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.*

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v.
UNITED STATES OF AMERICA, *Respondent.*

REPLY BRIEF FOR RESPONDENT/PETITIONER JOHN M. MISTRETTA

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This reply of respondent-petitioner, John M. Mistretta ("petitioner"), is submitted principally to remind the Court of what the Department of Justice and the Sentencing Commission (referred to collectively as "respondents") did not discuss in their briefs, to point out the necessary implications of their arguments, and to respond to the few new arguments raised by them. Point I responds to the separation of powers arguments made in both respondents' briefs, which, in essence, urge the

Court to sustain the guidelines on the theory that Article III judges are not disabled from making the policy determinations made by the Commission so long as they do so in their "individual capacities." Points II and III deal with the delegation and severability arguments, which are made only in the Department's brief.

I. THE SENTENCING GUIDELINES VIOLATE SEPARATION OF POWERS.

Although not as clearly stated as in the lower courts, the necessary implication of the Department's position is that the function of issuing sentencing guidelines cannot constitutionally be performed by a body within the Judicial Branch, but only by Congress itself or by an Executive Branch agency. Thus, the Department's unstated premise is that if the Court cannot find some way around the statutory assignment of this function to the Judicial Branch, the guidelines are unconstitutional.

The Solicitor General's solution is to sever the phrase "in the Judicial Branch," or to disregard it, or to interpret the statute in a way that the phrase no longer has any constitutional significance, despite the fact that both Houses of Congress went out of their way to see that this function was assigned to the Judicial, rather than the Executive, Branch (Pet. Br. 37-38) ("opening brief"). While petitioner agrees with the Department's unstated premise, he believes that Congress' decision to place the Commission in the Judicial Branch cannot simply be disregarded for purposes of separation of powers for the reasons set forth in his opening brief at 35-46 and accepted by all three Ninth Circuit Judges in *Gubiensio-Ortiz* v. *Kanahele*, No. 88-5848, and *United States* v. *Chavez-Sanchez*, No. 88-5109 (August 23, 1988), including Judge Wiggins who voted to upheld the statute, but not on the

grounds urged by the Department. More importantly, even if the Court could properly rewrite the statute, the Act still would be unconstitutional because of the required presence of three Article III judges on the Commission. Before turning to the reasons why the service of Article III judges on the Sentencing Commission fatally flaws the process, there are two major omissions from respondents' briefs that warrant discussion: the nature of the judgments made by the Sentencing Commission and the impact of this Court's decision in *Morrison* v. *Olson*, 108 S. Ct. 2597 (1988), on this case.

A. The Judgments of the Sentencing Commission Involve Policy Choices That Are Constitutionally Inappropriate for a Body Within the Judicial Branch.

Petitioner's separation of powers argument focused on the nature of the decisions made by the Commission. As his opening brief pointed out, the Commission did not make individual sentencing adjudications, but laid down general principles of law applicable to all defendants. This distinction between "retail" and "wholesale" decisionmaking (*see Gubiensio-Ortiz*, *supra*, at 23 n.7), is not wholly missing from respondents' briefs, although the Sentencing Commission seems to argue that if judges can perform one activity, they must necessarily be able to do the other (Br. 35).

What is lacking is an acknowledgment of the type of decisions that the Commission made in establishing the guidelines. Starting with the averages of prior sentences, the Commission moved those averages up or down according to its own views of the relative seriousness of each crime. While it is true that it had some general suggestions from Congress, at least in the legislative history (*see* Senate Brief 24-25; DiGenova Brief 24), the statute

assigned the responsibility for making these policy choices to the Commission alone, and it made them, as it frankly admitted (*see* opening brief 8-12). Indeed, the whole ranking of criminal offenses by relative seriousness necessarily involved a series of "political" choices. We use "political" in the best sense of the word, since the Commission was striving to create guidelines that would embody the values of the community, as the Commission saw them, in selecting sentences appropriate for each type of crime and category of offender. And, as essentially mandatory guidelines, they affect the tens of thousands of persons who are sentenced each year in the federal system under them. In short, the Solicitor General is simply in error when he states that "the Commission's function of developing rules that rationalize the sentencing process is entirely neutral . . ." (Br. 54). Rather, as the Ninth Circuit put it, the Commission's statutory task involved "a variety of complex determinations that required the exercise of important policy judgments." *Gubiensio-Ortiz*, *supra*, at 22; *id.* at 23 (judgments reflect different "philosophies of criminal justice" and are "substantive decisions"); *id.* at 32 (Commission's functions are "quintessentially political in nature, requiring substantive policy decisions.")

