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**OFFICIAL TRANSCRIPT  
PROCEEDINGS BEFORE  
THE SUPREME COURT  
OF THE  
UNITED STATES**

**CAPTION:** JOHN M. MISTRETТА, Petitioner V. UNITED STATES;  
and  
UNITED STATES, Petitioner V. JOHN M. MISTRETТА

**CASE NO:** 87-7028 & 87-1904

**PLACE:** WASHINGTON, D.C.

**DATE:** October 5, 1988

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1 IN THE SUPREME COURT OF THE UNITED STATES

2 -----x  
3 JOHN M. MISTRETTA, ;  
4 Petitioner ;  
5 V. ; No. 87-7028  
6 UNITED STATES; ;  
7 and ;  
8 UNITED STATES, ;  
9 Petitioner ;  
10 V. ; No. 87-1904  
11 JOHN M. MISTRETTA ;

12 -----x  
13 Washington, D.C.  
14 Wednesday, October 5, 1988  
15 The above-titled matter came on for oral  
16 argument before the Supreme Court of the United States  
17 12:59 at o'clock p.m.

1 APPEARANCES;

2  
3 ALAN B. MORRISON, ESQ., Washington, D.C.,

4 on behalf of the Petitioner/Respondent Mistretta.

5 CHARLES FRIED, ESQ., Solicitor General, U.S. Department

6 of Justice, Washington, D.C.,

7 on behalf of the Respondent/Petitioner United States

8 PAUL M. BATOR, Chicago, Illinois,

9 on behalf of the U.S. Sentencing Commission,

10 as amicus curiae  
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P R O C E E D I N G S

(12:59 p.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now in Number 87-7028, *Mistretta v. the United States*, and Number 87-1904, *the United States v. Mistretta*.

Mr. Morrison, you may proceed whenever you're ready.

ORAL ARGUMENT OF ALAN B. MORRISON  
ON BEHALF OF PETITIONER/RESPONDENT MISTRETTA

MR. MORRISON: Mr. Chief Justice, and may it please the Court, the question presented in this case is the Constitutionality of the Federal Sentencing Guidelines, or more precisely, the Constitutionality of the process by which those guidelines were issued.

To answer that question, it is necessary to know how the guideline system works, and what kind of judgments went into the guidelines.

In 1984, Congress instituted a new system of determinative sentencing. In that determinative sentencing system, it made sentencing guidelines the centerpiece. It also recognized that it could not -- chose not to issue the guidelines itself. Rather, it designated in a statute a commission to do the job. The commission to consist of seven members, three of whom were required to be Article 3 Federal Judges, all of whom

1 were appointed by the President with the advice and  
2 consent of the Senate, and no more than four of them  
3 could be members of the same political party.

4 Now, the term guidelines, which is what the  
5 commission is directed to issue, is something of a  
6 misnomer. These guidelines are not merely advisory. They  
7 are directions to sentencing judges with which the  
8 sentencing judges must comply, unless they find that  
9 there is a factor in the particular case which the  
10 sentencing commissioner did not adequately take into  
11 account. And if the sentencing judge diverts from the  
12 guidelines, either above or below the guideline, then the  
13 party -- either the defendant or the Government -- has a  
14 right of appeal on the grounds that the sentence was  
15 unreasonably either too high or too low.

16 Similarly, for the first time ever, both  
17 defendant and the Government has a right to appeal if  
18 they allege that the Court selected an improper guideline  
19 or otherwise misapplied the guidelines.

20 There is no dispute between the parties that  
21 the guidelines constitute the law of sentencing for  
22 Federal defendants from November 1, 1987 on, which is the  
23 effective date for the guidelines for crimes committed  
24 after that date.

25 In order to determine whether the guidelines

1 are consistent with separation of powers, it's necessary  
2 to examine the kind of judgments that the commission  
3 inevitably had to make in establishing a guidelines  
4 system.

5 The first question that the commission had to  
6 confront with respect to each of the crimes -- and this  
7 is not simply the Title XVIII, but all of the entire  
8 Federal criminal code, and other provisions in other  
9 parts of the United States Code -- where should the  
10 sentence be?

11 Congress told the commission that the  
12 sentencing range for each sentence could be no more than  
13 six months or 25 percent maximum to minimum jail time.  
14 So, for instance, for the crime of stealing a \$500 Social  
15 Security check in the mail, the commission had to decide  
16 what the appropriate punishment was for that particular  
17 crime.

18 Did it matter the commission had to decide  
19 whether the thief was caught before he spent the money,  
20 or whether the amount of the check was not \$500, but  
21 \$1,000, and --

22 QUESTION: Mr. Morrison, was the commission  
23 circumscribed at all by the outside limits of the  
24 penalties already prescribed by law?

25 MR. MORRISON: Yes, your Honor. Yes, your

1 Honor.

2 The commission also had to decide whether those  
3 similar kinds of monetary adjustments were appropriate  
4 for other kinds of crimes against property, for crimes  
5 such as tax evasion, for price fixing, securities fraud,  
6 and the like. Congress told the commission, "Start with  
7 the average sentences imposed in the past, but that you  
8 can move them up or down as you see fit in order to  
9 eliminate what Congress said were unwarranted disparities.

10 So, the commission had to decide what factors  
11 were properly aggravating and what properly mitigating in  
12 a particular crime to decide whether the particular  
13 differences were warranted or unwarranted. That is  
14 precisely the kind of process that sentencing judges used  
15 to do, before the commission issued its guidelines and  
16 they went into effect.

17 The second major task that the commission had  
18 to undertake was it had to rank the seriousness of  
19 disparate kinds of offenses. It was not simply enough to  
20 decide the absolute offence level for each crime, but as  
21 a practical matter, you had to rank the crimes in  
22 comparative degree of seriousness.

23 So for instance, the commission had to face  
24 questions rather like this: how should you punish the  
25 sale of six ounces of cocaine, the committing of perjury



1 before Congress, bid rigging in excess of \$50 million in  
2 Government contracts, the sale of \$100 in pornographic  
3 materials, or conspiracy to violate the civil rights of a  
4 Black family.

5 The commission chose, within the statutory  
6 range of sentencing, to treat all of those disparate  
7 offenses basically the same, and that question of how to  
8 treat them was a question that they had to address,  
9 despite the very dissimilar facts surrounding each of the  
10 crimes.

11 It is of course not the function of the Court  
12 to decide whether those analogous sentences for different  
13 crimes is right or wrong. But it's important to note  
14 these because it indicates the kind of ranking of  
15 judgments that the commission made, these very heavily  
16 policy-oriented judgments that are plainly debatable, and  
17 that the terms of these debates are about values and  
18 about policies, and they are political in the best sense  
19 of the word -- the kinds of political choices that we  
20 normally expect will be made by our political branches.

21 This ranking of offenses is inevitable, any  
22 time you have a base level system, which they had to have  
23 in this case, between 1 and 43. And while the guidelines  
24 themselves don't show the ranking, the equal ranking of  
25 disparate crimes, we have attached an addendum to our

1 brief, which goes through each base level offense and  
2 shows you what the commission determined to be similar  
3 crimes and hence deserving of similar punishments.

4 There are, in short, no neutral principles that  
5 the commission could follow, except its own good sense  
6 and personal views about which crimes were more serious  
7 or less serious than the others. The commission  
8 recognized in a number of places that it was making  
9 policy decisions, most particularly in the policy  
10 decisions to substantially increase the amount of time  
11 which persons convicted of white-collar crime, such as  
12 tax evasion, public corruption, anti-trust violations,  
13 securities fraud, would spend in jail.

14 The third set of determinations that the  
15 commission and to make was to decide who gets to go on  
16 probation and who doesn't get to go on probation. Under  
17 the statues, the commission was empowered to lay down the  
18 ground rules, and say below a certain level, probation is  
19 permissible, but above that level, it is not  
20 permissible. And the District Judge who sentences the  
21 individual is forbidden from giving probation to someone  
22 whom the commission said was not entitled to probation  
23 for that kind of crime, just as much as the District  
24 Judge is forbidden from going above or below the  
25 sentencing guidelines.

1           There is, I believe, a graphic example of the  
2 effect that the commission's judgments have on  
3 sentencing, and how the commission's judgments reflect  
4 its views about what kind of penalties are appropriate  
5 for what kind of crime. And The example I refer to is  
6 that of the recent sentence of Michael Deaver.

7           Mr. Deaver was convicted of committing three  
8 counts of perjury. Assume for simplicity it's only one  
9 count, because the guidelines become more confusing when  
10 there are multiple counts -- another matter which the  
11 commission had to deal with.

12           Now, under the commission's guidelines, a  
13 single count of perjury is a base level 12 offense.  
14 Because Mr. Deaver had no prior convictions, that would  
15 translate into a range of sentence between 10 and 16  
16 months confinement. Under the commission's guidelines,  
17 alcoholism, which was a factor cited in mitigation, would  
18 not have been an excuse to go below the 10 months. It  
19 would have been a proper basis for the judge to consider,  
20 within the 10 to 16 month range.

21           Now, of that 10 months, the sentencing  
22 commission said five had to be spent in actual  
23 confinement -- no straight probation, actual  
24 confinement. And five could have been served in  
25 community confinement, which means a person can go out

1 during the day and goes to a halfway house or similar  
2 facility in the evening.

