Criminal justice reform is having a moment and it’s heartening to see.
There’s the progressive prosecutor movement, the cash bail movement, the elimination of drug mandatory minimums in states like Texas, and a greater public awareness of the harms of mass incarceration.
When I started as a federal public defender in San Diego in 2005, I could not have imagined the conversations we’d be having and the reforms that have been enacted today.
These are all good things.
I’ve spent my career as a criminal defense attorney practicing in the federal system, so my interest and focus lies there.
And in this criminal justice reform moment, it’s been frustrating to be in the federal system because it feels like we’re so behind what’s happening in the states. Not because the problems aren’t known, but because there’s a lack of political will to make the big changes to our federal drug laws that many across the ideological spectrum believe are needed.
To give a bit of a backdrop for those not familiar with the federal system.
We have a presumption of detention for those charged with drug offenses.
We have mandatory minimums for most drug offenses.
And it’s pretty much business as usual in the U.S. Attorney’s offices with regard to the treatment of drug cases. If anything, it’s gotten worse with the installation of the Trump appointees.
President Obama tried to get drug law reform done. It didn’t happen because Senator Mitch McConnell wouldn’t bring anything to the floor. A bipartisan coalition of politicians and reform advocates kept at it and, probably thanks to President Trump’s son-in-law Jared Kushner, Trump signed the First Step Act into law in late 2018.
**The First Step Act made some very modest reforms to our federal drug laws.
The most significant are:
  o (1) The expansion of safety valve relief so that more low-level drug offenders are eligible to receive sentences under the mandatory minimum if they meet certain requirements
  o (2) Reducing the draconian § 851 recidivist enhancements and narrowing what prior convictions qualify for them.
  o Before the FSA, the recidivist enhancements doubled the mandatory minimum if a person had any felony drug offense on their record and
increased the mandatory minimum to life if they had two felony drug offenses on their record. Even simple possession convictions qualified for these enhancements!

- The First Step Act wisely limits qualifying convictions to “serious” drug felonies.

- But, otherwise, the First Step Act really just tinkers around the edges of federal drug law reform because it leaves in place the fundamental structure of our federal drug laws.
  - It didn’t get rid of any mandatory minimums.
  - And it didn’t make any modifications to the fundamental principle of punishment that ties federal sentences to drug type and quantity and does not account for a person’s role.
  - It didn’t do either of these things, even though these are changes that are being made at the state level across the country.

- In the federal system, we just can’t seem to quit drug mandatory minimums!
- The First Step Act almost didn’t make it across the finish line. Senators Cotton and Kennedy railed against it. It was unclear Mitch McConnell would even bring it to the floor.
- Given what a heavy lift the First Step Act was, it’s fair to wonder what lies ahead for federal drug law reform.
- Even though it was modest reform, the FSA was the most significant reform of our drug laws since the 1986 Anti-Drug Abuse Act.
- We’re in big trouble if we have to wait another thirty-two years to reevaluate our federal drug laws.
- So, what can be done to continue to push for reform?
  - **My paper argues that federal judges have an important role to play in drug law reform going forward and that one of the most effective ways they can do that is by lodging categorical policy disagreements with the drug sentencing guidelines promulgated by the Sentencing Commission, and in particular the career offender sentencing guideline.

- Federal judges are important to reform for several reasons.
  - **The first is obvious and doesn’t require much exposition—they have lifetime tenure, which insulates them from taking unpopular positions.
  - **Second, when it created the Sentencing Commission, Congress specifically envisioned that judges would provide feedback and critiques about the sentencing guidelines. They expected judges to do that through their sentences, statement of reasons, and written sentencing opinions.
  - The SRA requires the Commission to review and revise the guidelines based on consultation with all the players in the system, including judges, as
well as experts in the field.\footnote{28 U.S.C. § 992(o).} It also requires the Commission to collect and systematize data “concerning the sentencing process” and “concerning sentences actually imposed, and the relationship of such sentences to the factors set forth in” § 3553(a).\footnote{28 U.S.C. § 995(12)–(16).}

- **The Supreme Court has confirmed the centrality of judges to the evolution of guidelines.
  - “The Commission’s work is ongoing. The statutes and the Sentencing Guidelines themselves foresee a continuous evolution helped by the sentencing courts and courts of appeals in that process.” \textit{Rita} at 350.
- **Finally, the Supreme Court has more or less endorsed judges’ role in reform in the \textit{Kimbrough} case.
- The \textit{Kimbrough} case has long fascinated me. It is, in essence, the Supreme Court’s own critique of the drug sentencing guidelines and a blueprint for any judge who wants to disagree with the drug sentencing guideline on policy grounds, even in an ordinary, “mine-run” case.
- **\textit{Kimbrough} centered on the crack/powder disparity in the Guidelines that has since been reduced and whether judges could disagree with that Guideline on policy grounds after \textit{Booker}.
- The Court begins its opinion by laying out the history of the disparity, starting with the 1986 Act and its “weight-driven scheme” for mandatory minimum sentences, including crack and powder cocaine.\footnote{Id. at 96.}
- **As the Supreme Court explained, the 100:1 ratio was put into place because “Congress apparently believed that crack was significantly more dangerous than powder cocaine.”\footnote{Id. at 95.} Congress relied on “assumptions,” not data.\footnote{Id.}
- **In lockstep response, the Commission developed guidelines that simply adopted this weight-driven scheme without utilizing its empirical approach “based on data about past sentencing practices.”\footnote{Id. at 96. Interestingly, the Commission later “determined that the crack/powder sentencing disparity is generally unwarranted,” \textit{id.}, and in 1995, recommended a 1:1 ratio to Congress. Congress, of course, rejected this recommendation.}
- **On that basis, the Supreme Court concluded that the Commission “did not use [its] empirical approach in developing the Guidelines sentences for drug-trafficking offenses.”\footnote{Id. at 97.} And, as a result, the drug guidelines “do not
exemplify the Commission’s exercise of its characteristic institutional role” and judges could vary from them, even in a “mine-run” case.8

