
DEFERENCE ERRORS: THE UNITED STATES SENTENCING GUIDELINES, CHEVRON, AND THE APPELLATE PRESUMPTION OF REASONABLENESS

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Every federal circuit, in one form or another, gives cognizable deference to the United States Sentencing Commission. The presumption of reasonableness that appellate courts apply to sentences falling within the Commission’s Sentencing Guidelines represents the most popular iteration of this deference. However, deference to the Commission—whether in the form of a presumption, or otherwise—is problematic. Examination of the justifications and effects of the presumption shows that it is the functional equivalent of Chevron deference. Further examination shows that such de facto deference is unjustified. The Commission’s expertise is redundant to, and less than, that of Article III courts. Additionally, notions of lenity counsel against deference in a setting where the government acts at its fullest power. Appellate courts should remove any aspect of deference from their jurisprudence and strive toward a robust sentencing review. Holistic review of federal sentences will achieve the happy result of additional guidance to district courts, increased uniform and well-justified sentences, and an affirmation of the judiciary’s power over the cases and controversies of the nation.

INTRODUCTION..... 1210

I. OVERVIEW OF THE SENTENCING GUIDELINES AND THE PRESUMPTION OF REASONABLENESS..... 1220

 A. *History of the Act* 1221

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B.	<i>The Sentencing Reform Act, the Sentencing Commission, and the Sentencing Guidelines</i>	1222
C.	<i>The Appellate Presumption of Reasonableness</i>	1225
II.	THE APPELLATE PRESUMPTION OF REASONABLENESS IS FUNCTIONALLY <i>CHEVRON</i> DEFERENCE	1231
A.	<i>Chevron v. Natural Resources Defense Council</i>	1232
B.	<i>The Appellate Presumption of Reasonableness Is Chevron Deference in Disguise</i>	1235
1.	The Appellate Presumption of Reasonableness Relies on the Same Justifications as <i>Chevron</i>	1236
a.	<i>Deference to the Commission's Expertise</i>	1236
b.	<i>Deference to Legislative Intent</i>	1239
2.	Arbitrary and Capricious Review	1240
a.	<i>Deference to the Commission</i>	1240
b.	<i>Case Outcomes</i>	1242
c.	<i>Overturing the Commission on Procedural Error</i>	1244
III.	THE SENTENCING COMMISSION AND GUIDELINES DO NOT MERIT DE FACTO DEFERENCE	1246
A.	<i>The Commission's Expertise Does Not Surpass the Expertise of the Judiciary</i>	1247
1.	The Commission's Expertise Is Redundant	1247
2.	The Commission's Expertise Is Less than That of Article III Courts	1250
B.	<i>Chevron Is Inapplicable to Criminal Law and Best Serves Civil Cases</i>	1253
1.	Concerns for Legislative Supremacy Counsel Against the Presumption of Reasonableness...	1257
2.	Fair Notice Counsels Against De Facto <i>Chevron</i> Deference	1260
IV.	A NEW STANDARD OF REVIEW	1262
	CONCLUSION	1270

INTRODUCTION

Our laws should be well-reasoned, internally consistent, and justified. Because we place our trust in—and order our lives around—the law, laws that fail to meet these standards work harm by creating unjust and inconsistent results. And thus, ill-reasoned, inconsistent, and unjustified laws undercut

our reliance on the law itself. In short, to merit reliance, laws must continually justify themselves to the people they govern. This requirement of perennial rationalization is the brilliance and strength of our constitutional system. This system is designed to protect the people from arbitrary and ill-reasoned laws through a series of checks and balances spread across three branches of government. It provides the people with two political branches so that no law is created or enforced without the consent of the governed. And the system provides an independent judiciary. In this judiciary, the Constitution vests the power to decide the cases and controversies of the nation and to determine what the law says.¹ Our courts have taken this solemn charge and, accepting the premise that the law should be well-reasoned and justified, have applied logic to the cases and issues that have come before it.

The judiciary has always been weak, and rightfully so.² Our system should be political, and an overly zealous judiciary risks tyranny. However, justifiable caution must not be confused with the abandonment of duty. For the past thirty years, the judiciary has bowed to Congress's increased reliance on administrative agencies, often to the detriment of their duty. Currently, our judiciary stands in a weaker position than our constitutional system envisioned. This Comment explores but a small part of the judiciary's weakened position and offers a narrow solution to a narrow problem.

In 2015, the United States District Court for the District of Colorado sentenced Richard Franklin to one hundred years in prison for advertisement, receipt, and distribution of child pornography.³ Franklin's sentence was unprecedented.⁴ He was a first-time offender, and his crime did not involve contact with a child. Nevertheless, the United States Court of Appeals for the Tenth Circuit upheld the 100-year sentence,⁵ surpassing sentences given for a violent rape of a child.⁶ The court rejected

1. *Marbury v. Madison*, 5 U.S. 137, 173–74, 177–78 (1803).

2. THE FEDERALIST NO. 78, at 464 (Alexander Hamilton) (Clinton Rositer ed., 1961).

3. *United States v. Franklin*, 785 F.3d 1365, 1372 n.2 (10th Cir. 2015).

4. *Id.* at 1372 n.5 (acknowledging appellant's argument that the sentence was higher than any given for similarly situated defendants, but nevertheless upholding the sentence).

5. *Id.*

6. *See, e.g., United States v. Willie*, 253 F.3d 1215, 1217 (10th Cir. 2001) (upholding sentence of 151 months—or 12.5 years—for a violent rape on a child).

Franklin's arguments that the guideline used to determine his sentence was not empirically based⁷ and that the length of his sentence far surpassed previous cases.⁸ Instead, the court relied on the fact that the 100-year sentence was within the sentencing range recommended for Franklin's child pornography offenses under the United States Sentencing Guidelines ("The Guidelines").⁹

In terms of judicial consistency in sentencing, *Franklin* is but one data point in a troubling line of caselaw.¹⁰ While harsh and disproportionate child pornography sentences have recently drawn the ire of commentators and judges alike, appellate courts routinely uphold high sentences for child pornography crimes.¹¹ These judges and commentators identify the child pornography sentencing guidelines as the root of these extreme sentences. After twenty-two years of

In *Willie*, the court actually imposed an upward variance on the defendant to calculate the 151-month sentence. It still fell far below the sentence in *Franklin*.

7. *Franklin*, 785 F.3d at 1370.

8. *Id.* at 1372.

9. *Id.* at 1371. The United States Sentencing Guidelines, on which this Comment focuses, are guidance to federal sentencing published by the United States Sentencing Commission. For more information, see generally Brent E. Newton, *The History of the Original United States Sentencing Commission, 1985-87*, 45 HOFSTRA L. REV. 1167 (2017).

10. See, e.g., *United States v. Betcher*, 534 F.3d 820, 827-28 (8th Cir. 2008) (affirming a 750-year sentence for production, receipt, and possession of child pornography); *United States v. Sarras*, 575 F.3d 1191, 1219-21 (11th Cir. 2009) (upholding a 100-year sentence for child pornography); *United States v. Johnson*, 451 F.3d 1239, 1244 (11th Cir. 2006); *United States v. Duke*, 788 F.3d 392, 397-98 (5th Cir. 2015) (rejecting a substantive challenge to the child pornography guidelines for their lacking empirical basis); *United States v. Myers*, 442 F. App'x 220, 224 (6th Cir. 2011) (upholding a sixty-month sentence even though recognizing it was "harsh").

11. The child pornography guidelines are unique. Generally, the Sentencing Commission creates the Guidelines through an empirically based study of sentences imposed on similar offenders for similar crimes. The child pornography guidelines, on the other hand, are the product of congressional direction. Congress has intervened nine times since 1987, increasing the levels of punishment each time. The result is a twenty-two-level increase since the beginning of said congressional interference. Importantly, these increases are not based in empirical data. Moreover, the child pornography guidelines are so broad that there is a wide range of possible sentences for child pornography defendants. This results in illogical guidelines that have created a wide range of sentences handed down for similarly situated defendants. This was the evidence presented to the Tenth Circuit in *Franklin*. *Franklin*, 785 F.3d at 1372 n.2; see also *United States v. Dorvee*, 616 F.3d 174, 188 (2d Cir. 2006); Michael J. Pelgro, *Child Pornography: The New Crack Cocaine?*, BOS. BAR J. (May 29, 2012), <https://bostonbarjournal.com/2012/05/29/child-pornography-the-new-crack-cocaine/> [<https://perma.cc/D9TE-JEGT>].

congressional interference with the child pornography guidelines, the current guidelines can “easily generate unreasonable results.”¹²

A sensible check on such an illogical and inconsistent guidelines, and the often-harsh sentences it imposes, would be appellate courts. Nevertheless, these courts often endorse truly astonishing punishments¹³ that outstrip sentences imposed for more serious crimes.¹⁴ In upholding harsh sentences under the child pornography guidelines, for example, appellate courts rely on a “rebuttable presumption of reasonableness” applied to these within-Guidelines sentences.¹⁵ As its title suggests, this presumption gives within-Guidelines sentences special status, assuming they are the correct “starting point” and “ending point” for most sentences.¹⁶ This presumption, a form of which exists in all eleven circuits and the District of Columbia,¹⁷ allows appellate courts to easily uphold inconsistent child pornography sentences.¹⁸

The presumption’s effect goes beyond child pornography sentencing, however. While the issues surrounding the presumption and the child pornography guidelines are more visible than others because of their history,¹⁹ the presumption poses a larger problem in the federal judiciary. By giving

12. *Dorvee*, 616 F.3d at 188.

13. See Pelgro, *supra* note 11.

14. See, e.g., *Little v. Hobbs*, No. 14–6071, 2014 WL 5465441, at *1 (W.D. Ark. 2014) (upholding sentence of thirty-five years for defendant convicted of first-degree murder, using a firearm in commission of a felony, and residential burglary).

15. See, e.g., *Franklin* 785 F.3d at 1370 (relying on *United States v. Castillo-Arellano*, 777 F.3d 1100, 1104 (10th Cir. 2015)); *United States v. Miller*, 665 F.3d 114, 119–121 (5th Cir. 2011) (rejecting an empirical challenge to the guidelines because of the appellate presumption of reasonableness); *Myers*, 442 F. App’x at 224 (“Given [the defendant’s] age and personal history, a sentence of 60 months of incarceration seems harsh. However, his sentence falls within the advisory guidelines range and is therefore entitled to a presumption of correctness.”).

16. *United States v. Marcussen*, 403 F.3d 982, 984 n.4 (8th Cir. 2005). Within-Guideline sentences are those sentences which fall within the range prescribed by the Guidelines as applied to a particular defendant.

17. *United States v. Kaufman*, 791 F.3d 86, 89 (D.C. Cir. 2015).

18. See, e.g., *Franklin*, 785 F.3d at 1372. A 100-year sentence for a non-contact, first-offense child pornography violation exceeds sentences handed down for instances of physical child abuse. Moreover, the sentence also far exceeded sentences handed down in similar cases. See *id.* The Tenth Circuit seemed unconcerned. See *id.* In fact, the court devoted just three pages of its already cursory opinion justifying the sentence. See *id.* at 1371–74.

19. See Pelgro, *supra* note 11.

independent legal effect to the Guidelines, courts in effect defer to the Commission that publishes them.²⁰ This creates a host of legal and practical issues.

The practical effect of the presumption is to restrict appellate review. That is, the presumption effectively prohibits appellate courts from engaging with the substantive fairness of a sentence.²¹ This judicially created abdication grants district courts wide latitude to impose within-Guidelines sentences without appellate interference.²² If sentences fall inside the Guidelines, courts hold that “little explanation is required,” and assume the sentence is reasonable.²³ The appellate presumption can thus hide poorly judged and unreasonable within-Guidelines sentences.

The presumption also encourages rote justifications of significant deprivations of liberty on the part of appellate courts.²⁴ Short appellate opinions upholding within-Guidelines sentences are legion.²⁵ The proliferation of these short opinions is troubling as such opinions tend to show a diminished appellate review process. Because robust appellate review helps promote due process and fundamental fairness, abbreviated and cursory opinions do not inspire confidence.

20. The presumption requires appeals courts to treat within-Guidelines and outside-Guidelines sentences differently. *Compare* United States v. Pena-Luna, 595 F. App'x 398 (5th Cir. 2014), *with* United States v. Feemster, 572 F.3d 455 (8th Cir. 2009). Within-Guidelines sentences will “almost never be reversed as substantively unreasonable.” United States v. Gardellini, 545 F.3d 1089, 1092 (D.C. Cir. 2008) (citing *Rita v. United States*, 551 U.S. 338, 356–58 (2007)). Outside-Guidelines sentences, on the other hand, are reviewed on a “sliding scale” where the farther a sentencing court “diverges from the advisory guideline range, the more compelling the reasons for the divergence must be.” United States v. Valtierra-Rojas, 468 F.3d 1235, 1239 (10th Cir. 2006) (citing United States v. Moreland, 437 F.3d 424, 434 (4th Cir. 2006)).

21. The presumption has been widely criticized for effectively reinstating the pre-*Booker* mandatory sentencing regime discussed *infra* Section I.C. See Brief Amicus Curia of the National Association of Criminal Defense Lawyers in Support of the Defendants at 2, United States v. Carty, 520 F.3d 984 (9th Cir. 2008) (No. 05-10200), 2006 WL 3245012.

22. See, e.g., *Franklin*, 785 F.3d at 1371 (deferring to the district court’s sentence because it fell within the applicable sentencing guidelines).

23. United States v. Mares, 402 F.3d 511, 519 (5th Cir. 2005) (holding that the court will infer the sentencing judge considered § 3553 factors for within-Guidelines sentences).

24. *The Supreme Court, 2006 Term — Leading Cases*, 121 HARV. L. REV. 245, 254–55 (2007).

25. See, e.g., United States v. Craig, 808 F.3d 1249, 1263 (10th Cir. 2015) (upholding a life sentence and rejecting arguments that the sentence did not meet the applicable sentencing factors in a single paragraph).

Superficial and perfunctory justifications of sentences in a context where the government acts at its fullest authority should evoke a certain discomfort.

Additionally, deference to the Sentencing Commission denies district courts critical guidance. Under the presumption, appellate courts uphold sentences with little explanation.²⁶ As the result in *Franklin* and the fraught history of the child pornography guideline illustrate, the Commission and the district courts are not infallible.²⁷ Appellate review generally offers an additional check on arbitrary, ill-reasoned, or out-of-date guidelines or sentences.²⁸ However, this check is currently missing in criminal sentencing. The district courts currently operate without a strong and consistent check on their work for within-Guidelines sentences.²⁹ True appellate review would allow all sentences to be continually tested in an adversarial

26. See, e.g., *id.*

27. See Pelgro, *supra* note 11; see also, *The Supreme Court, 2006 Term — Leading Cases*, *supra* note 24, at 255 (“By simultaneously shoring up the Guidelines as the presumptive measure of lawfulness and requiring too little in the way of explanation from sentencing judges, the *Rita* court undermined the strength of appellate review. To avoid a system in which unreasonable, within-Guidelines sentences go unchecked, courts should be required to explain their reasons in detail.”).

28. J. Dickson Phillips, *The Appellate Review Function: Scope of Review*, 47 LAW & CONTEMP. PROBS. 1, 2 (1984) (“While there have been various formulations [regarding the functions appellate courts serve], most who have thought systematically about the matter identify two basic functions: (1) correction of error (or non-correction if no correction is required) in the particular litigation; and (2) declaration of legal principle, by creation, clarification, extension or overruling.”).

29. While it has some oversight over the Commission, Congress is not the appropriate body to ensure fair and well-reasoned guidelines. Separation of power concerns suggest that Congress should not delegate their power over sentencing in the first place. Additionally, Congress does not see how the Guidelines operate on a daily basis, and simply does not have the capacity to exercise sufficient oversight over the Commission. See Mark W. Bennett, *A Slow Motion Lynching? The War on Drugs, Mass Incarceration, Doing Kimbrough Justice, and a Response to Two Third Circuit Judges*, 66 RUTGERS U. L. REV. 873, 880–92 (2014); see *infra* Part III. District courts are a similarly unsatisfactory check because they lack the authority and reach of appellate courts. When a district court disagrees with a guideline, only one defendant will benefit. Appellate review provides much needed guidance. Developing caselaw would lead to better, well-reasoned sentencing. District courts are missing a body of common law on how it should apply sentencing factors to individual defendants. Currently, a range of caselaw has established the rules for imposing a sentence outside of the Guidelines. As discussed *infra* Part IV, defining the “backstop” or the “permissible range” for within-Guidelines sentences in this same way would be instructive to district courts.

setting.³⁰

Besides the practical concerns regarding the potential for poor reasoning and the restrictions on the adversarial process, the presumption of reasonableness raises a broader legal concern—a troubling expansion of judicial deference to agencies by appellate courts. Generally, courts defer to agency determinations because they want to effectuate legislative intent and recognize that agencies have “technical and complex” expertise beyond the courts.³¹ This doctrine, established in the seminal case *Chevron v. Natural Resource Defense Counsel*, defers to agency determination where Congress has expressly delegated policy-making authority, or where the statute is silent, and therefore ambiguous.³²

However, in terms of administrative law, the Guidelines are unique. They inject themselves into an area of law traditionally within the province of Article III judges.³³ By giving special status and deference to the Guidelines, appellate courts implicitly recognize that the judiciary is no longer the premier expert on sentencing criminal defendants. To be sure, the legislature has traditionally played a role in criminal sentencing, and one explanation of the Commission is that it is a new manifestation of this traditional role.³⁴ However, the Commission acts more like a judicial body than a legislative one.³⁵ In creating the presumption deferring to this Commission, the courts have accepted its expertise in determining criminal penalties.³⁶

There is no scholarly or judicial treatment of the overlap between the Commission and administrative law. To be sure, the academy and courts have not been completely silent. There has recently been considerable scholarly commentary and

30. See generally Monroe H. Freeman, *Our Constitutionalized Adversary System*, 1 CHAP. L. REV. 57 (1998).

31. *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 865 (1984).

32. *Id.*

33. See *infra* Section III.A.

34. See *Rita v. United States*, 551 U.S. 338 (2007).

35. Congress charged the Commission to balance the same sentencing factors that judges must weigh in imposing sentences. 19 U.S.C. § 994(m) (2012). In that sense, the Commission’s expertise overlaps with an Article III judge’s expertise. See *infra* Part III.

