NOTE

CABINING THE DISCRETION OF THE FEDERAL BUREAU OF PRISONS AND THE FEDERAL COURTS: INTERPRETIVE RULES, STATUTORY INTERPRETATION, AND THE DEBATE OVER COMMUNITY CONFINEMENT CENTERS

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1 *See infra* note 19 (explaining that the term "policy" is a powerful administrative label and must appear within quotation marks until this Note's later evaluation of the term).

2 *See* Monahan v. Winn, 276 F. Supp. 2d 196, 213 (D. Mass. 2003) (noting that courts have described the distinction between an interpretive rule and a substantive rule as, among other things, confusing and "'enshrouded in considerable fog'") (quoting Richard J. Pierce, *Distinguishing Legislative Rules from Interpretative Rules*, 52 ADMIN. L. REV. 547, 548

INTRODUCTION

Functioning in independent, sequential roles, much like sorting arms in a complex assembly line, federal courts and the Federal Bureau of Prisons have traditionally relied upon shared assumptions when sentencing convicted defendants and placing them in appropriate facilities. The power to decide the length and nature of a defendant's sentence rests exclusively in the hands of federal judges,[3] who must apply sentencing formulas prescribed by the United States Sen-

(2000)); Robert A. Anthony, *"Interpretive" Rules, "Legislative" Rules and "Spurious" Rules: Lifting the Smog*, 8 ADMIN. L.J. AM. U. 1, 4 n.13 (1994) ("'Smog' has become a catchword for the perplexities that beset the distinctions among nonlegislative rules.").

[3] *Cf.* United States v. Curry, 767 F.2d 328, 331 (7th Cir. 1985) ("The determination of a sentence imposes a responsibility of staggering proportions on the court. In the eyes of most citizens, this function is probably the single most important duty performed by judges. . . . The . . . view that such a function should be performed only by one who has had the opportunity to judge for himself the credibility of those on whose word the decision is based is in line with one of the most deeply rooted principles in our law."); Banks v. United States, 614 F.2d 95, 99 (6th Cir. 1980) ("Sentencing is probably the most difficult task faced by a federal district judge."); Iacaboni v. United States, 251 F. Supp. 2d 1015, 1022 (D. Mass. 2003) ("No judicial responsibility is more serious than sentencing.").

tencing Commission (the Commission)[4] and who may, in their limited discretion, evaluate additional factors.[5] Similarly, the power to place an individual in a penal or correctional facility rests exclusively with the Federal Bureau of Prisons (the Bureau),[6] a federal agency under the authority of the Department of Justice (DOJ).[7] Despite the strict statutory demarcation of their responsibilities, federal courts and the Bureau have nonetheless developed common understandings to facilitate the seamless transfer and review of prisoners.[8]

For over forty years,[9] the Bureau heeded judges' recommendations that it place select nonviolent offenders with short sentences in Community Confinement Centers (CCCs),[10] more commonly known as halfway houses.[11] This long-standing practice permitted judges to consider alternative forms of incarceration for cases "on the border-

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4 The Commission is an independent federal agency whose "purpose is to establish sentencing policies and practices for the federal criminal justice system that will assure the ends of justice by promulgating detailed guidelines prescribing the appropriate sentences for offenders convicted of federal crimes." *See* U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A, at 1 (2001).

5 *See id.* Under the modern sentencing system, federal judges select a criminal sentence in accordance with detailed guidelines issued by the Commission. *See id.* Congress and the Commission promulgated the Guidelines to eliminate arbitrary discrepancies in sentencing. *See* 28 U.S.C. § 991(b)(1)(B) (2000). The Supreme Court's recent decision in *United States v. Booker*, ___ U.S. ___, 125 S. Ct. 738 (2005), finding that certain mandatory provisions of the Federal Sentencing Act are incompatible with defendants' Sixth Amendment rights and must be severed from the Act, does not alter the conclusions of this Note. *See also* discussion *infra* Part I.C.1, III.B.1–2 (supporting this Note's premise that the Guidelines bind only federal judges and that the Department of Justice improperly stretched the Guidelines to restrict the discretion of the Federal Bureau of Prisons).

6 Congress created the Federal Bureau of Prisons in 1930 to "professionalize the prison service, and to ensure consistent and centralized administration of the 11 Federal prisons in operation at that time." FED. BUREAU OF PRISONS, U.S. DEP'T OF JUSTICE, ABOUT THE FEDERAL BUREAU OF PRISONS 2 (2001), *available at* http://www.bop.gov/news/PDFs/lpaabout.pdf [hereinafter ABOUT THE BUREAU].

7 28 C.F.R. §§ 0.1, 0.95–.99 (2004); *see* discussion *infra* Part IV.B.

8 *See An Interview with Bureau of Prisons Director Kathleen M. Hawk*, THE THIRD BRANCH, June 1996, http://www.uscourts.gov/ttb/jun96ttb/hawk.htm ("We take very seriously judicial recommendations that an inmate be placed in a particular institution or particular type of institution. . . . The [B]ureau's mission is to carry out the sentences of the courts . . . .").

9 *See, e.g.*, Monahan v. Winn, 276 F. Supp. 2d 196, 205 (D. Mass. 2003).

10 A CCC is a "community treatment center, halfway house, restitution center, mental health facility, alcohol or drug rehabilitation center, or other community facility" where residents participate in "gainful employment, employment search efforts, community service, vocational training, treatment, educational programs, or similar facility-approved programs during non-residential hours." *See* U.S. SENTENCING GUIDELINES MANUAL § 5F1.1, cmt. n.1 (2001). *But cf.* Howard v. Ashcroft, 248 F. Supp. 2d 518, 522 n.13 (M.D. La. 2003) (suggesting that the term "halfway house" may be misleading, because not all inmates are "halfway between jail and home," but rather are punished for an extended period of time, with limited privileges for employment and some contact with the community).

11 The Bureau nonetheless retained its discretion to disregard such judicial recommendations. *See* Iacaboni v. United States, 251 F. Supp. 2d 1015, 1023 (D. Mass. 2003).

line between probation and incarceration."[12] At the same time, this alternative permitted the Bureau to place nonviolent prisoners in a facility that was cost effective to taxpayers and the defendants' communities.[13] Congress and the Commission consistently encouraged the use of this alternative, and the Supreme Court noted it with approval.[14] Bureau guidance manuals, published by the DOJ, also documented and reinforced this practice.[15]

In December 2002, however, the DOJ caused a "sea change in settled understandings"[16] by announcing that placing individuals directly in CCCs was "unlawful."[17] In the form of a memorandum (the Memorandum), the DOJ instructed the Bureau to disregard any prospective recommendations for CCC placement,[18] as well as to apply the new "policy"[19] retroactively.[20] This abrupt change prompted individuals to challenge the Memorandum's "policy" and file for injunctions to prevent their immediate transfer from CCCs to more conventional prisons.[21] Such petitions raised the ire of judges nationwide,[22] who expressed shock at the "amputation of the [Bureau's] dis-

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12 *Monahan*, 276 F. Supp. 2d at 199.

13 Prisoners in a CCC were required to contribute twenty-five percent of their gross income to help defray the costs of the CCC. *See* Program Statement No. 7310.04, Fed. Bureau of Prisons, U.S. Dep't of Justice, Community Corrections Center (CCC) Utilization and Transfer Procedure 4 (Dec. 16, 1998), http://www.bop.gov//policy/progstat/7310_004.pdf [hereinafter Program Statement No. 7310.04]. Additionally, the cost of confining an individual in a CCC is "far less than the price tag on more conventional forms of imprisonment." *Iacaboni*, 251 F. Supp. 2d at 1023. CCCs were also a desirable choice because an inmate could "continue employment outside the facility during the day, and can maintain ties with vulnerable family members, such as children or ailing parents"; the inmate's employment often permitted families to stay out of the welfare and the foster care systems. *Id.* at 1022.

14 *See* Byrd v. Moore, 252 F. Supp. 2d 293, 299 (W.D.N.C. 2003).

15 *See infra* notes 67–69 and accompanying text.

16 Mallory v. United States, No. Civ.A. 03-10220-DPW, 2003 WL 1563764, at *1 (D. Mass. Mar. 25, 2003).

17 *See* Memorandum Opinion from M. Edward Whelan III, Principal Deputy Assistant Attorney General, Office of Legal Counsel, U.S. Dep't of Justice, to the Deputy Attorney General (Dec. 13, 2002), http://fd.org/Publications/SpecTop/bopimp.PDF (online version at 1) [hereinafter Memorandum (paginated as online version)].

18 *See id.* at 8.

19 The label "policy," as distinguished from "rule," signals important implications in the context of administrative law. This Note will refer to the DOJ Memorandum as a "policy" until Part IV, when it will address reasons for classifying it as either a policy or a rule. Throughout their analyses, several district courts referred to the Memorandum as a "policy" to indicate that they reserved judgment as to the proper classification of the action prior to a full analysis of the label and its ramifications. *See, e.g.*, Howard v. Ashcroft, 248 F. Supp. 2d 518, 525–26 (M.D. La. 2003). This Note adopts the use of this term in quotations to indicate the same.

20 *See infra* notes 29–30 and accompanying text.

21 *See infra* notes 34–35 and accompanying text.

22 *See, e.g.*, Iacaboni v. United States, F. Supp. 2d 1015, 1018 (D. Mass. 2003); Monahan v. Winn, 276 F. Supp. 2d 196, 199–200 (D. Mass. 2003).

cretion"[23] and the insult to the courts, and who criticized that even if the Bureau's "about-face on community corrections could somehow be justified . . . it should never have been carried out in the cavalier manner it was."[24]

The Memorandum marked a radical shift from the preexisting policy, which had been "repeatedly and explicitly conveyed to the judiciary" since 1965 and under which the Bureau considered judicial recommendations regarding sentencing when it was appropriate to do so.[25] The DOJ, however, firmly defended the Memorandum on the grounds that it corrected a long-standing erroneous application of 18 U.S.C. § 3621, the statute outlining the Bureau's responsibilities with respect to convicted individuals.[26] The DOJ argued that community confinement does not constitute imprisonment for the purposes of a sentencing order,[27] and that the Bureau consequently lacks the authority to place in community confinement an offender who has been sentenced to a term of imprisonment.[28] The DOJ thus declared that the Bureau could no longer designate offenders to CCCs or heed judicial recommendations for such placement.[29] The DOJ directed the Bureau to apply this new placement regime both prospectively and retroactively, forcing inmates who had more than 150 days remaining in their sentences to transfer from CCCs to conventional prisons.[30] While many commentators presume that the impetus for the Memorandum was a general crackdown on white-collar criminals,[31] the DOJ has not publicly asserted a reason for revisiting the Bureau's discretion under § 3261.[32]

The Memorandum caught the courts, prisoners, and even some at the Bureau by surprise. Prisoners' petitions in the face of impending transfer to distant, minimum-security facilities demonstrated the personal costs of the DOJ's policy shift. The petitioners' stories highlighted the effectiveness of confinement in CCCs, describing how CCCs rehabilitated nonviolent offenders and permitted them to provide for their children and families, while nonetheless isolating them

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23 *Iacaboni*, 251 F. Supp. 2d at 1018.

24 *Id.*

25 *Id.* at 1017.

26 *See* 18 U.S.C. § 3621 (2000); Memorandum, *supra* note 18, at 1–9.

27 Memorandum, *supra* note 17, at 1–4.

28 *Id.* at 5–9.

29 *Id.* at 4, 8–9.

30 *See Iacaboni*, 251 F. Supp. 2d at 1017.

31 *See id.* at 1023; Dan Eggen, *White-Collar Crime Now Gets Real Time: New Federal Prison Policy Criticized*, WASH. POST, Jan. 7, 2003, at A6.

32 *But cf.* Monahan v. Winn, 276 F. Supp. 2d 196, 205 n.9 (D. Mass. 2003) ("There is a certain disingenuousness about the 'occasion' for this revisitation of policy. The [DOJ] Opinion is written as if in response to a [Bureau] consultation about an unanswered question regarding its authority . . . when in fact the issue was well-settled in a [Bureau] Program Statement and manual.").

from society as punishment for their offenses.[33] On an institutional level, the abruptness of the DOJ's "policy" change and its retroactive application clearly struck a nerve on the bench. Courts expressed outrage that, months after judges had sentenced certain defendants, a "bureaucrat in an office in Washington D.C. determined that the entire legal world had been acting under the same shared 'unlawful' fantasy for decades and acted to bring us all back into step with his vision of the law."[34]

Petitioners sought relief from the retroactive application of the DOJ "policy" by filing preliminary injunctions in federal district courts throughout the country. While some courts rejected petitioners' claims on the grounds that petitioners had not exhausted their administrative remedies,[35] other courts agreed to hear petitioners' claims on the grounds that any further administrative appeal was futile in light of the DOJ's unyielding "policy."[36] Scrutinizing the Memorandum, this second group of courts concluded that the DOJ's "policy" substantively lacked merit and that Congress did not intend to reduce the Bureau's discretion to designate prisoners to facilities under the Bureau's control.[37] These courts ruled that the Memorandum was a substantive rule and was therefore procedurally invalid for its failure to comply with the Administrative Procedure Act (APA).[38] Further, these courts argued that the retroactive application of the DOJ's "policy" violated constitutional due-process protections afforded to persons standing before a court for sentencing.[39]

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33 *See, e.g.*, Howard v. Ashcroft, 248 F. Supp. 2d 518, 535 (M.D. La. 2003); *Iacaboni*, 251 F. Supp. 2d at 1022–23.

34 *See Howard*, 248 F. Supp. 2d at 531.

35 *See, e.g.*, United States v. James, 244 F. Supp. 2d 817, 820 (E.D. Mich. 2003) (asserting that the court did not have jurisdiction to grant the prisoner a temporary restraining order to prevent the Bureau from transferring him from a CCC to a conventional prison, because Congress intended prison designation to be a matter of Bureau discretion). Several courts also expressed doubt that any judge's decision to recommend CCC placement could have been material where the recommendation itself was not binding upon the Bureau. *See, e.g.*, United States v. Kramer, No. 02 CR 47, 2003 WL 1964489, at *3 (N.D. Ill. Apr. 28, 2003); Borgetti v. Bureau of Prisons, No. 03 C 50034, 2003 WL 743936, at *2 (N.D. Ill. Feb. 14, 2003); United States v. Herron, Nos. 03-3039-JAR, 02-40056-001-JAR, 2003 WL 272170, at *1–2 (D. Kan. Feb. 3, 2003); *James*, 240 F. Supp. 2d at 819; United States v. Schild, Nos. 00-40021-01, 03-3028-RDR, 2003 WL 260672, at *2 (D. Kan. Jan 21, 2003); United States v. Andrews, 244 F. Supp. 2d 636, 639 (E.D. Mich. 2003).

