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SENTENCING LAW IN THE SUPREME COURT'S 1990-91 TERM

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FSR asked Professor Ronald Wright to review this Term's guideline decisions by the Supreme Court. He is the author of a brilliant new article examining the Sentencing Commission in the context of doctrines of administrative law. See Sentencers, Bureaucrats, and the Administrative Law Perspective on the Federal Sentencing Commission, *79 Calif. L. Rev. 1 (1991).*

When the Supreme Court decided in *Mistretta v. United States*[1] that the U.S. Sentencing Commission was not structured in a way that violated the constitutional separation of powers, it created plentiful work for the federal courts. Defendants sentenced under the guidelines began to challenge the legality of various aspects of the guidelines. In the 1990-91 Term, the Supreme Court returned to the sentencing field to survey the progress of the lower federal courts. By taking three guidelines cases in one Term—*Chapman v. United States*,[2] *Braxton v. United States*,[3] and *Burns v. United States*[4]—the Court appeared to be rolling up its sleeves to contribute to the enterprise of a more effective sentencing policy. A reading of the opinions, however, suggests that the Court may have decided instead to wash its hands of sentencing. Taken together, the cases suggest that the Court plans from here on out to leave most questions of sentencing policy to other institutions, such as the Congress and the Sentencing Commission, and perhaps to the lower federal courts.[5]

The issues presented in the three cases did not seem to offer a ready opportunity to shape the relationship between the Commission and the courts. *Braxton* involved the use of stipulated facts in selecting an appropriate guideline, and *Chapman* addressed whether the weight of blotter paper carrying LSD would count towards the total weight of the drug. Only *Burns* addressed an issue with implications for a significant range of sentencing cases: the notice a court must give parties before departing from the guideline range.

In *Braxton*, the defendant had fired a gun as federal marshals were attempting to arrest him. He pled guilty to assault and to a firearm offense, but not to the greater charge of attempting to kill a federal marshal. At his plea hearing, Braxton agreed with the government that he had fired "through the door opening." Although the sentencing guidelines generally direct a court to use the offense guideline section corresponding to the offense of conviction, the court here began instead with the guideline for attempting to kill a marshal. It did so because some Commission commentary allows a court to begin with a guideline more serious than the count of conviction would allow where a guilty plea contains a "stipulation that specifically establishes a more serious offense."[6]

Braxton argued (1) that there was no "stipulation" regarding the facts establishing attempted murder, because there was no stipulation contained in the plea agreement, and (2) that his statements at the plea hearing did not "specifically establish" the more serious offense. Justice Scalia's opinion for a unanimous Court disposed of the case on the second issue. After describing the ambiguities in Braxton's admission that he had fired "through the door opening," the Court concluded that any stipulation Braxton made failed to establish the intent necessary for an attempt to kill a marshal.

The most significant part of the opinion was the reason the Court gave for refusing to address the first issue. Several courts of appeals had addressed the question of whether a stipulation leading to the use of a more serious guideline had to be contained in the plea agreement. Those courts had begun to form views on underlying questions such as the importance of a formal agreement in ascertaining the defendant's level of understanding, or the need to give the defendant bargaining power against the government.[7] Justice Scalia, however, avoided such questions because the Sentencing Commission had begun to consider a possible revision to the guideline language or commentary.[8] The Court noted the Commission's statutory authority periodically to review and revise the guidelines.[9] That power, the opinion said, indicates Congress' desire to let the Commission, rather than the courts, resolve any conflicts over the meaning of the guidelines. The statute, said Justice Scalia, would induce the Court "to be more restrained and circumspect in using our certiorari power as the primary means of resolving such conflicts."[10]

Certainly Congress has given the Commission ultimate authority to revise the guidelines. That power, however, should by no means lead the Supreme Court or any other federal court to hesitate in expressing its views on the merits of a guideline. The Sentencing Reform Act stresses the importance of judicial feedback on the operation of guidelines.[11] When the Commission announces that it will address an issue, that is no signal for courts to bow out of the process. If anything, courts should at that point redouble their efforts to describe to the Commission the practical consequences of different approaches. The Supreme Court and the other federal courts should not view their task as confined to resolving uncertainties in guideline language; they have a positive (and statutory) duty to help improve the guidelines. It is remarkable that Justice Scalia, who so recently dubbed the Sentencing Commission a "junior varsity Congress," seems content with such a minimal role for the Supreme Court in making sentencing policy.

In *Chapman v. United States*, the real significance of the case also lay in its dicta rather than its holding. The defendant had been convicted for selling LSD

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carried in small doses on blotter paper. The issue was whether the weight of the blotter paper, which weighed many times more than the LSD alone, could count for sentencing purposes. The applicability of a statutory minimum sentence,[12] as well as the base offense level,[13] depended on the weight of the drug. Both the statute and the guideline had provisions that counted the entire weight of a "mixture or substance containing a detectable amount" of LSD. The Court, by a 7-2 vote, interpreted this phrase to include the weight of the blotter paper.

