Nos. 87-1904 and 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 RESPONDENT— PETITIONER JOHN M. MISTRETTA

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QUESTIONS PRESENTED*

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?

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*In addition to the parties listed in the caption, Nancy L. Ruxlow was a co-defendant along with petitioner in the district court, and the United States Sentencing Commission appeared as *amicus curiae*.

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OPINION AND JUDGMENT BELOW

The opinion of the district court on the constitutional question is reported as *United States* v. *Johnson*, 682 F. Supp. 1033 (W.D. Mo. 1988). It is included in the Appendix to the petition for a writ of certiorari filed by the United States (No. 87-1904) at App. 1a-15a.

STATEMENT OF JURISDICTION

The notice of appeal to the Eighth Circuit was filed on April 19, 1988, App. 41a-44a, and the case was docketed in the court of appeals on April 22, 1988. App. 45a-46a. The jurisdiction of this Court is invoked under 28 U.S.C. §§ 1254(1) and 2101(e).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Constitution and of the Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837 (1984), as amended, are reproduced in the petition filed by the United States, at App. 47a-85a, including the transition provisions which appear at App. 80a-84a. For the convenience of the Court, we are providing copies of the final guidelines for each Justice and lodging with the Clerk a copy of the final guidelines as well as a copy of the two earlier drafts, one dated September 1986 (the "Preliminary Draft") and the other dated January 1987 (the "Revised Draft"), both of which were also before the district court.

STATEMENT OF THE CASE

Petitioner was indicted on three counts arising out of a December 3, 1987 sale of cocaine. App. 16a-18a. On February 3, 1988, petitioner pled guilty to conspiracy to distribute cocaine, the first count of the indictment. The government then dismissed the other two counts, and the parties entered into a stipulation regarding the factors to be considered by the Court in imposing sentence, which resulted in a 15-21 month range under the guidelines. App. 21a-22a.

On March 25, 1988, the United States District Court for the Western District of Missouri heard consolidated motions by several defendants, including petitioner, challenging the constitutionality of the sentencing guidelines on separation of powers and excessive delegation grounds. On April 1, 1988, the court denied those motions in a decision reported at 682 F. Supp. 1033 (App. 1a-6a). Thereafter, the court sentenced petitioner under the sentencing guidelines to an 18-month term of imprisonment, to be followed by a three-year term of supervised release. App. 30a. It also imposed a $1000 fine and a special assessment of $50. App. 30a-31a. The government and defendant filed cross-petitions for writs of certiorari before judgment, which this Court granted on June 13, 1988.[1]

In this Court, defendant alleges that the sentencing guidelines issued by the United States Sentencing Commission (the "Sentencing Commission"/"Commission") violate the Constitution in two separate, but related ways. First, they violate separation of powers principles because Congress may not assign the power to issue substantive sentencing guidelines to a body which, by statute, is part of the Judicial Branch of government and which has among its members three federal judges. *See infra* at 15-30. Moreover, even if the delegation could be made to a body within the Judicial Branch composed entirely of independent Article III judges, the Sentencing Commission is not so constituted because its members include a majority of non-judges, and because the President, the head of the Executive Branch, retains substantial control over the Commission through his ability to grant or deny reappoint-

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[1] At the sentencing hearing held on April 15, 1988, petitioner moved to have the guidelines declared invalid under the Due Process Clause on the ground that they prevented the court from considering relevant factors in sentencing. App. 26a-27a. The court denied the motion, concluding that "I am not aware of any factor that is not available to me to consider that would have made some difference favorable to the defendant if I had had it to consider." App. 28a. Accordingly, no due process issue is presented in these petitions.

ment to its members and his power to remove them for cause. *See infra* at 30-35. Second, the delegation to the Sentencing Commission of the authority to establish sentencing guidelines is excessive because Congress failed to make the necessary policy judgments and gave the Commission insufficient standards to guide its work. *See infra* at 47-54. In order to establish the basis for these constitutional defects, and to understand why the abolition of parole and the major changes in good time were not intended to exist apart from the guidelines (pp. 54-60), it is necessary to review the composition of the Sentencing Commission, its statutory mandate, and the actions it has taken.

A. The Sentencing Commission.

Title II of the Comprehensive Crime Control Act of 1984, known as the Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837, effected a major revolution in sentencing in the federal courts by establishing a determinate sentencing system. The Act did this through several interrelated reforms, namely, the creation of essentially mandatory sentencing guidelines that control judges' discretion in sentencing defendants, the abolition of parole, and the adoption of more limited and more predictable rules governing the availability of good behavior reductions in sentences. A major aim of the law is to eliminate unwarranted disparities in sentencing, both by ensuring, insofar as practicable, that similarly situated individuals convicted of the same crime receive the same sentence, and by ensuring that similar crimes are treated similarly for sentencing purposes, even though the violations are of different provisions of the United States Criminal Code.[2]

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[2] The Act was attached to the continuing resolution that funded nine major parts of the federal government for Fiscal Year 1985. *See* Title I of Pub. L. No. 98-473. Most of the sentencing provisions come from the Senate's bill, S. 1762, which the Senate approved on February 2, 1984, and which is fully described in S. Rep. No. 98-225, 98th Cong., 1st Sess. (1983) ("S. Rep."), *reprinted in* 1984 U.S. Code Cong. & Ad. News 3182 ("1984 USCCAN").

Congress could have done what it has previously done and revised the sentencing laws itself. Instead, it chose to delegate the very broad power to make these changes to the Sentencing Commission. Not surprisingly, Congress faced major disputes over the method by which the Commission would be appointed. The House Judiciary Committee voted to place the Commission in the Judicial Branch and to have the Judicial Conference of the United States appoint the Commissioners, a majority of whom would be federal judges. *See* H.R. Rep. No. 98-1017, 98th Cong., 2d Sess. 14 (1984) (§ 3794). The Senate, joined by the Administration, wanted the President to have the power to appoint the Commission's members, two of whom would be federal judges. *See* S. Rep. at 159-60; 1984 USCCAN at 3342-43.

To resolve the dispute, Congress, in essence, split the seven member Commission into two parts. *See* H.R. Conf. Rep. No. 98-1159, 98th Cong., 2d Sess. 415 (1984) (amendment no. 131); 1984 USCCAN at 3711. Under the compromise, Congress placed the Commission in the Judicial Branch, and the President was directed to appoint three federal judges to the Commission from a list of six judges furnished by the Judicial Conference. 28 U.S.C. § 991(a). Although the Commissioners serve on a full-time basis until six years after the guidelines become effective, the judicial members are not required to resign as federal judges while on the Commission. *Id.* § 992(c). In fact, during the time that the guidelines were being drafted, all of the judicial members of the Commission continued to sit on cases, albeit on a reduced caseload basis. Originally, all of the judges had to be active judges, but, after then-Chief Justice Warren Burger protested, Congress allowed senior judges to be Commission members. Pub. L. No. 99-22, 99 Stat. 46 (1985).

The other four members of the Commission who may, but need not be, federal judges, are also appointed by the President. 28 U.S.C. § 991(a). In addition, the Attorney General (or his designee) is a permanent non-voting member of the Com-

mission, *id.*, and the Chairman of the Parole Commission served as a non-voting Commission member when the guidelines were being prepared and will remain on the Commission during the first five years after they became effective. Pub. L. No. 98-473, § 235(b)(5) (App. 82a-83a). All of the voting members, including the President's choice of a chairman, must be confirmed by the Senate, and no more than four may be members of the same political party. 28 U.S.C. § 991(a). Commission members serve six-year terms, which are staggered beginning November 1, 1987, and they may be reappointed, but may serve no more than two full terms. 28 U.S.C. § 992(a) & (b); Pub. L. No. 98-473, § 235(a)(2) (App. 81a). Finally, the President may remove members of the Commission for "neglect of duty or malfeasance in office or for other good cause shown." 28 U.S.C. § 991(a).

B. The Commission's Mandate.

The Commission's principal mandate is to issue sentencing guidelines, or, as the Commission described it, "to establish sentencing policies and practices for the federal criminal justice system. . . ." Revised Draft, p. 1 (Jan. 1987); *see also* S. Rep. at 161; 1984 USCCAN at 3344. An affirmative vote of four of the seven Commission members is needed to approve the guidelines. 28 U.S.C. § 994(a). Although the Commission is required to submit the guidelines to Congress six months before they go into effect, *see* Pub. L. No. 98-473, § 235(a)(1)(B)(ii) (App. 80a), congressional approval is not required. Thus, Congress can prevent them from going into effect only by passing another law, requiring approval of two Houses plus the President, or two-thirds of each House if the President exercises his veto power.

Another critical feature of the guidelines is that they are not merely advice that sentencing judges may freely disregard. Thus, under 18 U.S.C. § 3553(b), sentencing courts must impose sentences in accordance with the applicable sentencing guideline. In order to further confine the discretion of sentencing judges, Congress provided that each guideline may have a

maximum differential in prison terms of no more than six months or 25%, whichever is greater. 28 U.S.C. § 994(b)(2). In addition, the sentencing judge must explain the reasons for imposing a particular sentence, if the guidelines have a range that exceeds 24 months or if the judge sentences outside the guideline range. 18 U.S.C. § 3553(c). However, Congress made it clear that departures from the guidelines are to be the exception, *i.e.*, they are allowed only when the case presents factors which the Commission did not adequately take into account in formulating the guidelines. 18 U.S.C. § 3553(b); Pub. L. No. 100-182, § 3, 101 Stat. 1266 (1987).

In order to make this direction more than hortatory, Congress gave both the defendant and the United States a right of appeal if the sentence is imposed in violation of law, or if there is an improper application of the guidelines. 18 U.S.C. § 3742. In addition, if a judge gives a sentence greater than authorized by the applicable guideline, the defendant has a right of appeal, and the appeals court will review the sentence to see whether it is "unreasonable" in light of the factors considered and the reasons given by the trial judge. *Id.* § 3742(a)(3) & (d)(3). Similarly, a sentence less than the applicable guideline is judicially reviewable on appeal by the government under the same standard. *Id.* § 3742(b)(3) & (d)(3). Thus, while the guidelines are not legally binding in the sense that the judge has no choice but to sentence a defendant under them, they are intended to have the force and effect of law, with deviations allowed in relatively narrow circumstances.

Another central element of this sentencing package is that the sentences served will be the sentences imposed. Thus, Congress abolished parole so that trial judges rather than the Parole Commission will fix the time in prison. *See* 18 U.S.C. § 3624(a); S. Rep. at 115; 1984 USCCAN 3298. In addition, Congress also provided that the maximum reduction for good time will be 54 days per year and that no reduction shall be allowed for any term of less than one year. *See* 18 U.S.C.

§ 3624(b); *compare* 18 U.S.C. § 4161 (1982) (repealed by Sentencing Reform Act).[3]

While Congress gave a number of directions to the Sentencing Commission, the sum of its guidance for establishing a coherent, workable system of sentencing guidelines is quite small. Thus, the Commission is directed to ensure certainty and fairness and to end unwarranted sentencing disparities, while at the same time maintaining sufficient flexibility to take into account individual circumstances. 28 U.S.C. § 991(b)(1)(B). However, as the Commission itself recognized, there is an inherent tension between the goals of "uniformity" and "proportionality" which makes it difficult to achieve them both. (Guidelines, p. 1.2)

Congress directed the Commission to base its guideline system on both the characteristics of the offense and the offender's personal character and criminal history. With respect to the categories of offenses, Congress listed seven broad factors, but gave the Commission the authority to determine the relevance, if any, of all of them. 28 U.S.C. § 994(c). Similarly, Congress gave the Commission a list of eleven offender characteristics in 28 U.S.C. § 994(d) and told the Commission to make the same relevancy determination, although Congress indicated that that consideration of several of them would generally be inappropriate. *Id.* § 994(e).

Congress also told the Commission to ascertain the average of past sentences, but it made it clear that it did not want the Commission to be bound by those averages. *Id.* § 994(m). It

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[3] Besides abolishing parole for those sentenced under the guidelines, Congress also abolished the Parole Commission five years from the effective date of the Act. Pub. L. No. 98-473, § 235(b)(1)(C) (App. 81a). Congress also directed the Parole Commission to set future release dates for all prisoners who are incarcerated under the old law, but who will not be released by the time that the Parole Commission is abolished. *Id.* § 235(b)(3) (App. 82a).

also gave the Commission free reign in deciding how to handle such vital matters as the availability of probation, whether fines as well as prison terms should be imposed, and if so, in what amounts, and whether sentences for multiple convictions should run concurrently or consecutively. *Id.* § 994(a)(1). In addition, Congress gave the Commission a number of other directions, dealing mainly with narrow problems of sentencing, but otherwise it left the Commission with unbridled discretion to establish whatever sentencing rules and policies it thought appropriate within the statutory limits for the particular crime. As the Senate Report described it, Congress was "delegating some of its authority [to the Commission] to set sentencing policy." S. Rep. at 64; 1984 USCCAN at 3247.[4]

C. What the Commission Did.

The 12-page introduction to the final guidelines provides a useful summary of where the Commission started, what it went through, and what it did. Acting in a manner similar to that of a traditional executive agency, as Congress directed it to do, *see* 28 U.S.C. § 994(x), the Commission embarked on notice and comment rulemaking, involving several rounds of comments and multiple drafts. The earlier drafts reflect the open-ended nature of the Commission's inquiry, which involved what the Preliminary Draft called (at ii) "a series of difficult policy issues that remain unresolved." Indeed, as the Commission acknowledged, the "process has required [it] to resolve a host of important policy questions," Guidelines, p. 1.5, due to the need to fill in the gaps in the very broad congressional mandate.

