Sentencers, Bureaucrats, and the Administrative Law Perspective on the Federal Sentencing Commission

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Since the United States Sentencing Commission is a rulemaking, administrative body, the doctrines and structure of administrative law should offer guidance for answering questions about this Commission. Though many have criticized the Commission during its short history, few have considered the implications of administrative law for the future direction of the Commission. Based on research through September 1990, this Article first describes the history and function of the Sentencing Commission, dwelling on the most distinctive qualities of its statutory mandate. The Article considers the Mistretta case, which presented the first constitutional challenge to the Commission. Next, drawing on precedents and insights from administrative law, the author recommends relationships between the Commission and each branch of government to enhance the Commission’s effectiveness. The author concludes with some suggestions for internal ideals the Commission should pursue in its effort to devise an effective sentencing policy.

INTRODUCTION

Imagine, if you can, that Congress passes a sensible statute furthering a sensible policy. The statute creates an administrative body which drafts rules to carry out the policy. When those adversely affected by the rules challenge their legality in court, how should the court respond? When the agency makes decisions that meet with the disapproval of the Congress and the President, how should those branches respond? It is natural to think that administrative law doctrines would provide some of the most important guidance on the unanswered questions facing this agency.

This generic agency story applies to the newly created United States

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Sentencing Commission. Surprisingly, the administrative law perspective has not yet been a part of the Commission's story. Its story begins in 1984, when Congress created the Commission to deal with serious disparities in federal criminal sentences. Criminals with similar backgrounds who had committed similar crimes were receiving wildly differing sentences, depending on which judge imposed the sentence. The Commission was created to establish sentencing guidelines that would direct and confine the discretion of judges.

The Sentencing Commission got off to a sputtering start. Its very constitutionality remained in doubt until the Supreme Court ruled, in Mistretta v. United States, that the structure of the Commission did not violate the constitutional separation of powers. Congress has remained uncertain how to treat its new creature. It has waffled over which sentencing issues to decide for itself and how to review guidelines submitted by the Commission. The President has been equally tentative in establishing the proper means of influencing Commission decisions. Finally, the courts, intended to be a working partner with the Commission, have adopted no single coherent posture towards the Commission. They have alternated between active hostility to the entire guidelines enterprise and passivity regarding their place in creating sentencing policy. After just two years of sentencing under the guidelines, some observers have questioned whether the Commission should continue to issue binding sentencing guidelines at all.

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1. The Sentencing Commission, federal courts, and Congress all purport to be interested in the emergence of a "common law" of sentencing, and the creation of appropriate working relationships among themselves. See, e.g., U.S. SENTENCING COMM'N, 1988 ANNUAL REPORT 10 (1989) [hereinafter 1988 ANNUAL REPORT] (describing new amendments which indicate Commission's willingness to interact with the courts and Congress); United States v. Birchfield, 709 F. Supp. 1064, 1065-66 (M.D. Ala. 1989) (rejecting "automaton" role for court in sentencing); S. REP. No. 225, 98th Cong., 2d Sess. 151 [hereinafter S. REP. 98-225], reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS 3182, 3334 (appellate review of sentences is "essential to assure that the guidelines are applied properly and to provide case law development of the appropriate reasons for sentencing outside the guidelines," and to assist Sentencing Commission in refining guidelines). However, these entities have in large part ignored the experiences of previous administrative agencies and the relationships that grew up around them.

2. In a well-known study of sentencing disparity in the Second Circuit, different judges sentenced the same hypothetical defendant to prison terms ranging from three years to twenty years, for extortion and tax violations. A PARTRIDGE & W. ELDRIDGE, THE SECOND CIRCUIT SENTENCING STUDY A4-7 (1974).


5. Id. at 412.

6. See, e.g., FEDERAL COURTS STUDY COMM., TENTATIVE RECOMMENDATIONS FOR PUBLIC COMMENT 60-65 (1989) (recommending that Congress remove Commission's authority to promulgate rigid sentencing rules so that Commission's guidelines become nonbinding general standards).
This Article describes the potential impact of administrative law on each of these particular questions, and on the future of the Sentencing Commission generally. I argue here that administrative law, which has developed a limited consensus about the best way to control administrative agencies, offers a fitting model for resolving many disputes about the Commission's role in sentencing policy.

The benefits of viewing sentencing as an administrative process flow in two directions. It can improve the quality of sentencing by suggesting appropriate control and review mechanisms that are not currently being utilized. At the same time, the paradigm can contribute to a general understanding of administrative agencies. After we see how the peculiar qualities of the Sentencing Commission point towards a particular pattern of external controls, we can then identify connections between agency characteristics and appropriate controls in a more typical setting.

The analogy between the Sentencing Commission and other agencies is imperfect. Hence, Part I of this Article describes the Sentencing Commission and its powers and duties, noting the qualities that set it apart from other federal agencies. The Commission is less politically accountable than virtually any other federal agency. Furthermore, it does not rely on adversary, on-the-record procedures which ordinarily characterize agency adjudication. The Commission, therefore, operates differently from other administrative bodies. Its distinctiveness, in turn, leads to novel forms of administrative review.

Part II considers Mistretta v. United States, the initial constitutional challenge provoked by this distinctively structured entity. Part II explores how the result in Mistretta deferred resolution of the difficult issues raised in that case. The decision did not, as many readers believe, give the Commission a clean bill of health. Rather, it acknowledged the importance of guarding against constitutional violations as the Commission begins to operate.

In the remainder of the Article, I suggest how relationships between the Sentencing Commission and the judiciary, legislature, and executive could sustain the Commission's effectiveness. Such an administrative success story is likely to result only if two things happen. First, the courts must monitor and influence sentencing policy more vigorously than they have been willing to do so far. Second, to guarantee the success of administrative sentencing, the political branches must take a more deferential posture toward the Commission than they have taken toward other agencies.

Accordingly, Part III examines the Commission's developing relationship with the judiciary. This Part considers how a judicial role, such

as the one that normally defines judicial review of agency action, would affect the sentencing process. The analysis suggests that courts have failed to consider the propriety of deferring to the Commission's interpretations of statutes. I propose that courts should defer to Commission interpretations only when they are not employing their statutory "departure" power to sentence outside the range mandated by the sentencing guidelines. The administrative review model also indicates that courts have unduly limited their own power to "depart" from binding sentencing guidelines, thereby limiting the primary method available to judges to promote a more rational set of sentencing guidelines. Finally, Part III recommends that courts remain willing to evaluate the drafting procedures employed by the Commission, perhaps even when no statute gives explicit direction regarding the choice of procedures.

I derive each of these prescriptions from one strain of administrative law. Those who subscribe to this view of administrative law are skeptical of the value of judicial review, yet are willing to rely on judges where there is no better hope for improving agency behavior. While an active review of agency decisions by courts has made mischief in many fields, in the context of sentencing, the role is surprisingly apt. Active judicial involvement in policy decisions offers the best hope for a common law of sentencing to develop within an administrative process. Indeed, the legitimacy of judicial participation in sentencing policy grows out of the independence of the judicial office; judges must take an active role unless Congress expressly forbids it.

Parts IV and V explore the Commission's relationship with the political branches—Congress and the President. I conclude that the political branches can best reinforce the Commission's distinctive structure and process by accepting its decisions whenever they are properly grounded in empirical analysis and common law value choices. Although administrative law places few limits on the interaction between agencies and the political branches, the unique structure of the Commission argues for an enhancement of those few administrative traditions that do limit the involvement of Congress and the President.

Finally, Part VI offers some concluding observations about the internal ideals that the Commission itself should adopt as it pieces together a fair and effective sentencing policy. Limits on such internal ideals stem from the ambiguous objectives Congress has assigned the Commission.

8. For an explanation of "departure" power, see infra notes 237-38 and accompanying text.
I
AN ADMINISTRATIVE MODEL FOR SENTENCING

The Sentencing Reform Act of 1984 (SRA)\(^9\) created the United States Sentencing Commission and designated it an “independent commission in the judicial branch.”\(^10\) At least three of its seven voting commissioners, all appointed by the President, must be federal judges.\(^11\) A Director, appointed by the Commission,\(^12\) coordinates the work of a large full-time staff.\(^13\) The purpose of the Commission is to establish criminal sentencing policy through the promulgation of sentencing guidelines that federal judges must use when sentencing convicted criminals, and through nonbinding policy statements that guide sentencing discretion.\(^14\)

A federal court generally must follow all applicable guidelines when sentencing a criminal defendant,\(^15\) unless the court finds a guideline invalid.\(^16\) The SRA also allows the sentencing judge to “depart” from the sentence prescribed in the guidelines if there is a factor present in the case that the Commission did not adequately consider in creating the guideline.\(^17\) Both the prosecution and the defense may appeal a sentence to the circuit court of appeals.\(^18\)

This Part highlights the two unprecedented structural decisions Congress made in creating the Sentencing Commission. First, Congress made the United States Sentencing Commission an independent commission in the judicial branch. Second, Congress appointed at least three of the seven voting commissioners, all federal judges, to ensure that the Commission would have a strong connection to the judicial branch.

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13. See id. § 996.
15. 18 U.S.C. § 3553(a)(4)-(5) (1988). An overview of guideline sentencing may be useful at this point. The guidelines require the court to select a guideline corresponding to the charged offense. That guideline provides a number known as the “base offense level,” which the court must then adjust according to enumerated factors specific to the offense, see Guidelines, supra note 3, ch. 2, or general to all crimes, see id. ch. 3, pts. A-C, E. Where the case involves multiple counts of conviction, the court must “group” related counts in a way that mirrors pre-guidelines usage of concurrent sentences to obtain a final “adjusted offense level.” See id. ch. 3, pt. D. The “adjusted offense level,” when combined with the “criminal history score” of the defendant, see id. ch. 4, determines the sentencing range. See id. ch. 5, pt. A. The court then decides whether or not to “depart” from the designated range. See id. ch. 5, pt. K. If the court departs, it must decide on the amount of departure; if not, the court selects a point within the designated range. See id. ch. 5. Finally, the court considers the amount of any fine. See id. ch. 5, pt. E1.2.
16. See infra Sections III(A), III(B)(1).
18. Id. § 3742(a)-(b).
made an exceptional effort to insulate the Sentencing Commission from short-term political accountability. 19 Second, Congress replaced political accountability with a paradoxical judicial role. 20 Both innovations ensure that the Commission will operate differently from other administrative bodies and will be subject to novel forms of administrative review.

A. Blunting the Role of Politics in Sentencing

1. Getting Sentencing Out of Politics

Beginning in the early 1970s, Congress began to hear the complaints of judges, lawyers, academicians, and others about criminal sentencing in the federal system. The foremost concern was disparity in sentences, that is, disparate sentences imposed on defendants with similar backgrounds who commit similar crimes. 21

Advocates for sentencing reform latched upon the idea of a sentencing commission as a way to remove sentencing from the "overly political" arena of the legislature. 22 Among other influential voices on the subject, Judge Marvin Frankel argued that one of the strengths of a commission would be its ability to resist the "crime-fighting passion" of the public that leads to ever-stricter prison terms and prison overcrowding. 23

19. See infra text accompanying notes 21-62.

20. Congress included federal judges as participants in creating and enforcing sentencing policy, see infra text accompanying notes 65-68; yet at the same time, it charged judges with monitoring the adequacy of the Commission's deliberations through "detached" judicial review, see infra text accompanying notes 91-95.


22. See, e.g., Hoffman & Stover, Reform in the Determination of Prison Terms: Equity, Determinacy, and the Parole Release Function, 7 HOFSRA L. REV. 89, 100 (1978) (dramatic incidents and public opinion make legislators likely to enact overly harsh sentencing statutes); Schulhofer, Due Process of Sentencing, 128 U. PA. L. REV. 733, 738-40 (1980) (legislative specification of punishment usually leads to excessive penalties due to concerns with crime control and ignorance of prison management issues); Tonry, The Sentencing Commission in Sentencing Reform, 7 HOFSRA L. REV. 315, 324, 336 (1979) (an independent commission would be insulated from counterproductive political pressure); von Hirsch, The Sentencing Commission's Functions, in THE SENTENCING COMMISSION AND ITS GUIDELINES 3, 5-7 (1987) (legislature has insufficient time to handle sentencing problems and would tend to enact draconian punishments); Zimring, Sentencing Reform in the States: Lessons From the 1970s, in REFORM AND PUNISHMENT 101, 115 (M. Tonry & F. Zimring eds. 1983) (legislators are responsive to lobbying groups promoting stricter sentences for their particular "pet crimes," hence legislators are likely to favor increasingly long sentences).

These reformers feared it was inevitable that the legislature would impose inappropriately stiff punishments in order to take a popular stand against crime.\textsuperscript{24}

Others expressed less concern over political passion, but preferred an administrative body because of the tendency of legislators to have short attention spans or to misunderstand a complicated subject. A sentencing commission could devote sustained attention to the issue and reflect changes in knowledge and attitudes about effective sentencing strategies.\textsuperscript{25} Whether the difficulty was passion, lack of endurance, or ignorance, reformers hoped that a commission could help save us from Congress' short-term political folly.\textsuperscript{26}

As a result of these rumblings, a number of bills were introduced, in which a commission on sentencing and corrections became a regular

\textsuperscript{24}Id. Other advocates of reform echoed Frankel's concern. \textit{See supra} note 22.


\textsuperscript{26}Public choice theory suggests that a failure of this sort by the legislature would be no surprise. Due to the information costs to interest groups of discerning how over-harsh sentences might affect them, and the organization costs of finding those with similar interests, legislatures would typically not face interest group pressure for restrained sentences, and hence are unlikely to enact more moderate sentencing laws. \textit{See generally} M. HAYES, LOBBYISTS AND LEGISLATORS 93-126 (1981) (statute furthering distributed benefits unlikely to pass); Macey, Public Choice: The Theory of the Firm and the Theory of Market Exchange, 74 CORNELL L. REV. 43, 46-51 (1988) (applying public choice theory to explain the success or failure of groups in achieving their aims in the legislature). However, public choice theory fails to explain the decision to coordinate sentencing policy through a commission: such coordination does not clearly benefit any visible or organized interest group.
These efforts culminated in the SRA, which created the Sentencing Commission. In passing the SRA, Congress apparently accepted the force of those arguments regarding its own likely failure. It hoped that the Sentencing Commission could remove sentencing issues from politics to some degree, because long experience with debates in the sentencing area suggested that rhetoric escalated quickly and blocked the use of the best information available.

Obviously, formulating sentencing policy involves some pure value choices that may appropriately and inevitably lead to heated debate. However, sentencing policies also reflect a sizeable empirical component.


30. Recent failures of several states to adopt sound recommendations for sentencing reform evidence the difficulties legislatures have in coping with their internal inadequacies. See, e.g., Tonry, Sentencing Guidelines and Their Effects, in THE SENTENCING COMMISSION AND ITS GUIDELINES, supra note 22, at 16, 23-25 (failure of sentencing reforms, particularly in Pennsylvania and South Carolina, due to lack of legislative resolve).


32. The extensive literature regarding the theory and purposes of sentencing incorporates this debate about values. See generally N. MORRIS, THE FUTURE OF IMPRISONMENT 58-74 (1974) (examining principles for imposing prison sentence, and arguing that retribution and deterrence, but not rehabilitation, are proper rationales for criminal punishment); A. Von Hirsch, Past or Future Crimes: Deservedness and Dangerousness in the Sentencing of Criminals 2-18 (1985) (characterizing the primary debate over sentencing as between the goal of punishing past wrongs and the goals of incapacitating and rehabilitating criminal offenders); J. Wilson, Thinking About Crime 117-77 (2d ed. 1983) (examining logical and moral underpinnings of theories of rehabilitation and deterrence, and empirical evidence concerning each).
susceptible of improvement or verification through research.\textsuperscript{33} In an attempt to downplay the inflammatory effect of value disagreements, the statute directed the Sentencing Commission to base its sentencing policy on input from those with relevant information,\textsuperscript{34} paying special attention to empirical data.\textsuperscript{35}

Because the problems with criminal sentences ran deeper than disparate sentences, the SRA also made the Commission an ongoing agency with a long-term perspective and multiple objectives. Any specific statutory instructions to sentencing judges might have proven unwise, and increasingly so as time passed. Had Congress retained complete power to change sentencing policy, various institutional weaknesses would likely have prevented it from returning to the problem often enough.\textsuperscript{36} So the statute instructed the Commission to adjust the guidelines over


\textsuperscript{34} The Commission is directed to consider comments and data from various representatives of the federal criminal justice system, 28 U.S.C. § 994(o) (1988), or brought to its attention by the defendant, id. § 994(s), and to reflect in its guidelines, insofar as practicable, "advancement in knowledge of human behavior as it relates to the criminal justice process," id. § 991(b)(1)(C).

\textsuperscript{35} See, e.g., id. § 991(b)(2) (charging Commission with developing means of measuring the effectiveness of sentencing practices); id. § 994(m) (requiring an empirical analysis of average sentences imposed by judges before Commission's creation as a starting point for preparing guidelines). To achieve this purpose, the statute grants the Sentencing Commission various information-gathering powers, research mandates, and educational functions. See id. § 995(a)-(9), (12)-(19).

time to respond to suggested improvements in sentencing policy.\textsuperscript{37}

2. \textit{Keeping Politics Out of Sentencing}

The vision of a scientific, apolitical sentencing policy is at once appealing and naive. Values not susceptible of empirical verification will always dominate sentencing decisions. Differing social values result in fundamentally conflicting views about the purpose of the penal system, such as retribution, deterrence, incapacitation, and the like. The choice of one view over another might affect the importance of different types of facts for those making sentencing decisions.\textsuperscript{38}

Additionally, the use of certain facts may be considered politically objectionable. For example, although the race or socioeconomic class of the offender may be statistically correlated to the rate of recidivism, society may nonetheless want to exclude these factors from use in sentencing determinations for moral and political reasons.\textsuperscript{39} In short, there are limits to the progress that is possible by relying solely on empirical data.

The archetypal American response to value-laden regulatory issues has been to make agencies politically accountable.\textsuperscript{40} In the case of an agency that is not "independent," the President (the elected representative of the entire nation) can legitimately use a variety of means, includ-

\begin{footnotesize}
\begin{enumerate}
\item See supra note 33. Consider, for example, the goal of retribution. Where society decides that the purpose of a criminal sentence is to give the offender "just deserts" for the crime, the sentencing court must ascertain the relative culpability of different offenders. See K. SCHLEGEL, \textit{JUST DESERTS FOR CORPORATE CRIMINALS} 148-51 (1990) (the concept of "desert" in punishment requires that offenders whose crimes are similar receive a similar punishment, and that punishments must be graded to reflect the relative seriousness of the criminal acts); A. VON HIRSCH, \textit{supra} note 32, at 63-76 (chief criterion of penal desert is the seriousness of a crime—measured in terms of intent, motive, and circumstance—which may be entirely distinct from the actual harm caused by the criminal act); Monahan, \textit{The Case for Prediction in the Modified Desert Model of Criminal Sentencing}, 5 INT'L J.L. & PSYCHIATRY 103, 104-05 (1982) (following von Hirsch's approach to calculating deserved sentence by reference to the seriousness of the conduct, noting that while people may agree to some extent on the harm element of seriousness, the culpability element remains elusive and subject to factors irrelevant to desert). For a general account of how value judgments might be made without appealing to facts or experience, see G. MOORE, \textit{PRINCIPIA ETHICA} (1903).
\item Coffee, \textit{supra} note 25, at 1017-18 (race could be a useful factor in predicting recidivism, but is generally excluded from sentencing decisions for moral reasons). The SRA explicitly excludes these factors from the Commission's consideration in formulating sentencing guidelines. See 28 U.S.C. § 994(d) (1988) (requiring that guidelines be neutral as to race, sex, national origin, creed, and socioeconomic status). I do not address the possibility that such factors may affect decisionmakers unconsciously.
\item This explanation of administrative law, which emphasizes devices to enhance accountability, came to prominence in the 1970s. See generally, Gellhorn, \textit{Public Participation in Administrative Proceedings}, 81 YALE L.J. 359, 361-62 (1972) (proposing procedural solutions to alleged problem of unresponsive agency actions); Stewart, \textit{The Reformation of American Administrative Law}, 88 HARV. L. REV. 1667, 1790-802 (1975) (analyzing possible mechanisms for reducing agency discretion through representation of interests).
\end{enumerate}
\end{footnotesize}
ing the appointment and removal power,\textsuperscript{41} to persuade the agency to follow certain policies.\textsuperscript{42} Likewise, the Congress normally can exert any available pressure to influence agency policy.\textsuperscript{43}

Agencies must respond not only to the people's elected representatives, but also to persons directly affected by the agencies' policies. The informal notice-and-comment rulemaking process, as set out in section 553 of the Administrative Procedure Act (APA),\textsuperscript{44} seeks to involve many people with differing perspectives on a given policy.\textsuperscript{45} Through expanded rules of standing and other techniques, courts have empowered a broad range of interested parties to enforce public involvement in rulemaking procedures.\textsuperscript{46}

These informal rulemaking procedures exclude no one and do not purport to give extra weight to any particular perspective; anyone with the inclination and energy can address the agency. The APA does not contemplate that certain parties may have especially important views worth eliciting.\textsuperscript{47} It provides little structure to the forces influencing

\begin{itemize}
\item \textsuperscript{41} See 3 U.S.C. § 301 (1988) (authorizing President to designate any executive department or agency head, and to revoke such authorization at any time); see also, e.g., 5 U.S.C. § 7119(c)(3) (1988) (granting President unrestricted power to remove members of Federal Services Impasse Panel).
\item \textsuperscript{42} See R. Waterman, Presidential Influence and the Administrative State 51-74 (1989) (recounting efforts of Nixon White House to influence Department of Housing and Urban Development; tactics included appointing loyalists to the agency, developing clearly articulated policy choices, and attempting structural reorganizations to allow more centralized control of the agency).
\item \textsuperscript{43} See Weingast & Moran, The Myth of Runaway Bureaucracy: The Case of the FTC, Regulation May-June 1982, at 33 (quantitative analysis of congressional influence over one agency). For potential limitations on congressional participation in agency activity, see infra Part IV.
\item \textsuperscript{44} 5 U.S.C. § 553 (1988).
\item \textsuperscript{45} Notice-and-comment rulemaking requires an agency to publish a notice in the Federal Register, stating the time and place of its rulemaking proceedings and the substance of the proposed rule (or at least the subject involved). \textit{Id.} § 553(b). The agency must give interested persons an opportunity to submit written statements regarding the proposed rule. \textit{Id.} § 553(c). Rules normally cannot take effect until 30 days after publication of the notice in the Federal Register. \textit{Id.} § 553(d).
\item \textsuperscript{46} See, e.g., United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669, 686-88 (1973) (standing to challenge administrative actions may not be denied merely because many other people have suffered the same injury); Center for Auto Safety v. NHTSA, 793 F.2d 1322, 1331-38 (D.C. Cir. 1986) (an injury suffered by a large number of people may nonetheless be an injury sufficient to establish standing in challenges to administrative agency actions). See generally S. Breyer & R. Stewart, Administrative Law and Regulatory Policy 1185-215 (2d ed. 1985) (examining "interest representation model" of administrative law, in which special or general interest groups represent the rights of their apparent constituents, and reviewing court decisions granting such groups both standing in court and rights of intervention in administrative proceedings); Sunstein, Standing and the Privatization of Public Law, 88 Colum. L. Rev. 1432 (1988) (arguing that courts have used standing to allow private individuals to enforce public laws and compel agency compliance).
\item \textsuperscript{47} Admittedly, judicial review under the arbitrary or capricious standard of the APA, see 5 U.S.C. § 706(2)(A) (1988), requires the agency to respond to certain important information and to seek out other important information. See South Terminal Corp. v. EPA, 504 F.2d 646, 665-67 (1st
agency action; agencies choose for themselves which comments, if any, deserve close attention.

Certain "independent" agencies do operate under a more restricted form of accountability than the open-ended pluralism of most executive branch agencies. These independent agencies answer to the President in only a limited sense. The President cannot remove an official without justification, and the membership of such agencies typically must be split between members of different political parties. Such limitations on accountability aim to preserve the integrity of adjudicative proceedings that have historically been the stock-in-trade of independent agencies.

Granted, some elements of political accountability for an independent agency remain, yet independent agencies formally differ from most administrative bodies since they remain one increment removed from short-term political accountability.

The Sentencing Commission, by comparison, is two increments

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48. See, e.g., 29 U.S.C. § 153(a) (1988) (NLRB members may be removed for neglect of duty or malfeasance, "but for no other cause"); 15 U.S.C. § 2053(a) (1988) (Consumer Product Safety Commission: same criteria); 42 U.S.C. § 175(d) (1988) (members of Civil Rights Commission removable “only for neglect of duty or malfeasance"). While this requirement does not significantly constrain the President’s choice of agency leadership, it does express the desire of Congress to lessen the agency’s accountability to the President. See Wiener v. United States, 357 U.S. 349, 352-56 (1958) (although statute creating War Claims Commission made no explicit provision for removal of appointed commissioners, court inferred congressional intent to deny that power to President from language granting Commission power to adjudicate claims “according to law” and “not subject to review by any other official of the United States” (quoting H.R. REP. No. 4044, 80th Cong., 2d Sess. 21, 30 (1948)); Humphrey’s Ex’r v. United States, 295 U.S. 602, 608 (1935) (to maintain Federal Trade Commission’s independence, Congress restricted President’s power to remove Commissioners without cause).


