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

Ronald F. Wright

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

Ronald F. Wright†

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

† Assistant Professor of Law, Wake Forest University. A.B. 1981, College of William and Mary; J.D. 1984, Yale Law School. I would like to thank Kathryn Abrams, Akhil Amar, Stephen Breyer, Cynthia Farina, Miles Foy, Michael Gerhardt, David Logan, Marc Miller, Alan Palmiter, and Michael Paulsen for giving that most precious commodity, time, to earlier drafts of this Article. Errors are distinctively my own. I also appreciate the research assistance of Georgina-Marie Mollick, Jesse Bone, Thomas Coulter, and Jane Mee.

Sentencing Commission. Surprisingly, the administrative law perspective has not yet been a part of the Commission's story.¹ 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.² The Commission was created to establish sentencing guidelines that would direct and confine the discretion of judges.³

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*,⁴ that the structure of the Commission did not violate the constitutional separation of powers.⁵ 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.⁶

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).

3. See U.S. SENTENCING COMM'N, *FEDERAL SENTENCING GUIDELINES MANUAL* 1 (1990 ed. 1989) [hereinafter *GUIDELINES*].

4. 488 U.S. 361 (1989).

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*,⁷ 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

7. 488 U.S. 361 (1989).

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" power⁸ 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

9. Pub. L. No. 98-473, tit. II, ch. 2, 98 Stat. 1987 (1984).

10. 28 U.S.C. § 991(a) (1988).

11. *Id.* Until a 1985 amendment, Act of Apr. 15, 1985, Pub. L. No. 99-22, 99 Stat. 46, only active federal judges could serve on the Commission.

12. 28 U.S.C. § 995(a)(2) (1988).

13. *See id.* § 996.

14. The Commission's duty to promulgate sentencing guidelines and policies is set forth in title 28, 28 U.S.C. §§ 991(b), 994(a)(1)-(2) (1988). The charge to federal judges to follow the Commission's guidelines is set forth in title 18, 18 U.S.C. §§ 3553(a)(4)-(5), 3553(b) (1988). For an ancient example of "sentencing guidelines" used to guide the discretion of clergy handing out penances for various sins, see G. DUBY, *THE KNIGHT, THE LADY, AND THE PRIEST* 59-74 (B. Bray trans. 1983).

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).

17. 18 U.S.C. § 3553(b) (1988).

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, academics, 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.

21. See, e.g., S. CLARKE, S. KURTZ, E. RUBINSKY & D. SCHLEICHER, *FELONY PROSECUTION AND SENTENCING IN NORTH CAROLINA* (1982) (study of the problems of disparate sentencing in North Carolina courts prior to enactment of the state's Fair Sentencing Act, N.C. GEN. STAT. § 15A-1340.1 to .7 (1989)); A. PARTRIDGE & W. ELDRIDGE, *supra* note 2 (study of sentencing disparity in the Second Circuit); Diamond & Zeisel, *Sentencing Councils: A Study of Sentence Disparity and Its Reduction*, 43 U. CHI. L. REV. 109 (1975) (statistical study of effectiveness of sentencing councils in Chicago and Brooklyn federal courts); Seymour, *1972 Sentencing Study for the Southern District of New York*, 45 N.Y. ST. B.J. 163, 169 (1973) (providing statistical data on sentencing and urging action to eliminate disparate sentencing).

22. See, e.g., Hoffman & Stover, *Reform in the Determination of Prison Terms: Equity, Determinacy, and the Parole Release Function*, 7 HOFSTRA 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 HOFSTRA 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).

23. Frankel & Orland, *Sentencing Commissions and Guidelines*, 73 GEO. L.J. 225, 232-35

These reformers feared it was inevitable that the legislature would impose inappropriately stiff punishments in order to take a popular stand against crime.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.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.²⁶

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

(1984). Since the creation of sentencing guidelines in 1987, every sentencing statute passed by Congress has raised the punishment applicable for a crime of current concern, such as drug offenses and bank fraud. See *infra* notes 349-50.

24. *Id.* Other advocates of reform echoed Frankel's concern. See *supra* note 22.

25. AM. BAR ASS'N, 3 STANDARDS FOR CRIMINAL JUSTICE § 18-3.1 comment (2d ed. 1986 Supp.) (a sentencing commission would have "greater flexibility, specificity and oversight than the legislature"); D. PARENT, STRUCTURING CRIMINAL SENTENCES: THE EVOLUTION OF MINNESOTA'S SENTENCING GUIDELINES 11 (1988). Professor Coffee, while making a compelling argument for a politically accountable body, acknowledges the advantages of sustained effort by an administrative body. Coffee, *The Repressed Issues of Sentencing: Accountability, Predictability, and Equality in the Era of the Sentencing Commission*, 66 GEO. L.J. 975, 988 (1978).

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. 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.

feature.²⁷ These efforts culminated in the SRA,²⁸ which created the Sentencing Commission.²⁹ In passing the SRA, Congress apparently accepted the force of those arguments regarding its own likely failure.³⁰ 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.³¹

Obviously, formulating sentencing policy involves some pure value choices that may appropriately and inevitably lead to heated debate.³² However, sentencing policies also reflect a sizeable empirical component,

27. See, e.g., S. 2699, 94th Cong., 1st Sess., 121 CONG. REC. 37,562-64 (1975) (establishment of sentencing guidelines); S. 1437, 95th Cong., 1st Sess., 123 CONG. REC. 13,064-66 (1977) (The Criminal Code Reform Act of 1977); S. 1722, 96th Cong., 1st Sess., 125 CONG. REC. 23,541-44 (1979) (Criminal Code Reform Act of 1979); S. 1630, 97th Cong., 1st Sess., 127 CONG. REC. 20,926-32 (1981) (The Criminal Code Reform Act of 1981). See generally U.S. SENTENCING COMM'N, SUPPLEMENTARY REPORT ON THE INITIAL SENTENCING GUIDELINES AND POLICY STATEMENTS 1-8 (1987) [hereinafter SUPPLEMENTARY REPORT] (tracing the seminal events culminating in passage of the SRA).

The idea of a sentencing and corrections commission came to prominence through the influential work of Judge Marvin Frankel. M. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER (1973) (based on Frankel, *Lawlessness in Sentencing*, 41 U. CIN. L. REV. 1 (1972)). The idea gained momentum through the 1978 draft of the Model Sentencing and Corrections Act, MODEL SENTENCING & CORRECTIONS ACT § 3-110 to -112 (Approved Draft 1978), and through implementation in several states, see generally S. SHANE-DUBOW, A. BROWN & E. OLSEN, SENTENCING REFORM IN THE UNITED STATES: HISTORY, CONTENT AND EFFECT (1985) (survey of sentencing policies in the 50 states and the District of Columbia). The concept of a commission also appeared in a proposal created during sessions of a sentencing workshop sponsored by the Yale Law School. P. O'DONNELL, M. CHURGIN & D. CURTIS, TOWARD A JUST AND EFFECTIVE SENTENCING SYSTEM: AGENDA FOR LEGISLATIVE REFORM 73-75, app. A at 111-15 (1977) (proposed statute prepared by workshop participants).

28. Sentencing Reform Act of 1984, Pub. L. No. 98-473, tit. II, ch. 2, 98 Stat. 1987.

29. 28 U.S.C. §§ 991-998 (1988).

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).

31. See, e.g., 123 CONG. REC. 13,061 (1977) (statement of Sen. McClellan) (bemoaning "flagrant distortions, half-truths and misrepresentations" by groups wishing to defeat criminal code reform). In fact, heated value debates within the Commission continue to hinder the formation of effective sentencing policy. See Yost, *The Long Term Debate: Charges of Politics Dog Sentencing Panel*, Washington Post, July 4, 1989, at A21, col. 1.

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.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,³⁴ paying special attention to empirical data.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.³⁶ So the statute instructed the Commission to adjust the guidelines over

33. This empirical element is present regardless of the theory of sentencing purposes at work. An incapacitation theory depends on predictions of future dangerousness. See *Jurek v. Texas*, 428 U.S. 262, 275 & nn.9-11 (1976) (plurality opinion) (commenting that prediction of defendant's future conduct is essential to determinations of bail, sentence, and parole). See generally Miller & Morris, *Predictions of Dangerousness: Ethical Concerns and Proposed Limits*, 2 NOTRE DAME J.L. ETHICS & PUB. POL'Y 393, 394-95 (1986) (society must endeavor to predict dangerousness since a "just system of punishment presupposes leniency toward those who least threaten social injury"). A general deterrence theory would benefit from evidence regarding the effects of different types of punishment on the crime rate. R. POSNER, *ECONOMIC ANALYSIS OF LAW* 201-26 (3d ed. 1986) (economic analysis of the deterrent value of various criminal sanctions); Coffee, *Corporate Crime and Punishment: A Non-Chicago View of the Economics of Criminal Sanctions*, 17 AM. CRIM. L. REV. 419, 430-32 (1980) (theoretical analysis of relative deterrent value of incarceration versus fines). A theory aimed at making punishment proportional to the seriousness of an offense might benefit from information about the harms caused by crimes, or public perceptions of the seriousness of various crimes. A rehabilitative model improves when authorities can establish a link between particular offender characteristics and effective treatment strategies. Cf. *Williams v. New York*, 337 U.S. 241, 247-49 (1949) (where rehabilitation is the goal of the criminal justice system, a sentencing judge needs more and better information about the offender's life and personality characteristics).

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).

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)(8)-(9), (12)-(19).

36. See generally *supra* notes 25-26 and accompanying text. For a general discussion of Congress' institutional weaknesses, see, e.g., R. RIPLEY, *CONGRESS: PROCESS AND POLICY* 5-19 (4th ed. 1988) (decentralized nature of Congress prevents it from reviewing the impact of policies and responding by updating legislation); Eskridge, *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 VA. L. REV. 275, 322-23 (1988) (analyzing legislative processes using public choice theory, and concluding that Congress is likely to neglect public interest legislation); Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81, 88-92, 95-99 (1985) (legislative practices justifying delegations of political decisions to agencies).

time to respond to suggested improvements in sentencing policy.³⁷

2. *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.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.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.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-

37. See 28 U.S.C. § 994(o)-(p) (1988).

38. 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, *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, *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, *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, *PRINCIPIA ETHICA* (1903).

