

Washington Law Review

Volume 65 | Number 1

1-1-1990

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Recommended Citation

Kristin L. Timm, Note, "*The Judge Would Then Be the Legislator*": *Dismantling Separation of Powers in the Name of Sentencing Reform—Mistretta v. United States*, 109 S. Ct. 647 (1989), 65 Wash. L. Rev. 249 (1990).

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“THE JUDGE WOULD THEN BE THE LEGISLATOR”: DISMANTLING SEPARATION OF POWERS IN THE NAME OF SENTENCING REFORM—*Mistretta v. United States*, 109 S. Ct. 647 (1989).

Abstract: In the Sentencing Reform Act of 1984 Congress created the United States Sentencing Commission, an independent agency in the judicial branch charged with promulgating binding sentencing guidelines for federal crimes. In *Mistretta v. United States*, the Supreme Court held that the Sentencing Reform Act does not violate separation of powers principles. This Note asserts that the Court misapplied separation of powers theory, and that the Sentencing Commission violates separation of powers in two ways. First, by delegating to the judicial branch the authority to create sentencing guidelines which have the effect of law, Congress impermissibly aggrandized the core function of the judiciary. Second, judicial service on the Sentencing Commission encroaches upon the core function of the judicial branch by threatening the impartiality and independence of judges and reducing public confidence in the judiciary. This Note concludes that the advantages of judicial service on the Sentencing Commission do not outweigh the detriment to the judicial branch.

*“Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for the judge would then be the legislator.”*¹

Congress enacted the Sentencing Reform Act of 1984² (“Sentencing Reform Act”) with the goal of creating a system of uniform and proportionate sentencing which imposes similar sentences for similar conduct and different sentences for different conduct.³ The sentencing guidelines system created by the Sentencing Reform Act achieves that objective, virtually eliminating the possibility of judges imposing widely divergent sentences for similar offenses.⁴ However, the sentencing guidelines themselves are not set out or enacted by Congress. Instead, the Sentencing Reform Act created the Sentencing Commission, to which Congress delegated the authority to promulgate the guidelines that determine the sentences for federal crimes.⁵

After the Commission released the first set of sentencing guidelines, confusion erupted in federal courts. Some courts invalidated the

1. THE FEDERALIST No. 47, at 315 (J. Madison) (E. Earle ed. 1976) (emphasis in original).

2. 18 U.S.C.A. §§ 3551–3586 (West 1985 & Supp. 1989) and 28 U.S.C.A. §§ 991–998 (West Supp. 1989).

3. UNITED STATES SENTENCING COMMISSION, FEDERAL SENTENCING GUIDELINES MANUAL 1.2 (1988) [hereinafter SENTENCING GUIDELINES MANUAL].

4. Sentencing judges must impose sentence within the guidelines, unless the court finds that an aggravating or mitigating factor exists that was not considered by the Sentencing Commission. 18 U.S.C.A. § 3553(b). Within the guidelines, the maximum of each range may not exceed the minimum by more than 25 percent or six months, except that a minimum sentence of 30 years may extend to a maximum of life imprisonment. 28 U.S.C.A. § 994(b)(2).

5. 28 U.S.C.A. § 991.

guidelines and others upheld them.⁶ The issue reached the Supreme Court in *Mistretta v. United States*,⁷ in which the Court held that the Sentencing Reform Act did not violate the nondelegation or separation of powers doctrines.⁸ This Note focuses on the separation of powers aspect of *Mistretta* and the provision of Article III that defines the constitutional role of the judiciary and judges. Close analysis shows that the Sentencing Reform Act violates separation of powers principles because promulgating sentencing guidelines unconstitutionally expands the powers of the judicial branch and unconstitutionally impairs the core function of the judiciary.

I. SEPARATION OF POWERS, THE SENTENCING REFORM ACT, AND *MISTRETTA V. UNITED STATES*

A. *Separation of Powers*

The United States Constitution does not express the doctrine of separation of powers⁹ in any specific provision, but divides the government into three separate branches corresponding to the traditional tripartite scheme of legislative, executive, and judicial branches.¹⁰ The first three articles of the Constitution establish the governmental structure, vesting the legislative powers in a Congress,¹¹ the executive power in a President,¹² and the judicial power in one Supreme Court

6. Defendants sentenced under the guidelines challenged their constitutionality. Violation of separation of powers and nondelegation doctrines were the most common claims. The courts' conclusions differed dramatically. *See, e.g.*, *Gubiensio-Ortiz v. Kanahale*, 857 F.2d 1245 (9th Cir. 1988) (Sentencing Reform Act violates separation of powers); *United States v. Johnson*, 682 F. Supp. 1033 (W.D. Mo. 1988) (sentencing guidelines do not violate nondelegation doctrine).

7. 109 S. Ct. 647 (1989).

8. *Id.* at 675.

9. The fundamental premise of separation of powers theory is that the judicial, legislative, and executive powers of government should not be combined. J. NOWAK, R. ROTUNDA & J. YOUNG, *CONSTITUTIONAL LAW* 136 (1983).

10. The concept of separating the legislative, executive, and judicial powers of government originated from western European power struggles between monarchs and legislatures. *Id.* at 135-36. The philosophy most familiar to Americans at the time of the Constitutional Convention was expressed in the writings of Montesquieu. He argued that intermingling of legislative, executive, and judicial powers would lead to tyranny. 1 MONTESQUIEU, *THE SPIRIT OF LAWS* 151-62 (T. Nugent trans. rev. ed. 1899). Montesquieu's theories had been emulated in the early constitutions of the new states. *See, e.g.*, MASS. CONST. of 1780, Part the First, art. XXX, reprinted in 5 W. SWINDLER, *SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS* 96 (1975); VA. CONST. of 1776, reprinted in 10 W. SWINDLER, *supra*, at 52.

11. U.S. CONST. art. I.

12. U.S. CONST. art. II.

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and other inferior courts established by Congress.¹³ Each of the articles enumerates the specific powers exercised by each branch.

