The Constitutional Infirmities of the United States Sentencing Commission

Lewis J. Liman

The promulgation of sentencing guidelines by the United States Sentencing Commission, if ultimately deemed valid, will introduce a new era in the application of criminal sanctions in federal court. The past pattern of sentencing, under which the judge had exclusive authority to set sanctions within typically broad congressional ranges, will disappear entirely. In the future, an administrative agency composed of seven commissioners, appointed and removable by the President, will determine the range of sentences that the judge may impose.

The Sentencing Commission undoubtedly is a convenient solution to the problem of sentence disparity. However, convenience is not a hallmark of the separation of powers and does not cure a violation of its dictates. The Constitution's separation of powers into three branches provides "structural protections against abuse of power" that do not turn upon the momentary beneficence of particular officers. The Sentencing


4. The differences in sentences imposed on defendants who have committed the same offenses is commonly referred to as sentence disparity. See 1 RESEARCH ON SENTENCING: THE SEARCH FOR REFORM 72 (A. Blumstein, J. Cohen, S. Martin & M. Tonry eds. 1983) [hereinafter 1 RESEARCH ON SENTENCING]. Objections to sentencing disparity and attempts to confine discretion date from the 1960's. See K. DAVIS, DISCRETIONARY JUSTICE (1969); Kadish, Legal Norm and Discretion in the Police and Sentencing Processes, 75 HARV. L. REV. 904 (1962). Such objections greatly increased with allegations that the prison riots of the 1970's were caused in part by frustration with disparate sentences. See M. FRANKEL, CRIMINAL SENTENCES (1973); TWENTIETH CENTURY FUND TASK FORCE ON CRIMINAL SENTENCING, FAIR AND CERTAIN PUNISHMENT (1976); A. vON HIRSCH, DOING JUSTICE (1976).


7. Id.
Commission imperils the liberty protected by the separation of powers not only because it vests the executive branch with the judicial and legislative power of determining sentences, but also because the President obtains the power to appoint and remove judges to a non-judicial body. Before the legal challenges to the Commission's guidelines create havoc in federal sentencing, and the Parole Commission is divested of authority to release persons sentenced under the guidelines, Congress should restructure the Commission and eliminate the binding effects of its guidelines.

I. THE UNITED STATES SENTENCING COMMISSION

The establishment of the Sentencing Commission under the Sentencing Reform Act of 1984 constitutes a marked change in the administration of criminal justice in the federal system. The judge has long been required to impose a sentence on a convicted defendant based on an individualized determination of his culpability. Appellate review of sentences has rarely been available, and the United States Parole Commission has determined whether and when to release defendants sentenced to a term of

---

10. See infra text accompanying note 19.
14. See, e.g., *Gore v. United States*, 357 U.S. 386, 393 (1958) (no appellate review of sentences in federal system). In the most complete judicial analysis of the subject, Judge Jerome Frank concluded that though the courts of appeals arguably have statutory power to revise sentences, the exercise of that power was precluded by extensive judicial precedent. United States v. Rosenberg, 195 F.2d 583, 604-06 (2d Cir. 1952); see also Kutak & Gottschalk, *In Search of a Rational Sentence: A Return to the Concept of Appellate Review*, 53 Nen. L. Rev. 463 (1974) (analyzing background of "axiomatic" principle that criminal sentences are beyond scope of appellate review). Under the current federal system, sentences may be challenged only on the basis that they are unconstitutional, illegal, or imposed on a "mechanical" basis. See infra note 174.
A product of the revolt against the disparity that this sentencing system produced, the sentencing guideline system will replace individualized consideration with a uniform sentence for all offenders who fit within each administratively established classification. Under the new system, the sentence will be determinate, and the United States Parole Commission will be abolished.

The Sentencing Commission will exercise vast discretion over the federal criminal law. Its guidelines will determine, on the basis of criminal history and current offense, whether a fine, probation, incarceration, or even possibly death will be imposed on a convicted defendant. The guidelines will also specify binding ranges for the prison terms that defendants must serve, the maximum of which may be no more than twenty-five per cent greater than the minimum. Although the Commission was directed to base the guidelines on principles of incapacitation, deterrence, punishment, and rehabilitation, Congress has provided the Commission no basis for resolving the conflicts that frequently arise among these objec-


18. A determinate sentence requires the defendant to actually serve the entire term imposed. See 1 RESEARCH ON SENTENCING, supra note 4, at 133-35.


21. See Memorandum for Judge William W. Wilkins, Jr., from U.S. Department of Justice, Office of Legal Counsel (Jan. 8, 1987) [hereinafter Justice Department Memorandum] (copy on file with author) (arguing that Commission has authority to promulgate capital punishment guidelines). Because of political considerations, the Commission decided not to include capital punishment within its first set of guidelines; however, according to its Chairman, the Commission may address the death penalty issue soon. U.S. Panel, Bowing to Congress, Votes Against the Death Penalty, N.Y. Times, Mar. 11, 1987, at A22, col. 3. But cf. Freed & Liman, Federal Panel Has No Authority over the Death Penalty, Nat'l L.J., Mar. 10, 1987, at 13, col. 1. (arguing that Commission lacks legal power to restore death penalty).

22. 28 U.S.C. § 994(a)(1), (b) (Supp. III 1985). The range may be less than 25%. See S. REP. NO. 223, 98th Cong., 1st Sess. 165 (1983) [hereinafter S. REP. NO. 223] (“The breadth of the sentencing range provided in each guideline is a matter for the Commission to decide so long as it is within the 25-percent limit . . . .”).

23. See, e.g., McGautha v. California, 402 U.S. 183, 284-85 (1975) (Brennan, J., dissenting) (criticizing failure to articulate sentencing policy from among four purposes of criminal law); United
The Commission may specify a sentence for a particular offense primarily on an assessment of the offense's harm to the community relative to the harm from other offenses. Within the wide ranges established by Congress, the Commission will decide what sentence a particular offense should receive and whether the judge should have any discretion in its imposition.

Because of the presumed judicial expertise in sentencing, the seven-member Commission is established as an independent agency in the judicial branch. Recognizing that the establishment of sentencing policy was not exclusively a judicial function, however, Congress rejected proposals to place authority to promulgate guidelines solely in the judiciary and instead constituted the Commission with a distinctly executive character. Unlike other judicial branch agencies, whose members are appointed and controlled by article III judges, the commissioners of the Sentencing Commission are appointed and may be removed by the President.
U.S. Sentencing Commission

include the Attorney General and the Chairman of the United States Parole Commission. The guidelines have legal force similar to regulations issued by administrative or executive agencies. Although the guidelines must sit before Congress for 180 days before they go into effect, only congressional legislation can block the implementation of the guidelines or change any of their terms.

Guidelines issued by sentencing commissions are now in force in several jurisdictions. However, the federal Commission is the most ambitious extension of the sentencing commission concept. Not only will the Commission's recommendations automatically govern the imposition of sanctions in all federal criminal cases unless Congress enacts countervailing legislation, but the guidelines will restrict sentencing judges far more than the restrictions in effect in any of the states or court systems that have adopted guideline systems. The statute establishing the Commission pro-

Justice has proposed an amendment to clarify that the salary increase that a United States district judge serving on the Commission receives should be treated as a stipend. Department of Justice, Minor and Technical Amendments to Comprehensive Crime Control Act of 1984, at 14 (1986) [hereinafter Proposed Minor and Technical Amendments] (copy on file with author).


37. See Judge Wilkins Sworn in as Chairman of U.S. Sentencing Commission, The Third Branch, Jan. 1986, at 6 (statement by Judge Wilkins) (Commission's work represents "the first effort in history by any country to adopt mandatory sentencing guidelines").