39. Coffee, *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.

40. This explanation of administrative law, which emphasizes devices to enhance accountability, came to prominence in the 1970s. See generally, Gellhorn, *Public Participation in Administrative Proceedings*, 81 YALE L.J. 359, 361-62 (1972) (proposing procedural solutions to alleged problem of unresponsive agency actions); Stewart, *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).

ing the appointment and removal power,⁴¹ to persuade the agency to follow certain policies.⁴² Likewise, the Congress normally can exert any available pressure to influence agency policy.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),⁴⁴ seeks to involve many people with differing perspectives on a given policy.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.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.⁴⁷ It provides little structure to the forces influencing

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).

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).

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.

44. 5 U.S.C. § 553 (1988).

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). *Id.* § 553(b). The agency must give interested persons an opportunity to submit written statements regarding the proposed rule. *Id.* § 553(c). Rules normally cannot take effect until 30 days after publication of the notice in the Federal Register. *Id.* § 553(d).

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).

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,⁴⁸ and the membership of such agencies typically must be split between members of different political parties.⁴⁹ Such limitations on accountability aim to preserve the integrity of adjudicative proceedings that have historically been the stock-in-trade of independent agencies.⁵⁰ Granted, some elements of political accountability for an independent agency remain,⁵¹ 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

Cir. 1974) (remanding case to EPA for factfinding hearings on the adequacy of data readings and the rationality of conclusions).

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. § 1975(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).

49. See, e.g., 2 U.S.C. § 437c(a)(1) (1988) (Federal Election Commission); 15 U.S.C. § 41 (1988) (Federal Trade Commission).

50. See *infra* note 63 and accompanying text.

51. The budget and review processes of Congress assure that independent agencies pay attention to the legislature. See Kovacic, *The Federal Trade Commission and Congressional Oversight of Antitrust Enforcement*, 17 TULSA L.J. 587, 623-27 (1982) (demonstrating FTC responsiveness to congressional policy choices); Posner, *The Federal Trade Commission*, 37 U. CHI. L. REV. 47, 53-54, 82 (1969) (FTC as a creature of Congress). Furthermore, the executive controls resources available to the agency and may control certain personnel decisions as well. See Dixon, *The Independent Commissions and Political Responsibility*, 27 ADMIN. L. REV. 1, 6-12 (1975) (enumerating available executive controls over independent commissions); see also Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 640-43, 650-53 (1984) (suggesting an appropriate balance between congressional and presidential control of agencies).

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,"⁵² but was placed outside the executive, in the judicial branch.⁵³ Although the standard, unstructured APA notice-and-comment procedures were applied to the Commission's promulgation of guidelines,⁵⁴ Congress supplemented these procedures with an unusual mandate. In addition to taking comments from all interested parties, as required under the APA,⁵⁵ the Commission is specifically required to "consult with authorities on, and . . . representatives of, various aspects of the Federal criminal justice system."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.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.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.⁵⁹ Those prior experiences differ from the

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. *Id.* In addition to these constraints, the President must consult with various interested parties before making appointments to the Sentencing Commission. *Id.*

53. *Id.*

54. 28 U.S.C. § 994(x) (1988) (applying the informal rulemaking procedures of the APA, codified at 5 U.S.C. § 553 (1988), to the Commission).

55. See *supra* notes 44-47 and accompanying text.

56. 28 U.S.C. § 994(o) (1988).

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. *Id.* The Commission is directed to consider these and other outside sources of relevant data. 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).

58. See *supra* note 35. The legislative history is replete with references to the primarily empirical nature of the Commission's drafting process. See, e.g., S. REP. 98-225, *supra* note 1, at 162, reprinted in 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"); *id.* at 169, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS 3182, 3352 (sufficiently detailed and refined guidelines only possible through "extensive research capability").

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.⁶⁰ 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.⁶¹ Now, as the Commission begins to address the propriety of that unified policy, the political heat is likely to rise.⁶² 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

worst aspects of the legislative process. One such agency "captured" in this manner, according to the Ralph Nader Study Group, is the Interstate Commerce Commission. See R. FELLMETH, *THE INTERSTATE COMMERCE COMMISSION: THE PUBLIC INTEREST AND THE ICC* at vii-viii (1970).

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 intense 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").

60. See 1988 ANNUAL REPORT, *supra* note 1, at 1-2 (82.3% of sentences imposed within guidelines). But cf. Tonry, *Are the U.S. Sentencing Commission's Guidelines "Working Well"?*, 2 Fed. Sentencing Rep. (Vera) 122 (Oct. 1989) (statistics from 1988 Annual Report not adequate to support conclusion of increased uniformity in sentences).

61. SUPPLEMENTARY REPORT, *supra* note 27, at 16-17; Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1, 15-18 (1988) (describing adoption of average past practice as compromise to make guidelines more acceptable).

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.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.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,”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.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;⁶⁷ and (2) the

63. See generally J. FREEDMAN, *CRISIS AND LEGITIMACY: THE ADMINISTRATIVE PROCESS AND AMERICAN GOVERNMENT* 129-30 (1978) (arguing that procedural rules followed by administrative agency suggest fairness of its methods, thus restoring public faith in legitimacy of its actions). The Federal Trade Commission primarily employed adjudicatory proceedings for the first six decades it existed. See R. CASS & C. DIVER, *ADMINISTRATIVE LAW: CASES AND MATERIALS* 271-75 (1987). It was not until 1975 that the Commission was even given rulemaking power. See Magnuson-Moss Warranty—Federal Trade Commission Improvement Act of 1975, Pub. L. No. 93-637, 88 Stat. 2183, 2193-98 (codified as amended in scattered sections of 15 U.S.C.). The National Labor Relations Board is the agency that has most persistently preferred adjudication to rulemaking. Note, *NLRB Rulemaking: Political Reality Versus Procedural Fairness*, 89 YALE L.J. 982, 984 (1980).

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).

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).

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).

66. 28 U.S.C. § 991(a) (1988).

67. This monitoring procedure is used both to initially establish guidelines, *id.* § 994(m)

provisions creating appellate review of sentences imposed by lower courts.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.⁶⁹ This helps legitimize the Commission's actions where it cannot demonstrate that its guidelines reflect empirical realities⁷⁰ or are a result of the democratic process.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.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.⁷³

Agency policymakers at the CFTC and elsewhere find that their adjudicative activities support their policymaking activities. In addition

(Commission to ascertain average sentences imposed by judges for various crimes as "starting point" in drafting guidelines), and to evaluate them once they are promulgated, *id.* § 994(w) (requiring judges to submit to Commission reports containing relevant data on each sentence made under guidelines, and requiring Commission to prepare and submit to Congress an analysis of these reports with recommendations for legislative action).

68. 18 U.S.C. § 3742 (1988); see S. REP. 98-225, *supra* note 1, at 151, *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. This, in turn, will assist the Sentencing Commission in refining the sentencing guidelines as the need arises.").

In addition to the forms of judicial involvement in sentencing policy already discussed, the Sentencing Commission may also be accountable in some way to the Judicial Conference, which oversees all policymaking functions of the judiciary. See generally 28 U.S.C. § 331 (1988) (creating Judicial Conference and giving it authority over business of U.S. courts).

69. For a description of the common law "mystique," see A. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 26 (1962). See generally M. EISENBERG, *THE NATURE OF THE COMMON LAW* (1988) (framing a theory of common law adjudication).

70. See *supra* text accompanying notes 38-39.

71. See *supra* text accompanying notes 52-53.

72. See 5 U.S.C. § 551(4)-(7) (1988) (defining rulemaking and adjudication). It is possible that an agency could use adjudication to announce significant new policies, but I am using the paradigm of adjudication as a setting for incremental changes in law and policy. See Diver, *Policymaking Paradigms in Administrative Law*, 95 HARV. L. REV. 393, 403-05 (1981) (describing strengths of incrementalist paradigm of policymaking).

73. 17 C.F.R. § 10.8 (1989) (hearing officer); *id.* § 10.21 (initiation of proceedings); *id.* § 10.102(a) (review of initial decision). An analogous procedure is used by the Social Security Administration, see 42 U.S.C. § 1383 (1988), and by the National Labor Relations Board, see 29 U.S.C. § 160 (1988).

to resolving a dispute, adjudication gives the agency information about how an established policy works.⁷⁴ 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.⁷⁵ Adjudication also provides an opportunity to experiment with incremental policy change, to find the prudent boundaries for a policy initiative.⁷⁶

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,⁷⁷ the Commission, although required to listen carefully to its adjudicators, does not itself adjudicate.⁷⁸ Furthermore, the SRA authorizes the Commission to diverge somewhat from the common law guidance.⁷⁹ 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.⁸⁰ The hundreds of federal judges setting sentences had no effective means of coordinating their choices,⁸¹

74. See *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 290-95 (1974); *SEC v. Chenery Corp.*, 332 U.S. 194, 201-03 (1947). There is, however, some limit on the ability of the agency to combine these two products of adjudication. For example, an agency must take care to insulate its adjudicators from its prosecutors and other policymakers. 5 U.S.C. § 554(d) (1988).

75. Cf. Bernstein, *The NLRB's Adjudication-Rule Making Dilemma Under the Administrative Procedure Act*, 79 YALE L.J. 571, 596-97 (1970) (suggesting the importance of bringing field experience to bear, but arguing that this supports rulemaking over adjudication).

76. See Diver, *supra* note 72, at 403-04 (narrow fact-specific decisions ensure “modest shifts” in policy); Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 HARV. L. REV. 921, 926 (1965) (rules evolve in agencies in the course of adjudication); see also *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1974) (Board develops standards cautiously, in case-by-case manner); *Chisholm v. FCC*, 538 F.2d 349, 357-58 (D.C. Cir.) (agency develops definitions of statute on case-by-case basis), *cert. denied*, 429 U.S. 890 (1976).

77. Compare 7 U.S.C. § 13a (1988) (CFTC adjudication) with *id.* § 4a(j) (CFTC rulemaking power).

78. Sentencing judges and the Sentencing Commission are not even part of the same organization.

79. The Commission is authorized to discount pre-guidelines sentencing experience, and is not bound by post-guidelines experience. 28 U.S.C. § 994(m) (1988).

80. See, e.g., 18 U.S.C. § 471 (1988) (0 to 15 years' imprisonment for counterfeiting); 18 U.S.C. § 1963 (0 to 20 years' imprisonment for racketeering).

81. There were limited efforts at coordination, such as sentencing institutes and sentencing

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.⁸² 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.⁸³ 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.⁸⁴ 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.

councils, but these were widely regarded as failures at achieving uniformity at the local level, let alone at the national level. See M. FRANKEL, *supra* note 27, at 63-67; Diamond & Zeisel, *supra* note 21, at 147.

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*, 1st 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).

