amdt. 713 (2008).

<sup>103</sup> *Federal Cocaine Sentencing Laws: Reforming the 100-to-1 Crack/Powder Disparity: Hearing before the Subcomm. on Crime and Drugs of the S. Comm. on the Judiciary*, 110th Cong. 267 (2008) (prepared statement of Reggie B. Walton, District Judge and Member, Federal Judicial Conference) [hereinafter Senate Hearings].

Still, the Commission viewed the amendment “only as a partial remedy.”<sup>104</sup> Despite its efforts, “the Commission recognizes that establishing federal cocaine sentencing policy, as underscored by past actions, ultimately is Congress’s prerogative.”<sup>105</sup> The Commission also recognized that “any comprehensive solution to the 100-to-1 drug quantity ratio would require appropriate legislative action by Congress.”<sup>106</sup> In other words, the Commission could only do so much. Although the guideline ranges for crack cocaine sentences were now at the lowest possible amount, the Commission could not do more without congressional intervention. Because of the statutory mandatory minimum sentences, the effect of the Guidelines only reaches so far. As one federal judge explained, the Commission’s efforts did not have much effect on general cocaine sentencing policy.<sup>107</sup> For those convicted of offenses with at least five grams of crack cocaine, the reduction might not have made a significant difference.

On the other hand, the 2007 amendment had, at least to some degree, its desired effect. After its passage, sentences for crack convictions were notably shorter than they were before the amendment.<sup>108</sup> The average disparity between crack and powder cocaine convictions decreased.<sup>109</sup> According to this data, the Commission took affirmative action to address the 100-to-1 ratio.

Furthermore, judges seem to concur in the Commission’s decision. Preliminary data shows that judges have granted sixty-seven percent (67%) of motions to reduce sentences since the amendment became effective.<sup>110</sup> In several jurisdictions, one hundred percent (100%) of those motions were granted.<sup>111</sup> In the Second and Eleventh Circuits, the court itself has made the motion for a reduced sentence in almost one out of three cases.<sup>112</sup>

Yet one wonders: if the Guidelines were truly advisory, as the recent Supreme Court cases repeatedly held, why did the Commission feel the need to change the sentencing ranges for crack convictions?

## B. CONGRESSIONAL [LACK OF] RESPONSE

For decades, Congress failed to act on the crack/powder disparity or the Commission’s amendment. More than two years after the amendment, the Commission’s “interim measure” was still the only significant change that had taken place since the disparity first arose in 1986.

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<sup>104</sup> 2007 report, *supra* note 76, at 10.

<sup>105</sup> *Id.* at 9.

<sup>106</sup> Press Release, U.S. Sentencing Comm’n, U.S. Sentencing Commission Votes to Amend Guidelines for Terrorism, Sex Offenses, Intellectual Property Offenses, and Crack Cocaine Offenses (Apr. 27, 2007), *available at* <http://www.ussc.gov/PRESS/rel0407.htm>.

<sup>107</sup> *Cracked Justice—Addressing the Unfairness in Cocaine Sentencing: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 110th Cong. 96 (2008) (statement of Reggie B. Walton, District Judge) [hereinafter House Hearings].

<sup>108</sup> U.S. SENTENCING COMM’N, *supra* note 100.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* at Table 1.

<sup>111</sup> *Id.* (including Northern Mississippi, Vermont, Northern California, and Arizona).

<sup>112</sup> *Id.* at Table 4.

Some authors have mistakenly asserted that the 100-to-1 ratio “is far from a clear expression of the will of Congress . . . .”<sup>113</sup> That statement is only true if one examines the will of individual members of Congress. The lack of congressional action demonstrates clearly that the 100-to-1 ratio *was* the expression of Congress—as a body—even if Congress would not announce it as such. To assert that “Congress's stance on the Guidelines ratio is less than pellucid”<sup>114</sup> is to ignore the fact that Congress, as a group, failed to express disagreement with the disparity for more than twenty years. As the Eleventh Circuit explained, “[t]he 100-to-1 cocaine-to-crack ratio directly reflects clearly expressed, unambiguous congressional sentencing policy, which Congress embedded in the U.S. Code and is reflected in the Guidelines.”<sup>115</sup> That policy stood until Congress, as a group, took action.

Some members of Congress have individually acted as crusaders against the crack/powder disparity. In the 110th Congress alone, at least seven different bills were submitted to address the distinction; bills were submitted by powerful members of Congress from both political parties.<sup>116</sup> The bills, however, had very different flavors. Senator Sessions, for example, proposed a bill that resulted in a 20-to-1 ratio by decreasing the amount required to trigger the powder mandatory minimum and increasing the amount required for the crack mandatory minimum.<sup>117</sup> Senator Biden, on the other hand, suggested eliminating any distinction by increasing the amount required to trigger the crack mandatory minimum to be the same as that of powder cocaine.<sup>118</sup>

Not wanting to seem oblivious, committees in both houses held hearings on the subject. The Senate Judiciary Committee held a hearing on the crack/powder disparity on February 12, 2008.<sup>119</sup> One senator expressed a familiar sentiment when he stated: “I am ready to get busy.”<sup>120</sup> Even the Department of Justice expressed interest “in a dialog and a discussion with this Committee and the Congress about changing the ratio of cocaine and cocaine powder and addressing the sentencing disparity in light of the concerns that have been raised by many different members of the community.”<sup>121</sup> Many speakers discussed the problems with the current 100-to-1 ratio, although few addressed a solution.