38. Most of the commission-promulgated guidelines are presumptive. In Florida, Minnesota, and Washington, the judge is ordinarily required to impose a guideline sentence; the courts monitor departures through appellate review. The trial judge, however, may depart from the guideline sentence if there are "clear and convincing reasons," Mayed v. State, 455 So. 2d 1153, 1154 (Fla. Dist. Ct. App. 1984), "substantial or compelling circumstances," State v. Garcia, 302 N.W.2d 643, 647 (Minn. 1981), or "substantial and compelling reasons," Wash. Rev. Code Ann. § 9.94A.011 (West Supp. 1986). Because these Commissions' guidelines allow the judge to depart for a variety of reasons and provide a broad right to appeal, a common law of sentencing may develop in these states. See, e.g., MINNESOTA SENTENCING GUIDELINES COMM'N, THE IMPACT ON THE MINNESOTA SENTENCE GUIDELINES 111–28 (1984). Fewer enforcement mechanisms are provided in Pennsylvania and Wisconsin. In Pennsylvania, the defendant and government may appeal a sentence, regardless of whether it is within the guidelines. 42 Pa. Cons. Stat. Ann. § 2151 (Purdon 1981 & Supp. 1986); see also Commonwealth v. Frazier, 347 Pa. Super. 64, 500 A.2d 158, 161 (1985) ("Although [Pennsylvania's] Sentencing Guidelines are found within the Sentencing Code . . . it was not the intention of the Legislature to adopt Guidelines as a way to preclude judicial discretion."). In Wisconsin, no appellate
vides that the court "shall" impose a sentence within the guidelines, unless the court finds a factor in the case not adequately considered by the Commission. A judge who disagrees with the guidelines themselves and not with their application to the particular case may not deviate from the guideline sentence. Even if a judge believes that a particular sentence is too harsh for a person convicted of a certain crime, she must impose that sentence if the offense and offender fit within the Commission's classifications.

To reduce judicial discretion in sentencing even further, Congress has for the first time provided for the appeal of criminal sentences. Both the government and the defendant may appeal any sentence outside the guidelines. Sentences within the guidelines may be appealed only if the guidelines are applied incorrectly or in violation of law. Although the courts of appeals must uphold deviations from the guidelines if they are reasonable, deviations for factors adequately considered by the Commission will likely not be considered reasonable.

---

39. 18 U.S.C. § 3553(b) (Supp. III 1985). Demonstrating their commitment to the view that the Commission, not the appellate courts, should make sentencing decisions, the Senate rejected an amendment proposed by Senator Mathias that would have permitted the judge to impose a sentence outside the guidelines even if the Commission had considered and rejected the aggravating or mitigating factors. See S. Rep. No. 223, supra note 36, at 76. See Rezneck, The New Federal Criminal Sentencing Provisions, 22 AM. CRIM. L. REV. 785, 786 (1985) (guidelines not intended to be "merely precatory"). But see S. Rep. No. 225, supra note 17, at 51 ("The sentencing guidelines system will not remove all of the judge's sentencing discretion. Indeed, it will enable the judge in making his decision on the appropriate sentence.")

40. See supra note 14 (describing appellate review of sentences in federal system).


44. Id. § 3742(d).

45. The court of appeals' reasonableness calculation is to be based upon the reasons given for the imposition of a particular sentence, id., reasons that in the case of a departure must include factors not adequately considered by the Commission, id. § 3553(b). According to the legislative history, neither the district courts nor the appellate courts are to consider the substance of a guideline. See S. Rep. No. 225, supra note 17, at 153 (district judge may depart only for factors not adequately considered by Commission); id. at 181 (guidelines not subject to appellate review). Thus as the Commission steadily eliminates factors on which the judge may base a departure, see id. at 154, all flexibility will be removed from application of the guidelines. If, however, the terms "not adequately considered," 18 U.S.C. § 3553(b), and "in violation of law," id. § 3742, are interpreted expansively to allow for departures and appellate review of the substance of the guidelines, the nondelegation challenge might be met. Cf. Conyers, Unresolved Issues in the Federal Sentencing Reform Act, 32 Fed.
In addition to the guidelines, the Commission will also promulgate policy statements for plea bargains, recommend legislation concerning the criminal justice system to Congress, and respond to petitions from offenders who allege that the guidelines for their offense should be changed. Because the Commission's responsibilities are so great, the first commissioners are serving on a full-time basis. Federal judges on the Commission are excused from their responsibility to reside in their judicial districts.

II. THE UNITED STATES SENTENCING COMMISSION AS AN UNLAWFUL DELEGATION OF POWER

The Sentencing Reform Act violates the separation of powers in two ways. Locating the power to determine sentences in an administrative agency violates the nondelegation doctrine. At the same time, the requirement that three article III judges sit on the Sentencing Commission, with the possibility that the President might appoint—and discharge—up to six judges, compromises judicial independence and impartiality.

A. The Nondelegation Doctrine

Article I of the Constitution provides that "all legislative powers . . . shall be vested in the Congress of the United States." The nondelegation doctrine embodies the notion that the "formulation of policy is a legislature's primary responsibility, entrusted to it by the electorate." Though perhaps underenforced, the doctrine retains vitality. The nondelegation
principle is prominent in statutory interpretation: By strictly construing statutes and granting no special deference to an agency's interpretation of its enabling act, the Supreme Court has ensured that administrative agencies work within the law rather than make it.

Although the reach of the nondelegation doctrine has not been carefully delimited, certain crucial choices must be made by elected representatives in Congress. Where the federal government seeks to trespass on the rights of states, to encroach on constitutionally protected interests, or to intrude on fundamental values, it must do so through the deliberative processes of the legislature. In Kent v. Dulles, for example, the Court held that the Secretary of State could not deny passports to persons because of their membership in the Communist Party. Refusing to reach the constitutional issue, the Court determined that the individual's interest at stake was so fundamental that it could be infringed only with explicit congressional authorization: “Where activities or enjoyment, natural and often necessary to the well-being of an American citizen, such as travel, are involved, we will construe narrowly all delegated powers that curtail or dilute them.”

The same principle, that only Congress may decide whether a person's liberty should be restricted, has been applied to the determination of criminal sanctions. The void-for-vagueness doctrine and the rule of lenity of this Note that where, as in the criminal law, those criteria have been established, the nondelegation doctrine should be rigorously applied.


58. See United States v. Bass, 404 U.S. 336, 349–50 (1971). In Garcia v. San Antonio Metropolitan Transit Auth., 469 U.S. 528 (1985), the Court held that the procedural safeguards of the federal political process, particularly the state's equal representation in the Senate, provided sufficient protection of state sovereign interests. The logic of Garcia, if not its precise holding, supports something like a nondelegation doctrine when the federal government seeks to intrude on traditional state functions.


62. Id. at 129.

63. See Parker v. Levy, 417 U.S. 733, 775 (1974) (Stewart, J., dissenting); Smith v. Goguen, 415 U.S. 566, 575 (1974); see also Schoenbrod, The Delegation Doctrine: Could the Court Give It Sub-
guard against executive lawmaking in the criminal law. Although primarily addressed to the substantive criminal law, both the rule of lenity and the void-for-vagueness doctrine have constrained vague specifications of criminal penalties. Specifically, current jurisprudence prohibits the executive from establishing the sanction for a criminal offense. Congress itself may set sanctions for violations of administrative regulations and allow the agency to write the regulation, but an administrative agency does not have the authority to prescribe criminal sanctions.