82. See 18 U.S.C. § 4203(b)-(c) (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); see also N. COHEN & J. GOBERT, *THE LAW OF PROBATION AND PAROLE* §§ 309-311 (1983) (describing operation of U.S. Parole Commission); *infra* note 93 (discussing history of parole function). Judges and parole officials also shared policymaking powers with corrections officials and prosecutors through their charging and bargaining decisions. See M. FEELEY, *THE PROCESS IS THE PUNISHMENT* (1979) (study of interplay among relevant parties, including judges, police, defense attorneys, and prosecutors, in lower criminal courts); Alschuler, *Sentencing Reform and Prosecutorial Power: A Critique of Recent Proposals for "Fixed" and "Presumptive" Sentencing*, 126 U. PA. L. REV. 550, 550 (1978) (power of sentence determination dispersed among legislatures, prosecutors' offices, courts, and correctional agencies such as parole boards); Coffee, *supra* note 25, at 1043-47 (advocating sentencing commission as means of coordinating and standardizing informational inputs to judges before they sentence offenders); cf. K. DAVIS, *DISCRETIONARY JUSTICE* 162-214 (1969) (detailing consequences of providing discretionary powers to parole officers and prosecutors).

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

85. See generally L. FULLER, *THE MORALITY OF LAW* 46-49 (rev. ed. 1969) (positing that clarity, availability, and prospective application of rules are necessary to success of a legal system).

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.

88. See S. WHEELER, K. MANN & A. SARAT, *SITTING IN JUDGMENT: THE SENTENCING OF WHITE-COLLAR CRIMINALS* (1988) (describing how federal district court judges think about sentencing of criminals).

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.⁹⁰

3. *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.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,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.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

90. *United States v. Vizcaino*, 870 F.2d 52, 53-54 (2d Cir. 1989); see also Schwartz, *Options in Constructing a Sentencing System Sentencing Guidelines Under Legislative or Judicial Hegemony*, in REFORM AND PUNISHMENT, *supra* note 22, at 71, 84-86 (discretion remains with judges under various forms of structured sentencing). In one expression of judicial disapproval, the Commission is damned for attempting to take too much discretion from judges, and then criticized for requiring the judge to make discretionary decisions. Weigel, *The Sentencing Reform Act of 1984: A Practical Appraisal*, 36 UCLA L. REV. 83, 89, 99-103 (1984).

91. See R. PIERCE, S. SHAPIRO & P. VERKUIL, ADMINISTRATIVE LAW AND PROCESS 350-417 (1985); Monaghan, *Marbury and the Administrative State*, 83 COLUM. L. REV. 1 (1983) (judicial review of administrative power is legitimate and necessary).

92. See L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 320-27 (1965).

93. See N. COHEN & J. GOBERT, *supra* note 82, § 1.05. A 1948 revision of the original federal parole statute (dating from 1910) created a five-member national Board of Parole. Act of June 25, 1948, ch. 311, § 4201, 62 Stat. 683, 854. That body, part of the Department of Justice, adopted guidelines in 1972 for setting presumptive release dates. 28 C.F.R. § 2.20 (1989). In 1976, the Parole Commission and Reorganization Act, Pub. L. No. 94-233, 90 Stat. 219 (1976), replaced the Board of Parole with the Parole Commission and formalized the guideline approach. The Sentencing Reform Act, Pub. L. No. 98-473, tit. II, ch. 2, § 218(a)(5), 98 Stat. 1987, 2027 (1984), abolished the parole function for all cases sentenced under sentencing guidelines.

Commission policies,⁹⁴ such as its Parole Guidelines.⁹⁵

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 *MISTRETTE*

In the first constitutional challenge to the Sentencing Commission, *Mistretta v. United States*,⁹⁶ 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.⁹⁷ Both the lower courts⁹⁸ and commentators⁹⁹ have

94. Only when the Commission adopted explicit guidelines in 1972 did some courts begin to hold that certain Commission determinations of parole for particular prisoners were "reviewable" under the Administrative Procedure Act, 5 U.S.C. § 701(a)(2) (1988), or under the due process clause. See Divine, *Parole Release and Due Process*, 11 WAKE FOREST L. REV. 641, 647-50 (1975). Federal prisoners may only obtain judicial review of parole decisions under limited circumstances, and never on direct review. See *United States v. Addonizio*, 442 U.S. 178, 184-87 (1979) (Parole Commission actions do not retroactively affect validity of sentences and are not basis for collateral attack); *Greenholtz v. Inmates of the Nebraska Penal & Correctional Complex*, 442 U.S. 1, 11 (1979) (prisoners must establish liberty interest beyond mere expectation of parole to receive due process protection); 18 U.S.C. § 4218(d) (1988) (defining Commission actions reviewable under APA), *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); N. COHEN & J. GOBERT, *supra* note 82, §§ 16.03-.05.

95. 28 C.F.R. § 2.20 (1989).

96. 488 U.S. 361 (1989).

97. *Id.* at 412.

98. Since *Mistretta*, many lower courts have denied facial challenges to the sentencing guidelines. *E.g.*, *United States v. Seluk*, 873 F.2d 15 (1st Cir. 1989) (*per curiam*); *United States v. Vizcaino*, 870 F.2d 52 (2d Cir. 1989); *United States v. Bolding*, 876 F.2d 21 (4th Cir. 1989); *United States v. White*, 869 F.2d 822, 825 (5th Cir.) (*per curiam*), *cert. denied*, 109 S. Ct. 3172 (1989); *United States v. Allen*, 873 F.2d 963 (6th Cir. 1989); *United States v. Pinto*, 875 F.2d 143, 144-46 (7th Cir. 1989); *United States v. Brittman*, 872 F.2d 827, 828 (8th Cir.), *cert. denied*, 110 S. Ct. 184 (1989); *United States v. Belgard*, 894 F.2d 1092, 1096-101 (9th Cir.), *cert. denied*, 111 S. Ct. 164 (1990); *United States v. Thomas*, 884 F.2d 540 (10th Cir. 1989); *United States v. Harris*, 876 F.2d 1502, 1504-06 (11th Cir.), *cert. denied*, 110 S. Ct. 569 (1989); *see also* *United States v. Smith*, 713 F. Supp. 1315, 1319 (D. Minn. 1989) (guidelines do not violate presentment clause).

99. See, *e.g.*, Redish, *Separation of Powers, Judicial Authority, and the Scope of Article III: The Troubling Cases of Morrison and Mistretta*, 39 DE PAUL L. REV. 299, 311-14 (1990); Note, "The

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.¹⁰⁰ *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.¹⁰¹ 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.¹⁰² According to this tradition, reckoning with constitutional problems should, whenever possible, occur later rather than earlier.¹⁰³

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,¹⁰⁴ and (2) the Commission's structure violated the constitutional separation of

Judge Would Then Be the Legislator": Dismantling Separation of Powers in the Name of Sentencing Reform, 65 WASH. L. REV. 249, 256-58 (1990) (authored by Kristin L. Timm); Recent Developments, 20 ST. MARY'S L.J. 1013, 1017-18 (1989); see also Comment, *The Constitutionality of the Federal Sentencing Reform Act After Mistretta v. United States*, 17 PEPPERDINE L. REV. 683 (1990) (authored by Charles Eskridge III) (characterizing *Mistretta* as having resolved issues surrounding the Commission, but not about the guidelines themselves).

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.

104. *Mistretta*, 488 U.S. at 371.

powers.¹⁰⁵ These were facial challenges to the constitutionality of the guidelines, and not challenges to how they applied to Mistretta's particular case.¹⁰⁶

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."¹⁰⁷ 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 . . ."¹⁰⁸ The words express an axiom of representative government: the people's elected agents cannot freely assign their delegated powers to subagents.¹⁰⁹ 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.¹¹⁰

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.

107. *Mistretta*, 488 U.S. at 371.

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).

109. *Industrial Union Dep't v. American Petroleum Inst.*, 448 U.S. 607, 672-73 (1980) (Rehnquist, J., concurring) (citing Locke, *Second Treatise of Civil Government* ¶ 141 in THE TRADITION OF FREEDOM (M. Mayer ed. 1957)); cf. RESTATEMENT (SECOND) OF AGENCY § 78 (1958) (agent can delegate authority to subagent to perform "incidental mechanical and ministerial acts" but cannot delegate authority to perform acts requiring discretion or agent's special skill).

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.¹¹¹ 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.¹¹²

In comparison with other statutes that have survived delegation challenges, the instructions to the Commission in the SRA seem obsessively detailed.¹¹³ As noted by the *Mistretta* Court,¹¹⁴ the Act sets forth three goals of sentencing policy,¹¹⁵ four purposes of sentencing,¹¹⁶ seven factors to consider in categorizing offenses,¹¹⁷ and eleven factors to consider in categorizing defendants.¹¹⁸ Dozens of other provisions in the Act give point-blank instructions to the Commission to draft guidelines on specific topics with a specified outcome.¹¹⁹ 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).

116. 18 U.S.C. § 3553(a)(2) (1988).

117. 28 U.S.C. § 994(c)(1)-(7) (1988).

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(e) (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.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.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.¹²² Lack of

based on specific class of offense); *id.* § 994(j) (guidelines must reflect general appropriateness of non-incarcerative sentence for nonviolent first offender); *id.* § 994(k) (guidelines must reflect general inappropriateness of incarceration for purposes of rehabilitation); *id.* § 994(l) (directions regarding concurrent and consecutive sentences).

120. See, e.g., Crime Control Act of 1990, Pub. L. No. 101-647, § 1214, 104 Stat. 4789, 4833 (setting new minimum sentences); Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, §§ 6371, 6452, 6460, 6481, 102 Stat. 4181, 4370, 4371, 4373-74, 4382 (setting new minimum sentences); Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, §§ 1002, 1102, 100 Stat. 3207, 3207-2 to 3207-4, 3207-10 to 3207-11 (1986) (new minimum sentences).

121. The handful of courts that have found an improper delegation cited the importance of criminal sanctions. Some held that the setting of criminal penalties was a "nondelegable" power. See, e.g., *United States v. Eastland*, 694 F. Supp. 512, 515-16 (N.D. Ill. 1988) (setting criminal penalties is nondelegable duty); *United States v. Alafriz*, 690 F. Supp. 1303, 1313 (S.D.N.Y. 1988) (acknowledging that guidance given is greater than in other cases, but found this case unique as delegation of power to "make 'important choices of social policy' ") (quoting *Industrial Union Dep't v. American Petroleum Inst.*, 448 U.S. 607, 685 (1980) (Rehnquist, J., concurring)). However, the Supreme Court had already determined that the definition of criminal conduct is not a subject assigned exclusively to the legislature. See *Boycott Motor Lines v. United States*, 342 U.S. 337, 340-41 (1952) (practical necessity limits ability of Congress to draft more specific statute; ICC could by regulation define conduct that would be subject to criminal penalties according to statute). Congress effectively gave the power to set criminal sanctions to the Parole Commission. See 18 U.S.C. §§ 4201-4218 (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).