This failure to acknowledge the value-laden nature of the determinations made by the Sentencing Commission shows up in another way. On several occasions the Commission argues that because the process relates to "sentencing," and because judges have been involved in sentencing for 200 years, there is nothing improper or incongruous about the Judicial Branch writing rules for sentencing. But "sentencing" involves not one, but several different activities, some of which are constitutionally appropriate for the Judicial Branch and some

inappropriate, just as is true for the Legislative and Executive Branches.

Thus, there is the act of setting a statutory maximum and minimum for each crime, a task which we assume (apart from delegation questions) the Commission does not believe that it could constitutionally perform, nor one that it believes could be properly assigned to the President or the Attorney General. On the other hand, there is the process of actually imposing specific sentences, from which Congress and the Executive are constitutionally disabled. In between is the process of deciding when parole should be granted, or whether good time credits should be allowed — tasks which can be shared, in the sense that Congress sets the general terms in the statutes, and the Executive Branch carries them out. While it is clear that Congress itself could not implement those statutes, in all probability the tasks of deciding whether to grant parole and/or how much good time has been earned, could be assigned to Article III judges, or to a commission within the Judicial, rather than the Executive Branch of government.

Writing sentencing guidelines, however, is a far different task from those that are or could be assigned to the Judicial Branch. The question presented in this case is whether a Commission in the Judicial Branch, including three Article III judges, may constitutionally perform that function, given the wide-ranging policy choices that the Commission had to make. That question cannot be answered by simply stating that the process involves sentencing, and therefore the Commission's assertion that "federal judges have been creating sentencing policy" for almost 200 years (Br. 16-17) disregards the fundamental differences between writing legislative-type sentencing rules and making individual sentencing determina-

tions. Rather, that question can only be answered by reviewing the work of the Commission and analyzing the types of choices it made, a task largely omitted by respondents in their analyses.[1]

B. Respondents Overlook the Most Salient Portions of *Morrison*.

In *Morrison* v. *Olson*, *supra*, the Court upheld a statute permitting Article III judges, sitting as a Special Division of the United States Court of Appeals for the District of Columbia Circuit, to appoint independent counsel and to perform certain other tasks relative to that office. The first point of note is that the basis for the appointment authority exercised by the Special Division

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[1] Although we believe that our brief was sufficiently clear on the point, we wish to emphasize again that we do not argue that the task of issuing guidelines is inherently executive, but only that it cannot be done by the Judicial Branch. *Accord*, *Gubiensio-Ortiz*, *supra*, at 33 n.8. While the Commission chides petitioner (Br. 2) for also objecting to assigning the task to the Executive Branch, his objection is not based on the functional incongruity at issue here, but on the problem of uniting the power to prosecute with the power to decide appropriate levels of sentencing. It is possible, under *Humphrey's Executor* v. *United States*, 295 U.S. 602 (1935), as reinforced by *Morrison* v. *Olson*, 108 S. Ct. 2597, 2616-22 (1988), that Congress might be able to create a Commission within the Executive Branch, with no federal judges as members, that might be sufficiently independent of the President and the Attorney General to avoid the merger of the prosecutorial and the sentencing functions. But Congress plainly did not do that here. For similar reasons, the Commission's argument (Br. 28-32) that the Act is not unconstitutional because it does not interfere with the function of the Executive Branch responds to a claim not advanced by petitioner. In any event, our claim here is that, however labeled, the issuing of sentencing guidelines is a function that is "more properly accomplished by" branches of government other than the Judicial Branch. *Morrison*, *supra*, 108 S.C. AT 2613.

was not Article III. Rather, the sole basis was the Appointments Clause, Article II, Section 2, Clause 2, which specifically allows courts of law to appoint inferior officers when Congress so provides. Since there are no comparable constitutional provisions for sentencing guidelines, and since Article III alone would not have supported that power and the related power to define the jurisdiction of the independent counsel, the portion of *Morrison* upholding those powers strongly suggests that Article III alone cannot be the basis for upholding the sentencing guidelines here.

