

# CLARITY AT SENTENCING DEFERRED: HOW *DORSEY V.* *UNITED STATES* COULD HAVE REFORMED FEDERAL SENTENCING

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## I. INTRODUCTION

In *Dorsey v. United States*,<sup>1</sup> the Supreme Court held that Congress's recent revision to the Controlled Substances Act should apply even when a defendant committed an offense before the statutory change was enacted.<sup>2</sup> The Court's conclusion was in line with prevailing public sentiment. The Court's legal analysis, however, was *ad hoc* and is likely to leave lower courts construing other ambiguous federal sentencing provisions uncertain as to how to apply *Dorsey* outside of its precise context.<sup>3</sup> This is problematic because ambiguities frequently arise in sentencing provisions. Federal sentencing is complex and consists of a web of interconnected sources of and constraints on judicial authority. Moreover, the stakes at sentencing hearings, for defendants, the government, and the public alike, are high and implicate significant social values—personal freedom versus societal order. Thus, not only are sentencing provisions inherently ambiguous, but resolving such ambiguities often entails making policy choices. The Supreme Court has not given lower courts generally applicable guidance on how to resolve ambiguous sentencing provisions, and Congress often leaves particular policy matters unaddressed. As a result, sentencing courts all too often employ the

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1. 132 S. Ct. 2321 (2012).
2. *Id.* at 2335.
3. *Id.* at 2344 (Scalia, J., dissenting).

sort of *ad hoc* analysis used by the Court in *Dorsey*.

This article explains *Dorsey* and demonstrates the pitfalls of the outcome-oriented approach that the *Dorsey* Court used. It then offers an alternative means of construing ambiguous sentencing provisions—giving judicial deference to some executive branch interpretations of ambiguous sentencing provisions. It argues that deference to the Attorney General is not necessarily appropriate in all cases. However, when the Attorney General interprets a sentencing provision in a lenient manner, such that prosecutors and defendants agree as to what a provision means and how it applies, courts should not interject their own, independently derived constructions. This proposed rule would provide a generally applicable framework for resolving sentencing ambiguities and would ensure that policy decisions are left to politically accountable branches.

## II. THE PROBLEM: AMBIGUOUS SENTENCING PROVISIONS, *DORSEY*, AND THE NEED FOR A NEW APPROACH

When a federal district court imposes a criminal sentence, it does so pursuant to various sources of authority, including non-statutory judicial power,<sup>4</sup> generally applicable federal sentencing provisions,<sup>5</sup> the advisory United States Sentencing Guidelines (Sentencing Guidelines), which are issued by the United States Sentencing Commission (Sentencing Commission) and authorized by federal statute,<sup>6</sup> and various offense-specific statutes that set maximum and minimum penalties for certain offenses.<sup>7</sup> The ways that these sources

4. See *Dorszynski v. United States*, 418 U.S. 424, 440 & n.14 (1974) (noting the broad discretion of trial judges in imposing sentences); see also Nancy Gertner, *A Short History of American Sentencing: Too Little Law, Too Much Law, or Just Right*, 100 J. CRIM. L. & CRIMINOLOGY 691, 695–96 (2010) (noting that appellate review of sentences is extremely limited and a trial judge’s authority is “virtually unquestioned”).

5. Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (codified as amended in scattered sections of 18 and 28 U.S.C.); see also Gertner, *supra* note 4, at 698–99; Stanley A. Weigel, *The Sentencing Reform Act of 1984: A Practical Appraisal*, 36 UCLA L. REV. 83, 83–86 (1988) (providing background information on the enactment of the complex statutory and regulatory scheme created by the Sentencing Reform Act of 1984).

6. See U.S. SENTENCING GUIDELINES MANUAL (2012); 28 U.S.C.A. § 994(a)(1) (West 2012).

7. E.g., 18 U.S.C.A. § 924(c) (West 2012) (authorizing additional penalties for certain crimes when a firearm is used in its commission); 18 U.S.C.A. § 2252A(b) (West 2012) (authorizing special penalties for possession of child pornography); see generally Erik Luna & Paul G. Cassell, *Mandatory Minimalism*, 32 CARDOZO L. REV. 1 (2010) (providing general background information on the rise of mandatory minimum sentencing and offering suggestions

of authority are intended to relate to each other is often unclear. As a result, a court must often resolve a thorny question of statutory interpretation during a sentencing hearing.

*Dorsey* provides an example of these difficulties and also demonstrates the way in which the Supreme Court often resolves ambiguous sentencing provisions—by focusing its attention on the policy questions implicated by these ambiguities. In *Dorsey*, the Court construed Congress’s most recent change to title 18, section 841(b), the provision setting the mandatory minimum and maximum penalties for cocaine offenses. Originally enacted as part of the Controlled Substances Act, from 1986 until 2010 the statute provided the same penalty for one gram of cocaine base (crack)<sup>8</sup> as it provided for one hundred grams of powder cocaine.<sup>9</sup> Although not required by statute, to achieve uniformity, the Sentencing Commission used the same ratio when it developed guidelines for cocaine offenses.<sup>10</sup> Shortly after its creation, the ratio was widely condemned. Its critics noted that it had no empirical basis and that its application had a disparate impact on African Americans.<sup>11</sup>

In 2010, Congress acquiesced to the calls for the 100:1 ratio’s replacement when it enacted the Fair Sentencing Act (FSA).<sup>12</sup> In the legislation, Congress replaced the 100:1 ratio with an 18:1 ratio.<sup>13</sup> Congress also granted the Sentencing Commission “emergency authority” to enact new guidelines reflecting the changed ratio and ordered it to do so within ninety days.<sup>14</sup> The President signed the FSA

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for reform consistent with a minimalist approach to statutory modification).

8. As discussed *infra*, the Court recently held that the statutory term “cocaine base” includes crack cocaine but also refers to other substances. *See DePierre v. United States*, 131 S. Ct. 2225, 2231–33 (2011) (holding that the term “cocaine base,” as used in federal drug statutes, is not just crack cocaine but also cocaine in its chemically basic form). However, for simplicity, this article treats “crack cocaine” and “cocaine base” as synonymous, unless otherwise stated.

9. 21 U.S.C.A. § 841(b) (West 2012); Pub. L. No. 99-570, 100 Stat. 3207 (1986) (codified as amended at 21 U.S.C. § 841(b)).

10. U.S. SENTENCING GUIDELINES MANUAL § 2D1.1(c) (1987); *Kimbrough v. United States*, 552 U.S. 85, 96–97 (2007).

11. The history of the crack/powder ratio and the academic, administrative, and judicial criticisms of the ratio have been well documented in Supreme Court opinions and scholarly articles. *E.g.*, *Dorsey v. United States*, 132 S. Ct. 2321, 2327–30; *Kimrough*, 552 U.S. at 94–101; Jacob Loshin, *Beyond the Clash of Disparities: Cocaine Sentencing After Booker*, 29 W. NEW ENG. L. REV. 619, 628–39 (2007); William Spade, Jr., *Beyond the 100:1 Ratio: Towards A Rational Cocaine Sentencing Policy*, 38 ARIZ. L. REV. 1233, 1245–57 (1996).

12. Fair Sentencing Act, Pub. L. No. 111-220, 124 Stat. 2372 (2010) (codified in scattered sections of 21 and 28 U.S.C.).

13. *Id.*; *Dorsey*, 132 S. Ct. at 2329; Luna & Cassell, *supra* note 7, at 4–6.

14. Fair Sentencing Act § 8(2).

on August 3, 2010, and it was immediately effective. On October 27, 2010, the Sentencing Commission issued these new guidelines.<sup>15</sup> The changes to the guidelines became effective on November 1, 2010, and courts applied the new guidelines in all sentencing hearings occurring on or after that date.<sup>16</sup>

Soon thereafter, first district and then circuit courts divided over whether the statutory change applied in all sentencing hearings occurring after August 3, 2010. Courts that held that it did not apply noted that the statute was silent on the issue. In the face of such silence, title 1, section 109, the savings statute, provides that a change in a sentencing provision does not apply when a defendant committed all or part of his offense prior to the date of enactment.<sup>17</sup> Courts that held that the FSA did apply noted that the savings statute could be impliedly repealed and that Congress's sense of urgency in enacting the FSA demonstrated that Congress did not intend for courts to continue applying the old ratio after the date of enactment.<sup>18</sup> These courts also emphasized that Congress's instruction to the Sentencing Commission, as well as congressional awareness that the new guidelines would become effective immediately, indicated that Congress intended for the new statute to become immediately effective as well, regardless of when an offense occurred.<sup>19</sup>

The Justice Department's original position in these cases was that courts must apply the pre-FSA version of the statute when offense conduct occurred before enactment.<sup>20</sup> On November 17, 2010, Senator

15. Sentencing Guidelines for United States Courts, 75 Fed. Reg. 66188-02 (October 27, 2010).

16. *Id.*; see 18 U.S.C.A. § 3553(a)(4)(A)(ii) (West 2012) (requiring sentencing courts to apply the guidelines "in effect on the date the defendant is sentenced").

17. *E.g.*, United States v. Fisher, 635 F.3d 336, 338–39 (7th Cir. 2011); see also 1 U.S.C.A. § 109 (West 2012) ("The repeal of any statute shall not have the effect to release or extinguish any penalty . . . incurred under such statute, unless the repealing Act shall so expressly provide . . .").

18. A district judge in Maine was the first to reach this conclusion. See generally United States v. Douglas, 746 F. Supp. 2d 220 (D. Me. 2010) (holding that the new mandatory sentencing floors under the FSA apply to a defendant who engaged in crack cocaine trafficking and pleaded guilty before the statutory reform). He was then followed by several other district courts. *E.g.*, United States v. Whitfield, Criminal No. 2:10CR13, 2010 WL 5387701, at \*1–2 (N.D. Miss. Dec. 21, 2010); United States v. Cox, No. 10-cr-85-wmc, 2011 WL 92071, at \*2–3 (W.D. Wisc. Jan. 11, 2011); United States v. Watts, 775 F. Supp. 2d 263, 273, 281 (D. Mass. 2011). The First Circuit then upheld the district court's decision in United States v. Douglas, 644 F.3d 39 (1st Cir. 2011).

