

# MIND THE GAP—WHEN THE GUIDELINES LAG BEHIND STATUTORY AMENDMENTS

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## INTRODUCTION

The United States Sentencing Guidelines (“Guidelines”) were intended to promote “certainty and fairness in meeting the purposes of sentencing”<sup>1</sup> and “reduce[] unwarranted sentence disparities.”<sup>2</sup> For a variety of reasons, the body that promulgates those guidelines, the United States Sentencing Commission (“Commission” or “USSC”) has been functional for only a small portion of the last five years.<sup>3</sup> This Note will examine two recent examples of the uncertainty caused when the Guidelines fail to keep pace with statutory amendments. Part One discusses the history and creation of the United States Sentencing Commission and the United States Sentencing Guidelines and outlines the current issues that face the Commission. Parts Two and Three identify specific instances of sentencing disparities resulting from these issues. Part Four proposes a solution to eliminate future uncertainty.

## I. THE UNITED STATES SENTENCING COMMISSION AND THE GUIDELINES

### *A. History and Creation*

In the 1950s, liberal reformers began raising objections to the then-dominate rehabilitation theory of justice.<sup>4</sup> This idea that punishment should be designed to rehabilitate an offender fell out of favor with legislators.<sup>5</sup> By the 1970s, both sides of the aisle were united in criticizing the inconsistency that resulted from indeterminate prison and parole terms.<sup>6</sup> A rehabilitative system necessarily affords

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1. 18 U.S.C. § 991(b)(1)(B).

2. 28 U.S.C. § 994(f).

3. *Guerrant v. United States*, 595 U.S. \_\_\_, at 2-3 (2022) (Statement of Sotomayor, J.).

4. *United States v. Grayson*, 438 U.S. 41, 47 n.6 (1978) (stating that “[i]ncreasingly there are doubts concerning the validity of earlier, uncritical acceptance of the rehabilitation model.”).

5. James M. Anderson, Jeffrey R. Kling & Kate Stith, *Measuring Interjudge Sentencing Disparity: Before and After the Federal Sentencing Guidelines*, 42 J. L. & ECON. 271, 275 (1999).

6. Jon O. Newman, *The Federal Sentencing Guidelines: A Good Idea Badly Implemented*, 46 HOFSTRA L. REV. 805, 806 (2018) (discussing support for the SRA by Senator Ted Kennedy, who sought to reduce the number and extent of disparities, and Strom Thurmond, who wanted enhanced

wide discretion to the sentencing judge, and later, the parole board.<sup>7</sup> As a consequence of this individualized assessment of each offender, this system resulted in inconsistent and seemingly unfair outcomes where similarly situated offenders served widely divergent sentences.<sup>8</sup> For example, in one study, district court judges were issued identical pre-sentence reports and asked to impose sentences; their sentences outcomes ranged from three years to twenty years in prison.<sup>9</sup> The system also served to insulate trial judge decisions from appellate review.<sup>10</sup> The Sentencing Reform Act of 1984 was framed against this backdrop and rejected rehabilitation as a goal of imprisonment.<sup>11</sup>

The Sentencing Reform Act of 1984<sup>12</sup> (“SRA”) was aimed at “enhanc[ing] the ability of the criminal justice system to combat crime” through effective, fair, uniform, and proportional sentences to be imposed based on the severity of the criminal conduct.<sup>13</sup> While the SRA was conceived of “by liberal reformers as an anti-imprisonment and antidiscrimination measure,” it was ultimately “born as part of a more conservative law-and-order crime control measure.”<sup>14</sup> The key aspects of the legislation were the implementation of a uniform, non-discretionary model of sentencing and the elimination of parole.<sup>15</sup>

The SRA created and delegated broad authority to the United States Sentencing Commission to reform and standardize the federal sentencing process.<sup>16</sup> This was to be achieved by delineating guidelines that furthered the basic goals of criminal punishment.<sup>17</sup> Thus, power that had previously been exercised by the sentencing judge and the parole commission was now imbued in the Commission.<sup>18</sup>

The United States Sentencing Commission is an independent, bipartisan agency within the judicial branch.<sup>19</sup> No more than four members of the

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punishments); Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223, 227 (1993).

7. Charles R. Eskridge II., *The Constitutionality of the Federal Sentencing Reform Act After Mistretta v. United States*, 17 PEPP. L. REV. 683, 690 (1990).

8. See generally MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER (1973) (Judge Frankel is often credited with bringing sentencing disparity into the national spotlight).

9. Anderson, Kling & Stith, *supra* note 5, at 276.

10. *Mistretta v. United States*, 488 U.S. 361, 364 (1989) (explaining that “the sentencing judge ‘sees more and senses more’ than the appellate court; thus... [a] determination as to what sentence was appropriate met with virtually unconditional deference on appeal.”); see also Stith & Koh, *supra* note 6, at 226.

11. 28 U.S.C. § 994(k) (“The Commission shall insure that the guidelines reflect the inappropriateness of imposing a sentence to a term of imprisonment for the purpose of rehabilitating the defendant or providing the defendant with needed educational or vocational training, medical care, or other correctional treatment.”).

12. 28 U.S.C. § 991(b)(1)(B).

13. U.S. SENT’G GUIDELINES MANUAL Ch. 1, Pt. A (U.S. SENT’G COMM’N 2018).

14. Stith & Koh, *supra* note 6, at 223.

15. *Id.* at 229.

16. U.S. SENT’G GUIDELINES MANUAL Ch. 1, Pt. A (U.S. SENT’G COMM’N 2018).

17. *Id.*

18. *Mistretta v. United States*, 488 U.S. 361, 367 (1989).

19. *Mission*, U.S. SENT’G COMM’N, <https://www.ussc.gov/about-page> (last visited Feb. 21,

Commission can be members of the same political party, and at least three must be federal judges.<sup>20</sup> The Commission is comprised of seven voting members appointed by the President and confirmed by the Senate who serve staggered six-year terms.<sup>21</sup> Commission members may be removed “only for neglect of duty or malfeasance in office or for other good cause shown.”<sup>22</sup> The Commission has two *ex officio*, nonvoting members.<sup>23</sup> At inception, the Commission’s primary duty was to promulgate fixed sentencing guidelines that would provide certainty and fairness in sentencing.<sup>24</sup> These Guidelines were intended to limit the trial judge’s discretion in determining the sentence to be imposed, including a determination of whether to impose a sentence of probation, a fine, or term of imprisonment; whether to include a term of supervised release; and whether multiple terms of imprisonment are to run concurrently or consecutively.<sup>25</sup> The Guidelines were successful in achieving some of Congress’s goals.<sup>26</sup> While the extent of the Guidelines’ success is unclear, most commenters agree that the Guidelines<sup>27</sup> did reduce sentencing disparities.<sup>28</sup> For instance, prior to the SRA, offenders served an average of 58% of their imposed sentence.<sup>29</sup> By contrast, the SRA insured greater uniformity in sentencing by mandating that all offenders must serve a minimum of 85% of their sentence.<sup>30</sup>

The SRA set out factors to be considered in imposing a sentence, and directed a court to impose a sentence that is “sufficient, but not greater than necessary to comply with the purposes set forth” in the SRA.<sup>31</sup> Once enacted, the Guidelines

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2023).

20. *Organization*, U.S. SENT’G COMM’N, <https://www.ussc.gov/about/who-we-are/organization> (last visited Feb. 21, 2023).

21. *Id.*

22. 28 U.S.C. § 991(a); *Mistretta*, 488 U.S. at 368.

23. *Organization*, *supra* note 20 (the Attorney General, or the Attorney General’s designee, and the Chair of the U.S. Parole Commission serve as *ex officio* members, that is, they are a member of the Commission by virtue their official title).

24. 28 U.S.C. § 991(b)(1)(A)(B).

25. 28 U.S.C. § 994(a)(1)(A)-(D).

26. Joe B. Brown, *The Sentencing Guidelines Are Reducing Disparity*, 29 AM. CRIM. L. REV. 875, 887 (1992); Gerald W. Heaney, *The Reality of Guidelines Sentencing: No End to Disparity*, 4 FED. SENT’G REP. 142, 142 (1991).

27. Commentators agree that the Guidelines, in conjunction with the PROTECT Act and Freney Amendment, which further limited judicial discretion by eliminating a number of statutory reasons a judge could depart from the Guidelines range, did not reduce sentencing disparities. April Terry & Ashley Lockwood, *Federal Sentencing Disparities and Marginalized Offenders: Revisiting Cumulative Disadvantage Theory Through Individual-Level Variables*, 5 ACAD. LEADERSHIP J. STUDENT RSCH. 1, 2 (2018).

28. *Id.*; see also Robin L. Lubitz & Thomas W. Ross, *Sentencing Guidelines: Reflections on the Future*, SENT’G & CORR.: ISSUES FOR THE 21ST CENTURY, June 2001, at 1.

29. Paul J. Hofer et al., *Fifteen Years of Guidelines Sentencing an Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform*, U.S. SENT’G COMM’N, Nov. 2004, at i, iv; but see Gerald W. Heaney, *The Reality of Guidelines Sentencing: No End to Disparity*, 4 FED. SENT’G REP. 142, 142 (1991).

30. 18 U.S.C. § 3624(b) (Prisoners serving a term of more than one year may receive up to 54 days per year good time credit or roughly 15 percent).