While these enumerated powers each belong to one branch alone, the Constitution allows partial intrusion by one or two branches into the workings of another.¹⁴ For example, the President has the power to appoint judges,¹⁵ and the Senate has the power to confirm or deny the Presidential appointments.¹⁶ Only where the whole power of one department is exercised by the same hands which possess the whole power of another department are separation of powers principles violated.¹⁷ Thus, under the Constitution, neither the President, who possesses the whole executive power, nor Congress, which possesses the whole legislative power, can exercise judicial power, but they may appoint and confirm those who do.¹⁸

The separation of powers among the branches may be violated in two major ways.¹⁹ First, one branch may be aggrandized if the branch is assigned powers more appropriately exercised by another branch.²⁰ Second, one branch may be encroached upon if the actions of another branch prevent the first branch from performing its constitutionally assigned function.²¹

13. U.S. CONST. art. III.

14. James Madison addressed concerns about the lack of complete segregation of the branches in *Federalist No. 47*. Madison argued that Montesquieu's theory did not demand complete isolation among the branches. THE FEDERALIST No. 47, at 314–15 (J. Madison) (E. Earle ed. 1976).

15. U.S. CONST. art. II, § 2, cl. 2.

16. *Id.*

17. THE FEDERALIST No. 47, at 314–15. Madison relies on Montesquieu's theories. See *supra* note 10.

18. See THE FEDERALIST No. 47. *Federalist No. 51* explains that these partial links among the branches may “be the means of keeping each other in their proper places.” THE FEDERALIST No. 51, at 336 (E. Earle ed. 1976).

19. When analyzing separation of powers cases, the Supreme Court has used historical separation of powers theory as its foundation. See, e.g., *Mistretta v. United States*, 109 S. Ct. 647, 658–59 (1989). The Court's treatment of separation of powers parallels the historical uncertainty about precisely how separate the powers of government should be. In some cases the Court has required strict separation of the three branches. See, e.g., *Bowsher v. Synar*, 478 U.S. 714 (1986). In other cases the Court has permitted some intermingling among the branches, analyzing whether the action of one branch intrudes upon the “core function” of another. See, e.g., *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833 (1986); see also Krent, *Separating the Strands in Separation of Powers Controversies*, 74 VA. L. REV. 1253, 1255 (1988). Commentators have characterized the Court's seemingly inconsistent approaches as “formalist” (requiring strict separation) and “functional” (permitting a more flexible approach). *Id.* at 1254. Distinction between the two theories is unnecessary under this Note's analysis of *Mistretta*, because the same conclusion results from either theory.

20. *Morrison v. Olson*, 108 S. Ct. 2597, 2613 (1988).

21. Comment, *Separation of Powers and Judicial Service on Presidential Commissions*, 53 U. CHI. L. REV. 993, 1004–06 (1986).

1. *Aggrandizement: The Expansion of Powers Test*

The Supreme Court has found that the separation of powers doctrine may be violated by one branch expanding or aggrandizing its constitutionally assigned powers.²² The case or controversy provision of Article III narrowly defines the function of the judiciary as deciding cases and controversies,²³ but some activities besides specifically adjudicating cases and controversies have been found judicially appropriate.²⁴ Thus, the expansion of powers test states that judges may not perform any government activities that are not within the judicial sphere.²⁵

2. *Encroachment: The Impairment of Function Test*

Separation of powers principles also may be violated when the actions of one branch encroach upon another branch, preventing the other branch from accomplishing its constitutionally assigned functions.²⁶ The Supreme Court has established a two-part test for unconstitutional encroachment.²⁷ The first step is to determine whether action by one branch has the capacity to prevent another branch from accomplishing its constitutionally assigned functions.²⁸ If it does, the second step is determining whether the impact is justified by an overriding need to promote objectives within the constitutional authority of the acting branch.²⁹

22. *Id.* at 1006–09. Such expansion of powers may not necessarily encroach upon the function of another branch. *Id.*

23. *See infra* notes 30–35 and accompanying text. The limitation of Article III makes it fairly easy to identify actions outside the realm of the judiciary. Expansion of the legislative and executive functions is more difficult to test, because executive and legislative actions may overlap. Comment, *supra* note 21, at 1007; *see also infra* note 86.

24. *See infra* notes 39–52 and accompanying text.

25. Comment, *supra* note 21, at 1008. “Government activities” include legislative functions and executive functions. Both are outside the judicial sphere. *Id.* at 1007–08 n.80. Approval of the expansion of power by the other branches does not remedy the constitutional deficiency when the exercised power is clearly outside the domain of the exercising branch. *Id.* at 1009. For example, the Supreme Court has overturned congressionally authorized expansions of judicial power. *See, e.g.,* *Keller v. Potomac Elec. Power Co.*, 261 U.S. 428 (1923) (holding unconstitutional a provision of a congressional act giving the Supreme Court power to hear appeals of decisions concerning rates and regulations of a public utility commission).

26. *See* *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 443 (1977).

27. *Id.* The Court articulated the two-part test in *Nixon v. Administrator of Gen. Servs.*, but did not clearly apply the test.

28. *Id.*

29. *Id.* The Court applied the two-part test in *Nixon v. Fitzgerald*, 457 U.S. 731 (1982), in determining that the President is immune from damages based on the President’s official acts. *Id.* at 754. The question was whether the action of the judicial branch in hearing the case would impair the function of the executive branch. The Court first determined that subjecting a President to civil liability could impair the functioning of the executive branch by influencing the

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3. *The Judiciary's Core Function: The Case or Controversy Requirement*

Article III of the Constitution defines the function of the judicial branch as deciding cases and controversies.³⁰ The Supreme Court historically has limited that function to resolving real disputes between adverse parties.³¹ The Court has refused to issue advisory opinions.³² The Court also has refused to permit Article III judges³³ to decide claims when the determinations would not be final, but instead would be reviewable by the executive branch or Congress.³⁴ The Court held that executive and legislative activities cannot be imposed on Article III judges.³⁵

The Supreme Court has also declined to decide cases involving “political questions,”³⁶ although these cases usually meet the case or controversy requirement.³⁷ The Court will not decide cases that involve issues committed by the Constitution to another branch, lack judicially discoverable or manageable standards for resolution, or

President's actions. *Id.* at 749–50. The Court then determined that resolution of a private suit for damages was not a sufficiently overriding need to justify intrusion on the functions of the executive branch. *Id.* at 754.

30. U.S. CONST. art. III, § 2.

31. *See* *Muskraat v. United States*, 219 U.S. 346, 356 (1911).

