Cases that Shaped the Federal Courts

Mistretta v. United States

1989

Justice Harry A. Blackmun

Federal Judicial Center
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Central Question

Could Congress create an independent judicial agency to guide courts in setting criminal sentences?

Historical Context

For much of American history, federal judges exercised significant discretion in sentencing those convicted in their courts. Most federal criminal statutes attached a wide range of potential penalties to offenses and left judges to decide what sentence within that range was appropriate. For some crimes, such as kidnapping, federal judges could sentence individuals to anything from probation (a noncustodial sentence designed to rehabilitate offenders) to life imprisonment.

Beginning in the 1970s, both liberal and conservative politicians argued this judicial discretion had led to troubling results. Liberals, like Massachusetts Senator Edward "Ted" Kennedy, pointed to the potential unfairness of different punishments for individuals who had committed similar offenses and suggested that these disparities might harm vulnerable minority groups. Conservatives, including Senator Strom Thurmond of South Carolina, argued that federal judges had generally proven too lenient and that this had emboldened criminals, exacerbating a nationwide rise in crime since the 1960s.

In 1984, Congress responded to these concerns with the Sentencing Reform Act. The Act created a new body designed to resolve sentencing disparities by producing mandatory guidelines for judges. This body, the U.S. Sentencing Commission, was designated an independent agency within the judicial branch of government. That status was unusual, but not unprecedented. The Administrative Office of the U.S. Courts, which administers much of the judiciary's day-to-day operations, and the Federal Judicial Center, the judiciary's research and education agency, occupy comparable positions with the branch. The Commission was led by a seven-member board, at least three of whom had to be federal judges. The President appointed the board with the advice and consent of the U.S. Senate. The Commission produced the first Sentencing Guidelines Manual in 1987. These guidelines set penalties based on a complex combination of factors related to both the crime and the offender.

Legal Debates Before *Mistretta*

The Sentencing Commission's structure raised important constitutional questions. Some suggested that the Commission violated the principle of separation of powers by mixing executive, legislative, and judicial powers and by interfering with the ordinary judicial process. Supporters argued that there was nothing unusual or improper about judges serving

other official roles—Chief Justice Earl Warren, for example, had led the commission investigating the assassination of President John F. Kennedy in the 1960s, and five justices had served on a commission that helped decide the outcome of the contested 1876 presidential election.

Critics also argued that Congress had given the Commission too much lawmaking power. Article I, Section 1 of the Constitution states that, "All legislative powers … granted [by the Constitution] shall be vested in a Congress." The Supreme Court had previously held this to mean Congress could not give another governmental entity, like the President or an executive agency, the power to make new laws. Some argued that the Sentencing Guidelines ran afoul of this idea, sometimes called the "nondelegation doctrine," by effectively creating new laws governing federal criminal punishments. Though only Congress could make laws, other branches of government often had to interpret and implement Congressional statutes. Supporters of the Sentencing Reform Act argued that Congress had wisely entrusted the complex issue of sentencing to an independent body that would be less likely to insert politics into the criminal process. They claimed that, far from creating its own laws, the Commission was simply designed to ensure the existing criminal statutes were applied fairly.

Finally, some lawyers and scholars raised questions about the way the guidelines would operate. Some argued that limiting judicial discretion through nonlegislative rules violated the Due Process Clause of the Fifth Amendment by impairing defendants' access to a fair, individualized trial. Others attacked specific provisions of the guidelines, such as the enhancement of sentences for additional offenses the defendant likely committed, but which the government did not allege or prove at trial.

The Case

On December 10, 1987, John Mistretta was charged in the U.S. District Court for the Western District of Missouri with three federal offenses arising from a narcotics sale. Mistretta pleaded guilty to one of the charges (conspiracy to distribute cocaine) in exchange for the government's agreement to drop the other charges. Mistretta's attorneys also filed a motion arguing that District Judge Howard F. Sachs should not follow the sentencing guidelines in setting his punishment because the Commission that created them was unconstitutional. Judge Sachs denied this motion and sentenced Mistretta to eighteen months in prison, along with a subsequent term of supervised release and a fine. The original statutory range for Mistretta's offense ran from probation to twenty years in prison. It is thus not clear whether Mistretta would have received a lighter sentence in the absence of the guidelines. Nevertheless, the guidelines prevented Judge Sachs from exercising such leniency had he considered a lesser sentence more appropriate.

Mistretta appealed to the Court of Appeals for the Eighth Circuit. Somewhat unusually, the Supreme Court of the United States agreed to hear Mistretta's appeal prior to the Eighth Circuit's decision. Since several other courts had already reached conflicting results over the constitutionality of the Sentencing Reform Act, the Justices wanted to resolve potential uncertainty. (The Eighth Circuit eventually issued a decision upholding Mistretta's conviction.)

