

The Independence Of the Judiciary in Question

By Allison B. Margolin

Marbury v. Madison (1803) continues to represent the most profound affirmation of the independence, jurisdiction, and role of the judiciary in the American government. The independence and electoral unaccountability of the judiciary have remained the most fundamental distinction between this branch and the others. In fact, Gerland N. Rosenberg, author of "Judicial Independence and the Reality of Political Power," writes that "the independence of the federal judiciary from political control is a hallmark of the American legal system" (371).

However, the decision of the Supreme Court in the 1989 case, *Mistretta v. United States*, upholding the constitutionality of the Federal Sentencing Guidelines Commission, and its subsequent decision in *Harmelin v. Michigan* (1991), eviscerated the judicial independence so highly valued in this country. In *Mistretta*, the Court upheld the constitutionality of the U.S. Sentencing Commission, an "agency" created by Congress to formulate sentencing guidelines and evaluate their effects. Although this decision took away some discretion formally located in district sentencing courts, the pitfall in the decision lies in the opportunity it opens for Congress to pare down the power of sentencing judges in order to impose their own political agendas on sentencing.

At the time of the passage of the 1984 Anti-Crime Bill (which included the provision to establish the Sentencing Commission), the Senate was controlled by the President's party, the Republicans, while the Democrats remained in control of the House. Republicans evidently wanted to seize the opportunity of having party members control the Senate and the presidency to exert influence on a liberal-leaning judiciary. However, the Republicans would probably not have felt the opportunity so ripe had they not counted on the increasingly conservative Supreme Court to bolster their efforts. In 1984, the Supreme Court consisted of Justices Burger, Powell, Blackmun, Brennan, Stevens, Marshall, White, O'Connor, and Rehnquist. Had the constitutionality of the Sentencing Commission been raised the year the Crime Bill passed, Congress would probably have been able to count on the support of the Supreme Court. However, Congress needed time to constitute the commission, and predicted that it would not even have been constituted until 18 months after the passage of the 1984 Anti-Crime Bill, which was passed in October.

Under the Sentencing Reform Act (submitted by the U.S. Sentencing Commission to Congress in April 1987), the guidelines promulgated by the commission were to become effective on November 1 of that year. Therefore, by the time the Court heard the *Mistretta* case in 1989, Reagan had the opportunity to replace Stewart, Powell, and Burger with O'Connor, Scalia, Kennedy, and Rehnquist as Chief Justice. Although these appointments did not change the Court drastically (especially in comparison to the repercussions of replacing Blackmun and/or Brennan), the '84 Republican congressmen were at least assured that their conservative agenda would be furthered by the President through his appointments. Although Scalia did dissent in the *Mistretta* case, he was the only one; and therefore, Congress was correct in its anticipation of Supreme Court support for their commission. Furthermore, Republicans in the '84 Congress were aware of the growing anti-crime sentiment, which had been gaining increasing support since the late '60s and captivated the country once articulated by Reagan; also

throughout 1984, Congress could reasonably count on Reagan's reelection, as indicated by his rise in public opinion polls throughout 1984 and culminating in his landslide victory a month after the passage of the anti-crime legislation. Therefore, the Republicans could rely on the appointment of conservatives to the Sentencing Commission and these appointees would formulate the guidelines that would serve as the basis for future ones; Reagan would nominate them, and even if Republicans lost control of the Senate, they would not expect the Democrats to hold up the appointments, especially in light of the "soft on crime" invectives waiting in the wings.

The judicial discretion of sentencing judges had suffered since the *Harmelin* decision in which the Court rejected the petitioner's arguments that the obligatory nature of sentencing was unfair and that creating sentences incommensurate with the crime was a violation of the Eighth Amendment. This decision, in effect, served as a warning to would-be appellants that appealing the constitutionality of guidelines was futile. Fortunately, in the 1996 case, *U.S. v. Koon*, the Court reaffirmed the discretion of sentencing district court judges to depart from the guidelines, and the appropriateness of district court's retaining wide discretion to stray from guidelines when warranted.

