

CONSTITUTIONAL LAW—The Sentencing Reform Act of 1984, Establishing the Sentencing Commission, Does Not Violate Either the Constitutional Doctrines of Nondelegation or Separation of Powers—*Mistretta v. United States*, 109 S. Ct. 647 (1989).

John M. Mistretta and Nancy L. Ruxlow were indicted on three counts for crimes arising out of a cocaine sale.<sup>1</sup> Mistretta challenged the constitutionality of the Sentencing Guidelines<sup>2</sup> prior to his trial.<sup>3</sup> The challenge failed, whereupon Mistretta plead guilty to conspiracy and agreement to distribute cocaine.<sup>4</sup> He was sentenced according to the Guidelines to serve eighteen months in prison followed by a three-year probation.<sup>5</sup> He was also instructed to pay a \$1,000 fine and a \$50 special assessment.<sup>6</sup>

Mistretta appealed his sentence to the Eighth Circuit Court of Appeals.<sup>7</sup> However, before the Eighth Circuit had an opportunity to adjudicate the constitutionality of the Guidelines, the United States Supreme Court granted a writ of certiorari to both Mistretta and the United States.<sup>8</sup>

The appeal centered around the Sentencing Reform Act of 1984.<sup>9</sup> Essentially, the Act transferred the power of the sentencing judge and the power of the Parole Commission to the Sentencing Commission.<sup>10</sup> The Act directed the Sentencing Commission to promulgate sentencing guidelines for use in all federal criminal cases.<sup>11</sup> The Guidelines contain sentences for every federal crime which are fixed in duration and binding on the courts.<sup>12</sup> The Guidelines do allow some discretion for the sentencing judge in extenuating circumstances.<sup>13</sup>

The Commission itself was envisioned by Congress to act “‘as an independent commission in the judicial branch of the United States.’”<sup>14</sup> The Commission consists of seven voting members, all appointed by the Presi-

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1. *Mistretta v. United States*, 109 S. Ct. 647, 653 (1989).

2. *Id.* The Guidelines are the sentencing rules promulgated by the Sentencing Commission [hereinafter Commission] pursuant to the Sentencing Reform Act of 1984 [hereinafter Act]. The Act is found at 18 U.S.C. §§ 3551-3581 (Supp. IV 1986), 28 U.S.C. §§ 991-998 (Supp. IV 1986).

3. *Mistretta v. United States*, 109 S. Ct. at 653.

4. *Id.*

5. *Id.* at 654.

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.* at 649.

10. *Id.* at 652.

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.* (quoting 28 U.S.C. § 991(a) (Supp. IV 1986)).

dent and subject to Senate confirmation.<sup>15</sup> There must be at least three active federal judges on the Commission, each recommended to the President by the Judicial Conference of the United States.<sup>16</sup> In addition, the Attorney General of the United States sits *ex officio*.<sup>17</sup> The President may remove a Commissioner only for "neglect of duty or malfeasance in office or for other good cause shown."<sup>18</sup>

The Commission has duties beyond the initial promulgation of the Guidelines.<sup>19</sup> It must, from time to time, "review and revise" the Guidelines.<sup>20</sup> The Commission must report any amendments to Congress and must issue an annual analysis regarding the operation of the Guidelines.<sup>21</sup> Moreover, the Commission is given the authority and the duty to issue policy statements on the Guidelines' application and to issue other policy statements "as are necessary to carry out the purposes" of the legislation.<sup>22</sup> Finally, the Commission must provide training programs in sentencing techniques to judicial personnel and must monitor probation officers.<sup>23</sup>

Mistretta challenged the constitutional validity of the Guidelines.<sup>24</sup> Rather than directing his challenge at the Guidelines themselves, he challenged the Commission which promulgated them.<sup>25</sup> The grounds of the challenge were twofold. First, Mistretta alleged that Congress had delegated excessive authority to the Commission.<sup>26</sup> Second, he argued that the Commission was organized and created in a fashion that violated the separation of powers doctrine.<sup>27</sup> The United States District Court for the Western District of Missouri upheld the Act.<sup>28</sup> The United States Supreme Court *held*, affirmed.<sup>29</sup> The Sentencing Reform Act of 1984, in establishing the Sentencing Commission, does not violate either the constitutional doctrines

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15. *Id.* (citing 28 U.S.C. § 991(a) (Supp. IV 1986)).

