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An End to Arbitrary and Capricious Federal Sentencing Guidelines

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AN END TO ARBITRARY AND CAPRICIOUS FEDERAL SENTENCING GUIDELINES

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I. INTRODUCTION

The Federal Sentencing Guidelines ("Guidelines") have been a source of controversy since their implementation in 1987.[1] One problem with the Guidelines is that they are not subject to rigorous judicial scrutiny.[2] A sentence can be overturned on appeal if the sentencing judge erred procedurally or if the sentence was clearly erroneous.[3] But what happens if the Guideline itself is clearly erroneous or arbitrary? Courts evaluate claims that the Guidelines violate the Equal Protection Clause of the Fourteenth Amendment under the rational basis standard, a standard which yields minimal scrutiny of the United States Sentencing Commission's ("Commission") decision to create the challenged Guideline.[4] The Commission, like other administrative agencies, does not create perfect Guidelines all of the time. When the Commission promulgates a Guideline that is arbitrary and capricious, an aggrieved criminal defendant should have judicial recourse to challenge the validity of the Guideline and, if she prevails, to have the opportunity to be resentenced.

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1. *See generally* Matthew Van Meter, *One Judge Makes the Case for Judgment*, THE ATLANTIC (Feb. 25, 2016), https://www.theatlantic.com/politics/archive/2016/02/one-judge-makes-the-case-for-judgment/463380/.

2. Pepper v. United States, 562 U.S. 476, 490 (2011).

3. Gall v. United States, 552 U.S. 38, 51 (2007).

4. Andrew N. Sacher, *Inequities of the Drug War: Legislative Discrimination on the Cocaine Battlefield*, 19 CARDOZO L. REV. 1149, 1159 (1997).

The Commission was established "as an independent commission in the judicial branch of the United States" by the Sentencing Reform Act of 1984 ("SRA").[5] Although the Commission looks like an administrative agency, courts have found that the Guidelines promulgated by the Commission are not subject to judicial review under the Administrative Procedure Act ("APA").[6]

Congress should amend the SRA to subject the Guidelines to the more rigorous arbitrary and capricious standard of judicial review.[7] This would ensure that the Commission engages in reasoned decision-making when promulgating the Guidelines and would provide a mechanism for challenging Guidelines for which the Commission inadequately considered the purposes of the SRA or failed to consider such purposes altogether. Part II provides a brief history of sentencing in the U.S. and background on the formation of the Commission. Part III shows that, although the Guidelines have been legally "advisory" since *United States v. Booker*,[8] they carry enormous weight in judges' sentencing determinations. The current sentencing scheme is inherently a ratchet-up system, and the presumption of reasonableness of in-Guidelines sentences from *Rita*[9] has strengthened the influence of the Guidelines. Part IV explains the traditional route of appellate review of a sentence for reasonableness and rational basis review when a sentence is challenged as violating the Equal Protection Clause. Part V explains the arbitrary and capricious standard of review and why it should be applied to the Commission. Finally, Part VI shows how implementing arbitrary and capricious review of the Guidelines would operate, and it calls for Congress to amend the SRA to allow such review.

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5. Sentencing Reform Act, 28 U.S.C. § 991(a) (1984).

6. *See* United States v. Lopez, 938 F.2d 1293, 1297 (D.C. Cir. 1991).

7. Some critics of the U.S. Sentencing Commission have called for a new sentencing commission that would be subject to a higher standard of judicial review. *See, e.g.*, Kate Stith & Karen Dunn, *A Second Chance for Sentencing Reform: Establishing a Sentencing Agency in the Judicial Branch*, 58 STAN. L. REV. 217, 231 (2005).

8. United States v. Booker, 543 U.S. 220, 245 (2005).

9. Rita v. United States, 551 U.S. 338 (2007).

II. BACKGROUND OF THE SENTENCING REFORM ACT OF 1984 AND THE SENTENCING COMMISSION

Although the Constitution does not dictate which branch of government shall have control over the sentencing of convicted criminals, it is well-established that Congress has the ability to set sentencing ranges and to set limits on the scope of judicial discretion.[10] The first two hundred years of the United States were characterized by judges having broad discretion in the sentence imposed and in the information that they could consider in making the sentencing determination.[11] Furthermore, prior to the SRA, federal sentencing orders were practically unappealable if they were within the prescribed sentencing range.[12] The then-mandatory Guidelines imposed by the SRA of 1984 brought about a monumental retraction of judicial discretion in sentencing.

The Commission is an independent agency in the judicial branch.[13] The Commission "unquestionably is a peculiar institution within the framework of our Government. Although placed by the Act in the Judicial Branch, it is not a court and does not exercise judicial power."[14] Rather, it is an independent agency that promulgates Guidelines for the federal courts.[15] Congress created the SRA to cure two main problems in federal sentencing: first, "the great variation among sentences imposed by different judges upon similarly situated offenders," and second, "the uncertainty as to the time the offender would spend in prison."[16] The Commission's principal purposes are:

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10. William W. Berry III, *Discretion Without Guidance: The Need to Give Meaning to § 3553 After Booker and its Progeny*, 40 CONN. L. REV. 631, 635 (2008).

11. *Id.* citing *inter alia* 18 U.S.C. § 3577 (1976) ("No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.").

12. Dorszynski v. United States, 418 U.S. 424, 440–41 (1974).

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

14. *Id.* at 384–85.

15. *Id.* at 385.

16. *Id.* at 366.

> (1) to establish sentencing policies and practices for the federal courts, including guidelines to be consulted regarding the appropriate form and severity of punishment for offenders convicted of federal crimes;
> (2) to advise and assist Congress and the executive branch in the development of effective and efficient crime policy; and
> (3) to collect, analyze, research and distribute a broad array of information on federal crime and sentencing issues, serving as an information resource for Congress, the executive branch, the courts, criminal justice practitioners, the academic community, and the public.[17]

The Guidelines were intended to promote uniformity in federal sentencing and the Commission was to act as the leading force in efficiently reaching this objective.

In 1989, the Supreme Court weighed in on the constitutionality of the Commission and the Guidelines and granted approval of both.[18] In *Mistretta v. United States*, John Mistretta was indicted for three counts stemming from a cocaine sale in the Western District of Missouri.[19] Mistretta moved to have the Guidelines declared unconstitutional as violating the separation of powers doctrine, and because "Congress delegated excessive authority to the Commission to structure the Guidelines."[20] The district court, and later the Supreme Court, rejected these claims.[21] The *Mistretta*

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17. *An Overview of the U.S. Sentencing Comm'n,* U.S. SENTENCING COMM'N (last visited Feb. 1, 2017), http://www.ussc.gov/sites/default/files/pdf/about/overview/USSC_Overview.pdf.

18. *Mistretta*, 488 U.S. at 374.

19. *Id.* at 370.

20. *Id.*

21. *Id.* at 374 ("[W]e harbor no doubt that Congress' delegation of authority to the Sentencing Commission is sufficiently specific and detailed to meet constitutional requirements.").

Court acknowledged that the Commission is tasked with exercising judgments on matters of policy.[22] In so doing, Congress "sets forth more than merely an 'intelligible principle.'"[23]

The Court further held that the Commission "is not a court and does not exercise judicial power."[24] Rather, it is an independent agency under the Judicial Branch.[25] In justifying the Commission's power to promulgate the Guidelines, the Court pointed to the Rules Enabling Act of 1934 where Congress conferred power to the federal courts to promulgate the Federal Rules of Civil Procedure.[26] One critique of this comparison is that it compares procedural rules of the Federal Rules of Civil Procedure with substantive rules under the Guidelines.[27] The Supreme Court rejected the importance of the substantive nature of the Guidelines vis-à-vis the procedural nature of the Federal Rules of Civil Procedure.[28] The Court held that the Federal Rules of Civil Procedure are not entirely procedural because they have important effects on the substantive rights of litigants.[29] Furthermore, the *Mistretta* Court held that granting the authority to promulgate Guidelines to the Commission "pose[s] no threat of undermining the integrity of the Judicial Branch or of expanding the powers of the Judiciary beyond the constitutional bounds by uniting . . . the political or quasi-legislative power of the Commission with the judicial power of the courts."[30] Thus, Congress appropriately delegated the authority to the Commission to determine sentencing ranges for all federal crimes.[31]

In a lengthy dissent, Justice Scalia stated he was "at a loss to understand why the Commission is 'within the Judicial Branch' in

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22. *Id.* at 378.

