No. 87-1904

In the

Supreme Court of the United States

OCTOBER TERM, 1987

UNITED STATES OF AMERICA,

Petitioner,

v.

JOHN M. MISTRETTA,

Respondent.

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

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QUESTIONS PRESENTED

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

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

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

3. Whether, if the sentencing guidelines are invalid, the 1984 amendments to the statutes governing parole and "good time" credits are severable and therefore apply to defendants sentenced for crimes committed after November 1, 1987.

PARTIES TO THE PROCEEDING

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page

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JOHN M. MISTRETTA

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

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari before judgment to review the judgment of the United States District Court for the Western District of Missouri in this case.

OPINION BELOW

The opinion of the district court (App., *infra*, 1a-15a) is not yet reported.

JURISDICTION

The judgment of the district court (App., *infra*, 33a-40a) was entered on April 18, 1988. The notice of appeal (App., *infra*, 41a-44a) was filed on April 19, 1988. The case was docketed in the court of appeals on April 22, 1988, as No. 88-1616WM (App., *infra*, 45a-46a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 2101(e).

Under 28 U.S.C. 1254(1), this Court may grant a petition for a writ of certiorari to review any case that is "in" the court of appeals, even if a final judgment has not yet been entered by that court. *United States* v. *Nixon*, 418 U.S. 683, 692 (1974). Even the party that prevailed in the district court may seek review in this Court on a petition for a writ of certiorari before judgment. *Id.* at 686, 690. Because a notice of appeal has been filed and this case has been properly docketed in the court of appeals, it comes within 28 U.S.C. 1254(1). *United States* v. *Nixon*, 418 U.S. at 692; *Gay* v. *Ruff*, 292 U.S. 25, 30-31 (1934); see *Dames & Moore* v. *Regan*, 453 U.S. 654, 667-668 (1981); R. Stern, E. Gressman, & S. Shapiro, *Supreme Court Practice* § 2.3, at 42 (6th ed. 1986). Under 28 U.S.C. 2101(e), a petition for a writ of certiorari before judgment is timely if it is filed "at any time before judgment."

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant provisions of Articles I, II, and III of the Constitution of the United States, of the Fifth Amendment to the Constitution of the United States, and of the Sentencing Reform Act of 1984, 18 U.S.C. (Supp. IV) 3551 *et seq.* and 28 U.S.C. (Supp. III) 991-998, as amended by the Sentencing Act of 1987, Pub. L. No. 100-182, 101 Stat. 1266,[1] are reproduced at App., *infra*, 47a-85a.

STATEMENT

A. The Statutory Scheme

The Sentencing Reform Act of 1984 created the United States Sentencing Commission as "an independent com-

[1] The Sentencing Reform Act of 1984 was enacted as Title II of the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987.

mission in the judicial branch of the United States." 28 U.S.C. (Supp. III) 991(a). The Commission is a permanent body with seven voting members, at least three of whom must be federal judges.[2] The members of the Commission are chosen by the President, with the advice and consent of the Senate, after considering a list of six judges recommended by the Judicial Conference of the United States. *Ibid.* The members are also removable by the President for good cause; otherwise, they serve six-year terms. 28 U.S.C. (Supp. III) 992(a).

The primary function of the Commission is to develop determinate guidelines to be used by the federal courts for sentencing purposes.[3] The Commission is responsible for issuing guidelines that "provide certainty and fairness in meeting the purposes of sentencing," while "avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct" and "maintaining sufficient flexibility to permit individualized sentences" where appropriate. 28 U.S.C. (Supp. III) 991(b)(1)(B); see also 28 U.S.C. (Supp. III) 994(a)-(n). The guidelines must address the following sentencing decisions: (1) whether to impose a sentence of probation, a fine, or imprisonment; (2) what fine or term of probation or imprisonment should be imposed; (3)

