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United States v. Muschik: An Administrative Law Critique of the Federal Sentencing Guidelines' Ability to Overried Judicial Statutory Interpretations

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Comment

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Richard Lee Muschik pleaded guilty to conspiracy[1] to distribute lysergic acid diethylamide (LSD)[2] in violation of 18 U.S.C. §§ 841(a)(1)[3] and 846.[4] Muschik conspired to distribute the LSD on blotter paper, known as a carrier medium.[5] The

1. United States v. Muschik, 49 F.3d 512, 513 (9th Cir. 1995), *petition for cert. filed*, 64 U.S.L.W. 3086 (U.S. July 25, 1995) (No. 95-156). On October 23, 1991, Muschik escaped from custody while awaiting trial on the drug charges. *Id.* Federal authorities apprehended him on November 28, 1991, and on January 28, 1992, the district court convicted him of escape from federal custody in violation of 18 U.S.C. § 751. *Id.* On March 12, Muschik pleaded guilty to the conspiracy charge and on May 26, the district court combined his escape and drug charges for sentencing purposes. *Id.*

2. LSD is a "crystalline compound that causes psychotic symptoms similar to those of schizophrenia." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 1351 (1986). LSD is categorized as a hallucinogenic drug that is taken orally. AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, § 304.50 (3d ed. rev. 1987). Hallucinogen use produces, *inter alia*, anxiety, depression, illusions, and tremors. *Id.* § 305.30.

3. In relevant part, § 841(a) provides that "[e]xcept as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally . . . to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance . . . ." 21 U.S.C. § 841(a) (1994).

4. Section 846 states that "[a]ny person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy." *Id.* § 846. Although Muschik actually pleaded guilty to conspiracy to distribute LSD in violation of § 846, 21 U.S.C. § 841(a) also governed his actions.

5. LSD dealers normally sell the drug in such small doses that they commonly create a "carrier" by dissolving the pure drug and spraying the solution on paper or gelatin. *See* Chapman v. United States, 500 U.S. 453, 457 (1991). The solvent then evaporates, leaving small amounts of the drug trapped on the carrier. *Id.*

United States District Court for the District of Montana determined that 21 U.S.C. § 841(b)(1)(A) (the "sentencing statute") imposed on Muschik a mandatory minimum sentence[6] for distributing more than ten grams of a "mixture or substance containing a detectable amount of [LSD]."[7] The district court accordingly sentenced Muschik to a twenty-year prison term.[8] Muschik appealed and the United States Court of Appeals for the Ninth Circuit affirmed his conviction, but vacated the district court's sentence and remanded for resentencing.[9]

On November 1, 1993, before Muschik's resentencing, the United States Sentencing Commission amended the United States Sentencing Guidelines,[10] thereby changing the manner of calculating the weight of LSD for sentencing purposes. Amendment 488 to the Guidelines provides, in certain situations, a standard dosage weight for LSD[11] and removes the drug's car-

6. On May 26, 1992, the district court combined Muschik's escape and drug charges for sentencing and determined that the amount of LSD involved warranted application of 21 U.S.C. § 841(b)(1)(A)'s mandatory minimum sentence provisions. United States v. Muschik, 49 F.3d 512, 513 (9th Cir. 1995), *petition for cert. filed*, 64 U.S.L.W. 3086 (U.S. July 25, 1995) (No. 95-156).

7. 21 U.S.C. § 841(b)(1)(A)(v). Section 841(b)(1)(A) imposes, *inter alia*, a mandatory sentence of not less than 10 years or more than life for distributing certain controlled substances, including LSD, in certain amounts. *Id.*

8. The district court sentenced Muschik to a 20-year-term pursuant to the mandatory minimum provision in 21 U.S.C. § 841(b)(1)(A) and based on Muschik's prior state felony drug conviction. *Muschik*, 49 F.3d at 513. The term of a mandatory minimum sentence doubles where the defendant has one or more prior felony drug convictions. 21 U.S.C. § 841(b)(1)(A).

9. *Muschik*, 49 F.3d at 513.

10. Congress provided authority for the Commission to amend the Guidelines.

> The Commission, at or after the beginning of a regular session of Congress, but not later than the first day of May, may promulgate under subsection (a) of this section and submit to Congress amendments to the guidelines and modifications to previously submitted amendments .... Such an amendment ... shall take effect on a date specified by the Commission ... except to the extent that the effective date is revised or the amendment is otherwise modified or disapproved by Act of Congress.

28 U.S.C. § 994(p) (1994).

11. The Background Commentary to § 2D1 of the Sentencing Guidelines refers to Amendment 488 and provides that:

> in cases involving LSD contained in a carrier medium, the Commission has established a weight per dose of 0.4 milligrams for purposes of determining the base offense level. . . . Because LSD typically is marketed and consumed orally on a carrier medium, the inclusion of some weight attributable to the carrier medium recognizes (A) that offense levels for most other controlled substances are based upon the weight of the mixture containing the controlled substance without regard to purity, and (B) the decision in Chapman v. United States, 111 S. Ct. 1919 (1991) (holding that the term "mixture or substance" in 21 U.S.C.

rier medium from the calculation of the total drug weight.[12] The United States Probation Office determined that, under the new calculation method, the weight of the LSD sold by Muschik[13] was 5.68 grams rather than the 101 grams calculated under the prior method.[14] Nevertheless, on December 6, 1993, the district court resentenced Muschik to the same twenty-year term as imposed originally.[15] The district court again included the weight of the carrier medium that Muschik used when he sold the drug.[16] Muschik appealed the district court's decision and on February 28, 1995, the Ninth Circuit Court of Appeals vacated Muschik's sentence a second time,[17] stating that Amendment 488 standardizes the weight of the LSD's carrier medium that can be included in the total weight calculation for mandatory minimum sentencing purposes.[18] The court of appeals remanded Muschik's case for resentencing in accordance with its decision.[19]

> § 841(b)(1) includes the carrier medium in which LSD is absorbed). . . . Thus, the approach decided upon by the Commission will harmonize offense levels for LSD offenses with those for other controlled substances and avoid an undue influence of varied carrier weight on the applicable offense level. *Nonetheless, this approach does not override the applicability of "mixture or substance" for the purposes of applying any mandatory minimum sentence* (see *Chapman*; § 5G1.1(b)).

UNITED STATES SENTENCING COMMISSION, GUIDELINES MANUAL, § 2D1.1 (1994) (emphasis added).

12. Prior to Amendment 488's enactment, weight calculation of LSD for sentencing purposes under both the sentencing statute and the Guidelines followed a literal "mixture or substance" interpretation that included the weight of any carrier medium upon which dealers affixed LSD. *See infra* notes 85-92 and accompanying text (discussing the holding and reasoning of *Chapman v. United States* with respect to the pre-amendment calculation method).

Amendment 488 alters the LSD calculation method by prescribing a somewhat less stringent, but now uniform, 0.4 milligram per-dose formula. U.S.S.G. § 2D1.1.

13. The Sentencing Commission indicated that courts may apply Amendment 488's new weight calculation formula retroactively in appropriate circumstances. U.S.S.G. § 1B1.10(a) (noting that "[w]here a defendant is serving a term of imprisonment, and the guideline range applicable to that defendant has subsequently been lowered as a result of an amendment to the Guidelines . . . a reduction in the defendant's term of imprisonment is authorized under 18 U.S.C. § 3582(c)(2)"); United States v. Holmes, 13 F.3d 1217, 1222 (8th Cir. 1994) (courts have discretion to apply Amendment 488 retroactively).

14. United States v. Muschik, 49 F.3d 512, 514 (9th Cir. 1995), *petition for cert. filed*, 64 U.S.L.W. 3086 (U.S. July 25, 1995) (No. 95-156).

15. *Id.*

16. *Id.* at 513.

17. *Id.* at 518.

18. United States v. Muschik, 49 F.3d 512, 518 (9th Cir. 1995), *petition for cert. filed*, 64 U.S.L.W. 3086 (U.S. July 25, 1995) (No. 95-156).

19. *Id.* at 518.

United States v. Muschik raises two important issues: whether a Federal Sentencing Guideline amendment can displace a judicial interpretation of a statutory provision, and the extent to which courts should defer to the Federal Sentencing Commission in its role as an independent agency within the judicial branch.[20] Further, the *Muschik* court's reasoning illuminates the problems resulting from Congress's placement of the Federal Sentencing Commission within the judicial branch. This placement has created confusion in the federal courts over the extent of the Commission's authority. Accordingly, the result in *Muschik* is hardly surprising, but nevertheless incorrect.

This Comment examines the *Muschik* court's failure to comply with principles of statutory interpretation and administrative law. Part I discusses the United States Sentencing Commission's role as an independent agency within the judicial branch and reviews traditional rules of statutory interpretation. Part I also surveys the existing circuit split resulting from attempts to conform the Federal Sentencing Guidelines with Congress's mandatory minimum drug sentence statutes. Part II discusses the Ninth Circuit Court of Appeals' reasoning in *Muschik*. Finally, Part III argues that the *Muschik* court deviated from administrative law and statutory interpretation principles. In particular, Part III asserts the *Muschik* court attributed excessive authority to Amendment 488 and improperly displaced the Supreme Court's interpretation of § 841 in *Chapman v. United States*.[21] This Comment argues that Amendment 488 serves a legitimate purpose other than displacing the meaning of § 841 and that Congress must clarify the meaning of § 841 before courts diverge from the existing statutory interpretation.

I. RECONCILING AGENCIES' ROLES WITH THE PURPOSES OF DRUG SENTENCING AND POST-*CHAPMAN V. UNITED STATES* FALLOUT

Traditional administrative bodies enjoy wide discretion in formulating policies through their rulemaking ability. This discretion often includes the authority to interpret statutes promulgated by Congress. The United States Sentencing Commission,

20. For a thorough analysis of the role of the Federal Sentencing Commission as viewed from an administrative law vantage point see Ronald F. Wright, *Sentencers, Bureaucrats, and the Administrative Law Perspective on the Federal Sentencing Commission*, 79 CALIF. L. REV. 3 (1991).

21. 500 U.S. 453 (1991).

although an independent agency, differs somewhat from a traditional agency. Congress has placed institutional checks on the Commission's rulemaking, and the federal judiciary has appeared reluctant to accept the Commission's authority. In particular, Congress's promulgation of mandatory minimum drug sentence statutes has called into question the extent of the Commission's authority over federal sentencing.

A. Administrative Law Theories and The United States Sentencing Commission: A Recipe for Conflict

1. The Role of Traditional Agencies in Promulgating Rules and Clarifying Laws

In their role as administrators of congressionally-created programs, traditional agencies[22] routinely formulate policy through rulemaking.[23] When confronted with new developments in their area of expertise, agencies have wide authority to adopt new policies, or even to change laws.[24] An agency's interpretation of its own regulations normally controls unless it violates a federal statute or the Constitution.[25]

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22. "Traditional" agencies trace their roots back to the New Deal era, when Congress created a "massive administrative apparatus" to carry out the New Deal agenda. Cass R. Sunstein, *Law and Administration After Chevron*, 90 Colum. L. Rev. 2071, 2079 (1990). Traditional agencies are generally associated with the executive branch, although some "independent" agencies enjoy a degree of political insulation from the executive branch. *See* Wright, *supra* note 20, at 13-14. This Comment differentiates such "traditional" agencies from the Federal Sentencing Commission in the same way that the Supreme Court differentiated the Commission in *Mistretta v. United States*. 488 U.S. 361 (1989). The *Mistretta* Court characterized the Commission as an independent agency located within the judicial branch of the federal government. *Id.* at 393-94.

