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 THE UNITED STATES SENTENCING COMMISSION AS AMICUS CURIAE SUPPORTING AFFIRMANCE

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QUESTIONS PRESENTED

The United States Sentencing Commission is an "independent commission in the judicial branch of the United States" having as members three judges and four nonjudges; under the Sentencing Reform Act of 1984 it has delegated power, subject to statutory standards, to issue (and thereafter review and revise) determinate sentencing guidelines to order and equalize the sentencing decisions of the federal courts.

The questions addressed in this *amicus curiae* brief are whether it violates principles of separation of powers for Congress

(1) to delegate power to issue rules to govern the sentencing discretion of the federal courts to an *independent* commission, free from policy control by the prosecutorial authorities;

(2) to assign the commission to the judicial branch in order to safeguard this independence;

(3) to provide that its membership must include three federal judges, but may include as well four persons from other fields; and

(4) to provide that all commissioners are to be appointed by the President (subject to Senate confirmation) and that all commissioners may be removed as commissioners by the President, but "only for neglect of duty or malfeasance in office or for other good cause shown."

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BRIEF FOR THE UNITED STATES SENTENCING COMMISSION AS AMICUS CURIAE SUPPORTING AFFIRMANCE

INTEREST OF THE AMICUS CURIAE

The United States Sentencing Commission has a direct interest in the constitutionality of the statute that established it and the sentencing guidelines that are its principal work. The parties have consented to the Commission's submission of this brief; Justice Blackmun has granted the Commission leave to file a brief not exceeding 50 pages; and this Court has given leave to the Commission to participate in the oral argument of this case.

INTRODUCTORY STATEMENT

In the Sentencing Reform Act of 1984, Congress created the United States Sentencing Commission—an "independent commission in the judicial branch of the United States" having as members both judges and nonjudges—and delegated to it, subject to statutory standards, the task of issuing (and thereafter monitoring and amending) determinate sentencing guidelines to order and equalize the sentencing decisions of the federal district courts. The question in this case is whether the Constitution is violated by Congress' considered judgment that the judicial branch and the federal judges should thus play a central role in this effort to bring equality and predictability to the judicial task of imposing sentence.

More specifically, the issues before this Court are whether Congress may (i) delegate the power to issue rules to govern the sentencing discretion of federal judges to an *independent* commission, free from control by the prosecutorial authorities; (ii) assign the commission to the judicial branch in order to guarantee this independence; (iii) ordain that its membership must include three

federal judges but may include, as well, as many as four persons from other fields; (iv) provide that all of the members are to be appointed by the President subject to Senate confirmation; and (v) provide that the members may be removed by the President, but "only for neglect of duty or malfeasance in office or for other good cause shown." 28 U.S.C. § 991(a).

Mistretta (hereafter "Petitioner") claims that the Commission's principal function—issuing sentencing guidelines through rulemaking—may not be delegated to the "Judicial Branch" or to "Article III courts" or to "Article III judges." (Petitioner persistently uses these terms as if they were simply interchangeable.) He asserts that the power to formulate rules, once delegated by the legislature, becomes an exclusively *executive* function. Further, Petitioner argues, Article III judges are prohibited by the Constitution from serving on the Commission whether it is in the judicial branch, is in the executive branch, or is simply an independent agency. On the other hand, if the Constitution permits judges to serve on the Commission, then *non*-judges may not serve with them, because such interbranch cooperation violates the separation of powers. And Congress violated the Constitution yet again by giving the President power to remove members for "good cause shown," because an officer of one branch may not be removed by the head of a different branch.

As if this were not enough, Petitioner completes the magic circle by suggesting that the task of issuing sentencing guidelines may not, under the Constitution, be delegated even to a purely executive agency in the executive branch, because this would "unite in one branch the power to prosecute with the power to decide the proper sentence" (Br. 35 n.9). Petitioner thus achieves perfect constitutional gridlock: if Congress wishes to subject sentencing discretion to a regime of rules, it has no choice other than to undertake itself the continuing task of formulating, monitoring and fine-tuning these rules.

The Commission's position, in contrast, is that under principles of separation of powers as developed by this Court, Congress acted wholly within the letter and spirit of the Constitution—as well as with eminent good sense —when it created an independent commission in the judicial branch to undertake the special task of creating rules, under statutory standards, to order and rationalize the preexisting (and virtually unfettered) sentencing discretion of federal judges. It was valid and appropriate for Congress to delegate to an expert specialized body, rather than to undertake itself, the massive task of collecting and analyzing data on historic sentencing practices in order to develop detailed guidelines, and the additional task of continuously reviewing and revising these in the future; to create a diverse Commission, drawing on the expertise of the federal judiciary but also authorizing the inclusion of persons from other disciplines (*e.g.*, corrections; economics; sociology); to specify that the Commission should be "independent," so that the sensitive functions it performs will be free from undue influence by prosecutorial (or defense) interests; to guarantee the Commission's independence and to underscore the judicial center of gravity of its mission by locating it in the judicial branch; and to give the President a limited check on clear abuse of office by a particular commissioner through the power (routinely associated with independent agencies) to remove commissioners, but only for "good cause shown."

In fact there do not exist rules of constitutional law that would invalidate this carefully thought out congressional scheme. The Sentencing Reform Act does not disobey the constitutional text, or make fundamental changes in accepted constitutional practice, or subvert the principles of separation of powers as these have been developed by this Court. Rather, the constitutional "violations" that have allegedly occurred involve rules invented for purposes of this litigation, based on separation-of-powers syllogisms having no real constitutional provenance.

A. Federal Sentencing: The Background

1. Perhaps the single most important thing about this case is that it concerns *sentencing*. This is critical because sentencing—the function of determining the scope and extent of punishment—has, historically, never been thought to be assigned by the Constitution to the exclusive jurisdiction of one of the three branches. The Constitution does not require that the sentence be defined exclusively by the legislature, or by the judiciary, or by the executive.[1] Rather, for almost 100 years our constitutional practice and theory of sentencing have featured a "three-way *sharing* of responsibility" (*Geraghty v. United States Parole Comm'n*, 719 F.2d 1199, 1211 (3d Cir. 1983), cert. denied, 465 U.S. 1103 (1984) (emphasis added)) for determining what sentence should be meted out to a federal defendant. The Sentencing Reform Act simply continues that tradition through a new, more carefully designed and ordered, methodology.

Thus, although it is settled that Congress has the *power* to fix the sentence for each federal crime, see, *e.g.*, *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76 (1820), and that the scope of judicial discretion with respect to sentences is subject to plenary congressional control, *Ex parte United States*, 242 U.S. 27 (1916), early in our history Congress abandoned the "excessive rigidity" of a system of fixed statutory punishments. *United States v. Grayson*, 438 U.S. 41, 45 (1978). Congress has continued to prescribe by statute the maximum (and occasionally the minimum) sentence; but for more than a century Congress has delegated virtually unfettered discretion to federal judges to determine what the sentence should be within that (typically) wide range. It has been the federal judge who has exercised the effective law-making power to decide what are the various goals of sentencing, what are the relevant aggravating

[1] *Imposing* sentence is, of course, a judicial function. But our references in this brief to the function of "sentencing" include the overall function of deciding what the punishment should be.

and mitigating circumstances, and how these factors should be combined in determining a specific sentence. And this large-scale discretion was thereafter substantially enhanced by the power granted to the courts to suspend the sentence and by the resulting growth of an elaborate probation system (administered within the *judicial* branch) for supervising defendants whose sentences had been conditionally suspended.[2]

In 1910, responding to advocates of sentencing reform who urged a "flexible sentencing system" permitting correctional experts to release prisoners according to "their potential for, or actual, rehabilitation," *Grayson*, 438 U.S. at 46, Congress took a major step toward a "three-way" sharing of sentencing responsibility by creating a parole system, under which executive-branch correctional personnel were given the discretionary authority to release prisoners before the expiration of the term imposed by the judge. The result was a regime of indeterminate sentences, under which Congress defined a statutory maximum, the judge imposed a sentencing range (which the judge could suspend and replace with supervised probation), and executive branch (parole) officials eventually determined the actual length of imprisonment. See *Williams v. New York*, 337 U.S. 241, 248 (1949); *United States v. Addonizio*, 442 U.S. 178, 188-189 (1979).

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[2] The Federal Probation Act, 18 U.S.C. § 3651 (1982), authorized probation for all offenses except those punishable by death or life imprisonment and made probation available even where Congress had provided for a mandatory minimum sentence. See *Rodriguez* v. *United States*, 107 S. Ct. 1391 (1987) (per curiam). The probation system is administered by an elaborate corrections and enforcement bureaucracy housed in the judicial branch and supervised by the courts. See Annual Report of the Director of the Administrative Office of the United States Courts 41-50 (1986). The Sentencing Reform Act preserved the basic structure of the probation system (see 18 U.S.C. §§ 3601-3606) but made probation subject to the guidelines. See 28 U.S.C. § 994(a)(1).

2. The federal system of indeterminate sentences conferred vast discretion on sentencing judges. The absence of any standards to guide this "unfettered" discretion, *Dorszynski v. United States*, 418 U.S. 424, 437 (1974), together with the fact that sentences were usually unreviewable, led to serious disparities in sentences.

Congressional dissatisfaction with these disparities dates at least to 1958, when Congress authorized the creation of judicial sentencing institutes and joint councils to formulate standards and criteria for sentencing. 28 U.S.C. § 334(a). The purely advisory character of these measures sharply limited their efficacy, however. In an effort to address the problem, the Parole Board in 1973 adopted parole guidelines that established "a 'customary range' of confinement." *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 391 (1980). Congress endorsed this initiative in the Parole Commission and Reorganization Act of 1976 ("PCRA"), 18 U.S.C. §§ 4201-4218. The PCRA did not, however, disturb the basic division of sentencing responsibility among the three branches: the sentencing judge continued to exercise plenary discretion to set a maximum and minimum term within the statutory range, while the prisoner's actual release date was generally set by the Parole Commission.

B. The Sentencing Reform Act

1. Fundamental dissatisfaction with the uncertainties and disparities of the federal system of indeterminate sentences became a major focus of public concern in the early 1970s. Congress came to believe that the existing system suffered from major flaws. "[E]very day Federal judges mete out an unjustifiably wide range of sentences to offenders with similar histories, convicted of similar crimes, committed under similar circumstances." These disparities, which are "unfair both to offenders and to the public," can be "traced directly to the unfettered discretion the law confers on * * * judges and parole authorities." "By dividing the sentencing author-

ity between the judge and the Parole Commission" the existing system engenders pervasive "uncertainty about the length of time offenders will serve in prison." "[S]entencing judges and the Parole Commission second-guess each other, often working at cross-purposes." The resulting system "lacks the sureness that criminal justice must provide if it is to retain the confidence of American society and if it is to be an effective deterrent against crime." S. Rep. No. 225, 98th Cong., 2d Sess. 38, 45, 38, 46, 49, 113, 49-50 (1984) ("S. Rep.").

