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

JOHN M. MISTRETTA, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

The United States Sentencing Commission was established by the Sentencing Reform Act of 1984 as "an independent commission in the judicial branch of the United States." 28 U.S.C. (Supp. IV) 991(a). It is a permanent body with seven voting members, at least three of whom must be federal judges. The members are chosen by the President with the advice and consent of the Senate, and they are removable by the President for cause. The primary function of the Commission is to develop binding determinate sentencing guidelines for the federal courts. The question presented by this case are:

1. Whether the sentencing guidelines are invalid because the Sentencing Commission is constituted in violation of separation of powers principles.

2. Whether the sentencing guidelines are invalid because the Sentencing Reform Act of 1984 improperly delegates legislative authority to the Sentencing Commission.

3. Whether, if the sentencing guidelines are struck down, the provisions of the Sentencing Reform Act abolishing parole and modifying the system of awarding "good time" credits to federal prisoners are nonetheless valid.

PARTIES TO THE PROCEEDINGS

The United States of America, John M. Mistretta, and Nancy L. Ruxlow were parties in the district court.

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OPINION BELOW

The opinion of the district court (Pet. App. 1a-15a)[1] is reported at 682 F. Supp. 1033.

JURISDICTION

The judgment of the district court (Pet. App. 33a-40a) was entered on April 18, 1988. The notice of appeal (Pet. App. 41a-44a) was filed on April 19, 1988. The case was

[1] "Pet. App." refers to the petition appendix in No. 87-1904.

docketed in the court of appeals on April 22, 1988, as No. 88-1616WM (Pet. App. 45a-46a). The petitions in Nos. 87-1904 and 87-7028 for a writ of certiorari before judgment were filed on May 19 and 20, 1988, respectively, and were granted on June 13, 1988. The jurisdiction of this Court rests on 28 U.S.C. 1254(1) and 2101(e).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant provisions of Articles I, II, and III of the Constitution of the United States and of the Sentencing Reform Act of 1984, 18 U.S.C. (Supp. IV) 3551 *et seq.* and 28 U.S.C. (Supp. IV) 991-998, are reproduced at Pet. App. 47a-85a.

STATEMENT

1. The Development of a Sentencing Guideline System.

Throughout the past century the federal government, like most states, has used a system of indeterminate sentencing. Statutes establishing the penalties for crimes typically gave sentencing courts broad discretion to decide whether offenders should be incarcerated and for how long, whether they should be fined and how much, or whether some lesser restraint, such as supervised probation, should be imposed instead of incarceration or a fine. The indeterminate sentencing system was complemented by the use of parole, under which offenders who were thought to be "good social risks" could be returned to society under the "guidance and control" of a parole officer. *Zerbst* v. *Kidwell,* 304 U.S. 359, 363 (1938).[2]

[2] An excellent survey of the sentencing schemes that preceded the Sentencing Reform Act of 1984, as well as a summary of Congress's work in developing the guideline system that was put into place by that Act, can be found in the amicus curiae brief submitted on behalf of the United States Senate. We will not here repeat the detailed treatment of the background that is set forth in that brief.

The indeterminate sentencing and parole systems were based on the "rehabilitative ideal"—the view that an important and realistic goal of sentencing was to rehabilitate the offender and minimize the risk that he would resume his criminal activities upon his return to society. Because the rehabilitative ideal required judges and parole officials to make sentencing and release decisions based on their assessments of the defendant's amenability to rehabilitation, trial judges and parole officials were necessarily given very broad discretion. Selecting an appropriate sentence involved "a discretionary assessment of a multiplicity of imponderables entailing primarily what a man is and what he may become rather than simply what he has done." Kadish, *The Advocate and the Expert—Counsel in the Peno-Correctional Process,* 45 Minn. L. Rev. 803, 812-813 (1961). Appellate courts believed that the trial judge "sees more and senses more" than they could, so the trial court's decision as to the appropriate sentence was virtually unreviewable on appeal. Rosenberg, *Judicial Discretion of the Trial Court, Viewed from Above,* 22 Syracuse L. Rev. 635, 663 (1971). See *Dorszynski* v. *United States,* 418 U.S. 424, 431 (1974). Deciding whether to parole an inmate was also "predictive and discretionary" in nature (*Morrissey* v. *Brewer,* 408 U.S. 471, 480 (1972)), and correctional officials enjoyed all but absolute discretion over that decision. See, *e.g., Rifai* v. *United States Parole Comm'n,* 586 F.2d 695 (9th Cir. 1978); *Brest* v. *Ciccone,* 371 F.2d 981 (8th Cir. 1967).

Over time, judges, legislators, correctional officials, and penologists came to be skeptical of the theory underlying indeterminate sentencing—that offenders could be rehabilitated in prison or in some other kind of correctional institution. By the 1970s a consensus began to emerge that rehabilitation was an unattainable goal in most cases, and that the system of indeterminate sentenc-

ing was producing intolerable disparities in sentences without a sufficient justification.[3]

The first major effort to reduce sentencing disparities in the federal system came through modifications in the parole system in the 1970s. In response to widespread criticism of its informal case-by-case method of making parole release decisions, the United States Board of Parole undertook an analysis of its prior release decisions in order to identify general parole policies and release criteria. In 1973, the Board devised a system of parole release guidelines that structured its discretion while retaining flexibility to deal with individual cases.[4] The guidelines established a "customary range" of imprisonment for various classes of offenders by using a matrix combining a "parole prognosis" score based on the prisoner's personal char-

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[3] See, *e.g.*, H.R. Rep. 1946, 85th Cong., 2d Sess. 6 (1958) (recommending creation of sentencing councils to reduce "widespread" disparities in sentencing); ABA, *Standards Relating to Sentencing Alternative and Procedures* (1969); K. Davis, *Discretionary Justice* 126 (1969); National Comm'n on Reform of Federal Criminal Laws, *Final Report* (1971); M. Frankel, *Criminal Sentences: Law Without Order* (1972); National Advisory Comm. on Criminal Justice Standards and Goals, *Task Force Report: Corrections* 418 (1973); N. Morris, *The Future of Imprisonment* 24-43 (1974); Project, *Parole Release Decisionmaking and the Sentencing Process,* 84 Yale L.J. 810, 826 & n.82 (1975) ("Extensive social science research strongly suggests that rehabilitation—defined as an increasing likelihood of successful adjustment upon release—cannot be observed, detected, or measured."); D. Stanley, *Prisoners Among Us: The Problem of Parole* 50-66 (1976); *Fair and Certain Punishment: Report of the Twentieth Century Fund Task Force on Criminal Sentencing* 98-100 (1976); P. O'Donnell, M. Churgin & D. Curtis, *Toward a Just and Effective Sentencing System: Agenda for Legislative Reform* (1977); A. von Hirsch & K. Hanrahan, *Abolish Parole ?* 7-14 (1978). See generally F. Allen, *The Decline of the Rehabilitative Ideal* (1981).

[4] 38 Fed. Reg. 31942-31945 (1973). The present parole release guidelines are codified at 28 C.F.R. 2.20 (1988).

acteristics, with an "offense severity" rating based on the characteristics of his offense.[5]

Three years later, Congress endorsed that approach and directed the newly created United States Parole Commission to use such a system of guidelines to govern its parole release decisions.[6] In particular, Congress indicated that the Commission should base its release decisions in significant part on the nature and circumstances of the offense and the offender so as to achieve, as much as possible, "equity between individual cases and a uniform measure of justice." S. Conf. Rep. 94-648, 94th Cong., 2d Sess. 23, 25, 26 (1976). Thus, the role envisioned for the Parole Commission was, at least in part, "to moderate the disparities in the sentencing practices of individual judges." *United States* v. *Addonizio,* 442 U.S. 178, 189 (1979) (footnote omitted).

At the same time, Congress had under consideration a much more sweeping reform in the federal sentencing system—the creation of a system of sentencing guidelines that would go much farther than the new parole statute to restrict the broad discretion enjoyed by district judges in determining how long an offender would remain in prison. After considering the matter for more than a decade, Congress in 1984 enacted the legislation that is at issue in this case. The conclusions that Congress reached in the course of its exhaustive study of the subject are summarized in the Senate Report on the 1984 law. S. Rep. 98-225, 98th Cong., 1st Sess. 37-65 (1983).[7]

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[5] See *United States Parole Comm'n* v. *Geraghty,* 445 U.S. 388, 391 (1980).

[6] The Parole Commission and Reorganization Act of 1976, Pub. L. No. 94-233, 90 Stat. 219-231 (codified at 18 U.S.C. 4201-4218). See 18 U.S.C. 4203(a)(1) and 4206(a) (requiring the Parole Commission to maintain a guidelines system).

[7] The House Judiciary Committee reached similar conclusions in its report, filed a year later on a bill that similarly proposed a wholesale

The Senate Report began with the recognition that the efforts of the criminal justice system to achieve the rehabilitation of offenders had failed dismally. S. Rep. 98-225, *supra,* at 38. The reason was that the theory of " 'coercive' rehabilitation" (*id.* at 40) was premised on "discredited assumptions" about the susceptibility of human behavior to change, especially in prison. *Id.* at 38. As the Report acknowledged, "almost everyone involved in the criminal justice system now doubts that rehabilitation can be induced reliably in a prison setting, and it is now quite certain that no one can really detect whether or when a prisoner is rehabilitated." *Ibid.* Besides failing to achieve the goal of rehabilitation, the Report noted, the system of indeterminate sentencing had two "unjustified" and "shameful" consequences. *Id.* at 38, 65. The first was an "astounding" and "unwarranted" variation among the sentences imposed by different district courts on similarly situated offenders. The second was an intolerable lack of certainty about the period of time that an offender would spend in prison. *Id.* at 38, 41, 42-46, 65, 75, 112. Both problems were serious impediments to the evenhanded and effective operation of the criminal justice system.

The Senate Report noted that although the Parole Commission had sought to reduce unwarranted disparities in sentencing and to increase the certainty of a prisoner's release date (S. Rep. 98-225, *supra,* at 46), the parole system was inadequate to the task, for several reasons. First, the division of authority between the sentencing court and the Parole Commission contributed to uncer-

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revision of the federal sentencing system. H.R. Rep. 98-1017, 98th Cong., 2d Sess. (1984). The House bill, which proposed a somewhat different sentencing guideline system, was rejected in favor of the Senate bill. Nonetheless, the House report is instructive because it indicates that the rationale underlying the sentencing reforms in the Senate bill was endorsed in the House as well.

tainty and resulted in "sentencing judges and the Parole Commission second-guess[ing] each other, often working at cross-purposes." *Id.* at 113. Second, the Parole Commission's guidelines failed to take into account certain factors that Congress regarded as particularly important in sentencing, such as "the amount of harm done by the offense, the criminal sophistication of the offender, and the importance of the offender's role in an offense committed with others." *Id.* at 48 (footnote omitted). Finally, the Parole Commission had only limited powers to adjust the sentences imposed by the courts: it often could not advance the offender's release to a date earlier than one-third of the imposed sentence; it could not increase sentences that were unduly lenient; and it had no authority whatever over persons who were not given a custodial sentence or were sentenced to a term of one year or less. *Id.* at 47.

The Senate Report concluded that the sentencing system required comprehensive reform that would (S. Rep. 98-225, *supra,* at 46 (footnote omitted)):

> (1) take into account the division of authority that currently exists between the sentencing judge and the Parole Commission, (2) consolidate that authority, and (3) develop a system of sentencing whereby the offender, the victim, and society all know the prison release date at the time of the initial sentencing by the court, subject to minor adjustments based on prison behavior called "good time."

The reform that Congress chose was the Sentencing Reform Act of 1984, Chapter II of the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987.

2. The Sentencing Reform Act.

The Sentencing Reform Act comprehensively revised the existing federal sentencing process in several ways.

First, Congress identified the purposes of criminal punishment. It rejected the use of imprisonment as a means of promoting rehabilitation (28 U.S.C. (Supp. IV) 994(k)) and stated that punishment should serve retributive, educational, deterrent, and incapacitative goals. 18 U.S.C. (Supp. IV) 3553(a)(2); see 28 U.S.C. (Supp. IV) 991(b).

Second, the Act consolidated the power exercised by district courts and the Parole Commission to decide what punishment an offender should suffer. The Act achieved that goal by creating the United States Sentencing Commission, directing the Commission to devise sentencing guidelines to be used by the district courts for sentencing, and prospectively abolishing the Parole Commission. 28 U.S.C. (Supp. IV) 991, 994, and 995(a)(1).[8]

Third, the Act made all sentences determinate. A prisoner would be released from custody at the completion of his sentence, less any "good time" credit that the prisoner could earn by good behavior while in custody. 18 U.S.C. (Supp. IV) 3624(a) and (b).

Fourth, the Act made the Sentencing Commission's guidelines binding on the courts, although it preserved discretion to depart from the applicable guideline in a particular case if the sentencing court found an aggravating or mitigating factor present that the guideline did not adequately consider. 18 U.S.C. (Supp. IV) 3553(a)-(b).[9] The Act also required the sentencing court to state the reasons for the sentence it imposed and to give "the specific reason" for imposing a sentence outside the range indicated in the applicable guideline. 18 U.S.C. (Supp. IV) 3553(c).

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[8] The Parole Commission was to remain in office with jurisdiction over pre-guideline offenses until 1992, five years after the effective date of the guidelines. Pub. L. No. 98-473, § 235(b)(2), 98 Stat. 2032 (1984).

[9] The Senate Report indicated that Congress expected that fewer than 20 percent of all sentences would fall outside the guidelines. S. Rep. 98-225, *supra,* at 52 n.71.