23. Morton v. Ruiz, 415 U.S. 199, 231 (1974).

24. *See* American Trucking Assn's., Inc. v. Atchison, Topeka & Santa Fe Ry., 387 U.S. 397, 416 (1967) (upholding as essential, the agency's adaptation of its rules and practices to the changing needs and patterns of transportation); American Power & Light Co. v. Securities & Exch. Comm'n, 329 U.S. 90, 105 (1946) (upholding a delegation of authority to the Securities and Exchange Commission to prevent unfair distribution of voting power among securities voters); Yakus v. United States, 321 U.S. 414, 426 (1943) (upholding a congressional delegation of authority to the Price Administrator to fix fair commodity prices that would effectuate the purposes of the Emergency Price Control Act). *See also* Sunstein, *supra* note 22, at 2088 (arguing that "administrators are in a far better position than courts to interpret ambiguous statutes in a way that takes account of new conditions"). *But see* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) (noting that the judiciary's role is to "say what the law is").

25. Stinson v. United States, 113 S.Ct. 1913, 1919 (1993) (citing Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945)).

The judiciary is the final arbiter on statutory construction issues, however, and it will reject agency interpretations that contradict clear congressional intent.[26] Moreover, once a court determines the meaning of a statute, it adheres to that interpretation under the doctrine of *stare decisis*.[27] Unfortunately, Congress often words statutes ambiguously and declines to identify whether courts or agencies should resolve the ambiguity.[28] The *Chevron* doctrine addresses this problem.[29]

Under the *Chevron* doctrine, courts normally defer to an administrative agency's interpretation of a statutory provision the agency administers.[30] Judicial deference is warranted by agencies' policy-making and fact-finding competence, combined with their electoral accountability.[31] An agency may clarify ambigu-

26. Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837, 843 n.9 (1984) (citing Federal Election Comm'n v. Democratic Senatorial Campaign Comm., 454 U.S. 27, 32 (1981); Securities Exch. Comm'n v. Sloan, 436 U.S. 103, 117-18 (1978); Federal Maritime Comm'n v. Seatrain Lines, Inc., 411 U.S. 726, 745-46 (1973)); *Cf.* Braxton v. United States, 500 U.S. 344, 348-49 (1991) (implicitly indicating that in the Federal Sentencing Guideline context the Court will look first to the Federal Sentencing Commission and its amendment authority to address intercircuit interpretive conflicts over the Guidelines).

27. Maislin Indus. v. Primary Steel, Inc., 497 U.S. 116, 131 (1990).

28. *See, e.g.*, Cass Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 467 (1987) (arguing that ambiguity alone does not signal a congressional delegation of interpretive authority to an agency); *cf.* Sunstein, *supra* note 22, at 2090 (noting that "Congress has rendered no general decision about which institution should interpret the statutes it enacts").

29. The *Chevron* doctrine derives from Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984). *See generally* Thomas W. Merrill, *Textualism and the Future of the Chevron Doctrine*, 72 WASH. U. L. Q. 351, 352-53 (1994) (outlining the *Chevron* doctrine's basic two-step inquiry that courts undertake when deciding whether to defer to an agency interpretation).

30. Lechmere, Inc. v. NLRB, 502 U.S. 527, 536 (1992); NLRB v. Food & Commercial Workers, 484 U.S. 112, 123 (1987). *See also* Merrill, *supra* note 29, at 358 (noting that "[s]ome lower courts . . . had treated [the *Chevron* doctrine] like the magna carta of deference"); *cf.* Thomas W. Merrill, *Pluralism, the Prisoner's Dilemma, and the Behavior of the Independent Judiciary*, 88 NW. U. L. REV. 396, 399 (1993) (noting that courts first look to legislative intent and then defer to agency interpretations when interpreting statutes). *But cf.* RICHARD J. PIERCE, JR. ET AL., ADMINISTRATIVE LAW AND PROCESS 350-54 (1985) (arguing that review of administrative provisions is both a legitimate and necessary judicial function).

31. Statutory authority permits the President to name executive non-independent agency leaders and to revoke their status at any time. 3 U.S.C. § 301 (1994). The Executive Department may exert some degree of control over even "independent" agencies by controlling their resources and influencing personnel decisions. *See* Wright, *supra* note 20, at 14 n.51. *See also* Sunstein, *supra* note 22, at 2084 (noting that, in *Chevron*, the Environmental Protection Agency's competence and electoral accountability heavily influenced the inter-

ous statutory provisions unless its interpretation is arbitrary, capricious, or contrary to a statute.[32] As a rule, courts reviewing an agency's interpretation require merely that the agency base its interpretation on a "permissible construction of the statute."[33] The Supreme Court, however, has placed two significant checks on an agency's power to interpret ambiguous statutory provisions. Courts reject an agency's statutory interpretation that contradicts prior judicial interpretations[34] or that directly conflicts with a governing statute.[35] Courts also limit the scope of an agency's interpretive power to those statutes within the agency's domain.[36]

Judicial authority to review agency actions and interpretations derives from the Administrative Procedure Act (APA) of 1946.[37] The APA, however, speaks only of the judicial review of

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pretation of the statutory term at issue). *Cf.* Maislin Indus., 497 U.S. at 134 (noting that the Interstate Commerce Commission has the expertise to adopt new policies when faced with new industrial developments).

32. *Chevron*, 467 U.S. at 844; *see also Maislin Indus.*, 497 U.S. at 119 (noting that the Interstate Commerce Commission has primary responsibility for determining whether motor common carrier rates are reasonable); Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (finding that an administrative decision that "failed to consider an important aspect" of an issue is arbitrary or capricious); Mitchell v. Budd, 350 U.S. 473, 480 (1956) (deferring to the Secretary of Labor's definition of "area of production" in the Fair Labor Standards Act because the Secretary "fulfills his role when he makes a reasoned definition"); RCA v. United States, 341 U.S. 412, 420 (1951) (noting that courts must not overrule decisions, given agencies' expertise in an area, merely because courts disagree with the wisdom of the policy); Federal Sec. Adm'r v. Quaker Oats Co., 318 U.S. 218, 227-28 (1943) (deferring to the Food and Drug Administration's rulemaking because of traditional deference to expert administrative bodies' informed judgment); *cf.* Wright, *supra* note 20, at 47 (arguing that, in the federal sentencing context, courts "cannot blindly apply a guideline that is based on a misinterpretation of the underlying statute").

33. *Chevron*, 467 U.S. at 843. *But cf.* Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 212 (1988) (noting that an agency's position during litigation does not trigger deference under the *Chevron* doctrine).

34. *Maislin Indus.*, 497 U.S. at 131.

35. *Id.* at 134-35; *cf.* Stinson v. United States, 113 S. Ct. 1913, 1915 (1993) (holding that, in the federal sentencing context, the Sentencing Commission's Guidelines interpretation is binding unless it violates the Constitution or a federal statute).

36. *See* Sunstein, *supra* note 22, at 2093 (noting that "the principle of deference does not extend to interpretations by agencies that have not been granted the authority to interpret the law"); *cf.* Federal Maritime Comm'n v. Seatrain Lines, Inc., 411 U.S. 726, 745 (1973) (noting that an agency "may not bootstrap itself into an area in which it has no jurisdiction").

37. 5 U.S.C. §§ 551-559, 701-706 (1994). Sections 701-706 of Title 5 govern, *inter alia*, the right to seek judicial review of agency action, the types of action that courts may review, and the scope of judicial review. Section 706 provides in relevant part that "the reviewing court shall decide all relevant

"agencies," and not of bodies within the judiciary[38]—such as the United States Sentencing Commission.

2. The Role of the United States Sentencing Commission

The United States Sentencing Commission is a permanent[39] rulemaking administrative body.[40] Congress established the Commission in the Sentencing Reform Act of 1984 (SRA).[41] Congress granted the Commission the authority to provide sentencing guidance for the federal courts through the promulgation of the United States Sentencing Guidelines.[42] Thus, the Commission is related by statute to the judicial, rather than the executive, branch of the federal government.[43]

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questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action."

38. 5 U.S.C. § 551(1)(B) defines an agency as "not includ[ing] . . . the courts of the United States."

39. William W. Wilkins, Jr. & John R. Steer, *The Role of Sentencing Guideline Amendments in Reducing Unwarranted Sentencing Disparity*, 50 WASH. & LEE L. REV. 63, 65 (1993). The Commission includes seven voting members whom the President appoints "by and with the advice and consent of the Senate." 28 U.S.C. § 991(a). At least three of these seven members are federal judges subject to removal by the President for neglect of duty, malfeasance in office, or for other good cause. *Id.*

40. Section 991(b) of Title 28 of the United States Code authorizes the Commission to develop "sentencing policies and practices for the Federal criminal justice system." 28 U.S.C. § 991(b). Congress granted the Commission temporary Guidelines amendment authority to counteract courts' potential invalidation of the Guidelines. Sentencing Act of 1987, Pub. L. No. 100-182, § 21, 101 Stat. 1266, 1271 (codified at 28 U.S.C. § 994 nt. (1988)).

41. Pub. L. No. 98-473, tit. II, ch. 2, 98 Stat. 1987 (1984) (codified at 18 U.S.C. §§ 3551, 3661-3672 (1988); 28 U.S.C. §§ 991-998).

42. The SRA provides direction to the Sentencing Commission.

> (a) The Commission . . . shall promulgate and distribute to all courts of the United States and to the United States Probation System -
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> (1) guidelines, as described in this section, for use of a sentencing court in determining the sentence to be imposed in a criminal case, including -
>
> (A) a determination whether to impose a sentence to probation, a fine, or a term of imprisonment;
>
> (B) a determination as to the appropriate amount of a fine or the appropriate length of a term of probation or a term of imprisonment.

28 U.S.C. § 994(a).

The Commission has discretionary authority to determine the severity of sentencing for federal crimes and to assess the weight of offender characteristics that Congress provided for the Commission's consideration. *Id.* § 994(c)-(d). The Commission also has discretion when deciding which crimes courts traditionally have punished either too severely or too leniently. *Id.* § 994(m).

43. Congress associated the Sentencing Commission with the federal judiciary by denoting it as an independent commission within the judicial branch and by including federal judges in the Commission. *Id.* § 991(a). In passing the

In addition to sharing a degree of its policy-making function with the federal judiciary,[44] there are other attributes that distinguish the Commission from a traditional agency. Although the Commission's Guidelines are subject to congressional amendment or revocation within the 180-day note and comment period required under usual agency rulemaking,[45] the Commission does not necessarily receive the usual judicial deference accorded to traditional agencies. This complicates the Commission's mission.[46] The SRA's legislative history, for instance, suggests Congress's intent that courts consider the fairness and appropriateness of sentences mandated by the Guidelines, and that they impose individualized sentences in appropriate circumstances.[47] The Commission thus occupies an uncertain position as both a guide to the judiciary and its uneasy partner in the sentencing process.[48]

SRA, Congress envisioned substantial interaction between the Sentencing Commission and the Federal Prisons Bureau. *Id.* § 994(o).