36 *See, e.g., Monahan*, 276 F. Supp. 2d at 204–05; *Howard*, 248 F. Supp. 2d at 532–34; Ferguson v. Ashcroft, 248 F. Supp. 2d 547, 563 (M.D. La. 2003).

37 *See, e.g., Monahan*, 276 F. Supp. 2d at 199–200; *Iacaboni*, 251 F. Supp. 2d at 1017–18 (commenting that the "well-established practice of the [Bureau] . . . was not, and is not, even remotely 'unlawful'").

38 *See, e.g., Monahan*, 276 F. Supp. 2d at 215; *Iacaboni*, 251 F. Supp. 2d at 1038–40; discussion *infra* Part III.A–B.

39 This Note will not address the propriety of retroactively applying the DOJ's new "policy" to prisoners' detriment once the sentencing phase was already completed. For

This Note endeavors to understand what powers Congress intended to delegate to the federal courts and the Bureau concerning CCCs. Part I will discuss the history of the Federal Sentencing Guidelines (the Guidelines) and the limitations they impose upon judicial discretion, the history of the Bureau and the relative breadth of its statutory authority, and the specific treatment of CCCs in the Guidelines and Bureau documents prior to December 2002. Part II will probe the DOJ's December 2002 Memorandum, contrasting the DOJ's interpretations with preexisting understandings between federal judges and the Bureau regarding CCC placement. Part III will discuss the distinction between substantive and interpretive rules, and will argue that the DOJ's "policy" poses as a substantive rule in disguise and as such is procedurally invalid for failure to comply with the APA notice and comment procedures. Under the guidance of *United States v. Mead Corp.*[40] and *Skidmore v. Swift & Co.*,[41] Part IV presents analysis in the alternative and assesses the reasonableness of the DOJ's Memorandum as an interpretive rule. This Note will acknowledge that the DOJ ultimately wields the authority to reverse the long-standing practice of placing inmates in CCCs, regardless of what the impetus for the revision might have been. It will conclude, however, that the DOJ improperly employed a statutory argument to avoid procedural due-process requirements and to unhinge sentences that judges had carefully evaluated.[42]

I
LAYING THE HISTORICAL GROUNDWORK: THE SENTENCING GUIDELINES, THE BUREAU OF PRISONS, AND COMMUNITY CONFINEMENT CENTERS

A. Balancing Uniformity and Judicial Discretion: The Purpose and Scope of Sentencing Guidelines

Seeking to curb nationwide dissatisfaction with the disparity and uncertainty resulting from discretionary sentencing, Congress enacted the Sentencing Reform Act of 1984 (SRA). The SRA's purpose was to replace a system in which "judges received wide ranges within which to sentence, but no anchoring point from which to begin,"[43] with a

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discussion of the due-process implications of retroactive application, see the cases cited in *supra* notes 35–36.

40 533 U.S. 218 (2001).

41 323 U.S. 134 (1944).

42 *See* discussion *infra* Part IV.

43 Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE L.J. 1681, 1687 (1992); *see* Leslie A. Cory, *Looking at the Federal Sentencing Process One Judge at a Time, One Probation Officer at a Time*, 51 EMORY L.J. 379, 387–88 (2002) (commenting that prior to the Sentencing Reform Act of 1984, "Congress had provided courts with very little statutory guidance . . . . Title 18 U.S.C. §§ 3561

"comprehensive and consistent statement of the Federal law of sentencing, setting forth the purposes to be served."[44] The product of this effort, the Guidelines, thus introduced a sentencing structure limiting judicial discretion.[45] Congress conceived of the Guidelines to assure consistency in sentencing so that the purpose and rationale behind each sentence would be clear to all parties involved.[46] The resulting system of guidelines now applies to more than ninety percent of all felonies and Class A misdemeanor cases in federal courts.[47]

The SRA created the Commission as the centerpiece of its efforts to reduce sentencing disparities among defendants with similar records and comparable convictions.[48] Congress directed the Commission, an independent agency within the judicial branch, to develop sentencing guidelines utilizing categories of offenses and offenders to prescribe suggested sentencing ranges.[49] Congress did not grant the Commission power to enforce the Guidelines.[50] Rather, it intended for the Commission, a "nonpolitical group of sentencing experts,"[51] to

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and 3562, both repealed when the sentencing guidelines took effect in 1987, provided only that judgment and sentence would be imposed pursuant to Rule 32 of the Federal Rules of Criminal Procedure. Rule 32, in turn, provided minimal guidance.").

44 S. REP. NO. 98-225, at 39 (1983), *as reprinted in* 1984 U.S.C.C.A.N. 3182, 3222.

45 *See* Freed, *supra* note 43, at 1683 (suggesting that a system of guidelines "must leave ample room for departures from the guidelines range so that judges can accommodate cases of greater and lesser seriousness. It must be developed by an institution that understands the complexity of criminal sentencing, that appreciates the wisdom, integrity and sense of justice that animates experienced judges, and that earns the respect of judges and practitioners.").

46 *See* S. REP. NO. 98-225, at 59 (1983), *as reprinted in* 1984 U.S.C.C.A.N. 3182, 3242.

47 *See* U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A, at 11 (2001). A summary report surveying judges' views of the efficacy of the Guidelines in meeting their purported goals, collected on the fifteenth anniversary of the Guidelines, found that judges believed that the Guidelines had been "relatively effective" in achieving the SRA goals of "providing punishment levels that reflect the seriousness of the offense," "providing adequate deterrence to criminal conduct," "protecting the public from further crimes of the defendant," and "avoiding unwarranted sentencing disparities among defendants with similar records." U.S. SENTENCING COMM'N, SURVEY OF ARTICLE III JUDGES: A COMPONENT OF THE FIFTEEN YEAR REPORT ON THE U.S. SENTENCING COMMISSION'S LEGISLATIVE MANDATE 2 (2002). The report indicated that a plurality of judges responding to the survey opined that the Guidelines were least effective in "providing defendants with training, medical care, or treatment in the most effective manner . . . and maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors." *Id.*

48 *See* 28 U.S.C. § 991(b)(1) (2000).

49 *See* 28 U.S.C. § 994(b)(1) (2000); William P. Ferranti, Note, *Revised Sentencing Guidelines and the Ex Post Facto Clause*, 70 U. CHI. L. REV. 1011, 1013 (2003) (noting that the Commission must consist of "seven voting members, at least three of whom are federal judges").

50 *See* Freed, *supra* note 43, at 1690. The Guidelines became effective after complying with applicable requirements of the Administrative Procedure Act and after a six-month period of congressional oversight and review. *Id.* at 1695.

51 *Id.* at 1690.

draft the Guidelines, and expected federal courts to independently enforce them.[52]

Although the SRA anticipated that the Guidelines would incorporate prior judicial practice, the very existence of the Guidelines displaced traditional judicial discretion in sentencing, requiring federal judges to implement the Guidelines and holding judges accountable for each sentencing choice.[53] By explicitly separating the functions of creating and enforcing the Guidelines, and by focusing all of the Guidelines' directives upon the federal courts,[54] Congress made one thing clear: The binding authority of the Guidelines was intended to restrain only federal courts. Indeed, the "Guidelines are administrative handcuffs that are applied to judges and no one else."[55]

The Guidelines specifically acknowledge judges' singular authority to determine the length and nature of defendants' sentences, and endeavor to cabin a judge's discretion without depriving him of the power to exercise discretion in limited situations in which he deems it appropriate.[56] Attempting to balance uniformity with the need for discretion in individual cases, the Guidelines arm judges with a range of sentences and enumerate limited grounds for departure from these prescribed ranges.[57] Despite providing grounds for departure from the Guidelines, however, the Commission intended the number of such departures to gradually decrease. Viewing the Commission as a permanent body whose objective was to create a more accurate grid over time, the SRA expected the Guidelines to adapt to previously un-

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52 *See* 28 U.S.C. § 994(a) (outlining the duties of the Commission and charging it to "promulgate and distribute . . . guidelines . . . *for use of a sentencing court* in determining the sentence to be imposed in a criminal case" (emphasis added)).

53 *See* Freed, *supra* note 43, at 1697 (noting that a federal judge must explain each sentence, "including a 'specific reason' for some sentences, and [that] his decision is subject to appellate scrutiny").

54 *See generally* U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A (2001) (discussing the SRA, outlining the Commission's efforts and reasoning in promulgating the Guidelines, and describing how the Guidelines would be applied by the federal courts).

55 Freed, *supra* note 43, at 1697 (noting that the Guidelines do not bind, for example, a U.S. Attorney negotiating a particular disposition, such as a plea bargain).

56 *See* Iacaboni v. United States 251 F. Supp. 2d 1015, 1034 (D. Mass. 2003).

57 *See* 18 U.S.C. § 3661 (2000) (indicating that a court may consider, without limitation, "information concerning the background, character, and conduct" of the defendant); U.S. SENTENCING GUIDELINES MANUAL §§ 5K2.0–.2 (2001) (enumerating appropriate grounds for departure, including coercion, distress, and diminished capacity); Ferranti, *supra* note 49, at 1013–14 (explaining that a judge may only review the guidelines, policy statements, and official commentary issued by the Commission in deciding whether to depart from the prescribed sentencing range, and that a decision to depart is subject to review for abuse of discretion). The limited reach of the Guidelines has been reenforced by the Supreme Court's recent decision in *United States v. Booker*, ___ U.S. ___ (2005), 125 S. Ct. 738, which found that certain mandatory provisions within the Guidelines must be severed because they are incompatible with defendants' Sixth Amendment rights, *id.* at 759.

foreseen circumstances with uniform solutions, thereby limiting the volume of departures over time, both in principle and in practice.[58]

B. The Federal Bureau of Prisons: Placing Individuals in the Post-Sentencing Phase

The Bureau, a federal agency under the direction of the Attorney General, was formed in 1930 in an effort to develop and manage an integrated system of prisons.[59] Replacing a system in which Congress separately financed the eleven existing federal prisons,[60] Congress granted the Bureau control and regulation of all federal penal and correctional institutions.[61] Congress entrusted the Bureau with the role of "protect[ing] society by confining offenders in the controlled environments of prison and community based facilities that are safe, humane, cost-efficient, and appropriately secure," as well as maintaining work and other self-improvement opportunities for those in the Bureau's custody.[62] Today, the Bureau directs over 100 federal prisons as well as over thirty community corrections offices.[63]

Rather than encouraging sentencing courts and the Bureau to operate in tandem, Congress specifically designed independent, albeit sequential, responsibilities and spheres of influence for the courts and the Bureau. As such, "[a] Person who *has been* sentenced to a term of imprisonment . . . shall be committed to the custody of the Bureau of Prisons until the expiration of the term imposed, or until earlier release for satisfactory behavior."[64] Thus, after a court has sentenced an individual to prison, that individual becomes the Bureau's responsibility and remains in the Bureau's custody through the term of imprisonment. The Bureau has the initial responsibility of "designat[ing as] the place of the prisoner's imprisonment . . . any available penal or correctional facility that meets minimum standards of health and habitability established by the Bureau," upon considering a number of factors in its discretion, including the resources of particular facilities, the criminal history of the individual, and the nature and circumstances of her offense.[65] The Bureau may also consider any statement by the sentencing judge, either concerning the purpose of the individual's imprisonment or concerning a recommendation for a specific

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58 *See* U.S. SENTENCING GUIDELINES MANUAL ch.1, pt. A, at 6 (2001).

59 *See* 18 U.S.C. § 4042(a) (2000); *supra* note 6.

60 *See* FED. BUREAU OF PRISONS, U.S. DEP'T OF JUSTICE, LEGAL RESOURCE GUIDE TO THE FEDERAL BUREAU OF PRISONS 1 (2004), *available at* http://www.bop.gov//news/PDFs/legal_guide.pdf [hereinafter LEGAL RESOURCE GUIDE].

61 *See* 18 U.S.C. § 4042(a).

62 *See* LEGAL RESOURCE GUIDE, *supra* note 60, at 1.

63 *Id.*

64 18 U.S.C. § 3621(a) (2000) (emphasis added).

65 18 U.S.C. § 3621(b).

type of penal or correctional facility, as well as any pertinent policy statement issued by the Commission pursuant to 28 U.S.C. § 994(a)(2).[66]

The Bureau retains broad discretion and may designate a prisoner to *any* penal or correctional facility, so long as it meets "minimum standards of health and habitability."[67] Official documents issued by the DOJ endorse this broad view of the Bureau's discretion, claiming that the statutory authority granted in the phrase "any available penal or correctional facility"[68] trumps other perceived statutory limitations on the Bureau.[69]

C. Community Confinement Centers as Conceived by the Guidelines and the Bureau

1. *Section 5C1.1 of the Sentencing Guidelines and Its Directives Concerning CCCs*

CCCs provide two distinct programs: a prerelease component and a community corrections component.[70] The Guidelines devote themselves to calculating the nature and length of a term of imprisonment, rather than the location of an individual's imprisonment. By corollary, the Guidelines do not address the direct placement of convicted individuals in the community corrections component of CCCs, and the language of the Guidelines does not address the focus of the Bureau's "policy" change in December 2002. The Guidelines limit discussion of CCCs to proper consideration of the prerelease component, a placement that facilitates a prisoner's transition to a community,[71] specifically counseling in section 5C1.1 that a sentence of imprisonment may include "a term of supervised release with a condition that substitutes community confinement or home detention."[72] The Guidelines thus permit judges to alter the quality of an individual's sentence without departing from the prescribed sentencing ranges for the individual's offense.

The Guidelines specifically provide that one day of community confinement, denoted as "residence in a community treatment

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66 *See id.*

67 *See id.*; Byrd v. Moore, 252 F. Supp. 2d 293, 301 (W.D.N.C. 2003) (emphasis added) (suggesting that § 3621(b) is constructed so broadly that it "rules out almost no imaginable facility or institution, public or privately owned"); *infra* Part I.C.2.