23. *Id.* at 379.

24. *Mistretta*, 488 U.S. at 384–85.

25. *Id.* at 385.

26. *Id.* at 387 (citing 28 U.S.C. § 2072 (2016)).

27. *Id.* at 391–92.

28. *Id.* at 391.

29. *Id.* at 392 (citing Hanna v. Plumer, 380 U.S. 460, 472 (1965)).

30. *Mistretta*, 488 U.S. at 393.

31. *Id.*

any sense that has relevance to today's discussion."[32] Justice Scalia argues that the Commission is not under the judicial branch because it is not controlled by the judiciary.[33] Nonetheless, the Commission's status as a lawfully-created judicial branch agency has remained unchanged.

III. THE GUIDELINES ARE FUNCTIONALLY MORE THAN MERELY ADVISORY.

Before *United States v. Booker*, federal judges were required to follow the Sentencing Guidelines; in other words, the Guidelines were mandatory.[34] The Court's decision in *Booker* transformed the Guidelines from mandatory to advisory.[35] Although advisory in name, the Guidelines still comprise an inherently one-way ratchet-up system where sentences are frequently increased and are rarely decreased.[36] In 2007, the Supreme Court further solidified the role of the Guidelines in sentencing determinations by creating a presumption of reasonableness for in-Guidelines sentences.[37] Further, the Sentencing Reform Act requires the sentencing judge to consider the Guidelines' range, effectively making the Guidelines the starting point for sentencing determinations.[38] *Advisory* does not appropriately describe the force and effect that the Guidelines have on present-day sentencing determinations.

Before *Booker*, federal judges were bound to follow the Guidelines "unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately

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32. *Id.* at 422 (Scalia, J., dissenting).

33. *See generally id.* at 413–27 (Scalia, J., dissenting).

34. 18 U.S.C. § 3553(b)(1) (repealed 2005) ("the court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind . . ."); *see also Mistretta*, 488 U.S. at 367.

35. United States v. Booker, 543 U.S. 220, 245 (2005).

36. Frank O. Bowman III, *Nothing is Not Enough: Fix the Absurd Post-Booker Federal Sentencing System*, 24 FED. SENT'G REP. 356, 356–57, (2012).

37. Rita v. United States, 551 U.S. 338, 346 (2007).

38. *See Booker*, 543 U.S. at 245; *see also* 18 U.S.C. § 3553(a)(4) (2012).

taken into consideration by the Sentencing Commission."[39] In *Booker*, the Supreme Court found that the mandatory Sentencing Guidelines violated the Sixth Amendment of the Constitution and held that the Guidelines were thereafter merely advisory.[40] The Sixth Amendment[41] right to a jury trial in a criminal proceeding means that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."[42] The *Booker* Court held that the mandatory nature of the Guidelines violated the right to trial by jury when judges enhanced sentences based on facts not determined by a jury nor admitted by the defendant.[43]

In *Booker*, a jury found the defendant, Freddie J. Booker, guilty of possession with intent to distribute at least 50 grams of cocaine base (crack).[44] Evidence was presented that Booker had 92.5 grams of crack in his duffel bag.[45] The Guidelines' range for this offense, given Booker's criminal history, was "not less than 201 nor more than 262 months."[46] However, in a sentencing hearing, the judge found by a preponderance of the evidence that Booker had possessed an additional 566 grams of crack and that he was guilty of obstructing justice.[47] From these findings, the Guidelines mandated a range for 360 months to life imprisonment.[48] Rather than the 21 years and 10 month maximum sentence based on jury findings of fact, the Guidelines required the judge to sentence

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39. 18 U.S.C. § 3553(b)(1) (repealed 2005).

40. *Booker*, 543 U.S. at 245 (holding that the provision of the statute making the Guidelines mandatory, 18 U.S.C. § 3553(b)(1), be severed and excised).

41. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed . . .").

42. Apprendi v. New Jersey, 530 U.S. 466, 490 (2000).

43. *Booker*, 543 U.S. at 245.

44. *Id.* at 227.

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

Booker to a minimum of 30 years in prison, the term ultimately imposed by the court.[49] This sentence violated Booker's Sixth Amendment right.[50]

The *Booker* Court cited several cases where courts have struck down sentences outside the range supported by the jury-verdict alone based on judge-found facts in violation of the Sixth Amendment.[51] The Court declared that making the Guidelines advisory would cure the Sixth Amendment problem.[52] Judges are frequently tasked with exercising discretion within statutory limits and this does not raise Sixth Amendment concerns.[53] The Sixth Amendment is implicated, however, when the statutory range is altered by a finding of fact made not by the jury but by the judge.[54] In turn, in the portion of the majority opinion authored by Justice Breyer, the *Booker* Court severed and excised two provisions of the Act that made the Guidelines mandatory and thereby cured the Sixth Amendment violations.[55]

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49. *Booker*, 543 U.S. at 227.

50. *Id.* at 231–32.

51. *Id.* at 230–32 (citing Blakely v. Washington, 542 U.S. 296, 301 (2004) (the application of Washington's sentencing scheme violated the defendant's right to have a jury find the existence of "any particular fact" essential to the determination of punishment)); Ring v. Arizona, 536 U.S. 584, 588–89 (2002) (impermissible for trial judge to determine presence or absence of aggravating factors warranting the death penalty under Arizona law); *Apprendi*, 530 U.S. at 490 (judge found that defendant's conduct violated New Jersey's "hate crime" law because it was racially motivated); Jones v. United States, 526 U.S. 227, 230 (1999) (holding that the harm to the victim was an element of the federal carjacking crime that needed to be determined by a jury).

52. *Booker*, 543 U.S. at 233.

53. *See Apprendi*, 530 U.S. at 481.

54. *Id.* at 466.

55. *Booker*, 543 U.S. at 265 (the provisions severed and excised were 18 U.S.C. §§ 3553(b)(1) and 3742(e)).

Dissenting in part, Justice Stevens, joined by Justices Souter and Scalia, renounced the majority's remedy to the alleged constitutional violation.[56] According to Justice Stevens, the excised provisions of the SRA were not unconstitutional.[57] Booker's sentencing would have been rectified had the two facts—responsibility for the additional 566 grams of crack and obstruction of justice—been found by a jury based on proof beyond a reasonable doubt instead of by the judge.[58] Justice Stevens asserted, "[t]he Court's decision to [invalidate the provisions] represents a policy choice that Congress has considered and decisively rejected."[59] In the end, excising the provisions won out, and the Guidelines became advisory rather than mandatory.[60]

A. The Post-*Booker* Guidelines Still Comprise an Inherently Ratchet-up System, and While "Advisory," their Legal Influence on Sentencing has been Undiminished.

Although *Booker* gave judges more discretion, the Guidelines are still inherently a ratchet-up system.[61] The length of sentences has nearly tripled since the Guidelines were instituted.[62] According to Professor Frank Bowman, *Booker* failed to change a major problem with pre-*Booker* sentencing—that is, that the rulemaking process for the Commission is designed as a one-way upward

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56. *See id.* at 272 (Stevens, J., dissenting in part).

57. *Id.*

58. *Id.* at 273 (Stevens, J., dissenting in part).

59. *Id.* at 272.

60. *Id.* at 233.