19. *Douglas*, 644 F.3d at 41.

20. Memorandum from Acting Deputy Attorney General Gary G. Grindler to All Federal Prosecutors (Aug. 5, 2010), available at <http://www.justice.gov/oip/docs/fair-sentencing-act->

Dick Durbin, one of the Senate bill's sponsors, and Senator Patrick J. Leahy sent a letter to Attorney General Eric Holder expressing their frustration with the Administration's position.<sup>21</sup> On April 25, 2011, Acting Assistant Attorney General Mark D. Agrast, on behalf of the Attorney General, responded to the Senators' letter.<sup>22</sup> In the meantime, the media noticed the Administration's seemingly odd position.<sup>23</sup> Major newspapers called on the Justice Department to alter its position so as to promote justice and fairness.<sup>24</sup> Others published news stories depicting the unfairness of the continued application of the old penalties.<sup>25</sup>

After months of continuing to advocate for the old ratio's viability, the Attorney General heeded the calls for reform. On July 15, 2011, Attorney General Holder issued a memorandum to all federal prosecutors in which he acknowledged the judicial confusion, stated that he had freshly considered the issue, and announced that the Justice Department had reversed its official position.<sup>26</sup>

After receiving the memorandum, prosecutors presented the Justice Department's changed position to a number of appellate courts.<sup>27</sup> However, most of these courts did not give weight to the prosecutors' new arguments. For example, in a Seventh Circuit case, Judge Frank Easterbrook wrote that the Attorney General's

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memo.pdf (last visited Nov. 17, 2012).

21. See Letter from Sen. Dick Durbin and Sen. Patrick J. Leahy to Attorney General Eric H. Holder (Nov. 17, 2010), available at <http://sentencing.typepad.com/files/fair-sentencing-act-ag-holder-letter-111710.pdf> (last visited Nov. 17, 2012) (stating that "the [FSA's] reduced crack penalties should apply to defendants whose conduct predates enactment of the legislation but who have not yet been sentenced").

22. Letter from Acting Assistant Attorney General Mark D. Agrast to Sen. Dick Durbin and Sen. Patrick J. Leahy (Apr. 25, 2011), available at [http://sentencing.typepad.com/files/fsa\\_holder\\_letter\\_response\\_042511.pdf](http://sentencing.typepad.com/files/fsa_holder_letter_response_042511.pdf) (last visited Nov. 17, 2012).

23. On December 21, 2010, the *Wall Street Journal* became the first major media outlet to report the mounting standoff between Congress, the Administration, and a slightly fractured Judiciary. See Gary Fields, *Crack Sentences Still Tough*, WALL ST. J., Dec. 23, 2010, at A3.

24. E.g., Editorial, *The Drug Sentencing Discrepancy*, WASH. POST, Feb. 19, 2011, at A20;

25. E.g., Gary Fields, *Crack Sentences Still Tough*, WALL ST. J., Dec. 23, 2010, at A3; Editorial, *Multiple Inequities*, N.Y. TIMES, Apr. 25, 2011, at A24; Editorial, *Fairness in Cocaine Sentences*, ST. PETERSBURG TIMES, May 13, 2011, at 10A.

26. See Memorandum from Attorney General Eric H. Holder to All Federal Prosecutors (July 15, 2011) [hereinafter "Holder Memorandum"], available at <http://sentencing.typepad.com/files/holder-fsa-memo-7.15.11.pdf> (last visited Nov. 17, 2012).

27. E.g., Brief of United States, Petition for Rehearing En Banc, *United States v. Sidney*, No. 11-1216 (8th Cir. 2011); Gov't Notice of Changed Position, *United States v. Holcomb*, 657 F.3d 445 (7th Cir. 2011) (Nos. 11-1588, 11-1559, 11-1586, 11-1758); Supplemental Brief of United States, *United States v. Tickle*, 661 F.3d 212 (5th Cir. 2010) (No. 10-30852).

memorandum, which the judge viewed as a mere statement of policy devoid of legal analysis, was insufficient to justify en banc review of circuit precedent.<sup>28</sup> This changed on November 28, 2010, when the Supreme Court granted certiorari in *Dorsey* and another Seventh Circuit case that raised the issue.<sup>29</sup> The Court consolidated the cases and appointed counsel to argue in support of the Seventh Circuit's opinions. Subsequently, the Government filed a brief supporting the petitioners, individuals who committed crack cocaine offenses before the FSA's enactment but who were sentenced subsequently.<sup>30</sup>

In the opinion that followed, Justice Breyer, on behalf of a five-to-four majority, sought to resolve the narrow statutory issue; however, he made little effort to conceal the policy concerns that animated his analysis.<sup>31</sup> The Court sided with the petitioners and the Government by looking to “background principles” against which Congress intended courts to view the FSA.<sup>32</sup> Justice Breyer began by citing indicia that Congress had intended to repeal the savings statute by implication.<sup>33</sup> The Court then held that affirming the lower court would result in significant and unwarranted sentencing disparities.<sup>34</sup> Although Justice Breyer did not hide the fact that he considered it imprudent to create these disparities, he was able to link these principles to the statutory admonition that sentencing courts should avoid “unwarranted sentencing disparities.”<sup>35</sup> However, for the final principle, Justice Breyer made no effort at statutory rooting. Instead, he simply held that “we have found no strong countervailing consideration.”<sup>36</sup> Thus, the majority concluded that applying the savings statute would make for bad policy—absent some affirmative indication that Congress intended to create such bad policy, the Court

28. *United States v. Holcomb*, 657 F.3d 445, 447 (7th Cir. 2011) (reh'g en banc denied) (Easterbrook, J.).

29. *Dorsey v. United States*, 132 S. Ct. 759 (2011); *Hill v. United States*, 132 S. Ct. 759 (2011).

30. *See generally* Brief for the United States Supporting Petitioners, *Dorsey v. United States*, *Hill v. United States*, 132 S. Ct. 2321 (2012) (Nos. 11-5683, 11-5721) (arguing that the FSA applies to all initial sentencing procedures that occurred after its enactment).

31. *See Dorsey*, 132 S. Ct. at 2328–29 (noting that the criticism concerning the 100-to-1 mandatory minimum ratio from the law enforcement community and the Sentencing Commission led Congress to adjust the ratio lower through enactment of the FSA after an emergency recommendation from the Sentencing Commission).

32. *Id.* at 2326.

33. *Id.* at 2330–32.

34. *Id.* at 2335.

35. *Id.* at 2333 (citing 28 U.S.C.A. § 991(b)(1)(B) (West 2012)).

36. *Id.* at 2335.

declined to create it on its own.

Other recent sentencing cases counseled against the Court's turning to the background principles that it found so compelling in *Dorsey*. First, the *Dorsey* Court treated the savings statute, a protector of a sentencing court's non-statutory authority, as a weak presumption.<sup>37</sup> However, in another recent case, the Court held that, to withdraw a sentencing court's non-statutory authority, Congress must do so explicitly.<sup>38</sup> Next, Justice Breyer concluded that Congress intended for the Sentencing Guidelines and statutory provisions to operate in tandem. This conclusion contravenes the Court's pronouncements in other recent sentencing cases, where the Court was content to acknowledge that sentencing statutes and the Sentencing Guidelines serve different purposes.<sup>39</sup> Finally, the *Dorsey* majority was troubled greatly by the sentencing disparities that would have resulted if the FSA and the savings statute were strictly construed. However, in other cases, the Court has held that when sentencing disparities result from the plain language of a statute enacted after Congress instructed courts to avoid "unwarranted sentencing disparities," such disparities are not "unwarranted."<sup>40</sup>

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37. The savings statute preserves a sentencing court's non-statutory power by requiring Congress to explicitly declare its desire to abrogate such power by requiring sentencing courts to apply a new statute in pending cases. See Harold J. Krent, *The Puzzling Boundary Between Criminal and Civil Retroactive Lawmaking*, 84 GEO. L.J. 2143, 2172 (1996) (discussing the fact that Congress has overridden the Supreme Court's presumption that pending criminal prosecutions are abated once a criminal statute is repealed); see also *Warden v. Marrero*, 417 U.S. 653, 660 (1974) (expounding on the history of the savings statute and holding that its purpose was to prevent the common-law abatement of affected prosecutions when there was subsequently passed legislation that affected the penalties, liabilities, or forfeiture of the original prosecutions). Admittedly, *Dorsey* involved the replacement of one statute with another statute. *Dorsey*, 132 S. Ct. at 759. However, the Court would have likely reached the same result had the 100:1 ratio been a judicial construct.

38. See *Setser v. United States*, 132 S. Ct. 1463, 1469 (2012) (holding that a sentencing court enjoys the power to order that a sentence be served consecutive to a not-yet-imposed but anticipated sentence, even though Congress had not explicitly granted sentencing courts such authority and congressional silence suggested an intent to withdraw this traditional power from sentencing courts).

39. See, e.g., *DePierre v. United States*, 131 S. Ct. 2225, 2236–37 (2011) (holding that the Sentencing Commission's definition of "cocaine base" for the purposes of the Sentencing Guidelines was not instructive as to Congress's intended meaning of "cocaine base" in 18 U.S.C. § 841(b)(1)(B)(iii)).

40. See, e.g., *Pepper v. United States*, 131 S. Ct. 1229, 1248–49 (2011) (holding that the disparities likely to result from courts, pursuant to statute, considering evidence of post-conviction rehabilitation were not unwarranted); *Kimbrough v. United States*, 552 U.S. 85, 106–09 (2007) (holding that disparities likely to result from the mandatory minimum provision were not unwarranted).

