

REINING IN THE “JUNIOR VARSITY CONGRESS”: A CALL FOR MEANINGFUL JUDICIAL REVIEW OF THE FEDERAL SENTENCING GUIDELINES

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I think the Court errs . . . because it fails to recognize that this case is not about commingling, but about the creation of a new Branch altogether, a sort of junior-varsity Congress.

—*Mistretta v. United States*, 488 U.S. 361, 427 (1989) (Scalia, J., dissenting)

I. INTRODUCTION

In 1989, the Supreme Court ruled that Congress had not delegated excessive legislative authority to the Sentencing Commission.¹ This was no surprise. The Sentencing Reform Act of 1984² (SRA) specified both the purposes to be achieved by the Commission and the means to achieve them—the guidelines system.³ The Court assured us that the Commission’s statutory dictates were sufficiently specific and detailed.⁴ Yet ever since, the courts have failed to enforce those same dictates against the agency supposedly bound by them. *United States v. Johnson*⁵ is but one example. Hardly unique, *Johnson* allowed the Commission to choose which statutory commands to follow and which to ignore:⁶ “[i]f any provision of the Sentencing Reform Act, reasonably interpreted, would support the [challenged] guideline, we must sustain it.”⁷ So long as the guideline comported with some SRA provision—whatever its inconsistency with many others—it would pass muster.⁸

Gradually, the Sentencing Reform Act of 1984 has become a forgotten

1. See *Mistretta v. United States*, 488 U.S. 361, 371-79 (1989).

2. 28 U.S.C. §§ 991-98 (1994); 18 U.S.C. §§ 3551 *et seq.* (1994).

3. See *Mistretta*, 488 U.S. at 374-75.

4. See *id.* at 374-77.

5. 28 F.3d 151 (D.C. Cir. 1994).

6. See *United States v. Davern*, 970 F.2d 1490, 1503 (6th Cir. 1992) (*en banc*) (Merritt, J., dissenting).

7. *Johnson*, 28 F.3d at 153 (emphasis added). The defendant in *Johnson* challenged the Guidelines’ inclusion of juvenile offenses within one’s criminal history score. *Id.*

8. See *id.*

source of law.⁹ Despite the SRA's numerous commands, the Commission's own Guidelines Manual plays a surprising role: "the Alpha and the Omega" of the federal sentencing regime.¹⁰ The Guidelines' enabling legislation is virtually absent from sentencing jurisprudence. Few parties challenge the Guidelines as contrary to the Commission's statutory mandates. Remarkably fewer succeed. Where the Guidelines are concerned, the usual precepts of administrative law—wherein an agency's legislative rules must comport with its statutory authority¹¹—are seldom mentioned.¹² In a post-*Chevron* era marked by heightened judicial scrutiny of administrative agencies,¹³ the courts have kowtowed to the one agency that regulates the courts themselves. They have deferred to the one agency whose agenda—the sentencing of criminal defendants—uniquely falls within the judiciary's expertise.

Perhaps more importantly, the courts have foresworn the task of determining whether the Guidelines rationally implement Congress's broad mandates.¹⁴ Although a court may impose a sentence outside the prescribed guideline range if the case presents an aggravating or mitigating circumstance "not adequately taken into consideration" by the Commission,¹⁵ the courts have declined this statutory invitation to question the soundness of particular guidelines.¹⁶ The Commission, in turn, rarely justifies its guidelines, consistently avoids on-the-record decisionmaking, and operates unencumbered by the procedural safeguards that ensure the political legitimacy of other administrative agencies.¹⁷ In short, the Commission is an anomaly in the modern administrative state—an anomaly that deserves those

9. See Ronald Weich, *The Strange Case of the Disappearing Statute*, 3 FED. SENT. REP. 239, 239 (1991).

10. Michael M. Mihm, *The Roles and Responsibilities of the Judiciary in the Implementation of the Sentencing Reform Act of 1984*, 5 FED. SENT. REP. 174, 175 (1992).

11. See *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 n.9 (1984) (explaining that the judiciary is the final authority on statutory construction and must reject administrative interpretations that violate clear congressional intent).

12. See Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE L.J. 1681, 1700 (1992).

13. See *infra* Part III.A.

14. See KATE STITH & JOSÉ A. CABRANES, *FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS* 56-57 (1998). The courts' approach is not wholly unwarranted. Congress only selectively imposed the Administrative Procedure Act upon the Commission. See 28 U.S.C. § 994(x) (1994). Conspicuously and intentionally absent are the APA's judicial review provisions. See 5 U.S.C. §§ 701-706 (1994). See also S. REP. NO. 98-225, at 181 (1983), reprinted in 1984 U.S.C.C.A.N. 3182, 3364 ("It is . . . not intended that the guidelines be subject to appellate review There is ample provision for review of the guidelines by the Congress and the public; no additional review of the guidelines as a whole is either necessary or desirable.").

15. 18 U.S.C. § 3553(b) (1994).

16. See *infra* Part IV.A.

17. See 5 U.S.C. §§ 551-53 (1994); STITH & CABRANES, *supra* note 14, at 95.

sentenced under the Guidelines as well as the legislative purposes that supposedly guide the Commission's task.

This article documents and challenges these unwelcome developments. Part II presents a brief history of federal sentencing reform, including the rise of judicial and academic dissatisfaction with the Guidelines. To provide a context for the administrative law prescriptions that I propose, Part II reviews some of the Commission's more questionable judgments. Part III details and criticizes the limited judicial review surrounding the Commission's implementation of its statutory mandates. Part III focuses upon "statutory review"—the side-by-side comparison of Guidelines provisions with the statutory commands that govern them. It begins with an administrative law framework against which the Guidelines might be evaluated, tracing the rise and fall of the *Chevron* principle, under which a court will accept an agency's interpretation of a statute as long as the agency has "reasonably" interpreted the statute.¹⁸ Part III then describes and analyzes the various means by which the Guidelines¹⁹ have been challenged as inconsistent with their enacting legislation. I have examined 312 such challenges from 1988 through 1997, the first full ten years during which the Guidelines operated. Part III ultimately confirms the SRA's status as a forgotten source of law, a status that prevents the courts from ensuring the agency's fealty to the statute it administers.

The last two Parts critique the findings of Part III. Because parties more often seek refuge from the Guidelines through the departure mechanism of 18 U.S.C. § 3553(b) rather than by pursuing judicial review, Part IV assesses the adequacy of departure as a means of keeping the Commission within its statutory mandate and ensuring that the Guidelines rationally implement Congress's commands. Part IV argues that the courts have limited departures to a greater extent than intended by the SRA and have eliminated any mechanism by which departures might be used to enforce the SRA. Finally, Part V offers an alternative SRA jurisprudence as well as an alternative SRA. I first propose that courts and litigants alike pay greater heed to the SRA and scrutinize the Guidelines' fealty to it. This modest proposal requires the enactment of no new laws; it requires only that lawyers and judges think about administrative law when they apply the Guidelines. Second, I propose generally to subject the Commission to the same procedural requirements that bind other agencies, including the full panoply of judicial review under

18. See *Chevron*, 467 U.S. at 842-43.

19. Unless otherwise stated, the term "Sentencing Guidelines" refers not simply to the guidelines themselves, but rather to the Guidelines Manual. Thus, the term includes specific guidelines, the Guidelines in general, commentary and application notes, and policy statements.

the Administrative Procedure Act.²⁰ The “Sentencing Commission Accountability Act” would abolish the Commission’s privileged status in the administrative state. It would invite meaningful public participation in the process of formulating the Guidelines, bring the Commission’s deliberations into open view, subject the Guidelines to the judicial scrutiny they deserve, and make the Guidelines worthier of our acceptance. More generally, it would ensure that Congress’s intent prevails over the will of an unelected and politically unaccountable agency. Such is the task of administrative law, and we should expect nothing less.

II. FEDERAL SENTENCING REFORM AND ITS AFTERMATH

A. *The Sentencing Reform Act and Its Implementation*

Dissatisfied with wide judicial discretion in sentencing, Congress undertook a sweeping reform project. Its purposes were essentially threefold. First, Congress sought to alleviate the broad sentencing disparities produced by different judges applying different sentencing philosophies to similar cases.²¹ Second, it replaced indeterminate sentencing and parole with “honesty in sentencing” so that one’s stated term of incarceration would bear a closer resemblance to time actually served.²² Third, it sought “proportionality” so that one’s sentence might resemble one’s criminality.²³

Congress manifested these purposes in the Sentencing Reform Act’s instructions to judges and the Commission. Channeling judicial discretion, the SRA directs the judge to impose a sentence “sufficient, but not greater than necessary”²⁴ to comply with seven considerations enumerated in 18 U.S.C. § 3553(a).²⁵ The prescribed guideline range is but one of these seven considerations.²⁶ Yet Congress’s sweeping “sufficient, but not greater than necessary” language did not vest sentencing judges with limitless discretion. Rather, the court must impose a sentence within the prescribed guideline range, absent “an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing

20. 5 U.S.C. §§ 551-59, 701-06, 1305, 3105, 3344, 4301, 5335, 5362, 7521 (1994).

21. See S. REP. NO. 98-225, at 38, 44 (1984), reprinted in 1984 U.S.C.C.A.N. 3182, 3221, 3227.

22. U.S. SENTENCING GUIDELINES MANUAL § 1A(3) (1998) [hereinafter GUIDELINES]. See S. REP. NO. 98-225 at 49, (1984), reprinted in 1984 U.S.C.C.A.N. at 3232; Deborah E. Dezelan, Case Comment, *Departures From the Federal Sentencing Guidelines After Koon v. United States: More Discretion, Less Discretion*, 72 NOTRE DAME L. REV. 1679, 1684 (1997).

23. See GUIDELINES § 1A(3) (1988).

24. 18 U.S.C. § 3553(a) (1994).

25. See *infra* Part II.B.1.

26. See 18 U.S.C. § 3553(a)(4).

Commission in formulating the guidelines."²⁷ These provisions are cryptic at best. What does "adequately taken into consideration" mean? What if the Guidelines prescribe a sentence at odds with the six other considerations that judges must weigh?²⁸

Congress instructed the Commission in equally broad terms. Its general directives require that the Guidelines meet the statutory purposes of sentencing: just deserts, deterrence, incapacitation, and rehabilitation.²⁹ Congress further directed the Commission to "provide certainty and fairness in . . . sentencing,"³⁰ to "avoid[] unwarranted sentencing disparities" among similar defendants,³¹ maintain flexibility sufficient to account for "mitigating or aggravating factors not taken into account in the establishment of general sentencing practices,"³² and reflect "advancement in knowledge of human behavior as it relates to the criminal justice process."³³ Finally, Congress required that the Commission's guidelines "minimize the likelihood that the federal prison population will exceed the [available] capacity,"³⁴ "reflect the general inappropriateness" of considering a defendant's "education, vocational skills, employment record, family ties and responsibilities, and community ties" in formulating a sentence,³⁵ and remain "entirely neutral" as to an offender's "race, sex, national origin, creed, and socioeconomic status."³⁶

Not all of the SRA's commands sweep so broadly. More specific directives include requirements that the top of each guideline range not exceed the bottom by more than twenty-five percent or six months;³⁷ that certain types of repeat offenders receive enhanced sentences;³⁸ that imprisonment not be imposed for the purpose of rehabilitation;³⁹ that the Guidelines reflect the "general appropriateness" of imposing non-

27. *Id.* § 3553(b).

28. Generally, courts reject the notion that the enumerated § 3553(a) considerations permit departure from the guideline range. Thus, § 3553(b) remains the sole source of departure authority. *See, e.g., Williams v. United States*, 503 U.S. 193, 200 (1992); *United States v. Barber*, 119 F.3d 276, 279-80 (4th Cir. 1997) (*en banc*); *United States v. Lowe*, 106 F.3d 1498, 1501 (10th Cir. 1997); *United States v. Andruska*, 964 F.2d 640, 644-45 (7th Cir. 1992).

29. *See* 28 U.S.C. §§ 991(b)(1)(A), 994(f) (1994).

30. 28 U.S.C. § 991(b)(1)(B).

31. *Id.*

32. *Id.*

33. *Id.* § 991(b)(1)(C).

34. *Id.* § 994(g).

35. *Id.* § 994(e).

36. *Id.* § 994(d).

37. *See id.* § 994(b)(2).

38. *See id.* §§ 994(h)-(i).

39. *See id.* § 994(k).

incarcerative sentences for certain non-violent first offenders;⁴⁰ that they provide reduced sentences for those who have provided “substantial assistance in the investigation or prosecution of another person who has committed an offense;”⁴¹ and that they prescribe consecutive sentences under certain circumstances.⁴² Congress further permitted the Commission to decide for itself the relevance of factors such as “the grade of the offense,”⁴³ the community’s view of the offense’s seriousness,⁴⁴ and the frequency of the offense in the community or the country as a whole.⁴⁵ The Commission also may determine the relevance of the defendant’s age,⁴⁶ mental or emotional condition,⁴⁷ criminal history,⁴⁸ and role in the offense,⁴⁹ and the extent to which a defendant earns his or her livelihood through criminal activity.⁵⁰

Finally, Congress imposed a number of procedural requirements upon the Commission. It required the Commission to submit the initial set of Guidelines to Congress by May 1987, adopt guidelines and amendments pursuant to the informal “notice and comment” rulemaking procedures of the Administrative Procedure Act,⁵¹ and consult with “individual and institutional representatives of . . . the federal criminal justice system” such as the Probation System, the Bureau of Prisons, the Judicial Conference of the United States, the Department of Justice, and Federal Public Defenders.⁵² Finally, the SRA allowed rejection of the initial Guidelines (or subsequent amendments) within 180 days through an Act of Congress.⁵³

The initial Guidelines took effect in November 1987 and revolutionized the federal sentencing regime. Today the Guidelines apply to over ninety percent of all federal felony and Class A misdemeanor cases.⁵⁴ Nearly 300,000 defendants have been sentenced under them since January 1989.⁵⁵ Defendants in the late 1980s focused upon the constitutionality of the

40. *See id.* § 994(j).

41. *Id.* § 994(n).

42. *See id.* § 994(l).

43. *See id.* § 994(c)(1).

44. *See id.* § 994(c)(4).

45. *See id.* § 994(c)(7).

46. *See id.* § 994(d)(1).

47. *See id.* § 994(d)(4).

48. *See id.* § 994(d)(10).

49. *See id.* § 994(d)(9).

50. *See id.* § 994(d)(11).

51. *See* 5 U.S.C. § 553 (1994); 28 U.S.C. § 994(x).

52. 28 U.S.C. § 994(o) (1994).

53. *See id.* § 994(p).

54. *See* GUIDELINES, § 1A(5) (1998).

55. *See* UNITED STATES SENTENCING COMM’N, 1996 ANN. REP. 2 (1996).

Commission and the Guidelines. This strategy initially succeeded as more than 200 federal judges declared the SRA unconstitutional.⁵⁶ Nevertheless, the Supreme Court held in 1989 that the Guidelines violated neither the separation of powers principle⁵⁷ nor the nondelegation doctrine.⁵⁸

Although *Mistretta* appeared to put the constitutional objections to rest, judges and commentators continued to criticize the Guidelines. They focused on two primary objections. First, critics perceived the Guidelines as rigid, inflexible, and unable to account for the particular circumstances of an offense or characteristics of an offender.⁵⁹ Second, they were viewed as unduly heavy-handed—harsher than Congress required or sound policy dictated.⁶⁰ Whatever the merit of such criticism,⁶¹ the Guidelines are unquestionably harsh. Under them, some eighty percent of convicted defendants receive prison terms.⁶² Prior to the Guidelines, more than fifty percent of such defendants received probation.⁶³ In the last year evaluated by the Commission, prison sentences under the Guidelines averaged 62.2 months, including 84.3 months for drug offenses and 106.5 months for

56. See UNITED STATES SENTENCING COMM’N, 1989 ANN. REP. 11 (1989).

57. See *Mistretta*, 488 U.S. at 380-411.

58. See *id.* at 371-79. For further discussion of the nondelegation doctrine, see *infra* Part III.E.

59. See, e.g., Donald P. Lay, *Rethinking the Guidelines: A Call for Cooperation*, 101 YALE L.J. 1755, 1762 (1992); Jack B. Weinstein, *A Trial Judge’s Reflections on Departures from the Federal Sentencing Guidelines*, 5 FED. SENT. REP. 6, 6 (1992) (criticizing Guidelines because they are based on “statistical averages” and take insufficient account of “ameliorating circumstances, rehabilitative possibilities and community and family needs”); Jon O. Newman, *The New Commission’s Opportunity*, 8 FED. SENT. REP. 8, 8 (1995) (criticizing Guidelines for “needlessly narrowing” judges’ sentencing discretion); Stephen J. Schulhofer, *Excessive Uniformity—And How to Fix It*, 5 FED. SENT. REP. 169, 169 (1992) (arguing that Guidelines have alleviated problem of unwarranted sentencing disparity, but still create unwarranted similar treatment for “substantively distinguishable cases”).

60. See, e.g., Kate Stith & Steven Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223, 283 n.375 (1993) (citing particular guideline procedures that operate more harshly than the SRA required: Commission’s determination that individual characteristics are “generally irrelevant to sentencing”; system of “real offense sentencing”; requirement that prosecutor file motion for downward “substantial assistance” departure; and incorporation of mandatory minimum sentences into sentencing ranges); Michael Tonry, *Salvaging the Sentencing Guidelines in Seven Easy Steps*, 4 FED. SENT. REP. 355, 355-58 (1992) (criticizing Commission for section 5K1.1’s requirement of a prosecutor’s motion; nullification of 28 U.S.C. § 994(j)’s presumption that nonserious first offenders receive probation; analytical treatment of probation as “zero months imprisonment”; operation of “relevant conduct” rule rather than basing sentence upon offense of conviction; emphasis on imprisonment at the expense of probation and other intermediate punishments; incorporation of mandatory minimum sentences; and mechanistic sentencing grid); Weinstein, *supra* note 59, at 6 (finding Guidelines “harsh in emphasizing prison”).

61. The Guidelines’ general harshness did not wholly lack congressional authorization. See 28 U.S.C. § 994(m) (1994) (“The Commission shall insure that the guidelines reflect the fact that, in many cases, current sentences do not accurately reflect the seriousness of the offense.”).

62. UNITED STATES SENTENCING COMM’N, 1996 ANN. REP. ix (1996).

63. UNITED STATES SENTENCING COMM’N, 1989 ANN. REP., app. B. tbl. B-7 (1989).

violent offenses.⁶⁴

Despite this continued criticism by the very judges charged with enforcing the Guidelines, few defendants after *Mistretta* questioned the Guidelines themselves. Constitutional attacks nearly ceased, and only a handful of defendants challenged the Guidelines as inconsistent with their enabling legislation.⁶⁵ Current sentencing jurisprudence therefore centers upon *interpreting* the Guidelines, not scrutinizing them.⁶⁶ Defendants and the government devote great attention to the applicability of particular guidelines, the extent to which a particular guideline provision will enhance or mitigate one's sentence, and the availability of a departure based on an offense's "atypicality" vis-à-vis others that form the "heartland" of crimes to which a guideline applies.⁶⁷ The Sentencing Reform Act is virtually absent from this discussion.⁶⁸ Mechanistically applying the Guidelines' 43-by-6 sentencing grid, judges have largely ignored the "purposes of sentencing" that Congress directed them to consider.⁶⁹ Moreover, judges infrequently examine a guideline's *facial* validity in light of Congress's directives to the Commission.⁷⁰

B. A Partial Litany of the Commission's Failures

A call for heightened judicial review of the Guidelines serves little purpose unless the Commission has *in fact* directly violated Congress's dictates or failed to craft the Guidelines in a manner that at least arguably fulfills Congress's wide-ranging and often contradictory aspirations. This subsection lists some of the Commission's questionable judgments. The examples provided here are by no means exhaustive. They merely provide a context for the reform that I advocate: a wider application of administrative law principles to the law of sentencing.

64. UNITED STATES SENTENCING COMM'N, 1996 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 34 (1996). If one counts probation as "zero months imprisonment," the average sentence in 1996 becomes 51 months. UNITED STATES SENTENCING COMM'N, 1996 ANN. REP. ix (1996).

65. For example, my research reveals only 312 statutory challenges to the Guidelines between 1988 and 1997, compared to the many thousands of reported Guidelines decisions in the same period. In fiscal year 1996 alone, the federal appellate courts handled 6,480 appeals of Guidelines cases. See UNITED STATES SENTENCING COMM'N, 1996 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 71 (1996).

66. See STITH & CABRANES, *supra* note 14, at 92-94; Kate Stith & José A. Cabranes, *Judging Under the Federal Sentencing Guidelines*, 91 NW.U.L. REV. 1247, 1277 (1997).

67. See *infra* Parts IV.A-B.

68. See Weich, *supra* note 9, at 239.

69. See Kenneth R. Feinberg, *The Federal Guidelines and the Underlying Purposes of Sentencing*, 3 FED. SENT. REP. 326, 327 (1991).

70. See Freed, *supra* note 12, at 1700.

Judicial review of agency rulemaking focuses on three aspects of an agency’s work: the agency’s interpretation of the statutory authority delegated to it by Congress; whether its rules are rational or “arbitrary and capricious” in light of facts, evidence, arguments, and suggestions before the agency as well as the agency’s stated rationale for the decisions reached; and whether the agency has complied with the procedures that bind it.⁷¹ I have therefore divided the Commission’s errors into these same categories: errors of law, of rationality, and of procedure.

As the law currently stands, only the first type of error is legally redressable. Parties may attack any provision of the Guidelines as inconsistent with the enabling legislation,⁷² but they may neither challenge a guideline as “arbitrary and capricious,”⁷³ nor judicially enforce the few procedures that bind the Commission.⁷⁴ The Commission’s “errors” of rationality and procedure are therefore *failures* rather than errors in the legal sense. Among other things, I propose to permit courts to correct such failures.

71. See 5 U.S.C. § 706 (1994). I have omitted those forms of judicial review that are not relevant to informal rulemaking.

72. Under 18 U.S.C. §§ 3742(a)(1) and (b)(1), either party may appeal a sentence “imposed in violation of law”—a phrase that suggests broader review than the phrase “in violation of *the guidelines*.” Thus, one aggrieved by the Commission’s violation of the SRA (in other words, one subject to a sentencing guideline alleged to violate a statute) may seek to remedy the violation. See *United States v. Nutter*, 61 F.3d 10, 12 (10th Cir. 1995); *United States v. Whyte*, 892 F.2d 1170, 1174 n.10 (3d Cir. 1989). The SRA’s legislative history also contemplates statutory review of the Guidelines—albeit by particular defendants in particular cases rather than through traditional APA “pre-enforcement” review. See S. Rep. 98-225, at 153 (1984), reprinted in 1984 U.S.C.C.A.N. 3182, 3336 (18 U.S.C. §§ 3742(a)(3)(B) and (b)(3)(B) permit defendant and government to appeal sentence where no guideline applies, and “this would include the situations where there is a new law for which no guideline has yet been developed and where an appellate court had invalidated the established guideline and no replacement had yet been determined.”). As one court observed, “It is apodictic that the sentencing guidelines cannot sweep more broadly than Congress’ grant of power to the Sentencing Commission permits.” *United States v. LaBonte*, 70 F.3d 1396, 1405 (1st Cir. 1995) (holding challenged guidelines provision invalid) (quoting *United States v. Saccoccia*, 58 F.3d 754, 786 (1st Cir. 1995)), *rev’d on other grounds*, 520 U.S. 751 (1997).

73. See *United States v. Lopez*, 938 F.2d 1293, 1297 (D.C. Cir. 1991); *United States v. Wimbush*, 103 F.3d 968, 969-70 (11th Cir. 1997).

74. See *Lopez*, 938 F.2d at 1297 (holding that because judicial review provisions of APA do not apply to Commission, defendant may not challenge adequacy of Commission’s explanation for guidelines amendment). See also 28 U.S.C. § 994(p) (1994) (requiring the Commission, when amending Guidelines, to include a “statement of the reasons therefor”).

1. *Errors of Law*

a. *The Process of Sentencing*

The Guidelines' instructions to sentencing judges⁷⁵ bear little resemblance to those outlined in the SRA.⁷⁶ Under 18 U.S.C. § 3553(a), judges "shall consider" seven enumerated factors in formulating a sentence:

(1) the "circumstances of the offense and the history and characteristics of the defendant;"⁷⁷

(2) the four purposes of sentencing as Congress has defined them (the judge "shall consider" the need for the sentence (i) "to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;" (ii) "to afford adequate deterrence to criminal conduct;" (iii) "to protect the public from further crimes of the defendant;" and (iv) "to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner");⁷⁸

(3) "the kinds of sentences available;"⁷⁹

(4) the sentencing range applicable under the Guidelines;⁸⁰

(5) "any pertinent policy statements issued by the Sentencing Commission;"⁸¹

(6) the need to avoid "unwarranted" sentencing disparity among "defendants with similar records who have been found guilty of similar conduct;"⁸² and

(7) the need to provide crime victims with restitution.⁸³

75. See GUIDELINES § 1B1.1 (1998).

76. See 18 U.S.C. §§ 3553(a)-(b) (1994). Both judges and commentators have noted this particular inconsistency between the Guidelines and the SRA. See *United States v. Davern*, 937 F.2d 1041, 1043-47 (6th Cir. 1991), *vacated*, 970 F.2d 1490 (6th Cir. 1992) (en banc); Marc Miller & Daniel J. Freed, *Honoring Judicial Discretion Under the Sentencing Reform Act*, 3 FED. SENT. REP. 235, 236-37 (1991); Marc Miller, *Purposes at Sentencing*, 66 S. CAL. L. REV. 413, 440-42 (1992); Freed, *supra* note 12, at 1742.

77. 18 U.S.C. § 3553(a)(1).

78. *Id.* § 3553(a)(2).

79. See *id.* § 3553(a)(3).

80. See *id.* § 3553(a)(4).

81. See *id.* § 3553(a)(5).

82. *Id.* § 3553(a)(6).

83. See *id.* § 3553(a)(7).

The guideline sentencing range is but one of these seven considerations and is not even the first factor enumerated. Congress instead listed it fourth—to be considered after a judge’s assessment of the facts and the offender, the purposes to be served by sentencing, and the types of sanctions available (imprisonment, fines, probation, restitution and so forth). Judges must thus form a “common law assessment” of the case before even *considering* the guideline range.⁸⁴ Once the guideline sentence is determined, the judge can measure its reasonableness against the other considerations described above.⁸⁵

The Commission appears to have ignored this statutory scheme. The Guidelines’ “Application Instructions” in section 1B1.1 contain nine steps. The first eight explain how to calculate the guideline sentencing range by applying Chapters Two through Five of the Manual.⁸⁶ Only the ninth step mentions the defendant’s noncriminal characteristics; even then, it directs the judge only to those characteristics that the Commission considers relevant.⁸⁷ The “Application Instructions” abandon much of § 3553(a). They make no mention of the “nature and circumstances of the offense,” the “need to avoid unwarranted sentence disparities,” the purposes of sentencing as defined by Congress, or the need to impose a sentence “sufficient, but not greater than necessary” to meet those purposes.⁸⁸ In short, the Guidelines prohibit that which Congress requires—reasoned judicial discretion in sentencing.