61. Bowman, *supra* note 36, at 356–57.

62. Bowman, *infra* note 64, at 1328. From 1984 to 1990, the mean sentence imposed for federal crimes rose from 24 months to 46 months. *Id.* at 1328, n.65 (citing U.S. SENTENCING COMM'N, THE FEDERAL SENTENCING GUIDELINES: A REPORT ON THE OPERATION OF THE GUIDELINES SYSTEM AND SHORT-TERM IMPACTS ON DISPARITY IN SENTENCING, USE OF INCARCERATION, AND PROSECUTORIAL DISCRETION AND PLEA BARGAINING 376 Figure 14 (1991), https://www.ncjrs.gov/pdffiles1/Digitization/137987NCJRS.pdf). By 1993, the mean sentence imposed increased by almost another fifty percent to 66.9 months. U.S. SENTENCING COMM'N, 1995 ANNUAL REPORT 61 Figure F (1996), http://www.ussc.gov/annrpt/1995/annua95.htm.

ratchet which raised sentences often and virtually never lowered them.[63]

The SRA was intended to distribute sentencing policy-making power and to control sentencing among various national and local actors.[64] However, that power has shifted from the judiciary and the Sentencing Commission "toward political actors in Congress and the central administration of justice" leading to a "one-way upward ratchet. . . ."[65]

There are multiple ways in which the defendant's offense level can be increased, ultimately increasing the sentence imposed.[66] First, out of the twenty subsections of Chapter Three of the Guidelines Manual that details sentencing adjustments, only two are applicable to downward adjustments of the offense level that could lead to a lesser sentence for the defendant: § 3B1.2 "Mitigating Role" and § 3E1.1 "Acceptance of Responsibility."[67] All the remaining adjustments under Chapter Three would result in increases to the defendant's offense level.[68]

Second, the Guidelines have an upward tendency because politicians are at the helm of sentencing policy and there is political pressure to be tough on crime and increase criminal penalties.[69]

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63. Bowman, *infra* note 64, at 1315.

64. Frank O. Bowman III, *The Failure of the Federal Sentencing System: A Structural Analysis*, 105 COLUM. L. REV. 1315, 1319 (2005).

65. *Id.*

66. *See generally* UNITED STATES SENTENCING COMM'N, GUIDELINES MANUAL § 3 (2015). *See e.g., id.* at § 3B1.1 (the defendant's leadership role in the crime); *id.* at § 3C1.1 (obstructing or impeding the administration of justice); *id.* at §3B1.3 (abuse of a position of trust or skill). A defendant's sentence is determined by offense level, which represents the seriousness of the present offense, and her criminal history category, which represents the defendant's disposition for criminal activity. Bowman, *supra* note 64, at 1324 (citing UNITED STATES SENTENCING COMM'N, GUIDELINES MANUAL § 4 (2005) (containing rules regarding calculation of criminal history category)).

67. *See* UNITED STATES SENTENCING COMM'N, GUIDELINES MANUAL § 3 (2015).

68. *See id.*

69. *See* Bowman, *supra* note 64, at 1345 ("[P]olitical forces acting on Congress are so uniformly aligned in one direction--that of increasing penalties.").

Although increasing sentencing penalties may have short-term political benefits, the long-term budgetary effects and consequences of over-incarceration are not adequately considered by politicians taking this stance.[70]

In 2005, Professor Bowman opined that *Booker* brought about one key difference in sentencing as long as the Guidelines remained a guide for appellate review: "The only theoretical difference is that the guidelines will now best be characterized as presumptive rather than mandatory. The only functional difference would be that we would still have guidelines with the *force of law*, but judges would have an expanded departure power."[71]

Two years later the Supreme Court confirmed Professor Bowman's theory that upon appellate review a within-Guidelines sentence by the district court carries a presumption of reasonableness in *Rita v. United States*.[72]

In *Rita*, the Supreme Court held that an appellate court may provide a "presumption of reasonableness" to a district court sentence that "reflects a proper application of the Sentencing Guidelines."[73] In that case, Victor Rita was charged with perjury, making false statements, and obstruction of justice for testimony he gave to a federal grand jury in connection with a machinegun kit he had purchased.[74] Following a jury trial, he was convicted on all counts.[75] At sentencing, Rita argued for a sentence below the properly calculated Guidelines range of 33 to 41 months for the following reasons: his physical condition, his vulnerability in prison, and his military service.[76] The district court rejected Rita's arguments that the sentencing range was inappropriate and sentenced him to the low end of the range—33 months.[77] Rita appealed

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70. *See id.* at 1345–46.

71. *Id.* at 1350 (emphasis added).

72. Rita v. United States, 551 U.S. 338, 346–47 (2007).

73. *Id.*

74. *Id.* at 342–43.

75. *Id.* at 343.

76. *Id.* at 344–45.

77. *Id.* at 345.

the sentencing decision to the Fourth Circuit Court of Appeals, which upheld his sentence as reasonable.[78]

After granting certiorari, the Supreme Court affirmed the sentence as reasonable and established that properly within-Guidelines sentences are presumptively reasonable.[79] The presumption represents the fact that "*both* the sentencing judge and the Sentencing Commission will have reached the *same* conclusion as to the proper sentence in the particular case."[80] "That double determination significantly increases the likelihood that the sentence is a reasonable one."[81]

This reasoning is misguided, however, because the Commission does not make determinations on particular cases, rather it prescribes Guidelines for criminal offenders in the aggregate. The Court seems to use the logic that if two sources come to the same conclusion, then the conclusion is given greater weight. However, this ignores the fact that the two problem-solvers are not independent. The sentencing court's sentence is partially, if not wholly, dependent on the Guidelines prescribed by the Commission.

Another consequence of *Rita* is that it grants even greater weight to the ostensibly advisory guidelines. The within-Guidelines presumption of reasonableness strengthens sentencing judges' reliance on the Guidelines for fear of being overturned on appeal. Judge Richard Posner describes the "economic theory" of judicial behavior which "treats the judge as a rational, self-interested" individual who is striving to maximize his or her "income . . . power, prestige, reputation, self-respect" and so on.[82] As an extension of this theory, judges are reticent to be overturned on appeal.[83]

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78. *Rita*, 551 U.S. at 346.

79. *Id.* at 347.

80. *Id.* (emphasis in original).

81. *Id.*

82. RICHARD A. POSNER, HOW JUDGES THINK 35–36 (2010).

83. *See Rita*, 551 U.S. at 391 (Souter, J., dissenting) (A judge is more likely to engage in fact finding necessary to apply a within-Guidelines sentence and are less likely to apply an outside the Guidelines sentence unless the judge has a "powerful reason to risk reversal on the sentence.").

In Justice Souter's dissent in *Rita*, he predicted that the presumption of reasonableness would produce within-Guidelines sentences almost as regularly as the mandatory guidelines, thereby rekindling the Sixth Amendment defect of sentences dependent on judge-found facts that existed pre-*Booker*.[84]

In addition, *Rita*'s presumption essentially nullifies a defendant's ability to appeal a sentence for lack of reasonableness. This is especially true in cases where the defendant seeks to challenge the Commission's decision to promulgate a specific Guideline as unreasonable. Nowhere in the creation of the Sentencing Commission did Congress state that the Sentencing Commission is infallible. As such, like any other human institution, the Sentencing Commission will from time to time make mistakes. *Rita* only acts to reinforce these mistakes and as logic might predict, judges are not eager to buck the trend even if they indeed believe that the Commission erred in its creation of a particular Guideline.

The presumption of reasonableness perpetuates the problem that existed pre-*Booker*—that a reasonable judge could often times do nothing to impose an appropriate sentence *outside* of the Guidelines. The presumption worsens the problem identified by Prof. Bowman that making the Guidelines advisory impacted very little how often judges sentence outside the guidelines.[85] *Booker* had little impact on giving judges the freedom to sentence outside the Guidelines, while *Rita* had the effect of further confining judges to the Guidelines. In a sense, *Rita*'s presumption of reasonableness works against the *Booker* Court's holding that the Guidelines are advisory. Although not legally mandatory, the Guidelines play an immensely significant role in federal judges' sentencing determinations.

B. Guidelines are the Starting Point for the Court's Sentencing

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84. *Id.* at 390.

85. Bowman, *supra* note 36, at 357–58. In FY 2010 and FY 2011, about 55% of sentences were within the Guidelines as opposed to 65% for the five years preceding *Booker*. Bowman, *supra* note 36, at 357. *See also* U.S. SENTENCING COMM'N, 2010 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS Tbl. N (2011); U.S. SENTENCING COMM'N, PRELIMINARY QUARTERLY DATA REPORT 1, Tbl. 1 (4th Quarter Release, through Oct. 31, 2011) (54.7% of defendants sentenced within range in FY 2011).

Determination.

