

Lawmaker prods court, raises brows

Demands longer term in Chicago drug case

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In an extraordinary move, the chairman of the House Judiciary Committee privately demanded last month that the 7th U.S. Circuit Court of Appeals in Chicago change its decision in a narcotics case because he didn't believe a drug courier got a harsh enough prison term.

Rep. James Sensenbrenner (R-Wis.), in a five-page letter dated June 23 to Chief Judge Joel Flaum, asserted that a June 16 decision by a three-judge appeals court panel was wrong.

He demanded "a prompt response" as to what steps Flaum would take "to rectify the panel's actions" in a case where a drug courier in a Chicago police corruption case received a 97-month prison sentence instead of the at least 120 months required by a drug-conspiracy statute.

"Despite the panel's unambiguous determination that the 97-month sentence was illegal, it appears to ... justify the sanctioning of both the illegal sentence and its own failure to [increase the sentence] by stating '[that the panel's decision] not to take a cross-appeal [ensures] that the [courier's] sentence cannot be increased.' The panel cites no authority for this bizarre proposition and I am aware of none," wrote Sensenbrenner, who cited a 1992 ruling as precedent for his argument that the longer prison term should have been imposed.

"I ask that all necessary and appropriate measures be taken, whether by members of the panel and/or by the other judges of the court, to ensure that the [1992] precedent ... is followed," said the congressman, who heads a committee with budgetary oversight of the judiciary.

Jay Apperson, the congressional counsel who brought the ruling to Sensenbrenner's attention, added: "We can't have judges violating the law."

Flaum declined comment on the situation, saying he does not publicly discuss matters pending before the court.

He sent a letter back to Sensenbrenner saying it was inappropriate to comment on a pending case. But the panel amended its ruling to cite a Supreme Court case that showed Sensenbrenner was wrong.

Apperson, who is chief counsel of a House Judiciary subcommittee, argues that Sensenbrenner is simply exercising his judicial oversight responsibilities. But some legal experts believe the action by the Judiciary Committee chairman, who is an attorney, is a violation of House ethics rules, which prohibit communicating privately with judges on legal matters, as well as court rules that bar such contact with judges without contacting all parties.

Further, the letter may be an intrusion on the Constitution's separation-of-powers doctrine, or, at least, the latest encroachment by Congress upon the judiciary,

analysts said.

'Completely inappropriate'

David Zlotnick, a law professor at Roger Williams University in Rhode Island and an expert on federal sentencing law, said, "I think it's completely inappropriate for a congressman to send a letter to a court telling them to change a ruling."

However, Stanley Brand, a Washington, D.C., attorney and former House counsel, said: "I don't think it's appropriate, but I don't know if it rises to the level of an ethical violation. It's unseemly. It's not something members ought to do, but they do it. . . . The context is troubling."

Sensenbrenner's letter is the latest example of a threat leveled by congressmen unhappy with court decisions, particularly controversial ones such as those in the Terri Schiavo case. Some Republicans in Congress sharply criticized judges for not acting to save the brain-damaged Florida woman, whose parents sought in court to have her feeding tube reinserted despite her husband's wish to let her die.

"This loss happened because our legal system did not protect the people who need protection most, and that will change," House Majority Leader Tom DeLay (R-Texas) said after Schiavo died March 31. "The time will come for the men responsible for this to answer for their behavior."

In May, during a speech at Stanford University, Sensenbrenner said his committee was considering the creation of an office of inspector general to oversee the federal judiciary.

"I do not believe that creating an IG for the judiciary will violate the separation-of-powers doctrine that promotes the independence of the three branches of government," he said.

Sen. Dick Durbin (D-Ill.), a member of the Senate Judiciary Committee, called Sensenbrenner's letter part of a series of threatening actions by Republican House leaders aimed at the federal judiciary, according to Durbin spokesman Joe Shoemaker.

"This is part of a broader and very disturbing pattern that goes to the heart of the separation of powers," Shoemaker said.

But Sen. John Cornyn (R-Texas) took the Senate floor in April to criticize a Supreme Court ruling in a death penalty case and suggested that recent incidents of courthouse violence may be the result of anger over judges' decisions.