As a result of these concerns, there commenced a prolonged bipartisan effort to reform the federal sentencing system. Four different administrations participated in that effort. The bills that became the Sentencing Reform Act were sponsored by leading members from a broad cross-section of each party and received the strong endorsement of the Reagan Administration. The Act was adopted by overwhelming majorities of both houses as part of the Comprehensive Crime Control Act of 1984, Pub. L. 98-473, 98 Stat. 1837. Attorney General William French Smith described the Act as "the most far-reaching, substantial reform of the federal criminal justice system ever enacted by the Congress," while Senator Kennedy described it as "a comprehensive and far-reaching new approach * * * [designed to] reduce the unacceptable disparity of punishment that plagues the federal system, and * * * to assure sentences that are fair—and perceived to be fair—to offenders, victims, and society." 32 Fed. B. News & J. 60, 62, 65 (1985).

2. Congress sought to solve the problems of the old sentencing system by enacting three fundamental reforms: (1) it replaced the standardless discretion of prior law with statutory guidance as to sentencing goals and as to the factors relevant to sentencing; (2) it determined that the discretion of judges should be confined by sentencing guidelines, and that these should be definitively applied by judges at the time of sentencing, rather than having terms of imprisonment determined later by parole officials; and (3) it provided for limited appellate review of sentencing.

The new statute is unprecedented in the degree to which Congress itself made the basic structural and policy decisions that shape the sentencing system. Congress continued the practice of setting maximum terms of imprisonment by statute. It enacted new maximums for fines and probation, and created a new system of supervised release following imprisonment. See 18 U.S.C. § 3583. It provided substantive guidance by specifying the purposes of sentencing that must be considered by the Commission in formulating sentencing guidelines (28 U.S.C. § 991(b)(1)(A)) and by the court in imposing sentence (18 U.S.C. § 3553(a)(2)). It established "two factors—the prior records of offenders and the criminal conduct for which they are to be sentenced"—as the principal determinants in sentencing. S. Rep. 161. The guidelines must establish a sentencing range "for each category of offense involving each category of defendant;" that range must be "consistent with all pertinent provisions of title 18;" and any range of imprisonment may vary by no more than 25% or 6 months from the minimum to the maximum. 28 U.S.C. § 994(b).

In addition, a critically important directive instructed the Commission, "as a starting point in its development of the initial sets of guidelines," to ascertain existing sentences in each category of cases. 28 U.S.C. § 994(m). Thus the Commission was given a vital initial framework for reaching decisions about sentence levels.

3. The Act reduces, but does not eliminate, the sentencing judge's discretion. Where unusual circumstances are present, the judge may depart from the guidelines. 18 U.S.C. § 3553(b). Judges also retain full discretion to determine what sentence is appropriate within the range specified in the guidelines, leeway in deciding what conditions of probation are appropriate (see 18 U.S.C. § 3563(b)), and authority to accept or reject a plea agreement. At the same time, by abolishing parole the Act removes a significant limitation on the sentencing judge's authority.

To make the guideline system effective, Congress required that judges explain their sentences and provided for appellate review. The defendant (or the government) may appeal a sentence that is more severe (or more lenient) than the applicable guideline, and either party may appeal an incorrect application of the guidelines. 18 U.S.C. § 3742. If the sentence is "outside the range of the applicable sentencing guideline," the court of appeals must determine whether it is "unreasonable." 18 U.S.C. § 3742(d)(3). Congress contemplated that if the case was an "entirely typical" one, the court would have "no adequate justification for deviating from the recommended range." S. Rep. 79. But departures would be permissible where the judge "conclude[s] that the guidelines fail to reflect adequately a pertinent aggravating or mitigating circumstance." *Id.* at 52.[3]

4. The Sentencing Reform Act also gives the Commission the continuing mission "periodically [to] review and revise" the sentencing guidelines. 28 U.S.C. § 994(o). The Commission is under a continuing obligation to "consult with authorities on, and individual and institutional representatives of, various aspects of the Federal criminal justice system." *Ibid.* It must report to Congress on amendments to the guidelines (§ 994(p)), inform Congress whether the grades or maximum penalties of specified offenses should be modified (§ 994(r)), monitor and analyze the operation of the guidelines (§ 994(w)), and issue "general policy statements regarding application of the guidelines" (§ 994(a)(2)). The Commission is also expected to monitor and issue instructions to pro-

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[3] The Commission has said that it "intends the sentencing courts to treat each guideline as carving out a 'heartland,' a set of typical cases embodying the conduct that each guideline describes. When a court finds an atypical case, one to which a particular guideline linguistically applies but where conduct significantly differs from the norm, the court may consider whether a departure is warranted." United States Sentencing Commission, *Federal Sentencing Guideline Manual* 6 (West 1988) ("Guidelines").

bation officers with respect to the guidelines, to conduct training programs for judicial and probation personnel, and to perform "such other functions as are required to permit Federal courts to meet their [sentencing] responsibilties." 28 U.S.C. § 995(a).

The monitoring function under these provisions is a particularly massive one. Each year, with respect to some 40,000 sentences, the federal courts must forward, and the Commission will review, the presentence report, the sentencing guideline worksheets, the court's sentencing statement, and any written plea agreement. These sentencing documents must be tabulated and analyzed, and will then be the basis of amendments to the guidelines and reports to Congress.

C. The Work Of The Commission

In promulgating the initial Sentencing Guidelines, the Commission took its bearings from the congressional goals of certainty, uniformity and proportionality in sentencing. The Commission proceeded from the requirement that it examine average sentences "as a starting point;" it examined data drawn from some 40,000 recent sentences (including more detailed analysis of 10,000 presentence investigations) "to determine which distinctions are important in present practice;" it then "accepted, modified, or rationalized" those distinctions. Guidelines 4. This approach enabled the Commission to develop "relatively broad" categories that will make the guidelines manageable while capturing significant differences. *Ibid.* The Commission did not simply copy "existing practice" (*ibid.*); but it is also clear that it did not write on a blank page: its discretion was meaningfully channeled by the Act's requirement that it use existing average sentences "as a starting point." 28 U.S.C. § 994(m).

The Commission's approach to its task, the resulting guideline system, and the relationship of these to Congress' statutory purposes, are described in more detail in the briefs submitted by the other *amici curiae* (in support of affirmance.

D. The Placement And Composition Of The Sentencing Commission

Congress established the Sentencing Commission "as an independent commission in the judicial branch of the United States" (28 U.S.C. § 991(a)). The Commission's seven voting members are appointed by the President with the advice and consent of the Senate. The Act requires that "[a]t least three of the members shall be Federal judges selected after considering a list of six judges recommended to the President by the Judicial Conference of the United States." *Ibid.*

Congress' decision on how to constitute the Commission was carefully considered. Congress made it clear that it did not wish the Commission to be an executive branch agency:

> Traditionally, the courts and Congress have shared responsibility for establishing Federal sentencing policy. Congress defines criminal conduct and sets maximum sentences, while the courts impose sentences in individual cases. Any suggestion that the Executive Branch should be responsible for promulgating the guidelines would present troubling constitutional problems. More importantly, it would fundamentally alter the relationship of the Congress and the Judiciary with respect to sentencing policy and its implementation. Giving such significant control over the determination of sentences to the same branch of government that is responsible for the prosecution of criminal cases is no more appropriate than granting such power to a consortium of defense attorneys.

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[4] Congress gave the executive branch a voice in the formulation of the guidelines by specifying that a designee of the Attorney General, together with the Chairman of the United States Parole Commission, should be *ex officio* members of the Commission; but it underscored the independence of the Commission by making these commissioners non-voting members. 28 U.S.C. § 991(a); Pub. L. No. 98-473, § 235(a)(2).

H.R. Rep. No. 1017, 98th Cong., 2d Sess. 94-95 (1984) (footnotes omitted).[5]

On the other hand, Congress also made a deliberate decision not to make the Commission a body entirely composed of judges or controlled by the courts. The Judicial Conference had proposed that the guidelines be issued by the Conference after considering the recommendations of a Committee appointed by the Conference and consisting of a majority of judges. Congress rejected that approach:

> [The Act] requires all three branches of government, rather than only the judicial branch, to participate in the selection of members of the Sentencing Commission. This permits legislative branch participation in the selection of members of the body to which Congress will be delegating some of its authority to set sentencing policy. Presidential appointment of the members assures high visibility of the Commission, which the Committee thinks is important to the Commission's role in guiding this extensive change in Federal sentencing policy. Finally, the [Act] does assure the judiciary a role in the selection of the members and does place the Commission in the judicial branch. S. Rep. 64.

Thus the Commission is not under the control of the Judicial Conference or any other entity in the judicial branch. It is exactly what Congress said it is: an "independent" Commission.

What, then, is the purpose and significance of the legislative designation of the Commission as being "in" the "judicial branch"? It goes without saying that that designation in no way attempts to vest the Commission with any share of "the judicial Power of the United

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[5] The House Report was attached to a version of the statute (H.R. 6012) that would have placed the Commission under the control of the Judicial Conference. This model was ultimately rejected. But the statute as enacted carried forward the House's decision not to make the Commission an executive branch agency. The reasons stated for that conclusion in the House Report thus carry continuing authority.

States." Like many other auxiliary institutions—the Administrative Office; the Probation Service; the Judicial Councils—the Commission is "in" the judicial branch but is not a court and has no jurisdiction to perform Article III adjudicatory functions.

The designation of the Commission as being in the judicial branch can be seen in part as a "housekeeping" measure governing budgetary and administrative matters and the applicability of various statutes.[6] Notwithstanding Petitioner's innuendo to the contrary (Br. 38-40), in this respect the designation is constitutionally unproblematic; there can be no doubt of Congress' power to determine whether the Commission should be covered by *statutory* provisions governing the executive departments.

The historic expertise of the federal judiciary in matters concerned with sentencing was also highly relevant to Congress' decision. So was Congress' obvious realization that the Commission's continuing oversight and educational roles would place it in daily contact with the federal judicial system at an operating level: with judges, clerks of court, probation officers, federal magistrates, the Judicial Councils, the Judicial Center, and the Administrative Office. See pp. 9-10, *supra*. Given the daily grist of the Commission's ongoing business, the sheer administrative convenience of its placement in the judicial branch goes far to support Congress' decision.