Lastly, the Guidelines are not merely advisory because they are the required starting point in the judge's sentencing determination. In making a sentencing determination the sentencing judge must first consider the Guidelines.[86] "[A] district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range."[87] This illustrates that while the Guidelines are advisory, initial consideration by the sentencing judge is mandatory.[88]

In sum, many of the problems that persisted pre-*Booker* still have not been resolved. *Rita*'s presumption that within-Guidelines sentences are reasonable solidifies the weight that the Guidelines play in sentencing decisions.[89] Judges are required to calculate the applicable Guideline range as a first step in sentencing, and they are quick to avoid straying from the Guidelines in order to prevent being overturned on appeal.[90] Finally, the scheme of the Guidelines causes sentences to be enhanced upward frequently.[91] For these reasons, the Guidelines act as a powerful force in increasing rather than decreasing sentences.

IV. EXISTING JUDICIAL REVIEW IN SENTENCING

The first avenue of review for a defendant challenging her sentence is to claim that the sentencing court abused its discretion.[92]

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86. *See Booker*, 543 U.S. at 245; *see also* 18 U.S.C. § 3553(a)(4).

87. Gall v. United States, 552 U.S. 38, 49 (2007). "The sentencing judge, as a matter of process, will normally begin by considering the presentence report and its interpretation of the Guidelines." *Rita*, 551 U.S. at 351 (citing 18 U.S.C. § 3552(a); Fed. Rule Crim. Proc. 32); Kimbrough v. United States, 552 U.S. 85, 91 (2007) ("A district judge must include the Guidelines range in the array of factors warranting consideration."); *see Kimbrough*, 552 U.S. at 112 (Scalia, J., concurring) (the sentencing court must take the Guidelines into consideration when sentencing).

88. *See id.*

89. *See Rita*, 551 U.S. at 359.

90. *See Booker*, 542 U.S. at 223–24.

91. Bowman, *supra* note 36, at 356–57.

92. *Gall*, 552 U.S. at 46–47.

The defendant can assert that the sentence imposed was procedurally inadequate, for example, by showing that the § 3553(a) factors were not considered or that the judge gave an incomplete explanation of the sentence.[93] The defendant can also claim that the sentence was substantively unreasonable.[94] The abuse of discretion challenge attacks the adequacy of the sentencing judge's imposition of a sentence and cannot be used to challenge the Commission's decision to promulgate a particular Guideline.[95] Next, a defendant may challenge her sentence as violating the Equal Protection Clause of the Fourteenth Amendment.[96] Under this appeal, the reviewing court will examine the challenged Guideline under the rational basis standard.[97] That is, the Guideline must be upheld if it is rationally related to a legitimate government purpose.[98] Neither of these types of judicial review permit a challenge that the Commission acted arbitrarily in promulgating a particular Guideline.

A. Reasonableness Review of a Sentence under the Abuse-of-Discretion Standard

Appellate review of a sentence imposed under the Guidelines is for reasonableness.[99] Standard appellate review of a district court's sentence is the deferential abuse-of-discretion standard.[100] The reviewing court must first ensure that the sentencing court made no substantial procedural error such as improperly calculating the applicable Guideline range, treating the Guidelines as mandatory, failing to consider the § 3553(a) factors, basing a sentence on clearly erroneous facts, or failing to adequately explain

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93. *See Booker*, 542 U.S. at 261.

94. *Id.*

95. *See generally Gall*, 552 U.S. 38 (2007).

96. *See* U.S. CONST. amend. XIV.

97. United States v. Coleman, 24 F.3d 37, 39 (9th Cir. 1994).

98. *Id.*

99. Pepper v. United States, 562 U.S. 476, 490 (2011) (citing Gall v. United States, 552 U.S. 38, 49–51 (2007)); *see also* United States v. Booker, 543 U.S. 220, 261 (2005) (the standard of appellate review for sentencings is whether the sentence is "unreasonable" with regard to the § 3553(a) factors).

100. *Gall*, 552 U.S. at 56.

the sentence imposed.[101] Then, the reviewing court will consider "the substantive reasonableness of the sentence imposed under an abuse-of-discretion standard."[102]

The defendant in *Gall v. United States* was charged with conspiracy to distribute ecstasy, cocaine, and marijuana for his involvement in distributing drugs as a college student at the University of Iowa.[103] Although the Guidelines called for a thirty to thirty-seven months sentence, the sentencing judge imposed a sentence of probation for a term of thirty-six months.[104] The judge referenced the § 3553(a) factors and enumerated several reasons for the below-Guidelines sentence, including Gall's voluntary withdrawal from the conspiracy, obtaining a college degree and starting a successful business, his lack of criminal history, and family support.[105] The Eighth Circuit overturned this sentence on the basis that the district court judge did not demonstrate extraordinary circumstances for sentencing below the Guidelines.[106] Ultimately, the Supreme Court upheld the district court's sentence, stating that the standard of appellate review of a sentence "inside or outside the Guidelines range" is the abuse of discretion standard.[107]

B. The Rational Basis Standard of Review

When an Equal Protection challenge is asserted by a defendant sentenced under the Guidelines, all twelve circuits have reviewed the Commission's rulemaking under the rational basis standard.[108] Under a traditional Equal Protection challenge to a

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101. *Id.* at 51.

102. *Id.*

103. *Id.* at 41.

104. *Id.* at 43.

105. *Id.* at 43–44.

106. *Gall*, 552 U.S. at 45.

107. *Id.* at 51.

108. *See* Andrew N. Sacher, *Inequities of the Drug War: Legislative Discrimination on the Cocaine Battlefield*, 19 CARDOZO L. REV. 1149, 1159 (1997) (citing United States v. Then, 56 F.3d 464, 466 (2d Cir. 1995); United States v. Williamson, 53 F.3d 1500, 1530 (10th Cir. 1995); United States v. Cherry, 50 F.3d 338, 342 (5th Cir. 1995); United States v. Johnson, 40 F.3d 436, 441 (D.C. Cir. 1994); United States v. Lewis, 40 F.3d 1325, 1344 (1st Cir. 1994);

statute or rule, rational basis review requires that the statute or rule be upheld if it is rationally related to a legitimate government purpose.[109] The rational basis standard of review is quite easy for the government to meet. This standard does not require the Commission to use the best means to achieve its goals and even permits decisions "based on rational speculation unsupported by evidence or empirical data."[110]

In the Supreme Court's seminal case on rational basis review, *City of Cleburne, Texas v. Cleburne Living Center*, respondents Jan Hannah and Cleburne Living Center (collectively "CLC") filed claims in district court alleging that a city ordinance requiring a special permit for a group home to house mentally retarded persons violated the Equal Protection Clause.[111] The Supreme Court, applying rational basis review, held that the ordinance did violate the Equal Protection Clause.[112] The City of Cleburne listed several purposes for requiring the special permit, all of which were rejected by the Supreme Court.[113] "[N]egative attitudes" toward the future residents of the group home by neighboring property owners and fears of elderly residents of Cleburne were not permissible reasons for treating the group home differently from apartments, hotels, hospitals, nursing homes, and the like.[114] Furthermore, protecting the group home residents from being harassed by a nearby school

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United States v. Harden, 37 F.3d 595, 602 (11th Cir. 1994); United States v. Clary, 34 F.3d 709, 713 (8th Cir. 1994); United States v. Coleman, 24 F.3d 37, 39 (9th Cir. 1994); United States v. D'Anjou, 16 F.3d 604, 612 (4th Cir. 1994); United States v. Lloyd, 10 F.3d 1197, 1220 (6th Cir. 1993); United States v. Frazier, 981 F.2d 92, 93 (3d Cir. 1992); United States v. Lawrence, 951 F.2d 751, 755 (7th Cir. 1991)).

109. U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 533 (1973); *see also* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 ("The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest.").

110. United States v. Navarro, 800 F.3d 1104, 1114 (9th Cir. 2015) (quoting FCC v. Beach Comm., Inc., 508 U.S. 307, 315 (1993)).

111. *Cleburne Living Ctr.*, 473 U.S. at 435–36.

112. *Id.* at 448.

113. *Id.* at 448–49.