32. In 1793, Secretary of State Thomas Jefferson asked the Supreme Court to advise the executive on certain legal questions. In response, Chief Justice Jay wrote that “the lines of separation drawn by the Constitution between the three departments of the government” and the Supreme Court’s role as “a court in the last resort, are considerations which afford strong arguments against the propriety of our extrajudicially deciding the questions alluded to” Letter from Chief Justice Jay to President Washington (July 20, 1793), *reprinted in* P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, *HART & WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 65 (2d ed. 1973).

33. Article III of the Constitution states that these judges, appointed by the President and confirmed by the Senate, shall have life tenure in office and shall receive compensation which may not be diminished during their term of office. U.S. CONST., art. III, § 1.

34. *Hayburn’s Case*, 2 U.S. (2 Dall.) 409 (1792).

35. *Id.* Five Supreme Court justices expressed formal opinions that a duty imposed on the judicial branch by Congress could not be executed as a judicial power when the decision was subject to revision by an executive officer and Congress. The Supreme Court confirmed the principle of *Hayburn’s Case* in *United States v. Ferreira*, 54 U.S. (13 How.) 40 (1851). In *Ferreira*, Congress passed a law authorizing certain judges to adjudicate claims arising from a treaty, after which the Secretary of Treasury would pay the claims if he thought they were just and equitable. *Id.* at 46–47. The Supreme Court held that the power to decide the claims was not a judicial function, because there was neither lawsuit nor parties. *Id.* at 46.

36. The political question doctrine holds that certain matters are political in nature and should be resolved by the body politic rather than the courts. J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 9, at 109.

37. Political question cases involve real disputes and real parties; it is the nature of the dispute that creates a political question. *See, e.g., Luther v. Borden*, 48 U.S. (7 How.) 1 (1849) (Court could not adjudicate trespass action because deciding the case would require making the political determination of which state government was the lawful regime).

require an initial policy determination of a kind clearly for non-judicial discretion.³⁸

4. *Judicial Rulemaking*

Despite the case or controversy principle, the judiciary has been permitted to perform some tasks not strictly within the scope of adjudicating cases. The judiciary may create and enforce rules to "put [its] own house in order."³⁹ Such permissible rulemaking authority has included adoption by the Supreme Court of the Federal Rules of Civil, Criminal, and Appellate Procedure, the Federal Rules of Evidence, and Bankruptcy procedure rules.⁴⁰ Lower federal courts may also "make and amend rules governing [their] practice," as long as the rules are consistent with the Federal Rules of Civil Procedure.⁴¹

The Supreme Court has found that such rulemaking is not outside the judicial power because it is auxiliary to the judiciary's core function of deciding cases and controversies.⁴² Chief Justice Marshall validated this type of judicial rulemaking in *Wayman v. Southard*,⁴³ where he wrote for the Court that Congress could confer to the judicial branch the authority to make laws necessary and proper for the administration of the courts.⁴⁴

Specifically, the judicial branch is permitted to make rules to regulate its own processes.⁴⁵ In *Sibbach v. Wilson & Co.*,⁴⁶ the Court held that Congress may delegate power to regulate the practice and procedure of federal courts to the Supreme Court or other federal courts.⁴⁷ The Court stated that such rules must regulate procedure, which the Court defined as the judicial process for enforcing rights and duties recognized by substantive law.⁴⁸

38. *Baker v. Carr*, 369 U.S. 186, 217 (1962) (guaranty clause of Constitution assigns protection of state governments to political branches).

39. *Chandler v. Judicial Council of the Tenth Circuit*, 398 U.S. 74, 85 (1970).

40. See J. WEINSTEIN, REFORM OF COURT RULE-MAKING PROCEDURES 61-75 (1977).

41. FED. R. CIV. P. 83.

42. *Chandler*, 398 U.S. at 111 (Harlan, J., concurring); see Comment, *supra* note 21, at 1022 n.127.

43. 23 U.S. (10 Wheat.) 1, 42-43 (1825).

44. *Id.* at 22. Marshall established that the judiciary's power to decide cases and controversies extends to the power to make laws for executing the judgments which the judicial branch has power to pronounce. *Id.*

45. *Sibbach v. Wilson & Co.*, 312 U.S. 1, 9-10 (1941).

46. 312 U.S. 1 (1941).

47. *Id.* at 9-10.

48. *Id.* at 14; see *infra* notes 99-100 and accompanying text.

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In addition to the enabling acts which empower the judicial branch to make procedural rules,⁴⁹ Congress has created judicial councils authorized to make rules for the administration of court business,⁵⁰ as well as administrative bodies designed to improve court practices and procedures.⁵¹ Like the rules of procedure, these exceptions from the case and controversy rule are housekeeping arrangements which do not detract from or add to the judiciary's adjudicative purpose.⁵²

B. *The Sentencing Reform Act and Sentencing Commission*

The Sentencing Reform Act eliminates indeterminate sentencing and parole.⁵³ In the Sentencing Reform Act, Congress created the Sentencing Commission, an independent commission in the judicial branch.⁵⁴ The Commission consists of seven voting members appointed by the President, with the advice and consent of the Senate.⁵⁵ Commissioners serve for six-year terms, except that the terms of the first Commissioners are staggered.⁵⁶ At least three of the members are to be federal judges.⁵⁷ The President has the power to remove members of the Commission for neglect of duty, malfeasance in office, or other good cause.⁵⁸

The Sentencing Commission is charged with promulgating sentencing guidelines that carry out the four purposes of sentencing,⁵⁹ provide

49. See, e.g., 28 U.S.C.A. §§ 3771–72 (1982) (empowering the Supreme Court to prescribe rules of criminal procedure).

50. *Chandler v. Judicial Council of the Tenth Circuit*, 398 U.S. 74, 86 n.7 (1970).

51. Examples of such bodies include the Judicial Conference and the Administrative Office of the United States Courts. The purpose of the Judicial Conference is to promote uniformity of management procedures and expeditious conduct of court business. 28 U.S.C.A. § 331 (West 1968 & Supp. 1989). The Administrative Office controls court administration and personnel matters. 28 U.S.C.A. §§ 601–611 (West 1968 & Supp. 1989).