50. See infra note 63 and accompanying text.


Examination of legal distinctions between agencies may, in fact, lead one to the conclusion that so-called "independent" agencies are not much more independent than "non independent" agencies. See Morrison, How Independent Are Independent Regulatory Agencies?, 1988 DUKE L.J. 252. It has been suggested that independent agencies are removed from politics more as a result of practical constraints than of legal distinctions. See Robinson, Independent Agencies: Form and Substance in Executive Prerogative, 1988 DUKE L.J. 238, 246.
removed from politics. It was not only denominated "independent,"\textsuperscript{52} but was placed outside the executive, in the judicial branch.\textsuperscript{53} Although the standard, unstructured APA notice-and-comment procedures were applied to the Commission's promulgation of guidelines,\textsuperscript{54} Congress supplemented these procedures with an unusual mandate. In addition to taking comments from all interested parties, as required under the APA,\textsuperscript{55} the Commission is specifically required to "consult with authorities on, and . . . representatives of, various aspects of the Federal criminal justice system."\textsuperscript{56} Furthermore, certain groups, who will likely have relevant information about the operation of the sentencing system, must submit written reports commenting on the Commission's guidelines and operations.\textsuperscript{57}

Having listened to all interested groups, paying particular attention to those with the best access to information, the Commission must respond to a particular form of argument: empirical argument, based on observation of the sentencing system in operation. The statute contemplates a Commission with independent research capabilities, able to draft guidelines to reflect advances in human knowledge.\textsuperscript{58}

Previous experience with administrative agencies insulated from popular will suggests that a structure that deflects immediate political accountability can result either in agency "capture" or in more rational deliberation of issues.\textsuperscript{59} Those prior experiences differ from the

\textsuperscript{52} 28 U.S.C. § 991(a) (1988). The restrictions ordinarily associated with independent agencies were imposed: the President can only remove Commissioners for good cause, and no more than four of the seven members may be from the same political party. \textit{Id.} In addition to these constraints, the President must consult with various interested parties before making appointments to the Sentencing Commission. \textit{Id.}

\textsuperscript{53} \textit{Id.}


\textsuperscript{55} \textit{See supra} notes 44-47 and accompanying text.


\textsuperscript{57} The statute creating the Sentencing Commission calls for timely comments and observations as to the work of the Commission, and a review of guidelines at least annually, from the United States Probation System, the Bureau of Prisons, the Judicial Conference of the United States, the Criminal Division of the Justice Department, and a representative of the Federal Public Defenders, as well as annual written reports from each of the listed entities. \textit{Id.} The Commission is directed to consider these and other outside sources of relevant data. \textit{See supra} note 35.

Furthermore, the executive has an ongoing voice in the process because the Attorney General sits as an ex officio nonvoting member. 28 U.S.C. § 994(a) (1988).

\textsuperscript{58} \textit{See supra} note 35. The legislative history is replete with references to the primarily empirical nature of the Commission's drafting process. \textit{See, e.g.}, S. REP. 98-225, \textit{supra} note 1, at 162, \textit{reprinted} in \textit{1984 U.S. CODE CONG. & ADMIN. NEWS} 3182, 3345 (Commission's purpose "emphasizes the importance of sentencing and corrections research in the process of improving the ability of the Federal criminal justice system to meet the goals of sentencing"); \textit{id.} at 169, \textit{reprinted} in \textit{1984 U.S. CODE CONG. & ADMIN. NEWS} 3182, 3352 (sufficiently detailed and refined guidelines only possible through "extensive research capability").

\textsuperscript{59} Agencies may become more responsive to some interests than others, thus exaggerating the
Sentencing Commission, however, whose insulation from politics is by design, rather than by a process of gradual development.

The blunted political accountability of the Commission is likely to take on more significance now that an initial set of guidelines is in place. The task of reducing disparities in sentencing was a major priority in drafting the guidelines. The Commission believes it has now accomplished that task. But the need to address disparity and to unify sentencing policy is relatively uncontroversial; a unified policy can be based on past practice, without inquiring into the wisdom of that past practice. Now, as the Commission begins to address the propriety of that unified policy, the political heat is likely to rise. The ability of the Commission to keep sight of empirical knowledge in the midst of intense philosophical and political conflict is only now being tested.

B. The Dual Role of Judges as Regulators and Regulated

If technical proficiency alone cannot legitimize the actions of the Commission, and if its political accountability is limited to an unprecedented extent, what can ensure the long-term acceptability of the Commission? For other independent agencies, the trappings of adjudicatory fairness have filled this gap. Agency actions that result from procedures


In a more positive vein, agencies may be capable of a kind of rational deliberation of public issues rarely achieved in the legislature. See Bruff, Legislative Formality, Administrative Rationality, 63 TEX. L. REV. 207, 236-44 (1984) (judicial “hard look” review of decisions can enforce rational policymaking at agency level, whereas legislative decisions not subjected to such intensive judicial review); Sunstein, Factions, Self-Interest, and the APA: Four Lessons Since 1946, 72 VA. L. REV. 271, 281-87 (1986) (emerging deliberative approach in administrative government supplanting conception of agency’s role as either purely empirical or entirely political). See generally S. KELMAN, MAKING PUBLIC POLICY: A HOPEFUL VIEW OF AMERICAN GOVERNMENT 271-85 (1987) (evaluation of performance of government organizations concluding that “[g]overnment performs better than its reputation, but not well enough”).


62. Indeed, the current debate over potential guidelines for the sentencing of corporations convicted of crimes has tested the political insulation of the Commission like never before. See 47 CRIM. L. REP. (BNA) 1179 (May 30, 1990). This issue has become notorious for two reasons: (1) the Commission is choosing an approach to sentencing not based on pre-guidelines practices of federal judges; and (2) corporate defendants are much better financed and organized than individual defendants and are therefore able to bring more pressure on the agency (just as public choice theory would predict). Labaton, Business and the Law: Corporate Crime and Punishment, N.Y. Times, Oct. 1, 1990, at D2, col. 1.
that more or less resemble a civil trial will undoubtedly appear more legitimate.\textsuperscript{63} However, the Sentencing Commission does not rely on such accoutrements of fairness. It does not adjudicate cases, nor does it follow procedures that mimic a judicial trial. It only drafts guidelines that others—that is, judges—will apply during sentencing proceedings.

Instead of providing for adjudication by the Commission, the statute creates an inventive interaction between the Commission and the judiciary.\textsuperscript{64} This Section introduces the tensions in this relationship and the dilemmas it creates for purposes of judicial review of administrative action.

1. The Legitimizing Aura of the Common Law

Recognizing that sentencing is and should remain "primarily a judicial function,"\textsuperscript{65} Congress placed judges together with the Commission at the center of sentencing policymaking. Congress associated the agency with the judicial branch, both by labeling it a judicial agency and by placing judges on the Commission.\textsuperscript{66} But the greatest influence exercised by judges over sentencing policy stems from two sources: (1) the statute's requirement that the Commission monitor judicial sentencing decisions both before and after the guidelines are promulgated;\textsuperscript{67} and (2) the


The legitimacy of the adjudicatory process has proven attractive to many agencies that are removed from political accountability, regardless of whether they carry the label "independent." For example, the Consumer Product Safety Commission and the National Highway Transportation Safety Administration (not an independent agency) are both removed from political accountability and have come to rely on adjudication rather than rulemaking. See Adler, From "Model Agency" to Basket Case: Can the Consumer Product Safety Commission Be Redeemed?, 41 ADMIN. L. REV. 61, 92-106, 117-29 (1989); Mashaw & Harfst, Regulation and Legal Culture: The Case of Motor Vehicle Safety, 4 YALE J. ON REG. 257, 263 (1987).

\textsuperscript{64} See 28 U.S.C. § 994(m) (1988) (Commission must look at pre-guidelines sentencing as starting point in setting guidelines); id. § 994(w) (judges must submit data to Commission on each sentence imposed under guidelines); 18 U.S.C. § 3742 (1988) (defendant may file an appeal in district court for review of sentence imposed).

\textsuperscript{65} See S. REP. 98-225, supra note 1, at 159, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS 3182, 3342; see also Fleet, Sentencing the Criminal—A Judicial Responsibility, 9 AM. J. TRIAL ADVOC. 369 (1986) (arguing that sentencing is properly in hands of judges; guidelines are helpful, but must not usurp judges' discretion).


\textsuperscript{67} This monitoring procedure is used both to initially establish guidelines, id. § 994(m)
provisions creating appellate review of sentences imposed by lower courts.\textsuperscript{68}

The slow process of creating policy incrementally, by applying past decisions to particular cases, reflects a form of moral intuition about the values that should guide future policy. Since the Commission relies to some extent on the wisdom accumulated by judges through case-by-case consideration of sentencing issues, it can claim some of the mystique of the common law process.\textsuperscript{69} This helps legitimize the Commission's actions where it cannot demonstrate that its guidelines reflect empirical realities\textsuperscript{70} or are a result of the democratic process.\textsuperscript{71}

The internal adjudicatory apparatus of other agencies serve a similar information-gathering function and help give common law legitimacy to agency policy. Adjudication applies agency policy to a particular party and a single set of facts, as contrasted with the more general process of rulemaking.\textsuperscript{72} The Commodities Futures Trading Commission (CFTC) process is typical. The enforcement staff of the CFTC initiates proceedings before an administrative law judge, and the top policymakers at the CFTC ultimately hear any appeal from such a ruling.\textsuperscript{73}

Agency policymakers at the CFTC and elsewhere find that their adjudicative activities support their policymaking activities. In addition
to resolving a dispute, adjudication gives the agency information about how an established policy works. Such information is valuable to the agency in formulating future policy. While those creating policy consider data and arguments from many sources, information from "the field" can make the policy more credible. Adjudication also provides an opportunity to experiment with incremental policy change, to find the prudent boundaries for a policy initiative.

The Sentencing Commission is able to ignore common law experience more readily than other agencies due to its unique structure. Unlike the CFTC, where the same persons carry out both the adjudicative and policymaking functions, the Commission, although required to listen carefully to its adjudicators, does not itself adjudicate. Furthermore, the SRA authorizes the Commission to diverge somewhat from the common law guidance. Thus, in a setting where empirical reasoning cannot stand alone, and where electoral accountability is limited, the agency has unusually weak incentives to let common law adjudication guide policy. The next Subsection discusses the advantages that flow to a Commission operating independently of the common law.

2. The Advantages of Centralized Sentencing Policy

Prior to the creation of the Commission and the sentencing guidelines, the sources of sentencing policy were diffuse. Within the broad outlines established by statute, a judge had discretion to set whatever sentence he or she deemed appropriate. The hundreds of federal judges setting sentences had no effective means of coordinating their choices.
so their policies tended to conflict. Further, courts shared their policymaking function with the Parole Commission, which had partial control over the sentence to be served by a defendant. Because of this fragmentation, judges were unable to consider information relevant to sentencing in any standardized way.

The Sentencing Commission makes a coordinated sentencing policy possible. To implement that policy, the Commission must on occasion disagree with a direction suggested by a sentencing judge. Perhaps the sentence conflicts with sentences of other judges; perhaps it ignores important considerations not apparent in the context of a single case. The Commission, ideally, simulates the decisions of a unified judiciary, establishing a single coordinated policy that nevertheless responds to the many factual circumstances in individual cases.

The difficulties of criminal sentencing have galvanized federal efforts to increase the administrative capacity of the judicial branch. For example, the need to improve sentencing played a role in the creation of the Judicial Conference. See Hearings on H.R. 8875 Before the House Comm. on the Judiciary, Ist Sess. 6 (1921) ("you find there is not uniformity of sentences, customs, rules and regulations in the various district courts"). The same issue made an appearance at the time of the creation of the Administrative Office. See DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE U.S. COURTS, REPORT OF THE JUDICIAL CONFERENCE OF SENIOR JUDGES 1 (1940).


83. See Morris, Towards Principled Sentencing, 37 MD. L. REV. 267, 285 (1977) (system combining sentencing commission guidelines with provisions for appellate review will have a "unifying effect" on sentencing); see also D. PARENT, supra note 25, at 4-11 (describing Minnesota's sentencing commission and guidelines). But see Proposed Sentencing Guidelines for United States Courts, 52 Fed. Reg. 3920, 3986-88 (1987) (dissenting view of Commissioner Paul H. Robinson) (arguing that guidelines that give little guidance may actually increase sentence disparity by increasing exercise of discretion).

84. See D. PARENT, supra note 25, at 40-44 (capacities of state and local correctional facilities must be considered); Knapp, Structured Sentencing: Building on Experience, 72 JUDICATURE 46, 49 (1988) (need to manage prison overcrowding is pushing legislatures toward more structured sentencing projects); Robinson, A Sentencing System for the 21st Century?, 66 TEX. L. REV. 1, 15-17 (1987) (advocating limits on judicial ability to depart from guidelines if they are designed to include all relevant factors).
Along with coordinating a sentencing policy, a single policymaker can make that policy more visible and accessible. Guidelines are prospective and available for scrutiny and criticism before sentencing. Furthermore, they apply generally to all offenders. Such qualities prevent the appearance of arbitrariness in sentencing.85

A division of labor that assigns all sentencing policy decisions to an agency also keeps the judge's duty in sentencing more in step with other judicial duties. Adjudication normally requires the judge to focus on a legal text (or other source of existing law), to consider the history of its enactment and the current social conditions, and thus to ascertain the meaning of the text or source.86 In pre-guidelines sentencing, judges did not interpret legal sources. Instead, some judges attempted to predict (based on their knowledge of psychology, sociology, or what-have-you) a sentence that would reduce crime and benefit both society and the individual involved.87 Others attempted to punish an offender according to their views of the relative seriousness of crimes.88 Hence, despite trial judges' often bitter dissatisfaction with their sentencing role,89 that role appears to follow more closely the core judicial function of interpreting legal texts and principles. And, although the guidelines admittedly contain much detail, they nonetheless leave some important discretionary

86. In this way, adjudication is more akin to literary interpretation than to policymaking. See generally Dworkin, Law as Interpretation, 60 TEX. L. REV. 527 (1982) (discussing the dynamics of legal interpretation; Fiss, Objectivity and Interpretation, 34 STAN. L. REV. 739 (1982) (stating that adjudication is interpretation, whether in the legal or literary field); Levinson, Law as Literature, 60 TEX. L. REV. 373, 374 (1982) (citing C. Langdell's characterization of law as a "literary enterprise, a science of extracting meaning from words).
87. M. FRANKEL, supra note 27, at 7-8; Project, Parole Release Decisionmaking and the Sentencing Process, 84 YALE L.J. 810, 845 (1975). It may be instructive to compare the exercise of judicial function in pre-guidelines sentencing and in ordering civil injunctive remedies. Mandating an injunction can pull a judge away from her source of legitimacy, since the decision involves questions of resource allocation and other issues that do not follow axiomatically from an announced legal principle. For an example of apparent judicial overextension, see Missouri v. Jenkins, 110 S. Ct. 1651, 1662-63 (1990) (order of tax increase to fund court-ordered desegregation exceeded court's authority). See also Shane, Rights, Remedies and Restraint, 64 CHI.-KENT L. REV. 531, 554-58 (1988). The pre-guidelines sentencing function is even further removed from a judge's legitimate power. While injunctive remedies attempt to apply a legal norm to a given setting, sentences interpret no legal norm at all.

There are, of course, other contexts in which judges make decisions based on ill-defined considerations of social welfare, not anchored to judicial interpretation of principles chosen by others. But nowhere is the judge less constrained by precedent than in non-guideline sentencing.

89. See, e.g., United States v. Palta, 880 F.2d 636, 638 (2d Cir. 1989) (trial court referred to Commission as "a bunch of sociologists"); see also Gorman, Judges See Sentencing Law as Usurping Their Power, Chicago Tribune, Jan. 18, 1989, § 2, at 7, col. 1 (many judges have ruled federal sentencing law unconstitutional).
decisions to the court.\textsuperscript{90}

3. \textit{The Open Question of Judicial Review}

The different duties assigned the Commission and courts make possible a unified and visible sentencing policy, available for courts to interpret and apply as they would any other legal norm or text. Yet application of guidelines is not the only responsibility of judges in administering the sentencing process. As they do with law produced by most other administrative agencies, judges both apply the law and evaluate it.\textsuperscript{91} For example, in sentencing offenders, a judge may refuse to apply a guideline if she believes the Commission has failed in some respect. Indeed, judicial review of the Sentencing Commission presents a wrinkle not normally a part of administrative review. Although judicial review of other agencies rests on a foundation of detachment and impartiality,\textsuperscript{92} with the guidelines judges systematically influence the Commission in forming sentencing policy. One might view judges simultaneously as policymakers, enforcers, and regulated parties.

Prior to the guidelines, courts never had occasion to develop an administrative review relationship with other bodies responsible for sentencing. Only a limited part of the sentencing process developed within an administrative setting, through the work of the Parole Commission and its predecessors.\textsuperscript{93} The courts themselves determined many aspects of criminal sentences, so the possibility of outsider review by courts arose only rarely. Courts normally were precluded from reviewing any Parole


Commission policies, such as its Parole Guidelines.

The multifarious role of courts in developing and applying sentencing guidelines complicates the issue of the courts' appropriate posture for purposes of reviewing administrative action. The question now presses in on the courts. Although not explicitly charged with authority to oversee policy, courts are regularly asked to review the choices made by the Commission. Litigants are challenging specific guidelines on both constitutional and statutory grounds, and are questioning Commission procedures. The challenges arise in sentencing proceedings, where the dual roles of the sentencing court may become difficult to distinguish.

II

POsing THE FAMiLiaR ADMINiSTRaTiVE LAW QUESTION IN MISTRETTA

In the first constitutional challenge to the Sentencing Commission, *Mistretta v. United States,* the Supreme Court delayed more than it decided. The Supreme Court held that Congress had not violated the Constitution by structuring the Sentencing Commission in a way that involved both the executive and the judiciary in the creation of sentencing guidelines. Both the lower courts and commentators have


97. *Id.* at 412.


treated Mistretta as a signal that the Commission's structure and assigned duties no longer raise constitutional concerns.

This reading of the case, however, ignores its temporizing quality. While the Court did not force Congress to restructure the Commission, it did recognize the validity of concerns raised in the case and determined that any problems could be managed as they arose. Mistretta was a deferral, not a resolution, of the difficulties that may develop when Congress, the President, and the judiciary interact to shape sentencing policy.

The Mistretta decision merely followed a tradition as old as the American administrative state. Under this tradition, the Court first listens carefully to the compelling constitutional arguments against the structure of the agency. Then the Court ignores those arguments, bows to necessities brought about by changing times, changing institutions, and changing functions of government, and upholds the delegation of power to the agency. According to this tradition, reckoning with constitutional problems should, whenever possible, occur later rather than earlier.

Mistretta involved two constitutional challenges. The petitioners argued that (1) the legislature had delegated too much power to the Sentencing Commission without giving adequate guidance, and (2) the Commission's structure violated the constitutional separation of


100. See Mistretta, 488 U.S. at 377 ("We cannot dispute petitioner's contention that the Commission enjoys significant discretion in formulating guidelines."); id. at 384 ("Although the unique composition and responsibilities of the Sentencing Commission give rise to serious concerns about a disruption of the appropriate balance of governmental power among the coordinate [b]ranches, we conclude, upon close inspection, that petitioner's fears for the fundamental structural protection of the Constitution prove, at least in this case, to be 'more smoke than fire."); id. at 397 (Addressing the requirement that at least three Commission members be federal judges, the Court stated, "We find Congress' requirement of judicial service somewhat troublesome, but we do not believe that the Act impermissibly interferes with the functioning of the Judiciary."); id. at 407 ("We are somewhat more troubled by petitioner's argument that the Judiciary's entanglement in the political work of the Commission undermines public confidence in the disinterestedness of the Judicial Branch.").

101. More specifically, the tradition dates back at least as far as the New Deal, the era most often considered as the starting point of the "administrative" or "regulatory" state. See, e.g., C. SUNSTEIN, AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE 19, 23-24 (1990) (noting the rise of regulatory and administrative activity in the New Deal era).

102. See, e.g., Yakus v. United States, 321 U.S. 414 (1944) (upholding delegation to Price Administrator of power to fix wartime commodity prices and rents).

103. See infra note 184 and accompanying text.

powers. These were facial challenges to the constitutionality of the guidelines, and not challenges to how they applied to Mistretta's particular case.

This Part reviews these structural challenges, each of which focuses on an aspect of the Commission that might lead it to abuse its power. The text of Mistretta reads as a rejection of each challenge. Here, however, I focus on the subtext of the case which gave the Commission only provisional approval.

A. Improper Delegation of Congressional Power to Subagents

John Mistretta contended that "in delegating the power to promulgate sentencing guidelines for every federal criminal offense to an independent Sentencing Commission, Congress has granted the Commission excessive legislative discretion in violation of the constitutionally based nondelegation doctrine." Such a challenge proceeds from the first operative words in the United States Constitution: "All legislative Powers herein granted shall be vested in a Congress . . . ." The words express an axiom of representative government: the people's elected agents cannot freely assign their delegated powers to subagents. Given the complexity and volume of topics that government now addresses, we now take the axiom to mean that the Congress must properly select and instruct its subagents.

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105. Id. at 380. Petitioner made the separation of powers challenge on three independent levels. See infra text accompanying notes 125-27.

106. Indeed, Mistretta made only a subset of the possible facial challenges. Mistretta's objections did not relate to the content of any guidelines promulgated by the Commission, nor did he challenge the propriety of using sentencing guidelines to limit the discretion of judges. In short, Mistretta objected not to what the guidelines said, but to who was saying it. For cases following Mistretta's lead in rejecting facial challenges to the sentencing guidelines, see supra note 98.


108. U.S. CONST. art. I, § 1. Both the preamble and article I, section 1 are founded on a vision of popular sovereignty. See Amar, Of Sovereignty and Federalism, 96 YALE L.J. 1425, 1450, 1455-57 (1987) (examining the meaning of the preamble and other constitutional provisions to find emphasis on popular sovereignty).


110. The delegation doctrine originally required that the legislature retain control over certain types of decisions, denominated "legislative." These might include all policy choices, Field v. Clark, 143 U.S. 649, 692-94 (1892) (finding constitutional the delegation of power to executive contingent on executive findings, because once findings were made discretion was curtailed), or at least all the important policy choices, United States v. Grimaud, 220 U.S. 506, 517 (1911) (executive has "power to fill up the details"). The doctrine later evolved to allow delegation of such decisions to subagents, but insisted that Congress retain sufficient control over agency power in such instances. Farina, Statutory Interpretation and the Balance of Power in the Administrative State, 89 COLUM. L. REV. 452, 480-88 (1989).
Challenges to legislative delegations have historically proved futile; this was no exception. The Court's previous delegation cases establish that virtually any guidance from Congress will satisfy the Constitution. Further, the Court has developed a wondrous gift for finding an intelligible guiding principle in phrases that appear to the untrained eye to provide no guidance whatsoever.

In comparison with other statutes that have survived delegation challenges, the instructions to the Commission in the SRA seem obsessively detailed. As noted by the Mistretta Court, the Act sets forth three goals of sentencing policy, four purposes of sentencing, seven factors to consider in categorizing offenses, and eleven factors to consider in categorizing defendants. Dozens of other provisions in the Act give point-blank instructions to the Commission to draft guidelines on specific topics with a specified outcome. Moreover, Congress

111. So long as there is some "intelligible principle" present in a statute to guide the agency, the Court has been willing to approve the grant of power. See, e.g., J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928).

The erosion of the doctrine is not as arbitrary as it may seem from an examination of the text of individual opinions. There are significant practical reasons why the Court has been unwilling to use the delegation doctrine as a real limit on congressional power. Mass institutional turmoil would result if the Court chose to invalidate major administrative and regulatory programs; day-to-day operation of the government, too unwieldy for Congress to administer, would become unthinkable. As Justice Scalia put it, the Congress is in a better position than the Court to say in different settings how much policymaking should be accomplished through execution rather than drafting of laws. See Mistretta, 488 U.S. at 416 (Scalia, J., dissenting); see also Kmiec, Judicial Deference to Executive Agencies and the Decline of the Nondelegation Doctrine, 2 ADMIN. L.J. 269, 275-77 (1988); Stewart, supra note 40, at 1696-97 (noting difficulty courts may encounter in determining when greater legislative specificity is required, or even possible).

112. Statutes have survived delegation challenges by instructing agencies to set "just and reasonable rates," Federal Power Comm'n v. Hope Natural Gas Co., 320 U.S. 591, 600 (1944), and to regulate licenses "as public convenience, interest, or necessity requires," National Broadcasting Co. v. United States, 319 U.S. 190, 214 (1943).

113. Note that a highly detailed statute might be weak nonetheless, if it failed to give any guidance as to the relative importance of the various details. Cf. Panama Refining Co. v. Ryan, 293 U.S. 388, 431-32 (1935) (statute cannot leave President free to choose among inconsistent objectives). However, conceding that Congress left the Commission with little guidance on some of the more fundamental issues, see, e.g., 18 U.S.C. § 3553(a)(2) (1988) (listing competing rationales for punishment), the statute still provides far more guidance than some other statutes that have survived challenge on improper delegation grounds, see, e.g., supra note 112.

114. Mistretta, 488 U.S. at 374-76. 115. 28 U.S.C. § 991(b)(1) (1988). This section defines the Commission's goals in designing sentencing policies. The Commission must also develop ways to measure success at achieving the first three. Id. § 991(b)(2).