Moreover, even though the power to appoint is explicitly provided for in the Constitution, this Court nonetheless placed an additional limitation on that power when exercised by Article III judges, *i.e.* the test of incongruity, which this Court read into the Appointments Clause to assure that fundamental principles of separation of powers remain intact. Therefore, in this case where there is no specific exception to separation of powers like the Appointments Clause, respondents must meet an even more stringent test in order to establish that Article III is not offended when Article III judges issue binding sentencing guidelines.

Furthermore, in applying that test, it is vital to look at what the courts have actually been allowed to do, consistent with Article III, and in that context, the distinction between substance and procedure, so derided by the Commission (Br. 17, 35-39), is instructive, even if not dispositive. The incongruity arises here not because the matter relates to sentencing, but because of the nature of the activities undertaken, *i.e.*, making the kinds of policy and political choices that are involved in making substantive rules, but not procedural ones. Indeed, even Judge Wiggins in his dissent in *Gubiensio-Ortiz*, *supra*, recog-

nized that "judges may not engage in substantive lawmaking" (dissent at 17). By way of contrast, in upholding the appointment power for independent counsel in *Morrison*, this Court noted that the independent counsel themselves have no role in making policy, 108 S. Ct. at 2608-09, nor does the Special Division make policy when it chooses an individual to serve as an independent counsel.

Finally, the most difficult aspect of the statute to justify in *Morrison* — that dealing with the shutting down of an independent counsel's office — was not discussed in either respondents' brief. This Court did not seek to construe the Appointments Clause broadly to justify that power. Rather, in order to save that statute, this Court adopted a very narrow interpretation of the power of the Special Division to close the independent counsel's office to avoid problems of separation of powers. *Id.* at 2614-15. If that approach is required for a function like shutting down an office in order to stay within the limits of Article III, then in this situation, where the powers exercised by the Sentencing Commission are of vastly greater impact and involve political and other policy choices, *Morrison* makes clear that issuing sentencing guidelines is not a proper function under Article III.[2]

[2] The Sentencing Commission avoided this issue by observing that the Special Division was a special court and arguing that because the Commission is not a court, that part of the *Morrison* discussion is irrelevant (Br. 42-43 n.27). But the Special Division, which is created under 28 U.S.C. § 49, has no duties except with respect to independent counsels. and it was made a court solely to satisfy the specific requirement that appointments under the Appointments Clause can be made only by "courts of law." Surely, the outcome would be no different here if Congress had called the Sentencing Commission a Sentencing Court, yet that is the import of the Sentencing Commission's position. Similarly, the Commission uses the same approach on page 44 of its brief to avoid the problems created by the fact that the Article III judges on the Sentencing Commission are sharing their power with non-judges, suggesting that such sharing is proper on a commission, but not on a court.

C. There Are Sound Reasons, Rooted In Separation of Powers Considerations, Why the Sentencing Commission Cannot Issue Sentencing Guidelines.

No court has ever permitted functions like those assigned to the Sentencing Commission to be undertaken by a body within the Judicial Branch. Moreover, all of the authorities, especially *Morrison*, strongly argue against such an assignment. Indeed, even Judge Wiggins in his dissent in *Gubiensio-Ortiz*, *supra*, at 26-31, acknowledged that the cases relied upon to date, as well as the historic evidence and the argument based on the Incompatibility Clause, do not directly support the guidelines. Thus, it is difficult to understand how the Commission can legitimately claim that "settled distinctions" (Br. 15) allow Article III judges, sitting as a Commission within the Judicial Branch, to perform the kind of functions at issue here. In any event, petitioner does not rely on precedent alone for his separation of powers claim. Rather, the reasons contained in petitioner's opening brief at 44-46, and those set forth below, demonstrate that there are sound policy considerations, grounded in principles of separation of powers, why the Sentencing Commission, which is required to have three Article III judges as members, cannot constitutionally issue binding sentencing guidelines.[3]