The distinction between setting the penalty and determining the elements of the offense may appear formalistic. The executive might determine the sanction for a specific offense by directing the appropriate administrative agency to promulgate a regulation making that conduct illegal. The limited scope of any particular agency's mandate, however, and the requirement that it base its decisions on reasons that derive from that mandate, restricts the range of conduct it may subject to a sanction. The executive may not, for example, direct the Securities and Exchange Commission to make criminal the operation of a gambling enterprise or any other activity outside its specific regulatory ambit. By preventing agencies from determining the sanctions to be imposed for the violation of their own regulations, the Court has implicitly required Congress to specify the relative severity of the violation of various agencies' rules.


64. See United States v. Bass, 404 U.S. 336, 348 (1971); United States v. Universal C.I.T. Credit Corp., 344 U.S. 218, 221–22 (1952); see also United States v. Enmons, 410 U.S. 396, 411 (1973) (criminal statutes must be strictly construed); United States v. Wiltherber, 18 U.S. (5 Wheat.) 76, 95 (1820) (Marshall, C.J.) (“The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself. It is founded on . . . . the plain principle that the power of punishment is vested in the legislative, not in the judicial department. It is the legislature, not the Court, which is to define a crime, and ordain its punishment.”).


68. See United States v. Howard, 352 U.S. 212 (1957) (Congress must establish penalty); Avent v. United States, 266 U.S. 127 (1924) (same); W. LAFAYE & A. SCOTT, *Criminal Law* § 2.6, at 113–14 (2d ed. 1986) (agencies permitted to determine sanctions over very narrow range). Compare Viereck v. United States, 318 U.S. 236, 241 (1943) (“One may be subjected to punishment for crime in the federal courts only for the commission or omission of an act defined . . . by regulation having legislative authority, and then only if punishment is authorized by Congress.”) with United States v. Smull, 236 U.S. 405, 409 (1915) (“The false swearing is made a crime, not by the Department, but by Congress; the statute, not the Department, fixes the penalty.”).

69. See Hampton v. Mow Sun Wong, 426 U.S. 88, 114 (1976) (administrative agency dedicated to one purpose may not use other purposes to justify its actions).

Similar constraints have been erected to cabin the discretion of the one executive branch agency that arguably has authority over criminal sanctions, the United States Attorney's Offices.\textsuperscript{71} Although the charge decision indirectly affects the sentencing decision by determining whether a person may be sentenced and the range within which that sentence must be imposed,\textsuperscript{72} various institutions check the prosecutor's authority to unilaterally dictate a sentence. The prosecutor's charge decision must be approved at the grand jury and preliminary hearing stages\textsuperscript{73} and must, of course, be based on sufficient evidence to convict. A decision to reduce a charge already brought must be based on legitimate prosecutorial considerations.\textsuperscript{74} One might imagine separate statutes that imposed fixed sentences of different durations for the identical criminal conduct. In this situation, none of the procedural safeguards would prevent the executive from determining the sentence imposed; the prosecutor's charge decision would effectively determine the sentence imposed upon conviction. In rejecting a nondelegation challenge to a prosecution under two statutes which made the identical conduct criminal, however, the Court rested its decision on the fact that the choice of statute under a system with no mandatory minimums "does not empower the Government to predetermine ultimate criminal sanctions."\textsuperscript{75} Where the statutory structure did empower the government to determine sanctions, then presumably the harsher statute would be unconstitutional.\textsuperscript{76}

Moreover, the courts have prevented prosecutors from directly determining the sentence on a charge already brought. The sentencing judge retains virtually unchecked authority to reject any plea bargain that, by dismissing charges, limits the punishment that the court may impose.\textsuperscript{77} If

\textsuperscript{71} United States Attorneys have statutory authority to "prosecute all offenses against the United States." 28 U.S.C. § 547 (1982).

\textsuperscript{72} See Bubany & Skillern, Taming the Dragon, 13 AM. CRIM. L. REV. 473, 480 (1976); Vorenberg, Decent Restraint of Prosecutorial Power, 94 HARV. L. REV. 1521, 1526 (1981) ("charge decision may have a major effect on the penalty"). It is well established that the decision of what charge to bring rests in the prosecutor's discretion. See Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978).

\textsuperscript{73} See Vorenberg, supra note 72, at 1537.

\textsuperscript{74} See United States v. Cowan, 524 F.2d 504, 512-13 (5th Cir. 1975); United States v. Ammidown, 497 F.2d 615, 622 (D.C. Cir. 1973); United States v. Greater Blouse, Skirt & Neckwear Contractors Ass'n, 228 F. Supp. 483 (S.D.N.Y. 1964). Professor Abraham Goldstein has noted that although the structure for reviewing prosecutorial discretion is well established, "courts have been curiously passive" in reviewing charge dismissals. A. GOLDSTEIN, THE PASSIVE JUDICIARY 51 (1981).

\textsuperscript{75} United States v. Batchelder, 442 U.S. 114, 125 (1979).

\textsuperscript{76} In a sense, the prosecutor's decision to prosecute a crime under a penalty-enhancing mandatory minimum statute may predetermine the ultimate sanction. See Vorenberg, supra note 72, at 1529–30. However, as the lower court noted in Batchelder, while Congress' decision to set different penalties for legally distinguishable offenses results in a constitutionally unavoidable delegation to the prosecutor, it does not in any way constitute a failure of the legislature to set sanctions. United States v. Batchelder, 587 F.2d 626, 633 (7th Cir. 1979), rev'd on other grounds, 442 U.S. 114 (1979).

\textsuperscript{77} See Fed. R. Crim. P. 11(c)(2), (4); see also United States v. Adams, 634 F.2d 830, 835 (5th
it will result in too light a sentence for the defendant or otherwise intrude on the judicial sentencing function, the court may reject a plea bargain that drops charges or specifies a sentence to be imposed. By exercising independent sentencing authority, the court prevents the sentencing decision from being delegated to those "whose temperment [is] shaped by their adversarial duties."

B. The Parole Commission Example

The United States Parole Commission illustrates the operation of the separation of powers in the criminal law. An independent agency in the Department of Justice, the Parole Commission has jurisdiction over parole decisions for all persons imprisoned for violating the federal criminal code. To promote uniformity in prison terms for offenders convicted of similar crimes, the Commission has since 1973 used guidelines which emphasize current offense and criminal history and which provided the model for the sentencing guidelines system.

In upholding the constitutionality of the Parole Commission's release decisions, the courts have emphasized the following point: The release decision must be within both the broad ranges allowed by statute and also, crucially, the smaller ranges set by the judicially imposed sentence. While the Parole Commission has repeatedly changed the sanctions attached to particular offenses to reflect the values and law enforcement priorities of an incumbent administration, it may not incarcerate a person...
for a longer period than the trial judge has determined is appropriate after hearing the defendant's case. Necessarily, therefore, the Parole Commission's decisions are constrained by the strategies and decisions of the judge and prosecutor.

C. The Unconstitutionality of the Commission

The Sentencing Commission intrudes into an area where decisions must be made through the deliberative processes of Congress. Every one of its guidelines, all of which go into effect unless Congress passes and the President signs an act to the contrary, will reflect the type of substantive moral judgment that has traditionally been reserved for Congress. The Commission's most recent set of guidelines, for example, departed significantly from past sentencing practice in requiring terms of imprisonment for persons convicted of price-fixing under the antitrust laws or paying a gratuity to an elected official. If the Justice Department interpretation is followed, the Commission may be able to decide both whether the death penalty should be restored and the crimes for which it should be imposed.

As with the United States Parole Commission, Congress created the Sentencing Commission as an independent agency. Despite this effort to insulate the Commission from constitutional challenge, however, neither the Commission's "independent" status nor its formal placement in the judiciary saves it from constitutional attack. Independent status, whatever its current viability in other respects, is irrelevant to nondele-
U.S. Sentencing Commission
gation analysis. Moreover, though judiciary branch status might be relevant to a nondelegation challenge, the Court has held that statutory designation is not dispositive in a separation of powers inquiry. In light of the Commission’s power to promulgate regulations and the President’s authority over its members, the majority of whom have no connection to the judiciary other than their service on the Commission, to claim that the Commission is in the judiciary rather than the executive branch is simply not colorable.