Furthermore, the "nondelegable powers" approach suffers from the same difficulties as the delegation doctrine itself. If the legislature can delegate authority in some areas but may not delegate "core functions," the court must still determine the relative importance of various policy areas.

Finally, it is important to note the difference between the ideal of separation of powers and the threshold of unconstitutionality. It may have been better, purely for purposes of preserving the separation of powers, to require Congress to vote on each package of guidelines proposed by the Commission. But a court would be hard-pressed to demonstrate that the most "ideal" course is always constitutionally compelled.

122. Lowi, *The End of Liberalism*, in *IDEOLOGY, POLICY, AND THE CRISIS OF PUBLIC AUTHORITY* 125-56 (1969); Aranson, Gellhorn & Robinson, *A Theory of Legislative Delegation*, 68 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 I¹²³ 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.¹²⁴ 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,¹²⁵ and (b) engaging in political rulemaking;¹²⁶ and (2) the appointment and removal power of the President gave the executive too much power over the judiciary.¹²⁷

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,

rewards special interests; strict nondelegation doctrine will force legislature to enact more specific laws, allowing voters to express their approval or disapproval of regulatory scheme at the polls); Schoenbrod, *The Delegation Doctrine: Could the Court Give It Substance?*, 83 MICH. L. REV. 1223, 1287-88 (1985) (legislative delegation "undercuts the accountability of the legislation process").

123. See *supra* text accompanying note 108.

124. Delegation concerns lead courts to construe statutes in ways that limit agency discretion and make agency actions more accessible for review. Such concerns are the force behind much of administrative law. See generally J. FREEDMAN, *supra* note 63, at 129-33 (discussing the importance of procedural integrity to agency legitimacy); Dripps, *Delegation and Due Process*, 1988 DUKE L.J. 657, 659 (line of due process cases as an enforcement tool for nondelegation doctrine); Gewirtz, *The Courts, Congress and Executive Policy-Making: Notes on Three Doctrines*, 40 LAW & CONTEMP. PROBS. 46 (Summer 1976) (courts may limit agency policymaking power by narrow application of the delegation doctrine or by narrow statutory construction).

125. *Mistretta v. United States*, 488 U.S. 361, 397 (1989).

126. *Id.* at 384-85.

127. *Id.* at 408-09.

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.¹²⁸ The Court confronted each of Mistretta's challenges by postulating two types of judicial power: (1) deciding cases and controversies;¹²⁹ and (2) various "nonadjudicatory" activities carried out either by judges alone or in association with the judicial branch.¹³⁰ 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.¹³¹ 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.¹³²

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.¹³³ 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.

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 *Muskraat 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 [eommingled 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

134. Brief for Mistretta at 15-30, *Mistretta*, 488 U.S. 361 (No. 87-1904).

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) ("[The] essential quality [of 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.").

Although article III contains few institutional details, its salary and tenure provisions clearly aim to establish the proper conditions for independent and legitimate judging. *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 59 (1982) (plurality opinion); Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U.L. REV. 205, 235 (1985).

140. Minow & Spelman, *Passion for Justice*, 10 CARDOZO L. REV. 37, 51-53 (1988); cf. Resnik, *On the Bias: Feminist Reconsiderations of the Aspirations for Our Judges*, 61 S. CAL. L. REV. 1877, 1921-28 (1988) (deemphasizing impartiality of judges as compared to compassion, care, and sympathetic attention).

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,¹⁴¹ 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.¹⁴²

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.¹⁴³ 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 policy¹⁴⁴ and a possible controversy that could tarnish judicial impartiality.¹⁴⁵ However, the Court decided that the judiciary, in fact as well as in appearance, would not suffer any loss of impartiality.¹⁴⁶

141. Act of Aug. 10, 1846, ch. 178, §§ 1, 3, 9 Stat. 102-03, cited in Schwartz, *The Other Things That Courts Do*, 28 UCLA L. REV. 438, 453 & n.74 (1981).

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.

148. See U.S. CONST. art. III, § 2.

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. ALFINI & 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 create rules governing practice and procedure. J. WEINSTEIN, *REFORM OF COURT RULE-MAKING PROCEDURES* 55-57 (1977).

Initially, federal procedural rules conformed to state rules. See *id.* at 65. The courts rarely engaged in procedural rulemaking until 1935, despite the statutory grant of rulemaking power, see *id.* at 64-68, and the inherent power of the court to make procedural rules, see *Heckers v. Fowler*, 69 U.S. (2 Wall.) 123, 128 (1865). Until the passage of the Rules Enabling Act in 1934, Act of June 19, 1934, ch. 651, 48 Stat. 1064 (codified as amended at 28 U.S.C. §§ 2072-2074 (1988)), Congress exercised concurrent power with the courts to formulate procedural rules. See J. WEINSTEIN, *supra*, at 55-60. That statute grants rulemaking power to the Supreme Court, making no mention of any legislative role except to delay the effective date of rules prescribed by the Court until after they have been reported to Congress. Act of June 19, 1934, § 2 (codified at 47 U.S.C. § 2074 (1988)). This scheme is preserved in the current version of the statute. See 28 U.S.C. §§ 2072-2074 (1988).

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).

150. See Levin & Amsterdam, *Legislative Control Over Judicial Rule-Making: A Problem in Constitutional Revision*, 107 U. PA. L. REV. 1, 10-11 (1958). See generally Hazard, *Undemocratic*

therefore be argued, is also appropriate in the area of sentencing, about which courts have developed special knowledge and expertise through their longstanding participation.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 law¹⁵²—a serviceable, if imperfect, device for assigning institutional responsibilities.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.”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

Legislation (Book Review), 87 YALE L.J. 1284 (1978) (reviewing J. WEINSTEIN, *supra* note 149) (discussing current federal rulemaking process in light of Judge Weinstein’s suggested reforms).

151. *Mistretta*, 488 U.S. at 396.

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. 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).

153. See generally Cover, *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, *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).

154. 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.¹⁵⁵ For example, proposals urging the Commission to promulgate guidelines relating to capital punishment plunged the Commission into controversy early in its history.¹⁵⁶ More recently, Commission efforts to alter the course of sentencing for corporate defendants has produced plenty of attention and criticism.¹⁵⁷

The Court recognized that judicial rulemaking in sentencing involves judges in a "substantive" and "political" enterprise.¹⁵⁸ 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.¹⁵⁹ 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.¹⁶⁰ The lifetime appointment and salary guarantees of article III,¹⁶¹ 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.¹⁶² 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.

156. See *Sentencing Panel Bars Death Penalty*, Wash. Post, Mar. 11, 1987, at A17, col. 4; *Justice Department Panel Asks Panel to Restore Death Penalty*, N.Y. Times, Feb. 18, 1987, at A17, col. 1.

157. See *Justice Department Withdraws Support on Sentencing*, Wall St. J., Apr. 30, 1990, at B5, col. 1; *Going Soft on Corporate Crime*, Wash. Post, Apr. 1, 1990, at C3, col. 1.

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

lowed 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. Nominations 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.¹⁶⁵

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.¹⁶⁶

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.¹⁶⁷

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.¹⁶⁸ The most extreme form of judicial independence is exercised in many of the major supporting institutions in the judiciary, including the Federal Judicial Center,¹⁶⁹ the Administrative Office,¹⁷⁰ the Judicial Conference,¹⁷¹ the various Rules Committees,¹⁷² and the Probation Office.¹⁷³ 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.¹⁷⁴ While complete independence

Commission: the membership of nonvoting ex officio commissioners appointed from the Department of Justice, 28 U.S.C. § 991(a) (1988), and from the Parole Commission, Sentencing Reform Act of 1984, Pub. L. No. 98-473, tit. II, ch. 2, § 235(b)(5), 98 Stat. 1987.

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.

167. See Strauss, *supra* note 51, at 598-99.

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

169. See 28 U.S.C. §§ 620-629 (1988).

170. See *id.* §§ 601-611.

171. See *id.* § 331.

172. See *id.* § 2077.

173. See 18 U.S.C. §§ 3654-3655 (1988).

174. 31 U.S.C. § 1105(b) (1988).

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. SURENCY, *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.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.¹⁸¹

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.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.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-

180. Again, this would be objectionable to the extent it politicized an institution associated with the judiciary.

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 *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.

182. See generally M. VILE, CONSTITUTIONALISM AND THE SEPARATION OF POWERS 1-20 (1967) (setting out the origins, development, and defining elements of the doctrine of separation of powers).

183. See *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. *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.

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.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.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

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, *Separating the Strands in Separation-of-Powers Controversies*, 74 VA. L. REV. 1253, 1254-55 (1988); Strauss, *Formal and Functional Approaches to Separation of Powers Questions—A Foolish Inconsistency?*, 72 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 *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." *Id.* at 682. Giving the statute the benefit of the doubt, the Court upheld the termination provision. *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 *Bowlsler 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. *Id.* at 944-59. Hence, the case did not require the Court to speculate about the future behavior of Congress. 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). 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).

185. See C. EDLEY, *ADMINISTRATIVE LAW: RETHINKING JUDICIAL CONTROL OF BUREAUCRACY* 3-12, 215-21 (1990); Garnett, *Operationalizing the Constitution Via Administrative Reorganization: Oilcans, Trends, and Proverbs*, in *THE AMERICAN CONSTITUTION AND THE ADMINISTRATIVE STATE: CONSTITUTIONALISM IN THE LATE 20TH CENTURY* 83, 83-94 (R. Stillman II ed. 1989).

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.¹⁸⁶

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.*,¹⁸⁷ *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*,¹⁸⁸ and *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*¹⁸⁹ 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).

187. 467 U.S. 837 (1984).

188. 463 U.S. 29 (1983).

189. 435 U.S. 519 (1978).

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.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,¹⁹¹ in general the APA applies only to "agencies" and not to courts.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.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-

190. See 5 U.S.C. §§ 701-706 (1988).

191. 28 U.S.C. § 994(x) (1988).

192. 5 U.S.C. § 551 (1988) (defining agency as "each authority of the Government of the United States . . . but . . . not includ[ing] . . . the courts of the United States").