ENFORCEMENT MECHANISMS

Although the Sentencing Commission's guidelines do account for mitigating circumstances, a judge has the authority to depart from the statute if "there is an aggravating or mitigating circumstance not adequately considered by the Commission that should result in a sentence different from that called for by the guidelines" (Hutchison and Yellin 13). According to Andrew von Hirsch, "once established, the guidelines system is policed through appellate review" (9). However, the most common form of appeals involve either the application of the guidelines to a particular case or the merit of a departure made by the sentencing judge. Therefore, a judge has incentive to provide a substantive explanation for his decision to depart if he decides to take that route; but he has a greater motivation to stay within the guidelines, for fear of appellate overrule.

The reluctance of either party (the government or the defense counsel) to appeal a guideline and the incentives for the judge to depart either on factors encouraged by the Sentencing Commission as relevant or on extra-statutory factors, may be more adequately understood through the 1991 Supreme Court decision in *Harmelin v. Michigan* 501 U.S. 957 and the 1996 decision in *Koon v. United States* (No. 94-1664), respectively.

In *Harmelin v. Michigan*, the petitioner argued that his sentence of life imprisonment without the possibility of parole for possession of 672 grams of cocaine was "cruel and unusual" and therefore a violation of the Eighth Amendment because it was "significantly disproportionate" to the crime he committed; he also alleged that the "rigid application of the sentencing judge to impose the harsh sentence, without taking into account the particularized circumstances of the crime and of the criminal (thereby questioning the constitutionality of the sentencing guideline under which he was sentenced) contributed to the cruel and unusual nature of his punishment.

The Court upheld the decision of the Court of Appeals of Michigan to reject the Petitioner's arguments and abide by the district court's ruling. Justice Scalia, who delivered the opinion of the Court with respect to the petitioner's Eighth Amendment claim (Justice Kennedy, joined by Justice O'Connor and Justice Souter, wrote the concurring opinion), wrote that "Harmelin's claim that his sentence is unconstitutional because

it is mandatory in nature, allowing the sentencer no opportunity to consider mitigating factors,¹ has no support in Eighth Amendment's text and history" (Findlaw website, *Harmelin v. Michigan* 1). Furthermore, Justice Scalia, joined by Chief Justice Rehnquist, reasoned that because no proportionality guarantee can be gleaned from the Eighth Amendment, Harmelin's sentence could not be "considered unconstitutionally disproportional" (Findlaw website, *Harmelin v. Michigan* 1).

According to the justices, the length of imprisonment in a state penitentiary "purely a matter of legislative prerogative" (Findlaw website, *Harmelin v. Michigan* 2). This implies that judges should treat the guidelines promulgated by the U.S. Sentencing Commission as statutes enacted by Congress and act pursuant to them (except in instances where they feel departures are necessary). The justices go on to write that "the context of the adoption of the Eighth Amendment, the debates of the state ratifying conventions and the First Congress, and early commentary and judicial decisions" (Findlaw website, *Harmelin v. Michigan* 1) support the notion that the Eighth Amendment was intended to act as a check on the particular types or modes of punishment a Legislature could prescribe, not as a guarantee against disproportionate sentences.

Evidently in an attempt to anticipate the argument that the Eighth Amendment implicitly guarantees against such sentencing, the Justices wrote "it is particularly telling that those who framed and approved the Federal Constitution chose not to include within it the explicit guarantee against disproportionate sentences that some State Constitutions contained" (Findlaw website, *Harmelin v. Michigan* 1). In the opinion's conclusion, Justice Kennedy recapitulated and clarified Scalia's points—Kennedy reaffirmed that few proportionality challenges had been successful outside the context of capital punishment and that the Eighth Amendment cannot be invoked in support for the disproportionality argument, as it "does not require strict proportionality between crime and sentence, but rather forbids only extreme sentences that are grossly disproportionate to the crime" (Findlaw website, *Harmelin v. Michigan* 3).

The decision in *Harmelin v. Michigan* warned prospective appellants that the Supreme Court would not tolerate Eighth Amendment arguments over the fairness of sentencing guidelines promulgated by the Commission. The Court, in effect, discouraged appealing the guidelines and implicitly admonished judges to have extremely substantial justification for departing from the guidelines (which the Court maintained through its insistence on the primacy of "legislative prerogative"). Therefore, the high courts have most often heard sentence appeals and determined judges' compliance with guidelines (von Hirsch 9). Appellate courts have had little incentive to uphold departures on cases except in very unusual circumstances.