Unlike the Parole Commission, the Sentencing Commission’s power will likely not be limited by the judicial imposition of a sentence. The Sentencing Commission’s guidelines are mandatory. Although judges may voice disagreement with the guidelines through letters to the Sentencing Commission, the Commission’s decision as to whether a factor is important in sentencing is final, and judges must adhere to it in imposing sentence. Only if the standards for departure and appellate review are stretched to make the guidelines into presumptive recommendations can the nondelegation challenge be met.

The provision that the guidelines remain before Congress for 180 days

Incorporation of Independent Agencies into the Executive Branch, 94 YALE L.J. 1766 (1985).
95. See McGautha v. California, 402 U.S. 183, 277 & n.33 (1971) (Brennan, J., dissenting) (congressional delegation of rulemaking power to judiciary virtually unique for its lack of standards). Even if the Commission were in the judicial branch, the promulgation of sentencing guidelines might still exceed the powers that may be constitutionally exercised by article III judges. See infra text accompanying notes 171–80.
96. See Bowsher v. Synar, 106 S. Ct. 3181 (1986); Glidden Co. v. Zdanok, 370 U.S. 530, 586–87 (1962) (opinion of Harlan, J.); Ex parte Bakelite Corp., 279 U.S. 438, 459 (1929); see also Ameron, Inc. v. United States Army Corps of Eng’rs, 787 F.2d 875, 883 (3d Cir.) (“Instead of ‘decision by label,’ we must focus on function and reality.”), aff’d as modified, 809 F.2d 979 (1986). But see id. at 892–93 (Becker, J., concurring in part) (“‘Comptroller General’s status within the government is a matter of statutory interpretation which, like all statutory interpretation, is controlled by legislative intent.’”).
97. Congressional agencies may not promulgate regulations binding persons outside the legislature. See Buckley v. Valeo, 424 U.S. 1, 130 (1976); see also Justice Department Memorandum, supra note 21 (Commission is in executive branch).
100. See S. REP. No. 223, supra note 22, at 76.
101. See 18 U.S.C. § 3553(b) (Supp. III 1985) (court may depart from guidelines only for factor not adequately considered by Commission).
102. See supra note 45.
before they take effect does not save the Commission.\textsuperscript{103} Congressional oversight does not turn administratively promulgated rules into legislation or cure a delegation that is too broad.\textsuperscript{104} The Supreme Court has held that Congress may act only through legislation passed by the two houses and signed by the President.\textsuperscript{108} Even when Congress has held hearings on an administrative practice or has long been aware of it, the Court will not attribute significance to congressional inaction or acquiescence.\textsuperscript{108} Because there are numerous reasons why Congress might be silent,\textsuperscript{107} the absence of repeal cannot be taken as the constitutional equivalent of an affirmation of an administrative proposal.

III. JUDICIAL MEMBERSHIP AND THE UNITED STATES SENTENCING COMMISSION

Congress' effort to cloak the Commission's activities in judicial robes, simply by placing judges on it, constitutes a deeper flaw in its constitutionality. The judiciary in our tripartite system is limited to deciding "cases" and "controversies" and exercising those non-adjudicative administrative powers that are essential to the running of the courts. The authority that the Commission possesses to implement final binding action on a matter outside the peculiar interests of the judiciary, and its mixed composition of judges and other presidential appointees renders the Commission unconstitutional.

\textsuperscript{105} See INS v. Chadha, 462 U.S. 919, 958 n.23 (1984) ("To allow Congress to evade the strictures of the Constitution and in effect enact Executive proposals into law by mere silence cannot be squared with Art. I.").
\textsuperscript{107} See Helvering v. Hallock, 309 U.S. 106, 119-21 (1940) ("To explain the cause of non-action by Congress when Congress itself sheds no light is to venture into speculative unrealities."); H. Hart & A. Sacks, The Legal Process 1395-96 (tent. ed. 1958) (listing reasons for congressional inaction); see also Coffee, Repressed Issues, supra note 16, at 1008-09 (Commission immune from all methods of oversight).
A. The Case and Controversy Requirement and the Modern Judiciary

By its terms, the Constitution limits the judiciary to the decision of cases and controversies. Along with the “compensation” and “good behavior” clauses, the case and controversy requirement reflects a commitment to the principle of judicial independence. As Alexander Hamilton argued, “the interpretation of the laws is the proper and regular province of the courts,” and “liberty would have everything to fear from [the judiciary’s] union with either of the other departments.”

The realities of administration of the modern judiciary preclude any contention that judges are limited to mere “bench-sitting.” Judges today promulgate rules of court procedure, assign other judges to hear cases, and perform various internal disciplinary functions. Moreover,


111. THE FEDERALIST No. 78, at 504, 506 (A. Hamilton) (Modern Library ed.).


114. See, e.g., 28 U.S.C. § 291 (1982) (assignment of circuit court judges to hear cases); id. § 292 (assignment of district court judges to hear cases); 50 U.S.C. § 1805(a) (1982) (Chief Justice to designate district judges to sit as court to hear applications for surveillance warrants). The constitutionality of the Chief Justice’s power to assign district judges from one circuit to hear cases in circuit was upheld in Lamar v. United States, 241 U.S. 103, 118 (1916).

under article II of the Constitution, the “Courts of Law” may be assigned the power to appoint inferior federal officers.\footnote{116. U.S. Const. art. II, § 2. Judges have been vested with the power to appoint independent counsel, 28 U.S.C.A. § 593 (West Supp. 1986), acting United States Attorneys, 28 U.S.C.A. § 546(d) (West Supp. 1987), probation officers, 18 U.S.C. § 3654 (1982), and federal public defenders, id. § 3006A(h)(2)(A). Although the view that the appointment power is limited to “the department of the government to which the officer to be appointed most appropriately belong[s],” \textit{Ex parte} Hennen, 38 U.S. (13 Pet.) 225, 258 (1839), has been rejected, see \textit{Ex parte} Siebold, 100 U.S. 371 (1879), the Court has held that the appointment power may not be “incongruous” with the judicial function. \textit{Id.} at 397–98; see also \textit{Hobson} v. Hansen, 265 F. Supp. 902, 914–15 (D.D.C. 1967) (three-judge court) (appointment power may not be “incongruous” or destructive of “guarantees of personal liberty”). This circumscribed authority to supervise non-judicial officers does not warrant a broad exception to the case and controversy requirement. See \textit{Ex parte} Siebold, 100 U.S. at 398; see also \textit{INS} v. Chadha, 462 U.S. 919, 946 (1984) (strictly construing constitutional provisions mixing powers); \textit{Myers} v. United States, 272 U.S. 52, 164 (1926) (same). The appointment power does not extend to authority to supervise officers, see \textit{Hobson}, 265 F. Supp. at 914–15, and might not extend to expanding an independent counsel’s jurisdiction or otherwise engaging in an investigation. Cf. \textit{Lo-Ji Sales} v. New York, 442 U.S. 319, 327 (1979) (violation of judicial neutrality for judge to join police officers in conducting search).} Rather, the case and controversy requirement and the principle of judicial independence it reflects forbids judges from making rules outside the case and controversy context on matters external to the administration of justice or from entering a formal working relationship with members of the other branches of government. At the Constitutional Convention, the Framers rejected two proposals that would have combined justices of the Supreme Court with members of the Executive Branch. The Council of Revision, on which “a convenient number of the national judiciary”\footnote{117. 1 M. Farrand, Records of the Federal Convention of 1787, at 21 (1911).} were to have served, would have exercised a veto over legislation, and the Council of State, of which the Chief Justice was to be a member, would have advised the President much as the Cabinet does today.\footnote{118. 2 id. at 335. See generally P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, \textit{Hart \& Wechsler’s The Federal Courts and the Federal System} 7–8 (2d ed. 1973) [hereinafter \textit{The Federal Courts and the Federal System}]; 2 W. Crosskey, Politics and the Constitution 1017 (1953) (same).} Despite support from such luminaries as Wilson and Madison, the proposal for a Council of Revision was overwhelmingly defeated. The Framers objected that it would establish “an improper coalition between the Executive and Judiciary.”\footnote{119. 2 M. Farrand, supra note 117, at 75 (statement of E. Gerry); The Council of Revision was discussed on the floor of the Convention and was much criticized. See, e.g., id. at 298 (statement of C. Finckney against Council of Revision) (“[I]t will involve [judges] in parties, and give a previous tincture to their opinions.”); 1 id. at 97–98 (statement of R. King) (“Judges ought to be able to expound the law as it should come before them, free from the bias of having participated in its formation.”); The Council of State, first proposed on August 20, 1787, see 2 id. at 335, never emerged from the Committee of Detail. For discussion of the implications of the rejection of the Council of Revision and Council of State, see C.E. Hughes, \textit{The Supreme Court of the United States} 27 (1928) (rejection of Council of Revision permitted Court to withstand attack that could have been destructive of its authority); \textit{Lerner, The Supreme Court as Republican Schoolmaster}, 1967 Sup. Ct. Rev. 127, 174–77 (Council of State and Council of Revision rejected for “sake of securing the proper separation of powers”).} That decision, rather than the Convention’s failure to ex-
U.S. Sentencing Commission

