

**STATEMENT OF THE UNITED STATES SENTENCING COMMISSION
BEFORE THE SUBCOMMITTEE ON
FINANCIAL SERVICES AND GENERAL GOVERNMENT
COMMITTEE ON APPROPRIATIONS
UNITED STATES SENATE**

March 12, 2008

Chairman Durbin, Ranking Member Brownback, and members of the subcommittee, the United States Sentencing Commission thanks you for the opportunity to submit this statement in support of its appropriations request for fiscal year 2009. The Commission's statutory mission, as set forth in the Sentencing Reform Act of 1984, continues to be both reaffirmed and significantly impacted by recent United States Supreme Court decisions regarding federal sentencing policy. Full funding of the Commission's fiscal year 2009 request will ensure that the Commission can continue to fulfill its statutory mission.

RESOURCES REQUESTED

The Commission is requesting \$16,257,000 for fiscal year 2009, representing a five percent increase over the fiscal year 2008 appropriation of \$15,477,000. The Commission recognizes that it must use its allotted resources carefully and that Congress expects the same. The Commission accordingly has tailored its fiscal year 2009 request narrowly and is seeking a limited increase over its fiscal year 2008 appropriation to account for inflationary increases and certain adjustments for personnel costs.

JUSTIFICATION FOR THE COMMISSION'S APPROPRIATIONS REQUEST

The statutory duties of the Commission include, but are not limited to: (1) developing sentencing guidelines to be determined, calculated, and considered in federal criminal cases; (2) collecting, analyzing, and reporting federal sentencing statistics and trends; (3) conducting research on sentencing issues in its capacity as the clearinghouse of federal sentencing data; and (4) providing training on sentencing issues to federal judges, probation officers, law clerks, staff attorneys, defense attorneys, prosecutors, and others.

These statutory duties and the continuing importance of the sentencing guidelines have repeatedly been reaffirmed by recent Supreme Court decisions beginning with *United States v. Booker*.¹ In *Booker*, the Supreme Court reemphasized the Commission's continuing role with regard to "writing Guidelines, collecting information about district court sentencing decisions, undertaking research, and revising the Guidelines accordingly."² In *Rita v. United States*,³ the Supreme Court reinforced the role of the Commission and the importance of the guidelines in holding that a court of appeals may apply a presumption of reasonableness to a sentence imposed within the properly calculated sentencing guideline range. The Court noted that "[t]he

¹ 543 U.S. 220 (2005).

² 543 U.S. at 264.

³ 127 S. Ct. 2456 (2007).

Commission's work is ongoing. The statutes and the Guidelines themselves foresee a continuous evolution helped by the sentencing courts and courts of appeals in that process."⁴ In *Gall v. United States*,⁵ the Court reemphasized that "[a]s a matter of administration and to secure nationwide consistency, the Guidelines should be the starting point and the initial benchmark" in determining an appropriate sentence.⁶

While reaffirming the ongoing nature of the Commission's work, these decisions also have had a significant impact on that work. Consistent with *Booker* and its progeny, the Commission has continued its core mission to review and revise the guidelines, taking into account 18 U.S.C. § 3553(a) and other congressional statutes and directives and in response to information it receives from sentencing courts, Congress, the Executive Branch, federal defenders, and others. The Commission also has increased its efforts to provide training on federal sentencing issues, including application of the guidelines, to federal judges, probation officers, law clerks, staff attorneys, prosecutors, defense attorneys, and others.

Furthermore, in response to these Supreme Court cases, the Commission has continued to refine its data collection, analysis, and reporting efforts to provide real-time data about federal district court sentencing practices and trends. The Commission must continue to disseminate sentencing information in real-time and in a thorough manner so that Congress and others can be fully informed and advised on sentencing policy in the wake of the *Booker* line of cases. In addition, the Commission must continue to monitor appellate case law applying these cases, requiring the Commission to further refine its appellate court database.

Despite the impact of these cases, the Commission is not requesting program increases for fiscal year 2009. The Commission has worked diligently over the past several years to maximize its resources overall and appreciates the support and funding it has received from Congress.

