Nos. 87-1904 & 87-7028

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

UNITED STATES OF AMERICA,

Petitioner,

v.

JOHN M. MISTRETTA,

Respondent.

JOHN M. MISTRETTA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writs Of Certiorari Before Judgment To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF AMICUS CURIAE, NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, IN SUPPORT OF RESPONDENT-PETITIONER MISTRETTA

Of Counsel:

NINA J. GINSBERG, ESQ.
DENNIS N. BALSKE, ESQ.
Co-Chairs, Amicus Committee
National Association of
Criminal Defense Lawyers

BENSON B. WEINTRAUB
BENEDICT P. KUEHNE
Counsel of Record
SONNETT SALE & KUEHNE, P.A.
Atico Financial Center, #500
200 Southeast First Street
Miami, Florida 33131
(305) 358-2000
Counsel for National
Association of Criminal
Defense Lawyers

QUESTIONS PRESENTED[1]

1. Did Congress violate principles of separation of powers when it assigned to the Sentencing Commission, a body within the judicial branch, three of whose seven voting members must be Article III judges, the power to issue substantive, binding sentencing guidelines for federal crimes?

2. Did Congress make an excessive delegation of legislative authority to the Sentencing Commission to issue sentencing guidelines, where Congress failed to make basic policy choices and failed to establish intelligible principles to constrain the Commission regarding fundamental areas of the guidelines?

3. When Congress enacted a new determinate sentencing system in the Sentencing Reform Act, would it have intended to abolish parole and substantially restructure good behavior adjustments if the sentencing guidelines, which form the core of the new system, were found unconstitutional and hence unenforceable?

---

[1] The phrasing of the questions presented is taken from the brief of Respondent-Petitioner Mistretta.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Table of Authorities Continued

Table of Authorities Continued

Table of Authorities Continued

Table of Authorities Continued

Office of the Clerk
Supreme Court of the United States

Memorandum

NO. 87-1904 UNITED STATES
VS.
MISTRETTA

***

NO. 7028 MISTRETTA
VS.
UNITED STATES

****

The Brief for the United States

is due Aug. 27.

It will be circulated upon receipt.

W. V. Gullickson
#3035

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

Nos. 87-1904 & 87-7028

UNITED STATES OF AMERICA,

Petitioner,

v.

JOHN M. MISTRETTA,

Respondent.

JOHN M. MISTRETTA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writs Of Certiorari Before Judgment To The United States Court Of Appeals For The Eighth Circuit

---

BRIEF OF AMICUS CURIAE, NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, IN SUPPORT OF RESPONDENT-PETITIONER MISTRETTA

STATEMENT OF INTEREST OF AMICUS CURIAE

The National Association of Criminal Defense Lawyers (NACDL) is a District of Columbia non-profit corporation founded in 1958. NACDL has an affiliated membership of

more than 10,000 lawyers, law professors, and interested legal professionals from every state, most of whom are engaged actively in defending criminal prosecutions and protecting individual rights. NACDL is the only national bar organization on behalf of public and private defense lawyers. The American Bar Association recognizes NACDL as an affiliated organization and awards it full representation in the ABA House of Delegates.

NACDL was founded to promote study and research in the field of criminal defense law, to disseminate and advance knowledge of the law in the field of criminal defense practice, and to encourage the integrity, independence, and expertise of criminal defense lawyers and criminal justice professionals. NACDL's members have worked to protect the rights and liberties of those accused of criminal offenses, and to promote the fair and proper administration of criminal justice.

NACDL's purpose in appearing as amicus curiae is to assist the Court in evaluating the constitutionality of both the sentencing guidelines and its derivative legislation. NACDL has appeared as amicus curiae in more than twenty district court cases focusing on the constitutionality of the Sentencing Commission and the sentencing guidelines. No criminal justice issue in recent history has had such a potential impact on the criminal justice system.

Consent has been granted by both parties to the filing of this amicus brief.

SUMMARY OF THE ARGUMENT

The sentencing provisions of the Comprehensive Crime Control Act of 1984,[2] known as the Sentencing Reform

[2] Pub.L. 98-473, Title II, c.II, Oct. 12, 1984, 98 Stat. 2031, as amended by Pub.L. 99-217, §§2, 4, Dec. 26, 1985, 99 Stat. 1728, Pub.L. 99-646, §35, Nov. 10, 1986, 100 Stat. 3599. *See* 18 U.S.C. §3551 note (Supp. 1987), as amended by the Sentencing Act of 1987, Pub.L. 100-187 (Dec. 7, 1987).

Act of 1984 ("Sentencing Reform Act"), established an agency within the judicial branch called the United States Sentencing Commission ("Commission"). 28 U.S.C. §991.[3] The Sentencing Reform Act directs the Commission to promulgate determinate sentencing guidelines for every federal offense and to insure that the guidelines promote "certainty and fairness in the purposes of sentencing."[4] The introduction of guideline sentencing to the federal criminal justice system drastically alters the traditional functions of the judiciary, defense counsel, the United States Probation Office, and prosecutors.

Congress delegated to the Commission the power to set sentences for all categories of offenders who commit crimes. The delegation shifts to the Commission the traditional role of the courts to determine the sentence to be imposed upon a particular defendant. The Commission has been given both legislative and rulemaking power to establish and amend regulations (the guidelines).[5] The Commission is empowered to issue policy statements which must be accorded substantial deference by the sentencing judge.[6] The Commission has adjudicatory power over petitions to modify the guidelines.[7] The Commission also

---

[3] The Commission is an independent agency in the "judicial branch." 28 U.S.C. §991(a). However, the Department of Justice has taken the position in cases involving the guidelines that the Commission exercises executive functions and is not an agency of the judicial branch, but is in the executive branch. *See* United States Department of Justice, Office of Legal Counsel, Memorandum for Judge William W. Wilkins, Jr., Chairman, United States Sentencing Commission (January 8, 1987); *United States v. Perez*, 685 F.Supp. 990, (W.D.Tex. 1988).

