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 CROSS-PETITIONS FOR A WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF THE UNITED STATES SENATE AS AMICUS CURIAE

MICHAEL DAVIDSON
(Counsel of Record),
Senate Legal Counsel

KEN U. BENJAMIN, Jr.
Deputy Senate Legal Counsel,

MORGAN J. FRANKEL,
Assistant Senate Legal Counsel,
642 Hart Senate Office Building,
Washington, D.C. 20510
(202) 224-4435

May 1988

CONTENTS

AUTHORITIES

In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-1904

UNITED STATES OF AMERICA, PETITIONER

v.

JOHN M. MISTRETTA, RESPONDENT

No. 87-7028

JOHN M. MISTRETTA, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

ON CROSS-PETITIONS FOR A WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF THE UNITED STATES SENATE AS AMICUS CURIAE

INTEREST OF THE AMICUS CURIAE

The defendant in this case has mounted a broad scale attack on the constitutionality of the sentencing guidelines system established by the Congress as part of the Sentencing Reform Act of 1984. As we explain below, that system—the most ambitious effort ever undertaken by Congress to reconsider the manner in which sentences are imposed on federal criminal defendants—was the product of substantial bipartisan efforts, over a period of more than a decade, within the Congress. The United

States Senate has a strong interest in ensuring that legislation that it has enacted is defended in this Court. *See, e.g., INS* v. *Chadha,* 462 U.S. 919, 939, 940 (1983); *Bowsher* v. *Synar,* 478 U.S. 714 (1986); *Morrison* v. *Olson,* No. 87-1279.[1]

DISCUSSION

For many years, members of Congress have been concerned about the "existence of widespread disparities in the sentences imposed by Federal courts . . . in different parts of the country, between adjoining districts, and even in the same districts." H.R. Rep. No. 1946, 85th Cong., 2d Sess. 6 (1958). Thirty years ago, Congress attempted to attain uniformity in sentencing by authorizing the creation of sentencing institutes and joint councils to formulate advisory "objectives, policies, standards, and criteria for sentencing." 28 U.S.C. § 334(a). These attempts proved largely unsuccessful, however, because the sentencing institutes and councils were purely advisory. In light of the continuing problem, a decade later the National Commission on Reform of Federal Criminal Laws proposed a comprehensive reform of federal sentencing. *See* National Commission on Reform of Federal Criminal Laws, *Final Report* 271-317 (1971), *reprinted in Reform of the Federal Criminal Laws: Hearings Before the Subcomm. on Criminal Laws and Procedures of the Sen. Comm. on the Judiciary,* 92d Cong., 1st Sess., Pt. 1, at 129, 424-69 (1971).

Congress held extensive hearings on the National Commission's Final Report. As a result, the Senate included sentencing reform provisions in a bill to revise the crimi-

---

[1] This appearance as amicus is pursuant to 2 U.S.C. § 288e(a), which provides that the Senate may direct its Legal Counsel to appear as amicus curiae in its name "in any court of the United States . . . in which the powers and responsibilities of Congress under the Constitution of the United States are placed in issue." Permission to appear is "of right" and may be denied only for untimeliness. 2 U.S.C. § 288*l*(a). *See* S. Res. 434, 100th Cong., 2d Sess. (1988), 134 Cong. Rec. S6525 (daily ed. May 24, 1988) (directing appearance in this case).

nal code, S. 1437, 95th Cong., 1st Sess. (1977), which the Senate passed on January 30, 1978. 124 Cong. Rec. 1463 (1978). These sentencing reform proposals were carried forward in S. 1722, 96th Cong., 1st Sess. § 125 (1979), and S. 1630, 97th Cong., 1st Sess. § 125 (1981). The proposals were strongly endorsed by the Attorney General's Task Force on Violent Crime (*see* Attorney General's Task Force on Violent Crime, *Final Report* 56–57 (1981)) and were included in S. 2572, 97th Cong., 2d Sess. (1982), which the Senate passed on September 30, 1982. 128 Cong. Rec. 26581 (1982).