But the designation of the Commission as being in the judicial branch has a deeper significance. Congress was acting on its "strong feeling that, even under this legislation, sentencing should remain primarily a judicial function." S. Rep. 159. The power to impose punishment is a judicial power: only the courts may subject a person to a lawful deprivation of liberty or property. *Ex parte United States*, 242 U.S. at 41. Congress thus

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[6] For example, the Administrative Procedure Act's definition of "agency," 5 U.S.C. § 551, excludes "the courts of the United States." Congress assumed that this exclusion applies to the entire judicial branch. See S. Rep. 180.

properly concluded that, historically, the center of gravity of the sentencing power is located in the judicial branch, and that responsibility for implementing the decision to create a new system of determinate sentences should, accordingly, be centered there as well.

Equally important was the focused congressional wish that the Commission not be subservient to the policy directions of the President. See H.R. Rep. No. 1017, *supra*, at 94-95. Congress realized that to unite the functions of creating sentencing guidelines with the President's prosecutorial power would strike many as a threat to liberty. The placement of the Commission in the judicial branch can thus be seen as a purposeful way of underlining and guaranteeing the Commission's independence.[7]

Overall, the Commission's placement and composition show how carefully Congress fine-tuned this institution to reflect all of the historic elements of our sentencing traditions. Congress reaffirmed its own role as creator of fundamental sentencing policies and standards. The placement of the Commission in the judicial branch and the inclusion of federal judges in its membership reflect Congress' awareness that the Commission's ongoing task is to help order and rationalize what had been for a century an essentially *judicial* enterprise. By giving the President the power to appoint commissioners, and allowing him to choose as many as four non-judges, Congress not only followed the conventional constitutional pattern for appointments (including those of judges and members of independent agencies), but also gave recog-

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[7] The importance of this designation and the Commission's resulting independence from executive control was manifested in practice when the Commission decided not to comply with the Justice Department's request that it issue guidelines with respect to the death penalty. Without formally deciding whether or not it had the authority to issue such guidelines, the Commission declined to do so when it rejected this proposal on March 10, 1987. Contrary to Petitioner's suggestion (Br. 51-52), what this confirms is not the breadth of the delegation to the Commission but the extent of its independence from executive control.

nition to the historic participation of the executive branch in sentencing determinations. And in assuring the Commission's independence by locating it in the judicial branch and by limiting the President's removal power to "good cause shown," Congress sought to guarantee that the sentencing function, so crucial to the administration of justice in our courts, would not be united with the power to prosecute and would not be otherwise subject to partisan or political control.

SUMMARY OF ARGUMENT

Under the principles of separation of powers as these have been developed by this Court, the Sentencing Reform Act is constitutional. Petitioner's attempt to show the contrary depends crucially on his persistent practice of collapsing settled distinctions between the separation-of-powers rules that govern the Article III *courts* acting as courts, those that govern the activities of federal *judges* acting as individuals, and those that govern auxiliary agencies housed in the *judicial branch* but not exercising the federal "judicial Power." Using the terms "judicial branch," "federal courts" and "federal judges" as if they were interchangeable, Petitioner misreads this Court's holdings and distorts its formulations.

A. This Court's separation-of-powers cases make it clear that where a congressional scheme does not violate the constitutional text, and the danger-signal of congressional aggrandizement is not present, a "pragmatic, flexible" approach should be taken to the critical questions whether Congress' plan prevents any branch from "accomplishing its constitutionally assigned functions" (*Nixon v. Adm'r of General Services*, 433 U.S. 425, 443 (1977)), or whether any branch has been assigned tasks that are "incongru[ous]" (*Ex parte Siebold*, 100 U.S. (10 Otto) 371, 398 (1880)) or "are more properly accomplished" by another branch. *Morrison v. Olson*, 108 S. Ct. 2597, 2613 (1988).

Under that standard, the Sentencing Reform Act is constitutional. The Act does not involve congressional

aggrandizement; nor does it violate the constitutional text. Indeed, the Act deals with a function—defining the appropriate punishment for crime—that the Constitution does not itself assign to the exclusive jurisdiction of any one branch and that has for a century been a shared responsibility among the three branches.

B. (1) The delegation to the Commission of power to make rules to channel the sentencing discretion of federal judges does not disrupt the performance of the constitutionally assigned functions of the *executive* branch. The claim that rulemaking is an exclusively "executive" power is wrong, ignoring 200 years of history during which Congress has delegated rulemaking power to courts, to independent agencies, and to other entities, entirely according to its judgments as to what institution is most appropriately concerned with the governance of the subject matter addressed by those rules. *Humphrey's Executor v. United States*, 295 U.S. 602, 628 (1935), rejected the claim that functions such as rulemaking are the exclusive prerogative of the executive branch; see also *Buckley v. Valeo*, 424 U.S. 1, 138 (1976). And *Bowsher v. Synar*, 106 S. Ct. 3181 (1986), leaves untouched the long-standing tradition of valid delegations of rulemaking power to the judicial branch.

(2) Nor does the delegation to the Commission threaten the constitutional mission of the *judicial* branch. The proper functioning, impartiality, and independence of the federal courts in deciding cases and controversies are not affected by the Act. Since the Commission is not controlled by the courts, no problem of "uniting" policy-making power with judicial power so as to endanger liberty is presented here. The Act reflects Congress' considered judgment that the threat to liberty would arise, if at all, from uniting power over sentences with the executive's power to prosecute.

The Act does not assign an "incongruous" or "inappropriate" task to the judicial branch. For almost 200 years, federal judges have been creating federal sentencing

policy, determining the severity of punishments within broad statutory ranges. Congress has now decided that sentencing policy should henceforth be developed through a more ordered and rational methodology. If Congress may constitutionally delegate to individual judges the power to prescribe the punishment for crime (subject to statutory maxima), it is free to circumscribe that delegation by authorizing a mixed commission in the judicial branch to issue sentencing guidelines subject to the same maxima.

(3) Petitioner's abstract syllogism---the judicial branch may not make *substantive* rules; sentencing guidelines are *substantive*—should be rejected. The critical question is not whether sentencing rules are substantive or procedural, but whether they concern a subject matter that is historically and functionally appropriate for rulemaking by an independent commission housed in the judicial branch. In *Hanna v. Plumer*, 380 U.S. 460 (1965), this Court held that Congress has wide discretion under the Constitution to classify rules for purposes of delimiting its power to delegate rulemaking authority to the federal courts. That ruling is determinative here. And the Court does not have to deal today with remote and imaginary cases involving other sorts of rulemaking powers.

C. The mixed composition of the Commission is constitutionally unproblematic. An unbroken tradition establishes the settled understanding that extrajudicial service by federal judges acting as individuals raises no constitutional question. Nor does there exist any constitutional rule against Congress creating an auxiliary agency within the judicial branch that aids the performance of the courts' Article III mission and that enlists the services of non-judges as well as judges.

D. The President's limited power to remove Commissioners "only for neglect of duty or malfeasance in office or for other good cause shown"—a power that leaves intact the judge-commissioners' tenure as judges—does not

violate the separation of powers. No absolute rule against interbranch removals has ever existed. Rather, the question is whether the *particular* removal provision makes an officer "subservient" to another branch. *Bowsher*, 106 S. Ct. at 3189. In the Sentencing Reform Act Congress, acting on the understanding (settled since *Humphrey's Executor*) that a "good cause" removal provision safeguards rather than subverts an officer's independence from the President's policy control, made it clear that it wished to insulate the Commission from control by "the same branch of government that is responsible for * * * prosecution" (H.R. Rep. No. 1017, *supra*, at 95); to read the removal provision as making the Commission "subservient" would be to defy Congress' intent. The Act's removal provision, wholly unlike the aggrandizing removal provision elaborately explicated by this Court in *Bowsher*, is a routine housekeeping measure designed to give the President only the conventional power to deal with clear abuse of office by individual commissioners.

ARGUMENT

The Sentencing Reform Act of 1984 and the guidelines issued under it come to this Court as the product of a major bipartisan (and inter-branch) cooperative effort to improve the administration of criminal justice in the federal courts. A heavy burden of proof falls, therefore, on those who would undo the fruits of this effort; the presumption of constitutionality has a special and forceful claim where the statute under attack is the result of a prolonged, meticulously considered consensus.

In order to prevail, therefore, Petitioner must do more than declaim a series of postulates drawn from his intuitions about what a system of separated powers should be. Petitioner must demonstrate that *our* Constitution and *our* system of separated powers, viewed in the light of history and precedent, prohibit Congress from authorizing the Commission to perform a delegated function—the issuance of rules to govern sentencing within a congres-

sionally-prescribed range—that the Constitution itself does not exclusively assign to any one branch.

No such demonstration has been or can be made. In fact the most striking feature of Petitioner's brief is that it is wholly silent on the question of what *principles* govern the question whether a particular congressional design violates the separation of powers: the brief simply ignores the standards developed by this Court to govern separation-of-powers questions. Rather, the methodology of the brief is to interweave abstract separationist rhetoric with snippets from this Court's cases, and then to promulgate a series of invented rules. The "Judicial Branch" (and/or "Article III Judges" and /or "Article III Courts"), we are told, may not be assigned rulemaking tasks (other than the promulgation of housekeeping rules having no policy consequences), because rulemaking is an exclusively executive power. Individual judges may not serve on the Commission because judicial officers may never perform any "substantive" non-judicial function. A body that includes judges may not also include non-judicial personnel. The President may not be given narrow power to remove members of the Commission for "cause," because no branch may ever be given any power to remove officers of another branch.

But where do these supposed rules come from? They cannot be found in the text of the Constitution or in any accepted course of constitutional practice. And they are not supported by this Court's precedents on separation of powers. An examination of those precedents will in fact show that, under the standards announced by this Court to determine whether Congress has violated principles of separation of powers, the Sentencing Reform Act is clearly constitutional.

I. THE STRUCTURE OF THE SENTENCING COMMISSION IS CONSISTENT WITH SEPARATION-OF-POWERS PRINCIPLES AS THESE HAVE BEEN DEVELOPED BY THIS COURT

The history and structure of the Constitution establish "the intent of the Framers that the powers of the three great branches of the National Government be largely separate from one another." *Buckley v. Valeo*, 424 U.S. 1, 120 (1976). The "purpose of separating and dividing the powers of government * * * was to 'diffus[e] power the better to secure liberty.'" *Bowsher v. Synar*, 106 S. Ct. 3181, 3186 (1986) (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring)). Separation-of-powers principles guard against the tendency of government—and of each branch of government—to aggrandize itself at the expense of the people or the other branches. See *INS v. Chadha*, 462 U.S. 919, 951 (1983).

The Framers, however, "likewise saw that a hermetic sealing off of the three branches of Government from one another would preclude the establishment of a Nation capable of governing itself effectively." *Buckley*, 424 U.S. at 121.

> "While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity." *Youngstown*, 343 U.S. at 635 (Jackson, J., concurring).