3 In actuality, the District Judge in this case  
4 gave Mr. Deaver three years' jail time, but suspended it  
5 entirely. Under the sentencing guidelines, he could not  
6 have done that. Now, again, the question is not which  
7 set of judgments is right or wrong, the sentencing  
8 commission's judgments or the District Court's judgments.  
9 The point for these purposes is to recognize that the  
10 judgement depends about your notions about this relative  
11 seriousness of the crime. What kind of offenses should  
12 people in all cases have to go to jail for? And this  
13 commission has made those judgments in every one of the  
14 cases in which it has written a sentencing guideline for.

15 QUESTION: You take the position that no  
16 commission, regardless of its composition, could have  
17 been given that power, I take it?

18 MR. MORRISON: That is the second argument we  
19 make. We make the argument on delegation as our second  
20 argument, given the definitions and the relatively few  
21 limits that Congress has placed upon the commission.

22 QUESTION: And if we disagree with you on that,  
23 then you fall back on the fact that it's the composition  
24 of the commission?

25 MR. MORRISON: Well, as your Honor notes,



1 those are alternative arguments. We have placed the  
2 sentencing -- let me see, the separation of powers  
3 argument first in our brief because we believe it is a  
4 lesser argument -- that is to say, we don't have to say  
5 that necessarily you could never issue sentencing  
6 guidelines, but that this commission with this  
7 composition, these powers and these restrictions couldn't  
8 do it.

9 QUESTION: Well, would it make a difference if  
10 the law did not require that judges serve on the  
11 commission?

12 MR. MORRISON: It would make a difference  
13 depending upon whether judges were serving on the  
14 commission or not.

15 QUESTION: Well, what if the President under a  
16 law that didn't specify that judges would have to serve  
17 --and what if the President in fact asked some to serve,  
18 and they said, "All right, we will."

19 MR. MORRISON: In my view, that is  
20 un-Constitutional as well. That is not permissible, to  
21 have Article 3 judges serving on commission of this kind.

22 QUESTION: Even as true volunteers, when it  
23 isn't mandated?

24 MR. MORRISON: I think that -- yes, that is  
25 also correct, your Honor, because of the nature of the

1 kind of choices that the commission was making.

2 The thrust of my submission that I have been  
3 making here in trying to describe the work of the  
4 commission is directly relevant on both the separation of  
5 powers issues -- because the Court has looked at the  
6 functions being performed -- as well as the delegation  
7 issue, and that factual predicate in this description  
8 directly bears on both of them, and not simply on the  
9 delegation issue, or on the separation of powers issue.

10 QUESTION: Well, what about Owen Roberts on the  
11 Pearl Harbor Commission, Earl Warren on the Warren  
12 Commission?

13 MR. MORRISON: I believe that all -- that many  
14 -- that those two are factually distinguishable on the  
15 grounds that they involved advice-giving and  
16 fact-finding. But the -- both the Government and the  
17 sentencing commission cite a number of historic examples  
18 about other kinds of activities undertaken by various  
19 justices at various times.

20 While I think there are some distinctions  
21 between that case and this one, principally because this  
22 one involves the making of law in a concrete situation --  
23 the most important distinction for our purposes is that  
24 in none of those examples was the Constitutionality of  
25 the conduct ever taken to court, let alone was it

1 reviewed under this Court's jurisprudence on separation  
2 of powers as it has evolved since Buckley in 1976.

3 QUESTION: Do you think that practice amounts  
4 to nothing in determining Constitutionality?

5 MR. MORRISON: I did not say that, your Honor.  
6 I would not agree that practice amounts to nothing.

7 I would point out, however, that there has been  
8 practice to the contrary. A number of Justices expressed  
9 extreme reservations about doing this, and while not  
10 directly citing separations of powers situations in all  
11 cases -- although Justice Stone has done so -- I would  
12 say that dating from the earliest days of our Republic,  
13 when as reported in United States v. Muskrat, President  
14 Washington asked Thomas Jefferson as Secretary of State  
15 to ask the Court for an opinion about the meaning of a  
16 treaty. Those -- the Justices declined to do so on the  
17 grounds that it was inappropriate.

18 I would suspect that if they had been asked in  
19 their individual capacities, as the respondent suggests,  
20 as opposed to their official capacity, the outcome should  
21 have been the same.

22 So, I think that the history is by no means  
23 unified all in one direction, but more importantly, I  
24 believe that none of the cases ever involved activities  
25 of a concrete, far-reaching nature that affects 40,000

1 criminal defendants a year, as the activities of the  
2 sentencing commission do here.

3 QUESTION: Well, as long as we're giving you  
4 these examples, what about the Federal rules of evidence?  
5 Suppose that this Court had promulgated the Federal rules  
6 of evidence. Would that have been Constitutional?

7 MR. MORRISON: Well, let me divide the answer  
8 into two parts, if I may.

9 As to the rules not relating to privilege, I  
10 would say that there would be no difficulty, that those  
11 are very close to the rules of civil procedure. That is,  
12 of course, the line that Congress ultimately hit upon.

13 This Court did, in the early 1970's, pursuant  
14 to a Congressional grant, promulgate the rules of  
15 evidence, sent them forward to Congress. Congress saw  
16 them, stopped them from going into effect, and ultimately  
17 said, "You can't put them into effect as to privileges."

18 Now, dealing with the privileges, I would even  
19 divide that into two parts. It seems to me that if we  
20 are dealing with the privileges as applies to Federal law  
21 and Federal causes of action involving Federal matters,  
22 that the Court may have some limited authority there.

23 But what I believe you have, in the case of  
24 privileges, are principally questions of value judgments.  
25 Do we value the confidence between the husband and wife



1 greater than we value the getting at truth? How do we  
2 value the attorney-client privilege -- not so much in  
3 the context of litigation, but in terms of pre-litigation  
4 matters?

5 And it is my view that that is a far closer  
6 question -- and I think if I had to come down on it, I  
7 would say that the Court could not do these -- at least  
8 certainly many of the privileges.

9 QUESTION: And is the historical occurrence  
10 that Congress did enact the privileges support for your  
11 position?

12 MR. MORRISON: Well, I would like to say yes,  
13 your Honor, but I think that it probably had to do more  
14 with a recognition of the underlying nature of the  
15 controversies in the privilege area -- that is, we are  
16 dealing with policy choices that are more substantive in  
17 nature than procedural.

18 I recognize that in recent years the Court has  
19 said -- I mean, just last term -- that there is no single  
20 dividing line between substance and procedure. But, on  
21 the other hand, the Court has recognized in a number of  
22 cases when persons have tried to claim something as  
23 procedural to be able to drag it in on the judicial side,  
24 the Court has said, "No, we won't allow that to take  
25 place."

1           So, I think that the efforts to expand  
2 procedural have -- albeit in a different context -- have  
3 generally not met with favor, and I would think that they  
4 would not apply here to the evidence context as well.

5           Turning back to the work of the commission, the  
6 commission also had to deal with the question of fines  
7 within the statutory restrictions. The commission was  
8 given the discretion to decide under what circumstances  
9 fines should be imposed, when and how much.

10           Originally the commission thought about having  
11 an ability-to-pay fine system, or is the alternative, a  
12 system based on a multiplier of the amount of money  
13 lost. The commission is even now about to hold some  
14 hearings dealing with fines for organizations,  
15 principally corporate defendants.

16           But, in the end, as to individuals, it's set up  
17 a schedule under which all but the indigent must pay  
18 fines in an amount within the range set forth in the  
19 schedule. So, turning back again to the Michael Deaver  
20 example, at the base level offense of 12, Mr. Deaver  
21 could have been required to pay a fine of between \$3,000  
22 and \$30,000.

23           In fact, he was fined a \$100,000, and again,  
24 the answer -- the question is, of course, not which set  
25 of fines is correct, but it shows how value-laden that

1 part of the system is as well.

2 QUESTION: Is this argument to say that the  
3 commission is treading on judicial, the power of  
4 individual judges?

5 MR. MORRISON: It is certainly the fact that  
6 the commission treads on the power of individual judges.

7 QUESTION: But individual judges have always  
8 been deciding what the sentence should be within the  
9 statutory range.

10 MR. MORRISON: In the context of a case or  
11 controversy, your Honor.

12 QUESTION: Yes, and in that process, they have  
13 certainly been making their own value judgments about the  
14 seriousness of the crime.

15 MR. MORRISON: But they have done it for the  
16 one individual before the Court.

17 QUESTION: That's true.

18 MR. MORRISON: They have not laid down  
19 precedent. And the fact that they were doing it for only  
20 the individual before the Court was the very fault that  
21 the Congress found with the present system, and the  
22 reason that they wanted to change it.

23 Congress didn't like the individual --

24 QUESTION: Well, what's wrong with -- put your  
25 finger on what's wrong with the commission doing it.

1 MR. MORRISON: The commission is improperly  
2 doing it here because we have a commission which includes  
3 three Article 3 judges in the judicial branches.

4 QUESTION: I know, but they aren't -- the  
5 judges aren't doing -- the commission, including the  
6 judges on the commission, aren't doing things that judges  
7 don't do, or that are improper for judges to do.

8 Your argument sounds like it's really the fact  
9 that the commission is doing it and interfering with  
10 judge's judgement in individual cases.

11 MR. MORRISON: No, your Honor.

12 I want to be precise in what I'm saying. It is  
13 of course true that judges have always engaged in  
14 sentencing, but sentencing is not a unified act. It's  
15 composed of several different elements.

