The Supreme Court's Pragmatic and Flexible Approach to Federal Judicial Separation of Powers Issues: Mistretta v. United States

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THE SUPREME COURT'S PRAGMATIC AND FLEXIBLE APPROACH TO FEDERAL JUDICIAL SEPARATION OF POWERS ISSUES: MISTRETTA v. UNITED STATES

"[I]f a given policy can be implemented only by a combination of legislative enactment, judicial application, and executive implementation, no man or group of men will be able to impose its unchecked will."

—Earl Warren, 1965

INTRODUCTION

Imagine this. The United States Advisory Council is an independent agency consisting of a panel of seven federal judges, the Attorney General, and a representative from each house of Congress. The Council's purpose is to advise both the Congress and the President on the constitutional ramifications of their respective actions and policies. Congress created the Council as a permanent body within the judicial branch of the federal government. The President appoints its members to serve for six year terms, and he may reappoint them for up to two additional terms. Council members may only be removed by the President for good cause shown. Although they do not sit on the bench during their mandatory service on the Council, the judicial members remain active federal judges, and are expected to serve in numerous other extrajudicial capacities. The advisory "opinions" of the Council permit Congress to foresee the presence of any constitutional infirmities in the bills pending before it, and to remedy such defects prior to their passage. Similarly, the President receives tacit approval of his actions and is forewarned if he or other members of the executive branch might exceed the limits of the executive power.

This scenario is of course nothing more than pure fantasy. The principle of separated powers inherent in our tripartite system of government would normally preclude such an egregious mingling of governmental authority.

2. The federal Constitution contains no express provision which prohibits the officials of one branch of government from exercising the functions of the other branches. However, the doctrine of separated powers is inferred from the fact that the legislative, executive, and judicial functions are described in three separate articles of the Constitution. Springer v. Gov't of the Philippine Islands, 277 U.S. 189, 201 (1928). The resulting scheme is usually referred to as either "separation of powers" or "checks and balances." See G. STONE, L. SEIDMAN, C. SUNSTEIN & M. TUSNÉT, CONSTITUTIONAL LAW 342 (1986) [hereinafter CONSTITUTIONAL LAW]. The term "separation of powers" captures the constitutional effort to allocate different power among three government bodies which are constituted in different ways. Id. The term "checks and balances" focuses on the constitutional effort to ensure the system will be able to guard against usurpation of authority by any one branch of government. Id.
However, in light of the Supreme Court’s recent decision in Mistretta v. United States, the future existence of a government agency resembling a United States Advisory Council may no longer be such a fanciful idea.

The Mistretta Court rejected a challenge to the constitutionality of the United States Sentencing Commission ("Commission") and the Sentencing Guidelines ("Guidelines") which the Commission promulgated pursuant to the Sentencing Reform Act of 1984 ("SRA"). At issue in Mistretta was the constitutionality of Congress’ delegation of legislative power to an independent agency within the judicial branch. Also at issue was the extent to which Congress may confer nonjudicial duties upon article III judges consistent with the exercise of their judicial function. The Mistretta decision marks what may be the apex in a series of recent Supreme Court developments redefining the meaning of the separation of powers doctrine.

This Note will focus on the Mistretta Court’s practical approach to the separation of powers doctrine, primarily as it relates to the powers of the federal judiciary. Specifically, the constitutional ramifications of allowing Congress to concentrate excessive power in the judicial branch of the federal government, and of permitting Congress to require federal judges to engage in extrajudicial activities will be discussed. The Mistretta Court’s resolution of these closely related issues is particularly important because the Court had not directly addressed either issue prior to its decision in Mistretta.

This Note will first discuss from a historical perspective both the separation of powers doctrine and the importance of maintaining an independent judiciary. The constitutional concern for allowing power to concentrate in any one branch of government, and the issue of extrajudicial service by federal judges will be similarly examined. Next, the Mistretta decision will be

5. Article III, section 1 of the Constitution provides that “[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”
7. These two interrelated issues composed the bulk of the Court’s decision in Mistretta. See infra notes 206-52 and accompanying text.
8. See Mistretta, 109 S. Ct. at 670. The Supreme Court had occasion to do so in this case because the Commission represents an unusual hybrid of all three branches of government, which has never been seen before. Id. at 675 (characterizing the Commission as an unusual hybrid in structure and authority).

In creating the Sentencing Commission, the SRA made a statutory scheme that differs in material respect from anything that has gone before, in over two centuries of constitutional history. See Gubiensio-Ortiz v. Kanahele, 857 F.2d 1245, 1250 (9th Cir. 1988).
evaluated in light of past precedent and practice in both these areas, including the Supreme Court's earlier ruling in *Morrison v. Olson.* Finally, this Note will examine the impact of the *Mistretta* decision upon both the constitutional requirement of separated powers in general, and the federal judiciary in particular.

I. BACKGROUND

A. A Historical Perspective of the Separation of Powers Doctrine and the Concept of an Independent Judiciary

Because the two main issues decided in *Mistretta* arise from, and are integral to, the separation of powers doctrine, a brief review of the principle of separated powers itself is necessary. In generally discussing its origin and subsequent development, this Note will pay particular attention to the traditional desire for an independent judiciary, on the one hand, and the historic fear of placing too much power in the hands of the federal judiciary, on the other.

1. Separation of Powers and the Independent Judiciary

The separation of powers doctrine has been referred to as the "second great structural principle of American Constitutional Law." Although not expressly provided for, the separation of powers doctrine is inferred from the Constitution's separate grant of power to each of the three specifically designated branches of government. Justice Sutherland aptly elucidated the meaning of the doctrine when he wrote:

10. Corwin, *Introductory Essay* in *The Constitution of the United States of America: Analysis and Interpretation*, vii, xvii (Killian & Beck ed. 1987). The first great structural principle is the doctrine or concept of Federalism; the third is the concept of a Government of Laws and not of Men; the fourth is the no longer prevalent substantive doctrine of Due Process of Law. *Id.* at xii.

Article I, section 1 of the United States Constitution states that, "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." U.S. CONST. art. I, § 1. Article II, section 1 states that, "[t]he executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice President, chosen for the same Term, be elected." U.S. CONST. art. II, § 1. Article III, section 1 states that,

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.

The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

U.S. CONST. art. III, § 1.
It may be stated, then as a general rule inherent in the American constitutional system, that, unless otherwise expressly provided or incidental to the powers conferred [by the Constitution], the legislature cannot exercise either executive or judicial power; the executive cannot exercise either legislative or judicial power; the judiciary cannot exercise either executive or legislative power.\(^\text{12}\)

As this passage indicates, the principle of separated powers is a fundamental component of our federal system of government.\(^\text{13}\) Imperative in that system is the notion of an independent judicial branch which operates free of interference or influence from the coordinate branches of government.\(^\text{14}\) Consequently, maintaining an independent judicial branch may be viewed as a specific goal of the doctrine of separated powers.

a. Origins of the principle of separated powers and an independent judiciary

Most persons would attribute the idea of separating government into three distinct and independent branches to the Framers of the United States Constitution. Quite the contrary is true. The notion of a system of government based on separated powers was neither unique to, nor a creation of, the political minds of the eighteenth century. In fact, the concept is nearly as old as civilization itself, some legal historians having traced the origins of the doctrine to the ancient Greeks and Romans.\(^\text{15}\) However, it was not until many centuries later that the concept of separated powers assumed a form similar to that which existed at the time of the Framers. Writing near the close of the seventeenth century, John Locke espoused a theory of government based on three powers,\(^\text{16}\) which he referred to as the "legislative," "executive," and "federative."\(^\text{17}\) Then, in 1748, Baron de Montesquieu published his *Spirit of the Laws*, a work which refined and expanded the

\(^{12}\) *Springer*, 277 U.S. at 210-12.

\(^{13}\) The American constitutional framework is best understood as a scheme that supplements the separation of powers by creating devices by which one branch is able to monitor and check the others. *Constitutional Law*, supra note 2, at 342. The system of checks and balances within the federal structure is intended to operate as a check against self-interested representation. If a segment of rulers obtained interests that diverged from those of the people, other national officials would have both the incentive and means to resist the advancement of those interests.


\(^{15}\) Aristotle's treatise entitled *Politics* described the fourth century versions of the legislature, the executive, and the judiciary. *See Ervin, Separation of Powers: Judicial Independence*, 35 *Law & Contemp. Probs.* 108, 108 (1970). Ervin relates that republican Rome also had a similar system consisting of public assemblies, the senate and the public officials, all operating on a principle of checks and balances. *Id.*

\(^{16}\) *J. Locke*, Two Treatises of Government (R. Cox ed. 1982).

\(^{17}\) *See Ervin, supra note 15*, at 108.
doctrine, and was well known to many members of the Constitutional
Convention. It is Montesquieu who is popularly credited with inspiring the
Framers to adopt a tripartite system of government. Furthermore, most of those present at the Convention were lawyers fa-
miliar with the centuries-old struggle for judicial independence in England. The concept of a judiciary separate from all other governmental branches had arisen as part of the development of the English common law. In the early part of the eleventh century, the English judiciary existed merely as an administrative extension of the King and his Council. The reigning sovereign would appoint and temporarily delegate royal authority to district officers, who then conducted all of the administrative and judicial business throughout the King’s territories. By 1176, royal commissioners were being sent all across England to hear the civil and criminal pleas of the Crown. At the

18. See id. at 108-09.
19. Madison cited extensively to Montesquieu when defending the draft Constitution’s distribution of power in The Federalist No. 47 (J. Madison). Montesquieu’s oft-quoted passage follows:

When the legislative and executive powers are united in the same person or body, there can be no liberty, because apprehension might arise lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.

Again, there is no liberty, if the judiciary power be not separate from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control: for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression.

There would be an end to everything, were the same man or the same body, whether the nobles or the people, to exercise those three powers, that of enacting the laws, that of executing the public resolutions, and of trying the cases of individuals.

1 B. DeMontesquieu, Spirit of the Laws 152 (Nugent ed. 1823).

However, the belief that Montesquieu so inspired the Framers has been subject to some debate. See, e.g., Wright, The Origins of the Separation of Powers in America, 13 Económica 169 (1933), reprinted in Separation of Powers, in Cases and Selected Readings, S. Doc. No. 91-49, 91st Cong., 1st Sess. 240, 240-41 & n.2 (1969). Wright notes that Montesquieu was not the sole inspiration to the framers for the principle of separated powers, and that the system the Framers ultimately adopted, violated the principles he envisioned in numerous respects. For example, the President’s veto power and the exclusive authority of the Senate to try impeachments would have been too great an overlapping of the branches under Montesquieu’s model. In these respects, the Framers did not accept the extreme French version of separation of powers. Rather, the Constitution reflects a conception of checks and balances which requires some interaction rather than total isolation between the branches. See M. Vile, Constitutionalism and the Separation of Powers 119-75 (1967).

22. Originally, the King possessed almost complete control over the business of the existing royal courts and the royal justices. Frequently, the King would personally hear the pleas before the royal courts, particularly those by which he stood to be somehow affected. See id. at 194.
23. See Shapiro, Judicial Independence: The English Experience, 55 N.C.L. Rev. 577, 590 (1977). Despite such sweeping powers, the royal delegate could not become an independent
end of the twelfth century, stationary tribunals began to emerge which exercised actual jurisdiction, and were mainly occupied with judicial work as contrasted with tribunals with large, undifferentiated governmental powers.25 These tribunals slowly lost their administrative functions, and consequently took on a distinctly more judicial character.26 As their former close connection with the King and his Council diminished, the royal tribunals gradually became separate courts of common law.27 This trend was to culminate in the Magna Carta of 1215, which made it legally necessary for the English Court of Common Pleas to remain stationary at Westminster.28 The Magna Carta also provided that the court was no longer to follow the King, emphasizing its character as a purely judicial body separated from the legislative and administrative arms of the government.29

Not surprisingly, English judges were originally appointed by and served at the pleasure of the royal monarch.30 The English Revolution of 1688 did not immediately liberate judges from the control of the King, but merely transferred administrative control of the courts to Parliament.31 The Revolution, nonetheless, made the independence of the judiciary a “linchpin of the constitutional monarchy.”32 Finally, the Act of Settlement of 1701 guaranteed the independence of the English judges by providing that judges should hold their office during “good behaviour,” and could only be removed by the Crown on an address by the two Houses of Parliament.33

25. Id. at 53.
26. Id. at 197. The judges of the English courts in the twelfth and early part of the thirteenth century were merely royal clerks. In the latter part of the thirteenth century and in the early part of the fourteenth century, these royal clerks were replaced with men who had made their career at bar. Id.
27. Id. at 206-07. The separation of the King's Bench from the person of the King was aided by the fact that the King had the Steward and Marshall courts to hear cases which most closely affected him. Id. at 207-208.
28. Id. at 56.
29. Id.
30. McIlwain, The Tenure of English Judges, 7 AMER. POL. SCI. REV. 217, 219 (1913); W. HOLDSWORTH, supra note 21, at 195. In fact, judicial office died with the Crown who had appointed it until an act of George III provided that judge's tenure of office should be unaffected by the demise of the Crown. Id.
31. See Shapiro, supra note 23, at 622.
33. W. HOLDSWORTH, supra note 21, at 195; McIlwain, supra note 30, at 224. The Act of Settlement was motivated in part by the manipulation of the bench by the Stuarts. W. HOLDSWORTH, supra note 21, at 195. The creation of judge-made decrees which formed the basis of the common law also assisted the common law courts in eventually separating themselves from the King and Parliament. By the middle of the eighteenth century, the common law had developed to such a point that only a close-knit guild of lawyers understood the esoteric legal system. See Shapiro, supra note 23, at 624. Although this period was the tightest and most resistant period of judicial independence in eighteenth century England, it later slackened with the eventual dominance of statutory law over common law. Id. at 630.
Through these developments, the freedom of judges from removal and intimidation, and supremacy of the rule of law over the royal prerogative, became basic tenets of the English constitutional monarchy. Therefore, the concept of an independent judiciary existing within a tripartite system of government was developed far in advance of the Constitutional Convention of 1787.

b. Early national and state experiences with separated powers

In addition to the English experience, the Framers were also influenced by their own country's practical experiences with early forms of state and national government. One example was the difficult lesson of the Articles of Confederation. The Articles had made little concession to the principle of separated powers, the one exception being that members of certain legislatively-created courts were not allowed to serve as members of Congress. Although the absence of separation of powers was not generally viewed as the main weakness of the Confederation, the Articles had been criticized for confounding legislative and executive powers in a single body, and for lacking a federal judiciary having cognizance of all matters of general concern. When the citizens of the newly formed United States called

34. Professor Shapiro has described three conceptual developments which composed what later became known as the independent judiciary, and ultimately served as a model for the eighteenth and nineteenth century English and American courts. These developments were the rule of law, the functional specialization of the judiciary, and the autonomy of the legal profession. The rule of law meant that although the King could intervene to change how the courts were applying the law, he could not do so to change the outcome of a particular case then at bar. Functional specialization simply recognized the development of distinct institutions and personnel devoted almost exclusively to the job of judging. Autonomy of the profession referred to the growth of the common law and common law lawyers, in that much of the law applied by English courts was created by them, rather than passed by the sovereign—thus the profession of judging was essentially politically independent. See Shapiro, supra note 23, at 583-85.

35. See Verkuil, supra note 32, at 322.

36. The Articles of Confederation had established a congress of state delegates as the central law-making and governing institution. Although its President, committees, and civil officers partook of an executive quality, and it established a court of appeals for cases of capture, the Confederation can hardly be seen as possessing the characteristics of a tripartite government. See Casper, supra note 11, at 219.

37. These early federal courts only heard trials for piracies and other maritime cases. See Wright, supra note 19, at 250.

