

Winter 1990

Separation of Powers--The Federal Sentencing Commission: Unconstitutional Delegation and Threat to Judicial Impartiality

Lisa G. Esayian

Follow this and additional works at: <https://scholarlycommons.law.northwestern.edu/jclc>

 Part of the [Criminal Law Commons](#), [Criminology Commons](#), and the [Criminology and Criminal Justice Commons](#)

Recommended Citation

Lisa G. Esayian, Separation of Powers--The Federal Sentencing Commission: Unconstitutional Delegation and Threat to Judicial Impartiality, 80 J. Crim. L. & Criminology 944 (1989-1990)

This Supreme Court Review is brought to you for free and open access by Northwestern University School of Law Scholarly Commons. It has been accepted for inclusion in Journal of Criminal Law and Criminology by an authorized editor of Northwestern University School of Law Scholarly Commons.

NOTES

SEPARATION OF POWERS—THE FEDERAL SENTENCING COMMISSION: UNCONSTITUTIONAL DELEGATION AND THREAT TO JUDICIAL IMPARTIALITY?

Mistretta v. United States, 109 S. Ct. 647 (1989).

I. INTRODUCTION

In *Mistretta v. United States*,¹ the United States Supreme Court held that the United States Sentencing Commission (the Commission) and the Sentencing Guidelines promulgated by it² do not violate the constitutionally based doctrines of nondelegation of power and separation of powers.³ The Court applied the “intelligible principle” test for congressional delegations to conclude that the authority delegated by Congress to the Commission was sufficiently detailed and specific to be constitutional.⁴ The Court then approved Madison’s view of a flexible separation of powers doctrine in holding that neither the location, composition, nor presidential control of the Commission violated separation of powers principles.⁵

The dissent agreed with the majority that Congress prescribed sufficiently detailed standards to meet the requirements of permissible delegation.⁶ However, the dissent contended that the Commission violated the separation of powers doctrine because it exercised

¹ 109 S. Ct. 647 (1989).

² The Sentencing Guidelines replace individualized sentences with defined sentencing ranges for all federal offenses and are binding on federal judges. See *infra* notes 58-67 and accompanying text for further discussion of the Commission and the Guidelines.

³ *Mistretta*, 109 S. Ct. at 675.

⁴ *Id.* at 654-55.

⁵ *Id.* at 658-75.

⁶ *Id.* at 677.

legislative power.⁷

This Note argues that the Commission and the Guidelines represent impermissible legislation, thus violating separation of powers principles. In addition, the composition and placement of the Commission threaten judicial impartiality and independence.

II. FACTS

On December 3, 1987, John M. Mistretta and Nancy L. Ruxlow sold cocaine to an undercover federal narcotics agent.⁸ On December 10, 1987, a grand jury indicted them⁹ with conspiracy to distribute cocaine,¹⁰ knowingly and intentionally distributing and causing to be distributed cocaine,¹¹ and knowingly and willfully using a firearm in a drug trafficking crime.¹² Mistretta was sentenced by the district court according to the Sentencing Guidelines.

Mistretta claimed that the Sentencing Guidelines were unconstitutional because Congress had violated the delegation of powers doctrine by delegating one of its "core" legislative obligations to the Sentencing Commission.¹³ He also asserted that the Guidelines violated the separation of powers doctrine because only Congress may prescribe sentences.¹⁴ The United States District Court for the Western District of Missouri rejected these claims, reasoning that the Commission was an executive agency whose guidelines were like the substantive rules of other executive agencies.¹⁵ Furthermore, members of the judiciary might serve constitutionally in the executive branch as Commissioners.¹⁶ In addition, the Commission should not have to sacrifice the input of judges to protect its independence.¹⁷

Mistretta pleaded guilty to the first count, conspiracy to possess cocaine with intent to distribute, on February 3, 1988.¹⁸ The district

⁷ *Id.* at 680-83.

⁸ Petition for Certiorari by United States at 6, *Mistretta* (Nos. 87-1904, 87-7028).

⁹ The District Court did not enter any judgment on Ruxlow's Indictment. Brief for Petitioner-Respondent United States at 13, *Mistretta* (Nos. 87-1904, 87-7028).

¹⁰ Distribution of cocaine is a felony. 21 U.S.C. § 841(a)(1) (1982). Conspiracy to distribute cocaine is also a felony. 21 U.S.C. § 841(b)(1)(B) (1982); 21 U.S.C. § 846 (1982).

¹¹ 21 U.S.C. § 841(a)(1).

¹² Using a firearm to commit a felony is a felony. 18 U.S.C. § 924(c)(1), (2) (1982).

¹³ *United States v. Johnson*, 682 F. Supp. 1033, 1034 (W.D. Mo. 1988).

¹⁴ *Id.*

¹⁵ *Id.* at 1034-35.

¹⁶ *Id.* at 1035.

¹⁷ *Id.*

¹⁸ Petition for Certiorari at 4, *Mistretta* (Nos. 87-1904, 87-7028); Brief for United States at 14, *Mistretta* (Nos. 87-1904, 87-7028).

court dismissed the second and third counts.¹⁹ The parties stipulated to the factors the Court should consider in sentencing, resulting in a fifteen to twenty-one month range according to the Guidelines.²⁰ The court sentenced Mistretta²¹ to an eighteen-month prison term followed by a three-year term of supervised release.²² The district court also imposed a \$1,000 fine and a \$50 special assessment.²³ Mistretta appealed to the Court of Appeals for the Eighth Circuit.

Before the Court of Appeals heard the appeal, both Mistretta and the United States petitioned the United States Supreme Court for certiorari.²⁴ The Court granted certiorari because of the strong public importance of rational sentencing²⁵ and because of the disagreement among the district courts.²⁶ The Court addressed the constitutionality of the United States Sentencing Commission and the Guidelines promulgated by it.²⁷

III. BACKGROUND

A. THE DOCTRINE OF UNLAWFUL DELEGATION OF POWER

Article I of the Constitution states that "all legislative Powers

¹⁹ *Johnson*, 682 F. Supp. at 1035.

²⁰ Brief for Respondent-Petitioner Mistretta at 1, *Mistretta* (Nos. 87-1904, 87-7028).

²¹ Before the court sentenced Mistretta, he moved to have the Guidelines invalidated as a violation of due process because they interfered with a trial judge's sentencing discretion. Mistretta argued that the Guidelines prevented sentencing judges from considering relevant factors. The district court denied this motion, concluding that the Guidelines allowed the court to consider all factors that could make a difference favorable to the defendant. Brief for Respondent-Petitioner Mistretta at 5, *Mistretta* (Nos. 87-1904, 87-7028). Mistretta did not renew this claim in the United States Supreme Court. Brief for Petitioner-Respondent United States at 14 n.23, *Mistretta* (Nos. 87-1904, 87-7028).

²² *Mistretta v. United States*, 109 S. Ct. 647, 654 (1989).

²³ *Id.*

²⁴ The parties petitioned for certiorari pursuant to 28 U.S.C. § 1252 (1982), which allows direct appeal to the Court from any court of the United States which holds a congressional act unconstitutional in a civil action in which the United States is a party.

²⁵ The United States noted that this decision "will affect a large percentage of all the criminal cases that reach judgment in the federal system." Brief for Petitioner-Respondent United States at 15, *Mistretta* (Nos. 87-1904, 87-7028). The Guidelines will govern sentencing for most felonies and misdemeanors committed on or after November 1, 1987, and ultimately would have been applied in approximately 40,000 cases every year. Petition for Certiorari by United States at 9, *Mistretta* (Nos. 87-1904, 87-7028).

²⁶ *Mistretta*, 109 S. Ct. at 654. The constitutionality of the Guidelines was challenged in more than 400 cases, and the district courts were sharply divided on this issue. As of May 11, 1988, 21 district courts had upheld the Guidelines and 29 had held them unconstitutional. Petition for Certiorari by United States at 9, *Mistretta* (Nos. 87-1904, 87-7028).

²⁷ *Mistretta*, 109 S. Ct. at 649.

