View metadata, citation and similar papers at core.ac.uk

brought to you by CORE

provided by Indiana University Bloomington Maurer School of Law

Maurer School of Law: Indiana University
Digital Repository @ Maurer Law

Indiana Law Journal

Volume 55 | Issue 1

Article 6

Fall 1979

The United States Sentencing Commission: A Constitutional Delegation of Congressional Power

William C. Potter II

Follow this and additional works at: http://www.repository.law.indiana.edu/ilj

Part of the Criminal Procedure Commons

Recommended Citation

Potter, William C. II (1979) "The United States Sentencing Commission: A Constitutional Delegation of Congressional Power," *Indiana Law Journal*: Vol. 55 : Iss. 1 , Article 6.
Available at: http://www.repository.law.indiana.edu/ilj/vol55/iss1/6

This Note is brought to you for free and open access by the Law School Journals at Digital Repository @ Maurer Law. It has been accepted for inclusion in Indiana Law Journal by an authorized editor of Digital Repository @ Maurer Law. For more information, please contact wattn@indiana.edu.

JEROME HALL LAW LIBRARY
INDIANA UNIVERSITY
Maurer School of Law
Bloomington

The United States Sentencing Commission: A Constitutional Delegation of Congressional Power

The proposed federal criminal code revision[1] would comprehensively recast our national criminal law.[2] Among various changes in the federal criminal justice system, the bill contemplates the creation of the United States Sentencing Commission (U.S.S.C.). The purpose of the U.S.S.C. would be "to establish sentencing policies and practices for the federal criminal justice system"[3] and develop techniques for measuring their effectiveness.[4]

This note describes how the U.S.S.C. will address the problem of sentencing disparity, examining its philosophical and theoretical premises and outlining the suggested organizational structure of the Commission. The delegation of legislative power problem implicit in S. 1722 will then be analyzed in light of the Supreme Court's traditional standards for delegation of congressional power to the executive and judicial branches. Finally, a suggested revitalized non-delegation test will be described, and it will be argued that the proposed delegation of power to the U.S.S.C. is constitutionally permissible because Congress will have fulfilled its constitutional

---

[1] S. 1722, 96th Cong., 1st Sess. (1979). Senator Edward Kennedy introduced S. 1722 on September 7, 1979. 125 CONG. REC. S12,204 (daily ed. Sept. 7, 1979). The Senate considered and passed a predecessor to S. 1722 in the 95th Congress. S. 1437, 95th Cong., 2d Sess. (1978); 124 CONG. REC. 749-5862 (daily ed. Jan. 30, 1978). However, the House version, H.R. 6869, was blocked within a subcommittee of the House Judiciary Committee and was never reported to the whole committee. Nat'l L.J., Jan. 15, 1979, at 12, col. 2; Wald, *Justice in the Ninety-Fifth Congress: An Overview*, 64 A.B.A.J. 1854, 1859 (Dec. 1978).

The effort to reform the federal criminal code began in 1966 when Congress created the Nation Commission on Reform of the Federal Criminal Laws. This commission isued its report in 1971; their report has served as the basis for legislative reform efforts culminating in S. 1, 94th Cong., 1st Sess. (1975), which was defeated, and S. 1437. *Reform of the Federal Criminal Laws: Hearings on S. 1437 Before the subcomm. on Criminal Laws and Procedure of the Senate Comm. on the Judiciary*, 95th Cong., 1st Sess. 8575-76 (1977) (opening statement of Chairman McClellan) [hereinafter cited as *Senate U.S.S.C. Hearings*].

[2] S. 1722, 96th Cong., 1st Sess. tit. III, ch. 58, §§ 991-998, at 294-302 (1979).

[3] *Id.* § 991(b)(1), at 295. Senator Kennedy introducted a second bill to revise the federal criminal code. S. 1723, 96th Cong., 1st Sess. (1979). This bill would not create the U.S.S.C.; rather a Committee on Sentencing would be established within the United States Judicial Conference. S. 1723, tit. III, ch. 43, § 4304, at 157. This committee would possess a power over sentencing equivalent to the power proposed for the U.S.S.C. The guidelines created under S. 1723 would be advisory, not mandatory as are those of the U.S.S.C. in S. 1722. *Id.* § 4301, at 156-57. Neither is the congressional direction given the Committee on Sentencing as detailed as the direction given the U.S.S.C. in S. 1722. *Id.* § 4302, at 157; S. 1722, 96th Cong., 1st Sess. tit. III, ch. 58, § 994, at 296-99.

Congress currently is considering both bills. In its deliberations, Congress is relying on hearings conducted on S. 1437/H.R. 6869. No new hearings on the U.S.S.C. are currently scheduled; therefore this note will utilize the reports from the hearings on S. 1437/H.R. 6869.

[4] S. 1722, 96th Cong., 1st Sess. tit III, ch. 58, § 991(b)(2), at 295.

function in creating the U.S.S.C. as a reasoned response to the problems of sentence disparity.

THE UNITED STATES SENTENCING COMMISSION

Philosophy of the U.S.S.C.

The proposed U.S.S.C. marks a radical departure from the current sentencing mechanism:[5] it embodies a belief that the problem of sentence disparity[6] cannot be solved through the present open-ended sentencing structure. Under the existing scheme, Congress sets the range of penalties for a crime and the judiciary imposes a specific sentence on a convicted defendant.[7] While the theory of contemporary sentencing structure is that justice requires individualized sentences which can be provided only by the judiciary,[8] the premise underlying the proposed code is that Congress must allocate the sentencing function to combine explicit standards and consistent sentences with a reasonable degree of individualization.[9] The basis of this allocation is the codification of four principles of sentencing: retribution, specific deterrence, general deterrence and rehabilitation.[10]

To implement this philosophy the U.S.S.C. will have multiple functions. First, it will be given the responsibility to establish policies to guide federal judges in imposing sentences.[11] The second function of the U.S.S.C. will be to promulgate guidelines establish-

[5] "The concept of a sentencing commission was suggested by the Workshop on Parole and Sentencing of the Yale Law School." S. REP. No. 605, 95th Cong., 1st Sess., pt. 1, 1159 [hereinafter cited as U.S.S.C. REPORT].

[6] *See* notes 26-44 & accompanying text *infra.*

[7] For example, in the federal system, second degree murder is punishable by imprisonment "for any term of years or for life." 18 U.S.C. § 1111 (1976). Kidnapping is punishable by life imprisonment or any term of years. 18 U.S.C. § 1201 (1976). Within the statutory limits federal judges have wide discretion to impose sentence. *See* FED. R. CRIM. P. 35.

[8] *See* Zalman, *A Commission Model of Sentencing,* 53 NOTRE DAME LAW. 266 (1977).

[9] *See* U.S.S.C. REPORT, *supra* note 5, at 1159-61.

[10] S. 1722, 96th Cong., 1st Sess. tit. I, pt. I, ch. 1, § 101(b), at 12. These four principles represent the first explicit statement by Congress of the principles American criminal law seeks to promote "to establish justice in the context of a federal system." U.S.S.C. REPORT, *supra* note 5, at 19-20.

[11] S. 1722, 96th Cong., 1st Sess. tit. III, ch. 58, § 991(b)(1), at 295 (1979). The policies and standards the U.S.S.C. promulgates will have to reflect three basic considerations: (1) promoting the principles of sentencing delineated by Congress; (2) providing certain and fair sentences to avoid "unwarranted sentence disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices"; and (3) utilizing "to the extent practicable, advancement in knowledge of human behavior" as it relates to the federal criminal justice system. *Id.*

ing sentence ranges.[12] Finally, the U.S.S.C. will be directed to develop techniques to measure the effectiveness of the Commission's sentencing, penal and correctional standards.[13]

Structure of the U.S.S.C.