In the end, by a vote of 6 to 1, with all three judges voting "yes," the Commission issued guidelines that it estimates will cover 90% of all criminal cases. Guidelines, p. 1.12. Under the

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[4] The Commission is also required to monitor the operation of the guidelines and amend and supplement them when necessary. 28 U.S.C. §§ 994(o) & (p); Pub. L. No. 100-182, *supra*, § 21 (App. 84a-85a).

guidelines, the sentence for each case is determined after calculating the seriousness of the offense and the criminal history of the offender in the manner that the Commission has directed.

In developing the ranking for the seriousness of each offense, the Commission grouped together what it considered to be similar crimes, such as property crimes or crimes against the person. Guidelines, ch.2, pts. A-T. It assigned each specific type of crime, such as theft or murder, a base level from 1 to 43, which translate into ascending terms of imprisonment. Thus, each base level includes a number of different crimes from various portions of the U.S. Code, which the Commission has determined to be of the same relative seriousness.

In setting the base offense level for each type of crime, the Commission started by estimating actual past sentences, and then, when it believed that the prior sentences were not sufficiently severe (or were too severe) according to the Commission's own views of the seriousness of the crime, it increased (or decreased) the base offense level to what it thought was proper. *See, e.g.*, Guidelines, p. 2.31 ("current sentencing practices do not adequately reflect the seriousness of public corruption offenses.") The result of the process is a table of base offense levels in which the Commission ranked crimes according to its view of their seriousness, with the greatest upward changes from prior practices in white collar crimes, including public corruption, tax evasion, and antitrust violations.

The Commission also concluded that the general base level punishment for a given type of crime would often not be appropriate for the particular violation. Accordingly, it included mitigating and aggravating factors that the sentencing judge must take into account for most offenses. For some offenses, such as robbery, a number of factors must be considered. *See* Guidelines, § 2.B3.1. Others, such as theft or tax evasion, are not complex, but depend in large part on the amount of money stolen or tax evaded. *See* § 2B1.1(b)(1) (Larceny Table) and § 2T4.1 (Tax Table). In some of the tables, the ranges are small

and multiple gradations are used; in others, the ranges are large and only a few separate gradations are employed. *Compare* Drug Quantity Table (Guidelines, pp. 2.38-39), *with* Robbery Table (*id.*, p. 2.21). In all cases, the Commission, on its own, decided whether to utilize monetary measures or other types of adjustments (*e.g.*, amounts of drugs), and, if so, what sort of ranges and gradations to use.

The Commission also provided for several other types of adjustments. Some were added for purely policy reasons, such as the upward adjustment for fraud committed on a religious, charitable, or governmental body, which was included because the Commission believed that such crimes "create particular social harm." Guidelines, p. 2.70. *See also* Revised Draft, p. 27 ("Public policy considerations compel additional punishment [beyond their actual monetary value] for theft of drugs, firearms, and destructive devices . . . .") The Guidelines also allow for an increase of two in the base offense level if the accused attempts to interfere with the investigation, even though he or she is not charged with obstruction of justice, perjury, or other similar offenses. *Id.* § 3C1.1.

The final offense-related adjustment is based on the defendant's acceptance of responsibility for his or her actions. Although the Commission had previously asked for comments on whether to include an automatic reduction for guilty pleas, Preliminary Draft, pp. 123-25, the final guidelines make it clear that judges do not have the authority to make a reduction simply for pleading guilty. Guidelines, pp. 3.21-.22 & n.3. Nor, on the other hand, is one who refuses to plead guilty, and is later convicted, automatically to be denied a reduction for acceptance of responsibility, if responsibility is accepted prior to sentencing. *Id.*, pp. 3.21-.22 & n.2.

The other major element of the sentencing decision for which the Commission had to prescribe rules is which characteristics of the defendant, including any prior criminal record, should be taken into account. Although the Commission was instructed to consider a number of factors regarding offender charac-

teristics, *see* 28 U.S.C. § 994(d), it chose to include only criminal sentences previously imposed. Guidelines, p. 4.1. The Commission specifically excluded such factors as age, drug and other substance abuse, and mental condition as a basis for calculating the appropriate guideline. *Id.* As a result, the Commission devised six criminal history categories, which, together with the 43 offense levels, are set forth in the sentencing table, which is essentially a two dimensional grid, appearing at page 5.2 of the Guidelines.

The sentencing range for each defendant is determined by the intersection of the offense level and the criminal history category. Judges have the power to depart from that range only if the Commission has not adequately taken a factor into account in setting the guidelines. 18 U.S.C. § 3553(b). However, in that event, the judicial review provisions described above would then be available to the defendant or the government. Thus, as the Commission recognized, "despite the courts' legal freedom to depart from the guidelines, they will not do so very often." Guidelines, p. 1.7.

The Commission made several other important policy decisions in the guidelines. First, in addition to any imprisonment or probation imposed, everyone found guilty of a federal crime who is not indigent must pay a fine, in the amount contained on the schedule created by the Commission. *See id.*, § 5E4.2. *See also* Preliminary Draft, pp. 157-61 (debate about the proper approach to fines).

Second, there will be a dramatic increase in the number of people who will spend some time in confinement because the Commission has authorized straight probation only in those cases in which the guidelines produce a minimum sentence of zero months. Guidelines, § 5C2.1(b). In particular, it made the policy judgment that straight probation had been given to an "inappropriately high percentage of offenders guilty of certain economic crimes. . . ." *Id.*, p. 1.8. As a result, if a crime for a first offender allows a sentence of at least one, but not more than six months, it must include some confinement, either

intermittent or community, in an amount equal to at least the amount of the minimum sentence. *Id.* § 5C2.1(c).[5] Where the minimum sentence is between six and ten months, the judge is required to sentence the individual to at least one-half of the minimum term in prison. *Id.* § 5C2.1(d). And for all offenses with a minimum range of more than ten months, imprisonment is mandatory for the entire minimum term of the sentence, subject only to the minimum good time reductions. *Id.* § 5C2.1(f).

Although the Commission recognized that its entire sentencing system could be undermined by the process of plea bargaining, which previously disposed of 90% of the cases, *see* Guidelines, p. 1.8, it decided not to make any major changes in that part of the process. *Id.* Instead, the Commission added to existing Federal Rule of Criminal Procedure 11(e) a system that would give the sentencing judge sufficient information and a proper framework, in the form of guidelines, for determining whether to accept a plea bargain, and then to give the defendant the right to withdraw a guilty plea in certain circumstances if the judge did not approve the bargain. *Id.* §§ 6B1.1-6B1.4. The Guidelines make clear that the court is not bound by the plea agreement or even by a stipulation of facts regarding the circumstances of the crime, but must await the presentence report before finally accepting a plea. *Id.* §§ 6B1.1(c) & 6B1.4(d). And even with a plea bargain, the judge may only impose a sentence that falls outside the applicable sentencing range for the same reasons that would justify such a departure for those found guilty after trial.

SUMMARY OF ARGUMENT

1. The extraordinary blending of executive, legislative, and judicial functions in the Commission has produced a truly

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[5] Under intermittent confinement, the individual may work in the community during the day, but must return to jail or prison during all remaining hours. Guidelines, p. 5.12. Community confinement is similar, but is served in a community treatment center, halfway house, or similar residential facility. *Id.*

unique situation. Although the Sentencing Commission and the Justice Department both purport to defend the constitutionality of the guidelines, their arguments on the separation of powers issue directly contradict each other, a phenomenon which visibly demonstrates the fundamental flaws in the Sentencing Commission that doom its fate.

The Commission seeks to defend the statute as written by arguing that the broad, substantive powers assigned to it are consistent with what even it admits are the limitations on the functions that may be performed by the Judicial Branch. And it argues that the presence of non-judges and the removal and reappointment powers of the President over the Commission do not involve an improper outside interference with its operation, notwithstanding this Court's ruling in *Bowsher* v. *Synar*, 106 S. Ct. 3181 (1986).

The Justice Department, on the other hand, contends that the duties assigned to the Commission cannot constitutionally be delegated to a body in the Judicial Branch, but must be given to an Executive Branch agency. But instead of contending that the law is unconstitutional because an executive function has been invaded, as it did in *Bowsher*, *Morrison* v. *Olson*, ___ U.S. ___, 56 U.S.L.W. 4835 (1988), and *Immigration and Naturalization Service* v. *Chadha*, 462 U.S. 919 (1983), it has asked the courts to rewrite the law and reassign the Commission from the Judicial to the Executive Branch. This unprecedented and unjustifiable request dramatically underlines the weakness in the Justice Department's defense of the guidelines.

Ordinarily, even the extraordinary sharing of power found in the Commission would be entitled to a presumption of constitutionality on the theory that Members of Congress are also sworn to uphold the Constitution, and their judgment on constitutional questions should not be lightly set aside. But here, despite the lengthy consideration that sentencing reform received, there is not a word in the committee reports or the floor debates concerning the Sentencing Reform Act of 1984

indicating that anyone in the Legislative or Executive Branches was aware that the composition of the Commission and the functions assigned to it presented serious separation of powers problems. While there were isolated references to other constitutional issues in the hearings that began in 1977, no one in Congress questioned whether the issuing of sentencing rules could constitutionally be undertaken by this kind of Commission, located in the Judicial Branch. Thus, there is no basis to defer to Congress' judgment, and the Court should consider the issues *de novo*.

2. In establishing the Commission, Congress commingled the branches of government in blatant violation of principles of separation of powers. First, Congress made the Commission part of the Judicial Branch and required that three federal judges serve on it. At the same time, however, Congress assigned the Commission the job of writing binding rules that will govern sentencing for federal crimes. Because the functions properly performed by the Judicial Branch are quite narrow and do not extend to substantive lawmaking, the guidelines are unconstitutional.

Second, even if a judicial body could issue sentencing guidelines, the Commission is not an appropriate judicial body to perform the task for two reasons. First, the President has too much control over the Commission members through his reappointment and removal powers, and second only a minority of Commission members are federal judges. Thus, the independence of the Judicial Branch is threatened because of the presence of presidential control of the kind forbidden by *Bowsher*, and because of the "sharing" of judicial power with persons who are not Article III judges, and who lack the protections of life and tenure and the guarantee against reduction in salary, of the kind condemned in *United States* v. *Nixon*, 418 U.S. 683, 704 (1974), and *INS* v. *Chadha*, *supra*, 462 U.S. at 958.

Third, assuming Congress could have delegated the guideline writing function to an Executive Branch body, the

Commission cannot be saved by a judicial reassignment of it to that branch because Congress deliberately chose to put the Commission in the Judicial Branch. But even if Congress had placed it in the Executive Branch, separation of powers principles would still be violated because federal judges cannot constitutionally serve on a substantive rulemaking body, whether located in the Judicial or Executive Branch of government.

The guidelines are also unconstitutional because Congress delegated too much power to make fundamental policy decisions to the Commission. Congress assigned the Commission the task of writing federal sentencing law, yet it failed to make the hard policy choices itself, and thus did not give the Commission sufficient direction to guide it in carrying out this law-making task.

If the guidelines are unconstitutional, then other portions of the Sentencing Reform Act, principally the abolition of parole and the substantial restructuring of good time credits, must also be set aside because they are not severable from the guidelines. The power to issue sentencing guidelines is the core of a new determinate sentencing scheme, and the structure of the Act and its legislative history make it clear that Congress would not have enacted other lesser aspects of that scheme without the guidelines. Thus, Congress enacted a sentencing reform package to create a new system of determinate sentencing, and there is no basis to believe that it would have enacted either the abolition of parole or the new good time rules without the core element of the package—the guidelines.

ARGUMENT

I. THE COMMISSION VIOLATES SEPARATION OF POWERS PRINCIPLES.

A. The Commission Cannot Constitutionally Issue Sentencing Guidelines Because It is a Part of the Judicial Branch and Its Members Include Article III Judges.