For a view of the Commission as a non-judicial branch agency, see Mistretta v. United States, 488 U.S. 361, 393 (1989) (noting that the Commission "is an independent agency in every relevant sense").

44. *See* Wright, *supra* note 20, at 17-19 (discussing the federal judiciary's sharing of policymaking duties with the Commission); Donald P. Lay, *Rethinking the Guidelines: A Call for Cooperation*, 101 YALE L.J. 1755, 1762 (1992) (noting that federal courts of appeal have restricted the authority of judges to depart from the Guidelines); *cf.* William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 374 (1991) (noting that the Supreme Court itself implements interpretive canons that reflect traditional policy preferences).

45. *See* 28 U.S.C. § 994(p).

46. For instance, courts must determine whether the Commission adequately considered aggravating or mitigating circumstances when it formulated the Guidelines. 18 U.S.C. § 3553(b) (1994). *But see* Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE L.J. 1681, 1699-1700 (1992) (noting that district judges rarely respond to Congress's invitation to review the Guidelines).

47. S. REP. No. 225, 98th Cong., 2nd Sess. 52 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3235.

48. *See* Wright, *supra* note 20, at 22 (noting that federal judges are simultaneously policymakers and parties regulated by the Commission in the federal sentencing process).

Judge Donald P. Lay of the Eighth Circuit Court of Appeals noted the tension inherent in the Commission-judiciary relationship in an open letter that he wrote to the Commission. He described the dynamics of this relationship at a 1992 meeting of the Sentencing Institute for the Second and Eighth Circuits:

> As the meeting progressed, many of the Commissioners expressed their disdain for the views of certain members of the federal judiciary. One Commissioner openly accused the judiciary of being arrogant. He claimed that Congress took away the sentencing discretion of federal judges because they could not be trusted in the sentencing process. At the same time, however, many judges challenged the Commissioners'

B. The United States Sentencing Guidelines and the Anti-Drug Abuse Act of 1986

1. The United States Sentencing Guidelines

The United States Sentencing Guidelines are limited rules that remain subordinate to any overriding statutes.[49] The ultimate objective of the Guidelines is to provide proportionality and uniformity in federal sentencing.[50] In accordance with the SRA,[51] the Guidelines seek to limit judicial sentencing discretion in furtherance of these concerns.[52] While congressional interference with the Federal Sentencing Commission's drafting discretion has been significant,[53] the Commission retains significant authority to promulgate the Guidelines.[54]

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attitudes and criticisms of the federal judiciary. It appears to many of us that the Commission is not interested in receiving input from the federal bench. Similarly, many judges seem to have stopped listening to the Commission.

Lay, *supra* note 44, at 1768.

49. Freed, *supra* note 46, at 1695, 1730.

50. U.S.S.G. ch. 1, pt. A, intro. cmt. (n.3) (Nov. 1992); *cf.* 28 U.S.C. § 991(b)(1)(B) (stating that the goal of the Guidelines is to reduce "unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct").

51. *See supra* note 41 and accompanying text (describing the Sentencing Reform Act).

52. The Sentencing Reform Act makes the Sentencing Commission's Guidelines binding on the courts, but allows a judge to depart from the Guidelines if the judge finds an aggravating or mitigating factor that the Commission failed to consider adequately when it formulated the Guidelines. 18 U.S.C. § 3553(b). *See generally* Freed, *supra* note 46 at 1689-91 (discussing steps Congress took in eliminating unwarranted sentencing disparity); Thomas J. Meier, Comment, *A Proposal to Resolve the Interpretation of "Mixture or Substance" Under the Federal Sentencing Guidelines*, 84 J. Crim. L. & Criminology 377, 379-82 (1993) (discussing the goals of the Federal Sentencing Guidelines).

53. Section 994 of Title 28 of the United States Code provides significant direction for the Commission to consider when drafting guidelines. Congress requires consideration of the nature and degree of harm that the offense caused and community concerns about the gravity of the offense. 28 U.S.C. § 994(c). The Commission also must consider comments made by representatives of the federal criminal justice system and by defendants. *Id.* §§ 994(o), (s). Other provisions require the Commission to collect sentencing data and to incorporate that data when drafting the Guidelines. *Id.* §§ 994(m), (w), 995(a). Congress prohibited the maximum range of imprisonment for sentencing categories from exceeding the minimum range by more than 25%. *Id.* § 994(b)(2).

54. Section 994(x) of Title 28 of the United States Code requires that the Guidelines comply with applicable Administrative Procedure Act requirements. Section 994(p) requires that proposed Guidelines survive a 180-day note and comment period in which Congress may reject or tacitly accept them. By using this approach, Congress granted the Commission, rather than reserving for itself, authority to formulate long-term Guidelines policy.

Because the Commission promulgates guidelines that derive from an express congressional delegation of authority,[55] the Guidelines are akin to legislative rules that traditional agencies promulgate.[56] In carrying out its policymaking duties in the sentencing area, the Commission interprets its Guidelines in commentaries.[57]

The Supreme Court, in *Stinson v. United States*,[58] declared that the Commission's interpretive commentary is authoritative unless it violates a federal statute or the Constitution.[59] The Court emphasized, however, that unlike traditional agency rulemaking, the Guidelines commentary is not the product of congressionally delegated authority.[60] Rather, commentary explains the Guidelines and guides the courts in applying them.[61] The commentary to the Guidelines, therefore, is functionally equivalent to a traditional agency's interpretation of its own legislative rules.[62] As a result, the *Stinson* Court declared, even a prior judicial construction of a Guideline provision cannot prevent the Commission from adopting a conflicting interpretation.[63] This comports with a traditional agency's authority to

55. 28 U.S.C. § 991(b)(1). *See generally* Mistretta v. United States, 488 U.S. 361, 371-79 (1989) (discussing the nondelegation doctrine implicit in the principle of separation of powers).

56. Stinson v. United States, 113 S. Ct. 1913, 1919 (1993). *See also* 28 U.S.C. § 994(x) (imposing the traditional note and comment rulemaking requirements, which the Administrative Procedure Act mandates under 5 U.S.C. § 553, on the Commission's rulemaking authority); *Mistretta*, 488 U.S. at 384-85, 395 (noting that the Sentencing Commission engages in rulemaking as a Judicial Branch agency, wielding the rulemaking power of an agency rather than the adjudicatory power that judges traditionally exercise when passing sentence); Sunstein, *supra* note 22, at 2093 (defining a legislative rule as one "issued by an agency pursuant to a congressional grant of power to promulgate regulations").

57. S. REP. No. 225, 98th Cong., 2d Sess. 165-67, 178 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3348-50; 28 U.S.C. § 994(a)(1)-(3) (permitting the Commission to promulgate policy statements and commentary in its efforts to periodically modify the Guidelines).

58. 113 S. Ct. 1913 (1993).

59. *Id.* at 1915.

60. *Id.* at 1918.

61. *Id.*

62. Courts must treat the Commission's commentary "like legislative history . . . that helps determine the intent of a drafter." U.S.S.G. § 1B1.7, cmt.

63. Stinson v. United States, 113 S. Ct. 1913, 1919 (1993). Amended commentary also is binding on the federal courts, even though it is not reviewed by Congress. *Id.*

change the law when confronted with a new development in its area of expertise.[64]

Additionally, Congress intends the Commission's authority to amend the Guidelines to be the primary means of resolving intercircuit conflicts over the interpretation of the Guidelines.[65] The Commission's amendment power extends both to the Guidelines and to the accompanying commentary.[66] The Commission's amendment authority is the equivalent of Congress's authority to amend ambiguous statutory provisions.[67]

Unfortunately, judicial resistance to the Guidelines,[68] spurred by their mandatory nature,[69] has partially frustrated

64. *See supra* note 24 and accompanying text (discussing an agency's ability to interpret recent developments).

65. The SRA's legislative history reveals congressional intent that the Commission "determine whether the guidelines are being effectively implemented and to revise them if for some reason they fail to achieve their purposes." S. REP. No. 225, 98th Cong., 2d Sess. 178 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3361; *see also* Braxton v. United States, 500 U.S. 344, 348 (1991) (explaining that "Congress necessarily contemplated that the Commission would . . . make whatever clarifying revisions to the Guidelines conflicting judicial decisions might suggest"); *see also* Wilkins & Steer, *supra* note 39, at 73 (arguing that "*Braxton* represents a fundamentally pragmatic view that the Commission, as the source of the sentencing law embodied in the guidelines, ultimately is in the best position to know how it intended that law to be interpreted and applied").

66. *See* Wilkins & Steer, *supra* note 39, at 76 (providing an example of the Commission's amendment power). Wilkins and Steer explain that the Commission in one case responded to conflicting court interpretations of statutory felon-in-possession offenses and "career offender" Guideline provisions by amending section 4B1.2 of the Guidelines and its accompanying commentary. *Id.* (citing U.S.S.G. app. C, amend. 433, 461).

67. *See Braxton*, 500 U.S. at 347-48.

68. *See, e.g.*, FEDERAL COURTS STUDY COMMITTEE, REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 142 (1990) (noting that 266 out of 270 respondents to a survey favored amending the Guidelines to make them "general standards" rather than "compusory rules"); FEDERAL COURTS STUDY COMMITTEE, TENTATIVE RECOMMENDATIONS FOR PUBLIC COMMENT 60-65 (1989) (explaining that "the Sentencing Guidelines have significantly increased the federal courts' workload"); U.S. SENTENCING COMM'N, 1989 ANNUAL REPORT 11 (1989) (noting that over 200 district judges held the SRA unconstitutional); Lay, *supra* note 44, at 1768 (noting that many judges seek the SRA's "outright repeal").

69. The Supreme Court noted that "the Guidelines bind judges and courts in the exercise of their uncontested responsibility to pass sentence in criminal cases." Mistretta v. United States, 488 U.S. 361, 391 (1989). If judges depart from the range of sentences that the Guidelines specify, courts must stipulate the "specific reason" for that departure. 18 U.S.C. § 3553(c)(2). During congressional debate over technical SRA amendments, the Senate rejected House efforts to add language to 18 U.S.C. § 3553(a) that would allow courts to impose sentences sufficient but not greater than necessary to comply with sentencing purposes. 133 CONG. REC. S16,644-48 (daily ed. Nov. 20, 1987). One commentator likens the Guidelines to "administrative handcuffs." Freed, *supra* note 46,

the realization of the Guidelines' purposes.[70] Moreover, congressional input in the mandatory minimum sentence area[71] fosters debate over the Guidelines' authoritative reach. Congressional action imposing harsh and inflexible drug-related sentences arguably contradicts the Guidelines' purposes of sentencing proportionality and uniformity.[72] The Anti-Drug Abuse Act of 1986 provides one example of this controversial congressional involvement in the federal sentencing process.

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at 1697. Another commentator argues that the Guidelines' restrictive nature emanates from a misguided perception that their enactment intended to eliminate all disparate sentencing by imposing a rigid system of rules on the courts. Lay, *supra* note 44, at 1756 n.5.