Fifth, the Act authorized limited appellate review of sentences. The Act permitted a defendant to appeal a sentence above the range defined by the applicable guideline; it permitted the government to appeal a sentence below the range defined by the guideline; and it permitted either party to appeal an incorrect application of the guidelines. 18 U.S.C. (Supp. IV) 3742(a), (b), and (c).

The sentencing guidelines were to be the centerpiece of the reforms introduced by the Act. They were to establish a range of determinate sentences for categories of offenses and defendants according to various enumerated factors "among others." 28 U.S.C. (Supp. IV) 994(b), (c), and (d). The ranges ordinarily could not vary by more than 25 percent from the minimum to the maximum, and all guideline sentences had to be within the limits provided in existing laws defining the punishment for the particular crime. 28 U.S.C. (Supp. IV) 994(a) and (b)(2).

Before settling on a mandatory guideline system, Congress considered and rejected several competing proposals for sentencing reform. For example, Congress declined to adopt a strict determinate sentencing system in which the sentences for particular crimes were fixed by legislation. Congress rejected that option because it believed that a guideline sentencing system would be successful in reducing sentencing disparities, while retaining the flexibility needed to adjust for unanticipated factors arising in particular cases. S. Rep. 98-225, *supra,* at 62; see *id.* at 78-79. The Senate Judiciary Committee also rejected a proposal that would have effectively made the sentencing guidelines only advisory by allowing a trial judge to depart from the guidelines whenever he found that doing so was warranted by the particular features of the case. *Id.* at 79, 423. The Committee rejected that proposal because voluntary guidelines had proved to be generally ineffective in the states that had used them. *Id.* at 79.[10]

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[10] See also S. Rep. 98-225, *supra,* at 52 n.71 (quoting National

3. The Sentencing Commission and the Sentencing Guidelines.

The Sentencing Reform Act created the United States Sentencing Commission to draft the sentencing guidelines and to review and modify them from time to time. 28 U.S.C. (Supp. IV) 991(*o*)-(u).[11] The Commission, which was designated as "an independent commission in the judicial branch of the United States," is a permanent body with seven voting members. At least three of the commissioners must be federal judges,[12] and no more than four members may belong to the same political party. The Attorney General or his designee serves as an ex officio, nonvoting member of the Commission. 28 U.S.C. (Supp. IV) 991(a).[13]

Academy of Sciences, Panel on Sentencing Research, *Research on Sentencing: The Search for Reform* 29 (A. Blumstein *et al.* eds. 1983) (" '[w]ith voluntary guidelines, studies have found no evidence of systematic judicial compliance' ")).

[11] Amendments to the guidelines take effect automatically unless, within 180 days after the amendments are reported, specific legislation provides otherwise. 28 U.S.C. (Supp. IV) 994(p). A defendant may file a petition requesting modification of the guidelines used in his sentencing on the basis of changed circumstances unrelated to the defendant. 28 U.S.C. (Supp. IV) 994(s). Although the Commission must consider such petitions, Congress has deleted the requirement in the 1984 Act that the Commission notify defendants in writing of its decision approving or disapproving such proposed modifications. Sentencing Act of 1987, Pub. L. No. 100-182, 101 Stat. 1271. Thus, contrary to the assertion of amicus National Association of Criminal Defense Lawyers (Br. 3), the Commission does not have "adjudicatory power over petitions to modify the guidelines," but instead amends the guidelines in response to defendants' petitions in the same manner that it makes any other amendment to the guidelines.

[12] The judicial members of the Commission are not required to resign as federal judges while serving on the Commission. 28 U.S.C. (Supp. IV) 992(c).

[13] In addition, during the five-year period before the Parole Commission expires in 1992, the Chairman of the Parole Commission will serve as an ex officio, nonvoting member of the Commission. See Pub. L. No. 98-473, § 235(b)(5), 98 Stat. 2033 (1984).

The members of the Commission are chosen by the President with the advice and consent of the Senate after the President considers a list of six judges recommended by the Judicial Conference of the United States. 28 U.S.C. (Supp. IV) 991(a).[14] The members are removable by the President for good cause. *Ibid.* Otherwise, they serve six-year terms and may be reappointed once. 28 U.S.C. (Supp. IV) 992(a) and (b).

The Sentencing Commission took several steps to acquire the information necessary to devise guidelines that were consistent with the policies set forth in the Act. First, the Commission established a research program in order to analyze current sentencing and parole release processes. United States Sentencing Comm'n, *Sentencing Guidelines and Policy Statements* 1.4 (1987); United States Sentencing Comm'n, *Supplementary Report On the Initial Sentencing Guidelines and Policy Statements* 16 (1987) [hereafter *Supplementary Report*].[15] Second, as directed by Congress (28 U.S.C. (Supp. IV) 994(x)), the Commission held public hearings in order to hear from interested parties about the form that the guidelines should take. *Supplementary Report* 10-11, App. A, at 1-10.[16] Third, the

[14] Petitioner is wrong in stating (Br. 4) that the President must select from among the judges who are on the list prepared by the Judicial Conference. The President must consider that list, but nothing in the Act requires him to select from it.

[15] The Commission "analyzed and considered detailed data drawn from more than 10,000 presentence investigations, less detailed data on nearly 100,000 federal convictions during a two-year period, distinctions made in substantive criminal statutes, the United States Parole Commission's guidelines and resulting statistics, public commentary, and information from other relevant sources." *Supplementary Report* 16.

[16] The Commission heard testimony from 74 witnesses and received more than 550 written comments from various officials, interested organizations, and individuals. Numerous federal judges and several United States Attorneys testified before the Commission, as well as representatives from the Department of Justice, the American Civil

Commission met informally with several advisory and working groups to discuss sentencing policies and issues. *Id.* at 9.[17] Finally, the Commission called on various federal agencies for information and met formally and informally with their representatives in order to discuss sentencing policy. *Ibid.*[18]

The Commission published a preliminary draft of sentencing guidelines in September 1986. It distributed copies to, and solicited comments from, all federal judges, United States Attorneys, Federal Public Defenders, Chiefs of the United States Probation Offices, defense lawyers, academics, researchers, and others. *Supplementary Report* 10-11. After considering those comments, the Commission published revised guidelines in January 1987, which were also widely distributed and subjected to the same analysis as the Commission's preliminary draft. *Id.* at 11. The Sentencing Commission promulgated the final guidelines on April 13, 1987, and issued a set of clarifying and technical amendments on May 1. The guidelines were then submitted to Congress for the six-month waiting period provided by the Act.[19] No law was enacted postponing their effective date, and the guidelines went into

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Liberties Union National Prison Project, the National Association of Criminal Defense Lawyers, the Federal Public Defenders Association, the Admininstrative Office of the United States Courts, the American Bar Association, the Vera Institute of Justice, and the District of Columbia Public Defenders Service. *Supplementary Report* App. A, at 1-10.

[17] Those working groups included federal judges, United States Attorneys, Federal Public Defenders, state district attorneys, federal probation officers, private defense attorneys, academics, and researchers. *Id.* at 9.

[18] Those agencies included the Department of Justice, the Bureau of Prisons, the Departments of Defense, Treasury, and Labor, and the Securities and Exchange Commission.

[19] The submission and delayed implementation was required by Section 235(a)(1)(B)(ii)(III) of the Sentencing Reform Act (98 Stat. 2031-2032).

effect on November 1, 1987. They apply to crimes committed on or after that date.

The final sentencing guidelines employ a matrix that defines a sentencing range for every offense and uses a scoring system in which points are added or subtracted according to characteristics of the crime or the offender. The guidelines start by giving numerical values to offenses. They then provide for adjustments depending on factors such as characteristics of the crime or the defendant's role in committing it. The guidelines also permit a district court to depart from the guidelines when a case involves factors that have not been given adequate consideration by the Commission. See United States Sentencing Comm'n, *Sentencing Guidelines and Policy Statements* (1987).

4. The Proceedings In This Case.

Petitioner was indicted in the United States District Court for the Western District of Missouri on three crimes arising out of the December 3, 1987, sale of cocaine to an undercover federal narcotics agent. Pet. App. 16a-18a.[20] He moved to have the sentencing guidelines held unconstitutional on the grounds that the Sentencing Commission was constituted in violation of separation of powers principles and that Congress delegated excessive authority to the Commission to establish the guidelines. The district court rejected petitioner's contentions. Pet. App. 1a-6a.[21]

The court rejected petitioner's delegation argument on the grounds that the Sentencing Commission is an Executive Branch agency and that its guidelines are similar to the

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[20] Petitioner's co-defendant Nancy Ruxlow was indicted along with petitioner, but no judgment was entered as to her.

[21] Because the claims presented by petitioner were identical to the claims raised by defendants in other cases pending in the same district, argument on petitioner's motion was presented to a panel of district court judges in the Western District of Missouri. Several judges joined in the opinion upholding the guidelines; one judge dissented.

substantive rules that are commonly promulgated by other such agencies. Pet. App. 2a-4a. The court also rejected petitioner's claim that the Sentencing Reform Act is unconstitutional because it requires three federal judges to serve on the Commission. *Id.* at 4a-5a. "Voluntary service of Article III judges in the Executive Branch is sanctioned by the history of judicial conduct as early as the Washington and Adams administrations, is not forbidden by the constitutional prohibition on dual service (applicable to members of Congress), and has continued occasionally from the Truman administration to date." *Ibid.* The court added that a contrary result "would deprive the Sentencing Commission of judicial insights in order to protect the independence of the judiciary," which the court found to be "a regrettable and unnecessary insistence on maintenance of functional purity." *Id.* at 5a.

Petitioner then pleaded guilty to conspiracy to possess cocaine with intent to distribute it, in violation of 21 U.S.C. 846.[22] He was sentenced pursuant to the guidelines to 18 months' imprisonment, to be followed by a three-year term of supervised release. Pet. App. 30a, 35a, 37a. The district court also imposed a $1,000 fine and a $50 special assessment. *Id.* at 31a, 40a.[23]

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[22] On the government's motion, the district court dismissed the remaining counts in the indictment. Pet. App. 31a, 34a.

[23] Before sentence was imposed, petitioner moved to have the guidelines held invalid on the ground that they violated his asserted due process right to individualized consideration by a judge with unrestricted discretion in sentencing. Pet. App. 26a-27a. The district court denied the motion. *Id.* at 28a. Petitioner has not renewed that claim in this Court. Although the claim has been accepted by a few courts, see *United States* v. *Frank*, 682 F. Supp. 815 (W.D. Pa. 1988), appeal pending, No. 88-3220 (3d Cir.); *United States* v. *Bolding*, 683 F. Supp. 1003 (D. Md. 1988); *United States* v. *Ortega-Lopez*, 684 F. Supp. 1506 (C.D. Cal. 1988); *United States* v. *Brodie*, Crim. No. 87-0492 (D.D.C. May 20, 1988), it is plainly wrong. As this Court has noted, "in non-capital cases, the established practice of individualized sentences weighing mitigating and aggravating circumstances, rests

Although petitioner filed a notice of appeal, the case was not heard by the court of appeals. Instead, because of the importance of the issue, which will affect a large percentage of all the criminal cases that reach judgment in the federal system, both parties petitioned this Court for certiorari before judgment, and the petitions were granted.[24]

SUMMARY OF ARGUMENT

I. Congress may authorize the Sentencing Commission to determine what punishment offenders should bear. That judgment is not a "core" legislative function that Congress itself must undertake. Congress's power to legislate in an area includes the power to delegate authority to an agency to implement the legislative policy. The Commission's authority to devise sentencing guidelines is similar to the power administrative agencies have to adopt regulations whose violation is a crime, or the power the Parole Commission had to fix release dates for inmates.

The Sentencing Reform Act provides detailed guidance to the Sentencing Commission about how it is to exercise its authority. Congress had previously defined the offenses and fixed the maximum penalties for federal crimes. In the Sentencing Reform Act, Congress defined the goals of punishment and directed the Commission to create

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not on constitutional commands, but on public policy enacted into statutes." *Lockett* v. *Ohio,* 438 U.S. 586, 604-605 (1978); see also *Woodson* v. *North Carolina,* 428 U.S. 280, 304 (1976) (opinion of Stewart, Powell & Stevens, JJ.); see *Gubiensio-Ortiz* v. *Kanahele,* Nos. 88-5848 and 88-5109 (9th Cir. Aug. 23, 1988), slip op. 3-4 (Wiggins, J., dissenting).

[24] At the time the petitions were granted, there were a number of district court decisions, but no court of appeals decisions addressing the issues presented in this case. Recently, the Ninth Circuit, in a divided decision, invalidated the sentencing guidelines on separation of powers grounds. *Gubiensio-Ortiz* v. *Kanahele,* Nos. 88-5848 and 88-5109 (9th Cir. Aug. 23, 1988). A decision from the Third Circuit is expected shortly.

guidelines that are consistent with those purposes, but that avoided unwarranted disparities while retaining flexibility for justified individualized differences. The guidelines were to be defined according to offense and offender characteristics largely specified by Congress. In addition, Congress instructed the Commission about the general appropriateness and length of terms of imprisonment for certain violent and narcotics offenses, for those who engage in a life of crime, for first offenders, and for those who aid in criminal investigations.

The Act is not flawed because the Commission may balance the factors it considers. Congress may leave to administrative judgment the relative weights of specified factors, and the decision as to what other considerations are relevant. The Parole Commission had that power in connection with release decisions, and its authority is not materially different from the power given to the Sentencing Commission. Each agency was given the power to decide how long an offender should be confined by balancing various considerations whose weight was left for the agency to decide.

II. A. The Sentencing Commission's authority to promulgate sentencing guidelines is an exercise of the executive power given to administrative agencies to adopt binding rules. The Executive has always had the authority to decide when a prisoner should be released by virtue of the commutation and parole powers. Under the Sentencing Reform Act, the judgment when a prisoner should be released is simply made at an earlier stage of the process and in a more formalized manner than under the indeterminate sentencing system. The Act also does not improperly combine prosecutorial and sentencing functions. The Sentencing Commission has no law enforcement authority, and district courts still impose sentence in each case.