Indeed, the very "checks and balances" that are designed to protect liberties give the branches important roles in each other's fields of action. The President participates in law-making through his veto; the Senate influences the execution of the laws through its advice-and-consent power over officers nominated by the President, as well as through its participation in the congressional appropriations process; the President appoints, and the Senate must confirm, judges; but the judges have the power to

invalidate statutes passed by Congress and signed by the President. Thus, "the provisions of the Constitution itself" show that "the Constitution by no means contemplates total separation" of the three branches. *Buckley*, 424 U.S. at 121; see also *Morrison v. Olson*, 108 S. Ct. 2597, 2620 (1988). And, as a consequence, this Court's standards for enforcing separation-of-powers requirements have carefully distinguished those cases where there is a genuine (rather than a merely abstract or remote) threat to the constitutional scheme.

1. Where a separation-of-powers claim is based on the specific *text* of the Constitution, the Court has not hesitated to strike down Congress' enactment. *Buckley* and *Chadha* are in point. The Appointments Clause, at issue in *Buckley*, specifies that Congress' sole role in the appointments process is the Senate's power of advice and consent. The Court consequently held that Congress may not give itself the power to appoint members of the Federal Election Commission. 424 U.S. at 124-137. The bicameral requirement and the Presentment Clauses, at issue in *Chadha*, specify "a single, finely wrought and exhaustively considered procedure" for exercising "the legislative power." 462 U.S. at 951. The Court concluded that the legislative veto violated the separation of powers by bypassing these express constitutional requirements for lawmaking. *Id.* at 956-959.

2. The Court has also recognized that separation-of-powers principles are especially likely to be violated in cases involving "an attempt by Congress to increase its own powers at the expense" of another branch. *Morrison*, 108 S. Ct. at 2620; see also *CFTC v. Schor*, 106 S. Ct. 3245, 3261 (1986). Thus this Court's decisions in *Buckley*, *Chadha*, and *Bowsher* gave great weight to the fact of congressional aggrandizement. In *Buckley*, Congress gave itself the power to appoint a majority of the members of the Federal Election Commission; in *Chadha*, Congress gave itself, through the legislative veto, control over the execution of a prior enactment; and in *Bowsher*, Congress retained a wide removal power over an officer

whose functions "plainly entail[] execution of the law in constitutional terms." 106 S. Ct. at 3192.

3. In contrast, where there is no violation of the constitutional text, and no aggrandizement by the acting branch, the Court has rejected the "archaic view of the separation of powers as requiring three airtight departments of government," and has made plain that general separation-of-powers principles must be interpreted in a "pragmatic" and "flexible" manner (*Nixon v. Adm'r of General Services*, 433 U.S. 425, 443, 442 (1977)):

> "True, it has been said that 'each of the three general departments of government [must remain] entirely free from the control or coercive influence, direct or indirect, of either of the others . . . ,' *Humphrey's Executor v. United States*, 295 U.S. 602, 629 (1935),' * * *.
>
> "But the more pragmatic, flexible approach of Madison in the Federalist Papers and later of Mr. Justice Story was expressly affirmed by this Court only three years ago in *United States v. Nixon*, [418 U.S. 683 (1974)]. * * * [T]he Court squarely rejected the argument that the Constitution contemplates a complete division of authority between the three branches." *Id.* at 441-443.[8]

Under this "pragmatic, flexible" approach, the fundamental test for determining whether a congressional statute violates the separation of powers is "the extent to which [the challenged action] *prevents the* [*affected*] *Branch from accomplishing its constitutionally assigned functions.*" *Nixon*, 433 U.S. at 443 (emphasis added). See also *Morrison*, 108 S. Ct. at 2621 (the test is whether

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[8] In a footnote, the Court quoted Madison's observation, in The Federalist No. 47, that a proper understanding of the separation of powers "d[oes] not mean that these departments ought to have no *partial agency* in, or no *controul* over the acts of each other," but rather "that where the *whole* power of one department is exercised by the same hands which possess the *whole* power of another department, the fundamental principles of a free constitution, are subverted." 433 U.S. at 442 n.5.

Congress' scheme " 'impermissibly undermine[s]' the powers of the Executive Branch, or 'disrupts the proper balance between the coordinate branches [by] prevent-[ing] the Executive Branch from accomplishing its constitutionally assigned functions' "); *Schor*, 106 S. Ct. at 3258 (rejecting "formalistic and unbending rules" that might "unduly constrict Congress' ability to take needed and innovative action pursuant to its Article I powers"); *Pacemaker Diagnostic Clinic v. Instromedix, Inc.*, 725 F.2d 537, 544 (9th Cir.) (en banc), cert. denied, 469 U.S. 824 (1984) ("The standard for determining whether there is an improper interference with or delegation of the independent power of a branch is whether the alteration prevents or substantially impairs performance by the branch of its essential role in the constitutional system").

In *Morrison*, the Court further specified that a threat to the "constitutionally assigned functions" of a branch may be created, and the "proper balance" between the branches therefore disrupted, if Congress assigns to a branch functions that "are more properly accomplished" by another branch. 108 S. Ct. at 2613. This theme echoes the Court's indication in *Ex parte Siebold*, 100 U.S. (10 Otto) 371, 398 (1880), that an "incongruity in the duty required" may lead the Court to invalidate an allocation of powers to one of the branches.

Finally, the Court has made it clear that even where there exists a "potential for disruption" of another branch, Congress' scheme will nevertheless pass muster if "that impact is justified by an overriding need to promote objectives within the constitutional authority of Congress." *Nixon*, 433 U.S. at 443. This is why the Court has insisted that a pragmatic evaluation be made of the circumstances that led Congress to adopt the statute and the seriousness of its impact on the "institutional integrity" of the affected branch. *Schor*, 106 S. Ct. at 3258; see also *Morrison*, 108 S. Ct. at 2621. "The idea of separation of powers is justified by eminently practical considerations. * * * It is faithful to the idea of separa-

tion of powers to examine the real consequences of the [challenged] statute." *Pacemaker*, 725 F.2d at 546-547.

4. This Court's "pragmatic, flexible" approach to separation-of-powers questions where no textual command of the Constitution is in play and the danger-signal of congressional aggrandizement is absent has another virtue: it pays proper heed to the explicit constitutional authority of Congress to determine how *all* the branches of government should be organized to carry out their respective functions. The Necessary and Proper Clause empowers Congress "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers [of Congress], *and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.*" U.S. Const. Art. I, § 8, cl. 18 (emphasis added). This specifically authorizes Congress to enact necessary and proper laws to effectuate not only its own enumerated powers, but all the powers of *every* branch of the federal government (including powers that Congress has validly delegated). See *Kaiser Aetna v. United States*, 444 U.S. 164, 172 n.7 (1979). The Constitution assigns to each branch its central mission and its enumerated powers. But the Constitution does not spell out a detailed table of organization; nor does it specify which branch is to perform the various subsidiary and incidental functions needed to round out the operations of the government as a whole.[9] Rather, the Constitution leaves broad latitude

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[9] As this Court recognized in *Siebold*, 100 U.S. at 397, "it would be difficult in many cases to determine to which department an office properly belonged;" in the Court's example, the marshal is "an executive officer" who is also "pre-eminently the officer of the courts." See also *Morrison*, 108 S. Ct. at 2618 n.28 (discussing "[t]he difficulty of defining * * * categories of 'executive' or 'quasi-legislative' officials"). What is true of officers is true of the functions officers perform. As Justice Stevens observed in his concurring opinion in *Bowsher*, "[o]ne reason that the exercise of legislative, executive, and judicial powers cannot be categorically distributed among three mutually exclusive branches of government is that governmental power cannot always be readily characterized

to Congress to decide what institutions, and what allocation of subsidiary and interstitial responsibilities, will best carry out the constitutional plan for the other branches of government.

5. A flexible approach to separation-of-powers questions, giving proper heed to the pragmatic circumstances that animated Congress, is consistent with the historical evidence of the Framers' philosophy of separation of powers. As recent important research confirms, there did not exist, at the time of the framing of the Constitution, a determinate set of rules that defined when the ideals of separation of powers were or were not satisfied. See generally Casper, *An Essay in Separation of Powers: Some Early Versions and Practices*, —— Wm. & Mary L. Rev. —— (1988) (forthcoming).[10] This is demonstrated, *inter alia*, by the fact that there was wide divergence with respect to constitutional allocations of power in the various state constitutions; and by the fact that many critical issues relating to separation of powers (*e.g.*, power over appointments and the mode of selecting the President) were hotly disputed in the Convention and often not settled until its closing sessions.[11] In other words, *there was no positive law of separation of powers* at the time of the framing. Thus, when the Constitution's text does not itself determine how powers are to be divided, the Constitution should not be read by implication to create a rigid table of organization with respect to how the many interstitial and subsidiary functions of

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with only one of those three labels. On the contrary, as our cases demonstrate, a particular function, like a chameleon, will often take on the aspect of the office to which it is assigned." 106 S. Ct. at 3200.

[10] Because this article is in press we have furnished copies to all counsel and lodged copies with the Court.

[11] Also relevant are the Convention's many decisions vesting in Congress (or in the executive branch) powers that were not self-defining and could readily have been assigned elsewhere (*e.g.*, the power to declare war, which was a royal prerogative under the English system).

government should be organized. Rather, as this Court has perceived, the question is whether the scheme adopted by Congress *substantially* subverts the independence of one of the branches, or *seriously* disrupts its central constitutional mission. See *Morrison*, 108 S. Ct. at 2621-2622.

6. Obviously, neither the Necessary and Proper Clause, nor a "pragmatic, flexible" approach, authorizes Congress to override an explicit provision of the Constitution. But if there is one thing plain, it is that the text of the Constitution does not explicitly prohibit what Congress did in the Sentencing Reform Act. More particularly, it is critically important to remember that the Constitution does not itself assign the sentencing function to the exclusive jurisdiction of any branch. Indeed, deciding what punishment fits the crime is a paradigm example of a responsibility that has, historically, been *shared* among the three branches. See pp. 4-6, *supra*. Sentencing is thus preeminently a field where interbranch cooperation and sharing of responsibility are appropriate, and where rules must therefore "be fixed according to common sense and the inherent necessities of the governmental co-ordination." *Hampton & Co. v. United States*, 276 U.S. 394, 406 (1928). And it is precisely in such a field that Congress' discretion to allocate authority and fashion appropriate offices and institutions must be at its greatest.[12]

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[12] The point may be illustrated by the administration of probation and parole. Currently, the administration of probation is the responsibility of the judicial branch whereas the administration of parole is the responsibility of the executive branch. Yet, functionally, both probation and parole are forms of supervised release that serve as alternatives to incarceration. There is no reason to think that the current allocation of responsibility is constitutionally compelled. In fact there is considerable interplay between probation officers and the parole authorities. See, *e.g.*, 18 U.S.C. § 3655 (requiring probation officers to "perform such duties with respect to persons on parole as the United States Parole Commission shall request").