The U.S.S.C. will be placed in the judicial branch to symbolize that sentencing is primarily a judicial function,[14] yet S. 1722 recognizes that the executive branch and Congress also have interests in sentencing which must be respected. The executive branch must assure that the criminal laws are faithfully executed[15] and Congress must set the broad framework of sentencing.[16] To represent these three interests the U.S.S.C. will be composed of seven members serving staggered six-year terms.[17] Four members will be appointed by the President from a list of judges recommended by the United States Judicial Conference. The remaining three members, including the chairman, will be selected by the President and confirmed by the Senate.[18]

As a part of its effort to resolve the problem of sentence disparity, the proposed revision divides the traditional power over sentencing between Congress and the U.S.S.C. The bill explicitly acknowledges Congress' interest in establishing the "broad framework" for sentencing. Congress would still define criminal conduct,[19] establish classes of offenses[20] and set the upper limit of the punishment range for each class.[21] In addition, Congress' interest would be served by requiring U.S.S.C. guidelines to be reported to the Congress.[22] The

[12] *Id.* § 994(b), at 296-97. These ranges will be based upon congressionally determined classes of offenses but will vary according to subclassses of offenses and categories of defendants defined by the U.S.S.C. *Id.* tit. I, pt. III, chs. 21-23, §§ 2101-2306, at 157-67; *id.* tit. III, ch. 58, § 994(b), at 296-97.

[13] *Id.* § 991(b)(2), at 295.

[14] U.S.S.C. REPORT, *supra* note 5, at 1159.

[15] *Id.*

[16] *Id.*

[17] S. 1722, 96th Cong., 1st Sess. tit. III, ch. 58, § 992(a), at 295 (1979).

[18] *Id.* Although the recommendation list is submitted by the Judicial Conference, the President will appoint the U.S.S.C. members. In establishing sentencing guidelines, U.S.S.C. members will be "exercising significant authority pursuant to the laws of the United States" and therefore will be officers of the United States. *See* Buckley v. Valeo, 424 U.S. 1, 126 (1975). Consequently such an appointment procedure will not violate the appointment clause of the Constitution. *Id.* However, while the three members appointed directly by the President will be subject to Senate approval, the four members selected by the President from the recommendation list of the Judicial Conference will not be subject to Senate confirmation. S. 1722, 96th Cong., 1st Sess. tit. III, ch. 58, § 991(a), at 294 (1979). The constitutional ramifications of such an appointment procedure are beyond the scope of this note.

[19] *Id.* tit. I, pt. II, chs. 10-18, §§ 1001-1861 at 37-153.

[20] *Id.*

[21] *Id.* pt. III, ch. 22, § 2201, at 163; *id.* ch. 23, § 2301, at 165.

[22] *Id.* tit. III, ch. 58, § 994(n), at 299. As passed by the Senate, S. 1722 requires only that

U.S.S.C., on the other hand, would have the power to establish subclasses of offenses and categories of defendants within the congressionally-decreed classes,[23] and the U.S.S.C. would set the specific penalty for each subclass of offense and category of defendant within the congressionally-decreed punishment range.[24] In establishing the initial guidelines, the U.S.S.C. would be required to examine the average sentences currently imposed in comparable cases and adopt them if they fulfill the sentencing principles of S. 1722.[25]

THE U.S.S.C. AND THE PROBLEM OF SENTENCE DISPARITY

The sentencing decision is afflicted with many ills which combine to create sentence disparity.[26] Sentence disparity results when differences in sentencing among similar defendants reflect fortuitous

---

the U.S.S.C. report its guidelines no later than May 1 of each year. The guidelines would become effective 180 days later. No provision for a congressional veto is contained in the bill. *Id.* However, the Senate report claims that this reporting provision gives Congress a veto power over any U.S.S.C. guidelines. U.S.S.C. REPORT, *supra* note 5, at 1169. At least one Senator concurred in this view. *Senate U.S.S.C. Hearings, supra* note 1, at 8577 (summary of the provisions of the proposed sentencing system contained in the opening statement of Sen. McClellan). The constitutional ramifications of congressional review of the U.S.S.C. guidelines are beyond the scope of this note.

[23] S. 1722, 96th Cong., 1st Sess. tit. III, ch. 58, § 994(c), (d), at 297 (1979).

[24] *Id.* § 994(b), at 296-97. Judges may impose a sentence which varies from the U.S.S.C. guidelines by writing an explanatory opinion. *Id.* tit. I, pt. III, ch. 20, § 2003(c), at 155.

[25] *Id.* tit. III, ch. 58, § 994(k), at 298. It is anticipated that the U.S.S.C. will form several subcommittees exercising specific delegated responsibilities to develop its sentencing ranges, guidelines and policies. The duties of the subcommittees could include: (1) review of the effectiveness of sentencing policies of the probation and parole system; (2) control of the application of the sentencing and parole guidelines and policy statements; (3) continued refinement of guidelines and policy statements; (4) development of and lobbying for legislative proposals concerning the area of sentencing; (5) development and coordination of research (for example, basic research on sentencing theories or applied research on the effectiveness of presently implemented sentencing policy); and (6) review of the effectiveness of the Bureau of Prison's corrections programs in achieving the purposes of prison sentences. U.S.S.C. REPORT, *supra* note 5, at 1160.

[26] A variety of problems and controversies involving the current sentencing process have been discussed. Among the relevant commentaries are: M. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER (1973); N. MORRIS, THE FUTURE OF IMPRISONMENT (1974); P. O'DONNELL, M. CHURGIN & D. CURTIS, TOWARD A JUST AND EFFECTIVE SENTENCING SYSTEM (1977); A. PARTRIDGE & W. ELDRIDGE, THE SECOND CIRCUIT SENTENCING STUDY, A REPORT TO THE JUDGES OF THE SECOND CIRCUIT (1974); A. VON HIRSCH, DOING JUSTICE: THE CHOICES OF PUNISHMENT (1976); Berger, *Equal Protection and Criminal Sentences: Legal and Policy Considerations,* 71 NW. U.L. REV. 29 (1976); Kennedy, *Toward a New System of Criminal Sentencing: Law with Order,* 16 AM. CRIM. L. REV. 353, 357-67 (1979); *Senate U.S.S.C. Hearings, supra* note 1, at 8603 (statement of Prof. Louis B. Schwartz), 8880 (statement of Norman A. Carlson), 9018 (statement of Curtis C. Crawford), 9042 (statement of Alan Dershowitz).

factors.[27] Two kinds of disparate sentences exist: substantially different sentence lengths may be imposed by different judges on similar defendants for the same crime, or the same judge may issue varying sentences for comparable crimes committed by similar defendants.[28] Although unequal sentences are appropriate to take account of mitigating or aggravating circumstances which differentiate the defendant or his conduct from other instances involving the same or similar offenses,[29] where there are no relevant differences between defendants or the circumstances of the crimes in the same category of offense, varying sentences are unjustified.[30]

The two primary causes of sentence disparity are irrational sentencing principles and judicial discretion in imposing sentence. Current federal law lacks any "clearly articulated sentencing philosophy to guide sentencing judges in the choice among the sentences that may be available."[31] Lacking guidance as to Congress' preference among the various sentencing rationales, the judiciary is burdened with weighing disparate sentencing criteria. With too large a caseload and lacking experience or training in the logic and theories of criminal sentencing principles, the individual judge, instead of society's elected representatives, independently decides the rationale for each sentence imposed.[32]

The proposed criminal code attempts to supplant the various irrational sentencing criteria now prevailing by delineating four sentencing principles which will constitute the basic federal policy in imposing criminal sanctions,[33] and serve as the foundation of the U.S.S.C. guidelines.[34] In turn, the U.S.S.C. guidelines will provide the judiciary with the necessary justification for the sentences it imposes.[35]

Sentence disparity is also a function of judicial discretion. Sen-

---

[27] Zalman, *supra* note 8, at 267-68.

