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Sentencing Commission Policy Power Faces Unusual Test on Appeal

By Holly Barker 2024-10-30T10:30:01000-04:00

- DOJ claims commission policy exceeds its statutory authority
- Former federal judge calls government's position 'grotesque'

A US Sentencing Commission policy statement that allows courts to consider nonretroactive changes to the law when weighing a criminal defendant's bid for compassionate release will be tested during oral arguments in the US Court of Appeals for the Sixth Circuit Thursday.

Federal prosecutors around the country have challenged the policy statement, which allows courts to consider a change in the law—other than nonretroactive changes to the guidelines manual—as an extraordinary and compelling reason allowing a sentence reduction.

Under the policy, courts must consider the defendant's individualized circumstances and can reduce a sentence only when the defendant received an "unusually long sentence," has served at least 10 years in prison, and there's a "gross disparity" between the sentence the defendant is serving and the sentence likely to be imposed now.

The Justice Department says the commission is effectively making nonretroactive laws retroactive.

But that's not what the policy does, said Doug Berman, an Ohio State University law professor who runs the Sentencing Law and Policy blog. Whether the law has changed is only one consideration.

Commission data shows that only a fraction of these motions are granted each year, he said. "There is every reason to think judges are doing a very good job of only addressing the most egregious cases when they cut sentences down," Berman said.

The government for years opposed petitions for US Supreme Court review that raised the issue, arguing that the commission instead should resolve the circuit split, said Andrew Graeve, a former federal public defender who is now in private practice. Now that it's unhappy with that resolution, the government is taking the "extraordinary" stance that the commission lacked the authority to do so, he

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said.

Questioning Authority

Debate over the commission's authority started not long after the Sentencing Reform Act created it in 1984 and continues today, said former federal district court Judge Nancy Gertner, now a senior lecturer at Harvard Law School. And *Loper Bright Enterprises v. Raimondo* , which overturned the Chevron doctrine, could reenergize it, she said.

The doctrine required courts to defer to agencies' reasonable interpretations of ambiguous laws.

The government says *Loper Bright* doesn't apply here because Congress explicitly delegated authority to the commission.

But Mark Allenbaugh, the founder and chief research officer of data analytics firm Sentencing Stats, reads the government's argument as effectively applying the decision.

The thrust is that courts shouldn't defer to the guidelines or commission policy statements, but must instead "independently interpret the statute," he said.

If the policy statement exceeds the commission's authority, Allenbaugh said he doesn't see how such a ruling doesn't infect the guidelines as a whole.

The DOJ and the US Attorney's Office for the Northern District of Ohio declined to comment.

Circuit Split

Shanna Rifkin, Deputy General Counsel with Families Against Mandatory Minimums, is most concerned that defendants in different states are playing by different rules until the circuit split is resolved.

The guidelines were intended to create predictability and uniformity in sentencing approaches.

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“It undermines everything we know about the purpose of the system,” she said.

Before the commission stepped in, five circuits—the Third, Sixth, Seventh, Eighth, and D.C.—said courts couldn’t consider a nonretroactive change in the law for purposes of compassionate release. Four circuits—the First, Fourth, Ninth, and Tenth—explicitly allowed judges to consider such changes, at least when examining a defendant’s overall circumstances.

The commission amended its policy statement describing “extraordinary and compelling” reasons for a sentence reduction in response to the First Step Act of 2018, an overdue move resulting from the commission lacking a quorum for several years.

The policy aimed to resolve the circuit split by allowing consideration of nonretroactive changes within a larger analysis. But DOJ has since taken the position that—despite an express delegation of authority—the policy exceeds the commission’s statutory power. In DOJ’s view, a change in law can never be “extraordinary” or “compelling.”

The agency also argues that the policy violates separation of powers because only Congress can establish minimum and maximum penalties for crimes.

The Seventh Circuit held oral argument on the topic in June, with the decision pending. The Fifth Circuit, meanwhile, tersely rejected the government’s position earlier this summer, but withheld the mandate while the full court considers a rehearing.

Gertner, an advocate for sentencing reform, called the government’s position “grotesque.”

These are defendants “challenging once-mandatory sentences that would never have been imposed today—serving multiples of the sentences they would receive now—and the government is saying an individual judge can’t assess that on a case-by-base basis,” he said

The cases are United States v. McHenry, 6th Cir., No. 24-03289, oral arguments scheduled 10/31/24 ; United States v. Orta, 6th Cir., No. 24-05182, oral arguments scheduled 10/31/24 ; United States v. Bricker , 6th Cir., No. 24-03286, oral arguments scheduled 10/31/24 .

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United States v. Bricker Docket

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