Nos. 87-1904 and 87-7028

In the

Supreme Court of the United States

OCTOBER TERM, 1988

UNITED STATES OF AMERICA,

Petitioner,

v.

JOHN M. MISTRETTA,

Respondent.

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 THE UNITED STATES SENATE AS AMICUS CURIAE

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AUGUST 1988.

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The Sentencing Reform Act of 1984 resulted from decades of consideration of the intractable problem of disparity and discrimination in sentencing. This brief focuses on that problem, earlier unsuccessful efforts to solve it, and Congress's fashioning of a sentencing guidelines system to foster equality in sentencing, while preserving legitimate individualization. We hope that this discussion will assist the Court in considering the briefs of the United States and the Sentencing Commission, upon which we rely to demonstrate the constitutionality of Congress's determinations.[1]

SUMMARY

Since the First Congress judges have had discretion to sentence offenders within broad statutory ranges. The wide disparities that resulted from the virtually unfettered judicial discretion in sentencing have provoked concern for at least a century. In 1958, Congress enacted legislation to increase uniformity through exchanges of views among sentencing judges, but by the early 1970s it was apparent that voluntary measures were inadequate. Research showed that disparity was not isolated or random, but was a pervasive, nationwide problem in part caused by invidious discrimination. Parole, which had once been seen as a remedy for disparate sentencing, came to be seen as itself contributing to inequality.

Building on Judge Marvin Frankel's proposal for a permanent expert agency to formulate rules to guide judicial discretion in sentencing, Senator Kennedy introduced the first sentencing guidelines bill in 1975. In the next two Congresses, the guidelines concept was refined in bills reported by both Houses' judiciary committees and supported by the Executive branch. Finally, in 1984 Congress en-

[1] The Brief of the United States Senate as Amicus Curiae, filed May 1988 in support of certiorari, sets forth the Senate's interest and authority to appear at 1-2 & n.1.

acted and President Reagan signed the Sentencing Reform Act. The Act reflects Congress's determination that channeling and rationalizing judges' discretion through guidelines is the best way to eliminate disparate treatment of similarly situated offenders, while preserving individualized sentencing based on legitimate differences. Congress met these two goals by requiring judges to sentence under the guidelines except in cases where aggravating or mitigating circumstances exist that were not taken into account in the guidelines. It believed that this structure would enhance legitimate individualization by ensuring that sentences reflect the circumstances of each case, rather than the identity and attitude of the sentencing judge.

Congress made three decisions to implement the guidelines system. First, it delegated the task of writing the guidelines to a commission because an independent, professional body created for that purpose could give more thorough and continuous attention to crafting detailed and complex guidelines than could Congress itself. Second, Congress accompanied its delegation with extensive guidance, prescribing the purposes to be met and the tools to be used. It set forth in the Act numerous specific constraints, directives, and prohibitions to guide the commission's discretion. Third, Congress placed the commission in the judicial branch to reflect the judiciary's preeminence in sentencing.

ARGUMENT

I.

THE SENTENCING REFORM ACT DEVELOPED FROM DECADES OF CONCERN OVER DISPARITY IN FEDERAL SENTENCING

A. Efforts to Remedy Sentencing Disparity Have Been Under Way for More Than Fifty Years

The problem of disparity in sentencing has existed throughout the Nation's history. Since the first years under the Constitution, federal criminal statutes have

typically authorized sentencing judges "to consider aggravating and mitigating circumstances surrounding an offense, and, on that basis, to select a sentence within a range defined by the legislature." *United States v. Grayson*, 438 U.S. 41, 46 (1978) (emphasis omitted).[2] The First Congress, for example, established ranges of punishments for all noncapital offenses.[3] The precedent set by the First Congress of legislating sentencing ranges and delegating discretion to judges has predominated throughout the Nation's history.[4]

From the beginning Congress's lack of guidance to channel "the unfettered sentencing discretion of federal district judges," *Dorszynski v. United States*, 418 U.S. 424, 437 (1974), has created a risk of "capricious and arbitrary

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[2] In *Grayson*, the Court stated that "[i]n the early days of the Republic . . . the period of incarceration was generally prescribed with specificity by the legislature." *Id.* at 45. In fact, the shift from legislatively fixed sentences to sentencing ranges had already begun in the colonies. *Compare* 2 *Stat. at L. of Pa. From 1682-1801*, ch. 120, at 178 (1896) (1705 law mandating 7 years hard labor and 31 lashes for rape) *and* 2 *id.*, ch. 117, at 173 (1705 law mandating 6 months hard labor and 21 stripes for burglary during day) *with* 7 *id.*, ch. 555, at 85 (1900) (1767 law mandating hard labor not exceeding 1 month for vagrancy) *and* 7 *id.*, ch. 557, at 91 (1767 law mandating hard labor not exceeding 6 months for horsestealing).

[3] *See, e.g.*, Act of April 30, 1790, ch. 9, § 2, 1 Stat. 112, 112 (imprisonment not exceeding 7 years and fine not exceeding $1000 for misprision of treason); *id.*, § 7, 1 Stat. 113 (imprisonment not exceeding 3 years and fine not exceeding $1000 for manslaughter); *id.*, § 22, 1 Stat. 117 (imprisonment not exceeding 1 year and fine not exceeding $300 for obstruction of process). For one crime, bribery of a federal judge, Congress left the term of imprisonment and fine to "the discretion of the court." *Id.*, § 21, 1 Stat. 117.

[4] Congress has mandated fixed terms of imprisonment only rarely. *See, e.g.*, Act of March 3, 1853, ch. 104, § 4, 10 Stat. 226, 239 (imprisonment of 2 years, in addition to fine, for embezzlement by government employee). Congress has sometimes narrowed judicial discretion by fixing minimum, as well as maximum, sentences. *See, e.g.*, Act of April 20, 1818, ch. 91, § 6, 3 Stat. 450, 452 (imprisonment of 3 to 7 years and fine of $1,000 to $10,000 for importing of slaves); Narcotic Control Act of 1956, Pub. L. No. 728, ch. 629, §§ 103, 105–108, 201, 70 Stat. 567, 568–71, 573–75 (various minimum sentences).

sentences." *Grayson*, 438 U.S. at 48. Briefly in the last century, egregious disparities could be ameliorated by appellate reduction of unduly harsh sentences.[5] However, since the abolition of appellate review of sentencing in 1891,[6] the "rule" has become "firmly established . . . that the appellate court has no control over a sentence which is within the limits allowed by a statute." [7] Meanwhile, "every other leading system of the free world, including the English, abandoned the position of non-reviewability of sentences. . . ." [8] Early in this century, "the United States [became] the only nation in the free world where one judge can determine conclusively, decisively and finally the minimum period of time a defendant must remain in prison, without being subject to any review of his determination." [9]

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[5] *See, e.g., Bates v. United States*, 10 F. 92, 96 (C.C.N.D. Ill. 1881); *United States v. Wynn*, 11 F. 57, 57–58 (C.C.E.D. Mo. 1882). Appellate review was authorized by the Act of Mar. 3, 1879, ch. 176, § 3, 20 Stat. 534. Before 1879 Congress had not authorized appellate sentencing review. *See Ex parte Watkins*, 32 U.S. (7 Pet.) 568, 574 (1833).