### III. THE PROPOSED SOLUTION: DEFERENCE TO THE ATTORNEY GENERAL AT SENTENCING

*Dorsey* presented a conundrum for the Court. When it enacted the FSA, Congress created a statutory ambiguity. The relevant legal principles strongly suggested an outcome that was contrary to the policy choice that motivated Congress to pass the FSA in the first place. The Court, therefore, had to craft a weak legal argument in order to ensure that it furthered Congress's (and the majority's own) policy view. Because the Court's analysis in *Dorsey* did not comport with its approaches in other sentencing cases, *Dorsey* likely will cause confusion among lower courts applying *Dorsey* in other sentencing contexts. This is especially troubling in a complicated area of the law like sentencing, where the stakes are high and ambiguities often arise. The following argues an alternative way that the Court could have resolved the issue in *Dorsey*—by deferring, pursuant to an established judicial deference doctrine, to the interpretation offered by the executive branch. The Court's doing so would have left policymaking to a policymaking branch and would have provided lower courts going forward with a generally applicable method of resolving ambiguities in sentencing provisions.

#### A. *Judicial Deference and the Proposed Rule*

Judicial deference is a bedrock concept of administrative law. Generally, when an agency charged with administering a statute interprets the statute, the agency interpretation is entitled to special consideration by a court. If Congress authorized the agency to use formal procedures to issue legally binding interpretations, the agency interpretation, so long as it is reasonable, is entitled to automatic deference pursuant to *Chevron U.S.A. v. Natural Resources Defense Council*.<sup>41</sup> When the agency interpretation results from less formalized

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41. 467 U.S. 837 (1984); see *United States v. Mead Corp.*, 553 U.S. 218, 229 (2001) (holding that a reasonable agency interpretation of an ambiguous statute is entitled to judicial deference). *Chevron* and its progeny have been the subject of numerous scholarly articles. See generally, e.g., David J. Barron & Elena Kagan, *Chevron's Nondelegation Doctrine*, 2001 SUP. CT. REV. 201 (expounding on the level of judicial deference due to agency heads as compared to low-level agency officials in the context of *Chevron*); Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 GEO. L.J. 833 (2001) (discussing the expansion of judicial deference to agency interpretations of statutes in the wake of *Chevron* and its progeny); Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511. In *Chevron*, the Court announced a now familiar two-step procedure for determining when mandatory deference applies. See *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S.



procedures and is not binding on regulated parties, a court should give the interpretation special consideration short of automatic deference pursuant to *Skidmore v. Swift & Co.*<sup>42</sup> The Court has previously declined to give deference to the Attorney General's interpretations of ambiguous substantive criminal statutes.<sup>43</sup> Nevertheless, the Court has applied *Chevron* deference to the Justice Department's interpretations of provisions related to criminal law and sentencing when the Court has found evidence of a congressional delegation to the Justice Department.<sup>44</sup> Accordingly, the rule proposed by this article is not barred by existing precedent, although it would

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967, 986 (2005) (“At the first step, we ask whether the statute’s plain terms directly addresses the precise question at issue. If the statute is ambiguous on the point, we defer at step two to the agency’s interpretation so long as the construction is a reasonable policy choice for the agency to make.” (internal quotation marks, citations, and alterations omitted)).

42. 323 U.S. 134 (1944); see *St. Martin Evangelical Lutheran Church v. South Dakota*, 451 U.S. 772, 783 n.13 (1981) (“The amount of deference due an administrative agency’s interpretation of a statute, however, will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.” (internal quotation marks omitted)); see also *Morton v. Ruiz*, 415 U.S. 199, 237 (1974) (“We have recognized previously that the weight of an administrative interpretation will depend, among other things, upon its consistency with earlier and later pronouncements of an agency.” (internal quotation marks omitted)); *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 93–94 (1973) (holding that *Skidmore* deference has limits when the agency’s interpretation is inconsistent with obvious congressional intent).

43. See *Crandon v. United States*, 494 U.S. 152, 177 (1990) (Scalia, J., concurring) (“The Justice Department, of course, has a very specific responsibility to determine for itself what the statute means, in order to decide when to prosecute; but we have never thought that the interpretation of those charged with prosecuting criminal statutes is entitled to deference.”).

44. The Court routinely defers to the Attorney General’s interpretations of ambiguous provisions of the Immigration and Nationality Act (INA) and its predecessor provisions. See *INS v. Aguirre-Aguirre*, 526 U.S. 414, 424–25 (1999) (“Based on this allocation of authority . . . the BIA should be accorded *Chevron* deference as it gives ambiguous statutory terms concrete meaning through a process of case-by-case adjudication . . .” (internal quotation marks and citations omitted)); see also *Negusie v. Holder*, 555 U.S. 511, 516–17 (2009) (holding that the Attorney General’s rulings with respect to the INA are due *Chevron* deference by the courts); *INS v. Yueh-Shaio Yang*, 519 U.S. 26, 29–32 (1996) (holding that the INS’s interpretation was entitled to deference unless it was arbitrary, capricious, or an abuse of discretion); *INS v. Abudu*, 485 U.S. 94, 110 (1988). The Court defers despite proceedings under the INA being considered “quasi-criminal.” See *Chew Heong v. United States*, 112 U.S. 536, 577 (1884) (Field, J., dissenting) (noting that the Court had no power to change the requirements necessary for Chinese laborers to enter the country under the Chinese Restriction Act, even though the Act was quasi-criminal in nature); see also *Johnson v. Ashcroft*, 378 F.3d 164, 172 n.10 (2d Cir. 2004) (“The difficulty is that removal proceedings, though involving matters that are quasi-criminal, have been deemed civil.”). Additionally, *Chevron* deference applies to the Bureau of Prisons’s interpretations of provisions addressing federal incarceration. See *Reno v. Koray*, 515 U.S. 50, 60–61 (1995) (holding that the interpretation by the Bureau of Prisons’s agency guideline was entitled to *Chevron* deference because it was a reasonable interpretation of an ambiguous statute); see also *Lopez v. Davis*, 531 U.S. 230, 240 (2001) (affirming that the interpretation of the statute denying early release by the Bureau of Prisons was entitled to *Chevron* deference).

constitute a leap from the Court's previous cases.

This deference proposal is not entirely novel. Professor Dan Kahan urges the Court to announce a rule requiring federal courts to defer to the Attorney General's interpretations of all ambiguous substantive federal criminal statutes.<sup>45</sup> Kahan's proposal is overbroad and would, as Justice Scalia warned when confronted with a similar argument, "turn the normal construction of criminal statutes upside down, replacing the doctrine of lenity with a doctrine of severity."<sup>46</sup> Nevertheless, the rationales for the deference doctrines that are most frequently articulated by courts support a limited and modified version of Kahan's thesis. Deference has a role to play at the sentencing phase of a criminal case, even if it does not have such a role to play at the adjudicative phase.

### 1. The Implied Delegation Rationale

The implied delegation rationale states that when Congress leaves an ambiguity in an agency-administered statute, Congress assumes that the agency will resolve the ambiguity. Thus, such an ambiguity is an implied delegation of Congress's lawmaking power to the agency.<sup>47</sup> The *Chevron* Court acknowledged that its decision rested at least in part on this justification,<sup>48</sup> and the Court has repeatedly reaffirmed the rationale's importance.<sup>49</sup>

45. Dan M. Kahan, *Is Chevron Relevant to Federal Criminal Law?*, 110 HARV. L. REV. 469, 488–90 (1996).

46. *Crandon*, 494 U.S. at 177 (Scalia, J., concurring).

47. See Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 368–70 (1986) (noting that agency expertise gives rise to an implied congressional directive from Congress for the courts to defer to an agency's reasonable interpretation); Scalia, *supra* note 41, at 516–18 ("An ambiguity in a statute committed to agency implementation can be attributed to either of two congressional desires: (1) Congress intended a particular result, but was not clear about it or (2) Congress had no particular intent on the subject, but meant to leave its resolution to the agency.").

48. See *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984) ("Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.").

49. See, e.g., *Mayo Found. for Med. Educ. & Research v. United States*, 131 S. Ct. 704, 713–14 (2011) ("Our inquiry [into whether there is *Chevron* deference] does not turn on whether Congress's delegation of authority was general or specific."); *Gonzales v. Oregon*, 546 U.S. 243, 255–56 (2006) (holding that there is *Chevron* deference even if Congress has delegated authority to the agency generally); *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001) (holding that the lack of express delegation from Congress does not prohibit agency interpretation of ambiguous statutes). Looking for an implied delegation is the primary means of determining whether *Skidmore* or *Chevron* deference applies. However, Congress might charge an agency with interpreting a statute and yet not intend that the agency be responsible

Kahan argues that when Congress passes a vague criminal statute, prosecutors and courts share the power to resolve the statutory ambiguity.<sup>50</sup> Because prosecutors can choose who to prosecute, under what statutes to bring cases, and what legal theories to press on courts, prosecutors play important roles in shaping federal criminal law.<sup>51</sup> The Justice Department's power to use prosecutorial discretion to shape sentencing law is even more substantial than its power to shape substantive criminal law. Thus, Congress delegates to the Attorney General some authority to craft sentencing law, while also delegating authority to courts.

Sentencing-related delegation can be viewed in three specific ways. First, statutory maximum and mandatory minimum provisions ensure that, at the charging phase, a prosecutor makes decisions that substantially dictate the sentence that a defendant will receive if convicted.<sup>52</sup> Likewise, prosecutors play a significant role in crafting a

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for resolving ambiguities in the statute. In such a case, an agency interpretation should not be accorded *Chevron* deference. Barron & Kagan, *supra* note 41, at 216–18. Nevertheless, Congress likely legislates with *Skidmore* in mind and is aware that an agency interpretation will be accorded at least some deference by a court. A court then can consider a statutory ambiguity as Congress's impliedly granting an agency authority to render an interpretation that, while not binding, is nevertheless owed deference. Accordingly, indicia of a congressional delegation to an agency to interpret a statute can support *Skidmore*, as well as *Chevron*, deference.

50. Kahan, *supra* note 45, at 479–81. Kahan characterizes federal criminal law as “a system of delegated common law-making.” *Id.* at 479. He cites the Racketeer Influenced Corrupt Organizations Act (RICO), 18 U.S.C.A. §§ 1961–1968 (West 2012), various fraud statutes, 18 U.S.C.A. §§ 371, 1341, 1343 (West 2012), the National Stolen Property Act (NSPA), 18 U.S.C.A. § 2314 (West 2012), and the federal theft statute, U.S.C.A. 18 § 641 (West 2012), as examples of vague federal statutes subject to federal common lawmaking. *See* Kahan, *supra* note 45, at 472–79.

