

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CR 03-2xx LH

XXXXXXXXXXXXXXXXX XXX,

Defendant.

MOTION TO IMPOSE SENTENCE
WITHOUT REGARD TO SENTENCING GUIDELINES

COMES NOW the defendant by and through counsel and, pursuant to U.S. Const. Article III, Amendment V, 18 U.S.C. §§ 3553, 28 U.S.C. §§ 991-998 and applicable statutes and rules, moves this court to impose sentence in this case without regard to U.S. Sentencing Guidelines. As grounds, defendant states:

1. By virtue of the structural and substantive changes of the PROTECT Act, Pub.L. 108-21 (“PROTECT”), the U.S. Sentencing Guidelines violate the separation of powers doctrine and constitute unconstitutional encroachment by the legislative branch on the judicial function of sentencing. As such, this court should impose sentence considering only the factors set out in 18 U.S.C. § 3553(a)(1)-(3) and (6)-(7).

2. The Sentencing Reform Act of 1984, as amended, 18 U.S.C. § 3551, *et seq.* and 28 U.S.C. §§ 991-998, (the Act) established the U.S. Sentencing Commission and a system of Federal Sentencing Guidelines that direct and limit judicial discretion at federal sentencing. In *U.S. v. Mistretta*, 488 U.S. 361, 109 S.Ct. 647 (1989), the U.S. Supreme

Court upheld the constitutionality of the sentencing guidelines against challenges that the Act constituted an improper delegation of legislative authority to the judiciary and that the structure, composition and placement of the Sentencing Commission violated the doctrine of separation of powers by including Article III judges appointed by the executive. In reaching this conclusion the Supreme Court stated “judicial participation on the Commission ensures that judicial experience and expertise will inform the promulgation of rules for the exercise of **the Judicial Branch’s own business - that of passing sentence on every criminal defendant.**” 488 U.S. at 408, 109 S.Ct. 673 (emphasis added). It is this “uniquely judicial subject of sentencing” this “heart of the Judicial Function” (*Id.*) that has been compromised by the PROTECT Act.

3. The U.S. Supreme Court consistently has given voice to and has reaffirmed the Central Judgment of the Framers of the Constitution that, within our political scheme, the separation of governmental powers into three coordinate branches is essential to the preservation of liberty. *Mistretta*, 488 U.S. at 380; *see, e.g., Morrison v. Olson*, 487 U.S. 654, 685-696, 108 S.Ct. 2597, 2616-2662 (1988); *Bowsher v. Synar*, 478 U.S. 714, 725, 106 S.Ct. at 3188(1986). Madison, writing about the principle of separated powers, said: “No political truth is certainly of greater intrinsic value or is stamped with the authority of more enlightened patrons of liberty.” *The Federalist* No. 47, p. 324 (J. Cooke, Ed. 1969).

4. The U.S. Supreme Court has recognized, as Madison admonished at the founding, that the Constitution mandates that “each of the three general departments of government [must remain] entirely free from the control or coercive influence, direct or

indirect of either of the others,” *Humphrey’s Executor v. U.S.*, 295 U.S. 602, 629, 55 S.Ct. 869, 874 (1935). The framers did not require and indeed rejected the notion that the three branches must be entirely separate and distinct. *See, e.g., Nixon v. Administrator of General Services*, 433 U.S. 425, 443, 97 S.Ct. 2777, 2790 (1977); *U.S. v. Nixon*, 418 U.S. 683, 94 S.Ct. 3090 (1974). However “where the whole power of one department is exercised by the same hands which possess the whole power of another department, the fundamental principles of a free Constitution are subverted.” *The Federalist* No. 47, pp. 325-326 (J. Cooke Ed. 1961) (emphasis in original). *See, Nixon v. Administrator of General Services*, 433 U.S. at 442, fn. 5.

5. The exercise of sentencing authority has, historically, been a cooperative venture of the legislative, executive and judicial branches of government. *Mistretta*, 364-366, 109 S.Ct. 650-651. The U.S. Supreme Court has stated:

Historically, the federal sentencing - the function of determining the scope and extent of punishment - never has been thought to be assigned by the Constitution to the exclusive jurisdiction of any one of the three branches of government. Under the indeterminate sentencing policy in effect before adoption of the guidelines and the Sentencing Reform Act of 1984, Congress defined the maximum, the judge imposed a sentence within the statutory range, and the Executive Branch’s parole official eventually determined the actual duration of imprisonment. *See, Williams v. New York*, 337 U.S. 241, 248, 69 S.Ct. 1079, 1083, 93 L.Ed. 1337 (1949).