But see United States v. Helton, 975 F.2d 430, 434 (7th Cir. 1992), which notes that sentencing departure decisions are wholly within a district court's discretion.

70. *See* Senator Orrin G. Hatch, *The Role of Congress in Sentencing: The United States Sentencing Commission, Mandatory Minimum Sentences, and the Search for a Certain and Effective Sentencing System*, 28 WAKE FOREST L. REV. 185, 190 (1993) (noting that the Guidelines have not eradicated completely pre-SRA sentencing disparities); Lay, *supra* note 44, at 1762 (noting that "[t]he guidelines have done nothing more than provide a negative contribution to a serious societal problem"); Wilkins & Steer, *supra* note 39, at 75 (noting that courts' differing guideline interpretations lead to "pockets" of disparate guideline sentencing).

71. *See, e.g.*, Anti–Drug Abuse Act of 1986, Pub. L. No. 99-570, § 1002, 100 Stat. 3207-2 to 3207-4 (codified at 21 U.S.C. § 841 (b)(1) (A)-(D) (1988)); *see also* UNITED STATES SENTENCING COMM'N, SPECIAL REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM, app. A (1991) (listing mandatory minimum sentence statutes) [hereinafter MANDATORY MINIMUM REPORT].

72. *See, e.g.*, United States v. McFadden, 13 F.3d 463, 468 (1st Cir. 1994) (Breyer, C.J., dissenting) (arguing that a mandatory minimum sentence represents an "ad hoc deviation" from the Guidelines' goals); MANDATORY MINIMUM REPORT, *supra* note 71, at 44 (noting Commission findings that defendants whose conduct warranted mandatory minimum sentences only received those sentences approximately 54% of the time); *supra* note 50 and accompanying text (discussing the Guidelines' uniform sentencing goal); *see also* Hatch, *supra* note 70, at 194-95 (noting Judicial Conference and Federal Courts Study Committee findings that mandatory minimum sentences "may be dramatically undermining sentencing certainty"); Lay, *supra* note 44, at 1764-65 (arguing that by enacting mandatory minimum sentences, Congress undermined some SRA objectives); Wright, *supra* note 20, at 78 (arguing that "[s]tatutes containing new mandatory minima may constitute the single largest threat by Congress to administrative development of sentencing guidelines").

2. The Anti–Drug Abuse Act of 1986

The Anti–Drug Abuse Act of 1986[73] seeks, in part, to tailor drug sentencing to drug quantities attributed to a defendant.[74] The Act imposes mandatory minimum sentences that correspond to the weight of a "mixture or substance containing a detectable amount" of a controlled substance.[75] Concern about major drug traffickers who create and market large quantities of diluted drugs led Congress to fashion the Act's mandatory minimum sentence provisions.[76] Congress therefore targeted the quantity of a distributed substance, and not the purity of the drug, in its initiative.[77] This "market-oriented" approach[78] in the mandatory minimum sentencing area arguably conflicts with the Guidelines' purposes.[79] Moreover, the Act's practical effect is to severely restrict the Sentencing Commission's authority over drug sentencing.[80]

Enacted at a time when the nation's anti-drug sentiments had reached their pinnacle,[81] the Anti–Drug Abuse Act repre-

73. Pub. L. No. 99-570, 100 Stat. 3207 (1986) (codified at 21 U.S.C. §§ 841 (b)(1)(A)-(D) (1988)).

74. 21 U.S.C. §§ 841(b)(1)(A)-(C).

75. *See supra* notes 6-7 and accompanying text (discussing the sentencing statute's mandatory minimum penalty imposition); *infra* notes 85-92 and accompanying text (discussing the current Supreme Court interpretation); *infra* note 79 (discussing the disproportionality in sentencing created by mandatory minimum sentences).

76. H.R. REP. No. 845, 99th Cong., 2d Sess., pt. 1 at 11-12 (1986).

77. Chapman v. United States, 500 U.S. 453, 465 (1991).

78. H.R. REP. No. 845, *supra* note 76, at 11-12, 17.

79. The Anti–Drug Abuse Act and its market-oriented approach essentially creates a dual calculation method with respect to certain controlled substances. Calculation of drug weight for defendants who have not triggered the sentencing statute is governed by the Guidelines. Calculation of drug weight for a defendant under the sentencing statute, however, includes the entire weight of the mixture or substance, including any carrier medium. *See* MANDATORY MINIMUM REPORT, *supra* note 71, summary. "Whereas guidelines seek a smooth continuum, mandatory minimums result in 'cliffs.' The 'cliffs' that result from mandatory minimums compromise proportionality, a fundamental premise for just punishment, and a primary goal of the Sentencing Reform Act." *Id.* at iii. *See supra* note 50 and accompanying text (discussing the Guidelines' purposes of providing federal sentencing proportionality and uniformity).

80. *See* Ronnie M. Scotkin, *The Development of the Federal Sentencing Guideline for Drug Trafficking Offenses*, 26 CRIM. L. BULL. 50, 52 (1990) (explaining that the "minimum sentencing provisions . . . effectively restricted the Commission's discretion in establishing guidelines for drug trafficking offenses").

81. One legislator's 1986 remarks are indicative of the congressional mood surrounding the enactment of the Anti–Drug Abuse Act: "The widespread use of illegal drugs is one of the most pressing problems facing our society. Illegal drugs are killing children and destroying families. Vast profits from the sale of

sents a distinct, yet controversial[82] congressional policy that differs from the goals of the Guidelines.[83] In fact, the Supreme Court noted that the assumption that the Guidelines are relevant to the interpretation of a sentencing statute is "dubious."[84] Lower courts, however, often face the challenge of reconciling sentencing statutes and Commission Guidelines that may appear similar, but that differ in substance.[85] The Supreme Court addressed this issue in *Chapman v. United States*.

C. *CHAPMAN V. UNITED STATES*

In *Chapman v. United States*, the Supreme Court interpreted the phrase "mixture or substance" in the drug sentencing context.[86] The *Chapman* Court held that blotter paper containing LSD is includable in a drug's weight under 21 U.S.C. § 841 and for sentencing purposes.[87] The Court, after stating that "[n]either the statute nor the Sentencing Guidelines define the terms 'mixture' or 'substance,'"[88] applied a dictionary definition to the term.[89] The Court reasoned that applying the term's

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illegal drugs have created a new criminal underworld which promotes violence and feeds on death." 132 CONG. REC. S14,282 (daily ed. Sept. 30, 1986) (statement of Sen. Kennedy); *see also Drug Arrests Put Prisons in a Pinch*, USA TODAY, Sept. 1, 1992, at A4 (noting that drug arrests in the United States more than doubled over the period 1980 to 1991).

82. *See supra* note 68 and accompanying text (noting general dissatisfaction with mandatory minimum sentences).

83. *See* MANDATORY MINIMUM REPORT, *supra* note 71, at 8 (describing the 1986 Drug Abuse Act as representative of the trend toward mandatory minimum sentences, which is separate from the effort to establish sentencing guidelines).

84. Smith v. United States, 113 S. Ct. 2050, 2055 (1993). *Smith* dealt with the interpretation of the "use" of a firearm in the context of a penalty-enhancing statute for drug trafficking. *Id.* at 2053. Justice Scalia, dissenting, referred to a provision of the Sentencing Guidelines and its commentary for guidance in determining the meaning of the term "use," *id.* at 2061, but the majority rejected the Guidelines' relevance. *Id.* at 2055.

85. *See* United States v. McFadden, 13 F.3d 463, 468 (1st Cir. 1994) (Breyer, C.J., dissenting) (arguing that a mandatory minimum sentence represents an "ad hoc deviation" from the Guidelines' goals); United States v. Young, 34 F.3d 500 (7th Cir. 1994) (noting that Congress did not intend to employ statutory sentencing provisions that are completely at odds with the Guidelines' approach).

86. 500 U.S. 453 (1991).

87. *Id.* at 461-62.

88. *Id.*

89. The Court defined a "mixture" as "a portion of matter consisting of two or more components that do not bear a fixed proportion to one another and that however thoroughly commingled are regarded as retaining a separate existence." *Id.* at 462 (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1449 (1986)). The Court further declared that a "mixture" may consist of two

plain meaning[90] corresponds to Congress's intent to punish drug dealers based on a solicited drug's "street weight."[91] The Court referred to the legislative history of the Anti–Drug Abuse Act of 1986, which indicated Congress's desire for a "market-oriented" approach to punishing drug offenders.[92] The Court supported its interpretation by noting that blotter paper facilitates LSD distribution through easy concealment, transport, and marketability.[93]

Chapman, however, marked merely the beginning of the interpretive controversy. Circuit court decisions demonstrate not only that the intent of Congress and the Sentencing Commission in using the phrase "mixture or substance" remains unclear, but also that the *Chapman* Court's precise holding remains vulnerable to judicial manipulation.[94] Circuit courts generally follow

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blended substances in which one substance's particles are diffused among the other substance's particles. *Id.* (citing 9 OXFORD ENGLISH DICTIONARY 921 (2d ed. 1989).

90. *Id.* This Comment uses the term "plain meaning" in the same context as courts use the terms "ordinary meaning," "literal interpretation," or "dictionary meaning."

91.

> By measuring the quantity of the drugs according to the "street weight" of the drugs in the diluted form in which they are sold, rather than according to the net weight of the active component, the statute and the Sentencing Guidelines increase the penalty for persons who possess large quantities of drugs, regardless of their purity. That is a rational sentencing scheme.

Chapman v. United States, 500 U.S. 453, 465 (1991).

92. Under the "market-oriented" approach to drug sentencing, a distributed substance's total quantity, and not the pure drug itself, is the determining weight measure. *Id.* at 461. The rationale for this approach is that "Congress did not want to punish retail traffickers less severely, even though they deal in smaller quantities of the pure drug, because such traffickers keep the street markets going." *Id.* The Court ultimately decided that "Congress had a rational basis for its choice of penalties for LSD distribution" since "the statute and the Sentencing Guidelines increase the penalty for persons who possess large quantities of drugs, regardless of their purity." *Id.* at 465.

93. *Id.* at 466.

94. *See* United States v. Stoneking, 34 F.3d 651, 653 (8th Cir. 1994), *reh'g en banc granted, vacated*, 60 F.3d 399 (8th Cir. 1995), *petition for cert. filed*, (Jul. 28, 1995) (No. 95-5410) (arguing that the Supreme Court based *Chapman*'s holding, in part, on the Sentencing Guidelines as they existed prior to Amendment 488); *cf.* United States v. Pirnat, 859 F. Supp. 995, 1000 (E.D. Va. 1994) (noting that plain meaning alone does not indicate precisely what weight standard governs LSD mixtures' total weight calculation). *Compare* United States v. Innie, 7 F.3d 840, 847 (9th Cir. 1993), *cert. denied*, 62 U.S.L.W. 3691 (U.S. Apr. 18, 1994) (No. 93-8198) (holding that congressional adoption of a market oriented approach to punishing drug possession warrants a plain meaning interpretation, even as applied to nonmarketable substances) *with* United States v. Palacios-Molina, 7 F.3d 49, 54 (5th Cir. 1993) (holding that in light of

one of three approaches in interpreting "mixture or substance."[95] The First and Tenth Circuits apply a plain meaning interpretation to the term.[96] The Second, Third, Fifth, Sixth, and Ninth Circuits focus on the purpose of a carrier medium when determining whether to include it in the drug weight calculation.[97] Finally, the Seventh and Eleventh Circuits condition drug weight calculation on whether the carrier itself is ingestible along with the drug.[98]

Congress's market oriented approach, courts must base culpability only on the amount of usable drug mixtures brought to the market).