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.

fined.¹⁹⁴ 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.¹⁹⁵ The complaint touches a raw nerve, for independence is at the heart of a federal judge's job.¹⁹⁶ 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.¹⁹⁷ 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.¹⁹⁸

194. See *infra* text accompanying notes 264-69.

195. See, e.g., *United States v. Swapp*, 719 F. Supp. 1015, 1026 (D. Utah 1989) (complaining in dicta of "sentencing by the numbers"); *Courts Study Committee Recommends Changes in Federal Judicial System*, 46 Crim. L. Rep. (BNA) 1389-90 (Feb. 7, 1990) (discussing Committee recommendations for restoring some judicial discretion; includes judges' comments); Stewart & Nelson, *Sentencing by the Book*, 75 A.B.A. J., Mar. 1989, at 38, 38 (sentencing by guidelines likened to filling out tax form); see also M. LIPSKY, *STREET-LEVEL BUREAUCRACY* 18-20 (1980) (street-level bureaucrats need to exercise discretion separate from their agency superiors; judges may do this through creative sentencing); Miller, *Guidelines Are Not Enough: The Need for Written Sentencing Opinions*, 7 BEHAV. SCI. & L. 3, 10-11, 20-21 (1989) (suggesting that use of Commission to draft guidelines has discouraged judicial involvement, and recommending judges make more frequent use of sentencing opinions to regain input in sentencing policy decided by Commission); Ogletree, *The Death of Discretion? Reflections on the Federal Sentencing Guidelines*, 101 HARV. L. REV. 1938, 1956-58 (1987) (need for more judicial discretion in sentencing).

196. See generally THE FEDERALIST NO. 78, at 469 (A. Hamilton) (S. Mittell ed. 1938) (essential judicial function to declare void those legislative acts in conflict with the Constitution demands judicial independence).

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).

198. See 28 U.S.C. § 994(o) (1988) (Commission shall periodically review and revise guidelines in consideration of comments and data coming to its attention); *id.* § 994(s) (1988) (Commission shall consider petitions by individual defendants requesting modification of guidelines).

The real danger of holding judges back in their review of judicial guideline sentencing is not so much a literal assimilation into a hierarchy,¹⁹⁹ 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.²⁰⁰ 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.²⁰¹

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.²⁰² 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.²⁰³ Guidelines coordinate sentencing courts and make them accountable despite the

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.²⁰⁴ 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 suffer on two fronts if a judge loses the spirit of independence. First, the judge may become less likely to recognize and enforce legal requirements. 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.²⁰⁵ 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.²⁰⁶ 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.²⁰⁷ 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 disability for Social Security disability claims. Compare 20 C.F.R. § 404.1520 (1989) (describing 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 exclusive power to impose sentences. See 18 U.S.C. §§ 3551, 3553 (1988).

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); cf. Rubin, *Common Law and Statute Law*, 11 J. LEGAL STUD. 205 (1982) (recognizing inefficiency 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 Lawmaking System*, 138 U. PA. L. REV. 1111, 1114-15 (1990) (comparing specialist courts and 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

208. Cf. 38 U.S.C. §§ 4051-4091 (1988) (creating specialized article I court for review of veterans' claims); J. MASHAW, *DUE PROCESS IN THE ADMINISTRATIVE STATE* 265-67 (1985) (Veterans' Administration claims administration deemed a success due to special capacities of that bureaucracy).

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.

209. See Brennan, *Reason, Passion, and "The Progress of the Law,"* 10 CARDOZO L. REV. 3, 19-21 (1988) (government and judiciary must utilize broad perspective instead of sterile rationality in promulgation and application of rules); cf. Schwartz, *Legal Restriction of Competition in the Regulated Industries: An Abdication of Judicial Responsibility*, 67 HARV. L. REV. 436, 474 (1954) (broad judicial perspective supports giving national economic policymaking to judiciary instead of administrative bodies, when Congress has remained silent).

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).

210. S. REP. 98-225, *supra* note 1, at 159, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS 3182, 3342.

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.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.²¹³ The constitutional dimension of this power would draw inspiration both from the due process clause and from the nondelegation doctrine.²¹⁴ This position is supported further by the fact that the law designates courts as the exclusive means of imposing criminal penalties.²¹⁵

In sum, the concerns about judicial integrity, which survived *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,²¹⁶ the day-to-

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.

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).

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).

215. The use of judges as the exclusive means of enforcement supports judicial review designed to vindicate legality. As Lonis 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.

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.²¹⁷ 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.*²¹⁸ 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.²¹⁹ 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.²²⁰ The preliminary question of the court's

WRONGS 150-81 (1983) (critique of "structural injunction," or, injunction mandating agency action).

217. See *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415-17 (1971).

218. 467 U.S. 837 (1984).

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.²²¹

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.²²² (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 *Chevron* favors only limited review of guidelines.

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.²²³ 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,²²⁴ while some had employed deferential review, which gives great weight or even controlling effect to agency views.²²⁵ The choice seemed to hinge on how those courts perceived the relative abilities of courts and agencies to interpret statutes.²²⁶

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).

221. There are, of course, a few exceptions. In *United States v. White*, 869 F.2d 822 (5th Cir.), *cert. denied*, 109 S. Ct. 3172 (1989), the court rejected several arguments based on alleged conflicts between the guidelines and the enabling statute. *Id.* at 827. The court noted that the "'construction given to a statute by those charged with its administration is entitled to great deference.'" *Id.* (quoting *Turner v. Weinberger*, 728 F.2d 751, 758 (5th Cir. 1984), case involving the Department of Defense); see also *United States v. Denardi*, 892 F.2d 269, 275 (3d Cir. 1989) (Becker, J., dissenting in part) (statute governing appealability of refusals to depart should be read in light of "well-settled administrative law principles"); *United States v. Terrill*, 688 F. Supp. 542, 546-47 (W.D. Mo. 1988) (*dicta*) (Commission's compliance with section 994(g) of SRA, dealing with prison capacity, will be measured under *Chevron*).

Sentencing courts may be ignoring *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) (*Chevron* deference does not apply to prosecutorial interpretation of criminal statute simply because Department of Justice must interpret all criminal statutes before bringing prosecution).

222. 18 U.S.C. § 3553(b) (1988).

223. See 5 U.S.C. § 706 (1988) (scope of judicial review).

224. 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).

225. 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 *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.

226. See generally *Diver, Statutory Interpretation in the Administrative State*, 133 U. PA. L.

In 1984, *Chevron* rearranged this corner of the world by creating a presumption in favor of deferential review.²²⁷ 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.²²⁸ 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 ability²²⁹ and impartiality of the judiciary.²³⁰

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.²³¹ 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.²³² Agencies are demonstrably better able than courts to formu-

REV. 549, 574-82 (1985) (cataloguing relative abilities of agencies and courts to interpret statutes). Such inquiries into institutional ability serve as a proxy for finding Congress’ intent regarding interpretive responsibility.

227. See *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-45 (1984).

228. See Farina, *supra* note 110, at 470-76 (difficulties involved in determining to whom Congress intended to delegate the task of interpreting statutory ambiguity); Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 467 (1987) (ambiguity does not imply delegation).

229. See Saunders, *Agency Interpretations and Judicial Review: A Search for Limitations on the Controlling Effect Given Agency Statutory Constructions*, 30 ARIZ. L. REV. 769, 780-81 (1988) (ambiguity not involving technical knowledge or policy consideration does not support notion of congressional intent to supersede APA’s delegation of interpretive authority to judiciary). The APA “provides that its provisions should not be held to have been superseded or modified by a later statute ‘except to the extent that it does so expressly.’” *Id.* at 792 (quoting 5 U.S.C. § 559 (1982)).

230. See Eskridge, *supra* note 36, at 304-05 (judges, less subject to capture by interest groups, can best enforce original policies of statute).

231. See Bruff, *supra* note 59, at 224-25 (*Chevron* requires clear statement by Congress on substantive issue in order to limit agency discretion). For a general discussion of the use of clear statement rules and other canons of construction, see W. ESKRIDGE & P. FRICKEY, *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 639-96 (1988).

232. See Pierce, *Chevron and Its Aftermath: Judicial Review of Agency Interpretations of Statutory Provisions*, 41 VAND. L. REV. 301, 305 (1988) (Congress avoids making many policy

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.”²³⁷ 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.²³⁸ 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,²³⁹ judges have been unwilling to

237. 18 U.S.C. § 3553(b) (1988). Floor debates regarding this language, added in 1987, confirm that the amended version was intended only to clarify the meaning of the original departure standard. See 133 CONG. REC. H10,017-21 (daily ed. Nov. 16, 1987) (statements of Reps. Conyers and Fish); 133 CONG. REC. S16,647-48 (daily ed. Nov. 20, 1987) (statements of Sens. Hatch, Biden, Thurmond, and Kennedy).

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).

238. See, e.g., *United States v. Rodriguez*, 724 F. Supp. 1118 (S.D.N.Y. 1989) (departure based on personal characteristics of defendant avoids conflict between statutory minimum sentence and guideline minimum).

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.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.²⁴¹ The effort to determine exactly how much statutory clarity is required may ultimately lead courts to backslide into the pre-*Chevron* days, when they measured anew the relative interpretive competence of court and agency in every case.

This eroded version of *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.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 1984.²⁴³

Despite the *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 insinter-

240. See, e.g., *Brotherhood of Ry. Carmen v. ICC*, 880 F.2d 562, 567 (D.C. Cir. 1989) (relying on "traditional tools of statutory construction" and looking to the "language and design of the statute as a whole" to ascertain Congress' intent) (quoting *Chevron*, 467 U.S. at 843 n.9, and *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988)), cert. granted sub nom. *Norfolk & W. Ry. v. American Train Dispatchers Ass'n*, 111 S. Ct. 292 (1990); *Sullivan v. Stroop*, 110 S. Ct. 2499, 2502-03 (1990) (construing "child support" as used in statute under *K Mart*, by reference to "common usage" and Black's Law Dictionary, and finding Secretary's gloss correct); *Seldovia Nation Ass'n v. Lujan*, 904 F.2d 1335, 1340-42 (9th Cir. 1990) (finding Secretary's gloss reasonable, but first interpreting the statute under *K Mart* to ascertain meaning from legislative history).

241. See 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 *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. *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 *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., *NLRB v. United Food & Commercial Workers Union*, 484 U.S. 112, 133-34 (Scalia, J., concurring) (writing "separately only to note that [*Chevron* is still good law]. Some courts have mistakenly concluded otherwise, on the basis of dicta in *INS v. Cardoza-Fonseca*"); Saunders, *supra* note 229, at 783-86 (discussing the uncertainty in applying *Chevron* created by *Cardoza-Fonseca*).