68 18 U.S.C. § 3621(b).

69 *See* Program Statement No. 7310.04, *supra* note 13, at 4 (indicating that perceived limitations set forth in 18 U.S.C. § 3624(c) do not restrict the scope of authority granted by § 3621(b)).

70 *See, e.g.*, U.S. SENTENCING COMM'N & FED. BUREAU OF PRISONS, REPORT TO CONGRESS ON THE MAXIMUM UTILIZATION OF PRISONS RESOURCES 9–10 (1994) [hereinafter REPORT TO CONGRESS].

71 *See* Program Statement No. 7310.04, *supra* note 13, at 5.

72 *See* U.S. SENTENCING GUIDELINES MANUAL § 5C1.1(c)(2) (2001).

center, halfway house, or similar residential facility," may be substituted for one day of imprisonment.[73] Application notes to section 5C1.1 suggest that a judge "may impose a sentence of imprisonment that includes a term of supervised release with a condition that requires community confinement or home detention."[74] These notes acknowledge that the prerelease component is a part of imprisonment, rather than a term separate from imprisonment, stating that a sentence may *include* a term of supervised release.[75] The Guidelines do not, however, recommend use of this discretionary tool for individuals qualifying for a criminal history category of III or higher.[76] The Guidelines also specifically prescribe that defendants in Zone D on the sentencing table must fulfill the minimum term of imprisonment without use of any imprisonment substitutes.[77] Limiting discussion of CCCs to the prerelease component, the Guidelines thus supply courts with an important, albeit limited, discretionary tool that allows them to operate within the Guidelines' prescribed sentencing range and to simultaneously facilitate inmates' transitions from the prison system to society.

Since 1965,[78] federal judges have taken their cues from statutory language directing the Bureau to consider "any statement by the court that imposed the sentence . . . recommending a type of penal or correctional facility as appropriate,"[79] and have recommended direct placement in CCCs for certain individuals. Judges have relied upon the availability of this option, particularly when evaluating sentences for individuals whose cases seem to lie on the difficult line between probation and incarceration or whose cases present particular hardships and concerns to the court.[80] Nonetheless, the Bureau fundamentally retained the discretion to disregard judicial

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73 *See id.* § 5C1.1(e)(2).

74 *See id.* § 5C1.1 cmt. n.3(C).

75 *See id.* § 5C1.1 cmt. n.4(B) ("[A]t least one-half of the minimum term specified in the guideline range must be satisfied by imprisonment, and the remainder of the minimum term specified in the guideline range must be satisfied by community confinement or home detention.").

76 *See id.* § 5C1.1 cmt. n.7.

77 The Guidelines follow a categorical table which classifies defendents by the severity of their crime and their previous criminal history. On this scale, Zone D defendants have the highest classification for both categories. *See id.* § 5C1.1(f).

78 *See* Iacaboni v. United States, 251 F. Supp. 2d 1015, 1017 (D. Mass. 2003).

79 18 U.S.C. § 3621(b)(4) (2000).

80 *See Iacaboni*, 251 F. Supp. 2d at 1021 (noting that without the possibility of direct CCC placement, the judge would have considered sentencing the defendant to four years probation with the first year to be served in the CCC, thus assuring that the defendant would remain close to home).

recommendations and to designate placement without judicial interference.[81]

2. *The Bureau's Long-Standing Encouragement of CCC Placement*

Acknowledging that "[n]ot all Federal inmates are confined in prisons with fences," the Bureau has consistently encouraged alternative modes of incarceration, recognizing that such placement may be more appropriate in certain circumstances and may simultaneously relieve the strain on the system of penal and correctional institutions as a whole.[82] As late as January 2003, Kathleen Hawk Sawyer, then-director of the Bureau, confirmed the Bureau's preexisting "deeply rooted practice of honoring, when appropriate, judicial recommendations that low-risk, non-violent offenders serving short prison sentences be directly designated to [CCCs]."[83] Ms. Hawk Sawyer's emphasis on the words "when appropriate" underscores the fact that the Bureau retained the discretion to disregard judicial recommendations concerning designation to a CCC or comparable facility. Further, her comments confirm the existence of a long-standing accord between the Bureau and the federal courts prior to December 2002.

The Bureau repeatedly publicized its policy concerning direct placement in CCCs in statements to Congress, manuals to federal courts, and publications for general distribution. Specifically describing CCCs as "correctional facilities,"[84] the Bureau represented to Congress in 1994 that "[t]he community corrections component [was] designed to be sufficiently punitive to be a legitimate sanction."[85] Bureau Program Statement No. 7310.04 confirmed this definition in practice, noting that "'[t]he Bureau may designate any available penal or correctional facility . . . the Bureau determines to be appropriate and suitable'"[86] and that "[a] CCC meets the definition of a 'penal or correctional facility.'"[87] This document conclusively defined CCCs as "'halfway houses,' provid[ing] suitable residence, structured programs, job placement, and counseling," but otherwise confining and closely monitoring inmates.[88] Further, the program statement classified the community corrections component as "the most restrictive

81 *See* 18 U.S.C. § 3621(b)(4) (stating that the Bureau *may* consider judicial recommendations and implying that the Bureau is not bound by them).

82 *See* ABOUT THE BUREAU, *supra* note 6, at 10.

83 *See Iacaboni*, 251 F. Supp. 2d at 1022 (quoting Ms. Hawk Sawyer's response to a letter from Judge Ponsor, which had "question[ed] the manner and substance of the [Bureau's] abrupt turnabout").

84 REPORT TO CONGRESS, *supra* note 70, at 10.

85 *Id.* at 9–10.

86 Program Statement No. 7310.04, *supra* note 13, at 4 (quoting 18 U.S.C. § 3621(b) (1994)).

87 *Id.*

88 *Id.*

option," in which inmates are released from confinement in the CCC only for employment and limited, structured activities pending approval of the CCC.[89] As compensation for this flexibility, inmates paid twenty-five percent of their earnings as subsistence to the CCC, paying in part for their room and board.[90]

Characterizing the community corrections component of CCCs as more restrictive than the prerelease component, Bureau documents clearly distinguished the components as separate programs requiring separate regulation. Regarding the prerelease component of CCCs, the Bureau has traditionally followed clear statutory authority instructing it to place prisoners in CCCs for the last ten percent of imprisonment, a period not to exceed six months, affording prisoners an opportunity to prepare for their transition out of an institutionalized setting.[91] Multiple Bureau manuals detail how and when a prisoner may be referred to a CCC for the prerelease component and how the Bureau may decide which CCC may best facilitate a prisoner's transition, as well as offering the Bureau detailed guidance regarding all aspects of prerelease placement.[92]

In the *Judicial Resource Guide to the Federal Bureau of Prisons (Judicial Resource Guide),* the DOJ offered federal judges clear guidance concerning direct placement in CCCs' community corrections component. Under the heading, "Imprisonment," the document permits the Bureau to place an offender directly in a community-based facility, noting that this usually transpires with the concurrence of the sentencing court.[93] Targeting federal courts as its audience, this Bureau document specifically encourages judges to consider alternative incarceration for individuals that satisfy these general criteria and reinforces the preexisting understanding between the Bureau and federal courts.[94]

The existence of separate statutory instructions for the prerelease component, as well as separate DOJ and Bureau guidance manuals for this component, support two inferences: first, that any policy directive

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89 *Id.* at 4–5.

90 *Id.* This section further states that failure of the inmate to make mandatory subsistence payments of twenty-five percent of her earnings to the CCC may result in disciplinary action or placement in a different facility. *Id.* at 4.

91 *See* 18 U.S.C. § 3624(c) (2000).

92 *See, e.g.,* Program Statement No. 7300.09, Fed. Bureau of Prisons & U.S. Dep't of Justice, Community Corrections Manual, ch. 5, at 5–9 (May 19, 1999), http://www.bop.gov//policy/progstat/7300_009.pdf.

93 U.S. DEP'T OF JUSTICE, JUDICIAL RESOURCE GUIDE TO THE FEDERAL BUREAU OF PRISONS 16 (2000) [hereinafter JUDICIAL RESOURCE GUIDE]. The *Judicial Resource Guide* suggests that a typical offender in the community corrections component of a CCC carries a sentence of six months or less and does not have a history of violent behavior, firearms offenses, or sex crimes. *Id.*

94 *See id.* at 15–17.

regarding a CCC must clearly designate the component it seeks to regulate, and second, that it would be inappropriate to apply restrictions concerning the prerelease component more broadly to the community corrections component of CCCs or to CCCs generally.[95]

II
THE DECEMBER 2002 MEMORANDUM: REINING IN ERRANT BUREAU POWER OR LAWMAKING IN DISGUISE?

Writing on behalf of the Office of Legal Counsel to the DOJ, Principal Deputy Assistant Attorney General M. Edward Whelan III asserted in a memorandum to the Deputy Attorney General in December 2002 that the Bureau "does not have general authority, either upon the recommendation of the sentencing judge or otherwise, to place . . . an offender in community confinement at the outset of his sentence or to transfer him from prison to community confinement at any time [the Bureau] chooses during the course of his sentence."[96] The Memorandum argued that the Bureau's statutory authority to implement sentences of imprisonment should, wherever possible, be interpreted harmoniously with statutory requirements imposed upon federal courts.[97] In accordance with such "harmonious interpretation," the Memorandum concluded that the Bureau's practice concerning direct placement in CCCs was "unlawful" on the grounds that community confinement does not constitute "imprisonment"[98] and that the Bureau lacks the statutory authority to designate prisoners directly to community confinement centers.[99]

From the outset, the Memorandum acknowledged the Bureau's practice of placing "low-risk and nonviolent" offenders in a form of community confinement for a short sentence of imprisonment.[100] Suggesting, however, that the Bureau requested DOJ guidance concerning its authority to designate such a placement,[101] the Memorandum engaged in separate analyses of the statutory authority granted to the federal courts and to the Bureau concerning sentencing. The

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95 By analogy, one might infer that it would be inappropriate to suggest, as the DOJ did, that the restrictions concerning prerelease placement as articulated in section 5C1.1 of the Guidelines should apply more broadly to CCCs, and thus should function as a restriction upon the Bureau's power to place individuals directly into the community component of a CCC. *See infra* Parts II, III.B.1.

96 Memorandum, *supra* note 17, at 1.

97 *Id.* at 5–6.

98 *Id.* at 3.

99 *Id.* at 6–8.

100 *Id.* at 1.

101 *See id.* Several courts have noted that it seems disingenuous for the DOJ to suggest that its guidance was requested in this instance. *See, e.g.*, Monahan v. Winn, 276 F. Supp. 2d 196, 205 n.9 (D. Mass. 2003).

Memorandum's emphasis upon "clear general statutory authority"[102] appears to set aside previous Bureau statements and guidance manuals, focusing instead upon statutory interpretation and the resultant narrowing of the Bureau's discretion to designate imprisonment for individuals sentenced by the courts.[103]

The Memorandum first examined whether the Guidelines grant federal courts the authority to order individuals to serve any part of their sentences in community confinement.[104] Following a brief history of the Guidelines and a discussion of the limited circumstances in which judges might depart from them,[105] the Memorandum specifically addressed the terms of sections 5C1.1(d) and (f) of the Guidelines and concluded that the plain language of section 5C1.1 did not provide federal courts authority "to substitute community confinement for any portion of the sentence" of Zone C or D defendants, the individuals who require the most severe sentences.[106] The Memorandum averred that federal courts of appeals cases have "uniformly determined that community confinement does not constitute 'imprisonment'" for Zone C or D defendants,[107] and further insisted upon distinguishing imprisonment and community confinement such that community confinement could never be understood as a substitute for imprisonment.[108] In sum, the Memorandum asserted that federal courts violate the Guidelines if they recommend community confinement for any offender with a Zone C or D sentence.[109]

Shifting its attention from the courts to the Bureau, the Memorandum's second section examined whether the Bureau, upon its own initiative or upon judicial recommendation, might place Zone C or D defendants in CCCs.[110] Contending that the Sentencing Reform Act of 1984 not only commissioned the creation of the Guidelines, but

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102 Memorandum, *supra* note 17, at 1.

103 *See id.* at 1–9.

104 *Id.* at 1–4.

105 *Id.* at 2 (noting that the court may depart from the Guidelines only where the criteria set forth in 18 U.S.C. § 3553(b) are satisfied and is otherwise bound by the provisions of the Guidelines (citing Koon v. United States, 518 U.S. 81, 92 (1996); Stinson v. United States, 508 U.S. 36, 42 (1993))).

106 *Id.* at 3. The Memorandum asserts that Zone C sentences require the minimum term to be satisfied "either by a simple 'sentence of imprisonment,'" as per section 5C1.1(d)(1), or by a sentence including a "'term of supervised release with a condition that substitutes community confinement or home detention,'" as per section 5C1.1(d)(2). *Id.* at 2. Regarding Zone D sentences, the DOJ concluded that section 5C1.1(f) requires the "minimum term be satisfied by a simple sentence of imprisonment." *Id.*

107 *Id.* at 3 (contending that "'[i]mprisonment is the condition of being removed from the community and placed in prison, wbereas "community confinement" is the condition of being controlled and restricted within the community'" (quoting United States v. Adler, 52 F.3d 20, 21 (2d Cir. 1995))).

108 *See id.*

109 *Id.* at 4.

110 *Id.*

also "rewrote the provisions governing [the Bureau's] implementation of sentences,"[111] the Memorandum submitted that it was "especially appropriate that [the Bureau's and courts' authority under Title 18] be construed to produce a harmonious interpretation."[112] The Memorandum argued that this interpretation of the Bureau's authority sustained Congress's overarching objective of eliminating arbitrary disparities in punishment.[113] This general interpretation undoubtedly comported with the DOJ's insistence that this Memorandum did not represent an arbitrary "policy" change, but rather a careful effort to restrict Bureau discretion to the limits Congress intended. The DOJ thus characterized its action as merely an interpretation of previous practice, rather than an effort to create a new administrative rule with the effect of law in the absence of legally binding authority to do so.[114]

The DOJ's arguments naturally suggested two potential limitations on the Bureau's authority under 18 U.S.C. § 3621, the Bureau's authorizing statute.[115] If, as the DOJ contended, placing prisoners directly in CCCs does not constitute imprisonment, the Bureau's act of designating a prisoner directly to a CCC interferes with a court's sentencing power, effectively replacing the court's sentence with a sentence of the Bureau's own choosing.[116] In the alternative, temporarily granting the argument that direct placement in CCCs does constitute imprisonment, the DOJ contended that Bureau discretion cannot be truly "unfettered."[117] In the spirit of harmonious interpretation, the Memorandum insisted that the Bureau's power under § 3621 must be restricted in accordance with the Guidelines.[118] The Memorandum also argued that § 3621 was restricted by § 3624(c), which permits the Bureau to transfer a prisoner to a prerelease program for a portion of his sentence not to exceed six months or ten percent of his sentence,[119] because § 3624(c) specifies the point in a prisoner's sentence when the Bureau gains the authority to transfer a prisoner to a CCC.[120] Allowing the Bureau to have "unfettered discretion" to place inmates in CCCs would, according to the DOJ, permit the Bureau to

111 *Id.* at 6.