118. Id. § 994(d)(1)-(11).

119. See, e.g., id. § 994(b)(2) (1988) (25% difference between top and bottom of guideline sentence ranges); id. § 994(d) (Commission to be neutral as to race, sex, national origin, creed, and socioeconomic status); id. § 994(c) (listing offender characteristics that are generally inappropriate to consider); id. § 994(g) (Commission to minimize likelihood of increasing prison population); id. § 994(h) (specifying treatment of career offenders); id. § 994(i) (specifying treatment of offenders
retained for itself the power to define criminal conduct and to set maximum and minimum penalties.\textsuperscript{120}

Given such detailed instructions and a history of court deference to delegations of power, one of the most interesting aspects of the improper delegation issue was that any lower courts accepted it in the sentencing context.\textsuperscript{121} The willingness of lower courts to accept a delegation challenge to the Commission, despite strong precedent to the contrary, was solid evidence, if any were needed, of hostility among lower court judges to the whole notion of sentencing according to guidelines.

These lower courts were also responding to an important constitutional concern, however. There are powerful reasons to prefer that Congress make the fundamental policy choices and that it give significant guidance to agencies charged with formulating policy. For one thing, Congress is more directly accountable to the voters and thus may be less susceptible to "capture" by powerful private interests.\textsuperscript{122} Lack of


\textsuperscript{122}Lowi, \textit{The End of Liberalism}, in \textit{IDEOLOGY, POLICY, AND THE CRISIS OF PUBLIC AUTHORITY} 125-56 (1969); Aranson, Gellhorn & Robinson, \textit{A Theory of Legislative Delegation}, 68 \textit{CORNELL L. REV.} 1, 63-64 (1982) (arguing that delegation is principal means by which legislature
guidance in the area of criminal sentencing may be especially troubling, since sentencing policy embodies some of society’s most cherished values concerning personal liberty and personal safety. The ideal of article I may be unattainable, but it is by no means perverse or antiquated.

Although the Court has backed away from the delegation doctrine as a way to disarm concerns about the lack of agency accountability, the concerns remain real. They continue to motivate courts to create alternative forms of discipline to prevent agencies from abusing their loose accountability to the legislature. In order for the Sentencing Commission to become acceptable and legitimate in the eyes of the legal community and of the public, it will have to follow the lead of other agencies. It must establish relationships with the judiciary and other branches and must develop internal practices to prevent abuses of its broad grant of discretion. Parts III through V of this Article discuss an appropriate set of relationships.

B. Separation of Powers Challenges

In his second group of challenges Mistretta suggested that Congress had attempted to create a subagent role that no judge or other member of the judicial branch could properly fill. In particular, he claimed that (1) the Commission threatened the impartiality and legitimacy of the judiciary by (a) requiring judges to sit as commissioners, and (b) engaging in political rulemaking; and (2) the appointment and removal power of the President gave the executive too much power over the judiciary.

Mistretta’s claims suggest something of a double bind for the Sentencing Commission. If the Commission exercises duties that too little resemble judging, then the participation of judges and the location of the Commission within the judicial branch become suspect. On the other hand, if the Commission exercised duties too much resembling judging,
the influence of legislative and executive agents would raise concerns. A restructured Commission would not readily solve this inherent tension.

The Court's decision turned on a distinctive reading of article III, which defines the powers of the judiciary. The Court confronted each of Mistretta's challenges by postulating two types of judicial power: (1) deciding cases and controversies, and (2) various "nonadjudicatory" activities carried out either by judges alone or in association with the judicial branch. The integrity of the judiciary depends on its ability to decide cases impartially. Nonadjudicative functions cause concern only when the chance becomes too great that they will compromise the Court's ability to adjudicate fairly. The Court concluded that Congress may create an "unusual hybrid" agency that combines functions of a legislative, executive, and judicial nature, because it will produce wise policy without undue risk to adjudication itself.

The Court did not articulate how it measured such risk. At every turn, however, the opinion searched out plausible benefits of the structure chosen by Congress, and asked whether it would be possible to operate the Commission in a way that could control the undeniable risks involved. The Court found in each structural feature of the Commission a conceivable benefit and a reason to hope that its risks could be managed. It left for another day the question of how to manage those risks.

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128. Although the Court addressed a variety of different separation of powers arguments, it attempted to provide a unifying principle drawn from its prior cases: the Constitution does not allow the Congress to "aggrandize" or "encroach on" the powers of another branch. Congress aggrandizes the judiciary when it assigns "tasks that are more appropriately accomplished by [other] branches," id. at 383 (quoting Morrison v. Olson, 487 U.S. 654, 680-81 (1988)), and it encroaches on the judiciary when it "impermissibly threatens the institutional integrity of the Judicial Branch," id. (quoting Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 851 (1986)).

Justice Blackmun's opinion for the Court attempted to steer clear of setting any broad separation of powers precedents by emphasizing the special nature of sentencing. Moreover, he gave a sympathetic hearing to Mistretta's arguments. For example, he found "troublesome" the SRA's requirement that judges serve on the Commission, id. at 384, and in holding the requirement was not unconstitutional, noted that the Court came to that conclusion "not without difficulty," id. at 407; see also id. at 384 ("composition and responsibilities of the Sentencing Commission give rise to serious concerns").

129. Id. at 385 (citing Muskrat v. United States, 219 U.S. 346, 356 (1911)).

130. Id. at 386-88.

131. See id. at 404.

132. See id. at 411-12.

133. The inquiry did not take the form of a cost/benefit calculus, but the majority did consider the functional benefits to be relevant while the dissent did not. Justice Scalia insisted that delegated lawmaking power be exercised only "in conjunction with" legitimate executive or judicial power, id. at 417 (Scalia, J., dissenting), but considered irrelevant any benefits or risks of combined functions in a particular case, id. at 427 ("It may well be that in some circumstances such a [commingled agency] would be desirable; perhaps the agency before us here will prove to be so. But there are many desirable dispositions that do not accord with the constitutional structure we live under.").
1. Judicial Participation in Policymaking

Mistretta’s first two separation of powers challenges focused on the supposedly apolitical nature of the judiciary. He claimed that by giving policymaking power to the judge-commissioners and by designating the Commission a judicial agency, Congress had wrongly immersed the judicial branch in politics, thus undermining its ability to act impartially.

a. Judge-Commissioners and Loss of Impartiality

Mistretta argued that participation by judges on the Commission threatens the impartiality and effectiveness of individual judge-commissioners and of the judiciary as a whole.\(^{134}\) The Court considered the threat to impartiality of individual judges, finding it significant that no constitutional text prohibits non-court service by judges.\(^{135}\) The Court further found that such service is consistent with historical practice.\(^{136}\) Finally, the Court relied on the fact that service by any given judge is voluntary.\(^{137}\) The Court determined that service on the Commission does not impair the effectiveness of the judiciary as a whole because the use of a few (probably no more than three) judges does not unduly drain judicial resources—mass recusals would not be necessary.\(^{138}\)

Although the Court rejected it, Mistretta’s argument deserves close attention. No less today than in the eighteenth century, judges must be perceived as impartial.\(^{139}\) Being impartial does not mean a judge must deny any sense of sympathy or commonality with litigants. Rather, the judge is expected to listen and respond meaningfully to all points of view presented to the court.\(^{140}\) The impartial judge is one who can respond

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135. Mistretta, 488 U.S. at 397-98.
136. Id. at 398-401.
137. Id. at 405-06.
138. Id. at 406-07; see also United States v. Wright, 873 F.2d 437, 445-47 (1st Cir. 1989) (opinion of Judge Breyer, Sentencing Commissioner, regarding limited circumstances warranting recusal).
139. See Mayberry v. Pennsylvania, 400 U.S. 455, 465 (1971) (vacating contempt sanction imposed by state judge “embroiled in a running, bitter controversy” with petitioner); Dennis v. United States, 341 U.S. 494, 525 (1951) (Frankfurter, J., concurring) (“[T]he essential quality of the courts is detachment, founded on independence. History teaches that the independence of the judiciary is jeopardized when courts become embroiled in the passions of the day and assume primary responsibility in choosing between competing political economic and social pressures.”).
fairly to all information presented within the adversary structure of a lawsuit.

Judges with professional activities outside the context of deciding lawsuits may be courting bias. Some duties, such as the Chief Justice's membership on the board of the Smithsonian Institution, present no difficulty. On the other hand, membership on a commission to enhance the enforcement of the criminal laws raises serious questions about a judge's ability to listen impartially to all parties in future cases.

Bias can spill over from individual judges to the judiciary as a whole. Even if judge-commissioners recused themselves from guidelines cases, or if the entire Commission were composed of members who are not judges, there could still be cause for concern. Designating an entity a "judicial" body implies that it deserves special deference from society at large. The judicial label also implies that any government body so labeled will bring to its activities the same attentive judgment that a judge brings to a lawsuit. Thus, decisions by judicial bodies are normally exempted from the full public scrutiny usually applied to policies created through a more overtly political process. A misuse of this exemption could lead the public to question the impartiality of the judiciary in general.

The Mistretta Court did not overlook the potential damage to the legitimacy of the judiciary. It perceived that Congress had chosen between a loss of judicial expertise in sentencing policy and a possible controversy that could tarnish judicial impartiality. However, the Court decided that the judiciary, in fact as well as in appearance, would not suffer any loss of impartiality.

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142. For instance, a judge who participates on a commission relating to the control of organized crime would seem less the impartial referee and more the anti-crime advocate. In re President's Comm'n on Organized Crime (Subpoena of Scaduto), 763 F.2d 1191, 1197 (11th Cir. 1985).
143. See Schwartz, supra note 141, at 454-56, 460-61 (stating that judiciary is final arbiter and legitimator of other government branches' actions; its own moral authority legitimates its acts and may extend to any officials it might appoint). The threat of undue deference described in the text would be strongest where a court has authority to draft rules, weaker for judges acting in their individual capacities, and weakest of all for other personnel of the judicial branch. Congress faced a tradeoff between the expertise and judicial temperament judges could bring to the Commission and the threat to judicial impartiality arising from their participation. Cf. Tonry, supra note 30, at 336-39 (considering strengths and weaknesses of significant judicial role on a sentencing commission). Perhaps Congress could better have accounted for this threat by using retired judges or using active judges in an advisory capacity only.
144. Mistretta, 488 U.S. at 408 (stating that "judicial participation on the Commission ensures that judicial experience and expertise will inform the promulgation of rules").
145. Id. at 407 ("We are somewhat more troubled by petitioner's argument that the Judiciary's entanglement in the political work of the Commission undermines public confidence in the disinterestedness of the Judicial Branch.").
146. See id.
b. The Danger of Judicial Rulemaking

Mistretta also contended that no entity in the judicial branch can engage in rulemaking on substantive topics, for judicial rulemaking threatens judicial impartiality.147 At the very least, rulemaking by judges or a judicial body is an especially suspect activity. In order to draft a rule, judges must reach a decision without briefs, arguments from counsel, or the specific facts that necessarily arise in the cases and controversies to which the judicial power clearly does extend.148 Yet as the Mistretta Court pointed out, the judiciary has long held the power to make such procedural rules as are necessary and proper to carry its judgments into effect.149

What is it about procedural rules that makes them an acceptable area for judicial rulemaking? The rationale for judicial rulemaking has always been the judiciary's special competence. Federal courts were granted procedural rulemaking power because they have immediate familiarity with the day-to-day practice of courts, which allows them to identify both problems and solutions.150 Judicial rulemaking, it may

147. Id. at 391-92.
149. Mistretta, 488 U.S. at 391; see Schwartz, supra note 141, at 444-45.

The legal culture has accepted the peculiarities of judicial rulemaking in connection with procedural rules. See generally D. Pugh, C. Korbakes, J. Alfiniti & C. Grau, JUDICIAL RULEMAKING: A COMPENDIUM (1984) (procedural rulemaking power of courts accepted in all 50 states and the federal court system). In the federal system, judicial rulemaking power is as old as the federal judiciary itself. The Judiciary Act of 1789, Act of Sept. 24, 1789, ch. 20, 1 Stat. 73, granted courts the power to make such procedural rules as are necessary and proper to carry its judgments into effect.149


Since then, the judiciary (acting both through the Supreme Court and the Judicial Conference) has initiated most of the procedural rulemaking, see J. Weinstein, supra, at 68 (noting, however, that the Court's inaction again prompted Congress, in 1955, to initiate reforms through the Judicial Conference), with only occasional objections from Congress, see Clark, The Role of the Supreme Court in Federal Rule-Making, 46 J. AM. JUDICATURE SOC'Y 250, 254 (1963).

Although some controversy has surrounded the Supreme Court's role in rulemaking, there has not been in this century more than the isolated concern about the involvement of non-court bodies of the judicial branch. Even those most critical of the Court's role in rulemaking propose that the Judicial Conference be placed in charge of rulemaking. See, e.g., Lesnick, The Federal Rule-Making Process: A Time for Re-examination, 61 A.B.A. J. 579, 582 (1975).

therefore be argued, is also appropriate in the area of sentencing, about which courts have developed special knowledge and expertise through their longstanding participation.\textsuperscript{151}

Courts, however, could not legitimately employ rulemaking procedures on any and all subjects for which they have expertise. After all, judges develop special knowledge and expertise about many politically controversial topics, such as antitrust policy, federalism, and freedom of speech, but make choices about these topics only within the confines of specific cases and controversies. Expertise, even when judicial expertise surpasses others, cannot alone support judicial rulemaking outside the context of deciding cases.

Instead, the proper boundary for judicial rulemaking is marked by the vague notion that some issues should not be entrusted to the judiciary, but should instead be subjected to the full rigors of political debate. The questions that should be decided by the public in the political arena are those most plainly bearing on collective and individual values. Thus, we say that judges may prescribe procedural rules, but not rules of substantive law\textsuperscript{152}—a serviceable, if imperfect, device for assigning institutional responsibilities.\textsuperscript{153} Cases approving the power of the courts to make procedural rules have described procedure as an area of “less interest,” separating it from the “important subjects, which must be entirely regulated by the legislature itself.”\textsuperscript{154} The separation of important topics from less important ones remains an uncertain exercise for the courts, to be evaluated ultimately in terms of its effect on the public’s impression of the judiciary as impartial.

One can imagine sentencing guidelines that would resemble in effect


\textsuperscript{151} Mistretta, 488 U.S. at 396.

\textsuperscript{152} See Sibbach v. Wilson & Co., 312 U.S. 1, 9-10 (1940); see also Amendments to the Rules of Civil Procedure for the United States District Courts, Statement of Justice Black and Justice Douglas, 374 U.S. 861, 865-66 (1963) (opposing submission of the amended rules to Congress because many go beyond procedure and affect substantive rights). Compare 28 U.S.C. § 2072(a) (1988) (procedure) with id. § 2072(b) (substantive rights). The distinction between procedure and substantive law is sometimes framed as that between regulation of “primary conduct” and regulation of enforcement mechanisms. \textit{See, e.g.}, American Transp. Ass’n of Am. v. Department of Transp., 900 F.2d 369, 382 (D.C. Cir. 1990) (Silberman, J., dissenting) (spectrum of rules from most substantive to most procedural has at one end those regulating primary conduct, at the other end those dealing with enforcement or adjudication of claims).

\textsuperscript{153} See generally Coves, \textit{For James Wm. Moore: Some Reflections on a Reading of the Rules}, 84 YALE L.J. 718, 721-32 (1975) (treating the inherent tension in distinguishing between procedure and substantive law); Ely, \textit{The Irrepressible Myth of Erie}, 87 HARV. L. REV. 693, 724-28 (1974) (offering particular examples of rules in which substantive and procedural values coincide, or are combined).

\textsuperscript{154} \textit{E.g.}, Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 43 (1825). While it is no longer possible to contend that the legislature itself must decide all important policy questions, it remains an appealing aspiration.
those rules that are perceived as "merely" procedural. Such guidelines would not change sentences too often, or too drastically, from the sentence a judge would impose without the guidelines. On the other hand, sentencing guidelines (like procedural rules) could easily slip into areas of controversy that would make judicial involvement, and insulation from political scrutiny, seem inappropriate. For example, proposals urging the Commission to promulgate guidelines relating to capital punishment plunged the Commission into controversy early in its history. More recently, Commission efforts to alter the course of sentencing for corporate defendants has produced plenty of attention and criticism.

The Court recognized that judicial rulemaking in sentencing involves judges in a "substantive" and "political" enterprise. Nevertheless, the "practical consequences" of such rulemaking remained tolerable for the Court because of the longstanding public acceptance of judicial policymaking in the area of sentencing. This longstanding acceptance, along with judicial expertise in sentencing, could disappear if sentencing guidelines began to diverge in significant ways from the subjects and approaches typically addressed by sentencing judges. When the Commission strays too far from judicial sentencing practice, the "practical consequences" addressed by the Court could change, and so could the provisional constitutional judgment the Court announced.

2. Excessive Presidential Influence Over the Judiciary

Mistretta also asserted that the President's power to appoint judges as commissioners, to reappoint them to second terms, and to remove them from the Commission threatened the integrity of the judiciary. The lifetime appointment and salary guarantees of article III, however, are capable of insulating judges from far greater blandishments than being offered a position on the Sentencing Commission. The prospect of obtaining or losing the Commission appointment is highly unlikely to affect a judge in deciding cases. The Mistretta Court fol-

155. Sentencing rules might touch on policy areas that are not only controversial, but maybe only loosely connected to judicial expertise. The Commission may, for instance, eventually promulgate rules governing plea bargaining.
158. Mistretta, 488 U.S. at 392-96.
159. Id. at 395-96.
160. Id. at 409.
161. U.S. CONST. art. III, § 1 ("The Judges . . . shall hold their Offices during good Behaviour, and shall . . . receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.").
162. Although the appointment power does give the President some control over the personnel
owed this train of logic to establish the President's lack of influence over the Commission.163

The train, however, stopped short of its destination. The statute undoubtedly gives the President some influence over Commission decisions. The appointment, reappointment, and removal powers give the President influence over the actions of judges as commissioners, even if not over the cases that judge-commissioners decide in their judicial capacity.164 This influence was no accident, for there are persuasive

(and therefore the policy) of an agency in the judiciary, the President already appoints article III judges. This form of control is one of the checks and balances specifically allowed by the constitutional text. See id. art. II, § 2. Moreover, President Reagan arguably had less control over appointment of judge-commissioners than he did over judges, since the statute required him to consider a list of six judges submitted by the Judicial Conference before appointing commissioners. 28 U.S.C. § 991(a) (1988). The Judicial Conference list apparently carried some weight with the President, since he appointed Judges Wilkins, Breyer, and MacKinnon from that list. See Strasser, Sentencing Panel May Start Soon, Nat'l L.J., July 8, 1985, at 5, col. 1; Seven Picked for Sentencing Panel, Wash. Post, Sept. 11, 1985, at A13, col. 1. The statute does not require the Judicial Conference to recommend any future commissioners.

There is also no reason to think that the power to reappoint sitting commissioners to a second term gives the President undue influence over their official actions. The ability to "promote" a judge to the circuit court or the Supreme Court surely gives the President as much influence over judges as the ability to appoint or reappoint commissioners. This sort of influence has never provoked any concern. Mistretta, 488 U.S. at 409-10. The appointment of federal judges to high-level executive branch positions, such as the appointment of Judge Kenneth Starr as Solicitor General, see 1990 Federal Staff Directory/2, at 508, 1138 (A. Brownson midyear updated ed. 1990), is similarly uncontroversial. In fact, to the extent that the Sentencing Commission engages in policymaking, one could argue that Congress is constitutionally required to give the President some power over the appointment.

Finally, the threat that the President may remove a judge-commissioner is not likely to have any measurable influence over how the judge decides cases. As the Mistretta Court pointed out, judges serving on the Commission retain their tenure and salary as federal judges before, during, and after their term on the Commission. 488 U.S. at 410-11; see also 28 U.S.C. § 992(c) (1988) ("Federal judge may serve as a member of the Commission without resigning his appointment as a Federal judge"). In any event, the "good cause" limitations on the President's removal power, id. § 991(a), would be likely to prevent the President from removing a judge-commissioner for her decisions made on the bench, as opposed to her decisions on the Commission.

Mistretta argued only that the President has too much control over removal. Mistretta, 488 U.S. at 409 & n.30. If the Commission were not in the judicial branch, Mistretta might have argued that Congress had not given the President enough control over removal. See, e.g., Bowsher v. Synar, 478 U.S. 714, 721-32 (1986) (Congress' exclusive reservation of the power to remove the Comptroller General compels conclusion that Comptroller is not an executive officer); Myers v. United States, 272 U.S. 52, 176 (1926) (presidential removal of postmasters cannot be dependent on Senate approval). 163. Mistretta, 488 U.S. at 411.

164. Congress recognized that participants in the appointment process would influence sentencing policy. Nomination of commissioners by the President would also enhance the prestige of the position. S. REP. 98-225, supra note 1, at 64, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS 3182, 3247; cf. Meador, The Federal Judiciary and Its Future Administration, 65 Va. L. Rev. 1031, 1051 (1979) (proposing the creation of a national court administrator, whose appointment by the president would enhance the position's status). Presumably, the removal power creates the same influence over policy, but to a lesser degree.

Mistretta did not challenge an even more pervasive executive influence over the work of the
reasons to involve the President in sentencing policy: for one thing, executive officers have traditionally played a role in administering criminal punishments.  

This picture of cooperation between the branches takes on a more sinister quality, however, when one recalls that the statute places the Commission in the judicial branch. Hence, even the limited removal power might appear to be an executive interference with the judiciary. 

Why should the "location" of the Commission in the judicial branch limit the President's influence over it? There is no ready answer in the text of the Constitution. Article III speaks of judges, both of the Supreme Court and inferior courts. But the text and history say nothing about institutions affiliated with or supporting the judges, nor whether judges could serve in such institutions.

The Constitution insulates judges themselves from presidential influence; however, it might allow the President greater influence over certain of the affiliated institutions. The issue seems to hinge on how much an affiliated institution affects adjudication, the core judicial function. The most extreme form of judicial independence is exercised in many of the major supporting institutions in the judiciary, including the Federal Judicial Center, the Administrative Office, the Judicial Conference, the various Rules Committees, and the Probation Office. In each of these institutions, all personnel are appointed by and are answerable to judges. Furthermore, each submits a budget request to Congress without any input from the President. While complete independence


165. The Bureau of Prisons and the Parole Commission contribute to the decision about the length of a prison term, 18 U.S.C. § 4205 (1988); prosecutors influence sentences through the charges they decide to file (or not to file); the executive also retains the clemency power, U.S. CONST. art. II, § 2, cl. 1.

More generally, the Constitution provides for a single executive who is responsible for major administrative policy choices. U.S. CONST. art. II, § 1, cl. 1. To the extent that Congress makes sentencing a matter of administration rather than legislation, the President should be involved. See Strauss, supra note 51, at 640-46.

166. Although some have argued that the Commission is not actually in the judicial branch, see, e.g., Note, The Constitutional Infirmities of the United States Sentencing Commission, 96 YALE L.J. 1363, 1374-75 (1987) (authored by Lewis J. Liman), the danger to the legitimacy of the President's removal power may arise simply from the public perception of such a judicial affiliation.


168. See Schwartz, supra note 141, at 439.


170. See id. §§ 601-611.

171. See id. § 331.

172. See id. § 2077.


from the executive may not be a constitutional requirement for each of these support institutions, it is most important for those most closely involved in adjudication.

The President has greater control over certain institutions that are affiliated with the judiciary, but that are unlikely to influence adjudication to any great extent. These agencies include the U.S. Marshals Service,175 the General Services Administration,176 and the Merit System Protection Board.177

It is not clear at this time which model of interaction is most appropriate for the Sentencing Commission. It performs some clearly nonadjudicative functions, such as research and consolidation of information, and some functions that affect adjudication, such as setting guidelines to restrict judicial discretion as to sentencing. The legitimacy of presidential influence may depend on whether the Commission (along with the President) begins to operate in a way that crosses over into improper participation in adjudication.

For instance, the Commission might attempt, at the President's urging, to remove so much judicial discretion over sentencing that virtually no adjudicative task remains for judges.178 At least where Congress itself has not drawn detailed rules of law to bind judges, and has called exclusively on the courts to enforce agency policy, such a case would arguably infringe on the constitutional separation of powers.179 Alternatively, the President could thwart the distinctive administrative process that calls on the Commission to focus on empirical information and judicial appli-

175. This is a bureau within the Department of Justice, 28 U.S.C. § 561(a) (1988), whose duties include ensuring the safety of witnesses, detaining criminal defendants, and executing court orders. Id. § 566. Officers of the U.S. Marshals Service are subject to appointment and removal by the President. Id. § 561(c)-(d).

176. This agency, which arranges office space and furnishings for judges, is appointed by the President and is subject to the President's direction and control. 40 U.S.C. § 751(b) (1988).

177. This agency oversees federal employee pension plans and provides such services to judicial branch employees, 5 U.S.C. §§ 1201, 8440a (1988), and is subject to the appointment and removal powers of the President, id. §§ 1201, 1202(d), 1204.

In addition to continuing executive influence over the institutions mentioned, prior to 1939 all matters of judicial administration were managed by the Department of Justice. E. Surrency, History of the Federal Courts 83 (1987).

178. The guidelines seem to envision an ever-decreasing area for judicial departures from its provisions. See, e.g., Guidelines, supra note 3, at v (highlights of the 1989 amendments describing how the Commission amended the guidelines to eliminate a particular class of departures).