The Supreme Court's Ruling

The Supreme Court focused on two, somewhat related, issues: (1) legislative delegation; and (2) separation of powers. The Court's nondelegation doctrine states that Congress cannot give other entities the power to make laws. It can, however, set up executive agencies that may craft regulations designed to carry out congressional legislation. The doctrine of separation of powers prohibits one branch of government from intruding too far on the role of another branch. In this instance, Mistretta's lawyers argued that Congress had created a body that unduly interfered with one of the most fundamental aspects of the judicial role. Additionally, they argued that the President's power to appoint and remove judges to serve on the Commission gave him undue influence over judges, who should be politically independent.

In an 8–1 decision, the Supreme Court of the United States upheld the constitutionality of the Sentencing Commission. Justice Harry A. Blackmun wrote the Court's opinion. Blackmun began his discussion of the case by emphasizing that it was rare for the Court to invalidate a law on nondelegation grounds (it had done so only twice before). This was because it was important to permit Congress flexibility to deal with issues that might not be amenable to ordinary legislation. Congress need only set the agency some "intelligible principle" controlling its work to comply with the Constitution for these purposes. Since the Sentencing Reform Act specified the goals of the Commission, the broad framework for its operation, and several required components of the guidelines it was to produce, the Court determined the act had met this standard.

Justice Blackmun devoted the majority of this opinion to the separation-of-powers issues raised by Mistretta's appeal. He began his analysis of this issue by acknowledging that the founders believed the separation of powers was an important component of the constitutional framework, but they "rejected … the notion that the three Branches must be entirely separate and distinct." A law did not violate the Constitution, therefore, whenever it created some overlap between the powers exercised by different parts of the government. Instead, the question was whether one branch was attempting to "aggrandize" itself at the cost of the power or independence of the other two.

Applying this rubric, Blackmun dismissed the notion that service on the Commission threatened judges' impartiality. He noted that there was a long history of federal judges serving additional, nonjudicial roles. For example, John Jay, the first Chief Justice of the United States, had also served as ambassador to England, Chief Justice John Marshall briefly served as Secretary of State after joining the Court, and Justice Robert Jackson had been the lead prosecutor in the Nuremburg Tribunal following World War II. Judicial service on the Commission, moreover, was voluntary; judges could not be "conscripted" into performing this extrajudicial role. He also noted that the text of the Constitution implicitly recognized judges' ability to serve other roles. While Article I contained a provision prohibiting members of Congress from serving in other government offices, there was no such language in Article III, the part of the Constitution dealing with the federal courts.

The Court's majority similarly dismissed as "fanciful" the notion that the President's appointment or removal of Commission board members threatened judicial impartiality. The President had long possessed the power to "promote" judges by nominating them to higher judicial offices, Blackmun noted, but this power had not undermined judges' ability to remain impartial. Moreover, removal from the Commission was restricted to cases of "good cause," meaning the President could not simply remove a judge because he or she did not like a ruling the judge had made. Finally, even were a judge removed from the Commission, he or she would retain his or her judicial office "during good behavior" under Article III, Section 2 of the Constitution.

The Court noted a related issue that presented greater difficulty: whether the work of the Commission was so political that judges' involvement created an appearance of bias or partiality. Justice Blackmun reasoned that, although judges had to avoid any appearance of political entanglements, the Commission's work was solely designed to "rationalize" the judicial process of sentencing. This, he concluded, was "an essentially neutral endeavor in which judicial participation is peculiarly appropriate."

Justice Antonin Scalia disagreed with his colleagues and wrote a dissenting opinion laying out a different view of the Constitution and the Commission. Scalia argued that, because the guidelines were mandatory, the Commission was improperly interfering with the judicial role by requiring judges to impose sentences with which they may or may not have agreed. In doing so, it was making law as if it were "a sort of junior-varsity Congress." Justice Scalia emphasized that it was essential to democracy that only Congress make the laws setting criminal penalties. He claimed that if Congress could avoid controversial or difficult topics like criminal sentencing by setting up independent commissions in other branches of government, then the people would no longer have any control over those governing them.

Turning to the separation-of-powers issue, Scalia lamented that the rest of the Court seemed to treat the Constitution as "no more than a generalized prescription that the functions of the Branches should not be mingled too much." It was not for the Court to decide how much blurring of lines between the branches was permissible. The only legitimate elements of "cross-over" between the powers exercised by the three branches of government, he argued, were those explicitly laid out in the Constitution itself, such as the President's veto power over Congress or Congress's powers of impeachment.

Aftermath and Legacy

Although *Mistretta* established the Sentencing Commission's constitutionality, it did not resolve all issues related to federal sentencing or the guidelines themselves. As the nation's prison population continued to swell from the 1990s to the 2010s, many politicians and activists, including some who had initially supported the Sentencing Reform Act, argued that the guidelines had produced unduly harsh sentences for nonviolent offenses, particularly those tending to involve nonwhite and poor defendants at disproportionate rates. Debate continues on these issues.