The House Subcommittee on Crime, Terrorism, and Homeland Security held similar hearings two weeks later.<sup>122</sup> Much of the discussion was the same, as were many of the speakers. Even a pro-disparity speaker said, “I support a re-examination of Federal drug sentencing laws and do believe this is worth a bipartisan re-examination of these laws during this session.”<sup>123</sup>

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<sup>113</sup> Recent Case, *Eighth Circuit Holds That District Court Cannot Reduce Sentence Based on Categorical Disagreement with 100:1 Powder/Crack Cocaine Quantity Ratio*, 120 HARV. L. REV. 2004, 2007.

<sup>114</sup> *Id.*

<sup>115</sup> *United States v. Williams*, 472 F.3d 835, 837 (11th Cir. 2006).

<sup>116</sup> H.R. 79, 110th Cong. (2007) (introduced by Rep. Bartlett); H.R. 460, 110th Cong. (2007) (introduced by Rep. Rangel); H.R. 4545, 110th Cong. (2007) (introduced by Rep. Jackson-Lee); H.R. 5035, 110th Cong. (2007) (introduced by Rep. Scott); S. 1383, 110th Cong. (2007) (introduced by Sen. Sessions); S. 1685, 110th Cong. (2007) (introduced by Sen. Hatch); S. 1711, 110th Cong. (2007) (introduced by Sen. Biden).

<sup>117</sup> S. 1383, 110th Cong. (2007).

<sup>118</sup> S. 1711, 110th Cong. (2007).

<sup>119</sup> Senate Hearings, *supra* note 103.

<sup>120</sup> *Id.* at 31 (statement of Sen. Jeff Sessions).

<sup>121</sup> *Id.* at 25 (statement of Gretchen Shappert, U.S. Att’y).

<sup>122</sup> House Hearings, *supra* note 107.

<sup>123</sup> *Id.* at 4 (statement of Rep. Louie Gohmert).

Those outside the legislature hoped that such actions would be the signal of a significant change. “Congress seems poised to follow the Commission's recommendations and address this disparity.”<sup>124</sup> Yet, despite the alleged concurrence in both Houses of Congress, the legislature took no further action. Not a single bill made it out of either committee.

In 2010, however, Congress presented an unexpected plot twist with the advent of new legislation.<sup>125</sup> President Barack Obama signed into law the Fair Sentencing Act on August 3, 2010. This most recent statute changes the crack/powder disparity in two significant ways. First, it raises the amount of crack cocaine needed to trigger a mandatory minimum sentence.<sup>126</sup> While five grams of crack cocaine used to trigger a five-year mandatory sentence, twenty-eight grams are now required for the same effect.<sup>127</sup> The amounts required for powder cocaine have remained the same. Thus, the 100-to-1 ratio has been changed to an 18-to-1 ratio. Second, the statute eliminates a mandatory minimum sentence for simple possession of crack cocaine.<sup>128</sup>

The statute also gives an important directive to the Commission. With this most recent legislation, Congress has instructed the Commission to adjust the guideline ranges for various attendant circumstances, including violence used in drug trafficking crimes, and amend the Guidelines within a statutory deadline of ninety days.<sup>129</sup> The Commission was not instructed, however, to amend the Guidelines for cocaine offenses. Instead, Congress directed the Commission to prepare a report on the matter within the next five years.<sup>130</sup> Even through passing this legislation, the legislature has failed to acknowledge the full potential of the Sentencing Commission.

As could be expected, reactions to the bill have varied widely. Many commentators, although pleased with the outcome, are not satisfied that the statute went far enough. The new statute may be “an important step in the right direction” but is “still not entirely fair.”<sup>131</sup> Furthermore, the current legislation only operates prospectively, spurring many advocates to already call for a retroactive application of the provision.<sup>132</sup> Others, recognizing that any decrease in sentences is a phenomenal feat, are more benevolent toward the legislation.<sup>133</sup>

#### IV THE DENOUEMENT

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<sup>124</sup> John R. Steer & Mark H. Allenbaugh, *The State of Federal Cocaine Sentencing Policy: Will Congress Soon Finish What the U.S. Sentencing Commission Started?* (Feb. 18, 2008), <http://writ.news.findlaw.com/allenbaugh/20080218.html>.

<sup>125</sup> Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372.

<sup>126</sup> *Id.* § 2.

<sup>127</sup> *Id.* Likewise, the amount of crack cocaine required to trigger a ten-year mandatory sentence was changed from fifty grams to 280 grams. *Id.*

<sup>128</sup> *Id.* § 3.

<sup>129</sup> *Id.* §§ 4-8.

<sup>130</sup> *Id.* § 9.

<sup>131</sup> Editorial, *The Fair Sentencing Act of 2010: It's about Time*, L.A. TIMES (July 31, 2010), <http://articles.latimes.com/2010/jul/31/opinion/la-ed-sentencing-20100731>.

<sup>132</sup> See, e.g., Julie Stewart, *Well Done Congress, Now Make Fair Sentencing Act Retroactive*, HUFFINGTON POST (Aug. 4, 2010), [http://www.huffingtonpost.com/julie-stewart/well-done-congress-now-ma\\_b\\_671008.html](http://www.huffingtonpost.com/julie-stewart/well-done-congress-now-ma_b_671008.html).