36. See Nancy Gertner, *From Omnipotence to Impotence: American Judges and Sentencing*, 4 OHIO ST. J. CRIM. L. 423 (2007) (tracking the rise of this judicial abdication).

judicial protest of agencies intruding on traditional legislative functions, and even criticism of agency intrusion on the judiciary's role in interpreting the law.³⁷ However, there has been no similar commentary on how the Commission, an independent agency, publishes Guidelines that interfere with the traditional role of Article III judges to decide cases and controversies.³⁸ Furthermore, there has been no true consideration—either among scholars or the courts—about how the Commission's eccentricities might require treatment different from traditional executive agencies.³⁹ As this Comment suggests, that Congress empowers the Commission to create the Guidelines does not mean that the Guidelines are automatically entitled to the same benefits as a conventional executive agency.

The appellate presumption of reasonableness applied to within-Guidelines sentencing is functionally *Chevron* deference to agency expertise. The Commission does not merit such de facto deference because the Commission's expertise overlaps with, and is more abstract than that of Article III judges;⁴⁰ and traditional administrative law applies poorly in the criminal setting.⁴¹ Rather, the Commission best serves the courts as a trusted advisor rather than an active participant. In recognition of the Commission's true role, appellate courts should reexamine their approach in determining whether within-Guidelines sentences are reasonable. The approach

37. See, e.g., *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142 (2016) (Gorsuch, J., concurring); see also, e.g., John F. Manning, *Lawmaking Made Easy*, 10 GREEN BAG 2d 191, 202 (2007).

38. This Comment does not suggest that creating the Commission was outside of Congress's lawmaking authority. In *Mistretta v. United States*, the Court rejected a challenge to the Commission based on the nondelegation doctrine. 488 U.S. 361 (1989). This Comment does not revive that debate. *But see* *United States v. Grundy*, 695 F. App'x 634 (2d Cir. 2017), *cert granted*, 2018 WL 1143828 (U.S. Mar. 5, 2018) (No. 17-6086) (raising nondelegation arguments in the context of the sex offender registry).

39. The Commission is different from traditional executive agencies in several ways. Perhaps most importantly, it claims expertise over an area of law that judges have traditionally (and constitutionally) been declared the experts. Moreover, sentencing criminal defendants is not necessarily overly technical. Also, because sentencing benefits from individualized consideration and mathematical sentencing can often miss the point, the Commission has less ability than the judges whose power they invade. Finally, criminal law is special in that liberty is at stake. See *infra* Part III.

40. See *infra* Section III.A.

41. See *infra* Section III.A.

should recognize the special concerns associated with criminal sentencing and put more focus on congressionally mandated sentencing factors.⁴²

This Comment recognizes that, by deferring to the Guidelines, appellate courts allow the Commission to intrude on the judiciary's central task of deciding "cases and controversies."⁴³ The central question of this Comment is whether the legal community should be concerned that appellate courts have given away some of the judiciary's Article III power.⁴⁴ As a backdrop to these arguments, this Comment acknowledges that, in practice, the presumption levies significant costs on the judicial system by allowing appellate courts to abdicate their role as a due process check on the district courts and the advisors on proper sentencing practices.⁴⁵ It argues that these costs on the judiciary are not justified because deference to the Commission is not justified.⁴⁶

Finally, it is important to recognize what this Comment does not do. It does not call for the Commission to be disbanded; it does not propose the Commission change the means by which it promulgates guidelines; and it does not argue the Commission is constitutionally infirm. Nor does this Comment suggest that the Guidelines do not have the potential to be beneficial to federal sentencing practices. This Comment is about an appellate standard and whether it is a justified relinquishment of judicial power.

Part I of this Comment examines the origins of the Sentencing Reform Act (SRA). It provides a brief history, highlighting the goals of Congress in enacting the SRA, and

42. Section 3553 of Title 18 of the United States Code outlines sentencing factors each judge should consider at sentencing. *See infra* Part II. These factors are the need for the sentence to (1) reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense, (2) afford adequate deterrence to criminal conduct, (3) protect the public from further crimes of the defendant, (4) provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner. 18 U.S.C. § 3553(a)(2) (2012).

43. U.S. CONST. art. III, § 2, cl. 1; *Marbury v. Madison*, 5 U.S. 137, 173–74 (1803).

44. *Cf.* Douglas A. Berman, *A Common Law for the Age of Federal Sentencing: The Opportunity and Need for Judicial Lawmaking*, 11 STAN. L. & POL'Y REV. 93, 94 (1999) ("By its own hand, the judiciary has undermined or simply underused the mechanics which were intended to foster judicial involvement in the SRA's evolutionary law making process.").

45. *Marbury*, 5 U.S. at 173–74.

46. *See infra* Part III.

describes the Sentencing Commission and its Guidelines. Finally, it tracks the development of the appellate presumption of reasonableness and explains how it functions in the courts today.

Part II compares the appellate presumption of reasonableness with *Chevron* deference. Specifically, the Part argues that the presumption is functionally *Chevron* deference. It points out that the presumption operates in the same way as arbitrary and capricious review. Further, it explains how the Commission justifies itself through notions of deference to agency expertise and legislative intent, parroting prerequisites for deference set down in *Chevron*. The Part concludes that any distinction between the presumption of reasonableness and *Chevron* deference does not amount to a difference.

Part III discusses why de facto *Chevron* deference to within-Guidelines sentences is unjustified. The Part discusses the expertise of the Commission, and concludes its expertise largely overlaps with the judiciary's expertise. It further notes that the Commission only has "contributory expertise," while the judiciary has both "contributory" and "interactional" expertise. It claims that this makes the judiciary more of an expert than the Commission. The Part further argues the Commission should not receive deference anyway because criminal law involves the weighty decision of imposing deprivations of liberty. It argues that such decisions require a determination by an Article III judge, and, in the context of criminal law, deference to the Commission is especially problematic. This Part concludes that these considerations require that within-Guidelines sentences should not receive a presumption of reasonableness, and that the Commission and the courts would be best served if the Commission acted in a purely advisory capacity.

Finally, Part IV suggests a new way forward. Specifically, the Part argues that courts should remove any trace of deference to the Commission from appellate review. It proposes that courts continue to follow a two-tiered appellate standard, but suggests that at the second tier, "substantive reasonableness" should involve a true engagement with the fairness of the sentence. Specifically, it argues the legislative history of the SRA and language in the *Booker v. United*

*States*⁴⁷ suggest a deferential, but still active, standard of review. It concludes more active review will aid in developing a federal sentencing common law that will avoid the significant practical costs under the presumption of reasonableness.

I. OVERVIEW OF THE SENTENCING GUIDELINES AND THE PRESUMPTION OF REASONABLENESS

In order to understand the appellate presumption of reasonableness, one must recognize it is but one part of the long history of sentencing reform in the United States.⁴⁸ The presumption's roots begin with the passage of the SRA in 1984.⁴⁹ Distressed by the disproportionate sentencing of the current system, Congress sought to bring uniformity and fairness to sentencing through the SRA.⁵⁰ The Act suffered from a constitutional infirmity, however. In *Booker*, the Supreme Court found that the mandatory sentencing scheme violated the Sixth Amendment.⁵¹ While some thought *Booker* would render the Sentencing Guidelines moot, the Guidelines have continued to exert force in the federal system.⁵² One of the ways the Guidelines have retained their relevancy is through the appellate presumption of reasonableness. This presumption gives the Guidelines its own separate and compelling appellate deference.⁵³

This Part explores the history of the SRA, the makeup of the Sentencing Commission and the Guidelines, and the development and functioning of the presumption of reasonableness in the courts. Section I.A examines the roots of

47. *Booker v. United States*, 543 U.S. 220 (2005).

48. The United States has struggled with the appropriate approach to crime and punishment since its founding. See SANDRA SHANE-DUBOW ET AL., SENTENCING REFORM IN THE UNITED STATES: HISTORY, CONTENT, AND EFFECT 2 (1985).

49. Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (1984), partially invalidated by *United States v. Booker*, 543 U.S. 220 (2005).

50. SHANE-DUBOW, *supra* note 48. It is worth noting that one may view the presumption of reasonableness as serving the goals of uniformity in the SRA. This is a legitimate concern, and one addressed *infra* Part IV.

51. For a more full treatment of the *Booker* decision, see *infra* Section I.C.

52. Frank O. Bowman, *The Year of Jubilee... Or Maybe Not: Some Preliminary Observations About the Operation of the Federal Sentencing System After Booker*, 43 HOUS. L. REV. 279, 297 (2006) (explaining that, a year after the Guidelines became advisory, federal judges followed the Guidelines in about 61 percent of cases).

53. See *infra* Section II.B.

the SRA. Section I.B discusses the Guidelines and how they operated pre-*Booker*. Section I.C explains *Booker*, and the presumption of reasonableness's development.

A. *History of the Act*

The SRA was a long time coming.⁵⁴ Leading up to the Act, prominent senators and distinguished judges criticized the expansive discretion judges possessed in sentencing.⁵⁵ Senator Edward Kennedy, for example, referred to the nation's sentencing practices as a "national scandal."⁵⁶ Judge Marvin Frankel lamented the disparate sentences resulting from trial judge discretion.⁵⁷ The outcry against pre-SRA sentencing practices centered largely on the vastly variable sentences handed down across the country. Prior to the SRA, judges sentenced defendants based on a rehabilitative ideal.⁵⁸ Under this theory, judges sought to sentence defendants based on their capacity to return to society as law-abiding citizens.⁵⁹

The rehabilitative ideal was imperfect, however, and as the century progressed, faith in rehabilitation decreased. Detractors lamented that courts lacked the ability to track when and whether rehabilitation was successful because the institutional commitment to track all released prisoners was simply too great.⁶⁰ Moreover, and perhaps more importantly,

54. For a more complete treatment of the legislative history of the SRA, see Julia L. Black, *The Constitutionality of Federal Sentences Imposed Under the Sentencing Reform Act of 1984*, 75 IOWA L. REV. 767, 769–74 (1990).

55. See, e.g., Edward M. Kennedy, *Justice in Sentencing*, N.Y. TIMES, July 29, 1977, at A21, col. 5; MARTIN FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER 5 (1973).

56. FRANKEL, *supra* note 55 (citing situations in which offenders convicted of identical offenses were given a long prison sentence by one judge and probation by another).

57. *Id.* Judge Frankel's outrage centered on the disparate sentencing for similarly situated defendants. A *Yale Law Journal* study catalogs this disparate treatment. Kennedy, *supra* note 55, at A23, col. 5 (discussing testimony to this effect before Congress by the authors of this study).

58. U.S. Sentencing Comm'n, *Introduction to the Sentencing Reform Act*, USSC.GOV, <http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/15-year-study/chap1.pdf> (last visited Nov. 7, 2016) [<https://perma.cc/HBN8-CFNH>]. The rehabilitative ideal grew out of the progressive era and its belief that people could be "made better." Francis T. Cullen, *Rehabilitation: Beyond Nothing Works*, 42 CRIME & JUST. 299, 312 (2013) (tracking the rise of the rehabilitative ideal).

59. Black, *supra* note 54, at 767–69.

60. *Id.* at 769–73.

because defendants' capacities for rehabilitation varied widely, judges following the ideal imposed widely disparate sentences.⁶¹ These failings undercut faith in rehabilitation and judicial discretion as the guiding light of criminal sentencing.⁶² Beginning around 1970, scholars, judges, and legislators alike began clamoring for sentencing reform.⁶³

The SRA was the culmination of this reform movement. At its passage, Congress hailed the SRA as a strong attempt to set up a more equitable and determinative sentencing regime.⁶⁴ Congress promised the SRA would do away with the primary evil of rehabilitation sentencing: "unwarranted sentencing disparities."⁶⁵ Pursuant to this goal, the Senate Judiciary Committee sought to create a scheme that set forth a consistent statement of federal sentencing law that explained the rationale for the sentence and provided a comprehensive range of sentencing options.⁶⁶

B. The Sentencing Reform Act, the Sentencing Commission, and the Sentencing Guidelines

Congress pursued its goals of uniform sentencing by inserting itself into the judiciary's sentencing analysis. When passed, the SRA represented an unprecedented addition to the legislature's involvement in sentencing.⁶⁷ The hallmarks of this involvement, and the pillars of the SRA, were sentencing factors every judge was required to consider and the creation of the Sentencing Commission and Guidelines.⁶⁸

61. For example, two defendants could commit the same crime under the same circumstances and get different sentences. The sentencing scheme focused on a person's potential to reenter society, not the aggravating or mitigating factors of their actions. A defendant would receive a lighter sentence if she could prove that she could learn from her mistake and follow the law in the future. A person's ability in this regard had very little to do with the crime they committed. Thus, similar crimes and actions received widely disparate sentences. *Id.*

62. *Id.*

63. *Id.*

64. See S. REP. NO. 98-225, at 40 (1984), as reprinted in 1984 U.S.C.C.A.N. 3182, 3223.

65. Sentencing Reform Act of 1984, 28 U.S.C. § 991(b)(1)(B) (2012); see also Black, *supra* note 54.

66. S. REP. NO. 98-225.

67. See Gertner *supra* note 36, at 524 (discussing how judges believed that sentencing was within their expertise and how the SRA undercut that idea).

68. 18 U.S.C. § 3553 (1984) ("The court, in determining the particular sentence to be imposed, shall consider . . .").

In its original form, section 3553 of the SRA listed seven factors every judge had to consider when it imposed a sentence.⁶⁹ Some factors were modest additions, representing considerations judges had already weighed prior to the SRA. These traditional factors required the judge to deliberate on things like the nature of the crime and character of the offender,⁷⁰ the need to provide restitution,⁷¹ and the sentences available.⁷²

The SRA also imposed wholly new considerations on a court's sentencing decisions. First, in response to the problems of the rehabilitative ideal, the SRA narrowed a judge's focus at sentencing, mandating specific theories of punishment that could justify sentences. Section 3553(a)(2) named the four penal theories that should be used to influence sentences: (1) punishment, (2) deterrence, (3) public protection, and (4) "correctional treatment."⁷³ Rehabilitation was left off the list.⁷⁴ Second, the SRA mandated judicial reliance on the work of the then-newly-created Sentencing Commission. The SRA required every judge to consider both the Guidelines' range for the crime established by the Commission and "any pertinent policy statement" published by it.⁷⁵ And it required every judge to sentence within the applicable Guidelines' range.⁷⁶

Congress also inserted itself into the traditional roles of the judiciary by creating the Sentencing Commission. The SRA charged the Commission with two tasks: develop sentencing guidelines and publish policy statements that would

69. See Gertner *supra* note 36 for the section 3553 factors.

70. § 3553(a)(1).

71. § 3553(a)(7).

72. § 3553(a)(3).

73. § 3553(a)(2). As discussed in Section I.A, the Sentencing Reform Act developed in part out of a general repudiation of rehabilitative ideal. See David B. Muhlhausen, *Theories of Punishment and Mandatory Minimum Sentences*, HERITAGE FOUND. (May 27, 2010), <http://www.heritage.org/research/testimony/theories-of-punishment-and-mandatory-minimum-sentences> [https://perma.cc/2M3Z-K3K9] (pointing out that one of the main critiques of the rehabilitative ideal is that it leads to wide sentencing ranges). While § 3553 mentions "corrective treatment" (perhaps a nod to rehabilitation), it significantly reduced the ability of judges to consider the potential for rehabilitation in handing down sentences. *Id.*

74. See Muhlhausen, *supra* note 73 (explaining that § 3553(a) is an exhaustive list and no other theory may be considered).

75. § 3553(a)(4)–(5).

76. § 3553(b)(1).

accompany these guidelines.⁷⁷ It believed that these guidelines and policy statements would further the factors set forth in section 3553 of the SRA.⁷⁸ Congress intended the Commission and Guidelines to be essential tools in eliminating the sentencing disparities that inspired the SRA.⁷⁹

The Commission develops the Sentencing Guidelines through an empirical approach.⁸⁰ To create the original iteration of the Guidelines, the Commission researched pre-SRA sentencing practices and established ranges for specific crimes based on the average sentence for every crime.⁸¹ This empirical data formed the original basis of the Guidelines, and the Commission continues to create the Guidelines through this approach.⁸² The Commission also considers the opinions of interested parties in refining the raw guideline ranges.⁸³ It uses reports filed by these “stakeholders” to further refine the guidelines’ ranges. But, variation based on these reports is the exception, not the rule.⁸⁴ The Commission recognizes that, generally, the raw guideline range will approximate the “average pre-guideline practice.”⁸⁵ The Guidelines have become extremely important to the federal judiciary, especially courts of appeals. For these courts, a sentence within these Guidelines merits a presumption of reasonableness.

77. 28 U.S.C. § 994(a)(1)–(2) (2012).

78. See § 994(a)(2), (g); *Rita v. United States*, 551 U.S. 338, 347–48 (2007).

79. 28 U.S.C. § 994(f) (requiring the Commission to pay “particular attention” to reducing “unwarranted sentencing disparities”).

80. See U.S. SENTENCING GUIDELINES MANUAL § 1A1.3 (U.S. SENTENCING COMM’N 2016) [hereinafter GUIDELINES MANUAL].

81. *Id.* § 1A1.4.

82. The Commission has sustained its empirical approach, and the determination of current average sentences is still vital to the Commission’s work. It continues to collect presentence reports, written plea agreements, and judgment and conviction reports on virtually every criminal defendant sentenced in the United States keep the Guidelines up to date. *Id.*

83. These parties include the Department of Justice, Bureau of Prisons, Federal Public Defenders, the U.S. Probation System, and the Judicial Conference of the United States, among others. *Id.* § 1A2; § 994(o).

84. The process is unlike notice and comment rulemaking. While there is an opportunity to comment, there are no hearings, nor does the Commission publish decisions balancing the concerns raised by the reports. GUIDELINES MANUAL, *supra* note 80, § 1A1.3 (“[T]he guidelines represent an approach that begins with, and builds upon, empirical data.”).

85. *Id.* The most recent iteration of the Sentencing Guidelines admits that “it has not attempted to develop an entirely new system.” *Id.* In fact, it claims it has largely relied on the empirical calculations of average sentences across the United States. *Id.* § 1A1.4.

