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A Sentencing Commission for the Administrative State?

MAX MINZNER*

Since the 1980s, oversight of punishment in the federal criminal system has been centralized. A single body, the Sentencing Commission, regulates criminal punishment through the Sentencing Guidelines. The Guidelines are designed to bring consistency and transparency to criminal punishment, but come with the inevitable cost of a loss of case-by-case judicial discretion. In contrast, punishment in the federal administrative state is almost completely decentralized. No single body oversees agency punishment practices. The administrative model makes the opposite choice of the criminal model. It favors individualized punishment determinations over the benefits of consistency and transparency.

In this Essay, I consider the arguments in favor of a sentencing commission for the administrative state. I conclude that although the advantages of centralized punishment are real, they are not large enough to support centralizing the administrative civil penalty power into a single body. Administrative enforcement involves a level of specialized knowledge and integration with other agency regulatory choices that is absent in the criminal context. However, while a top-down approach enforcing penalty consistency and transparency would be a mistake, agencies can and should work from the bottom up to develop their own penalty guidelines and coordinate their penalty practices with parallel regulators.

INTRODUCTION

Over the last five years, federal administrative agencies have ratcheted up their enforcement programs with a particular focus on civil penalties. Recent penalty actions have had three distinguishing characteristics. First, they are large, reflecting record penalty assessments both for individual agencies and for administrative enforcement generally.[1] Next, they are opaque. Agencies frequently provide little or no transparency explaining the calculation producing the penalty level ultimately imposed.[2] Finally, they are not necessarily consistent. Some agencies impose much larger or smaller penalties than others, even when the conduct may require (or deserve) similar penalties.[3]

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1. I (and others) have outlined each of these trends elsewhere. *See, e.g.*, Max Minzner, *Should Agencies Enforce?,* 99 MINN. L. REV. (forthcoming 2015), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1153097 (describing recent record civil penalties).

2. *See id.* at 16–17 (discussing penalty opacity and inconsistency); Max Minzner, *Why Agencies Punish*, 53 WM. & MARY L. REV. 853, 865 (2012) (discussing opacity in NHTSA and Office of Pipeline Safety proceedings).

3. *See* Cass R. Sunstein, Daniel Kahneman, David Schkade & Ilana Ritov, *Predictably Incoherent Judgments*, 54 STAN. L. REV. 1153, 1190–91 (2002) (discussing penalty inconsistencies across agencies).

While this development is new for administrative agencies, it echoes an older story. These characteristics of punishment choices—size, clarity, and consistency—were the foundational concerns that produced the United States Sentencing Guidelines in the 1980s for federal criminal prosecutions.[4] Federal judges historically had the ability to impose any sentence within a wide statutory range. This discretion produced significant sentencing disparities with limited justification for the differences. The Sentencing Guidelines, initially mandatory and now advisory, dramatically changed this process. In applying the Guidelines, district judges now are much more constrained in their options. While the Sentencing Guidelines have spawned numerous critics, they likely have added transparency and consistency in the federal sentencing process.

The possibility of a similar body in the administrative context has received some academic attention but little traction.[5] The trade-off inherent in such an approach is clear: centralizing the punishment calculus exchanges individuation for uniformity. Penalty guidelines provide the benefit of coherence across punishers at the cost of individual, case-by-case determinations.

Is it time for a Sentencing Commission for the administrative state? While the answer (for now) is no, the concerns of consistency and transparency in administrative enforcement are real. Rather than a top-down solution, the right approach is to begin from the bottom up. Agencies should start by developing their own penalty policies that provide enforcement transparency, then take the next step of coordinating those policies with sister regulatory agencies. Supplemented in appropriate cases by judicial oversight, these steps can achieve the benefits of centralized punishment without paying the costs.

I. CENTRALIZING AND DECENTRALIZING PUNISHMENT

Before the Sentencing Reform Act of 1984, federal criminal punishment choices operated on a decentralized model. Congress set statutory maxima (and sometimes minima) for given criminal offenses. These ranges were wide. For example, a defendant convicted of rape in federal court faced a sentencing range of probation to life.[6] Following a finding of guilt, a district judge sentenced the defendant within that range.[7] A central tenet of the pre-Guidelines system was wide-ranging judicial discretion. Judges had the statutory power to consider virtually any source of information they considered relevant in setting the sentence.[8] No agency provided centralized oversight of the punishment process.[9]

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4. *See* Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises upon Which They Rest*, 17 HOFSTRA L. REV. 1, 3 (1988) (describing motivation for development of the Sentencing Guidelines).