112 *Id.*

113 *Id.*

114 *See* discussion *infra* Part III.B.

115 18 U.S.C. § 3621 (2000).

116 *See* Memorandum, *supra* note 17, at 6 ("[S]ection 3621(b) does not authorize [the Bureau] to subvert that statutory scheme [that gives courts the authority to sentence prisoners] by placing in community confinement an offender who has received a sentence of imprisonment.").

117 *See id.* at 7, 8 & n.8.

118 *Id.* at 6.

119 18 U.S.C. § 3624(c).

120 *See* Memorandum, *supra* note 17, at 7.

nullify these statutory restrictions and to extend the Bureau's sphere of influence far beyond that which Congress intended.[121]

The crux of the Memorandum's revised policy lies in the DOJ's position that CCCs are not places of imprisonment "within the ordinary meaning of that phrase."[122] The Memorandum criticized that CCC residents, "although still in federal custody," are not confined to a CCC for the entire day, but rather are permitted to leave for employment, training, and education.[123] The Memorandum recounted that inmates in CCCs normally become eligible for weekend and evening leave passes after the second week of confinement, criticizing that such provisions are incongruous with traditional conceptions of incarceration.[124] Reasoning that if confinement in a CCC is not imprisonment, then the Bureau cannot place a prisoner in one under § 3621, the Memorandum formally concluded that the Bureau lacks statutory authority to place a Zone C or D offender directly in community confinement.[125]

III

INTERPRETATION OR RULE? UNMASKING THE DOJ'S "POLICY" ON PROCEDURAL AND SUBSTANTIVE GROUNDS

Under the guidance of the APA, courts apply different levels of deference to administrative rules depending on their classification as interpretive rules or substantive rules.[126] Thus, in order to under-

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121 *Id.*

122 *Id.*

123 *Id.* While facilitating an inmate's transition to society through training programs in an effort to curb recidivism, the prerelease component is still considered imprisonment by the Guidelines and is credited toward an inmate's imprisonment term. *See* U.S. SENTENCING GUIDELINES MANUAL § 5C1.1 cmt. n.4(B) (2001) ("[The court] may impose a sentence of imprisonment that *includes* a term of supervised release with a condition requiring community confinement or home detention." (emphasis added)). The DOJ's argument, suggesting that permission to leave for educational and training purposes fundamentally contradicts the traditional conception of imprisonment, does not comport with the prerelease component. *See* Memorandum, *supra* note 17, at 7. On one hand, under the prerelease component, the DOJ treats placement in a CCC as imprisonment, properly crediting prison time; on the other hand, the DOJ suggests that time in the community corrections component, which is in fact more restrictive, does not constitute imprisonment. *See id.* at 5, 7; discussion *infra* Part IV.A.

124 Memorandum, *supra* note 17, at 7. Again, the Memorandum appears to confuse the two components of CCC programs, extrapolating that options available to those individuals in the prerelease component are available to all residing in a CCC. *See id.*; Program Statement No. 7310.04, *supra* note 13, at 4–5 (delineating between the prelease and community corrections components of a CCC).

125 *See* Memorandum, *supra* note 17, at 8–9.

126 *See* 5 U.S.C. § 553(b) (2000) (specifying that traditional rulemaking procedures are not necessary for "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice"); Skidmore v. Swift & Co., 323 U.S. 134, 139–40 (1944) (establishing the appropriate level of deference courts should grant to agency interpretations).

stand whether APA requirements bind the DOJ's new "policy" and what deference the court must apply when evaluating the reasonableness of the DOJ's action, an effort must be made to determine whether the "policy" constitutes an interpretive rule or a substantive rule.[127] An agency's assertion that its actions constitute an interpretation is not determinative.[128] Instead, the proper question is whether the DOJ's reinterpretation of § 3621 is fairly encompassed within the statute or whether it introduces new rights or duties.[129]

A. Rules, Interpretations, and Hazarding the Smog[130] to Discern the Difference

Administrative law affords the DOJ, in its capacity as the federal agency overseeing Bureau procedure and practice, the power to make reasonable interpretive choices concerning the statutes it administers without judicial interference.[131] The Supreme Court aptly noted in *United States v. Mead Corp.* that

> [i]mplementation of a statute may occur in formal adjudication or the choice to defend against judicial challenge; it may occur in a central board or office or in dozens of enforcement agencies dotted across the country; its institutional lawmaking may be confined to the resolution of minute detail or extend to legislative rulemaking on matters intentionally left by Congress to be worked out at the agency level.[132]

Regardless of the form that implementation of a statute may take, however, it is vulnerable to substantive and procedural review by the courts.[133]

Holding agencies to due-process standards that appear judicial in nature,[134] the APA matches a set of procedures to each type of rule or agency action with the objective of "assur[ing] informed administra-

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127 *See infra* notes 128–46 (discussing the consequences classifying a rule as a substantive or interpretive). *But cf.* Syncor Int'l Corp. v. Shalala, 127 F.3d 90, 93–94 (D.C. Cir. 1997) (discussing the difficulty courts face in attempting to determine whether a rule is interpretive or substantive).

128 Paralyzed Veterans of Am. v. D.C. Arena L.P., 117 F.3d 579, 588 (D.C. Cir. 1997).

129 *See* Air Transport Ass'n of Am., Inc., v. Fed. Aviation Admin., 291 F.3d 49, 55 (D.C. Cir. 2002).

130 *See* Anthony, *supra* note 2, at 4 n.13.

131 *See* United States v. Mead Corp., 533 U.S. 218, 227–28 (2001). The Supreme Court approved the Bureau as the proper interpreter of the sentence-related statutes. *See* Reno v. Koray, 515 U.S. 50, 60 (1995) (noting that the Bureau is the proper agency to interpret the Bail Reform Act).

132 *See* 533 U.S. at 236.

133 *See* 5 U.S.C. § 706 (2000).

134 *See, e.g.*, Edward Rubin, *It's Time to Make the Administrative Procedure Act Administrative*, 89 CORNELL L. REV. 95, 111 (2003).

tive action and adequate protection to private interests."[135] The level of judicial intervention into agency action mirrors each rule's level of formality, making classification of each agency action critically important.[136] The APA, however, defines the term "rule" very broadly and does not distinguish between substantive and legislative rules,[137] a distinction often characterized as "enshrouded in considerable smog."[138] Courts have treated substantive rules that comply with extensive APA requirements for notice and comment with a high level of deference, known as *Chevron* deference, and have refrained from interfering so long as the rule does not contradict the clear meaning of the statute or the clear intent of Congress and so long as the interpretation is reasonable.[139] Regarding interpretative rules, a broad category of agency action that lacks the force of law[140] and does not have to meet the APA requirements of notice and comment, courts have traditionally employed the lower level of deference the Supreme Court applied in *Skidmore*, which essentially grants the interpretative rule only persuasive authority.[141]

The procedures that comprise an agency's rulemaking process reveal the proper classification of the agency's actions. The APA definition of rulemaking, the "agency process for formulating, amending, or repealing a rule,"[142] generally applies to substantive rules that implement a statute over which an agency has interpretive authority and that bear the force and effect of law.[143] Seeking to ensure all interested parties an opportunity to offer guidance and raise concerns,[144] the APA mandates that an agency explain the reasons for its actions

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135 *See* U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 31 (Wm. W. Gaunt & Sons 1973) (1947) [hereinafter ATTORNEY GENERAL'S MANUAL]; *see* 1 KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 6.10, at 282 (3d ed. 1994) ("The agency typically is in a superior position to determine what it intended when it issued a rule, how and when it intended the rule to apply, and the interpretation of the rule that makes the most sense given the agency's purposes in issuing the rule. Courts have significant institutional disadvantages in attempting to resolve these critical issues.").

136 *See* Skidmore v. Swift & Co., 323 U.S. 134, 139 (1944).

137 *See* 5 U.S.C. § 551(4).

138 *See* Anthony, *supra* note 2, at 4 & n.13.

139 *See* Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–45 (1984).

140 This broad category of agency actions includes opinion letters, guidance manuals, and policy statements. *See* Christensen v. Harris County, 529 U.S. 576, 587 (2000).

141 *See* 323 U.S. at 140 (noting that rulings, interpretations, and opinions, "while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance").

142 5 U.S.C. § 551(5).

143 *See* Am. Mining Cong. v. Mine Safety & Health Admin., 995 F.2d 1106, 1109 (D.C. Cir. 1993) (citing ATTORNEY GENERAL'S MANUAL, *supra* note 135, at 30 n.3).

144 *See* 5 U.S.C. § 553(c).

regardless of whether its action enacts, amends, or repeals a rule.[145] Rulemaking thus requires an agency to demonstrate that it has "ventilated" all major issues of policy.[146]

Because the APA exempts interpretive rules from the notice and comment procedures required for substantive rules,[147] interpretive rules permit agencies to immediately assume responsibility for interpreting legislation without managing lengthy notice and comment procedures.[148] In contrast to substantive rules, interpretive rules "advise the public of the agency's construction of the statutes and rules which it administers"[149] and do not bear the force and effect of law.[150] Interpretive rules explain, but do not supplement, existing substantive law.[151] By designating an action with the label "interpretive rule," an agency not only exempts itself from APA requirements, but also formally asserts that the interpretation does not project a new legal effect of its own.[152] As such, an agency that labels its action an "interpretive rule" implicitly announces that its action reasonably falls within the umbrella of an existing regulation. As the Supreme Court specified in *Skidmore*, the weight of such an interpretation in court depends upon the "thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."[153]

Apart from procedural and philosophical distinctions, the fundamental factor distinguishing substantive and interpretive rules centers on "whether the interpretation itself carries the 'force and effect of law' or rather whether it spells out a duty fairly encompassed within

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145 *See* 5 U.S.C. § 551(5). The APA requires a published notice in the *Federal Register*, as well as a period of comment that gives "interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation." *Id.* § 553(c). The agency must incorporate these comments in a "concise general statement of their basis or purpose," publicly demonstrating that the agency proceeded as a reasonable decision-maker. *Id.*

146 *See* United States v. Nova Scotia Food Prods. Corp., 568 F.2d 240, 252 (2d Cir. 1977).

147 5 U.S.C. § 553(b).

148 *See* Am. Hosp. Ass'n v. Bowen, 834 F.2d 1037, 1045 (D.C. Cir. 1987). Interpretive rules preserve agencies' flexibility to act more freely and efficiently where substantive rights are not in question. *See id.*; Todd D. Rakoff, *The Choice Between Formal and Informal Modes of Administrative Regulation*, 52 ADMIN. L. REV. 159, 162 (2000) (commenting on the general notion that an "issue will graduate to a more formal process of rulemaking or adjudication" if there is substantial disagreement concerning a regulation).

149 *Am. Mining Cong.*, 995 F.2d at 1109 (citing ATTORNEY GENERAL'S MANUAL, *supra* note 135, at 30 n.3).

150 *See* Shalala v. Guernsey Mem'l Hosp., 514 U.S. 87, 99 (1995).

151 *See* Nat'l Family Planning & Reprod. Health Ass'n v. Sullivan, 979 F.2d 227, 236–37 (D.C. Cir. 1992); Anthony, *supra* note 2, at 13.

152 *See* Anthony, *supra* note 2, at 13.

153 Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

the regulation that the interpretation purports to construe."[154] In part, one may determine whether a rule is substantive or interpretive based on how closely the agency tied its interpretation to the actual language of the statute or regulation the rule interprets.[155] On these grounds, an interpretation of general terms in a statute, sucb as "equitable" or "fair," is likely to be a substantive rule that introduces a new right or duty with legal effect.[156] An interpretation based upon more specific wording, without which the government could arguably rely on the regulation itself and reach the same outcome, is likely to be a proper interpretive rule exempt from APA notice and comment requirements.[157] This linguistic analysis assists one in assessing whether an interpretation merely "spells out a duty fairly encompassed within the [statute or] regulation,"[158] or whether the interpretation strays outside the confines of the statute or regulation with the force and effect of law.[159]

A more substantive test of whether an interpretation is "fairly encompassed" within the statute or regulation may be whether the parties, in the absence of the agency's interpretation, would have adequate legislative guidance to perform their duties.[160] Substantial deviation from previous interpretations, even those previously characterized as "fairly encompassed" within the substantive regulation, may also suggest that an interpretation actually supplements the law by imposing new rights or duties.[161] Put another way, the test of an interpretive rule may be whether its meaning is "self-evident in the statute" and whether the rule still permits parties to exercise their own discretion.[162] On these grounds, the fate of the DOJ Memorandum's procedural and substantive validity rests on whether it is a "mere effort at interpretive guidance" or a "rulemaking exercise designed to reshape

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154 Paralyzed Veterans of Am. v. D.C. Arena L.P., 117 F.3d 579, 588 (D.C. Cir. 1997) (quoting *Am. Mining Cong.*, 995 F.2d at 1109).

155 *See id.*

156 *Id.*

157 *See id.*

158 *Id.*

159 *See id.*

160 *See* Am. Mining Cong. v. Mine Safety & Health Admin., 995 F.2d 1106, 1112 (D.C. Cir. 1993).

161 *See* Shalala v. Guernsey Mem'l Hosp., 514 U.S. 87, 100 (1995) (commenting that rulemaking is required where an interpretation "adopt[s] a new position inconsistent with . . . existing regulations"); Alaska Prof'l Hunters Ass'n v. Fed. Aviation Admin., 177 F.3d 1030, 1034 (D.C. Cir. 1999) ("When an agency has given its regulation a definitive interpretation, and later significantly revises that interpretation, the agency has in effect amended its rule, something it may not accomplish without notice and comment.").