C. *The Appellate Presumption of Reasonableness*

The Sentencing Guidelines were originally mandatory.⁸⁶ Sentencing courts had to calculate the sentencing range under the Guidelines and sentence within that range.⁸⁷ To calculate the range for a particular defendant, judges held sentencing hearings where they determined whether certain “sentencing factors” applied to a defendant’s circumstances. At these hearings, the government bore the burden to prove any aggravator; the defendant bore the burden for any mitigator.⁸⁸ All aggravators and mitigators were determined by the judge by a preponderance of the evidence and used to calculate the applicable sentencing range.⁸⁹ Once determined, the judge was required to impose a sentence within the range unless she found an aggravating or mitigating circumstance not considered by the Commission.⁹⁰

Pre-*Booker* appellate review, like district court sentencing, was also restrained. Section 3742(e) granted appellate courts extremely limited jurisdiction to review sentences.⁹¹ Under the mandatory scheme, within-Guideline sentences could not be appealed unless the sentence was “imposed in violation of the law” or “imposed as a result of an incorrect application” of the Guidelines.⁹² In the instances of outside-Guidelines sentences,⁹³ the SRA required appellate courts to review the

86. 18 U.S.C. § 3553(b)(1) (1984).

87. *Id.* (requiring within-Guidelines sentences unless the court finds a factor not considered by the sentencing commission).

88. For example, under the mandatory scheme, if convicted of burglary, a defendant could receive additional punishment if the government proved he or she engaged in “more than minimal planning,” caused a loss more than \$2,500, or burgled a residence. U.S. SENTENCING GUIDELINES MANUAL §§ 2B2.2(a)–(b) (U.S. SENTENCING COMM’N 2000) (amended 2011).

89. 18 U.S.C. § 3553(b)(1); *see* *United States v. Booker*, 543 U.S. 220, 226 (2005).

90. § 3553(b)(1); *see also, e.g.*, *United States v. Pipich*, 688 F.Supp. 191, 193 (D. Md. 1988) (holding that the defendant’s military service was an applicable sentencing factor not considered by the Sentencing Commission).

91. 18 U.S.C. § 3742(a) (1984) (outlining four bases on which a defendant could maintain an appeal).

92. *Id.* Section 3742(a) also provided an appeal for a sentence “greater than the sentence specified in the applicable guideline,” and for a sentence “imposed for an offense for which there is no sentencing guideline, and is plainly unreasonable.” §§ 19 U.S.C. § 3742(a)(3)–(4). However, because these provisions related to narrow and uncommon circumstances, most appeals taken under the mandatory scheme came under Section 3742(a)(1)–(2). 19 U.S.C. §§ 3742(a)(1)–(2).

93. Situations where a court would depart from the Guidelines are outlined in

sentences de novo.⁹⁴ Under this de novo review, the SRA required appellate courts to consider whether the sentence did not further the section 3553 factors,⁹⁵ was not authorized by the SRA, or was not justified by the facts.⁹⁶ The Supreme Court interpreted this language to create an “abuse of discretion” standard where appellate courts would accept findings of fact unless “clearly erroneous” and review questions of law de novo.⁹⁷

For many judges, the mandatory system went too far in limiting discretion.⁹⁸ These judges fought for a compromise between the restrictive mandatory scheme and the wide discretion of the rehabilitative era.⁹⁹ Judges and commentators lamented that the Guidelines were too restrictive and sentences were too high.¹⁰⁰ Criminal defense attorneys agreed and worked against the mandatory sentencing scheme.¹⁰¹

While early attacks on the constitutionality of the sentencing guidelines were originally repelled,¹⁰² adversaries of the Guidelines finally found a foothold in the Sixth Amendment.¹⁰³ In the early 2000s, the Supreme Court decided *Apprendi v. New Jersey*¹⁰⁴ and *Blakely v. Washington*.¹⁰⁵ Both cases struck down state sentencing guidelines that mirrored

18 U.S.C. § 3553(b)(1).

94. § 3742(e); *Booker*, 543 U.S. at 224.

95. Thus, if the sentence fell outside of the presumptive range, appellate courts would apply the sentencing factors to a defendant’s case themselves.

96. §§ 3742(e)(3)(B)(i)–(iii).

97. See *Koon v. United States*, 518 U.S. 81, 100–01 (1996); *United States v. Tucker*, 386 F.3d 273, 276–77 (D.C. Cir. 2004) (holding that the considerations set out in section 3742(e)(3)(B)(i)–(iii) were questions of law under the SRA).

98. See, e.g., Marc Miller, *Rehabilitating the Federal Sentencing Guidelines*, 78 JUDICATURE 180, 180–81 (1995) (reviewing judicial complaints concerning the Guidelines); José A. Cabranes, Perspective, *Sentencing Guidelines: A Dismal Failure*, N.Y.L.J., Feb. 11, 1992, at 1; John S. Martin, Jr., Opinion, *Let Judges Do Their Jobs*, N.Y. TIMES, June 24, 2003, at A31; see also Gertner, *supra* note 36.

99. G. Thomas Eisele, *The Sentencing Guidelines System? No. Sentencing Guidelines? Yes.*, 55 FED. PROB. 16, 20–21 (1991).

100. *Id.*

101. In the early years of the SRA, defense attorneys tried to escape the mandatory sentencing scheme. See, e.g., *Mistretta v. United States*, 488 U.S. 361, 370–71 (1989).

102. *Id.* at 378–79 (rejecting a nondelegation challenge against the Sentencing Commission)

103. U.S. CONST. amend. VI.

104. 530 U.S. 466, 594 (2000) (requiring that aggravating factors be found by proof beyond a reasonable doubt)

105. 542 U.S. 296, 308–09 (2004) (holding that mandatory guidelines violate the right to a jury trial).

their federal counterpart.

In *Apprendi*, the Supreme Court pointed to the “historic link” between verdict and sentence.¹⁰⁶ It highlighted the “novelty” of removing the jury from a determination of fact exposing a defendant to punishment that would exceed the maximum sentence if based solely on the facts found by the jury.¹⁰⁷ It held that, because the sentencing factors were being decided by a judge after the trial by a preponderance of the evidence, New Jersey’s mandatory sentencing scheme violated the Sixth Amendment.¹⁰⁸ Four years later, the Court in *Blakely* applied *Apprendi* to Washington’s determinative sentencing scheme.¹⁰⁹ It overturned a sentence for kidnapping because the judge, rather than the jury, determined the defendant had acted with “deliberate cruelty.”¹¹⁰ While both cases related to state sentencing guidelines, it soon became clear *Apprendi* and *Blakely*’s Sixth Amendment reasoning should also apply to the federal Guidelines.¹¹¹

That application was finally made in *United States v. Booker*, in which the Court rendered the Guidelines “advisory.”¹¹² In that case, Booker appealed his sentence for possessing crack cocaine because the judge, not the jury, had found he had possessed an additional 522 grams of crack cocaine at the sentencing hearing.¹¹³ The Court reaffirmed *Apprendi* and *Blakely*, holding that any fact necessary to

106. *Apprendi*, 530 U.S. at 482.

107. *Id.* at 482–83.

108. *Id.* at 491–92 (holding that the sentencing scheme violated the right to a jury trial).

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, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

U.S. CONST. amend. VI.

109. *Blakely*, 542 U.S. at 301–04.

110. *Id.* at 313–14.

111. *United States v. Booker*, 543 U.S. 220, 231, 233 (2005).

112. *Id.* at 245.

113. This finding substantially increased his sentence. During Booker’s sentencing hearing, the judge found that he possessed 566 grams of crack in addition to the 92.5 grams that agents had originally found in his duffel bag. *Id.* at 227. Based on this fact, the court imposed a 360-month sentence, ten years above the maximum sentence based on the facts found by the jury. *Id.*

support a sentence must be proven to a jury beyond a reasonable doubt.¹¹⁴

The *Booker* Court then turned to the question of remedying the SRA's constitutional deficiencies.¹¹⁵ It held that section 3553(b)(1), the provision requiring mandatory application of the Guidelines, violated the Sixth Amendment.¹¹⁶ It removed the provision, rendering the Guidelines "effectively advisory."¹¹⁷ The Court also removed section 3742(e), the provision that set out standards of review for appeal.¹¹⁸ This excision eliminated de novo review for outside-Guideline sentences and the procedural appeals for trial court errors below.¹¹⁹ The Court stressed that the SRA would continue to set out an appellate standard of review, but would do so implicitly.¹²⁰ Looking to legislative history and appellate practice under the mandatory Guidelines,¹²¹ the Court instituted an appellate review for "unreasonableness."¹²²

Following *Booker*, appellate courts scrambled to define the bounds of "unreasonableness." After initial struggles, the Supreme Court announced in *Gall v. United States* a two-tiered approach that appellate courts follow to this day.¹²³ This appellate standard divides the analysis between "procedural unreasonableness" and "substantive unreasonableness."¹²⁴ Under the procedural review, appellate courts examine district court decisions to see if they met the technical standards of the SRA,¹²⁵ ensuring that the court properly calculated the guideline range, considered the sentencing factors, and explained their sentencing decision.¹²⁶ Then, if the court finds

114. *Id.* at 244.

115. *Id.* at 245.

116. *Id.*

117. *Id.*

118. *Id.* at 260.

119. See 18 U.S.C. § 3742(a), (b) (2012).

120. *Booker*, 543 U.S. at 260.

121. *Id.* at 258–61.

122. *Id.* at 264.

123. See *Gall v. United States*, 552 U.S. 38, 51 (2007); see also, e.g., *United States v. White*, 850 F.3d 667, 674 (4th Cir. 2017) (setting out the two-tiered appellate standard), *cert. denied*, 137 S. Ct. 2252 (2017).

124. *Gall*, 522 U.S. at 51.

125. *Id.* (mandating review of district court's action for failing to calculate—or improperly calculating—the Guidelines range, treating the Guidelines as mandatory, failing to consider the § 335(a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence).

126. *Id.*

no procedural issues, it turns to the “substantive unreasonableness” of the sentence.¹²⁷ Here, the courts look for an “abuse of discretion.”¹²⁸ If the court finds that the district judge acted within her powers, it will uphold the sentence.¹²⁹

In determining the bounds of “substantive unreasonableness,” the inferior federal courts relied heavily on the newly advisory Sentencing Guidelines.¹³⁰ Specifically, appellate courts instituted a “rebuttable presumption of reasonableness” for within-Guidelines sentences.¹³¹ In creating the presumption, courts often focused on a specific piece of *Booker*’s remedial opinion that seemed to suggest that the Commission was an expert at sentencing.¹³² This suggestion proved critical in defining substantive reasonableness for appellate courts.¹³³ The circuits were reluctant to render the Guidelines irrelevant in sentencing appeals.¹³⁴ They determined that the *Booker* Court mandated that the courts view the Commission as an “expert” in sentencing.¹³⁵ In *United States v. Mykytiuk*, for example, the Seventh Circuit agreed with the *Booker* Court that the Commission was an expert.¹³⁶ The court held that ignoring the Guidelines would be inconsistent with *Booker* and, therefore, it would assume any within-Guidelines sentence would be reasonable.¹³⁷ Many circuits follow the same reasoning.¹³⁸

127. *Id.*

128. *Id.*

129. *Id.*

130. *See id.*

131. *See, e.g.*, *United States v. Morales-Machucha*, 546 F.3d 13 (1st Cir. 2008).

132. “As we have said, the Sentencing Commission remains in place, writing Guidelines, collecting information about actual district court sentencing decisions, undertaking research, and revising the Guidelines accordingly. The district courts, while not bound to apply the Guidelines, must consult those Guidelines and take them into account when sentencing.” *United States v. Booker*, 543 U.S. 220, 264 (2005) (citation omitted).

133. *United States v. Mykytiuk*, 415 F.3d 606, 607–08 (7th Cir. 2005).

134. *See, e.g., id.*

135. *See, e.g., id.*

136. *Id.* (“The Sentencing Guidelines represent at this point eighteen years’ worth of careful consideration of the proper sentence for federal offenses. When the Supreme Court directed the federal courts to continue using the Guidelines as a source of advice for proper sentences, it expected that many (perhaps most) sentences would continue to reflect the results obtained through an application of the Guidelines.”).

137. *Id.*

138. *See, e.g.*, *United States v. Kristl*, 437 F.3d 1050 (10th Cir. 2006); *United States v. Hughes*, 401 F.3d 540 (4th Cir. 2005); *United States v. Crosby*, 397 F.3d

Appellate courts also relied on notions of legislative intent to create the presumption of reasonableness. In *United States v. Mares*, the court relied heavily on the goals of the SRA when adopting the presumption of reasonableness in the Fifth Circuit.¹³⁹ It noted that *Booker* did not alter the statutory scheme and that the goals of uniform and determinative sentencing still applied with full force. In recognition of the goal of uniformity, the court held that it would rarely find a within-Guidelines sentence “unreasonable.”¹⁴⁰

Finally, not all circuits use the appellate presumption of reasonableness in the same way.¹⁴¹ Circuit courts are split between an appellate presumption of reasonableness and an approach that gives “great weight” to within-Guidelines sentences. Specifically, the Third, Fourth, Fifth, Sixth, Seventh, Eighth, and Tenth circuits apply a presumption of reasonableness.¹⁴² The First, Second, Ninth, and Eleventh

103 (2d Cir. 2005). While most circuits rely on *Booker*'s express language, other courts rely on a mixture of *Booker*'s remedial opinion and the inclusion of the Guidelines in § 3553. Because reference to the Guidelines in § 3553 was not excised, circuits use the section's continued validity to justify deference to the Guidelines. See, e.g., *United States v. Mares*, 402 F.3d 511, 518–19 (5th Cir. 2005).

139. *Mares*, 402 F.3d at 519 (holding that the court will infer the sentencing judge considered § 3553 factors for within-Guidelines sentences). The Fifth Circuit has not adopted the presumption of reasonableness. However, the extremely deferential review it does apply makes it essentially the equivalent. See *United States v. Carty*, 520 F.3d 984, 993–94 (9th Cir. 2008) (recognizing the split, but holding that “[t]he difference appears more linguistic than practical”).

140. *Mares*, 402 F.3d at 519.

141. In fact, it was the split between circuits that originally justified the Court granting certiorari in *Rita*. *Rita*, 551 U.S. 338, 345–46 (2007).

142. *United States v. Gonzalez*, 134 F. App'x 595, 598 (3d Cir. 2005) (“Although the Sentencing Guidelines are not mandatory, sentences within the prescribed range are presumptively reasonable.”); *United States v. Johnson*, 445 F.3d 339, 341 (4th Cir. 2006) (“[A] sentence within the proper advisory Guidelines range is presumptively reasonable.”); *United States v. Alonzo*, 435 F.3d 551, 554 (5th Cir. 2006) (“We agree with our sister circuits that have held that a sentence within a properly calculated Guideline range is presumptively reasonable.”); *United States v. Williams*, 436 F.3d 706, 708 (6th Cir. 2006) (“We now join several sister circuits in crediting sentences properly calculated under the Guidelines with a rebuttable presumption of reasonableness.”); *United States v. Mykytiuk*, 415 F.3d 606, 608 (7th Cir. 2005) (“[A]ny sentence that is properly calculated under the Guidelines is entitled to a rebuttable presumption of reasonableness.”); *United States v. Lincoln*, 413 F.3d 716, 717 (8th Cir. 2005) (holding that when a defendant's sentence is within the Guidelines' range “it is presumptively reasonable”); *Kristl*, 437 F.3d at 1054 (“[W]e join our sister circuits and hold that a sentence that is properly calculated under the Guidelines is entitled to a rebuttable presumption of reasonableness.”).

circuits do not apply the presumption, but accord within-Guidelines sentences “great weight.”¹⁴³ Under either test, the courts recognize that within-Guidelines sentences will usually be reasonable and accord deference to the Commission.¹⁴⁴ In fact, the Ninth Circuit refused to adopt the presumption because it saw no reason to create a legal rule recognizing what it believed is already the case: that within-Guidelines sentences are generally reasonable.¹⁴⁵ Thus, while the formal “presumption” has not been universally adopted, all circuits adopt some degree of presumed reasonableness in their review of within-Guidelines sentences.

The appellate presumption of reasonableness is thus a wholly judicially created response to the constitutional deficiencies of the SRA. Besides a rebutted constitutional challenge to the presumption,¹⁴⁶ its legality has largely gone unquestioned. No commentator or court has examined the presumption through the context of administrative law. The remainder of this Comment does just that.

II. THE APPELLATE PRESUMPTION OF REASONABLENESS IS FUNCTIONALLY *CHEVRON* DEFERENCE

Administrative and criminal law do not often appear together contemporaneously. When they are forced together, they interact awkwardly.¹⁴⁷ Despite the inherent clumsiness, appellate courts have generally taken a traditional administrative law approach to the Sentencing Commission

143. *United States v. Jimenez Beltre*, 440 F.3d 514, 528 (1st Cir. 2006) (fearing the “presumption language would be too controlling on district courts”); *United States v. Fernandez*, 443 F.3d 19, 27 (2d Cir. 2006) (“We therefore decline to establish any presumption, rebuttable or otherwise, that a Guidelines sentence is reasonable.”); *Carty*, 520 F.3d at 994 (“We recognize that a Guidelines sentence ‘will usually be reasonable,’ [citation omitted] and this done, we see no particular need for an appellate presumption that says so.”); *United States v. Talley* 431 F.3d 784, 788 (11th Cir. 2005) (“[O]rdinarily we would expect a sentence within the Guidelines range to be reasonable.”).

144. *Johnson*, 445 F.3d at 351; *Carty*, 520 F.3d at 949 (recognizing the split, but holding that “[t]he difference appears more linguistic than practical”).

145. *Carty*, 520 F.3d at 994 (“We recognize that a Guidelines sentence ‘will usually be reasonable,’ and this done, we see no particular need for an appellate presumption that says so.”) (citation omitted).

146. *Rita*, 551 U.S. 338.

147. See *infra* Section III.B (discussing the particular considerations unique to criminal law and how they change the traditional administrative law considerations under *Chevron*).

and its Guidelines. That is, appellate courts defer to the Commission's determinations of the proper sentence in a particular case. This Part explains the traditional approach to administrative law embodied in *Chevron v. Natural Resources Defense Council*, examines how the presumption of reasonableness reflects this traditional approach, and shows how the presumption and traditional administrative deference are one and the same.