explicitly bar dual-holding by judges, set the tempo for future consideration of the constitutional limitations on activities that may be assigned judges.

In 1793, the Justices of the Jay Court responded to an inquiry by Thomas Jefferson whether the judiciary would make itself available to advise the executive on legal questions, by stating that "the lines of separation between the three departments of the government" forbade the judiciary from extrajudicially advising the president. As Felix Frankfurter noted, such an activity would have "involve[d] the judges too intimately in the process of policy and thereby weaken[ed] confidence in the disinterestedness of their judicatory functions.

Concurrentlv, five Justices of the Supreme Court sitting as circuit justices refused to make pension determination subject to revision by the Department of War. The statute's assignment of jurisdiction to the circuit courts, all the judges agreed, constituted an unconstitutional request for courts to perform extrajudicial functions. Justice Wilson stated, "It is a

120. A motion barring Supreme Court Justices from holding "any other office of trust or emolument under the United States or an individual state" was introduced at the Constitutional Convention and referred without discussion to the Committee of Detail from which it was never reported. Slonim, Extrajudicial Activities and the Principle of the Separation of Powers, 49 CONN. B.J. 391, 401 (1975); see also Wheeler, Extrajudicial Activities of the Early Supreme Court, 1973 Sup. Ct. Rev. 123, 129 (discussing motion at Convention and similar proposal in 1800). The failure of this proposal, the reasons for which are now lost to history, cannot provide affirmative constitutional warrant for the exercise of extrajudicial duties. See United States v. Nixon, 418 U.S. 683, 705-06 n.16 (1974); Tribe, Toward a Syntax of the Unsaid: Construing the Sounds of Congressional and Constitutional Silence, 57 IND. L.J. 515, 553 (1982).

121. See Letter from Chief Justice Jay to President Washington, reprinted in The Federal Courts and the Federal System, supra note 118, at 65. The Justices wrote, "[The branches of government] being in certain respects checks upon each other, and our being judges of a court in the last resort, are considerations which afford strong arguments against the propriety of our extrajudicially deciding the questions alluded to . . . ." Id. Russell Wheeler has observed that the Justices' letter constituted a rejection on constitutional grounds of a permanent position for judges as advisors to the executive. Wheeler, supra note 120, at 149-55.

122. Frankfurter, Advisory Opinions, in 1 Encyclopedia of the Social Sciences 476, 478 (1930); see also Frankfurter, A Note on Advisory Opinions, 37 HARV. L. REV. 1002, 1007 (1924) ("[T]he burden of decision ought not to be shifted to the tribunal whose task is the most delicate in our whole scheme of government.").

123. The opinions of the five Justices and three district judges, expressed in letters to President Washington, are reported at Hayburn's Case, 2 U.S. (2 Dalh.) 409 app. (1794). The 1792 Act required the circuit courts to examine the nature of wounds incurred in the Revolutionary War and recommend a pension that would be "just." If the Secretary of War suspected error, however, he could reverse the judges' recommendations. See Wheeler, supra note 120, at 135-38 (discussing context and holding of Hayburn's Case).

124. Although the judges in Hayburn's Case held that the circuit courts could not exercise extrajudicial power as courts, three of the judges agreed to certify pension funds in their personal capacity. The judges' exercise of that power was successfully challenged in United States v. Yale Todd (1794), notes printed in United States v. Ferreira, 54 U.S. (13 How.) 40, 52 app. (1851). Although there is no surviving opinion in Yale Todd, some have argued that its holding, that judges may not personally exercise extrajudicial powers, was based on constitutional grounds. See In re Sanborn, 148 U.S. 222, 225 (1893); D. Corrie, The Constitution in the Supreme Court 10 (1965). Perhaps significantly, Justice Iredell, who did hear the pension claims, felt compelled to write, "If therefore it appeared to me that this question could by any possibility come before me as Judge . . . I ought not to
principle important to freedom that the judicial should be distinct from, and independent of, the legislative department.\textsuperscript{125}

Concern with these twin matters—the creation of a formal relationship between article III judges and members of the other branches and the assignment to judges of authority to legislate on matters outside the particular concern of the judiciary—has continued to the present day. Congress still may not require courts to render decisions that will be subject to legislative revision—an activity in which judges and legislators act as partners;\textsuperscript{126} and its power to permit article III judges to serve on legislative courts has been closely questioned.\textsuperscript{127} Congress' decision to reconstitute the Court of Claims as an article III court, for example, reflected in part a belated realization that it would be unconstitutional for article III judges to serve on a non-article III body.\textsuperscript{128}

Moreover, in considering the constitutionality of such nonadjudicatory functions as the disciplinary activities of the Judicial Conference under the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980\textsuperscript{129} and the rulemaking power of the courts under the Rules Enabling Act,\textsuperscript{130} the courts have drawn a distinction between matters "ancillary to the administration of the courts"\textsuperscript{131} and matters "lying outside the immediate concerns of the judicial branch."\textsuperscript{132} The judiciary may promulgate and enforce rules to "put its own house in order"\textsuperscript{133}; indeed, the place-
ment of that authority outside the judiciary might be disruptive of the judiciary’s independence. However, it may not engage in non-adjudicatory behavior that is substantive in nature.

B. Constitutional History and the Activities of Individual Judges

Drawing on history, several commentators have suggested that judges may perform extrajudicial functions as individuals that they could not perform as judges. There is a long tradition of justices participating in

(Courts "must, therefore, be invested with incidental powers of self-protection."). The Jay Court may have recognized this distinction. Though it refused to advise President Washington on the construction of foreign treaties, see supra text accompanying note 121, it did write him about the duties of judges riding on circuit. See Eisenberg, A Consideration of Extra-Judicial Activities in the Pre-Marshall Court Era, 1985 Yearbook Supreme Ct. Hist. Soc’y 117, 119; Wheeler, supra note 120, at 148.