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[3] The Commission chides petitioner on several occasions (Br. 2, 15) for interchangeably using "Judicial Branch," "federal courts" and "federal judges." The reason for the mixed usage is that the Commission itself is a mixed body because Congress made it that way. Thus, Congress specifically placed the Commission in the Judicial Branch, as the Commission itself recognizes and indeed embraces, and hence it can hardly be unfair for petitioner to describe the Commission that way. Congress also required three Article III judges to serve on the seven-member Commission, and so when describing what is being done, it is hardly unfair to describe the activities as those of Article III judges or federal judges. Furthermore, in explaining the limita-

The implications of upholding the Commission's powers can be seen by asking whether it would be constitutional for Congress to have assigned the power to issue sentencing guidelines to this Court, presumably with a staff and an advisory committee for assistance. While not directly acknowledging it, the Solicitor General's brief can only be read as conceding that such a scheme would be unconstitutional, but that this Act is saved because the Commission can be treated as part of the Executive Branch, with the judges merely serving in their individual capacities. The Commission is more oblique, saying that it is not functioning as a court (a claim that petitioner does not dispute), and then arguing that it is constitutional to assign the function of issuing sentencing guidelines to a body within the Judicial Branch, so long as this body is not acting as a court. There are several reasons why those arguments cannot be accepted.

Although the Sentencing Commission suggests that petitioner has approached the separation of powers questions in an overly formalistic way, in contrast to its own "pragmatic" and "flexible" approach (Br. 26), it is respondents against whom the charge of formalism is more properly directed. If judges may not constitutionally issue sentencing guidelines when their organizational designation is a "court," what reason can there be, consistent with the purposes of separation of powers, to allow them to do so when their organizational designation is a "commission?" Either the nine members of this Court may constitutionally issue binding sentencing guidelines, or they

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tions imposed by Article III in *Morrison*, *supra*, 108 S. Ct. at 2611-13, this Court used the terms "judges," "judiciary," and "Judicial Branch" interchangeably. *See also id.* at 2613-14, using "courts" and "judges" synonymously.

may not, but no purpose underlying the doctrine of separation of powers could possibly be served by allowing Supreme Court Justices to issue sentencing guidelines on the condition that they do so only in their "individual capacities." Surely, there is more to the limitations of Article III than a rule that they apply only when judges purport to be deciding cases or controversies. Accordingly, since Congress required Article III judges to serve on the Commission and perform an official governmental function, there is simply no merit to the claim that they are serving on the Commission in their individual capacities, let alone that such service saves the guidelines.[4]

Perhaps the principal reason why issuing sentencing guidelines is not a proper function for Article III judges is that it threatens their impartiality and that of the entire federal judiciary. Federal judges are supposed to interpret the law, and not create it. By adhering to that restriction, they avoid entering the political struggle that lawmaking entails. That avoidance is necessary to maintain their impartiality and the inevitable spill-over effect on the public's perception of the federal judiciary when even a few federal judges step outside their constitutionally assigned roles. Thus, the very act of expanding judicial powers through the making of sentencing policy inevitably detracts from the primary mission of the judiciary because it reduces the appearance of impartiality that is so essential to public confidence in the federal judiciary.

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[4] Service in a judge's "individual capacity" would have meaning in a context in which the judge wished to be an officer of, for example, a religious or civic organization or a private university, since such officers are not performing a governmental function and there is no legislative requirement that their positions be filled by an Article III judge.