114. *Id.* at 448.

was rejected as a valid reason for the discrimination.[115] The City's objection that the group home was located on a 500-year flood plain was not a sufficient reason to treat the group home differently than a hospital or nursing home which could be located at the same site without a special use permit.[116] After thorough examination of the city's purported reasons for the ordinance, the Supreme Court held that the ordinance was based on the "irrational prejudice against the mentally retarded."[117] Because the ordinance was not rationally related to a legitimate government interest, it unconstitutionally violated the Equal Protection Clause of the Fourteenth Amendment.[118]

In conducting a rational basis analysis, a court must first find the government purpose behind its decision to act.[119] In *U.S. Department of Agriculture v. Moreno*, the Supreme Court granted certiorari on a challenge to an amendment to the Food Stamp Act that prohibited participants in the program from living with persons in the same household to whom they were unrelated.[120] The express purposes of the Food Stamp Act were found in a congressional "declaration of policy."[121] Among these were: the goal to "raise levels of nutrition among low-income households . . . ," "promot[ing] the distribution in a beneficial manner of our agricultural abundances . . . ," and to "alleviate such hunger and malnutrition . . . ."[122] The challenged disparity in classifying households with related individuals with those that had members unrelated to each other was "clearly irrelevant" to these stated purposes.[123] To uphold this clas-

115. *Id.* at 449.

116. *Id.*

117. *Cleburne Living Ctr.*, 473 U.S. at 450.

118. *Id.*

119. *See Moreno*, 413 U.S. at 533.

120. *Id.* at 530.

121. *Id.* at 533.

122. *Id.*

123. *Id.* at 534.

sification, the amendment would need to serve some other legitimate government purpose.[124] In analyzing the legislative history to the amendment, the Court held that the state purpose of preventing "hippies" and "hippie communes" from taking advantage of the program was not a legitimate government interest.[125] Simply preventing a politically unpopular group from patronizing the food stamp program does not constitute a legitimate government purpose.[126] Similarly, the Court rejected the government's argument that the amendment was intended to prevent fraud.[127] For these reasons, the amendment failed the rational basis test and was struck down in violation of the Equal Protection Clause.[128]

C. Rational Basis Applied to the Guidelines

Equal protection challenges to the Guidelines receive rational basis review.[129] Even prior to Congress reducing the disparity in sentencing ranges between crack cocaine and powder cocaine, several circuits found that the 100-to-1 disparity passed the rational basis test.[130] Despite the disproportionate affect this disparity had on black people, these circuits found that Congress had a legitimate government interest in prescribing harsher penalties for crack because it is more addictive, more dangerous, and can be sold in smaller quantities than its powder counterpart.[131]

Similarly, the Ninth Circuit and Eleventh Circuit have rejected Equal Protection challenges in the Guidelines' treatment of

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124. *Id.*

125. *Moreno*, 413 U.S. at 534.

126. *Id.*

127. *Id.* at 535.

128. *Id.* at 538.

129. Sacher, *supra* note 108, at 1168.

130. *See, e.g.*, United States v. King, 972 F.2d 1259, 1260 (11th Cir. 1992); United States v. Watson, 953 F.2d 895, 898 (5th Cir. 1992), *cert. denied*, 504 U.S. 928 (1992); United States v. House, 939 F.2d 659, 664 (8th Cir. 1991); United States v. Thomas, 900 F.2d 37, 39 (4th Cir. 1990); United States v. Cyrus, 890 F.2d 1245, 1248 (D.C. Cir. 1989).

131. *See, e.g.*, *King*, 972 F.2d at 1260; *Watson*, 953 F.2d at 898; *House*, 939 F.2d at 664; *Thomas*, 900 F.2d at 39; *Cyrus*, 890 F.2d at 1248.

illegal reentry, § 2L1.2(b)(1)(A).[132] This Guideline created an enhancement of sixteen offense levels for defendants previously convicted of an aggravating felony.[133] In *United States v. Ruiz-Chairez*, defendant Roman Ruiz-Chairez was convicted of illegal reentry.[134] He appealed his sentence on the ground that it violated the Equal Protection Clause because the enhancement he received under § 2L1.2(b)(1)(A) was more severe than that of other felonies.[135] Specifically, Ruiz-Chairez compared the severity of the enhancement under § 2L1.2(b)(1)(A) with the enhancement under § 2K2.1(a)(4) for possession of a firearm.[136] Because Ruiz-Chairez was previously

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132. *See* United States v. Ruiz-Chairez, 493 F.3d 1089, 1092 (9th Cir. 2007); United States v. Adeleke, 968 F.2d 1159, 1160–61 (11th Cir. 1992).

133.

> If the defendant previously was deported, or unlawfully remained in the United States, after—
>
> (A) a conviction for a felony that is (i) a drug trafficking offense for which the sentence imposed exceeded 13 months; (ii) a crime of violence; (iii) a firearms offense; (iv) a child pornography offense; (v) a national security or terrorism offense; (vi) a human trafficking offense; or (vii) an alien smuggling offense, increase by **16** levels. . . .

U.S. SENTENCING COMM'N, U.S. SENTENCING GUIDELINES MANUAL § 2L1.2(b)(1)(A) (Nov. 1, 2004), http://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2004/manual/CHAP2-4.pdf.

The Guidelines effective November 1, 2004 were in effect at the time of Ruiz-Chairez's sentencing on March 25, 2005. *See* Appellant Roman Ruiz-Chairez's Opening Brief at 2, United States v. Ruiz-Chairez, 493 F.3d 1089 (9th Cir. 2007), No. 05-10226, 2005 WL 3132445, at *2. On November 1, 2016, the Sentencing Commission significantly amended § 2L1.2. Of note, the Commission removed the sixteen-level enhancement for crimes enumerated above, replacing it with an increase of up to four levels for prior illegal reentry offenses and an increase of up to ten levels for prior felony convictions (other than an illegal reentry offense) based on the term of the sentenced imposed. *See* U.S. SENTENCING COMM'N, U.S. SENTENCING GUIDELINES MANUAL § 2L1.2 (Nov. 1, 2016), http://www.ussc.gov/guidelines/2016-guidelines-manual/2016-chapter-2-l-x#NaN.

134. *Ruiz-Chairez*, 493 F.3d at 1090.

135. *Id.*

136. *Id.*

convicted of a "crime of violence,"[137] his base offense level was increased sixteen levels to twenty-four.[138] Under § 2K2.1(a)(4) for unlawful possession of a firearm, a similar prior offense would result in an adjusted offense level of only twenty.[139] In his Equal Protection claim, Ruiz-Chairez argued that this discrepancy demonstrated that the Commission acted arbitrarily and violated the Equal Protection Clause.[140] In rejecting his argument, the Ninth Circuit held that the severity of § 2L1.2(b)(1)(A) did meet the rational basis standard.[141] The court cursorily stated that the legitimate government interest in Ruiz-Chairez's case was "deterring illegal reentry."[142] In offering some justification, the court quoted the Eleventh Circuit, "[T]he Sentencing Commission *may* have concluded that an alien who has been convicted of a felony should be strongly deterred from re-entering the United States, a consideration not present with respect to an American citizen."[143] This exemplifies the nature of rational basis review—there is no requirement that the Commission actually have a legitimate government interest for its action; a speculative government interest will do.

V. THE ARBITRARY AND CAPRICIOUS STANDARD OF REVIEW

The arbitrary and capricious standard is a common standard of judicial review of actions of administrative agencies.[144] The Ad-

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137. Ruiz-Chairez's previous conviction of a drug-trafficking offense also warrants the enhancement under the Guidelines. *Id.*

138. *Id.*

139. U.S. SENTENCING COMM'N, U.S. SENTENCING GUIDELINES MANUAL § 2K2.1(a)(4) (Nov. 1, 2004), http://www.ussc.gov/guidelines/2016-guidelines-manual/2016-chapter-2-l-x#NaN.

140. *Ruiz-Chairez*, 493 F.3d at 1090.

141. *Id.* at 1091.

142. *Id.* at 1092.

143. *Id.* (emphasis added) (quoting United States v. Adeleke, 968 F.2d 1159, 1160 (11th Cir. 1992)).

144. *See* 5 U.S.C. § 706(2)(A) (2016).

ministrative Procedure Act (APA) prescribes this standard as a default standard of review in certain instances.[145] Section 706(2)(A) of the APA states, "The reviewing court shall . . . hold unlawful and set aside any agency action, findings, and conclusions found to be . . . *arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law*. . . ."[146] The arbitrary and capricious standard has two functions. First, it is the standard of review of the factual basis for certain agency decisions, including informal adjudications and informal rulemaking.[147] Second, the arbitrary and capricious standard applies to judicial review of the overall rationality of the agency decision.[148] The latter requires the reviewing court to determine if the agency considered all relevant factors and whether there has been a clear error of judgment.[149] In other words, the agency must engage in reasoned decision making.[150] An agency ruling would be arbitrary and capricious:

> if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the

145. *See* 5 U.S.C. § 706(2)(A) (1966).

