Amendments in the Route to Sentencing Reform

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The future of sentencing reform appears to rest for now in the hands of permanent sentencing commissions. These commissions have appeared during the last fifteen years, in a sizeable group of states enacting comprehensive changes to their sentencing laws. In virtually every case, the legislature has created a commission to direct future adjustments in sentencing laws. The United States Sentencing Commission is the most visible of these administrative agencies.

From the beginning, the advocates of these institutions have suggested that commissions have several advantages over legislatures. Commissioners, they have argued, will have more expertise and more time than legislators to devote to complex problems of sentencing. Their political insulation will allow them to resist short-sighted but popular views on punishment, and thus take full advantage of the expertise and time available to them. Furthermore, the advantages of time and expertise for a commission should become more pronounced over time. After the commission puts into place an initial set of sentencing guidelines, it can continue to monitor the operation of the system and adjust the guidelines as the need arises.

This account of sentencing commissions places considerable weight on the power of the commission to amend guidelines. Without an amendment mechanism at its disposal, one might conclude that a commission could not orchestrate the sentencing changes necessary in a dynamic criminal justice system. If the commission does have the amendment power, its wise use over time could fulfill the promise of this sentencing institution.

In this essay, I will describe the amendment mechanisms available to the most important sentencing commissions at work today in the United States. The survey leads me to a few related observations about the amendment power. First, the vast majority of sentencing commissions do not have fully independent power to change sentencing law or practice. Lawmakers have not often promised to limit their own future involvement in sentencing questions.

Second, the independent power to amend sentencing guidelines is neither necessary nor sufficient to make a commission successful as it manages a changing system. The amendment power has indeed contributed to the quiet and steady achievements of some commissions. But other commissions without any amendment power have nevertheless managed changes in the law effectively. Conversely, some commissions with even the broadest amendment powers have not used them for effective change. Amendment power is one tool for a commission to use as it manages change in the sentencing system, but it is only one among several possible mechanisms.

Third, the experience of sentencing commissions thus far has shown that the quality of the amendment process—whether independent or not—matters more than the existence or non-existence of an independent amendment power. A commission paying attention to lawyerly "process values" such as notice, participation, and accessibility will have more success, regardless of the institutional arrangements necessary to amend the law.

The values of procedural regularity are far older and more widespread than the innovative sentencing commissions appearing on the scene over the last fifteen years. The commissions, if they are to mature as institutions to administer legal systems, must draw more on the experience of other administrators in American governments. They can no longer think of themselves as exceptional or temporary bodies operating in a crisis setting. The process ethic of the bureaucrat will determine the future of commissions in setting sentencing policy.

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I Degrees of Independent Amendment Power

For those who are enthusiastic about the use of commissions to set sentencing policy, the agency’s permanent presence is critical to its appeal. Once sentencing guidelines go into place, they could quickly fall out of step with their surroundings. The behavior of criminals or criminal justice officials might change: the number of arrests and convictions might rise, or new charging practices might start producing longer average sentences. Just as deadly for a sentencing system, the public may quickly change its priorities as it decides how to respond to crime. To prevent these sorts of changes from undermining the sentencing system, some institution must monitor sentencing practices and respond when the need arises.

That monitoring and adjusting institution, many have argued, should be a permanent commission rather than the legislature. In part, they base their argument on the negative experience of states, such as California, Indiana, and Illinois in the 1970s, where the legislature itself took control of amendments to its determinate sentencing laws. In those states, the legislature increased sentence lengths time and again, sometimes for all crimes and at other times for particular crimes that had captured the attention of the public. The fiscal strains and injustices of this approach intensified the search for other institutional arrangements that would not depend so heavily on the legislature.

The preferred alternative to legislative selection of sentencing policy was a permanent sentencing commission with clear power to monitor sentencing and to adjust the system quickly in light of experience. A commission would, in this view, succeed to the extent it kept the legislature uninvolved in sentencing. It might carry out the broad-brush policy choices of the legislature, but the primary responsibility for developing information about sentencing practices and adjusting the system over time would remain with the commission.