52. Comment, *supra* note 21, at 1022.

53. S. REP. No. 225, 98th Cong., 2d Sess. 65, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 3182, 3248 [hereinafter S. REP. No. 225]. The prior system of indeterminate sentencing allowed judges to sentence within the limits of no penalty and the maximum penalty set out in the statute defining the crime. *Id.* at 3222–29. The parole system further increased the ambiguity of sentences. *Id.* at 3223, 3229–32. The Sentencing Reform Act attempts to eliminate unwarranted sentencing disparities. *Id.* at 3235.

54. 28 U.S.C.A. § 991(a).

55. *Id.*

56. *Id.* § 992(a). The Sentencing Reform Act provides that on the first Commission two members will serve terms of six years; three members will serve terms of four years; and two members will serve terms of two years. *Id.*

57. *Id.* § 991(a).

58. *Id.*

59. *Id.* § 991(b)(1)(A). Congress stated that the four purposes of sentencing were punishment, deterrence, incapacitation, and education. 18 U.S.C.A. § 3553(a)(2).

certainty and fairness in sentencing,⁶⁰ and reflect advancement in knowledge of human behavior in the context of the criminal justice process.⁶¹ Congress directed the Commission to establish a system of sentencing ranges for every category of offense and category of defendant. Congress listed factors for the Commission to consider when formulating the offense and defendant categories.⁶² For any crime, the Commission may not exceed the maximum penalty provided in the statutory definition of the crime.⁶³

C. *Mistretta v. United States*

The Supreme Court held in *Mistretta v. United States*⁶⁴ that the sentencing guidelines promulgated by the Sentencing Commission are constitutional, because Congress did not violate separation of powers principles.⁶⁵ The Court based its separation of powers holding on four determinations. The Court first determined that the location of the Commission in the judicial branch is permissible because the Commission's nonadjudicatory functions do not invade the prerogatives of another branch.⁶⁶ The Court wrote that although Article III of the Constitution limits the judicial power to deciding cases and controversies, judicial rulemaking is permitted where the rules are necessary and proper for executing the judgments which the judicial department has the power to pronounce.⁶⁷ Finding that the sentencing guidelines are necessary and proper for sentencing, the Court held that the extrajudicial activity of promulgating sentencing guidelines is consonant with the integrity of the judicial branch and is not more appropriate to another branch.⁶⁸

60. 28 U.S.C.A. § 991(b)(1)(B).

61. *Id.* § 991(b)(1)(C).

62. Offense factors for the Commission to consider are the grade of offense; aggravating and mitigating circumstances; harm caused by the crime; community view of the gravity of the crime; public concern generated by the crime; deterrent effect of the sentence; and the current incidence of the offense. *Id.* § 994(c). Defendant factors for the Commission to consider are age; education; vocational skills; mental and emotional condition; physical condition, including drug addiction; previous employment record; family ties and responsibilities; community ties; role in the offense; criminal history; and dependence on crime for a livelihood. *Id.* § 994(d).

63. 28 U.S.C.A. § 994(b)(1) requires the Commission to establish sentencing ranges consistent with all pertinent provisions of title 18, United States Code.

64. 109 S. Ct. 647 (1989).

65. *Id.* at 675. The Court also held that Congress did not violate the nondelegation doctrine. Discussion of the nondelegation doctrine is beyond the scope of this Note.

66. *Id.* at 661-64.

67. *Id.* at 663.

68. *Id.* at 663-64.

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Second, the Court determined that promulgation of sentencing guidelines is appropriate to the central mission of the judicial branch.⁶⁹ The Court found that locating the Commission in the judicial branch did not undermine the integrity or unconstitutionally expand the powers of the judicial branch.⁷⁰ The Court additionally asserted that because judges always have had the power to pronounce sentences, promulgation of sentencing guidelines does not give the judiciary any more power than it always has possessed.⁷¹ Based on the judiciary's traditional role in sentencing, the Court held that promulgation of sentencing guidelines is merely the creation of court rules to regulate sentencing and is therefore an appropriate task for the judicial branch.⁷²

Third, the Court determined that judicial service on the Sentencing Commission does not impair the function of the judicial branch.⁷³ The Court found that service of judges on the Commission does not threaten the impartiality or independence of the judicial branch.⁷⁴ Therefore, the Court found, service of judges on the Commission will not affect judges' ability to adjudicate cases.⁷⁵

Fourth, the Court determined that the President's power to appoint and remove members of the Commission does not prevent the judicial branch from performing its constitutionally assigned functions.⁷⁶ The Court pointed out that the President's power to elevate judges or tempt them away from the bench with executive branch positions has never been considered a threat to the integrity of judges,⁷⁷ nor did the Court find it likely that judges would conduct their activities in any particular way to win a position on the Sentencing Commission.⁷⁸ Furthermore, the Court wrote, although the President may remove members of the Commission for cause, the removal power extends only to the Commission itself.⁷⁹ The President has no power to affect the tenure or compensation of judges in their judicial capacity.⁸⁰

69. *Id.* at 664–67.

70. *Id.* at 665.

71. *Id.* at 666.

72. *Id.* at 667.

73. *Id.* at 671–72.

74. *Id.* at 672, 673.

75. *Id.* at 672.

76. *Id.* at 673–75.

77. *Id.* at 674.

78. *Id.*

79. *Id.*

80. *Id.*

Justice Scalia dissented from the majority opinion.⁸¹ He wrote that lawmaking power can be exercised only by Congress, except in conjunction with the lawful exercise of executive or judicial power.⁸² Justice Scalia argued that although the Commission is "located" within the judicial branch, the Commission's power is legislative,⁸³ and that the Commission has no place except within the legislative branch.⁸⁴

II. THE DISINTEGRATION OF SEPARATION OF POWERS BOUNDARIES: AGGRANDIZEMENT AND ENCROACHMENT OF THE JUDICIAL BRANCH

The Supreme Court erred when it decided in *Mistretta* that the sentencing guidelines promulgated by the Federal Sentencing Commission are constitutional. Although Congress may delegate the power to promulgate some guidelines, Congress violated the separation of powers among the branches by creating the Sentencing Commission within the judicial branch and mandating service of Article III judges on the Commission. The Sentencing Commission simultaneously aggrandizes and encroaches upon the constitutional function of the judicial branch.