38. Id.


40. Casper, supra note 11, at 219. Professor Casper reveals that Alexander Hamilton once wrote that the Articles were "contrary to the most approved and well founded maxims of free government which would require that the legislative executive and judicial authorities should be deposited in distinct and separate hands." Id. at 219-20 (citing 3 THE PAPERS OF ALEXANDER HAMILTON 421 (H. Sryett ed. 1966)).
for a reform of the defective Articles, the members of the Constitutional Convention turned to the concept of separated powers in order to remedy the shortcomings of the previous system.\footnote{41. See Ervin, supra note 15; at 110.}

The experiences of the American colonial\footnote{42. For a detailed discussion of the development of the doctrines of separated powers and bicameralism in the early colonies, see Wright, supra note 19, at 242-47. See also Casper, supra note 11, at 212-24 (discussing separation of powers elements in the American Colonies and early states).} and state governments also afforded the Framers with special guidance in forming a new national government. Many of the early state constitutions contained provisions separating the powers of government into independent and coequal branches,\footnote{43. For example, the Massachusetts Constitution of 1780 contained a clause strictly delineating the proper roles of the branches of government: In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them; the executive shall never exercise the legislative and judicial powers, or either of them; the judicial shall never exercise the legislative and executive powers, or either of them; to the end that it may be a government of laws, and not of men. MASS. CONST. OF 1780, art. 30, cited in THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS AND OTHER ORGANIC LAWS OF THE UNITED STATES 960 (B. Poore ed. 1878). Similarly, the Virginia Constitution of 1776 provided in part: The legislative, executive, and judiciary departments, shall be separate and distinct, so that neither exercise the powers properly belonging to the other: nor shall any person exercise the powers of more than one of them, at the same time . . . . 3 F. THORPE, THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 1687 (1909).} or at least defining and limiting the extent to which governmental powers overlapped.\footnote{44. See THE FEDERALIST No. 47, at 339-42 (J. Madison) (H.M. Jones ed. 1972) (commenting on the degree to which the early state constitutions mixed the powers of the three departments of government). In examining the constitutions of the early states, however, James Madison conceded that "there is not a single instance in which the several departments of power have been kept absolutely separate and distinct." Id. at 339.} Similarly, many of the states' colonial charters had provided for a system of divided, but "mixed" governmental power\footnote{45. At least one commentator has noted that the first constitutions of the early states appear to have generally embodied less of a separated powers or "checks and balances" concept than has since been the case in this country. See Wright, supra note 19, at 248. Wright points to two states in particular, Connecticut and Rhode Island, which operated under their colonial charters as constitutions until 1818 and 1842 respectively, seemingly uninterested in the separation of powers theory. Id. at 249-50.} which was based in part on their English forerunners.\footnote{46. Although the sources of governmental authority greatly varied from one colony to another, the American colonies generally had "mixed" governments based on the British model. Colonial governments typically contained monarchic, aristocratic, and democratic elements which were manifested in their governors, councils and legislatures. Id. at 215 & n.17.} Thus, by the time the Framers gathered
at the Constitutional Convention in 1787, many people considered the concept of separation of powers to be a fundamental political maxim.\textsuperscript{47}

Also inherent in the early American conception of separation of powers was the notion of a judiciary independent from both the legislature and executive.\textsuperscript{48} That the Framers were aware of this concept is apparent from the fact that several proposals were submitted at the Convention which would have guaranteed total judicial isolation from the other branches of government.\textsuperscript{49} Given this familiarity with both the principle of separated powers and the notion of an independent judiciary, it is not surprising that the Framers provided for both concepts in the document which established the new United States government.

c. Separation of powers in the United States Constitution

Despite the absence of express textual language establishing an independent principle of separated powers, the records of the Constitutional Convention nonetheless indicate that the Framers were concerned with preventing the concentration of power in any single branch of government.\textsuperscript{50} The Framers believed that only the distribution of power amongst several governmental institutions could counteract the inevitable tendency of concentrated authority to overreach and threaten liberty.\textsuperscript{51} They therefore carefully drafted a tripartite system of government which conferred separate and distinct powers upon each individual branch.\textsuperscript{52} To this system, they added a set of correlative checks and balances to safeguard against the encroachment or aggrandizement of one branch’s power at the expense of another.\textsuperscript{53} Hence, the President has a legislative role in vetoing or approving proposed legislation,\textsuperscript{54} and a judicial role in appointing the Justices of the Supreme Court.\textsuperscript{55} Judicial review by the courts presupposes scrutiny of the validity of the executive

\textsuperscript{47} Ironically, Thomas Paine and Benjamin Franklin both opposed the separated powers theory, but had little influence in that respect. Paine, in particular, argued for a simple union of powers in America. See Wright, supra note 19, at 241-42.

\textsuperscript{48} See Wheeler, Extrajudicial Activities of the Early Supreme Court, 1973 SUP. CT. REV. 123, 126. The notion of an independent judiciary was firmly in place in England before the American colonies were formed, and the English struggle for judicial independence was still fresh in the minds of those who attended the Convention. Id.

\textsuperscript{49} See infra note 111 and accompanying text.

\textsuperscript{50} See 1 Bryce, Studies in History and Jurisprudence 307-10 (1901). The central fear of those who opposed the Draft Constitution in 1787, was that it created an effective central government, the concentration of power in any part of could transform it into a tyrannical aristocracy. Id. Professor Casper reveals that in 1789, James Madison submitted a proposal for a new article VII, and Roger Sherman submitted a draft bill of rights, both which would have institutionalized separation of powers as an independent principle. While the House adopted Madison’s amendment, the Senate rejected it for reasons now lost to history. Casper, supra note 11, at 221-22.


\textsuperscript{52} See sources cited supra note 11.

\textsuperscript{53} See supra note 13.

\textsuperscript{54} U.S. CONST. art. I, § 7, cl. 3.

\textsuperscript{55} U.S. CONST. art. II, § 2, cl. 2.
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and legislative branches’ actions. Furthermore, Congress has the power to block certain appointments, reject treaties and other executive agreements, and to control to some extent the jurisdiction and structure of the federal courts.

The text of the Constitution expressly provides for the independence of article III judges. By fixing their tenure for life during “good behavior,” and forbidding reduction of their compensation, article III of the Constitution insulates federal judges from influence or coercion by the political branches, as well as radical swings in popular opinion. These textual provisions reflect the Framers’ desire to insure the independence and impartiality of the federal judiciary.

Conversely, the Framers were careful to protect against the accumulation of too much power in the judicial branch, since they believed that such power would surely result in tyranny. They therefore limited the exercise

56. U.S. CONST. art. II, § 2, cl. 2.
[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law . . . .

Id.

57. U.S. CONST. art. III, § 2, cl. 2.
In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

Id. See Ex parte McCordle, 74 U.S. (7 Wall.) 506 (1869) (within limits, Congress has power to prescribe the instances in which Supreme Court’s appellate jurisdiction may be exercised).

58. U.S. CONST. art. III, § 1. “The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.” Id.

59. “The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their services, a Compensation, which shall not be diminished during their Continuance in Office.”

U.S. CONST. art. III, § 1.

60. The Framers’ intent is exemplified by a statement made by Alexander Hamilton in the Federalist Papers:

“[T]here is no liberty, if the power of judging be not separated from the legislative and executive powers” . . . liberty can have nothing to fear from the judiciary alone, but would have everything to fear from its union with either of the other departments.

The complete independence of the courts of justice is peculiarly essential in a . . . Constitution.

The Federalist No. 78, at 491 (A. Hamilton) (quoting in part, Montesquieu).

61. See The Federalist, supra note 44, at 338. As indicative of his beliefs on the subject, Madison quoted Montesquieu as saying:
of federal judicial power only to the "Cases" and "Controversies" which properly came before the courts. Thus, the system of government designed by the members of the Constitutional Convention reflected their unique understanding of the need for a careful balance between ensuring the judiciary's independence, and preventing the growth of counter-majoritarian powers therein.

Perhaps because the separation of powers doctrine is more inherent than explicit, it remains uncertain what the American version of separated powers actually forbids or requires. As a result, the degree to which each of the branches of government should be restricted to their own spheres of operation has always been the subject of intense debate. The key question has always been what, if any, mingling of legislative, executive, and judicial power is permitted beyond the express provisions of the Constitution.

d. Supreme Court interpretation of the doctrine

The Supreme Court has generally applied the separation of powers doctrine consistent with the Framers' wish to prevent a concentration of power in

"When the legislative and executive powers are united in the same person or body," says he, "there can be no liberty, because apprehensions may arise lest the same monarch or senate should enact tyrannical laws to execute them in a tyrannical manner." Again: "were the power of judging joined with legislature, the life and liberty of the subject would be exposed to arbitrary control, for the judge would then be the legislator. Were it joined to the executive power, the judge might behave with all the violence of an oppressor."

Id. (emphasis in original).

62. Article III, section 2 provides:
The Judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

U.S. Const. art. III, § 2.

63. See Muskrat v. United States, 219 U.S. 346, 356 (1911) (adjudicatory or decisional power of article III courts limited to "cases" or "controversies").

64. See, e.g., Note, The Constitutional Infirmities of the United States Sentencing Commission, 96 Yale L. Rev. 1363, 1382-83 & nn.144-45 (1987) (assumption of extrajudicial activities by judges has long elicited controversy among judges and legislators). Even as the Constitution itself was awaiting ratification, James Madison sought to defend the proposed government against charges that it had so dangerously blended the powers of government so as to give cause for alarm. See The Federalist, supra note 44, at 336-42; Wright, supra note 19, at 255.

65. The Framers required some interaction between the three branches of the federal government in order to create our system of "checks and balances." To that end, the Constitution provides for limited mechanisms by which each branch can oversee the proper exercise of the constitutionally-assigned functions of the others. See supra notes 54-58 and accompanying text.
any one branch of government at the expense of liberty. Accordingly, the Court has struck down those provisions of law which either assigned to a single branch, powers more appropriately diffused among separate branches, or that undermined the authority or independence of either of the coordinate branches. Illustrative of the Court’s approach to the separation of powers concept is its enforcement of the nondelegation doctrine. Developed in Field v. Clark, this doctrine holds that by vesting legislative power in Congress, article I imposes restraints on the national legislature’s authority to delegate its legislative power to others. In applying the nondelegation doctrine, however, the Supreme Court has only struck down two delegations of legislative authority to other governmental bodies, and has not invoked the nondelegation doctrine in the last half-century.

68. See A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 529 (1935) (“The Congress is not permitted to abdicate or to transfer to others the essential legislative function with which it is . . . vested”); see also Field v. Clark, 143 U.S. 649, 692 (1892) (principle that Congress cannot delegate legislative power to another branch universally recognized as vital to the integrity and maintenance of system of government ordained by Constitution).
69. 143 U.S. 649 (1892).
70. See CONSTITUTIONAL LAW, supra note 2, at 366. The traditional per se test for a proper delegation of legislative authority outside of the legislative branch originally derived from dicta in Wayman v. Southard, 23 U.S. (10 Wheat) 1 (1825). Termed the “core function” test, this per se test prohibits congressional delegations of its core legislative functions. Id. at 43. The “core function” test was later rejected as problematic, see Lichter v. United States, 334 U.S. 742 (1948); Synar v. United States, 626 F. Supp. 1374 (D.D.C.), aff’d sub nom. Bowsher v. Synar, 478 U.S. 714 (1986), and was eventually replaced by the “intelligible principle” test. See J.W. Hampton, Jr. & Co. v. United States, 267 U.S. 394 (1928). Chief Justice Taft described the applicable test in stating that “[i]f Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to [exercise delegated authority] is directed to conform, such legislative action is not a forbidden delegation of legislative power.” Id. at 409. In other words, a delegation of legislative authority should be invalidated only if there is an absence of standards, such that “it would be impossible in a proper proceeding to ascertain whether the will of Congress has been obeyed.” Yakus v. United States, 321 U.S. 414, 420 (1944).
71. A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935) (invalidating statute authorizing creation of the “live poultry code” by the President on the ground that it was an impermissible delegation of legislative authority); Panama Refining Co. v. Ryan, 293 U.S. 388 (1935) (invalidating provision of the National Industrial Recovery Act of 1933 authorizing President to prohibit transportation in interstate commerce of oil produced in violation of state imposed production quotas).
72. The nondelegation doctrine has been said to have all “but disappeared as a constraint on the delegation of authority to administrative agencies.” CONSTITUTIONAL LAW, supra note
The Court's overall approach to separation of powers issues has been somewhat flexible, recognizing that the Framers did not intend the three branches to be entirely separate and distinct. Justice Jackson, concurring in *Youngstown Sheet & Tube Co. v. Sawyer*, summarized this approach when he stated that the Constitution "enjoins upon its three branches separateness but interdependence, autonomy but reciprocity." Indicative of this pragmatic and flexible view, the Court has adopted a functional test for gauging the permissible level of interaction between the branches where the separation of powers challenge at issue is nontextual. Developed in *Nixon v. Administrator of General Services* and its progeny, this test first focuses on the extent to which a legislative act prevents the executive or judicial branch from accomplishing its constitutionally-assigned functions. Second, where a potential disruption is present, the Court then determines whether

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74. See *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425 (1977) (separation of powers doctrine does not require the three departments of government to remain hermetically sealed from one another).

75. 343 U.S. 579 (1952).

76. *Id.* at 635 (Jackson, J., concurring).

77. Where no specific textual provision of the Constitution is alleged to be violated, legislative action is still subject to scrutiny for a functional violation of the principle of separation of powers. See *Nixon*, 433 U.S. at 425. The *Nixon* Court stated that the analysis of alleged functional, as opposed to textual, violations of the separation of powers doctrine does not "contemplate [ ] complete division of authority between the three branches," but adopts a "more pragmatic, flexible approach." *Id.* at 422-43.

78. 433 U.S. 425 (1977) (upholding under functional separation of powers analysis, the Presidential Recordings and Materials Preservation Act, directing the Administrator of GSA to take custody of presidential materials).


80. See *Nixon*, 433 U.S. at 433 (citing United States v. Nixon, 418 U.S. 683, 711-12). Whereas the nondelegation doctrine is primarily concerned with curbing excessive delegations of legislative power, the *Nixon* test is generally applicable to separation of powers challenges involving the exercise of any power by any of the branches not constitutionally authorized to do so. See, e.g., Morrison v. Olson, 108 S. Ct. 2597 (1988) (challenge to Congress' authorization of article III court to appoint special prosecutors).
the negative impact is justified by an overriding need to promote objectives within the constitutional authority of Congress. Applying the pragmatic and flexible Nixon test, the Court has upheld several congressional acts authorizing one branch of government to exercise, on a limited basis, the constitutional power of a coordinate branch.

Similarly, the members of the federal judiciary have not been confined solely to resolving disputes which come before them while they sit on the bench. Article III of the Constitution specifically limits the exercise of judicial power to "Cases" or "Controversies." As a result of this limitation, the

81. See Nixon, 433 U.S. at 443. In determining whether an act of Congress disrupts the proper balance between the coordinate branches, this two-prong test first subjects challenged legislation to three inquiries, asking whether, under the legislation: (1) one branch of government assumes a function more properly entrusted to another (the aggrandizement-of-power test); (2) one branch assumes functions that impair the ability of another branch to perform its proper functions; and, (3) the imposition of functions on one branch impairs that branch's ability to perform its own functions (the impairment test). Second, if the legislation has the potential for aggrandizement or impairment in any of these matters, then it can be justified only "by an overriding need to promote objectives within the constitutional authority of [the acting branch]." See United States v. Frank, 864 F.2d 992, 1013 (3d Cir. 1988) (citations omitted) (summarizing the applicable test). The Third Circuit characterized this pragmatic approach to functional separation of powers violations as "requiring heightened scrutiny of the question whether the congressional action is 'necessary and proper.' " Id. (citing U.S. Const. art. I, § 8, cl. 18).

However, the Nixon test has not always commanded the full support of the Court. Dissenting in Nixon, Chief Justice Burger took issue with the vague balancing or "disruption" standard articulated by the Court. 433 U.S. at 512-13. Justice Rehnquist also disagreed with both the Court's articulation and application of the test, arguing that any balancing test would ultimately distort the constitutional framework. Id. at 558-60.

Accordingly, one commentator has argued that the Court should apply a different test based not on whether there is a textual separation of powers challenge, but rather based on the means by which the congressional action was taken. See Krent, Separating the Strands in Separation of Powers Controversies, 74 Va. L. Rev. 1253 (1988). Where Congress has circumvented the requirements of bicameralism and presentment, Professor Krent advocates a nonbalancing, formalistic approach in assessing the statute in issue. Where Congress has comported with the requirements of bicameralism and presentment, however, then a balancing, flexible, and functional approach is proper. Id. at 1283. For a discussion that the SRA satisfied the purposes of bicameralism and presentment, see infra note 277.


83. U.S. Const. art. III, § 2. Several other doctrines have developed to elaborate the case or controversy requirement which are founded in concern over the properly limited role of the courts in our democratic society. See Valley Forge Christian College v. Americans United for
general rule is that executive or administrative duties may not be imposed upon judges holding office under article III. However, the Supreme Court has permitted the federal courts to exercise limited authority beyond the adjudication of cases or controversies.