84. See Miller & Freed, *supra* note 76, at 235.

85. See *id.* at 235, 237.

86. See GUIDELINES § 1B1.1 (1998); Miller & Freed, *supra* note 76, at 237.

87. See GUIDELINES § 1B1.1 (1998); Miller & Freed, *supra* note 76, at 237.

88. See 18 U.S.C. § 3553(a) (1994). See Miller & Freed, *supra* note 76, at 237. To be fair, section 3553(a) should not be read in a vacuum. The subsection that follows it states that the judge must impose a sentence within the guideline-prescribed range, absent a relevant aggravating or mitigating circumstance “not adequately taken into consideration by the Commission.” 18 U.S.C. § 3553(b) (1994). This provision arguably cabins the judicial discretion that section 3553(a) confers. Professors Freed and Miller have proposed the following three-step sentencing process to reconcile the two sections. First, the judge should arrive at a “common-law” assessment of the case by analyzing the facts under the first three steps of section 3553(a). Second, the judge should determine the applicable guideline range. Third, the judge should apply section 3553(b) to assess whether the Guidelines sentence adequately accounts for the facts and circumstances found—in other words, whether the considerations listed in section 3553(a) present circumstances “not adequately taken into consideration by the Commission” in the case at hand. See Miller & Freed, *supra* note 76, at 237. A panel of the Sixth Circuit essentially endorsed the Miller/Freed approach, but the court *en banc* reversed the panel’s decision. See *United States v. Davern*, 937 F.2d 1041, 1043-47 (6th Cir. 1991), *vacated*, 970 F.2d 1490 (6th Cir. 1992) (*en banc*). See also *United States v. Anderson*, 82 F.3d 436, 440 (D.C. Cir. 1996); *United States v. Davern*, 970 F.2d 1490, 1492-93 (6th Cir. 1992) (*en banc*); Cf. *United States v. Chastain*, 84 F.3d 321, 325-26 (9th Cir. 1996) (holding that judge’s use of considerations outlined in section 3553(a) should be limited to determining where to sentence defendant within prescribed guideline range); *United States v. Huerta*, 878 F.2d 89, 93 (2d Cir. 1989) (same).

b. The Twenty-Five Percent Rule

Along with many others, Congress provided the following directive to the Sentencing Commission:

If a sentence specified by the guidelines includes a term of imprisonment, the maximum of the range established for such a term shall not exceed the minimum of that range by more than the greater of 25 percent or 6 months, except that, if the minimum of the range is 30 years or more, the maximum may be life imprisonment.⁸⁹

The import of this command is clear enough—Congress required that the maximum of a sentencing range prescribed by the Guidelines generally not exceed the minimum by more than twenty-five percent or six months.⁹⁰ In a narrow sense, the Commission has complied with this requirement. For example, a defendant who is given an offense level of twenty-two and a criminal history score of one faces a sentencing range of forty-one to fifty-one months, while one with an offense level of thirty and a criminal history score of three faces a range of 121 to 151 months.⁹¹ In each case, the top of the range is within twenty-five percent of the bottom.

But the Guidelines reflect a much broader—and unwarranted—reading of the “twenty-five percent rule.” Under the Commission’s approach,⁹² the rule governs the *entire Guidelines sentencing process* rather than simply the ranges specified by the sentencing table.⁹³ For example, adjustments based on the characteristics of the offense or the offender’s role therein prescribe a *fixed* number of offense levels by which to enhance or mitigate the sentence. The adjustments do not vary *at all*, much less by 25 percent. Moreover, the adjustments are *mandatory* if the facts of the case fit the prescribed criteria.⁹⁴ Thus, a defendant found to obstruct justice (as the Guidelines define that concept) faces a two-level enhancement,⁹⁵ as do tax evaders who used

89. 28 U.S.C. § 994(b)(2) (1994).

90. For a detailed analysis of the relevant text and legislative history of section 994(b)(2) see generally Catharine M. Goodwin, *Background of the AO Memorandum on the 25% Rule*, 8 FED. SENT. REP. 109 (1995); *Memorandum Opinion of the General Counsel’s Office, Administrative Office of United States Courts: Interpretation of 28 U.S.C. § 994(b)(2), the “25% Rule,” and Analysis of its Effects on the Federal Sentencing Guidelines Interpretation and Analysis of Section 994(b)(2)*, 8 FED. SENT. REP. 110 (1995) [hereinafter *Memorandum Opinion of the General Counsel’s Office*].

91. See GUIDELINES § 5A (Sentencing Table).

92. The Commission has never formally interpreted section 994(b)(2), but the Guidelines as structured reflect such an interpretation. See *Memorandum Opinion of the General Counsel’s Office*, *supra* note 90, at 118, 122.

93. See *id.* at 118.

94. See, e.g., *United States v. Cali*, 87 F.3d 571, 577 (1st Cir. 1996).

95. See GUIDELINES § 3C1.1 (1998). Any six-level increase on the sentencing table corresponds

“sophisticated means” to impede the detection of their crime,⁹⁶ drug dealers who served as copilots, navigators, or “flight officers” aboard the aircraft that imported the contraband,⁹⁷ and aggravated assailants who “more than minimal[ly] plan[ned]” their assaults.⁹⁸ By comparison, a robber who inflicted “serious bodily injury” earns a four-level enhancement over one who did not.⁹⁹ Meanwhile, an individual who falsified certain records regarding environmental pollutants (not including “hazardous or toxic substances or pesticides”) faces an eleven-level enhancement if the offense resulted in a “substantial likelihood of death or serious bodily injury,”¹⁰⁰ but only a four-level enhancement if the offense resulted in the evacuation of a community.¹⁰¹

Because the Commission sets sentence enhancements in fixed amounts, rather than creating a range based on objective criteria that it and the courts could develop together, the broader operation of the “twenty-five percent rule” restricts judicial discretion more than Congress intended.¹⁰² To be sure, the adjustments provided by the Guidelines appear somewhat reasonable. We may wish to punish environmental record falsifiers more severely if their misdeeds cause death or serious injury. Nevertheless, the Commission’s “all-or-nothing” approach needlessly hamstring the sentencer’s ability to make the punishment fit the crime.¹⁰³ What if one’s fraudulent recordkeeping threatened the lives of an entire community rather than a single household? What if the offender knew that death or serious injury would likely result from the offense, or what if he or she merely “should have known”? What if the act of false recordkeeping is one of misrepresentation, active concealment, or passive omission? The Commission’s approach both overlooks relevant differences between cases and requires the sentencing judge to do the same.

The Commission’s approach suffers from a second defect—incrementalism.¹⁰⁴ Faced with the often disproportionate sentences resulting

roughly to a doubling of the prescribed range. *See id.* § 5A Sentencing Table (1998).

96. *See id.* § 2T1.1(b)(2).

97. *See id.* § 2D1.1(b)(2).

98. *See id.* § 2A2.2(b)(1).

99. *See id.* § 2B3.1(b)(3)(B).

100. *See id.* §§ 2Q1.2, 2Q1.3(b)(2).

101. *See id.* § 2Q1.3(b)(3).

102. *See Memorandum Opinion of the General Counsel’s Office, supra* note 90, at 118.

103. *Id.*; *see also* 28 U.S.C. § 991(b)(1)(B) (1994) (requiring the Commission to avoid “unwarranted sentencing disparities” among similar defendants and “maintain[] sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices”).

104. *See Memorandum Opinion of the General Counsel’s Office, supra* note 90, at 118.

from all-or-nothing fixed adjustments, the Commission created an ever-increasing number of sub-adjustments, rather than giving judges the flexibility to craft appropriate sentences. For example, an “organizer or leader” of criminal activity involving five or more participants earns a four-level increase; a “manager or supervisor” who is not an “organizer or leader” earns a three-level increase; and any other “organizer, leader, manager, or supervisor” in criminal activity (presumably activity involving fewer than five participants) earns a two-level increase.¹⁰⁵ Creation of these adjustments spawned a flood of litigation by parties seeking to pigeonhole their cases into one category rather than another.¹⁰⁶

The origins of the broader “twenty-five percent rule” are telling. An early draft of the Guidelines adhered to the narrower reading described above, so that only the ranges prescribed in the sentencing table were subject to the rule.¹⁰⁷ The Department of Justice, leery of the judicial discretion that flexible adjustment ranges might create, threatened to oppose the Guidelines before Congress. The Commission abruptly reversed its view.¹⁰⁸ The current and former versions of the robbery offense firearm adjustment illustrate the Commission’s about-face and the ill consequences thereof.¹⁰⁹ The “Revised Draft” of January 1987 provided that “[i]f a weapon or dangerous instrumentality was used, displayed, or possessed in the commission of the offense, increase by 3 to 6 levels, depending upon the use made of the weapon.”¹¹⁰ By contrast, today’s version reads as follows:

(A) If a firearm was discharged, increase by 7 levels; (B) if a firearm was otherwise used, increase by 6 levels; (C) if a firearm was brandished, displayed, or possessed, increase by 5 levels; (D) if a dangerous weapon was otherwise used, increase by 4 levels; (E) if a dangerous weapon was brandished, displayed, or possessed, increase by 3 levels; or (F) if a threat of death was made, increase by 2 levels.¹¹¹

In sum, the Commission’s reading of the “twenty-five percent rule” is neither necessary nor desirable.

105. See GUIDELINES § 3B1.1 (1998).

106. See *id.* STITH & CABRANES, *supra* note 14, at 92 & n.68 (noting torrent of litigation regarding offense role adjustments).

107. See *Memorandum Opinion of the General Counsel’s Office*, *supra* note 90, at 115.

108. See *id.* at 115-18.

109. See *id.* at 118-19.

110. U.S. SENTENCING COMMISSION, REVISED DRAFT, SENTENCING GUIDELINES, § B231(a)(1) (1987).

111. GUIDELINES § 2B3.1(b)(2) (1998).

c. Substantial Assistance and Insubstantial Assurance

A defendant's best prospects for avoiding the Guidelines' harshness and inflexibility lie in helping the government prosecute his or her criminal associates.¹¹² This policy is not itself troublesome. The government appropriately wishes to sow distrust and discontent within criminal organizations. Indeed, Congress required the Commission to "assure that the guidelines reflect the general appropriateness of imposing a lower sentence than would otherwise be imposed . . . to take into account a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense."¹¹³

The Guidelines indeed permit the court to depart on the basis of a defendant's "substantial assistance" to authorities, but only if the government moves for such a departure.¹¹⁴ Congress's command, by contrast, requires a government motion only for deviation from a *statutory* sentence.¹¹⁵ Moreover, conditioning a departure upon the government's motion does not assure that the Guidelines will reflect Congress's wish that criminals be rewarded for turning state's evidence. The Commission's approach has been roundly criticized,¹¹⁶ but the courts have upheld it with near uniformity.¹¹⁷

d. "Due Regard" and the "Most Analogous Guideline"

Some federal crimes, such as violations of state criminal law committed by non-Indians on Indian land, do not fit neatly into any particular guideline.

112. See *id.* § 5K1.1. In 1996, substantial assistance departures occurred almost twice as frequently as all other downward departures combined (19.2 percent of all cases compared to 10.3 percent). See U.S. SENTENCING COMM'N, 1996 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 41 (1996).

113. 28 U.S.C. § 994(n) (1994) (emphasis added).

114. See GUIDELINES § 5K1.1 (1998).

115. A court may sentence below a *statutorily* required minimum sentence only upon the government's motion, see 18 U.S.C. § 3553(e) (1994), or pursuant to the "safety-valve" provision enacted in 1996 (18 U.S.C. § 3553(f) (1998)). However, where no mandatory sentence statute is in place, Congress does not require a government motion. 28 U.S.C. § 994(n) (1994).

116. See Freed, *supra* note 12, at 1710, 1753; Tonry, *supra* note 60, at 355.

117. See *United States v. Massie*, 108 F.3d 1374 (table decision), 1997 WL 107743, at *2 (4th Cir. Mar. 12, 1997); *United States v. Cueto*, 9 F.3d 1438, 1441-42 (9th Cir. 1993); *United States v. Doe*, 934 F.2d 353, 359 (D.C. Cir. 1991); *United States v. Sarmiento*, 933 F.2d 1017 (table decision), 1991 WL 80624, at *1 (9th Cir. May 9, 1991); *United States v. Lopez*, 928 F.2d 1138 (table decision), 1991 WL 39901, at *1 (9th Cir. Mar. 20, 1991); *United States v. Lewis*, 896 F.2d 246, 247-48 (7th Cir. 1990); *United States v. Grant*, 886 F.2d 1513, 1514 (8th Cir. 1989); *United States v. Ayarza*, 874 F.2d 647, 653 n.2 (9th Cir. 1989); *United States v. White*, 869 F.2d 822, 828-29 (5th Cir. 1989); *United States v. Donatiu*, 720 F. Supp. 619, 628 (N.D. Ill. 1989); *United States v. Dixon*, 713 F. Supp. 565, 567 (E.D.N.Y. 1989); *United States v. Cortes*, 697 F. Supp. 1305, 1308 n.3 (S.D.N.Y. 1988); *United States v. Amesquita-Padilla*, 691 F. Supp. 277, 289 (W.D. Wash. 1988).

Such crimes, often referred to as “assimilative crimes” present unique sentencing problems.¹¹⁸ For example, the assimilative crime of “vehicular battery” (drunken driving resulting in bodily injury) committed on an Indian Reservation in South Dakota defies precise categorization,¹¹⁹ since no guideline exists for “vehicular battery.” Thus the Commission must direct courts to sentence this assimilative crime under Guidelines section 2X5.1: “Other offenses.”

When no particular guideline applies, statutory law requires the judge to heed the four statutory purposes of sentencing and to “have *due regard* for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission.”¹²⁰ By contrast, Guidelines section 2X5.1 requires the court to “apply the *most analogous* offense guideline.”¹²¹ Only absent a “*sufficiently analogous* guideline” may the court sentence pursuant to Congress’s directions.¹²²

Here as elsewhere, the Commission limited judicial discretion beyond what Congress intended: the phrase “due regard” for Guidelines sentences prescribed for similar offenses and offenders is simply broader than the section 2X5.1 requirement that the court automatically apply the “most analogous guideline.”¹²³ Moreover, the Commission’s approach spawned yet another tirade of litigation. If several “sufficiently analogous” guidelines could apply, under what standard should an appellate court review the sentencer’s choice of the “most analogous” one?¹²⁴ What standard of review applies to the district court’s determination of whether any “sufficiently analogous” guideline exists?¹²⁵ If multiple guidelines are “sufficiently analogous,” may a district court apply each of them partially, or must it select

118. See 18 U.S.C. §§ 7, 13, 1152 (1994).

119. See S.D. CODIFIED LAWS § 22-16-42 (Lexis 1998); *United States v. Allard*, 164 F.3d 1146 (8th Cir. 1999); *United States v. Osborne*, 164 F.3d 434 (8th Cir. 1999).

120. 18 U.S.C. § 3553(b) (1994) (emphasis added).

121. GUIDELINES § 2X5.1 (1998) (emphasis added).

122. *Id.*

123. See *United States v. Garcia*, 893 F.2d 250, 254 (10th Cir. 1989) (holding the commentary to section 2X5.1 invalid).

124. See *Osborne*, 164 F.3d at 438 (choice of “most analogous guideline” reviewed with due deference); *United States v. Cefalu*, 85 F.3d 964, 968 n.6 (2d Cir. 1996) (same); *United States v. Mariano*, 983 F.2d 1150, 1158 (1st Cir. 1993) (same). *But see* *United States v. Couch*, 65 F.3d 542, 544 (6th Cir. 1995) (reviewing choice of most analogous guideline de novo); *United States v. Smertneck*, 954 F.2d 264, 265 (5th Cir. 1992) (same); *United States v. Norman*, 951 F.2d 1182, 1184 (10th Cir. 1991) (same).

125. See *Osborne*, 164 F.3d at 437 (reviewing de novo the district court’s determination of whether a sufficiently analogous guideline existed); *United States v. Gabay*, 923 F.2d 1536, 1545 (11th Cir. 1991) (same).

and apply only a single guideline?¹²⁶

2. *Failures of Rationality*

a. *The Purposes of Sentencing*

Congress assigned numerous “purposes” to the Sentencing Commission. These include (i) to “assure” the achievement of the four general purposes of sentencing: retribution/just deserts, deterrence, incapacitation, and rehabilitation, (ii) to provide “certainty and fairness” in meeting these four general purposes, while avoiding “unwarranted sentencing disparities” and maintaining “sufficient flexibility” to account for relevant mitigating and aggravating circumstances, (iii) to “reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process,” and (iv) to develop means to *measure* the degree to which the federal sentencing scheme meets its enumerated objectives.¹²⁷

The achievement of these purposes is no small task. The various aims that Congress enumerated lack precise definition and often conflict with each other.¹²⁸ Yet the Commission has consistently failed to reconcile these conflicts so that the Guidelines could achieve their purposes generally, even if not in every individual case.¹²⁹ Early on, the Commission refused to “choose” between competing philosophies of criminal justice because it viewed the choice as too value-laden and otherwise fraught with difficulty.¹³⁰ Yet Congress never asked or permitted the Commission to “choose” among the purposes of sentencing; instead, it directed the Commission to achieve *all* of the purposes, and to *measure* the degree to which it was doing so.¹³¹

Not surprisingly, the Commission has presented scant *empirical* evidence to suggest that its Guidelines achieve, even roughly, the purposes of retribution, deterrence, incapacitation, and rehabilitation.¹³² Only the

126. See *Allard*, 164 F.3d at 1150 (district court erred by adding specific offense characteristics of aggravated assault guideline to base offense level for involuntary manslaughter). *But see* *United States v. Cherry*, 10 F.3d 1003, 1012-13 (3d Cir. 1993) (multiple guidelines can be used whenever Guidelines § 2X5.1 applies).

127. See 28 U.S.C. § 991(b) (1994) (emphasis added).

128. See *STITH & CABRANES*, *supra* note 14, at 53; *Miller*, *supra* note 76, at 439; *see also id.* at 429 (arguing that Congress hoped that the four primary purposes would be achieved “whenever possible” rather than in each particular sentence imposed).

129. See *Miller*, *supra* note 76, at 438-39; *STITH & CABRANES*, *supra* note 14, at 53.

130. See *Miller*, *supra* note 76, at 439.

131. See *id.*; *see also* 28 U.S.C. § 991(b) (1994).

132. See *STITH & CABRANES*, *supra* note 14, at 53. In fairness, the Commission undertook a “just punishment” study, which compared various sentences prescribed by the Guidelines to sentences that the public would favor. See U.S. SENTENCING COMMISSION, 1996 ANN. REP. 41-42 (1996). The

Commission's privileged status in the administrative state ensures that its rules are not held "arbitrary and capricious," in light of the dearth of evidence that the Guidelines achieve their stated goals. And perhaps they do, but the courts would require any other agency to demonstrate *how* and *why*.

b. Of Quantities and Qualities

Many individual guidelines specify a "base offense level" for the relevant crime, then require the court to increase or decrease the offense level based on various "specific offense characteristics." The most common such "specific offense characteristic" is the *quantity* of the defendant's wrongdoing.¹³³ Quite often the quantity associated with the defendant's crime will dwarf the base offense level attached to that crime. For example, larceny, embezzlement, and other forms of theft receive a base offense level of four—or a range of zero to six months' incarceration if the defendant has little or no criminal history.¹³⁴ The relevant guideline then specifies *twenty-one* categories of loss, each requiring an additional offense level. For example, a theft involving less than \$100 receives no increase, one involving more than \$40,000 but less than \$70,000 will receive a seven level increase, and one involving more than \$80 million earns a twenty-level increase, resulting in a sentence of fifty-one to sixty-three months for a defendant with no criminal history.¹³⁵ Similarly, sentences for fraud depend overwhelmingly upon the quantity of the fraud;¹³⁶ those for robbery or burglary upon the amount of money robbed or burgled;¹³⁷ those for carrying explosive materials upon the weight of the materials;¹³⁸ those for alien-smuggling upon the number of aliens smuggled;¹³⁹ those for trafficking in fraudulent passports upon the number of false passports distributed;¹⁴⁰ those for receiving, possessing or transporting illegal firearms upon the number of firearms received, possessed, or transported;¹⁴¹ those for income tax evasion

Commission's achievement of "just punishment" nevertheless falls short. First, public perception represents only one possible proxy for just deserts. Second, the public considered most of the sentences discussed in the Annual Report unduly harsh or lenient. These results, although perhaps inevitable, do not suggest that the Commission has achieved "just punishment" in sentencing.

133. See STITH & CABRANES, *supra* note 14, at 68.

134. See GUIDELINES § 2B1.1(a).

135. See *id.* § 2B1.1(b)(1).

136. See *id.* § 2F1.1(b)(1).

137. See *id.* §§ 2B2.1(b)(2), 2B3.1(b)(7).

138. See *id.* § 2K1.3(b)(1).

139. See STITH & CABRANES, *supra* note 14, at 70; GUIDELINES § 2L1.1(b)(2) (1998).

140. See GUIDELINES § 2L2.1(b)(2) (1998).

141. See *id.* § 2K2.1(b)(1).

on the quantity of taxes evaded;¹⁴² those for money laundering upon the amount laundered;¹⁴³ those for drug trafficking upon the weight of the particular drug trafficked.¹⁴⁴

The Commission's approach suffers from three shortcomings. First, its obsession with *quantity* unduly diminishes the influence of less quantifiable (but perhaps equally relevant) aggravating or mitigating circumstances. Why, for example, should the *weight* of crack cocaine involved in a distribution conspiracy so predominate over the defendant's particular role in that conspiracy, whether major or minor? An offense involving crack cocaine can carry an offense level as low as twelve (ten to sixteen months) or as great as thirty-eight (235-293 months), depending upon the weight of the drugs.¹⁴⁵ By contrast, the defendant's role in the conspiracy (whether a "kingpin" or a mere "drug mule") changes the offense level by no more than four in either direction.¹⁴⁶ Second, the Commission has nowhere *justified* its fixation with quantities. Perhaps the quantities of drugs, stolen money, or smuggled aliens best approximate a defendant's culpability (or some other purpose of sentencing), but the Commission has never explained or proven *why*.¹⁴⁷ Third, even if quantity is a reasonable proxy for just deserts or the other objectives to be served, the Commission has never defended the particular sentences assigned to particular quantities. Why, for example, is evading \$1.5 million in taxes equivalent to committing a fraud worth \$5 million?¹⁴⁸ Unless courts can scrutinize the Commission's choices, we will never know.

c. Family: The Ties That Don't Bind

The Commission has declared that "[f]amily ties and responsibilities . . . are not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range."¹⁴⁹ Not surprisingly, it has never explained how it reached this conclusion.¹⁵⁰ The conclusion indeed may be a sound one,¹⁵¹ but here, as elsewhere, the Commission has not troubled to

142. *See id.* § 2T4.1.

143. *See id.* § 2S1.1(b)(2).

144. *See id.* § 2D1.1(c).

145. *See id.* § 2D1.1(c). All sentence ranges enumerated assume a criminal history category of I.

146. *See id.* § 201.5.

147. *See* STITH & CABRANES, *supra* note 14, at 68-69.

148. *See* GUIDELINES §§ 2T1.1(a)(1), 2T4.1, 2F1.1(b) (1998).

149. *Id.* § 5H1.6.

150. *See* Patricia M. Wald, "What About the Kids?": *Parenting Issues in Sentencing*, 8 FED. SENT. REP. 137, 137 (1995).

151. *See* 28 U.S.C. § 994(e) (1994) ("The Commission shall assure that the guidelines and policy statements, in recommending a term of imprisonment or length of a term of imprisonment, reflect the general inappropriateness of considering the education, vocational skills, employment record, family

explain its “Delphic pronouncement.”¹⁵² Instead, it leaves courts struggling to determine what sort of “family ties and responsibilities” differ from the larger set of cases in which family ties are “not ordinarily relevant.”¹⁵³

Perhaps the Commission’s solution simply reflects the fact that incarceration inevitably breaks up families. To be sure, the seriousness of some offenses require that one’s family obligations be ignored.¹⁵⁴ Nevertheless, the Commission’s approach is not free from difficulty. For example, the Guidelines ignore the effects of imprisonment upon the parent-child relationship, despite a “growing body” of research suggesting that children generally fare better in their parent’s care than in foster care or elsewhere.¹⁵⁵ After excluding those cases where the nature of the crime precludes consideration of a child’s welfare, one commentator asks, “[w]hat principle of equity, uniformity, or just deserts blocks any *consideration* of society’s interests in avoiding the risk of producing a next generation of unloved, unnourished, sociopathic criminals?”¹⁵⁶ Perhaps a satisfactory answer to this question exists, but the Commission has never offered one.

d. Public Corruption and Sentence Inflation

The Commission began its reform project by assessing past sentencing practices in the federal system.¹⁵⁷ Congress authorized the Commission to enhance sentences for those crimes deemed to be inadequately punished in

ties and responsibilities, and community ties of the defendant.”). Notwithstanding section 994(e), it is far from obvious that the Commission’s pronouncement accords with congressional intent. Legislative history indicates that lawmakers wished to prevent courts from imprisoning those who lack education, employment, and family ties for the purpose of rehabilitation. *See* S. Rep. No. 98-225, at 175 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3358; Stephen J. Schulhofer, *Assessing the Federal Sentencing Process: The Problem is Uniformity, Not Disparity*, 29 AM. CRIM. L. REV. 833, 860-61 (1992).

152. *See* Wald, *supra* note 150, at 137; STITH & CABRANES, *supra* note 14, at 95 (describing Guidelines as a set of “administrative *diktats*” that the Commission “promulgated and enforced *ipse dixit*”).

153. *See, e.g.,* *United States v. Leandre*, 132 F.3d 796, 807-08 (D.C. Cir. 1998) (finding defendant’s status as single father of two young children who might be placed in foster care upon defendant’s incarceration insufficient to permit departure); *United States v. Allen*, 87 F.3d 1224, 1225-26 (11th Cir. 1996) (holding defendant’s role as primary caretaker of parent with Alzheimer’s and Parkinson’s diseases not sufficiently extraordinary); *United States v. Haversat*, 22 F.3d 790, 797-98 (8th Cir. 1994) (holding that while defendant’s wife’s serious psychiatric problem justified departure where defendant actively provided care that treating physician described as “irreplaceable,” district court abused discretion by downwardly departing too many levels).

154. *See* Wald, *supra* note 150, at 138.

155. *See id.*

156. *Id.* (emphasis added).

157. *See* 28 U.S.C. § 994(m) (1994) (In assessing which crimes were inadequately punished in the past, the Commission’s “starting point” must be to “ascertain the average sentences imposed in such categories of cases prior to the creation of the Commission, and in cases involving sentences to terms of imprisonment, the length of such terms actually served.”).

the old regime.¹⁵⁸ But it did not give *carte blanche* to ratchet-up sentences at will. Rather, Congress instructed it to develop sentencing ranges consistent with the goals of sentencing—just deserts, deterrence, incapacitation, and rehabilitation.¹⁵⁹

The Commission indeed provided higher sentences for numerous offenses, particularly white collar crimes such as antitrust offenses, insider trading, and tax evasion.¹⁶⁰ Yet, it did not explain why any *particular* class of sentences in the old system were inadequate and did not quantify *how* inadequate those past sentences were.¹⁶¹ The Guidelines’ treatment of public corruption offenses is illustrative: “The Commission believes that pre-guidelines sentencing practice did not adequately reflect the seriousness of public corruption offenses. Therefore, these guidelines provide for sentences that are considerably higher than average pre-guidelines practice.”¹⁶²

Perhaps pre-Guidelines’ sentences for public bribery offenses were “inadequate.” Yet, so too is the Commission’s explanation.

3. *Failures of Procedure*

Few procedural constraints govern the Commission’s work. The Commission need only publish proposed guidelines or amendments in the Federal Register and welcome public comments before adding or amending any guidelines.¹⁶³ Congress apparently exempted the Commission from the Administrative Procedure Act’s other requirements.¹⁶⁴ For instance, the Commission need not conduct open meetings,¹⁶⁵ provide ready public access to the information before it,¹⁶⁶ or subject proposed “commentary” and “policy statements” to the modest notice-and-comment process, even when these proposals exceed the scope of “interpretive rules.”¹⁶⁷

158. *See id.*

159. *See id.* § 994(n).

160. *See* Tonry, *supra* note 60, at 356; STITH & CABRANES, *supra* note 14, at 60-61.

161. *See* STITH & CABRANES, *supra* note 14, at 64; Marc L. Miller & Ronald F. Wright, *Your Cheatin’ Heart(land): The Long Search for Administrative Sentencing Justice*, 2 BUFF. CRIM. L. REV. 723, 727 (1999).

162. GUIDELINES § 2C, intro. cmt. (1998).

163. *See* 28 U.S.C. § 994(x) (1994).

164. *See* United States v. Wimbush, 103 F.3d 968, 969-70 (11th Cir. 1997); Washington Legal Foundation v. United States Sentencing Comm’n, 17 F.3d 1446, 1450 (D.C. Cir. 1994); United States v. Lopez, 938 F.2d 1293, 1297 (D.C. Cir. 1991); Samuel J. Buffone, *The Federal Sentencing Commission’s Proposed Rules of Practice and Procedure*, 9 FED. SENT. REP. 67, 68 (1996).

165. *See* 5 U.S.C. § 552(b)(B) (1994).

166. *See* 5 U.S.C. § 552(a) (1994).

167. *See* Buffone, *supra* note 164, at 68; 28 U.S.C. § 994(x) (1994) (mentioning only guidelines); 5 U.S.C. § 553(b)(A) (1994) (notice and comment not required when agency formulates “interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice”).