The Sentencing Commission was given the task of issuing substantive sentencing guidelines that have the force and

effect of law, yet the statute creating the Commission assigns it to the Judicial, not Executive, Branch of government, and requires it to have at least three Article III judges as members. Under basic principles of separation of powers, as most recently construed and applied to the Judicial Branch in Part IV of *Morrison* v. *Olson*, ____ U.S. ____, 56 U.S.L.W. 4835 (1988), the broad policymaking functions assigned to the Commission may not properly be assigned to a body within the Judicial Branch.

Before examining *Morrison*, there are a number of earlier rulings of this Court that also support our separation of powers claim. For example, in *Springer* v. *Government of the Philippine Islands*, 277 U.S. 189, 201-02 (1928), the Court observed that it

> may be stated then, as a general rule inherent in the American constitutional system, that, unless otherwise expressly provided or incidental to the powers conferred, the legislature cannot exercise either executive or judicial power; the executive cannot exercise either legislative or judicial power; the judiciary cannot exercise either executive or legislative power.

These principles were discussed at considerable length in *Buckley* v. *Valeo*, 424 U.S. 1, 120-22 (1976), where the Court stated that the three branches shall be largely, but not totally, separate from one another and that the system of separation of powers, together with its correlative checks and balances, was intended to safeguard against the encroachment or aggrandizement of one branch at the expense of another. And in *Immigration and Naturalization Service* v. *Chadha*, 462 U.S. 919, 951 (1983), the Court observed: "The Constitution sought to divide the delegated powers of the new Federal Government into three defined categories, Legislative, Executive, and Judicial, to assure, as nearly as possible, that each branch of government would confine itself to its assigned responsibility." The Court further noted that, when the Framers intended to allow one branch to undertake an activity outside of its ordinary

functions, it made explicit provision for it in the Constitution. *Id.* at 955.

The function of the Judicial Branch is embodied in Article III, and it is basically confined to deciding "cases" or "controversies," as those terms have been historically understood, *i.e.*, to resolve real disputes between adverse parties. *See Muskrat* v. *United States*, 219 U.S. 346, 356 (1911). Thus, when, at President Washington's direction, then-Secretary of State Thomas Jefferson asked this Court for an advisory opinion on the construction of certain laws and treaties, the Court refused to provide it, because that function is for the Executive and not the Judicial Branch. *Id.* at 354. *See also Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 594 (1952) (Frankfurter, J., concurring) ("Even as to questions that were the staple of judicial business, it is not for the court to pass upon them unless they are indispensably involved in a conventional litigation.")

Similarly, the Court has refused to allow Article III judges to pass on claims where the determinations would not be final, but would be reviewable by officials of the Executive Branch or by Congress. *See Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792); *United States* v. *Ferreira*, 54 U.S. (13 How.) 40 (1851); and the unreported opinion in *United States* v. *Todd*, (U.S. February 17, 1794), which is summarized and appears by order of the Court in an addendum to *Ferreira*, 54 U.S. 51. *See also Glidden Co.* v. *Zdanok*, 370 U.S. 530, 538-41 (1962) (upholding Article III status of Claims Court and Court of Customs and Patent Appeals only by finding that non-Article III duties were extremely limited).

Other cases have produced analogous constructions and limitations on the powers of the Judicial Branch. In *Matter of Certain Complaints Under Investigation*, 783 F.2d 1488, 1505 (11th Cir.), *cert. denied*, 106 S. Ct. 3273 (1986), the court allowed a judicial investigation of the activities of Judge Alcee Hastings to continue over a separation of powers challenge, but did so only because the investigatory tasks at issue had "the

sole purpose of exploring complaints against federal judges and magistrates, with the ultimate aim of promoting 'the effective and expeditious administration of the business of the courts.'" It further found that "[f]unctions so limited in scope and purpose . . . do not fall outside the ambit of duties assignable to the members of the judicial rather than of another branch." *Id.* And in *Young* v. *United States ex rel. Vuitton et Fils S.A.*, 107 S. Ct. 2124, 2131 (1987), the Court permitted a federal court to appoint an attorney to prosecute criminal contempt when the Justice Department would not, because to do so was "essential in ensuring that the Judiciary has a means to vindicate its own authority without complete dependence on other branches."

Then in *Morrison* v. *Olson*, 56 U.S.L.W. 4835 (1988), this Court reaffirmed that Article III courts may perform functions beyond the adjudication of live cases and controversies only in rare and narrowly defined circumstances. Quoting *Buckley* v. *Valeo*, *supra*, 424 U.S. at 123, and discussing *Hayburn's Case* and *Ferreira*, the Court noted that "[a]s a general rule, we have broadly stated that 'executive or administrative duties of a nonjudicial nature may not be imposed on judges holding office under Art. III of the Constitution.'" *Id.* at 4841 & n.15. This limitation on the scope of Article III "judicial power" serves a dual purpose: "to help ensure the independence of the Judicial Branch and to prevent the judiciary from encroaching into areas reserved for the other branches." *Id.* at 4842. The Constitution's separation of powers principle thus bars an Article III court from performing functions that either "pose[] any threat to the 'impartial and independent federal adjudication of claims,'" *Id.* at 4843, *quoting Commodity Futures Trading Comm'n* v. *Schor*, 478 U.S. 833, 850 (1986), or "that are more properly accomplished by [the legislative or executive] branches." *Id.* at 4842.

In upholding the independent counsel provisions in *Morrison*, the Court first addressed the question of whether the Special Division usurped Executive Branch functions. The Court began by noting that the Division's authority to appoint

the independent counsel and to define her jurisdiction was based on the explicit constitutional authority in the Appointments Clause that allows courts to appoint inferior officers, Article II, § 2, cl. 2, not on Article III, although it also made it clear that the Division did not have "*unlimited* discretion to determine the independent counsel's jurisdiction." *Id.* at 4842 (emphasis in original).

The Court then considered the host of "miscellaneous powers" that Congress vested in the Special Division, such as receiving the final report of the independent counsel, or granting extensions of time, or deciding whether to release a report. The Court found that these "passive" or "essentially ministerial" functions were "directly analogous to functions that federal judges performed in other contexts," and were sufficiently close to traditional Article III functions to avoid "impermissibly trespass[ing] upon the authority of the Executive Branch." *Id.*

Finally, the Court scrutinized the authority of the Special Division to terminate the office of the independent counsel, which it found was potentially "administrative" and therefore not "typically 'judicial.' . . ." *Id.* at 4843. Nevertheless, by construing this power narrowly, as "basically a device for removing from the public payroll an independent counsel who has served her purpose, but is unwilling to acknowledge the fact," the Court concluded that it did not pose a threat of judicial intrusion into the domain of the Executive Branch. *Id.*

Measured against the stringent standard expressed in *Morrison*, it is apparent that the powers of the Sentencing Commission go far beyond the constitutionally permissible scope of Article III activities. The establishment of comprehensive, binding sentencing guidelines is a very different function from imposing sentences in individual cases. Indeed, the intense dissatisfaction with the prior method of individual, discretionary sentencing led Congress to establish a whole new sentencing system. While Article III judges may surely impose individual sentences in cases before them, that power does not

equate with the power to establish sentencing rules that will bind all federal judges and all federal defendants, as the Commission has done here. As this Court has observed, it is "indisputable" that "the authority to define and fix the punishment for a crime is [a] legislative," not a judicial, task. *Ex Parte United States*, 242 U.S. 27, 42 (1916); *see also Rummel* v. *Estelle*, 445 U.S. 263, 283 (1980); *Gore* v. *United States*, 357 U.S. 386, 393 (1958). By performing this task, the Sentencing Commission has thus "impermissibly trespass[ed] upon the authority" of another branch. *Morrison*, 56 U.S.L.W. at 4842.

The Commission's own actions demonstrate how inappropriate it is for an unelected body in the Judicial Branch to carry out these functions. In essence, what the Commission has done is to take broad statutory statements, apply its judgments and views to them, and then translate them into a scheme which will be the law of sentencing for federal crimes. Probably the most significant choices that the Commission made, which are inherent in any system of guidelines, are the "policy decisions with respect to the relative severity of offenses and the appropriate level of punishment." Revised Draft, p. 7. An exhibit that was before the district court, and is an Addendum to this brief, lists the offenses according to levels of punishment assigned to them by the Commission, which reflects the Commission's judgment of the relative seriousness of each crime. Ordinarily, this equating of dissimilar acts is a legislative, or on occasion an executive, judgment, essentially embodying the community's values as to what kinds of sentences are appropriate for what kinds of crime, but here that function has been delegated to a body in the Judicial Branch.

The clear policy implications of the Commission's tasks can be seen by examining the Addendum. For example, at base offense level 18, the Commission grouped together the following disparate offenses: robbery below $2500 (increasing to level 24 if over $5,000,000); obstructing an election by force or threats; losing top secret national defense information; tampering with the public water system; and tax evasion over

$5,000,000. Addendum at 6a-7a. Or, consider those at level 13: civil rights conspiracy; structuring transactions to evade reporting requirements (subject to a plus 18 adjustment); involving children under age 14 in drug trafficking; transporting sexually explicit material involving children under age 18 (with an adjustment of as much as plus 13); and possessing weapons or narcotics in prison. *Id.* at 8a-9a. And all of those in the latter group are one level above perjury, bribing a witness, and obstruction of justice, which many would consider to be at least as serious, yet the Commission decided otherwise. *Id.* at 9a-10a. Similarly, at level 9, a convicted bid rigger involving $1-4 million in commerce would be treated the same as a person found guilty of passing a single counterfeit $5 bill or a few dollars worth of phony food stamps. *Id.* at 11a. Similar policy-oriented, discretionary judgments are reflected in the Commission's decisions about when probation will be allowed, how to deal with cooperating (and obstructionist) defendants, what role fines should play in sentencing, and how to handle plea bargaining. Assuming that Congress can delegate this law-making function to another branch, it can only be delegated to the Executive Branch, not the Judicial Branch, because it is precisely the same kind of function—"[i]nterpreting a law enacted by Congress to implement the legislative mandate"—that the Supreme Court found in *Bowsher* v. *Synar*, 106 S. Ct. 3181, 3192 (1986), to be "the very essence of 'execution' of the law." Indeed, merely to state what the Commission is doing is to underscore how far adrift this function is from traditional Article III responsibilities under our system of separation of powers.

As noted above, principles of separation of powers limit judges from deciding matters except when they present direct cases or controversies. Thus, in the standing context, such limits are "founded in concern about the proper—and properly limited—role of the courts in a democratic society." *Warth* v. *Seldin*, 422 U.S. 490, 498 (1975). Under those principles, the judiciary is equally precluded from establishing binding sentencing guidelines in a rulemaking proceeding without even a

semblance of a lawsuit. Similarly, among the reasons why the Court has declined to address certain claims on political question grounds—the "lack of judicially discoverable and manageable standards for resolving [them] or the impossibility of deciding [them] without an initial policy determination of a kind clearly for nonjudicial discretion," *Baker* v. *Carr*, 369 U.S. 186, 217 (1962)—apply fully to the kinds of issues that the Commission had to decide in issuing sentencing guidelines.

The Sentencing Commission has responded by analogizing its binding sentencing guidelines to the Federal Rules of Civil Procedure, but that comparison ignores several fundamental differences between the two types of rules. First, the judiciary is authorized to issue only procedural rules. Thus, the Rules Enabling Act specifically provides that the rules "shall not abridge, enlarge or modify any substantive right . . . ." 28 U.S.C. § 2072. Indeed, in *Sibbach* v. *Wilson & Co.*, 312 U.S. 1 (1941), both the majority and dissenters expressed agreement on the narrow scope of the legislation authorizing the Federal Rules, although they differed in their resolution of the case before them. According to the majority, a rule would be authorized if it affected "the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them." *Id.* at 14. Justice Frankfurter in dissent described the authority as limited to "formulat[ing] rules for the more uniform and effective dispatch of business on the civil side of the federal courts." *Id.* at 18. And, although the limitation on courts' rulemaking authority in the Rules Enabling Act is statutory, and is based in part on considerations of federalism, it plainly has constitutional underpinnings.[6]

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[6] The 1926 Senate Report to a predecessor bill made it clear that questions about the judiciary's authority to make rules "will surely be resolved by construing a statutory provision in such a way that it will not have the effect of an attempt to delegate to the courts what is in reality a legislative function." S. Rep. No. 1174, 69th Cong., 2d Sess. 1 (1926). Indeed, Justice Sutherland testified that the courts' rulemak-

(footnote continued next page)

Here, by contrast, there can be little doubt that the sentencing guidelines are intended to be substantive rather than merely procedural. As this Court observed in *Miller* v. *Florida*, 107 S. Ct. 2446, 2453 (1987), while the distinction between substance and procedure may sometimes prove elusive, there can be no doubt that sentencing rules are substantive in nature. Although the Commission has criticized the use of a substance-procedure dichotomy to help resolve this case, it has failed to propose an alternative test to apply. While "the terms 'substance' and 'procedure' precisely describe very little except a dichotomy, and what they mean in a particular context is largely determined by the purposes for which the dichotomy is drawn," *Sun Oil Co.* v. *Wortman*, ____ U.S. ____, 56 U.S.L.W. 4601, 4604 (1988), the dichotomy remains a useful one. And, more importantly, the purpose behind separating the policymaking from the adjudicatory functions under the doctrine of separation of powers leaves no doubt that the issuing of sentencing guidelines falls on the substance-policymaking side of the line.