31. 18 U.S.C. § 3553(a).

were binding on federal courts.<sup>32</sup> Any departure from the Guidelines subjected a sentence to appellate review.<sup>33</sup> A court could depart from the Guidelines only if it found that there existed “aggravating or mitigating circumstances of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the [G]uidelines that should result in a sentence different from that described.”<sup>34</sup>

The Supreme Court of the United States (“SCOTUS”) affirmed the validity of the Guidelines in *Mistretta v. United States*.<sup>35</sup> In *Mistretta*, an offender challenged the Guidelines’ constitutionality on separation of powers and non-delegation grounds.<sup>36</sup> SCOTUS held that “in creating the Sentencing Commission—an unusual hybrid in structure and authority—Congress neither delegated excessive legislative power nor upset the constitutionally mandated balance of powers among the coordinate Branches.”<sup>37</sup>

More than a decade later, the Guidelines were again under scrutiny in *Apprendi v. New Jersey*, which tolled the beginning of the end for the mandatory Guidelines.<sup>38</sup> Apprendi was charged with discharging a gun into the home of an African-American family that had recently moved into an all-white neighborhood.<sup>39</sup> After Apprendi was arrested, he made a statement, which he later retracted, indicating that the crime was racially motivated.<sup>40</sup> Ultimately, Apprendi pled guilty and was sentenced pursuant to a New Jersey law which allowed a judge to extend the term of imprisonment if he found, by a preponderance of the evidence, that an offender’s actions were racially motivated.<sup>41</sup> On appeal, SCOTUS found that the hate crime enhancement was an element of the charged crime and held that “any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.”<sup>42</sup>

Similarly, in *Blakely v. Washington*, the Court extended the *Apprendi* rule to Washington state’s sentencing scheme.<sup>43</sup> There, an offender pled guilty to kidnapping and received a ninety-month sentence, far exceeding of the statutory maximum of fifty-three months.<sup>44</sup> The facts admitted in the guilty plea were

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32. 18 U.S.C. § 3553(b)(1) (making the Guidelines mandatory).

33. 18 U.S.C. § 3742(e) (which sets forth standards of review for appeals of departures from the mandatory Guidelines).

34. 18 U.S.C.S. § 3553(b)(1).

35. *Mistretta v. United States*, 488 U.S. 361, 412 (1989).

36. *Id.* at 370.

37. *Id.* at 412.

38. *Apprendi v. New Jersey*, 530 U.S. 466 (2000) (beginning the end for the mandatory Guidelines).

39. *Id.* at 469.

40. *Id.* (“After further questioning, at 6:04 a.m., he made a statement—which he later retracted—that even though he did not know the occupants of the house personally, ‘because they are black in color he does not want them in the neighborhood.’”).

41. *Id.* at 468-69.

42. *Id.* at 490.

43. *Blakely v. Washington*, 542 U.S. 296, 313 (2004).

44. *Id.* at 300.



insufficient to support such an exceptional sentence and only justified by judicial findings that the offender had acted with “deliberate cruelty, a statutorily enumerated ground for departure.”<sup>45</sup> SCOTUS reversed and invalidated the excessive sentence, holding that, as in *Apprendi*, the state’s sentencing procedure was violative of the Sixth Amendment.<sup>46</sup>

Finally, in *United States v. Booker*, the Court applied *Apprendi* to the Federal Sentencing Guidelines. Booker was sentenced to 360 months in prison, significantly longer than the 210–262 months required by the Guidelines.<sup>47</sup> This enhanced sentence was justified on facts found by the judge alone, which were never presented to the jury.<sup>48</sup> SCOTUS held that the Sixth Amendment required that “any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt.”<sup>49</sup> Thus, the Court concluded that 18 U.S.C. § 3553(b)(1), the provision making the Guidelines mandatory, was unconstitutional, rendering the Guidelines merely advisory.<sup>50</sup> In addition, the court invalidated de novo review for sentences that depart from the Guidelines.<sup>51</sup> This means that courts of appeals must now review all sentencing decisions under an abuse of discretion standard.<sup>52</sup>

Despite its demotion to advisory status, the Guidelines continue to be influential. As SCOTUS explained in *Gall v. United States*, “a district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range.”<sup>53</sup> Clearly, the Guidelines remain the foundation of our federal sentencing scheme.

#### B. Recent Issues with the Sentencing Commission

Recently, the Commission has been in crisis.<sup>54</sup> Four voting members are required for a quorum.<sup>55</sup> If the Commission wishes to amend the Guidelines or issue policy statements, four members must be present.<sup>56</sup> The Commission lost its

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45. *Id.*

46. *Id.* at 305.

47. *United States v. Booker*, 543 U.S. 220, 235 (2005).

48. *Id.* at 235.

49. *Id.* at 244.

50. *Id.* at 245.

51. *Id.* at 259.

52. *Gall v. United States*, 552 U.S. 38, 47 (2007) (“In reviewing the reasonableness of a sentence outside the Guidelines range, appellate courts may therefore take the degree of variance into account and consider the extent of a deviation from the Guidelines.”).

53. *Id.* at 49.

54. Todd Ruger, *Help Wanted: Revived Commission Could Spark Criminal Justice Changes*, ROLL CALL: CONG. (Mar. 29, 2021, 6:00 AM), <https://www.rollcall.com/2021/03/29/help-wanted-revived-commission-could-spark-criminal-justice-changes/>.

55. 28 U.S.C. § 995(d) (“A simple majority of the membership then serving shall constitute a quorum for the conduct of business.”).

56. *Q*, U.S. SENT’G COMM’N, <https://www.ussc.gov/q> (last visited Feb. 21, 2023).

quorum in January 2019.<sup>57</sup> Although President Trump made several nominations to the Commission, it appears the White House may have neglected to send those nominations to the Senate for confirmation.<sup>58</sup>

The Supreme Court has taken notice of this failure. Justice Sotomayor has twice issued statements emphasizing the need for clarification from the Commission.<sup>59</sup> For more than a year, the Commission had only one voting member, Senior U.S. District Court Judge Charles R. Breyer, the Commission's acting chair.<sup>60</sup> Judge Breyer's term expired October 31, 2021; however, he remained on the Commission until August 2022.<sup>61</sup> On May 11, 2022, President Biden announced seven nominations to the Commission.<sup>62</sup> These nominations were confirmed by the Senate on August 5, 2022.<sup>63</sup>

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57. Nate Raymond, *U.S. Sentencing Panel's Last Member Breyer Urges Biden to Revive Commission*, REUTERS (Nov. 11, 2021, 8:27 PM), <https://www.reuters.com/legal/government/us-sentencing-panels-last-member-breyer-urges-biden-revive-commission-2021-11-11/>.

58. Sarah N. Lynch, *Trump's Sentencing Panel Picks May Face Uphill U.S. Senate Path*, REUTERS: U.S. NEWS (Mar. 2, 2018, 10:57AM) <https://www.reuters.com/article/us-usa-trump-sentencing/trumps-sentencing-panel-picks-may-face-uphill-u-s-senate-path-idUSKCN1GE2GO>; see *President Donald J. Trump Announces Intent to Nominate and Appoint the Following Individuals to Key Administration Posts*, TRUMP WHITE HOUSE ARCHIVES (Nov. 17, 2020), <https://trumpwhitehouse.archives.gov/presidential-actions/president-donald-j-trump-announces-intent-nominate-appoint-following-individuals-key-administration-posts-111720/>. But see Steward Bishop, *Wide-Open Sentencing Commission Gives Biden Reform Path*, LAW360 (Jan. 21, 2021, 10:11 PM), <https://www.law360.com/articles/1347291/wide-open-sentencing-commission-gives-biden-reform-path?copied=1> ("according to congressional records, the White House apparently never actually sent those nominations to the U.S. Senate for confirmation.").

59. *Guerrant v. United States*, 595 U.S. \_\_\_, at 2-3 (2022); *Longoria v. United States*, 592 U.S. \_\_\_, at 2 (2021).

60. *Organization*, *supra* note 20.

61. 28 U.S.C. § 992(b)(2)(A)(B) ("A voting member of the Commission whose term has expired may continue to serve until the earlier of (A) the date on which a successor has taken office; or (B) the date on which the Congress adjourns sine die to end the session of Congress that commences after the date on which the member's term expired."); see also Nate Raymond, *U.S. Sentencing Panel's Last Member Breyer Urges Biden to Revive Commission*, REUTERS (Nov. 11, 2021, 8:27 PM), <https://www.reuters.com/legal/government/us-sentencing-panels-last-member-breyer-urges-biden-revive-commission-2021-11-11/>.

62. *President Biden Nominates Bipartisan Slate for the United States Sentencing Commission*, WHITE HOUSE (May 11, 2022), <https://www.whitehouse.gov/briefing-room/statements-releases/2022/05/11/president-biden-nominates-bipartisan-slate-for-the-united-states-sentencing-commission/>.

63. *Acting Chair Judge Charles Breyer, Incoming Chair Judge Carlton W. Reeves Applaud Senate Confirmation of New Commissioners*, U.S. SENT'G COMM'N (Aug. 5, 2022), <https://www.uscc.gov/about/news/press-releases/august-5-2022>.

## II. THE FIRST STEP ACT'S SAFETY VALVE MODIFICATIONS CONFLICT WITH GUIDELINES § 5C1.2

### *A. Calculating a Sentence Under the Guidelines*

The Commission sent the initial guidelines to Congress on April 13, 1987, and after six months of review, they became effective on November 1, 1987.<sup>64</sup> The Sentencing Guidelines are represented as a table with the offense level displayed on the vertical axis and the criminal history category on the horizontal axis.<sup>65</sup> The offense level is “the starting point for determining the seriousness of a particular offense.”<sup>66</sup> A lower offense level indicates a less serious offense.<sup>67</sup> The criminal history category is “based upon the extent of an offender’s past misconduct.”<sup>68</sup> Each combination of offense level and criminal history category results in a recommendation for sentence length expressed in a range of months.<sup>69</sup>

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64. U.S. SENT’G COMM’N, SPECIAL REPORT TO CONGRESS: MANDATORY MINIMUMS IN THE FEDERAL CRIMINAL JUSTICE SYSTEM, at i, (1991), [https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/mandatory-minimum-penalties/1991\\_Mand\\_Min\\_Report.pdf](https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/mandatory-minimum-penalties/1991_Mand_Min_Report.pdf).

65. See U.S. SENT’G GUIDELINES MANUAL Ch.5., Pt.A (U.S. SENT’G COMM’N 2021).

66. *An Overview of the Federal Sentencing Guidelines, How the Sentencing Guidelines Work*, U.S. SENT’G COMM’N, [https://www.ussc.gov/sites/default/files/pdf/about/overview/Overview\\_Federal\\_Sentencing\\_Guidelines.pdf](https://www.ussc.gov/sites/default/files/pdf/about/overview/Overview_Federal_Sentencing_Guidelines.pdf) (last visited Feb. 21, 2023).

