Nos. 87-1904 and 87-7028

In the Supreme Court of the United States

OCTOBER TERM, 1988

UNITED STATES OF AMERICA, PETITIONER

v.

JOHN M. MISTRETTA, RESPONDENT

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v.

UNITED STATES OF AMERICA, RESPONDENT

On Writ of Certiorari Before Judgment to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR JOSEPH E. DiGENOVA, KENNETH R. FEINBERG, MARVIN E. FRANKEL, GEDNEY M. HOWE, III, TOMMASO D. RENDINO, HAROLD R. TYLER, AND WILLIAM F. WELD AS AMICI CURIAE IN SUPPORT OF AFFIRMANCE

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QUESTION PRESENTED

Whether the Sentencing Reform Act of 1984, which established the United States Sentencing Commission as an independent agency in the judicial branch with authority to promulgate guidelines governing the sentencing of federal criminal offenders, violates constitutional principles of separation of powers.

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INTEREST OF THE AMICI CURIAE

Amici curiae are individuals who were actively involved in the evolution of the federal sentencing reform effort in Congress that led to the passage of the Sentencing Reform Act of 1984. At the invitation of the Sentencing Commission, *amici* participated, through public hearings and working groups, in the Commission's open,

broadly-inclusive process of developing sentencing guidelines. Thus, *amici* are knowledgeable about the manner in which the Commission conducted its mission pursuant to the Act. *Amici* believe that a proper understanding of the historical development of the legislation establishing the Commission, and of its initial implementation by the Commission, is important to the Court's resolution of the constitutional issues presented in this case.

Amici curiae and their specific association with the work of the Commission are as follows: (1) Joseph E. DiGenova, former United States Attorney and member of the prosecutors working group; (2) Kenneth R. Feinberg, former Special Counsel to the Senate Committee on the Judiciary and one of the principal authors of the legislation establishing the Commission; (3) Marvin E. Frankel, former United States District Judge and the leading judicial spokesman for the need for sentencing reform; (4) Gedney M. Howe, III, member of the defense attorneys working group; (5) Tommaso D. Rendino, United States Probation Officer, President, Federal Probation Officers Association and member of the probation officers working group; (6) Harold R. Tyler, former United States District Judge and Deputy Attorney General; (7) William F. Weld, former Assistant Attorney General and member of the Department of Justice working group.

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court stated in *Ex Parte United States*, 242 U.S. 27, 42 (1916), that it is "indisputable" that "the authority to define and fix the punishment for crime is legislative," that Congress has the power "to bring within judicial discretion for the purpose of executing the statute elements of consideration which would otherwise be beyond the scope of judicial authority," and that "the right to relieve from the punishment fixed by law * * * belongs to the executive department." The issue in this

case is whether Congress may create a commission in the judicial branch, composed of both judges and non-judges, to channel the "judicial discretion" previously exercised in imposing sentence on persons convicted of federal offenses. We fully agree with the *amicus curiae* brief filed by the Sentencing Commission that Congress acted well within its authority under the Necessary and Proper Clause when it enacted the Sentencing Reform Act of 1984.

The constitutionality of the current sentencing system cannot be assessed, however, without an appreciation of Congress's historical allocation of sentencing-related powers and the particular circumstances that led Congress to enact the Sentencing Reform Act—*i.e.*, the substantial disparities, inconsistencies and uncertainties in federal sentencing policy and practices that raised questions of fundamental fairness and threatened to bring the criminal justice system into disrepute. These problems, which had defied every other remedial approach, led Congress to conclude that delegation to a permanent, expert sentencing commission was the most effective and, perhaps, the only workable means of accomplishing these reforms.

Part A of this brief shows that Congress has historically delegated certain decisions regarding sentencing—by which we mean the determination of the length and content of the sentences actually served by federal offenders—to both the executive and judicial branches of government. Part B sets out the salient defects Congress found in the prior federal sentencing system of indeterminate sentences whose actual duration depended on the combined, largely unfettered, discretion of district judges and the Parole Commission. These defects included a lack of coherent sentencing principles, unwarranted sentencing disparities, and pervasive uncertainty as to the actual length of sentences. The persistent and serious nature of these problems eventually convinced Congress—after more than a decade of debate and numerous false

starts—to create a specialized sentencing commission and to delegate the evolutionary task of drafting guidelines to that permanent expert body.

Part C shows that Congress itself made the basic structural and substantive decisions with respect to the overhaul of the federal sentencing system and provided the newly-created Sentencing Commission with detailed guidance as to the scope and form of the guidelines and the factors that should inform their development. Part D describes the manner in which the Commission developed the guidelines, with particular reference to the influence of congressional directives on the Commission's decision-making. Part E explains that attaining meaningful sentencing reform depends upon the guidelines being evolutionary and that a permanent and independent sentencing commission is critical to an evolving set of guidelines.

ARGUMENT

CONGRESS ACTED WITHIN ITS CONSTITUTIONAL POWERS IN ESTABLISHING AN INDEPENDENT COMMISSION TO ELIMINATE SENTENCING DISPARITY AND PROMOTE CERTAINTY OF PUNISHMENT.

A. The History Of Federal Sentencing Practices Illustrates That Congress's Delegation Of Authority To The Commission Was Proper.

The modern approach to federal sentencing has presupposed broad grants of sentencing discretion by Congress to both the executive and the judiciary. Although this Court has long recognized that the power "to define a crime, and ordain its punishment" is vested in the legislature, *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820), the Constitution does not require that Congress impose a mandatory, fixed sentence for every federal offense. Throughout this century, Congress has repeatedly allocated and reallocated portions of its power to ordain punishment to the other branches of government.