Perhaps the only motivation for sentencing judges to risk departing from all ranges was the lofty hope that many judges had departed on the same guideline. "Frequent departures from the cell ranges for a particular type of case, for example, may suggest that the ranges themselves need amendment. Through such "feedback" the commission can alter and try to improve the guidelines over time" (von Hirsch 9). However, an individual judge would have to rely on a ubiquitous departure from a specific guideline as well as the sentencing commission's taking notice of the departures and deciding to act upon them. The chances of all these factors occurring is minimal, and therefore a departing judge must ground his departure well or stay within the guidelines.

However, *Koon v. United States* reaffirmed the permissibility of departures and encouraged appellate courts to allow sentencing judges more discretion, in effect reinvigorating the concept of judicial discretion. This 1996 case involved the decision by a District Court judge to grant two downward departures to Los Angeles police officer

...ing their sentences from the 70 to 87 month range prescribed by the U.S. guidelines (30 months) convicted of violating the constitutional rights, under color of law, dney King. The sentencing judge based the first departure on the misconduct of victim, which he claimed "contributed significantly to provoking the offense" (Findlaw website, *Koon v. United States* 1). The District Court provided four factors in support of the second departure: "(Findlaw website, *Koon v. United States* 1) petitioner was unusually susceptible to abuse in prison; (Findlaw website, *Koon v. United States* 2) that petitioners would lose their jobs and be precluded from employment in enforcement; (Findlaw website, *Koon v. United States* 3) that petitioners had been subjected to successive state and federal prosecutions; and (Findlaw website, *Koon v. United States* 4) that petitioners posed a low risk of recidivism" (Findlaw website, *Koon v. United States* 4).

The Court held that an appellate court should not review *de novo* a decision to depart from the Guideline sentencing range, but instead should ask whether the sentencing court abused its discretion (Findlaw website, *Koon v. United States* 4). Justice Kennedy emphasized that the U.S. Sentencing Guidelines do not "eliminate all of the district court's traditional sentencing discretion. Rather, it allows a departure from the range if the court finds 'there exists an aggravating or mitigating circumstance of a kind, to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the Guidelines, Section(s) 3553 (b)'" (Findlaw website, *Koon v. United States* 2). Kennedy refers to the explicit explanation provided by the Commission regarding the application of the Guidelines to a "heartland" of typical cases that do not "adequately ... consider] atypical cases ..." (Findlaw website, *Koon v. United States* 2) Kennedy distinguishes between "encouraged," "discouraged," and "unmentioned" bases for departure.

According to Kennedy, courts may depart on the basis of an encouraged factor if that factor is not accounted for within the applicable Guideline. A court's discretion to depart on the basis of a discouraged guideline or an encouraged one already accounted for within the Guideline, is much more circumscribed—a court may depart on these factors "only if the factor is present to an exceptional degree or in some other way makes the case different from the ordinary case" (Findlaw website, *Koon v. United States* 2). In cases where the Guidelines are silent on a factor deemed relevant by the sentencing judge, that court must

after considering the structure and theory of relevant individual Guidelines and the Guidelines as a whole, decide whether the factor is sufficiently unusual to take the case out of the Guideline's heartland, bearing in mind the Commission's expectation that departures based on factors not mentioned in the Guidelines will be 'highly infrequent' (Findlaw website, *Koon v. United States* 3).

In the next paragraph of the decision, Kennedy again returns to his effort to bolster the authority of the district court. "Although Section(s) 3742 established a limited appellate review of sentencing decisions, Section(s)3742(e)(4)'s direction to 'give due deference to the district court's application of the guidelines to the facts' demonstrates that the Act was not intended to vest in appellate courts wide-ranging authority over district court sentencing decisions" (Findlaw website, *Koon v. United States* 3). In the section of the opinion addressing the validity of the district court's departures in the *Koon* case, Kennedy writes "For a court to conclude that a factor must never be considered would be to usurp the policy-making authority that Congress vested in the

Commission/' (FindLaw website, *Koon v. United States* 3).