242. See 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).

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.

preted a statute.²⁴⁴ More frequently, courts have rejected statute-based challenges to the guidelines, or policy statements of the Commission.²⁴⁵

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 "[e]rroneous 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).

Another example of a questionable Commission interpretation of a statute appears in the deliciously captioned case of *United States v. Justice*, 877 F.2d 664, 668-69 (8th Cir.), *cert. denied*, 110 S. Ct. 375 (1989), where the court stated in dicta that the guidelines requirement of a government motion under section 5K1.1 (requesting downward departure from the guidelines based on substantial assistance to authorities) conflicts with a federal statute, 28 U.S.C. § 994(n) (1988). *But see United States v. Huerta*, 878 F.2d 89, 91-92 (2d Cir. 1989) (rejecting separation of powers argument against section 5K1.1), *cert. denied*, 110 S. Ct. 845 (1990).

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.²⁴⁶ Taken together, these cases suggest that courts have not relied on *Chevron*'s presumption that statutory ambiguity of an appropriate type and amount requires deference to the agency.

Without *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 sentences²⁴⁷ or to consider relevant aggravating and mitigating circumstances,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 *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 *Chevron*, carry out the clear intent of Congress in a sentencing statute, contradicting any Commission interpretation.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. See, e.g., *United States v. Erves*, 880 F.2d 376, 381-82 (11th Cir.) 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.), 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. 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).

246. Those courts have consulted the statute and its legislative history, not the Commission's reading of the statute. 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).

247. E.g., 28 U.S.C. § 991(b)(1)(B) (1988).

248. E.g., *id.* § 994(c)(2).

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 *Chevron*; 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), cert. denied, 110 S. Ct. 1792 (1990); 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.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 *State Farm* doctrine calls on courts to scrutinize carefully any agency explanation of its policy choices.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.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.

a. *Models of Rationality Review*

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

250. See *supra* text accompanying notes 237-38.

251. See *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).

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.²⁵³ For informal rulemaking proceedings, the court will only reject agency findings that are "arbitrary and capricious."²⁵⁴ Both review standards aim to ensure the quality of input the agency receives through its adjudication procedures.²⁵⁵ 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.²⁵⁶ Other courts, invoking a doctrine similar to that endorsed by the Supreme Court in *State Farm*, will undertake (or require the agency to undertake) a "hard look" at the quality of the agency's reasoning process.²⁵⁷ 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-

253. 5 U.S.C. § 706(2)(E) (1988).

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," *id.*; however, when used by the courts, this standard is usually simply referred to as the "arbitrary and capricious" standard of the APA. *See, e.g., Marsh v. Oregon Natural Resources Council*, 109 S. Ct. 1851, 1859 (1989).

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." *Id.* at 131. The Court relied in great measure on the "everyday experience" of the NLRB. *See id.* at 130.

In *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487-91 (1951), the Court defined the "substantial evidence" required to uphold an agency's finding of fact. The Court based its holding in large part on the involvement of a hearing examiner who was able to observe witness demeanor and to perceive the evidence in context. Such perception could not be duplicated from a written record alone. Where an agency agrees with a separate factfinder like a hearing examiner, the reasons for judicial deference are compelling. Where it contradicts the hearing examiner, the court may be less willing to find "substantial evidence" to support agency findings. *Id.* at 493-97.

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).

257. *See, e.g., Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976) (interpreting the *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); *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.²⁵⁸ 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.²⁵⁹ 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.²⁶⁰ 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."²⁶¹

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.²⁶² 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).

260. See generally Sunstein, *On the Costs and Benefits of Aggressive Judicial Review of Agency Action*, 1989 DUKE L.J. 522, 526-27 (describing difficulties in measuring benefits of judicial review of agency actions, but suggesting nonetheless that aggressive judicial review has on balance produced benefits).

261. Pedersen, *Formal Records and Informal Rulemaking*, 85 YALE L.J. 38, 60 (1975).

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 COAL/DIRTY AIR 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.²⁶³ 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.²⁶⁴ 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.²⁶⁵ 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.²⁶⁶

263. See generally J. MENDELOFF, *THE DILEMMA OF TOXIC SUBSTANCE REGULATION: HOW OVERREGULATION CAUSES UNDERREGULATION AT OSHA* 105-39 (1988) (agency uncertainty of meeting judicial standard of proof constrains pace of standard-setting); M. SHAPIRO, *WHO GUARDS THE GUARDIANS? JUDICIAL CONTROL OF ADMINISTRATION* 48-77 (1988) (discussing the relationship between administrative agencies and the courts that review them).

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,"²⁶⁷ 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.²⁶⁸ 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.²⁶⁹

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) ("[I]n 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 weapon²⁷⁰ or victim conduct.²⁷¹ The Commission stated that it did not fully consider these factors,²⁷² 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,²⁷³ 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.²⁷⁴ 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.* § 2F1.1, 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. Diaz-Villafane, 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

departures 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. Ferri*, 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).

279. 133 CONG. REC. S16,647-48 (daily ed. Nov. 20, 1987) (statements of Sens. Biden and Kennedy).

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-Rojas, 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).

282. The Commission includes "commentary" after most of its guidelines and policy statements. The first statutory mention of commentary appeared in the 1987 amendments to the departure statute. *See* Sentencing Act of 1987, Pub. L. No. 100-182, § 3(3), 101 Stat. 1266 (codified as amended at 18 U.S.C. § 3553 (1988)).

283. *See* A. VON HIRSCH, *supra* note 32, at 74-76 (suggesting methods of approaching seriousness rankings, with examples actually in use); J. FLOUD & W. YOUNG, DANGEROUSNESS AND CRIMINAL JUSTICE 20-37, app. C (1981) (discussing difficulty of determining likelihood that individual criminals will commit crimes upon release).

often than not. Second-guessing specified departure amounts calls to mind the worst excesses of hard look review in other settings.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,²⁸⁵ and some courts have followed this view.²⁸⁶ Nevertheless, the case for a

284. See *supra* note 262.

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.").

286. The Sentencing Commission's 1988 and 1989 annual reports show that courts have departed for unique local conditions and other grounds not mentioned in the guidelines. 1988 ANNUAL REPORT, *supra* note 1, table XII; 1989 ANNUAL REPORT, *supra* note 274, tables VIII-IX; see, e.g., *United States v. Diaz-Villafane*, 874 F.2d 43 (1st Cir.) (departure based on pending drug charges, amount of money involved, and use of minors in drug distribution), *cert. denied*, 110 S. Ct. 177 (1989); *United States v. Ryan*, 866 F.2d 604 (3d Cir. 1989) (departure based on amount, purity, and packaging of drugs); *United States v. Correa-Vargas*, 860 F.2d 35 (2d Cir. 1988) (quantity of drugs proper grounds for departure although not mentioned for telephone/drug offenses); *United States v. Harrington*, 741 F. Supp. 968 (D.D.C. 1990) (likelihood of successful drug treatment warranted downward departure); *United States v. Huss*, 726 F. Supp. 1140 (N.D. Ill. 1989) (downward departure for assisting federal investigation leading to exoneration of potential defendant); *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); *United States v. Bell*, 716 F. Supp. 1207 (D. Minn. 1989) (downward departure where weighing of criminal history in sentencing for escape conviction constituted double counting, and Commission showed no awareness of problem); *United States v. Birchfield*, 709 F. Supp. 1064 (M.D. Ala. 1989) (downward departure where defendant intended to return to prison within hours after escape); *United States v. Hon*, 2 Fed. Sentencing Rep. (Vera) 84 (S.D.N.Y. May 31, 1989) (downward departure for counterfeiter appropriate where Commission did not consider civil remedies available to crime victims); *United States v. Aguilar-Pena*, 696 F. Supp. 781 (D.P.R. 1988) (upward departure based on special circumstances in Puerto Rico, including frequent use of

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,²⁸⁷ 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."²⁸⁸ Using this line of reasoning, many courts have restricted departures based on unmentioned circumstances.²⁸⁹

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.²⁹⁰ 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.²⁹¹ Most courts have agreed that they have no power to depart on such grounds against the will of the Commission in a typical case.²⁹² 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).²⁹³

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. Sailes*, 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. Palta*, 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.²⁹⁴ Critics of the Commission have begun to note this lack of explanation.²⁹⁵ 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,²⁹⁶ and others have found "unusual" circumstances even though they could arise quite frequently.²⁹⁷ 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.²⁹⁸ In this situation, both statutory interpretation and the administrative review model argue for an

294. See GUIDELINES, *supra* note 3, §§ 5H1.1-.6. Such policy statements also appear to run counter to the statutory instructions directing courts to consider when such characteristics should affect sentences. See 18 U.S.C. § 3661 (1988) (providing that no limitation shall be placed on the information a court may receive and consider in imposing a sentence); *United States v. Boshell*, 728 F. Supp. 632 (E.D. Wash. 1990) (judge retains discretion under section 3661 to consider factors whose relevance is restricted under the guidelines). This area may offer a prime opportunity for courts to depart based on an inadequate reading of a statute. See *supra* text accompanying notes 237-38.

295. See, e.g., P. BAMBERGER, PRACTICE UNDER THE NEW FEDERAL SENTENCING GUIDELINES § 5A (1988); see also 2 Fed. Sentencing Rep. (Vera) 238-51 (Feb.-Mar. 1990) (various commentators' remarks to the Commission, criticizing lack of explanation for guideline amendments).

296. See *supra* note 287.

297. See, e.g., *United States v. Big Crow*, 898 F.2d 1326 (8th Cir. 1990) (employment history in difficult socioeconomic setting); *United States v. Rodriguez*, 724 F. Supp. 1118 (S.D.N.Y. 1989) (family circumstances, efforts at rehabilitation); *United States v. Swapp*, 719 F. Supp. 1015 (D. Utah 1989) (family situation, physical condition, and lack of previous criminal history); *United States v. Pipich*, 688 F. Supp. 191 (D. Md. 1988) (exemplary military record); *United States v. Gonzalez*, 2 Fed. Sentencing Rep. (Vera) 81 (S.D.N.Y. July 27, 1989) (family ties and responsibilities); see also Weinstein, *supra* note 200, at 12, 16-17 (listing possible departure grounds).