In 1910, Congress created the United States Parole Board as an agency in the executive branch "to administer the parole system as a part of the program to rehabilitate federal prisoners and restore them to useful membership in society." *Hyser v. Reed*, 318 F.2d 225, 233 (D.C. Cir.) (en banc) (Burger, J.), *cert. denied*, 375 U.S. 957 (1963). Fifteen years later, Congress gave the judiciary specific discretionary powers over sentencing when it passed the Federal Probation Act of 1925, 43 Stat. 1259. Prior to the passage of the Probation Act, federal courts lacked authority to place an offender on probation or otherwise suspend a sentence. *See Ex parte United States*, *supra*. The Probation Act authorized federal judges to place a defendant on probation if doing so would serve "the ends of justice and the best interest of the public, as well as the defendant." *Burns v. United States*, 287 U.S. 216, 220 (1932). The Probation Act created "an exceptional degree of flexibility in administration" in order to facilitate "comprehensive consideration of the particular situation of each offender which would be possible only in the exercise of a broad discretion." *Id.* It authorized probation for all offenses except those punishable by death or life imprisonment and gave sentencing judges discretion to suspend even where Congress had legislated a minimum sentence (unless Congress expressly provided otherwise). *Rodriguez v. United States*, 480 U.S. 522 (1987).

Until the passage of the Sentencing Reform Act in 1984, however, Congress imposed virtually no enforceable limitation on the "unfettered sentencing discretion of federal district judges." *Dorszynski v. United States*, 418 U.S. 424, 437 (1974). *See* Kadish, *Legal Norm and Discretion in the Police and Sentencing Processes*, 75 Harv. L. Rev. 904, 916 (1962) (in the United States, the discretion of the sentencing judge is "virtually free of substantive control or guidance"). The absence of any standards to guide district judges' sentencing discretion, together with the virtual unreviewability of sentences, as

long as they were within statutory limits, created the risk that this broad discretion would result in "capricious and arbitrary sentences." *United States v. Grayson*, 438 U.S. 41, 48 (1978).

An early initiative to bring some order to federal sentencing was taken by the United States Parole Board when it adopted detailed Parole Release Guidelines for adult prisoners in 1973. 38 Fed. Reg. 31942 (1973). The guidelines established "a 'customary range' of confinement for various classes of offenders," using a "matrix" that combined "a 'parole prognosis' score (based on the prisoner's age at first conviction, employment background, and other personal factors) and an 'offense severity' rating, to yield the 'customary' time to be served in prison." *United States Parole Commission v. Geraghty*, 445 U.S. 388, 391 (1980). The Parole Board's guidelines served, indirectly, as a check on judicial sentencing discretion, at least with respect to sentences of imprisonment that the court did not suspend by granting probation.

The Parole Board's authority for this initiative was uncertain until 1976 when Congress enacted the Parole Commission and Reorganization Act ("PCRA"), 90 Stat. 219 (1976), which "provided the first legislative authorization for parole release guidelines." *United States Parole Commission* v. *Geraghty*, 445 U.S. at 391. The PCRA replaced the Parole Board with a newly created Parole Commission—"established * * * as an independent agency in the Department of Justice" (90 Stat. 219-20)—and required the Parole Commission to promulgate guidelines for granting or denying parole to eligible prisoners. 90 Stat. 220-21. The PCRA preserved the previously established division of sentencing responsibility among the three branches, leaving "the extent of a federal prisoner's confinement * * * initially [to be] determined by the sentencing judge, who selects a term within an often broad, congressionally prescribed range; release on pa-

role is then available on review by the United States Parole Commission, which, as a general rule, may conditionally release a prisoner any time after he serves one-third of the judicially fixed term." *Grayson*, 438 U.S. at 47.

Statutory and constitutional challenges to the PCRA and the parole guidelines focused on the extent to which the district judges' imposition of sentence constrained the discretion of the Parole Commission. In *Addonizio v. United States*, 573 F.2d 147, 150 (3d Cir. 1978), the Third Circuit held that "resentencing is required in a [28 U.S.C.] § 2255 proceeding where implementation of the Parole Commission's guidelines frustrated the sentencing judge's probable expectations in the imposition of a sentence * * *" Shortly thereafter, in *Geraghty v. United States*, 579 F.2d 238 (3d Cir. 1978), the Third Circuit stated that, because the parole guidelines focused primarily on "the very factors that are available to the sentencing judge," "serious questions are raised whether the constitutional protections provided by an independent judiciary are being undermined." 579 F.2d at 261.

This Court granted certiorari in both *Addonizio* and *Geraghty*. In *Geraghty*, the Court did not reach the separation-of-powers issues, confining itself to ruling on issues of class certification and mootness, and remanding the case for further proceedings. 445 U.S. 388 (1980). In *United States v. Addonizio*, 442 U.S. 178 (1979), however, the Court (again without addressing the constitutional question) flatly rejected the Third Circuit's approach:

> The decision as to when a lawfully sentenced defendant shall actually be released has been committed by Congress, with certain limitations, to the discretion of the Parole Commission. Whether wisely or not, Congress has decided that the Commission is in the best position to determine when release is appropriate, and in doing so, to moderate the dispari-

> ties in the sentencing practices of individual judges. The authority of sentencing judges to select precise release dates is, by contrast, narrowly limited: the judge may select an early parole eligibility date, but that guarantees only that the defendant will be considered at that time by the Parole Commission.

442 U.S. at 188-89 (Footnotes omitted).

After the decision in *Addonizio*, the courts of appeals uniformly rejected claims that the PCRA, construed as authorizing the parole guidelines, was "unconstitutional as an impermissible delegation of a judicial function or a standardless delegation of a legislative function." *Geraghty v. United States Parole Commission*, 719 F.2d 1199, 1208 (1983), *cert. denied*, 465 U.S. 1103 (1984). See also *Artez v. Mulcrone*, 673 F.2d 1169 (10th Cir. 1982); *Page v. United States Parole Commission*, 651 F.2d 1083 (5th Cir. 1981); *Moore v. Nelson*, 611 F.2d 434 (2d Cir. 1979).

B. The Federal Sentencing System Based On The Outmoded Rehabilitation Model Led To Arbitrary and Indefensible Distinctions In Criminal Sentences.

Although Congress's delegations of its power to ordain punishment have been consistently upheld as permissible and compatible with separation of powers principles, over time Congress became profoundly dissatisfied with the quality of justice that resulted from these delegations. *See* S. Rep. No. 98-225, 98th Cong., 1st Sess. 37 (1983). As viewed by Congress, federal sentencing was "in desperate need of reform", S. Rep. No. 96-553, 96th Cong., 2d Sess. 912 (1979), because of two overriding problems: the absence of guidelines to channel judges' sentencing discretion, S. Rep. No. 96-225, *supra*, at 38, and the division of sentencing authority between the courts and the Parole Commission, which promoted uncertainty in the length of sentences actually served by convicted offenders. S. Rep. No. 98-225, *supra*, at 46-47.