95. For a thorough examination of the post-*Chapman* "mixture or substance" circuit split, see generally Douglas J. Quivey, Note, *Market-Oriented Approach to Determining Drug Quantity Under the Federal Sentencing Guidelines*, 1993 U. ILL. L. REV. 653, 673-83.

96. *See, e.g.*, United States v. Lopez-Gil, 965 F.2d 1124, 1127 (1st Cir.) (on rehearing), *cert. dismissed*, 504 U.S. 980, *cert. denied*, 113 S. Ct. 484 (1992) (including two suitcases' weight in the total weight calculation for punishing a cocaine offense); United States v. Restrepo-Contreras, 942 F.2d 96, 99 (1st Cir. 1991), *cert. denied*, 502 U.S. 1066 (1992) (including 11 wax statues' weight in the total weight calculation for punishing a cocaine offense); United States v. Killion, 7 F.3d 927, 935 (10th Cir. 1993) *cert. denied*, 114 S. Ct. 1106 (1994) (including the total weight of "yellow liquid" and a "dark brown substance" in the weight calculation for punishing a Phenyl-2-Propanone offense).

97. *See, e.g.*, United States v. Palacios-Molina, 7 F.3d 49, 53 (5th Cir. 1993) (refusing to include an "innocuous liquid" in the total weight of a mixture containing distilled cocaine because the defendant intended to market only the cocaine, and not the liquid); United States v. Rodriguez, 975 F.2d 999, 1005 (3d Cir. 1992) (refusing to include boric acid in the total weight of a mixture containing the acid and cocaine because the acid did not facilitate the drug's distribution); United States v. Davern, 970 F.2d 1490, 1492 n.2 (6th Cir. 1992), *cert. denied*, 113 S. Ct. 1289 (1993) (noting that the weight of plaster of Paris that is combined with cocaine is not includable in cocaine's weight calculation because it is a packaging material); United States v. Robins, 967 F.2d 1387, 1391 (9th Cir. 1992) (refusing to include cornmeal in the weight of a cornmeal-cocaine mixture because the cornmeal did not facilitate the drug's distribution); United States v. Acosta, 963 F.2d 551, 554 (2d Cir. 1992) (refusing to include creme liqueur's weight in cocaine's weight calculation because cocaine users must separate the liquer from the cocaine prior to use); *cf. Innie*, 7 F.3d at 847 (including the weight of liquid containing methamphetamine in a weight calculation because the entire mixture facilitates the drug's distribution).

98. *See, e.g.*, United States v. Johnson, 999 F.2d 1192, 1197 (7th Cir. 1993) (refusing to include in a weight calculation a waste water byproduct containing cocaine because the water is not ingestible and therefore not marketable); United States v. Bristol, 964 F.2d 1088, 1089-90 (11th Cir. 1992) (per curiam) (refusing to include the weight of a quantity of wine containing cocaine because the "ultimate user" could not consume the wine prior to separating it from the drug). *But see* Ambriz v. United States, 14 F.3d 331, 333-34 (7th Cir. 1994) (including the weight of dirt mixed with cocaine because the defendant believed cocaine comprised the full weight of the mixture that he purchased from federal drug agents).

To support their conclusions in drug sentencing cases, courts must reconcile congressional intent, the purposes of federal sentencing, and the reasoning in *Chapman*.[99] Courts that have diverged from the *Chapman*'s plain meaning interpretation of "mixture or substance" have attempted to support their decisions with both language from *Chapman* and with independent reasoning that seems to contradict *Chapman*.[100]

Following the promulgation of Amendment 488, the circuits once again split over the interpretation of "mixture or substance." In *United States v. Stoneking*, the Eighth Circuit Court of Appeals initially held that Amendment 488 overrode *Chapman*'s interpretation of the sentencing statute.[101] The Eighth Circuit, however, subsequently vacated its decision in order to rehear the case *en banc*.[102] Adding to the confusion, the First, Second, Sixth, and Seventh Circuits have held that Amendment 488 does not apply to weight determinations under the sentencing statute.[103] *United States v. Muschik* demonstrates a differ-

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99.

> Congress intended, *at the time it enacted the* [minimum mandatory sentence] *statute* . . . that the pivotal term "mixture or substance containing a detectable amount" of controlled substance required the sentencing court to include *the entire weight* of the LSD *and* its carrier medium. . . . Until the Supreme Court or the Congress revisits the issue, *Chapman* governs the meaning of the term "mixture or substance" in 21 U.S.C. § 841 (b)(1)(B)(v) . . . .

United States v. Boot, 25 F.3d 52, 55 (1st Cir. 1994) (citation omitted).

For a thorough discussion of problems in discerning and relying on legislative intent, see Daniel A. Farber and Philip P. Frickey, *Legislative Intent and Public Choice*, 74 VA. L. REV. 423, 425-37, 453-61 (1988).

100. *See, e.g.*, United States v. Muschik, 49 F.3d 512, 516 (9th Cir. 1995), *petition for cert. filed*, 64 U.S.L.W. 3086 (U.S. July 25, 1995) (No. 95-156) (reasoning that Amendment 488 remains true to the *Chapman* mandate but also strengthens the theoretical foundation of the *Chapman* rationale); United States v. Stoneking, 34 F.3d 651, 653 (8th Cir. 1994), *reh'g en banc granted, vacated,* 60 F.3d 399 (8th Cir. 1995), *petition for cert. filed*, (July 28, 1995) (No. 95-5410) (reasoning that because *Chapman* deals only with mandatory minimum sentences, Amendment 488's intent must be to conform sentences under the statute and the Sentencing Guidelines).

101. 34 F.3d at 654.

102. *Id.* at 655.

103. These courts hold that the mandatory minimum statute trumps Amendment 488. United States v. Reddick, 53 F.3d 462, 464 (2nd Cir. 1995); United States v. Andress, 47 F.3d 839, 840 (6th Cir. 1995) (per curiam); United States v. Neal, 46 F.3d 1405, 1408 (7th Cir.) (en banc), *cert. granted*, 115 S. Ct. 2576 (1995); United States v. Dimeo, 28 F.3d 240, 241 (1st Cir. 1994); United States v. Pirnat, 859 F.Supp. 995, 1002 (E.D.Va. 1994). *But cf.* United States v. McFadden, 13 F.3d 463, 467-68 (1st Cir. 1994) (Breyer, C.J., dissenting) (arguing that Guideline amendments trump even the mandatory minimum sentence statute, which is an "ad hoc deviation" from federal sentencing goals).

ent court's decision to avoid a perceived injustice in mandatory minimum sentencing, and provides an illustration of the post-*Chapman* circuit split over the "mixture or substance" interpretation problem.[104]

II. *UNITED STATES V. MUSCHIK*: ADDRESSING THE POST-*CHAPMAN* CONTROVERSY

In *United States v. Muschik*, Richard Lee Muschik appealed his conviction under 21 U.S.C. §§ 841(a)(1) and 846 for conspiring to distribute LSD.[105] The United States District Court for the District of Montana imposed a twenty-year sentence due to Muschik's prior felony drug conviction.[106] Later, in November 1993, Amendment 488 to the Federal Sentencing Guideline 2D1.1 modified the LSD weight calculation method under which the court imposed Muschik's sentence.[107]

The district court, despite the United States Probation Office's recalculation under Amendment 488 of the weight of the LSD that Muschik sold,[108] reimposed on remand the same twenty-year sentence on Muschik.[109] The district court's decision apparently rested on the court's belief that the sentencing statute continued to require the inclusion of the carrier medium in the weight calculation, notwithstanding Amendment 488.[110] The Ninth Circuit Court of Appeals, however, concluded that Amendment 488 and the statute do not conflict.[111] The court sought to avoid a "nonuniform and unfair result"[112] and imposed a sentence below that which the sentencing statute otherwise required.

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104. *Compare* United States v. Muschik, 49 F.3d 512, 518 (9th Cir. 1995), *petition for cert. filed*, 64 U.S.L.W. 3086 (U.S. July 25, 1995) (No. 95-156) (holding that Amendment 488 applies even in the mandatory minimum sentence area) *with* United States v. Boot, 25 F.3d 52, 55 (1st Cir. 1994) (holding that Amendment 488 does not apply to LSD calculations in the mandatory minimum sentence area).

105. *Muschik*, 49 F.3d at 513.

106. *Id.* In order to comply with 21 U.S.C. § 841(b)(1)(A) the court must double Muschik's mandatory minimum sentence term because he had a prior state felony drug conviction.

107. *See* U.S.S.G. § 2D1.1(c).

108. *See supra* text accompanying notes 13-14 (describing the recalculation of the weight of LSD that Muschik sold).

109. United States v. Muschik, 49 F.3d 512, 514 (9th Cir. 1995), *petition for cert. filed*, 64 U.S.L.W. 3086 (U.S. July 25, 1995) (No. 95-156).

110. *Id.* at 514-15.

111. *Id.* at 515.

112. *Id.* at 518.

The *Muschik* court based its decision on the Eighth Circuit's reasoning in *United States v. Stoneking*,[113] but disregarded the fact that the Eighth Circuit subsequently vacated its decision in order to rehear the case *en banc*.[114] The *Muschik* court announced that, where a statute and the Guidelines conflict, the statutory sentence controls.[115] The court's analysis, however, distinguishes calculation of the weight of LSD from the application of the sentencing statute. Under *Muschik*'s post-*Chapman* approach, the Guidelines first apply to the weight determination and next the statutory minimum governs the applicable sentence.

The *Muschik* court distinguished the Supreme Court's prior calculation of the weight of LSD in *Chapman*. The *Muschik* court concluded that *Chapman*'s "mixture or substance" dictionary definition,[116] as applied to the sentencing statute at that time, derived from the lack of a unifying weight measure in the Guidelines and the statute.[117] The court reasoned that the *Chapman* Court faced only two choices. The Court could recalculate the negligible net weight of pure LSD or it could calculate the gross weight of the pure LSD together with the carrier medium.[118] Constrained by the Guidelines' market-oriented approach, the *Chapman* Court felt compelled (said *Muschik*) to choose the gross weight.[119] The court then maintained that Amendment 488 provides a third option for courts, not available at the time of *Chapman*, of using a predesignated rational weight in calculating sentences.[120]

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113. "[T]his precise issue has already been addressed . . . . We find the reasoning of the Eighth Circuit . . . persuasive and herein adopt it for our own." *Id.* at 515. *See supra* notes 101-102 and accompanying text (discussing the Eighth Circuit's reasoning in *Stoneking*).

114. "Regardless of the Eighth Circuit's eventual decision in this case, we remain impressed by the reasoning expressed in the original opinion." United States v. Muschik, 49 F.3d 512, 515 n.3 (9th Cir. 1995), *petition for cert. filed*, 64 U.S.L.W. 3086 (U.S. July 25, 1995) (No. 95-156).