[6] The statute that established the current courts of appeal, Act of Mar. 3, 1891, ch. 517, 26 Stat. 826, repealed appellate jurisdiction over sentencing by implication. *Freeman v. United States*, 243 F. 353, 357 (9th Cir. 1917), *cert. denied*, 249 U.S. 600 (1919); *see United States v. Rosenberg*, 195 F.2d 583, 604 n.25 (2d Cir.), *cert. denied*, 344 U.S. 838 (1952).

[7] *Dorszynski*, 418 U.S. at 440–41 (quoting *Gurera v. United States*, 40 F.2d 338, 340–41 (8th Cir. 1930)). Appellate courts have overturned sentences within the prescribed statutory range only in exceptional cases in which the sentencing judge relied upon impermissible factors, *e.g., United States v. Tucker*, 404 U.S. 443, 447–48 (1972); *Townsend v. Burke*, 334 U.S. 736, 740–41 (1948); *United States v. Maples*, 501 F.2d 985, 987 (4th Cir. 1974), or failed to exercise discretion, *e.g., Yates v. United States*, 356 U.S. 363, 366 (1958); *United States v. Barker*, 771 F.2d 1362, 1365–69 (9th Cir. 1985).

[8] George, *An Unsolved Problem: Comparative Sentencing Techniques*, 45 A.B.A.J. 250, 253 (1959); *see* 7 Edw. VII, c. 23, § 4(3) (1907) (England).

[9] *Dorszynski*, 418 U.S. at 440 n.14 (quoting Symposium, Appellate Review of Sentences, 32 F.R.D. 257, 260–61 (1962)); *Gore v. United States*, 357 U.S. 386, 393 (1958).

The resulting "gross and startling inequalities" in sentencing in the United States have provoked concern for at least a century. *Long v. Short Sentences*, 20 Wash. L. Rep. 135 (1892); Lewis, *The Indeterminate Sentence*, 9 Yale L.J. 17, 18 (1900). Homer Cummings was the first of many Attorneys General to bring the problem of sentencing disparity to Congress's attention. Attorney General Cummings reported his studied "conclusion that there frequently occur wide disparities and great inequalities in sentences imposed in different districts, and even by different judges in the same district, for identical offenses involving similar states of facts." The Attorney General told Congress that the extent to which criminal penalties "depend upon chance and on the fortuitous circumstance that a particular judge disposes of the case . . . makes it difficult to maintain that equal, even-handed justice is attained."[10]

As the number of criminal offenders grew and the courts increased their vigilance about the procedures used to adjudicate criminal guilt, concern rose about the unfettered judicial discretion in sentencing. Describing "the disparity of sentences" as "a seriously urgent problem," then-Circuit Judge Potter Stewart noted the "anomaly that a judicial system which has developed so scrupulous a concern for the protection of a criminal defendant throughout every other stage of the proceedings against him should have so neglected this most important dimension of fundamental justice." *Shepard v. United States*, 257 F.2d 293, 294 (6th Cir. 1958). Professor Henry Hart identified the costs of the "anarchical inequality" in sentencing:

> The very ideal of justice is offended by seriously unequal penalties for substantially similar crimes, and the most immediate of its practical purposes

[10] U.S. Dep't of Justice, *Annual Report of the Attorney General of the United States* 6, 7 (1938); *accord id.* at 6 (1939) (Att'y Gen. Murphy); *id.* at 5–7 (1940) (Att'y Gen. Jackson); *id.* at 4 (1941) (Att'y Gen. Biddle).

> are obstructed. Grievous inequalities in sentences are ruinous to prison discipline. And they destroy the prisoner's sense of having been justly dealt with, which is the first prerequisite of his personal reformation.

Hart, *The Aims of the Criminal Law*, 23 Law & Contemp. Probs. 401, 439 (1958). Professor Hart concluded that "achievement of the purposes of the criminal law can never be satisfactorily approximated until this intractable problem is in some fashion reduced to minor, instead of major, proportions." *Id.*

Congress's "pain[st]aking evaluation" in 1958 confirmed "that prisoners with similar backgrounds and similar offenses are serving markedly disparate sentences," thereby "weaken[ing] respect for the administration of justice." H.R. Rep. No. 1946, 85th Cong., 2d Sess. 4, 6 (1958). "In the interest of uniformity in sentencing procedures," Congress authorized the Judicial Conference to convene "institutes and joint councils for the purpose of studying, discussing, and formulating the objectives, policies, standards, and criteria for sentencing." [11] These sentencing institutes and councils were intended to encourage "Federal judges [to] reach a desirable degree of consensus as to the types of sentences which should be imposed in different kinds of cases." S. Rep. No. 2013, 85th Cong., 2d Sess. 3 (1958).

Congress also expanded the use of parole toward the same end. Parole had been instituted in the federal system in 1910,[12] patterned after state experiments replacing "the old rigidly fixed punishments" with "[i]ndeterminate sentences." *Williams v. New York*, 337 U.S. 241, 248 (1949). The traditional retributive model of sentencing was tempered with an "emerging rehabilitation model," in which "judges and correctional personnel, particularly the latter, . . . set the release date

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[11] Act of Aug. 25, 1958, Pub. L. No. 85–752, § 1, 72 Stat. 845, 845 (28 U.S.C. § 334(a)).

[12] Act of June 25, 1910, ch. 387, 36 Stat. 819.

of . . . prisoners according to informed judgments concerning their potential for, or actual, rehabilitation and their likely recidivism." *Grayson*, 438 U.S. at 46. Parole was seen as an instrument to correct sentencing disparities by permitting offenders to be released upon rehabilitation, rather than after an arbitrary period fixed by the sentencing judge. The 1958 law expanded the use of indeterminate sentences in the belief that "additional flexibility in the determination of parole eligibility . . . will mitigate the problem of sentence disparities."[13]

The 1958 statute proved to be of limited success. Assembling judges to exchange views failed to generate sufficient consensus to "produce meaningful criteria for sentencing."[14] By 1962 Circuit Judge Simon Sobeloff had concluded that institutes "should not be expected to afford by themselves a complete solution for this deep-seated problem. Institutes will have but slight impact on extreme disparities. . . ."[15] District Judge Marvin Frankel argued that "the sentencing institute is almost entirely irrelevant" to the root cause of disparity: the absence of any law to guide judges' discretion. M. Frankel, *Criminal Sentences: Law Without Order* 66 (1972). Judge Frankel viewed "the almost wholly unchecked and sweeping powers we give to judges in the fashioning of sentences" as "terrifying and intolerable for a society that professes devotion to the rule of law." *Id.* at 5. He maintained that elemental standards of justice compelled our "reject[ing] individual distinctions—discriminations, that is—unless they can be justified by relevant tests capable of formulation and application with sufficient objectivity to ensure that the results will be more than the idiosyn-

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[13] *Federal Sentencing Procedure: Hearing Before Subcomm. No. 3 of the House Comm. on the Judiciary*, 85th Cong., 2d Sess. 38 (1958).

