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The Constitutionality of the Federal Sentencing Reform Act after Mistretta v. United States

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> The sentencing of the convicted offender demands of the trial judge the best that he has in wisdom, knowledge, and insight, as a jurist and as a human being. Difficult as it is to do, he must constantly weigh in the balance the future course of life of the individual before him with his judicial responsibility for the protection of the community.*

INTRODUCTION

As part of an omnibus package of crime control measures,[1] Congress enacted the Sentencing Reform Act of 1984 (the Act).[2] Patterned in many respects after a failed attempt at similar legislation in 1979,[3] the ideas expressed within the Act represented the culmination of at least ten years of serious study on federal sentencing reform.[4] Dissatisfied with the perception of wide sentencing disparity within the federal system,[5] Congress attacked the problem at its per-

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* B. Laws, *Foreword* to ADVISORY COUNCIL OF JUDGES OF THE NATIONAL PROBATION AND PAROLE ASSOCIATION, GUIDES FOR SENTENCING at v (1st ed. 1957). The Honorable Bolitha J. Laws was Chief Judge of the United States District Court for the District of Columbia from 1945 to 1958.

1. Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1976 (1984). For an exhaustive overview of this legislation, see B. GEORGE, THE COMPREHENSIVE CRIME CONTROL ACT OF 1984 (1986 & Supp. 1988). *See also Symposium on the Crime Control Act of 1984*, 22 AM. CRIM. L. REV. 707, 707-85 (1985).

2. Sentencing Reform Act of 1984, Pub. L. No. 98-473, tit. II, ch. II, 98 Stat. 1987 (codified as amended at 18 U.S.C. §§ 3551-3742 (Supp. IV 1986), and 28 U.S.C. §§ 991-998 (Supp. IV 1986)) [hereinafter the Act]. Although the Act has undergone slight subsequent amendment, for clarity all references, unless otherwise indicated, will be to this codification, upon which the United States Supreme Court relied in its decision in Mistretta v. United States, 109 S. Ct. 647 (1989).

3. S. 1722, 96th Cong., 1st Sess. (1979). This bill, introduced by Senator Edward Kennedy, followed on the heels of a similar bill introduced to the 95th Congress. S. 1437, 95th Cong., 2d Sess. (1978). Senator Kennedy also sponsored the legislation ultimately embodied in the Act.

4. In 1973, Judge Marvin Frankel published the seminal work spurring sentencing reform. *See* M. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER (1973) [hereinafter M. FRANKEL, CRIMINAL SENTENCES]. He advocated, among other things, the establishment of a "Commission on Sentencing" to study, formulate, and enact sentencing rules. *Id.* at 119. For a more technical presentation of Judge Frankel's views, see Frankel, *Lawlessness in Sentencing*, 41 U. CIN. L. REV. 1 (1972).

5. Sentencing disparity refers to "the imposition of substantially different sentences for the same offense or for offenses of comparable seriousness, without any apparent rational basis . . . ." COUNCIL OF JUDGES OF THE NATIONAL COUNCIL ON CRIME AND DELINQUENCY, GUIDES FOR SENTENCING 57 (2d ed. 1974). Senator Kennedy

ceived roots: judicial discretion in sentencing and the parole process.[6] To limit judicial discretion, Congress created the United States Sentencing Guidelines Commission (the Commission) to promulgate guidelines binding on federal judges in the sentencing decision.[7] To further curb discretion, both the government and the offender may now appeal the sentence imposed to determine whether the judge's disposition was either too lax or too severe.[8] Congress' decision concerning parole is even more direct: the Act prospectively abolishes the entire parole system in phases that conclude in 1992.[9]

The Commission, after issuing two tentative drafts,[10] promulgated a sweeping set of guidelines (the Guidelines) applicable to any federal crime committed after November 1, 1987.[11] Judicial challenges to the Act, the Commission, and the Guidelines began immediately.[12]

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stated that the driving force behind sentencing reform "emanated from recent studies demonstrating inequity in the sentences actually imposed on similarly situated offenders convicted of the same crimes." Kennedy, *Toward a New System of Criminal Sentencing: Law With Order*, 16 AM. CRIM. L. REV. 353, 357 (1979) (footnote omitted).

6. In its extensive legislative history of the Act, the Senate noted:

> These disparities, whether they occur at the time of the initial sentencing or at the parole stage, can be traced directly to the unfettered discretion the law confers on those judges and parole authorities responsible for imposing and implementing the sentence. This sweeping discretion flows from the lack of any statutory guidance or review procedures to which courts and parole boards might look.

S. REP. NO. 225, 98th Cong., 2d Sess. 38, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 3182, 3221 (footnote omitted) [hereinafter S. REP. NO. 225].

7. 28 U.S.C. § 991 (Supp. IV 1986). The United States Sentencing Guidelines Commission will hereinafter be referred to as "the Commission." For a comprehensive collection of the work proffered thus far by the Commission, including annotated sentencing guidelines, and handbooks for recommended procedures issued by the Department of Justice and the Judicial Conference of the United States, see T. HUTCHISON & D. YELLEN, FEDERAL SENTENCING LAW AND PRACTICE (1989 & Supp. 1989). For a collection of essays addressing practical concerns, see D. CHAMPION, THE U.S. SENTENCING GUIDELINES: IMPLICATIONS FOR CRIMINAL JUSTICE (1989).

8. 18 U.S.C. § 3742 (Supp. IV 1986); *see infra* notes 94-98 and accompanying text.

9. Pub. L. No. 98-473, § 218(a)(5), 98 Stat. 2027 (1984); *see infra* notes 99-103 and accompanying text.

10. *See* Preliminary Draft of Sentencing Guidelines for United States Courts, 51 Fed. Reg. 35,080 (1986) (proposed Oct. 1, 1986); Proposed Sentencing Guidelines for United States Courts, 52 Fed. Reg. 3920 (1987) (proposed Feb. 6, 1987).

11. *See* Sentencing Guidelines for United States Courts, 52 Fed. Reg. 18,046 (1987) (proposed Apr. 13, 1987), *reprinted in* UNITED STATES SENTENCING COMMISSION, FEDERAL SENTENCING GUIDELINES MANUAL (1987) [hereinafter SENTENCING GUIDELINES MANUAL]. The petitioner in *Mistretta* was sentenced under these provisions. A 1990 edition of this manual exists as amended, and reference will be to this edition [hereinafter the Guidelines]. Citation to discussion within the 1990 edition will be to the SENTENCING GUIDELINES MANUAL, while citation to a particular guideline will follow the Commission's recommended citation form. *See* SENTENCING GUIDELINES MANUAL, *supra*, at XXVII.

12. A case filed on behalf of the Federal Public Defenders on November 23, 1987, was dismissed for lack of standing. *See* Federal Defenders v. United States Sentencing Comm'n, 680 F. Supp. 26 (D.D.C. 1988). Defendants with charges against them arising from alleged conduct occurring after November 1, 1987, challenged sentencing under the Guidelines so early in the proceedings that ripeness was a frequent threshold issue.

The federal circuits and district courts split deeply over three main facial constitutional challenges: (1) the scope of Congress' delegation of legislative power to the Commission; (2) the blurring of the separation of powers implicated by the Act; and (3) the due process rights of offenders sentenced under the Guidelines.[13] The United States Supreme Court granted a special appeal in *Mistretta v. United States*[14] due to the disarray among the lower courts and because of the "imperative public importance" of settling the challenges to the Act to allow uniformity in sentencing procedures to return to the district courts.[15]

In *Mistretta*, the Supreme Court resolved the constitutional questions surrounding the Act and the Commission, but declined the opportunity to consider questions concerning the constitutionality of the Guidelines. Based upon two broad challenges, excessive legislative delegation[16] and separation of powers,[17] the Court ruled in favor

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In the earliest published case addressing the constitutionality of the Guidelines, United States v. Arnold, 678 F. Supp. 1463 (S.D. Cal. 1988) (decided Feb. 18, 1988), the defendants pleaded not guilty to a five-count indictment, and the proceedings remained in an early pre-trial stage. Because the issues were purely legal and required no development to clarify the dispute, the court held that a challenge to the constitutionality of the Commission and the Guidelines was ripe for review. *Id.* at 1466. Thereafter, other courts uniformly reached this same conclusion.

13. *See* Appendix I, *infra*. As the Appendix indicates, the Third and Ninth Circuits differed on the separation of powers doctrine. The Third Circuit concluded that the Commission did not violate the doctrine. United States v. Frank, 864 F.2d 992, 1014 (3d. Cir. 1988), *cert. denied*, 109 S. Ct. 2442 (1989). Conversely, the Ninth Circuit concluded that the doctrine was violated by the Commission. Gubiensio-Ortiz v. Kanahele, 857 F.2d 1245, 1259-60 (9th Cir. 1988), *cert. granted and judgment vacated sub nom.* United States v. Chavez-Sanchez, 109 S. Ct. 859 (1989). The academic debate on the subject produced equally disparate results. *Compare* Note, *The Constitutional Infirmities of the United States Sentencing Commission*, 96 YALE L.J. 1363, 1369 (1987) (arguing that the Commission resulted from an unlawful delegation of power and impermissibly required judicial service) *with* Comment, *The United States Sentencing Commission: A Constitutional Delegation of Congressional Power*, 55 IND. L.J. 117, 123 (1979) (arguing that a similar commission proposed in 1979, *see supra* note 3, was a constitutional delegation of power). Although many district courts differed on the due process issue, no appellate court has struck down the Guidelines based on this challenge. *See infra* note 252 and accompanying text.

14. 109 S. Ct. 647 (1989).

15. *Id.* at 654. The petitioner in *Mistretta* filed a notice of appeal to the Eighth Circuit following the district court decision upholding the Guidelines. *See* United States v. Johnson, 682 F. Supp. 1033 (W.D. Mo. 1988) (en banc), *aff'd sub nom.* Mistretta v. United States, 109 S. Ct. 647 (1989). The Supreme Court, however, granted certiorari pursuant to Rule 18, which addresses issues of "imperative public importance." SUP. CT. R. 18.

16. *See infra* notes 141-64 and accompanying text.

17. *See infra* notes 165-208 and accompanying text.

of the Commission's constitutionality.[18] However, the Court did not consider two other challenges that have overturned the Guidelines in some district courts: the due process rights of convicted offenders to be sentenced under the Guidelines;[19] and the enactment of the Guidelines despite the presentment clause.[20]

This comment will address the foundations of the Commission and the Guidelines, and will analyze both the resolved and extant constitutional challenges to each. Part I discusses the background of the sentencing reform movement and previous attempts at legislation. Part II sets out the legislative intent and statutory framework of the Act, and presents an overview of the Guidelines promulgated by the Commission. Part III analyzes the issues resolved by the Supreme Court in *Mistretta*, with consideration given to the way these challenges were handled in the lower courts. Part IV discusses constitutional challenges left unresolved by the Court. Finally, Part V comments upon the Act, the Guidelines, and *Mistretta*. Part V also contains an assessment of suggested reform measures to both the Act and the Guidelines. In conclusion, the perceptions and criticisms of those implementing the Guidelines on a daily basis are noted with a brief assessment of their practicality and acceptance apart from their constitutionality.

I. FOUNDATIONS OF SENTENCING REFORM

A. Background and Goals

Before consideration of the Act itself, the shifts in prevailing attitudes concerning the purposes of sentencing are instructive on the radical changes the Act embodies. The legislative history of the Act initially noted the lack of a clear sentencing purpose or philosophy, and as its first goal, Congress set out to alleviate this shortcoming.[21]

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18. *Mistretta*, 109 S. Ct. at 675. Justice Blackmun authored the opinion of the Court, joined by Chief Justice Rehnquist, and Justices Brennan, White, Marshall, Stevens, O'Connor, and Kennedy. In a lone dissent, Justice Scalia agreed that the Act did not encompass an unconstitutional delegation of legislative authority, but argued vigorously that the Act violated separation of powers principles. *See infra* notes 209-21 and accompanying text.

19. *See infra* notes 250-93 and accompanying text.

20. *See infra* notes 294-322 and accompanying text.

21. *See* S. REP. NO. 225, *supra* note 6, at 39. The legislative history of the Act noted that "sentencing legislation should contain a comprehensive and consistent statement of the Federal law of sentencing, setting forth the purposes to be served by the sentencing system . . . ." *Id.* The goals and purposes of the Act are set out in detail at *infra* notes 60-61, 69-75 and accompanying text.

The authors of the Model Sentencing Act expressed a similar concern: "Although in general the nature of penal treatment is determined primarily by the quality of the custodial, supervisory, and administrative personnel, the philosophy and legal structure of sentencing are highly influential." COUNCIL OF JUDGES OF THE NATIONAL

In general, criminal sentencing may serve one or more of five basic purposes:

> *Retribution*, the exaction of payment—"an eye for an eye."
> *Deterrence*, which may be "general" (i.e., discouraging others than the defendant from committing the wrong), "special" (discouraging the specific defendant from doing it again), or both.
> *Denunciation*, or condemnation—as a symbol of distinctively criminal "guilt," as an affirmation and re-enforcement of moral standards, and as reassurance to the law-abiding.
> *Incapacitation*, during the time of confinement.
> *Rehabilitation*, or *reformation* of the offender.[22]

Although there may be shifts in emphasis between and among these five, the particular purpose or purposes emphasized by society shape to a large extent "the decision as to type, length, and conditions of sentence."[23]

Regarding these basic purposes, an evolving emphasis on policy was acknowledged fifty years ago to have wrought a radical change in American penology.[24] In 1949, a majority of the Supreme Court in *Williams v. New York*[25] joined Justice Black, who stated: "Retribu-

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COUNCIL ON CRIME AND DELINQUENCY, MODEL SENTENCING ACT 5 (2d ed. 1972) (comment to § 1, addressing purpose and policy).

22. M. FRANKEL, CRIMINAL SENTENCES, *supra* note 4, at 106 (emphasis in original). Judge Frankel noted that these were the basic categories, although others might "shorten or lengthen the list, or prefer other terminology." *Id.*; *see, e.g.*, REPORT OF THE TWENTIETH CENTURY FUND TASK FORCE ON CRIMINAL SENTENCING, FAIR AND CERTAIN PUNISHMENT 69-75 (1976) [hereinafter FAIR AND CERTAIN PUNISHMENT] (three considerations noted are isolation, punishment, and rehabilitation); Robinson, *A Sentencing System for the 21st Century?*, 66 TEX. L. REV. 1, 6 (1987) (four purposes listed as "just punishment, deterrence, incapacitation, and rehabilitation").

23. This reflects the title of a thoughtful work on the subject—ROBERT O. DAWSON, SENTENCING: THE DECISION AS TO TYPE, LENGTH, AND CONDITIONS OF SENTENCE (1969). Professor Dawson explicitly stated at the outset of his work that "[o]ne of the major goals of the correctional process is the rehabilitation of the convicted offender." *Id.* at 3.

24. This comment focuses on recent changes in the law of sentencing. However, the proper punishment of offenders has always been a consideration of civilized societies. *See* United States v. Barker, 771 F.2d 1362, 1365 & n.4 (9th Cir. 1985) (citing HAMMURABI'S CODE § 196, *Deuteronomy* 19:21, and *Matthew* 7:2 as ancient recognition of retribution). In the 17th century, Thomas Hobbes recognized the need of "some coercive power, to compel men equally to the performance of their covenants, by the terror of some punishment, greater than the benefit they expect by the breach of their Covenant." T. HOBBES, LEVIATHAN 113 (Collier Books ed. 1962). Compare this tacit recognition of retribution and deterrence with his equal recognition of rehabilitation: "Men look not at the greatness of the evil past, but the greatness of the good to follow. Whereby we are forbidden to inflict punishment with any other design, than for the correction of the offender, or direction of others." *Id.* at 119 (emphasis omitted). Merely comparing the titles of treatises from certain eras emphasizes the change in a society. *Compare* C. BECCARIA, ON CRIMES AND PUNISHMENT (1764) *with* K. MENNINGER, THE CRIME OF PUNISHMENT (1968).

25. 337 U.S. 241 (1949).

tion is no longer the dominant objective of the criminal law. Reformation and rehabilitation of offenders have become important goals of criminal jurisprudence."[26] This statement by the Court acknowledged not only a departure from the common law,[27] but also the modern view that punishment should be tailored to fit the criminal, and not merely the crime.[28] Penological treatises from this era reflect a similar embracing of the rehabilitative ideal.[29]

However, by the early 1970s, the experiment with rehabilitation had produced inconclusive or dissatisfying results.[30] Rehabilitation of

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26. *Id.* at 248 (footnote omitted). This was not a sudden realization on the part of the Court. In considering Congress' passage of the Federal Probation Act, the Court had previously explained that "[i]t is necessary to individualize each case, to give that careful, humane and comprehensive consideration to the particular situation of each offender which would be possible only in the exercise of a broad discretion." Burns v. United States, 287 U.S. 216, 220 (1932).

27. Justice Black cited 2 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 1756-57 (Lewis' ed. 1897), to support the proposition that "[t]his whole country has traveled far from the period in which the death sentence was an automatic and commonplace result of convictions—even for offenses today deemed trivial." *Williams*, 337 U.S. at 247-48 (footnote omitted). Professor Alan Dershowitz provides an apt summary of the evolution from colonial American punishment of offenders to the modern American emphasis on rehabilitation, and beyond, to the current attack on rehabilitation. *See* FAIR AND CERTAIN PUNISHMENT, *supra* note 22, at 83-100. For a perspective of the recent trend, see Dowd, *The Pit and the Pendulum: Correctional Law Reform from the Sixties into the Eighties*, 29 VILL. L. REV. 1 (1984).

28. *Williams*, 337 U.S. at 247. The Court stated that "[t]he belief no longer prevails that every offense in a like legal category calls for an identical punishment without regard to the past life and habits of a particular offender." *Id.* Compare this statement with Congress' intent embodied in the Act. *See infra* notes 69-75 and accompanying text.

29. *See* G. PATON, A TEXT-BOOK OF JURISPRUDENCE (1946), wherein the author states:

> Modern criminology considers that the *personality* of the offender is as important as his *act* and emphasizes that the wrongdoer is not only a criminal to be punished but a patient to be treated. The cry is for individualization of the penalty, not to let the punishment fit the crime, but the personality of the criminal.

Id. at 289 (footnote omitted) (emphasis in original); *see also* ADVISORY COUNCIL OF JUDGES OF THE NATIONAL PROBATION AND PAROLE ASSOCIATION, GUIDES FOR SENTENCING (1st ed. 1957), wherein the judges concluded:

> Far more effective than deterrence as an objective of sentencing is rehabilitation, the satisfactory adjustment of the offender to law-abiding society. . . . This book holds that sentencing functions best when the judge demonstrates an understanding of *individualized treatment*, which means that the sentence must take into account the offender's needs.

Id. at 3-5 (emphasis in original). For an extremely influential essay from the late 1960s, see H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION (1968).

30. *See* United States v. Grayson, 438 U.S. 41, 47 n.6 (1978) (stating that "[i]ncreasingly there are doubts concerning the validity of earlier, uncritical acceptance of the rehabilitation model"); *see also* United States v. Mejia-Orosco, 867 F.2d 216, 218 (5th Cir.), *cert. denied*, 109 S. Ct. 3257 (1989) ("Congress concluded after decades of empirical evidence that this commendable and ambitious approach [to rehabilitation] had proven unworkable and unjust.").

A study completed in 1975 announced that "coerced programs of rehabilitation in prison rarely, if ever, affected the recidivism rate of prisoners who participated in them, probably because the prisoner did not wish to be rehabilitated, but participated

convicted criminals was based upon the idea of a "medical model," but the treatment of crime as a disease subject to scientific cure had failed, largely because the "diseases" varied significantly, as did the "recuperative possibilities" of the criminal/patient.[31] One jurist posed significant questions raised through his experience: "If the sentence is for 'punishment,' how agreeable should the dungeon be? If the sentence is for 'rehabilitation,' is it acceptable to use the same prison as the one serving to punish? If we mean both to punish and to rehabilitate, is such a thing possible?"[32] His answer was that "a mythical goal of rehabilitation . . . is much more than an objectionable abstraction. It is the foundation, however well surrounded with good intentions, upon which we construct a monstrous apparatus of ignorance and horror."[33]

Sentencing disparity is one "horror" that the rehabilitative model inevitably created,[34] and this same disparity eroded confidence in the model.[35] Prior to passage of the Act, the standard federal sentencing decision involved a broad range of sentencing options within a stat-

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only to obtain early release." R. SINGER, JUST DESERTS: SENTENCING BASED ON EQUALITY AND DESERT 7 (1979) (citing D. LIPTON, R. MARTINSON & J. WILKS, THE EFFECTIVENESS OF CORRECTIONAL TREATMENT (1975)).

31. *See* R. SINGER, *supra* note 30, at 1-2; M. FRANKEL, CRIMINAL SENTENCES, *supra* note 4, at 89-91.

32. M. FRANKEL, CRIMINAL SENTENCES, *supra* note 4, at viii. Professor Dershowitz, although conceding that coalescing the goals of sentencing generates confusion, nonetheless argued that prison, at the same time, "isolates, punishes, and provides—in theory at least—an appropriate setting for rehabilitation." FAIR AND CERTAIN PUNISHMENT, *supra* note 22, at 75.

33. M. FRANKEL, CRIMINAL SENTENCES, *supra* note 4, at 91; *see also* Mistretta v. United States, 109 S. Ct. 647, 651 (1989) (critics came to regard rehabilitation as a questionable and unattainable goal).

34. Three models for sentencing may be defined based upon the institution setting the policy and determining the sentence. The "legislatively fixed model" has the legislature set the exact sentence for any given crime. Under the "judicially fixed model," the legislature establishes a range from which the judge selects a determinate sentence. In an "administratively fixed model," the legislature establishes a wide range from which the judge selects a disposition, and an administrative agency (*e.g.*, the Parole Commission) determines the actual duration. FAIR AND CERTAIN PUNISHMENT, *supra* note 22, at 79-82. Rehabilitation, by its nature, demands the flexibility afforded by the last model, but it leads to "glaring disparities." Kennedy, *supra* note 5, at 353-54; *see also Mistretta*, 109 S. Ct. at 650-51 (discussion of "three-way sharing" of the sentencing responsibility).

35. A study published in 1978 reported that "perceived disparities in sentencing have led to public loss of confidence in the fair and impartial administration of criminal justice and have led many to advocate the elimination of the sentencing discretion of the trial court judge." L. WILKINS, J. KRESS, D. GOTTFREDSON, J. CALPIN & A. GELMAN, *Abstract* to SENTENCING GUIDELINES: STRUCTURING JUDICIAL DISCRETION: REPORT ON THE FEASIBILITY STUDY at vii (1978). *See generally* F. ALLEN, THE DECLINE OF THE REHABILITATIVE IDEAL (1981).

ute,[36] from which the sentencing judge would pick the appropriate term of imprisonment, probation, fine, or combination thereof.[37] This choice by the sentencing judge was largely not subject to appellate review.[38] Subsequent decisions by the Parole Commission factored into the length of any term of imprisonment actually served,[39] and these decisions also were not readily subject to review.[40] Yet,

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36. Federal theft crimes provide an excellent example of the variance possible within and between various categories of crime. *Compare* 18 U.S.C.A. § 656 (West 1976) (maximum sentence for theft, embezzlement, or misapplication of funds by bank officer set at five years imprisonment and $5000 fine) *with* 18 U.S.C.A. § 641 (West 1976) (maximum sentence for embezzlement of public money, property or records set at 10 years imprisonment and $10,000 fine). No guidance exists within these statutes concerning how important increasingly large amounts of stolen property impact the sentencing decision. More heinous crimes exhibit even wider latitude. *See, e.g.*, 18 U.S.C.A. § 1111 (West 1984) (second degree murder); *id.* § 1201 (kidnapping) (both punishable by any term of years or for life).

37. A study within the Second Circuit asked 50 federal district court judges to establish sentences for 20 different hypothetical federal offenders based on the presentence report. The disparities were alarming. One hypothetical case involved extortionate credit transactions and income tax violations, with the sentences ranging from 20 years imprisonment and a $65,000 fine, to only three years imprisonment. Another involved possession of barbiturates with intent to sell, with the most severe sentence set at five years imprisonment and three years probation, and the least severe set at two years probation. A. PARTRIDGE & W. ELDRIDGE, THE SECOND CIRCUIT SENTENCING STUDY, A REPORT TO THE JUDGES OF THE SECOND CIRCUIT (1974), *reprinted in* S. REP. NO. 225, *supra* note 6, at 42-43.

38. The Supreme Court previously stated that "once it is determined that a sentence is within the limitations set forth in the statute under which it is imposed, appellate review is at an end." Dorszyniski v. United States, 418 U.S. 424, 431 (1974); *see also* Gore v. United States, 357 U.S. 386, 393 (1958) (federal sentences not susceptible to appellate review). The American Bar Association has long recommended more complete and meaningful appellate review of the sentencing decision. *See* AMERICAN BAR ASSOCIATION PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO APPELLATE REVIEW OF SENTENCES (1968) (approved draft recommending that judicial review be available to determine "propriety" of any sentences).

Before the Act, when a judge *did* state particular sentencing reasons, the judge's decision was more likely subject to reversal and remand on appeal. *See, e.g.*, United States v. Barker, 771 F.2d 1362, 1365-67 (9th Cir. 1985) (overturning imposed maximum sentence due to statements by judge indicating displeasure with the crime rather than the criminal, and whose sole aim was deterrence of others).

39. The report of the Attica Commission concluded that disparity in the sentencing and parole process was a key factor in the violent uprising among prison inmates, who became enraged at the uncertainty inherent in their length of incarceration. McKay, *It's Time To Rehabilitate the Sentencing Process*, 60 JUDICATURE 223, 226 (1976); *see infra* note 103 and accompanying text ("good time" credit under the Act).

"Whether wisely or not, Congress has decided that the [Parole] Commission is in the best position to determine when release is appropriate, and in doing so, to moderate the disparities in the sentencing practices of individual judges." United States v. Addonizio, 442 U.S. 178, 188-89 (1979). This interplay between the judge and the Parole Commission led to considerable second-guessing by both, which encouraged judges to sentence based upon the possibility of parole, and the Parole Commission to release prisoners without concern for the sentencing judge's purpose. S. REP. NO. 225, *supra* note 6, at 49. This practice "actually *promotes* disparity and uncertainty." *Id.* at 46 (emphasis added).

40. *See* Morrissey v. Brewer, 408 U.S. 471, 480 (1972) (parole decision is a matter of discretion based upon prediction). In *Addonizio*, the Supreme Court declared that

while the belief prevailed that the offender could be rehabilitated, and therefore the sentence should be tailored to fit the offender's reformation, the broad range of discretion accorded to the sentencing judge and the parole authorities was appropriate.[41] Consequently, the "indeterminate sentences"[42] meted out and the terms of imprisonment actually served by similar offenders convicted of similar crimes were widely divergent. This created a backlash against rehabilitation as a goal of sentencing, replacing it with goals based upon retribution and deterrence.[43]

B. Attempts at Change and Legislative Reform

Options less radical than the sweeping reforms embodied in the Act previously existed to attack and to control sentencing disparity. Sentencing institutes[44] and sentencing councils[45] were implemented throughout the 1950s and 1960s, with varying degrees of success. By

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even when the sentencing judge expressed his desire at sentencing that the defendant obtain parole at a certain time if certain parameters were met, "[t]o require the Parole Commission to act in accordance with judicial expectations, and to use collateral attack as a mechanism for ensuring that these expectations are carried out, would substantially undermine the congressional decision to entrust release determinations to the Commission and not the courts." *Addonizio*, 442 U.S. at 190.