16. *Id.* (quoting 28 U.S.C. § 991(a) (Supp. IV 1986)). The Judicial Conference of the United States consists of the Chief Justice of the United States Supreme Court and other members of the judiciary. 28 U.S.C. § 331 (1982). The Conference monitors the administration of the courts, and it prepares plans for the assignment of judges. *Id.* It is also responsible for monitoring the effectiveness of the various rules promulgated by the Supreme Court. *Id.*

17. *Mistretta v. United States*, 109 S. Ct. at 652.

18. *Id.* at 652-53 (quoting 28 U.S.C. § 991(a) (Supp. IV 1986)).

19. *Id.* at 653.

20. *Id.* (quoting 28 U.S.C. § 994(o) (Supp. IV 1986)).

21. *Id.* (citing 28 U.S.C. § 994 (p), (w) (Supp. IV 1986)).

22. *Id.* (quoting 28 U.S.C. §§ 994(a)(2), 995(a)(1) (Supp. IV 1986)).

23. *Id.* (citing 28 U.S.C. § 995(a)(9), (18) (Supp. IV 1986)).

24. *Id.* at 649.

25. *Id.* at 653.

26. *Id.* See *infra* notes 29-59 and accompanying text.

27. *Mistretta v. United States*, 109 S. Ct. at 653. See *infra* notes 66-133 and accompanying text.

28. *Mistretta v. United States*, 109 S. Ct. at 653.

29. *Id.* at 675. Justice Blackmun delivered the Court's opinion. Chief Justice Rehnquist and Justices Marshall, Stevens, O'Connor, and Kennedy joined in the opinion. Justice Brennan joined all but note 11 of the opinion. Justice Scalia was the sole dissenter.

of nondelegation or separation of powers. *Mistretta v. United States*, 109 S. Ct. 647 (1989).

The Court, through Justice Blackmun, began its analysis with the nondelegation doctrine.<sup>30</sup> At the outset of this discussion the Court stated that it would read statutes narrowly when considering a challenge based on nondelegation.<sup>31</sup> Under a narrow construction, statutes which might otherwise be unconstitutional are upheld.<sup>32</sup>

Justice Blackmun set out three variations of the standard which statutes must meet in order to pass scrutiny under a challenge based on excessive delegation of authority.<sup>33</sup> First, quoting Chief Justice Taft in *J.W. Hampton, Jr. & Co. v. United States*,<sup>34</sup> the majority stated that "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.'"<sup>35</sup> Second, the Court declared that a statute is constitutional if Congress clearly outlines the policy underlying the statute, states which public agency is to apply it, and establishes the boundaries of the delegated authority.<sup>36</sup> Finally, the Court postulated, "'Only if we could say that there is an absence of standards for the guidance of the [agency], so that it would be impossible . . . to ascertain whether the will of Congress has been obeyed, would we be justified in'" ruling the statute unconstitutional.<sup>37</sup>

In applying these three standards, the Court was "driven" by pragmatic considerations.<sup>38</sup> Justice Blackmun first stated that Congress is not prevented from seeking assistance from other branches of the federal government.<sup>39</sup> Building on this idea, he stated, "Congress simply cannot do its job absent an ability to delegate power under broad general directives."<sup>40</sup> Recognizing that the establishment of sentencing guidelines, with the inherent morass of factors to be considered is a task better suited for a small expert body, the majority found that there were sufficient guidelines within the statute to support an "intelligible principle" under which the Commission

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30. *Id.* at 654-58.

31. *Id.* at 655 n.7.

32. *Id.* (citing *Industrial Union Dep't. v. American Petroleum Inst.*, 448 U.S. 607, 646 (1980); *National Cable Television Ass'n v. United States*, 415 U.S. 336, 342 (1974)).

33. *Id.* at 654, 655, 658.