162 Monahan v. Winn, 276 F. Supp. 2d 196, 212–13 (D. Mass. 2003) (suggesting that a rule that binds the agency and third parties is substantive rather than interpretive).

the scope of a statutory provision through an administrative statement of lawmaking."[163]

B. The DOJ "Policy": A Substantive Rule in Disguise

1. *The DOJ's Interpretations are Misguided and Not Fairly Encompassed Within 18 U.S.C. § 3621*

Despite the DOJ's insistence that it merely reinterpreted § 3621, the Memorandum clearly strayed outside of the broad language of § 3621 and "drastically truncate[s] [the Bureau's] discretion in a manner that is in no way 'outlined' in the applicable statute."[164] The Memorandum consistently disregarded the distinction between CCCs' two separate components, treating the community corrections and prerelease components as one.[165] In so doing, the Memorandum not only misinterpreted the DOJ's own documents,[166] but fundamentally reinterpreted the plain terms of § 3621 and improperly stretched the terms of the Guidelines to limit the Bureau's discretion.[167] The Memorandum did not outline an interpretation "in the absence of [which] there would . . . be an adequate legislative basis . . . to ensure performance of duties."[168] Quite to the contrary, the Bureau consistently placed prisoners in the community corrections component of CCCs for over forty years without the assistance of this interpretation.[169] Collectively, these factors illustrate that the Memorandum formulated a substantive rule, one that is invalid for failing to comply with mandatory APA notice and comment procedures.[170]

The Memorandum departed from the plain terms of § 3621 by declaring that CCCs do not qualify as penal or correctional facilities and that placing prisoners in CCCs is therefore unlawful.[171] The Memorandum circumvents § 3621's broad instruction that "[t]he Bureau may designate . . . *any* available penal or correctional facility,"[172]

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163 *See* Mallory v. United States, No. Civ.A. 03-10220-DPW, 2003 WL 1563764, at *2 (D. Mass. Mar. 25, 2003) (holding that the DOJ Memorandum was procedurally invalid for failure to comply with notice and comment, but reserving judgment on the substantive merits of the Memorandum).

164 *See* Iacaboni v. United States, 251 F. Supp. 2d 1015, 1039 (D. Mass. 2003).

165 *See supra* discussion *supra* Part I.C.2.

166 *See id.*; *infra* Part IV.C.

167 *See supra* notes 110–21 and accompanying text (discussing the Memorandum's attempts to use the Guidelines to restrict the Bureau's discretion to designate prisoners to penal or correctional institutions under 18 U.S.C. § 3621); *supra* notes 53–55 (noting that the Guidelines were intended to bind the federal courts only).

168 *See* Am. Mining Cong. v. Mine Safety & Health Admin., 995 F.2d 1106, 1112 (D.C. Cir. 1993); *supra* notes 156–57 and accompanying text.

169 *See supra* note 9 and accompanying text.

170 The DOJ made no effort to comply with the APA's notice and comment procedures for substantive rules, mandated by 5 U.S.C. § 553. *See* discussion *supra* Part II.

171 *See* discussion *infra* Part IV.A.

172 18 U.S.C. § 3621(b) (2000) (emphasis added).

arguing instead that a CCC does not constitute a form of imprisonment by virtue of the fact that it releases prisoners for employment and related programs.[173] The general terms of § 3621, however, do not delimit the Bureau's discretion in such a manner.[174]

Kathleen Hawk Sawyer underscored the Bureau's traditional interpretation of § 3621 during a 1996 interview in which she encouraged judges to visit institutions and consider all forms of incarceration, noting that the Bureau's mission is to

> place offenders at facilities providing appropriate security that are as close as possible to their homes, to maintain balance in the inmate population throughout the system, and to use [Bureau] resources wisely by ensuring that inmates requiring only low security are not housed in higher security institutions that cost more to operate.[175]

Reinforcing this notion, as several courts aptly noted, imprisonment does not require "that all those in custody of the [Bureau] must be confined in structures resembling Alcatraz or Sing Sing,"[176] nor does a penal facility necessitate "barbed wire and absolute constraints on liberty—and nothing else."[177] Rather, the language of § 3621 itself "rules out almost no imaginable facility or institution, publicly or privately owned."[178]

The Memorandum fundamentally misinterprets the scope of the Guidelines and misapplies restrictions that were intended to bind only judges.[179] The Memorandum relies heavily upon section 5C1.1 of the Guidelines and 18 U.S.C. § 3624 to suggest that placement in a CCC does not constitute imprisonment, insisting that these statutes' prescriptions concerning the prerelease component of CCCs apply generally to CCCs as a whole.[180] The DOJ's efforts to disregard the distinction between the prerelease and community corrections components is particularly ironic, given that the DOJ's official documents instruct judges that these components are distinct.[181] The Guidelines never address the Bureau as their intended audience, nor do they dis-

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173 *See* Memorandum, *supra* note 17, at 7.

174 *See* discussion *infra* Part IV.A.

175 *See An Interview with Bureau of Prisons Director Kathleen M. Hawk*, *supra* note 8.

176 Byrd v. Moore, 252 F. Supp. 2d 293, 301 (W.D.N.C. 2003).

177 Monahan v. Winn, 276 F. Supp. 2d 196, 206 (D. Mass. 2003).

178 *See Byrd*, 252 F. Supp. 2d at 301.

179 *See supra* notes 53–55 and accompanying text (discussing Congress's intent that the Guidelines bind only judges); *see also* Howard v. Ashcroft, 248 F. Supp. 2d 518, 525 (M.D. La. 2003) (criticizing that the DOJ has, "with respect to sentencing discretion, assigned the judiciary and the Bureau as bunkmates under the guidance of the Sentencing Commission's camp counselor").

180 *See* Memorandum, *supra* note 17, at 6–7.

181 *See, e.g.*, Program Statement No. 7310.04, *supra* note 13, at 4 (stating that a "CCC meets the definition of a 'penal or correctional facility'" and that the community corrections component is a restrictive form of confinement).

cuss the community corrections component of CCCs.[182] Thus, even without examining the precedential value of the DOJ's previous representations,[183] it is clear that the Memorandum's reliance upon guidance *outside* of the plain terms of the statute cannot be "fairly encompassed" within 18 U.S.C. § 3621.

2. *The DOJ Masks a New Legal Effect Under the Veil of an Interpretive Rule*

The Memorandum imposes rights or obligations "'the basic tenor of which [are] not already outlined in the law itself'"[184] and therefore constitutes a substantive rule with the force and effect of law. The DOJ's characterization of this action as an interpretive rule or "policy" stands in sharp contrast to over forty years of reliance on the plain terms of § 3621.[185] By contrast, Bureau and DOJ documents, guidance manuals to federal courts, and representations to Congress prior to December 2002 more aptly illustrate guidance that is encompassed within the statute itself.

The statutory and legislative history of § 3621, as well as its predecessor statute, § 4082, supports the argument that the language and intent of § 3621 are unambiguous. Several factors are particularly telling in this analysis. First, a 1965 amendment to the predecessor statute, adding the term "facility" after the term "institution," specifically defined the term "facility" to include a "residential community treatment center."[186] Legislative history highlights the continuity between § 4082 and § 3621, stating that § 3261(b) permitted the Bureau to designate prisoners to appropriate facilities upon considering specified factors[187] and did not intend to change preexisting law concerning the breadth of the Bureau's authority.[188] Nonetheless, the DOJ Memorandum selectively interpreted "minor statutory changes" to introduce a policy that "[b]y all accounts . . . would alter a sentencing landscape that existed long before the Sentencing Guidelines hit the scene."[189]

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182 *See supra* text accompanying notes 53–54, 71–72.

183 *See* discussion *infra* Part IV.C.

184 Iacaboni v. United States, 251 F. Supp. 2d 1015, 1039 (D. Mass. 2003) (quoting La Casa Del Convaleciente v. Sullivan, 965 F.2d 1175, 1178 (1st Cir. 1992)); *see* Shalala v. Guernsey Mem'l Hosp., 514 U.S. 87, 100 (1995) (indicating that an agency effectively amends the substance of a statute when it "adopt[s] a new position inconsistent with any of the [agency's] existing regulations," regardless of whether the agency acknowledges such a change).

185 *See supra* notes 9, 78–81 and accompanying text.

186 *Iacaboni*, 251 F. Supp. 2d at 1025. The court also notes that "residential community treatment center" is an older name for "community confinement center." *Id.*

187 *See id.* (citing S. REP. 98–225, at 141–42 (1983), *as reprinted in* 1984 U.S.C.C.A.N. 3182, 3324).

188 *See id.* (citing McCarthy v. Doe, 146 F.3d 118, 123 n.2 (2d Cir. 1998)).

189 *See* Howard v. Ashcroft, 248 F. Supp. 2d 518, 545 (M.D. La. 2003).

If Congress had wanted to restrict the Bureau's discretion, it had ample opportunity to amend the old law, to insert this specification in § 3621, or to provide commentary to this end.[190] Similarly, the Commission might have issued a policy statement specifically restricting the Bureau's practices concerning CCC placement.[191] Neither Congress nor the Commission have ever issued such statements or guidance.[192] To the contrary, only ten years prior to the DOJ Memorandum in question, the DOJ itself published a document indicating that § 3621(b) offers no statutory basis for distinguishing between residential community facilities and secure facilities or for limiting the Bureau's designation authority based on legal history.[193] Taken together, the broad wording of § 3621(b), the explicit wording of the predecessor statute § 4082, the legislative history indicating continuity between the two, and the lack of objection by the Commission or Congress over several generations[194] only serve to strengthen the conclusion that Congress did not intend to restrict the Bureau's authority to designate inmates for direct placement in CCCs.

The DOJ Memorandum thus binds the Bureau to a new interpretation bearing the force of law, all the while ignoring "the *positive* authorization given the [Bureau] to consider *any* appropriate facility, as well as the complete absence of any hint of a prohibition" against authorizing placement in a CCC.[195] Under the preexisting practice, judges' recommendations concerning CCCs did not bind the Bureau's discretion; the Bureau always retained the power to disregard a judge's recommendation.[196] The Memorandum, however, removed all Bureau discretion concerning direct CCC placement,[197] setting

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190 *See id.* at 546; *Iacaboni*, 251 F. Supp. 2d. at 1025.

191 *See* 18 U.S.C. § 3621(b)(5) (2000) (directing the Bureau to consider policy statements issued by the Commission).

192 *See* Monahan v. Winn, 276 F. Supp. 2d 196, 207 (D. Mass. 2003) (noting that the Commission never addressed "issues concerning the place of confinement"); *Iacaboni*, 251 F. Supp. 2d at 1025, 1027 (stating that the Commission "could easily have condemned the practice [of CCC placement]," and noting that "[i]n fact, the . . . Commission has never so much as hinted that the . . . well established practice was 'unlawful'"); *Howard*, 248 F. Supp. 2d at 546 ("[F]ar from explicitly overriding that known practice—as of course it was and is within the power of Congress to do—the Crime Control Act of 1984 left that practice in place . . . .").

193 *See Iacaboni*, 251 F. Supp. 2d at 1027 (citing 16 Op. Off. Legal Counsel 65 (1992), *available at* http://www.usdoj.gov/olc/quinlan.15.htm).

194 *See id.* at 1025–26.

195 *Id.* at 1026.

196 As a matter of practice, however, the Bureau usually complied with a court's recommendation. *See An Interview with Bureau of Prisons Director Kathleen M. Hawk*, *supra* note 8 (indicating that the Bureau generally followed eighty percent of judicial recommendations concerning the placement of inmates); *see also supra* text accompanying notes 34, 84.

197 *See* Gen. Elec. Co. v. Envtl. Prot. Agency, 290 F.3d 377, 382 (D.C. Cir. 2002) (suggesting that a statement that automatically restricts a decision-maker's proper discretion is a binding statement, which creates rights or obligations); Chamber of Commerce v. U.S.

forth "a uniform, predetermined outcome that admits of no exception."[198] The DOJ's "policy" denied the Bureau the fundamental discretion that it had exercised for over forty years[199] and which Congress granted to it in the broad language of § 3621.[200] Removing the Bureau's long-standing discretion to designate inmates directly to CCCs indicates that the Memorandum introduced a substantive rule with the effect of law, not merely an interpretive rule.[201]

3. *The "Policy" is Procedurally Invalid for Failure to Comply with APA Requirements*

The APA prescribes that when formulating, amending, or repealing a rule, an agency must comply with mandatory due-process requirements.[202] The APA prohibits the DOJ from introducing a rule with the force and effect of law without first inviting the comments of all interested persons and responding to their rational inquiries.[203] Despite the DOJ's insistence upon labeling the Memorandum an interpretive rule, the Memorandum strays far beyond the language and intentions of § 3621. A rule that departs from the plain meaning of the statute, relies upon other statutes in search of "harmonious interpretation,"[204] and is not "fairly encompassed" within the existing statute[205] cannot purport to merely provide guidance for agency decision-making. It is undisputed that the DOJ failed to comply with notice and comment procedures for substantive rules as outlined in 5 U.S.C. § 553.[206] On these grounds, the DOJ Memorandum is procedurally invalid.[207]

Dep't of Labor, 174 F.3d 206, 213 (D.C. Cir. 1999) (commenting that a rule is binding where it "leaves no room for discretionary choices" by agency employees).

198 *See* Monahan v. Winn, 276 F. Supp. 2d 196, 214 (D. Mass. 2003).

199 *See supra* note 9 and accompanying text.

200 *See* discussion *supra* Part I.B; *infra* Part IV.A.

201 Ashkenazi v. Att'y Gen., 246 F. Supp. 2d 1, 6 n.9 (D.D.C. 2003) (finding that where the new policy is "not flexible and does not permit [the Bureau] to exercise any discretion," it has the force of law and is "not merely interpretive"), *vacated as moot*, 346 F.3d 191 (D.C. Cir. 2003).

202 *See* 5 U.S.C. § 551(5) (2000); discussion *supra* Part III.A.

203 *See* 5 U.S.C. § 553 (2000); Mallory v. United States, No. Civ.A. 03-10220-DPW, 2003 WL 1563764, at *2 (D. Mass. Mar. 25, 2003) (opining that the Memorandum "is no mere effort at interpretive guidance but rather a rulemaking exercise designed to reshape the scope of a statutory provision through an administrative statement of lawmaking").