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

[3] The Commission also has the continuing responsibility to review and modify the guidelines on a regular basis. 28 U.S.C. (Supp. III) 994(*o*)-(u), as redesignated by the Narcotics Penalties and Enforcement Act of 1986, Pub. L. No. 99-570, Tit. I, Subtit. A, § 1008, 100 Stat. 3207-7 to 3207-8. Amendments to the guidelines take effect automatically unless, within 180 days after the amendments are reported, specific legislation provides otherwise. 28 U.S.C. (Supp. III) 994(*o*), as redesignated by § 1008, 100 Stat. 3207-7 to 3207-8.

whether imprisonment should be followed by a period of supervised release, and, if so, for what term; and (4) whether multiple sentences should run concurrently or consecutively. 28 U.S.C. (Supp. III) 994(a)(1).

The guidelines must establish categories for offenses and defendants and must define a sentencing range "for each category of offense involving each category of defendant." 28 U.S.C. (Supp. III) 994(b). That range must be "consistent with all pertinent provisions of title 18" (28 U.S.C. (Supp. III) 994(b)), and the range of imprisonment may not vary by more than the greater of six months or 25% from the minimum to the maximum sentence. 28 U.S.C. (Supp. III) 994(b)(2), as amended by the Sentencing Guidelines Act of 1986, Pub. L. No. 99-363, § 2, 100 Stat. 770. The Commission is also instructed to determine average current sentences in each category of cases "as a starting point in its development of the initial sets of guidelines." 28 U.S.C. (Supp. III) 994(m).

In establishing categories of offenses, the Commission must decide how much (if any) weight to give to seven enumerated factors "among others." 28 U.S.C. (Supp. III) 994(c). Those factors include the grade of the offense, mitigating or aggravating circumstances, the harm caused by the offense, the community's view of the gravity of the offense, the public concern that the offense generated, the deterrent effect that a particular sentence may have on the commission of the offense by others, and the current incidence of that offense. *Ibid.* Similarly, in establishing categories of defendants, the Commission must decide how much (if any) weight to give to 11 enumerated factors "among others." 28 U.S.C. (Supp. III) 994(d). Those factors include the defendant's age, education, vocational skill, mental and emotional condition, physical condition, employment record, family ties and responsibilities, com-

munity ties, role in the offense, criminal history, and degree of dependence on crime for a livelihood. *Ibid.*

It is somewhat inaccurate to refer to the Commission's work as "guidelines," because they are binding on all federal judges. The Act states that a sentencing court "shall impose a sentence of the kind, and within the range [set forth in the Sentencing Commission's guidelines] unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, that was not adequately taken into consideration by the Sentencing Commission in formulating the guidelines and that should result in a sentence different from that described."[4] 18 U.S.C. (Supp. IV) 3553(b), as amended by the Sentencing Act of 1987, Pub. L. No. 100-182, § 3, 101 Stat. 1266. At sentencing, a judge must state the reasons for the sentence he imposes, and he must give "the specific reason for the imposition of a sentence different from that described" in the applicable guidelines. 18 U.S.C. (Supp. IV) 3553(c). A defendant may appeal a sentence that is more severe than the one defined by the applicable guidelines; the government may appeal a sentence that is less severe than the one defined by the guidelines; and either party may appeal a sentence that is imposed as a result of an incorrect application of the guidelines. 18 U.S.C. (Supp. IV) 3742(a), (b), and (c).

The Sentencing Reform Act of 1984 also prospectively abolished the United States Parole Commission, which served as an independent agency within the Department of Justice, 18 U.S.C. (& Supp. IV) 4201 *et seq.* The Parole Commission remains in office with jurisdiction over pre-guideline offenses until 1992, five years after the effective

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[4] Congress expected that fewer than 20% of sentences would be imposed outside the guidelines. S. Rep. 98-225, 98th Cong., 2d Sess. 52 n.71 (1983).

date of the guidelines. The Sentencing Reform Act of 1984, Pub. L. No. 98-473, § 235(b)(2), 98 Stat. 2032.

