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Casenotes: Constitutional Law — The Supreme Court Upholds the Constitutionality of the Federal Sentencing Guidelines. Mistretta v. United States, 488 U.S. 361 (1989)

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CONSTITUTIONAL LAW: THE SUPREME COURT UPHOLDS THE CONSTITUTIONALITY OF THE FEDERAL SENTENCING GUIDELINES. *Mistretta v. United States*, 488 U.S. 361 (1989).

In 1984, President Reagan signed into law the Sentencing Reform Act of 1984[1] establishing the United States Sentencing Commission (Commission). The Commission was charged with developing the Federal Sentencing Guidelines (Guidelines).[2] In November 1987, the Guidelines took effect.[3] A majority of district courts held the Guidelines to be unconstitutional, on the basis that they violated the separation of powers doctrine. In January 1989, however, the Supreme Court held the Guidelines to be constitutional.[4] This Casenote examines the arguments and rationales involved in determining the constitutionality of the Guidelines.

The policies behind the creation of the Commission were to "provide certainty and fairness in meeting the purposes of sentencing [and] avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct."[5] Congress noted that "in many cases, current sentences do not accurately reflect the seriousness of the offense."[6]

The Commission promulgated the Guidelines, establishing a sentencing table[7] upon which an offense level is determined. The level is adjusted to reflect the defendant's circumstances, conduct, and prior record. The sentencing judge enters a sentence within a designated range, unless there are unusual circumstances.[8] If there are

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1. Pub. L. No. 98-473, §§ 211, 217(a), 98 Stat. 1987, 2017 (1984) (codified as amended at 28 U.S.C. §§ 991-998 (1988) and 18 U.S.C. §§ 3551-3586 (1988)).
2. *See* UNITED STATES SENTENCING COMM'N, FEDERAL SENTENCING GUIDELINES MANUAL (1990) [hereinafter GUIDELINES]. The Commission may submit amendments to the Guidelines each year to Congress between the beginning of a regular session and the first day of May. 28 U.S.C. § 994(p) (1988). Such amendments shall take effect 180 days after submission, unless a law is enacted to the contrary. *Id.*
3. Pub. L. No. 98-473, § 235, 98 Stat. 2017, 2031 (1984).
4. Mistretta v. United States, 488 U.S. 361 (1989).
5. 28 U.S.C. § 991(b)(1)(B) (1988).
6. *Id.* § 994(m).
7. GUIDELINES, *supra* note 2, at 235.
8. 18 U.S.C. § 3553(b) (1988). Although there is no clear definition of what constitutes unusual circumstances, the provision gives the trial judge the discretion to depart from the Guidelines if "the court finds that 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

unusual circumstances, the judge may depart from the Guidelines, provided the reasons are specified.[9]

The Act placed the Commission within the judicial branch and provided that the Commission be composed of seven voting and two nonvoting members. The members are nominated by the President[10] and ratified by the Senate, and at least three must be federal judges.[11] This unique relationship between the three branches of government gave rise to attacks upon the Guidelines' constitutionality.

The challenges to the constitutionality of the Guidelines focused on both the improper delegation of power and the doctrine of separation of powers. Specifically, the challenges attacked Congress' capacity to delegate authority to the Commission, whether Congress had located the Commission within an appropriate branch, and whether, as a result of the above, the independent branches exceeded their authority.

The nondelegation doctrine prohibits Congress from delegating its power to the other branches of government.[12] In general, it is constitutionally impermissible for Congress to relinquish significant legislative power.[13] Opponents of the Guidelines have asserted that Congress has improperly delegated its power to define and establish penalties.[14]

Congress can, however, delegate its authority if the delegation is not excessive. Whether delegation is excessive depends upon the degree of guidance furnished by Congress to the delegated body. Proper delegation of legislative authority would require adequate guidance to the Commission to assure that the Guidelines "compl[y]

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guidelines that should result in a sentence different from that described." *Id.* In addition, the trial judge has the power to reduce a sentence to a level below that prescribed to reflect a "defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense." *Id.* § 3553(e).

9. *Id.* § 3553(b).
10. Most members of judicial branch agencies are appointed and removed by article III judges. *See, e.g.*, 28 U.S.C. §§ 601-620 (1988) (Supreme Court has appointment and removal power over the Administrative Office of the United States Courts).
11. 28 U.S.C. § 991(a) (1988). The *Mistretta* Court noted, however, that service on the Commission is voluntary and that a judge could not be compelled to serve against his will. *Mistretta*, 488 U.S. at 405-06.
12. "All legislative Powers herein granted shall be vested in a Congress of the United States. . . ." U.S. CONST. art. I, § 1.
13. A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935). "The Congress is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested." *Id.* at 529.
14. *See, e.g.*, United States v. Ruiz-Villanueva, 680 F. Supp. 1411, 1415-16 (S.D. Cal. 1988).

with the legislative will."[15] Therefore, if a congressional act proclaims a clear and intelligible principle to which the authorized body is directed to conform, "such legislative action is not a forbidden delegation of legislative power."[16]