B. Designating the Sentencing Commission as an entity in the judicial branch has no significance for separa-

tion of powers purposes. The powers and functions of the Commission are neither enhanced nor impaired by the "judicial branch" label, which is relevant only when determining whether laws applicable to the courts also apply to the Commission. In any event, the label cannot alter the nature of the power the Commission exercises, which is executive.

If the label is deemed to have constitutional significance, it can be severed. The Commission will function in the same manner with or without the label, and there is no reason to believe that Congress would have refused to implement the guideline system if the Sentencing Commission were denominated an Executive Branch agency.

C. The President's power to remove judge-commissioners is a virtue, not a vice, in the Act. No problem is presented by a law authorizing the President to remove officers that he appointed who exercise executive power. That three of the commissioners are federal judges does not call for a different result, because the Act only authorizes the President to remove the judges from their positions as commissioners, not from their positions as Article III judges.

D. Individual judges may serve on a commission that exercises the executive power. The text of the Constitution does not prohibit that practice, and federal judges have served in nonjudicial capacities since the nation's earliest days. The Sentencing Commission is not a court, and the judge-commissioners do not act as judges when devising sentencing guidelines. There is, accordingly, no risk that an Article III court will be asked to perform a nonjudicial function. The requirement that three commissioners be federal judges is not a flaw, because judges serve on the Commission voluntarily. Service on the Commission will not bias judges toward the government or create an appearance of partiality because of the nature of the Commission's work: Rationalizing the sentencing process is a

neutral undertaking closely allied to an historic judicial function, and recusal of the judge-commissioners in appropriate cases can avoid any possible perception of unfairness. The service of judges on the Commission also will not unduly interfere with the functioning of the judiciary because any disruption caused by recusal would be negligible and is vastly outweighed by the important contributions judges can make by their active participation in the Sentencing Commission's work.

III. A. The provision in the Act abolishing parole cannot stand if the Court rules that the sentencing guidelines are invalid. Parole was abolished because it became unnecessary once sentences were made determinate and the problem of disparity in sentencing was addressed by the guidelines. Abolishing parole without also instituting a guideline system, however, would have the opposite effect from the one Congress sought to implement through the Sentencing Reform Act: it would leave intact (or, more likely, increase) the existing disparities in sentencing, because there would be no effective mechanism for moderating the disparate sentences imposed by individual district court judges on different defendants. The abolition of parole was therefore inextricably tied to the guideline sentencing system.

B. By contrast, the provision modifying the award of "good time" credits to inmates should be severed. The Act retained the existing good time system with only three modifications. The Act altered the amount of credit that an inmate could earn, it vested credits once they were awarded to an inmate, and it required that a prisoner be informed about prison disciplinary rules before he could be penalized for their violation. The new good time system will function independently of the sentencing guidelines and in precisely the way Congress intended even if the guidelines are held invalid. The fact that the good time provision was set to go into effect at the same time as the

sentencing guidelines is not indicative of Congress's intention to link those two portions of the statute. Congress provided that almost every one of the many varied provisions of the Sentencing Reform Act would go into effect at the same time. Many portions of the statute, like the good time provision, have no direct relationship with the sentencing guidelines and clearly would have been intended to survive without respect to the fate of the guidelines.

ARGUMENT

I. THE SENTENCING REFORM ACT DOES NOT IMPROPERLY DELEGATE LEGISLATIVE POWER TO THE SENTENCING COMMISSION

Congress directed the Sentencing Commission to create and revise the sentencing guidelines because Congress believed that the problem of sentencing was too complex to be addressed solely through legislation. It was clear that generating a guideline system would require intensive study and the promulgation of hundreds of separate guidelines, together with dozens of offense and offender characteristics that would increase or decrease the sentence to be imposed in a particular case. In order for the guideline system to be effective, the guidelines would have to be reviewed constantly and modified in response to reports and experience from persons close to the criminal justice system. Therefore, instead of creating the entire guideline system, enacting it as legislation, and enacting modifications in the system from time to time, Congress chose a different course: it set out the policies that were to govern the guideline system and then delegated to the Sentencing Commission the task of generating, reviewing, and revising the particular guidelines in compliance with those statutory policies. That delegation was not only a sensible solution to the problem of generating a complex system of guidelines, but it was entirely consistent with the well-settled practice of delegating rulemaking authority to ad-

ministrative agencies, a practice that this Court has repeatedly upheld as essential to the efficient functioning of the federal government.

A. Deciding What Sentences Should Be Imposed For Particular Criminal Offenses Is A Function That The Legislature May Delegate To Other Entities

There is no general prohibition against Congress's delegation of its rulemaking authority in the area of sentencing. Contrary to the view of several of the district courts that have struck down the Sentencing Reform Act, sentencing is not a "core legislative field" in which any delegation is impermissible. *United States* v. *Brittman,* No. LR-CR-87-194 (E.D. Ark. May 27, 1988), slip op. 39-40; see also *United States* v. *Williams,* No. 3-88-00014 (M.D. Tenn. June 23, 1988), slip op. 25.

This Court has never invalidated a statute on the ground that certain "core" legislative functions are nondelegable. In fact, the Court has embraced the opposite proposition, stating that in general "[a] constitutional power implies a power of delegation of authority under it sufficient to effect its purposes." *Lichter* v. *United States,* 334 U.S. 742, 778-779 (1948). As the court pointed out in *Synar* v. *United States,* 626 F. Supp. 1374 (D.D.C.), aff'd *sub nom. Bowsher* v. *Synar,* No. 85-1377 (July 7, 1986), attempting to determine which of Congress's enumerated powers is too important to be delegated would be an essentially standardless undertaking: "No constitutional provision distinguishes between 'core' and 'non-core' legislative functions," and any line attempting to distinguish among Congress's powers on that ground "would necessarily have to be drawn on the basis of the court's own perceptions of the relative importance of various legislative functions." 626 F. Supp. at 1385.[25]

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[25] The dissenting judge below seemed to take the even more extreme position that Congress may *never* delegate *any* legislative powers. Pet.

The Court has long held that Congress's authority to delegate its power extends to describing the conduct that will be subject to criminal sanctions. For example, in *United States* v. *Grimaud,* 220 U.S. 506 (1911), the Court concluded that Congress could authorize the Secretary of Agriculture to promulgate regulations whose violation was punishable as a crime. See also *United States* v. *Shapnack,* 355 U.S. 286 (1958) (upholding the constitutionality of the Assimilative Crimes Act, 18 U.S.C. 13, which incorporates for federal enclaves offenses and sentences that are defined by state law); *Yakus* v. *United States,* 321 U.S. 414 (1944) (upholding the constitutionality of a statute making violations of the Price Administrator's regulations a crime). Applying that principle, the courts of appeals have uniformly upheld statutes authorizing an Executive Branch agency to declare particular items unlawful, or to reclassify particular items in a way that makes their possession subject to enhanced penalties. See *United States* v. *Daniel,* 813 F.2d 661, 662-663 (5th Cir. 1987) (collecting cases) (approving delegation to Attorney General of authority to list controlled substances under the narcotics laws); *United States* v. *Hope,* 714 F.2d 1084, 1087 (11th Cir. 1983) (same); *United States* v. *Womack,* 654 F.2d 1034, 1036-1039 (5th Cir. 1981), cert. denied, 454 U.S. 1156 (1982) (approving delegation to Secretary of the Treasury of authority to list prohibited explosives). And in at least one instance, Congress has delegated to the Executive complete authority to designate the sentences that attach to particular offenses. See 10 U.S.C. 856 (delegating to the President the authority to establish maximum punishments for offenses under the Uniform Code of Military Justice).

App. 7a-14a (Wright, J., dissenting). Under that view, no regulation promulgated by an administrative agency could take effect without being enacted by the Congress after presentment to the President. That is certainly not the law. See *Chevron U.S.A. Inc.* v. *NRDC,* 467 U.S. 837, 843-844 (1984).

Besides lacking any support in the constitutional text or in this Court's precedents, the suggestion that sentencing is a "core function" that cannot be delegated runs afoul of 200 years of history. Far from being a function reserved to the legislature, the task of determining how long an offender should remain in prison has traditionally been shared by the courts and the parole authorities, subject to only very general directives from Congress. Thus, it is incongruous to refer to the Sentencing Reform Act as delegating legislative power, since the Act actually reflected an increase in legislative control over sentencing, not a decrease. Prior to the enactment of the Sentencing Reform Act, Congress had delegated the entire task of determining the length of sentences to district courts and the Parole Commission, subject in most cases only to the statutory limits on the maximum penalties that could be imposed. Petitioner does not suggest that the prior system involved an impermissible degree of delegation of legislative authority; indeed, petitioner urges that the Court should require a return to that regime. It is therefore clear that there is no special principle that imposes an absolute prohibition against the delegation of legislative authority over sentencing.

B. The Sentencing Reform Act Provides Sufficient Guidance To The Sentencing Commission To Avoid The Charge Of Excessive Delegation

Although petitioner does not embrace the broad position taken by some district courts that Congress may not delegate authority over sentencing at all, he argues (Br. 47-54) that the Sentencing Reform Act is invalid because it delegates legislative authority in an improper manner. According to petitioner, Congress did not define "an intelligible principle" (*J.W. Hampton, Jr., & Co.* v. *United States,* 276 U.S. 394, 409 (1928)), to guide the Commission's judgment about the sentences that should be im-

posed in particular cases. For that reason, he argues, the delegation of authority to create and revise the sentencing guidelines is constitutionally invalid. In fact, the delegation at issue in this case falls comfortably within the principles of this Court's cases upholding congressional delegations of rulemaking authority to agencies outside the Legislative Branch.

The "nondelegation doctrine" is an expression of the principle that Congress cannot authorize the Executive to make the laws in the first instance, rather than to execute the laws Congress makes. *Panama Refining Co.* v. *Ryan,* 293 U.S. 388, 421 (1935); *Field* v. *Clark,* 143 U.S. 649, 692 (1892). Nonetheless, delegations of rulemaking authority have regularly been upheld. Recognizing that Congress cannot by itself generate all the rules necessary for the governance of a complex society, the Court has held that the Constitution does not deny Congress "the necessary resources of flexibility and practicality, which will enable it to perform its assigned function in laying down policies and establishing standards, while leaving to selected instrumentalities the making of subordinate rules within prescribed limits." *Panama Refining Co.* v. *Ryan,* 293 U.S. at 421. It is "constitutionally sufficient," the Court has held, "if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of th[e] delegated authority." *American Power & Light Co.* v. *SEC,* 329 U.S. 90, 105 (1946).

In deciding whether that standard has been satisfied, the Court has been most reluctant to conclude that Congress has unconstitutionally yielded its power to another Branch. While the Court has insisted that Congress set forth the policies that are to direct the administrative action, the Court has recognized that "the degree to which Congress must specify its policies and standards in order that the administrative authority granted may not be an unconstitutional delegation of its own legislative power is

not capable of precise definition." *Lichter* v. *United States,* 334 U.S. 742, 779 (1948). The Court has granted Congress broad latitude in deciding how much discretion should be left to designated agencies in exercising the rule-making authority granted to them by Congress, because "[t]he question of how far Congress should go in filling in the details of the standards which [the] administrative agency is to apply raises large issues of policy" (*Bowles* v. *Willingham,* 321 U.S. 503, 515 (1940)), on which Congress's judgment is entitled to great weight.

The Court has only twice invalidated a statute on grounds of excessive delegation, and in those cases the Court found that the statute at issue "declare[d] no policy" as to the subject matter of the delegation and left the Executive with "unlimited authority to determine the policy * * * as he sees fit." *Panama Refining Co.* v. *Ryan,* 293 U.S. at 415; see also *A.L.A. Schechter Poultry Corp.* v. *United States,* 295 U.S. 495 (1935). In the case of every other challenge to legislative delegations, both before and after the *Panama Refining* and *Schechter Poultry* cases, the Court has upheld the delegation, even though in some cases the legislative statement of policy has been quite general and the discretion afforded to the administrative agency quite broad. For example, the Court has found sufficient specificity in legislation permitting the Executive to determine what constitute "excessive profits" (*Lichter* v. *United States, supra*); authorizing the Price Administrator to fix commodity prices at a "fair and equitable" level (*Yakus* v. *United States,* 321 U.S. at 423-427); permitting the Federal Power Commission to fix "just and reasonable" rates for natural gas (*FPC* v. *Hope Natural Gas Co.,* 320 U.S. 591, 600 (1944)); permitting the licensing of radio communication "as public interest, convenience, or necessity [requires]" (*National Broadcasting Co.* v. *United States,* 319 U.S. 190, 225-226 (1943)); authorizing the establishment of maximum prices for coal "when in the

public interest" (*Sunshine Coal Co.* v. *Adkins,* 310 U.S. 381, 397 (1940)); and permitting the consolidation of interstate carriers when "in the public interest" (*New York Central Securities Corp.* v. *United States,* 287 U.S. 12, 24 (1932)).

The policy directives that the Court held sufficient in each of those cases were far less specific and detailed than the directives in the Sentencing Reform Act. In the case of the Sentencing Reform Act, of course, Congress made the most important policy choices when it defined the offenses and fixed the maximum (and sometimes the minimum) penalties for each of those crimes. Congress further channeled the Sentencing Commission's discretion by specifying, for the first time ever, the purposes it intended criminal sentences to serve and by directing the Commission to fashion the guidelines in a way that would satisfy those goals. 28 U.S.C. (Supp. IV) 991(b). Moreover, Congress expressed its overall intention that the guidelines should be designed so as to "avoid[ ] unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct," while at the same time "maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors." 28 U.S.C. (Supp. IV) 991(b)(1)(B).