5. *See, e.g.*, Sunstein et al., *supra* note 3, at 1193 (proposing creation of Civil Penalties commission); Colin S. Diver, *The Assessment and Mitigation of Civil Money Penalties by Federal Administrative Agencies*, 79 COLUM. L. REV. 1435, 1458–59 (1979) (discussing issue of inconsistency and desirability of uniform standards).

6. *See* 18 U.S.C. § 2031 (1948).

7. *See generally* Mistretta v. United States, 488 U.S. 361, 364–65 (1989) (describing pre-Guidelines sentencing regime); Stanley A. Weigel, *The Sentencing Reform Act of 1984: A Practical Appraisal*, 36 UCLA L. REV. 83, 89 (1988).

8. *See, e.g.*, United States v. Grayson, 438 U.S. 41, 50 (1978) (noting that Congress later confirmed this power).

9. After the defendant began serving his sentence, the parole process determined the ultimate length of that sentence. In the early 1970s, the United States Parole Board made an attempt to regulate the punishment process by setting "customary" periods of confinement for various classes of offenders. U.S. Parole Comm'n v. Geraghty, 445

Not surprisingly, district judges exercised the discretion granted to them. Across the United States, sentences for identical federal crimes ranged widely within the statutory sentencing range.[10] Two basic criticisms were leveled at the pre-Guidelines sentencing process. First, district judges were simply inconsistent in their sentencing practices. Defendants would receive longer or shorter sentences for reasons unrelated to legitimate purposes of punishment. Second, the punishment process was opaque and unpredictable. Defendants, prosecutors, and defense counsel were not able to forecast the potential sentence with any accuracy.[11]

The 1984 Act radically overhauled the sentencing process in response to these criticisms and moved toward a centralized model of punishment. Instead of wide-ranging statutory limits, the United States Sentencing Guidelines Manual sets a narrow sentencing range measured in months, with the top and bottom of the range often differing by less than a year. The product of two other calculations largely determines this range: the defendant's "criminal history category" and the "offense level."[12] These three inputs to the sentencing process—the criminal history and offense level calculation, as well as the resulting sentencing range—are determined by a central administrative body. The United States Sentencing Commission writes the Guidelines Manual and limits the range of options for district judges.[13] Prior to 2005, district judges were required to sentence defendants within the Guidelines range unless the case involved a specific basis for departing from the range.[14] After the Supreme Court concluded that a mandatory Guidelines system was unconstitutional in *United States v. Booker*,[15] the Guidelines are now merely advisory, although they remain quite influential.

Compare this centralized model of criminal punishment to the parallel system of administrative agency enforcement. Numerous federal agencies operate their own civil enforcement programs that can impose civil penalties. For example, the Securities and Exchange Commission (SEC) can sanction individuals and companies that violate the securities laws and the Environmental Protection Agency has the power to impose financial penalties for environmental misconduct. Depending on the agency, the civil penalties may be imposed solely administratively (without any judicial oversight) or may require federal court involvement. As a practical matter, even when the federal courts exercise formal oversight, it is limited, especially in the typical situation where the agency and the enforcement target have reached an agreed settlement.[16]

U.S. 388, 391 (1980). Even this limited attempt at centralization, though, could only go so far; logically, the Parole Board could only shorten sentences, not lengthen them.

10. *See* S. REP. NO. 98-225 (1983), *reprinted in* 1984 U.S.C.C.A.N 3182, 3224–27 (providing examples of pre-Guidelines sentencing disparity).

11. *Mistretta*, 488 U.S. at 366; S. REP. NO. 98-225, *supra* note 10, at 3228–33.