41. One critic of the rehabilitation goal of sentencing stated: "We never fully believed this thesis, however. Had we, our legislatures would have simply passed sentences of zero-to-life for all crimes and left the rest for the parole board." R. SINGER, *supra* note 30, at 2. One judge stated: "Everyone with the least training in law would be prompt to denounce a statute that merely said the penalty for crimes 'shall be any term the judge sees fit to impose.' " M. FRANKEL, CRIMINAL SENTENCES, *supra* note 4, at 8.

42. An indeterminant sentence is "any prison sentence for which the precise term of confinement is not known on the day of judgment but will be subject within a substantial range to the later decision of a parole board . . . ." M. FRANKEL, CRIMINAL SENTENCES, *supra* note 4, at 86. This is the direct result of adopting an administratively fixed model of sentencing. *See supra* note 34.

43. Judge Frankel emphasized that "criminal penalties are painful measures taken against offenders for *punishment*. . . . [W]e fine and jail and denounce people to punish them." M. FRANKEL, CRIMINAL SENTENCES, *supra* note 4, at 111-12 (emphasis in original). *See generally* F. ALLEN, *supra* note 35; R. SINGER, *supra* note 30, at 1-10, 14-20; Morris, *Conceptual Overview and Commentary on the Movement Toward Determinacy, reprinted in* NATIONAL INSTITUTE OF LAW ENFORCEMENT AND CRIMINAL JUSTICE, DETERMINATE SENTENCING: REFORM OR REGRESSION? 1 (1978); Orland, *From Vengeance to Vengeance: Sentencing Reform and the Demise of Rehabilitation*, 7 HOFSTRA L. REV. 29 (1978); Pugsley, *Retributivism: A Just Basis for Criminal Sentences*, 7 HOFSTRA L. REV. 379 (1979); van den Haag, *Punishment as a Device for Controlling the Crime Rate*, 33 RUTGERS L. REV. 706 (1981).

44. Congress created the Judicial Conference of the United States to convene periodically to address the disparity between and among the federal districts. *See* 28 U.S.C. § 334 (Supp. IV 1986). Although of some use in providing a forum to compare sentencing views of jurists and nonjurists, the institutes neither provided binding deci-

the mid-1970s, however, none proved effective in controlling disparity.[46]

The concept of sentencing commissions to establish and to review sentencing guidelines dominated academic debate as the cure-all for disparity.[47] Several states took the lead in implementing commissions and guidelines.[48] Taking note of the success in these states, Congress began the decade-long process of refining the legislation to package the Commission and the resulting Guidelines.[49]

Judge Marvin E. Frankel succinctly posited both the "problems"

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sions nor in any way structured judicial discretion. *See* M. FRANKEL, CRIMINAL SENTENCES, *supra* note 4, at 61-68.

45. *See* FEDERAL JUDICIAL CENTER, THE EFFECTS OF SENTENCING COUNCILS ON SENTENCING DISPARITY (1981); M. FRANKEL, CRIMINAL SENTENCES, *supra* note 4, at 69-74; C. PHILLIPS, SENTENCING COUNCILS IN THE FEDERAL COURTS (1980); Diamond & Zeisel, *Sentencing Councils: A Study of Sentence Disparity and Its Reduction*, 43 U. CHI. L. REV. 109 (1975).

46. Two studies indicated the failure to obtain a remedy for sentencing disparity. *See* A. PARTRIDGE & W. ELDRIDGE, THE SECOND CIRCUIT SENTENCING STUDY, A REPORT TO THE JUDGES OF THE SECOND CIRCUIT (1974); INSLAW, INC., AND YANKELOVICH, SKELLY & WHITE, FEDERAL SENTENCING: TOWARD A MORE EXPLICIT POLICY OF CRIMINAL SANCTIONS at III-4 to III-21 (1981). Both studies presented panels of judges with hypothetical offenders, and the judges sentenced the offenders to a disparate range of punishments. *See* S. REP. NO. 225, *supra* note 6, at 41-46.

47. The essence of the debate is captured in two articles published at the beginning of the reform movement. *Compare* Kennedy, *Criminal Sentencing: A Game of Chance*, 60 JUDICATURE 208 (1976) (advocating mandatory sentencing through commissions and guidelines) *with* Kress, Wilkins & Gottfredson, *Is the End of Judicial Sentencing in Sight?*, 60 JUDICATURE 216 (1976) (advocating adherence to judicial sentencing discretion). *See also* FAIR AND CERTAIN PUNISHMENT, *supra* note 22, at 25-26; M. FRANKEL, CRIMINAL SENTENCES, *supra* note 4, at 118-24; J. KRESS, PRESCRIPTION FOR JUSTICE: THE THEORY AND PRACTICE OF SENTENCING GUIDELINES (1980); R. SINGER, *supra* note 30, at 62-65; L. WILKINS, J. KRESS, D. GOTTFREDSON, J. CALPIN & A. GELMAN, *supra* note 35; Coffee, *The Repressed Issues of Sentencing: Accountability, Predictability, and Equality in the Era of the Sentencing Commission*, 66 GEO. L.J. 975 (1978); Morris, *Towards Principled Sentencing*, 37 MD. L. REV. 267 (1977); Newman, *A Better Way to Sentence Criminals*, 63 A.B.A. J. 1562 (1977); Tonry, *The Sentencing Commission in Sentencing Reform*, 7 HOFSTRA L. REV. 315 (1979).

48. Minnesota, Pennsylvania, and Washington have created agencies to implement guidelines, while others, including California and Illinois, have adopted the legislatively fixed model of determinate sentencing. *See* Frankel & Orland, *Sentencing Commissions and Guidelines*, 73 GEO. L.J. 225, 230 (1984); Martin, *Interests and Politics in Sentencing Reform: The Development of Sentencing Guidelines in Minnesota and Pennsylvania*, 29 VILL. L. REV. 21 (1984). A study completed in 1985 provided an overview of each state's approach to sentencing reform. *See* S. SHANE-DUBOW, A. BROWN & E. OLSEN, SENTENCING REFORM IN THE UNITED STATES: HISTORY, CONTENT, AND EFFECT (1985).

49. For a complete chronicle of the various attempts at legislation, see UNITED STATES SENTENCING COMMISSION, SUPPLEMENTARY REPORT ON THE INITIAL SENTENCING GUIDELINES AND POLICY STATEMENTS 1-8 (1987) [hereinafter SUPPLEMENTARY REPORT]. T. HUTCHISON & D. YELLEN, *supra* note 7, at 423-37 (legislative history of the Act and subsequent amendments through end of 1988); *see also* Rodino, *Federal Criminal Sentencing Reform*, 11 J. LEGIS. 218 (1984) (Representative Rodino sponsored the House of Representatives' version of the Act).

and the "palliatives" upon which Congress and the states acted.[50] Judge Frankel criticized the nation's penal system as composed of judges with widely divergent views on sentencing who were given virtually unlimited discretion, neither constrained by any articulated sentencing policies or goals, nor required to state the reasons for their choice of sentence, nor subjected to appellate review.[51] This "untrammeled discretion" was specifically denounced by the Supreme Court in death penalty cases,[52] and Judge Frankel argued that such reasoning applied in noncapital cases as well.[53] His proposal to the legislatures called for (1) an explicit statement of penological purpose;[54] (2) concrete guidelines to set determinate sentences;[55] (3) appellate review of sentences imposed;[56] (4) revision of the parole apparatus;[57] and (5) a permanent commission to study sentencing and to enact rules to govern imposition of sentences.[58] As described below, Congress accepted the proposal.[59]

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50. *See* M. FRANKEL, CRIMINAL SENTENCES, *supra* note 4, at 3-49 (problems within the sentencing process), 53-124 (palliatives, limitations, and proposals for change).

51. *Id.* at 49. "The basic problem remains the unruliness, the absence of rational ordering, the unbridled power of the sentences to be arbitrary and discriminatory." *Id.*

52. *See* Furman v. Georgia, 408 U.S. 238, 248 (per curiam) (Douglas, J., concurring), *reh'g denied*, 409 U.S. 902 (1972).

53. *See* M. FRANKEL, CRIMINAL SENTENCES, *supra* note 4, at 103-04.

54. *Id.* at 107. "There should be at a minimum a basic provision of the criminal code listing and defining the legislatively decreed purposes or objectives the community has chosen to pursue . . . by means of criminal sanctions." *Id.*; *see infra* notes 69-70 and accompanying text.

55. *See* M. FRANKEL, CRIMINAL SENTENCES, *supra* note 4, at 113. Judge Frankel argued that the factors affecting length and severity of sentence should be codified and reduced to a "detailed chart or calculus" prescribing guidelines for use by the judge, those affecting the sentencing decision, and appellate courts on review. *Id.*; *see infra* notes 117-24 and accompanying text.

56. M. FRANKEL, CRIMINAL SENTENCES, *supra* note 4, at 115. Judge Frankel argued that "[a]ppellate review of sentences . . . would foster a measure of consistency and uniformity." *Id.*; *see infra* notes 94-98 and accompanying text.

57. M. FRANKEL, CRIMINAL SENTENCES, *supra* note 4, at 116-17; *see infra* notes 99-103 and accompanying text.

58. M. FRANKEL, CRIMINAL SENTENCES, *supra* note 4, at 118-23. Judge Frankel stated: "The proposed commission would be a permanent agency responsible for (1) the study of sentencing, corrections, and parole; (2) the formulation of laws and rules to which the studies pointed; and (3) *the actual enactment of rules*, subject to traditional checks by Congress and the courts." *Id.* at 119 (emphasis in original); *see infra* notes 62-87 and accompanying text.

59. Upon passage of the Act, Judge Frankel commented upon the efforts of Congress and the states: "It is remarkable how long it took before we became aware that most defendants are convicted—and sentenced." Frankel & Orland, *supra* note 48, at 225. While not advocating commissions and guidelines as sentencing's "panacea," he hoped for a more consistent approach and wider perspective. *Id.* at 246.

II. THE SENTENCING REFORM ACT OF 1984 AND THE FEDERAL SENTENCING GUIDELINES

The legislators developing the Act set five goals to which they believed the comprehensive sentencing reform package should attain: (1) a clear, consistent statement of sentencing law and purpose, which unambiguously delineated the type and length of sentence available; (2) fairness to both the offender and to society; (3) certainty of sentence and the reasons therefor; (4) availability of a range of options from which the sentencing judge may select the most appropriate individual disposition; and (5) assurance that every stage of the penological process aspired to reach these same goals for the offender and society.[60] While current practices were a mass of inconsistencies that achieved none of these goals, Congress believed the Act would meet and ameliorate the disparities of the prevailing system.[61]

A. The Act and the Commission

In 1984, Congress created the United States Sentencing Guidelines Commission to act as an independent agency within the judicial branch,[62] composed of seven voting members[63] appointed, with the advice and consent of the Senate, by the President after consulting various groups interested in the criminal justice process.[64] At least three of the members must be federal judges recommended by the Judicial Conference of the United States,[65] and these judges may serve on the Commission without resigning their lifetime judicial appointments.[66] Not more than four members may be affiliated with

60. S. REP. NO. 225, *supra* note 6, at 39. These purposes were embodied in the Act. *See* 28 U.S.C. § 991(b)(1) (Supp. IV 1986).

61. *See* S. REP. NO. 225, *supra* note 6, at 39.

62. *See* 28 U.S.C. § 991(a) (Supp. IV 1986). Although a broad range of views should contribute to formulating sentencing policy, "even under this legislation, sentencing should remain primarily a judicial function." S. REP. NO. 225, *supra* note 6, at 159.

63. *See* 28 U.S.C. § 991(a) (Supp. IV 1986). The Commission also has two nonvoting *ex officio* members: the Attorney General, *id.*, and, for the first five years following the effective date of the Act, the Chairman of the United States Parole Commission. *See* Pub. L. No. 98-473, § 235(b)(5), 98 Stat. 2033 (1984).

64. *See* 28 U.S.C. § 991(a) (Supp. IV 1986). The President is to consult "judges, prosecuting attorneys, defense attorneys, law enforcement officials, senior citizens, victims of crime, and others interested in the criminal justice process . . . ." *Id.*

65. *See id.* The Judicial Conference requested the requirement of federal judges to serve on the Commission. *See* S. REP. NO. 225, *supra* note 6, at 159. The three federal judges appointed to the Commission are Judge William W. Wilkins, Chairman, of the Fourth Circuit Court of Appeals, Judge Stephen Breyer of the First Circuit Court of Appeals, and Senior Judge George MacKinnon of the District of Columbia Circuit Court of Appeals. *See* SENTENCING GUIDELINES MANUAL, *supra* note 11, at XXV.

66. *See* 28 U.S.C. § 992(c) (Supp. IV 1986). The drafters believed this to be appropriate, as the judge remains in the judicial branch engaged in "activities closely related to traditional judicial activities . . . ." S. REP. NO. 225, *supra* note 6, at 163.

the same political party.[67] The term of office for each member is six years; however, all members of the Commission may be removed by the President "for neglect of duty or malfeasance in office or for other good cause shown."[68]

1. Purpose

Congress dictated the purposes to be served by sentencing: "deterrence, protection of the public from further crimes by the defendant, assurance of just punishment, and promotion of rehabilitation."[69] When establishing federal sentencing policies and practices, the Commission is to consider these purposes while assuring certainty and fairness in sentencing and avoiding unwarranted sentencing disparities among similar defendants convicted of similar crimes.[70] The overarching design is to propel courts away from the individualized, indeterminate sentencing approach of the past, and toward a new model featuring presumptive, determinate sentences.[71]

Although Congress provided a statement of purpose, the Commission must make progress against Congress' apparent endorsement of retribution and deterrence over rehabilitation.[72] For example, the Commission's work must, to the extent possible, implement the advances made in the behavioral sciences as applied to the criminal jus-

67. 28 U.S.C. § 991(a) (Supp. IV 1986). Because of the critical importance of outstanding membership on the Commission, the drafters of the Act noted that "Presidential appointments based on politics rather than merit would, and should, be an embarrassment to the appointing authority." S. REP. NO. 225, *supra* note 6, at 160.

68. *See* 28 U.S.C. § 992(a) (Supp. IV 1986) (terms of office); *id.* § 991(a) (removal for neglect). The Act limits voting members to two full terms. *Id.* § 992(b). The Chairman's position on the Commission is full-time; the other six positions are full-time only until six years after initial promulgation of guidelines. *Id.* § 992(c). The annual rate of compensation is commensurate with that of circuit judges. *Id.*

69. S. REP. NO. 225, *supra* note 6, at 161; *see* 18 U.S.C. § 3553(a)(2) (Supp. IV 1986).

70. *See* 28 U.S.C. § 991(b)(1)(B) (Supp. IV 1986).

71. Under the Act, the judge's sentence of imprisonment will be the one actually served, as the Parole Commission is prospectively abolished. *See infra* notes 99-103 and accompanying text. This sentence is in turn mandated by the Guidelines, which may not establish a range varying by more than 25% or six months, whichever is greater, between the upper and lower limits of the range. *See* 28 U.S.C. § 994(b)(2) (Supp. IV 1986). While sentencing disparity is ostensibly permitted when "warranted," this occurs only when mitigating or aggravating factors were not considered in the Guidelines. *See id.* § 991(b)(1)(B). As the Guidelines are refined, fewer circumstances will be "warranted." *See infra* notes 125-28 and accompanying text. Nonetheless, the drafters of the Act obliquely maintained that "the sentencing guidelines system will enhance, rather than detract from, the individualization of sentences." S. REP. NO. 225, *supra* note 6, at 16; *see also id.* at 50-58.

72. S. REP. NO. 225, *supra* note 6, at 75-76 (legislative history indicating favor of retributive and deterrent theories of punishment).

tice process.[73] Despite this, in setting a term of imprisonment, the judge must consider the statement of purpose, which contains reference to rehabilitation, and at the same time recognize that "imprisonment is not an appropriate means of promoting correction and rehabilitation."[74] Although no actual preference for any particular sentencing purpose was articulated, rehabilitation has been relegated to probation scenarios.[75]

2. Duties

The primary duty of the Commission is to promulgate guidelines "for [the] use of a sentencing court in determining the sentence to be imposed in a criminal case . . . ."[76] These guidelines must determine whether the sentence should be probation, fine, or imprisonment—and the appropriate length or amount—as well as whether a term of imprisonment should include supervised release, and whether multiple terms should run concurrently or consecutively.[77] Within the guidelines, the Commission is to establish a range of sentences "for each category of offense involving each category of defendant . . . ."[78] Congress listed relevant factors the Commission may consider in grading both the offense[79] and offender characteristics.[80] Congress also set out other concerns relevant to the formulation of the guidelines, including the nature and capacity of the nation's penal facilities,[81] and the general appropriateness or inappropriateness of

73. 28 U.S.C. § 991(b)(1)(C) (Supp. IV 1986).

74. 18 U.S.C. § 3582(a) (Supp. IV 1986). The Commission, when considering reasons for sentence reduction, must recognize that "[r]ehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason." 28 U.S.C. § 994(t) (Supp. IV 1986).

75. *See* S. REP. NO. 225, *supra* note 6, at 76-77.

76. 28 U.S.C. § 994(a)(1) (Supp. IV 1986).

77. *Id.*

78. *Id.* § 994(b)(1). The principle determinants under the guideline system are "the prior records of offenders and the criminal conduct for which they are to be sentenced . . . ." S. REP. NO. 225, *supra* note 6, at 161.

79. The Commission may find as relevant to the offense category consideration of the circumstances and grade of the offense, the nature and degree of harm caused, the community's view and public concern, and the deterrence afforded by a particular sentence. *See* 28 U.S.C. § 994(c) (Supp. IV 1986).

80. The Commission may not consider "race, sex, national origin, creed, and socioeconomic status of offenders." *Id.* § 994(d). The Commission may consider as relevant age, education, vocational skills, previous employment, mental, emotional and physical condition, family and community ties, role in the offense, criminal history, and criminal livelihood. *Id.* However, consideration by the Commission of the offender's education, vocational skills, employment, and family and community ties are inappropriate to the recommendation of imprisonment or the length of the term. *Id.* § 994(e). The Commission's findings on these points are set forth at *infra* note 121.

81. *See* 28 U.S.C. § 994(g) (Supp. IV 1986). The Commission also works with the Bureau of Prisons in recommending to Congress the best means to optimize prison facilities. *Id.* § 994(q).

certain types of punishment for certain offenders.[82] Adjunct to the promulgation of guidelines, Congress directed the Commission to release policy statements, as necessary, concerning use of these guidelines and other aspects of sentencing.[83]

The Commission's continuing duties include consulting penal authorities periodically to review and to revise the promulgated guidelines.[84] Any amendments to those guidelines, as well as the initial set of guidelines, take effect 180 days after report to the Congress, "except to the extent the guidelines are disapproved or modified by Act of Congress."[85] The Commission's ongoing charge is to analyze all sentences issued under its guidelines, to report to Congress legislation it believes appropriate, and to recommend changes in penalties for those offenses in which an adjustment appears necessary.[86] The Commission also shall entertain petitions from any offender requesting amelioration of guidelines applicable to the offender's case due to a changed circumstance unrelated to the offender, such as a change in the community's view or public concern about the offense.[87]

3. Sentencing

Each federal judge is to consider all guidelines and policy statements "in effect on the date the defendant is sentenced"[88] when determining the appropriate fine, term of imprisonment or probation,

82. The Act affords "general statements of legislative direction for the Commission to follow in promulgating guidelines." S. REP. NO. 225, *supra* note 6, at 174. For example, the term of imprisonment should be at or near the maximum term authorized if an adult offender commits a crime of violence or deals in drugs. 28 U.S.C. § 994(h). *See generally id.* § 994(e)-(n).

83. *See id.* § 994(a)(2). The policy statements are more general in nature than the Guidelines. S. REP. NO. 225, *supra* note 6, at 166-67. While a sentence inconsistent with policy statements is not subject to appellate review, *see infra* note 97 and accompanying text, the judge must still consider them when imposing sentence. *See* 18 U.S.C. § 3553(a)(5) (Supp. IV 1986).

84. *See* 28 U.S.C. § 994(o) (Supp. IV 1986). Now that the Guidelines have been issued, this "revision and refinement process" will comprise the majority of the Commission's work. S. REP. NO. 225, *supra* note 6, at 178.

85. 28 U.S.C. § 994(p) (Supp. IV 1986).

86. *See id.* § 994(r), (w).

87. *See id.* § 994(s). The Commission must respond in writing within 180 days, either agreeing with the petition or stating reasons for disapproval. *Id.*

88. 18 U.S.C. § 3553(a)(4) (Supp. IV 1986). The drafters of the Act believed that the use of superseded guidelines would be administratively difficult, as well as fundamentally at odds with the directive that the Commission continually revise the Guidelines. S. REP. NO. 225, *supra* note 6, at 77. Noting that the Parole Commission applies its own current guidelines, the drafters concluded that "[t]o impose a sentence under outmoded guidelines would foster irrationality in sentencing and would be contrary to the goal of consistency in sentencing." *Id.*

or combination thereof.[89] Although the Act ostensibly requires the judge to consider seven factors when imposing a sentence, the Commission was to consider five of these factors—offense and offender characteristics, purposes of sentencing, kinds of sentences available, avoidance of unwarranted sentencing disparity, and restitution to victims—when formulating the Guidelines.[90] In effect, the judge need only look to the applicable guidelines and policy statements.

When sentencing the defendant, the judge must state in open court the reasons for imposing a particular sentence, regardless of whether it falls at a particular point within a guideline range, or whether it falls outside the recommended range altogether.[91] Furthermore, application of these guidelines is not discretionary:

> The court *shall* impose a sentence of the kind, and within the range, [as set forth in the guidelines] *unless* the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described.[92]

Primarily because of the poor record shown in states with "voluntary" guidelines, Congress rejected an amendment that would have allowed departure from the guidelines system "*whenever* a judge determined that the characteristics of the offender or the circumstances of the offense warranted deviation."[93]

4. Appeal

The drafters of the Act believed that appellate review of sentencing had long been ineffective because of the wide discretion given judges, who were not even required to state reasons for their sentence; therefore, a court on appeal had no standard by which to judge the reasonableness of the sentence imposed.[94] By requiring judges to sentence according to the Guidelines, or to state reasons for departure, appellate review is available and "essential to assure that the

89. *See* 18 U.S.C. § 3553(a)(4), (5) (Supp. IV 1986). For a clear and concise discussion of the sentencing and appeals process, see United States v. Mejia-Orosco, 867 F.2d 216, 217-21 (5th Cir.) (Clark, C.J.), *cert. denied*, 109 S. Ct. 3257 (1989).

90. *Compare* 18 U.S.C. § 3553(a)(1)-(3), (6), (7) (Supp. IV 1986) *with* 28 U.S.C. § 994(a)(1)(b)-(d), (f), (g) (Supp. IV 1986).

91. *See* 18 U.S.C. § 3553(c) (Supp. IV 1986). This provision is important to preserve the record on appeal while affording a basis to determine the "reasonableness" of the sentence imposed. *See infra* note 97 and accompanying text. However, the legislators drafting the Act cautioned against making the statement of reasons a "legal battleground," which would either deter judges from ever departing from the Guidelines, or cause them to standardize their reasons. S. REP. NO. 225, *supra* note 6, at 80.

92. 18 U.S.C.A. § 3553(b) (West Supp. 1989) (emphasis added).

93. S. REP. NO. 225, *supra* note 6, at 79 (emphasis added).

94. S. REP. NO. 225, *supra* note 6, at 150; *see supra* note 38. The Chairman of the United States Sentencing Commission, William W. Wilkins, Jr., Circuit Judge for the United States Court of Appeals for the Fourth Circuit, recently presented his analysis of sentencing appeals under the Guidelines. *See* Wilkins, *Sentencing Reform and Appellate Review*, 46 WASH. & LEE L. REV. 429 (1989).

guidelines are applied properly and to provide case law development of the appropriate reasons for sentencing outside the guidelines."[95]

Both the offender and the government may appeal for review of a sentence imposed under the Guidelines.[96] A court on review determines "whether the sentence (1) was imposed in violation of law; (2) was imposed as a result of an incorrect application of the sentencing guidelines; (3) is outside the applicable guideline range, and is unreasonable . . . ; or, (4) was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable."[97] If the sentence falls within one of these categories, the sentence will either be corrected or be set aside and the case remanded for further sentencing procedures.[98]

5. Termination of the Parole Commission

The Act provides for the phasing out of the Parole Commission over a period of five years, concluding in November 1992.[99] Before the expiration of its existence, the Parole Commission is to set release dates for all prisoners within its jurisdiction corresponding to the applicable parole guidelines.[100] Instead of parole, the Act envisions the vesting of "good time" credit for each prisoner serving more than one year's imprisonment.[101] At the end of each year of a term, fifty-four days credit vests in the prisoner and is deducted from the

95. S. REP. NO. 225, *supra* note 6, at 151.

96. *See* 18 U.S.C. § 3742(a)(b) (Supp. IV 1986).

97. 18 U.S.C.A. § 3742(d) (West Supp. 1989). The sentencing judge has the opportunity to judge the credibility of witnesses, and the court on appeal shall accept any findings of fact unless "clearly erroneous." *Id.*; *see, e.g.*, United States v. Lanese, 890 F.2d 1284, 1291 (2d Cir. 1989); United States v. Mejia-Orosco, 867 F.2d 216, 221 (5th Cir.), *cert. denied*, 109 S. Ct. 3257 (1989).

98. 18 U.S.C. § 3742(e) (Supp. IV 1986).

99. Pub. L. No. 98-473, § 235(b)(1)(A), 98 Stat. 2032 (1984). The original target date of the phase-out (1991) was pushed back by amendment. *See* Pub. L. No. 99-646, § 35, 100 Stat. 3599 (1984). Congress had previously endorsed guidelines established by the United States Parole Board to establish customary terms of confinement. *See* Mistretta v. United States, 109 S. Ct. 647, 651 (1989) (citing the Parole Commission and Reorganization Act of 1976).

100. Pub. L. No. 98-473, § 235(b)(3), 98 Stat. 2032 (1984).

101. *See* 18 U.S.C. § 3624(a) (Supp. IV 1986). "A prisoner shall be released by the Bureau of Prisons on the date of the expiration of his term of imprisonment, less any time credited toward the service of his sentence . . . ." *Id.* By abolishing parole, a "confusing array of statutes and administrative procedures" disappears, to be replaced with the certainty of the imposed sentence, less credit for good time served. S. REP. NO. 225, *supra* note 6, at 144-46. This eliminates the second-guessing between the parole board and the judge, who may establish artificially high sentences, and assures a prisoner of a definite release date. *Id.* at 146-47; *see supra* note 39.

end of the term, unless the prisoner has failed to comply with institutional disciplinary regulations.[102] "Credit that has vested may not later be withdrawn, and credit that has not been earned may not later be granted."[103]

B. The Guidelines

Taking its cue from Congress, the Commission set out to achieve the objectives of honesty,[104] uniformity,[105] and proportionality[106] in sentencing. Acknowledging a practical stalemate between uniformity and proportionality, the Commission struck the middle ground between overly broad and simplistic categories and infinitely detailed categories, while checking the discretionary powers of the sentencing judge.[107]

Despite guidance from Congress, the Commission faced initial difficulty articulating the purposes of sentencing, noting that "the ultimate aim of the law itself, and of punishment in particular, is the control of crime. Beyond this point, however, the consensus seems to break down."[108] The Commission appeared most concerned in addressing aspects of retribution ("just deserts") and deterrence/incapacitation ("crime control"), stating that "[a]s a practical matter, in most sentencing decisions both philosophies may prove consistent with the same result."[109] The Commission avoided any philosophical

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102. *See* 18 U.S.C. § 3642(b) (Supp. IV 1986).