<sup>133</sup> Editorial, *The Fair Sentencing Act Corrects A Long-Time Wrong in Cocaine Cases*, WASH. POST (Aug. 3, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/08/02/AR2010080204360.html>.

Perhaps it was intentional that the Fair Sentencing Act did not receive significant fanfare. Some have noted that the law was passed in relative obscurity.<sup>134</sup> Despite the fact that the bill received unanimous support in the Senate,<sup>135</sup> it passed without much media attention. Similarly, the legislation was approved by bipartisan members of the House.<sup>136</sup> Upon signing such “historic” legislation,<sup>137</sup> President Obama did not make a single public comment.<sup>138</sup>

The quiet surrounding the passage of the bill is almost as surprising as the act itself. Members of the 111th Congress introduced bills that were essentially identical to those proposed the session before.<sup>139</sup> A new Democratic administration expressed dedication to changing the 100-to-1 ratio.<sup>140</sup> What it was that exactly allowed the bill to pass both houses, however, is unclear.

Still, history demonstrates that Congress is unlikely to accept another drastic reduction in crack cocaine sentences, one that would make the sentences for crack and powder cocaine equivalent. Institutional reluctance to reduce sentences is rooted far more deeply than a simple difference between crack and powder cocaine. Congress obliquely surnamed the new legislation “an act to restore fairness to Federal cocaine sentencing,”<sup>141</sup> but the legislature’s concept of “fairness” is still debatable.

Rather than relying on incremental and tentative attempts at legislation, however, Congress has another option it can use: the United States Sentencing Commission. As evidenced by the 2007 crack amendment, the Commission has shown both the ability and the willingness to address public concerns related to federal sentencing policy.<sup>142</sup> Congress can grant the Commission additional power without appearing to cave in to political pressure. Indeed, such an approach has the potential to resolve the complaints of vociferous sentencing critics. Furthermore, it allows Congress to have the best of both worlds by creating ameliorative change in federal criminal sentences without being forced to take affirmative action.

## A. THE PROBLEM WITH THE CURRENT SITUATION

The most recent legislative proposals sharply disagreed on the proper treatment of crack and powder cocaine sentencing. One proposed bill would have reduced the amount required to trigger the mandatory minimum sentence for powder cocaine to be the same as crack cocaine,<sup>143</sup>

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<sup>134</sup> See, e.g., Anthony Jerrod, *Justice Prevails with Crack Cocaine Sentencing but Why Is Media So Quiet about It?*, ATLANTA POST (Aug. 2, 2010), <http://atlantapost.com/2010/08/02/justice-prevails-with-crack-cocaine-fair-sentencing-but-why-is-media-so-quiet-about-it/>.

<sup>135</sup> Danielle Kurtzleben, *Data Show Racial Disparity in Crack Sentencing*, U.S. NEWS & WORLD REPORT (Aug. 3, 2010), <http://politics.usnews.com/news/articles/2010/08/03/data-show-racial-disparity-in-crack-sentencing.html>.

<sup>136</sup> *Id.*

<sup>137</sup> Stewart, *supra* note 132.

<sup>138</sup> Scott Wilson, *Obama Signs Fair Sentencing Act*, WASH. POST (Aug. 3, 2010), <http://voices.washingtonpost.com/44/2010/08/obama-signs-fair-sentencing-ac.html>.

<sup>139</sup> Compare H.R. 79, 110th Cong. (2007) with H.R. 18, 111th Cong. (2009).

<sup>140</sup> *Obama Seeks Crack Cocaine Sentence Changes*, ASSOCIATED PRESS (Apr. 29, 2009), available at <http://www.msnbc.msn.com/id/30479677/>.

<sup>141</sup> Fair Sentencing Act of 2010, Pub. L. No. 111-220, § 1, 124 Stat. 2372.

<sup>142</sup> See *supra* Part III.A.

<sup>143</sup> H.R. 18, 111th Cong. (2009).

another would have done the opposite.<sup>144</sup> Although those proposed bills eliminated the crack/powder disparity completely, others simply reduced it.<sup>145</sup> The Fair Sentencing Act adopted this latter approach. Still, all three types of proposals are inadequate.

Simply eliminating any disparity between crack and powder cocaine is an attractive proposition, but it may not be the complete answer. Despite the problems with the current disparity, even the Commission's most recent reports to Congress "do not urge identical treatment of crack and powder cocaine."<sup>146</sup> Crack convictions more often involve the use of weapons,<sup>147</sup> and powder convictions receive more safety valve reductions.<sup>148</sup> Defendants convicted of crack cocaine offenses usually have a more extensive criminal history than powder cocaine offenders.<sup>149</sup> Furthermore, a difference "in the *typical* methods of administration . . . makes crack cocaine more potentially addictive to *typical* users."<sup>150</sup> The Department of Justice is still convinced that "whereas powder cocaine destroys an individual, crack cocaine destroys a community."<sup>151</sup> The two types of drugs are not identical, which explains why groups such as the Commission do not urge for equivalent treatment.

