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THE UNITED STATES SENTENCING GUIDELINES: HAS SENTENCING REFORM OVERSTEPPED SEPARATION OF POWERS?*

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

Petitioner moved to have the United States Sentencing Commission's Sentencing Guidelines declared unconstitutional.¹ Petitioner alleged establishment of the Commission violated the separation of powers and the nondelegation doctrines.² The district court rejected petitioner's delegation argument and found the Commission comparable to an executive agency and the Guidelines similar to substantive rules promulgated by other agencies.³ The district court sentenced petitioner according to the Guidelines.⁴ On certiorari,⁵ the Supreme Court affirmed the judgment of the district court, and HELD, that Congress neither violated the separation of powers doctrine nor delegated excessive legislative power.⁶ The Supreme Court found the establishment of the Commission as an independent agency in the judicial branch, the requirement of at least three federal judges on the Commission, and the grant of limited appointment and removal power to the President constituted a valid governmental structure.⁷

**Editor's Note:* This comment received the *Huber Hurst Award* for the outstanding case comment submitted in the Spring 1989 semester.

1. 109 S. Ct. 647 (1989). Petitioner and another were indicted on three counts centering on a cocaine sale. *Id.* The U.S. Sentencing Commission is a body created under the Sentencing Reform Act of 1984. 18 U.S.C. §§ 3551-3559 (1987) and 28 U.S.C. §§ 991-998 (Supp. V 1987). *Id.* at 649.

2. *Id.* Petitioner claimed Congress delegated excessive authority to the Commission to structure the Guidelines. Petitioner also claimed the Act's requirement for article III federal judges to serve on the Commission was unconstitutional.

3. *Id.* The district court also rejected the claim that the requirement that article III federal judges serve on the Commission was unconstitutional.

4. *Id.* at 654. Under the Guidelines, the district court sentenced petitioner to 18 months imprisonment to be followed by a three-year term of supervised release. The court also imposed a \$1,000 fine and \$50 special assessment.

5. *Id.* The Supreme Court granted both the petitioner's and the United States' petitions for certiorari. Petitioner filed notice of appeal to the circuit court, but the Supreme Court, pursuant to its Rule 18, granted certiorari before judgment.

6. *Id.* at 675. Justice Blackmun wrote for the majority, and Justice Scalia filed a dissenting opinion.

7. *Id.*

Rising dissatisfaction with sentencing disparities and doubts as to the success of rehabilitation spurred Congress to enact the Sentencing Reform Act of 1984.⁸ Pursuant to the Act, the U.S. Sentencing Commission became an independent agency with authority to promulgate regulations.⁹ As other agencies before it, the Sentencing Commission was destined to be challenged as a violation of the separation of powers doctrine.¹⁰

To fully analyze a separation of powers challenge, it is necessary to look first to the doctrine's constitutional foundation. In *The Federalist Paper No. 47*, Madison expanded Montesquieu's notion of political liberty.¹¹ Political liberty demands that no governmental department wholly control the power exercised by another department.¹² However, the Constitution's Framers also recognized that some degree of control was necessary to check the usurpation of power in one branch.¹³ Thus, separation of powers depends not so much on strict divisions of power, but on a limited degree of necessary branch interaction.

In the twentieth century, the concentration of governmental power shifted from the legislative branch to the executive branch.¹⁴ Courts, however, continue to limit branch interaction through the separation of powers doctrine.¹⁵ Courts often quote Justice Jackson's concurring

8. *Id.* at 651 n.3 (Senate Report on the 1984 legislation, S. REP. NO. 225, 98th Cong., 1st Sess. (1983) corresponding House Report, H.R. REP. NO. 1017, 98th Cong., 2d Sess. (1984)). The Sentencing Reform Act is codified at 18 U.S.C. §§ 3551-3559 (1987) and 28 U.S.C. §§ 991-998 (Supp. V 1987).