A. *Chevron v. Natural Resources Defense Council*

By presuming that within-Guidelines sentences are reasonable, appellate courts are deferring to the Commission's "expertise" and the legislative goals of Congress. While no case actually cites to *Chevron v. Natural Resources Defense Council*,¹⁴⁸ the reliance on the Commission's knowledge and know-how mirrors *Chevron* deference and creates a standard that is functionally the same as *Chevron* deference.

Chevron v. Natural Resource Defense Council arose out of a dispute over the Environmental Protection Agency's (EPA) regulations defining provisions of the Clean Air Act. The Act required that a company could not modify or build a "stationary source"¹⁴⁹ without first obtaining a permit. In 1981, the EPA rejected the then-current definition of stationary source as an individual polluting facility or installation.¹⁵⁰ Instead, the EPA adopted a "bubble" definition that defined "stationary source" as an entire plant, which could contain multiple polluting facilities and installations.¹⁵¹ The Natural Resources Defense Council opposed this definition. The Supreme Court, however, held that the EPA's definition should receive deference, found that the "bubble" definition was a permissible construction of the Act, and upheld the regulation.¹⁵²

In deferring to the EPA's definition, the Court stressed that the EPA's expertise and Congress's intent supported their

148. 467 U.S. 837 (1984).

149. A "stationary source" is any building, structure, facility, or installation that would create pollutants. *Id.* at 840 n.2.

150. *Id.* at 840.

151. This definition loosened the permit requirement of the Clean Air Act because it allowed companies to build or modify polluting installations without a permit so long as the changes did not modify the emissions of the larger plant. *Id.* at 840.

152. *Id.* at 859-66.

conclusion.¹⁵³ In relation to congressional intent, the Court held that because Congress had delegated authority to the EPA, it was important to recognize that Congress intended the EPA to be the leader in environmental policy.¹⁵⁴ Part and parcel of this recognition, the Court explained, was deference to the policy decisions that Congress had entrusted to the EPA.¹⁵⁵ The Court relied heavily on this notion of “delegation.”¹⁵⁶ Based on a desire to effectuate the congressional grant of power, the Court held that, unless the new “bubble” definition was one Congress would not have sanctioned, it would not disturb the EPA’s interpretation.¹⁵⁷ It explained that the power to gap fill is implicit in any congressionally created program that requires the formulation of policy.¹⁵⁸ From that premise, the Court inferred congressional delegation to an agency in all undefined terms and unfilled holes in that agency’s enacting statute.¹⁵⁹ Because the Court found that Congress authorized the EPA to make policy decisions, it concluded the agency was the better vehicle to make policy decisions like the proper definition of “stationary source.”¹⁶⁰

Moreover, in upholding the EPA’s construction as permissible, the Court stressed the fact that the matter at issue was “technical and complex” and the EPA had more expertise than the Court.¹⁶¹ It noted that the EPA considered the issues in a “detailed and reasoned fashion” and the decision involved “reconciling competing policies.”¹⁶² It held that courts had consistently deferred to an agency’s definition whenever it involved resolving conflicting policies, and whenever an understanding of the statutory policy depended upon “more than ordinary knowledge respecting the matters subject to agency regulation.”¹⁶³ Recognizing that the EPA’s expertise

153. *Id.* at 865.

154. *Id.*

155. *Id.*

156. *See id.* at 842–44.

157. *Id.* at 845.

158. *Id.* at 843.

159. *See id.*

160. *Id.* at 865.

161. *Id.* at 863.

162. *Id.* at 865.

163. *Id.* at 844–45 (citing *Nat’l Broad. Co. v. United States*, 319 U.S. 190 (1943); *Labor Bd. v. Hearst Publ’ns, Inc.*, 322 U.S. 111 (1944); *Republic Aviation Corp. v. Labor Bd.*, 324 U.S. 793 (1945); *SEC v. Chenery Corp.*, 322 U.S. 194 (1947); *Labor Bd. v. Seven-Up Bottling Co.*, 344 U.S. 344 (1953)).

went beyond the judiciary's, the Court felt comfortable deferring to the "bubble" definition.¹⁶⁴

Finally, the *Chevron* Court discussed political accountability. The Court explained that, while unelected courts must sometimes make policy decisions, administrative agencies were the bodies better suited to that task.¹⁶⁵ The Court argued that "[w]hile agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch to make such policy choices."¹⁶⁶ It stressed that it is proper for the federal judiciary, which lacks a "constituency," to defer to decisions made by actors who can be held politically accountable.¹⁶⁷

Thus, *Chevron* explained that agencies deserve deference when they interpret, or act pursuant to, their enacting statutes.¹⁶⁸ In explaining part of what has now famously been named the *Chevron* two-step,¹⁶⁹ the Court operationalized this deference, holding that where delegation is explicit, agency decisions control unless they are "arbitrary, capricious, or manifestly contrary to statute."¹⁷⁰ Where, on the other hand, the delegation is implicit, courts should uphold agency construction if it is "reasonable."¹⁷¹

Here, the Commission received an express delegation of authority to create the Guidelines.¹⁷² The SRA created the Commission for the stated purpose of establishing sentencing policies with supporting guidelines and policy statements.¹⁷³ Thus, under traditional administrative law, there is an express delegation of policy-making authority to the Commission and the Guidelines are subject to arbitrary and capricious review.¹⁷⁴

164. *Chevron*, 467 U.S. at 865.

165. *Id.* at 865–66.

166. *Id.*

167. *Id.*

168. *Id.* at 843–45.

169. Lewie Briggs, *The Chevron Two Step*, YOUTUBE (May 4, 2014), <https://www.youtube.com/watch?v=uHKujqyktJc> [<https://perma.cc/BNS7-RLXM>].

170. *Chevron*, 467 U.S. at 844.

171. *Id.*

172. 28 U.S.C. § 994(b)(1) (2012).

173. 28 U.S.C. §§ 991, 994 (2012).

174. *Chevron*, 467 U.S. at 843–44 ("If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly

Arbitrary and capricious review requires a court to determine if the agency has “examine[d] the relevant data, and articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made.”¹⁷⁵ The reviewing court must not substitute its own judgment for that of the agency.¹⁷⁶ Under arbitrary and capricious review, the court’s only investigation will be whether the agency’s decision was based on a consideration of the “relevant factors,” or if it represents a “clear error of judgment.”¹⁷⁷ The court may only overturn an agency action if the agency (1) relied on factors Congress did not intend it to rely on, (2) entirely failed to consider an important aspect of the problem, (3) offered an explanation counter to the evidence, or (4) is so implausible it cannot be ascribed to a difference of opinion between experts.¹⁷⁸

Chevron and administrative jurisprudence focus on agency expertise and legislative delegation. The resulting caselaw show a strong willingness to defer to agency definitions where these factors are present. Part III below explains that these factors for deference are not present for the Commission, and thus de facto *Chevron* deference for the Guidelines is therefore unjustified. The remainder of this Part, however, shows how the same considerations of expertise and legislative intent lead to a standard indistinguishable from current deference in administrative law.

B. The Appellate Presumption of Reasonableness Is Chevron Deference in Disguise

Both *Chevron* and the presumption of reasonableness justify themselves based on a conception of agency expertise and legislative deference.¹⁷⁹ Moreover, the appellate presumption mirrors *Chevron*’s arbitrary and capricious standard because both tests assume the agency’s decision—either the Commission’s Guidelines or some other agency policy

contrary to the statute.”).

175. *Motor Vehicles Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983).

176. *Id.* at 43.

177. *Id.*

178. *Id.*

179. *See, e.g., Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 864–66 (1984); *United States v. Mykytiuk*, 415 F.3d 606 (7th Cir. 2005).

choice—is accurate and valid.¹⁸⁰ Thus, both standards of review are simply the same standard masquerading under different names. The preceding Section outlined the Court's traditional approach to administrative law. This Section shows how the same justifications that informed *Chevron* informed the presumption's deference to the Commission, resulting in a presumption that mirrors the arbitrary and capricious standard of review.

1. The Appellate Presumption of Reasonableness Relies on the Same Justifications as *Chevron*

Courts base the appellate presumption of reasonableness on two justifications: (1) deference to agency expertise in making determinations, and (2) reliance on legislative intent.¹⁸¹ Both these explanations were central to *Chevron* and continue to justify deference to agencies in traditional administrative law.¹⁸² The foundations shared between *Chevron* deference and the appellate presumption of reasonableness highlight the traditional administrative law approach appellate courts have taken in developing the presumption of reasonableness.

a. *Deference to the Commission's Expertise*

A central justification for the appellate presumption of reasonableness lies in the expertise commanded by the Commission.¹⁸³ *Booker* planted the seed for this justification in a short passage in the remedial opinion.¹⁸⁴ In making the Guidelines advisory, the Court required that district courts still

180. See, e.g., *State Farm*, 463 U.S. at 42; *United States v. Johnson* 445 F.3d 339 (4th Cir. 2006).

181. See, e.g., *United States v. Mares*, 402 F.3d 511, 518–19 (5th Cir. 2005) (citing *Booker*'s insistence of the continuing efficacy of the SRA, and deferring to the district court's "discretion" only when it sentences within the Guideline range).

182. *Chevron*, 467 U.S. at 843–44; see also Melanie E. Walker, *Congressional Intent and Deference to Agency Interpretations of Regulations*, 66 U. CHI. L. REV. 1341, 1352 (1999).

183. *United States v. Smith*, 445 F.3d 1, 4–7 (1st Cir. 2006) (citing *United States v. Jimenez-Beltre*, 440 F.3d 514, 518 (1st Cir. 2006), and its reliance on the Commission as an "expert agency," explaining the reasonableness of within-Guidelines sentences, and overturning a non-Guidelines sentence).

184. *Booker v. United States*, 543 U.S. 220, 263–64 (2005).

“consult” the Guidelines.¹⁸⁵ In defending this requirement, it stressed that the Commission would continue to “writ[e] Guidelines, collect information about actual district court sentencing decisions, undertak[e] research, and revis[e] the Guidelines accordingly.”¹⁸⁶ In other words, the Commission’s continued work justified the requirement that district courts consider the Guidelines.

Booker’s language bore all the hallmarks of *Chevron* deference. By requiring courts to consider the Guidelines at sentencing, and justifying that requirement on the Commission’s continued work (especially their research and revisions), the Court placed value on the Commission.¹⁸⁷ This value, it seemed, grew out of the Commission’s role as an expert in sentencing policy and the arbitrator of the Guidelines.¹⁸⁸

While it was not guaranteed post-*Booker*, the Supreme Court’s subsequent opinion in *Rita v. United States* cemented deference to expertise as a principal reason for the appellate presumption of reasonableness.¹⁸⁹ In *Rita*, the Fourth Circuit applied the presumption of reasonableness to affirm Rita’s sentence for “perjury, obstruction of justice and making false statements.”¹⁹⁰ The Supreme Court affirmed the Fourth Circuit, holding the appellate presumption of reasonableness valid.¹⁹¹ The Court pointed out that a within-Guidelines sentence meant that *both* the district court *and* the Commission had reached the same conclusion, resulting in a sentence that was mostly likely reasonable.¹⁹² In so holding, the Court credited the Commission with expertise rivaling and exceeding that of district courts, especially in its ability to balance the goals of uniformity and proportionality in creating the Guidelines.¹⁹³ Moreover, the Court argued that both bodies

185. *Id.* at 224.

186. *Id.* at 264.

187. *Id.*

188. *Id.*

189. *Rita v. United States*, 551 U.S. 338, 347 (2007); *see also supra* Section I.C.

190. *United States v. Rita*, 177 F.App’x. 357, 357–58 (4th Cir. 2006).

191. *Rita*, 551 U.S. at 347 (2007).

192. *Id.*

193. *Compare id.* at 349 (explaining how the Commission debated different approaches in order to fulfill its competing statutory mandates, and describing the empirical approach it eventually settled on), *with Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984) (applauding the EPA for its balancing of the competing approaches to balancing clean air and economic interests).

accurately weighed the section 3553 factors.¹⁹⁴ It noted the number of sentences the Commission reviews, the opinions from the criminal justice community it considers,¹⁹⁵ and the Commission's ability to adjust the Guidelines to fit the Commission's conception of equitable sentences, which it applauded.¹⁹⁶

Taken together, *Booker* and *Rita* establish that the Court views the Commission as an expert agency meriting deference. Summarizing these holdings in *Kimbrough v. United States*, the Supreme Court held that the Commission has capacity the courts lack: to "base its determinations on empirical data and national experience, guided by a *professional* staff with appropriate *expertise*."¹⁹⁷ The Court recognized that this expertise is why Guidelines sentences reflect a rough approximation of valid, reasonable sentences.¹⁹⁸

The parallels between *Chevron's* justifications for agency deference and the appellate presumption of reasonableness for within-Guidelines sentences are striking. First and foremost, both schemes ground themselves in deference to expertise in a given area. *Chevron* recognizes that judges are generalists and permits agencies to use their expertise to solve problems where the judiciary is less knowledgeable. Like *Chevron*, the appellate presumption of reasonableness also recognizes the deficiencies of courts, deferring to the Commission and its sentencing expertise.¹⁹⁹ Moreover, the *Chevron* Court deferred to the EPA's definition of "stationary source" because it represented an expert agency balancing the competing goals of reducing air pollution and economic growth. Likewise, in *Rita*, the Court upheld deference to the Commission because the Commission used its expertise to balance the competing goals of

194. *Rita*, 551 U.S. at 348–49.

195. *Id.*

196. *Id.*

197. *Kimbrough v. United States*, 522 U.S. 85, 109 (2007) (emphasis added) (citation omitted).

198. *Id.* In creating the presumption of reasonableness, lower courts reflected the Supreme Court's deference to the Commission's determination of proper sentences. *See, e.g.*, *United States v. Rueda-Zarate*, 291 F.App'x. 364, 366 (2d Cir. 2008) (discussing due respect to the fact that the Guidelines are "the product of careful study based on extensive empirical evidence derived from the review of thousands of individual sentencing decisions").

199. *Kimbrough*, 522 U.S. at 109; *United States v. Mykytiuk*, 415 F.3d 606 (7th Cir. 2005). The courts' assumption that the Commission warrants deference is not correct. *See infra* Section III.A.

proportionality and uniformity announced in the SRA.²⁰⁰

b. Deference to Legislative Intent

Both the appellate presumption of reasonableness and *Chevron* deference rely on agency determinations out of a desire to defer to legislative intent. An eagerness to continue to fulfill the mandates of the SRA fueled the development of the presumption in other circuits. Many circuits felt that, without a presumption, the SRA's goals of sentencing uniformity would fall by the wayside.²⁰¹

In *United States v. Mares*, the Fifth Circuit examined the post-*Booker* SRA for the first time.²⁰² The court concluded that the excised provision of sections 3553 and 3742 did not change the SRA's goals.²⁰³ And in recognition of the statutory goals of uniformity and the deference due to the sentencing judge under the SRA, the court held that it would rarely find within-Guidelines sentences "unreasonable."²⁰⁴

Similarly, in *United States v. Mykytiuk*, the Seventh Circuit argued that the Guidelines were essential to achieve one of the major goals of the SRA, "a fair and uniform sentencing regime across the country."²⁰⁵ Courts held that the best way to effectuate the intent of Congress was to give the

200. *Rita*, 551 U.S. at 349.

201. *See, e.g., Mykytiuk*, 415 F.3d 606 (arguing that the Guidelines remain an essential tool in creating a fair and uniform sentencing regime); *see also Rita*, 551 U.S. at 347 ("[T]he presumption reflects the nature of the Guidelines-writing task that Congress set for the Commission and the manner in which the Commission carried out that task.").

202. *United States v. Mares*, 402 F.3d 511, 519 (5th Cir. 2005) (holding that the court will infer the sentencing judge considered § 3553 factors for within-Guidelines sentences). The Fifth Circuit did not expressly adopt the presumption in *Mares*. The opinion came months after *Booker* and was one of the first attempts to make sense of the confusing remedial opinion. *See id.* However, subsequent caselaw makes clear that *Mares* created a presumption of reasonableness. *United States v. Alonzo*, 435 F.3d 551, 554 (5th Cir. 2006) ("[W]e are simply recognizing that our language in *Mares* comports with subsequent precedent in other circuits. In other words, there does not seem to be a practical difference between the burden of rebutting a presumption of reasonableness afforded a properly calculated Guideline range sentence and the burden of overcoming the great deference afforded such a sentence.").

203. *Mares*, 402 F.3d at 519.

204. *Id.*

205. 415 F.3d at 608; *see S. REP. NO. 98-225, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS 3182, 3223* (explaining that Congress's goal was to provide for nationwide uniformity in sentencing).

Guidelines a special place in sentencing review and afford them special deference in order to further the goals of uniform sentencing.²⁰⁶

The parallels are, again, striking.²⁰⁷ While deference to legislative intent is not new to the judiciary, deference to agencies on this basis is more unusual. The fact that both *Chevron* and the presumption rely so heavily on a congressional delegation of power highlights the similarities between the two standards. Moreover, as this next Section shows, not only do the standards rest on the same foundations, they are also equivalents in practice.

2. Arbitrary and Capricious Review

The appellate presumption of reasonableness mirrors *Chevron's* arbitrary and capricious standard.²⁰⁸ The presumption (1) defers to the findings of the Commission, (2) creates a high bar that is difficult to overcome, and (3) only overturns the Guidelines if the Commission commits a procedural error.²⁰⁹ These features of the presumption mirror the essential aspects of arbitrary and capricious review.²¹⁰

a. Deference to the Commission

The appellate presumption of reasonableness defers to the findings of the Commission represented in the Guidelines. It is well established that, in the right circumstances, an appellate

206. *Mykytiuk*, 415 F.3d at 608.

207. *Chevron*, too, deferred to the EPA in order to better effectuate the goals of Congress. In discussing the competing policies set forth in the Clean Air Act, the Court held that it was enough to merit deference that the Act gave power to the EPA to untangle and balance the conflicting policies at issue. *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 865 (1984). It held that, once there is delegation, the matter is at an end, and the courts should allow the agency to whom power has been delegated to make the policy choice Congress intended it to make. *Id.*

208. *See Motor Vehicles Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983). Under arbitrary and capricious review, the court may only overturn an agency action if it (1) relies on factors Congress did not intend it to rely on, (2) entirely fails to consider an important aspect of the problem, (3) offers an explanation counter to the evidence, or (4) is so implausible it cannot be ascribed to a difference of opinion between experts. *Id.*

209. *See, e.g., United States v. Dorvee*, 616 F.3d 174, 188 (2d Cir. 2006).