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

35. *Mistretta v. United States*, 109 S. Ct. at 654 (quoting *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. at 409) (emphasis added).

36. *Id.* at 655 (citing *American Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946)).

37. *Id.* at 658 (quoting *Yakus v. United States*, 321 U.S. 414, 425-26 (1944)).

38. *Id.* at 654.

39. *Id.* at 654-55.

40. *Id.* at 654.

could function.<sup>41</sup>

The Court, noting that historically it had overturned only two cases for excessive delegation,<sup>42</sup> concluded that delegation of authority under broad standards can be constitutionally valid.<sup>43</sup> Further, the sentencing commission, or any body to which authority has been delegated, is not precluded from making policy judgments within these broad standards.<sup>44</sup> The nature of promulgating regulations, rules, or guidelines is such that determinations of fact and policy must be made. Delegation to an expert body is an appropriate means to accomplish such tasks.<sup>45</sup>

The Court endeavored to outline the extent to which Congress has limited the discretion of the Sentencing Commission.<sup>46</sup> The Commission was assigned three goals: (1) to meet the purposes of sentencing;<sup>47</sup> (2) to promote certainty and fairness in sentencing by avoiding disparity between similarly situated defendants; and (3) to reflect advances in criminology.<sup>48</sup> The purposes set forth were: (1) to punish offenses; (2) to deter criminal conduct; (3) to protect the public from offenders; and (4) to correct the offender.<sup>49</sup> These goals and purposes were to be accomplished through the implementation of the "guidelines system."<sup>50</sup>

In developing the Guidelines, the Commission was limited in its discre-

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41. *Id.* at 658.

42. *Id.* at 655 (citing *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935)).

These anomalous cases on the issue of excessive delegation of power were decided during the depression. *Panama Refining* involved a Presidential order that prohibited the interstate transportation of petroleum produced in excess of limits imposed by a state. *Panama Refining Co. v. Ryan*, 293 U.S. 388, 405-06 (1935). The order was issued pursuant to section 9(c) of the National Industrial Recovery Act ("NIRA"). *Id.* at 406. The test applied by the Court examined (1) whether the statute declared Congressional policy, (2) whether Congress had established a standard for the President to follow, and (3) whether Congress had required the President to make a finding of need. *Id.* at 414. The Court held that the statute totally lacked guidance. *Id.* at 414-20, 430. Conceptually, the President could have devised any means to accomplish the purpose of the statute, and the statute's grant of unlimited authority was therefore unconstitutional. *Id.* at 420.

*Schechter Poultry* discussed the "Live Poultry Code." *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 521 (1935). The President promulgated the code pursuant to authorization in the NIRA. *Id.* The code's aim was that of fair competition. *Id.* at 523. However, the statute did not define "fair competition" leaving the president with broad discretion to interpret the phrase. *Id.* at 530-31. Again, the Court held that the authorization was "virtually unfettered" and thus, unconstitutional. *Id.* at 542.

43. *Mistretta v. United States*, 109 S. Ct. at 655.

44. *Id.* at 658.

45. *Id.*

46. *Id.* at 653-58.

47. *Id.* at 655.

48. *Id.* (citing 28 U.S.C. § 991(b)(1) (Supp. IV 1986)).

49. *Id.* at 655-56 (citing 18 U.S.C. § 3553(a)(2) (Supp. IV 1986)).

50. *Id.* at 656.

tion by narrow sentencing ranges.<sup>51</sup> Congress specified that the Commission utilize the current average sentences to structure the new Guidelines.<sup>52</sup> The Commission, in determining what sentences were to be given, to whom, and for what, was further limited by twenty factors which Congress had established.<sup>53</sup> Seven of those factors were to be considered by the Commission in establishing offense categories.<sup>54</sup> Eleven factors were to be considered in establishing defendant categories.<sup>55</sup> Two other factors, one mitigating and one aggravating, were specifically enumerated as considerations for the Commission to discuss.<sup>56</sup> In addition, Congress set the maximum sentence possible, relative to the minimum sentence promulgated by the Commission.<sup>57</sup>