146. *Id.* (emphasis added).

147. *See* Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402, 415–16 (1971) (the APA defines both "rule" and "order."); *see* 5 U.S.C. §§ 551(4), (6) (1966) (a rule derives from "rule making" and an order derives from an "adjudication."); *see* 5 U.S.C. §§ 553–54 (1966) (the APA specifies unique procedures for both actions and determining whether Congress granted the agency the authority to engage in rulemaking or adjudication is an often source of debate and litigation. The Supreme Court created a framework for determining if an action is rulemaking or an adjudication.); *see* Londoner v. City and County of Denver, 210 U.S. 373 (1908); Bi-Metallic Inv. Co. v. St. Bd. of Equalization, 239 U.S. 441 (1915). This Comment will not distinguish between the Commission's actions as rules or orders.

148. *Volpe*, 401 U.S. at 416; *see also* RICHARD SEAMON, ADMINISTRATIVE LAW 845–46 (2013).

149. *Volpe*, 401 U.S. at 416.

150. *Id.*; SEAMON, *supra* note 148, at 845.

> agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.[151]

Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co. involved the rulemaking decisions of the Secretary of Transportation under the National Traffic and Motor Vehicle Safety Act of 1966.[152] The purpose of the Act was to reduce injuries and deaths due to traffic accidents.[153] The Act tasked the Secretary of Transportation with establishing mandatory motor vehicle safety standards—in other words, the Act granted the Secretary of Transportation informal rulemaking authority.[154] It also directed the Secretary to consider "relevant available motor vehicle data" and the extent to which the proposed standards would promote the purposes of the Act.[155] The Secretary of Transportation delegated this authority to the National Highway Traffic Safety Administration ("NHTSA"), an agency in the Transportation Department.[156] The NHTSA issued the rule "Modified Standard 208," which provided that all new vehicles during model years 1982–1984 would be equipped with either automatic seatbelts or airbags, giving the manufacturer the choice of which to install.[157] This standard was promulgated in part because the NHTSA found that providing these passive restraints "could prevent approximately 12,000 deaths and over 100,000 serious injuries annually."[158]

In February 1981, after a new presidential administration came to power, the rulemaking process was reopened and the pas-

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151. Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Ins. Co., 463 U.S. 29, 43 (1983).

152. *Id.* at 33; 15 U.S.C.A § 1381 (1976 and Supp. IV 1980) (repealed 1994).

153. *Id.*

154. *Id.* at 33, 41.

155. *Id.* (*quoting* 15 U.S.C. § 1392(f)(1), (3), (4) (repealed 1994)).

156. *Id.* at 34 n.3.

157. *Motor Vehicle Manufacturers Ass'n*, 463 U.S. at 37.

158. *Id.* at 35.

sive restraint requirement of Modified Standard 208 was rescinded.[159] The question for the Supreme Court was whether revoking parts of Modified Standard 208 was arbitrary and capricious.[160] The Secretary gave the following reasons for rescinding the passive restraint requirement: (1) the automobile industry planned to install seatbelts 99% of the time so the effects of airbags could not be realized;[161] and (2) the seatbelts could be easily detached leaving the existing problem with manual belts that users must take some affirmative action.[162] Accordingly, the agency concluded that there was no longer a basis for predicting that usage of passive restraints would be significantly increased.[163] This line of reasoning led the Court to find that the agency's action was arbitrary and capricious.[164] First, the agency failed to consider requiring the use of airbags as part of the standard.[165] Second, "the agency was too quick to dismiss the benefits of automatic seatbelts."[166] The Court of Appeals for the D.C. Circuit held that only a justifiable excuse not to seek further evidence on this issue would render it non-arbitrary.[167] In sum, the agency's decision to rescind the passive restraint requirement was not the result of reasoned decision-making, and was therefore arbitrary and capricious.[168]

159. *Id.* at 38.

160. *Id.* at 34.

161. *Id.* at 38.

162. *Id.* at 38–39.

163. *Motor Vehicle Manufacturers Ass'n*, 463 U.S. at 39.

164. *Id.* at 46.

165. *Id.*

166. *Id.* at 51.

167. *Id.*

168. *Id.* at 52.

Professor Richard Seamon has summarized the requirement of reasoned decision-making.[169] First, the "agency's reasoning process must be rational and comprehensible."[170] Second, the agency must consider all relevant factors.[171] Third, the agency should not base its decision on irrelevant factors.[172] Fourth, there should be "a clear, logical connection between the agency's factual determinations and its ultimate decision."[173] And fifth, the agency's action must be consistent with prior agency action unless the agency adequately explains its change of course.[174]

A. The Guidelines are not Subject to Arbitrary and Capricious Review

A rule promulgated by an administrative agency is typically subject to a challenge in federal court pursuant to Chapter 7 of the APA.[175] In other words, a party aggrieved by an agency action can seek judicial review of the agency action.[176] The Supreme Court has a long-standing tradition of permitting judicial review.[177] Nonetheless, two circuit courts have held that the Sentencing Commission's decisions are not subject to the APA's arbitrary and capricious standard of judicial review.[178] Instead, the D.C. Circuit and the Ninth Circuit concluded that Congress did not intend for

169. SEAMON, *supra* note 148, at 838–39.

170. *Id.* at 838.

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.* at 839.

175. *See* 5 U.S.C. § 702 (1966).

176. *Id.*

177. *See* Abbott Laboratories v. Gardner, 387 U.S. 136, 140 (1967).

178. *See* United States v. Lopez, 938 F.2d 1293, 1297 (D.C. Cir. 1991); *see also* Andrade v. U.S. Sentencing Comm'n, 989 F.2d 308, 309 (9th Cir. 1993) (holding that the Freedom of Information Act ("FOIA") and the APA do not apply to the Commission).

certain provisions of the APA, including the arbitrary and capricious standard of judicial review, to apply to the Sentencing Commission.[179]

In *United States v. Lopez*, the defendant, Clarence Morales—charged under the name José Lopez—received a 51-month sentence after pleading guilty to conspiracy to distribute cocaine base.[180] On appeal, Morales made several claims alleging the trial court erred in determining his sentence.[181] First, Morales claimed that the sentencing judge erred in refusing to grant a downward departure based on his age and background.[182] Second, Morales argued that not considering his age violated due process.[183] Third, and most importantly for the purposes of this article, Morales challenged § 5H1.1 of the Guidelines "on the basis that the Sentencing Commission had failed to explain why a defendant's youth should not ordinarily be taken into account by the sentencing court."[184] The then-current version of § 5H1.1 stated that age is "not ordinarily relevant in determining whether a sentence should be outside the guidelines. . . ."[185] As to Morales's first claim, the court found that the district court judge did not abuse his discretion in finding that there lacked a showing that this case was extraordinary enough to consider age.[186] Similarly, the court cursorily disposed of the due process claim.[187]

As for Morales's claim that the Sentencing Commission failed to give adequate reasons for declaring that age is ordinarily not relevant, the court determined that it lacked authority to review

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179. *Id.*

180. *Lopez*, 938 F.2d at 1294–95.

181. *Id.* at 1295–96.

182. *Id.* at 1296.

183. *Id.*

184. *Id.*

185. *Id. (*quoting U.S. SENTENCING COMM'N, U.S. SENTENCING GUIDELINES MANUAL § 5H1.1 (Nov. 1, 1987) (amended 2010)).

186. *Lopez*, 938 F.2d at 1294.