By the 1970s, there was growing evidence before Congress that the separate and uncoordinated grants of wide discretion to individual judges and the Parole Commission had failed dramatically. Studies of correctional treatment programs repeatedly demonstrated their ineffectiveness in reducing recidivism and led Congress to conclude that both sentencing judges and parole officials "know too little about human behavior to be able to rehabilitate individuals on a routine basis or even to determine whether or when a particular prisoner has been rehabilitated." S. Rep. No. 98-225, *supra*, at 40.

Even worse, since district judges held widely varying views on the purposes of sentencing and the wisdom of the rehabilitation model, and were given virtually no guidance on how to select an appropriate sentence, there was an inevitable disparity in the sentences imposed on similarly situated defendants. Studies showed wide disparities among districts and circuits. *See* P. O'Donnell, M. Churgin & D. Curtis, *Toward a Just and Effective Sentencing System* 5, Table 1 (1977). For example, in 1974 the average federal sentence for bank robbery was 11 years, but in the Northern District of Illinois it was only five and one-half years. S. Rep. No. 98-225, *supra*, at 41. Similarly, "[t]he range in average sentences for forgery [ran] from 30 months in the Third Circuit to 82 months in the District of Columbia. For interstate transportation of stolen motor vehicles, the extremes in average sentences [were] 22 months in the First Circuit and 42 months in the Tenth Circuit." Seymour, *1972 Sentencing Study for the Southern District of New York*, 45 N.Y.S. B.J. 1-3, reprinted in 119 Cong. Rec. 6060 (1973).

Moreover, and more troubling, the evidence showed that there were major distinctions among individual judges and offenses even *within* a single district or circuit. In 1974, 50 federal district judges within the Second Circuit were given 20 identical presentence reports

drawn from actual cases and were asked to indicate the sentence that they would impose on the defendant. "The variations in the judges' proposed sentences in each case weer astounding." S. Rep. No. 98-225, *supra*, at 41. In one extortion case, for example, the sentences ranged from 20 years imprisonment and a $65,000 fine to three years imprisonment and no fine. A. Partridge & W. Eldridge, *The Second Circuit Sentencing Study: A Report to the Judges* 5 (1974). Experienced judges were no more of one mind that those recently appointed to the bench. *Id.* at 34-35. And the problem was not merely one of "tough" and "lenient" judges; even the same judge gave sentences that were much longer than average in one case and much shorter than average in another. *Id.* at 36-40. These findings of wide, unexplained disparities in sentencing were confirmed by numerous other studies. *See, e.g.*, Yankelovich, Skelly & White, *Federal Sentencing: Toward a More Explicit Policy of Criminal Sanctions*, Exhibit III (1981); Diamond & Zeisel, *Sentencing Councils: A Study of Sentence Disparity and its Reduction*, 43 U. Chi. L. Rev. 109 (1975); *Seminar and Institute on Disparity of Sentences for Sixth, Seventh and Eighth Judicial Circuits, Highland Park, Illinois, 1961*, 30 F.R.D. 401 (1962).

The pervasive, unwarranted disparities in the length and severity of federal sentences caused knowledgeable commentators to conclude that something was seriously wrong. Professor Davis remarked:

> The power of judges to sentence criminal defendants is one of the best examples of unstructured discretionary power than can and should be structured. The degree of disparity from one judge to another is widely regarded as a disgrace to the legal system. All the elements of structuring are needed—open plans, policy statements and rules, findings and reasons, and open precedents.

K. Davis, *Discretionary Justice: A Preliminary Inquiry* 133 (1969). Similarly, Judge Frankel argued that the

federal system of indeterminate sentences, of "individualized" justice, was really one of lawless discretion, with no agreement on the purposes of sentencing or even the criteria to be considered or the weight to be given to such criteria:

> The evidence is conclusive that judges of widely varying attitudes on sentencing, administering statutes that confer huge measures of discretion, mete out widely divergent sentences where the divergencies are explainable only by the variations among the judges, not by material differences in the defendants or their crimes. * * * The disparities, if they are no longer astonishing, are horrible.

M. Frankel, *Criminal Sentences: Law Without Order* 21 (1972). *See also* A.B.A. Project on Minimal Standards for Criminal Justice, *Standards Relating to Appellate Review of Sentences* 1-2 (1968) ("in no other area of our law does one man exercise such unrestricted power. No other country in the free world permits this condition to exist"); Report of the Twentieth Century Fund Task Force on Criminal Sentencing, *Fair and Certain Punishment* 12-13 (1976) (criticizing sentencing practices on the ground that there are "few if any rules, standards, or guidelines * * * to guide the exercise of judicial and administrative sentencing discretion"). In sum, the federal sentencing system was truly "a wasteland in the law." Frankel, *Lawlessness in Sentencing*, 41 U. Cinn. L. Rev. 1, 54 (1972).

Compounding the problem of sentencing disparity was the fact that sentencing authority was divided between the federal courts and the Parole Commission. It became increasingly clear that the courts and the Parole Commission often worked at cross purposes in the sentencing of convicted criminal offenders. S. Rep. No. 96-553, *supra*, at 915. The sentencing judge would sentence a convicted offender to a term of imprisonment, but federal law permitted the offender's early release by the Parole Commission.

Congress was well aware of these criticisms of the federal sentencing system. Indeed, the first legislative effort to address the lack of uniformity in federal sentencing came three decades ago, in 1958, when Congress, adopting a recommendation of the Judicial Conference of the United States, authorized the creation of sentencing institutes and joint councils to formulate advisory "objectives, policies, standards, and criteria for sentencing" "[i]n the interest of uniformity in sentencing procedures." Pub. L. No. 85-752, 72 Stat. 845 (1958), 28 U.S.C. § 334(a) (1964). The legislation reffected Congress's concern with "the existence of widespread disparities in the sentences imposed by Federal courts * * * in different parts of the country, between adjoining districts, and even in the same district." H.R. Rep. No. 1946, 85th Cong., 2d Sess. 6 (1958).