[28] Note, *Disparity and Discretion in Sentencing: A Proposal for Uniformity*, 25 U.C.L.A. L. REV. 323, 325 (1975).

[29] *See* U.S.S.C. REPORT, *supra* note 5, at 890, 1161.

[30] Berger, *supra* note 26, at 32. In the same light, congressional establishment of overlapping statutes prescribing varied penalties for a single act or similar acts is unjustified if there are no significant differences between the proscribed acts.

[31] *Hearings on the Sentencing Provisions of H.R. 6869 and S. 1437 Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 95th Cong., 2d Sess. 1405 (1978) (statement of Ronald L. Gainer) [hereinafter cited as *House U.S.S.C. Hearings*].

[32] *See id.* at 1407-09.

[33] S. 1722, 96th Cong., 1st Sess. tit. I, pt. I, ch. 1, § 101(b), at 12 (1979). Although sentences may be imposed for purposes of rehabilitation, it is recognized "that imprisonment is generally not an appropriate means of promoting . . . rehabilitation." *Id.*

[34] *Id.* tit. III, ch. 58, § 991(b)(1)(A), at 295. The relative weight to be given each objective is left to the U.S.S.C.

[35] *Id.* § 994(a), at 296.

tencing power currently is divided among various agencies and decisionmakers having both legal and factual discretion in deciding the sentence to impose.[36] Diffusion of sentencing authority intensifies the effects of judicial discretion at the sentencing stage. Currently, Congress' role is to define the elements of a crime and set the punishment for it,[37] while the trial judge is to impose the specific sentence within the congressionally-declared range.[38] Congress is not supposed to delegate to the courts this power to prescribe the punishment for a criminal offense,[39] but because Congress in the past has failed to fulfill its responsibilities in setting the penalties for crimes by establishing a rational sentencing scheme, the judiciary exercises a broad discretion in imposing sentence within the statutory limits.[40]

S. 1722 through the U.S.S.C. attempts to circumscribe the discretion of the individual judge by clarifying the lines of sentencng authority. It condenses the criminal code's overlapping crimes into three distinct classes of crimes: infraction, misdemeanor and felony,[41] and it sets the upper limit of the general penalty ranges for each class of crime.[42] The U.S.S.C. would then establish the specific sentence range for each congressionally-defined class of crime and create categories of defendants and offenses which will be established within the sentence ranges.[43] Congress has limited its delegation, however, by describing factors the U.S.S.C. must consider in prescribing sentencing criteria.[44]

[36] Zalman, *supra* note 8, at 269-70.

[37] United States v. Hall, 98 U.S. 343, 345 (1878); Harris v. United States, 190 F.2d 503, 505 (10th Cir. 1951).

[38] United States v. Johnson, 507 F.2d 826, 829 (7th Cir. 1974), *cert. denied,* 421 U.S. 949 (1975); United States v. Sweig, 454 F.2d 181, 183-84 (2d Cir. 1972); *accord,* United States v. Menichino, 497 F.2d 935, 945 (5th Cir. 1974); United States v. Wade, 364 F.2d 931, 936 (6th Cir. 1966); Ellis v. United States, 321 F.2d 931, 933 (9th Cir. 1963); Harris v. United States, 190 F.2d 503, 505-06 (10th Cir. 1951).

[39] United States v. Evans, 333 U.S. 483, 495 (1948); United States v. Hairston, 437 F. Supp. 33, 35 (N.D. Ill. 1977).

[40] United States v. Johnson, 507 F.2d at 829. *See generally* United States v. Tucker, 404 U.S. 443, 446 (1972); United States v. Trigg, 392 F.2d 860 (7th Cir. 1968), *cert. denied,* 391 U.S. 961 (1968). Despite Congress' questionable practice of granting the judiciary a broad discretion in imposing sentence, the courts have never been called upon to set the limits Congress must observe in delegating to the judiciary the power to set the penalty for a defendant convicted of a crime. *See generally* United States v. Evans, 333 U.S. 483, 495 (1948); United States v. Hairston, 437 F. Supp. 33, 35 (N.D. Ill. 1977).

[41] S. 1722, 96th Cong., 1st Sess. tit. I, pt. II, chs. 10-18, §§ 1001-1861, at 37-153 (1979).

[42] *Id.* pt. III, chs. 21-23, §§ 2101-2306, at 157-66.

[43] *Id.* tit. III, ch. 58, § 994(b)-(d), at 296-97.

[44] For example, in establishing categories of offenses the U.S.S.C. shall consider, but shall not limit its consideration to the relevancy of:

(1) the grade of the offense; (2) the circumstances under which the offense was

By seeking to limit the sentencing discretion of individual judges through this delegation of the power to issue guidelines and policies, Congress would thus authorize the U.S.S.C. to operate in the gray area between the legislative and judicial spheres. This poses two novel problems: identifying the appropriate constitutional concepts to be applied in analyzing the U.S.S.C., and assessing the validity of the delegation of sentencing power inherent in S. 1722.

DELEGATION OF CONGRESSIONAL POWER TO THE U.S.S.C.

Judicially Imposed Limits on Delegation of Legislative Power to the Executive Branch.

Nowhere does the Constitution expressly limit the delegation of legislative power to the executive or judicial branch.[45] From the earliest days of the United States, however, Congress has delegated portions of its authority to other branches of the federal government.[46] Although such delegations usually have been upheld as ways

---

> committed which mitigate or aggravate the seriousness of the offense; (3) the nature and degree of the harm caused by the offense, including whether it involved property, irreplaceable property, a person, a number of persons, or a breach of public trust; (4) the community view of the gravity of the offense; (5) the public concern generated by the offense; (6) the deterrent effect a particular sentence may have on the commission of the offense by others; and (7) the current incidence of the offense in the community and in the nation as a whole.

Id. § 994(c), at 297.

Similarly, in creating categories of defendants the U.S.S.C. shall consider the relevance of the defendant's:

> (1) age; (2) education; (3) vocational skills; (4) mental and emotional condition to the extent that such condition mitigates the defendant's culpability or to the extent that such condition is otherwise plainly relevant; (5) physical condition, including drug dependence; (6) previous employment; (7) family ties and responsibilities; (8) community ties; (9) role in the offense; (10) criminal history; and (11) degree of dependence upon criminal activity for a livelihood.

Id. § 994(d), at 297.

[45] *See generally* U.S. CONST. art. I, § 1.