From a legal perspective, *Mistretta* left several questions about the guidelines' application unanswered. Subsequent cases raised such issues, including questions over the mandatory nature of the guidelines and a specific set of rules that required judges to take into account uncharged crimes the defendant may have committed. Under the guidelines, these offenses increased the sentence, but were not subject to proof beyond a reasonable doubt or evidentiary restrictions like hearsay rules. In *United States v. Booker* (2005), the Supreme Court held this process unconstitutional under the Sixth Amendment, which entitles criminal defendants to a trial by jury. Importantly, *Booker* did not strike down the guidelines in their entirety. Instead, the Court held that federal judges should consult the guidelines, but are not bound to impose the sentences listed in them.

Discussion Questions

- The separation of powers is a fairly abstract idea. What does *Mistretta* suggest about its practical importance?
- Congress could have conducted an investigation on sentencing and formulated exactly the same guidelines the Commission produced in the form of a statute. Would this have resolved all of the constitutional questions raised in *Mistretta*?
- The issue of sentencing guidelines arguably pits two of the most important aspects of judging against each other: flexibility and consistency. Is one more important than the other? Is the tension between these two goals unavoidable?
- Justice Scalia argued it was important for Congress, rather than unelected commissions, to make federal laws. Is there an argument that it is equally important for judges to control criminal trials even though they are *un*elected? Why or why not?

Documents

Senator Edward M. Kennedy, *Judicature*, 1976

In this article, Senator Kennedy critiques the lack of guidelines for federal sentences, arguing that unbounded judicial discretion led to unfair sentencing practices.

"The federal code contains no list of criteria to be considered by the sentencing judge in deciding whether to impose a term of imprisonment. The result has been chaotic—one judge may sentence in order to rehabilitate, another to deter the offender (or the potential offender) from committing a similar crime, a third to incapacitate and a fourth simply to "punish." One judge may place a convicted defendant on probation, arguing that rehabilitation should never be a justification for imprisonment; another judge may justify a sentence of probation on the ground that "deterrence doesn't work."…

The absence in the federal criminal code of any articulated purposes or goals of sentencing has, unfortunately, led to a situation where different judges often mete out different sentences to similar defendants convicted of similar crimes, depending on the sentencing attitudes of the particular judge.…

The impact of such statistics on our criminal justice system is real and immediate. An important prerequisite of any effective crime-fighting program—certainty of punishment—is absent. In addition, the criminal justice system appears arbitrary and unjust, a game of chance in which the potential offender may "gamble" on receiving not just a lenient term of imprisonment but no jail sentence at all. Disparity encourages the white collar offender to commit crimes and gives the impression that justice is something different for the rich and the poor. It nurtures an already growing public cynicism about our own institutions, a cynicism which inhibits corrective action and stimulates others to cut corners and commit crime.…

Such sentencing disparity cannot be traced to "weak" judges who "coddle criminals." The great majority of our federal judges perform their sentencing duties in a responsible and diligent manner. But these judges must act without any guidelines or review because Congress has never built any standards or safeguards into the sentencing process. Indeed, the federal criminal code invites disparity by conferring unlimited discretion on the sentencing judge to impose a sentence within wide statutory limits, ranging from probation to lengthy prison terms.… I have introduced legislation in the United States Senate which would make long overdue reforms in the criminal sentencing process.… The bill adopts the concept of imprisonment as punishment. Rehabilitation as a justification for imprisonment, as opposed to a beneficial side effect, is conspicuously absent.… The concept of rehabilitation is grounded in the optimistic belief that criminals have simply "gone wrong"

and can be "cured", much as disease can be cured. But prison rehabilitation programs have not been successful—at least in those cases where such programs are compulsory in nature and are forced on the prisoner as a precondition of his release.… The bill concentrates, therefore, on the other major justifications for imposing a term of imprisonment—incapacitation, specific deterrence, general deterrence and retribution.… It is obvious that correcting the arbitrary and capricious method of sentencing will not eliminate our nation's crime problem.… But the shameful disparity in criminal sentences imposed in the federal courts is a major flaw which encourages the potential criminal to "play the odds" and, through luck and circumstance, "beat the system." Sentencing disparity is unfair; it cannot help but have an impact on a prisoner who views his offense as no more reprehensible than that of another offender placed on probation after committing the same crime."

Document Source: Senator Edward M. Kennedy, "Criminal Sentencing: A Game of Chance," *Judicature* 60, no. 5 (December 1976): 209–212, 214, 215 (footnotes omitted).

Supreme Court of the United States, Opinion in *Mistretta v. United States*, January 18, 1989

These excerpts from Justice Blackmun's majority opinion and Justice Scalia's dissenting opinion in Mistretta *focus on separation-of-powers issues.*

Justice Blackmun delivered the opinion of the Court.