A. *Aggrandizement: The Sentencing Commission Impermissibly Expands the Function of the Judicial Branch.*

The Supreme Court's conclusion that Congress did not violate the Constitution by delegating authority to the Sentencing Commission is, standing alone, probably accurate.⁸⁵ However, although Congress may delegate much authority without Constitutional violation, the results of the delegation must not offend separation of powers restrictions. The result of Congress' delegation to the Sentencing Commission is that members of the judiciary exercise powers more appropriately exercised by Congress.⁸⁶ The legislative behavior of the

81. *Id.* at 675 (Scalia, J., dissenting).

82. *Id.* at 678.

83. *Id.* at 679-80.

84. *Id.* at 683.

85. The Court evaluates congressional delegation under an "intelligible principle" test, requiring Congress to lay down an intelligible principle to which the person or body authorized to exercise the delegated authority is directed to conform. *Mistretta v. United States*, 109 S. Ct. 647, 654 (1989). The Supreme Court will rarely choose to second-guess Congress' assessment of how much delegation is appropriate. See *id.* at 677 (Scalia, J., dissenting).

86. The Sentencing Commission is also executive in nature. Most of Congress' delegation to executive agencies does not aggrandize the executive branch. See *supra* note 23. The sentencing guidelines are similar to the regulations that Congress may empower executive agencies to issue.

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Sentencing Commission in promulgating substantive rules aggrandizes the function of the judicial branch.

1. *The Sentencing Commission Makes Legislative Decisions.*

The sentencing guidelines, once promulgated by the Commission, are similar to legislation and have the force of law.⁸⁷ Such exercise of legislative authority is outside the Constitutional function of the judicial branch and, therefore, unconstitutionally aggrandizes that branch.

The Sentencing Commission makes many decisions which are more appropriate to the legislative branch than the judicial branch. First, the Sentencing Commission sets the punishments for crimes by determining the sentences for crimes.⁸⁸ It is well established that “the authority to define and fix the punishment for a crime is [a] legislative” task.⁸⁹ Determining the relative weights of crimes is a political task properly left to Congress.⁹⁰ Because the sentences establish the punishment for crimes,⁹¹ defining and fixing the limits of sentencing is a legislative task.

Second, the Sentencing Commission makes policy decisions by determining the relative severity of federal crimes.⁹² A judge passing sentence on an individual defendant under specific facts must determine how the defendant’s actions correspond to the societal value of the crime. The Sentencing Commission, in establishing sentences for

Some lower courts, in deciding upon the constitutionality of the Sentencing Commission, characterized the Commission as part of the executive branch. *See United States v. Johnson*, 682 F. Supp. 1033 (W.D. Mo. 1988). *But see Gubiensio-Ortiz v. Kanahale*, 857 F.2d 1245, 1258–59 (9th Cir. 1988) (court could not recharacterize the Commission as part of the executive branch, when Congress had located the Commission in the judicial branch). In many cases challenging the guidelines, the government and Commission urged the courts to characterize the Sentencing Commission as an executive agency. *See, e.g., Gubiensio-Ortiz*, 857 F.2d at 1035.

It is not necessary to determine whether the Commission’s function is legislative or executive to determine that it is nonjudicial. Any nonjudicial government function is likely to involve some legislative or executive facets. Judges should not exercise such functions even when the activities cannot be precisely characterized as either legislative or executive. *Id.* at 1259 n.8; *see also Morrison v. Olson*, 108 S. Ct. 2597, 2612 (1988) (governmental duties of a nonjudicial nature may not be imposed on judges holding office under Article III of the Constitution).

87. Guidelines and subsequent amendments automatically go into effect six months after the Commission submits them to Congress, unless Congress enacts a law to the contrary. 18 U.S.C.A. § 3551 note; 28 U.S.C.A. § 994(p).

88. *Gubiensio-Ortiz*, 857 F.2d at 1254.

89. *Ex parte United States*, 242 U.S. 27, 42 (1916); *see also Rummel v. Estelle*, 445 U.S. 263, 283 (1980).

90. *See Gubiensio-Ortiz*, 857 F.2d at 1254–1256; *see also Mistretta v. United States*, 109 S. Ct. 647, 676–77 (1989) (Scalia, J., dissenting).

91. Punishment is one of the four stated purposes of sentencing. 18 U.S.C.A. § 3553(a)(2)(A).

92. *Gubiensio-Ortiz*, 857 F.2d at 1255–56.

all defendants under all facts, actually determines the societal values of federal crimes. The sentencing guidelines promulgated by the Commission have an effect similar to the maximum sentences set out in legislative definitions of crimes—both reflect policy judgments concerning the severity of the crime and the appropriate level of punishment.⁹³

Third, the Sentencing Commission decides appropriate sentences for an entire class of defendants.⁹⁴ The sentencing guidelines apply to all potential defendants, while the sentences pronounced by judges apply only to individual defendants under specific facts. In sentencing an individual defendant, a judge determines the relevant law—the statutory penalties for the crime—and then applies the law to the facts. When the judiciary promulgates the guidelines under which judges will pronounce sentence, the judiciary is not just deciding which law to apply, but is also drafting that law, which is a legislative task.

By assigning to the Sentencing Commission these policymaking responsibilities more appropriately exercised by the legislative branch, Congress has aggrandized the function of the judicial branch beyond its proper role of deciding cases and controversies. The Supreme Court has recognized the inappropriateness of judicial policy-making, even within the proper function of the judicial branch, when it has refused to decide cases involving political questions.⁹⁵ In the case of the Sentencing Commission, the exercise of political judgments by a commission within the judicial branch impermissibly expands the role of the judiciary.

2. *Sentencing Guidelines Are Substantive, Not Procedural, Rules.*

The Sentencing Commission's powers are outside the Constitution's limitation of the judicial power to cases and controversies.⁹⁶ Permissible exceptions to the case or controversy limitation all concern judicial activities relating solely to the internal procedural functioning of the judicial branch.⁹⁷ The substantive aspects of the sentencing guidelines render judicial service on the Commission impermissible.

93. While judges also make policy judgments about the relative values of crimes when sentencing individual defendants, sentencing decisions limited to individual defendants are properly within judges' function of deciding cases and controversies. *See supra* notes 30–35 and accompanying text.