12. U.S. SENTENCING GUIDELINES MANUAL § 5A (2014).

13. *See generally* Frank O. Bowman, III, *The Failure of the Federal Sentencing Guidelines: A Structural Analysis*, 105 COLUM. L. REV. 1315, 1323–26 (2005) (describing the Sentencing Commission and the process of setting the Guidelines).

14. *See, e.g.*, Stinson v. United States, 508 U.S. 36, 42 (1993) (describing the binding nature of the Guidelines).

15. 543 U.S. 220, 245 (2005).

16. *See, e.g.*, SEC v. Citigroup Global Mkts., Inc., 752 F.3d 285, 293–94 (2d Cir. 2014) (reversing district court's rejection of SEC consent decree and emphasizing the need for deference to the agency's enforcement choice).

As a result, agencies operate in an environment similar to the pre-Guidelines world—no centralizing authority exercises oversight of their punishment practices. We see the same issues of consistency and opacity arising with administrative civil penalties that existed with criminal sentences prior to the Guidelines. Consider the civil penalties imposed in the consent degree in *SEC v. Citigroup Global Markets*.[17] As Judge Rakoff noted, the defendant in that case paid a $95 million penalty after earning $160 million in profits, while another recent SEC consent decree imposed a $535 million penalty on a defendant who earned only $15 million from the violation. Under the current decentralized system of civil penalties, the SEC has no obligation to provide predictability or consistency. It is unconstrained in the inputs it chooses to consider in the punishment process. Moreover, the agency may shift those inputs (and their relative weights) from case to case as it sees fit.[18]

These problems of consistency and opacity only grow when we move from considering intra-agency civil penalties practices to look at penalties imposed by different administrative agencies. For example, on the same day in September 2013, JP Morgan Chase entered into two different settlement agreements with enforcement agencies—one with the Consumer Financial Protection Bureau and another with a collection of regulators including the SEC.[19] The CFPB settlement included a $20 million civil penalty (and $309 million in refunds) while the securities settlement involved a total penalty of $920 million to all of the enforcement agencies. Both settlements were opaque—they did not clearly explain the process of reaching the final penalty figure. Similarly, neither sought to provide any intra- or inter-agency consistency by comparing the penalty to past practice. As is typical in a decentralized model, the agencies made use of their broad discretion in making punishment choices.

Given the costs of decentralization, it is no surprise that scholars have explored the possibility of centralizing the penalty process. Colin Diver, in connection with his work with the Administrative Conference of the United States, comprehensively explored the civil penalty practices of federal administrative agencies in the late 1970s. He recognized the potential value of consistency enforced by Congress but thought any such reform would be politically unlikely.[20] More recently, Cass Sunstein and co-authors have persuasively argued that even when civil penalties are consistent within a given agency, they are frequently incoherent when compared to the penalties imposed by other agencies.[21] Sunstein *et al.* propose the United States Sentencing Guidelines as a model to solve this problem.[22]

So, is a Guidelines system right for the administrative state? The experience under the Sentencing Guidelines starkly presents the benefits and costs that come from centralizing punishment. While the evidence is mixed, the Guidelines probably achieved their stated goals of

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17. 827 F. Supp. 2d 328, 334 n.7 (S.D.N.Y. 2011), *rev'd*, 752 F.3d 285 (2d Cir. 2014).

18. Of course, shifts in agency input can lead to such changes, whether due to a new presidential inauguration or simply the passage of time. *See* Minzner, *supra* note 1, at 13 (noting changes in SEC enforcement priorities resulting from a new Chair).

19. I discuss these settlements in more detail in Minzner, *supra* note 1, at 48–49.

20. *See* Diver, *supra* note 5, at 1458–59.

21. *See* Sunstein et al., *supra* note 3, at 1190–91.

22. *Id.* at 1183–84.

increasing transparency and reducing inconsistency.[23] Because all judges must consider the same inputs in determining criminal histories and offense levels, sentences became somewhat more predictable and consistent across the country, at least in the period when the Guidelines were mandatory rather than merely advisory.[24] Of course, focusing on these factors limits judicial discretion. Consistency and transparency came at the loss of individualized judicial decision-making. The choice of centralized or decentralized punishment is essentially a choice between the relative merits of consistency versus individuation in deciding penalties.