187. *Id.* at 1296 (citing United States v. Brady, 895 F.2d 538, 539–40 (9th Cir. 1990)).

the adequacy of the Commission's basis, or rationale, for promulgating such Guidelines.[188] The court reasoned that "well-settled Administrative Law principles" have limited applicability to this case.[189] These "well-settled Administrative Law principles" refer to the idea that the default rule for administrative agencies is that agency actions can be reviewed under the arbitrary and capricious standard.[190] Instead, the court held that Congress did not intend for the Commission's actions to be subject to judicial review under the APA.[191] This determination of Congressional intent was twofold: first, by subjecting the Commission to one section of the APA, Congress impliedly excluded the applicability of all other provisions of the APA to the Commission; second, the legislative history confirmed that Congress did not intend for the judicial review provisions of the APA to apply.[192]

Regarding the first point, the *Lopez* court held that § 994(x) of the SRA determines the extent to which the APA applies to the Commission and the Guidelines.[193] This section states: "The provisions of section 553 of title 5, relating to publication in the Federal Register and public hearing procedure, shall apply to the promulgation of guidelines pursuant to this section."[194]

Applying the canon of *inclusio unius est exclusio alterius*, the court concluded that by subjecting the promulgation of the Guidelines to this one provision of the APA, "Congress affirmed that the Commission's rulemaking was not subject to any other provision of the APA, including those for judicial review."[195] The Eighth and Ninth circuits have followed this line of reasoning.[196]

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188. *Id.* at 1297.

189. *Id.*

190. *See* 5 U.S.C. § 706(2)(A) (2012).

191. *Lopez*, 938 F.2d at 1297.

192. *Id.*

193. *Id.*

194. 28 U.S.C. § 994(x) (2012).

195. *Lopez*, 938 F.2d at 1297.

196. *See, e.g.*, Andrade v. U.S. Sentencing Comm'n, 989 F.2d 308, 309 (9th Cir. 1993) (Congress intended that the Commission be exempt from the Freedom of Information Act and

Next, the *Lopez* court held that the legislative history on § 994(x) of the SRA confirms that Congress did not intend the Commission to be subject to judicial review under the APA.[197] The court quoted the following language of the Senate Committee Report:

> [Section 994(x)] is an exception to the general inapplicability of the Administrative Procedure Act . . . to the judicial branch.
>
> . . . .
>
> It is . . . not intended that the guidelines be subject to appellate review under chapter 7 of title 5. There is ample provision for review of the guidelines by the Congress and the public; no additional review of the guidelines as a whole is either necessary or desirable.[198]

This Senate Committee Report convinced the D.C. Circuit that Congress did not intend to subject the Commission to all of the provisions of the APA. Accordingly, *Lopez* established that the Guidelines are not subject to judicial review under the APA, and by extension, are not held to the arbitrary and capricious standard of reasonableness.

The Ninth Circuit similarly held that the APA does not apply to the Commission except to the extent to which § 994(x) applies.[199] In *Andrade v. U.S. Sentencing Commission*, the plaintiff brought suit in order to compel the Commission to comply with a Freedom of Information Act ("FOIA") request.[200] The FOIA is part of the APA; because Congress spoke to the specific provisions of the APA which apply to the Commission in § 994(x), it implicitly exempted

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the provisions of the APA not mentioned in § 994(x)); United States v. Johnson, 703 F.3d 464, 468 (8th Cir. 2013).

197. *Lopez*, 938 F.2d at 1297.

198. *Id.* (citing S.Rep. No. 98-225, 98th Cong., 1st Sess. 180–81 (1983)).

199. *Andrade*, 989 F.2d at 309.

200. *Id.*

other provisions of the APA, including the FOIA, from applying.[201] Although *Andrade* does not speak directly to the judicial review provisions of the APA, following the court's reasoning that only § 994(x) applies would yield the same result.[202]

The Eighth Circuit has held that it didn't have the authority to review the Commission's reasoning for issuing a policy statement.[203] In *United States v. Johnson*, Defendant Johnson appealed his sentencing on various grounds, including a claim that the Commission acted arbitrarily and capriciously.[204] Johnson was convicted of "conspiracy to distribute fifty grams or more of cocaine base (crack cocaine), . . . and for distribution of and possession with intent to distribute cocaine base."[205] Johnson challenged "the Commission's decision not to make Amendment 742 retroactive . . . ."[206] If Amendment 742 was retroactive, Johnson's criminal history category would have decreased by one level.[207]

At his original sentence date in 2005, Johnson's criminal history category level was VI.[208] This level was partially increased because of § 4A1.1, which adds criminal history points to the defendant when the instant crime is committed in a short time after the defendant's release from prison on a former crime.[209] On November 1, 2010, the Commission issued a policy statement establishing

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201. *Id.*; *see also* United States v. Frank, 864 F.2d 992, 1013 (3d Cir. 1988) (because the Commission is housed in the judicial branch, it is exempt from certain statutes, including FOIA, 5 U.S.C. § 552 (2012)).

202. *See Andrade*, 989 F.2d at 309.

203. *Johnson*, 703 F.3d at 467. For the purposes of this article, a policy statement advising how a Guideline should be applied carries similar force and effect as a Guideline created by the Commission.

204. *Id.*

205. United States v. Johnson, 439 F.3d 947, 949 (8th Cir. 2006).

206. *Johnson*, 703 F.3d at 467.

207. *Id.* at 466.

208. *Id.*

209. *Id.*; *see* U.S. SENTENCING COMM'N, U.S. SENTENCING GUIDELINES MANUAL § 4A1.1(e) (2004).

Amendment 742, which eliminated these recency points.[210] The court determined it did not have the authority to review the Commission's decision to issue this policy statement, denying Johnson's claims.[211]

VI. A CALL FOR CONGRESS TO MAKE THE GUIDELINES SUBJECT TO THE ARBITRARY AND CAPRICIOUS STANDARD OF JUDICIAL REVIEW

Agencies are not perfect. The Sentencing Commission is not perfect. This is why there needs to be meaningful judicial review of the Guidelines passed by the Commission. When a rule is passed without proper consideration, or with no consideration, of the relevant factors set out in the SRA, a party aggrieved by the rule—most typically a sentenced defendant—should have a meaningful opportunity to challenge the rule as arbitrary and capricious.[212] This would force reviewing courts to provide a meaningful review of the Commission's decision-making process. The appellate courts are uniquely capable of reviewing the Sentencing Commission's decisions because these courts routinely exercise review of criminal sentencings. This is unlike many other administrative agency actions where the courts might not have expertise in the substance of the agency action.

To institute arbitrary and capricious review of the Guidelines, Congress should create a special review provision that can be incorporated in the SRA. "The APA was meant to bring uniformity to a field full of variation and diversity."[213] "Some facets of an administrative decision, because they raise issues within the courts' area of competence, are well suited to judicial oversight."[214] The standard of judicial review of an agency action will depend on the

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210. *Johnson*, 703 F.3d at 466.

211. *Id.*

212. Congress would make the determination of who has standing to challenge the rule. If the APA language is followed, a person "adversely affected or aggrieved by an agency action" would be the standard for standing. *See* 5 U.S.C. § 702 (2012). A defendant sentenced under the alleged arbitrary Guideline would undoubtedly have standing.

213. Dickinson v. Zurko, 527 U.S. 150, 155 (1999).

214. Nat. Res. Def. Council, Inc. v. Sec. & Exch. Comm'n, 606 F.2d 1031, 1050 (D.C. Cir. 1979).

agency's competence in the area.[215] Some facets of administrative decisions are suitable to stringent judicial oversight, while others require more deference to the agency's decision.[216]

Many existing statutes provide the standard of judicial review that applies to agency rulemaking or adjudications. One example is the judicial review provision of the Consumer Product Safety Act, which states "The . . . safety rule shall not be affirmed unless the Commission's findings . . . are supported by substantial evidence on the record taken as a whole . . . ."[217] Another review statute subjecting agency rulemaking to judicial review under the arbitrary and capricious standard is 5 U.S.C. § 7703, which regulates the Merit Systems Protection Board.[218] The statute reads:

> In any case filed in the United States Court of Appeals for the Federal Circuit, the court shall review the record and hold unlawful and set aside any agency action, findings, or conclusions found to be—
> (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . . .[219]

The language under subection (1) is identical to that of the APA, which also calls for arbitrary and capricious review.[220] The APA states: "The reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . *arbitrary, capricious*, an abuse of discretion or otherwise not in accordance with law . . . ."[221]

As these statutes demonstrate, courts are accustomed to this kind of language and this type of judicial review. Because the problems with the Guidelines identified in Part IV warrant heightened

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215. *See id.* at 1049.

216. *Id.* at 1049–50.

217. 15 U.S.C. § 2060(c) (2016).