Because probation officers are "peace officers" (*Minnesota v. Murphy*, 465 U.S. 420, 432 (1984)), and have "law enforcement" powers such as the power to arrest (*Kimberlin v. United States*

7. Just as it is plain that the Sentencing Reform Act does not violate the text of the Constitution, it is also plain that this case does not in any way involve congressional aggrandizement. Congress created the Commission as an independent agency, free from the policy control of the President (and, for that matter, of the courts). And Congress retained no improper or constitutionally suspect supervising authority over the Commission.

8. The sole remaining inquiry under this Court's cases, then, is whether the functions delegated to the Commission, or its composition, involve a substantial "disruption" (*Schor*) of the ability of one or more branches of government to "accomplish[] its constitutionally assigned functions" (*Nixon*). It is to this inquiry that we now turn. We first examine whether the delegation of powers to the Commission to make rules to govern the sentencing discretion of the courts undermines the performance of the constitutionally assigned functions of the *executive* branch.[13] Second, we turn to the reciprocal question whether the Act undermines the constitutional scheme regarding the "constitutionally assigned functions" of the *judicial* branch.

Dep't of Justice, 788 F.2d 434, 437 (7th Cir.), cert. denied, 478 U.S. 1009 (1986)), the placement of the probation service in the judicial branch and the courts' powers to supervise (and remove) probation officers, see 18 U.S.C. § 3602, would become constitutionally suspect under Petitioner's rigid version of separation of powers.

[13] This case presents no serious question of an impairment of the "constitutionally assigned functions" of the *legislative* branch. That question is simply another way of asking whether Congress has made an unconstitutional delegation. As explained in the Brief for the United States, Petitioner's non-delegation argument is plainly insubstantial.

II. CONGRESS MAY AUTHORIZE AN INDEPENDENT COMMISSION HOUSED IN THE JUDICIAL BRANCH TO PROMULGATE RULES TO GUIDE THE SENTENCING DISCRETION OF FEDERAL JUDGES

A. The Delegation Of Rulemaking Power To The Commission Does Not Disrupt The Constitutionally Assigned Functions Of The Executive Branch

The location of the Commission in the judicial branch and its power to promulgate sentencing guidelines do not disrupt the ability of the executive branch to accomplish its constitutionally assigned functions. The judicial branch has always been, and continues to be, centrally involved in sentencing. It therefore cannot be suggested that the *field* in which the Commission acts is wholly or exclusively executive in character. Rather, Petitioner argues that *rulemaking* to guide the delegated sentencing discretion of federal judges is the exercise of an exclusively "executive" power.

1. The notion that rulemaking under a legislative delegation is an "executive" power seems anomalous on its face. The very fact that this is a *delegated* power—that Congress itself could unquestionably enact rules such as the guidelines—shows that rulemaking is not "executive" in the sense that it has "always and everywhere * * * been conducted never by the legislature, never by the courts, and always by the executive." *Morrison*, 108 S. Ct. at 2626 (Scalia, J., dissenting). Beyond this, Congress' consistent practice, consistently sustained by this Court, has been to delegate the power to make rules to the institution appropriately concerned with the governance of the subject matter addressed by those rules. Rulemaking power has been delegated in appropriate circumstances to the judicial branch; to independent agencies; to the state legislatures (as in the Assimilative Crimes Act, upheld in *United States v. Sharpnack*, 355 U.S. 286 (1958)); and to the governmental authorities of the District of Columbia and the territories and possessions of the United States. In each case the sole constitutional

issue has been, simply, whether Congress' choice of rulemaking institution is an appropriate and reasonable one; the Court has never suggested that Congress may delegate rulemaking power only to institutions that are "executive," that are "in" the executive branch, or that are under the control of the President.

2. In *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), this Court squarely rejected the proposition that functions such as rulemaking are the exclusive prerogative of the executive. The government argued in that case that the President's power to remove FTC commissioners could not be limited by Congress because the FTC's functions "are not different from those regularly committed to the executive departments." 295 U.S. at 617 (argument for the United States). The Court responded that in "administering the details" of the statute "the commission acts in part quasi-legislatively and in part quasi-judicially. * * * To the extent that [the FTC] exercises any executive function—*as distinguished from executive power in the constitutional sense*—it does so in the discharge and effectuation of its quasi-legislative or quasi-judicial powers * * *." *Id.* at 628 (emphasis added).

In *Buckley* the Court reaffirmed this conclusion. In contrast to the Federal Election Commission's "enforcement power"—which the Court found to be a function that "the Constitution entrusts" to the President, 424 U.S. at 138 [14]—the Court expressly rejected any characterization of the Commission's powers involving "rulemaking, advisory opinions, and determinations of eligibility" as exclusively executive. "These functions, exercised free from day-to-day supervision of either Congress or the Executive Branch, are *more legislative and judicial in nature than are the Commission's enforcement powers*, and are of kinds usually performed by independent regulatory agencies or by some department in the Executive

[14] The Sentencing Commission has no "enforcement" functions or powers.

Branch under the direction of an Act of Congress." *Id.* at 140-141 (emphasis added) (footnote omitted).[15]

3. Petitioner relies (Br. 21) on *Bowsher's* holding that an officer controlled by *Congress* may not participate in "execution of the law in constitutional terms." 106 S. Ct. at 3192. Seizing on the *Bowsher* Court's statement that "[i]nterpreting a law enacted by Congress to implement the legislative mandate is the very essence of 'execution' of the law" (*ibid.*), Petitioner points out that the Commission's rulemaking functions involve "interpreting a law enacted by Congress to implement the legislative mandate," and concludes that the Commission's placement in the judicial branch is therefore unconstitutional.

Petitioner's argument is a false syllogism drawn from a wildly inflated premise.

(a) The Court in *Bowsher* did not mean, and could not have meant, that only the executive branch may "interpret" laws in order to "implement" a legislative mandate. That, after all, is what the courts do every day.[16]

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[15] In *Chadha* the Court stated that rulemaking by executive branch agencies or officials constitutes "Executive action," 462 U.S. at 953 n.16, and therefore is not governed by the Presentment Clauses. But this statement in no way supports the proposition that when a body in the *judicial* branch exercises delegated rulemaking authority it must be seen as performing an exclusively executive function. The Court's statement in *Chadha* was made in response to the contention that rulemaking by administrative agencies constitutes "lawmaking" subject to the Presentment Clauses. The Court rejected that characterization because "administrative activity cannot reach beyond the limits of the statute that created it." *Ibid.* But that is equally true of agencies within the judicial branch. Thus, as applied to the Commission, *Chadha* simply confirms that sentencing rulemaking may properly be delegated by Congress, within the limits of the delegation doctrine, without violating the Presentment Clauses.

[16] Both the Third and Ninth Circuits have rejected this out-of-context reading of *Bowsher*, which would make it unconstitutional for courts to act. *Lear Siegler, Inc. v. Lehman*, 842 F.2d 1102, 1106 & n.1 (9th Cir. 1988); *Ameron, Inc. v. United States Army Corps of Engineers*, 809 F.2d 979, 991 (3d Cir. 1986), cert. granted, 108 S. Ct. 1218 (1988).

(b) The only issue facing the Court in *Bowsher* was whether, *as between Congress and the executive*, the functions delegated to the Comptroller General involved "execution of the law in constitutional terms." The Court had no occasion to decide, and did not purport to be deciding, what are the appropriate lines between executive and *judicial* implementations of legislative mandates.

(c) In any event, *Bowsher* did not even involve rulemaking. The Comptroller General's duties required him to "exercise judgment concerning facts," "determine precisely what budgetary calculations are required," "determine the budget cuts to be made," and "command[] the President himself to carry out * * * the directive of the Comptroller General as to the budget reductions." 106 S. Ct. at 3192. That is a description, not of rulemaking, but of factfinding and enforcement power (to which some authority to interpret the law is a necessary adjunct). Plainly, then, *Bowsher* does not hold that rulemaking is an exclusively executive function.

5. *Bowsher* obviously cannot mean that the judicial branch may never engage in rulemaking pursuant to a congressional delegation of authority. Since the beginning, Article III courts have been authorized to promulgate rules on subjects touching the administration, procedures, and operation of the courts. Indeed, so far as we know, the Second Congress' delegation of rulemaking power to the courts with regard to the forms of process and modes of proceedings in cases at law and in equity, Act of May 8, 1792, 1 Stat. 275, 276, antedates by many years the practice of delegating regulatory rulemaking authority to the executive branch or to independent agencies.[17]

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[17] Judicial rulemaking was approved in *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 43 (1825) (rulemaking powers pertaining to the operation of the judicial branch may "be done by the legislature," or, alternatively, may be "conferred on the judicial department"). In *Sibbach v. Wilson & Co.*, 312 U.S. 1, 9-10 (1941), the Court upheld the Rules Enabling Act of 1934, 28 U.S.C. § 2072,

Pursuant to the Rules Enabling Act and similar grants of delegated rulemaking power, this Court has promulgated a large range of rules in aid of the federal courts' mission to adjudicate cases and controversies. But if *Bowsher* means that the exercise of delegated rulemaking authority constitutes "execution of the law in constitutional terms," then the various enabling statutes are unconstitutional, as are all rules promulgated thereunder.

6. Since neither the field in which the Commission acts (sentencing) nor the methodology it uses (rulemaking) is inherently or exclusively "executive" in character, it follows that Congress' decision to delegate to the Commission the power to issue sentencing guidelines cannot "disrupt" the ability of the executive branch to accomplish its "constitutionally assigned functions."

B. The Delegation Of Rulemaking Power To The Commission Does Not Disrupt the Constitutionally Assigned Functions Of The Judicial Branch

We turn now to the other side of the coin: whether the assignment of the power to issue sentencing guidelines to an independent commission located in the judicial branch undermines or threatens the constitutionally assigned mission of the *judicial* branch.

1. The central mission of the judicial branch is to exercise "the judicial Power of the United States" by adjudicating "cases" and "controversies." Article III contemplates that the federal judiciary will perform that function impartially, free from the control of the other branches. It also contemplates that the Article III courts will not be assigned tasks that are inconsistent with that mission. That is why this Court has held that an Article III *court* may not render advisory opinions (see *Muskrat v. United States*, 219 U.S. 346, 354 (1911)), or give judgments that are subject to executive or congressional revision. See *Hayburn's Case*, 2 U.S. (2 Dall.) 409

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reaffirming that delegations of rulemaking power to the judicial branch are constitutional.

(1792); *United States v. Ferreira*, 54 U.S. (13 How.) 40 (1852).