135. See Statement of Mr. Justice Black and Mr. Justice Douglas, 374 U.S. 861, 865–66 (1963) (Court may only promulgate rules that address “housekeeping details”); Sibbach v. Wilson & Co., 312 U.S. 1, 14 (1941) (rulemaking power limited to rules that “really regulate procedure”); id. at 18 (Frankfurter, J., dissenting) (“A drastic change in public policy in a matter deeply touching the sensibilities of people . . . ought not to be inferred from a general authorization to formulate rules for the more uniform and effective dispatch of business on the civil side of the federal courts.”); Hastings v. Judicial Conference of the United States, 770 F.2d 1093, 1108 (D.C. Cir. 1985) (Edwards, J., concurring) (“While it is unquestioned that Congress has the power to establish (or authorize the judiciary to establish) purely administrative, ‘housekeeping’ procedures—such as procedures for managing dockets and assigning cases—that authority does not necessarily extend beyond such administrative matters.”); In re Grand Jury Proceedings, 558 F. Supp. 532, 535–36 (W.D. Va. 1983); Beale, Reconsidering Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Authority of the Federal Courts, 84 Colum. L. Rev. 1433, 1468 (1984); Landers, Of Legalized Blackmail and Legalized Theft: Consumer Class Actions and the Substance-Procedural Dilemma, 47 S. Cal. L. Rev. 842, 854 (1974) (constitutional limitations on delegating rulemaking power coextensive with Rules Enabling Act). It is perhaps significant that under 28 U.S.C. § 2076 (1982) only Congress, and not the Court through its rulemaking procedures, can change a rule of privilege.

Although the procedure-substance distinction may not capture the effect of rules on the outcome of litigation, see, e.g., Hanna v. Plumer, 380 U.S. 460, 468 (1965), it does express an important difference in institutional capacity. Procedural rules are designed to make the litigation process itself fair and efficient, see Ely, The Irrepressible Myth of Erie, 87 Harv. L. Rev. 693, 724 (1978), and have never needed a statutory basis. See J. Weinstein, supra note 113, at 24–33 (inherent court rulemaking power existed at common law); Pound, The Rule-making Power of the Courts, 12 A.B.A. J. 599, 601 (1926) (same). A comparable distinction has been made with respect to Congress’ power to hold witnesses in contempt. The congressional need to be informed makes the congressional right to hold persons in contempt a necessary “auxiliary . . . in aid of the legislative function.”

136. See Slonim, supra note 120; see also In re President’s Comm’n on Organized Crime Subpoena of Scarfo, 783 F.2d 370 (3d Cir. 1986) (history indicates that judges may engage in extrajudicial governmental activities); In re President’s Comm’n on Organized Crime Subpoena of Scaduto,
executive branch activities. In the early days of the country, several Justices performed foreign affairs functions on behalf of the executive; more recently, judges have served as international arbiters and members of presidential commissions.

The argument from past practice, however, renders an incomplete historical account. The early practice of the Supreme Court Justices reflected a complex understanding of the constitutional restrictions: Whereas informal advice-giving was constitutional, actual participation in legislative revision was not. Even the early extrajudicially active Justices recognized boundaries to extrajudicial commitments, declining positions that might have compromised their independence. John Jay felt that a judge could undertake extrajudicial activity as long as it was “consistent and compatible with” the judicial function. John Marshall stepped down from his position as Secretary of State when appointed to the bench, agreeing to perform the duties of the office only until a replacement could be found. Moreover, the Justices persistently refused to accept remuneration for performing extrajudicial governmental functions. Indeed, the assump-
tion of extrajudicial responsibilities by judges has long elicited controversy among judges\(^{144}\) as well as legislators.\(^{146}\)

The practice of judges performing extrajudicial activities is thus not nearly as “unbroken” and “systematic,”\(^{146}\) as would be necessary to support the implication of a constitutional norm.\(^{147}\) Indeed, the argument gets the principle exactly backwards. The only significant difference between assigning a duty to a judge as an individual and as a member of a court is that as an individual she will be acting outside the judiciary.\(^{148}\) But by

was “contrary to the spirit of the Constitution” and may have been ratified only because of speculation that he would resign from his judicial post. See J. Goebel, Antecedents and Beginnings to 1801, at 747 (1971) (Holmes Devise); 1 C. Warren, The Supreme Court in United States History 119 (1922). His successor Ellsworth only reluctantly accepted the position as envoy extraordinary to France and his appointment was opposed on constitutional grounds by Jefferson, Madison, and Charles Pinckney. C. Warren, supra, at 167.

144. See, e.g., Mason, Extra-Judicial Work for Judges: The Views of Chief Justice Stone, 67 Harv. L. Rev. 193 (1953). Many of the Justices who have undertaken extrajudicial activity have done so despite constitutional qualms, see, e.g., In re President’s Comm’n on Organized Crime Subpoenas of Scarff, 783 F.2d 370, 377–78 (3d Cir. 1986) (describing Chief Justice Warren’s reluctance to head Warren Commission), and have later regretted their service. See Roberts, Now Is the Time: Fortifying the Supreme Court’s Independence, 35 A.B.A. J. 1, 2 (1949) (suggesting that no Justice or judge hold “any other governmental or public office or position”); The Association and the Supreme Court, 32 A.B.A. J. 862–63 (1946) (Justice Jackson regretted participating in extrajudicial activities). See generally Comment, Separation of Powers and Judicial Service on Presidential Commissions, 53 U. Chi. L. Rev. 993, 998–99 (1986) (many judges have refused extrajudicial service).

145. “The whole independence and integrity of judicial office must at least be embarrassed, if not compromised, by the easy flow from bench to political office. Yet this is where the practice of appointing judges to Executive offices tends to lead.” S. Exec. Rep. No. 7, supra note 138, at 793; see also S. 1097, 91st Cong., 1st Sess. (1969), reprinted in Nonjudicial Activities of Supreme Court Justices and Other Federal Judges: Hearings Before the Subcommittee on Separation of Powers of the Senate Comm. on the Judiciary, 91st Cong., 1st Sess. 7–8 (1969) (enforcing “principle of separation of powers” by prohibiting exercise by judges “of nonjudicial governmental powers and duties”); 10 Annals of Cong. 97–98 (1800) (statement of Rep. Pinckney) (“[I]f vain will we consider [judges] independent . . . until we have determined that it shall not be in [the President’s] power to give them additional offices and emoluments . . . ”).


147. The Court regularly rejects the controlling effect of custom, compare INS v. Chadha, 462 U.S. 919, 944 (1983) (“[O]ur inquiry is sharpened rather than blunted by the fact that congressional veto provisions are appearing with increasing frequency in statutes which delegate authority to executive and independent agencies . . . .”) and id. at 968–74 (White, J., dissenting) (discussing historical use of legislative veto) with Nixon v. Administrator of Gen. Servs., 433 U.S. 425, 509–10 (1977) (Burger, C.J., dissenting) (noting that claim of executive privilege dismissed by Court has been practice of Presidents since George Washington, save perhaps where it is “unbroken” and “has prevailed almost from the inception of the national government.”) United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 322 (1930); see also Youngstown Sheet & Tube Co., 343 U.S. at 610–11 (Frankfurter, J., concurring) (practice must be “long pursued” and “never before questioned”); United States v. Midwest Oil Co., 236 U.S. 459, 474–75 (1915) (longstanding practice of Presidents, acquiesced in by Congress and not interfering with any vested rights, operates as an implied grant of power). See generally Glennon, The Use of Custom in Resolving Separation of Powers Disputes, 64 B.U.L. Rev. 109, 121 (1984) (relying on custom “equals what is with what ought to be and regards patterns of practice as principles of law”). As the Supreme Court has never decided the propriety of extrajudicial service, it is arguable that the judiciary has never acquiesced in the practice.

