EX-POST-*BOOKER*: RETROACTIVE APPLICATION OF FEDERAL SENTENCING GUIDELINES

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INTRODUCTION

In strongly protecting the rights of criminal defendants, the Founders of the U.S. Constitution were reacting to the near absolute power of the English Crown and Parliament, which operated without constitutional restraint.[1] This "uncontrolable [sic] authority"[2] left a bitter taste in the mouths of the Founders, so when they set up the federal government of the United States, they ensured important governmental limits on the creation of the criminal law by placing those limitations in the nation's Constitution.[3] One of these express limitations upon both the powers of the United States and of the individual states is the prohibition on the passage of ex post facto laws.[4] While both ex post facto legislation and bills of attainder were valid and binding in England and untouchable by the English judiciary,[5] the U.S. Constitution banned their use in Article I[6] and the federal judiciary has built upon the constitutional prohibition by creating a clear and definitive line of precedent governing such retroactive laws.[7]

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1. WILLIAM P. WADE, A TREATISE ON THE OPERATION AND CONSTRUCTION OF RETROACTIVE LAWS, AS AFFECTED BY CONSTITUTIONAL LIMITATIONS AND JUDICIAL INTERPRETATIONS § 4 (1880).

2. WILLIAM BLACKSTONE, 1 COMMENTARIES *160.

3. Wayne A. Logan, *The Ex Post Facto Clause and the Jurisprudence of Punishment*, 35 AM. CRIM. L. REV. 1261, 1275–77 (1998) (describing the Framers' attitude while adopting the Constitution as an "obsessive concern over the threat of retroactively-designed laws").

4. Article I contains two Ex Post Facto Clauses: one directed at Congress (§ 9, cl. 3) and one directed at the States (§ 10, cl. 1). In fact, the principle of anti-retroactivity is found in several provisions of the Constitution. For example, Article I, §§ 9–10 (forbidding bills of attainder) prohibits legislatures from passing any law which inflicts punishment upon a person or group of people without a judicial trial, the Takings Clause of the Fifth Amendment prohibits government actors from taking private property for public use without just compensation, and the Due Process Clause of the Fourteenth Amendment protects the interests in fair notice that retroactive legislation may compromise.

5. WADE, *supra* note 1.

6. U.S. CONST. art. I, § 9, cl. 3 ("No . . . ex post facto Law shall be passed.").

7. *See infra* text accompanying notes 50–57.

Although the applicability of the ex post facto prohibition to civil law has been debated in the judicial branch,[8] its ban in the criminal arena has been settled since the country's inception—retroactive criminal laws will not be tolerated.[9] This is because, according to one historical treatise, "it is difficult to reconcile to our sense of justice and right, a rule which directs its commands and prohibitions to past conduct."[10] The Supreme Court has carved out four categories of prohibited ex post facto laws: (1) criminalizing innocent acts after they are committed, (2) aggravating past offenses, (3) requiring less evidence than was required for conviction of an offense after it is committed, and (4) increasing the punishment attached to an offense after it is committed.[11] In recent years, the U.S. Sentencing Guidelines (the Guidelines) have thrust this problem of retroactively increasing punishments into the federal courts. Specifically, the question confronting courts is whether revisions of the Guidelines can be applied retroactively, to cases pending in court, without violating the Ex Post Facto Clause.

In its 1987 decision in *Miller v. Florida*, the Supreme Court held that Florida's retroactive application of its legislatively-enacted state sentencing guidelines, which increased punishments attached to prior-committed offenses, was in violation of the Ex Post Facto Clause.[12] Since that time, federal circuit courts, relying on *Miller* and the similarly mandatory role of the *federal* Guidelines, used the Ex Post Facto Clause to prohibit sentencing judges from retroactively applying their revisions as well.[13] However, in *United States v. Booker*,[14] a dramatic decision handed down in early 2005, the Supreme Court excised the provision of the U.S. Sentencing Guidelines that made them mandatory. In an effort to cure Sixth Amendment issues—specifically, judges determining sentences by making factual findings that may not have been reflected in a jury verdict—the Supreme

8. *See, e.g.*, Landgraf v. USI Film Prods., 511 U.S. 244, 267 & n.21 (1994) ("[T]he potential unfairness of retroactive civil legislation is not a sufficient reason for a court to fail to give a state its intended scope. . . . In some cases, however, the interest in avoiding the adjudication of constitutional questions will counsel against a retroactive application."). For an early version of the debate, compare the decisions of Justices Yates and Thompson in *Dash v. Van Kleeck*, 7 Johns. 477, 5 Am. Dec. 291 (N.Y. Sup. Ct. 1811) (Justice Yates found it "manifest" that the Constitution did not include civil cases in its prohibition of ex post facto laws while Justice Thompson insisted that the retrospective application of any "new rule of law" that "can be so construed as to do injustice" is a violation of the Ex Post Facto Clause).

9. Justice Chase's opinion in Calder v. Bull, 3 U.S. (3 Dall.) 386, 390–91 (1798), serves as the first judicial decision setting forth the application of the Ex Post Facto Clause to penal legislation. The opinions listed *supra* in note 8 all agreed upon the Ex Post Facto Clause's application to criminal laws.

10. WADE, *supra* note 1, § 3.

11. *Calder*, 3 U.S. at 390.

12. 482 U.S. 423, 435–36 (1987).

13. *See infra* notes 70–72 and accompanying text.

14. 543 U.S. 220 (2005).

Court changed the Guidelines' role in determining sentences from binding to advisory.

Booker's advisory mandate and the Guidelines' apparent loss of force in sentencing decisions led some circuits to find that the same retroactive application of the Guidelines no longer violates the Ex Post Facto Clause.[15] Ironically, *Booker*'s attempt to remedy unconstitutional sentencing and protect individual rights has resulted in this unintended and different, yet equally disturbing, breed of constitutional conflicts. While these dramatic shifts in constitutional precedent have passed under the legal radar relatively unnoticed, they are no less threatening to our nation's commitment to a limited government and protection of individual liberties than those actions found unconstitutional in *Booker*.

The following scenario will help illustrate this extreme change in precedent. Defendant A commits wire fraud in December of 1995. At the time of the crime, the 1995 Guidelines Manual directs a sentence in the range of eighteen to twenty-four months. By the time Defendant A is sentenced, the 1996 Guidelines Manual is in effect and directs an increased sentencing range of between twenty-seven and thirty-three months. Any federal circuit court at that time would have reversed a retroactive application of the increased sentencing range to Defendant A as a violation of the Ex Post Facto Clause.[16] The Supreme Court hands down the *Booker* opinion in 2005, directing courts to consider the Guidelines in addition to other statutory factors. Defendant B commits bank fraud in December of 2005. At the time of the crime, the 2005 Guidelines Manual directed a sentence of eighteen to twenty-four months. By the time Defendant B is sentenced, the 2006 Guidelines Manual is in effect and directs an increased sentence of between twenty-seven and thirty-three months. After *Booker*, some circuits are now affirming the same retroactive applications of the increased sentencing ranges that they reversed prior to *Booker*.[17]

Applying revisions of the Guidelines to defendants who committed their crimes prior to the effective date of those revisions remains retroactive and substantially disadvantages such defendants. Moreover, the national trend since *Booker* indicates that the Guidelines continue to have the "force

15. *E.g.*, United States v. Demaree, 459 F.3d 791, 795 (7th Cir. 2006); United States v. Barton, 455 F.3d 649, 652–56 (6th Cir. 2006).

16. *See infra* note 70 for a circuit-by-circuit list of cases finding the retroactive application of the Guidelines in violation of the Ex Post Facto Clause.

17. *Compare Demaree*, 459 F.3d 791 (retroactive application no longer violates Ex Post Facto Clause), *and Barton*, 455 F.3d 649 (retroactive application no longer violates Ex Post Facto Clause), *with* United States v. Seacott, 15 F.3d 1380, 1385–86 (7th Cir. 1994) (retroactive application violates Ex Post Facto Clause) *and* United States v. Nagi, 947 F.2d 211, 213 n.1 (6th Cir. 1991) (retroactive application violates Ex Post Facto Clause).

and effect of law," create "high hurdles" for judicial discretion, and can "directly and adversely affect the sentence" a defendant receives.[18] Therefore, despite these early precedents, federal courts need to continue applying the Ex Post Facto Clause to the revisions of the now-advisory Guidelines.

Part I of this Note provides an overview of the Guidelines and the precedent regarding the application of the Ex Post Facto Clause to those Guidelines. Part II outlines the Supreme Court's opinion in *Booker* and examines the effect the decision has had on sentencing practices. Next, Part III illustrates how the advisory Guidelines still fall within ex post facto doctrine, specifically applying pre-*Booker* rationale to post-*Booker* practices. Finally, Part IV argues that regardless of the level of deference or weight circuit courts choose to accord the Guidelines after *Booker*, the Ex Post Facto Clause continues to bar the retroactive application of Guidelines revisions.

I. HISTORY

The structure of the United States government has become much more complex since the Framers originally drafted the U.S. Constitution.[19] For example, the legislative branch has created a wide array of agencies and commissions within the three branches, such as the Environmental Protection Agency under the executive branch and the Federal Judicial Center under the judicial branch. Due to the immense increase of federal oversight and regulation since the founding, the legislature has found it necessary to delegate parts of its authority and oversight power to these agencies.[20] As a result, language which was unambiguous to the drafters when originally

18. Miller v. Florida, 482 U.S. 423, 435 (1987).

19. *See generally* G. EDWARD WHITE, THE CONSTITUTION AND THE NEW DEAL 95–127 (2000) (describing the emergence of agency government and the complications arising from administrative law). White traces the evolution of the changing concept of the Constitution—an evolution that allowed for its increasing complexity and the emergence of agency government.

> Prior to the twentieth century, the Constitution was generally seen as the embodiment of universal, fixed principles . . . [that] were not designed to change with time or events. . . . In the early twentieth century this traditional conceptualization of the Constitution was challenged by the view that the Constitution was a "living" document, one capable of responding to changing conditions.

