

## Sec. 1—The Congress

## Legislative Powers

and thereby to trigger imposition of criminal penalties, set by statute, that vary according to the level of a drug's classification by the Attorney General.<sup>184</sup>

Congress may also confer authority on administrators to prescribe criteria for ascertaining an appropriate sentence within the range between the maximum and minimum penalties that are set by statute. The Court upheld Congress' conferral of "significant discretion" on the Sentencing Commission to set binding sentencing guidelines establishing a range of determinate sentences for all categories of federal offenses and defendants.<sup>185</sup> Although the Commission was given significant discretionary authority "to determine the relative severity of federal crimes, . . . assess the relative weight of the offender characteristics listed by Congress, . . . to determine which crimes have been punished too leniently and which too severely, [and] which types of criminals are to be considered similar," Congress also gave the Commission extensive guidance in the act, and did not confer authority to create new crimes or to enact a federal death penalty for any offense.<sup>186</sup>

***Delegation and Individual Liberties.***—Some Justices have argued that delegations by Congress of power to affect the exercise of "fundamental freedoms" by citizens must be closely scrutinized to require the exercise of a congressional judgment about meaningful standards.<sup>187</sup> The only pronouncement in a majority opinion, however, is that, even with regard to the regulation of liberty, the standards of the delegation "must be adequate to pass scrutiny by the accepted tests."<sup>188</sup> The standard practice of the Court has been to interpret the delegation narrowly so as to avoid constitutional problems.<sup>189</sup>

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(1946). The Court summarized these cases in *Loving v. United States*, 517 U.S. 748 (1996), drawing the conclusion that "there is no absolute rule . . . against Congress' delegation of authority to define criminal punishments."

<sup>184</sup> *Touby v. United States*, 500 U.S. 160 (1991).

<sup>185</sup> *Mistretta v. United States*, 488 U.S. 361 (1989).

<sup>186</sup> 488 U.S. at 377–78. "As for every other offense within the Commission's jurisdiction, the Commission could include the death penalty within the guidelines only if that punishment was authorized in the first instance by Congress and only if such inclusion comported with the substantial guidance Congress gave the Commission in fulfilling its assignments." *Id.* at 378 n.11.

<sup>187</sup> *United States v. Robel*, 389 U.S. 258, 269 (1967) (Justice Brennan concurring). The view was specifically rejected by Justices White and Harlan in dissent, *id.* at 288–89, and ignored by the majority.

<sup>188</sup> *Kent v. Dulles*, 357 U.S. 116, 129 (1958).

<sup>189</sup> *Kent v. Dulles*, 357 U.S. 116 (1958); *Schneider v. Smith*, 390 U.S. 17 (1968); *Greene v. McElroy*, 360 U.S. 474, 506–08 (1959) (Court will not follow traditional principles of congressional acquiescence in administrative interpretation to infer a delegation of authority to impose an industrial security clearance program that lacks the safeguards of due process). More recently, the Court has eschewed even this limited mode of construction. *Haig v. Agee*, 453 U.S. 280 (1981).