After fifteen years and the creation of more than a dozen permanent sentencing commissions in this country, it now appears that commissions will not hold legislatures at bay. Most commissions do not have one of the best tools to eliminate the need for new legislation: strong independent power to amend sentencing guidelines. Instead of quieting the legislatures, commissions must influence the legislatures’ inevitably active involvement. They must frame issues and debates for the legislatures, provide information, and enable the legislators (perhaps even force them) to understand the consequences of their choices.

A Legislation Necessary for Amendments

The independence a sentencing commission enjoys as it amends guidelines is a matter of degree. There are several partners with whom the commission may share amendment power: the legislature, corrections and parole officials, and judges. Moreover, commissions may exercise a greater or lesser degree of independence from each of their various partners.

The sentencing commissions with the least influence over amendments are those that cannot amend guidelines unless they convince the legislature to pass new sentencing legislation. These commissions may set an agenda for change by initiating one proposal rather than another, and they may gather and present information to the legislatures, but in the end the amendment decision rests with the legislatures.

The sentencing commissions completely dependent on legislatures include those in Florida, Kansas, North Carolina, Tennessee, and Utah. In Delaware, where the legislature requires the judiciary to approve guidelines and amendments before they take effect, the commission remains similarly dependent on the approval of another institution.

Washington state and Oregon also belong in the group requiring legislative action before amendments take effect, although these commissions do have power to amend guidelines unilaterally in a few exceptional circumstances. Both of these commissions have emergency power to amend guidelines in times of severe prison crowding, but the power is rarely invoked. The governor of Washington has never declared such an emergency. The Oregon commission also has power to amend the guidelines dealing with eligibility for “boot camp” prison programs. In all other settings,
the Washington and Oregon commissions can only present recommended amendments to the legislatures for approval by statute.  

"Sunset" provisions strengthen the dependence of some of these commissions on the legislatures. Both the North Carolina and Tennessee commissions, for example, cease to exist after a few years of operation unless the legislatures enact new authorizing legislation. 

Limited delegations of authority to these commissions suggest that legislators do not accept the unflattering portrait of legislatures often used to explain the need for a commission. These legislatures do not see any need to limit the number of times in the future they will have to address sentencing questions. Every time an amendment to the complex guidelines is necessary, the legislatures in these states will once again place criminal sentences on their agendas. The Washington legislature has amended its sentencing laws every year since 1985.  

Nor do they seem to believe that legislative bodies are more incapable of dealing rationally with issues of crime than with other issues. Indeed, these legislatures have retained more authority for criminal sentencing than for many other important policy areas. They readily delegate rulemaking authority to environmental agencies, or to health departments, but not to sentencing commissions. 

It is perhaps not surprising that legislators are reluctant to give away sentencing power. By the same token, it is unexpected to find, even in these states with dependent commissions, that the legislatures now ask commissions to enforce some discipline on the legislative process for sentencing questions. In Florida, the commission must submit, along with any guideline amendments it recommends to the Supreme Court and legislature, an estimate of the impact of the amendments on corrections resources. In Kansas and North Carolina, the commission's disciplinary role goes even further: it must comment on the fiscal impact of any bill proposing changes in felony sentencing, whether or not the bill originates from the commission. In Tennessee, the commission must assist the legislature in classifying any proposed new crime, regardless of the bill's origin. 

Note that these states do not merely make the commissions available as a discretionary resource available at the request of a legislator. They require routine consultation with the commissions during the consideration of sentencing legislation.  

B Guidelines Lack Determinative Power  

A second group of states grants somewhat more independent amendment power to its sentencing commissions. The commissions do have the power to amend guidelines without obtaining the approval of the legislature. Nevertheless, their amendment power is limited because the guidelines themselves are not binding on courts, or they do not abolish parole release, or for some other reason do not effectively control the sentence served. In this group of states, the commission once again must obtain the cooperation of another institution before its proposed changes to the sentencing system can really take effect. A legislature can afford to grant amendment power to the commission because a competing institution can check the commission. 

For example, the sentencing guidelines in Wisconsin do not bind sentencing courts: a court sentencing outside the guidelines need only put reasons in writing, and the sentence cannot be overturned on appeal merely because it fell outside the guidelines. The Wisconsin sentencing commission may amend the guidelines without legislative action, but if sentencing judges do not accept the changes and adjust their sentences accordingly, they will have no effect. In practice, Wisconsin judges have tended to follow the non-binding guidelines, but this should not obscure the commission's reliance on the judicial acceptance of amendments. 

