AMERICAN CONSTITUTIONALISM
VOLUME I: STRUCTURES OF GOVERNMENT
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Supplementary Material

Chapter 10: The Reagan Era – Separation of Powers

Mistretta v. United States, 488 U.S. 361 (1989)

In the late nineteenth and early twentieth centuries, a great deal of policymaking authority was shifted into the bureaucracy. Independent regulatory commissions like the Interstate Commerce Commission (which regulated railroad rates) and the Federal Trade Commission (which regulated economic competition and trade practices) were given both a modicum of independence from the other branches of government and a great deal of power to formulate and implement policies within their specific area of authority. Executive agencies such as the Food and Drug Administration and departments such as the Department of Labor were under the authority of the president, but were often likewise entrusted with sweeping authority to design policy and promulgate rules to achieve vaguely worded statutory goals. Congress sometimes hemmed in the bureaucracy with more detailed legislation or provided for more aggressive legislative or judicial oversight or denied the executive branch the resources or authorization to launch even more ambitious projects that interfered with congressional interests. But the rise of the administrative state was one of the great transformations in government in the early twentieth century.

In the early twentieth century, the Supreme Court largely accommodated that transformation. Congress was given a free hand to delegate power to the executive, and the courts did not examine very closely how the executive used that discretion. By the 1960s and 1970s, however, the Court had become more skeptical of how executive branch officials used that discretion. The Court continued to say that the Constitution allowed Congress to delegate expansive authority to the executive branch. It used administrative law to more aggressively review how the executive branch used that authority. Administrative law is the body of law that governs how the commissions and agencies of government operate. At the opening of the Reagan era, the executive branch had a great deal of power to make policy under such broadly worded statutes as the Clean Water Act and the Sherman Antitrust Act, but the courts had asserted a strong role in reviewing both the procedures that agencies used in making decisions and the substantive outcomes of those decisions.[1]

The Supreme Court shook things up in Chevron v. Natural Resource Defense Council *(1984). When Ronald Reagan assumed the presidency, the Environmental Protection Agency reversed an interpretation of a provision of the Clean Air Act that had been adopted during the Carter administration. Environmental interest groups sued to overturn the EPA's decision and return to the old policy. In a unanimous decision, the Supreme Court not only refused to overturn the EPA, but it also laid out a new standard for how courts should review such disputes. In an opinion authored by John Paul Stevens, the Court held that so long as the statute was ambiguous on the question at issue, the courts should defer to any reasonable interpretation that the executive branch makes. Statutory ambiguity should be understood to be a congressional delegation of policymaking authority to the executive branch, and Congress is normally the correct institution for correcting executive branch mistakes in policymaking.*

Technically, Chevron *was a case in administrative law, but it also had ramifications for American constitutionalism. The Supreme Court instructed the lower courts to be much more deferential to the policy decisions of the executive branch when interpreting statutes. "*Chevron *deference" potentially expanded the ability of presidents to influence the direction of public policy through bureaucratic decision-making. It likewise forced Congress to be more explicit, either in authorizing judicial review of executive decisions or in actually making substantive policy choices in the first place. Whether the* Chevron *decision had a significant effect in the long-term remains a matter of debate, but both the theory and practice of presidential power over public policy within a system*

[1] Richard B. Stewart, "The Reformation of American Administrative Law," *Harvard Law Review* 88 (1975): 1667.

of separated branches of government depends not only on constitutional law but also on how statutes are written and interpreted.[2]

The Sentencing Reform Act of 1984 sought to sharply limit the traditional discretion that individual judges exercised when sentencing convicted criminals. By the early 1980s, however, this traditionally broad discretion had given rise to concerns that defendants were being treated unequally, that uncertainty in the practical length of sentences was undermining deterrence, and that some judges were too "soft" on criminals in handing out sentences. Rather than itself setting specific sentences for each crime in statute, however, Congress created the United States Sentencing Commission within the judicial branch to develop a set of binding sentencing guidelines to be applied to various categories of federal criminal offenses and defendants. The seven-member, bipartisan Commission was to include three sitting federal judges. The sentencing guidelines were binding as soon as they were promulgated by the Commission, and they were to be subject to periodic review and revision by the Commission.