Enactment of the Sentencing Reform Act was finally achieved in the Ninety-Eighth Congress. After further hearings,[2] the Committee on the Judiciary reported to the Senate with strong bipartisan support two bills containing sentencing guideline provisions. S. 668, 98th Cong., 1st Sess. (1983), *reported by* S. Rep. No. 223, 98th Cong., 1st Sess. (1983); S. 1762, 98th Cong., 1st Sess. (1983), *reported by* S. Rep. No. 225, 98th Cong., 1st Sess. (1983), *reprinted in* 1984 U.S. Code Cong. & Ad. News 3182. The sentencing reform proposals were debated extensively on the floor,[3] and the Senate passed both bills, as it had in earlier Congresses, by overwhelming votes. 130 Cong. Rec. S759, S818–19 (daily ed. Feb. 2, 1984). After the House of Representatives passed similar provisions, 130 Cong. Rec. H10130–31 (daily ed. Sept. 25, 1984), the Sentencing Reform Act of 1984 was enacted into law as part of the Comprehensive Crime Control Act of 1984, Pub. L. No. 98–473, 98 Stat. 1976.

The Senate Committee on the Judiciary set forth the reasons for this landmark legislation:

---

[2] Hearings were held on S. 829, 98th Cong., 1st Sess. (1983), the Administration's criminal code reform package, which included the sentencing reform provisions. *Comprehensive Crime Control Act of 1983: Hearings Before the Subcomm. on Criminal Law of the Sen. Comm. on the Judiciary,* 98th Cong., 1st Sess. (1983).

[3] 130 Cong. Rec. S329–33 (daily ed. Jan. 27, 1984); *id.* at S425–33, S457–60 (Jan. 30, 1984); *id.* at S521–36, S541–50 (Jan. 31, 1984); *id.* at S751–59, S814–18 (Feb. 2, 1984).

> In the Federal system today, . . . each judge is left to apply his own notions of the purposes of sentencing. As a result, every day Federal judges mete out an unjustifiably wide range of sentences to offenders with similar histories, convicted of similar crimes, committed under similar circumstances. One offender may receive a sentence of probation, while another—convicted of the very same crime and possessing a comparable criminal history—may be sentenced to a lengthy term of imprisonment. Even two such offenders who are sentenced to terms of imprisonment for similar offenses may receive widely differing prison release dates; one may be sentenced to a relatively short term and be released after serving most of the sentence, while the other may be sentenced to a relatively long term but be denied parole indefinitely.

S. Rep. No. 98-225, *supra*, at 38.

Congress determined that these disparities, whether they occur at sentencing or at the parole stage, "can be traced directly to the unfettered discretion the law confers on those judges and parole authorities responsible for imposing and implementing sentence." *Ibid.* The Sentencing Reform Act sought to remedy this defect by abolishing parole, substituting a system of determinate sentences, and providing sentencing courts with explicit direction, in the form of binding guidelines that prescribe the kinds and lengths of sentences appropriate for typical federal offenders. Congress legislated in detail the purposes of the new sentencing guidelines system (18 U.S.C. § 3553(a)(2)), the sentencing decisions covered by the guidelines (28 U.S.C. § 994(a)), the permissible range of the guidelines (28 U.S.C. § 994(b)), the factors that the guidelines must take into account (28 U.S.C. § 994(f)–(j), (*l*)–(n)), the factors that the guidelines may take into account (28 U.S.C. § 994(c)–(d)), and the factors that the guidelines may not take into account (28 U.S.C. § 994 (e), (k)).