298. The guidelines prohibit departure in any case on grounds of race, sex, national origin, creed, religion, socioeconomic status, GUIDELINES, *supra* note 3, § 5H1.10, drug dependence or alcohol abuse, *id.* § 5H1.4, prior arrest record, *id.* § 4A1.3, and personal financial difficulties and economic pressures upon a trade or business, *id.* § 5K2.12. Departures on the grounds listed in section 5H1.10 are explicitly prohibited by statute. See 28 U.S.C. § 994(d) (1988). *But cf.* Ogletree, *supra* note 195, at 1958 (criticizing guidelines for insufficient effort to ensure that race is not considered in sentence). However, the other exclusions are apparently not compelled by statute.

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.²⁹⁹ 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.³⁰⁰ 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.³⁰¹

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.³⁰² 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 language³⁰³ connotes a range of acceptable explanations which, for the sake of sentencing uniformity, judges should accept despite personal misgivings.³⁰⁴

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.³⁰⁵

299. For the ambiguous legislative history on this question, see *supra* note 266.

300. See, e.g., *SEC v. Chenery Corp.*, 332 U.S. 194 (1947) (court considers validity of agency action only on basis of reasons offered by agency); B. SCHWARTZ, *ADMINISTRATIVE LAW* § 10.4 (2d ed. 1984).

301. Compare *Williamson v. Lee Optical*, 348 U.S. 483 (1955) (deferential review of legislative rationale for statute) and *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981) (same) with *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 n.9 (1983) (agency not given presumption of validity afforded to congressional legislation).

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, 4A1.3, 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,³⁰⁶ 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.³⁰⁷ 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.³⁰⁸ 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.³⁰⁹ 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).

307. See, e.g., *Aqua Slide 'N' Dive Corp. v. Consumer Prod. Safety Comm'n*, 569 F.2d 831 (5th Cir. 1978) (swimming pool slide rule); *H & H Tire Co. v. Department of Transp.*, 471 F.2d 350 (7th Cir. 1972) (retreaded tires rule).

308. Departures from the guidelines are reviewed under a reasonableness standard on appeal. 18 U.S.C. § 3742(e) (1988); cf. *United States v. Daughtrey*, 874 F.2d 213, 218 (4th Cir. 1989) (finding the statute's reasonableness standard to require "due deference" to findings of fact, which requires affirmance unless trial court's decision "clearly erroneous"). A failure to depart is not appealable under section 3742. *United States v. Morales*, 898 F.2d 99 (9th Cir. 1990); *United States v. Colon*, 884 F.2d 1550 (2d Cir.), *cert. denied*, 110 S. Ct. 553 (1989). But cf. *United States v. Franz*, 886 F.2d 973 (7th Cir. 1989) (refusal to depart appealable if resulting sentence violates law); Yellen, *Appellate Review of Refusals to Depart*, 1 Fed. Sentencing Rep. (Vera) 264 (Oct. 1988) (court must depart in certain circumstances where refusal would result in appealable sentence imposed in violation of law).

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).

309. See 28 U.S.C. §§ 994(m), (w), 995(a)(8) (1988).

support any effort to limit departures.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,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.

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

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.³¹² 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.³¹³ Although Congress decided not to allow any pre-enforcement review of the substance of the guidelines,³¹⁴ 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,³¹⁵ 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.

315. *Association of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 153-55 (1970).

create sentencing guidelines;³¹⁶ similarly, there is no question that the claim is ripe³¹⁷ and that the offender has no administrative remedies to exhaust.³¹⁸ Moreover, parties other than criminal offenders would have trouble establishing standing to challenge Commission procedures.³¹⁹ 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 requirements 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 adversary nature of informal rulemaking.³²⁰ However, the specific types of procedures that courts tended to impose exposed a conflict with congres-

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).

317. *Cf. Abbott Labs. v. Gardner*, 387 U.S. 136, 148-52 (1967) (administrative decision is ripe for review if challenge is purely legal, regulation is "final adjudication" under APA, and its impact on parties is direct and immediate).

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.

319. *Cf. Federal Defenders of San Diego v. United States Sentencing Comm'n*, 680 F. Supp. 26 (D.D.C. 1988) (federal public defenders fail to meet threshold requirement of injury in fact to have standing to challenge constitutionality of guidelines).

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

sional 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.³²¹

Judicial supplementation of the APA began to recede with the Supreme Court's decision in *Vermont Yankee*.³²² 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,³²³ along with an opportunity for comments on the proposed rules.³²⁴ 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.³²⁵ 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.³²⁶

technical issues in rulemaking); *Walter Holm & Co. v. Hardin*, 449 F.2d 1009, 1015 (D.C. Cir. 1971) (requiring cross-examination and oral hearing).

321. See *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 547 (1978) (criticizing court decisions forcing agencies to adopt adjudicatory hearing procedures); see also Byse, *Vermont Yankee and the Evolution of Administrative Procedure: A Somewhat Different View*, 91 HARV. L. REV. 1823, 1828-29 (1978) (criticizing hybrid rulemaking for over-judicializing rulemaking process); Scalia, *Vermont Yankee: The APA, the D.C. Circuit, and the Supreme Court*, 1978 SUP. CT. REV. 345, 359 (same).

322. *Vermont Yankee*, 435 U.S. 519.

323. 5 U.S.C. § 553(b), (d) (1988). These provisions are made applicable to the Sentencing Commission by the SRA. See 28 U.S.C. § 994(x) (1988).

324. 5 U.S.C. § 553(c) (1988).

325. See, e.g., Notice of Submission of Amendments to Congress—Summary, 53 Fed. Reg. 15,530 (1988) (documenting compliance with notice-and-comment procedures); Notice of Submission of Amendments to Congress—Summary, 54 Fed. Reg. 21,348 (1989) (same); Notice of Submission of Amendments to Congress—Supplementary Information, 55 Fed. Reg. 19,188 (1990) (same).

326. See *Chocolate Mfrs. Ass'n of the U.S. v. Block*, 755 F.2d 1098, 1105, 1107 (4th Cir. 1985) (rule remanded because not a logical outgrowth of material in previously published notice); *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011, 1030-31 (D.C. Cir. 1978) (regulation based on computations made following comment period remanded to agency). The Commission has on occasion issued relatively controversial decisions in the form of policy statements rather than guidelines, thereby avoiding the notice-and-comment requirements. Cf. 28 U.S.C. § 994(x) (1988) (making notice-and-comment provisions of the APA applicable only to guidelines). One example is the Commission's policy statement regarding the retroactive application of guidelines. See Notice of Policy Statement—Supplementary Information, 54 Fed. Reg. 46,032 (1989) (notably absent documentation of notice-and-comment procedures). While a court enforcing section 994(x) might

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.³²⁷

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,³²⁸ 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.

Based on certain provisions of the SRA, a criminal justice researcher might challenge the Commission’s policy on access to documents. See 28 U.S.C. §§ 994(w), 995(a)(12)-(16) (1988) (requirements for Commission’s document dissemination). Although the Commission’s policy regarding access to documents, 54 Fed. Reg. 51,279 (1989), does not literally violate the Freedom of Information Act, 5 U.S.C. § 552 (1988), and has many commendable features, at least one aspect has generated criticism. The policy protects from disclosure any plea agreements, judgments, and sentencing orders collected by the Commission, even though the same documents would be open to public inspection in their dispersed locations in court files around the country. Letter from Samuel Buffone, Committee Chairperson, ABA Committee on the U.S. Sentencing Commission, to William Wilkins, Chairman, U.S. Sentencing Commission (Aug. 30, 1989).

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).

328. See S. REP. 98-225, *supra* note 1, at 180-81, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS 3182, 3363-64.

invitation to courts in individual cases to evaluate Commission procedures.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 permanent 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 guidelines through appropriate legislation.³³⁴ This review mechanism raises a "standard of review" issue for the Congress parallel to the one faced by

329. See 133 CONG. REC. H10,017, H10,019 n.9 (daily ed. Nov. 16, 1987) (statement of Rep. 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 Legislator's Guide to Constitutional Interpretation*, 27 STAN. L. REV. 585, 587-88 (1975) (legislators should personally consider the constitutionality of legislation).

333. 28 U.S.C. § 994(p) (1988).

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 reelection 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,³³⁵ suggest that Congress would exercise inconsistent and incoherent review of the Commission in the future.³³⁶ 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),³³⁷ 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.³³⁸

Administrative law once again offers precedent for some course lying between complete refusal to review and unrestricted review by Congress.³³⁹ Once Congress has delegated power to an agency, it ought to respect that delegation.³⁴⁰ 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-

335. See *supra* text accompanying notes 23-26 & note 26.

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.

340. *INS v. Chadha*, 462 U.S. 919, 954-55 (1983).

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

341. *E.g.*, *Pillsbury Co. v. FTC*, 354 F.2d 952 (5th Cir. 1966) (vacating FTC order that Pillsbury divest itself of acquired assets); *cf.* *District of Columbia Fed'n of Civic Ass'ns v. Volpe*, 459 F.2d 1231 (D.C. Cir. 1971) (invalidating approval by Secretary of Transportation of bridge construction, deemed to be nonjudicial decision), *cert. denied*, 405 U.S. 1030 (1972). *See generally* W. CARY, *POLITICS AND THE REGULATORY AGENCIES* 45-55 (1967) (Congress has frequently interfered with commission rulemaking).

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* Pierce, *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).

343. *Cf.* Bloch, *supra* note 332, at 116-18 (detailing potential problems of undue congressional influence).

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 guidelines³⁴⁴ and the amendments effective in October, 1988³⁴⁵ all passed without any action on the part of Congress. The May, 1989 amendments (effective November, 1989),³⁴⁶ containing over two hundred changes, also became effective without any hearings or other formal inquiries by Congress.³⁴⁷ 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 supported³⁴⁸ 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.³⁴⁹ Moreover, some statutes have included explicit instructions to the Commission.³⁵⁰ These statutes are responsible for

344. See Notice of Sentencing Guidelines as Submitted to Congress, 52 Fed. Reg. 18,046 (1987).

345. See Notice of Submission of Amendments to Congress, 53 Fed. Reg. 15,530 (1988).

346. See Notice of Submission of Amendments to Congress, 54 Fed. Reg. 21,348 (1989).

347. *ABA Program on Sentencing Discusses Roles of Congress*, Sentencing Commission, 46 Crim. L. Rep. (BNA) 1154, 1155 (Nov. 15, 1989).

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).

349. See, e.g., Crime Control Act of 1990, Pub. L. No. 101-647, § 1214, 104 Stat. 4789, 4833 (1990) (mandatory minima for drug crimes); Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, §§ 6371, 6452, 6460, 6481, 102 Stat. 4181, 4370, 4371, 4373, 4382 (new mandatory minima); Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, § 1002, 100 Stat. 3207, 3207-2 to 3207-4 (1986) (same).