But, as we discuss in Part III of this brief, this has never meant that federal *judges* may not, as individuals, participate in tasks other than the adjudication of cases. Nor has it ever meant that Congress may not create non-adjudicating institutions *within* the judicial branch that do not, themselves, exercise the judicial power of the United States. These auxiliary entities, whether consisting entirely of judges (the Judicial Conference; the Judicial Councils), a mix of judges and nonjudges (the various rules Advisory Committees), or nonjudges (the Administrative Office; the Probation Service), are validly housed in the judicial branch if their functions are necessary and proper to support the constitutionally assigned mission of that branch. See *Chandler v. Judicial Council*, 398 U.S. 74, 86 n.7 (1970). The Constitution forbids Congress to create such an entity only if it is assigned a task that "disrupt[s]" the Article III mission (*Nixon*), or if it assigns to the judicial branch functions that are "incongru[ous]" (*Siebold*) or are "more properly accomplished" by another branch (*Morrison*).

2. It is not easy to see how the delegation to the Sentencing Commission can be said to "disrupt" the constitutional mission of the judicial branch. The suggestion that the Sentencing Reform Act is unconstitutional because the service of three judges on the Commission is such a drain on resources that it will undermine the ability of the courts to do their job is too farfetched to take seriously. No less farfetched is the notion that the courts will be unable impartially to make judgments about the meaning or validity of the guidelines because three judges participated in their drafting or because the commission that issued them is within the judicial branch.[18] Nor has any meaningful demonstration been made that the loca-

[18] The problem of the impartiality of the judges actually serving on the Commission is adequately taken care of by the rules and practices governing recusal. See p. 43 & n.29 *infra*.

tion of the Commission in the judicial branch, and the service of three federal judges on the Commission, will somehow compromise the independence of the federal courts in adjudicating cases and controversies.

What remains is the suggestion (Pet. Br. 28) that delegating the power to make rules in the field of sentencing to the judicial branch unites policy-making power with judicial power in a manner that is dangerous to liberty. But of course Congress did not in fact "unite" these powers at all. Whatever concerns might arise if the power to issue sentencing guidelines were given to the courts as such are simply irrelevant here, since the Sentencing Commission is not a court and is not controlled by the courts or the judges.[19]

Congress' judgment was that a threat to liberty would arise, if at all, only from giving the power to promulgate sentencing rules to the branch that possesses the power and responsibility to prosecute: the executive branch. Congress' precautionary solution—to create an *independent* commission, consisting of independent experts including federal judges but not exclusively judicial, housed in the judicial branch but not subject to the control of the courts—represents a carefully balanced choice of means, precisely of the sort contemplated by the Necessary and Proper Clause's grant of discretion to Congress.

3. We turn now to the question whether the Commission's function—issuing sentencing guidelines to channel the sentencing discretion of the federal judges—is so "incongru[ous]" (*Siebold*), or so clearly "more properly

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[19] The reverse argument, that the delegation to the Commission is dangerous because its independence makes it unaccountable, would invalidate all independent agencies. It is answered by the fact that the Commission is fully accountable to Congress, which can revoke or amend any guideline either during its mandatory six-month waiting period or at any time. In addition, Congress required the Commission to abide by the notice-and-comment rulemaking requirements of the Administrative Procedure Act, thereby ensuring ample opportunity for public participation in its deliberations. 28 U.S.C. § 994(x).

accomplished" by another branch (*Morrison*), that its assignment to a judicial branch agency is unconstitutional. But the answer seems obvious: Congress' decision to enlist the judicial branch and the federal judges in the enterprise of channeling the judicial function of imposing sentence is the opposite of incongruous.

For almost 200 years, federal judges have been exercising an "unfettered" (*Dorszynski*, 418 U.S. at 437) policy-making discretion (subject to legislative maxima) to prescribe punishments. In so doing, the judges have not been engaged in mere interpretation; they have, in effect, determined what are the proper aims of sentencing, what factors make a more or less severe sentence appropriate, and how these factors should be combined in a particular case. In vivid contrast to Petitioner's suggestions (Br. 20), the judiciary has created, not merely applied, sentencing policy. Congress has now decided that this delegated judicial "lawmaking" should be accomplished by a different methodology: should be ordered to make it more evenhanded and predictable.

It defies understanding, we submit, to assert that it is incongruous or inappropriate to assign the effectuation of this changed methodology to an independent commission housed in the judicial branch that includes federal judges in its membership. The overall effect of the Act is to curb, rather than to increase, the delegated policy-making power of the judiciary with respect to sentencing. In light of this, what institutional allocation could be *more* "congruous"? Would it be "congruous" to deny the Commission the expertise of the judges, who have been originating sentencing standards (albeit on a case-by-case basis) for two centuries? To make the Commission an executive agency, with all the attendant problems of uniting the sentencing function with the executive's prosecutorial functions?

4. Petitioner's sole answer (Br. 22-27) is an abstract syllogism that supposedly shows that upholding the Act will inexorably set the Court on a dangerous slippery

slope. The sentencing guidelines, Petitioner says, are "substantive." If the Court upholds the power of Congress to delegate the function of issuing sentencing guidelines to the judicial branch—or, in Petitioner's habitual interchangeable usage, to the "courts" or the "judges"—it will be forced to uphold parallel delegations to that branch to issue ordinary substantive regulations in fields such as antitrust and securities, opening the door to massive expansions in the power of the judiciary. The only way to prevent this mischief is to adopt a rigid constitutional rule: the judicial branch may engage in rulemaking only with respect to *procedure*, and "procedure" must be defined narrowly to encompass only housekeeping matters that have no impact on "policy."

The Court should reject this line of argument.

(a) This Court has so far resisted the temptation to enter into the semantic exercise of classifying rules according to an all-purpose definition of "substance" and "procedure;" [20] and we hope it will maintain that tradition here. As a matter of *principle*, sentencing guidelines are obviously not "substantive": the defendant's conduct is unlawful irrespective of the sentence. As a *practical* matter, a sentencing rule may tend to influence people's behavior—as may many other remedial and procedural rules. But it is critical to remember that the influence of a sentencing guideline on behavior is no more or less than that of the more or less severe sentencing practices

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[20] As this Court noted only last Term, "[e]xcept at the extremes, the terms 'substance' and 'procedure' precisely describe very little except a dichotomy, and what they mean in a particular context is largely determined by the purposes for which the dichotomy is drawn." *Sun Oil Co. v. Wortman*, 108 S. Ct. 2117, 2124 (1988). See also *Guaranty Trust Co. v. York*, 326 U.S. 99, 108 (1945). For that reason, *Miller v. Florida*, 107 S. Ct. 2446 (1987) (see Pet. Br. 23), is not in point. *Miller* dealt with the question of "substance" versus "procedure" only for purposes of determining whether sentencing guidelines adopted by a state legislature may be retroactively applied under the Ex Post Facto Clause. It had nothing to do with the question of what branch of government may be delegated power to issue such guidelines.

of particular courts. If sentencing guidelines are, therefore, "substantive," so were the sentences imposed at the discretion of individual judges. In neither case does it follow that the judicial branch is constitutionally barred from making sentencing decisions.[21]

We believe, therefore, that the entire definitional issue is a red herring. The Constitution does not say, and this Court has never held, that separation-of-powers principles limit the rulemaking power of the courts to "procedural" matters.[22] Still less is it the law that the meaning of the substance-procedure dichotomy is that Congress may not delegate to the courts the power to issue rules in fields involving issues of federal policy that affect substantive rights. Judicial rulemaking under the various enabling acts has frequently involved important policy choices and has important effects on the substantive rights of litigants. Yet the Court has repeatedly promulgated such rules despite dissents arguing that "many [Rules] determine matters so substantially affecting the rights of litigants in lawsuits that in practical effect they are the equivalent of new legislation

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[21] The sentencing guidelines, unlike the rules issued by the FTC and SEC, do not bind the general public (no one can go to jail for disobeying a sentencing guideline); they are *court* rules regulating the conduct of judges. Probably the most accurate definitional approach is to characterize the sentencing guidelines as *remedial*, rather than either substantive or procedural.

[22] The Rules Enabling Act provides that the rules issued thereunder "shall not abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072. But the Court has never said that this proviso is compelled by separation-of-powers principles. Instead, the Court's "original and enduring view" has been that "the Act's procedure/substance dichotomy was intended to allocate lawmaking power between the federal government and the states." Burbank, *The Rules Enabling Act of 1934*, 130 U. Pa. L. Rev. 1015, 1028 (1982). See, *e.g.*, *Hanna v. Plumer*, 380 U.S. 460, 471 (1965) ("the Enabling Act * * * say[s], roughly, that federal courts are to apply state 'substantive' law and federal 'procedural' law"). Consequently, the constitutional significance of the line between procedure and substance concerns issues of *federalism*, not separation of powers.

* * *" 374 U.S. 865-866 (1963) (statement of Black and Douglas, JJ.). And in *Sibbach* the Court—in upholding a rule that was recognized as having a major impact on the right to privacy—characterized the courts' rulemaking power under the Enabling Act in broad terms, encompassing all rules that regulate "the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress." 312 U.S. at 14.

On the one occasion when this Court has addressed the question of Congress' *power* in this connection, the Court ruled explicitly that Congress possesses a wide constitutional discretion to classify rules for purposes of defining the proper scope of the federal courts' delegated rulemaking power. "[T]he constitutional provision for a federal court system (augmented by the Necessary and Proper Clause) carries with it congressional power to make rules governing the practice and pleading in those courts, which in turn includes a power to regulate matters which, though falling within the uncertain area between substance and procedure, are rationally capable of classification as either." *Hanna v. Plumer*, 380 U.S. 460, 472 (1965). This ruling would seem determinative here.[23]

(b) In light of *Sibbach* and *Hanna*—and in light of the overriding separation-of-powers standards announced in *Siebold* and *Morrison*—it seems clear that the important question is not whether sentencing guidelines regu-

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[23] Indeed, *Hanna* is *a fortiori* for the conclusion that the Sentencing Reform Act is constitutional. In *Hanna*, it was the constitutional power of Congress to enact the relevant rule that was *itself* in question (in view of the states' constitutional prerogative to make their own substantive laws). In the case of the Sentencing Commission, no doubt can be raised about Congress' own constitutional power to enact the sentencing guidelines; the sole issue is the scope of Congress' constitutional discretion in classifying the rulemaking power for purposes of determining whether it may be delegated to the judicial branch. It would be perverse to conclude that Congress' discretion is smaller in the latter situation than it was in *Hanna*.

late "substance" or "procedure," [24] but whether the *subject* of sentencing is incongruous (*Siebold*) or inappropriate (*Morrison*) for rulemaking by an independent agency within the judicial branch. As we have already demonstrated (pp. 34-35, *supra*), under this test, no serious doubt can attach to the appropriateness of allowing an independent mixed commission, assigned to the judicial branch in order to safeguard its independence, to formulate sentencing guidelines to guide the sentencing discretion of the federal district courts. The history and theory of sentencing during the past two centuries amply justify Congress' careful judgment that "sentencing should remain primarily a judicial function." S. Rep. 159. Since policy making in the *field* of sentencing has been and remains appropriate for the judicial branch; and since the *methodology* of rulemaking is not forbidden to an independent commission within the judicial branch, no serious issue of "incongruity" arises.