103. *Id.* Prior law allowed credit for good time to be withdrawn and later restored, thus leading to uncertainty and "a resulting adverse effect on prisoner morale." S. REP. NO. 225, *supra* note 6, at 147.

104. The Commission believed that Congress began making sentences "honest" by abolishing parole and allowing the Commission to establish determinate guidelines. SENTENCING GUIDELINES MANUAL, *supra* note 11, at 2.

105. Uniformity entails treating similar cases similarly. *Id.* If fewer categories exist, then uniformity is more easily achieved, but at the expense of proportionality. A tension exists between uniformity and proportionality, which makes it impossible simply to lump all categories of crime together—all forms of robbery, for example—and still have an equitable disparity between different types of offenders. *Id.*

106. Proportionality involves treating different cases differently. *Id.* Because of the virtually limitless combinations and permutations of human conduct and characteristics, a line must be drawn beyond which factors will not be considered. *Id.* at 3-4. The Commission provided an example of this problem:

> A bank robber with (or without) a gun, which the robber kept hidden (or brandished), might have frightened (or merely warned), injured seriously (or less seriously), tied up (or simply pushed) a guard, a teller or a customer, at night (or at noon), for a bad (or arguably less bad) motive, in an effort to obtain money for other crimes (or for other purposes), in the company of a few (or many) other robbers, for the first (or fourth) time that day, while sober (or under the influence of drugs or alcohol), and so forth.

Id. at 2.

107. *Id.* at 3. For a brief chronicle of the Commission's procedure in formulating the Guidelines, see SUPPLEMENTARY REPORT, *supra* note 49, at 9-11.

108. SENTENCING GUIDELINES MANUAL, *supra* note 11, at 3.

109. *Id.* Congress favored this approach. *See supra* notes 72-75 and accompanying text.

quandaries by resorting to an empirical approach designed simply to analyze actual sentencing practice, thus restricting the relevant distinctions necessary to construct the Guidelines.[110] This conscious parallelism to current practice also sought to alleviate any concerns about prison capacity and overcrowding.[111]

The Commission's first draft of guidelines featured a "real offense" system, which based the sentence on the actual conduct of the defendant.[112] When this draft received widespread criticism,[113] the Commission regrouped and promulgated a revised draft featuring a "charge offense" system, basing punishment on the elements of the conduct for which a defendant is indicted.[114] Although criticism

110. *See* SENTENCING GUIDELINES MANUAL, *supra* note 11, at 3-4. The Commission analyzed 10,000 presentence investigation reports, substantive criminal statutes, and Parole Commission statistics. *Id.* The Commission also conducted extensive public hearings and received "more than 1000 written comments, testimonies, and observations from various individuals and groups." *See Sentencing Commission Chairman Wilkins Answers Questions on the Guidelines*, NIJ REP., Sept.-Oct. 1987, at 7.

111. *See supra* note 81 and accompanying text. Commissioner Breyer stated that prison population should rise between 2 and 10%, "consistent with the fact that the Guidelines, by and large, are based upon existing sentencing practices." *Testimony of Sentencing Commissioner Stephen Breyer Before the Senate Committee on the Judiciary October 22, 1987, reprinted in* PRACTICING LAW INSTITUTE, FEDERAL SENTENCING GUIDELINES 826 (1987) [hereinafter *Testimony of Commissioner Breyer*]. The Commission's research staff concluded that, while straight probationary sentences will be decreased with a commensurate increase in average time served, the Guidelines would not have a major impact on prison capacity. *See* Block & Rhodes, *The Impact of the Federal Sentencing Guidelines*, NIJ REP., Sept.-Oct. 1987, at 2-4; *see also* SUPPLEMENTARY REPORT, *supra* note 49, at 53-75 (detail of Commission's study of prison impact).

112. *See* Preliminary Draft of Sentencing Guidelines for United States Court, 51 Fed. Reg. 35,080 (1986) (proposed Oct. 1, 1986). The Commission deviated somewhat from a "pure" real offense system in its initial draft, mainly because of the difficulty in quantifying actual conduct and determining the method by which a judge would determine actual factors. SENTENCING GUIDELINES MANUAL, *supra* note 11, at 5.

113. After receiving input on its tentative draft, the Commission decided that it could not fairly or practically implement a real offense system. SENTENCING GUIDELINES MANUAL, *supra* note 11, at 5. One of the commissioners, Judge Breyer of the First Circuit, disagreed with this assessment, and argued that "real" aspects need to be considered along with the "charge" elements. *See* Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1, 11-12 (1988). For insight into some of the negotiations behind the promulgation of the Guidelines, see Alschuler, *The Selling of the Sentencing Guidelines: Some Correspondence with the U.S. Sentencing Commission, reprinted in* D. CHAMPION, *supra* note 7, at 49.

114. *See* Proposed Sentencing Guidelines for United States Courts, 52 Fed. Reg. 3920 (1987) (proposed Feb. 6, 1987). The Commission noted that this was not a "pure" charge system, as the Guidelines describe generic conduct, and deal largely with indictments that reflect actual conduct. SENTENCING GUIDELINES MANUAL, *supra* note 11, at 5-6. This draft was not without criticism, even from within the Commission itself. *See* Dissenting View of Commissioner Paul H. Robinson to the Proposed Sentencing Guidelines for the United States Courts, 52 Fed. Reg. 3986 (1987).

arose that this placed too much power in the hands of the prosecutor,[115] this system of guidelines went into effect on November 1, 1987.[116]

Upon conviction, the Guidelines require that the sentencing judge first determine the guideline section applicable to the offense for which the defendant stands convicted.[117] Next, the judge determines the "base offense," applying "specific offense characteristics" as appropriate.[118] Then the judge determines any appropriate adjustments "related to victim, role, and obstruction of justice,"[119] while also considering any multiple counts of conviction and the defendant's acceptance of responsibility.[120] The judge then categorizes the defendant's criminal history, subject to adjustments.[121] This places

115. Commissioner Breyer, acknowledging the criticism that prosecutors could bargain for charges and conduct factors to bring before the court, stated that this does not reflect any change in a prosecutor's power before and after the Guidelines. *See Testimony of Commissioner Breyer, supra* note 111, at 828-29. However, this concern has blossomed into a vigorous attack upon the new sentencing procedures. *See infra* notes 338-42 and accompanying text. *See generally* Alschuler, *Sentencing Reform and Prosecutorial Power: A Critique of Recent Proposals for "Fixed" and "Presumptive" Sentencing, reprinted in* NATIONAL INSTITUTE OF LAW ENFORCEMENT AND CRIMINAL JUSTICE, DETERMINATE SENTENCING: REFORM OR REGRESSION? 59 (1978); Steury, *Prosecutorial and Judicial Discretion, reprinted in* D. CHAMPION, *supra* note 7, at 9.

116. *See* Sentencing Guidelines for United States Courts, 52 Fed. Reg. 18,046 (1987) (proposed Apr. 13, 1987). Commissioner Robinson again dissented, as no significant change had occurred. *See* Dissenting View of Commissioner Paul H. Robinson to the Sentencing Guidelines for United States Courts, 52 Fed. Reg. 18,121 (1987). Commissioner Robinson has published his theory of a sentencing guideline system. *See* Robinson, *A Sentencing System for the 21st Century?*, 66 TEX. L. REV. 1, 14-61 (1987); *see also* Robinson, *Hybrid Principles for the Distribution of Criminal Sanctions*, 82 NW. U.L. REV. 19 (1987) (attempt to harmonize desert-based view with utilitarianism). *But see* Blumstein, *The Search for the Elusive Common Principle*, 82 NW. U.L. REV. 43 (1987); Steir, *Hybrids and Dangerousness*, 82 NW. U.L. REV. 52 (1987); von Hirsch, *Hybrid Principles in Allocating Sanctions: A Response to Professor Robinson*, 82 NW. U.L. REV. 64 (1987) (articles in response to Commissioner Robinson's proposals).

117. *See* UNITED STATES SENTENCING COMMISSION, GUIDELINES MANUAL § 1B1.1(a) (Nov. 1989); *see also* U.S.S.G. § 1B1.2 (guidance on choosing the applicable guideline). The Commission included as an appendix a statutory index that keys statutes to applicable guidelines. *See id.* app. C.

118. *See* U.S.S.G. § 1B1.1(b). For example, if the statute of conviction involved larceny, embezzlement or another form of theft, the "base offense level" is 4. However, "specific offense characteristics" can significantly raise the level: theft from the person of another or involving more than minimal planning each increase the base 2 levels. These characteristics can also be tied to the amount taken: as little as 1 level for more than $1000, to as much as 13 levels for over $800,000. They may also call for a mandatory increase to some minimal level: theft of undelivered United States mail increases the level to 6. *See id.* § 2B1.1.

119. *See id.* § 1B1.1(c). For example, if the victim was a law enforcement officer or a member of his immediate family, the level is increased by 3. *See id.* § 3A1.2.

120. *See id.* § 1B1.1(d)(e). Clear recognition and acceptance of personal responsibility can reduce the level by 2, but merely entering a guilty plea does not. *See id.* § 3E1.1.

121. *See id.* § 1B1.1(f). This comprises a separate base level related to the offender and unrelated to the computations of offense characteristics. In a series of policy statements, the Commission stated that the following factors were "not ordinarily relevant"

the judge at a particular guideline range on the sentencing table corresponding to the total offense level and the criminal history category.[122] Within this particular range, the judge considers sentencing requirements and options, along with any policy statement or commentary relevant to imposing sentence.[123] The Commission provided for overlapping levels on the sentencing table to reduce needless litigation, while at the same time providing proportionate increases between the levels, with a change of six levels approximately doubling any sentence.[124] In addition, with the abolishment of the parole system under the Act, *any* life sentence registered on the sentencing table literally means life imprisonment without possibility of parole.

The Guidelines allow a judge to depart from the system only when the Commission did not adequately consider an aggravating or mitigating circumstance.[125] Although not generally limiting the factors upon which a judge might depart from the Guidelines, the Commission recognized the difficulty of ascertaining all facets of offense and

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to the sentencing decision: age, education and vocational skills, mental and emotional conditions, physical condition, previous employment record, community and family ties, and responsibilities. *Id.* § 5H1.1-1.6, p.s. Race, sex, national origin, creed, religion, and socioeconomic status are *not* relevant considerations. *Id.* § 5H1.10, p.s. Only the offender's role in the offense, criminal history, and dependence upon criminal activity for livelihood are relevant considerations to determine the appropriate sentence. *Id.* § 5H1.7-1.9, p.s.

122. *See id.* § 1B1.1(g). The sentencing table is reprinted in Appendix II, *infra*. The "offense level" runs down the left axis of the grid, from 1 through 43. Any offense of 43 or above, regardless of offender characteristics, nets the defendant life imprisonment. The "criminal history category" runs along the top axis, from I through VI. The actual numbers computed for an offender can range upwards of 13, but these are broken into 6 broad categories (*i.e.*, 0 or 1 correspond to I, while 7, 8, or 9 correspond to IV). The area where these categories intersect establishes a range that reflects a certain number of months in incarceration, which may correspond to probation, fine, restitution, or other sentencing option. *See* SENTENCING GUIDELINES MANUAL, *supra* note 11, at 211.

123. *See* U.S.S.G. § 1B1.1(h)(i).

124. *See* SENTENCING GUIDELINES MANUAL, *supra* note 11, at 11.

125. *See* U.S.S.G. § 5K2.0, p.s; *see also* 18 U.S.C. § 3553(b) (Supp. IV 1986); *see supra* notes 71, 88-93 and accompanying text.

The Commission released a policy statement allowing the court to depart from the Guidelines if the defendant has given "substantial assistance" to the prosecution, but only upon motion by the government. *See Id.* § 5K1.1, p.s; *see also* 18 U.S.C. § 3553(e) (Supp. IV 1986); 28 U.S.C. § 994(n) (Supp. IV 1986). This "government-only" option regarding substantial assistance has led to criticisms of abuse and unfairness amounting to violations of due process as applied. *See* United States v. Roberts, 726 F. Supp. 1359 (D.D.C. 1989); United States v. Curran, 724 F. Supp. 1239 (C.D. Ill. 1989); *see also infra* notes 341-42 and accompanying text. The Guidelines also mandate that a defendant's refusal to assist authorities in investigating others may *not* be considered in aggravation. U.S.S.G. § 5K1.2, p.s.

conduct in its initial set of guidelines.[126] However, the Commission also believed that judges would not often depart from the Guidelines because of the close parallel the Commission sought in practice before and after their implementation.[127] In the future, as the Commission revises the Guidelines and appellate courts review sentences imposed, fewer grounds will remain for departure as previously unaddressed factors are considered. The Commission can further preclude departure by declaring that it has "adequately considered"[128] any particular factor used as a point of departure from the Guidelines.

The Commission in many respects mirrored current practices in formulating the Guidelines.[129] For example, the current method of plea agreement is not disturbed, even though such practice can push a sentence downward.[130] Faced by time constraints and politically volatile issues,[131] the Commission set forth a system which it believed would, at the same time, be acceptable, workable, and adaptable.[132] Whether or not disparity will disappear remains to be seen;

126. *See* SENTENCING GUIDELINES MANUAL, *supra* note 11, at 6-7.

127. *See id.* at 7; *see also supra* notes 110-11 and accompanying text.

128. *See* SENTENCING GUIDELINES MANUAL, *supra* note 11, at 6. "[T]he Commission, by specifying that it had adequately considered a particular factor, could prevent a court from using it as grounds for departure." *Id.*

129. *See supra* notes 111, 127 and accompanying text; *see also* SUPPLEMENTARY REPORT, *supra* note 49, at 16-26. In the Commission's view, the Guidelines "represent an approach that begins with and builds upon empirical data, but does not slavishly adhere to current sentencing practices." *Id.* at 17.

130. *See* SUPPLEMENTARY REPORT, *supra* note 49, at 45-52. The Commission stated that "these initial guidelines will not, in general, make significant changes in current plea agreement practices." SENTENCING GUIDELINES MANUAL, *supra* note 11, at 8.

131. The issue of capital punishment was particularly controversial. When the Commission submitted the Guidelines to Congress, it requested an extension on the effective date. Certain testimony before Congress urged immediate acceptance because "the death penalty looms large as a likely amendment to any legislative vehicle." *Testimony of Kenneth R. Feinberg Before the House Subcommittee on Sentencing Guidelines July 15, 1987, reprinted in* PRACTICING LAW INSTITUTE, FEDERAL SENTENCING GUIDELINES 849 (1987). As the Commission itself could not avoid the issue, opening the Act for technical amendments to postpone the effective date would run "unacceptable political risks that the guidelines would be held hostage to other law enforcement amendments designed to play to the constituents back home." *Id.* at 849-50.

The Commission set the base offense level for first degree murder at 43 (life imprisonment), but noted that "[t]he maximum penalty authorized [by statute] for first-degree murder is death or life imprisonment." U.S.S.G. § 2A1.1, comment (backg'd); *see also* 18 U.S.C. § 1111 (Supp. IV 1986). The Supreme Court stated: "We assume, without deciding, that the Commission was assigned the power to effectuate the death penalty provisions of the Criminal Code." Mistretta v. United States, 109 S. Ct. 647, 657 n.11 (1989). However, "the Commission could include the death penalty within the guidelines only if that punishment was authorized in the first instance by Congress and only if such inclusion comported with the substantial guidance Congress gave the Commission in fulfilling its assignments." *Id.* Justice Brennan did not join this footnote to the Court's majority opinion. For further discussion of this issue, see *infra* notes 230, 239 and accompanying text.

132. The Commission made the curious observation that "[t]he guidelines may prove acceptable . . . to those who seek more modest, incremental improvements in the

however, Congress designed the Commission as a permanent agency, with the power to amend the Guidelines as it sees fit based upon a continuous influx of additional ideas, information, and empirical data.[133]

III. CONSTITUTIONALITY OF THE ACT: *MISTRETTA V. UNITED STATES*

The challenge to the Act brought by the defendant in *Mistretta v. United States*[134] resembled attacks launched throughout the nation in district courts to strike down the entire Act before the Guidelines could be applied upon conviction.[135] After indictment on three counts arising from a cocaine sale, the defendant moved to have the United States District Court for the Western District of Missouri declare the Commission and its actions unconstitutional.[136] This the district court refused to do.[137] The defendant pleaded guilty to one count of the indictment, and the court sentenced him under the Guidelines even while entertaining "serious doubts about some parts of the Sentencing Guidelines and the legality of their anticipated operation."[138] Although the defendant filed an appeal with the Eighth Circuit, both the defendant and the United States specially petitioned

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status quo, who believe the best is often the enemy of the good, and who recognize that these initial guidelines are but the first step in an evolutionary process." SENTENCING GUIDELINES MANUAL, *supra* note 11, at 4. Commissioner Robinson dissented because he viewed the Guidelines as a failure "to provide the principled, binding, comprehensive, and workable system for which the Act calls, and was unlikely to bring rationality and uniformity to federal criminal sentencing." Robinson, *A Sentencing System for the 21st Century?*, 66 TEX. L. REV. 1, 4 (1987).

133. *See supra* notes 84-86 and accompanying text. The Commission noted that it was "established as a permanent agency to monitor sentencing practices in the federal courts throughout the nation." SENTENCING GUIDELINES MANUAL, *supra* note 11, at 2.

134. 109 S. Ct. 647 (1989). Justice Blackmun authored the majority opinion, joined by all members of the Court except Justice Scalia, who dissented in a separate opinion.

135. For a list of the published cases and the constitutional issues decided, see Appendix I, *infra*.

136. *See* United States v. Johnson, 682 F. Supp. 1033 (W.D. Mo. 1988) (en banc), *aff'd sub nom.* Mistretta v. United States, 109 S. Ct. 647 (1989). As one of the early published opinions indicated, "[d]etailed factual recitation of the case is not necessary since the motion [to declare the Act and Guidelines unconstitutional] does not depend on the alleged conduct of the defendant." United States v. Arnold, 678 F. Supp. 1463, 1464 (S.D. Cal. 1988).

137. *Johnson*, 682 F. Supp. at 1035 (upholding the Act against challenges under doctrines of excessive delegation of legislative power and separation of powers). A dissenting opinion stated that the Guidelines ran afoul of the separation of powers doctrine, especially the presentment clause analysis in INS v. Chadha, 462 U.S. 919 (1983). *Johnson*, 682 F. Supp. at 1035-39 (Wright, C.J., dissenting). Interestingly, the Supreme Court in *Mistretta* did not address the presentment clause issue. *See infra* notes 294-322 and accompanying text.

138. *Johnson*, 682 F. Supp. at 1035.

for certiorari to the Supreme Court.[139] "Because of the 'imperative public importance' of the issue . . . and because of the disarray among the Federal District Courts, [the Court] granted those petitions."[140]

A. Delegation of Legislative Power

1. Precedent

A fundamental challenge to the Act questioned whether Congress impermissibly delegated to the Commission excessive—or in essence, nondelegable—legislative discretion to formulate sentencing rules.[141] The Constitution provides that "[a]ll legislative Powers shall be vested in a Congress of the United States,"[142] and that Congress has the power "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."[143] Construing these provisions, the Supreme Court has held that "Congress manifestly is not permitted to abdicate, or to transfer to others, the essential legislative functions with which it is thus vested."[144] Chief Justice Rehnquist, paraphrasing John Locke, adroitly summarized the principle as "legislatures are to make laws, not legislators."[145]

Although the Constitution was interpreted early on to proclaim that any congressional delegation of legislative power generally was invalid,[146] the Court later recognized both the benefit of allowing the

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139. The Supreme Court's Rule 18 allows special grants of certiorari from the district courts for issues of "imperative public importance." SUP. CT. R. 18.

140. Mistretta v. United States, 109 S. Ct. 647, 654 (1989). One judge noted that "the most striking characteristic of district court decisions thus far has been the application by different judges of widely varying, and often times contradictory analyses." United States v. Olivencia, 689 F. Supp. 1319, 1320 (S.D.N.Y. 1988).

Attempts were made to achieve uniformity. The Fifth Circuit, cognizant of the issues pending in *Mistretta*, noted that 6 of 65 district court judges were not applying the Guidelines, and ordered the Guidelines imposed in all district courts until the Supreme Court's resolution of that case. United States v. White, 855 F.2d 201, 203 (5th Cir. 1988), *cert. denied*, 109 S. Ct. 3172 (1989).

141. *See generally* Aronson, Gellhorn & Robinson, *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1 (1982); Schoenbrod, *The Delegation Doctrine: Could the Court Give It Substance?*, 83 MICH. L. REV. 1223 (1982).

142. U.S. CONST. art. I, § 1.

143. *Id.* § 8, cl. 18.

144. Panama Ref. Co. v. Ryan, 293 U.S. 388, 421 (1935).

145. Industrial Union Dep't. v. American Petroleum Inst., 448 U.S. 607, 686 (1980) (Rehnquist, J., concurring). The principle was established long ago: "The legislative cannot transfer the power of making laws to any other hands; for it being but a delegated power from the people, they who have it cannot pass it over to others." *Id.* at 673 n.1 (quoting J. LOCKE, SECOND TREATISE OF CIVIL GOVERNMENT, IN THE TRADITION OF FREEDOM ¶ 141, at 244 (M. Mayer ed. 1957)).

146. *See* Field v. Clark, 143 U.S. 649, 692 (1892). "That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the

branches to coordinate their efforts, and the ensuing difficulty of drawing lines by which Congress could judge the efficacy of its delegations.[147] This is consonant with the realization that, while Congress is required under the Constitution to make those decisions that set the policy of the nation, it is inescapably a part of the legislative function that those charged with executing or applying the laws must, to some degree, exercise a measure of discretion.[148] The nondelegation doctrine now exists not to confine all discretion within the legislative branch, but to ensure that three goals are met: (1) that Congress, as the branch most susceptible to "popular will," set social policy; (2) that Congress set out some guidance or standard by which to direct the delegatee; and (3) that a reviewing court test the delegated legislative discretion by the articulated standard.[149] Bearing in mind these goals, the limits of delegation are measured by "common sense and the inherent necessities of the governmental coordination,"[150] and the Court has never lightly questioned Congress' own ability to determine what is "necessary and proper" to run the government.[151]

Charged with this deference to congressional action, and favoring always a presumption that Congress acts in conformance with the

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integrity and maintenance of the system of government ordained by the Constitution." *Id.*

147. *See* Synar v. United States, 626 F. Supp. 1374, 1384 (D.D.C.), *aff'd sub nom.* Bowsher v. Synar, 478 U.S. 714 (1986). The Supreme Court gives deference to congressional delegations "motivated in part by concerns that, '[i]n an increasingly complex society Congress obviously could not perform its functions if it were obliged to find all the facts subsidiary to the basic conclusions which support the defined legislative policy.'" *Id.* (quoting Opp Cotton Mills, Inc. v. Administrator, 312 U.S. 126, 145 (1941)). One district court analyzing the delegation within the Act stated that "[t]he economy has become so complex and technical and scientific problems have become so unintelligible to the layman, educated or not, that regulation by executive agencies and independent commissions has become indispensable to modern government." United States v. Brodie, 686 F. Supp. 941, 950 (D.D.C. 1988).

148. *See* Mistretta v. United States, 109 S. Ct. 647, 677 (1989) (Scalia, J., dissenting). Justice Scalia summed up the difficulty courts face in scrutinizing delegations made by Congress, a coequal branch of the government:

> Once it is conceded, as it must be, that no statute can be entirely precise, and that some judgments, even some judgments involving policy considerations, must be left to the officers executing the law and to the judges applying it, the debate over unconstitutional delegation becomes a debate not over a point of principle but over a point of degree.

Id. (Scalia, J., dissenting).

149. *See Industrial Union*, 448 U.S. at 685-86 (Rehnquist, J., concurring).

150. J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 406 (1928).

151. *See, e.g., Ex parte* Curtis, 106 U.S. 371, 372 (1882) (Congress can determine for itself what is "necessary and proper" to carry out its functions).

Constitution,[152] the Court articulated an "intelligible principle" test by which to judge delegations of power: "So long as Congress 'shall lay down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform, such legislative action is not a forbidden delegation of legislative power.' "[153] Although shortly after the Court enunciated this principle it twice in rapid succession struck down congressional delegations of power,[154] since 1935, the Court has not considered any delegation to be unconstitutionally "excessive." While many cases frequently are cited to indicate the wide latitude that the Supreme Court affords congressional delegation of legislative power,[155] perhaps the broadest occurred when Congress delegated to the Federal Communications Commission authority to regulate broadcast licensing "as public interest, convenience, or necessity" demand, and the Court approved.[156] Surely no delegation can be too broad when merely the "public interest" satisfies the

152. *See* Bowsher v. Synar, 478 U.S. 714 (1986), wherein Justice Stevens stated that, when "asked to invalidate a statutory provision that has been approved by both Houses of the Congress and signed by the President, particularly an Act of Congress that confronts a deeply vexing national problem, [the Court] should only do so for the most compelling constitutional reasons." *Id.* at 736 (Stevens, J., concurring); *see also* INS v. Chadha, 462 U.S. 919, 944 (1983).

153. Mistretta v. United States, 109 S. Ct. 647, 654 (1989) (quoting J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928)) (brackets in original). This principle was recently restated: "the ultimate judgment regarding the constitutionality of a delegation must be made not on the basis of the scope of the power alone, but on the basis of its scope *plus* the specificity of the standards governing its exercise." Synar v. United States, 626 F. Supp. 1374, 1386 (D.D.C.) (emphasis in original), *aff'd sub nom.* Bowsher v. Synar, 478 U.S. 714 (1986).

154. *See* Panama Ref. Co. v. Ryan, 293 U.S. 388, 432-33 (1935); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 529-42 (1935). In *Panama Refining*, Congress authorized the President to declare illegal the transportation of "hot oil," although the penalty was prospectively set by Congress. *Panama Refining*, 293 U.S. at 405-07, 418-19. Fahey v. Mallonee, 332 U.S. 245 (1947), drew the distinction that this allowed the President to criminalize that which had yet to be declared criminal by Congress. *Id.* at 249. In *Schechter Poultry*, Congress authorized the President to approve "codes of fair competition" developed by market competitors. *Schechter Poultry*, 295 U.S. at 521-23. Yakus v. United States, 321 U.S. 414 (1944), drew the distinction that this placed regulatory authority in private hands. *Id.* at 424; *see also Mistretta*, 109 S. Ct. at 655 n.7.