In this litigation, we granted certiorari before judgment in the United States Court of Appeals for the Eighth Circuit in order to consider the constitutionality of the Sentencing Guidelines promulgated by the United States Sentencing Commission.…

Historically, federal sentencing—the function of determining the scope and extent of punishment—never has been thought to be assigned by the Constitution to the exclusive jurisdiction of any one of the three Branches of Government. Congress, of course, has the power to fix the sentence for a federal crime, and the scope of judicial discretion with respect to a sentence is subject to congressional control. Congress early abandoned fixed-sentence rigidity, however, and put in place a system of ranges within which the sentencer could choose the precise punishment. Congress delegated almost unfettered discretion to the sentencing judge to determine what the sentence should be within the customarily wide range so selected. This broad discretion was further enhanced by the power later granted the judge to suspend the sentence and by the resulting growth of an elaborate probation system. Also, with the advent of parole, Congress moved toward a "three-way sharing" of sentencing responsibility by granting corrections personnel in the Executive

Branch the discretion to release a prisoner before the expiration of the sentence imposed by the judge. Thus, under the indeterminate-sentence system, Congress defined the maximum, the judge imposed a sentence within the statutory range (which he usually could replace with probation), and the Executive Branch's parole official eventually determined the actual duration of imprisonment....

Serious disparities in sentences, however, were common. Rehabilitation as a sound penological theory came to be questioned and, in any event, was regarded by some as an unattainable goal for most cases....

Fundamental and widespread dissatisfaction with the uncertainties and the disparities continued to be expressed. Congress had wrestled with the problem for more than a decade when, in 1984, it enacted the sweeping reforms that are at issue here....

This Court consistently has given voice to, and has reaffirmed, the central judgment of the Framers of the Constitution that, within our political scheme, the separation of governmental powers into three coordinate Branches is essential to the preservation of liberty. Madison, in writing about the principle of separated powers, said: "No political truth is certainly of greater intrinsic value or is stamped with the authority of more enlightened patrons of liberty."

In applying the principle of separated powers in our jurisprudence, we have sought to give life to Madison's view of the appropriate relationship among the three coequal Branches. Accordingly, we have recognized, as Madison admonished at the founding, that while our Constitution mandates 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," the Framers did not require—and indeed rejected—the notion that the three Branches must be entirely separate and distinct. Madison, defending the Constitution against charges that it established insufficiently separate Branches, addressed the point directly. Separation of powers, he wrote, "d[oes] not mean that these [three] departments 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." ...

In adopting this flexible understanding of separation of powers, we simply have recognized Madison's teaching that the greatest security against tyranny—the accumulation of excessive authority in a single Branch—lies not in a hermetic division among the Branches, but in a carefully crafted system of checked and balanced power within each Branch....

The Sentencing Commission unquestionably is a peculiar institution within the framework of our Government. Although placed by the Act in the Judicial Branch, it is not a court and does not exercise judicial power. Rather, the Commission is an "independent"

body comprised of seven voting members including at least three federal judges, entrusted by Congress with the primary task of promulgating sentencing guidelines. Our constitutional principles of separated powers are not violated, however, by mere anomaly or innovation. Setting to one side, for the moment, the question whether the composition of the Sentencing Commission violates the separation of powers, we observe that Congress' decision to create an independent rulemaking body to promulgate sentencing guidelines and to locate that body within the Judicial Branch is not unconstitutional unless Congress has vested in the Commission powers that are more appropriately performed by the other Branches or that undermine the integrity of the Judiciary. . . .

[W]e can discern no separation-of-powers impediment to the placement of the Sentencing Commission within the Judicial Branch. As we described at the outset, the sentencing function long has been a peculiarly shared responsibility among the Branches of Government and has never been thought of as the exclusive constitutional province of any one Branch. For more than a century, federal judges have enjoyed wide discretion to determine the appropriate sentence in individual cases and have exercised special authority to determine the sentencing factors to be applied in any given case. Indeed, the legislative history of the Act makes clear that Congress' decision to place the Commission within the Judicial Branch reflected Congress' "strong feeling" that sentencing has been and should remain "primarily a judicial function." . . .

Whatever constitutional problems might arise if the powers of the Commission were vested in a court, the Commission is not a court, does not exercise judicial power, and is not controlled by or accountable to members of the Judicial Branch. The Commission, on which members of the Judiciary may be a minority, is an independent agency in every relevant sense. In contrast to a court's exercising judicial power, the Commission is fully accountable to Congress, which can revoke or amend any or all of the Guidelines as it sees fit either within the 180-day waiting period, or at any time. In contrast to a court, the Commission's members are subject to the President's limited powers of removal. In contrast to a court, its rulemaking is subject to the notice and comment requirements of the Administrative Procedure Act. While we recognize the continuing vitality of Montesquieu's admonition: "'Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary controul,'" because Congress vested the power to promulgate sentencing guidelines in an independent agency, not a court, there can be no serious argument that Congress combined legislative and judicial power within the Judicial Branch. . . .

[A]lthough the Commission wields rulemaking power and not the adjudicatory power exercised by individual judges when passing sentence, the placement of the Sentencing Commission in the Judicial Branch has not increased the Branch's authority. Prior to

the passage of the Act, the Judicial Branch, as an aggregate, decided precisely the questions assigned to the Commission: what sentence is appropriate to what criminal conduct under what circumstances. It was the everyday business of judges, taken collectively, to evaluate and weigh the various aims of sentencing and to apply those aims to the individual cases that came before them....