According to the Court, all of these goals, purposes, and factors were sufficient standards by which the Commission could operate.<sup>58</sup> Although the Commission had to make *some* policy decisions, as long as they were within the bounds of the "intelligible principle" set by Congress they were not unconstitutional.<sup>59</sup>

Justice Scalia, the sole dissenter, agreed with the majority regarding the excessive delegation challenge.<sup>60</sup> His rationale was, however, more direct. First, the Guidelines are laden with policy decisions.<sup>61</sup> Second, no statute can be so precise as to relieve a delegated agency of the necessity of making policy choices.<sup>62</sup> Third, the point of debate in considering a charge of excessive delegation is one of degree; i.e., how much delegation is too much?<sup>63</sup> Finally, the Court should not "second-guess" Congress' decision regarding

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51. *Id.* (citing 28 U.S.C. § 994(b) (Supp. IV 1986)).

52. *Id.* (citing 28 U.S.C. § 994(m) (Supp. IV 1986)).

53. *Id.* at 656-57.

54. *Id.* at 656. The seven factors include, "[T]he grade of the offense; the aggravating and mitigating circumstances of the crime; the nature and degree of the harm caused by the crime; the community view of the gravity of the offense; the public concern generated by the crime; the deterrent effect that a particular sentence may have on others; and the current incidence of the offense." *Id.* (citing 28 U.S.C. § 994(c)(1)-(7) (Supp. IV 1986)).

55. *Id.* The eleven factors are: "[O]ffender's age, education, vocational skills, mental and emotional condition, physical condition (including drug dependence), previous employment record, family ties and responsibilities, community ties, role in the offense, criminal history, and degree of dependence upon crime for a livelihood." *Id.* (citing 28 U.S.C. § 994(d)(1)-(11) (Supp. IV 1986)).

56. *Id.* at 657. The two additionally cited factors were multiple or repeat offenses and helping the government in its investigation. *Id.* (citing 28 U.S.C. § 994(l), (n) (Supp. IV 1986)).

57. *Id.* at 656. "[T]he maximum of the range established for such a term shall not exceed the minimum of that range by more than the greater of 25 percent or 6 months, except that, if the minimum term of the range is 30 years or more, the maximum may be life imprisonment." *Id.* (quoting 28 U.S.C. § 994(b)(2) (Supp. IV 1986)).

58. *Id.* at 658.

59. *Id.*

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

61. *Id.* at 676 (Scalia, J., dissenting).

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

63. *Id.* (Scalia, J., dissenting).



how much delegation should be allowed.<sup>64</sup> Under this rationale, Justice Scalia agreed that the Act does not amount to an excessive delegation of power.<sup>65</sup>

Having disposed of the excessive delegation challenge, the majority turned to the more difficult question of whether the Act violated the separation of powers doctrine.<sup>66</sup> Mistretta challenged that the establishment of the Commission contravened the purpose behind the separation of powers doctrine.<sup>67</sup> He raised three general issues: (1) the placement of the Commission within the judicial branch is unconstitutional;<sup>68</sup> (2) the requirement of having three sitting federal judges on the Commission is unconstitutional;<sup>69</sup> and (3) the President's appointment and removal power over the Commissioners is unconstitutional.<sup>70</sup>

In addressing the separation of powers challenge, the Court began with a very broad statement. It reiterated the Framers' position that, to avoid the innate despotic tendency of governmental bodies, no one branch of the government should be able to legislate, execute, and adjudicate independently of the others.<sup>71</sup> However, this is not to be construed as mandating an absolute and airtight separation of functions.<sup>72</sup> The separation of powers doctrine "enjoins upon [the] branches separateness but interdependence, autonomy but reciprocity."<sup>73</sup>

Having laid out the basic principles of the separation of powers doctrine, Justice Blackmun established as the focus of inquiry whether the statute prevents one branch of government from accomplishing its constitutionally defined functions.<sup>74</sup> More specifically, the competing issues became whether the powers with which the Commission was vested "are more appropriately performed by the other Branches," or "undermine the integrity of the Judiciary."<sup>75</sup> As applied to the Sentencing Commission, Justice Blackmun stated that "our inquiry is focused on the 'unique aspects of the congressional plan at issue and its practical consequences in light of the larger

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64. *Id.* (Scalia, J., dissenting).