The foremost example is the Court's consistent approval of the federal judiciary's exercise of rulemaking authority. In Sibbach v. Wilson & Co., for example, the Court held that Congress may confer upon the judicial branch the power to regulate the practice and procedure of the federal courts, and to make such rules not inconsistent with the statutes or Constitution of the United States. The Sibbach Court rejected a challenge to certain rules promulgated under the Rules Enabling Act of 1934 which conferred upon the judiciary the power to promulgate federal rules of civil procedure. However, Congress' vesting of such rulemaking authority in the courts of the United States or bodies within the judicial branch, has typically been restricted to "matters of pleading and court procedure."
Congress has also granted to various administrative bodies within the judicial branch, authority over matters directly affecting the performance of judicial functions. For example, the Administrative Office of the United States Courts oversees the administrative, personnel and other court matters which are essential to the effective and efficient operation of the federal judicial system. Similarly, the Judicial Conference of the United States is charged with various administrative tasks, including promoting uniformity of management procedures and the expeditious conduct of court business. Similarly, the task of the Federal Judicial Center is to study and recommend improvements in judicial administration. The Judicial Councils, on the other hand, are designed to actually participate in the management of the judicial work of each federal circuit. In particular, Congress has provided the judiciary with the authority to police both itself and those who appear before it pursuant to the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980. Such limited grants of authority to administrative bodies within the Judicial Branch have been generally upheld, as either absolutely necessary, or reasonably ancillary to the exercise of the judicial function. For example, the Court in Chandler v. Judicial Council of the

authority traditionally limited to govern only matters related to litigation, not the public's "primary conduct and affairs"). See also Gubienio-Ortiz v. Kanahele, 857 F.2d 1245 (9th Cir. 1988) (never thought appropriate to grant judges power to issue substantive rules). The Court in Sibbach enunciated the test for what is procedural as being "whether a rule really regulates procedure,—the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them." 312 U.S. at 14.


92. 28 U.S.C. § 332 (1982 & Supp. VI 1986). Each Judicial Council is charged with making all necessary orders for the effective and expeditious administration of the business of the courts within its circuit. It has been suggested that a Judicial Council's function is judicial in nature and should be treated as a judicial tribunal for purposes of the Supreme Court's appellate jurisdiction under article III. See Chandler, 398 U.S. at 102-06 (Harlan, J., concurring).

93. 28 U.S.C. §§ 331, 332, 372(c), 604 (1982). The Act establishes a formal mechanism by which federal judges can be disciplined by fellow judges for "conduct prejudicial to the effective and expeditious administration of the business of the courts." Id. § 372(c)(1).

94. See, e.g., Young v. United States ex rel. Vuitton et Fils S.A., 481 U.S. 787 (1987) (ability to punish disobedience to judicial orders essential in ensuring judiciary has means to vindicate its own authority without complete dependence upon other branches); Chandler v. Judicial Council of the Tenth Circuit of the United States, 398 U.S. 74 (1970) (courts authorized to exercise functions "reasonably ancillary" to their primary, dispute-deciding function); In re Certain Complaints Under Investigation (Williams v. Mercer), 783 F.2d 1488 (11th Cir.) (upholding statute authorizing judicial council to investigate improper conduct by federal judges
Tenth Circuit of the United States held that Congress could vest within the Judicial Councils of the United States the authority to “make all necessary orders for the effective and expeditious administration of the business of the courts.” More recently, the Supreme Court held in Morrison v. Olson, that Congress may vest within a special division of the District of Columbia Appellate Court the power to appoint special prosecutors. Again, the exceptions from the general rule are not without limit. Although federal courts have occasionally exercised authority over matters which are not strictly cases or controversies, the exceptions from that constitutional limitation on judicial power have been both infrequent and “carefully circumscribed” in scope.

2. Extrajudicial Activity and the Independent Judiciary

The history of extrajudicial service by United States Supreme Court Justices and other federal judges spans more than two centuries. Many courts considering the issue have concluded that this long-standing practice of extrajudicial service by judges, particularly by some of the leaders of the early Republic, is “contemporaneous and weighty evidence” of the meaning of the Constitution. Other courts have questioned whether the frequency of a practice can ever insulate it from constitutional challenge, and specifically point to the refusal of many judges to serve in a nonjudicial capacity. In any event, extrajudicial service has been the exception, rather as conferring duties “ancillary to the administration of the courts”), cert. denied, 477 U.S. 904 (1986). For an extensive list of functions which may properly be assigned to the judiciary, see Gubiensio-Ortiz v. Kanahele, 857 F.2d 1245, 1251-54 (9th Cir. 1988).

96. Id. at 86 n.7.
98. Id. at 2612-13.
100. The sources containing compendia of examples are numerous. See, e.g., In re President’s Comm’n on Organized Crime (Subpoena of Scarfo), 783 F.2d 370, 377 (3d Cir. 1986); Mason, Extra-Judicial Work for Judges: The Views of Chief Justice Stone, 67 Harv. L. Rev. 193 (1953); Slonim, Extrajudicial Activities and the Principle of Separated Powers, 49 Conn. B.J. 391 (1975). However, several examples are cited quite frequently. John Jay served simultaneously as the first Chief Justice and Ambassador to England in 1794. A successor, Chief Justice Oliver Ellsworth was Minister to France during his term on the Court. John Marshall briefly served as both Chief Justice and Secretary of State. Five Justices served on the Election Commission in 1877 that resolved the bitterly contested presidential election that year. Justice Roberts served on the Mexican Claim Commission, and Justice Van Devanter was an arbitrator in the controversy with Great Britain which grew out of the seizure of the ship “I’m Alone.” More recently, Justice Owen Roberts served on the Commission to investigate the disaster at Pearl Harbor. Justice Robert Jackson was a prosecutor at the Nuremberg war crimes trial, and Chief Justice Earl Warren presided over the Commission investigating the assassination of President Kennedy. Scarfo, 783 F.2d at 377.
102. See, e.g., Gubiensio-Ortiz v. Kanahele, 857 F.2d 1245, 1265 (9th Cir. 1988).
103. Id. at 1265 nn.24-25.
than the rule, and it is a practice that has always been highly controversial.\textsuperscript{104}

a. The lack of a constitutional bar to extrajudicial activity

As previously mentioned, the Framers were well aware of the struggle for independence by the English judiciary.\textsuperscript{105} They were also of the conviction that an independent judiciary was inherent in the principle of separated powers.\textsuperscript{106} Yet, despite the fact that the Crown stressed judicial independence in its courts, extrajudicial activity had nonetheless been relatively common in England during the 1700's.\textsuperscript{107} This history may explain, in part, why the text of the United States Constitution contains no specific provision which expressly bars federal judges from engaging in extrajudicial activities.\textsuperscript{108}

The Constitution does, however, absolutely forbid members of Congress from holding other government positions or offices.\textsuperscript{109} The lack of a similar prohibition on judicial office-holding has been cited as support for the argument that the Framers did not intend to so restrict members of the judiciary.\textsuperscript{110} To bolster this argument, proponents of extrajudicial service point to the failure of several early attempts to forbid nonjudicial government service by federal judges.\textsuperscript{111} Others respond that neither the lack of a specific

\textsuperscript{104} Id. at 1265; see also Note, supra note 64, at 1383 & nn.144-45. It was only recently that serious challenges have been mounted to instances of extrajudicial service. See, e.g., Morrison v. Olson, 108 S. Ct. 2597 (1988); Hastings v. Judicial Conference of the United States, 829 F.2d 91 (D.C. Cir. 1987); In re President's Comm'n on Organized Crime (Subpoena of Scarfo), 783 F.2d 370 (3d Cir. 1986); In re President's Comm'n on Organized Crime (Subpoena of Scaduto), 763 F.2d 1191 (11th Cir. 1985). Aside from these cases, the last occasion on which the Supreme Court considered at length what nonadjudicative duties Congress may legitimately confer upon the judiciary or its members was during the mid-nineteenth century. See United States v. Ferreira, 54 U.S. (13 How.) 40 (1851); see also Hayburn's Case, 2 U.S. (2 Dall.) 409 (1792); see generally infra notes 117-21.

\textsuperscript{105} See Ervin, supra note 15, at 114; see also The Federalist, No. 78, at 496 (A. Hamilton).

\textsuperscript{106} See Ervin, supra note 15, at 121 (concept of judicial independence was a sine qua non to drafters of the Constitution).

\textsuperscript{107} See Wheeler, supra note 48, at 126. A basic assumption of the English constitution was that judges were obligated to serve the nation extrajudicially in various ex officio capacities where their judicial skills would be of use. Id. at 124.


\textsuperscript{109} The incompatibility clause states that "[n]o 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 . . . 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.

\textsuperscript{110} See, e.g., United States v. Chambless, 680 F. Supp. 793, 797 (E.D. La. 1988). However, at least two commentators have suggested that the true purpose for including an incompatibility clause as against the legislature was aimed less at preserving the separation of powers than it was to prevent legislators from creating positions for themselves. See Slonim, supra note 100, at 397 (1975); Comment, Separation of Powers and Judicial Service on Presidential Commissions, 53 U. Chi. L. Rev. 993, 1003 n.54 (1986).

\textsuperscript{111} At the Constitutional Convention, Charles Pinckney proposed a motion which would have prevented the justices of the Supreme Court from holding at the same time "any other
constitutional prohibition, nor the failure of Congress to pass legislation precluding simultaneous office-holding by judges, affirmatively warrants the exercise of extrajudicial activities. Moreover, the failure of the Constitutional Convention to include in the Constitution two other proposals which would have institutionalized extrajudicial service, suggests that the Framers intended that federal judges not serve extrajudicially. Despite various attempts to settle the question, the fact remains that there exist neither constitutional nor statutory prohibitions on extrajudicial service by members of the federal judiciary.

b. Supreme Court review of extrajudicial service

The case law reviewing mandatory extrajudicial service by federal judges is scarce; case law considering voluntary service is practically nonexistent. To support their position, proponents of extrajudicial service, therefore, frequently cite to a handful of early Supreme Court decisions considering congressional attempts to impose extrajudicial functions on federal courts. The first such opinion was Hayburn's Case, which considered Congress' assignment to the federal circuit courts the authority to settle pension claims, subject to revision by the Secretary of War and the Congress. The issue was eventually mooted before Supreme Court disposition. However, one of the circuit courts which had considered the merits believed that the judges could

office of Trust or Emolument under the U.S. or an individual State." 2 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 341-42 (rev. ed. 1937). The proposal was never reported out of the Committee of Detail. One writer has suggested that Pinckney's motion seemed directed solely at preventing dual office holding by members of the executive and judiciary and was unrelated to the separation of powers doctrine. See Slonim, supra note 100, at 401 n.36. A constitutional amendment to the same effect was proposed in 1800, and yet again in 1804, but to no avail. See Wheeler, supra note 48, at 129.

112. See Gubiensio-Ortiz v. Kanahele, 857 F.2d 1245, 1279 (9th Cir. 1988) (Wiggins, J., dissenting); Note, supra note 64, at 1378-79. 113. The records of the Convention reflect the submission of a Council of State which included the Chief Justice of the Supreme Court as one of its members. 2 M. FARRAND, supra note 111, at 334, 342. Also proposed was a Council of Revision which was to consist of the President and a "convenient number" of the national judiciary, whose task it was to examine every act of Congress before it became operative. 1 M. Farrand, supra, at 21; see also Note, supra note 64, at 1378-79 (arguing that rejection of these proposals set the tempo for future consideration of the constitutional limitation on extrajudicial activities). But see Wheeler, supra note 48, at 129 (defeat of Council of Revision does not indicate that judges are to do only what they are trained to do).

114. The Congress of 1789 passed a law making it a crime for a judicial officer to accept a bribe, and on conviction, disqualifying him from holding any other office of honor, trust, or profit with the United States government. Act of April 30, 1790, ch. 19, § 21, 1 Stat. 117. Although this statute has been interpreted by some as an early attempt to limit the outside activities of federal judges by means other than impeachment, the statute has never been enforced. Ervin, supra note 15, at 118.

115. 2 U.S. (2 Dall.) 409 (1792).
have heard the pension claims by the power conferred in their individual capacity, even though such power could not be exercised by the judges as courts.\textsuperscript{116}

The strongest support for the constitutionality of extrajudicial service, however, may be found in \textit{United States v. Ferreira}.\textsuperscript{117} There the Supreme Court considered a statute which empowered a Florida federal district court to hear claims arising under the Treaty of 1819 with Spain, subject to approval by the Secretary of the Treasury.\textsuperscript{118} Although the case was ultimately dismissed for lack of jurisdiction, the Court described the Act as imposing the duty to settle claims on the judge as an individual, rather than on the court itself.\textsuperscript{119} In dicta, Chief Justice Taney stated that the judges in \textit{Hayburn's Case} could have constitutionally exercised the power conferred onto them in their individual, rather than judicial capacities, and that the Secretary of War could have revised their decision.\textsuperscript{120}

Ever since these early rulings, many federal courts have interpreted them as weighty support for the proposition that individual judges may exercise extrajudicial powers.\textsuperscript{121} Several commentators have agreed that federal judges

\begin{footnotes}
\footnote{116. See \textit{United States v. Chambless}, 680 F. Supp. 793, 798 (E.D. La. 1988) (characterizing opinions of the three circuit courts reviewing the issue). Three circuit courts had reviewed the issue of whether they could validly hear the claims. The judges in the New York Circuit, composed of Chief Justice Jay, Justice Cushing, and District Judge Duane, held that the power to hear the claims could not be exercised by them as a court. \textit{United States v. Ferreira}, 54 U.S. (13 How.) 40, 49 (1851) (discussing the circuit court opinions in Hayburn's case). But in consideration of the meritorious and benevolent objective of the law, they agreed to construe the power as conferred on them individually as commissioners, and to adjourn the court over from time to time, so as to enable them to perform the duty out of court, in the character of commissioners. \textit{Id.} at 50.}

\footnote{117. 54 U.S. (13 How.) 40 (1851).}

\footnote{118. \textit{Id.} at 45.}

\footnote{119. \textit{Id.} at 52. Chief Justice Taney had stated, "[t]he [special tribunal's] decision is not the judgment of a court of justice. It is the award of a commissioner. . . . [Consequently] an appeal to this court from such a decision, by such an authority from the judgment of a court of record, would be an anomaly in the history of jurisprudence." \textit{Id.} at 47.}

\footnote{120. \textit{Id.} at 50.}

\footnote{121. See, e.g., \textit{United States v. Chambless}, 680 F. Supp. 793, 799 (E.D. La. 1988) (the clear implication of these early decisions is that individual judges may exercise extrajudicial powers, while courts may not). Despite the claims of its proponents, some courts and commentators have found it questionable whether these early decisions provide firm precedential support for the constitutionality of extrajudicial activities by article III judges. For example, the Ninth Circuit questioned \textit{Ferreira's} supposed authorization of extrajudicial service by judges in their...
may serve extrajudicially in their individual, rather than judicial capacities. For example, one commentator has concluded that the separation of powers principle relates only to the exercise of powers or the performance of official acts appertaining to a department, other than the one to which the individual concerned belongs, and not to informal, private and unofficial contacts on a personal level. In contrast, other commentators have argued that separation of powers mandates not only that there be separate branches of government, but that the personnel in those branches also remain separate. Despite the fact that extrajudicial service on government bodies has long been the source of such disagreement among both judges and legislators, the Supreme Court had not ruled on the question of its constitutionality.

The issue of extrajudicial activity by federal judges awaited its resolution at the hands of the Mistretta Court.

3. The Morrison v. Olson Decision

Particularly useful in understanding the Supreme Court’s stance in Mistretta is a similar decision rendered by the Court during its previous term.

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personal, rather than judicial, capacity:

While we ordinarily give great weight to Supreme Court dicta, the significance of the dicta in Ferreira must be viewed with particular skepticism. First, the Court did not purport to state its own view, but construed what much earlier justices had said in the circuit court advisory opinions quoted in Hayburn's Case. Second, it is not clear to us that Ferreira's observation that "there seem[ed] to be no doubt, at that time," that judges could exercise executive powers qua commissioners is quite accurate.

Gubiensio-Ortiz v. Kanahele, 857 F.2d 1245, 1259 & n.10 (9th Cir. 1988).