9. *Id.* at 652-53. The Act established the Sentencing Commission as an independent commission in the judicial branch of the United States government. The Commission is responsible for promulgating determinative-sentence guidelines.

10. *See, e.g.*, *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 835-36 (1986) (challenging congressional grant of authority to hear common law counterclaims in reparation by the Commodity Futures Trading Commission); *Immigration & Naturalization Serv. v. Chadha*, 462 U.S. 919, 944 (1983) (challenging legislative veto by one house over I.N.S. decision not to deport a nonimmigrant student); *Yakus v. United States*, 321 U.S. 414, 418 (1944) (challenging delegation to Price Administrator of the legislative power to control rent prices).

11. THE FEDERALIST NO. 47, at 300-03 (J. Madison).

12. *Id.* at 301, 303.

13. *See* THE FEDERALIST NO. 48, at 308-11 (J. Madison).

14. *Id.* at 309-10. Although the framers' notion of tyranny was based on their experience with England's George III, the framers feared the greatest danger of usurpation of power was in the legislature because of its extensive powers and its access to the pockets of the people. *See* Levi, *Some Aspects of Separation of Powers*, 76 COLUM. L. REV. 371 (1976) (discussing the growing power of the executive).

15. *Bowsher v. Synar*, 478 U.S. 714, 723 (1986) (holding that legislation granting Congress removal power over an executive officer violates the separation of powers doctrine); *Immigration*

opinion from *Youngstown Sheet & Tube, Co. v. Sawyer* as espousing the current principle of separation of powers.¹⁶ *Youngstown* presented a challenge to the President's authority to seize steel mills absent congressional legislation.¹⁷ In rejecting this use of the President's power, Jackson defined government in terms of "separateness but interdependency, autonomy but reciprocity."¹⁸ Jackson developed a power continuum, whereby one branch's authority to act fluctuated with another branch's authority to take related action.¹⁹ Under Jackson's theory, presidential power to seize steel mills fell on the low end of the spectrum.²⁰ The President's seizure of the steel mills was incompatible with the will of Congress.²¹ Moreover, the Constitution explicitly granted exclusive authority to Congress to take such actions.²² Thus, Jackson declared the President's acts unconstitutional.²³

At the other end of Jackson's continuum, the President's powers are maximized when acting pursuant to congressional authority.²⁴ This power, however, is not absolute. The nondelegation doctrine limits

& *Naturalization Serv. v. Chadha*, 462 U.S. 919 (1983) (holding that legislation authorizing a legislative veto by one house over an I.N.S. decision not to deport a nonimmigrant student violates the separation of powers doctrine).

16. 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

17. *Id.* at 582-83. The President issued an executive order directing the Secretary of Commerce to take possession and operate most of the nation's steel mills. *Id.* at 583. Under threat of a steelworkers' strike, the President claimed the action was necessary to ensure continued production of steel for war materials. *Id.* The majority opinion rejected the claim and held the executive order unconstitutional. *Id.* at 587. Absent constitutional and congressional authority, the President lacked the power to execute his own policy. *Id.* at 588.

18. *Id.* at 635.

19. *Id.*

20. *Id.* at 640.

21. *Id.* at 586. Although Congress was silent when the President issued the order, Congress previously rejected a seizure technique in an amendment proposed to the Taft-Hartley Act. *Id.* Compare *Humphrey's Executor v. United States*, 295 U.S. 602 (1935) (President's effort to remove Federal Trade Commissioner held contrary to congressional policy and an impingement on congressional control) with *Myers v. United States*, 272 U.S. 52 (1926) (affirming President's exclusive removal powers as an inherent executive power derived from the power to appoint).

22. U.S. CONST. art. I, § 1 ("All legislative Powers herein granted shall be vested in the Congress of the United States, which shall consist of a Senate and House of Representatives.").

23. 343 U.S. 579, 655 (1952) (Jackson, J., concurring) (the executive, except for recommendation and veto, has no legislative power).