The Commission has sought to defend the guidelines on the theory that they merely affect remedies and hence are properly judicial, *i.e.*, they fall on the procedural side of the line. In *Miller* v. *Florida*, *supra*, this Court rejected a similar claim regarding sentencing guidelines under the *Ex Post Facto* Clause, 107 S. Ct. at 2452, and just last term it twice turned aside analogous efforts, albeit in statutory contexts. *Felder* v.

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ing authority "could not involve the making of any substantive law, because the Congress would be powerless to delegate such power to the courts. I should say it would be confined to making rules pointing out the way in which cases should be presented, and the way in which the court should discharge its duty in determining what the substantive law is." Hearing on S. 2060 and S. 2061 before a Subcommittee of the House Judiciary Committee, 68th Cong., 2d Sess. 56 (1924), *quoted in* Burbank, *The Rules Enabling Act of 1934*, 130 U. Pa. L. Rev. 1015, 1078 (1982); see also *id.* at 1106-07 (Congress intended to keep substantive lawmaking in Congress and away from the Court).

Casey, ___ U.S. ___, 56 U.S.L.W. 4689, 4692 (1988) (state notice of claim and exhaustion requirements in conflict with 42 U.S.C. § 1983), and *Monessen Southwestern Ry.* v. *Morgan*, ___ U.S. ___, 56 U.S.L.W. 4494 (1988) (prejudgment interest and discounting lost earnings to present value in conflict with Federal Employers' Liability Act).

In defending its authority, the Commission has argued that the guidelines simply operate "in aid of a central judicial function." Brief of Sentencing Commission in Support of Certiorari at 5. According to the Commission, just as the courts may issue procedural rules, police the members of the Judicial Branch, or even appoint counsel to prosecute criminal contempt cases when the Justice Department declines to do so, they can issue sentencing rules. Similarly, the Commission points to the various committees of judges, including those of the Judicial Conference of the United States, none of which operates solely in the context of a case or controversy.

There are, however, several substantial differences between those non-adjudicatory functions, which may be properly undertaken by Article III judges, and the issuing of sentencing guidelines, which judges may not do. Some of these activities produce reports or recommendations that are advisory, while the guidelines are binding. Others, such as the Federal Rules of Civil Procedure, are binding but not substantive, whereas the guidelines are both binding and substantive. Still others, such as investigations of judicial misconduct, principally affect the judiciary, and could not appropriately be conducted by another branch, except as part of an impeachment proceeding.

In contrast to those activities, which are properly characterized as "in aid of" the judicial function, sentencing guidelines do not "aid" the judicial function of sentencing: they control it. Indeed, it seems far more accurate to describe judges as "aiding" the implementation of the sentencing guidelines, rather than, as the Commission describes it, the guidelines acting "in aid of" the judicial role of imposing sentence. *Cf. Miller* v. *Florida*, *supra*, 107 S. Ct. at 2453 (rejecting claim that changes

in sentencing guidelines only changed the exercise of sentencing judge's discretion). Therefore, this Court should reject the Commission's "in aid of" argument just as it rejected similar efforts to save the unconstitutional structure of the Federal Election Commission as "in aid of" Congress' powers over elections. *See Buckley* v. *Valeo*, *supra*, 424 U.S. at 138. *See also Northern Pipeline Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 73, 77 (1982) (rejecting arguments supporting authority of Bankruptcy judges on theories that their activities were "related to" or "adjunct" to those of Article III judges). *Cf. Bowsher* v. *Synar*, *supra*, 106 S. Ct. at 3202-03 (Stevens, concurring) (rejecting claim that Comptroller General properly exercises "ancillary" functions of Congress under Gramm-Rudman law).

The same point can be made by comparing the goals of the procedural rules on the one hand and those of the sentencing guidelines on the other. The goal of procedural rules is to enable the truth to prevail by permitting the facts to be brought forth and the legal issues to be decided fairly and efficiently. *See* Ely, *The Irrepressible Myth of Erie*, 87 Harv. L. Rev. 693, 724-25 (1974). Thus, procedural rules are intended to provide for fair adjudication, not to favor one outcome over another. *Hanna* v. *Plumer*, 380 U.S. 460, 466-67 (1965). Indeed, unless one becomes a litigant, the Rules do not, and are not intended to, affect individuals in our society. While it is true that some rule changes make it easier for one side to prevail by either increasing or removing barriers to proof, their purpose is not to alter the result, but to achieve a balanced set of procedures that will promote justice. *Id.*

By contrast, the purpose of the sentencing guidelines is precisely the opposite. These guidelines are laden with value judgments about the appropriate level of punishment, both for the particular offense and as compared to other offenses. The Commission, consistent with its statutory mandate, chose particular levels of punishment for particular offenses for the very purpose of achieving certain goals of deterrence and punish-

ment. Thus, it is only by overlooking the intended deterrent effect on the public at large, and in particular on that portion that is wont to commit crimes, that the Commission can even argue, as it did below, that it is the judges whose conduct is being regulated and that the guidelines have no substantive impact on the general public. To the contrary, for those found guilty, the guidelines actually control the amount of time that they will serve and do not merely set the procedures that judges must use in deciding which sentence will be imposed.[7]

In other cases, the Commission has acknowledged that there are limits on what functions the Judicial Branch may constitutionally perform, even if the function relates in some way to litigation. Thus, it has admitted that it could not issue "binding antitrust guidelines through rulemaking," Brief for Sentencing Commission at 38, in *Gubiensio-Ortiz* v. *Kanahele*, No. 88-5848, and *United States* v. *Chavez*, No. 88-5109, 9th Cir., April 28, 1988, because such rules would bind the general public rather than the courts. *Id.* at 39. But as we have shown,

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[7] Another way to see the contrast between these guidelines and the Rules of Civil Procedure is to read the introductions to them. The introduction to the guidelines reads like a report of a committee of Congress or the description of a new rule being issued by an administrative agency, both as to tone and content. The introduction to the various drafts of the first Rules of Civil Procedure are written by and for lawyers in a matter of fact style. Advisory Committee on Rules for Civil Procedure, Report and Proposed Rules of Civil Procedure for the District Courts of the United States v-viii (April 1937); Advisory Committee on Rules for Civil Procedure, Preliminary Draft of Rules of Civil Procedure for the District Courts of the United States and the Supreme Court of the District of Columbia viii- xviii (May 1936) ("1936 Rules Report"). Indeed, the "problems of policy" identified by the Advisory Committee in the first draft available for public scrutiny featured such issues as whether to require filing for all actions at the outset, the standard of review in non-jury cases, and the introduction of summary judgment, which would not be considered highly charged issues of a kind our elected representatives should address. 1936 Rules Report at ix, ix-xi, xiii-xiv & xvi-xvii.

sentencing guidelines affect, and are intended to affect, the general public, and it is only by ignoring their intended deterrent purpose that the Commission can argue to the contrary.

But more fundamentally, the Commission's argument for an exception to the narrow scope of Article III has "no limiting principle." *Northern Pipeline Co.*, *supra*, 458 U.S. at 73. If the Sentencing Commission can issue sentencing guidelines, then another Commission or this Court could, at least as far as separation of powers is concerned, be delegated such tasks as establishing rules quantifying appropriate levels of damages for pain and suffering for federal claims, prescribing when and in what amounts punitive damages should be awarded (and how they should be apportioned among plaintiffs, their attorneys, and public entities), promulgating statutes of limitations for federal causes of actions, and setting rates for the payment of attorneys fees. Indeed, Congress might even assign the judiciary the job of codifying the federal criminal code, which has proven so difficult to do in the past. All of these can be characterized as "in aid of" the judicial function, or as dealing with remedies, as the Commission uses those terms, yet they all are wholly different in kind from the functions traditionally performed by the Judicial Branch, and functionally indistinguishable from issuing sentencing guidelines.

Examining the kind of judgments that the Commission has made in issuing the sentencing guidelines leaves no doubt that it has entered into the policy-making domain. It has decided what factors are relevant in sentencing, when probation should be allowed, and how much incarceration will be needed to achieve what it considers to be appropriate levels of deterrence and punishment. Moreover, it has done so without political accountability to the electorate, as the President or Congress would have when they make policy judgments of this kind. As this Court observed in *Massachusetts* v. *Mellon*, 262 U.S. 447, 483 (1923), when it dismissed the case for lack of standing, the dispute here is "political, and not judicial, in character, and therefore is not a matter which admits of the exercise of the

judicial power." We do not suggest that judges have no proper role in the sentencing process, but only that the Judicial Branch cannot constitutionally undertake the one assigned to the Commission in the Sentencing Reform Act.

The purposes behind Article III's case or controversy limitations—"to help insure independence of the Judicial Branch and to prevent the judiciary from encroaching into areas reserved for other branches," *Morrison*, 56 U.S.L.W. at 4842—lend further support to our position. In *The Federalist*, James Madison highlighted the dangers of Judicial Branch involvement in executive or legislative activities:

> 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*. Were it joined to the executive power, *the judge* might behave with all the violence of *an oppressor*.

The Federalist No. 47, at 303 (Rossiter ed. 1961), *quoting* Montesquieu (emphasis as quoted). *Accord Glidden Co. v. Zdanok*, *supra*, 370 U.S. at 582 (limiting judicial power to deciding cases is based on the "Framers' desire to safeguard the independence of the judicial from the other branches. . . .") The Sentencing Commission involves precisely this combination of functions, which, as feared by Madison, threatens the judicial independence that is so vital to separation of powers.

There is another essential strand underlying the separation of powers as it applies to Article III: the need to ensure both impartiality and the appearance of impartiality. *See* Comment, *Separation of Powers and Judicial Service on Presidential Commissions*, 53 U. Chi. L. Rev. 993, 1010-25 (1986). As Justice Frankfurter remarked, the intimate involvement of Article III judges in the process of policymaking and legislating "weaken[s] confidence in the disinterestedness of the judicatory functions." F. Frankfurter, *Advisory Opinions*, in 1 Encyclopedia of the Social Sciences 474, 478 (1930). This caution was shared by Chief Justice Stone, whose views on the

subject were grounded in separation of powers concepts, but not limited by what the Constitution alone prohibits. See Mason, *Extra-Judicial Work for Judges: The Views of Chief Justice Stone*, 67 Harv. L. Rev. 193 (1953).

One of the most thoughtful statements of the reasons why judges should confine their activities to deciding cases is that of Judge Skelley Wright in his dissent from the opinion of the three-judge court in *Hobson* v. *Hansen*, 265 F. Supp. 902 (D.D.C. 1967). The issue there was the constitutionality of the appointment by the District Court for the District of Columbia of the members of the District of Columbia School Board, which the majority sustained based on the Appointments Clause and the special powers that Congress has over the District of Columbia, neither of which is applicable here. After noting the problems of judges diverting their time from deciding cases and their lack of specific competence for choosing the members of the school board, Judge Wright highlighted several reasons for restricting judges' activities which apply directly to this case:

> Since these issues involve democratic choice, it is politically illegitimate to assign them to the federal judiciary, which is neither responsive nor responsible to the public will. Moreover, it misleads the public to camouflage the legislative character of a social decision and shore up its acceptability by committing it to the judiciary, thereby cashing in on the judicial reputation. Most critically, public confidence in the judiciary is indispensable to the operation of the rule of law; yet this quality is placed in risk whenever judges step outside the courtroom into the vortex of political activity. Judges should be saved "from the entanglements, at times the partisan suspicions, so often the result of other and conflicting duties."

265 F. Supp. at 923, *quoting*, *Matter of Richardson*, 247 N.Y. 401, 420, 160 N.E. 655, 661 (1928) (Cardozo, C.J.).

One provision in the Sentencing Reform Act, on which we have not previously focused, underscores the political nature of the job of writing sentencing rules and therefore why it cannot

constitutionally be performed by the Judicial Branch. Included in the section describing the composition of the Sentencing Commission is the following sentence: "Not more than four of the members of the Commission shall be members of the same political party." 28 U.S.C. § 991(a). The concept is, of course, not an uncommon one, appearing in the statutes governing numerous bodies such as the Federal Election Commission, 2 U.S.C. § 437c(a)(1); the Federal Communications Commission, 47 U.S.C. § 154(b)(5); the Federal Trade Commission, 15 U.S.C. § 41; the Securities and Exchange Commission, 15 U.S.C. § 78d(a); and the Commission on Civil Rights, 42 U.S.C. § 1975(b). But all of those Commissions are in the Executive Branch, and all of them have major policymaking responsibilities. By way of contrast, the Sentencing Commission is in the Judicial Branch, and it is, we believe, the only body within that Branch to have a similar limitation in its enabling provision.