The seriousness of the drug situation is also worrisome. Among some populations, the rate of reported powder cocaine use is approximately eight to ten times more than crack cocaine.<sup>152</sup> Among those arrested for drug offenses, however, crack cocaine is used approximately twice as often as is powder cocaine.<sup>153</sup> Approximately six million individuals use cocaine every year.<sup>154</sup> Together, crack and powder cocaine offenses comprise nearly half of all the federally-prosecuted drug offenses.<sup>155</sup> Therefore, whatever the comparison, statistics show that a serious need exists to control cocaine use:

On the other hand, the Fair Sentencing Act, which merely reduces the disparity to another arbitrary ratio, does not respond to the most persuasive criticisms of cocaine sentencing. Current understanding is that both forms of cocaine essentially "cause identical effects."<sup>156</sup> Although crack cocaine was traditionally associated with acts of violence, research has shown that violence committed by crack cocaine users is relatively rare.<sup>157</sup> Crack cocaine use by high school students, which was a major fear during the debates that culminated in the passage of the ADAA, remains relatively constant.<sup>158</sup> Some would argue that just as the 100-to-1 ratio was inexplicable, so is a 50-to-1 or the current 18-to-1 ratio. As the daughter of one convicted defendant bluntly remarked, "It's

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<sup>144</sup> H.R. 265, 111th Cong. (2009). Some attorneys have called for a similar equalization. *See, e.g.*, T. Michael Andrews, *Unequal Sentences: The Crack and Powder Cocaine Disparity*, 44 ARIZ. ATT'Y 22 (2008).

<sup>145</sup> S. 1383, 110th Cong. (2007).

<sup>146</sup> *Kimbrough v. United States*, 552 U.S. 85, 98 (2007).

<sup>147</sup> 2007 report, *supra* note 76, at 32-33.

<sup>148</sup> *Id.* at 49.

<sup>149</sup> 2002 report, *supra* note 75, at 59.

<sup>150</sup> *Id.* at 63.

<sup>151</sup> Senate Hearings, *supra* note 103, at 7 (statement of Gretchen Shappert, U.S. Att'y).

<sup>152</sup> 2007 report, *supra* note 76, at 76.

<sup>153</sup> *Id.* at 80.

<sup>154</sup> Senate Hearings, *supra* note 103, at 14 (statement of Nora D. Volkow, Director, National Institute on Drug Abuse).

<sup>155</sup> *Id.* at 166 (prepared statement of Ricardo H. Hinojosa, Chair, U.S. Sentencing Comm'n).

<sup>156</sup> 2007 report, *supra* note 76, at 62.

<sup>157</sup> *Id.* at 86.

<sup>158</sup> 2002 report, *supra* note 75, at 69.

almost as hard to understand the logical basis for an 18:1 ratio as for a 100:1 ratio. Where did they come up with that number?”<sup>159</sup>

Furthermore, various sentencing procedures already address many of Congress’s original concerns about the effects of crack cocaine. The Guidelines include a specific sentencing enhancement for offenses involving a minor.<sup>160</sup> The Guidelines impose a greater offense level for crimes that result in violence<sup>161</sup> or involve a firearm.<sup>162</sup> Furthermore, the defendant’s criminal history is an integral part of the sentencing calculation.<sup>163</sup> In essence, “[t]he federal sentencing guidelines provide for increased sentences in cases where aggravating conduct . . . is present.”<sup>164</sup> To the extent that the original congressional concerns still exist, the Guidelines have appropriately addressed them independent of the amount of drugs involved in an offense.

Finally, the proposed legislative reforms have not analyzed external factors such as the potential for retroactivity or the role of the Commission. Some have criticized the proposed bills, including the Fair Sentencing Act, as an unfair solution because they only affect future cocaine convictions without addressing those who are already in prison.<sup>165</sup> In a similar vein, most of the bills did not allow the Commission to adopt measures that would speed up any change in the Guidelines.<sup>166</sup>

Even if the decision to eliminate the crack/powder disparity was adequate, however, Congress is unlikely to adopt it. When it comes to criminal sentences, Congress generally walks down a one-way street. Sentences are rarely, if ever, reduced. Indeed, the federal criminal code generally “seems to expand exponentially.”<sup>167</sup> The reasons for this unilateral direction are not always clear. Perhaps one reason is that “[c]riminal law and the substantive law of sentencing become not a body of rules that define banned conduct and its consequences, but a means of extracting guilty pleas and expressing public outrage.”<sup>168</sup> More lenient sentences help only convicted criminals, and those people are politically unattractive.<sup>169</sup> “When severity is politically costless, one can expect to see severe laws.”<sup>170</sup>

Even since 1962, people have recognized that there would be “political fallout for cutting back on sentencing requirements for drug dealing . . . . That’s strictly an uphill fight.”<sup>171</sup> “[F]or the past generation, virtually everyone who has written about federal criminal law has bemoaned its expansion. But the expansion has continued apace, under very different sorts of Congresses and

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<sup>159</sup> Quoted in Press Release, Am. Civil Liberties Union, Fair Sentencing Act an Important First Step but Sizeable Sentencing Gap Remains (July 28, 2010), <http://www.commondreams.org/newswire/2010/07/28-10>.

<sup>160</sup> U.S. SENTENCING GUIDELINES MANUAL § 3B1.4 (2009).

<sup>161</sup> *Id.* at § 2D1.1(a).

<sup>162</sup> *Id.* at § 2D1.1(b).

<sup>163</sup> *Id.* at ch. 4.