[4] 28 U.S.C. §§991(b)(1)(B), 994(a)-(n)(Supp. III 1985).

[5] 28 U.S.C. §994(a)(1)(b),(o),(p) S.Rep. No. 98-225 at 168 98th Cong., 1st Session September 14, 1983, hereinafter cited as "S.Rep." and referred to as the Report.

[6] 28 U.S.C. §994(a)(2).

[7] 28 U.S.C. §994(s).

exercises more traditional executive functions: conducting training programs; recommending legislation; conferring with the Bureau of Prisons and other agencies; and collecting, generating and distributing information.[8]

The Commission is a permanent body composed of seven voting members, at least three of whom must be federal judges, appointed for six year terms by the President, with the advice and consent of the Senate. The President can remove commissioners for neglect of duty, malfeasance in office, or other good cause.[9] The federal judges serving on the commission do not resign from the bench, even though all Commissioners serve full-time for the first six years and the chair serves full-time thereafter.[10]

The delegation to the Commission of the traditional judicial sentencing role to be carried out by legislative rulemaking and executive enforcement violates the constitutional principle of separation of powers. Congress has no authority to give the power to promulgate sentencing legislation to an agency which includes federal judges among its membership. The required presence of judges in their judicial roles places the Article III judges in the constitutionally awkward position of engaging in binding rulemaking and statutory administration. The constitutional independence of Article III judges is compromised, because the President's removal power gives the executive branch abundant unfettered control over the Commission.

The delegation to the Commission of the authority to promulgate sentencing guidelines is excessive where the Commission's role, responsibilities, and power are unbridled and unchecked. Congress cannot delegate this core legislative function; even if it could do so, the method of delegation to the Commission is so lacking in intelligible

---

[8] 28 U.S.C. §994(o)-(s), (w), §995(a)(12)-(20).

[9] 28 U.S.C. §991(a).

[10] 28 U.S.C. §992(c).

rules and principles as to be standardless and unconstitutional.

Upon a finding that the Sentencing Reform Act is unconstitutional with respect to the sentencing guidelines, the Court should declare that the related provisions of the Act are not severable from the unconstitutional portion. The Act itself must be read as a whole, with the guidelines being the central focus of a comprehensive revision of the sentencing code. The Act, without the guidelines, promotes the very unfairness and disparity which was to be eliminated by the sentencing guidelines. Consequently, Congress would not have enacted the related provisions without the guidelines themselves.

ARGUMENT

I. The United States Sentencing Commission Violates The Separation Of Powers Doctrine Because Of Its Required Membership Of Article III Judges.

A. The Judicial Role Envisioned By The Sentencing Reform Act Impairs The Independent Functioning Of The Judiciary.

The strength and endurance of our federal government results from the foresight of the framers of our Constitution, who created a secure separation of power among and between the three branches of government. The Constitution assigned distinct powers and responsibilities to the three coordinate branches, devising a system of checks and balances which hinders excessive control by any one of the branches. The aggregation of power in one branch, or the exercise of non-branch authority by another, creates an imbalance which fosters constitutional crisis. The Sentencing Reform Act has just that effect. In order to bring equilibrium back to our governmental system, the Court must declare that the Sentencing Reform Act and the sentencing guidelines are unconstitutional.

The Sentencing Commission is legislatively designated as "an independent commission in the judicial branch." 28 U.S.C. §991(a).[11] Notwithstanding this congressional moniker, the Commission does not act like a creature of the judicial branch. Nor can the Commission be a judicial agency if it is to accomplish its legislative purpose. As the agency directed to make and execute the law, the Commission performs legislative, executive and administrative duties. *Buckley v. Valeo,* 414 U.S. 1, 134-135 (1976); *Humphrey's Executor v. United States,* 295 U.S. 602, 623 (1935). This puts the Commission on a collision course with the Constitution, because the judiciary is being asked to both write and execute the very laws which it is required to apply. This collaborative effort between the judicial and the executive and legislative branches compromises the very independence and impartiality of the federal bench, characteristics which are essential to our system of justice.[12]

To analyze the separation of powers problem, it is essential to recognize what the Commission does. Its purpose is to *fix* the punishment for the entire spectrum of the federal criminal code. The Commission formulates policy decisions relevant to sentencing, and yet the Act mandates the close collaboration of the judicial and executive branches. This "judicial" Commission acts not on the basis of actual cases or controversies, but as a legislative and policy setting government agency.[13] *Massachusetts v. Mel-*

---

[11] "Placement of the Commission in the judicial branch is based upon the Commmittee's strong feeling that, even under this legislation, sentencing should remain primarily a judicial function." Report at 159, *reprinted in* 1984 U.S. Code Cong. & Admin. News 3182, 3342.

[12] The separation of powers is the definitive characteristic of American constitutional government. G. Wood, *The Creation of the American Republic, 1776-1787,* at 51 (1969); *United States v. Bogle,* ___F.Supp. ___, 1988 Westlaw 60560 (S.D.Fla. June 15, 1988) (en banc).

[13] Because the Sentencing Reform requires that three of the seven

lon, 262 U.S. 447, 482 (1923). *See also Muskrat v. United States,* 219 U.S. 346, 355 (1911).