... shall be vested in a Congress of the United States. . . ."²⁸ As a result, "it is a breach of the National fundamental law if Congress gives up its legislative power and transfers it to the President, or to the Judicial branch"²⁹ Such delegation is unconstitutional because the legislature cannot transfer law-making power "for it being but a delegated power from the people, they who have it cannot pass it over to others."³⁰ Courts³¹ and commentators³² have suggested that the nondelegation doctrine preserves congressional accountability. Despite the strong words of this doctrine, the Court consistently has permitted congressional delegations of authority³³ as far back as 1813.³⁴

The Court first laid down a standard for judging such congressional delegations in *J.W. Hampton, Jr. & Co. v. United States*.³⁵ Such delegation of authority was constitutional if Congress legislated an

²⁸ U.S. CONST. art. I, § 1.

²⁹ *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 406 (1928) (upholding the constitutionality of § 312(a) of the Tariff Act of 1922, which allowed the President to change any duties authorized by the Act after investigation).

³⁰ J. LOCKE, SECOND TREATISE OF CIVIL GOVERNMENT § 141 (C. Macpherson ed. 1980).

³¹ The nondelegation doctrine "ensures to the extent consistent with orderly governmental administration that important choices of social policy are made by Congress, the branch . . . most responsive to the popular will." *Industrial Union Dep't, AFL-CIO v. American Petroleum Inst.*, 448 U.S. 607, 685 (1980) (Rehnquist, J., concurring) (invalidating OSHA's power to promulgate standard because it exceeded statutory authority); see also *Arizona v. California*, 373 U.S. 546, 626 (1963) (Harlan, J., dissenting in part).

³² John Hart Ely has argued that "by refusing to legislate, our legislators [escape] the sort of accountability that is crucial to the intelligible functioning of a democratic republic." J. H. ELY, *DEMOCRACY AND DISTRUST, A THEORY OF JUDICIAL REVIEW* 131-33 (1980). Similarly, Judge Skelly Wright has noted that when Congress cannot deal with a problem, "it passes some 'soft' statutes which throw the mess into the lap of an administrative agency . . . at the expense of democratic decisionmaking." Wright, *Review: Beyond Discretionary Justice*, 81 YALE L.J. 575, 585-86 (1972).

³³ In only two cases has the Court held a congressional delegation excessive and unconstitutional. See *infra* notes 44-46 and accompanying text for discussion of these cases.

³⁴ *Cargo of the Brig Aurora v. United States*, 11 U.S. (7 Cranch) 382 (1813) (permissible for Congress to grant to the President power to declare by proclamation that either Great Britain or France ceased violating neutral commerce with the United States, which effectively revived sections of the expired non-intercourse act of 1809). In *Field v. Clark*, 143 U.S. 649, 682, 691 (1892), the Court relied on *Brig Aurora* to uphold a delegation of tariff-making power to the President. Writing for the majority, Justice Harlan stated, "That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution." *Id.* at 692. However, the Court held that the President's power to suspend tariff provisions favorable to a country was executive and not legislative power. *Id.*

³⁵ 276 U.S. 394 (1928). See *supra* note 29 for discussion of this case.

"intelligible principle" and directed delegates to conform to it.³⁶ The Court has since applied this "intelligible principle" standard to uphold a wide range of delegations, even though some delegations have been general and given the delegatee broad discretion. Such constitutional delegations have included authority to fix prices³⁷ and rates,³⁸ determine water rights,³⁹ and regulate broadcast licensing.⁴⁰ The Court upheld these delegations largely because of congressional inability to deal with technical, expert, or large fields.⁴¹ Thus Congress had provided a general policy on which the delegates had premised their authority.⁴² The Court rationalized this type of delegation as in the public interest.⁴³

³⁶ *Id.* at 409. In *Hampton*, Chief Justice Taft stated the often-cited principle that delegations of legislative authority must be judged "according to common sense and the inherent necessities of the governmental co-ordination." *Id.* at 406; see also, *Industrial Union Dep't, AFL-CIO v. American Petroleum Inst.*, 448 U.S. 607, 674 (Rehnquist, J., concurring) (citing *Hampton*, 276 U.S. at 406) (see *supra* note 31 for further discussion of this case).

³⁷ *Yakus v. United States*, 321 U.S. 414, 426 (1944) (upholding delegation to an administrator to set fair and equitable commodity prices that would effectuate purposes of Emergency Price Control Act of 1942). In *Yakus*, the Court held that the Constitution had not required Congress to complete the fact-finding required for its legislative action, but rather has compelled it to set legislative policy. *Id.* at 424; see also *Sunshine Coal Co. v. Adkins*, 310 U.S. 381, 397 (1940) (upholding delegation of power to Bituminous Coal Commission to establish maximum prices for coal).

³⁸ *Federal Power Comm'n v. Hope Natural Gas*, 320 U.S. 591, 600 (1944) (upholding delegation of power to Federal Power Commission to determine just and reasonable rates).

³⁹ *Arizona v. California*, 373 U.S. 546 (1963) (upholding delegation of power to the Secretary of the Interior to choose among water users and settle terms of contracts for apportioning impounded waters because the vast water system required a single manager to function efficiently).

⁴⁰ *National Broadcasting Co. v. United States*, 319 U.S. 190, 225-26 (1943) (upholding delegation of power to the Federal Communications Commission to regulate broadcast licensing as required by public interest, convenience, or necessity).

⁴¹ See *supra* notes 37-39 and *infra* note 42 for discussion of these cases.

⁴² *Industrial Union Dep't, AFL-CIO v. American Petroleum Inst.*, 448 U.S. 607, 675 (Rehnquist, J., concurring) (invalidating OSHA's power to promulgate particular standard because it exceeded statutory authority). Justice Rehnquist further concurred:

[Decisions upholding congressional delegations of authority] have done so largely on the theory that Congress may wish to exercise its authority in a particular field, but because the field is sufficiently technical, the ground to be covered sufficiently large, and the Members of Congress themselves not necessarily expert . . . , the most that may be asked . . . is that Congress lay down the general policy and standards that animate the law.

Id. (Rehnquist, J. concurring); see also *Panama Ref. Co. v. Ryan*, 293 U.S. 388 (1935) (invalidating delegation of power to President to prohibit interstate transportation of oil). Congress needed "flexibility and practicality, which will enable it to perform its function in laying down policies and establishing standards, while leaving to selected instrumentalities the making of subordinate rules within prescribed limits." *Id.* at 421.

⁴³ See, e.g., *Sunshine Coal Co. v. Adkins*, 310 U.S. 381, 397 (1940) (Bituminous Coal Commission's setting of maximum coal prices was constitutional "when in the public

The Court invalidated only two congressional delegations of power for Congress' failure to articulate any policy or standard confining the discretion of the delegates' authority.⁴⁴ In *Panama Ref. Co. v. United States*, the Court struck down a section of the National Industrial Recovery Act (NIRA) because Congress had not declared a policy, established a standard, or laid down a rule.⁴⁵ Similarly, in *A.L.A. Schechter Poultry Corp. v. United States*, the Court invalidated another section of the NIRA that had dispensed with administrative procedure.⁴⁶

B. SEPARATION OF POWERS

The Constitution vests legislative power in the Congress,⁴⁷ executive power in the President,⁴⁸ and judicial power in the Supreme Court.⁴⁹ These grants establish a separation of governmental powers. James Madison espoused that this separation of powers guarded "against a gradual concentration of the several powers in the same department."⁵⁰ The Court, asserting that the three

interest."); *National Broadcasting Co.*, 319 U.S. at 225-26 (FTC's licensing of radio communication permitted as required by "public interest, convenience, or necessity").

⁴⁴ *Panama Ref.*, 293 U.S. at 388 (see *supra* note 42 and *infra* note 45 for discussions of this case); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

⁴⁵ *Panama Ref.*, 293 U.S. at 415-20. Title I, § 9(c) of the NIRA gave the President authority to prohibit transportation of petroleum in interstate commerce in excess of the amount prescribed by state authority. *Id.* at 406 (citing National Industrial Recovery Act of 1933, 15 U.S.C. § 709(c)). The Court held that this section did not set a standard but rather gave the President "unlimited authority" to determine policy. *Id.* at 415. The Court enumerated a three-pronged test for deciding when a delegation had been excessive: 1) whether Congress had declared a policy with respect to that subject; 2) whether Congress had set a standard for the President's action; and 3) whether Congress had required any finding by the President in the exercise of the delegated judicial authority. *Id.*

⁴⁶ *Schechter Poultry*, 295 U.S. at 533. The Court held that the NIRA was unconstitutional. Section 703 of the NIRA allowed the President to approve industry codes of fair competition. Once approved, such codes were to "be the standards of fair competition for such trade or industry." 15 U.S.C. § 703 (1933). The Court invalidated § 703's code-making authority as an unconstitutional delegation. *Schechter Poultry*, 295 U.S. at 551. The Court distinguished previous decisions upholding seemingly equally vague standards because, unlike this section of the NIRA, they included constraining procedures. *Id.* at 532-33.

