

Sec. 1—The Congress

Legislative Powers

sions and its limitation of removal to a “good cause” standard. The Court nonetheless noted the circumscribed nature of the reduction, the discretion of the Attorney General to initiate appointment, the limited jurisdiction of the counsel, and the power of the Attorney General to ensure that the laws are faithfully executed by the counsel. This balancing, the Court thought, left the President with sufficient control to ensure that he is able to perform his constitutionally assigned functions.

A notably more pragmatic, functional analysis suffused the opinion of the Court when it upheld the constitutionality of the Sentencing Commission in *Mistretta v. United States*.³¹ Charged with promulgating guidelines binding on federal judges in sentencing convicted offenders, the seven-member Commission, three members of which had to be Article III judges, was made an independent entity in the judicial branch. The President appointed all seven members, choosing the judges from a list compiled by the Judicial Conference, and he could remove from the Commission any member for cause. According to the Court, its separation-of-powers jurisprudence is always animated by the concerns of encroachment and aggrandizement. “Accordingly, we have not hesitated to strike down provisions of law that either accrete to a single Branch powers more appropriately diffused among separate Branches or that undermine the authority and independence of one or another coordinate Branch.”³² Thus, to each of the discrete questions, the placement of the Commission, the appointment of the members, especially the service of federal judges, and the removal power, the Court carefully analyzed whether one branch had been given power it could not exercise or had enlarged its powers impermissibly and whether any branch would have its institutional integrity threatened by the structural arrangement.

Although it is possible, even likely, that *Morrison* and *Mistretta* represent a decision by the Court to adopt the functional analysis for all separation-of-powers cases, the history of adjudication since 1976 and the shift of approach between *Myers* and *Humphrey’s Executor* suggest caution. Recurrences of the formalist approach have been noted. Additional decisions must be forthcoming before it can be decided that the Court has finally settled on the functional approach.

³¹ 488 U.S. 361 (1989). Significantly, the Court acknowledged reservations with respect to the placement of the Commission as an independent entity in the judicial branch. *Id.* at 384, 397, 407–08. As in *Morrison*, Justice Scalia was the lone dissenter, arguing for a fairly rigorous application of separation-of-powers principles. *Id.* at 413, 422–27.

³² 488 U.S. at 382.