The use of Hayburn's Case as authority for permitting federal judges to do in their personal capacity what they could not do in their role as judges has been similarly criticized. See Marcus & Tier, Hayburn's Case: A Misinterpretation of Precedent, 1988 Wis. L. Rev. 527. Marcus and Tier point out that the Supreme Court never decided the merits of William Hayburn's underlying claim. Rather, it merely commented on the letters written to President Washington by the three circuit courts which had considered the issue. The Hayburn Court's comments on the letters were thus, in the classic sense, nothing more than advisory opinions. Id. at 534. Furthermore, of the three circuit courts which had written letters to President Washington on the Invalid Pension Act issue, only one court thought that judges could assume the role of commissioner and do what Congress wanted them to do out of court as commissioners rather than in court as judges. Id. at 529-534. The other two courts chose not to interpret the Act as permitting them to act as commissioners. Id.


123. See, e.g., Slonim, supra note 100, at 395.

124. See, e.g., Comment, supra note 110, at 1003-4 (separation of powers mandates there be both separate branches of government, but also that personnel in those branches be separate). Furthermore, one could hardly argue that the role which the three judges on the Commission play is not "official," since they are appointed by the chief executive and hold a government office.

125. See Note, supra note 64, at 1383 n.147.

126. See supra note 8 and accompanying text.
Although the Court's ruling in *Morrison v. Olson* focused primarily upon an alleged deprivation of executive power, it nonetheless had significance for the federal judiciary as well. Thus, the Court's reasoning in *Morrison* provided the foundation for its later disposition of the issues raised in *Mistretta*.

Writing for a seven-member majority, Chief Justice William Rehnquist upheld Congress' vesting in a "Special Division" of the District of Columbia Appellate Court the power to appoint an independent prosecutor under the Ethics in Government Act of 1978 ("Act"). Specifically, three former government officials had brought suit challenging the authority of independent prosecutor Alexia Morrison to issue subpoenas compelling their testimony before a grand jury. The district court upheld the constitutionality of the Act, and the officials appealed. The appellate court reversed, and then Morrison appealed.

The *Morrison* Court rejected the arguments that the Act violated the appointments clause of the Constitution, the limitations of article III, and impermissibly interfered with the President's authority under article II in violation of the separation of powers doctrine. The government officials had argued that the appointments clause prevented Congress from assigning the power to appoint an independent prosecutor outside the executive branch. The Supreme Court disagreed, concluding that Congress could vest the power to appoint independent prosecutors in the Special Division without running afoul of the constitutional limitation on incongruous interbranch appoint-

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129. The Special Division of the United States Court of Appeals for the District of Columbia Circuit consisted of three Circuit Court Judges or Justices, appointed by the Chief Justice of the United States. One of the judges must be a judge of the United States Court of Appeals for the District of Columbia, and no two judges may be named to the Special Division from a particular court. The judges are appointed for two-year terms, with any vacancy being filled only for the remainder of the two-year period. *Morrison*, 108 S. Ct. at 2603 n.3, citing 28 U.S.C.A. § 49 (West Supp. 1988).
131. *Morrison*, 108 S. Ct. at 2607. The three former governmental officials were Theodore B. Olson, Edward C. Schmults and Carol E. Dinkins. All three were former Assistant Attorney Generals.
133. *In re Sealed Case*, 838 F.2d 476 (D.C. Cir. 1988).
134. U.S. Const. art. II, § 2, cl. 2.
135. See supra note 63.
136. The appellants in that case charged that the Act's provision restricting the Attorney General's power to remove the independent counsel to only those instances in which he could show "good cause" impermissibly interfered with the President's exercise of his constitutionally assigned function. *Morrison*, 108 S. Ct. at 2616.
137. *Morrison*, 108 S. Ct. at 2609. Specifically, the government officials argued that the appointments clause forbade any interbranch appointments whatsoever. *Id*.
ments.\textsuperscript{138} The \textit{Morrison} Court reasoned that: (1) the text of the Constitution did not contain any specific limit on interbranch appointments; (2) it was more practical to vest the power in the judiciary rather than the executive; and, (3) there was no suggestion that the Framers intended to preclude such interbranch appointments.\textsuperscript{139} Generally, the Court found that vesting the appointment power in the judiciary was not incongruous with the judicial function. In support of this overall conclusion, the \textit{Morrison} majority stated that courts are "especially well qualified to appoint prosecutors,"\textsuperscript{140} and that courts have traditionally made similar appointments.\textsuperscript{141}

The three government officials further argued that the powers which Congress had vested in the Special Division by the Act conflicted with article III of the Constitution.\textsuperscript{142} The Court ruled, however, that the Special Division's powers under the Act did not exceed article III's limits, because the appointments clause of article II\textsuperscript{143} gave Congress the express authority to vest the appointment of independent prosecutors in the "Courts of law."\textsuperscript{144} Furthermore, the Court held that the Special Division could properly define the jurisdiction of the independent prosecutor, and conduct various other administrative tasks\textsuperscript{145} pursuant to the Act, as "incidental to its appointment

\textsuperscript{138} \textit{Id.} at 2611. The Court noted that \textit{Ex parte Siebold}, 100 U.S. 371 (1880), "suggested that Congress' decision to vest the appointment power in the courts would be improper if there was some 'incongruity' between the functions normally performed by the courts and the performance of their duty to appoint." 108 S. Ct. at 2611.

\textsuperscript{139} \textit{Morrison}, 108 S. Ct. at 2610.

\textsuperscript{140} \textit{Id.} at 2611 n.13. The Court noted that this was not a case where judges were given a power in an area in which they have no special knowledge or expertise. \textit{Id.}


\textsuperscript{142} \textit{Morrison}, 108 S. Ct. at 2611.

\textsuperscript{143} [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. Const. art. II, § 2, cl. 2.

\textsuperscript{144} \textit{Morrison}, 108 S. Ct. at 2612.

\textsuperscript{145} These miscellaneous powers included granting extensions for the Attorney General's preliminary investigation, 28 U.S.C. § 592(a)(3); receiving the report of the Attorney General's preliminary investigation, 28 U.S.C. §§ 592(b)(1), 593(c)(2)(B); receiving a final report from the counsel, 28 U.S.C. § 594(h)(1)(B); deciding whether to release the counsel's final report to Congress or the public, and determining whether any protective orders should be issued, 28
Additionally, the Court upheld the Special Division's exercise of these powers because they did not constitute a significant encroachment on the Executive's authority.

The Chief Justice's opinion also rejected the contention that the Special Division's exercise of the appointment power posed a threat to the impartiality and independence of the judiciary. The Court based its ruling on several findings. First, the Special Division had no power to review the decisions of either the independent prosecutor or the Attorney General with regard to the independent prosecutor. Second, the Act precluded the Special Division from taking part in any proceedings involving the independent prosecutor. Third, the Special Division's authority was limited by the specific provisions of the Act.

Finally, the government officials contended that the Act's limitation on the Attorney General's power to remove the independent prosecutor interfered with the President's exercise of his constitutional function. They urged the Court to apply a "core function" test which would preclude any assignment of executive power to anyone not removable by the President at will. The Court decided, however, that the President's need to control the exercise of discretion by the Special Division was not so central to the function of the executive branch so as to necessitate an unlimited removal power.

Justice Antonin Scalia was the lone dissenter. He vigorously argued that article II of the Constitution vests not some, but all of the executive power in the President. Justice Scalia agreed with the government officials' call for a "core function" test, and concluded that since government investigation and prosecution of crime are quintessentially executive functions, the Act deprived the President of his exclusive control over those functions.

U.S.C. § 594(h)(2); and terminating an independent counsel when his or her task is completed, 28 U.S.C. § 596(b)(2). *Morrison*, 108 S. Ct. at 2613.

146. *Id.* at 2613-15. The Court applied a two-prong test in determining that article III did not prevent Congress from vesting in the Special Division, various other miscellaneous powers pursuant to the Act. Under the first prong, the Court found that vesting of the miscellaneous powers did not impermissibly encroach upon the executive authority. Under the second, the Court found that the powers vested in the Special Division were not necessarily more properly exercised by another branch. *Id.*


148. *Id.* at 2616.

149. *Id.*

150. *Id.* at 2616. The Court did note that any exercise of authority by the Special Division outside of the provisions of the Act would exceed the limitations of article III. *Id.*


152. *Id.* at 2617.

153. *Id.* at 2619.

154. *Id.* at 2626 (Scalia, J., dissenting).

155. *Id.* at 2626-27. Justice Scalia stated that, Almost all investigative and prosecutorial decisions—including the ultimate decision whether, after a technical violation of the law has been found, prosecution is
cording to Justice Scalia, the fact that the Act deprives the President of only partial control is irrelevant because article II grants the President the exclusive exercise of the executive power. The Justice further argued that the Court may not decide how much Congress may deprive the president of control over an executive function where the Constitution states that such control shall be exclusive.

Much of the reasoning underlying the Court’s decision in *Morrison* was to appear again in the *Mistretta* decision the following year. Consequently, many of the objections which this Note raises to the *Mistretta* holding have their roots in *Morrison*. The two cases, viewed together, provide an encapsulation of the Rehnquist Court’s pragmatic and flexible approach to separation of powers issues, as they relate to the judicial branch of the federal government.

**B. The Sentencing Commission**

The *Mistretta* Court reviewed a district court decision which upheld the constitutionality of the Federal Sentencing Guidelines promulgated by the United States Sentencing Commission. The Commission is an independent government agency created under the Sentencing Reform Act of 1984. Congress passed the SRA as part of a larger overhaul of the federal law dealing with crime. Because this Note focuses primarily upon the separation of powers aspects of the Court’s decision, and their impact upon the federal judiciary, the detailed provisions of the SRA creating and instructing the Commission will not be discussed at great length. However, a cursory review of the structure of the Commission and its purpose is nonetheless essential to a proper constitutional analysis of its intended function.

1. **The Purpose of the Sentencing Commission**

Prior to the enactment of the SRA, federal trial judges had traditionally enjoyed extremely broad discretion to fashion sentences for criminal defen-

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warranted—involve the balancing of innumerable legal and practical considerations.

In sum, the balancing of various legal, practical and political considerations, none of which is absolute, is the very essence of prosecutorial discretion. To take this away is to remove the core of the prosecutorial function, and not merely “some” presidential control.

*Id.* at 2627-28.


157. *Id.*


Additionally, the sentences imposed by these judges were not subject to review, except in very limited circumstances. Therefore, the combination of these two factors eventually resulted in a significant amount of sentencing disparity at the federal level. The Commission represents Congress' latest attempt to eliminate this problem of increasing disparity in the sentences imposed upon criminals by the federal trial courts. Accordingly, the stated purpose of the Commission is to:

Establish sentencing policies and practices for the Federal criminal justice system that . . . provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices.

Not surprisingly, the SRA represents a major change from the previous law, motivated in part by the realization that rehabilitative theories of

161. See, e.g., Ogletree, supra note 160, at 1941; Weigel, supra note 159, at 86.
162. See, e.g., Gore v. United States, 357 U.S. 386, 393 (1958) (no appellate review of sentences in federal system); Ogletree, supra note 160, at 1942 & n.27 (occasions for appellate review of sentences limited to circumstances such as dangerous offender and dangerous drug offender statutes, or where judge imposed clearly illegal sentence based upon consideration of false or unreliable information); see also Note, supra note 64, at 1364 n.14 (noting that under prior federal system, sentences may only be challenged on basis that they are unconstitutional, illegal, or imposed on a mechanical basis).
163. See, e.g., McCleskey v. Kemp, 481 U.S. 279, 312 (1987) (apparent disparities in sentencing are an inevitable part of the criminal justice system).
164. The United States Parole Commission was created in 1976 pursuant to the Parole Commission and Reorganization Act. 18 U.S.C. §§ 4201-4218 (1982 & Supp. VI 1986). The Parole Commission was an earlier congressional attempt to minimize disparate sentencing, by empowering the Parole Commission to make parole release decisions for eligible federal prisoners. Id. § 4203(b). However, the Parole Commission has been generally ineffective in attaining that goal, having frequently resulted in the courts and parole officers working at cross purposes. This is primarily due to the fact that the Parole Commission may compute the time a prisoner must serve before release on parole without regard to the maximum-minimum offense penalties set by Congress or sentence length. See Geraghty v. United States Parole Comm'n, 719 F.2d 1199, 1204 (3d Cir. 1983). Consequently the SRA provides for its abolition in 1992.
166. The Mistretta Court listed five specific ways in which the SRA departs from the previous system of federal sentencing:
   1. It rejects imprisonment as a means of promoting rehabilitation, 28 U.S.C. § 994(k), and it states that punishment should serve retributive, educational, deterrent, and incapacitative goals, 18 U.S.C. § 3553(a)(2).
   2. It consolidates the power that had been exercised by the sentencing judge and the Parole Commission to decide what punishment an offender should suffer. This is done by creating the United States Sentencing Commission, directing that Commission to devise Guidelines to be used for sentencing, and prospectively abolishing the Parole Commission. 28 U.S.C §§ 991, 994, 995(a)(1).
   3. It makes all sentences basically determinate. A prisoner is to be released at the
sentencing were largely ineffective, and that in many cases the sentence did not accurately reflect the seriousness of the offense. Consequently, the SRA mandates that the Guidelines reflect Congress' view that a more determinate approach to federal sentencing is warranted.

2. The Nature of the Sentencing Commission

The SRA provides that the Commission is established as an "independent commission in the judicial branch of the United States." The President appoints the Commission's seven voting members, including its chairman, subject to Senate confirmation. At least three members of the Commission are to be current federal judges, each of whom may serve without resigning from the bench. The judicial members of the Commission are selected from a list of six judges recommended to the President by the Judicial Conference of the United States. While the Attorney General or his designee serves as an ex officio, nonvoting member of the Commission, no more than four members are to be of the same political affiliation. Except for initial staggering of terms, each voting member serves for six years, and may serve no more than two full terms. The President may remove

completion of his sentence reduced only by any credit earned by good behavior while in custody. 18 U.S.C. § 3624(a), (b).

4. It makes the Sentencing Commission's Guidelines binding on the courts, although it preserves for the judge the discretion to depart from the Guideline applicable to a particular case if the judge finds an aggravating or mitigating factor present that the Commission did not adequately consider when formulating guidelines. 18 U.S.C. § 3553(a), (b). The SRA also requires the court to state its reasons for the sentence imposed and to give the "specific reason" for imposing a sentence different from that described in the guideline. 18 U.S.C. § 3553(c).

5. It authorizes limited appellate review of the sentence. It permits a defendant to appeal a sentence that is above the defined range, and it permits the Government to appeal a sentence which is below that range. It also permits either side to appeal an incorrect application of the guideline. 18 U.S.C. § 3742(a), (b).


167. See, e.g., Ogletree, supra note 160, at 1941 (judges and penologists skeptical about value of rehabilitation). Accordingly, the SRA instructs the Commission to insure that its Guidelines "reflect the inappropriateness of imposing a sentence to a term of imprisonment for the purpose of rehabilitating the defendant." 28 U.S.C. § 994(k).

168. 28 U.S.C. § 994(m).

169. See supra note 164, and sources cited therein.


171. Id. In making his selections, the President is also to consult with representatives of judges, prosecuting attorneys, defense attorneys, law enforcement officials, senior citizens, victims of crime, and others interested in the criminal justice process. Id.

172. 28 U.S.C. § 992(c). The current voting members of the Commission are compensated at the annual rate at which judges of the United States courts of appeals are compensated. 28 U.S.C. § 992(c). During their term, federal judges who are members of the Commission are relieved of the requirement of residing within the district in which they sit. 28 U.S.C. § 992(d).


174. Id.

175. 28 U.S.C. § 992(a)-(b).
Commission members only "for neglect of duty or malfeasance in office or for other good cause." 176

3. The Duties of the Sentencing Commission

The Commission’s primary task is to produce Guidelines by which federal district courts are to determine whether to impose a sentence including probation, a fine, or a term of incarceration upon the criminal defendants who come before them. 177 The Guidelines are binding on the federal courts, 178 and are subject to appellate review only in limited circumstances. 179 The SRA permits a judge to depart from the sentence specified by the Guidelines when he or she finds that an aggravating or mitigating circumstance exists which was not adequately taken into consideration by the Commission in formulating the applicable Guideline. 180 However, a judge who finds that such factors do exist, and therefore imposes a sentence outside of the Guidelines, must expressly state for the record his or her reasons for doing so. 181

The Commission is also obligated to periodically review and revise the Guidelines it promulgates, based on the suggestions of authorities and individual representatives of the various aspects of the federal criminal justice system. 182 The Commission must report to Congress at least annually on any amendments to the Guidelines and the reasons therefor, 183 as well as recommend to Congress that it raise or lower the grade of penalty for those offenses it finds appropriate. 184

The SRA further requires the Commission to issue general policy statements regarding the application of the Guidelines, 185 establish general policies, and promulgate such rules and regulations for the Commission as are necessary for carrying out the purposes of the SRA. 186 The SRA also requires

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177. 28 U.S.C. § 994(a)(1). The Guidelines are also to include other determinations, such as whether a sentence to a term of imprisonment should include a requirement that the defendant be placed on a term of supervised release after imprisonment, and if so, the appropriate length of such a term. 28 U.S.C. § 994(a)(1)(C).