The Sentencing Commission promulgated sentencing guidelines in 1987. They were submitted to Congress for a statutory six-month waiting period,[5] and no statute was enacted postponing their effective date. The guidelines went into effect on November 1, 1987, and they apply to crimes committed on or after that date.[6]

B. The Proceedings In This Case

1. Respondent was indicted in the United States District Court for the Western District of Missouri on three offenses arising out of the December 3, 1987, sale of cocaine to an undercover agent of the Drug Enforcement Agency. App., *infra*, 16a-18a.[7] Respondent moved to have the sentencing guidelines held unconstitutional on the grounds that the Sentencing Commission was constituted in violation of separation of powers principles, and that Congress delegated excessive authority to the Sentencing Commission to establish binding determinate sentencing guidelines.

The district court rejected respondent's contentions. App., *infra*, 1a-6a.[8] The court rejected respondent's dele-

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[5] The Sentencing Reform Act of 1984, Pub. L. No. 98-473, § 235(a)(1)(B)(ii)(III), 98 Stat. 2032.

[6] The government has taken the position that the guidelines apply to offenses committed entirely on or after the effective date of the Act and to continuing offenses, *i.e.*, crimes that are begun before the effective date of the Act but are not completed until afterwards.

[7] Respondent's co-defendant Nancy Ruxlow was indicted along with respondent, but no judgment was entered as to her.

[8] Because the claims presented by respondent were identical to the claims raised by other defendants, argument on respondent's motion was presented to a panel of district court judges in the Western

gation argument on the ground that the Sentencing Commission is an Executive Branch agency and that its guidelines are similar to the substantive rules that are commonly promulgated by other executive agencies. *Id.* at 2a-4a. The court also rejected respondent's claim that the Sentencing Reform Act of 1984 is unconstitutional because it requires that three federal judges serve on the Commission. *Id.* at 4a-5a. The court reasoned that "[v]oluntary service of Article III judges in the Executive Branch is sanctioned by the history of judicial conduct as early as the Washington and Adams administrations, is not forbidden by the constitutional prohibition on dual service (applicable to members of Congress), and has continued occasionally from the Truman administration to date." *Ibid.* The court added that "[t]he contrary result * * * would deprive the Sentencing Commission of judicial insights in order to protect the independence of the judiciary," which "would be a regrettable and unnecessary insistence on maintenance of functional purity." *Id.* at 5a.

2. Respondent thereafter pleaded guilty to conspiracy to possess cocaine with the intent to distribute it,[9] and he was sentenced on April 15. Before sentence was imposed, respondent moved to have the guidelines held invalid under the Due Process Clause, on the ground that they unreasonably interfered with a trial judge's sentencing discretion. App., *infra*, 26a-27a. The district court denied the motion (*id.* at 28a) and sentenced respondent pursuant to the guidelines to 18 months' imprisonment, to be followed by a three-year term of supervised release. *Id.* at

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District of Missouri. Several judges joined in the opinion below upholding the guidelines; one judge dissented.

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

30a, 35a, 37a. The district court also imposed a $1,000 fine and a $50 special assessment. *Id.* at 31a, 40a.

REASONS FOR GRANTING THE PETITION

A petition for a writ of certiorari before judgment in a case pending in a court of appeals will be granted "only upon a showing that the case is of such imperative public importance as to justify the deviation from normal appellate practice and to require immediate settlement in this Court." Sup. Ct. R. 18. This case meets that strict criterion.

1. This Court on several occasions has issued a writ of certiorari before judgment when it was necessary to obtain expeditious resolution of exceptionally important legal questions. For example, the Court issued a writ of certiorari before judgment in *Dames & Moore* v. *Regan*, 453 U.S. 654 (1981) (Iran hostage agreement); *United States* v. *Nixon*, 418 U.S. 683 (1974) (subpoena to the President); *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579 (1952) (the steel seizure case); and *Ex parte Quirin*, 317 U.S. 1 (1942) (President's assignment to a military tribunal of jurisdiction over the trial of belligerent saboteurs). See Lindgren & Marshall, *The Supreme Court's Extraordinary Power to Grant Certiorari Before Judgment in the Court of Appeals*, 1986 Sup. Ct. Rev. 259. The constitutionality of the Sentencing Reform Act of 1984 concerns a subject of equal national importance.

