

CONGRESSIONAL ADMINISTRATION DURING THE CRACK WARS: A STUDY OF THE SENTENCING COMMISSION

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This article revisits the history of mass incarceration using historical literature, oral history interviews, and archival records from the Clinton Library and the Sentencing Commission. In doing so, it also tells a story of what many scholars call “Congressional administration.”

In 1995, a hotly divided Commission recommended that Congress treat crack and powder cocaine sentences more equally. Congress overrode that recommendation months later, lambasting the Commission’s soft-on-crime approach. Drawing on unexamined Commission records and oral histories, this article argues that the repudiation changed the Commission’s culture. Haunted by the fate of the 1995 recommendation, future Commissioners began to operate by consensus and proceed cautiously in politically sensitive areas. In this way, Congressional administration can broadly shape agency culture.

At the same time, this article shows that the Sentencing Commission’s politically unpopular opinion had beneficial results. While it resulted in Congressional rebuke, it added a voice to the growing chorus of critics of cocaine sentencing. These critics prompted the Clinton administration, which was formally opposed to crack sentencing reform, to investigate its charging practices for crack defendants. It also prompted future Commissioners to produce data that tracked racial inequality in the sentencing system. While political savvy might have produced more immediate change, the agency’s fractured, apolitical decision broke ground for long-term reform. In the end, both approaches—apolitical expertise and consensus and compromise—were successful in different ways. As expert agencies play the lead in criminal justice reform efforts, these agencies must be candid about the costs and benefits of each approach.

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INTRODUCTION

Consider two stories about an agency. In the first one, Congress asks the agency to study a thorny problem and propose a solution for legislators to approve. The agency's seven members carefully examine the issue. They agree that something needs to change, but they cannot decide how much change is appropriate. There is a spectrum of possible solutions. Some members prefer the option that makes a more dramatic change from the status quo, citing scientific evidence suggesting that such a change is necessary. Others do not want to take such a big step, citing sociological evidence that, they say, puts the science in context. When the two sides are unable to compromise, they vote. Each member comes to his or her own conclusion, and the more radical proposal wins by a slim majority. Although they know their position will entail a big change, the members of the agency send it to Congress for approval. Those who are not in the majority write strongly worded dissenting opinions that explain to the legislature why they prefer the more moderate approach. Congress is displeased with the radical result, but each member of the agency has spoken his or her mind.

Now for the second story. In this one, disagreement is not an option. The agency's members have decided that they can only propose a solution that they all agree on. On top of that, they want to focus only on proposals that will be acceptable to Congress. They eschew the more sweeping solutions to the problem and come up with a compromise among themselves. Then, they network with members of Congress to make sure that their proposal is acceptable. The legislators are pleased with the proposal and endorse it, but some members of the agency are disappointed by the limited reach of the resulting solution.

Which type of agency is the United States Sentencing Commission? In the Sentencing Reform Act of 1984, Congress intended to create something more like the first type of agency than

the second. Legislators imagined a “politically neutral expert body”¹ that would be insulated from political winds.² Over the years many critics have reiterated this emphasis, arguing that the Commission should be more isolated from political influence.³ But the politics of crime can be “heated,” “volatile,” and even “pathological,” especially in an era when, as Judge Jed Rakoff has noted, “‘law and order’ was the watchword of the day.”⁴ As it supervised the Commission’s sentencing recommendations, Congress taught the Commission to proceed unanimously, cautiously, and with great sensitivity to politics. By doing so, it ended up creating the second type of agency. And it delivered this lesson by tangling with the Commissioners over their most controversial assignment: dealing with the “plague” of illegal drug trafficking and a “demon drug”

¹ Amy Baron-Evans & Kate Stith, *Booker Rules*, 160 U. PA. L. REV. 1631, 1636 n.17 (2012) (adding that “[e]xpertise and political neutrality were to be the core features of a sentencing commission since sentencing reform was conceived.”). See also J. Nancy Gertner, *A Short History of American Sentencing: Too Little Law, Too Much Law, or Just Right*, 100 J. CRIM. L. & CRIMINOLOGY 691, 698 (2010) (“The Commission was supposed to do what Congress had been wholly unable to do, namely, to rationalize sentencing free of political influence, separate from the ever popular ‘crime du jour.’”); Marc L. Miller, *Domination & Dissatisfaction: Prosecutors as Sentencers*, 56 STAN. L. REV. 1211, 1261 (2004) (“Part of the theory behind the creation of sentencing commissions was that they might bring expertise to the task of sorting out the relevance of various factors, while providing a political shield to the legislature (a theory that has some support in the states but has little evidence in the federal arena).”). Rachel Barkow has noted that some advocates of the SRA, particularly “those on the right who wanted more severe and certain punishments,” might have “agreed to agencies with traditional hallmarks of independence knowing that those features would do little to impede political control.”). Rachel E. Barkow, *Administering Crime*, 52 UCLA L. REV. 715, 746 (2005) (adding that “[f]or them, the creation of an agency might have been functionally equivalent to assigning responsibility to a legislative task force or subcommittee.”).

² Edward M. Kennedy, *Toward a New System of Criminal Sentencing: Law with Order*, 16 AM. CRIM. L. REV. 353, 380 (1979) (describing S. 1437, The Federal Criminal Code Reform Act of 1978, and stating that: the Commission [is] a major asset of the bill. . . . Congress historically has delegated authority to a host of administrative agencies; it lacks both the expertise and manageable size necessary to establish the numerous sentencing ranges required. Nor is it likely that Congress could avoid politicizing the entire sentencing issue; with vocal debate centering around harsher versus more lenient punishment, the ultimate issue of reform might very well become lost.”); S. REP. NO. 98-225, at 160 (1983) (“For such a critical position, Presidential appointments based on politics rather than merit would, and should, be an embarrassment to the appointing authority.”).

³ See Baron-Evans & Stith, *supra* note 1, at 1663 (arguing that “[b]y failing to act neutrally or expertly, the Commission undermined its own legitimacy and invited ongoing political interference.”); Paul Hofer, *After Ten Years of Advisory Guidelines, and Thirty Years of Mandatory Minimums, Federal Sentencing Still Needs Reform*, 47 U. TOL. L. REV. 649, 652 (2016) (“If sentencing reform was to succeed, reformers recognized it must contain several key elements. Perhaps chief among them was policy making based on research and consultation and insulated from partisan politics.”); Aaron J. Rappaport, *Unprincipled Punishment: The U.S. Sentencing Commission’s Troubling Silence About the Purposes of Punishment*, 6 BUFF. CRIM. L. REV. 1043, 1091 (2003) (arguing that the Commission’s “conduct reflected a heightened sensitivity to political pressures for higher sentences” and advocating for a “public statement of purposes.”).

⁴ Rachel E. Barkow, *Sentencing Guidelines at the Crossroads of Politics and Expertise*, 160 U. PA. L. REV. 1599, 1608 (2012) (arguing that cost-benefit analyses regarding sentencing may fail because “[t]he politics of crime remain too heated for that.”); Frank O. Bowman III, *The Sounds of Silence: American Criminal Justice Policy in Election Year 2008*, 20 FED. SENT. R. 289, 290 (Jun. 2008) (describing the “volatility of criminal justice politics and the ease with which difficult issues can be reduced to inflammatory sound bites. . . .”); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 509 (2001) (“Voters demand harsh treatment of criminals; politicians respond with tougher sentences (overlapping crimes are one way to make sentences harsher) and more criminal prohibitions. This dynamic has been particularly powerful the past two decades, as both major parties have participated in a kind of bidding war to see who can appropriate the label ‘tough on crime.’”); Judge Jed S. Rakoff, *Why the Federal Sentencing Guidelines Should Be Scrapped*, 26 FED. SENT’G R. 6, 7 (Oct. 2013).

called crack cocaine.⁵

The disparity between crack and cocaine sentences has become “infamous” to advocates, historians, and legal scholars.⁶ At its best, the sentencing scheme was an unfortunate response to the “social disaster” of crack-related crime in black communities.⁷ At its worst, it was racist and “calculated [to use] disadvantaged black Americans as a means to the achievement of politicians’ electoral ends.”⁸ Since its inception, historians and legal scholars alike have used the cocaine sentencing scheme to examine the causes of mass imprisonment, reflect on the goals of drug policy, and theorize about the role of race in the criminal justice system.⁹ No one, however, has used the episode to discuss Congress, agencies, and the Sentencing Commission. By investigating the Commission’s position on crack, I not only document this important history, but use it to demonstrate the power of congressional control in the context of a criminal agency.

In this article, I use archival records from the Sentencing Commission and the Clinton Library, as well as interviews with former Commissioners and Commission staff members, to trace the development of the Commission’s position on cocaine sentencing. This history offers a case study of the Commission’s decision-making process and a comprehensive exploration of the Commission’s opposition to mandatory minimum sentencing. Most importantly, though, it suggests the informal—and perhaps unintentional—techniques that members of Congress use to control criminal agencies. It suggests that Congress’s opposition to one Commission decision—its divided recommendation on crack sentencing in 1995—morphed into a broader narrative, what I call the “crack stories,” about how the Sentencing Commission should engage with politics.

This article focuses on a crucial moment in the history of the United States Sentencing Commission. In 1995, the Sentencing Commission amended the *Guidelines Manual* to lower penalties for crack offenders. The Sentencing Reform Act, much like the recently revived Congressional Review Act, gives Congress the opportunity to prevent a Commission decision—a guidelines amendment—from taking effect. Congress used this power—for the first and only time—to reject the Commission’s crack amendment. This defining moment in the history of the young agency deserves further study, because it demonstrates how one congressional action can change an agency’s institutional culture.

Congress’s opposition had long-lasting effects on the Commission’s activities. In the

⁵ See Newspaper Interview with Martz, *Trying to Say No*, NEWSWEEK (Aug. 11, 1986), at 19 (“[N]early everyone now concedes that the plague is all but universal.”); Ellis Cose, *Closing the Gap: Obama Could Fix Cocaine Sentencing*, NEWSWEEK (Jul. 20, 2009) (“There was also the notion that crack was a freakish demon drug -- that it was many times more addictive, a trigger for violence, and infinitely more dangerous than powder in virtually every way.”).

⁶ Donna Murch, *Crack in Los Angeles: Crisis, Militarization, and Black Response to the Late Twentieth-Century War on Drugs*, 102 J. AM. HISTORY 163 (June 2015) (describing the “now-infamous racial impact of sentencing for crack cocaine possession, consumption, and distribution”).

⁷ RANDALL KENNEDY, RACE, CRIME, AND THE LAW 11 (1997).

⁸ Richard Dvorak, *Cracking the Code: “De-Coding” Colorblind Slurs During the Congressional Crack Cocaine Debates*, 5 MICH. J. RACE & L. 611, 628 (2000); MICHAEL TONRY, MALIGN NEGLECT—RACE, CRIME, AND PUNISHMENT IN AMERICA 84, 123 (1995).

⁹ See, e.g., David A. Sklansky, *Cocaine, Race, and Equal Protection*, 47 STAN. L. REV. 1283, 1289 (1995) (“Whatever its causes, the heavily disproportionate impact of federal crack penalties on black defendants raises serious concerns of equal protection”); Randall Kennedy, *The State, Criminal Law, and Racial Discrimination: A Comment*, 107 HARV. L. REV. 1255, 1278 (1994) (“Perhaps decriminalizing the use of cocaine and other illicit drugs would be a better policy. But being wrong is different from being racist, and the difference is one that matters greatly.”). See also CHRIS HAYES, A COLONY IN A NATION 112-13 (2017) (“In 1986 Congress passed laws creating a 100-1 sentencing disparity between crack and powder cocaine. This change was widely understood as racially biased . . .”).

words of one former Commissioner, the “vigorous” rejection marked the “nadir of the Commission’s relationship with the legislative branch.”¹⁰ The Commission’s relationship with Congress suffered for years afterwards, reaching a point at which the Commission thought that its funding—and its very existence—was in jeopardy. Commissioners and staff became keenly aware of what members of Congress could do when they were displeased. They internalized the repudiation, learning to carefully manage legislative affairs, proceed cautiously with controversial decisions, and act unanimously whenever possible. For this reason, the crack debates provide a perfect opportunity to reflect on how Congress can informally control agencies, even ones that it originally designed to be politically insulated.

This article has four parts. In Part I, I introduce the literature on criminal justice agencies, which itself contains two parts. One portion of the literature emphasizes the need for expertise in criminal justice policymaking, encouraging agencies like the Sentencing Commission to eschew political concerns. Another segment of scholars takes a *realpolitik* approach, animated by an understanding of the politically charged nature of crime policy. Understanding this dichotomy in the scholarship is important to understanding the crack story, in which members of Congress exercised their ability to control the Sentencing Commission to force the *realpolitik* approach. For this reason, Part I also introduces the concept of “congressional administration,” explaining Congress’s ability to shape individual agency decisions and suggesting that congressional administration can also shape the internal culture, practices, and presumptions of agencies by operating on their institutional memory more broadly.

In Part II, I explain the genesis of the 1995 recommendations. I show that the Commission used reports from attorneys, judges, probation officers, and defendants to describe the harms of mandatory minimum drug sentencing and, eventually, the crack-powder disparity. Initially, this opposition to the cocaine sentencing scheme did not singularly focus on racial disparity, but also on mandatory minimums, quantity-based drug sentences, and the War on Drugs more generally. Examining the resistance to crack cocaine sentences, therefore, provides a window into the chaotic transition to guidelines sentencing. In Part II, I also describe the Commission’s opposition to mandatory minimum sentences and, eventually, its 1995 recommendation that Congress use a 1-to-1 ratio between triggering quantities of crack and powder cocaine.

In Part III, I describe the fallout from the 1995 recommendations about crack. I argue that members of Congress used their “awesome arsenal” of “informal controls” to convey their discontent to the Sentencing Commission.¹¹ Commissioners and their staff experienced this disapproval in informal conversations, struggles for appropriations, and years-long delays in the confirmation of new commissioners in the late 1990s.¹² They started to share what I call the “crack

¹⁰ William K. Sessions III, *At the Crossroads of the Three Branches: The U.S. Sentencing Commission’s Attempts to Achieve Sentencing Reform in the Midst of Inter-Branch Power Struggles*, 26 J.L. & POL. 305, 319 (2011).

¹¹ Peter H. Schuck, *Delegation and Democracy: Comments on David Schoenbrod*, 20 CARDOZO L. REV. 775, 784–87 (1999) (referring specifically to “statutory controls; legislative history; oversight; the appropriations process; statutory review of agency rules; and confirmation of key personnel”); see also Jack M. Beermann, *Congressional Administration*, 43 SAN DIEGO L. REV. 61, 122 (2006) (“Oversight is the general term applied to a broad range of congressional monitoring and supervision of administrative agencies, most of which fall into the category of “informal” supervision.”); JAMES Q. WILSON, BUREAUCRACY: WHAT GOVERNMENTS DO AND WHY THEY DO IT 235–36 (1989) (“Congress possesses . . . an ‘awesome arsenal’ of weapons that it can use against agencies: legislation, appropriations, hearings, investigations, personal interventions, and ‘friendly advice’ that is ignored at an executive’s peril.”) (citation omitted).

¹² See Jim Felman, *A Former Chief Judge Speaks Out About the Federal Sentencing Guidelines*, FED. LAW. 40, 44 (May 1999) (noting that “[w]e have a situation where there are supposed to be seven members of the U.S. Sentencing

stories,” cautionary tales about the dangers of apolitical action. As the Commission continued to wrestle with crack sentencing, it was aware of political limits and attuned to the importance of compromise and consensus. Commissioners shared the story of the failed crack reform effort with their successors, advising future Commissioners to carefully manage legislative relations and to proceed unanimously in controversial areas.

Although there are many reasons why the Commission’s crack proposal failed, the Commission used the defeat to spark self-reflection and reform. One might blame Congress and the pathological politics of crime for the 100-to-1 cocaine sentencing ratio. Indeed, it is hard to argue that the Commission would have fared better with a compromise proposal—a 10-to-1 or 20-to-1 ratio—or even a unanimous request for 1-to-1. Even additional political advocacy may not have been enough to convince Congress or President Clinton’s White House to accept a 1-to-1 ratio.¹³ There may have been nothing that the Commission could have done to save its recommendation from the “get tough” Congress of 1995. The Commission, however, saw the 1995 vote as a mistake from which it could learn. It ascertained the importance of political advocacy, compromise, and unanimity. Congress may have intended to punish the Commission for the crack amendment, but it ended up wielding a broader form of discipline.

Part III outlines three moments in which the Commission significantly engaged with the topic of cocaine sentencing to illustrate this point. In 1997 and 2002, the Commission made recommendations to Congress about how to change cocaine sentencing. In 2002, the Commission also tangled with Congress about amendments concerning sentences for minor players in drug crimes, once again learning the importance of managing congressional relations. Then, in 2007, the Commission took more significant action by slightly decreasing the penalties for crack offenders in the guidelines. In each of these moments, the Commissioners compromised, anticipated the reaction of Congress, and reached unanimity in its decisions.

In Part IV, I use this history to reflect on the tenuous relationship between the Sentencing Commission and politics. I use records from the Clinton Library to show that the Commission’s 1995 recommendation succeeded in changing the discourse on crack-cocaine sentencing, even if it did not change the minds of legislators. I do not take a position on whether the Commission was right when it proposed the 1-to-1 ratio in 1995, or whether the Commission was better served by pursuing a more modest approach in later years. Rather than evaluating any specific decision, I use this history to illustrate the tension between politics and expertise in the world of criminal sentencing, and to show that congressional administration forced the Commission to navigate this conflict in a particular way.

In this way, I hope to use this history to tell a story of congressional oversight from the agency perspective. Congress’s crack decisions affected the Commission more broadly, prompting

Commission, and all seven positions are vacant.”); Steven Flanders, *Searching for Direction*, 82 JUDICATURE 235 (1999) (“Another vacancy crisis . . . has so afflicted the U.S. Sentencing Commission that it now has no commissioners, and has not had a quorum that allows it to act in nearly a year.”).

¹³ See, e.g., CHRISTOPHER EDLEY, NOT ALL BLACK AND WHITE: AFFIRMATIVE ACTION, RACE, AND AMERICAN VALUES 236 (1998) (“I suspect—although I have never discussed this with my former White House colleagues—that . . . whatever the substantive merits of reducing the disparities in sentencing, it would have been impossible from a communications standpoint to explain to the American people that it was anything but a soft-on-crime retreat in the War on Drugs. One of President Clinton’s single political achievements was to eliminate the national GOP’s almost thirty year edge in opinion polls as the party that is tough on crime.”); KENNEDY, *supra* note 7, at 382 (finding it “doubtful that any conceivable set of arguments offered by the Commission would have persuaded Congress or the president to lessen punishments imposed on crack offenders” but observing that its focus on racial disparities made the effort “even more improbable”).

it to create internal norms that remain pertinent today. While scholars have theorized about Congress's ability to "supervise" agencies, few of them have described how broad this supervision can be.¹⁴ This article shows that Congress's rejection of one Commission proposal turned into a set of rules that every future Commissioner would learn.