24. *Id.* at 635. When the President acts pursuant to an express or implied authorization of Congress, the scope of authority includes presidential rights plus other rights that Congress may delegate. Justice Jackson also recognized a "zone of twilight" when the President acts relying solely on his own independent power and absent congressional grant or denial of authority. *Id.* at 637.

the authority Congress may constitutionally grant to other branches and agencies. The Constitution initially vests all legislative power in Congress.²⁵ Yet, this provision has been qualified by the necessary and proper clause to afford Congress flexibility to establish reasonable standards to carry out its policies.²⁶ Thus, Congress may delegate some degree of legislative power.

The Supreme Court struck down a congressional act for excessive delegation of legislative power in *Panama Refining Co. v. United States*.²⁷ In *Panama Refining*, the Supreme Court struck down legislation authorizing the President to determine policy concerning transportation of "hot oil" as an unconstitutional delegation of the power to make laws.²⁸ In the same year, the Court declared a portion of the National Industrial Recovery Act unconstitutional on similar grounds in *A.L.A. Schechter Poultry Corp. v. United States*.²⁹ No Court majority has subsequently applied the nondelegation doctrine to invalidate an act of Congress.³⁰

Recently, the Court has turned its focus toward excessive limitations on executive powers rather than excessive delegation of power to the executive branch and its agencies. In *Morrison v. Olson*,³¹ the

25. U.S. CONST. art. I, § 1.

26. See *Panama Refining Co. v. Ryan*, 293 U.S. 388, 421 (1935).

27. *Id.* at 389. Cf. *Yakus v. United States*, 321 U.S. 414, 667 (1944) (no excessive delegation of power found where Congress defined policy and prescribed standards for the agency to follow in formulating regulations).

28. 293 U.S. at 416. Oil produced or transported in excess of statutory quota is known in the industry as "hot oil." *Id.* at 436 (Cardozo, J., dissenting).

29. 295 U.S. 495, 541-42 (1935). Congress granted the function of formulating a fair competition code without sufficiently defining policy or standards.

30. See, e.g., *Field v. Clark*, 143 U.S. 649 (1892) (no excessive delegation of power found where Congress makes the revival of an act dependent upon presidential proclamation following ascertainment of a fact prescribed by Congress); *Hampton, Jr. & Co. v. United States*, 276 U.S. 394 (1928) (no excessive delegation of power found where legislative act provides an intelligible principle to which the body authorized to fix customs rates is directed to conform); *Yakus v. United States*, 321 U.S. 414, 667 (1944) (no excessive delegation of power found where Congress provided policy and standards to direct the Office of Price Administration in regulating maximum prices of commodities and rents).

31. 108 S. Ct. 2597 (1988). The Ethics in Government Act provides that where reasonable grounds to initiate an investigation exist, the Attorney General may request the Special Division to appoint an independent counsel. The Special Division is a court created by the Act. Once appointed, the independent counsel has full power and independent authority to exercise all investigative and prosecutorial functions of the Department of Justice on matters within its jurisdiction. The Attorney General may remove the independent counsel for good cause or terminate the office when the counsel's functions are complete or substantially complete. *Id.* at 2602-04.

Court held the Ethics in Government Act,³² providing for a special prosecutor to investigate and prosecute alleged criminal acts by certain high ranking officials, did not violate the separation of powers doctrine. The Court again looked to Madison's theory of constitutional separation of powers as a safeguard against the encroachment or aggrandizement of one branch at the expense of another.³³ However, the Court noted the doctrine does not require all three branches to operate with absolute independence.³⁴ The Court focused on whether the Act unduly interfered with the executive branch.³⁵

The *Morrison* Court did not limit its analysis to executive and legislative powers but also examined powers granted to the judiciary. The Court found that, generally, no executive or administrative duties of a nonjudicial nature may be imposed on article III judges.³⁶ Nonetheless, the Court held that the powers granted to the Special Division to appoint independent counsel did not encroach on areas reserved for the other branches³⁷ or threaten the independence and impartiality of the judiciary.³⁸ Thus, the Court found strict separation of power inapplicable and allowed for some branch interaction.³⁹

32. 28 U.S.C. §§ 591-599 (Supp. V 1987).