155. *See, e.g.* Lichter v. United States, 334 U.S. 742, 785-86 (1948) (upholding delegation of authority to determine "excessive profits"); American Power & Light Co. v. Securities & Exch. Comm'n, 329 U.S. 90, 105 (1946) (upholding delegation of authority to the Securities and Exchange Commission to prevent "unfair or inequitable" voting power distribution); *Yakus*, 321 U.S. at 419, 426 (upholding authority delegated to administrator to fix "fair and equitable" commodity prices); Federal Power Comm'n v. Hope Natural Gas Co., 320 U.S. 591, 600 (1944) (upholding delegation of authority to Federal Power Commission to determine "just and reasonable" rates); Opp Cotton Mills, Inc. v. Administrator, 312 U.S. 126 (1941). *But see* National Cable Television Ass'n v. United States, 415 U.S. 336, 342 (1974) (to avoid possible delegation problem, narrow construction given to statutory standard governing fees assessed by agency).

156. *See* National Broadcasting Co. v. United States, 319 U.S. 190, 225-26 (1943).

Constitution.[157]

2. Decision

On this basis the Supreme Court held that "Congress' delegation of authority to the Sentencing Commission is sufficiently specific and detailed to meet constitutional requirements."[158] The Act was quite clear in not only stating the goals of sentencing reform,[159] but also defining the purposes of sentencing[160] and the tools by which the Commission must carry out its task.[161] The Court noted the specific guidance that Congress provided the Commission through the Act and its legislative history, and concluded that, even though significant discretion inured to the Commission's delegated task, "[d]eveloping proportionate penalties for hundreds of different crimes by a virtually limitless array of offenders is precisely the sort of intricate, labor-intensive task for which delegation to an expert body is especially appropriate."[162] As Congress set forth much more than "minimal standards," the Act did not amount to an excessive delegation of power, an issue on which the Court was unanimous.[163] This was not a departure in any way from precedent, as the Court had long accepted the notion that the "intelligible principle" test does not require Congress to use the highest degree of specificity possible, nor

157. In *Mistretta*, the Court acknowledged that recently the nondelegation doctrine has principally been limited to statutory interpretation and to construing narrowly those statutory delegations that are possibly unconstitutional. Mistretta v. United States, 109 S. Ct. 647, 655 n.7 (1989). This gives life to the presumption in favor of a statute's constitutionality. *See supra* note 152 and accompanying text.

158. *Mistretta*, 109 S. Ct. at 655. The Court believed one district court framed the consideration succinctly: "The statute outlines the policies which prompted establishment of the Commission, explains what the Commission should do and how it should do it, and sets out specific directives to govern particular situations." *Id.* at 658 (quoting United States v. Chambless, 680 F. Supp. 793, 796 (E.D. La. 1988), *cert. denied*, 110 S. Ct. 560 (1989)).

159. *See supra* note 60 and accompanying text.

160. *See supra* notes 69-75 and accompanying text.

161. *See supra* notes 76-83 and accompanying text. The Court emphasized the Act's clarity in designating the Commission's tool as "the guidelines system," and analyzed at length 28 U.S.C. § 994 (Supp. IV 1986), which sets out the duties of the Commission in formulating that system. *See Mistretta*, 109 S. Ct. at 656-57.

162. *Id.* at 658; *see also supra* note 147 and accompanying text.

163. *Mistretta* 109 S. Ct. at 658. Justice Scalia agreed with the Court's nondelegation analysis, but he alone concluded that "[p]recisely because the scope of delegation is largely uncontrollable by the courts, we must be particularly rigorous in preserving the Constitution's structural restrictions that deter excessive delegation." *Id.* at 677-78 (Scalia, J., dissenting). This, however, shifts the emphasis to issues concerning separation of powers. For Justice Scalia's separation of powers discussion, see *infra* notes 209-21 and accompanying text.

even set forth "a specific formula," especially when adaptability to varying conditions is necessary to accomplish congressional policy.[164]

B. Separation of Powers

When analyzing the strictures of the constitutional government forged by the Framers, the Court has recognized that "each of the three general departments of government [must remain] entirely free from the control or coercive influence, direct or indirect, of either of the others . . . ."[165] As part of this separation, no branch of the federal government may exercise the power of another unless expressly provided for by, or incidental to, the powers conferred on each branch by the Constitution.[166] However, just as in the delegation issue, the Court acknowledged the necessity and benefit of upholding some commingling among the coordinate branches,[167] and rejected an approach striking down any division that was less than complete.[168] Instead, the Court adopted a "flexible approach" to the separation of powers,[169] confining itself most exclusively to "safeguard[ing] against the encroachment or aggrandizement of one branch at the expense of the other."[170] When the separation of powers issue involves the judicial branch, the Court guards against two threats: (1) that the federal courts neither seize upon nor be burdened by tasks better suited to

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164. *See* Lichter v. United States, 334 U.S. 742, 785 (1948). One district court acknowledged that "Congress could have given more guidance to the Commission than it did. That is not the test, however." United States v. Arnold, 678 F. Supp. 1463, 1468 (S.D. Cal. 1988).

165. Humphrey's Executor v. United States, 295 U.S. 602, 629 (1935).

166. *See* Springer v. Government of the Philippine Islands, 277 U.S. 189, 201-02 (1928).

167. *See* Buckley v. Valeo, 424 U.S. 1, 121 (1976) (complete division "would preclude the establishment of a Nation capable of governing itself effectively"). The Framers, especially James Madison, recognized that separation need not be complete, and stated that the doctrine did not mean that each branch " 'ought to have no *partial agency* in, or no *controul* 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.' " *Mistretta*, 109 S. Ct. at 659 (quoting THE FEDERALIST NO. 47, at 325-26 (J. Madison) (J. Cooke ed. 1961) (emphasis in original)).

168. *See* Nixon v. Administrator of Gen. Servs., 433 U.S. 425, 443 (1977) [hereinafter *Nixon v. AGS*] (notion of complete separation and division between branches unattainable and archaic).

169. In a classic statement of the principle, Justice Jackson explained that "[w]hile the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity." Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

170. *Buckley*, 424 U.S. at 122; *see Mistretta*, 109 S. Ct. at 659; *see also Youngstown Sheet & Tube*, 343 U.S. at 587-89 (analysis of whether arrangement impermissibly gives power to one branch which properly belongs to another); *Nixon v. AGS*, 433 U.S. at 443 (analysis of whether arrangement impermissibly prevents one branch from accomplishing functions assigned by the Constitution).

either of the executive or the legislative branches;[171] and (2) that the "institutional integrity" forming the bedrock of the judicial function not be compromised.[172]

Questions arose that the Act violated both of these concerns in three ways: (1) by placing the Commission within the judicial branch, and allowing the exercise of legislative discretion; (2) by requiring Article III judges not only to serve on the Commission, but also to do so alongside nonjudges; and (3) by affording the President appointment and removal power over all Commission members, including federal judges. Although cognizant of "serious concerns about a disruption of a balance of power among the coordinate Branches," the Court ultimately concluded that any concern over the separation of powers within the Act generated "more smoke than fire," which did not compel wholesale invalidation of "Congress' considered scheme for resolving the seemingly intractable dilemma of excessive disparity in criminal sentencing."[173]

1. Placement Within the Judicial Branch

The Court recognized that the Commission is an "anomaly," an independent agency "placed by the Act in the Judicial Branch, [although] it is not a court and does not exercise judicial power."[174] By its terms, the Constitution limits Article III courts to the resolu-

171. This comprises an analysis of "expansion of powers." *See* Morrison v. Olson, 108 S. Ct. 2597, 2613, 2620 (1988); Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 856-57 (1986); INS v. Chadha, 462 U.S. 919, 963 (1983); *Nixon v. AGS*, 433 U.S. at 443; United States v. Nixon, 418 U.S. 683, 694-96 (1974) [hereinafter *Nixon*].

172. This comprises an analysis of "impairment of function." *See Morrison*, 108 S. Ct. at 2615; *Schor*, 478 U.S. at 850-51; *Nixon v. AGS*, 433 U.S. at 443; *Nixon*, 418 U.S. at 711-12.

173. *Mistretta*, 109 S. Ct. at 661.

174. *Id.*; *see also* Gubiensio-Ortiz v. Kanahele, 857 F.2d 1245 (9th Cir. 1988), *cert. granted and judgment vacated sub nom.* United States v. Chavez-Sanchez, 109 S. Ct. 859 (1989), wherein the Ninth Circuit noted that "the Act creates a statutory scheme that differs in material respects from anything that has gone before in our two centuries of constitutional history." *Id.* at 1250. The concern expressed was over the Act's textual placement of the Commission "in the judicial branch." 28 U.S.C. § 991(a) (Supp. IV 1986), discussed *supra* at note 62 and accompanying text.

The Third Circuit rejected concerns that this might impair executive functions, and declined the Department of Justice's suggestion to regard the Commission as an agency within the executive branch. United States v. Frank, 864 F.2d 992, 1014 (3d Cir. 1988), *cert. denied*, 109 U.S. 2442 (1989). The Ninth Circuit expressly declined to construe the Act in this manner, although noting that such construction would not, in its view, save the Act. *Gubiensio-Ortiz*, 857 F.2d at 1258-59. The Supreme Court did not address the semantics of this concern.

tion of actual "Cases" and "Controversies,"[175] but this has not precluded judicial rulemaking or other nonadjudicative responsibilities in all instances.[176] Instead, when the federal judiciary is required to develop rules by which federal courts will be bound, the Court has examined both the types of rules generated and the substantive discretion exercised, and determined whether each is appropriate to the judiciary.[177] The Court recently stated that this separation of the judiciary from the other branches serves to "ensur[e] that judges do not encroach upon executive or legislative authority or undertake tasks that are more properly accomplished by those branches."[178] Consequently, the Court's analysis in *Mistretta* turned on the degree of political judgment exercised, as well as the nature of the congressional delegation at issue, even while recognizing that "*all* rulemaking is nonjudicial in the sense that rules impose standards of general application divorced from the individual fact situation which ordinarily forms the predicate for judicial action."[179]

Precisely because of the nature of the rules promulgated by the Commission, the Court found Congress's delegation consistent with the separation of powers: sentencing is the "central mission" in the criminal justice process overseen by the judiciary, and neither the ex-

175. U.S. CONST. art III, § 2; *see* Massachusetts v. Mellon, 262 U.S. 447, 488-89 (1923) (federal judiciary's duty limited to "interpreting and applying [laws] in cases properly brought before the courts"); Muskrat v. United States, 219 U.S. 346, 361 (1911) (federal courts limited to determinations of "actual controversies arising between adverse litigants").

176. *See, e.g.*, Morrison v. Olson, 108 S. Ct. 2597, 2622 (1988) (upholding judicial appointment of special prosecutors); Sibbach v. Wilson & Co., 312 U.S 1, 9-10 (1941) (upholding congressional delegation of power to judiciary to promulgate federal rules of civil procedure); *Ex parte* Siebold, 100 U.S. 371, 397-98 (1879) (upholding judicial appointment of election supervisor); Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 49-50 (1825) (upholding judicial procedural rulemaking); *In re* Certain Complaints Under Investigation, 783 F. 2d 1488 (11th Cir.), *cert. denied*, 477 U.S. 904 (1986) (upholding judicial investigation of judge's alleged misconduct). Upon proper delegation, the Court has long upheld its authority "to establish rules for the conduct of its own business and to prescribe rules of procedure for lower federal courts in bankruptcy cases, in other civil cases, and in criminal cases, and to revise the federal rules of evidence." *Mistretta*, 109 S. Ct. at 663.

This ability extends to the Judicial Conference of the United States and to the Administrative Office of the United States Courts to study the judicial process and to promote uniformity and efficiency in the operation of the courts. *See id.* at 663 n.15. It cannot be denied that the courts are called upon to execute numerous functions not directly linked to an *actual* case or controversy. *See Gubiensio-Ortiz*, 857 F.2d at 1252-53, discussed *infra* at note 235 and accompanying text.

177. *See, e.g.*, Chandler v. Judicial Council, 398 U.S. 74, 84-85 (1970) (judiciary may assume nonjudicial functions to manage the business of the judiciary); Hanna v. Plumer, 380 U.S. 460, 464 (1965) (procedural rules promulgated pursuant to the Rules Enabling Act valid); *Sibbach*, 312 U.S. at 9-10 (procedural rules promulgated by judiciary upheld because substantive rights not affected); *Wayman*, 23 U.S. at 43 (congressional delegation of power to federal courts to regulate their practices upheld).

178. *Morrison*, 108 S. Ct. at 2613.

179. *Mistretta*, 109 S. Ct. at 665 (emphasis added).

ecutive nor legislative branch lost authority.[180] Although each branch has its own role in the sentencing process,[181] determining the initial sentence in an individual case has long been left to the discretion of the judge.[182] Placement of the Commission within the judicial branch demonstrates only that the courts play the most vital role in sentencing, and that the judiciary must have the means of "providing for the fair and efficient fulfillment of [its] responsibilities."[183]

While the Court acknowledged that the Guidelines were not merely "procedural," but had "substantive effects,"[184] this realization held no sway in its separation of powers analysis: the Commission

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180. *Id.* at 663. The Court specifically noted that "Congress may delegate to the Judicial Branch nonadjudicatory functions that do not trench upon the prerogatives of another Branch and that are appropriate to the central mission of the Judiciary." *Id.*

181. *See supra* notes 34-40 and accompanying text (discussing historical interplay between the branches concerning sentencing).

182. *See supra* note 37 and accompanying text, and note 62.

183. *Mistretta*, 109 S. Ct. at 663-64.

184. *Id.* at 665. The Supreme Court has attempted to distinguish judicial and legislative functions:

> A judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation on the other hand, looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power.

Keller v. Potomac Elec. Power Co., 261 U.S. 428, 440-41 (1923) (quoting Prentis v. Atlantic Coast Line Co., 211 U.S. 210, 226 (1908)).

The Supreme Court has long held that "the power to define criminal offenses and to prescribe the punishments . . . resides wholly within the Congress." Whalen v. United States, 445 U.S. 684, 689 (1980); *see also Ex parte* United States, 242 U.S. 27, 42 (1916); United States v. Wiltberger, 18 U.S. (5 Wheat.) 76, 95 (1820) (power of punishment vested in legislature, not in judicial department). In *Mistretta*, the Court indicated that the Guidelines were rules of court "for carrying into execution judgments that the judiciary has the power to pronounce." *Mistretta*, 109 S. Ct. at 664 (indicating also that the Guidelines are analogous to Federal Rules of Criminal and Civil Procedure). Regarding rules of procedure, the Court long ago recognized Congress' ability not only to regulate practice and procedure in the federal courts, but also to delegate this authority to the federal courts to promulgate rules "not inconsistent with the statutes or constitution of the United States." *Id.* at 662 (quoting Sibbach v. Wilson & Co., 312 U.S. 1, 9-10 (1941)).

There has been considerable debate as to whether the Guidelines are legislative in nature, comprising substantive—not merely procedural—rules. The Court, in confronting issues of state sentencing guidelines, specifically noted that they are not merely procedural, but instead have substantive effect. *See* Miller v. Florida, 482 U.S. 423, 433-34 (1987) (Florida's sentencing guidelines deemed substantive in nature because they impact "quantum of punishment" and must be applied in all but exceptional circumstances). The *Mistretta* Court acknowledged the political nature of the Guidelines, although it held that the separation of powers issue did not turn on the substantive/procedural or political/judicial dichotomy, but rather on whether the judiciary was impermissibly expanded or impaired in its functions under the Act. *Mistretta*, 109 S. Ct. at 665. *Cf.* Judge Kozinski's views, *infra* at notes 236, 239.

was not a court, but an independent body, neither accountable to nor controlled by the judiciary, subject only to congressional oversight and the limited presidential power to remove its members.[185] The power of the judiciary is not increased; the Act simply formalized and codified, albeit collectively, "the everyday business of judges . . . to evaluate and weigh the various aims of sentencing and to apply those aims to the individual cases that [come] before them."[186] Certainly, the Commission exercises "political judgment," but not, as the Court concluded, at the expense of either the executive or the legislative branch.[187]

2. Service of Article III Judges

The Court also addressed the question of whether requiring Article III judges to serve on the Commission[188] would compromise the integrity of the judicial branch. While this requirement was "somewhat troublesome," the Court noted that the Constitution did not explicitly forbid judicial activity on independent commissions,[189] and that a long history of extrajudicial service, beginning with the first Chief Justice, John Jay, and continuing throughout every level of the federal judiciary, actually supported this activity.[190] Both the execu-

185. *Mistretta*, 109 S. Ct. at 665-66; *see also* United States v. Frank, 864 F.2d 992 (3d Cir. 1988), *cert. denied*, 109 S. Ct. 2442 (1989), wherein the Third Circuit noted that "[t]he Commission is not authorized to render judgments, and it does not speak for the judiciary as a whole." *Id.* at 1014.

186. *Mistretta*, 109 S. Ct. at 666.

187. *Id.* at 666-67.

188. *See* 28 U.S.C. § 991(a) (Supp. IV 1986), discussed *supra* notes 63-68 and accompanying text.

189. *Mistretta*, 109 S. Ct. at 667. Of particular relevance is the Constitution's explicit bar against the appointment of members of Congress "to any civil Office under the Authority of the United States" during their time of elected office. U.S. CONST. art. I, § 6, cl. 2. This prohibition, coupled with the Constitutional Convention's rejection twice of similar proposals concerning the judiciary, was "at least inferentially meaningful" to the Court. *Mistretta*, 109 S. Ct. at 668; *see also Nixon*, 418 U.S. 683, 705 n.16 (1974) (absence of presidential privilege analogous to congressional immunity granted by the Constitution's Speech or Debate clause).

190. Chief Justice John Jay served as Ambassador to England while on the bench, followed by Chief Justice Oliver Ellsworth's service as Minister to France. Other notable appointments include Chief Justice Earl Warren's role in chairing the committee investigating President Kennedy's assassination; Justice Robert Jackson's service as prosecutor at the Nuremberg trials; and Justice Owen Roberts' position on the committee investigating the bombing of Pearl Harbor. *See Mistretta*, 109 S. Ct. at 668-69. While these appointments were subject to criticism in their day, none were prohibited under the separation of powers. *See generally* McKay, *The Judiciary and Nonjudicial Activities*, 35 L. & CONTEMP. PROBS. 9 (1970); Slonim, *Extrajudicial Activities and the Principle of the Separation of Powers*, 49 CONN. B.J. 391 (1975); Wheeler, *Extrajudicial Activities of the Early Supreme Court*, 1973 SUP. CT. REV. 123; Note, *Extrajudicial Activity of Supreme Court Justices*, 22 STAN. L. REV. 587 (1970); Comment, *Separation of Powers and Judicial Service on Presidential Commissions*, 53 U. CHI. L. REV. 993 (1986); Note, *supra* note 13, at 1381-85.

Two recent circuit cases arrived at contradictory conclusions over whether history

tive and legislative branches, as well as the Framers, acquiesced in this contemporaneous service adjunct to, but not dependent upon, the status of a judge under Article III.[191] The Court concluded that a separation of powers analysis did not forbid per se the service of federal judges on legislatively mandated commissions, for when, as under the Act, their service does not require them to wield "judicial power," their roles are purely administrative, to which their expertise in the sentencing field is unquestionably suited.[192]

However, the scrutiny on this issue was not simply a question of judicial service, but of judicial integrity. Justice Frankfurter once reasoned that a court's authority is founded upon the "sustained public confidence in its moral sanction . . . [which] must be nourished by the Court's complete detachment, in fact and in appearance, from political entanglements and by abstention from injecting itself into the clash of political forces in political settlements."[193] Therefore, the query remained whether the extrajudicial assignments contemplated by the Act undermined the real and perceived integrity of the judicial branch.[194] The Court thought it did not. Despite mandatory service of *some* Article III judges, the Court held that no "specific threat" existed to undermine judicial independence, because the service of any *particular* judge would be voluntary.[195]

Nor did the Court heed the argument that the political nature of the Guidelines would not only entangle the judiciary with the other branches, but also compromise the public appearance of disinterestedness and impartiality that is the essence of judicial authority.[196]

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bears out the constitutionality of extrajudicial service by judges. *Compare In re* President's Comm'n on Organized Crime (Subpoena of Scaduto), 763 F.2d 1191 (11th Cir. 1985) (judicial service on investigative committee unconstitutionally impairs judicial function) *with In re* President's Comm'n on Organized Crime (Subpoena of Scarfo), 783 F.2d 370 (3d Cir. 1986) (judicial service permitted). Another decision upheld the authority of a judicial council to investigate alleged misconduct of federal judges. *See In re* Certain Complaints Under Investigation, 783 F.2d 1488, 1505 (11th Cir. 1986).

191. *See Mistretta*, 109 S. Ct. at 668 (appointments made by President with "Advice and Consent" of Senate indicate acquiescence in extrajudicial roles). This factors into the presumption in favor of a statute's constitutionality. *See supra* note 152. The Court observed that several of the Framers, notably Thomas Jefferson and James Madison, opposed extrajudicial service on constitutional grounds. *Mistretta*, 109 S. Ct. at 668 n.22.

192. *See Mistretta*, 109 S. Ct. at 671.

193. Baker v. Carr, 369 U.S. 186, 267 (1962) (Frankfurter, J., dissenting).

194. *Mistretta*, 109 S. Ct. at 671.

195. *Id.* at 672. The Act on its face does not "conscript" a judge into service, thus the Court avoided any issue of "whether Congress may *require* a particular judge to undertake the extrajudicial duty . . . ." *Id.* (emphasis added).

196. The Court was not concerned that judicial participation on the Commission

Focusing again on the nature of the Commission's work—promulgating sentencing guidelines—the Court believed this to be "an essentially neutral endeavor" which an individual judge confronts on a daily basis, and thus, "Congress has provided, not inappropriately, for a significant judicial voice on the Commission."[197] Furthermore, the Court concluded that requiring Article III judges to serve alongside nonjudges does not undermine judicial power, as the Commission is not a court, and exercises only administrative authority.[198]

3. Presidential Appointment and Removal Power

The threat of executive fiat concerning decisions as to the longevity of an appointment can compromise the independence of the one appointed.[199] Thus, Article III provides that all judges appointed thereunder shall "hold their Offices during good Behaviour" and shall not be subject to a reduction in salary.[200] By comparison, while the Act equates a commissioner's salary to that of a circuit judge,[201] it also gives authority to the President to remove commissioners "for neglect of duty or malfeasance in office or for other good cause shown," which power extends to Article III judges required to serve on the Commission.[202] Despite the different removal standards, the Court perceived this as a "negligible threat to judicial independence."[203]

First, the President's power to affect the tenure of a judge as a commissioner neither involved coercion of the member as a *judge*, nor in any way threatened the judge's status under Article III.[204] In any event, the Court believed the "good cause" standard mandated by the Act also significantly curtailed the President's ability to affect a judge's status even as a commissioner.[205] Acknowledging the "embarrassment or even damage to reputation" that would attach to removal from the Commission, the Court maintained that any judge appointed to the Commission would have "undertaken the risk vol-

might seemingly "cloak [the Guidelines] in the neutral colors of judicial action," *id.* at 673, or that such participation could lead to judicial recusal, which is necessary to cure perceptions of individual bias. *Id.* at 672; *see also* United States v. Frank, 864 F.2d 992, 1014-15 (3d Cir. 1988), *cert. denied*, 109 S. Ct. 2442 (1989). These concerns are noted by several commentators. *See* Comment, *supra* note 190, at 1013 (judicial recommendation of law carries with it an opinion favoring constitutionality); Note, *supra* note 13, at 1384-85 (judicial policymaking accords presumptive validity to political rules).

197. *Mistretta*, 109 S. Ct. at 673.

198. *Id.*

199. *See Nixon v. AGS*, 433 U.S. 425, 443 (1977).

200. U.S. CONST. art. III, § 1.

201. 28 U.S.C. § 992(c) (Supp. IV 1986), discussed *supra* note 68.

202. 28 U.S.C. § 991(a) (Supp. IV 1986); *see supra* notes 65-68 and accompanying text.

203. Mistretta v. United States, 109 S. Ct. 647, 674 (1989).

204. *Id.*

205. *Id.*

untarily by accepting the President's appointment to serve."[206] While this same assumption-of-the-risk argument could conceptually attach to the removal of a judge from his Article III post, the Court did not set forth reasons explaining the Framers' use of stricter removal provisions in the Constitution.

Second, history bears witness to the President's ability to elevate sitting judges or to lure them off the bench altogether by appointment to an office within the Executive Branch.[207] The Court did not see this as a threat to judicial integrity because "[w]ere the impartiality of the Judicial Branch so easily subverted, our constitutional system of tripartite government would have failed long ago."[208] Almost without citation to precedent, the Court dispensed with the possible corruption or domination of the judicial branch, or some of its members, by the President's appointment and removal powers over the commissioners.

4. Dissent

Dissenting from the *Mistretta* majority, Justice Scalia could "find no place within our constitutional system for an agency created by Congress to exercise no governmental power other than the making of laws."[209] Although critical of the majority's treatment of the separation of powers issue, he admitted that the majority followed its own recent trend to analyze the Constitution's structuring of the separation of powers "as though it were no more than a generalized prescription that the functions of the Branches should not be commingled too much . . . ."[210] This treatment of the Constitution as a "generalized prescription" forces the Court into a case-by-case analysis and overlooks the notion that the Framers' finished product reflects their considered judgment on the permissible extent of commingling.[211]

Apart from these concerns, Justice Scalia argued that the Court did not simply uphold the entanglement of the judiciary with the political branches, but instead allowed "the creation of a new branch

206. *Id.* at 675 n.34.
207. *Id.* at 674. In recent memory, President Reagan elevated Justice Rehnquist, appointed to the bench by President Nixon, to his current position as Chief Justice. Conversely, President Johnson lured Justice Goldberg off the bench altogether to serve as the Ambassador of the United States to the United Nations.
208. *Id.*
209. *Id.* at 676 (Scalia, J., dissenting).
210. *Id.* at 682 (Scalia, J., dissenting).
211. *Id.* (Scalia, J., dissenting).

altogether, a sort of junior-varsity Congress."[212] While acknowledging the possible efficacy of the Commission, his belief that the strictures drawn by the Framers should remain inviolate led to the conclusion that "many desirable dispositions . . . do not accord with the constitutional structure we live under."[213]

Justice Scalia's separation of powers jurisprudence would draw the line at judicial rulemaking, and allow such exercise only when ancillary to judicial power.[214] Noting the difference between rules that *make law* and rules that *apply law*, Justice Scalia argued that the Act contemplated "a pure delegation of legislative power," with congressional standards clearly laid out, but for no other purpose than to pass further legislation.[215] Moreover, the legislation required is not *ancillary* to judicial power, but is in itself "quite naked."[216] Although Justice Scalia found himself alone in dissent last term in *Morrison v. Olson*,[217] decrying the decision to uphold a statute permitting court appointment of independent counsel to exercise executive power without accountability to the President,[218] he facetiously found that decision "rigorously logical" in the face of an independent agency within the judicial branch charged with a mandate to make law, without true accountability to any branch, and without any ability left to the Court to delimit the powers the agency may be delegated.[219] Attacking the concept of this "branchless" Commission, he

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

213. *Id.* (Scalia, J., dissenting). The Court has affirmatively expressed this concern as a controlling consideration. *See* INS v. Chadha, 462 U.S. 919 (1983), wherein the Court stated that "the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution. Convenience and efficiency are not the primary objectives—or the hallmarks—of democratic government . . . ." *Id.* at 944.

214. *Mistretta*, 109 S. Ct. at 678 (Scalia, J., dissenting). This comports with the recognition that discretion follows any legislation which delegates authority to execute or to apply the law. *See supra* note 148.