179. Judges might insist on an irreducible minimum role in sentencing, see infra note 214, much as they have claimed an inherent power to control civil remedies and agency adjudication, see, e.g., Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 541 (1985) (judiciary rather than legislature to define procedural rights attaching to substantive entitlement); J.I. Case Co. v. Borak, 377 U.S. 426, 433-35 (1964) (courts can fashion any available relief to protect federal substantive rights); Crowell v. Benson, 285 U.S. 22, 56-57 (1932) (Congress may not endow agency, to the exclusion of constitutional courts, with ultimate power to determine facts in administrative adjudication of constitutional rights).
cation of the guidelines, or could induce the Commission to respond to a broader and more political range of arguments through threatened removals or other forms of presidential persuasion.\textsuperscript{180} By ratifying Congress' choice to keep the President involved in sentencing policy, the Court acted on the unspoken hope that someone could control these kinds of risks in the future.\textsuperscript{181}

\section*{C. The Deferred Questions}

Separation of powers doctrine attempts to identify those structures of power that are most likely, if continued unchecked, to lead to a tyrannical abuse of power.\textsuperscript{182} The potential abuses identified by Mistretta were far from imaginary. The lack of agency accountability at issue in a delegation challenge might indeed leave the Commission so much discretion that its legitimacy could falter. The Commission may adopt policies reaching beyond any area of relative judicial expertise or reaching into areas likely to damage the impartiality of the judiciary. The President may ultimately influence the Commission in a way that effectively excludes judges from participating in making sentencing policy. Furthermore, as Justice Scalia mentioned in dissent, judges may exercise inadequate control over the Sentencing Commission, nominally located in the judicial branch.\textsuperscript{183}

Nevertheless, the Court made no effort to prevent such abuses of power through restructuring or closing down the Commission. The Court instead treated the separation of powers as an operational rather than a structural concern, and was content to allow courts and Congress to address any operational issues as they arise.

The willingness to postpone examination, to monitor an agency's operation rather than predicting its capacity for tyranny, has been a hall-

\begin{footnotes}
\item[180] Again, this would be objectionable to the extent it politicized an institution associated with the judiciary.
\item[181] Although the Court expressed every reason to feel secure that the President will not abuse the appointment and removal power, the language only discusses the facial validity of the statute and the hypothetical unlikelihood of abuse. See \textit{Mistretta}, 488 U.S. at 409-10 ("The mere fact that the President within his appointment portfolio has positions that may be attractive to federal judges does not, of itself, corrupt the integrity of the Judiciary. . . . We simply cannot imagine that federal judges will comport their actions to the wishes of the President for the purpose of receiving an appointment to the Sentencing Commission."). Certainly the Court would feel compelled to correct the situation should an actual abuse arise.
\item[182] See generally M. Vile, \textit{Constitutionalism and the Separation of Powers} 1-20 (1967) (setting out the origins, development, and defining elements of the doctrine of separation of powers).
\item[183] See \textit{Mistretta}, 488 U.S. at 424-25 (Scalia, J., dissenting). Judges are guaranteed no more than a minority of votes on the Commission. See 28 U.S.C. § 991(a) (1988). Judges do not appoint or remove commissioners. \textit{Id.} Lack of judicial control over the Commission could leave it more vulnerable to politicization—the very result Congress tried to avoid by placing the Commission in the judicial branch.
\end{footnotes}
mark of the Court's recent separation of powers jurisprudence. Where postponement could refine the dispute and flesh out the factual background, the Court has tended to take that route.\textsuperscript{184}

In the modern bureaucratic state, the problem of tyranny which separation of powers was originally devised to address has been overshadowed by the need to rationalize agency actions. This is the task of administrative law.\textsuperscript{185} It looks more to established agency behavior than to predictions of possible behavior. It attempts to give courts, the Congress, the President, and the agency itself a way to evaluate an agency's actions rather than its structure.

Hence, while Mistretta confirms that the Sentencing Commission may exercise power in the area of criminal sentencing, it leaves the largest task undone: filling in the terms under which the Commission and

\textsuperscript{184} Supreme Court rulings in the area of separation of powers have been marked by a tension between a "formalist" and "functionalist" approach, but there is little to explain why the Court chooses one or the other. See Krent, \textit{Separating the Strands in Separation-of-Powers Controversies}, 74 \textit{Va. L. Rev.} 1253, 1254-55 (1988); Strauss, \textit{Formal and Functional Approaches to Separation of Powers Questions—A Foolish Inconsistency?}, 72 \textit{Cornell L. Rev.} 488, 489 (1987).

The ability to monitor future developments and prevent abuses of power as they arise may provide the Court with the assurance necessary to proceed with the functionalist approach, which allows for some level of interaction not specifically foreseen in the Constitution. This may help to explain the recent Supreme Court decision holding that Congress could insulate a special prosecutor from presidential control. Morrison v. Olson, 487 U.S. 654 (1988). Any resulting abuses of power by the special prosecutor would likely come before the courts for review; by waiting until that time, the Court could foster development of a full factual record. Similarly, although the Court in \textit{Morrison} could see the potential for the Special Division to abuse its power to terminate the independent counsel, it noted that the power had "not been tested in practice." \textit{Id.} at 682. Giving the statute the benefit of the doubt, the Court upheld the termination provision. \textit{Id.} at 683; see also Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 833-57 (1986) (approving assignment to agency of the adjudicatory power over private rights at the core of article III, where court retains adequate supervisory capacity, and parties willingly submit claim to agency).

The Court does not postpone deciding the issue in all separation of powers cases, in the hopes of hearing the dispute in a more concrete, less conjectural setting. Instead, when the Court feels it knows enough to predict whether abuse of power is likely, it may then forego the chance to monitor later activity. In Bowsher v. Synar, 478 U.S. 714 (1986), the future course of events would not have clarified the central problem, so the Court acted on the limited facts at its disposal. Congress had assigned a budgetary function to the Office of the Comptroller General. That office, unlike the Sentencing Commission, was an established bureaucracy with settled patterns of interaction with Congress and the President. Similarly, in INS v. Chadha, 462 U.S. 919 (1983), where the Court struck down the use of a legislative veto, there was little prospect of fuller factual development in the future. The legislative veto already had a long track record. \textit{Id.} at 944-59. Hence, the case did not require the Court to speculate about the future behavior of Congress. \textit{See also} Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982) (invalidating assignment of certain cases to well-established bankruptcy courts). \textit{But see} Buckley v. Valeo, 424 U.S. 1 (1976) (Court invalidated the powers granted to the Federal Election Commission, even though the Commission had not yet begun to exercise its power).

other institutions of government must live together from day to day. In disposing of the separation of powers issues surrounding the Sentencing Commission, the Court managed only to cross the river Styx and to arrive at the gate of Hades. Next, we explore that unholy realm beyond the gate: administrative law.

III
THE JUDICIARY AND ADMINISTRATIVE SENTENCING

The institutional integrity of both the Commission and the judiciary remain in doubt after the Mistretta decision. This Part considers why the integrity of both institutions requires involvement—but only limited involvement—of sentencing judges in the activity of this agency. Administrative law offers an appropriate model of limited interaction. While courts are not bound to apply most provisions of the Administrative Procedure Act (APA) to the Sentencing Commission, administrative law does offer a potential mechanism for controlling the ongoing threat that the Sentencing Commission will abuse its power.

This Part traces the optimal judicial role in sentencing as outlined by administrative law through three points on the current landscape: Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co., and Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc. These decisions form a pattern of grudging reliance by the Supreme Court on lower courts to monitor and improve agency decisions. The cases give Congress the power to tailor a supervisory role for courts. The cases also allow courts to create forms of review not specifically envisioned in a statute, but only where those forms of review will do the least damage.

This sort of review by judges is consistent with current sentencing statutes and should become the centerpiece of efforts to direct the Commission towards an improved sentencing policy. While there are important differences between the Sentencing Commission and other agencies, those differences only strengthen the case for a strong judicial presence in this context. At the same time, the differences confirm the

186. Recall the words inscribed on that gate and the reaction of Dante's narrator: " 'JUSTICE MOVED MY HEAVENLY CONSTRUCTOR;/ . . . BEFORE ME NOTHING BUT ETERNAL THINGS/ WERE MADE, AND I SHALL LAST ETERNALLY./ ABANDON HOPE, FOREVER, YOU WHO ENTER.' I saw these words spelled out in somber colors/ inscribed along the ledge above a gate;/ 'Master,' I said, 'these words I see are cruel.' " A. DANTE, INFERNO, canto III, ll. 4, 7-12 (M. Musa trans. 1971).
need to remain generally skeptical about the ability of judges to improve upon administrative decisions outside the sentencing area.

A. Judicial Review of Sentencing Policy as a Necessary Outgrowth of Judicial Independence

Normally, when a court reviews the activity of an agency, it has clear statutory license to do so. Often the license flows from the judicial review provisions of the APA.\textsuperscript{190} It is unclear whether these review provisions (or something equivalent) are available to structure the relationship between the courts and the Sentencing Commission. While the SRA states that the notice-and-comment rulemaking procedures of section 553 of the APA apply to the Commission,\textsuperscript{191} in general the APA applies only to "agencies" and not to courts.\textsuperscript{192} The APA exclusion for courts apparently applies to all judicial branch bodies. The statutory language indicates, therefore, that apart from section 553, the remainder of the APA does not apply to the Commission—as an independent agency in the judicial branch.\textsuperscript{193}

Despite the literal inapplicability of the APA judicial review procedures, Congress did give the judiciary some power to review Commission decisions; the precise boundaries of that review power remain unde-

\textsuperscript{192} 5 U.S.C. § 551 (1988) (defining agency as "each authority of the Government of the United States . . . but . . . not including . . . the courts of the United States").
\textsuperscript{193} See Coffee, supra note 25, at 998-99 & n.65 (creation of Sentencing Commission in place of Parole Commission substituted an "agency that is largely immune from the reach of the [APA] for one that has been largely subject to that Act" (footnotes omitted)). Courts have often refused to apply the APA to other judicial branch bodies. E.g., In re Fidelity Mortgage Investors, 690 F.2d 35, 37-38 (2d Cir. 1982) (rulemaking provision of APA not applicable to U.S. Judicial Conference), cert. denied, 462 U.S. 1106 (1983); Tashima v. Administrative Office of U.S. Courts, 719 F. Supp. 881, 886 (C.D. Cal. 1989) (Administrative Office of U.S. Courts not an "agency" governed by APA).

Conceivably, a court could interpret the APA to apply to the Commission despite its position in the judicial branch. The APA, by its terms, excludes "the courts" rather than all judicial branch bodies. As the Mistretta Court emphasized, the Commission functions in almost every respect as an executive agency would. Mistretta v. United States, 488 U.S. 361, 393 (1988) (Commission "is an independent agency in every relevant sense"); see Weintraub, Defense Advocacy Under the Federal Sentencing Guidelines, Fed. Probation, June 1989, at 18, 19-20.

However, the legislative history of the APA seems to compel a broad reading of the "courts" exclusion. See ADMINISTRATIVE PROCEDURE ACT, LEGISLATIVE HISTORY, S. Doc. No. 248, 79th Cong., 2d Sess. 12 (1946) (incorporating definition of "agency" from other statutes); see also 44 U.S.C. § 1501 (1988) (explicitly excluding legislative and judicial branches from definition of "agency" in Federal Register and Code of Federal Regulations); id. § 3502(1) (omitting legislative and judicial branches from definition of "agency" for coordination of Federal Information Policy). Furthermore, the Congress that gave life to the Commission believed that the APA (except for section 553) would not apply to its creation. See S. REP. 98-225, supra note 1, at 180-81, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS 3182, 3363-64. Congress apparently believed that at least some forms of administrative procedure and judicial review of guidelines would be unnecessary and undesirable.
As courts work to ascertain the outer limits of their power to review the Commission, they could err either in the direction of ambition or of timidity. This Section examines each of these dangers. I conclude that courts should continue to review actions of the Commission and should, for the most part, observe the limits on judicial review outlined in the traditional doctrines of administrative law.

The image of a sentencing judge as a bureaucrat crystallizes the difficulties that may result when judges are limited to a modest review role. In fact, early evaluations of guideline sentencing have particularly complained about the movement away from judicial discretion. The complaint touches a raw nerve, for independence is at the heart of a federal judge's job. Thus, if a judge regards herself as a functionary, authorized only to carry out the will of the Sentencing Commission, she has, in the eyes of many, ceased to be a judge.

That complaint, in such an unrefined form, is not credible. While judges must be independent, they are not independent from rules. The guidelines provide sentencing courts with an opportunity to demonstrate their independence from personal influences through their fidelity to the rule of law. Moreover, guideline sentencing does not literally assimilate judges into a bureaucratic hierarchy. Even assuming the most modest view of the judicial role in guideline sentencing, significant power remains with the courts. The Commission cannot overrule individual sentences imposed by the court; at most it may adjust the guidelines to affect future sentences.

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194. See infra text accompanying notes 264-69.
197. Such literal assimilation of judges was prohibited by Hayburn's Case, 2 U.S. (2 Dall.) 409, 410 n. * (1792) (barring assimilation of judges caused by provision allowing nonjudicial officers to review and possibly to reverse judicial decisions).
The real danger of holding judges back in their review of judicial guideline sentencing is not so much a literal assimilation into a hierarchy, but an attitudinal assimilation. If sentencing under the guidelines becomes a routine process, one that numbs the judge's sensitivity to potential conflicts between the guidelines and statutory or constitutional requirements, then the judge has lost the independence that makes the office distinctive. Although not literally within the hierarchy, the judge who exercises no independent discretion is little different from an agency adjudicator, subject to reversal by the agency.

The chances of a judge becoming in some sense assimilated into the hierarchy is heightened when the judge operates in a mass justice system that processes thousands of criminal convictions each year. When a judge hears so many cases, each case necessarily receives less deliberation. Prior to guideline sentencing, the sheer number of defendants to be sentenced profoundly affected the ability of judges to coordinate sentencing policy and to remain accountable for their actions. Guidelines coordinate sentencing courts and make them accountable despite the

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199. In fact, the move to guideline sentencing reduces the risk of literal assimilation. Before enactment of the guidelines, the U.S. Parole Commission interacted with judicial sentencing decisions in a way that resembled a hierarchical bureaucratic relationship. The trial judge would impose sentence on a given defendant, but the actual amount of time the prisoner would serve depended on the Parole Commission. The only limits on this “review” function of the Parole Commission were that (1) it could not increase a judicially imposed sentence, 18 U.S.C. § 4210(b)(2)(1988), repealed by Sentencing Reform Act of 1984, Pub. L. No. 98-473, tit. II, ch. 2, § 218(a)(5), 98 Stat. 1987, 2027 (terms to remain applicable to certain defendants); and (2) it could not reduce a judicially imposed sentence by more than two-thirds and could not reduce a sentence below any statutory minimum, see 18 U.S.C. § 4205(a) (1988), repealed by Sentencing Reform Act of 1984, Pub. L. No. 98-473, tit. II, ch. 2, § 218(a)(5), 98 Stat. 1987, 2027 (terms to remain applicable to certain defendants).

That the legal culture tolerated this form of Parole Commission review merely attests that judges need help from other branches to carry out their judgments. The point at which remedial assistance becomes intolerable “review” of a decision by a nonjudicial officer is an elusive one indeed. But if the Parole Commission did not drift past that point, the Sentencing Commission certainly does not.

Of course, guideline sentencing does make possible an appellate review of sentences. 18 U.S.C. § 3742 (1988) (authorizing appeal by defendant or government to court of appeals). But this review is conducted by judges, not by executive officers (or officers of the judicial branch who are not judges). Such a check is consistent with judicial independence.

200. See Weinstein, A Trial Judge's First Impression of the Federal Sentencing Guidelines, 52 ALB. L. REV. 1, 11 (1987). Federalist 78 speaks of an “independent spirit” among judges, essential to the task of adherence to higher-order constitutional law, even when it conflicts with statutes. THE FEDERALIST NO. 78, supra note 196, at 469.

201. See 5 U.S.C. § 557(b) (1988) (findings of administrative law judge—the “presiding employee” of the statute—subject to reversal by agency).

202. Approximately 40,000 defendants are sentenced in the federal system each year. 1988 ANNUAL REPORT, supra note 1, at 14.

203. Cf. Resnik, Managerial Judges, 96 Harv. L. Rev. 374, 424-31 (1982) (efforts by judges to manage large caseloads undermine traditional constraints on judicial power, such as need for written justification, outside scrutiny, and impartiality).
large number of cases. However, a routine sentencing process applied
to so many defendants might make judges even less likely to take
personal responsibility for imposing an appropriate sentence.

The judicial responsibility to impose appropriate sentence may suf-
fer on two fronts if a judge loses the spirit of independence. First, the
judge may become less likely to recognize and enforce legal require-
ments. As a result, a defendant's claim of possible conflicts between the
guidelines and higher orders of law, such as statutes or constitutional
provisions, may receive a less sympathetic hearing from a judge not
accustomed to overseeing the Commission.

The second, and more controversial, responsibility of the judge is to
promote a more rational decisionmaking process by the agency. It
is beneficial to involve courts in administrative review, because they are less
susceptible than agencies to private influence, or to a single-minded
pursuit of one incomplete objective. Some type of judicial review of the
Commission could help remedy these shortcomings.

It is well worth asking if judges are capable of making Commission
decisions more rational, given the Commission's ability to specialize in
sentencing decisions. There are many contexts in which the specialist
administrator has a decided advantage over the generalist judge. A
specialist brings a familiarity with the setting involved and with the indi-

204. See supra text accompanying notes 80-85. Sentencing offenders according to guidelines
resembles processes used to administer mass claims systems, as exemplified by the determination of
factors to be applied) and id. pt. 404, subpt. P, app. I (disability determined through application of
standardized factors) with 28 U.S.C. § 994(b) (1988) (defining what factors are to be considered
relevant under sentencing guidelines). Establishment of some similar system for administering
criminal sentences could ease some of the burden on judges through bureaucratic resolution of
routine cases. The creation of administrative courts, to the extent that they remove routine and
easily resolved cases from the courts, reinforces judicial integrity rather than threatens it. However,
transfer of sentencing responsibility to an agency is impossible because federal judges hold the

205. P. STRAUSS, AN INTRODUCTION TO ADMINISTRATIVE JUSTICE IN THE UNITED STATES
261-69 (1989) (positive impact of in-depth review on agency decisionmaking); Bruff, supra note 59,
at 238-39 ("hard look" review as attempt to force reasoned decisionmaking by agency); see infra text
accompanying notes 251-311.

206. See Sunstein, On the Costs and Benefits of Aggressive Judicial Review of Agency Action,
1989 DUKE L.J. 522, 527; see also Eskridge, supra note 36, at 303-07 (offering public choice theory
perspective on judicial procedures that tend to prevent domination of litigation by interest groups);
of legislation but questioning comparative advantage of judicial decisions).

207. See Levin, Identifying Questions of Law in Administrative Law, 74 GEO. L.J. 1, 44-45
(1985) (comparative qualifications of expert agencies and courts suggest Congress intended to leave
technical decisions in hands of specialist agencies); Mashaw & Harfst, supra note 63, at 293-97
(negative consequences may result when generalist judge reviews "expert" agency decisions;
discussed in context of auto safety regulation); Revesz, Specialized Courts and the Administrative
generalist courts); infra text accompanying notes 262-63.
rect consequences of a decision, both of which might be lost on the generalist. 208

However, there are potent reasons for judges to remain unassimilated generalists in the sentencing process. The specialization of the Commission may result in an unduly narrow focus in sentencing guidelines that itself fails to account for broader concerns. 209 In fact, Congress implicitly expressed a preference for the generalist in the sentencing context when it reaffirmed the essentially judicial nature of sentencing. 210 Moreover, judges in the criminal justice system have always purported to value individualized handling of cases, even where the social cost is less effective control of crime. 211

Admittedly, the Constitution does not require judicial involvement in the creation of wise sentencing policy. Congress may set determinate


The Sentencing Commission assembles information from many types of sources as it creates policy. In order for a judge to exercise nondeferential review of all Commission decisions, she would have to evaluate all the political, empirical, and other influences at work in Commission policy. Even where presented in the format of a case or controversy rather than judicial rulemaking, this sort of decision taxes the competence and legitimacy of the court. See supra note 87. See generally Remedial Law: When Courts Become Administrators 76-79 (R. Wood ed. 1990) (discussing why judicial supervision of equitable remedies must eventually terminate). Furthermore, a court's lengthy proceedings, and the court-ordered agency response, can delay policy development for years. See Mashaw & Harfst, supra note 63, at 295.


This has been a common complaint regarding administrative law judges and an impetus for their centralization into a corps that would be exposed to many different substantive areas. See E. Thomas, Administrative Law Judges: The Corps Issue 14-17 (1987) (benefits of centralized corps of administrative law judges); Davis, Judicialization of Administrative Law: The Trial-Type Hearing and the Changing Status of the Hearing Officer, 1977 Duke L.J. 389, 401-04 (centralized approach of California and Florida as attempt to avoid narrow perspective of specialization).


211. See In re Winship, 397 U.S. 358, 371-72 (1970) (Harlan, J., concurring) (criminal law standard of proof beyond a reasonable doubt is preferable to avoid erroneous convictions, even if some guilty parties go free because of it); 4 W. Blackstone, Commentaries *352 ("it is better that ten guilty persons escape, than that one innocent suffer"). The system also purports to value the participation of the convicted criminal in the sentencing process. See Ford v. Wainwright, 477 U.S. 399, 413-14 (1986) (state must afford condemned the chance to present evidence on alleged insanity).

Of course, many less visible decisions in the criminal justice system, particularly those carried out by police officers and prosecutors, conform more to the model of the specialist administrator than the generalist. See generally K. Davis, supra note 82, at 162-214 (selective enforcement and prosecutorial discretion).
sentences and remove virtually all judicial discretion in sentencing.\textsuperscript{212} Rather, the minimum judicial role in sentencing described here might be understood as a form of constitutional common law, which an agency acting without express authority of Congress could not modify.\textsuperscript{213} The constitutional dimension of this power would draw inspiration both from the due process clause and from the nondelegation doctrine.\textsuperscript{214} This position is supported further by the fact that the law designates courts as the exclusive means of imposing criminal penalties.\textsuperscript{215}

In sum, the concerns about judicial integrity, which survived\textsuperscript{216} Mistretta, compel judicial review of administrative procedures, tempered by some degree of deference to the decisions arrived at through those procedures. This is, of course, the familiar posture of judges vis-à-vis administrative agencies in this country. While those doctrines have created a destructive relationship in many areas of regulation, the day-to-

\textsuperscript{212} Cf. Farber, Statutory Interpretation and Legislative Supremacy, 78 Geo. L.J. 281, 283-87 (1989) (interpretive freedom of court in face of legislative silence consistent with legislative supremacy); Monaghan, The Supreme Court, 1974 Term—Foreword: Constitutional Common Law, 89 Harv. L. Rev. 1, 2 (1975) (Congress could modify Miranda warnings); Stewart & Sunstein, Public Programs and Private Rights, 95 Harv. L. Rev. 1193, 1201, 1255, 1264-65, 1286-87, 1314-15 (1982) (judicially created administrative remedies are normally common law remedies rather than constitutional). However, Congress only specifically disapproved of one form of judicial review of the Sentencing Commission: pre-enforcement review of guidelines as a whole. See infra text accompanying note 314.

\textsuperscript{213} Cf. Weinberger v. Romero-Barcelo, 456 U.S. 305, 319 (1982) (permitting statutory presidential exemption to override exercise of courts' equitable discretion); NLRB v. Catholic Bishop, 440 U.S. 490, 507 (1979) (in absence of clear expression by Congress, Court can hold that National Labor Relations Act does not apply to parochial schools); Hampton v. Mow Sun Wong, 426 U.S. 88, 103-05 (1976) (disregarding governmental interests asserted by agency that might have been accepted if asserted by President or Congress).

\textsuperscript{214} Several courts rejecting due process challenges to the guidelines relied in part on the guideline provisions allowing courts to depart from a guideline sentence. E.g., United States v. Brady, 895 F.2d 538, 540 (9th Cir. 1990); United States v. Seluk, 873 F.2d 15, 17 (1st Cir. 1989); United States v. Fernandez, 877 F.2d 1138, 1144 (2d Cir. 1989). Other courts have also held or stated that specific guidelines violate the due process clause where they unduly restrict the judicial role in sentencing. E.g., United States v. Roberts, 726 F. Supp. 1359, 1374 (D.D.C. 1989) (requirement of government motion for court to consider departure from sentencing guidelines under guideline section 5K1.1 for substantial assistance to authorities violates due process); United States v. Curran, 724 F. Supp. 1239, 1245 (C.D. Ill. 1989) (same). But see United States v. Lewis, 896 F.2d 246, 248-49 (7th Cir. 1990) (holding that section 5K1.1 does not violate due process).

\textsuperscript{215} The use of judges as the exclusive means of enforcement supports judicial review designed to vindicate legality. As Louis Jaffe put it: "[I]nsofar as the judicial power is invoked in the enforcement of an order, a court must apply all of the relevant law." L. JAFFE, supra note 92, at 384; see also Yakus v. United States, 321 U.S. 414, 444-45 (1944) (even where Congress may restrict court's authority to rule on constitutional validity of a regulation, jurisdiction to impose punishment is preserved); Monaghan, supra note 91, at 20-34, 26 n.154 ("No one . . . believes that Congress could authorize direct administrative enforcement of criminal penalties . . . ."). See generally L. JAFFE, supra note 92, at 390-94 (discussing scope of judicial review of administrative order validity). It also supports, to a lesser extent, judicial review of rationality.

\textsuperscript{216} See infra text accompanying notes 262-63. For judicial review to be effective and to avoid negative effects, the reviewing court must become expert in complex matters; it must, in effect, "get inside" the agency. Cf. P. SCHUCK, SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL
day involvement of the courts in sentencing makes a stronger case for intervention here than in other areas. The remainder of this Part canvasses various limits on judicial review of administrative agencies, and considers adjustments to such review appropriate to the sentencing context.