Few districts accepted Congress's invitation to form sentencing councils. Only four councils were in operation by 1975. *See* Diamond & Zeisel, *supra*, at 117. Moreover, because the sentencing institutes and councils were purely advisory, their influence was limited. "For the most part the judges tend to record their differences, reassure each other of their independence, and go home to do their disparate things as before." Frankel, *supra*, 41 U. Cinn. L. Rev. at 20. Those councils that did exist were able to eliminate only about one-tenth of existing sentence disparities. Diamond & Zeisel, *supra*, at 147.

In light of this experience, many observers believed that the problem could not be solved without sentencing guidelines to control judicial discretion. The sentencing commission approach, originally conceived by Judge Frankel, gained wide support among judges and, eventually, the American Bar Association. *See, e.g.*, Frankel, *Criminal Sentences*, *supra*, at 111-123; Tyler, *Sentencing Guidelines: Control of Discretion in Federal Sentencing*, 7 Hofstra L. Rev. 11 (1978); Newman, *A*

Better Way to Sentence Criminals, 63 A.B.A.J. 1563, 1566 (1977); *A.B.A. Standards for Criminal Justice*, Standards 18-3.1 to 18-3.5 (2d ed. 1980). In addition, several studies proved the feasibility of sentencing guidelines. *See* L. Wilkins, J. Kress, D. Gottfredson, J. Caplin & A. Gelman, *Sentencing Guidelines: Structuring Judicial Discretion* (1978); P. O'Donnell, M. Churgin & D. Curtis, *supra*.

Similarly, despite adoption of the PCRA, a bipartisan consensus began to emerge in Congress that reforming the Parole Commission's functions was mere tinkering and would not adequately address the fundamental problems of sentencing disparity and uncertainty. Instead, it was decided that the division of sentencing authority should be abolished and that the sentencing function should be consolidated in the sentencing court. In this way, indeterminate sentencing—with the ultimate prisoner release date determined by the Parole Commission—would be replaced by a new system of determinate sentencing, with the sentencing function resting with the sentencing judge. *See* S. Rep. No. 96-553, *supra*, at 922-932; S. Rep. No. 98-225, *supra*, at 59-60.

Perhaps the most important antecedent and greatest impetus to the eventual passage of the Sentencing Reform Act was Congress's protracted effort to enact comprehensive federal criminal code reform. *See* S. Rep. No. 96-553, *supra*, at 1, 37. Beginning with consideration of the 1971 Final Report of the National Commission on Reform of Federal Criminal Laws, and through almost a decade of extensive hearings and debates, Congress attempted to eliminate the systemic problems of sentencing disparities and uncertainty through statutory amendment of individual criminal laws. This massive undertaking included attempts to standardize countless definitions, simplify elements of scienter and, above all, fundamentally to reorganize federal criminal law through a coherent and comprehensive classification of offenses according to simi-

larity of conduct and the relative seriousness of the offense. As the Senate Report noted:

> The sentencing structure of present Federal criminal law * * * cannot escape criticism. Indeed, it is riddled with irrationality and inconsistency. In title 18 alone, there are no fewer than seventeen different maximum terms, apart from the death penalty, and fourteen different fine levels. Only occasionally, as if by accident, are fines related to the amount of injury inflicted or gain realized by the offender, and then the ratio of fine to amount involved may be one-to-one, or three-to-one. Grading of offenses is also erratic. Similar conduct is often treated with gross disparity. For example, robbery of a Federally insured bank carries a maximum term of 20 years while robbery of a Post Office carries a 10 year maximum sentence. In plain terms the present penalty structure offends the precept of equity before the law.

S. Rep. No. 96-553, *supra*, at 5; *see also* S. Rep. No. 98-225, *supra*, at 39-40; *Reform of the Federal Criminal Laws: Hearings on S. 1437 Before the Subcommittee on Criminal Laws and Procedure of the Senate Committee on the Judiciary*, 95th Cong., 1st Sess. (1977).

Congress ultimately abandoned its attempt to effect a comprehensive overhaul of the entire federal criminal code, but its efforts to reform sentencing practices continued. Having given years of legislative consideration to the question, Congress concluded that the task of bringing uniformity and consistency to the federal sentencing system could best be accomplished by delegating a portion of its power to determine appropriate punishment to a commission of highly qualified experts in the sentencing and corrections field. Congress correctly foresaw that writing sentencing guidelines and, indeed, the larger task of sentencing reform would be an evolutionary process requiring continuous review, and it therefore designed a commission "to encourage the constant refinement of sentenc-

ing policies and practices as more is learned about the effectiveness of different approaches." S. Rep. No. 98-225, *supra*, at 161. The need for an ongoing process of guideline revision, combined with Congress's recognition of its own institutional limitations in directly undertaking such a task, led Congress to assign these responsibilities to a specialized body created expressly for that purpose. *See* S. Rep. No. 96-553, *supra*, at 931 (footnote omitted):

> Some have questioned the idea of a Commission promulgating the guidelines rather than the Congress. These critics view the Commission idea as an abdication of Congressional responsibility. The Committee, however, views the Commission as a major asset of the bill. Congress historically has delegated authority to a host of administrative agencies where the task involves complex issues requiring continuous monitoring and fine tuning by experts in the field. The Committee believes the creation of sentencing guidelines contemplated under this bill similarly requires expert attention.

Congress placed this specialized body in the judicial branch because of its "strong feeling that, even under this legislation, sentencing should remain a judicial function." *Id.* at 1229.

In sum, the history of federal sentencing is characterized by broad congressional delegations of certain powers to the federal judiciary and to the judicial branch, and by a series of congressional efforts to confront the problems of sentencing disparity and uncertainty. After trying and reviewing a number of suggested remedies, including sentencing institutes and recodification of the entire criminal code, Congress concluded that the persistence and urgency of the problems could be satisfactorily addressed only through the creation of a specialized commission ("a major asset") with an ongoing mission—that of creating, monitoring and constantly revising a system of determinate sentencing guidelines.

C. The Sentencing Reform Act Of 1984 Provided The Sentencing Commission With Detailed Guidance In Promulgating Sentencing Guidelines Designed To Eliminate Disparities And Uncertainties In The Sentencing Of Federal Criminal Offenders.