⁴⁷ U.S. CONST. art. 1, § 1.

⁴⁸ U.S. CONST. art. 2, § 1.

⁴⁹ U.S. CONST. art. 3, § 1.

⁵⁰ THE FEDERALIST No. 51, at 349 (J. Madison) (J. Cooke ed. 1961). Concentration of powers should be prevented by "giving to those who administer each department, the necessary constitutional means, and personal motives, to resist encroachments of the others." *Id.*; see also *INS v. Chadha*, 462 U.S. 919, 998 (1983) (purpose of separating governmental authority is to prevent "unnecessary and dangerous concentration of power in one branch").

branches be largely but not totally separate,⁵¹ uses the separation of powers to safeguard against one branch's encroachment or aggrandizement at the expense of another.⁵² This doctrine prevented the exercise of arbitrary power by creating friction through distributing the government's powers among three departments.⁵³

However, the Supreme Court has consistently followed the Madisonian interest in a flexible separation of powers standard. The doctrine does not imply that the branches cannot have "*partial agency* in, or . . . *controul* [sic] over the acts of each other," but rather "that where the *whole* power of one department is exercised by the same hands which possess the *whole* power of another department, the fundamental principles of a free constitution, are subverted."⁵⁴ Thus, the three branches need not be totally distinct.⁵⁵

Applying this flexible approach, the Court has approved delegations that partially mixed branches' tasks but had not allowed one branch to aggrandize another's power.⁵⁶ The Court has, however, struck down many delegations as violative of separation of powers⁵⁷

⁵¹ *Humphrey's Ex'r v. United States*, 295 U.S. 602, 629 (1935) (each branch must remain "entirely free from the *control or coercive influence*" of other branches) (emphasis added); *Buckley v. Valeo*, 424 U.S. 1, 121 (1976) (Congress could not reserve to itself power to appoint members of the Federal Election Commission, a body exercising "executive" power; Constitution does not contemplate total separation of the three branches); *United States v. Nixon*, 418 U.S. 683, 707 (1974) ("In designing the structure of our Government and dividing and allocating the sovereign power among three co-equal branches, the Framers of the Constitution sought to provide a comprehensive system, but the separate powers were not intended to operate with absolute independence.").

⁵² *Buckley*, 424 U.S. at 120-22. See *supra* note 51 for discussion of this case.

⁵³ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 629 (1952) (Douglas, J., concurring (citing *Myers v. United States*, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting))).

⁵⁴ THE FEDERALIST No. 47, at 325-26 (J. Madison) (J. Cooke ed. 1961) (emphasis in original).

⁵⁵ *Buckley*, 424 U.S. at 121 (Constitution does not contemplate total separation of the three branches of government); *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 442 n.5 (1977) (upholding delegation of power to the General Services Administration to control presidential papers after resignation because the delegation did not prevent the executive from achieving its constitutional functions); *Youngstown Sheet & Tube*, 343 U.S. at 635 (Jackson, J., concurring) (The Constitution "contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity.").

⁵⁶ See, e.g., *Morrison v. Olson*, 108 S. Ct. 2597 (1988) (upholding the judicial appointment of independent counsel because this appointment authority did not impermissibly interfere with the President's powers); *CFTC v. Schor*, 478 U.S. 833 (1986) (upholding agency's assumption of jurisdiction over state-law counterclaims because it involved narrow class of actions, the agency's power was restricted, and the agency was subject to congressional review).

⁵⁷ See, e.g., *Bowsher v. Synar*, 478 U.S. 714 (1986) (congressional power of removal over executive branch official violated separation of powers); *INS v. Chadha*, 462 U.S.

but only two as unlawful delegations of powers.

C. THE SENTENCING COMMISSION AND THE GUIDELINES

In 1984, Congress created the United States Sentencing Commission as an independent body of the judiciary.⁵⁸ The Commission promulgates guidelines which determine sentences based on criminal history and current offense and specify binding ranges for prison terms.⁵⁹

The Commission consists of seven voting members appointed by the President with the advice and consent of the Senate.⁶⁰ At least three of the members of the Commission must be federal judges⁶¹ who may serve concurrently as judges and Commissioners.⁶² The President may remove a Commission member "only for neglect of duty or malfeasance in office" or if other good cause is shown.⁶³

The Sentencing Guidelines should "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 conduct" and "maintaining sufficient flexibility to permit individualized sentences."⁶⁴ The final Sentencing Guidelines are a matrix defining a sentencing range for every offense by using a scoring system in which points are added or subtracted according to characteristics of the crime or of the offender.⁶⁵

Although the Guidelines are binding on the courts, a sentencing judge may forgo the applicable guideline if he or she finds an aggravating or mitigating factor that the Commission failed to consider adequately when formulating the guidelines.⁶⁶ The judge

919 (1983) (invalidating legislative veto); *Northern Pipeline Const. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982) (separation of powers violated because Act conferred Article III powers on bankruptcy judges who did not qualify as Article III judges because they lacked lifetime tenure and salary protection).

⁵⁸ Sentencing Reform Act of 1984, 28 U.S.C. § 991(a) (Supp. V 1987).

⁵⁹ 28 U.S.C. § 994(a)(1),(b) (Supp. V 1987). In addition, the Commission's proposed rules become effective if Congress fails to reject or modify them within six months of their submission. 28 U.S.C. § 994(p).

⁶⁰ 28 U.S.C. § 991(a).

⁶¹ 28 U.S.C. § 991(a).

⁶² 28 U.S.C. § 992(c).

⁶³ 28 U.S.C. § 991(a).

⁶⁴ 28 U.S.C. §§ 991(b)(1)(B), 994(a)-(n).

⁶⁵ For example, "Tax Evasion" receives a score of +4, while "Insider Trading" receives a score of +11. UNITED STATES SENTENCING COMMISSION, SENTENCING GUIDELINES AND POLICY STATEMENTS FOR THE FEDERAL COURTS (1987).

⁶⁶ 18 U.S.C. § 3553(a),(b) (Supp. V 1987).

must then state a specific reason for imposing a sentence different from the applicable guideline.⁶⁷

IV. SUPREME COURT OPINIONS

A. MAJORITY OPINION

In *Mistretta*, the Court held that Congress' delegation of the power to formulate sentencing guidelines for federal criminal offenses to a Sentencing Commission did not violate the constitutional principles of nondelegation and separation of powers.⁶⁸ In the majority opinion,⁶⁹ Justice Blackmun stressed that Congress laid down a sufficiently intelligible principle to guide the Commission.⁷⁰ Furthermore, the Commission's location in the judicial branch, its judicial component, and its membership by presidential appointment did not violate the separation of powers principle.⁷¹

1. *Delegation of Power*

Justice Blackmun used the "intelligible principle" test to determine whether or not congressional power delegations to and requests for assistance from different governmental branches survive delegation of powers restrictions.⁷² This test permitted congressional delegation of legislative power where Congress had first laid down an intelligible principle to which the delegatee must conform.⁷³ The test's flexibility allowed Congress to function in an increasingly complex society.⁷⁴ Justice Blackmun noted that, with two exceptions,⁷⁵ the Court has never invalidated a challenged statute on delegation grounds.⁷⁶

Applying this "intelligible principle" test, the Court found that Congress sufficiently had specified and detailed the Sentencing Commission's authority.⁷⁷ Congress had provided the Commission

⁶⁷ 18 U.S.C. § 3553(c).

⁶⁸ *Mistretta v. United States*, 109 S. Ct. 647, 675 (1989).