The SRA instructed the Commission to use as starting point in drafting the Guidelines the average sentences imposed for particular categories of cases prior to the Commission’s creation. 28 U.S.C. § 994(m). Additionally, the maximum range of determinate sentences for categories of offenses and defendants under the Guidelines may not exceed the minimum by more than the greater of 25% or six months, 28 U.S.C. § 994(b)(2), and each sentence is to be within the limits provided by the existing law. 28 U.S.C. § 994(a).

179. 18 U.S.C. § 3742 (a), (b).
180. 18 U.S.C. § 3553(b).
182. 28 U.S.C. §§ 994(o), 994(r), 995(a).
183. 28 U.S.C. § 994(p). Amendments to the Guidelines take effect 180 days after their submission to Congress unless modified or disproved of by Act of Congress. Id.
the Commission to perform other functions as are necessary to permit the federal courts to meet their responsibilities in the sentencing process. The Commission is obligated to analyze this information, and to annually report to Congress any recommendations for legislation it derives from its analysis.

II. MISTRETTA v. UNITED STATES

John Mistretta was arrested and indicted on three counts alleging his sale of cocaine. Prior to sentencing under the new federal sentencing Guidelines, Mistretta moved to have the Guidelines ruled unconstitutional. Mistretta charged that the power delegated to the Commission by Congress was excessive and improper, and the composition of the Commission violated the separation of powers doctrine. The United States District Court for the Western District of Missouri rejected Mistretta's arguments that the Commission and the Guidelines it produced were constitutionally invalid. Mistretta then pled guilty to one of the counts he was charged with, and was sentenced to eighteen months in prison, pursuant to the Guidelines. Mistretta filed notice of appeal to the Eighth Circuit Court of Appeals, however, both Mistretta and the United States petitioned for certiorari, before judgment, pursuant to Supreme Court Rule 18. At that time, approximately 116 district courts which had considered the constitutionality of the Guidelines had upheld them, while approximately 158 district courts had struck them down. A similar split existed at the circuit court level, with the Ninth Circuit striking the Guidelines down as unconstitutional, and the Third Circuit upholding their validity. The Supreme Court granted

188. 28 U.S.C. § 994(w).
189. Id.
191. Id. at 653.
194. Id. at 654.
the petitions of Mistretta and the United States for certiorari before judgment by the Eighth Circuit in order to consider the issue, and to settle the division amongst the lower courts.\textsuperscript{199}

\textbf{A. The Excessive Delegation Issue}

Mistretta raised two principal arguments before the Supreme Court. His first argument was that in delegating power to promulgate sentencing guidelines for every federal crime to an independent commission, Congress had granted the Commission excessive legislative discretion in violation of the nondelegation doctrine.\textsuperscript{200}

Writing for the eight-member majority, Justice Blackmun rejected this argument, stating that "the separation-of-powers principle, and the nondelegation doctrine in particular, do not prevent Congress from obtaining the assistance of its coordinate Branches."\textsuperscript{201} Justice Blackmun reasoned that so long as Congress has laid down an "intelligible principle," by which the body authorized to exercise the delegated authority is to perform, there is no improper delegation of legislative power.\textsuperscript{202} The Court found that Congress' delegation of authority to the Commission satisfied this "intelligible principle" test, because Congress had more than adequately defined the general policy involved,\textsuperscript{203} the agency that was to exercise the delegated authority, and the limits of that authority.\textsuperscript{204}

Although recognizing that the Commission's function required it to exercise considerable discretion, the Court found there was no "absence of standards

\begin{itemize}
\item \textsuperscript{199} Mistretta, 109 S. Ct. at 654.
\item \textsuperscript{200} Brief of Respondent-Petitioner John M. Mistretta at 47-54, Mistretta v. United States, 109 S. Ct. 647 (1989) (Nos. 87-1904 and 87-7028).
\item \textsuperscript{201} Mistretta, 109 S. Ct. at 654.
\item \textsuperscript{202} Id. (quoting J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928)).
\item \textsuperscript{203} For example, Congress charged the Commission with three goals: "to assure the meeting of the purposes of sentencing as set forth" in the Act; to "provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records... while maintaining sufficient flexibility to permit individualized sentences" where appropriate; and, to "reflect to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process." 28 U.S.C. § 991(b)(1). Congress further specified four purposes of sentencing which the Commission was to pursue in carrying out its mandate: "to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense"; "to afford adequate deterrence to criminal conduct"; "to protect the public from the further crimes of the defendant"; and, "to provide the defendant with needed... correctional treatment." 18 U.S.C. § 3553(a)(2).
\item \textsuperscript{204} Mistretta, 109 S. Ct. at 655-57. The Court found that the delegation of authority to the Commission was sufficiently specific and detailed to meet constitutional standards. For example, the Court noted that Congress directed the Commission to consider seven factors in formulating the Guidelines: the grade of the offense; the aggravating and mitigating circumstances of the crime; the nature and degree of the harm caused by the crime; the community view of the gravity of the offense; the public concern generated by the crime; the deterrent effect that a particular sentence may have on others; and, the current incidence of the offense. 28 U.S.C. § 994(c)(1)-(7); Mistretta, 109 S. Ct. at 656.
\end{itemize}
for the guidance of the [Commission’s] action, [such] that it would be impossible . . . to ascertain whether the will of Congress had been obeyed."

Consequently, the Court ruled that Congress’ delegation of legislative authority to the Commission was not excessive.

B. The Separation of Powers Issues

The Court next considered whether the Commission violated the separation of powers doctrine. Mistretta had argued that Congress’ placement of the Commission in the judicial branch constituted an unconstitutional accumulation of power within that branch. He further argued, that placement of the Commission in the judicial branch, undermined its institutional integrity by: (1) requiring article III judges to serve on the Commission; (2) requiring article III judges to share their power with nonjudges; and, (3) granting to the President the power of appointment and removal over the article III judges on the Commission.

The Court began its analysis of Mistretta’s separation of powers arguments by first discussing the doctrine itself. The Court noted that it had invalidated past attempts by Congress to either exercise the responsibilities of the other branches or to reassign powers vested by the Constitution in the judicial or executive branch. However, the Court stated that although the principle of separated powers is essential to the preservation of liberty, it does not require the three branches of government to be entirely distinct. Consequently, the Court indicated that it has also upheld legislative provisions which mingled the powers of the three branches, but posed no threat to any one branch. After briefly describing the Nixon test for nontextual separation of powers challenges, the Court laid out the proper test for such cases specifically involving the judicial branch. This two-pronged test asks: (1) whether the function assigned to the judicial branch would be better accomplished by one of the other branches; and, (2) whether the assigned function impermissibly threatens the institutional integrity of the judicial branch.

205. Mistretta, 109 S. Ct. at 656 (quoting Yakus v. United States, 321 U.S. 414, 425-426 (1944)).
207. See id. at 30-35.
212. Id. (quoting Commodity Futures Trading Comm’n v. Schor, 478 U.S. 833, 851 (1986)).
Mistretta contended that the Commission violated both prongs.\textsuperscript{213} Having defined the applicable law, the Court then addressed these arguments in turn.

1. Congress' Location of the Commission in the Judicial Branch

Recognizing the limitation of judicial power to "cases and controversies,"\textsuperscript{214} the Court restated the general rule that Congress cannot confer executive or administrative tasks upon judges holding office under article III of the Constitution.\textsuperscript{215} However, the Court noted the significant exception to the general rule which holds that there is a "twilight area" in which the functions of the three branches merge,\textsuperscript{216} and that judicial rulemaking certainly falls into that area.\textsuperscript{217} In determining that the promulgation of sentencing guidelines was an appropriate function for an independent body located in the judicial branch, the Court relied heavily on the existence of other rulemaking and administrative bodies in the judiciary. Specifically, the Court pointed to the various administrative functions assigned to the Judicial Conference of the United States,\textsuperscript{218} the Administrative Offices of the United States Courts,\textsuperscript{219} and the Federal Judicial Center.\textsuperscript{220}

As further support for its holding, the Court cited to \textit{Sibbach v. Wilson & Co.},\textsuperscript{221} and analogized the sentencing Guidelines to the Federal Rules of Evidence, and Civil and Criminal Procedure, as promulgated under the enabling acts.\textsuperscript{222} The Court also relied in part upon the "necessary and proper" clause of article I,\textsuperscript{223} which the Court apparently construed as empowering Congress to vest the authority to promulgate sentencing guide-
Therefore, the Court concluded that, although limited by the case or controversy requirement, Congress could confer administrative or rulemaking duties upon auxiliary bodies in the judicial branch which are "necessary and proper . . . for carrying into execution all the judgments the judicial department has the power to pronounce." Furthermore, since the judiciary has always been associated with sentencing, the Court held that the issuance of sentencing guidelines by the Commission was neither incongruous with, nor inappropriate to, the function of the judicial branch.

Justice Blackmun admitted, however, that his analogy to the Federal Rules of Procedure was imperfect. He recognized that the Commission's product was more substantive than procedural, and required the Commissioners to exercise considerable discretion and to make various policy judgments in performing their task. Nonetheless, Justice Blackmun did not find these distinctions fatal, as he chose to focus upon the "practical consequences" of locating the Commission in the judicial branch rather than the substantive-procedural dichotomy. In support of the majority's position, Justice Blackmun first argued that the Commission is not a court, but rather an independent agency, thus its powers are not united with the judiciary "in any way that has meaning for separation of powers analysis." He next concluded that since the Commission wields rulemaking rather than adjudicatory power, the power of the judiciary is not increased. Finally, Justice Blackmun found that promulgating sentencing Guidelines is not incongruous with the judicial function, since the judges on the Commission do not exercise

224. See Mistretta, 109 S. Ct. at 662-63. The Court did not expressly refer to article II in this context. Rather, the Court cited to a passage from Wayman v. Southard, 23 U.S. (10 Wheat.) 1 (1825), which construed the "necessary and proper" clause as empowering the Congress to delegate rulemaking power to the judicial department. Id. at 22.

225. Mistretta, 109 S. Ct. at 663 (citing Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 22 (1825)).

226. Id. at 664. The Court stated, "[t]hat Congress should vest such rulemaking in the Judicial Branch, far from being 'incongruous' or vesting within the Judiciary responsibilities that more appropriately belong to another Branch, simply acknowledges the role that the Judiciary always has played and continues to play, in sentencing." Id.

227. Id. at 665. As the Court stated, "[w]e agree with petitioner that the nature of the Commission's rulemaking power is not strictly analogous to this Court's rulemaking power under the enabling acts." Id.

228. Id. The Court also stated that they recognized "that the task of promulgating rules regulating practice and pleading before federal courts does not involve the degree of political judgment integral to the Commission's formulation of sentencing guidelines." Id.

229. Mistretta, 109 S. Ct. at 665. "Our separation-of-powers analysis does not turn on the labelling of an activity as 'substantive' as opposed to 'procedural,' or 'political' as opposed to 'judicial'. . . . Rather, our inquiry is focused on the 'unique aspects of the congressional plan at issue and its practical consequences in light of the larger concerns that underlie Article III.' " Id.

230. Id. at 665.

231. Id. at 666.
power in an area in which they have no expertise. Consequently, the majority held that Congress' decision to place the Commission in the judicial branch did not violate the principle of separated powers.

2. The Composition of the Commission

The Supreme Court also rejected Mistretta's claim that requiring federal judges to serve on the Commission was unconstitutional. The Court did find "somewhat troublesome" the fact that Congress had mandated service by at least three article III judges on the Commission. Nonetheless, the Court found that required judicial service did not reach the point of unconstitutionality. In reaching its conclusion, the Court considered several factors as persuasive. First, unlike the incompatibility clause applicable to federal legislators, the text of the Constitution contains no similar provision barring dual office-holding by active federal judges. Second, the Court inferred from the fact that some judges served extrajudicially in the early days of the Republic, that the Framers did not intend to so restrict the federal judiciary. Third, the Court found the subsequent two hundred years of extrajudicial activity by federal judges to be additional evidence that such practice is not absolutely prohibited by the principle of separation of powers. Finally, the fact that the judges who serve on the Commission do so in their individual, rather than their judicial capacity, seemed to the Court to eliminate any possibility of constitutional infirmity.

The Court next considered two additional arguments that the congressional requirement of at least three judges presented a distinct threat to the judi-
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According to Mistretta, mandatory service by article III judges on the Commission would undermine the independence of the federal judiciary. The Court, however, found that no problem existed because, although service was mandatory, no particular judge was conscripted to participate on the Commission and service by any individual judge was merely voluntary. Moreover, the Court failed to see why the service of a few judges on the Commission, in their individual capacity, would affect the ability of other judges to impartially adjudicate sentencing issues.

Mistretta also argued that the participation of judges on the Commission would improperly lend judicial prestige and an aura of impartiality to its political work. Although the majority found this contention to be somewhat more troubling, they rejected it, nonetheless, because the judiciary was engaging in an activity which was one of its traditional functions. Hence, Justice Blackmun concluded, "the Constitution does not prohibit Congress from enlisting federal judges to present a uniquely judicial view on the uniquely judicial subject of sentencing." 3. The Significance of Presidential Control

Finally, the Court dismissed the argument that the SRA subjected article III judges to executive authority and therefore threatened the independence of the judiciary. The Court held that the possibility of executive manipulation of judges through promise of appointment, or threat of removal from the Commission, was no greater than that which normally existed under the President's usual power of appointment. Furthermore, the President's removal power is limited, in that Commission members only be removed for

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242. Id. at 671.
243. Mistretta, 109 S. Ct. at 672. The Court apparently meant that service was "voluntary" in the sense that the SRA requires at least three federal judges to be members of the Commission without specifying any individuals.
244. Id. The Court concluded "that federal judges participate in the promulgation of guidelines does not effect their or other judges' ability to impartially adjudicate sentencing issues." Id.
245. Id. at 671.
246. Id. at 672. The Court stated, "[w]e 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." Id.
247. In support of judicial service on the Commission, Justice Blackmun argued that "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." Id. at 673.
248. Mistretta, 109 S. Ct. at 673. The Court also rejected Mistretta's argument that the mixed composition of the Commission violated the Constitution because it required judges to share their power with nonjudges. Since the Commission is not a court and exercises no judicial power, the Court held that the SRA therefore does not vest article III power in nonjudges or force judges to share their power with same. Id.
249. Id. at 673-75.
250. Id. at 674.
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good cause shown. Consequently, the majority concluded that the President’s removal power over Commission members, posed only a negligible threat to judicial independence.\(^{252}\)

C. Justice Scalia’s Dissent

As in *Morrison v. Olson*, Justice Scalia was the lone dissenter from the majority’s ruling. Justice Scalia generally agreed with the Court’s application of the “intelligible principle” test to Mistretta’s excessive delegation argument.\(^{253}\) However, he argued that there is an enormous difference between the exercise of discretion as to how the law shall be executed, and as to what the substance of the law will actually be.\(^{254}\) According to Justice Scalia, the former is a valid delegation of authority, while the latter simply cannot be done.\(^{255}\) The Justice primarily argued that the authority vested in the Commission represented a delegation of pure legislative power, which is never acceptable.\(^{256}\) Consequently, it was irrelevant whether the standards laid out by Congress in the SRA were adequate, because “they are not related to the exercise of executive or judicial powers; they are . . . simply . . . standards for further legislation.”\(^{257}\)

Justice Scalia also disagreed with the majority’s characterization of the Commission as being an “independent agency in every relevant sense.”\(^{258}\) According to Justice Scalia, the Court’s decision did not provide a justiciable standard for determining to which branch a so-called “independent agency” such as the Commission belongs.\(^{259}\) Consequently, it is unclear what powers

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251. Even were a judge sitting on the Commission to be removed by the President, she would still retain her life term and irreducible salary guaranteed to federal judges under article III.