The U.S. Supreme Court stated that this approach to federal sentencing did not violate separation of powers because “if a given policy can be implemented only by a combination of legislative enactment, **judicial application**, and executive implementation, no man or group of men will be able to impose its unchecked will.” *U.S. v. Brown*, 381 U.S. 437, 443 85 S.Ct. 1707, 1712, 14 L.Ed. 2d 484 (1965)(emphasis

added).

6. However, in approving the structure, placement and composition of the Sentencing Commission and the Sentencing Guidelines, the Supreme Court was careful to state that its approval was dependent in great part on the fact that “substantive judgment in the field of sentencing” 488 U.S. at 396, 109 S.Ct. at 668 remained in the hands of judges. Similarly, as set out above, the Supreme Court stated “judicial participation on the Commission ensures that judicial experience and expertise will inform the promulgation of rules for the exercise of the Judicial Branch’s own business - that of passing sentence on every criminal defendant.” 488 U.S. at 408, 109 S.Ct. at 673.

Rather than establish mandatory punishments for all federal offenses, as it has the authority to do, Congress has attempted to control federal criminal sentences by a system of mandatory sentencing guidelines. Lacking the political will or political capital to establish a national, federal mandatory sentencing scheme Congress has attempted a legislative end run via the Sentencing Guidelines to exert control over federal sentencing. The problem with this end run is that it tramples the judicial process along the way. While the goal of this end run may be legitimate, it simply cannot take a path that does violence to the integrity of the judicial function.

In ruling that “the independence of the Judicial Branch must be “jealously guarded” against outside interference” the Supreme Court stated:

While we have some reservation that Congress required such a dialog in this case, the Constitution does not prohibit Congress from enlisting federal judges to present a uniquely judicial view on the uniquely judicial subject of sentencing. In this case, at least, where the subject lies so close to the heart of the judicial function, and where purposes of the Commission are

not inherently partisan, such enlistment is not coercion or co-optation, but merely assurance of judicial participation.

488 U.S. at 408, 109 S.Ct. at 673-4.

7. The Supreme Court's reference to "reservations" in 1989 was prescient. Since *Mistretta* was decided there have been almost 600 amendments to the Sentencing guidelines. Almost all of these amendments further restrict and limit the judicial function at sentencing. What started out as a system of guidelines and guided discretion has become over time a cage, entrapping and even eliminating judicial discretion rather than guiding it. As clearly seen in PROTECT there is no indication that this process will stop any time soon. In fact, all indications are that this process will expand to include other aspects of judicial performance. *See, e.g.* Rules 413-415 Federal Rules of Evidence (Mandatory admissibility of prior acts evidence in sex assault cases). The delicate balance of the federal sentencing structure and process so narrowly and carefully approved by the Supreme Court in *Mistretta* in 1989 has morphed into an accusatory, politicized process that evinces no respect for the traditional judicial function of sentencing or the coequal institution of the Judiciary.

PROTECT is the last straw upsetting the delicate balance of power between the branches of government. PROTECT was passed without substantive hearing or debate. PROTECT was added as the last minute "Feeney Amendment" to the national "Amber Alert" bill. Authorship of the sentencing provisions of the "Feeney amendment" is yet unclear. PROTECT directs the Sentencing Commission to "substantially limit the incidence of downward departures" and yet authorizes a new class of departures in

approving “fast track” early disposition departure programs in USSG § 5K3.1.

Subsequent analysis by the Sentencing Commission points out the infirmities and inconsistencies in the assumptions and dictates of PROTECT, (*DOWNWARD DEPARTURES FROM THE FEDERAL SENTENCING GUIDELINES (in reponse to section 401(m) Of Public Law 108-21)* U.S. Sentencing Commission, October, 2003).

Yet Congress has initiated no remedial action. Bills to undo the PROTECT Act, endorsed by the Judicial Conference of the United States (The JUDGES Act, S. 1086, H.R. 2213, 108th Congress), languish in committee with little hope of passage.

PROTECT abandons the cooperative, deliberative process of guidelines amendment by study, publication, comment and approval in favor of direct Legislative authorship of guidelines provisions. *E.g.* PROTECT § 401(b) (rewriting USSG § 5K2.0) Considering the one party majority in both houses of the Legislative Branch and the Executive, the potential for further politicization of the judicial process is manifest. Manipulation of the judicial function now appears to be an accepted political response to sensational criminal cases. This should stop.