There is another, closely-related reason why judicial service on the Sentencing Commission undermines separation of powers. Placing judges on the Commission may provide some expertise (although here none of the three judges here had any significant experience in sentencing), but it provides something more: an air of neutrality, a patina that the Commission's decisions are the impartial product of judicial expertise, rather than the result of political judgments involving fundamental policy choices between competing value schemes. *See Gubiensio-Ortiz*, *supra*, at 40-44. But when the cover of what the Sentencing Commission actually has done is removed, and it is recognized that the Commission decided what offenders go to jail and for how long, and what kinds of crimes and offenders deserve probation, then it becomes plain that the work of the Commission has thrown three Article III judges into the political arena which separation of powers makes off-limits to them. Therefore, in the words of *Morrison*, those functions are "more properly accomplished by [the other two] branches." 108 S. Ct. at 2613.

It is true that, in terms of the loss of judgepower, three judges is not a devastating reduction. But, of course, if this Commission is upheld, others will surely follow on its heels as a device for resolving other intractable political problems. *See Gubiensio-Ortiz*, *supra*, at 50. However, the loss of three judges is not the heart of the problem. Rather, it is the loss of the appearance of judicial neutrality and impartiality, which are the *sine qua non* of an effective federal judiciary. Yet embroiling Article III judges in creating sentencing policy, whether as part of a Judicial Branch commission, or as part of a body actually assigned by Congress to the Executive Branch, can only serve to undermine that impartiality and hence to reduce the respect and powers of persuasion that the federal

judiciary must have in order to carry out its constitutional function.

Congress recognized that the Commission would be making political judgments and forbade more than four members from being members of the same political party. 28 U.S.C. § 991(a). Congress was, of course, correct in its expectation that the Commission would engage in political determinations, but as the Ninth Circuit recognized in *Gubiensio-Ortiz*, *supra*, at 50, that is precisely why this Commission, as presently constituted, cannot perform the functions assigned to it under principles of separation of powers.[5]

There is another perspective from which it is incongruous to allow judicial judges, even in their "individual capacities," to make the kind of substantive, political judgments involved in creating sentencing guidelines. As this Court observed in *INS* v. *Chadha*, 462 U.S. 919, 951 (1983), the Framers established "a single, finely wrought and exhaustively considered, procedure" for making those kinds of judgments, *i.e.*, the concurrence of both Houses of Congress and the President or two-thirds of both Houses over the President's objection. To allow the Sentencing Commission to issue guidelines offends that procedure in two respects. First, the checks and balances of the mandatory involvement of three units of government is lacking when only a single body, like the Sentenc-

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[5] Respondents rely heavily on the history of extra-judicial service by Article III judges to defend the Commission. While we believe that the circumstances of many of those examples differ markedly from this case, the most important factor distinguishing them is that none of them has been subjected to judicial scrutiny by this Court under principles of separation of powers as they have come to be interpreted since *Buckley* v. *Valeo*, 424 U.S. 1 (1976). *Accord*, *Gubiensio-Ortiz*, *supra*, dissent at 26-31; *see also* opening brief 41-42.

ing Commission, makes such decisions. Second, unlike Congress and the President, who are elected by the people, members of the Sentencing Commission are appointed for terms of six years and will never have to stand for election or re-election. And, in the case of the members who are federal judges, they have lifetime positions to which they can return even if they invoke the displeasure of the public. These two factors, therefore, further demonstrate that the Commission represents an erosion of our democratic principles and constitute another reason why issuing sentencing guidelines is a task suited for the Legislative or perhaps Executive Branch, but surely not for Article III judges.

Finally, neither respondent addresses the additional problem created by the fact that federal judges are in a minority on the Commission. As a result, Article III judges are forced to share their substantive, and not merely advisory, power with non-judges, a situation which is contrary to this Court's warning in *United States* v. *Nixon*, 418 U.S. 683, 704 (1974), and *INS* v. *Chadha*, *supra*, 462 U.S. at 958. Most importantly, because of the nature of the Commission's work, the sharing will involve bargaining over the appropriate sentences for different crimes, precisely the kind of horse-trading which should be left to the political branches and not the kind of activity in which judges may engage with non-judges, as the Commission did when it decided on the contents of the guidelines here. *See Gubiensio-Ortiz*, *supra*, at 27 (discussing Commission's refusal to include death penalty as "an entirely understandable response to political pressures by a political body.") Thus, the mixed composition of the Commission further exacerbates the separation of

powers problems already present when Article III judges write binding sentencing rules.[6]