[46] *See generally* Zemel v. Rusk, 381 U.S. 1 (1965) (upholding grant of authority to Secretary of State to refuse to validate passports of American citizens for travel to specific countries); Arizona v. California, 373 U.S. 546 (1963) (upholding broad powers of allocation of the waters of the Colorado River and its tributaries delegated to the Secretary of the Interior); Kent v. Dulles, 357 U.S. 116 (1958) (upholding delegation of power to Secretary of State to issue passports); Lichter v. United States, 334 U.S. 742 (1948) (upholding authority delegated to the War and Navy Departments or Maritime Commission for administrative determination of the amount of "excessive profits" realized on war contracts); Currin v. Wallace, 306 U.S. 1 (1939) (upholding authority granted to the Secretary of Agriculture to establish tobacco prices and designate auction markets where tobacco which moved in interstate or foreign commerce could be bought and sold); Hampton & Co. v. United States, 276 U.S. 394 (1928) (upholding § 315(a) of the 1922 Tariff Act delegating to the President the power to increase or decrease import duties).

to effectuate the law, some delegations have been rejected under the non-delegation doctrine. Since the inception of the New Deal over forty years ago, the Supreme Court rarely has utilized the doctrine to invalidate congressional delegations of power.[47] Nevertheless, while the Supreme Court subsequently has sustained the broadest delegations, often accepting statutory standards more vague than those invalidated during the 1930's when the non-delegation doctrine was being applied rigorously,[48] the Court has never explicitly abandoned the doctrine, nor explicitly overruled some of its stricter applications. While the cases from the 1930's are doubtful precedents for invalidating legislative delegations to the executive branch, the Court's failure to repudiate them suggests that the non-delegation doctrine remains available to invalidate extreme delegations of legislative power.[49]

In refusing to utilize the non-delegation doctrine to invalidate congressional acts containing vague or non-existent standards, the Supreme Court has relied on various verbal formulae to distinguish when and to what extent delegations are allowed. Initially, the Court required Congress to provide a "triggering" event, announced by a presidential proclamation, to make the delegation effective.[50] Subsequent formulations evolved to guide and limit the exercise of delegated power by the executive. Theories ranged from the view that the delegatee merely filled in the details of the statute,[51] to the belief that the legislation's "intelligible principle" guided the delegatee's actions.[52] During this evolution the Court routinely came to accept certain axioms of the non-delegation doctrine. Thus, because fact-finding aids Congress in setting policy and enacting legislation, the Court consistently has upheld delegations of fact-finding power to administrative agencies;[53] Congress also has been permitted to

[47] In fact, only on three occasions since 1933 has the Supreme Court overruled legislative delegations. Carter v. Carter Coal Co., 298 U.S. 238 (1936) (holding unconstitutional Congress' delegation to private parties of the authority to fix maximum hours and minimum wages); Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935) (invalidating an attempted delegation of power to the President to develop and approve "codes of fair competition" since the delegation permitted the President to exercise unfettered discretion); Panama Ref. Co. v. Ryan, 293 U.S. 388 (1935) (declaring unconstitutional a more narrow delegation to the President of the power to prohibit the interstate shipment of oil produced in violation of state law).

[48] *See, e.g.*, cases cited note 46 *supra*.

[49] *See* Amalgamated Meat Cutters v. Connally, 337 F. Supp. 737, 746-47 (D.D.C. 1971). *See generally* United States v. Nixon, 418 U.S. 683, 703-07 (1974).

[50] The Brig Aurora v. United States, 11 U.S. (7 Cranch) 382 (1813).

[51] United States v. Grimaud, 220 U.S. 506, 517 (1911).

[52] Hampton & Co. v. United States, 276 U.S. 394, 409 (1928).

[53] Yakus v. United States, 321 U.S. 414, 424 (1944).

delegate broad powers to issue and revoke licenses,[54] set rates,[55] and promulgate rules—including rules enforced by administrative sanctions.[56] Moreover, the scope of a delegation tends to receive a liberal interpretation to accomplish the statutory purpose.[57] These justifications were developed by the Court because it felt that the complexity of certain problems left Congress no practical alternative.[58] Thus the role of the non-delegation doctrine has evolved into one of establishing limits on congressional delegations.[59]

One example of traditional Supreme Court analysis of congressional delegations to the executive is *Lichter v. United States,*[60] where the court upheld the provisions of the 1942 Renegotiation Act that authorized the executive branch to recover "excessive profits" earned by corporations through subcontracts with primary contractors for products used in the American effort in World War II. These recoveries were authorized despite a lack of any contractual provisions for defining "excessive profits."[61] The petitioners argued that the 1942 Renegotiation Act represented an unconstitutional delegation of legislative power to the executive branch because of an absence of any statutory definition of legislative policy and standards. They specifically focused on the term "excessive profits."[62] Any determination of excessive profits on contracts prior to April 28, 1942 would have constituted, it was claimed, "an unconstitutional exercise of legislative power by an administrative official instead of a mere exercise of administrative discretion under valid legislative authority."[63] The Supreme Court admitted there was no "express definition of the term 'excessive profits' "[64] so the Court examined the statute and the actions of the administrative officials for an implicit definition.[65]

The Court found an adequate definition in certain express provisions of the Act and subsequent amendments of it, and in the administrative practices implementing the Act. A partial definition of

[54] *See* NBC v. United States, 319 U.S. 190 (1943).
[55] Permian Basin Area Rate Cases, 390 U.S. 747, 769-70 (1968).
[56] *See, e.g.,* L.P. Steuart & Bros. v. Bowles, 322 U.S. 398 (1944).
[57] *See* FPC v. Hope Natural Gas Co., 320 U.S. 591 (1944).
[58] *See* Buttfield v. Stranahan, 192 U.S. 470, 496 (1904).
[59] Amalgamated Meat Cutters v. Connally, 337 F. Supp. 737, 745-46 (D.D.C. 1971).
[60] 334 U.S. 742 (1948).
[61] *Id.* at 746. Furthermore, the Act allowed recovery of "excessive profits" on contracts entered into prior to the enactment of the Act if the final payment on the contract had not been made prior to the April 28, 1942 enactment date. *Id.*
[62] *Id.* at 774-75.
[63] *Id.* at 775.
[64] *Id.* at 776.
[65] *Id.* at 776-78.

"excessive profits" was found in an amendment requiring that contracts entered into after April 28, 1942 contain renegotiation clauses when the profit exceeded $100,000.[66] A second statutory change, requiring that the administrative officials renegotiating contracts or determining excessive profits should not allow for excessive salaries or costs, provided further guidance to the meaning of "excessive profits."[67] At the time Congress amended the Act in 1942, it knew of a War Department directive establishing certain factors for determining excessive profits and providing a general definition of the term.[68] The Court did not claim that this represented a real definition of the phrase, but rather accepted it as an expression of congressional satisfaction that current administrative practice was within "the existing specificity of the Act."[69] This judicial acceptance of an ambiguous definition as an adequate albeit implicit congressional standard reflected a need to balance maintenance of the constitutional framework against the need for a Constitution flexible enough to allow congressional responses to complex and critical problems. Influenced by the contingencies of World War II,[70] the court empha-

---

[66] *Id.* at 776-77.

[67] *Id.* This second statutory provision did not define "excessive profits" in terms of excessive salaries or costs or offer a guide as to the meaning of excessive salaries or costs. *Id.*

[68] *Id.* at 777. The definition provided by the War Department directive was: "The term 'excessive profits' means any amount of a contract or subcontract price which is found as a result of renegotiation to represent excessive profits." *Id.*

[69] *Id.*

[70] *Id.* at 778-80. Nowhere in the opinion did the Court address the question of the result had not the crisis of the second world war been a factor.