The legislature in Louisiana has explicitly stated its desire for the judiciary to serve as a significant check on the amending power of the commission. After some Louisiana courts began to treat the sentencing guidelines as binding, the legislature passed a joint resolution urging the judiciary to sentence outside the guidelines and to treat them as advisory only.  

In other states, corrections officials are available to check the amending power of the commissions. In Arkansas, judges may sentence outside the presumptive guidelines range, so long as they provide an explanation for the sentence. If the sentence does fall outside the presumptive range and remains unexplained, the offender becomes eligible for early release. Thus,
when the commission exercises its rulemaking authority to amend the guidelines, the changes will not affect sentences unless either judges or the parole authority choose to follow them. Pennsylvania's commission also has amendment power hemmed in by the parole authority.

C More Complete Independence from Legislature, Executive, and Judges

There are only two jurisdictions which give their sentencing commissions authority to amend their guidelines without any action by the legislatures, and without the approval of judges or corrections officials. The two commissions with the broadest amendment power are also the two most visible: the Minnesota and federal commissions.

Minnesota's commission may act independently of the legislature: its proposed amendments to the guidelines take effect automatically if the legislature does not pass a statute to the contrary. The commission must submit rules on some subjects to the legislature, and delay their effective date by seven months to make time for legislators to review the changes. But guideline changes touching on most subjects can take effect without immediate submission to the legislature, according to the commission's own procedural rules.

The commission shares relatively little amendment power with the courts because the presumptive guidelines are binding (that is, an unjustified departure from the guidelines can result in a reversal of the sentence on appeal). Furthermore, appellate decisions have, in practice, reinforced the choices of the commission.

The federal sentencing commission has similarly broad amendment powers. It may amend guidelines by submitting them to Congress: if no legislation over-turns the guideline, it takes effect six months after submission to Congress. The commission may amend policy statements and guideline commentary without submitting the changes to Congress for review. Congress has never held a hearing on any of the commission's proposed amendments, much less passed legislation to block an amendment before its effective date.

It would be a mistake, however, to conclude that the Minnesota legislature and the U.S. Congress gave their commissions amendment power because they wanted no further involvement in sentencing policy. Even in these jurisdictions with the most pervasive forms of independence, the legislature still has the ability to amend sentencing guidelines by passing legislation at any time. In both jurisdictions, this has happened more than a few times since the creation of the commissions.

The U.S. Congress has passed sentencing legislation almost every year since the creation of the sentencing commission. Most of these statutes specify mandatory minimum sentences to override any guidelines, although a few have given the commission direction on how to integrate particular crimes into the guidelines framework.

The Minnesota legislature has not resorted as often to mandatory minimum sentences. But it has periodically amended sentencing statutes, and it has legislated more actively since 1989. The legislature, in a series of new bills over a three-year span, increased the prison terms for drug and sex offenses and increased the pool of non-violent offenders eligible for intermediate punishments.

II Effects of Independent Amendment Power

It appears obvious that the power to amend guidelines could contribute to the success of a sentencing commission. But the experience of commissions thus far only supports the modest claim that the power to amend is one useful tool for a commission. Commissions holding substantial power to amend guidelines sometimes have not adjusted their guidelines wisely, and others with no amendment power have made all the difference in improving their states' sentencing systems.

Illustrations from three jurisdictions should demonstrate the real but limited effects of amendment power. A few years after the guidelines took effect in Minne-
sota, computer projections forecast a prison crowding problem on the horizon. The Commission considered major reductions in the duration of all prison terms, but the proposal kindled too much controversy. Instead, the Commission decided to make a few smaller and less visible changes to the guidelines, and asked the legislature to make a marginal change. These changes successfully kept the system within its resources, without raising fundamental doubts about the guidelines early in their history.

On the other hand, a commission can use its ample amendment power ineffectively. For instance, a commission may simply remain inactive for too long. This occurred in Minnesota when the commission failed to respond to the overuse of jails to replace prison terms, or to prosecutorial charging practices designed to inflate criminal history scores.