[*Mistretta*] urges us to strike down the Act on the ground that its requirement of judicial participation on the Commission unconstitutionally conscripts individual federal judges for political service and thereby undermines the essential impartiality of the Judicial Branch. We find Congress' requirement of judicial service somewhat troublesome, but we do not believe that the Act impermissibly interferes with the functioning of the Judiciary.

The text of the Constitution contains no prohibition against the service of active federal judges on independent commissions such as that established by the Act. The Constitution does include an Incompatibility Clause applicable to national legislators:

"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 encreased 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." U. S. Const., Art. I, § 6, cl. 2.

No comparable restriction applies to judges, and we find it at least inferentially meaningful that at the Constitutional Convention two prohibitions against plural office-holding by members of the Judiciary were proposed, but did not reach the floor of the Convention for a vote.

Our inferential reading that the Constitution does not prohibit Article III judges from undertaking extrajudicial duties finds support in the historical practice of the Founders after ratification. Our early history indicates that the Framers themselves did not read the Constitution as forbidding extrajudicial service by federal judges. The first Chief Justice, John Jay, served simultaneously as Chief Justice and as Ambassador to England, where he negotiated the treaty that bears his name. Oliver Ellsworth served simultaneously as Chief Justice and as Minister to France. While he was Chief Justice, John Marshall served briefly as Secretary of State and was a member of the Sinking Fund Commission with responsibility for refunding the Revolutionary War debt....

Subsequent history, moreover, reveals a frequent and continuing, albeit controversial, practice of extrajudicial service. In 1877, five Justices served on the Election Commission that resolved the hotly contested Presidential election of 1876, where Samuel J. Tilden and Rutherford B. Hayes were the contenders. Justices Nelson, Fuller, Brewer, Hughes, Day, Roberts, and Van Devanter served on various arbitral commissions. Justice Roberts was a member of the commission organized to investigate the attack on Pearl Harbor. Justice

Jackson was one of the prosecutors at the Nuremberg trials; and Chief Justice Warren presided over the commission investigating the assassination of President Kennedy. Such service has been no less a practice among lower court federal judges. While these extrajudicial activities spawned spirited discussion and frequent criticism, and although some of the judges who undertook these duties sometimes did so with reservation and may have looked back on their service with regret, "traditional ways of conducting government … give meaning" to the Constitution. Our 200-year tradition of extrajudicial service is additional evidence that the doctrine of separated powers does not prohibit judicial participation in certain extrajudicial activity. . . .

In light of the foregoing history and precedent, we conclude that the principle of separation of powers does not absolutely prohibit Article III judges from serving on commissions such as that created by the Act. The judges serve on the Sentencing Commission not pursuant to their status and authority as Article III judges, but solely because of their appointment by the President as the Act directs. Such power as these judges wield as Commissioners is not judicial power; it is administrative power derived from the enabling legislation. Just as the nonjudicial members of the Commission act as administrators, bringing their experience and wisdom to bear on the problems of sentencing disparity, so too the judges, uniquely qualified on the subject of sentencing, assume a wholly administrative role upon entering into the deliberations of the Commission. In other words, the Constitution, at least as a *per se* matter, does not forbid judges to wear two hats; it merely forbids them to wear both hats at the same time. . . .

We are somewhat more troubled by petitioner's argument that the Judiciary's entanglement in the political work of the Commission undermines public confidence in the disinterestedness of the Judicial Branch. While the problem of individual bias is usually cured through recusal, no such mechanism can overcome the appearance of institutional partiality that may arise from judiciary involvement in the making of policy. The legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship. That reputation may not be borrowed by the political Branches to cloak their work in the neutral colors of judicial action.

Although it is a judgment that is not without difficulty, we conclude that the participation of federal judges on the Sentencing Commission does not threaten, either in fact or in appearance, the impartiality of the Judicial Branch. We are drawn to this conclusion by one paramount consideration: that the 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. In our view, this is an essentially neutral endeavor and one in which judicial participation is peculiarly appropriate. Judicial contribution to the enterprise of creating rules to limit the discretion of sentencing judges

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. Rather, judicial participation on the Commission ensures that judicial experience and expertise will inform the promulgation of rules for the exercise of the Judicial Branch's own business—that of passing sentence on every criminal defendant. To this end, Congress has provided, not inappropriately, for a significant judicial voice on the Commission. . . .

Document Source: *Mistretta v. United States*, 488 U.S. 361, 362, 364–66, 380–81, 384–85, 390, 393, 395, 397–99, 400–1, 404, 407–8 (1989) (citations omitted).

Justice Antonin Scalia, Dissenting Opinion in *Mistretta v. United States*, January 18, 1989

I dissent from today's decision because I can find no place within our constitutional system for an agency created by Congress to exercise no governmental power other than the making of laws. . . .