51. *Id.* at 479–80.

52. *See, e.g.,* Russell M. Gold, *Promoting Democracy in Prosecution*, 86 WASH. L. REV. 69, 93 (2011) (“Where mandatory minimum sentences exist, the discretionary charging decision essentially controls what sentence a particular defendant will receive.”); Michael A. Simons, *Prosecutors as Punishment Theorists: Seeking Sentencing Justice*, 16 GEO. MASON L. REV. 303, 351 (2009) (“As the system stands now, prosecutors effectively impose the sentence by choosing to file (or choosing not to file) sentencing enhancements.”); *see generally* David Bjerk, *Making the Crime Fit the Penalty: The Role of Prosecutorial Discretion Under Mandatory Minimum Sentencing*, 48 J.L. & ECON. 591 (2005); Michael A. Simons, *Prosecutorial Discretion in the Shadow of Advisory Guidelines and Mandatory Minimums*, 19 TEMPLE POL. & CIV. RTS. L. REV. 377 (2010). For example, a prosecutor decides at the charging phase of a drug trafficking case the quantity of drugs to allege. The amount that the prosecutor alleges dictates the statutory penalties to which the defendant is subject upon conviction, regardless of the drug quantity that the court believes was actually involved in an offense. *See* 21 U.S.C.A. § 841(b) (West 2012); *see also* United States v. Sanders, 668 F.3d 1298, 1310 (11th Cir. 2012) (holding that 18 U.S.C. § 841(b) required no proof of the defendant's *mens rea* and only required proof beyond a reasonable doubt that the offense involved a particular quantity of the drug charged in the indictment); United States v. Graham, 317 F.3d 262, 273–74 (D.C. Cir. 2003) (holding that sentencing under 18 U.S.C. § 841(b) is based on the quantity of drugs charged in the indictment

defendant's sentencing guideline range. Although the United States Probation Office (Probation), an arm of the Judiciary, is charged with gathering evidence relevant to calculating a defendant's guideline range,<sup>53</sup> Probation is seldom able to do this work independently. Instead, it relies on information provided by the Justice Department to determine a defendant's offense level and whether certain enhancements apply.<sup>54</sup> Thus, a prosecutor's decision about what evidence to provide to Probation, and what evidence to withhold, directly influences a defendant's sentence.<sup>55</sup> Finally, a prosecutor can dictate a defendant's guideline range in more direct ways. Section 5K1.1 of the guidelines allows a court to reduce a defendant's offense level based on a defendant's assistance to the government in an ongoing investigation; however, the court is only able to do so upon motion from the government.<sup>56</sup> An implied delegation could have supported the Court's applying deference in *Dorsey*. Although Congress changed the crack/powder ratio when it enacted the FSA, it left in place a prosecutor's authority to determine at the charging stage whether a mandatory minimum will apply at sentencing, and if so, what that mandatory minimum will be.

## 2. The Political Accountability Rationale

The *Chevron* Court acknowledged that, in some instances, a statute's drafting history will be inconclusive as to whether Congress

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and proven by the prosecution beyond a reasonable doubt); *United States v. Aguayo-Delgado*, 220 F.3d 926, 933 (8th Cir. 2000) (holding that if the prosecution wants to seek penalties in excess of the elements of the offense alone, it must charge the facts in the indictment and prove them beyond a reasonable doubt).

53. FED. R. CRIM. P. 32.

54. See William J. Powell & Michael T. Cimino, *Prosecutorial Discretion Under the Federal Sentencing Guidelines: Is the Fox Guarding the Hen House?*, 97 W. VA. L. REV. 373, 383 n.55 (1995) ("It should be clear that while the probation office is intended to act independently on behalf of the court, the reality is that probation offices have neither the resources nor the training to conduct independent investigations prior to sentencing, and rely upon Assistant United States Attorneys to provide sentencing information."); see also Kate Stith, *The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion*, 117 YALE L.J. 1420, 1449–50 (2008) (expounding that, because there is no possible way for the Justice Department to review and control every charging decision and plea agreement made by Assistant United States Attorneys, they are afforded a wide level of discretion).

55. See Powell & Cimino, *supra* note 54, at 382–95 (noting that the nature of sentencing in this country gives the prosecutor wide discretion on influencing the kind of offenses with which defendants are charged and the length of sentences they eventually receive).

56. U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 (2012); see Powell & Cimino, *supra* note 54, at 390–92 (noting that it is at the prosecutor's discretion whether or not to move for a departure under 5K1.1); see also Ellen S. Podgor, *The Ethics and Professionalism of Prosecutors in Discretionary Decisions*, 68 FORDHAM L. REV. 1511, 1523–25 (2000).

intended to delegate interpretive authority to the executive branch. Nevertheless, deference may be appropriate in such cases where resolving a statutory ambiguity requires making a policy judgment. The *Chevron* Court concluded that “[i]n such a case, federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do.”<sup>57</sup> The argument then follows that if Congress, when enacting an agency-administered statute, does not resolve a policy issue implicated by the statute, courts should defer to the politically accountable agency’s resolution of the matter.<sup>58</sup>

Professor David Barron and then-Professor Elena Kagan argue that a search for congressional intent is usually futile—Congress seldom anticipates the interpretive issues that will arise when an agency administers a statute.<sup>59</sup> Thus, they contend that this political accountability rationale best explains the deference doctrines.<sup>60</sup> Whether rooted in the constitutional doctrine of separation of powers,<sup>61</sup> or merely in prudent judicial practice,<sup>62</sup> most commentators agree that when the Executive has spoken about a policy matter related to an agency-administered statute, courts should pause before casting aside the Executive’s opinion.

How long a person convicted of a federal crime spends incarcerated for her offense is undoubtedly an important matter of national policy. For the past three decades, the executive and legislative branches have devoted considerable resources to discussing and reforming the country’s sentencing laws. Public opinion about these issues almost certainly has shaped the debate.<sup>63</sup> When an

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57. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 866 (1984).

58. *See id.* (holding that only the political branches, not the Judiciary, have the responsibility to resolve conflicts between policy viewpoints).

59. *See Barron & Kagan, supra* note 41, at 223 (“Congress’s view on deference (were Congress to consider the matter) likely would hinge on numerous case-specific and agency-specific variables, not readily susceptible to judicial understanding or analysis.”)

60. *See id.* at 235–36, 241 (reasoning that *Chevron* deference should only apply to agency decisions when the official originally named in Congress’s delegation of authority personally assumes responsibility for the decision because such limitation of deference promotes political accountability and disciplined decision making).

61. *E.g.*, Kenneth W. Starr, *Judicial Review in the Post-Chevron Era*, 3 *YALE J. ON REG.* 283, 308–09 (1986) (arguing that the Constitution does not grant courts supervisory powers over agencies, therefore courts should voluntarily avoid intrusions into the decisions of the political branches).

62. *E.g.*, Maureen B. Callahan, *Must Federal Courts Defer to Agency Interpretations of Statutes?: A New Doctrinal Basis for Chevron U.S.A. v. Natural Resources Defense Council*, 1991 *WISC. L. REV.* 1275, 1289 (arguing that the Court in *Chevron* was motivated by a theory of prudential self-restraint).

63. *See, e.g.*, PEW CENTER ON THE STATES, *PUBLIC OPINION ON SENTENCING AND*

ambiguity arises in a sentencing provision, the resolution of the ambiguity bears directly on the possible prison sentences faced by a class of defendants. Thus, when a court construes an ambiguous sentencing provision, it necessarily makes policy and does so without a constituency holding it accountable—one of the evils that the *Chevron* Court sought to redress. By giving deference to the Attorney General in matters of sentencing, a court would allow a political branch to resolve a political issue.

However, just as the political accountability rationale supports the proposed rule, it also limits it. Barron and Kagan contend that *Chevron* deference should only apply to statutory interpretations that reflect official agency policy and that are sanctioned by the agency head.<sup>64</sup> While agency heads are likely to mold their judgments to fit prevailing political views, career officials within agencies are less likely to do so and are more likely to be beholden to special interest groups with whom they repeatedly interact.<sup>65</sup> Thus, if *Chevron* deference serves to ensure that policy decisions are made by politically accountable actors, and agency heads are the politically accountable actors within agencies, then *Chevron* deference should only be given to their decrees.<sup>66</sup> Accordingly, courts should only give deference when the Attorney General speaks about a sentencing provision.

In *Dorsey*, instead of cobbling together a shaky legal basis for a policy position that it happened to share with the Attorney General, the Court could have acknowledged that the Attorney General's opinion was informed by public will and then given deference to that opinion. The Government's position in *Dorsey* is a classic example of an agency position molded by the political process. Congress enacted

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CORRECTIONS POLICY IN AMERICA (2012), available at [http://www.pewstates.org/uploadedFiles/PCS\\_Assets/2012/PEW\\_NationalSurveyResearchPaper\\_FINAL.pdf](http://www.pewstates.org/uploadedFiles/PCS_Assets/2012/PEW_NationalSurveyResearchPaper_FINAL.pdf). (last visited Nov. 18, 2012) (concluding that support for sentencing reform is strong among many major voting demographics).

64. See Barron & Kagan, *supra* note 41, at 235–36 (advocating giving *Skidmore* deference to statutory interpretations rendered by lower-level agency officials).

65. *Id.* at 242–43.

66. See *id.* (“It is only the presence of high-level agency officials that makes plausible *Chevron*'s claimed connection between agencies and the public; and it is only the involvement of these officials in decision making that makes possible the kind of political accountability that *Chevron* viewed as compelling deference.”). For similar reasons, Kahan envisions courts only giving deference to the Attorney General's interpretations of criminal statutes. He argues that individual prosecutors' policy judgments are often colored by self-interest and that this self-interest often leads to prosecutorial overreaching. Kahan, *supra* note 45, at 496–500.

the FSA after years of public condemnation of the old ratio. Members of Congress, the media, and lower court judges then pointed out that the Justice Department's original position did not comport with the motivation for Congress's action. Their doing so prompted the Attorney General to intervene. The *Dorsey* Court could have noted that the Attorney General had offered a plausible legal argument to support the prevailing wisdom of the political branches and thus left its hands clean of the policy-driven analysis for which the Attorney General, as a politically accountable member of government, is better suited.