In analyzing whether the Guidelines enunciated clear and intelligible principles, the United States District Court for the Southern District of California in *United States v. Ruiz-Villanueva*[17] noted that Congress "carefully outlined its sentencing philosophy."[18] The court stated that "Congress explicitly instructed the Commission on what to do . . . and how to do it . . . commented on numerous other matters attendant to formation of the Guidelines . . . [and] retained for itself the power to fix maximum sentence lengths."[19] Accordingly, the court held that Congress did articulate intelligible principles, and thus, the delegation of power to the Commission was permissible.[20]

The Guidelines were again held to be a proper exercise of congressional delegation of power in *United States v. Chambless*.[21] The United States District Court for the Eastern District of Louisiana explained that the Act "outlines the policies which prompted establishment of the Commission, explains what the Commission should do and how it should do it, and sets out specific directives to govern particular situations."[22]

In contrast, the United States District Court for the Northern District of Illinois in *United States v. Eastland*[23] held the Guidelines to be in violation of the nondelegation doctrine, reasoning that because a fundamental liberty was at stake, the strict scrutiny test should be applied when evaluating the Guidelines.[24] While recognizing

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15. Yakus v. United States, 321 U.S. 414, 425 (1944). "[T]he statute violates the Constitution only if there is an absence of standards such that 'it would be impossible in a proper proceeding to ascertain whether the will of Congress has been obeyed.'" United States v. Costelon, 694 F. Supp. 786, 793 (D. Colo. 1988) (quoting *Yakus*, 321 U.S. at 426). The court in *Costelon* concluded that the challenge to the guidelines was unpersuasive because "[t]he statute provides the Commission with explicit and detailed instructions for formulating the guidelines." *Id.* at 794.
16. J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928).
17. 680 F. Supp. 1411 (S.D. Cal. 1988).
18. *Id.* at 1417.
19. *Id.*
20. *Id.* at 1418.
21. 680 F. Supp. 793 (E.D. La. 1988).
22. *Id.* at 796.
23. 694 F. Supp. 512 (N.D. Ill. 1988).
24. *Id.* at 515-16. A court generally defers to the legislature by analyzing an equal protection claim under the "rational basis" test. A piece of legislation is upheld if it rests upon any rational basis. United States v. Carolene Prods. Co., 304 U.S. 144, 152 (1938). Where a fundamental right is concerned, however, the legislation is "subjected to more exacting judicial scrutiny" in which the government must show that the legislation is narrowly tailored to advance a compelling governmental interest. *Id.* at 152 n.4.

that Congress has the authority to delegate many functions, particularly those involving economic regulation, the court concluded that delegations involving fundamental rights were impermissible.[25]

The Constitution divided the delegated powers of the federal government into three branches "to assure, as nearly as possible, that each branch of government would confine itself to its assigned responsibility."[26] The Supreme Court has said that Congress cannot increase its power at the expense of another branch.[27] The Constitution, however, does not establish precisely defined boundaries for the three branches.[28] Although the powers are functionally identifiable,[29] the branches are not isolated from each other.[30]

The Supreme Court confronted the separation of powers issue in *Morrison v. Olson*.[31] In analyzing whether the Ethics in Government Act[32] had violated the separation of powers doctrine, the Court addressed whether the Act had unduly interfered with the role of a coordinate branch.[33] The Act created the office of independent counsel to investigate certain government officials. The Court noted that it would present conflicts of interest if the office of independent counsel were placed in the executive branch.

The *Olson* Court focused upon the extent to which the Act prevented the executive branch from accomplishing its constitutionally assigned functions.[34] The Court held that because the President has long appointed attorneys to perform assorted prosecutorial duties, the appointment of an independent counsel does not run afoul of the constitutional limitation on interbranch appointments.[35] Furthermore, because the Attorney General retains the right to remove the independent counsel for good cause, the Act does not impermissibly undermine the functions of the executive branch.[36]

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25. *Eastland*, 694 F. Supp. at 515-16.
26. Immigration & Naturalization Serv. v. Chadha, 462 U.S. 919, 951 (1983).
27. Morrison v. Olson, 487 U.S. 654, 695 (1988).
28. Buckley v. Valeo, 424 U.S. 1, 121 (1976) (per curiam). The branches are not "hermetically" sealed from one another. "The President is a participant in the lawmaking process by virtue of his authority to veto bills. . . . The Senate is a participant in the appointive process by virtue of its authority to refuse to confirm persons nominated to office by the President." *Id.*
29. *Chadha*, 462 U.S. at 951.
30. *Id.* (citing *Buckley*, 424 U.S. at 121).
31. 487 U.S. 654 (1988).
32. 28 U.S.C. §§ 591-599 (1988). The Act allows for the appointment of an independent counsel by a specially constituted panel to investigate and prosecute government officials for criminal violations upon recommendation by the Attorney General.
33. *Olson*, 487 U.S. at 695-96.
34. *Id.*
35. *Id.*
36. *Id.*

In *United States v. Tolbert*,[37] the United States District Court for the District of Kansas applied this functional analysis. The court held the Guidelines were unconstitutional because there was a potential for disruption that was not justified by an overriding need.[38] The court reasoned that because there are three federal judges on the panel, the impartiality of judges on the Commission, as well as other federal judges, is threatened.[39] In *United States v. Schwartz*,[40] however, the United States District Court for the District of Delaware reasoned that "because there is minimal infringement upon the Judiciary, just as there was with the Executive Branch," the Guidelines do not violate the separation of powers doctrine.[41]