Thomas G. Walker, *G. Edward White's The Constitution and the New Deal*, 11 LAW & POLITICS BOOK REV. 128, 129 (2001).

20. Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 398 (1940) ("Delegation by Congress has long been recognized as necessary in order that the exertion of legislative power does not become a futility.") (citing Currin v. Wallace, 306 U.S. 1, 15 (1939)); Mistretta v. United States, 488 U.S. 361, 372 (1989) ("[I]n our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives.").

included in the Constitution, such as "law," is now ambiguous and subject to debate under the new governmental structure.[21] In particular, the prohibition of ex post facto "laws" included in Article I was clearly aimed at Congress, the sole legislative branch of the federal government. But with the advent of rulemaking and quasi-legislative functions in these inferior agencies, what really constitutes a "law" is not as clear. Subpart A below will discuss the establishment of the current sentencing scheme created by Congress, including the U.S. Sentencing Commission and the Sentencing Guidelines promulgated by that agency. Subpart B will outline the history of ex post facto jurisprudence leading up to, and including, present day doctrine, and then will summarize the courts' treatment of the Sentencing Commission and the Guidelines under that jurisprudence.

A. Overview of Federal Sentencing Guidelines

When the federal court system was established, and for over two centuries after, judges were entrusted with wide discretion in sentencing, allowing them to give defendants any punishment ranging from probation to the maximum statutory sentence.[22] This lack of statutory or other type of guidance resulted in enormous disparities and uncertainty in sentencing, leading one prominent judge in the 1970s to express his disappointment that, in our criminal justice system, a defendant's opportunity for liberty arbitrarily depended upon "the variegated passions and prejudices of individual judges."[23] Congress struggled with sentencing disparities for over a decade before enacting the Sentencing Reform Act of 1984 (SRA),[24] which

21. Since the arrival of administrative agencies, commissions and the overall approval of Congress's delegation of its powers, the general standard for determining whether an enactment is a "law" is not where it originated (i.e., the legislature) but rather whether it carries with it "the force of law." *See, e.g.*, Weaver v. Graham, 450 U.S. 24, 31 (1981) ("[I]t is the effect, not the form, of the law that determines whether it is *ex post facto*."); Watkins v. Sec'y, Dep't of Pub. Safety & Corr. Serv., 831 A.2d 1079, 1088 (Md. 2003) (noting that agency directives are not "laws" within the meaning of the Ex Post Facto Clause because "although in the context of the *ex post facto* clause, the 'concept of a "law" . . . is broader than a statute enacted by a legislative body, and may include some administrative regulations' . . . . [i]f the provision 'does not have the force and effect of law' . . . the *ex post facto* clause does not apply.") (quoting Lomax v. Warden, Md. Corr. Training Ctr., 741 A.2d 476, 480 (Md. 1999)); Russell L. Weaver, *Challenging Regulatory Interpretations*, 23 ARIZ. ST. L.J. 109, 151–53 (1991) (courts generally refuse to apply the Ex Post Facto Clause to administrative interpretations, but will bar their retroactive application if a lack of fair notice violates the Due Process Clause).

22. U.S. SENTENCING COMM'N, AN OVERVIEW OF THE UNITED STATES SENTENCING COMMISSION 1 (2007), http://www.ussc.gov/general/USSCoverview.pdf.

23. Marvin E. Frankel, *Lawlessness in Sentencing*, 41 U. CIN. L. REV. 1, 8 (1972). Judge Frankel's work served as a springboard for the federal sentencing reform era of the 1970s and 1980s, earning him the title, "father of sentencing reform." Erik Luna, *Misguided Guidelines: A Critique of Federal Sentencing*, *in* GO DIRECTLY TO JAIL: THE CRIMINALIZATION OF ALMOST EVERYTHING 122 (Gene Healy ed., 2004).

24. *See generally Mistretta*, 488 U.S. at 364–66 (detailing the sentencing inadequacies and legislative history leading up to Congressional enactment of the Sentencing Reform Act of 1984); Kate Stith

attempted to remedy the apparent deficiencies in the system by creating a permanent commission charged with defining the national parameters of federal sentences—thus severely restricting federal judges' previously unlimited discretion.[25]

The U.S. Sentencing Commission (the Commission), an independent agency within the judicial branch, consists of seven voting members, all appointed by the President, confirmed by the Senate and committed to serving six year terms.[26] Congress charged the Commission with promulgating the U.S. Sentencing Guidelines by establishing categories of offenses and offender characteristics and devising appropriate sentence ranges for each category.[27] The Commission must review and revise the Manual periodically and submit it to Congress for review. Absent explicit Congressional modification or disapproval, the revisions go into effect automatically 180 days after submission.[28] In 1987, the Commission drafted the first version of the Guidelines Manual, which became effective that same year due to congressional inaction.[29]

As a result of this sentencing reform, the discretion of courts was severely limited in the sentencing stage; appellate courts closely scrutinized any deviation from the Guidelines' ranges.[30] The Sentencing Table in the Guidelines Manual showed the relationship between the offense category and offender characteristics; for each pairing of offense level and offender characteristic category, the Table specified a sentencing range within which a court should sentence a defendant.[31] Judges were provided with discretion to depart from the applicable Guidelines range only if there was an

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

25. Pub. L. No. 98-473, § 991(b)(1)(B), 98 Stat. 2017, 2018 (codified as amended at 28 U.S.C. § 991(b)(1)(B) (2000 & Supp. IV 2004)) (setting forth the Commission's purpose, including providing "certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices . . . .").

26. § 991(a), 98 Stat. at 2017; § 992(a), 98 Stat. at 2018.

27. § 994(c), 98 Stat. at 2020 (outlining factors to be considered in establishing offense categories); § 994(d), 98 Stat. at 2020 (outlining factors to be considered in establishing categories of defendants).

28. § 994(o), 98 Stat. at 2023.

29. U.S. SENTENCING GUIDELINES MANUAL (1987) [hereinafter 1987 MANUAL].

30. In *Koon v. United States*, the Supreme Court instructed sentencing courts to determine what took the case outside of the Guidelines' "heartland" and made it a special case and whether the Commission had either encouraged or discouraged such departures. 518 U.S. 81, 95 (1996) (adopting United States v. Rivera, 994 F.2d 942, 949 (1st Cir. 1993)).

31. U.S. SENTENCING GUIDELINES MANUAL § 1B1.1 (2006) (determination and use of range) and § 5A (Sentencing Table) [hereinafter 2006 MANUAL].

"aggravating or mitigating circumstance" which the Commission did not adequately consider in formulating the appropriate range[32] and were required to state on the record any reasons for departure.[33] Thus, although the Manuals were labeled "Guidelines," they were in fact mandatory, providing only limited discretion for sentencing judges. Deviations from the Guidelines rarely passed appellate review.[34]

The Guidelines became law despite overwhelming criticism from the judiciary.[35] Nearly 200 judges wrote opinions holding the system unconstitutional within the first year.[36] And although the Supreme Court validated the constitutionality of the SRA and the Guidelines in an 8–1 decision,[37] judges continued to criticize the new sentencing scheme in all forums.[38] Nearly four years after the Guidelines went into effect, one D.C. Circuit judge analogized the Guidelines to the emperor's new clothes, calling them a "farce."[39] According to one commentator, the judges "spoke as though the third branch had become the victim of a hostile takeover."[40] Despite this strong opposition, the mandatory Guidelines remained in full force.

Although it seemed as if Congress had meticulously laid out all the decisions to be made by judges during the sentencing of defendants, the SRA did not explicitly tell the courts which version of the Manuals to use when sentencing offenders. Because the Guidelines are revised rather frequently, defendants often fall between conflicting Manuals: one in effect at

32. Pub. L. No. 98-473, § 3553(b), 98 Stat. 1987, 1990 (codified as amended at 18 U.S.C. § 3553(b)(1) (2000 & Supp. IV 2004)).

33. § 3553(c)(2), 98 Stat. at 1990 (requiring "specific reason" for any sentence imposed outside the Guidelines range).

34. As has continued to be the case after *Booker*, see *infra* notes 130–134 and accompanying text, above-Guideline sentence deviations were consistently affirmed, while below-Guideline deviations were much more likely to be reversed.

35. Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE L.J. 1681, 1719 (1992).

36. U.S. SENTENCING COMM'N, ANNUAL REPORT 1989, at 11 (1989).

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

38. Indeed, the displeasure with the judges' lack of discretion in sentencing continued long after the Guidelines' enactment. *E.g.*, *Criticizing Sentencing Rules, U.S. Judge Resigns*, N.Y. TIMES, Sept. 30, 1990, at 22. *See generally* David Margolick, *Justice by the Numbers: A Special Report; Full Spectrum of Judicial Critics Assail Prison Sentencing Guides*, N.Y. TIMES, Apr. 12, 1992, at 1. For a comedic rendition, see Jon O. Newman, *Ode to the Guidelines*, 9 FED. SENT'G REP. 338 (1997). Judge Newman sang the following verse at a celebration of his 25 years on the bench (to the "School Days" tune):

> Guidelines, guidelines not so very wide lines. Enter a plea to a minor crime; you'll be amazed at the extra time. And if a departure is what you seek, your 30-year sentence will drop by a week. Guidelines, guidelines, narrow side-by-side lines. Relevant conduct is all that counts; DEA agents will set the amounts. And if any jury should set you free, the guidelines will treat you as if you're guil-tee! Guidelines, guidelines, those take-you-for-a-ride lines. Sentences used to require minds and hearts; now all that you need are those guideline charts.

39. United States v. Harrington, 947 F.2d 956, 963–64 (D.C. Cir. 1991) (Edwards, J., concurring).

40. Freed, *supra* note 35, at 1720.

the time of the crime and the other in effect at the time of the sentencing.[41] Were a sentencing judge to apply a newly enacted version of the Manual, with an increased sentencing range, to a defendant who committed his or her crime prior to that Manual's enactment, that application would be retroactive because it applied a new punishment to an old crime. In the Senate Report accompanying the SRA, Congress expressed its belief that retroactively applying Guideline revisions in this way would not violate the Ex Post Facto Clause.[42] Nevertheless, the first Manual was devoid of any instruction to the courts regarding which version of the Manual to apply.[43] This gap in the sentencing scheme raised serious issues with the constitutional prohibition on ex post facto laws.