### 3. The Agency Expertise Rationale

An agency's expertise with a statute that it administers is the primary justification for applying *Skidmore* deference.<sup>67</sup> Moreover, agency expertise is at least a secondary justification for applying *Chevron* deference.<sup>68</sup> Kahan argues that the Justice Department's expertise in interpreting and applying federal criminal statutes, and the fact that "the experience of individual judges (particularly at the appellate level) with criminal law remains limited and sporadic," combine to support deferring to the Attorney General's interpretations of criminal statutes.<sup>69</sup> This argument gives short shrift to judges' expertise in interpreting and applying substantive criminal law. However, when it comes to sentencing provisions, the Justice Department has, in the aggregate, greater expertise than the Judiciary. This is because most criminal cases require only that federal judges become "experts" in interpreting and applying the substantive elements of the drug trafficking statutes of title 21, the firearm provisions of title 18, and the immigration provisions of title 8.<sup>70</sup> Not

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67. See Barron & Kagan, *supra* note 41, at 223–25.

68. See *Pension Benefits Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 651–52 (1990) ("[P]ractical agency expertise is one of the principle justifications behind *Chevron* deference."); Ronald M. Levin, *Mead and the Prospective Exercise of Discretion*, 54 ADMIN. L. REV. 771, 782 (2002) ("If factors such as . . . agency expertise have persuasive force in a *Skidmore* context, they should have like force when a court is applying the first step of *Chevron*."); Merrill & Hickman, *supra* note 41, at 862 ("[T]he goal of resolving statutory ambiguities in such a way as to further the purposes of the statute is increasingly becoming a task beyond the grasp of generalist judges. . . . [D]eference to agency interpretations may thus be necessary . . . to make law internally coherent.")

69. Kahan, *supra* note 45, at 485, 488–89.

70. In fiscal year 2011, 73.2% of all federal prosecutions fell into one of these three general categories. U.S. SENTENCING COMM'N, FY 2011 SOURCEBOOK, FIG. A, OFFENDERS IN EACH PRIMARY OFFENSE CATEGORY (depicting the portion of offenders categorized as "Immigration" (34.9%), "Drugs" (29.1%), and "Firearms" (9.2%)).

surprisingly, federal courts are also quite often required to apply the penalty provisions associated with these statutes. However, while Congress seldom modifies the portions of section 841 (the drug trafficking statute), section 922 (the general firearm statute), or title 8, section 1326 (the illegal reentry statute) that set forth substantive offense elements, the accompanying penalty provisions are often subject to congressional amendment.<sup>71</sup> As a result, while a federal judge's expertise with substantive criminal law is often lasting, her expertise with sentencing provisions is often rendered moot by Congress's shifting prerogatives. A court's crowded docket might mean that it will take a judge considerable time to fully acquaint herself with all aspects of a new sentencing provision. Conversely, the prevalence of plea bargaining in federal prosecutions results in a sentencing hearing being the part of a prosecution that requires the most preparation by a prosecutor.<sup>72</sup> Thus, a prosecutor must quickly become an expert in interpreting and applying a new federal sentencing provision.

Moreover, the Justice Department has sufficient institutional resources to empirically study and evaluate federal sentencing.<sup>73</sup> The Justice Department's empirical knowledge of the effectiveness of incarceration likely informs the types of sentences for which it

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71. Congress has not amended the substantive part of the drug trafficking statute, 21 U.S.C. § 841(a), since it originally enacted the provision. However, Congress has modified 21 U.S.C. § 841(b), the penalty provision, repeatedly during the same period. Since 1986, Congress has modified the provision ten times. *See* Pub. L. No. 99-570, 100 Stat. 3207 (1986); Pub. L. No. 100-690, 102 Stat. 4181 (1988); Pub. L. No. 101-647, 104 Stat. 4789 (1990); Pub. L. No. 103-322, 108 Stat. 1796 (1994); Pub. L. No. 104-305, 110 Stat. 3807 (1996); Pub. L. No. 105-277, 112 Stat. 2681 (1998); Pub. L. No. 106-172, 114 Stat. 7 (2000); Pub. L. No. 107-273, 116 Stat. 1758 (2002); Pub. L. No. 110-425, 122 Stat. 4820 (2008); Pub. L. No. 111-220, 124 Stat. 2372 (2010). Congress last made a substantive change to the provision setting forth the elements of federal firearms offenses, 18 U.S.C. § 922, in 1994. *See* Pub. L. No. 103-322, 108 Stat. 1796 (1994). Since then, Congress has made substantive changes to the statute providing penalties for firearms offenses, 18 U.S.C. § 924, on four separate occasions. *See* Pub. L. No. 104-294, 110 Stat. 3488 (1996); Pub. L. No. 105-386, 112 Stat. 3469 (1998); Pub. L. No. 107-273, 116 Stat. 1758 (2002); Pub. L. No. 109-92, 119 Stat. 2095 (2005). Finally, Congress has not made substantive changes to the illegal reentry statute, 8 U.S.C. § 1326, since originally enacting it in 1952. However, Congress has modified the penalties for illegal reentry three times since 1990. *See* Pub. L. No. 101-649, 104 Stat. 4978 (1990); Pub. L. No. 103-322, 108 Stat. 1796 (1994); Pub. L. No. 104-208, 110 Stat. 3009 (1996).

72. In fiscal year 2011, 96.9% of all federal cases ended in guilty pleas. U.S. SENTENCING COMM'N, FY 2011 SOURCEBOOK, FIG. C, GUILTY PLEAS AND TRIAL RATES (depicting guilty plea and trial rates for fiscal years 2007 to 2011).

73. For example, the Bureau of Justice Statistics, a sub-agency within the Justice Department, annually compiles and publishes numerous reports on topics like recidivism and incarceration rates. Similarly, the Bureau of Prisons frequently evaluates and reports on recidivism and the effectiveness of various prison treatment and training programs.



advocates, and the constructions of sentencing statutes that it offers in support of its advocacy. For example, an internal report on cocaine sentencing likely influenced the Government's position in *Dorsey*.<sup>74</sup> This fact, standing alone, supports deference to the Justice Department's interpretations of sentencing provisions. There is more, though. The Justice Department prepares these reports at the direction of Congress.<sup>75</sup> Congress directs the Justice Department to empirically study federal sentencing—thus, one could reason that Congress intends for courts to defer to the Justice Department's interpretations of sentencing provisions.<sup>76</sup>

#### 4. The Uniformity and Consistency Rationale

Finally, deference ensures uniformity in the construction and administration of highly technical statutes.<sup>77</sup> The limited number of cases that the Supreme Court hears annually and the highly technical nature of agency-administered statutes make it almost certain that, without deference doctrines, many circuits would split over how best to interpret such provisions. By making an agency interpretation of an ambiguous provision immediately binding, deference bestows uniformity-related benefits on all interested parties. Deference allows an agency to administer a statute confident as to what the provision means and how it applies. Deference allows regulated parties to conform their actions to the statute's requirements, as uniformly construed by the agency. Deference also furthers the democratic

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74. See U.S. DEP'T OF JUSTICE, FEDERAL COCAINE OFFENSES: AN ANALYSIS OF CRACK AND POWDER PENALTIES (2002), available at [http://www.justice.gov/olp/pdf/crack\\_powder2002.pdf](http://www.justice.gov/olp/pdf/crack_powder2002.pdf) (analyzing how facial disparities between powder and crack cocaine sentencing guidelines play out in actual sentences).

75. See, e.g., 42 U.S.C.A. § 3732 (West 2012) (establishing the Bureau of Justice Statistics and charging it with completing certain reporting duties); 18 U.S.C.A. § 4047 (West 2012) (“Any submission of legislation . . . which could increase or decrease the number of persons incarcerated in Federal penal institutions shall be accompanied by a prison impact statement [prepared by the Attorney General in consultation with the Sentencing Commission and the Administrative Office of the Courts].”).

76. Courts hold that Congress's explicitly instructing an agency to study an issue and prepare a report supports the assumption that Congress intends for courts to defer to an agency interpretation of a statute addressing the issue when the agency bases its interpretation on its empirical study. E.g., *Allied Local & Reg'l Mfrs. Caucus v. EPA*, 215 F.3d 61, 72–73 (D.C. Cir. 2000) (“[W]e must be particularly deferential . . . where Congress—by instructing [an agency] to set priorities using multiple, nondeterminative [sic] criteria—HAS NECESSARILY indicated an intention to delegate substantial discretion to the agency.” (emphasis in original)).

77. See Peter L. Strauss, *One Hundred-Fifty Cases Per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093, 1126 (1987) (arguing that the Court defers to agencies, therefore reducing the role of lower courts, partially to promote uniformity and effective enforcement).

process. If an agency interpretation is immediately binding, and Congress is not satisfied with the agency's work, it can promptly act to supersede the agency. Finally, deference, at least in theory, benefits courts by conserving judicial resources.<sup>78</sup>

All parties interested in a sentencing hearing would benefit from the uniformity that the proposed rule would engender. A defendant would be able to make a decision about how to plead fully informed of the likely penalties. So too would a prosecutor be informed, even before charging a defendant. The democratic process would be served by ensuring that Congress knows, as soon as the Attorney General speaks, how an ambiguous sentencing provision will be construed and applied. If Congress is dissatisfied with the Attorney General's reading, it would have an impetus to act, without waiting on the tedious process of Supreme Court review. Finally, the Judiciary would benefit. Not only would district and circuit courts not have to waste resources construing ambiguous sentencing provisions, but district courts would also be spared from the painstaking process of resentencing defendants when higher courts subsequently disagree with the district courts' interpretations.<sup>79</sup>

## B. *The Specifics of the Proposed Rule*

### 1. Only Lenient Statutory Interpretations?

Although there is good reason for courts giving deference to the Attorney General's interpretations of some ambiguous sentencing provisions, courts need not give deference to all such interpretations. Sentencing courts should only apply a deference doctrine when the Attorney General interprets an ambiguous provision in a manner that results in a class of defendants being subject to lesser penalties than the defendants would be subject to based on any plausible alternative

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78. *See id.* at 1095 (suggesting that the Court's resource dilemmas might have influenced it to accept the broad standpoint on deference introduced by *Chevron*). Other scholars counter that applying *Chevron* step one is as arduous as independently construing a statute, and that deference therefore does not conserve judicial resources. *E.g.*, Jack M. Beerman, *End the Failed Chevron Experiment Now: How Chevron Failed and Why It Can and Should Be Avoided*, 42 CONN. L. REV. 779, 850–51 (2010).