I. POLITICS AND EXPERTISE, CONGRESS AND AGENCIES

In a moment when policymakers as well as scholars are questioning the wisdom of the criminal justice policies of the 1980s and 1990s, the U.S. Sentencing Commission has become a popular target.¹⁵ For many scholars, the Commission reduced the sentencing judge to "little more than the instrument of distant bureaucracy," rather than a practitioner of "judgment or moral reasoning."¹⁶ For these critics, the sentencing guidelines are no different from mandatory minimum sentencing statutes—they are just a "particularly complex *form* of mandatory sentencing."¹⁷ Furthermore, scholars have observed, with varying degrees of chagrin, the Commission's decision to integrate mandatory minimum sentences into the original guidelines. They argue that the Commission reproduced Congress's harshness into the guidelines system and was a formidable opponent of judicial discretion and mercy.¹⁸

Political insulation takes a central role in these studies. Many scholars argue that the Commission was insufficiently politically insulated, and therefore failed to stop the "one-way

¹⁴ Beermann, *supra* note 11, at 144.

¹⁵ See, e.g., Baron-Evans & Stith, *supra* note 1, at 1641.

¹⁶ KATE STITH AND JOSE A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 84 (1998); *id.* at 169 ("The federal Sentencing Guidelines of today are based on a fear of judging; they attempt to repress the exercise of informed discretion by judges."); Albert W. Alschuler, *The Changing Purposes of Criminal Punishment: A Retrospective on the Past Century and Some Thoughts About the Next*, 70 U. CHI. L. REV. 1, 11–12 (2003) (describing the "'new penology' that emphasizes monitoring, risk management, and the control of dangerous groups. . . . One can discern this new penology in sentencing guidelines and mandatory minimum sentences that allocate punishment wholesale rather than retail."); David M. Zlotnick, *The War Within the War on Crime: The Congressional Assault on Judicial Sentencing Discretion*, 57 SMU L. REV. 211, 212 (2004) ("Since 1984, traditional notions of judicial sentencing discretion have been virtually eliminated by legislation requiring mandatory minimum penalties for drug and gun crimes as well as through the creation of the Sentencing Guidelines.").

¹⁷ STITH & CABRANES, *supra* note 16, at 123; see also *id.* at 122–123 ("The Commission's opposition to mandatory minimum penalties set by Congress has placed it on common ground with federal trial judges, thereby deflecting criticism towards Congress that might otherwise be focused on the Commission and its Guidelines. Yet the two phenomena (mandatory minimums and mandatory guideline ranges) are different manifestations of the same 'counter reformation.'").

¹⁸ See, e.g., Michael Tonry, *Sentencing Commissions and Their Guidelines*, 17 CRIME & JUST. 137, 179 (1993) ("The commission apparently decided that the U.S. Department of Justice and the most law-and-order members of the U.S. Congress were its primary constituency, and it established and attempted to enforce policies that pleased that constituency."); William W. Schwarzer, *Sentencing Guidelines and Mandatory Minimums: Mixing Apples and Oranges*, 66 S. CAL. L. REV. 405, 411 (1992) ("A fair evaluation of the operation of the guidelines will require developing and segregating mandatory minimum data. This evaluation would be aided considerably if the Sentencing Commission would develop guidelines for drug cases independent of the mandatory minimums."); see also Frank O. Bowman, III, *The Failure of the Federal Sentencing Guidelines: A Structural Analysis*, 105 COLUM. L. REV. 1315, 1329–30 (2005) ("Rightly or wrongly, the Commission chose to create a primarily quantity-based drug guideline built on the framework of fixed points provided by the statutory minimum sentences of the ADAA."); Stephen J. Schulhofer, *Excessive Uniformity--And How to Fix It*, 5 FED. SENT'G REP. 169, 169 (1992) (defending Commission's decision to integrate drug mandatory sentences into guideline levels).

upward ratchet” towards higher sentences.¹⁹ More recently, Rachel Barkow, a scholar and former Sentencing Commissioner, has started to analyze the Commission as an agency, proposing a regulatory understanding of criminal law and taking a new stance on political insulation.²⁰ Barkow argues that the agency model can be useful in sentencing policy, but suggests that the “value of structural agency independence is overstated” in the sentencing context.²¹ As Barkow’s corrective suggests, there are two ways to look at the sentencing commission. In one, political neutrality and expertise is the ultimate goal. From the other vantage point, neutrality is undesirable, if possible at all.

Part I of this article summarizes scholarship on the Sentencing Commission, describing the politics of crime and charting a divide between scholars focused on expertise and those focused on political acumen. It then reflects on Congress’s ability to control agencies, to explain how Congress controlled the Sentencing Commission’s decisions about crack sentencing. Then, it uses literature on institutional memory and agency behavior to propose that Congress’s anti-crack crusade changed Commission culture more broadly. Commissioners learned to anticipate Congressional reactions, even at the cost the opinions they developed through expert analysis. In this way, I argue, the Commission began to resemble the politically-conscious agency that Barkow and others describe.

A. The Politics/Expertise Divide

One cannot understand the Sentencing Commission without understanding the unique political dynamics of crime policy in America. Crime control is an arena of “pathological” politics, to borrow William Stuntz’s famous phrase, because it is uniquely subject to symbolic political action that has little to do with crime control.²² As Barkow explains, this pathological politics often leads to increased sentences. Political actors are “pressure[d] to escalate sentences without considered reflection on whether an increase is good long-term public policy.”²³

Crime is easily politicized because it is, as Stuntz says, “one of those matters about which most voters care a great deal.”²⁴ Barkow agrees, explaining that voters have a natural understanding of the business of crime and sentencing. Because sentencing decisions seem like moral ones, members of the public “do[] not readily perceive [a] knowledge deficit” that would allow them to fully trust an expert agency with sentencing decisions.²⁵ Furthermore, people are more likely to rely on the media to get information about the need for sentencing. Because media coverage tends to

¹⁹ Frank O. Bowman, III, *Mr. Madison Meets A Time Machine: The Political Science of Federal Sentencing Reform*, 58 STAN. L. REV. 235, 246 (2005).

²⁰ See, e.g., Rachel E. Barkow, *Criminal Law As Regulation*, 8 NYU J.L. & LIBERTY 316, 327 (2014) (“There are also sentencing commissions, which tend to look the most like other regulatory agencies.”); Barkow, *Administering Crime*, *supra* note 1.

²¹ Barkow, *Administering Crime*, *supra* note 1, at 720.

²² William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 530 (2001) [hereinafter *Pathological Politics*]; see also WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* 190 (2010) (describing how the “symbolic politics” of crime incentivized legislators to give discretion to local law enforcement by broadening criminal statutes).

²³ Barkow, *Administering Crime*, *supra* note 1, at 812.

²⁴ Stuntz, *Pathological Politics*, *supra* note 22, at 529–30 (“If there is any sphere in which politicians would have an incentive simply to please the majority of voters, it’s criminal law.”).

²⁵ Barkow, *Administering Crime*, *supra* note 1, at 728.

focus on the most sensational crimes, the public may overestimate the need for criminal justice regulation.²⁶ Voters and their representatives are unlikely to fully delegate sentencing decisions to experts, instead exerting strong pro-sentencing pressures on judges and agencies.

As Barkow explains, prosecutors are the predominant “pro-regulatory force” in criminal justice policymaking. Unlike the advocates of other types of regulation, such as the regulation of medicine or the environment, prosecutors are “strong and unified,” with close connections to law- and policy-makers.²⁷ Legislators are eager to take a symbolic stance on crime and to “make[] it cheaper for prosecutors to do their jobs.”²⁸ They tend to support reforms that help prosecutors extract guilty pleas, including, for example, the broadening of criminal liability or raising of sentences.

While pro-regulatory forces are especially strong in criminal justice administration, anti-regulatory forces are uniquely diffused. As Barkow explains, there are few well-organized interest groups united against criminal justice regulation. As an initial matter, criminal regulation is indirect. Criminal justice agencies regulate government officers—such as sentencing judges, prosecutors, or police—but primarily impact individuals who are arrested, charged, or convicted. These truly impacted individuals are unlikely to mobilize against additional regulation because they are often unable to vote and are likely to be far from sources of power.²⁹ They have a hard time generating sympathy for their cause because stories of innocent victims of crime are very relatable and uncomplicated, especially when the media tends to take a sound-bite, story-driven approach to criminal justice.³⁰

Of course, these observations about the political economy of crime reflect the lessons of a particular historical period. The dynamics that Barkow and Stuntz describe developed between the 1960s and the 1990s, when social unrest and rising crime rates led to increased concern with crime control.³¹ In the 1980s and ‘90s, politicians from both parties sought to communicate their concern about crime with “tough” legislation. Political scientist Naomi Murakawa describes the “explosion of punitive crime policy” between 1980 and 2000, when Democrats “attempted to shed their soft-on-crime moniker” by supporting drug-related mandatory minimums, increased funding for local

²⁶ *Id.* at 750 (citing several studies of media coverage, including Gregg Barak, *Between the Waves: Mass-Mediated Themes of Crime and Justice*, in *POLITICS, CRIME CONTROL AND CULTURE* 135–36 (Stuart A. Scheingold ed., 1997)).

²⁷ Barkow, *Administering Crime*, *supra* note 1, at 729 (“[U]nlike most areas of regulation, criminal law features pro-regulatory forces that are strong and unified and face little coordinated opposition.”); see Stuntz, *Pathological Politics*, *supra* note 22, at 510 (describing “tacit cooperation” between prosecutors and legislators to strengthen anti-crime laws).

²⁸ *Id.* at 537–38.

²⁹ Barkow, *Criminal Law as Regulation*, *supra* note 20, at 319.

³⁰ *Id.* at 321.

³¹ See KATHERINE BECKETT, *MAKING CRIME PAY: LAW AND ORDER IN CONTEMPORARY AMERICAN POLITICS* 27 (1997) (describing the “politicization of crime in the 1960s,” which was “fueled by fears of urban riots and reported increases in the crime rate”); DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* 76 (2001) (describing “get tough” crime politics as a reaction to “political realignment” in the second half of the 20th Century, “in response to the crisis of the welfare state and the transforming dynamics of late modern life”).

police, and capital punishment.³² Both parties competed to be the “tough[est] on crime,”³³ providing an incentive to “favor increasingly harsh sentences as the major solution to crime.”³⁴ For Democrats, this was a strategic choice based on perceived political necessity. As then-Representative Charles Schumer explained in 1992, “it was imperative for the Democrats to put their own stamp on crime,” and sentencing legislation became an important component of this strategy.³⁵

Because of these political realities, some scholars suggest that the Sentencing Commission and other criminal justice agencies should be more politically connected. In a 2005 article, Barkow argued that sentencing agencies can shape criminal justice policy if they have “strong political connections,” despite the theoretical benefits of agency independence.³⁶ Almost a decade later, Wayne Logan and Ronald Wright summarized that “although supporters of commissions often hope for a body insulated from ordinary political pressures, the most effective policy comes from a commission that is well-connected and able to produce politically feasible information and proposals.”³⁷

Scholars, therefore, take two approaches to the Sentencing Commission, both based on an awareness of the pathological politics of crime control. First, there are those—including many proponents of the Sentencing Reform Act—who envision the Commission as an apolitical sanctuary from the pathological politics of crime.³⁸ Then, there are others who find that sentencing agencies

³² NAOMI MURAKAWA, *THE FIRST CIVIL RIGHT: HOW LIBERALS BUILT PRISON AMERICA* 113–119 (Oxford University Press 2014).

³³ Stuntz, *Pathological Politics*, *supra* note 22, at 509, 530 (“For legislators, pleasing voters might mean producing rules the voters want. But this requires that the rules be simple and understandable, the sort of thing politicians can use in campaign speeches and advertisements. Sentencing offers some examples. Mandatory minimum sentences for drug or gun crimes and ‘three strikes’ laws are simple rules that voters can comprehend and politicians can use in stump speeches.”).

³⁴ Sara Sun Beale, *What’s Law Got to Do With It? The Political, Social, Psychological and Other Non-Legal Factors Influencing the Development of (Federal) Criminal Law*, 1 BUFF. CRIM. L. REV. 23, 31, 40 (1997) (noting that crime became a significant national political issue in the 1960s, “coincid[ing] with the Republican Party’s aggressive pursuit of Southern voters, characterized by its opposition to civil rights legislation and emphasis on crime control”); Paul Hofer, *supra* note 3, at 659–60 (adding that “[b]y the time the original Commissioners began their work, the SRA’s vision of neutral expert policymaking had faded in favor of “tough on crime” politics. The political branches began to undermine the Commission’s independence. The Commission did not or could not insulate itself from these influences, and sought ways to accommodate the new environment.”). See Kate Stith & Steve Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223, 259 (1993) (arguing that members of Congress were eager to “demonstrate [their] anticrime sentiment” with mandatory minimum sentences).

³⁵ Guy Gugliotta, *Crime Bill a Hostage of Politics*, WASH. POST, Aug. 5, 1992, at A1.

³⁶ Barkow, *Administering Crime*, *supra* note 1, at 814 (“The common view is that more independence translates into more power over policy decisions. But this study of sentencing commissions shows that the story is much more complicated. . . . Agencies can influence policy not merely through structural features of independence, but also by acting as interest groups for particular positions.”).

³⁷ Wayne A. Logan & Ronald F. Wright, *Mercenary Criminal Justice*, 2014 U. ILL. L. REV. 1175, 1216 (2014); Lynn Adelman, *What the Sentencing Commission Ought to Be Doing: Reducing Mass Incarceration*, 18 MICH. J. RACE & L. 295, 312–13 (2013) (lamenting that the Commission did not more widely share its “excellent” report on mandatory minimum sentences); see also Eric S. Fish, *Sentencing and Interbranch Dialogue*, 105 J. CRIM. L. & CRIMINOLOGY 549, 572–73 (2015) (suggesting that sentencing agencies should “frequently look over their shoulders, anticipating that a particular ruling or policy decision may provoke a legislative response.”).

³⁸ RACHEL BARKOW, *PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION* 137 (2019) (noting that a key staffer of the Sentencing Reform Act was aware that “a Congress caught up in the politically volatile issues of law enforcement and crime control would be unable [or] unwilling to avoid the temptation to increase sentences”);

are best positioned to influence policy when they act as “interest groups for particular positions,” rather than isolating themselves from politics.³⁹

B. Congressional Oversight of Agencies

These studies of Congress-agency relations in the criminal justice context should be informed by a rich scholarship on Congressional oversight. Over a decade ago, Jack Beermann wrote that scholars had paid “insufficient” attention to an important feature of the administrative state: “that Congress is deeply involved in the day-to-day administration of the law.”⁴⁰ Justice Scalia echoed Beermann’s assessment in *FCC v. Fox Television Stations*, in which he described Congress’s “extrastatutory influence” over agencies.⁴¹ Beermann and other political theorists argue that Congress retains significant control over agency policy via formal and informal tools.⁴² Beermann calls this control “congressional administration.” He describes how members of Congress exact control over agencies by “cajoling” them, auditing or investigating them, forcing their members to appear at hearings, and pressuring the President to appoint favored nominees to agency positions.⁴³

Scholars are split on how to understand Congressional administration from a normative perspective. For advocates, Congressional oversight can “combat the general insulation of agencies from political accountability,” making agencies more responsive to the legislators who created them.⁴⁴ As Mark Seidenfeld writes, political oversight constrains agency policies to avoid

see also Sessions, *supra* note 10, at 307 (describing “Congress’s original laudatory intent, expressed in the SRA, to create an independent and expert federal sentencing agency removed to a large degree from the political pressures facing the legislative branch”) (citations omitted); Richard P. Conaboy, *The United States Sentencing Commission: A New Component in the Federal Criminal Justice System*, 61 FED. PROBATION 58, 62 (1997) (observing that the Commission “was intended to insulate sentencing policy, to some extent, from the political passions of the day” and that, as “an independent, expert agency, the Commission’s role is to develop sentencing policy on the basis of research and reason”); for scholars, see Bowman, *supra* note 19, at 255 (“the practical problem with the Commission has proven to be . . . that the Commission is too much a creature of Congress, unable to exercise independent judgment.”); Tonry, *supra* note 18, at 178 (“Successful administrative [bodies] have some degree of insulation from short-term political emotions and pressures.”).

³⁹ Barkow, *Administering Crime*, *supra* note 1, at 814.

⁴⁰ Beermann, *supra* note 11, at 64; *see also* Jack M. Beermann, *The Turn Toward Congress in Administrative Law*, 89 B.U. L. REV. 727 (2009).

⁴¹ *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 522 n.5 (2009).

⁴² Mark Seidenfeld, *The Role of Politics in A Deliberative Model of the Administrative State*, 81 GEO. WASH. L. REV. 1397, 1410 (2013) (describing Beermann and other “positive political theorists”); *see also* Jason A. MacDonald, *Limitation Riders and Congressional Influence over Bureaucratic Policy Decisions*, 104 AM. POL. SCI. REV. 766, 767–70 (2010) (noting that “agencies [that] flout congressional priorities . . . risk sanction[,] if congressional majorities can successfully overcome institutional hurdles, such as the presidential veto,” and describing limitation riders as a tool of congressional control that are “less subject to antimajoritarian lawmaking hurdles.”).

⁴³ Beermann, *supra* note 11, at 70.

⁴⁴ *Id.* at 142; *see also* J.R. DeShazo & Jody Freeman, *The Congressional Competition for Control of Delegated Power*, 81 TEX. L. REV. 1443, 1446 (2003) (“Congress is best viewed as a collection of rivals who vie for control over power delegated to agencies”); *but see* Brian D. Feinstein, *Congress in the Administrative State*, 95 WASH. U.L. REV. 1187, 1240 (2018) (acknowledging that “the presence of a bifurcated principal [could lead] committees to ignore agencies that Congress, in the aggregate, would prefer to actively monitor” but noting the “subtle majoritarian dynamic in the oversight dilemma,” because “committees devote greater attention to oversight when their preferences are more closely aligned with those of the parent chamber.”).

“deviation from the preferences of [the agency’s] political principals.”⁴⁵ Critics argue that informal congressional control can give individual members of Congress, or small groups within Congress, an outsized influence in shaping administrative action.⁴⁶ Furthermore, congressional administration can be “reactive,” and tends to lead to “ad hoc rather than the systematic consideration of administrative policy.”⁴⁷ In this way, congressional control can get in the way of professional expertise and decision-making.

In *Congressional Administration*, Beermann describes “formal” and “informal” methods of congressional administration. In formal administration, Congress “employs its legislative power” to control administrative action.⁴⁸ Formal administration takes many forms. Congress has the power to write legislation that controls agencies, set agency budgets, and approve agency appointments, all of which provide venues for formal involvement in agency activities. In “informal” Congressional administration, members of Congress rely on the threat of legislative action rather than legislative power itself.⁴⁹ Informal congressional control can involve “cajoling, adverse publicity, audits, investigations, committee hearings, factfinding missions, informal contacts with agency members and staff, and pressure on the President to appoint persons chosen by members of Congress to agency positions.”⁵⁰

For Beermann, formal and informal mechanisms of control are separate types of congressional oversight. At the Sentencing Commission, I argue, these forms of oversight were intermingled, because agency members and staff associated Congress’s exercise of its override power—a formal oversight technique—with subsequent informal interactions with members of Congress. By exercising formal and informal control over the Commission, Congress, perhaps unwittingly, altered the agency’s institutional memory, changing its operation in the future. Several forms of congressional administration were especially important to this story. I survey these methods—override, appropriations, appointments, and internal contacts—in the rest of this subpart, summarizing how Congress’s use of these tools affected the Sentencing Commission’s development.