The question arises as to whether Congress violated the separation of powers doctrine by placing a commission that exercises executive power and functions within the judicial branch.[42] Article III, section 2 of the Constitution limits the judicial power of the United States to the adjudication of cases and controversies.[43] Congress, however, chose to place the Commission in the judicial branch because of a "strong feeling that, even under this legislation, sentencing should remain primarily a judicial function."[44]

The *Tolbert* court noted that although Congress may delegate to the judiciary the authority to make rules, the rules must be

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37. 682 F. Supp. 1517 (D. Kan. 1988).
38. *Id.* at 1527.
39. *Id.*
40. 692 F. Supp. 331 (D. Del. 1988).
41. *Id.* at 342.
42. *See* United States v. Amesquita-Padilla, 691 F. Supp. 277, 285 (W.D. Wash. 1988) (holding that placement of the Commission within the judicial branch did not violate separation of powers because the Commission served a judicial sentencing function).
43. U.S. CONST. art. III, § 2, cl. 1; *see* Flast v. Cohen, 392 U.S. 83 (1968) (construing the terms "cases" and "controversies" as limitations upon the business of federal courts).
44. S. REP. No. 225, 98th Cong., 1st Sess. 159, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 3182, 3342. Although the Commission is within the judicial branch, power is also granted to the executive branch. Prevailing principles, however, prevent an executive agency from prescribing criminal penalties. *See, e.g.*, United States v. Howard, 352 U.S. 212 (1957). Because the Guidelines provide for "charge offense" sentencing, the prosecutor has increased authority over the criminal sanction, and the decision of what charge to bring will have a significant effect upon the penalty. GUIDELINES, *supra* note 2, at 5-6. With charge offense sentencing, the sentences imposed by the Guidelines are not based on the defendant's actual conduct, but on the conduct which constitutes the elements of a statutory offense. *Id.* at 5. In justifying the use of a charge offense system, the Commission pointed out that a court "may control any inappropriate manipulation . . . through use of its power to depart from the specific guideline sentence." *Id.* at 6.

procedural in nature.[45] The court reasoned that since the Supreme Court stated that Florida's sentencing guidelines were substantive in nature,[46] the Federal Sentencing Guidelines were also substantive in nature and, therefore, not properly within the judicial branch.[47]

At least one federal judge has considered the issue of placement of the Commission in the judicial branch one of semantics only.[48] "[W]hat must be examined are the *function* and the *powers* of the Commission . . . ."[49] Although in agreement with that statement, the United States District Court for the Southern District of California in *United States v. Arnold*[50] held that the Guidelines were invalid because the Commission was "performing . . . executive duties and powers, [and] its location in the Judicial Branch [offended the] U.S. CONST. art. III, § 2, cl. 1."[51]

The question of whether the Commission is performing a legislative function within the judiciary also arises. It has been held that the authority to define and fix punishment for a particular crime is not judicial, but legislative.[52] The imposition of an individual sentence, however, is a judicial function.[53]

In holding the Guidelines valid, the United States District Court for the Western District of Washington in *United States v. Amesquita-Padilla*[54] maintained that Congress had not assigned nonjudicial executive and legislative functions, but had "established an independent commission in the Judicial Branch."[55] Because the function of the Commission is to aid judges in the performance of their judicial duties,[56] the court found "no constitutional infirmity in Congress' decision to establish the Commission as an independent agency in the judicial branch."[57] The United States District Court for the Eastern District of Pennsylvania in *United States v. Whyte*,[58] however, reasoned: "Neither the legislative, the executive, nor the

45. *Tolbert*, 682 F. Supp. at 1524 (citing Sibbach v. Wilson & Co., 312 U.S. 1, 14 (1941)).
46. *Id.* (citing Miller v. Florida, 482 U.S. 423, 433 (1987)).
47. *Id.*
48. *See* United States v. Ortega-Lopez, 684 F. Supp. 1506, 1516 (C.D. Cal. 1988) (Hupp, J., dissenting).
49. *Id.* (emphasis added) (stating that the Commission did not violate separation of powers).
50. 678 F. Supp. 1463 (S.D. Cal. 1988).
51. *Id.* at 1470.
52. *Ex parte* United States, 242 U.S. 27, 42 (1916).
53. *Id.* at 41.
54. 691 F. Supp. 277 (W.D. Wash. 1988).
55. *Id.* at 282.
56. The court drew an analogy to the rule-making power of the judiciary, which was upheld in Sibbach v. Wilson & Co., 312 U.S. 1 (1941). 691 F. Supp. at 283.
57. 691 F. Supp. at 284.
58. 694 F. Supp. 1194 (E.D. Pa. 1988).