79. Since deciding *Dorsey*, the Court has remanded forty-three pending cases for further consideration in light of *Dorsey*. *E.g.*, *Davis v. United States*, No. 11-5323 (U.S. June 29, 2012); *Sidney v. United States*, No. 11-8134 (U.S. June 29, 2012); *Strowder v. United States*, No. 11-8413 (U.S. June 29, 2012). This figure reflects only the pre-enactment FSA cases that had made it to the certiorari petition stage when the Court decided *Dorsey*. Undoubtedly, *Dorsey* remands will crowd district courts' dockets for the immediate future.

reading of the provision. In short, deference should only apply when the Attorney General interprets a sentencing provision in the most lenient manner.<sup>80</sup> There are four reasons for this requirement.

First, this limitation moderates the novelty of the proposed rule. At first glance, it appears that adopting this deference rule would require the Judiciary to cede a considerable amount of power to the executive branch. However, if deference applies only to lenient interpretations of sentencing provisions, then applying deference, as a functional matter, does not give the executive branch power that it does not already enjoy. Since the Constitution was ratified, the President has enjoyed near plenary authority to pardon or commute a sentence.<sup>81</sup> The Court long ago recognized that clemency is based on the principle that legal effect should be given to the President's determination "that the public welfare will be better served by inflicting less [punishment] than what the judgment fixed."<sup>82</sup> When the Attorney General endorses, and a court then adopts out of deference, a lenient interpretation of a sentencing provision, the same outcome results as would have followed if the President had commuted the sentences of a class of defendants after determining that the defendants' sentencing courts should have applied a provision in a lenient manner. In both instances, defendants receive shorter sentences due to the executive branch making a policy judgment about a sentencing provision. For example, had the *Dorsey* dissenters prevailed, the President could have subsequently commuted the sentences of all individuals sentenced under the old ratio after August

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80. This requirement forces a court to consider whether the Attorney General's interpretation is the most lenient of all plausible interpretations. The government might ask the court to apply the proposed rule even when the Attorney General's position and the defendant's position do not align. The government might characterize its interpretation as the most lenient interpretation that is plausible, and the defendant's interpretation, although resulting in even less punishment, as not legally defensible. In such a case, the court would have to resolve the dispute. However, courts are experienced in identifying statutory interpretations that are and are not "fairly possible." See *Crowell v. Benson*, 285 U.S. 22, 62 (1932) ("When the validity of an act of the Congress is drawn in question . . . it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.").

81. See U.S. CONST. art. II, § 2 ("The President . . . shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment."); *United States v. Wilson*, 32 U.S. (7 Pet.) 150, 159–60 (1833) ("A pardon . . . proceed[s] from the power intrusted [sic] with the execution of the laws."); see generally William F. Duker, *The President's Power to Pardon: A Constitutional History*, 18 WM. & MARY L. REV. 475 (1977) (advocating adoption of a constitutional amendment "to rid the pardoning power of its apprehensible novelty.").

82. *Biddle v. Perovich*, 274 U.S. 480, 486 (1927).

3, 2010. The President's doing so would have nullified the Court's decision, and would have rendered the extensive litigation on the issue moot. However, the Administration's policy position, first embodied in the Attorney General's memorandum, would have been implemented. Had the *Dorsey* Court deferred to the Attorney General's position, it would have efficiently implemented executive branch policy. By independently resolving the issue, the Court left open the possibility that the President would be forced to implement the Administration's chosen policy after the Court spoke.<sup>83</sup>

Second, this limitation ensures that courts apply the proposed rule in ways that are most consistent with the political accountability and agency expertise rationales. The government's default position in most prosecutions is to advocate for the harshest punishment available.<sup>84</sup> Thus, when the Attorney General interprets an ambiguous sentencing provision in a manner that subjects a class of defendants to the harshest possible punishment, his doing so might be in response to national consensus on a policy issue or to an empirical study; however, it is just as likely that his doing so is nothing more than an example of the government's common practice of seeking to punish offenders severely. When the Attorney General retreats from this default position, and asks courts to construe a sentencing provision in a lenient way, he probably has a compelling reason for doing so.<sup>85</sup>

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83. Professors Jack Goldsmith and John Manning argue that the President has broad power to choose the means of carrying into effect a legislative scheme. Jack Goldsmith & John F. Manning, *The President's Completion Power*, 115 YALE L.J. 2280, 2282 (2006). They contend that courts should not review the President's exercise of this "completion power" so long as Congress has not articulated specific means that the President should use to achieve an end, so long as the Constitution does not vest in Congress exclusive authority to dictate such means, and so long as deferring to the President's chosen means does not upset long-standing balances of power between the President and the Judiciary. *Id.* at 2308–11. Congress has made the purposes of federal sentencing statutes clear in 18 U.S.C. 3553(a) and has entrusted the Executive with achieving those ends. See 18 U.S.C.A. § 3553(a) (West 2012) (listing factors to be considered when imposing a sentence).

84. See Kahan, *supra* note 45, at 486–87 (arguing that prosecutorial overreach may result from systems that incentivize high conviction rates). Many scholars have considered whether prosecutors are most likely to be motivated by a quest for justice or by some other goal, like a high conviction rate or a defendant receiving a harsh punishment. These scholars have generally reached the latter conclusion. See Alafair S. Burke, *Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science*, 47 WM. & MARY L. REV. 1587, 1589–90 (2006) (describing how the majority of literature on the subject assigns different values to prosecutorial decisions than simply a search for justice).

85. Specifically, prosecutorial leniency likely results from either prevailing popular will or empirical study. See discussion of *Dorsey*, *supra* Part II (explaining that when there has been a change in the legislation, differences in sentencing are to be expected).

Third, this limitation prevents sentencing courts from applying the proposed rule in a way that conflicts with the rule of lenity. The rule of lenity applies when courts construe sentencing provisions, and it requires that sentencing courts not read a statute in a way that increases the penalties to which a defendant is subject when the court could plausibly read the statute in a way that results in lesser penalties.<sup>86</sup> Thus, adopting a rule that requires sentencing courts to defer to the Attorney General's reading of an ambiguous sentencing provision when the Attorney General and defendants offer differing readings would run afoul of this rule.<sup>87</sup> However, by limiting deference to lenient interpretations, the proposed rule becomes an extension of the rule of lenity. The rule of lenity is rooted in part in the principle of legislative supremacy—when Congress does not make clear its desire to impose punishment, a court should not step in and do so.<sup>88</sup> More broadly, the rule of lenity, like the deference doctrines, requires that courts not tread in areas best left to the politically accountable branches.<sup>89</sup> Deference to only lenient interpretations ensures that when one political branch (the Executive) determines that a certain type of punishment should not be applied, and the other political branch (Congress) acquiesces to that determination by failing to act, courts will not step in and impose punishment in contravention of the political branches' wishes.

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86. See *Albernaz v. United States*, 450 U.S. 333, 342 (1981) (“This policy of lenity means that the Court will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than guesses as to what Congress intended.” (internal quotation marks omitted)). See generally Phillip M. Spector, *The Sentencing Rule of Lenity*, 33 U. TOL. L. REV. 511, 531–65 (2002) (discussing the principles of the rule of lenity in the sentencing context).

87. More broadly, several scholars have noted that the rule of lenity is violated when a court gives *Chevron* deference to an agency's interpretation of an ambiguous statute that allows for criminal penalties. See Elliot Greenfield, *A Lenity Exception to Chevron Deference*, 58 BAYLOR L. REV. 1, 38–61 (2006) (arguing that the rule of lenity can displace *Chevron* deference); Kristen E. Hickman, *Of Lenity, Chevron, and KPMG*, 26 VA. TAX REV. 905, 912–17 (2007) (arguing that the rule of lenity is in opposition to *Chevron* deference).

88. See *United States v. Bass*, 404 U.S. 336, 347–48 (1971) (holding that the rule of lenity is based in part on the principle that the seriousness of criminal prosecutions dictates that “legislatures and not courts should define criminal activity”); see also *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95–96 (1820) (“[T]hough penal laws are to be construed strictly, they are not to be construed so strictly as to defeat the obvious intention of the legislature.”).

89. See Note, *Justifying the Chevron Doctrine: Insights from the Rule of Lenity*, 123 HARV. L. REV. 2043, 2059–63 (2010) (arguing that *Chevron* deference constitutes the extension of the rule of lenity into areas of administrative law).

Finally, this limitation prevents sentencing courts from applying the proposed deference doctrine in a way that violates the Fifth Amendment's guarantee of due process. It is settled that a criminal defendant enjoys some due process rights at sentencing, although such rights are less comprehensive than those that he enjoyed at the adjudicative phase.<sup>90</sup> Among the rights applicable at sentencing is the right to make legal arguments about the pertinent sentencing provisions.<sup>91</sup> Accordingly, applying the proposed rule when the government and the defendant are not in general agreement about a legal issue would effectively withdraw from the defendant this due process right.<sup>92</sup> However, when the government and the defendant generally agree about a statutory or guideline issue, then the court can apply the deference rule and assume that the defendant impliedly waived his right to be heard on the issue.

## 2. What Level of Deference Should Sentencing Courts Apply?

The next task is to determine just what level of deference a sentencing court should give to the Attorney General's lenient

90. See *McMillan v. Pennsylvania*, 477 U.S. 79, 84–85 (1986) (explaining that the defendant retains due process rights during sentencing); see also *Wasman v. United States*, 468 U.S. 559, 564 (1984) (affirming that some of the defendant's due process rights extend to the sentencing proceedings); *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972) (holding that due process may be different in certain situations).