16 The imposition of a particular sentence in a  
17 particular case is what judges have been doing. What the  
18 judges and the other members of the commission are doing  
19 here is, they are writing the rules of sentencing not to  
20 apply to themselves, but to apply to all judges.

21 QUESTION: What's wrong with that?

22 MR. MORRISON: Because they have historically  
23 never done that before, and because they are making --

24 QUESTION: So practice really does make a  
25 difference?



1 MR. MORRISON: No, and because they are making  
2 policy decisions of a kind --

3 QUESTION: You could say the same thing in the  
4 Hampton case. There had never been an independent agency  
5 before, so the Court should have thrown out the whole  
6 idea of independent agencies. There's going to be a  
7 first time for lots of things.

8 MR. MORRISON: Yes, your Honor. But I simply  
9 wanted to respond to Justice White's statement that this  
10 is what sentencing judges have always done. It's not  
11 what sentencing judges have always done, and you are  
12 right, there has to be a first time. And my argument is  
13 that sentencing judges should not be doing this, because  
14 --

15 QUESTION: Even though they've always been  
16 doing it?

17 MR. MORRISON: They have not --

18 QUESTION: Well, haven't they always been  
19 deciding what the sentence should be within the statutory  
20 range?

21 MR. MORRISON: In an individual case. They  
22 have not always been deciding the general rule.

23 QUESTION: Well, I know, but it's the kind of  
24 judgments that judges have always been making. Judges  
25 always make these judgments.

1           Now, you say the commission shouldn't be making  
2 it to apply to every case, but the fact of (them) making  
3 the judgments is not non-judicial business.

4           MR. MORRISON: Well, there may be less  
5 difference between us than I think there may appear.  
6 Your Honor, of course it is only the translation of the  
7 making of these judgments on an across the board basis  
8 that creates the problem.

9           But I do think that there is a difference in  
10 kind between laying down and establishing a sentence for  
11 a particular individual in a case, and laying down broad  
12 rules for --

13          QUESTION: Well, everybody would agree to that.

14          MR. MORRISON: That --

15          QUESTION: But what's wrong? What's  
16 un-Constitutional about that?

17          MR. MORRISON: It is the laying down of the  
18 broad rules that causes Judges to be embroiled in  
19 political controversy.

20          QUESTION: Mr. Morrison, judges generally have  
21 for many years -- even before the Sherman Act -- decided  
22 in an individual case whether a particular combination or  
23 conspiracy was in unlawful restraint of trade, haven't  
24 they?

25          MR. MORRISON: Yes, your Honor.

1 QUESTION: And you wouldn't maintain that they  
2 can take it upon themselves to write a new Sherman Act,  
3 therefore, would you?

4 MR. MORRISON: I would not.

5 QUESTION: It's a different job, isn't it?

6 MR. MORRISON: That's correct.

7 QUESTION: Mr. Morrison, have you taken into  
8 consideration the large city courts where they have  
9 committees of judges that meet with the sentencing judge?

10 MR. MORRISON: You're talking about the  
11 non-Federal system, your Honor?

12 QUESTION: Where one judge calls in two other  
13 judges to tell him -- sit down and decide what we're  
14 going to do.

15 MR. MORRISON: Yes, I'm aware of that.

16 QUESTION: And that's recognized as being valid  
17 and good.

18 MR. MORRISON: Well, it has never been  
19 challenged, your Honor, but it is distinguishable on  
20 several grounds.

21 QUESTION: It certainly is legal and valid, and  
22 has been in existence for 20 years or more.

23 MR. MORRISON: It certainly has been in  
24 existence. It has never been challenged, and it probably  
25 is not challengeable, but there is a major difference,

1 and that is, the three judges sit down, and they have a  
2 meeting, and they decide what's appropriate for sentence.

3 But only the sentencing judge actually decides.  
4 A judge gets advice from his or her colleagues and  
5 decides what's appropriate. It is not binding.

6 That system was known to the Congress, and it  
7 was one of the things that Congress thought might happen

8 --

9 QUESTION: What happens if you and I sit down  
10 to decide, and I don't agree with you, and the next time  
11 we sit down, do you think you're going to agree with me?

12 MR. MORRISON: I might, or I might not, your  
13 Honor.

14 QUESTION: You wanna bet?

15 [Laughter]

16 MR. MORRISON: But it's not binding. It's not  
17 binding, and that's the difference.

18 It's the difference between advice which the  
19 Congress rejected as being sufficient, and mandatory  
20 binding guidelines subject to very limited exceptions,  
21 and that is the reason the Congress felt that it was not  
22 sufficient.

23 QUESTION: Well, I suppose in another sense  
24 that every time a Federal Judge hands down some ruling on  
25 a point of law, they're binding others not before the



1 Court, aren't they?

2 MR. MORRISON: Well, your Honor, it is --

3 QUESTION: And in a sense they're establishing  
4 precedent?

5 MR. MORRISON: Yes, your Honor, but the rules  
6 for deviating from precedent, particularly by one judge  
7 from another judge in another circuit, or even in the  
8 same district, are far less stringent and do not give  
9 rise to the same kind of rights that are given rise to  
10 when a judge deviates from the sentencing guideline in  
11 this case.

12 QUESTION: Yes, but in a very real sense,  
13 judges generally are in the business, at least at the  
14 Federal level, of making a good deal of law, in a sense.

15 MR. MORRISON: Well, they make law, but it's  
16 not binding. I would give the example in this very case,  
17 Your Honor -- the sentencing guidelines have been before,  
18 I think it's approximately 250 Federal Judges, who have  
19 voted on their Constitutionality. I do not have the  
20 latest count, I think it is slightly more than 50 percent  
21 who have decided they are un-Constitutional, and less  
22 than 50 percent Constitutional, for a variety of  
23 different reasons.

24 QUESTION: I know, but does any of them include  
25 the argument you're just making?

1 MR. MORRISON: Many of them include my  
2 argument. Some of them include delegation arguments, some  
3 of them include due process arguments, some of them  
4 include arguments I've chosen not to make.

5 There are a whole variety, and I would say the  
6 same is true on the other side. There have been cases  
7 upheld on grounds that have not been urged by the parties.

8 The point I make, Justice O'Connor, is to  
9 indicate that at least in this particular kind of  
10 controversy, no one has felt bound by what their fellow  
11 judges have done. Even in the same district courts,  
12 there have been deviations in the same district court,  
13 and there have been different defendants being sentenced  
14 by different people until this case can be decided.

15 Now, the policy choices that this commission  
16 had to make were inevitable, given the kind of functions  
17 that it would perform, and that the Ninth Circuit was  
18 correct in describing these choices as political. And  
19 Indeed, that is what the Congress expected, because  
20 Congress proscribed the presence of more than four  
21 members of the commission from being of the same  
22 political party.

23 That kind of restriction, which is extremely  
24 common in executive branch agencies, where we expect our  
25 executive branch officials to be making policy, is unique

1 In the judiciary, and it's unique in the judiciary  
2 because we do not expect those bodies in the judicial  
3 branch to be making policy, making these kind<sup>s</sup> of  
4 political choices.

5 QUESTION: Well, that speaks in favor of the  
6 Solicitor-General's argument that in fact this is  
7 executive power being exercised.

8 MR. MORRISON: I agree, your Honor, and that if  
9 the power is properly delegable, it must be executive  
10 power.

11 Now, the Solicitor-General has a matter which  
12 I'm sure he will tend to, of how he's going to move the  
13 commission out of the judicial branch, where Congress so  
14 carefully placed it, into the executive branch, but in  
15 any event -- and I'd like to turn to this now, if I may  
16 -- we don't think it makes any difference. That if  
17 Congress had placed this body in the executive branch of  
18 Government, labeled it "executive branch", but had the  
19 same Article 3 judges on it, we don't think that would  
20 have made a single bit of difference, and it would have  
21 been just as unconstitutional there as it is here.

22 And the reason we say that is because we go  
23 back to the purposes behind separation of powers for the  
24 judicial branch of Government. That the Founding Fathers  
25 separated the judges because they wanted them to be

1 independent, and they wanted them to be impartial. And  
2 they were specially concerned about that because they  
3 have lifetime appointments.

4 Now, it's true that they were also conscious of  
5 the possibility of tyranny developing when judges were  
6 involved in the making of the law or the executing of the  
7 law -- but the principal concern was that for the Federal  
8 courts to be effective, to be seen as neutral arbiters of  
9 our law and our facts, that members of the Federal  
10 Judiciary have to stay out of the political fray.

11 QUESTION: (inaudible)

12 MR. MORRISON: Making policy.

13 QUESTION: In all cases?

14 MR. MORRISON: Openly.

15 QUESTION: The judges to follow?

16 MR. MORRISON: That's right, except in the  
17 context of a case of controversy where there inevitably  
18 will be some policy to be made. It's when --

19 QUESTION: Well, when the Court of Appeals  
20 decides a case, and in effect makes some new law, or  
21 makes new policy, it certainly binds every judge in the  
22 circuit.

23 MR. MORRISON: It does, your Honor.

24 QUESTION: And at the trial court --

25 MR. MORRISON: And it is done in the context of



1 a case or controversy. Nobody suggests --

2 QUESTION: And I won't say what happens if we  
3 decide it.

4 [Laughter]

5 QUESTION: Well, how about the judicial  
6 councils?

7 MR. MORRISON: well, two things about the  
8 judicial councils. One is the areas in which they have  
9 power to act are by and large procedural, or they relate  
10 to matters such as discipline, which this Court's  
11 decision in Chandler and others recognized are ancillary  
12 to the principle function of judges deciding cases or  
13 controversies.