Seen in this way, the arguments for a centralized system of penalty guidelines are both stronger and weaker in the administrative context than in the criminal arena. Administrative and criminal enforcement have important differences that alter the relative values of consistency and individuation. Start with the identity of defendants. The overwhelming majority of federal criminal defendants are individuals.[25] Corporate criminal prosecutions occur, but they represent a very small fraction of the federal criminal docket. In contrast, administrative enforcement actions frequently involve organizational defendants.[26]

This difference in defendant identity undermines a central argument for a centralized approach to punishment. Even if phrased in terms of consistency, a central concern of decentralized penalty decisions is not merely differences in punishment, but instead punishment choices based on race. Disparate treatment of defendants based on race provided a powerful justification for the Sentencing Guidelines.[27] Because significant administrative enforcement actions are less likely to involve individuals, disparities on racial or other constitutionally suspect grounds tend to be absent.

However, the identity of the defendants provides an important alternative basis for penalty consistency. Administrative defendants are repeat players. A large publicly traded company has SEC filing obligations (and the possibility of enforcement actions) every year. Even recidivist defendants do not face the possibility of criminal punishment so frequently. Not only do the same regulated entities reliably appear before the same regulator, different agencies bring enforcement actions against the same entity. A publicly traded mining company can face

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23. Studies suggesting that the guidelines increased consistency include PAUL J. HOFER ET AL., U.S. SENTENCING COMM'N, FIFTEEN YEARS OF GUIDELINES SENTENCING 99 (2004), *available at* http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/15-year-study/15_year_study_full.pdf; James M. Anderson et al., *Measuring Interjudge Sentencing Disparity: Before and After the Federal Sentencing Guidelines*, 42 J.L. & ECON. 271, 303 (1999); Paul J. Hofer et al., *The Effect of the Federal Sentencing Guidelines on Inter-Judge Sentencing Disparity*, 90 J. CRIM. L. & CRIMINOLOGY 239, 241 (1999). For a general overview of the studies relating to the effectiveness of the Guidelines in the mandatory era, see Bowman, *supra* note 13, at 1326–28.

24. Recent studies on post-*Booker* sentencing outcomes suggest a substantial increase in disparities in the sentences imposed by different judges. *See* Ryan W. Scott, *Inter-Judge Sentencing Disparity After* Booker*: A First Look*, 63 STAN. L. REV. 1, 4–5 (2010); Crystal S. Yang, *Have Interjudge Sentencing Disparities Increased in an Advisory Guidelines Regime? Evidence from* Booker, 89 N.Y.U. L. REV. 1268, 1275 (2014).

25. In 2012, 84,173 individuals were sentenced for federal crimes. GLENN R. SCHMITT & JENNIFER DUKES, U.S. SENTENCING COMM'N, OVERVIEW OF FEDERAL CRIMINAL CASES: FISCAL YEAR 2012 1 (2012) *available at* http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2013/FY12_Overview_Federal_Criminal_Cases.pdf. In comparison, only 187 organizational defendants were sentenced. *Id.*

26. *See* Minzner, *supra* note 2, at 906 (discussing the role of corporate charges in administrative law).

27. *See* Dawinder S. Sidhu, *Moneyball Sentencing*, B.C. L. REV. (forthcoming 2015), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2463876 (describing the elimination of discrimination as a central goal of the Sentencing Reform Act).

enforcement penalties from multiple federal agencies. The Mine Safety and Health Administration regulates any mine safety violations while the SEC investigates misconduct relating to its securities filings.[28]

The presence of multiple overlapping regulators exercising jurisdiction over a single entity provides a powerful argument for penalty coherence enforced by a centralizing body. Compliance budgets are inevitably limited—entities are going to make decisions to focus their efforts in response to the incentives created by enforcement agencies. As a result, penalties of the wrong size for a given violation by one agency can distort the efforts of sister enforcement agencies by shifting the compliance incentives of entities that they jointly regulate.[29] Centralizing the punishment choice in a sentencing commission would reduce or eliminate this inconsistency and bring coherence to the penalty regimes of federal agencies.