215. *Mistretta*, 109 S. Ct. at 679 (Scalia, J., dissenting). Justice Scalia recognized that by both designating the sentence to be imposed and creating the basis for reversal on appeal for deviation, the Guidelines "have the force and effect of laws . . . ." *Id.* at 676 (Scalia, J., dissenting). For a discussion of the relevant statutory provisions, see *supra* notes 88-93 and accompanying text. For a discussion of the procedural and substantive debate concerning the Guidelines, see *supra* note 184.

216. *Mistretta*, 109 S. Ct. at 680 (Scalia, J., dissenting).

217. 108 S. Ct. 2597 (1988).

218. *Morrison* presented the issue of the constitutionality of a statutory provision which allowed court appointment of independent counsel to investigate and to prosecute alleged violations of federal law by a member of the Attorney General's Office, with removal power vested in the President but limited to "good cause." The Court, in an opinion by Chief Justice Rehnquist, held, *inter alia*, that the statute did not improperly vest executive or administrative duties of a nonjudicial nature in Article III judges, *id.* at 2614-15, and did not violate the separation of powers by interfering too extensively with executive functions. *Id.* at 2620-22. Justice Scalia viewed this arrangement as one of the most pernicious violations of separation of powers imaginable. *Id.* at 2623 (Scalia, J., dissenting) ("this wolf comes as a wolf").

219. *Mistretta*, 109 S. Ct. at 681 (Scalia, J., dissenting). Justice Scalia's steadfast ar-

noted the "undemocratic precedent" the Court had set, which allowed Congress to abdicate lawmaking responsibility in all types of politically sensitive areas in favor of " 'expert' bodies, insulated from the political process."[220] On a more immediate level, however, Justice Scalia viewed the Commission as an independent agency impermissibly placed in the judicial branch to exercise legislative power, when the exercise of any power therein should be personally in the hands of the judge presiding in court.[221]

C. Disagreement in the Lower Courts

1. Arguments Against the Delegation of Legislative Power

Although no appellate court agreed with the excessive delegation arguments,[222] several district courts accepted the invitation to dust off this doctrine and strike down the Act.[223] Beginning with the premise that the Guidelines enacted encompassed substantive legisla-

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gument has been to define an agency in terms of who controls it; however, if the agency is to be considered "independent," it *must* be within the executive branch exercising executive power, as legislation and adjudication are powers that *must* be exercised personally by the members of the legislative or judicial branch. Only in the executive branch does the notion hold true that the President need not exercise his power personally, but may appoint others to enforce the laws. Comparing *Morrison* with *Mistretta*, Justice Scalia lamented:

> It is already a leap from the proposition that a person who is not the President may exercise executive powers to the proposition we accepted in *Morrison* that a person who is *neither* the President *nor* is subject to the President's control may exercise executive powers. But with respect to the exercise of judicial powers (the business of the Judicial Branch) the platform for such a leap does not even exist. For unlike executive power, judicial and legislative powers have never been thought delegable.

Id. at 682 (Scalia, J., dissenting) (emphasis in original). He termed this leap "the *Humphrey's Executor* of the Judicial Branch," which he found regrettable. *Id.*; *see* Humphrey's Executor v. United States, 295 U.S. 602, 628 (1935) (upholding congressional delegation of rulemaking authority to the executive branch).

220. *Mistretta*, 109 S. Ct. at 680 (Scalia, J., dissenting). He specifically posited the temptation to create a "Medical Commission" to dispose of difficult issues concerning health care, such as the withholding of life-support equipment in federally funded hospitals. *Id.* The same concerns could easily encompass issues of abortion or the death penalty.

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

222. The Third Circuit ruled that the Act survived this challenge. *See* United States v. Frank, 864 F.2d 992, 1012 (3d. Cir. 1988), *cert. denied*, 109 S. Ct. 2442 (1989). The Ninth Circuit did not reach the issue of excessive delegation. *See* Gubiensio-Ortiz v. Kanahele, 857 F.2d 1245, 1251 n.2 (9th Cir. 1988), *cert. granted and judgment vacated sub nom.* United States v. Chavez-Sanchez, 109 S. Ct. 859 (1989).

223. Although joining the majority in *Mistretta*, Chief Justice Rehnquist stated previously that "[w]e ought not to shy away from our judicial duty to invalidate unconstitutional delegations of legislative authority solely out of concern that we should thereby reinvigorate discredited constitutional doctrines of the pre-New Deal era." In-

tion,[224] some district courts strained to revive the nondelegation doctrine on a theory that Congress may not delegate certain "core legislative functions."[225] This argument contends that certain legislative powers exist which Congress cannot constitutionally delegate. Such powers include those defining and fixing the punishments for crimes and limiting judicial sentencing discretion, because the interest affected will be one of liberty; therefore, Congress must draft the legislation itself, with any delegation being unconstitutional.[226] Some courts extended the argument that even if such a delegation were not per se unconstitutional, scrutiny of a "delegation of functions affecting fundamental liberty interests would be held to a higher standard of review than the version of the 'intelligible principle' currently used to review delegations solely affecting economic matters."[227] Beyond this, some district courts would even have struck down the Act as too vague under this same current test.[228] These three separate

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dustrial Union Dep't. v. American Petroleum Inst., 448 U.S. 607, 686 (1980) (Rehnquist, J., concurring). *See* Appendix I, *infra*, for a list of district courts following this view.

224. *See supra* note 184 for a discussion of the debate concerning the procedural and substantive nature of the Guidelines.

225. The idea of nondelegable "core functions" arose from dictum in Wayman v. Southard, 23 U.S. (10 Wheat.) 1 (1825), wherein Chief Justice Marshall stated:

> The line has not been exactly drawn which separates those important subjects, which must be entirely regulated by the legislature itself, from those of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions to fill up the details.

Id. at 43. In United States v. Robel, 389 U.S. 258 (1967), Justice Brennan stated that "[t]he area of permissible indefiniteness narrows, however, when the regulation invokes criminal sanctions and potentially affects fundamental rights . . . ." *Id.* at 275 (Brennan, J., concurring). The most extensive discussions to hold that defining criminal sentences is a nondelegable "core function" can be found in United States v. Williams, 691 F. Supp. 36, 41-53 (M.D. Tenn. 1988), and United States v. Brittman, 687 F. Supp. 1329, 1331-40 (E.D. Ark. 1988), *aff'd in part and vacated in part*, 872 F.2d 827 (8th Cir.), *cert. denied*, 110 S. Ct. 184 (1989).

Earlier reasoning dictated that no nondelegable "core functions" exist, because "judicial adoption of a 'core functions' analysis would be effectively standardless." Synar v. United States, 626 F. Supp. 1374, 1385 (D.D.C.), *aff'd on other grounds sub nom.* Bowsher v. Synar, 478 U.S. 714 (1986). The Supreme Court's own decisions may have foreclosed this argument. In Lichter v. United States, 334 U.S. 742 (1948), the Court stated that "[a] constitutional power implies a power of delegation of authority under it sufficient to effect its purposes." *Id.* at 778 (emphasis omitted).

226. *See* United States v. Swapp, 695 F. Supp. 1140, 1149 (D. Utah 1988), *rev'd sub nom.* United States v. Singer, 868 F.2d 1201 (10th Cir. 1989). Citing dicta from Kent v. Dulles, 357 U.S. 116, 129 (1958), the *Williams* court stated that if "liberty" is to be regulated, delegations will be narrowly construed, and also that the Supreme Court has recognized that nondelegable legislative powers exist, although no list could be articulated because the Court "has never invalidated a delegation on this basis." *Williams*, 691 F. Supp. at 46-47.

227. United States v. Eastland, 694 F. Supp. 512, 516 (N.D. Ill. 1988). Several district courts believed that the Supreme Court's past delegation decisions dealt merely with "regulations of economic forces and factors." United States v. Brodie, 686 F. Supp. 941, 950 (D.D.C. 1988).

228. *See Brittman*, 687 F. Supp. at 1337-40 (the Act only appears to channel Com-

levels of review formed the "continuum" which some district courts believed previous Supreme Court decisions created:

> On one end, broad delegations involving the regulation of economic activity generally are permissible. In the center, narrow delegations implicating important legislative functions, such as taxation, are permissible, but only if Congress expresses a clear intent to delegate such authority. At the other end of the continuum, no delegations involving as yet unidentified fundamental rights are permissible.[229]

These arguments suggested that, regardless of the scrutiny applied, the Constitution demanded accountability by Congress for the Guidelines because the delegation did not arise from any complexity beyond the ability of Congress to handle efficiently, but rather from an attempt by the nation's legislators to escape difficult debate and political criticism.[230] One insightful district court judge realized that the Supreme Court subjects delegations to scrutiny only under the "intelligible principle" test, although he concurred "with those who contend the delegation doctrine should be revived, and a standard derived which would not permit Congress to confer power which is 'legislative' in character to agencies or commissions."[231] Even with such arguments presented, the Supreme Court declined to modify or even to reexamine its conclusions concerning congressional delegations, although a clear impact on liberty interests exist under the Act and the Guidelines.

2. Arguments Concerning the Separation of Powers

Although the Court dismissed the separation of powers issue with relatively little difficulty, the decision probably was closer than the opinion indicates. While some courts had overturned the Act when considering nondelegation principles, they did so despite the

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mission discretion at a superficial level); *Brodie*, 686 F. Supp. at 950-51 (factors listed in the Act are vague in substance and in application).

229. *Eastland*, 694 F. Supp. at 515 (citing *Williams*, 691 F. Supp. at 46-47).

230. *See Brodie*, 686 F. Supp. at 951. The *Brodie* court contended that Congress "could certainly have drafted sentencing guidelines on its own, assuming that the determination existed to face the difficult policy issues." *Id.* Indicative of Congress' abdication of policy consideration and control was the Commission's consideration of whether to provide for the death penalty. *See supra* note 131. "Although [the Commission] ultimately declined to include a death penalty, the fact that it even thought it had the power to do so demonstrates the excessive delegation from Congress." *Eastland*, 696 F. Supp. at 516. This concern over the death penalty also factors into separation of powers concerns. *See infra* note 239 and accompanying text.

231. United States v. Tolbert, 682 F. Supp. 1517, 1522 (D. Kan. 1988). Upon applying the test, the judge found "(albeit with some resignation) that the Sentencing Reform Act does not constitute an unconstitutional delegation of power." *Id.* at 1522-23 (parentheses in original).

Supreme Court's reluctance to afford that doctrine vitality. However, questions of separation of powers have been more vigorously enforced by the Court,[232] and it was not surprising that the *Mistretta* majority not only drew a sharp dissent from within the Court, but also many district courts and one circuit court thought that the Act excessively entangled the judiciary with the other branches, to the detriment of the judicial branch.[233]

Presaging Justice Scalia's dissent, Judge Kozinski, writing for the Ninth Circuit, struck down the Act, stating: "The Commission is constitutionally infirm not merely because it resides in the judicial branch, but, independently, because its principal officers include federal judges, while its function is political and not judicial in nature."[234] Acknowledging certain limited exceptions to the Article III "cases or controversies" limitation on federal judicial purpose,[235] Judge Kozinski could find no exception for substantive rulemaking by Article III judges.[236] As one district court tersely noted, "[s]imply put, we do not believe that judges may be called upon in this context to write the very laws they must apply."[237]

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232. "This court has not hesitated to enforce the principle of separation of powers embodied in the Constitution when its application has proved necessary for the decisions of cases or controversies properly before it." Buckley v. Valeo, 424 U.S. 1, 123 (1976) (nonjudicial executive or administrative duties may not be imposed on Article III judges); *see, e.g.*, Bowsher v. Synar, 478 U.S. 714, 734 (1986) (holding unconstitutional Congress' attempt to retain power to remove Comptroller General exercising executive responsibilities); INS v. Chadha, 462 U.S. 919, 954-55 (1983) (holding unconstitutional the legislative veto absent new legislation subject to Presidential veto); Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 59, 87 (1982) (holding unconstitutional congressional assignment of Article III judicial power to judges not within the judicial branch). *But see* Morrison v. Olson, 108 S. Ct. 2597, 2611 (1988) (upholding judicial appointment of independent counsel, not subject to summary removal by President, to investigate and prosecute crime).

233. *See* Appendix I, *infra*, for circuit and district court decisions.

234. Gubiensio-Ortiz v. Kanahele, 857 F.2d 1245, 1259 (9th Cir. 1988), *cert. granted and judgment vacated sub nom.* United States v. Chavez-Sanchez, 109 S. Ct. 859 (1989).

235. Generally, the exceptions are grouped into three areas: (1) ministerial duties directly related to judicial performance; (2) authority given to the judiciary for self-policing; and (3) authority given to the judiciary to promulgate procedural rules to govern the courts. *See Gubiensio-Ortiz*, 857 F.2d at 1252-53.

236. "It has never before been thought appropriate to grant judges the power to issue substantive rules." *Id.* at 1253. Judge Kozinski considered the Commission "myopic" in its argument that its authority to issue the Guidelines was analogous to the promulgation of rules of procedure, because "we [the court] can say with some assurance that people would not change their day-to-day behavior if the time to respond to motions under Fed.R.App.P. 27(a) were ten days rather than seven, or if pleadings had to be filed on paper 14 inches long rather than 11." *Id.* at 1257. However, "[a]cross-the-board increases in the quantum of punishment imposed for certain categories of crime will very likely diminish the propensity of people to engage in that or closely related conduct." *Id.*

237. United States v. Bogle, 689 F. Supp. 1121, 1125 (S.D. Fla. 1988). Another judge stated the matter at length quite eloquently:

> [I]n my view, service by *any* Article III judge on *any* commission, whose duty it is to legislate, offends Article III of the Constitution . . . [W]hen we accept

The concern was not merely that judge-made sentencing guidelines would have a presumptive validity and acceptance that would be lacking were the agency wholly unentangled.[238] Instead, such substantive delegation typified the wholesale abdication of policy considerations and the difficult political wrestling that is the function of Congress, not judges.[239] The perception of Congress foisting these decisions upon the Commission, located within but independent from the judicial branch, resulted in the conclusion that "[t]he guidelines must fall because they have no constitutional parent."[240]

Additionally, perhaps judges in the lower courts perceived a greater threat than did the Supreme Court in the required service of federal judges on the Commission with power over their selection

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> the President's appointment to office, secure the Senate's consent, and take the oath of office, we willingly assume an entirely new and lonely role. Our role is distinct from all others; we are now judges; our sole responsibility is clear. We are to judge the cases, and in my view, no more is expected or contemplated of us. Because of our experience, we probably can, when asked, consult or lend advice. Surely, however, under no circumstance can we, or should we, be expected to write the very law we are expected to exercise.

United States v. Tolbert, 682 F. Supp. 1517, 1527 (D. Kan. 1988) (Kelly, J.). Judge Kozinski stated that "Congress may not, under our system of separated powers, require judges to serve on bodies that make political decisions." *Gubiensio-Ortiz*, 857 F.2d at 1266.

238. *Gubiensio-Ortiz*, 857 F.2d at 1262 (citing Note, *supra* note 13, at 1384-85); *see supra* note 196 for the Supreme Court's rejection of this contention.

239. This was of extreme concern to the Ninth Circuit. *See Gubiensio-Ortiz*, 857 F.2d at 1254-57. Judge Kozinski, writing for the Ninth Circuit, stated that the Guidelines are substantive in nature, and despite the guidance afforded by Congress, Congress required the Commission to make countless policy decisions when confronting the nature of penalties in setting a term of punishment. *Id.* Of the utmost concern was the Commission's refusal, for political reasons, to address the death penalty in the initial set of Guidelines. *See supra* note 131. "There is nothing inherently wrong with this, of course; it is an entirely understandable response to political pressures by a political body. But it vividly points up that the Commission's work was indeed substantive and political, not procedural and impartial." *Gubiensio-Ortiz*, 857 F.2d at 1256. Justice Scalia and Judge Kozinski both quoted words of dissenting Commissioner Robinson, who pointed out that the Commission made "political assessments" when equating, in terms of punishment, "drug trafficking and a violation of the Wild Free-Roaming Horses and Burros Act; arson with a destructive device and failure to surrender a cancelled naturalization certificate; . . . illegal trafficking in explosives and trespass; . . . aggravated assault and smuggling $11,000 worth of fish." Mistretta v. United States, 109 S. Ct. 647, 676-77 (1989) (Scalia, J., dissenting) (quoting *Dissenting View of Commissioner Paul H. Robinson on the Promulgating of Sentencing Guidelines by the United States Sentencing Commission* 6-7 (May 1, 1987) (citations omitted)); *see also Gubiensio-Ortiz*, 857 F.2d at 1255. For additional concerns, see United States v. Bolding, 683 F. Supp. 1003, 1004 & n.2 (D. Md. 1988), *rev'd*, 876 F.2d 21 (4th Cir. 1989).

240. United States v. Whyte, 694 F. Supp. 1194, 1195 (E.D. Pa. 1988). The concern is political accountability: "[I]f the guidelines were to provide a sentence of probation, or on the other hand, the death penalty, for this defendant, whom would the citizens of the United States hold responsible and accountable?" *Id.* at 1195-96.

and removal vested in the President. The Act clearly ordains a continuous and ongoing relationship between the judicial branch and the two political branches.[241] Several courts expressed their concern that federal judges *must* serve on the Commission precisely *because* of their Article III status.[242] Coupled with this was power vested in the President, where Commission appointment could conceivably be sought as a reward for "politically correct" service, and removal viewed as a sanction.[243] Whether or not such a scenario would ever develop was a speculative concern,[244] but the underlying interest to be protected was not: the perception of judicial objectivity and neutrality that sustains the nation's confidence in her courts.[245] This is the judiciary's power over those appearing before it, and entangling

241. *See Gubiensio-Ortiz*, 857 F.2d at 1261. "The Act creates a permanent working relationship between the Judiciary and the Executive on matters affecting criminal law." United States v. Arnold, 678 F. Supp. 1463, 1472 (S.D. Cal. 1988). *See supra* notes 62-68, 84-87 and accompanying text (President will appoint or reappoint several commissioners every other year; Attorney General is a permanent part of the Commission as a non-voting member; Department of Justice will monitor and provide input on the Commission's work; President has limited removal powers over commissioners; Commission must report amendments to Congress, along with analysis of guideline effects and recommendations concerning underlying criminal statutes).

242. "The judges on the Commission are not merely qualified citizens who happen to be judges; they are Article III judges who happen to be qualified commissioners." United States v. Schetz, 698 F. Supp. 153, 156 (N.D. Ill. 1988). Judge Kozinski stated that "non-judges would not be qualified to serve [on the Commission]." *Gubiensio-Ortiz*, 857 F.2d at 1259.

243. The idea of appointment and removal of a commissioner is related to the political nature of the Commission. The Ninth Circuit observed that "as a political body performing a political function, the Commission ought to be responsive to political realities." *Gubiensio-Ortiz*, 857 F.2d at 1262. Be that as it may, the judiciary, as part of the nonpolitical branch, should not be part of that reality. *Id.* at 1261-62.

One district judge painted the scenario of the President attempting to remove a judge for neglect of duty, captured as it unfolded as a national media event. *See* United States v. Sumpter, 690 F. Supp. 1274, 1282 (S.D.N.Y. 1988). The *Sumpter* court posed this question: "During what would undoubtedly be protracted and notorious inter-branch strife, how could such a judge, so accused, maintain the confidence of the parties on his criminal and civil dockets in the dignity and stature of his court?" *Id.* Compare the Supreme Court's own position, *supra* note 206 and accompanying text, that a judge acquiesced in such a risk by accepting appointment to the Commission.

244. Arguably, such speculation concerning enforcement could not save the provision in any event. When considering a similar, closely delimited removal power vested in Congress over the Comptroller General, who was by statute to perform certain executive functions, the Supreme Court "deemed [it] sufficient that there was the potential for interference." *Gubiensio-Ortiz*, 857 F.2d at 1260 (analyzing Bowsher v. Synar, 478 U.S. 714, 727 n.5, 730-33 (1986)). Unimpressive was the fact that, of the six Comptrollers since 1921, none had ever been threatened with removal. *See Bowsher*, 478 U.S. at 773 (White, J., dissenting).

245. Judge Kozinski, drawing upon considerable precedent, reasoned that:

> Judicial prestige is not an unlimited resource; it is a fragile and finite one, easily damaged or exhausted. "[P]ublic confidence in the judiciary is indispensable to the operation of the rule of law; yet this quality is placed in risk whenever judges step outside the courtroom into the vortex of political activity. Judges should be saved 'from the entanglements, at times the partisan suspicions, so often the result of other and conflicting duties.' "

Gubiensio-Ortiz, 857 F.2d at 1262 (quoting Hobsen v. Hansen, 265 F. Supp. 902, 923

judges with the political branches could tarnish "the luster of judicial impartiality."[246] Thus, the required service of Article III judges worked both a quantitative and qualitative impairment of the judiciary, and several courts struck down the Act on separation of powers grounds.[247]

The majority of the Supreme Court rejected these contentions, leaving Congress' work intact and allowing the Commission a toehold in the American bureaucracy. Although perhaps indicating the underlying validity of the Guidelines themselves, the Court did not directly examine the Guidelines, which have been struck down for constitutional reasons apart from, but in many ways related to, those addressed in *Mistretta v. United States*.

IV. EXTANT CONSTITUTIONAL CHALLENGES TO THE GUIDELINES

Although several cases at the district court level addressed a broader range of constitutional issues implicated by the Act, the Supreme Court granted certiorari to a decision addressing only those challenges specifically against the creation and function of the Commission. This choice of vehicles by the Supreme Court indicated

(D.D.C. 1967) (quoting *In re* Richardson, 247 N.Y. 401, 420, 160 N.E. 655, 661 (1928) (Cardozo, C.J.))).

246. *Gubiensio-Ortiz*, 857 F.2d at 1262. The Supreme Court had previously indicated that "[a] Judiciary free from control by the Executive and the Legislature is essential if there is a right to have claims decided by judges who are free from potential domination by other branches of government." United States v. Will, 449 U.S. 200, 217-18 (1980). This is the other side of the same coin to which James Madison referred, quoting Montesquieu, in framing the argument for the separation of powers: " '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*. Were it joined to the executive power, *the judge* might behave with all the violence of *an oppressor*.' " *Gubiensio-Ortiz*, 857 F.2d at 1263 (quoting THE FEDERALIST NO. 47, at 303 (J. Madison) (Mentor ed. 1961) (emphasis in original)).

247. The following passage represents most concisely all of the various separation of powers concerns:

> The threat to the impartiality of the judges on the Sentencing Commission is . . . real. In their role as Commissioners the judges are required to write the law on sentencing. As judges, these same individuals must apply the law they have written. It is little wonder that criminal defendants and the public have the perception that the Commissioner-judges are not impartial. Moreover, a greater threat exists to the judiciary as a whole. The judicial branch must surrender at least three of its members to service on an executive commission. The Act requires an on-going and permanent relationship between the executive and the judiciary that endangers the independence of the judiciary. Additionally, the placement of appointment and removal power in the President threatens the appearance of the independence of the Commissioner-judges and the judiciary.

United States v. Richardson, 690 F. Supp. 1030, 1033 (N.D. Ga. 1988) (Freeman, J.).

great sensitivity to Congress' efforts, and the Court's determination that the Commission itself was constitutionally acceptable in turn affirmed Congress' work. However, the Guidelines remain the target of constitutional attack, and have been struck down in whole by several district courts.[248] The Guidelines are the handiwork of the Commission, and the Supreme Court may not accord to the Commission's work the same deference and political sensitivity given to the Act and to Congress.[249]

A. Due Process

1. Sentencing and Judicial Discretion

The imposition of a regimented body of sentencing rules such as the Guidelines creates the significant issue whether a convicted offender has a substantive liberty interest in an individualized, discretionary determination of an appropriate sentence by the trial judge. The Supreme Court in *Mistretta* did not address this concern over a defendant's due process rights at sentencing; however, dicta suggests that the Court may not be receptive to such claims.[250] Specifically, the Court noted that Congress not only has unquestioned power to fix the sentence for federal crime, but also that "the *scope of judicial discretion* with respect to a sentence is subject to congressional control."[251] Of ten circuit courts of appeals to address the issue, *all* have concluded that the Guidelines do not offend a defendant's right to due process.[252] However, the Courts of Appeals for both the District of Columbia Circuit and the Ninth Circuit have yet to rule on this issue, and, as indicated above, the Ninth Circuit was sympathetic to attack against the Act on separation of powers grounds.[253]

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248. *See* Appendix I, *infra*.

249. The presumption favoring constitutionality arises from the considered work of both Houses of Congress and the signature of the President, all in furtherance of their constitutional charges. *See supra* note 152 and accompanying text. The Commission's work, on the other hand, is neither required by the Constitution, nor subject to the President's signature. *See infra* notes 294-322 and accompanying text.

250. Mistretta v. United States, 109 S. Ct. 647, 650 (1989).

251. *Id.* (emphasis added).

252. The circuits upholding the Guidelines against due process attack are the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Tenth, and Eleventh. *See* Appendix I, *infra*.

253. The District of Columbia Circuit had challenges raised before it concerning the defendant's due process rights. *See* United States v. Baskin, 886 F.2d 383 (D.C. Cir. 1989). Having held constitutional challenges to the Guidelines in abeyance pending resolution in *Mistretta*, the court remanded the case to the district court to consider challenges regarding due process and the eighth amendment. *Id.* at 390. In a separate action, one district court judge in the District of Columbia held that the Guidelines, as applied to the defendant, violated due process. *See* United States v. Roberts, 726 F. Supp. 1359 (D.D.C. 1989), discussed *infra* at notes 341-42.

The Ninth Circuit declined to address the due process challenge as not properly raised or briefed in United States v. Sanchez-Lopez, 879 F.2d 541, 556 (9th Cir. 1989).

The due process clause of the Constitution provides: "No person shall be . . . deprived of life, liberty, or property without due process of law."[254] In the sentencing context, the Supreme Court has long recognized Congress' ability to define specific, mandatory sentences for any crime.[255] While Congress abdicated this authority to judicial tailoring of individualized sentences at trial from the material of congressionally dictated sentencing ranges, the Court recognized this as "simply enlightened policy rather than a constitutional imperative"[256] that evolved from the attempt to rehabilitate offenders.[257] Furthermore, despite Congress' general practice of establishing these ranges, it has, through the present day, also set out both mandatory and mandatory-minimum sentences, which the courts have upheld.[258]

Judge Wiggins reached the issue in dissent in Gubiensio-Ortiz v. Kanahele, 857 F.2d 1245 (9th Cir. 1988), *cert. granted and judgment vacated sub nom.* United States v. Chavez-Sanchez, 109 S. Ct. 859 (1989). He believed that no right to individualized sentencing exists. *Id.* at 1269 (Wiggins, J., dissenting). In United States v. Belgard, 894 F.2d 1092 (9th Cir. 1990), a panel of the Ninth Circuit addressed due process considerations relating to the abolishment of parole, *see supra* notes 99-103 and accompanying text, and the restrictions that the Guidelines place on probation. The *Belgard* court held that the Commission properly followed Congress' guidance under the Act. *Id.* at 1099-1100. Further, the court broadly asserted that (1) the Constitution did not require individualized sentencing in noncapital cases; (2) the Guidelines allowed the trial judge enough discretion to depart from the Guidelines in certain instances; (3) Congress may guide, as well as remove, judicial sentencing discretion; and (4) a defendant has no constitutional right to probation. *Id.* at 1100 (citing with approval United States v. Brittman, 872 F.2d 827 (8th Cir.), *cert. denied*, 110 S. Ct. 184 (1989); United States v. White, 869 F.2d 922 (5th Cir.), *cert. denied*, 109 S. Ct. 3172 (1989)). These holdings, which go beyond probation and parole and may be read to address individualized sentencing concerns generally, may have foreclosed this line of argument in the Ninth Circuit. *See also* United States v. Belgard, 694 F. Supp. 1488 (D. Or. 1988), *aff'd sub nom.* United States v. Summers, 895 F.2d 615 (9th Cir. 1990) (addressing parole and probation due process challenges).

