COMMENTARY

THE UNITED STATES SENTENCING COMMISSION AS AN ADMINISTRATIVE AGENCY

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The most remarkable aspect of the 1984 Sentencing Reform Act was Congress' decision to give responsibility for sentencing to an administrative agency, the U.S. Sentencing Commission. The Commission had instructions to restructure what had long been a judicial function and to adapt and improve policy over time. What is the significance of choosing an administrative agency to do this job? I argue that it should profoundly influence the way that courts and Congress address federal sentencing policy in the future. This essay summarizes some of the implications that administrative law doctrine might hold for the federal sentencing system.

I. The Commission and the Judicial Branch

Judges have long been responsible for reviewing and shaping the actions of administrative agencies. Should courts likewise review the Sentencing Commission? This question is more complex than usual in the sentencing area, for the Commission itself was created in an effort to review and shape the actions of sentencing courts.

A judge might act as an enforcer of sentencing policy, as a regulated party, or as a reviewer of administrative policy. The statute asks courts to act in each of these roles to some degree. Because judges normally must impose a sentence within the guideline range, they enforce policy choices of the Commission and comply with its guidelines. On the other hand, the statute requires sentencing courts to depart from the guidelines range when a defendant presents a circumstance "of a kind, or to a degree, not adequately taken into consideration by the Commission."[1] It also requires the Commission to consider departures by sentencing courts and decisions by appellate courts as it amends guidelines to reflect experience and "advancement in knowledge of human behavior."[2]

The departure power gives courts a mechanism for reconciling its conflicting roles in sentencing. Departures allow the Commission to initiate and coordinate sentencing policy. At the same time, they give courts a powerful means for conducting the sort of review function for the Sentencing Commission that they often perform for other administrative agencies. I describe three types of administrative review functions that a court might carry out through its departure powers. If the judicial branch is to remain an active force in formulating sentencing policy, as Congress intended, courts must employ their departure powers in these ways more often.

A. Rationality Review through Departures

The Administrative Procedure Act empowers courts to overturn any reviewable agency action that is "arbitrary" or "capricious."[3] Under this authority, federal courts have required agencies creating rules to take a "hard look" at the evidence and major alternatives presented to them. They must also give an adequate explanation for their choices, and justify their rejection of important evidence or policy alternatives. The objective of such requirements is to promote the "rationality" of agency decisions.[4]

I do not believe that sentencing courts have the power to overturn one of the Commission's guidelines because it is irrational, and thereby refuse to apply the guideline in *any* criminal case. However, the departure power does give a sentencing court the power to depart in *individual* cases which present circumstances not adequately considered by the Commission. Where the Commission has taken a controversial position without any explanation for its choice or its rejection of important competing proposals, a departure would signal to the Commission the inadequacy of its explanation and might promote a more rational sentencing policy. It would also be consistent with the sort of review that courts often exercise over administrative agency actions.

Insistence by courts for adequate explanations and empirical support for sentencing policy may be more appropriate for some forms of departure than for others. Accordingly, I offer a typology of departures that may help to identify the circumstances under which courts should be most assertive in insisting on fuller explanations from the Commission.

The first of my departure categories, "authorized unbounded" departures, covers those departures that the Commission explicitly recognizes as an appropriate basis for departure. The power of the court to depart in these circumstances goes unquestioned and does not depend at all on the adequacy of the Commission's explanation for a guideline. A second category of departures, "authorized bounded departures," is similarly uncontroversial. The Commission has on occasion recognized the propriety of departing on particular grounds and suggested in commentary that the departure should be in a particular amount.[5] Because the suggested size of the departure has appeared in non-binding commentary rather than in the guideline themselves, courts may choose for themselves the proper size of such departures. They should, however, refrain from selecting some departure size other than the one suggested by the Commission unless the Commission's choice is unexplained and inconsistent

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with the size of departures under comparable circumstances elsewhere in the guidelines.

The third category of departures deals with circumstances left unmentioned by the Commission.[6] Here the parallels between a sentencing court's departure power and "arbitrary and capricious" review under the APA begin to have more force. Where the Commission has passed over a particular circumstance without any comment at all, it seems clear that it has not adequately considered the circumstance within the meaning of the departure statute. The failure to mention an important circumstance might lead to a remand for further rulemaking when a court is reviewing an agency under the APA; the best parallel would be for a sentencing court to depart from the guideline range.

A fourth departure category reaches those circumstances that the Commission deems to be "not ordinarily relevant" to a sentence.[7] While the Commission certainly has the power to limit the use of departures after it has adequately considered the potential impact of some circumstances on a sentence in the ordinary case, it may not do so by a conclusory statement that the Commission considers some potential ground for departure to be irrelevant in the ordinary case. Once again, a complete failure by the Commission to explain such a prohibition could justify a court in departing on that ground—despite the Commission's prohibition—just as a complete failure to explain a rule or a rejection of some major alternative policy would be grounds for overturning agency rules under the APA.

Finally, the analogy to arbitrary and capricious review is helpful for a fifth category of departures, those where the Commission has prohibited sentencing courts from considering the circumstances in any case at all. Some of these complete prohibitions merely repeat limitations imposed on sentencing courts by statute, and must be scrupulously observed by sentencing courts.[8] Others, however, were created by the Commission, for instance, the prohibition of departures based on drug dependence or alcohol abuse,[9] without any substantial explanation. A court could properly ignore the Commission's complete bar to using one potential ground for departure if the Commission fails to put into the relevant administrative record a justification for its position, along with an explanation for rejecting serious arguments to the contrary.