The Commission's close interaction with the judiciary is not limited to the judges who serve as commissioners. Individual judges are made subservient to the Commission, with the requirement that all judges submit written reports to the Commission on every sentence imposed. 28 U.S.C. §994(w). The Judicial Conference is required to perform a number of tasks essential to the operation of the Commission, including recommending a list of six judges to serve on the Commission, 28 U.S.C. §991(a), and submitting an annual report on the operation of the guidelines. 28 U.S.C. §994(o).

The doctrine of separation of powers is one of the most important checks on governmental power in the Constitution. The premise of the doctrine was set out by the Court in *Bowsher v. Synar,* 478 U.S. 714, ___ , 106 S.Ct. 3181, 3186 (1986):

> The Constitution sought to divide the delegation powers of the new Federal Government into three defined categories, Legislative, Executive and Judicial. *INS v. Chadha,* 462 U.S. 919, 951 (1983). The declared purpose of separating and dividing the powers of government, of course, was to "diffus[e] power the better to secure liberty." *Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579, 635 (1952) (Jackson, J. concurring).

Structuring government into three separate branches recognizes that the necessary powers wielded by each branch is different, and that those powers should be carefully defined:

---

voting members of the Commission "shall be federal judges," 28 U.S.C. §991(a), absent membership by the judiciary, the Commission could not function. *United States v. Bogle,* ___F.Supp. ___, 1988 Westlaw 60560 (S.D.Fla, June 15, 1988) (en banc).

> [t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.

The Federalist No. 47, at 301 (J. Madison).

The three branches were never intended to be sealed off from one another without any possibility of interaction. *See, e.g., Nixon v. Administrator of General Services,* 433 U.S. 425 (1977); *Buckley v. Valeo,* 424 U.S. 1 (1976). While the Constitution permits some interdependence among the branches, *Missouri Kan. & Tenn. Ry. Co. v. May,* 194 U.S. 267, 270 (1904) (Justice Holmes stated, "some play must be allowed for the joints of the machine . . . "), that cooperation cannot be so great as to threaten the independence of the branches.

The aggregation of legislative, executive, and judicial power in the same hands is as threatening to notions of liberty today as it was when Madison recognized the problem:

> Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for *the judge* would then be *the legislator.*

The Federalist No. 47, at 303 (J. Madison) (emphasis in original). Hamilton further explored that danger in *The Federalist No. 81,* at 483 (A. Hamilton):

> From a body which has had even a partial agency in passing bad laws we could rarely expect a disposition to temper and moderate them in the application. The same spirit which had operated in making them would be too apt to operate in interpreting them; still less could it be expected that men who had infringed the Constitution in

> the character of legislators would be disposed to repair the branch in the character of judges.

These sound principles have led to the evolution of a "functional test" to determine whether the imposition of powers traditionally associated with one branch on officials of another branch interferes with constitutionally assigned functions. *Nixon v. Administrator of General Services*, 433 U.S. at 443. In the case of the judiciary, the function of judges is to decide cases and controveries. Art. III, §2, U.S. Const.;[14] *United States v. Serpa*, ___ F.Supp. ___, 1988 Westlaw 71484 (D.Neb. July 12, 1988) (en banc). This Court so stated in *Flast v. Cohen*, 392 U.S. 83, 94-95 (1968):

> [T]he judicial power of federal courts is constitutionally restricted to "cases" and "controversies". . . . Embodied in the words "cases" and "controversies" are two complimentary, but somewhat different limitations. In part those words limit the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process. And in part those words define the role assigned to the judiciary

---

[14] "Consistent with Article III the judiciary may also exercise certain administrative powers incidental to the smooth running of the courts, such as promulgating rules of court procedure, assigning judges to hear cases in other districts or circuits and disciplining judges." *United States v. Swapp*, ___ F.Supp. ___, n.5 (D.Utah July 8, 1988) (en banc). *See Chandler v. Judicial Council of the Tenth Circuit*, 398 U.S. 74,111 (1970) (Harlan, J. concurring) (The judiciary may exercise such powers as are "reasonably ancillary to the primary, dispute-deciding function" of the courts). *See also In re: Certain Complaints Under Investigation*, 783 F.2d 1488, 1503-1506 (11th Cir.), *cert. denied*, 477 U.S. 904 (1986). Nothing in Article III allows judges to make substantive rules. *Sibbach v. Wilson & Co.*, 312 U.S. 1, 12-14 (1941). Judges are not permitted to make rules on matters external to their traditional judicial function. *See* Liman, *The Constitutional Infirmities of the United States Sentencing Commission*, 96 Yale L.J. 1363, 1378 (1987).

> in a tripartite allocation of power to assure that the federal courts will not intrude into areas committed to the other branches of government.

The meaning of this doctrine as it applies to judges is clear:

> [The Court has held that] executive or administrative duties of a nonjudicial nature may not be imposed on judges holding office under Article III of the Constitution.

Morrison v. Olson, 108 S.Ct. 2597, ___ (1988).