This reading of the statute was certainly defensible, given that the statute is generally structured to include the weight of dilutants and cutting agents in the total amount of illicit drugs.[14] But the statutory language and structure taken together were still highly ambiguous.[15] Moreover, the government's reading of the statute led to some peculiar outcomes, since a defendant would be punished more for the weight of the blotter paper chosen than for the amount of drug sold. The Court explained its willingness to tolerate such peculiarities by using two arguments that, once again, demonstrated its reluctance to become involved in the creation of sentencing policy.

Chief Justice Rehnquist's opinion for the Court explained away the arbitrary differences among sentences for different defendants by stating, first, that Congress has no duty to adopt individualized sentencing at all.[16] He concluded from this that there was no reason to construe a statute in a way that would avoid arbitrary differences. Second, when the defendant argued that the statute was unduly vague, Rehnquist responded that vagueness was more acceptable in sentencing statutes than in statutes criminalizing conduct.[17] Taken together, these arguments suggest that the Supreme Court will not inquire closely into the policy implications of sentencing statutes. While there may be some areas courts will "press" a statute in desirable directions, sentencing will apparently not be one. The Court declined to use the opportunity presented by statutory ambiguity to prevent arbitrary results.

In *Burns v. United States*, unlike the other two cases, the Supreme Court took upon itself the responsibility of improving sentencing. Burns had been convicted for defrauding the government, and the trial court had decided *sua sponte* to depart upward, without notifying the parties of that possibility prior to the sentencing hearing. The Court, in a 5-4 decision authored by Justice Marshall, held that Federal Rule 32(a)(1), which gives the parties an "opportunity to comment" on matters relating to the sentence, must include notice of possible grounds for departure. Without notice, the opportunity to comment would be meaningless. Parties would have to anticipate the nearly endless potential for departure.

It is important to appreciate, however, the limited range of responsibility that the Court accepted in *Burns*. The case involved interpretation of a rule initiated in the judicial branch; the Sentencing Commission had not taken a position on the question. Moreover, the issue involved a procedural matter, where courts have traditionally been more inclined to involve themselves, and the vote was close. *Burns* may be the exception that proves the rule: the Supreme Court will not develop or express its own views about the wisdom of sentencing policies.

Is it appropriate for the Court to defer to other institutions on substantive Federal sentencing questions? There are reasons to think not. Courts traditionally demand more from an agency than from the legislature,[18] and the Congress intended to keep judges integrally involved in the formation of federal sentencing policy.[19] The cases this Term indicate, however, that if Federal courts are to remain involved in a meaningful way in sentencing issues, the involvement will likely come from below rather than from above.

FOOTNOTES

[1] 488 U.S. 361 (1989).

[2] 111 S.Ct. 1919 (1991).

[3] 111 S.Ct. 1854 (1991).

[4] 111 S.Ct. 2182 (1991).

[5] Two state cases from the 1990-91 Term also showed a reluctance by the Supreme Court to remain involved in monitoring and shaping a sentencing system. In *Harmelin v. Michigan*, 111 S.Ct. (___) (1991), the Court limited the range of cases in which a defendant could challenge the proportionality of a sentence. In *Payne v. Tennessee*, 111 S.Ct. (___) (1991), the Court limited the Federal role in evaluating victim impact evidence in capital sentencing proceedings.

[6] §1B1.2, *Commentary*, n.1.

[7] *United States v. McCall*, 915 F.2d 811, 816 n.4 (2d Cir. 1990); *United States v. Warters*, 885 F.2d 1266, 1372 n.5 (5th Cir. 1989); *United States v. Guerrero*, 873 F.2d 245, 248 (2d Cir. 1988).

[8] 111 S.Ct. at 1857; *see* 56 Fed. Reg. 1845, 1891 (Jan. 17, 1991).

[9] 28 U.S.C. §994(o) (1988).

[10] 111 S.Ct. at 1858.

[11] Wright, *Sentencers, Bureaucrats, and the Administrative Law Perspective on the Federal Sentencing Commission*, 79 Calif. L. Rev. 1, 16-23 (1991).

[12] 21 U.S.C. §841(b)(1)(B)(v).

[13] §2D1.1(c) & n.*.

[14] 111 S.Ct. at 1924 (statute includes entire weight of mixtures containing heroin, distinguishes between pure PCP and mixtures containing PCP).

[15] 111 S.Ct. at 1929 (Stevens, J., dissenting) ("Although it is true that ink which is absorbed by a blotter 'can be said to 'mix' with the paper,' . . . I would not describe a used blotter as a 'mixture' of ink and paper. So here, I do not believe the [statutory term] 'mixture' comfortably describes the relatively large blotter which carries the grains of LSD that adhere to its surface.") The Commission had asked Congress to clarify the ambiguity.

[16] 111 S.Ct. at 1928.

[17] 111 S.Ct. at 1929.

[18] Compare *Minnesota v. Clover Leaf Creavery Co.*, 449 U.S. 456 (1981) with *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 n.9 (1983).

[19] Wright, *supra* note 11, at 16-23, 50-51.

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