33. 108 S. Ct. at 2620. See *Bowsher v. Synar*, 478 U.S. 714, 736 (1985) (violation of separation of powers for Congress to have removal power over an executive officer); *Buckley v. Valeo*, 424 U.S. 1, 122 (1976) (per curiam) (violation of separation of powers for congressional officers to appoint members of an executive commission); *Myers v. United States*, 272 U.S. 52, 161 (1925) (violation of separation of powers for Congress to require removal of certain postmasters only with the advice and consent of the Senate).

34. 108 S. Ct. at 2621. See *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 441 (1977) (no violation of separation of powers where Congress directs an executive branch officer to obtain presidential records); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) (although presidential actions declared unconstitutional, Jackson's concurring opinion recognizes that interdependence and reciprocity between branches may be constitutional).

35. 108 S. Ct. at 2616-17, 2621. See *Nixon*, 433 U.S. at 443 (appropriate separation of powers inquiry is whether congressional legislation disrupts the balance of power to the extent that it prevents the executive branch from accomplishing its constitutionally assigned function).

36. 108 S. Ct. at 2612. See *Buckley v. Valeo*, 424 U.S. 1, 123 (1976) (per curiam) (holding that president pro tempore of Senate's and the Speaker of the House of Representatives's appointment of members to an executive commission violated the Appointment Clause of the Constitution).

37. 108 S. Ct. at 2612-15. The Act does not give the Special Division executive power to supervise the independent counsel's exercise of investigative or prosecutorial authority.

38. *Id.* at 2615. Because the Ethics in Government Act does not grant the Special Division any power of review over the independent counsel, risk of partisan or biased adjudication is avoided. The Act prevents members of the Special Division from participating in any judicial proceedings concerning matters within the independent counsel's jurisdiction. See *Commodity*

The instant case confirms the *Morrison* policy that commingling of government power is not a per se violation of the separation of powers doctrine.⁴⁰ The Sentencing Commission did not encroach on the powers reserved for the executive branch or threaten the integrity of the judiciary.⁴¹ Furthermore, the instant Court distinguished *Panama Refining* to determine that the Sentencing Reform Act was not an excessive delegation of legislative power.⁴²

The instant Court initially addressed the nondelegation doctrine, which is one aspect of the broader separation of powers theory.⁴³ The instant Court analyzed the nondelegation doctrine on two levels. First, the Court held, in light of precedent, the Sentencing Reform Act sufficiently specified and detailed congressional policy.⁴⁴ Thus, on the face of the Act, the Court found that the Commission lacked authority to determine legislative policy.⁴⁵ The Court then questioned whether the Act delegated excessive discretion to the Commission to formulate the Guidelines.⁴⁶ Although the duties granted to the Commission require a degree of discretion, the Act sets sufficient standards for the Commission to follow in carrying out congressional policy.⁴⁷ The Court concluded that Congress retained its legislative power while appropriately delegating the labor-intensive task of formulating determinative-sentencing guidelines to the Commission.⁴⁸ Therefore, the Sentencing Reform Act complied with the nondelegation doctrine.⁴⁹

Second, finding that Congress appropriately delegated rulemaking authority, the Court examined the structure of the Commission to determine whether it violated the broader separation of powers doc-

Futures Trading Comm'n v. Schor, 478 U.S. 833, 850-51 (1986) (no infringement on article III judges to permit Commodities Futures Trading Commission to exercise jurisdiction over common law counterclaims).

39. 108 S. Ct. at 2612-15. See Justice Scalia's dissenting opinion which finds that article II, § 1 of the Constitution grants all executive control to the President. Thus, the issue is not how much the Act reduces the President's control but whether it deprives the executive of exclusive control over purely executive power. Justice Scalia considered it unconstitutional to grant prosecutorial powers to an agency not within complete executive control. *Id.* at 2626-28 (Scalia, J., dissenting).