[14] Proceedings of the Pilot Institute on Sentencing, 26 F.R.D. 231, 239 (1959).

[15] Symposium, Appellate Review of Sentences, 32 F.R.D. 257, 270 (1962). Sentencing councils eliminate only 10 percent of unwarranted disparity. Diamond & Zeisel, *Sentencing Councils: A Study of Sentence Disparity and Its Reduction*, 43 U.Chi.L.Rev. 109, 137 (1975).

cratic ukases of particular officials, judges or others." *Id.* at 11.

Rather than relying on appellate review to develop a common law of sentencing, which he saw as insufficient, *id.* at 84, Judge Frankel proposed a permanent agency composed of judges and other experts "responsible for (1) the study of sentencing, corrections, and parole; (2) the formulation of laws and rules to which the studies pointed; and (3) the actual enactment of rules, subject to traditional checks by Congress and the courts." *Id.* at 119 (emphasis omitted). Judge Frankel envisioned the commission's "creation eventually of a detailed chart or calculus to be used . . . by the sentencing judge in weighing the many elements that go into the sentence" and "by appellate courts in reviewing what the judge has done." *Id.* at 113. While "legislators do not (and should not) lightly delegate their authority," Judge Frankel argued that the "need [for] ongoing study and an indefinite course of revision" provided "good reason for delegating in this instance." *Id.* at 122. He likened his proposal to delegating rulemaking authority to administrative agencies in areas that Congress had similarly determined "neither require nor are likely to receive from the legislature the necessary measure of steady attention." *Id.*[16]

Judge Frankel's plea for reform received a powerful boost with the publication in the early 1970s of a spate of empirical studies of sentencing. One analysis revealed "widespread sentencing disparity" across federal districts in the decision whether to incarcerate or to grant proba-

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[16] Judge Frankel's proposal mirrored a suggestion in England eighty years earlier to reduce sentencing disparity by creating "a Commission composed of competent persons (not all lawyers) having knowledge and aptitude . . . [to] fram[e] . . . a code" of "leading principles to be observed in awarding punishment . . . for the guidance of Courts." Hawkins, *Crime and Punishment*, 8 New Rev. 617, 619-20 (1893); Crackanthorpe, *New Ways With Old Offenders*, 34 Nineteenth Century 614, 630-31 (1893).

tion and in the average length of incarceration.[17] The average sentence for robbery, for example, was 39 months in the Northern District of New York, but 224 months in the Northern District of Texas and 240 months in the Northern District of West Virginia.[18]

The possibility that such statistics were obscuring real differences in cases that justified differential treatment was dispelled by an experiment undertaken by the Second Circuit in 1974.[19] Fifty district judges imposed shadow sentences based on identical portfolios of twenty hypothetical defendants. "The variations in the judges' proposed sentences in each case were astounding." S. Rep. No. 98-225, at 41. "In one extortion case, for example, the range of sentences varied from twenty years imprisonment and a $65,000 fine to three years imprisonment and no fine." [20] Another study concluded that less than one-half of the variance in sentences could be explained by legitimate factors and that differences in judges' attitudes accounted equally for the disparities. *See id.* at 44.

Moreover, the prevailing disparities were not purely arbitrary, but invidious. Research suggested that the disparity was attributable in part to discrimination on the basis of race and other illegitimate factors.[21] As Professor Alan Dershowitz testified, "The statistics are appalling. . . . [W]hen both the crime and the previous history of the offender are held equal, black and minority offenders fare

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[17] *See* P. O'Donnell, M. Churgin & D. Curtis, *Toward a Just and Effective Sentencing System: Agenda for Legislative Reform* 3, 5-6 (1977).

[18] *Id.* at 4-5. These disparities were corroborated by numerous studies. *See* S. Rep. No. 225, 98th Cong., 1st Sess. 41 & nn.18-21, 44 & nn.23-25 (1983), *reprinted in* 1984 U.S. Code Cong. & Ad. News 3183.

[19] A. Partridge & W. Eldridge, *The Second Circuit Sentencing Study: A Report to the Judges of the Second Circuit* (1974).

[20] *Id.* at 44 (citing A. Partridge, *supra* note 19, at 5); *see id.* at 42-43.

[21] *See Federal Sentencing Revision: Hearings Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 98th Cong., 2d Sess., Pt. 2, at 1118, 1179 (1984); *Developments in the Law—Race and the Criminal Process*, 101 Harv. L. Rev. 1472, 1630-32 (1988).

considerably worse." [22] The intractability of the problem of invidious discrimination in sentencing provided strong impetus to adoption of a system to guide judges' discretion.[23]

Heightened concern over sentencing disparity and discrimination coincided with a growing recognition of the elusiveness of the goal of rehabilitation. Observers pointed out that loss of confidence in the ability to rehabilitate or to identify rehabilitation had undermined the analytical basis for indeterminate sentencing and parole. *See* S. Rep. No. 98–225, at 38. Absent rehabilitation, Judge Frankel remarked, "[t]he [indeterminate] sentence purportedly tailored to the cherished needs of the individual turns out to be a crude order for simple warehousing." M. Frankel, *supra* p. 7, at 93. Far from remedying disparity, the administration of parole came to be seen as contributing to inequity and discrimination.[24] The Commission that investigated the prison disturbance at Attica in 1971 concluded that "the parole system was a primary source of tension and bitterness within the walls. Parole . . . was . . . intended as a beneficial reform to promote rehabilitation. Instead, it became an operating evil." [25]

In 1973 the federal parole board attempted to achieve "more nearly uniform decisions" by adopting Parole Release Guidelines "more rigid[ly] [to] structur[e] . . . the Board's discretion." *Pickus v. U.S. Board of Parole*, 507 F.2d 1107, 1111 (D.C. Cir. 1974). The guidelines generated "a 'customary range' of confinement for various classes of offenders" through use of "a matrix, which combines a 'parole prognosis' score (based on the prisoner's . . . personal factors) and an 'offense severity' rating, to yield the

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[22] *Reform of the Federal Criminal Laws: Hearing Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary*, 95th Cong., 1st Sess., Pt. 13, at 9047 (1977) [hereinafter *Senate Hearing*].

[23] *See Developments in the Law*, *supra* note 21, at 1634, 1638–39.

[24] *See id.* at 94–97; K. Davis, *Discretionary Justice* 128–29 (1969).

[25] N.Y. State Special Comm'n on Attica, *Attica: The Official Report* 93 (1982).