<sup>164</sup> 2007 report, *supra* note 76, at 31.

<sup>165</sup> Earl Ofari Hutchinson, *New Crack-Cocaine Sentencing Reform Bill Leaves Thousands Behind Bars* (Oct. 22, 2009), [http://www.alternet.org/rights/143428/new\\_crack-cocaine\\_sentencing\\_reform\\_bill\\_leaves\\_thousands\\_behind\\_bars](http://www.alternet.org/rights/143428/new_crack-cocaine_sentencing_reform_bill_leaves_thousands_behind_bars).

<sup>166</sup> *But see* S. 1789, 111th Cong. (2009) (granting the Commission emergency amendment authority).

<sup>167</sup> William J. Stuntz, *Reply: Criminal Law’s Pathology*, 101 MICH. L. REV. 828, 830 (2002).

<sup>168</sup> William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 780, 803 (2006).

<sup>169</sup> *Id.* at 804.

<sup>170</sup> *Id.* at 805-06.

<sup>171</sup> Newton, *supra* note 55.



Presidents.”<sup>172</sup> To summarize, “[v]oters demand harsh treatment of criminals; politicians respond with tougher sentences.”<sup>173</sup> Perhaps to appease those who might accuse them of being soft on crime, then, Congress added increased penalties for drug trafficking offenses at the same time it modified the crack/powder disparity.<sup>174</sup>

Still, “[n]either the short-term political incentives favoring sentencing increases nor the complexity of the federal sentencing guidelines can entirely explain the behavior of Congress.”<sup>175</sup> The fault lies not with the SRA but with deeper problems within Congress. It is Congress, as a body, that failed to address the crack/powder disparity despite two decades of criticism.

At the same time, though, there is almost universal agreement that the arbitrary distinction between crack and powder cocaine is inadequate. The objectives of the Sentencing Reform Act have been largely unrealized, but the Commission is currently helpless to change anything more. Most of the crack/powder disparity in federal sentencing stems directly from the statutory mandatory minimum sentences, not the Commission itself.<sup>176</sup> The original impetus for the SRA was “concern that indeterminate sentencing produced unjust disparities between similarly situated offenders.”<sup>177</sup> Yet, despite the passage of the SRA, empirical research has shown a “remarkable degree of variation in both sentence length and change in average sentence length.”<sup>178</sup> Particularly in the area of drug offenses, lack of sentencing uniformity has been a serious problem.<sup>179</sup>

## B. GIVING THE COMMISSION MORE POWER

Instead of focusing on changes like the Fair Sentencing Act, Congress could potentially resolve the drama with one additional plot twist: give even more power to the Commission. Specifically, Congress should enable the Commission to have more authority to establish sentences for drug offenses. Although mandatory minimum and maximum sentences are complex policy decisions that are most likely within Congress’s purview, the legislature is not required to delineate sentences with such specificity as is currently constituted. Instead, based on its own research and responsiveness to public consensus, the Commission could establish appropriate guideline ranges.

Delineating the most practical and plausible solution to the current problem is beyond the scope of this article. Congress could, for example, establish a relatively low mandatory minimum sentence for drug offenses in general. Alternatively, Congress could abolish the system of mandatory sentences based on drug weight and enact a system of minimum sentences based on the type of

<sup>172</sup> William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 508 (2001).

<sup>173</sup> *Id.* at 509.

<sup>174</sup> Fair Sentencing Act of 2010, Pub. L. No. 111-220, § 4, 124 Stat. 2372.

<sup>175</sup> Frank O. Bowman III, *The Failure of the Federal Sentencing Guidelines: A Structural Analysis*, 105 COLUM. L. REV. 1315, 1345 (2005).

<sup>176</sup> Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary, May 21, 2009, at 7 (prepared statement of Ricardo H. Hinojosa, Acting Chair, U.S. Sentencing Comm’n).

<sup>177</sup> Bowman, *supra* note 2, at 1322.

<sup>178</sup> Frank O. Bowman III & Michael Heise, *Quiet Rebellion II: An Empirical Analysis of Declining Federal Drug Sentences Including Data from the District Level*, 87 IOWA L. REV. 477, 482 (2002). For additional discussion on the role of uniformity in sentencing policy, see Michael M. O’Hear, *The Original Intent of Uniformity in Federal Sentencing*, 74 U. CIN. L. REV. 749 (2006); Mark Osler, *Must Have Got Lost: Traditional Sentencing Goals, the False Trail of Uniformity and Process, and the Way Back Home*, 54 S.C. L. REV. (2003); Michael A. Simons, *Departing Ways: Uniformity, Disparity and Cooperation in Federal Drug Sentences*, 47 VILL. L. REV. 921 (2002).

<sup>179</sup> See, e.g., Bowman & Heise, *supra* note 178.

conviction. Whatever the result,<sup>180</sup> the Commission should have additional power over federal sentences for drug convictions.

Such a proposition may seem to run afoul of the criticisms described above, yet the Commission has proven itself willing and able to effect change in sentencing policy. Empowering the Commission satisfies many of the prominent concerns, and it should also be an attractive option to a politically-accountable legislature.