67. *Id.*

68. *Id.*

69. See *Sentencing Table*, U.S. SENT’G COMM’N (Nov. 1, 2016), [https://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2016/Sentencing\\_Table.pdf](https://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2016/Sentencing_Table.pdf).

**SENTENCING TABLE**  
(in months of imprisonment)

Offense Level	Criminal History Category (Criminal History Points)					
	I (0 or 1)	II (2 or 3)	III (4, 5, 6)	IV (7, 8, 9)	V (10, 11, 12)	VI (13 or more)
Zone A	1	0-6	0-6	0-6	0-6	0-6
	2	0-6	0-6	0-6	0-6	1-7
	3	0-6	0-6	0-6	2-8	3-9
	4	0-6	0-6	2-8	4-10	6-12
	5	0-6	1-7	4-10	6-12	9-15
	6	0-6	2-8	6-12	9-15	12-18
	7	0-6	4-10	8-14	12-18	15-21
	8	0-6	4-10	6-12	10-16	15-21
Zone B	9	4-10	6-12	8-14	12-18	18-24
	10	6-12	8-14	10-16	15-21	21-27
	11	8-14	10-16	12-18	18-24	24-30
Zone C	12	10-16	12-18	15-21	21-27	27-33
	13	12-18	15-21	18-24	24-30	30-37
	14	15-21	18-24	21-27	27-33	33-41
Zone D	15	18-24	21-27	24-30	30-37	37-46
	16	21-27	24-30	27-33	33-41	41-51
	17	24-30	27-33	30-37	37-46	46-57
	18	27-33	30-37	33-41	41-51	51-63
	19	30-37	33-41	37-46	46-57	57-71
	20	33-41	37-46	41-51	51-63	63-78
	21	37-46	41-51	46-57	57-71	70-87
	22	41-51	46-57	51-63	63-78	77-96
	23	46-57	51-63	57-71	70-87	84-105
	24	51-63	57-71	63-78	77-96	92-115
	25	57-71	63-78	70-87	84-105	100-125
	26	63-78	70-87	78-97	92-115	110-137
	27	70-87	78-97	87-108	100-125	120-150
	28	78-97	87-108	97-121	110-137	130-162
	29	87-108	97-121	108-135	121-151	140-175
	30	97-121	108-135	121-151	135-168	151-188
	31	108-135	121-151	135-168	151-188	168-210

Figure 1<sup>70</sup>

The Guidelines direct a court to determine the type of sentence (e.g., supervised release, prison and/or financial penalties) and identify the corresponding guideline range by following a series of steps.<sup>71</sup> In sum, the court must decide what guidelines are applicable to the offense of conviction.<sup>72</sup>

Federal law sets the minimum required prison term for a variety of crimes. Most commonly, federal minimums are set for drug offenses;<sup>73</sup> however, minimums are also applicable to other crimes.<sup>74</sup> Using the Guidelines, the sentence

70. U.S. SENT'G GUIDELINES MANUAL Ch.5, Pt. A (U.S. SENT'G COMM'N 2021).

71. U.S. SENT'G GUIDELINES MANUAL § 1B1.1(a)(1)-(8) (U.S. SENT'G COMM'N 2021).

72. U.S. SENT'G GUIDELINES MANUAL App. A (U.S. SENT'G COMM'N 2021) (determine which Chapter Two offense guideline applies by consulting Appendix A of the Guidelines Manual).

73. See generally *2011 Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System*, U.S. SENT'G COMM'N (2011), <https://www.ussc.gov/research/congressional-reports/2011-report-congress-mandatory-minimum-penalties-federal-criminal-justice-system>.

74. 18 U.S.C. § 2252(b)(1) (statutory minimum of five years for child pornography crimes); 18 U.S.C. § 924(c)(1)(A) (mandatory minimum sentences for firearm offenses).

for drug crimes is influenced by drug type, purity, and quantity, all of which affect the base offense level.<sup>75</sup>

For example, to determine a sentence for conspiracy to distribute 500 grams or more of methamphetamine pursuant to 21 U.S.C. § 841(a)(1), one would be directed to 2D1.1 of the Guidelines. A defendant convicted under this statute has a base level offense of thirty.<sup>76</sup> The Guidelines provide forty-three levels to denote the severity of the crime committed—the higher the number, the more serious the offense.<sup>77</sup> Next, the court must look to the applicability of any Specific Offense Characteristics (“SOC”) that may increase or decrease the base offense level.<sup>78</sup> A defendant’s relevant conduct will inform whether any SOC apply.<sup>79</sup> Relevant conduct includes conduct that constitutes the offense of conviction as well as conduct that is part of the same course of conduct or common scheme or plan.<sup>80</sup> Thus, if an offender bribed or attempted to bribe a police officer in the course of their relevant conduct, the offender’s base offense level would be increased by two levels.<sup>81</sup> Now that base offense level is set, we check Chapter Three for any additional adjustments that apply across offense types.<sup>82</sup>

The next major component is determining an offender’s criminal history points. Criminal history points are assessed based on a prior sentence of imprisonment.<sup>83</sup> Each prior sentence of imprisonment exceeding one year and one month adds three criminal history points to an offender’s total.<sup>84</sup> The reasoning behind this consideration is that “repeated criminal behavior is an indicator of a limited likelihood of successful rehabilitation.”<sup>85</sup>

The number of criminal history points an offender has will determine their criminal history category.<sup>86</sup> Once the criminal history category and offense levels have been determined, the sentencing table provides a range of months where the two categories intersect.<sup>87</sup> Accordingly, an offender with an offense level of 30 and no criminal history points is assessed at a guideline range of 97–121 months. However, conspiracy to distribute 500 grams or more of methamphetamine pursuant to 21 U.S.C. § 841(a)(1) is a crime for which Congress has required a

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75. U.S. SENT’G GUIDELINES MANUAL § 2D1.1 n.A (U.S. SENT’G COMM’N 2021) (drug quantity, that is “the entire weight of any mixture or substance containing a detectable amount of the controlled substance.”).

76. U.S. SENT’G GUIDELINES MANUAL § 2D1.1(C)(5) (U.S. SENT’G COMM’N 2021).

77. U.S. SENT’G GUIDELINES MANUAL Ch.5, Pt.A, comment. n.1 (U.S. SENT’G COMM’N 2021).

78. U.S. SENTENCING COMM’N, FEDERAL SENTENCING: THE BASICS 21 (Sept. 2020), [https://www.uscc.gov/sites/default/files/pdf/research-and-publications/research-publications/2020/202009\\_fed-sentencing-basics.pdf](https://www.uscc.gov/sites/default/files/pdf/research-and-publications/research-publications/2020/202009_fed-sentencing-basics.pdf).

79. *See generally* U.S. SENT’G GUIDELINES MANUAL § 1B1.3 (U.S. SENT’G COMM’N 2021).

80. U.S. SENT’G GUIDELINES MANUAL § 1B1.3(a)(1)(2) (U.S. SENT’G COMM’N 2021); *see also* *Edwards v. United States*, 523 U.S. 511, 514 (1998).

81. U.S. SENT’G GUIDELINES MANUAL § 2D1.1(b)(11) (U.S. SENT’G COMM’N 2021).

82. *Id.* at § 1B1.1(a).

83. *Id.* at § 4A1.1.

84. *Id.* at § 4A1.1(a).

85. *Id.* at § 4A1.1.

86. *Id.*

87. *Id.* at Ch. 5, Pt. A.

mandatory minimum sentence.<sup>88</sup> Since Congress has set the minimum sentence for this crime at 120 months, an offender will be subject to the higher mandatory minimum sentence, a sentence nearly two years in excess of the bottom of the Guidelines range. Mandatory minimums are not set by the Guidelines; rather, they are delineated in the respective offense's criminal statute. Hence, unlike the Guidelines, mandatory minimums are truly mandatory.

Even so, Congress has authorized three procedures that allow an offender to escape a mandatory minimum sentence.<sup>89</sup> Two of these procedures are available only upon the motion of the prosecutor.<sup>90</sup> Under 18 U.S.C. § 3553(e) and Rule 35(b) of the Federal Rules of Criminal Procedure, a departure below the mandatory minimum is permitted when an offender has “provided substantial assistance in investigating or prosecuting another person.”<sup>91</sup> The term “substantial assistance” is explained in the Guidelines as “directed to the investigation and prosecution of criminal activities by persons other than the defendant.”<sup>92</sup> Substantial assistance departures are available only to those who have information to offer. This creates what is known as the cooperation paradox, where the most culpable offenders are often rewarded with a sentence below the statutory minimum because they can provide high value information to assist prosecutors.<sup>93</sup> Meanwhile, peripheral defendants—who are less culpable and therefore possess less or no useful information—are unable to qualify, meaning they are subject to the longer, mandatory minimum sentence.<sup>94</sup>

Recognizing this perverse incentive, Congress enacted a third procedure to allow offenders to escape mandatory minimums, the “safety valve.”<sup>95</sup> The first safety valve provision was enacted in the Violent Crime Control and Law Enforcement Act of 1994 (“VCCLEA”).<sup>96</sup> VCCLEA directed the Commission to

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88. 21 U.S.C. § 841(b)(1)(A)(viii) (“[A]ny person who violates subsection (a) of this section shall be sentenced as follows... 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine... such person shall be sentenced to a term of imprisonment which may not be less than 10 years.”).

89. CHARLES DOYLE, CONG. RSCH. SERV., R41326, FEDERAL MANDATORY MINIMUM SENTENCES: THE SAFETY VALVE AND SUBSTANTIAL ASSISTANCE EXCEPTIONS 1 (Aug. 25, 2015).

90. 18 U.S.C. § 3553(e); FED. R. CRIM. P. 35(b); *see also* United States v. Johnson, 379 F. Supp. 3d 1213 (M.D. Ala. 2019) (One such commonly utilized departure is found in §5k1.1, substantial assistance to authorities: “substantial assistance in the investigation or prosecution of another person who has committed an offense may justify a sentence below a statutorily required minimum sentence.”).