'customary' time to be served in prison." *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 391 (1980). Congress "provided the first legislative authorization for parole release guidelines," *id.*, in 1976 by enacting the Parole Commission and Reorganization Act, Pub. L. No. 94-233, 90 Stat. 219, which delegated the task of promulgating guidelines to "reduc[e] the opportunity for sentencing disparity," S. Rep. No. 369, 94th Cong., 1st Sess. 18 (1975), to the Parole Commission, "an independent agency in the Department of Justice," 90 Stat. 219.

Although the parole guidelines achieved "a measure of success in reducing sentencing disparities,"[26] serious shortcomings in the division of responsibility between sentencing judges and the Parole Commission soon emerged. First, "disparities still remained because the initial decisions by judges whether to incarcerate an offender at all [or to grant probation] could not be controlled by the guidelines." *Id.* Second, "the guidelines . . . attempt[ed] to impose sentencing uniformity after the fact. Judges ha[d] no obligation to use the guidelines . . . in the initial sentencing decision." *Id.* The resulting anomaly was that judges and the Parole Commission often worked at cross-purposes: the Commission tried to equalize judges' disparate sentences, while the judges crafted sentences to achieve results they preferred despite the guidelines.[27] Further, the Parole Commission virtually abandoned any effort to factor rehabilitation into parole decisions,[28] despite the fact that rehabilitation had once been the sole criterion for parole. Thus, even more paradoxically, by the mid-1970s, the Parole Commission was making presumptive release decisions soon after sen-

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[26] P. O'Donnell, *supra* note 17, at 25.

[27] *See* Project, *Parole Release Decisionmaking and the Sentencing Process*, 84 Yale L.J. 810, 883-86 (1975).

[28] *See Geraghty v. U.S. Parole Comm'n*, 719 F.2d 1199, 1207 (3d Cir. 1983), *cert. denied*, 465 U.S. 1103 (1984); *Moore v. Nelson*, 611 F.2d 434, 438 (2d Cir. 1979).

tencing, based entirely on the factors used at sentencing.[29]

B. A Decade of Legislative Deliberation Led to Enactment of the Sentencing Reform Act

The legislative effort for sentencing reform grew directly out of the academic and professional criticisms leveled at the sentencing system. The idea of a commission to promulgate sentencing guidelines first appeared in legislative form in 1975, when Senator Kennedy introduced a bill, S. 2699, 94th Cong., 1st Sess. (1975), building on Judge Frankel's and Pierce O'Donnell's work, to authorize the Judicial Conference to appoint a commission to promulgate guidelines for consideration by courts as "the beginning of a concerted legislative effort to deal with sentencing disparity." 121 Cong. Rec. 37562 (1975). In the next Congress, Senators McClellan and Kennedy refined the sentencing commission concept in a criminal code reform bill[30] fashioned with the support of Attorney General Griffin Bell.[31] Their bill set forth statutory purposes of punishment for the first time ever, *id.*, § 101, and mandated creation of a commission in the judicial branch to promulgate guideline sentencing ranges to meet the

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[29] See 90 Stat. 224 (18 U.S.C. § 4208(a)); 28 C.F.R. §§ 2.12, 2.20 (1977); Project, *supra* note 27, at 892.

[30] The criminal code reform effort was spawned by the work of the National Commission on Reform of Federal Criminal Laws, which was charged to study the criminal justice system and recommend revision of the federal criminal laws, including "changes in the penalty structure." Act of Nov. 8, 1966, Pub. L. No. 89-801, § 3, 80 Stat. 1516, 1517. The Commission proposed recodifying the criminal code, regrading offenses to rationalize the sentencing structure, and instituting appellate review of sentencing. Nat'l Comm'n on Reform of Federal Criminal Laws, *Final Report* 271-317 (1971). The Commission's proposal was introduced in the Senate, S. 1, 93d Cong., 1st Sess. (1973); S. 1, 94th Cong., 1st Sess. (1975), and stimulated a decade of deliberation, before omnibus reform was abandoned in favor of a less comprehensive approach in 1982.

[31] S. 1437, 95th Cong., 1st Sess. (1977), *reprinted in Senate Hearing, supra* note 22, Pt. 13, at 9485-9792.

statutory "purposes of sentencing, avoiding unwarranted disparity while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors." *Id.*, § 241.

At the opening of hearings, Senator Kennedy stressed the importance "of a sentencing commission, which, hopefully, will report back to the Congress with guidelines for various Federal crimes. In addition, the bill requires written reasons be stated by the court at the time of sentence and provides for appellate review in cases where the sentence is above or below the prescribed guidelines. The bill thus deals with the critical problem of sentencing disparity." *Senate Hearing, supra* note 22, Pt. 13, at 8578–79. After a broad range of favorable testimony, *id.* at 8870–9057, the Senate Committee on the Judiciary reported the bill to the Senate, S. Rep. No. 605, 95th Cong., 1st Sess. (1977), which passed it, 124 Cong. Rec. 1463 (1978). Similar legislation was reported out of both Houses' judiciary committees in the next two Congresses,[32] but stalemate over comprehensive criminal code reform prevented enactment of a sentencing guidelines measure.

In the Ninety-Eighth Congress, a broad bipartisan consensus in favor of sentencing guidelines emerged. Guidelines provisions were contained in bills introduced by Senator Kennedy, S. 668, *reprinted in* 129 Cong. Rec. 3798, 3806 (1983), by Senators Thurmond and Laxalt on behalf of the Administration, S. 829, tit. II, *reprinted in* 129 Cong. Rec. S3077, S3080 (Mar. 16, 1983), and by Senator Dole on behalf of the Judicial Conference, S. 1182, *reprinted in* 129 Cong. Rec. S5659 (Apr. 28, 1983).

The Senate Judiciary Committee reported two bills containing identical guidelines provisions. S. 668, *reported by*

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[32] S. 1722, tit. III, *reported by* S. Rep. No. 553, 96th Cong., 2d Sess. (1980); H.R. 6915, *reported by* H.R. Rep. No. 1396, 96th Cong., 2d Sess. (1980). Neither House acted on the bills. In the 97th Congress, the Senate Judiciary Committee again reported guidelines legislation. S. 1630, § 126, *reported by* S. Rep. No. 307, 97th Cong., 2d Sess. (1982). Similar provisions passed the Senate by a vote of 95 to 1, 128 Cong. Rec. 26581 (1982), but were not approved by the House.