The fundamental question presented by this case is whether Congress may empower a commission, consisting in part of federal judges, who are appointed and removable by the President, to establish binding and determinate sentencing standards for criminal cases. It is not an overstatement to say that that question is one of the most important questions regarding federal criminal procedure

ever to come before this Court. The Sentencing Reform Act of 1984 was the product of a decade-long effort to reform the sentencing process in federal criminal cases in order to promote the purposes of punishment while eliminating unjustified disparities in the sentences imposed on convicted defendants. The sentencing guidelines promulgated by the Sentencing Commission will govern or affect the sentences imposed for virtually every felony and most misdemeanors committed on or after November 1, 1987, and ultimately will be applied in approximately 40,000 cases every year.

The constitutionality of the Sentencing Reform Act of 1984 and of the sentencing guidelines has been challenged in more than 400 cases across the nation, and the district courts are sharply divided on that question. As of May 11, 1988, the guidelines sentencing system has been upheld by 21 district courts[10] and held unconstitutional by

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[10] In addition to the decision below, the following district courts have upheld the constitutionality of the Act and the guidelines. *United States* v. *Etienne*, No. 87 Cr. 791 (E.D.N.Y. May 5, 1988); *United States* v. *Lambert*, No. A88-88-3-CR (D. Alaska May 4, 1988); *United States* v. *Alves*, Crim. No. 88-11-MA (D. Mass. May 3, 1988); *United States* v. *Dixon*, Crim. No. 3-88-29-16 (D.S.C. Apr. 27, 1988); *United States* v. *Amodu*, No. 87 Cr. 763 (ERK) (E.D.N.Y. Apr. 26, 1988); *United States* v. *Burroughs*, No. H-87-312 (S.D. Tex. Apr. 22, 1988); *United States* v. *Ayarza*, No. A88-019CR (D. Alaska Apr. 22, 1988); *United States* v. *Knox*, No. CR88-11D (W.D. Wash. Apr. 21, 1988); *United States* v. *Amesquita-Padilla*, No. CR87-264R (W.D. Wash. Apr. 20, 1988); *United States* v. *Macias-Pedroza*, No. CR 88-13 TUC RMB (D. Ariz. Apr. 19, 1988); *United States* v. *Velasquez*, No. 88-07-CR-ORL-18 (M.D. Fla. Apr. 11, 1988); *United States* v. *Myers*, No. CR 87-0902-TEH (N.D. Cal. Apr. 11, 1988); *United States* v. *Mead & Sanchez*, No. G87-13501-CR (W.D. Mich. Mar. 31, 1988); *United States* v. *Ocabe*, No. 88-3233 (E.D. La. Mar. 23, 1988); *United States* v. *Ortega*, No. EP-87-CR-274 (W.D. Tex. Mar. 23, 1988); *United States* v. *Erves*, Crim. No. 87-178-A (N.D. Ga. Mar. 23, 1988); *United States* v. *Franco*, No. 87-44 (E.D. Ky. Mar. 21, 1988); *United*

29.[11] This widespread and entrenched division has created intolerable uncertainty about the sentencing process. Unless this Court promptly settles the dispute, the federal criminal justice system not only will suffer from this

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States v. *Chambless*, Crim. No. 87-609 (E.D. La. Mar. 9, 1988); *United States* v. *Hukel*, No. L-87-418 (W.D. Tex. Mar. 4, 1988); *United States* v. *Ruiz-Villanueva*, Crim. No. 87-1296-E (S.D. Cal. Feb. 29, 1988); *United States* v. *Grimaldo*, No. G-87-33 (S.D. Tex. Feb. 26, 1988).