91. See *Blakely v. Washington*, 542 U.S. 296, 343–44 (2004) (Breyer, J., dissenting) (explaining that defendants have an additional right to be heard in the sentencing process); see also FED. R. CRIM. P. 32 (allotting to a defendant, in relevant section (i), the right to be heard by the court on matters relating to sentencing proceedings).

92. See Evan J. Criddle, *When Delegation Begets Domination: Due Process of Administrative Lawmaking*, 46 GA. L. REV. 117, 193–97 (2011) (arguing that *Mead* establishes that *Chevron* deference should only be given to agency interpretations of statutes when such interpretations follow from procedures that serve to vindicate regulated parties' due process rights). Similarly, the Court has indicated, and lower courts have held, that deference is not owed when an agency interpretation of a statute withdraws from a regulated party a constitutional right. See *Rust v. Sullivan*, 500 U.S. 173, 204–05 (1991) (Blackmun, J., dissenting) (arguing that administrative agency regulations must be interpreted in a way as to afford their constitutionality rather than disregarding constitutional rights); *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 574–75 (1988) (declining to apply *Chevron* when the agency's interpretation of a statute risked infringing on labor union members' First Amendment rights); *United States v. Deaton*, 332 F.3d 698, 705 (4th Cir. 2003) (holding that when an administrative regulation reflects the limits of constitutional Congressional power, it is to be narrowly read unless there is a specific indication from Congress that it meant for it to be read broadly); *Williams v. Babbit*, 115 F.3d 657, 661–63 (9th Cir. 1997) (holding that when an administrative regulation raises serious constitutional issues, it will be read narrowly in order to protect constitutional rights). The imposition of a criminal sentence results in the defendant losing constitutional rights. Thus, when the defendant does not acquiesce to the Attorney General's opinion as to how long he should lose his rights, a court should not give deference.

interpretations of ambiguous sentencing provisions. The deference doctrines do not support sentencing courts' giving automatic deference pursuant to *Chevron*. However, the doctrines do support sentencing courts applying a robust version of the *Skidmore* doctrine. First, *United States v. Mead*<sup>93</sup> establishes that *Chevron* deference applies only when the agency received from Congress the power to promulgate rules having the force of law.<sup>94</sup> Although Congress has given prosecutors a large role at sentencing, courts actually impose sentences. Thus, the Justice Department cannot make sentencing-related statements that have the force of law. Second, the *Mead* Court also emphasized that the formality of the processes that produce an agency interpretation dictate the level of deference that a court should apply to the interpretation.<sup>95</sup> When an agency uses informal procedures, *Skidmore* deference is appropriate.<sup>96</sup> Kahan notes that the Attorney General does not have the statutory authorization to develop statutory interpretations through notice and comment rulemaking or formal adjudications.<sup>97</sup> Instead, the interpretations to which courts should give deference will likely be developed informally and will take the form of directives from the Attorney General to his employees. Third, *Chevron* deference is required by either statute or the Constitution, whereas *Skidmore* deference reflects courts' voluntary cession of some judicial authority to the Executive for prudential reasons.<sup>98</sup> Neither the Constitution nor any statute requires the proposed rule; instead, the policy reasons for giving deference suggest it. Fourth, to the extent that the implied delegation rationale supports deference at sentencing, it only supports *Skidmore* deference. As explained, Congress delegated to both the courts and to the Justice Department the power to construe and apply sentencing provisions. Merrill and Hickman argue that when

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93. 553 U.S. 218 (2001).

94. *Id.* at 227.

95. *Id.* at 228.

96. *Id.* at 234–38; see *Coeur Alaska, Inc. v. Se. Alaska Conservation Council*, 557 U.S. 261, 283–84 (2009) (“The Memorandum, though not subject to sufficiently formal procedures to merit *Chevron* deference . . .”).

97. Kahan, *supra* note 45, at 519.

98. See generally Peter L. Strauss, “Deference” is Too Confusing—Let’s Call them “Chevron Space” and “Skidmore Weight”, 112 COLUM. L. REV. 1144 (2012). Strauss characterizes “Chevron space” as “the area within which an administrative agency has been statutorily empowered to act in a manner that creates legal obligations or constraints—that is, its delegated or allocated authority.” *Id.* at 1145. He describes “Skidmore weight” as “the possibility that an agency’s view on a given statutory question may in itself warrant respect by judges.” *Id.*

Congress entrusts multiple agencies with the enforcement of a single provision, it intends for courts to give the agencies' interpretations *Skidmore* deference.<sup>99</sup>

Although *Chevron* deference is not appropriate, the proposed rule would nevertheless reform the current way that courts decipher ambiguous sentencing provisions. One could currently argue that when a court considers the government's brief filed in support of a defendant's sentencing argument, it gives the government's position *Skidmore* deference. However, *Skidmore* deference at sentencing should entail more.

Commentators have long grappled with just what *Skidmore* deference is. They have generally come to agree that *Skidmore* deference requires giving an agency special consideration not given to other litigants based solely on the agency's status.<sup>100</sup> *Skidmore* deference at sentencing should reflect this general agreement. A sentencing court should first ask whether a provision is in fact ambiguous. If there are sufficient indicia of Congress's intent, then the inquiry should end and the court should give effect to Congress's intended meaning.<sup>101</sup> If the statute is ambiguous, and the Attorney

99. See Merrill & Hickman, *supra* note 41, at 895–96 (arguing that in the case of conflict, courts should give deference to the interpretation most likely to persuade); see also Sutton v. United Air Lines, Inc., 527 U.S. 471, 478–80 (1999) (acknowledging that three agencies jointly administered the ADA, but holding that a determination of the deference owed to one agency's interpretation was not necessary to deciding the case).

100. Professor Kristin E. Hickman and Matthew D. Krueger argue that, when it applies *Skidmore* deference, a court should first ask whether an agency interpretation reflects the agency's expertise, or whether it reflects arbitrary action. If the interpretation is rooted solely in expertise, then a court should be highly deferential; if it is plainly arbitrary, then the court should award no deference; and if there are indicia of both expertise and arbitrariness, then the court should apply an intermediate level of deference. Such intermediate deference should cause a court to pause before displacing an agency interpretation with one of its own so long as the agency, during litigation, can offer a reasoned basis for its interpretation. Kristin E. Hickman & Matthew D. Krueger, *In Search of the Modern Skidmore Standard*, 107 COLUM. L. REV. 1235, 1294–99 (2007). Similarly, Professor Jim Rossi contends that *Skidmore* deference should be identical to *Chevron* deference, except that at step two of the analysis, a court applying *Skidmore* deference should be more exacting in asking whether the agency's interpretation is reasonable. Jim Rossi, *Respecting Deference: Conceptualizing Skidmore Within the Architecture of Chevron*, 42 WM. & MARY L. REV. 1105, 1138–46 (2001). Finally, a recent commentator contends that a court applying *Skidmore* deference should treat an agency interpretation in the same way that it would treat nonbinding precedent from a sister circuit—it should give it respect and be reluctant to depart from it absent good reason for doing so. Bradley Lipton, Note, *Accountability, Deference, and the Skidmore Doctrine*, 119 YALE L.J. 2096, 2133–34 (2010).

101. Scholars generally agree that *Skidmore* deference includes such a step one inquiry. See Hickman & Krueger, *supra* note 100, at 1280 (“[S]kidmore deference exclude[s] cases in which the court found the statute clear or unambiguous.”); Rossi, *supra* note 100, at 1139 (“*Skidmore*



General has proffered a lenient interpretation, then the sentencing court should apply a presumption of validity to the Attorney General's interpretation.

The court should, however, consider *sua sponte* whether any of the following *Skidmore* factors defeats the presumption.<sup>102</sup> The court should ask first whether substantial empirical evidence counsels against the Attorney General's interpretation. The court might consider whether the Attorney General reached his opinion without considering an important study, or by relying on flawed data. Next, the court should consider whether the Attorney General's position appears to be arbitrary or inconsistent with earlier pronouncements. In asking this question, the court should be careful to distinguish between the Attorney General's pronouncements and the arguments made by individual prosecutors. A court should not deny the Attorney General's position deference merely because line prosecutors advanced the opposing argument before the Attorney General spoke. However, if the Attorney General has repeatedly changed his official position on an issue, or if his interpretation is merely advisory and not official Justice Department policy, then such facts might counsel against applying deference.<sup>103</sup> Finally, the court should ask whether the legal basis for the Attorney General's position is fundamentally flawed. In asking this question, the court should be careful not to compare the Attorney General's reasoning with the court's own legal analysis. The court should merely seek to ensure that the Attorney General's position is not foreclosed by binding precedent and at least reasonably follows from the statute and existing case law. So long as there is a plausible legal basis for the Attorney General's position, the court need not be troubled if it finds that the Attorney General was motivated by policy considerations in crafting his argument. Upon finding any one of these factors strongly present, or a combination of these factors moderately present, the court should treat the presumption of validity defeated and then independently consider the statutory issue. Otherwise, the court should adopt the Attorney General's position without ever considering the legal issue on its own.

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or *Chevron* deference issues arise only when the statute is silent or ambiguous.”).

102. See *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (explaining that even when administrative interpretations are not “reached by trial in adversary form” they still deserve deference).

103. A court should, nevertheless, excuse a change in official Justice Department policy when it results from a change in presidential administrations. The court might even excuse such a change when it results from the appointment and confirmation of a new Attorney General.