94. *Gubiensio-Ortiz*, 857 F.2d at 1255–57.

95. *See supra* notes 36–38 and accompanying text.

96. *See supra* notes 30–35 and accompanying text.

97. *See supra* notes 39–52 and accompanying text.

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In *Mistretta*, the Supreme Court analogized the Commission's promulgation of sentencing guidelines to the judiciary's permissible rulemaking tasks, such as the promulgation of the Federal Rules of Civil Procedure.⁹⁸ However, the substantive sentencing policies made by the Sentencing Commission differ vastly from procedural court rules.⁹⁹ The Rules Enabling Act authorizing the promulgation of the Rules of Civil Procedure specifically provided that the rules could not "abridge, enlarge or modify any substantive right."¹⁰⁰ In contrast, sentencing rules actually define substantive rights, by establishing what the punishment will be for a defendant convicted of a crime.¹⁰¹ For defendants who are found guilty, the guidelines do not merely establish the procedures judges will use in deciding which sentence to impose; they actually determine the amount of time defendants will serve.¹⁰² Sentencing rules have as much significance to defendants as the legislation that sets out the elements of the crime itself.

Furthermore, sentencing guidelines do not merely affect the internal functioning of the judicial branch. Although Congress may give the judicial branch power to make rules for executing the judgments that it may pronounce,¹⁰³ such rules should be limited to those which govern the processes of courts and trials.¹⁰⁴ If, as the Court implies in *Mistretta*, the judiciary actually had the power to make any rules relevant to its judgments, the judiciary would have potentially unfettered discretion over the substantive outcomes of trials.¹⁰⁵ Under this

98. *Mistretta v. United States*, 109 S. Ct. 647, 664–65 (1989).

99. While admitting some difference between the nature of substantive sentencing policies and procedural rules directing the processes of the courts, the Court rejected labels such as "substantive" and "procedural." *Mistretta*, 109 S. Ct. at 665. However, the Court does not offer any viable substitute. Without a yardstick to determine the extent of impermissible rulemaking, delegation of rulemaking potentially could extend without limit. Furthermore, while the line between substance and procedure may be unclear at times, the Court itself has employed the distinction. In *Miller v. Florida*, the Supreme Court held that Florida's sentencing guidelines were not procedural rules. 482 U.S. 423, 433–34 (1987).

100. 28 U.S.C.A. § 2072 (West 1982 & Supp. 1989).

101. *See, e.g., Miller v. Florida*, 482 U.S. 423 (1987). In determining that an increase in sentencing ranges under Florida's sentencing guidelines violated the ex post facto clause, the Supreme Court in *Miller* had to determine whether the guidelines were substantive or procedural. The Court held that the guidelines were substantive, because "the amendment was intended to, and did, increase the 'quantum of punishment' for certain crimes." *Id.* at 433–34. The guidelines promulgated by the Sentencing Commission also increased the sentencing range for certain crimes. *See infra* notes 108–109.

102. *See supra* note 4.

103. *Mistretta*, 109 S. Ct. at 663 (quoting *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 22 (1825)).

104. *See supra* notes 45–48 and accompanying text.

105. *Cf. Mistretta*, 109 S. Ct. at 680 (Scalia, J., dissenting) (predicting potential delegation of authority to expert medical commissions to make rules for federal medical policy).

reasoning, because judges have the power to pronounce a defendant guilty, Congress could delegate to the judicial branch power to promulgate rules as to what constitutes guilt. The sentencing guidelines have a similar substantive effect on the outcomes of trials, because the guidelines determine whether or not defendants will serve prison time, and how long that time will be. The sentencing guidelines do not merely aid the process of pronouncing sentences: they determine the actual sentences.¹⁰⁶

Substantive sentencing guidelines also differ from procedural court rules because the guidelines affect people who are not in court. The guidelines affect persons in the outside world, whether or not they are ever involved in a trial.¹⁰⁷ Rules governing the admission of hearsay in a trial or the proper time for filing pleadings affect only the litigants. But rules that determine the penalties for crimes may affect behavior before individuals get to court or even commit crimes.¹⁰⁸ The weight of the penalty may prevent potential criminals from acting or encourage them to risk committing the crime.¹⁰⁹

B. Encroachment: The Sentencing Commission Impairs the Core Function of the Judicial Branch.

Service by federal judges on the Sentencing Commission impairs judges in their function of considering and applying laws to cases and controversies. Such service encroaches on the judiciary's function by threatening the impartiality and independence of judges and reducing public confidence in the judiciary.¹¹⁰ The need for judicial expertise on the Sentencing Commission does not outweigh the impairment of

106. See Brief of Respondent-Petitioner John M. Mistretta at 24-25, *Mistretta v. United States*, 109 S. Ct. 647 (1989) (Nos. 87-1904 and 87-7028); see also *supra* note 4.

107. See *Gubiensio-Ortiz*, 857 F.2d 1245, 1257 (9th Cir. 1988).

108. Individual sentences also may affect behavior patterns on a long-term basis. However, this potential occurrence is a residual effect; the primary goal of individual sentencing is to determine a just sentence for a single defendant under specific circumstances. The sentencing guidelines, however, apply to all defendants and all future defendants. See 28 U.S.C.A. § 991(b). The Commission intended to influence primary conduct by developing sentencing ranges that would deter illegal behavior. For example, the Commission mandated prison terms for many crimes where probation had previously been the norm, with the view that the prospect of prison would act as a significant deterrent to many of those crimes. See SENTENCING GUIDELINES MANUAL, *supra* note 3, at 1.9. While creating penalties that will deter crime is a worthy goal, the task should be left to the legislative branch.

109. By stating that deterrence is one of the goals of sentencing, Congress demonstrated that it intended the sentencing guidelines to influence primary conduct. 18 U.S.C.A. § 3553(a)(2)(B). The Commission that developed the first guidelines also stated that it believed that the prospect of harsher penalties for certain activities would act as a significant deterrent. SENTENCING GUIDELINES MANUAL, *supra* note 3, at 1.9.