It may also occur when a commission makes so many amendments, so quickly, that the lawyers, judges and court officials who apply the guidelines can no longer keep sight of the moving target. The federal commission amended the guidelines, policy statements and commentary 472 times during its first five years of operation. The guideline and commentary governing the use of “relevant” uncharged conduct, § 1B1.3, was amended in each of its first five years. While some of these adjustments may have improved the guideline, it remains difficult to apply uniformly. The continual amendments to this section may simply mirror its unpopularity, and strongly suggest that the entire approach is unstable and unworkable.

Finally, several commissions have managed change skillfully without any amendment power at all. The Florida sentencing commission has no power to amend guidelines, yet it has recently exercised a tremendous influence over changes in the state’s sentencing system. Within a few years after guidelines took effect in 1983, rising conviction rates and other factors led Florida to shorten prison sentences. Mandatory minimum sentences proliferated, and soon the only important sentencing decisions were being made by an administrative body known as the Control Release Authority.

The sentencing commission attempted to convince the legislature, year after year, to respond to prison crowding by changing prison admission decisions rather than through a combination of mandatory minima and early releases. The commission appeared to be without any influence in the legislature, and its recommendations had no impact on sentencing or corrections. Yet in 1993 when continued crowding forced the hand of the legislature, they ultimately adopted a package the commission had advocated. The package added new prison beds, but it also restructured the guidelines to give priority to violent offenders, linked all future changes in sentences to funding for corrections, and repealed several mandatory minimum penalties. If the Florida commission can influence complex reform legislation despite years of isolation and scorn from the legislature, it suggests that commission influence over legislatures everywhere is a robust species that can survive long droughts.

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Even though the sentencing commissions in Florida and several other states lack amendment power entirely, their influence over change in the system is considerable. They have influenced the legislative process by initiating proposals, which can control the selection and framing of issues. They have also, either by statutory directive or by practice, become the only source of information on sentencing questions for legislators.

Regardless of the amendment mechanisms available to them, all commissions must manage a changing system. To do so, they all must gain the cooperation of judges and must convince an ever-interested legislature that its program is effective. Admittedly, amendment power does give a commission the benefit of inertia. If another institution opposes a commission with complete amendment power, it must take affirmative action. This device therefore makes it easier for a commission to gain cooperation and approval. Nevertheless, the amendment power is only one legal mecha-
nism among several available to further a commission's inevitably political tasks.

Indeed, experience of commissions thus far suggests that the amendment power is actually less influential than the commission's ability to influence the legislative process. Until recent efforts by the Pennsylvania commission, no sentencing commission had used its amendment process to bring about fundamental changes in an unsatisfactory sentencing system. They have tended to use amendments for smaller adjustments and to make their case for more far-reaching changes to the legislature (if they make the case for change at all).

III Process Values in Amendments

A related legal technique that commissions use to obtain cooperation and approval is not the amendment power itself, but the procedure they follow as they fashion amendments. Commissions have found the greatest success when they have followed a careful and open consultation process, by and large tracking the "notice and comment" rulemaking process of the Model State Administrative Procedure Act. Agencies promulgating rules under the APA must publish the subject matter or text of a proposed rule, receive comments for a designated period from all interested parties, and publish a final rule along with an explanation for the rule and a response to the most significant comments. They also typically hold meetings open to the public.

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A number of commissions have no choice but to use the rulemaking process set out in the state's APA. Their statutes impose that process on them whenever they amend the guidelines. This form of accountability applies to most of the states with rulemaking power, including Wisconsin, Louisiana, and Arkansas. The Pennsylvania commission must comply with the public meeting laws, and its statute sets out a customized process for the commission to follow, one that resembles the APA rulemaking process.

For those commissions with the power only to recommend amendments to the legislatures, the rulemaking process is less important, because the consultations with affected groups can take place when the recommendations go through the legislative process. Thus, a number of the dependent commissions are not required to follow the state APA. The commissions in Tennessee, Oregon, North Carolina, Kansas, and Florida need not follow the rulemaking process contained in their states' respective APAs.