Judicial Branch bears the responsibility for the creation of the Guidelines. No branch of the government is accountable for their policy decisions."[59] The court concluded that "[t]he Judicial Branch has no authority to legislate or execute sentences binding on all judges."[60]

Although the Constitution contains no express prohibition against article III judges serving on independent commissions, it has been held that the doctrine of separation of powers was created to prevent officials in one branch from taking on the duties of another.[61] "As a general rule, . . . 'executive or administrative duties of a nonjudicial nature may not be imposed on judges holding office under Art. III of the Constitution.'"[62] Two federal circuits that have addressed the issue have reached opposite conclusions regarding the service of federal judges on presidential commissions.[63] The Eleventh Circuit found that judicial service on the President's Commission on Organized Crime was improper because the judges were placed in a prosecutorial position that may have impaired the judges' neutrality.[64] Conversely, the Third Circuit held that if an impartiality problem arose, it could be handled on an individual-case basis.[65]

The Ninth Circuit, in *Gubiensio-Ortiz v. Kanahele*,[66] held the Guidelines unconstitutional because they obstructed the independence of the branches when judges are required to exercise both judicial and executive power.[67] The court reasoned that because judges would not be permitted to serve in high-level presidential cabinet positions, it would be equally impermissible for judges to serve on the Commission.[68]

The Congress gave the President the power to appoint and remove members of the Commission.[69] Because the Commission is located in the judicial branch, the issue arises as to whether "the removal powers of the President over the Commissioners in the

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59. *Id.* at 1195.
60. *Id.* at 1196.
61. Immigration & Naturalization Serv. v. Chadha, 462 U.S. 919, 951 (1983).
62. Morrison v. Olson, 487 U.S. 654, 677 (1988) (quoting Buckley v. Valeo, 424 U.S. 1, 123 (1976) (per curiam)).
63. *See In re* President's Comm'n on Org. Crime, Subpoena of Scarfo, 783 F.2d 370 (3d Cir. 1986); *In re* President's Comm'n on Org. Crime, Subpoena of Scaduto, 763 F.2d 1191 (11th Cir. 1985).
64. *Scaduto*, 763 F.2d at 1197-98.
65. *Scarfo*, 783 F.2d at 381.
66. 857 F.2d 1245 (9th Cir. 1988).
67. *Id.* at 1259.
68. *Id.* at 1259-60.
69. 28 U.S.C. § 991(a) (1988). The Act provides in part that the members of the Commission "shall be subject to removal by the President only for neglect of duty or malfeasance in office or for other good cause shown." *Id.*

Judicial Branch violate the separation of powers principles."[70] In *Bowsher v. Synar*,[71] the Supreme Court held that the retention by Congress of the right to remove an executive officer (the Comptroller General) was an unconstitutional violation of the separation of powers doctrine.[72] As a result of *Synar*, an argument was made that a "judicial commission to be controlled by the President similarly runs afoul of the Constitution."[73]

Several federal district courts rejected the *Synar* analogy as a basis for invalidating the Guidelines. For example, in *United States v. Ruiz-Villanueva*,[74] the *Synar* analogy failed for two reasons. First, the President does not control the Commission because the President appoints members of the Commission "by and with the advice and consent of the Senate."[75] Second, because the Commission does not perform an exclusively judicial function, the President's removal power does not infringe on the judicial branch.[76]

The *Synar* analogy was also rejected by the district court in *United States v. Chambless*.[77] In *Chambless*, the court applied a functional analysis,[78] finding that even though the "Commission is situated in the judicial branch, the duties imposed on the Commission are . . . executive in nature."[79] Because the court considered the Commission functionally executive, it held that the President's removal power was constitutionally proper.[80] The court did not, however, discuss whether it is impermissible for the executive branch to participate in the judicial branch by reason of the President's power to appoint the commissioners.

In *Mistretta v. United States*,[81] John M. Mistretta and Nancy L. Ruxlow were indicted on three counts relating to the sale of cocaine.[82] The United States District Court for the Western District of Missouri denied Mistretta's motion to have the Guidelines invalidated as an excessive delegation of legislative authority and a violation

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70. United States v. Frank, 682 F. Supp. 815, 821 (W.D. Pa. 1988) (citing United States v. Ruiz-Villanueva, 680 F. Supp. 1411, 1423 (S.D. Cal. 1988)) (*Frank* avoided this issue by deciding that the location of the Commission in the judicial branch violated art. III, § 2, cl. 2 of the Constitution).
71. 478 U.S. 714 (1986).
72. *Id.* at 723.
73. *Ruiz-Villanueva*, 680 F. Supp. at 1423.
74. *Id.* at 1411.
75. *Id.* at 1423 (quoting 28 U.S.C. § 991(a)).
76. *Id.* at 1424 (citing 28 U.S.C. § 991(a)).
77. 680 F. Supp. 793, 802 (E.D. La. 1988).
78. *Id.*
79. *Id.*
80. *Id.*
81. 488 U.S. 361 (1989).
82. *Id.* at 370.

of the separation of powers doctrine.[83] The court held that the Commission was constitutionally sound and that the Guidelines did not constitute an unconstitutional delegation of power.[84] Mistretta subsequently pleaded guilty to "conspiracy and agreement to distribute cocaine," and the remaining counts were dismissed.[85] He was sentenced to eighteen months imprisonment with three years of supervised release and fined over $1,000.[86] Mistretta appealed to the Eighth Circuit.[87] Both Mistretta and the United States, pursuant to Supreme Court Rule 18, petitioned the Supreme Court for certiorari before judgment.[88] The Court granted certiorari[89] because of the public importance of the issue and the disarray of the federal district courts.[90]

In an eight-to-one decision,[91] the Supreme Court affirmed the district court's decision. Justice Blackmun, writing for the Court, held the Guidelines constitutional on delegation of power and separation of power grounds.[92]