115. *Id.* at 515.

116. The court noted the Supreme Court's "mixture" definition as "a portion of matter consisting of two or more components that do not bear a fixed proportion to one another and that however thoroughly commingled are regarded as retaining a separate existence." *Id.* at 515 n.5 (citing Chapman v. United States, 500 U.S. 453, 462 (1991)).

117. *Id.* at 515.

118. *Id.* at 516.

119. United States v. Muschik, 49 F.3d 512, 516 (9th Cir. 1995), *petition for cert. filed*, 64 U.S.L.W. 3086 (U.S. July 25, 1995) (No. 95-156).

120. *Id.*

Far from overriding the *Chapman* interpretation of "mixture or substance," the court believed Amendment 488 provides a standardized weight for carrier-mixed doses of LSD.[121] The court maintained that Amendment 488 thus conforms to the *Chapman* mandate by including the carrier weight in the calculation and by maintaining the "market-oriented" approach to drug sentencing.[122] By standardizing the weight of a dose of LSD, the court stated, the Sentencing Commission furthered the "market-oriented" approach because dealers sell LSD by doses rather than weight.[123] The court reasoned that the amendment continues to punish retail traffickers by establishing a LSD weight figure eight times higher than that of the pure drug.[124]

The *Muschik* court next addressed the Sentencing Commission's purported intent in promulgating Amendment 488. The court found that the Commission intended to correct the disproportionate sentencing of LSD defendants, who incurred severe punishments for selling a less dangerous controlled substance than many other dealers.[125]

Finally, the court addressed Congress's apparent acquiescence in Amendment 488's promulgation. The court maintained that by allowing the Commission to refine the LSD sentencing scheme without challenging the amendment,[126] Congress chose to implement a single policy comprising both mandatory minimum sentencing and the Guidelines sentencing scheme.[127] The court criticized the First,[128] Fifth,[129] and Seventh[130] Circuits for

121. *Id.*
122. *Id.*
123. *Id.* at 516-17.
124. United States v. Muschik, 49 F.3d 512, 517 (9th Cir. 1995), *petition for cert. filed*, 64 U.S.L.W. 3086 (U.S. July 25, 1995) (No. 95-156).
125. *Id.* The court noted that prior to Amendment 488's enactment, LSD dealers incurred disproportionate sentences in relation to phencyclidine (PCP) dealers, whose drug of choice is much more dangerous. *Id.*
126. *Id.*
127. "We should not assume that Congress has made conflicting policy decisions regarding LSD weight in the areas of mandatory minimum and Guideline sentencing when those decisions may be so easily harmonized." *Id.*
128. *Id. See* United States v. Boot, 25 F.3d 52, 55 (1st Cir. 1994) (stating that "Congress simply acquiesced in the restrictive reach of Amendment 488 duly noted by the Commission").
129. United States v. Muschik, 49 F.3d 512, 517 (9th Cir. 1995), *petition for cert. filed*, 64 U.S.L.W. 3086 (U.S. July 25, 1995) (No. 95-156). *See* United States v. Pardue, 36 F.3d 429, 431 (5th Cir. 1994) (per curiam), *cert. denied*, 115 S. Ct. 1969 (1995) (maintaining that adherance to the "does not override" language of the Background Commentary of Section 2D1.1(c) of the Guidelines disallows the use of "the mandatory minimum of § 841, calculated according to *Chapman*").

misinterpreting the amendment's background commentary.[131] The *Muschik* court contended that those circuits perpetuate a dual system of LSD weight calculation and continue to frustrate sentencing uniformity and fairness.[132]

The *Muschik* court concluded that the weight of the LSD that Muschik sold, calculated in accordance with Amendment 488's standards, subjected him to a mandatory minimum sentence of ten years.[133] The court accordingly vacated the district court's decision and remanded the case for resentencing consistent with its opinion.[134]

III. IN *MUSCHIK*'S WAKE: REEVALUATING THE SENTENCING COMMISSION'S INTERPRETIVE AUTHORITY AND INVITING CONGRESS AND THE COURTS TO REVISE PAST INTERPRETATIONS

In concluding that Amendment 488 controls the measure of LSD for mandatory minimum sentencing purposes, the *Muschik* court made three critical errors. The court failed to adhere to traditional interpretive canons by holding that the Supreme Court's interpretation of the sentencing statute no longer governs the measure of weight in that statute. The court also failed to recognize the self-limiting nature of Amendment 488. Amendment 488 cannot remedy the perceived inequities of the dual system of LSD weight measure in the mandatory minimum sentencing area that Congress and the *Chapman* Court produced. The court, moreover, misinterpreted Congress's inaction in allowing Amendment 488 to become effective following the statutorily-mandated 180-day waiting period after its promulgation. An analysis of the Sentencing Commission's role under administrative law principles reveals the *Muschik* court's flawed reasoning.

The *Muschik* decision, however, illuminates a positive development in federal sentencing. The Sentencing Commission appears committed to conforming drug sentences with the Guidelines' overarching goals of uniformity and proportionality.

130. *Muschik*, 49 F.3d at 517. *See* United States v. Neal, 46 F.3d 1405, 1408 (7th Cir.) (en banc), *and cert. granted*, 115 S. Ct. 2576 (1995) (noting that the Sentencing Commission promulgated Amendment 488 in full recognition that it would create a "dual weight" system).

131. *Muschik*, 49 F.3d at 517.

132. *See id.* at 517-18.

133. *Id.* at 518.

134. *Id.*

Amendment 488 remedies the prior dual system of LSD weight measure where mandatory minimum sentences do not apply. Amendment 488 also may serve as the catalyst for Congress or the Supreme Court to change the calculation of LSD weight for mandatory minimum sentencing purposes.

A. THE *MUSCHIK* COURT ASSIGNED EXCESSIVE INTERPRETIVE AUTHORITY TO THE FEDERAL SENTENCING COMMISSION

The *Muschik* court's analysis focused on the purported viability of reading Amendment 488 and the *Chapman* decision in harmony. This approach is both unnecessary and improper in light of the *Chapman* Court's definitive interpretation of the "mixture or substance" term that the *Muschik* court believed the amendment clarifies. The *Muschik* court, moreover, dismissed the Commission's own recognition of its inability to alter the *Chapman* interpretation. Finally, the *Muschik* court misinterpreted Congress's failure to comment on Amendment 488 before the amendment took effect.

1. Amendment 488 Cannot Control the Measure of LSD for Mandatory Minimum Sentencing Purposes Because it Would Contradict a Prior Supreme Court Interpretation

The Federal Sentencing Commission routinely formulates drug sentencing policy in accordance with its congressional mandate.[135] The Commission also clarifies or amends its prior drug sentencing policies if these changes do not contradict governing statutes.[136] The Commission enjoys wide latitude in formulating sentencing policy through the Guidelines and commentary, just as traditional agencies enjoy wide latitude in promulgating rules under administrative law theories.[137] These same theories, however, also constrain the Commission's authority. The Supreme Court, in *Chapman*, definitively settled the "mixture or substance" question with respect to the sentencing statute.[138] As a result, the Commission, whose primary goal

135. *See supra* notes 41-42 and accompanying text (describing the Sentencing Commission's authority to promulgate sentencing guidance).

136. *See supra* notes 66-67 and accompanying text (discussing the Commission's apparent authority).

137. *See supra* notes 22-25, 53-67 and accompanying text (describing generally the role of agencies and the Sentencing Commission).

138. *See* 500 U.S. 453, 462 (1991) (holding that the term "mixture or substance" in U.S.C. § 841(b)(1) includes the carrier medium).

is to ensure sentencing fairness,[139] retained only limited interpretive authority in promulgating Amendment 488.

At the time the Supreme Court decided *Chapman*, neither the sentencing statute nor the Guidelines defined the term "mixture or substance."[140] As a result of the Guidelines' lack of guidance as to the meaning of this term, the Court provided its own definition of the term.[141] After defining the term using a plain meaning interpretation,[142] the Court settled the "mixture or substance" controversy with respect to the sentencing statute. The Court unequivocally held that courts must include the weight of blotter paper in the calculation of the LSD weight where mandatory minimum sentences are involved.[143] Therefore, two years later, when the Commission promulgated Amendment 488, no interpretive gap remained with respect to the sentencing statute. The *Chapman* interpretation of the "mixture or substance" term effectively became part of the statute and ended debate with respect to the statute.[144] Amendment 488, accordingly, cannot apply to the weight calculations of LSD under the sentencing statute.

Moreover, the *Chevron* doctrine dictates that the Sentencing Guidelines cannot disturb *Chapman*. That doctrine limits an agency's authority to clarify those statutes the agency promulgates.[145] The doctrine, furthermore, accords no judicial deference to agency interpretations that conflict with prior judicial interpretations or a governing statute.[146]

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139. *See supra* note 50 and accompanying text (describing the Guidelines' goals).

140. Chapman v. United States, 500 U.S. 453, 461-62 (1991).

141. *Id.* at 462.

142. *Id.* (citing Moskal v. United States, 498 U.S. 103, 108-10 (1990)).

143. "[I]t is the weight of the blotter paper containing LSD, and not the weight of the pure LSD, which determines eligibility for the minimum sentence." *Id.* at 455.

144. *See supra* text accompanying note 27 (discussing the role of *stare decisis*). In light of Congress's legislative intent to punish drug kingpins more harshly, *see* Chapman v. United States, 500 U.S. 453, 465 (1993), deference to the Commission is particularly inappropriate in this case. *See* Sunstein, *supra* note 22, at 2091 (arguing that "*Chevron* is inapplicable when the particular context suggests that deference would be a poor reconstruction of congressional desires").

145. *See supra* note 36 and accompanying text (noting the limited interpretive authority of agencies).

146. *See supra* notes 34-35 and accompanying text (indicating that agency interpretations that conflict with judicial interpretations or governing statutes are not binding).

Mandatory minimum sentencing statutes, furthermore, reflect distinct congressional policy choices in federal drug sentencing[147] and the Commission plays no role in the enactment of these statutes. Accordingly, if Amendment 488 has any value, it must be with respect to the Guidelines themselves, when no mandatory minimum sentence is imposed.

2. The Sentencing Commission Recognized its Inability to Alter LSD Calculation Under the Sentencing Statute

The *Muschik* court believed its holding to be consistent with *Chapman*'s interpretation of "mixture or substance." The court rationalized this determination by noting that Amendment 488 continues to factor carrier weight into the formula.[148] According to the court, Amendment 488 merely standardizes the amount of carrier medium that is "mixed" with pure LSD.[149] The court maintained that the Sentencing Commission sought to promote equal treatment and fairness in sentencing by creating a uniform method of calculating LSD weight.[150]

The post-amendment commentary to Amendment 488, however, indicates that the Commission actually intended to further a dual system of calculating LSD weight. The Commission recognized that the term "mixture or substance" in the sentencing statute includes the carrier medium on which LSD is affixed.[151] The background commentary to Sentencing Guideline section 2D1.1(c), as modified by Amendment 488, expressly stipulates that the new weight calculation method does not override the

147. *See supra* note 81 and accompanying text (noting congressional concern over widespread drug commerce, usage, and the resulting enactment of the Anti-Drug Abuse Act of 1986).