B. History of the Ex Post Facto Clause's Application to the Guidelines

The United States Constitution expressly prohibits any ex post facto law.[44] Although the Latin phrase "*ex post facto*" literally encompasses any law passed "after the fact,"[45] courts have long recognized that the constitutional prohibition on ex post facto laws applies only to penal statutes that disadvantage the offender affected by them.[46] When including this prohibition in the Constitution, the Framers intended it to be one of the "greater securities to liberty and republicanism" by protecting against retroactive application of penal laws.[47] The Ex Post Facto Clause shields against this "favourite and most formidable instrument[] of tyranny"[48] by curbing malicious and retributive legislation and ensuring that citizens are given fair

41. As an example of a possible ex post facto violation, the Manual provides the following scenario:

> A defendant is convicted of an antitrust offense in November 1989. He is to be sentenced in December 1992. . . . Under the 1992 edition of the Guidelines Manual (effective November 1, 1992), the defendant has a guideline range of 4–10 months . . . . Under the 1989 edition of the Guidelines Manual (effective November 1, 1989), the defendant has a guideline range of 2–8 months . . . .

2006 MANUAL, *supra* note 31, § 1B1.11 cmt. n.1. According to the Manual, in this situation a court could determine that "application of the 1992 edition of the Guidelines Manual would violate the Ex Post Facto Clause."

42. *Id.*, § 1B1.11 cmt. background (citing S. Rep. No. 98-225, at 77–78 (1983), *as reprinted in* 1984 U.S.C.C.A.N. 3182, 3260–61).

43. 1987 MANUAL, *supra* note 29.

44. U.S. CONST. art. I, § 9, cl. 3 ("No . . . ex post facto Law shall be passed.").

45. BLACK'S LAW DICTIONARY 620 (8th ed. 2004).

46. Calder v. Bull, 3 U.S. (3 Dall.) 386, 390–92 (1798) (opinion of Chase, J.); *id.* at 396 (opinion of Paterson, J.); *id.* at 400 (opinion of Iredell, J.); *see also* Miller v. Florida, 482 U.S. 423, 429–32 (1987).

47. THE FEDERALIST NO. 84, at 346 (Alexander Hamilton) (J. & A. McLean 1787).

48. *Id.*

notice of a law so they can rely on its directive and conform their conduct.[49]

In 1798, the Supreme Court in *Calder v. Bull* established four categories of ex post facto laws, including laws that increase the punishment of a crime after it is committed.[50] One of the earliest Supreme Court cases examining the retroactive application of sentencing laws came in 1937 with *Lindsey v. Washington*, which struck down California's retroactive application of an increase in the maximum statutory punishment for grand larceny because "[t]he Constitution forbids the application of any new punitive measure to a crime already consummated, to the detriment or material disadvantage of the wrongdoer."[51] According to the Court, the length of the sentence actually imposed was immaterial since the actual measure of punishment prescribed by the later statute was more severe than that of the earlier.[52] This "measure of punishment" rule served as controlling precedent when the Guidelines first made their appearance, effectively structuring the measurement of punishments and altering those measurements when revised.

With the sentencing reform era of the late 1970s and early 1980s, the establishment of both the U.S. Parole and U.S. Sentencing Commissions, and the enactment of the federal Sentencing Guidelines, constitutional challenges flooded the courts.[53] In the midst of the sentencing debate, Justice Marshall delineated modern ex post facto doctrine with the Supreme Court's 1981 opinion in *Weaver v. Graham*.[54] Under *Weaver*, two critical elements must be present for a penal law to be barred by the Ex Post Facto Clause: (1) the law must apply to events that occurred before the law's

49. *See* Weaver. v. Graham, 450 U.S. 24, 28–29 (1981); *see also* Stephen R. Munzer, *A Theory of Retroactive Legislation*, 61 TEX. L. REV. 425, 471 (1982) ("The rule of law . . . is a defeasible entitlement of persons to have their behavior governed by rules publicly fixed in advance."). For a brief but informative history of prohibiting retroactive legislation, along with the importance of doing so, see Landgraf v. USI Film Prod., 511 U.S. 244, 265–67 (1994).

50. *Calder*, 3 U.S. at 390–91 ("1st. Every law that makes an action done before the passing of the law, and which was *innocent* when done, criminal; and punishes such action. 2d. Every law that *aggravates a crime*, or makes it *greater* than it was, when committed. 3d. Every law that *changes the punishment*, and inflicts a *greater punishment*, than the law annexed to the crime, when committed. 4th. Every law that alters the *legal* rules of *evidence*, and receives less, or different, testimony, than the law required at the time of the commission of the offence, *in order to convict the offender*. All these, and similar laws, are manifestly *unjust and oppressive*."); *see also* Beazell v. Ohio, 269 U.S. 167, 169–70 (1925) ("[A]ny statute . . . which makes more burdensome the punishment for a crime, after its commission . . . is prohibited as *ex post facto*.").

51. 301 U.S. 397, 401 (1937).

52. *Id.*

53. Before the Supreme Court upheld the constitutionality of the Guidelines in *Mistretta v. United States*, approximately 120 district judges upheld the Guidelines as constitutional and more than 200 district judges invalidated the Guidelines and all or part of the Sentencing Reform Act. U.S. SENTENCING COMM'N, *supra* note 36, at 11.

54. 450 U.S. at 28–31.

enactment, and (2) the law must disadvantage the offender it affects.[55] Later, in *California Department of Corrections v. Morales*, the Court went on to state that the inquiry for the second element is not whether the change produces some "ambiguous sort of 'disadvantage,'" but "whether any such change alters the definition of criminal conduct or increases the penalty by which a crime is punishable."[56] While *Weaver* had incorporated a third requirement (that the law's modification must be more than just a procedural change),[57] the Court in *Morales* appeared to have melded these second and third requirements into one by giving them both essentially the same language.

As previously noted in Part I.A., Congress did not believe the amended Guidelines would fall within the ex post facto prohibition when originally enacting the SRA.[58] The Senate Judiciary Committee (the Committee), relying on the federal judiciary's practice of upholding retroactive applications of the Parole Guidelines,[59] assumed the Ex Post Facto Clause only applied to increases in statutory maximums.[60] Since the Sentencing Guidelines left the statutory maximums unaltered and were intended only to structure discretion and not eliminate it, the Committee believed the justifications for allowing the Parole Commission to retroactively apply revised Parole Guidelines equally applied to the new Sentencing Guidelines.[61] In addition, the Committee reasoned that since the Guidelines were intended to be "the most sophisticated statements available" regarding appropriate sentencing practices, the application of "outmoded" Guidelines would "foster irrationality and would be contrary to the goal of consistency in sentencing."[62]

Nevertheless, the original 1987 Manual did not include any explicit instruction regarding which version of the Manuals to apply, nor did it express any ex post facto concerns.[63] Despite this omission, the Supreme Court never explicitly addressed whether the Guidelines fell within the

55. *Id.* at 29 (citing *Lindsey*, 301 U.S. at 401, and *Calder*, 3 U.S. at 390).

56. 514 U.S. 499, 506 n.3 (1995).

57. 450 U.S. at 29 n.12 (a law is procedural if it does "not increase the punishment nor change the ingredients of the offence or the ultimate facts necessary to establish guilt") (quoting Hopt v. Utah, 110 U.S. 574, 590 (1884)).

58. S. REP. NO. 98-225, at 77–78 (1983), *as reprinted in* 1984 U.S.C.C.A.N. 3182, 3260–61.

59. *Id.* at 78 (citing Portley v. Grossman, 444 U.S. 1311 (1980); Warren v. U.S. Parole Comm'n, 659 F.2d 183 (D.C. Cir. 1981); Zeidman v. U.S. Parole Comm'n, 593 F.2d 806 (7th Cir. 1979); Rifai v. U.S. Parole Comm'n, 586 F.2d 695 (9th Cir. 1978); Ruip v. United States, 555 F.2d 1331 (6th Cir. 1977)).

60. *Id.*

61. *Id.*

62. *Id.* at 77.

63. 1987 MANUAL, *supra* note 28.

prohibition on ex post facto laws. In *Miller v. Florida*, however, a case that ultimately defined the issue, the Supreme Court relied on the *Weaver* test to hold that Florida violated the Ex Post Facto Clause when retroactively applying its statutorily-revised state sentencing guidelines.[64] Florida urged the Court to fall in line with the circuit courts' approach to the federal Parole Guidelines (and the opinion of the Senate Judiciary Committee) by holding that the state Sentencing Guidelines were merely procedural and thus outside the scope of the Ex Post Facto Clause.[65] The Court rejected Florida's argument, outlining three characteristics that the Florida Sentencing Guidelines possessed, which the federal Parole Guidelines did not, that required the Guidelines' inclusion within the Ex Post Facto Clause.[66] First, the Florida legislature enacted the revised sentencing law, giving it the force and effect of law, as opposed to Parole Guidelines, which courts had consistently held are not "laws" for the purposes of ex post facto analysis.[67] Second, the Guidelines created a "high hurdle" that had to be cleared before a court could exercise its discretion.[68] Third, the revised Guidelines "directly and adversely" affected the sentence a defendant received.[69]

There is one notable difference between the Florida and federal systems—in Florida, the state legislature enacts the guidelines, whereas the federal Guidelines become effective without any congressional action. Nevertheless, nearly every circuit relied upon *Miller* when prohibiting federal courts from retroactively applying the federal Guidelines.[70] For example, in *United States v. Bell*, the Eighth Circuit relied on *Miller* when finding sufficiently "high hurdles preventing the court from departing" from the Guidelines and thus holding that the federal Guidelines were in

64. 482 U.S. 423, 435–36 (1987).

65. *Id.* at 434.