D. Since The Guidelines Are Unconstitutional, Neither Petitioner Nor Any Other Defendant May Be Sentenced Under Them.

In an effort to save the guidelines, the United States, but not the Sentencing Commission, contends that, even if the Commission could not constitutionally issue the guidelines, they should nonetheless be followed under the *de facto* officer doctrine (Br. 58-59 n.48). Initially, we note, as this Court observed in *Norton* v. *Shelby County*, 118 U.S. 425, 441 (1886), that the doctrine applies only to validate the actions of officers "whatever defects there may be in the legality of their appointment or election," in order to assure that their authority is obeyed until their status is determined as provided by law. Petitioner here does not argue that any one, or even all of the Commission members, is not properly serving in his or her office, but that the Commission as a whole cannot constitutionally

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[6] The same is true for the power of the President to remove Commission members for cause; it too blurs the accountability of the Commission and renders its independence suspect, because it allows the head of one branch (the President) to affect the workings of the Commission, an independent body within another branch. Indeed, the Solicitor General does not dispute this proposition, but argues that the Commission can be saved since it is an Executive Branch agency whose members the President may properly remove (Br. 43). That proposition, of course, depends upon the correctness of the Solicitor General's efforts to convince this Court to disregard the express will of Congress and place the Commission in the Judicial Branch. The Commission's response (Br. 45-49) depends largely on the untenable distinction between actions by judges as courts and those taken by them in their individual capacities.

perform its assigned function. Hence, the *de facto* officer doctrine as such has no applicability here.

The United States also relies on this Court's ruling in *Buckley* v. *Valeo*, *supra*, 424 U.S. at 142-43, according the past acts of the unconstitutional Federal Election Commission *de facto* validity and allowing Congress thirty additional days to remedy the impediment. The impact of the Department's suggestion is not clear, but if it is to the effect that the guidelines could continue to be applied forever, that is plainly inconsistent with the time limit placed on the Commission in *Buckley*. If it means that petitioner can be sentenced under unconstitutional guidelines, when he has brought the case resulting in the finding of unconstitutionality, that suggestion is truly unprecedented, especially for a criminal case. If the term "administrative actions" in footnote 48 refers to matters other than the issuing of guidelines, petitioner would probably not object to such a ruling, even though this case only concerns the guidelines, plus the severability of parole and good time over which the Commission has no jurisdiction. Furthermore, the individuals challenging the Commission in *Buckley* alleged only that the "agency designated to adjudicate their rights," but which apparently had not yet done so, was unconstitutional, 424 U.S. at 12 n.10, whereas here the injury from the unconstitutional guidelines is clear and direct. Thus, for that reason as well, there is no basis for applying *Buckley* to the thousands of individuals like petitioner who have had criminal sentences imposed on them based on acts of an unconstitutional Commission.

II. THE DEPARTMENT'S ARGUMENTS ON DELEGATION DO NOT RESPOND TO PETITIONER'S BASIC POINT.

Petitioner has not argued that sentencing is a "core function" that can only be exercised by Congress, nor that

Congress made no policy choices in the Sentencing Reform Act.[7] Rather, petitioner's point is that, despite the large number of directions given to the Commission (most of which are set forth in the Department's brief at 25-28), they are by-and-large not significant because they do not deal with the difficult policy choices that the Commission had to address, except at the perimeter. Instead, the Sentencing Commission was given a task like that of assembling a jigsaw puzzle of a Jackson Pollack painting, without a copy of the original, and with most of the multicolored pieces interchangeable with one another, other than the edges. It might result in something resembling the original, but that would be more a matter of luck than design.