Beginning its analysis with the nondelegation doctrine, the Court applied the "intelligible principle" test set forth in *J.W. Hampton, Jr., & Co. v. United States*.[93] The Court stated that because Congress cannot properly perform its job without the ability to delegate power, it is sufficient if Congress "lay[s] down by legislative act an intelligible principle" delineating the policy and the boundaries of such authority.[94] The Court found that Congress provided "detailed guidance" to the Commission and "overarching constraints" on the formation of the Guidelines.[95] Despite the Commission's significant discretion in formulating the Guidelines, the exhaustive task of their formation is "precisely the sort of intricate, labor-intensive task for which delegation to an expert body is especially appropriate."[96] The Court concluded that Congress had not delegated excessive power because

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83. *Id.*
84. United States v. Johnson, 682 F. Supp. 1033, 1035 (W.D. Mo. 1988), *aff'd sub nom.* Mistretta v. United States, 488 U.S. 361 (1989).
85. *Mistretta*, 488 U.S at 370.
86. *Id.* at 371.
87. *Id.*
88. *Id.*
89. *Id.*
90. *Id.*
91. Chief Justice Rehnquist and Justices White, Marshall, Stevens, O'Connor, and Kennedy joined Justice Blackmun's opinion. Justice Brennan joined Justice Blackmun's opinion in all but n.11. *See infra* note 121.
92. *Mistretta*, 488 U.S. at 412.
93. 276 U.S. 394 (1928).
94. *Mistretta*, 488 U.S. at 372 (quoting *J.W. Hampton, Jr., & Co.*, 276 U.S. at 409).
95. *Id.* at 376.
96. *Id.* at 379.

the delegation of authority was "sufficiently specific and detailed to meet the constitutional requirements."[97]

Turning to the separation of powers doctrine, the Court rejected the notion that the three branches of government must be totally separate and distinct.[98] Instead, the Court applied a flexible view of separation of powers, observing that the constitutional system imposes a degree of overlapping responsibility.[99] There are, consequently, "twilight areas" where the activities of the branches merge.[100]

In applying the separation of powers doctrine, the Court first looked at the placement of the Commission in the judicial branch. Although prior decisions focused on whether there was interference with another branch,[101] the *Mistretta* Court applied a "not more appropriate to another branch" standard.[102] Admitting that the placement of the Commission in the judicial branch was unusual, the Court refused to hold the placement unconstitutional because the Commission's activities were not more appropriately performed by one of the other branches.[103] The judiciary may perform nonadjudicatory functions that are appropriate and do not "trench upon the prerogatives of another Branch."[104]

Second, the Court examined whether the participation of federal judges on the Commission interfered with the judicial branch. While adhering to the general rule that an article III judge may not undertake "executive or administrative duties of a nonjudicial nature,"[105] the Court did not believe that the requirement of article III judges on the Commission impeded the function of the judicial branch.[106] Additionally, there is no explicit constitutional prohibition upon federal judges serving on independent commissions.[107]

The Court observed that there is a tradition of extrajudicial service,[108] and after enumerating several notable

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97. *Id.* at 374.
98. *Id.* at 380. The Court observed that the security against the excessive authority of one branch "lies not in a hermetic division between the Branches, but in a carefully crafted system of checked and balanced power within each Branch." *Id.* at 381.
99. *Id.*
100. *Id.* at 386. The Court cited as an example Sibbach v. Wilson & Co., 312 U.S. 1 (1941), where it upheld the power of the judiciary to promulgate the Federal Rules of Civil Procedure. *Mistretta*, 488 U.S. at 386.
101. *See, e.g.*, Morrison v. Olson, 487 U.S. 654 (1988).
102. *Mistretta*, 488 U.S. at 385.
103. *Id.* at 384-85.
104. *Id.* at 388.
105. *Id.* at 385 (citing *Olson*, 487 U.S. at 677 (quoting Buckley v. Valeo, 424 U.S. 1, 123 (1976) (per curiam))).
106. *Id.* at 395-96.
107. *Id.* at 397.
108. *Id.* at 400 & n.23.

examples,[109] the Court held that the separation of powers doctrine does not prohibit article III judges from participating in "certain extrajudicial activity."[110] Further, the Court believed that the inclusion of federal judges enhanced the makeup of the Commission. By enlisting federal judges, the Commission is assured experience and expertise in the area of sentencing.[111]

Finally, the Court turned to the President's power to remove members of the Commission for cause. The Court held that the President's removal power did not violate the separation of powers doctrine.[112] Because the Act did not diminish the status of the article III judges as judges, the President's removal power posed a negligible threat to judicial independence.[113] Even if a judge was removed from the Commission, absent impeachment, the judge would continue serving as a federal judge.[114] Thus, the Court found that there was "no risk that the President's limited removal power would compromise the impartiality of Article III judges serving on the Commission and, consequently, no risk that the Act's removal provision would prevent the Judicial Branch from performing its constitutionally assigned function."[115]

Justice Scalia dissented, arguing that the formation of the Commission violated the separation of powers doctrine.[116] Justice Scalia reasoned that the Commission's only responsibility is establishing the Guidelines, which is a "legislative" function.[117]

The Supreme Court's decision to hold the Guidelines constitutional is supported by sound application of prior case law, proper exercise of judicial deference to a congressional decision, and regard for public policy.