The Commission need not follow the procedures that bind other agencies, but it surely is not *forbidden* from doing so. Its refusal to follow such procedures suggests an intentional political aloofness. For example:

a. Commentary and Policy Statements

The Commission's own procedures do not provide for notice-and-comment rulemaking when amending or adding policy statements or commentary, even when such amendments have a greater affect than typical guideline amendments.¹⁶⁸ Indeed, some of the Guidelines' most far-reaching provisions appear under the rubrics of "commentary" or "policy statements." These include the rule forbidding downward departure for "substantial assistance in the investigation or prosecution of another person" unless the government first moves for such a departure,¹⁶⁹ the declaration that family ties and responsibilities are "not ordinarily relevant" in determining whether a sentence should be outside the guideline range,¹⁷⁰ and the standards governing whether a defendant will earn a reduced sentence for "acceptance of responsibility."¹⁷¹ Notice-and-comment procedures strengthen the legitimacy of agency decisions because interested parties have the opportunity to participate in those decisions.¹⁷² Unfortunately, the Commission appears content to dictate to the public rather than invite its participation.

b. The "Logical Outgrowth" Principle

At times, guidelines as enacted differ markedly from guidelines as proposed.¹⁷³ When a final rule so differs from its original proposal that it cannot constitute a "logical outgrowth" of that proposal and the rulemaking proceedings surrounding it, an administrative agency must usually undertake a separate notice-and-comment proceeding before it enacts the final rule.¹⁷⁴ This requirement is no mere formalism. Without it, the agency deprives those

168. See Buffone, *supra* note 164, at 68 (commenting upon proposed Rule 5.3); Rules of Practice and Procedure, 61 Fed. Reg. 39493, 39495 (1996). Rule 4.3 of the Commission's "Rules of Practice and Procedure" excludes commentary and policy statements from notice-and-comment procedures. See Rules of Practice and Procedure, 62 Fed. Reg. 38598, 38599 (1997). The rule nevertheless provides that the Commission will seek, "to the extent practicable" comparable public input when considering amendments to commentary or policy statements. *Id.*

169. See GUIDELINES § 5K1.1 policy statement (1998).

170. See *id.* § 5H1.6 policy statement.

171. See *id.* § 3E1.1, application notes.

172. See Buffone, *supra* note 164, at 68.

173. See *id.* at 69 (e.g., organizational sanctions and environmental guidelines).

174. *Id.* See, e.g., *AFL-CIO v. Donovan*, 757 F.2d 330, 338 (D.C. Cir. 1985).

affected by the final rule (but not its dissimilar ancestor) of the opportunity to comment upon its soundness or to suggest more reasonable alternatives.¹⁷⁵ The Sentencing Commission nevertheless refuses to heed the “logical outgrowth” norm. Indeed, the time schedule governing the Commission’s operating rules does not even *permit* a second notice-and-comment process.¹⁷⁶

c. Open Meetings

The Commission’s “Rules of Practice and Procedure” require at least two public meetings per quarter.¹⁷⁷ These same rules, however, permit the Commission to avoid the scrutiny of public meetings by conducting “executive sessions” and “working sessions” (now called “briefing sessions”).¹⁷⁸ As with any agency, of course, certain internal matters are appropriately addressed without public involvement.¹⁷⁹ Nevertheless, the effects of amendments to guidelines, commentary, and policy statements reverberate far beyond the Commission’s walls. Such amendments warrant consideration at open meetings.¹⁸⁰

d. Ex Parte Contacts

Ex parte contacts inevitably play a role in informal rulemaking procedures. In this respect, the Commission does not differ from its fellow agencies. Yet, the Commission does not make a record of those contacts or

175. See Buffone, *supra* note 164, at 70.

176. See *id.* at 69 (discussing proposed rules and arguing that Commission’s experiences in setting organizational sanctions and environmental guidelines demonstrate agency’s need to heed “logical outgrowth” norm); see also Rules of Practice and Procedure, Rule 4.4, 62 Fed. Reg. 38598, 38600 (1997).

177. Rules of Practice and Procedure, Rule 3.2, 62 Fed. Reg. 38598, 38599 (1997).

178. See Buffone, *supra* note 164, at 69 (discussing proposed Rules 4.3 and 4.4); see also Rules of Practice and Procedure, Rules 3.3 and 3.4, 62 Fed. Reg. 38,598, 38,599 (1997).

179. Indeed, the APA permits agencies to close meetings in various enumerated circumstances, such as when the meeting “relate[s] solely to the internal personnel rules and practices of an agency.” See 5 U.S.C. § 552b(c)(2) (1994). The Commission may hold “executive sessions” to transact business “that is not appropriate for a public meeting, e.g., [but apparently not limited to] discussion and resolution of personnel and budget issues.” Rules of Practice and Procedure, Rule 3.3, 62 Fed. Reg. 38,598, 38,599 (1997). It may hold closed “briefing sessions” to “receive in-depth information from staff and other persons.” Rules of Practice and Procedure, Rule 3.5, 62 Fed. Reg. 38,598, 38,599 (1997).

180. See Buffone, *supra* note 164, at 69. At the very least, minutes should be kept of closed meetings when such meetings concern the promulgation or amendment of guidelines, commentary, or policy statements. *Id.* The Commission’s rules, however, require that minutes be kept only of public meetings. See Rules of Practice and Procedure, Rule 3.6, 62 Fed. Reg. 38,598, 38,599 (1997); Buffone, *supra* note 163, at 69.

disclose them to the public.¹⁸¹ Without records of this sort, the factual, legal, and political bases for the Commission's decisions remain unclear.

Whether we consider questions of law, rationality, or procedure, the Commission's implementation of its statutory mandate is hardly beyond reproach. The next section focuses upon statutory judicial review of the Guidelines—and its overwhelming failure.

III. STATUTORY REVIEW OF THE GUIDELINES: AN EMPIRICAL AND CRITICAL ANALYSIS

A. *Chevron and its Quick Demise: A Model of Non-Deference*

At first blush, *Chevron, U.S.A. v. Natural Resources Defense Council, Inc.*¹⁸² appears to give agencies considerable discretion in interpreting the statutes they administer. Under *Chevron*, courts undertake a two-step inquiry to review agency rules for statutory compliance. A court first asks whether Congress has unambiguously spoken to the matter at issue.¹⁸³ If so, the court must reject the agency's statutory interpretation if inconsistent with Congress's express intent.¹⁸⁴ If not, then the court still may not simply impose its own statutory construction.¹⁸⁵ Rather, it must give effect to any agency interpretation that is "based on a *permissible* construction of the statute."¹⁸⁶ A "permissible" construction need not be one that a court would reach by itself.¹⁸⁷

However compelling its rationales,¹⁸⁸ *Chevron* created its own demise.¹⁸⁹

181. See Buffone, *supra* note 164, at 69-70 (discussing proposed rules); see also Rules of Practice and Procedure, 62 Fed. Reg. 38,598 (1997). Rule 5.1 requires the Commission's Office of Legislative and Public Affairs to maintain a file of public comments and testimony and to make the file available for public inspection. *Id.* at 38600. Meanwhile, Rule 6.2 generally directs the Office to maintain and make available various documents that "inform Commission decisions or actions," but the Rules lack any requirement that it document all nonpublic comments bearing upon guidelines. *Id.*

182. 467 U.S. 837 (1984).

183. See *id.* at 842.

184. See *id.* at 843.

185. See *id.*

186. *Id.* (emphasis added)

187. See *id.* at 843 n.11.

188. The *Chevron* principle—accepting an agency's "permissible" interpretation of the statute it administers—has three primary justifications. The first, and perhaps most persuasive, involves congressional intent. When Congress leaves ambiguity in a statute, then delegates rulemaking authority to an agency, it arguably intends for the agency to resolve the ambiguity. See *id.* at 865 (legislators "on each side decided to take their chances with the scheme devised by the agency."); *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 740-41 (1996); Cass R. Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071, 2090-91 (1990).

The legal realist tradition provides a second underlying justification: interpretation is policy-making. See Ronald F. Wright, *Sentencers, Bureaucrats, and the Administrative Law Perspective on*

Specifically, courts have used (and perhaps abused) *Chevron's* first inquiry—whether Congress has spoken—to avoid deference in questions of statutory interpretation. For example, *Chevron* does not apply to so-called “pure questions of statutory interpretation.”¹⁹⁰ *Chevron* is similarly inapposite when the agency’s interpretation conflicts with what the court gleans from legislative history,¹⁹¹ a statutory scheme’s general “structure,”¹⁹² and other “traditional tools of statutory construction.”¹⁹³ The cases present numerous other exceptions to *Chevron*. First, courts might afford no deference to agency interpretations formulated for the first time in court proceedings.¹⁹⁴ Second, agency interpretations may not contradict prior

the Federal Sentencing Commission, 79 CAL. L. REV. 1, 49 (1991). When a statute’s text is unclear, interpretation should be performed by a politically accountable agency rather than unelected judges. See *Chevron*, 467 U.S. at 865-66 (since President is politically accountable, agencies appropriately resolve competing policy interests); Sunstein, *supra*, at 2086-88; Kenneth W. Starr, *Judicial Review in the Post-Chevron Era*, 3 YALE J. ON REG. 283, 309-09, 312 (1986).

Third, administrative agencies often possess greater expertise than generalist judges over the law and subject matter being administered. See, e.g., *Pension Benefit Guar. Corp. v. L. T. V. Corp.*, 496 U.S. 633, 651-52 (1990) (upholding agency action based in part upon agency’s “real world” expertise); *Chevron*, 467 U.S. at 865 (noting judicial nonexpertise and technical complexity of Clean Air Act regulatory scheme).

189. See Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 1001 (1992).

190. See, e.g., *Immigration & Naturalization Serv. v. Cardoza-Fonseca*, 480 U.S. 421, 446-48 (1987); *NLRB v. United Food & Commercial Workers Union Local 23*, 484 U.S. 112, 123 (1987). See also Russell L. Weaver, *Some Realism About Chevron*, 58 MO. L. REV. 129, 147 (1993) (discussing reach of “plain language” exception); Theodore L. Garrett, *Judicial Review After Chevron: The Courts Reassert Their Role*, 10 NAT. RESOURCES & ENV’T 59, 59, 61 (1995) (same).

191. See *Regents of the Univ. of California v. Public Employment Relations Bd.*, 485 U.S. 589, 594-99 (1988) (finding “clear” congressional intent after reviewing statutory language and legislative history); Weaver, *supra* note 190, at 158. Cf. *EEOC v. Commercial Office Prod. Co.*, 486 U.S. 107, 115-16 (1988) (adopting agency interpretation because consistent with legislative history); Jerry L. Mashaw, *Textualism, Constitutionalism, and the Interpretation of Federal Statutes*, 32 WM. & MARY L. REV. 827, 833 (1991) (predicting that legislative history will fall into greater disuse in interpreting federal statutes).

192. See, e.g., *Dole v. United Steel Workers of America*, 494 U.S. 26, 35 (1990) (rejecting OMB’s interpretation of Paperwork Reduction Act due to Act’s “language, structure, and purpose”); *K-Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) (directing courts to evaluate “language and design of the statute as a whole”); *Commercial Office Prod. Co.*, 486 U.S. at 121-22.

193. *Chevron*, 467 U.S. at 843 n.9. See also *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 256-58, 260 (1991) (*overruled by* § 109 Civil Rights Act) (Scalia, J., concurring) (agency interpretation must be “reasonable in light of the principles of construction courts normally employ,” EEOC interpretation trumped by presumption against extraterritorial applicability of statutes); *United Steelworkers of America*, 494 U.S. at 35; *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 576 (1988) (rule of avoiding unconstitutional construction trumped rule of deferring to agency); *United Food & Commercial Workers Union*, 484 U.S. at 123; *Cardoza-Fonseca*, 480 U.S. at 432 (“[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.”) (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)).

194. See *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988).

judicial constructions of a statute.¹⁹⁵ Third, courts afford less deference to agency constructions that conflict with the agency's own prior interpretations.¹⁹⁶

Not surprisingly, numerous studies have chronicled *Chevron's* limited effects. Evaluating all Supreme Court cases between 1981 and 1990 that involved a "deference question," Professor Merrill found that the Court's deference to agency interpretations actually *declined* after *Chevron*.¹⁹⁷ Although the Court accepted agency interpretations with greater frequency in 1984 and 1985, it rejected such interpretations in over forty percent of cases from 1986 to 1990.¹⁹⁸ By comparison, the Court rejected agency interpretations in only twenty-five percent of cases during the three years preceding *Chevron*.¹⁹⁹ Merrill further found that the Court applied *Chevron's* framework in only thirty-six percent of cases involving a deference question.²⁰⁰ Finally, Merrill found "no discernible relationship" between *Chevron's* application and greater acceptance of the agency's interpretation.²⁰¹

Professors Schuck and Elliott observed similar behavior by the federal courts of appeals.²⁰² They found a pronounced *Chevron* effect during 1984-85,²⁰³ but noted that the rate of agency affirmance declined in 1988 and approached pre-*Chevron* levels.²⁰⁴ Courts of appeals accepted the agency's view in about seventy percent of pre-*Chevron* cases compared to about seventy-five percent of 1988 cases.²⁰⁵

Whether or not distressing, *Chevron's* decline is no surprise. No court has criticized its rationale,²⁰⁶ but many have evaded its dictates. Several considerations explain this evasion. The quintessential "counter-*Marbury*,"²⁰⁷

195. See, e.g., *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 536-38 (1992) (adhering to stare decisis by rejecting NLRB interpretation of NLRA provision in favor of court's prior interpretation); *Maislin Indus. v. Primary Steel, Inc.*, 497 U.S. 116, 130-31 (1990).

196. See, e.g., *Lechmere*, 502 U.S. at 536-38; *Arabian-American Oil Co.*, 499 U.S. at 257.

197. See Merrill, *supra* note 189, at 984.

198. See *id.* at 981. Merrill's study shows that the Supreme Court accepted the agency's view in 5 of 9 cases in 1986, 9 of 14 in 1987, 4 of 9 in 1988, 8 of 14 in 1989, and 8 of 11 in 1990. See *id.*

199. See *id.* at 982.

200. See *id.* at 981.

201. See *id.* at 984.

202. See Peter H. Schuck & E. Donald Elliott, *To the Chevron Station: An Empirical Study of Federal Administrative Law*, 1990 DUKE L.J. 984 (1991).

203. See *id.* at 1038. Schuck and Elliott found a pre-*Chevron* affirmance rate of 70.9 percent and a post-*Chevron* (i.e. 1984-85) affirmance rate of 81.3 percent. *Id.*

204. See *id.*

205. See *id.*

206. But see *Arabian-American Oil Co.*, 499 U.S. at 260 (Scalia, J., concurring) ("But deference is not abdication . . .")

207. Sunstein, *supra* note 188, at 2075.

Chevron wrests from the judiciary its foremost task: to "say what the law is."²⁰⁸ Second, *Chevron* arguably creates the danger of agency aggrandizement. Pure *Chevron* deference entrusts those who enforce the law with the power to interpret it,²⁰⁹ threatening to shift primary lawmaking authority from Congress to agencies.²¹⁰ Third, *Chevron* may not accord with congressional intent. When writing ambiguous statutes, Congress may not always intend for agencies to resolve the ambiguities.²¹¹ Fourth, *Chevron* arguably produces undemocratic results.²¹² Even though agencies are more politically accountable than the judiciary, they are manifestly less so than Congress. Thus, courts should vigorously enforce Congress's directives when they conflict with an agency's actions.²¹³ A fifth explanation for *Chevron*'s decline involves the behavior of interest groups. The interest groups that regulate agencies have strong incentives to insist upon aggressive judicial review.²¹⁴ Powerful groups, such as corporations, business associations, and labor unions, fear the *ex ante* uncertainty of agency rulemaking. Thus, they seek strong judicial review as a check against future political losses.²¹⁵ Because attempts to control agencies might fail,²¹⁶ interest groups hedge their political bets with judicial review.²¹⁷

Chevron, then, has lost its force because judges hesitate to cede their powers to unelected administrators, because we fear that agency decisionmaking will run amok, and because those subject to agency rules demand "hard-look" judicial review.

Might these same reasons dictate the same result as to the Sentencing Commission and its Guidelines? Several considerations suggest that the judiciary might (and should) review the Sentencing Guidelines with particular scrutiny. First, the Sentencing Commission, rather than regulating

208. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803); Sunstein, *supra* note 188, at 2074-75; Garrett, *supra* note 190, at 79; Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 460 (1989).

209. See Sunstein, *supra* note 188, at 2077; Garrett, *supra* note 99, at 79; Merrill, *supra* note 189, at 969-70.

210. See Sunstein, *supra* note 188, at 2092-93.

211. See Merrill, *supra* note 89, at 995. Indeed, the Administrative Procedure Act itself directs courts to "decide *all* relevant questions of law." *Id.* at 995 (alteration in original) (quoting 5 U.S.C. § 706 (1988)). See also Garrett, *supra* note 190, at 79.

212. See Merrill, *supra* note 189, at 978-79.

213. See *id.*

214. See Nicholas S. Zeppos, *Deference to Political Decisionmakers and the Preferred Scope of Judicial Review*, 88 NW.U.L. REV. 296, 299, 322-23 (1993).

215. See *id.* at 323, 326.

216. See Jerry L. Mashaw & David L. Harfst, *Regulation and Legal Culture: The Case of Motor Vehicle Safety*, 4 YALE J. ON REG. 257 (1987); Zeppos, *supra* note 213, at 326.

217. See Zeppos, *supra* note 214, at 332.

automobile manufacturers, broadcast entities, or securities brokers, regulates judges themselves.²¹⁸ Furthermore, the Commission regulates a process well within the grasp and experience of federal judges—the sentencing of criminal defendants.²¹⁹

Second, the Commission is perhaps the least politically accountable of all administrative agencies.²²⁰ It abjures on-the-record adversarial proceedings, often fails to explain its decisions, frequently conducts its deliberations in secret, and enjoys immunity from the Freedom of Information Act²²¹ as well as rationality review under the Administrative Procedure Act.²²² In an era concerned with agencies run amok, the judiciary might notice the Commission's aloofness and guard its own traditional law-interpreting role all the more carefully.²²³

218. Oddly, judges both enforce and are regulated by the Guidelines. See Ronald F. Wright, *Sentencers, Bureaucrats and the Administrative Law Perspective on the Federal Sentencing Commission*, 79 CAL. L. REV. 1, 22 (1991).

219. See *United States v. Galloway*, 976 F.2d 414, 434 (8th Cir. 1992) (en banc) (Beam, J., dissenting) (dismissing as unfounded argument that members of Commission have more sentencing expertise than judges). In contrast to judges who possess considerable expertise in sentencing, those whom they sentence lack expertise in the process of challenging agency-promulgated regulations in court. They are also less funded and organized than, say, the corporations, labor unions and other special interests who routinely challenge agency actions. See Zeppos, *supra* note 214, at 324. To the extent that the relative poverty of criminal defendants might explain lax judicial review of the Commission's work, it surely does not justify such treatment.

220. See Wright, *supra* note 218, at 5.

221. 5 U.S.C. § 552 (1994).

222. See *United States v. Wimbush*, 103 F.3d 968, 969-70 (11th Cir. 1997); *United States v. Cooper*, 35 F.3d 1248, 1255 (8th Cir. 1994), *vacated on other grounds*, 514 U.S. 1094 (1995); *United States v. Lopez*, 938 F.2d 1293, 1297 (D.C. Cir. 1991).

223. This same consideration could counsel either greater or less deference from the judiciary. Congress, after all, deliberately exempted the Commission from most of the APA's procedural dictates. See 28 U.S.C. § 994(x) (1994) (requiring notice and comment procedure prior to formulation of guidelines). See also S. REP. NO. 98-225, at 181 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3364 ("It is . . . not intended that the guidelines be subject to appellate review There is ample provision for review of the guidelines by Congress and the public; no additional review of the guidelines as a whole is either necessary or desirable."). If Congress intended to free the Commission from most of the external controls that bridle other agencies, then heightened judicial review of the Guidelines might thwart that intent. Perhaps more importantly, Congress approves the Sentencing Guidelines in a limited sense. Guidelines (and their subsequent amendments) do not take effect until Congress declines to disapprove them within 180 days of their proposal. See 28 U.S.C. § 994(p). Because Congress arguably approved the Commission's work, several courts have announced a more lax standard of review. See, e.g., *United States v. Munoz-Realpe*, 21 F.3d 375, 378 (11th Cir. 1994); *United States v. Jones*, 18 F.3d 1145, 1150 (4th Cir. 1994); *United States v. Landers*, 690 F. Supp. 615, 624 (W.D. Tenn. 1988); cf. *United States v. Galloway*, 976 F.2d 414, 435 (8th Cir. 1992) (en banc) (Beam, J., dissenting) ("Statutes are not considered, passed, amended, revoked or interpreted by the inaction of Congress. Further, it is not for the Congress to interpret a duly enacted law, it is, as in this instance, a matter for the court."). Ultimately, the premise that Congress approved the Guidelines does not warrant the conclusion that the Guidelines should be reviewed more deferentially than legislative rules promulgated by other agencies. Congressional guideline invalidation requires an Act of Congress; i.e., approval by both houses and the President's signature. The same action can

Third, to a large extent, the Commission is unique among administrative agencies insofar as it interprets and implements the substantive *criminal* law. When a criminal law provision is “grievously” ambiguous, the venerable “rule of lenity” requires resolution of the ambiguity in the defendant’s favor.²²⁴ Admittedly, the rule of lenity has fallen upon hard times,²²⁵ and it may have little application to many provisions of the SRA, which are not themselves criminal statutes.²²⁶ Nevertheless, when the Commission’s “permissible interpretation” of a statute operates to a defendant’s detriment, it may cease to be “permissible” in the *Chevron* sense.

At the very least, then, courts should afford the Commission *no greater deference* than they give to other administrative agencies. The rest of Part III documents and criticizes the courts’ deviation from this hypothesis.

invalidate *any* agency’s legislative rule within any time period of a rule’s enactment. Indeed, 5 U.S.C. § 801 (1996) provides that a “major” rule (defined by its economic impact) promulgated by *any* agency cannot become law until 60 days after the agency submits it to Congress. As in other contexts, mere congressional inaction does not and should not suggest that an agency’s rule otherwise comports with all relevant statutes. Even if statutory fealty were for Congress to decide, mere congressional inaction provides at most a cryptic determination of a regulation’s legality. Further, it is clear that Congress contemplated judicial review of the Guidelines for consistency with the enabling legislation. See 18 U.S.C. §§ 3742(a)(1), (b)(1) (1994) (allowing both government and defendant to appeal a sentence “imposed in violation of law”); *United States v. Nutter*, 61 F.3d 10, 12 (2d Cir. 1995); *United States v. Whyte*, 892 F.2d 1170, 1174 n.10 (3d Cir. 1989) (asserting jurisdiction for appellate review pursuant to § 3742). See also S. REP. 98-225, at 153 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3336 (interpreting sections 3742(a)(3)(B) and (b)(3)(B) to permit defendant and government to appeal sentence where no guideline applies, and noting that “[t]his would include the situations where there is a new law for which no guideline has yet been developed and where an appellate court had invalidated the established guideline and no replacement had yet been determined”) (emphasis added).

224. See, e.g., *United States v. R.L.C.*, 503 U.S. 291, 305 (1992) (plurality opinion) (dictum) (finding no statutory ambiguity, but noting that if it did, it would “choose the construction yielding the shorter sentence by resting on the venerable rule of lenity”).

225. See, e.g., *Smith v. United States*, 508 U.S. 223, 239 (1993); *R.L.C.*, 503 U.S. at 305 (plurality opinion) (reserving application of rule for situation where ambiguity exists even after court resorts court to “the language and structure, legislative history, and motivating policies of the statute”) (quoting *Moskal v. United States*, 498 U.S. 103, 108 (1990)); *Chapman v. United States*, 500 U.S. 453, 463 (1991) (requiring court to first “seize every thing from which aid can be derived” before applying rule of lenity) (citation omitted); cf. *R.L.C.*, 503 U.S. at 307-08 (Scalia, J., concurring) (criticizing Court’s resort to legislative history before invoking rule of lenity as defendant should not be charged with knowledge of legislative committee reports); *id.* at 311 (Thomas, J., concurring) (same).

226. See *United States v. Rivera*, 996 F.2d 993, 996-97 (9th Cir. 1993) (Because 28 U.S.C. § 994 does not proscribe any conduct, but only directs the Sentencing Commission to establish guidelines, it is not a criminal statute, is not subject to the rule of lenity, and does not limit court’s ability to accept “sufficiently reasonable” agency interpretation.); cf. *United States v. Galloway*, 976 F.2d 414, 434-35 (8th Cir. 1992) (en banc) (Beam, J., dissenting) (advocating application of rule of lenity, rather than *Chevron*, to determine whether Commission exceeded scope of statutory authority).

B. A Brief Taxonomy of SRA-based Challenges to the Sentencing Guidelines

Congress has issued numerous and often conflicting statutory commands to the Commission. These include specific dictates, such as the requirement to provide enhanced sentences for certain “career” offenders.²²⁷ Other statutory commands evince the SRA’s more general underlying policies. For example, Congress required the Commission to “minimize the likelihood” that the Guidelines will strain the federal prison capacity.²²⁸ These conflicting commands render it inherently problematic to challenge the Guidelines: any *particular* guideline might increase the prison population, but a more lenient provision might detract from Congress’s sentencing goals²²⁹ or fail to reflect Congress’s concern that previous sentencing practices were too lenient.²³⁰ Facial challenges to Guidelines provisions thus take many forms. The form varies according to the basis of a statutory challenge (specific SRA requirements, general SRA requirements, or statutory requirements outside Congress’s explicit directions to the Commission) and the type of provision challenged (a guideline, the Guidelines in general, official commentary, or a policy statement). The following sections detail the types of challenges analyzed for this study.

1. The Statutory Sources of Guidelines Challenges

A distinction between the SRA’s specific and general requirements is fraught with difficulty. Nevertheless, I define a “specific SRA requirement” as a statutory command that appears to direct the Commission to craft a *particular* Guideline provision to meet the requirement. For instance, Congress required that the Guidelines reflect the “general appropriateness” of imposing lower sentences for defendants who provide “substantial assistance in the investigation or prosecution of another person who has committed an offense.”²³¹ Guideline section 5K1.1 implements this mandate. Specific statutory commands carry only narrow policymaking delegations. Their tangible subject matter facilitates judicial review, yet such review is rare and seldom fruitful.

The SRA’s more general dictates grant the Commission markedly

227. See 28 U.S.C. §§ 994(h)-(i) (1994).

228. See *id.* § 994(g).

229. See *id.* § 994(f); 18 U.S.C. § 3553(a)(2) (1994).

230. See 28 U.S.C. § 994(m).

231. *Id.* § 994(n).

broader power. Among other things, Congress directed the Commission to “reduc[e] unwarranted sentence disparities,”²³² to provide “certainty and fairness in sentencing,”²³³ to avoid straining the federal prison capacity,²³⁴ and to remain “entirely neutral” as to one’s “race, sex, national origin, creed, and socioeconomic status.”²³⁵ Because such directives evade precise definition, judicial review is a less straightforward task. It ought not trouble the courts, however, for the judiciary often compares agency rules with the broad statutory commands they implement.²³⁶

“External” statutory commands present a third avenue of challenging the Guidelines. The SRA itself requires the Guidelines to be consistent with all “pertinent provisions” of Title 18.²³⁷ Such “pertinent” statutory provisions are of two types: (i) non-SRA statutes defining substantive crimes and their statutory penalties, and (ii) procedural SRA provisions directed to judges rather than the Commission. As for the first type, 18 U.S.C. § 922 subsections (g) and (k), provides a relevant example. Subsection (g) forbids felons from knowingly possessing firearms, while subsection (k) proscribes only the knowing possession of a firearm (whether or not by a felon) with an

232. *Id.* § 994(f).

233. *Id.* §§ 994(f), 991(b)(1)(13).

234. *See id.* § 994(g).

235. *Id.* § 994(d). Here as elsewhere, neutrality is an elusive concept. On occasion, facial neutrality leads to disparate outcomes between groups that are not similarly situated. *See, e.g.*, Julian Abele Cook, Jr., *Gender and Sentencing: Family Responsibility and Dependent Relationship Factors*, 8 FED. SENT. REP. 145, 145 (1995) (facial neutrality of guideline provision that “family ties and responsibilities” are “not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range” disproportionately burdens female defendants) (quoting GUIDELINES § 5H1.6).

