



1-1-1989

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Recommended Citation

Janis Hillman, *Judicial Rulemakers Held to have Produced Federal Sentencing Guidelines within Permissible Twilight Area in Which Branches of Government Merge.*, 20 ST. MARY'S L.J. (1989). Available at: <https://commons.stmarytx.edu/thestmaryslawjournal/vol20/iss4/11>

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RECENT DEVELOPMENTS

CONSTITUTIONAL LAW—SEPARATION OF POWERS—JUDICIAL RULEMAKERS HELD TO HAVE PRODUCED FEDERAL SENTENCING GUIDELINES WITHIN PERMISSIBLE “TWILIGHT AREA” IN WHICH BRANCHES OF GOVERNMENT MERGE. *Mistretta v. United States*, __ U.S. __, 109 S. Ct. 647, 102 L. Ed. 2d 714 (1989).

The wide disparity in sentences handed down by different federal judges for similar crimes has long been the object of public criticism. In 1984, Congress addressed the disparity through the Sentencing Reform Act, Pub. L. No. 98-473, 98 Stat. 2017 (codified as amended at 28 U.S.C. §§ 991-998 (1982 & Supp. IV 1986)). The Act created the United States Sentencing Commission as an independent agency within the judicial branch. Congress assigned to the Commission the task of promulgating Federal Sentencing Guidelines (“Guidelines”). The Commission’s Guidelines, which took effect on November 1, 1987, greatly narrowed the permissible range of sentences which federal district judges could impose. The Guidelines effectively reduced a district judge’s discretion by limiting the scope of his inquiry to facts concerning the offense and the offender. *See* 28 U.S.C. § 994(c), (d) (1982 & Supp. IV 1986).

The Guidelines proved to be extremely unpopular with the criminal defense bar and were repeatedly challenged. *See, e.g., United States v. Kane*, 691 F. Supp. 341 (N.D. Ga. 1988); *United States v. Williams*, 691 F. Supp. 36 (M.D. Tenn. 1988); *United States v. Brodie*, 686 F. Supp. 941 (D. D.C. 1988). A number of defense attorneys advanced separation-of-powers challenges to the Guidelines. Another argument was that the Guidelines were the result of an unlawful Congressional delegation of authority. *See United States v. Johnson*, 682 F. Supp. 1033, 1034 (W.D. Mo. 1988). Additional arguments maintained that the Guidelines were unconstitutional under related separation-of-powers principles because the Sentencing Commission, a rule-making body, included members of the judiciary, and because judges on the Commission were required to share their authority with non-judges. *See Gubiensio-Ortiz v. Kanahale*, 857 F.2d 1245, 1259-62 (9th Cir. 1988).

Over 150 federal trial and appellate courts ruled in favor of defendants who claimed that the Commission and its Guidelines were unconstitutional; those courts refused to apply them. *See, e.g., Gubiensio-Ortiz v. Kanahale*, 857 F.2d 1245, 1266 (9th Cir. 1988); *United States v. Molina*, 688 F. Supp. 819, 824 (D. Conn. 1988); *United States v. Rosario*, 687 F. Supp. 426, 428 (N.D. Ill. 1988). Conversely, numerous other federal courts determined that no constitutional principles were violated by implementation of the Guidelines and applied the new sentencing directives as ordered. *See, e.g., United States v. Belgard*, 694 F. Supp. 1488, 1495 (D. Or. 1988); *United States v. Franz*, 693 F. Supp. 687, 691-93 (N.D. Ill. 1988); *United States v. Schwartz*, 692 F. Supp. 331, 343 (D. Del. 1988).

To address the discord which the Guidelines created in federal courts across the nation, the United States Supreme Court considered the constitutionality of the new sentencing scheme in *Mistretta v. United States*, ___ U.S. ___, 109 S. Ct. 647, 102 L. Ed. 2d 714 (1989). In *Mistretta*, the United States District Court for the Western District of Missouri rejected a defendant's claim that the Guidelines were unconstitutional because of unlawful delegation of authority and separation-of-powers violations. *See United States v. Johnson*, 682 F. Supp. 1033, 1035 (W.D. Mo. 1988)(upholding constitutionality of Congress' delegation of legislative power to Sentencing Commission), *aff'd sub nom., Mistretta v. United States*, ___ U.S. ___, 109 S. Ct. 647, 102 L. Ed. 2d 714 (1989). *Mistretta* then pleaded guilty to conspiracy and agreement to distribute cocaine and was sentenced under the Guidelines. *See Mistretta*, ___ U.S. at ___, 109 S. Ct. at 653-54, 102 L. Ed. 2d at 729-30. Citing the urgent need to resolve the confusion created by lower federal courts' split on the Guidelines, both *Mistretta* and the United States petitioned the Supreme Court for certiorari, bypassing judgment in the Eighth Court of Appeals under Supreme Court Rule 18. *See id.* at ___, 109 S. Ct. at 654, 102 L. Ed. 2d at 730. On January 18, 1989, the Supreme Court ruled that the Guidelines were constitutional, rejecting the separation-of-powers arguments advanced by *Mistretta*. *See id.* at ___, 109 S. Ct. at 675, 102 L. Ed. 2d at 755-56.