148. United States v. Muschik, 49 F.3d 512, 516 (9th Cir. 1995), *petition for cert. filed*, 64 U.S.L.W. 3086 (U.S. July 25, 1995) (No. 95-156).

149. *Id.* (noting that the Sentencing Commission assigned a sentencing weight per dose that is eight times the actual weight of pure LSD) (citing United States v. Stoneking, 34 F.3d 651, 654 (8th Cir. 1994), *reh'g en banc granted, vacated*, 60 F.3d 399 (8th Cir. 1995), *petition for cer. filed*, (Jul. 28, 1995) (No. 95-5410)).

150. *Id.* at 518; *see also id.* at 517 (noting that the Commission "intended for Amendment 488 to correct the pre-amendment situation wherein LSD sentences were disproportionate to those sentences imposed for other, more dangerous substances"). *But cf.* United States v. McFadden, 13 F.3d 463, 466 (1st Cir. 1994) (noting that the Guidelines do not alter 21 U.S.C., a "monolith of a statute," that remained undisturbed when the Guidelines entered into effect); Lay, *supra* note 44, at 1756 n.5 (noting that the Guidelines are not necessarily designed to eliminate all sentencing disparity).

151. U.S.S.G. app. C, amend. 488.

applicability of the term "mixture or substance" when the sentencing statute applies.[152]

An examination of the Commission's role in federal sentencing further supports the argument that Amendment 488 applies only when the sentencing statute does not. The Commission's primary mission is to promulgate guidelines and to remove the varying discretion of the courts in federal sentencing.[153] The Commission also may provide commentary to the Guidelines to help courts interpret them.[154] Under *Stinson v. United States*, however, this commentary is only authoritative with respect to the Guidelines, which are the functional equivalent of a traditional agency's legislative rules.[155] The commentary cannot carry authoritative weight with respect to an overriding statute.[156]

Courts that allow the Guidelines commentary explaining Amendment 488 to override the sentencing statute violate *Stinson*. This is a result that the Sentencing Commission did not and should not have anticipated when it wrote Amendment 488 and the commentary. In fact, the Guidelines themselves indicate that "[w]here a statutorily required minimum sentence is greater than the maximum of the applicable guideline range, the statutorily required minimum sentence shall be the guideline sentence."[157]

While the proper interpretation of Amendment 488 fosters a dual method for calculation of the weight of LSD, this approach is not necessarily inconsistent with the purpose of the sentencing statute. By permitting the sentencing statute to continue to punish more harshly drug "kingpins" who deal in high "street weights" of diluted drugs,[158] whatever their form, Amendment 488 yields to a rational, albeit controversial,[159] congressional

152. "[T]his approach does not override the applicability of 'mixture or substance' for the purpose of applying any mandatory minimum sentence (see Chapman; § 5G1.1(b))." U.S.S.G. § 2D1.1, comment. (backg'd.).

153. *See supra* notes 42, 52 and accompanying text (explaining the Commission's main function is to provide functional guidelines to be followed).

154. *See supra* notes 59-64 and accompanying text (indicating that the Commission has interpretive power over the Guidelines it issues).

155. *See supra* notes 56, 62 and accompanying text (likening the Commission's control over the Guidelines to that of an agency's control).

156. *See supra* note 59 and accompanying text (noting that a Guideline is not authoritative if it violates a federal statute or the Constitution).

157. U.S.S.G. § 5G1.1(b).

158. *See supra* notes 76-77 and accompanying text (discussing Congress's intent that mandatory minimum sentencing be imposed on these "kingpins").

159. For a graphic illustration of the controversial sentencing disparity that the sentencing statute fosters, see United States v. Neal, 46 F.3d 1405 (7th Cir.)

policy choice.[160] Because the Commission recognizes that Congress sometimes purposefully seeks a dual calculation method,[161] courts must read Amendment 488 as reaffirming the Commission's adherence to Congress's wishes.

3. Congressional Acquiescence to Amendment 488 Did Not Extend to the Amendment's Application to the Sentencing Statute

In directing the Sentencing Commission to review and revise the Sentencing Guidelines periodically, Congress anticipates that the Commission will clarify the Guidelines and remedy conflicting judicial decisions.[162] According to the *Muschik* court, Congress acquiesced not only to the Commission's clarification of the proper weight measure of LSD, but also to the weight measure's application to the sentencing statute.[163] By failing to take action during the statutorily-mandated 180-day review period, the court reasoned, Congress agreed that Amendment 488 establishes a unitary measure of weight with regard to the sentencing statute.[164] Arguably, Congress should have foreseen the potential for the tortured interpretation of Amendment 488 that surfaced in *Muschik*. More likely, however, Congress, like the majority of circuit courts that addressed this issue,[165] merely predicted the amendment's limited application outside of

(en banc), *cert. granted*, 115 S. Ct. 2576 (1995). In *Neal*, the weight attributed to the defendant under the unitary method of calculation amounted to only 4.58 grams of LSD with a corresponding sentencing range of 70 to 87 months. *Id.* at 1407. Under the dual calculation method, however, the total weight attributed to him amounted to 109.51 grams with a corresponding sentencing range of 10 years. *Id.* The sole difference in the weight calculations and Neal's sentence ultimately rested on his improvident choice to distribute LSD on blotter paper.

160. *See supra* note 92 and accompanying text (noting the *Chapman* Court's determination that the "market-oriented" approach to drug sentencing and the sentencing statute represents a rational policy choice).

161. *See supra* note 79 (noting that the Anti–Drug Abuse Act has created a dual calculation method).

162. *See supra* notes 60-67 and accompanying text (explaining that the Commission has perspective and authority to resolve problems in applying the Guidelines).

163. "Congress did not challenge the revision. We should not assume that Congress has made conflicting policy decisions regarding LSD weight in the areas of mandatory minimum and Guideline sentencing . . . ." United States v. Muschik, 49 F.3d 512, 517 (9th Cir. 1995), *petition for cert. filed*, 64 U.S.L.W. 3086 (U.S. July 25, 1995) (No. 95-156).

164. *Id.*

165. *See supra* note 103 and accompanying text (stating that the First, Sixth and Seventh Circuits failed to find that Amendment 488 governs the measure of LSD weight with regard to the sentencing statute).

the mandatory minimum context. The noted congressional desire to maintain a dual system of weight measure with respect to mandatory minimum sentences makes this explanation even more compelling.[166]

Since the Supreme Court decided *Chapman* in 1991, Congress has not amended the sentencing statute to change the meaning of "mixture or substance." Congress's implicit approval of the *Chapman* interpretation of "mixture or substance" further indicates that Congress did not intend for the Commission's new amendment to alter the two-year old interpretation of the sentencing statute. Absent congressional action, therefore, the continued viability of the sentencing statute as an "ad hoc deviation"[167] from sentencing goals is unassailable.

B. Amendment 488 as a Positive Development: Providing a More Uniform Approach to Drug Sentencing in Light of the Purposes of the Guidelines

Muschik is indicative of circuit courts' continuing discontent with mandatory minimum sentences and their displeasure with the perceived inequities of drug sentencing. The question remains, however, as to what function Amendment 488 serves if not to alter LSD weight calculation for mandatory minimum sentence purposes. Courts should view Amendment 488 as a renewed attempt by the Sentencing Commission to conform drug sentences with the Guidelines' overarching goals where the sentencing statute does not apply.

Between the two rules for carrier medium weight established by *Chapman* and Amendment 488, the amendment's uniform approach seems preferable in light of the Guidelines' purposes. Amendment 488's approach provides the dual benefits of insuring a uniform and proportional LSD weight measure and avoiding the hypothetically absurd and arbitrary sentencing that the *Chapman* Court admitted its approach might produce.[168] The *Muschik* court recognized this more favorable approach, as did the Commission in its amendment commen-

166. *See supra* note 79 and accompanying text; *see also* United States v. Mueller, 27 F.3d 494, 497 (10th Cir. 1994) (noting that if Congress wishes courts to waive mandatory minimum sentence provisions, it would clearly articulate that desire).

167. United States v. McFadden, 13 F.3d 463, 467-68 (1st Cir. 1994) (Breyer, C.J., dissenting) (deeming a mandatory minimum statute an "ad hoc deviation" from the goals of federal sentencing).

168. Chapman v. United States, 500 U.S. 453, 466 (1991) ("While hypothetical cases can be imagined involving very heavy carriers and very little LSD,

tary.[169] Even courts that refuse to permit Amendment 488 to override the sentencing statute[170] have stated that "[t]he superior formula is the Guidelines' formula"[171] and suggested that the sentencing statute is "an ill-advised policy."[172]

The Commission recognized the need to address the nation's drug problem through stiff penalties. In doing so, it rejected recommendations to exclude, in whatever form, a carrier's weight for sentencing purposes.[173] Concerned merely with the continuing inequities of drug sentencing, and not with the inflexible penalties of mandatory minimum sentencing, the Commission acted to remedy the disproportional sentences that the Guidelines imposed.[174] Amendment 488 thus represents a positive step toward aligning drug sentencing under the Guidelines with the Guidelines' purposes.

The sentencing statute will continue to polarize courts because it will require the application of a different weight calculation method to those dealers falling within its reach.[175]

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those cases are of no import in considering a claim by persons . . . who used a standard LSD carrier.").

169.

> [T]he Commission has determined that basing offense levels on the entire weight of the LSD and carrier medium would produce unwarranted disparity among offenses involving the same quantity of actual LSD (but different carrier weights), as well as sentences disproportionate to those for other, more dangerous controlled substances such as PCP. Consequently, in cases involving LSD contained in a carrier medium, the Commission has established a weight per dose of 0.4 milligram for purposes of determining the base offense level. . . . Thus, the approach decided upon by the Commission will harmonize offense levels for LSD offenses with those for other controlled substances and avoid an undue influence of varied carrier weight on the applicable offense level.

U.S.S.G. § 2D1.1, comment. (backg'd.).

170. *See, e.g.*, United States v. Pirnat, 859 F. Supp. 995, 1002 (E.D. 1994) ("[D]espite the reduction in the Sentencing Guidelines range applicable to defendant pursuant to amended § 2D1.1, defendant is still subject to the 120 month mandatory minimum sentence set forth at 21 U.S.C. § 841(b)(1)(A)(v).").

171. United States v. Hanlin, 48 F.3d 121, 125 (3rd Cir. 1995) ("The superior formula is the Guidelines' formula because it recognizes that weighing the entire carrier medium produces unwanted disparity among offenses involving the same quantity of LSD . . . .").

172. United States v. Neal, 46 F.3d 1405, 1410 (7th Cir.) (en banc) *cert. granted*, 115 S. Ct. 2576 (1995) (noting that mandatory minimum sentencing "may be an ill-advised policy . . . [but that] [s]uch judgments are for Congress, not the courts, and we will not interfere with them").

173. U.S.S.G. § 2D1.1, comment. (n.18).

174. *Id.*

175. *See supra* note 159 and accompanying text (noting the very harsh sentence imposed on the defendant in *United States v. Neal* that resulted from the defendant's choice to distribute LSD on blotter paper).