Although the general rule is that Congress may not "delegate its legislative power to another Branch,"[118] the nondelegation doctrine does not completely bar Congress from granting the coordinate branches a portion of its power.[119] As long as Congress provides

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109. *Id.* The examples included five Justices participating on the election commission that resolved the contested Presidential election of 1876; Justice Robert's participation on the commission that investigated the attack on Pearl Harbor; Justice Jackson's service as a prosecutor at the Nuremberg trials; and Chief Justice Warren's service on the commission investigating the assassination of President Kennedy.
110. *Id.* at 401.
111. *Id.* at 408.
112. *Id.* at 411 n.35.
113. *Id.* at 410.
114. *Id.* (citing U.S. CONST. art. III, § 1).
115. *Id.* at 411.
116. *Id.* at 426-47 (Scalia, J., dissenting).
117. *Id.* at 420-21 (Scalia, J., dissenting).
118. *Id.* at 371-72 (citing Field v. Clark, 143 U.S. 649, 692 (1892)).
119. *Id.*

intelligible principles to which the recipient of the power must conform, the delegation of legislative power is not prohibited.[120]

Congress could not have been more specific in delegating the authority to the Commission to formulate the Guidelines. Congress clearly specified the purposes of the Commission.[121] In addition, Congress specified that sentencing ranges must be consistent with the pertinent provisions of title 18 and must reflect current average sentences.[122] Moreover, Congress established statutory factors for each sentencing question[123] that the Commission was to consider in formulating the Guidelines.[124] Finally, Congress set forth several aggravating and mitigating circumstances to be considered by the Commission.[125]

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120. *Id.* at 372 (citing J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928)).

121. 28 U.S.C. § 991(b) (1988); *see also supra* notes 6-7 and accompanying text.

122. Under 28 U.S.C. § 994 (1988), the Guidelines must be "consistent with all pertinent provisions of . . . title 18." *Id.* § 994(a). Under 28 U.S.C. § 991(b)(1)(A) (1988), the Commission must meet the sentencing purposes set forth in 18 U.S.C. § 3553(a)(2) (1988), which provide that the sentence is:

> (A) to reflect the seriousness of the offense, to provide respect for the law, and to provide 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.

Id.

123. *Mistretta*, 488 U.S. at 376-77. In footnote 11 to the Court's opinion, Justice Blackmun acknowledged the range of the Commission's discretion by assuming that Congress had given the Commission the authority to reinstate the federal death penalty. Justice Brennan declined to join this part of the Court's opinion.

124. 28 U.S.C. § 994(c)(1)-(7) (1988). Section 994(c) provides that the circumstances to be considered in establishing categories of offenses are:

> (1) the grade of the offense;
> (2) the circumstances under which the offense was committed which mitigate or aggravate the seriousness of the offense;
> (3) the nature and degree of the harm caused by the offense, including whether it involved property, irreplaceable property, a person, a number of persons, or a breach of public trust;
> (4) the community view of the gravity of the offense;
> (5) the public concern generated by the offense;
> (6) the deterrent effect a particular sentence may have on the commission of the offense by others; and
> (7) the current incidence of the offense in the community and in the Nation as a whole.

Id.

125. *Id.* § 994(d)(1)-(11). The aggravating and mitigating factors are:

> (1) age;
> (2) education;
> (3) vocational skills;

Notwithstanding the nondelegation doctrine, historically Congress has frequently delegated its power to define punishment to the coordinate branches. For example, the Federal Probation Act granted federal judges the power to place defendants on probation.[126] In addition, Congress established the United States Parole Board as an agency of the executive branch.[127] Furthermore, Congress has delegated to the executive branch full authority to establish punishments under the Uniform Code of Military Justice.[128]

If the nondelegation doctrine endures as a fundamental element of the Constitution, it has remained largely inactive. No delegation of congressional power has failed for indefiniteness since 1935.[129] In *Mistretta*, because of the deference accorded to Congress by the Court and the articulate guidance provided to the Commission by Congress, the decision that the Guidelines were not the result of an excessive delegation of power was in harmony with stare decisis.

Although the Supreme Court has invalidated previous attempts to reassign constitutionally-vested powers,[130] statutory provisions that pose no danger of encroaching upon the province of the coordinate branches have been upheld.[131]

Placing the Commission within the judiciary has not interfered with the role of the other branches.[132] Prior to the establishment of the Guidelines, it was a member of the judicial branch (the trial judge) who determined criminal sentences.[133] The relationship between

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(4) mental and emotional condition to the extent that such condition mitigates the defendant's culpability or to the extent that such condition is otherwise plainly relevant;
(5) physical condition, including drug dependence;
(6) previous employment record;
(7) family ties and responsibilities;
(8) community ties;
(9) role in the offense;
(10) criminal history; and
(11) degree of dependence upon criminal activity for a livelihood.

Id.