40. 109 S. Ct. at 660.

41. *Id.* at 667, 672-73.

42. *Id.* at 655 n.7.

43. *Id.* at 655.

44. *Id.*

45. *Id.* at 658.

46. *Id.* at 656-57.

47. *Id.* at 658.

48. *Id.*

49. *Id.*

trine. Expanding *Morrison*, the instant Court applied Madisonian principles to find the degree of overlapping responsibility in the sentencing procedure constitutional.⁵⁰ Historically, the sentencing procedure was shared by all three branches.⁵¹ Accordingly, the Act appropriately located the Commission in the judiciary⁵² as an independent rulemaking body and properly required article III judges to serve on the Commission.⁵³ These provisions neither vest power reserved for another branch in the judiciary⁵⁴ nor threaten the integrity of the judiciary.⁵⁵ Furthermore, the Court found that the President's limited appointment and removal powers do not prevent the judiciary from performing its constitutionally assigned functions.⁵⁶

The Sentencing Reform Act presents a unique governmental structure, never before tested by separation of powers standards.⁵⁷ Although the Guidelines remedy some sentencing disparities among similarly situated offenders, Congress may have overstepped the constitutional bounds of the separation of powers doctrine.⁵⁸ The constitutionality of the Act's allowance for a degree of control over sentencing by each branch is supported by the previous sentencing procedure.⁵⁹ The Legislature maintains its constitutional responsibility for determining the outer limits of criminal sanctions.⁶⁰ The judiciary, through judges serving on the Commission and courts applying the Guidelines, continues to determine what sentence is warranted.⁶¹ Finally, although the Act diminishes executive control by abolishing the parole function, the President retains a degree of power over members of the Commis-

50. *Id.* at 658-61.

51. *Id.* at 650-51.

52. *Id.* at 667.

53. *Id.* at 673.

54. *Id.* at 665-66.

55. *Id.* at 665, 672.

56. *Id.* at 675.

57. *Id.* at 661. The Court notes the peculiarity of an institution within the judicial branch that is not a court and does not exercise judicial power.

58. See generally Liman, *The Constitutional Infirmities of the United States Sentencing Commission*, 96 YALE L.J. 1363 (1987); Ogletree, *The Death of Discretion? Reflections on the Federal Sentencing Guidelines*, 101 HARV. L. REV. 1938 (1988).

59. 109 S. Ct. at 650. Before the Sentencing Reform Act, an indeterminate system was in effect. Congress set broad ranges for sentences, allowing judges wide discretion in sentencing, supplemented by discretionary parole provisions in the executive branch.

60. *Id.* at 656. Congress directed the Commission not to exceed the statutory maxima for sentences.

61. 18 U.S.C. § 3553(a)-(b) (1987); 28 U.S.C. § 991(a) (Supp. V 1987).

sion.⁶² Nonetheless, similarities to the previous system cannot alone protect the reform from constitutional challenges.

The establishment of the Commission as an independent agency within the judiciary should be closely scrutinized under the separation of powers doctrine. The instant Court justified this placement by analogizing the Sentencing Commission to the independent counsel authorized in *Morrison*.⁶³ Unlike *Morrison*, conflict of interest within the executive branch was not a chief concern in the instant case.⁶⁴ Thus, the only justification for placement of the Commission in the judiciary is the historical discretion judges have exercised in determining sentences.⁶⁵ As Justice Scalia noted in his dissent, independent agencies are more appropriate in the executive branch since it is inconceivable that the President alone could carry out his constitutional duties to execute the laws.⁶⁶ On the other hand, the judiciary and legislature are capable of performing their duties with only the assistance and advice of agencies.⁶⁷ Therefore, absent conflict of interest, the Commission as an independent agency should be located in the executive branch. Although the judiciary would lose some degree of control, the presence of judges on the Commission would ensure judicial participation in establishing the Guidelines.