91. FED. R. CRIM. P. 35(b).

92. U.S. SENT’G GUIDELINES MANUAL § 5K1.1, comment. n.2. (U.S. SENT’G COMM’N 2021).

93. H.R. Rep. No. 103-460, at 4 (1994); United States v. Hargrove, 911 F.3d 1306, 1326 (10th Cir. 2019); United States v. Brooks, 722 F.3d 1105, 1108 (8th Cir. 2013); United States v. Carillo-Ayala, 713 F.3d 82, 88 (11th Cir. 2013); *see also* Shana Knizhnik, *Failed Snitches and Sentencing Stitches: Substantial Assistance and the Cooperator’s Dilemma*, 90 N.Y.U. L. REV. 1722, 1726 (2015).

94. Antoinette Marie Tease, *Downward Departures for Substantial Assistance: A Proposal for Reducing Sentencing Disparities Among Codefendants*, 53 MONT. L. REV. 75, 75 (1992).

95. CHARLES DOYLE, CONG. RSCH. SERV., R41326, FEDERAL MANDATORY MINIMUM SENTENCES: THE SAFETY VALVE AND SUBSTANTIAL ASSISTANCE EXCEPTIONS 1 (Aug. 25, 2015).

96. Violent Crime Control and Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 § 80001.

“promulgate guidelines, or amendments to guidelines, to carry out the purposes of this section and the amendment made by this section; and... promulgate policy statements, or amendments to policy statements, to assist in the application of this section and that amendment.”<sup>97</sup> The Commission responded to those charges by adopting 5C1.2, which mirrors the statutory language of 18 U.S.C. 3553(f).<sup>98</sup>

These mechanisms are important and frequently used. In fiscal year 2020, 56.5% of all drug trafficking offenders convicted under a statute carrying a mandatory minimum penalty received relief, either through the safety valve exception to such sentences or by providing substantial assistance to the government.<sup>99</sup>

### B. *The Safety Valve Solution*

As originally enacted, the safety valve applied to offenses under 21 U.S.C. §§ 841, 844, 846 and 21 U.S.C. §§ 961 and 963; in relevant part, it contained five requirements:

- (1) the defendant does not have more than 1 criminal history point, as determined under the sentencing guidelines;
- (2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;
- (3) the offense did not result in death or serious bodily injury to any person;
- (4) the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines and was not engaged in a continuing criminal enterprise as defined in 21 U.S.C. § 848; and
- (5) not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence that the defendant has concerning the offense or offenses that were part of the same course of conduct....<sup>100</sup>

To receive a sentence below the mandatory minimum, an offender must convince the sentencing court, by a preponderance of the evidence, that he satisfies each of the safety valve’s five requirements.<sup>101</sup> If an offender meets the safety valve

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97. Violent Crime Control and Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1986 (1994) (codified as amended at 28 U.S.C. § 994).

98. See U.S. SENT’G GUIDELINES MANUAL, Amendment 509 (U.S. SENT’G COMM’N 1994) (“This amendment adds a new guideline as §5C1.2, and revises the commentary in §§2D1.1 and 2D1.2, to reflect the addition of 18 U.S.C. § 3553(f) by section 80001 of the Violent Crime Control and Law Enforcement Act of 1994.”).

99. U.S. SENT’G COMM’N, FISCAL YEAR 2020 OVERVIEW OF FEDERAL CRIMINAL CASES 16 (Apr. 2021), [https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2021/FY20\\_Overview\\_Federal\\_Criminal\\_Cases.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2021/FY20_Overview_Federal_Criminal_Cases.pdf).

100. Violent Crime Control and Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1985 (1994) (§80001 codified as amended at 18 U.S.C. § 3553(f)).

101. *United States v. Hargrove*, 911 F.3d 1306, 1326-27 (10th Cir. 2019).

requirements, the court “shall”<sup>102</sup> sentence the offender pursuant to the Guidelines, with no regard for the statutory minimum sentence.<sup>103</sup>

Criticism of the original safety valve focused on the narrow class of offenders eligible under the first three requirements of the provision: criminal history points, possession of a firearm, and violence of the offensive conduct.<sup>104</sup> In addition, some were critical of the inclusion of cooperation since this requirement undermines the intent of allowing less culpable offenders to benefit absent substantial assistance.<sup>105</sup>

In response to this criticism, Congress passed the First Step Act (“FSA”) in December 2018.<sup>106</sup> The FSA was the culmination of years of bipartisan efforts and contains many key provisions of the Sentencing Reform and Corrections Act (“SRCA”), a bill which failed to pass in 2016.<sup>107</sup> Most notably, the FSA broadened the category of offenders eligible for safety valve relief.<sup>108</sup>

As a result of the FSA, 18 U.S.C. § 3553 was modified. Paragraph 1, which read “the defendant must have not more than one criminal history point, as determined under the sentencing guidelines” was replaced with:

- (1) the defendant does not have—
  - (A) more than 4 criminal history points, excluding any criminal history points resulting from a 1-point offense, as determined under the sentencing guidelines;
  - (B) a prior 3-point offense, as determined under the sentencing guidelines; and
  - (C) a prior 2-point violent offense, as determined under the sentencing guidelines[.].<sup>109</sup>

The new language has precipitated a “highly technical debate” resulting in a circuit split concerning 3553(f)(1)’s use of “and” as conjunctive or disjunctive.<sup>110</sup> A conjunctive reading—as embraced by the Ninth Circuit—would make the FSA

102. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 80001, 108 Stat. 1796, 1985 (1994) (amending 18 U.S.C. § 3553(f)).

103. 18 U.S.C. § 3553(f) (“Notwithstanding any other provision of law, in the case of an offense under section 401, 404, or 406 of the Controlled Substances Act (21 U.S.C. 841, 844, 846), section 1010 or 1013 of the Controlled Substances Import and Export Act (21 U.S.C. 960, 963), or section 70503 or 70506 of title 46, the court shall impose a sentence pursuant to guidelines promulgated by the [USSC] under [28 U.S.C. § 994] without regard to any statutory minimum sentence.”).

104. Jane L. Froyd, *Safety Valve Failure: Low-Level Drug Offenders and the Federal Sentencing Guidelines*, 94 NW. U. L. REV. 1471, 1498 (2000).

105. Virginia G. Villa, *Retooling Mandatory Minimum Sentencing: Fixing the Federal “Statutory Safety Valve” to Act as an Effective Mechanism for Clemency in Appropriate Cases*, 21 HAMLINE L. REV. 109, 124 (1997) (“Minor offenders may not be able to meet the fifth element due to fear of reprisal from more culpable offenders, or simply because they do not have the commutation ability to satisfy the prosecution.”).

106. First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194.

107. Ames Grawert & Tim Lau, *How the First Step Act Became Law – and What Happens Next*, BRENNAN CTR. FOR JUST. (Jan. 4, 2019), <https://www.brennancenter.org/our-work/analysis-opinion/how-first-step-act-became-law-and-what-happens-next>.

108. First Step Act of 2018, Pub. L. No. 115-391, §402, 132 Stat. 5194, 5221 (amending 18 U.S.C. § 3553).

109. 18 U.S.C. § 3553(f)(1).

110. *United States v. Wells*, No. 20-cr-30063, 2021 U.S. Dist. LEXIS 131370, at \*6 (C.D. Ill. July 9, 2021).



safety valve provision available to more offenders.<sup>111</sup> Under a conjunctive interpretation, only an offender who meets all three criteria would be ineligible for safety valve relief. Whereas an offender meeting only one or two criteria would be eligible for relief.<sup>112</sup>

Alternatively, a disjunctive reading of the provision, as adopted by the Eleventh Circuit, renders an offender with any one of the three stated conditions ineligible for safety valve relief.<sup>113</sup> Hence, a disjunctive interpretation would render ineligible an offender with more than 4 criminal history points; a prior 3-point offense; *or* a prior 2-point violent offense..

The First Step Act amended the safety valve criteria in 18 U.S.C. § 3553(f). Accordingly, if an offender qualifies under the expanded criteria, the court disregards the statutory minimums and turns to the Guidelines.<sup>114</sup> An offender convicted of the most common federal drug crimes<sup>115</sup> will be sentenced pursuant to 2D1.1.<sup>116</sup> After identifying the appropriate base offense level, 2D1.1(b)(18) directs a court to decrease the base offense level by two levels if the offender “meets the criteria set forth in” § 5C1.2(a)(1)–(5).<sup>117</sup>

However, § 5C1.2, reflects the requirements of 18 U.S.C. § 3553(f), prior to the FSA revisions.<sup>118</sup> So, a court seeking to apply the Guidelines to a newly eligible offender must determine whether an offender is eligible for the two-level decrease in light of the Commission’s failure to update 5C1.2 to reflect new the cap of 4+ criminal history points.

A two-level decrease can be significant. An offender convicted under 21 U.S.C. § 841(a)(1) is subject to a mandatory minimum of 120 months.<sup>119</sup> An offender with two criminal history points qualifying under the safety valve has a base offense level of 30, providing a range of 108–135 months.<sup>120</sup> A two point reduction under 2D1.1(b)(18) would reduce that range to 87–108 months.<sup>121</sup> An offender sentenced at the bottom of that range would have their sentence reduced by as much as twenty-one months.<sup>122</sup>

111. *United States v. Lopez*, 998 F.3d 431, 433 (9th Cir. 2021).

112. *Id.*

113. *United States v. Garcon*, 997 F.3d 1301, 1303 (11th Cir. 2021). *See also Wells*, 2021 U.S. Dist. LEXIS 131370, at \*6; *United States v. Howell*, No. 20-cr-30075-1, 2021 WL 2000245, at \*5 (C.D. Ill. May 19, 2021).

114. 18 U.S.C. § 3553(f).

115. Glenn R. Schmitt & Amanda Russell, *OVERVIEW OF FEDERAL CRIMINAL CASES* 13 (U.S. Sent’g Comm’n ed., 2021) (“Most of the 16,829 drug cases reported to the Commission involved the manufacture, sale, or transportation of a drug.”).