(c) The Court does not have to pass on the purely hypothetical question whether it would be proper to assign to the courts, or to an independent agency within the judicial branch, the task of issuing purely substantive regulations governing matters such as securities fraud. It seems obvious that such a scheme would, on historical grounds alone, be problematic in ways that are irrelevant to the sentencing guidelines. The judiciary has never exercised, and has no expertise in, rulemaking that *directly* regulates the primary conduct of the public; at some point a substantial concern that the powers traditionally exercised by the judicial branch had been inappropriately expanded might very well come into play.

But it would be most unwise to anticipate those concerns by fashioning an abstract, procrustean rule against

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[24] It would surely be of questionable appropriateness for the Supreme Court to be assigned the task of issuing *procedural* rules to govern proceedings before executive branch agencies; and it would certainly be inappropriate for an executive branch agency to issue *substantive* rules governing the grounds for removal from the bar of the Supreme Court.

rulemaking within the judicial branch that would needlessly tie Congress' hands and that would invalidate a sensible scheme such as the Sentencing Reform Act. The Court today needs to decide only a specific question: whether it is "incongruous" or "inappropriate" to create an independent agency, housed in the judicial branch, to issue rules to channel the discretion of the judges in the field of sentencing, which has for more than 100 years been largely confided to the policy-making discretion of the judiciary. We submit that the only possible answer to that question is a simple, definitive "No."

III. THE COMMISSION'S MIXED COMPOSITION DOES NOT VIOLATE SEPARATION-OF-POWERS PRINCIPLES

A. The Constitution Does Not Forbid Judges, Acting As Individuals, To Undertake Extra-Judicial Activities

Petitioner's assertion that Article III judges may not serve on the Commission casually sweeps into the dustbin 200 years of consistent constitutional practice that has seen numerous Justices and judges serve, in their individual capacities, in a wide variety of non-adjudicative roles. This Court has never held or even suggested that there exist *constitutional* rules governing the question whether federal judges may take on such nonjudicial duties in their individual capacities. Even if such rules are to be created, they should not bar service on a Commission charged with the task of channeling the sentencing discretion of federal judges.

1. The Constitution does not speak to the question whether individual federal judges may undertake nonjudicial governmental duties. The Constitutional Convention framed the Incompatibility Clause (Art. I, § 6, cl. 2) to prohibit members of Congress from serving as officers of the United States, but rejected proposals that would have barred judges from holding other office. See Slonim, *Extrajudicial Activities and the Principle of the Separation of Powers*, 49 Conn. B.J. 391, 396-401 (1975). The natural inference—and the one on which Justices

and judges have consistently acted since 1789—is that the Constitution does not bar federal judges from accepting official duties outside their adjudicative capacities. See *In re President's Commission On Organized Crime* (*"Scarfo"*), 783 F.2d 370, 377 (3d Cir. 1986) (collecting examples).

The long tradition of service by federal judges on various nonjudicial bodies does not, of course, mean that it is always prudent or proper for a judge to engage in extra-judicial tasks. But the range and variety of nonjudicial duties accepted by Justices and judges (some of them participants in the framing of the Constitution) attests to a common understanding that the decision whether to do so is a matter for the discretion of the individual judge, the canons of judicial ethics, and the rules governing recusals, rather than for constitutional norms. If it was valid for Marshall to serve as Secretary of State and Jay as Ambassador to Great Britain, for Justice Jackson to prosecute at Nuremberg and Chief Justice Warren to investigate the Kennedy assassination, it would surely be perverse to conclude that three circuit judges may not participate in the work of the Sentencing Commission.

2. Congress, too, has repeatedly acted on the understanding that it may constitutionally assign significant non-adjudicative tasks to judges.[25] Congress has created numerous bodies, such as the Judicial Conference and the Judicial Councils, that are composed entirely or in part of designated judges. See 28 U.S.C. §§ 331-332; see generally Meador, *The Federal Judiciary and Its Future*

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[25] Early in our history, Congress assigned the Chief Justice to serve *ex officio* as a member of the Sinking Fund Commission, which was entrusted with the task of repurchasing evidences of the national war debt. Act of August 12, 1790, ch. 47, 1 Stat. 186. Although the Commission was "clearly expected by Congress to exercise administrative discretion" in making purchases of the debt pursuant to its own regulations, no objection was raised in the debate "to this 'further use' of the Chief Justice." Wheeler, *Extrajudicial Activities of the Early Supreme Court*, 1973 Sup. Ct. Rev. 123, 141-142.

Administration, 65 Va. L. Rev. 1031 (1979). Far from suggesting that the separation of powers is incompatible with Congress' settled understanding that it may assign a broad range of non-adjudicative duties to Article III judges, this Court in *Chandler* saw "no constitutional obstacle preventing Congress from vesting in the Circuit Judicial Councils, as administrative bodies," the authority to administer " 'the business of the courts within [each] circuit.' " 398 U.S. at 86 n.7.

3. Petitioner persistently obscures this issue by collapsing the settled distinction between what Congress may ask *courts* to do and what it may ask *judges*, acting individually, to do. Thus Petitioner quotes (Br. 18) this Court's observation that, "[a]s a general rule * * * 'executive or administrative duties of a nonjudicial nature may not be imposed on judges holding office under Art. III of the Constitution.' " *Morrison*, 108 S. Ct. at 2612 (quoting *Buckley v. Valeo*, 424 U.S. at 123). But this Court has never applied that "general rule" to service by judges *outside* the "office [they hold] under Art. III." [26] In fact, the decisions on which the rule is based—*United States v. Ferreira* and *Hayburn's Case*—demonstrate beyond a doubt that the rule governs only the question of what duties Congress may assign to an Article III court acting as a court.[27]

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[26] The "Special Division" whose non-adjudicative duties this Court upheld in *Morrison* is a "special court" created to appoint independent counsels. 108 S. Ct. at 2603. For that reason, Petitioner's extensive discussion (Br. 18-20) of the Court's Article III analysis of the Special Division's powers is inapposite.

[27] As the Court explained in *Ferreira*, the principle of *Hayburn's Case* is that a "duty imposed, where the decision was subject to the revision of a Secretary and of Congress, *could not be exercised by the court as a judicial power*." 54 U.S. at 50 (emphasis added). Conversely, the Court indicated that if the statute in *Hayburn's Case* had "conferr[ed] the power on the judges personally as commissioners," the judges "might constitutionally exercise it, and the Secretary constitutionally revise their decisions." *Ibid.*

The distinction drawn in *Ferreira* is not an empty technicality; rather, it is fully consistent with the rationale for the limitation

4. Petitioner does not—and could not—show that service by three judges on the Sentencing Commission threatens judicial independence or allows judicial "encroaching into areas reserved for the other branches." *Morrison*, 108 S. Ct. at 2612. Instead, he resorts yet again to the slippery slope. Br. 45-46. What Petitioner cannot explain away, however, is that for 200 years we have managed, without inventing constitutional rules to govern the matter, to avoid parade-of-horribles statutes such as one requiring the Director of the FBI to be a sitting judge. There is no reason to think that Congress would enact a statute that assigned judges to such an inappropriate role, let alone that judges would accept it.[28] What history demonstrates is that rules relating to recusal and canons of judicial ethics are quite sufficient to regulate these matters.[29]

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on Congress' power to assign nonjudicial duties to Article III courts. Revision of the nonjudicial action of an individual judge does not threaten "the independence of the Judicial Branch" (*Morrison*, 108 S. Ct. at 2612) because the judge is not exercising the judicial power conferred by Article III; and service by an individual judge in a nonjudicial capacity does not enable "the judiciary" to "encroach[] into areas reserved for the other branches" (*ibid.*) because the supremacy of the judiciary in its own sphere does *not* extend to the judge's nonjudicial acts, which may be restrained and limited by the other branches.

[28] In the case of the Sentencing Commission, Congress determined that it was "appropriate" for judges to serve without resigning their judicial office because they "will be engaged in activities closely related to traditional judicial activities," and that this was "necessary" to enable "highly qualified [judicial] candidates" to serve without "the substantial burden" of resigning. S. Rep. 163.

[29] Judge-commissioners can recuse themselves in appropriate cases in order to avoid any appearance of bias without impairing the work of the courts. See 28 U.S.C. § 455; *Scarfo*, 783 F.2d at 381. See also *Morrison*, 108 S. Ct. at 2615 (the statute requiring recusal of members of the Special Division in cases involving any independent counsel "avoid[s] any taint of the independence of the judiciary").

The Eleventh Circuit's questionable ruling that federal judges may not constitutionally serve on the Crime Commission, *In re Application of the President's Comm'n on Organized Crime*, 763

B. Non-Judges May Serve On The Commission.

In recognition of the historic role of the executive in the shaping of sentencing policy, and to create a wide range of expertise on the Commission, Congress sensibly decided to create a mixed Commission, with non-judges as well as judges as members. Petitioner argues (Br. 14) that the service of non-judges with Article III judges on a commission in the judicial branch constitutes a forbidden " 'sharing' of judicial power with persons who are not Article III judges." Petitioner cites this Court's statement that "the 'judicial Power of the United States' vested in the federal courts" may not be "shared with the Executive Branch." *United States v. Nixon*, 418 U.S. 683, 704 (1974). But this statement has no application to the Commission, which is not a "federal court" and which does not exercise "the judicial Power of the United States." [30]

Petitioner's approach would forbid all inter-branch cooperation in the name of rigid rules against "sharing" of governmental power. As this Court has repeatedly emphasized, that is not what the separation of powers means: "interdependence" and "reciprocity" among the branches are often necessary to "integrate the dispersed powers into a workable government." *Morrison*, 108 S. Ct. at 2620 (quoting *Youngstown*, 343 U.S. at 635 (Jackson, J., concurring)).

F.2d 1191 (11th Cir. 1985), overlooks recusal, and in any event has no application to the Sentencing Commission, which is not charged with assisting the executive branch in investigation or enforcement of the criminal laws.

[30] Petitioner evidently assumes that because the Commission is "in" the judicial branch it must be exercising the "judicial power." This assumption, which would call into question the constitutionality of numerous non-adjudicative bodies in the judicial branch, such as the Administrative Office and the Probation Service, would actually *increase* threats to the independence of the judicial branch by making it dependent on executive branch agencies for necessary administrative assistance. See Fish, *Crises, Politics, and Federal Judicial Reform: The Administrative Office Act of 1939*, 32 J. Pol. 599, 604-609 (1970).