1. Override

Especially in recent years, override of agency regulations has become an important instrument of congressional administration.⁵¹ The Congressional Review Act of 1996 (“CRA”) requires rule-issuing agencies to submit proposed rules to Congress at least 60 legislative days before they are enacted.⁵² In this period, Congress can introduce a “joint resolution of disapproval,”

⁴⁵ Seidenfeld, *supra* note 42, at 1450.

⁴⁶ Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2336 (2001) (emphasizing that “members of congressional committees and subcommittees almost guaranteed by their composition and associated incentive structure to be unrepresentative of national interests.”).

⁴⁷ *Id.* at 2260.

⁴⁸ Beermann, *supra* note 11, at 69.

⁴⁹ *Id.* at 70 (“All of the informal congressional action directed at agencies takes place in the context of (often unspoken) threats that Congress (or a particularly powerful member or committee) will not cooperate with the executive branch in the future.”).

⁵⁰ *Id.*

⁵¹ The CRA was enacted as Title II, Subtitle E, of the Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. No. 104-121, 110 Stat. 868, 871 (1996) (codified at 5 U.S.C. §§ 801-08 (2012)).

⁵² 5 U.S.C. § 801(d)(1) (2012).

which, if passed and signed by the President—or supported by a sufficient majority to overcome a presidential veto—sets aside an agency’s rule.⁵³ Once a rule is invalidated, an agency cannot reissue a rule that is “substantially the same” again.⁵⁴ The 115th Congress has revived the CRA to disapprove of the Department of the Interior’s stream protection rule, the FCC’s internet privacy rule, and two rules from the Consumer Financial Protection Bureau.⁵⁵

In the Sentencing Reform Act, Congress instituted CRA-like procedures that would give it the power to review and disapprove of amendments to the Sentencing Guidelines. Under section 994(p) of the Act, the Commission submits its amendments to Congress not later than the first day of May each year. Absent congressional action to the contrary, these amendments become effective 180 days later.⁵⁶ In the case of crack policy, the threat of Congressional override played an important role in the Commission’s behavior. Especially after Congress vetoed the crack amendment, members of the Sentencing Commission began to consider the possibility of Congressional override as they made their policy decisions.

2. Appropriations

Another oversight tool is what Beermann calls the “power of the purse.”⁵⁷ Many scholars have observed the importance of congressional appropriations, noting that “Congress has carved out for itself a huge role in law execution through the oversight and appropriations processes.”⁵⁸ In the case of the Sentencing Commission, members of Congress did not pass appropriations riders or tacitly consent to budget flexibility, as many scholars describe.⁵⁹ Rather, Congress implied that the agency’s funding was at risk by failing to invite the Commissioners to testify before the House Appropriations Subcommittee. As Mark Seidenfeld has documented, the mere threat of cuts in appropriations gives agencies “a strong incentive to conform their actions” to the desires of members of Congress or the appropriations committee.⁶⁰

⁵³ *Id.* § 801(b)(1).

⁵⁴ *Id.* § 802(b)(2) (“A rule that does not take effect (or does not continue) under paragraph (1) may not be reissued in substantially the same form, and a new rule that is substantially the same as such a rule may not be issued, unless the reissued or new rule is specifically authorized by a law enacted after the date of the joint resolution disapproving the original rule.”).

⁵⁵ See generally GW Regulatory Studies Center, *Congressional Review Act – 115th Congress* (June 1, 2018), <https://regulatorystudies.columbian.gwu.edu/sites/g/files/zaxdzs1866/f/downloads/CRA%20Tracker%205-23-18.pdf> [perma.cc/2GJH-PR73].

⁵⁶ 28 U.S.C. § 994(p) (2018) (stating that the Commission may promulgate guidelines or amendments by May 1st each year, and Congress must accept or reject these suggestions no later than the first day of November of the year in which the guidelines or amendments were submitted).

⁵⁷ Beermann, *supra* note 11, at 84–85.

⁵⁸ Steven G. Calabresi, Mark E. Berghausen, Skylar Albertson, *The Rise and Fall of the Separation of Powers*, 106 NW. U. L. REV. 527, 537 (2012).

⁵⁹ Beermann, *supra* note 11, at 85 (describing Congress’s use of “appropriations riders to supervise the execution of the laws in a very direct and particularized way”); *id.* at 137–38 (“Permission from Congress to reallocate funds from a lump-sum appropriation does not come formally via an amendment to the appropriations legislation, but rather informally via a committee’s explicit or tacit consent.”); see also Thomas McGarity, *Administrative Law as Blood Sport: Policy Erosion in a Highly Partisan Age*, 61 DUKE L.J. 1671, 1747 (2012) (describing riders as “the tools of special-interest lobbyists with access to key congressional players”).

⁶⁰ Mark Seidenfeld, *The Psychology of Accountability and Political Review of Agency Rules*, 51 DUKE L.J. 1059, 1077–78 (2001) (“Because there is strong competition for dollars spent on regulatory programs, programs that do not

3. Appointments

The Senate also exercises oversight through its appointments power. Many scholars have documented the Senate's power over appointments, and the inevitable vacancies that result. Thomas McGarity describes confirmation battles in the Senate as a "blood sport strategy" that powerful political coalitions pursue in the context of "high-impact" regulated areas that have the "potential for both high political visibility."⁶¹ As Beermann summarizes, this power is often used to "convince the President to nominate an individual favored by an influential Senator, providing that Senator with a loyal friend at an agency who is likely to execute the law in line with that Senator's wishes."⁶²

The Sentencing Commission's tussle with Congress over crack policy shows that Congress can control agencies by failing to appoint members as well as by confirming nominees. Anne Joseph O'Connell argues that vacancies themselves are a form of congressional control. She reports that Senate-confirmed positions were empty or filled by acting officials, on average, one quarter of the time from 1977 to 2005.⁶³ For O'Connell, delays in appointments can foster agency inaction, confuse nonpolitical employees, and undermine the agency's long-term political accountability.⁶⁴

In 1998, appointments to the Commission were delayed so much that, at the end of the year, there were no Commissioners at all. There are many ways to explain this appointments delay. The Senate is more likely to delay confirmations when the government is divided, as it was from 1995-2001, and vacancies were especially prominent under President Clinton.⁶⁵ For many Commissioners, though, this was Congress's response to the Commission's mistreatment of the crack issue. It became, therefore, a form of congressional oversight, in addition to resulting in the agency inaction that O'Connell describes.

enjoy the support of the oversight committee are apt to face cuts in appropriations."); *see also* Note, *Independence, Congressional Weakness, and the Importance of Appointment: The Impact of Combining Budgetary Autonomy with Removal Protection*, 125 HARV. L. REV. 1822, 1826–27 (2012) ("The appropriations process can control agencies through subtle, indirect means as well. For instance, the budget or talk of the budget can be a signaling device to convey preferences or to indicate approval of an activity. Small changes to the budget can therefore provoke large responses from the agency because of the threat of deeper change the following year. Similarly, signals of an impending budget cut can cause agencies to act preemptively.").

⁶¹ McGarity, *supra* note 59, at 1680–1681.

⁶² Beermann, *supra* note 11, at 110–11; *see also* Robert V. Percival, *Presidential Management of the Administrative State: The Not-So-Unitary Executive*, 51 DUKE L.J. 963, 1005 (2001) ("Although presidents tend to appoint officials who are likely to agree with their policies, the need to obtain their confirmation by the Senate can have a substantial impact on the types of people who ultimately take the helm of executive agencies.").

⁶³ Anne Joseph O'Connell, *Vacant Offices: Delays in Staffing Top Agency Positions*, 82 S. CAL. L. REV. 913, 962 (2009) (using data from the Office of Personnel Management, which provided the start and end dates of service of all Senate-confirmed and recess presidential appointees); *see also* Gillian E. Metzger, *Appointments, Innovation, and the Judicial-Political Divide*, 64 DUKE L.J. 1607, 1625–1626 (2015) (noting that "[d]elays in staffing agencies are not a new phenomenon," but that "recent developments"—senators' placing nominees on "hold," using pro forma sessions, and refusing to attend committee hearings on nominees—have "made the problem worse").

⁶⁴ *Vacant Offices*, *supra* note 63, at 938–944; *see also* Jennifer Nou, *Subdelegating Powers*, 117 COLUM. L. REV. 473, 478 (2017) (adding that "subdelegations are likely to become even more common should legislative gridlock result in further vacancies.").

⁶⁵ *Vacant Offices*, *supra* note 63, at 953–954 (noting that "the Senate takes longer to confirm appointees in divided government") and 963 (reporting that total vacancies were largest under Clinton).

4. Informal Contacts

Many scholars have acknowledged the informal influence that individual members of Congress can exercise via “regular contacts with agency officials.”⁶⁶ According to J.R. DeShazo and Jody Freeman, this type of congressional involvement in administration involves a “double delegation,” in which Congress transfers ex ante policymaking authority to agencies and entrusts responsibility for ex post monitoring of these agencies to committees, subcommittees, and interested members of Congress. In a recent article, Neomi Rao notes that “[r]esponsiveness to law sometimes becomes responsiveness to individual members [of Congress],” and, while acknowledging that many of these contacts “remain behind closed doors,” gives some examples of recent legislators’ attempts to control agency rulemaking.⁶⁷

The history of the Sentencing Commission’s treatment of crack suggests that informal contacts with members of Congress played a role in the Commission’s decision-making. Members of the Senate Judiciary Committee communicated their positions to the Commission, alerting Commissioners of their positions on sentencing related issues and their intent to oppose the Commission’s pending amendments. In addition, the Commission corresponded with influential members of Congress before voting on certain amendments. At various points in their discussion of cocaine sentencing, Sentencing Commissioners referred to these communications in their meetings, suggesting that informal communications with Congress played a role in agency policymaking.

C. Institutional Memory and Congressional Control

To study how Congress influenced the Sentencing Commission, one must look behind the formal and informal mechanisms of congressional administration to observe how Congress’s behaviors reverberated in the minds of agency actors. In a variety of contexts, administrative law scholars have described the role of an agency’s institutional memory. Elena Kagan and David Barron have observed that agencies have “strong institutional cultures” and “attachment[s] to past practice.”⁶⁸ Peter Strauss references the “institutional memory” of agencies when studying agency statutory interpretation, describing “the set of understandings, vivid in the minds of its civil servants, [of what its implementing] statute has ‘always’ been understood to mean.”⁶⁹ Stephen Breyer echoed this assessment before his career as a Justice, noting that an agency “may possess an internal history

⁶⁶ Neomi Rao, *Administrative Collusion: How Delegation Diminishes the Collective Congress*, 90 N.Y.U. L. REV. 1463, 1482 (2015); see also Brian D. Feinstein, *supra* note 44, at 1236 (describing “informal legislator-administrator contacts” as a “tool” of Congressional control); Beermann, *supra* note 11, at 144 (“Congress also engages in constant informal monitoring of, and input into, the execution of the laws.”).

⁶⁷ Rao, *supra* note 66, at 1482–1483 (quoting Sen. Al Franken saying “that the CFPB was accountable to Congress because ‘I’ve gone to CFPB on mortgages, rules on mortgages in rural areas, and gotten them to change their rules. So I can go to them all the time and get changes.’”).

⁶⁸ Barron & Kagan, *Chevron’s Nondelegation Doctrine*, 2001 SUP. CT. REV. 201, 249 (2001); see also Thomas W. Merrill, *High-Level, “Tenured” Lawyers*, LAW & CONTEMP. PROBS., at 83, 95 (1998) (“In any governmental office, history has deposited many layers of past decisions, which leave behind them different degrees of settled practices. As many a short-termer will attest, the senior civil servants are an invaluable storehouse of this office lore. Practices followed in the past may or may not be optimal solutions to problems. But they are usually at least functional solutions, and it is always worth knowing that they exist before embarking on a different course.”).

⁶⁹ Peter L. Strauss, *When the Judge Is Not the Primary Official with Responsibility to Read: Agency Interpretation and the Problem of Legislative History*, 66 CHI.-KENT L. REV. 321, 330 (1990).

in the form of documents or ‘handed-down oral tradition[.]’⁷⁰

For the most part, the scholars who comment on the institutional memory of agencies focus on how agencies interpret their implementing statutes. For them, institutional memory facilitates political oversight, because it is informed by communications with Congress and other interested parties.⁷¹ But few scholars have considered the fact that congressional control can change the agency’s operating rules more broadly, as it did in the context of the Sentencing Commission. By vetoing the crack amendment, Congress taught the young agency the importance of consensus and how to navigate the debate between politics and expertise.

II. THE CRACK POWDER CONUNDRUM

In addition to indicating the broad reach of Congressional control, the history of the Sentencing Commission’s actions on crack reveals the agency’s unique ability to marshal expertise. In this Part, I describe the development of American crack policy in the 1980s. I also use the Commission’s research into the crack issue to provide a window into the Commission’s decision-making, showing how it used scientific evidence, sentencing data, and information from its constituents in the criminal justice system to assess the issue.

Present day observers understand crack sentences as a unique example of racial disparity in drug sentencing. In the third subpart, I show that the Commission originally approached it differently. As the Commission learned about crack, it first tried to reform mandatory minimum sentencing more generally. Only later, when tasked by Congress in a 1994 law, did it start to approach cocaine sentencing as a separate issue. In the final subsection of Part II, I describe how members of the Commission took on this task. They approached the issue primarily as apolitical experts, each member reviewing the evidence and voting his or her mind. Because of this, I argue, Congress’s rejection of the crack amendments set the stage for the agency’s consideration of the role of political awareness and expertise.

A. The Commission Creates Drug Sentences

The debate about crack and cocaine sentencing began at the Commission’s inception. In 1986, two years after creating the Sentencing Commission, Congress passed the Anti-Drug Abuse Act of 1986. In this Act, Congress established mandatory minimum penalties for drug trafficking offenses that involved a certain amount of a prohibited substance. Seeking to advance a “total coordinated assault” upon the “menace” of crack cocaine, it imposed particularly harsh penalties on this drug. In a provision that received little attention in Congressional debates, the new Act included a 100-to-1 ratio between the weight-based sentencing thresholds for cocaine base, or crack, and the powder cocaine from which it was derived. The Sentencing Commission revised the penalty levels in its draft version of the Sentencing Guidelines to reflect the mandatory minimum sentences that Congress had created. In 1988, Congress amended the drug act to further differentiate between different types of cocaine, creating a mandatory minimum sentence for simple possession of crack cocaine that did not apply to defendants who simply possessed powder cocaine. The Commission reflected this change in the Guidelines Manual as well. By the end of the decade, a federal drug

⁷⁰ Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 368 (1986).

⁷¹ Strauss, *supra* note 69, at 330–31 (“[T]he staff of an agency enduring over time and pursuing its mission will form understandings grounded in its history, as it unfolds, that political leaders may find they have to respect if they do not wish to destroy morale or an internal sense of the agency’s legitimacy.”).

sentencing scheme had developed in which crack and cocaine offenders were treated entirely differently. A few years after that, fourteen states joined the federal government to distinguish between the two types of cocaine in their criminal statutes.

As a newly formed agency, the Commission was forced to wrestle with competing Congressional directives. In the Sentencing Reform Act, Congress delegated to the Commission the power to create sentences for federal offenses. In 1986, however, Congress decided to set some sentences itself. It created severe mandatory minimum penalties, including mandatory five-year, ten-year, twenty-year, and life in prison sentences for many types of federal drug offenders.⁷² Of course, the two acts were consistent in one way: both suggested that Congress intended criminal penalties to rise—either by bureaucratic action or congressional command. Indeed, the Sentencing Reform Act specifically instructed the Commission to “insure that the guidelines reflect the fact that, in many cases, current sentences do not accurately reflect the seriousness of the offense.”⁷³

It is no surprise, then, that the Commissioners accommodated Congress’s mandatory minimums into its draft of the Guidelines. Given the text of the Sentencing Reform Act and the new drug legislation, which crystallized what Commissioner Block called the “strongly-expressed intent of Congress and the administration to deal harshly with drug traffickers,” there was no other option.⁷⁴ “The Commissioners took the charges in the Sentencing Reform Act very seriously,” reflected a former staff member.⁷⁵ Commissioners and staff members emphasized the decision as a necessary political compromise. If the original guidelines had not reflected Congress’s “get tough” approach to drug sentencing and the 1986 mandatory minimums, a former Congressional staffer noted, the original Guidelines may not have “passed muster.”⁷⁶ While the Commissioners certainly had options—they could have, as many scholars note, de-linked the drug guidelines and the mandatory minimums—they felt that their hands were tied.

The Commission increased the penalties for drug crimes in its draft guidelines to incorporate Congress’s mandatory minimums. In the January 1987 draft of the guidelines, the Commission increased the offense levels for drug trafficking offenses so that the drug quantity that would trigger a mandatory minimum would also trigger a Guidelines sentence range that was at least as high, even for a first-time offender who had committed no aggravating conduct.⁷⁷

⁷² Brent E. Newton & Dawinder S. Sidhu, *The History of the Original United States Sentencing Commission, 1985-1987*, 45 HOFSTRA L. REV. 1167, 1274 (2017) (“In the wake of enacting the SRA—which directed the new Commission to create a detailed set of sentencing guidelines addressing “all important variations that commonly may be expected in criminal cases, and that reliably break [] cases into their relevant components and assure[] consistent and fair results” — Congress took a substantial step in the opposite direction by enacting new statutory mandatory minimum sentences that carried severe penalties.”) (quoting S. REP. NO. 98-225, at 168–69).

⁷³ 28 U.S.C. § 994(m) (2012).

⁷⁴ *Federal Prison Policy: Hearing Before Subcomm. on Courts, Civil Liberties & the Admin. of Justice of the H. Comm. on the Judiciary*, 100th Cong. 36 (1987) (testimony of Michael Block, Comm’r, U.S. Sentencing Comm’n).

⁷⁵ See Interview with Deanell Tacha, Judge, 10th Cir. Court of Appeals, Commissioner, 1994-1998, (Jan. 4, 2018) (describing the decision as “politically pragmatic”); Interview with John Steer, General Counsel, U.S. Sentencing Commission, 1987-1999, Vice Chair, 1999-2007, (Jan. 9, 2018) (“politics” made the tying guidelines to mandatory minimums “almost an imperative.”).

⁷⁶ Interview with former staff member to Sen. Thurmond.

⁷⁷ Newton & Sidhu, *supra* note 72, at 1278.