236. *See, e.g.*, National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. § 1392(a) (repealed 1994) (directing Secretary of Transportation to, *inter alia*, “meet the need for motor vehicle safety”); *Motor Vehicle Mfr. Ass’n of the United States v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 34-40 (1983) (finding agency action arbitrary and capricious in light of statutory objectives). *See also* 7 U.S.C. § 2011 (1994) (purpose of Food Stamp Act is to “alleviate . . . hunger and malnutrition” among the poor); *Lopez v. Espy*, 83 F.3d 1095, 1101 (9th Cir. 1996) (regulation promulgated by Secretary of Agriculture regarding offsets for past overissuances to program beneficiaries violated Congress’s specific intent and contravened statute’s broad purpose). *See also* Communications Act, 47 U.S.C. § 203(b)(2) (1994) (allowing Federal Communications Commission to “modify” any tariff requirement for common carriers under 47 U.S.C. § 203(a) (1994)); *MCI Telecomm. Corp. v. AT&T*, 512 U.S. 218, 225-34 (1994) (refusing to interpret “modify any requirement” language to permit FCC to undertake basic or fundamental changes in regulatory scheme, notwithstanding agency’s proffered dictionary definitions of “modify”). *See also* Immigration and Nationality Act, §§ 101(a)(42)(A), 208(a), codified at 8 U.S.C. §§ 1158(a), 1101(a)(42) (1994) (authorizing Attorney General to grant asylum to alien unable to return to home country because of “persecution or a well-founded fear of persecution”); *Immigration and Naturalization Serv. v. Cardoza-Fonseca*, 480 U.S. 421, 446-48 n.31 (1986) (rejecting agency’s position that “well-founded fear” means that alien must show that he or she “more likely than not” faces persecution if forced to return to home country).

237. 28 U.S.C. § 994(b)(1) (1994). The Guidelines must also be consistent with all pertinent provisions of Title 28. *See United States v. Holloway*, 991 F.2d 370, 373 (7th Cir. 1993).

altered or obliterated serial number.²³⁸ By contrast, the guideline which prescribes the base offense level for felons who knowingly possess firearms provides a mandatory enhancement if the weapon's serial number was altered or obliterated, regardless of whether the defendant knew of the altered serial number.²³⁹ The second variety of "external" statutory commands is typified by 18 U.S.C. § 3583(a), which *permits* the court to impose a term of supervised release whenever it imposes a prison sentence.²⁴⁰ By contrast, the Guidelines *require* a term of supervised release whenever a prison term exceeds one year.²⁴¹

2. *The Targets of Statutory Challenges: Guidelines, Commentary, and Policy Statements*

Guidelines, commentary,²⁴² and policy statements all presumptively bind the sentencing court.²⁴³ In most instances, commentary and policy statements

238. See 18 U.S.C. §§ 922(g), 922(k) (1994); *United States v. Schnell*, 982 F.2d 216, 220 (7th Cir. 1992).

239. See GUIDELINES § 2K2.1(b)(4) (1998). The Seventh Circuit nevertheless upheld the challenged guideline. *Schnell*, 982 F.2d at 220-21. The court reasoned that among those felons who knowingly possess firearms, the Commission chose to enhance the sentences of those whose guns have obliterated serial numbers. *Id.* at 220. The court considered this choice rational: because felons may not possess firearms, they generally purchase guns from "shady characters" rather than legitimate vendors. These "shady characters" often deal in stolen or altered firearms, which pose "a special threat to the community" when possessed by felons—those people "recognized as irresponsible." *Id.* at 220-21.

240. See 18 U.S.C. § 3583(a) (1994).

241. See GUIDELINES § 5D1.1(a) (1998). The courts have uniformly rejected challenges to this particular restriction on judicial discretion. See *United States v. Williams*, 55 F.3d 685 (unpublished table decision), 1995 WL 309988 (D.C. Cir. 1995); *United States v. Chinske*, 978 F.2d 557, 559 (9th Cir. 1992); *United States v. Mondello*, 927 F.2d 1463, 1468 (9th Cir. 1991); *United States v. Martinez-Cortez*, 924 F.2d 921, 924 (9th Cir. 1991); *United States v. Hurtado*, 899 F.2d 371, 376 (5th Cir. 1990); *United States v. West*, 898 F.2d 1493, 1503-04 (11th Cir. 1990); *United States v. Saldivar*, 730 F. Supp. 329, 331 (D. Nev. 1990); *United States v. Dixon*, 713 F. Supp. 565, 567 (E.D.N.Y. 1989); *United States v. Cortes*, 697 F. Supp. 1305, 1308 & n.3 (S.D.N.Y. 1988); *United States v. Mendez*, 691 F. Supp. 656, 663-64 (S.D.N.Y. 1988); *United States v. Schender*, No. CR-87-00806-02, 1988 WL 83193 at *2 (E.D.N.Y., July 21, 1988); *United States v. Sparks*, 687 F. Supp. 1145, 1157 (E.D. Mich. 1988); *United States v. Smith*, 686 F. Supp. 1246, 1253-54 (W.D. Tenn. 1988).

242. Within the term "commentary," I include "application notes" listed within "commentary" sections.

243. See *Williams v. United States*, 503 U.S. 193, 200-01 (1992) (policy statements binding); *Stinson v. United States*, 508 U.S. 36, 38 (1993) (commentary that interprets or explains a guideline is authoritative unless contrary to statute, Constitution, or a "plainly erroneous" reading of the guideline it interprets); *id.* at 42 (Guidelines binding upon sentencing courts). As a separate matter, *Stinson* and *Williams* might apply only when the commentary or policy statement in question interprets a guideline. However, if commentary or a policy statement operates in lieu of a guideline, courts might only be bound to "consider" it. See, e.g., *United States v. Hill*, 48 F.3d 228, 231 (7th Cir. 1995) (policy statement calling for consecutive sentence not binding, but court would abuse its discretion by ignoring it). See also 18 U.S.C. § 3553(a) (1994) (requiring sentencing court to consider "any pertinent

interpret guidelines.²⁴⁴ In others, they interpret or implement statutory commands. Parties challenge all three types of provisions, whether predicated upon “specific” SRA commands, “general” SRA commands, or “external” statutes. For example, the defendant in *United States v. Price*²⁴⁵ challenged a commentary item that included conspiracy offenses within the Guidelines’ “career offender” provisions.²⁴⁶ The statutory basis for the “career offender” guideline arguably prescribes sentence enhancements only for repeat offenders convicted of “crime[s] of violence” and various substantive drug offenses rather than drug conspiracies.²⁴⁷ Although the commentary at issue in *Price* interpreted the career offender guideline, it may have misinterpreted the statute from which the guideline arose.

Commentary and policy statements differ from guidelines in two important respects. First, Congress “approves” guidelines by declining to reject them.²⁴⁸ Therefore, such “approval” means little.²⁴⁹ Second, commentary and policy statements are exempt from the “notice and comment” procedures required of guidelines.²⁵⁰ Faced with statutory challenges, however, courts generally fail to differentiate the three varieties of Guidelines provisions.²⁵¹

C. The Rejection of Statutory Challenges: A Descriptive Account of Judicial Abdication

On the rare occasion that criminal defendants challenge particular guidelines as inconsistent with the SRA,²⁵² courts generally give such challenges short shrift. Below, I detail five broad methods of judicial decisionmaking through which the courts have avoided meaningful statutory review of the Guidelines.

policy statement” when crafting sentence).

244. *See Stinson*, 508 U.S. at 45 (commentary that interprets guideline binds court unless “plainly erroneous or inconsistent with” the guideline) (citation omitted).

245. 990 F.2d 1367 (D.C. Cir. 1993).

246. *See id.* at 1368; GUIDELINES §§ 4B1.1, 4B1.2 (1992).

247. *See Price*, 990 F.2d at 1368.

248. *See* 28 U.S.C. § 994(p) (1994).

249. *See supra* note 223.

250. *See* 28 U.S.C. § 994(x).

251. Few courts have seized upon the differences between guidelines and commentary or policy statements. *See United States v. Piervinanzi*, 23 F.3d 670, 683 (2d Cir. 1994) (refusing to recognize commentary as an authoritative interpretation of the criminal statutes upon which guideline is premised); *United States v. Forrester*, 19 F.3d 482, 484 (9th Cir. 1994) (finding policy statement not binding when they deal only with an “applicable statute”); *United States v. Washington*, 933 F. Supp. 1003, 1006 (D.D.C. 1996) (explaining that courts generally owe deference to commentary, but Commission may not “override or amend a statute”).

252. *See supra* note 65.

1. *Picking and Choosing Among the Commission's Statutory Commands*

Too often, courts acknowledge the tension between a challenged guideline provision and the statutory provision it allegedly violates, only to uphold the guideline provision on the basis of some other statutory command. This, in effect, permits the Commission to choose which statutes it will obey.²⁵³ Courts uphold the Commission's choice without attempting to reconcile the statute alleged to be violated with the one alleged to save the challenged guideline or examining whether the two statutes, so reconciled, permit the Commission's interpretation.

The D.C. Circuit's opinion in *United States v. Johnson*²⁵⁴ illustrates this first approach. Johnson challenged the Guidelines' inclusion of juvenile convictions within one's criminal history score.²⁵⁵ Congress required the Commission to consider the relevance of "criminal history."²⁵⁶ However, Johnson contended that juvenile offenses were not "crimes" in the District of Columbia, and that the Commission exceeded its statutory authority by including juvenile offenses within one's "criminal history." His argument failed.²⁵⁷ The court erected a hopelessly permissive test to review the challenged guideline: "If *any* provision of the Sentencing Reform Act, reasonably interpreted, would support the guideline, we must sustain it."²⁵⁸ Needless to say, Guidelines section 4A1.1(b) fared well by this measure. First, the court reasoned that the general statutory provisions requiring the Commission to promulgate guidelines convey "broad authority to formulate sentencing criteria."²⁵⁹ Second, Congress directed the Commission to consider the relevance of eleven enumerated factors, including criminal history.²⁶⁰ Only then did the Court specifically reject Johnson's definition of "criminal history."²⁶¹

What are the limits of the Commission's "broad authority"? How might the general command to formulate guidelines be modified by the more specific dictate that the Commission consider the relevance of one's "criminal history" in "establishing categories of defendants for use in the

253. See *United States v. Davern*, 970 F.2d 1490, 1503 (6th Cir. 1992) (en banc) (Merritt, C.J., dissenting).

254. 28 F.3d 151 (D.C. Cir. 1994).

255. See *id.* at 153. See also GUIDELINES § 4A1.2(d) (1998).

256. See 28 U.S.C. § 994(d)(10) (1994).

257. 28 F.3d at 155.

258. *Id.* at 153 (emphasis added).

259. See *id.* at 154 (citing 28 U.S.C. §§ 991, 994(a)).

260. See *id.* (citing 28 U.S.C. § 994(d)).

261. See *id.* at 154-55.

guidelines?”²⁶² Where might the Commission’s curious definition of “criminal history” fit in between these provisions? We can only speculate.

2. *Upholding What the Commission Might Have Done*

An agency’s actions must be judged by “what [it] did, not by what it might have done.”²⁶³ Presumably, then, the Commission must specify the statutory authority underlying each guideline.²⁶⁴ However, where the Commission’s specification falls short, courts often uphold guidelines based upon a *post hoc* rationalization that other statutory authority, whether or not relied upon by the Commission, nonetheless countenances the challenged guideline.

A now-defunct controversy surrounding the Guidelines’s “career offender” provisions illustrates this approach. An overwhelming majority of courts upheld the Commission’s decision to include drug conspiracy crimes within the set of predicate offenses that could trigger “career offender” status.²⁶⁵ They did so even though Congress omitted drug conspiracies from the list of repeat crimes deserving enhanced Guidelines sentences. Specifically, Congress required increased punishment for repeat offenders who committed “crimes of violence” or certain enumerated drug offenses not including conspiracies.²⁶⁶ The Commission relied upon this same list as the statutory basis for its career offender guidelines, as the relevant Guidelines provision itself stated.²⁶⁷ When presented with challenges to the guidelines, several courts upheld the Commission’s treatment of drug conspiracies, not on the basis of the Commission’s own rationale, but on the basis of the

262. See 28 U.S.C. § 994(d)(10) (1994).

263. SEC v. Chenery Corp., 318 U.S. 80, 93-94 (1943).

264. See 28 U.S.C. § 994(x) (1994) (imposing notice and comment proceedings of 5 U.S.C. § 553 upon Commission); 5 U.S.C. § 553(b)(2) (1994) (agency must refer to “the legal authority under which the rule is proposed” in published notice in Federal Register).

265. See GUIDELINES § 4B1.2 (1989); United States v. Mendoza-Figueroa, 65 F.3d 691, 693 (8th Cir. 1995) (en banc); United States v. Jackson, 60 F.3d 128, 132 (2d Cir. 1995); United States v. Williams, 53 F.3d 769, 772 (6th Cir. 1995); United States v. Weir, 51 F.3d 1031, 1032 (11th Cir. 1995); United States v. Kennedy, 32 F.3d 876, 889 (4th Cir. 1994); United States v. Damerville, 27 F.3d 254, 257-58 (7th Cir. 1994); United States v. Hightower, 25 F.3d 182, 187 (3d Cir. 1994); United States v. Heim, 15 F.3d 830, 831 (9th Cir. 1994); United States v. Dyer, 9 F.3d 1, 1 (1st Cir. 1993); Nwachia v. United States, 891 F. Supp. 189, 200 (D.N.J. 1995); United States v. Mayes, 844 F. Supp. 677, 679 (D. Kan.), *aff’d*, 36 F.3d 1106 (10th Cir. 1994). *But see* United States v. Bellazerius, 24 F.3d 698 (5th Cir. 1994); United States v. Price, 990 F.2d 1367 (D.C. Cir. 1993).

266. See 28 U.S.C. § 994(h) (1994) and statutes referenced therein.

267. See GUIDELINES § 4B1.1(1989); *Mendoza-Figueroa*, 65 F.3d at 695, 698 (John R. Gibson, J., dissenting) (gleaning from guideline commentary and proposed guideline amendment seeking to expand statutory basis for including conspiracy offenses that previous basis of § 4B1.1 was solely § 994(h)).

Commission's broad authority to promulgate guidelines in the first place.²⁶⁸ The courts' approach is troublesome regardless of whether the SRA's broader dictates permit the Commission's particular choice. If indeed an agency's rule must stand or fall upon the agency's rationale for its adoption, then the courts have privileged the Commission above other agencies and have turned "institutional consistency on its head."²⁶⁹

For better or worse, the Commission later amended the relevant guideline to "clarify" that it had relied upon its "broad" powers all along.²⁷⁰

3. *Validation by Proclamation*

Faced with statutory challenges to the Guidelines, many courts fail to define the meaning or scope of a particular statutory command and to ascertain whether the guideline permissibly implements it. Instead, they recite the statute of issue, describe how the guideline implements it, and proclaim the guideline's validity *ipse dixit*.

Decisions upholding the Commission's treatment of probation typify this third approach. Congress required the Commission to "insure that the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise *serious* offense."²⁷¹ Nevertheless, the Guidelines authorize probation only when one's sentencing range is six to twelve months or below.²⁷² Without question, the Commission

268. See, e.g., *Mendoza-Figueroa*, 65 F.3d at 693-94; *Jackson*, 60 F.3d at 132; *Kennedy*, 32 F.3d at 888-89. To be fair, other courts upheld the challenged guideline, reasoning that section 994(h) did not provide an exclusive list of offenses for which Congress desired to enhance sentences. See, e.g., *Weir*, 51 F.3d at 1032; *Piper*, 35 F.3d at 618. See also S. REP. NO. 98-225, at 176 (1984), reprinted in 1984 U.S.C.C.A.N. 3182, 3359 (Section 994(h) is "not necessarily intended to be an exhaustive list of types of cases in which the guidelines should specify a substantial term of imprisonment, nor of types of cases in which terms at or close to authorized maxima should be specified."). Still others concluded that the Commission *had in fact* relied upon section 994(a). Because that section guided all other guidelines, section 994(h) was not the sole basis of the Commission's authority to include conspiracy offenses within the career offender provisions. See *Mendoza-Figueroa*, 65 F.3d at 693-94; *Kennedy*, 32 F.3d at 888; *Damerville*, 27 F.3d at 257. Of course, even this approach permits the Commission to "pick and choose" among the two contradictory statutory provisions. See *supra* Part III.C.1.

269. See *Mendoza-Figueroa*, 65 F.3d at 697 (John R. Gibson, J., dissenting).

270. Specifically, the Commission purported to rely upon 28 U.S.C. §§ 994(a)-(f). See GUIDELINES, App. C, Am. 528 (1998); see also *id.* § 4B1.1 commentary, background (1998). Amendment 528 ended the circuit split over the treatment of conspiracies as career offenses. Courts thereafter accepted § 994(h) as well as §§ 994(a)-(f) as sufficient authority for the Commission's action. See, e.g., *United States v. Lightbourn*, 115 F.3d 291, 292-93 (5th Cir. 1997) (reversing Fifth Circuit's rejection of career conspiracy offender provision, given newly proffered statutory justification).

271. See 28 U.S.C. 994(j) (1994) (emphasis added).

272. See GUIDELINES § 5B1.1(a) (1998).

restricted probationary sentences more than Congress required.²⁷³ Whether it did so more than Congress *permitted* is a different question that the courts answered only summarily.

Many defendants convicted of offenses they consider “non-serious” have challenged the mandatory incarceration they faced. None have succeeded.²⁷⁴ The Seventh Circuit’s decision in *United States v. Lueddeke*²⁷⁵ is typical. A first offender, Lueddeke faced a Guidelines-mandated prison term for perjury and obstruction of justice.²⁷⁶ The court predictably rejected the characterization of the offense as “non-serious.”²⁷⁷ It then described the Commission’s chosen policy: the Guidelines permit probation whenever a first offender’s sentencing range includes zero months imprisonment. They also allow probation beyond zero months in cases involving four additional offense levels, as long as the court also imposes “intermittent confinement, community confinement, or home detention.”²⁷⁸ The court accepted—implicitly and without examination—the Commission’s determination of which sentences were “serious” and which were not. The court failed to ascertain precisely *what* obligation section 994(j) imposed on the Commission. Rather, it merely recited the particular choice made by the Commission regarding probation’s availability, then upheld that choice with little discussion.

Lueddeke leaves the reader with no idea of the statute’s force. The court did not mark the statute’s contours, and *any* choice by the Commission would presumably pass muster. Whatever the correctness of its holding—perjury is surely a “serious offense”—*Lueddeke*’s rationale proves too much.

4. *Curtailing the Availability of Judicial Review*

273. See 18 U.S.C. § 3561 (1994) (forbidding probation only for defendants convicted of Class A or B felonies, as well as certain other narrow categories of offenders).

274. See *United States v. Strandquist*, 993 F.2d 395, 399 (4th Cir. 1993); *States v. Ellen*, 961 F.2d 462, 467-68 (4th Cir. 1992); *United States v. Lueddeke*, 908 F.2d 230, 232-33 (7th Cir. 1990); *United States v. Ortez*, 902 F.2d 61, 65 (D.C. Cir. 1990); *United States v. Erves*, 880 F.2d 376, 380 (11th Cir. 1989); *United States v. White*, 869 F.2d 822, 827 (5th Cir. 1989); *United States v. Saldivar*, 730 F. Supp. 329, 331 (D. Nev. 1990); *United States v. Hallemeier*, 715 F. Supp. 203, 205-06 (N.D. Ill. 1989); *United States v. Gioeli*, No. 88-CR-185, 1989 WL 32833 (E.D.N.Y. Mar. 27, 1989); *United States v. Macias-Pedroza*, 694 F. Supp. 1406, 1417-18 (D. Ariz. 1988); *United States v. Myers*, 687 F. Supp. 1403, 1420-21 (N.D. Cal. 1988); *United States v. Sparks*, 687 F. Supp. 1145, 1156 (E.D. Mich. 1988); *United States v. Smith*, 686 F. Supp. 1246, 1253 (W.D. Tenn. 1988); *United States v. Frank*, 682 F. Supp. 815, 823 (W.D. Pa. 1988), *modified*, 864 F.2d 992 (3d Cir. 1988); *United States v. Schender*, No. CR-87-00806-02, 1988 WL 83193, at *2 (E.D.N.Y. July 21, 1988).

275. 908 F.2d 230 (7th Cir. 1990).

276. See *id.* at 232.

277. See *id.* at 233.

278. See *id.* at 232; GUIDELINES § 5B1.1(a).

A fourth approach views certain SRA commands as judicially unenforceable. For instance, the SRA requires the Commission to “minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons. . . .”²⁷⁹ All attempts to enforce this provision have failed, and perhaps rightly so.²⁸⁰ First, 28 U.S.C. § 994(g) arguably requires only that the Commission *consider* the federal prison capacity while formulating the Guidelines.²⁸¹ Second, the legislative history confirms that Congress did not intend to limit the Commission’s choices, but only to prevent “inadvertent” increases in the prison population.²⁸²

Although correctly decided, the cases rejecting section 994(g) challenges do not adequately review the Commission’s decision-making process. For example, even if the Commission need only *consider* the federal prison capacity, we have no assurance that it has done so. The Commission is aware of the Guidelines’ effect upon the federal prison population; its models predict a ten percent increase over ten years.²⁸³ But “awareness” is not

279. 28 U.S.C. § 994(g) (1994). Courts have not limited this fourth approach to challenges predicated upon section 994(g). *See, e.g.,* United States v. Galloway, 976 F.2d 414, 422 (8th Cir. 1992) (en banc) (rejecting argument that “relevant conduct” guideline creates unwarranted sentencing disparities by enhancing penalties for unconvicted conduct because it is “too diffuse to compel a conclusion that section 1B1.3 lacks statutory support”).

280. *See* States v. Martinez-Cortez, 924 F.2d 921, 923-24 (9th Cir. 1991); United States v. Foote, 898 F.2d 659, 666-67 (8th Cir. 1990); United States v. Erves, 880 F.2d 376, 380 (11th Cir. 1989); United States v. White, 869 F.2d 822, 828 (5th Cir. 1989); United States v. Saldivar, 730 F. Supp. 329, 331 (D. Nev. 1990); United States v. Hallemeier, 715 F. Supp. 203, 206 (N.D. Ill. 1989); United States v. Dixon, 713 F. Supp. 565, 567 (E.D.N.Y. 1989); United States v. Schender, No. CR-87-00806-02, 1988 WL 83193, at *2 (E.D.N.Y., July 21, 1988); United States v. Mendez, 691 F. Supp. 656, 663 (S.D.N.Y. 1988); United States v. Amesquita-Padilla, 691 F. Supp. 277, 288 (W.D. Wash. 1988); United States v. Sparks, 687 F. Supp. 1145, 1156-57 (E.D. Mich. 1988); United States v. Smith, 686 F. Supp. 1246, 1253 (W.D. Tenn. 1988).

281. *See* 28 U.S.C. § 994(g) (1994). Specifically, Congress issued the following directive:

The Commission “shall *take into account* the nature and capacity of the penal, correctional, and other facilities and services available, and shall make recommendations concerning any change or expansion in the nature or capacity of such facilities and services that might become necessary as a result of the guidelines promulgated pursuant to the provisions of this chapter.

Id. (emphasis added).

282. *See* S. REP. NO. 98-225, at 175 (1984), reprinted in 1984 U.S.C.A.N. 3182, 3358 (Section 994(g) is “not intended . . . to limit the Sentencing Commission in recommending guidelines that it believes will best serve the purposes of sentencing. Instead, it is intended that the Commission be aware of the system’s capacity in order to assure that it is not inadvertently exceeded . . .”). Numerous courts have cited § 994(g)’s legislative history to defeat challenges based upon this provision. *See, e.g.,* White, 869 F.2d at 828; Hallemeier, 715 F. Supp. at 206.

283. GUIDELINES Ch. 1, Pt. A, policy statement 4(g) (1998). Although the Guidelines are predicted to increase the prison population by ten percent, Congress itself bears primary responsibility for federal prison crowding. *See* Mihm, *supra* note 10, at 175 (questioning whether Commission bears primary responsibility for strained prison capacity). *But see* STITH & CABRANES, *supra* note 14, at 64-65 (criticizing Commission’s methods of calculating prison population increases; among other things, Commission’s estimate ascribed to Congress those population increases caused by measures that Congress required Commission to take); Miller & Wright, *supra* note 161, at 751 n.65 (observing that

necessarily "consideration." Whatever the Commission's "awareness" of this effect, was this effect actually *considered* when the Guidelines were formulated? Which guidelines, if any, were altered because of limited federal prison space? If the Commission failed even to consider prison capacity, how might this affect the legality of *all* the guidelines? Neither the courts nor the Commission have provided a satisfactory answer.²⁸⁴

5. *The Availability of Departure*

A fifth approach uses the departure mechanism of 18 U.S.C. § 3553(b) to harmonize SRA commands with the guidelines that supposedly implement them. Congress permits departure from the guideline sentencing range when "there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines."²⁸⁵

Let us consider the Commission's chosen method of calculating criminal history.²⁸⁶ Section 4A1.1 bases the history score upon the actual lengths of the defendant's previous sentences. It ignores other factors such as the types of previous offenses committed, the particular facts of such offenses, or the typicality of a previous sentence in view of the facts underlying the offense, or the sentencing practices in that jurisdiction or others.²⁸⁷ At the same time, Congress ordered the Commission to avoid "unwarranted sentence disparities."²⁸⁸ Arguing that previous sentencing practices themselves produced unwarranted disparities, several defendants have challenged the Guidelines' perpetuation of such disparities.²⁸⁹ Courts consistently reject these claims. Instead, they endorse the Commission's method as a rational approximation of one's criminal past.²⁹⁰ Where straightforward application

Commission did not conduct analysis of Guidelines' effect upon federal prison capacity until *after* submitting initial draft of Guidelines to Congress, and thus questioning how the Commission could *draft* its guidelines while taking into account federal prison capacity).

284. *But see* United States v. Griffith, 85 F.3d 284, 292 (7th Cir. 1996) (rejecting challenge by defendant on standing grounds); United States v. DeFeo, No. 90-CR-250 (MJL), 1997 WL 316449, at *5 (S.D.N.Y. June 11, 1997) (same).

285. 18 U.S.C. § 3553(b) (1994).

286. *See* GUIDELINES § 4A1.1 (1998).

287. *See id.*

288. *See* 28 U.S.C. § 994(f) (1994).

289. *See* United States v. White, 869 F.2d 822, 828 (5th Cir. 1989); United States v. Craig, 911 F.2d 739 (unpublished table decision), 1990 WL 119615 (9th Cir. Aug. 20, 1990); United States v. Dixon, 713 F. Supp. 565, 567 (E.D.N.Y. 1989); United States v. Macias-Pedroza, 694 F. Supp. 1406, 1418 (D. Ariz. 1988); United States v. Schender, No. CR-87-00806-02, 1988 WL 83193, at *3 (E.D.N.Y. July 21, 1988); United States v. Mendez, 691 F. Supp. 656, 664-65 (S.D.N.Y. 1988); United States v. Amesquita-Padilla, 691 F. Supp. 277, 290 (W.D. Wash 1988).

290. *See, e.g.,* Macias-Pedroza, 694 F. Supp. at 1418; Mendez, 691 F. Supp. at 665.

of section 4A1.1 would produce unjust results by exaggerating one's criminal history, departure is authorized.²⁹¹ Because the court can depart in appropriate circumstances, section 4A1.1 does not violate the SRA's command to avoid "unwarranted sentence disparities."

This last approach to reconciling the Guidelines with the SRA suffers from two shortcomings. First, defendants may not appeal any sentence that falls within the prescribed guideline range.²⁹² If a guideline-mandated sentence violates the SRA but not a sentencing judge's sensibilities, an alleged statutory violation is unreviewable. More importantly, however, departure law is generally ill-equipped to keep the Commission within its statutory mandate—a shortcoming that I address at greater length in Part IV.C.

D. Statutory Challenges to the Guidelines: An Empirical Analysis

This section analyzes courts' treatment of statutory Guidelines challenges from 1988 through 1997.²⁹³ My research revealed 237 cases²⁹⁴ involving 312

291. *See id.*; *Schender*, 1988 WL 83193 at *3; *Mendez*, 691 F. Supp. at 665; *Amesquita-Padilla*, 691 F. Supp. at 290.

292. *See* 18 U.S.C. § 3742(a) (1994) (sentence within guideline range not appealable). The courts have uniformly interpreted section 3742 to preclude appellate jurisdiction when a district court has the authority, but decides not to depart. In fact, an appellate court may review a district court's decision not to depart only if the district court erroneously believed that it lacked the authority to depart. *See, e.g.*, *United States v. Shlater*, 85 F.3d 1251, 1257-58 (7th Cir. 1996); *United States v. Holsey*, 995 F.2d 960, 963 (10th Cir. 1993); *United States v. Gaskill*, 991 F.2d 82, 84 (3d Cir. 1993). The courts' reading may not be compelled by statute. Subsections 3742(a)(2) and (b)(2) permit an appeal by the defendant or government when a sentence results from an "incorrect application of the sentencing guidelines," and a district court's failure to depart often might reflect a misapplication of the guidelines.