8. As stated by Mr. Justice Brandeis in *Olmstead v. U.S.*, 277 U.S. 438, 479, 48 S.Ct. 564, 573 (1928), “The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning, but without understanding.” The insidious encroachment of the Sentencing Guidelines on the judicial function of sentencing is sufficient to rise to the level of a separation of powers violation. It is not just overt and complete control over courts’ judgments that violates separation of powers, but “interference” and indirect control as well. *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 223, 225 (1995).

The three different branches of government are to be “free from the control or coercive influence, direct or indirect,” of another branch. *Humphrey’s Executor v. U.S.*, 295 U.S. at 629, quoted in *Mistretta*, 488 U.S. at 380. The judiciary, in performing its essential functions, must be “free from the remotest influence” of other branches. *Humphrey’s Executor* 295 U.S. at 630.

Separation of powers analysis focuses not just on literal and technical statutory provisions, but on “practical consequences in light of the larger concerns that underlie article III.” *Mistretta*, 488 U.S. at 393 (quoting *Commodity Futures Trading Commission v. Schor*, 478 U.S. 833, 857 (1986)). See also, *Nixon v. Administrator of General Services*, 433 U.S. 425, 443 (1977) (focusing on “potential for disruption”) *Mistretta*, 488 U.S. at 383 (fn. 13).

9. The “practical consequences” of the guidelines’ encroachment is apparent in this case. 8 U.S.C. §1326, the statute under which Mr. Samora is charged, contains a maximum sentence of 20 years. That statute contains no mandatory minimum. Yet through the guidelines’ web of laws, demi laws and half laws, the essential judicial function of determining where within the statutory range Mr. Samora should be sentenced has been circumscribed to the point where the court performs only a ministerial function. If the law affords judges discretion then individual sentences for individual defendants should be for individual judges to determine. If there is no discretion then the law should show its face and state that clearly for all to see. In short, Congress should plainly set the parameters and get out of the courtroom. Under the current system, Congress is in the courtroom examining individual cases and individual decisions, micromanaging the

judicial function to ensure that sentencing decisions comport with prevailing political pressures.

10. The U.S. Sentencing Guidelines, as amended by PROTECT, are pervasive, affecting every aspect of sentencing in almost every federal criminal case. This is all the more true in cases in which a departure is requested, as in the instant case. Despite the severability provision of the PROTECT Act, the guidelines as a whole have been revealed as an unconstitutional encroachment on the fundamental judicial function of determining individual sentences in individual cases. The only effective way for the court to reassert its independence and to reclaim control over the essential judicial function of sentencing is to declare the U.S. Sentencing Guidelines as a whole unconstitutional and to impose sentence without regard to Sentencing Guidelines.

11. Considering the difficulty of sentencing another human being, the appeal of the sentencing guidelines to judges is apparent. However the system that has evolved calls to mind the interchange between Roper and Thomas More in “A Man for all Seasons”

Roper: So now you'd give the Devil benefit of law!

More: Yes. What would you do? Cut a great road through the law to get after the Devil?

Roper: I'd cut down every law in England to do that!

More: Oh? And when the last law was down, and the Devil turned round on you - where would you hide Roper, the laws all being flat? This country's planted thick with laws from coast to coast - man's laws, not God's - and if you cut them down - and you're just the man to do it - d'you really think you could stand upright in the winds that would blow then? Yes, I'd give the devil benefit of law, for my own safety's sake.¹

¹Bolt, Robert, “*A Man for all Seasons*” Vintage Books, Random House 1990 ed.

With PROTECT's individual reporting requirements singling out "liberal" judges because of decisions rendered in individual cases, it is becoming clear that the court should give Mr. Samora the benefit of the law of separation of powers- for its own safety's sake.

12. Counsel for the government, AUSA James Tierney opposes this motion.

WHEREFORE, the defendant respectfully requests this court to impose sentence in this case without regard to the Sentencing Guidelines, to declare the U.S. Sentencing Guidelines unconstitutional, and for such other and further relief as the court deems proper.

I hereby certify that a true copy of the foregoing was delivered to AUSA James Tierney and USPO Shannon Bohlken at their respective boxes at the U.S. Courthouse, Albuquerque, NM, this 13th day of February, 2004.

Respectfully submitted,

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