Beyond those broad directions, Congress provided the Commission with detailed instructions about how the Commission should go about formulating the guidelines. The Commission was directed to use current average sentences as the starting point. 28 U.S.C. (Supp. IV) 994(m). Compare *Yakus* v. *United States,* 321 U.S. at 427. The Commission was then to devise guideline sentences based on a number of specified offense and offender characteristics. The range of permissible sentences for each combination of offense and offender characteristics could not be more than 25 percent of the total sentence or six

months, whichever was greater. 28 U.S.C. (Supp. IV) 994(b).

Congress set out each of the factors that the Commission was required to consider in establishing categories of crimes. 28 U.S.C. (Supp. IV) 994(c). Those factors included the grade of the offense; the aggravating and mitigating circumstances of the crime; the nature and degree of harm caused by the crime; the community's view of the gravity of the offense; the public concern generated by the crime; the deterrent effect that a sentence might have on others; and the incidence of the offense in the community and the nation. 28 U.S.C. (Supp. IV) 994(c)(1)-(7). The Senate report on the legislation provided an explanation and elaboration of the purpose to be served by each factor. See S. Rep. 98-225, *supra,* at 170-171. For example, the report explained that the reference to the community's view of the gravity of the offense was "not intended to mean that a sentence might be enhanced because of a public outcry about a single offense," but "to suggest that changed community norms concerning certain criminal behavior might be justification for increasing or decreasing the recommended penalties for the offense." *Id.* at 170. Those explanations supplied an important part of the "statutory context" that added to the specificity of Congress's mandate to the Commission. *American Power & Light Co.* v. *SEC,* 329 U.S. at 104-105.

Similarly, the Act directed the Commission to consider certain factors in establishing categories of offenders under the guidelines. 28 U.S.C. (Supp. IV) 994(d). Those factors included the offender's age, education, and vocational skills; his mental and emotional condition; his physical condition (including drug dependence); his prior employment record, his family ties and responsibilities, and his community ties; his role in the offense; his criminal history; and the offender's degree of dependence upon crime for his livelihood. 28 U.S.C. (Supp. IV)

994(d)(1)-(11). Once again, the Senate Report provided additional direction with respect to each of those factors. For example, the report stated that drug dependence "generally should not play a role in the decision whether or not to incarcerate the offender. In an unusual case, however, it might cause the Commission to recommend that the defendant be placed on probation in order to participate in a community drug treatment program, possibly after a brief stay in prison for 'drying out,' as a condition of probation." S. Rep. 98-225, *supra,* at 173.

In addition, the Act furnished a number of other guideposts for the Sentencing Commission. The Commission was directed to ensure that the sentencing guidelines were entirely neutral as to the "race, sex, national origin, creed, and socioeconomic status of offenders." 28 U.S.C. (Supp. IV) 994(d). The guidelines were also to reflect the "general inappropriateness" of considering certain factors that could serve as the proxy for forbidden considerations, such as a person's lack of employment, in imposing a sentence. 28 U.S.C. (Supp. IV) 994(e).

Congress directed the Commission to ensure that the guidelines require a term of confinement "at or near the maximum term authorized" for certain crimes of violence and narcotics offenses, particularly when committed by recidivists. 28 U.S.C. (Supp. IV) 994(h). It directed that a "substantial term of imprisonment" should be imposed on certain other defendants, such as recidivists, those who commit crimes as part of a pattern of conduct for which they earn a substantial portion of their income, those who pursue a pattern of racketeering activity, those who commit a violent crime while on pretrial or post-trial release, and those who commit certain narcotics crimes. 28 U.S.C. (Supp. IV) 994(i). The statute further stated Congress's view that it is generally inappropriate to imprison a first offender whose crime did not involve violence and was not otherwise serious. 28 U.S.C. (Supp. IV) 994(j). By con-

trast, the statute provided that it is generally appropriate to imprison a defendant for committing a violent crime resulting in serious bodily injury. *Ibid.* Finally, the statute required that the guidelines provide leniency for defendants who give substantial assistance to the government in the investigation of a crime. 28 U.S.C. (Supp. IV) 994(n).

Short of actually creating the entire guideline system by statute, it is difficult to imagine how Congress could have given the Commission more precise guidance than it did in the Sentencing Reform Act. As one court put it, the Act "outlines the policies which prompted establishment of the Commission, explains what the Commission should do and how it should do it, and sets out specific directives to govern particular situations." *United States* v. *Chambless,* 680 F. Supp. 793, 796 (E.D. La. 1988). The combination of general and specific legislative instruction did far more than simply set forth an "intelligible principle" to guide the Sentencing Commission's discretion; it gave the Commission "the makings of a blueprint" for the guidelines. *United States* v. *Ruiz-Villaneuva,* 680 F. Supp. 1411, 1414 (S.D. Cal. 1988). Congress stated the reasons why the Act was adopted; Congress identified the goals of punishment; Congress instructed the Commission to adopt sentencing guidelines that would meet those goals; Congress restricted the range of sentences the guidelines could impose; Congress identified factors that the Commission must consider when devising sentencing standards; and Congress set forth specific directives to cover particular types of cases. Congress therefore identified "both the 'whither?' and the 'why?' of sentencing reform—the destination toward which the Guidelines should point and the reasons why that destination was chosen." *Id.* at 1417. Under this Court's precedents, that degree of congressional guidance is more than sufficient to overcome constitutional objections.[26]

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[26] That is particularly true in light of the "accumulated experience" (*Fahey* v. *Mallonee,* 332 U.S. 245, 250 (1947)) and "familiar[ity] with

Petitioner maintains (Br. 49-52) that the Act is invalid because it gave the Commission discretion to balance the various factors the Commission must consider and to rank federal crimes according to the Commission's view of their relative seriousness. This Court, however, has expressly held that Congress may leave to "administrative judgment * * * the relative weights to be given to [specified] factors," and to such " 'other relevant factors' " that the agency deems important, "instead of attempting the impossible by prescribing their relative weight in advance for all cases." *Opp Cotton Mills, Inc.* v. *Administrator,* 312 U.S. 126, 145-146 (1941); see also *Lichter* v. *United States,* 334 U.S. at 785-786 ("It is not necessary that Congress supply administrative officials with a specific formula for their guidance in a field where flexibility and the adaptation of the congressional policy to infinitely variable conditions constitute the essence of the program."); *Yakus* v. *United States,* 321 U.S. at 425 (statute may "call for the exercise of judgment, and for the formulation of subsidiary administrative policy within the prescribed statutory framework"). Regardless of whether the administrative agency acts by adjudication or by rulemaking, there is no constitutional requirement that Congress both declare the competing considerations that the agency is to apply and then assign those considerations relative weights that will dictate how they are to be applied in every case.

The functions of the Sentencing Commission are in many respects similar to the functions previously performed by the Parole Commission. Indeed, the similarity between the two agencies is quite damaging to petitioner's

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[the] realities" of the criminal process (*American Power & Light Co.* v. *SEC,* 329 U.S. at 104) that the members of the Commission would bring to their task. See *Sunshine Coal Co.* v. *Adkins,* 310 U.S. at 390 ("Certainly in the hands of experts the criteria which Congress has supplied are wholly adequate for carrying out the general policy and purposes of the Act.").

case. The Sentencing Reform Act commits no greater degree of discretion to the Sentencing Commission than the federal parole laws had previously committed to the Parole Commission, within its jurisdiction, in deciding how long an offender should spend in prison. Congress authorized the Parole Commission to promulgate guidelines authorizing the release of an incarcerated offender "upon consideration of the nature and circumstances of the offense and the history and characteristics of the prisoner," if release "would not depreciate the seriousness of his offense or promote disrespect for the law," and if release "would not jeopardize the public welfare." 18 U.S.C. (1982 ed.) 4206(a). Even though those standards obviously required the Parole Commission to assign weights to different factors and to resolve conflicts where the factors looked in different directions, the delegation of that authority to the Parole Commission has uniformly been upheld,[27] and petitioner does not question its lawfulness.

Petitioner attempts (Br. 53) to distinguish the example of the Parole Commission on the ground that the Sentencing Commission may create guidelines that increase the period of incarceration that a defendant would serve over the average sentence that was imposed for that offense in the past, whereas the Parole Commission could not increase the punishment imposed by the district court. It is unclear why that distinction makes any difference for purposes of the nondelegation doctrine. Congress has simply chosen different outer limits for the operation of the two

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[27] See *Geraghty* v. *United States Parole Comm'n*, 719 F.2d 1199, 1208-1213 (3d Cir. 1983), cert. denied, 465 U.S. 1103 (1984); *Artez* v. *Mulcrone*, 673 F.2d 1169, 1170 (10th Cir. 1982); *Page* v. *United States Parole Comm'n*, 651 F.2d 1083 (5th Cir. 1980); *Moore* v. *Nelson*, 611 F.2d 434, 439 (2d Cir. 1979); *Hawkins* v. *United States Parole Comm'n*, 511 F. Supp. 460, 462 (E.D. Va. 1981), aff'd mem., 679 F.2d 881 (4th Cir. 1982); *Wilden* v. *Fields*, 510 F. Supp. 1295, 1302-1303 (W.D. Wis. 1981).

agencies' guidelines. The outer limits would be the same if Congress simply declared for one offense—or even for all offenses—that district courts should sentence offenders to the maximum statutory sentence for their crimes and that the Parole Commission would determine the release dates for the offenders by applying the parole guidelines. Surely the validity of the delegation to the Parole Commission would not suddenly come into question if Congress required district courts to impose fixed sentences or high minimum sentences.

Petitioner's remaining efforts to distinguish the sentencing guidelines from the parole guidelines are even less persuasive. Petitioner argues (Br. 52-53) that the parole guidelines were advisory and were adopted merely to guide the Parole Commission's individualized consideration of the eligibility of each prisoner for release. But under the Sentencing Reform Act, the district court must also consider each defendant individually (18 U.S.C. (Supp. IV) 3553(a)), and a court may depart from the guidelines if an aggravating or mitigating circumstance of the crime or defendant is present that the Sentencing Commission did not adequately consider. 18 U.S.C. (Supp. IV) 3553(b).[28] More importantly, for purposes of the nondelegation doctrine it does not matter whether the parole guidelines were "advisory" or whether they bound the Parole Commission. The point is that Congress delegated to the Parole Commission the responsibility for determining how long offenders should remain in prison. See H.R. Conf. Rep. 94-838, 94th Cong., 2d Sess. 28 (1976) ("the weight assigned to individual factors (in parole decision making) [was] solely within the province of the (commission's)

[28] Significantly, Congress anticipated that the district courts would vary from the guidelines in no more than 20 percent of all cases because that was the percentage of cases in which the Parole Commission fixed release dates outside its guidelines. S. Rep. 98-225, *supra*, at 52 n.71.

broad discretion."). Congress has done the same thing in the Sentencing Reform Act, except that in the latter case Congress has provided much more detailed guidance as to the policies it wishes the agency to apply.

Finally, petitioner claims (Br. 53) that the parole guidelines are distinguishable from the sentencing guidelines because "Congress explicitly told the Parole Commission when a prisoner will be eligible for parole," whereas Congress gave the Sentencing Commission "*carte blanche*" to determine whether the various factors listed in the statute are relevant to the sentencing decision. That argument compares apples and oranges. Eligibility for parole simply meant that the Commission had the authority to grant parole, not that it was required to do so. An inmate who was eligible for parole had a right to be *considered* for release, not a right to release. Once the inmate became eligible, the decision whether to grant parole was "committed to [the Parole Commission's] discretion." 18 U.S.C. (1982 ed.) 4218(d). While the statutory restrictions on parole eligibility often required an inmate to serve some period of time before the Parole Commission acquired the authority to release him, see 18 U.S.C. (1982 ed.) 4205, the Parole Commission enjoyed broad discretion over whether to release him after he served that minimum period of time. Thus, the "eligibility" restriction on the Parole Commission's authority was no different from the restrictions imposed on the Sentencing Commission in the case of offenses carrying mandatory minimum sentences.

In sum, the Sentencing Reform Act represents an effort by Congress to play a greater, not a lesser, role in the sentencing process and to ensure that sentences will be equitable and will conform to a number of specified congressional policies. It is incorrect to suggest that, in its effort to narrow and rationalize the exercise of discretion previously enjoyed by the courts and the Parole Commission, Congress has suddenly become guilty of the sin of excessive delegation.

II. THE PROMULGATION OF SENTENCING GUIDELINES IS A PROPER EXERCISE OF EXECUTIVE POWER THAT MAY BE UNDERTAKEN BY THE SENTENCING COMMISSION

If Congress may leave to courts or the Executive the task of making more particular its general determinations regarding the appropriate punishments for crimes, the next question is whether the means Congress chose in the Sentencing Reform Act ran afoul of any constitutional prohibition. In our view, the Sentencing Reform Act granted to the Sentencing Commission the authority to exercise the executive power of Article II. That grant of authority is permissible because the structure, operation, and responsibilities of the Sentencing Commission are entirely consistent with the lawful exercise of that power.

A. An Administrative Agency's Promulgation Of Binding Rules Is A Traditional Exercise Of Executive Power.

Congress has often authorized executive officers to implement legislation by promulgating substantive rules or regulations that have the " 'force and effect of law.' " *Chrysler Corp.* v. *Brown,* 441 U.S. 281, 295 (1979) (citation omitted). See, *e.g., Bowen* v. *Yuckert,* No. 85-1409 (June 8, 1987), slip op. 6-7; *Chevron U.S.A. Inc.* v. *NRDC,* 467 U.S. 837, 843-844 (1984); *Heckler* v. *Campbell,* 461 U.S. 458, 466-468 (1983); *Batterton* v. *Francis,* 432 U.S. 416, 425 (1977). That "quasi-legislative" undertaking is one example of the exercise of executive power. *INS* v. *Chadha,* 462 U.S. 919, 953 n.16 (1983); *Buckley* v. *Valeo,* 424 U.S. 1, 140-141 (1976); *Consumer Energy Council* v. *FERC,* 673 F.2d 425, 473-474 (D.C. Cir. 1982), aff'd *sub nom. Process Gas Consumers Group* v. *Consumer Energy Council,* 463 U.S. 1216 (1983); Miller, *Independent Agencies,* 1986 Sup. Ct. Rev. 19, 66.