116. U.S. SENT’G GUIDELINES MANUAL § 2D1.1 (U.S. SENT’G COMM’N 2021).

117. U.S. SENT’G GUIDELINES MANUAL § 2D1.1(b)(18) (U.S. SENT’G COMM’N 2021).

118. U.S. SENT’G GUIDELINES MANUAL § 5C1.2 (U.S. SENT’G COMM’N 2021).

119. U.S. SENT’G GUIDELINES MANUAL ch. 5, pt. A, sent’g table (U.S. SENT’G COMM’N 2021).

120. *Id.*

121. *Id.*

122. *Id.* (108 months – 87 months = 2).

Courts confronted with this discrepancy have responded to this issue in several ways. Some courts have read the FSA as superseding the conflicting Guidelines provisions.<sup>123</sup> In *United States v. Johnson*:

The court found that USSG § 5C1.2(a) (1)–(5) is intended to reflect the statutory criteria in 18 U.S.C. § 3553(f), and that the First Step Act amendments to 18 U.S.C. § 3553(f) are therefore incorporated into USSG § 5C1.2(a) (1)–(5), even though the text of the Guidelines ha[d] not yet been updated.<sup>124</sup>

Using the updated criteria, the court found that Johnson met the requirements of USSG § 5C1.2(a) (1)–(5), and qualified for a reduction of two levels pursuant to USSG § 2D1.1(b)(18).<sup>125</sup>

The downward variance is another approach.<sup>126</sup> “A ‘variance’ refers to the selection of a sentence outside of the advisory Guidelines range based upon the district court’s weighing of one or more of the sentencing factors of [18 U.S.C.] § 3553(a).”<sup>127</sup> Factors that are disfavored considerations for a departure may be a proper basis for a variance.<sup>128</sup> In *Johnson*, the court noted in the alternative, that Johnson was entitled to a two-level downward variance to reflect Congressional intent to make him eligible for the safety valve.<sup>129</sup>

Other courts have disagreed with the “incorporation” and variance approaches.<sup>130</sup> In *U.S. v. Leri*, the Eleventh Circuit found no plain error when the trial court found Leri, who had a single prior three-point conviction, did not satisfy safety valve criteria in § 5C1.2.<sup>131</sup> The court explained:

The only way Leri could qualify for the two-level reduction is if § 5C1.2’s reference to ‘the criteria in 18 U.S.C. § 3553(f)(1)–(5) set forth below’ is read to incorporate the amended criteria in § 3553(f), including the broadened criteria for criminal history in § 3553(f)(1). But that reading is not plain from the language of § 5C1.2, which sets out the former criteria explicitly, and Leri has not pointed to any binding precedent

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123. *United States v. Johnson*, 379 F. Supp. 3d 1213, 1226 n.15 (M.D. Ala. 2019).

124. *Id.*

125. *Id.*

126. *See United States v. Martinez*, 839 F. App’x 993, 996-97 (6th Cir. 2021) (acknowledging the FSA change in criminal history points where the district court granted a downward variance to defendant with three criminal history points who was convicted one month before FSA became effective); *United States v. Green*, 816 F. App’x 859, 860 (4th Cir. 2020) (finding a defendant with four criminal history points eligible under 3553(f), however, since the Guidelines were not yet amended, and the defendant had more than one criminal history point, the court granted downward variance).

127. *United States v. Mitchell*, 681 F.3d 867, 880 n.60 (6th Cir. 2012). For an in-depth discussion of these factors see *infra* Part III(A).

128. *United States v. Grams*, 566 F.3d 683, 686-87 (6th Cir. 2009). *See also* OFF. OF GEN. COUNS., U.S. SENT’G COMM’N, PRIMER ON DEPARTURES AND VARIANCES 43 (2020) (The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth” below.).

129. *Johnson*, 379 F. Supp. 3d at 1226 n.15.

130. *United States v. Leri*, 849 F. App’x 898, 899 (11th Cir. 2021); *United States v. Shanklin*, 835 F. App’x 145, 146 (7th Cir. 2021) (mem.).

131. *Leri*, 849 F. App’x at 900.

stating that § 5C1.2 must be read to incorporate the amended criteria in § 3553(f), even though § 5C1.2 itself has not been amended.<sup>132</sup>

In *United States v. Shanklin*, the court declined to furnish a two-level reduction to an offender with four criminal history points.<sup>133</sup> “Shanklin did not meet all the criteria set forth in § 5C1.2(a)(1)–(5) because these provisions have yet to be amended and still require that he have no more than one criminal history point.”<sup>134</sup> Other courts, not directly confronted with the issue, have addressed the discrepancy in dicta, reaching varying conclusions.<sup>135</sup>

Despite the issues, it appears that some offenders are benefiting from the expanded safety valve.<sup>136</sup> An August 2020, USSC report identified 1,369 “newly eligible” drug trafficking offenders who received safety-valve relief.<sup>137</sup> Despite this, it is clear that some newly eligible offenders have been denied safety valve protection based the Commission’s failure to update the Guidelines.<sup>138</sup> The failure of the Commission in respect to the safety valve is but one example of issues that arise when the Guidelines fail to evolve in the face of statutory changes. As discussed below, the COVID-19 pandemic highlighted another glaring, and potentially life-threatening issue.<sup>139</sup>

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132. *Id.*

133. *Shanklin*, 835 F. App’x at 146.

134. *Id.*

135. *United States v. Tracy*, 18-cr-00081, 2019 WL 1409841, at \*5 (D. Me. Mar. 28, 2019) (discussing in passing the potential “stumbling block” faced by D, who pled guilty prior to the effective date of the first step act if found eligible for safety valve in light of the Commissions failure to amend the guidelines); *United States v. Chapman*, 18CR00025-010, 2021 U.S. Dist. LEXIS 7545, at \*7-8 (W.D. Va. Jan. 14, 2021) (discussing applicability of the safety valve in absence of updated guidelines); *United States v. Hamilton*, 770 F. App’x 1003, 1004-1005 (11th Cir. 2019) (D raised eligibility on appeal but Court held appeal was barred by waiver); *United States v. Scott*, 838 F. App’x 992, 994 n.1 (6th Cir. 2021) (“Scott was technically ineligible for the § 5C1.2 safety valve, pursuant to the Guidelines. The court explained, however, that its ‘practice has been [that,] if the safety valve is established by statute as amended in the First Step Act, the [c]ourt would often apply a variance to address that on the guideline side of the ledger.’ Therefore, while the sentencing court referred to this as a consideration of the ‘safety valve,’ and we have done likewise for consistency, this was an analysis under 18 U.S.C. 3553(f), for which Scott would have been eligible had he complied.”); *United States v. Valencia*, 822 F. App’x 942, 951 n.5 (11th Cir. 2020) (assuming for purpose of appeal that D qualified for safety valve reduction despite the guidelines not having been amended to reflect the First Step Act change).

136. JULIE ZIBULSKY & CHRISTINE KITCHENS, *THE FIRST STEP ACT OF 2018: ONE YEAR OF IMPLEMENTATION* 4 (U.S. Sent’g Comm’n ed., 2020).

137. *Id.*

138. *Shanklin*, 835 F. App’x at 146; *United States v. Leri*, 849 F. App’x 898, 899 (11th Cir. 2021).

139. Brendan Saloner et al., 324(6) JAMA 529-614 (2020) (finding “the adjusted death rate in the prison population was 3.0 times higher than would be expected if the age and sex distributions of the US and prison populations were equal.”).

### III. CONFLICT BETWEEN THE GUIDELINES 1B1.13 POLICY STATEMENT AND COMPASSIONATE RELEASE AS AMENDED BY THE FIRST STEP ACT

#### *A. History of Compassionate Release*

The Guidelines significantly increased the average length of time served by offenders.<sup>140</sup> This has contributed to a boom in federal prison populations.<sup>141</sup> Generally, a sentencing court may not modify a term of imprisonment once it has been imposed.<sup>142</sup> Compassionate release is an exception to that general rule.<sup>143</sup> Recognizing that there are circumstances which warrant a modification of sentence, compassionate release was created as part of the Comprehensive Crime Control Act of 1984.<sup>144</sup> This provision prohibited a court from modifying a term of imprisonment except:

[U]pon motion of the Director of the Bureau of Prisons... after considering the factors set forth in in section 3553(a) to the extent that they are applicable, if it finds that extraordinary and compelling reasons warrant such a reduction and that such a reduction is consistent with applicable policy statement issued by the Sentencing Commission.<sup>145</sup>

Thus, the Bureau of Prisons (“BOP”) was placed as the gatekeeper of compassionate release petitions. The BOP demonstrated a reluctance to utilize this power.<sup>146</sup> While in charge, the BOP granted only a small number of requests for compassionate release.<sup>147</sup> A 2013 report found that on average, only twenty-four people were released per year on motion of the BOP.<sup>148</sup> Between 2013 and 2017, the BOP approved only 6% of the 5,400 compassionate release applications received, and during the same time period, 266 applicants died in prison awaiting

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140. U.S. SENT’G COMM’N, FIFTEEN YEARS OF GUIDELINES SENTENCING: AN ASSESSMENT OF HOW WELL THE FEDERAL CRIMINAL JUSTICE SYSTEM IS ACHIEVING THE GOALS OF SENTENCING REFORM 46 (U.S. Sent’g Comm’n ed., 2004) (“By 1992, the average time in prison had more than doubled, from 26 months in 1986 to 59 months in 1992.”).

141. Gerald W. Heaney, *The Reality of Guidelines Sentencing: No End to Disparity*, 4 FED. SENT’G REP. 142, 142 (1991).

142. 18 U.S.C. § 3553(c).

143. 18 U.S.C. § 3582(c)(1)(A).

144. Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, § 3582, 98 Stat. 1998, 1998-99.

145. *Id.*

146. *United States v. Brooker*, 976 F.3d 228, 231 (2d Cir. 2020).