210. *See supra* Section II.A.

court should defer to the district court.²¹¹ However, in applying the presumption of reasonableness, appellate courts go beyond simple deference to lower courts, extending their deference to the Commission.²¹² The Supreme Court recognized this fact in *Rita v. United States*.²¹³ Under the Court's view of the presumption, a "double determination" of a reasonable sentence represents an agreement between two distinct parties, both worthy of appellate deference.²¹⁴ The Court held that such agreements do not require extra scrutiny.²¹⁵ Deference under the presumption thus goes well beyond simple deference to district courts. It embraces deference to the Commission as well.²¹⁶

Arbitrary and capricious review also defers to agency findings and actions, mirroring deference under the presumption of reasonableness. In *Citizens to Preserve Overton*

211. Jonathan S. Masur & Lisa Larrimore Ouellette, *Deference Mistakes*, 82 U. CHI. L. REV. 643, 652–57 (2015).

212. Under traditional review of agency action, the district court is not involved. Rather, the agency both finds facts and creates policy based on the facts they find. *See, e.g.*, *Dickerson v. Zurko*, 527 U.S. 150 (1999) (reviewing the Patent and Trademarks findings of fact and discussing the relevant appellate standard). Moreover, appellate reviews of agency decisions generally skip the district court and go straight to the courts of appeals. *Appeals*, U.S. COURTS, <http://www.uscourts.gov/about-federal-courts/types-cases/appeals> (last visited Jan. 25, 2018). Criminal sentencing is unique in that the district court and the Commission are mixed together when they present themselves for appellate review.

213. 551 U.S. 338, 348 (2007). There, while rejecting a constitutional challenge to the presumption, the Court justified its decision based on its belief that a within-Guidelines sentence will represent a "double determination" where "both the sentencing judge and the Sentencing Commission will have reached the *same* conclusion as to the proper sentence in a particular case." *Id.* (emphasis in original). Lower courts follow similar reasoning. *See, e.g.*, *United States v. Johnson*, 445 F.3d 339, 342 (4th Cir. 2006)

214. *Rita*, 551 U.S. at 348.

215. *See id.* It should be noted that the district courts may *not* defer to the Commission in making a sentencing decision. Appellate deference to the Commission is thus not a situation where deference to the lower court implicitly encompasses that court's deference to another party. District courts are expressly forbidden from giving the Guidelines independent legal effect. *Nelson v. United States*, 555 U.S. 350, 351 (2009) ("The Guidelines are not only *not mandatory* on sentencing courts; they are also not to be *presumed* reasonable."). This fact also highlights the absurdity that appellate courts do exactly what district courts are forbidden to do in their review of sentences.

216. Lower courts follow this reasoning. Many courts assume that the Guidelines represent reasonable sentences. *See, e.g.*, *United States v. Marcussen*, 403 F.3d 982, 984 n.4 (8th Cir. 2005). The reasoning rests on a notion that the Sentencing Commission's determinations on reasonable sentences merit deference wholly separate from the sentencing court. *Id.*

Park v. Volpe, the Supreme Court stressed that arbitrary and capricious review is narrow, and that courts may not substitute their own judgment for that of the agency.²¹⁷ When courts apply the presumption of reasonableness, they make the same commitment. The presumption ensures that within-Guidelines sentences are easier to affirm than those outside.²¹⁸ This represents a commitment not to disturb the “double determination between district court and Commission; to not substitute appellate review for sentences determined by the Guidelines.”²¹⁹ Again, while it is true there is both an element of deference to lower courts and to the Commission in appellate review,²²⁰ the presumption injects agency deference alongside traditional deference to the district courts, creating an extremely deferential standard.²²¹

b. Case Outcomes

Further elucidating the similarities between the presumption of reasonableness and arbitrary and capricious review, case outcomes show that the presumption of reasonableness is an exceedingly difficult hurdle to overcome.²²² By assuming the validity of within-Guidelines sentences and requiring a more searching analysis for sentences that stray from the Guidelines, the appellate presumption of reasonableness creates a high bar for

217. 401 U.S. 402, 416 (1971).

218. See *supra* note 131 and accompanying text.

219. *Rita*, 551 U.S. at 348.

220. See, e.g., *United States v. Garcia*, 512 F.3d 1004, 1006 (8th Cir. 2008) (applying the presumption of reasonableness, and reviewing the district court for an “abuse of discretion”).

221. See *United States v. Mares*, 402 F.3d 511, 519 (5th Cir. 2005).

222. See, e.g., *United States v. Morales-Machuca*, 546 F.3d 13, 25 (1st Cir. 2008) (“A defendant who attempts to brand a within-the-range sentence as unreasonable must carry a heavy burden.”) (citation omitted); *United States v. Turbides-Leonardo*, 468 F.3d 34, 41 (1st Cir. 2006) (“Sentences that fall inside a properly calculated guideline sentencing range require a lesser degree of explanation than those that fall outside the guideline sentencing range.”); *Mares*, 402 F.3d at 519 (“[I]t will be rare for a reviewing court to say such a sentence is ‘unreasonable.’”); *United States v. Mykytiuk*, 415 F.3d 606, 608 (7th Cir. 2005) (“[I]t will be a rare Guidelines sentence that is unreasonable.”); *United States v. Lincoln*, 413 F.3d 716, 717 (8th Cir. 2005) (“[Defendant’s] sentence, however, was within the guidelines range for his offense level of 38 and criminal history category IV, and as a result, we think that it is presumptively reasonable.”).

overturning within-Guidelines sentences.²²³ Such sentences rarely fail on appeal.²²⁴ For example, in the Fourth Circuit, there is no case overturning within-Guidelines sentences as substantively unreasonable.²²⁵ Further, besides assuring that overturning a within-Guidelines sentence will be “rare,” most cases offer little guidance on what would actually justify such a result.²²⁶ Thus, not only is the bar high, at times it can be hard to even see where the bar is set. It is little wonder that few sentences successfully overcome the presumption of reasonableness.²²⁷

223. *Mares* is not alone in expressing concern about non-Guidelines sentences. See, e.g., *supra* note 44. In fact, sentences falling outside the Guidelines’ ranges seem to be the only place where the courts are willing to engage in a searching analysis of the substantive reasonableness of a sentence. Caselaw following the presumption of reasonableness certainty establishes this focus. See, e.g., *United States v. Baucom*, 486 F.3d 822 (4th Cir. 2007), *vacated sub nom. Davis v. United States*, 552 U.S. 1092 (2008) (mem.); *United States v. Taylor*, 499 F.3d 94 (1st Cir. 2007), *vacated*, 552 U.S. 1092 (2008) (mem.); *United States v. Smith*, 445 F.3d 1, 4 (1st Cir. 2006). Another explanation for this trend is that the appellate presumption of reasonableness dampens appeals. Because defendants with within-Guidelines sentences are less likely to succeed, some might decide not to pursue an appeal on this point.

224. Often, a sentence will fail on “procedural grounds.” Here, the appellate court reverses based on district court error. Usually, reversible error occurs when the district court misunderstands the law (*United States v. Montague*, 438 F. App’x 478 (6th Cir. 2011)), treats the Guidelines as presumptively reasonable (*Nelson v. United States*, 555 U.S. 350, 351 (2009)), or the court improperly weighs the § 3553 factors (*United States v. Sharp*, 436 F.3d 730, 738 (7th Cir. 2006)).

225. A Westlaw search conducted on March 20, 2017 revealed no cases where a within-Guidelines sentence failed on substantive ground. The Fourth Circuit’s presumption of reasonableness is even less searching than arbitrary and capricious review. Under its caselaw, the presumption can *only* be rebutted by a showing that the sentence did not adequately further § 3553 factors. *United States v. Louthian*, 756 F.3d 295, 306 (4th Cir. 2014). The quality of the Commission’s work is not even up for dispute. This forgiving test is more problematic than most. Arbitrary and capricious review, while limited, provides an important check on agency action. See Louis J. Verilli, *Deconstructing Arbitrary and Capricious Review*, 92 N.C. L. REV. 722, 723 (“Hard look review provides a critical check against unconstrained agency power.”). The Fourth Circuit’s presumption gives the Commission immense power to ignore fact-finding and accuracy-ensuring procedures. While the Commission does not generally cut these corners, the inability and refusal to check the Commission is troubling. See, e.g., *United States v. Franklin*, 785 F.3d 1365, 1372 n.2 (10th Cir. 2015).

226. See *supra* note 25 and accompanying text.

227. See *United States v. Cutler*, 520 F.3d 136 (2d Cir. 2008) (overturning a within-Guidelines sentence for improper departures), *abrogated by United States v. Cavera*, 550 F.3d 180, 189 (2d Cir. 2008) (holding *Cutler* implied too meddlesome of a review); *United States v. Montague*, 438 F. App’x 478, 483 (6th Cir. 2011) (sentencing court misunderstood the law); *United States v. Sharp*, 436

The high bar set by the appellate presumption of reasonableness mirrors the exacting requirements of arbitrary and capricious review. Because arbitrary and capricious review is “narrow” and grounded in deference,²²⁸ challengers to agency action fail at a prodigious rate. Arbitrary and capricious challenges brought to the Supreme Court fail 87 to 92 percent of the time.²²⁹ There is a similar (or even higher) rate of failure for challenges to the Guidelines.²³⁰ In terms of upholding agency action, the presumption of reasonableness has essentially the same effect as arbitrary and capricious review. Both create an extremely limited opportunity for challenges to succeed upon appeal.

c. Overturning the Commission on Procedural Error

Finally, the only place where courts are active in overturning within-Guidelines sentences is when the Guidelines do not represent a reasoned, Commission-driven, decision. In the rare instance that a sentence is overturned based on a Guideline’s inadequacy, the justification for such reversal is that the agency did not act in its traditional capacity.²³¹ Specifically, a guideline is most likely to be ignored when the Commission did not exert its “expertise” when it created the Guidelines.²³²

Child pornography sentences best capture this trend in the

F.3d 730, 738 (7th Cir. 2006) (“[A] defendant can only rebut the presumption by demonstrating that the sentence is unreasonable when measured against § 3553(a) factors.”).

228. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971).

229. ADRIAN VERMEULE, *LAW’S ABNEGATION: FROM LAW’S EMPIRE TO THE ADMINISTRATIVE STATE* app. to chapter 5 (2016) (“[A]gencies win arbitrariness challenges to the Supreme Court about 87%-92% of the time.”).

230. *See, e.g., supra* note 225. Importantly, arbitrary and capricious review removes deference to the district court from the analysis. The increased failure of within-Guidelines sentences can probably be attributed to the “double deference” that includes deference to the district court. *See Rita v. United States*, 551 U.S. 338, 347 (2007).

231. *See United States v. Dorvee*, 616 F.3d 174, 183 (2d Cir. 2010) (refusing to grant deference to the child pornography guidelines).

232. *United States v. Cavera*, 550 F.3d 180 (2d Cir. 2008) (citing *Kimbrough v. United States*, 552 U.S. 85 (2007), which held that a district court may disagree with the sentencing commission solely on policy grounds). This is not relevant here except to show again that the district court holds all the power and appellate courts are restrained.

caselaw. In *United States v. Dorvee*, the Second Circuit held that a 240-month sentence for distribution of child pornography was unreasonable.²³³ The court held that the sentence's unreasonableness resulted in part from the fact that the child pornography guidelines "[did] not exemplify the Commission's exercise of its characteristic institutional role."²³⁴ The court recited a history of the PROTECT Act,²³⁵ focusing specifically on Congress's interference with the Guidelines.²³⁶ Citing traditional administrative law, the court concluded that the child pornography guideline was not entitled to weight, and that the district court had improperly relied on the Guidelines in that instance.²³⁷

Invalidation of within-Guidelines sentences based on the failings of the Commission exactly mirrors arbitrary and capricious review. As the *Dorvee* court explained:

[D]eference to the Guidelines is not absolute or even controlling; rather, like our review of many agency determinations, "[t]he weight of such a judgment in a particular case will depend upon the thoroughness evident in [the agency's] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."²³⁸

233. 616 F.3d at 183 (holding that the district court was justified in not following the child pornography guideline). The Second Circuit does not apply the actual language of the presumption of reasonableness. However, it follows the "great weight" test which creates a similar standard. *See supra* Part II.

234. *Dorvee*, 616 F.3d at 188.

235. Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act (PROTECT Act) attempted to combat the sexual abuse of children. PROTECT Act, Pub. L. No. 108-21, 117 Stat. 650 (2003) (codified in scattered sections of 18, 21, 28, and 42 U.S.C.). Specifically, the PROTECT Act mandated changes to the child pornography guidelines, setting out the applicable factors judges must consider. Mark H. Allenbaugh, *Who's Afraid of the Federal Judiciary? Why Congress' Fear of Judicial Sentencing Discretion May Undermine a Generation of Reform*, CHAMPION, June 2003, at 6.

236. 616 F.3d at 184–87.

237. *Id.* at 188 (citing *Skidmore v. Swift*, 323 U.S. 134 (1944) and *United States v. Mead Corp.*, 533 U.S. 218 (2001)). It is worth noting that this reliance on administrative law is far from the norm. Even cases discussing *Dorvee* skip over its reliance on administrative law. *See, e.g.*, *United States v. Morain*, 594 F. App'x 520, 525 (10th Cir. 2014) (distinguishing *Dorvee* on its facts).

238. 616 F.3d at 188 (quoting *Skidmore*, 323 U.S. at 140).

Just as with conventional agency determinations, *Dorvee* shows that courts will discount the Guidelines if they feel the Commission has failed to act in its “traditional capacity.”²³⁹ In this sense, both in terms of form and function, the appellate presumption of reasonableness operates in the same way as arbitrary and capricious review.

A review of the similarities between the presumption of reasonableness and administrative law deference shows that they are one and the same. Both the presumption and *Chevron* justify their deference by citing agency expertise and legislative intent. Moreover, the presumption operates in the same way as arbitrary and capricious review. To be sure, because the courts have yet to overtly recognize the similarities between arbitrary and capricious review and the presumption of reasonableness, the application of the presumption application of the presumption does not follow the rigid form of traditional arbitrary and capricious review.²⁴⁰ Nevertheless, the similarities discussed above highlight the fact that the presumption of reasonableness is functionally *Chevron* deference. Now the question becomes: Is such deference proper?

III. THE SENTENCING COMMISSION AND GUIDELINES DO NOT MERIT DE FACTO DEFERENCE

While the appellate presumption of reasonableness is functionally *Chevron* deference, such deference is unwarranted. As discussed in the Introduction, this de facto deference creates substantive harm to judicial review and rational sentencing in the United States.²⁴¹ These harms, typified in *United States v. Franklin*,²⁴² are not justified under traditional administrative law doctrine. The Guidelines do not merit de facto deference because the Commission’s expertise overlaps with, and does not

239. *See id.*

240. Often, arbitrary and capricious analyses follow a more rigid analysis, whereas the analysis in sentencing review is more free-flowing. *Compare* *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 549–56 (1978) (rejecting an arbitrary and capricious challenge to the Atomic Energy Commission’s decision to permit Vermont Yankee to build a nuclear power plant), *with* *United States v. Franklin*, 785 F.3d 1365, 1372 n.2 (10th Cir. 2015) (rejecting challenge to a child pornography sentence).

241. *See supra* notes 21–30 and accompanying text.

242. 785 F.3d 1365.

surpass, the expertise of Article III judges,²⁴³ and *Chevron*-like deference is best reserved for civil cases.

A. *The Commission's Expertise Does Not Surpass the Expertise of the Judiciary*

1. The Commission's Expertise is Redundant

The SRA and the post-*Booker* cases show that the expertise that justifies deference to the Commission is less compelling than it may seem at first glance. In short, the Commission's expertise is somewhat redundant. It makes determinations that judges have traditionally made,²⁴⁴ and the Guidelines reflect the application of expert knowledge generally already found in the judiciary. Moreover, it is not clear that the Commission's expertise is even equivalent to that of Article III judges.²⁴⁵

There is no doubt that judges are experts in sentencing policy and practice.²⁴⁶ American courts have been weighing competing penal justifications and offender mitigating and

243. To be sure, the Commission technically resides in the judicial branch and has three judges as board members. PROTECT Act, Pub. L. No. 108-21, 117 Stat. 650 (2003) (codified in scattered sections of 18, 21, 28, and 42 U.S.C.). However, the Commission should not be considered part of the judiciary. This is so for two reasons. First, over the years Congress has limited the ability for actual judges to sit on the Commission, making the Commission's makeup less centered on the judiciary. See Allenbaugh, *supra* note 235 (explaining how the PROTECT Act limited the number of judges that could sit on the Commission). Second, the Commission is an independent agency. While located in the judiciary, its members are appointed by the Executive and their Guidelines are sanctioned through the power of the Legislature. U.S. Sentencing Comm'n, *Annual Report Fiscal Year 2016*, USSC.GOV <https://www.usc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2016/2016-Annual-Report.pdf> (last visited Oct. 29, 2017) [<https://perma.cc/7NY4-W4NG>].

244. An early critique of the SRA was that judges were already experts in the field of sentencing. The judiciary felt that it had significant expertise, and the Commission invaded into an area that traditionally belonged to them. See Gertner, *supra* note 36.

245. See *infra* Section III.A.3.

246. *Id.* at 527. When the retributive ideal was at its height, no one questioned the supremacy and expertise of the judiciary in sentencing. Gertner's article tracks how the view of judges and Congress began to change on this idea. See Gertner, *supra* note 36. However, regardless of this movement, it is established that, for much of U.S. history, the judiciary has acted, and been regarded as, the supreme actor in sentencing. Even the rise of the Commission has not fully undercut that notion because courts still find facts and tailor sentences to defendants. See *United States v. Johnson*, 445 F.3d 334, 343–44 (4th Cir. 2006).

aggravating factors since their inception.²⁴⁷ In fact, one of the judiciary's main complaints about the SRA was that it invaded judicial independence in an area central to its expertise.²⁴⁸ In fiscal year 2015, the federal bench sentenced 71,184 felonies and Class A misdemeanors.²⁴⁹ If these numbers are typical, that averages to about 104 criminal penalties imposed by a district judge every year.²⁵⁰ Data regarding the number of sentencing appeals was not available, but assuming that just 10 percent of offenders appeal their sentence, then federal appeals courts would hear approximately 7,000 sentencing appeals in a single year.²⁵¹

While the Commission takes a different approach from the judiciary, it does the same job as Article III courts. In *Rita v. United States*, the Court actually held that this was the case.²⁵² In elucidating the benefits of the Commission, the Court applauded the SRA for creating a scheme wherein the sentencing judge and the Commission carry out "the *same* basic section 3553(a) objectives, the one, at retail, the other wholesale."²⁵³

Recognizing that the Commission brings a new lens to sentencing policy does not necessarily support the deferential approach taken by appellate courts. The operative fact here is that the Commission's charge is to interpret and apply the same section 3553 factors that district courts are supposed to be applying.²⁵⁴ For example, in creating the Guideline for

247. *See id.*

248. *Id.* at 524 ("American judges waxed indignant on the subject of any external sentencing restrictions. Sentencing discretion was central to their work, a pillar of judicial independence.").