Sentencing Policy Development and Guideline Promulgation

As part of its statutory duty to develop sentencing guidelines to be determined, calculated, and considered in federal criminal cases, the Commission promulgated a number of guideline amendments during the amendment cycle ending on May 1, 2007. These amendments, which absent congressional action to the contrary became effective on November 1, 2007, related to several substantive areas of the criminal law, including transportation, terrorism, intellectual property, and drug offenses. As part of this work, the Commission updated its extensive 2002 report on federal cocaine sentencing and amended the guidelines prescribing sentences for crack cocaine offenses, keeping the guideline penalties within the statutorily-prescribed mandatory minimum sentences. The Commission received voluminous public comment on this issue, including whether these changes should be applied retroactively. It held multiple public hearings on the amendment and the issue of retroactivity, receiving testimony from a cross-section of witnesses. Based on this testimony and its own research, the Commission decided to give

⁴ *Id.* at 2464.

⁵ 128 S. Ct. 586 (2007).

⁶ *Id.* at 596.

retroactive effect to its amendment for crack cocaine offenses. It now is working closely with the federal criminal justice community to ensure its efficient application.

For the amendment cycle ending May 1, 2008, the Commission is considering several guideline amendments in response to recent congressional action. The Commission has proposed amendments in response to the Animal Fighting Prohibition Enforcement Act of 2007, the Honest Leadership and Open Government Act of 2007, the Emergency and Disaster Assistance Fraud Penalty Enhancement Act of 2007, and the Court Security Improvement Act of 2007. The Commission also is considering amendments in the areas of immigration offenses, drug offenses, and criminal history. These proposed amendments respond to input received from the criminal justice community and reflect the Commission's ongoing work to refine the guidelines in accordance with its statutory obligations.

Consistent with the requirements of the Sentencing Reform Act of 1984, the Commission engages in a collaborative process for sentencing policy development and guideline promulgation. That process continues to include significant outreach to, and input from, representatives of the criminal justice community, as well as the review of pertinent literature, data, and case law. For example, the Commission recently held a public briefing session on disaster fraud offenses and the illegal use of human growth hormone. During this briefing session, the Commission received testimony from the Department of Justice, the Federal Defenders Service, the Department of Housing and Urban Development, the American Red Cross, and the Food and Drug Administration.

Collecting, Analyzing and Reporting Sentencing Data

In fulfillment of its statutory duties related to collecting, analyzing, and reporting federal sentencing statistics and trends, the Commission collects documentation from the district courts on over 70,000 federal felony and class A misdemeanor cases annually.⁷ From this documentation, the Commission extracts, analyzes, and reports information on national sentencing trends and practices. As with other aspects of the Commission's statutory mission, data collection, analyzing, and reporting efforts continue to be impacted by the Supreme Court's recent sentencing-related decisions.

Immediately after the Supreme Court's 2004 decision in *Blakely v. Washington*,⁸ the Commission recognized that one of the most critical functions it could perform was reporting timely and accurate sentencing data. The Commission refined its data collection, analysis, and reporting requirements to such a degree that it was able to produce relevant information beyond

⁷ See 28 U.S.C. § 994(w), which requires the chief judge of each district court, within 30 days of entry of judgment, to provide the Commission with: (1) the charging document; (2) the written plea agreement (if any); (3) the Presentence Report; (4) the judgment and commitment order; and (5) the statement of reasons form.

⁸ 542 U.S. 296 (2004). *Blakely* was a precursor to the *Booker* decision, which applied to a state guideline sentencing scheme. After the *Blakely* decision, several federal courts questioned whether the federal sentencing guideline system was still viable and federal sentencing practices became uncertain. The Commission's data collection and analysis efforts assisted the criminal justice community in evaluating the impact of *Blakely*, and later *Booker*, on the federal system.

that which it promulgated in its annual reports and sourcebooks. By the time the Supreme Court issued its *Booker* decision in January 2005, the Commission was able to provide real-time data about national sentencing trends and practices.

The Commission further refined its processes throughout fiscal years 2006 and 2007 to maximize the information it made available to the criminal justice community. The Commission now provides detailed quarterly national sentencing data similar to the format and types of data produced in its year-end annual reports. In addition, the Commission has begun to provide real-time data on the impact on federal sentencing practices of the Supreme Court's recent decisions in *Rita*, *Gall*, and *Kimbrough v. United States*.⁹ The Commission also has expedited publication of its year-end annual reports, which are now released in February of each year. For fiscal year 2007, the Annual Report and Sourcebook contained information on 72,865 federal cases, which represents approximately 24,000 more cases than the Commission processed a decade ago. The information contained in these reports and other analyses conducted by the Commission are used by, among others, Congress, the judiciary, the Department of Justice, defense practitioners, and academics.

