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Deputy Assistant Attorney General

Washington, D.C. 20530

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MEMORANDUM FOR ARNOLD I. BURNS
Deputy Attorney GeneralRe: Outline of Constitutional Defense of the
Sentencing Commission Within the Executive BranchI. Statutory designation of Commission not controlling.

A. Under Bowsher v. Synar, 106 S. Ct. 3181 (1986), the functions of an officer, rather than the statutory label attached to that officer, controls whether he is a member of the legislative, executive, or judicial branch. In the case of the Sentencing Commission, the functions assigned to the Commission are entirely non-judicial in nature.

1. The primary function of the Commission is to promulgate general, prospective, and binding guidelines for use of the federal courts in sentencing. Because this in no sense involves the decision of cases or controversies, or the incidental judicial housekeeping functions necessary to carry out that constitutionally assigned role, it is not properly characterized as a judicial function.

2. Rather, the promulgation of binding sentencing guidelines is an exercise of legislative power.

3. While Congress routinely delegates to the judiciary broad discretion in the form of vaguely-worded statutes, such as the Sherman Act, these delegations are entirely consistent with the judicial function because they are exercised in the context of deciding individual cases.

II. Delegations of legislative power may only be exercised by the executive branch.

A. The promulgation of binding rules may only be undertaken by Congress through legislation or by the executive branch pursuant to a valid delegation of legislative power. Under Supreme Court precedent, Congress may validly delegate legislative power to the executive branch, provided that Congress supplies sufficient guidance for its exercise. See Yakus v. United States, 321 U.S. 414 (1944). The specific delegation of power to the Sentencing Commission satisfies the standards for delegations set by the Supreme Court. See J. W. Hampton, Jr. & Co. v. United States, 276 U.S. 394 (1928).

B. The ability to delegate legislative power outside the executive branch would permit Congress to deprive the executive of his constitutionally-prescribed participation in lawmaking.

1. Under Article I, section 7 of the Constitution, legislation may obtain the force of law only with the approval of both houses of Congress and of the President, subject to two-thirds override. See INS v. Chadha, 462 U.S. 919 (1983). The requirement that delegations of legislative power be made to executive officials leaves the President with the functional equivalent of a veto by virtue of his ability to direct executive branch officials in their execution of the delegation. Simply put, the President would not permit his subordinates to promulgate rules that he would have vetoed had the same rules been passed by Congress.

III. Effect of composition of the Sentencing Commission and statutory removal provision.

A. The fact that the statute requires only three members of the Commission to be Article III judges, and that in fact non-judges are currently serving as Commissioners, precludes the Commission from being in the judicial branch.

B. Under the statute, the President may remove members of the Commission for "neglect of duty or malfeasance in office or for other good cause shown." 28 U.S.C. 991(a).

1. According to Bowsher v. Synar, 106 S. Ct. 3181 (1983), an officer is accountable to that branch of government which exercises the power to remove him. Thus, under the standards established in Bowsher, the Sentencing Commission may not perform non-executive functions.

2. The fact that the statute purports to limit the President's removal power does not make the Commission any less an executive branch agency. In Bowsher, the Comptroller General was removable by Congress only for "(i) permanent disability; (ii) inefficiency; (iii) neglect of duty; (iv) malfeasance; (v) a felony or conduct involving moral turpitude." 31 U.S.C. 703(e)(1). Despite these restrictions, the Supreme Court held that the placement of removal authority in Congress meant that the Comptroller General could only validly perform legislative functions. Thus, the statutory qualifications on the President's power to remove members of the Sentencing Commission does not alter its character as an executive agency capable of performing executive functions.

3. The question whether these restrictions impermissibly limit the President's prerogative has not been finally resolved by the Supreme Court or the Department. We note that these restrictions simply place the Sentencing Commission in the same category as numerous, so-called independent agencies.

4. Moreover, any power in the President to remove members of the Commission conclusively precludes placement of the Commission in the judicial branch since Article III states that only those with life tenure may exercise the judicial power of the United States.

C. The long historical practice and the negative implication of the incompatibility clause (precluding members of Congress from simultaneous service as officers of the United States) conclusively demonstrate the constitutionality of federal judges serving in their individual capacities as members of the executive branch.

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