Congress's principal concerns in enacting the Sentencing Reform Act were the elimination of unwarranted disparities while establishing proportionality and certainty in sentencing. S. Rep. No. 98-225, *supra*, at 52. The prior regime of indeterminate sentencing had produced widely different sentences for similar offenders convicted of similar offenses. Accordingly, the new sentencing system was "intended to treat all classes of offenses committed by all categories of offenders consistently." *Id.* at 51.

Congress sought to achieve these purposes by requiring the Sentencing Commission to promulgate a system of sentencing guidelines that would take account of the relevant facts and circumstances of the particular offense as well as the particular criminal history and other background information concerning that offender. *See* 28 U.S.C. § 994(b)(1). "The purpose of the sentencing guidelines is to provide a structure for evaluating the fairness and appropriateness of the sentence for an individual offender." S. Rep. No. 98-225, *supra*, at 52-53. Overall, the objective was to develop a complete set of guidelines that covered "in one manner or another all important variations that commonly may be expected in criminal cases, and that reliably breaks cases into their relevant components and assures consistent and fair results." *Id.* at 168. By requiring that "a comprehensive examination of the characteristics of the particular offense and the particular offender" occur prior to sentencing, Congress thought that the guidelines would increase "the individualization of sentences as compared to current law." *Id.* at 53.

Congress also intended that the Commission create "numerous" sentencing ranges within the guidelines.

Each range would "describ[e] a somewhat different combination of offender characteristics and offense circumstances * * * [reflecting various] aggravating and mitigating circumstances" for any given offense. S. Rep. No. 98-225, *supra*, at 168. While under 28 U.S.C. § 994 (b) (2) no individual guideline range may vary by more than 25% between its minimum and maximum terms of imprisonment, Congress expected that the ranges would "cover the spectrum from no, or little, imprisonment to the statutory maximum, or close to it, for the applicable class of offense." *Ibid.*

As the Senate Report observed, the Sentencing Reform Act "contains a comprehensive statement of the Federal law of sentencing. It outlines in one place the purposes of sentencing, describes in detail the kind of sentences that may be imposed to carry out these purposes, and prescribes the factors that should be considered in determining the kind of sentence to impose in a particular case." S. Rep. No. 98-225, *supra*, at 50.

To begin with, Congress itself set forth the purposes of criminal punishment in the federal system. 18 U.S.C. § 3553(a) (2). While some commentators had argued that sentencing should principally be determined on the basis of "just deserts," and others had urged that considerations of "crime control" be given primacy, the Act "rejected a single doctrinal approach in favor of one that would attempt to balance all the objectives of sentencing." U.S. Sentencing Commission, *Supplemental Report on the Initial Sentencing Guidelines and Policy Statement* 16 (1987) (*"Supplementary Report"*). The guidelines reflect this legislative judgment.

In addition to stating these guiding premises, the Act charged the Sentencing Commission with promulgating sentencing guidelines that "provide certainty and fairness in meeting the purposes of sentencing," while "avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct" and "maintaining sufficient flexibility to permit individualized sentences" in appropriate

cases. 28 U.S.C. § 991(b)(1)(B). Thus, Congress both specified the general purposes that should inform the sentencing guidelines and established "two factors—the prior records of offenders and the criminal conduct for which they are to be sentenced—as the principal determinants of whether two offenders' cases are so similar that a difference between their sentences should be avoided unless it is warranted by other factors." S. Rep. No. 98-225, *supra*, at 161. The Commission was further required to revise the guidelines periodically to take into account advances in "knowledge of human behavior as it relates to the criminal justice process." 28 U.S.C. § 991(b)(1)(C).

The Act also spelled out in some detail the matters to which the guidelines apply and the form the guidelines must take. The guidelines must address four types of sentencing determinations to be made by federal judges: (1) whether to impose a sentence of probation, a fine, or imprisonment; (2) what size fine or what term of probation or imprisonment to impose; (3) whether imprisonment should be followed by supervised release, and if so for what term; and (4) whether multiple sentences should run concurrently or consecutively. 28 U.S.C. § 994(a)(1). In promulgating such guidelines, the Commission was required to categorize offenses and defendants and to establish a sentencing range "for each category of offense involving each category of defendant." 28 U.S.C. § 994(b)(1). This range must be "consistent with all pertinent provisions of title 18," and, in the case of a sentence of imprisonment, may vary by no more than 25% or 6 months from the maximum to the minimum. 28 U.S.C. § 994(b)(1), (2). Congress thus itself decided (and insured that the Commission would carry out its decision) that the federal sentencing system should consist of determinate sentences within a narrow range, thereby alleviating the inequality and uncertainty that were the most mischievous features of the prior law.

Moreover, in establishing categories of offenses, the Commission must decide how much (if any) weight to give to seven enumerated factors. These factors include the grade of the offense, the mitigating or aggravating circumstances, the harm caused by the offense, the community's view of the gravity of the offense, the public concern the offense generated, the deterrent effect a particular sentence may have on the commission of the offense by others, and the current incidence of the offense. 28 U.S.C. § 994(c). And in establishing categories of defendants for use in the guidelines and policy statements, the Commission must decide how much (if any) weight to give to eleven enumerated factors. These factors include the defendant's age, education, vocational skill, mental and emotional condition, physical condition, employment record, family ties and responsibilities, community ties, role in the offense, criminal history, and degree of dependence on crime for his livelihood. 28 U.S.C. § 994(d).

The Commission's discretion is further constrained by a number of additional directives in the Act. 28 U.S.C. § 994(e)-(n). Some of these directives require the Commission to ensure that certain factors, such as "the race, sex, national origin, creed, and socioeconomic status of offenders," are given no weight in the guidelines. 28 U.S.C. § 994(d). Some directives require the Commission to give special weight to a particular factor or circumstance: for example, the guidelines must specify a term of imprisonment at or near the maximum for adult offenders who have been convicted of a third violent felony. 28 U.S.C. § 994(h). Other directives require the Commission to discount the significance of a particular factor or circumstance: for example, in recommending imprisonment or the length of imprisonment, the guidelines must "reflect the general inappropriateness of considering the education, vocational skills, employment record, family ties and responsibilities, and community ties of the defendant." 28 U.S.C. § 994(e). And yet others require the Commission to ensure that the guidelines pre-

vent "a term of imprisonment for the purpose of rehabilitating the defendant or providing the defendant with needed educational or vocational training, medical care, or other correctional treatment." 28 U.S.C. § 994(k).