B. Administrative Law Limitations on Judicial Review of the Sentencing Commission

A reviewing court can consider several different aspects of an administrative decision. Venerable administrative law doctrines characterize the tasks of a reviewing court as (1) review of statutory authority, (2) review of rationality, and (3) review of procedures. Each of these traditional tasks of the reviewing court has an analogue in the realm of sentencing.

1. Reviewing Statutory Fidelity of Guidelines: Chevron and Sentencing

The Sentencing Commission makes some of its most critical choices as it interprets provisions of the SRA and other sentencing statutes. At the same time, a court that must impose a sentence according to law cannot blindly apply a guideline that is based on a misinterpretation of the underlying statute. Because of the substantive importance of the issues resolved through statutory interpretation, and the widespread acceptance of some judicial role in interpreting sentencing statutes, a survey of the potential forms of judicial review of Commission decisions can profitably begin with review of the Commission's statutory interpretation. Because administrative review doctrines address this precise issue, they provide a useful model for interaction between the Commission and the courts over questions involving statutory interpretation.

The landmark case of *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.* declared that many issues of statutory interpretation involve policy choices that are best left to an agency to decide. *Chevron* requires courts to defer to agency interpretations of a statute unless Congress expressed its "unambiguous" intent on the issue. However, a survey of cases involving the validity of guidelines in the first two years since they were adopted reveals that very few cases have invoked the *Chevron* analysis. The preliminary question of the court's

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219. See id. at 842-45.
220. See, e.g., *United States v. Wills*, 881 F.2d 823 (9th Cir. 1989) (making no reference to *Chevron* in deciding question regarding Commission's interpretation of statute); *United States v.*
authority to interpret the statute has largely gone unaddressed.\footnote{Lee, 887 F.2d 888, 892 (8th Cir. 1989) (same); United States v. Justice, 877 F.2d 664, 668-69 (8th Cir. 1989) (same), cert. denied, 110 S. Ct. 375 (1989).}

The SRA provides a unique mechanism for courts to express their disapproval of a particular guideline and the Commission's reading of the SRA: when a court finds "an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission," the court may depart from a particular guideline sentence.\footnote{Sentencing courts may be ignoring \textit{Chevron} and other administrative law doctrines because of the literal inapplicability of the APA to the Commission. Cf. Crandon v. United States, 110 S. Ct. 997, 1011 (1990) (Scalia, J., concurring) \textit{(Chevron} deference does not apply to prosecutorial interpretation of criminal statute simply because Department of Justice must interpret all criminal statutes before bringing prosecution).} (Exercise of this power is termed a "departure," and the power itself "departure power.") I contend in this Subsection that, except within the departure context, the logic behind \textit{Chevron} favors only limited review of guidelines.

\subsection*{a. The Chevron Presumption}

Where agencies interpret statutes, a distinctive set of administrative law doctrines apply. The judicial review provisions of the APA do not clearly state how much weight a court should give the agency's statutory interpretation.\footnote{See generally Diver, \textit{Statutory Interpretation in the Administrative State}, 133 U. PA. L.} Until recently, the courts, including the Supreme Court, had not made a consistent choice: some cases had employed independent review, which attaches little weight to the views of the agency,\footnote{See, e.g., SEC v. Sloan, 436 U.S. 103, 117-19 (1978) (refusing to defer to SEC's interpretation of section 12(k) of the Securities Exchange Act).} while some had employed deferential review, which gives great weight or even controlling effect to agency views.\footnote{See, e.g., Gray v. Powell, 314 U.S. 402, 412 (1941) (judicial deference to agency definition of "producer" in Bituminous Coal Act of 1937). In \textit{Gray}, a "mixed" question of law and fact, involving a statutory interpretation relevant to a narrow group of litigants, called for deferential review because of agency familiarity with social reality and the parties most affected.} The choice seemed to hinge on how those courts perceived the relative abilities of courts and agencies to interpret statutes.\footnote{See, e.g., SEC v. Sloan, 436 U.S. 103, 117-19 (1978) (refusing to defer to SEC's interpretation of section 12(k) of the Securities Exchange Act).}
In 1984, *Chevron* rearranged this corner of the world by creating a presumption in favor of deferential review. Under *Chevron*, the key factor is whether Congress has expressed an "unambiguous" intent on the subject. If so, the court enforces that intent regardless of the agency's views. If not, the court must accept any reasonable reading of the statute by the agency. The *Chevron* doctrine treats any ambiguity in the statute as an implicit grant of interpretive authority to an agency.

If *Chevron* represents an attempt to ascertain, by way of a general rule, when Congress intends to delegate interpretive authority to an agency rather than to a court, it leaves much to be desired. Congress often formulates statutes ambiguously, and this alone does not indicate who Congress believed should resolve the ambiguity. Where the statute does not contain technical language or suggest any other reason to rely on agency expertise, it is reasonable to think that Congress would rely on the proven interpretive ability and impartiality of the judiciary.

But *Chevron* does not represent an attempt to discern legislative intentions. Rather, it is a "clear statement" rule, that is, a rule expressing a judicial view about statutory language and requiring the Congress to speak clearly when it disagrees. The Court expressed a common law preference for agency interpretation rather than judicial interpretation of statutes. Such a common law preference is a sensible one because statutory construction is often no more than a vehicle for formulating policy. Agencies are demonstrably better able than courts to formul-
late a technically viable, nationally uniform, politically acceptable policy. 233

b. The Departure Power as a Rebuttal of the Chevron Presumption

As with any other clear statement rule, Congress can overcome the presumption of agency interpretation. Consistent with Chevron, Congress may remove interpretive power from the agency in either of two ways. First, step one of Chevron makes it clear that Congress may take an issue away from the agency by speaking clearly on the substantive issue at hand. 234 Second, and less obvious, is the power of Congress to speak clearly to the question of who has interpretive authority, and to give that authority to the courts. 235 Congress can leave an issue open and explicitly entrust that policy decision to the courts rather than to an agency. Critics of the decision have not accounted for this second aspect of the Chevron clear statement rule. 236

Congress has abrogated the common law preference of Chevron in at least one aspect of criminal sentencing: departures. Section 3553(b) of the SRA empowers a court to depart from a guideline sentence when it finds there is a mitigating or aggravating circumstance present "of a kind, or to a degree, not adequately taken into consideration by the

decisions by using ambiguous statutory language); see also Starr, Judicial Review in the Post-Chevron Era, 3 YALE J. ON REG. 283, 294-95 (1986) (because legislation is a process of compromise, statute may not contain clear underlying policy).

233. See infra text accompanying notes 262-63.

234. Chevron, 467 U.S. at 842-43 ("If the intent of Congress is clear, that is the end of the matter.").

235. The Court did not explicitly recognize the possibility of Congress granting interpretive authority to courts, but it spoke of limits on a court's authority only where the Congress implicitly or explicitly gives such authority to the agency. See id. at 843-44; see also Scalia, Judicial Deference to Administrative Interpretations of Law, 1989 DUKE L.J. 511, 515-16 (would not be unconstitutional for Congress to pass a statute ordering de novo review of agency policy choices). The judiciary has often used clear statement rules where it develops policy as a matter of common law, hesitating to constitutionalize an issue. See, e.g., Kent v. Dulles, 357 U.S. 116, 129 (1958) (in order to avoid constitutional questions, Court refused to grant Secretary of State unlimited discretion in issuing passports, absent clear statement from Congress). The Chevron opinion generally avoids constitutional language and precedent. The opinion never clearly identifies the Court's authority for allocating interpretive authority as it does, although the opinion does use some language with separation of powers overtones. See Chevron, 467 U.S. at 864-66 (discussing who should decide policy arguments); see also Farina, supra note 110, at 464-67 (Chevron's justification for deference to agencies is rooted in the concept of separation of powers).

236. While commentators generally recognize Congress' ability to speak to the substantive issue, they do not address Congress' power to delegate interpretive authority to the courts through a clear statement. See, e.g., Farina, supra note 110, at 458-63, 469-70 (irrebuttable presumption of delegation to agency); Saunders, supra note 229, at 773-86 (discussing implicit and explicit delegations of authority to agency, but not explicit delegations to courts). But cf. Luneburg, Judicial Review of Agency Statutory Interpretation: An Introduction, 2 ADMIN. L.J. 243, 250 (1988) (if Congress has no intent regarding deference, reviewing court has discretion as to amount of deference).
Sentencing Commission. Although Congress recognized an ambiguity in the meaning of “adequate consideration,” it empowered the courts to flesh out that meaning and, in doing so, effectively gave the courts policymaking power in interpreting this statutory phrase.

Hence, courts may disagree with the Commission reading of a statute—provided they act within their departure power. Where a court concludes that the Commission inadequately considered the consequences of its reading of an ambiguous statute, it may on that basis depart in a particular case. Even where the statutory interpretation depends upon policy considerations and not just a search for congressional intent or purpose, the court has the power to participate with the Commission in making policy, by departing from the guidelines and explaining the departure.

c. Invalidating Guidelines Outside the Departure Context

Putting departures aside, Chevron seems to offer a straightforward instruction to sentencing courts: ambiguities in a statute should normally lead the court to defer to the Commission’s reading of the statute. Yet it would be prudent to note that the apparently uniform Chevron presumption could have a different impact for sentencing cases than for other cases.

Like many judicial decisions, Chevron contains the seeds of its own destruction. Since the judiciary is accustomed to enforcing legislative boundaries on the power of agencies, judges have been unwilling to

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The departure provision was a natural area for Congress to entrust to judges rather than to the Commission. The provision has a jurisdictional flavor, for it sets forth when the Commission can and cannot bind the judgment of sentencing courts. Where the statute in question defines an agency's powers, courts have traditionally maintained a vigilant watch over the reach of the agency's jurisdiction; it is here that the self-interest of the agency is most likely to distort its interpretation of the statute. See Rudolph, Judicial Deference to Administrative Interpretation: When Is It Proper?, 2 ADMIN. L.J. 291, 296 (1988) (Chevron deference should not apply where statutory question relates to scope of agency authority); Sunstein, supra note 228, at 467 (arguing against application of Chevron deference to questions of agency jurisdiction); see also Monaghan, supra note 91, at 25-28 (only judicial task is to determine the extent of an agency's statutory authority); cf. Crowell v. Benson, 285 U.S. 22, 56-63 (1932) (facts pertaining to agency's jurisdiction must be resolved by courts).


239. See Addison v. Holly Hill Fruit Prods., 322 U.S. 607, 616-19 (where Congress granted area exemptions, court restricted agency to drawing geographical lines and forbade it to factor in the number of employees of various enterprises in each area).
concede that any minimal amount of statutory ambiguity commits an interpretive question to the agency.\textsuperscript{240} Instead, they have begun the exceedingly difficult job of determining the amount and type of ambiguity that must be present before they will defer to an agency interpretation.\textsuperscript{241} The effort to determine exactly how much statutory clarity is required may ultimately lead courts to backslide into the pre-\textit{Chevron} days, when they measured anew the relative interpretive competence of court and agency in every case.

This eroded version of \textit{Chevron} is consistent with the refusal of courts thus far to defer to Commission interpretations of statutes passed prior to 1984. In determining the appropriate degree of deference, courts have found it relevant to consider the likelihood that a particular agency will know what Congress intended. Courts may be more ready to provide an answer themselves for agencies that have no special access to Congress' intent.\textsuperscript{242} Because the Commission did not exist prior to the passage of the SRA, courts may give the Commission less deference in interpreting the 1984 Act and other criminal statutes passed before 1984.\textsuperscript{243}

Despite the \textit{Chevron} doctrine, courts seem to be interpreting statutes independently, with little deference to the views of the Commission. A few courts have held, in varying contexts, that the Commission misinterpre-


\textsuperscript{241} See \textit{Shapiro & Glicksman, Congress, the Supreme Court, and the Quiet Revolution in Administrative Law}, 1988 DUKE L.J. 819, 860-62. Some dicta from a recent Supreme Court case suggest that all questions will be resolved by the courts under the first step of \textit{Chevron}, see supra text accompanying note 234, unless they involve interpretations that arise in cases where the agency applies standards to a particular set of facts. \textit{INS v. Cardoza-Fonseca}, 480 U.S. 421, 446-48 (1987).

But this formulation is misleadingly simple, since any interpretation of a statute involves consideration of facts. This reading of \textit{Cardoza-Fonseca} is also difficult to square with results in other cases and probably could not command a majority on the Court today. Cf. e.g., \textit{NLRB v. United Food & Commercial Workers Union}, 484 U.S. 112, 133-34 (Scalia, J., concurring) (writing "separately only to note that [\textit{Chevron} is still good law]. Some courts have mistakenly concluded otherwise, on the basis of dicta in \textit{INS v. Cardoza-Fonseca}"); \textit{Saunders, supra} note 229, at 783-86 (discussing the uncertainty in applying \textit{Chevron} created by \textit{Cardoza-Fonseca}).

\textsuperscript{242} See \textit{Breyer, Judicial Review of Questions of Law and Policy}, 38 ADMIN. L. REV. 363, 368-72 (1986) (variety of factors may affect degree of court's deference to agency interpretation).

\textsuperscript{243} However, because the Commission will doubtless have a significant hand in any future sentencing statutes and will therefore have exceptional insight into the wishes of legislators, courts should perhaps require greater clarity from Congress before ignoring the Commission's interpretation of sentencing statutes enacted after 1984.
interpreted a statute. More frequently, courts have rejected statute-based challenges to the guidelines, or policy statements of the Commission.

244. See, e.g., United States v. Lee, 887 F.2d 888, 892 (8th Cir. 1989) (holding guideline section 2J1.6 conflicts with general statutory directives for Commission to consider all mitigating and aggravating circumstances); United States v. Wills, 881 F.2d 823 (9th Cir. 1989). Wills illustrates how Chevron analysis might improve interaction between the Commission and the courts on matters of statutory interpretation. The Commission had read a statute concerning the choice of consecutive or concurrent sentences, 18 U.S.C. § 3584(a) (1988), to embody a “presumption” in favor of consecutive sentences. The Commission carried out that presumption in the guideline it enacted. See Wills, 881 F.2d at 826 (quoting U.S. SENTENCING COMM’N, FEDERAL SENTENCING GUIDELINES AND POLICY STATEMENTS § 5G1.3 & commentary (1987)). The Wills court, however, held that the guideline conflicted with the statute, which it interpreted as giving discretion over the choice of concurrent or consecutive sentence to the sentencing court. Id.

Following Wills, the Commission replaced the guideline at issue with a new guideline requiring a consecutive term only where the offense is committed while still serving the existing sentence. See GUIDELINES, supra note 3, § 5G1.3 & commentary. The original version and commentary were withdrawn to correct erroneous language in the Commentary—presumably the characterization of section 3584(a) as a presumption in favor of consecutive terms. See 54 Fed. Reg. 9,165 (1989). One might therefore view this case as a happy ending, a positive example of dialogue between a court and the Commission, despite the court’s failure to address the interpretive weight that should be given to Commission positions.

A proper use of the Chevron analysis would have improved the outcome, however. While the Commission was incorrect to assume that section 3584(a) favored the use of consecutive sentences, the Ninth Circuit was equally wrong to conclude that that statute prevented the Commission on its own initiative from restricting the use of concurrent sentences. The SRA gives the Commission authority to create guidelines on this subject. See 28 U.S.C. § 994(a)(1)(D) (1988). The “unambiguous intent” of Congress on this issue merely established that the statute does not tell the Commission what to do about consecutive sentences.

Rather than foreclosing any future Commission effort to restrict judicial discretion on this matter, the court should have pointed to the evidence that the Commission had based its guideline on a mistaken reading of the statute. At that point, it should have recognized that a guideline mandating consecutive sentences in most cases would comport with a “reasonable” reading of the statute and therefore deserve deference under Chevron.

Finally, the court could have concluded that the Commission had not given adequate consideration to relevant factors in drafting the current guideline, and departed in the case at bar, while pointing out to the Commission any difficulties in its reading of the statute. See, e.g., United States v. Scott, 1 Fed. Sentencing Rep. (Vera) 91, 92 (D. Md. May 23, 1988) (departing because of questionable Commission reading of section 3584(a)); cf. United States v. Rogers, 897 F.2d 134, 135-38 (4th Cir. 1990) (district courts retain discretion under section 3584(a) to impose concurrent sentences rather than consecutive sentences mandated by guidelines section 5G1.3, provided there are grounds for departure); United States v. Boshell, 728 F. Supp. 632, 636 (E.D. Wash. 1990) (district court discretion to depart from guidelines may not be proscribed or limited by the Sentencing Commission).


245. Courts have refused to invalidate specific guidelines relating to the criminal history of offenders. See, e.g., United States v. Mendez, 691 F. Supp. 656, 664-65 (S.D.N.Y. 1988) (criminal history provisions do not perpetuate disparity and therefore do not violate statute). They have also rejected claims by defendants that the statute requires the Commission to make probation more
However, even in those cases, the courts have examined legislative materials independently, without asking what level of ambiguity could properly sustain the Commission's reading of a statute.\textsuperscript{246} Taken together, these cases suggest that courts have not relied on \textit{Chevron}'s presumption that statutory ambiguity of an appropriate type and amount requires deference to the agency.

Without \textit{Chevron} deference, there is a greater chance of inconsistent rulings on ambiguous statutory questions. Comparable offenders will receive different sentences depending on which judge, or which circuit, is reading the statute. Courts that perceive conflicts between guidelines and open-ended statutory directives to the Commission, such as those requiring the Commission to "reduce disparity" in sentences\textsuperscript{247} or to consider relevant aggravating and mitigating circumstances,\textsuperscript{248} would significantly expand their ability to sentence outside the guidelines and bypass the limitations on their departure power. To the extent the statutory question really raises a policy issue unresolved by Congress, the Commission's choice should, according to \textit{Chevron}, normally prevail.

This is not to say that a court should have no influence over the meaning of a statute. A court can, under \textit{Chevron}, carry out the clear intent of Congress in a sentencing statute, contradicting any Commission interpretation.\textsuperscript{249} Additionally, as discussed in the previous Section, where an ambiguous statute commits an issue to the Commission, a court may shape Commission policy by departing from the guidelines in an individual case if the Commission has inadequately considered the policy readily available than it currently is. \textit{See, e.g.}, United States v. Erves, 880 F.2d 376, 381-82 (11th Cir.) \textit{cert. denied sub nom.} Villareal-Farias v. United States, 110 S. Ct. 416 (1989); United States v. White, 869 F.2d 822, 827 (5th Cir.), \textit{cert. denied}, 109 S. Ct. 3172 (1989).

Finally, courts have declined to invalidate the guidelines as a whole on the basis of their alleged tendency to increase prison populations, despite the SRA's direction that the Commission take that fact into account. \textit{See, e.g.}, Erves, 880 F.2d at 380; White, 869 F.2d at 828; United States v. Hallemeier, 715 F. Supp. 203, 206 (N.D. Ill. 1989).

\textsuperscript{246} Those courts have consulted the statute and its legislative history, not the Commission's reading of the statute. \textit{See, e.g.,} Erves, 880 F.2d at 381 (finding Congress' intent was not to foreclose increase in prison population, but to direct Commission to consider that factor—and Commission complied with this directive); White, 869 F.2d at 827 (finding that legislative history of statute gives Commission discretion regarding availability of probation).


\textsuperscript{248} \textit{E.g.}, id. § 994(c)(2).

\textsuperscript{249} For instance, in United States v. Richards, 1 Fed. Sentencing Rep. (Vera) 303, 303-04 (D. Kan. Oct. 21, 1988), the court held that the guidelines did not apply to state law offenses prosecuted in federal court under the Assimilated Crimes Act. The Commission had concluded otherwise. While the court did not consider the issue of deference to the Commission's interpretation of the Act, the outcome was supported by legislative history of sufficient clarity under \textit{Chevron}; \textit{see also} United States v. Garcia, 893 F.2d 250, 254-55 (10th Cir. 1989) (under Assimilated Crimes Act, sentence imposed under guidelines may not exceed minimum and maximum sentences permitted under state law), \textit{cert. denied}, 110 S. Ct. 1792 (1990); \textit{cf.} United States v. Bear, 915 F.2d 1259, 1261-62 (9th Cir. 1990) (guidelines do not apply to state law offenses committed on Indian reservation).
involved in its reading of the statute.\textsuperscript{250}

Giving the courts full interpretive authority for some purposes (departures) but not for others (facial challenges to guidelines) may at first blush appear inconsistent. But the two levels of interpretive authority create a coherent and safely limited means for the courts to participate in sentencing policy. When a court rules, after a facial challenge to a guideline, that the Commission has misinterpreted a statute, the decision binds all other courts in that judicial district in future cases. A departure, on the other hand, does not commit the sentencing court or any other court to ignoring the Commission’s interpretation of a statute in later cases. It only sends the Commission a message that its policy may have been inadequately considered. The next Section explores more fully the promise and the limits of departures as a review mechanism.

2. Reviewing the Rationality of Guidelines: State Farm and Sentencing

Judges at times evaluate administrative action not only to uncover infidelity to statutory instructions, but also to expose the fundamental irrationality of the agency’s decision. The \textit{State Farm} doctrine calls on courts to scrutinize carefully any agency explanation of its policy choices.\textsuperscript{251} Sentencing courts make a comparable evaluation of Commission action when litigants ask them to depart from the guidelines because the Commission gave “inadequate consideration” to some pertinent factor.

Judicial review of agency rationality is a power easily abused, for it can substitute an individual court’s preferences for the coordinated policy choices of the agency. In response to this danger, sentencing courts have thus far adopted a modest view of their departure powers.\textsuperscript{252} However, efforts to develop a constrained but effective form of rationality review in other administrative settings reveal the promise of a broader departure power for sentencing courts. Those efforts are reviewed below. The distinctive level of judicial involvement in sentencing makes an active form of rationality review easier both to justify and to control than in most other settings.

\textbf{a. Models of Rationality Review}

The APA sets out two standards for judicial review of agency find-

\textsuperscript{250} \textit{See supra} text accompanying notes 237-38.

\textsuperscript{251} \textit{See} \textit{Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.}, 463 U.S. 29, 40-57 (1983) (agency explanation must be sufficient to enable court to conclude that rule rescission was a product of reasoned decisionmaking).

\textsuperscript{252} It is interesting to note that judges have both complained about their loss of discretion under the guidelines and failed to exercise their full measure of control over sentencing allowed under the departure power.
ings and conclusions other than interpretations of statutes. In formal adjudications and on-the-record rulemaking, a court must accept agency factual findings if they are supported by substantial evidence on the record as a whole.\footnote{5 U.S.C. § 706(2)(E) (1988).} For informal rulemaking proceedings, the court will only reject agency findings that are “arbitrary and capricious.”\footnote{Id. § 706(2)(A) (1988). The statute itself requires findings that are not “arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law,” \textit{id.}; however, when used by the courts, this standard is usually simply referred to as the “arbitrary and capricious” standard of the APA. \textit{See, e.g.}, Marsh v. Oregon Natural Resources Council, 109 S. Ct. 1851, 1859 (1989).} Both review standards aim to ensure the quality of input the agency receives through its adjudication procedures.\footnote{Leading cases on judicial review of agency adjudication call for the greatest judicial deference to agency actions that demonstrate responsiveness by the agency to factual input. For example, in NLRB v. Hearst Publications, 322 U.S. 111 (1944), the Court held that “where the question is one of specific application of a broad statutory term in a proceeding in which the agency administering the statute must determine [the question] initially, the reviewing court's function is limited.” \textit{Id.} at 131. The Court relied in great measure on the “everyday experience” of the NLRB. \textit{See id.} at 130.} They encourage an agency to listen closely to those in the field who see firsthand the state of the world and its interaction with a policy.

Some courts will not find an agency action “arbitrary and capricious” so long as there is some minimal rational connection between factual input and policy outcome.\footnote{See, e.g., Baltimore Gas & Elec. Co. v. Natural Resources Defense Council, Inc., 462 U.S. 87, 101-06 (1983) (when examining scientific determinations, as opposed to simple findings of fact, the reviewing court should be at its most deferential, requiring only a rational connection between facts found and choices made); RCA v. United States, 341 U.S. 412, 419-20 (1951) (given the agency's special familiarity with the problems involved in adopting standards, courts should not overrule an administrative decision simply because they disagree with its wisdom).} Other courts, invoking a doctrine similar to that endorsed by the Supreme Court in \textit{State Farm}, will undertake (or require the agency to undertake) a “hard look” at the quality of the agency's reasoning process.\footnote{See, e.g., Kleppe v. Sierra Club, 427 U.S. 390, 410 n.21 (1976) (interpreting the \textit{Overton Park} inquiry as requiring agency to take “hard look”); Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416 (1971) (requiring that court reviewing agency action undertake “searching and careful” inquiry into agency procedure and rationality); \textit{see also} Greater Boston Television Corp. v. FCC, 444 F.2d 841, 851 (D.C. Cir. 1970) (originating the term “hard look” review).} Where the agency has employed a faulty reasoning process, these courts will find that it has acted “arbitrarily and capriciously.” More specifically, this doctrine provides a way for courts to monitor the agency's efforts to gather facts and its responsive-

\textit{\footnotetext[253]{5 U.S.C. § 706(2)(E) (1988).} \footnotetext[254]{Id. § 706(2)(A) (1988). The statute itself requires findings that are not “arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law,” \textit{id.}; however, when used by the courts, this standard is usually simply referred to as the “arbitrary and capricious” standard of the APA. \textit{See, e.g.}, Marsh v. Oregon Natural Resources Council, 109 S. Ct. 1851, 1859 (1989).} \footnotetext[255]{Leading cases on judicial review of agency adjudication call for the greatest judicial deference to agency actions that demonstrate responsiveness by the agency to factual input. For example, in NLRB v. Hearst Publications, 322 U.S. 111 (1944), the Court held that “where the question is one of specific application of a broad statutory term in a proceeding in which the agency administering the statute must determine [the question] initially, the reviewing court's function is limited.” \textit{Id.} at 131. The Court relied in great measure on the “everyday experience” of the NLRB. \textit{See id.} at 130.} \footnotetext[256]{See, e.g., Baltimore Gas & Elec. Co. v. Natural Resources Defense Council, Inc., 462 U.S. 87, 101-06 (1983) (when examining scientific determinations, as opposed to simple findings of fact, the reviewing court should be at its most deferential, requiring only a rational connection between facts found and choices made); RCA v. United States, 341 U.S. 412, 419-20 (1951) (given the agency's special familiarity with the problems involved in adopting standards, courts should not overrule an administrative decision simply because they disagree with its wisdom).} \footnotetext[257]{See, e.g., Kleppe v. Sierra Club, 427 U.S. 390, 410 n.21 (1976) (interpreting the \textit{Overton Park} inquiry as requiring agency to take “hard look”); Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416 (1971) (requiring that court reviewing agency action undertake “searching and careful” inquiry into agency procedure and rationality); \textit{see also} Greater Boston Television Corp. v. FCC, 444 F.2d 841, 851 (D.C. Cir. 1970) (originating the term “hard look” review).}
ness to the facts it has gathered. Under this doctrine, the agency must obtain certain critical facts and respond to certain important contentions.