Congress entrusted the Sentencing Commission with the function of implementing through formal rules the pol-

icies set forth in the Sentencing Reform Act. The Commission thus performs a type of rulemaking function that has regularly been assigned to administrative agencies exercising the executive power.[29]

The Executive has always possessed the authority to decide when a prisoner should be released and therefore to control the length of his confinement. The Constitution grants the President the authority "to grant Reprieves and Pardons" (Art. II, § 2, Cl. 1), which includes the power of commutation, without regard to minimum and maximum terms prescribed in legislation. *Schick* v. *Reed,* 419 U.S. 256 (1974); *Ex parte Wells,* 59 U.S. (18 How.) 307 (1855). Before the parole laws existed, the President exercised his clemency power with regularity. W. Humbert, *The Pardoning Power of the President* 116-122 (1941); *Annual Report of the Attorney General* 39-114 (1903). Since 1910, the Executive Branch has possessed the authority to release a prisoner on parole before the end of his term of incarceration, a power that "originated as a form of clemency," but over time came to be seen as "an extension of the sentencing process." S. Rep. 94-369, 94th Cong., 1st Sess. 15-16 (1975); see also H.R. Conf. Rep. 94-838, 94th Cong., 2d Sess. 19-20 (1976); see *Morrissey* v. *Brewer,* 408 U.S. 471, 477 (1972) ("Rather than being an *ad hoc* exercise of clemency, parole is an established variation on the imprisonment of convicted criminals.").

For purposes of determining what constitutional power is being invoked, the system implemented by the Sentencing Reform Act is not materially different from the system implemented long ago by the federal parole statutes. Under

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[29] We agree with the Sentencing Commission and with petitioner that in creating the sentencing guidelines, the Commission is not exercising the "judicial power" of Article III, since it is not a court engaged in adjudication in the context of a particular "case" or "controversy." Art. III, § 2.

the sentencing guidelines, the determination when a prisoner should be released is made at an earlier stage of the process and in a more formalized manner than under the rules previously applied by the Parole Commission. But otherwise, the two statutory schemes are quite similar. In both cases, the administrative agency is exercising the authority to decide what term of confinement would best serve the goals of the criminal process and what criteria should be used to make that judgment. The exercise of the parole power, and the Parole Commission's power to promulgate guidelines governing release on parole, have always been regarded as executive in nature; the Sentencing Commission's exercise of its closely analogous power to promulgate enforceable sentencing guidelines is therefore appropriately characterized as an exercise of executive power.

No valid objection can be made that the executive power cannot be invoked, through different entities, both to pursue the prosecution of an individual and to set generally applicable guidelines that will govern his sentence. The Sentencing Commission does not perform or participate in any law enforcement or prosecutorial activities. Service on the Commission does not entangle the members of the Commission in law enforcement activities or imbue them with the perspective of the Executive Branch. The Commission's exercise of its authority to promulgate sentencing guidelines poses no greater threat of improper consolidation of prosecution and sentencing than did the Parole Commission's exercise of its authority as an independent agency within the Justice Department.

B. The Statutory Designation Of The Sentencing Commission As "An Independent Commission In The Judicial Branch" Does Not Compel A Different Conclusion.

1. Petitioner's principal response to our argument that the Sentencing Commission is exercising executive power

is that our argument is contrary to the plain language of the Sentencing Reform Act, which places the Commission "in the judicial branch." That response does not address our point. The Sentencing Reform Act does not indicate what power it is that the Commission exercises, but merely identifies the "branch" with which the Commission is associated. The Constitution, however, does not speak of "branches" at all, but instead speaks of "powers." If the Commission is exercising executive power, as we believe it is, the only question of constitutional significance is whether the structure and function of the Commission are consistent with the exercise of that power. The designation of the Commission as an agency "in the judicial branch" may be of symbolic significance and may even affect the application of various other statutes to the Commission. But the "judicial branch" designation, standing alone, has no bearing on whether the Sentencing Commission may constitutionally exercise the power that it has been assigned. As one district judge put the point:

> The legislative history makes clear that Congress intentionally sought to place the Sentencing Commission "in the judicial branch." However, to suggest that this label makes the Act, or the creation of the Sentencing Commission, unconstitutional, elevates semantics over substance. While "branch" is a convenient shorthand expression, the Constitution does not create "branches"; instead, it allots powers. * * * The label placed by Congress ("in the judicial branch") is constitutionally meaningless; instead, what must be examined are the function and powers of the Commission without the distraction provided by the label, which serves semantic purposes only.

United States v. *Ortega-Lopez*, 684 F. Supp. 1506, 1516 (C.D. Cal. 1988) (Hupp, J., dissenting).

Petitioner argues (Br. 38-39) that the "judicial branch" designation is significant because laws such as the Freedom of Information Act, 5 U.S.C. 552, the Privacy Act, 5 U.S.C. 552a, and the Government in the Sunshine Act, 5 U.S.C. 552b, apply to the Executive but not the Judicial Branch. See 5 U.S.C. 552(f), 552a(a)(1), 552b(a)(1). That contention misses the point. The designation of the Commission as a "judicial branch" agency may well be relevant in determining, as a matter of statutory construction, whether Congress meant to exclude the Sentencing Commission from the coverage of those and similar laws. But Congress could have extended the same exemptions to the Commission directly, without reference to the Judicial Branch, and it would have raised no question as to the constitutional validity of the Commission's work. Thus, the effect of the "judicial branch" label on the applicability of various statutory provisions is a matter of no constitutional significance.[30]

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[30] One of petitioner's points (Br. 38-39) is that the label has significance because the President must include the figures from the Judicial Branch without change when he sends his budget to Congress. 31 U.S.C. 1105(b). Petitioner argues that (Br. 39) "[o]bviously, the power to alter the budget request of the Sentencing Commission is a matter of considerable significance." But petitioner fails to note that the relevant budget preparation provision, 31 U.S.C. 1105(b), which requires that the Judicial Branch proposals be included in the proposed budget without change, is not unique to the Judicial Branch. Nearly identical provisions apply to the International Trade Commission and the United States Postal Service. See 19 U.S.C. 2232; 39 U.S.C. 2009. Analogous provisions apply to the Commodity Futures Trading Commission, 7 U.S.C. 4a(h), the Consumer Product Safety Commission, 15 U.S.C. 2076(k), the Federal Aviation Administration, 49 U.S.C. App. 2205(f), the Interstate Commerce Commission, 31 U.S.C. 1108(f), and the National Transportation Safety Board, 49 U.S.C. App. 1903(b)(7), among other executive agencies. Moreover, 31 U.S.C. 1105(b) requires only that the President "include[]" the

Rather than suggesting some constitutional flaw in the Sentencing Reform Act, the special exemptions that "judicial branch" agencies enjoy from particular statutory obligations imposed on other federal agencies help to explain why Congress decided to place the Commission "in the judicial branch." In part, it appears, Congress intended by that designation to ensure that the Sentencing Commission would enjoy some of the same prerogatives that other Judicial Branch entities enjoy. See S. Rep. 98-225, *supra,* at 180. Indeed, quite apart from the reference to the Judicial Branch, the Sentencing Reform Act explicitly provides some of those protections for the Commission. See, *e.g.*, 28 U.S.C. (Supp. IV) 996(b) (exempting employees of the Sentencing Commission from most provisions generally applicable to federal employees); 28 U.S.C. (Supp. IV) 995(a)(6) (permitting the Commission freely to enter into contracts for services necessary to the Commission's functions). Plainly, no constitutional issue is presented by Congress's decision to grant to the Sentencing Commission a dispensation from certain statutory obligations that are generally imposed on Executive Branch agencies.

To be sure, there is some evidence that Congress may have selected the "judicial branch" label in part because it was uncomfortable placing the Commission in the same Branch that is responsible for prosecuting criminal cases. See H.R. 98-1017, 98th Cong., 2d Sess. 95 (1984). But to the extent that the designation was intended to show that Congress intended the Commission to operate independently of day-to-day and policy direction from the President, Congress already sought to achieve that purpose by stating that the Commission is "independent" and by pro-

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judiciary's budgetary proposals without change. For all agencies covered by Section 1105(b), the President is free to offer alternatives, or to comment upon budget proposals. Accordingly, the budgetary law hardly represents a basis for finding the "judicial branch" label affects the constitutional status of the Commission.

viding for Presidential removal for cause only.[31] If that functional guarantee of independence is sufficient to satisfy any separation of powers concerns, the use of the "judicial branch" label is unnecessary. And if that functional guarantee of independence is insufficient, the use of the "judicial branch" label would do nothing to rescue the statute.

Finally, Congress used the reference to the Judicial Branch in part to signal that the Commission performs a function that directly assists and therefore requires close communication with the judiciary. Once again, however, the "judicial branch" label has no functional effect and therefore no constitutional significance. The provisions requiring courts to consult with and report to the Commission are set forth in other portions of the statute. The reference to the Judicial Branch does not in any way increase or decrease the authority of the Commission to perform those functions.[32] In fact, perhaps the best demon-

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[31] The Commission's rejection of the Administration's proposals regarding the inclusion of provisions relating to the death penalty (see Pet. Br. 51) does not support petitioner's expression of concern about potential abuses of the President's removal power; to the contrary, the incident demonstrates that the Commission regards itself as independent, as the statute provides.

[32] Petitioner suggests (Br. 39) that the Sentencing Commission is in some sense judicial because it is assertedly authorized by statute to issue orders to judges and judicial officers. The Sentencing Reform Act does instruct judges to submit written reports of sentences imposed to the Commission to assist in the gathering of information about sentencing trends and practices. 28 U.S.C. (Supp. IV) 994(w). That requirement, however, hardly confers on the Commission any authority over the judiciary or its members in the exercise of the judicial power. The Commission may also issue instructions to probation officers concerning the application of the sentencing guidelines. 28 U.S.C. (Supp. IV) 995(a)(10). Providing assistance to probation officers, who must prepare presentence reports with recommendations on the applications of the guidelines, cannot plausibly be characterized as an exercise of authority over or interference with the duties of

stration that the "judicial branch" label is more symbolic than functional is that Congress intended the Sentencing Commission to be independent of policy or other direction by the Chief Justice, the Judicial Conference, or any other judicial entity, unlike other agencies within the Judicial Branch, such as the Administrative Office of the United States Courts or the Federal Judicial Center.

In sum, the statutory reference to the Commission as being "in the judicial branch" is not inconsistent with our argument that the Commission was exercising executive power when it promulgated the sentencing guidelines. The question whether the Commission was exercising executive power is one that is resolved by looking at what the Commission does, not what it is called. Just as Congress could not assign executive power to a court simply by stating that when exercising that power the court would be deemed to be in the Executive Branch, Congress cannot render the exercise of executive power unlawful simply by referring to the agency that exercises it as an agency "in the judicial branch."

2. If the Court disagrees with us and agrees with petitioner that the reference to the "judicial branch" in the Sentencing Reform Act has constitutional significance and that the Act is thereby rendered unconstitutional, we submit that the label can easily be severed and the remainder of the Act upheld.[33] In *Alaska Airlines, Inc.* v. *Brock*, No. 85-920 (Mar. 25, 1987), this Court described the relevant inquiry. The Court noted first that no more of a statute

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probation officers. In any event, it is not unprecedented for an agency other than a court to have authority over probation officers. The Parole Commission has long had express statutory authority to direct the activities of probation officers in supervising parolees. 18 U.S.C. 3655, 4205(e).

[33] Of course, if the Court upholds the statute on the ground proposed by the Sentencing Commission, it will be unnecessary to address the question of severability.

should be struck down than is absolutely necessary. "Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law.' " Slip op. 5 (quoting *Buckley* v. *Valeo,* 424 U.S. at 108). In that regard, the inquiry is "whether the statute will function in a *manner* consistent with the intent of Congress." *Id.* at 6 (emphasis in original). Moreover, "the presumption is in favor of severability." *Regan* v. *Time, Inc.,* 468 U.S. 641, 653 (1984) (plurality opinion).