254. U.S. CONST. amend. V. Assessing due process involves determining first whether a substantive right exists compelling protection, and then whether the process given to protect the interest is adequate. *See* Mathews v. Eldridge, 424 U.S. 319, 332-33 (1976); Morrissey v. Brewer, 408 U.S. 471, 481-90 (1972).

255. "[T]he power to define criminal offenses and to prescribe the punishments . . . resides wholly within the Congress." Whalen v. United States, 445 U.S. 684, 689 (1980); *see also Ex parte* United States, 242 U.S. 27, 42 (1916); United States v. Wiltberger, 18 U.S. (5 Wheat.) 76, 95 (1820).

256. Woodson v. North Carolina, 428 U.S. 280, 304 (1976) (three-justice plurality opinion); *see also* Sumner v. Shuman, 483 U.S. 66, 75-76 (1987) (dicta); Lockett v. Ohio, 438 U.S. 586, 604-05 (1978) (four-justice plurality opinion).

257. *See supra* notes 34-41 and accompanying text. In 1978, a plurality opinion written by Chief Justice Burger stated that "the concept of individualized sentencing in criminal cases generally, *although not constitutionally required*, has long been accepted in this country." *Lockett*, 438 U.S. at 602 (emphasis added).

258. *See, e.g.*, Spencer v. Texas, 385 U.S. 554, 559-60 (1967) (mandatory sentencing provision upheld); United States v. Pineda, 847 F.2d 64, 65 (2d Cir. 1988) (mandatory

Conceivably, Congress could curtail entirely the sentencing discretion now reposed in judges by establishing an exact punishment when defining criminal activity by statute.[259]

While a defendant does have a right to individualized sentencing in cases involving capital punishment,[260] this is due to the proportionality requirements of the eighth amendment, rather than the due process constraints of the fifth amendment.[261] The purpose of the Guidelines, however, is to *reduce* disparity, which would make strides toward enhancing proportionality.[262] But as a matter of substantive due process, while the Court has recognized several liberty interests "inherent in the human condition,"[263] this recognition has not extended to the individualization of sentence for noncapital offenses.

2. Sentencing and Public Policy

Sentencing is in part an expression of public policy, and Congress, as the barometer of the nation's evolving political views, can establish what that policy will be.[264] The Guidelines represent a shift in the emphasis of punishment away from rehabilitation and toward retribution and deterrence, which indicates a change in the public's response to crime from protecting the offender to protecting the victim

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minimum sentencing provision upheld); United States v. Holmes, 838 F.2d 1175, 1178 (11th Cir.), *cert. denied*, 486 U.S. 1058 (1988) (mandatory minimum sentencing statute upheld); United States v. Goodface, 835 F.2d 1233, 1236 (8th Cir. 1987) (mandatory sentencing provision upheld); United States v. Bridgeman, 523 F.2d 1099, 1121 (D.C. Cir. 1975), *cert. denied*, 425 U.S. 961 (1976) (mandatory minimum sentencing provision upheld); Smith v. United States, 284 F.2d 789, 791 (5th Cir. 1960) (mandatory sentencing provision upheld).

259. "[I]n noncapital cases, the established practice of individualized sentences rests not on constitutional commands, but on public policy enacted into statutes." *Lockett*, 438 U.S. at 604-05 (plurality opinion); *see also* United States v. Grayson, 438 U.S. 41, 45 (1978) (citing FAIR AND CERTAIN PUNISHMENT, *supra* note 22, at 83-85) (Congress has power to mandate specific sentence for each crime, which it has exercised in the past).

260. *Lockett*, 438 U.S. at 598. In capital offenses, the sentencing judge or jury cannot be restricted from receiving all relevant evidence in mitigation. *See* Skipper v. South Carolina, 476 U.S. 1, 4 (1986); Eddings v. Oklahoma, 455 U.S. 104, 114-15 (1982); *Lockett*, 438 U.S. at 605.

261. *Compare* Solem v. Helm, 463 U.S. 277 (1983) (recidivist statute allowing life imprisonment without parole for passing bad checks held invalid under proportionality requirements of eighth amendment) *with* Rummell v. Estelle, 445 U.S. 263 (1980) (recidivist statute allowing life imprisonment with possibility of parole for obtaining $120 by false pretenses upheld under eighth amendment).

262. *See supra* notes 105-06.

263. United States v. Frank, 864 F.2d 992, 1009 (3d Cir. 1988), *cert. denied*, 109 S. Ct. 2442 (1989). The *Frank* court cited cases affirming interests in a qualified right to privacy and to terminate a pregnancy, Roe v. Wade, 410 U.S. 113 (1973), in freedom from civil commitment, Vitek v. Jones, 445 U.S. 480 (1980), and in freedom from use of excessive physical force, Ingraham v. Wright, 430 U.S. 651 (1977). *See Frank*, 864 F.2d at 1009.

264. *See* United States v. Grayson, 438 U.S. 41, 45 (1978); *see also* United States v. Ortega-Lopez, 684 F. Supp. 1506, 1519 (C.D. Cal. 1988) (Hupp, J., dissenting) (tracing development from rigid sentencing to flexible parole standards).

and society.[265] Whether any particular goal is a suitable foundation upon which to base punishment implicates matters of policy: all have found expression at one time or another in America's penological system, but such choices, rather than being dictated by the Constitution, have been made by Congress.[266] While sensitive to the defendant's condition, these decisions are not driven by due process concerns.[267]

3. Countervailing Concerns

The argument persists, however, that while Congress may completely circumscribe judicial discretion by mandating rigid sentences fully embodying retributive and deterrent goals, when it does not, any sentencing range leaves "a sphere of discretionary power which is inherently judicial in nature."[268] Due process involves a fair opportunity to be heard "at a meaningful time and in a meaningful manner,"[269] which seemingly implies that the defendant will be heard by someone with discretionary decisional power. If not, to what avail is the hearing? The removal of judicial discretion, and its replacement by the Guidelines, effectively annuls a judge's ability to act upon the defendant's challenge to the weight of factors deemed relevant. Although subsequent to a congressional delegation, these changes, which demonstrably affect an offender's liberty, were wrought not by Congress, but by the Commission.

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265. *See supra* notes 41-43 and accompanying text.

266. The Guidelines represent Congress' most recent assessment on sentencing, and because "Congress has the right to state what public policy is, Congress may modify it to meet the demands of a changing society." United States v. Harris, 876 F.2d 1502, 1505-06 (11th Cir.), *cert. denied*, 110 S. Ct. 569 (1989); *see also* United States v. Pinto, 875 F.2d 143, 145-46 (7th Cir. 1989) (establishing sentencing range is Congress' function, and Guidelines merely shrink the range); *Frank*, 864 F.2d at 1009-10 (congressional choice of retribution and deterrence are "appropriate societal reasons" for sentencing).

267. *See* United States v. Landers, 690 F. Supp. 615, 624 (W.D. Tenn.), *appeal dismissed mem. sub nom.* United States v. Lievano, 856 F.2d 196 (6th Cir. 1988) (defendants can neither challenge Congress' imposition of a mandatory sentence nor its evaluation of relevant factors).

268. United States v. Bolding, 683 F. Supp. 1003, 1004 (D. Md. 1988), *rev'd*, 876 F.2d 21 (1989); *see also* United States v. Brodie, 686 F. Supp. 941, 951 (D.D.C. 1988).

One district court reasoned, without citing to authority, that such discretion must be exclusively judicial because only Article III judges are nonpolitical, and sentencing, as the final resolution of a "case or controversy," should not be entangled with either the prosecutor or the legislator. United States v. Brittman, 687 F. Supp. 1329, 1355 (E.D. Ark. 1988), *aff'd in part and vacated in part*, 872 F.2d 827 (8th Cir.), *cert. denied*, 110 S. Ct. 184 (1989); *see also* United States v. Alafriz, 690 F. Supp. 1303, 1310 (S.D.N.Y. 1988); United States v. Scott, 688 F. Supp. 1483, 1493 (D.N.M. 1988).

269. Armstrong v. Manzo, 380 U.S. 545, 552 (1965); *see also* Morrissey v. Brewer, 408 U.S. 471, 481 (1972).

The argument also persists that the trial judge's individual assessment and weighing of the facts relevant to the offense and the offender are now ingrained in the sentencing process,[270] and that due process affords the defendant the opportunity to affect the judge's balancing of relevant factors.[271] The Guidelines dictate that, once fact-finding relevant to the offense and offender is complete, the sentencing range will be established by the sentencing table, and not by the judge.[272] The Supreme Court has, however, recognized a due process right in the defendant to challenge information presented to the sentencing judge.[273] To deny the defendant the ability to challenge effectively the weight assigned to each factor is incongruous, as the latter is but a lesser example of the former ability to challenge

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270. The Ninth Circuit, in a decision rendered prior to the advent of the Guidelines, noted that "the concept of individualized sentencing is firmly entrenched in our present jurisprudence." United States v. Barker, 771 F.2d 1362, 1365 (9th Cir. 1985). The demand for individualized sentencing may be viewed not only as a result of the historical evolution and expansion of the due process clause, but also as a result of "state-fostered expectation." *See Alafriz*, 690 F. Supp. at 1309 (citing L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 10-9, at 515 (1978)). This argument would mean that individualized sentencing practices in effect for over 40 years could not be replaced by sentences of classification, as the process due was legitimately expected to be specific to the case. *Id.* at 1309-10. Of course, this in effect would imply that the Constitution is subject to *statutory* amendment, so long as the statute endures a requisite number of years.

271. The Supreme Court has noted that consideration of the defendant's whole person and personality is "proper—indeed, even necessary for the rational exercise of discretion." United States v. Grayson, 438 U.S. 41, 53 (1978). However, this does not imply anything about the *amount* of discretion required. *But see* Wasman v. United States, 468 U.S. 559, 563 (1984) (sentencing judge must be allowed to consider all information relevant to proper determination of sentence).

272. *See supra* notes 117-24 and accompanying text. The Guidelines allow for departure only if a "circumstance exists that was not adequately taken into consideration by the Sentencing Commission in formulating the guidelines . . . ." 18 U.S.C. § 3553(b) (Supp. IV 1986); *see* UNITED STATES SENTENCING COMMISSION, GUIDELINES MANUAL, § 5H1.1-1.10 (Nov. 1989) (factors the Commission has considered, discussed *supra* note 121). The Commission has mandated that many factors are not relevant to sentencing, and that as time passes, it will "adequately consider" other circumstances being used as points of departure. *See supra* notes 125-28 and accompanying text. For examples of the rigidity already being built into the system, see United States v. Brittman, 687 F. Supp. 1329, 1355-56 (E.D. Ark. 1988), *aff'd in part and vacated in part*, 872 F.2d 827 (8th Cir.), *cert. denied*, 110 S. Ct. 184 (1989); United States v. Brodie, 686 F. Supp. 941, 953-54 (D.D.C. 1988).

273. Due process allows a defendant to challenge sentencing proceedings because a "defendant has a legitimate interest in the character of the procedure which leads to the imposition of sentence even if he may have no right to object to a particular result of the sentencing process." Gardner v. Florida, 430 U.S. 349, 358 (1977). Furthermore, due process allows the offender an opportunity to ensure that the trial judge receives accurate and reliable sentencing information, United States v. Romano, 825 F.2d 725, 728 (2d. Cir. 1987), and that a sentence is imposed only upon those statements that are materially true and accurate. United States v. Tucker, 404 U.S. 443, 447 (1972); Townsend v. Burke, 334 U.S. 736, 741 (1948). A sentence may not, however, reflect retaliation for the exercise of a constitutional right. North Carolina v. Pearce, 395 U.S. 711, 723-25 (1969).

the information altogether.[274]

4. Disposition

The answer to these concerns is twofold. First, as a *substantive* matter, these arguments run counter to the Supreme Court's own recent statements that individualized sentencing, while practiced, has never been constitutionally required.[275] The Supreme Court has never directly discounted its statement in 1949 that "punishment should fit the offender and not merely the crime,"[276] and this sentiment has found renewed vitality in a recent Ninth Circuit opinion.[277] However, even this expression was not impelled by the Constitution, and it does not support the bald assertion by some district courts that "defendants enjoy a due process right to individualized sentencing."[278]

274. Although reversed by the Third Circuit, a district court judge presented this contention forcefully. *See* United States v. Frank, 682 F. Supp. 815, 818-19 (W.D. Pa. 1988), *modified*, 864 F.2d 992 (3d. Cir.), *cert. denied*, 109 S. Ct. 2442 (1989). One judge has, in this respect, analogized the Guidelines to "conclusive presumptions," which the Supreme Court has repeatedly held to be a due process violation. *See* United States v. Elliott, 684 F. Supp. 1535, 1541 (D. Colo. 1988) (citing Stanley v. Illinois, 405 U.S. 645 (1972); United States v. Brown, 381 U.S. 437 (1965); Skinner v. Oklahoma, 316 U.S. 535 (1942)).

275. *See supra* notes 251, 257-59 and accompanying text. The Eleventh Circuit recognized that "the *sole* interest being protected at sentencing is the right *not* to be sentenced on the basis of inaccurate or unreliable information." United States v. Giltner, 889 F.2d 1004, 1008 (11th Cir. 1989) (emphasis added). The Tenth Circuit has seemingly gone further in stating that, even if individualized sentencing is necessary to due process, "[t]he statutory scheme here permits departure from the guidelines in a proper case, and has not withdrawn all discretion from the sentencing court." United States v. Thomas, 884 F.2d 540, 542-43 (10th Cir. 1989).

276. Williams v. New York, 337 U.S. 241, 247 (1949). *See* discussion *supra* notes 24-29 and accompanying text.

277. *See* United States v. Barker, 771 F.2d 1362, 1365 (9th Cir. 1985). The *Barker* court made broad assertions when overturning a sentence due to the judge's failure to individualize a sentence in the hope of sending out a message of deterrence to others. For example: "In each case, a criminal sentence must reflect an individualized assessment of a particular defendant's culpability rather than a mechanistic application of a given sentence to a given category of crime." *Id.* The court also noted that "[t]ailoring punishment to the individual criminal may reduce the efficacy of deterrence, but that reduction is an inevitable cost of a system that eschews mechanistic punishment." *Id.* at 1368. *Barker* may be limited to a holding that when discretion is given to the sentencing judge, he abuses that discretion by sentencing mechanistically. *See* United States v. Vizcaino, 870 F.2d 52, 54-55 (2d Cir. 1989). "That a sentencing judge may not *abdicate* discretion does not mean that the [C]onstitution requires that sentencing judges be *given* discretion." United States v. Weidner, 692 F. Supp. 968, 971 (N.D. Ind. 1988) (emphasis added).

278. United States v. Brittman, 687 F. Supp. 1329, 1355 (E.D. Ark. 1988), *aff'd in part and vacated in part*, 872 F.2d 827 (8th Cir.), *cert. denied*, 110 S. Ct. 184 (1989); *see*

Second, and more importantly, these concerns devolve into considerations of the *procedural* due process required to protect a valid substantive interest. If no substantive interest is found to exist, arguments over procedure are irrelevant.[279] However, if the substantive interest is deemed valid, then the four-part balancing test announced by the Supreme Court in *Mathews v. Eldridge*[280] answers the question of what process is due the convicted offender facing imposition of sentence. The factors balanced are: (1) the nature of the private interest at stake; (2) the risk of procedural error under the challenged system; (3) the likely value in additional or alternative procedural safeguards; and (4) the interest of the government regarding the additional safeguards, including function, administration, and expense.[281]

The defendant's stake is obviously high, as his interest involves liberty in the face of imminent sentencing procedures.[282] Nonetheless, the Supreme Court has required only minimal due process protections at sentencing.[283] Acknowledging this, the circuit courts passing on the issue of procedural due process have found the Guidelines to be sound.[284] The defendant may offer evidence and challenge the of-

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also United States v. Alafriz, 690 F. Supp. 1303, 1309 (S.D.N.Y. 1988); United States v. Scott, 688 F. Supp. 1483, 1494 (D.N.M. 1988). *Cf.* United States v. Oxford, 735 F.2d 276, 278 (7th Cir. 1984) (no constitutional mandate to individualize sentence).

279. *See* United States v. Frank, 864 F.2d 992, 1008 (3d Cir. 1988), *cert. denied*, 109 S. Ct. 2442 (1989) (identifying substantive interests is the first consideration, the absence of which controls procedural questions).

280. 424 U.S. 319 (1976). *Mathews* dealt with deprivations under administrative proceedings, but the clearly enunciated rule has broader importance. *See* United States v. Romano, 825 F.2d 725, 729-30 (2d Cir. 1987) (employing the *Mathews* test in sentencing).

281. *Mathews*, 424 U.S. at 335.

282. *See Romano*, 825 F.2d at 729.

283. In Specht v. Patterson, 386 U.S. 605 (1967), the Supreme Court held that due process at sentencing proceedings demands that the defendant have an opportunity to be heard with counsel present, be able to confront and cross-examine the witnesses against him, and be allowed to present evidence on his own behalf. *Id.* at 610. However, even these requirements are subject to limitations for good cause. *See, e.g.*, United States v. Fatico, 579 F.2d 707, 713 (2d Cir. 1978), *cert. denied*, 444 U.S. 1073 (1980) (reliance on corroborated hearsay allowed if good cause exists to keep informant anonymous); *see also* United States v. Darby, 744 F.2d 1508, 1537 (11th Cir. 1984), *cert. denied*, 471 U.S. 1100 (1985) (Supreme Court requires "only minimal due process protections" at sentencing proceedings). The Eleventh Circuit has gone so far as to hold that a sentencing proceeding meets due process constraints so long as it is not *fundamentally* unfair. Armstrong v. Dugger, 833 F.2d 1430, 1434 (11th Cir. 1987).

284. *See* United States v. Thomas, 884 F.2d 540, 544 (10th Cir. 1989) (Guidelines permissibly alter extent of judicial discretion); United States v. Erves, 880 F.2d 376, 379 (11th Cir.), *cert. denied*, 110 S. Ct. 416 (1989) (the Guidelines enhance procedural protections by channeling discretion to relevant factors); United States v. Harris, 876 F.2d 1502, 1506 (11th Cir.), *cert. denied*, 110 S. Ct. 569 (1989) (uniform sentencing actually enhances fairness); United States v. Allen, 873 F.2d 963, 966 (6th Cir. 1989) (restricting judicial discretion not violative of due process); United States v. Seluk, 873 F.2d 15, 16-17 (1st Cir. 1989) (Guidelines take into account broad range of variables and factors typical to sentencing, are necessary to achieve congressional purpose, and judge is able

fers made by the government; the Guidelines themselves take into account a broad panoply of variables commonly assessed in sentencing; and although the judge's discretion is diminished, the judge may depart from the Guidelines altogether when the Commission has not "adequately considered" some factor the judge deems relevant to the case at hand.[285] Furthermore, the government's expressed interest—reduction in sentencing disparity—is of considerable weight, and may *demand* a mandatory process such as the Guidelines to ensure that this goal is achieved.[286]

Whether the Guidelines invite erroneous deprivation of an offender's liberty due to mechanical fitting of facts into prescribed slots is arguable. The Commission has precluded from consideration many factors significant and discrete to each offender before the court.[287]

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to depart therefrom); United States v. Brittman, 872 F.2d 827, 828 (8th Cir.), *cert. denied*, 110 S. Ct. 184 (1989) (judges retain some discretion and power to individualize sentence); United States v. Vizcaino, 870 F.2d 52, 56-57 (2d Cir.), *cert. denied*, 109 S. Ct. 3172 (1989) (procedural safeguards satisfactory); United States v. White, 869 F.2d 822, 825 (5th Cir.), *cert. denied*, 109 S. Ct. 3172 (1989) (guiding discretion in adherence to Guidelines not violative of due process).

285. The court in *Vizcaino* set out various provisions within the Act and the Guidelines indicating both the circumstances warranting departure, *Vizcaino*, 870 F.2d at 53-54, and the amount of discretion retained by the sentencing judge. *Id.* at 55-56. Of particular importance was the fact that the Guidelines have *not* affected the defendant's "right to appear, to offer evidence, and to challenge the Government's evidence." *Id.* at 56; *see supra* note 283. The Fifth Circuit noted that "[t]he guidelines do not impose the sentence, they provide a framework for a district court to impose a sentence." United States v. Mejia-Orosco, 867 F.2d 216, 219 (5th Cir.), *cert. denied*, 109 S. Ct. 3257 (1989).

In the view of Judge Merritt, it is only the fact that judges retain discretion and are able to depart from the Guidelines that prevents a violation of due process. United States v. Allen, 873 F.2d 963, 966-67 (6th Cir. 1989) (Merritt, J., concurring). In United States v. Brittman, 872 F.2d 827 (8th Cir.), *cert. denied*, 110 S. Ct. 184 (1989), the court stated that:

> [S]entencing judges retain discretion to accept or reject a plea bargain, to resolve factual disputes about the appropriate base offense level, to consider adjusting that base level for mitigating and aggravating circumstances, to choose from a range of sentences to set probation conditions, and to determine when to depart from the Guidelines.

Id. at 828. Procedural safeguards actually may be enhanced by restricting judicial discretion in an attempt to focus the judge's attention upon only relevant aggravating and mitigating circumstances. *See Erves*, 880 F.2d at 379; *Seluk*, 873 F.2d at 16-17.

286. *See Seluk*, 873 F.2d at 17 (curtailing judicial sentencing discretion necessary to achieve legitimate goals of the Act). The Eighth Circuit stated that "Congress could reasonably think that enactment of the Guidelines will help eliminate a different sort of potential due-process problem—that of arbitrary or disparate sentencing." *Brittman*, 872 F.2d at 828.

287. *See supra* note 121 and accompanying text. Unless specifically provided for, the Guidelines preclude the consideration of age, education, vocational skills, mental and emotional conditions, physical condition, previous employment record, and family

Of those factors "adequately considered" by the Commission in promulgating the generalized Guidelines, the offender cannot ask the court to consider them in departure from the Guidelines. However, consideration of *all* information pertinent to the offender can help the judge to better understand both the nature of the offense and the character of the offender.[288] Furthermore, the government's interest in minimizing disparity could to some degree be addressed by sentencing or appellate rules designed to channel discretion, and not to entrench it based upon detached decisions of an independent Commission divorced from both the crime and the criminal.[289]

In the final analysis, the Guidelines will survive this due process challenge.[290] The Supreme Court has ruled that Congress properly delegated rulemaking authority to the Commission in a fashion that does not abridge the separation of powers.[291] The Act's only true change to the sentencing process was restriction of the discretion exercised by the judge, which Congress believed to be the source of disparity in sentencing, and the Supreme Court in *Mistretta* indicated that Congress may restrict this discretion.[292] Because the delegation of legislative power was upheld, the Supreme Court will not likely be

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and community ties in determining the appropriate sentence. UNITED STATES SENTENCING COMMISSION, GUIDELINES MANUAL § 5H1.1-1.6 (Nov. 1989).

288. Williams v. New York, 337 U.S. 241, 247 (1949).

289. Congress specifically rejected the notion of voluntary guidelines. *See supra* note 93 and accompanying text.

290. The Supreme Court need not confront the issue if all circuits end in unanimity on the point. However, the trend of some district courts within the Ninth Circuit has been one of declaring the Guidelines void on this ground. The Central District of California, sitting en banc, struck down the Guidelines as violative of due process. United States v. Ortega-Lopez, 684 F. Supp. 1506, 1513 (C.D. Cal. 1988). *But see id.* at 1518-20 (Hupp, J., dissenting, joined by nine judges). The same is also true of the District of Idaho. United States v. Martinez-Ortega, 684 F. Supp. 634, 636 (D. Idaho 1988). *But see* United States v. Macias-Padroza, 694 F. Supp. 1406 (D. Ariz. 1988) (upholding Guidelines against due process challenge). *See also supra* notes 253 and 278.

One judge of the Central District of California concluded that the Guidelines violate due process by allowing the judge to base a sentence on factors not proven beyond a reasonable doubt. United States v. Davis, 715 F. Supp. 1473, 1477 (C.D. Cal. 1989). The judge believed that "[i]f Congress desires to fix specific sentencing lengths in advance of the commission of crimes, it must also fix the standard of proof . . . [as] beyond a reasonable doubt." *Id.* The Ninth Circuit may already have foreclosed this line of argument. *See* United States v. Restrepo, 883 F.2d 781, 784 n.7 (9th Cir. 1989). Under the sentencing scheme prior to the Guidelines, the appellate courts "uniformly held that use of the preponderance standard in sentence enhancement proceedings comports with the due process clause." United States v. Darby, 744 F.2d 1508, 1536 (11th Cir. 1984), *cert. denied*, 471 U.S. 1100 (1985) (citing cases). The Second Circuit has concluded that the preponderance of evidence standard satisfies due process concerns when determining relevant conduct under the Guidelines. United States v. Guerra, 888 F.2d 247 (2d Cir. 1989).

291. *See supra* notes 158, 173 and accompanying text.

292. For references to the legislative history regarding concerns of sentencing disparity, see *supra* notes 5-6 and accompanying text. For the Supreme Court's reference to Congress' latitude in sentencing legislation, see *supra* note 251 and accompanying text.

sympathetic to substantive claims of rights in individualized sentencing, and the Guidelines' procedures will prove sound, as Congress simply circumscribed that which it had the power to destroy.[293]

B. The Presentment Clause

The Constitution requires Congress to present every bill to the President for signature prior to its becoming law.[294] Because the Act delegates rulemaking authority to the Commission, it does not require presentation of the Guidelines to the President for his signature or veto. Instead, the Act merely contemplates the Commission transmitting to Congress the Guidelines and any amendments thereto, with an explanation of supporting reasons, which "shall take effect one hundred and eighty days after the Commission reports them, except to the extent . . . the guidelines are disapproved or modified by Act of Congress."[295] Because Congress did not disapprove of the Guidelines submitted by the Commission, the Guidelines became effective according to the statutory timetable.[296] Accordingly, the Guidelines were not presented to the President for his consideration before the date of their enactment.

Presumably, because Congress' delegation to the Commission was a valid exercise of its authority, the necessary result of that delegation—promulgation of the Guidelines—is also valid. However, in the case to which the Supreme Court granted review, the presentment issue was the sole and exclusive ground upon which Judge Wright registered a sharp dissent, although he did so without addressing whether Congress made a valid delegation or whether the Act generally violated the separation of powers.[297] That the Supreme Court ig-

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293. Judge Sachs, whose opinion the Supreme Court affirmed in *Mistretta*, in a later opinion rejected claims that the Guidelines violate due process. *See* United States v. Rodriguez, 691 F. Supp. 1252, 1253 (W.D. Mo. 1988), *aff'd mem.*, 881 F.2d 1080 (8th Cir. 1989).

