

**Sec. 1—Judicial Power, Courts, Judges**

creature of federal statutory action. The general descriptive language suggests that, but the Court seemingly goes beyond this point in its determination whether the right at issue in the case, the recovery of preferential or fraudulent transfers in the context of a bankruptcy proceeding, is a “private right” that carries with it a right to jury trial. Though a statutory interest, the actions were identical to state-law contract claims brought by a bankrupt corporation to augment the estate.<sup>128</sup> *Schor* was distinguished solely on the waiver part of the decision, relating to the individual interest, without considering the part of the opinion deciding the institutional interest on the merits and utilizing a balancing test.<sup>129</sup> Thus, although the Court has made some progress in reconciling its growing line of disparate cases, doctrinal harmony has not yet been achieved.

**Noncourt Entities in the Judicial Branch**

Passing on the constitutionality of the establishment of the Sentencing Commission as an “independent” body in the judicial branch, the Court acknowledged that the Commission is not a court and does not exercise judicial power. Rather, its function is to promulgate binding sentencing guidelines for federal courts. It acts, therefore, legislatively, and its membership of seven is composed of three judges and three nonjudges. But the standard of constitutionality, the Court held, is whether the entity exercises powers that are more appropriately performed by another branch or that undermine the integrity of the judiciary. Because the imposition of sentences is a function traditionally exercised within congressionally prescribed limits by federal judges, the Court found the functions of the Commission could be located in the judicial branch. Nor did performance of its functions contribute, in any meaningful way, to a weakening of the judiciary or an aggrandizement of power, the Court observed.<sup>130</sup>

**JUDICIAL POWER****Characteristics and Attributes of Judicial Power**

Judicial power is the power “of a court to decide and pronounce a judgment and carry it into effect between persons and parties who

<sup>128</sup> *Granfinanciera*, 492 U.S. at 51–55, 55–60.

<sup>129</sup> 492 U.S. at 59 n.14.

<sup>130</sup> *Mistretta v. United States*, 488 U.S. 361, 384–97 (1989). Clearly, some of the powers vested in the Special Division of the United States Court of Appeals for the District of Columbia Circuit under the Ethics in Government Act in respect to the independent counsel were administrative, but because the major nonjudicial power, the appointment of the independent counsel, was specifically authorized in the appointments clause, the additional powers were miscellaneous and could be lodged there by Congress. Implicit in the Court’s analysis was the principle that a line exists that Congress may not cross. *Morrison v. Olson*, 487 U.S. 654, 677–685 (1988).