The Eleventh Circuit visited the "functional test" for separation of powers application in a challenge to the constitutionality of the President's Commission on Organized Crime. In *Application of the President's Commission on Organized Crime (Subpoena of Scaduto),* 763 F.2d 1191 (11th Cir. 1985), the court concluded that "[u]nder the functional test propounded in the *Nixon* cases, that conferral of such powers on federal judges violates the separation of powers." *Scaduto* held that the inclusion of Article III judges on the President's Commission on Organized Crime ran afoul of the separation of powers doctrine because it threatened the impartiality requirements of "the federal judicial office." The decision rested upon the view that the separation of powers "has been construed to prohibit . . . those arrogations of power to one branch of Government which 'disrupt[] the proper balance between the coordinate branches,' *Nixon v. Administrator of General Services,* 433 U.S. at 443, or 'prevent [one of the branches] from accomplishing its constitutionally assigned functions,' *Id.* (Citing *United States v. Nixon,* 418 U.S. 711-12, 94 S.Ct. at 3109-10)". 763 F.2d at 1195.[15]

---

[15] The Third Circuit evinced similar concerns for the impartiality of the judicial branch in *In Matter of President's Commission on Organized Crime (Subpoena of Scarfo),* 783 F.2d 370 (3d Cir. 1986), but disagreed

These principles, when focused on the constitutionality of the Sentencing Commission, fall on the side of its unconstitutionality. The multi-functioned Commission compromises the independence and integrity of the judiciary, calls into question the propriety of a congressional grant of rulemaking authority to an independent "judicial" agency, and increases the power of the executive branch. The unprecedented power wielded by the Commission is precisely why its enabling legislation is unconstitutional. The Commission, as it is constituted and operates, strikes at the very concept of an impartial federal bench. This fact is enough to cause the citizenry to question the institutional fairness of the criminal justice system, a consequence which could wreak havoc upon its operation.

Impartiality is one of the central constitutionally ordained requirements of federal judicial office. *Commodities Futures Trading Comm. v. Schor*, 478 U.S. 833, ___ (1986); *United States v. Will*, 449 U.S. 200 (1980); *Scaduto*, 763 F.2d at 1197. Where judges have written the rules, the loss of neutrality must be presumed. The fears that concerned the framers of the Constitution are made real by the Commission and its work. Judges, fulfilling the mandate of Congress, write the guidelines and revise them, promulgate them as law, prepare interpretative materials, and teach their use. Then, the judge-commissioners and their colleagues apply the guidelines and sentence based on what the judiciary has previously written. The Commission's work necessarily involves the judges in formulating and recommending legislation for changes in sentencing laws as well as all statutes relating to any part of the criminal adjudication and corrections system. Each of these duties requires participation in matters which will

---

with the *Scaduto* conclusion, relying in part on the distinction between the powers conferred upon a "court" and upon a "judge." *Id.* at 376. *Scarfo* held the President's Commission to be nonjudicial, and observed that the services of the judges were voluntary and could be severed.

come before the judges, either as trial judges or on appeal.[16]

In the court below and in other lower tribunals, the Commission and the government have supported the constitutionality of the Commission in various ways. One argument advanced by the Commission is that it was properly placed in the judicial branch because it performs a judicial or quasi-judicial function. That argument is unpersuasive, as the primary Commission function of setting sentences is overtly legislative. *See United States v. Wittberger,* 18 U.S. (5 Wheat.) 76, 95 (1820). Even if this Court were to accept that argument, the Commission would nevertheless violate separation of powers by allowing non-Article III judges to exercise that power. *United States v. Swapp,* ___F.Supp. ___, n.9 (D.Utah July 8, 1988) (en banc); *United States v. Bolding,* 683 F.Supp. 1003, 1005 n.3 (D.Md. 1988) *(en banc); see also Northern Pipeline Construction Co. v. Marathon Pipe Line Co.,* 458 U.S. 50, 58-60 (1982) (judicial power may not be exercised by non-article III Judges).

If the Sentencing Commission is viewed as implementing a congressional mandate by interpreting, monitoring, and enforcing that mandate, then it would be an executive agency. *See United States v. Arnold,* 678 F.Supp. 1463 (S.D.Cal. 1988). In that case, the separation of powers is undermined because Article III judges are performing non-judicial functions in another branch of government. *United States v. Olivencia,* ___ F.Supp. ___, 1988 Westlaw 36487 (S.D.N.Y. April 20, 1988).

---

[16] This argument applies with equal force and validity to all members of the judiciary. Support for this position is found in *Hobson v. Hansen,* 265 F.Supp. 902, 931 (D.D.C. 1967) (three judge court) (Wright, J. dissenting): "The need to preserve judicial integrity is more than just the judges satisfying themselves that the environment in which they work is sufficiently free of interference to enable them to administer the law honorably and efficiently. Litigants and our citizenry in general must also be satisfied."

A substantial number of district courts have considered the constitutionality of the Sentencing Reform Act, and have offered widely differing rationales for upholding or striking down the guidelines.[17] NACDL, as amicus curiae, has participated in many of those cases, and urges this Court to review the decisions of the district courts throughout the country. Several decisions are worthy of special note for the clarity and depth of the legal analysis brought to focus. The Southern District of Florida, sitting *en banc* in *United States v. Bogle,* ___ F.Supp. ___ , 1988 Westlaw 60560 (S.D.Fla. June 15, 1988), found the Commission unconstitutional on separation of powers grounds. District Judge Marcus, writing for the twelve to four majority, found that:

> The Act violates the doctrine of separation of powers in that it has conferred unprecedented rulemaking authority upon the judiciary that sweeps far beyond the case and controversy requirement of Article III; and it has created a Commission combining the power of the judiciary and the executive in such a manner as to plainly conflict with the functions of the courts under Article III. In the process, the Act has had the effect of drawing the least responsive branch of

---

[17] The following district courts are a few of the many that have ruled that the Sentencing Reform Act or the sentencing guidelines are unconstitutional. *United States v. Kane,* ___F.Supp. ___, 1988 Westlaw 67692 (N.D.Ga. June 28, 1988); *United States v. Rosario,* ___F.Supp. ___, 1988 Westlaw 64343 (N.D.Ill. June 23, 1988); *United States v. Molina,* ___F.Supp. ___, 1988 Westlaw 63254 (D.Conn. June 16, 1988); *United States v. Mendez,* ___F.Supp. ___, 1988 Westlaw 62634 (S.D.N.Y. June 16, 1988) (review of decisions striking and upholding guidelines); *United States v. Terrill,* ___F.Supp. ___, 1988 Westlaw 59768 (W.D.Mo. June 13, 1988); *United States v. Brodie,* ___F.Supp. ___, 1988 Westlaw 52990 (D.D.C. May 19, 1988); *United States v. Perez,* 685 F.Supp. 990 (W.D.Tex. 1988); *United States v. Lopez,* 684 F.Supp. 1506 (C.D.Cal. 1988) (en banc); *United States v. Estrada,* 680 F.Supp. 1312 (D.Mn. 1988).