Today's decision follows the regrettable tendency of our recent separation-of-powers jurisprudence to treat the Constitution as though it were no more than a generalized prescription that the functions of the Branches should not be commingled too much—how much is too much to be determined, case-by-case, by this Court. The Constitution is not that. Rather, as its name suggests, it is a prescribed structure, a framework, for the conduct of government. In designing that structure, the Framers *themselves* considered how much commingling was, in the generality of things, acceptable, and set forth their conclusions in the document. That is the meaning of the statements concerning acceptable commingling made by Madison in defense of the proposed Constitution, and now routinely used as an excuse for disregarding it. When he said, as the Court correctly quotes, that separation of powers "'d[oes] not mean that these [three] departments ought to have no *partial agency* in, or no *controul* over the acts of each other,'" his point was that the commingling specifically provided for in the structure that he and his colleagues had designed—the Presidential veto over legislation, the Senate's confirmation of executive and judicial officers, the Senate's ratification of treaties, the Congress' power to impeach and remove executive and judicial officers—did not violate a proper understanding of separation of powers. He would be aghast, I think, to hear those words used as justification for ignoring that carefully designed structure so long as, in the changing view of the Supreme Court from time to time, "too much commingling" does not occur. Consideration of the degree of commingling that a particular disposition produces may be appropriate at the margins, where the

outline of the framework itself is not clear; but it seems to me far from a marginal question whether our constitutional structure allows for a body which is not the Congress, and yet exercises no governmental powers except the making of rules that have the effect of laws.

I think the Court errs, in other words, not so much because it mistakes the degree of commingling, but because it fails to recognize that this case is not about commingling, but about the creation of a new Branch altogether, a sort of junior-varsity Congress. It may well be that in some circumstances such a Branch would be desirable; perhaps the agency before us here will prove to be so. But there are many desirable dispositions that do not accord with the constitutional structure we live under. And in the long run the improvisation of a constitutional structure on the basis of currently perceived utility will be disastrous. I respectfully dissent from the Court's decision, and would reverse the judgment of the District Court.

Document Source: *Mistretta v. United States*, 488 U.S. 361, 413, 426–27 (1989) (citations omitted).

Supreme Court of the United States, Opinion in *United States v. Booker*, January 12, 2005

In Booker*, the Supreme Court held that parts of the statute creating the Sentencing Commission, which required that courts be bound by the Guidelines, violated the Sixth Amendment right to jury trial. However, as Justice Stevens's opinion, which expressed part of the majority view on the case, acknowledged, this ruling did not overturn* Mistretta*'s holding that the Commission itself was constitutional.*

It has been settled throughout our history that the Constitution protects every criminal defendant "against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." It is equally clear that the "Constitution gives a criminal defendant the right to demand that a jury find him guilty of all the elements of the crime with which he is charged." These basic precepts, firmly rooted in the common law, have provided the basis for recent decisions interpreting modern criminal statutes and sentencing procedures.…

If the Guidelines as currently written could be read as merely advisory provisions that recommended, rather than required, the selection of particular sentences in response to differing sets of facts, their use would not implicate the Sixth Amendment. We have never doubted the authority of a judge to exercise broad discretion in imposing a sentence within a statutory range. Indeed, everyone agrees that the constitutional issues presented by these cases would have been avoided entirely if Congress had omitted from the SRA the

provisions that make the Guidelines binding on district judges; it is that circumstance that makes the Court's answer to the second question presented possible. For when a trial judge exercises his discretion to select a specific sentence within a defined range, the defendant has no right to a jury determination of the facts that the judge deems relevant.

The Guidelines as written, however, are not advisory; they are mandatory and binding on all judges. . . .

Our holding today does not call into question any aspect of our decision in *Mistretta*. That decision was premised on an understanding that the Commission, rather than performing adjudicatory functions, instead makes political and substantive decision. We noted that the promulgation of the Guidelines was much like other activities in the Judicial Branch, such as the creation of the Federal Rules of Evidence, all of which are non-adjudicatory activities. We also 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." While we recognized that the Guidelines were more substantive than the Rules of Evidence or other nonadjudicatory functions delegated to the Judicial Branch, we nonetheless concluded that such a delegation did not exceed Congress' powers.

Further, a recognition that the Commission did not exercise judicial authority, but was more properly thought of as exercising some sort of legislative power, was essential to our holding. If the Commission in fact performed adjudicatory functions, it would have violated Article III because some of the members were not Article III judges. As we explained:

"[T]he 'practical consequences' of locating the Commission within the Judicial Branch pose no threat of undermining the integrity of the Judicial Branch or of expanding the powers of the Judiciary beyond constitutional bounds by uniting within the Branch the political or quasi-legislative power of the Commission with the judicial power of the courts. [The Commission's] powers are not united with the powers of the Judiciary in a way that has meaning for separation-of-powers analysis. Whatever constitutional problems might arise if the powers of the Commission were vested in a court, the Commission is not a court, does not exercise judicial power, and is not controlled by or accountable to members of the Judicial Branch."

We have thus always recognized the fact that the Commission is an independent agency that exercises policymaking authority delegated to it by Congress. Nothing in our holding today is inconsistent with our decision in *Mistretta*. . . .