Under that standard, the reference to the "judicial branch" is plainly severable. The Commission will function in precisely the same way whether the reference to the "judicial branch" is included in the statute or not. Indeed, there is no indication in the statute or the legislative history that the reference to the "judicial branch" was critical to the achievement of the statutory purpose. The Senate Report stated that the Commission was placed in the Judicial Branch because it was intended that sentencing "should remain primarily a judicial function" and because sitting judges would be serving on the Commission. S. Rep. 98-225, *supra,* at 159, 163. But both of those goals were achieved by other provisions in the statute, and the reference to the "judicial branch" did nothing concrete to advance either one. Regardless of whether the reference to the "judicial branch" is included, the statute clearly contemplates that judges will have a major role in the activities of the Commission, in both an advisory and a reporting capacity, and through their participation as commissioners. And if we are correct, as we argue below, that there is no constitutional prohibition against judges serving on an agency that exercises executive power, the reference to the "judicial branch" is not needed to solve

that possible constitutional objection.[34]

Petitioner charges that we are asking the Court to rewrite the statute by "judicial reassignment" of the Commission from the Judicial Branch to the Executive (Br. 35-40) and characterizes this as an "unprecedented and unjustifiable request" (*id.* at 13). In fact, it would be far more unjustifiable for the Court to refuse to sever the "judicial branch" label and strike down a large segment of the Sentencing Reform Act, together with the work of the Sentencing Commission, because of the asserted constitutional difficulty raised by that single phrase. Since the statute and the legislative history make clear that Congress's principal concern was to effect the sweeping reforms contained in the Sentencing Reform Act, petitioner has failed to overcome the presumption in favor of severing a portion of the statute that may be constitutionally invalid, but was not essential to the operation of the statute as Congress intended. As in *Alaska Airlines,* slip op. 18, the Senate Report shows that the "emphasis during deliberations on the Act was placed overwhelmingly on the substantive provisions of the statute with scant attention paid to" the reference to the Commission's status as a Judicial Branch agency.[35]

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[34] The refusal of some courts to sever the language placing the Commission in the Judicial Branch on the ground that such a step "would appear to unduly frustrate Congressional intent" (*United States* v. *Arnold,* 678 F.2d 1463, 1470 (S.D. Cal. 1988); see *Gubiensio-Ortiz* v. *Kanahele,* Nos. 88-5848 and 88-5109 (9th Cir. Aug. 23, 1988), slip op. 32)) focuses on the wrong issue. There is no question that Congress intended the Commission to be in the Judicial Branch. For severability purposes, however, the issue is whether it is clear that Congress would not have enacted the statute at all if it had realized that the invalid provisions would have to be omitted. *Alaska Airlines,* slip op. 5-6; *Chada,* 462 U.S. at 934; *Buckley* v. *Valeo,* 424 U.S. at 108; *Champlin Refining Co.* v. *Corporation Comm'n of Oklahoma,* 286 U.S. 210, 234 (1932).

[35] Although the Senate was the moving congressional force behind the legislation that was ultimately enacted, we note that a report on an

If the Court concludes, as we submit, that the Commission was exercising executive power, there are only two remaining constitutional objections that petitioner raises to the statute that must be addressed: the objection that it requires that federal judges serve as members of the Commission, and the objection that it authorizes the President to remove those judge-commissioners from the Commission. It is to those two remaining objections that we now turn.

C. The President May Be Authorized To Remove Judge-Commissioners From The Sentencing Commission

The Sentencing Reform Act authorizes the President to remove commissioners, including the ones who are federal judges, from the Sentencing Commission "for neglect of

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earlier House bill on the same subject focused more on the placement of the Commission. See H.R. Rep. 96-1396, 96th Cong., 2d Sess. 489-490 (1980). That Report urged that the guidelines be promulgated by the Judicial Conference of the United States, a body composed entirely of judges (28 U.S.C. 331). One reason for that recommendation was that the House committee had doubts on separation of powers grounds about having an Executive Branch agency promulgate sentencing guidelines. The Committee also noted that assignment to the Executive Branch would "alter the relationship between Congress and the Judiciary with respect to sentencing policies and their implementaton." H.R. Rep. 96-1396, *supra*, at 490. See also H.R. Rep. 98-1017, 98th Cong., 2d Sess. 105-108 (1984) (proposing a Sentencing Guidelines Commission as an advisory body within the Judicial Conference). That policy concern was not heeded, since Congress ultimately placed responsibility not with the Judicial Conference but with a Commission subject to appointment and removal by the President. Accordingly, if severance of the "judicial branch" clause would solve the House committee's other concern—the objection on separation of powers grounds—the House Report provides no reason to believe that the phrase "in the judicial branch" was of such central concern to Congress that it cannot be severed and the remaining portions of the statute upheld.

duty or malfeasance in office or for other good cause shown." 28 U.S.C. (Supp. IV) 991(a). Petitioner claims (Br. 32-35) that the removal provision is invalid, but there is no constitutional infirmity in a law that allows the President to remove officials that he has appointed to exercise executive power. Indeed, as petitioner appears to acknowledge, it is only if the Commission is seen as exercising judicial power that the removal provision would be in any way problematic.

The removal power granted to the President under the Sentencing Reform Act differs significantly from the removal power that Congress enjoyed under the statute at issue in *Bowsher* v. *Synar, supra.* In *Bowsher,* the Court held an Act of Congress invalid because it assigned executive power to the Comptroller General, who was removable only by Congress. By granting the Comptroller General executive power, the Court held, Congress had attempted to retain control over the execution of the law and thereby to intrude into the exercise of executive power in a manner expressly forbidden by Article II. As the Court noted, "[t]o permit an officer controlled by Congress to execute the laws would be, in essence, to permit a congressional veto," since "Congress could simply remove, or threaten to remove, an officer for executing the laws in any fashion found to be unsatisfactory to Congress." *Bowsher* v. *Synar,* slip op. 10-11. Because the Constitution does not allow Congress to implement policy without the bicameral passage of a bill and presentment to the President, the Court ruled, Congress could not retain for itself the power to remove an officer who exercises the executive power. *Ibid.* By contrast, under the Sentencing Reform Act it is the Chief Executive who is authorized to remove a member of the Sentencing Commission. Because the Sentencing Commission is exercising executive power, that removal power raises no separation of powers concern.

The removal provision in the Sentencing Reform Act also does not run afoul of this Court's analysis in *Myers* v. *United States,* 272 U.S. 52 (1926); *Humphrey's Executor* v. *United States,* 295 U.S. 602 (1935); *Wiener* v. *United States,* 357 U.S. 349 (1958); and *Morrison* v. *Olson,* No. 87-1279 (June 29, 1988). A separation of powers question arose in those cases only because Congress *restricted* the President's authority to remove officials who exercise executive power, not because a removal power was accorded in the first place.

The fact that three of the commissioners are federal judges does not call for a different conclusion. The President's removal power enables him only to remove the commissioners from their role as members of the Sentencing Commission and does not authorize the President to remove judge-commissioners from their positions as Article III judges. See *Gubiensio-Ortiz* v. *Kanahele,* Nos. 88-5848 and 88-5109 (9th Cir. Aug. 23, 1988), slip op. 34 (Wiggins, J., dissenting) ("That the President can remove individuals as Commissioners in no way affects the performance of their judicial duties, because they can never have their salaries diminished or be removed as judges, except by impeachment."); see also *United States* v. *Alves,* No. 88-11MA (D. Mass. May 3, 1988), slip op. 14-15. The Act therefore poses no threat to the separation of powers, because it allows Article III courts to continue to adjudicate cases impartially, without any fear of domination by the executive.

D. The Constitution Does Not Forbid Congress From Requiring That Three Members of the Sentencing Commission Be Federal Judges

We have shown that the Sentencing Commission can perform an executive function without running afoul of any separation of powers concerns, because the members of the Commission are appointed by the President and

removable by him. Petitioner contends that even if we are correct in that regard, the statute is nonetheless flawed because federal judges cannot serve on the Commission under those terms. We submit, to the contrary, that the separation of powers principle is not violated in any way by the voluntary service of three federal judges on the Commission. Although nonjudicial functions may not be assigned to judges acting in their judicial capacity, there is no prohibition against judges serving voluntarily and in their personal capacity in extra-judicial roles.

1. Participation on the Sentencing Commission will not impermissibly interfere with judges' performance of their judicial functions.

There is no constitutional prohibition against permitting judges to serve as members of the Sentencing Commission. The text of the Constitution itself offers guidance on this issue. The Incompatibility Clause provides (Art. I, § 6, Cl. 2):

> No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been increased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

No similar restriction applies to judges. That omission is significant because a parallel clause that would have applied to the judiciary was proposed at the Constitutional Convention, but was not reported out of the Committee on Style.[36] The text of the Constitution thus suggests that

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[36] 2 M. Farrand, *The Records of the Federal Convention of 1787*, at 341-342 (rev. ed. 1966); Wheeler, *Extrajudicial Activities of the Early Supreme Court*, 1973 Sup. Ct. Rev. 123, 129. The proposal at the Constitutional Convention would have added the following provision

the Framers did not intend to forbid judges from ever holding any executive positions.

History is also instructive on this point. Federal judges have served in nonjudicial capacities since the nation's first years.[37] In 1794, John Jay, the first Chief Justice of the United States, served also as Secretary of State and special envoy to England, where he negotiated the treaty that bears his name.[38] Oliver Ellsworth was both Chief Justice

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to the Constitution: "No person holding the office of President of the U.S., a Judge of their Supreme Court, Secretary for the Department of Foreign Affairs, of Finance, of Marine, of War, or of—, shall be capable of holding at the same time any other office of Trust or Emolument under the U.S. or an individual State." 2 M. Farrand, *supra,* at 341-342. The Virginia Ratifying Convention also endorsed and forwarded to the First Congress a resolution drafted by George Mason providing that "The Judges of the federal Court shall be incapable of holding any other Office, or receiving the Profits of any other Office, or Emolument under the United States or any of them." III *The Papers of George Mason 1725-1792,* at 1057 (R. Rutland ed. 1970). The First Congress declined to endorse that proposal.

[37] See *In re President's Commission on Organized Crime (Scarfo),* 783 F.2d 370 (3d Cir. 1986); *In re President's Commission on Organized Crime (Scaduto),* 763 F.2d 1191 (11th Cir. 1985); Eisenberg, *A Consideration of Extra-Judicial Activities in the Pre-Marshall Era,* 1985 Yearbook Sup. Ct. Hist. Soc'y 117; Mason, *Extra-Judicial Work for Judges: The Views of Chief Justice Stone,* 67 Harv. L. Rev. 193, 193-194 & n.3 (1953); McKay, *The Judiciary and Nonjudicial Activities,* 35 Law & Contemp. Probs. 9, 27-36 (1970); Murphy, *The Brandeis/Frankfurter Connection* 347-363 (1983); Slonim, *Extrajudicial Activities and the Principle of the Separation of Powers,* 49 Conn. B.J. 391 (1975); Wheeler, *Extrajudicial Activities of the Early Supreme Court,* 1973 Sup. Ct. Rev. 123; Note, *Extrajudicial Activities of Supreme Court Justices,* 22 Stan. L. Rev. 587 (1970).

[38] Chief Justice Jay explained that there is a difference between the extrajudicial activities of a judge and the same type of actions by a court. As he wrote in a draft of a letter for President Washington, "[w]e are aware of the distinction between a Court and its Judges, and are far from thinking it illegal or unconstitutional, however it may be inexpedient, to employ them for other purposes, provided the latter purposes be consistent and compatible with the former." Draft of a

and Minister to France. Chief Justice John Marshall served briefly as Secretary of State during his term on this Court, and he was a member of the Sinking Fund Commission, which was given the responsibility of refunding the Revolutionary War debt.[39] More recently, in 1911 Justice Charles Evans Hughes accepted the invitation of President Taft to sit on a commission to establish second class postal rates. Justice Owen Roberts served on the commission investigating the disaster at Pearl Harbor. Justice Robert Jackson was the chief American prosecutor at the Nuremberg War Crimes Trials. Chief Justice Earl Warren presided over the commission investigating the assassination of President Kennedy. And other Members of this Court and the lower courts have also served on other executive commissions.[40] That long pedigree of

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letter by Chief Justice Jay, intended for President Washington, enclosed with a letter from Jay to Justice Iredell (Sept. 15, 1790), *reprinted in* 1 G. McRee, *The Life and Correspondence of James Iredell* 293, 294 (1949).

[39] Act of Aug. 12, 1790, ch. 47, 1 Stat. 186. Although the debt funding plan was controversial. "[a]t no time in the debate" on its adoption "was opposition expressed to this 'further use' of the Chief Justice." Wheeler, *supra,* 1973 Sup. Ct. Rev. at 142. The First Congress also assigned to the Chief Justice the duty of inspecting the operation of the U.S. Mint. Act of Apr. 2, 1792, ch. 16, § 18, 1 Stat. 250.

[40] The long list of instances in which Members of this Court have performed extra-judicial services are summarized in *Scarfo,* 783 F.2d at 377 & n.4; Mason, *supra,* 67 Harv. L. Rev. at 194 n.3, 200-201 n.19; and Note, *supra,* 22 Stan. L. Rev. at 590-592 & nn.14, 34 & 35. Examples of recent service by lower court judges on executive commissions include the following: Judge A. Leon Higginbotham, Jr., of the Third Circuit was appointed by the President to the National Commission on the Causes and Prevention of Violence. Exec. Order No. 12,435, 3 C.F.R. 202 (1983). Judges James Parsons and Luther Youndahl were members of the President's Commission on Law Enforcement and the Administration of Justice. Exec. Order No. 11,236, 3 C.F.R. 329 (1965). Judges George C. Edwards, Jr., James

service by the federal judiciary—beginning with the appointment by the President of the Constitutional Convention and first President of the United States of a contributor to *The Federalist,* appointments accepted by some of the earliest Members of this Court, and laws enacted by the First Congress—provides compelling evidence that the practice does not contravene the constitutional principle of separation of powers. See *Bowsher* v. *Synar,* slip op. 8 (decisions by First Congress, which included many of the Framers, provides " 'contemporaneous and weighty evidence' of the Constitution's meaning"); *Youngstown Sheet and Tube Co.* v. *Sawyer,* 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring); *United States* v. *Woodley,* 751 F.2d 1008, 1012 (9th Cir. 1985) (en banc) ("considerable weight is to be given to an unbroken practice which has prevailed since the inception of our nation and was acquiesced in by the Framers of the Constitution when they were participating in public affairs").