> government into an ongoing series of controversial policy debates about crime and punishment.

In another district court decision, Circuit Judge Heaney, sitting by designation, concluded in *United States v. Estrada*, 680 F.Supp. 1312 (D.Mn. 1988), that the sentencing guidelines violated separation of powers because the guidelines impermissibly grant substantive legislative power to the judiciary. Judge Heaney ruled that Congress can only delegate to the judiciary the authority to promulgate procedural rules.[18]

This Court's most recent analysis of the separation of powers doctrine, *Morrison v. Olson*, 108 S.Ct. 2597 (1988), validates the position advanced by amicus. In upholding the appointment of independent counsels under the 1978 Ethics in Government Act, this Court acknowledged that Article III judges may perform functions in addition to resolving cases and controversies, but only in exceptional and narrowly tailored circumstances. The limitation on the authority of Article III judges is meant to ensure judicial independence and prevent judicial encroachment into other governmental powers. The Court determined that the appointment by a special court division of an inferior office to investigate and prosecute crimes committed by high government officials was consistent with the Appointments Clause. None of the special court's express authority, to define the jurisdiction of the independent counsel, to terminate the appointment when the case is concluded, and to receive the final report, compromised the limits placed on Article III judges, since they were sufficiently analogous to traditional judicial functions. The interaction between branches, moreover, did not work any judicial

---

[18] There is little doubt that the sentencing guidelines are substantive and not procedural. As the Court observed in *Miller v. Florida*, 107 S.Ct. 2446, 2543 (1987), there can be no debate that sentencing guidelines, as outcome determinative in individual cases, are substantive.

usurpation of the traditional powers of the executive branch.

For the very reasons that *Morrison* upheld the independent counsel provisions of the 1978 Ethics in Government Act, this Court should reach the opposite conclusion concerning the Sentencing Commission. First and foremost is the problem which occurs when the judiciary, in addition to making nationwide decisions of sentencing policy, also devises the law and is then called upon to apply it. Thus, in a single agency reposed in the judicial branch is the power to make the law (legislative authority), execute it (traditionally an executive function), and then apply it in individual cases (the normal judicial role). If such a comprehensive multi-dimensional agency is constitutional, our system no longer can rely on the checks and balances which have functioned to guard against the excessive arrogation of power. While the judiciary may be capable of exercising this tremendous combination of powers, the societal concern with too much government power is too great.

This unprecedented participation of judges in making and executing the law brings new meaning to the term judicial activism.[19] Such extrajudicial conduct, granted by one of the most comprehensive pieces of criminal justice legislation in recent years, adversely affects the judicial institution and all judges, not just the ones who serve on the Commission. District Judge Kane recognized this assault in *United States v. Smith*, ___ F.Supp. ___, 1988 Westlaw 25223 (D.Colo. March 25, 1988):

> The direct and blatant collaboration between the judiciary and the other branches of government

---

[19] Discharging tasks other than deciding cases or controversies would "involve the judges too intimately in the process of policy and thereby weaken confidence in the disinterestedness of the judicatory functions." F. Frankfurter, "Advisory Opinions," in 1 *Encyclopedia of the Social Sciences* 475, 478 (1930).

> the Act creates not only serves to tarnish the reputation of the judiciary as independent of and completely divorced from those other arms of government, but also in fact compromises its very independence . . .

Amicus is of the view that this combination of powers in one agency, located within the judicial branch, creates the impression of judicial dependence. District Judge Marcus, in the *Bogle* decision, held that same view:

> Perhaps even more fundamental is the appearance of partiality where the judiciary becomes involved with setting the public policy of crime and punishment. As we have seen, fixing the rules of punishment for all crimes calls for the integration of a variety of considerations, including the public's perception of the offense, its "seriousness," and the efficacy of deterrence, as well as resource allocation. These are exactly the types of controversial and changing policy determinations from which the judiciary traditionally has been removed.

The Sentencing Commission tips that careful balance which has marked our constitutional system of government since its very inception, and the benefit to society does not outweigh the constitutional costs.

In summary as to this point, the membership of Article III judges on the Commission violates the traditional separation of powers doctrine which had its origins in the writings attributed to Montesquieu. *See Myers v. United States,* 272 U.S. 52, 116 (1926). "Where the whole power of one department is exercised by the same hands which possess the whole power of another department, the fundamental principles of a free Constitution are subverted." *The Federalist No. 47,* at 325-26 (J. Cooke ed. 1961). The problem here was recognized by this Court in *INS v. Chadha,* 462 U.S. 919, 951 (1983): "The hydraulic pressure

inherent within each of the separate branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted." The sentencing guidelines, the Sentencing Commission, and the enabling legislation must be declared unconstitutional as offensive to the separation of powers doctrine.