- As I mentioned, this case provides a literal blueprint for judges to use to disagree with the drug guideline, but the Supreme Court’s rationale in Kimbrough extends to any guideline that’s not based on national experience and data and therefore does not exemplify the Commission’s exercise of its characteristic institutional role.

- Though after Kimbrough, it was unclear whether that was the case.

- So, for example, courts were split on whether judges could disagree with the fast track guideline or the career offender guideline because those were promulgated in response to congressional directives, which made them different than the drug guideline.

- My paper focuses on the career offender guideline, because it’s a guideline where I believe judges’ voices are most needed for drug law reform, particularly in the current criminal justice climate.

- **The career offender guideline is the Commission’s response to a congressional directive to set sentences for certain recidivist offenders “at or near” the statutory maximum.

- The career offender guideline functions in a way that often has a drastic impact on a person’s guideline range, especially in drug cases.

- **The career offender provision applies to a person who commits a “controlled substance” offense or a “crime of violence” after two prior felony convictions for those crimes.9

- The Guidelines assign all career offenders to Criminal History Category (CHC) VI and to offense levels at or near the statutory maximum penalty of the offense of conviction.10

- **Here’s a comparison between the sentence a person would receive under the career offender guideline and a sentence that the same person would have received before the guidelines:

  - Before the guidelines were enacted, a person charged with possessing with intent to distribute 50 grams of heroin and who had two prior drug offenses on his record would be facing 37 to 46 months.

  - Today, that same person faces approximately the same sentence under the guidelines without application of the career offender guideline.

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8 Id. at 109.
9 USSG § 4B1.1.
10 USSG § 4B1.1.
Under the career offender guideline, however, the person’s guideline range skyrockets to 210 to 262 months.\textsuperscript{11}

- Because the career offender guideline is the product of a congressional directive to set sentences “at or near” the statutory maximum, it is not based on national experience and data and therefore does not exemplify the Commission’s exercise of its characteristic institutional role.
- This is not a controversial proposition.
- That means that the \textit{Kimbrough} blueprint for a categorical policy disagreement with the drug guidelines applies with equal force to the career guideline.
- The Sentencing Commission has weighed in on the problems with the career offender guideline.
- As I mentioned, the Commission’s mandate requires it to constantly be studying the guidelines, consulting with experts, reviewing judicial decisions and data, and issuing reports.
- The whole point of this is for the Commission to figure out if the guidelines are “effective in meeting the purposes of sentencing” set forth in § 3553(a)(2).\textsuperscript{12}
- In 2016, it issued a very lengthy report on the career offender guideline and recommended substantial changes.
- **The Commission concluded that “drug trafficking only” career offenders, meaning those who are convicted of a federal drug trafficking offense and have two drug convictions on their background, “are not meaningfully different from other federal drug trafficking offenders and should not categorically be subject to the significant increases in penalties required by the career offender directive.”**
- The Commission recommended to Congress that § 994(h) should be amended “to differentiate between career offenders with different types of criminal records, and is best focused on those offenders who have committed at least one ‘crime of violence.’”\textsuperscript{13}
- **Specifically, the Commission recommended that “Congress amend [§ 994(h)] . . . by no longer including those who currently qualify as career offenders based solely on drug trafficking offenses.”\textsuperscript{14}

\textsuperscript{11} ABE at 2.
\textsuperscript{12} 28 U.S.C. § 991(b).
\textsuperscript{14} \textit{Id.} at 3.
• The Commission’s reasoning is that this change “would help ensure that federal sentences better account for the severity of the offenders’ prior records, protect the public, and avoid undue severity for certain less culpable offenders.”

• These are important and striking conclusions. The Commission has flat out admitted that the career offender guideline should not apply to “drug trafficking only” career offenders.

• **As one federal judge has noted, “We find ourselves in a space in which the Commission disagrees with its own Guidelines as applied” in cases of “drug trafficking only career offenders.”**

• Of course, the changes the Commission is recommending, in large part, can’t be enacted without Congress amending its statutory directive.

• I expected to find more judges categorically disagreeing with the career offender guideline in drug trafficking only career offender cases after the Commission’s powerful 2016 report.

• But my research shows that’s not the case, and that judges have been reticent to disagree categorically with the career offender guideline in drug trafficking only career offender cases, at least in written opinions.

• Judges need to do this more. They need to explain why the career offender guideline is categorically flawed, even in an ordinary, mine-run case.

• **Ultimately, judges’ voices are crucial if there’s to be any hope of Congress amending the career offender guideline as the Commission has recommended.**

• *Kimbrough* gives judges a blueprint and an endorsement to be part of the reform effort, and judges should take advantage of this.

\[15\] Id. at 3.