[11] The following district courts have ruled that the Act or the sentencing guidelines are unconstitutional. *United States* v. *Fonseca*, Crim. No. 87-00159 (S.D. Ala. May 11, 1988); *United States* v. *Diaz*, Crim. No. 87-00159 (S.D. Ala. May 11, 1988); *United States* v. *DiBiase*, Crim. No. N-88-4 (JAC) (D. Conn. May 6, 1988); *United States* v. *Troiano*, Crim. No. D-88-3 (EBB) (D. Conn. May 6, 1988); *United States* v. *Martinez-Ortega*, Crim. No. 87-40023 (D. Idaho May 6, 1988); *United States* v. *Cardona*, Crim. No. 88-67 (S.D. Tex. May 5, 1988); *United States* v. *Lopez*, No. CR 88-050-R (C.D. Cal. May 5, 1988); *United States* v. *Rios*, No. 87 Cr. 963 (WK) (S.D.N.Y. May 3, 1988); *United States* v. *Russell*, No. CR 88-7 (N.D. Ga. Apr. 29, 1988); *United States* v. *Nordall*, No. CR87-067TB (W.D. Wash. Apr. 29, 1988); *United States* v. *Harris*, No. 88-CR-6-B (N.D. Okla. Apr. 29, 1988); *United States* v. *Olivencia*, No. 88 Cr. 64 (PKL) (S.D.N.Y. Apr. 20, 1988); *United States* v. *Wilson*, No. CR-88-67-W (W.D. Okla. Apr. 19, 1988); *United States* v. *Bolding*, No. JFM-87-0540 (D. Md. Apr. 14, 1988); *United States* v. *Andrade*, No. CRS-88-002-FAR (E.D. Cal. Apr. 13, 1988); *United States* v. *Diuzio*, No. CR-88-36-1 (E.D. Wash. Apr. 13, 1988); *United States* v. *Elliott*, No. 87-CR-393 (D. Colo. Apr. 13, 1988); *United States* v. *Martinez*, No. 87 Cr. 1020 (KTD) (S.D.N.Y. Apr. 11, 1988); *United States* v. *Tolbert*, No. 87-10091-01 (D. Kan. Apr. 8, 1988); *United States* v. *Molander*, Crim. No. 88-CR-2-5 (W.D. Wis. Apr. 7, 1988); *United States* v. *Estrada*, No. CR-5-87-22 (D. Minn. Mar. 31, 1988); *United States* v. *Frank*, Crim. No. 87-226 (W.D. Pa. Mar. 30, 1988); *United States* v. *Wylie*, No. CR88-04T (W.D. Wash. Mar. 29, 1988); *United States* v. *Smith*, No. 87-CR-374 (D. Colo. Mar. 25, 1988); *United States* v. *Chavez-Sanchez*, Crim. No. 87-133-JLI (S.D. Cal. Mar. 10, 1988); *United States* v. *McLean*, No. B-27-544 (S.D. Tex. Mar. 2, 1988); *United States* v. *Lopez-Barron*, Crim. No. 87-1309-K (S.D. Cal. Mar. 2,

uncertainty, but also will face the prospect of having to resentence thousands of defendants who have been sentenced during the interim.[12]

This case is an appropriate vehicle to settle that dispute. Respondent pleaded guilty, and there is therefore no challenge to the validity of his conviction. Respondent raised the same delegation and separation of powers claims that have been litigated in other cases, and the district court rejected those contentions on their merits. Accordingly, there is no reasonable possibility that the claims asserted by respondent would not be properly presented to this Court after review by the court of appeals.

A grant of certiorari before judgment in this case would serve the same purpose that is served in civil cases by a direct appeal to this Court under 28 U.S.C. 1252 where a district court has held an Act of Congress unconstitutional.[13] In a case in which Section 1252 does not apply,

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1988); *United States* v. *Manley*, Crim. No. 87-1290-R (S.D. Cal. Feb. 18, 1988); *United States* v. *Arnold*, 678 F. Supp. 1463 (S.D. Cal. 1988).