Information Technology Issues Associated with Data Collection, Analysis and Reporting

Over the past three fiscal years, the Commission has apprised Congress of its development of an electronic document submission system that enables courts to electronically submit the five statutorily required sentencing documents directly to the Commission. This system is now used by 91 of the 94 judicial districts, an increase from 80 districts in fiscal year 2007 and 64 districts in fiscal year 2006. The electronic document submission system has greatly alleviated the courts' need to spend judicial resources on copying, bundling, and mailing hard copies to the Commission.

During fiscal years 2008 and 2009, the Commission intends to continue to make technological advancements related to data collection, analysis, and reporting. For example, working with the courts, the Commission has begun to advance the evolution of its electronic submission system to a web-based system with the ability to accept both the statutorily required sentencing documents and data fields from the courts. Specific projects include the planning, coordination, and implementation of a pilot project for the expanded use of this web-based system.

Increased Requests for Commission Work Product from Congress

In addition to providing quarterly and annual data reports on national sentencing practices, the Commission continues to experience increased requests for particularized data analysis from Congress. The Commission is statutorily required to assist Congress in assessing the impact proposed criminal legislation will have on the federal prison population. These assessments are often complex, time-sensitive, and require highly specialized Commission resources. The Commission also has experienced an increase in requests for information from Congress on issues

⁹128 S. Ct. 558 (2007).

such as drugs, gangs, fraud, immigration, and sex offenses. The Commission increasingly is providing data to assist Congress during oversight and legislative hearings on proposed changes to substantive areas of the criminal law. Informational requests from the Congressional Research Service have also increased. The Commission anticipates that congressional requests will continue to increase throughout fiscal year 2009 and looks forward to fulfilling them in a timely and thorough manner.

Conducting Research

The Sentencing Reform Act of 1984 directed the Commission to establish a research agenda as part of its role as the clearinghouse on federal sentencing statistics and policy and to assist the courts, Congress, and the Executive Branch in the development, maintenance, and coordination of sound sentencing policies. As part of this statutory mission, the Commission issued its fourth comprehensive report on federal cocaine sentencing policy in May 2007. It also released an analysis on the impact of the amendment to the guidelines for crack cocaine offenses if it were given retroactive effect. The Commission's research agenda in fiscal year 2008 includes reports associated with its policy work and other projects of interest to the criminal justice community. One of these projects is an examination of alternatives to incarceration, which will include a two-day symposium featuring leading experts in the field.

Training and Outreach

The Sentencing Reform Act of 1984 also directed the Commission to provide specialized sentencing training and guidance to the criminal justice community. In fulfillment of this statutory duty, the Commission provides training, technical assistance, and other educational programs to federal judges, probation officers, law clerks, staff attorneys, prosecutors, and defense attorneys throughout the year. The Commission's training and outreach efforts have expanded in each of the past four years, particularly in response to the Supreme Court's recent sentencing-related decisions and to the Commission's annual promulgation of guideline amendments. In fiscal years 2007 and 2008, the Commission provided training in every federal judicial circuit and a majority of the districts. It also participated in numerous symposia, conferences, and workshops. In May 2008 in Orlando, Florida, the Commission will co-host its annual national training program at which several hundred participants will receive federal sentencing guideline training. The Commission expects that the need to provide specialized training on federal sentencing issues will continue to increase throughout fiscal year 2009.

SUMMARY

The Commission remains uniquely positioned to assist all three branches of government in ensuring sound and just federal sentencing policy. Located in the judicial branch and composed of federal judges, individuals with varied experience in the federal criminal justice community, and ex-officio representatives of the Executive Branch, the Commission is an expert, bipartisan body that works collaboratively with Congress. It therefore sits at the crossroads where all three branches of government intersect to determine federal sentencing policy.

The Commission appreciates the funding it has received from Congress to meet its ever-increasing needs. Full funding of the Commission's fiscal year 2009 request will ensure that the Commission continues to fulfill its statutory mission to develop federal sentencing guidelines, collect, analyze and report federal sentencing statistics and trends, conduct research on sentencing issues, and provide training to the criminal justice community. The Commission respectfully asks that Congress fully support the Commission's fiscal year 2009 appropriation request of \$16,257,000 so that it can continue its statutory role as a leader in federal sentencing policy.