148. The irrelevance of the term “court” to article III restrictions on extrajudicial activities is aptly demonstrated by the Ethics in Government Act, 28 U.S.C. § 593 (1982). Although the Constitution only allows Congress to place the appointment power in the “Courts of Law,” the three judges
rendering constitutional otherwise unconstitutional behavior if performed in another branch of government, this principle would sacrifice both individual judicial independence and the interest of the judiciary as a whole in the control of its members.

Virtually every state court and legislature has found that a judge’s occupation of an office in another department of government or performance of functions that could compromise her judicial impartiality violates either specific constitutional prohibitions or separation of powers. Although the judge who is appointed to the bench from an executive or legislative office may bring her own prejudices with her, concurrent participation in policymaking threatens the judge’s ability to make an independent judicial decision, accords the political decision of an administrative agency a presumptive legality that it might not otherwise who actually appoint an independent counsel under the Act are convened solely for that purpose and do not exist independently. See id. If the three judges who appoint the independent counsel must be considered a “court,” so should the three judges who sit on the Sentencing Commission.

149. For a discussion of the role of state law as a source of federal constitutional norms, see Utter, Swimming in the Jaws of the Crocodile: State Court Comment on Federal Constitutional Issues when Disposing of Cases on State Constitutional Grounds, 63 Tex. L. Rev. 1025, 1040 (1985) (“[a]late courts have made vast contributions to the growth of federal constitutional law.”).

150. See Abbott v. McNutt, 218 Cal. 225, 22 P.2d 510 (1933) (membership of two judges on five-judge qualification board nominating candidates for chief executive violates separation of powers); State ex rel. White v. Barker, 116 Iowa 96, 109, 89 N.W. 204, 208 (1902) (appointment of members of utility board); Local 170 v. Gadola, 322 Mich. 332, 34 N.W.2d 71 (1948) (one judge on three-member arbitration board); State ex rel. Atty Gen. v. Armstrong, 91 Miss. 513, 44 So. 809 (1907) (mayor of city); In re Richardson, 247 N.Y. 401, 414-15, 160 N.E. 655, 657-58 (1928) (appointment as special investigator for governor); State ex rel. Young v. Brill, 100 Minn. 499, 111 N.W. 639 (1907) (appointment of members of board of control); IOWA CONST. art. 5, § 18; MONT. Const. art. VII, § 9(3); W. VA. CONST. art. VIII, § 7; N.Y. CONST. art. 6, § 20. Under New York’s elaborate standards, a judge is prohibited from assuming a position that is not “transient, occasional, or incidental” to the judicial function. People v. Nichols, 52 N.Y. 478, 485, 11 Am. Rep. 734, 740 (1873).

151. The proposition that judicial participation in extrajudicial activities is barred by the separation of powers is supported by two eminent jurists. See In re Richardson, 247 N.Y. at 410-11, 160 N.E. at 657-58 (Cardozo, J.) (“From the beginning of our history, the principle has been enforced that there is no inherent power in Executive or Legislature to charge the judiciary with administrative duties except where reasonably incidental to the fulfillment of judicial duties.”); Dasm v. Van Kleeck, 7 Johns. 477, 508, 5 Am. Dec. 291, 313 (N.Y. 1811) (Kent, Ch.) (“If [the provision that the legislative and judicial powers shall be preserved separate and distinct] be not found in our own constitution, in terms, it exists there in substance.”); see also People v. Bott, 261 Ill. App. 261 (1931) (position of town clerk incompatible with judicial position); In re Nelson, 163 N.W.2d 533 (S.D. 1968) (single judge on seven-member mediation board); Conklin, Plural Office Holding, 28 Or. L. Rev. 332, 356 (1949) (“The separation of powers of government into different departments itself makes inconsistent the holding of offices in different departments by the same person.”); Note, Extrajudicial Activities of Judges, 47 Iowa L. Rev. 1025 (1962) (discussing state constitutional limitations on governmental activities of judges).


153. See Note, Extrajudicial Activity of Supreme Court Justices, 22 Stan. L. Rev. 587, 594 (1970) (“Justices who have advised the President or Congress on a ‘correct’ course of action will find it difficult to strike down the action they recommended as illegal or unconstitutional if the action is challenged in Court.”); see also Smith, Judge Charles E. Clark and the Federal Rules of Civil Procedure, 85 Yale L.J. 914, 951-52 (1976) (discussing Judge Clark’s difficulty in dissociating his decisions on Federal Rules of Civil Procedure from his work in creating them).
merit, and, by occupying much of a judge's time, impairs the judiciary's ability to perform its constitutionally assigned functions.

C. Judicial Participation on the Sentencing Commission

These twin concepts—that judges may not enter into a formal working relationship with members of the other branches or exercise rulemaking power on matters that are not ancillary to the judicial process—give content to the Supreme Court's dicta that "executive or administrative duties of a nonjudicial nature may not be imposed on [article III] judges." Under these principles, the Sentencing Commission violates the separation of powers.

The union of the judiciary and the executive that the Sentencing Commission creates gives the executive a power considered among the more pernicious: the power to control the responsibilities of sitting judges. For most of constitutional history, a judge assigned to a particular circuit was required to reside in that circuit and could not be reassigned. Although the immobile judiciary did not survive the 1922 creation of the Judicial Conference, the power of reassignment has always been placed within the judiciary. The potential that certain assignments would be granted as political favors and that others would be used to dictate outcomes fueled the concern that the Chief Justice felt about his own power of assignment, as well as the common assumption that the power could not be placed outside the judiciary. Under the Sentencing Reform Act, how-

---

154. As one commentator has noted, "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." Comment, supra note 144, at 1013. Fear of the effect that the judicial imprimatur might have on subsequent judicial review was the basis of the attack on judicial rulemaking by Justices Douglas, Black, and Frankfurter. See Statement of Mr. Justice Douglas, 409 U.S. 1132 (1973); Statement of Mr. Justice Douglas, 383 U.S. 1089 (1966); Statement of Mr. Justice Black, 383 U.S. 1032 (1966); Statement of Mr. Justice Black and Mr. Justice Douglas, 374 U.S. 861, 865 (1963); Memorandum of Mr. Justice Frankfurter, 323 U.S. 821, 822 (1944). But see Hanna v. Plumer, 380 U.S. 460, 471 (1965) ("[T]he court has been instructed to apply the Federal Rule, and can refuse to do so only if the Advisory Committee, this Court, and Congress erred in their prima facie judgment that the Rule in question transgresses neither the terms of the Enabling Act nor constitutional restrictions."). For discussion of judicial rulemaking, see supra text accompanying notes 113, 133-35.

155. See, e.g., Note, supra note 153, at 596-97.


158. See statutes cited supra note 114.

159. In 1920, Chief Justice Edward Douglass White opposed a Justice Department proposal to expand his power to assign lower court judges to particular circuits because of "the possible harm which might come to the whole system . . . ." P. Fish, supra note 157, at 16 (quoting Letter from White to Arthur C. Denison (Feb. 9, 1920)). White's successors, Chief Justices Taft and Hughes, were also wary of the possibility that the assignment power would be used for political purposes. Chandler, Some Major Advances in the Federal Judicial System: 1922-1947, 31 F.R.D. 307, 338-39 (1963).

160. See F. FRANKFURTER & J. LANDIS, supra note 157, at 242 ("The judiciary like most other
ever, the executive branch chooses the judges who then are excused from their responsibilities to reside in their districts and are required to serve full-time on the Commission. Not only does the provision that the President appoint at least three judges to the Commission provide him a vehicle for virtually the first time through which he can determine the assignments of sitting judges, but the composition of the Commission is such that the four non-judicial presidential appointees at any one time may be able to determine whether the judges on the Commission should be summoned to Washington or allowed to stay in their courtrooms.