⁶⁹ Justice Blackmun was joined by Chief Justice Rehnquist and Justices White, Marshall, Stevens, O'Connor, and Kennedy, and in all but n.11 by Justice Brennan.

⁷⁰ *Id.* at 654-58.

⁷¹ *Id.* at 658-75.

⁷² *Id.* at 654.

⁷³ *Id.* (citing *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394 (1928)).

⁷⁴ *Mistretta*, 109 S. Ct. at 654-55.

⁷⁵ *Panama Ref. Co. v. Ryan*, 293 U.S. 388 (1935) (invalidating NIRA's delegation of power to President to prohibit interstate transportation of excess oil); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) (invalidating section of NIRA for lack of administrative procedure). See *supra* notes 44-46 and accompanying text for further discussion of these exceptions.

⁷⁶ *Mistretta*, 109 S. Ct. at 655.

⁷⁷ *Id.*

with three specific goals and four clear purposes.⁷⁸ It also had set out that the Commission should develop guidelines to regulate sentences⁷⁹ and had listed certain uses of sentencing ranges.⁸⁰ Congress also had formulated detailed instructions for establishing offense and offender categories.⁸¹

The Court acknowledged that although Congress had allowed the Commission significant leeway in formulating the Guidelines, the Commission might not establish policy.⁸² However, it might have decided the relative severity of crimes, determined which had been punished too leniently or severely, and developed categories of similar offenses.⁸³ Justice Blackmun, approving this magnitude of discretion, relied upon *Yakus v. United States*⁸⁴ which had permitted bodies with congressionally delegated power to find facts and draw inferences where standards guide their actions and courts could determine whether or not congressional goals had been met.⁸⁵ Justice Blackmun argued that Congress had more than met this standard by delineating the Commission's policies, rules, and procedures and by indicating methods for handling specific sentencing situations.⁸⁶ Reinforcing the conclusion that the delegation of power was acceptable, he maintained that the development of detailed sentencing guidelines for hundreds of crime and offender classifications had necessitated a complex fact-finding effort for which an expert body was particularly well-suited.⁸⁷

⁷⁸ *Id.* Congress stated that the Commission's goals should be 1) to "assure the meeting of the purposes of sentencing as set forth" in the Act, 2) to "provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records . . . while maintaining sufficient flexibility to permit individualized sentences," where appropriate, and 3) to "reflect to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal process." 28 U.S.C. § 991(b)(1) (Supp. V 1987). Congress specified the Commission's four purposes as 1) "to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense," 2) "to afford adequate deterrence to criminal conduct," 3) "to protect the public from further crimes of the defendant," and 4) "to provide the defendant with needed . . . correctional treatment." 18 U.S.C. § 3553(a)(2) (Supp. V 1987).

⁷⁹ *Mistretta*, 109 S. Ct. at 656 (citing 28 U.S.C. § 994(b)).

⁸⁰ *Id.*

⁸¹ *Id.* at 656-57.

⁸² *Id.* at 657-58.

⁸³ *Id.* at 657.

⁸⁴ 321 U.S. 414 (1944).

⁸⁵ *Mistretta*, 109 S. Ct. at 658.

⁸⁶ *Id.* (citing *United States v. Chambliss*, 680 F. Supp. 793, 796 (E.D. La. 1988) (Congress constitutionally delegated to the Commission authority to set criminal penalties by providing it with explicit instructions regarding formulation of the Guidelines, creating congressional policies reflected in the statute, and circumscribing power to the Commission by providing specific rules for certain situations)).

⁸⁷ *Id.*

2. Separation of Powers

The Court held that the Guidelines did not violate the separation of powers doctrine. Justice Blackmun reviewed the fundamental principles of the doctrine to validate the constitutionality of the Sentencing Commission as part of the judicial branch. He stressed the Court's traditional adherence to the Madisonian view that the three branches of government were separate yet interdependent.⁸⁸ The Court explained that the purpose of separation of powers was not to compartmentalize rigidly each branch but rather to prevent "the encroachment or aggrandizement of one branch at the expense of the other."⁸⁹ In applying these principles, the Court has held as unconstitutional statutes which had empowered one branch with authority appropriately spread among all three or which had threatened one branch's authority.⁹⁰ However, Justice Blackmun noted the Court has upheld statutes which had mixed the functions of the branches but had "pose[d] no danger of either aggrandizement or encroachment."⁹¹ Furthermore, Congress might have delegated to the judiciary nonadjudicatory functions that had not threatened the authority of another branch and had been "appropriate to the central mission of the Judiciary."⁹² The Court held that concerns over the distribution of power among the branches raised by the Commission's responsibilities and composition were constitutionally unpersuasive reasons to require its invalidation.⁹³

In examining these responsibilities and composition, the Majority held that the Commission's location within the judicial branch did not violate separation of powers.⁹⁴ Justice Blackmun noted that although judges appointed through Article III of the Constitution might not serve concurrently in executive or administrative positions,⁹⁵ the Court has "recognized significant exceptions to this general rule and . . . approved the assumption of some nonadjudicatory activities by the Judicial Branch."⁹⁶ Examples of such included the

⁸⁸ *Id.* at 658-59.

⁸⁹ *Id.* at 659 (quoting *Buckley v. Valeo*, 424 U.S. 1, 122 (1976) (see *supra* note 51 for discussion of *Buckley*)).

⁹⁰ *Mistretta*, 109 S. Ct. at 659-60.

⁹¹ *Id.* at 660 (citing *Morrison v. Olson*, 108 S. Ct. 2597 (1988) (upholding the judicial appointment of independent counsel because appointment authority did not impermissibly interfere with the President's powers); *CFTC v. Schor*, 478 U.S. 833 (1986) (upholding delegation of jurisdiction to CFTC for common law counterclaims)).

⁹² *Id.* at 663.

⁹³ *Id.* at 661.

⁹⁴ *Id.* at 664.

⁹⁵ *Id.* at 661 (citing *Morrison*, 108 S. Ct. at 2612) (quoting *Buckley v. Valeo*, 424 U.S. 1, 123 (1976)).

⁹⁶ *Mistretta*, 109 S. Ct. at 661.

Court's power to promulgate federal rules of civil procedure⁹⁷ and the judicial branch's power to administer the business of courts through judicial councils.⁹⁸ Because these extrajudicial activities and organizations relate closely to the judiciary's responsibilities, the judiciary was the appropriate branch for their administration.⁹⁹

The majority thus justified that the Sentencing Commission's placement within the judicial branch complied with separation of powers principles.¹⁰⁰ Justice Blackmun noted that judges have played primary roles in sentencing.¹⁰¹ Furthermore, like the Federal Rules of Civil Procedure, the Sentencing Guidelines bound judges and courts in exercising their powers.¹⁰² Although the development of sentencing guidelines required more political judgment than the Federal Rules of Civil Procedure,¹⁰³ Justice Blackmun observed that the Guidelines did not engender too much political activity.¹⁰⁴ They did not govern public behavior or afford the judiciary with legislative authority to establish penalties for every crime.¹⁰⁵ The majority also noted that the Commission was fully accountable to Congress, subject to the President's limited removal powers, and beholden to the notice and comment requirements of the Administrative Procedure Act.¹⁰⁶ It was neither a court nor some other type of body able to exercise judicial power.¹⁰⁷ Thus, the Commission's position within the judicial branch did not enhance its power or threaten another branch's authority.¹⁰⁸

The Court also ruled that Congress' requirement that the Commission be partly composed of federal judges who would share their authority with non-judges did not interfere impermissibly with the judiciary's functioning.¹⁰⁹ Active federal judges might constitutionally serve on commissions.¹¹⁰ In *United States v. Ferreira*¹¹¹ and

⁹⁷ *Id.* at 662 (citing 28 U.S.C. § 2072 (1982); *Sibbach v. Wilson & Co.*, 312 U.S. 1 (1941)).

⁹⁸ *Id.* at 663 (citing *Chandler v. Judicial Council*, 398 U.S. 74, 86 n.7 (1970)). Other examples of judicial administration of the courts cited by the Court include the Judicial Conference of the United States and the Administrative Office of the United States Courts. *Id.*

⁹⁹ *Id.* at 664.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.* at 665.