218. 5 U.S.C. § 7703 (2016).

219. *Id.* For another example of a statute that has a special review provision calling for the arbitrary and capricious standard of judicial review, *see* 30 U.S.C. § 1276(a)(1) (2012).

220. 5 U.S.C. § 706 (2012).

221. *Id.* (emphasis added).

review,[222] Congress should amend the SRA and create a special review statute to that affect. An example of the review statute would be as follows:

> 28 U.S.C. § 999. Judicial Review
>
> (a) Any person adversely affected by a rule or order promulgated by the Commission, may file a petition with the Court of Appeals within the district that such party resides, or with the Court of Appeals within the district that the sentence was imposed.
> (b) The reviewing court shall hold unlawful and set aside any action by the Commission found to be—
>
> (1) arbitrary, capricious, an abuse of discretion, or not otherwise in accordance with law.
>
> (c) This section is not intended to modify or supersede any other provision under this Act, including § 994(x).[223]

A. The Proposed Standard Would Enable Courts to Meaningfully Review the Commission's Rationale

Creating the above special review provision would alleviate problems caused by arbitrary Guidelines. First, it would require reviewing courts to determine if the Commission engaged in reasoned decision-making in promulgating the Guidelines. The SRA conveniently states the purposes of the Commission and the Guidelines, and the Commission would be forced to consider these purposes in its decision-making. Furthermore, this provision would force the Commission to state its reasons behind certain Guidelines, bringing a long-awaited and much-needed level of transparency to this enigmatic judicial branch agency. In theory, this record-keeping requirement will promote cautious and well-reasoned decisions by the Commission.

Under the proposed amendment, the reviewing court would first look to see if the Commission considered the relevant factors when creating the Sentencing Guidelines. The relevant factors to be considered were mandated by Congress in the SRA in two main

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222. *See supra* Part IV.

223. Subsection (c) avoids overlapping or inconsistent language in the SRA.

places.[224] First, Congress gave the purposes to the Commission in 28 U.S.C. § 991(b):

> The purposes of the United States Sentencing Commission are to—
> (1) establish sentencing policies and practices for the Federal criminal justice system that—
> (A) assure the meeting of the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code;
> (B) provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices; and
> (C) reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process; and
> (2) develop means of measuring the degree to which the sentencing, penal, and correctional practices are effective in meeting the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code.[225]

The second source of relevant factors the Commission must consider, as mentioned twice in the language of § 991(b), are the § 3553(a)(2) factors. These factors are the following:

> The court, in determining the particular sentence to be imposed, shall consider—
> the need for the sentence imposed—
> (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
> (B) to afford adequate deterrence to criminal conduct;

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224. *See* 28 U.S.C. § 991(b) (2012); *see also* 18 U.S.C. § 3553(a)(2) (2012).

225. 28 U.S.C. § 991(b).

> (C) to protect the public from further crimes of the defendant; and
> (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner. . . .[226]

Under the proposed statute the reviewing court would ask whether the Commission adequately considered the purposes of § 991(b) and the § 3553(a)(2) factors.[227] To meet the former, a Guideline must meet the following purposes: avoid unwarranted disparities in the Guidelines while maintaining flexibility in sentencing when necessary. To meet the latter, the Guideline must reflect the seriousness of the offense, promote deterrence, protect the public from future crimes, and promote rehabilitation.

B. Arbitrary and Capricious Review Applied to *Ruiz-Chairez* and *Johnson*

Applying arbitrary and capricious review would have a significant impact on the reviewing court's analysis in *Ruiz-Chairez*. Most importantly, the government would not be able to sit back and enjoy the free pass it received under the rational basis test. Rather, the government would be required to demonstrate the Commission's reasons for the discrepancy of the adjusted offense levels between the crimes of illegal reentry and felon in possession of a firearm. Specifically, the government would have the burden of demonstrating that the Commission properly considered the purposes of sentencing set forth in 28 U.S.C. § 991(b) and 18 U.S.C. § 3553(a)(2). The *Ruiz-Chairez* court stated that the defendant's argument that a felon in possession of a firearm is inherently more dangerous than illegal reentry "misses the point."[228] Perhaps, this comparison misses the point in considering whether the illegal reentry Guideline satisfies the rational basis standard, but such a comparison would be critical in determining if the Commission acted arbitrarily when it created the Guideline. Indeed, this argument addresses an alleged unwarranted disparity in the Guidelines. If a court subsequently determines that § 2L1.2 created an

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226. 18 U.S.C. § 3553(a)(2).

227. The author does not claim that this is the most useful description of the relevant factors the Commission may consider, but it is a good start for combatting arbitrary Guidelines.

228. United States v. Ruiz-Chairez, 493 F.3d 1089, 1092 (9th Cir. 2007).

unwarranted disparity, the Guideline would be struck down as arbitrary and capricious.

Furthermore, the court would review the decision to implement the sixteen offense level enhancement with respect to the relevant § 3553(a)(2) factors. If the reviewing court were to find that the Commission did not consider the relevant factors in determining the offense levels, then the challenged enhancement could be invalidated as arbitrary and capricious. The sixteen offense level enhancement does deter illegal reentry, and it arguably protects the public from future crimes because the defendant will be behind bars for longer. However, a court reviewing the Guideline may determine that the steep enhancement is out of proportion with the seriousness of the offense, does not serve to protect the public from the future crimes of the defendant (because the defendant's crime is merely remaining in the U.S.), and does not provide the defendant with rehabilitative, educational or vocational treatment.[229] For these reasons, the government may fail to meet its burden that the Commission engaged in reasoned decision-making in promulgating the Guideline.

Next, looking at *United States v. Johnson* under the proposed standard, a reviewing court would look to the Commission's rationale behind Amendment 742, and specifically, the Commission's rationale for denying the Amendment retroactive effect. The reviewing court would first ask whether the Commission considered the purposes under § 3553(a)(2) in denying retroactivity. The reviewing court would take a close look and inquire: Would such denial reflect the seriousness of the offense, promote respect for the law, and provide just punishment for the offense?

In these examples, the hypothetical outcomes are uncertain. However, creating judicial review of the Sentencing Commission would have positive effects. First, instituting the proposed amendment would expose the thought processes of the Commission. It would also shift the burden to the government to defend the Commission's actions. The special review provision would increase the level of scrutiny of the reviewing court on the actions of the Commission, forcing the reviewing court to take a close look at the disputed Guideline. In turn, this would incentivize the Commission to act cautiously in promulgating the Guidelines and to justify any

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229. The absence of promoting rehabilitation is especially prevalent given the fact that deportable aliens are ineligible for the Residential Drug Abuse Program (RDAP) and halfway house programs. *See* FEDERAL BURUEAU OF PRISONS, DEFENDER SERVICES OFFICE TRAINING DIVISION 7, https://www.fd.org/docs/select-topics---bop/fed_bop_merchant.pdf (Feb. 15, 2017).

actions in terms of the purposes of the SRA and the purposes of the Commission. Increasing transparency will improve the public perception that the Guidelines are fair. Lastly, the judicial review provision would act as a backstop for human errors which the Commission is bound to commit.

VII. CONCLUSION

The Federal Sentencing Guidelines are in need of a backstop to prevent arbitrary Guidelines from remaining in effect. The Supreme Court has given little credence to claims that the Guidelines are arbitrary because, since *Booker*, judges are not required to sentence within the Guidelines. Rational basis review offers minimal scrutiny to the Guidelines. At present, the Commission may pass arbitrary Guidelines without considering the purposes of the Sentencing Reform Act or the § 3553(a) factors. If created, an arbitrary Guideline could have a significant impact on sentences imposed by judges and it would carry a presumption of reasonableness on appeal if the sentence is imposed within the Guideline range. Advisory or not, the influence of the Guidelines is both real and substantial.

By amending the SRA to include arbitrary and capricious review of the Guidelines, an arbitrary Guideline would be struck down. This standard is currently applied to agency actions of administrative agencies subject to the judicial review provisions of the APA, meaning courts are capable of applying the same standard to the actions of the Sentencing Commission. Hapless defendants would cease to bear the brunt of the Commission's failure to exercise reasoned decision-making. Ultimately, this check on the Commission would restore faith in the fairness of federal sentencing.