### 1. FITTING ADDITIONAL POWER IN THE CONGRESSIONAL FRAMEWORK

The legislative proposals for reforms to the crack/powder disparity, including the Fair Sentencing Act of 2010, have not recognized the vital functions of the Commission. Although the bills are laudable rhetoric, the crack/powder disparity still exists. Both houses of Congress have held repeated hearings on the matter, but the legislative efforts have never come to fruition except to reduce the 100-to-1 ratio to an inexplicable 18-to-1 ratio.

“Congress has the undoubted power to make and modify federal sentencing law,”<sup>181</sup> but it also has the authority to delegate that power. “The SRA created a Sentencing Commission and delegated to it the power to draft sentencing rules precisely because Congress believed a Commission would have two attributes Congress lacked itself: expertise and political neutrality.”<sup>182</sup> Those attributes are seemingly unrecognized by the most recent efforts at legislative reform.

Congress is even less likely to act if it perceives itself to be in conflict with the judiciary. “The criminal justice system seems less a cooperative enterprise than a battleground - or a boxing ring, with judges in one corner and politicians in the other, each warily eyeing the other, looking for a chance to land a jab here or block a punch there.”<sup>183</sup> The Commission, though, is the bridge between the branches. Comprised of members of the judiciary but under congressional supervision, the Commission is the best referee in that boxing match.

The current situation, however, is unsatisfactory. Congress has directed sentencing judges to impose an “appropriate sentence”<sup>184</sup> while “avoid[ing] unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct.”<sup>185</sup> Despite the complex considerations taken into account by the guideline ranges, though, judges are bound by the current regime of mandatory minimum sentences. At least with crack cocaine sentences, Congress is, in essence, interfering with its directive to the Commission to consider “the community view of the gravity of the offense.”<sup>186</sup> Granting additional power to the Commission would better allow the body to fulfill its statutory obligations.

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<sup>180</sup> Of course, some have advocated for the abolishment of mandatory minimum sentences altogether. See, e.g., *On the Subject of Mandatory Minimum Sentences: Before the Subcomm. on Crime, Terrorism and Homeland Security of the H. Comm. on the Judiciary*, 111th Cong. (2009) (statement on behalf of the Judicial Conference).

<sup>181</sup> Bowman, *supra* note 2, at 1341.

<sup>182</sup> *Id.* at 1344.

<sup>183</sup> Stuntz, *supra* note 167, at 847.

<sup>184</sup> 18 U.S.C. § 3553(b) (2006).

<sup>185</sup> *Id.* § 3553(a)(6).

<sup>186</sup> 28 U.S.C. § 994(c) (2006).

In many ways, such additional delegation would also be to Congress's benefit. The Commission, whose members are appointed by the President, is not comprised of congressmen. The Commission is not elected, and its members are not (at least ostensibly) politically accountable. As the 2007 amendment demonstrates, the Commission is able to take steps that Congress itself could not or would not take. As the amendment also shows, Congress can accept the Commission's recommendations by simply staying silent. In that way, Congress can act progressively in reducing sentences without losing the appearance of being tough on crime. "Cloaked with the mantle of 'expertise,' the commission not only freed legislators from the labors of guideline specification, but also insulated them from the risk that a political opponent would cite the promulgation of a guideline below a statutory maximum as evidence of inappropriate leniency."<sup>187</sup>

Professor Stuntz has noted that "[o]ne of the pathologies of criminal lawmaking is the difficulty of repealing criminal statutes that once represented community norms but no longer do."<sup>188</sup> Once again, the Commission is the cure. Instead of "repealing" criminal statutes, Congress can simply allow the Commission to "amend" them. The Commission is even given statutory responsibility to ensure that sentencing practices reflect common public consensus.<sup>189</sup>

Indeed, such additional power may have actually been Congress's intent. The statute reads, "If the Commission reduces the term of imprisonment recommended in the guidelines applicable to a particular offense or category of offenses, it shall specify in what circumstances and by what amount the sentences of prisoners serving terms of imprisonment for the offense may be reduced."<sup>190</sup> Congress recognized that lower sentences would sometimes be needed, but the statute placed the burden on the Commission rather than congressmen to delineate the reduction.

## 2. REASONS TO APPROVE OF ADDITIONAL DELEGATION

Professor Bowman has identified three primary roles of the Commission: an entity to draft reasonable sentencing rules, a body of experts for "monitoring, study, and modification" of the Guidelines, and a group with some insulation from the distorting pressures of politics.<sup>191</sup> To the extent that those roles are worthwhile in federal sentencing, the Commission is a valuable tool.

Of course, evaluations of the Commission's actions have not been unanimous.<sup>192</sup> One critic expressed a familiar concern with the 2007 amendment: "The Sentencing Commission has been cowed by Congress and should be revamped. . . . We need a brand new, independent commission that can't be intimidated."<sup>193</sup> Admittedly, the Commission has not (and currently cannot) eliminated the disparity between crack and powder cocaine sentences.

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<sup>187</sup> Daniel C. Richman, *Federal Criminal Law, Congressional Delegation, and Enforcement Discretion*, 46 UCLA L. REV. 757, 773 (1999).

<sup>188</sup> Stuntz, *supra* note 172, at 591.

<sup>189</sup> *See, e.g.*, 28 U.S.C. § 994(c)(4) (2006).

<sup>190</sup> *Id.* § 994(u).

<sup>191</sup> Bowman, *supra* note 2, at 1324.