¹⁰⁴ *Id.* at 667.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 665-66.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 666-67.

¹⁰⁹ *Id.* at 667.

¹¹⁰ *Id.* The Court noted that while the "Constitution does include an Incompatibility

Hayburn's Case,¹¹² the Court generally had agreed that although neither courts nor judges acting as part of a court could have assumed administrative duties, individual judges acting as commissioners could have accepted such tasks.¹¹³ The Court noted that "judges serve on the Sentencing Commission not pursuant to their status and authority as Article III judges," but solely because the statute requires the President to appoint such judges.¹¹⁴

The Court then rejected *Mistretta's* claims that mandatory service of judges on the Commission would have weakened the judiciary and that policymaking by Article III judges would have threatened judicial impartiality.¹¹⁵ The Court noted that no judge had been appointed to the Commission against his or her consent and that the President most likely had lacked authority to force an unconsented appointment.¹¹⁶ In addition, Justice Blackmun maintained that federal judges' participation in the development of the Sentencing Guidelines had not affected their or other judges' impartiality on sentencing issues.¹¹⁷

The Court struggled with the petitioner's claim that the judiciary's encroachment in the political development of the Sentencing Guidelines weakened public confidence in judicial impartiality.¹¹⁸ The Court stressed that the judicial branch had drawn legitimacy from its "reputation for impartiality and nonpartisanship."¹¹⁹ Justice Blackmun concluded that the participation of judges in the Commission had left undisturbed this appearance.¹²⁰ The task of the Commission was to develop rational guidelines for a process performed exclusively by the judicial branch.¹²¹ Therefore, significant judicial participation in the Commission was appropriate.¹²²

Lastly, the Court maintained that the President's power to ap-

Clause applicable to national legislators . . . [n]o comparable restriction applies to judges." *Id.* at 668 (citing U.S. CONST. art. I, § 6, cl. 2).

¹¹¹ 54 U.S. (13 How.) 40 (1852).

¹¹² 2 U.S. (2 Dall.) 409 (1792).

¹¹³ *Mistretta*, 109 S. Ct. at 671 (citing *Ferreira*, 54 U.S. (13 How.) at 40; *Hayburn's Case*, 2 U.S. (2 Dall.) at 409).

¹¹⁴ *Id.* at 671.

¹¹⁵ *Id.* at 671-72.

¹¹⁶ *Id.* at 672.

¹¹⁷ *Id.* (citing *Mississippi Publishing Corp. v. Murphree*, 326 U.S. 438 (1946) (Court's promulgation of Federal Rules of Civil Procedure did not foreclose its consideration of challenges to their validity)).

¹¹⁸ *Mistretta*, 109 S. Ct. at 672.

¹¹⁹ *Id.* at 672-73.

¹²⁰ *Id.* at 673.

¹²¹ *Id.*

¹²² *Id.*

point and remove Commission members¹²³ had not precluded judges from their constitutional duty to adjudicate fairly cases and controversies.¹²⁴ Justice Blackmun noted that the President could have "elevate[d] federal judges from one level to another or . . . tempt[ed] judges away from the bench with Executive Branch positions."¹²⁵ Presidential removal of a judge from the Commission would not have threatened his or her status as an Article III judge.¹²⁶ Moreover, Congress had specified that the President might remove Commission members only for good cause.¹²⁷ Thus, the Court held that the presidential appointment and removal powers had not compromised the impartiality of judges on the Commission.¹²⁸

In sum, the Court held that the Commission's composition, its placement in the judicial branch, and its presidential authority over its members' appointments and removals did not violate the separation of powers doctrine.

B. DISSENTING OPINION

In his dissenting opinion, Justice Scalia agreed with the majority that the Commission complied with the "intelligible principle" standard for delegation of power.¹²⁹ However, he rejected the "intelligible principle" standard as irrelevant to the decision because the Sentencing Commission served a legislative function unrelated to the exercise of judicial power.¹³⁰ Justice Scalia asserted that the Commission's existence violated the separation of powers doctrine.¹³¹

1. *Delegation of Power*

Justice Scalia deemed the Guidelines as "legally binding prescriptions governing application of governmental power against private individuals . . . heavily laden . . . with value judgments and policy assessments."¹³² He recognized that it is important for the

¹²³ *Id.* The President may appoint all seven members of the Commission with the advice and consent of the Senate and remove them "only for neglect of duty or malfeasance in office or for other good cause shown." *Id.* (citing 28 U.S.C. § 991(a) (1982)).

¹²⁴ *Id.* at 674-75.

¹²⁵ *Id.* at 674.

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.* at 675.

¹²⁹ *Id.* at 677 (Scalia, J., dissenting).

¹³⁰ *Id.* at 679 (Scalia, J., dissenting).

¹³¹ *Id.* at 679-83 (Scalia, J., dissenting).

¹³² *Id.* at 676 (Scalia, J., dissenting). For example, under the Guidelines, a judge

legislature to decide basic policy questions.¹³³ However, the dissent argued that the judicial and executive branches also necessarily had decided some basic policy questions.¹³⁴ Thus, the Court has upheld all but two congressional delegations of power¹³⁵ based on a "public interest standard."¹³⁶ Justice Scalia conceded that the Commission had sufficient congressional guidance and, therefore, did not violate the doctrine of unconstitutional delegation.¹³⁷

2. Separation of Powers

Justice Scalia rejected the majority's contention that the Guidelines complied with the separation of powers doctrine.¹³⁸ Because the delegation of powers doctrine was so flexible that many congressional acts satisfied it, he urged that doctrines such as separation of powers, which deter excessive delegation, must be rigorously enforced to rein in excessive delegation.¹³⁹ Justice Scalia reasoned that most congressional delegations had been constitutional because the executive and judicial branches inherently possessed some policymaking discretion, not because congressional burdens had necessitated delegation.¹⁴⁰ He noted that the Court had upheld congressional delegation of discretion to administrate and execute laws to other branches.¹⁴¹

could have pronounced the same sentence for abusive sexual contact terrorizing a child as for unlawfully entering or remaining in the United States. Similarly, the Guidelines had permitted equivalent sentences for drug trafficking and violations of the Wild Free-Roaming Horses and Burros Act. *Id.* (Scalia, J., dissenting).

¹³³ *Id.* at 677 (Scalia, J., dissenting).

¹³⁴ *Id.* (Scalia, J., dissenting).

¹³⁵ *Panama Ref. Co. v. Ryan*, 293 U.S. 388 (1935) (NIRA's delegation of power to the President to prohibit interstate transportation of excess oil violated the nondelegation doctrine because it lacked a standard); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) (invalidating section of NIRA because it lacked administrative procedures). See *supra* notes 44-46 and accompanying text for further discussion of these exceptions.

¹³⁶ *Id.* (Scalia, J., dissenting).

¹³⁷ *Id.* (Scalia, J., dissenting).

¹³⁸ *Id.* at 683 (Scalia, J., dissenting).

¹³⁹ *Id.* at 677-78 (Scalia, J., dissenting).

¹⁴⁰ *Id.* at 678 (Scalia, J., dissenting). Applying this reasoning to the instant case, Justice Scalia argued that trial judges have the "power to determine what factors justify a greater or lesser sentence within the statutorily prescribed limits because that was ancillary to their exercise of the judicial power of pronouncing sentence upon individual defendants." *Id.* (Scalia, J., dissenting).