293. Several methodological shortcomings limit the reliability of my statistical models. These pervade the entire analysis, and any conclusions must be drawn only tentatively. First, I do not pretend to have located every single case in which a guideline has been challenged for statutory non-compliance. I attempted to locate all such cases that are available through case squibs and WESTLAW searches, but surely I inadvertently omitted some cases along the way.

Second, the universe of readily accessible cases is narrow. Only a small fraction of Guidelines cases are published or available on-line. Thus, I have little doubt that far more than 312 statutory challenges were launched against the Guidelines between 1988 and 1997. Nevertheless, the SRA's status as a forgotten source of law rests with the *relative* number of available "challenges" cases compared to the number of other Guidelines cases. The 237 cases that I located are a tiny fraction of all accessible Guidelines cases.

Third, parties might be deterred from challenging Guidelines through the "selection effect." *See* George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1 (1984). The state of the law inevitably influences the set of disputes that parties will choose to bring for judicial resolution. Nevertheless, the selection effect may be less salient in administrative law cases. *See* Schuck & Elliott, *supra* note 202, at 1011. Those challenging agency rules prevail far less than fifty percent of the time, as the selection effect would hypothesize. Despite this, defendants continue to challenge agency rules, as they have little to lose and much to gain from litigating their

such challenges.²⁹⁵ These cases represent a small fraction of the many thousands of reported cases that apply the Guidelines. Although opaque, the numbers generally support my argument that the Commission enjoys a privileged status among administrative agencies.

1. Judicial Review: The Sentencing Commission Compared to Other Agencies

Of 312 statutory challenges aimed at Guidelines provisions, only forty-two (13.5%) succeeded. Table 1 compares this result with those found in other empirical studies of administrative law. Courts have accepted the Sentencing Commission's statutory interpretations with unusual frequency. While the courts accepted the Commission's interpretation in 86.5% of cases, the Supreme Court accepted agency interpretations in only 70% of cases studied by Merrill and 71.1% of those studied by Zeppos. By comparison, Schuck and Elliott's study shows that the courts of appeals accepted the agency's view in 81.3% of relevant 1985 cases and 75.5% of 1988 cases.²⁹⁶

cases. *Id.* Where the Guidelines are concerned, the defendant need not initiate a lawsuit to challenge an administrative action; rather, the government commences the proceedings and forces the defendant into court. If already forced to contest a conviction and sentence desired by the government, and dissuaded from bargaining away the right to appeal the conviction or sentence, a defendant risks little by challenging a Guidelines provision.

Fourth, and perhaps most importantly, some of the coding involves categorization that lacks precision; for example, the determination of whether the statute claimed to be violated is a "specific," "general," or "external" command requires the exercise of the coder's judgment (in this case, mine).

294. My study includes all cases containing challenges that are described in case squibs in West's FEDERAL PRACTICE DIGEST, the annotated United States Code, and all other cases retrieved through multiple WESTLAW searches.

295. This project required numerous up-front decisions on how to define the concept of a "challenge." First, a single case might attack multiple Guidelines provisions on multiple statutory bases, a single provision on multiple statutory bases, or multiple provisions on a single statutory basis. Whenever statutory challenges are readily separable, I count them as separate challenges. Second, I viewed each single adjudication of a challenge as a single challenge, even if a higher court, or an appellate court en banc, later affirmed or reversed the result reached in the case. Third, I excluded from the set of "challenges" (i) decisions not addressing a challenge on the merits (*e.g.*, resolving the question on the grounds of Article III standing), and (ii) decisions not squarely resolving a challenge, but instead reaching a particular interpretation of a Guidelines provision so as not to conflict with a statute. *See, e.g.*, United States v. Carroll, 798 F. Supp. 291, 293-95 (D. Md. 1992) (holding cross-reference in GUIDELINES § 2K2.1(c) inapplicable to state-law offenses committed while felon illegally possessed firearm, in light of guideline's ambiguity and 18 U.S.C. § 3553(a)).

296. Because *Chevron* was decided in 1984, the years 1985 and 1988 track the courts' behavior immediately after *Chevron*, and then a few years thereafter.

Author of Study	Luby	Merrill ²⁹⁷	Zeppos ²⁹⁸	Schuck & Elliott ²⁹⁹	Schuck & Elliott ³⁰⁰
Scope of Study	Statutory Challenges to Sentencing Guidelines; All Federal Courts; 1988-97	Admin. Law Cases Involving Statutory Interpretation; Supreme Court; 1984-90	Admin. Law Cases Involving Statutory Interpretation; Supreme Court; 1938-90	General Admin. Law Cases; Courts of Appeals; 1985	General Admin. Law Cases; Courts of Appeals; 1988
% Cases Accepting Agency View	86.5%	70.0%	71.1%	81.3% ³⁰¹	75.5% ³⁰²

Ultimately, these statistics probably *understate* the differences between review of the Commission and that of other agencies. Of the forty-two successful Guidelines challenges that I found, eighteen were of a single type. From 1994 to 1997, the Department of Justice launched eighteen successful challenges against Guidelines Amendment 506, an amendment which somewhat eased the harshness of the Guidelines' "Career Offender" provisions.³⁰³ In *United States v. Labonte*, the Supreme Court ultimately agreed with the government that Amendment 506 violated the SRA.³⁰⁴ I defer detailed discussion of *Labonte* until Part V.A. If we exclude cases of this type,³⁰⁵ Guidelines challenges failed in 263 of 287 attempts. Otherwise stated, the courts accepted the Commission's statutory interpretation in 91.6% of cases.

297. See Merrill, *supra* note 189, at 981.

298. See Zeppos, *supra* note 214, at 324.

299. See Schuck & Elliott, *supra* note 202. Because Schuck and Elliott did not confine their inquiry to cases involving statutory interpretations, comparisons are difficult to establish.

300. See *id.*

301. For 1985, Schuck and Elliott found a reversal rate of 8.2%, while courts remanded to the agency in 9.3% of cases. *Id.* at 1039.

302. In 1988, courts reversed the agency in 8.2% of cases and remanded in 17% of cases. *Id.*

303. See GUIDELINES App. C., Am. 506 (1998) (amending § 4B1.1, comment).

304. 520 U.S. 751 (1997) (amendment violated statutory command to sentence certain repeat offenders "at or near the statutory maximum"); see 28 U.S.C. § 994(h) (1994).

305. In all, the government launched 25 challenges against Amendment 506, but only 18 succeeded.

Obviously, comparisons of this sort must be drawn with care. Any number of explanations—external to the judiciary itself—might account for the Guidelines' relative success against statutory challenges. First, counsel challenging the Sentencing Guidelines might generally lack resources and relevant litigation skills. Some seventy-five percent of federal criminal defendants are indigent.³⁰⁶ Few are represented by lawyers with experience in challenging administrative agencies. Second, the Commission is not represented in cases in which the Guidelines are challenged. Consequently, courts lack the power to remand cases to the Commission for further consideration—a power they frequently exercise in other administrative law contexts.³⁰⁷ Courts must accept or reject a challenged Guidelines provision. Lacking a middle ground, they might exercise greater deference.³⁰⁸ A third possibility rests with the Commission itself. The Commission might have exercised its statutory authority with unparalleled fidelity to Congress's dictates. This possibility is unverifiable but unlikely.

Ultimately, none of these possibilities plausibly explains the disparities described in this section and elsewhere. To whatever extent defense counsel frame statutory challenges with less skill, courts themselves frequently scrutinize agency regulations.³⁰⁹ Moreover, a criminal defendant's relative poverty provides no *doctrinal* justification for the Commission's privileged status. Courts' inability to remand, meanwhile, does not explain why they *reject* Guidelines challenges with greater frequency than other challenges. An agency's actions must stand or fall upon the legal ground explicitly relied upon by the agency.³¹⁰ When remand is possible, the agency can clarify further the legal basis for its actions. When it is not, failure of the agency's rationale should compel rejection of the regulation it supports. Finally, the third possibility—the Commission's unusual fealty to its statutory mandate—is similarly unilluminating. If the Guidelines are crafted with unusual legality, why must courts so strain to uphold them?³¹¹

While the aggregate statistics do not prove the Commission's privileged

306. See Tracey L. Meares, *Rewards for Good Behavior: Influencing Prosecutorial Discretion and Conduct with Financial Incentives*, 64 *FORDHAM L. REV.* 851, 879 (1995).

307. See *United States v. Price*, 990 F.2d 1367, 1369 (D.C. Cir. 1993) (noting that if Commission itself were before it, the court might remand for explanation of agency's reasoning); Schuck & Elliott, *supra* note 202, at 1030 (14.4% and 9.3% of reviewed cases resulted in remand to agency in 1984 and 1985, respectively).

308. Indeed, Schuck and Elliott found that the increasing rate of remands in the post-*Chevron* period largely accounted for the decreasing frequency with which courts affirmed agency actions during that period. See Schuck & Elliott, *supra* note 202, at 1040.

309. See *supra* note 236.

310. See *SEC v. Chenery Corp.*, 318 U.S. 80, 93-94 (1943).

311. See *supra* Part III.C.

status, they provide evidence of that status. The numbers suggest a pattern in which the SRA has become a forgotten source of law: seldom invoked and even more seldom prevailing. The law does not compel this result, and I offer an alternative in Part V.

2. “*Specific*” SRA Directives, “*General*” SRA Directives, and “*External*” Statutory Directives

Table 2 compares the success of the three types of statutory challenges described in Part III.B.1. It suggests courts’ particular reluctance to enforce the SRA’s broader mandates. Challenges predicated upon specific statutory commands prevailed nearly four times more frequently than those founded upon general statutory commands—20.2% to 5.2%. Searching ten years of available case law, I found only six successful “general SRA” challenges.³¹² Of these six cases, only one remains good law today.³¹³ Meanwhile, challenges based upon “external” statutes succeeded in 16.9% of cases. Because most “external” statutes are specific, this result is not surprising.

312. See *United States v. Davern*, 937 F.2d 1041, 1043–47 (6th Cir. 1991) (Guidelines’ application instructions violate Congress’s directives to sentencing judges), *vacated*, 970 F.2d 1490 (6th Cir. 1992) (en banc); *United States v. Galloway*, 943 F.2d 897, 903–04 (8th Cir. 1991) (Relevant conduct guideline violates, *inter alia*, statutory directive to “avoid unwarranted sentence disparities among defendants with similar records *who have been found guilty of similar criminal conduct.*”), *vacated*, 976 F.2d 414 (8th Cir. 1992) (en banc); *United States v. Lee*, 887 F.2d 888, 890–92 (8th Cir. 1989) (Guideline prescribing sentence for failure to appear violated Commission’s statutory obligations to consider all relevant aggravating or mitigating circumstances, to provide “certainty and fairness” in sentencing, and to avoid “unwarranted sentencing disparities.”); *United States v. Polanco*, 866 F. Supp. 744, 746–47 (S.D.N.Y. 1994) (As applied to particular defendant and subsidiary to equal protection and due process argument, guideline defining aggravated felony violated Commission’s obligation to treat similar cases similarly and to provide fairness in meeting the purposes of sentencing), *vacated*, 47 F.3d 516 (2d Cir. 1995); *United States v. Spencer*, 817 F. Supp. 176, 182 (D.D.C. 1993) (Subsidiary to due process and Eighth Amendment argument, Guidelines’ application instructions violate congressional requirement that sentencer consider “the nature and circumstances of the offense and the history and characteristics of the defendant.”), *modified*, 25 F.3d 1105 (D.C. Cir. 1994); *United States v. Carroll*, 798 F. Supp. 291, 293–95 (D. Md. 1992) (Cross-reference to GUIDELINES § 2K2.1(c) exceeds Commission’s general statutory authority, which reaches only violations of *federal* law), *vacated*, 3 F.3d 98 (4th Cir. 1993).

313. See *Lee*, 887 F.2d 888. See also *supra* Part III.C.

	Specific SRA Directive (N=114)			General SRA Directive (N=116)			External Statute (N=77)		
	Observed Frequency	Expected Frequency	$(O-E)^2$ E	Observed Frequency	Expected Frequency	$(O-E)^2$ E	Observed Frequency	Expected Frequency	$(O-E)^2$ E
Challenge Succeeds N=42	23 (20.2%)	15.4 (13.5%)	3.75	6 (5.2%)	15.7 (13.5%)	5.99	13 (16.9%)	10.4 (13.5%)	0.65
Challenge Fails N=270	91 (79.8%)	98.6 (86.5%)	0.59	110 (94.8%)	100.3 (86.5%)	0.94	64 (83.1%)	66.6 (86.5%)	0.10
$\chi^2 = \sum (O-E)^2/E = 12.02$ With d.f.=2, p. 0.003 (calculation omits consideration of five cases for which statutory basis of challenge was classified as “other/unspecified”)									
NOTE: Of 312 total challenges, 42 (13.5%) succeeded and 270 (86.5%) failed.									

Table 2 demonstrates a statistically significant relationship between the success of a challenge and its statutory source. Of the 312 challenges studied, 42 (13.5%) succeeded while 270 (86.5%) failed. The “independence” hypothesis posits that these percentages should remain constant across types of statutory challenges. Thus, we would expect success in 13.5% of “specific” challenges (15.4 out of 114), 13.5% of “general” challenges (15.7 out of 116), and 13.5% of “external” challenges (10.4 of 77). A chi-square test compares the independence hypothesis with the observed data. When the differences between observed and expected data are large enough, we reject the independence hypothesis. Table 2 permits such a rejection with 99.7% certainty.³¹⁴

If the SRA is indeed a forgotten source of law,³¹⁵ its broader mandates most fit that description. By itself, Table 2 does not explain why this is so. “General” SRA provisions are inherently more ambiguous than “specific” ones.³¹⁶ For instance, what are “certainty and fairness in . . . sentencing?”³¹⁷ The SRA’s general dictates present a second difficulty—they often conflict with one another. How, for example, should we reconcile the mandates of

314. For a more detailed description of chi-square tests for independence, see RONALD E. WALPOLE & RAYMOND H. MYERS, *PROBABILITY AND STATISTICS FOR ENGINEERS AND SCIENTISTS* 343-48 (4th ed. 1989).

315. See Weich, *supra* note 9, at 239.

316. Indeed, *Chevron*’s progeny assumes that statutory ambiguity itself manifests Congress’s intent to vest the interpretive task with the agency. See *Smiley v. Citibank (South Dakota)*, N.A., 517 U.S. 735, 740-41 (1996).

317. 28 U.S.C. § 991(b)(1)(B) (1994).

non-disparity,³¹⁸ which requires that similar offenses and offenders receive similar treatment, and proportionality,³¹⁹ which requires that the punishment fit the crime, often by accounting for relevant differences between otherwise similar offenders?³²⁰ Judicial review of the Guidelines might yield perverse results since *any* Guidelines provision arguably violates at least *some* broad statutory command. Because concepts like “unwarranted sentencing disparity” vary from judge to judge, aggressive judicial review threatens the guideline system itself. In essence, one’s sentence could depend upon the judge’s sentencing philosophy rather than the offense’s and offender’s characteristics as considered relevant by the Commission pursuant to Congress’s express delegation.³²¹

Table 2’s result should therefore not surprise us. Even so, the failure of “general SRA” challenges is remarkable; ninety-five percent of such challenges failed, and all but one of the cases that enforced “general commands” were later reversed or otherwise vacated.³²² Although the SRA’s commands are difficult to define and dangerous to enforce, the Commission should not have the last word as to their meaning.³²³ Lax judicial review renders Congress’s broader dictates virtually unenforceable, threatens the assumption that Congress’s commands have meaningful limitations,³²⁴ and privileges the Commission above other agencies, that labor under similarly broad delegations,³²⁵ without a principled basis for doing so. In an era marked by courts’ unwillingness to cede the task of saying “what the law

318. *See id.* § 994(f).

319. *See* 18 U.S.C. § 3553(a)(2)(A) (1994) (sentence should reflect seriousness of offense, promote respect for law, and provide “just punishment” for offense); 28 U.S.C. § 991(b)(1)(A) (1994) (referencing purposes of sentencing listed in 18 U.S.C. § 3553(a)(2)).

320. *See* GUIDELINES Ch. 1, Pt. A, policy statement (g) (1998); Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1, 13 (1988); STITH & CABRANES, *supra* note 14, at 52-53 (SRA’s four purposes of sentencing often in tension).

321. *See* S. REP. NO.98-225, at 161 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3344 (“Each sentence will be the result of careful consideration of the particular characteristics of the offense and the offender, rather than being dependent on the identity of the sentencing judge and the nature of his sentencing philosophy.”).

322. *See supra* note 312. Even the one exception, *United States v. Lee*, 887 F.2d 888 (8th Cir. 1989), is no longer good law for the narrow proposition that GUIDELINES § 2J1.6 violates the SRA, because the Commission subsequently amended section 2J1.6. The Eighth Circuit later held that the Commission’s amendment “adequately addressed” *Lee*’s objections. *See United States v. Marion*, 977 F.2d 1284, 1289 (8th Cir. 1992).

323. *See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 n.9 (1984) (“The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent.”).

324. *See infra* Part III.E. *See also* *Mistretta v. United States*, 488 U.S. 361, 371-79 (1989) (rejecting argument that SRA violates nondelegation doctrine).

325. *See supra* note 236.

is,³²⁶ the judiciary’s refusal to enforce the SRA’s broad mandates is at best an anomaly and at worst an abdication. We should accept neither.

3. *Challenges of Guidelines, Commentary, and Policy Statements*

Table 3 shows that parties challenging particular guidelines rarely succeed. Challenges directed against particular commentary items succeeded nearly five times more frequently (34.2%) than challenges of guidelines (7.1%). Those challenging policy statements succeed at nearly double the rate (12.5%) of guideline challenges. Finally, challenges directed against the Guidelines in general failed with near-uniformity.³²⁷ These differences are statistically significant. Not surprisingly, a challenge’s success partly depends upon the type of provision being challenged.

	Type of Guidelines Provision Involved				
	Aggregate Results	Specific Guideline	Guidelines in General	Commentary/ Application Note	Policy Statement
TOTALS	312	156	53	79	24
Challenge Succeeds	42 (13.5%)	11 (7.1%)	1 (1.9%)	27 (34.2%)	3 (12.5%)
Challenge Fails	270 (86.5%)	145 (92.9%)	52 (98.1%)	52 (65.8%)	21 (87.5%)
$\chi^2=32.88^{328}$. With d.f.=2, $p<0.001$					

These results might reflect Congress’s “approval” of actual guidelines.³²⁹ Unlike guidelines, commentary and policy statements need not be submitted to Congress. Instead, they become effective whenever the Commission

326. See *supra* Part III.A.

327. Such challenges include arguments against the Guidelines’ general harshness and inflexibility. See, e.g., *United States v. Fairman*, 947 F.2d 1479, 1481-82 (11th Cir. 1991) (rejecting challenge based upon “no limitation on information” provision of 18 U.S.C. § 3661).

328. The chi-square test is not appropriate unless each expected frequency is at least equal to five. See Walpole & Myers, *supra* note 314, at 341. Here, the independence hypothesis assumes that 13.5% of policy statement challenges will succeed; with only 24 such challenges, we would expect 3.24 successes. Because this value is less than five, I consolidated the last two columns for purposes of the statistical test. As a result, I used two rather than three degrees of freedom. By consolidating the two rightmost columns, I have grouped policy statements and commentary together. Although different in important respects—policy statements are presumptively non-binding when not interpreting a guideline—neither is submitted to Congress and neither undergoes the “notice and comment” procedures of 28 U.S.C. § 994(x) (1994).

329. See, e.g., *United States v. Munoz-Realpe*, 21 F.3d 375, 377 (11th Cir. 1994).

designates them as such, and need not survive 180 days of Congressional inaction. As I have explained elsewhere,³³⁰ Congress does not “approve” guidelines in any meaningful sense. Congress may of course “disapprove” any guideline through a statutory enactment,³³¹ and may could invalidate commentary or policy statements in the same manner. However, this is no different from its power to nullify any legislative rule of any administrative agency. To infer statutory fealty from Congressional inaction is to exempt the Sentencing Commission from the administrative law principles that bring political accountability to all agencies.³³² Perhaps more importantly, relatively few courts discuss the “approval” process explicitly. Courts afford the Commission wide deference without explaining why they are doing so.

4. Formal Judicial Deference Accorded the Commission During Challenges to the Guidelines

In practice, courts defer broadly to the Commission’s interpretation of the SRA. While sweeping, this deference usually lacks doctrinal formulation. Courts rebuff challenges without specifying what deference, if any, the Commission is due. Table 4 identifies three surprising results.

330. *See supra* note 223.

331. 28 U.S.C. § 994(p) (1994). Although commentary and policy statements need not survive 180 days of Congressional inaction, nothing prevents Congress from invalidating commentary and policy statements by statute.

332. *See* *United States v. Galloway*, 976 F.2d 414, 435 (8th Cir. 1992) (en banc) (Beam, J., dissenting) (“Statutes are not considered, passed, amended, revoked or interpreted by the inaction of Congress. Further, it is not for the Congress to interpret a duly enacted law; it is, as in this instance, a matter for the court.”).

	Type of Deference Applied By Court				
	Aggregate Results	<i>Chevron</i> Deference	Deference Similar to <i>Chevron</i>	Question of Deference Reserved	No Deference Level Discussed
TOTALS	312	22	9	7	274
Challenge succeeds	42 (13.5%)	4 (18.2%)	0	5 (71.4%)	33 (12.0%)
Challenge Fails	270 (86.5%)	18 (81.8%)	9 (100%)	2 (28.6%)	241 (88.0%)

NOTE: Statistical significance not tested because expected values not sufficiently high in all cells.³³³

First, courts explicitly discussed the deference issue in only thirty-eight of the 312 challenges studied. Courts applied the *Chevron* standard to the Commission in twenty-two instances, a similar formulation, without explicit reference to *Chevron*, in nine cases,³³⁴ and reserved the deference question in seven other cases.³³⁵ In 274 of 312 challenges (88%), courts failed to discuss what type of deference might apply.³³⁶ Administrative law is mysteriously absent when the Guidelines are challenged.³³⁷

Second, those courts purporting to defer to the Commission were no more likely to uphold challenged Guidelines provisions. Of thirty-one courts applying *Chevron* or similar deference, twenty-seven (or 87.8%) upheld the Commission’s view, compared to 88% of courts not discussing the deference issue.³³⁸

333. See WALPOLE & MYERS, *supra* note 314, at 341.

334. See, e.g., *United States v. Consuegra*, 22 F.3d 788, 789 (8th Cir. 1994) (court must uphold Commission’s interpretation as long as it is “‘sufficiently reasonable’ in light of the congressional directive”) (quoting *United States v. Marion*, 977 F.2d 1284, 1289 (8th Cir. 1992)).

335. Courts reserving the question generally decline to decide whether *Chevron* applies to the Commission, then address the challenge on a “plain meaning” basis. See, e.g., *United States v. Labonte*, 520 U.S. 751, 762 n.6 (1997).

336. In thirteen of these 274 challenges, courts included language implying, but not specifying, broad deference. For instance, several courts rejected challenges while remarking generally upon the “broad” discretion Congress conferred upon the Commission. See, e.g., *United States v. White*, 869 F.2d 822, 827 (5th Cir. 1989) (noting Commission’s broad discretion with respect to treatment of probation).

337. By comparison, the Supreme Court applied the *Chevron* framework in 32 of 90 cases presenting a “deference question” between 1984 and 1990. See Merrill, *supra* note 189, at 981.

338. By contrast, Merrill’s study of the Supreme Court’s behavior showed a negative association

Third, courts that even troubled to *discuss* the deference issue were more likely to strike challenged guidelines. Specifically, nine of thirty-eight challenges succeeded in cases where courts explicitly discussed the deference issue (24%). In comparison, only 13.5% of all challenges studied, as well as 12% of those challenges in which courts did not discuss the deference issue, succeeded. Thus, courts professing *awareness* of the deference issue (*i.e.*, those courts that correctly view statutory challenges within *some* administrative law framework) were twice as likely to strike challenged Guidelines provisions as courts not discussing the issue. The Commission's exemption from much of administrative law is therefore not without consequence. It is, however, without justification.

E. The Nondelegation Problem, Phase Two: A Further Shortcoming of Current Judicial Review of the Guidelines

Thus far, I have attempted to demonstrate that the courts have generally refused to hold the Commission to its statutory mandates. Particularly, they have refused to enforce the SRA's more general commands. Whatever the dangers of broad SRA enforcement,³³⁹ its absence calls into question whether any congressional authority meaningfully binds the Commission. If the Commission operates free of any statutory moorings, then it is indeed a "junior-varsity Congress"³⁴⁰ whose creation exceeds Congress's authority to delegate legislative power.

In *Mistretta v. United States*,³⁴¹ the Supreme Court rejected the argument that the SRA delegated excessive legislative authority to the Commission. This was no surprise, for courts generally disfavor the nondelegation doctrine.³⁴² The nondelegation doctrine imposes two types of restrictions

between the application of *Chevron* and deference to agencies. See Merrill, *supra* note 189, at 984. From 1984 to 1990, the Court accepted the agency's view in 70% of cases involving a deference question, as compared to only 59% of deference cases in which the *Chevron* framework was applied. *Id.* at 981.

339. See *supra* notes 316-20 and accompanying text.

340. See *Mistretta v. United States*, 488 U.S. 361, 427 (1989) (Scalia, J., dissenting).

341. 488 U.S. 361 (1989).

342. Since 1935, the court has invalidated only two statutes on delegation grounds. See *id.* at 373; *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Panama Ref. Co. v. Ryan*, 293 U.S. 388 (1935). Nevertheless, delegation concerns have led courts to construe statutes more narrowly than they might otherwise. See *Industrial Union Dep't v. American Petroleum Inst. (Benzene)*, 448 U.S. 607 (1988); *National Cable Television Ass'n (NCTA) v. United States*, 415 U.S. 336, 342 (1974). In *Benzene*, a plurality narrowly construed part of the Occupational Safety and Health Act, 29 U.S.C. § 655(b)(5), so as to avoid questions of excessive delegation. 448 U.S. at 646. In his concurring opinion, Justice Rehnquist urged the section's invalidation on delegation grounds. See *id.* at 685-88 (Rehnquist, C.J., concurring). *NCTA* reached a similarly narrow reading of the Independent Officers Appropriation Act. See 415 U.S. at 342-43. In short, reports of the delegation doctrine's demise are

upon Congress’ power to delegate its legislative authority. The first is specificity. So long as Congress furnishes an “intelligible principle” to guide the agency’s decisionmaking, it has not excessively delegated legislative authority.³⁴³ A second requirement concerns measurability. Under this requirement, Congress runs afoul of the doctrine if its delegation so lacks standards “that it would be impossible in a proper proceeding to ascertain whether the will of Congress has been obeyed.”³⁴⁴

Mistretta assured us that the SRA met both requirements.³⁴⁵ The statute’s directives were “sufficiently specific and detailed to meet constitutional requirements.”³⁴⁶ These ranged from general directives (*e.g.*, meeting the statutory goals of sentencing, reducing unwarranted sentence disparities, reflecting relevant “advancement in knowledge of human behavior”) to more specific directives (*e.g.*, the twenty-five percent rule, enhanced sentences for certain repeat offenders, incarcerative sentences for violent crimes resulting in bodily injury.)³⁴⁷ The SRA’s directives comported with both the “specificity” and “measurability” principles, and the court upheld the Act.

However, subsequent case law applying the Guidelines creates tension with the “specificity” and “measurability” found by the court in *Mistretta*.³⁴⁸ Perhaps the SRA was sufficiently “specific” when the Supreme Court addressed the matter. But today, courts refuse to enforce the SRA’s broad dictates, precisely *because* of their breadth.³⁴⁹ When no court will enforce a delegation, perhaps the delegation loses specificity.³⁵⁰

The Constitution is not violated by broad delegations such as “reducing

exaggerated.

343. See *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928).

344. See *Yakus v. United States*, 321 U.S. 414, 426 (1944); *Mistretta*, 488 U.S. at 379.

345. See *Mistretta*, 488 U.S. at 372-73.

346. *Id.* at 374.