14 The judicial conference could be said to be  
15 making policy, but it principally affects the workings of  
16 the Court. These sentencing guidelines are intended to  
17 affect primary conduct. The purpose of the sentencing  
18 guidelines, as Congress said, is not to rehabilitate  
19 defendants, but to deter them, to punish them. The  
20 message is to go out loud and clear. Members of the  
21 public, if you commit crimes, look at the sentencing  
22 guidelines and you will go to jail. No more hoping for  
23 a judge to let you off.

24 That's the judgement Congress made, and that is  
25 a very different kind of judgement than that kind made by

1 judicial bodies, which are largely advisory or operating  
2 in the context of a case or controversy.

3 QUESTION: Well, that judgement Congress did  
4 make. Congress didn't leave that judgement to the  
5 commission.

6 MR. MORRISON: That is correct.

7 As to the ultimate effect, it did.

8 QUESTION: Right.

9 MR. MORRISON: It did.

10 QUESTION: Mr. Morrison, what if the judges in  
11 a particular circuit got together and decided that in  
12 order to improve the operation of the criminal system in  
13 their circuit, they would develop for themselves some  
14 sentencing guidelines, within the ranges established by  
15 Congress, and they'd try to get all their colleagues to  
16 follow them.

17 Is that improper? Invalid?

18 MR. MORRISON: Well, let me say, that took  
19 place before. There were sentencing groups, councils, I  
20 don't know the precise appellation -- they may have  
21 varied from court to court -- but they were not  
22 mandatory, and that no right of appeal by any defendant  
23 or by the Government pertained in the event a judge  
24 diverted from that.

25 And it seems to me that the mandatory nature

1 makes this into a law-making function that is going on  
2 here. But as I said, to me it matters not that there is  
3 an attempt here to say that judges are after all not  
4 sitting as courts of law, they're acting in their  
5 individual capacities when they are deciding these rules  
6 --that the judges are commissioners and the fact that  
7 they are judges is simply -- can be disregarded.

8 QUESTION: Mr. Morrison, can I interrupt with  
9 one question? If the program had been one that made the  
10 sentencing guidelines a recommendation to Congress, in  
11 effect, and Congress had then adopted them --

12 MR. MORRISON: Yes?

13 QUESTION: Would there be any Constitutional  
14 objection?

15 MR. MORRISON: If my client had been sentenced  
16 under the guidelines, there would have been no  
17 Constitutional objection to the sentence imposed on him,  
18 because once Congress goes to the Constitutionally  
19 mandated form for enacting legislation, I do not believe  
20 that my client could go behind it.

21 I would still say that there has been a  
22 transgression of the principles of separation of powers  
23 by the Article III judges participating in this system,  
24 although it would be of a somewhat different nature.

25 But nobody would have any standing, I don't

1 think to --

2 QUESTION: What you're saying is it would still  
3 be un-Constitutional even though no one could challenge  
4 it?

5 MR. MORRISON: I assume no one could challenge  
6 it, but I would believe it would be un-Constitutional.  
7 It would be inconsistent with what the Founding Fathers  
8 believed should be the properly limited function of  
9 Article III Judges.

10 QUESTION: Doesn't the undermine --

11 QUESTION: -- before a committee of Congress  
12 about a substantive law?

13 MR. MORRISON: No, your Honor, I did not say  
14 that, and I'm glad you asked me that, because I want to  
15 clarify my views on that.

16 If a judge, not acting pursuant to a statutory  
17 mandate, as we have here, and not being directed to  
18 produce a consensus determination, not only with Article  
19 III Judges, but with four people who are not Article III  
20 judges, wants to proceed on his own individual basis, and  
21 to testify before Congress about a matter relating to  
22 judicial administration -- it seems to me that under the  
23 balancing test that this Court has established in cases  
24 such as Nixon v. GSA and Morrison v. Olson, that that  
25 would not be a transgression upon the powers of the



1 judiciary or upon any other powers.

2 QUESTION: Well, what if a judge wants to  
3 testify about some pending bill that has absolutely  
4 nothing to do with the judiciary? It may be very bad  
5 judgement, but surely he isn't violating the Constitution.

6 MR. MORRISON: Well, your Honor, I would not  
7 say "surely". I think that's a closer question. I do  
8 not think that judges should -- if they tend --

9 QUESTION: And what provision in the  
10 Constitution is it that prevents a judge from going over  
11 and testifying about a bill for appropriation for a  
12 wildlife center?

13 MR. MORRISON: It seems to me, your Honor, that  
14 Article III of the Constitution, as most recently  
15 interpreted by this Court in Morrison -- particularly the  
16 part in which the Court said that even the attempt to  
17 close down the office of the independent counsel might be  
18 administrative acts of the kind inappropriate for a judge.

19 QUESTION: But we were talking about a court  
20 there.

21 MR. MORRISON: your Honor, I submit that if  
22 Congress had said that the function shall be performed by  
23 an independent appointing commission, or that if in this  
24 case the Court said the Congress described this body as a  
25 sentencing court, the outcome would have been the same.

1 We have, in our system -- courts do not decide  
2 cases, controversies. Judges decide cases or  
3 controversies, and judges are lifetime appointees --

4 QUESTION: But that's just pure metaphysics.

5 MR. MORRISON: No, I think it's quite a  
6 question of reality, your Honor, that a judge cannot  
7 remove his --

8 QUESTION: That's like saying guns don't kill  
9 people, people kill people.

10 [Laughter]

11 QUESTION: Mr. Morrison, while you're thinking  
12 about that --

13 [Laughter]

14 MR. MORRISON: No, I have an answer, I'm just  
15 waiting for the applause to die down.

16 QUESTION: Yes.

17 What about a judge testifying about sentencing?  
18 Testifying in opposition to capital punishment, for  
19 example?

20 MR. MORRISON: I would say a judge should not  
21 testify in opposition.

22 QUESTION: You think he would be acting in  
23 violation --

24 MR. MORRISON: It is a political act. We are  
25 --what we are having in this situation is that in order

1 to maintain our judiciary in the way that I believe the  
2 Founding Fathers envisioned, judges are supposed to stay  
3 out of political controversies.

4 QUESTION: May they vote?

5 MR. MORRISON: Yes, your Honor.

6 [Laughter]

7 QUESTION: And what if the judge if asked by a

8 -- MR. MORRISON: But it would be improper for  
9 them to campaign on behalf of a person for a political  
10 office.

11 QUESTION: I didn't ask that.

12 MR. MORRISON: And the difference is because it  
13 is visible on the one hand and not visible on the other.

14 QUESTION: But what if a Congressional  
15 committee dealing with a sentencing problem wanted to  
16 call in judges and ask them for the reasons they'd  
17 imposed a series of sentences in cases, just to better  
18 understand the sentencing process? You tell me that the  
19 judges could not respond to that request.

20 MR. MORRISON: No, I do not believe that. I  
21 did not intend to say that, because if you're talking --

22 QUESTION: Well, what's the difference, though?

23 MR. MORRISON: I think the judges are providing  
24 expert explanation of what they did. Perhaps some of it  
25 will turn into advice. But one of the things we have

1 here is not simply an individual judge acting on his or  
2 her own. We don't simply have a collective group of  
3 judges coming in and making a recommendation.

4 We have a collective group of judges joining  
5 with four non-judges, attempting to reach a political  
6 consensus, and that consensus then becomes the law of  
7 sentencing. And inherent in reaching that sentence is  
8 not merely expert advice, but very value-laden judgments.

9 QUESTION: I think you said your position would  
10 actually carry to the extent that even if it did not  
11 become the law, it was subject to further enactment by  
12 Congress, you would still object to this whole process.

13 MR. MORRISON: In this commission process.

14 QUESTION: Yes.

15 MR. MORRISON: I believe that judges shouldn't  
16 do it. As I said, the sentence imposed --

17 QUESTION: I know, you said you think it's  
18 un-Constitutional for them to do it.

19 MR. MORRISON: Yes, I would have to say that.

20 QUESTION: I wish you hadn't said that. We  
21 don't really have to get into that.

22 MR. MORRISON: We certainly do not, your Honor,  
23 but --

24 QUESTION: It's quite a bit different being a  
25 member of an agency that promulgates law, which is what



1 you say is the problem here --

2 MR. MORRISON: Correct.

3 QUESTION: From testifying before Congress. We  
4 really have to reach that problem today?

5 MR. MORRISON: We do not have to reach that  
6 problem, your Honor, but I was asked the question and I  
7 do have to answer, I believe.

8 [Laughter]

9 MR. MORRISON: The effort to treat the judges  
10 here as acting in their individual capacity falters both  
11 on the facts of this statute -- that is, that Congress  
12 insisted that three Article III judges be on board. They  
13 insisted that they sit down and meet with four other  
14 non-Article III judges, and that they engage in a process  
15 that could fairly be called horsetrading, to come up with  
16 a ranking of offenses and appropriate levels of offenses  
17 involving some of the most political judgments that we  
18 have to make.

19 And it seems to me that it doesn't matter  
20 whether this function was assigned to a court -- if it  
21 had been assigned to this Court, without the non-judicial  
22 members, surely the outcome of the case would not have  
23 been any different. If your Honors had descended from  
24 the bench, taken off your robes, gone into a conference  
25 room instead of a courtroom, and decided the case in your

1 individual capacities, decided in your individual  
2 capacities to issue these sentencing guidelines.