204 *See* Memorandum, *supra* note 17, at 6.

205 *See supra* Part III.B.1.

206 *See supra* Part II.

207 A determination of procedural invalidity does not imply that the DOJ lacks the power to reverse its original interpretation. Rather, if the DOJ wants to reintroduce this policy, it must comply with APA requirements for rulemaking. *See* discussion *infra* Part IV.B–C.

IV

ASSESSING THE REASONABLENESS OF THE DOJ'S "POLICY" AS AN INTERPRETIVE RULE THROUGH *MEAD* AND *SKIDMORE*

Even if the DOJ properly classified the Memorandum as an interpretive rule, thereby securing its procedural validity by avoiding APA requirements, this label does not shield the DOJ "policy" from judicial scrutiny. Indeed, although the DOJ Memorandum averred that its reinterpretation of 18 U.S.C. § 3621 corrects a mistaken interpretation, precedent is unsettled concerning whether additional process is due for reinterpretations of long-standing, documented policy.[208] Further, the label of "interpretive rule" exposes the DOJ's "policy" to a more searching judicial review for reasonableness, since the rule was not vetted through a notice and comment process.[209] A court may substitute its own interpretation for an agency's in the case of interpretive rules on the grounds that the court's view is more reasonable.[210] As such, interpretive rules have the power to persuade, but not to control or bind, the court.[211] Thus, a court must determine whether the DOJ "policy," even if properly classified as an interpretive rule, is nonetheless either procedurally or substantively invalid.

As the final authority concerning statutory construction,[212] courts face a complicated balancing act when assessing interpretive rules. On one hand, they must assess whether "Congress has directly spoken to the precise question at issue"[213] or whether Congress delegated to the agency the authority to regulate a gap between two statutes or rules.[214] On the other hand, carefully weighing an individual agency's expertise and track record, courts must also assess whether the agency acted with the proper degree of care based on the "consistency, formality, and relative expertness, and [ ] the persuasiveness of the agency's position."[215]

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208 *See, e.g.*, Paralyzed Veterans of Am. v. D.C. Arena L.P., 117 F.3d 579, 586 (D.C. Cir. 1997) (suggesting that once an agency releases an interpretation of a regulation, if it makes any substantive changes to the interpretation, the agency should follow the same procedures required to "formally modify the regulation itself: . . . the process of notice and comment").

209 *See* Skidmore v. Swift & Co., 323 U.S. 134, 139 (1944) (noting that interpretive rules "do not constitute an interpretation of [an] Act or a standard for judging factual situations which binds a . . . court's processes").

210 *See* Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 n.9 (1984) ("The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent.").

211 *See Skidmore*, 323 U.S. at 140.

212 *Chevron*, 467 U.S. at 843 n.9.

213 *Id.* at 842.

214 *See id.* at 843–44; United States v. Mead Corp., 533 U.S. 218, 229 (2001).

215 *Mead*, 533 U.S. at 228 (citations omitted); *Skidmore*, 323 U.S. at 140 (noting that the "weight [accorded to an administrative] judgment . . . will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and

Part IV will first employ traditional tools of statutory construction to assess whether Congress answered the precise issue in question:[216] whether a CCC constitutes punishment. Further, it will evaluate the breadth of authority Congress delegated to the DOJ to regulate Bureau policy. Finding that Congress purposefully defined punishment in a very broad manner and did not restrict the Bureau's judgment to designate inmates' imprisonment, Part IV will then study the precedential value of earlier Bureau and DOJ documents that directly contradict the policy espoused in the Memorandum. It will discuss the unsettled precedent concerning whether reinterpretations, even legitimate ones, require additional due-process procedures. Part IV will conclude that the DOJ Memorandum is unreasonable and both procedurally and substantively invalid.

A. Understanding the Plain Meaning of 18 U.S.C. § 3621: Punishment and CCCs Defined

The Bureau's "policy," as outlined in the DOJ Memorandum, does not comport with the plain meaning of § 3621. Relying on the textual analysis of four courts, which determined that they had jurisdiction to hear appeals of the DOJ's administrative decision,[217] this Note concludes that the common usage and dictionary definitions of the terms of the statute, as well as its relevant legislative history, demonstrate that Congress crafted a purposefully broad definition of imprisonment that comfortably includes CCCs. This Note opines that the DOJ Memorandum not only mischaracterized the history of CCCs but also placed undue emphasis on the Guidelines in support of its "policy,"[218] and misinterpreted their intended scope.[219]

The text of § 3621(a) unequivocally grants the Bureau custody of a "person who has been sentenced to a term of imprisonment."[220] The statute further specifies that "[t]he Bureau may designate *any available penal or correctional facility* that meets minimum standards of

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later pronouncements, and all those factors which give it power to persuade, if lacking power to control").

216 *See Chevron*, 467 U.S. at 843 n.9.

217 *See* Monahan v. Winn, 276 F. Supp. 2d 196, 205 (D. Mass. 2003); Iacaboni v. United States, 251 F. Supp. 2d 1015, 1035–36 (D. Mass. 2003); Byrd v. Moore, 252 F. Supp. 2d 293, 297 (W.D.N.C. 2003); Howard v. Ashcroft, 248 F. Supp. 2d 518, 534 (M.D. La. 2003); *supra* note 35 and accompanying text (discussing that many courts dismissed cases on the grounds that the petitioners had not exhausted their administrative remedies).

218 *See Iacaboni*, 251 F. Supp. 2d at 1024 (commenting that the DOJ's analysis, beginning "with a corner of the Sentencing Guidelines, then working backwards to the controlling general statute," utilizes "a clever rhetorical tactic, [but] begins the wrong way around").

219 *See supra* notes 56–57 and accompanying text.

220 18 U.S.C. § 3621(a)(2000); *see Monahan*, 276 F. Supp. 2d at 205–07; *Byrd*, 252 F. Supp. 2d at 300–01.

health and habitability established by the Bureau."[221] Surmising that "[i]t could not be clearer from [the language of § 3621] that Congress granted the Bureau a rather broad discretion to appoint the places where prisoners will serve their terms of imprisonment," the court in *Howard v. Ashcroft* opined that "the only apparent limitation on the Bureau is that it choose a place that is a 'penal or correctional facility.'"[222] Reinforcing this characterization, the court in *Byrd v. Moore* contended that the language of § 3621 "rules out almost no imaginable facility or institution, public or privately owned."[223]

Looking to dictionaries for technical guidance, at least two courts concluded that the terms "penal" and "correctional" do not limit Bureau discretion concerning CCC placement, but rather embrace the traditional conception of CCC placement, both in principle and in practice.[224] According to the *Oxford English Dictionary*, something is properly characterized as "penal" if it is any of the following:

> Of, pertaining to, or relating to punishment. (a.) Having as its object the infliction of punishment, punitive; prescribing or enacting the punishment to be inflicted for an offence or transgression. . . . (e.) Used or appointed as a place of punishment. (f.) Involving, connected with, or characterized by, a penalty or legal punishment. (g.) Of, pertaining to, or subject to the penal laws, penal servitude, etc.[225]

Similarly, the *American Heritage Dictionary* defines "penal" as "relating to, or prescribing punishment, as for breaking the law. Subject to punishment; legally punishable: *a penal offense.* Serving as or constituting a means or place of punishment."[226] Although the *Oxford English Dictionary* is not instructive concerning the definition of "correctional," defining it as "[o]f or pertaining to correction; corrective,"[227] the *American Heritage Dictionary* directs that the term "correctional" means "[p]unishment intended to rehabilitate or improve."[228]

These definitions do not mandate the type of rigid restrictions the Memorandum emphasized. Rather than focusing on the specific

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221 18 U.S.C. § 3621(b) (emphasis added); *see Byrd*, 252 F. Supp. 2d at 300 ("Section 3621 endows the [Bureau] with considerable discretion to designate prisoners anywhere the [Bureau] decides is appropriate . . . .").

222 248 F. Supp. 2d at 538. As the court noted, no party, including the DOJ, has questioned the Bureau's discretion to set minimum standards of health and habitability. *See id.*

223 252 F. Supp. 2d at 301.

224 *See, e.g., Monahan*, 276 F. Supp. 2d at 206–08 (D. Mass. 2003); *Byrd*, 252 F. Supp. 2d. at 300–02.

225 *Howard*, 248 F. Supp. 2d at 538 (quoting XI OXFORD ENGLISH DICTIONARY 460 (2d ed. 1989)).

226 *Id.* (quoting AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1298 (4th ed. 2000)).

227 *Id.* at 539 (quoting III OXFORD ENGLISH DICTIONARY 962 (2d ed. 1989)).

228 *Id.* (quoting AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 411 (4th ed. 2000)).

nature of a facility or, for example, requiring restrictive confinement without exception, these definitions characterize punishment as the deprivation of one's liberty for some period of time on account of a legal process. This plain-language analysis embraces CCCs as penal *or* correctional facilities purporting to punish, correct, and rehabilitate their inmates.[229] Indeed, the "plain language of § 3621 obviously covers a community confinement facility, and no whisper of anything to the contrary can be found anywhere, in anything Congress has said."[230]

The courts' reflections on the nature and purpose of punishment endorse the definitions noted above and stand in direct contrast to the DOJ's conception of prison as a very specific place, "with barbed wire and absolute constraints on liberty—and nothing else."[231] The court in *Iacaboni* noted that "[i]n a modern penal system, it is the rare prisoner who is immured behind six-foot-thick walls 365 days a years [sic] like some character out of a Dumas romance,"[232] commenting that the statutes themselves make alternate provisions such as the prerelease component and provisions for training and education during imprisonment.[233] The court in *Byrd v. Moore* agreed that permitting an offender outside of the physical confinement of a Bureau facility is not fundamentally inconsistent with the concept of imprisonment,[234] arguing that "[s]ection 3621 certainly does not impose such a limitation on the [Bureau's] discretion."[235] On these grounds, the DOJ Memorandum's more restricted view of incarceration is not only out of step with previous Bureau practice, but also out of step with the plain language of the Bureau's enacting statute.

Section 3551(b) articulates only three categories of authorized sentences for individuals: a term of probation, a fine, and a term of imprisonment.[236] This statute's simple sentencing structure does not classify community confinement or other alternative placements as anything other than sentences of imprisonment.[237] The *Oxford English Dictionary* defines "imprisonment" as "[t]he action of imprisoning, or fact or condition of being imprisoned; detention in a prison or place of confinement; close or irksome confinement; 'forcible restraint within bounds'; incarceration."[238] Similarly, the *American Heritage Dic-*

229 *See* discussion *supra* Part I.C.
230 Iacaboni v. United States, 251 F. Supp. 2d 1015, 1025 (D. Mass. 2003).
231 *See* Monahan v. Winn, 276 F. Supp. 2d 196, 206 (D. Mass. 2003).
232 *Iacaboni*, 251 F. Supp. 2d 1015, 1029 (D. Mass. 2003).
233 *See id.*
234 252 F. Supp. 2d 293, 301 (W.D.N.C. 2003).
235 *Id.*
236 *See* 18 U.S.C. § 3551(b) (2000).
237 *See Iacaboni*, 251 F. Supp. 2d at 1024.
238 Howard v. Ashcroft, 248 F. Supp. 2d 518, 540 (M.D. La. 2003) (quoting VII OXFORD ENGLISH DICTIONARY 746 (2d. ed. 1989)).

tionary defines "imprisonment" as "[t]o put in or as if in prison; confine."[239] In finding that CCCs meet these definitions, the *Howard* court emphasized that the community corrections component permits inmates to leave only for employment and selected, individually approved tasks, restricting inmates to the confines of the CCC at all other times.[240] The *Monahan* court suggested that "§ 3621(a) . . . arguably provides the closest thing to a definition of 'imprisonment' as one can find in the United States Code" by requiring that "'[a] person who has been sentenced to a term of imprisonment . . . *shall be committed to the custody of the Bureau of Prisons* until the expiration of the term imposed.'"[241] The *Monahan* court thus contended that custody, rather than a particular locale, defines "imprisonment," finding that this "conceptual distinction . . . is consistent with long-accepted views on this subject."[242] Holding that "the critical litmus is whether offenders '*always remain subject to the control of the Bureau*,'"[243] the *Iacaboni* court agreed, concluding that Bureau custody is the "touchstone of 'imprisonment.'"[244]

Building upon this broad-based analysis, the *Howard* court assessed the definition of CCCs and suggested that the term "halfway house," generally used to characterize CCCs, may itself be misleading.[245] Noting that not all CCC inmates are "halfway between jail and home," *Howard* contends that the term "halfway house" "elides a distinction" between the prerelease and community corrections components offered by CCCs.[246] Using the term "CCC" in place of "halfway house," the court acknowledged that CCCs are designed as a restrictive option punishing an inmate for a period of time, but allowing limited privileges, including leave for employment.[247] Although undoubtedly less confining than conventional prisons, CCCs "impose heavily on the freedom of inmates."[248] Indeed, the "*degree* of confine-

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239 *Id.* (quoting AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 882 (4th ed. 2000)).

240 *See id.* (noting, for example, that although Ms. Howard was permitted to travel to her job five days per week and received limited one- to three-hour passes to visit her family or attend counseling or religious services, she was otherwise confined in a CCC, and stating that this qualified as "confinement as most people would understand it").

241 Monahan v. Winn, 276 F. Supp. 2d 196, 206 (D. Mass. 2003) (quoting 18 U.S.C. § 3621(a)).

242 *Id.* (citing Reno v. Koray, 515 U.S. 50, 63–65 (1995), which held that the issue of Bureau custody is controlling—specifically, that community confinement under Bureau custody entitles an inmate to sentencing credit, but that residence in such a facility when released from Bureau custody does not receive such credit).

243 *See* Iacaboni v. United States, 251 F. Supp. 2d 1015, 1029 (D. Mass. 2003) (quoting *Koray*, 515 U.S. at 63).

244 *Id.*; *see Monahan*, 276 F. Supp. 2d at 206.

245 *See Howard*, 248 F. Supp. 2d at 522 n.13.

246 *Id.*; *see supra* Part I.C (discussing the two separate components of CCCs).

247 *Howard*, 248 F. Supp. 2d at 523 n.13.