B. The Commission Discovers Discontent

As soon as the Commissioners finished the draft Guidelines, they began to hear reports about the guidelines and mandatory minimums governing the sentencing of crack cocaine. In a March 8, 1987 letter, Alfred C. Villaume, a federal prisoner in Oxford, Wisconsin, expressed his disapproval of the inequal treatment of crack and powder cocaine. He asked the Commission not to “fall prey to the hysteria that has been instilled in the general public by the media” about drugs and warned that the current drug guidelines would increase the prison population and erode the fairness and reasonableness of federal sentences. He specifically pointed to the 100-to-1 ratio, pointing to its genesis in the “widespread misconception that ‘crack,’ the free-base form of cocaine, is somehow different from cocaine, when the former can easily be derived from the latter on approximately a one-to-one basis by anyone with a glass of water, some baking soda, and a book of matches.”⁷⁸

Mr. Villaume was not the only one to observe this phenomenon. By the early 1990s, many scholars and activists began to condemn this sentencing scheme. Critics, including many members of the judiciary, lamented a system that imposed long sentences on young, first-time crack offenders, eighty-eight percent of whom were African American.⁷⁹ Reporters commented on the unfairness of mandatory minimum drug sentences for “small offenders” and the emergence of an “assembly line” sentencing system.⁸⁰ Many agreed with Judge Clyde Cahill’s forceful conclusion

⁷⁸ Letter from Alfred C. Villaume to U.S. Sentencing Commission (March 8, 1987) (on file with author) (Mr. Villaume was, to be fair, not an ordinary prisoner. He wrote in his letter that he was a “multiply - convicted prisoner who ha[d] spent a total of nearly twenty years in prison, mostly in federal institutions,” and who “also [held] a master’s degree in criminology . . . had various articles on law and the criminal justice system published, and [was] a ‘jailhouse lawyer’ of no small ability.”). See Alfred C. Villaume, “*Life without Parole*” and “*Virtual Life Sentences*”: *Death Sentences by any Other Name*, 8 CONTEMP. JUST. REV. 265, 267 (2005).

⁷⁹ U.S. SENTENCING COMM’N, SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY xi (1995) (“Blacks accounted for 88.3 percent of federal crack cocaine distribution convictions in 1993, Hispanics 7.1 percent, Whites 4.1 percent, and others 0.5 percent.”).

⁸⁰ Michael Isikoff & Tracy Thompson, *Getting Too Tough on Drugs: Draconian Sentences Hurt Small Offenders More Than Kingpins*, WASH. POST, Nov. 4, 1990, at C2 (describing judicial perceptions of “a form of robotic justice which metes out harsh penalties every day to low-level offenders, most of them poor, young and members of minority groups”); see *You Have The Right: Black Jail Rate Highest in World*, N.Y. AMSTERDAM NEWS, May 5, 1990, at 44 (Reporting on the Sentencing Project’s report, *YOUNG BLACK MEN AND THE CRIMINAL JUSTICE SYSTEM: A GROWING NATIONAL PROBLEM* (1990), and describing unevenness in drug enforcement); ASSOCIATED PRESS, *Crack dealer gets life term despite lack of prior record*, CHI. TRIB., Aug. 16, 1989, at 10; Scott Simon, WEEKEND EDITION, NATIONAL PUBLIC RADIO (Dec. 14, 1991) (“Since 1986, many drug crimes have been included under mandatory minimum sentencing laws. These are federal statutes that specify the minimum punishment that must be delivered for specific drug crimes. Possessing 50 grams of crack, for example, or about 1/10th of a teaspoon, must be punished by a minimum of 10 years in prison, which is more than the average federal sentence for attempted murder.”). Later reports, often spurred by judicial rulings, focused on the comparison between crack and cocaine sentences. ASSOCIATED PRESS, *A Law Distinguishing Crack From Other Cocaine Is Upset*, N.Y. TIMES, Dec 29, 1990, at 8 (reporting on ruling concerning Minnesota’s crack cocaine disparity); William Raspberry, *Why Are So Many People In Prison?*, WASH. POST, Jan 4, 1991, at A17 (mentioning same ruling); Alan Ellis, *A Glaring Contrast: Criminal Justice in Black and White*, WALL ST. J., May 14, 1992, at A13 (including in a list of items to “consider” about the “tough on crime rhetoric,” the fact that “under federal law, possession for personal use of five grams of crack cocaine (predominantly used by minorities) carries a five year mandatory minimum sentence without parole,” and contrasting crack and other drugs); ASSOCIATED PRESS, *Judge Delays Prison Term, Biased Crack Law Claimed*, PHILA. TRIB., Jan. 21, 1992, at 4A (reporting on ruling by U.S. District Judge U.W. Clemon, who said “four convicted drug dealers do not have to go to prison until he considers whether tough crack cocaine laws discriminate against Blacks.”). See generally JAMES FORMAN JR., *LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA* 204 (2017) (“By the 1990s,

that the law was “directly responsible for incarcerating nearly an entire generation of young black American men . . . during the most productive time of their lives.”⁸¹

As some reporters chronicled harshness of mandatory minimum crack sentences, others focused on the racial distribution of those harsh penalties. Many reporters and public scholars had always understood the crack trade as a particular scourge on African American neighborhoods, and some came to see crack sentences in the same light.⁸² As James Forman, Jr., has written, “alongside the damage from crack itself lies another set of harms—the damage caused by the criminal justice systems increasingly harsh response to the epidemic.”⁸³ The impact of criminal justice reform on black neighborhoods became a matter of increasing concern in the Sentencing Commission’s early years. In 1990, the *Washington Post* published an editorial describing the “inner city crack epidemic” and the resulting “generation of physically damaged cocaine babies whose biological inferiority is stamped at birth.”⁸⁴ In 1992, the same paper featured an editorial charging that the “war on drugs,” rather than the drugs themselves, had “shattered the cities,” wreaking particular havoc on young black men.⁸⁵ Soon, Paul Butler had observed, it seemed that “both crack and the crack [sentencing] disparity had ravaged low income families.”⁸⁶ The Commissioners and their staff circulated articles like these as they reviewed information on drug sentences.⁸⁷

The Sentencing Commission’s own constituents were even more important in revealing this trend. As the Commission staff prepared survey instruments and pilot site visits to evaluate the impact of the sentencing guidelines, they encountered probation officers, judges, and attorneys who reported the impact of the cocaine guidelines on the ground.⁸⁸ In the Commission’s early years, opposition to cocaine sentencing invoked a set of issues that involved much more than the crack-cocaine disparity. Reports from the field, many of which were collected by the Commission itself, decried the harshness of drug sentences generally, the influence of mandatory minimums, and the injustice of quantity-based sentences. Many discussed the harshness—and unfairness—of the crack-cocaine disparity. Judges were particularly upset. They chafed at having to sentence young, first-

evidence of the drug war’s racial impact began to mount.”).

⁸¹ United States v. Clary, 846 F. Supp. 768, 770 (E.D. Mo. 1994), *rev’d*, 34 F.3d 709 (8th Cir. 1994).

⁸² Murakawa, *supra* note 32, at 122–123 (describing crack as a “representation of black degeneration” and arguing that “the conventional wisdom on crack retained its power through racial ideology”); DOROTHY ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE 63 (2009) (“The pregnant crack addict was portrayed as a black woman who put her love for crack above her love for her children.”); Sklansky, *supra* note 9, at 1294 (describing the theory that crack was a “black drug, sold by black men”).

⁸³ Forman, *supra* note 80, at 163–64.

⁸⁴ Charles Krauthammer, Opinion, *Children of Cocaine*, WASH. POST, July 30, 1989, at C7.

⁸⁵ Jonathan Marshall, Opinion, *How Our War on Drugs Shattered The Cities*, WASH. POST, May 17, 1992, at C1–C2 (“Minorities also suffered because many states mete out harsher punishment for crack than ordinary cocaine, the drug of choice in wealthy suburbs” and later mentioning the federal disparity).

⁸⁶ PAUL BUTLER, LET’S GET FREE: A HIP-HOP THEORY OF JUSTICE 38 (2009).

⁸⁷ See The Need for Sentencing Reform, Memorandum from Sid Moore to Interested Staff, Commissioners (February 28, 1989) (on file with the author) (sharing two articles from the *Washington Post*).

⁸⁸ See Evaluation Staff Report to Research Advisory Group, Chapter 3: Interviews at Pilot Site, Memorandum from David Rauma to All Commissioners, Staff Director, Evaluation Working Group (Oct. 17, 1990) (on file with the author) at 37 (reporting, after conducting interviews of six probation officers at one pilot site, that “[o]ne half of the probation officers spoke about the prison impact, one stating that the system will eventually collapse down the road. Two [one third] talked about stiff drug penalties, especially for crack and for young first-time offenders.”).

time crack offenders to long prison sentences.⁸⁹

The Commission uncovered reports of the racial impact of cocaine sentencing, too. In an interview for the Commission's self-evaluation, one federal prosecutor asked a staff member "[w]hy is their [sic] a difference between cocaine base and cocaine powder?"⁹⁰ He complained that the difference was "unfair" and "racist as applied in this district," summarizing that "[d]ope is dope."⁹¹ A public defender called the crack guideline "ridiculous."⁹² Another added that it was a "crazy policy that ha[d] no relationship to the harm."⁹³ One was reassured that the prosecutors in his district—a federal district that the Commission had chosen for its evaluation—were "man enough to see that it is wrong and will do things to defeat the guidelines."⁹⁴

Many of the probation officers, attorneys, and defendants who reported on the crack-cocaine disparity were not specifically hostile to the guidelines scheme and were aware of the role of Congress in drug sentencing.⁹⁵ One Probation Officer told the Commission that she felt that guideline penalties were "draconian," but recognized that "part of this is the result of mandatory minimums." Nevertheless, she "believe[d] that sending so many people away for so long cannot continue without terrible consequences."⁹⁶ Others shared this appreciation of the role of mandatory minimums. The National Association of Criminal Defense Attorneys' first reference to crack sentences at a Public Hearing concerned mandatory minimums, rather than Guidelines sentences.⁹⁷

⁸⁹ See Sentencing Commission Request for Raw Data, Memorandum from Federal Judicial Center staff member "Barbara" to "Bill," (January 30, 1990) (on file with the author) (in redacted summary of trip reports, stating that "[s]everal judges volunteered that they were troubled by the mandatory minimum sentences applicable to young drug couriers. They see these as cases where an immature kid takes a few hundred dollars to carry a package, and they have to send him away for ten years.").

⁹⁰ Interview by "RJ" with Assistant United States Attorney (Feb. 21, 1991), Report of Interviewer "RJ" at 15 (Feb. 21, 1991), q. 47.

⁹¹ *Id.*

⁹² Interview by "RJ" with Public Defender (Feb. 20, 1991) ("100 to 1 ratio for crack to cocaine is ridiculous," adding "drug cases are much too severe").

⁹³ *Id.*; see also Interview by "PAT/PAM" with Supervising Federal Public Defender (Jan. 31, 1991) ("I'm convinced we're incarcerating a generation of young blacks. That's the worst part of this job.").

⁹⁴ Interview by "RJ" with Public Defender (Feb. 20, 1991) ("Crack issue has to be addressed. Defendants are always black, young, with no criminal record. They end up doing more time than violent crime cases do. It's refreshing that the prosecutors here are man enough to see that it is wrong and will do things to defeat the guidelines.").

⁹⁵ Interview by Liz Phillips with Public Defender (Jan. 23, 1991) ("She seemed much more matter-of-fact about the whole thing, and recognized other forces that were having a tremendous impact on the criminal justice system: the 'war on drugs' and mandatory minimums."); Interview by Pat MacDonald with Probation Officer (undated) ("Feels that the guideline penalties are 'draconian,' especially for drug trafficking. Recognizes that part of this is the result of mandatory minimums, but believes that sending so many people away for so long cannot continue without terrible consequences."); Interview by Elaine Wolf with Judge (Feb. 13-14, 1991) ("Having known no other sentencing system, this judge said that she was fairly comfortable with [the Guidelines], except in those offenses carrying mandatory minimums, and for those cases that 'cry out for some other solution,' such as kids who are on the periphery of the offense and don't qualify for a substantial assistance motion."); see also Memorandum, *supra* note 89 ("Judges did not for the most part express offense at the sentences that the guidelines mandate. One judge said it was the mandatory minimums, not the guidelines, that were the major problem.").

⁹⁶ Interview by Pat MacDonald, *supra*, note 95.

⁹⁷ *Hearing on Proposed Amendments to the Sentencing Guidelines, U.S. Sentencing Commission* (1990) (statement of Scott Wallace, National Association of Criminal Defense Attorneys) (urging the Commission to advocate "for legislation repealing all statutory mandatory minimums," noting that "[i]t has been estimated that the new 5-year mandatory

Similarly, survey respondents often invoked crack sentences as component of broader complaints about the role of quantity in drug sentencing. In the first few years of the Guidelines' history, determining the amount of drugs in an offense was "rife with potential conflict" and often produced seemingly inequitable results.⁹⁸

In short, Commissioners and their staff initially experienced opposition to cocaine Guidelines as one element of a larger controversy over the drug quantity table, mandatory minimum sentences, and American racism. Crack cocaine sentences exemplified all the problems with drug sentencing in the 1990s: they were quantity-driven, so that minimal participants in a large conspiracy could still get locked up for a long time, they were statutorily mandated, so that an individual's circumstance—even his or her criminal history—would make no difference, and they were harsh, especially compared to the drug sentences of the past. And then, on top of that, most crack offenders were African American.⁹⁹ As one Public Defender told the Commission, "I'm convinced we're incarcerating a generation of young blacks."¹⁰⁰

In this way, opposition to crack sentences called into question not just the cocaine sentencing system, but the Commission's very existence. As the Commission's staff director summarized in 1995, "[w]ithout question, the Sentencing Commission has experienced more adverse comments about the drug guideline than all other guidelines."¹⁰¹ This made the issue of crack cocaine sentences a loaded one. As one staff member put it, "the Commissioners were aware of the issue from the beginning."¹⁰² By 1994, the issue "loomed" over the Commission.¹⁰³

C. The Commission Speaks to Congress about Crack

Soon after the Sentencing Commission advocated for changes to mandatory minimum sentences in the early 1990s, it began to advocate for changes to the crack-cocaine disparity.¹⁰⁴ The brief political opening on mandatory minimums, which allowed Judge Wilkins to propose his Sentencing Reform Act, presented a legislative opportunity to reform crack sentences. In 1994, Judge Wilkins reported Congressman William Hughes had advised him of "an opportunity and willingness" among members of Congress in the House. Representative Hughes anticipated that

minimum for crack possession alone will add more than 50 million dollars per year in Federal prison costs.").

⁹⁸ See Memorandum, *supra* note 90 (summarizing research on guidelines interpretation).

⁹⁹ U.S. SENTENCING COMM'N, 1995 SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY (as directed by section 280006 of Public Law 103-322) (February 1995) [hereinafter 1995 REPORT] ("Blacks accounted for 88.3 percent of federal crack cocaine distribution convictions in 1993, Hispanics 7.1 percent, Whites 4.1 percent, and others 0.5 percent."). In Fiscal Year 2016, more than three-quarters of crack cocaine trafficking offenders were Black (82.6%) followed by Hispanic (11.3%), White (5.6%), and Other Races (0.5%). See Staff of the United States Sentencing Commission, 114th Congress, Quick Facts: Crack Cocaine Trafficking Offenses (Comm. Print 2016).

¹⁰⁰ See Interview by "PAT/PAM", *supra* note 94.

¹⁰¹ Proposed Amendments to the Drug Guideline, Memorandum from Staff Director Phyllis J. Newton to Chairman Conaboy, Commissioners, Office Directors (Oct. 19, 1994) ("Combined with the mandatory minimum penalties, judges and practitioners have frequently noted that they have only minor problems with other areas of the guidelines.").

¹⁰² Interview with John Steer, *supra* note 75.

¹⁰³ Interview with Hon. Deanell Tacha, *supra* note 75.

¹⁰⁴ Between 1987 and 1994, Chairman Wilkins and other Commissioners communicated with Congress in advance of every crime bill, urging their allies in Congress to avoid mandatory minimum penalties. As Congress debated crime proposals in these years—eventually adding almost 100 mandatory minimum sentencing provisions—the Commissioners continued to advocate against these provisions and for its own authority in sentencing.

Congress could “actually amend the statutory penalties for cocaine offenses” and requested a “letter setting forth the Commission’s recommendations for modified crack and powder cocaine penalties.”¹⁰⁵ Under Wilkins’ leadership, the Commission convinced Congress to direct the Commission to both submit a report on cocaine sentencing to propose amendments that would revise crack-cocaine sentences and override the mandatory minimums.¹⁰⁶ At the Commission, staffers took seriously the possibility of reform. In 1994, Commission staff exchanged memos that referenced the possibility of changing or even equalizing the triggering quantities for crack and cocaine offenses.¹⁰⁷

In its 1994 crime legislation, Congress directed the United States Sentencing Commission to study federal sentencing policy as it relates to possession and distribution of all forms of cocaine.¹⁰⁸ While the Commission had been working to articulate a position on cocaine sentences for several years, the staff realized that this report needed to be perfect. The Staff Director created a team of some of her best members—including several new staff members—to revise the current draft.¹⁰⁹

The timing of the issue was complicated by the arrival of several new Commissioners and a new Chairman, Judge Richard Conaboy of the District of Pennsylvania.¹¹⁰ These new Commissioners were inexperienced with the Sentencing Commission and did not have the political ties of their predecessors. The new Commissioners were due to submit the crack-cocaine report to Congress by the end of 1994, less than three months after their confirmation.¹¹¹ One of the new

¹⁰⁵ Crack Cocaine Legislative Proposal Requested by Congressman Hughes, Memorandum from Billy Wilkins to Commissioners (May 10, 1994) (“I told him that I did not believe the Commission was prepared to make such recommendations at this time and suggested an alternative approach of delegating to the Commission the responsibility of establishing appropriate penalties within the guideline system (in lieu of the higher mandatory minimums for crack). He thought that was a viable proposal and requested that the Commission promptly submit that recommendation to all conferees.”).

¹⁰⁶ Violent Crime Control and Law Enforcement Act of 1994, P.L. 103-322, § 280006, 108 Stat. 1796 (1994).

¹⁰⁷ Memorandum from Phyllis Newton, Former Staff Director, U.S. Sent’g Comm’n., to Chairman Wilkins, U.S. Sent’g Comm’n., 1, (March 31, 1994) (on file with author) (distributing “staff analysis of proposed guideline amendments,” including Amd. 33(A), which changed the existing 100:1 ratio of crack cocaine to cocaine powder to 1-to-1) (proposing ultimately an amendment only described changing the ratio from 100-to-1); Memorandum from John Steer, Former General Counsel, U.S. Sent’g Comm’n., to Phyllis Newton, Former Staff Director, U.S. Sent’g Comm’n. (July 18, 1994) (on file with author) (“Provide for 1:1 powder cocaine:crack evidence ratio”); Memorandum from Peter Ossorio to Phyllis Newton, Former Staff Director, U.S. Sent’g Comm’n. (July 19, 1994) (on file with author) (stating that among the “primary features of the proposals” to “[e]stablish a realistic, defensible cocaine to “crack” ratio of 5: 1 by equating “crack” in severity with the same quantities of the other major “hard” drugs, other than cocaine, involved in the majority of controlled substance prosecutions: Heroin, PCP, and methamphetamine.”).

¹⁰⁸ Sec. 280006 of Public Law 103-322, the Violent Crime Control and Law Enforcement Act of 1994 (Providing that “the United States Sentencing Commission shall submit a report to Congress on issues relating to sentences applicable to offenses involving the possession or distribution of all forms of cocaine”).

¹⁰⁹ Telephone interview with Kevin Blackwell, Senior Research Assoc., Office of Research and Data, U.S. Sent’g Comm’n (Dec. 19, 2017); Telephone interview with Anonymous, Former Staff Member, U.S. Sent’g Comm’n (Dec. 4, 2017); Telephone Interview with Lou Reedt, Former Deputy Director, Office of Research and Data, Sent’g Comm’n (Nov. 1, 2017).