3 Surely the outcome can't be depended upon  
4 whether you're wearing robes, whether you're called  
5 "commissioner" or "your Honor." The Constitution deals  
6 with the reality that Federal judges who are appointed  
7 for life must maintain their neutrality and their  
8 impartiality and because this sentencing commission  
9 system fundamentally alters that balance, it is  
10 un-Constitutional.

11 Thank you, your Honors. I'll reserve the rest  
12 of my time.

13 CHIEF JUSTICE REHNQUIST: Thank you, Mr.  
14 Morrison.

15 We'll now hear from you, General Fried.

16 ORAL ARGUMENT OF CHARLES FRIED

17 ON BEHALF OF RESPONDENT/PETITIONER, UNITED STATES

18 MR. FRIED: Thank you, Mr. Chief Justice, and  
19 may it please the Court, for more than 30 years, Congress  
20 has been troubled and has worked at the problem of grave,  
21 invidious, and inexplicable disparities in the Federal  
22 sentencing process.

23 In 1958, it tried some gentle measures. It put  
24 in the judicial councils and institutes to which I  
25 believe Justice O'Connor made reference. That did no

1 good at all.

2 In 1976, they did something a little bit more  
3 drastic; we had the Parole Commission Act, which sought  
4 to give the parole commission power to even out the  
5 sometimes quite dreadful disparities after the fact, and  
6 the Court will be familiar with that from the Adinizio  
7 case. That, too, failed, and it failed because the  
8 judges and the parole commission were working at cross  
9 purposes, and the sentencing judges would anticipate the  
10 work of the parole commission in pronouncing sentence.

11 So, strong measures were required to obtain  
12 equality and honesty in sentencing. Now, I think that  
13 this statute is misunderstood when it is viewed as being  
14 unduly rigid. It provides for 25 percent range in which  
15 the sentencing judge may operate. That should be enough  
16 -- and allows for departures in a rather wide range of  
17 circumstances, provided that the judge gives reasons and  
18 explains what he's doing.

19 Now, Petitioner raises three objections. He  
20 objects that Congress did not do the whole job here, but  
21 rather delegated it to an expert independent agency, and  
22 then Petitioner complains as to how that agency is  
23 constituted, and most particularly about the inclusion of  
24 three Federal judges among the seven members.

25 Turning to the delegation point -- because it's

1 a good way to indicate what the commission actually did  
2 do -- one would have thought, given the very great  
3 particularity in the statute, that it would be too late  
4 in the day to raise a delegation objection. In fact, the  
5 statute sets not only the goals for the commission, but  
6 provides the methodology and makes many of the particular  
7 judgments, and as was remarked from the bench, of course,  
8 all of this takes place within the maxima which are set  
9 out by the particular criminal statutes, and which are the  
10 basis for the kind of grading of severity to which Mr.  
11 Morrison referred.

12 Turning to the methodology because it's most  
13 important; the statute required the commission to begin  
14 with actual experience. And, indeed, the commission  
15 surveyed 40,000 cases, 10,000 of them in very great  
16 detail, to see what the sentences actually served under  
17 actual circumstances involving the circumstances of the  
18 case, the circumstances of the offender -- what they were.

19 And not only did the commission start with  
20 actual experience, to a large extent that's where it  
21 ended. To a large extent, these guidelines reflect  
22 today's practice. Where the commission departed in these  
23 value judgments about which you've heard, they have done  
24 so under the explicit mandate of the Act, that for  
25 instance, violent offenders, repeat offenders, career



1 criminals, drug traffickers, be sentenced at or near the  
2 maximum.

3 That is not something the commission dreamed up  
4 -- they were enjoined to do that by the statute.  
5 Similarly, as to white collar criminals --

6 QUESTION: But the problem is, they've been  
7 enjoined to do it for every case.

8 MR. FRIED: What I was suggesting, Justice  
9 White, is that the commission was enjoined to do it by  
10 the statute, and therefore they were not simply following  
11 their own policy judgement. That they were being guided  
12 by what Congress had required, and the guidance from  
13 Congress here, I submit, was miles greater than we  
14 usually encounter in a delegation.

15 QUESTION: You're making a non-delegation  
16 argument, is that it right not?

17 MR. FRIED: I am, your Honor.

18 And the suggestion that this is something that  
19 Congress might have handed to an advisory panel, then to  
20 enact its work, misses the point that these guidelines,  
21 in order to be sensible and effective, must be  
22 evolutionary. They must require monitoring of what  
23 happens and constant revision, and that of course is  
24 precisely the kind of work which is given to an  
25 independent agency.

1 QUESTION: General Fried, do you know of any  
2 other agency -- let's say this is in the executive branch  
3 -- do you know of any other agency in the executive  
4 branch that has no function whatever except to promulgate  
5 law?

6 MR. FRIED: No, I do not, but I do know of a  
7 number of agencies which among their other functions do  
8 promulgate --

9 QUESTION: Indeed, just as rulemaking is almost  
10 a necessary incident of being an executive.

11 You must acknowledge -- this is a distinctive  
12 entity. Has there ever been an agency of the Government  
13 that has no function except to promulgate law, other than  
14 the Congress?

15 MR. FRIED: Well, I ran through that in my own  
16 mind, and I was not able to discover one.

17 QUESTION: I don't think so.

18 MR. FRIED: But I do think there are agencies  
19 which establish laws for others as well as for  
20 themselves, and laws which are enforced by others other  
21 than themselves.

22 QUESTION: In the course of conducting some  
23 administrative function or other -- some other executive  
24 function.

25 MR. FRIED: Well, I think the SEC, when it sets

1 down rules, is making rules for others, and for the  
2 enforcement by others, as much as for themselves.

3 QUESTION: That's true, but I assume that if  
4 Congress could do this, Congress could decide that we  
5 need a massive revision of securities laws, and could  
6 simply compose a commission, so long as the directives  
7 are general enough to overcome the bare objections we  
8 have against overdelegation -- assuming that there's  
9 enough standard there, it could just create a commission  
10 and say that whatever this commission comes out with  
11 shall be our new securities laws.

12 Can it do that?

13 MR. FRIED: Well, in this case, of course, the  
14 regulations, the rules, have to lie before Congress for  
15 six months before becoming effective. I cannot propose  
16 any general objection to what you suggest.

17 QUESTION: Well, it certainly is a nice -- it's  
18 a handy way to get around legislative impasse. You just  
19 create an agency to make law, right?

20 MR. FRIED: Well, I don't think that we have  
21 here a way of getting around a legislative impasse which  
22 might be what was a problem in the Gramm-Rudman situation  
23 --because here Congress had come down to a lot of very  
24 specific policy judgments, but there was the need to  
25 bring them that last six feet down to earth. But they'd

1 done an awful lot of the work themselves.

2 QUESTION: But if this handy device is doable,  
3 why has it never been done before? I mean, it certainly  
4 is handy.

5 MR. FRIED: Well, I can't answer why --

6 QUESTION: To just simply say, why go through  
7 all the trouble of hammering out a new securities law?  
8 Let's just create an agency and say, hey, promulgate a  
9 securities law.

10 MR. FRIED: Well, I would answer that question  
11 ultimately by saying that I do not know what provision of  
12 the Constitution is violated when an independent agency  
13 does make general but really quite guiding legislative  
14 judgments ultimately specific. I don't think it violates  
15 any provision of the law.

16 QUESTION: Well, it could be that a certain  
17 amount of lawmaking can be given to executive agencies  
18 because it inevitably belongs to them, just as a certain  
19 amount of lawmaking is given to courts. It's part of  
20 their executive function, and you can augment it to a  
21 certain degree. And perhaps that's permissible, but it's  
22 not permissible to create an agency that has no function  
23 except to promulgate a law.

24 MR. FRIED: With respect, your Honor, I do not  
25 know what provision of the Constitution is violated by



1 that.

2 QUESTION: If all it does is promulgate a law,  
3 what kind of action would you call that?

4 MR. FRIED: I would call that executive, your  
5 Honor.

6 QUESTION: You would?

7 MR. FRIED: If they are executing a law which  
8 directs them to make more specific the mandates in the  
9 statute, which is how we analyze this case.

10 Now, beyond the delegation, beyond the  
11 delegation objection, which obviously is more formidable  
12 than I had imagined it to be --

13 [Laughter]

14 MR. FRIED: The complaint is made that the  
15 phrase, that this is an independent commission in the  
16 judicial branch is a cause for concern. Should we  
17 stumble over the phrase "in the judicial branch"? A  
18 number of things are quite clear: that the commission is  
19 not a court, and that is not simply a technical point.  
20 It is not a court because it does not issue judgments in  
21 cases, it is not subject to appellate jurisdiction, its  
22 judgments cannot be appealed from, it is not issuing  
23 final judgments. And it is not subordinate to any court  
24 as are, for instance probation officers or bankruptcy  
25 judges.

1           It is in the judicial branch in a perfectly  
2 harmless, Constitutionally harmless sense, and that is,  
3 first of all, that it is -- its judicial branch  
4 connections, which explain the logistics of managing this  
5 commission -- who makes out the checks, how is the budget  
6 submitted, what particular housekeeping rules, such as  
7 the Freedom of Information Act, conflict of interest  
8 laws, and so on, will apply?

9           Similarly, there is a strong administrative  
10 connection between the commission and the administrative  
11 office of the courts, and the probation offices, which  
12 supply it with a great deal of its information. And that  
13 seems to me a set of consequences which Congress might  
14 have provided in detail, but in fact, it did so  
15 compendiously by stating that this is an independent  
16 commission in the judicial branch.