249. GLENN R. SCHMITT & ELIZABETH JONES, OVERVIEW OF FEDERAL CRIMINAL CASES: FISCAL YEAR 2015, at 1 (2016), http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2016/FY15_Overview_Federal_Criminal_Cases.pdf [<https://perma.cc/UTT2-JPRR>].

250. This number comes from the 71,184 criminal sentences divided by the 678 district judges currently on the bench.

251. This amount of cases speaks to the possible benefit more robust review of criminal sentence could bring to federal criminal law. As discussed in the Introduction, the legal arguments in this Comment should be seen against the background of the practical harms created by the presumption of reasonableness. The appeals presenting sentencing issues offer the opportunity for guidance from appellate courts. However, the presumption of reasonableness currently constricts that opportunity. Seven thousand cases a year provides ample opportunity to develop a substantive sentencing doctrine.

252. 551 U.S. 338, 348 (2007).

253. *Id.* (emphasis added).

254. *See* 18 U.S.C. § 3553(a) (2012) (requiring the district courts to consider

burglary, the Commission must balance and enhance section 3553 factors. The courts have the same duty in fashioning an individual sentence for a criminal defendant convicted of burglary. Because both the courts and the Commission weigh the same sentencing factors, the Commission's expertise is redundant. The only difference is the circumstances in which the section 3553 factors are applied.

The fact that most guidelines simply track federal sentencing practices highlights the overlap between the Commission's and the judiciary's expertise. The Commission creates the Guidelines by collecting data from sentences imposed across the country.²⁵⁵ From this data, the Commission develops raw sentencing ranges.²⁵⁶ Most of these raw ranges remain untouched, becoming the official range in the Guidelines.²⁵⁷ If the Commission brought new expertise to sentencing policy, one would expect the Commission to be more active in revising the raw data ranges. This inaction shows that the Guidelines are often nothing more than a restatement of federal sentencing practices. Such inaction suggests that the Commission does not bring new expertise to sentencing practices and is thus undeserving of appellate deference.

Even assuming that the Commission is an expert at balancing section 3553 factors,²⁵⁸ the fact that judges are also experts in the same area significantly undermines the de facto deference the Commission receives. Article III judges can certainly benefit from the Commission's guidance in carrying out the duties of their office. This is not in question. Rather,

and balance certain factors in arriving at the appropriate sentence); 28 U.S.C. § 994(g) (2012) (requiring the Commission to "meet the purposes of sentencing set forth in section 3553(a)" when creating the Guidelines); *see also Rita*, 551 U.S. at 48 ("[T]he presumption reflects the fact that, by the time an appeals court is considering a within-Guidelines sentence on review, *both* the sentencing judge and the Sentencing Commission will have reached the *same* conclusion as to the proper sentence in the particular case.").

255. *See* GUIDELINES MANUAL, *supra* note 80, § 1A1.3; *see also supra* Section I.B.

256. *See* GUIDELINES MANUAL, *supra* note 80, § 1A1.3.

257. *See id.*

258. There are strong concerns about what expertise the Commission actually commands. As discussed above, the Guidelines are based off the sentencing ranges developed through the Commission's empirical study. These original ranges are rarely changed. Expertise concerns are especially salient considering that the Commission is balancing these factors based on the elements of a crime in the abstract, rather than faced with a specific set of facts constituting a crime. *See* GUIDELINES MANUAL, *supra* note 80, § 1A1.3; Section III.A.2.

what is at issue is whether that guidance is entitled to what is functionally *Chevron* deference. Courts are the constitutionally mandated arbiters of criminal sentencing.²⁵⁹ In areas where they are already experts, there is no reason to defer.²⁶⁰ Again, this does not render the Commission useless as it can still provide guidance to district courts. But, *Chevron* deference only makes sense where the judiciary's expertise is not sufficient to make a decision.²⁶¹ Here, because the courts already have expertise in the subject of sentencing criminal defendants, courts may not grant legally significant deference at the appellate level. Under *Chevron*, where the judiciary is already an expert, it cannot defer to the expertise of another.²⁶²

2. The Commission's Expertise Is Less than That of Article III Courts

Not only does the Commission's expertise overlap with the judiciary's, the Commission has less expertise than Article III judges. The central weakness in the Commission's expertise is that it cannot really claim it is "better" at balancing a highly subjective and context-dependent set of factors.²⁶³ The Commission does examine federal sentencing practice and distills common factors that, in addition to the considerations

259. U.S. CONST. art. III, § 2 ("The Judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority."). An interesting question is whether Congress has the authority to delegate the powers of the judicial branch to the Commission. While *Mistretta v. United States* considered the nondelegation doctrine in the context of the SRA, the Court only asked whether Congress had impermissibly delegated. No mention was made of the assault on the judiciary's constitutional authority. *See* 488 U.S. 361 (1989). That question, however, is beyond the scope of this Comment. A short answer is that it probably does not violate of the nondelegation doctrine. *See* Mark Thomson, *Who Are They To Judge?: The Constitutionality of Delegations by Courts to Probation Officers*, 96 MINN. L. REV. 306 (2011) (explaining how the nondelegation doctrine applies when the judiciary delegates to probation officers).

260. *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 865 (1984).

261. *Id.*

262. *See id.*

263. *See* 18 U.S.C. § 3553 (2012). Of course the same can be said of Congress. But the weight given to valid congressional enactments is controlled by Article I and the separation of powers. U.S. CONST. art. I, § 1. Deference to the Commission is (functionally) controlled by *Chevron*. The deference inquiry is therefore different and is justified by normative commitments to expertise and legislative intent that do not hold water here. *Chevron*, 467 U.S. at 864–66.

of section 3553, weigh toward more or less punishment.²⁶⁴ However, whatever expertise that practice may furnish on the Commission is overshadowed by the knowledge and experience of the courts. What the Commission does in the abstract, district courts do every day.²⁶⁵ Article III courts have the advantage of considering both the common factors between defendants and the individual facts of a particular case.²⁶⁶

Expertise is, in many ways, a measure of experience and knowledge.²⁶⁷ In order to be a successful expert, one must have at least one.²⁶⁸ The best experts have both.²⁶⁹ In 2002, Professors H.M. Collins and Robert Evans published a lengthy article wherein they attempted, in part, to define expertise.²⁷⁰ The professors identified three levels of expertise: (1) no expertise, (2) interactional expertise, and (3) contributory expertise.²⁷¹ Interactional expertise is largely based on experience. Contributory expertise is largely based on training, knowledge, or skill. The professors gave as an example the effects of Chernobyl on sheep farmers in Ukraine and the attempts to minimize the damage to the surrounding countryside.²⁷² In coming to a solution, it was discovered that, through their years of farming, sheep farmers had interactional knowledge of sheep and rain patterns. Thus, the farmers' expertise could help the scientists (who possessed contributory expertise) devise a plan to mitigate the damage to their flocks caused by radioactivity coming from Chernobyl.²⁷³ From this example, the professors theorized that, where one party has interactional expertise and the other contributory expertise, the party with interactional expertise must be the one to come up with a solution while the contributory expert should

264. U.S. SENTENCING COMMISSION, *supra* note 80.

265. See *Rita v. United States*, 551 U.S. 338, 348 (2007).

266. This is the advantage of deciding individual cases and controversies. *Golden v. Zwickler*, 394 U.S. 103, 108 (1969) (“[T]he federal courts established pursuant to Article III of the Constitution do not render advisory opinions.”) (quoting *United Pub. Workers of America v. Mitchell*, 330 U.S. 75, 88 (1947)).

267. H.M. Collins & Robert Evans, *The Third Wave of Science Studies: Studies of Expertise and Experience*, 32 SOC. STUD. SCI. 235, 254–56 (2002).

268. *Id.*

269. *Id.*

270. *Id.*

271. *Id.*

272. *Id.*

273. *Id.* at 255–56.

advise.²⁷⁴

Through this lens, an Article III judge is more of an expert in sentencing criminal defendants than the Commission.²⁷⁵ The Commission makes the difficult section 3553 inquiry without the aid of specific facts.²⁷⁶ The Commission thus has contributory expertise. It studies sentencing practices, and publishes broad, non-defendant-specific guidelines. The courts, on the other hand, have both interactional and contributory experience. Judges sentence and review the sentences of more defendants and are intimately involved in every sentence they impose or review. Not only do they have experience actually sentencing defendants (interactional experience), they are also experts in the theory of punishment (contributory expertise).²⁷⁷ The added benefit of interactional expertise makes the courts more expert than the Commission. While this is not to say that the Commission is devoid of knowledge on the subject, the fact that Article III courts have access to more information and regularly impose sentences means that the Commission's expertise does not surpass that of the judiciary.²⁷⁸

The Commission is a helpful tool that is ultimately undeserving of what is functionally *Chevron* deference. The Commission's expertise both overlaps with, and falls short of, the expertise of the courts.²⁷⁹ The deference to the Commission is thus not justified under traditional administrative law and is in fact dangerous when applied in the criminal law setting. This next Section highlights the dangers of allowing an agency to act in an area that traditionally belonged to the common law

274. *Id.* at 254–56.

275. Bernard W. Bell, *Using Statutory Interpretation to Improve the Legislative Process: Can It Be Done in the Post-Chevron Era?*, 13 J.L. & POL. 105, 144 (1997) (“[O]n issues that recur in a number of subject areas or that involve the relationship of one area to a broader range of law, judges, as generalists, may occupy a uniquely advantageous position.”).

276. While it is true that three of the six members of the Commission are acting judges, this means that, at most, the Commission has the same expertise as any other federal judge. However, because the Commission deals in the abstract, its lack of facts probably makes it less knowledgeable at sentencing defendants than the average federal district judge.

277. The judges who protested the original Guidelines argued that they were already experts in theories of punishment and sentencing defendants. The judiciary had been the master of both theories of punishment and sentencing defendants for almost a century before the SRA was passed. *See* Gertner, *supra* note 36.

278. *See* Collins & Evans, *supra* note 267.

279. *Id.*

and where the Government acts at its fullest power.

B. Chevron Is Inapplicable to Criminal Law and Best Serves Civil Cases

Simmering below the surface of recent scholarship and Supreme Court precedent is a fundamental concern with administrative involvement with criminal law.²⁸⁰ This line of caselaw seems to be motivated by one compelling observation: criminal law is different. “Because of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community,” special attention should be given when an institution besides the judiciary is involved in determining criminal penalties.²⁸¹ In short, looking at the aspects of criminal law that are unique, Article III judges should impose sentences, not an independent Commission.

Scholars and judges have recently questioned whether administrative agencies should be involved in defining criminal conduct.²⁸² The majority of this critique has come through criticism of agency interpretation of so-called “hybrid statutes.”²⁸³ Hybrid statutes regulate conduct through both criminal and civil penalties.²⁸⁴ One of the earliest examples of a hybrid statute is the Sherman Act.²⁸⁵ That Act creates criminal penalties in sections 1 and 2, but allows for private civil actions in section 15. Prominent agencies like the FTC²⁸⁶ and EPA²⁸⁷ exercise jurisdiction over these so-called hybrid statutes.

Scholars argue that *Chevron* deference should not be

280. See, e.g., Jonathan Marx, *How to Construe a Hybrid Statute*, 93 VA. L. REV. 235, 267 (2007) (describing path-dependence and the contexts in which courts should apply the rule of lenity in a civil context); Sanford N. Greenberg, *Who Says It's a Crime?: Chevron Deference to Agency Interpretations of Regulatory Statutes* 58 U. PITT. L. REV. 1 (1996).

281. *United States v. Bass*, 404 U.S. 336, 348 (1971) (discussing the rule of lenity).

282. See, e.g., Greenberg, *supra* note 280; *United States v. Thompson/Center Arms Co.*, 504 U.S. 505 (1992).

283. See Marx, *supra* note 280, at 267.

284. The Sherman Act is a classic example of a hybrid statute. See, e.g., 15 U.S.C. §§ 1–37(a) (2012) (establishing criminal penalties for violations of §§ 1–3, and civil liability for violations of § 15).

285. 15 U.S.C. §§ 1–2, 15.

286. See 15 U.S.C. §§ 1–3.

287. See 33 U.S.C. § 1319(c)(1) (2012).

applied to agency interpretation of the criminal aspects of these hybrid statutes because criminal law is fundamentally different. Sanford Greenberg, for example, argues that the doctrine of lenity²⁸⁸ and *Chevron* deference are incompatible, and that this incongruity requires that a criminal liability exception be read into *Chevron*.²⁸⁹ In his article, Mr. Greenberg argues that the rule of lenity conflicts with *Chevron* deference because agencies, unlike courts, are not bound to interpret criminal penalties in hybrid statutes narrowly.²⁹⁰ He maintains that the freedom of agencies to interpret administrative crimes broadly undercuts the lenity doctrine's three-part justification of legislative supremacy, fair warning, and separation of powers.²⁹¹

While the Supreme Court has not squarely confronted a conflict between an agency interpretation and the rule of lenity, the Court at least has expressed concern over hybrid statutes intruding on the values furthered by the lenity doctrine.²⁹² Beginning in 1992, the Supreme Court announced a line of cases that construed civil statutes narrowly because of their potential criminal implications.²⁹³ Extrapolating from these cases, one can reasonably conclude that the Supreme Court also recognizes a distinction between criminal and civil law that undercuts the de facto *Chevron* deference operationalized by the presumption of reasonableness.

288. Under the doctrine of lenity, "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *United States v. Bass*, 404 U.S. 336, 347–48 (1971) (quoting *Rewis v. United States*, 401 U.S. 808, 812 (1971)).

289. Greenberg, *supra* note 280, at 14–15; *see also* Cass R. Sunstein, *Nondelegation Canons* 18, at 2115–16 (John M. Olin Program in Law and Econ., Working Paper No. 82, 1999) (suggesting that principles of statutory interpretation, including the rule of lenity, should not be overcome by agency interpretation).

290. Greenberg, *supra* note 280, at 15.

291. *Id.* at 16. For Mr. Greenberg's full argument concerning the rule of lenity see *id.* at 15–21.

292. *See, e.g.*, *United States v. Thompson/Center Arms Co.*, 504 U.S. 505, 517–18 (1992). I find the lenity doctrine particularly interesting because the doctrine grounds itself in constitutional policy, rather than specific textual clauses. *See* Sunstein, *supra* note 289; *United States v. Brown*, 333 U.S. 18, 25–26 (1948) ("Lenity is not an inexorable command."). *Chevron* is somewhat similar in this respect. Considering how these two doctrines play together, attention should be paid to the competing values at stake, and purposeful reasoning should resolve conflicts. Here, *Chevron*'s interest in good, efficient government and expert-driven policy must bow to fair notice and legislative supremacy.

293. *See Thompson/Center Arms Co.*, 504 U.S. at 517–18; *Leocal v. Ashcroft*, 543 U.S. 1, 11–12 n.8 (2004); *Clark v. Martinez*, 543 U.S. 371, 380 (2005).

This line of cases began in *United States v. Thompson/Center Arms Co.*²⁹⁴ There, while recognizing that it was construing a tax provision in a civil context,²⁹⁵ the Court nevertheless applied the rule of lenity.²⁹⁶ It explained that the definition of firearm in this context could have potential criminal consequences for certain parties.²⁹⁷ Recognizing this possibility, the Court held that it was proper “to apply the rule of lenity and resolve the ambiguity in Thompson/Center’s favor.”²⁹⁸

Twelve years later, the Court affirmed this reasoning through two cases involving civil application of a statute that could have criminal repercussions.²⁹⁹ In *Leocal v. Ashcroft*, the Court issued dicta that the rule of lenity would limit the statutory definition of a “crime of violence” in a deportation context because of the possible criminal applications.³⁰⁰ In *Clark v. Martinez*, the Court delivered further dicta that, in reference to laws with possible criminal application, “the lowest common denominator, as it were, must govern.”³⁰¹

The Court’s application of the rule of lenity to civil statutes with criminal implications, and the academy’s concern of *Chevron*’s ability to frustrate the purpose of that rule, suggests that the rule of lenity reasonably denies agencies the ability to interpret criminal statutes. This was the position of Justices Scalia and Thomas when they dissented from a denial of certiorari in 2014.³⁰² In that case, the Second Circuit deferred

294. 504 U.S. 505 (1992).

295. *Thompson/Center* concerned section 5821 of the National Firearms Act. It taxed anyone making a “firearm.” The Bureau of Alcohol, Tobacco and Firearms imposed this tax on Thomson/Center for manufacturing certain guns. *Id.* at 506–09.

296. *Id.* at 517.

297. *Id.* (citing various tax crimes).

298. *Id.*

299. *Leocal v. Ashcroft*, 543 U.S. 1, 11–12 n.8 (2004) (holding that lenity must apply to a deportation statute that had criminal implications as well); *Clark v. Martinez*, 543 U.S. 371, 380 (2005) (“It is not unusual to give a statute’s ambiguous language a limiting construction called for by one of the statute’s applications, even though other of the statute’s applications, standing alone, would not support the same limitation. The lowest common denominator, as it were, must govern.”).

300. *Leocal*, 543 U.S. at 12 n.8.

301. *Martinez*, 543 U.S. at 380.