[12] Regardless of how this issue is ultimately resolved, it is likely that many defendants will have to be resentenced. If the Act is upheld, those defendants who were sentenced under the pre-guidelines system by district courts that struck down the guidelines will be subject to resentencing under the guidelines. If the Act is held invalid, those defendants who have been sentenced under the guidelines by courts that have upheld the guidelines will be subject to resentencing either under prior law or under such provisions of the Sentencing Reform Act of 1984 that the Court may find to be severable from the sentencing guidelines.

[13] Of course, even if this were a civil case, Section 1252 would not apply, because the district court upheld the constitutionality of the Sentencing Reform Act of 1984. Nevertheless, because the guidelines have been struck down on constitutional grounds by several other district courts, the analogy between Section 1252 and certiorari before judgment remains apt.

either because it is not a civil case or because the government has prevailed in district court, certiorari before judgment remains appropriate where "the litigation raises a cloud over the statute." Lindgren & Marshall, *supra,* 1986 Sup. Ct. Rev. at 290.[14]

2. We recognize that the Court normally would prefer to wait until the questions presented by this case have been considered by one or more courts of appeals before granting review. Yet if this Court were to deny review at this time to await developments in the courts of appeals, the result would be a substantial delay in the ultimate resolution of the constitutional questions. We submit that the costs of postponing review greatly outweigh the benefits, for several reasons.

First, the widespread disagreement resulting from the scores of district court rulings on the constitutionality of the Sentencing Reform Act of 1984 has generated considerable uncertainty regarding the validity of the Sentencing Commission's guidelines, and that uncertainty is producing serious disorder in federal sentencing. See *United States* v. *Lopez,* No. CR 88-050-R (C.D. Cal. May 5, 1988), slip op. 11 (Hupp, J., dissenting). As Judge Hupp noted (*id.* at 15 n.12):

> The "chaos" adverted to is in numerous areas of practice and procedure; for example: 1. Is the Act as a

[14] The Court has been willing to grant certiorari before judgment in precisely those contexts where the purposes behind 28 U.S.C. 1252 are advanced although the case does not technically fall within the Court's appellate jurisdiction. For example, in *NOW, Inc.* v. *Idaho,* 455 U.S. 918 (1982), a district court held unconstitutional the House Joint Resolution extending the time for ratifying the Equal Rights Amendment. Because a Joint Resolution may not be an "Act of Congress" within the meaning of 28 U.S.C. 1252, it was unclear whether the Court had appellate jurisdiction over the case. Nonetheless, the Court granted certiorari before judgment.

> whole invalid or only the guidelines? 2. Does parole still exist, and, if not, how should this affect sentencing decisions? 3. Should we utilize alternative sentencing, and, if so, are there problems of uncertainty as to what, in fact, the judgment consists of? 4. Should we sentence under the guidelines when a defendant does not challenge the validity of or desires to be sentenced under the guidelines? 5. What information should the Probation Officer develop—a guidelines report, a preexisting law report, or both? 6. How do we take a plea? 7. How is a defense attorney to advise the client as to the effect of the plea? Does the repeal of certain parts of the old statutory scheme fall with the unconstitutionality of the new provisions? Other knotty problems can be seen with a little imagination.

Most importantly, during the period between the effective date of the sentencing guidelines and the resolution by this Court of their constitutionality, Congress's intent to "avoid[] unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct" (28 U.S.C. (Supp. III) 991(b)(1)(B)) will be frustrated as individual district judges independently decide whether to sentence defendants under the pre- or post-Act sentencing system. Indeed, different judges within the same district court have followed conflicting sentencing approaches based on their individual views of the validity of the guidelines.[15] As a