147. *Id.*

148. U.S. DEP’T OF JUST., OFF. OF THE INSPECTOR GEN., THE FEDERAL BUREAU OF PRISONS’ COMPASSIONATE RELEASE PROGRAM 1 (2013).

a decision.<sup>149</sup> Not only was the decision process slow, the procedure for offenders to apply for compassionate release was also complicated.<sup>150</sup>

The SRA directed the Commission to establish general policy statements regarding the application of guidelines to modification of an imposed term of imprisonment.<sup>151</sup> Further, the Commission was directed to “describe what should be considered extraordinary and compelling reasons for sentence reduction.”<sup>152</sup> Congress specified only that “[r]ehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason.”<sup>153</sup>

It took the Commission more than twenty years to issue a policy statement on the matter, which was first effective November 1, 2006.<sup>154</sup> One year later, the Commission expanded its commentary to the 1B1.13 policy statement, for the first time defining what should be deemed “extraordinary and compelling.” This amendment identified specific circumstances that qualify as “extraordinary and compelling” circumstances which included terminal illness, debilitating physical conditions that prevent inmate self-care, the death or incapacitation of the only family member able to care for a minor child, and other extraordinary and compelling reasons as determined by the BOP.<sup>155</sup> In 2016, the Commission updated and expanded the policy statement, broadening eligibility criteria and explicitly encouraging the BOP to file a motion for compassionate release when an offender presents one of the enumerated extraordinary and compelling reasons.<sup>156</sup>

The FSA amended 18 U.S.C. § 3582(c)(1)(A) to permit district courts to review a sentence upon the motion of the BOP or “upon motion of the defendant” after the defendant has fully exhausted all administrative rights to appeal.<sup>157</sup> This modification retained the requirement that the court consider the factors set forth in 18 U.S.C. § 3553, and:

- (i) extraordinary and compelling reasons warrant such a reduction; or
- (ii) the defendant is at least 70 years of age, has served at least 30 years in prison, pursuant to a sentence imposed under section 3559(c), for the offense or offenses for which the defendant is currently imprisoned, and a determination has been made by the Director of the Bureau of Prisons that the defendant is not a danger to the safety

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149. Christie Thompson, *Frail, Old and Dying, But Their Only Way Out of Prison is a Coffin*, N.Y. TIMES (Mar. 7, 2018), <https://www.nytimes.com/2018/03/07/us/prisons-compassionate-release-.html>.

150. U.S. DEP’T OF JUST., FED. BUREAU OF PRISONS, PROGRAM STATEMENT, COMPASSIONATE RELEASE/REDUCTION IN SENTENCE: PROCEDURES FOR IMPLEMENTATION OF 18 U.S.C. §§ 3582 AND 4205 (G) 3, 13 (2019). See also Emily Widra & Wanda Bertram, *Compassionate Release Was Never Designed to Release Large Numbers of People*, PRISON POL’Y INITIATIVE (May 29, 2020), <https://www.prisonpolicy.org/blog/2020/05/29/compassionate-release/>.

151. 28 U.S.C. § 994(a)(2)(C).

152. 28 U.S.C. 994(t).

153. *Id.*

154. See U.S. SENT’G GUIDELINES MANUAL § 1B1.13 historical note (U.S. SENT’G COMM’N 2016 2021).

155. U.S. SENT’G GUIDELINES MANUAL § 1B1.13 amend. 698 (effective Nov. 1, 2007).

156. U.S. SENT’G GUIDELINES MANUAL § 1B1.13 amend. 799 (effective Nov. 1, 2016).

157. First Step Act of 2018, Pub. L. No. 115-391, § 603(b)(1), 132 Stat. 5238, 5239.

of any other person or the community, as provided under section 3142(g).<sup>158</sup>

Section 3553 sets forth seven factors including: “the nature and circumstances of the offense and the history and characteristics of the defendant;”<sup>159</sup> “the need for the sentence imposed;”<sup>160</sup> “the kinds of sentences available;”<sup>161</sup> and “the need to avoid unwarranted sentencing disparities.”<sup>162</sup>

The statute also directs the court to consider any pertinent policy statement issued by the Commission pursuant to 28 U.S.C. 994(a)(2).<sup>163</sup> The 1B1.13 policy statement, last substantively updated in 2016, begins: “[u]pon motion of the Director of the Bureau of Prisons....”<sup>164</sup> In the Application Notes, the Commission explains that “extraordinary and compelling reasons exist under any of the circumstances set forth below.”<sup>165</sup>

(A) Medical Condition of the Defendant.—

(i) The defendant is suffering from a terminal illness (*i.e.*, a serious and advanced illness with an end of life trajectory). A specific prognosis of life expectancy (*i.e.*, a probability of death within a specific time period) is not required. Examples include metastatic solid-tumor cancer, amyotrophic lateral sclerosis (ALS), end-stage organ disease, and advanced dementia.

(ii) The defendant is—

(I) suffering from a serious physical or medical condition, (II) suffering from a serious functional or cognitive impairment, or (III) experiencing deteriorating physical or mental health because of the aging process, that substantially diminishes the ability of the defendant to provide self-care within the environment of a correctional facility and from which he or she is not expected to recover.

(B) Age of the Defendant.—The defendant (i) is at least 65 years old; (ii) is experiencing a serious deterioration in physical or mental health because of the aging process; and (iii) has served at least 10 years or 75 percent of his or her term of imprisonment, whichever is less.

(C) Family Circumstances.—

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158. 18 U.S.C. § 3582(c)(1)(A).

159. 18 U.S.C. § 3553(a)(1).

160. 18 U.S.C. § 3553(a)(2) (“(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (B) to afford adequate deterrence to criminal conduct; (C) to protect the public from further crimes of the defendant; and (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.”).

161. 18 U.S.C. § 3553(a)(3).

162. 18 U.S.C. § 3553(a)(6) (noting that the need to provide restitution to any victims of the offense was omitted but is present in the statute).

163. 18 U.S.C. § 3553(a)(5).

164. U.S. SENT’G GUIDELINES MANUAL § 1B1.13 (U.S. SENT’G COMM’N 2016).

165. U.S. SENT’G GUIDELINES MANUAL § 1B1.13 application n.1 (U.S. SENT’G COMM’N 2016).

- (i) The death or incapacitation of the caregiver of the defendant's minor child or minor children.
- (ii) The incapacitation of the defendant's spouse or registered partner when the defendant would be the only available caregiver for the spouse or registered partner.
- (D) Other Reasons.—As determined by the Director of the Bureau of Prisons, there exists in the defendant's case an extraordinary and compelling reason other than, or in combination with, the reasons described in subdivisions (A) through (C).

After the FSA modified 18 U.S.C. § 3582(c)(1)(A), courts were faced with a statute that directed they consider the Commission's policy statement, allowed "other reasons" only at the discretion of the BOP.<sup>166</sup> This provision of the FSA "overturned over 30 years of history, but at the same time it often did no more than shift discretion from the [BOP] to the courts."<sup>167</sup>

*B. Can Courts Determine the Existence of "Other" Extraordinary and Compelling Reasons?*

The conflict between the 1B1.13 policy statement and the FSA amendments was on prominent display as COVID-19 spread throughout the United States. In the year prior to the pandemic, 1,735 offenders sought compassionate relief from the BOP.<sup>168</sup> From March 2020 to May 2020, 10,940 federal prisoners applied to the BOP for compassionate release.<sup>169</sup> Ultimately, 0.1% of those who applied were approved by BOP.<sup>170</sup>

The prison system faced unique challenges during the COVID-19 pandemic. Inmates older than fifty are the fastest growing age group among the federal prison population.<sup>171</sup> Older adults are more likely to become severely ill or die of COVID-19.<sup>172</sup> Further, federal prisons are overcrowded, operating at 103% capacity as of December 2020.<sup>173</sup> This makes social distancing and isolation a physical

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166. U.S. SENT'G GUIDELINES MANUAL § 1B1.13 (U.S. SENT'G COMM'N 2016).

167. *United States v. Brooker*, 976 F.3d 228, 230 (2d Cir. 2020).

168. Keri Blakinger & Joseph Neff, *31,000 Prisoners Sought Compassionate Release During COVID-19. The Bureau of Prisons Approved 36.*, THE MARSHALL PROJECT (June 11, 2021, 6:00 AM), <https://www.themarshallproject.org/2021/06/11/31-000-prisoners-sought-compassionate-release-during-covid-19-the-bureau-of-prisons-approved-36>.

169. Joseph Neff & Keri Blakinger, *Thousands of Sick Federal Prisoners Sought Compassionate Release. 98 Percent Were Denied.*, THE MARSHALL PROJECT (Oct. 7, 2020, 6:00 AM), <https://www.themarshallproject.org/2020/10/07/thousands-of-sick-federal-prisoners-sought-compassionate-release-98-percent-were-denied>.

170. Blakinger & Neff, *supra* note 168.

171. Daniel Litwok et al., *Causes of Aging in the Federal Prison Population and a Comparison to States*, 45 CRIM. JUST. REV. 129, 129 (2020).

172. *COVID-19 Risks and Vaccine Information for Older Adults*, CDC, <https://www.cdc.gov/aging/covid19/index.html#:~:text=Older%20adults%20are%20more%20likely,very%20sick%20from%20COVID%2D19>, (last visited Mar. 8, 2023).

173. Emily Widra, *Since You Asked: Just How Overcrowded Were Prisons Before the Pandemic, and at This Time of Social Distancing, How Overcrowded are They Now?*, PRISON POL'Y INITIATIVE

impossibility. As of January 12, 2023, the BOP reports 311 inmates and 7 staff deaths attributed to COVID-19.<sup>174</sup>

District courts are confronted with the issue of whether the Commission's policy statement, enacted before the FSA modifications, is binding. Every circuit<sup>175</sup> confronted with this question, with the exception of the Eleventh Circuit, has found the policy statement not applicable in light of the FSA amendment.<sup>176</sup>

In *United States v. Brooker*, the Second Circuit reviewed the district court's denial of an offender's motion for compassionate release relying on 1B1.13.<sup>177</sup> The court concluded that "[t]he First Step Act freed district courts to consider the full slate of extraordinary and compelling reasons that an imprisoned person might bring before them in motions for compassionate release."<sup>178</sup> The court relied on 18 U.S.C. § 3582(c)(1)(A) which requires a court to consider only *applicable* policy statements.<sup>179</sup> The text of 1B1.13, however, was "clearly outdated" and therefore "[could] not be fully applicable."<sup>180</sup> The court held that it was not limited by 1B1.13, nor Application note 1(D), when reviewing a motion for a sentence reduction brought by an offender and not the BOP.<sup>181</sup> A court's discretion to determine what reasons are extraordinary and compelling is, therefore, not constrained.<sup>182</sup> The Sixth Circuit reached a similar conclusion in *United States v. Jones*.<sup>183</sup> There, the court determined that "1B1.13 does not apply to cases where an imprisoned person files a motion for compassionate [release]."<sup>184</sup>

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(Dec. 21, 2020), <https://www.prisonpolicy.org/blog/2020/12/21/overcrowding/#:~:text=Before%20the%20pandemic%2C%20nine%20state,into%20prisons%20across%20the%20country>.