17           Furthermore, of course, and much more  
18 substantively, this is a way of underlining Congress'  
19 very great concern that this be an independent commission  
20 --and that, of course, is also thereby accomplished. But  
21 beyond that, I see no reason, I see no need, to engage in  
22 a rewriting or severance, or anything else, of what  
23 Congress did, because I am unable to discover any  
24 harmful, any infectious aspect to that designation.

25           What the designation does do is perfectly

1 appropriate, and if there is some work that it does do  
2 that I have not been able to discover, that is  
3 inappropriate, by all means let us sever that, but I  
4 don't know what it is.

5 QUESTION: It's been suggested that that one  
6 thing was that Congress didn't adopt it afterwards.

7 MR. FRIED: Well, Congress was very concerned  
8 to insist on the independence of the agency, and very  
9 concerned --

10 QUESTION: They have adopted the Act?

11 MR. FRIED: Well, it could have done it one  
12 time, Justice Marshall, but the need here is --

13 QUESTION: It could do it right now, could it?

14 MR. FRIED: Indeed it could.

15 QUESTION: Well, I mean --

16 MR. FRIED: But the important thing is that  
17 this be allowed to evolve, that there be monitoring of  
18 the experience, collection of the data -- that's a  
19 monumental task, and continuous revision -- and that is  
20 something --

21 QUESTION: But you wouldn't have had this  
22 headache and this lawsuit.

23 MR. FRIED: You wouldn't have had this  
24 headache, but you also would not have had the promise of  
25 continuous monitoring and revision, which is what is

1 necessary to make something which would really work.

2 So I think that if it could have been a  
3 one-shot affair, that would have been a different story,  
4 but I don't think it sensibly could have been a one-shot,  
5 one-time affair. I'd like to turn --

6 QUESTION: General Fried, if there is a concern  
7 -- and I submit there is -- about preserving the  
8 independence and the impartiality of the judiciary, it  
9 really doesn't make any difference which branch this is  
10 under, does it? That concern is the same.

11 MR. FRIED: I agree, it does not make any  
12 difference at all, Justice Kennedy, and I'd like to turn  
13 to the objection to the service of three judges on the  
14 committee.

15 QUESTION: When you do that, will you please  
16 tell me whether or not in your view the value of  
17 impartiality and independence is a value that's protected  
18 by the doctrine of separation of powers?

19 MR. FRIED: Yes, that's precisely what it's my  
20 intention to do, because my view is that there is no  
21 doctrine and no provision of the Constitution which  
22 supports the argument which Petitioner has made.

23 The framers considered an incompatibility  
24 clause, for judges, and rejected -- they omitted to enact  
25 one, although they did enact one for Members of



1 Congress. Nor was this an oversight. There are --

2 QUESTION: Would you concede that the frequent  
3 and continuous service by judges on rulemaking and  
4 lawmaking commissions might impair the impartiality and  
5 the integrity of the judiciary in the minds of the public?

6 MR. FRIED: As a matter of policy and  
7 judgement, that is a very reasonable concern. But we are  
8 talking about Constitutional --

9 QUESTION: And you say the Constitution has no  
10 concern and no provisions to protect against that  
11 encroachment?

12 MR. FRIED: I think that in extremis policing  
13 the margins, perhaps it does. But I am struck by the  
14 fact that Chief Justice Jay served for six months as  
15 Secretary of State as did Chief Justice Marshall.

16 QUESTION: How many cases were pending at that  
17 time, Chief Justice?

18 [Laughter]

19 MR. FRIED: I don't know, but Chief Justice  
20 Marshall, I believe, signed the commission which was the  
21 subject of Mawbry v. Madison.

22 QUESTION: What strikes me about this argument,  
23 General Fried -- it seems to me what is remarkable if  
24 there is no impediment -- as you say, there is not --  
25 what is remarkable is that not that this is happening

1 sometimes, but that it has happened so rarely. If there  
2 has been no felt impediment to members of the judiciary  
3 serving in executive positions, I'm amazed that you can  
4 come up with no more than the number of examples that  
5 you've brought before us.

6 MR. FRIED: Well, I am quite --

7 QUESTION: There are very capable men and women  
8 in the judiciary over the years, and that so few of them  
9 should have thought that they had the time and the  
10 ability to lend to the public service in the executive  
11 branch strikes me as extraordinary.

12 MR. FRIED: The matter was discussed, and the  
13 only case which I know of which discussed it at some  
14 length is United States v. Ferreira, and I think it's  
15 quite striking what the Court said in that case.

16 Petitioner says that Ferreira claims that the  
17 Court refused to allow -- I'm quoting here from their  
18 brief -- Article III judges to pass on claims such as  
19 we're involved in.

20 What the Court actually said in Ferreira was  
21 that the authority conferred on respective judges was  
22 nothing more than as a commissioner to adjust certain  
23 claims. Nor can we see any ground for objection for the  
24 power in that case. That's what this Court said, and  
25 when this Court in Ferreira considered the matter, they

1 referred to Hayburn's Case. The only question was  
2 whether it might not be construed as conferring the power  
3 on the judges personally as commissioners, and if it  
4 would bear that construction, which is of course the  
5 construction we urge -- there seems to have been no doubt  
6 at that time but that they might Constitutionally  
7 exercise it.

8 Those are the words of the Supreme Court of the  
9 United States.

10 QUESTION: Were they serving as commissioners  
11 here, or as judges?

12 MR. FRIED: They were designated --

13 QUESTION: As Judges.

14 MR. FRIED: In the case mentioned, in Ferreira,  
15 the designation was the Judge of the Northern District of  
16 Florida -- so he was designated by name. That is to say  
17 the designation was much closer than the designations  
18 involved in this Act.

19 And yet, this Court said, "we can see no  
20 objection to that service." Those are the precedents in  
21 this Court. I think there are policy concerns, such as  
22 you and Justice Kennedy raised, but I submit they have no  
23 grounding as Constitutional prohibitions, either in the  
24 text or the practice of the Constitution, nor in the  
25 decisions of this Court.

1 QUESTION: So that Congress could provide that  
2 every day, every judge in the United States spends his  
3 morning on a commission and the afternoon on an Article  
4 III bench?

5 MR. FRIED: I doubt it.

6 QUESTION: Why?

7 MR. FRIED: I doubt it.

8 QUESTION: Why, if there's no Constitutional  
9 prohibition?

10 MR. FRIED: Because at some point, you reach  
11 the point where what you've done is impaired the ability  
12 of the judiciary to function.

13 QUESTION: Just from the standpoint of their  
14 workload, or from the standpoint of their reputation for  
15 impartiality and independence?

16 MR. FRIED: I think the two begin to merge, at  
17 the point you mentioned.

18 QUESTION: Well, then, the limiting principle  
19 is that there is some limit on whether or not the  
20 independence and the impartiality of the judges can be  
21 impaired by a delegation.

22 MR. FRIED: I think there is some limit.

23 QUESTION: And it's in the Constitution?

24 MR. FRIED: Well, I think it is gathered from  
25 the principles of the Constitution, but the practice --



1 QUESTION: Well, is it a Constitutional  
2 doctrine?

3 MR. FRIED: Yes, yes, it is. But the practice  
4 of distinguished Chief Justices of this Court, and the  
5 words of this Court indicate that those limits are  
6 nowhere near as tightly drawn as Petitioners would  
7 suggest.

8 Indeed, Petitioner draws the limits very  
9 tightly, very tightly, and I think that the practice and  
10 doctrines of this Court clearly indicate that that tight  
11 a drawing has no basis.

12 I simply don't want, and it would imprudent, to  
13 suggest there are no limits. If there are limits, of  
14 course they are Constitutional limits. So, to that  
15 extent, I would certainly agree.

16 QUESTION: Of course, no judge in this case was  
17 required to serve at all.

18 MR. FRIED: No judge was required to serve, and  
19 one can see how --

20 QUESTION: If all of them, if every judge who  
21 was asked to serve had refused, the commission could  
22 never have been constituted.

23 MR. FRIED: That is correct. That is correct.

24 And if the requirement of three judges were  
25 thought to be an impediment, that indeed would be easily

1 cured. Congress could simply indicate in the legislative  
2 history that it would be loathe to confirm a commission  
3 which did not include three judges, and you would be at  
4 the same place.

5 QUESTION: Wasn't at least one of the judges a  
6 senior judge? Wasn't George McKenna, a senior judge?

7 MR. FRIED: Yes, one of the judges is a senior judge, and  
8 there was a question about whether that would be all  
9 right, and the matter was adjusted to make sure that it  
10 would be all right. That's very useful.

11 QUESTION: I take it from what you say, General  
12 Fried, that if the statute provided that the President  
13 could appoint a designated judge, and the judge would be  
14 required to serve, that you would agree that would be  
15 un-Constitutional.

16 MR. FRIED: I think that would create a grave  
17 problem of the sort Justice Kennedy raises, and a  
18 different case.