¹⁴¹ *Id.* at 678-79 (Scalia, J., dissenting) (citing *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 406 (1928) (Congress had frequently found it necessary to use executive branch officers to make public regulations interpreting and executing statutes) (see *supra* notes 29 and 36 for further discussion of *Hampton*); *United States v. Grimaud*, 220 U.S. 506 (1911) (upholding statutory grant of authority to Secretary of Agriculture to make rules and regulations governing the use of public forests); *Field v. Clark*, 143

Justice Scalia would forbid delegation of purely legislative power without adequate standards.¹⁴² The Sentencing Commission represented such an unconstitutional delegation.¹⁴³ Because the Commission had no executive¹⁴⁴ or judicial¹⁴⁵ powers, he concluded that the majority's holding allowed "rulemaking [to] be entirely unrelated to the exercise of judicial or executive powers," thereby allowing for endless congressional creation of independent expert bodies.¹⁴⁶

The dissent, rejecting the majority's finding, maintained that the Commission had not been part of the judicial branch.¹⁴⁷ He bolstered his contention by reiterating the majority's reasoning that the Commission was "'not a court, does not exercise judicial power, and is not controlled by or accountable to' the judicial branch."¹⁴⁸

Justice Scalia also refused to characterize the Commission as an "independent agency"¹⁴⁹ because such agencies may not be part of the legislative or judicial branches.¹⁵⁰ Because judicial power, unlike executive power, was not delegable, an independent agency could not have purported to exercise power on behalf of a branch where judges personally exercise the power.¹⁵¹ Justice Scalia rejected the trend of separation of powers cases, including the majority's holding, that viewed the Constitution as "a generalized prescription" prohibiting excessive mixing of the branches and advocating case-by-case analyses.¹⁵² Instead, he viewed the Constitution as a governmental framework which had already set the boundaries of permissible mixing of the branches.¹⁵³ The Constitu-

U.S. 649 (1892) (authority to execute laws may be delegated while authority to make laws may not) (see *supra* note 34 for further discussion of *Field*)).

¹⁴² *Id.* at 679 (Scalia, J., dissenting).

¹⁴³ *Id.* (Scalia, J., dissenting).

¹⁴⁴ *Id.* (Scalia, J., dissenting). Justice Scalia stated that the Commission had not been located in the executive branch, had not exercised executive power on its own, and had not been subject to the control of the President. *Id.*

¹⁴⁵ *Id.* at 680 (Scalia, J., dissenting).

¹⁴⁶ *Id.* (Scalia, J., dissenting).

¹⁴⁷ *Id.* at 681 (Scalia, J., dissenting).

¹⁴⁸ *Id.* at 680-81 (Scalia, J., dissenting) (quoting *Mistretta*, 109 S. Ct. at 665).

¹⁴⁹ *Id.* at 681 (Scalia, J., dissenting).

¹⁵⁰ *Id.* (Scalia, J., dissenting).

¹⁵¹ *Id.* at 682 (Scalia, J., dissenting).

¹⁵² *Id.* (Scalia, J., dissenting) (citing *Morrison v. Olson*, 108 S. Ct. 2597 (1988) (see *supra* note 56 for further discussion of *Morrison*); *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787 (1987) (United States Attorney's Office did not have exclusive power to initiate contempt proceedings for disobedience to federal court orders; judiciary may also prosecute contempt because judiciary must have independent means to vindicate its own authority without dependence on another branch to decide whether proceedings should be initiated)).

¹⁵³ *Id.* (Scalia, J., dissenting).

tion thus had prohibited the "creation of a new branch altogether," a "junior-varsity Congress," or a "body which is not Congress, and yet exercises no governmental powers except the making of rules that have the effect of laws."¹⁵⁴ Because the Commission violated this framework, he concluded it was an unconstitutional violation of separation of powers.¹⁵⁵

V. ANALYSIS

Judicial participation in the Sentencing Commission and in the promulgation of the Sentencing Guidelines violates the separation of powers doctrine in at least two respects. First, the Guidelines represent the judiciary's impermissible legislative action, because precedent reveals that sentencing decisions are legislative in nature and because the Commission's promulgation of the Guidelines violates general nondelegation principles. Second, judicial participation in the Commission threatens judicial autonomy and impartiality. However, altering the Commission's responsibilities and composition can meet separation of powers requirements while retaining the benefits of judicial input to the Commission and to the Guidelines.

A. THE SENTENCING GUIDELINES VIOLATE SEPARATION OF POWERS BECAUSE THEY ARE LEGISLATIVE

The Commission's promulgation of Sentencing Guidelines violates separation of powers because the Court has decided that sentencing decisions are legislative.¹⁵⁶ Because the judicial branch may not legislate,¹⁵⁷ such promulgation is beyond judicial power. Also, the Guidelines violate the basic test for permissible delegation, for they contain "matter which is properly . . . regarded as legislative in its character and effect."¹⁵⁸ The majority failed to address whether or not the delegated power was legislative. Although Justice Scalia

¹⁵⁴ *Id.* at 683 (Scalia, J., dissenting).

¹⁵⁵ *Id.* (Scalia, J., dissenting).

¹⁵⁶ *Rummel v. Estelle*, 445 U.S. 263, 284 (1980) (any trend toward lighter, discretionary sentencing must come from the legislature); *Gore v. United States*, 357 U.S. 386, 393 (1958) (apportionments of punishments are questions of legislative policy); *United States v. Sharpnack*, 355 U.S. 286, 297 (1957) ("power to make laws under which men are punished for crimes call for . . . the exercise of legislative judgment"); *United States v. Evans*, 333 U.S. 483, 486 (1947) ("defining crimes and fixing penalties are legislative, not judicial, functions"); *Ex parte United States*, 242 U.S. 27, 42 (1916) ("authority to define and fix the punishment for crime is legislative").

¹⁵⁷ *Massachusetts v. Mellon*, 262 U.S. 447, 488 (1923) (judicial function is to interpret and apply laws in cases properly brought before courts).

¹⁵⁸ *INS v. Chadha*, 462 U.S. 919, 952 (1983) (see *supra* note 50 for further discussion of this case).

referred to this issue to support his dissent, the legislative nature of the Guidelines is even clearer than he described, thereby justifying their unconstitutionality.

The Court consistently has defined sentencing decisions as legislative.¹⁵⁹ Only Congress can define criminal offenses and prescribe punishments.¹⁶⁰ In addition, only legislation approved by both Houses may limit federal judges' sentencing discretion.¹⁶¹ The Guidelines prescribe punishments, are not promulgated by a legislative act, and are not approved by the House of Representatives. Therefore, the Commission's promulgation of the Guidelines violates separation of powers because they are beyond the scope of judicial powers.

Alternatively, the Guidelines also violate separation of powers because they fail the *INS v. Chadha* test for appropriate exercise of legislative power.¹⁶² They contain matter which is properly regarded as legislative in character and effect; actions are legislative in character and effect when they "[alter] the legal rights, duties and relations of persons."¹⁶³ Congress exclusively has the authority to set basic policy decisions.¹⁶⁴ The Guidelines contain basic moral judgments about appropriate levels of punishment.¹⁶⁵ Also, the Commission's elaborate decision making process indicates that the Guidelines were created through a distinctly legislative method.¹⁶⁶

¹⁵⁹ See *supra* note 156 for these definitions.

¹⁶⁰ *Whalen v. United States*, 445 U.S. 684, 689 (1980) ("within our federal constitutional framework the legislative power, including the power to define criminal offenses and to prescribe the punishments to be imposed upon those found guilty of them, resides wholly with the Congress"); see also Liman, *The Constitutional Infirmities of the United States Sentencing Commission*, 96 YALE L.J. 1363, 1370 (1987) ("only Congress may decide whether a person's liberty should be restricted").

¹⁶¹ *United States v. Johnson*, 682 F. Supp. 1033, 1037 (W.D. Mo. 1988) (Wright, C.J., dissenting) (see *supra* notes 13-17 and accompanying text for further discussion of this case).

¹⁶² *Chadha*, 462 U.S. at 952 (see *supra* note 50 for further discussion of this case).

¹⁶³ *Id.*

¹⁶⁴ *Arizona v. California*, 373 U.S. 546, 626 (1963) (important social policy choices must be made by Congress).

¹⁶⁵ The Guidelines' classification of offenses "reflects a sentencing philosophy." Schwartz, *Options in Constructing a Sentencing System: Sentencing Guidelines Under Legislative or Judicial Hegemony*, 67 VA. L. REV. 637, 641 (1981). The Guidelines include particular levels of punishment for particular offenses for the purpose of achieving certain goals of deterrence and retribution. *Id.* at 643.

¹⁶⁶ *United States v. Estrada*, 680 F. Supp. 1312, 1324 (D. Minn. 1988) (Sentencing Commission violated separation of powers principles by having judiciary perform legislative function; the Commission's "extensive hearings, elaborate fact-finding processes, and myriad policy decisions undertaken by the Commission in promulgating general rules of future applicability . . . are clear evidence that the Commission has performed the legislative function of prescribing the punishment for crime.").