But the Washington and Utah commissions, even though they have only recommending power, still must follow their state APAs. This may be the better approach, given the real influence that a commission recommendation can have on the prospects of new legislation. The ABA Standards for Criminal Justice also require all sentencing commissions to follow the procedures that apply generally to administrative agencies in rulemaking proceedings.

The Minnesota and federal commissions once again stand apart in the minimal controls placed on their amendment process. Both commissions are exempted from following the APA when they create amendments to the sentencing guidelines. The Minnesota statute, however, does require the commission to create its own set of procedural rules, and to use the APA rulemaking process during the creation of those specialized procedural rules.

Fairly early in its life, the Minnesota commission adopted a process that mimicked the rulemaking process under the state APA. Notice of any proposed amendment goes to all interested parties and appears in the State Register. All meetings are open to the public, and the commission both seeks and receives comments (oral and written) from interested groups not represented on the commission. Although the commission's rules do not require a written explanation for any amendment, they do require the commission to adopt any amendment in a meeting open to the public, where observers can determine the rationale for the amendment. The commission also accounts spe-
cifically for the legislative process in its own practices. It has agreed with the legislature to consult with key legislators before undertaking a significant guideline amendment.\textsuperscript{59}

The federal commission has moved in the same direction as the Minnesota commission, but much more slowly. The commission is not bound to follow all the provisions of the federal APA. While it must comply with the notice and comment procedures of the APA, its process is not subject to judicial review under the APA.\textsuperscript{60} Because there is no forum to enforce on the agency any procedural rulemaking requirements, the commission has taken a rather stinging view of what process its statute requires.

The U.S. Sentencing Commission’s guideline amendment process differs from the rulemaking process of other federal agencies in several ways.\textsuperscript{61} The commission does not have a regularized process for accepting or responding to petitions for the issuance of new guidelines. Its advisory committees do not hold open meetings, and the commission’s own open meetings have not been the locus for all serious policy decisions.\textsuperscript{62} The commission’s notice of proposed rules was at one time too late and too poorly organized to allow any meaningful commentary, but lately the commission has made important progress in this area. It now provides more timely notice, in a clearer format, and allows access to the data its staff generates in support of a proposal.

Perhaps the most glaring shortcoming in the federal commission’s process is its “statement of basis and purpose” for final guideline amendments.\textsuperscript{63} While most rulemaking agencies provide thorough explanations of their final rules, including the factual evidence supporting the rule, and respond to important comments from opponents, the commission’s explanations for its final guidelines are strikingly terse and conclusory.\textsuperscript{64}

In some cases these procedural short cuts do not have much import. But taken together, the departures from standard rulemaking practice have contributed to the distrust of the commission among judges,\textsuperscript{65} defense attorneys, academics, and others. Most of the constituent groups involved with any sentencing commission will be lawyers. Thus, they will be unusually attuned to what Lon Fuller once called the “internal morality” of the law: the clarity, generality, and above all, proper promulgation of legal rules.\textsuperscript{66}

The drafters of the federal Administrative Procedure Act saved administrative agencies from a crisis of legitimacy in the 1940s by creating regular procedures for the agencies to follow. The procedures became acceptable because they were familiar to lawyers. Since that time, federal and state agencies have used such procedures to mollify, more or less, the hostile legislators, executive officials, and powerful private interests watching over them.

Careful consultation and explanation lie at the heart of these procedures. These will be valuable practices for any sentencing commission, whether it is using its independent amendment process or shaping the legislative process. It is time for these virtues to take firm root in any sentencing commission that wishes to survive in the turbulent politics of crime. Habits of consultation and explanation will give sentencing commissions more staying power than any particular amendment mechanism could.

NOTES

1 The states adopting sentencing guidelines and relying on a permanent sentencing commission include Minnesota, Pennsylvania, Florida, Washington, Utah, Wisconsin, Delaware, Oregon, Tennessee, Louisiana, Kansas, Arkansas, and North Carolina. A few states (such as Alaska, Michigan, and Virginia) have statewide guidelines, but no commissions to monitor or adjust them. Several other states, including New York, South Carolina, and Texas, have considered and rejected the concepts of sentencing guidelines and sentencing commissions. See Frase, Sentencing Guidelines in the States: Lessons for State and Federal Reformers, 6 Fed. Sentencing Rep. No. 3 (November/December 1993).