¹¹⁰ *Judge Conaboy Chairs United States Sentencing Commission, Three New Commissioners Named*, 7 FED. SENT’G REP. 107 (1994). The new commissioners joined the continuing members, Judge Julie E. Carnes of Atlanta, Commissioner Michael S. Gelacak of Centreville, Virginia, and Judge A. David Mazzone of Boston.

¹¹¹ *Id.*

Commissioners recalled that the crack issue “loomed” over them.¹¹² Another new Commissioner, who came to the Commission “determined” to do something about the “grossly unfair” disparity, remembered taking “a lot of time” to “thoroughly vet the issue.”¹¹³

1. The Report

In Commission meetings and memos, the old and new Commissioners provided edits to the draft report and shared it with various constituents, including representatives of the Department of Justice and the Office of National Drug Control Policy.¹¹⁴

The eventual report, published in February 1995, concluded that the ratio between crack and powder cocaine was unwarranted. The Commission was attuned to the demographic disparities that the sentencing scheme produced. “When such an enhanced ratio for a particular form of a drug has a disproportionate effect on one segment of the population,” the Commission wrote, “it is particularly important that sufficient policy bases exist in support of the enhanced ratio.”¹¹⁵ The Commission then observed that crack and powder cocaine were pharmacologically identical, produced the “same physiological and psychotropic effects,” and did not make users any more or likely to “commit crimes to support their habits.”¹¹⁶ While the Commission acknowledged some differences between the two drugs, it concluded that the differences “did not approach the level of a 100-to-1 quantity ratio.”¹¹⁷

2. The Ratio

While the Commissioners were unanimous in their conclusion that the 100-to-1 ratio should be changed, they disagreed on what the new ratio should be. Some felt that Congress and the Commission should equalize the quantity thresholds for the two drugs and address any additional harms caused by crack by increasing punishments for aggravating factors like violent behavior or firearms. Many of these Commissioners were concerned that “the Government [w]as perceived as not being fair,” breeding “serious distrust . . . of the criminal justice system.”¹¹⁸

Other Commissioners found that there were compelling reasons to punish crack more harshly than powder cocaine. They were concerned with the fact that crack could “be administered easily and sold cheaply,” making it “particularly appealing . . . to the most vulnerable members of our society.”¹¹⁹ They thought that a 1-to-1 ratio might not adequately address the unique dangers of crack cocaine.

Underlying this debate was a concern about the racial disparity produced by the cocaine

¹¹² Interview with Hon. Deanell Tacha, *supra* note 75.

¹¹³ Telephone interview with Wayne Budd, Former Comm’r., U.S. Sent’g Comm’n (Jan. 10, 2018).

¹¹⁴ Letter from Robert Wasserman, Former Chief of Staff, Office of Nat’l Drug Control Policy, to Phyllis Newton, Former Staff Director, U.S. Sent’g Comm’n. (Nov. 16, 1994) (on file with author).

¹¹⁵ 1995 REPORT, *supra* note 99, at xii.

¹¹⁶ *Id.* at ix, vii.

¹¹⁷ *Id.* at xiv.

¹¹⁸ *The Crack/Cocaine Penalty Ratio: Recommendations to Congress*, 7 FED. SENT’G REP. 312, 317 (1995).

¹¹⁹ *Id.* at 320 (emphasizing that “12- to 17-year-olds choose crack over powder cocaine more than any other age group,” and also detailing the correlation between crack and a “host of social harms including parental neglect, child and domestic abuse, and high risk sexual behaviors”).

sentencing scheme. As one staff member summarized:

The [Commission's] report shows that currently the vast majority of federal crack cocaine defendants are Black. The report also shows that any quantity ratio higher than 1-to-1 will have a disparate impact on Black federal cocaine defendants. These facts raise an important policy question: in setting a sentencing policy, how should the Commission consider the racial impact of that policy.¹²⁰

The Commission had been created to avoid “unwarranted sentencing disparities” and reduce the impact of race in sentencing, but it had not been instructed on how to deal with disparities between offenders sentenced for different crimes—disparities that Congress itself had created.¹²¹ Commissioners also understood that reducing the disparity between crack and powder cocaine would reduce the racial impact of Guidelines sentences. At least according to the Bureau of Justice Statistics, there would be “no racial disparity” in guidelines sentences “absent the crack guideline and the crack mandatory minimum.”¹²² The agency's reputation was also at stake.

Then there was the anticipated reaction of Congress. While Congress had authorized the Commission to propose new crack guidelines, it retained the authority to disapprove of them. The Commissioners knew that “Congress clearly was going to be looking at” their proposal, and this made things tense.¹²³ On November 8, 1994, Republican candidates won control of both houses of Congress for the first time in 40 years.¹²⁴ The new majority pledged to support the “Republican Contract with America,” committing to, among other things, pass mandatory minimum sentences for drug crimes involving weapons.¹²⁵ In this climate, a misstep on the crack issue would threaten the Commission's reputation. A staff member for Senator Hatch reported to the Commissioners that the decision to reduce crack sentences, “at least in the minds of some, will reinforce the view that mandatory minimums remain necessary because the Commission cannot be depended upon to maintain tough penalties.”¹²⁶ Commissioners were aware that they “could cause [them]selves much unnecessary hardship if [they did] not make the effort to handle this well.”¹²⁷

For these reasons, the Commissioners did not settle on a punishment scheme to propose to Congress until April 1995, when they voted on the issue.¹²⁸ As late as November 1994, Judge Conaboy told the other Commissioners that he was “not comfortable recommending a specific ratio

¹²⁰ Memorandum from the Clinton Administration Crack-Power Initiative November 1997 (Nov. 18, 1997) (on file with author)

¹²¹ *Id.*

¹²² U.S. SENT'G COMM'N, BUSINESS MEETING MINUTES (Oct. 12, 1993).

¹²³ Interview with Hon. Deanell Tacha, *supra* note 75.

¹²⁴ Andrew Glass, *Congress Runs into “Republican Revolution”*, POLITICO, (Nov. 11, 2007), <https://www.politico.com/story/2007/11/congress-runs-into-republican-revolution-nov-8-1994-006757> [<https://perma.cc/4PSW-VCHD>].

¹²⁵ CONTRACT WITH AMERICA: THE BOLD PLAN, REP. NEWT GINGRICH, REP. DICK ARMEY, AND THE HOUSE REPUBLICANS TO CHANGE THE NATION 46–47 (Ed Gillespie & Bob Schellhas eds., 1994).

¹²⁶ Letter from John Steer, Former General Counsel, U.S. Sent'g Comm'n to Judge Richard Conaboy, Former Chairman Comm'r, U.S. Sent'g Comm'n. (Apr. 20, 1995) (on file with author) (summarizing meeting with Staff of Sen. Hatch after vote).

¹²⁷ Memorandum from Michael Gelacak, Comm'r, U.S. Sent'g Comm'n. to Judge Richard Conaboy, Former Chairman Comm'r, U.S. Sent'g Comm'n. (Oct. 31, 1994) (on file with author).

¹²⁸ See U.S. SENT'G COMM'N, BUSINESS MEETING MINUTES (Apr. 11-12, 1995).

in place of the current 100-to-1 distinction,” because “any number that we come up with could be subject to some of the same criticisms that the Commission’s research finds with the current ratio.”¹²⁹ At some point in the next few months, though, he decided to propose the 1-to-1 ratio to the rest of the Commission. He proposed additional amendments to the guidelines that would enhance penalties for drug offenses that involved dangerous weapons, violence or injury, juveniles, pregnant women, and “criminal street gangs.”¹³⁰ These amendments would specifically address weapons and other aggravating factors associated with some crack cocaine offenses.¹³¹

3. The Vote

The Commissioners voted on Judge Conaboy’s proposal—the 1-to-1 ratio—at their April meeting in 1995.¹³² For some Commissioners, this was a surprise. They expected to consider the future of crack cocaine sentences, but not necessarily to vote on the 1-to-1 ratio.¹³³ At the meeting, there were some efforts at compromise, but they were unsuccessful.¹³⁴ At the end, Chairman Conaboy made some final remarks. According to one observer, he noted that crack was a—“horrible substance”—and that crack defendants had “found a way to make it cheaper and to get it to the people on lowest rungs of the economic ladder in our country.”¹³⁵ But at the end, he said, he didn’t believe in “punishing people in the lower economic ladders of our society more severely for the same conduct than we punish others.”¹³⁶ He emphasized that the guidelines would still punish drug defendants severely. “We have more people in jail in this country per capita than any other nation ever in the history of the world.”¹³⁷

Three Commissioners agreed with Judge Conaboy, and three voted against his proposal.¹³⁸ Within days, two of the Commissioners in the minority had written dissents. The dissenters explained that “a one-to-one quantity ratio allows crack distributors to go virtually unpunished for the addictiveness, ease of use, marketability, and physical and social harms associated a greater

¹²⁹ Memorandum from Judge Richard Conaboy, Former Chairman Comm’r, U.S. Senten’g Comm’n. to Commissioners, U.S. Senten’g Comm’n. (Nov. 22, 1994) (on file with author).

¹³⁰ Amendments to the Sentencing Guidelines for United States Courts, 60 Fed. Reg. 25,074 (proposed May 10, 1995) (“Harm-specific guideline enhancements will better punish the most culpable offenders and protect the public from the most dangerous offenders, while avoiding blanket increases for all offenders involved with the crack form of cocaine.”).

¹³¹ *Id.*

¹³² U.S. SENT’G COMM’N, BUSINESS MEETING MINUTES (Apr. 11-12, 1995).

¹³³ Interview with Hon. Deanell Tacha, *supra* note 75 (stating that equalization amendment came up in “a flash of an eye”).

¹³⁴ *See* U.S. SENT’G COMM’N, BUSINESS MEETING MINUTES (Apr. 11-12, 1995). (“Commissioner Goldsmith proposed an amendment to provide a 1-to-1 quantity ratio for lower drug amounts and a higher ratio (4:1 or 5:1) at higher drug amounts. The amendment was withdrawn.”).

¹³⁵ U.S. SENT’G COMM’N, BUSINESS MEETING MINUTES, SELECTED REMARKS OF JUDGE RICHARD P. CONABOY (Apr. 10, 1995) (stating “At Judge Conaboy’s direction, attached is the transcript of his remarks from the public hearing on April 11, 1995. Unfortunately, they do not fully articulate the justification for the one to one crack cocaine ratio Judge Conaboy artfully provided in discussions with the staff.”).

¹³⁶ *Id.* at 3.

¹³⁷ *Id.* at 3.

¹³⁸ Interview with Hon. Deanell Tacha, *supra* note 75.

degree with crack than with powder cocaine.”¹³⁹ The dissenters also made clear that they disagreed with the 1-to-1 quantity ratio but agreed that the current 100-to-1 quantity ratio “should be re-examined and revised.”¹⁴⁰ Commissioner Goldsmith dissented separately to suggest that a ratio of between 5-to-1 and 10-to-1 would be appropriate.¹⁴¹

4. The Hearings

The Commission submitted its recommendations to Congress on May 1, 1995, just like it had every year before. The majority included a description of its reasoning, and the dissenters attached their opinions in a dissent. In his letter to Congress, Chairman Conaboy emphasized that the Commissioners “unanimously agree[d]” that the 100-to-1 ratio should be changed.¹⁴² “Given the complexity of the issue,” he added, “it is not surprising . . . that individual Commissioners hold somewhat different views” about the precise ratio.¹⁴³ Commissioners also reached out to members of Congress to brief them on their decision.¹⁴⁴

Within two weeks, a representative of the Department of Justice reached out to members of Congress to express concerns about the guidelines and circulate draft legislation rejecting them: “[I]f Congress adopts the Commission’s recommendation . . . some offenses now subject to a 5- or 10- year mandatory minimum prison term will potentially result in a sentence involving no required prison term at all.”¹⁴⁵ Soon, the Commission had scheduled congressional hearings in which it would face questioning about the controversial amendments.

At the hearings on the amendments, the Commissioners once again tried to emphasize that their recommendations were more similar than different. Some of them may have disagreed about the 1-to-1 ratio, but all of them had unequivocally agreed that the 100-to-1 ratio should be changed. “I want to stress first the Commission’s unanimity,” Chairman Conaboy told a House Subcommittee.¹⁴⁶ “[W]hile we certainly differ on parts of our final specific recommendations; our differences are relatively small. The Commissioners who dissented . . . did not seriously discuss any ratio greater than 5-to-1.”¹⁴⁷ Still, lawmakers were concerned. Conaboy ended his statement at the Senate hearing by emphasizing that the Commission was “willing to try anything” to reach a compromise.¹⁴⁸

¹³⁹ *View of Commissioner Tacha.*

¹⁴⁰ *Id.*

¹⁴¹ *View of Commissioner Goldsmith, Dissenting, In Part, From Amendment Five and Related Legislative Recommendation*, 7 FED. SENT’G REP. 322, 323 (1995).

¹⁴² Letter from Richard Conaboy, Chairman, U.S. Sentencing Commission, to Orrin Hatch, Senator, Senate Judiciary Committee (May 1, 1995) (on file with author).

¹⁴³ *Id.*

¹⁴⁴ Letter from John Steer, General Counsel, U.S. Sentencing Commission, to Paul McNulty, Chief Counsel, House Crime Subcommittee (March 22, 1995) (“We are also trying to arrange with Michael O’Neill of Senator Hatch’s staff a similar briefing for Senate Judiciary Committee staff on the same date (which is the day following a scheduled Commission meeting, when Judge Conaboy hopefully could be present and participate.)” (on file with author)).

¹⁴⁵ *Cocaine and Federal Sentencing Policy: Hearing before H. Comm. on the Judiciary*, 104th Cong., 1st Sess. 64 (June 29, 1995) (hereinafter *House Hearing*).

¹⁴⁶ *Id.* at 15.

¹⁴⁷ *Id.*

¹⁴⁸ *U.S. Sentencing Commission and Cocaine Sentencing Policy: Hearing before Sen. Comm. on the Judiciary*, 104th Cong. 1st Sess. 18 (Aug. 10, 1995) (hereinafter *Senate Hearing*).

Congress balked at the proposal. In the view of various senators, the proposal was “irresponsible public policy”¹⁴⁹ based on “very vulnerable”¹⁵⁰ findings that “sent entirely the wrong message” to drug dealers; namely, “that in the war against crack, society has blinked.”¹⁵¹ Indeed, the Commissioners remembered the hearings as momentous occasions because they were treated so harshly. “The day I went over to the hearing was one of the major shocks of my life,” Judge Conaboy said.¹⁵² “One of my 48 grandchildren, by the way, was there with me, one of my oldest ones, and he said to me when we got outside, he said, ‘Papa, I don’t think you’re used to being talked to like that, are you?’”¹⁵³ Commissioner Budd remembered being “upbraided” by senators at the hearing.¹⁵⁴ “You’d think I was trying to pass a law against apple pie, motherhood, and the American dream.” In short, he said, he got his “butt kicked.”¹⁵⁵

In *Race, Crime, & the Law*, Randall Kennedy argued that the Commission departed from the scientific research it had assembled in its 1995 crack report and instead weakened its own argument by emphasizing that “in substance as well as appearance, the existing crack-powder distinction is racially unjust.”¹⁵⁶ This is only partially true. Early in his statement at the House hearings, Judge Conaboy described the “difficult questions about race and about fairness” raised by cocaine sentencing and referenced the “disproportionate impact” of the sentencing scheme.¹⁵⁷ But throughout the hearings, the Commissioners tried their best to emphasize their unanimous willingness to compromise, the lack of scientific support for the 1-to-1 ratio, and the fact that the differences between crack and powder cocaine could be better addressed by additional enhancements for particularly troubling offenders. Judge Conaboy insisted that the enhancements in the Commission’s proposal would ensure that “sentences for crack cocaine offenders would probably remain significantly higher than sentences for powder offenders.”¹⁵⁸ The Commissioners also repeatedly assured Congress that their research had not uncovered any “racially motivated intent in the creation of the 100-to-1 ratio.”¹⁵⁹

¹⁴⁹ See Act of Oct. 30, 1995, Pub. L. No. 104-38, § 1, 109 Stat. 334, 334; S. Res. 1254, 104th Cong. (1995); see also Proceedings and Debates, 141 Cong. Rec. S14,781 (1995) (Statement of Sen. Hatch) (“Given what crack has done to our cities, it frankly amazes me to hear people arguing for lower sentences. Especially from people who wouldn’t for one moment tolerate an open-air crack market in their neighborhood in Scarsdale or Chevy Chase.”).

¹⁵⁰ *Senate Hearing, supra* note 148, at 56 (Senator Feinstein: “I must just tell you, in my view, at least, the findings are very vulnerable. What you are, in essence, saying is that the Federal system is unfairly targeting some low-level minority crack people. I don’t believe that is true.”).

¹⁵¹ 141 Cong. Rec. S13,738 (1995) (Statement of Sen. Abraham).

¹⁵² Interview with Judge Richard Conaboy (Judge, U.S. District Court, Middle District of Pennsylvania; Chairman, 1994-1998) (Feb. 13, 2018).

¹⁵³ *Id.*

¹⁵⁴ Interview with Wayne Budd, *supra* note 113.

¹⁵⁵ *Id.*

¹⁵⁶ Kennedy, *supra* note 7, at 383.

¹⁵⁷ *House Hearing, supra* note 145, at 9–10.

¹⁵⁸ *Id.* at 11–12 (Judge Conaboy also gave five reasons for the majority’s proposal, only one of which involved the “very strong perceptions of unfairness” to minorities).

¹⁵⁹ *Id.* at 34 (Statement of Commissioner Budd); see also *Senate Hearing, supra* note 148, at 28 (Statement of Commissioner Goldsmith) (“ . . . in my judgment, this issue has been unduly framed, at least to a degree, in terms of racial considerations. We have seen that there is no persuasive evidence that present Federal sentencing policy is based upon discriminatory considerations, nor does the record suggest or demonstrate that African-American crack dealers are treated more severely than their Caucasian crack counterparts.”); *Id.* at 17–18 (Statement. of Judge Conaboy).

Why would Randall Kennedy conclude that the Commission led with the race argument in his review of the issue? The hearings were steeped in discussion of race, even though the Commissioners devoted much of their testimony to different topics. Congresspeople who supported the Commission's proposal raised the race issue themselves. In fact, Rep. Bobby Scott (D-VA) began the House hearing by stating that he was "particularly grateful for these hearings because it gives us an opportunity to confirm suspicions some of us have had that the current 100-to-1 disparity in sentencing for crack and powder cocaine offenders is a gross injustice that has significant racial overtones."¹⁶⁰ Opponents of the Commission's proposal also framed the issue in racial terms. As Rep. Bryant stated:

I do know that a lot of gang activity and a lot of the crack cocaine sales, as it comes in, goes into minority neighborhoods[, and to] not aggressively prosecute those cases I think works a tremendous disservice to that majority of victims that live in a neighborhood, regardless of whether they are minority or not.¹⁶¹

In this way, opponents of the Commission's proposal framed it as a grievance against minorities who deserved the protection of the law. Randall Kennedy was right: "race took center stage" at the hearings on the Commission's 1995 recommendations.¹⁶² But the Sentencing Commission wasn't the one that put it there.