What is important is not its uniqueness, but the fact that its inclusion is a clear recognition by Congress that the Sentencing Commission would be making political and other policy judgments of the kind normally made by the Executive and Legislative Branches. The absence of a similar provision in the statute governing this Court's powers to issue procedural rules strongly reinforces the vast differences between that authority and the power to issue sentencing guidelines at issue here. As demonstrated above, the Commission in fact made countless political decisions in issuing these guidelines, as Congress expected that it would, yet by doing so, it stepped outside the proper boundaries of Article III activities. In short, this is another case, like *INS* v. *Chadha*, *supra*, where "[t]he 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." 462 U.S. at 951.

B. The Composition of the Commission and the President's Control Over its Members Violate the Separation of Powers.

Even if the Commission could constitutionally issue sentencing guidelines despite its assignment to the Judicial Branch,

that would be permissible only if the entire Commission were composed of Article III judges, insulated from outside interference, as is true for this Court when it issues rules pursuant to 28 U.S.C. § 2072. In that case, the protection of life tenure and the prohibition against reductions in salary would provide an independence that at least arguably offsets the absence of political accountability found in the Executive and Legislative Branches. But that is not this case for two separate reasons: the Commission is not composed entirely of Article III judges, and the President retains substantial authority to control the activities of the Commission.

Of the seven Commission members, only three are Article III judges. This sharing of power with non-Article III judges runs afoul of the Constitution. As this Court observed in *United States* v. *Nixon*, 418 U.S. 683, 704 (1974):

> [T]he "judicial Power of the United States" vested in the federal courts by Art[iclé] III, § 1, of the Constitution can no more be shared with the Executive Branch than the Chief Executive, for example, can share with the Judiciary the veto power, or the Congress share with the Judiciary the power to override a Presidential veto. Any other conclusion would be contrary to the basic concept of separation of powers and the checks and balances that flow from the scheme of a tripartite government.

See also INS v. *Chadha*, *supra*, 462 U.S. at 958 (condemning legislative veto as impermissible sharing of power). Similarly, the provisions of the Bankruptcy Code that could have been viewed as an effort to share power between Article III judges and bankruptcy judges, who lacked Article III's protections of life tenure and the guarantee against reduction in salary, were set aside on separation of powers grounds in *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50 (1982), even though the rulings of bankruptcy judges were subject to judicial review by the Article III courts.

But even if the presence of four non-judges does not constitute an impermissible sharing of power, there is another separation of powers flaw in the composition of the Sentencing Commission—the presidential role in overseeing its operations

and in controlling it. Thus, all seven Commission members are appointed by the President, and he chooses the chairman, who is now Circuit Judge William B. Wilkins, Jr. They all serve for staggered terms, and the President decides who will have which terms, and whether or not to reappoint them. Most important of all, the President alone has the power to remove Commission members, which he may do for cause.

The question is whether this continuing presidential role in a Judicial Branch body violates principles of separation of powers. As the Court observed in *Nixon* v. *Administrator of General Services*, 433 U.S. 425, 443 (1977), such an inquiry "focuses on the extent to which [the Act] prevents the [particular] Branch from accomplishing its constitutionally assigned functions . . . and [a violation occurs] [o]nly where the potential for disruption is present . . . ." But as this Court emphasized in *Northern Pipeline*, *supra*, 458 U.S. at 59, 60, the independence of the Judicial Branch must be jealously guarded from outside interference. *See also*, *United States* v. *Will*, 449 U.S. 200, 217-18 (1980): ("A Judiciary free from control by the Executive and the Legislature is essential if there is a right to have claims decided by judges who are free from potential domination by other branches of government."); *The Federalist No. 48*, at 308 (J. Madison) (Rossiter ed. 1961) ("none of [the branches] ought to possess, directly or indirectly, an overruling influence over the other in the administration of their respective powers.")

These principles were recently applied in *Bowsher* v. *Synar*, 106 S. Ct. 3181 (1986), which held that the Comptroller General could not constitutionally perform executive functions because he could be removed by Congress, and hence was under the potential influence of the legislative branch of government: "a direct congressional role in the removal of officers charged with the execution of the laws beyond [the power of impeachment] is inconsistent with separation of powers." *Id.* at 3187. Thus, where a function has been assigned to a particular branch of government, either by the Constitution or, as in most cases, by

legislation, another branch may not interfere with it, absent some express authority for such a role in the Constitution. As this Court subsequently described *Bowsher*, the case involved a "question of the aggrandizement of congressional power at the expense of a coordinate branch." *Commodity Futures Trading Comm'n* v. *Schor*, 106 S. Ct. 3245, 3261 (1986).

The President has at least as much, if not more, control over the Sentencing Commission than Congress had over the Comptroller General in *Bowsher*. Thus, the statutory bases for removal in the two statutes are substantially the same, although not identical.[8] However, the Comptroller General could be removed only if a majority of both Houses of Congress and the President, or two-thirds of each House without the President, agreed that the statutory conditions had been met. In this case, the President alone may decide to remove a Commission member. Moreover, unlike this case, the Comptroller General was entitled to prior notice and an opportunity for a hearing, whereas no such protections are explicitly provided for Commission members. Finally, the Comptroller General serves only a single 15-year term and cannot be reappointed, whereas Commission members may be reappointed or not, as the President chooses, thus giving him an additional lever that Congress did not have over the Comptroller General. Moreover, two Executive Branch officials—the Attorney General and the Chairman of the Parole Commission—sit as *ex officio* members of the Sentencing Commission to provide input from the Executive Branch and, not incidentally, to maintain a close watch on what the Commission is doing.

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[8] The President has the power to remove members of the Sentencing Commission for "neglect of duty or malfeasance in office or for other good cause shown," 28 U.S.C. § 991(a), while Congress has the power to remove the Comptroller General for "permanent disability," "inefficiency," "neglect of duty," "malfeasance," or "a felony or conduct involving moral turpitude." 31 U.S.C. § 703(e)(1)(B).

The Commission contended below that *Bowsher* is distinguishable because it applies only when the function at issue is inherently part of the branch in which it is placed and another branch holds the removal power. According to that argument, the President's removal power is proper here because others besides judges have traditionally played roles in the sentencing process and thus sentencing is not inherently judicial. However, until 1985, when the Gramm-Rudman Act was passed, the functions performed by the Comptroller General under that Act were not executive at all, but were performed by Congress as part of the appropriations process. Thus, *Bowsher* cannot be read, as the Commission would like, to apply only to intrusions on powers that are inherently part of the branch whose officials are subject to outside interference.

Finally, the Commission has contended that, even if the President can remove Article III judges, it is of little consequence since they will automatically resume their judicial duties at their current pay. That is true now only because all three judicial members are circuit judges, and all Commissioners are paid at the rate for circuit judges. 28 U.S.C. § 992(c). But it would not have been true initially since Chairman Wilkins was then a district judge. Moreover, the Commission overlooks the reality that no one likes to be fired, especially for cause, and thus Commission members may be willing to bend to the President's will in order to avoid such action. And of course, the Commission includes four nonjudges who do not have lifetime appointments to which they can return if they incur the displeasure of the President.

Thus, this situation involves the same kinds of threats of inter-branch interference that the Court found unacceptable in *Bowsher, supra*, 106 S. Ct. at 3189-91. The Court there observed that the unconstitutionality of the statute did not depend on establishing that the removal power will in fact be exercised, because the structural protections afforded by separation of powers not only guard against actual abuses of power, but provide a shield that is "critical to preserving liberty." *Id.*

at 3190-91. The problem in both this case and *Bowsher* was aptly described, and the answer to it given, over 50 years ago in *Humphrey's Executor* v. *United States*, 295 U.S. 602, 630 (1935): "The sound application of a principle that makes one master in his own house precludes him from imposing his control in the house of another who is master there." Or, as the Court observed in upholding the authority of judges to initiate contempt proceedings, the courts "cannot be at the mercy of another branch" in carrying out their functions. *Young* v. *United States ex rel. Vuitton et Fils S.A.*, *supra*, 107 S. Ct. at 2131.

C. The Sentencing Commission Cannot Be Judicially Reassigned to the Executive Branch to Cure Its Unconstitutionality.

After concluding that "the work of the Commission in carrying out the Congressional mandate can be more conventionally described as executive rather than judicial," the district court upheld its constitutionality by "judicially characteriz[ing it] as having Executive Branch status." App. 4a. Similarly, the Justice Department has argued that the sole infirmity in the Act is the placement of the Commission in the Judicial Branch, that the problem can be cured by severing the offending language, and that the guidelines can be saved by a judicial reassignment of the Sentencing Commission from the Judicial to the Executive Branch of government. To support that effort, the Justice Department claimed that the label attached by Congress to an activity is not necessarily dispositive of separation of powers questions, citing *Bowsher* v. *Synar*, *supra*. That kind of rewriting of the Sentencing Reform Act is unavailing for several reasons.[9]

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[9] We do not concede that a purely executive body, with no federal judges as members, would survive a separation of powers challenge since such a body would unite in one branch the power to prosecute with the power to decide the proper sentence, thereby running afoul of the concern of the Framers that the power to enact laws should not be united with the power to execute them, lest tyranny result. *See Buckley* v. *Valeo*, *supra*, 424 U.S. at 120-21, *quoting* Madison, *see supra* at p. 28, who, in turn, was quoting and relying on Montesquieu.

1. There is No Basis For Reassigning the Commission To the Executive Branch.

There is no judicial precedent to support "reassignment." In *Bowsher*, the issue was whether the Comptroller General could constitutionally perform certain functions under the Gramm-Rudman Act in view of the fact that Congress had retained the power to remove him. This Court held that he could not because the functions to be performed were executive in nature, and no person performing such functions could be subject to removal by Congress. The question in *Bowsher* was who controlled the Comptroller General since, after *INS* v. *Chadha*, *supra*, it is clear that neither Congress, nor any person operating under its control, can constitutionally carry out the function of executing the laws. Thus, the observation in *Bowsher* that several statutes placed the Comptroller General in the Legislative Branch was part of the discussion showing that he was under the control of Congress, not the President. 106 S. Ct. at 3191.

The Court next undertook an analysis of the functions at issue in *Bowsher* in order to determine whether those functions were legislative, in which case they could be performed by the Comptroller General, or executive, in which case they could not. The Court did not, as the government suggests, reassign the Comptroller General in order to *save* his status, which is what the government is asking the Court to do here. Indeed, the statute establishing his office does not place it in either branch, but instead makes it "an instrumentality of the United States Government independent of the executive departments." 31 U.S.C. § 702(a), *quoted* at 106 S. Ct. at 3191. Thus, neither *Bowsher* nor any other case of which we are aware authorizes the Court, as a means of saving a function from running afoul of separation of powers, to disregard an explicit congressional statement to place that function in an improper branch of government. To the contrary, this Court has admonished the lower courts that they are not free to judicially rewrite statutes or "to manufacture a restriction" in order to avoid a constitutional question. *Commodity Futures Trading*

Comm'n v. *Schor*, *supra*, 106 S. Ct. at 3255. Therefore, the constitutionality of the Commission must be determined on the basis of the statute as written, and not as the Justice Department would like to have it rewritten.

The problem is not merely one of mislabelling or a slip of the word processor. Several separate references in the Senate Report establish that the Senate made a conscious determination to place the Commission in the Judicial Branch. Thus, the Committee stated that the Sentencing Commission "would be in the judicial branch. . . ." S. Rep. at 63; 1984 USCCAN 3246. On the following page, it added that it had acted to ensure the role of all three branches, "rather than only the judicial branch," in the selection of the members of the Sentencing Commission, and it then observed that the bill "does assure the judiciary a role in the selection of the members and does place the Commission in the judicial branch." S. Rep. at 64; 1984 USCCAN 3247.

In the section by section analysis, the Committee made its point even clearer: "Placement of the Commission in the judicial branch is based upon the Committee's strong feeling that, even under this legislation, sentencing should remain primarily a judicial function." S. Rep. at 159; 1984 USCCAN at 3342. Finally, in discussing the provision that authorized federal judges to serve as Commission members without having to resign their judicial positions, the Committee found this to be appropriate, since the judges will remain in the Judicial Branch and will be engaged in activities closely related to traditional judicial activities, and found it necessary to assure that highly qualified judges are not excluded by having to resign a lifetime appointment in order to serve on the Commission. S. Rep. at 163; 1984 USCCAN at 3346.