Moreover, the Sentencing Commission effects a permanent collaborative relationship between the judiciary and executive that violates the norm of judicial independence. Service on the Commission is not merely transient. Although the statutory requirement that at least three article III judges serve on the Commission may not be constitutionally dispositive, it is indicative of the permanent association of the judiciary with the executive and legislative branches that the Sentencing Commission represents. Like other public offices, Commission membership embraces concepts of tenure, duration, emoluments and duties, and involves the exercise of "significant authority [under] the laws of the United States."

The judges on the Commission will exercise substantial rulemaking authority on a full-time basis, for a period of six years, and, in the case of a district political institutions must be directed. But it must be self-directed."); Meador, supra note 112, at 1046 (constitutional considerations foreclose administration of court system by member of executive branch); Shartel, Federal Judges—Appointment, Supervision and Removal—Some Possibilities Under the Constitution, 28 Mich. L. Rev. 870, 873 n.8, 882 n.31 (1930) (arguing that statute authorizing President to deprive a judge of his seniority and rank within the judiciary would be unconstitutional); cf. Nixon v. Administrator of Gen. Servs., 433 U.S. 425, 444 (1977) (less intrusive on separation of powers for executive branch to supervise itself than for "Congress or some outside agency" to perform function).

161. See supra notes 49–50.

162. But see Act of Mar. 4, 1911, ch. 241, 36 Stat. 1334 (1911) (President required to appoint Judge to second class postal rate commission). Most statutes have been crafted with a particular judge in mind and passed only with the assent of that judge. See, e.g., Mason, supra note 144, at 207 (legislation requiring justice to serve on War Ballot Commission changed when Chief Justice Stone refused position).

163. See Bowsher v. Synar, 106 S. Ct. 3181, 3199 n.10 (1986) (Stevens, J., concurring in judgment) (statutory assignment of Chief Justice to Board of Regents of Smithsonian Institution de minimis violation of separation of powers). But see In re President's Comm'n on Organized Crime Subpoena of Scarfo, 783 F.2d 370, 376 & n.3 (3d Cir. 1986) (statutory requirement that judges serve on Sentencing Commission alone might render it unconstitutional).


165. See Buckley v. Valeo, 424 U.S. 1, 126 (1976).

166. See In re President's Comm'n on Organized Crime Subpoena of Scaduto, 763 F.2d 1191, 1205 (11th Cir. 1985) (Roney, J., concurring specially) (drawing distinction between advisory commissions and commissions with "autonomous authority to . . . implement final binding action").


168. Id.
judge, will receive an extra stipend. 169 Indeed, Congress understood that the Commissioners were officers of the United States when it decided to place the appointment power with the President. 170

Finally, the nature of the Commission’s authority is such that it might well be unconstitutional even if it were solely within the judiciary. The type of legislative rulemaking that the Sentencing Commission will engage in both involves the judiciary in the decision of matters of broad public policy outside the confines of a specific case 171 and breaks with the separation of powers in allowing the legislators who promulgated rules to also apply them. 172 As many commentators have noted, this power is justified with respect to procedural rules because of the courts’ special expertise and because procedural rulemaking is inherent to the judicial process. 173 Neither rationale applies to sentencing. The court has repeatedly emphasized that the considerations that go into determining sentencing ranges, such as deterrence and just deserts, are peculiarly a matter for legislative determination. 174 Moreover, though courts may consider the advice and practices of other judges when imposing sentences, 175 the specification of sentence ranges has never been considered an inherent judicial function like the promulgation of court rules. 176 The guidelines that the federal Sentencing Commission will promulgate must of course be construed and applied by the district courts in every sentencing and will likely be frequently challenged on constitutional 177 and statutory

169. Id. In 1986, the differential between the salary of a court of appeals judge and a district judge, which any district judge on the Commission would have received as an extra stipend, was $4,500.


171. See, e.g., Landers, supra note 135, at 854 n.43.

172. See, e.g., Pound, supra note 135, at 602.

173. See, e.g., J. WNSTEIN, supra note 113, at 54-55; Pound, supra note 135, at 602.

174. See Rummel v. Estelle, 445 U.S. 263, 283-84 (1980); Gore v. United States, 357 U.S. 386, 393 (1958) (“Whatever views may be entertained regarding severity of punishment . . . these are peculiarly questions of legislative policy.”); United States v. Evans, 333 U.S. 483, 490 (1957). Under well-established doctrine, a court may not usurp the legislative function in specifying sentence ranges by imposing sentences on a mechanical basis. See, e.g., Woosley v. United States, 478 F.2d 139, 144 (8th Cir. 1973).

175. The extraordinary powers of the Sentencing Commission are highlighted by comparing it to the Sentencing Councils in the judicial branch whose authority includes the development of principles and criteria for sentencing. See 28 U.S.C. § 334(a)(5) (1982). Unlike the Sentencing Commission, a Sentencing Council is composed solely of judges, and the principles that it develops are not binding on judges and do not confer rights of appeal on the government or defendant.

176. See Ex parte United States, 242 U.S. 27 (1916) (“authority to define and fix the punishment for crime is legislative”). In a dramatic move, the Wisconsin Supreme Court recognized precisely this distinction, refusing legislatively granted authority to promulgate sentencing guidelines. In re Judicial Admin.: Felony Sentencing Guidelines, 120 Wis. 2d 198, 353 N.W.2d 793 (1984). But see Frankel, Lawlessness in Sentencing, 41 U. CHI. L. REV. 1, 53 (1974) (suggesting without analysis that “most familiar precedent” for Sentencing Commission is authority of Supreme Court to promulgate procedural rules).

IV. Conclusion

The federal Sentencing Commission currently is constitutionally infirm. The Sentencing Reform Act vests more legislative authority than the separation of powers permits in an administrative agency composed of seven presidential appointees. The confounding of the separate functions of the different branches is aggravated by the requirement that judges be appointed to the Commission and subject to possible removal by the President.

The hope for sentencing reform, however, is not dead. Congress may reconstitute the Commission as an advisory body in the judiciary or enact the guidelines into law, thus ensuring not only that the imposition of the criminal sanction is structured by a set of principles but also that sentencing guidelines will survive separation of powers challenges to their constitutionality. A system of appellate review for all sentences could prevent gross disparities. With these fundamental changes, the Commission can bring rationality to federal sentencing without compromising judicial independence or removing the essential legislative and judicial checks on executive control of the criminal law.

178. See supra notes 41-45 (discussing appellate review of sentences).
179. See supra notes 117-19 and accompanying text.
180. See, e.g., Mason, supra note 144, at 203 (Letter from Chief Justice Stone to President Roosevelt (July 20, 1942)) ("plainly inadmissible" for Justice "to pass upon proposals involving questions of constitutional power or other questions which would be subject to review by the courts"). The argument that judges on the Commission might recuse themselves from cases where their impartiality might be questioned, see In re President's Comm'n on Organized Crime Subpoena of Scarfo, 783 F.2d 370, 381 (3d Cir. 1986), proves too much. As only a few judges exercise any of the rulemaking power delegated to the judiciary, such an argument would effectively gut the separation of the legislature from the judiciary. The judiciary could exercise rulemaking power over any issue, no matter how politically charged, so long as only a few judges exercised effective power. Moreover, recusal in all of these cases would likely excessively burden the courts and neither redress the Commission member's influence on his colleagues, see Comment, supra note 144, at 1013 & n.100, nor mitigate the impact that politically controversial activity such as the promulgation of guidelines would have on the public's perception of judicial impartiality.
181. See supra note 38 (discussing voluntary judicially-promulgated guidelines).
182. See ABA STANDARDS RELATING TO APPELLATE REVIEW OF SENTENCES (1968) (recommending appellate review).