John Mistretta pled guilty to a federal charge to conspiracy to distribute cocaine in Missouri and was sentenced under the new guidelines to 18 months in prison and three years of supervised release, as well as a monetary fine. He challenged the sentencing guidelines as an unconstitutional delegation of legislative powers to the Sentencing Commission. The district court upheld the guidelines. Given that both district courts and circuit courts across the country had divided over the constitutionality of the Sentencing Reform Act, the case was taken directly to the U.S. Supreme Court to resolve the issue. In an 8-1 decision, the Supreme Court upheld the act, pulling it within the scope of the New Deal era precedents on the delegation of legislative powers. Does it make a difference when rulemaking power delegated by Congress is exercised by a commission composed of judges rather than an executive agency?

JUSTICE BLACKMUN delivered the opinion of the Court.

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Petitioner argues that in delegating the power to promulgate sentencing guidelines for every federal criminal offense to an independent Sentencing Commission, Congress has granted the Commission excessive legislative discretion in violation of the constitutionally based nondelegation doctrine. We do not agree.

The nondelegation doctrine is rooted in the principle of separation of powers that underlies our tripartite system of Government. The Constitution provides that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States," U.S. Const., Art. I, § 1, and we long have insisted that "the integrity and maintenance of the system of government ordained by the Constitution" mandate that Congress generally cannot delegate its legislative power to another Branch. *Field* v. *Clark* (1892). We also have recognized, however, that the separation-of-powers principle, and the nondelegation doctrine in particular, do not prevent Congress from obtaining the assistance of its coordinate Branches. In a passage now enshrined in our jurisprudence, Chief Justice Taft, writing for the Court, explained our approach to such cooperative ventures: "In determining what [Congress] may do in seeking assistance from another branch, the extent and character of that assistance must be fixed according to common sense and the inherent necessities of the government co-ordination." *J. W. Hampton, Jr., & Co.* v. *United States* (1928). So long as Congress "shall lay down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform, such legislative action is not a forbidden delegation of legislative power."

Applying this "intelligible principle" test to congressional delegations, our jurisprudence has been driven by a practical understanding that in our increasingly complex society, replete with ever

[2] For a provocative discussion of critique of the modern nondelegation doctrine, see David Schoenbrod, *Power without Responsibility* (New Haven, Conn.: Yale University Press, 1993). More generally on *Chevron* and administrative law, see Daniel B. Rodriguez, "Administrative Law," in *Oxford Handbook of Law and Politics*, eds. Keith E. Whittington, R. Daniel Kelemen, and Gregory A. Caldeira (New York: Oxford University Press, 2008); Keith E. Whittington, "Judicial Checks on the President," in *Oxford Handbook of the American Presidency*, eds. George C. Edwards III and William G. Howell (New York: Oxford University Press, 2009); Matthew Stephenson, "Statutory Interpretation by Administrative Agencies," in *Research Handbook in Public Law and Public Choice*, eds. Daniel Farber and Anne Joseph O'Connell (Northampton, Mass.: Edward Elgar Publishing, 2010).

changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives. . . .

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We cannot dispute petitioner's contention that the Commission enjoys significant discretion in formulating guidelines. The Commission does have discretionary authority to determine the relative severity of federal crimes and to assess the relative weight of the offender characteristics that Congress listed for the Commission to consider. . . .

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The Sentencing Commission unquestionably is a peculiar institution within the framework of our Government. Although placed by the Act in the Judicial Branch, it is not a court and does not exercise judicial power. Rather, the Commission is an "independent" body comprised of seven voting members including at least three federal judges, entrusted by Congress with the primary task of promulgating sentencing guidelines. . . . Our constitutional principles of separated powers are not violated, however, by mere anomaly or innovation. . . .

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What Mistretta's argument comes down to, then, is not that the substantive responsibilities of the Commission aggrandize the Judicial Branch, but that that Branch is inevitably weakened by its participation in policymaking. We do not believe, however, that the placement within the Judicial Branch of an independent agency charged with the promulgation of sentencing guidelines can possibly be construed as preventing the Judicial Branch "from accomplishing its constitutionally assigned functions." *Nixon* v. *Administrator of General Services* (1977). Despite the substantive nature of its work, the Commission is not incongruous or inappropriate to the Branch. As already noted, sentencing is a field in which the Judicial Branch long has exercised substantive or political judgment. . . .

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. . . . Accordingly, we hold that the Act is constitutional.

The judgment of United States District Court for the Western District of Missouri is affirmed.

It is so ordered.

JUSTICE SCALIA, dissenting.