66. *Id.* at 434–35. Although the Sentencing Reform Act of 1984 abolished parole for federal crimes, the U.S. Parole Commission continues to promulgate guidelines for those sentenced for federal crimes prior to November 1, 1987 and those sentenced for District of Columbia Code felony offenses after August 5, 2000. PETER B. HOFFMAN, U.S. DEP'T OF JUSTICE, HISTORY OF THE FEDERAL PAROLE SYSTEM 1–2 (2003).

67. *Miller*, 482 U.S. at 434–35 (citing Wallace v. Christensen, 802 F.2d 1539, 1553–54 (9th Cir. 1986)). In *Wallace*, the Ninth Circuit noted that just because Congress had "placed boundaries on the [Parole] Commission's discretion," they did not "transform the Guidelines into law." 802 F.2d at 1553. The Court cited the discretion of the Commission and the infrequency of compliance with the parole guidelines as support for its finding. *Id.* at 1554.

68. *Miller*, 482 U.S. at 434–35.

69. *Id.*

70. *See* United States v. Seacott, 15 F.3d 1380, 1385–86 (7th Cir. 1994); United States v. Bell, 991 F.2d 1445, 1447 (8th Cir. 1993); United States v. Kopp, 951 F.2d 521, 526 (3d Cir. 1991); United States v. Morrow, 925 F.2d 779, 782–83 (4th Cir. 1991); United States v. Nagi, 947 F.2d 211, 213 n.1 (6th Cir. 1991); United States v. Sweeten, 933 F.2d 765, 772 (9th Cir. 1991); United States v. Smith, 930 F.2d 1450, 1452 n.3 (10th Cir. 1991); United States v. Harotunian, 920 F.2d 1040, 1042 (1st Cir. 1990); United States v. Suarez, 911 F.2d 1016, 1021–22 (5th Cir. 1990); United States v. Worthy, 915 F.2d 1514, 1516 n.7 (11th Cir. 1990).

fact "laws" within the meaning of the Ex Post Facto Clause.[71] The Eighth Circuit also found that because the Guidelines were binding on all federal courts, they had been incorporated into the law, and Congress could not "avoid the proscriptions of the ex post facto clause simply by delegating its lawmaking function to a judicial agency and claiming the result is insulated from the constitutional limitations on its legislative powers."[72]

When the Commission finally did adopt an official position in 1992, it expressed agreement with the Senate Judiciary Committee's original position that the Ex Post Facto Clause did not apply to the Guidelines.[73] But by that time, the circuit courts had already applied *Miller* to the Guidelines,[74] holding that their retroactive application did in fact violate the Ex Post Facto Clause. In accordance with the circuits' prevailing opinion, the Commission adopted the position that a sentencing court must use the Guidelines Manual in effect at the time the defendant is sentenced *unless* it determines that such a use would violate the Ex Post Facto Clause, in which case the court must use the Manual in effect on the date the defendant committed the offense.[75] This provision continues to appear in the Manual after *Booker*,[76] though without much effect in those circuits relying upon *Booker*'s mandate to no longer find any retroactive applications in violation of the Ex Post Facto Clause.

II. SENTENCING PRACTICES AFTER *UNITED STATES V. BOOKER*

Until January of 2005, the federal Guidelines were mandatory, giving them the force of law described in *Miller*.[77] However, the sentencing landscape was dramatically altered with *U.S. v. Booker*, in which the Supreme Court remedied Sixth Amendment conflicts with the Guidelines by excising their mandatory provisions. One year prior to *Booker*, the Court held that, under the Sixth Amendment, judges can only base sentences on facts reflected in a jury verdict or admitted by the defendant.[78] Thus, the Court subsequently held in *Booker* that, because the Guidelines were mandatory and required the judge to determine appropriate ranges by making his or

71. 991 F.2d 1445, 1451 (8th Cir. 1993).

72. *Id.* at 1449.

73. U.S. SENTENCING GUIDELINES MANUAL § 1B1.11 cmt. background (1992) (citing S. Rep. No. 98-225, at 77–78 (1983) *as reprinted in* 1984 U.S.C.C.A.N. 3182, 3260–61) [hereinafter 1992 MANUAL].

74. *See* cases cited *supra* note 70.

75. 1992 MANUAL, *supra* note 73, § 1B1.11.

76. 2006 MANUAL, *supra* note 31, § 1B1.11.

77. *See supra* note 69 for a list of circuits finding *Miller* applicable to the federal Guidelines.

78. Blakely v. Washington, 542 U.S. 296 (2004); Apprendi v. New Jersey, 530 U.S. 466 (2000).

her own factual findings, which may not have been reflected in a jury verdict, sentencing under the Guidelines violated the Sixth Amendment right to a jury trial.[79] The Court then proceeded to alter the SRA by excising § 3553(b)(1), the provision of the statute making the Guidelines mandatory,[80] and § 3742(e), the appellate review section including, in particular, *de novo* review of departures.[81] While the federal sentencing statute still requires courts to "consider" Guideline ranges and "take them into account when sentencing,"[82] it also "permits" courts to "tailor the sentence in light of other statutory concerns as well."[83]

A. District Court Standard: "Sufficient, but not Greater than Necessary"

Under this new advisory system, sentencing courts must impose a sentence that is "sufficient, but not greater than necessary" to achieve the purposes of sentencing.[84] However, the post-*Booker* approach to sentencing is quite similar to pre-*Booker* sentencing.[85] The circuits are in general agreement that, even after *Booker*, the first step a sentencing judge must take in determining a defendant's sentence is to calculate the appropriate Guideline sentence.[86] In fact, if the trial judge incorrectly calculates the Guidelines

79. 543 U.S. 220, 230–44 (2005).

80. *Id.* at 259. The relevant text of the excised provision is as follows: "[T]he court shall impose a sentence of the kind, and within the [Guideline] range. . . . In determining whether a circumstance was adequately taken into consideration, the court shall consider *only* the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission." 18 U.S.C. § 3553(b)(1) (2000 & Supp. IV 2004) (emphasis added).

81. 543 U.S. at 259.

82. *Id.* at 264.

83. *Id.* at 245–46.

84. 18 U.S.C. § 3553(a) (2003). To do so, a court must consider, among other things:

> (1) [T]he nature and circumstances of the offense and the history and characteristics of the defendant;
>
> (2) [T]he need for the sentence imposed—(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (B) to afford adequate deterrence to criminal conduct; (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;
>
> (3) [T]he kinds of sentences available;
>
> (4) [T]he kinds of sentence and the sentencing range established for—(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines . . . .

Id.

85. *See, e.g.*, United States v. Crosby, 397 F.3d 103, 110–11 (2d Cir. 2005) ("*Booker* . . . can be expected to have a significant effect on sentencing in federal criminal cases, although perhaps not as drastic an effect as some might suppose.").

86. United States v. Jiménez-Beltre, 440 F.3d 514, 518 (1st Cir. 2006); United States v. Hughes, 401 F.3d 540, 546 (4th Cir. 2005) ("[A] district court shall first calculate . . . the range prescribed by the [G]uidelines."); United States v. Dean, 414 F.3d 725, 727 (7th Cir. 2005) ("The Supreme Court's decision in *Booker* requires the sentencing judge first to compute the [G]uidelines sentence just as he would have done before Booker . . . ."); United States v. Talley, 431 F.3d 784, 786 (11th Cir. 2005)

range, the appellate court will usually remand the case before even considering whether the sentence otherwise qualifies as reasonable.[87]

The difference post-*Booker* is that now sentencing courts must consider not only the applicable Guideline ranges and policy statements in the Guidelines Manual, but also all of the factors and policies set forth in 18 U.S.C § 3553(a).[88] While federal appellate courts since *Booker* have generally required that the record reflect the sentencing judge's consideration of the § 3553(a) factors, they have refused to require specific findings or even reference to specific individual factors.[89] This is particularly true where the sentence falls within the Guidelines range. More specifically, the sentencing court "must more thoroughly articulate its reasons when it imposes a non-Guideline sentence than when it imposes a sentence under authority of the Sentencing Guidelines."[90] In fact, "the farther a sentence departs from the [G]uidelines sentence . . . the more compelling the justification based on factors in section 3553(a)" must be.[91] In effect, although sentencing courts must consider all of the § 3553(a) factors in reaching a sentence "sufficient, but not greater than necessary,"[92] the closer to the Guidelines

("First, the district court must consult the Guidelines and correctly calculate the range provided by the Guidelines."). *But cf.* United States v. Cantrell, 433 F.3d 1269, 1279 n.3 (9th Cir. 2006) ("We leave open the question whether, and under what circumstances, district courts may find it unnecessary to calculate the applicable Guidelines range.").

87. United States v. Green, 436 F.3d 449, 457 (4th Cir. 2006); United States v. Hazelwood, 398 F.3d 792, 801 (6th Cir. 2005) ("[R]egardless of whether the Guidelines are mandatory or merely advisory, district courts are *required by statute* to consult them . . . a district court's misinterpretation of the Guidelines effectively means that it has not properly consulted the Guidelines . . . ."); United States v. Skoczen, 405 F.3d 537, 549 (7th Cir. 2005) ("Even under an advisory regime, if a district court makes a mistake in calculations under the Guidelines . . . remand would be required just as before."); United States v. Mashek, 406 F.3d 1012, 1015 (8th Cir. 2005) ("The duty to remand all sentences imposed as a result of an incorrect application of the [G]uidelines exists independently of whether we would find the resulting sentence reasonable . . . ."). *But see Crosby*, 397 F.3d at 112 ("In one circumstance . . . precise calculation of the applicable Guideline range may not be necessary . . . . [S]ituations may arise where . . . the sentencing judge, having complied with section 3553(a), makes a decision to impose a non-Guideline sentence. . . .").

88. *See supra* note 84.