248 *Id.* at 541.

ment is not determinative of *whether* . . . inmates are confined";[249] CCCs properly commit inmates to the custody of the Bureau and restrict them to a facility designed to punish and rehabilitate. Bureau program statements, as noted in Part I.C.2, confirm this analysis and emphasize the restrictive nature of the community corrections component of CCCs.

By enumerating in § 3621(b) several factors for the Bureau to consider,[250] Congress not only permitted the Bureau to designate prisoners to the community corrections component of the CCC on its own initiative, but also specifically instructed the Bureau to consider "any statement by the court . . . recommending a type of *penal or correctional facility* as appropriate."[251] As such, it is utterly incongruous for the DOJ to contend that § 3624(c) and section 5C1.1 of the Guidelines direct the Bureau to designate inmates to CCCs' prerelease components for ten percent of their total sentences, crediting the time spent there as part of their imprisonment,[252] yet on the other hand to argue that direct placement in a CCC does not constitute imprisonment.[253] In so doing, the DOJ appears to elide the distinctions between CCC components in some circumstances and yet to differentiate certain CCC practices at other times. Such inconsistent and opportunistic analysis fails to offset Congress's unambiguous intent that the Bureau consider CCCs among possible placements for sentenced offenders facing imprisonment.

Finally, in its search for explicit, positive authorization for CCC placement, the Memorandum ignores the absence of any prohibition against authorizing placement in a CCC.[254] Setting aside the DOJ's "rather dog-eared trick of the 'artful negative,'"[255] at least one court pointed out that the language of § 3621(b) could not be any clearer in directing the breadth of the Bureau's discretion and noted that the search for further positive authorization is "flat chicanery."[256] Indeed, the Memorandum erred by relying upon selective and inconsistent precedent;[257] the number of decisions actually supporting the Memorandum's contention and new "policy" is "exactly zero."[258]

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249 *Id.*

250 *See supra* note 62 and accompanying text.

251 Iacaboni v. United States, 251 F. Supp. 2d 1015, 1025 (D. Mass. 2003).

252 *See* 18 U.S.C. § 3624(c) (2000).

253 Memorandum, *supra* note 17, at 3, 6–7; *see Iacaboni*, 251 F. Supp. 2d at 1029–30.

254 *See Iacaboni*, 251 F. Supp. 2d at 1026.

255 *Id.*

256 *See id.*

257 *See id.* at 1030 (noting that "decisional authority is not nearly as uniform as the memo's selective quotations would suggest").

258 *See id.* at 1033.

B. Probing the Breadth of the DOJ's Authority to Change Bureau Practice

In 28 C.F.R. § 0.1, Congress clearly identifies the Bureau of Prisons as a principal organizational unit under the authority of the DOJ.[259] Section 0.95 further details the general functions of the Director of the Bureau of Prisons, including the "[p]rovision of suitable quarters for, and safekeeping, care, and subsistence of, all persons charged with or convicted of offenses against the United States or help as witnesses or otherwise,"[260] and the "[c]lassification, commitment, control, or treatment of persons committed to the custody of the Attorney General."[261] More specifically, section 0.96 confirms that the Director of the Bureau may perform any of the duties conferred on the Attorney General, including "[d]esignating places of imprisonment or confinement where the sentences of prisoners shall be served and ordering transfers from one institution or another,"[262] and "[e]stablishing and designating Bureau of Prisons Institutions."[263]

Together, these provisions confirm the DOJ's direct authority over the Bureau, as well as the breadth of the Bureau's power to designate inmates to a variety of prison facilities. Joint DOJ and Bureau manuals and other documentation confirm this relationship and these shared responsibilities.[264] These authorities do not, however, evidence whether this relationship is truly symbiotic or whether the Memorandum represents an effort by the DOJ to reach down from above and intervene in the daily operations of the Bureau. Former Director Kathleen Hawk Sawyer characterized placing prisoners directly in CCCs as "deeply-rooted" even after the release of the Memorandum,[265] revealing a difference of opinion within the DOJ. Several courts have criticized as disingenuous the Memorandum's attempt to pose as if responding to a Bureau inquiry about its legal authority when some at the Bureau appeared just as surprised as federal judges by the reinterpretation.[266] Nonetheless, it remains clear that the DOJ has authority to alter the policies of the organizational units it oversees, including the Bureau.

Irrespective of the breadth of the DOJ's power over Bureau policy, however, the DOJ lacks the authority to interpret the Sentencing Guidelines or to "harmoniously interpret" the Guidelines alongside its

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259 *See* 28 C.F.R. § 0.1 (2004).

260 *Id.* § 0.95(b).

261 *Id.* § 0.95(d); *see* 18 U.S.C. § 4042(a)(2) (2000).

262 28 C.F.R. § 0.96(c).

263 *Id.* § 0.96(p).

264 *See supra* Part I.B.

265 *See Iacaboni*, 251 F. Supp. 2d at 1022.

266 *See* text accompanying notes 16–34, 102.

own enacting statutes.[267] The DOJ's efforts to interpret § 3621 in line with section 5C1.1 of the Guidelines are misplaced and laden with error, resting upon textual analysis and legislative history concerning the prerelease, rather than the community corrections, component of CCCs.[268] Even if Congress had intended the Guidelines to restrict the Bureau, the instructions of section 5C1.1 still would not constitute a "blanket prohibition against using community confinement placements."[269] The fact remains that the Guidelines' silence on the issue of the community corrections component should not be interpreted as a prohibition on judicial recommendations for direct CCC placement or an indication that the Bureau may never place individuals in CCCs. Such analysis stretches far beyond the scope of the Guidelines and does not heed their plain language or legislative history.

The Commission does not have the authority to limit the discretion of the Bureau, whose duties are explicitly outlined in 18 U.S.C. § 4042.[270] The Guidelines "govern [only] what a judge does in imposing a sentence; they do not control what the [Bureau] does *after* the sentence is imposed."[271] The Commission's enabling statute gives it authority only over the sentencing responsibilities of courts, listing the Bureau as merely a partner in the sentencing process.[272] The Commission's enabling statute and the Guidelines do not discuss specific *places* of imprisonment, implicitly acknowledging that this task is the purview of the Bureau.[273] Consequently, it is nonsensical to suggest that the plain language of section 5C1.1 makes decades of Bureau placement decisions unlawful.[274]

Finally, even if it were appropriate to apply the Guidelines to the Bureau, proper statutory analysis concerning Bureau practice should center on the governing statutes, because "statutes trump guidelines,

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267 *See supra* notes 54–55 and accompanying text (noting that Congress intended the Guidelines to bind the federal courts and no one else).

268 *See* Program Statement No. 7310.04, *supra* note 13, at 4–5 (describing the distinction between the two CCC components); Memorandum, *supra* note 17, at 7–8 (describing inmates' relative freedom at the prerelease stage as one of the reasons the DOJ did not consider confinement in a CCC to constitute imprisonment).

269 *See Iacaboni*, 251 F. Supp. 2d at 1033. The court also notes that the language of section 5C1.1, when discussing the prerelease component, does not say that the minimum term will be *followed* by community confinement, but rather that the minimum term of a prescribed sentence may be satisfied by "'a sentence of imprisonment that *includes* a term of supervised release with a condition that substitutes community confinement,'" suggesting that community confinement itself is a form of imprisonment. *Id.* at 1034 (quoting U.S. SENTENCING GUIDELINES MANUAL § 5C1.1(c)(2) (2001)).

270 *See* 18 U.S.C. § 4042 (2000).

271 *Iacaboni*, 251 F. Supp. 2d at 1033.

272 *See* Howard v. Ashcroft, 248 F. Supp. 2d 518, 542 (M.D. La. 2003).

273 *See* 28 U.S.C. § 994(g) (2000) (specifying only that the Commission consider "the nature and capacity of the penal, correctional, and other facilities and services available").

274 *See Iacaboni*, 251 F. Supp. 2d. at 1033–35.

not vice versa."[275] The *Iacaboni* court noted that the Supreme Court "could not have been more emphatic" in directing that regardless of the breadth of discretion that Congress granted the Commission to formulate sentencing guidelines, the Commission must nonetheless "bow to the specific directives of Congress."[276] As such, even if the Commission were steadfastly committed to forcing a distinction between community confinement and imprisonment, such a directive could not restrict the discretion of the Bureau, whose primary authority lies in § 3621.[277] Significantly, § 3621(b) does not instruct the Bureau to consider the Guidelines themselves, but only "policy statements" issued by the Commission.[278] Not only is the instruction to the Bureau permissive, indicating that the Bureau *may* consider any of the enumerated factors,[279] but, more directly, the Commission has never issued a policy statement concerning community confinement placements.[280]

The language of § 3621 clearly grants the Bureau broad discretion to commit offenders to *any* facility it deems appropriate.[281] To date, no court, either at the trial or appellate level, has held to the contrary.[282] As the *Iacaboni* court so cogently notes, "The [Bureau] may use its discretion in various ways; it may not, through an erroneous interpretation of its powers, attempt to divest itself of the discretion Congress has given it."[283] Considering the intended scope of the Guidelines, the Bureau's enacting statutes, and relevant precedent, it would be improper to permit the Guidelines to trump unambiguous statutory language. The Commission and Guidelines do not wield power over the Bureau, and thus, even in the spirit of "harmonious interpretation,"[284] they should not encourage the DOJ to divest the Bureau of the broad discretion Congress delegated to it.

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275 *Id.* at 1024.

276 *Id.* (citing United States v. LaBonte, 520 U.S. 751, 757 (1997)).

277 *See Howard*, 248 F. Supp. 2d at 543.

278 *See* 18 U.S.C. § 3621(b) (2000).

279 *See id.*

280 *See* Monahan v. Winn, 276 F. Supp. 2d 196, 207 (D. Mass. 2003); *Iacaboni*, 251 F. Supp. 2d at 1027.

281 *See* 18 U.S.C. § 3621(b); *supra* note 67 and accompanying text.

282 *Cf. Howard*, 248 F. Supp. 2d at 544 (noting that the government could not produce cases addressing the appropriate question: "whether community confinement is a form of imprisonment under [§ 3621, which] fleshes out the concept of 'place of imprisonment' by using the term 'any penal or correctional facility'").

283 251 F. Supp. 2d at 1038.

284 *See supra* note 118 and accompanying text.

C. The DOJ Memorandum Lacks the Power to Persuade the Courts

1. *Dissecting the Power to Persuade*

An agency's interpretation of the statutes it administers generally warrants judicial deference, so long as the agency gives "effect to the unambiguously expressed intent of Congress."[285] As noted in Part III.A, however, agency interpretations in the form of opinion letters or interpretative rules merit judicial deference only to the extent that they are persuasive[286] and only when the statutory language is ambiguous.[287] The analyses in Parts III.A, III.B, and IV.A argue that the language of § 3621 is not ambiguous regarding the breadth of the Bureau's authority or the definition of imprisonment. For this reason, the flexibility of an interpretive rule or opinion on this issue is rather limited.

A court may defer to an agency's interpretation of a statute because of the agency's presumed familiarity or expertise in a particular area[288] but is in no way bound by an agency's previous representations or interpretations.[289] Agency interpretations represent "a body of experience and informed judgment" upon which a court may rely.[290] However, courts need not uphold an agency policy "that merely satisfies the test of reasonableness."[291] Rather, courts may exercise their own judgment and defer to the agency's interpretation "only to the extent that those interpretations have the 'power to persuade.'"[292] In the end, "[e]ach case must stand on its own facts," and the weight of any agency interpretation hinges upon "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."[293]

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285 *See* Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984).

286 *See* Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944); 1 CHARLES H. KOCH, JR., ADMINISTRATIVE LAW AND PRACTICE § 4.11, at 326 (2d ed. 1997) ("[L]egislative rules are binding on courts as an extension of legislative power whereas interpretative rules have only the effect courts choose to give them.").

287 *See Chevron*, 467 U.S. at 842–43.

288 *See, e.g.*, Immigration & Naturalization Serv. v. Aguirre-Aguirre, 526 U.S. 415, 424–25 (1999) (deferring to the agency because of its expertise in the immigration context).

289 *See, e.g.*, Christensen v. Harris County, 529 U.S. 576, 587 (2000); *see also* Peter L. Strauss, *Publication Rules in the Rulemaking Spectrum: Assuring Proper Respect for an Essential Element*, 53 ADMIN. L. REV. 803, 822–23 (2001) (explaining that the Supreme Court in *Skidmore* and in *Mead* recognized that independent analysis of the language and intent of a statute is the exclusive purview of the courts).

290 *Skidmore*, 323 U.S. at 140.

291 Pac. Gas & Elec. Co. v. Fed. Power Comm'n, 506 F.2d 33, 40 (D.C. Cir. 1974).

292 *Christensen*, 529 U.S. at 587 (quoting *Skidmore*, 323 U.S. at 140).

293 *Skidmore*, 323 U.S. at 140.

Where, as in this instance, an interpretation conflicts with a previous interpretive rule, some courts have opined that such interpretations deserve less deference than an interpretation consistently espoused by an agency.[294] An agency's initial interpretation of a statute need not be "carved in stone,"[295] and agencies "must be given ample latitude to 'adapt their rules and policies to the demands of changing circumstances.'"[296] Nonetheless, consistency in an agency's interpretation represents a significant marker for evaluating the legitimacy of subsequent changes in policy or practice.[297]

2. *Unsettled Precedent: May Interpretive Rules Bind Future Interpretation?*

The Supreme Court in *Shalala v. Guernsey Memorial Hospital*[298] clearly stated that an interpretation that adopts a new position inconsistent with existing regulations triggers APA rulemaking requirements.[299] The Court's reasoning behind this argument suggests that such an interpretation effectively amends or repeals the existing regulation.[300] If one assumes that the Memorandum is a substantive rule, as discussed in Part III, the Memorandum clearly triggers APA requirements and is procedurally invalid. Similarly, if one agrees that the Memorandum presents a position that is inconsistent with the plain meaning of § 3621, the Memorandum substantively lacks merit.[301] Courts have not, however, clearly articulated whether an agency may amend or repeal an interpretive rule or policy statement without running afoul of APA requirements, leaving open the question of whether an agency's prior interpretation can be so long-standing that it has legal effect and may be changed only through notice and comment procedures. Courts thus have not conclusively offered guidance to parties like the federal courts and the Bureau, who operated in reliance upon what appeared to be a settled interpretation.

Some courts and commentators have focused on the relatively flexible nature of interpretive rules, noting that Congress intended them to be administrative tools to explain, but not to supplement, substantive regulations.[302] To this end, they have noted that Congress

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294 *See, e.g.*, Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 515 (1994).