B. The Presidential Removal Power Over The Sentencing Commission Violates The Separation of Powers Doctrine.

Because the Sentencing Reform Act empowers the President to remove members of the Commission, 28 U.S.C. §991, including those federal judges who serve for six-year terms, the independence and neutrality traditionally associated with the judicial branch is destroyed. From a constitutional point of view, this removal power compromises the right of defendants to have their cases decided by judges who are free from the power and influence of a coordinate branch of government.

The determination of sentences in criminal cases traditionally has been divided between the legislature and the judiciary.[20] Congress establishes allowable sentences by statute, usually setting a discretionary maximum sentence or a mandatory minimum term up to a maximum. *United States v. Evans*, 333 U.S. 483 (1948); *United States v. Elkin*, 731 F.2d 1005, 1011 (2d Cir.), *cert. denied*, 469 U.S. 822 (1984).

> One may be subjected to punishment for crime in the federal courts only for the commission or omission of an act defined by statute or by regulation having legislative authority and then only if punishment is authorized by Congress.

United States v. Viereck, 318 U.S. 236, 241 (1943). Once Congress has acted, it has been the judicial function to

---

[20] *See generally Dorszynski v. United States*, 418 U.S. 424 (1974); *Williams v. New York*, 337 U.S. 241 (1949).

determine the sentence applicable to a particular defendant. The role of the branches historically was separate and unimpeded by the executive. Judicial precedents in a variety of contexts leave unquestioned that control, apparent control, or improper influence over judicial functions by the executive, like the merger of legislative and judicial functions, impairs the constitutionally required neutrality of the courts. The neutrality inherent in the judicial branch is protected by the separation of powers doctrine.

The Sentencing Reform Act does not guarantee the required independence of the Commission, because the Commissioners are removable by the President, the head of the executive branch and the chief law enforcement officer. The significance of the executive authority was expressed by the Supreme Court:

> A lawsuit is the ultimate remedy for a breach of the law, and it is to the President and not the Congress, that the Constitution entrusts the responsibility to 'take care that the law be faithfully executed.' Art. II, §3.

Buckley v. Valeo, 424 U.S. at 138.

In the past, the independence of agencies from improper interference by the executive has been preserved by limiting removal by the executive to removal for cause. *Weiner v. United States,* 357 U.S. 349 (1958); *Humphrey's Executor,* 295 U.S. 602 (1935). But the Court has recognized that removal for cause is insufficient to assure adequate independence when the removing official is barred from that action by the Constitution. *Bowsher v. Synar,* 478 U.S. at 730 (1986), held that "Congress cannot reserve for itself the power of removal of an officer charged with the execution of the laws except by impeachment." Similarly, the Court held that removal for cause by the judiciary of an Article I judge is not adequate to protect the independence of a court exercising Article III powers.

Northern Pipeline Const. Co. v. Marathon Pipe Line Co., 458 U.S. at 61-62.

The power of the President to remove a commissioner, functioning as a judicial officer, is unprecedented. It undermines the requisite independence of the judicial agency, and permits executive control over the Commission. Just as Congress cannot reserve to itself the power to remove those charged with the duty of carrying out the laws because that intrudes upon constitutional functions, *Bowsher v. Synar; Myers v. United States*, 272 U.S. 52 (1926), Congress cannot delegate to the executive the power to remove those who determine sentences.[21]

Congress cannot vest removal power of an independent judicial agency in the executive. *United States v. Olivencia*, ___ F.Supp. ___, 1988 Westlaw 36487 (S.D.N.Y. April 20, 1988) (Sentencing Reform Act unconstitutional because executive branch exercises unwarranted control over judicial agency). The words of *Bowsher* ring true here:

> As the District Court observed, 'When an officer is appointed, it is only [the] authority that can remove him, and not the authority that appointed him, that he must fear and, in the performance of his functions, obey,' 626 F.Supp. at 1401.

106 S.Ct. at 3188. The Constitution does not allow the executive to control the determination of sentences; it follows that Congress cannot give to the President control of the Commission. As that power is central to the sta-

---

[21] The view that "an agency to which Congress has delegated policy-making responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments," *Chevron, USA, Inc., v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 865 (1984), is simply inappropriate when the agency is determining sentences. Any argument that the President's removal power is unlimited only strengthens the position that the Commission's mandatory guidelines violate the separation of powers doctrine.

tutory framework, the Sentencing Reform Act is unconstitutional.

II. The Authority Granted To The Commission By Congress To Promulgate Sentencing Guidelines Represents An Unconstitutional And Excessive Delegation.

The lower court held that the sentencing guidelines were not promulgated pursuant to an unconstitutional delegation of legislative power. This conclusion was in marked contrast to the strong dissent filed by Chief District Judge Scott O. Wright. Amicus urges this Court to conclude that the Sentencing Reform Act of 1984 is unconstitutional in that it delegates excessive authority to the Sentencing Commission.

Article I of the Constitution provides: "All legislative powers . . . shall be vested in the Congress of the United States." This constitutional provision embodies the nondelegation doctrine, the notion that the "formulation of policy is a legislature's primary responsibility, entrusted to it by the electorate." *United States v. Robel*, 389 U.S. 258, 276 (1967) (Brennan, J. concurring). Inconsistent with this constitutional restriction of law making power, the Sentencing Commission exercises authority which can only be characterized as legislative power. *See INS v. Chadha*, 462 U.S. 919, 952 (1983).

Under Article I, Sec. 7, before legislation can become law it must have "passed the House of Representatives and the Senate" and "be presented to the President of the United States" for signature. The district court in *United States v. Swapp*, ___ F.Supp. ___, 88-Cr-006J (D.Utah July 8, 1988), concluded "that the Guidelines promulgated by the Sentencing Commission are unconstitutional because they have not been passed by both houses of Congress and presented to the President . . ." "Congress cannot delegate its power to enact legislation in

contravention of the majority passage and presentment requirements of the Constitution."