89. *Compare* United States v. Cooper, 437 F.3d 324, 329 (3d Cir. 2006) ("Nor must a court discuss and make findings as to each of the § 3553(a) factors if the record makes clear the court took the factors into account in sentencing."), *and* United States v. Lopez-Flores, 444 F.3d 1218, 1222 (10th Cir. 2006) (finding that where a sentence is within the Guidelines range and the defendant does not raise any § 3553(a) contentions, courts are not required to explain on the record how the factors justify the sentence), *with* United States v. Sanchez-Juarez, 446 F.3d 1109, 1117 (10th Cir. 2006) ("[O]ur pre-*Booker* requirement that district courts provide sufficient reasons to allow meaningful appellate review of their discretionary sentencing decisions continues to apply in the post-*Booker* context."), *and* United States v. Cunningham, 429 F.3d 673, 679 (7th Cir. 2005).

90. United States v. Smith, 440 F.3d 704, 707 (5th Cir. 2006) (citing United States v. Mares, 402 F.3d 511, 519 (5th Cir. 2005)).

91. *Dean*, 414 F.3d at 729.

92. *See supra* note 84.

range a sentence falls, the more likely that sentence will pass appellate "reasonableness" review.

B. Appellate Court Standard: "Reasonableness" Review

In addition to the mandatory requirement, *Booker* also excised § 3742(e), the SRA provision amended in 2003 to require *de novo* appellate review of sentences. Prior to 2003, § 3742(e) directed appellate courts to ensure sentences were reasonable,[93] which they proceeded to do by evaluating sentences for abuse of discretion.[94] The *Booker* remedial opinion effectively invalidated the 2003 amendment when it excised § 3742 and directed appellate courts to return to their familiar pre-2003 practice of reviewing sentences under the "reasonableness" standard.[95] As the Sixth Circuit clarified, "a district court's job is not to impose a 'reasonable' sentence. Rather, a district court's mandate is to impose a 'sentence sufficient, but not greater than necessary'. . . . Reasonableness is the *appellate* standard of review in judging whether a district court has accomplished its task."[96]

When the *Booker* decision was initially handed down, its apparent return of judicial discretion was heralded, particularly by sentencing judges, who described the new advisory system as "ideal,"[97] "marvelous,"[98] and "a very positive thing because it puts the decisionmaking responsibility on the person who is supposed to be making the decision, and that is the judge."[99] According to U.S. District Judge David O. Carter, "[u]niformity under the . . . [G]uidelines was a shield for defendants who deserved harsher sentences and a sword that struck down rehabilitation for those who deserved

93. The relevant portion of 18 U.S.C. § 3742(e) enacted in 1984 and recodified in 2000 read in part:

> Upon review of the record, the court of appeals shall determine whether the sentence . . . (3) is outside the applicable [G]uideline range, and is unreasonable, having regard for—(A) the factors to be considered in imposing a sentence, as set forth in chapter 227 of this title [§§ 3551–3586]; and (B) the reasons for the imposition of the particular sentence, as stated by the district court pursuant to the provisions of section 3553(c); or (4) was imposed for an offense for which there is no applicable sentencing [G]uideline and is plainly unreasonable.

94. Koon v. United States, 518 U.S. 81, 91 (1996) ("The appellate court should not review the departure *de novo*, but instead should ask whether the sentencing court abused its discretion.").

95. 543 U.S. 220, 261 (2005) (in addition to other factors, "the past two decades of appellate practice in cases involving departures, imply a practical standard of review already familiar to appellate courts: review for 'unreasonableness.'").

96. United States v. Foreman, 436 F.3d 638, 644 n.1 (6th Cir. 2006).

97. Carle Hulse & Adam Liptak, *New Fight Over Controlling Punishments is Widely Seen*, N.Y. TIMES, Jan. 13, 2005, at A29 (quoting former federal New York Judge John S. Martin, Jr., who resigned in 2003 due to what he described as the unnecessarily "cruel and rigid" sentencing system).

98. *Id.* (quoting U.S. District Judge Jack B. Weinstein).

99. Alicia Caldwell, *Sentencing Overruled, Justices: "Mandatory Guidelines" Unconstitutional*, DENV. POST, Jan. 13, 2005, at A-01 (quoting U.S. District Judge John Kane).

leniency. [*Booker*] lets the judge sentence fairly. Experience shows that uniformity was a bad proxy for justice."[100] Yet others condemned the change as directly contrary to the express congressional intent to limit discretion and disparity in sentencing. Immediately after the Supreme Court handed down *Booker*, republican Florida Representative Tom Feeney described the decision as "fl[ying] in the face of the clear will of Congress" by placing "extraordinary power to sentence a person solely in the hands of a single federal judge—who is accountable to no one . . . ."[101]

While the amount of discretion actually practiced or even allowed post-*Booker* is still debated, Part III will illustrate that discretion in sentencing has not come close to its pre-Guidelines prevalence. In fact, the Guidelines' persistent influence and weight in sentencing decisions continues to place their revisions within the ex post facto prohibition.

III. RETROACTIVELY APPLYING FEDERAL SENTENCING GUIDELINES AFTER *UNITED STATES V. BOOKER* CONTINUES TO VIOLATE THE EX POST FACTO CLAUSE

In order to determine whether the new advisory sentencing scheme post-*Booker* should alter the Guidelines' placement within the ex post facto prohibition, the role of the Guidelines must be analyzed under current ex post facto doctrine as outlined in Part I.B. Subpart A will apply the *Weaver v. Graham* two-pronged test to the current sentencing scheme. Subpart B will evaluate the Guidelines' new role under the three *Miller* factors previously used by courts to ban retroactive application of revisions.

A. Weaver Analysis

Under current doctrine set forth in *Weaver v. Graham*, a law must be both retrospective and disadvantageous to the offender to fall within the scope of the Ex Post Facto Clause. According to Justice Marshall, the critical question in determining whether a law is retrospective is "whether the law changes the legal consequences of acts completed before its effective date."[102] When applied to revisions of the federal Guidelines, the answer to this critical question, even post-*Booker*, is emphatically "yes." To begin

100. Henry Weinstein & David Rosenzweig, *How Judges Will Use Discretion is the Big Question*, L.A. TIMES, Jan. 13, 2005, at A24 (quoting U.S. District Judge David O. Carter).

101. Hulse & Liptak, *supra* note 97. Two years before *Booker*, Representative Feeney authored a successful provision requiring the Attorney General to provide Congress with the names of federal judges who sentenced below the Guidelines range for certain offenses. PROTECT Act, Pub. L. No. 108-21, 117 Stat. 650, 675 (2003).

102. 450 U.S. 24, 31 (1980).

with, in order to "consider" the Guidelines and "take them into account" a district court judge must first calculate the Guideline range as outlined in the Manual.[103] Therefore, the Guidelines still serve as the baseline number from which courts determine sentences. If the applicable Guidelines ranges present in the Manual that was in effect at the time the defendant committed the crime are altered in the revised Manual that is in effect at the time of sentencing, that revision changes the legal consequences of the act completed before the revised Manual's effective date.

Although the "reasonableness review" of appellate courts gives the appearance that sentencing courts have considerable discretion to deviate from the Manual and seems to allow for the argument that the revision would not necessarily change the sentence, a closer look at sentencing post-*Booker* reveals that compliance with the Guidelines is still considerable. In fact, six circuits have explicitly adopted a "presumption of reasonableness" for any sentence falling within the appropriate Guideline range,[104] a practice recently upheld by the Supreme Court in *Rita v. United States*;[105] nearly all other circuits have recognized the increased likelihood that a within-Guidelines sentence will be reasonable.[106] As a result of the con-

103. *See supra* text accompanying notes 85–87; *see also* Nancy Gertner, *What Yogi Berra Teaches About Post-Booker Sentencing*, 115 YALE L.J. POCKET PART 137, 140 (2006), http://www.thepocketpart.org/2006/07/gertner.html.

104. United States v. Johnson, 445 F.3d 339, 341 (4th Cir. 2006); United States v. Alonzo, 435 F.3d 551, 554 (5th Cir. 2006); United States v. Williams, 436 F.3d 706, 708 (6th Cir. 2006); United States v. Kristl, 437 F.3d 1050, 1054 (10th Cir. 2006); United States v. Mykytiuk, 415 F.3d 606, 608 (7th Cir. 2005); United States v. Lincoln, 413 F.3d 716, 717–18 (8th Cir. 2005).

105. 127 S. Ct. 2456, 2462 (2007). The Supreme Court heard oral arguments on two reasonableness cases in February of 2007. In both cases, *Rita v. United States* (Fourth Circuit) and *United States v. Claiborne* (Eighth Circuit), the appellate courts recognized that their respective circuits had adopted a presumption of reasonableness for within-Guideline sentences when reviewing the defendants' punishments. In *Rita*, the Fourth Circuit affirmed the defendant's within-Guideline sentence; in *Claiborne*, the Eighth Circuit reversed a below-Guideline sentence. The question presented to the Supreme Court was whether a presumption of reasonableness for within-Guidelines sentences made the Guidelines effectively mandatory and thus in violation of *Booker*. In *Rita*, the Supreme Court held that:

> A nonbinding appellate presumption that a Guidelines sentence is reasonable does not *require* the sentencing judge to impose that sentence. Still less does it *forbid* the sentencing judge from imposing a sentence higher than the Guidelines provide for the jury-determined facts standing alone. . . . Thus, our Sixth Amendment cases do not forbid appellate court use of the presumption.

127 S. Ct. at 2466.

106. Four circuits have explicitly rejected a presumption of reasonableness, yet continue to acknowledge that within-Guidelines sentences will typically be found reasonable. United States v. Jiménez-Beltre, 440 F.3d 514, 516–18 (1st Cir. 2006) (en banc) (quoting with approval the district court's decision to give "substantial weight" to the Guidelines); United States v. Fernandez, 443 F.3d 19, 27 (2d Cir. 2006) (Guidelines sentences will be reasonable "in the overwhelming majority of cases"); United States v. Cooper, 437 F.3d 324, 331 (3d Cir. 2006) (noting that unvaried sentences are "more likely to be reasonable"); United States v. Zavala, 443 F.3d 1165, 1170 (9th Cir. 2006) (it is "very likely" a Guideline calculation will fall "within the borders of reasonable sentencing territory"); *see also* United States v. Talley, 431 F.3d 784, 788 (11th Cir. 2005) (not rejecting the reasonableness presumption, but recognizing that within-range sentences will "ordinarily" be reasonable).

tinuing strength of the Guidelines in sentencing decisions, the legal consequences of a defendant's act can still be significantly altered by revisions in the federal Guideline Manuals.