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,³⁵¹ and threaten to take a greater and greater proportion of cases outside the policy framework the Commission has established.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.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.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.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.

351. SUPPLEMENTARY REPORT, *supra* note 27, at 58 n.99 (mandatory minima of 1986 Act responsible for most projected increases in prison population).

352. See 134 CONG. REC. S17,354 (daily ed. Nov. 10, 1988) (statement of Sen. Kennedy); *id.* at S17,353 (statement of Sen. Thurmond); 134 CONG. REC. H11,250, H11,251 (daily ed. Oct. 21, 1988) (statement of Rep. Conyers).

353. See 54 Fed. Reg. 24,073, 24,073-74 (1988) (emergency amendments to obscenity and crack cocaine provisions, prompted by congressional action in related areas). See generally Weich, *Emergency Amendments*, 2 Fed. Sentencing Rep. (Vera) 71, 71 (July/Aug. 1989) (criticizing Commission's emergency amendments prompted by, but not required by, congressional action).

354. 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, *id.* § 994(g), (q), offense grades and maximum penalties, *id.* § 994(r). The Commission is also empowered to make recommendations concerning the modification of penalties generally. *Id.* § 995(a)(20).

The Congress has recently recognized the potential conflict between the work of the Commission and the use of mandatory minima. See Crime Control Act of 1990, Pub. L. No. 101-647, § 1703, 104 Stat. 4789, 4845 (1990) (calling for study of mandatory minima).

355. See generally Eule, *Temporal Limits on the Legislative Mandate: Entrenchment and Retroactivity*, 1987 AM. B. FOUND. RES. J. 379, 383-427 (surveying theories and offering new insights about limited power of legislature to bind successive legislatures); Kahn, *Gramm-Rudman and the Capacity of Congress to Control the Future*, 13 HASTINGS CONST. L.Q. 185, 219-31 (1986) (historical and theoretical analysis of congressional rules dictating congressional action).

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.³⁵⁶ 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.³⁵⁷ 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.³⁵⁸ While the moral outrage of the public over a particular crime

356. Cf. Studies of Impact and Operation of Sentencing Guideline System, 28 U.S.C. § 994 note (1988) (Congress to determine effectiveness of guidelines system, especially compared to parole system, based on GAO study of impact after four years of operation). The proper intensity of congressional review through committee hearings would depend on whether the committee is engaged in comprehensive review of the guideline enterprise or piecemeal review of particular guidelines or crimes. For a discussion of the difference between committee review focused on one issue and congressional review on a larger scale, see J. ABERBACH, *KEEPING A WATCHFUL EYE: THE POLITICS OF CONGRESSIONAL OVERSIGHT* 130-44 (1990); M. KIRST, *GOVERNMENT WITHOUT PASSING LAWS* (1969) (use of appropriations to control agencies); McCubbins, Noll & Weingast, *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431, 440-44 (1989) (amendment of agency procedures prevents deviations from consensus of policymaking coalition); Robinson, *The Federal Communications Commission: An Essay on Regulatory Watchdogs*, 64 VA. L. REV. 169, 179-82 (1978) (examination of the practical weaknesses of congressional review); Shapiro & Glicksman, *supra* note 241, at 820-40 (increasingly narrow legislative grants of authority in environmental area).

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

Death Penalty Once More, 18 U.C. DAVIS L. REV. 957, 964-67 (1985) (supporter of capital punishment concluding that deterrent effect of capital punishment is unproven and perhaps unprovable).

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).

361. Corporate defendants make up less than one percent of all criminal defendants in federal court. M. Cohen, Chih-Chin Ho, E. Jones & L. Schleich, *Report on Sentencing of Organizations in the Federal Courts, 1984-1987*, in U.S. SENTENCING COMMISSION: DISCUSSION MATERIALS ON ORGANIZATIONAL SANCTIONS, ch. 3, at 12 (1988). In particular, federal courts lack significant experience with criminal punishments, other than fines, for corporate offenders. See Wright, *The Proposed Organizational Sanctions Guidelines and the Issue of Corporate Probation*, 1 Fed. Sentencing Rep. (Vera) 295-98 (Nov. 1988).

362. Cf. *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (plurality opinion) (noting that "the penalty of death is qualitatively different from a sentence of imprisonment").

concerns were addressed but not dispelled by the *Mistretta* decision.³⁶³ 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.³⁶⁴

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.³⁶⁵ 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 appointment power.³⁶⁶ 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).

364. *Mistretta v. United States*, 488 U.S. 361, 427 (1988) (Scalia, J., dissenting).

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.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,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.

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.³⁶⁹ These executive orders, however, do not apply to the Sentencing Commission, which is an independent agency within the judicial branch.³⁷⁰ Still, it is worth asking

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).

368. See 28 U.S.C. § 991(a) (1988).

369. 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).

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,³⁷¹ and must consult with various corrections officials during the periodic review and revision of guidelines.³⁷² 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.³⁷³ 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.³⁷⁴ The SRA provides a natural communication channel: through the Attorney General or his or her designee sitting on the Commission.³⁷⁵ This person can monitor the Commission's activities for the President and inform the Commission regarding matters within the purview of the executive.

371. 28 U.S.C. § 997 (1988).

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).

375. *See* 28 U.S.C. § 991(a) (1988).

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."³⁷⁶ 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.³⁷⁷ 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.³⁷⁸

The Sentencing Commission has been fraught with internal disagreement and criticism. Of the seven commissioners appointed in 1984, three no longer serve.³⁷⁹ Commissioner Paul Robinson resigned in 1988 due to his disagreement with the approach adopted in formulating the initial set of guidelines.³⁸⁰ Robinson's concerns included the Commission's refusal to use existing social science data when setting

376. Unfortunately, this is precisely what the Attorney General's designee did with respect to the November 1989 (effective date) amendments, submitted to Congress in May, 1989. See Block, *Emerging Problems in the Sentencing Commission's Approach to Guideline Amendments*, 1 Fed. Sentencing Rep. (Vera) 451, 452 (May 1989).

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).

380. See Coyle & Strasser, *Short-Timer*, Nat'l L.J., Feb. 22, 1988, at 11, col. 1.

sentences.³⁸¹ Commissioner Michael Block resigned after the Commission submitted to Congress a major set of amendments in 1989.³⁸² He alleged that the Commission was “actively seeking an ‘information free’ environment in which to make sentencing policy,”³⁸³ and that it lacked “any real commitment to research as a basis for sentencing law.”³⁸⁴ Judge-Commissioner Stephen Breyer, who has also criticized the Commission’s failure to support its decisions with reliable research,³⁸⁵ did not seek reappointment to the Commission at the end of his abbreviated first term.³⁸⁶ Observers have also begun to criticize the Commission for responding to political pressure rather than to the information it collects.³⁸⁷

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,³⁸⁸ those objectives often conflict and cannot be pursued simultaneously.³⁸⁹ 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

381. Yost, *Sentencing Panel Member Resigns Over Research*, Washington Post, Aug. 23, 1989, at A25, col. 3.

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.

386. *See Sentencing Policy, Disabled*, N.Y. Times, Dec. 19, 1989, at A26, col. 1.

387. Yost, *supra* note 31, at A21, col. 1.

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.³⁹⁰ 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 success arguably embodies the view, adopted by Congress, that the purpose of sentencing is to impose a punishment proportional to the offense.³⁹¹ 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.³⁹² 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.³⁹³

Another potential measure of success might be reduced crime rates. The SRA embraces this view by naming deterrence as a purpose of sentencing.³⁹⁴ However, the difficulty in accurately measuring deterrence has plagued criminal justice researchers in all their efforts.³⁹⁵ Measuring the deterrent effects of sentencing guidelines will likely be equally problematic, 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

390. See Coyle & Strasser, *Guidelines Range*, Nat'l L.J., July 10, 1989, at 21, col. 1 (statement 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).

391. See 18 U.S.C. § 3553(a)(2)(A) (1988).

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 more reliably point to possible reform where the reasons for departures fall into a pattern.

394. See 18 U.S.C. § 3553(a)(2)(B) (1988).

395. See, e.g., *DETERRENCE AND INCAPACITATION: ESTIMATING THE EFFECTS OF CRIMINAL SANCTIONS ON CRIME RATES* 3-14 (A. Blumstein, J. Colien & 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.³⁹⁶ While Congress asked the Commission to create guidelines that would generally not result in the need for expanded prison capacity,³⁹⁷ 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.³⁹⁸ 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.³⁹⁹ 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

396. See 28 U.S.C. § 994(g) (1988); cf. 18 U.S.C. § 3553(a)(2)(C) (1988) (protection of the public—that is, effective incapacitation of criminals—was one of Congress' purposes for sentencing).

397. 28 U.S.C. § 994(g) (1988).

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.

399. See Blumstein, *The Search for the Elusive Common "Principle,"* 82 NW. U.L. REV. 43, 48 (1987) (unavoidable conflict between retribution and crime reduction, the dual objectives of sentencing). See generally A. VON HIRSCH, *supra* note 32 (examining merits of these two competing views of sentencing).

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.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.⁴⁰¹ The Commission has also begun to monitor the *outcomes* of sentencing decisions.⁴⁰² On the other hand, it has no comprehensive method of observing the *process* of sentencing, apart from published opinions.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.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-

400. See *supra* text accompanying notes 32-35, 63-79.

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

402. See *Departments of Commerce, Justice, and State, the Judiciary and Related Agencies Appropriations for 1990, Part 4: The Judiciary: Hearings before the Subcomm. on the Dep'ts of Commerce, Justice, State, the Judiciary, and Related Agencies of the House Comm. on Appropriations*, 101st Cong., 1st Sess. 401, 417-37 (1989) (statement of William W. Wilkins, Jr., Chairman, U.S. Sentencing Comm'n); 1988 ANNUAL REPORT, *supra* note 1, at 13-14.

403. See Alschuler, *The Selling of the Sentencing Guidelines: Some Correspondence With the U.S. Sentencing Commission*, in *THE U.S. SENTENCING GUIDELINES: IMPLICATIONS FOR CRIMINAL JUSTICE* 49, 58-59 (D. Champion ed. 1989) (Commission based guidelines on compiled aggregate statistics of past sentences, but failed to investigate the "human process" involving judges, prosecutors, and defendants). See generally Miller, *supra* note 195, at 9-11, 20-21 (the federal guidelines affirm the need for written sentencing opinions).

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.