<sup>192</sup> For a history, discussion, and criticism of sentencing commissions in general, *see* Robert Weisberg, *How Sentencing Commissions Turned Out to Be a Good Idea*, 12 BERKELEY J. CRIM. L. 179 (2007).

<sup>193</sup> U.S. Sentencing Commission Announces Reduction in Crack Cocaine Sentences, DRUG WAR CHRONICLE (May 4, 2007) (quoting Nora Callahan, executive director of the November Coalition).

Similarly, scholars have asserted that the Sentencing Reform Act has failed in its goals. “[T]he Guidelines are too harsh: they have contributed to a ratcheting up of sentencing levels that has gone much too far.”<sup>194</sup> Professor Bowman expressed his disappointment that the “hoped-for institutional balance has broken down.”<sup>195</sup> The world of ideal sentencing, where every defendant is treated perfectly fairly and receives the perfect length of sentence, is neither realized nor realistic.

Still, society has exhibited general agreement with the proposition that similarly-situated defendants should be treated similarly. The Supreme Court has recognized that uniformity in sentencing procedures is a worthwhile goal.<sup>196</sup> A sentencing regime should recognize that as individual circumstances change, defendants are no longer truly similarly-situated. On the other hand, some argue that “[c]riminal punishment will always be governed by a mix of law and discretion, but today, the mix is dangerously tilted toward discretion. It needs to be tilted back.”<sup>197</sup> The Commission, and the SRA, is dedicated to helping that trend.

But the Guidelines in and of themselves are not the problem. Instead, they are an important step to ensuring both uniformity and consideration of individual circumstances. Even a critic of the current sentencing policy recognized that the Guidelines are “in many respects a marvel of the legislative art.”<sup>198</sup> With all their faults, the Guidelines have, at least to some degree, recognized the goal of more equal treatment for criminal defendants around the nation.

The real trouble with the current sentencing landscape is not the Guidelines but the slow-moving wheels of Congress. “The available evidence strongly suggests that the Sentencing Commission, had it been free to exercise its independent judgment, would have responded to the feedback from guideline critics and frontline sentencing actors by making ameliorating changes to the drug guidelines.”<sup>199</sup> The Commission can do what Congress generally cannot: lower sentences.

Furthermore, the Commission is in a better position to act quickly. Indeed, the Commission is statutorily mandated to review and revise the status of sentencing procedures.<sup>200</sup> A quick response is important because “[t]he severity of federal sentences is primarily attributable to the actions of Congress rather than the preferences of the Sentencing Commission.”<sup>201</sup> As evidenced by the 2007 amendment, the Commission can establish changes to sentencing policy that are both significant and workable. The Commission will not have to reach the optimal result in any situation because it has the ability and the willingness to change its decisions.

In many ways, the Commission is also better informed. As evidenced by the crack cocaine debate, for example, the Commission spends time and resources to investigate the sentencing regime.<sup>202</sup> Statutory language gives the Commission broad abilities to gather information.<sup>203</sup> The Commission, with only one purpose in mind, is able to collect, analyze, and review the relevant data.

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<sup>194</sup> Stuntz, *supra* note 172, at 586.

<sup>195</sup> Bowman, *supra* note 2, at 1333.

<sup>196</sup> *Kimbrough v. United States*, 552 U.S. 85, 107 (2007).

<sup>197</sup> Stuntz, *supra* note 168, at 822.

<sup>198</sup> Bowman, *supra* note 2, at 1346.

<sup>199</sup> *Id.* at 1330.

<sup>200</sup> 28 U.S.C. § 994(o) (2006).

<sup>201</sup> Bowman, *supra* note 2, at 1341.

<sup>202</sup> *See, e.g.*, 2002 report, *supra* note 75 (collecting and analyzing seven years of data).

<sup>203</sup> 28 U.S.C. § 995 (2006).

Congress, on the other hand, resorts to compromises such as the Fair Sentencing Act that do not reflect a true consensus on fair sentencing.

Some have argued that the Commission cannot reform sentencing because it is comprised of out-of-touch experts.<sup>204</sup> That group of experts, though, is precisely what is needed for sentencing reform. The Commission is comprised not only of judges but also of academics and practicing attorneys. With such a unique composition of different political parties and legal backgrounds, the Commission is in an ideal position to make expert decisions on federal sentencing policy.

Admittedly, the defense bar is underrepresented in the current Commission. Although the Attorney General is given ex officio membership, no analogous position is reserved for the opposing side. However, Congress could easily remedy this problem with the addition of a defense representative. As the crack amendment demonstrates, the Commission is willing to listen to opposing viewpoints *and* take action based on what it learns.

Assuming the *Booker* regime is here to stay, the Guidelines would still be advisory with more power delegated to the Commission. Even with more detailed guidelines, judges are free to tailor a sentence to a specific situation. Although uniformity is a worthwhile endeavor, fairness to a particular defendant is still the overriding aspiration of the criminal justice system. The Commission recognizes the need for individual consideration, and it has indeed recommended to Congress that the legislature adopt more specific enhancements for certain situations.<sup>205</sup> Because of the *Booker* standards, “systematic restraint of district court sentencing discretion”<sup>206</sup> is no longer a problem (or at least less so). “A complex guidelines sentencing table is not an insuperable barrier to a generous exercise of judicial sentencing discretion so long as sentencing judges are granted significant authority to sentence outside the ranges produced by guideline calculations.”<sup>207</sup> *Booker* and its progeny provide that significant authority.