126. *See* Burns v. United States, 287 U.S. 216, 220-21 (1932).
127. *See Ex parte* United States, 242 U.S. 27, 50 (1916).
128. 10 U.S.C. § 856 (1988) (delegates to the President the power to prescribe the limits on military punishments).
129. *See Mistretta*, 488 U.S. at 373; *see also* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); Panama Ref. Co. v. Ryan, 293 U.S. 388 (1935). (The Court, in both cases, held that the National Industrial Recovery Act was an invalid delegation of legislative power to the President.).
130. *See, e.g.*, Bowsher v. Synar, 478 U.S. 714 (1986) (Congress may not retain the right to remove an officer appointed to the executive branch.).
131. *See, e.g.*, Morrison v. Olson, 487 U.S. 654 (1988) (The Court upheld the judicial appointment of an independent counsel.).
132. *Mistretta*, 488 U.S. at 385.
133. *See id.* at 395.

the branches has not changed.[134] The location of the Commission in the judicial branch did not intrude upon the coordinate branches to any greater extent than when a trial judge has determined the appropriate sentence for a criminal defendant.[135]

It has been argued that if the words "in the judicial branch" render the Guidelines unconstitutional, then such language could be severed, and the remainder of the Act upheld.[136] The courts, however, are reluctant to perform a task which would thwart congressional intent.[137] The canon of construction that presumes constitutionality does not empower courts to rewrite statutes to avoid a question of constitutionality.[138] Furthermore, the legislative history supports the conclusion that the legislative intent was to locate the Commission within the judicial branch.[139]

The Department of Justice has advocated placing the Commission within the executive branch to avoid constitutional separation of power problems.[140] However, attempting this "cure" for unconstitutionality would raise further separation of powers questions. A minimum of three article III federal judges are required to serve on the Commission. If the location of the Commission was within the executive branch, members of the judiciary would be carrying out executive functions, thus compromising the independence of both the judicial and executive branches. Although there is an analogy between the Parole Commission and the Sentencing Commission, "the conceptual basis for the Parole Commission's authority lies in the executive branch's power to execute judgments and its power to pardon."[141] The Commission determines proper sentences for specific levels of crimes. Even if the Commission is formally moved, or considered an "executive" agency by function, the Act may still face constitutional challenges based upon the composition of the

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134. *Id.*
135. *Id.*
136. Brief for Respondent at 40, *Mistretta* (Nos. 87-1904 & 87-7028).
137. *See* United States v. Arnold, 678 F. Supp. 1463, 1470 (S.D. Cal. 1988). "[T]ransfer of the Commission from the Judicial Branch to a different branch or to an independent status would appear to unduly frustrate Congressional intent." *Id.*; *see also* United States v. Tolbert, 682 F. Supp. 1517, 1525 (D. Kan. 1988) (The court declined "to rewrite the Sentencing Reform Act in order to place the Commission within the executive branch.").
138. Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 841 (1986).
139. "The better view is that the sentencing should be within the province of the judiciary." S. REP. No. 225, 98th Cong., 2d Sess. 54 (1983), *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 3182, 3237.
140. *See* United States v. Bolding, 683 F. Supp. 1003, 1004 n.1 (D. Md. 1988), *rev'd*, 876 F.2d 21 (4th Cir. 1989).
141. *Id.*

Commission.[142] Thus, Congress's decision to place the Commission within the judiciary is appropriate because there has been no showing that its placement within the judiciary trespasses upon the dominion of the coordinate branches. Moreover, there is no more suitable place for such a commission. A commission that performs one of the functions traditionally performed by the judicial branch is properly located within the judicial branch.

Although the Supreme Court has determined that article III judges may not perform nonjudicial functions in their capacity as judges,[143] and has held that as article III judges they may not perform administrative duties of a nonjudicial executive nature,[144] the Court has not suggested that article III judges may not perform a *judicial* function in their capacity as commissioners. Therefore, to withstand the challenge, the service of the judges on the Commission must be of a judicial nature and in a nonjudicial capacity.

In this situation, the function of the judges on the Commission is not to perform the function of an executive officer, but to determine appropriate sentences, which is a judicial function. Because the judges are performing duties of a judicial nature rather than an executive nature, the prohibition expressed in *Morrison v. Olson*[145] is not applicable. Additionally, because the judges are acting as commissioners and not as judges, they are serving in a nonjudicial capacity, and the principle that they as judges should not perform nonjudicial functions does not apply.[146]

The tradition of service by federal judges in nonjudicial roles has been well established.[147] Furthermore, one can hardly find adequate ground for believing that the framers of the Constitution would

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142. *See* United States v. Arnold, 678 F. Supp. 1463 (S.D. Cal. 1988) (concluding that the presence of article III judges on the Commission violated separation of powers).
143. *See* Hayburn's Case, 2 U.S. (2 Dall.) 409, 410 (1792).
144. *See* Morrison v. Olson, 487 U.S. 654, 677 (1988) (quoting Buckley v. Valeo, 424 U.S. 1, 123 (1976) (per curiam)).
145. *Id.* at 654.
146. One federal court reasoned that because the Commissioners do not decide cases or controversies, "inclusion of Article III judges on the Commission does not violate the separation of powers doctrine." United States v. Costelon, 694 F. Supp. 786, 792-93 (D. Colo. 1988). However, this line of reasoning may result in the court being hoisted by its own petard. To declare that the Commission does not decide cases or controversies may implicitly suggest that the Commission is improperly within the judicial branch.
147. *See, e.g.*, Brief for the United States Sentencing Commission at 41, *Mistretta* (Nos. 87-1904 & 87-7028). If it was valid for Marshall to serve as Secretary of State and Jay as Ambassador to Great Britain, for Justice Jackson to prosecute at Nuremberg, and for Chief Justice Warren to investigate the Kennedy assassination, it would surely be anomalous to conclude that three circuit judges may not participate in the work of the Commission. *Id.*

prevent persons experienced in sentencing from participating in a commission formed for that very purpose. Any slight overlap of branches would undoubtedly be outweighed by the benefits of having accomplished judges participate in the promulgation and review of the Guidelines. The alternative of having no judicial participation in the development of the Guidelines is a far less desirable option.