65. *Id.* (Scalia, J., dissenting).

66. *See id.* at 658-75.

67. *Id.* at 660.

68. *Id.* at 661-67. *See infra* notes 78-99 and accompanying text.

69. *Mistretta v. United States*, 109 S. Ct. at 667-73. *See infra* notes 100-125 and accompanying text.

70. *Mistretta v. United States*, 109 S. Ct. at 673-75. *See infra* notes 126-133 and accompanying text.

71. *Mistretta v. United States*, 109 S. Ct. at 659 (citing *THE FEDERALIST* No. 47, at 325-26 (J. Madison) (J. Cooke ed. 1961)).

72. *Id.* (citing *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 443 (1977); *United States v. Nixon*, 418 U.S. 683 (1974)).

73. *Id.* (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring)).

74. *Id.* at 660 (citing *Nixon v. Administrator of Gen. Servs.*, 433 U.S. at 443)).

75. *Id.* at 661.

concerns that underlie Article III.'"<sup>76</sup> In his analysis, Justice Blackmun was concerned with preventing the encroachment and aggrandizement of one branch of government at the expense of the others.<sup>77</sup>

Mistretta first challenged the placement of the Commission within the judicial branch.<sup>78</sup> Initially, the Court noted that there is no precedent suggesting that Congress may not place a rulemaking entity within the judicial branch.<sup>79</sup> Indeed, precedent dictates that Congress may delegate nonadjudicatory functions, which are central to the judicial mission, to the judiciary.<sup>80</sup> The Court used the Rules Enabling Act of 1934<sup>81</sup> as an example.<sup>82</sup> The Court also cited *Sibbach v. Wilson & Co.*,<sup>83</sup> which challenged the constitutionality of the procedure and evidentiary rulemaking power conferred on the judiciary.<sup>84</sup> The Court held that Congress can confer upon the judiciary the power to make rules not inconsistent with the statute so long as the rules promulgated pertain to the judicial branch.<sup>85</sup>

Justice Blackmun reasoned that because of the close relationship of sentencing to the central mission of the judicial branch, the Commission's powers "are consonant with the integrity of the Branch and are not more appropriate for another Branch."<sup>86</sup> In placing the Commission within the judicial branch, Congress "simply acknowledge[d] the role that the Judiciary always has played, and continues to play, in sentencing."<sup>87</sup> Indeed, a scheme placing the Commission in another branch could be viewed as an

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76. *Id.* at 665 (quoting *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 857 (1986)).

77. *Id.* at 659.

78. *Id.* at 661.

79. *Id.* at 662.

80. *Id.*

81. 28 U.S.C. § 2072 (1982). The general rules enabling statute states, "The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed by the Supreme Court." 28 U.S.C. § 2071 (1982). Section 2072 authorizes the promulgation of the Federal Rules of Civil Procedure. 28 U.S.C. § 2072 (1982). Section 2076 authorizes the promulgation of the Federal Rules of Evidence. 28 U.S.C. § 2076 (1982).

82. *Mistretta v. United States*, 109 S. Ct. at 662.

83. *Sibbach v. Wilson & Co.*, 312 U.S. 1 (1941).

84. *Mistretta v. United States*, 109 S. Ct. at 662 (citing *Sibbach v. Wilson & Co.*, 312 U.S. at 3).

85. *Id.* (citing *Sibbach v. Wilson & Co.*, 312 U.S. at 9-10). See also *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1 (1825).

86. *Mistretta v. United States*, 109 S. Ct. at 664.