5. The Repudiation

Eventually, Congress voted to reject the Commission's amended crack guidelines, amounting to what one former Senate Judiciary staff member called a "repudiation."¹⁶³ Congress took advantage of part of the Sentencing Reform Act that allowed it to disapprove of the Commission's guideline amendments and retain the 100-to-1 quantity ratio.¹⁶⁴ It was the first time in the Commission's ten-year existence in which Congress had done this. This action was well-publicized: inmates in several federal prisons rioted, breaking windows with baseball bats and

¹⁶⁰ *House Hearing, supra* note 145, at 4 (Statement of Rep. Scott (D-VA)); *see also id.* at 55 (Statement of Rep. Rangel (D-NY)) (observing that "the Commission went out of its way to say that [racial disparity in prison population] does not mean that the penalties are racially motivated," pressing Conaboy to respond to the question, "Is not race a factor?"). Invited guests of the minority made similar points. *See, e.g., House Hearing, supra* note 145, at 76 (Statement of Hon. Lyle Strom) (noting that the distinction between crack and powder cocaine has disproportionately impacted African American males); *id.* at 114 (Statement of William Moffitt, Nat'l Ass'n of Criminal Def. Lawyers) (noting that the ratio "renders the promise of . . . a race neutral sentencing regime . . . a cruel hoax"); *see also Kennedy, supra* note 7, at 384 (providing quotations from Congressmen Bobby Rush and Mel Watt).

¹⁶¹ *House Hearing, supra* note 145, at 72; *see id.* at 94 (Statement of Dr. Kleber) (observing that "[t]his low price also has another feature which I have not heard any of the witnesses talk about this morning, and that is the enormous destabilizing effect that crack has had on predominantly our minority communities."); *see also Senate Hearing, supra* note 148, at 1 (Statement of Sen. Hatch) (noting that "[n]o one questions whether crack has had a devastating effect on our cities, on their predominantly minority residents, and on the poor. The question before us today is whether crack penalties should be lowered.").

¹⁶² Kennedy, *supra* note 7, at 383.

¹⁶³ Act of Oct. 30, 1995, Pub. L. 104-38, 109 Stat. 334 (disapproving of proposed amendments to the sentencing guidelines).

¹⁶⁴ Jelani J. Exum, *Forget Sentencing Equality: Moving from the "Cracked" Cocaine Debate towards Particular Purpose Sentencing*, 18 LEWIS & CLARK L. REV. 95, 105 (2014).

setting fire to a housing unit in Talladega, Alabama.¹⁶⁵ The *New York Times* reported that the Talladega inmates had watched on C-Span as Congress voted to reject the Sentencing Commission's proposal.¹⁶⁶

6. The Reaction

The Commission's relationship with Congress continued to suffer after the repudiation. In December 1995, the House Crime Subcommittee scheduled an oversight hearing for the Commission, which concerned, as one staff-member summarized, "the Commission's authority to deviate from sentencing policy in guidelines when Congress has already spoken on the general policy."¹⁶⁷ After this hearing, Representatives in the House declined to invite the Chairman to discuss the Commission's work in support of its initial request for appropriations.¹⁶⁸ In the House's appropriations bill for 1995 and 1996, the Sentencing Commission's budget was very small. When this had happened in the past, Commissioners usually reached out to an advocate in Senate to increase the appropriations.¹⁶⁹ Eventually, one of the Commissioners was able to call a Senate staffer, who managed to get the agency's budget increased.¹⁷⁰ The Commission's position was still precarious, however.

The Commission's future was further jeopardized when the President failed to nominate, and Congress failed to approve, new Commissioners after the terms of the remaining members expired, amounting to what the one staff member called a "period of political neglect" for the Commission.¹⁷¹ After the expiration of two Commissioners' terms in October 1995, the Commission was reduced to five voting members. Commissioner Budd resigned in May 1997, and the terms of three more Commissioners—all but the Chairman—expired in October of that year.¹⁷² In other words, by the end of the year there were six vacancies on the Commission.¹⁷³ During the next year, the Commission was run by its staff members alone and could not promulgate guidelines

¹⁶⁵ Ray Long, *Rioting Breaks out at Three Federal Prisons*, PHILA. INQUIRER, Oct. 21, 1995, at A3.

¹⁶⁶ Ronald Smothers, *Wave of Prison Uprisings Provoke Debate on Crack*, N.Y. TIMES, Oct. 24, 1995, at A18.

¹⁶⁷ Minutes of the December 12, 1995 Business Meeting at 2 (statement of legislative liaison Jonathan Wroblewski).

¹⁶⁸ Letter from Hon. Richard Conaboy, Chairman, U.S. Sentencing Commission, to Hon. Harold Rogers, Chairman, Subcommittee on Commerce, Justice, State, the Judiciary, and Related Agencies, (July 11, 1996) ("This is the first year since the Commission's inception in FY 1986 that we have not been invited to appear before the House Subcommittee to discuss the important mission of this agency and answer questions regarding the agency's work and budget.").

¹⁶⁹ Interview with Anonymous, Staff Member, U.S. Sent'g Comm'n.

¹⁷⁰ *Id.*

¹⁷¹ Interview with Anonymous, Former Staff Member, U.S. Sent'g Comm'n.

¹⁷² U.S. Sentencing Commission: Membership, Att. Letter from Hon. William Rehnquist, Justice, Supreme Court of U.S., to William Clinton, President, U.S. (Oct. 16, 1997).

¹⁷³ See Letter from Hon. Richard Conaboy, Chairman, U.S. Sentencing Commission, to Charles Ruff & Eric Holder (Dec. 5, 1997) (describing the "six vacancies that exist at the United States Sentencing Commission").

amendments.¹⁷⁴ Of course, the “staff took a hit” during that period, as one staff member recalls.¹⁷⁵ Morale was low and the staff “spun their wheels” without guidance from Commissioners.¹⁷⁶

III. THE COMMISSION AFTER CRACK

Almost immediately after the crack vote, the Sentencing Commissioners reformed their agency to be more attentive to Congress. As an institution, the Commission began to value congressional connections and internal consensus, focusing less on providing apolitical expertise. In Part III, I explain these dynamics in detail. I first describe what I call the crack stories: the account that Commissioners and their staff internalized about why Congress rejected the crack amendments in 1995. Drawing on the theories of congressional administration discussed in Part I, I describe how Congress’s reactions to the crack vote created an internal narrative—the crack stories—about the types of recommendations the Commission should make. I then describe the Commission’s future actions on crack to illustrate the agency’s newfound focus on consensus and compromise.

A. Crack Stories

Many things happened after Congress rejected the Commission’s 1995 recommendations about crack. First, the proposed guideline amendment was eliminated so that the ratio between the triggering quantities of powder and crack cocaine remained at 100-to-1. Second, the Commission struggled to get appropriations from Congress, a marked change from previous years, and operated with a reduced budget during the years after the 1995 recommendations were rejected.¹⁷⁷ Third, Congress delayed in appointing new Commissioners, so that by 1998, only one of the seven positions on the Commission was filled and the Chairman resigned. Finally, members of Congress informally reminded the Commission of the failure of the 1995 crack amendment when they wanted commissioners to avoid controversial proposals.

As one staff member acknowledged, Congress’s actions—the budget reductions and Commission vacancies—may not have been a “conscious effort” to punish the Sentencing Commission.¹⁷⁸ Nevertheless, the Commissioners and their staff understood that Congress’s message was “don’t ever do that again.”¹⁷⁹ Commissioners and staff connected the crack proposal to the lack of budget and to the Commission vacancies in the late 1990s—what then-General Counsel John Steer called the “period of political neglect.”¹⁸⁰ The next head of the Commission,

¹⁷⁴ Sessions, *supra* note 10, at 319 (“By 1998, the Commission had no commissioners. For a year thereafter, the Commission operated solely with staff members - none of whom were presidentially-appointed - and could not promulgate guidelines amendments.”); see also *Confirmation Hearings on Federal Appointments Before S. Comm on the Judiciary*, 106th Cong, 1st Sess., at 273 (2000) (Stmt. of Sen. Thurmond: “Judge Murphy, as you know, the Sentencing Commission has been without Commissioners for almost 1 year.”).

¹⁷⁵ Interview with Kevin Blackwell, *supra* note 109.

¹⁷⁶ *Id.*; see also Interview with Lou Reedt, *supra* note 109 (“spun their wheels”).

¹⁷⁷ Diana E. Murphy, *Inside the United States Sentencing Commission: Federal Sentencing Policy in 2001 and Beyond*, 87 IOWA L. REV. 359, 396 (2002) (“A serious disadvantage we only gradually came to understand fully was that Congress had drastically cut the Commission’s budget during the period when there were no commissioners.”).

¹⁷⁸ Interview with Steer, *supra* note 75 (adding that “someone in Congress probably couldn’t get their guy in so the spots were not filled,” but also suggesting that Congress may have been more “careful” after the crack vote).

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

Judge Diana Murphy, observed that “the long delay in making appointments to the Commission had caused some to question whether the Commission had a future.”¹⁸¹ One Commissioner, who joined the agency in 2010, remembered hearing that the vote “almost destroyed the commission.”¹⁸²

Congressional administration changed the Commission’s institutional culture. Even after the Senate confirmed new Commissioners in 1999, subsequent members of the agency internalized the message that the 1995 recommendation was a political disaster that could not happen again. Two principles were especially central to this message: first, that the Commission should be attentive to politics and second, that the Commission should only advance unanimous proposals.

As Commissioners and their staff remembered the crack vote, they described it as a failure of congressional relations. In 1996, Commissioner Mazzone summarized his impression of how the Commission’s relationship with Congress had changed:

Earlier, the Commission enjoyed a close and cordial relationship with Congress, but that relationship was limited to relatively few members[.] We were able to accomplish a great deal by working this crowd, such as the ‘safety valve’ . . . We no longer enjoy that relative obscurity. To some extent, we have made ourselves too visible and, perhaps, even obsolete.¹⁸³

Soon after the crack vote, Mazzone and his colleagues selected a staff-member to be a designated “congressional liaison,” suggesting their newfound understanding of the importance of politics.¹⁸⁴

Future Commissioners continued to reiterate the importance of Congressional relations. At a 2002 public hearing, Judge Conaboy reiterated this understanding of what went wrong in 1995. He told his predecessors that the 1-to-1 proposal was an “error[] of judgment” or of “naivete,” because the Commission “didn’t give enough thought to the political parts of that recommendation.”¹⁸⁵ A few years later, Michael Goldsmith, who had then left the Commission, observed that “the Commission . . . suffered from image problems with the Congress” after the vote, because “Congress thinks that the Commission doesn’t take crime seriously, doesn’t issue tough sentences, and just can’t be trusted.”¹⁸⁶ Other Commissioners, too, made this assessment of the

¹⁸¹ Murphy, *supra* note 177 at 395–96 (adding that “the response to the [crack amendments] had created a less favorable climate for the Commission. We understood that rebuilding a relationship with Congress would be important.”); *see also* Sessions, *supra* note 10, at 319 (“[N]ot only did Congress (for the first time in the history of the Commission) reject a proposed amendment to the guidelines, but the Senate later did not confirm any of the President’s nominees to the Sentencing Commission when the existing commissioners’ terms expired.”).

¹⁸² Interview with former Commissioner (2010-2017) (March 28, 2018) (adding that the “crack situation almost destroyed the Commission”); *see also* Interview with former Commissioner (2010-2014) (March 15, 2018) (stating that the crack vote was a “precipitating event behind the culture of the commission that developed around unanimity. Before that people used to vote however they liked. After this there were no Commissioners and it was attributed to that.”).

¹⁸³ Letter from Judge Mazzone to Judge Conaboy (March 5, 1996) (adding “the first concern is encouraging communication and even reconciliation with Congress whenever feasible”).

¹⁸⁴ Interview with Anonymous, Former Staff Member, U.S. Sent’g Comm’n.

¹⁸⁵ Transcript of U.S. Sentencing Comm’n Public Hearing at 98 (Feb. 26, 2002) (Statement of Judge Conaboy) (“In 1994 then, when the recommendations were made, we were in an era, perhaps without maybe realizing it, although I don’t think that’s fair, but it was an era of being tough on crime. And even though we were led to believe that those in other parts of the government were ready to agree to abolish that ratio or at least dramatically change it[.]”).

¹⁸⁶ *See also* Sessions, *supra* note 10, at 319 (quoting Michael Goldsmith: “In retrospect, the Commission majority might have been better served had it realized that, given the prevailing political climate, only a unanimous

crack vote.¹⁸⁷ One Commissioner remembered “teasing” from members of Congress.¹⁸⁸ Another remarked that Congress “thought we went off the rails.”¹⁸⁹

According to the crack stories, unanimity among Commissioners was extremely important. The fact that the Commissioners had disagreed in 1995 became an important issue. Some Commissioners believed that Congress might have treated the amendments differently if they had been proposed unanimously.¹⁹⁰ In 2001, then-Chairwoman Murphy noted that she had “learned the importance of . . . moving forward together as one body.”¹⁹¹ In a 2004 meeting, then-Chairman Sessions explained “the need to reach a consensus for the health of the Commission,” especially for “controversial” recommendations like those involving crack.¹⁹² At a 2007 conference call about crack policy, then-Chairman Hinojosa noted that it was “dangerous” if the Commissioners were not unanimous.¹⁹³ One Commissioner, who joined the Commission in 2010, stated that the crack vote was a “precipitating event behind the culture of the Commission that developed around unanimity.”¹⁹⁴ Another remembered that she was advised to proceed with consensus. Consensus was part of the “lore” of the Commission, she said, the “culture of the place.”¹⁹⁵

B. Telling and Retelling

The story of crack taught the Commission the value of consensus, compromise, and political networking. Nowhere is this clearer than the Commission’s subsequent treatment of crack sentences. By examining these actions in detail, I show that the Commission valued political

Commission resolution to modify crack penalties stood any chance of winning Congressional approval.”)

¹⁸⁷ Jose A. Cabranes, *Sentencing Guidelines: Where We Are and How We Got Here*, 44 ST. LOUIS U. L.J. 394, 397 (2000) (Stmt. of Michael Goldsmith: “That rejection constituted a severe rebuff of the Sentencing Commission. Congress no longer trusted the Commission. Frankly, it felt that, if the majority of the Commission could vote to reduce crack penalties to such an extent, the Commission was goofy. And in the aftermath of that vote, the Commission would have to spend considerable efforts trying to re-win the trust of Congress.”). In 2001, Judge Diana Murphy observed that “the response to [the crack proposal] had created a less favorable climate for the Commission,” causing some to “question whether the Commission had a future.” Murphy, *supra* note 177, at 395–96. In 2011, Judge William Sessions remembered that “the nadir of the Commission’s relationship with the legislative branch came during the mid- to late 1990s,” after Congress’s “vigorous” reaction to the crack issue. Sessions, *supra* note 10, at 319.

¹⁸⁸ Interview with Wayne Budd, *supra* note 113.

¹⁸⁹ Interview with Hon. Deanell Tacha, *supra* note 75.

¹⁹⁰ See also Transcript of U.S. Sentencing Comm’n, Public Hearing (November 16, 2004) at 31 (Stmt. of Michael Goldsmith: “Reflecting again on the Commission’s experience with the crack cocaine issue in 1995, I felt back then that it was important for the Commission to take a position on this unanimously. We didn’t. It was a four to three vote. And I think that was part of the majority problem that the Commission encountered in subsequent years, the fact that we were so closely divided.”); Michael Goldsmith, *A Former Sentencing Commissioner Looks Forward*, 12 FED. SENT. R. 98, 98 (1999) (“In retrospect, the Commission majority might have been better served had it realized that, given the prevailing political climate, only a unanimous Commission resolution to modify crack penalties stood any chance of winning Congressional approval.”); Sessions, *supra* note 10, at n.75 (emphasizing that “subsequent reports by the Commission concerning sentences for crack cocaine have been unanimous”).

¹⁹¹ Murphy, *supra* note 161, at 361–62.

¹⁹² U.S. Sentencing Commission Public Meeting Minutes April 8, 2004, at 3 (on file with author).

¹⁹³ U.S. Sentencing Comm’n, Handwritten Notes of Chairman Ricardo Hinojosa from Commissioner Conference Call (2007).

¹⁹⁴ Interview with former Commissioner (2010-2015), *supra* note 182.

¹⁹⁵ Interview with former Commissioner (2010-2017), *supra* note 182.

legitimacy and internal consensus, moving away from the expert-driven advisors that Senator Kennedy and others envisioned. This subpart reviews three moments in which the Commission engaged with crack sentences—in 1997, 2002, and 2007—to illustrate the durability of the crack stories.

In 1997, the Commission sent Congress a compromise proposal for cocaine sentencing reform, after cooperating with allies in Congress and the Department of Justice to intuit the political limits at issue. It abandoned its 1-to-1 proposal and instead suggested that Congress raise penalties for powder cocaine to reduce the disparity between the sentences for the two drugs.

After Congress failed to act on its 1997 recommendations, the Commission continued to deliberate about how to address the crack issue. In 2002, sensing a window in Congress, Commissioners considered the possibility of proposing guideline amendments that would increase the quantity threshold for crack cocaine. Eventually, however, the Commission chose to make recommendations to Congress instead. As then-Chairwoman Murphy summarized, “the Commission could bring either light or heat to this issue” and chose to bring light.¹⁹⁶ Once again, the Commission was cognizant of Congress’s disapproval powers and aware of the importance of political legitimacy.

In 2007 the Commission considered the issue again, this time submitting an amendment that moved the base offense level for all crack cocaine offenders two levels down the sentencing grid (the “crack minus two” amendment). The Commissioners took this “modest” approach because it believed that it could prompt Congress to make further changes.¹⁹⁷ The care with which the Commission decided to apply the Amendment retroactively also reflected its sensitivity to political concerns. Some critics, including members of Congress, opposed the Commission’s retroactivity decision. The Commission worked to ameliorate their concerns by delaying the amendment’s implementation so that probation officers, federal defenders, and the Bureau of Prisons could be properly prepared for implementation. The Commissioners also placated opponents in Congress by abandoning a proposal to reform the Commission’s internal rules on retroactivity.

1. 1997

In 1997, the somewhat beleaguered Commission was due to make revised recommendations to Congress about crack sentencing. The bill rejecting the crack amendment included specific instructions for the Commission. It asked them to propose a quantity ratio in which sentences for crack offenses would “generally exceed the sentence imposed for trafficking in a like quantity of powder cocaine.”¹⁹⁸

¹⁹⁶ U.S. Sentencing Comm’n, Transcript of Public Meeting (2002) at 57: 8–10 (“[W]e have decided that we can do best by bringing light as opposed to heat at this point.”).

¹⁹⁷ U.S. Sentencing Comm’n, Transcript of Public Meeting (2007) at 47: 5–15 (Statement of Chairman Hinojosa: “We continue to say that this is a modest, partial step, whatever you want to call it. We have always said that. Ultimately in our system of government Congress makes the decisions . . . We continue to be hopeful that Congress will act in a bipartisan fashion to correct this serious problem.”). *See also* Kimbrough v. United States, 522 U.S. 85, 100, 128 S.Ct. 558, 569 (2007) (citing UNITED STATES SENTENCING COMMISSION, REPORT TO CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 10 (May 2007)) (“This modest amendment yields sentences for crack offenses between two and five times longer than sentences for equal amounts of powder. Describing the amendment as ‘only . . . a partial remedy’ for the problems generated by the crack/powder disparity, the Commission noted that ‘[a]ny comprehensive solution requires appropriate legislative action by Congress.’”).