347. See *id.* at 374-77.

348. At least two courts have hinted at such a tension. See *United States v. Denardi*, 892 F.2d 269, 276-77 (3d Cir. 1989) (Becker, J., dissenting) (arguing that refusal to enforce § 3553(a) belies *Mistretta*’s assurance that SRA doesn’t violate nondelegation doctrine); see also *United States v. Hunter*, 982 F. Supp. 541, 548 (N.D. Ill. 1997) (noting that *Mistretta* permitted delegation because Commission’s obedience to Congress’s wishes is mandatory). See also Wright, *supra* note 218, at 28 and n. 124 (although courts have retreated from delegation doctrine, concerns that underlie delegation doctrine lead courts to construe statutes so as to limit agency discretion and to make agency actions more reviewable); Samuel J. Buffone, *Control of Arbitrary Sentencing Guidelines: Is Administrative Law the Answer?*, 4 FED. SENT. REP. 137, 137 (1991) (“*Mistretta* can be viewed as an invitation to apply traditional administrative law concepts to judge the ongoing work of the Commission within the broad parameters of its delegated power.”).

349. See *supra* Part III.D.2.

350. See Harold H. Bruff, *Legislative Formality, Administrative Rationality*, 63 TEX. L. REV. 207, 236-37 (1984) (rather than enforcing the delegation doctrine, courts infer and enforce substantive standards from statutes, reading statutes to avoid constitutional questions).

unwarranted sentence disparity,³⁵¹ avoiding unreasonable increases in the prison population,³⁵² or assuring the “general appropriateness” of non-incarcerative sentences for first-time non-violent offenders.³⁵³ But what if these broad commands are not given content? How are we to assess the Commission’s performance of its statutory mandates? Ultimately, courts applying the Guidelines have turned the “measurability” principle on its head. They have abjured the very task of measurement: “If *any* provision of the Sentencing Reform Act, reasonably interpreted, would support the guideline, we must sustain it.”³⁵⁴

When courts allow the Commission to decide *which* statutory commands it will heed, the agency has lost its moorings. Free to follow its own will rather than Congress’s,³⁵⁵ the Commission is an anomaly in the modern administrative state. Its unique status flaunts the SRA and belies *Mistretta*’s assurances. The truth of those assurances depends upon the courts themselves, for it is they who must assure that Congress’s directives are given meaning.

F. *United States v. Lee*³⁵⁶: *A Model of Meaningful Statutory Review*

Part III has described and criticized the judiciary’s lax review of the Guidelines. Most courts have given short shrift to the SRA, have allowed the Commission to chart its own course rather than that dictated by Congress, and have silently called the Commission’s constitutionality into question. By contrast, the Eighth Circuit’s opinion in *Lee* exemplifies the modest solution that I endorse: courts should measure the Commission’s legislative rules for fealty to their enabling legislation, just as they do the regulations promulgated by other agencies. To date, *Lee* represents the judiciary’s most far-reaching effort to enforce the SRA’s broad mandates. It also suggests that judicial review can improve the Guidelines by encouraging a dialogue between the Commission and the courts.

Sharon Kay Lee was convicted of distributing methamphetamine and sentenced to eighteen months in prison.³⁵⁷ She later failed to report for

351. 28 U.S.C. § 994(f) (1994).

352. *See id.* § 994(g).

353. *See id.* § 994(j).

354. *United States v. Johnson*, 28 F.3d 151, 153 (D.C. Cir. 1994) (emphasis added).

355. *See United States v. Davern*, 970 F.2d 1490, 1503 (6th Cir. 1992) (en banc) (Merritt, J., dissenting).

356. 887 F.2d 888 (8th Cir. 1989).

357. *See id.* at 889.

service of her sentence.³⁵⁸ Under Guidelines section 2J1.6(a),³⁵⁹ Lee ultimately received an additional eighteen month sentence for her failure to appear.³⁶⁰ As applied to Lee, section 2J1.6 presented two anomalies. First, the applicable guideline failed to differentiate a defendant's failure to appear for service of a *sentence* from a failure to appear for trial or *sentencing*.³⁶¹ Those who fail to appear for trial do not know what sentence they will eventually face and indeed might receive the statutory maximum for the underlying offense.³⁶² Those previously sentenced for the underlying offense, by contrast, face no such uncertainty.³⁶³ Second, for those defendants already sentenced for the underlying offense, the sentence for failure to appear depended upon the statutory maximum for the underlying offense rather than the sentence actually imposed for that offense.³⁶⁴ While Lee received an eighteen month sentence for her drug offense, the statutory maximum exceeded fifteen years.³⁶⁵ Guidelines section 2J1.6 predicated her failure-to-appear sentence upon the latter.³⁶⁶ Section 2J1.6 therefore ignored "the significant difference . . . between failing to report for trial or sentencing, when a real possibility exists that the maximum sentence will be imposed, and failing to report for service after sentencing where the sentence to be served is but a fraction of the maximum."³⁶⁷

The *Lee* court found section 2J1.6 inconsistent with several SRA provisions.³⁶⁸ The court interpreted 28 U.S.C. § 994³⁶⁹ to require the Commission to consider "all relevant circumstances . . . which mitigate or aggravate the seriousness of the offense."³⁷⁰ By ignoring the difference between failing to appear for service of a sentence and failing to appear for trial or *imposition* of a sentence, the Commission ignored a relevant

358. *See id.*

359. The Commission amended § 2J1.6 in 1990. *See* GUIDELINES App. C, Am. 329 (1997). Throughout the discussion of *Lee*, "§ 2J1.6" refers to the "failure to appear" guideline as it operated when Lee was sentenced.

360. *See* 887 F.2d at 889. Lee had a base offense level of 15, received a two level "acceptance of responsibility" reduction, and thus faced a guideline range of 18 to 24 months. *Id.*

361. *See id.* at 892.

362. *See id.* at 891.

363. *See id.* The court found this difference "particularly relevant" for Lee, who received a sentence substantially below the statutory maximum. *Id.*

364. *See id.*

365. *See id.* at 889.

366. *See id.*

367. *Id.* at 892.

368. The court relied both upon the SRA's directives to the Commission (28 U.S.C. §§ 991, 994) and judges (18 U.S.C. § 3553). *See* 887 F.2d at 890-91.

369. Particularly section 994(c). *See id.* at 890 n.5.

370. *Id.* at 891.

mitigating circumstance.³⁷¹ Second, the “fail[ure] to consider this significant circumstance” violated the Commission’s obligation to provide “certainty and fairness in sentencing” under section 991(b)(1)(B).³⁷² Third, this same failure contravened the Commission’s obligation to avoid “unwarranted sentencing disparities.”³⁷³ Section 2J1.6 was therefore not in “sufficiently reasonable compliance with the statutory mandate.”³⁷⁴ The Lee court remanded the case for a “reasonable” sentence as if no guideline applied to the offense.³⁷⁵

Might *Lee*’s strong medicine kill the patient?³⁷⁶ Whatever the dangers of aggressive judicial review,³⁷⁷ *Lee* does not appear to have created them.³⁷⁸ First, the court’s searching scrutiny of the Guidelines in light of the SRA’s broad commands is hardly unique in the post-*Chevron* era.³⁷⁹ More importantly, however, *Lee* invited the Commission to make the challenged guideline more reasonable, and the Commission may have accepted the invitation. Shortly after *Lee*, the Commission amended section 2J1.6. The Guidelines now differentiate one’s failure to appear for service of a previously-imposed sentence from one’s failure to appear for earlier criminal proceedings.³⁸⁰ Under the amended section 2J1.6, Lee would face a guideline range of four to ten months imprisonment rather than the eighteen to twenty-four months she originally faced.³⁸¹ By comparison, Lee today would face a guideline range of twelve to eighteen months had she absconded at any point

371. *See id.*

372. *See id.*

373. *See id.* at 892.

374. *Id.* at 891. Because the court “must reject administrative constructions which are contrary to clear Congressional intent,” *Lee* invalidated GUIDELINES § 2J1.6. *Id.* at 892 (citing *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843 n.9 (1984)).

375. *Id.* at 892-93. *See also* 18 U.S.C. § 3553(b) (1994) (directing sentencing procedure when no guideline applies); GUIDELINES § 2X5.1 (1997) (same).

376. *See Weich, supra* note 9, at 240 (questioning *Lee*).

377. *See id.* Weich argues that *Lee* “treads on . . . thin ice” by second-guessing the Guidelines based upon the more “subjective sentencing principles” of the SRA. *Id.*

378. As an initial matter, other courts rejected or distinguished *Lee*. For a case explicitly rejecting *Lee*, see *United States v. Harper*, 932 F.2d 1073, 1077 (5th Cir. 1991) (explicitly rejecting *Lee*). For cases distinguishing *Lee* where the defendant failed to appear prior to trial, see *United States v. Kincaid*, 959 F.2d 54, 57-58 (6th Cir. 1992); *United States v. Gardiner*, 955 F.2d 1492, 1498 (11th Cir. 1992); *United States v. Agbai*, 930 F.2d 1447, 1449 (10th Cir. 1991);. *See also* *United States v. Nelson*, 919 F.2d 1381, 1382-84 (9th Cir. 1990) (section 2J1.6 held not to violate SRA for failing to distinguish between defendants who are acquitted of the underlying offense and those who are convicted).

379. *See supra* note 236.

380. *See* GUIDELINES § 2J1.6 (1998).

381. Under § 2J1.6(a)(1) (1998), Lee’s base offense level would be 11. She would then receive a 2-level reduction for acceptance of responsibility. *See* GUIDELINES § 3E1.1 (1998). Assuming Lee’s criminal history category to be I, her guideline range would be 4 to 10 months. *See id.* at ch. 5, pt. A.

before imposition of sentence.³⁸² The Commission's amendment ultimately satisfied the Eighth Circuit. Two years later, the court rebuffed a challenge to the amended section 2J1.6, adding that the Commission had "adequately addressed *Lee's* concerns."³⁸³

The Commission itself appears to have embraced *Lee*. Unfortunately, we don't know whether *Lee* actually inspired the Guidelines amendment. The Commission's explanation is perfunctory at best: "This amendment provides greater differentiation in the guideline offense levels for the various types of conduct covered by this guideline."³⁸⁴ Because the Commission need not fully explain its reasoning,³⁸⁵ the process of collaboration between the courts and the Commission is incomplete. *Lee* nevertheless represents a promising first step in that dialogue.

IV. DEPARTURE AS A MEANS OF JUDICIAL REVIEW

Judicial review of the sort undertaken by *Lee* is exceedingly rare. Parties seldom even request it, preferring instead to seek refuge from the Guidelines' harshness through the departure mechanism of 18 U.S.C. § 3553(b). That section permits departure from the guideline range when "there exists an aggravating or mitigating circumstance of a kind, or to a degree, not *adequately taken into consideration* by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described [by the guideline range]."³⁸⁶ This cryptic provision permits at least two interpretations. First, section 3553(b) might countenance departure when the Commission has failed to consider "adequately" that which it *ought* to have considered. This is a normative inquiry. It challenges both the circumstances considered by the Commission and the adequacy of that consideration. A second approach sanctions departure only when a case's facts make the case atypical relative to other cases governed by the same guideline. This is an interpretive and factual inquiry. It assesses the relevant

382. Today's guideline would assign *Lee* a base offense level of 6. See GUIDELINES, § 2J1.6(a)(2) (1998). *Lee* would then receive a 9-level enhancement because her underlying drug crime carried a statutory maximum exceeding 15 years. See *id.* § 2J1.6(b)(2)(A) (1998). After a 2-level reduction for acceptance of responsibility under § 3E1.1 (1998), *Lee* would have offense level 13 and a guideline range of 12-18 months.

383. *United States v. Marion*, 977 F.2d 1284, 1289 (8th Cir. 1992).

384. GUIDELINES App. C, Am. 329 (1997).

385. See 28 U.S.C. § 994(p) (1994). When amending the Guidelines, the Commission must include a "statement of the reasons therefor." In promulgating Amendment 329, the Commission obviously interpreted this requirement narrowly.

386. 28 U.S.C. § 3553(b) (1994) (emphasis added).

guideline, the “heartland” of cases applicable to it,³⁸⁷ and the facts of the underlying case itself. This second approach does not directly question the Commission’s work. It nevertheless dominates “departure” jurisprudence. Courts have gradually rejected departures as a means to question the Guidelines. Instead, departure jurisprudence only *interprets* the Guidelines.³⁸⁸ As such, departures cannot ensure the Commission’s fealty to its statutory mandate and cannot remedy the shortcomings of the lax judicial review described in Part III.

A. “Normative” Section 3553(b) Departures, the Atypicality Requirement, and All Things “Adequately” Considered

For lack of a better term, I shall call the first approach described above “normative” departures. Although largely rejected today, the approach does not lack statutory justification. The phrase “adequately taken into consideration”³⁸⁹ appears normative at first blush. “Adequate” may mean either “sufficient for a specific requirement” or “lawfully and reasonably sufficient.”³⁹⁰ Moreover, the statute explains how to assess the “adequacy” of the Commission’s consideration: “In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission.”³⁹¹

The court is thus confined to the four corners of the Guidelines Manual. Congress added this limitation in 1987 to protect the Commission from the subpoena power; rather than examining the Commission’s full deliberative process, litigants were confined to its finished product.³⁹² Yet the proviso carries an additional advantage. Far from forbidding judicial inquiry into the “adequacy” of the Commission’s “consideration,” it facilitates such inquiry.

387. See GUIDELINES Ch. 1, Pt. A, policy statement 4(b) (1998).

388. See Stith & Cabranes, *supra* note 66, at 1277. See also STITH & CABRANES, *supra* note 14, at 92-93.

389. 18 U.S.C. § 3553(b) (1994).

390. See WEBSTER’S NINTH NEW COLLEGIATE DICTIONARY 56 (1989).

391. 18 U.S.C. § 3553(b) (1994).

392. See 133 CONG. REC. H10,014, H10,017 (daily ed. Nov. 16, 1987) (statement of Rep. Conyers). Representative Conyers explained the importance of the amendment:

If the adequacy of the Sentencing Commission’s deliberative process is the determining factor, then testimony, from members of the Sentencing Commission, and its records, would be relevant to a court’s determination of whether to depart under section 3553(b). The Sentencing Commission is concerned at that prospect, fearing that its members and records will be frequently subpoenaed.

Id. Rep. Conyers’ statement assumes that *courts* will assess the adequacy of the Commission’s consideration. The statute’s language simplifies the assessment.

Judges and parties alike need only refer to the Guidelines Manual itself. Congress arguably placed upon the Commission the onus of establishing “adequacy of consideration”; to carry its burden, the Commission need only include sufficient documentation in the Manual.³⁹³ Confined to the Guidelines Manual, courts reviewing the “adequacy of consideration” need not review multi-thousand page records that are common in administrative law cases. Yet, despite the relative simplicity of reviewing the Commission’s “adequacy of consideration,” few courts have undertaken the task.³⁹⁴

The Guidelines’ controversial treatment of crack cocaine offenses provided a fertile battleground for the “normative” departure power. The “Drug Quantity Table” equates one gram of crack cocaine with 100 grams of powder cocaine.³⁹⁵ By singling out crack cocaine for harsh treatment, the Guidelines disproportionately punished African-American defendants.³⁹⁶ Recognizing the Guidelines’ disproportionate racial impact, the Commission attempted to equate the guideline sentences for crack and cocaine by amending the relevant guideline. Congress rejected this attempt.³⁹⁷

After Congress acted, several defendants nevertheless sought departure from Guidelines section 2D1.1’s harsh treatment of crack offenses. They argued that the Commission’s attempt to change its policy arguably demonstrated its original failure to “adequately consider” the policy’s racial disparities. This argument failed.³⁹⁸ Because the argument sought departure based upon the Commission’s failure—a failure relevant in *all* crack cases—rather than a defendant or crime’s unusual circumstances, the courts rejected it.³⁹⁹

393. See Miller & Freed, *supra* note 76, at 236-37.

394. See Freed, *supra* note 12, at 1753 (noting that appellate courts have not required Commission to demonstrate adequacy of consideration in Guidelines Manual).

395. See GUIDELINES § 2D1.1 (1998).

396. In Fiscal Year 1996, African-Americans represented 85.8 percent of defendants sentenced for federal crack cocaine offenses. See UNITED STATES SENTENCING COMM’N, 1996 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 47 (1996).

397. See Pub. L. No. 104-38, §§ 1, 2(a)(1)(A); H.R. REP. NO. 104-272, at 4 (1995), reprinted in 1995 U.S.C.C.A.N. 335, 337. Congress rejected the Commission’s proposed 1-to-1 powder to crack cocaine ratio, but, recognizing that 100-to-1 might not be appropriate, ordered the Commission to consider other ratios. 1995 U.S.C.C.A.N. at 337.

398. See *United States v. Gaines*, 122 F.3d 324, 329-30 (6th Cir. 1997); *United States v. Jackson*, 103 F.3d 561, 572-73 (7th Cir. 1996); *United States v. Canales*, 91 F.3d 363, 369 (2d Cir. 1996); *United States v. Lewis*, 90 F.3d 302, 304-06 (8th Cir. 1996); *United States v. Ambers*, 85 F.3d 173, 177 (4th Cir. 1996); *United States v. Fike*, 82 F.3d 1315, 1326 (5th Cir. 1996) (departure not warranted where defendants advanced no theory distinguishing their cases from “heartland” of crack offenses); *United States v. Alton*, 60 F.3d 1065, 1069-70 (3d Cir. 1995); *United States v. Bynum*, 3 F.3d 769, 774-75 (4th Cir. 1993).

399. See, e.g., *Alton*, 60 F.3d at 1070; *Ambers*, 85 F.3d at 177 (refusing to grant departure because proposed revision does not demonstrate that Commission inadequately considered existing policy, and

The crack cases exemplify the most significant restraint upon “normative” departures: the atypicality requirement. In effect, this requirement eviscerates the “normative” departure power. It countenances departure only when unique offense or offender characteristics remove a case from the “heartland” of cases covered by a particular guideline.⁴⁰⁰ Therefore, a guideline—no matter how ill-considered or otherwise misguided—must be followed unless a case presents unusual facts.⁴⁰¹ Courts cannot use the section 3553(b) departure mechanism to second-guess the Commission’s work.⁴⁰²

The atypicality requirement is not compelled by statute,⁴⁰³ and its origins may lie with the Commission itself. The Guidelines Manual first defines each guideline as “carving out a ?heartland,?? or a “set of typical cases” described by each guideline.⁴⁰⁴ In an “atypical” case, a court *may* consider whether to depart, provided that the defendant’s conduct “significantly differs from the norm.”⁴⁰⁵ The Guidelines’ catch-all departure mechanism⁴⁰⁶ further clarifies the issue. The official commentary interpreting Guidelines section 5K2.0 provides:

In the absence of a characteristic or circumstance that distinguishes a case as sufficiently atypical to warrant a sentence different from that called for under the guidelines, a sentence outside the guideline range is not authorized. For example, dissatisfaction with the available sentencing range or a preference for a different sentence than that authorized by the guidelines is not an appropriate basis for a sentence outside the applicable guideline range.⁴⁰⁷

issue of disparate racial impact is “broad” and “does not involve the sort of individual, case-specific mitigating circumstance justifying a departure under 18 U.S.C. § 3553(b)”.

400. *See, e.g., Canales*, 91 F.3d at 369-70; *United States v. Godfrey*, 22 F.3d 1048, 1058 (11th Cir. 1994); *United States v. Aguilar-Pena*, 887 F.2d 347, 350-51 (1st Cir. 1989).

401. *See, e.g., United States v. Weaver*, 126 F.3d 789, 793 (6th Cir. 1997) (if case not atypical, court may not premise departure upon disparity that Sentencing Commission intentionally created); *Canales*, 91 F.3d at 369-70 (departure not warranted despite fact that Commission may have inadequately considered racial impact because case not atypical crack case).

402. *See United States v. Rivera*, 994 F.2d 942, 951 (1st Cir. 1993) (section 3553(b) departure unwarranted if based on a “quintessentially legal” argument). *See also United States v. Wilson*, 114 F.3d 429, 433 (4th Cir. 1997) (“[C]ircumstances within the heartland of conduct encompassed by the applicable guideline are deemed to have been adequately considered by the Commission while conduct falling outside the heartland is not.”); Stith & Cabranes, *supra* note 66, at 1280.

403. *See supra* notes 386-93, and accompanying text.

404. *See* GUIDELINES Ch. 1, Pt. A, policy statement 4(b) (1998).

405. *Id.*

406. *Id.* § 5K2.0 (1998). This provision represents the Commission’s implementation of 18 U.S.C. § 3553(b) (1994).

407. GUIDELINES § 5K2.0, commentary (1998) (internal citation omitted).

The Commission thus shielded itself from second-guessing.

Oddly, the courts have endorsed section 5K2.0 as a reasonable interpretation of the underlying statutory scheme.⁴⁰⁸ This endorsement is anomalous for three reasons. First, the Commission’s commentary interprets not the statute but rather section 5K2.0 itself.⁴⁰⁹ As such, the commentary cannot limit courts’ power to depart outside the scope of section 5K2.0. If 18 U.S.C. § 3553(b) (a statute) confers a broader departure power than section 5K2.0 (a Guidelines provision), the latter cannot represent a court’s full power to depart under circumstances “not adequately considered” by the Commission.⁴¹⁰ Second, to whatever extent the commentary “interprets” section 3553(a)-(b), the interpretation may not be “reasonable.”⁴¹¹ Indeed, section 3553(b) never conditions departure upon *unusual* factual circumstances—only circumstances whose presence or degree were not “adequately considered” by the Commission.⁴¹² The Commission informs us that “atypical” facts are among those circumstances it has not “adequately considered.”⁴¹³ Yet atypical facts need not represent the entire universe of that which the Commission has “inadequately considered.” At the very least, we might question the Commission’s self-serving assessment. Third, such a circumscribed departure mechanism might compel a court to impose a guideline sentence that, as applied, otherwise violates a statute.⁴¹⁴ However misguided it may be, the atypicality requirement is firmly ensconced in departure jurisprudence.

408. See *United States v. Banks*, 130 F.3d 621, 626 (4th Cir. 1997); *United States v. Anderson*, 82 F.3d 436, 439 (D.C. Cir. 1996).

409. See *Williams v. United States*, 503 U.S. 193, 201 (1992) (policy statements limiting power to depart are “authoritative guide[s]” to meaning of Guidelines); *Anderson*, 82 F.3d at 445-46 (Wald, J., dissenting).

410. “When a statute and a guideline conflict, the statute controls.” *United States v. Stoneking*, 60 F.3d 399, 402 (8th Cir. 1995).

411. See 18 U.S.C. § 3553(b) (1994). The statute speaks of “aggravating or mitigating” circumstances but never explicitly mentions atypicality.

412. Legislative history also calls the Commission’s “interpretation” into question. See S. REP. NO. 98-225, at 52 (1984), reprinted in 1984 U.S.C.C.A.N. 3182, 3235 (Judge may either “decide that the guideline recommendation appropriately reflects the offense and offender characteristics and impose sentence according to the guideline recommendation or he may conclude that the guidelines fail to reflect adequately a pertinent aggravating or mitigating circumstance and impose sentence outside the guidelines.”). It is thus *pertinence* and not “atypicality” that guides the inquiry. Pertinence is to be determined by the sentencing judge in accordance with the seven factors specified by Congress, including the four enumerated purposes of sentencing. See 18 U.S.C. § 3553(a) (1994).

413. See GUIDELINES Ch. 1, Pt. A, policy statement 4(b) (1998).

414. See, e.g., *Anderson*, 82 F.3d at 445-47 (Wald, J., dissenting) (court’s use of atypicality requirement to forbid departure from crack guidelines violates § 3553(a), which directs courts to impose sentences “sufficient, but not greater than necessary” to achieve statutory purposes; where Commission itself admits that crack guideline is “greater than necessary,” departure is warranted despite absence of atypicality).

A second limitation restricts the “normative” departure power: the “adequacy” of the Commission’s consideration of a sentencing factor is presumed from the fact of consideration itself.⁴¹⁵ So long as the guidelines, commentary, or policy statements mention a relevant circumstance, the Commission has “considered” it. So long as the Commission has considered it, it has done so “adequately.”⁴¹⁶ For example, a defendant may not argue that the Commission failed to consider “adequately” the fact that his or her previous convictions occurred over ten years ago and his or her criminal history category therefore overstates the defendant’s actual criminal history. Because the Guidelines count offenses committed within the past *fifteen* years, the Commission has already “fully considered” the relevance of ten-year-old convictions.⁴¹⁷ Further, because the Commission has “fully considered” the matter, it has “adequately” considered it as well.⁴¹⁸

Together, the atypicality requirement and the automatic adequacy of considered circumstances hopelessly disable the “normative” departure power. This result is not unintentional. Through it, the Commission ensures its hegemony in the sentencing regime. The courts, meanwhile, fear that departures in “typical” cases will undermine the guideline system itself.⁴¹⁹ This is surprising, for “normative” departures represent a relatively low-cost enforcement mechanism for the Commission’s statutory dictates. When courts depart because of the Commission’s *failure* to consider adequately a relevant aggravating or mitigating circumstance, they deviate from the Guidelines only in a particular case. So predicated, departure is a far less

415. See, e.g., *Anderson*, 82 F.3d at 439 (questioning whether court may find “inadequate” consideration unless Commission “has not officially considered the factor at all”); *United States v. Wong*, 127 F.3d 725, 728 (8th Cir. 1997) (court should not ordinarily depart based on mitigating factors that Sentencing Guidelines have already taken into account); *United States v. Cox*, 921 F.2d 772, 774 (8th Cir. 1990) (because Guidelines already provide mechanism for grouping separate offenses, court may not depart upward based on finding that Guidelines inadequately consider the separate offense; Commission’s consideration and decision forbid departure). See also STITH & CABRANES, *supra* note 14, at 73 (noting Commission’s repeated assertions that “it has plenary authority to decide which grounds for departure are warranted” and which are not); Freed, *supra* note 12, at 1753; Stith & Cabranes, *supra* note 66, at 1277.

416. Like the atypicality requirement, this restriction upon the departure power might have originated with the Sentencing Commission itself. See GUIDELINES ch. 1, pt. A policy statement 4(b) (1989) (“[i]n principle, the Commission, by specifying that it had adequately considered a particular factor, could prevent a court from using it as grounds for departure.”). The Commission has since altered section 1A.4(b) but not its position. See *id.* Amend. 307 (1998); STITH & CABRANES, *supra* note 14, at 73.

417. See *United States v. LaSalle*, 948 F.2d 215, 217-18 (6th Cir. 1991) (Because criminal history category under GUIDELINES § 4A1.2(e) includes offenses committed within past fifteen years, court may not depart based on fact that previous convictions were older than ten years; Commission “fully considered” the effect that age of past crimes had upon future sentences).

418. See *id.*

419. See, e.g., *United States v. Williams*, 891 F.2d 962, 964 (1st Cir. 1989).

drastic measure than wholesale guideline invalidation. Given courts’ hesitancy to strike Guidelines based on the SRA,⁴²⁰ one might expect wider acceptance of “normative” departures. If guideline invalidation is unacceptably strong medicine, departures represent a milder approach. But the courts have abandoned even mild enforcement of the Commission’s statutory moorings.

B. “Non-Normative” Section 3553(b) Departures and the Impact of Koon⁴²¹

“Not adequately considered” takes on a far narrower meaning within the context of “non-normative” departures. Such departures are fact-based and depend upon guideline *interpretation*: a court must assess the universe of cases to which a guideline applies and compare that set of cases to the facts of the underlying case.⁴²² Where unusual aggravating or mitigating circumstances render the case sufficiently atypical, departure is warranted, but not required.

There are thousands of “non-normative” departure cases. The Third Circuit’s opinion in *United States v. Marin-Castaneda*⁴²³ illustrates the judicial inquiry that typically surrounds requests for “non-normative” departures. Marin-Castaneda pleaded guilty to importing 1,127 grams of heroin into the United States, including 90 heroin pellets that he ingested⁴²⁴—a common but dangerous means of smuggling the drug. As a result of ingesting the pellets, Marin-Castaneda was hospitalized for eleven days.⁴²⁵ Facing a sentencing range of fifty-seven to seventy-one months’

420. See generally *supra* Parts III.C-D.

421. Koon v. United States, 518 U.S. 81 (1996).

422. See, e.g., *United States v. Kraig*, 99 F.3d 1361, 1371 (6th Cir. 1996) (no abuse of discretion where sentencing court refused to grant downward departure to attorney who, believing government was “out to get” client, assisted in client’s tax fraud, because facts did not make case sufficiently unusual in comparison to other cases of conspiracy to conceal client assets from IRS); *United States v. Rybicki*, 96 F.3d 754, 759 (4th Cir. 1996) (refusing to permit departure on basis that defendant did not commit “serious fraud” in that crime directly harmed no one because Commission considered this factor in drafting applicable fraud guideline); *United States v. Dyce*, 91 F.3d 1462, 1467 (D.C. Cir. 1996) (holding that defendant’s status as single mother with three children under four years old, fact that youngest child was still being breast-fed, and assertion that mother’s incarceration would require placing children into foster home did not place case outside heartland of cases in which family responsibilities are not relevant and thus, did not warrant downward departure); *United States v. Holland*, 22 F.3d 1040, 1047 (11th Cir. 1994) (refusing to find commission of perjury in a civil suit “unusual” and thus meriting departure, even though vast majority of perjury convictions arise in criminal proceedings).