87. *Id.* The Court alluded to its discussion of the roles historically played by each branch in fixing, giving, and executing sentences. In sum, Congress has always had the power to fix punishment, but has readily deferred to the judges' discretion. The executive's role is deciding whether and when to release prisoners before completing the term of their sentences. The system of indeterminate sentences and parole which evolved, was the evil to which the Act was directed. *Id.* at 650-52.

encroachment upon the judiciary.<sup>88</sup>

The Court made short work of the argument that the judiciary's integrity was damaged by having the Commission located within the judicial branch. The "'practical consequences' of locating the Commission within the Judicial Branch pose no threat of undermining the integrity of the Judicial Branch or of expanding [its] powers beyond constitutional bounds."<sup>89</sup> First, the Commission's power is not meaningfully related to the function of courts for purposes of separation of powers.<sup>90</sup> The Commission does not exercise judicial power because it does not hear cases or controversies; neither is it accountable to members of the judiciary.<sup>91</sup> Rather, the Commission as a whole is accountable to Congress, and the Commissioners are individually subject to the President's removal power.<sup>92</sup> Second, the judiciary's power has not been increased because, as noted in the historical discussion,<sup>93</sup> sentencing has traditionally been left to judges.<sup>94</sup> If anything, the judicial branch's power has been diminished by Congress' imposition of the framework within which the Commission must work.<sup>95</sup>

Furthermore, because the Commission was specifically placed in the judicial branch to take advantage of the judiciary's unique experience and expertise, the placement should not harm the judiciary's integrity.<sup>96</sup> Rather, the judiciary, through the Commission, could pass sentence more accurately and uniformly than it had previously done, which is "consonant with the integrity of the Branch."<sup>97</sup>

In the end, the Court found that there was no aggrandizement or impairment of any branch sufficient to render the Act unconstitutional.<sup>98</sup> The Court limited this part of the opinion to the facts of this case, and noted that it should not be applied to a case where similar authority is granted to a court rather than a commission.<sup>99</sup>

Secondly, Mistretta contended that the composition of the Commission was unconstitutional under the separation of powers doctrine.<sup>100</sup> The majority was troubled by this contention which was based on the statutory re-

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88. *Id.* at 664 n.17 (citing *Reform of the Federal Criminal Laws: Hearing on S. 1437 Before the Subcomm. on Criminal Laws and Procedure of the Senate Comm. on the Judiciary*, 95th Cong., 1st Sess. 9005 (1977)).

89. *Id.* at 665.

90. *Id.*

91. *Id.*

92. *Id.* at 666.

93. *See supra* note 87.

94. *Mistretta v. United States*, 109 S. Ct. at 666.

95. *See supra* notes 46-59 and accompanying text.

96. *Mistretta v. United States*, 109 S. Ct. at 667.

97. *Id.* at 664.

98. *Id.* at 666.

99. *Id.* at 666 n.20.

100. *Id.* at 667.



quirement that three active federal judges sit on the Commission.<sup>101</sup> However, Justice Blackmun immediately set the tone for the Court's analysis by noting that there is no textual prohibition against such a scheme.<sup>102</sup> The Court made reference to the incompatibility clause,<sup>103</sup> which applies to members of Congress, but concluded that it does not similarly apply to judges.<sup>104</sup> In explaining its conclusion, the majority noted that proposals were made to the Constitutional Convention that would have established a similar incompatibility clause for judges, but those proposals were rejected before they came to a vote.<sup>105</sup>

Justice Blackmun next delineated several examples of active federal judges who participated in extrajudicial bodies.<sup>106</sup> The examples given were exclusively examples of sitting United States Supreme Court justices performing extrajudicial functions.<sup>107</sup> Chief Justice John Jay, the first Chief Justice, was simultaneously our Ambassador to Great Britain.<sup>108</sup> Chief Justice Oliver Ellsworth was concurrently the Ambassador to France.<sup>109</sup> Chief Justice John Marshall also served, although briefly, as the Secretary of State.<sup>110</sup> Chief Justice Earl Warren chaired the commission which investigated the assassination of President John F. Kennedy, although he had grave reservations in doing so.<sup>111</sup>

The Court turned next to a situation in which courts, not just judges, were assigned the function of determining pensions for Revolutionary War soldiers, subject to review by the Secretary of War. The Court noted that three circuit court rulings had invalidated such a scheme on the grounds that a court's power cannot be extended to duties better performed by the executive branch.<sup>112</sup> Closer to the point, Justice Blackmun referred to a case in which the Court directly held that "*judges* [as opposed to courts] acting not in their judicial capacities but as individual commissioners could exer-

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101. *Id.*

102. *Id.*

103. U.S. CONST. art. I, § 6, cl. 2. The clause states:

No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been increased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

*Id.*

104. *Mistretta v. United States*, 109 S. Ct. at 668.

