

Open Letter to the United States Sentencing Commission

From Scholars and Researchers Who Study Federal Sentencing

April 20, 2009

Dear Commissioners:

The undersigned scholars and researchers study the federal sentencing system from a variety of policy and philosophical perspectives. As you well know, these are interesting times. Constitutional decisions by the Supreme Court revised the guideline system put in place by the Sentencing Reform Act of 1984 (the SRA). Legislation, both enacted and proposed, has raised important questions concerning the fairness and effectiveness of federal sentencing. The quality of our national policy debate can be improved by empirical research, just as our sentencing practices can be improved by empirical evaluation.

We call on you to fully use the powers granted by the SRA to facilitate research and evaluation.¹ The upcoming Data and Research Conference on May 5-7 provides an opportunity for the Commission to expand its role as “clearinghouse and information center” on federal sentencing practices and to assist researchers working with the annual monitoring data file. The conference agenda published on your website does not seem to address several concerns regarding the timing and method of release of Commission data, however, and the release of data beyond the annual monitoring, appeals, and organizations data files. We ask that you consider these additional issues and recommendations.

In recent years, the Commission has accelerated data collection and reporting and issued *Quarterly Data Reports* in addition to the annual *Sourcebooks of Federal Sentencing Statistics*. Timely release of reports through the Commission’s website has helped policymakers and researchers track basic trends in federal sentencing practice, such as the rate of sentences imposed within and outside the recommended guideline ranges. These reports, however, contain tabulated aggregated data that do not address the full variety of questions that could be investigated with the underlying datasets. The reports are released before the datasets on which

¹ Title 28 U.S.C. § 995 gives the Commission broad powers to:

(12) establish a research and development program within the Commission for the purpose of –
(A) serving as a clearinghouse and information center for the collection, preparation, and dissemination of information on Federal sentencing practices;

* * *

(13) collect systematically the data obtained from studies, research, and the empirical experience of public and private agencies concerning the sentencing process;

(14) publish data concerning the sentencing process;

(15) collect systematically and disseminate information regarding effectiveness of sentences imposed.

they are based are made publicly available, and in some cases special datasets have never been made available.

Timely access to the datasets underlying the Commission's reports is crucial because the particular tabulations presented in the reports do not address many questions of great interest to policymakers, researchers, and other participants in the criminal justice system. As the Commission itself has demonstrated, examining the underlying data using additional variables not used in the Commission's routine reports can shed considerable light on trends that have been the subject of concern and misunderstanding.² Analyses by outside researchers have raised questions about some of the premises on which Congress has acted in the past, but too late to contribute to the policy debate.³

For many years the Commission has sent the datasets underlying its annual reports to the Inter-University Consortium for Political and Social Research (ICPSR). Commission Rule of Practice and Procedure 6.5 makes the ICPSR the sole means for persons outside the Commission to access Commission data. In recent years data have also been made available through the Federal Justice Statistics Resource Center (FJSRC). This approach of imposing an intermediary between the Commission and researchers has hampered timely research. For example, at the date of this writing the most recent monitoring dataset available from ICPSR is for FY2007, while the Commission has released a report containing monitoring data through the first quarter of FY2009. Moreover, unless the datasets on which the Commission's reports are based are made publicly available at the time of a report's release, there is no way for the Commission's analyses to be replicated and supplemented. This is why the norms of science and the ethical guidelines of professional organizations promote release of statistical data.⁴

Very early in the Commission's existence it also made public through the ICPSR additional data from surveys and special studies, such as the 1991 study of mandatory minimum statutes. In recent years, much of the data generated by the Commission has not been reported or released to the public at all, even though it could be used to address many questions that the Commission has not studied. No datasets containing information more recent than 1991 have been deposited with ICPSR concerning plea bargaining, mandatory minimums, judicial attitudes, or any other special topic. The dataset from a multi-year study of the recidivism of a large sample of federal offenders was the basis of three reports published in 2004 but has not been released to the public. This dataset could be used to address many additional questions, such as

² See United States Sentencing Commission, *Downward Departures from the Federal Sentencing Guidelines* (May 2003). The report showed that the growth in the rate of downward departures and variability among districts apparent in the tabulated aggregate data contained in the Commission's routine reports could be partly explained by variations in numbers of immigration offenses and the existence of early disposition programs in some districts.