Document Source: *United States v. Booker*, 543 U.S. 220, 230, 233, 242 (2005) (citations omitted).

Lynn Adelman, *Michigan Journal of Race and Law*, 2013

In this article, Judge Lynn Adelman of the U.S. District Court for the Eastern District of Wisconsin critiques the Sentencing Guidelines, arguing that they have contributed to a mass incarceration crisis and unduly limited the discretion of federal judges.

Beginning in the 1970s, the United States embarked on a shift in its penal policies, tripling the percentage of convicted felons sentenced to confinement and doubling the length of their sentences. This shift included a dramatic increase in the prosecution and incarceration of drug offenders. As a result of its move toward long prison sentences, the United States now incarcerates so many people that it has become an outlier; this is not just among developed democracies, but among all nations, including highly punitive states such as Russia and South Africa, and also in comparison to the United States' own long-standing practices. The present rate of incarceration in the United States is currently "almost five times higher than the historical norm prevailing throughout most of the twentieth century." In sum, the United States has a serious over-punishment problem. Our country's imprisonment rate has acquired the name, "mass incarceration," meant to provoke shame about the fact that the world's wealthiest democracy imprisons so many people, even at a time when crime rates have diminished and crime is "not one of the nation's pressing social problems."

Most criminal justice scholars agree that our current prison population is too large. They also agree that the impact of imprisonment on the crime rate is modest and that the speed at which people are released from prison bears little relation to the likelihood that they will remain crime free. Many prisoners can serve shorter sentences without triggering an increase in crime. As a result, we can reduce sentence lengths substantially without adversely affecting public safety.

Federal sentencing policy contributes significantly to the problem of mass incarceration. Every year the federal government sets a new record for the number of people locked up in federal prisons, which now stands at approximately 218,000. Federal prisons are operating 38 percent over-capacity. While the state prison population recently declined for the first time in almost forty years, the federal prison population continues to increase. The unremitting growth of the federal prison population is a direct result of the Sentencing Reform Act ("SRA") of 1984, the United States Sentencing Guidelines ("the guidelines") promulgated pursuant to the SRA by the United States Sentencing Commission ("the Commission"), and statutes imposing mandatory minimum prison sentences for many offenses, particularly drug offenses.

The guidelines were mandatory until the Supreme Court made them advisory in *United States v. Booker*. When the guidelines were mandatory, they caused the average

federal sentence to increase from twenty-eight to fifty months. Although the Commission stated that it based the guidelines on past sentencing practice, its methodology immediately tilted sentences higher. For many offenses, the Commission ignored past practice and, with little or no explanation, established much harsher sentences. And in all but a very small percentage of cases, it prohibited courts from sentencing defendants to probation. To the extent that it relied on past sentencing practice, the Commission calculated average pre-guideline sentences by counting only prison sentences, ignoring that "approximately 50 % of defendants in the pre[-]guideline era received sentences of probation." Based on Congress's abolition of parole, another feature of the SRA, and the Commission's choices with respect to the guidelines, the average time served by federal defendants rose from thirteen months to forty-three months. . . .

Reducing mass incarceration is conceptually simple: We need to send fewer people to prison and for shorter lengths of time. In addition, many prisoners currently serving long sentences are elderly and present little risk to public safety. Establishing an early release program for such prisoners would also contribute to reducing the number of people incarcerated.

A reasonable observer might conclude from the foregoing that the Commission, which has considerable authority with respect to federal sentencing policy, would be making an effort to address the problem of mass incarceration. Such an observer would be surprised to discover not only that the Commission has expressed little interest in the problem, but that it recently asked Congress to enact legislation that would likely result in an increase—not a decrease—in the federal prison population. The Commission proposed a number of statutory changes all designed to make it more difficult for judges to impose sentences below those called for by the guidelines. Specifically, the Commission asked Congress to require judges to give more weight to the guidelines and to provide additional reasons for imposing sentences that vary substantially from the guidelines. The Commission also asked Congress to require courts of appeals to presume that sentences within the guidelines are reasonable and to scrutinize more carefully sentences based on disagreements with the guidelines.

The Commission justified its proposed changes on the ground that in the wake of *Booker*, it had observed "troubling trends in sentencing, including growing disparities among circuits and districts and demographic disparities." In her statement to Congress, Commission Chair Patti B. Saris made clear that what she meant by "troubling trends" was the fact that judges were too often exercising the discretion that *Booker* conferred on them to grant sentences below guideline sentences. Saris stated that "over the last three years, average sentence lengths have decreased," and that this was attributable "to a decrease in the rate at which courts are imposing sentences within the applicable guideline range."

She asserted, "The most notable change in federal sentencing over time involves the rate of non-government sponsored below range sentences," which increased from 12.5 percent of all cases in the year after *Booker* to "17.8 [percent] of all cases in fiscal year 2010.". . .