The Department largely defends the constitutionality of the sentencing guidelines by analogizing them to the parole guidelines which have been upheld against delegation challenges (Br. 29-32). This is rather surprising because, on page 7 of its brief, the Department admits that it was the very inadequacy of the parole guidelines that led to the Sentencing Reform Act. In so doing, it points to the very features of the parole guidelines, beyond their advisory nature, that make any analogy to binding sentencing guidelines wholly inapposite:

> Finally, the Parole Commission had only limited powers to adjust the sentences imposed by the courts: it often could not advance the offender's

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[7] Some of the "choices," such as including statements of the purposes of sentencing, contain mutually inconsistent goals, such as eliminating sentencing disparities and retaining the ability to sentence defendants on an individual basis. Even the elimination of the rehabilitation model may be less than complete since the Commission and judges are still required to consider educational factors in sentencing. *See* 18 U.S.C. § 3553(a)(2); 28 U.S.C. § 994(a).

> release date to a date earlier than one-third of the imposed sentence; it could not increase sentences that were unduly lenient; and it had no authority whatever over persons who were not given a custodial sentence or were sentenced to a term of one year or less.

These distinctions, plus those noted in our opening brief (52-53), demonstrate that the constitutionality of the parole guidelines cannot save the sentencing guidelines.[8]

III. THE GOOD TIME PROVISIONS ARE NOT SEVERABLE.

The Department concedes that the elimination of parole is not severable from the sentencing guidelines, but argues that the provisions substantially changing the rules for good time are severable and should be applied. There are two basic reasons, beyond those stated in our opening brief, why the Department's distinction should be rejected.[9]

First, the Department offers no evidence that Congress ever intended the kind of split that it suggests, nor

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[8] The Department also relies on the fact that the task of issuing sentencing guidelines is complex and requires a permanent commission to make adjustments to them in the light of experience (Br. 19). But that argument fails to distinguish between the task of creating the original sentencing guidelines and making adjustments to them in the future. Thus, from a delegation perspective, it is surely far less suspect to allow a Commission to make adjustments that do not alter the basic structure or philosophy of the guidelines than it is to allow it to establish the entire system on its own, as Congress did here. If Congress had established an advisory committee to recommend a sentencing guideline system, and then adopted that system in whole or in part, there would be little likelihood of a successful delegation challenge to future adjustments in it, even if they were made by a commission rather than by Congress.

[9] Interestingly, the Sentencing Commission, which is the agency directed to administer the Sentencing Reform Act, has taken no position on the severability issue.

did our review of the legislative history find any such evidence. Indeed, the references to good time show that it was part of a package including sentencing guidelines and parole elimination. All that the Department has offered is the assertion that good time is not *necessarily* tied to sentencing guidelines or parole and that there *might* be independent reasons for Congress to have adopted the good time changes on their own. That does not, however, answer the pertinent question of what Congress actually intended to do in 1984. Stated another way, because the Department asked the wrong question, it reached the wrong conclusion.

Second, there is one piece of evidence that strongly supports the position that Congress did not intend changes in good time alone. Congress was very concerned about prison over-crowding and directed the Commission to consider that as a factor in issuing its guidelines. 28 U.S.C. § 994(g). The new good time rules, whatever benefits to inmates they may have in terms of certainty, will work a marked reduction in the total availability of good time credits. Thus, the inevitable effect of the new rules, especially without sentencing guidelines, will be to increase prison populations. Therefore, given Congress' specific concern about over-crowding, and the absence of any affirmative reason to believe that Congress wanted good time changes independent of the other parts of the package, this Court should not sever the good time requirements and should not permit them to go into effect.[10]

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[10] We note that the Department has apparently abandoned its argument that changes in the Sentencing Reform Act in 1987 have the effect of sustaining its position on good time. That argument was accepted only by Judge Wiggins in his dissent on the severability issue in *Gubiensio-Ortiz*, dissent at 40-41, after he concluded, like the majority, that, based on the 1984 Act alone, there was no basis for severing good time. *Id.* at 39.

CONCLUSION

For the foregoing reasons and those set forth in petitioner's opening brief, the judgment of the district court should be reversed, and the district court should be directed to resentence petitioner under the pre-1984 law, with the former rules on parole and good time remaining in effect.

Respectfully submitted,

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