A technique parallel to the one utilized in *Lichter* was used in Amalgamated Meat Cutters v. Connally, 337 F. Supp. 737 (D.D.C. 1971), to uphold the Economic Stabilization Act of 1970 as a valid delegation of decisionmaking power. The Act granted broad powers to the President to stabilize prices, wages, rents and salaries through Presidential orders and administrative regulations. The union sought an injunction against such an order "freezing" wages and prices. *Id.* at 742-43. Judge Leventhal, writing for a three-judge district court, acknowledged "the broad discretion given to the President by the Act." *Id.* at 745. The court recognized that the purpose of the non-delegation doctrine was to allow congressional delegations of "legislative authority provided it has exercised 'the essentials of the legislative function'—of determining the basic legislative policy and formulating a rule of conduct." *Id.* at 746. In light of the limitations contained in the Act, plus the complexity of the problem of inflation that Congress sought to resolve, Judge Leventhal held the Act to be valid within the non-delegation doctrine.

While admitting the ambiguity of certain statutory limitations, the court focused on specific provisions providing adequate guidance to the President in exercising the delegated discretion. First, in stabilizing prices and wages the President could not set price and wage levels below "those prevailing on May 25, 1970." *Id.* at 747. Second, a 1971 amendment to the Act further limited the President's discretion, since it precluded "singling out 'a particular industry or sector of the economy upon which to impose controls' " unless wages or prices in that industry or sector increased at a disproportionate rate. *Id.*

The Court discerned a third statutory limitation in that the President's orders regulating

sized the latter half of the balance and upheld the Act as a proper delegation of legislative power.

The Supreme Court also has discovered implied limitations to validate standardless delegations involving constitutional rights. In *Kent v. Dulles*[71] the Secretary of State denied passports to two applicants because they refused to comply with regulations issued by the Secretary of State requiring affidavits stating they were not communists. The regulations were premised upon a standardless delegation from Congress,[72] directing the Secretary to "issue passports under such rules as the President shall designate and proscribe."[73] When Congress, in 1952, made possession of a passport mandatory for foreign travel by an American citizen, the President or his subordinate had the power to deny a citizen's right to travel.[74]

Mr. Justice Douglas, for the Court, narrowed the issue to avoid any delegation question. This was necessitated by the standardless delegation that Congress gave the Secretary of State and in light of the concession by the Solicitor General that the "right to travel is a part of the 'liberty' of which a citizen cannot be deprived without due process of law."[75] Without such a narrow reading, the Court would have had to consider whether Congress had delegated to the Secretary the power to abridge the right to travel. Justice Douglas avoided this issue by noting that from the codification of the Passport Act in 1926 down to the 1952 Act which made possession of a passport mandatory for foreign travel, passports had been denied for only three reasons: lack of citizenship or allegiance to the United States and criminal conduct.[76] The individuals in *Kent* had been denied passports on neither ground, and the Court concluded that these were "the only ones . . . adopted by Congress in light of prior administrative practice."[77] These three bases became the standards

wages and prices were limited to a six-month lifespan with subsequent extensions of these orders limited to shorter durations. *Id.* at 754.

A less specific, non-statutory limitation, which also demonstrated the difficulty of combating "inflationary psychology," was the experience of Congress and the judiciary in resolving the inflation caused by World War II and the Korean War. *Id.* at 748-50. Viewed from this background, the Act provided less discretionary power than the Emergency Price Control Act of 1942, *id.* at 747, which had been validated in Yakus v. United States, 321 U.S. 414 (1944). Despite the absence of a wartime emergency, however, Congress was "entitled to a fresh approach" in light of the divergent views of the causes of and alternate solutions to inflation. Amalgamated Meat Cutters, 337 F. Supp. at 748-54.

[71] 357 U.S. 116 (1958).

[72] *Id.* at 123.

[73] *Id.*

[74] *Id.* at 128.

[75] *Id.* at 125.

[76] *Id.* at 127.

[77] *Id.* at 128.

read into the 1952 Act as a "legislative" limitation on the otherwise "unbridled discretion," given to the Secretary of State.[78]

These traditional tests for a congressional delegation could be utilized to formulate adequate limitations upon the delegation of power to the U.S.S.C. First, it should be recognized that the problem of disparate sentences is complex and that Congress is entitled "to a fresh approach" in solving it.[79] Next, the "filling up the details"[80] or the "intelligible principle"[81] rationales can be utilized to characterize the U.S.S.C. as the delegatee implementing the congressional decision to establish rational sentencing schemes applying specific principles. Other aspects of S. 1722 further bolster the comparison to these traditional approaches. Congress not only has set the basic sentencing philosophy, but has also created three classes of crimes (infraction, misdemeanor and felony)[82] for which three levels of punishment (probation, fines and imprisonment)[83] are allowed within maximum levels.[84] Further, Congress sets forth the factors for defining categories of defendants.[85] Thus the Commission's role would be to apply the general policy and factors of S. 1722 through the sentence ranges to specific subclasses of offenses and categories of defendants which it will develop. Either justification for the delegation to the U.S.S.C. is premised upon acceptance of Congress' belief that the general problem of sentencing, along

[78] *Id.* Zemel v. Rusk, 381 U.S. 1 (1965), upheld a similar standardless delegation in the same area of administration by relying upon a long-standing practice known to Congress when it enacted the 1952 statute. The State Department prevented the petitioners from traveling to Cuba by refusing to validate passports for transit there pursuant to a departmental regulation which was premised on the 1926 statute, restricting travel to certain countries (including Cuba). Violations of these area restrictions resulted in criminal sanctions. The Court upheld these regulations since Congress, at the time of the 1952 enactment giving the Secretary the power to grant or deny passport applications, knew of the practice of area restrictions. The Court rejected the argument that the petitioner's first and fifth amendment rights were impaired, and similarly rejected the contention that the basic delegation to the Secretary of State was unconstitutional due to a lack of any standard. *Id.* at 1-11.

Mr. Justice Black, in a vigorous dissent, attacked the legislation as a standardless delegation of legislative power in violation of the Constitution. The basis of his dissent was the belief that the challenged regulations represented a delegation of the congressional lawmaking function and were not a mere bestowal of an executive or law-executing function. The challenged delegation was even more objectionable in Black's view because a constitutional right was abridged and a criminal sanction imposed on any citizen exercising that right in violation of the Secretary's regulations. *Id.* at 20-23.

[79] *See* Lichter v. United States, 334 U.S. 742, 774-78 (1948); Amalgamated Meat Cutters v. Connally, 337 F. Supp. 737, 750-54 (D.D.C. 1971).

[80] United States v. Grimaud, 220 U.S. 506, 517 (1911).

[81] Hampton & Co. v. United States, 276 U.S. 394, 409 (1928).

[82] S. 1722, 96th Cong., 1st Sess. tit. I, pt. II, chs. 10-18, §§ 1001-1861, at 37-153 (1979).

[83] *Id.* pt. III, chs. 21-23, §§ 2101-2306, at 157-66.

[84] *Id.*

[85] *Id.* tit. III, ch. 58, § 994(d), at 297.

with the specific problem of disparate sentences, cannot be dealt with merely by enacting legislation. The only courses left to Congress are either to outline the area in which its delegatee is to operate and give it the power to solve the problem, or to pass and constantly amend a series of complex laws to address the problem as it evolves.

Kent v. Dulles[86] offers an analogous basis on which the delegation to the U.S.S.C. could be upheld. There the Court relied on agency procedures known at the time the statute was enacted to limit the standardless delegation contained in the statute. Similarly, the U.S.S.C., in promulgating its initial guidelines, is to be guided by the "average sentences imposed . . . prior to the creation of the Commission."[87] These average sentences are known to Congress[88] just as the reasons for denying passports were known in 1952. Thus, if the delegation to the U.S.S.C. appears to be too broad, the rationale of *Kent* would offer the means to limit the U.S.S.C.'s discretion without invalidating the delegation.