295 *See* Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 863 (1984).

296 Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 42 (1983) (quoting *In re* Permian Basin Area Rate Cases, 390 U.S. 747, 784 (1968)).

297 *See* Food & Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 158–59 (2000).

298 514 U.S. 87 (1995).

299 *See id.* at 100.

300 *See id.*

301 *See supra* discussion Part IV.A.

302 *See* Anthony, *supra* note 2, at 13 & n.43.

exempted interpretive rules from the more cumbersome APA procedures, implicitly delegating to agencies the authority to interpret statutes where Congress has left a gap or ambiguity.[303] On this theory, agencies must have the flexibility to amend or repeal an initial interpretation of a gap or ambiguity, as well as to adapt to changed circumstances, so long as both interpretations are fairly encompassed within the original regulation.[304] Some courts have upheld this view, suggesting that so long as the agency has not definitively spoken on an informal policy, a new interpretive rule may overrule a long-standing informal policy.[305] This position clearly recognizes the importance of preserving interpretive rules as flexible administrative tools and suggests that even long-standing interpretations do not bear the force or effect of law in court.

In contrast, other courts and commentators have recognized that interpretive rules, guidance manuals, and policy statements have enormous consequences in agency regulation and, in practice, are often regarded as binding.[306] The watershed administrative-law case *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*[307] first hinted that "a totally unjustified departure from well-settled agency procedures of long standing might require judicial correction."[308] Complementing the Supreme Court's clear statement in *Shalala v. Guernsey Memorial Hospital*,[309] the D.C. Court of Appeals has held, on several occasions, that an interpretation that differs significantly from a previous interpretation effectively amends the rule it-

303 *See* Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 (1984); discussion *supra* Part III. *But see* Peter L. STRAUSS, TODD D. RAKOFF & CYNTHIA R. FARINA, GELLHORN AND BYSE'S ADMINISTRATIVE LAW: CASES AND COMMENTS 716 (rev. 10th ed. 2003) (discussing concerns that agencies will purposely enact vague substantive rules, and subsequently seek to fill in the gaps through interpretation, in order to avoid the required notice and disclosure that the APA would generally demand).

304 *See* Robert A. Anthony & David A. Codevilla, *Pro-Ossification: A Harder Look at Agency Policy Statements*, 31 WAKE FOREST L. REV. 667, 678–79 (1996).

305 *See* Air Transp. Ass'n of Am. v. Fed. Aviation Admin., 291 F.3d 49, 57–58 (D.C. Cir. 2002) (finding that an interpretation did not trigger APA protections where it was not inconsistent with the existing substantive regulation); Chief Prob. Officers v. Shalala, 118 F.3d 1327, 1334 (9th Cir. 1997) (finding that the notice and comment requirement is triggered when an interpretation conflicts with a prior rule, not merely a prior interpretation).

306 *See, e.g.*, Anthony & Codevilla, *supra* note 304, at 679 (commenting that those who make adjudicatory decisions often apply policy statements in "the same routinely controlling way as they apply legislative rules").

307 435 U.S. 519, 525 (1978) (holding, ironically, that the APA represents the maximum procedural requirements that may be imposed upon agencies and that Congress and agencies, rather than courts, should impose any extra procedural safeguards when necessary).

308 *Id.* at 542.

309 514 U.S. 87, 100 (1995).

self.[310] Concerning the Memorandum in this instance, at least one court similarly suggested that the DOJ's previous guidance manuals and interpretations have some precedential value and questioned whether long-standing interpretive rules should be wholly exempt from APA procedures.[311] Stating that "when an interpretation departs from a long-standing agency practice, it too must be promulgated under the general APA notice and comment procedures," the *Howard* court acknowledged the unique nature of long-standing interpretations.[312] Similarly, the *Iacaboni* court asserted that the rule in question "represent[ed] a drastic departure from the [Bureau's] previous regulations and policies"[313] and concluded that the Bureau "must comply with the strictures of the APA."[314] Even if long-standing interpretations do not trigger additional protections, since the APA itself does not distinguish between initial and subsequent interpretations, an agency must nonetheless publicly explain the reasoning behind its new interpretation in order for a reviewing court to later deem it reasonable.[315]

In this instance, there is no doubt that federal courts and the Bureau relied upon the long-standing practice and written statements issued by the DOJ.[316] As noted above, even after the DOJ had issued the Memorandum, Kathleen Hawk Sawyer commented that the policy of directly placing offenders in the community corrections component of CCCs was deeply rooted.[317] The ire and surprise of federal

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310 *See, e.g.*, Paralyzed Veterans of Am. v. D.C. Arena L.P., 117 F.3d 579, 586 (D.C. Cir. 1997) (suggesting that "[o]nce an agency gives its regulation an interpretation, it can only change that interpretation as it would formally modify the regulation itself: through the process of notice and comment rulemaking"); Alaska Prof'l Hunters Ass'n v. Fed. Aviation Admin., 177 F.3d 1030, 1033–34 (D.C. Cir. 1999).

311 *See, e.g.*, Howard v. Ashcroft, 248 F. Supp. 2d 518, 536 (M.D. La. 2003) ("[W]hen an interpretation departs from a long-standing agency practice, it too must be promulgated under the general APA notice and comment procedures. There is no doubt that the new Bureau 'policy' is the exact opposite from its past policy and practice with regard to direct CCC commitments. Thus . . . it is highly probable that the court could conclude that the Bureau has issued a 'rule' that requires notice and comment.") (citation omitted).

312 *Id.* at 525, 536 (citing Shell Offshore Inc. v. Babbitt, 238 F.3d 622, 630 (5th Cir. 2001)).

313 *See* Iacaboni v. United States, 251 F. Supp. 2d 1015, 1040 (D. Mass. 2003).

314 *Id.*

315 *See* Scott H. Angstreich, *Shoring Up* Chevron*: A Defense of* Seminole Rock *Deference to Agency Regulatory Interpretations*, 34 U.C. DAVIS L. REV. 49, 79 (2000); *supra* Part III.A (noting that courts regard interpretive rules with *Skidmore* deference, a relatively weak deference, and evaluate these rules for their reasonableness).

316 The court in *Alaska Professional Hunters* suggested that written statements evidencing official advice concerning a policy are an important factor in considering the reasonableness of an interpretation as well as whether the interpretation is fairly encompassed within the regulation. *See* Alaska Prof'l Hunters Ass'n v. Fed. Aviation Admin., 177 F.3d 1030, 1031–32 (D.C. Cir. 1999) (finding it significant that the Alaska Region never set forth its interpretation in a written statement).

317 *See supra* note 83 and accompanying text.

judges nationwide confirms this characterization. Although no single document appears to specifically embrace the propriety of placing individuals directly in the community corrections component of CCCs, a series of DOJ manuals and documents historically encouraged the practice.[318] Perhaps most notably, the DOJ asserted that the "Bureau may designate an offender directly to a community based facility to serve his or her sentence," noting that "ordinarily this is done only with the concurrence of the sentencing court."[319] This guidance only reaffirmed the Bureau and Commission's representations to Congress in 1994, which posited that the "community corrections component [was] designed to be sufficiently punitive to be a legitimate sanction."[320] Together, these and other documents consistently confirmed the availability and propriety of direct placement in the community corrections component of CCCs, supporting the Bureau's broad discretion to place offenders in CCCs and the courts' right to recommend such placement.

The precedential value of the DOJ's publications and representations remains unclear, as does the answer to whether an interpretive rule that replaces a long-standing interpretation triggers APA rulemaking requirements.[321] It is clear, however, that the pre-2002 DOJ documents directly contradict the Memorandum and inform courts' inquiries as to the reasonableness of the DOJ's interpretation. As such, these publications and representations retain their relevance, not only in assessing the substantive merits of the agency's actions, but also as part of a court's inquiry into the nature, consistency, and reasonableness of the DOJ's actions.

3. *The Memorandum's Faulty Statutory Analysis and Misapplication of the Facts Fail to Harness the Power to Persuade*

It is unlikely that a reviewing court would consider the Memorandum to be either reasonable or independently persuasive. As Parts III and IV discuss, a court will likely find that the Memorandum misconstrued the plain terms of § 3621, straying outside of the language of the statute and its legislative history to reinterpret punishment and the proper role of CCCs. As such, a court will likely conclude that the Memorandum is not reasonable where it does not comport with the proper dictionary definitions of the terms "penal" and "correctional."[322] Similarly, a court will likely criticize the Memorandum's

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318 *See, e.g.*, JUDICIAL RESOURCE GUIDE, *supra* note 93; Program Statement No. 7310.04, *supra* note 13.

319 *See* JUDICIAL RESOURCE GUIDE, *supra* note 93, at 16.

320 REPORT TO CONGRESS, *supra* note 70, at 9–10; *see supra* notes 83–85 and accompanying text.

321 *See supra* notes 298–315.

322 *See supra* text accompanying notes 224–28.

consistent failure to treat the community corrections and prerelease components of CCCs separately, finding this characterization to be at odds with representations in Bureau manuals that the DOJ itself published.[323] Noting that the Memorandum did not originate out of a particular agency expertise, a court will likely consider the statutory and legislative history of 18 U.S.C. § 3621 and its predecessor to confirm the lack of ambiguity as to the breadth of authority Congress intended to delegate to the Bureau.[324] Moreover, acknowledging that Congress and the Commission intended for the Guidelines to bind only courts' discretion, a court will likely scrutinize the Memorandum's emphasis upon "harmonious interpretation,"[325] and be unconvinced by this apparent effort to "divest [the Bureau] of the discretion that Congress has given it."[326]

Taken together, these analyses do not undercut the DOJ's power or authority to change or even reinterpret the breadth of the Bureau's discretion and its treatment of CCC facilities. These analyses do, however, demonstrate that the DOJ selected the wrong administrative tool to implement its vision. Many factors make the DOJ's efforts to characterize its policy as an interpretive rule suspect. The DOJ's answer as to whether the Bureau may place certain offenders in CCCs is not self-evident, nor does it articulate a duty fairly encompassed within the regulation.[327] To the contrary, numerous DOJ publications and representations previously articulated a policy directly contrary to that of the Memorandum while purporting to interpret the same statute.[328]

The DOJ is not precluded from reinterpreting its policy toward placing prisoners directly in CCCs. In light of the aforementioned factors, however, the DOJ must acknowledge that such a reinterpretation effectively amends the current rule or, at the very least, amends a long-standing interpretation.[329] As such, the DOJ should implement such a policy only by complying with notice and comment procedures under the APA, a process through which the DOJ must answer its critics in a reasonable manner, subject to the court's review of its procedural efforts and its substantive answers. As it stands, it would not be difficult for a court to deem the Memorandum unreasonable for any of the many reasons discussed above.

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323 *See* discussion *supra* Part I.C.2.

324 *See* discussion *supra* Part IV.A.

325 *See* Memorandum, *supra* note 17, at 6.

326 *See* Iacaboni v. United States, 251 F. Supp. 2d 1015, 1038 (D. Mass. 2003).

327 *See supra* note 161; discussion *supra* Part III.B.1.

328 *See* discussion *supra* Part I.C.2.

329 *See* discussion *supra* Part IV.C.2.

CONCLUSION

The motivation behind the DOJ's Memorandum and revised CCC policy remains unclear. The Memorandum deprived judges of an important sentencing tool for difficult borderline cases, especially those involving personal or economic hardship.[330] Prisoners who successfully petitioned the court received preliminary injunctions and were permitted to remain in CCC facilities for the duration of their sentences.[331] Those who were unsuccessful, and those who will face sentencing in the future, no longer have the option of imprisonment in the community corrections component of CCCs.[332] Although the number of cases on this issue has diminished because of a decrease in petitioners who have standing to challenge the rule, the impact of the Memorandum persists, preventing judges from sentencing any low-level offenders directly to CCCs.[333] Fundamentally, the Memorandum also deprived the federal government and taxpayers of an important cost-saving tool; prisoner placement in CCCs freed taxpayers from the cost of a minimum-security prison facility for select offenders and also from funding welfare and other social benefits for prisoners' families, because offenders continued to provide financially for their families.[334]

Despite the DOJ's efforts to characterize it otherwise, the Memorandum constitutes a substantive rule, one which admits of no exception, offers no meaningful opportunity for input, and severely restricts the Bureau's power and discretion.[335] The Memorandum muddies the interpretation of the plain language of 18 U.S.C. § 3621, disregarding the distinction between the community corrections and prerelease components of CCCs, and misinterprets the proper scope of the Guidelines' authority. It is clear that the Guidelines do not restrict the Bureau's authority to place offenders in the community corrections component of CCCs and do not even mention this component by name. Moreover, the Guidelines in no way purport to undercut the broad authority granted to the Bureau in § 3621. On these grounds, the DOJ Memorandum fails as either a substantive or

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330 *See supra* text accompanying notes 9–15, 75–81.

331 *See Iacaboni*, 251 F. Supp. 2d at 1045; Byrd v. Moore, 252 F. Supp. 2d 293, 306 (W.D.N.C. 2003); Howard v. Ashcroft, 248 F. Supp. 2d 518, 547 (M.D. La. 2003).

332 The Bureau retains the power, however, to place inmates in such facilities for no more than ten percent of their sentence in the prerelease component. *See supra* note 91 and accompanying text.

333 *See, e.g.*, Judge Hellerstein, Crowley v. the Federal Bureau of Prisons*: Bureau of Prisons is Wrong to Adopt Restrictive Policy on Placing Inmates in Halfway Houses*, N.Y. L.J., Mar. 24, 2004, at 23; Tom Schoenberg, *Halfway House Backlash: Low-Level Offenders Battle New DOJ Policy Calling for More Hard Time*, LEGAL TIMES, Feb. 10, 2003, at 1.

334 *See supra* note 13.

335 *See* Monahan v. Winn, 276 F. Supp. 2d 196, 215 (D. Mass. 2003) (commenting that the DOJ was trying to "have its cake and eat it too").

interpretive rule. Notwithstanding these arguments, the Bureau and the DOJ *do* retain the power to reevaluate their policies regarding CCCs and to disregard judicial recommendations. The guidelines of the APA, however, do not permit the DOJ to simply reverse a long-standing policy and implement an administrative rule bearing the force of law without ensuring adequate due process through notice and comment procedures.