19 I would not want to say that for instance, the  
20 Sinking Fund Commission, on which Chief Justice Jay  
21 served ex officio as Chief Justice, along with the  
22 Secretary of State and the Secretary of Treasury, was  
23 un-Constitutional, though it was a matter considered by  
24 those who were much closer to the framing than we are --

25 QUESTION: General Fried, I guess you're right

1 that it certainly will make us feel better about it if  
2 you tell us we can't be appointed to some things, whether  
3 we like it or not, but I'm not sure I see the basis for a  
4 Constitutional distinction. If we approve this, why?  
5 Why can't -- if it's somehow a violation of separation of  
6 powers, I don't know why it makes any difference whether  
7 the initiative comes from the Congress or from us?  
8 Whether I volunteer for this violative service, or am  
9 enlisted into it, I don't know what difference that  
10 should make.

11 MR. FRIED: Justice Scalia, that is of course  
12 not this case, but let's think why that would be bad,  
13 because my instinct is as yours: it would be.

14 I think what would be bad would come out if  
15 they designated the second most Junior Associate Justice  
16 and you simply refused to serve. What would happen then?  
17 Could they issue a writ of mandamus?

18 Would your vote be counted as present, although  
19 you were never there? All of those circumstances suggest  
20 that in enforcing such a mandate, they would run afoul of  
21 one or another --

22 QUESTION: Sort of a First Amendment  
23 entanglement problem?

24 [Laughter]

25 MR. FRIED: Yes, I think that -- I don't think

1 it's cruel and unusual problem this time. I think that  
2 is correct.

3 [Laughter]

4 QUESTION: Well, it might be a separation of  
5 powers argument, if a judge said, well, you can't do this  
6 to me, because I was appointed a judge, and you're going  
7 to keep me from being a judge.

8 MR. FRIED: I gave my judgement. In my  
9 judgement, this prevents me from being a judge.

10 I suppose that if the Chief Justice declined to  
11 serve, as he is by statute designated to do, on the Board  
12 of the National Gallery, or the Smithsonian Institution,  
13 I don't think that he could be compelled to do so, and  
14 that I think is the answer to Justice Scalia's question.

15 Now, --

16 QUESTION: It's a small point, perhaps, General  
17 Fried, but on the salary, could Congress provide that  
18 service on one of these commissions entitles the judge to  
19 a \$25,000 increase for service on the commission?

20 QUESTION: Now you're hitting it.

21 [Laughter]

22 MR. FRIED: Well, I must admit to you, the  
23 question is a fresh one to me. I right offhand can see  
24 no objection to it, and in fact --

25 QUESTION: I wouldn't worry a lot about that



1 problem.

2 [Laughter]

3 MR. FRIED: Chairman Wilkens, at the time of  
4 his designation, was a District Judge, and therefore  
5 suffered an increase in his salary.

6 QUESTION: Well, isn't the objection in the  
7 delightful hypothetical, I propose, that the President  
8 could prefer some Judges over others? Is this an  
9 interference with the independence of the judiciary?

10 MR. FRIED: Well, that is a preference which he  
11 can show today, not to members of this Court, and  
12 certainly not to the Chief Justice, but even today the  
13 possibility of promotion, if it is a promotion --

14 QUESTION: That's provided for in the  
15 Constitution?

16 MR. FRIED: Well, unless we beg the question,  
17 so is this. The question of promotion from a District  
18 bench to a Court of Appeals bench.

19 I thank the Court for its attention.

20 CHIEF JUSTICE REHNQUIST: Thank you, General  
21 Fried.

22 Mr. Bator, we'll hear now from you.

23 ORAL ARGUMENT OF PAUL M. BATOR  
24 ON BEHALF OF U.S. SENTENCING COMMISSION  
25 AS AMICUS CURIAE IN SUPPORT OF THE UNITED STATES

1 MR. BATOR: Mr. Chief Justice, and may it  
2 please the Court, the problem that Congress faced when it  
3 enacted this statute is well known to this Court. I'll  
4 try to adjust my machinery here -- there's too much  
5 machinery.

6 The problem is familiar to this Court from  
7 cases like Furman and Georgia and other cases which  
8 showed ugly and indefensible discriminations and  
9 disparities and irrational distinctions in the  
10 punishments that people get in the criminal justice  
11 system.

12 And in those cases, litigants came to this  
13 Court and said, "This Court should do something about  
14 that." Now, this case is very different, because in this  
15 case, the executive departments and the Congress for 10  
16 years put on a massive bipartisan effort, and it said,  
17 "We're going to do something about it. We're going to  
18 reduce these ugly and indefensible discriminations and  
19 disparities in criminal sentences."

20 And now this Court is being asked to undo this  
21 effort and really send us back to what were very ugly  
22 days of discriminatory and arbitrary sentencing.

23 Now, I think really the key to Mr. Morrison's  
24 submission here today is simply that this -- Congress has  
25 never quite created an animal quite like this. The

1 sentencing commission is not quite like the parole board  
2 -- its guidelines are not quite like the rules of  
3 procedure, and therefore this is un-Constitutional. But  
4 there is no rule of Constitutional law that Congress may  
5 not do something that is new.

6 In this courtroom, this Petitioner must really  
7 show that this act violated the separation of powers by  
8 really prejudicing one of the branches from doing their  
9 Constitutionally-appropriate law. We really must find  
10 actual prejudice under the standards of separation of  
11 powers that this Court has promulgated. Mere  
12 atmospherics is not enough, and our central submission,  
13 your Honors, is that there is no incursion here on any  
14 Constitutional role of the executive, and that this  
15 commission and this Act does not prejudice the  
16 independence and the impartiality and the performance by  
17 the courts of doing their Constitutionally-assigned  
18 functions.

19 Now, this Act is an act that creates an  
20 institutional design. What are the parts of the design?  
21 Congress says this ought to be an independent commission,  
22 and as far as I understand, there was no serious argument  
23 that that was un-Constitutional. Congress said this  
24 commission should not be controlled by the political  
25 branches or by the Congress or even controlled by the

1 courts, because this agency is not under the domination  
2 of the courts.

3 Second, Congress said this agency is to be  
4 designated as being in the judicial branch -- and there's  
5 been talk about what does that mean? Congress had, I  
6 think, very simple purposes in mind in making that  
7 designation. It had practical purposes. The commission  
8 in its daily work works intimately, all the time, with  
9 the judicial apparatus, and it just makes logistical and  
10 administrative and budgetary sense to put it in the  
11 judicial branch.

12 Congress had a symbolic function here in this  
13 designation. As the Senate commission said, Congress  
14 wanted sentencing to continue to be primarily a judicial  
15 function. For 150 years, it was the judges'  
16 responsibility to sentence. And that --

17 QUESTION: As courts, it was the court's  
18 responsibility to sentence.

19 MR. BATOR: But the general, the symbolism of  
20 making the judicial branch responsible for bringing order  
21 and good repair into the judicial house of sentencing  
22 --Congress thought that it was important to make the  
23 judicial branch responsible for that role.

24 Congress also had in mind, your Honor -- it's a  
25 precautionary note, and that's the point of independence.



1 Congress wanted to make sure that sentencing is kept free  
2 from the domination of the executive branch, which  
3 initiates prosecutions. It wanted to make sure the  
4 commission is independent.

5 Now, Mr. Morrison's central submission -- I  
6 think Justice Scalia's questions probe at this issue --  
7 is that the problem this statute creates is with respect  
8 to the judicial branch, because the judicial branch has  
9 never before been given the task of issuing legislative  
10 style rules that so directly affect the liberties of  
11 citizens. They have been given this task that looks like  
12 the making of law -- and Mr. Morrison says that's  
13 incongruous, and therefore un-Constitutional.

14 But it seems to me, your Honor, that there are  
15 clearly important factors which show that this is a  
16 separate situation, and a distinct situation, which makes  
17 this a congruous assignment by Congress. Congress had,  
18 really, four factors, I think, in mind.

19 First of all, this job was not given, Justice  
20 Kennedy, to the courts or to the judges. It was given to  
21 an agency that functionally functions exactly like a  
22 hundred other independent agencies. It happens to have  
23 three judges. But this is not the same case as if  
24 Congress had said, "This Court is to issue sentencing  
25 guidelines."

1           The Court does not need to decide today whether  
2 that would be Constitutional, although in candor I should  
3 tell the Court that our position is that sentencing is so  
4 special that sentencing is so closely tied to the fair  
5 administration of justice in the courts, that if Congress  
6 finds that this Court should be made responsible for  
7 helping to bring some order into the task of sentencing,  
8 that would be valid. But that's not this Court's problem  
9 today.

10           The second point about these rules is  
11 historical. This delegation is novel in form but not in  
12 substance. It is for 150 years the courts have already,  
13 in their sentencing decisions, exercised virtually  
14 unfettered lawmaking power.

15           QUESTION: Well, they may have decided they  
16 wanted to fetter it. Congress wanted to fetter the power  
17 that individual judges had been exercising, because they  
18 are the ones who created the problem. They are the ones  
19 who gave the disparate sentences all around the country.

20           MR. BATOR: I think I agree with that  
21 completely, your Honor. In a sense, we had the worst of  
22 both worlds, because Congress had created no general  
23 standards, so the courts in their individual decisions  
24 were making general, implicit, general standards. The  
25 only difference is that they were doing it one by one.

1           That is, there is a sense in which the courts,  
2 the individual judges, were making sentencing guidelines  
3 for 150 years, because Congress provided no standards.  
4 And the only difference is that they did it each one for  
5 himself, each one for herself.

6           QUESTION: But that's not a guideline at all.  
7 I mean, I could depart from it tomorrow. Even the same  
8 judge could go over to a different methodology the next  
9 case, couldn't he?