Of course, the Commission cannot be unchecked. Certain safeguards are in place, however, to ensure that the Commission is not omnipotent. Members of the Commission are appointed by the President and approved by the Senate. Commissioners who make it through the process are only in place for six years. Congress, if concerned about the appearance of being tough on crime, can appoint members of the Commission who will best embody those goals. In addition, any action by the Commission requires congressional approval. Although it is easier for Congress to stay silent than to act as a body (as shown above), the legislature’s oversight is still a powerful check on the Commission’s abilities.

Furthermore, the Supreme Court has already decided that the Commission is constitutional. *Mistretta* was broad in its approval, despite some of the Justices being concerned. While the Court at one point in history seemed poised to strike down congressional delegation in general,<sup>208</sup> it has shown overall reluctance to do so.<sup>209</sup> Although non-delegation doctrine suggests

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<sup>204</sup> See, e.g., Bowman, *supra* note 2.

<sup>205</sup> See, e.g., 2002 report, *supra* note 75, at 108.

<sup>206</sup> Bowman, *supra* note 2, at 1326.

<sup>207</sup> *Id.* at 1334.

<sup>208</sup> *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Pan. Ref. Co. v. Ryan*, 293 U.S. 388 (1935).

<sup>209</sup> See, e.g., *Am. Power & Light Co. v. Sec. Exch. Comm’n*, 329 U.S. 90 (1946) (upholding congressional delegation of authority to Securities and Exchange Commission to prevent unfair voting power among security holders); *Fed. Power*

that at some point Congress can go too far,<sup>210</sup> the checks described above are likely sufficient to ensure the Commission's constitutionality. The Supreme Court explained soon after the advent of the SRA that "federal sentencing . . . has never been thought to be assigned by the Constitution to the exclusive jurisdiction of any one of the three Branches of Government."<sup>211</sup>

Indeed, the Court already approved of the Commission's discretion "to determine the relative severity of federal crimes" and "to determine which crimes have been punished too leniently, and which too severely."<sup>212</sup> Granting the Commission additional power over sentencing would not be much of a leap. Indeed, the Court went even further in suggesting that "[d]eveloping proportionate penalties for hundreds of different crimes by a virtually limitless array of offenders is precisely the sort of intricate, labor-intensive task for which delegation to an expert body is especially appropriate."<sup>213</sup>

The decision to grant additional power will be constitutional "unless Congress has vested in the Commission powers that are more appropriately performed by the other Branches or that undermine the integrity of the Judiciary."<sup>214</sup> Insofar as sentencing is at least partially within the judiciary's prerogative, granting additional power to the Commission will not violate this principle. As the Court explained, "the Commission is not a court, does not exercise judicial power, and is not controlled by or accountable to members of the Judicial Branch."<sup>215</sup> It is "an independent agency" that is "fully accountable to Congress."<sup>216</sup> As such, even with additional power, it is likely constitutional.

"[S]entencing is a field in which the Judicial Branch long has exercised substantive or political judgment."<sup>217</sup> Rather than upsetting the delicate balance of powers between the branches, granting additional power to the Commission is a way to fill in the gaps. "While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity."<sup>218</sup>

In essence, the 2007 crack amendment demonstrates the underappreciated value of the Commission. Although the amendment has not solved the crack/powder disparity, it has improved the situation to some degree. Sentences are shorter now than they were before the amendment. The Commission has also apparently inspired judges to latch onto the reform movement. Judges have granted almost two-thirds of motions to reduce sentences, and courts have been so bold as to make motions on their own accord. Even if limited by mandatory minimum sentences, the Commission

Comm'n v. Hope Natural Gas Co., 320 U.S. 591 (1944) (upholding delegation to Federal Power Commission to determine fair utility rates).

<sup>210</sup> See, e.g., Clinton v. City of New York, 524 U.S. 417 (1998) (holding the Line Item Veto Act unconstitutional as violating non-delegation doctrine).

<sup>211</sup> Mistretta v. United States, 488 U.S. 361, 364 (1989).

<sup>212</sup> *Id.* at 377.

<sup>213</sup> *Id.* at 379.

<sup>214</sup> *Id.* at 385.

<sup>215</sup> *Id.* at 393.

<sup>216</sup> *Id.*

<sup>217</sup> *Id.* at 396.

<sup>218</sup> Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

has shown its determination and ability to improve federal sentencing policy. It may even be that the 2007 amendment was what spurred Congress into action with the Fair Sentencing Act.

V  
CONCLUSION

Thus, available evidence does not show that “[t]he peculiar position of the Sentencing Commission in the federal government makes it powerless to resist a combination of the legislative and executive branches.”<sup>219</sup> To the contrary, the Commission’s peculiar position makes it an ideal body to resist pressure. The Commission is less of a villain and more of a hero waiting in the wings.

Congress has made the decision to punish drug offenses severely, but it has not set the sentences in stone. The Fair Sentencing Act is a step in the right direction, albeit a surprising one. But Congress can do more, for itself and its constituents, by recognizing the full potential of the Commission. By delegating additional power to the Sentencing Commission, Congress could not only satisfy sentencing critics but also save its own political skin.

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<sup>219</sup> Bowman, *supra* note 2, at 1348.