423. 134 F.3d 551 (3d Cir. 1998).

424. See *id.* at 553.

425. See *id.*

imprisonment, he argued for a downward departure on several grounds, including the medical ordeal that followed his heroin ingestion.⁴²⁶

Perhaps understandably, the district court and the Third Circuit were unmoved, and Marin-Castaneda's fifty-seven month sentence was affirmed.⁴²⁷ Yet, the court's rationale is more telling than the result it reached. Departure would be inappropriate, the court reasoned, because Marin-Castaneda's offense was not outside the "'heartland' [of] cases covered by the guidelines."⁴²⁸ Specifically, the physical trauma suffered by the defendant is "inherent in smuggling drugs in this manner."⁴²⁹

The approach taken in *Marin-Castaneda* (and countless cases like it) is problematic. First, the court pigeonholed the departure inquiry required by section 3553(b)—whether the case presents "an aggravating or mitigating circumstance of a kind, or to a degree, *not adequately taken into consideration* by the Sentencing Commission"⁴³⁰—into a much narrower inquiry: whether the case is "atypical" enough to warrant departure. Nowhere did the court ask whether the Commission *ought* to have considered heroin-ingesting when it crafted the relevant guideline, nor whether the defendant's self-induced illness *should* result in a lower sentence (and perhaps it shouldn't). Rather, the court merely interpreted the guidelines, determined that the medical consequences of eating ninety heroin pellets did not render the case unusual, and affirmed the sentence.

Second, the court's analysis suggests that "heartland" is an elusive concept. Perhaps "adequately taken into consideration" indeed means "typical," but typical *with respect to what*? To the set of offenses covered by the specific offense guideline (drug trafficking)? To some broad subset of cases within that guideline (all heroin trafficking offenses)? To a narrower subset of cases having something in common with the defendant's (all heroin cases in which the defendant ingests heroin, whether or not ill health effects follow)? To the Guidelines in general and the "typical" set of offenders that the Commission might have envisioned? There is no clear answer.⁴³¹

Non-normative departures, then, inject a needed flexibility into the federal sentencing regime, but they are ill-equipped to *challenge* the Guidelines. They only interpret them⁴³²—and incoherently at that.

426. *See id.*

427. *See id.* at 553, 557.

428. *Id.* at 557 (quoting GUIDELINES § 5K2.0).

429. *Id.*

430. 18 U.S.C. § 3553(b) (1994) (emphasis added).

431. *See* Miller & Wright, *supra* note 161, at 756-57 (arguing that "heartland" concept is incoherent).

432. *See* Stith & Cabranes, *supra* note 66, at 1277 (departure jurisprudence is "useful for only one

Despite their modest scope, “non-normative” departures are controversial. The Commission itself hoped that such departures would be “highly infrequent.”⁴³³ Sentencing practices belied this hope, but courts disagreed over the departure power’s confines.⁴³⁴ In *Koon v. United States*,⁴³⁵ the Supreme Court sought to clarify the scope of the departure power. It held that appellate courts must review departures under an “abuse of discretion” standard rather than *de novo*.⁴³⁶

Yet *Koon*’s central holding remains unclear.⁴³⁷ The court directed district courts to undertake a two step process when considering departures. First, a court must identify the particular characteristics that remove the case from the applicable guideline’s “heartland.”⁴³⁸ Second, the court must assess whether the characteristic that removes the case from the “heartland” is a “forbidden,” “discouraged,” “encouraged,” or “unmentioned” basis for departure—as designated by the Commission.⁴³⁹ If the Commission has forbidden departure based upon the relevant factor, the court may not depart.⁴⁴⁰ If the factor is “discouraged,” the court may only depart if the factor is present to an “exceptional” degree.⁴⁴¹ Similarly, the court may depart upon an “encouraged” factor that the applicable guideline already takes into account only when the factor is present to an extraordinary extent.⁴⁴² Finally, if the Guidelines do not mention the factor, the court must consider the “structure and theory” of the individual guideline and the Guidelines as a whole. It must determine whether the case is outside the “heartland,” bearing in mind the Commission’s admonition that such departures will be “highly infrequent.”⁴⁴³

Koon’s “abuse of discretion” standard appeared to liberalize the departure

purpose: interpreting the Federal Sentencing Guidelines.”).

433. See GUIDELINES Ch. 1 Pt. A, policy statement 4(b) (1998).

434. Compare *United States v. Koon*, 34 F.3d 1416, 1451 (9th Cir. 1994), modified by 518 U.S. 81 (1996) (reviewing *de novo* district court’s decision to depart) with *United States v. Rivera*, 994 F.2d 942, 950 (1st Cir. 1993) (adopting more flexible approach).

435. 518 U.S. 81 (1996).

436. See *id.* at 91.

437. Indeed, *Koon* itself stated that “[l]ittle turns” on whether the standard of review is labeled “abuse of discretion” or “*de novo*.” *Id.* at 100.

438. See *id.* at 95.

439. See *id.* at 95-96.

440. See *id.* at 93. Factors that cannot form the basis of departure include race, sex, national origin, creed, religion, socioeconomic status and lack of guidance as a youth. See GUIDELINES §§ 5H1.10, 5H1.12 (1998).

441. *Koon*, 518 U.S. at 95. “Discouraged” factors, including physique, are those declared “not ordinarily relevant” by GUIDELINES § 5H1.4. *Id.*

442. See *Koon*, 518 U.S. at 94-95. Under GUIDELINES § 5K2.10 (1998), victim provocation is an “encouraged” basis for departure. *Id.*

443. See *id.* at 96; GUIDELINES Ch. 1, pt. A, policy statement 4(b) (1998).

regime.⁴⁴⁴ Whether it has actually done so remains unclear.⁴⁴⁵ *Koon* probably countenanced greater use of the “non-normative” departure power.⁴⁴⁶ At the same time, it confirmed courts’ earlier restrictions upon “normative” departures.⁴⁴⁷ Its “heartland” analysis merely reiterates the atypicality requirement.⁴⁴⁸ Because each guideline carves out a “heartland” of typical cases, *Koon* authorizes departure only for factually exceptional ones.⁴⁴⁹ Courts applying *Koon* continue to impose the atypicality requirement uniformly and without ambiguity.⁴⁵⁰ Similarly, the Commission’s consideration of an aggravating or mitigating circumstance remains *ipso facto* “adequate consideration.”⁴⁵¹

444. In particular, *Koon* valued district courts’ ability to assess whether the facts of a particular case remove it from the “heartland.” See 518 U.S. at 98.

445. Cases applying *Koon* are as cryptic as *Koon* itself. Nevertheless, most circuits appear to accord greater deference to sentencing courts. Generally, the district court’s assessment that a given circumstance removes a case from the “heartland” is reviewed for abuse of discretion. This assessment is the most central in the departure regime and is thought to be within the district court’s unique competence. See, e.g., *United States v. Collins*, 122 F.3d 1297, 1303, 1305 (10th Cir. 1997); *United States v. Arce*, 118 F.3d 335, 340 (5th Cir. 1997); *United States v. Wilson*, 114 F.3d 429, 433 (4th Cir. 1997); *United States v. Galante*, 111 F.3d 1029, 1034 (2d Cir. 1997); *United States v. Washington*, 109 F.3d 459, 462 (8th Cir. 1997); *United States v. Cali*, 87 F.3d 571, 580 (1st Cir. 1996). Cf. *Collins*, 122 F.3d at 1303, n.4 (where court’s “heartland” determination is primarily based upon descriptive characterization of guideline’s “heartland” rather than underlying facts of particular case, review is less deferential because question is essentially legal); *United States v. Rybicki*, 96 F.3d 754, 758 (4th Cir. 1996) (whether discouraged factor is present to sufficiently extraordinary degree is a legal question subject to de novo review).

Most courts of appeals have adopted a so-called “uniform abuse of discretion” standard in light of *Koon*. See, e.g., *United States v. Bristow*, 110 F.3d 754, 757 (11th Cir. 1997); *United States v. Hairston*, 96 F.3d 102, 106-07 (4th Cir. 1996); *United States v. Barajas-Nunez*, 91 F.3d 826, 831 (6th Cir. 1996); *United States v. Beasley*, 90 F.3d 400, 402-03 (9th Cir. 1996); *Cali*, 87 F.3d at 579-80. Nevertheless, “[a] district court by definition abuses its discretion when it makes an error of law.” *Koon*, 518 U.S. at 100. By characterizing various steps of the departure inquiry as “questions of law,” appellate courts may avoid deferential review.

446. *But see* Stith & Cabranes, *supra* note 66, at 1278-79 (questioning whether courts have recognized *Koon* as conferring greater departure authority).

447. In addition, *Koon* suggests that 18 U.S.C. § 3553(b) represents a sentencing court’s sole departure mechanism. See 518 U.S. at 92-93. Absent wholesale guideline invalidation, a court must presumably impose a guideline sentence unless facts remove a case from the guideline’s “heartland.” *Id.* at 96.

448. The “heartland” concept is itself flawed. First, its origins are dubious. Prior to an amendment to the Guidelines in 1994, the concept appeared in only one sentence of the entire Guidelines Manual. See GUIDELINES ch. 1, pt. A policy statement 4(b) (1987); STITH & CABRANES, *supra* note 14, at 75-76. Second, it depends upon the faulty assumption that the Commission intended each guideline to cover only the “typical” cases falling under it. See STITH & CABRANES, *supra* note 14, at 75-76. To the contrary, Congress intended the Guidelines to be “quite comprehensive,” and the Commission has consistently and “comprehensively [sought] to cover almost all situations that a sentencing judge might encounter in a criminal case.” *Id.*

449. See *Koon*, 580 U.S. at 96.

450. See, e.g., *United States v. Dethlefs*, 123 F.3d 39, 44 (1st Cir. 1997); *United States v. Otis*, 107 F.3d 487, 490 (7th Cir. 1997); *United States v. Kalb*, 105 F.3d 426, 428 (8th Cir. 1997).

451. See Stith & Cabranes, *supra* note 66, at 1279-80; Kate Stith, *The Hegemony of the*

Koon's effects are ultimately cosmetic at most.⁴⁵² *Koon*'s departure inquiry concerns only guideline interpretation and ignores guideline validity or rationality.⁴⁵³ The decision confirms that courts may not wield the departure power to question any Guidelines provision: neither its fealty to the SRA's dictates nor the adequacy of its underlying rationale. As such, “[t]he hegemony of the Sentencing Commission remains intact.”⁴⁵⁴

C. The Adequacy of Judicial Review Through Departure: A Response to Professor Wright

Eight years ago, Ronald F. Wright described the departure power of section 3553(b) as the means to evaluate the Guidelines through administrative law principles.⁴⁵⁵ Under Wright's model, section 3553(b) entails rationality review, procedural review, and review of the Commission's statutory interpretations all within the same inquiry: whether the Commission “adequately considered” the relevant sentencing factors present in a particular case.⁴⁵⁶ Wright's model of “statutory review” is novel. Within the departure mechanism of § 3553(b), Wright argues, Congress intended courts to accord little deference to the Commission's legal interpretations.⁴⁵⁷ The “inadequately considered” language abrogates *Chevron*'s⁴⁵⁸ default rule that courts will accept “permissible” agency interpretations.⁴⁵⁹ Outside the departure context, Wright argues for

Sentencing Commission, 9 FED. SENT. REP. 14, 14 (1996). *See also Koon*, 518 U.S. at 111 (court abused discretion by departing upon factor that Commission already took into account—defendants' low probability of recidivism); *United States v. Rios-Favela*, 118 F.3d 653, 656-58 (9th Cir. 1997) (court abused discretion by departing based upon minor nature of deported alien's prior aggravated felony, because Guidelines already account for such factor); *United States v. Bristow*, 110 F.3d 754, 757-58 (11th Cir. 1997) (court would have abused discretion had it departed downward for felon possessing firearm where felon was in debt, owed child support, and gained possession of firearm as collateral for loan as Guidelines already account for financial difficulties under § 5K2.12). *But see United States v. Sanchez-Rodriguez*, 161 F.3d 556 (9th Cir. 1998) (overruling *Rios-Favela*).

452. *See Stith & Cabranes*, *supra* note 66, at 1279.

453. *Id.* at 1277 (“[M]ost jurisprudence concerning departure from the Guidelines, like most jurisprudence concerning application of the Guidelines, is useful for only one purpose: interpreting the Federal Sentencing Guidelines.”).

454. *Id.* at 1282.

455. *See Wright*, *supra* note 218, at 48-69.

456. *See id.* at 55. Wright likens the § 3553(b) “adequacy” concept with the “arbitrary and capricious” concept underlying judicial review of the rationality of agency decisions. *Id.* at 59. *See Motor Vehicle Mfr. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983). For procedural review, *see Wright*, *supra* note 218, at 70-74; *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978). For statutory review, *see Wright*, *supra* note 218, at 48-51.

457. *See Wright*, *supra* note 218, at 48, 50-51.

458. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

459. *See Wright*, *supra* note 218, at 50-51.

deferential statutory review of the Guidelines in accordance with *Chevron*.⁴⁶⁰ Absent a departure under section 3553(b), courts should normally accept the Commission's reading of the SRA.⁴⁶¹

Through an altogether plausible interpretation of the SRA's departure power, Wright invited the courts to monitor the Commission through tried and true administrative law principles. Unfortunately, the courts have resoundingly rejected this invitation. The courts' evisceration of the departure power disables meaningful judicial review. Current law dictates an absurd but unfortunate result: whenever the Commission has considered a sentencing factor, it has considered it "adequately."⁴⁶² Moreover, departures under current law serve only to *interpret* the Guidelines.⁴⁶³ Courts merely ask whether a given case is atypical compared to other cases governed by the same guideline—a banal inquiry having nothing to do with the Commission's adherence to its statutory mandate. Faced with the "atypicality requirement" and the automatic "adequacy" of the Commission's "consideration," courts are unable to challenge the Commission's actions—whether in the guise of statutory review, rationality review, or procedural review. This result is not inevitable, but it prevents section 3553(b) from serving as the vehicle for meaningful judicial review. The judiciary's narrow reading of section 3553(b) is firmly entrenched;⁴⁶⁴ absent Congressional action, courts remain relatively powerless to question the Commission's judgments.⁴⁶⁵

Judicial review through departure suffers from a second shortcoming. Even a broader section 3553(b)—as urged by Wright and rejected by the courts—cannot adequately accomplish the task of statutory review because it asks a question of limited relevance: whether the particular case presents an aggravating or mitigating circumstance "of a kind, or to a degree, not adequately taken into consideration" by the Commission.⁴⁶⁶ Certain types of questions do not fit neatly into such an inquiry. For example, what of the Commission's restrictions on probation? The SRA generally permits probation for Class C and D felonies, but the Guidelines often require

460. *See id.* at 6, 48.

461. *See id.* at 41-42.

462. *See supra* Part IV.A.

463. *See* Stith & Cabranes, *supra* note 66, at 1277.

464. *See supra* Parts IV.A-B.

465. Stare decisis has particular force in matters of statutory interpretation. *See, e.g.,* Lechmere, Inc. v. NLRB, 502 U.S. 527, 536-38 (1992) (because court adheres to prior interpretation under *stare decisis*, NLRB interpretation of NLRA provision rejected); *Maislin Indus. v. Primary Steel*, 497 U.S. 116, 130-31 (1990).

466. 18 U.S.C. § 3553(b) (1994).

imprisonment for such felonies.⁴⁶⁷ An alleged conflict between the statute and the Guidelines presents a pure question of law. Congress’s treatment of probation is not a “mitigating circumstance” relating to the particular offense. More importantly, when the Commission has broadly violated a statutory command, departure is an inadequate remedy. It reduces a particular defendant’s sentence but leaves the Commission’s illegality intact. Later courts facing other cases might elect not to depart, and such decisions are not appealable.⁴⁶⁸

If administrative law seeks to ensure the political accountability of agencies, the departure power is manifestly unfit for this task. Despite the promise of departure as a means of judicial review—a promise that Wright captured effectively—the courts have since hamstrung the departure power almost beyond recognition. They are not free to reverse course today. The next Part therefore proposes a revised SRA that promises to keep the Sentencing Commission true to its statutory mandate.

V. TOWARD A NEW SRA JURISPRUDENCE AND A NEW SRA

Courts have consistently abandoned their obligation to keep the Sentencing Commission within the statutory authority that Congress delegated. Statutory review of the Guidelines is consistently lax, and the departure power has proven unfit for the task of enforcing the SRA’s dictates. Meanwhile, the Commission is perhaps the least accountable of all administrative agencies. Its proceedings are often covert, many of its most far-reaching decisions have never been explained or defended, and its Guidelines cannot justly claim the legitimacy they need in the federal sentencing regime.

I offer two solutions, and my platform is severable. First, courts should review the Commission’s statutory interpretations with the same rigor with which they review other agencies’ legislative rules. Current law already permits and obligates judges to do so, but the courts have been derelict in their duty. Second, the Administrative Procedure Act should more fully apply to the Sentencing Commission. In particular, the Guidelines should be subject to judicial review if alleged to be “arbitrary and capricious” or if alleged to have originated without observance of the procedures required by law.

467. *See id.* § 3561(a) (1994); GUIDELINES § 5B1.1 (1998).

468. Sentences within the guideline range are generally unreviewable. *See* 18 U.S.C. §§ 3742(a)-(b). Yet the same section allows either party to appeal a sentence “imposed in violation of law.” *Id.* §§ 3742(a)(1), (b)(1). Where the *Commission* has violated the law, its illegality should not stand.

A. *Statutory Review of the Sentencing Guidelines: A Modest Proposal and a Call to Action*

Challenges to the Guidelines can be based upon three types of statutory commands: the SRA's specific directives to the Commission, its more general directives, and directives external to those addressed to the Commission. Each is described in Part III.B. All three types of challenges can be directed at guidelines, commentary, or policy statements.⁴⁶⁹ Part III suggested the extraordinary deference accorded the Commission's reading of the statute it administers.

1. *The Modest Proposal*

I argue that the Sentencing Commission's statutory interpretations should receive no more nor less deference than those of other administrative agencies. This suggestion is far from radical or dangerous. Indeed, the Commission's unique political aloofness arguably warrants more *stringent* judicial review than used.⁴⁷⁰ Moreover, because Congress has not precluded as-applied judicial review of the Commission's statutory interpretations,⁴⁷¹ my suggestion requires no fundamental changes to existing law. Third, since the courts aggressively review other agencies' statutory interpretations, we should have little concern for the guideline system's continuing vitality. Far from dismantling administrative programs, judicial review keeps them politically accountable, at least in theory. It ensures that agencies follow Congress's will rather than their own. Where the Sentencing Commission is concerned, we should expect nothing less.

Finally, and most importantly, guideline invalidation would not free sentencing judges from the *Guidelines* themselves. The SRA itself states otherwise. When no guideline applies, "the court shall . . . have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders."⁴⁷² The court must also act with "due regard" for the four purposes of sentencing that Congress

469. See *supra* Parts III.B.2, III.D.3.

470. See *supra* Part III.A.

471. See *supra* note 223.

472. 18 U.S.C. § 3553(b) (1994). The Commission has provided further guidance in GUIDELINES § 2X5.1. In the absence of an applicable guideline, the court must "apply the *most analogous offense guideline*," but absent a "sufficiently analogous guideline," the court should impose a sentence to fulfill the four statutory purposes of sentencing outlined by Congress. Guidelines § 2X5.1 (1998) (emphasis added). I have argued above, however, that section 2X5.1 violates the statute upon which it is based. See *supra* Part II.B.1.

has defined.⁴⁷³ For example, a court invalidating the “fraud” guideline should consider the sentences similar guidelines would prescribe: embezzlement, burglary, or perhaps tax evasion (depending upon the facts). A court acting with “due regard” for the structure of the Guidelines does not have *carte blanche* to fashion a sentence from its own sense of justice, and any sentence that it imposes is subject to appellate review.⁴⁷⁴

2. *Labonte*⁴⁷⁵: A Call to Action

Meaningful statutory review of the Guidelines requires a departure only from prevailing practice, not prevailing doctrine. The Supreme Court’s recent opinion in *United States v. Labonte* supports non-deferential review. *Labonte* resulted from the Department of Justice’s concerted campaign against Guidelines Amendment 506. The amendment at issue altered the commentary defining the Guidelines’ career offender provision, Guidelines section 4B1.1.⁴⁷⁶ Section 4B1.1 enhances a repeat offender’s sentence depending upon the “offense statutory maximum” penalty of one’s underlying conviction.⁴⁷⁷ For example, section 4B1.1 assigns base offense level thirty-seven (360 months to life) when the “offense statutory maximum” is life.⁴⁷⁸ Meanwhile, it assigns level thirty-two (210 to 262 months) when the “offense statutory maximum” is more than twenty years but less than twenty-five years.⁴⁷⁹ Amendment 506 defined “statutory maximum” to include only the base statutory maximum for the underlying offense, exclusive of any *statutorily* required enhancements.⁴⁸⁰ For example, one who distributes 500-5000 grams of cocaine faces a maximum penalty of forty years under 21 U.S.C. § 841(b)(1)(B).⁴⁸¹ A subsequent statutory subsection increases the maximum penalty to life imprisonment if the offender has a previous drug conviction.⁴⁸² Under Amendment 506, the individual’s enhancement under Guidelines section 4B1.1 would be governed by the “offense statutory maximum” of forty years rather than the

473. See 18 U.S.C. § 3553(b) (1994).

474. See *id.* § 3742(f)(2) (where there is no applicable guideline, sentence may be reversed if “plainly unreasonable”).

475. *United States v. Labonte*, 520 U.S. 751 (1997).

476. See GUIDELINES § 4B1.1, cmt. n.2 (1996).

477. See *id.*

478. See GUIDELINES § 4B1.1 (1998). The 360 months to life range corresponds to Criminal History Category VI, as required by GUIDELINES § 4B1.1 (1998). See also *id.* ch. 5, pt. A.

479. See *id.* This 210 to 262 month range corresponds to Criminal History Category VI, as required by GUIDELINES § 4B1.1 (1998). See also *id.* ch. 5, pt. A.

480. See GUIDELINES App. C, Amend. 506 (1997).

481. See *Labonte*, 520 U.S. at 767 (Breyer, J., dissenting).

482. See *id.* at 768; 21 U.S.C. § 841(b)(1)(B) (1994).

enhanced statutory maximum of life imprisonment.⁴⁸³ Assuming that the individual otherwise meets the Guidelines definition of “career offender,” he or she would face a presumptive sentencing range of 262 to 327 months under Amendment 506⁴⁸⁴ instead of 360 months to life without the Amendment.⁴⁸⁵

Amendment 506 involves an interpretation of Guidelines section 4B.1, as well as one of Congress’s express directives to the Commission: for defendants with two prior drug or violent offenses, “[t]he Commission shall assure that the guidelines specify a sentence to a term of imprisonment at or near the maximum term authorized.”⁴⁸⁶ In effect, Amendment 506 interpreted the term “at or near the maximum term authorized” to include only an unenhanced statutory maximum.⁴⁸⁷ Urged by the government, the Supreme Court rejected this interpretation.⁴⁸⁸

Three aspects of the majority’s reasoning are instructive. First, the Commission’s interpretation violated the “plain meaning” of the phrase “maximum term authorized.”⁴⁸⁹ The statute’s “at or near” language provided insufficient support for Amendment 506.⁴⁹⁰ When a statute lacks a readily apparent “plain meaning,” such “plain meaning” review typifies the post-*Chevron* era’s non-deferential review.⁴⁹¹ Second, the court refused to announce whether *Chevron* deference applied to the Commission at all—instead reserving the question.⁴⁹² In so doing, it rejected the dissent’s argument that the Commission had “permissibly” interpreted the statute under *Chevron*.⁴⁹³ One might thus infer that courts owe the Commission’s interpretations either *Chevron* or some lesser measure of deference. Third, the court rejected the Commission’s own argument that Amendment 506 served the SRA’s broader purposes.⁴⁹⁴ The Commission argued that the Amendment fulfilled the statutory obligation to “reduce unwarranted [sentencing] disparity.”⁴⁹⁵ Specifically, the Amendment mitigated “variations

483. See *Labonte*, 520 U.S. at 768 (Breyer, J., dissenting).

484. See GUIDELINES § 4B1.1 ch. 5, pt. A (1998).

485. See *id.*

486. 28 U.S.C. § 994(h) (1994).

487. See GUIDELINES App. C., Amend. 506 (1997).

488. See *Labonte*, 520 U.S. at 757-61.

489. See *id.*

490. See *id.* at 760-61.

491. See *supra* Part III.A.

492. See *Labonte*, 520 U.S. at 764 n.6.

493. See *id.* at 62-63 (Breyer, J., dissenting).

494. See *id.* at 761-62. The Commission was not a party to *Labonte*, but it accompanied Amendment 506 with a statement justifying its adoption.

495. See *id.*; see also 28 U.S.C. § 994(f) (1994) (directing Commission to reduce sentence disparity).

in the exercise of prosecutorial discretion in seeking enhanced penalties based on prior convictions."⁴⁹⁶ This argument failed, for the Commission's broad discretion "must bow to the specific directives of Congress."⁴⁹⁷ The Supreme Court thus repudiated the Commission's attempt to "pick and choose" which statutory commands to follow. Previous courts had countenanced such attempts—a practice I criticized earlier.⁴⁹⁸ If free to choose which directives to follow, the Commission could follow its own will rather than Congress's. *Labonte*, then, tends to repudiate the heightened judicial deference described in Part III. It supports the proposition that the Sentencing Commission merits no special treatment by the judiciary.

Armed with *Labonte*, lawyers and judges alike should challenge the Commission's implementation of the Sentencing Reform Act. To this point, criminal defendants have rarely challenged the Guidelines, preferring instead to seek departures or to supplement the already voluminous case law that merely *interprets* the Guidelines.⁴⁹⁹ Litigation strategy must change, so that judicial review can play a meaningful role in the federal sentencing scheme. Despite *Labonte*'s law-and-order overtones, defense attorneys should embrace its invitation to question the Guidelines, to resurrect the SRA as a valid source of sentencing law, and to attack the Commission's unwarranted status in the federal sentencing regime and the modern administrative state. After *Labonte*, their arguments should no longer fall upon deaf, or even muffled, ears.⁵⁰⁰

B. Reforming the Sentencing Reformers: A Recipe for Rationality and Procedural Review

My second proposal is less modest because it requires a statutory amendment. The proposal is threefold. First, Congress should subject the

496. GUIDELINES App. C., Am. 506 (1997).

497. See *Labonte*, 520 U.S. at 757.

498. See *supra* Part III.C.1. See also *United States v. Davern*, 970 F.2d 1490, 1503 (6th Cir. 1992) (en banc) (Merritt, J., dissenting).

499. See STITH & CABRANES, *supra* note 14, at 92-93 (listing examples of trivial Guidelines jurisprudence).

500. One consideration might, but should not, limit *Labonte*'s holding: the Supreme Court invalidated an item of commentary rather than an actual guideline. Unlike guidelines, commentary is not "approved" by Congress and need not survive a "notice and comment" process. See 28 U.S.C. §§ 994(p), (x) (1994). I have already explained that Congress does not "approve" the Guidelines in any meaningful sense. See *supra* note 223. Therefore, neither "approval" nor the "notice and comment" requirement distinguish guidelines from commentary. Courts routinely apply the attenuated *Chevron* doctrine throughout the entire spectrum of agency interpretations of law, all of which Congress may "disapprove" by statute and many of which arise from "notice and comment" procedures. See cases cited *supra* note 236.

Sentencing Commission to the same procedural requirements imposed upon other administrative agencies through the Administrative Procedure Act.⁵⁰¹ Second, the Guidelines should be subject to judicial review to the same extent provided by the APA. Third, the APA's judicial review provisions⁵⁰² should be tailored to fit the Commission and the sentencing process. Part V.B.2 outlines several needed adjustments of the APA's judicial review provisions. I therefore suggest that Congress enact the following statute:⁵⁰³

THE SENTENCING COMMISSION ACCOUNTABILITY ACT

SECTION ONE - Subsection 994(x) of title 28 is hereby repealed. The Sentencing Commission shall be governed by the provisions of sections 551 through 553 of title 5, regarding rulemaking, the public availability of information and records, and open meetings. The provisions of section 553(b)(3), rather than the designations "guidelines," "commentary," and "policy statement," shall determine the necessity of the notice-and-comment procedures described in subsections 553(b) and (c).