10          MR. BATOR: The judge has unfettered lawmaking  
11 discretion.

12          QUESTION: Well, would you call -- I don't call  
13 that lawmaking, to decide a particular case, that this  
14 defendant will get 15 years. I don't call that making a  
15 law. I call making a law, all defendants that have this  
16 characteristic will get 15 years. That's a law.

17          But saying that this defendant will get 15  
18 years -- that's not a law at all. That's the decision of  
19 a case.

20          MR. BATOR: Your Honor, I believe substantively  
21 they were making the law in deciding what ought to be the  
22 severity of punishment.

23          QUESTION: Well, I think we're using law in two  
24 different senses. You're not using it in the relevant  
25 sense here, it seems to me.

1 MR. BATOR: They were doing it case by case --  
2 of course I acknowledge that. But the distinction  
3 between case by case adjudication and general rulemaking  
4 is at its weakest where the Congress provides no general  
5 standards, and the courts have to -- even if implicitly  
6 -- create the standards as well as to make the particular  
7 application point.

8 QUESTION: Well, suppose that Congress told the  
9 courts, that Congress created a commission with judges on  
10 it, judges only, to promulgate rules for damages in libel  
11 cases.

12 Now, really, Professor, the whole justification  
13 for our making law at all -- and we do all the time -- is  
14 because we must do so in order to decide a case. And  
15 that's not what the sentencing guidelines are.

16 MR. BATOR: Your Honor, our position would be  
17 that if Congress created an independent agency and said  
18 judges ought to be participating in it, and the purpose  
19 of the agency is to rationalize and clean up a system of  
20 incredible discrepancies in, for instance, the allocation  
21 of punitive damages -- we think that ought to be  
22 Constitutional.

23 Now, sentencing seems to me an even easier case  
24 though, because of the very special role that judges have  
25 historically played in the creation of law and policy



1 with respect to sentences. But that is within the  
2 general ambit of our argument, your Honor, and would  
3 distinguish both of those cases from what we were talking  
4 about -- the anti-trust guidelines. There is a  
5 jurisprudential difference between sentencing guidelines  
6 and anti-trust guidelines.

7 Sentencing guidelines do not tell the citizens,  
8 "This is now illegal." No sentencing guideline makes  
9 illegal or actionable anything that had been done before.  
10 Of course it has an impact on liberties, but it is not  
11 jurisprudentially a substantive rule, and that's an  
12 important distinction.

13 I have one more point, your Honors, and that's  
14 a separation of powers point. And it's also a very  
15 important practical point.

16 Overall, globally viewed, the Sentencing Reform  
17 Act significantly reduces, rather than expands, the  
18 overall power of the judicial branch to make law with  
19 respect to sentencing. Before the Act, the judicial  
20 branch exercised a plenary discretion to make sentencing  
21 law. This Act significantly narrows and makes  
22 accountable that power.

23 The doctrine of separation of powers is  
24 supposed to have something to do with liberty, and it  
25 would be a huge irony if this Court invalidated a statute

1 whose global effect is not to increase but sharply to  
2 curtail the prerogatives of one of the branches of  
3 Government.

4 Your Honor, I have not had time to deal with a  
5 question of the specific service of judges, and I will  
6 leave that issue to the briefs, and also to the argument  
7 made by the Solicitor-General.

8 I want to add one footnote, if I have time. In  
9 his reply brief, Mr. Morrison makes, I think, an  
10 important concession. He says it would be Constitutional  
11 to have a commission in the judicial branch with judges  
12 dealing with issues of parole and reduction of good  
13 time. I think that's a fatal concession for him, both at  
14 a superficial and at a deep level; at a superficial  
15 level, because I don't understand the distinction, at a  
16 Constitutional level, between the commission that deals  
17 with parole and the commission that deals with the things  
18 this commission did.

19 At a deeper level, I think, the concession  
20 shows that sentencing cannot be cabined into the tidy  
21 table of organization that Petitioner prefers.  
22 Sentencing has always been a special feature of our  
23 jurisprudence. It's always been a field in which  
24 responsibility has been shared among the branches.

25 QUESTION: Limits on sentencing -- the limits

1 on what an individual judge could do in imposing a  
2 sentence, has always been the prerogative of the  
3 Congress, hasn't it?

4 MR. BATOR: Has always been the prerogative of

5 -- QUESTION: The prerogative of the Congress.  
6 The pronouncement of the sentence has always been for the  
7 judge, to be sure, but the limits within which the judge  
8 is permitted to operate in imposing the sentence has  
9 until now been with the Congress, has it not?

10 MR. BATOR: The Congress, of course, has  
11 plenary Constitutional authority to determine what the  
12 punishment should be.

13 QUESTION: I'm just asking whether up until now  
14 it is not true that the limits within which each  
15 individual judge had to maneuver in imposing a sentence  
16 has been up to the Congress. And the effect of this  
17 legislation is to place those limits within this  
18 commission.

19 MR. BATOR: No, your Honor, I don't think so.

20 Before this statute, Congress in the  
21 substantive criminal statute legislated the maximum, and  
22 the individual judge had plenary discretion on where to  
23 sentence within that maximum. Exactly that same  
24 constraint operated on the commission.

25 The maximums created by statute continue to

1 bind the commission, and the commission and the judge  
2 then operating with the guidelines together are  
3 exercising not more authority but less authority than  
4 before the sentencing guidelines, because Congress added  
5 an awful lot of other, specific, narrowings to the  
6 situation.

7 QUESTION: The commission has established new,  
8 lower, maximums -- has established new, lower maximum  
9 sentences for certain offenses.

10 MR. BATOR: I'm not sure I understand your  
11 Honor's question. But the commission operated as  
12 individual judges.

13 QUESTION: Some offenses which the statute says  
14 can be sentenced to 30 years, some of those the  
15 commission has said, given certain circumstances, the  
16 maximum can only be 20. Isn't that right?

17 MR. BATOR: That's true, yes, sir.

18 That's exactly what the District Judge did  
19 before. The District Judge could say, for this offense,  
20 I will never sentence anybody for more than 20 years.

21 QUESTION: But he couldn't say that another  
22 District Judge couldn't sentence to 30 years. He could  
23 say that he couldn't, or that he wouldn't.

24 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Bator.  
25 Mr. Morrison, you have three minutes remaining.



1 REBUTTAL ARGUMENT OF ALAN B. MORRISON

2 MR. MORRISON: Thank you, your Honor.

3 Let me turn first to the point that Mr. Bator  
4 made regarding the question of whether these kinds of  
5 parole and probation functions could be taken care of in  
6 the judicial branch, although they're now in the  
7 executive branch.

8 I thought that our reply brief was clear, but  
9 if it's not, I'll make it clear now. We weren't talking  
10 about what judges could do, but I don't think it would  
11 matter.

12 I think the important point is that in those  
13 particular circumstances, they would be acting as  
14 individual adjudicators, much as the parole commission  
15 now adjudicates when a person, or determines when a  
16 person is entitled to parole.

17 We said nothing about judges laying down rules  
18 to apply to probation any more than judges now do.

19 Second, I want to be clear that although Bator  
20 says that you have to show actual prejudice to find a  
21 violation of separation of powers, last year in this  
22 Court's decision in Morrison v. Olson, when discussion  
23 the question of whether the independent counsel, the  
24 judges could close down the office of the independent  
25 counsel in the event the work of the independent counsel

1 was done, the Court did not look to find actual prejudice.

2 It said that "we will construe the statute  
3 narrowly, lest it be considered that the special court  
4 could engage in administrative-type activity." No  
5 showing of actual prejudice to any branch of the  
6 Government -- a prophylactic rule of the kind that we're  
7 asking for here.

8 It is, I suggest, the fact that if this  
9 commission is allowed to do this that we will have  
10 commissions on punitive damages dealing with remedies, on  
11 pain and suffering dealing with remedies, on statutes of  
12 limitations dealing with remedies, at least in Federal  
13 causes. Indeed, we could have the commission re-write  
14 the bankruptcy code, for what is the bankruptcy law after  
15 all but a series of remedies for pre-existing rights?

16 And if you do not believe, as I do, that that's  
17 sufficiently incongruous for Article III judges to be  
18 performing on their own, it certainly seems to me that  
19 given our separation of powers to add four non-judges to  
20 a commission and to have them make the policy choices  
21 offends our basic notions of separation of powers, and  
22 for those reasons, the commission cannot stand.

23 Let me say one final word about the  
24 Solicitor-General's notion of need for evolution. If the  
25 Congress had taken the advice of many and passed this

1 statute, these guidelines into law, we would have a very  
2 different set of circumstances, for the basic policy  
3 choices would have been made, albeit with much advice, by  
4 the Congress when it enacted it into law. We would then  
5 have intelligible principles against which we could  
6 determine whether, in the light of experience, the  
7 guidelines were working.

8 We would have a very different situation, so it  
9 would be a one-shot act by Congress, followed by a  
10 commission which thereafter properly constituted could  
11 effectively carry out the law and not leave us in place  
12 forever.

13 Thank you very much.

14 CHIEF JUSTICE REHNQUIST: Thank you, Mr.  
15 Morrison.

16 The case is submitted.

17 (Whereupon, at 2:17 o'clock p.m., the case in  
18 the above-titled matter was submitted.)  
19  
20  
21  
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23  
24  
25

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

#87-7028 - JOHN M. MISTRETTA, Petitioner V. UNITED STATES;  
and

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#87-1904 - UNITED STATES, Petitioner V. JOHN M. MISTRETTA

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BY Judy Freilicher

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