The Guidelines thus reflect legislative action because they constitute sentencing decisions and involve basic policy judgments.

B. THE SENTENCING GUIDELINES ARE UNCONSTITUTIONAL BECAUSE THEY THREATEN JUDICIAL INDEPENDENCE AND IMPARTIALITY

Contrary to the majority's analysis,¹⁶⁷ judicial participation in the Sentencing Commission is unconstitutional because it threatens judicial impartiality¹⁶⁸ and independence.¹⁶⁹ Although the majority considered the impartiality issue under separation of powers principles, it may also be viewed as a separate, important policy reason for invalidating the Guidelines. Impartiality is a central, constitutionally ordained requirement of federal judicial offices.¹⁷⁰ Litigants trust in the judiciary's impartiality.¹⁷¹ Judicial involvement in the promulgation of the Guidelines undermines both the judiciary's impartial adjudication of particular cases and its reputation for impartiality among litigants and the public.¹⁷²

¹⁶⁷ The Eighth Circuit recently confirmed this view that judicial participation on the Commission does not threaten the independence and impartiality of the judiciary. *United States v. Barnerd*, 887 F.2d 841 (8th Cir. 1989).

¹⁶⁸ In *Morrison v. Olson*, 108 S. Ct. 2597, 2615 (1988), the Court held that judicial power over the independent counsel did not threaten judicial impartiality because the judges were "isolated . . . from the review of the activities of the independent counsel." Thus, *Morrison* is distinguishable from *Mistretta*, because judicial members of the Sentencing Commission are not isolated from the activities that threaten their impartiality.

¹⁶⁹ Chief Justice Taney found that if a judge personally assumes a nonjudicial task, the judge does not violate separation of powers. *Slonim, Extrajudicial Activities and the Principle of the Separation of Powers*, 49 CONN. B.J. 391, 407 (1975) (citing *United States v. Ferreira*, 54 U.S. (13 How.) 40 (1852)). However, this analysis did not encompass the issue of judicial impartiality.

¹⁷⁰ *United States v. Will*, 449 U.S. 200 (1980).

¹⁷¹ *Hobson v. Hansen*, 265 F. Supp. 902, 931 (D.D.C. 1967) (Wright, J., dissenting) (upholding delegation of authority to district court to appoint members of the District of Columbia Board of Education).

¹⁷² This Note will not analyze whether United States Supreme Court Justices should participate in extrajudicial activities in general. This Note discusses the reasons judicial participation in the Sentencing Commission threatens judicial impartiality. However, it should be noted that the majority recognized that not "every kind of extrajudicial service under every circumstance necessarily accords with the Constitution The ultimate inquiry remains whether a particular extrajudicial assignment undermines the integrity of the Judicial Branch." *Mistretta v. United States*, 109 S. Ct. 647, 671 (1989). For analyses arguing that Justices should not participate in any non-judicial activities, see *The Association and the Supreme Court*, 32 A.B.A. J. 862, 862-63 (1946) (describing Justice Robert Jackson's personal view that Justices should not hold other government offices); Note, *Extrajudicial Activity of Supreme Court Justices*, 22 STAN. L. REV. 587, 589 (1970). For arguments in favor of allowing extrajudicial activity by Justices, see *United States v. Woodley*, 751 F.2d 1008, 1012 (9th Cir. 1985) (en banc) ("considerable weight is to be given to an unbroken practice, which has prevailed since the inception of our nation and was acquiesced in by the Framers of the Constitution when they were participating in public affairs"); *Slonim, supra* note 169, at 404, 406 (court as a whole cannot exercise nonjudicial powers, but individual judges acting in personal capacity may do so).

Judges cannot be impartial when they promulgate Sentencing Guidelines which they will use in future cases.¹⁷³ The Guidelines threaten the courts' independence because they "give a Justice a stake in what persons outside the judiciary do or tie him to interests which become involved in litigation before the Court. . . ."¹⁷⁴ After expending great effort in the formulation of the Guidelines, judges who served on the Commission will more likely apply the Guidelines dogmatically. The Guidelines cannot possibly anticipate every sentencing decision. Thus, the potential for strict application of the Guidelines to these instances is alarming.

Just such a dilemma was exemplified by Judge Charles E. Clark, principal drafter of the Federal Rules of Civil Procedure.¹⁷⁵ After drafting the rules, Judge Clark "heard hundreds of cases that required interpretation or application of the Federal Rules" as a judge for the Second Circuit Court of Appeals.¹⁷⁶ In cases involving the Federal Rules, Clark's behavior was strongly influenced by his experience as scholar and draftsman of the Rules. His strong bias for the Rules prompted his defense of the Rules against both constitutional and Rules Enabling Act challenges, and precedents that he thought construed the Rules incorrectly.¹⁷⁷ Similarly, judicial participation in the promulgation of the Guidelines will prevent judges from impartially adjudicating constitutional challenges to the Guidelines' validity.¹⁷⁸ Judges who served on the Commission may be biased in favor of viewpoints they advocated as Commission members and

¹⁷³ The majority erroneously argued that federal judges' participation in the promulgation of the Guidelines does not affect their or other judges' ability to adjudicate sentencing issues impartially. *Mistretta*, 109 S. Ct. at 673. Conversely, "the mandatory inclusion of Article III judges on the Commission compromises judicial neutrality by charging judges with both the execution and the imposition of sentences in particular cases." *United States v. DiBiase*, 687 F. Supp. 38, 44 (D. Conn. 1988) (Guidelines violate separation of powers).

¹⁷⁴ Note, *supra* note 172, at 589.

¹⁷⁵ Smith, *Judge Charles E. Clark and the Federal Rules of Civil Procedure*, 85 YALE L.J. 914, 915 (1976). Throughout the development of the Rules of Civil Procedure, Judge Clark held numerous key positions, including Reporter to the Supreme Court's Advisory Committee on the Rules, to the Committee that oversaw the functioning of the Rules, and to this Committee when it was later reconstituted as part of the Judicial Conference of the United States. Judge Clark was largely responsible for these Committees' works, which included revising the Rules. *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at 951.

¹⁷⁸ The majority argued that judges who had served on the Commission can impartially adjudicate constitutional challenges to the Guidelines. The majority supported this argument by an analogy to *Mississippi Publishing Corp.*, in which the Court held that its promulgation of the Federal Rules of Civil Procedure did not foreclose its consideration of challenges to their validity. *Mistretta v. United States*, 109 S. Ct. 647, 672 (1989) (citing *Mississippi Publishing Corp. v. Murphree*, 326 U.S. 438, 444 (1946)).

blind to potentially viable challenges.¹⁷⁹

A judge who helped to formulate the Guidelines is more likely to try to interpret the Guidelines according to his or her own vision of the Guidelines in an individual case, thereby slighting the unique circumstances of the case. Again, the example of Judge Clark is analogous. He viewed his decisions as opportunities to correct what he saw as errors in the Rules.¹⁸⁰ Guidelines judges may also try to correct errors they perceive in the Guidelines through their cases.

The Court's ability to decide constitutional questions regarding civil procedure rules is not analogous to its ability to decide challenges to the Guidelines. The Court's power to promulgate civil procedure rules is justified by its expertise of procedural rules and its inherent procedural rulemaking role.¹⁸¹ These justifications are inapplicable to sentencing. As noted above, the Court has emphasized repeatedly that determining sentencing ranges are legislative dominion.¹⁸² Though courts may consider the advice and practices of other judges when imposing sentences, setting sentence ranges is not an inherent judicial function like the promulgation of court rules.¹⁸³ Also, civil procedure rules provide for fair adjudication rather than favoring one outcome over another.¹⁸⁴ The Guidelines, on the other hand, specifically set particular levels of punishment to carry out particular goals of deterrence and retribution.

Moreover, judicial participation in the promulgation of the Guidelines undermines the judiciary's reputation for impartiality. The judiciary draws legitimacy from this reputation.¹⁸⁵ Judicial de-

¹⁷⁹ Comment, *Separation of Powers and Judicial Service on Presidential Commissions*, 53 U. CHI. L. REV. 993, 1011 (1986) ("Judicial service on presidential commissions may threaten judicial impartiality because it could bias a judge in favor of viewpoints that he or his colleagues promoted as members of a commission."); see also Note, *supra* note 172, at 594 ("Justices who have advised . . . on a 'correct' course of action will find it difficult to strike down the action they recommended as illegal or unconstitutional if the action is challenged in Court.").