¹⁹⁸ Act of Oct. 30, 1995, Pub. L. No. 104-38, § 1-2, 109 Stat. 334, 334; S. Res 1254, 104th Cong. § 1-2 (1995).

Commissioner Budd took the lead on developing a new policy. “Because of the strongly held and divergent views on this issue,” he said, the Commissioners had to determine a response plan “early on.”¹⁹⁹ Under Budd’s leadership, the Commission staff coded cases to “help define ‘high level wholesale cocaine traffickers’ and ‘low-level retail traffickers’” based on the quantity of drugs they carried.²⁰⁰ The Commission learned that the DEA identified mid-level crack dealers as those involved with around one ounce (28 g.) of the drug.²⁰¹ The Commission’s own analysis suggested that mid-level crack dealers are accountable for between 50 and 100 grams of the drug.²⁰²

The Commission used this data to make its proposal to Congress. Eventually, they decided to propose a range of penalties rather than a specific ration. In the April 1997 report, the Commissioners recommended that Congress increase the quantity threshold for crack cocaine to be between 25 and 75 grams, to capture mid-level drug dealers. They also recommended that Congress reduce the threshold for cocaine, producing a ratio of between 5-to-1 and 15-to-1 between the threshold quantities of powder and crack cocaine that would trigger mandatory sentences.²⁰³

Commissioner Budd and his colleagues were careful to coordinate their efforts with the Department of Justice and members of Congress. The newly-appointed legislative liaison insisted that “[t]he precise five-year sentence trigger should be selected following consultations between the Congress, the Administration, and the Commission.”²⁰⁴ In early 1997, Commissioners Conaboy, Tacha, and Budd met with allies in Congress and Attorney General Janet Reno to talk about the “crack cocaine issue.”²⁰⁵ Rather, the Commissioners selected a range of ratios that would bring political allies on board.

The Commission’s approach garnered the support of a fractured Clinton Administration. By 1997, the Administration had formed a crack cocaine working group with representatives from the Department of Justice, Office of National Drug Control Policy (ONDCP), and the White House. The ONDCP and the Department of Justice recommended a 10-1 ratio.²⁰⁶ The Administration was

¹⁹⁹ Memorandum from Wayne Budd, Comm’r U.S. Sent’g Comm’n to Commissioners, U.S. Sent’g Comm’n (July 29, 1996).

²⁰⁰ *Id.* at 3.

²⁰¹ U.S. DOJ, Federal Cocaine Offenses: An Analysis of Crack and Powder Penalties 7 (Mar. 17, 2002). *See also* Jonathan Wroblewski, Memo to Commissioners re: Statement on Federal Cocaine Sentencing (Dec. 4, 1996) at 4; Drug Enf’t Admin., Response to U.S. Sentencing Commission Information Request of 8/23/96 (Oct. 1996) (“Although crack trafficking methods vary widely, generally, they are conducted at three broad levels, namely, wholesale trafficking, midlevel distribution, and retail selling. Wholesale crack traffickers purchase cocaine in kilogram or multikilogram allotments from traditional cocaine sources. They will either package the cocaine into ounce quantities or convert it into crack and then divide it into ounces for sale at the next level.”).

²⁰² Wroblewski, *supra* note 201, at 4.

²⁰³ U.S. Sentencing Comm’n, Special Report to the Congress: Cocaine and Federal Sentencing Policy 188 (1997) (recommending that the 500-gram trigger for powder cocaine be reduced to 125 to 375 grams).

²⁰⁴ Wroblewski, *supra* note 201, at 4.

²⁰⁵ The Commission’s archives contain letters from Chairman Conaboy to Kennedy, Watts, and Richard Thornborough (Feb. 12, 1997); *see also* Letter from Richard Conaboy, Chairman U.S. Sent’g Comm’n to Janet Reno, U.S. Attorney Gen. (Jan. 22, 1997) (“We are convinced this must be a cooperative effort. We deeply appreciate the tone and spirit of yesterday’s meeting - and particularly your leadership, and suggestions for establishing a broad basis of support for this endeavor.”); Agenda for June 3, 1997 Meeting (“Crack and Powder Cocaine Recommendations: John Kramer will outline efforts to assist the Department of justice end Office of National Drug Control Policy as they develop recommendations for the President.”).

²⁰⁶ Fax to Elena Kegan, Deputy Assistant to the President for Domestic Policy, Draft: The Clinton Administration Crack-Powder Initiative, November 1997 (Nov. 18, 1997) (on file with William J. Clinton Presidential

aware of the political consequences of the decision. “Whatever we do,” wrote Senior Policy Analyst Dennis Burke in a memo to Rahm Emanuel, “will not be enough to receive the support of the left,” but will cause “Republicans [to] jump on us for any adjustment down.”²⁰⁷ Indeed, as Bruce Reed and Elena Kagan wrote in a memorandum to the President, any proposed approach would risk “placing the Administration in the center of a debate that has no center—with Members of Congress attacking from both directions.”²⁰⁸

Eventually, Clinton’s Working Group endorsed the center of the range of quantity thresholds that the Commission proposed. This generated a 10-to-1 ratio by both raising the threshold for crack and by lowering it for powder cocaine, thereby increasing cocaine sentences.²⁰⁹ The President endorsed the proposal as well.²¹⁰ “[P]recisely because it takes a middle position,” Reed and Kagan explained, “this recommendation offers the best hope of achieving progress on this issue.”²¹¹ The group made “determined efforts” to promote this ratio.²¹²

A majority of Congress, however, disagreed with the Working Group’s recommendations. Indeed, Senators Hatch, Abraham, and Feinstein had proposed legislation that would reduce the ratio between crack and powder cocaine to 10-to-1 by lowering the triggering quantity for powder cocaine, raising sentences for cocaine defendants without decreasing crack penalties.²¹³ The Administration and the Sentencing Commission took the threat of this proposal seriously. Bruce Reed and Elena Kagan estimated that “Senator Abraham would have offered, and the Committee would have passed, this amendment if we had made the [drug working group]’s recommendation

Library in Folder: Kagan_Crime – Crack Sentencing) (“In July 1997, a Department of Justice, Office of National Drug Control Policy (ONDCP), and White House Working Group was formed to develop and implement a strategy to advance the Administration’s proposal to reduce the disparity in sentences for crack and powder cocaine offenses from the current 100 to one disparity down to 10 to one.”).

²⁰⁷ Memorandum regarding Crime Issues from Dennis Burke, Senior Policy Analyst, White House Domestic Policy Council, to Rahm Emanuel, Senior Advisor to President William J. Clinton, (May 1, 1997) (on file with William J. Clinton Presidential Library in Folder: Ideas - Crime and Drugs); *see also* Dennis K. Burke, BALLARD SPAHR LLP, <https://www.ballardspahr.com/people/attorneys/burke-dennis.aspx> [<https://perma.cc/5ECS-M879>] (noting that Burke was Senior Policy Analyst for the White House Domestic Policy Council during the Clinton Administration).

²⁰⁸ Memorandum from Bruce Reed, Dir., Domestic Policy Council, and Elena Kagan to the President William J. Clinton. Crack Sentencing Recommendations (July 3, 1997) (on file with William J. Clinton Presidential Library in Folder: Kagan_Crime - Crack Sentencing).

²⁰⁹ *See* Fax to Elena Kagan, *supra* note 206, at 1.

²¹⁰ *See, e.g.*, Fax to Elena Kagan, The Clinton Administration’s Strengthened Strategy to Fight Cocaine Traffickers (August 25, 1997) (on file with William J. Clinton Presidential Library in Folder: Kagan_Crime - Crack Sentencing) (“The Clinton Administration concluded that the federal cocaine laws should be changed so that individuals who distribute 25 grams of crack or 250 grams of powder should be sent to prison for a mandatory minimum sentence of 5 years.”).

²¹¹ Reed & Kagan, Memorandum for President, *supra* note 208, at 3.

²¹² Memorandum from Bruce Reed and Elena Kagan to President William J. Clinton (Oct. 24, 1997) (on file with William J. Clinton Presidential Library in Folder: DPC_2) (“Notwithstanding determined efforts, the Administration’s crack cocaine working group (including Justice, ONDCP, and DPC) failed to gain any serious Congressional support for our proposed sentencing revision.”).

²¹³ Penalties for Crimes Involving Cocaine Act, S. 260, 105th Cong. (1997).

public.”²¹⁴ For this reason, the Working Group adopted a “longer term strategy.”²¹⁵ Instead of promoting the Commission’s proposal, the Administration “engaged in private discussions with Senator Abraham to prevent him from offering an amendment to drop the mandatory minimum threshold for powder while leaving the threshold for crack intact.”²¹⁶

The Sentencing Commission played a unique role in this fraught political context. While the Working Group endorsed the Commission’s recommendations and cited their findings in the 1997 report, some White House officials proposed that the Commission could provide political cover for the Administration by proposing something outside of the political mainstream. One senior policy analyst suggested that the Working Group’s recommendations, “at a minimum, should not reduce crack penalties as much as the Sentencing Commission.”²¹⁷ In fact, he said, “it would be helpful to have the Sentencing Commission criticizing us too.”²¹⁸ The Clinton Administration seems to have given up on this idea, convinced, at least in part, that the Commission would be unlikely to make this type of recommendation. The historical record, although incomplete, does suggest that sentencing agencies can have a political impact by making less moderate recommendations and therefore broadening the range of politically acceptable options. The Commission, though, was unlikely to try such an approach. Two years before, the Commissioners had learned the importance of networking with Congress and compromising among themselves.

2. 2002

In 2002, the Commission considered amending the crack guidelines once again. Prompted by interest in the issue in Congress, the Commission once again sought public comment on the issue of crack and cocaine sentencing and held public hearings on the topic. The Commission’s research revealed what the Commissioners likely already knew: that the 100-to-1 ratio “exaggerate[d] the relative harmfulness of crack cocaine,” often applying to low-level offenders rather than serious drug traffickers.²¹⁹

The question, now, was what to do. Should the Commission take advantage of the opening in Congress and propose amendments to the crack guidelines, as it did in 1995, or should it make recommendations to Congress, as it had in 1997?²²⁰ As Judge Murphy had summarized, “the Commission could bring either light or heat to this issue.”

There were many reasons to turn up the heat. The Commissioners were aware that the fates of thousands of incarcerated drug offenders hung in the balance. Vice Chair Castillo reminded his

²¹⁴ Memorandum from Bruce Reed, Dir., Domestic Policy Council, and Elena Kagan to the President William J. Clinton. Crime—Crack Cocaine Sentencing (July 12, 1997) (on file with William J. Clinton Presidential Library in Folder: DPC_3).

²¹⁵ Memorandum from the Clinton Administration Crack-Power Initiative November 1997 (Nov. 18, 1997) (on file with author) (“The revised plan is a one to two-year plan --recognizing that it will take time to build sufficient support in Congress to pass the Administration’s proposal and that there may be a need to oppose legislation in the 1998 Congressional session.”); *See also* Reed & Kagan, *supra* note 212.

²¹⁶ Reed & Kagan, Memorandum for President, *supra* note 208.

²¹⁷ Burke, *supra* note 207, at 3.

²¹⁸ *Id.*

²¹⁹ U.S. SENTENCING COMM’N, REPORT TO THE CONG.: COCAINE AND FED. SENTENCING POLICY (2002).

²²⁰ *See* Agenda for Feb. 2002 meeting (“Regarding crack cocaine, will the Commission recommend statutory changes only (as done in 1997), or propose statutory changes and promulgate guideline amendments (as was attempted unsuccessfully in 1995)?”).

colleagues at an April meeting that this was a “human issue.”²²¹ Commissioner Kendall added that “justice delayed is justice denied.”²²² The Commissioners were aware, too, that an amendment would be a strong public statement against the current cocaine sentencing scheme. According to Commissioner Castillo, “all the participants in the criminal justice system, including federal judges, . . . shared the “near unanimous view” that the 100-1 ratio should be changed.”²²³

Communications with Congress made clear that Congressional disapproval was always a threat. In January of 2002, members of the Commission’s staff met with various members of Congress about the possibility of changing cocaine sentences. Jay Apperson, the Chief Counsel to the majority staff of the House Crime Subcommittee, warned that “the Commission should not act on crack until Congress does.”²²⁴ Rep. Lamar Smith (D-TX) wrote to Chairman Murphy with “deep concerns” regarding the possibility of amending the crack guidelines.²²⁵ “I will oppose any such amendments,” he told her, “and will initiate congressional action to reject them should they be sent to the Congress.”²²⁶ In his letter, he specifically referenced the Commission’s 1995 amendments:

[A]ttempts by the Commission to propose such amendments are even more troubling in light of the fact that Congress overturned the Commission’s 1995 amendments and then rejected the Commission’s recommendation in 1997. Congress has made its position clear time after time that the Commission should not reduce the ratios without a congressionally enacted change to the statute.²²⁷ Just like it did in 1995, the Commission risked Congressional disapproval if it decided to amend the Guidelines.

In this context, the Commission chose light rather than heat. Instead of promulgating new guidelines concerning crack, it published a report that “unanimously and firmly concludes that the various congressional objectives can be achieved more effectively by decreasing substantially the 100-to-1 drug quantity ratio.”²²⁸ In the report, it recommended that the triggering quantity for the five-year mandatory minimum for crack cocaine distribution be raised to somewhere between 25 and 100 grams. This recommendation, if adopted, would have reduced the ratio to, at minimum, 20-to-1.²²⁹ After anticipating Congress’s reaction, the Commission decided not to risk another Congressional override.

To many observers, it was clear that the Commission’s strategy was shaped by potential

²²¹ Transcript of U.S. Sentencing Comm’n, Public Meeting (April 5, 2002) at 65:18–20 (“There are human faces in jail today that we should be doing better about. It’s a fairness issue.”).

²²² *Id.* at 68:7–12 (Commissioner Kendall: “But I would also like to remind everyone that it was once said, and I’m paraphrasing here, justice delayed is justice denied. If you believe there is an injustice in this area, the longer the delay in curing it, the longer there is a problem.”).

²²³ *Id.*

²²⁴ Memorandum from Ken Cohen to Tim McGrath (Jan. 24, 2002) (on file with author).

²²⁵ Letter from Sen. Lamar Smith, Chairman, Subcomm. on Crime, Terrorism, and Homeland Security, House Judiciary Comm., to Diana Murphy, Chair, U.S. Sentencing Comm’n (Mar. 29, 2002) (on file with the Federal Sentencing Reporter).

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ U.S. SENTENCING COMM’N, REPORT TO THE CONGRESS: FEDERAL COCAINE SENTENCING POLICY viii (2002).

²²⁹ *Id.* at 106 (“The Commission, however, unanimously concludes that the five-year mandatory minimum threshold quantity for crack cocaine offenses should be increased to at least 25 grams. If the threshold were benchmarked to methamphetamine mixture, the five-year threshold quantity would be 50 grams, and if to heroin, the five-year threshold quantity would be 100 grams.”).

opposition in Congress and the Department of Justice.²³⁰ As Vice Chair Castillo explained, crack had become “a political maze which the Commission ha[d] struggled with for too many years.”²³¹ Despite his concern about the “human faces in jail,” he believed that passing an amendment would have been a “mistake.”²³²

3. 2007

The Commission dealt with crack sentences once again in 2006 and 2007. This Commission, led by Judge Ricardo Hinojosa, took pains to bring the issue to Congress. In October 2006, Commission staff met with Senator Biden’s staff and reported that it was possible that the Senator would propose legislation reforming cocaine sentences sometime in the next year. “The interest expressed by Senator Biden’s staff mirrors what we are seeing in both chambers and both sides of the aisle,” the staff estimated.²³³ Indeed, the Commission received assistance from Congresspeople of both parties, and specifically enjoyed the assistance of Senator Sessions, who had sponsored two bills that would reduce the cocaine sentencing disparity by reducing the amount of powder cocaine and increasing the amount of crack cocaine needed to trigger the respective mandatory minimum sentences.²³⁴ Commission staff worked with Senator Sessions and other allies to get members of Congress to support reform.²³⁵

In April of 2007, Commissioners had been considering several options for cocaine sentencing reform, including a proposal that would reduce the crack quantity threshold to 25 grams, which would reduce the average crack offender’s sentence to approximately 93 months, and a proposal from Commissioner Steer that would add a two-level reduction for certain non-violent crack cocaine offenses and would lower the average sentence for crack cocaine offenders to 109 months.²³⁶ The Commission also considered reducing all crack sentences by two levels, which they called “crack minus two.” Crucially, this would bring the average crack sentence down to 99 months, but still would maintain Congress’s ultimate control over drug sentences by ensuring that the guidelines aligned with the mandatory minimum provisions for crack.

By the April meeting, all but one Commissioner had decided on crack minus two. The

²³⁰ Frank Bowman, *The Geology of Drug Policy in 2002*, 14 FED. SENT. R. 123, 129–30 (2002) (noting in the introduction to a volume about drug law that “[w]hat emerges unmistakably from these materials is that the Commission was hoping to promulgate an amendment reducing the crack-powder ratio for guideline sentences[.] . . . Equally unmistakable is the conclusion that concerted opposition from the Department of Justice (expressed personally to the Commission by Deputy Attorney General Larry Thompson) and Rep. Lamar Smith, of the House Judiciary Committee dissuaded the Commission from passing an amendment on crack.”).

²³¹ U.S. Sentencing Comm’n, Transcript of Public Meeting (2002) at 62:5–6.

²³² *Id.* at 67: 13–15 (“[T]his is a problem that uniquely needs to be totally solved by Congress; and to pass an amendment today would be a mistake and, so I’m going to join in making the recommendations that will be forthcoming.”).

²³³ Memorandum from Lisa Rich and Matt Osterrieder to U.S. Sentencing Comm’n (Oct. 11, 2006) (on file with author).

²³⁴ Drug Sentencing Reform Act of 2006, S. 3725, 109th Cong. § 101 (2006); Drug Sentencing Reform Act of 2001, S. 1874, 107th Cong. § 101 (2001).

²³⁵ Letter from Sen. Jeff Sessions to “Dear Colleague” (March 15, 2007) (“Please support my ongoing efforts to address this disparity in federal law by signing on to comments that will be submitted to Sentencing Commission to urge them to reduce the 100 to 1 disparity.”); *see also* U.S. Sentencing Commission Meetings with Senators and Staff (April 26, 2007) (packet reflecting correspondence).

²³⁶ Memorandum from Ken Cohen to U.S. Sentencing Comm’n (Apr. 11, 2007) (on file with author).