IV. THE PRESIDENT'S REMOVAL POWER IS CONSISTENT WITH THE SEPARATION OF POWERS

Petitioner argues that the President's power to remove commissioners "only for neglect of duty or malfeasance in office or for other good cause shown" (28 U.S.C. § 991(a)) violates the separation of powers.

1. Petitioner acknowledges (Br. 32) that the ultimate issue in evaluating the constitutionality of the President's removal power is "the extent to which it prevents the [judicial] Branch from accomplishing its constitutionally assigned functions." *Nixon*, 433 U.S. at 443. But, having paid lip service to the *Nixon* test, Petitioner makes no effort to show that the Sentencing Reform Act runs afoul of it. The President's power to remove commissioners for cause in no way threatens the life tenure or salary of judges as judges.[31] Nor does it in any way undermine the performance of the "constitutionally assigned" function of the federal courts to adjudicate cases within the federal judicial power. Thus, the Act does not breach the controlling constitutional standard.

2. Nevertheless, relying on this Court's decision in *Bowsher* that Congress may not retain the power to remove an official performing "executive" functions, Petitioner asserts that the President may not be given the power to remove Commission members performing "judicial" functions. And he attempts to repair the obvious defect in the analogy—the fact that Commission

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[31] Petitioner complains (Br. 32-33) that the President's power to decide whether or not to reappoint members of the Commission (and to designate its Chairman) will enable the President to control the commissioners. But the notion underlying this objection—that the President must be stripped of all possible ways to influence judges—is wrong. For example, the President has the power to "promote" judges to a higher court; and he has the power to ask judges to leave the judicial branch for high positions in government. If Presidents can refrain from abusing these means of "tempting" judges, and if judges can withstand these blandishments, it seems clear that any temptation that may attach to possible reappointment to, or chairmanship of, the Commission is not constitutionally problematic.

members do not perform a "judicial" function—by broadening *Bowsher* into a flat *per se* rule against removals of officials of one branch by a member of another branch.

Having rejected a parallel *per se* rule against interbranch appointments in *Morrison*, see 108 S. Ct. at 2609-2611, the Court should not create such a constitutional rule for removals. Article III grants life tenure to federal judges, but does not rule out giving the President limited removal powers in the case of malfeasance on the part of other officers of the United States who serve in the judicial branch. Certainly no *per se* rule against interbranch removals has existed in the past, as is attested by the unquestioned practice of presidential removal of judges who serve on "legislative courts" created by Congress under Article I. In *McAllister v. United States*, 141 U.S. 174, 185 (1891), this Court, after reviewing the variety of tenure provisions Congress had enacted in establishing courts in the territories, flatly stated: "As the courts of the Territories were not courts the judges of which were entitled, by virtue of the Constitution, to hold their offices during good behavior, it was competent for Congress to prescribe the tenure of good behavior * * * or to prescribe * * * the tenure of four years and no longer, or four years unless sooner removed, or four years unless sooner removed by the President * * *"[32]

3. Nor did *Bowsher* create such a *per se* rule. This Court carefully limited its holding in *Bowsher* to cases where the power of removal makes the officer "sub-

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[32] Similarly, the judges of the United States Tax Court, which is "established, under article I of the Constitution of the United States, [as] a court of record," 26 U.S.C. § 7441, are appointed by the President and may be removed by him "for inefficiency, neglect of duty, or malfeasance in office, but for no other cause." 26 U.S.C. § 7443(f). See also *Palmore v. United States*, 411 U.S. 389, 409 (1973) (discussing provisions for removal of Article I judges of the District of Columbia courts by a commission a majority of whose members are appointed by the President).

servient to Congress." 106 S. Ct. at 3189.[33] It then went on to examine in detail the question whether the *particular* removal provision in *Bowsher* in fact created "subservience." If the mere existence of a limited removal provision were enough to establish "subservience" to the removing body, this Court's elaborate exploration of the background of the provision for removal of the Comptroller General (106 S. Ct. at 3189-3191) would have been pointless. That it was in fact decisive is plain from the Court's opinion. The Court made it clear that the kind of "control" that is "constitutionally impermissible" exists where "Congress could simply remove, or threaten to remove, an officer for executing the laws in any fashion found to be unsatisfactory to Congress." *Id.* at 3189. On the basis of a detailed study of the legislative history of the removal provision and the history of Congress' relationship to the Comptroller General, the Court concluded—although the statute was in form a limited removal provision—that the removal power actually conferred was "very broad and, as interpreted by Congress, could sustain removal of a Comptroller General for any number of actual or perceived transgressions of the legislative will." *Id.* at 3190.

Congress gave the President no such broad authority over the Sentencing Commission. In fact Congress emphasized that it did *not* wish to give "significant control over the determination of sentences to the same branch of government that is responsible for the prosecution of criminal cases." H.R. Rep. No. 1017, *supra*, at 95. That is why Congress made the Commission "independent" and placed it in the judicial branch, thus requiring it to perform its duties "without executive leave." *Humphrey's Executor*, 295 U.S. at 628. In making its decision to create an independent Commission, Congress obviously

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[33] We note, too, that *Bowsher* related entirely to the special problem of aggrandizement by *Congress* of its role in the removal process, in the teeth of the "Decision of 1789" rejecting "a congressional role in the removal of Executive Branch officers." *Bowsher*, 106 S. Ct. at 3187.

acted on the understanding, settled since *Humphrey's Executor*, that a "good cause" removal provision is designed to safeguard an officer's independence from executive branch control, not his accountability or subservience to the President.[34] See *Morrison*, 108 S. Ct. at 2619 n.30 (noting that Congress frequently employs "a 'good cause' removal standard" where it determines that "a degree of independence from the Executive * * * is necessary to the proper functioning of the agency or official"); *id.* at 2627 (Scalia, J., dissenting) ("good cause" removal provisions are "a means of eliminating presidential control"). Given this tradition and these careful statutory provisions, it is nonsense to suppose that Congress intended at the same time to make the Commission "subservient" to the President. *Bowsher*, 106 S. Ct. at 3189.

5. As a matter of administration, it is sensible and appropriate that the President should exercise some supervision over possible dishonesty or neglect of duty by

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[34] In *Humphrey's Executor*, the Court interpreted the statute establishing the FTC to mean that that agency was to perform "[i]ts duties * * * without executive leave and * * * free from executive control," 295 U.S. at 628, and held that the President's power to remove commissioners "for inefficiency, neglect of duty, or malfeasance in office" did not permit removal because of a disagreement over policies. *Id.* at 625-626. By contrast, in *Bowsher* this Court found that a more expansive reading of the Comptroller General's "good cause" removal provision was warranted because that *particular* provision (adopted some fourteen years *prior* to *Humphrey's Executor*) was intended to give "'[t]he Congress of the United States * * * absolute control of the man's destiny in office.'" *Bowsher*, 106 S. Ct. at 3190 (quoting 61 Cong. Rec. 987 (1921)). The Sentencing Commission, however, was created some 50 years *after Humphrey's Executor* established that "good cause" removal provisions ensure the freedom of independent agencies from presidential control, and it was plainly modeled on agencies that are "independent of the Executive in their day-to-day operations." *Buckley v. Valeo*, 424 U.S. at 133. In fact, the *Bowsher* Court specifically distinguished the Comptroller General's removal provision from the typical "good cause" removal provision in statutes, such as 28 U.S.C. § 991(a), establishing independent agencies. See 106 S. Ct. at 3188 n.4.

commissioners—so long as this involves no presidential control over the Commission's policy discretion. Congress' decision to give the President—rather than, say, the Judicial Conference—the narrow power to remove commissioners for "good cause shown" is no more anomalous or problematic than the President's undoubted constitutional power faithfully to execute the laws by instituting criminal prosecutions against persons who are serving in the other branches (including judges and legislators). It is a typical instance of a needed housekeeping decision that Congress may make pursuant to its authority to enact necessary and proper legislation.

V. IF THIS COURT DETERMINES THAT THE COMMISSION MAY NOT BE HOUSED IN THE JUDICIAL BRANCH FOR SEPARATION-OF-POWERS PURPOSES, THE STATUTORY PHRASE "IN THE JUDICIAL BRANCH" MAY BE CONSTRUED AS LIMITED TO HOUSEKEEPING AND ADMINISTRATIVE MATTERS

If this Court concludes that it is constitutionally problematic to treat the Commission as located in the judicial branch for separation-of-powers purposes, the phrase "in the judicial branch" (28 U.S.C. § 991(a)) should be read simply as an exercise of Congress' undoubted power to assign the Commission to the judicial branch for budgetary, housekeeping, and statutory purposes. On that interpretation, the Commission—for separation-of-powers purposes—would simply be an "independent commission" like any other independent agency. This reading of the statute—which requires no "severance"—would leave intact Congress' central purpose that the Commission should be wholly *independent* from control by the political branches.

On this view, the constitutional status of the Commission is unproblematic. Independent agencies routinely issue even purely "substantive" rules. And the service of federal judges on this agency is amply justified both historically and functionally by the central role of the judiciary in matters of sentencing.

CONCLUSION

At the end of the day, we submit that the case against the validity of the Sentencing Reform Act is remarkably thin—an example of the "wish is father to the thought" school of constitutional interpretation. Neither constitutional text, nor constitutional practice, nor this Court's precedents, put this statute under a cloud. Rather, the Court can freely accede to Congress' determined wish that the guideline system go forward.[35]

For these reasons, the judgment of the district court should be affirmed.

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[35] As this brief was in press, the Ninth Circuit, in *Gubiensio-Ortiz v. Kanahele*, Nos. 88-5848 & 88-5109 (Aug. 23, 1988), held 2-1 that the Sentencing Reform Act is unconstitutional, stating: "We can prevent undue entanglement by the judiciary in the operation of the political branches only by adopting a clear-cut, prophylactic rule: Congress may not, under our system of separated powers, require judges to serve on bodies that make political decisions." Slip op. 50 (footnote omitted). Yet for 200 years we have left this issue to be settled, according to the felt necessities of the times, by the good sense and self-discipline of the American judiciary, without the need for *constitutional* intervention. We do not understand how the Constitution can be read to authorize the federal courts to exercise the awesome power to invalidate a major congressional enactment on the basis of a self-generated prophylactic rule that is not supported by the text or structure of the Constitution or by our historic practices.

Nor do we understand why any such prophylactic rule should be generated for *this* case, involving the delegation of rulemaking power in a field where for 200 years the federal courts have already been exercising authority to "make political decisions." See pp. 36-37, *supra*. If Congress may constitutionally delegate to individual judges "unfettered" lawmaking authority to prescribe the punishment for crime, subject only to statutory maxima, there is no substantial reason why Congress may not now circumscribe that delegation by authorizing an independent commission including judges to promulgate sentencing guidelines that are also subject to statutory maxima, as well as to newly-prescribed congressional standards.

Respectfully submitted.

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