I argue that the Commission serves no useful purpose by continuing to seek ways of preventing or dissuading judges from imposing below guideline sentences. Rather, I suggest that the Commission ought to strike out in a new direction, one that is responsive to present conditions. The Commission should focus on reducing mass incarceration. The Commission has considerable resources and, if it made a serious and concentrated effort, could significantly ameliorate the problem of mass incarceration. At the same time, the Commission could reduce the number of below guideline sentences. The most effective way to reduce the number of below guideline sentences would be to make the guidelines less severe. If judges were in greater agreement with the guidelines, they would be less inclined to impose sentences beneath them.

Document Source: Lynn Adelman, "What the Sentencing Commission Ought to be Doing: Reducing Mass Incarceration," *Michigan Journal of Race and Law* 18 (Spring 2013): 295–98, 299 (footnotes omitted).

Cases that Shaped the Federal Courts

This series includes case summaries, discussion questions, and excerpted documents related to cases that had a major institutional impact on the federal courts. The cases address a range of political and legal issues including the types of controversies federal courts could hear, judicial independence, the scope and meaning of "the judicial power," remedies, judicial review, the relationship between federal judicial power and states' rights, and the ability of federal judges to perform work outside of the courtroom.

- *Hayburn's Case* (1792). Could Congress require the federal courts to perform non-judicial duties?
- *Chisholm v. Georgia* (1793). Could states be sued in federal court by individual citizens of another state?
- *Marbury v. Madison* (1803). Could federal courts invalidate laws made by Congress that violated the Constitution?
- *Fletcher v. Peck* (1810). Could federal courts strike down state laws that violated the Constitution?
- *United States v. Hudson and Goodwin* (1812). Did the federal courts have jurisdiction over crimes not defined by Congress?
- *Martin v. Hunter's Lessee* (1816). Were state courts bound to follow decisions issued by the Supreme Court of the United States?
- *Osborn v. Bank of the United States* (1824). Could Congress grant the Bank of the United States the right to sue and be sued in the federal courts?
- *American Insurance Co. v. Canter* (1828). Did the Constitution require Congress to give judges of territorial courts the same tenure and salary protections afforded to judges of federal courts located in the states?
- *Louisville, Cincinnati, and Charleston Rail-road Co. v. Letson* (1844). Should a corporation be considered a citizen of a state for purposes of federal jurisdiction?
- *Ableman v. Booth* (1859). Could state courts issue writs of habeas corpus against federal authorities?
- *Gordon v. United States* (1865). Could the Supreme Court hear an appeal from a federal court whose judgments were subject to revision by the executive branch?
- *Ex parte McCardle* (1869). Could Congress remove a pending appeal from the Supreme Court's jurisdiction?
- *Ex parte Young* (1908). Could a federal court stop a state official from enforcing an allegedly unconstitutional state law?
- *Moore v. Dempsey* (1923). How closely should federal courts review the fairness of state criminal trials on petitions for writs of habeas corpus?

- *Frothingham v. Mellon* (1923). Was being a taxpayer sufficient to give a plaintiff the right to challenge the constitutionality of a federal statute?
- *Crowell v. Benson* (1932). What standard should courts apply when reviewing the decisions of executive agencies?
- *Erie Railroad Co. v. Tompkins* (1938). What source of law were federal courts to use in cases where no statute applied and the parties were from different states?
- *Railroad Commission of Texas v. Pullman Co.* (1941). When should a federal court abstain from deciding a legal issue in order to allow a state court to resolve it?
- *Brown v. Allen* (1953). What procedures should federal courts use to evaluate the fairness of state trials in habeas corpus cases?
- *Monroe v. Pape* (1961). Did the Ku Klux Klan Act of 1871 permit lawsuits in federal court against police officers who violated the constitutional rights of suspects without authorization from the state?
- *Baker v. Carr* (1962). Could a federal court hear a constitutional challenge to a state's apportionment plan for the election of state legislators?
- *Glidden Co. v. Zdanok* (1962). Were the Court of Claims and the Court of Customs Appeals "constitutional courts" exercising judicial power, or "legislative courts" exercising powers of Congress?
- *United States v. Allocco* (1962). Were presidential recess appointments to the federal courts constitutional?
- *Walker v. City of Birmingham* (1967). Could civil rights protestors challenge the constitutionality of a state court injunction, having already been charged with contempt of court for violating the injunction?
- *Bivens v. Six Unknown Named Agents* (1971). Did the Fourth Amendment create an implied right to sue officials who conducted illegal searches and seizures?
- *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.* (1982). Did the Bankruptcy Reform Act of 1978 violate the Constitution by granting too much judicial power to bankruptcy judges?
- *Morrison v. Olson* (1988). Could Congress empower federal judges to appoint independent counsel investigating executive branch officials?
- *Mistretta v. United States* (1989). Could Congress create an independent judicial agency to guide courts in setting criminal sentences?
- *Lujan v. Defenders of Wildlife* (1992). Could an environmental organization sue the federal government to challenge a regulation regarding protected species?
- *City of Boerne v. Flores* (1997). Could Congress reverse the Supreme Court's interpretation of the Constitution through a statute purportedly enforcing the Fourteenth Amendment?