¹⁸⁰ Smith, *supra* note 175, at 951. Judge Clark's judicial opinions "befitted a judge who had explored the subject thoroughly and was determined to see his conclusions prevail." *Id.*

¹⁸¹ Liman, *supra* note 160, at 1387 (citing J. WEINSTEIN, REFORM OF COURT RULE-MAKING PROCEDURES 54-55 (1977); Pound, *The Rule-Making Power of the Courts*, 12 A.B.A. J. 599, 602 (1926)).

¹⁸² See *supra* notes 156 and 160 and accompanying text for cases and further discussion regarding the legislative nature of sentencing decisions.

¹⁸³ See *In re Judicial Admin.: Felony Sentencing Guidelines*, 120 Wis. 2d 198, 353 N.W.2d 793 (1984) (recognizing this distinction in refusing legislatively granted authority to promulgate sentencing guidelines).

¹⁸⁴ *Hanna v. Plumer*, 380 U.S. 460, 466-67 (1965) (in civil action where jurisdiction is based on diversity, service of process shall be made as specified in Federal Rule of Civil Procedure 4(d)(1) rather than in manner prescribed by state law).

¹⁸⁵ Indeed, the majority recognized this point. *Mistretta v. United States*, 109 S. Ct.

cisions have only as much force as other branches and the public accord them.¹⁸⁶ One commentator suggests that the United States Supreme Court draws popular support from the public's symbolic association of the Constitution, a publicly revered document, with the Court, its neutral arbiter.¹⁸⁷ Similarly, Justice Robert Jackson observed that " 'public opinion . . . seems always to sustain the power of the Court. . . . ' "¹⁸⁸ Thus, an activity such as the creation of the Guidelines "that gives even the appearance of partiality . . . or that in some other way harms the public image of the Court as the neutral guardian of the Constitution, jeopardizes the Court's power to persuade."¹⁸⁹ Such a perception of bias by litigants and the public in general threatens the judiciary's ability to decide cases effectively.¹⁹⁰

In addition, one judge's participation in promulgating the Guidelines may influence another judge's view and application of the Guidelines. Judicial Commission members stamp their constitutional approval on the Guidelines by creating and approving them.¹⁹¹ This judicial approval may influence other judges to favor

647, 672-73 (1989) (see *supra* note 119 and accompanying text for the majority's discussion of the importance of impartiality).

¹⁸⁶ Note, *supra* note 172, at 588; see also Comment, *supra* note 179, at 1017 ("[N]ot only must a judge in fact be independent and impartial in resolving disputes, but the public must also *perceive* this to be the case") (emphasis in original) (citing H.T. RUBIN, *THE COURTS: FULCRUM OF THE JUSTICE SYSTEM* 3 (2d ed. 1984) (the purpose of the courts is not only to "do justice," but "to *appear* to do justice") (emphasis in original)); *Hobson v. Hansen*, 265 F. Supp. 902, 931 (D.D.C. 1967) (Wright, J., dissenting) (see *supra* note 171 for further discussion of *Hobson*).

¹⁸⁷ Lerner, *Constitution and Court as Symbols*, 46 *YALE L.J.* 1290, 1294 (1937); see also Comment, *supra* note 179, at 1017 ("A court's effectiveness in applying the law to the parties depends on its public image as a fair and neutral arbiter . . .").

¹⁸⁸ E. GERHART, *AMERICA'S ADVOCATE: ROBERT H. JACKSON* 121 (1958).

¹⁸⁹ Note, *supra* note 172, at 589; see also *In re Application of the President's Comm'n on Organized Crime, Subpoena of Scaduto*, 763 F.2d 1191, 1197 (11th Cir. 1985) ("even if a judge could satisfy himself that he could separate his participation on the Commission from his judicial functions, it is not clear that litigants could sustain equal faith in his impartiality").

¹⁹⁰ *United States v. Arnold*, 678 F. Supp. 1463, 1472 (S.D. Cal. 1988) (Commission's makeup violated separation of powers to the extent it included Article III judges as members).

¹⁹¹ *United States v. Tolbert*, 682 F. Supp. 1517, 1527 (D. Kan. 1988) (composition of Commission violated separation of powers) (citing Comment, *supra* note 179, at 1012-13 ("A judge's part in the formation of that action may influence how other judges consider and apply such enactments. By recommending a law, a judge puts his stamp of approval on it and in effect renders an opinion that it is constitutional or legal.")). *Contra United States v. Chambliss*, 680 F. Supp. 793, 800 (E.D. La. 1988) ("It is no secret that judges disagree with each other constantly. In construing or applying the guidelines, federal judges are unlikely to be impressed, or even minimally affected, by the fact that other judges serve on the Sentencing Commission.") (see *supra* note 86 for further discussion of this case).

the Guidelines. Thus, service of three judges in such a Commission is enough to threaten the loss of independence and impartiality to the entire judiciary.¹⁹²

The majority and commentators cite recusal as preventing judicial partiality.¹⁹³ However, recusal does nothing to alleviate the effect the judge's service on the Commission has on the impartiality of other judges.¹⁹⁴ Also, "[g]iven the prevalence of guidelines issues, the participating judges could be at risk of disqualification in nearly every criminal case."¹⁹⁵

Service by judges on the Commission thus creates the potential that these judges will not decide future Guidelines-related cases impartially. Judicial promulgation of the Guidelines also damages the public's perception of judicial impartiality and influences other judges' acceptance of the Guidelines.

C. POSSIBLE SOLUTIONS

Several solutions to correct and salvage the Commission and the Guidelines exist. To prevent the Commission from unconstitutionally legislating, Congress could further limit the Commission's policy judgments. Congress should make more of the basic decisions about which goals, such as retribution and punishment, to favor in which cases.

In addition, to prevent judges who have served on the Commission from later presiding over cases governed by or challenging constitutionally the Guidelines, Congress can either require that the Commission's judicial members be retired judges or restrict these members from deciding cases governed by the Guidelines while or after serving on the Commission. However, as noted above, such

¹⁹² In *In re Sealed Case*, 838 F.2d 476 (D.C. Cir. 1988), the Court of Appeals found that a "Special Court" consisting of three federal judges to appoint and supervise an independent counsel to investigate the actions of various government officials violated separation of powers. "Intimate involvement of an Article II court in the supervision and control of a prosecutorial office undermines the status of the judiciary as a neutral forum." *Id.* at 516. In discussing this case, one of the district courts found that "service by three federal judges on the Sentencing Commission even more severely undermines the status of the judiciary and involves them even more intimately with the executive branch." *United States v. Estrada*, 680 F. Supp. 1312, 1332 (D. Minn. 1988) (see *supra* note 166 for further discussion of this case).

¹⁹³ *Mistretta v. United States*, 109 S. Ct. 647, 672 (1989).

¹⁹⁴ *Tolbert*, 682 F. Supp. at 1527; *Estrada*, 680 F. Supp. at 1335 ("given the interest in staffing important commissions with knowledgeable and highly respected judges, commission appointees are likely to be those with the greatest potential to influence other judges"); Comment, *supra* note 179, at 1013.

¹⁹⁵ *Estrada*, 680 F. Supp. at 1335.

wholesale restriction would still not prevent the effect a judicial Commission member's views may have on a colleague.

VI. CONCLUSION

The impermissible delegation of legislative power and potential weakening of judicial impartiality make the Guidelines unconstitutional. The Court has held sentencing decisions to be legislative because they encompass basic value judgments. Judicial independence is threatened by giving judges a stake in nonjudicial activities. Judicial impartiality is threatened by allowing judges who serve on the Commission to decide cases related to the Guidelines. Other judges who do not serve on the Commission may be influenced by the judicial members' stamp of approval on the Guidelines. Also, the potential solutions are drastic and undoubtedly difficult for the individual judges involved, who may be required to give up a large number of cases. However, these solutions will preserve the benefits of federal judicial input to sentencing decisions while eradicating the separation of powers problems.

LISA G. ESAYIAN