302. *Whitman v. United States*, 135 S. Ct. 352, 353–54 (2014) (Scalia, J., dissenting from denial of certiorari). The Court recently had the opportunity to consider Justice Scalia’s argument. However, it did not do much with it. The Court used only a few lines to find that neither *Chevron* nor lenity applied to the

to the Securities and Exchange Commission's interpretation of a provision permitting criminal prosecution.³⁰³ Justice Scalia strongly objected to the Second Circuit's decision. He was adamant that "[a] court owes no deference to the prosecution's interpretation of a criminal law," and that "[c]riminal statutes are for the courts, not the Government, to construe."³⁰⁴ Citing to the *Thompson/Center* line of cases, Justice Scalia argued that the rule of lenity should control on hybrid statutes.³⁰⁵ He admonished the Second Circuit's holding as replacing "the doctrine of lenity with a doctrine of severity."³⁰⁶

While all of this concern over the (lack of) application of the doctrine of lenity arises in the context of agencies *interpreting* criminal statutes, the concerns voiced by scholars, the Court, and Justices Scalia and Thomas ground themselves in a deeper discomfort with the government's involvement in determining criminal liability, and—relevant here—criminal penalties. This discomfort seems to arise out of a belief that criminal law is fundamentally different from civil law—the usual context for administrative agencies. Examining the Sentencing Commission through the lens of lenity explains this fundamental belief of the courts and reveals the problematic nature of de facto deference.

The rule of lenity is grounded in two main interests: legislative supremacy and fair notice.³⁰⁷ These concerns are equally valid in the context of the Sentencing Commission, where a government agency sets sentencing policy. These similarities show that the de facto deference accorded to the Commission is unjustified.

Board of Immigration Appeal's interpretation of "aggravated felony." *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562, 1572 (2017).

303. *Whitman*, 135 S. Ct. at 353.

304. *Id.* at 352 (internal quotations omitted).

305. *Id.* at 353.

306. *Id.* (citing *Crandon v. United States*, 494 U.S. 152 (1990) (Scalia, J., concurring in judgment)).

307. *Esquivel-Quintana v. Lynch*, 810 F.3d 1019, 1023 (6th Cir. 2016). While Mr. Greenburg argues there is an additional justification for lenity based on separation of powers, that argument tends to overlap with justifications based on legislative supremacy. *See* Greenberg, *supra* 280, at 15–16. While I recognize the possibility of such a distinction, for the purposes of this Comment, any notion of legislative supremacy necessarily includes notions of separation of powers.

1. Concerns for Legislative Supremacy Counsel Against the Presumption of Reasonableness

A criminal penalty “represents the ultimate governmental intrusion on individual freedom, together with a sense of community approbation not present in other government action.”³⁰⁸ On this basis, the rule of lenity requires strict construction.³⁰⁹ Beyond strict construction, however, because criminal law is the height of governmental intrusion, lenity commands that the legislature must be the body to define criminal conduct.³¹⁰

By granting *de facto* deference to the Commission, the courts undermine the rule of lenity by recognizing and deferring to a non-Congressional body in the criminal context.³¹¹ When the state acts at its fullest capacity, the democratic systems are the most necessary. To be sure, a permissive definition of legislative supremacy views it as a grant of power to the legislature to act and delegate however it wills.³¹² This is the prevailing view in the civil context.³¹³ But, in the context of lenity, legislative supremacy is a duty, not only to announce general policy, but to actually write the law that will take away that last great individual right to be free.³¹⁴

308. Greenberg, *supra* note 280, at 16 (citing Mark D. Alexander, *Increased Judicial Scrutiny for the Administrative Crime*, 77 CORNELL L. REV. 612, 644–46 (1992)).

309. See Brian Slocum, *RICO and the Legislative Supremacy Approach to Federal Criminal Lawmaking*, 31 LOY. U. CHI. L.J. 639, 662–67 (2000) (explaining the rule of lenity).

310. See *id.*; *United States v. Bass*, 404 U.S. 336, 348 (1971) (“[B]ecause of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity.”).

311. *Bass*, 404 U.S. at 348.

312. This seems to be the view taken by the original *Chevron* Court. The Court’s creation of deference was heavily grounded in a view that Congress delegated the policy-making power to the EPA. See *Chevron U.S.A., Inc. v. Nat. Res. Defense Council, Inc.*, 467 U.S. 837, 843–44 (1984).

313. See *id.*

314. Elliot Greenfield, *A Lenity Exception to Chevron Deference*, 58 BAYLOR L. REV. 1, 54 (2006) (“[T]he rule of lenity is a prime example of a non-delegation canon.”); see also Sunstein, *supra* note 289 (“Criminal law must be a product of a clear judgment on Congress’s part. Where no clear judgment has been made, the statute will not apply merely because it is plausibly interpreted, by courts or enforcement, to fit the case at hand. The rule of lenity is inspired by the due process constraint on conviction pursuant to open-ended or vague statutes. While

The rule's emphasis on legislative supremacy counsels against deference to the Sentencing Commission. True, because the Commission does not define criminal conduct *per se*, it might seem a poor candidate for the rule's application.³¹⁵ Nevertheless, defining criminal conduct necessarily includes delineating punishment.³¹⁶ It makes no substantive difference if the Commission is defining the elements of the crime or the amount of punishment. Both are equal steps to the same end.³¹⁷ Congress's grant to the Commission therefore implicates the rule of lenity. To be sure, Congress has every right to delegate "at least some authority that it could exercise itself."³¹⁸ But the rule of lenity's concern for legislative supremacy suggests that, where Congress delegates power to define criminal punishment, courts should exercise caution.

An abstract grant of power to an agency, while valid in the civil context, raises concerns when the setting is criminal.³¹⁹ Necessary to the act of creating an agency like the Commission

it is not itself a constitutional mandate, it is rooted in a constitutional principle, and serves as a time-honored nondelegation canon.").

315. However, the distinction between sentencing facts and elements has always been tortured. *See* *Apprendi v. New Jersey*, 530 U.S. 466 (2000) (explaining that "sentencing facts" must still be proven to the jury beyond a reasonable doubt). While the Commission does not create penal law in the traditional sense, the Commission still identifies conduct relevant to punishment. 28 U.S.C. § 994(c)(2)–(3) (2012) (requiring the Sentencing Commission to consider mitigators and aggravators, and the amount of damage the crime caused). Pursuant to its duties, the Commission identifies acts that can bear on the length of a sentence. *See, e.g.*, GUIDELINES MANUAL, *supra* note 80, § 2G2.1 (raising the presumptive sentence based on whether the offense involved contact with a child or the use of a computer). To the extent that the Guidelines punish specific conduct, the rule of lenity's interest in legislative supremacy is triggered. However, as this Section argues, the rule of lenity's pull is stronger than that, and in fact counsels that the Guidelines not be given legal deference on appeal.

316. The whole purpose of criminal law is to define and deter culpable, antisocial conduct. The simple act of defining an act as illegal cannot achieve the purposes of criminal law. The state must create some deterrence. The definition of a crime, therefore, cannot exist without the definition of a punishment.

317. *See, e.g., Apprendi*, 530 U.S. 482 (explaining the link between verdict and sentence, and applying a functional approach to determine which facts must be found by a jury). *See also* *United States v. Bass*, 404 U.S. 336, 348 (1971) ("[C]riminal *punishment* usually represents the moral condemnation of the community.") (emphasis added).

318. *Loving v. United States*, 517 U.S. 748, 758 (1996). As discussed previously, this Comment does not attempt to revive a debate about the nondelegation doctrine. *But see* *United States v. Grundy*, 695 F. App'x 639 (2d Cir. 2017), *cert granted*, 2018 WL 1143828 (U.S. Mar. 5, 2018) (No. 17-6086).

319. *Whitman v. United States*, 135 S. Ct. 352, 353–54 (2014) (Scalia, J., dissenting from denial of certiorari); *Bass*, 404 U.S. 336, 348 (1971).

is a relinquishment of legislative power. Congress could have created legislation mirroring the Sentencing Guidelines, but has instead given that power to the Commission. In the criminal context, this relinquishment of power is troubling. If a body is going to prescribe general rules delineating deprivations of liberty, it should be Congress, not the Commission.

Finally, the presumption's permissive approach to legislative supremacy is problematic regardless of any political accountability the Sentencing Commission (and its commissioners) may or may not have.³²⁰ As discussed in Part II, the *Chevron* Court's deference to administrative agencies is in part justified because an agency is more politically accountable than a court.³²¹ True enough, but agencies are also certainly less politically accountable than Congress.³²² Because the weighty decision to deprive a person of liberty is so serious, lenity requires that if a sentencing scheme is to be adopted, Congress, not an agency, should be the one to pass it. This is true regardless of how politically accountable the agency at issue is.

There is, however, a counterargument. Lenity's legislative-

320. As an independent agency, the Commission receives for cause protections. Independent agencies are an interesting aspect of the regulatory state, and beyond the scope of this Comment. It is sufficient to say that there is some concern about the political accountability of these agencies. *See* PHH Corp. v. Consumer Fin. Prot. Bureau, 839 F.3d 1, 25–29 (2016) (discussing the CFPB and independent agencies). Whether these agencies are in fact politically accountable, however, is somewhat beside the point. While political accountability is important when considering other agencies, because the Commission deals with criminal law, different rules apply.

321. *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 865–66 (1984) (“[A]n agency to which Congress has delegated policy-making responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration’s views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices – resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.”).

322. No agency head is directly selected by the people. Members of Congress are. Structurally, therefore, they are more politically accountable. A recent study further shows how the premise that agencies are politically accountable is not always true. *See generally* David E. Lewis & Abby K. Wood, *Judicial Deference and Agency Accountability* (July 2011) (unpublished manuscript), <https://my.vanderbilt.edu/davidlewis/files/2011/12/lewis-and-wood-paper-v.9.pdf> [<https://perma.cc/2HXZ-DKRD>].

supremacy concerns unusually focus on the body defining the elements of a crime.³²³ Because the Sentencing Commission deals with punishment—rather than the creation—of substantive crimes, one could argue that lenity is inapplicable, that it is better to have an agency define sentences because at least the agency is more accountable than the courts.

However, a court determining punishment in an individual case is different from an agency determining a scheme of punishment for all cases. A court acting in an individual case is fulfilling its constitutional duty: deciding the single case and controversy in front of it. Determining an individual sentence is not a legislative task, but a judicial one.³²⁴ Creating a Guidelines scheme, however, is legislative. The deference enshrined in the presumption of reasonableness gives legal effect to a legislative-type scheme created by an agency. Lenity requires that such generally applicable schemes only receive legal effect if passed by Congress.³²⁵

2. Fair Notice Counsels Against De Facto *Chevron* Deference

Separate from these structural concerns, de facto deference to the Commission additionally undermines the due process interest in providing fair notice of what conduct is criminal. Again, because criminal law is different, the rule of lenity reads criminal statutes narrowly so that a criminal defendant will only be convicted of conduct that the law clearly outlaws.³²⁶ The Guidelines can serve this interest by giving criminal defendants facing impending prosecution an idea of the sentence they will likely receive upon plea or conviction. However, in a broader and deeper sense, the Guidelines actually provide less fair notice to criminal defendants. The statutory grant of power to the Commission is vague and

323. *Bass*, 404 U.S. at 348.

324. See U.S. CONST. art. III, § 2, cl. 1 (“The judicial power shall extend to all cases, in law and equity, arising under this Constitution.”); *Aubin v. United States*, 943 F.Supp. 126, 128 (D. Mass. 1996) (“[T]he imposition of a sentence . . . is a core judicial function.”).

325. *Bass*, 404 U.S. at 348.

326. *Id.* (“[A] fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so fair as possible the line should be clear.”) (quoting *McBoyle v. United States*, 283 U.S. 25, 27 (1931)).

broad.³²⁷ While the Supreme Court has forbidden retroactive application of the Guidelines,³²⁸ the Commission's broad authority to issue and revise its Guidelines still creates a notice problem.³²⁹ At this moment, any limits to the Commission's ability to define new factors that increase punishment generally rest on its own ingenuity and discretion.³³⁰ This discretion puts criminal defendants in a position where significant deprivations of liberty turn on the Commission's exercise of its broad mandate. Because criminal defendants cannot guess how the Commission's policy will change from year to year, because the Commission does not follow a traditional legislative process, and because the Commission has absolute power to change the Guidelines as they wish, criminal defendants lack fair notice of what makes conduct more or less culpable.

Looking at the Guidelines through the lens of lenity explains the discomfort courts rightfully have in applying traditional administrative law in the criminal setting.³³¹ Criminal law is different because of its potential to deprive people of their liberty. And because of that difference, courts must be exceedingly cautious that the concerns unique to criminal sanctions are properly respected. Using the rule of lenity is a helpful lens that highlights how *de facto* deference accorded to the Commission creates deep structural and due process concerns.

The rule of lenity recognizes that the judiciary must always be aware of these structural and due process concerns, even when there is no direct violation of the Constitution.³³²

327. See 28 U.S.C. § 994(b)(1) (2012) (charging the Commission with creating "guidelines" that "establish a sentencing range that is consistent with all pertinent provisions of title 18").

328. *Peugh v. United States*, 569 U.S. 530, 537–39 (2013) (finding retroactive application would violate the *ex post facto* clause).

329. See 28 U.S.C. § 994 (2012). While it is true that ignorance of the law is no excuse, one cannot impute knowledge of a law that does not exist to a criminal defendant at the time of her criminal act.

330. Admittedly, the same can be said about Congress. However, an interest in promoting the separation of powers, especially in criminal law, counsels against the Commission's broad power to define punishment and still receive appellate deference.

331. *Whitman v. United States*, 135 S. Ct. 352, 353–54 (2014) (Scalia, J., dissenting from denial of certiorari).

332. *United States v. Brown*, 333 U.S. 18, 25–26 (1948) (Lenity "is not an inexorable command."); see also Sunstein *supra* note 289, at 332 ("The rule of lenity is inspired by the due process constraint on conviction pursuant to open-

Earlier, this Comment recognized that criminal law and administrative law interact awkwardly.³³³ Administrative law exists in part because of the pragmatic benefit, the efficiencies, and the cost-effective governance that agencies bring to democracy. But criminal law does not welcome the kinds of benefits that agencies like the Sentencing Commission bring. Because the penalties are so heavy, and the government's power so heightened, the criminal system erects substantial hurdles for criminal punishment.³³⁴ Efficiencies should certainly be welcomed, but should not be used to remove these fundamental barriers. Moreover, when such harsh punishment is at issue, each individual has a right to the kind of notice protections provided by the legislative process. The presumption's deference to a non-legislative body, and the issues of notice created by the broad discretion of the Commission require that the courts not grant the Commission *de facto* deference.

The appellate presumption of reasonableness is unjustified because it represents an incorrect use of agency deference. The Commission's expertise overlaps with, and is less than, the judiciary's.³³⁵ Moreover, there are a host of particularities unique to criminal sentencing that makes *de facto Chevron* deference inoperable. These considerations require that courts no longer defer to the Guidelines. The next Section examines what could replace this *de facto* deference.

IV. A NEW STANDARD OF REVIEW

Moving forward, appellate courts should reexamine their approach to determining whether within-Guidelines sentences are reasonable. Instead of a presumption of reasonableness, appellate courts should engage in a more searching analysis. First and foremost, courts should not treat the Guidelines as presumptively reasonable, or give any deference to the Commission. The approach should recognize the special concerns associated with criminal sentencing and put more

ended or vague statutes. While it is not itself a constitutional mandate, it is rooted in a constitutional principle, and serves as a time-honored nondelegation canon.”).

333. See *supra* Part II.

334. See, e.g., U.S. CONST. amend. VI; see also, e.g., FED. R. APP. P. 4(b) (granting an appeal of right to criminal defendants).

335. See *supra* Section III.A.

focus on the section 3553 factors. While this step may not solve the various difficulties appellate courts have had in defining substantive reasonableness, this review will at least remove the unjustified deference to the Commission,³³⁶ focus appellate courts on providing sentencing courts with guidance, and aid in proper execution of section 3553.

At the outset, one should note that several circuits are not far off from this more thorough standard of review. Often the healthiest sentencing review comes from circuits that have not explicitly adopted the presumption of reasonableness.³³⁷ Perhaps the best of that group is the Second Circuit. As discussed previously in Part II, in *United States v. Dorvee*, the reviewing court engaged in a wholesome review of the Guidelines.³³⁸ The court held that, because the child pornography guideline did not exemplify the Commission's exercise of its characteristic institutional role, a sentence based on those Guidelines was unreasonable.³³⁹ The willingness to question the Commission represents a positive step toward a workable test in keeping with the law.

Questioning the Commission, however, is not enough. Deference to the Sentencing Commission should be absent from appellate review. Appellate courts should refocus their review on the district court and review the sentences for substantive fairness. The best way to achieve this goal is for appellate courts to redefine their standard of review for federal sentences.

A drastic change is not necessary to remove deference to the Commission. Appellate courts simply should redefine the

336. D. Michael Fisher, *Still in Balance? Federal District Court Discretion and Appellate Review Six Years After Booker*, 49 DUQ. L. REV. 641, 650 (2011) (“Despite the Supreme Court’s best efforts in *Booker*, *Rita*, *Gall*, and *Kimbrough* to clarify the scope and definition of reasonableness review, the courts of appeal remain unclear as to the exact test to be applied when conducting substantive reasonableness review.”).

337. *United States v. Jimenez-Beltre*, 440 F.3d 514, 515 n.2 (1st Cir. 2006) (fearing the “presumption language” would be too controlling on district courts); *United States v. Fernandez*, 443 F.3d 19, 27 (2d Cir. 2006) (“We therefore decline to establish any presumption, rebuttable or otherwise, that a Guidelines sentence is reasonable.”); *United States v. Carty* 520 F.3d 984, 994 (9th Cir. 2008) (“We recognize that a Guidelines sentence ‘will usually be reasonable,’ and this done, we see no particular need for an appellate presumption that says so.”) (citation omitted); *United States v. Talley* 431 F.3d 784, 788 (11th Cir. 2005) (“[O]rdinarily we would expect a sentence within the Guidelines range to be reasonable.”).

338. 616 F.3d 174, 183 (2d Cir. 2010).

339. *Id.* at 188.

two-tiered approach taken by appellate courts when engaging in federal sentencing review. They should continue to divide their sentencing review into two distinct parts, beginning with a procedural review³⁴⁰ and followed by a substantive review. No change to the procedural test is necessary.³⁴¹ The courts simply must remove the presumption of reasonableness from the substantive review of sentences.