None of this legislative guidance, extensive as it is, negates the substantial powers and responsibilities vested in the Commission by Congress. S. Rep. No. 98-225, *supra*, at 160. But it is clear that Congress went to considerable lengths to make certain that the guidelines would effectively implement the detailed plan worked out by Congress itself. Indeed, even where Congress delegated an important choice, Congress cabined and defined that choice for the Commission. For example, Congress decided to "provide no presumption either for or against probation as opposed to imprisonment, but to allow the Sentencing Commission and, under its guidelines, the courts, the full exercise of informed discretion in tailoring sentences to the circumstances of individual cases." *Id.* at 91. *See* 28 U.S.C. § 994(a)(1). But Congress provided for maximum and minimum terms of probation, 18 U.S.C. § 3561(b), delineated the choice the Commission was to make, and required the Commission to make that choice in a manner that would "achiev[e] the purposes of sentencing set forth in section 3553(a)(2)." S. Rep. No. 98-225, *supra*, at 90. This pattern of congressional guidance pervades all aspects of the delegation to the Commission.

What is more, Congress gave the Commission explicit instructions concerning how to go about translating these statutory goals and criteria into discrete guidelines. It directed the Commission to follow an empirical approach using data reflecting historic sentencing practices. Thus, 28 U.S.C. § 994(m) provides that:

> as a starting point in its development of the initial sets of guidelines for particular categories of cases, the Commission [shall] ascertain the average sentences imposed in such categories of cases prior to the creation of the Commission, and in cases involv-

ing sentences to terms of imprisonment, the length of such terms actually served.

Accordingly, the Commission was not to set sail on uncharted seas: it was to anchor its project firmly to existing practice as a point of departure, adopting changes only where necessary to achieve the congressional purposes and in order to comply with other specific directions in the Act. *See* S. Rep. No. 98-225, *supra*, at 177-178.

D. The Sentencing Commission Closely Adhered To Its Statutory Mandate In Developing And Issuing Sentencing Guidelines.

The Sentencing Reform Act was signed into law by President Reagan on October 12, 1984, and the Commissioners were appointed and confirmed by the end of 1985. Less than a year later, the Commission published a preliminary draft of the sentencing guidelines, and it promulgated its final guidelines and policy statements seven months thereafter, on April 13, 1987. The Commission subsequently issued a series of technical, clarifying and conforming amendments on May 1, 1987, and has promulgated a number of additional amendments since that time.

As noted above, the congressional mandate to the Sentencing Commission was twofold: (1) using current practices as a starting point, to establish an initial set of sentencing guidelines that reduced unwarranted sentencing disparities and uncertainties, and (2) to monitor and evaluate the impact of the initial sentencing guidelines and make such refinements as necessary to achieve Congress's goal of fair, certain and more uniform sentences. The Commission fulfilled the first part of this mandate—to take an initial step toward reducing unwarranted sentencing disparities, using present practice as the starting point—in the following way.

First, in terms of process, the Commission adhered to the congressional mandate of developing the guidelines in an open manner that drew advice and criticism from

a broad cross-section of interested groups and individuals. *See* 28 U.S.C. § 994(v); S. Rep. No. 98-225, *supra*, at 181.[1] The Commission solicited information from a variety of federal agencies concerning sentencing issues,[2] held public hearings on specific sentencing issues critical to the development of the guidelines,[3] published and widely circulated for public comment several guideline drafts, held hearings on these drafts, and subjected alternate approaches to intensive public debate and case testings. Thus, the guidelines sent to Congress in April 1987 were the product of considered judgments that the Commission intended to further refine in the light of actual sentencing experience with the guidelines.[4]

Second, as instructed by 28 U.S.C. § 994(m), the Commission determined guideline base offense levels by conducting an empirical analysis of nearly 100,000 federal convictions during a two-year period, including detailed scrutiny of more than 10,000 presentence reports. *Sup-*

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[1] The Commission established and regularly consulted with advisory and working groups of federal judges, United States Attorneys, Federal Public Defenders, state district attorneys, federal probation officers, private defense attorneys, academics and researchers knowledgeable in the fields of sentencing and corrections. Supplementary Report 9.

[2] The Commission received information from and met with representatives of the Department of Justice, Bureau of Prisons, the Departments of Treasury, Defense, Education, Health and Human Services, Interior, and Labor, the Federal Deposit Insurance Corporation, and the Securities and Exchange Commission. *Id.* Other resource groups contributing to the Commission's work were the Judicial Conference, the National Institute of Sentencing Alternatives, and the National Institute of Corrections.

[3] In connection with six hearings on specific sentencing issues, the Commission received oral testimony from 74 witnesses and written comments from more than 550 respondents. *Id.* at 10.

[4] The Commission's highly public process is consistent both with the statutory command and with the trend toward greater public involvement in judicial branch rules. *See, e.g.*, Fed. R. Civ. P. 83 (requiring notice and public comment prior to promulgation of local rules).

plementary Report 16. As it considered each frequently committed crime, the Commission referred to data that set forth estimates of sentences, the extent to which a specific characteristic (such as the presence of a weapon or victim injury) typically affected the duration of the sentence imposed, and the distribution of the mean. *See Hearings on Sentencing Commission Guidelines Before the Senate Comm. on the Judiciary*, 100th Cong., 1st Sess. xx (1987) (statement of Commissioner Breyer).