Cornyn, a former Texas Supreme Court justice and also a member of the Senate Judiciary Committee said, "I don't know if there is a cause-and-effect connection, but we have seen some recent episodes of courthouse violence. . . . And I wonder whether there may be some connection between the perception in some quarters, on some occasions, where judges are making political decisions yet are unaccountable to the public."

A spokesman for Sensenbrenner said he would not comment on his letter to the appellate judge. "The letter speaks for itself," said Thomas Schreiber, the

congressman's chief of staff.

Apperson, who is chief counsel of the House Judiciary Subcommittee on Crime, Terrorism and Homeland Security, insisted the request for the court to change its ruling was "appropriate. . . . This is the committee with oversight of the judiciary-- that's exactly what we are supposed to do."

At issue was the court's decision to uphold a 97-month prison term for Lissett Rivera, who was convicted for her role as a courier in a drug ring headed by former Chicago Police Officer Joseph Miedzianowski.

Sensenbrenner said in his letter to Flaum that federal law required the sentence to be 120 months.

Contrary to court rules, Sensenbrenner's letter was not sent to Rivera's appellate attorney, Steve Shobat, who received a copy only after the letter was placed in the official court file.

"To try to influence a pending case is totally inappropriate," Shobat said. "My client had a very small role in this case, and to think that she is the focus of the head of the House Judiciary Committee? It is intimidating."

Law professor Zlotnick echoed Shobat, saying, "To try to influence a court ruling is entirely inappropriate, particularly in an ex parte [without notifying all parties] proceeding. They are trying to intimidate the judiciary."

Rivera was convicted, along with other defendants, of participating in a conspiracy to distribute more than 5 kilograms of cocaine--a charge that carries a mandatory minimum sentence of 120 months in prison. Miedzianowski and more than 20 others, including street gang leaders, were convicted of taking part in the distribution of 350 kilograms of cocaine.

Evidence at the trial showed that Rivera, who had no criminal record, was personally involved in handling less than 5 kilograms.

Precedent for lesser sentence

At sentencing, U.S. District Judge Blanche Manning imposed the 97-month term, citing a 1993 court ruling that allowed that the drug quantity that relates to an individual be taken into account in imposing a sentence less than the minimum required.

At the time, federal prosecutor Brian Netols told Manning, "I think that would be the appropriate sentence."

Shobat appealed, contending the sentence still was too high. The U.S. attorney's office did not appeal the sentence as a violation of the 120-month minimum.

The three-judge panel on the case, Frank Easterbrook, Ilana Diamond Rovner and Diane Wood, issued its opinion, written by Easterbrook, stating that the sentence should have been 120 months.

"By deciding not to [challenge the 97-month sentence], the United States has

ensured that Rivera's sentence cannot be increased," the opinion states.

Apperson said the committee learned of the decision after being contacted the day of the ruling by "a citizen who I assume had seen it on the court's Web site."

After Sensenbrenner's letter was placed in the court file, the three-judge panel issued a revised final paragraph of its decision that added a citation explaining why it was not legal to change Rivera's sentence and why the precedent cited by Sensenbrenner was wrong.

Sensenbrenner also wrote a letter to Atty. Gen. Alberto Gonzales, demanding that the decision be appealed further and that he investigate why the U.S. attorney's office in Chicago did not appeal Rivera's sentence.

Bryan Sierra, a spokesman for the Justice Department, said Sensenbrenner's letter was being reviewed.

Randall Samborn, a spokesman for U.S. Atty. Patrick Fitzgerald, declined to comment.

The deadline for filing a petition requesting a rehearing on the appellate decision passed without any motions filed, according to the court record.

Charles Geyh, a professor at Indiana University School of Law, in Bloomington, Ind., said, "This is contrary to the judicial system. Proceedings are initiated by parties."

Geyh, an expert on separation of powers and author of a forthcoming book titled "When Courts and Congress Collide," said, "The federal judiciary has a lot less clout and a lot less power when it comes to control of its budget, and when you have someone like Mr. Sensenbrenner--this is a thinly veiled attempt to exercise control over judges and their decisions."

He added: "The way to resolve matters in the courts is that the losing party appeals. This hybrid . . . of in the middle of litigation having someone rattle a saber--this is potentially dangerous to the process."

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