Amendment 488, however, now provides courts a uniform approach to drug sentencing where the weight of LSD involved does not trigger the sentencing statute's harsher penalties.[176] Amendment 488, accordingly, serves a legitimate purpose beyond overturning the *Chapman* Court's "mixture or substance" interpretation as applied to the sentencing statute.

C. Bad Law as the Catalyst for Better Law: Recommendations for Reconciling the Guidelines and the Sentencing Statute

Muschik represents more than merely one circuit court's attempt to reconcile the competing interests of the Sentencing Guidelines and mandatory minimum sentences. *Muschik* indicates that significant problems continue to plague the Sentencing Commission as it seeks to fulfill its congressional mandate. By further clarifying Amendment 488's limited authoritative scope, the Commission can signal its recognition of the limitations that Congress placed on it. Congress, which created the potential for controversy and confusion as to Amendment 488's reach, can clarify its intentions in the mandatory minimum sentencing area by rewording the sentencing statute. Finally, the Supreme Court can circumvent the need for these two alternatives by revisiting the "mixture or substance" controversy.

1. The Sentencing Commission Should Clarify Amendment 488's Limited Authoritative Reach

The Federal Sentencing Commission, constrained by congressional limits on its authority and by its uneasy partnership with the judiciary,[177] should reword Amendment 488. By clarifying the amendment's limited authoritative reach, the Commis-

176. *See Neal*, 46 F.3d at 1411 ("The Guidelines amendment creating a presumptive weight for purposes of calculating a defendant's base offense level, in effect, cuts small scale dealers a break by making them eligible for shorter sentences, and even probation."); United States v. Boot, 25 F.3d 52, 55 n.3 (1st Cir. 1994) (noting that Amendment 488 eliminates considerable sentencing disparity for offenders).

Amendment 488 provides more sentencing proportionality and fairness up to the point that the weight attributed to a defendant triggers the harsher mandatory minimum statute. Ultimately, this approach may produce the unforeseen problem of determining the point at which the court should cease calculating weight under the Sentencing Guidelines formula and revert to calculating the weight under the *Chapman* formula.

177. *See supra* notes 68-72 and accompanying text (indicating judicial discomfort with the Guidelines and congressional action exacerbating that discomfort).

sion will signal both its intention to comply with the limited congressional mandate it enjoys and its understanding of the role it plays in federal sentencing. The Commission should clearly indicate that Amendment 488's weight calculation does not apply in situations where the court must use the sentencing statute.[178] The rules of statutory superiority for agencies interpreting their own provisions when they contradict governing statutes mandate such an approach.[179]

2. Congress Should Clarify the Meaning of the Sentencing Statute

Of the three actors who determine drug sentencing, Congress is most guilty of perpetuating sentencing ambiguity. Congress's penchant for vague statutory language,[180] combined with the constraints that it imposes on the Sentencing Commission,[181] inevitably leads to controversies like those that *Muschik* and *Chapman* attempted to resolve. By interjecting itself into the federal sentencing area, Congress subjected itself to criticism from both the judiciary and sentencing authorities.[182] Congress therefore must accept responsibility by remedying problems that it helped to create.

Unfortunately, congressional action in this instance appears unlikely. Congress generally is unresponsive to the Supreme Court's statutory decisions.[183] Furthermore, when Congress has acted to override[184] the Court through statutory

178. In this respect, the Commission may wish to reference the court's application of Amendment 488 in *United States v. Neal*. The *Neal* court refused to apply Amendment 488 because the defendant fell within the purview of the sentencing statute. 46 F.3d 1405, 1410 (7th Cir.) (en banc) *cert. granted*, 115 S. Ct. 2576 (1995).

179. *Stinson v. United States* indicates that the Commission's Guidelines interpretation will have a binding effect unless the interpretation violates a federal statute. 113 S. Ct. 1913, 1915 (1993); *see supra* note 25 and accompanying text (discussing the courts' rejection of agency interpretations that conflict with the Constitution or a governing statute).

180. *See supra* note 28 and accompanying text (noting Congress's refusal to signal specific statutory meaning).

181. *See supra* notes 53, 71-72 and accompanying text (noting that congressional requirements conflict with the Commission's aims).

182. *See supra* note 72 and accompanying text (citing congressional action as contributing to sentencing inequities).

183. Eskridge, *supra* note 44, at 335.

184. Professor Eskridge defines a "congressional override" as the promulgation of a statute that completely overrules the holding of a statutory interpretation decision, modifies the result such that the Court would decide the case differently, or modifies the consequences of the decision such that the Court would decide later cases differently. *Id.* at 332 & n.1.

amendments, it most often has done so within five years of a decision.[185] This short response time suggests that Congress is unlikely to act at this point, as the Court decided *Chapman* in 1991. On the other hand, congressional overrides have increased recently.[186] Criminal law statutes, furthermore, traditionally constitute the single largest group of statutes subject to congressional overrides.[187] Additionally, Congress, when it does choose to act, is much more prone to override "plain meaning" decisions such as *Chapman*.[188]

Congress can accept responsibility for resolving problems created by the sentencing statute by following one of two very different approaches. If Congress believes Amendment 488's approach is superior to the current *Chapman* approach, it can clarify 21 U.S.C. § 841 to indicate precisely what constitutes a "mixture or substance" for mandatory minimum sentencing purposes. Congress need not wait for a long-overdue judicial reinterpretation of the sentencing statute. Congressional intent should not remain hidden within that body, thereby subject to continuing manipulation by the judiciary. Congress can follow the Sentencing Commission's lead by incorporating into the sentencing statute the same method of measuring the weight of LSD as that contained in Amendment 488.

Alternatively, Congress can specifically repudiate the Commission's approach in the Guidelines context and reaffirm its desire for a dual weight calculation system. This approach, however, would ignore the input of a commission that is "an independent agency in every relevant sense"[189] and that is specifically charged with developing the bulk of sentencing policies.

3. The Supreme Court Should Revisit *Chapman v. United States*

The Supreme Court, in the absence of decisive congressional action, can remedy the *Muschik* controversy by revisiting *Chapman*. While both the sentencing statute and Amendment 488 are subject to manipulation, the Supreme Court realizes that its

185. *Id.* at 345 (noting that, in a study of congressional overrides of Supreme Court decisions in the years 1967 to 1990, Congress overrode two-thirds of the decisions within five years of the Court's decision).

186. *Id.* at 335-36 (noting that, in the years 1975 to 1990, Congress overrode an average of 12 Court interpretive decisions each year).

187. *Id.* at 344 tbl. 4. Criminal law statutes constituted 15% of all congressional overrides from 1967 to 1990. *Id.*

188. *Id.* at 348.

189. Mistretta v. United States, 488 U.S. 361, 393 (1989).

Chapman interpretation is vulnerable to similar manipulation. The Court recognizes that the circuits are deeply split over the *Chapman* court's "mixture or substance" interpretation and the precise holding in that case.[190] The time appears ripe for a reinterpretation of the sentencing statute.

The Court can reaffirm its *Chapman* interpretation and in the process once again signal Congress of the need for clarification of the sentencing statute as to the appropriate weight measure of a "mixture or substance." This tactic would place the onus on Congress to stipulate its policy choice. Congressional inaction would reaffirm Congress's desire for the dual weight measure system.[191]

Alternatively, the Supreme Court can conform its "mixture or substance" interpretation for mandatory minimum sentencing to the theory established in *Muschik*. Because the Guidelines now establish a uniform carrier weight measure that was unavailable when *Chapman* was decided, the Court can now choose to attribute that measure to the sentencing statute.[192]

This avenue presents the benefit of integrating the Sentencing Commission's approach into federal sentencing if Congress refuses to act.[193] This approach also would rescue the sentenc-

190. *See, e.g.*, Sewell v. United States, 113 S.Ct. 1367 (1993) (White, J., dissenting from a denial of certiorari).

191. This approach may be preferable in light of the observation that "federal judges are not the agents of Congress. . . . [I]t is the courts' role to carry out congressional directives in light of their understanding of the Constitution." Daniel J. Farber, *Statutory Interpretation and Legislative Supremacy*, 78 GEO. L. J. 281, 284 (1989).

192. *See supra* notes 120-121 and accompanying text (noting the *Muschik* court's belief that Amendment 488 now provides a third option for calculating LSD weight, unavailable at the time the Supreme Court decided *Chapman*); *supra* note 88 (noting that the Supreme Court first consulted the Guidelines to determine the meaning of "mixture or substance" before applying its own definition).

Of course, this approach would require a modification of the *Chapman* interpretation which, as many courts note, produced harsh sentences. The Court ultimately would be forced to break from *stare decisis*. Such an approach would raise the spectre of the four years of disproportionate and unfair sentencing since the 1991 *Chapman* decision. This would, however, provide the Court with the rationale missing in *Chapman*: that the Sentencing Commission now provides a definitive calculation method that promotes fairness and proportionality. *See* Farber, *supra* note 191, at 307 (arguing that "the supremacy principle [subordinating courts to legislatures] may allow courts to disobey clear statutory language when, because of post-enactment events, the legislature's intent would be undermined by strict adherence to the statutory formula").

193. Professor Sunstein, in fact, notes that agency input can be valuable even if the ultimate interpretation remains with the courts. "[R]esolution of statutory ambiguities may call for the agency's specialized capacities, even if

ing statute's controversial interpretation from the stifling grip of *stare decisis*. Finally, and perhaps most important, this approach would indicate that the federal judiciary values the Commission's input as both an independent agency and a valuable partner in the federal sentencing process.

CONCLUSION

In *United States v. Muschik*, the United States Court of Appeals for the Ninth Circuit held that United States Sentencing Guideline Amendment 488 establishes a unitary LSD weight measure for sentencing purposes under both the United States Sentencing Guidelines and 21 U.S.C. § 841. The court held that Amendment 488 controls the meaning of the term "mixture or substance containing a detectable amount" of a controlled substance; a phrase contained within the Guidelines and 21 U.S.C. § 841. The court denied that its holding contradicted Amendment 488's commentary, which states that the amended approach does not override the applicability of 21 U.S.C. § 841's LSD weight measure that the Supreme Court earlier established.

The Ninth Circuit's approach accords far greater interpretive authority to the United States Sentencing Commission, a judicial branch agency, than do traditional interpretive theories. Although the *Muschik* court's intentions are laudable, its methods defy established interpretive rules that prevent agencies from substantively altering a congressionally-promulgated statute. This Comment urges the United States Sentencing Commission to clarify Amendment 488's limited reach to conform with the Commission's limited congressional mandate. This Comment also argues that Congress should reformulate 21 U.S.C. § 841 to conform to Amendment 488's approach in the Guidelines. Alternatively, this Comment argues that the Supreme Court should revisit and decisively resolve the "mixture or substance" controversy that continues to split the circuits. By finally resolving the "mixture or substance" controversy, Congress or the Court will insure that the judiciary will not use the Federal Sentencing Commission's misunderstood and limited authority in the drug sentencing area to resolve a continuing circuit conflict.

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the issue appears to be purely one of law. . . . [R]esolution of ambiguities often calls for an assessment of issues of policy and principle. That assessment is best made by agencies rather than courts." Sunstein, *supra* note 22, at 2095.