Third, the Commission decided which specific offense characteristics to add to the basic description of each crime, and the weight to be accorded each characteristic, by examining the factors that had actually accounted for enhanced sentences for that crime, existing statutory distinctions, and other relevant sources.[5]

Fourth, the Commission decided that the initial guidelines generally should not "make significant changes in current plea agreement practices," U.S. Sentencing Commission, *Guidelines Manual* 1.8 (1987) ("Guidelines Manual"), except to the extent necessary to assure that

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[5] For example, the Commission utilized advanced statistical techniques to estimate the average time served for typically occurring variations of burglary offenses, including the value of the property taken, the degree of planning, the possession of a weapon, and the disposition of the case (*e.g.*, guilty plea or trial). The results of these analyses were then used as an anchoring point for the derivation of the burglary guidelines. In building into the guidelines various offense level adjustments, the Commission excluded some distinguishing characteristics because the data showed they occurred very infrequently. For example, the Commission's database included 1,100 instances of robbery; 40 of those 1,100 involved physical injury to the victim and three involved death. The guidelines for robbery therefore mention "injury to the victim" as a separate aggravating factor. They do not include "death," because death rarely occurred in connection with a prosecuted robbery charge, and the Commission felt that rare occurrences could be addressed by a court as a basis for departure from the guidelines, or by the Government as a separately charged offense. *See* U.S. Sentencing Commission, *Preliminary Observations of the Commission on Commissioner Robinson's Dissent* 3 (May 1, 1987).

the purposes of the Sentencing Reform Act and the guidelines were not undermined.[6]

As Congress had instructed, the Commission did not limit its role only by narrowing the range of variance in past sentencing norms. In some discrete areas the Commission consciously departed from historical sentencing practices. In so doing the Commission followed Congress's directive that it not be "bound" by current practices, but that it should develop a sentencing range consistent with the overall purposes of sentencing articulated by Congress in the statute. The Commission therefore sought to *rationalize*, rather than mirror, the prior sentencing regime and to prohibit the use of certain previously-employed criteria in sentencing. Thus, "[t]he guidelines represent an approach that begins with and builds upon empirical data, but does not slavishly adhere to current sentencing practices." *Supplementary Report* 17. *See* 28 U.S.C. § 994(m).

For example, as petitioner Mistretta notes (Br. 9 & 50), the Commission's guidelines increase the length of sentences for white collar crimes, the major change being that many white collar offenders, who would previously have received only probation, will now receive one to five months of confinement. *See, e.g.*, Guidelines Manual §§ 5B1.1(a)(2); 5C2.1(e); 5F5.1. But this policy choice was *not* an independent initiative of the Commission. Congress clearly expressed its determination that white collar crime had been underpunished in the past and was, for that reason, an "otherwise serious offense" within the meaning of 28 U.S.C. § 994(j). *See* S. Rep. No. 98-225, *supra*, at 91-92. This congressional determination

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[6] Nevertheless, the Commission believed that the guidelines would have a positive effect on plea bargaining for two reasons: first, "the guidelines create a clear, definite expectation in respect to the sentence that a court will impose if a trial takes place," *id.*, and, second, "the guidelines create a norm to which judges will likely refer when they decide whether, under [Fed. R. Crim. P.] Rule 11(e), to accept or to reject a plea agreement or recommendation." *Id.*

is also echoed in the statutory command that the sentencing guidelines to "entirely neutral as to the race, sex, national origin, creed and socioeconomic status of offenders." 28 U.S.C. § 994(d).[7]

Other departures from historical sentencing practices likewise implement public policy choices that had been made in the first instance by Congress and not the Commission. For example, Congress required that the Commission provide sentences at or near the statutory maximum for "career offenders"—*i.e.*, adult offenders who have been convicted of a third crime of violence or drug-related offense. 28 U.S.C. § 994(h). By the same token, Congress required that the Commission provide a substantial term of imprisonment for, among others, offenders who derive a substantial portion of their income from criminal activity or who are managers or supervisors involved in a pattern of racketeering activity. 28 U.S.C. § 994(i). And Congress directed the Commission to ensure that the guidelines reflect "the general appropriateness of imposing a term of imprisonment on a person convicted of a crime of violence that results in serious bodily injury." 28 U.S.C. § 994(j).

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[7] Consistent with 28 U.S.C. § 994(d), one of the most important objectives sought to be achieved through the guidelines is that of ending various forms of individual discrimination found to pervade past sentencing practices. Available data clearly showed that women were treated more favorably, and black defendants were discriminated against, in connection with sentencing for certain types of crimes and in certain regions of the country. For example, female bank robbers were likely to serve six months less than their similarly situated male counterparts and black bank robbers sentenced elsewhere. See *Hearings Before the Subcommittee on Criminal Justice of the House Committee on the Judiciary*, 100th Cong., 1st Sess. 676 (1987) (statement of Commissioner Nagel). Moreover, women convicted of fraud served, on average, three and a half months less than similarly situated men. A defendant sentenced in the West was likely to serve an extra three months on that basis alone. *Id.* at 680. In districts with a high volume of heroin cases, Hispanic defendants went to prison significantly more often than non-Hispanic defendants. *Id.* at 683.

Here, too, the guidelines conform to the Act by providing significantly increased penalties for career offenders who have "committed an offense as part of a pattern of criminal conduct from which [they] derived a substantial portion of [their] income" (*Guidelines Manual* § 4B1.3); and an increased sentence for offenders who are organizers, leaders, managers or supervisors of "a criminal activity that involved five or more participants or was otherwise extensive" (*Id.*, § 3B.1). In the area of drug related crimes, the guidelines reflect, as they were required to do, the mandatory minimum sentences contained in the Anti-Drug Abuse Act of 1986, Pub. L. 99-570, 100 Stat. 3207 (1986). *Supplementary Report* 18.[8]

In sum, the sentencing guidelines at issue do not represent the Commission's own idiosyncratic or policy choices among widely-divergent sentencing alternatives; they reflect the broad legislative consensus on sentencing policy that was articulated in the Sentencing Reform Act. The guidelines incorporate existing sentencing practices, with the adjustments necessary to accomplish Congress' goals of consistency and proportionality and to eliminate regional, sexual, racial and other indefensible disparities. To the extent that the guidelines do depart from past practice, this departure reflects a *congressional* determination that a new approach was needed. Contrary to petitioner Mistretta's assertion (Br. 54), *Congress* made the "hard policy choices" and "political judgments" and the Commission faithfully and successfully implemented *Congress's* mandate.[9]

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[8] With the exception of implementing such congressionally-mandated changes, the guidelines' net effect is not enormously different from the average prior practice. The Commission's Prison Impact Study, using two different sets of assumptions, predicted that over 15 years the guidelines' effect on the prison population would be between −2% and +10%, but for the congressionally-mandated drug and career offender sentences. *Supplementary Report* 75.