Because the sentencing choices of the U.S.S.C. would be governed by explicit congressional standards, the delegation of power would be permissible under the traditional non-delegation tests; but this would involve reaching the right result for the wrong reasons. Relying on the traditional tests perpetuates the illogical basis of the non-delegation doctrine.

Delegation of Non-Judicial Power to the Judiciary

The U.S.S.C. delegation also could be analogized to delegations of arguably non-judicial power to the judiciary. While Congress has never attempted to delegate to the judiciary the power to prescribe the exact punishment for a specific crime, other non-judicial powers have been delegated successfully, suggesting that Congress may delegate some of its penal power to the U.S.S.C.

Congress has delegated to the Supreme Court the power, subject to congressional review and veto, to establish rules of practice and procedure for the federal courts.[89] Generally, however, the Supreme Court's exercise of rulemaking power has not been attended by congressional assertions of the retained legislative power to change rules

---

[86] 357 U.S. 116 (1958).

[87] S. 1722, 96th Cong., 1st Sess. tit. III, ch. 58, § 994(k), at 298 (1979).

[88] *Senate U.S.S.C. Hearings, supra* note 1, at 9227 (average sentences imposed and served for federal offenses committed in randomly selected districts).

[89] 18 U.S.C. §§ 3371-3372 (1976); 28 U.S.C. §§ 2072, 2075 (1970); 28 U.S.C. § 2076 (1976).

of procedure and practice prescribed by the Court.[90] Until recently,[91] controversial rules had never caused the perimeter of the Court's rulemaking power to be approached. Constitutional questions concerning the proper division of power between Congress and the Supreme Court over judicial practice and procedure have seldom arisen and have never been settled.[92] As a consequence, the Court dominated the development of the Federal Rules of Civil Procedure,[93] the Federal Rules of Criminal Procedure,[94] the Federal Rules of Evidence[95] and general rules of practice and procedure under the Bankruptcy Act.[96] The only restraint on the Court's domination is an unexercised congressional veto power over the substantive nature of the rules.[97]

Wayman v. Southard,[98] the first case to examine judicial rulemaking, held that the 1792 Process Act provision, delegating to the federal courts power to alter regulations concerning executive processes issued by the courts, was not an unconstitutional delegation of legislative authority.[99] The Court recognized a gray area between exclusively legislative power and exclusively judicial power, but al-

---

[90] *See* 1B MOORE'S FEDERAL PRACTICE, ¶ 0.501[2], [3], at 5020-35 (2d ed. 1974).

[91] On November 20, 1972, the Supreme Court issued proposed Federal Rules of Evidence. *See* Rules of Evidence for United States Courts and Magistrates, 56 F.R.D. 183, 194-353 (1972). On January 29, 1973, Senator Sam Ervin introduced a bill seeking to prevent these rules from taking effect until the close of the first session of the 93d Congress. 119 CONG. REC. 2395 (1973). The House of Representatives amended the bill to require affirmative congressional approval of the rules. 119 CONG. REC. 7652 (1973). Senator Ervin's bill, as amended, became law on March 30, 1973. 119 CONG. REC. 5987 (1973).

[92] MOORE, *supra* note 90, ¶ 0.501[2]-[3], at 5020-35. The judiciary has long exercised statutory power over its own procedure. The 1789 Judiciary Act granted the Supreme Court the power " 'to make and establish all necessary rules for the orderly conducting [of] business in the said Courts, provided such rules are not repugnant to the laws of the United States.' " Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 42 (1825). The Court has accepted Congress' dominant power over federal rules of procedure and practice; apparently the Court also would accept a clear congressional withdrawal of its rulemaking power. *See, e.g.*, Sibbach v. Wilson & Co., 312 U.S. 1 (1941); Wayman v. Southard, 23 U.S. (10 Wheat.) at 43.

[93] 28 U.S.C. § 2072 (1976).

[94] 18 U.S.C. §§ 3371-3372 (1976).

[95] 28 U.S.C. § 2076 (1976).

[96] *Id.* § 2075.

[97] *See generally* Abourezek, *Congressional Veto: A Contemporary Response to Executive Encroachment on Legislative Prerogatives*, 52 IND. L.J. 323 (1977); Bruff & Gellhorn, *Congressional Control of Administrative Regulation: A Study of Legislative Vetoes*, 90 HARV. L. REV. 1369 (1977); Cooper & Cooper, *Legislative Veto and the Constitution*, 30 GEO. WASH. L. REV. 467 (1962); Miller & Knapp, *Congressional Veto: Preserving the Constitutional Framework*, 52 IND. L.J. 367 (1977); Address by Antonin Scalia, Proceedings of the Administrative Law Section's 1976 Bicentennial Institute—Oversight and Review of Agency Decisionmaking (Mar. 19, 1976), *reprinted in* 28 AD. L. REV. 661, 684-95 (1975); Watson, *Congress Steps Out: A Look at Congressional Control of the Executive*, 63 CALIF. L. REV. 983 (1975).

[98] 23 U.S. (10 Wheat.) 1 (1825).

[99] *Id.* at 42.

lowed Congress to delegate powers shared with the other branches of government.[100] Despite the language of *Wayman* which seems to allow delegated judicial rulemaking, the Court did not adopt procedural rules governing actions at law until the Federal Rules of Civil Procedure were promulgated in 1938, because Congress failed to delegate such power to the Court.[101] This failure to delegate the power, considered in combination with Congress' veto power over procedural rules, suggests that the correct source of the Court's rulemaking power is not an inherent judicial power, but a delegated legislative power.

Not until 1940, in *Sibbach v. Wilson & Co.*,[102] were these subtle distinctions in the possible basis of the Supreme Court's rulemaking power presented to the Court. The underlying issue in *Sibbach* was whether the Court could constitutionally act as Congress' delegatee in formulating a code of federal rules of procedure.[103] The Court viewed judicial procedure as properly within the legislative realm; thus Congress could delegate rulemaking power to the judiciary, provided that the judiciary's rules of procedure would not alter the substantive rights of a litigant.[104] A procedural rule changing substantive rights would be evidence of the Court's acting in a legislative, non-judicial sphere.[105]

The delegation to the U.S.S.C. of the authority to promulgate sentence guidelines and ranges cannot be justified as merely delegation to the judiciary of the power to administer the business of the courts, because these guidelines will affect the substantive rights of the convicted defendants. If the U.S.S.C. guidelines are viewed as substantive, *Wayman* and *Sibbach* might appear to render them unconstitutional. Dicta in these decisions, however, provide support by analogy for the delegation to the U.S.S.C. on another point. The Court in *Sibbach* recognized a gray area incident to the delegation

[100] *Id.* at 43.

[101] Rules of Civil Procedure for the District Courts of the United States, 308 U.S. 645 (1938). The Supreme Court, however, did issue equity rules in 1822, Rules of Practice for the Courts of Equity of the United States, 20 U.S. (7 Wheat.) v (1822), and admiralty rules in 1842, Rules of Practice of the Courts of the United States in Causes of Admiralty and Maritime Jurisdiction, 44 U.S. (3 How.) iii (1845).

[102] 312 U.S. 1 (1941).

[103] *Id.* at 9-10.