294. U.S. CONST. art. I, § 7, cls. 2, 3. Clause 2 provides, in relevant part:

> Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to the House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it.

Id. at cl. 2. Clause 3 extends this to every action by Congress requiring concurrence by both Houses. *Id.* at cl. 3.

295. 28 U.S.C. § 994(p) (Supp. IV 1986).

296. *See supra* notes 112-16 and accompanying text.

297. *See* United States v. Johnson, 682 F. Supp. 1033, 1035-39 (W.D. Mo. 1988) (Wright, J., dissenting), *aff'd sub nom.* Mistretta v. United States, 109 S. Ct. 647 (1989). Judge Wright expressed favor for both the Act and the Guidelines, but found the pre-

nored this issue is interesting in light of this dissent, as well as the fact that several district courts struck down the Guidelines partly because of this failure in presentment prior to enactment.[298]

1. *Immigration & Naturalization Service v. Chadha*

Analysis of the presentment clause issue begins with *Immigration & Naturalization Service v. Chadha*,[299] in which the Supreme Court was confronted with the so-called "legislative veto."[300] In *Chadha*, an East Indian overstayed the duration of his nonimmigrant student visa, but upon application and hearing, the immigration judge suspended deportation. As required by statute, the Attorney General, after reviewing the application to suspend deportation, transmitted to Congress his findings and recommendation that deportation not occur. Under the statute, Congress retained power "to veto the Attorney General's determination that Chadha should not be deported."[301] Thus, either the Senate or the House of Representatives could pass a resolution overturning the Attorney General's recommendation, and

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sentment issue to be a "glaring constitutional flaw." *Id.* at 1035 (Wright, J., dissenting).

298. *See* United States v. Swapp, 695 F. Supp. 1140, 1149 (D. Utah 1988), *rev'd sub nom.* United States v. Singer, 868 F.2d 1201 (10th Cir. 1989); United States v. Brittman, 687 F. Supp. 1329, 1340-41 (E.D. Ark. 1988), *aff'd in part and vacated in part*, 872 F.2d 827 (8th Cir.), *cert. denied*, 110 S. Ct. 184 (1989); United States v. Perez, 685 F. Supp. 990, 999-1000 (W.D. Tex. 1988), *aff'd mem. sub nom.* United States v. Carrales, 888 F.2d 1389 (5th Cir. 1989) (Guidelines enacted contrary to presentment clause). *But see* United States v. Sparks, 687 F. Supp. 1145, 1151 (E.D. Mich. 1988) (presentment clause argument is "specious").

The Eighth Circuit has held that no violation of the presentment clause exists. *See* United States v. Barnerd, 887 F.2d 841, 842 (8th Cir. 1989). The Third Circuit also may have foreclosed this argument. *See* United States v. Frank, 864 F.2d 992, 1014 (3d Cir. 1988), *cert. denied*, 109 S. Ct. 2442 (1989); *see also infra* notes 316, 319 and accompanying text.

299. 462 U.S. 919 (1983).

300. The legislative veto was a device written into federal statutes delegating legislative authority to executive or independent agencies to allow Congress to halt actions taken by the agency in fulfilling its statutory charge without the need to pass new legislation. Abourezk, *The Congressional Veto: A Contemporary Response to Executive Encroachment on Legislative Prerogatives*, 52 IND. L. REV. 323, 323-24 (1977); *see also* Miller & Knapp, *The Congressional Veto: Preserving the Constitutional Framework*, 52 IND. L.J. 367, 371 (1977).

301. *Chadha*, 462 U.S. at 925. Congress had passed the Immigration and Naturalization Act pursuant to its power to control naturalization. U.S. CONST. art. I, § 8, cl. 4. However, Congress delegated enforcement responsibilities to the Attorney General. *Chadha*, 462 U.S. at 924 n.1. The statute at issue provided in relevant part:

> if [within the prescribed time frame], either the Senate or the House of Representatives passes a resolution stating in substance that it does not favor the suspension of such deportation, the Attorney General shall thereupon deport such alien. . . . If, within the time above specified, neither the Senate nor the House of Representatives shall pass such a resolution, the Attorney General shall cancel deportation proceedings.

Id. at 925 (quoting 8 U.S.C. § 1254(c)(2) (1982)). The Court noted that this type of provision had found its way into nearly 200 different statutes since 1932. *Id.* at 945-46 (citing Abourezk, *supra* note 300, at 324).

deportation would occur. The House of Representatives exercised its prerogative.

Scrutinizing the statute under separation of powers standards, the Supreme Court, in an opinion authored by Chief Justice Burger, held the statute invalid under both the presentment clause and the bicameral passage requirements[302] of the Constitution.[303] The Court believed that the Constitution delimited political inventions such as the legislative veto, even while noting that the power retained by Congress under the challenged statute was "efficient, convenient, and useful in facilitating functions of the government."[304]

In analyzing the presentment clause, the Court interpreted the Framers' intent, and concluded that "[i]t is beyond doubt that lawmaking was a power to be shared by both Houses and the President."[305] The bicameral passage requirements, on the other hand, reflect the Framers' decision that "legislation should not be enacted unless it has been carefully and fully considered by the Nation's elected officials."[306] Although these requirements do not inure to every action taken by Congress, bicameral passage and presentment to the President are necessary when the action has "the purpose and effect of altering the legal rights, duties, and relations of persons . . . outside the Legislative Branch."[307] The statute failed this standard,

302. "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." U.S. CONST. art. I, § 1. This provision, taken in conjunction with those set out *supra* note 294, reflects the bicameral nature of the legislative procedure requiring enactment of laws only after approval by both Houses.

303. *Chadha*, 462 U.S. at 956-57, 959.

304. *Id.* at 944-46.

305. *Id.* at 947. The Court declared this to realize the Framers' desire "to check whatever propensity a particular Congress might have to enact oppressive, improvident, or ill-considered measures," *id.* at 947-48, as well as the Court's own recognition that presentment serves "the important purpose of assuring that a 'national' perspective is grafted on the legislative process . . . ." *Id.* at 948 (citing Myers v. United States, 272 U.S. 52, 123 (1926)).

306. *Chadha*, 462 U.S. at 949. The Court noted that the purpose of bicameralism was to reduce the chance of legislative despotism, as well as to reflect the "Great Compromise," which split power between the Houses to allow representation by state (the Senate) and by population (the House of Representatives). *Id.* at 948-51.

307. *Id.* at 952. Judge Wright struck the Guidelines based in part upon this premise. *See supra* note 297 and accompanying text. First, the congressional delegation to the Commission was of legislative power, rather than executive or judicial power. Second, by altering the sentencing process, the Guidelines substantively affect the rights and responsibilities of defendants facing imposition of federal sentence. Thus, the Guidelines are "legislation" subject to Article I procedures. Third, Congress cannot delegate power to limit sentencing discretion, as this amounts to "regulation" of the federal judiciary, which requires action by Congress. United States v. Johnson, 682 F.

although the Court held open the question of whether congressional *legislation* overturning the Attorney General's determination would have violated any constitutional strictures.[308]

2. *Mistretta* and Beyond

In *Mistretta*, while the Supreme Court did address several broad challenges under the separation of powers, it did not directly confront the *Chadha* issue; however, the Court stated that *Chadha* supports the proposition that "Congress may not control execution of laws except through Art. I procedures."[309] This is undoubtedly true, as each house of Congress retained the power to undo the executive authority delegated to the Attorney General.[310] Any analogy drawn between the legislative veto and the enactment of the Guidelines will be less than perfect, as the former saw one house of Congress seeking to reject that which the executive put forth in furtherance of its congressional delegation to execute the law, whereas the latter sees Congress serving as a rubber stamp to the Commission promulgating rules pursuant to a delegation of legislative authority. However, the principles expressed in *Chadha* that support the bicameralism and presentment requirements arguably apply equally to the legislative veto and to the Guidelines: the creation of law must, as a requisite step, pass through the President.

Had Congress disapproved or modified the Guidelines, the need for bicameral passage and presentment of legislation presumably would have been obviated, as any such disapproval or modification could occur only by an "Act of Congress,"[311] which would require conformity with the Constitution.[312] The Guidelines *as enacted*, however, faced

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Supp. 1033, 1036 (W.D. Mo. 1988) (Wright, J., dissenting), *aff'd sub nom.* Mistretta v. United States, 109 S. Ct. 647 (1989).

The first and third concerns appear to be resolved by *Mistretta*. *See supra* notes 158-64, 222-31 and accompanying text (*Mistretta* upheld delegation while implicitly rejecting arguments concerning nondelegability of "core functions"); *see also supra* note 251 and accompanying text (*Mistretta* noted Congress may control judicial discretion at sentencing). Through *Chadha*, however, the second premise may survive. The *Chadha* Court stated that the test to determine whether an action of Congress is "an exercise of legislative power depends not on [its] form but upon 'whether they contain matter which is properly to be regarded as legislative in its character and effect.' " *Chadha*, 462 U.S. at 952 (citing S. REP. NO. 1335, 54th Cong., 2d Sess. 8 (1897)). *Cf. supra* note 184.

308. *See Chadha*, 462 U.S. at 953-55 n.17.

309. Mistretta v. United States, 109 S. Ct. 647, 660 (1989) (citing *Chadha* as an example of Court's invalidation of congressional attempts to exercise or reassign powers and responsibilities of other branches).

310. *See Chadha*, 462 U.S. at 953 n.16 (explaining that Attorney General's function under statute at issue involved only execution of authority delegated by Congress, and did not entail rulemaking).

311. *See supra* note 295 and accompanying text.

312. The Supreme Court's analysis favors a presumption of constitutionality of any statute under scrutiny, with narrow construction given if necessary to uphold the stat-

neither bicameral passage nor presentment to the President. The bicameralism issue is not significant after *Mistretta*, which held the creation of the Commission to be a valid delegation by Congress of legislative rulemaking authority.[313] Furthermore, Congress had before it the proposed Guidelines, which it chose not to modify, and thereby impliedly granted to the Guidelines Congress' majority approval.

Turning to the presentment issue, however, the President's approval was neither sought nor required in enacting the Guidelines.[314] As discussed previously, the determination of sentencing ranges, whether fixed or flexible, is a legislative consideration within the purview of Congress,[315] but *legislation* requires approval by the President, or congressional override of a veto. The Guidelines excise the determination of sentence from the statute defining the crime and take effect unless Congress initiates action to the contrary. This effectively circumvents the President's constitutional obligations concerning the legislative process.

With this in mind, the Court's approval of Congress' delegation to the Commission becomes more inauspicious, as that delegation "bootstraps" the Guidelines over the presentment clause. Although arguably implied in *Chadha*, the Court in *Mistretta* refuted the notion that rulemaking is executive in nature.[316] Because the Court held that

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ute. *See supra* note 152. "Act of Congress" then means passage in conformance with Article I procedures. One court addressing the presentment clause issue halted its analysis at this level, thus failing to address the issue of whether *any* Guidelines to take effect must be presented to the President, and not merely those that Congress disapproves or seeks to modify. *See* United States v. Sparks, 687 F. Supp. 1145, 1151 (E.D. Mich. 1988). Judge Wright, on the other hand, believed that Congress' mere use of the "Act of Congress" provision enhanced the recognition of the Guidelines *as legislation* subject in *every* instance to bicameral passage and presentment to the President. United States v. Johnson, 682 F. Supp. 1033, 1037-38 (W.D. Mo. 1988) (Wright, J., dissenting), *aff'd sub nom.* Mistretta v. United States, 109 S. Ct. 647 (1989).

313. *See supra* notes 158-64 and accompanying text.

314. Judge Wright believed the direct holding of *Chadha*—that any legislative act by Congress is subject to bicameral passage and presentment to the President—also fairly implied that "a valid delegation of Congress' *legislative authority* must comport with the procedural constrictions of Article I, § 7." *Johnson*, 682 F. Supp. at 1036-37 (Wright, J., dissenting) (emphasis in original).

315. *See supra* notes 251, 264-67 and accompanying text.

316. *Compare* Mistretta v. United States, 109 S. Ct. 647, 662 n.14. (1989) (rulemaking pursuant to legislative delegation not within exclusive prerogative of the executive branch) *with* INS v. Chadha, 462 U.S. 919, 953 n.16 (1983) (rulemaking characterized as "Executive action" not subject to presentment). The Third Circuit anticipated this clarification when it specifically noted that "[d]elegated authority to develop sentencing guidelines is not inherently executive. . . . The fact that delegations of legislative rulemaking authority have in the past been made to executive branch agencies does

Congress made a valid delegation, and because rulemaking authority need not be placed within the executive branch, the rules created need not be presented to the President. This is incongruous when the Court also took note of "the degree of political judgment about crime and criminality exercised by the Commission and the scope of the substantive effects of its work . . . ."[317] The admonition from *Chadha* then takes on added import: "The President's participation in the legislative process was *to protect the Executive Branch from Congress* and *to protect the whole people from improvident laws*."[318]

The Guidelines substantially impact every offender facing sentence, and this impact has neither been checked nor even considered by the President. Furthermore, the President, whose consideration and advice attach to every other aspect of a criminal statute, no longer examines the ultimate goal of that which he must enforce: the sentencing of the convicted offender under federal law. The ultimate force of the Act is not merely to nullify judicial discretion, but to remove the President's contribution to the legislative process.[319] While Congress had power to so affect the judiciary,[320] the "hydraulic pressure" between the two political branches is sharply controlled.[321] Had Congress itself legislated such mandatory guidelines, clearly they must have first faced the President. Instead, Congress delegated this authority, not to an executive agency, nor even to an independent agency within the executive branch, but rather to an independent agency within the judicial branch. How much further beyond the reach of the President could such legislative authority have

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not, however, convert rulemaking for all purposes into the execution of the laws." United States v. Frank, 864 F.2d 992, 1014 (3d Cir. 1988), *cert. denied*, 109 S. Ct. 2442 (1989).

317. *Mistretta*, 109 S. Ct. at 665. For a discussion of the nature of the Guidelines, see *supra* note 184 and accompanying text.

318. *Chadha*, 462 U.S. at 951 (emphasis added).

319. It is no argument that the President acquiesced in the Act's provisions by signing the bill presented to him. The *Chadha* Court was faced with the legislative veto woven into a statute signed by the President, and stated that its "inquiry is sharpened rather than blunted by the fact that congressional veto provisions are appearing with increasing frequency in statutes which delegate authority to executive and *independent* agencies . . . ." *Id.* at 944 (emphasis added).

The argument must be made that upholding rule promulgation features such as those within the Act would allow one President, in effect, to sign *all* future rules into law by placing his signature on enabling legislation that merely began their development. The Eighth Circuit failed to note this when concluding that the Act "was signed by the President. The President's signature on the actual guidelines is therefore not required." United States v. Barnerd, 887 F.2d 841, 842 (8th Cir. 1989). The Third Circuit avoided the presentment clause challenge because it upheld the delegation. United States v. Frank, 864 F.2d 992, 1014 (3d Cir. 1988), *cert. denied*, 109 S. Ct. 2442 (1989). The *Frank* court noted that the presentment clause limits Congress' ability to avoid the President's veto, but that the delegation within the Act did not exceed these limits when Congress presented the Act for signature. *Id.*

320. *See supra* notes 251, 259 and accompanying text.

321. *Chadha*, 462 U.S. at 951.

been placed? Justice Scalia dubbed the Commission "a sort of junior-varsity Congress."[322] This is an apt description, noting the alacrity with which the Commission by its delegation can run an "end around" the President.

V. COMMENT

The Supreme Court has declared constitutional the Act and the Commission. Because this approval upheld Congress' delegation, the Guidelines will most likely resist attack on due process and presentment grounds. Interestingly, the excessive delegation issue was the most easily resolved by the Court, and yet validating this delegation seemingly makes other constitutional challenges foregone conclusions. Combining the principles of delegation and separation of powers, this jurisprudence now allows independent agencies to be placed within the judicial branch and judges to serve on legislative bodies creating the laws they apply. Yet, the Supreme Court chose neither to invigorate nor even to question the lax legislative delegation standards established in the New Deal era, regardless of the far-ranging consequences such a delegation has in the field of criminal sentencing. Seemingly any difficult decision coming before Congress can now follow the course of least resistance: delegation without further accountability.

A. Criticism

The irony of the extended debate over the constitutionality of the Act and the Guidelines, and the multiplicity of issues these challenges entail, is the ease with which the debate could have been altogether avoided. Were Congress the entity channeling judicial discretion and structuring rigid sentencing guidelines, the issues addressed in this comment would have absolutely no foundation. No delegation of legislative authority would exist, as the nation's legislators would themselves address the entrenched problem of sentencing disparity. This would serve to obviate concern over the separation of powers as well. The implication of an offender's due process rights would likewise diminish were Congress itself to exercise the unquestionable control it retains regarding the amount of judicial discretion and sentencing flexibility available upon conviction. Finally, Congress's decisions on sentencing would then follow Article I proce-

322. Mistretta v. United States, 109 S. Ct. 647, 683 (1989) (Scalia, J., dissenting).

dures, thus drawing the President back into the sentencing decision through presentment of legislation in need of his signature.

This criticism arises not from a perception that Congress chose to fix something which was not broken. Disparity in sentence is an affliction unfair to both the offender and society.[323] Nor does this criticism arise from the belief that Congress wrongly identified the method by which to correct this problem. Broad judicial discretion at sentencing uncheckable by appellate review, compounded by similar latitude during parole proceedings, leads inevitably not only to the imposition of different sentences to similar offenders convicted of similar crimes, but also to a plethora of widespread and inconsistent reasons underlying the decision.[324]

Instead, this critism results from the manner in which Congress chose to correct the problem and its source. Specifically, Congress stripped away any semblance of *accountability* from the sentencing process, in both the formulation and imposition of the Guidelines.[325] The members of Congress have insulated themselves from political accountability to their constituents by delegating the responsibility to formulate the Guidelines to an independent agency unreachable by vote. The President cannot be held accountable because, but for his appointment of commissioners, he has absolutely no positive power over sentencing legislation.[326] The judiciary is least accountable of all, as any judge may rightly claim his hands were tied when the time came to fit the punishment to the offender.[327]

Congress apparently took into account the Supreme Court's admonitions in *Chadha*, avoiding any retention of a legislative veto while

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323. *See supra* notes 34-43 and accompanying text. This view is not without its critics. One judge stated: "The idea that disparity in sentencing is always an evil to be corrected is . . . constitutionally erroneous. Because no two individuals are identical, due process dictates some degree of disparity to insure fair treatment." United States v. Alafriz, 690 F. Supp. 1303, 1310 (S.D.N.Y. 1988). Another wrote that "[t]he Guidelines exemplify the arrogance of quantification. If a sentencing judge . . . lumped all defendants into categories based on broad generalizations, he would rightly be accused of abusing his discretion. But that is precisely how the Guidelines operate. The heart of prejudice and bigotry is generalization." United States v. Martinez-Ortega, 684 F. Supp. 634, 636 (D. Idaho 1988), *aff'd in part and remanded in part sub nom.* United States v. Sanchez-Lopez, 879 F.2d 541 (9th Cir. 1989). Yet another judge questioned "whether judges, who deal with human beings, not numbers, are prepared to operate on the theory that disparity is 'shameful' and to apply the sentencing guidelines in the literal fashion that the Commission apparently intends." Van Graafeiland, *Some Thoughts on the Sentencing Reform Act of 1984*, 31 VILL. L. REV. 1291, 1297 (1986) (Senior Judge, Second Circuit Court of Appeals).

324. *See supra* notes 50-53 and accompanying text.

325. This argument was accorded broad consideration in United States v. Brodie, 686 F. Supp. 941, 952-55 (D.D.C. 1988).

326. The Attorney General is a permanent member of the Commission, but in an *ex officio*, non-voting role. *See supra* note 63.

327. *See Brodie*, 686 F. Supp. at 955 (judges' ability to engage in "truly conscience-driven, individualized sentencing" has largely disappeared).

favoring a requirement of "an Act of Congress" to undo any Guidelines promulgated by the Commission. Even this reservation of power can work great mischief. Should the Commission amend the Guidelines in a manner of which Congress disapproves, Congress will presumably pass a bill contrary to the Commission's rules, to be presented to the President for signature into law. If the President favors the Commission version, a veto of Congress' bill will follow. Congress must then muster the two-thirds vote necessary to override this veto, or else no "Act of Congress" will have occurred, and the Guidelines will take effect as promulgated. Falling short of this necessary super-majority vote, legislation will become law against the will of a majority of the legislators.

A deeper question addresses the extent to which Congress cut out the ability of the President to affect sentencing legislation and the judiciary to apply it. It is difficult to imagine a presidential candidate promising to be "tough on crime" by appointing tough commissioners. Even were this true, the impact the President can have by virtue of such appointment is far from certain. Instead, the President expresses displeasure with sentencing policy by vetoing the legislation before him and advising Congress of his views.[328] When a plank within a campaign promises that the President will seek certain enumerated goals, his record on review indicates whether his word has been kept to the electorate. This is the nature of accountability in a political official.

However, what Congress' vehicle and the Commission's choice entail for the judiciary is far more lamentable. The Commission has already debated implementing capital punishment.[329] If this ever occurs, the judiciary will find itself constrained to deal out "the supreme penalty" after tabulating an offender's characteristics against those factors relevant on the Commission's scoresheet, although time and distance remove the commissioners from the criminal and his crime.[330] Whether the penalty is one of death or harsh noncapital effect, what may happen—and what apparently already is occurring[331]—is that the judge will strain to deem certain factors rel-

328. U.S. CONST. art. I, § 7, cl. 2.

329. *See supra* note 131.

330. One judge believed that if the Commission were to exercise the death penalty, defendants will be executed years later on the basis of decisions by "seven unelected commissioners drawn from different branches of government who, by the time sentence is actually pronounced, have long departed from the scene." United States v. Brodie, 686 F. Supp. 941, 954 n.40 (D.D.C. 1988).

331. A recent study showed that 83% of 30 judges interviewed in 25 federal districts

evant or irrelevant to the sentencing decision, thus avoiding the need to confront factors deemed applicable to the offender, but warranting a sentence out of step with the judge's own beliefs. This, in turn, introduces elements of dishonesty and sham into the system, as judges seek to exercise the discretion flowing from years of accumulated wisdom on the bench.

The statement by Judge Bolitha J. Laws with which this comment commenced is greater than merely an abstract principle: the sentencing of the convicted offender will always be to the judge a difficult and demanding choice. This difficulty, however, should inure to the judge because he faces the offender while serving as the channel for the community's safekeeping. The difficulty should not be in conflict with the decisions of a commission which refuse to allow the judge even to assume this responsibility. Were the conflict with Congress, it could be ascribed to the pressures inherent between members of coequal branches of constitutional government. While composed of three judges, the Commission is not, and cannot be, the equal of a judge presiding over those before his or her court. As such, the Commission should not presume to command the judge seeking to exercise rightful constitutional authority as best as he or she sees fit.

B. Proposal

The proposal for reform is straightforward: Congress should reassign the Commission to the legislative branch to serve as an advisory body. The argument favoring delegation—that Congress cannot be expected to devote the time necessary to formulate specific guidelines for a virtually infinite array of crimes and criminals[332]—is meritorious. However, merely because Congress cannot undertake the full scope of the debate and the commensurate attention to detail does *not* mean Congress should remove itself from the legislation altogether. The Commission should exist exactly as Congress instituted it, with one significant change in the end result: the Guidelines should be offered to Congress, with the Commission's supporting reasons, as an advisory disposition. Congress should then assume the debate, modify the Guidelines as it sees fit, and present this package to the President for his approval. The debate may be extensive and the wrestling between and among the Houses of Congress and the President intense, but such measure would bring together the branches of

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across the country knowingly accepted pleas which involved prosecutors dismissing provable counts. Chambers, *The Old Days: When a Plea Was a Plea . . .*, Nat'l L.J., Nov. 16, 1989, at 13-14. Apparently prosecutors and defense attorneys also are colluding as to what charges will be brought, as well as to what "facts" are to be presented to the judge. *Id.*; *see supra* note 115 (prosecutors to wield great power under the Guidelines); *see also infra* notes 338-42 and accompanying text.

332. *See supra* notes 147, 162 and accompanying text.

government to shape the decision as to type and length of sentence in a fashion undoubtedly constitutional.

Surely that which is clearly sound holds some sway over that which is only arguably so. The Supreme Court, in *Mistretta v. United States*, began the resolution of the bitter and deeply divisive argument over the Act, the Commission, and the Guidelines. That further argument is foreclosed does nothing to alleviate lasting perceptions of inequity and abdication in the sentencing formulation.[333] This perception, though, is for Congress to correct, not the courts.

CONCLUSION

The decisions made both by Congress when passing the Act and by the Commission when promulgating the Guidelines are the subject of attack on more than just constitutional grounds. At its base are those who disagree with the fundamental policy choice to place the penological goals of retribution and deterrence over that of rehabilitation.[334] Although the true concern of Congress was the elimination of sentencing disparity, the rigid nature of the Guidelines have led to criticism that many sentences are unduly harsh.[335]

The ramifications of these policy concerns warrant several observations in conclusion. For many crimes, an alarming disparity is developing between sentences imposed for the same crimes in state and federal courts.[336] Of greater concern is the elusive nature of imple-

333. Regarding such perceptions of the Supreme Court's work, Justice Jackson stated: "We are not final because we are infallible, but we are infallible only because we are final." Brown v. Allen, 344 U.S. 443, 540 (1953) (Jackson, J., concurring).

334. Statements made by a federal prosecutor and a public defender following the life sentence imposed upon a 30-year-old first offender after conviction of possession, distribution, and conspiracy regarding 686 grams of crack cocaine are indicative of this clash. The federal prosecutor stated, "We caught him selling crack just once, but he'll never sell it again, and that's the kind of justice I want." Bearack, *New Sentencing Rules Mean Life for 1st Offender*, L.A. Times, Aug. 17, 1989, part 1, at 1, col. 4. The public defender replied, "I've represented people who took lives and received less of a sentence . . . . Everybody has worth and dignity. Everybody should have a chance at rehabilitation." *Id.* at 20, col. 1.

335. *See* Weinstein, *5 1/2 Ounces of Crack Brings Life Term With No Parole*, L.A. Times, Dec. 7, 1989, part 1, at 1, col. 1. Defense counsel characterized the life sentence given his 22-year-old client as "Draconian." The defendant had three prior state court convictions for cocaine possession, and stood convicted in federal court of possession with intent to distribute 151 grams of crack cocaine. Because of the repeal of parole, *see supra* note 99 and accompanying text, any life sentence necessarily will mean an entire life spent behind bars.

336. Acknowledging the consistently tougher federal sentencing laws, one assistant United States attorney noted the disparity between punishments under federal and state sentencing schemes while stating that "the new crap shoot for the defendant" is

menting a system designed to eliminate disparity. Congress believed that implementing the Guidelines and repealing parole would accomplish this goal by attacking discretion within the sentencing process.[337] However, the Guidelines have been in full force and effect at least since the Supreme Court handed down its decision in *Mistretta*, and disparity within the federal system continues.[338] That disparity still remains indicates that discretion also remains within the sentencing process. This is the developing criticism of the Guidelines as enacted: the discretion once reposed in federal judges has now been placed in the hands of the prosecutors.[339]

Judicial criticism of this shift in power has taken two forms. On one hand, many judges criticize their loss of sentencing power when stripped of the discretion once given them.[340] On the other hand,

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which jurisdiction will try the crime. Bearack, *supra* note 334, at 20, col. 2. Regarding the 22-year-old sentenced to life imprisonment for possession with intent to distribute 151 grams of crack cocaine, a spokesperson for the Los Angeles County District Attorney's Office acknowledged that the maximum term under California law for his crimes would have been four years in prison. Weinstein, *supra* note 335, at 37, col. 1.