[9] If further proof were required that the guidelines fully implement the intentions of the statute, it is supplied by Congress's re-

E. If The Goals Of Sentencing Reform Are To Be Achieved, The Constitutionality Of The Sentencing Commission Must be Sustained.

As years of congressional effort poignantly demonstrate, the task of developing an initial, detailed set of sentencing guidelines required establishing a *permanent, independent commission* of experts. Moreover, Congress recognized that the ongoing need for monitoring, analyzing and revising the guidelines was as much a part of sentencing reform as writing the initial guidelines themselves; this, too, called for an independent, permanent body to oversee the reform effort. This point is well illustrated by several examples of areas in which the Commission has indicated that it might make revisions in the light of experience.

First, the number of subcategories that the guidelines draw within each major offense and offender category may turn out in some (or many) instances to be too great for administrative ease, or too few to meaningfully discriminate between offenders who warrant different punishments. For example, as noted above, the Commission did not include death as an aggravating factor in the bank robbery guideline because of the infrequency with which death has historically occurred in association with that offense. Obviously, new experience could reveal the need for change, perhaps to bring death within the guideline, perhaps to subdivide "injury" more finely,

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fusal to delay their effective date. Pursuant to Section 235(a)(1)(B)(ii) of the Act, the guidelines did not take effect until six months after their submission to Congress, to allow Congress the opportunity to enact legislation amending or abolishing the Commission's work product. After the Commission promulgated the final guidelines, as amended, on May 1, 1987, the House and Senate Judiciary Committees held hearings on the guidelines, and bills were considered to delay their effective date. See, *e.g.*, 133 Cong. Rec. H8107 *et seq.* (daily ed. October 5, 1987); 133 Cong. Rec. H8142 *et seq.* (daily ed. October 6, 1987). Delay legislation was subsequently rejected by a substantial margin (133 Cong. Rec. H815 (daily ed. October 5, 1987)), and the guidelines went into effect, as scheduled, on November 1, 1987.

perhaps to reduce the number of injury subcategories from three (as now) to one. The Commission cannot know what, if any, refinement is appropriate until it sees how judges actually apply this guideline, under what circumstances they depart, and why.

By way of another example, the guidelines, drawing in part upon past practice, require an increase in punishment by two levels where "the defendant abused a position of public or private trust, or used a special skill." Guidelines Manual § 3B1.3. The terms used are general, and the Commission may find them applied differently by different courts. Monitoring the way in which courts apply such terms might persuade the Commission to define them, possibly through example, or it might encourage the Commission to abandon the effort to distinguish among defendants upon this basis because this approach is too complex and actually fosters disparity. Whether and how the guidelines should be revised, in short, requires careful and ongoing examination of how the courts actually apply them. A permanent, independent body whose sole function and expertise relates to the guidelines is best suited for the task.

As a final example, the Commission has initially decided largely to maintain existing plea bargaining practice under guideline sentencing, with some important changes. Counsel are required to set forth the relevant facts of the actual offense conduct and explain their reasons for offering and accepting a plea bargain. In turn, the court (under Fed. R. Crim. P. 11(e)) must explain its reasons for accepting a plea agreement. *Guidelines Manual* § 6B. The Commission will collect and analyze these reasons, which will permit it to understand the dynamics of bargaining under a guidelines system and why judges accept or reject pleas. Only then will the Commission be able to determine the extent to which the fact of a bargain ought to affect the length of a sentence and the need for further regulatory reform.

For the reasons discussed above, the Commission, unlike Congress itself, is institutionally capable of dealing with the problem of making continuing changes such as these in a complex and closely-interrelated set of rules. Furthermore, in order to carry out the evolutionary tasks that Congress assigned it, the Commission must continually require sentencing officials to provide detailed sentencing information, *see* 28 U.S.C. § 995(a)(13), (15); monitor and evaluate their performance, *id.*, § 995(a)(9); and engage these sentencing officials in a continual interchange of information and views. *Id.*, § 995(a)(17)-(18). Congress believed that assigning such roles to an agency within the judicial branch would be less intrusive into judicial independence and more conducive to a cooperative approach in carrying out these objectives, as well as to the important related tasks of ongoing sentencing research and education.[10]

In sum, both Congress in the Sentencing Reform Act, and the Commission in promulgating its initial guidelines and policy statements, envisoned an evolutionary process. This process will work, if at all, and the goals of sentencing reform will be achieved, *only* if the constitutionality of the Sentencing Commission—an independent, undistracted and expert body—is sustained.

CONCLUSION

The sentencing guidelines under which petitioner Mistretta was sentenced represent the product of an intensive, bipartisan effort to solve the problems of sentencing disparity and uncertainty of punishment. After years of congressional debate, and following attempts by Congress itself to reform federal criminal sentencing practices in

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[10] The Judicial Conference of the United States had initially proposed that it be given the authority to issue sentencing guidelines. *See* S. Rep. No. 98-225, *supra*, at 63-64. Although Congress ultimately gave this authority to a new commission, it took care to assure that the commission would coordinate its activities with existing judicial branch agencies. *Id. See also* 18 U.S.C. § 995(b).

the context of revisions to the federal criminal code, Congress concluded in its wisdom that the only way to achieve effective sentencing reform was to delegate some of its power to an expert Sentencing Commission. The Commission would then promulgate uniform sentencing guidelines in accordance with detailed statutory standards. At the same time, Congress concluded that the division of sentencing authority among courts and the Parole Commission should be eliminated and that the entire sentencing function should be consolidated in the courts, with the essential caveat that judicial sentencing discretion would be structured and limited by a system of sentencing guidelines. Simply stated, Congress concluded, after years of false starts, that delegation to the Sentencing Commission was the only way to assure meaningful federal criminal sentencing reform. Such a delegation is entirely consistent with past congressional practice and with this Court's approval of Congress's actions.

As it has in the past, this Court should defer to Congress's policy judgment as to what is "necessary and proper" in the area of sentencing federal offenders. The validity of the Sentencing Reform Act of 1984 should be upheld and the judgment of the district court should be affirmed.

Respectfully submitted,

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