In order to "make criminal sentencing fairer and more certain," S. Rep. No. 98-225, *supra*, at 65, Congress re-

quired sentencing courts to impose sentences "of the kind, and within the range" prescribed by the guidelines, 18 U.S.C. § 3553(b), developed by an independent commission of judges and other sentencing experts within the judicial branch. 28 U.S.C. § 991(a). However, a court may impose a sentence outside the range mandated by an applicable guideline whenever "there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." 18 U.S.C. § 3553(b) (as amended by the Sentencing Act of 1987, Pub. L. No. 100-182, § 3, 101 Stat. 1266). This limited authority for sentencing courts to deviate from the otherwise mandatory guidelines provides "the flexibility necessary to assure adequate consideration of circumstances that might justify a sentence outside the guidelines," because a factor either is too rare to have been considered by the Commission or was "considered only in its usual form and not in the particularly extreme form present in a particular case." S. Rep. No. 98-225, *supra*, at 78, 79.

Congress determined that its objective of sentencing uniformity would best be achieved by delegating the authority to promulgate sentencing guidelines to an independent commission in the judicial branch, rather than itself undertaking the duty to translate the standards that it legislated into specific sentencing ranges. Congress reasonably concluded that the task of developing guidelines pursuant to the statutory standards should be delegated to a body that could make a permanent commitment of resources, because "the task involves complex issues requiring continuous monitoring and fine tuning." S. Rep. No. 307, 97th Cong., 1st Sess. 976 (1982).

Congress determined that this responsibility for creating and revising sentencing guidelines should remain within the judicial branch, because of its "strong feeling that, even under this legislation, sentencing should

remain primarily a judicial function." S. Rep. No. 98-225, *supra*, at 159. Congress believed that locating the sentencing commission in the judicial branch would best accommodate its view that judges, who "have been among the most articulate spokesmen for sentencing reform," *id.* at 64, should be able to serve on the Commission without sacrificing their lifetime appointments, "since the judge will remain in the judicial branch and will be engaged in activities closely related to traditional judicial activities," *id.* at 163.

At the same time, Congress determined that "all three branches of government, rather than only the judicial branch, [should] participate in the selection of members of the Sentencing Commission." *Id.* at 64. Congress accordingly required that the seven voting members of the Commission—including at least three members chosen from a list of judges submitted by the Judicial Conference—be appointed by the President by and with the advice and consent of the Senate. 28 U.S.C. § 991(a). "This permits legislative branch participation in the selection of members of the body to which Congress will be delegating some of its authority to set sentencing policy." S. Rep. No. 98-225, *supra*, at 64.

Finally, Congress expressed its intent that the Commission function as an independent, balanced, and expert body by requiring the President to make the appointments "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," by providing that "[n]ot more than four members of the Commission shall be members of the same political party," and by limiting the President's authority to remove members to grounds of "neglect of duty or malfeasance in office or for other good cause shown." 28 U.S.C. § 991(a). As the Senate Committee on the Judiciary explained, the Congress believed that the "extraordinary powers and responsibilities vested in the Commission . . . demand the

highest quality of membership." S. Rep. No. 98-225, *supra*, at 160.

On January 27, 1988, the Attorney General formally notified the President pro tempore of the Senate that, while the executive branch would defend the Act, it would take the position that the Congress may delegate only to the executive branch, but not to the judicial branch, the function of formulating general rules such as sentencing guidelines. The United States has adhered to that position in the lower courts in which the issue has arisen.[4] In contrast, the Sentencing Commission has striven to articulate to the courts a full defense of the Sentencing Reform Act of 1984. We therefore request the Court not only to act expeditiously to resolve the challenges to the Act, but also to accord to the Sentencing Commission a plenary role in presenting to the Court a complete understanding of Congress's carefully balanced effort to "meet[] the critical challenge of sentencing reform." *Id.* at 65.

CONCLUSION

For the foregoing reasons, the petitions for a writ of certiorari before judgment should be granted.

Respectfully submitted,

MICHAEL DAVIDSON,
Senate Legal Counsel,
KEN U. BENJAMIN, JR.,
Deputy Senate Legal Counsel,
MORGAN J. FRANKEL,
Assistant Senate Legal Counsel.

MAY 1988.

---

[4] According to the most recent information available to the Sentencing Commission, 119 district judges have ruled upon the constitutionality of the Sentencing Reform Act: 49 have upheld the statute and 70 have invalidated it.