The Supreme Court ultimately remanded the case back to the District Court as it deemed some elements of the departure valid and others invalid. The failure of the Court to make a decisive judgment on the future of Officer Stacey Koon is quite ironic in light of the number of decisive statements it did make in regard to District Court discretion. Kennedy quoted the U.S. Sentencing Reform Act of 1984 in his defense of the wide discretion still held by district courts. "[T]he court of appeals shall give due regard to the opportunity of the district court to judge the credibility of the witnessed and shall accept the findings of fact to the district court unless they are clearly erroneous" (FindLaw website, *Koon v. United States* 9). He also cited a letter from Pamela G. Montgomery, Deputy General Counsel, United States Sentencing Commission (March 29, 1996): "To ignore the district court's special competence—about the 'ordinariness' or 'unusualness' of a particular case—would risk depriving the Sentencing Commission of an important source of information, namely, the reactions of the trial judge to the fact-specific circumstances of the case ..." (FindLaw website, *Koon v. United States* 10).

According to Harlan Braun, counsel for Stacey Koon, his client noted another irony in the decision. "I, [more than anyone else in America], helped more black defendants get lower sentences." Koon struck upon one of the major repercussions of this case: to bolster the authority and discretion of sentencing judges who may have formerly been loathe to depart from mandatory minimum and maximum guidelines.

REFERENCES

Congressional Quarterly Almanac. 98th Congress, 2nd session ... 1984, Volume XL, Washington D.C.: Congressional Quarterly Inc., 1985.

Congressional Quarterly Almanac. 100th Congress, 1st session ... 1987, Volume XLIII, Washington D.C.: Congressional Quarterly Inc., 1988.

Hutchison, Thomas W, David Yellin, et. al. *Federal Sentencing Law and Practice*. Second Edition. St. Paul: West Publishing Col., 1989.

FindLaw Internet Legal Resources, www.fedworld.gov/cgi-bin/waisgate.waisdocid=0601712856+0+0+0&waisaction=retrieve

Braun, Harlan. Criminal defense attorney, Los Angeles.

Von Hirsch, Knapp, and Tonry. *The Sentencing Commission and Its Guidelines*. Boston: Northeastern UP, 1987.

The Republican Party and Women: The Party's External Move to the Center

By Brenda Baer

If we are to accomplish the goals of bringing people back to the party and, at the same time, expanding its base, moderate and traditionally conservative Republicans must literally fight for the party's soul. We have allowed the forces of the religious fundamentalism with its message of moral absolutism about social and cultural issues to take over the party in many states.

- Congresswoman Constance Morella (R-MD), 1993

The Republican Party is one of the oldest political parties and its survival depends on its ability to reshape itself to mold to the needs of contemporary society. Its strength in the political arena is contingent on voters' acceptance of the ideas and views for which it stands. The current political trend is to become part of the center and the Republican party is trying to join the bandwagon. The center is usually the middle point of activity. In politics, the center is a point where most people can agree on a particular view. For this to happen, the central meeting place cannot be too liberal or too conservative.

This current shift involves an increasing amount of bipartisan cooperation to show that the two parties are not on opposite sides of the spectrum and can work together towards a mutual goal. Yet the party is presenting these mainstream views despite an internal struggle between the right wing of the party and those that are more moderate. The Republicans are trying to use personality politics as opposed to issue politics to gain votes. To this extent, their strategy is to put the media focus on women because women are often centrists. While this unusually moderate message is being relayed to the public, official party stances are moving to a more conservative standpoint. The irony of this situation is that part of the Republican oath is that, "I believe we must retain those principles worth retaining, yet always be receptive to new ideas with an outlook broad enough to accommodate thoughtful change and varying points of view." The current party is trying to retain their conservative views but its outlook is fettered by any point of view that is not as conservative. The centrists, many of who are highlighted by the party in order to gain votes, are facing the problem of trying to direct the party in a more moderate path while being faced with extraordinary strength in the opposition.

Women are at the core of this struggle because they are the ones being pushed to the front by the party. Beginning in the 1980's the Republican Party placed women in the spotlight at their conventions. Most recently in the 1996 Convention, which nominated Senator Bob Dole as the party's candidate for president, Congresswoman Susan Molinari gave the keynote address. Her selection to represent the party to the world during the best prime time media slot indicates the party's commitment to