110. See Comment, *supra* note 21, at 1011-19.

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the judicial function.¹¹¹ Therefore, judicial service on the Sentencing Commission is unconstitutional under the two-step *Nixon v. Administrator of General Services* separation of powers test.¹¹²

1. *Service on the Sentencing Commission Threatens Judges' Impartiality.*

The Supreme Court was partially correct when it stated in *Mistretta* that the participation of federal judges in promulgating sentencing guidelines would not affect judges' ability to impartially adjudicate sentences.¹¹³ Because the sentencing guidelines restrict judges' discretion in sentencing, even judges who have served on the Sentencing Commission can dispassionately plug offense and defendant characteristics into the guidelines to determine the Commission-mandated sentence. However, the entanglement of federal judges in the political work of promulgating sentencing guidelines threatens the impartiality of the judiciary.¹¹⁴

a. *Judicial Service on the Sentencing Commission Lends an Aura of Judicial Impartiality to the Political Work of the Commission.*

The aura of judicial impartiality exists to protect judges' core function of deciding cases and controversies.¹¹⁵ Judges' neutrality and impartiality, and public perception of that neutrality, are key elements in judges' ability to decide cases effectively.¹¹⁶ While the political branches—the legislative and the executive—are subject to political

111. See Comment, *supra* note 21, at 1019–20.

112. The determination that Congress' action impairs the function of the judicial branch satisfies the first part of the *Nixon v. Administrator of Gen. Servs.* test. See *supra* notes 27–29 and accompanying text. The determination that legitimate Congressional objectives do not outweigh the impairment of the judicial function satisfies the second part of the *Nixon v. Administrator of Gen. Servs.* test. See *supra* note 29 and accompanying text.

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

114. The Supreme Court found that service of judges on the Sentencing Commission is not objectionable because the members do not serve in their capacity as judges. *Mistretta*, 109 S. Ct. at 671. However, it is not possible to separate the identities of judges as members of courts and members of the Sentencing Commission. In the Sentencing Reform Act, Congress stated that federal judges could serve as members of the Commission without resigning their judicial appointments. 28 U.S.C.A. § 992(c). Furthermore, if the purpose of separating the powers of the three branches is to prevent concentration of power in the same hands, it is irrelevant whether a judge is acting as an individual or a court. See Comment, *supra* note 21, at 1009; see also *supra* text accompanying note 17.

115. *Gubiensio-Ortiz v. Kanahale*, 857 F.2d 1245, 1263 (9th Cir. 1988).

116. Frankfurter, *Advisory Opinions*, in 1 *ENCYCLOPEDIA OF THE SOCIAL SCIENCES* 475, 478 (1930).

pressure and influence, the judiciary is separated from political influences to preserve its impartiality and independence.¹¹⁷ By mandating judicial service on the Sentencing Commission, Congress imposed the image of judicial impartiality on the political work of the Commission. Judicial participation in promulgating the sentencing guidelines symbolically places a judicial seal of approval on the political and legislative work of the Commission. By approving the guidelines developed by the Commission, the judges on the Commission have, in effect, expressed their opinion that the guidelines are legal and constitutional.¹¹⁸

b. Judicial Service on the Sentencing Commission May Bias Judges When Considering the Guidelines.

Judicial service on the Sentencing Commission further threatens judges' impartiality because such service could predispose judges in favor of the policies they or fellow judges helped promulgate.¹¹⁹ When a proposed set of guidelines goes into effect and becomes subject to judicial review, the already existing judicial imprimatur may influence judges when they consider the guidelines. Because other judges helped compose the guidelines, reviewing judges may rely on respect for their colleagues' judgment when determining the validity of the guidelines.¹²⁰ A similar situation may occur when a sentencing judge departs from or arguably misapplies the guidelines and the sentence is appealed. Because the guidelines are the product of judges, other judges may give them greater weight than had they been a mere political product.

c. Recusal Will Not Solve the Threat to Judicial Impartiality.

In most cases, threats to judicial bias are solved by recusal.¹²¹ However, the possibility of recusal is impractical when it affects such a primary judicial activity as pronouncing sentence. Although only three judges were members of the original Sentencing Commission, the six-year term of Commission service means that ultimately far more

117. *Gubiensio-Ortiz*, 857 F.2d at 1261.

118. All three judicial members of the Sentencing Commission approved the first set of guidelines promulgated by the Commission. *Gubiensio-Ortiz*, 857 F.2d at 1262 n.15.

119. Comment, *supra* note 21, at 1011.

120. *See id.* at 1012-13.

121. Judges who perceive a threat to their impartiality in a specific case will decline to decide the case or participate in its decision. *See Mistretta v. United States*, 109 S. Ct. 647, 672 (1989).

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judges will be affected.¹²² And even for a small number of judges, recusal in every case involving the sentencing guidelines would drastically limit their judicial capacities.¹²³ Furthermore, disqualifying judges who have served on the Sentencing Commission will not diminish the effects on other judges.¹²⁴

2. *Judicial Service on the Sentencing Commission Threatens Public Confidence in and Respect for the Judiciary.*

Whether judicial involvement in the sentencing guidelines actually threatens judges' impartiality is only a part of the relevant inquiry. Judges must not only be actually impartial; they also must appear impartial to the public. This appearance of fairness is crucial to ensuring public confidence in the judiciary.¹²⁵

Although the Supreme Court in *Mistretta* admitted being "troubled" by the possibility that judicial involvement in the sentencing guidelines could undermine public confidence in the impartiality of the judiciary,¹²⁶ the Court glossed over the problem by comparing promulgation of sentencing guidelines to the judiciary's traditional role in pronouncing sentence.¹²⁷ The Court ignored the distinction between the judiciary's actual role of pronouncing sentence based on Congress' political definitions of crimes, and the essentially political and legislative task of classifying ranges of sentences within which judges may pronounce sentence.¹²⁸ In their sentencing duties, judges impartially evaluate individual situations based on criteria set by Congress. When judges have developed the guidelines within which they will pronounce sentence, judges appear to lose their disinterestedness in adjudication, because they have a stake in the process.

122. Although the term for Commissioners is six years, the Act provides for an initial staggering of terms. See *supra* note 56. Eventually, the result will be that at least three federal judges will be appointed to the Commission within every six-year period.

123. Because sentencing is a primary activity of judges, no judge realistically could decline to ever apply the sentencing guidelines.