One can imagine the State Farm doctrine leading to an effective supervisory relationship between courts and agencies. The courts would not decide policy themselves; they would merely ensure that agencies do not ignore or slight truly important aspects of a problem or any possible solution. Enthusiasts of hard look review have acknowledged the possibility of abuse, but tend to favor this form of review because of the benefits it might confer in the future, rather than because of its past performance. Detailed judicial review would give the agency an incentive to find support for its decisions and to explain them to the public. It might also give those in an agency “who care about well-documented and well-reasoned decisionmaking a lever with which to move those who do not.”

But experience, to the extent we have studied it, tells a different story. Studies of the impact of judicial monitoring of agency rationality have concluded that judges have made a mess of administrative policy. Hard look review may fail for a number of reasons. For one thing, it

258. R. PIERCE, S. SHAPIRO & P. VERKUIL, supra note 91, at 380-89.

259. See generally Bruff, supra note 59, at 236-44 (courts police the distribution of power between Congress and agencies, allocating policymaking authority between them when statutes do not clearly do so); Shapiro & Glicksman, supra note 241, at 863-72 (courts must apply stricter scrutiny to decisions of nonelected officials because agencies are not directly subject to electoral checks and balances).


262. See R. MELNICK, REGULATION AND THE COURTS: THE CASE OF THE CLEAN AIR ACT 343-93 (1983) (court action under Clean Air Act extended scope of EPA program, diminishing already inadequate resources for achieving objectives, leading to serious inefficiencies and inequalities, and frustrating rational debate and political choice); Fiorino, Judicial-Administrative Interaction in Regulatory Policy Making: The Case of the Federal Power Commission, 28 ADMIN. L. REV. 41, 82-88 (1976) (constrained by fear of reversal, FPC's response to emergencies is stalled by courts); Mashaw & Harfst, supra note 63, at 273-316 (judicial review of National Highway Traffic Safety Administration has been major cause of agency's shift from rulemaking to recalls as a regulatory technique, and abandonment of more ambitious mission to force production of safe autos by design); O'Leary, The Impact of Federal Court Decisions on the Policies and Administration of the U.S. Environmental Protection Agency, 41 ADMIN. L. REV. 549 (1989) (three-year study of effects and patterns of judicial intervention, finding fault with court review of EPA technical decisions and court direction of agency efforts, but faulting Congress as well for allowing extensive judicial review); cf. B. ACKERMAN & W. HASSLER, CLEAN AIR/DIRTY COAL 104-28 (1981) (courts sometimes meet level of, but often fall short of, statesmanship required to coordinate policy between Congress and EPA, but it is Congress that mixed clean air symbols with dirty coal self-interest); Breyer & MacAvoy, The Natural Gas Shortage and the Regulation of Natural Gas Producers, 86 HARV. L. REV. 941, 941 n.5, 943 (1973) (Supreme Court failed to examine Federal Power Commission's regulatory policies, upheld FPC's pricing authority, and thus contributed to resulting natural gas shortages despite abundant supply).
does not give courts a clear idea of what constitutes inadequate agency consideration of a problem. Furthermore, the litigation process gives the court a limited and therefore distorted view of the agency's priorities and process. The agency responds to judicial demands by focusing its resources on the limited issues likely to come to the court's attention, thus slighting all others. This review power, outside the sentencing context, operates without reliable limits. Thus, it has little to recommend it as a guiding principle for the judicial role in sentencing, unless something about the sentencing context creates limits not possible in other contexts.

b. The Departure Power as Rationality Review

Instead of the various review levels available under the APA, the SRA gives courts the power to depart from the Commission's guidelines where the Commission has not met the standard requiring "adequate consideration" of other circumstances. The statutory departure standard and its legislative history provide weak guidance on the more important questions surrounding departures. The statute defines the "administrative record" available to the court when determining what the Commission in fact has done. However, the statute is less clear on whether courts, the Commission, or both institutions can determine the "adequacy" of the Commission's consideration of a factor.

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264. 18 U.S.C. § 3553(b) (1988); see supra text accompanying note 237.

265. Courts may determine the adequacy of the Commission's consideration of an aggravating or mitigating circumstance in light of only three sources: (1) the guidelines themselves; (2) policy statements; and (3) official commentary. 18 U.S.C. § 3553(b) (1988). This provision was added to the departure statute in 1987, and was intended to spare Commission members and staff the burden of being subpoenaed to testify about the Commission's reasoning process. See 133 CONG. REC. H10,017 (daily ed. Nov. 16, 1987) (statement of Rep. Conyers). But cf. Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 420 (1971) (granting access to evidence regarding thought processes of agency officials in absence of formal findings).

At its most restrictive, the evidentiary clause of section 3553(b) confines the courts to the above three sources (all contained within the guidelines) in determining whether and how much the Commission considered a circumstance. A more liberal reading of the statute would allow courts to resort to other sources of evidence, such as public pronouncements of Commissioners that might qualify as "commentary" (which the statute does not define), so long as those courts do not compel personal testimony of Commission staff or compulsory discovery of Commission records. The Sentencing Commission's 1987 report, SUPPLEMENTARY REPORT, supra note 27, would be an important source of such commentary.

266. The legislative history of the 1984 Act consistently indicates that the courts will determine the "adequacy" of the Commission's consideration. S. REP. 98-225, supra note 1, at 78-79, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS 3182, 3261-62 (departure power gives court flexibility necessary "to assure adequate consideration" of relevant circumstances). Although Congress
Although the statute and its history offer little help on the critical issue of how to measure "adequacy," there are parallels between this concept and the "substantial evidence" and "arbitrary and capricious" standards of review. The APA should therefore provide a background understanding of how courts should guard against faulty agency decisions. Such an understanding, however, will only create parameters for a sound decision. Furthermore, this analysis will be more applicable to some forms of departure than to others.

It may be helpful to group departures into five categories: (1) authorized unbounded departures; (2) authorized bounded departures; (3) unmentioned circumstance departures; (4) normally prohibited departures; and (5) wholly prohibited departures. What follows is an envisioned that the Commission would restrict the realm of possible departures over time, it was thought this would be the result of continuing Commission efforts to refine the guidelines by giving adequate consideration, as judged by the courts, to additional circumstances brought to light in empirical sentencing data. See id. at 178, 182-83, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS 3182, 3361, 3364-65. Nowhere did Congress explicitly empower the Commission merely to assert that its consideration has been "adequate," and there is contradictory evidence in the congressional debate on whether such an assertion would be enough to restrict the realm of possible departures. The House sponsors stated that the Commission had no such power, 133 CONG. REC. H10,017 (daily ed. Nov. 16, 1987) (statement of Rep. Conyers); the Senate sponsors disagreed, 133 CONG. REC. S16,646-47 (daily ed. Nov. 20, 1987) (joint statement of Sens. Biden, Thurmond, Kennedy, and Hatch). The Commission initially asserted that it had such a power, but declined to use it. See GUIDELINES, supra note 3, at 6. But see G. MCFADDEN, J. CLARKE & J. STANIELS, FEDERAL SENTENCING MANUAL § 3.04, at 3-29 to -30 ("The Commission's position appears to be inconsistent with the face of the statute."). More recently, the Commission has withdrawn its claim that it can unilaterally limit grounds for departure. See 55 Fed. Reg. 19,193 (1990) ("[In the discussion of departures . . . , language concerning what the Commission, in principle, might have done is deleted as unnecessary, but no substantive change is made.").

267. In floor debate regarding the 1987 amendment to the departure statute, Senators Biden and Kennedy both mentioned two possible forms of inadequacy: (1) no mention of the circumstance by the Commission; or (2) failure of guidelines to consider a factor to the unusual extent it is present in a particular case. See 133 CONG. REC. S16,647-48 (daily ed. Nov. 20, 1987) (statements of Sens. Biden and Kennedy).

The House seemed to hold a different view. While it is clear that a circumstance not considered at all by the Commission "cannot, a fortiori, have been adequately considered," 133 CONG. REC. H10,017 (daily ed. Nov. 16, 1987) (statement of Rep. Conyers), it is also possible that the Commission could consider a circumstance but do so inadequately. The adequacy of the Commission's consideration is for the court to decide, and is "a subjective determination." Id.

The committee report on the original legislation mentions the two bases for "inadequacy" suggested by Senators Biden and Kennedy, but apparently did not intend these reasons to be exclusive. S. REP. 98-225, supra note 1, at 78-79, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS 3182, 3261-62 ("A particular kind of circumstance, for example, might not have been considered by the Sentencing Commission at all because of its rarity, or it might have been considered only in its usual form and not in the particularly extreme form present in a particular case.").

268. See supra text accompanying notes 205-15.

269. The type of departures focused on in this Article are guided departures (that is, where the guidelines give some guidance), and unguided departures. Cf: GUIDELINES, supra note 3, at 7 (describing the two types of departures).
evaluation of the proper review powers of courts for each category of departure in light of the administrative model of rationality review.

i. Authorized Unbounded Departures

The first type of departure involves a circumstance explicitly listed by the Commission as legitimate grounds for departure, without any guidance regarding the extent of departure. Such "authorized unbounded" departure grounds appear throughout the guidelines and include such factors as use of a weapon\(^2\) or victim conduct.\(^1\) The Commission stated that it did not fully consider these factors,\(^2\) and this appears to hold true for typical cases within an offense category as well as for unusual cases. Since nothing in the guidelines, policy statements, or commentary contradicts the Commission's statement that it has not considered these factors,\(^2\) a court would plainly have the power to base a departure on these grounds and depart to any reasonable extent. Courts have used this form of invited departure more than any other.\(^2\) Such

\(^{270}\) Id. § 5K2.6.

\(^{271}\) Id. § 5K2.10. The guidelines also mention the following grounds for departure: substantial assistance to the authorities, id. § 5K1.1, death, physical injury, or extreme psychological injury resulting from the crime, id. § 5K2.1–3, abduction or unlawful restraint, id. § 5K2.4, property damage, id. § 5K2.5, disruption of governmental function, id. § 5K2.7, extreme conduct, id. § 5K2.8, facilitating or concealing the commission of another offense, id. § 5K2.9, avoidance of perceived greater harms, id. § 5K2.11, acting under duress, id. § 5K2.12, or diminished capacity, id. § 5K2.13, endangering national security, or public health or safety, id. § 5K2.14, and terrorism, id. § 5K2.15. In addition, the commentary to many specific offenses contains invited and unbounded departures. See, e.g., id. § 2D1.1, application note 9 (purity of drugs may warrant upward departure); id. § 2Fl.1, application notes 1, 9, 10, 11 (fraud); id. § 2J1.3, application note 4 (perjury); id. § 2L1.1, application note 8 (large number of aliens or dangerous or inhumane treatment of aliens may warrant upward departure in transportation of aliens case); id. § 2Q1.3, application note 3 (negligent mishandling of pollutants, as opposed to knowing contact, may warrant downward departure).

\(^{272}\) Id. § 5K2.0.

\(^{273}\) Former Commissioner Robinson claims that invited departures are illegal because the Commission has considered a factor where it is mentioned. 52 Fed. Reg. 3,986, 3,988 (1987); supra note 84, at 15-16. However, the departure statute clearly contemplates that a factor might be mentioned and still have been inadequately considered. See supra note 267.

\(^{274}\) The Commission's 1988 Annual Report lists substantial assistance to authorities, Guidelines, supra note 3, § 5K1.1, as the most frequently used grounds for departure during the first few months of operation under the guidelines. 1988 Annual Report, supra note 1, table XII. The report also notes multiple cases involving weapons, id. § 5K2.6, duress, id. § 5K2.12, diminished capacity, id. § 5K2.13, and public safety, id. § 5K2.14. The 1989 Annual Report also confirms that authorized departures remain the most common grounds for departure. U.S. Sentencing Comm'n, 1989 Annual Report tables VIII-IX (1990) [hereinafter 1989 Annual Report]; see also, e.g., United States v. Fousek, 912 F.2d 979, 980-81 (8th Cir. 1990) (fraud that damaged public trust in the institution of bankruptcy court as grounds for departure under guidelines section 2F1.1 application note 9); United States v. Dorsey, 888 F.2d 79, 80-81 (11th Cir. 1989) (unrepresentative criminal history score as grounds for upward departure under section 4A1.3), cert. denied, 110 S. Ct. 756 (1990); United States v. Díaz-Villafañe, 874 F.2d 43, 49-52 (1st Cir.) (among other grounds, purity of drugs as grounds for upward departure under section 2D1.1 application note 9), cert. denied, 110 S. Ct. 177 (1989); United States v. Ramirez-De Rosas, 873 F.2d
departs should not generate any controversy that a model of administrative review would need to resolve.275

ii. Authorized Bounded Departures

The second type of departure arises when the Commission mentions a circumstance as a possible basis for departure, and goes on to recommend the size of such a departure. For instance, an offender might receive a downward departure of eight “levels”276 for a crime involving transportation for the purpose of prostitution, if he or she did not commit the offense for profit and if the offense did not involve physical force or coercion.277 Plainly, departure within the specified limit is appropriate for the same reasons that authorized unbounded departures are proper.

Further, a departure beyond the specified range could occur in atypical cases, where a recognized factor is present to an unusual extent. For example, although the commentary to section 2Q1.2 suggests an upward departure of one or two levels for public disruption caused by mishandling of hazardous substances,278 an exceptional disruption might lead a court to depart even more. Both the legislative history279 and the Commission itself280 contemplate that courts will identify factors atypi-

1177, 1178 (9th Cir. 1989) (dangerousness of high-speed chase during illegal transportation of aliens as grounds for upward departure under section 2L1.1 application note 8); United States v. Roberson, 872 F.2d 597, 602-04 (5th Cir.) (burning body of fraud victim is extreme conduct under section 5K2.8, and separately warrants departure under section 1B1.4 as “information concerning the . . . conduct of the defendant”), cert. denied, 110 S. Ct. 175 (1989); United States v. Salazar-Villarreal, 872 F.2d 121, 122-23 (5th Cir. 1989) (reckless flight during illegal transportation of aliens leading to death and physical injury as grounds for upward departure under sections 5K2.1 and 5K2.2 policy statements; United States v. Kikumura, 706 F. Supp. 331, 340-42 (D.N.J. 1989) (among other grounds, intended use of explosives against innocent citizens to disrupt U.S. military policy as grounds for departure under section 5K2.7).

275. While an authorized unbounded departure gives a sentencing court no difficulty in deciding whether there is sufficient justification to depart from the guidelines, the court may still find it difficult to decide the extent of the departure. A court might determine the appropriate extent of the departure by seeking some analogy in the guidelines themselves, looking to the extent of departures prescribed for similar factors in comparable situations. See United States v. Pearson, 911 F.2d 186, 190-91 (9th Cir. 1990) (departure should be guided by analogy to guidelines); United States v. Ferra, 900 F.2d 1057, 1061-63 (7th Cir. 1990) (extent of departure should be linked to structure of guidelines).

276. For an overview of guidelines terminology, see supra note 15.

277. See GUIDELINES, supra note 3, § 2G1.1, application note 1. An adjustment within the specified range would still properly be called a “departure,” since the judge retains the discretion not to make the adjustment.

278. Id. § 2Q1.2, application note 7; see also id. § 2Q1.3, application note 4 (suggesting departure of up to two levels for mishandling of environmental pollutants, depending on risk, harm, and quantity released).


280. GUIDELINES, supra note 3, at 6 (“The Commission intends the sentencing courts to treat each guideline as carving out a ‘heartland,’ a set of typical cases embodying the conduct that each
cal of a particular crime and depart on the basis of such factors where appropriate. Just as the guidelines were based on a "heartland" of typical offenses, the size of an authorized bounded departure was likely based on a heartland of the typical exceptions to these offenses. Extremely exceptional circumstances could lead, without controversy, to a departure beyond the suggested bounds. 281

But what of the typical case involving authorized and bounded grounds for departure? These could be cases where the Commission gave inadequate consideration to the extent of a departure, resulting in an "arbitrary or capricious" choice. Accordingly, a court using the administrative review model would not accept a stated departure amount at face value. Since recommended departure amounts appear in nonbinding commentary rather than binding guidelines, 282 a court clearly has the power to diverge from the suggested amount.

Yet where the Commission recommends a departure of a specified amount, departure in a greater amount would multiply the risks of substituting a court's judgment for what is essentially a policy judgment by the Commission. There is always a plausible argument for choosing a nine rather than an eight. Our ability to compare the seriousness of offenses or to measure the deterrent effects of an incremental change in punishment is crude at best. 283 Hence, if courts begin to question the Commission's choice of amounts, they could ignore the amounts more guideline describes. When a court finds an atypical case, one to which a particular guideline linguistically applies but where conduct significantly differs from the norm, the court may consider whether a departure is warranted.

281. With one exception, the courts have had little or no occasion to consider departures both authorized and bounded by the Commission. The exception is section 4A1.3, which enables the court to depart if the criminal history score does not adequately reflect the seriousness of the offender's prior activity. The section lists several types of information that might lead a court to conclude that the prescribed category does not fit the defendant. The guideline also requires the sentencing court to limit the amount of departure by referring to the criminal history category that better reflects the offender's past. Id. § 4A1.3. Appellate courts have, for the most part, required the sentencing court to justify each upward or downward move in categories. See, e.g., United States v. Montenegro-Rojo, 908 F.2d 425, 431 (9th Cir. 1990) (vacating and remanding sentence in part because district court failed to justify the degree of its departure by analogy to the guideline range for a defendant with a higher criminal history category); United States v. Lira-Barraza, 897 F.2d 981, 986 (9th Cir.) (sentencing court "must state its reasons for the direction and the degree of its departure"), reh'g granted, 909 F.2d 1370 (9th Cir. 1990); United States v. Coe, 891 F.2d 405, 412-13 (2d Cir. 1989) (judge obliged to proceed sequentially through criminal history categories, justifying each movement upward).


often than not. Second-guessing specified departure amounts calls to mind the worst excesses of hard look review in other settings.\textsuperscript{284} Thus, although a court can question a Commission-specified departure amount, even in a "typical" case, the court should interpret this power in a way that will stanch the bleeding of Commission authority. A litigant would have to demonstrate that the chosen amount was essentially irrational. For instance, the litigant might compare the amount of departure at issue with the amount typically allowed for other circumstances, looking either to average judicial departures or to other bounded departures specified by the Commission. It would also be significant if the administrative record revealed no explanation for the Commission's choice of one amount over another. Only an unexplained and significant difference should lead a court to increase the size of its departure.

iii. Unmentioned Circumstance Departures

The third form of departure involves a circumstance that is not mentioned by the Commission. The Commission has taken the view that unmentioned circumstances may form the basis for departure,\textsuperscript{285} and some courts have followed this view.\textsuperscript{286} Nevertheless, the case for a

\textsuperscript{284} See supra note 262.

\textsuperscript{285} The Sentencing Guidelines state:

Circumstances that may warrant departure from the guidelines pursuant to this provision cannot, by their very nature, be comprehensively listed and analyzed in advance. . . . Simply because [a specific offense characteristic] was not listed [in a guideline] does not mean that there may not be circumstances when that factor would be relevant to sentencing.

GUIDELINES, supra note 3, § 5K2.0; id. at 7 ("The Commission recognizes that there may be other grounds for departure that are not mentioned.").

departure of this type is not entirely straightforward.

Whether or not a court feels a departure is justified has often hinged on whether the unmentioned circumstance is typical or atypical for a particular offense. The Commission’s silence about an atypical factor probably shows only that the Commission never considered it. In these cases, there is a clear case for departure. By contrast, where the unmentioned circumstance seems fairly typical of an offense, there is a greater chance that the Commission considered the common characteristics of the crime and simply did not mention them all. Departure in such a case may amount to second-guessing the Commission’s choice of a “base offense level.” Using this line of reasoning, many courts have restricted departures based on unmentioned circumstances.

Nonetheless, the case law dealing with arbitrary and capricious review suggests that courts should not feel constrained from departing in cases involving unmentioned typical factors. For purposes of administrative review in other areas, the quality of the agency’s reasoning process is most clearly suspect where the agency ignores a factor that will appear routinely in the application of a rule. Moreover, a departure in this setting does not inevitably entail a conflict between courts and the

airport in drug trafficking, lack of airport security, and local public sentiment and mores), vacated, 887 F.2d 347 (1st Cir. 1989) (finding circumstances relied upon by district court insufficient to warrant departure).

287. A court can only guess the facts present in the “typical” case considered by the Commission. The Commission’s Supplementary Report analyzes the sentencing data upon which the Commission based its initial guidelines. See Supplementary Report, supra note 27, at 21-39. That report looks to a small number of variables present for many crimes; many other variables go unmentioned. Where official Commission documents do not offer a clue about the description of a “typical” offense, the judge’s own experience might be helpful, since the Commission relied in large part on existing practices. If a judge knows a particular configuration of facts to be commonly associated with an offense, chances are good that the Commission had similar facts in mind. Obviously, this effort involves a great deal of guesswork. See United States v. Ryan, 866 F.2d 604, 610 (3d Cir. 1989) (“[H]ere, as in many situations, there is really no way of knowing whether or not the Commission would view the circumstances of this case as ‘unusual.’ ”).

288. See supra note 15.

289. See, e.g., United States v. Williams, 891 F.2d 962, 966-67 (1st Cir. 1989) (no downward departure for factors not mentioned by Commission, including good behavior in prison and “half-hearted” nature of criminal acts); United States v. Bolden, 889 F.2d 1336, 1340 (4th Cir. 1989) (no downward departure to prevent loss of employment, despite failure of guidelines to mention factor); United States v. Aguilar-Pena, 887 F.2d 347, 353 (1st Cir. 1989) (local antipathy to crime not mentioned by guidelines, but does not make case atypical and may not serve as departure ground); United States v. Medeiros, 884 F.2d 75, 78-79 (3d Cir. 1989) (no downward departure based on unmentioned distinction between walking away from non-secure penal institution and escaping from secure institution); United States v. Lopez, 875 F.2d 1124, 1129 (5th Cir. 1989) (Rubin, J., concurring) (dicta) (because Commission distinguished among types of guns, finer distinctions are not an appropriate basis for departure).

290. For instance, State Farm itself specifically indicated that an agency decision that “entirely failed to consider an important aspect of the problem” would normally be arbitrary and capricious. Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983); see also Public Citizen Health Research Group v. Tyson, 796 F.2d 1479, 1507 (D.C. Cir. 1986) (refusing to find
Commission. By departing, the court identifies a potential problem area for future Commission action and presumes in the meantime that the Commission, by remaining silent, did not intend to require a sentence that conflicts with good sense.

iv. Normally Prohibited Departures

The fourth type of departure is one that arises where the Commission mentions a circumstance and purports (either implicitly or explicitly) to prohibit departures for typical cases, while conceding that departure would be proper in an atypical case. Several examples of these "normally prohibited" departure grounds involve specific characteristics of the offender, such as age or education. Most courts have agreed that they have no power to depart on such grounds against the will of the Commission in a typical case. In addition, courts generally have not allowed departure based on a factor the Commission already considered in setting the guideline offense level (implicitly prohibiting its use as grounds for departure).

In this setting, above all others, the courts may be unduly restricting substantial evidence on the record as a whole where OSHA "entirely failed to consider an important aspect of the problem").

291. See GUIDELINES, supra note 3, § 5H1.1 (age not ordinarily relevant to type of sentence or length of incarceration, but could be relevant if offender is elderly and infirm, or could be relevant to determining length and conditions of probation or supervised release); id. § 5H1.2 (education and vocational skills not ordinarily relevant for departure, but may be relevant to supervision); id. § 5H1.3 (mental and emotional conditions only relevant to determining length and conditions of probation or supervised release, or as provided in chapter 5K); id. § 5H1.4 (physical condition normally not relevant to length of imprisonment, but extraordinary impairment may justify sentence other than imprisonment); id. § 5H1.5 (previous employment record not ordinarily relevant, but may be relevant where guidelines provide for sentencing options); id. § 5H1.6 (family ties and responsibilities not ordinarily relevant for departures, but may be relevant in determination of probation); see also id. § 2F1.1 (permits downward departure where the loss from the offense overstates the seriousness of the crime). It is important to note that these "normally prohibited" departure grounds are listed in nonbinding policy statements rather than binding guidelines. Compare 28 U.S.C. § 994(a)(1) (1988) (Commission shall promulgate guidelines) with id. § 994(a)(2) (Commission shall promulgate policy statements).