While the historical evidence by itself would not be conclusive, two early decisions of this Court provide substantial support for the view that the practice is constitutional. *Hayburn's Case,* 2 U.S. (2 Dall.) 409 (1792), involved a law empowering federal courts to resolve pension claims by disabled Revolutionary War veterans. The Act directed a circuit court to hear the evidence, decide the amount of disability pay due, and certify that amount to the Secretary of War, who had discretion to adopt or reject the court's findings. This Court did not decide

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M. Carter, A. Leon Higginbotham, Jr., and Thomas MacBride served on the National Commission on the Reform of the Federal Criminal Laws. *Reform of the Criminal Laws: Hearings Before the Subcomm. on Criminal Laws and Procedure of the Senate Comm. on the Judiciary,* 92d Cong., 1st Sess. 135 (1971). And Judge Robert W. Warren of the Eastern District of Wisconsin served on the Task Force on Organized Crime for the National Advisory Committee on Criminal Justice Standards and Goals. Task Force on Organized Crime, National Advisory Comm. on Criminal Justice Standards and Goals, *Organized Crime* xvii (1976).

whether a court could perform that task, since the law had been repealed, but the opinions of several Justices sitting on the circuit courts were reported in the margin of the Court's opinion. The Members concluded that a court could not undertake that duty, but some Justices believed that an individual judge might be able to do so as a commissioner.[41] As this Court later explained, "the only question upon which there appears to have been any difference of opinion, was whether [the statute] might not be construed as conferring the power on the judges personally as commissioners. And if it would bear that construction, there seems to have been no doubt, at that time, but that they might constitutionally exercise it, and the Secretary constitutionally revise their decisions." *United States* v. *Ferreira,* 54 U.S. (13 How.) 40, 50 (1851).

Ferreira involved a law authorizing a federal district judge in Florida to resolve claims against the United States under the 1819 treaty with Spain that ceded Florida to this nation. The results of that ex parte proceeding were reported to the Secretary of the Treasury, who made the final determination whether to pay a claim. 54 U.S. (13 How.) at 45-47. The district judge decided that Ferreira's claim was valid, and the United States appealed to this Court. The Court held that it lacked jurisdiction over the appeal, since the judge was not acting as a court, but as a commissioner, and therefore was not exercising the Article III judicial power. *Id.* at 47-51. In so ruling, however, the Court did not suggest that the statute in question was unconstitutional on the ground that it empowered a federal

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[41] See 2 U.S. (2 Dall.) at 410 n.† (Jay, C.J., Cushing, J., & Duane, Dist. Ct. J.) (individual judges could perform that function); *id.* at 411-412 n.† (Wilson & Blair, JJ., and Peters, Dist. Ct. J.) (not expressing an opinion on that question); *id.* at 413-414 n.† (Iredell, J., & Sitgreaves, Dist. Ct. J) (leaving question open). See also *United States* v. *Yale Todd* (1794) (unreported decision discussed at *Ferreira,* 54 U.S. (13 How.) at 52-53).

judge to perform the function of resolving administrative claims. On the contrary, the Court concluded that the "law [in *Hayburn's Case*] is the same in principle with the one we are now considering, with this difference only, that the act of 1792 imposed the duty on the court *eo nomine,* and not personally on the judges." *Id.* at 50. Thus, the Court in *Ferreira* appears to have embraced the principle that an executive assignment to judges acting as a court would have been improper, but such an assignment to judges acting in their individual capacity would not. See *id.* at 50-51. The only potential flaw this Court saw in the Act in *Ferreira* was that, by designating the Florida judge as a commissioner, the statute may have violated the President's Article II power to appoint the "officers" of the United States. *Id.* at 51. *Ferreira* therefore strongly implies that Congress may authorize a federal judge to perform an executive function.

The service of Article III judges on the Sentencing Commission is also consistent with Article III and separation of powers principles. The commissioners appointed by the President to serve on the Commission—whether selected because they are Article III judges or otherwise—do not act as judges when they collectively develop and promulgate sentencing guidelines. Their power to promulgate sentencing guidelines is administrative in nature and is derived from the enabling legislation establishing the adminsitrative agency of which they are a part. The Commission is not a court, it does not function as one, and the judges who serve as commissioners are never called upon to exercise their judicial powers while serving in that role. Instead, the judges serve during their limited terms as administrators who lend their experience and expertise to its ongoing work. Judge-commissioners must be appointed by the President, just as any other commissioner must be

appointed (28 U.S.C. 991(a)), and they derive their power to act as commissioners solely from that presidental appointment, not from any authority they possess as Article III judges.

The Sentencing Reform Act therefore creates no risk that an Article III court will be required to perform a nonjudicial function. Thus, this case is not similar to *Hayburn's Case* or *Ferreira,* in which an Article III court was asked to exercise the executive power. See *Morrison* v. *Olson,* slip op. 19 n.15. The Commission does not perform any judicial function that can be impaired by the assignment to it of nonjudicial, administrative responsibilities. The only impact of the Sentencing Commission's work on the judicial function arises from the participation of Article III judges as commissioners.

The fact that the Sentencing Reform Act *requires* that three members of the Sentencing Commission be drawn from the ranks of Article III judges does not change that result, because service on the Commission by any particular judge is voluntary. Cf. *In re President's Commission on Organized Crime (Scarfo)*, 783 F.2d 370, 378 (3d Cir. 1986); *In re President's Commission on Organized Crime (Scaduto)*, 763 F.2d 1191 (11th Cir. 1985) (Roney, J., specially concurring).[42] The Act does not conscript

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[42] *Scarfo* and *Scaduto* involved challenges to subpoenas issued by the President's Commission on Organized Crime. The Organized Crime Commission was chartered to conduct a national analysis of organized crime and to make recommendations about ways to improve law enforcement efforts against organized crime and legislation to that effect. Exec. Order No. 12,435, § 2(a), 3 C.F.R. 202 (1983). The recipients of the subpoenas in *Scarfo* and *Scaduto* argued that the Commission violated the separation of powers because Judge Irving Kaufman was a member (and chairman) of the Commission.

In *Scarfo,* the Third Circuit held that Judge Kaufman's service on the Organized Crime Commission was not unconstitutional, for several reasons: the work of the Commission was nonjudicial,

judges onto the Commission. None of the current judicial members of the Commission was appointed without his consent, and there is no reason to believe that the President could require any judge to serve on the Commission if he did not wish to do so. In any event, to the extent that petitioner's constitutional claim is based on the possibility that some judge in the future may be compelled to serve on the Sentencing Commission against his will, petitioner cannot raise that claim in this criminal proceeding, since the current guidelines, and thus the sentence that was imposed on him, could not have been affected by the hypothetical possibility of Presidential conscription of a Article III judge at some time in the future.

The service of Article III judges on the Sentencing Commission will not bias those judges toward the government or undermine public confidence in the impartiality of the federal judiciary. That concern troubled the courts in the *Scarfo* and *Scaduto* cases, which involved the participa-

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nonprosecutorial, and only advisory; service on the commission was voluntary; federal judges had historically served in nonjudicial posts; any risk that a judge who served on the commission would thereafter be partial to the government could be remedied through recusal; and the recusal of judges would not prevent the courts from discharging their Article III functions, since other judges could be substituted for the recused judges. 783 F.2d at 376-381.

The Eleventh Circuit in *Scaduto* ruled to the contrary in a divided decision that nonetheless upheld a contempt order for Scaduto's failure to comply with a subpoena. The Eleventh Circuit was concerned primarily with the risk that judges serving on the Organized Crime Commission could not thereafter maintain impartiality in cases involving organized crime and that the public and litigants might lose confidence in their impartiality. 763 F.2d at 1197. The court did not consider whether those risks could be avoided through recusal of the judges who sat on the Commission. Judge Roney concluded that the service of Article III judges on the Commission did not violate the separation of powers for the reasons later adopted by the Third Circuit in *Scarfo*. *Id.* at 1202-1206.

tion of federal judges on a commission seeking to improve enforcement efforts against organized crime. Unlike that enterprise, and in light of the statutory guidance that Congress gave to the Sentencing Commission, the Commission's function of developing rules that rationalize the sentencing process is entirely neutral and is not likely to lead judges to become partisans in criminal cases.[43] Although it is conceivable that the need to preserve the appearance of impartiality and the rights of defendants might require judicial commissioners to recuse themselves in some future cases involving challenges to sentences under the guidelines, the possibility of future recusals does not render their present service on the Commission constitutionally invalid.[44] Moreover, the possibility that the

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[43] As one judge explained in upholding the guidelines (*United States* v. *Myers,* No. CR 87-0902 TEH (N.D. Cal. Apr. 11, 1988), slip op. 29): "Whether the eleventh [*Scaduto*] or the third circuit's [*Scarfo*] view on this question is correct, the instant case is distinguishable. The Commission is a different entity with a different purpose. The Sentencing Commission has not been authorized to assist the president in the fight against crime; instead, its purpose is a far more neutral one of rationalizing federal sentencing." See *United States* v. *Ruiz-Villanueva,* 680 F. Supp. at 1422-1423 (emphasis in original) (judicial service on the Sentencing Commission does not undermine the impartiality of the judiciary because "Congress created the Commission for the express purpose of *assisting* the judiciary in its sentencing function").

[44] It is by no means clear that recusal would be necessary in all criminal cases involving sentencing issues, and it is certainly not true that the independence of the Judicial Branch will be compromised by the appearance of judges reviewing the work of other judges. Otherwise, the judges who participated in drafting federal rules of procedure would be disqualified from deciding cases challenging those rules. This Court, however, has specifically rejected that argument. *Mississippi Publishing Corp.* v. *Murphree,* 326 U.S. 438, 444 (1946) (the fact that this Court promulgated the Federal Rules of Civil Procedure did not foreclose consideration of challenges to them by the Court). As one judge aptly stated, "[i]t is no secret that judges disagree with each other constantly. In construing or applying the guidelines,

participation of judges on the Sentencing Commission may lead to actual or perceived unfairness to defendants in future cases in which those judges sit is not a claim that petitioner can raise in challenging his conviction. He has been sentenced by a judge who was not a Commissioner, and his sentence is being reviewed by a Court none of whose members sat on the Sentencing Commission. If there is any flaw in permitting judges to sit on the Commission because of the possibility that future defendants may be prejudiced on account of the judges' service as commissioners, those defendants—not petitioner—are the proper parties to raise the objection.[45]

Petitioner argues (Br. 45) that the voluntary interbranch assignment of federal judges should be held invalid because "its logic contains no limiting principles" and could justify the assignment of law enforcement functions to a sitting judge. In fact, there are limiting principles on the permissible assignment of judges to nonjudicial tasks, and those principles are sufficient to answer the parade of horribles that petitioner proposes (Br. 45). The first question to be asked is whether a nonjudicial task is being assigned to a court *qua* court, or whether the individual judges serves voluntarily in a nonjudicial capacity. See *United States* v. *Ferreira, supra.* The second question to be asked is whether there is an inherent incongruity between the judge's assigned duties and his Article III responsibilities. See *Morrison* v. *Olson,* slip op. 17 & n.13.

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federal judges are unlikely to be impressed, or even minimally affected, by the fact that other judges serve on the Sentencing Commission." *United States* v. *Chambless,* 680 F. Supp. at 800.

[45] We see no force to the argument made by the majority in *Gubiensio-Ortiz* v. *Kanahele, supra,* that appointment to the Commission might be preceived by the public as a reward to judges "for service particularly pleasing to the President." Slip op. 39. It seems unlikely that service on the Sentencing Commission would be viewed as so glamorous that the public would conclude that judges might alter their behavior in the hopes of being appointed to serve on the Commission.

The assignment at issue in this case satisfies both tests. Judges serve on the Commission in a nonjudicial capacity, and service on the Commission is not "inherently incongruous" with judges' performance of their work as judges. The judges who serve on the Commission are not required to perform law enforcement responsibilities, as would be the case in petitioner's hypothetical example of a federal judge assigned to serve as the head of the FBI. The Sentencing Commission exercises no law enforcement power; it performs no investigations; it files no charges. Instead, its purpose "is a far more neutral one of rationalizing federal sentencing." *United States* v. *Myers*, No. CR 87-0902 TEH (N.D. Cal. Apr. 11, 1988).

In *Morrison* v. *Olson*, *supra*, this Court upheld as a proper exercise of power under the Appointments Clause, Art. II, § 2, Cl.2, the appointment of independent counsels by a Special Division of a United States Court of Appeals. The Court found no "inherent incongruity" between a court's judicial function and its duty to appoint executive prosecutorial officers, both because judges are "well qualified" to select prosecutors as a result of their experience with prosecutors in criminal cases (slip op. 17 & n.13), and because recusal of the judges from any matter involving the prosecutors they appointed would fully protect against the risk or appearance of impartiality. *Id.* at 18. The same principles apply here. As the Senate Report noted, judges were regarded as especially well qualified to serve on the Sentencing Commission because of their intimate familiarily with sentencing—a much greater familiarity than judges are likely to have with the prosecutorial function. And, as in the case of the appointment of prosecutors, any appearance of impartiality can be avoided through recusal. Accordingly, we believe that petitioner's "slipperly slope" concerns are overstated. In the unlikely event that Congress should make any assignments of the type he describes, this Court will be

free to strike down those assignments on the ground that they are inconsistent with the performance of judicial functions.

2. Assigning judges to the Sentencing Commission will not unduly interfere with the functioning of the Judiciary.

The service of judges on the Sentencing Commission will not impair the ability of the federal judiciary to function effectively.[46] Even if the judges who serve on the Commission must recuse themselves in cases involving challenges to the guidelines, those cases can be reassigned to other judges. The minor disruption that such reassignment would cause would hardly disable the judiciary from doing its work. Even if the judges who serve on the Sentencing Commission recuse themselves in some cases involving challenges to the guidelines, those judges can take on a greater share of other cases, so the total burden on the judiciary will not be increased by any recusals. Congress could properly conclude that the administrative burden of recusals is outweighed by the benefits of having judges participate in the generation and review of the sentencing guidelines. In particular, it was reasonable for Congress to determine that the vital contributions of expertise and wisdom to be made by the three judge-commissioners as active participants in the Sentencing Commission's work was necessary to accomplish the task of devising fair and reasonable sentencing guidelines. The alternative of having a judicial committee occasionally supply advice to the

[46] While it is true that, at least initially, service on the Commission consumed a substantial amount of the judicial members' time, the three judge-commissioners, Judges Wilkins, Breyer, and MacKinnon, have continued to perform their judicial duties while serving as Commissioners. As the court observed in *United States* v. *Chambless,* 680 F. Supp. at 797, despite the fact that the Commission was established four years ago, there is no "empirical evidence which suggests that the functioning of the judiciary has been appreciably impaired."