124. Comment, *supra* note 21, at 1013; see *supra* notes 117–18 and accompanying text.

125. *Gubiensio-Ortiz v. Kanahale*, 857 F.2d 1245, 1262 (9th Cir. 1988) (citing *Hobson v. Hansen*, 265 F. Supp. 902, 923 (D.D.C. 1967) (Wright, J., dissenting)).

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

127. *Id.* at 673. The Court asserts that judicial experience with sentencing provides judges with the expertise needed by the Commission. *Id.* However, judicial expertise does not cure separation of powers problems. See *infra* notes 135–43 and accompanying text. Furthermore, while delegating the authority to establish sentencing guidelines to federal judges who have expertise in sentencing may be convenient and practical for Congress, "[c]onvenience and efficiency are not the primary objectives—or the hallmarks—of democratic government." *Immigration and Naturalization Serv. v. Chadha*, 462 U.S. 919, 944 (1983).

128. See *supra* notes 88–93 and accompanying text.

3. *Judicial Service on the Sentencing Commission Threatens the Independence of the Judicial Branch.*

Judicial service on the Sentencing Commission may endanger the independence of the judicial branch by subjecting judges to the control and influence of the executive branch. The President not only appoints judges to the Commission, but also has the power to remove members of the Commission for cause.¹²⁹

The Court correctly decided that the President's appointment power is not a great risk to judicial independence, as the President always has had the power to elevate judges to higher levels or tempt them away from the judiciary with executive branch appointments.¹³⁰ However, the President's removal power, even though only for cause, gives the President the control over federal judges that the Constitution's provision for life tenure was intended to prevent.¹³¹ The Court dismissed the removal power because the Act does not authorize the President to remove or diminish the status of Article III judges as judges.¹³² The Court ignores the potential diminution of status that removal for cause would constitute for judges removed from the Commission.¹³³ Furthermore, because members of the Commission are paid at the rate of courts of appeals judges,¹³⁴ removal from the Commission would constitute a decrease in pay for district court judges sitting on the Commission. Such control over judges by the executive impermissibly threatens the independence of the judiciary, in both appearance and actuality.

4. *The Need for Judicial Experience and Viewpoint on the Commission Does Not Outweigh the Impairment of the Judicial Function.*

Because service of judges on the Sentencing Commission impairs the function of the judicial branch, the separation of powers inquiry turns on whether the disruption of the judicial function may be justified by an overriding need to promote objectives within Congress' constitutional authority.¹³⁵ In the case of the Sentencing Commission, the

129. 28 U.S.C.A. § 991(a).

130. *Mistretta*, 109 S. Ct. at 674.

131. *Gubiensio-Ortiz v. Kanahale*, 857 F.2d 1245, 1261-62 (9th Cir. 1988).

132. *Mistretta*, 109 S. Ct. at 674-75.

133. See Brief of Respondent-Petitioner John M. Mistretta at 34, *Mistretta v. United States*, 109 S. Ct. 647 (1989) (Nos. 87-1904 and 87-7028).

134. 28 U.S.C.A. § 992(c).

135. See *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 443 (1977); see *supra* notes 26-29 and accompanying text.

determination must be whether there is an overwhelming need for active federal judges on the Sentencing Commission that outweighs the impairment of the judicial branch caused by judicial service. Because requiring service of active federal judges is only one potential method of securing expert contribution to the Commission, the need for such service does not outweigh the impairment it causes to the judiciary.

The Senate Report on the Sentencing Reform Act¹³⁶ states that the Sentencing Commission was located in the judicial branch because Congress believed that sentencing should remain primarily a judicial function.¹³⁷ In *Mistretta* the Supreme Court also cited judges' role in sentencing, and their accompanying experience and expertise, as justification for judicial service on the Commission.¹³⁸ However, Congress could have obtained judicial input to the sentencing guidelines by methods less burdensome than enlisting active federal judges for the Commission. Former or retired federal judges could sit on the Commission as adequately as active federal judges.¹³⁹ Alternatively, the Commission could seek informal input from the judiciary by welcoming comments and holding hearings.¹⁴⁰

Furthermore, the stated goals of the Sentencing Commission do not establish that active federal judges are so indispensable that the need for their service on the Commission overrides the need for separation of powers. The first goal for the Commission is establishing sentencing policies that carry out the four purposes of sentencing: deterrence, incapacitation, punishment, and rehabilitation.¹⁴¹ Although these may be the same goals judges have attempted to accomplish in individual sentencing, persons who have worked with criminals after sentencing are just as likely to be qualified to evaluate which sentences actually succeed in achieving these goals. The second goal—providing certainty and fairness in meeting the purposes of sentencing¹⁴²—is the result of establishing a uniform system of guidelines, regardless of who establishes the system. The third goal—creating sentencing policies and practices that reflect advancement in knowledge of human behavior in the context of the criminal justice process¹⁴³—similarly does not

136. S. REP. NO. 225, *supra* note 53.

137. *Id.* at 3342.

138. *Mistretta v. United States*, 109 S. Ct. 647, 667, 673 (1989).

139. *Gubiensio-Ortiz v. Kanahale*, 857 F.2d 1245, 1264 (9th Cir. 1988).

140. The Commission did so with a preliminary draft of the first guidelines. *Id.*

141. 28 U.S.C.A. § 991(b)(1)(A).

142. *Id.* § 991(b)(1)(B).

143. *Id.* § 991(b)(1)(C).

require judges' particularized knowledge. If professional legal perspective is crucial, lawyers, law professors, and former judges could serve as competently as sitting judges. The need for judges' presence on the Commission is not preponderant enough to outweigh the injury their service does to the judicial function.

III. CONCLUSION

The Sentencing Commission violates separation of powers principles by simultaneously aggrandizing the role of the judicial branch beyond constitutional limits and encroaching upon the core function of the judicial branch. By making the legislative and political decisions necessary to promulgate sentencing guidelines, the Sentencing Commission impermissibly expands the function of the judiciary. At the same time, service of Article III judges on the Sentencing Commission threatens the impartiality and independence of judges and reduces public confidence in the judiciary, thus impairing the judiciary's ability to impartially decide cases and controversies. While securing expert contributions to the formulation of sentencing guidelines is a worthy congressional goal, the need for judicial expertise on the Sentencing Commission does not outweigh the impairment of the judicial function.

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