S. Rep. No. 223, 98th Cong., 1st Sess. (1983); S. 1762, tit. II, *reported by* S. Rep. No. 98-225. After extended debate [33] the Senate passed both bills by votes of 91 to 1, 130 Cong. Rec. S759 (Feb. 2, 1984), and 85 to 3, *id.* at S818-19. The House passed identical sentencing provisions as an amendment to H.R.J. Res. 648, the fiscal year 1985 continuing appropriations resolution. *Id.* at H10130-31 (Sept. 25, 1984). The Senate amended the sentencing title of H.R.J. Res. 648, *id.* at S13384, S13520 (Oct. 4, 1984), the House agreed to the Senate amendments after a conference, H.R. Conf. Rep. No. 1159, 98th Cong., 2d Sess. 415 (1984), and President Reagan signed the Sentencing Reform Act of 1984 into law. Pub. L. No. 98-473, § 211-239, 98 Stat. 1837, 1987.

II.

CONGRESS ADOPTED A GUIDELINES SYSTEM TO ELIMINATE UNWARRANTED DISPARITY BUT PERMIT JUSTIFIED INDIVIDUALIZATION IN SENTENCING

Thus, after more than a decade of deliberation over the continuing problem of sentencing disparity, Congress adopted a sentencing guidelines system in the Sentencing Reform Act of 1984. Congress determined that channeling and rationalizing judges' discretion through guidelines was the best way to achieve the two attributes of fair sentencing: filtering out disparities in the treatment of similarly situated cases while preserving individualized sentencing determinations based on legitimate differences between cases.

Congress concluded that formally structuring judicial discretion through guidelines would help, where voluntary exchanges of views among judges had failed, "to achieve the goal of avoiding disparity in sentences that

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[33] 129 Cong. Rec. S11679-S11712 (Aug. 4, 1983), S17077-80 (Nov. 18, 1983); 130 Cong. Rec. S329-33 (Jan. 27, 1984), S395-96, S425-33, S457-60 (Jan. 30, 1984), S521-36, S541-50 (Jan. 31, 1984), S751-59, S814-18 (Feb. 2, 1984).

are not justified by differences among offenses or offenders." S. Rep. No. 96-553, at 944. At the same time, Congress recognized that

> each offender stands before a court as an individual, different in some ways from other offenders. The offense, too, may have been committed under highly individual circumstances. Even the fullest consideration and the most subtle appreciation of the pertinent factors—the facts in the case; the mitigating or aggravating circumstances; the offender's characteristics and criminal history; and the appropriate purposes of the sentence to be imposed in the case—cannot invariably result in a predictable sentence being imposed. Some variation is not only inevitable but desirable.

S. Rep. No. 98-225, at 150.

Congress sought to meet the twin goals of equal and individualized treatment by requiring judges to sentence under the guidelines "unless the court finds that an aggravating or mitigating circumstance exists that was not adequately taken into consideration by the Sentencing Commission in formulating the guidelines and that should result in a [different] sentence." 18 U.S.C. § 3553(b) (Supp. IV 1986).[34] The Senate Judiciary Committee explained that, "[i]f the sentencing court felt the case was an entirely typical one for the applicable guideline category, it would have no adequate justification for deviating from the recommended range," because,

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[34] An earlier bill reported by the Senate Judiciary Committee had not included a specific standard to guide judges' decisions to follow or to depart from the guidelines, but had directed judges to "consider" the applicable guidelines along with other enumerated factors, including the need to avoid unwarranted disparities. S. 1437, 95th Cong., 1st Sess. § 101 (1977) (18 U.S.C. § 2003). Senator Gary Hart offered the more specific standard for departure as a floor amendment. 124 Cong. Rec. 382 (1978). Senator Kennedy agreed that the amendment furthered the Committee's intent to "make sure these guidelines are followed in the great majority of cases," and it was agreed to, *id.* at 383, and carried forward in subsequent bills.

> The need for consistency in sentences for similar offenders committing similar offenses should be sufficiently important to dissuade a judge from deviating from a clearly applicable guideline range simply because it would have promulgated a different range. The offender before him should not receive more favorable or less favorable treatment solely by virtue of the sheer chance that he is to be sentenced by a particular judge.

S. Rep. No. 95–605, Pt. 1, at 893.

"At the same time," Congress provided "the flexibility necessary to assure adequate consideration of circumstances that might justify a sentence outside the guidelines." S. Rep. No. 96–553, at 944. Congress "expected that most sentences will fall within the ranges recommended in the sentencing guidelines," but where "there is an offense or offender characteristic, not adequately considered by the Sentencing Commission, that justifies a sentence different from that provided . . . the judge [should be authorized to] deviate from the guideline's recommendation." S. Rep. No. 98–225, at 150. "A particular kind of circumstance, for example, might not have been considered by the Sentencing Commission at all because of its rarity, or it might have been considered only in its usual form and not in a particularly extreme form which happens to be present in a particular case." S. Rep. No. 96–553, at 944. Congress recognized that the guidelines could not "be imposed in a mechanistic fashion," because "the sentencing judge has an obligation to consider all the relevant factors in a case and to impose a sentence outside the guidelines in an appropriate case." S. Rep. No. 98–225, at 52.

In striking this balance between curbing unwarranted disparity and permitting individualized consideration of legitimate distinguishing factors, Congress rejected a proposal "which would have expanded significantly the circumstances under which judges could depart from the sentencing guidelines" to "whenever a judge determined that the characteristics of the offender or the circum-

stances of the offense warranted deviation, whether or not the Sentencing Commission had considered such offense and offender characteristics in the development of the sentencing guidelines." *Id.* at 79. Senator Thurmond explained that the ill of disparity demanded guidelines "that have teeth in them" and are not "merely advisory information for the judiciary to accept or reject based on each individual judge's view of the appropriateness of the guideline sentence." 130 Cong. Rec. S428 (Jan. 30, 1984).

Congress put additional "teeth" in the guidelines by authorizing appellate review of sentences that departed "unreasonabl[y]" from the guidelines, 18 U.S.C. § 3742(d)(3), "to assure that the guidelines are applied properly and to provide case law development of the appropriate reasons for sentencing outside the guidelines," S. Rep. No. 96-553, at 1136.[35] This limited appellate review "preserve[s] the concept that the discretion of a sentencing judge has a proper place in sentencing and should not be displaced by the discretion of an appellate court. At the same time, [it is] intended to afford enough guidance and control of the exercise of that discretion to promote fairness and rationality, and to reduce unwarranted disparity, in sentencing." S. Rep. No. 96-553, at 1136.

Congress slightly modified the departure standard in 1987 by altering the condition for sentencing outside the guidelines—if an aggravating or mitigating circumstance had not adequately been taken into account by the Commission—to permit departure if "the court finds that

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[35] The sentencing judge "shall state in open court . . . the specific reason for the imposition of a sentence" outside the guidelines. 18 U.S.C. § 3553(c). In determining whether a sentence departed unreasonably from the guidelines, the appellate court must consider "the [statutory] factors to be considered in imposing a sentence . . . and . . . the reasons for the imposition of the particular sentence, as stated by the district court" and "shall give due regard to the opportunity of the district court to judge the credibility of the witnesses, and shall accept the findings of fact of the district court unless they are clearly erroneous." *Id.* § 3742(d)(3).

there exists an aggravating or mitigating circumstance *of a kind, or to a degree*, not adequately taken into consideration by the Sentencing Commission." [36] "The addition of kind or degree [was] intended to make explicit what was intended when the Sentencing Reform Act was passed and [was] not intended to enlarge the court's authority to depart from the guidelines." [37] The change responded to the "concern . . . that without this phrase some courts might erroneously interpret the Sentencing Reform Act as limiting their ability to consider seriously aggravating or mitigating circumstances if those circumstances were mentioned at all by the guidelines, even if the case before the court was clearly different from what the Sentencing Commission had in mind in writing the guidelines." 133 Cong. Rec. H10021 (Nov. 16, 1987).