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[15] Compare *United States* v. *Grimaldo*, No. G-87-33 (S.D. Tex. Feb. 26, 1988) (upholding the guidelines), with *United States* v. *McLean*, No. B-27-544 (S.D. Tex. Mar. 2, 1988) (invalidating the guidelines); compare *United States* v. *Ruiz-Villanueva*, Crim. No. 87-1296-E (S.D. Cal. Feb. 29, 1988) (upholding the guidelines), with *United States* v. *Chavez-Sanchez*, Crim. No. 87-133-JLI (S.D. Cal. Mar. 10, 1988), *United States* v. *Lopez-Barron*, Crim. No. 87-1309-K (S.D. Cal. Mar. 2, 1988), *United States* v. *Manley*, Crim. No.

result, the sentencing system that a defendant faces now hinges on what judge is assigned his case, a condition that undermines the integrity of the federal criminal justice system for as long as it is permitted to continue. Immediate review by this Court is necessary in order to make possible a uniform application of a single sentencing system for every federal criminal case.

Second, the longer the constitutionality of the Sentencing Reform Act remains an open question, the greater will be the number of defendants who may ultimately have to resentenced, regardless of the resolution of this matter. The Sentencing Commission estimates that by July 1, 1988, approximately 1800 defendants will have been subject to the new guidelines, that by January 1, 1989, roughly 10,000 sentenced defendants will have been subject to the new system; and that by April 1, 1989, 15,900 defendants will have been subject to the guidelines.[16] While some trial courts have applied the guidelines, others have not. As a result, thousands of defendants will be subject to resentencing regardless of this Court's decision, and the number will grow every day.

87-1290-R (S.D. Cal. Feb. 18, 1988), and *United States* v. *Arnold,* 678 F.Supp. 1463 (S.D. Cal. 1988) (invalidating the guidelines); compare *United States* v. *Knox,* No. CR88-11D (W.D. Wash. Apr. 21, 1988), and *United States* v. *Amesquita-Padilla,* No. CR87-264R (W.D. Wash. Apr. 20, 1988) (upholding the guidelines), with *United States* v. *Wylie,* No. CR88-04T (W.D. Wash. Mar 29, 1988), and *United States* v. *Nordall,* No. CR87-067TB (W.D. Wash. Apr. 29, 1988) (invalidating the guidelines); and compare *United States* v. *Erves,* Crim. No. 87-178-A (N.D. Ga. Mar. 23, 1988) (upholding the guidelines), with *United States* v. *Russell,* No. CR 88-7 (N.D. Ga. Apr. 29, 1988) (invalidating the guidelines).

[16] These figures include convictions for felonies and Class A misdemeanors only.

The financial and institutional costs of resentencing thousands of defendants will be considerable. The Sentencing Commission has estimated that the costs of resentencing to the federal courts, the United States Attorneys' offices, defense counsel appointed under the Criminal Justice Act, the Marshals Service, and the Probation Service will run in the millions of dollars. Perhaps even more disruptive is the impact that resentencing hearings will have on already swollen district court calendars, as well as on judges, prosecutors, and defense attorneys. Although these harms cannot be completely avoided, they can be reduced if this Court expeditiously resolves the constitutional challenges presented by this case to the sentencing guidelines.[17]

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[17] Although we do not have figures available on the subject, the present uncertainty may well adversely affect the plea bargaining process, the manner by which approximately 90% of all federal criminal prosecutions are resolved. Some defendants may decide to stand trial in the hope of being acquitted, rather than enter a plea without knowing what sentencing process will apply to them. Even an increase from 10% to 20% in the number of persons who stand trial would double the number of cases that must be adjudicated, which would greatly aggravate the hardships felt by everyone involved in the criminal justice system. As one district court has observed (*United States* v. *Arnold,* 678 F. Supp. at 1466):

> Hundreds of cases are being filed nationally each week, pleas are being analyzed and negotiated, extensive effort is being expended by the [Sentencing] Commission, and a myriad of arrangements are being made for putting into place institutions to monitor, oversee, review, and administrate the Act and its execution. The longer the constitutionality of the Guidelines and the Commission remain[s] uncertain, the deeper the system will be impacted. Furthermore, defendants presently need to decide whether to tender a guilty plea or to risk trial. They would be assisted in making an informed decision by knowing more about their prospective sentence than what the statutory maximum is for each count.