More problematic than the placement of the Sentencing Commission within the judiciary, is the delegation of rulemaking authority to the Commission. The instant Court relied on Madisonian principles of necessary branch interaction.⁶⁸ Unlike the *Youngstown* conflict between the authority of two constitutional branches of government, the Sentencing Commission's authority is independent of the three branches.⁶⁹ Justice Jackson's theory of one branch's power building on the authority granted it by another branch is misplaced.⁷⁰ Congress has the constitutional authority to do what is necessary and proper to enact legislation, but independent agencies are not granted constitu-

62. 28 U.S.C. §§ 991, 994, 995(a)(1) (Supp. V 1987). The President may appoint voting members of the Commission. The President may also remove these members of the Commission for neglect of duty, malfeasance or for good cause.

63. 109 S. Ct. at 666, n.20.

64. See 108 S. Ct. at 2611.

65. 109 S. Ct. at 664-65.

66. *Id.* at 681-82.

67. *Id.*

68. *Id.* at 659.

69. *Id.* at 652; see also *Youngstown Sheet & Tube, Co. v. Sawyer*, 343 U.S. 579 (1952) (Jackson, J., concurring).

70. See *supra* note 22 and accompanying text.

tional powers.⁷¹ Thus, the instant case should not be analyzed as the constitutional power of one branch building on that of another branch. A better analysis would be to scrutinize the joining of judicial and legislative powers in an independent agency.

Furthermore, the instant Court permits Congress to delegate its legislative responsibilities without fully considering alternative structures.⁷² The instant Court relies too heavily on its history of upholding the Legislature's delegation of its rulemaking authority.⁷³ Concededly, Congress did not grant the Sentencing Commission the broad discretion struck down in *Panama Refining*.⁷⁴ Congress explicitly defined the policies to be achieved by the Commission's application of numerous specified criteria.⁷⁵ However, under the current procedure, the Guidelines automatically go into effect if Congress does not act.⁷⁶ Congress claims this delegation is necessary since it lacks the expertise to formulate the Guidelines.⁷⁷ However, the Constitution prohibits the Legislature from delegating its constitutionally mandated legislative function.⁷⁸ Thus, a better approach would be to create an advisory committee.⁷⁹ Although the committee would still determine the appropriate Guidelines, the Guidelines would then be subject to legislative and executive scrutiny before obtaining the status of law.⁸⁰

Undeniably, the Sentencing Reform Act is an honorable attempt to limit sentencing disparities.⁸¹ Our legal system prides itself on the principle of treating similarly situated offenders alike.⁸² That same system, however, professes to be a government of laws not men.⁸³ Placing power to deprive individuals of their liberty in the hands of an independent commission, rather than under the wisdom of the legislature, executive or judiciary, presents serious problems. The best solution would be to make the Commission a judicial rulemaking

71. U.S. CONST. art. I, § 8, cl. 18.

72. Liman, *supra* note 58, at 1367.

73. 109 S. Ct. at 654-56.

74. *Id.*; see also *Panama Refining Co. v. Ryan*, 55 S. Ct. 241 (1935).

75. 109 S. Ct. at 654-56.

76. 28 U.S.C. § 994(c) (Supp. V 1987).

77. 109 S. Ct. at 658.

78. U.S. CONST. art. I, § 1.

79. Liman, *supra* note 58, at 1368.

80. *Id.*

81. 109 S. Ct. at 651-52.

82. *Id.* The Court recognized the serious impediment an indeterminate sentencing system placed on evenhanded and effective operation of the criminal justice system.

83. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) (Justice Marshall's discussion of an individual's right to the protection of laws).

committee with the legislative and executive branches exercising limited control over its actions. Thus, the judicial branch would be able to reduce sentencing disparities while holding the constitutional branches of government responsible for the impact of the Guidelines on individuals' liberty.

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