Through the departure and appellate review provisions, Congress carefully designed the guidelines system to achieve its goal of "provid[ing] a structure for evaluating the fairness and appropriateness of the sentence for an individual offender," without "eliminat[ing] the thoughtful imposition of individualized sentences." S. Rep. No. 98-225, at 52. Congress intended the guidelines to "enhance, rather than detract from, the individualization of sentences. Each sentence will be the result of careful consideration of the particular characteristics of the offense and the offender, rather than being dependent on the identity of the sentencing judge and the nature of his sentencing philosophy." *Id.* at 161. As this Court has recognized, sentencing guidelines "further an essential need of the Anglo-American criminal-justice system—to balance the desirability of a high degree of uniformity against the

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[36] 18 U.S.C.A. § 3553(b) (West Supp. 1988), *as amended by* Sentencing Act of 1987, Pub. L. No. 100-182, § 3(1)-(2), 101 Stat. 1266 (emphasis added to show change).

[37] 133 Cong. Rec. H10017 (Nov. 16, 1987) (Rep. Conyers); *accord id.* at S16648 (Nov. 20, 1987) (Sen. Kennedy); 23 Week. Comp. Pres. Doc. 1453 (Dec. 14, 1987).

necessity for the exercise of discretion." *McCleskey v. Kemp*, 107 S.Ct. 1756, 1777 n.35 (1987).

III.

CONGRESS'S ESTABLISHMENT OF A COMMISSION TO PROMULGATE SENTENCING GUIDELINES RESPECTS THE PROPER ROLES OF THE BRANCHES

Congress made three determinations to implement its decision to adopt guidelines sentencing. First, it delegated the task of promulgating guidelines to a commission. Second, it accompanied its delegation with detailed guidance. Third, it placed the commission in the judicial branch. Each of these decisions was based on sound considerations that respected the roles of the legislative and judicial branches.

A. Congress Sensibly Delegated the Task of Promulgating Guidelines to a Commission

After its decade-long effort at criminal code reform, *see supra* note 30, Congress established the Sentencing Commission based upon its considered view that rational and equitable sentencing could best be achieved by assigning the task of developing sentencing guidelines to a permanent independent agency. Experts testified that developing guidelines would require "time consuming . . . analysis of existing sentencing practice, and extensive simulations with alternative guideline models." [38] One commentator observed that, because of "the complexities and intricacies that are involved in establishing a scale of proportionate penalties for hundreds of different crimes," without delegation to an expert body, "[e]ither the scale will become ludicrous or the differences in crimes and culpability will become meaningless." R. Singer, *Just Deserts* 58 (1979).

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[38] *Revision of the Federal Criminal Code: Hearings Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 96th Cong., 1st Sess., Pt. 1, at 593 (1979) [hereinafter *1979 House Hearings*] (Prof. Andrew von Hirsch).

Further, because guidelines require "continued experimentation and revision over time—as experience reveals the difficulties, ambiguities and omissions of the original rules," Congress concluded that the guidelines should be written by an entity "capable of reviewing and adjusting the guidelines continually, in the light of accumulating experience." [39] Witnesses also pointed out that, because sentencing is not an area, like taxation, in which participation by all interests in the political process will produce a balanced outcome, delegation to an independent, professional body could produce fairer guidelines.[40] Based upon those considerations and states' recent experiences, Congress sensibly concluded that more refined guidelines to effect its purposes could be produced by a commission, rather than by Congress itself.

B. Congress Accompanied the Delegation to the Commission With Detailed Legislative Guidance

Contrary to the defendant's claim, Congress provided extensive instructions to guide the Sentencing Commission's delegated duty to "establish sentencing policies and practices." 28 U.S.C. § 991(b)(1). Most fundamentally, Congress charged the Commission with three goals: (1) to "assure the meeting of the purposes of sentencing as set forth" in the law; [41] (2) to "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

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[39] *1979 House Hearings, supra* note 38, at 593 (Prof. von Hirsch).

[40] *See Legislation to Revise and Recodify Federal Criminal Laws: Hearings on H.R. 6869 Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary,* 95th Cong., 1st & 2d Sess., Pt. 2, at 1344 (1977-78) (Prof. von Hirsch); R. Singer, *supra* p. 19, at 58-59.

[41] The Act established four purposes of sentencing: "(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (B) to afford adequate deterrence to criminal conduct; (C) to protect the public from further crimes of the defendant; and (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner." 18 U.S.C. § 3553(a)(2).

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;" and (3) to "reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process." 28 U.S.C. § 991(b)(1)(A)–(C).

Congress prescribed the specific tool—the guidelines system—for the Commission to use to regulate sentencing. Congress directed the Commission to develop a system of "sentencing range[s]" applicable "for each category of offense involving each category of defendant." *Id.* § 994(b). Congress expected "that there will be numerous guideline ranges, each range describing a somewhat different combination of offender characteristics and offense circumstances," including, for example, "several guideline ranges for a single offense varying on the basis of aggravating and mitigating circumstances." S. Rep. No. 98-225, at 168. Congress intended that there "be a complete set of guidelines that covers in one manner or another all important variations that commonly may be expected in criminal cases, and that reliably breaks cases into their relevant components and assures consistent and fair results." *Id.*[42]

Congress supplied two overarching constraints to the guidelines. First, the sentencing ranges must be "consistent with all pertinent provisions of title 18, United States Code," including all maximum sentences fixed by law. 28 U.S.C. § 994(b).[43] Second, for sentences of imprisonment, "the maximum of the range established for such a term shall not exceed the minimum of that range by more than the greater of 25 percent or 6 months, except that, if

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[42] Congress gave the Commission flexibility to design the guidelines "in the form of a series of grids, charts, formulas, or other appropriate devices, or perhaps a combination of such devices. . . . [T]he result will be sets of guidelines considerably more detailed than the existing parole guidelines." *Id.*

[43] The Commission may only recommend changes in maximum penalties. *Id.* § 994(r).

the minimum term of the range is 30 years or more, the maximum may be life imprisonment." *Id.* · § 994(b)(2). Through the interaction of this requirement and the directive that "all the ranges together . . . cover the spectrum from no, or little, imprisonment to the statutory maximum, or close to it," S. Rep. No. 98-225, at 168, Congress effectively set the degree of graduation of the entire guidelines system.