174. *COVID-19 Coronavirus*, FED. BUREAU OF PRISONS, <https://www.bop.gov/coronavirus/> (last visited Feb. 21, 2023).

175. Seven other circuits have answered this question. *United States v. McCoy*, 981 F.3d 271, 275 (4th Cir. 2020) (explaining that "the Commission has yet to issue a policy statement that applies to motions filed by defendants under the recently amended § 3582(c)(1)(A)"); *United States v. Brooker*, 976 F.3d 228, 235 (2d Cir. 2020) ("[I]t is manifest that [the] language [of 1B1.13] is clearly outdated and cannot be fully applicable."); *United States v. Shkambi*, 993 F.3d 388, 393 (5th Cir. 2021) (concluding "that neither the policy statement nor the commentary to it binds a district court addressing a prisoner's own motion under [18 U.S.C.] § 3582"); *United States v. Jones*, 980 F.3d 1098, 1111 (6th Cir. 2020) ("[E]nforcing the as-written catch-all provision both contravenes Congress's motivation for reforming compassionate release in the First Step Act and ignores the Sentencing Commission's grounds for augmenting § 1B1.13's application notes in 2016."); *United States v. Gunn*, 980 F.3d 1178, 1180 (7th Cir. 2020) (noting that "[a]ny decision is 'consistent with' a nonexistent policy statement"); *United States v. Aruda*, 993 F.3d 797, 802 (9th Cir. 2021) (per curiam) ("The Sentencing Commission's statements in U.S.S.G. § 1B1.13 may inform a district court's discretion for § 3582(c)(1)(A) motions filed by a defendant, but they are not binding."); *United States v. McGee*, 992 F.3d 1035 (10th Cir. 2021).

176. *United States v. Bryant*, 996 F.3d 1243, 1266 (11th Cir. 2021) (Martin, J., dissenting), *cert. denied*, 2021 WL 5763101 (Dec. 6, 2021).

177. *Brooker*, 976 F.3d at 234.

178. 18 U.S.C. § 3582(c)(1)(A); *Id.*

179. 18 U.S.C. § 3582(c)(1)(A); *Brooker*, 976 F.3d at 235.

180. *Brooker*, 976 F.3d at 235.

181. *Id.* at 236.

182. *Id.*

183. *Jones*, 980 F.3d at 1108.

184. *Id.*



In *United States v. Aruda*, an offender filed a motion for compassionate release based on her particular medical conditions which increased her risk for becoming seriously ill should she contract COVID-19 in conjunction with the increased risk of COVID-19 at her facility.<sup>185</sup> The court synthesized the reasoning of its sister circuits in holding that the 1B1.13 policy statement was not a constraint on the ability of a court to determine what reasons are extraordinary and compelling.<sup>186</sup>

(1) the text of § 3582(c)(1)(A), which only requires courts to consider ‘applicable’ policy statements by the Sentencing Commission; (2) the text of U.S.S.G. § 1B1.13, which begins ‘[u]pon motion of the Director of the Bureau of Prisons’; (3) the text of Application Note 4 to § 1B1.13, which states that ‘[a] reduction under this policy statement may be granted only upon motion by the Director of the Bureau of Prisons pursuant to 18 U.S.C. § 3582(c)(1)(A)’; (4) the text of Application Note 1(D) to § 1B1.13, which is a catch-all provision allowing only the ‘Director of the Bureau of Prisons’ to determine ‘other’ extraordinary and compelling reasons; and (5) the legislative history of the First Step Act’s compassionate-release amendment, which sought to expand and expedite compassionate-release motions because they had seldom been brought by the BOP.<sup>187</sup>

In *United States v. Bryant*, the Eleventh Circuit reviewed the district court’s denial of offender Bryant’s motion for compassionate release pursuant to the FSA amended § 3582(c)(1)(A).<sup>188</sup> First, the court determined whether a district court reviewing defendant-filed motions pursuant to § 3582 are bound by the Commission’s 1B1.13 policy statement.<sup>189</sup> The court found the policy statement binding, arguing that the procedural change made by the FSA did not affect the substantive standards of § 3582 or 1B1.13.<sup>190</sup> In particular, the Commission’s definition of extraordinary and compelling reasons “are still capable of being applied and relevant to all Section 3582(c)(1)(A) motions, whether filed by the BOP or a defendant.”<sup>191</sup> Next, the court determined whether Application note 1(D) limits “other” extraordinary and compelling reasons to those “determined by the BOP” with procedural changes in the statute.<sup>192</sup> Bryant argued the court should read this portion as “determined by the court,” which would allow a district court discretion to identify other qualifying reasons.<sup>193</sup> The court declined to adopt

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185. *Aruda*, 993 F.3d at 798.

186. *Id.* at 801. *See also* *United States v. McCoy*, 981 F.3d 271, 288 (4th Cir. 2020) (reaching the same conclusion with similar reasoning); *United States v. Gunn*, 980 F.3d 1179, 1181 (7th Cir. 2020).

187. *United States v. Aruda*, 993 F.3d 797, 801 (9th Cir. 2021) (per curiam).

188. *United States v. Bryant*, 996 F.3d 1243, 1247 (11th Cir. 2021), *cert. denied*, 2021 WL 5763101 (Dec. 6, 2021).

189. *Id.* at 1247.

190. *Id.*

191. *Id.*

192. *Id.* at 1248.

193. *Id.*

Bryant's reasoning and held that Application note 1(D) did not allow courts to identify other reasons justifying a reduction in sentence.<sup>194</sup>

The Eleventh Circuit is alone in its interpretation. Every other circuit that has addressed the question has found that the 1B1.13 policy statement is not binding in light of the FSA amendments.<sup>195</sup>

In circuits where courts are free to determine what constitutes an extraordinary and compelling circumstance, the reasons cited by courts are varied.<sup>196</sup> District courts have cited sentencing disparities, serious health conditions, mental health issues, family circumstances, and the mere existence of

194. *Id.*

195. Eleven other circuits have answered this question. *United States v. McCoy*, 981 F.3d 271, 275 (4th Cir. 2020) (explaining that “the Commission has yet to issue a policy statement that applies to motions filed by defendants under the recently amended § 3582(c)(1)(A)”); *United States v. Brooker*, 976 F.3d 228, 235 (2d Cir. 2020) (“[I]t is manifest that [the] language [of 1B1.13] is clearly outdated and cannot be fully applicable.”); *United States v. Shkambi*, 993 F.3d 388, 393 (5th Cir. 2021) (concluding “that neither the policy statement nor the commentary to it binds a district court addressing a prisoner’s own motion under [18 U.S.C.] § 3582”); *United States v. Jones*, 980 F.3d 1098, 1111 (6th Cir. 2020) (“[E]nforcing the as-written catch-all provision both contravenes Congress’s motivation for reforming compassionate release in the First Step Act and ignores the Sentencing Commission’s grounds for augmenting § 1B1.13’s application notes in 2016.”); *United States v. Gunn*, 980 F.3d 1178, 1180 (7th Cir. 2020) (noting that “[a]ny decision is ‘consistent with’ a nonexistent policy statement”); *United States v. Aruda*, 993 F.3d 797, 802 (9th Cir. 2021) (per curiam) (“The Sentencing Commission’s statements in U.S.S.G. § 1B1.13 may inform a district court’s discretion for § 3582(c)(1)(A) motions filed by a defendant, but they are not binding.”); *United States v. McGee*, 992 F.3d 1035, 1050 (10th Cir. 2021); *United States v. Andrews*, 12 F.4th 255, 259 (3d Cir. 2021); *United States v. Ruvalcaba*, 26 F.4th 14, 21 (1st Cir. 2022); *United States v. Long*, 997 F.3d 342, 355 (D.C. Cir. 2021); *United States v. Marcussen*, 15 F.4th 855, 859 (8th Cir. 2021).

196. Post-First Step Act Sentencing Disparity: *United States v. Redd*, 444 F. Supp. 3d 717, 723 (E.D. Va. 2020) (“consider[ing] the sentence received relative to the sentence [an offender] would now receive for the same offense, whether and to what extent there is a disparity between the two sentences, and why that disparity exists.”); *United States v. Urkevich*, 8:03CR37, 2019 WL 6037391 (D.C. Neb. Nov. 14, 2019). *But see* *United States v. Andrews*, 480 F. Supp. 3d 669, 682, (E.D. Pa. 2020), *aff’d*, 12 F.4th 255 (3d Cir. 2021) (“[T]he argument that compassionate release can be used as a vehicle to provide case-by-case retroactivity without running afoul of the retroactivity provision ignores principles of statutory construction.”). Health issues: *United States v. Dana*, 467 F. Supp. 3d 962, 966 (D.C. Or. 2020) (granting early release to an immunocompromised 59-year-old at a facility with no reported cases); *United States v. Torres*, 464 F. Supp. 3d 651, 665 (S.D.N.Y. 2020) (releasing brothers, aged 63 and 59, from life without parole sentences due to age, health conditions and “thorough and long-term rehabilitation”); *United States v. Ramos*, 2020 WL 7247208, at \*1, 5 (N.D. Cal. Dec. 9, 2020) (finding extraordinary and compelling reasons for 51 year old offender suffering from type 2 diabetes, obesity, and hypertension, despite the fact that she had served only 37% of her sentence). Mental Health: *United States v. Rodriguez*, 476 F. Supp. 3d 1071, 1073 (S.D. Cal. 2020) (citing offenders major depressive disorder among the factors justifying release after serving 32 months of 86 month sentence); *United States v. Pina*, 2020 WL 3545514, at \*2-3 (S.D.N.Y. June 29, 2020) (finding lockdown conditions exacerbated offenders PTSD symptoms justifying release 20 months into 39 month sentence); *United States v. Lavy*, 2020 WL 3218110, at \*4 (D.C. Ka. June 15, 2020) (ordering release based on bipolar and major depressive disorder in conjunction with hypertension and age). Existence of COVID-19 Pandemic: *United States v. Kelly*, 2020 WL 2104241, at \*7 (S.D. Miss. May 1, 2020) (granting an offender’s compassionate release motion “[d]espite his youth and lack of health issues,” based on the BOP’s failure to control the COVID-19 outbreak at the facility where the offender was incarcerated).