Commissioners in support acknowledged that the amendment was a “modest step,” and that the “matter must be addressed from a congressional standpoint.”²³⁷ Commissioner Horowitz hoped that the amendment would “spur debate in Congress.”²³⁸ Commissioner Castillo, who also supported the amendment, concluded his remarks by observing that only Congress could solve the problem.²³⁹

Commissioner Steer, the sole dissenter, worried about Congress’s reaction. He thought that the amendment was too broad—it would reduce sentences for all crack offenders, including violent ones—and he thought action by the Commission could “cause Congress to be less likely, not more likely, to take action on the issue of mandatory minimums for cocaine offenses.”²⁴⁰ Steer, who was the only Commissioner who had been at the Commission for the 1995 crack vote, voted against the amendment. Eight months later, the Commissioners voted to make the amendment retroactive.²⁴¹ The Commission estimated that almost 20,000 offenders would be eligible for a reduction in sentence.²⁴² Commissioner Howell called it “one of the most important decisions that the Commission’s made.”²⁴³

The Commission’s implementation of the controversial retroactivity amendment was careful and politically astute. When the Commissioners made crack minus two retroactive, they made sure to smooth the process as much as possible for Congress and other stakeholders. It was not necessarily an easy process. Thirteen Republican members of the House Judiciary Committee had written a letter to Chairman Hinojosa “question[ing] the wisdom of releasing serious drug dealers back into our communities.”²⁴⁴ The Department of Justice also registered its opposition. The Judicial Conference wrote to the Commission supporting retroactivity and recommending procedures that would reduce the burden of the related resentencing hearings. The Commission amended the *Guidelines Manual* as the Judicial Conference suggested, emphasizing that resentencing proceedings based on a retroactively applied amendment did not “constitute a full resentencing of the defendant.”²⁴⁵ The Commission also delayed the effective date of the retroactivity amendment until March 3, 2008, to “give the courts sufficient time to prepare for and process these cases.”²⁴⁶ In this way, even the Commission’s retroactivity decision reflected a keen sense of real world context.²⁴⁷

While the Commission did not bend on retroactivity, it compromised with members of Congress in other ways. After the Commission made the retroactivity decision, it proposed an

237 Press Release, U.S. Sentencing Comm’n at 3 (Apr. 27, 2007) (on file with author).

238 U.S. Sentencing Commission Public Meeting Minutes April 27, 2007, at 3 (on file with author).

239 *Id.* at 2.

240 *Id.*

241 United States Sentencing Commission, Meeting on Retroactivity (Dec. 11, 2007) (on file with author) at 49–50.

242 *Id.* at 39:8–11.

243 *Id.* at 18:20–23.

244 Letter from House Committee on Judiciary to Judge Hinojosa (Nov. 6, 2007) (“We write to express our concern that the Commission may soon vote to make its April amendments to United States Sentencing Guidelines pertaining to crack cocaine apply retroactively.”).

245 See U.S. Sentencing Guidelines Manual § 1B1.10(a)(3) (U.S. Sentencing Comm’n 2018).

246 Press Release, U.S. Sentencing Comm’n, U.S. Sentencing Commission Votes Unanimously to Apply Amendment Retroactively for Crack Cocaine Offenses (Dec. 11, 2007), http://www.ussc.gov/Legislative_and_Public_Affairs/Newsroom/Press_Releases/20071211_Press_Release.htm [<https://perma.cc/EV7B-W3ZR>].

247 For an analysis of the implementation of a similar retroactive amendment, see Caryn Devins, *Lessons Learned from Retroactive Resentencing After Johnson and Amendment 782*, 10 FED. CTS. L. REV. 39 (2018).

amendment to its rules that would free the Commission from the obligation to make retroactivity decisions at the same time as the original amendment was promulgated.²⁴⁸ The Commission had rarely followed the rule, anyway, often deciding retroactivity after passing the original amendment.²⁴⁹ “On April 7, 2008, the Commission received a letter from Senators Coburn, Cornyn, Grassley, Kyl, Inhofe, and Ensign expressing their opposition to the proposed amendment to the rules.²⁵⁰ The Senators worried that the new rule would not give Congress enough time to review and potentially respond to a controversial retroactivity decision.²⁵¹ In the Sentencing Reform Act, the letter stated, “Congress delegated, *not abdicated*, its legislative function. The Commission’s actions regarding retroactivity are at odds with this principle.”²⁵² After receiving the letter, Chair Hinojosa and Commissioner Howell met with Senator Coburn to hear his concerns directly, and the Commission’s legislative staff alerted members of the Democratic majority to the issue.²⁵³ Eventually, the Commission decided not to change the language, citing Congress’s opposition.²⁵⁴

IV. THE COSTS AND BENEFITS OF EXPERTISE

I have argued that the Sentencing Commission’s 1995 recommendations on crack preceded a congressional response that prompted the Commission to become politically shrewd. Specifically, the Commission began to proceed by consensus and be sensitive to the political viability of their proposals. At the same time, though, the Sentencing Commission’s politically unpopular opinion had beneficial results. In Part IV, I use the Commission’s 1995 recommendations to explain the costs and benefits of political savvy. I show that the Commission’s politically unpopular recommendation prompted the Clinton administration, which was formally opposed to crack sentencing reform, to push prosecutors to reform their charging and sentencing practices. In this sense, the unpopular crack recommendation was successful behind the scenes. At the same time, the politically sensitive approach that the Commission adopted after 1995 was also successful in moving the conversation about crack sentencing. As the Commission continued to produce data that tracked racial inequality in the sentencing system, Commissioners were able to encourage long term sentencing reform.

A. The Benefits of Boldness

The Commission remembered the 1995 crack amendment as a political failure. But the

²⁴⁸ Memorandum from Ken Cohen to U.S. Sentencing Comm’n (July 9, 2008) (on file with the author).

²⁴⁹ *Id.*

²⁵⁰ Letter from Senators Coburn, Cornyn, Grassley, Kyl, Inhofe, and Ensign, to Ricardo Hinojosa (April 7, 2008) (on file with the author).

²⁵¹ *Id.*

²⁵² *Id.*

²⁵³ E-mail from Lisa A. Rich, Dir., Office of Legislative and Governmental Affairs, U.S. SENTENCING COMM’N, to staff of Democratic members (Apr. 9, 2008, 18:11 EST) (on file with author) (“We were not expecting congressional response on this internal matter but I wanted you all to be aware of the issue. If your bosses have any desire to weigh in on this matter, please try to have letters to me by COB Monday April 14, 2008.”).

²⁵⁴ Coburn, Cornyn, Grassley, Kyl, Inhofe, and Ensign, *supra* note 250, at 2 (“No action was taken at the April 2008 meeting, in part because on April 7, 2008, the Commission received a letter from Senators Coburn, Cornyn, Grassley, Kyl, Inhofe, and Ensign expressing their opposition to the proposed amendment to the rules. . . . Following the April meeting, Chair Hinojosa and Commissioner Howell met with Senator Coburn . . .”).

Commission's recommendations were successful in mobilizing advocates of crack sentencing reform. The Commission's endorsement of a 1-to-1 ratio legitimated this ratio as a goal, supporting judges, advocates, and defendants who shared that objective. Justice Stevens cited the Commission's 1995 report when dissenting in *Armstrong*, a case concerning allegations of selective prosecution of black crack defendants.²⁵⁵ Reverend Jesse Jackson mentioned the amendment at the Million Man March.²⁵⁶ The Commission's recommendations became known to federal prisoners, who rioted when they learned that Congress had rejected the Commission's 1-to-1 proposal.²⁵⁷ And the conclusions of the 1995 Commission underlay the agency's longstanding commitment to collecting data about crack defendants, which it used to advocate for statutory reform of crack sentences.²⁵⁸

Furthermore, an investigation of the records of the Clinton administration suggests that the recommendation may have prompted a change in the administration's drug prosecution policy. While the Department of Justice had opposed the Commission's 1-to-1 proposal, the department began to engage with the possibility of racial disparities in drug prosecutions. In October 1995, months after the Commission's proposal, the Deputy Attorney General asked Eric Holder, United States Attorney for the District of Columbia, to chair a working group that would "examine racial issues in the criminal justice system."²⁵⁹

Behind the scenes, the working group was able to accomplish some of what the Commission had aimed to do in its 1995 recommendations.²⁶⁰ Specifically, the working group shared the Sentencing Commission's concern about the 100-to-1 ratio, and explicitly phrased its recommendations as an effort to reduce the impact of unequal sentencing. "Although changing prosecution strategies cannot totally resolve any inequities caused by the 100-to-1 sentencing ratio between powder and crack cocaine," the Working Group wrote, targeting prosecution efforts on the right people—"major traffickers" or threats to the community—would help to ameliorate concern "that defendants would be unfairly affected by the sentencing ratio."²⁶¹

²⁵⁵ United States v. *Armstrong*, 517 U.S. 456, 478 (1996) (Stevens, J., Dissenting).

²⁵⁶ Gary Marx, *Race Is at Center of Crack-Sentencing Debate*, CHI. TRIB., Oct. 30, 1995, at D1.

²⁵⁷ Ray Long, *Rioting Breaks out at Three Federal Prisons*, PHILA. INQUIRER, Oct. 21, 1995, at A3.

²⁵⁸ See, e.g., U.S. SENTENCING COMM'N, SENTENCE AND PRISON IMPACT ESTIMATE SUMMARY S. 756, THE FIRST STEP ACT OF 2018 (2018) (reporting on the impact of sentencing reform proposals that became the First Step Act (P.L. 115-391)).

²⁵⁹ Memorandum from Eric Holder, Jr., Chair, Racial Disparity Working Grp., to Carol DiBattiste, Dir., Exec. Office of U.S. Attorneys (Mar. 28, 1997) (on file with the William J. Clinton Presidential Library) ("At a meeting convened by the Deputy Attorney General on October 19, 1995, the Deputy Attorney General asked United States Attorney Eric Holder (DC) to chair a working group of United States Attorneys and representatives of the Criminal Division to examine racial issues in the criminal justice system and recommend what additional steps, if any, United States Attorneys should take to ensure that race plays no role in prosecution."). Mary Harkenrider, *ex officio* member of the Commission, participated in the working group. *Id.* at 2.

²⁶⁰ *Id.* at 2.

²⁶¹ *Id.* at 7–8 ("To the extent that the Federal focus is consistent and properly directed, there is less concern that defendants will be unfairly affected by the sentencing ratio."); see also Memorandum from Janet Reno, Attorney Gen., to All U.S. Attorneys, at 2 (undated) (on file with the William J. Clinton Presidential Library) (cautioning that "the quantity of crack involved in a single transaction does not always accurately reflect an individual's position in the hierarchy of a drug trafficking organization[,] aggregation of the quantities of crack involved in a series of small transactions to achieve a mandatory minimum sentence may not promote federal law enforcement goals . . . Federal prosecution of individual (and replaceable) retail-level dealers, without additional action, may result in only a short-term fix with no lasting impact on the overall crack distribution activity in a given jurisdiction.").

The administration's recommendations may have been reflected in drug sentencing trends, helping to explain what Frank Bowman III and Michael Heise call a "quiet rebellion" against the drug guidelines in the 1990s.²⁶² According to Bowman & Heise, drug sentences declined between 1992-2000, as a result of "discretionary choices" made by "front line sentencing actors" who were convinced that drug sentences were too high.²⁶³ Prosecutors expressed their dissatisfaction with mandatory minimum sentences by dismissing provable charges in plea deals, recommending departures from guidelines sentences, and allowing judges to exercise sentencing discretion without opposition.²⁶⁴ Records from the Clinton Administration suggest that the administration, in reaction to the Sentencing Commission's recommendations, made a concerted effort to avoid prosecuting low-level crack defendants, examine prosecution practices generally, and institute training and reflection about "issues relating to disparity."²⁶⁵ By sharing the message that drug sentencing should be examined, the working group likely contributed to the "quiet rebellion." In other words, the Sentencing Commission's 1995 recommendations may have had a profound effect.

B. The Benefits of the Commission's Political Savvy use of Data

Despite the fact that the Sentencing Commission's 1995 recommendations influenced a series of political actors to commit themselves to the 1-to-1 ratio, the Commission learned from the 1995 experience to proceed with additional caution. Specifically, as I have demonstrated above, the Commission developed a commitment to internal consensus, deliberation, and sensitivity to political reactions. These commitments had their own benefits, as well, especially when combined with the Commission's powerful data and analytics. Ironically, the Commission was able to push for reform with data and political savvy, just like it was when it was apolitical.

While the Commission's 1995 recommendations pushed the Clinton administration to quietly reform crack sentencing, the 2007 Commission, which had acted in a unanimous, bipartisan manner to reduce crack sentences by two offense levels in the *Guidelines Manual*, was able to push for change during the Obama era. In 2010, Congress passed the Fair Sentencing Act (FSA), which

²⁶² Frank O. Bowman, III & Michael Heise, *Quiet Rebellion? Explaining Nearly a Decade of Declining Federal Drug Sentences*, 86 IOWA L. REV. 1043, 1126 ("the evidence we have reviewed shows [that] at virtually every point in the Guidelines sentencing process where prosecutors and judges can exercise discretionary authority to reduce drug sentences, they have done so" and suggesting that "charge and fact bargaining" seem to have increased as well); *but see* Frank O. Bowman, III & Michael Heise, *Quiet Rebellion II: An Empirical Analysis of Declining Federal Drug Sentences Including Data from the District Level*, 87 IOWA L. REV. 477, 556 (2002) (reevaluating the earlier article with district-specific drug sentencing data and concluding that "[i]f indeed there is a quiet rebellion against the severity of federal drug sentences, or at least a falling away from uniform and disciplined enforcement of drug sentencing rules, that movement has not swept into every corner of the land"). Other scholars have suggested a similar dynamic with the power to plea bargain. *See, e.g.*, Oren Gazal-Ayal, *Partial Ban on Plea Bargains*, 27 CARDOZO L. REV. 2295, 2345-46 (2006) (suggesting that "prosecutors often reduce charges or, in other ways, reduce the sentence to which the defendant is exposed, when they believe that the prescribed sentence is much too severe"); William Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 HARV. L. REV. 2548, 2553-54 (2004) (arguing that prosecutors are often interested in milder sentences than the law prescribes, but they use the harsh post-trial sentence as a threat to extract guilty pleas).

²⁶³ Bowman & Heise, *supra* note 262, at 1049 (positing that the decline was a product of a "widespread perception among the foot soldiers of the criminal justice system-the prosecutors, defense attorneys, probation officers, and district judges-that drug sentences are often too high").

²⁶⁴ *Id.* at 1125.

²⁶⁵ Memorandum from Eric Holder, *supra* note 259, at 20-22.

reduced the 100-to-1 ratio in triggering quantities for mandatory minimums to 18-to-1.²⁶⁶ In 2018, Congress passed the First Step Act, which made the Fair Sentencing Act's changes retroactive. Of course, the political winds were changing, but it was also the Commission's own data and advocacy that made these legislative changes possible.²⁶⁷ Members of Congress referenced the Commission's studies when advocating for the bills.²⁶⁸ Indeed, the Commission's extensive studies on the effect of applying sentence reductions retroactively, which all showed that retroactivity had no effect on recidivism, demonstrated to Congress that the Fair Sentencing Act should be made retroactive.²⁶⁹

* * *

As the nation reckons with the history of mass incarceration and the war on drugs, many jurisdictions have started to rely on apolitical expertise. Federal and state lawmakers have passed laws aiming to contain criminal justice costs, de-prioritize low-level offenders, and reduce incarceration. Independent agencies and expert decision-makers play a central role in these efforts. Reformers prioritize independence and expertise setting bail policies, reforming policing, and managing public defense services.²⁷⁰ These reforms make the lessons of the Sentencing Commission's own crack wars even more important. When an expert agency wades into the politically charged waters of criminal justice policy, insulation and expertise are all the more important. And if these agencies are tied to Congressional approval or override, they face an important decision: be politically savvy or risk political isolation. Each one, I have argued, has its costs and benefits.

²⁶⁶ Press Release, U.S. Sentencing Commission, U.S. SENTENCING COMMISSION REPORTS ON IMPACT OF FAIR SENTENCING ACT OF 2010 (Aug. 3, 2015), https://www.uscc.gov/sites/default/files/pdf/news/press-releases-and-news-advisories/press-releases/20150803_Press_Release.pdf [<https://perma.cc/W8Y6-9UEK>]; Fair Sentencing Act of 2010, Pub. L. No. 111-220, § 2(a), 124 Stat. 2372 (2010), 124 Stat. 2372 (2010).

²⁶⁷ See, e.g., 156 Cong. Rec. H6203, 111th Cong., 2nd Sess. H6203 (July 28, 2010) (Statement of Rep. Hoyer (D-MD): "The 100-to-1 disparity is counterproductive and unjust. That's not just my opinion, but the opinion of a bipartisan Sentencing Commission."); *id.* at H6198 (Statement of Rep. Sensenbrenner (R-WI): "The Sentencing Commission has been set up by this Congress to look at sentencing patterns and look at sentencing statistics. For the last 15 years, they have called for a change in the disparity and the minimum sentences between those who are indicted for violating the crack cocaine laws versus those who are indicted for violating the powder cocaine laws."); Jesselyn McCurdy, *The First Step Act Is Actually the "Next Step" After Fifteen Years of Successful Reforms to the Federal Criminal Justice System*, 41 CARDOZO L. REV. 189, 226 (2019) ("Building on reports by the Sentencing Commission criticizing the disparity between the two drugs and bipartisan congressional support for reducing the disparity, the Justice Roundtable successfully educated members of Congress and the public at large about the importance of the crack cocaine issue.").

²⁶⁸ For the use of the studies by Congress, see Penalties, Hearings before the Overcriminalization Taskforce of 2014, H. Jud. Comm., 113th Cong., 2nd Sess. (May 30, 2013) at 4 (Stmt. of Rep. Scott (noting that drug defendants are "not the kingpins, they are not the leaders, and they are not organizers of criminal syndicates. Rather, data from the U.S. Sentencing Commission tells us that the vast majority are couriers, street-level dealers, and addicts.").

²⁶⁹ For studies, see, e.g., U.S. SENTENCING COMM'N, RECIDIVISM AMONG FEDERAL OFFENDERS RECEIVING RETROACTIVE SENTENCE REDUCTIONS (MARCH 2018) 1 (finding "no difference between the recidivism rates for offenders who were released early due to retroactive application of the FSA Guideline Amendment and offenders who had served their full sentences before the FSA Guideline Amendment reduction retroactively took effect").

²⁷⁰ Note, *Bail Reform and Risk Assessment: The Cautionary Tale of Federal Sentencing*, 131 HARV. L. REV. 1125 (2018).

V. CONCLUSION

In 1995, after a thorough study of drug sentencing, the Sentencing Commission began a process of self-reflection. After thorough study and consultation with its constituents, the Commission decided that it had been over-punishing defendants who trafficked in crack cocaine. This decision reflected the decision that the drug was not as dangerous as it seemed, but also a concern for the racial disparities produced by the crack sentencing scheme. This decision represents the Commission at its most apolitical and least consensus-driven. Each Commissioner reviewed the information and voted on their own. And this mode of operation had disastrous results.

Congress used formal and informal mechanisms to reject the Commission's controversial recommendation. These examples of "congressional administration" profoundly impacted the new agency. In addition to formally rejecting the Commission's crack amendments, congressional meddling changed the Commission's approach to decision-making more broadly. By initiating the crack stories, opposing members of Congress pushed the agency to embrace a certain set of priorities, abandoning expertise and individualized review for political awareness and consensus driven decision-making. Criminal justice reformers should keep this incident in mind when delegating important policy decisions to expert agencies and data-collectors. If these agencies are not insulated from the pathological politics of crime, they will be wise to review the history of the Sentencing Commission.