Although departure may be proper in any situation where the Commission provides inadequate rational support for a guideline or a purported limit on departure powers, sentencing courts could be especially sensitive to the Commission's explanations for guidelines in areas where courts have departed frequently in the past. The enabling statute calls on the Commission to monitor the operation of the sentencing system and to adjust guidelines accordingly. Its failure to respond to judicial signals that a particular guideline is not working well should be a critical indication that the Commission's consideration has been inadequate.

B. Statutory Interpretation Review through Departures

Often the Commission must interpret a statute when it drafts a guideline. A now-classic case in administrative law, *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,[10] instructs courts in most instances to give agencies deference when they interpret the meaning of statutes they administer, unless the agency interpretation conflicts with the "unambiguous" intent of Congress. When a court reviews the Sentencing Commission's reading of the Sentencing Reform Act, it would appear proper to apply *Chevron*; the resulting guideline should be overturned only if it violates the unambiguous intent of Congress, as discerned through the use of traditional tools of statutory construction.

However, a departure in an individual case, based on the Commission's questionable reading of the statute, would be another matter. The departure statute grants the sentencing court power to decide that the Commission has inadequately considered the consequences of its reading of the statute. In effect, the departure statute rebuts *Chevron's* presumption that agencies rather than courts should interpret ambiguous statutes. A departure based on an inadequate consideration of the consequences of one reading of the statute would identify a problem area for the Commission. Further, the signal would promote possible rethinking of the issue without invalidating the guideline in other cases in the same district or circuit.

C. Addressing Procedural Challenges through Departures

A third use of departures to review the work of the Commission involves challenges to the procedures that the Commission follows in creating or amending guidelines, commentary, or policy statements. The Commission has come under some criticism for various alleged procedural shortcomings, such as failure to give adequate notice of potential subjects for guideline change, or failure to make significant decisions in meetings open to the public. Some of the putative shortcomings in procedures might violate statutory requirements, while others may contribute to misguided or misunderstood policy choices.

The enabling statute and its legislative history both suggest that such procedural shortcomings should probably not form the basis for outright invalidation of a guideline. The D.C. Circuit has recently decided a case to this effect.[11] On the other hand, some procedural shortcomings might provide grounds for departing from a guideline on an individual case. Procedural error by the Commission may convince a court that the Commission has inadequately considered the circumstances implicated by a particular guideline.

II. The Commission and Congress

While administrative law doctrines point toward a more active role or courts in influencing sentencing policy through their departure powers, the use of an

COMMENTARY

administrative agency to coordinate sentencing policy should induce Congress to take fewer initiatives in the sentencing area. Congress turned to an administrative agency because anti-crime sentiment had routinely led legislators to vote for increased prison terms without paying enough attention to prison capacity, or the actual influence of different sanctions on different offenders. An administrative agency, they thought, would be better able to assimilate empirical information, monitor the system in operation, and account for the system wide effects of any changes to sentences for one crime.

Congress has consistently undermined the Commission's capacity to coordinate sentencing policy and to respond to the most reliable types of information available. Perhaps most important, Congress has resorted time and again to mandatory minimum sentences for crimes of current concern (such as drug-related offenses). Statutes have also instructed the Commission to increase the offense level of particular crimes. These amendments to selected sentencing statutes threaten to unravel the power of the Commission to treat criminal sentences as an integrated package. Unless Congress can restructure its drafting process to incorporate a "pay as you go" approach to sentencing legislation (where any increase in penalties for one crime is "paid for" by decreases in penalties for another crime), it would be well advised to allow the Commission to take more of an initiative in identifying potential amendments to sentencing statutes.

Although an effective administrative approach to sentencing requires fewer legislative amendments of selected statutes, there are two ways that the Congress needs to become more active. First, the Congress should not continue to allow packages of proposed guideline amendments that the Commission submits for review to sit idle for six months without any sustained scrutiny. They should review amendments to be sure that the Commission is providing adequate support for its changes, based in empirical evidence or the experience of sentencing courts. Where the Commission has failed to provide such support, Congress ought to pass legislation invalidating the proposed amendment and asking the Commission to try again. Second, Congress might properly legislate on sentencing issues in self-contained areas such as capital punishment or corporate sentences, where the availability or relevance of empirical evidence is questionable and where the side effects on other criminal sentences will be minimal.

Conclusion

Criminal lawyers often know little administrative law, and administrative lawyers just as often know little criminal law. Now that we have turned to administrative agencies in the federal system and in several states to develop sentencing policy, habits of thought will have to change.

FOOTNOTES

[1] 18 U.S.C. §3553(b) (1988).

[2] 28 U.S.C. §§994(b)(1)(C), 994(w); 18 U.S.C. §3742 (1988).

[3] 5 U.S.C. §706(2)(A) (1988).

[4] *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 436 U.S. 29, 40-57 (1983).

[5] *See* U.S.S.G. §§2Q1.2 (application note 6), 2Q1.3 (application note 4).

[6] *See, e.g., United States v. Valle*, 716 F. Supp. 1452 (S.D. Fla. 1989) (departure up to statutory maximum warranted where defendants stood to recover hidden bank larceny proceeds and refused to disclose whereabouts).

[7] Examples of such prohibitions appear now in non-binding policy statements at U.S.S.G. §§5H1.1 to 5H1.6 and elsewhere in the guidelines.

[8] The statute and a Commission policy statement prohibit any consideration of a defendant's race, sex, national origin, creed, religion, or socioeconomic status. 28 U.S.C. §994(d) (1988); U.S.S.G. §5H1.10.

[9] U.S.S.G. §5H1.4 (non-binding policy statement).

[10] 467 U.S. 837, 842-45 (1984).

[11] *United States v. Lopez*, 938 F.2d 1293 (D.C. Cir. 1991).