105. *Id.* & n.21.

106. *Id.* at 668-69.

107. *Id.* & nn.22-26.

108. *Id.* at 668.

109. *Id.*

110. *Id.*

111. *Id.* at 669 & n.26.

112. *Id.* at 670 (citing *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792)).

cise the duties conferred upon them by the statute."<sup>113</sup>

In the instant case, the Court found that federal judges who serve on the Sentencing Commission do not do so as Article III judges.<sup>114</sup> They do not wield judicial power as members of the Commission, but rather, they exercise administrative power.<sup>115</sup> "[T]he Constitution . . . does not forbid judges from wearing two hats; it merely forbids them from wearing both hats at the same time."<sup>116</sup> The "ultimate inquiry," however, is whether the appointment to and service on the Commission injures the judiciary's integrity.<sup>117</sup>

Mistretta argued that by having active federal judges serve on the Commission, the judiciary loses its aura of impartiality.<sup>118</sup> The Court held that having the judges perform this extrajudicial function does not affect the judiciary's impartiality in adjudicating sentencing issues.<sup>119</sup> the "danger [of affecting impartiality] is far too remote for consideration . . . ."<sup>120</sup>

Although concerned by the allegation that the public's confidence in the courts may be undermined; Justice Blackmun had no difficulty in defeating the allegation.<sup>121</sup> "[T]he Sentencing Commission is devoted exclusively to the development of rules to rationalize a process that has been and will continue to be performed exclusively by the Judicial Branch."<sup>122</sup> The Commission "does not enlist the resources or reputation of the Judicial Branch in either the legislative business of determining what conduct should be criminalized or the executive business of enforcing the law."<sup>123</sup> These two observations were the basis of the majority's decision that the judiciary's integrity would remain unscathed.<sup>124</sup> Because no textual provision prohibits placing the Commission within the judicial branch, past practice supports the placement. Furthermore, because the judiciary's integrity is unharmed, Mistretta's argument that the composition of the Commission violates the separation of powers doctrine was rejected by the Court.<sup>125</sup>

Finally, Mistretta argued that the President's appointment and removal power violated the separation of powers doctrine because it unduly interferes in the performance of the judicial branch's constitutional functions.<sup>126</sup>

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113. *Id.* (citing *United States v. Ferriera*, 54 U.S. (13 How.) 40, 50 (1852) (emphasis added)).

114. *Id.* at 671.

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.* at 672.

120. *Id.*

121. *Id.*

122. *Id.* at 673.

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

The Court distinguished this from the more common challenge that Congress has unconstitutionally limited the President's removal power or that Congress itself has retained such power unconstitutionally.<sup>127</sup> Rather, the challenge goes to the validity of the power's existence, regardless of limitations *vel non*.<sup>128</sup>

In summary fashion, the Court found this contention baseless.<sup>129</sup> Justice Blackmun stated that the President's control over the Commissioners had no effect on the judges, "as judges."<sup>130</sup> The limited removal power over Commissioners could not be used to remove the judges from the bench nor could it affect the judges' compensation.<sup>131</sup> Moreover, the power to remove a Commissioner could have no resulting coercive effect upon the performance of judicial functions.<sup>132</sup> Therefore, the President's power to appoint and remove Commissioners does not affect the independence of the judiciary.<sup>133</sup>

Justice Scalia dissented from the majority's analysis of the separation of powers challenge.<sup>134</sup> He stated that because Congress' ability to delegate is virtually uncontrollable, given the deference accorded Congress' decision in this matter,<sup>135</sup> the Court must rigorously protect the structure of the government which was designed to prevent excessive delegation.<sup>136</sup> Congress is the only governmental branch that has the constitutional authority to make law, except in conjunction with the exercise of executive or judicial power.<sup>137</sup> Given that the delegation of authority is inevitable, the question becomes "whether the *degree* of generality contained in the authorization . . . of . . . power . . . is so unacceptably high as to *amount* to a delegation of legislative power."<sup>138</sup> Thus, the issue is not whether the delegation was excessive because of the lack of adequate standards,<sup>139</sup> but whether there was "any delegation of legislative power" at all.<sup>140</sup>

"The true distinction . . . is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution."<sup>141</sup> The dissent ar-

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127. *Id.* at 673 n.30.