Criminal and administrative enforcement also differ in the relative benefits of case-by-case adjudication. A common criticism of the Sentencing Guidelines involves a reduction in judicial oversight. On this theory, judges were stripped of their discretion to mitigate punishment in appropriate cases because prosecutorial charging decisions—and their effect on the presentence report—play such an important role in setting penalty levels.[30] As a result, the Guidelines may not reduce the individual decision-making in a given case, but simply alter the decision maker. Prosecutors, not judges, make many of the important choices that set the ultimate sentence.

Notably, this criticism is largely inapplicable in the civil enforcement context. District judges already play virtually no role in mitigating or otherwise regulating settlements. A core choice in administrative enforcement is abandoning the sharp separation of executive and judicial powers.[31] Agencies blend the investigative and prosecutorial role with the judicial role in setting penalties. In that sense, the key cost of a guidelines system has already been paid. Establishing an administrative agency enforcer starts with the decision to reduce or eliminate external judicial oversight.

Administrative cases, though, also provide an alternative basis to support case-by-case decision-making. Administrative enforcement, as a general matter, involves more complicated substantive subject matter than federal criminal actions. As a result, agency enforcement expertise provides significant value in setting penalties. Agencies are well placed to determine the relative significance of violations of complicated regulatory regimes.[32] Centralizing punishment decisions into a set of guidelines and away from expert agencies surrenders that benefit.[33]

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28. *See* Minzner, *supra* note 1, at 33 (discussing the joint regulation of mining companies by MSHA and the SEC).

29. *See* i*d.* at 28–31.

30. *See, e.g.*, Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE L.J. 1681, 1723–24 (1992); Kate Stith & José A. Cabranes, *Judging Under the Federal Sentencing Guidelines*, 91 NW. U. L. REV. 1247, 1254–56 (1997).

31. *See* FTC v. Ruberoid Co., 343 U.S. 470, 487 (1952) (Jackson, J., dissenting) ("[Administrative agencies] have become a veritable fourth branch of the Government, which has deranged our three-branch legal theories much as the concept of a fourth dimension unsettles our three-dimensional thinking.").

32. *See* Minzner, *supra* note 1, at 9.

33. Indeed, this value of agency expertise is the standard justification for strong judicial deference to agency penalty choices. *See, e.g.*, Butz v. Glover Livestock Comm'n Co., 411 U.S. 182, 185–86 (1973). This argument can

The structure of administrative agencies produces an additional benefit from decentralized punishment that is absent in the criminal context. Agencies do not just enforce. The blend of executive, judicial, and legislative functions means that enforcement leading to penalties is merely one agency option. When faced with violations by regulated entities, agencies can take other paths. They may have the ability to impose punishments other than civil penalties—for example, stripping violators of their license to operate in a given industry. More importantly, they can rewrite the regulatory regime to prevent violations more broadly, both by the defendant in a given enforcement action as well by other regulatory targets.

In my view, this benefit is the strongest argument against a guidelines approach in civil administrative enforcement. Criminal punishment involves evaluating the conduct of an individual defendant against a fixed legal regime prescribed by congressional statutory choices. While the court may consider the deterrent impact of a sentence on other defendants, the district judge exercises his or her authority through a simple lever of raising or lowering the quantity of punishment. Judges can neither expand the scope of the criminal case to reach non-defendants nor can they alter the underlying legal landscape.

Administrative agencies can do both. Agencies can reach non-defendants and change the substantive law. As a result, when done well, agency enforcement is merely one potential response to violations, not the only option. Because it exists in this web of other regulatory choices, agency enforcement produces a level of complexity that makes the centralization of penalty decision-making inappropriate.

II. ALTERNATIVES TO CENTRALIZED PUNISHMENT

In the end, although we should seriously consider modifying the administrative penalty process, the Sentencing Commission is not the ideal model. The Sentencing Commission is a single generalist body looking at all federal criminal violations. It is unlikely to be able to develop a system of penalties that can effectively apply across the diverse range of regulatory authorities. In particular, it is unlikely to be able to adjust penalties appropriately in light of the complete range of regulatory responses available in the administrative context. Instead, an effective solution is likely to be more modest.