The second element requiring the retroactive application of the advisory Guidelines to disadvantage the offender, and not merely be procedural, is also fulfilled. After *Morales*, the focus of this ex post facto inquiry is not on whether the revision produces some "ambiguous sort of 'disadvantage,' . . . but on whether any such change alters the definition of criminal conduct or increases the penalty by which a crime is punishable."[107] The Supreme Court has defined procedural laws as those that do "not increase the punishment, nor change the ingredients of the offence or the ultimate facts necessary to establish guilt."[108]

Even though a procedural change may work to the disadvantage of a defendant, such a change is not ex post facto. For example, in *Hopt v. Utah*, on the date of Hopt's alleged crime a convicted felon could not be called as a witness.[109] Subsequent to that date, but prior to the trial of the case, the law was changed, and a convicted felon was called to the stand and testified, implicating Hopt in the crime charged against him.[110] Even though this change in the law obviously had a detrimental impact upon the defendant, the Court found that the law was merely procedural and not ex post facto: it neither made a previously innocent act criminal, nor aggravated a crime previously committed, nor provided greater punishment, nor changed the proof necessary to convict.[111]

The Court examined this issue more recently in *Dobbert v. Florida*, where a capital sentencing statute in effect when Dobbert committed murder was held invalid before Dobbert was sentenced.[112] While the previous statute prohibited a judge from overruling a jury's life imprisonment recommendation,[113] Dobbert was sentenced to death pursuant to the subse-

107. 514 U.S. 499, 506 n.3 (1995).

108. Miller v. Florida, 482 U.S. 423, 433 (1987) (quoting Hopt v. Utah, 110 U.S. 574, 590 (1884)).

109. 110 U.S. at 587–88 (Section 505 of Utah's Compiled Laws stated that "persons against whom judgment has been rendered upon a conviction for a felony . . . shall not be witnesses.").

110. *Id.*

111. *Id.* at 589–90.

112. 432 U.S. 282, 288 (1977). In *Donaldson v. Sack*, 265 So. 2d 499 (Fla. 1972), the Florida Supreme Court held Florida's death penalty statutes to be inconsistent with the Supreme Court's then-recent decision in *Furman v. Georgia*, 408 U.S. 238 (1972) (per curiam), in which a Georgia death penalty statute was held in violation of the Eighth and Fourteenth Amendments. The Florida legislature enacted its new death penalty legislation the following year. *Dobbert*, 432 U.S. at 288 (citing 1973 Fla. Laws 72-724).

113. 432 U.S. at 288. The relevant provisions of the unconstitutional statutes provided that:

> A defendant found guilty by a jury of an offense punishable by death shall be sentenced to death unless the verdict includes a recommendation to mercy by a majority of the jury. When

quently enacted statute, under which the district court judge was able to (and in fact did) overrule the jury's recommendation of life imprisonment.[114] Dobbert argued that application of the new sentencing law "deprived him of a substantial right to have a jury determine, without review by the trial judge, whether [the death] penalty should be imposed" and thus constituted an ex post facto violation.[115] Rejecting Dobbert's argument, the Court concluded there was no ex post facto violation because the challenged provisions changed the procedural role of jury and judge in sentencing but did not add to the "quantum of punishment."[116]

The Guidelines have more than a procedural effect on sentences, even after *Booker*; indeed, they continue to directly impact the punishments defendants receive for their crimes. For circuits adopting a presumption of reasonableness for within-Guidelines sentences,[117] a change in the applicable range in a subsequent Manual changes what sentence an appellate court views as presumptively reasonable. Even in circuits that have refused to adopt such a presumption, the courts have expressed the increased likelihood that they will find those sentences reasonable—even accord them "substantial weight."[118] Thus, unlike the statutes in both *Hopt* and *Dobbert*, applying a revised Guideline Manual to a crime committed prior to its enactment "substantially alters the consequences attached to a crime already completed, and therefore changes 'the quantum of punishment.'"[119] Therefore, under *Weaver* and *Morales*, the retroactive application of even the new "advisory" federal guidelines falls within the Constitutional prohibition of ex post facto laws.

B. Miller Analysis

As illustrated above, analysis of the new advisory guidelines under *Weaver* and *Morales* places them within the scope of the ex post facto pro-

> the verdict includes a recommendation to mercy by a majority of the jury, the court shall sentence the defendant to life imprisonment.

FLA. STAT. ANN. § 921.141 (1971 & Supp. 1971–72).

114. 432 U.S. at 287–91.

115. *Id.* at 292.

116. *Id.* at 293–94.

117. *See* cases cited *supra* note 104.

118. *Supra* note 106. The high probability of increased circuits adopting reasonableness presumptions post-*Rita* must be noted here. For example, the Seventh Circuit in *Demaree* stated that appellate courts were not "permitted" to presume that a Guidelines sentence was correct. 459 F.3d 791, 794 (2006). Since the Supreme Court has subsequently held that appellate courts are indeed permitted to make those presumptions, it will be interesting to see what, if any, different approaches circuits begin to adopt. At the time this article went to press, however, circuits have yet to hand down any significant *Rita* decisions.

119. Weaver v. Graham, 450 U.S. 29, 33 (1981) (quoting *Dobbert*, 432 U.S. at 293–94).

hibition. This conclusion is further supported by looking at other rationales relied upon by the courts in forbidding the retroactive application of the Guideline revisions when they were mandatory. In *Miller v. Florida*, the Court differentiated the mandatory state Sentencing Guidelines from the federal Parole Guidelines,[120] which courts had always held outside the prohibition's scope.[121] Because circuit courts initially used the *Miller* rationale to place the Guidelines within the ex post facto prohibition before *Booker*, it would be beneficial to evaluate the new role of the Guidelines after *Booker* under *Miller* as well.

The advisory Guidelines continue to fulfill all three *Miller* factors: (1) they have retained the force and effect of law, (2) they impose a "high hurdle" before discretion can be exercised by sentencing judges, and (3) retroactive application of their revisions "directly and adversely" affects the sentence a defendant receives. First, the statutorily enacted state guidelines at issue in *Miller* had the force and effect of law.[122] When the federal Guidelines were mandatory pre-*Booker*, the federal courts consistently recognized them as having the similar force and effect of law.[123] At first glance, the now "advisory" status of the Guidelines seemingly pulls them out of the ex post facto realm. However, a closer look at sentencing decisions post-*Booker* show a peculiar likeness to pre-*Booker* compliance.[124] While *Booker* only requires sentencing courts to "consider" the Guidelines, among the other § 3553(a) factors, the pattern emerging under circuit court reasonableness review makes it clear that any post-*Booker* approach to sentencing is still required to start with the appropriate Guideline ranges.[125] As was the practice pre-*Booker*, a sentence will be immediately remanded if the court miscalculates the applicable range.[126] Although the *Booker* opinion is void of any such mandate, nearly every circuit has adopted this approach.[127] This judicially enforced requirement—that every sentencing

120. 482 U.S. 423, 435–36 (1987).

121. *See, e.g.*, Wallace v. Christensen, 802 F.2d 1539, 1553 (9th Cir. 1986) (citing cases).

122. 482 U.S. at 435.

123. *See supra* note 70 for a list of circuits finding *Miller* applicable to the federal Guidelines.

124. For a comprehensive list of reasonableness review throughout the circuits for the first eighteen months, see U.S. SENTENCING COMM'N, FINAL REPORT ON THE IMPACT OF *UNITED STATES V. BOOKER* ON FEDERAL SENTENCING 30 (2006); Sentencing Law and Policy, *Tracking Reasonableness Review Outcomes . . . Final Update?*, http://sentencing.typepad.com/sentencing_law_and_policy/2006/07/tracking_reason.html (July 31, 2006, 23:59 EST). It is important to note that the Sentencing Law and Policy Blog and the U.S. Sentencing Commission differ in the way they each categorize some of the same cases.

125. *See supra* note 86.

126. *See supra* note 87.

127. *Id.*

decision begin with a Guidelines calculation—ensures that the Guidelines retain their force and effect of law.

Second, Florida's guidelines created a "high hurdle" before discretion could be exercised.[128] In order to avoid Sixth Amendment implications, *Booker* only requires appellate courts to determine whether a sentence is unreasonable. However, as discussed in Part III.A., many circuits have adopted a presumption of reasonableness for within-Guideline sentences—a presumption recently held constitutional by the Supreme Court.[129] And while there may be numerous circuit decisions affirming sentences that deviated from the Guidelines, the vast majority of those are above-Guideline sentences.[130] The New York Council of Defense Lawyers conducted a survey of those cases between January 1, 2006 and November 16, 2006 where appellate courts undertook a reasonableness review.[131] Of the 1,515 cases analyzed, 154 cases involved above-Guideline sentences and only seven of those sentences were vacated.[132] In contrast, sixty of the seventy-one cases involving below-Guideline sentences were vacated as unreasonable.[133] This study and others[134] illustrate that the "high hurdles" judges face before they can impose discretion get even higher when they exercise that discretion in favor of the defendant.

Third, retroactively applying the mandatory consideration of the Guidelines "directly and adversely" affects the sentence the defendant receives.[135] The post-*Booker* data referenced above[136] strongly indicate that defendants who are sentenced below the Guidelines are much more likely to see their sentence reversed (and increased) on appeal than those defendants who receive above-Guideline sentences. In fact, the Tenth Circuit expressed similar concerns:

> [B]elow [G]uidelines-range sentences are treated less deferentially by appellate courts than above [G]uidelines-range sentences. According to

128. *Miller*, 482 U.S. at 435.

129. *See* cases cited *supra* note 104. Nearly all others have recognized the likelihood of within-Guidelines sentences being reasonable. *See* cases cited *supra* note 106.