292. See, e.g., United States v. Barone, 913 F.2d 46, 50-51 (2d Cir. 1990) (status as a community leader not relevant); United States v. Carey, 895 F.2d 318 (7th Cir. 1990) (dollar loss overstates seriousness of fraud only in rare cases); United States v. Burch, 873 F.2d 765 (5th Cir. 1989) (socioeconomic status never relevant; education relevant only if defendant misused special training in perpetuating crime); United States v. Sails, 872 F.2d 735 (6th Cir. 1989) (family responsibilities not ordinarily relevant); United States v. Weidner, 703 F. Supp. 1350 (N.D. Ind. 1988) (employment and family responsibilities not ordinarily relevant), aff'd, 885 F.2d 873 (7th Cir. 1989).

293. See, e.g., United States v. Van Dyke, 895 F.2d 984 (4th Cir.) (effort at self-rehabilitation), cert. denied, 111 S. Ct. 112 (1990); United States v. Falta, 880 F.2d 636 (2d Cir. 1989) (obstruction of justice); United States v. Campbell, 878 F.2d 164 (5th Cir. 1989) (magnitude of offense and unsuspecting victims in mail fraud case); United States v. Nuno-Para, 877 F.2d 1409 (9th Cir. 1989) (role in offense and amount of gain); United States v. Missick, 875 F.2d 1294 (7th Cir. 1989) (possession of firearm in drug offense); United States v. Paulino, 873 F.2d 23 (2d Cir. 1989) (minor role in offense); United States v. Uca, 867 F.2d 783 (3d Cir. 1989) (number of firearms).
their own departure power. The Commission might give "inadequate" consideration to a circumstance even though it mentions the circumstance and states that it does not typically justify a departure. Indeed, the policy statements prohibiting departures based on offender characteristics like age normally provide no supporting explanation at all. Critics of the Commission have begun to note this lack of explanation. High departure rates may be the most workable way to prod the Commission into explaining itself satisfactorily.

Courts have not directly considered the possibility of departure in typical cases even where the Commission has spoken. However, a few have pointed out the difficulty of knowing what the Commission considers to be a "typical" case, and others have found "unusual" circumstances even though they could arise quite frequently. Each of these reasons for departure responds to the Commission's failure to explain the rationale or scope of its prohibition against departure.

v. Wholly Prohibited Departures

Finally, we consider the last type of departure, in which the Commission explicitly prohibits departures based on a particular circumstance in any case, typical or atypical. In this situation, both statutory interpretation and the administrative review model argue for an
independent decision by the court as to whether or not it should depart. The enabling statute does not compel courts to accept the Commission's judgment that it has adequately considered a given matter. Similarly, the "arbitrary and capricious" review standard suggests that a court could ignore a conclusory prohibition by the Commission and depart where the failure to do so would be unjust. For decades, courts have required agencies to include an explanation of their positions in the record. Whereas a legislature might make a conclusory finding to support a statute, an agency must satisfy the court that its conclusion was a rational one.

While the court may determine for itself whether to depart on grounds prohibited by the Commission, it should do so only where the Commission has failed to support its prohibition. Where the Commission has given a reasoned explanation of its decision to prohibit a departure, courts should give it a respectful hearing. Courts have power to depart only where the Commission has given inadequate consideration—and "adequate" does not mean "optimal." The statutory language connotes a range of acceptable explanations which, for the sake of sentencing uniformity, judges should accept despite personal misgivings.

c. Constraints on the Departure Power

Explanation is a burden. If the Commission must offer a rational explanation wherever it limits one of the grounds for departure, it could expend more than a trivial amount of agency resources in the effort.

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299. For the ambiguous legislative history on this question, see supra note 266.
302. This follows the spirit of the statute, 18 U.S.C. § 3553(b) (1988), which allows the court to depart if it finds "an aggravating or mitigating circumstance" not adequately considered by the Commission.
303. See supra text accompanying note 237 (reproducing language of statute).
304. Some courts appear to assume that they may consider circumstances mentioned in sections 5H1.4, 5H1.10, 4A1.1, and 5K2.12 in an appropriate case, despite the Commission's prohibition. See, e.g., United States v. Big Crow, 898 F.2d 1326 (8th Cir. 1990) (socioeconomic status relevant for departure); United States v. Taylor, 868 F.2d 125 (5th Cir. 1989) (departures based on substance abuse should be made with extreme reluctance); see also Alschuler, Departures and Plea Agreements Under the Sentencing Guidelines, 117 F.R.D. 459, 463 (1987) (departures may be justified in "usual" case where Commission has purported to preclude departure); Weintraub, supra note 193, at 19 (characterizing section 5H1.4 prohibition as arbitrary and capricious).
305. See generally M. SHAPIRO, supra note 263, at 36-54 (discussing problems of limited agency resources).
Moreover, the rationality of an explanation may turn on the quality of its evidentiary support. A requirement of empirical support for limits on departures might be consistent with the peculiar processes of the Commission, yet it would make it even more difficult for the Commission to limit departures over time.

Nevertheless, forcing the Commission to make this effort before it can limit departures will not have the paralyzing effects that strenuous judicial review of agency rationality has had on other agency action. Sentencing is a different process, and it is less susceptible to abuse. In the typical hard-look case challenging the validity of regulations, an adverse judicial ruling will remand the case to the agency and force an attempt to formulate a new rule that the agency can enforce. An adverse sentencing decision, on the other hand, only affects the sentence of one offender. Even a precedent set by a court of appeals would only empower sentencing judges in the circuit to depart on particular grounds in similar cases, which they might or might not choose to do. In short, an adverse sentencing decision is only a partial setback for the sentencing policy of the Commission.

The distinctive and paradoxical role that the SRA gives to courts in the sentencing process also helps limit the impact of a tenacious exercise of departure powers. The statute envisions a process in which the Commission listens and responds to sentencing and appellate courts. It requires the Commission to collect data regarding judicial sentencing and to use such data in drafting guidelines. This judicial role helps identify the instances where the Commission most clearly needs to explain and

306. See generally supra text accompanying notes 33-62 (discussing Commission’s empirical approach).


An adverse decision by one circuit would have the same effect on the Commission as it would on any agency that engages in “intercircuit nonacquiescence,” that is, pursuing its policy in all other judicial circuits after one circuit overturns the policy. See generally Estreicher & Revesz, Nonacquiescence By Federal Administrative Agencies, 98 YALE L.J. 679 (1989) (describing nonacquiescence policies of several agencies).

support any effort to limit departures.\textsuperscript{310} Judges should be most willing to depart, and least willing to accept limitations on the power to depart, where the Commission has not responded to clear input from judges, as envisioned by the SRA.

Judges, then, should use the departure power to enforce Congress' expectation that the Commission will remain particularly responsive to judicial input. Unlike rationality review of policy in more technical areas, the role is well within their abilities. Judges have an unusual familiarity with their own efforts to apply guidelines to particular offenders.

To the extent the Commission has relied on previous judicial experience in drafting the initial guidelines, courts may accept the guidelines without requiring elaborate explanation or empirical support. However, in the future, departures might occur more frequently if the Commission fails to maintain its efforts to monitor judicial application of the guidelines. Similarly, widespread departures may be warranted where the Commission fails to give a reasoned response to earlier judicial decisions explaining departures from the guidelines, or indeed, criticizing the Commission's choice of a base offense level.

Some might argue that if courts assertively exercise their departure powers, the Commission will become unduly subservient to the courts. Such critics might question the ability of courts to contribute to a systematic and coherent sentencing policy,\textsuperscript{311} and these critics explain departures cynically as an effort by judges to retain their traditional (and now unjustified) prerogatives in sentencing. Nevertheless, the statute keeps judges collectively involved as central participants in sentencing policy: sentencing remains a judicial function. Moreover, the statute calls on the Commission to support its policies with something more than preference or hunch, and this aspiration should not go unenforced. Judges who tenaciously exercise departure powers would stay involved where their historical experience gives them special insight. Departures accomplish more safely in this context what the feedback-monitoring doctrines of administrative law attempt to do elsewhere.

\textsuperscript{310} See supra text accompanying notes 64-79; see also United States v. Birchfield, 709 F. Supp. 1064, 1066-68 (M.D. Ala. 1989).

\textsuperscript{311} See, e.g., Jackson, Departure From the Guidelines: The Frolic and Detour of the Circuits—How the Circuit Courts Are Undermining the Purposes of the Federal Sentencing Guidelines, 94 DICK. L. REV. 605, 605-07 (1990) (circuits do not agree on proper standard of review for sentences nor have they created uniform system of application); Proposed Sentencing Guidelines for United States Courts, supra note 83, at 3988 (Dissenting View of Commissioner Robinson) (discretionary system would set back cause of federal sentencing reform); Robinson, supra note 84, at 16-17 (judicial discretion leads to unwarranted disparity in sentencing).
3. Reviewing Commission Procedures: Vermont Yankee and Sentencing

Administrative review aims not only at the substantive adequacy of agency rules, but also at the adequacy of the procedures an agency employs. In the sentencing area, the means and scope of enforcement of procedural requirements remain unclear. Who can go to court to force the agency to comply with procedural requirements? And, assuming courts can enforce at least some procedural requirements, what is the source of those requirements and how broadly should courts interpret them?

Recognizing that the Sentencing Commission presents some distinctive difficulties for procedural review, this Section argues that (1) offenders may themselves challenge procedural shortcomings of the Commission during their sentencing hearings, and (2) because the Commission's work is buffered from political processes, judges should subtly expand the sources and scope of the procedures they will enforce upon the Commission.

As mentioned earlier, the SRA incorporates the informal rulemaking procedures of APA section 553 without the corresponding judicial review provisions. One could conclude from Congress' silence that it decided not to allow courts to enforce section 553 against the Sentencing Commission. However, Congress imposed section 553 on the Commission's guideline drafting process as a "checking mechanism" to ensure a minimum level of consultation with interested parties, and an evaluation of all relevant views. Although Congress decided not to allow any pre-enforcement review of the substance of the guidelines, it expressed no opposition to other forms of judicial review to enforce the procedures of section 553.

Since most parties directly and adversely affected by regulations can challenge rulemaking in court, considerations of equity support reading the statute to allow judicial enforcement of APA section 553, and suggest that courts should do so in sentencing hearings. An offender about to be sentenced has standing to challenge the procedures used to

312. See supra text accompanying notes 190-93.
313. Congress expected the Commission routinely to surpass this minimum level of consultation. S. REP. 98-225, supra note 1, at 180-81, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS 3182, 3363-64.
314. Id. at 181 ("It is also not intended that the guidelines be subject to appellate review under chapter 7 of title 5. There is ample provision for review of the guidelines by the Congress and the public; no additional review of the guidelines as a whole is either necessary or desirable."). The reference to guidelines "as a whole" and the failure to mention procedures used by the Commission suggest that the Congress was referring to substantive review.
create sentencing guidelines; similarly, there is no question that the
claim is ripe and that the offender has no administrative remedies to
exhaust. Moreover, parties other than criminal offenders would have
trouble establishing standing to challenge Commission procedures. If
offenders cannot raise these issues, nobody else can.

Assuming courts may enforce procedural requirements against the
Commission, the next step is to determine which procedural require-
ments to impose. In the past, judges have been willing to supplement the
APA to render informal rulemaking closer to the ideal of adjudicative
fairness. This effort reached a high-water mark during the 1970s, when
judges imposed upon agencies certain procedures to enhance the adver-
sary nature of informal rulemaking. However, the specific types of
procedures that courts tended to impose exposed a conflict with congres-

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316. In order to have standing to challenge administrative action, a plaintiff must suffer injury from agency action (or in limited circumstances, inaction) to an interest arguably within the zone of interests protected or regulated by the statutes involved. Data Processing, 397 U.S. at 152-56. In addition, the challenger must show some causal link between the violation and the injury. Watt v. Energy Action Educ. Found., 454 U.S. 151, 161 (1981). See generally B. Schwartz, supra note 300, §§ 8.11-21 (reviewing the sources of and requirements for various types of standing). The Commission's failure to employ procedures required by law may influence the content of the guidelines; certainly the interests of offenders being sentenced fall within the relevant zone of interests. It is less likely, however, that an inadequate report from the General Accounting Office to the Congress regarding the guidelines, cf. Sentencing Reform Act of 1984, Pub. L. 98-473, § 236, 98 Stat. 1987, 2033 (codified at 28 U.S.C. § 994 note (1988)) (requiring GAO to undertake study of guidelines' impact and report to Congress), would have affected the substance of the guidelines in the same manner. See United States v. White, 869 F.2d 822, 829 (5th Cir.) (GAO report intended solely for benefit of Congress; adequacy of report a political question), cert. denied, 109 S. Ct. 3172, and cert. denied sub nom. Chambless v. United States, 110 S. Ct. 560 (1989); United States v. Mendez, 691 F. Supp. 656, 665-66 (S.D.N.Y. 1988) (no interest peculiar to defendant was violated when GAO failed to submit report to Congress on time).

A more difficult issue is whether offenders should be able to challenge the Commission when it fails to enact guidelines. While limited remedies have been available for potential beneficiaries of regulations, see Stewart & Sunstein, supra note 212, at 1202-20, to make such a remedy available, the statute would have to create a duty on the part of the Commission to enact guidelines that would clearly benefit an offender, cf. Heckler v. Chaney, 470 U.S. 821, 831-32 (1985) (establishing presumption against review of agency inaction).


318. One seeking judicial review of an administrative decision must normally exhaust the prescribed administrative remedies. McKart v. United States, 395 U.S. 185, 193 (1969) ("The doctrine of exhaustion of administrative remedies is well established in the jurisprudence of American law."). The SRA provides no such remedies for those challenging decisions of the Sentencing Commission.


320. See, e.g., Mobil Oil Corp. v. Federal Power Comm'n, 483 F.2d 1238, 1262-63 (D.C. Cir. 1973) (requiring agency to devise adversary procedures that would produce "whole record," including written cross-examination if necessary); International Harvester Co. v. Ruckelshaus, 478 F.2d 615, 630-31 (D.C. Cir. 1973) (dicta) (limited cross-examination would be required on certain
ional policy: judges tried to recreate agencies in their own image—to make a judicial process out of one that Congress had designed instead to resemble a legislative process.  

Judicial supplementation of the APA began to recede with the Supreme Court’s decision in Vermont Yankee. In that case, the Court held that the judiciary could not supplement the procedural specifications of the APA for informal rulemaking. The Vermont Yankee decision rightly recognized that procedural innovations may have an effect on substantive choices. Hence, the judiciary should normally refrain from making such innovations without some direction from Congress.

Offenders can challenge some Sentencing Commission procedures within the confines of Vermont Yankee, that is, within the terms of the APA or the SRA itself. For example, section 553 of the APA calls for publication in the Federal Register of any substantive proposed rule thirty days before its effective date, along with an opportunity for comments on the proposed rules. On several occasions, the Commission has published draft guidelines, received comment, redrafted the guidelines, and sent the revised versions of the guidelines to Congress for approval. While the statute does not contemplate renewed opportunities to comment after every revision to a proposed rule, interested parties should have the chance to comment on any significant changes.

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The interpretive confines of *Vermont Yankee* may, however, prove too narrow for other challenges to Sentencing Commission procedures. For instance, an offender might, at a sentencing hearing, challenge a guideline based on allegedly improper "ex parte" contacts with the Commission outside the statutory "notice-and-comment" procedure. Neither the SRA nor the APA expressly controls ex parte contacts in informal proceedings.\(^3\)\(^2\)\(^7\)

It may, however, be appropriate for a court to insist on such procedural requirements where not plainly foreclosed by statute, at least as a basis for departure in an individual case. Congress endowed the Commission with a form of administrative deliberation (focused on empirical evidence and common law development) that does not strictly parallel a legislative process. The informal procedures of the APA, on the other hand, embody what is essentially a legislative process. A court might therefore require the Commission to conform to certain procedural standards in order to reinforce its unique form of deliberation. Conversely, the requirements should not aim towards a more adversary (that is, judicial) procedure, for that too would conflict with the Commission's singular process.

Admittedly, the source of authority for such procedural enhancements would be somewhat uncertain. Since the SRA gives only limited attention to procedure and little explanation for incorporating section 553 procedures as a minimum,\(^3\)\(^2\)\(^8\) courts would be acting without express textual authority. Nevertheless, the power to depart from the guidelines based on inadequate Commission consideration of a factor is arguably an

not invalidate such a policy statement on procedural grounds, it might give significantly less weight to a policy statement enacted without the benefit of pre-publication comment.


327. See *Action for Children's Television v. FCC*, 564 F.2d 458, 477-78 (D.C. Cir. 1977) (APA does not prohibit ex parte communications in informal hearing); see also *Town of Orangetown v. Ruckelshaus*, 740 F.2d 185, 188-89 (2d Cir. 1984) (ex parte communications not necessarily prohibited in informal process); cf. 5 U.S.C. § 557(d) (1988) (control of ex parte communications for formal hearings only); *United States Lines v. Federal Maritime Comm'n*, 584 F.2d 519, 537 (D.C. Cir. 1978) (finding ex parte communications improper in informal proceeding resembling adjudication); *Sangamon Valley Television Corp. v. United States*, 269 F.2d 221, 224 (D.C. Cir. 1959) (same).

invitation to courts in individual cases to evaluate Commission proce-
dures.329 The SRA, when interpreted in light of understandings about
the judicial role discussed earlier,330 provides authority for judges to
insist on procedures beyond those required by the APA. In this setting,
the justification for a judicial role in shaping administrative procedural
remedies is unusually compelling.

IV

CONGRESS AND THE COMMISSION

Congress created the Commission because it mistrusted its own
short-term political perspective on sentencing policy and felt that a more
insulated and long-term view could lead to some generally acceptable
changes.331 Congress does, however, continue to influence the ongoing
work of the Commission, through (1) review of guidelines submitted
before their effective date and (2) amendment of sentencing statutes.
Congressional contact with the Commission could either contaminate or
nurture the Commission's long-term perspective. This Section argues
that the administrative law doctrines that call for congressional deference
to agencies should apply with particular force to the Sentencing
Commission.332

A. Review of Guidelines

The SRA calls on the Commission to submit any proposed perma-
nent guidelines to the Congress by May of each year.333 The guidelines
do not go into effect until 180 days after their submission to Congress;
the waiting period gives Congress the time to reject or modify the guide-
lines through appropriate legislation.334 This review mechanism raises a
“standard of review” issue for the Congress parallel to the one faced by

Conyers) (departure standard focuses on extent and nature of Commission's deliberations rather
than on substance of consideration). Again, allowing procedural failings as grounds for departure
would permit a district court to impose sentence contrary to a guideline, but would not compel it to
do so.
330. See supra text accompanying notes 205-11.
331. See supra text accompanying notes 21-62.
332. Several norms of administrative government shape the influence of Congress over agencies.
Only a few of them are judicially enforceable. All the norms are relevant nonetheless if one assumes
that legislators sometimes act according to their own views of proper administration, regardless of
what a court might say or do. See Bloch, Orphaned Rules in the Administrative State: The Fairness
Doctrine and Other Orphaned Progeny of Interactive Deregulation, 76 GEO. L.J. 59, 122 (1987)
(conscientious legislator should not improperly interfere with agencies); Brest, The Conscientious
should personally consider the constitutionality of legislation).
334. Id.
courts reviewing agency action: how much deference should the agency be given in this context?

At one extreme, a legislator reviewing proposed guidelines might not defer to the Commission at all, and seek to reject or modify a guideline for any reason whatsoever. For example, voting to increase a penalty proposed in a guideline may, in the legislator's mind, increase the chances of re-election or strengthen the appearance of our nation's ability to fight crime. If enough legislators take this view, the short-term political perspective on sentencing could dilute any distinctive contribution the Commission might make. The pathologies of a legislature, as described through the lens of public choice theory, combined with Congress' prior history of ineptitude regarding sentencing policy, suggest that Congress would exercise inconsistent and incoherent review of the Commission in the future. The Commission may also take its duties less seriously if Congress routinely ignores the Commission's work.

At the other extreme, a legislator might decide to give proposed guidelines great deference. Since the SRA creates an administrative process that significantly differs from the legislative process (in its reliance on empirical evidence), a legislator might choose to preserve the administrative process by removing herself entirely from any review role. A complete refusal to review, however, would be out of line with the congressional design of the process. Congress presumably reserved the review power for a reason. Legislative history expresses the expectation that Congress may reject some guidelines.

Administrative law once again offers precedent for some course lying between complete refusal to review and unrestricted review by Congress. Once Congress has delegated power to an agency, it ought to respect that delegation. This admonition is strongest where the agency is deciding a relatively focused issue that will affect a small group, as in a typical agency adjudication. In such a setting, courts have invali-

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336. Bruff, Presidential Management of Agency Rulemaking, 57 GEO. WASH. L. REV. 533, 542-45 (1989); Tonry, supra note 22, at 323-24. The only difference (albeit a significant one) between unrestrained guideline review and pure reliance on sentencing legislation is inertia: guidelines, even when freely reviewed, go into effect where Congress takes no action at all.
337. See supra text accompanying notes 32-35.
338. See S. REP. 225, supra note 1, at 61, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS 3182, 3244 (Congress may reject guidelines).
339. The Congress has apparently employed a number of different standards of review regarding procedural rules submitted by the Judicial Conference after Supreme Court approval. The transmittal of evidence rules in 1972 marked the beginning of close congressional review of at least some proposed rules. See W. BROWN, FEDERAL RULEMAKING: PROBLEMS AND POSSIBILITIES 2-3 (1981); J. WEINSTEIN, supra note 149, at 71-76.
dated agency action when the action has been improperly influenced by Congress. 341

Where an agency makes decisions with broader ramifications, as in a typical rulemaking proceeding, the expectations loosen somewhat. Courts have hesitated to overturn broader agency policy choices, even when those choices have been influenced by Congress. 342 Congress itself, however, may recognize some value in restraining its informal influence over an agency, even where the agency is resolving nonadjudicative issues with a wide focus. 343 Congress can expect the agency to resist any efforts by individual legislators or committees to influence its decisions, especially on issues falling within the agency’s special expertise.

The aspiration of limiting Congress’ participation in agency affairs is especially appropriate for sentencing. A legislator should object to a guideline only where it appears that the Commission has not adequately considered the types of argument that make its process distinctive. If the Commission has not acted on the basis of empirical evidence, such as evidence of the effects of sentencing on criminal behavior or prison population, a legislator should vote to override the guideline. Similarly, if the Commission has not responded to the expression of values by courts faced with individual cases, the legislator should reject a guideline. Conversely, where the Commission has emphasized appropriate forms of input, as instructed by the statute, then Congress should not overturn a guideline. This form of congressional review would reinforce the review function of courts exercising an expansive departure power.

Where Congress identifies an improperly supported guideline, there is every possibility that Congress will choose to replace the Commission’s


342. See, e.g., United States v. Armada Petroleum Corp., 562 F. Supp. 43, 50-51 (S.D. Tex. 1982) (Congress may generally pressure agency to enforce regulations, if pressure not directed at merits of particular actions), aff’d, 700 F.2d 706 (Temp. Emer. Ct. App. 1983); United States ex rel. Parco v. Morris, 426 F. Supp. 976, 982 (E.D. Pa. 1977) (INS rule change was legislative in nature, and therefore congressional attempts to influence agency’s policy not invalid). This reluctance to overturn agency rulemaking because of congressional intervention may reflect the courts’ inability to distinguish impermissible forms of influence (which inject a statutorily irrelevant factor into the decision) from permissible forms of influence. See generally Fierce, Political Control Versus Impermissible Bias in Agency Decisionmaking: Lessons from Chevron and Mistretta, 57 U. CHI. L. REV. 481, 495-98 (1990) (courts cannot practically forbid agencies to consider legislative concerns outside factors defined by statute; proper rule is that agencies cannot rely on factors Congress prohibited it from considering).

short-term perspective with its own. However, if Congress remains committed to a distinctive administrative process in sentencing, it will not act this way. Rather, Congress should use a limited remedy: it can veto the guideline (through appropriate legislation) and ask the Commission to return to the task, this time in keeping with its special perspective. This legislative remedy parallels the usual judicial remedy—remand to the agency.

The first few rounds of guideline review do not reveal which model of review the Congress has used. The initial guidelines and the amendments effective in October, 1988 all passed without any action on the part of Congress. The May, 1989 amendments (effective November, 1989), containing over two hundred changes, also became effective without any hearings or other formal inquiries by Congress. These actions might be consistent with a deferential review standard, but more likely reflect no review at all. Indeed, a few of the guidelines in the May, 1989 package may have been inadequately supported and some congressional resistance could well have been justified.