the COVID-19 pandemic as conditions so extraordinary and compelling as to grant an offender's motion for compassionate release.<sup>197</sup>

These disparate outcomes undermine the purposes of the SRA, the FSA, and the Guidelines themselves. Rather than certainty and proportionality in sentencing, whether a motion for compassionate release will be granted depends on in large part on the district in which the motion is heard.<sup>198</sup> For example, during 2020 and 2021, the District Court for the Middle District of Florida granted 6% of motions for compassionate release, meanwhile, the district courts in Vermont and Nevada granted 44% of motions for compassionate release.<sup>199</sup>

#### IV. PROPOSAL

It is antithetical to the purpose of the SRA and the FSA that the Guidelines are an impediment to achieving sentencing reform. The Supreme Court has made clear that it will not resolve circuit splits among Courts of Appeal created as a result of differing interpretation of guidelines provisions, stating “[t]he Sentencing Commission should have the opportunity to address this issue in the first instance, once it regains a quorum of voting members.”<sup>200</sup> Thus, the restoration of the Commission to functionality lays squarely within the domain of the President and the Senate. However, should the President fail to act by appointing new members, Congress could alter the appointment process or quorum requirements of the Commission.

As discussed in Part I, the composition and process for adding members to the Sentencing Commission is laid out in 28 U.S.C. § 911(a).<sup>201</sup> The Commission is comprised of seven voting members, and two non-voting members.<sup>202</sup> The President, with the advice and consent of the Senate, appoints the voting members of the Commission “after consultation with representatives of judges, prosecuting attorneys, defense attorneys, law enforcement officials, senior citizens, victims of crime, and others interested in the criminal justice process.”<sup>203</sup> No more than four members of the Commission may be members of the same political party.<sup>204</sup> Three of the members must be federal judges, selected after considering a list of six judges recommended<sup>205</sup> to the President by the Judicial Conference of the United

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197. *Id.*

198. *Compassionate Release Data Report: Calendar Years 2020 to 2021, Table 2*, U.S. SENT’G COMM’N, <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/compassionate-release/20210928-Compassionate-Release.pdf> (last visited Feb. 21, 2023).

199. *Id.* Middle Florida 43/715; Vermont 39/88; Nevada 34/76.

200. *Longoria v. United States*, 592 U.S. \_\_\_, at 2 (2021). *See also* *Guerrant v. United States*, 595 U.S. \_\_\_, at 2-3 (2022).

201. Codified at 28 U.S.C. § 991(a), the composition of the commission has been modified slightly from the original Sentencing Reform Act of 1984.

202. 28 U.S.C. § 991(a); *Organization*, U.S. SENT’G COMM’N, <https://www.ussc.gov/about/who-we-are/organization> (last visited Mar. 8, 2023).

203. *Id.*

204. *Id.*

205. The Judicial Conference submitted six names to the White House in April 2021. Madison Adler, *Near-Vacant Sentencing Panel Gives Biden Chance for Fresh Start*, BLOOMBERG L. (June 28,

States.<sup>206</sup> Finally, “members of the Commission shall be subject to removal from the Commission by the President only for neglect of duty or malfeasance in office or for other good cause shown.”<sup>207</sup> The Commission can make some decisions—establish internal rules and regulations, fix staff salaries, or enter into contracts—with a majority of the members “present and voting.”<sup>208</sup> Yet, the ability to pass guidelines and policy statements is limited by statute to a four-member quorum.<sup>209</sup>

*A. Duplicate the System Adopted by the Federal Reserve*

Commission members serve six-year terms.<sup>210</sup> Expanding Commissioners term length is one option to reduce vacancies. For example, the seven members of The Board of Governors of the Federal Reserve (“Board”) are appointed by the President and confirmed by the Senate to serve fourteen-year terms.<sup>211</sup> The Board is not immune to political gridlock, in fact three of the seven seats are vacant pending Senate confirmation as of February 2022.<sup>212</sup> As such, the Board took further steps to allow it to function during these times.

The Federal Reserve Act does not define what constitutes a quorum of the Board and empowers the Board to create its own rules and regulations to enable it to carry out its duties.<sup>213</sup> “For many years, the Board defined a quorum to be a majority (four members) of its authorized strength of seven members.”<sup>214</sup> Though, after dealing with lengthy vacancies the Board adopted rules to allow it to function in such circumstances.<sup>215</sup> In 2017, the Board “amend[ed] its definition of a quorum to provide that a quorum of the Board is four members, unless there are three or fewer members in office, in which case a quorum would be all members in office.”<sup>216</sup>

Unlike the Board, the rules and regulations by which the Commission must operate are laid out in its creation statute. Therefore, Congress must act to amend the operating procedure of the Commission.

Congress could expand the Commission’s emergency amendment authority. The Commission is empowered to issue emergency amendments pursuant to

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2021, 4:46 AM), <https://news.bloomberglaw.com/us-law-week/near-vacant-sentencing-panel-gives-biden-chance-for-fresh-start>.

206. 28 U.S.C. § 991(a).

207. *Id.*

208. 28 U.S.C. § 995(a).

209. 28 U.S.C. § 994(a).

210. *Organization*, *supra* note 20.

211. *Board*, FED. RESRV., <https://www.federalreserve.gov/aboutthefed/bios/board/default.htm> (last visited Feb. 21, 2023).

212. Ann Saphir, *Explainer: What’s Next as Biden’s Fed Nominees Await Senate Action*, REUTERS (Feb. 4, 2022, 3:10 PM), <https://www.reuters.com/world/us/fed-chiefs-term-nears-end-biden-nominees-await-senate-action-2022-02-04/>.

213. *See* 12 U.S.C. § 248(i).

214. 12 C.F.R. § 265 (2019).

215. *Id.*; *Rules of Organization*, FED. REG., <https://www.federalregister.gov/documents/2017/11/22/2017-25122/rules-of-organization> (last visited Feb. 21, 2023).

216. 12 C.F.R. § 265 (2019).

special statutory authorization.<sup>217</sup> This occurs when a statute directs the Commission to act. For example, USSG Amendment 714,<sup>218</sup> effective February 6, 2008, implemented an emergency directive of the Emergency and Disaster Assistance Fraud Penalty Enhancement Act of 2007.<sup>219</sup> This amendment instituted a two-level enhancement that applies “if the offense involved fraud or theft in connection with a declaration of a major disaster or emergency.”<sup>220</sup> As it stands, this authority expedites the Guidelines publication process and eliminates the opportunity for a public hearing on proposed amendments.<sup>221</sup> But even emergency amendment authority requires an affirmative vote of at least four members of the Commission.<sup>222</sup> Expanded use of this authority or direction to act would be of little help with an understaffed Commission.

Therefore, Congress must amend the Commission creation statute to allow it to function with less than a four-member quorum. This change would parallel the changes adopted by the Board. Should the Commission have three or less voting members, the Commission can issue Guidelines and policy statements with the affirmative vote of all then-serving voting members. Accordingly, so long as the Commission is staffed with at least one commissioner, the authority to conduct business is present. Such a change, however, could leave the Commission vulnerable to exploitation.

A President intent on circumventing the requirement that the Commission be politically balanced could intentionally leave the Commission understaffed to enable a perpetual “one-man” Commission. This vulnerability could be minimized by retaining the now-existing emergency amendment authority. That is, if the Commission is staffed by three or less members, Congress must invoke the Commission’s emergency amendment authority and order the Commission to act, via statute, before the Commission can utilize this authority. Still, this system would seemingly frustrate the goal of a smaller quorum, to enable the Commission to act in times of a legislative bottleneck.

#### *B. Institute an Automatic Appointment Procedure*

There is no mechanism to force the President to appoint members to the Commission. However, a process for automatic appointment to the Commission could serve as a backstop to prevent lengthy vacancies.

Should the President fail to nominate, or the Senate fail to confirm a new Commission member after one year, new members would automatically be elevated to the Commission from an identified group of qualified individuals.

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217. The Sentencing Act of 1987, Pub. L. No. 100-182, § 21, 101 Stat. 1266, 1271. *See* U.S. SENT’G COMM’N RULE OF PRAC. AND PROC. 4.5.

218. U.S. SENT’G GUIDELINES MANUAL § 2B1.1(b) amend. 714 (effective Feb. 6, 2008).

219. *Id.*

220. *Id.*

221. U.S. SENT’G COMM’N RULE OF PRAC. AND PROC. 4.5.

222. The Sentencing Act of 1987, Pub. L. No. 100-182, § 21, 101 Stat. 1266, 1271.

Federal judges are an obvious choice, having already been nominated by the President and confirmed by the Senate.<sup>223</sup> This system envisions the chief judge of each federal district, beginning with the First District and proceeding sequentially through to the DC Circuit, being automatically appointed to the Commission, should a seat on the Commission remain vacant for more than one year. In addition to preventing vacancies, this process may also serve to exert political pressure on the President or the Senate, coercing them to act or face the appointment of a potentially undesirable new Commission member.

#### V. CONCLUSION

Courts and society struggle when the Commission fails to carry out its duties. A nearly vacant Sentencing Commission is unable to effectuate its duties, nor can it carry out the aims of the SRA.<sup>224</sup> The Supreme Court has made it clear it will not resolve ambiguities until the Commission has an opportunity to do so. While the Commission regained a quorum, it is only a matter of time before this issue reoccurs. Thus, Congress must adopt measures to ensure a staffed and functional Commission.

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223. U.S. CONST. art. II, § 2, cl. 2.

224. 28 U.S.C. § 994.