The Constitution allocates governmental powers among three separate and co-equal branches of government, dictating at the outset that "all legislative Powers herein granted be vested in a Congress of the United States." U.S. CONST. art. I, § 1. *See generally* J. FITZGERALD, CONGRESS AND THE SEPARATION OF POWERS 27-43 (1986). Congress, exercising its legislative authority, established the Sentencing Commission as "an independent commission in the judicial branch." Sentencing Reform Act, 28 U.S.C. § 991(a) (1982 & Supp. IV 1986). The Commission's seven voting members, including at least three federal judges, are appointed by the President and confirmed by the Senate. *Id.* The Commission is entrusted with the task of promulgating Federal Sentencing Guidelines that are binding on all federal

courts. The Guidelines fix narrow ranges of permissible sentences for federal judges to assess according to specific factors concerning the offense and the offender. 28 U.S.C. § 994 (1982 & Supp. IV 1986).

Rulemaking, ordinarily within the domain of the executive branch, has neither been considered assigned to that branch exclusively nor considered a wholly non-judicial function. *See Humphrey's Executor v. United States*, 295 U.S. 602, 617 (1935)(rulemaking under legislative direction outside exclusive province of executive branch); *see also Wayman v. Southard*, 23 U.S. (19 Wheat.) 1, 43 (1825)(rulemaking power may be conferred on judiciary). For example, the task of judicial rulemaking in the realm of procedure was assigned to the Supreme Court under the Rules Enabling Act of 1934, which conferred upon the Court the power to promulgate Federal Rules of Civil Procedure. *See* 28 U.S.C. § 2072 (1982). However, the Sentencing Commission's work is undisputedly substantive and in this regard clearly extends the boundaries of judicial rulemaking. *See Mistretta v. United States*, ___ U.S. ___, ___, 109 S. Ct. 647, 665, 102 L. Ed. 2d 714, 743 (1989)(Commission's goals are unlike those involved in procedural rulemaking). The *Mistretta* Court acknowledged this departure but set aside such concerns under the rationale that no harm was foreseeable from the "practical consequences" of the Commission and its assignment. *See id.*

Justice Blackmun, writing for the *Mistretta* majority, recounted how the Court has consistently recognized the necessity of a "twilight area" in which the separate branches' activities merge. *See id.* at ___, 109 S. Ct. at 661-62, 102 L. Ed. 2d at 739 (calling for integration of dispersed powers into workable government). The *Mistretta* Court viewed the authors of the Federal Sentencing Guidelines as performing their task of substantive judicial rulemaking in precisely such a nontraditional "twilight area." *See id.* at ___, 109 S. Ct. at 662, 102 L. Ed. 2d at 739.

The Court rejected all three of *Mistretta's* challenges to the Commission's structure. *See id.* at ___, 109 S. Ct. at 675, 102 L. Ed. 2d at 756. Initially, the Court struck down *Mistretta's* claim that Congress had delegated an excessive amount of its legislative authority to the judicial branch by providing for the formation of the Commission. *See id.* at ___, 109 S. Ct. at 654, 102 L. Ed. 2d at 730-31. Although Congress generally may not delegate its legislative powers to another branch, there is nothing which prevents Congress from relying upon the assistance of another branch of government. *Id.* at ___, 109 S. Ct. at 654, 102 L. Ed. 2d at 730. The Court reiterated that so long as Congress dictates "an intelligible principle" to which an agency must conform when exercising Congressionally delegated legislative functions, no unconstitutional delegation of legislative power occurs. *See id.* (quoting *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 406 (1928)). Congress, the Court continued, actually went beyond setting the requisite "intelligible

principle" by outlining specific policies and directives upon which the Commission is to act. *See id.* at ___, 109 S. Ct. at 658, 102 L. Ed. 2d at 735.

Recounting with approval numerous instances during past decades in which the Supreme Court upheld broad Congressional delegation of authority, the *Mistretta* Court suggested that delegation concerning the Federal Sentencing Guidelines was more specific and, therefore, less constitutionally suspect than that found in the cases from that decade. *See id.* at ___, 109 S. Ct. at 655, 102 L. Ed. 2d at 731-32. In establishing the categories from which lengths of sentences were to be drawn, Congress dictated the specific factors which the Commission was to consider. *See* 28 U.S.C. § 994(c) (1982 & Supp. IV 1986). The factors include aggravating and mitigating circumstances of the crime, the harm caused by the crime, the community view of the gravity of the offense, and the offender's age, education, mental, emotional and physical condition, criminal history, employment record, and family and community ties and responsibilities. *See id.* § 994(c), (d).