Removing the appellate presumption of reasonableness is supported by both caselaw and the legislative history of the SRA. It better reflects *Booker*'s remedial opinion and the SRA.³⁴² In *Booker*, the Court held that the Guidelines would still continue to play a role in sentencing.³⁴³ However, the Court only mentioned the Guidelines' role in terms of district courts.³⁴⁴ The Court mentioned no such requirement when discussing the new appellate standard of reasonableness.³⁴⁵ In fact, by excising section 3742(e),³⁴⁶ the Court removed any statutory requirement for appellate courts to consider whether a sentence fell within the Guidelines.³⁴⁷ An appellate test that ignores the applicability of the Guidelines better accords with *Booker* (and the text of the post-*Booker* SRA) and solves the deference problems raised by an appellate presumption of

340. Under *Gall v. United States*, appellate courts must follow a two-tiered standard of review. The first step is to review the district court's procedure. Under this procedural review, appellate courts ensure that the district court properly calculated and considered the Guidelines. If the court is satisfied that the procedural requirements of the SRA were met, it then engages in a substantive review of the actual sentence imposed. It is under this aspect of review where the court reviews for unreasonableness and where the appellate presumption of reasonableness guides appellate courts. See *Gall v. United States*, 552 U.S. 38, 51 (2007); see also *supra* note 124 and accompanying text. This standard is borrowed from the appellate standard for motion for a new trial after a jury verdict or intentional torts by state actors.

341. Procedural review is important and cannot be changed. There is a statutory mandate in the SRA that certain procedures should be followed by district courts. See *Gall*, 552 U.S. at 51.

342. The appellate presumption of reasonableness does not represent the most well-reasoned standard of review. That is to say, when judges step outside of "saying what the law is," and try to write new law, they often fail. The scramble to define the bounds of "unreasonableness" (another instance of judges writing law (see *United States v. Booker*, 543 U.S. 220, 303 (2005) (Scalia, J., dissenting))) led to some hastened decisions. This new standard erases those mistakes.

343. *Booker*, 543 U.S. at 264.

344. See *id.*

345. *Id.* at 261–62.

346. *Id.*

347. 18 U.S.C. § 3742(e)(3)(B) (2012). The excised portion pertinent to the sentencing phase retained its reference to the Sentencing Guidelines.

reasonableness for within-Guidelines sentences.

This test would also track a significant strain in the SRA's legislative history. At the time of its creation, many congresspersons believed that the Commission would simply aid judges in making better, more rational sentencing law.³⁴⁸ These congressmen and women did not expect the Guidelines to carry binding force.³⁴⁹ Rather, many proponents of the SRA envisioned the Commission's role as research oriented, policy driven, and above all, advisory.³⁵⁰ The role of the Commission that this Comment envisions reflects this view of the Guidelines' proper place.

Finally, it should be noted that removing the appellate presumption of reasonableness will not harm Congress's goal of reducing "unwarranted sentencing disparities."³⁵¹ Judges are still required to consider possible sentencing disparities in imposing punishments.³⁵² In addition, the Commission will continue its work, and sentencing judges are required to reference those Guidelines as well.³⁵³ While increased appellate discretion may lead to some discrepancy between circuits, discrepancy is not always a bad thing. Most likely these discrepancies will reflect the area and culture in which a particular court resides, and should lead to a healthy debate in the federal judiciary about how the courts should approach crime and punishment. The net effect would be increased scrutiny of sentences and, overall, a fairer sentencing system.

It may be enough to simply recognize that the appellate presumption of reasonableness is unjustified, should be removed, and leave it at that. However, while removing the presumption would be a sufficient remedy, because the presumption occupies such a large place in sentencing review, the questions of what is to replace the presumption of reasonableness merits some discussion.

While the Supreme Court has held that all sentences—whether within the Guidelines or not—should be reviewed for an "abuse of discretion,"³⁵⁴ the circuits are substantially split

348. See Gertner, *supra* note 36, at 530.

349. *Id.*

350. *Id.*

351. 18 U.S.C. § 3553(a)(6) (2012).

352. *Id.*

353. 18 U.S.C. § 3553(a)(4).

354. *Id.*

on what this means, especially in reviewing for substantive unreasonableness.³⁵⁵ The Fourth Circuit, for example, reviews a sentence outside of the Guidelines' range to determine "whether the sentencing court acted reasonably both with respect to its decision to impose such a sentence and with respect to the extent of the divergence from the sentencing range."³⁵⁶ The Second Circuit, on the other hand, applies its abuse of discretion standard by reviewing sentences for punishments that are manifestly unjust or shock the conscience.³⁵⁷

This split exists in part because of the presumption of reasonableness. As discussed in Part I, under the presumption, the substantive review of within-Guidelines sentences is exceedingly rote.³⁵⁸ However, for sentences falling outside of the Guidelines, courts apply a more searching analysis of the substantive reasonableness of the sentence imposed.³⁵⁹ The presumption thus divides sentencing review standards between within-Guidelines and outside-Guidelines sentences. The Fourth Circuit's substantive abuse of discretion standard, for example, only applies to outside-Guidelines review.³⁶⁰ Abuse of discretion in that circuit necessarily examines the extent a sentence "diverg[es] from the guideline's range" because analysis is only required where the district court diverges from the Sentencing Commission.³⁶¹

Instead, courts should follow an abuse of discretion standard that engages the substantive fairness of the sentence in all cases. Again, the Second Circuit's approach is instructive. In *United States v. Rigas*, a unanimous bench upheld a within-Guidelines sentence imposed on Rigas for various white collar

355. See Note, *More Than a Formality: The Case for Meaningful Substantive Reasonableness Review*, 127 HARV. L. REV. 951, 959 (2014). Delving into this split is beyond the scope of this Comment. However, it should be noted that a happy result of the proposed test is that it would probably serve to even the circuits' approaches to sentencing review.

356. *United States v. Strayhorn*, 591 F. App'x. 225, 226 (4th Cir. 2015).

357. *United States v. Rigas*, 583 F.3d 108, 123 (2d Cir. 2009) (reviewing the sentence to determine if the punishment is "shockingly high, shockingly low, or otherwise unsupportable as a matter of law").

358. See, e.g., *United States v. Franklin*, 785 F.3d 1365 (10th Cir. 2015).

359. See *supra* Part II.

360. For within-Guidelines sentences, the Fourth Circuit generally relies on the presumption of reasonableness. *Strayhorn*, 591 F. App'x. at 225.

361. *Id.*

crimes.³⁶² Its approach did not completely ignore the sentence's within-Guidelines status.³⁶³ However, as in *Dorvee*,³⁶⁴ the court considered the substantive fairness of the sentence.³⁶⁵ The court likened substantive unreasonableness to the “shock to conscience” standard applied to intentional torts by state actors or the “manifest injustice” standard applied to the review of jury verdicts.³⁶⁶ It noted that all three standards are deferential to district courts, highly contextual, and dependent on the “informed intuition” of the appellate panel applying these standards.³⁶⁷ It concluded substantive unreasonableness is a “backstop” where courts should overturn a sentence if it would “damage the administration of justice because the sentence was shockingly high, shockingly low, or otherwise unsupportable as a matter of law.”³⁶⁸

The Second Circuit's approach is a strong starting point for developing a workable standard of review. However, it is perhaps too burdensome on litigants and the development of a substantive sentencing review doctrine. District courts will sometimes impose unreasonable sentences, and “[c]ircuit courts exist to correct such mistakes when they occur.”³⁶⁹ The correct standard of review for these errors depends on how scrutinizing the appellate court should be: should the court be invasive and active, or deferential and passive?³⁷⁰ The answer to this question generally depends on the distinct capacities of the different courts³⁷¹ and the substantive goals to be served by appellate review.³⁷² As sentencing is a matter of

362. *Rigas*, 583 F.3d at 108.

363. *Id.*

364. 616 F.3d 174, 183 (2d Cir. 2010).

365. *Rigas*, 583 F.3d at 108.

366. *Id.* at 122–23 (referring also to the “manifest injustice” standard).

367. *Id.*

368. *Id.*

369. *Rita v. United States*, 551 U.S. 338, 354 (2007).

370. This is not a novel question. Generally, appellate courts follow three different tiers of standards of review. Questions of law are reviewed de novo, questions of fact are reviewed for clear error, and matters of discretion are reviewed for an abuse of discretion. *Highmark Inc. v. Allencare Health Mgmt. Sys., Inc.*, 134 S. Ct. 1744, 1748 (2014).

371. See Alan Wright, *The Doubtful Omniscience of Appellate Courts*, 41 MINN. L. REV. 751, 778 (1957) (discussing the accepted premise that district courts excel at making factual judgements); *Salve Regina Coll. v. Russell*, 499 U.S. 225, 231–32 (1991) (explaining that appellate courts are particularly well-suited to decide questions of law).

372. *Russell*, 499 U.S. at 231–32 (“Independent appellate review best serves

discretion,³⁷³ there should certainly be some element of deference to the district court in the correct standard of review.³⁷⁴ But discretionary decisions are also not a purely factual matter where district courts' particularities make them the ideal decider and where district courts receive the most deferential review.³⁷⁵ There are doctrinal and legal matters at issue in a sentencing decision that an appellate court is well-suited to decide.³⁷⁶ It is a mixed question of law and fact.³⁷⁷ In adopting an abuse of discretion standard, *Gall* seemed to honor this fact.³⁷⁸ The abuse of discretion standard announced in *Gall* thus grants more power to appellate courts to overturn district courts than if it were reviewing a pure fact issue.³⁷⁹ The critical question becomes defining the contours of that power in the context of sentencing review.³⁸⁰

While the Second Circuit has defined appellate review narrowly, the goals of the SRA and the remedial opinion in *Booker* suggest a more intrusive version of abuse of discretion review. The SRA placed some of the onus on maintaining

the dual goals of doctrinal coherence and economy of judicial administration.”).

373. *Gall v. United States*, 552 U.S. 38 (2007).

374. *Highmark Inc.*, 134 S.Ct. 1744, 1748 (explaining that the discretionary decision whether a case was “exceptional” under the Patent Act’s fee shifting provision should be with the district court because “the district court is ‘better positioned’ to decide whether a case is exceptional”).

375. See Wright, *supra* note 371.

376. See *Russell*, 499 U.S. at 231–32 (describing the appellate court as the ideal body to serve the goals of uniformity and judicial economy).

377. *Pullman-Standard v. Swint*, 456 U.S. 273, 289 n.19 (1982) (explaining that a mixed question of law and fact is one where “the historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the [] standard”). Sentencing decisions are controlled by statutory and constitutional provisions, and involve “admitted or established” historical facts. See *id.* Like the *Miranda* caselaw, one could see development of a common law that would aid judges in determining a sentence. See Thompson Keohane, *Miranda in Custody Determinations: Mixed Questions of Fact and Law*, 62 MO. L. REV. 211, 224 (1997) (“As a result of *Thompson*, federal courts will be able to define the ‘in custody’ aspect of *Miranda*, which should foster uniformity in the application of *Miranda* nationwide . . .”).

378. *Gall*, 552 U.S. at 57–59.

379. See *Pullman-Standard*, 456 U.S. at 284–85 n.14.

380. There is no one version of abuse of discretion. Courts apply different versions of that standard in different contexts. Carrisa B. Hessick & F. Andrew Hessick, *Appellate Review of Sentencing Decision*, 60 ALA. L. REV. 1, 15 (2008) (discussing the deferential version of abuse of discretion of when to schedule a trial, and the searching version of abuse of discretion applied to the grant of a preliminary injunction).

uniform sentences on the federal judiciary.³⁸¹ The *Booker* remedial majority stressed that, by granting appellate review, they were forwarding Congress's goal of uniformity across the federal judiciary the best they could.³⁸² Appellate courts are the proper bodies to enforce these cross-system checks on district courts.³⁸³ Promoting uniformity requires courts to provide guidance; and, in order to provide guidance, appellate courts must be more scrutinizing of district courts. An active version of an abuse of discretion standard is therefore warranted.

Beyond stressing that appellate review would serve uniformity, *Booker* offers additional evidence that a more searching version of the abuse of discretion standard should be applied to sentencing appeals. *Booker*'s reasonableness standard is an unusual appellate standard. Review for "reasonableness" is not usually applied to review of a district court's decision.³⁸⁴ While *Gall* has interpreted the reasonableness standard as "abuse of discretion,"³⁸⁵ it is noteworthy that Justice Breyer's remedial opinion nowhere mentioned this standard of review.³⁸⁶ Because Breyer and the remedial majority in *Booker* did not expressly call for review for abuse of discretion, and because they were invested in ensuring continued uniformity in federal sentencing, the remedial opinion probably envisioned a robust and searching standard of review.³⁸⁷ "Reasonableness" seems to call for an appellate standard that engages with the sentence.

While reasonableness is poorly defined,³⁸⁸ it is also probably more searching than the Second Circuit's "shock to

381. See 18 U.S.C. § 3742 (2003) (setting out sentencing appeals and permitting appellate action when the district court varied from the Sentencing Guidelines).

382. *United States v. Booker*, 543 U.S. 220, 264 (2005) (noting that retention of sentencing appeals, "by providing appellate review, would tend to iron out sentencing differences [W]e believe congress would have preferred" the retention of sentencing appeals).

383. See *Salve Regina Coll. v. Russell*, 499 U.S. 225, 231–32 (1991).

384. *Id.*

385. *Gall v. United States*, 552 U.S. 38, 49–50 (2007).

386. See *Booker*, 543 U.S. at 260 (setting out unreasonableness standard).

387. *Id.* at 246 (explaining that the advisory system still maintained a "connection between the sentence imposed and the offender's real conduct—a connection important to the increased uniformity of sentencing that Congress intended its Guideline system to achieve").

388. See Craig D. Rust, *When "Reasonableness" Is Not Reasonable*, 26 *TOURO L. REV.* 75, 101 (2010) (summarizing circuit court precedent on substantive review of sentences).

conscious” abuse of discretion standard.³⁸⁹ To be sure, it is probably still a deferential standard of review, but because the original standard announced in *Booker* seemed to expect more from appellate courts than the extreme deference adopted by the Second Circuit, creating a standard that is more scrutinizing of the district court is probably more in line with *Booker*’s original formulation.

Appellate courts should remove the presumption of reasonableness from their jurisprudence and apply *Booker*’s “reasonableness” standard actively. Not only is this scrutinizing standard supported by the SRA and *Booker*, it also creates the happy result of guidance for district courts. By applying an active version of the abuse of discretion standard, appellate courts would still defer. But this deference would be directed wholly at the sentencing court, not the Commission. The standard would require courts to actually engage in the substantive fairness of the punishment. Appellate judges would have to consider the application of the sentencing factors and whether they believed the sentence was fair. Thus, as recognized in *Rigas*, the standard would reach the correct balance of “placing great trust in sentencing courts while still recognizing the [appellate court’s] responsibility to examine the actual sentence itself.”³⁹⁰

CONCLUSION

Consider again the case of Mr. Franklin.³⁹¹ Had the Tenth Circuit foregone the presumption of reasonableness, it could have delivered an opinion grounded in well-reasoned and justified legal doctrine. And, in doing so, it could have facilitated the development of a federal sentencing common law that would serve the goals of uniformity embodied in the SRA. Abdication of the judiciary’s function through the de facto deference embodied in the presumption of reasonableness has made the judiciary less effective. And this harm to the

389. *Booker*’s remedial opinion expected appellate courts—at some level—to apply the section 3553(a) factors. *See Booker*, 543 U.S. at 260 (“Section 3553(a) remains in effect, and sets forth numerous factors that guide sentencing. Those factors in turn will guide appellate courts, as they have in the past, in determining whether a sentence is unreasonable.”).

390. *United States v. Rigas*, 583 F.3d 108, 123 (2d Cir. 2009).

391. *See United States v. Franklin*, 785 F.3d 1365 (10th Cir. 2015).

judiciary's effectiveness is unjustified under traditional administrative law. Perhaps a technocratic bureaucracy is indeed the superior vehicle for defining criminal sentences, but I am not ready to give up on the judiciary just yet.

However, this Comment should not be seen as a repudiation of the premise of agencies, or even judicial agencies for that matter. Agencies are an indispensable aspect of governing in the modern world.³⁹² However, like all things, administrative law requires thoughtful and meaningful checks. While agencies certainly add value, they are creatures of our constitutional system. Agencies like the Commission are only justified when they make sense within that structure. While this Comment does not suggest that the Commission is illegal under this structure,³⁹³ structural concerns do not fall out just because a court determines an agency can exist.

Agency deference is one of the places where these structural concerns are clearest. Here, for example, the Guidelines, a valid exercise of the Commission's delegated power, are nonetheless undeserving of *Chevron* deference because the Commission's expertise largely overlaps, and is less than, traditional Article III judges. Moreover, criminal law is special in a way that counsels against *Chevron* deference. Giving the Guidelines independent and deferential effect (as the presumption of reasonableness does) is simply not justified under *Chevron* and traditional administrative law.

The courts can and should reassert the primacy of the three branches of government—especially the judiciary—by removing deference to the Commission. This outcome is desirable. It ensures a constitutional system where judges continue to decide cases and controversies,³⁹⁴ and legislatures

392. A paradigmatic case is the EPA. *See Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 866–67 (1984). There are simply some issues where educating Congress to the point where it could successfully legislate would prove so time consuming as to be harmful to the nation.

393. This fight has traditionally been waged within the context of the nondelegation doctrine. Cass R. Sunstein, *Is the Clean Air Act Unconstitutional?*, 98 MICH. L. REV. 303, 356 (1999) (“The Place of the Nondelegation Doctrine in Administrative Law.”). The Supreme Court recently granted certiorari on a case raising a nondelegation argument in the context of the sex offender registry. *United States v. Grundy*, 695 F. App'x 639 (2d Cir. 2017), *cert. granted*, 2018 WL 1143828 (U.S. Mar. 5, 2018) (No. 17-6086). Depending on the outcome in that case, opinions like the one in *Mistretta v. United States* may be on less sturdy footing.

394. U.S. CONST. art. III, § 2, cl. 1.

define criminal penalties.³⁹⁵ The Commission's expertise is redundant to Article III courts. When an agency does not add value in the way the *Chevron* Court foresaw, it should not receive deference. To hold otherwise would undercut the Constitution's preference that the three branches of government rule the nation.

Finally, redundant does not mean useless. It does mean that, under *Chevron*, courts should not defer to the Commission. Under the proposed test, the Commission can continue with its work, but as trusted advisors rather than active participants. This role strikes the right balance. It forwards Congress's goals under the SRA, while properly elevates the judiciary, and protects our constitutional system.

395. U.S. CONST. art. I, § 1.