First, the place to start is within agencies. Although no single federal agency should impose penalty guidelines on other agencies, nothing precludes administrative agencies from developing their own guidelines. This is perhaps the simplest and quickest way for agencies to achieve the benefits of consistency and transparency without paying the costs outlined above.[34] Intra-agency policies effectively provide guidance to regulated entities, force equal treatment in applying penalties, and help guide agencies toward penalty approaches that achieve appropriate goals.[35]

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be—and often is—taken too far. As I have argued elsewhere, making effective enforcement choices, including punishment decisions, does not merely require a deep understanding of the specialized regulatory subject matter. Punishment also requires the application of generalist enforcement principles, such as prosecutorial discretion, which specialized agencies are sometimes more likely to struggle to apply. Minzner, *supra* note 1, at 8–13.

34. This is the same proposal outlined in Colin Diver's seminal article. *See* Diver, *supra* note 5, at 1458.

35. *See* Minzner, *supra* note 2, at 866 (describing the value of penalty policies).

Second, cross-agency penalty coordination is crucial. To some degree, this type of coordination already happens at the level of individual cases. The SEC and the DOJ, for example, already bring and resolve investigations jointly.[36] However, agencies seldom coordinate systems of penalties. Such coordination is especially important when agencies simultaneously regulate the same entities, like large investment banks, even if the regulatory subject matter seems unconnected or unrelated. Without systemic coordination, agencies can easily distort the goals of sister regulatory bodies through their enforcement efforts.

Finally, where Congress has given district courts oversight of agency enforcement settlements, the nature of that oversight requires careful consideration. In appropriate cases, judges may be able to provide some of the benefits of penalty consistency and transparency. Consider again the Second Circuit decision in *SEC v. Citigroup Global Markets*.[37] The Court of Appeals there rejected the district court's attempt to provide rigorous oversight of the adequacy of the agency settlement.[38] The court noted that the adequacy analysis appeared to be drawn from the class action doctrine and found that comparison inapt.[39] That holding is right, as far as it goes. The reason for considering adequacy of class action settlements (ensuring fairness to the absent members of the class) is essentially absent when examining agency enforcement settlements.

However, distinguishing these settlements from class actions does not end the analysis. How should district judges exercise their authority in reviewing agency penalty settlements? It depends on the nature of the penalty decision and its relationship to the agency's other regulatory goals. In some cases, civil penalties may be decided merely to serve the classic purposes of punishment—retribution for past misconduct or deterring future violations. In those situations, district judges are quite well situated to review the penalty and decide whether it is appropriate.

In contrast, though, deference is especially appropriate when penalties are closely tied to regulatory choices. In cases where the agency is doing more than just imposing punishment, district judges are not well placed to closely review the penalty. For example, a civil penalty may be accompanied by a range of other regulatory changes that apply either to the specific defendant in the case or to an industry as a whole. In those cases, close judicial scrutiny of the penalty has the real possibility of upsetting a thoughtful regulatory choice by an expert agency.[40]

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36. *See, e.g.*, Brandon L. Garrett, *Collaborative Organizational Prosecution*, *in* PROSECUTORS IN THE BOARDROOM 154, 154–72 (Anthony S. Barkow & Rachel E. Barkow eds., 2011) (describing enforcer coordination).

37. 752 F.3d 285 (2d Cir. 2014).

38. *Id.* at 294.

39. *Id.* Federal Rule of Civil Procedure 23(e)(2) requires district courts approving settlements of class actions that bind absent class members to find that the settlement is "fair, reasonable, and adequate."

40. *See* Minzner, *supra* note 1, at 52 (advocating for this deference model). Of course, it is difficult for courts to review penalty choices that are not adequately explained. However, courts certainly have expertise in looking at the adequacy of the reasons given for agency choices and rejecting those choices where the reasons were not persuasive. *See* Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 42 (1983) (rejecting regulatory change as inadequately supported).

CONCLUSION

Who determines punishment? This threshold question receives perhaps less focus than it should. In many cases, deciding who punishes also decides the ultimate question of how much punishment should be imposed. The centralization of punishment under the authority of the Sentencing Commission, even if appropriate in the criminal context, is a poor fit for regulatory enforcement. Agency practices are simply too complex. However, the core goals of transparency and consistency are worthy goals for agencies reconsidering their own punishment choices.