Moreover, as noted above (at 4), not only did the House concur in the placement of the Commission in the Judicial Branch, but it would have had the Judicial Conference appoint all of the Commissioners. It wanted to keep the Commission out of the Executive Branch to avoid altering the roles tradi-

tionally played by Congress and the Judiciary in determining sentences:

> Giving such significant control over the determination of sentences to the same branch of government that is responsible for the prosecution of criminal cases is no more appropriate than granting such power to a consortium of defense attorneys.

H.R. Rep. No. 98-1017, 98th Cong., 2d Sess. 95 (1984). The House Report also stressed that the Judicial Conference approach would allow the Commission to "remain[] independent of contemporary political currents." *Id.* Although, in the end, Congress did not place the Commission under the Judicial Conference, the emphasis in the House Report on the Commission's independence from the Executive Branch, which is echoed in the Senate Report, demonstrates that Congress gave great weight to the location of the Commission in the constitutional scheme. Thus, if there is a problem with the placement of the Sentencing Commission in the Judicial Branch, it is the responsibility of Congress, not the courts, to correct it.

The premise underlying the Justice Department's contention that the courts can move the Commission, and thereby avoid a constitutional problem, is groundless. The basis of this assumption is that Congress' placement of the Commission in the Judicial Branch has "no real-world consequences" other than who signs paychecks. However, there is far more at stake than simply correcting a label or placing the Commission in the proper box on an organizational chart of the federal government. Thus, one significant consequence is that, because 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 only to executive, and not to judicial, bodies, the Commission is exempt from these laws, as well as from the Federal Advisory Committee Act, 5 U.S.C. App. I, which applies only to advisory committees that serve the President or executive agencies, but not the judiciary.

Second, the Commission's budget is now grouped with the Judicial, not the Executive, Branch. Although all of the funds

come from the Treasury Department, the President must include in the budget he sends to Congress the figures from the Judicial and Legislative Branches "without change." 31 U.S.C. § 1105(b). Obviously, the power to alter the budget request of the Sentencing Commission is a matter of considerable significance, at least to the Commission, if not to the President, but the President has no such power under the hands-off rule of section 1105(b), which is informed by, if not required by, principles of separation of powers.[10]

Third, if the Commission is part of the Executive Branch, then the activities of its members and staff are controlled by certain conflict of interest statutes that do not apply to the Judicial Branch, the most prominent of which are 18 U.S.C. §§ 207 and 208. *Compare* 18 U.S.C. § 205, which specifically includes officials of the Judicial Branch. Other federal statutes, such as the prohibitions on discrimination contained in Title VII, *see* 42 U.S.C. § 2000e-16(a), and various civil service statutes, *see* 5 U.S.C. §§ 2102-2103, also apply to the Commission and/or its staff only if the Commission is in the Executive Branch. On the other hand, the Commission is authorized by 28 U.S.C. § 995(a)(10) to issue instructions to probation officers, who are part of the Judicial Branch, *see* 18 U.S.C. § 3602, which would be highly unusual, if not inappropriate, for an Executive Branch agency to do. Moreover, under 28 U.S.C. § 994(w), the Commission can require judges or court officers to submit written reports for each sentence imposed, a power that the Executive Branch would not normally exercise over federal judges or other judicial officers.

Fourth, if the Commission is part of the Executive Branch, it is clear that none of the judicial members can sit on any case that involves any part of the Executive Branch of the government because to do so would deprive the other parties of the

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[10] Along the same lines, Congress directed the Commission to obtain support services from the Judicial Branch. *See* 28 U.S.C. § 995(b).

independent Article III judiciary that the Constitution requires. *See, e.g., Commodity Futures Trading Comm'n* v. *Schor, supra*, 106 S. Ct. at 3256; *In re Murchison*, 349 U.S. 133, 136 (1955).

For all of these reasons, the placement of the Sentencing Commission in the Judicial Branch is hardly an inconsequential matter, with no practical significance. While the Executive Branch claims that it is only asking the Court to disregard what it sees as a single offending phrase, what it is really asking the Court to do is to rewrite the statute and alter the relationship of the Commission to other parts of the federal government in a number of very substantial ways, plainly not intended by Congress. This, we submit, is not severance, but judicial revision of legislation, which is also barred by separation of powers.

2. Reassigning the Commission to the Executive Branch Would Not Make It Constitutional.

Even if this Court could rewrite this statute, it would not save the Commission. Rather, it would create another constitutional objection—that Article III judges are improperly serving in an Executive Branch agency, carrying out very substantial executive functions. The service of judges on the Sentencing Commission runs afoul of James Madison's admonition in *The Federalist* against joining the power of the legislature and the judiciary in one person. *See supra* at p. 28. Indeed, the Constitutional Convention rejected a proposal to establish a "Council of Revision," composed of Supreme Court Justices and high Executive Branch officials, that would review all legislation and, if the Council found the legislation objectionable, call upon Congress to reexamine it. *See The Federalist No. 69*, at 416-17 (Rossiter ed. 1961). As Alexander Hamilton explained in *The Federalist No. 73*, this proposal was rejected because, first, "judges, who are to be the interpreters of the law, might receive an improper bias from having given a previous opinion in their revisionary capacities. . . ." Second, the Convention feared any unification of executive and judicial power:

> [B]y being often associated with the executive, [judges] might be induced to embark too far in the political views of that magistrate, and thus a dangerous combination might by degrees be cemented between the executive and judiciary departments. It is impossible to keep the judges too distinct from every other avocation than that of expounding the laws. *It is peculiarly dangerous to place them in a situation to be either corrupted or influenced by the executive.*

Id. at 446-47 (emphasis added).

While this Court has not had occasion to address the issue of whether Article III judges may perform non-judicial functions in the Executive Branch, this question has recently been the subject of two appeals court rulings involving the presence of Article III judges on the President's advisory committee on organized crime. *Application of the President's Commission on Organized Crime (Scaduto)*, 763 F.2d 1191 (11th Cir. 1985), and *Matter of the President's Commission on Organized Crime (Scarfo)*, 783 F.2d 370 (3d Cir. 1986). Of the six judges who considered the question of whether judges could even serve on a purely advisory body, four found that judges could, and two concluded that they could not. *See generally* Comment, *Separation of Powers and Judicial Service on Presidential Commissions*, 53 U. Chi. L. Rev. 993 (1986).

More significant than the holdings in those cases is that those judges who found no objection to such service were very cautious in their approvals. First, both *Scaduto* and *Scarfo* recognize that service by judges in non-judicial capacities, while of long-standing duration, albeit of relatively infrequent usage, has never been judicially approved, 763 F.2d at 1202; 783 F.2d at 377, and it has been extremely controversial. *See* Slonim, *Extrajudicial Activities and the Principle of Separation of Powers*, 49 Conn. Bar J. 391, 402-03 (1975); Wheeler, *Extrajudicial Activities of the Early Supreme Court*, 1973 Sup. Ct. Rev. 123, 126. Indeed, judges have often refused to serve in extra-judicial capacities on separation of powers grounds and have criticized others for accepting such service. *See, e.g.*,

Mason, *Extra-Judicial Work for Judges: The Views of Chief Justice Stone*, 67 Harv. L. Rev. 193, 197, 199-205, 207-12, 213-15 (1953) (the Chief Justice refused to serve on a commission studying the nation's rubber supply policies during World War II, as well as on several other commissions, including the Atomic Energy Commission, because of the incompatibility of such service with his judicial position). Moreover, the history of such judicial service has not been so universal or unbroken that it can serve as a proper precedent for judicial service in the Executive Branch. *See* Liman, *The Constitutional Infirmities of the United States Sentencing Commission*, 96 Yale L.J. 1363, 1381-84 (1987).

Second, the advisory nature of the Organized Crime Commission was the essential ingredient needed to save it from unconstitutionality. As Judge Roney, who voted to uphold the practice in *Scaduto*, observed, the Commission's role is "simply to advise and recommend," and it has "no autonomous authority to impose sanctions or implement final binding action." 763 F.2d at 1205. And in *Scarfo*, the court ruled that, while there may be certain circumstances under which judges violate the principles of separation of powers by undertaking non-judicial acts, service on the Crime Commission was acceptable because the judges were simply rendering advice, and the appearance of bias could be addressed by recusals in specific cases. 783 F.2d at 379-81. Here, of course, the Commission is not an advisory body, but an operative one whose rules become law unless they are overturned by Congress. Indeed, if the Sentencing Commission can have Article III judges as voting members, there would have been no doubt about the propriety of a purely advisory body, such as the Crime Commission, especially since only two of its nineteen members were federal judges. *See Scarfo*, *supra*, 783 F.2d at 371.

The narrow rulings in favor of permitting service on the Crime Commission provide absolutely no support for the proposition that Article III judges may serve on bodies like the Sentencing Commission that are performing not simply

advisory, but operational, functions of a substantive, policy-making nature. No case supports any such sweeping proposition, and the GSA's regulations implementing the Federal Advisory Committee Act suggest the opposite by the clear line that they draw between operational and advisory bodies. 41 C.F.R. § 101-6.1004(g) (1987).

The court below concluded that judicial service on an executive body presents no problem so long as it is "voluntary," App. 4a-5a, which we understand to mean that no particular Article III judge has been required, or as the Commission has put it, "conscripted," to perform executive functions. However, in *Scaduto*, the majority found the composition of the Crime Commission unconstitutional, despite the voluntary service of the two judicial members, and in *Scarfo*, the Third Circuit qualified its reliance on the voluntariness of the judges' service by noting that "[n]either the enabling statute nor the Executive Order mandates inclusion of judicial members." 783 F.2d at 376. Most significant of all, it then cited the Sentencing Commission as an example of a body on which judicial service has been mandated. *Id.* at 376 n.3; *see also id.* at 378-81.

Thus, as *Scarfo* recognized, service on the Sentencing Commission by federal judges is not "voluntary" because the statute requires the participation of three Article III judges, and thus this is not a case, as the Department has suggested, where three of the Commission's members "happen to be judges." Brief of United States at 27, in *Gubiensio-Ortiz* v. *Kanahele*, No. 88-5848 and *United States* v. *Chavez*, No. 88-5109, 9th Cir., April 25, 1988. While no individual judge is required to serve on the Commission, Congress and the President have, in effect, conscripted three judges from among the ranks of the federal judiciary to serve on the Commission on a full-time basis, which thereby weakens the judiciary to that extent. Moreover, given the major roles that all three judges have in the development of the sentencing guidelines, and the fact that their votes were needed to approve the guidelines, the impact on the judiciary is even greater because, not only are

they unavailable to serve while they are on the Sentencing Commission, but they also must inevitably disqualify themselves from all future criminal cases involving sentencing issues.

But even if individual judges can avoid the loss of impartiality that may flow from such commingling of powers, the service of judges on the Sentencing Commission also interferes with the Judicial Branch by giving the appearance of a loss of judicial independence. *See* Comment, *Separation of Powers*, *supra*, 53 U. Chi. L. Rev. at 1010-25. Moreover, all of the reasons given by Judge Wright and others on pages 28-29, *supra*, why functions such as these should not be performed by the Judicial Branch, if principles of separation of powers and the appearance of judicial impartiality are to remain intact, apply equally when the agency on which the judges serve is in the Executive Branch.

Finally, the district court accepted the argument of the Justice Department based on the absence of a comparable "constitutional prohibition on dual service (applicable to members of Congress)" through the Incompatibility Clause in Article I, § 6, cl. 2. App. 4a. Since there is no comparable prohibition for judges, the government argues, the omission constitutes an approval of dual appointments, which permits the sharing of executive powers with members of the Judicial Branch. Once again, decisions of this Court, in particular the portion of *United States* v. *Nixon*, quoted *supra* at 31, make it clear that such a sharing arrangement is expressly forbidden by the Constitution. *See also INS* v. *Chadha*, *supra*, 462 U.S. at 958.

Moreover, as the Court observed in *Springer* v. *Philippine Islands*, *supra*, 277 U.S. at 202, the inclusion of express exceptions to separation of powers "emphasizes, rather than casts doubt upon, the generally inviolate character of this basic rule." *See also INS* v. *Chadha*, *supra*, 462 U.S. at 955 (inclusion of specific inter-branch roles underscores unconstitutionality of legislative veto). Here, the fact that the courts of

law are specifically permitted by the Constitution to appoint inferior officers, when Congress so authorizes, and the fact that the Chief Justice is the presiding officer in cases of trials of impeachment before the Senate, serve to underscore the absence of any authorization for Article III judges to perform Executive Branch functions of the kind undertaken here, whether the body is formally situated in the Executive or Judicial Branch of government.