The nondelegation doctrine is essential to the preservation of two constitutional safeguards that protect each individual's liberty and property: congressional accountability and judicial review. *See* Schoenbrod, *The Delegation Doctrine: Could the Court Give It Substance?* 83 Mich. L. Rev. 1223, 1283 (1985). Justice Harlan emphasized the importance of these safeguards in *Arizona v. California*, 373 U.S. 546, 626 (1963) (Harlan, J. dissenting in part):

> The [nondelegation] principle . . . serves two primary functions vital to preserving the separation of powers required by the Constitution. *First*, it insures that the fundamental policy decisions in our society will be made not by an appointed official but by the body immediately responsible to the people. *Second*, it prevents judicial review from becoming merely an exercise at large by providing the courts with some measure against which to judge the official action that has been challenged.

(emphasis in original; footnote omitted). Congress alone exercises "[t]he essentials of the legislative function, [which] are the determination of legislative policy and its formulation and promulgation as a defined and binding rule of conduct." *Yakus v. United States*, 321 U.S. 414, 424 (1944).

The roots of the nondelegation doctrine are found in the separation of powers doctrine, which serve to guarantee that each coordinate branch will perform its constitutionally assigned function and no other. *See Synar v. United States*, 626 F.Supp. 1374, 1383 (D.D.C.), *aff'd sub nom, Bowsher v. Synar*, 478 U.S. 714 (1986). With the Sentencing Reform Act's assignment to the judicial branch the power to create sentences, implement sentences, and judicially review those sentences, the Sentencing Commis-

sion has become a sort of super-agency, transcending the limitations imposed on the individual branches.

The delegation of legislative power to the Commission is so excessive that nothing the Commission does can be seen as merely following a carefully drafted congressional mandate. This itself renders the Sentencing Reform Act unconstitutional. *See A.L.A. Schecter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Panama Refining Co. v. Ryan*, 293 U.S. 388, 421-430 (1935). Congressional delegation of legislative or even quasi-legislative power is proper only if Congress "shall lay down by legislative Act an intelligible principle to which the person or body authorized to [exercise the delegated power] is directed to conform . . ." *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928).

Congress here has failed to set out a "framework of the policy which [it] has sufficiently defined." *National Cable Television, Inc. v. United States*, 415 U.S. 336, 342 (1974). Clear enunciation of policy enables the agency executing the delegated power, and a reviewing court, to determine whether the power has been properly exercised and is within the scope of the delegation. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); *Yakus v. United States*, 321 U.S. at 425 (1944).

Congress has not provided the framework for the Sentencing Commission's exercise of its delegated power. In *United States v. Brodie*, ___ F.Supp. ___, 1988 Westlaw 52990 (D.D.C. May 19, 1988), the court declared the Sentencing Reform Act unconstitutional on the grounds that ". . . the present Act would probably fail to pass muster, for Congress has given to the Sentencing Commission a mandate of such vagueness that it constitutes no real direction at all." In reaching this conclusion, the court relied upon *Whalen v. United States*, 445 U.S. 684, 689 (1980) ("the power to define criminal offenses and to prescribe the punishment . . . resides wholly with the Congress.").

Brodie also pointed to Justice Brennan's concurrence in *United States v. Robel*, 389 U.S. 258, 276 (1967), stating, in the criminal law context, that the "[f]ormulation of policy is a legislature's primary responsibility, entrusted to it by the electorate, and to the extent Congress delegates authority under indefinite standards, this policy making function is passed on to other agencies, often not answerable or responsive in the same degree to the people." (footnote omitted).

United States v. Brittman, ___ F.Supp. ___, 1988 Westlaw 54178 (E.D.Ark. May 27, 1988), provided instructive guidance on the delegation issue. "Congress delegated its authority in a core legislative field, an area affecting the most fundamental of constitutional rights." The court noted that "delegated powers that, as in this case, affect liberty interests must be construed narrowly," relying on *Kent v. Dulles*, 347 U.S. 116, 129 (1958).

Litigants in the criminal justice system have a right to expect that the Congress, after its required factual investigation, policy development, and study, will promulgate the laws. Congress has the obligation to perform its required duty. The delegation of unbridled legislative power to the Commission represents a shirking of congressional responsibility and deprives citizens of the protections of the nondelegation doctrine. Congress cannot abandon its duties for reasons of political expedience. Nor can the judicial branch assume new duties because of a congressional desire to avoid extended debate and political complaint. The District Court in *United States v. Williams*, ___ F.Supp. ___, 1988 Westlaw 63614 (M.D.Tenn. June 23, 1988) (en banc), addressed these concerns in striking down the Sentencing Reform Act on excessive delegation grounds:

> Finally, we observe that the Framers of the Constitution, in allocating all legislative powers to Congress, expected Congress, as a body of

> elected representatives, to assume primary responsibility for the formulation of policy. This is true particularly in areas that impinge on personal liberties. Judging by its work product, the Commission made literally thousands of policy choices in formulating the guidelines... These choices profoundly influence every citizen's liberty... In our view, the fixing of criminal penalties requires a legislative policy determination and direct Congressional action. The determination of the comparative societal egregiousness of one crime as opposed to another would seem to be one of the most important functions committed to the legislative branch. Congressional delegation of this function to the Commission disrupts the proper balance between the coordinate branches and permits the Congress to evade its constitutional assigned role as chief policy maker.