SECTION TWO - Except as otherwise provided below, judicial review of any guideline, commentary, or policy statement shall be governed by sections 701 through 706 of title 5. Specifically, a court shall hold unlawful and set aside any guideline, commentary, or policy statement promulgated by the Commission that is held to be (i) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (ii) contrary to constitutional right, power, privilege, or immunity; (iii) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; or (iv) without observance of procedure required by law. Neither subsection

501. See 5 U.S.C. §§ 551-553 (1994). I include only those requirements relevant to agency informal rulemaking because the Sentencing Commission is unlikely to engage in formal rulemaking and has no reason to undertake adjudications.

502. See *id.* §§ 701-706.

503. I am not the first to advocate broader application of the APA to the Sentencing Commission. See Wald, *supra* note 149, at 137 & n.6 (noting American Bar Association recommendation that Commission adopt internal rules of practice and procedure, "including procedures commonly used by other rulemaking agencies to invite and structure public participation, disclose information, and justify promulgated rules"); STITH & CABRANES, *supra* note 14, at 95 (noting and criticizing Commission's exemption from most of APA). Most importantly, professors Miller and Wright advocate full APA application to the Commission, but their solution follows primarily from (i) the Commission's dubious claim that the Guidelines largely mirror past sentencing practice (a claim upon which the Guidelines' original legitimacy depended and which can only be verified if the Commission's analysis is open to inspection), and (ii) courts' utter inability to determine the "heartland" of offenses surrounding each particular guideline, when the Commission has rarely explained what types of offenses and offenders are "typical" for each guideline. See Miller & Wright, *supra* note 161, at 800-01 (and generally).

706(b)(1)(B) nor 551(1)(B) shall be construed to preclude judicial review of any rule adopted by the Commission or to exempt the Commission from any laws that would otherwise bind it.

(a) The Process of Judicial Review - During a sentencing proceeding in which the government or the defendant challenges a guideline, commentary item, or policy statement on the grounds of rationality, procedure, or law, a court, if invalidating the provision, shall declare the provision unenforceable until the Commission remedies the defect. Under such circumstances, the defendant shall be sentenced as though no guideline applies to the underlying offense, in accordance with subsection 3553(b) of title 18.

(b) Pre-Enforcement and As-Applied Review - Parties may challenge any provision of the Guidelines within 180 days of the provision's enactment. Parties may seek such review in the District of Columbia Court of Appeals. Thereafter, judicial review shall be limited to criminal cases in which particular provisions of the Sentencing Guidelines are applied. In all cases where any guideline, commentary item, or policy statement is challenged, the Sentencing Commission shall be permitted to intervene as of right.

(c) Reviewability of Previously Enacted Guidelines Provisions - Judicial review on the basis of the Commission's obedience to procedural rules shall only be available to guidelines, commentary, and policy statements enacted after the effective date of this Act. All other challenges may apply to previously enacted guidelines, commentary, and policy statements as well as future provisions.

(d) Information to be Considered During Judicial Review - A court reviewing the rationality of any provision of the Guidelines shall not limit its consideration to the guidelines, commentary, and policy statements issued by the Commission. Nothing herein, however, shall be construed to amend subsection 3553(b) of title 18, regarding the sentencing court's ability to depart from the applicable guideline range under appropriate aggravating or mitigating circumstances not adequately taken into consideration by the Commission, nor the court's obligation to evaluate only the guidelines, commentary, and policy statements issued by the Commission to determine whether a circumstance was adequately considered.

1. A Brief Description and Defense of APA Procedures and Judicial Review

The procedures governing informal notice-and-comment rulemaking are familiar and less than onerous, and are outlined in 5 U.S.C. § 553. When proposing a rule, the agency must first publish it in the Federal Register, along with a reference to the legal authority underlying the rule and “a statement of the time, place, and nature of public rule-making proceedings.”⁵⁰⁴ After publishing the required notice, the agency must permit any “interested persons” to comment upon the proposed rule.⁵⁰⁵ Only after it considers the views and evidence presented may the agency determine whether to accept, reject, or modify the rule.⁵⁰⁶ Any final rule must include a “concise general statement” of its “basis and purpose.”⁵⁰⁷ Meanwhile, the Freedom of Information Act (Section 552) requires agencies to disclose documents in their possession upon a request “by any person,” subject to several exceptions.⁵⁰⁸ Finally, the Sunshine Act requires agency meetings to be open to the public, again with several exceptions.⁵⁰⁹

The APA’s judicial review provisions are similarly familiar. Generally, any “person suffering legal wrong” because of an agency action may obtain judicial review thereof.⁵¹⁰ The relevant substance of judicial review takes three forms.⁵¹¹ First, the court may ascertain whether the rule is beyond, or otherwise contrary to, the agency’s statutory authority⁵¹²—an inquiry already permitted of the Guidelines.⁵¹³ Second, the court may invalidate a rule, or remand to the agency, if the rule was adopted “without observance of

504. See 5 U.S.C. § 553(b) (1994).

505. See *id.* § 553(c).

506. See *id.*

507. See *id.*

508. See *id.* § 552.

509. See *id.* § 552b. The Privacy Act, 5 U.S.C. § 552a, will likely be of little relevance to the Commission. The Act limits an agency’s power to disclose information about an individual to the government or third parties. See *id.* § 552a (1994).

510. See *id.* § 702.

511. Because the Sentencing Commission will not undertake adjudications or so-called “formal rulemaking,” I omit the factual review described in § 706(2)(E).

512. See *id.* § 706(2)(C).

513. See 18 U.S.C. §§ 3742(a)(1), (b)(1) (allowing government and defendant both to appeal a sentence “imposed in violation of law”); *United States v. Nutter*, 61 F.3d 10, 12 (2d Cir. 1995); *United States v. Whyte*, 892 F.2d 1170, 1174 n.10 (3d Cir. 1989) (exercising jurisdiction pursuant to § 3742). Sections 3742(a)(3)(B) and (b)(3)(B) also permit defendant and government to appeal sentence where no guideline applies. As contemplated in the legislative history, “[t]his would include the situations where there is a new law for which no guideline has yet been developed and *where an appellate court had invalidated the established guideline and no replacement had yet been determined.*” S. REP. 98-225, at 153 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3336 (emphasis added).

procedure required by law.”⁵¹⁴ Third, the court may review a rule’s rationality—whether it is “arbitrary, capricious, [or] an abuse of discretion.”⁵¹⁵ Under the prevailing formulation of “hard look” rationality review, a rule is “arbitrary and capricious” if:

[t]he agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.⁵¹⁶

Under rationality review, the court evaluates a rule in light of the facts before the agency, the inferences drawn from those facts, the alternatives offered to the challenged rule, and the arguments for and against the rule presented in the record.⁵¹⁷ Often, the agency’s view fails for lack of an adequate explanation.⁵¹⁸ Here as elsewhere, the court may invalidate the rule but will often remand to the agency for further explanation or fact-finding.⁵¹⁹

Procedural regularity and judicial review perform a needed legitimizing function in the administrative state. The APA’s procedures foster rational decisionmaking, ensure broad participation by those with a stake in the agency’s decision, and provide at least some assurance that the rule itself is fair.⁵²⁰ “Hard look” judicial review serves similar purposes, at least in theory.⁵²¹ First, it helps to ensure that agencies and their unelected

514. See 5 U.S.C. § 706(2)(D) (1994).

515. See *id.* § 706(2)(A).

516. *Motor Vehicles Mfrs. Ass’n v. State Farm Mut. Ins. Co.*, 463 U.S. 29, 43 (1983).

517. See Bruff, *supra* note 349, at 238; Thomas O. Sargentich, *The Critique of Active Judicial Review of Administrative Agencies: A Reevaluation*, 49 ADMIN. L. REV. 599, 631 (1997).

518. See Patricia M. Wald, *Judicial Review in Midpassage: The Uneasy Partnership Between Courts and Agencies Plays On*, 32 TULSA L.J. 221, 234 (1996).

519. See *United States v. Price*, 990 F.2d 1367, 1369 (D.C. Cir. 1993) (noting that if Commission itself were before court, court might remand for explanation of agency’s reasoning); Schuck & Elliott, *supra* note 201, at 1030 (14.4% and 9.3% of reviewed cases resulted in remand to agency in 1984 and 1985, respectively).

520. See Keith Werhan, *Delegalizing Administrative Law*, 1996 U. ILL. L. REV. 423, 463 (1996).

521. Numerous commentators have criticized the role played by judicial review generally and “hard look” review in particular. Most criticisms center upon the “ossification” thesis: aggressive judicial review has paralyzed agencies by requiring unrealistic and exacting support for decisions, and it permits unelected judges to substitute their own policy views for those of the agency. See Richard J. Pierce, Jr., *Rulemaking and the Administrative Procedure Act*, 32 TULSA L.J. 185, 195 (1996); Wald, *supra* note 518, at 228-29. See also Jerry L. Mashaw & David L. Harfst, *Inside the National Highway Traffic Safety Administration: Legal Determinants of Bureaucratic Organization and Performance*, 57 U. CHI. L. REV. 443, 444-45 & n.8, 478 (1990) (arguing that judicial review led NHTSA to abandon rulemaking in favor of less effective product recalls). I express no opinion as to the efficacy of “hard look” review. Whatever may be the merits of such review, our positive law assigns the judiciary a

decisionmakers act within the authority delegated by Congress, promoting the rule of law.⁵²² Second, it requires that rules emerge from reasoned deliberation rather than raw politics or agency capture.⁵²³ Third, it fosters broader citizen participation, since agencies whose actions will be reviewed by the courts are more likely to consider a wider set of viewpoints.⁵²⁴ Finally, it pressures agencies to make comprehensible decisions and to defend those decisions comprehensibly—an important democratizing function in today's technocratic state.⁵²⁵

The Sentencing Commission's own practices suggest the ill effects of its exemption from administrative law principles. The Commission avoids on-the-record decisionmaking, conducts much of its most important business behind closed doors, and seldom explains its actions in much detail.⁵²⁶ Not surprisingly, there is scant evidence that the Commission has achieved the purposes assigned to it by Congress,⁵²⁷ that it has even considered (much less adequately) the views of its critics or the facts and evidence presented by those appearing before it,⁵²⁸ or that the Guidelines "reflect . . . advancement in knowledge of human behavior as it relates to the criminal justice process."⁵²⁹ It should also come as no surprise that the Commission has little legitimacy in the sentencing regime. Its Guidelines are reviled (even though tolerated) by lawyers, judges, and commentators alike.⁵³⁰

2. Tailoring Judicial Review to Fit the Sentencing Commission

The Sentencing Commission occupies a unique role in the administrative state: it cannot enforce the rules it promulgates, and it is absent from the

central role in the administrative process. The defenders of "hard look" review have carried the day in this sense. I argue only that our law should treat the Sentencing Commission as it treats other administrative agencies. Whatever the dangers of aggressive judicial review, they are no more pronounced in this context than in others.

522. See Bruff, *supra* note 349, at 236; Sargentich, *supra* note 517, at 601; Werhan, *supra* note 520, at 442.

523. See Jim Rossi, *Redeeming Judicial Review: The Hard Look Doctrine and Federal Regulatory Efforts to Restructure the Electric Utility Industry*, 1994 WIS. L. REV. 763, 819 (1994); Sargentich, *supra* note 517, at 629; Cass R. Sunstein, *Factions, Self-Interest and the APA: Four Lessons Since 1946*, 72 VA. L. REV. 271, 284 (1986).

524. See Bruff, *supra* note 350, at 240; Rossi, *supra* note 523, at 818.

525. See Rossi, *supra* note 523, at 820. See also Bruff, *supra* note 350, at 240.

526. See *supra* Parts II.B.2-3.

527. See STITH & CABRANES, *supra* note 14, at 53; see also *supra* Part II.B.2.

528. See 28 U.S.C. §§ 994(o), 994(x) (1994).

529. See *id.* § 991(b)(1)(C).

530. See José A. Cabranes, *Sentencing Guidelines: A Dismal Failure*, 207 N.Y. L.J., Feb. 11, 1992, at 2 ("[T]he Sentencing Guidelines system is a failure - a dismal failure, a fact well known and fully understood by virtually everyone who is associated with the federal justice system.").

lawsuits that challenge those rules. A wider application of the APA to the Commission requires certain fine-tuning, lest the sentencing process itself grind to a halt.⁵³¹ Below, I suggest several modifications of the APA’s judicial review provisions.

a. The Process of Guideline Invalidation

When agency rules are held “arbitrary and capricious,” the process of litigation, remand, revision by the agency, and re-litigation may last several years.⁵³² A criminal defendant facing a fifteen month sentence, however, may not have the luxury of waiting five years for the Commission to adequately justify a challenged guideline, nor would such delay serve the government’s interest in swift justice. In short, the typical “hard look” review process simply will not do.

I propose the following alternative. When a court holds a guideline “arbitrary and capricious,” the product of inadequate procedures, or inconsistent with the SRA, it should sentence the defendant as though no specific guideline applies to the offense.⁵³³ This is not a difficult task, for Congress has already instructed judges on how to proceed when no guideline applies: the sentencer must consider the four purposes of sentencing, having “due regard” for “sentences prescribed by guidelines applicable to similar offenses and offenders.”⁵³⁴ Any such sentence may be reversed on appeal if it is “plainly unreasonable.”⁵³⁵

Second, the court invalidating a guideline should declare that it, and all federal courts under its jurisdiction, shall no longer enforce the challenged Guidelines provision until the Sentencing Commission has remedied the relevant defect of rationality, procedure, or law. In effect, the court should issue an informal “remand” to the Commission, but the parties before the court need not await the Commission’s revisions. Meanwhile, the Commission would be free to provide a missing explanation, gather research to support an unproven empirical proposition, reformulate the guideline after

531. In one important respect, the federal sentencing regime has already grinded to a halt. The Commission acts through its seven members, but the President and the Senate have failed to nominate and confirm new members as quickly as the terms of old members expire. As a result, all seven of the Commission’s membership slots are vacant as of this writing. See Miller and Wright, *supra* note 161, at 726 n.14. It may strike the reader as odd that I prescribe a “reining in” of an agency that has no members.

532. See Pierce, *supra* note 521, at 195.

533. An appellate court reaching such a holding should remand with directions to impose a sentence as though no guideline applies.

534. See 18 U.S.C. § 3553(b) (1994).

535. See *id.* §§ 3742(a)(4), (b)(4).

undertaking whatever procedural measures were lacking, or amend a guideline so that it conforms with all relevant statutes.

b. The Question of Pre-Enforcement Review

Courts indulge a presumption that parties may challenge a regulation once the rule is final, without waiting for it to be enforced against them.⁵³⁶ There is no reason to exempt the Sentencing Commission's rules from this presumption. First, most of the available APA challenges are not case-specific and would not benefit from the facts of a particular offense.⁵³⁷ Are there facts in the administrative record to support the Commission's inferences, or are there not? Has the Commission adequately explained itself, or has it not? Does the guideline violate the SRA, or does it not? Second, because criminal defendants as well as their lawyers are inherently less organized than federal prosecutors, pre-enforcement review might permit meaningful challenges to be brought by organizations (such as the National Association of Criminal Defense Lawyers) whose assistance and expertise might be unavailable in individual criminal cases.

At any rate, I anticipate most challenges to be of the "as applied" variety. For one thing, few parties will have a sufficient stake in any particular future guideline. For another, the Commission already has accomplished most of its work. Most guidelines that will ever exist already do; these hopefully will face renewed scrutiny by the parties sentenced under them and the judges enforcing them.

c. The Retroactivity of the New Judicial Review

Most challenges to the Guidelines will target those provisions already in existence. When the Commission enacted these, it was free from the procedural requirements that I advocate. Likewise, the Commission has operated against a backdrop of parties' inability to challenge guidelines as "arbitrary and capricious."⁵³⁸ Review of previously-enacted guidelines will impose substantive and procedural obligations upon the Commission that did

536. See *Abbott Lab. v. Gardner*, 387 U.S. 136 (1967); RICHARD H. FALLON, JR. ET AL., *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 251 & n.2 (4th ed. 1996) (pre-enforcement review now "the norm").

537. See *Abbott Lab.*, 387 U.S. at 149 (in determining availability of pre-enforcement review, court "evaluate[s] both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.").

538. See *United States v. Wimbush*, 103 F.3d 968, 969-70 (11th Cir. 1997); *United States v. Cooper*, 35 F.3d 1248, 1255 (8th Cir. 1994), *vacated on other grounds*, 514 U.S. 1094 (1995); *United States v. Lopez*, 938 F.2d 1293, 1297 (D.C. Cir. 1991).

not exist when the Guidelines were enacted.

I would permit retroactive review for matters of law and rationality, but not procedure. Retroactive SRA-based review is not problematic; courts already conduct such review, and the Commission has always been bound by the SRA. By contrast, retroactive procedural review is simply too costly. For example, we should not cast aside the entire Guidelines Manual simply because the Commission conducted closed meetings when the law did not require otherwise. That, of course, does not mean the Commission *should* have closed its meetings; it only means that no feasible legal remedy exists for the Commission’s pre-existing procedural failures.

Rationality review, meanwhile, occupies a middle ground between procedural and legal review. On one hand, no statute expressly requires the Commission to behave rationally or permits parties to attack the Commission’s irrationality. On the other, Congress did expressly require the Commission to achieve certain specific ends—the four purposes of sentencing, “certainty and fairness” in sentencing, and a reduction of “unwarranted sentencing disparit[y],” to name a few.⁵³⁹ It even required the Commission to measure the success of the Guidelines in terms of these goals, by comparing pre- and post-Guidelines sentencing practices.⁵⁴⁰ Congress, then, imposed a norm of rationality, even if parties could not enforce that norm. For example, if Congress wanted the Commission to avoid straining the federal prison capacity,⁵⁴¹ the Commission would violate the spirit of this command if it did not at least *ascertain* the prison capacity and formulate a plausible model estimating the Guidelines’ impact on that capacity.⁵⁴² Similarly, if Congress required the Commission to determine the relevance of criminals’ age, education, or employment records,⁵⁴³ a coin-flip or vague hunch would not do. Rather, Congress (and the rest of us) expected the Commission to arrive at *some* reasoned outcome, regardless of whether we agree with that outcome.

Further, the legitimacy of the Guidelines—like that of all regulations—depends upon whether they are the product of informed deliberation rather

539. See 28 U.S.C. § 991(b) (1994).

540. See John M. Walker, Jr., *Is the Commission Fulfilling Its Mandate?: A Review of the Sentencing Commission’s 1994 Annual Report*, 8 FED. SENT. REP. 106, 106 (1995); see also 28 U.S.C. § 991(b)(2) (1994) (purposes of Commission include “develop[ing] means of measuring the degree to which the sentencing, penal, and correctional practices are effective” in meeting the four enumerated purposes of sentencing).

541. See *id.* § 994(g).

542. See STITH & CABRANES, *supra* note 14, at 64-65 (criticizing Commission’s methods of determining prison population increases caused by Guidelines).

543. See 28 U.S.C. § 994(d) (1994).

than raw political power operating behind closed doors. Why are a defendant's family ties "not ordinarily relevant"?⁵⁴⁴ Why indeed should an alien-smuggler's sentence depend upon the number smuggled rather than the deplorable conditions under which aliens are often smuggled into the country?⁵⁴⁵ Why must a downward departure for assisting the government depend upon a motion by the government?⁵⁴⁶ Did the Commission consider an alternative? Did the facts underlying the Commission's decision—if any—reasonably warrant the decision reached? Judges, prosecutors, defendants, and the public have a right to know. I therefore favor retroactive rationality review.

I add one caveat. Retroactive rationality review should be permitted only after one year following the Sentencing Commission Accountability Act's enactment.⁵⁴⁷ During the first year, the Commission should organize a guideline-by-guideline docket containing all data, arguments, public comment, and other information from which each Guidelines provision emerged.⁵⁴⁸ Each "docket" will serve as the "administrative record" for the relevant guideline. For those individual dockets that appear sparse, the Commission might attempt at least to explain the decision that it reached, if not to gather empirical research to strengthen that decision. In either case, the Commission's political aloofness would quickly end.

d. Rationality Review Versus Departures: The Scope of the Inquiry

As the foregoing discussion suggests, rationality review will entail a comparison of the administrative record with the rule finally enacted. Courts are accustomed to this task, and are used to questioning whether the agency relied on an irrelevant consideration, ignored an important one, arrived at implausible inferences from the facts in the record, or otherwise failed to explain the decision that it reached.

I wish to contrast the "administrative record" with the much more limited scope of the departure inquiry. The sentencer may depart from the guideline range if the case presents an "aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission."⁵⁴⁹ Despite the broad language of the departure

544. See GUIDELINES § 5H1.6 policy statement (1998).

545. See STITH & CABRANES, *supra* note 14, at 70.

546. See GUIDELINES § 5K1.1 policy statement (1998).

547. For those defendants sentenced during the first year of the Act's enactment, I would permit rationality challenges within one year of the statute's first anniversary.

548. See Buffone, *supra* note 164, at 69.

549. 18 U.S.C. § 3553(b) (1994).

provision, the court’s inquiry is limited. In determining what the Commission has “adequately considered,” the court may only evaluate the four corners of the Guidelines Manual.⁵⁵⁰ Further, courts may not *measure* the adequacy of the Commission’s consideration; rather, they may depart only in factually atypical cases—when the case falls outside the relevant guideline’s “heartland.”⁵⁵¹ I have criticized these developments elsewhere,⁵⁵² but I do not advocate a change in the departure inquiry. Departure should of course remain available in factually atypical cases.⁵⁵³ The courts have erred in confining departure to such cases. Yet, rather than advocating for departures in *non-atypical* cases when the Commission has not considered adequately that which it *ought* to have considered,⁵⁵⁴ I argue for traditional rationality review.

Rationality review carries several advantages over the departure power, and even over the broader “normative” departure power that courts have rejected.⁵⁵⁵ First, rationality review provides a more complete remedy because it invalidates irrational rules. When the Commission has failed to justify a provision, rationality review requires the Commission to correct its failure. By contrast, departure might produce a more just sentence in the case at hand, or even encourage other courts to depart in similar cases, but it leaves the Commission’s general failure intact.⁵⁵⁶ Second, rationality review would encourage the Commission to scrutinize its own work and to abandon those rules which it cannot justify. To this end, administrative law provides stronger medicine than mere departure. Third, “hard look” review of the Guidelines would promote the same democratic values that underly judicial review of any administrative action; that is, it encourages public participation, informed agency deliberation, comprehensible agency rules supported by comprehensible explanations, and decisions that follow statutory directives rather than bureaucratic whim.

550. *See id.*

551. *See supra* Parts IV.A-B.

552. *See supra* Parts IV.A-B.

553. The Guidelines Manual itself provides a rough and imperfect proxy for what is “typical” in relation to each guideline. Further, by confining departure to the Manual, the court’s task is simplified. I do not wish to discourage departure by subjecting the sentencing judge to a multi-thousand page administrative record.

554. *See supra* Part IV.A.

555. *See supra* Part IV.A.

556. Furthermore, at least under existing law, a judge’s decision not to depart is discretionary, and thus not appealable. *See* 18 U.S.C. §§ 3742(a)(2), (b)(2) (1994). If the Commission has violated the law, then discretionary, non-appealable departure determinations cannot adequately remedy the violation.

CONCLUSION

In a legal era marked by suspicion of administrative agencies, the Sentencing Commission is strangely exempt from the checks and balances that administrative law provides. It is time to end this exemption. First, courts and litigants alike must scrutinize the Guidelines for legal error—just as they are accustomed to scrutinizing other agency regulations. Second, Congress should apply the Administrative Procedure Act more fully to the Commission. Only then will the Commission be required to explain its decisions. Only then might the Guidelines achieve their broad, and laudable, statutory purposes. And only then might the Commission and its Guidelines gain the legitimacy they now lack.

APPENDIX A: TABLE OF CASES ANALYZED IN PART III.D

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67 F.3d 1359
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61 F.3d 10
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60 F.3d 128
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58 F.3d 464
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27 F.3d 254
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23 F.3d 839
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998 F.2d 634
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996 F.2d 993
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993 F.2d 395
992 F.2d 853
991 F.2d 370
990 F.2d 1367
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932 F.2d 1073
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925 F.2d 359
924 F.2d 921
919 F.2d 1381

917 F.2d 1495
917 F.2d 1178
914 F.2d 1352
909 F.2d 1109
908 F.2d 260
908 F.2d 230
907 F.2d 781
903 F.2d 341
902 F.2d 1311
902 F.2d 61
899 F.2d 371
898 F.2d 1493
898 F.2d 1461
898 F.2d 659
898 F.2d 390
898 F.2d 119
897 F.2d 963
897 F.2d 134
896 F.2d 246
894 F.2d 1092
894 F.2d 1000
893 F.2d 250
892 F.2d 1170
887 F.2d 888
886 F.2d 1513
883 F.2d 13
881 F.2d 976
880 F.2d 376
874 F.2d 647
869 F.2d 822
982 F. Supp. 541
933 F. Supp. 1003
917 F. Supp. 543
917 F. Supp. 22
914 F. Supp. 533
906 F. Supp. 1136
906 F. Supp. 261
891 F. Supp. 189
890 F. Supp. 764
885 F. Supp. 185
885 F. Supp. 19

879 F. Supp. 80
870 F. Supp. 1197
866 F. Supp. 744
844 F. Supp. 677
817 F. Supp. 176
798 F. Supp. 291
780 F. Supp. 658
730 F. Supp. 329
728 F. Supp. 632
724 F. Supp. 1118
720 F. Supp. 619
715 F. Supp. 203
713 F. Supp. 565
697 F. Supp. 1305
694 F. Supp. 1488
694 F. Supp. 1406
691 F. Supp. 656
691 F. Supp. 277
690 F. Supp. 272
687 F. Supp. 1403
687 F. Supp. 1145
686 F. Supp. 1246
686 F. Supp. 1174
682 F. Supp. 815
1997 WL 699307
1997 WL 557568
1997 WL 460926
1997 WL 311468
1997 WL 48975
1997 WL 107743
1996 WL 721725
1996 WL 636193
1996 WL 394034
1996 WL 355569
1996 WL 185749
1996 WL 143458
1996 WL 122019
1996 WL 80015
1995 WL 611153
1995 WL 595043
1995 WL 389900

1995 WL 390286
1995 WL 331466
1995 WL 309988
1995 WL 109338
1995 WL 12448
1994 WL 664920
1994 WL 577402
1994 WL 574140
1994 WL 470203
1994 WL 416287
1994 WL 399497
1994 WL 381758
1994 WL 224346
1994 WL 118111
1994 WL 81301
1994 WL 14838
1993 WL 498055
1993 WL 483252
1993 WL 393128
1993 WL 222505
1992 WL 383275
1992 WL 174560
1992 WL 44737
1992 WL 33253
1992 WL 2881
1991 WL 173158
1991 WL 80624
1991 WL 39901
1991 WL 12860
1990 WL 119615
1990 WL 105586
1990 WL 27196
1989 WL 32833
1988 WL 83193

APPENDIX B: CODING SHEET

- 1) Case/Challenge ID No.
- 2) Court Level
 - 1=District Court
 - 2=Appeals Court
 - 3=Supreme Court
- 3) Circuit of Authority

01=First Circuit	02=Second Circuit
03=Third Circuit	04=Fourth Circuit
05=Fifth Circuit	06=Sixth Circuit
07=Seventh Circuit	08=Eighth Circuit
09=Ninth Circuit	10=Tenth Circuit
11=Eleventh Circuit	12=D.C. Circuit
- 4) Identity of Challenging Party
 - 1=Defendant
 - 2=Government
 - 3=Unspecified
- 5) Year of Case Decision

01=1987	02=1988
03=1989	04=1990
05=1991	06=1992
07=1993	08=1994
09=1995	10=1996
11=1997	
- 6) Type of Guidelines Provision Challenged
 - 1=Specific Guideline
 - 2=Commentary/Application Note
 - 3=Policy Statement
 - 4=Guidelines in general
- 7) Level of Deference Accorded by Court to Sentencing Commission
 - 1=*Chevron* deference
 - 2=Other deference/similar to *Chevron*
 - 3=Other deference/less than *Chevron*
 - 4=No deference level discussed

8) Success of Challenge

1=Succeeds

2=Fails

9) Type of Statutory Violation Alleged

1=Specific SRA Directive

2=General SRA Directive

3=External SRA Directive

4=Other/Unspecified