Third, it is likely that the Court will have to address the issues presented in this case at some point. In light of the sharp division among the district courts on the question of the constitutional validity of the sentencing guidelines, it is highly unlikely that the ordinary process of appellate review will produce a uniform line of decisions, which would avoid the need for review by this Court. The prospect that an issue will be satisfactorily resolved at the court of appeals level—a prospect that ordinarily counsels against early review by this Court—is therefore not a significant consideration in this case, particularly when it is weighed against the costs that the resulting delay would impose on the federal criminal justice system.

Fourth, granting review at this time is not likely to mean that the Court will be denied "the substantial value inherent in an intermediate consideration of the issue by the Court of Appeals." *Youngstown Sheet & Tube Co.* v. *Sawyer,* 343 U.S. 937, 938 (1952) (Burton, J., dissenting from the grant of certiorari before judgment). Several other cases that raise the same questions presented here have been appealed to the courts of appeals.[18] Some courts have expedited consideration of the cases, and they may very well issue opinions in cases similar to this one before this case would be argued in this Court at the beginning of the October 1988 Term.[19] It therefore is likely that by the time this case is submitted to the Court for decision, the Court will have the benefit of the views of other courts at both the district and appellate level.

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[18] A total of 13 cases are now pending in the courts of appeals, including cases in all but the First, Eleventh, and District of Columbia Circuits.

[19] In addition, a number of the district courts that have ruled on the issues presented in this case have written lengthy opinions setting forth their constitutional analysis.

Finally, granting review at this time will not deny the Court the time for adequate reflection on the important questions at issue here. Briefing on the merits can proceed at a normal pace during the Court's upcoming summer recess, and argument can be scheduled for the first session during the October 1988 Term.[20] That procedure will enable the parties fully to present their positions, while allowing the Court the opportunity fully to consider the merits of the questions presented.

3. If the guidelines are held to be invalid, questions of severability will be presented. Some courts have held that those portions of the Act creating the Sentencing Commission and empowering the Commission to promulgate sentencing guidelines are severable from the other provisions of the Act, which are valid. *United States* v. *Harris,* No. 88-CR-6-B (N.D. Okla. Apr. 29, 1988); *United States* v. *Estrada,* No. CR-5-87-22 (D. Minn. Mar. 31, 1988). Other courts that have found the guidelines unconstitutional have ruled that a defendant should be sentenced under the pre-Act law, which included a possibility of release on parole. The Sentencing Reform Act of 1984 repealed the statutes authorizing parole, and it amended the statutory provisions granting "good time" credit to federal prisoners sentenced for offenses committed on or after November 1, 1987. If the Court strikes down the

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[20] Indeed, the risk that time pressures would induce hasty deliberation by this Court will increase as each month passes and the number of criminal cases as to which the guidelines apply continues to rise. Even a relatively short delay of a few months that would result from awaiting review by a court of appeals would add to the pressure on the Court to render its decision promptly. Under these circumstances, "[a] rushed schedule in two appellate courts"—a court of appeals and this Court—"may not produce a more considered opinion than a somewhat longer deliberation in one court." Lindgren & Marshall, *supra,* 1986 Sup. Ct. Rev. at 282.

sentencing guidelines, we submit that it should also reach the question of the severability of those other provisions of the Sentencing Reform Act of 1984. If the guidelines are struck down without a definitive resolution of the status of the parole system and the eligibility of federal prisoners for statutory "good time" credits, the current confusion within the federal sentencing system will continue until another case raising those issues reaches this Court. In order to avoid that result, we urge the Court to review not only the merits of the constitutional questions presented by this case, but also, if necessary, the question of the severability of the 1984 amendments as they relate to the parole and good time provisions of the federal sentencing scheme.

CONCLUSION

The petition for a writ of certiorari before judgment should be granted.

Respectfully submitted.

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