337. *See supra* notes 5-9 and accompanying text.

338. *See* Collora, *Commission's Goal of Uniformity Is Still Elusive After One Year*, Nat'l L.J., Jan. 22, 1990, at 15. The negotiations between defense counsel and federal prosecutors over adjustments, characterization of facts and charges, and negotiated plea settlements—all done outside the presence of the court—undermines Congress's goal of uniformity. *Id.* One district court believed that when determining charges to be brought, "the prosecutor is free to introduce as much sentencing disparity into the system as he may choose." United States v. Roberts, 726 F. Supp. 1359, 1365 (D.D.C. 1989). Aside from negotiated sentences and discretionary adjustments within the Guidelines, through the end of 1989 nearly 19% of all sentences have involved departure from the Guidelines. Collora, *supra*, at 16 (citing UNITED STATES SENTENCING COMMISSION, REPORT ON COMPLIANCE AND DEPARTURES THROUGH END OF FISCAL YEAR 1989, at 1 (1989)). The court in United States v. Bethancurt, 692 F. Supp. 1427 (D.D.C. 1988), explained at length its opinion that "the new sentencing statute and the guidelines are riddled with conceptual and practical dilemmas in the plea bargaining area." *Id.* at 1429. Upon examining plea bargaining and sentencing procedures, the court believed that disparity would not be eliminated, but only that "the responsibility therefor will merely be shifted from the judge to the prosecutor." *Id.* at 1432.

339. *See supra* note 115 and accompanying text. Especially in regard to plea bargains, the Guidelines "generally seem to have transferred to the prosecution a great amount of the discretion formerly vested in the courts." Collora, *supra* note 338, at 16. One critic recently wrote that "[t]he loss of judicial oversight of sentencing and of prosecutors, the transfer of sentencing to the government and the serious reduction in public accountability is the true legacy of the guidelines." Chambers, *Sentencing by Secret Committee?*, Nat'l L.J., Jan. 22, 1990, at 14. Judge Harold H. Greene, United States District Court for the District of Columbia, has twice written from the bench his sharp criticisms of the mandated shift in discretion and resulting sentencing practices. *See Roberts*, 726 F. Supp. at 1359; *Bethancurt*, 692 F. Supp. at 1427; *see also* United States v. Curran, 724 F. Supp. 1239 (C.D. Ill. 1989).

340. In United States v. Lopez, 875 F.2d 1124 (5th Cir. 1989), the Fifth Circuit was faced with a district judge's intentional and explicit upward departure from the applicable guideline range, which he believed was "weak and ineffectual with respect to this crime." *Id.* at 1126. The appellate court held this departure unreasonable because the "sentencing court's personal disagreement with the guidelines does not provide a reasonable basis for sentencing." *Id.* Many of the judges who believe due process requires individualized sentencing are cognizant of the power vested in the court when it

some judges are critical of the practices developing as federal prosecutors devise means to implement the power which accompanies their newfound discretion in the sentencing process.[341] But whatever

"individualizes" any sentence. *See supra* notes 268-74 and accompanying text. United States District Judge David W. Williams meted out the guideline-mandated life sentence to a 22-year-old crack dealer, while rebuffing arguments that the sentence encompassed cruel and unusual punishment and compromised his judicial freedom. *See* Weinstein, *supra* note 335, at 1, col. 2. In an interview off the bench, Judge Williams indicated his personal dissatisfaction with the congressional check on his judicial discretion. *See* Jones & Stewart, *Opposite Lives Grow From South-Central Roots*, L.A. Times, Dec. 7, 1989, part 1, at 36, col. 1. He stated, "Some of us judges feel we are made to be like robots who cannot decide for themselves, but this is the law, and it's my job and it's up to Congress to do something about it . . . ." *Id.* at 37, col. 2. He concluded with the observation that "[t]oday was the first time in 35 years as a judge that I have had to give anyone a life sentence." *Id.*

341. Within the ranks of the United States Attorneys' Offices has developed a "Departure Committee" to determine whether the government should move for reduction of sentence due to "substantial assistance" given by the defendant. *See* Chambers, *supra* note 339, at 13. Used to interpret 18 U.S.C. § 3553(e) and *Id.* § 5K1.1, *see supra* note 125, these committees are under serious constitutional attack on due process grounds, as is the implicit statutory and guideline base. One court held that these sections on their face deny a defendant's right to substantive and procedural due process. *Curran*, 724 F. Supp. at 1241. Because only the *government* can move for departure based on assistance given, the court cannot raise it sua sponte, and the government's neutrality is questionable in its decisionmaking process. *Id.* Furthermore, while no substantive right to these provisions exists, once in place and available to one party, they must be available to both. *Id.* at 1244. The Fifth Circuit saved these sections by reading them to *require* government acknowledgment of assistance given, and that the defendant could move the court to demand reasons for government refusal to recognize assistance. United States v. White, 869 F.2d 822, 828-29 (5th Cir.), *cert. denied*, 109 S. Ct. 3172 (1989); *see also* United States v. Justice, 877 F.2d 664, 668-69 (8th Cir.), *cert. denied*, 110 S. Ct. 375 (1989) (district court may grant departure in appropriate case even absent motion by government).

Judge Greene's attack was even more direct. *See Roberts*, 726 F. Supp. at 1359. He noted that two factors combine to place sentencing power in the hands of prosecutors: first, the wide latitude of statutes and guideline provisions to choose among when charging the accused; and second, the "relative inflexibility" in guideline sentencing that reduces the judge's contribution to "ministerial" proportions once the charges are set. *Id.* at 1363. He concluded that "judicial decisionmaking has until now remained the hallmark of the Anglo-American system of justice for the great bulk of criminal offenses." *Id.* at 1367. The use of a "Departure Committee" to interpret 18 U.S.C. § 3553(e) could not accord a defendant due process, and Judge Greene ordered his own "departure" hearing. *Id.* at 1377. This allowed the defense to subpoena the Departure Committee's records, minutes, and standards; however, the government settled with leniency on the next business day on the condition that the defendant withdraw the subpoena, which she did. *See* Chambers, *supra* note 339, at 14. Despite the government's attempt to justify these secret committees in terms of defendant profiles and possibly inept recommendations by inexperienced prosecutors, the government refuses to divulge its reasoning or methodology, leading to criticism that a "star chamber" has emerged. *Id.* Judge Greene concluded:

> [T]hese standardless processes administered by secret bodies, by which decisions of vast consequence to the defendants are arrived at, without the ac-

is made of this discretion, at least when reposed in the judiciary it was to be neutrally applied. The same cannot be said of the prosecutor seeking conviction.[342]

Thus, the new federal sentencing scheme will remain subject to attack and to attempts at reform of more than just the perceived constitutional flaws. While this comment concludes that neither the Act nor the Guidelines will prove constitutionally infirm as a whole, particular sections might fail when viewed in their developing manner of application. Concerns over due process remain bound up in the attempt to ensure fairness when the government deprives a person of liberty, and only the preliminary spadework has been done to commence building the new sentencing infrastructure. While the United States Supreme Court approved the foundation in *Mistretta*, the concern now must shift to the search for fairness and the final elimination of disparity that was the goal of Congress.

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> knowledgement that these defendants have any rights in the matter, whatever their efforts, bear out the fears of arbitrary decisionmaking that some expressed when the historically judicial subject of sentencing was largely transferred to the prosecution. These extraordinary procedures do not comport with the kind of process that the Constitution requires as a prerequisite to the loss of liberty.

Roberts, 726 F. Supp. at 1376.

342. Judge Greene believed that every judge has witnessed prosecutors who bring arbitrary, discriminatory, and "wholly disparate charges against defendants whose conduct was essentially identical . . . ." *Roberts*, 726 F. Supp. at 1366. While judicial disparity was at least subject to public view, prosecutor decisions are made "off the record." *Id.* And while judges are expected to be generally fair and impartial, the position of prosecutor is rightfully biased and aggressive, as this position demands partiality. *Id.* However, when viewing the government's use of committees to make decisions involving a defendant's liberty interest, Judge Greene concluded that "to substitute prosecutors for judges with respect to the sentencing responsibility is no more compatible with due process than would be the prosecutorial assumption of such other functions as the conduct of hearings on bail or on motions to suppress." *Id.* at 1368. As applied, the Act and the Guidelines violated due process. *Id.* at 1360.

APPENDIX I

The body of law addressing the constitutionality of the Federal Sentencing Reform Act and the Federal Sentencing Guidelines is a discrete group of cases commencing shortly after the Guidelines went into effect on November 1, 1987. This appendix collects these decisions through December 1989, although additional cases involving statutory construction, guideline application and departure, and other collateral issues exist. This appendix is further limited to those constitutional challenges addressed in this comment, which involved broad attacks made against the entire Act or Guidelines. This necessarily omits challenges made to individual statutory sections or a particular guideline as applied.

Each listed case contains the citation, the subsequent history, and the result reached. The columns correspond to the following questions:

I. Whether the Act violates principles concerning the delegation of legislative authority?
II. Whether the Act in any respect violates the separation of powers between the judicial and two political branches?
III. Whether the Guidelines violate an offender's right to due process? Alternatively stated, whether an offender has a due process right to an individualized, discretionary sentence?
IV. Whether enactment of the Guidelines violated the presentment clause?

A "Y" resolves the issue in the affirmative, indicating that the Act or the Guidelines were struck down. An "N" resolves the issue in the negative, indicating that the Act and the Guidelines were upheld. A dash indicates no decision on the issue.

CASES

	I	II	III	IV
UNITED STATES SUPREME COURT				
Mistretta v. United States, 109 S. Ct. 647 (1989).	N	N	—	—
D.C. CIRCUIT				
DISTRICT COURTS				
United States v. Roberts, 726 F. Supp. 1359 (D.D.C. 1989).	—	—	Y	—
United States v. Brodie, 686 F. Supp. 941 (D.D.C. 1988).	Y	Y	Y	—

	I	II	III	IV
FIRST CIRCUIT				
COURT OF APPEALS				
United States v. Seluk, 873 F.2d 15 (1st Cir. 1989).	—	—	N	—
DISTRICT COURTS				
United States v. Seluk, 691 F. Supp. 525 (D. Mass. 1988), *aff'd*, 873 F.2d 15 (1st Cir. 1989).	N	N	N	—
United States v. Alves, 688 F. Supp. 70 (D. Mass. 1988).	N	N	N	—
SECOND CIRCUIT				
COURT OF APPEALS				
United States v. Huerta, 878 F.2d 89 (2d Cir. 1989), *cert. denied*, 110 S. Ct. 845 (1990).	—	—	N	—
United States v. Vizcaino, 870 F.2d 52 (2d Cir. 1989).	—	—	N	—
DISTRICT COURTS				
United States v. Cortes, 697 F. Supp. 1305 (S.D.N.Y. 1988).	—	Y	—	—
United States v. Perez, 696 F. Supp. 55 (S.D.N.Y. 1988), *dismissed mem. sub nom. United States v. Cabrera*, 872 F.2d 1022 (2d Cir. 1989).	—	Y	—	—
United States v. Mendez, 691 F. Supp. 656 (S.D.N.Y. 1988).	—	Y	—	—
United States v. Velez-Naranjo, 691 F. Supp. 584 (D. Conn. 1988).	—	Y	—	—
United States v. Alafriz, 690 F. Supp. 1303 (S.D.N.Y. 1988).	Y	Y	Y	—
United States v. Sumpter, 690 F. Supp. 1274 (S.D.N.Y. 1988).	—	Y	—	—
United States v. Hickernell, 690 F. Supp. 272 (S.D.N.Y. 1988).	N	N	—	—
United States v. Olivencia, 689 F. Supp. 1319 (S.D.N.Y. 1988).	—	Y	—	—
United States v. Molina, 688 F. Supp. 819 (D. Conn. 1988).	—	Y	—	—
United States v. Dibiase, 687 F. Supp. 38 (D. Conn. 1988).	—	Y	—	—

	I	II	III	IV
THIRD CIRCUIT				
COURT OF APPEALS				
United States v. Frank, 864 F.2d 992 (3d Cir. 1988), *cert. denied*, 109 S. Ct. 2442 (1989).	N	N	N	—
DISTRICT COURTS				
United States v. Whyte, 694 F. Supp. 1194 (E.D. Pa. 1988).	—	Y	—	—
United States v. Schwartz, 692 F. Supp. 331 (D. Del. 1988).	N	N	—	—
United States v. Brown, 690 F. Supp. 1423 (E.D. Pa. 1988), *aff'd mem.* 869 F.2d 592 (3d. Cir.), *cert. denied*, 109 S. Ct. 2457 (1989).	—	Y	—	—
United States v. Kerr, 686 F. Supp. 1174 (W.D. Pa. 1988).	—	—	N	—
United States v. Frank, 682 F. Supp. 815 (W.D. Pa.), *modified*, 864 F.2d 992 (3d. Cir. 1988), *cert. denied*, 109 S. Ct. 2442 (1989).	N	Y	Y	—
FOURTH CIRCUIT				
COURT OF APPEALS				
United States v. Bolding, 876 F.2d 21 (4th Cir. 1989).	—	—	N	—
DISTRICT COURTS				
United States v. Richardson, 685 F. Supp. 111 (E.D.N.C. 1988).	N	N	N	—
United States v. Bolding, 683 F. Supp. 1003 (D. Md. 1988), *rev'd*, 876 F.2d 21 (4th Cir. 1989).	—	Y	Y	—
FIFTH CIRCUIT				
COURT OF APPEALS				
United States v. White, 869 F.2d 822 (5th Cir.), *cert. denied*, 109 S. Ct. 3172 (1989).	—	—	N	—
DISTRICT COURTS				
United States v. Perez, 685 F. Supp. 990 (W.D. Tex. 1988), *aff'd mem. sub nom. United States v. Carrales*, 888 F.2d 1389 (5th Cir. 1989), *cert. denied*, 110 S. Ct. 1153 (1990).	—	Y	Y	Y
United States v. Chambless, 680 F. Supp. 793 (E.D. La. 1988), *cert. denied*, 110 S. Ct. 560 (1989).	N	N	—	—

	I	II	III	IV
SIXTH CIRCUIT				
COURT OF APPEALS				
United States v. Jacobs, 877 F.2d 460 (6th Cir. 1989).	—	—	N	—
United States v. Allen, 873 F.2d 963 (6th Cir. 1989).	—	—	N	—
DISTRICT COURTS				
United States v. Thomas, 699 F. Supp. 147 (W.D. Tenn. 1988), *aff'd mem. sub nom. United States v. Ray*, 884 F.2d 1393 (6th Cir. 1989).	—	Y	—	—
United States v. Franco, 691 F. Supp. 1036 (E.D. Ky. 1988), *aff'd mem.* 878 F.2d 1436 (6th Cir.), *cert. denied*, 110 S. Ct. 340 (1989).	N	N	—	—
United States v. Williams, 691 F. Supp. 36 (M.D. Tenn. 1988).	Y	—	—	—
United States v. Landers, 690 F. Supp. 615 (W.D. Tenn.), *appeal dismissed mem. sub nom. United States v. Lievano*, 856 F.2d 196 (6th Cir. 1988).	N	N	N	—
United States v. Sparks, 687 F. Supp. 1145 (E.D. Mich. 1988).	N	N	—	N
United States v. Smith, 686 F. Supp. 1246 (W.D. Tenn. 1988).	N	N	—	—
SEVENTH CIRCUIT				
COURT OF APPEALS				
United States v. Pinto, 875 F.2d 143 (7th Cir. 1989).	—	—	N	—
DISTRICT COURTS				
United States v. Donatiu, 720 F. Supp. 619 (N.D. Ill. 1989).	—	—	N	—
United States v. Hallemeier, 715 F. Supp. 203 (N.D. Ill. 1989).	—	—	N	—
United States v. Jimenez, 708 F. Supp. 964 (S.D. Ind. 1989).	N	N	N	—
United States v. Dahlin, 701 F. Supp. 148 (N.D. Ill. 1988).	Y	—	—	—
United States v. Schetz, 698 F. Supp. 153 (N.D. Ill. 1988).	N	Y	N	—
United States v. Eastland, 694 F. Supp. 512 (N.D. Ill. 1988).	Y	—	—	—
United States v. Franz, 693 F. Supp. 687 (N.D. Ill. 1988), *appeal dismissed*, 886 F.2d 973 (7th Cir. 1989).	N	N	N	—

	I	II	III	IV
United States v. Weidner, 692 F. Supp. 968 (N.D. Ill. 1988).	N	N	N	—
United States v. Rosario, 687 F. Supp. 426 (N.D. Ill. 1988).	—	Y	—	—
United States v. Molander, 683 F. Supp. 701 (W.D. Wis. 1988).	N	Y	—	—
EIGHTH CIRCUIT				
COURT OF APPEALS				
United States v. Barnerd, 887 F.2d 841 (8th Cir. 1989).	—	—	N	N
United States v. Nunley, 873 F.2d 182 (8th Cir. 1989).	—	—	N	—
United States v. Brittman, 872 F.2d 827 (8th Cir.), *cert. denied*, 110 S. Ct. 184 (1989).	—	—	N	—
DISTRICT COURTS				
United States v. Smith, 713 F. Supp. 1315 (D. Minn. 1989).	—	—	—	N
United States v. Rodriguez, 691 F. Supp. 1252 (W.D. Mo. 1988), *aff'd mem.* 881 F.2d 1080 (8th Cir. 1989).	—	—	N	—
United States v. Whitfield, 689 F. Supp. 954 (D. Minn. 1988), *aff'd*, 874 F.2d 591 (8th Cir. 1989).	—	N	—	—
United States v. Serpa, 688 F. Supp. 1398 (D. Neb. 1988), *aff'd in part and rev'd in part mem.* 873 F.2d 1447 (8th Cir. 1989).	—	Y	—	—
United States v. Terrill, 688 F. Supp. 542 (W.D. Mo. 1988).	—	Y	—	—
United States v. Brittman, 687 F. Supp. 1329 (E.D. Ark. 1988), *aff'd in part and vacated in part*, 872 F.2d 827 (8th Cir.), *cert. denied*, 110 S. Ct. 184 (1989).	Y	Y	Y	Y
United States v. Horton, 685 F. Supp. 1479 (D. Minn. 1988).	—	Y	—	—
United States v. Johnson, 682 F. Supp. 1033 (W.D. Mo. 1988), *aff'd sub nom. Mistretta v. United States*, 109 S. Ct. 647 (1989).	N	N	—	—
United States v. Estrada, 680 F. Supp. 1312 (D. Minn. 1988), *rev'd mem.* 873 F.2d 1449 (8th Cir. 1989).	Y	Y	—	—

	I	II	III	IV
NINTH CIRCUIT				
COURT OF APPEALS				
Gubiensio-Ortiz v. Kanahele, 857 F.2d 1245 (9th Cir. 1988), *cert. granted and judgment vacated sub nom. United States v. Chavez-Sanchez*, 109 S. Ct. 859 (1989).	—	Y	—	—
DISTRICT COURTS				
United States v. Davis, 715 F. Supp. 1473 (C.D. Cal. 1989).	—	—	Y	—
United States v. Belgard, 694 F. Supp. 1488 (D. Or. 1988). *aff'd sub nom. United States v. Summers*, 895 F.2d 615 (9th Cir. 1990).	N	N	N	—
United States v. Macias-Pedroza, 694 F. Supp. 1406 (D. Ariz. 1988).	N	N	N	—
United States v. Knox, 694 F. Supp. 777 (W.D. Wash. 1988).	N	N	—	—
United States v. Amesquita-Padilla, 691 F. Supp. 277 (W.D. Wash. 1988).	N	N	—	—
United States v. Myers, 687 F. Supp. 1403 (N.D. Cal. 1988).	N	N	—	—
United States v. Lopez-Barron, 685 F. Supp. 725 (S.D. Cal. 1988).	—	Y	—	—
United States v. Ortega-Lopez, 684 F. Supp. 1506 (C.D. Cal. 1988) (en banc).	N	Y	Y	—
United States v. Martinez-Ortega, 684 F. Supp. 634 (D. Idaho 1988), *aff'd in part and remanded in part sub nom. United States v. Sanchez-Lopez*, 879 F.2d 541 (9th Cir. 1989).	—	Y	Y	—
United States v. Ruiz-Villanueva, 680 F. Supp. 1411 (S.D. Cal. 1988).	N	N	—	—
United States v. Arnold, 678 F. Supp. 1463 (S.D. Cal. 1988).	N	Y	—	—
TENTH CIRCUIT				
COURT OF APPEALS				
United States v. Thomas, 884 F.2d 540 (10th Cir. 1989).	—	—	N	—
DISTRICT COURTS				
United States v. Swapp, 695 F. Supp. 1140 (D. Utah 1988), *rev'd sub nom. United States v. Singer*, 868 F.2d 1201 (10th Cir. 1989).	Y	Y	—	Y
United States v. Costelon, 694 F. Supp. 786 (D. Colo. 1988).	N	N	N	—

	I	II	III	IV
United States v. Scott, 688 F. Supp. 1483 (D.N.M. 1988).	N	Y	Y	—
United States v. Smith, 686 F. Supp. 847 (D. Colo. 1988).	N	Y	—	—
United States v. Wilson, 686 F. Supp. 284 (W.D. Okla. 1988).	N	Y	—	—
United States v. Elliott, 684 F. Supp. 1535 (D. Colo. 1988).	—	Y	Y	—
United States v. Tolbert, 682 F. Supp. 1517 (D. Kan. 1988).	N	Y	—	—
ELEVENTH CIRCUIT				
COURT OF APPEALS				
United States v. Giltner, 889 F.2d 1004 (11th Cir. 1989).	—	—	N	—
United States v. Erves, 880 F.2d 376 (11th Cir.), *cert. denied sub nom. Richardson v. United States*, 110 S. Ct. 416 (1989).	—	—	N	—
United States v. Harris, 876 F.2d 1502 (11th Cir.), *cert. denied*, 110 S. Ct. 569 (1989).	—	—	N	—
DISTRICT COURTS,				
United States v. Kane, 691 F. Supp. 341 (N.D. Ga. 1988).	—	Y	—	—
United States v. Richardson, 690 F. Supp. 1030 (N.D. Ga. 1988).	N	Y	—	—
United States v. Bogle, 689 F. Supp. 1121 (S.D. Fla. 1988).	Y	Y	—	—
United States v. Fonseca, 686 F. Supp. 296 (S.D. Ala. 1988).	Y	Y	—	—
United States v. Russell, 685 F. Supp. 1245 (N.D. Ga. 1988), *rev'd in part and vacated in part mem.* 880 F.2d 419 (11th Cir. 1989).	N	Y	—	—
United States v. Diaz, 685 F. Supp. 1213 (S.D. Ala. 1988), *aff'd in part and rev'd in part mem. sub nom. United States v. Zubiaga*, 876 F.2d 900 (11th Cir. 1989).	—	Y	—	—
United States v. Allen, 685 F. Supp. 827 (N.D. Ala. 1988).	—	Y	—	—

APPENDIX II

SENTENCING TABLE
(IN MONTHS OF IMPRISONMENT)

Offense Level	Criminal History Category (Criminal History Points)					
	I (0 or 1)	II (2 or 3)	III (4, 5, 6)	IV (7, 8, 9)	V (10, 11, 12)	VI (13 or more)
1	0 - 6	0 - 6	0 - 6	0 - 6	0 - 6	0 - 6
2	0 - 6	0 - 6	0 - 6	0 - 6	0 - 6	1 - 7
3	0 - 6	0 - 6	0 - 6	0 - 6	2 - 8	3 - 9
4	0 - 6	0 - 6	0 - 6	2 - 8	4 - 10	6 - 12
5	0 - 6	0 - 6	1 - 7	4 - 10	6 - 12	9 - 15
6	0 - 6	1 - 7	2 - 8	6 - 12	9 - 15	12 - 18
7	1 - 7	2 - 8	4 - 10	8 - 14	12 - 18	15 - 21
8	2 - 8	4 - 10	6 - 12	10 - 16	15 - 21	18 - 24
9	4 - 10	6 - 12	8 - 14	12 - 18	18 - 24	21 - 27
10	6 - 12	8 - 14	10 - 16	15 - 21	21 - 27	24 - 30
11	8 - 14	10 - 16	12 - 18	18 - 24	24 - 30	27 - 33
12	10 - 16	12 - 18	15 - 21	21 - 27	27 - 33	30 - 37
13	12 - 18	15 - 21	18 - 24	24 - 30	30 - 37	33 - 41
14	15 - 21	18 - 24	21 - 27	27 - 33	33 - 41	37 - 46
15	18 - 24	21 - 27	24 - 30	30 - 37	37 - 46	41 - 51
16	21 - 27	24 - 30	27 - 33	33 - 41	41 - 51	46 - 57
17	24 - 30	27 - 33	30 - 37	37 - 46	46 - 57	51 - 63
18	27 - 33	30 - 37	33 - 41	41 - 51	51 - 63	57 - 71
19	30 - 37	33 - 41	37 - 46	46 - 57	57 - 71	63 - 78
20	33 - 41	37 - 46	41 - 51	51 - 63	63 - 78	70 - 87
21	37 - 46	41 - 51	46 - 57	57 - 71	70 - 87	77 - 96
22	41 - 51	46 - 57	51 - 63	63 - 78	77 - 96	84 - 105
23	46 - 57	51 - 63	57 - 71	70 - 87	84 - 105	92 - 115
24	51 - 63	57 - 71	63 - 78	77 - 96	92 - 115	100 - 125
25	57 - 71	63 - 78	70 - 87	84 - 105	100 - 125	110 - 137
26	63 - 78	70 - 87	78 - 97	92 - 115	110 - 137	120 - 150
27	70 - 87	78 - 97	87 - 108	100 - 125	120 - 150	130 - 162
28	78 - 97	87 - 108	97 - 121	110 - 137	130 - 162	140 - 175
29	87 - 108	97 - 121	108 - 135	121 - 151	140 - 175	151 - 188
30	97 - 121	108 - 135	121 - 151	135 - 168	151 - 188	168 - 210
31	108 - 135	121 - 151	135 - 168	151 - 188	168 - 210	188 - 235
32	121 - 151	135 - 168	151 - 188	168 - 210	188 - 235	210 - 262
33	135 - 168	151 - 188	168 - 210	188 - 265	210 - 262	235 - 293
34	151 - 188	168 - 210	188 - 235	210 - 262	235 - 293	262 - 327
35	168 - 210	188 - 235	210 - 262	235 - 293	262 - 327	292 - 365
36	188 - 235	210 - 262	235 - 293	262 - 327	292 - 365	324 - 405
37	210 - 262	235 - 293	262 - 327	292 - 365	324 - 405	360 - life
38	235 - 293	262 - 327	292 - 365	324 - 405	360 - life	360 - life
39	262 - 327	292 - 365	324 - 405	360 - life	360 - life	360 - life
40	292 - 365	324 - 405	360 - life	360 - life	360 - life	360 - life
41	324 - 405	360 - life	360 - life	360 - life	360 - life	360 - life
42	360 - life	360 - life	360 - life	360 - life	360 - life	360 - life
43	life	life	life	life	life	life