Congress provided additional direction to govern the severity or leniency of sentencing and the use of incarceration. Congress mandated "that the guidelines specify a sentence to a term of imprisonment at or near the maximum term authorized for categories of defendants . . . eighteen years old or older" on a third felony conviction for a crime of violence or drug trafficking. 28 U.S.C. § 994(h). Congress directed "that the guidelines specify a sentence to a substantial term of imprisonment" for defendants in five other specified categories of particularly serious criminal behavior. *Id.* § 994(i).[44] Descending the scale of criminal conduct, Congress stipulated that the guidelines reflect "the general appropriateness of imposing a term of imprisonment on a person convicted of a crime of violence that results in serious bodily injury" and "of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense." *Id.* § 994(j). Thus, Congress in effect legislated the entire hierarchy of punishment by creating four categories of sentences—imprisonment at or near the statutory maximum, substantial imprisonment, some imprisonment, and no imprisonment—and by stipulating

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[44] Congress mandated substantial incarceration for offenses constituting a third felony conviction, reflecting career criminal status, furthering a managerial role in a racketeering conspiracy, constituting a felony crime of violence while on release from another felony conviction, and involving trafficking in substantial quantities of drugs. *Id.*

the most important offense and offender characteristics to match defendants with the four categories.[45]

Beyond legislating the overall hierarchy of punishment, Congress provided abundant guidance about the specific factors to be used to construct the sentencing ranges that make up the guidelines matrix. Congress prescribed specific criteria to regulate the imposition of enhanced penalties for multiple offenses, 28 U.S.C. § 994(*l*), and required diminished punishment "to take into account a defendant's substantial assistance in the investigation or prosecution of another" offender, *id.* § 994(n). Equally significantly, Congress set forth factors that could not be used in the guidelines. Of critical importance to Congress's goal of eradicating discrimination, Congress ordered that the guidelines be "entirely neutral as to the race, sex, national origin, creed, and socioeconomic status of offenders." *Id.* § 994(d). Congress buttressed its command of equality by foreclosing the more subtle practice of ordering "imprisonment for the purpose of rehabilitating the defendant or providing the defendant with needed educational or vocational training, medical care, or other correctional treatment," *id.* § 994(k), and by requiring the guidelines to "reflect the general inappropriateness of considering the education, vocational skills, employment record, family ties and responsibilities, and community ties of the defendant" in decisions about imprisonment, *id.* § 994(e).[46]

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[45] It is thus simply untrue, as the defendant asserts, "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." Brief of Respondent-Petitioner John M. Mistretta 50 [hereinafter Mistretta Br.].

[46] Congress did permit the guidelines to take these factors into account to the extent "relevan[t] to the nature, extent, place of service, or other incidents of an appropriate sentence." *Id.* § 994(d) (2)–(3), (6)–(8). The Senate Judiciary Committee explained that factors such as education or family or community ties, although "generally inappro-

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Moreover, even where Congress delegated discretion, it detailed numerous factors for the Commission to consider. In the "establish[ment of] categories of offenses for use in the guidelines," Congress specified seven factors for the Commission to take into account where relevant: the grade of the offense; mitigating or aggravating circumstances of its commission; the nature and degree of the "harm caused," including whether it involved property, irreplaceable property, a person, a number of persons, or a breach of public trust; the community view of the offense's gravity; the public concern generated; general deterrence of commission of the offense; and the offense's incidence in the community and nation. 28 U.S.C. § 994(c). Similarly, in the establishment of categories of offenders, Congress spelled out specific factors for the Commission to consider, including the offender's age; mental and emotional condition; physical condition, including drug dependence; role in the offense; criminal history; and degree of dependence on criminal activity for a livelihood. *Id.* § 994(d)(1), (4)–(5), (9)–(11).[47]

The procedural contexts in which Congress required the Commission to function are a final source of legislative guidance. First, Congress ensured that guidelines would be developed in a historical context by instructing the Commission to ascertain the average prevailing sentences imposed. Congress made clear that "[t]he Commission shall not be bound by such average[s]," because "in many cases, current sentences do not accurately reflect

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priate in determining to sentence a defendant to a term of imprisonment or in determining the appropriate length of a term of imprisonment, . . . could play a role in determining in which prison facility a defendant might be incarcerated." S. Rep. No. 98-225, at 174.

[47] The legislative history supplies detailed guidance for these factors. For example, the "criminal history . . . factor includes not only the number of prior criminal acts—whether or not they resulted in convictions—the defendant has engaged in, but their seriousness, their recentness or remoteness, and their indication whether the defendant is a 'career criminal' or a manager of a criminal enterprise." S. Rep. No. 98-225, at 174.

the seriousness of the offense." 28 U.S.C. § 994(m).[48] Nevertheless, Congress's directive to use historical averages "as a starting point," 28 U.S.C. § 994(m), created an initial presumption in favor of prevailing norms to focus the Commission's discretion.[49]

Second, Congress placed the Commission in a professional, administrative, and political context to ensure continued guidance to the Commission. Congress instructed the Commission "to consult with authorities on, and individual and institutional representatives of, various aspects of the Federal criminal justice system" and periodically to "review and revise" the guidelines "in consideration of comments and data coming to its attention." *Id.* § 994(o).[50] Congress also made notice-and-comment procedures, 5 U.S.C. § 553, applicable to the promulgation of guidelines. 28 U.S.C. § 994(x). Congress provided a final measure of control over the Commission by requiring that the initial guidelines and all amendments be submitted to Congress six months before going into effect to permit Congress to delay, modify, or disapprove them by legislation. 18 U.S.C. § 3551 note; 28 U.S.C. § 994(p). This "report

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[48] The Senate Judiciary Committee gave specific examples of areas in which prevailing sentences might be deficient, including too lenient treatment of major white collar criminals. S. Rep. No. 98-225, at 177. It is thus untrue that the Commission's treatment of white collar crime "was not guided by a mandate from Congress." Mistretta Br. 50.

Congress's commitment to eradicating discrimination barred use of a strict historical basis. *See* Fisher & Kadane, *Empirically Based Sentencing Guidelines and Ethical Considerations*, in 2 Nat'l Res. Coun., *Research on Sentencing: The Search for Reform* 184 (1983) (difficulty of purging improper factor such as race from empirically based guidelines).

[49] Congress reinforced the guidelines' ties to prevailing sentencing practices by directing the Commission to "take into account" the availability of prison facilities and "to minimize" prison overcrowding. *Id.* § 994(g).