Indeed, we are simply unable to fathom how, according to the Justice Department, the seven Commission members cannot perform the task of issuing sentencing guidelines as part of the Judicial Branch, due to the doctrine of separation of powers, but those same seven individuals are freed of that limitation if the label attached to their Commission is executive. The three Commission members who are Article III judges are Article III judges for life, and their status is unchanged when they remove their robes or when they are addressed as "Commissioner" rather than "Judge." In our view, the separation of powers limitations on the proper function of judges apply whether the Commission is in the Executive or Judicial Branch, and we do not understand the basis of the Justice Department's argument to the contrary.

But the most telling reason why this inter-branch assignment of judges on a "voluntary" basis cannot be upheld is because its logic contains no limiting principles. If Congress decided that it would be advisable to have an experienced federal judge occupy a seat on the Securities and Exchange Commission, the government's position would allow Congress to require that a sitting federal judge fill that job. Or, it could decide that the head of the FBI must be an active judge in order to assure that the agency will protect the civil liberties of the accused, or that the war on drugs requires the service of the Chief Justice as "drug czar." Similarly, it could require that top officials in the Justice Department sit with this Court in deciding on the Federal Rules of Criminal Procedure. Indeed, a federal judge could sit on cases dealing with one agency in the

morning and preside over a meeting of another in the afternoon, without offending separation of powers. The possibilities are endless if judges can assume substantive roles in the Executive Branch, so long as they do so on a "voluntary" basis and perform those duties only in their "individual," not judicial, capacities, simply by removing their judicial robes. No authority allows separation of powers to be so trammelled by such a formalistic approach.

The doctrine of separation of powers was not created to keep organizational charts neat, but to prevent officials in one branch from taking on the duties of another. *INS* v. *Chadha*, 462 U.S. at 951; *id.* at 963 (Powell, J., concurring). Accordingly, its proscriptions apply to people, not just to entities, and under our system it is the function of judges to decide the law, not to write it, regardless of where they are located in a government organizational chart and regardless of whether they are wearing their robes. Because it is unconstitutional for Article III judges to perform the non-judicial tasks assigned to the Commission when it is part of the Judicial Branch, it can only compound the problem by moving the Commission into another branch. Thus, even a judicial rewriting of the statute to make the Commission part of the Executive Branch will not save the guidelines.

* * *

This system for issuing sentencing guidelines is not one of separated powers, but of blurred responsibility. Congress passed a broad law, established a Commission, and then declined to review its substantive work, let alone approve it. 133 Cong. Rec. H8107-13 (daily ed. Oct. 5, 1987); *id.* at H8215 (daily ed. Oct. 6, 1987). The President was limited in his selection by the requirement that he include three judges on the Commission, and by the limitations on his influence over it because it is in the Judicial Branch. The judiciary, while having its representatives on the Commission, has no say in the selection of a majority of the Commission, no check on the President's unfettered reappointment power, and little ability to

resist if the President tries to remove a member, even for cause. As a result, if the public dislikes these guidelines, there is no branch that is truly responsible for them, and that result plainly transgresses the doctrine of separation of powers.

In striking down the legislative veto in *INS* v. *Chadha*, this Court observed that the veto "has been in many respects a convenient shortcut; the 'sharing' with the Executive by Congress of its authority over aliens in this manner is, on its face, an appealing compromise . . . [which] is obviously easier [than obtaining full legislation]." 462 U.S. at 958. But that did not save the veto because the "Framers ranked other values higher than efficiency." *Id.* at 959. The same kinds of sharing of powers, short-cuts, and political compromises that brought about the constitutional downfall of the legislative veto are fully present here. The question of whether the sentencing guidelines are sound policy is not before the Court. The sole question is whether the process by which they were reached is consistent with our Constitution. For all of the reasons described above, we respectfully submit that it is not and ask the Court to declare the guidelines unconstitutional.

II. THE GUIDELINES ARE UNCONSTITUTIONAL BECAUSE THE DELEGATION TO THE SENTENCING COMMISSION IS EXCESSIVE.

The other ground on which the guidelines should be set aside is that the delegation to the Commission of the function of determining sentences for those convicted of federal crimes is excessive. We recognize that Congress need not make every single judgment in connection with sentencing rules, but the discretion granted here to the Commission is excessive under the applicable standards. As this Court has remarked, "the power to define criminal offenses and to prescribe the punishments . . . resides wholly with the Congress." *Whalen* v. *United States*, 445 U.S. 684, 689 (1980). *See also Gore* v. *United States*, *supra*, 357 U.S. at 393 ("the proper apportionment[s] of punishment . . . are peculiarly questions of legislative policy"). And little more than a year ago, the Court ruled that the *Ex*

Post Facto Clause, which is applicable to legislative actions, prevents a state from increasing the amount of punishment after a crime had been committed, even though an increased penalty, through an amendment to the applicable sentencing guideline, was a realistic possibility when the crime was committed. *Miller* v. *Florida*, *supra*. While it is Congress that has defined what constitutes a federal crime, the Sentencing Reform Act has handed to the Sentencing Commission the power to make rules for the imposition of criminal sentences on a wholesale basis that has fundamentally transformed the sentencing process in the federal courts.

The question of whether a delegation is excessive was recently reviewed and thoroughly discussed in *Synar* v. *United States*, 626 F. Supp. 1374 (D.D.C.) (three-judge court), *aff'd sub nom. Bowsher* v. *Synar*, 106 S. Ct. 3181 (1986). We need not repeat that discussion or quote the relevant authorities, most of which are referred to in that opinion at pages 1382-91. As that court observed, the "classic exposition of the governing test" is set forth in *J. W. Hampton & Co.* v. *United States*, 276 U.S. 394 (1928), where Chief Justice Taft held that a delegation is constitutional so long as Congress "'lay[s] down by legislative act an intelligible principle to which the person or body authorized to [exercise delegated authority] is directed to conform. . . .'" 626 F. Supp. at 1383, *quoting J.W. Hampton*, 276 U.S. at 406, 409. Or, as *Synar* also described the test, a court must find "an adequate 'intelligible principle' to guide and confine administrative decisionmaking." 626 F. Supp. at 1389. Thus, whether the delegation is excessive depends on "whether the specified guidance 'sufficiently marks the field within which the administrator is to act so that it may be known whether he has kept within it in compliance with the legislative will.'" *Id.* at 1387, *quoting Yakus* v. *United States*, 321 U.S. 414, 425 (1944). To answer that question "requires a careful review of the statute." *Id.*

The Sentencing Reform Act directs the Commission to establish policies and practices that:

> provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices.

28 U.S.C. § 991(b)(1)(B). But this "direction" is really no direction at all, because Congress delegated to the Commission the authority to balance these factors, which the Commission itself recognized are inherently at odds with each other (Guidelines, p. 1.2), as it sees fit, and thereby to establish all sentencing policies for federal criminal offenses, with essentially no congressional principle to guide it in any meaningful sense.

To be sure, there are some limitations. Existing statutory maximum and minimum sentences must be followed, but their very breadth caused the displeasure with the old system. The Commission is also, in essence, required to use a double matrix which considers both the circumstances of the particular offense and the characteristics of the individual offender. And it is also true that the maximum range for a sentencing guideline can be no greater than six months or 25% and that Congress decided to make certain factors such as race, sex, and national origin, irrelevant. 28 U.S.C. §§ 994(b)(2) & (d). The problem, however, lies in what Congress left open for the Commission to decide.

The most important and open-ended decisions that the Commission had to make were how to rank all of the federal offenses in a way that would reflect the relative degree of seriousness of the crime, including the special facts in aggravation and mitigation of the basic charge, how to assess the relevant characteristics of the offender, and then to translate those rankings into sufficiently narrow punishment ranges to meet the 25%/6 months rule set by Congress. Average prior sentences were to be a starting point, but no more, and the Commission regularly deviated from them when it thought a change was appropriate.

Thus, for white collar crimes, the Commission chose to increase the existing sentences because it viewed them as more serious than judges previously found them to be when imposing sentences under the prior system. In doing so, it was not guided by a mandate from Congress, but essentially took Congress' place in deciding what "policy-oriented departures" from prior practices were appropriate. Guidelines, p. 1.4. The question is not whether those changes were justified; they are surely debatable, and if that is the case, the debate should be among our elected legislators, rather than among appointed Commissioners.[11]

Along with the absolute changes in average sentences for particular crimes, the Commission grouped together at the same punishment levels violations of different provisions of the U.S. Code. Included in this task was the assignment of sentencing ranges for every offense, 28 U.S.C. § 994(c), which resulted in a set of ranges that provides the same sentences for very disparate crimes at each base offense level. Some examples of the highly policy-oriented judgments that the Commission made are set forth on pages 20-21, *supra*, which are in turn taken from the Addendum to this brief. What is most noteworthy about this process, beyond its inevitability in any comprehensive guidelines system such as this, is that all of the rankings could have been raised or lowered dramatically, as the Commission and the Commission alone thought appropriate, and there would have been no basis to object because Congress left all of those choices up to seven politically unaccountable individuals.

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[11] A similar kind of choice was made in determining where, for instance, different gradations of offense levels for tax evasion should fall. Thus, under the Commission's approach, the seriousness of tax evasion always depends on the amount of tax avoided, but that judgment is one that Congress never made in the past, and is at least subject to serious debate, both in principle and as to the places where the demarcations should be drawn. *See* Guidelines, ch. 2, pt. T.

The Commission was also required to make a number of other significant unguided judgments beyond "creat[ing] categories of offense behavior and offender characteristics." Guidelines, p. 1.1. It had to make what it called a "fundamental" choice about whether to use a "real offense" system, which virtually eliminated all flexibility, or to go to a "charged offense" system in which the prosecutors' power would be enhanced because of their control over the charge. Preliminary Draft, p. 11. It also decided when probation was permissible and when it was forbidden, opting in favor of a strict system of controls over its use, Guidelines § 5C2.1(b), because of what it decided had been its use for an "inappropriately high percentage of offenders guilty of certain economic crimes." *Id.*, p. 1.8. After a vigorous debate about the role of fines in criminal cases, *see* Preliminary Draft, pp. 157-61, the Commission decided to require that every non-indigent defendant pay a fine according to a schedule that the Commission devised. Guidelines, § 5E4.2, pp. 5.20-21. It was also given the discretion to determine whether seven offender characteristics "have any relevance" and include them or not (as it did not with age and drug dependence "for policy reasons," Guidelines, p. 4.1), as it saw fit. 28 U.S.C. § 994(d). Finally, it had to decide, with no guidance from Congress, what to do about the prior practice of plea bargaining, whose continued existence in the form of bargaining over charges, could undermine the whole effort to eliminate disparity in sentencing. Although the Commission temporized and made no changes for the present (Guidelines, p. 1.8), what is important is that it was free to select among a variety of options with no concern that it would be violating a congressional mandate.

Perhaps the single most poignant example of the breadth of the Commission's powers relates to its decision as to whether to reinstate the death penalty. Since *Furman* v. *Georgia*, 408 U.S. 238 (1972), the absence of adequate statutory standards has precluded the use of the death penalty provisions that remain in the Federal Criminal Code for certain offenses. Every recent Congress has debated whether the death penalty should be

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reimposed and what procedures would comport with constitutional requirements, but it has been unable to agree over this very contentious matter, except for two crimes for which it established elaborate standards that must be followed before the death penalty may be imposed. *Establishing Constitutional Procedures for the Imposition of Capital Punishment*, S. Rep. No. 99-282, 99th Cong., 2d Sess. 2-4 (1986); 49 U.S.C. §§ 1472-1473 (aircraft piracy); 10 U.S.C. § 906a (espionage by military personnel).

In order to make the death penalty provisions that remain on the statute books enforceable, the Justice Department offered its opinion that the Sentencing Commission had been given the authority under the Sentencing Reform Act to do what Congress has been unwilling to do itself—establish procedures that would bring back the death penalty for a broad range of offenses. Although the Commission eventually determined not to include the death penalty in its guidelines, it did not omit such procedures because it believed that it had no power to include them, but for other reasons, related to its desire to assure that congressional controversy over the death penalty would not prevent the guidelines from going into effect. *Washington Post*, March 11, 1987, at A17, *National Law Journal*, March 23, 1987, at 5. While we have the most serious doubts that the Commission has the authority to reimpose the death penalty through its guidelines, the correctness of that interpretation is not what is important. The fact that the Commission seriously considered this matter, and that there is at least an arguable case that the Commission may have that power, dramatically underscores the sweeping breadth of the Commission's delegated authority.