B. Amendment of Sentencing Statutes

Congress has been more active in amending sentencing statutes than in reviewing guidelines. Numerous bills passed since the SRA have raised the mandatory minima for crimes of great public concern, especially drug offenses. Moreover, some statutes have included explicit instructions to the Commission. These statutes are responsible for

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348. Amendments making significant changes without any empirical basis or any prompting from courts applying guidelines might include increases in the offense levels for robbery and obscenity violations without explanation. See 54 Fed. Reg. 21,355, 21,365-66 (1989).
350. See, e.g., Crime Control Act of 1990, Pub. L. No. 101-647, §§ 401, 2507, 104 Stat. 4789, 4819, 4862 (1990) (directs Commissioner to adjust offense level or offense characteristics for crimes involving minors or bank fraud); Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 6453, 102 Stat. 4181, 4371-72 (instructs Commission to double offense level where drugs enter country by certain aircraft; sets minimum offense level under guidelines chapter 2); id. § 6454, 102 Stat. 4372 (same for drug crimes involving children); id. § 6468, 102 Stat. 4376 (same for drug crimes in federal prisons); id. § 6482, 102 Stat. 4382 (setting minimum guideline offense levels under chapter 2 for cases involving employees of common carriers under influence of alcohol or drugs, where accident results in death or serious injury). Statutes setting a minimum offense level do not present the same
most of the current increase in federal prison populations,\textsuperscript{351} and threaten to take a greater and greater proportion of cases outside the policy framework the Commission has established.\textsuperscript{352} Moreover, a change in one statute creates pressure for the Commission to change its guidelines in related areas for the sake of consistency, thus creating a ripple of changes in large areas of the guidelines.\textsuperscript{353}

Statutes containing new mandatory minima may constitute the single largest threat by Congress to administrative development of sentencing guidelines. While the SRA contemplates new sentencing statutes, it places the burden on the Commission to propose changes in corrections laws or criminal laws influencing sentencing policy.\textsuperscript{354} Where the Commission can make a proposal to Congress, congressional debate might become focused somewhat more closely on the sorts of evidence that otherwise inform sentencing policy. The Commission can also group proposed changes together in a way that would tend to remove inconsistencies rather than create new ones. The SRA does not purport to describe the exclusive method for enacting sentencing statutes. Nevertheless, Congress will devalue administrative sentencing if it continues to amend statutes without relying on the Commission to initiate or package possible amendments.

As a matter of constitutional and political theory, a past Congress has no power to bind future Congresses.\textsuperscript{355} Consequently, my recommendations here—for Congress to limit itself to rationality review of guidelines and generally to rely on Commission initiative in amending problems as statutes setting a minimum sentence. The minimum offense level can still be overcome by general adjustments or departures.


354. \textit{See} 28 U.S.C. § 994(r) (1988). The Commission must submit a number of reports to Congress recommending legislation, covering topics such as use of prison resources, \textit{id.} § 994(g), (q), offense grades and maximum penalties, \textit{id.} § 994(r). The Commission is also empowered to make recommendations concerning the modification of penalties generally. \textit{Id.} § 995(a)(20).


individual sentencing statutes—do not flow from any claim that the SRA is a higher order of law. Rather, they are methods by which each succeeding Congress can reaffirm the decision of the 98th Congress to reorder its agenda on sentencing matters. Because piecemeal amendments to sentencing statutes had proven unattractive, Congress chose to consider sentencing policy as an integrated package or not at all. It may be desirable for Congress to re-examine the entire guidelines enterprise periodically, to evaluate whether a Commission relying on distinctive forms of support for its guidelines has truly improved sentencing. Nevertheless, the cumulative effect of many amendments to the sentences for single offenses, if out of step with the existing guideline structure, may inadvertently unravel the guidelines before they can be considered as a whole.

C. Areas for Congressional Initiatives

There are important exceptions to my proposal that Congress should ordinarily allow the Commission to initiate and guide the development of sentencing legislation. Some sentencing issues, such as capital punishment or special sanctions for corporate defendants, are not well-suited to the administrative process followed by the Sentencing Commission. Hence, any significant developments in these two areas, and others like them, would be best addressed by Congress. There are several considerations supporting this recommendation.

First, there is little guidance to be found on these subjects in the Commission's specialized sources of evidence: empirical research and common law developments. For instance, there is no convincing empirical support for the proposition that capital punishment generally deters crime. While the moral outrage of the public over a particular crime

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357. See generally supra text accompanying notes 150-59 (judicial body should not make substantive rules in areas where it lacks special expertise).

358. Gregg v. Georgia, 428 U.S. 153, 184-85 (1976) (plurality opinion); van den Haag, The
may be considered an acceptable basis for imposing the death penalty,\(^359\) responding to such outrage does not call on the empirical research capabilities of the Commission. As for common law developments, there is no developed body of federal law regarding capital punishment in the federal court system.\(^360\) Hence, if the Commission were to enact guidelines regarding capital punishment, it would have to proceed without relying on either of its distinctive sources of support.

Similarly, the Commission is currently operating with limited support from empirical analysis and common law developments as it attempts to create sentencing guidelines for corporate defendants. The federal courts have little common law experience in sentencing corporations, and thus the Commission has little to draw on.\(^361\) While there may be a great deal of empirical research that could help the Commission determine the effects of different corporate penalties, much of that work remains to be done.

The second reason for encouraging congressional initiatives in areas like these is the lack of any "packaging" problem. A statute amending the guidelines for one type of offense committed by individuals may require adjustments in other guidelines, if the guidelines are to treat like offenses alike. But a statute regarding capital punishment might not require concomitant changes in other sentencing statutes, to the extent one considers capital punishment a unique form of punishment.\(^362\) Likewise, a statute dealing with corporate sentencing would not require an "unraveling" of the other guidelines, because corporate defendants may be considered as falling into a different category.

Finally, congressional initiatives in these areas would respond to lingering separation of powers concerns regarding the Commission. These

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359. Gregg, 428 U.S. at 183.

360. There is an extensive body of federal constitutional law governing capital punishment in the state courts, but federal judges have little or no experience themselves in operating a capital punishment system. One federal court, the United States Court of Military Appeals, is just now addressing the propriety of certain federal capital punishment statutes and regulations. See United States v. Curtis, No. 63044/MC, 28 M.J. 1074 (1989).


concerns were addressed but not dispelled by the Mistretta decision. Where Congress makes the fundamental value choices in areas outside the special competence of the Commission and apart from the "package" of existing guideline crimes, it properly limits its delegation of authority. The Congress can thereby answer Justice Scalia's charge, in his Mistretta dissent, that the Congress created a "junior-varsity Congress" when it created the Commission.

V
THE PRESIDENT AND THE COMMISSION

The Constitution gives the President considerable power to coordinate administrative policy. The President can accomplish this by appointing agency personnel, requiring submission of agency plans and rules to the White House for review, or offering advice. The Sentencing Commission's location in the judicial branch, along with its special use of empirical data, should limit the means of coordination the President can and should use. Nevertheless, coordination of sentencing policy with other aspects of the federal criminal justice system remains a fitting and feasible objective for the President. I will consider in turn the most prominent means available to the President to coordinate policy.

A. Appointments

The President influences administrative policy most profoundly by appointing those responsible for that policy. The SRA does not list the qualifications of the commissioners who are not judges; it only minimally constrains the President's appointive power. Nevertheless, the integrity of the Commission would be best served if the President and the Senate developed certain traditions regarding the expected qualifications for those commissioners.

The nominees best able to further the Commission's purposes will be those able to assimilate the forms of information most pertinent to the Commission's task: empirical evidence of sentencing effects and evidence of judicial efforts to apply the guidelines. Since the judge-commissioners should be expert in the latter form of evidence, the President and Senate should always remain aware of the need for the commissioner who is not a judge to have a background in empirical evidence relevant to sentenc-

363. See supra Part II(B).
365. See Robinson, supra note 356, at 210-12 (examining presidential influence over agencies).
366. Although three of the members must be judges, the President is otherwise free to nominate whomever he or she chooses. See 28 U.S.C. § 991(a) (1988). The President must also balance the membership between the two political parties, id., although this should not prevent the President from finding appointees sympathetic to his or her own views.
ing. This person might have a background in criminology or criminal justice research; he or she should have an ability to interpret and design research into the operation of the criminal justice system.\textsuperscript{367}

An attorney experienced in the operation of the guidelines and the criminal process could provide a distinct but important contribution to the Commission's mission. He or she would understand the ease or difficulty of using a proposed guideline on a day-to-day basis. Given the presence of the Attorney General's designee on the Commission,\textsuperscript{368} it might be appropriate (at least for the sake of appearances) to nominate an attorney with significant defense experience.

On the other hand, if the President's nominee were chosen primarily because of campaign largesse or personal loyalty to the President, the Senate would have a duty to reject the nominee. Such a nominee would not be able to help the Commission reach decisions through its own distinctive processes, but would primarily serve as the eyes, ears, and voice of another branch.

\textbf{B. Review of Proposed Rules and Agenda}

The President also coordinates policy by requiring executive agencies to submit for review regulatory agenda and any proposed rules under consideration. Several executive orders formalize these review processes by establishing regulatory impact and planning programs to be supervised by the Office of Management and Budget.\textsuperscript{369} These executive orders, however, do not apply to the Sentencing Commission, which is an independent agency within the judicial branch.\textsuperscript{370} Still, it is worth asking

\textsuperscript{367} Although the SRA calls for the commissioners to change from full-time to part-time status after six years, 28 U.S.C. § 992(c) (1988), the Commission has asked to remain full-time. Part-time status might enable the Commission to attract those with stronger credentials and abilities. See Freed & Miller, Intrigue at the U.S. Sentencing Commission: The Battle Over Part-Time Commissioners, 2 Fed. Sentencing Rep. (Vera) 156, 157 (Nov. 1989).


\textsuperscript{369} \textit{E.g.}, Exec. Order No. 12,498, 50 Fed. Reg. 1036 (1985) (regulatory planning program requiring publication of the agency's regulatory policies, goals, and objectives for the coming year and information concerning all significant regulatory actions under way or planned); Exec. Order No. 12,291, 46 Fed. Reg. 13193 (1981) (regulatory impact analysis program requiring a cost-benefit analysis of the agency's proposed rules).

\textsuperscript{370} It is unclear whether these orders could apply to independent agencies within the executive branch. See Exec. Order No. 12,044, 43 Fed. Reg. 12,661, 12,670 (1978) (Justice Department stated that most of this order was binding on the independent regulatory agencies, whereas several members of Congress argued that the President could not require the independent regulatory agencies to comply with the order); see also DeMuth & Ginsburg, White House Review of Agency Rulemaking, 99 HARV. L. REV. 1075, 1083 n.13 (1986) (The House of Delegates of the American Bar Association has resolved that executive orders regarding executive review of agency rulemaking activities should be extended to reach the independent agencies); Shane, Presidential Regulatory Oversight and the Separation of Powers: The Constitutionality of Executive Order No. 12,291, 23 ARIZ. L. REV. 1235, 1238 n.14 (1981) (Executive Order No. 12,291 adopts a definition of "agency" that excludes "independent regulatory agencies").
whether the President should ask the Commission to comply voluntarily with the review process.

Two considerations suggest that even a presidential request for voluntary compliance would be improper. To begin with, the SRA already provides for a formal exchange of views between the executive and the Commission, which serves to facilitate policy coordination. The Commission must submit an annual report of its activity to the President, and must consult with various corrections officials during the periodic review and revision of guidelines. These monitoring devices should provide adequate opportunity for the President to coordinate sentencing policy.

In addition, the form of review favored by recent Presidents—cost-benefit analysis—may be inappropriate for sentencing policy. The costs of a particular sentence can only be partially measured. While we can estimate the cost of a given period of prison or probation, the costs of additional incarceration to an offender and his or her community are much more difficult to measure. The benefits of incapacitating the offender or deterring others from committing crimes are equally elusive. Further, a focus on such benefits would ignore one of the statutory purposes of sentencing: imposing a sentence that is proportional to the crime committed, regardless of the social benefits flowing from that sentence. These considerations suggest that any informal request that the Commission coordinate its policy through the executive must, at the very least, result in a form of executive review that is different from the review currently imposed on executive departments.

C. Informal Advice

Less formal channels of communication may also serve to coordinate policy. Presidents have been able to influence even independent agencies that are not formally accountable to the Executive. The SRA provides a natural communication channel: through the Attorney General or his or her designee sitting on the Commission. This person can monitor the Commission’s activities for the President and inform the Commission regarding matters within the purview of the executive.

372. See id. § 994(o).
373. Strauss & Sunstein, The Role of the President and OMB in Informal Rulemaking, 38 ADMIN. L. REV. 181, 184 (1986). How one views this issue may turn on how expansively one defines “benefit” and “cost.”
374. For example, President Carter was able to influence the Interstate Commerce Commission, an independent agency not normally accountable to the President, through the use of his power of appointment. R. Waterman, Presidential Influence and the Administrative State 75-105 (1989).
There is still a danger that the executive branch commissioner will add an advocate's voice to the Commission's proceedings. For example, it would be inappropriate for this official to support an amendment based on the assertion that the current guideline is "too low" or "too high." To avoid this danger, the executive seat on the Sentencing Commission should develop a tradition of restraint, similar to that of the office of the Solicitor General in the Department of Justice. This commissioner has dual responsibilities as a prosecutor and an officer of the commission; the latter role should restrain the former. The executive branch commissioner should aspire to propose or evaluate possible amendments to the guidelines only when consonant with the Commission's design and empirical focus.

VI
AN INTERNAL ADMINISTRATIVE IDEAL FOR THE COMMISSION

After accounting for all the ways that other bodies might influence the Sentencing Commission, a sizeable number of decisions remain solely in the hands of the Commission. For that core of untouched decisions, where there will be no interference or threat of interference, the Commission must rely only on its own vision of proper administration. This Section outlines an appropriate set of internal norms for the Commission.

The Sentencing Commission has been fraught with internal disagreement and criticism. Of the seven commissioners appointed in 1984, three no longer serve. Commissioner Paul Robinson resigned in 1988 due to his disagreement with the approach adopted in formulating the initial set of guidelines. Robinson's concerns included the Commission's refusal to use existing social science data when setting


377. See generally L. CAPLAN, THE TENTH JUSTICE: THE SOLICITOR GENERAL AND THE RULE OF LAW 3-7 (1987) (describing, in historical context, the judicious role of the Solicitor General in pursuing appeals to the Supreme Court). This tradition of restraint was cultivated in the absence of statutory and regulatory constraints.

378. Professor Mashaw has led the effort to elaborate an internal administrative law. His study of the Social Security Administration, J. MASHAW, BUREAUCRATIC JUSTICE (1983), develops an ideal of administration that he calls "bureaucratic rationality." This ideal exemplifies the agency's efforts to determine claims accurately, in a manner consistent with congressional will, and in a cost-effective manner.

379. President Bush has, after an interim period, replaced these three commissioners. See News Briefs, 47 Crim. L. Rep. (BNA) 1280 (July 4, 1990).

sentences. Commissioner Michael Block resigned after the Commission submitted to Congress a major set of amendments in 1989. He alleged that the Commission was “actively seeking an ‘information free’ environment in which to make sentencing policy,” and that it lacked “any real commitment to research as a basis for sentencing law.” Judge-Commissioner Stephen Breyer, who has also criticized the Commission’s failure to support its decisions with reliable research, did not seek reappointment to the Commission at the end of his abbreviated first term. Observers have also begun to criticize the Commission for responding to political pressure rather than to the information it collects.

This turmoil suggests that the Commission has not yet formulated an ideal by which to measure its own success. More disturbing, it may reflect a divergence of views between the Commission and Congress regarding the proper way to create sentencing policy. An internal ideal that elaborates on the congressional design for the Commission would be an appropriate means to end this turmoil. The following Sections outline appropriate substantive and procedural elements of an ideal that would enable the Commission to realize its full potential.

A. Substantive Ideals

While the traditional objectives of sentencing provide the Commission with several potential measures of substantive success, those objectives often conflict and cannot be pursued simultaneously. Even if the Commission finds a way to combine the conflicting objectives, measuring progress in such a program would be next to impossible. An overview of three potential indices of substantive success should demonstrate the difficulties the Commission would face were it to rely primarily on substantive ideals in the near future.

One measure of the substantive quality of the guidelines, mentioned

382. Id.
383. Block, supra note 376, at 453.
384. Yost, supra note 381, at A25, col. 3; see also Yost, supra note 31, at A21, col. 1.
385. See Block, supra note 376, at 453.
388. See 18 U.S.C. §§ 3551(a), 3553(a)(2) (1988) (providing that a defendant shall be sentenced so as to achieve the purposes of retribution, deterrence, incapacitation, and rehabilitation, to the extent they are applicable in light of all the circumstances of the case).
389. Congress itself refused to choose among the competing substantive objectives, when it directed the Commission to pursue them simultaneously. See 28 U.S.C. § 994(a)(2) (1988) (directing the Commission to issue policy statements for furtherance of purposes referred to at supra note 388); id. § 994(b)(1) (sentencing policy to be consistent with all pertinent provisions of title 18).
from time to time by the Commission, is the rate of departure from the
guidelines by sentencing judges. Under this measure, a low rate of
departure would demonstrate the success of the guidelines and a high
departure rate would signal trouble. This measure of Commission suc-
cess arguably embodies the view, adopted by Congress, that the purpose
of sentencing is to impose a punishment proportional to the offense. A
low number of departures might be viewed as evidence of a successful
effort to rank offenses according to their relative seriousness in the minds
of judges.

It would be unwise, however, to infer successful guidelines from low
departure rates. Courts might depart infrequently for reasons unrelated
to the proportionality of guideline sentences, such as judges' having an
inappropriately restricted view of their departure power. And while
low rates do not necessarily mean that all is well, high departure rates are
not always symptomatic of an unsuccessful guideline. Certainly,
frequent departures may result in disparate sentences imposed under the
same guideline, but the guidelines aim to eliminate unjustified disparities,
not mere differences.

Another potential measure of success might be reduced crime rates.
The SRA embraces this view by naming deterrence as a purpose of sen-
tencing. However, the difficulty in accurately measuring deterrence has
plagued criminal justice researchers in all their efforts. Measuring
the deterrent effects of sentencing guidelines will likely be equally prob-
lematic, with a few exceptions. Where the Commission has set for itself a
goal of deterring a particular type of offense, and the incidence of that
crime changes disproportionately to other offenses without any apparent

by Commissioner Wilkins that federal judges' compliance with sentencing guidelines shows that
guidelines are working). But cf Martin, Response to Michael Tonry, 2 Fed. Sentencing Rep. (Vera)
158 (Nov. 1989) (statistical compliance data should not be interpreted as adequate measure for
evaluating impact of guidelines on sentencing practices).


392. See generally supra text accompanying notes 252-311 (analyzing where courts most
appropriately might exercise departure power).

393. Departures and other constructive criticism from judges are the Commission's primary
sources of information regarding the application of the guidelines to a changing criminal reality.
Where courts tend to give a wide range of reasons for departing from a particular guideline, an
amended guideline would have little chance of addressing whatever shortcomings have prompted the
departures. High departure rates in more reliably point to possible reform where the reasons for
departures fall into a pattern.


395. See, e.g., DETERRENCE AND INCAPACITATION: ESTIMATING THE EFFECTS OF CRIMINAL
SANCTIONS ON CRIME RATES 3-14 (A. Blumstein, J. Cohen & D. Nagin eds. 1978) (no definite
conclusions could be drawn from an extensive body of studies of the deterrent effects of criminal
sanctions on crime rates); A. VON HIRSCH, supra note 32, at 115-27 (questioning deterrent effect of
selective incapacitation). The difficulty of measuring deterrent effects of different sentences is
compounded by the fact of overlapping state and federal criminal sanctions.
explanation other than the guidelines, it may be reasonable to infer a causal relationship. However, the inherent difficulty in isolating the effects of the Commission's actions from a host of sociological, administrative, and other factors means that the Commission will not often be able to take credit for reduced crime rates.

A third indication of the substantive success of the guidelines would be efficient utilization of existing prison space and other correctional resources. While Congress asked the Commission to create guidelines that would generally not result in the need for expanded prison capacity, it is even more important that the Commission consider how society can use prison resources economically. Thus, even if courts are able to apply the guidelines so as to keep prison populations within the limits of available resources, those resources may still be inefficiently used if, for example, the wrong persons are placed in prison for the wrong length of time.

Sentencing theory concedes that the leading goals of sentencing, all endorsed by the SRA, sometimes work at cross purposes. Where different ideals of successful sentencing systems conflict, the Commission currently has no means to convince the proponents of the various ideals that it should legitimately pursue one ideal at the expense of another. Congress has not chosen among competing ideals; nor is it likely that the Commission can demonstrate that any one of the leading purposes of sentencing is unworthy.

The limits of each of those ideals and the possible conflicts among them provide a powerful reason for caution on the part of the Commission. Since its creation, the Commission has had the instinct to move slowly. Perhaps it has reduced disparity in sentencing. But any future attempts to improve the guidelines could threaten the relative uniformity now prevailing, by disturbing accepted sentencing practices.

B. The Procedural Ideal

Given the uncertain dividends that could result from its pursuit of these competing substantive goals, the Commission would be wiser for

398. A proportional sentence might not deter; a focus on deterrence or incapacitation might prevent effective rehabilitation; and experiments with rehabilitation or imposition of simple proportional punishment may frustrate the goal of incapacitation by setting dangerous criminals free.
now to highlight the special procedures that lend it legitimacy: relying on empirical analysis and following common law evaluation of individual cases. The courts and the political branches will demand that the Commission accept this procedural ideal to some degree. The Commission, if it is to accomplish more than shielding Congress from unpleasant or unpopular decisions, must itself embrace the empirical and common law sources of support that Congress found so crucial to creating an improved sentencing policy.\textsuperscript{400}

Although there are some hopeful signs, it is not entirely clear whether the Commission recognizes the importance of such procedures. The Commission has initiated research into the deterrent effects of penalties for particular forms of offenses and offenders.\textsuperscript{401} The Commission has also begun to monitor the outcomes of sentencing decisions.\textsuperscript{402} On the other hand, it has no comprehensive method of observing the process of sentencing, apart from published opinions.\textsuperscript{403} The outstanding question is whether the Commission plans to rely on other unspecified sources of input on which to base its decisions, or to remain content with the sources that presently define its unique deliberative process.\textsuperscript{404}

A procedural ideal, absent some measure of substantive success, will not suffice for long. Even if the Commission relies on appropriate sources of information and provides impeccable support for all its choices, the guidelines could still fail miserably at improving sentencing. And even if it "succeeds" by some acceptable substantive measure of success, evidence of such success may be ambiguous and slow to arrive. In the meantime, the Commission's use of empirical and common law sources of support to generate policy, through its distinctive deliberative processes, will remain paramount for its survival. There in its adminis-

\textsuperscript{400} See supra text accompanying notes 32-35, 63-79.

\textsuperscript{401} The Commission has continued its research into the impact of guidelines on prison populations. 1989 ANNUAL REPORT, supra note 274, at 66-67.


\textsuperscript{404} Cf. Coyle & Strasser, Internal Fights Rend Sentencing Commission, Nat'l L.J., Sept. 4, 1989, at 5, col. 1, 23, col. 1 (quoting Judge-Commissioner MacKinnon) (Congress expects the Commission to use its own judgment, as opposed to mechanically applying past data, as a guide for appropriate sentences); Yost, supra note 31, at A21, col. 1 (statement of Commissioner Nagel that "the data are anchors but not binding or dispositive on our judgment").
trative process, the Commission will find the acceptance of the three branches of government and of the public. There it will join the ranks of other administrative bodies that have proven to the people that such agencies deserve to be tolerated.

CONCLUSION

The working relationships that develop between the Sentencing Commission and the heads of the three branches of government will ultimately determine whether the Commission succeeds or fails at improving criminal sentencing. I have attempted to set out in this Article a series of recommendations about those relationships, each drawn from archetypal agency relationships embodied in doctrines of administrative law.

Perhaps the most critical relationship is the one developing between the Commission and the federal courts. On the whole, courts have not expected enough from the Commission. By taking on the posture that courts usually assume in the review of administrative agencies, sentencing courts could improve both the legality and rationality of Commission decisions. In particular, courts should make more aggressive use of their departure power to extract proper explanations from the Commission regarding controversial guidelines. They should also freely question the Commission’s reading of sentencing statutes when deciding whether or not to depart from the guidelines. On the other hand, sentencing courts should defer to Commission interpretations of ambiguous statutes when there are no grounds for a departure. Finally, sentencing courts should remain receptive to offenders’ objections to the procedures employed by the Commission in promulgating guidelines. Each of these changes in current practice will further the objectives of the SRA, which reaffirmed that sentencing is still primarily a judicial function. They will also reduce the prospects of this agency abusing delegated powers.

The relationship between the Commission and Congress will also need to mature. The Congress must focus more explicitly on the proper standard for legislative review of guidelines. The standard most in keeping with the SRA would require the Congress to accept any proposed guideline with an adequate basis in the distinctive evidentiary sources used by the Commission: empirical data and common law value choices.

Congress should also rely more heavily on Commission initiatives and input when amending sentencing statutes that will have an impact on the existing set of sentencing policies adopted by the Commission. By contrast, the Congress should itself take the initiative to review periodically the entire concept of sentencing guidelines and the duties of the Commission. Congress should also legislate by its own lights in areas such as capital punishment, which do not draw on the special strengths
of the Commission. In these areas, the Commission does not help Congress avoid difficulties that arise from considering sentencing issues piecemeal. Congress should not expect the Commission to resolve sentencing issues simply because they would be politically explosive.

Finally, the executive branch must nurture certain traditions of restraint and respect regarding the Commission. Appointments should include persons with special competence in the sorts of information that the Commission employs most frequently. Furthermore, any advocate of executive views regarding sentencing policy before the Commission must focus on the empirical and common law sources of evidence to which the Commission should respond.

Relationships like these will not enable the Sentencing Commission to create a sentencing policy that will please everyone. They will, however, foster the perception that the process of creating sentencing policy is a legitimate one. They will give everyone involved something that has been in short supply: hope for the future of sentencing.