Commission would be a less effective substitute for the regular service of the judge-commissioners in the day-to-day work of the Commission.

In any event, the possible disruption caused by guidelines-related recusals is likely to be minimal. There are at present 752 federal judges. Browson, *1988 Judicial Staff Directory* 554 (1987). Even a complete loss of three would represent only a 0.4 percent diminution in the judiciary's total work force. The actual effect will be much smaller, since the judge-commissioners would need to recuse themselves, if at all, only in that small fraction of cases involving challenges to the guidelines.[47] Of course, the number of judges who might need to recuse themselves will increase over time as the current and future members of the Commission complete their terms. 28 U.S.C. (Supp. IV) 992(a) and (b) (no commissioner may serve more than two six-year terms). The additional increase in the workload of other judges, however, is still likely to be negligible. A minor impact on the ability of the courts to handle their workload is not a sufficient basis to render invalid Congress's carefully crafted reforms.

In sum, there is no constitutional reason that judges cannot serve voluntarily and in their personal capacities on the Sentencing Commission. As the district court below held (Pet. App. 5a), a contrary result "would deprive the Sentencing Commission of judicial insight in order to protect the independence of the judiciary. This would be a regrettable and unnecessary insistence on maintenance of functional purity."[48]

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[47] Statistics prepared by the Admininstrative Office of the U.S. Courts also show that between 1982 and 1987 felony criminal cases constituted on the average only between 8 and 11 percent of the new filings each year for district court judges. *Federal Court Management Statistics 1987*, at 167.

[48] If the Sentencing Reform Act is held invalid on the ground that three judges must serve on the Commission, the guidelines should

III. IF THE SENTENCING REFORM ACT IS HELD UNCONSTITUTIONAL, THE PROVISION OF THE ACT ABOLISHING PAROLE MUST ALSO BE STRUCK DOWN, BUT THE PROVISION MODIFYING THE "GOOD TIME" CREDITS EARNED BY PRISONERS SHOULD BE UPHELD

Petitioner argues (Br. 54-60) that if the sentencing guidelines are invalidated, the provisions of the Sentencing Reform Act that abolish parole and modify the system for alloting good time to federal prisoners must fall as well. He argues that those provisions were intended to be part of a "comprehensive plan" for sentencing reform (Br. 58), and that if one part of the package is struck down, the remaining parts cannot be saved. For purposes of determining whether particular parts of a single statutory scheme are severable, however, the inquiry is not simply whether the parts were all intended to be part of a comprehensive whole, but whether Congress would have enacted the constitutionally valid portions of the law if it had known it could not enact those portions that the Court decides must be struck down. See *Alaska Airlines,* slip op. 5. Applying that test to the Sentencing Reform Act, we reach a somewhat different conclusion from that reached by peti-

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nonethelesss be given full effect under the "de facto officer" doctrine. Under that doctrine, a "person actually performing the duties of an office under color of title is an officer de facto, and his acts as such officer are valid so far as the public or third parties who have an interest in them are concerned." *Untied States* v. *Lindsley,* 148 F.2d 22, 23 (7th Cir.), cert. denied, 325 U.S. 858 (1945); see also *Buckley* v. *Valeo,* 424 U.S. at 142-143; *Norton* v. *Shelby County,* 118 U.S. 425 (1886). That doctrine, "which gives validity to acts of officers *de facto,* whatever defects there may be in the legality of their appointment of election, is founded upon considerations of policy and necessity, for the protection of the public and individuals whose interests may be affected thereby." *Norton,* 118 U.S. at 441-442. Thus, if the appointment of judges to serve on the Commission renders the Act invalid, the validity of the Commission's past administrative actions should not be affected. See *Buckley* v. *Valeo,* 424 U.S. at 143.

tioner. We agree with petitioner that if the sentencing guidelines fall, the provision of the Act that abolishes parole must be invalidated as well, because Congress would not have abolished parole if it had known that the sentencing guidelines would not survive. But we disagree with petitioner's contention that the same analysis applies to the provisions of the Act modifying the system of granting "good time" credit to federal prisoners. Those provisions can be upheld, we submit, because they can function quite independently of the sentencing guidelines system and were designed to serve purposes quite distinct from those served by the guideline system.

A. The Abolition Of Parole Was Inseparably Linked To The Promulgation Of The Sentencing Guidelines

Three components of the Sentencing Reforms Act were central to Congress's creation of a new mechanism for sentencing in the federal courts: (1) the sentencing guidelines, which were both determinate and mandatory; (2) the abolition of parole, a system of sentence adjustment that became unnecessary once all sentences became determinate and subject to univerally applicable guidelines; and (3) a provision for appellate review of sentences not in conformity with the guidelines, which was designed to ensure that the guidelines were correctly applied and to establish a body of case law defining the circumstances in which courts could depart from the guidelines. S. Rep. 98-225, *supra,* at 46, 51-55, 151. Those three components were closely integrated and were designed to work together to effect the principal purposes of the Sentencing Reform Act—to reduce the disparity among sentences imposed on equally situated defendants and to make the sentences imposed closely approximate the sentences that defendants would actually serve. S. Rep. 98-225, *supra,* at 39.

It is clear that the system of appellate review of sentences that Congress devised (see 18 U.S.C. (Supp. IV)

3742) cannot function in the fashion Congress intended if the guidelines are struck down. The provision for appellate review of sentences is tied directly to the guidelines, so that only sentences falling outside the guidelines or resulting from a misapplication of the guidelines are subject to appellate review. The legislative history makes it clear that Congress did not intend to create a system of unrestricted appellate review of sentences, under which any sentence would be subject to appeal by either the defendant or the government, and in which there would be no benchmarks to guide the exercise of the appellate review function. See S. Rep. 98-225, *supra,* at 154.

The same analysis applies to the provision of the Act that abolishes the federal parole system, Pub. L. No. 98-473, § 218(a)(4), 98 Stat. 2027 (1984). Congress recognized that the parole system had some effect in mitigating the disparities among sentences, although it did not do enough in that regard. See S. Rep. 98-225, *supra,* at 46-47, 164 (the Parole Commission "is now able to alleviate some of the disparity among sentences in terms of imprisonment; however, it has no jurisdiction to eliminate disparity among decisions whether or not to sentence convicted defendants to terms of imprisonment"); H.R. Rep. 98-1017, *supra,* at 35 ("the Parole Commission has succeed[ed] in reducing much of the disparity in the amount of time served by those similarly situated; the decision whether to incarcerate, however, is still subject to disparity"); see also *United States* v. *Addonizio,* 442 U.S. at 189 ("Congress has decided that the [Parole] Commission is in the best position to determine when release is appropriate, and in doing so, to moderate the disparities in the sentencing practices of individual judges."); S. Conf. Rep. 94-648, 94th Cong., 2d Sess. 19, 26 (1976).

Because the parole system was an inefficient means of addressing the problem of disparities in sentencing, Congress chose to supplant the parole system with the sentenc-

ing guideline system, a more effective vehicle for rationalizing sentences. But if the guideline system (including the appellate review process) is struck down and the provision of the Act abolishing parole is preserved, the result will be to increase the disparities among sentences, since there will be no check on the disparate treatment that similarly situated offenders could receive from different judges. That result would be fatally inconsistent with Congress's repeatedly stated intention to eliminate sentencing disparities in the federal courts. For that reason, we agree with petitioner that Congress would not have wished to abolish parole if the guideline system were not available to replace it.

B. The Revisions To The "Good Time" Laws Are Severable From the Remainder of The Act

Unlike the provision of the Act abolishing parole, the provision modifying the system for alloting "good time" credits to federal prisoners, 18 U.S.C. (Supp. IV) 3624(b), is not in any way tied to the sentencing guidelines, and it advances the purposes of the Sentencing Reform Act whether or not the guideliness survive. The new good time statute should therefore be upheld without regard to the fate of the sentencing guidelines.

Good time laws are designed to provide an incentive to prisoners to maintain good behavior while they are in custody. In the federal system prior to the effective date of the Sentencing Reform Act, a prisoner could earn good time allowances for good insitutional behavior at a rate ranging from five to ten days per month, depending on the length of his sentence. 18 U.S.C. (1982 ed.) 4161. A prisoner could earn an additional three to five days of credit each month, called "industrial good time," for employment in a prison industry or camp, for "exceptionally meritorious service," or for "performing duties of outstanding importance in connection with institutional

operations." 18 U.S.C. (1982 ed.) 4162. A prisoner could forfeit all or any part of his accumulated good time credits if he committed an offense or violated institutional rules. 18 U.S.C. (1982 ed.) 4165. The Attorney General could restore whatever credit he deemed proper upon a recommendation of the Director of the Bureau of Prisons. 18 U.S.C. (1982 ed.) 4166. See S. Rep. 98-225, *supra,* at 146-147.

The Sentencing Reform Act changed prior law in three ways. First, it established a uniform maximum rate of 54 days per year of credit for all prisoners convicted of a felony, with the exact amount to be determined by the Bureau of Prisons. Second, the good time credits each prisoner earns each year vest at the end of that year. As a result, an inmate's violation of institutional rules can affect only the credits the inmate has earned during that year. Third, good time credit can be withheld only for the violation of institutional disciplinary regulations that have been approved by the Attorney General and provided to the prisoner. 18 U.S.C. (Supp. IV) 3624(b); S. Rep. 98-225, *supra,* at 147.

The enactment of the good time provision had nothing to do with the sentencing guidelines. The Senate Committee explained that the good time statute was amended in part because of "the complexity of current law," and the uncertainty it caused. In particular, under the former good time statute all or part of a prisoner's accumulated good time credits could be forfeited for a single disciplinary infraction. That system "increase[d] the uncertainty of the prisoner as to his release date, with a resulting adverse effect on prisoner morale." S. Rep. 98-225, *supra,* at 147. At the same time, the fact that lost good time was "usually restored" deprived the good time provisions of "the intended effect on maintaining prison discipline." *Ibid.* Congress concluded that permitting an inmate to earn credit toward an early release at a "steady," "sufficiently high,"

and "easily determined rate" will supply prisoners an "incentive for good institutional behavior" without carrying forward the uncertainty about his release date existing under prior law. *Ibid.*

The new good time provision serves each of those purposes quite independently of the fate of the sentencing guidelines. In addition, the new statute serves the overall statutory purpose of "truth in sentencing" by ensuring that the sentence imposed on an offender closely approximates the sentence he actually serves. See S. Rep. 98-225, *supra,* at 56. Accordingly, the background and purposes of the good time provision indicate that even if the guidelines are struck down, the new good time provision should be upheld.

Petitioner does not treat the status of the good time provision separately from the status of the provision abolishing parole. Instead, in contending that the abolition of parole and the new good time provision must stand or fall with the guidelines, he relies principally on the fact that Congress made the abolition of parole and the new good time provision effective at the same time that the new guidelines went into effect. But there is no particular significance in that. With only a few exceptions, Congress made every provision of the Sentencing Reform Act effective at the same time the guidelines went into effect. Yet the Act contains a wide variety of statutory changes, many of which have little or nothing to do with the guidelines. For example, the new statute revamps the procedures to be followed in granting and administering probation (18 U.S.C. (Supp. IV) 3561, 3563); it codifies the rules applicable to multiple sentences of imprisonment (18 U.S.C. (Supp. IV) 3584); it changes the law with respect to prison furloughs (18 U.S.C. (Supp. IV) 3622); it changes the law with respect to prerelease custody at the end of a prisoner's term (18 U.S.C. 3624(b)); and it makes changes in several

of the Federal Rules of Criminal Procedure, including Rule 6(e), which has nothing whatever to do with the sentencing guidelines (Pub. L. No. 98-473, § 215, 98 Stat. 2031 (1984)).

It cannot plausibly be contended that Congress would have wanted the entire Sentencing Reform Act, or at least the great portion of it that did not go into effect until November 1, 1987, to be declared invalid if the guidelines could not be upheld. Petitioner is thus clearly incorrect in attaching weight to the fact that Congress postponed the effective date of the good time provision until the guidelines became effective. Petitioner's point establishes that Congress devised a broad ranging package of sentencing reforms and wanted the reforms all to take effect simultaneously. But that is far from suggesting that if one of those reforms was found invalid, Congress would have wanted them all to fall. Rather than being inextricably bound up with the creation of the guidelines system, the good time statute is as independent as the provisions modifying the procedures for granting probation or prison furloughs. The new good time statute can therefore survive even if the sentencing guidelines must be struck down.[49]

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[49] Petitioner asserts in passing (Br. 60) that the former good time statute helped reduce sentencing disparities by granting early release to persons who had received especially harsh sentences. That was true only to the limited extent that the former good time statute automatically granted more good time credits to persons with longer sentences. Thus, under the former regime a prisoner with a five-year sentence would receive eight days of good time per month, while a prisoner with a ten-year sentence would receive ten days of good time per month. See 18 U.S.C. (1982 ed.) 4161. But that was only a minor and quite incidental effect of the graded good time schedule in the prior statute. Unlike the case with the parole system, there is no indication in the legislative history of the Sentencing Reform Act that the good time system was regarded as having any meaningful role in reducing sentence disparities.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

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