253. *Id.* at 677 (Scalia, J., dissenting). Justice Scalia did not dispute the majority’s rejection of the argument that the nondelegation doctrine had been violated because of the lack of intelligible, congressionally prescribed standards to guide the Commission. *Id.* However, Justice Scalia’s discussion suggests that although he agreed with the majority’s application of the “intelligible principle” test, he is disturbed by the breadth of the standard as it has developed. Furthermore, his comments suggest his displeasure with the erosion of the nondelegation doctrine, and hinted at a return to the “core function” test. See *id.* at 676-77.

254. *Mistretta*, 109 S. Ct. at 678 (citing Field v. Clark, 143 U.S. 649 (1892)).

255. See *id.* at 678.

256. *Id.* The power to make law must derive from the people alone, and the legislature has no power to transfer such to other hands. *Id.* at 679 (citing J. Locke, *Second Treatise of Government* 87 (R. Cox ed. 1982)).

257. *Mistretta*, 109 S. Ct. at 679. In Justice Scalia’s words, “[t]he power to make law at issue here . . . is quite naked.” *Id.* at 680. The majority’s decision to uphold the SRA and the Commission have several subsequent negative effects: first, the decision facilitates and encourages judicially uncontrollable delegations of congressional power; second, Congress will accordingly find such delegations of its lawmaking power more attractive in the future; third, since the power to make law rests not in the hands of a representative of the people, the decision sets undemocratic precedent. *Id.*

258. *Id.* at 681.

259. *Id.*
Congress may assign such an agency, except for what the Court says may be assigned. 260 Without a justiciable standard, the powers exercisable by an "independent agency" would repeatedly have to be made on an ad hoc basis.

Furthermore, the concept of an independent agency is justified only in the executive sphere, and does not translate into legislative or judicial spheres. 261 For example, although it is generally understood that the President need not exercise the executive function personally, 262 there is no basis for such a conclusion with regard to members of the legislative and judicial branches. 263 Consequently, Justice Scalia argued that the Commission was an unconstitutional "anomaly," because it was an independent agency which exercised governmental powers that were only supposed to be exercised by federal judges and legislators personally. 264

Finally, Justice Scalia stated that the majority failed to recognize that this case was not so much about the permissible extent of commingling between the branches, as it was about the creation of a new branch of government altogether. 265 To Justice Scalia, the Court's nearsightedness in this respect, was just part of its recent trend toward treating the Constitution as only prohibiting too much commingling, rather than having already established the degree of permissible overlap between the branches of the federal government. 266

III. Analysis

The Mistretta Court adopted what can be characterized as a pragmatic and flexible, rather than formalistic, approach to the separation of powers doctrine. The decision reflects the Court's awareness of the contemporary problem of sentencing disparity, and the need for centralized direction in the area of criminal punishment. However, this may have been an instance where the Supreme Court found it impossible to adequately distance itself from a crisis with which they were all too familiar. Undoubtedly, the

260. Id.
261. Id.
262. See, e.g., Williams v. United States, 42 U.S. (1 How.) 290 (1843).
263. Mistretta, 109 S. Ct. at 682 (Scalia, J., dissenting). Justice Scalia noted that unlike executive power, judicial and legislative power have never been thought to be delegable. Id. (citing United States v. Raddatz, 447 U.S. 667, 683 (1980)).
265. Justice Scalia termed the Commission a "sort of junior-varsity Congress." Id. at 683.
266. Mistretta, 109 S. Ct. at 682-83. Justice Scalia adopted the position that when James Madison argued that separation of powers did not mean that the three departments of government were not meant to have "partial agency in, or control over the acts of each other," The Federalist, supra note 44, at 325-26 (J. Madison), he was only referring to that limited mingling of power for which the text of the Constitution expressly provided. Mistretta, 109 S. Ct. at 682-83. According to Justice Scalia, Madison did not intend his statement to be taken as meaning that the three branches could intermingle their functions so long as no particular branch was threatened. Id. at 683.
Commission’s Guidelines are a bold attempt at much needed sentencing reform in the federal criminal system. However, the provisions of the SRA are contrary to several established constitutional principles, and threaten many others.267 The Mistretta Court, nonetheless, determined that the practical benefits of the SRA necessitated upholding the constitutionality of both the Commission and its Guidelines. Consequently, the decision of the Mistretta Court reflects the lower court’s view, that striking the Guidelines down on separation of powers grounds would “be a regrettable and unnecessary insistence on maintenance of functional purity.”268

A. The United States Sentencing Commission as a Concentration of Power in the Judicial Branch

As a branch of the federal government, the judiciary is unique in several respects. Unlike the President and the members of Congress, the members of the judiciary are nonelected officials who remain in office for life unless impeached. Thus, the judiciary is not accountable to the general public in the same fashion as are the members of the political branches. Because federal judges are not subject to the direct control of the people, a federal court’s jurisdiction in a particular matter must be firmly established, prior to its exercise of any authority or power whatsoever. Consequently, the courts are not permitted to exercise judicial power outside the narrow confines of their jurisdiction. In upholding the constitutionality of the Commission and its product, the Mistretta Court circumvented this fundamental limitation on the power exercisable by the federal judiciary.

1. The Court’s Decision Permits an Excessive Concentration of Legislative Power Within the Judicial Branch

In his dissent in Mistretta, Justice Scalia repeatedly stressed that the core function of any of the three branches of government cannot properly be exercised by a coordinate branch.269 This notion embodies the very essence of the separation of powers doctrine.270 The quintessential function of Congress is the creation of national legislation, a function which may not be

267. At several points in his opinion, Justice Blackmun admitted that he was not entirely comfortable with the conclusions the Majority had reached with regard to the constitutionality of the Commission and the Guidelines it produced. See Mistretta, 109 S. Ct. at 661 (Court notes that unique composition of Commission gives rise to serious concerns over disrupting the appropriate balance of power); id. at 665 (recognizing analogy between Guidelines and F.R.C.P. is flawed); id. at 667 (regarding Congress’ requirement of judicial service on Commission as troublesome); id. at 671 (Court again troubled by argument that judiciary’s entanglement in political work of Commission undermines public confidence in and disinterestedness of the judicial branch).


269. See supra note 70.

270. See supra notes 10-14 and accompanying text.
assigned elsewhere, regardless of how extensive the instructions provided by Congress for the exercise of that function may be. The express language of the Constitution requires legislative power to be exercised solely by the Congress. The majority in Mistretta failed to adequately recognize that the authority assigned to the Commission, despite the congressionally-imposed limits on its discretion, constitutes nothing less than an assignment of pure legislative power.

Justice Scalia argued in Morrison that it was not the Court’s role to determine how much of the executive power must be within the full control of the President. Rather, Justice Scalia noted that “[t]he Constitution prescribes that they all are.” The same conclusion is warranted with regard to the Mistretta Court’s sustaining of Congress’ delegation of legislative power to the Commission. Justice Scalia’s argument is particularly applicable to the decision in Mistretta since the legislative power, unlike the executive power, has never been thought to be delegable. Precisely because there is express constitutional language regarding the exercise of legislative power, it was improper for the Mistretta Court to determine how little must remain within the control of Congress, or how much may be exercised by others. Consequently, the majority in Mistretta did not merely validate a grant of rulemaking authority to an independent government agency, but

271. See Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 589 (1952) (lawmaking power entrusted to the Congress alone).
274. Id. (emphasis in original).
275. It has never been thought that the President must exercise the executive power personally. See, e.g., Wosley v. Chapman, 101 U.S. 755 (1880) (President may generally authorize others to exercise executive powers in his place).
276. Dissenting in Mistretta, Justice Scalia stated that the basis for permitting an independent body to exercise legislative power does not even exist. 109 S. Ct. at 682 (Scalia, J., dissenting).
277. Although not considered by the Mistretta Court, several district courts had held the Guidelines to be unconstitutional because they constituted legislation which had neither been passed by both houses of congress nor signed by the President. See, e.g., United States v. Serpa, 688 F. Supp. 1398, 1400 (D. Neb. 1988) (sentencing Guidelines not established according to article I’s procedural requirements and therefore are unconstitutional); United States v. Johnson, 682 F. Supp. 1033, 1036-38 (W.D. Mo. 1988) (Wright, J., dissenting), aff’d sub nom. Mistretta v. United States, 109 S. Ct. 647 (1989); see also Note, supra note 64, at 1375-76 (arguing that Guidelines are unconstitutional because not passed by both houses and signed by President). The promulgation of Guidelines by the Commission, it was argued, is an exercise of legislative power which impermissibly circumvents article I’s requirements of bicameralism and presentment. U.S. Const. art. I, § 7 (“Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States”). Setting aside whether the Guidelines are properly characterized as legislation, the immediate response to this argument is that the requirements of bicameralism and presentment are unnecessary in this situation. The purpose of these requirements is to provide for a check on the exercise of legislative power. Congress cannot pass a law unless both the House and the Senate are in agreement, and the President has given his express approval (or Congress has overridden his veto). U.S. Const. art. I, § 7. When Congress
instead opened new doors to what pure legislative powers may be exercised by entities outside the legislative branch.

delegates its policy making authority to one of its components or agents without satisfying these requirements, it evades the "carefully crafted restraints spelled out in the Constitution." INS v. Chadha, 462 U.S. 919, 959 (1983). However, when Congress delegates legislative power to another branch, or to an independent agency located within another branch, then the underlying purpose for the article I checks no longer exist. See Krent, supra note 82, at 1282 (arguing that agents of the executive branch, including independent agencies, are not bound by article I restrictions because of Framers greater fear of unchecked legislative power). Congress' power is essentially "checked" by the fact that a coordinate branch exercises the power rather than Congress or one of its agents.

Applying this analysis to the Commission and the Sentencing Guidelines, it is clear that Congress satisfied the purpose of article I's requirements. The SRA was passed by both Houses and signed by President Reagan into law, as part of the Comprehensive Crime Control Act of 1984, on October 12, 1984. See United States v. Myers, 687 F. Supp. 1403, 1406 (N.D. Cal. 1988). Although the Guidelines themselves went into effect automatically, Congress did not reserve for itself a one-house legislative veto over the decisions of the Commission as was the case in INS v. Chadha, 462 U.S. 919 (1983). In Chadha, Congress sought to provide itself with a one-house legislative veto over decisions made by an executive agency. Since this self-empowerment had not conformed to the procedures of article I, the Court found that it was unconstitutional. Neither is the Commission directly accountable to Congress, as was the case in Bowsher v. Synar, 478 U.S. 714 (1986), such that it constitutes an agent of Congress. In Bowsher the Court found that Congress had assigned to the Comptroller General the duty to make policy decisions that had the force of law. Since the Comptroller General remained primarily accountable to Congress, he was viewed as an "agent" of Congress. Therefore, the exercise of the Comptroller's power was unconstitutional since it was "legislation" that had not been approved by both Houses of Congress and the President. 478 U.S. at 714. In contrast, the Commission is explicitly established as "an independent commission in the judicial branch of the United States." 28 U.S.C. § 991(a). Furthermore, the Chairman and other members of the Commission are subject to removal by the President "only for neglect of duty or malfeasance in office or for other good cause shown." 28 U.S.C. § 991(a). Consequently, the examples of Chadha and Bowsher are inapposite to the Commission or its sentencing guidelines. Although Professor Krent reached a different result as to the sentencing guidelines' constitutionality for other reasons, the conclusion herein reached by the author is consistent with Professor Krent's formalist-functionalist test for proper delegations of congressional policy-making authority. See Krent, supra note 60, at 1273-93.

Concurring in Bowsher, Justice Stevens argued for permitting Congress to delegate legislative power to independent agencies and executive departments without requiring the passage of new legislation authorizing the prescription of law through substantive rulemaking. 478 U.S. at 752 (Stevens, J., concurring). Similarly, Justice Blackmun wrote in his dissent that Chadha clarified that the bicameralism and presentation requirements prevented Congress itself from exercising legislative power through some kind of procedural shortcut, such as the one-House veto challenged therein. "But," he continued, "we also made it clear that our holding in no way questioned Congress' authority to delegate portions of its power to administrative agencies." 478 U.S. at 778.
2. **The Constitutional Ramifications of Locating the Commission in the Judicial Branch**

The *Mistretta* Court also failed to adequately recognize that Congress' placement of the Commission in the judicial branch constituted a significant addition to the authority of the federal judiciary. The Court had previously held that Congress may not vest within the judicial branch powers which are "more appropriately performed by the other Branches."\(^{278}\) In sustaining Congress' location of the Commission in the judicial branch the Court ignored the vital distinctions between the Commission's function and the narrow exceptions to article III's express limits on the exercise of judicial power. The *Mistretta* Court held that, although limited by the cases or controversies requirement, Congress may confer administrative or rulemaking duties upon courts or auxiliary bodies within the judicial branch which are "necessary and proper . . . for carrying into execution all the judgments which the judicial department has the power to pronounce."\(^{279}\) However, this rule does not warrant the Court's conclusion that placing a Commission in the judicial branch, vested with the authority to promulgate sentencing Guidelines, does not violate the principle of separation of powers.

In determining that the promulgation of federal sentencing Guidelines was an appropriate function for the Commission to exercise, the Court analogized the sentencing Guidelines to the Federal Rules of Evidence, and Civil and Criminal Procedure, promulgated under their respective enabling acts.\(^{280}\) The judicial functions which the Court cited are valid exceptions to the "cases and controversies" limitation.\(^{281}\) Accordingly, it is not disputed that Congress may properly authorize article III courts to promulgate rules regarding court administration, operations and procedures,\(^{282}\) and that congressional delegations of such rulemaking authority are constitutionally permitted.\(^{283}\) However, a closer inspection of the nature of the Commission's task, and the Guidelines themselves, reveals that the Court's analogy in this respect is severely flawed.\(^{284}\)


\(^{280}\) See supra notes 218-33 and accompanying text.

\(^{281}\) "The judicial Power shall extend to all Cases . . . to Controversies . . . ." U.S. Const. art. III, § 2.

\(^{282}\) See *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1 (1825) (Congress' power to make laws for carrying into execution all the judgments which the judicial department has power to pronounce expressly conferred by necessary and proper clause).

\(^{283}\) See, e.g., *Sibbach v. Wilson & Co.*, 312 U.S. 1 (1941); see also *Chandler v. Judicial Council of the Tenth Circuit*, 398 U.S. 74 (1970) (federal judges may be granted authority over matters that are not strictly cases or controversies but are reasonably ancillary to the primary dispute-deciding function of the courts).

\(^{284}\) The Court recognized the weakness of the analogy they drew between the Guidelines and the Court's rulemaking power under the enabling acts. The Court stated, "[w]e agree with petitioner that the nature of the Commission's rulemaking power is not strictly analogous to
In deciding the issue, the Court expressed its reluctance to enter the "logical morass of distinguishing between substantive and procedural rules." Rather than attempt to develop or apply a justiciable standard distinguishing between substance and procedure, the Court was content to limit its inquiry to the "unique aspects of the congressional plan at issue and its practical consequences in light of the larger concerns that underlie Article III." In merely considering the possible threat to the judicial branch, that locating the Commission therein could have posed, the Court misconstrued the purpose of the substance-procedure dichotomy. The substance-procedure dichotomy focuses on the effect of a court rule upon the parties before the court, not the effect of a rule on the judiciary itself. The Mistretta Court ignored the fact that the judiciary may promulgate rules of procedure only because such rules are not intended to affect substantive rights or duties. The effects of a particular rule upon the judiciary itself, as an institution, are irrelevant for purposes of this analysis. Despite its lack of analysis, the Court nonetheless made a sweeping characterization of the Guidelines as procedural, while providing no convincing basis for its conclusion. Thus, although seeking to avoid entering a "logical morass," the Mistretta Court instead plunged the substance-procedure dichotomy into an even deeper conceptual quagmire.

this Court's rulemaking power under the enabling acts." Mistretta, 109 S. Ct. at 665. Therefore, the majority also attempted to characterize the Commission as merely an administrative agency within the judiciary, similar to the Administrative Office of the United States Courts, or the Judicial Council. Concurring in Chandler v. Judicial Council of the Tenth Circuit of the United States, 398 U.S. 74 (1970), Justice Harlan argued that the Judicial Council's power to direct trial judges in the execution of their decisionmaking duties was a judicial power. Id. at 103 (Harlan, J., concurring). The first Justice Harlan had similarly applied the test in Prentis v. Atlantic Coast Line Co., 211 U.S. 210 (1908), to determine that the function of the Judicial Council was adjudicative. Id. at 106-10. Under the reasoning of both Justice Harlans, the Commission would also exercise judicial power in that it is also located in the judicial branch, and similarly directs trial judges in the execution of their sentencing decisionmaking duties.