2 M. Frankel, Criminal Sentences: Law Without Order 118-23 (1973); Dailey, Minnesota: Sentencing Guidelines in a Politically Volatile Environment, 6 Fed. Sentencing Rep. No. 3 (November/December 1993). This is part of the standard rationale for administrative agencies working in other areas, as


7 See American Bar Association, Standards for Criminal Justice §§ 18-1.2, 18-1.3 (3d ed. 1993). The ABA standards recommend that legislatures articulate societal purposes in sentencing, define the authorized types of sanctions, and set the maximum limits of the sanctions. The legislature should delegate all more "particularized" efforts to guide judicial discretion to the commission.

8 Under 1993 legislation, the commission submits its recommendations to the Supreme Court, but the legislature must also approve of the changes accepted by the Supreme Court. FLA. STAT. ANN. § 921.001(4)(c) (1993).

9 KAN. STAT. ANN. §§ 74-9101(b)(2), 9101(b)(7).

10 N.C. GEN. STAT. §§ 164-36, 164-43.

11 TENN. CODE ANN. § 40-37-207.

12 UTAH CODE ANN. § 63-89-4 (retains parole).

13 DEL. CODE ANN. tit. 11, § 6581(a).

14 OR. REV. STAT. § 137.665(3).


16 OR. REV. STAT. § 137.667(3).

17 WASH. REV. CODE § 9.94A.040(7),(8); OR. REV. STAT. § 137.667(1).


21 The limits on legislative authority to delegate its policymaking power to an executive agency is narrower in some states than in the federal system. See Sun Ray Drive-In Dairy, Inc. v. Oregon Liquor Control Commission, 16 OR. APP. 63, 517 P.2d 289 (1973). Nevertheless, the states that have denied rulemaking power to their sentencing commissions have granted rulemaking authority to other state agencies regulating important subjects. See OR. STAT. ANN. § 468.020 (environmental rulemaking).

22 FLA. STAT. ANN. § 921.001(9)(a).

23 N.C. GEN. STAT. § 120-36.7; KAN. STAT. ANN. §§ 74-9101(b)(8); 50-1013.

24 TENN. REV. STAT. § 40-37-207.

25 WASH. STAT. § 973.012.

26 WES. STAT. §§ 973.01(b), 973.011.


29 ARK. CODE ANN. § 16-90-804(c).

30 ARK. CODE ANN. §§ 16-90-802(a), (d)(2).

31 42 PA. CONS. STAT. §§ 2153(a)(1); 2154(a); 61 PA. CONS. STAT. § 351.2

32 Under MINN. STAT. ANN. § 244.09(11), the commission must submit proposed modifications to the legislature, and delay their effective date from January 1 to August 1, if the proposed amendments change "the sentencing guidelines grid, including severity levels and criminal history scores," or if the changes result in early release of any inmate. Other changes can take effect without submission to the legislature, although an annual report from the commission to the legislature must describe all amendments.

33 D. Parent, supra note 6, at 155-75.


contains further mandatory minima.


38 Knapp, Implementation of the Minnesota Guidelines: Can the Innovative Spirit be Preserved?, in The Sentencing Commission and Its Guidelines 127, 131-32 (Von Hirsch, Knapp, & Tonry eds. 1987). The commission asked the legislature to apply good-time credits to prisoners serving mandatory minimum sentences. The commission amended the guidelines to reduce some sentences for property offenses, and to extend credit for time spent in jail to sentences served after revocation of probation.

39 D. Parent, supra note 6, at 192-93, 197-98.


47 Model State Administrative Procedure Act art. III (1981)

48 Wis. Stat. § 973.01(b).


54 ABA Standards for Criminal Justice § 18-4.3(d) (3d ed. 1993).

55 Minn. Stat. Ann. § 244.09(5).


58 Minn. R. 3000-0600 (1985). Minnesota’s APA does not require an agency to explain the basis for its rule at the time of adoption, although it does require a public “statement of need and reasonableness” when a rule is first proposed. Minn. Stat. Ann. § 14.131.

59 Parent, supra note 6, at 149