³ See e.g. Max Schanzenbach, *Have Federal Judges Changed Their Sentencing Practices? The Shaky Empirical Foundations of the Feeney Amendment*, 2 J. of Empirical Legal Studies 1 (2005).

⁴ See American Statistical Association, Ethical Guidelines for Statistical Practice, Rule F.1. ("Promote sharing of (nonproprietary) data and methods. As appropriate, make suitably documented data available for replicate analyses, metadata studies, and other suitable research by qualified investigators.") and Rule H.3. ("Make new statistical knowledge widely available in order to benefit society at large.")

the effectiveness of various types of sanctions, including mandatory minimum penalties, or to explore the variety and combinations of factors that best predict recidivism. Similarly, the Commission's Intensive Study Samples collected in 1995, 2000, and 2005 have never been released to the public but could be used in a variety of policy-relevant research.

Of particular interest, given recent Supreme Court decisions, are the reasons courts are sentencing both within and outside the recommended guideline ranges. These reasons are a vital component in the evolution of the guidelines in light of judicial feedback, which has been anticipated by Congress, the Commission, and the Supreme Court. There is concern that the information currently collected about these reasons is inadequate to inform this evolutionary process.⁵ While judges have the option of writing and publishing sentencing opinions, many choose only to state their reasons in open court, which may or may not be transcribed or transmitted to the Commission. The Statement of Reasons Form provided by the Administrative Office of the United States Courts provides boxes and blanks which indicate in only a crude manner the circumstances, purposes, and policy reasons that explain a particular sentence.

In light of these concerns and the greater transparency being encouraged for all federal agencies, we believe the Commission should consider the following recommendations:

- 1) **Make data available for download directly from the Commission's website.** The Commission may wish to continue depositing datasets with the FJSRC and ICPSR. But the time lag between the deposit and posting of data is unnecessarily long. Technological advances, and the need for more timely information on federal sentencing practices, require that the Commission follow the practice of other agencies who supply datasets directly.
- 2) **Make the datasets on which reports are based available at the time the reports are released.** Because interest in a report's findings is greatest at the time of its release, the dataset on which the report's tabulations and findings are based should be available simultaneously to permit replication and supplementary analyses.
- 3) **Release special study datasets once data collection is completed.** The Commission may be unable to conduct all the research possible with its datasets. The creativity and resources of outside researchers should be tapped through prompt release of all completed datasets and should not be delayed while the Commission conducts or plans its own studies.
- 4) **Establish a task force to evaluate the quality of information received by the Commission regarding the reasons judges sentence within and outside the guideline range.** Because the requirements for statements of reasons depend on many factors, including the legal standards for procedural reasonableness, the institutional needs of the Commission, and the policy-development interests of all participants in the federal criminal justice process, a multi-agency task force is needed to study this important issue.

⁵ See Sherod Thaxton, *Determining "Reasonableness" without a Reason? Federal Appellate Review Post-Rita v United States* 75 U. Chi. L. Rev. 1885 (2008) (describing need for detailed statements of reasons if evolution of guidelines in light of judicial experience is to be possible).

This task force could include, in addition to representatives of the Commission, representatives of the Judicial Conference of the United States, the United States Probation System, the Criminal Division of the Department of Justice, the Federal Public Defenders, representatives of the private defense bar, and members of the research community.

- 5) **Establish a research advisory task force.** The early research of the Commission was informed by a task force comprised of legal and social science scholars concerned with federal sentencing. We believe such a task force could help formulate a research agenda for the Commission's own staff and help the Commission improve the access and user-friendliness of its data so that more research could be done by outside scholars.

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