[50] The Probation System, the Bureau of Prisons, the Judicial Conference, the Criminal Division of the Justice Department, and the Federal Public Defenders Service were directed to submit comments on the guidelines and to suggest changes. *Id.*

and wait" process guarantees Congress's opportunity "to stay in the fray, as it should." [51]

C. Congress Placed the Commission in the Judicial Branch to Respect the Judiciary's Preeminent Role in Sentencing

Unlike Congress's typical delegation of authority that it had previously exercised legislatively, in the Sentencing Reform Act Congress delegated authority to structure decisionmaking previously exercised largely by individual district courts, not by Congress. Primarily for that reason, Congress "established [the Commission] as an independent commission in the judicial branch." *Id.* § 991(a). Congress "[p]lace[d] . . . the Commission in the judicial branch . . . based upon [its] strong feeling that, even under this legislation, sentencing should remain primarily a judicial function." S. Rep. No. 98-225, at 159. The Department of Justice agreed with the decision, "since the sentencing function that the Commission will be guiding is historically a judicial function, to repose ultimate responsibility for the guidelines in the judicial branch." [52] The Justice Department observed that, "[i]f guidelines were to be promulgated by an agency outside the judicial branch, it might be viewed as an encroachment on a judicial function and engender a circumspection on the part of sentencing judges that could impede the effective operation of the guidelines." *Id.*

After considerable adjustment,[53] Congress settled on a seven-member Commission, including at least three feder-

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[51] *Senate Hearing, supra* note 22, Pt. 13, at 8962 (Judge Harold Tyler). Congress also directed the General Accounting Office to study and report to Congress on the guidelines' impact after four years to permit Congress to evaluate whether to alter them. 28 U.S.C. § 994 note.

[52] *Senate Hearing, supra* note 22, Pt. 13, at 9005 (Act'g Ass't Att'y Gen. Ronald Gainer).

[53] *Compare* 128 Cong. Rec. 26512, 26515, 26581, 26598 (1982) (deleting requirement that 3 members be judges) *with* S. Rep. No. 98-223, at 156 (restoring requirement that 2 members be judges) *and* 130 Cong. Rec.

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al judges. 28 U.S.C. § 991(a).[54] Congress believed that including judges and others on the Commission would ensure that "sentencing policy [w]ould be formulated after examining a wide spectrum of views." S. Rep. No. 98-225, at 159. Congress vested authority to appoint the Commission in the President with the advice and consent of the Senate and, for the three judge-members, "after considering a list of six judges recommended to the President by the Judicial Conference." 28 U.S.C. § 991(a).[55] Congress prescribed Presidential appointment with confirmation to obtain "the highest quality of membership." S. Rep. No. 98-225, at 160. Directing the President to consider judges recommended by the Judicial Conference "enable[s] judges to participate in, without controlling, the process of establishing and adjusting the sentencing guidelines and to lend their expertise and experience to that process." 130 Cong. Rec. S527 (Jan. 31, 1984) (Sen. Laxalt).

Presidential appointment also ensured adherence to the Appointments Clause, Art. II, sec. 2, cl. 2, of the Constitution. Initially, the Senate Judiciary Committee had bridged the gulf between proposals for the Judicial Conference to appoint the Commission [56] and bills providing for Presidential appointment [57] by combining the two approaches and permitting the President to appoint four members with confirmation and the Judicial Conference to designate three members.[58] The Committee believed

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S13077, S13384, S13520 (Oct. 4, 1984) (restoring requirement that 3 members be judges).

[54] The Attorney General's designee and the Chairman of the Parole Commission are nonvoting members. *Id.*; 18 U.S.C. § 3551 note.

[55] Congress required the President to appoint on a bipartisan basis "after consultation with representatives of judges, prosecuting attorneys, defense attorneys, law enforcement officials, senior citizens, victims of crime, and others interested in the criminal justice process." *Id.*

[56] *E.g.*, S. 2699, 94th Cong., 1st Sess. § 5 (1975); S. 1437, 95th Cong., 1st Sess. § 241 (1977) (as introduced).

[57] *E.g.*, S. 204, 95th Cong., 1st Sess. § 4(a)(1) (1977).

[58] S. 1437, 95th Cong., 1st Sess. § 124 (1977) (as reported).

that participation by the President and the Senate, in addition to the judiciary, in selecting the Commission would reflect "the other branches['] . . . strong interest in assuring fair and effective sentencing" and "assure a broadly representative membership" on the commission. S. Rep. No. 95–605, Pt. 1, at 1159.

In response to an objection that appointment by the Judicial Conference was improper under the Appointments Clause and *Buckley v. Valeo*, 424 U.S. 1 (1976),[59] Senator Gary Hart offered an amendment specifying Presidential appointment after recommendations of the Judicial Conference. 124 Cong. Rec. 377 (1978). Senator Hart explained that his proposal would ensure that the Judicial Conference's "recommendations are considered" and provide "greater assurance that a broad range of interests will be represented. . . . Sentencing is an important concern of the Congress. If we are to delegate this important responsibility, we must at least play a major role in deciding who assumes that responsibility." *Id.* at 378. Although Department of Justice analysis "satisfied [Senator Kennedy] that there is no constitutional issue," he accepted the amendment, which "insures the input of the Judiciary and also preserves the Presidential authority in making the appointment," while "cur[ing]" any constitutional question. *Id.* The Senate accepted the amendment, *id.* at 381, which was carried forward in the Sentencing Reform Act.[60]

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[59] Senator William Scott argued that commission members were not "inferior Officers" who could be appointed by "the Courts of Law," and that, if they were, the Judicial Conference was "an association of judges, not a court" within the meaning of the Clause. 124 Cong. Rec. 296–97 (1978).

[60] The President was also given the power to remove members of the Commission "only for neglect of duty or malfeasance in office and for other good cause shown." 28 U.S.C. § 991(a). Congress vested removal authority in the President not to give him supervisory authority or control over the Commission, which, after all, it deliberately "es-

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Defendant claims that the Sentencing Reform Act is not entitled to the normal presumption of constitutionality because separation of powers questions he presents were not considered by the Congress. Mistretta Br. 13–14. The history of the Act shows that the Congress strove to resolve problems relating to fundamental constitutional values. The effort to eliminate arbitrary and invidious disparities in sentencing is, at its heart, an effort to imbue sentencing practices with the values of the due process clause, by implementing that clause's command of equal protection in a manner consistent with the imperatives of proper individualization. To achieve that goal, the Congress has created a system that not only respects the roles of the separate branches, but creatively draws upon the special strengths of each. A fair reading of the history of Congress's efforts shows that the presumption of constitutionality has been well earned.

CONCLUSION

The constitutionality of the Sentencing Reform Act should be sustained.

Respectfully submitted,

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AUGUST 1988.

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tablished as an independent commission in the judicial branch." *Id.* Rather, originally, when a split appointment mechanism had been contemplated, the Senate Judiciary Committee had provided for Commission members to be removed by the respective "authority appointing or designating them only for malfeasance in office." S. 1437, 95th Cong., 1st Sess. § 124 (1977) (as reported). Accordingly, when Congress shifted all appointment authority to the President, it also transferred to him removal responsibility. 124 Cong. Rec. 380 (1978).