In their responses below, the Department and the Commission attempted to analogize the delegations here to those made to the Parole Commission, but that analogy is inapposite for several reasons. First, parole guidelines are purely advisory by their own terms, 28 C.F.R. § 2.20(e) (1986), and they are issued merely to assist that Commission in the performance of

its primary duty of making individual parole determinations. *See* 18 U.S.C. §§ 4204(a)(1) & (b). Second, the Parole Commission's discretion is confined by the sentence imposed by the judge; it cannot increase incarceration time, as the Sentencing Commission did for some crimes for which it believed that past sentences were too lenient, nor can it alter the amount of any fine imposed. Finally, and most important, Congress explicitly told the Parole Commission when a prisoner will be eligible for parole, 18 U.S.C. §§ 4205(a), (b) & (f), and decided what the relevant factors are in making parole decisions, 18 U.S.C. §§ 4206-4207. By contrast, Congress gave the Sentencing Commission *carte blanche* to determine whether the various factors listed in the statute "have any relevance to the nature, extent, place of service, or other incidents of an appropriate sentence . . ." and directed it to "take them into account only to the extent that they do have relevance. . . ." 28 U.S.C. §§ 994(c) & (d).

In *Synar*, the delegation was upheld because the court found that "the *only* discretion conferred is the ascertainment of facts and the prediction of facts." 626 F. Supp. at 1389 (emphasis in original). Thus, according to the court, the "Comptroller General is not made responsible for a single political judgment. . . ." *Id.* (emphasis in original). The court further found that it was not true that "Congress has declined to make the 'hard political choices,'" but instead that it had "specified in meticulous detail which program budgets will be reduced . . . and by how much." *Id.* at 1391. Since "[a]ll that has been left to administrative discretion" are some relatively minor matters, the court concluded that Congress did not give the Comptroller General any "distinctively *political* judgment, much less a political judgment of such scope that it must be made by Congress itself." *Id.* (emphasis in original).

As we have shown above, the contrast between this case and *Synar* is enormous. Admittedly, Congress gave the Commission a large number of directions, but there are vast policy areas in which it simply turned over to the Commission, on a

wholesale basis, virtually all of the hard policy choices and political judgments, instead of doing the job itself. Thus, the delegation must fail here because Congress failed to lay down "intelligible principles" in so many areas. Insisting that Congress include "adequate standards" serves the function of ensuring 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." *Arizona* v. *California*, 373 U.S. 546, 626 (1963) (Harlan, concurring). Moreover, as Justice Brennan has cautioned about sentencing law, "[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." *United States* v. *Robel*, 389 U.S. 258, 276 (1967) (Brennan, concurring). In short, Congress has failed to provide the "intelligible principle" to make any of the "hard choices" or "fundamental policy decisions" that must be accomplished in the legislative process. *Industrial Union Dep't, AFL-CIO* v. *American Petroleum Inst.*, 448 U.S. 607, 687 (1980) (Rehnquist, concurring). Instead, it has given to the Commission the power to make "the type of substantive moral judgment[s] that [have] traditionally been reserved for Congress," Liman, *supra*, 96 Yale L.J. at 1374, and it is for that reason as well that the delegation here is excessive and must be set aside.

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.

If the Court agrees that the guidelines are unconstitutional, it must then address the question of severability. Although numerous severability issues may arise, the only questions that must be decided in order for the district courts to make intelligent sentencing decisions concern the extent to which pre-

guidelines sentencing practices still apply. Obviously, the provisions of the Sentencing Reform Act that bind judges to consider and adhere to the guidelines fall with the guidelines. In our view, it is equally obvious that the abolition of parole (and the substitution of supervised release), as well as what the Commission referred to as "substantially restructur[ing] good behavior adjustments," must fall. *See* Guidelines, p. 1.1.

The Sentencing Reform Act is a comprehensive sentencing law which establishes a determinate sentencing system. S. Rep. at 49-50; 1984 USCCAN at 3232-33. The sentencing guidelines are its central feature, with the abolition of parole and the good time changes constituting lesser, but significant, elements of the determinate sentencing scheme. Although Congress could theoretically have changed parole or good time without establishing guideline sentencing, there is no evidence that Congress would have enacted these lesser pieces of the package without the guidelines, and, therefore, this Court cannot save them from the fate of the guidelines.

In *Alaska Airlines, Inc.* v. *Brock*, 107 S. Ct. 1476 (1987), this Court recently reiterated the test for severability: "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." *Id.* at 1480, *quoting Buckley* v. *Valeo*, *supra*, 424 U.S. at 108, which quotes *Champlin Refining Co.* v. *Corporation Comm'n of Oklahoma*, 286 U.S. 210, 234 (1932). Thus, "[w]hether 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) (plurality opinion). Moreover, as this Court has instructed, it is also critical that "the statute will function in a *manner* consistent with the intent of Congress." *Alaska Airlines*, 107 S. Ct. at 1481 (emphasis in original).

The starting point for assessing congressional intent is the language and structure of the statute itself. *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 108

(1980). Here, both elements make it clear that Congress would not have enacted the parole and good time provisions without the sentencing guidelines. First, the statute itself provides that the abolition of parole and the new good time rules apply only to sentences that are imposed under the sentencing guidelines system. *See* 18 U.S.C. §§ 3551, 3558 & 3624. Second, the effective dates of the various provisions of the Sentencing Reform Act confirm that Congress intended that the guidelines, the abolition of parole, and the new good time rules would operate as a package. Thus, Congress delayed implementation of the parole and good time changes until the guidelines became effective, while at the same time it made the repeal of the Federal Youth Corrections Act immediately effective. Pub. L. No. 98-473, § 235, 98 Stat. 1837, 2031-34 (1984), as amended by Pub. L. No. 99-217, §§ 2, 4, 99 Stat. 1728 (1985). Congress tied the effective date of the parole and good time changes to that of the guidelines in order to ensure 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." S. Rep. at 188-89; 1984 USCCAN 3371-72; 131 Cong. Rec. H11,998 (daily ed. Dec. 16, 1985) (statement of Rep. Gekas supporting extension of deadline for issuance of Sentencing Guidelines) ("[w]e do not want the parole process to die before the sentencing guidelines are created, so we stretch out the period of the life of the parole process to allow the Sentencing Commission work to be completed.") Accordingly, the Act retained parole and good time provisions "to deal with sentences imposed under current sentencing practices." S. Rep. at 189; 1984 USCCAN 3372.[12]

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[12] In addition, the Sentencing Reform Act does not contain a severability clause, even though Title I of the Continuing Resolution, which immediately precedes the Comprehensive Crime Control Act, has such a clause. 98 Stat. 1975. Although the absence of a severability clause is not dispositive, *see Alaska Airlines*, *supra*, 107 S. Ct.

The purposes of the Sentencing Reform Act that were stressed throughout its legislative history reinforce the conclusion that Congress would not have separately enacted the changes in parole and good time. Thus, Congress had two interrelated goals in mind: eliminating disparities in sentences and establishing certainty in sentencing. S. Rep. at 38, 52; 1984 USCCAN 3221, 3235. The Senate Report makes it crystal clear that, to achieve these goals, Congress established a determinate sentencing system consisting of the sentencing guidelines, the abolition of parole, and the revision of good time rules. *See* 130 Cong. Rec. S531-32 (daily ed. Jan. 31, 1984) (statement of Sen. Thurmond, a co-sponsor of the Sentencing Reform Act); 128 Cong. Rec. 11,819 (1982) (statement of Sen. Baker); *id.* at 26,466 (statement of Sen. Thurmond); *id.* at 26,503 (statement of Sen. Kennedy).

Throughout the Senate Report, Congress identified the aspects of the current system that it sought to correct. First, Congress believed that both federal judges and the Parole Commission had too much sentencing discretion under the current system, which led to wide disparities in sentences that reflected neither the circumstances of the case nor any consistent purpose in sentencing. S. Rep. at 38 & n.6, 41-49; 1984 USCCAN 3221 & n.6, 3224-32. Thus, as the Senate Report stated, "[u]ntil the present sentencing statutes are changed . . . , judges and the Parole Commission are left to exercise their discretion to carry out what each believes to be the purposes of sentencing." S. Rep. at 40; 1984 USCCAN 3223. Second, parole decisions created uncertainty in sentencing, which was compounded by the constant adjustments of good time by prison officials and the duplication of effort and often inconsistent release dates resulting from parole and good time

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at 1481, it is more significant than usual in this situation in light of Congress' inclusion of such a clause in another part of the crime bill and the importance of such clauses after the decision in *INS* v. *Chadha*, *supra*, which was issued a little more than a year before the Sentencing Reform Act was passed.

determinations. S. Rep. at 49-50, 57, 145-46; 1984 USCCAN 3232-33, 3240, 3328-29.

Congress wanted to improve upon the current model under which judges, the Parole Commission, and the Bureau of Prisons tried to lessen sentencing disparities by second-guessing each others' judgments and adjusting their own decisions accordingly. S. Rep. at 38-39, 49; 1984 USCCAN 3221-22, 3232. The Senate Report summarized both the problems with the current system and Congress' solution as follows:

> By dividing the sentencing authority between the judge and the Parole Commission, however, current law actually promotes disparity and uncertainty. First, the dangers of unfettered exercise of discretion can occur at the time that an offender is released on parole as well as at the initial sentencing. For this reason, any *comprehensive plan* for reform should (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."

S. Rep. at 46; 1984 USCCAN 3229 (emphasis added); *see also* S. Rep. No. 97-307, 97th Cong., 1st Sess. 959, 969-70 (1981).

In place of discretionary sentencing, the Sentencing Reform Act establishes a "comprehensive plan" for determinate sentencing, which is accomplished through the interplay of three separate, but interrelated, reforms: (1) the issuance of essentially mandatory sentencing guidelines; (2) the abolition of parole; and (3) the adoption of more limited and predictable good time credit rules. Congress made it clear that these three interrelated reforms were intended to be part of a package by expressly tying the abolition of parole and application of the new good time rules to the establishment of the guideline system, S. Rep. at 53-54 & n.74, 56; 1984 USCCAN 3236-37 & n.74, 3239, and by stating that: "The guideline sentencing system must totally supplant the indeterminate sentencing

system in order to be successful. Accordingly, all sentences to imprisonment under the new system are determinate." S. Rep. at 115; 1984 USCCAN 3298. Thus, under the guideline sentencing system:

> A sentence imposed by a judge . . . will represent the actual period of time that the defendant will spend in prison, except that a prisoner, after serving one year of his term of imprisonment, may receive credit at the end of each year of up to [54] days per year toward service of his sentence if he satisfactorily complies with the institution's rules.

Id.[13]

Given the goals that Congress sought to achieve and the interrelationship between the three major reforms, it is inconceivable that Congress would have eliminated parole or revised the good time rules without establishing the primary element of a guideline sentencing system. The Senate Report makes it clear that the sentencing guidelines were the cornerstone of the determinate sentencing system, which Congress endorsed in its entirety, but not in its component parts. Thus, the abolition of parole and the new good time rules were considered essential to achieve determinate sentencing through the primary vehicle of sentencing guidelines, but were never defended by Congress as worthy ends in their own right. Instead, the coupling of the concepts was simply assumed. As one Senator put it, "[s]ince sentencing will take place in accord with stated and reviewable standards, there is no need for a parole commission to second guess the judicial sentence." 130 Cong. Rec. S411 (daily ed. Jan. 30, 1984) (statement of Sen. Hatch).

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[13] Rather than being hostile to the concept of parole, Congress envisioned that, after the guidelines system had been put into place, it would evaluate "whether the parole system should be reinstated in some form." S. Rep. at 56 n.82, 190; 1984 USCCAN 3239 n.82, 3373.

If the guidelines are invalid, but the abolition of parole and new good time rules are nonetheless put into effect, the Act would operate to increase disparities in sentencing and thereby frustrate Congress' principal goal. Before the Sentencing Reform Act, the Parole Commission had the power to reduce sentencing disparities by releasing individuals who had received abnormally harsh sentences early in their terms and by not releasing those who had been given more lenient terms of imprisonment. To a lesser extent, the Bureau of Prisons played a similar role in granting good time credits. But the abolition of parole in a non-guidelines system would give individual judges total discretion to determine the time that would be served. This result runs counter to Congress' unmistakable intent in the Sentencing Reform Act to constrain judges' discretion through sentencing guidelines and reduce sentencing disparities, since it would eliminate the primary checks on that discretion under the old system. Although the parole system was imperfect in many respects, Congress recognized that it had made major inroads in lessening sentencing disparities in the pre-guidelines system. S. Rep. at 164; 1984 USCCAN 3347. There is simply no basis to conclude that Congress would have eliminated the pre-existing mechanisms for lessening sentencing disparities without the core feature of the Sentencing Reform Act—the sentencing guidelines—and therefore produced a sentencing system that would not operate in a manner even remotely resembling what Congress intended under the guidelines.

CONCLUSION

For these reasons, the sentencing guidelines are unconstitutional and not severable from the parole and good time revisions of the Sentencing Reform Act.

Respectfully submitted,

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