### 3. What Procedures are Required for Deference to Apply?

To receive deference, the Attorney General should be required to make his statutory interpretation publicly available in a published document that is prepared and released independent of any single case.<sup>104</sup> This requirement stems from the administrative-law rule that deference is not owed to “agency litigating positions that are wholly unsupported by regulations, rulings, or administrative practice.”<sup>105</sup>

The requirement also serves various practical purposes. First, it allows a court giving deference to rest assured that it is deferring to uniform Justice Department policy, and not to a case-specific litigating position. Because sentencing ambiguities are likely to arise in a large number of factually similar cases, if a sentencing court were asked to defer to the government’s brief alone, it would impose a heavy burden on the court to scour other courts’ dockets where the same issue had arisen to ensure that the position to which it was deferring was actually uniform Justice Department policy and not merely a case-specific argument. However, if the government’s position is backed by an independent policy statement from the Attorney General, then sentencing courts need not go to such lengths. Second, the requirement guarantees that sentencing courts are only deferring to the politically accountable agency head, the Attorney General, and not to lower-level agency officials.<sup>106</sup>

Third, the requirement ensures that the Attorney General’s statements are subjected to public scrutiny without preventing the Attorney General from efficiently administering the Justice Department. It would be relatively easy for the government to file the same brief advancing a lenient interpretation in a class of cases without calling attention to its doing so. In cases involving issues as notable and frequently debated as the new crack/powder cocaine ratio, observant court watchers would probably notice the government’s actions. However, in cases involving more technical issues that are not in the public eye, the government might be able to

104. The Attorney General could release such interpretations in publications like the *Federal Register* or the *United States Attorneys Manual*, regulations prepared by the Office of Legal Policy, or in publicly available memoranda.

105. *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988); see *United States v. Mead Corp.*, 533 U.S. 218, 228 (2001) (explaining that the degree of deference given to administrative interpretation varies according to circumstances that give it “power to persuade”).

106. See *Barron & Kagan*, *supra* note 41, at 238–39 (“Only when an interpretation bears the name of the statutory delegatee has she adopted it as her own.”).

file such briefs and draw the attention only of informed members of the bar. In such cases, sentencing courts would not be able to assume that the government's position had been publicly vetted. The publication requirement remedies this problem. When the Attorney General publicly releases an interpretation, it will likely be examined and scrutinized.<sup>107</sup> If it is left unchanged and then included in Justice Department briefs and litigation memoranda, sentencing courts can confidently assume that the interpretation has been subjected to public scrutiny.

The Attorney General's published statement should make clear the precise class of cases in which the Attorney General intends for his interpretation to apply, the specifics of the interpretation, the legal basis for the position, and the empirical and policy bases for the position. In short, the statement should include enough for a sentencing court to know when to give deference, and to begin to consider whether the presumption of validity has been defeated.<sup>108</sup> However, a sentencing court considering whether to give deference should not be limited to analyzing the Attorney General's statement. Instead, the court should be allowed to consider a brief or memorandum advancing the position, so long as the Attorney General's statement satisfies these basic requirements, and the litigation statement does not break new ground or advance wholly new arguments.

### C. *Imagining Deference in Dorsey*

*Dorsey* could have been the moment when the Court articulated and first applied a deference rule like the one proposed here. Initially, the disagreement among lower courts on the issue strongly suggests that the FSA is ambiguous as to whether it applies in all post-August 3, 2010, sentencing hearings. The Government took the position that the FSA should apply in all post-August 3, 2010, sentencing hearings, regardless of when a defendant committed his offense. The petitioners

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107. Such post-publication scrutiny is sufficient, and notice and comment rulemaking would be far too onerous a requirement to impose. If notice and comment rulemaking were required, it seems unlikely that the Attorney General would ever go to such trouble, and thus would be deterred from advancing lenient interpretations. Kahan makes a similar argument regarding his proposed deference standard. *See* Kahan, *supra* note 45, at 519–20 (“Courts shouldn’t defer to readings embodied in internal memoranda and briefs, however, for these interpretations are too low-profile to ensure notice and political accountability.”).

108. *Cf. id.* at 515–18 (arguing that deference should only be applied to statements of the Attorney General that reflect “reasoned decisionmaking”).

and the Government were in agreement on this point, and it does not appear that there is a plausible alternative reading of the FSA that would have resulted in the petitioners receiving less punishment. Thus, the Government's position was lenient. The Government's lenient litigation position in *Dorsey* (and in the array of similar cases where the issue arose) was dictated by the Attorney General's interpretation of the FSA. The Attorney General issued this interpretation in the form of a signed and publicly released memorandum. In the memorandum, the Attorney General stated that his legal opinion applied only in the cases of defendants sentenced for cocaine-related offenses under section 841(b) after August 3, 2010; his opinion was that the version of section 841(b) to be applied at such sentencing hearings was the version as amended by the FSA, that the district and circuit courts' views in *Douglas* formed the legal basis for his opinion, and that "the serious impact on the criminal justice system of continuing to impose unfair penalties" was the policy consideration that prompted him to act.<sup>109</sup> Judge Easterbrook was correct in noting that the Attorney General left questions unanswered in his memorandum.<sup>110</sup> However, the Attorney General provided sufficient information in the memorandum for the Court to begin to perform a *Skidmore* analysis. The Government's brief filed in *Dorsey* provides answers for questions left unanswered by the Attorney General.<sup>111</sup> Thus, the Government's brief could also have informed the deference review. The Government's lenient interpretation of the FSA, first espoused by the publicly released and well-articulated statement of the Attorney General, could have triggered a

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109. Holder Memorandum, *supra* note 26, at 1–2.

110. *United States v. Holcomb*, 657 F.3d 445, 447 (7th Cir. 2011) (Easterbrook, J., concurring) ("[The memorandum] does not explain why *partial* retroactivity is appropriate—or why the transition should depend on the date of sentencing, rather than some other event, such as a guilty plea or an appeal.").

111. *See generally* Brief for the United States, *supra* note 30 (explaining how Congress's directive and the structure of the Act dictate application of the new sentencing scheme by the administrative agency). The Government answered Judge Easterbrook's questions by contending that values of finality cautioned against reopening closed cases and that Congress had only expressed its intent for the new penalties to apply in pending cases. *Id.* at 48, 53–56. This argument followed from the Attorney General's memorandum, where Attorney General Holder had argued that "Congress intended the [FSA] not only to 'restore fairness in federal cocaine sentencing policy' but to do so as expeditiously as possible and to all defendants sentenced on or after the enactment date." Holder Memorandum, *supra* note 26, at 2. Thus, the Government's brief did not advance new arguments or take positions distinct from the Attorney General's; it merely elaborated on the arguments already made by the Attorney General. Accordingly, the Court could have appropriately considered it when performing the *Skidmore* analysis.

presumption of validity.

Had it applied the rule proposed here, the Court would have then considered whether any one of the factors described above defeated the presumption of validity. The Court would have determined that there was voluminous empirical evidence for the Attorney General's view that the 100:1 ratio was unsound and should be immediately abandoned.<sup>112</sup> Next, the Court would have noted that the Attorney General's memorandum did constitute a change in Justice Department policy. However, when he issued his memorandum, the Attorney General himself had not yet addressed the specific issue. Moreover, the Attorney General's memorandum came after he had the opportunity to see how the statutory issues were playing out in practice, and to hear the public's responses to such events. Thus, to the extent that this factor counsels against deference, the Court would have concluded that it does not, standing alone, defeat the presumption. Finally, the Court would have noted that, although line prosecutors had taken the opposing view before the Attorney General spoke, the Attorney General himself had been unwavering in his belief that the FSA applied in all post-enactment cases. Ultimately, as evidenced by the fact that the actual *Dorsey* Court made the Government's legal argument its own, the Court would have concluded that the Attorney General's legal position was sound. Finding that no factor defeated the presumption of validity, the Court would have deferred to the Attorney General and concluded its analysis. Instead of leaving lower courts grappling with what "background principles" should inform their readings of sentencing provisions, the Court would have adopted and applied a straightforward deference rule.

#### IV. CONCLUSION

The obvious retort to this criticism of the Court's decision in *Dorsey* is, "what was the harm?" The Court ultimately made law the Administration's lenient, policy-oriented interpretation of the statute. In fact, the Court did so by following reasoning that was very similar to the Government's position. Perhaps the *Dorsey* Court applied

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112. In the memorandum, the Attorney General suggested that this evidence informed his position. See Holder Memorandum, *supra* note 26, at 1. In its brief, the Government specifically cited evidence proving that the old ratio had a discriminatory effect. See Brief for the United States, *supra* note 30, at 46 (explaining that, based on the evidence, the heightened sentencing standards affected offenders discriminatorily).

deference to the Attorney General without admitting that it was doing so. If that is the case, why demand that the Court make clear its implied legal analysis?

Fairness in federal sentencing law demands nothing less. It is less important that the *Dorsey* Court ultimately agreed with the Government than it is that, before it issued its opinion, there was a very real possibility that the Court would resolve *Dorsey* in such a way that a class of individuals would receive prison sentences significantly longer than either the Administration or Congress thought were appropriate. In a case where reasonable minds could and did argue about the relevant legal principles, such an outcome would have been a stark departure from the value of judicial modesty. The *Dorsey* Court's ultimately agreeing with the Government does not foreclose the possibility of this unjust and legally dubious outcome in future cases. The proposed rule, however, does. Without withdrawing from a sentencing court its ultimate power to impose a sentence, it would leave for the political branches the power to make sentencing policy.

The proposed rule would also give lower courts grappling with ambiguous sentencing provisions a method of resolving such ambiguities in a way that transcends any single case. Of course, sentencing courts would not be able to apply the proposed rule in every case involving an ambiguous sentencing provision. It is perhaps infrequent that the government and a defendant agree on how best to construe a sentencing provision. In the majority of cases, a sentencing court must resolve the disagreement between the government and a defendant by independently construing the provision. Developing generally applicable methods to assist a court in doing so is a task for another day. However, the proposed rule would add consistency and clarity in at least some cases.

Federal courts' dockets are crowded. The Bureau of Prisons's facilities are even more so. In cases like *Dorsey*, the Attorney General offers to alleviate both problems. He is willing to shoulder some of the work of statutory interpretation that usually is left to a court. More importantly, he will do so in a way that, consistent with Congress's decree, results in individuals entitled to lenient punishment being sentenced accordingly. When the stakes are so high and the issues so difficult, what reason can there be for not allowing the Attorney General to aid courts by providing his own statutory interpretations? Moreover, what reason can there be for incarcerating

a prisoner for longer than the politically accountable branches each believe is appropriate?