130. *See infra* notes 131 and 134 and text accompanying notes 136–37. *See also, e.g.*, United States v. Larrabee, 436 F.3d 890, 892 (8th Cir. 2006) (affirming sentence 54% above Guidelines range because the sentencing judge took into account § 3553(a)); United States v. Smith, 417 F.3d 483, 491–92 (5th Cir. 2005) (affirming sentence seventy-nine months, or 300%, above the Guidelines range because the seriousness of the offense was underrepresented by the criminal history category).

131. N.Y. COUNCIL OF DEF. LAWYERS, REASONABLENESS REVIEW DATABASE (2006), http://www.nycdl.org/itemcontent/booker/NYCDL_reasonableness_review.PDF.

132. *Id.* at 2a.

133. *Id.*

134. *E.g.*, OFFICE OF DEFENDER SERV. TRAINING BRANCH, ADMIN. OFFICE OF THE U.S. COURTS, COURT OF APPEALS REVIEW 2 (2007), http://www.fd.org/CourtofAppealsReview12.1.05-11.30.06.pdf.

135. Miller v. Florida, 482 U.S. 423, 435 (1987).

136. *See supra* notes 131–34 and accompanying text.

> the United States Sentencing Commission, nearly three times as many below [G]uidelines-range sentences have been reversed for unreasonableness as have been affirmed as reasonable. In contrast, the same report states that close to seven times as many above [G]uidelines-range sentences have been found reasonable than have been found unreasonable.[137]

It follows that appellate courts are more likely to allow sentences that are not controlled by the Guidelines when those sentences are harsher than what the Guidelines range calls for. Conversely, it is the defendants whom sentencing judges believe deserve a lower-than-Guidelines sentence that are more strictly controlled by the Guidelines' ranges. Perversely, it is those defendants whom sentencing judges believe deserve leniency that are more likely to be adversely affected when the Guidelines' ranges are increased.

While it is true that not every defendant in every case will be individually harmed by receiving a longer sentence, the Supreme Court has consistently held that a party claiming an ex post facto violation does not have the burden of showing that he would have received a lesser punishment under the previous statute.[138] Instead, the defendant must establish that "the measure of punishment itself has changed."[139] Because the Guidelines continue to be the starting point for all sentence determinations,[140] a revision in the Guidelines changes the measure of punishment. Whereas procedural changes, such as the frequency of parole reviews[141] or the roles of the judge and jury,[142] leave the crime or punishment unaffected, retroactively applying the Guideline revisions directly and adversely affects the punishment the defendant receives, even after *Booker,* because such revisions alter "the measure of punishment itself."

The analyses under both *Miller* and *Weaver* illustrate how the retroactive application of Guidelines revisions after *Booker* continues to violate the Ex Post Facto Clause. *Weaver* mandates the inclusion of the advisory Guidelines in the ex post facto prohibition because their revisions (1) alter the legal consequences of acts completed after their effective date, and (2) disadvantage offenders by altering the "quantum of punishment" applied in their cases. *Miller* further supports the Guidelines' continuing inclusion because (1) they have retained the force and effect of law, (2) they impose

137. United States v. Cage, 451 F.3d 585, 595 n.5 (10th Cir. 2006) (citing U.S. SENTENCING COMM'N, *supra* note 124, at 30).

138. Cal. Dep't of Corr. v. Morales, 514 U.S. 499, 510 n.6 (1995) (citing Lindsey v. Washington, 301 U.S. 397, 401 (1937)).

139. *Id.*

140. *See supra* notes 86 and 87 and accompanying text.

141. Garner v. Jones, 529 U.S. 244, 249–56 (2000).

142. Dobbert v. Florida, 432 U.S. 282, 292–94 (1977).

a high hurdle before sentencing judges can impose discretion, and (3) the retroactive application of their revisions directly and adversely affects the punishment the defendant receives. Nevertheless, the issue initially appears to be splitting the federal circuits.

IV. CURRENT CIRCUIT AND DISTRICT COURT OPINION

The Seventh Circuit drew the first hard line on the status of applying the ex post facto prohibition to revised Manuals after *Booker*. In *United States v. Roche*, the Seventh Circuit noted that *Booker* removed the *Miller* foundation upon which circuits had relied when placing the Guidelines within the ex post facto prohibition.[143] In *United States v. Demaree*, the Seventh Circuit went on to explicitly hold that, after *Booker*, applying revised Guideline Manuals to defendants who committed their crimes before the Manuals were enacted no longer violated the Ex Post Facto Clause.[144] In *Demaree*, the defendant pleaded guilty to wire fraud and tax offenses.[145] Under the 2000 Manual, which was effective at the time of the offenses, the sentencing range for Demaree's offenses was eighteen to twenty-four months.[146] Under the 2004 Manual, which was effective at the time of sentencing and which the judge used to determine Demaree's sentence, the applicable sentencing range was twenty-seven to thirty-three months.[147] The judge sentenced Demaree to thirty months, but noted that he would have only imposed a sentence of twenty-seven months had the 2000 Manual applied—"above the Guidelines range, but not quite so far above as the [thirty] month sentence that he actually gave her."[148] Demaree appealed, claiming the Government's use of the 2004 Manual violated the Ex Post Facto Clause and that she was thereby injured by receiving a longer sentence than she would have received under the 2000 Manual.[149]

The Seventh Circuit, while noting that the purpose of the ex post facto prohibition "is not to enable criminals to calculate with precision the punishments that might be imposed on them,"[150] rejected Demaree's argument

143. 415 F.3d 614, 619 (7th Cir. 2005).

144. 459 F.3d 791, 795 (7th Cir. 2006) ("We conclude that the ex post facto clause should apply only to laws and regulations that bind rather than advise, a principle well established with reference to parole guidelines whose retroactive application is challenged under the ex post facto clause."). *Demaree* was followed in *United States v. Zimmer*, 199 F. App'x 555, 560 (7th Cir. 2006), which advised lower court to apply Guidelines in effect at the time of sentencing on remand.

145. *Demaree*, 459 F.3d at 792.

146. *Id.*

147. *Id.*

148. *Id.* at 792–93.

149. *Id.* at 793.

150. *Id.*

that the presumption of reasonableness given to the Guidelines presumptively alters the sentence a defendant receives and thus keeps the Guidelines within the Ex Post Facto Clause's reach.[151] The court reasoned that sentencing judges are "not required—or indeed permitted" to presume that a sentence within the Guidelines' range is correct—all they are obligated to do is "consider" the Guidelines along with § 3553(a) factors.[152] Notably, the court relied on the proposition that "[t]he applicable [G]uideline nudges [the sentencing judge] toward the sentencing range, but his freedom to impose a reasonable sentence outside the range is unfettered."[153]

In *United States v. Barton*, which the Seventh Circuit cited as support in *Demaree*, the Sixth Circuit also found that the now-advisory nature of the Guidelines required a new stance on applying ex post facto doctrine to the revised Manuals.[154] The court referred to the Guidelines as "recommendations" and emphasized that there was no guarantee that the Guidelines' ranges would have any "critical effect" on a defendant's sentence.[155] According to the Sixth Circuit:

> When the Guidelines were mandatory, defendants faced the very real prospect of enhanced sentences caused by changes in the Guidelines or changes in the interpretation of the Guidelines that occurred after they had committed their crimes. Now that the Guidelines are advisory, the Guidelines calculation provides no such guarantee of an increased sentence, which means that the Guidelines are no longer akin to statutes in their authoritativeness. As such, the Ex Post Facto Clause itself is not implicated.[156]

Yet not all courts have been as willing to retreat from pre-*Booker* precedent. Following *Booker*, the First Circuit, while not specifically addressing the issue, reiterated the same pre-*Booker* ex post facto concerns in *United States v. Cruzado-Laureano*: "The Constitutional prohibition against ex post facto laws . . . requires that a defendant be sentenced under the [G]uidelines in effect when he committed the offense, rather than those in effect at time of sentencing, where subsequent amendments would have increased his punishment."[157] In addition, the Ninth Circuit affirmed a

151. *Id.* at 794.

152. *Id.* at 794–95 (citing United States v. Brown, 450 F.3d 76, 81–82 (1st Cir. 2006)).

153. *Id.* at 795. The Court based this conclusion on the premise that the district court's sentence is subject to "only light review." *Id.*

154. 455 F.3d 649, 655 n.4 (6th Cir. 2006).

155. *Id.* at 654.

156. *Id.* at 655 n.4.

157. 404 F.3d 470, 488 n.10 (1st Cir. 2005).

district court's refusal to apply the revised Manual due to ex post facto concerns.[158]

Because these ex post facto issues are not especially prominent on the circuit court level as of yet, the district courts are grappling with the question of which version of the Manuals to apply—and they do so with virtually no guidance. The District Court of Maine noted that "after *Booker* made the Guidelines advisory, the underpinning for the *ex post facto* concern, namely, that changes in the mandatory Guidelines were 'the equivalent of statutory changes,' has no longer been as clear."[159] While indicating a need for more guidance from the First Circuit, the District Court relied on *Cruzado-Laureano* and applied the Manual in effect at the time of the crime.[160] When discussing the same issue, the District Court of Massachusetts acknowledged what the Seventh Circuit in *Demaree* refused to acknowledge—that after *Booker*, the Guidelines still are not "truly advisory" because, even without a presumption of reasonableness, the sentencing court is required under First Circuit precedent to give "substantial weight to the Guidelines" and "may not question even the unexplained policy choices of the Sentencing Commission."[161] However, the District Court instead relied on the doctrine of constitutional avoidance to apply the version of the Manual in force at the time of the defendant's offense and not at the time of his sentencing.[162]

When allowing retroactive application of increased Guideline ranges, neither the Seventh nor Sixth Circuit applied or even acknowledged the ex post facto doctrine established under *Weaver* and *Miller*. As a result, the Supreme Court's attempt in *Booker* to make sentencing comply with Sixth Amendment requirements has led the constitutionality of sentencing to depend on the circuit in which a defendant lives. This imposition of a geographical bias on the right to due process is a completely at odds with the congressional desire for sentencing conformity when initially enacting the SRA. Accordingly, circuits, and perhaps even the Supreme Court, must address the persisting ex post facto concerns raised by the advisory Guideline system before the gap between approaches widens.