While the products of the Sentencing Commission's labors have been given the modest name "Guidelines," . . . they have the force and effect of laws, prescribing the sentences criminal defendants are to receive. A judge who disregards them will be reversed . . . . I dissent from today's decision because I can find no place within our constitutional system for an agency created by Congress to exercise no governmental power other than the making of laws.

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Petitioner's most fundamental and far-reaching challenge to the Commission is that Congress' commitment of such broad policy responsibility to any institution is an unconstitutional delegation of legislative power. It is difficult to imagine a principle more essential to democratic government than that upon which the doctrine of unconstitutional delegation is founded: Except in a few areas constitutionally committed to the Executive Branch, the basic policy decisions governing society are to be made by the Legislature. Our Members of Congress could not, even if they wished, vote all power to the President and adjourn *sine die*.

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The whole theory of *lawful* congressional "delegation" is not that Congress is sometimes too busy or too divided and can therefore assign its responsibility of making law to someone else; but rather that a certain degree of discretion, and thus of lawmaking, *inheres* in most executive or judicial action, and it is up to Congress, by the relative specificity or generality of its statutory commands, to determine -- up to a point -- how small or how large that degree shall be. Thus, the courts could be given the power to say precisely what constitutes a "restraint of trade," . . . or to adopt rules of procedure . . . because that "lawmaking" was ancillary to their exercise of judicial powers . . . .

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The focus of controversy, in the long line of our so-called excessive delegation cases, has been whether the *degree* of generality contained in the authorization for exercise of executive or judicial powers in a particular field is so unacceptably high as to *amount to* a delegation of legislative powers. I say "so-called excessive delegation" because although that convenient terminology is often used, what is really at issue is whether there has been *any* delegation of legislative power, which occurs (rarely) when Congress authorizes the exercise of executive or judicial power without adequate standards. Strictly speaking, there is *no* acceptable delegation of legislative power. As John Locke put it almost 300 years ago, "[t]he power of the *legislative* being derived from the people by a positive voluntary grant and institution, can be no other, than what the positive grant conveyed, which being only to make *laws*, and not to make *legislators*, the *legislative* can have no power to transfer their authority of making laws, and place it in other hands." . . . In the present case, however, a pure delegation of legislative power is precisely what we have before us. It is irrelevant whether the standards are adequate, because they are not standards related to the exercise of executive or judicial powers; they are, plainly and simply, standards for further legislation.

The lawmaking function of the Sentencing Commission is completely divorced from any responsibility for execution of the law or adjudication of private rights under the law. . . . The power to make law at issue here, in other words, is not ancillary but quite naked. The situation is no different in principle from what would exist if Congress gave the same power of writing sentencing laws to a congressional agency such as the General Accounting Office, or to members of its staff.

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By reason of today's decision, I anticipate that Congress will find delegation of its lawmaking powers much more attractive in the future. If rulemaking can be entirely unrelated to the exercise of judicial or executive powers, I foresee all manner of "expert" bodies, insulated from the political process, to which Congress will delegate various portions of its lawmaking responsibility. How tempting to create an expert Medical Commission (mostly M.D.'s, with perhaps a few Ph.D.'s in moral philosophy) to dispose of such thorny, "no win" political issues as the withholding of life-support systems in federally funded hospitals, or the use of fetal tissue for research. This is an undemocratic precedent that we set -- not because of the scope of the delegated power, but because its recipient is not one of the three Branches of Government. The only governmental power the Commission possesses is the power to make law; and it is not the Congress.

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Today's decision follows the regrettable tendency of our recent separation-of-powers jurisprudence,. . . to treat the Constitution as though it were no more than a generalized prescription that the functions of the Branches should not be commingled too much -- how much is too much to be determined, case-by-case, by this Court. The Constitution is not that. Rather, as its name suggests, it is a prescribed structure, a framework, for the conduct of government. In designing that structure, the Framers *themselves* considered how much commingling was, in the generality of things, acceptable, and set forth their conclusions in the document. That is the meaning of the statements concerning acceptable commingling made by Madison in defense of the proposed Constitution, and now routinely used as an excuse for disregarding it. . . . Consideration of the degree of commingling that a particular disposition produces may be appropriate at the margins, where the outline of the framework itself is not clear; but it seems to me far from a marginal question whether our constitutional structure allows for a body which is not the Congress, and yet exercises no governmental powers except the making of rules that have the effect of laws.

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

I respectfully dissent from the Court's decision, and would reverse the judgment of the District Court.