286. Id. (quoting Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 857 (1986)).
287. For example, the Supreme Court is vested with the power to promulgate rules of court procedure pursuant to the Rules Enabling Act of 1934. 18 U.S.C. §§ 3771, 3772; 28 U.S.C. §§ 2071-2076. The exercise of authority under that statute is restricted, however, in that any rules promulgated thereunder "shall neither abridge, enlarge, nor modify the substantive rights of any litigant." Id. (emphasis added).
288. Although Congress has the undoubted power to delegate the power to regulate the procedure and practice to the federal courts, it has never been considered capable of vesting the power to affect substantive rights or duties. See Sibbach v. Wilson & Co., 312 U.S. 1, 9-10 (1941); see also Walker v. Armco Steel Corp., 446 U.S. 740 (1980).

Professor Burbank has noted that among the standards of the 1924 Senate Report for classifying what matters are excluded from the Court's rulemaking power, was the notion that such power did not extend to matters involving substantive, legal, and remedial rights affected by the considerations of public policy. Burbank, The Rules Enabling Act of 1934, 130 U. Pa. L. Rev. 1015, 1121 (1982).
Despite the Court's brief attempt to portray them as procedural, the substantive nature of the sentencing Guidelines is clear from their purpose and impact. The powers delegated to the Commission were by no means designed to be merely supervisory or administrative in nature. As one district court observed, "Congress intended the Commission, in formulating the Guidelines, to proceed in a nonjudicial manner in performing what has historically been described as a legislative function—prescribing the punishment for crime." Furthermore, the sentencing Guidelines are far from mere administrative "housekeeping" rules, by which the courts may regulate their own business. Nor are they within the courts' permissible authority to issue rules, either ministerial, or absolutely essential, to the exercise of the judiciary's constitutionally-assigned function. Rather, the Guidelines are equivalent to substantive law, which bind not only the entire federal judiciary, but also the conduct of the general public. Consequently, the Court's attempt to equate the Commission's function to the judiciary's traditional authority to produce either administrative rules, or rules of practice and procedure was unconvincing.

The Mistretta Court conceded that the promulgation of sentencing Guidelines involved an unusually high degree of discretion and political judgment, which set the Commission's rulemaking powers apart from prior judicial rulemaking. However, it concluded such discretion was not incongruous

289. See Mistretta, 109 S. Ct. at 667. The Court conceded that the Guidelines were intended to have substantive effects on public behavior, but argued that they did not "bind or regulate the primary conduct of the public or vest in the Judicial Branch the legislative responsibility for establishing minimum penalties for every crime." Id.
292. The Gubiensio-Ortiz court noted that the decisions of the Commission are substantive, fundamentally different from those governing the time for filing of responsive pleadings or to the extent of allowable discovery. 857 F.2d 1245, 1255 (9th Cir. 1988).
293. See, e.g., Young v. United States ex rel. Vuitton et Fils S.A., 481 U.S. 787 (1987) (ability to punish disobedience to judicial orders essential in ensuring judiciary has means to vindicate it own authority without complete dependence upon other branches); In re Certain Complaints Under Investigation (Williams v. Mercer), 783 F.2d 1488 (11th Cir.) (upholding statute authorizing judicial council to investigate improper conduct by federal judges as conferring duties "ancillary to the administration of the courts"), cert. denied, 477 U.S. 904 (1986).
294. See supra notes 227-29 and accompanying text; see also Gubiensio-Ortiz v. Kanahele, 857 F.2d 1245 (9th Cir. 1988) (decisions of Commission are substantive and fundamentally different from those made pursuant to the Rules Enabling Act of 1934).
295. The Mistretta Court conceded that the Guidelines are intended to have substantive effects on public behavior. 109 S. Ct. at 657-58, 665. The Court stated that "the degree of political judgment about crime and criminality exercised by the Commission and the scope of the substantive effects of its work does to some extent set its rulemaking powers apart from prior judicial rulemaking." Id. at 665.
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with the function of the judiciary, since judges had always played a significant role in sentencing, and had traditionally enjoyed broad discretion in doing so.\footnote{297} At first glance, it might appear that all Congress did was to restructure an existing function of the judicial branch. However, the Court confused adjudication with legislation.\footnote{298} Adjudication serves to investigate, declare, and enforce liabilities as they stand on present or past facts and under already existing laws.\footnote{299} Legislation, on the other hand, looks to the future, and changes existing conditions by making a new rule to be applied thereafter, to all or part of those subject to its power.\footnote{300} Applying these definitions to the Guidelines, it becomes clear that they are effectively legislation, since the future circumstances of any given defendant are unknown to the Commission at the time it promulgates its Guidelines.

Of course, district judges had considerable discretion to make individual sentencing decisions prior to the SRA. They could not, however, make wholesale determinations binding upon other judges in the federal system.\footnote{301} Nor had sentencing judges typically made policy judgments to the same extent required of the judges on the Commission, in drafting the Guidelines.\footnote{302} Rather, the duties which Congress assigned to the Commission cannot be properly characterized as traditional judicial functions, since the establishing of sentencing policy has never been an exclusive judicial function.\footnote{303} It is only Congress which has the power to fix the statutory punishment for federal crimes.\footnote{304} Consequently, the scope of judicial sentencing discretion has always been subject to congressional control.\footnote{305}

\footnote{297} Id. at 650.
\footnote{298} Gubiensio-Ortiz, 857 F.2d at 1255 n.7. The Gubiensio-Ortiz court observed that "[t]he Justice Department and the Sentencing Commission suggest that Congress has long delegated such decisions to the Judiciary in the form of broad sentencing discretion exercised by individual judges in particular cases. This argument deserves scant attention because it confuses adjudication with rulemaking." Id.
\footnote{300} Keller, 261 U.S. at 440.
\footnote{301} See Gubiensio-Ortiz v. Kanahele, 857 F.2d at 1255 n.7 (arguing that the Framers made this distinction when they vested the power to decide cases in the judiciary and the power to make law in the legislature).
\footnote{302} See, e.g., SENTENCING GUIDELINES MANUAL 1.4 (Oct. 1987) (decisions by commissioners were policy-oriented departures from previous judicial practices).
\footnote{303} See Mistretta, 109 S. Ct. at 650 (federal sentencing never has been thought to be assigned by the Constitution to any one of the three branches of government); see also Note, supra note 64, at 1366 (establishment of sentencing policy not an exclusively judicial function).
\footnote{304} United States v. Wiltberger, 18 U.S. (5 Wheat.) 76 (1820).
\footnote{305} See Ex parte United States, 242 U.S. 27 (1916). Under the indeterminate-sentence system which existed prior to Congress' enactment of the SRA, all three branches of government determined in part the actual prison time served by any given person. Under the prior system, Congress defined the statutory maximum sentence, the particular judge on the case decided where in the statutory range the sentence should fall, and a parole board official would ultimately determine the actual duration of confinement. See Williams v. New York, 337 U.S. 241, 248 (1949); Geraghty v. United States Parole Comm'n, 719 F.2d 1199, 1211 (3d Cir. 1983), cert. denied, 465 U.S. 1103 (1984).
Furthermore, the Mistretta decision represents an unqualified extension of the reasoning, which the Court adopted in Morrison v. Olson, concerning Congress' authority to vest nonjudicial powers in a judicial body. In Morrison, the Court affirmed Congress' authority to vest the power to appoint independent prosecutors in a special division of the District of Columbia appellate court.\(^{306}\) The Morrison Court reasoned that the appointments clause of article II\(^ {307}\) provided a basis for the Special Division's exercise of that appointment power, separate from, and independent of article III.\(^ {308}\) Therefore, Congress’ decision to vest the appointment of executive officers in a court of the United States did not violate separation of powers, since article II expressly provided a constitutional basis for such.\(^ {309}\)

However, no similar separate and independent constitutional basis authorizes Congress to vest the power to promulgate sentencing Guidelines in an entity such as the Commission. Therefore, the Mistretta Court was forced to rely upon the “necessary and proper” clause\(^ {310}\) of article II as alternative support for its decision.\(^ {311}\) The Court failed to recognize, however, that the “necessary and proper” clause is entirely unrelated to either the powers or functions which the judicial branch may properly exercise. Rather, the Court seemed to reach the inconceivable conclusion that the “necessary and proper” clause authorizes Congress to vest powers in the judicial branch, uninhibited by the express limitations of article III.\(^ {312}\) The only limits which the Court did impose upon this authority, was that any functions assigned by Congress to the judiciary must remain consonant with the integrity of the judicial branch, and cannot be more appropriately exercised by another branch.\(^ {313}\) Thus, the Mistretta Court effectively substituted its own self-imposed constraints for those which article III expressly provides. The Court's analysis is, therefore, not only inconsistent with the doctrine of separated powers, but also contravenes the constitutional limitation on judicial power to “Cases” or “Controversies.”

Consequently, the Court’s assertion that Congress’ placement of the Commission in the judicial branch was not only constitutional, but also particularly appropriate, was not colorable. Rather, the location of the Commission within the judicial branch gives that branch a significant new dimension.

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311. See Mistretta, 109 S. Ct. at 662-63. The Court relied on the decision in Wayman v. Southard, 23 U.S. (10 Wheat.) 1 (1825), which held that rulemaking power pertaining to the judicial branch could be conferred on the judicial department. Id. at 43.
312. See Mistretta, 109 S. Ct. at 663.
313. Id. at 661, 664.
3. The Placement of the Commission in the Judicial Branch Undermines its Institutional Integrity

The cases or controversies limitation of article III serves, in part, to prevent the judiciary from becoming embroiled in the business of the political branches. Congress, however, created an ongoing relationship between the judiciary and the political branches of government by requiring federal judges to serve on a commission within the judicial branch alongside nonjudges appointed by the Chief Executive. In upholding Congress' placement of the Commission in the judicial branch, the Supreme Court insufficiently considered two distinct concerns raised by this new ongoing relationship.

First, by allowing federal judges to become so deeply involved with the political branches of government, the Court's decision gives rise to an undesirable public perception of the judiciary. One principle underlying the doctrine of separated powers is the need to maintain both the actual and apparent impartiality of the judicial branch. An adjudicatory body must, at the very least, appear to be neutral in order to retain its legitimacy. Similarly, the federal judicial system must avoid giving criminal defendants the impression that they have been "ganged-up on" by the branches of government.

The composition of the Commission may give the public the distinct impression that lawmakers, law-enforcers, and adjudicators have

314. See supra notes 62-63.
315. See Varat, Cases and Controversies, in Encyclopedia of the American Constitution 218, 219 (L. Levy, K. Karst & D. Mahoney eds. 1986) (cases and controversy restriction reinforces judges' ability to resist nonjudicial tasks imposed on them by others); see also Note, supra note 64, at 1378 (case and controversy limitation forbids judges from entering into a formal working relationship with members of other branches of government); Massachusetts v. Mellon, 262 U.S. 447, 483 (1923) (one purpose of political question doctrine is to keep judiciary out of the political business of the other branches).
317. 28 U.S.C. § 991(a). This includes a representative of the Attorney General. Id.
318. Although the Court briefly responded to Mistretta's argument that the independence of particular judges serving on the Commission would be jeopardized, it did not specifically address the probable negative public perception of such a joint effort by the three branches of government.
319. It is essential to the maintenance of an independent judiciary that the courts remain entirely detached from the parties which appear before them. See Chandler v. Judicial Council of the Tenth Circuit of the United States, 398 U.S. 74, 84 (1970) (need for total and absolute independence of judges in deciding cases or in any phase of decisional function is imperative); see also Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 59-60 (1982) (independence of the judicial branch must be "jealously guarded" from outside interference).
320. In order for the courts to remain both effective and legitimate adjudicative bodies, the parties who appear before the courts, as well as the public in general, must also perceive them to be impartial and independent. See id. at 50, 59 n.10. (independence of judiciary promotes public confidence in judicial determinations).
321. See Comment, supra note 110, at 1010-25.
322. See Shapiro, supra note 23, at 580. In other words, the loser must not perceive his loss as the result of a two-against-one conspiracy.
banded together at the ultimate expense of liberty. As Justice Frankfurter once remarked, the intimate involvement of article III judges in the process of policymaking and legislating "weaken[s] confidence in the disinterestedness of adjudicatory functions." Ultimately, any negative public perception of the judicial branch will erode the legitimacy of the judiciary as a whole, as well as the effectiveness of individual judicial decrees.

Second, by participating in the framing of substantive legislation, such as sentencing Guidelines, judges bestow upon that legislation the appearance that it is presumptively fair and impartial. Thus, Congress was able to cast an aura of judicial prestige and neutrality over both the Commission and its work, although essentially political in nature, by enlisting federal judges to serve on the Commission. The majority in Mistretta realized that the political branches should not be allowed to cloak themselves in the aura of independence and impartiality which has traditionally surrounded the judicial branch. The Court, nonetheless, dismissed this concern by stating that the Commission "is devoted exclusively to the development of rules to rationalize a process that has been and will continue to be performed by the Judicial Branch." However, the fact that the judiciary has traditionally played a significant role in sentencing, does not justify Congress' combining the judiciary's power with the other branches of government in order to make wholesale sentencing determinations.

323. This may be especially true since the Attorney General, or his representative, serves on the Commission in an ex officio capacity. 28 U.S.C. § 991(a).
324. The Mistretta Court failed to realize that the public in general will undoubtedly perceive this "joint effort" as directed against their better interests. In fact, the SRA is specifically directed against certain classes of criminals which Congress thought should be punished more severely than others. The SRA also directs the Commission to focus more on some offenses than others. See supra note 166.
326. Many critics have chastised both judges and the judiciary for policymaking in the cases which come before them. See, e.g., L. Baum, American Courts: Process and Policy 301 (1986) (judicial activism a controversial matter). The policymaking by the judges on the Commission does not even occur within the context of a case.
327. See Comment, supra note 110, at 1013 (by recommending a law a judge puts his "stamp of approval" on it and in effect renders an opinion that it is constitutional or legal); Hobsen v. Hansen, 265 F. Supp. 902, 923 (D.D.C. 1967) (Wright, J., dissenting) (judicial involvement in social decisionmaking camouflages its legislative character and "shores up" its acceptability by cashing in on the judicial reputation). This result is an inevitable consequence considering the fact that nonjudges are also members of the panel, and the presence of the Attorney General, or his designee, as an ex-officio nonvoting member.
328. The internally political nature of the Commission is apparent from the fact that the SRA permits no more than four members of the Commission to be members of the same political party. 28 U.S.C. § 991(a).
329. Mistretta, 109 S. Ct. at 673.
330. Mistretta, 109 S. Ct. at 673. But see id. at 650 (Justice Blackmun's earlier comment relating fact that sentencing is not inherently or exclusively a judicial function); see also Ex parte United States, 242 U.S. 27, 41-42 (1916) (same); Geraghty v. United States Parole Comm'n, 719 F.2d 1199, 1211 (3d Cir. 1983) (same).
Furthermore, by requiring that federal judges serve on political agencies, Congress inevitably forces judges who have served on these agencies to recuse themselves from future cases which raise challenges to their validity.\(^3\) The majority was correct in stating that the service of a few federal judges on the Commission would not initially result in "wide-spread judicial recusals."

However, the actual number of recusals is irrelevant for separation of powers purposes, since the Court has no authority to determine the extent to which one branch of government may interfere with the constitutionally-assigned function of another. The principle of separation of powers doctrine, inherent in the Constitution, demands that there should be no interference at all.

The Court was too quick to dismiss the arguments that the Commission was incongruous with the judiciary, impermissibly expanding the judicial branch's power while simultaneously undermining its integrity. The Supreme Court had previously held that Congress could not vest within the judicial branch powers or duties which "undermine the integrity of the Judiciary."\(^3\) However, its understanding of the desperate need for a practical solution to the problem of sentencing disparity encouraged the Court to somehow overcome serious constitutional challenges to the validity of the Commission and its Guidelines. Consequently, the \textit{Mistretta} Court afforded too little weight to the potential adverse effects of locating the Commission in the judicial branch upon the institution itself. Ultimately, the Court's decision in \textit{Mistretta} contraves the notion that "a federal court's first duty is to guard zealously against impairment of its own integrity as an institution."\(^3\)

\textbf{B. The Legislative Requirement of Extrajudicial Service}

In directly addressing the issue for the first time,\(^3\) the Supreme Court rejected Mistretta's argument that permitting article III judges to serve in...
various nonjudicial capacities was unconstitutional. The Court concluded that separation of powers doctrine does not prohibit judicial participation in certain extrajudicial activities. The Court largely based its conclusion on the textual absence of an express prohibition against extrajudicial activity by federal judges, and on the tradition of such service by federal judges since the time of the Framers. Although the Mistretta Court apparently found the history of extrajudicial service to be dispositive, it is certainly questionable whether custom alone can ever render an otherwise unconstitutional practice valid. Furthermore, the Court upheld extrajudicial service despite conflicting intentions on the part of the Framers, and without either clear precedent on the issue, or textual support from the Constitution. Standing alone, this country's sporadic history of extrajudicial activity was an inadequate basis for the Court to have constitutionalized judicial service on nonjudicial government bodies.