158. United States v. Andres, 178 F. App'x 736, 741 (9th Cir. 2006) ("The sentencing took place after [*Booker*], and the district court clearly indicated that it knew the Guidelines were 'advisory.' Because the district court determined that use of the Guidelines in effect at the time of sentencing might implicate the ex post facto clause, it properly followed U.S.S.G. § 1B1.11(b)(1) and applied the version in effect 'on the last day of the offense of conviction.'").

159. United States v. Kingsbury, No. CR-05-51-B-W, 2006 U.S. Dist. LEXIS 62779, at *5 (D. Me. Sept. 1, 2006).

160. *Id.* at *7–8.

161. United States v. Kandirakis, 441 F. Supp. 2d 282, 335 (D. Mass. 2006) (citations omitted).

162. *Id.*

V. THE GUIDELINES MAINTAIN THE FORCE OF LAW AND SHOULD RETAIN PLACEMENT WITHIN THE EX POST FACTO PROHIBITION

The debate over ex post facto's reach after *Booker* appears to center around one issue: whether or not the Guidelines still retain the force of law, or statutory authoritativeness. After seeing the circuits' differing views on how much authority the Guidelines actually possess, it is easy to understand why circuits cannot agree on how to apply the Ex Post Facto Clause. While different levels of deference, or authority, accorded the Guidelines have emerged after *Booker*, an examination of the two most extreme views will clearly illustrate why the Guidelines retain their placement within the ex post facto prohibition. Level One, the heaviest weight, includes those circuits that have adopted a presumption of reasonableness for within-Guideline sentences. Level Two, providing the least amount of weight to the Guidelines, makes the Guidelines an equal among the other § 3553(a) factors. The strength of support for the continuing application of the Ex Post Facto Clause to Guideline revisions appears to weaken in proportion to the applicable level of deference accorded the Guidelines by the courts. However, regardless of the Guidelines' strength, any level of deference still demands compliance with the ex post facto prohibition.

Level One provides the strongest argument for the Ex Post Facto Clause's continuing application, because it encompasses the situations that are most similar to pre-*Booker* practices. In dissent to the remedial portion of the *Booker* opinion (excising the mandatory provisions of the Guidelines), Justice Scalia expressed serious concerns over the resulting standard of reasonableness review.[163] According to Scalia, appellate courts faced with the "daunting prospect" of evaluating each individual sentence for reasonableness "might seek refuge in the familiar and continue the 'appellate sentencing practice during the last two decades.'"[164] Scalia rather accurately predicated exactly what has happened—that appellate courts would use the "reasonableness" language while reverting to their pre-*Booker* sentencing habits of affirming within-Guideline range sentences, and vacating and remanding those falling outside Guideline ranges (and below-range sentences, in particular).[165] According to Scalia, "any system which [holds] it *per se* unreasonable (and hence reversible) for a sentencing judge to reject the Guidelines is indistinguishable from the mandatory Guidelines system that the Court . . . holds unconstitutional."[166] Yet a little over two

163. 543 U.S. 220, 303–13 (2005) (Scalia, J., dissenting).
164. *Id.* at 312 (citing *id.* at 262 (majority opinion)).
165. *See supra* text accompanying notes 124–37.
166. 543 U.S. at 311 (Scalia, J., dissenting).

years later, the Supreme Court upheld the presumption of reasonableness for within-Guideline sentences against Sixth Amendment attacks in the wake of *Booker*. Thus, although appellate courts have not in fact adopted a per se rule of reasonableness, given current trends and the Supreme Court's nod of approval, they might as well have adopted Scalia's hypothetical system.

The Seventh Circuit, having already adopted a presumption of reasonableness and drawn itself closer to Scalia's prediction than some other circuits, proceeded in *Demaree* to deny the Ex Post Facto Clause's application to Guidelines revisions. The *Demaree* decision is confusing because the argument for the Ex Post Facto Clause's application after *Booker* is strongest in the circuits that have adopted a presumption of reasonableness. According to the Seventh Circuit in *Demaree* (a decision preceding the Supreme Court's opinion in *Rita*), courts are not "permitted . . . to 'presume' that a sentence within the [G]uidelines range is the correct sentence . . . ."[167] However, that is exactly what the Seventh and other similar circuits have allowed sentencing courts to do by adopting a presumption of reasonableness in favor of within-Guideline sentences. The *Demaree* court went on to assert that while the Guideline ranges may "nudge" the sentencing judge's decision, the judge's ability to give a sentence outside the range is "unfettered," as long as it is reasonable.[168] The *Demaree* reasoning, while pragmatic, is unrealistic. The data clearly shows that the discretion of sentencing judges is anything but "unfettered." Even the *Demaree* court acknowledged the high Guidelines compliance since *Booker* when it noted that "[m]ost federal sentences . . . continue after *Booker* to be within the [G]uidelines' sentencing ranges."[169] Accordingly, the Seventh and other circuits falling within Level One must be wary of the *Demaree* and *Roche* precedents and acknowledge the actual continuing strength of the Guidelines in future ex post facto challenges.

Even Level Two weight demands adherence to the ex post facto prohibition. Despite its holding, the *Demaree* court acknowledged that a literal interpretation of the current ex post facto test under *Weaver*, asking whether the defendant is disadvantaged as a result of a retroactively applied law, "would encompass a change in even voluntary sentencing guidelines, for official guidelines even if purely advisory are bound to influence judges' sentencing decisions."[170] In other words, continuing to apply the

167. United States v. Demaree, 459 F.3d. 791, 794 (7th Cir. 2006) (citing United States v. Brown, 450 F.3d 76, 81–82 (1st Cir. 2006)).

168. *Id.* at 795.

169. *Id.* at 794.

170. *Id.* at 794.

Ex Post Facto Clause is consistent with *Booker*'s mandate that guidelines be "advisory"—there are still statutory and judicial directives for courts to consider the Guidelines in formulating a sentence, even if they are not given presumptively reasonable treatment on appellate review. Thus, these legal requirements clearly are "laws" within the ex post facto prohibition, making the requirement to consider the Guidelines law and placing it squarely within the Clause's scope.

To date, no circuit has recognized the other § 3553(a) factors as having the same importance as the Guidelines. Douglas Berman, Professor at the Moritz College of Law and author of the Sentencing Law and Policy Web Blog, asserts that this is the central flaw of reasonableness review—the failure of sentencing court's to phrase "reasonableness" in terms of § 3553(a) factors and not in terms of the Guidelines.[171] According to Berman, the Guidelines are just "one factor among many—and not the first or most important one."[172] Therefore, the Supreme Court should have corrected the current trend in appellate courts by "clarifying that reasonableness review must be informed, as the Court said in *Booker*, by the 'numerous factors' of [§] 3553(a) and not just the [G]uidelines."[173]

Contrary to Professor Berman's wishes, with the current state of reasonableness review under *Rita*,[174] the Guidelines remain the first and most important factor in sentencing. Consequently, and contrary to the rulings in *Demaree* and *Barton*, retroactive application of the Guidelines is clearly barred by the Ex Post Facto Clause. And while the varying approaches taken by the circuits post-*Booker* may differ now and in the future regarding the amount of weight they each accord the Guidelines, their mandate to consider the Guidelines will surely be left unaltered.

CONCLUSION

The drafters of the U.S. Constitution wrote from experience. They had known tyranny and they appreciated the importance of every assurance of personal liberty that they included in the country's founding document. Retroactive legislation had been a favorite form of retributive and vindic-

171. Sentencing Law and Policy, http://sentencing.typepad.com/sentencing_law_and_policy/2006/08/the_central_cir.html (Aug. 22, 2006, 08:57 EST).

172. *Id.*

173. *Id.*

174. 127 S. Ct. 2456, 2467–68 (2007) ("[W]e believe that, where judge and Commission *both* determine that the Guidelines sentences is an appropriate sentence for the case at hand, that sentence likely reflects the § 3553(a) factors (including its 'not greater than necessary' requirement). This circumstance alleviates any serious general conflict between § 3553(a) and the Guidelines, for the purposes of appellate review. And, for that reason, we find that nothing in § 3553(a) renders use of the presumption unlawful.") (citations omitted).

tive governmental action by the English Crown.[175] The prohibition against ex post facto laws, crucial to the drafters, was not included by chance—its assurance was of supreme importance. As one legal commentator noted over one hundred years after the founding, "[l]aws of this kind are so at variance with the general idea of legislative power, that, even in the absence of a constitutional prohibition, it may fairly be doubted whether they would be tolerated by the courts in this country."[176] So it is impossible to conceive how, even with such a steadfast constitutional guarantee against ex post facto laws, federal circuits have begun to shrink from such an imbedded principle of our limited government and indeed tolerate actions "so at variance" with that principle.

With the current reasonableness pattern, including the presumptions in favor of within-Guideline sentences and the substantial weight given to the Guidelines, courts must continue to hold the retroactive application of federal Guideline revisions forbidden by the Ex Post Facto Clause. This result is consistent with *Booker*'s mandate that guidelines be "advisory," because there are still statutory and judicial directives for courts to consider the Guidelines, even if not presumptively reasonable, in formulating a sentence. These directives, or mandates, are clearly "laws" within the ex post facto prohibition, making the requirement to consider the Guidelines a law; thus, this requirement falls squarely within the Clause's scope. Congress cannot insulate itself from constitutional limitations on its authority by delegating that authority to an administrative or judicial agency. Federal courts must not allow such a dangerous wolf to dress in sheep's clothing.

175. Calder v. Bull, 3 U.S. (3 Dall.) 386, 389 (1798) (listing several historical instances to illustrate the Founders' rationale behind the prohibitions against bills of attainder and ex post facto laws). This is further evidenced by the inclusion of the same prohibitions in many state Constitutions. By the time of the *Calder* decision in 1798, the states of Massachusetts, Pennsylvania, Delaware, Maryland, North Carolina and South Carolina all had ex post facto prohibitions. *Id.*

176. WADE, *supra* note 1, § 270.