[104] *Id.*

[105] *Id. See generally* Comment, *Rules of Evidence and the Federal Practice: Limits on the Supreme Court's Rulemaking Power*, 1974 ARIZ. ST. L.J. 77, 78-79 (1974); Weinstein, *Reform of the Federal Court Rulemaking Procedures*, 76 COLUM. L. REV. 905, 930 (1976). Further limitations on judicially developed rules were that they could not be at odds with the laws or Constitution of the United States, nor reach beyond the authority delegated by Congress. *See id.* at 907.

of congressional authority over procedure,[106] within which Congress could delegate those powers it shared with the other branches[107] to promote efficiency in the federal judicial process.[108] Consequently, the congressional delegation to the Supreme Court to develop and enforce rules of procedure, subject only to congressional review and possible disapproval, was upheld.[109]

A gray area calling for similar treatment exists in relation to sentencing today, although the matters involved are substantive. No explicit sentencing philosophy exists; rather each judge follows his own philosophy every time a sentence is imposed.[110] Congress, through S. 1722 and the U.S.S.C., seeks to clarify the rationale of sentencing responsibility. First, S. 1722 defines the principles of sentencing[111] which will fulfill the purpose of establishing "justice in the context of the federal system."[112] Next, Congress continues to provide the definition of a crime[113] and place it within a general class of offenses[114] with a corresponding level of penalty[115] for which a maximum punishment limit is set.[116] While Congress sets the general framework for sentencing, it delegates to the U.S.S.C. the tasks of establishing specific "sentencing policies and practices"[117] which fulfill the congressionally determined sentencing principles,[118] achieve "certainty and fairness" in sentencing,[119] and reflect advancement in scientific "knowledge of human behavior as it relates to the criminal justice process."[120] Furthermore, the U.S.S.C. must examine the effectiveness of these policies and practices in promoting the principles of sentencing.[121]

In clarifying the current confusion over the legislative and judicial roles in sentencing, Congress promotes the efficiency of the federal justice system. Because the power to set the sentence for a convicted defendant is a composite of judicial and legislative power, the

---

[106] 312 U.S. 1, 8 (1941).
[107] *Id.*
[108] *Id.*
[109] Weinstein, *supra* note 105, at 905.
[110] See notes 26-44 & accompanying text *supra.*
[111] S. 1722, 96th Cong., 1st Sess. tit. I, pt. I, ch. 1, § 101(b)(1)-(4), at 12 (1979).
[112] *Id.* § 101.
[113] *Id.* pt. II, chs. 10-18, §§ 1001-1861, at 37-153.
[114] *Id.* pt. III, chs. 20-23, §§ 2001-2306, at 157-66.
[115] *Id.*
[116] *Id.*
[117] *Id.* tit. III, ch. 58, § 991(b)(1), at 295.
[118] *Id.* § 991(b)(1)(A).
[119] *Id.* § 991(b)(1)(B).
[120] *Id.* § 991(b)(1)(C).
[121] *Id.* § 991(b)(2).

Wayman and *Sibbach* rationales suggest that Congress may delegate the power to establish sentence guidelines and ranges to the U.S.S.C.[122]

Application of Constitutional Supremacy Theory to the U.S.S.C.

Only on three occasions since the Great Depression has the Supreme Court utilized the non-delegation doctrine to invalidate dele-

[122] Closely analogous to the proposed U.S.S.C. are the institutes and joint councils on sentencing. 28 U.S.C. § 334 (1976). While this statute refers to "institutes and joint councils" it fails to distinguish them; however, they are a branch of the United States Judicial Conference. *Id.* These institutes formulate advisory sentencing criteria, objectives, policies and standards for federal judges to consider in determining the sentence for a convicted defendant. *Id. See* S. REP. 2013, 85th Cong., 2d Sess., *reprinted in* [1958] U.S. CODE CONG. & AD. NEWS 3891, 3891-94. While this duty relates to the "proposed role in formulating sentencing policies and guidelines" of the U.S.S.C. it is an insufficient precedent because the sentencing policies and standards of the institute are merely advisory while the U.S.S.C. guidelines will be mandatory.

A second statutory body analogous to the U.S.S.C. is the United States Parole Commission (an agency of the Justice Department). 18 U.S.C. §§ 4201-4218 (1976). The U.S.P.C. acts as Congress' delegatee in the promulgation of parole rules and regulations. 18 U.S.C. § 4203 (1976). While both the U.S.S.C. and U.S.P.C. are subject to the Administrative Procedure Act, S. 1722, 96th Cong., 1st Sess. tit. III, ch. 58, § 994(q), at 299 (1979); 18 U.S.C. § 4218 (1976), and determine the actual degree of punishment, S. 1722, 96th Cong., 1st Sess. tit. III, ch. 58, § 994, at 296-99; 18 U.S.C. § 1203 (1976), there are several distinctions which can be drawn between these two bodies. First, in the U.S.P.C. Congress limited the time of eligibility for release on parole, 18 U.S.C. § 4205, while delegating the parallel power (the determination of the exact sentence within statutory limits) to the U.S.S.C., S. 1722, 96th Cong., 1st Sess. tit. III, ch. 58, § 994(b), at 296-97. Second, since the U.S.P.C. is an executive agency, the present structure of authority over punishment is split among the three branches of government. For example, the sentencing judge may impose a sentence of a term greater than one year which contains "a minimum term at the expiration of which the prisoner shall become eligible for parole." 18 U.S.C. § 4205(b) (1976). The Parole Commission would then determine the date of release on parole and the parole conditions. *Id.* §§ 4203, 4205-4209, 4211. However, the proposed delegation to the judicial sentencing commission concentrates the delegated sentencing power to set penalties in one branch with a yearly report to Congress providing the only safeguard. S. 1722, 96th Cong., 1st Sess. tit. III, ch. 58, §§ 991-998, at 296-97.

The U.S.S.C. and U.S.P.C. are also operationally distinguishable. The latter deals with specific individuals for whom hearings on parole applications must be held by hearing examiners followed by written decisions on the prospective parolee's application within certain time limits. 18 U.S.C. §§ 4205-4209 (1976). In so doing the U.S.P.C. must consider the applicant's history and character in addition to the nature and circumstance of the offense. *Id.* The U.S.S.C., on the other hand, will deal only with abstractly defined classes of crimes and offenders. It will reach defendants only by means of impersonal statistics on crimes used to verify the effectiveness of various forms of punishment. The judge will continue to be the official who will deal directly with the defendant. S. 1722, 96th Cong., 1st Sess. tit. III, ch. 58, §§ 981-998, at 294-302. Congress has recognized this distinction in limiting the U.S.P.C. to specific channels for securing information related to the parole application, 18 U.S.C. §§ 4205-4209 (1976), while allowing the U.S.S.C. to research a broad area to deal with its topic. S. 1722, 96th Cong., 1st Sess. tit. III, ch. 58, §§ 991-998, at 294-302. Thus the U.S.S.C. would receive a broader delegation of power than does the U.S.P.C.

gations of congressional power.[123] This apparent judicial abandonment of the non-delegation principle, allowing Congress to delegate its power in widely varying degrees, has dissolved the doctrine's theoretical base. Yet delegation continues to raise significant philosophical and institutional questions. Thus the non-delegation doctrine remains relevant for our tripartite form of government.[124] The most important function of the doctrine is to maintain a balance between modern society's demands for governmental flexibility—possible only if broader delegations of legislative power are allowed—and the constitutional requirement that Congress make the basic policy decisions embodied in a law.[125]

This doctrine also maintains the balance between the legislative, executive and judicial branches. The Framers of the Constitution sought to remove "certain institutional alternatives from the sphere of legally uninhibited choices"[126] to ensure that "the binding character of the constitutional arrangement of offices and powers" would be preserved.[127] Extreme delegations defeat the maintenance of "the constitutional arrangement of offices and powers,"[128] since such delegations are an abdication of Congress' constitutional duty and result in a new arrangement of offices and powers.[129]

To avoid "abdication" Congress must make the basic decisions; when presented with a controversial problem Congress must choose between the opposing viewpoints.[130] If Congress deliberately transfers to others the responsibility for such decisions, the delegation should be unconstitutional. Such a rule does not prevent delegating subordinate decisionmaking powers, so long as the delegation is a proper "instrument of decision," rather than a "substitute for decision."[131] If Congress makes a clear policy decision among the alternatives presented to it, and the delegation involved is able to effectuate that decision, Congress meets its responsibilities.[132]

---

[123] *See* note 47 *supra*.