Additionally, the Court acknowledged that the Commission had exercised considerable discretion in preparing the Guidelines. *See Mistretta v. United States*, ___ U.S. ___, ___, 109 S. Ct. 647, 658, 102 L. Ed. 2d 714, 735 (1989). For example, the Commission members used their judgment in determining what crimes had in the past been punished too severely or too lightly, in deciding how the factors which Congress listed were to be weighed in assessing sentences, and in deciding which crimes were to be viewed as the most serious. *See id.* at ___, 109 S. Ct. at 647, 102 L. Ed. 2d at 734. However, the court cited other cases in which Congressional delegations of authority carried with them the need to exercise a reasonable amount of discretion, and stated that Congress is not bound to employ the least possible delegation of discretion when authorizing tasks. *See id.*

The Court next dismissed *Mistretta's* argument that the composition of the Commission violated the separation of powers principle. Three federal judges are required to serve on the Commission, which performs an essentially legislative role. *See id.* at ___, 109 S. Ct. at 667, 102 L. Ed. 2d at 746. The separation of governmental powers into three distinct branches is basic to the political scheme inherent in the Constitution. *See* J. FITZGERALD, CONGRESS AND THE SEPARATION OF POWERS 27-31 (1986). The *Mistretta* court emphasized that the principle is aimed primarily at assuring that each branch remain free from control or coercive influence by either of the other branches. *See Mistretta v. United States*, ___ U.S. ___, ___, 109 S. Ct. 647, 659, 102 L. Ed. 2d 714, 736-37 (1989). The Court noted that the three branches need not remain wholly separate and distinct and endorsed a "pragmatic, flexible view of differentiated governmental power." *Id.* at ___, 109 S. Ct. at 659, 102 L. Ed. at 736.

The Court found that inherent in separation-of-powers violations is the danger that one branch may aggrandize itself at the expense of another, and

ruled that no such attempt by one branch to seize power for itself at the expense of either of the others existed in the formation of the Sentencing Commission. *See id.* at ___, 109 S. Ct. at 659-61, 102 L. Ed. 2d at 736-38. The Court conceded that the Commission “unquestionably is a peculiar institution within the framework of our Government.” *See id.* at ___, 109 S. Ct. at 661, 102 L. Ed. 2d at 738. However, the Supreme Court cited its past approval of instances in which non-adjudicatory duties were assigned to the judicial branch. *See id.* at ___, 109 S. Ct. at 662, 102 L. Ed. 2d at 739 (quoting *Myers v. United States*, 272 U.S. 52 (1926)(Brandeis, J., dissenting)).

Finally, the appellant asserted that the independence and integrity of the judicial branch is threatened by a Congressional mandate which dictates that federal judges serve on the Commission and that the judges share their authority with non-judges. *See id.* at ___, 109 S. Ct. at 667, 102 L. Ed. 2d at 746. Although the Court found the Congressional requirement of service on the Commission somewhat troublesome, they dismissed the concern, noting that the Founding Fathers themselves did not absolutely prohibit such extra-judicial service. *See id.* at ___, 109 S. Ct. at 667-68, 102 L. Ed. 2d at 747-48. Likewise, the *Mistretta* Court found that no threat to “judicial integrity” arose from judges being required to serve on the Commission along with non-judges, noting that the Commission is not a court, nor does it exercise judicial power. *See id.* at ___, 109 S. Ct. at 665, 102 L. Ed. 2d at 744.

The Court, despite a lone dissent by Justice Scalia, continued its pattern of rejecting challenges brought under separation-of-powers principles. *See, e.g., Morrison v. Olson*, ___ U.S. ___, ___, 108 S. Ct. 2597, 2620, 101 L. Ed. 2d 569, 609 (1988)(Ethics in Government Act does not violate separation-of-powers principles); *Nixon v. Administrator of General Services*, 433 U.S. 425, 441-42 (1977)(Presidential Recordings and Materials Preservation Act retained proper balance between separate branches); *Buckley v. Valeo*, 424 U.S. 1, 131-33 (1976)(Congressional regulation of elections found not contrary to separation-of-powers restriction). In response to the *Mistretta* decision, the criminal defense bar finds itself committed to continue challenging the legality and the application of the Guidelines. *See National Law Journal*, Jan. 30, 1989 at 3 (Third Circuit Judge Edward R. Becker predicts federal courts will be inundated by appeals which will have major impact on appellate workload); *see also* Tjoflat, *A Practical Look At the Sentencing Provisions of S. 1722*, 72 J. CRIM. L. & CRIMINOLOGY 555, 579-89 (1981)(outlining feasible attacks on Guidelines under due process, double jeopardy, statutory insufficiency, and faulty evidentiary foundation grounds).

The Supreme Court is continuing to reflect its modern-day pragmatism and flexibility concerning the permissible roles and interaction of the three branches of government. The Court has signalled that “twilight area” arrangements, formulated to adapt to the difficult problems which the government faces, will continue to be upheld over allegations that they are