128. *Id.* at 674.

129. *Id.* at 674-75.

130. *Id.* at 674.

131. *Id.* at 675.

132. *Id.* & n.35.

133. *Id.* at 675.

134. *See id.* at 676 (Scalia, J., dissenting).

135. *See supra* note 64 and accompanying text.

136. *Mistretta v. United States*, 109 S. Ct. at 677-78 (Scalia, J., dissenting).

137. *Id.* at 678 (Scalia, J., dissenting).

138. *Id.* at 679 (Scalia, J., dissenting) (emphasis in original).

139. *See supra* notes 33-37 and accompanying text.

140. *Mistretta v. United States*, 109 S. Ct. at 679 (Scalia, J., dissenting) (emphasis in original).

141. *Id.* at 678 (Scalia, J., dissenting) (quoting *Field v. Clark*, 143 U.S. 649, 693-94 (1892)) (emphasis deleted).

gued that the power delegated by Congress to the Commission was the power to legislate.<sup>142</sup> The Commission does not exercise any executive or judicial power, nor is it accountable to any branch other than the legislative.<sup>143</sup> Therefore, the Commission's power "is not ancillary" to any other delegated power but is quite clearly legislative in nature.<sup>144</sup> In effect, Justice Scalia concluded that Congress has created a fourth branch, or at least a branchless agency, by placing the Sentencing Commission, endowed with its arguably legislative powers, in the judicial branch.<sup>145</sup>

The effects of this case are not readily visible. Regardless of the decision, *Mistretta* would have gone to jail with or without the Guidelines. The only question relative to him and the other convicted defendants, was how long they were to be incarcerated. The immediate effect was to reverse the decisions of nearly seventy-five percent of the federal district court judges who had addressed the issues set forth in *Mistretta*.<sup>146</sup> The full impact of this decision, however, may not be clear until Congress delegates authority to other bodies which are not one of the branches of the federal government.

Justice Scalia's dissent may appear to be reactionary, but it does have merit. The limit to Congress' ability to delegate its lawmaking authority is somewhat nebulous. Yet, in light of all of the factors and considerations that Congress imposed upon the Sentencing Commission, it would seem that a limit has been established, both minimum and maximum. The question of what limits are constitutionally sufficient is one of degree. The more critical question is whether the separation of powers doctrine is being emasculated just as the nondelegation doctrine had been after 1935. *Mistretta* is certainly the first step in that direction.

Roger Eric Nell

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

143. *Id.* (Scalia, J., dissenting).

144. *Id.* at 680 (Scalia, J., dissenting). The issue of ancillary authority was arguably raised by the majority. *Id.* at 664-67. *Mistretta* argued that the Guidelines are not analogous to other rules such as civil procedure or evidence, because they are substantive. *Id.* at 664-65. Thus, the judicial branch, because the Commission was located therein, was entangled in political decision making. *Id.* at 665. The majority responded that although the Guidelines are more substantive than other rules, the labeling of rules as "substantive" would not invalidate the Guidelines. *Id.* Further, the extent of decision making is no greater than what judges had always done, individually. *Id.* at 666. Therefore, because the power to establish the Guidelines is within the ambit of judicial authority and arguably ancillary (though the majority never used that term), the Commission's authority to do so is not unconstitutional. *Id.* at 667.

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

146. Using a Westlaw search, the author retrieved 125 cases which had addressed the issues decided in *Mistretta*. The total number of cases considers consolidated cases individually. Ninety-nine of the cases were overturned by *Mistretta*. Of the 115 judges who participated in the decisions of these cases, 83 were effectively reversed.