[124] *See generally* S. Barber, The Constitution and the Delegation of Congressional Power 14-18, 38-41 (1975); K. Davis, Administrative Law Treatise 37 (1958); Freedman, *Delegation of Power and Institutional Competence*, 43 U. Chi. L. Rev. 307 (1976); Merrill, *Standards—A Safeguard for the Exercise of Delegated Power*, 47 Neb. L. Rev. 469 (1968); Stewart, *The Reformation of American Administrative Law*, 88 Harv. L. Rev. 1669 (1975).

[125] *See* S. Barber, *supra* note 124, at 38. *See also* K. Davis, *supra* note 124, at 37; Merrill, *supra* note 124, at 477.

[126] S. Barber, *supra* note 124, at 14.

[127] *Id.*

[128] *Id.* at 17.

[129] *Id.*

[130] *Id.* at 38.

[131] *Id.* at 41.

[132] Accordingly, the delegation doctrine permits sufficient leeway for administrative action. In defining a problem and establishing the fundamental policy to solve the problem, Congress

The traditional non-delegation doctrine does not preserve the necessary balance between the three branches of government. Often Congress creates an executive agency to solve a problem yet provides it with no guidance as to the basic policies the agency is to implement in resolving the problem. Consequently, the agency creates the "law" and then implements it.[133]

To make the non-delegation doctrine an effective test of modern legislation,[134] the theory of constitutional supremacy suggests a new two-part approach to the analysis of legislative delegations. First, the judiciary should place greater emphasis on investigating the legislative history of a particular delegation to ensure that the challenged statute expresses Congress' choice among the known alternatives and that it is not an abdication of responsibility.[135] In analyzing the constitutionality of a delegation the court should consider the process by which Congress decides to delegate, not the character of the power delegated nor the identity of the delegatee.[136] This should be the focus of the test, because it seeks to preserve the fundamental functions of each branch of government as established by the Constitution. Once Congress has fulfilled its fundamental legislative function the implementation of the law could be accomplished by either the judicial or executive branches. Finally, the requisite explicitness in the statutory standards should be measured by the complexity of the issues Congress attempted to address by the delegation.[137]

---

sets the permissible limits of the delegatee's action. An administrative agency may then implement this policy by choosing among different solutions. However, whichever solution is chosen, it must be within the congressionally-decreed policy and not beyond any limitations imposed by Congress, or the proposed delegation would be unconstitutional. *Id.*

[133] *See, e.g.*, K. DAVIS, *supra* note 124, at 94-99.

[134] While the non-delegation doctrine is unlikely to invalidate most congressional delegations, it still illuminates relevant issues. One such issue is whether the delegation is so extreme as to alter the constitutional framework of our tripartite form of government. *See generally* Amalgamated Meat Cutters v. Connally, 337 F. Supp. 737 (D.D.C. 1971). Another issue is whether any delegated powers to impose sanctions are penal in nature and therefore an impermissible invasion of the judicial realm of authority. *See* L.P. Steuart & Bros. v. Bowles, 322 U.S. 398 (1944).

[135] *See* S. BARBER, *supra* note 124, at 43-48.

[136] *Id.* at 41, 49.

[137] *Id.* at 43; Merrill, *supra* note 124, at 469. The non-delegation doctrine serves other purposes related to its "balancing" function. The doctrine compels Congress to exercise greater care in crafting the public policy of the statute. Similarly, where the judiciary requires congressional standards, Congress is forced to draft statutory language more carefully. Initially, the doctrine provides guidance to the delegatee administering the law in a degree varying in direct proportion to the specificity of the legislative standard. In implementing the congressionally-decreed policy, the delegatee's discretion would be limited to the area defined by the Congress, and the delegatee would be forced to determine the existence of any condition precedent to the utilization of the delegated power. The doctrine also acts to inhibit and,

The proposed delegation of power in S. 1722 is consonant with the principles of the constitutional supremacy theory. Congress has not left to the judiciary the task of selecting the philosophical and institutional responses to the problem of disparate sentences. Rather, Congress relies on a commission within the judiciary, instead of on an executive agency or repeated legislative action, as the proper institutional approach. Moreover, Congress has weighed the various potential purposes different sentencing schemes could serve, and has decided upon basic principles implemented by a general plan.[138] The U.S.S.C. will develop the specific sentencing scheme within the general scheme Congress has established.[139] Congress has further fulfilled its constitutional role by establishing categories of offenses[140] punished within general ranges of fines,[141] probation[142] and imprisonment.[143] The U.S.S.C.'s role will be to develop specific sentences for specific categories of defendants convicted within classes of offenses.[144] This proposed delegation of decisionmaking power does not represent a substitute for decision; rather the U.S.S.C. will operate as an instrument of the basic decisions Congress has made in stating the sentencing policy for the federal system and describing types of offenses and levels of punishment.

CONCLUSION

Congress has focused on the U.S.S.C. as the solution to the problem of sentence disparity and proposes to give it authority sufficient to combat the problem. This grant of power could be upheld under the traditional non-delegation doctrine or could be sustained by analogizing it to Congress' delegation to the judiciary of the power to promulgate procedural rules. This note has argued, however, that the theory of constitutional supremacy, which provides a basis for a revitalized non-delegation test, is a more appropriate means of examining the delegation of power to the U.S.S.C.

The factors, standards, policies and principles Congress has set forth in S. 1722 reveal that Congress is undertaking a broad consideration of different responses to the problem of sentence disparity.

in some cases, prevent "unwarranted enlargements of legislative grants." Finally, it provides a minimum yet requisite basis for judicial review of the delegatee's action. *Id.* at 473-78.

[138] S. 1722, 96th Cong., 1st Sess. tit. I, pt. I, ch. 1, § 101, at 12 (1979).

[139] *Id.* tit. III, ch. 58, § 994, at 296-99.

[140] *Id.* tit. I, pt. II, chs. 10-18, §§ 1001-1861, at 37-153.

[141] *Id.* pt. III, ch. 22, §§ 2201-2204, at 161-63.

[142] *Id.* ch. 21, §§ 2101-2106, at 157-61.

[143] *Id.* ch. 23, §§ 2301-2306, at 163-67.

[144] *Id.* tit. III, ch. 58, § 994(b)-(c), at 296-97.

The complexity of the problem can be overcome only by an elaborate and specific response premised upon extensive research into the roots of the problem. Congress has found itself unsuited to the task. Consequently it had two choices: to rely on extensive and continual revision of legislation as the problem evolves; or to define the problem, establish the policy of a general solution and delineate factors and standards to limit the exercise of the delegated power. In choosing the latter route Congress has fulfilled its constitutional function by deciding between alternate responses sponsored by competing interests; Congress has made the law to govern sentencing under the criminal code revision. In establishing sentence ranges and guidelines for specific categories of offenses and offenders, the U.S.S.C. will be acting as a constitutional delegatee.

WILLIAM C. POTTER II