Although in *Synar*[148] the Supreme Court invalidated a scheme by which Congress, acting alone, could dismiss a member of the executive branch,[149] a distinction from *Synar* may be drawn. In *Synar*, Congress did not have power over the Comptroller General.[150] "No impermissible transfer of authority out of the Executive Branch occurs because the Executive Branch retains control through appointment and removal."[151] The congressional act in *Synar* was held unconstitutional because one branch had the power to discharge an official appointed by another branch.[152] In *Mistretta*, however, it is the President who appoints and removes the judges as commissioners.[153] The President's power over the Commission does not impermissibly interfere with the judiciary.[154] The Act does not grant the President the power to remove the judges from their posts as article III judges.[155] Moreover, the President has not been granted the power to interfere with the impartial adjudication of cases before article III judges.[156]

The initial consequence of the Supreme Court's decision is the resentencing of all persons convicted of federal crimes after November 1987 who were not sentenced according to the Guidelines.[157] In some cases, where a defendant has relied on a district court's holding that the Guidelines were unconstitutional, there may be grounds for a new trial. Next, because the Act redefines parole[158] and limits

148. 478 U.S. 714 (1986).
149. *Id.* at 726-34.
150. *Id.*
151. United States v. Schwartz, 692 F. Supp. 331, 339 (D. Del. 1988).
152. 478 U.S. at 726-34.
153. 28 U.S.C. § 991(a) (1988).
154. *Mistretta*, 488 U.S. at 410.
155. *Id.*
156. *Id.* at 411.
157. Some courts have had the wisdom to sentence according to the Guidelines, even though they held them unconstitutional, thus avoiding an unfortunate waste of judicial resources. *See, e.g.*, United States v. Bolding, 683 F. Supp. 1003, 1004 (D. Md. 1988), *rev'd*, 876 F.2d 21 (4th Cir. 1989).
158. 18 U.S.C. § 3624 (1988). Section 3624(b) provides that prisoners who serve one year or more, other than a life term, are automatically credited with 54 days toward their sentence, unless the prisoner has not complied with the institutional regulations. *Id.* § 3624(b).

probation[159] for all offenses governed by the Guidelines, changes in plea bargaining may develop.

The Guidelines may afford defendants another avenue of appellate review. Formerly, appellate courts gave the sentencing judge almost unconditional deference in determining the appropriate sentence.[160] Under the Guidelines, however, a defendant may appeal a sentence that the defendant considers an incorrect application of the Guidelines or is outside of the Guidelines.[161]

Finally, prosecutors, defense attorneys, and judges will be required to become familiar with the Guidelines and the provisions of the Act.[162] There may be some offenses for which no Guidelines are provided because of unusual circumstances. In such instances, the trial judge has the discretion to impose a sentence after considering certain factors, such as the Guidelines provided for similar offenses.[163] It remains to be seen, however, how liberally judges will use the unusual circumstances provision. The various districts are likely to disagree as to what constitutes an unusual circumstance and to what degree they should depart from the Guidelines.

The Supreme Court has ruled that the Guidelines are constitutional because by creating the Commission, Congress neither excessively delegated legislative power nor violated the separation of powers doctrine. The decision to uphold the Guidelines was consistent with prevailing constitutional principles and the intentions of Congress. There remains, however, the possibility that the Guidelines will be challenged on other grounds such as due process or the eighth amendment.

The Court and the Commission have recognized that the reformation of the federal criminal sentencing system is an enormous task. The value of a criminal justice system with less sentencing disparity is outweighed by whatever harm, if any, may arise from the slight overlap of authority among the branches. The constitutionality of the Guidelines should not rest upon the slender reed of interbranch balancing, but rather, upon the merit of fairness to

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159. *Id.* §§ 3561-3566.

160. *Mistretta*, 488 U.S. at 364; *see also* Rosenberg, *Judicial Discretion of the Trial Court, Viewed from Above*, 22 SYRACUSE L. REV. 635, 663 (1971).

161. 18 U.S.C. § 3742(a)(2)-(3) (1988). The government may also file a notice of appeal on the same grounds. *Id.* § 3742(b)(2)-(3).

162. For an introduction to the application of the Guidelines from a practitioner's perspective, see Cassella, *A Step-by-Step Guide to the New Federal Sentencing Guidelines*, 34 PRAC. LAW. 13 (Apr. 1988).

163. 18 U.S.C. § 3553(b) (1988) provides the trial judge with the discretion to impose "an appropriate sentence, having due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders." *Id.*

defendants, prosecutors, and defenders, and not incidently, improved governmental efficiency.

Stanley Turk