The Mistretta Court also sustained the validity of the Commission, despite its composition, because judges serve on the Commission not pursuant to

336. See Mistretta, 109 S. Ct. at 671.
337. Id. The Court did state, however, that not every kind of extrajudicial service under every circumstance would necessarily be considered constitutional. Id. "The ultimate inquiry," according to Justice Blackmun, "remains whether a particular extrajudicial assignment undermines the integrity of the Judicial Branch." Id.
338. Id. at 667-68. The limitation on the exercise of judicial power to "cases" and "controversies" is one possible exception. One commentator has argued that judges may not involve themselves in any government activities besides the adjudication of cases or controversies. See Comment, supra note 110, at 1003 & n.54 (federal judges may not perform any function officially connected to government that is not properly within the judicial sphere).
340. It is not disputed that the Court's grant of constitutional approval to extrajudicial service by federal judges on governmental bodies is consistent with some prior practice. The issue is whether extrajudicial service, traditional or not, is inconsistent with the doctrine of separated powers.
341. See In re President's Commission on Organized Crime (Subpoena of Scarfo), 783 F.2d 370, 377 (3d Cir. 1986) (same); In re President's Comm'n on Organized Crime (Subpoena of Scaduto), 763 F.2d 1191, 1202 (11th Cir. 1985) (recognizing that service by judges in nonjudicial capacities, while of long-standing duration has never before been judicially approved).
342. Mistretta, 109 S. Ct. at 668. Justice Blackmun recognized that while two proposals at the Federal Convention which would have prohibited extrajudicial service by federal judges were never reported out of committee, two proposals which would have institutionalized such service were rejected by the Framers. Id. at 668 n.21. He also conceded that the Court did not "pretend to discern a clear intent on the part of the Framers with respect to the issue, but glean[ed] from the Constitution simply an inference that the Framers did not intend to forbid judges from holding extrajudicial positions." Id.
343. Mistretta, 109 S. Ct. at 670-71. The two early Supreme Court cases which touched on the subject only "suggest" that separation of powers prohibits the assignment of administrative or executive duties to judges in their role as judges, but not in their individual capacity. See id. at 671 (discussing Hayburn's Case and United States v. Ferreira); see also supra notes 115-26 and accompanying text.
their status and authority as article III judges, but solely because the SRA directs the President to appoint them.\footnote{Mistretta, 109 S. Ct. at 671.} There is no question that retired federal judges, or judges willing to resign their post, may readily hold office outside the judicial branch. In fact, the continued service in government by such experienced persons is a valuable resource and should be strongly encouraged. However, the SRA does not require the President to appoint federal judges to the Commission merely because they possess special expertise in the area of sentencing, but precisely because they are \textit{currently} federal judges.\footnote{The SRA requires that at least three members of the Commission be active federal judges. 28 U.S.C. § 991(a).} Simply because the Court determined that the Commission was not a "court”\footnote{See \textit{Mistretta}, 109 S. Ct. at 665, 673. The Court reached this conclusion despite the fact that it had earlier construed the Special Division in \textit{Morrison} to constitute a "court." \textit{See infra} notes 349-54 and accompanying text.} does not eliminate the possibility that the judges serving upon it do so in an official capacity, or exercise judicial authority.\footnote{See Note, \textit{supra} note 64, at 1383 (only significant difference between assigning duty to judge as an individual and as a member of a court is that as an individual she will be acting outside judiciary); \textit{see also} Chandler v. Judicial Council of the Tenth Circuit of the United States, 398 U.S. 74 (1970) (Harlan, J., concurring) (power of judicial councils to direct trial judges in the execution of their decisionmaking duties regarded as a judicial power, "one to be entrusted only to a judicial body"). Furthermore, the functions performed by the judge-commissioners are "judicial" in the sense that they are quite similar to those adjudicatory functions that have typically been exercised by members of the judiciary; \textit{cf.} \textit{Morrison v. Olson}, 108 S. Ct. 2597, 2619 (1988) (functions performed by independent counsel "executive" in nature in that they are law enforcement functions typically undertaken by officials within executive branch).} The fact remains that the judge-commissioners are not stripped of their article III status upon their appointment to the Commission.\footnote{Mistretta had contended that whether the judges on the Commission are referred to as either "Commissioner" or "your Honor" should not be dispositive of separation of powers issues involving the judiciary. \textit{See Brief of Petitioner-Respondent John M. Mistretta at 45, Mistretta v. United States, 109 S. Ct. 647 (1989) (Nos. 87-1904 and 87-7028) (arguing that separation of powers limitations on the proper function of judges apply whether the judges are in the judicial or executive branch); \textit{see also} Hobson v. Hansen, 265 F. Supp. 902, 925 (D.D.C. 1967) (Wright, J., dissenting) (to permit the constitutionality of an act turn on the fact that Congress used the word "judges" rather than "court" would attach critical significance to a trivial detail of draftsmanship); Note, \textit{supra} note 64, at 1383 n.148 (use of the term "court" is irrelevant for purposes of article III restrictions upon extrajudicial activity).} The definition of what constitutes a judicial function should not hinge merely upon the Court’s choice of nomenclature.\footnote{It is interesting to note that in the judicial immunity context, the test for distinguishing between administrative and judicial functions focuses upon the nature of the function performed, not the identity of the actor who performed it. \textit{See} Forrester v. White, 108 S. Ct. 538 (1988); Supreme Court of Va. v. Consumers Union of United States, Inc., 446 U.S. 719 (1980); \textit{Ex parte} Virginia, 100 U.S. 339 (1880). Arguably, since Congress enlisted the judges on the...}
Furthermore, the Supreme Court determined that the three federal judges who were appointed to the Commission were not a "court," and therefore exercised no judicial power cognizable under article III.\textsuperscript{350} This characterization of the Commission is inconsistent with the Court's earlier ruling in \textit{Morrison v. Olson}. The \textit{Morrison} Court held that a special division of the District of Columbia Court of Appeals could appoint independent prosecutors without violating article III's limits on the exercise of judicial power.\textsuperscript{351} In reaching its decision, the \textit{Morrison} Court correctly noted that the appointments clause of article II grants Congress the authority to vest the power to appoint inferior officers in "the President alone, in the \textit{Courts} of Law, or in the Heads of Departments."\textsuperscript{352} As one commentator has pointed out, the three judges who constitute the Special Division, and who actually appoint the independent prosecutor, are convened solely for that purpose and do not exist independently as a "court."\textsuperscript{353} Therefore, one would think that the appointments clause could not authorize the Special Division to appoint special prosecutors. The Supreme Court, however, held in \textit{Morrison} that the Special Division did constitute a "court" for purposes of article II, and therefore could constitutionally appoint special prosecutors.\textsuperscript{354} What the Supreme Court failed to explain in \textit{Mistretta} was how the three judges who make up the Special Division can be a "court" for purposes of article II, but the three judges who currently serve on the Commission cannot logically be considered a "court" for purposes of article III.\textsuperscript{355}

Finally, the Supreme Court dismissed too quickly the fact that Congress impermissibly intruded upon the independence of the judicial branch by requiring the service of at least three federal judges on the Commission.\textsuperscript{356} Although the \textit{Mistretta} Court found the SRA's conscription of federal judges to be "somewhat troublesome,"\textsuperscript{357} it nonetheless managed to overcome its discomfort.\textsuperscript{358} Absent a "more particularized threat to judicial independ-

\textsuperscript{350}\textit{Mistretta}, 109 S. Ct. at 673.

\textsuperscript{351} See supra notes 143-46 and accompanying text.

\textsuperscript{352} U.S. CONST. art. II, § 2, cl. 2 (emphasis added).

\textsuperscript{353} See supra note 64, at 1383 n.148 (citing 28 U.S.C. § 593).


\textsuperscript{355} The commentator had originally raised this argument prior to the Supreme Court's decision in \textit{Morrison}. See Note, supra note 64, at 1383 n.148.

\textsuperscript{356} The President could appoint and discharge, up to six judges to the Commission.

\textsuperscript{357} \textit{Mistretta}, 109 S. Ct. at 667.

\textsuperscript{358} Id. at 672. The Court's ruling on this issue is apparently not limited to the approval of extrajudicial service by judges on governmental bodies within the judiciary, but extends to service on bodies outside of the judiciary, both governmental and nongovernmental.
ence, the Court concluded that the Congress' inclusion of federal judges on the Commission did not undermine the integrity of the judicial branch. The Court reasoned that Congress may generally require federal judges to serve on the agencies it creates, so long as no particular individual judge is required to serve, and that service by any individual judge is voluntary, not mandatory. The Court's distinction is unconvincing. Simply because the SRA does not indicate which particular judges are to serve on the Commission does not alter the fact that Congress has ordered members of a coordinate branch to participate in activities which exceed their constitutionally-assigned roles. Lacking volunteers, the Judicial Council must still submit a list of six candidates to the President, at least three of which he must select to serve on the Commission.

Federal judges may be most competent people to promulgate sentencing Guidelines, and therefore it may be convenient for Congress to enlist them to do so. However, these factors do not justify the Supreme Court's decision to override the limits imposed upon the judiciary by article III of the Constitution in light of a practical solution to sentencing disparity.

IV. IMPACT

The immediate effect of the Supreme Court's decision in Mistretta was that the lower federal courts, which had refused to apply the Guidelines on the grounds that they were unconstitutional, were required to resentence those defendants according to the Guidelines. The long-term effects of the Court's ruling, however, will be far-reaching. The United States may now be closer to someday having a governmental body resembling a fictitious United States Advisory Council than it was when the members of the Constitutional Convention first considered adopting a Council of Revision in 1789.

The Court's decision establishes precedent for relaxing the formal mandates of the separation of powers doctrine for purely practical purposes. The Constitution is a framework which exists not only to designate the functions of government, but also to preserve liberty. That carefully drafted framework should not be dispensed with simply because Congress has devised a convenient solution to a currently distressing problem. The pragmatic and flexible view of separation of powers which the Rehnquist Court adopted in Morrison v. Olson, and to an even greater extent in Mistretta, threatens to

359. Id.
360. See id.
361. Apparently, the Court would also uphold an Act of Congress conscripting a third of the entire federal judiciary so long as no particular judge was named in the legislation.
362. See Schwartz, supra note 122, at 453.
363. The Federalist No. 47 (J. Madison); Constitutional Law, supra note 2, at 342 (basic principle of separation of powers was to many of the Framers the most fundamental element in the Constitution and all free government).
render impotent the constitutional limitations on the exercise of governmental power inherent in the federal system.

As Justice Scalia pointed out in his dissent, the most significant problem which arises from the Mistretta Court's decision is that it encourages Congress to further delegate judicially-uncontrollable legislative power to so-called "independent agencies." The proliferation of such agencies will undoubtedly have serious implications. For example, one goal of the non-delegation doctrine was to ensure that the branch of government to which the Constitution assigns power ultimately remains responsible for the exercise or abuse of that power. The Mistretta Court has defeated this fundamental goal by permitting Congress to place pure legislative power in the hands of an independent judicial agency, which is neither responsive nor accountable to the public will. Since the Commission makes decisions which involve democratic choice, it is "politically illegitimate" for Congress to assign them to the federal judiciary.

Relying upon the Court's decision in Mistretta, Congress is now free to create further mechanisms by which to remove politically sensitive or difficult issues from the democratic process, for resolution by what Justice Scalia termed a "junior-varsity Congress." In this manner, the Supreme Court has provided Congress with a convenient and efficient method for disposing of such issues while circumventing the "check" of government accountability.

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365. *Constitutional Law*, supra note 2, at 366 (first and foremost function of nondelegation doctrine is to ensure that fundamental policy choices will be made by the legislature, and not by officials thought to be politically less accountable).
366. No branch of government is directly responsible for the Commission or its actions. The Mistretta majority itself described the Commission as an "independent agency in every relevant sense." 109 S. Ct. at 665-66. If the Commission strays from its congressional mandate, the only remedy available against its judicial members, is their removal from the Commission, which would simply return them to the bench. Furthermore, undue zealously by one of the judge-commissioners, would likely not be considered an impeachable offense. See *Morrison*, 108 S. Ct. at 2639 (Scalia, J., dissenting) (discussing similar danger of allowing judges to appoint independent prosecutors to investigate the executive).

Nonetheless, the Commission promulgates substantive Guidelines and policy which directly affect tens of thousands of federal defendants each year. See Stewart & Nelson, *Sentencing by the Book*, 75 A.B.A. J. 38, 38 (1989) (more than 40,000 federal defendants sentenced every year). The Commission itself had estimated that the Guidelines would apply to roughly 90% of the annual number of federal criminal cases. See *United States v. Myers*, 687 F. Supp. 1403, 1407 (N.D. Cal. 1988).
368. *Mistretta*, 109 S. Ct. at 683 (Scalia, J., dissenting). Justice Scalia also predicted that "there may [now] be agencies within the Judicial Branch (whatever that means) exercising governmental powers, that are neither courts nor controlled by courts, or even judges." Id. at 682. For example, Congress could conceivably empanel a group of judges and lay experts to tackle any number of sensitive issues, such as abortion or desegregation while remaining politically unattached and unaccountable for the decisions of such "expert" panels.
to the public for the exercise of its powers.\textsuperscript{369} Hence, the \textit{Mistretta} Court's decision establishes an undemocratic precedent for future congressional delegations of substantial legislative power to recipients which are politically unaccountable.

A related concern is the effect of the \textit{Mistretta} Court's decision upon the federal judiciary itself. The notion of a judiciary which operates independently from the political branches of government, free from their influence or from involvement in their political work, is essential to the American version of separated powers.\textsuperscript{370} By permitting Congress to freely conscript federal judges to perform essentially political tasks for the legislative and executive branches, the \textit{Mistretta} Court has removed a crucial safeguard to that independence. Congress clearly mandated judicial service on the Commission in order to legitimize its bold effort to reform federal sentencing policy.\textsuperscript{371} However, for Congress to have done so is an abuse of the image of neutrality and impartiality which has traditionally been associated with the federal judiciary. Ultimately, the Supreme Court's decision may represent the legislature's first step toward reducing the federal courts to mere "vassals of the Congress."\textsuperscript{372}

\section*{V. Conclusion}

The Supreme Court's pragmatic approach to the principles of separation of powers and judicial independence in \textit{Mistretta v. United States} threatens to undermine their status as fundamental structural components of our federal system of government. Standing alone, convenience has never been,
and should never be, a valid basis for disregarding express constitutional limitations. Nonetheless, the *Mistretta* Court sustained Congress' creation of a significant new dimension to the federal judiciary, despite various implications that it violated the separation of powers doctrine. Consequently, the Court's decision permits independent judicial agencies to decide important political issues, even though such agencies are unaccountable to either the public, or to any particular branch of government.

In the interests of providing a practical solution to the growing problem of sentencing disparity, the *Mistretta* Court similarly undervalued the importance of maintaining a completely independent judiciary. The Supreme Court must limit its decision on the constitutionality of legislatively-required extrajudicial service or, in the words of Justice Black, "the hope for an independent judiciary will prove to be no more than an evanescent dream."[374]

The late eighteenth century saw the Framers of the Constitution, meeting in Philadelphia, to design a system of government for the newly liberated United States. In drafting the Constitution, they considered and rejected several proposals resembling the United States Advisory Council described in the Introduction of this Note. By upholding the constitutionality of the United States Sentencing Commission, the seven-member majority of the *Mistretta* Court have seen fit to lay the foundation for the future creation of the very Advisory Council of which our Founding Fathers were so fearful.

*Martin T. Tully*

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373. Arguably, it is through inconvenience that the separation of powers doctrine achieves its goal. For example, Chief Justice Warren Burger once wrote:

That this system of division and separation of powers produces conflicts, confusion, and discordance at times is inherent, but it was deliberately so structured to assure full, vigorous, and open debate on the great issues affecting the people and to provide avenues for the operation of checks on the exercise of governmental power.


The doctrine of the separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was, not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy.