In summary as to this point, Congress has written a statute which fails to define the parameters as to the selection of sentencing options. The "intelligible principles" required for valid delegation of authority are notably lacking here. Since a judge's decision making is channelled through the Commission's guidelines, and because Congress has not adequately instructed the Commission, it is evident that the Commission—not the sentencing court—is the body which sets the choice of sentence. This deliberate congressional omission leaves the delegation of authority to the Commission constitutionally deficient.

III. The Provisions Of The Sentencing Reform Act That Abolish Parole And Limit The Availability Of Good Time Cannot Be Severed From The Sentencing Guidelines.

Once the Court determines that the guideline portion of the Sentencing Reform Act is unconstitutional, the re-

maining question is whether other portions of the Act are severable. The principal aspects of severability which are relevant to this case are the abolition of parole and the substantial reduction in the rate of statutory and other forms of prison good time.[22]

The Sentencing Reform Act, as a comprehensive sentencing law, establishes determinate federal sentencing. The Sentencing Commission, and the guidelines issued by it, are the central feature of this reform, without which the remaining portions of the Sentencing Reform Act would be fragmented and would lead to results contrary to the overall legislative purposes. It is the position of amicus that Congress would not have enacted these lesser pieces of the package without the guidelines. This Court should not sever these other revisions of federal sentencing practices from the fate of the guidelines.[23]

As the Court stated in *Alaska Airlines, Inc. v. Brock*, 107 S.Ct. 1476, 1480 (1987):

> The standard for determining the severability of an unconstitutional provision is well established: "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." *Buckley v. Valeo*, 424 U.S. 1, 108 (1976), quoting *Champlin Refin-*

---

[22] In addition to these features of severability, other important issues should be addressed by the Court. For example, if the district courts are to return to a system of pre-guideline sentencing, shouldn't the former provisions of Rule 35(b), F.R.Cr.P. be available to a defendant? *See United States v. Molina*, ___ F.Supp. ___, 1988 Westlaw 63254 (D.Conn. June 16, 1988) (Rule 35 retained upon a finding that the guidelines are unconstitutional).

[23] Under the pre-guideline system, it was the Parole Commission—rather than the sentencing court—which established the actual release date of a convicted offender. *See, e.g., United States v. Grayson*, 438 U.S. 41, 48 (1978).

ing Co. v. Corporation Commission of Oklahoma, 286 U.S. 210, 234 (1932).

The "relevant inquiry in evaluating severability is whether the statute will function in a *manner* consistent with the intent of Congress." *Id.* at 1481 (emphasis in original). "Whether an unconstitutional provision is severable from the remainder of the statute in which it appears is largely a question of legislative intent. . ." *Regan v. Time, Inc.*, 468 U.S. 641, 653 (1984). Both the statute[24] and its legislative history made clear that the abolition of parole and the new good time rules apply only to sentences that are imposed under a system of guideline sentencing. *See* 18 U.S.C. §§3551, 3558, 3624.

Congress intended that the guidelines, including the abolition of parole the new good time rules, operate as a package. For that reason, Congress delayed implementation of the parole and good time changes until the guidelines became effective. Congress created this package to insure that "the sentencing guidelines system will not replace the current law provisions relating to the imposition of sentence, the determination of a prison release date, and the calculation of good time allowances" until the guidelines "replace the existing sentencing system." Report at 188-89; 1984 U.S. Code Cong. & Admin. News at 3372-3373.

The Senate Report shows that the guidelines were the cornerstone of the determinate sentencing system—which Congress passively endorsed in its entirety—but not in its component parts. The "comprehensive plan" for determinate sentencing is accomplished only through the interrelationship of three major reforms: mandatory sentencing guidelines; abolition of parole; and substantial reduction of

---

[24] In assessing congressional intent, one must first look to the language and structure of the statute. *Consumer Product Safety Commission v. G.T.E. Sylvania Inc.*, 447 U.S. 102, 108 (1980).

existing good time. The combination of these elements of sentencing reform carry out the policy goals sought to be furthered by a system of guidelines sentencing. None of these elements of sentencing reform function independently.

Fundamental fairness mandates a return to the entire pre-existing scheme upon a finding that the guidelines are unconstitutional. In a supplemental order issued in *United States v. Bogle*, ___ F.Supp. ___ , Case No. 87-856-Cr-Marcus (S.D.Fla. June 30, 1988) (en banc), the court found on the issue of severability that defendants sentenced for post-November 1, 1987 offense conduct are eligible for parole if not otherwise precluded by statute. *E.g., United States v. Allen*, 685 F.Supp. 827 (N.D.Ala. 1988) (en banc) (old law applies upon conclusion that guidelines unconstitutional). One of the laudable goals of the Sentencing Reform Act was consistency and uniformity. These goals will be compromised by a determination of severability. In order to reduce unwarranted disparity in sentencing, convicted defendants must also be able to avail themselves of the former provisions of Rule 35(b) to serve as a check on disparate sentences.

In summary as to this point, once the Court determines that the guidelines are unconstitutional, the Court must find all the other associated provisions of the Sentencing Reform Act incapable of severance and strike them accordingly.

CONCLUSION

Amicus asks this Court to declare the sentencing guidelines and the Sentencing Reform Act of 1984 unconstitutional.

Respectfully submitted,

NINA J. GINSBERG, ESQ.
DENNIS N. BALSKE, ESQ.
Co-Chairs, Amicus Committee
National Association of
Criminal Defense Lawyers

BENSON B. WEINTRAUB
BENEDICT P. KUEHNE
Counsel of Record
SONNETT SALE & KUEHNE, P.A.
Atico Financial Center, #500
200 Southeast First Street
Miami, Florida 33131
(305) 358-2000
Counsel for National
Association of Criminal
Defense Lawyers

July 28, 1988