

1 ROSEMARY SCAPICCHIO, ESQ., Boston, Mass.; on
2 behalf of the Respondent Fanfan.

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1 P R O C E E D I N G S

2 (1:00 p.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear
4 argument now in Number 04-104, United States
5 against Freddie J. Booker and 04-105, United
6 States against Duncan Fanfan.

7 Mr. Clement.

8 ORAL ARGUMENT OF PAUL D. CLEMENT

9 ON BEHALF OF THE PETITIONER

10 MR. CLEMENT: Thank you, Mr. Chief
11 Justice, and may it please the Court:

12 This case, and these cases, concern the
13 constitutionality of the twelve hundred criminal
14 sentencings that take place in Federal court each
15 week. If this Court re-affirms its traditional
16 understanding of the relationship between the
17 Guidelines, and the statutory maximum penalties
18 set forth in the United States Code, an
19 understanding reflected in a series of this
20 Court's decisions dealing with the Guidelines,
21 than the constitutionality of those criminal
22 sentencings remains secure.

23 On the other hand, if this Court takes a
24 different view, and treats the outer bounds of the
25 Guideline ranges as if they were statutory

1 maximums, then the majority of those criminal
2 sentencings become constitutionally dubious, and
3 this Court must confront difficult remedial
4 issues.

5 This is, of course, not the first time
6 that this Court has confronted a challenge to the
7 constitutionality of the Guidelines or to the
8 Commission. To be sure, in those previous cases,
9 this Court has never considered the precise Sixth
10 Amendment issue before the Court today. But,
11 nonetheless, those previous cases are instructive,
12 because all of those cases, Dunnigan, Witte,
13 Watts, and Edwards, all reflect a particular
14 understanding of the relationship between the
15 Guidelines and the statutory maximum sentences for
16 each specific crime defined in the United States
17 Code. And all of those decisions suggest that the
18 statutory maximum in the Code is the relevant
19 focal point for constitutional analysis.

20 So, in the Witte case, for example, the
21 finding of relevant conduct in the Witte case increased
22 his sentence under the Guidelines by two hundred
23 months. Nonetheless, this Court rejected the
24 double jeopardy challenge before the Court by
25 emphasizing that that consideration of relevant

1 conduct did not increase his penalty beyond the
2 statutory maximum.

3 Likewise in the Edwards case, this Court
4 considered the propriety of a judicial finding of
5 crack cocaine that increased the Guideline
6 sentence, when the jury was instructed in the
7 alternative, to find cocaine or crack. Now, even
8 though the judicial finding had the effect of
9 raising the punishment under the Guidelines, this
10 Court found no serious Sixth Amendment issue
11 raised precisely because the effect of the judge's
12 finding did not take the sentence beyond the
13 maximum for a cocaine-only conspiracy.

14 JUSTICE SCALIA: And you say we found no
15 serious Sixth Amendment issue raised. Was the
16 right of jury trial issue argued in that case, and
17 decided?

18 MR. CLEMENT: In the Edwards case, a Sixth
19 Amendment issue and, I think, fairly including the
20 jury trial, was raised in that case. Now, I've tried
21 to go back and look briefs in that case and I have
22 to admit, they're a little difficult to get
23 through in terms of the precise issue that was
24 being raised.

25 JUSTICE SCALIA: The right to jury trial

1 is fairly clear and stark, and I just don't
2 recall that being argued in any of those cases.

3 MR. CLEMENT: Well, it was argued, I
4 think, fairly clearly in the Watts case, I mean,
5 there was a section -- Watts, of course, was a
6 summary reversal, so you have to go and look at
7 the brief in opposition in the Watts case. And if
8 you do, there's a separate paragraph in the
9 argument section denominated the jury trial
10 right.

11 And I think in some respects, the Watts
12 case is a particularly clear indicator that this
13 Court has rejected the view of the Guidelines that
14 Respondents embrace. Because Justice Stevens was
15 quite prophetic in his dissent in that case. He
16 embraced the precise understanding of the
17 significance of the outer bound of the Guidelines
18 range in his Watts dissent, and no member of this
19 Court joined that dissent, and no member found the
20 disposition with respect to Watts

21 JUSTICE STEVENS: That just proves they
22 don't listen to me as much as they should.

23 MR. CLEMENT: It may very well prove that,
24 Justice Stevens, because you were very clear about
25 the point, just to remind you, in the Watts case

1 there were two cases before the Court, there was
2 the Putra case, and there was the Watts case, they
3 were consolidated. And with respect to Putra, you
4 can envision that case, or characterize that case
5 as being sort of a collateral estoppel, double
6 jeopardy case, but as you correctly recognized,
7 very clearly, in your Watts dissent, with respect
8 to Mr. Watts, the finding, the criminal finding of
9 acquittal was based on 924(c), which requires use
10 of a gun. The sentencing enhancement was done
11 based on an enhancing factor that only requires
12 possession of a gun. So there wasn't any
13 collateral estoppel effect in that case.

14 But, nonetheless, in your dissent you
15 pointed out, in footnotes 2 and 4 that it still
16 had the effect of raising his sentence above the
17 outer bound of the Guidelines range, and that,
18 because that was done on the basis of a
19 preponderance of the evidence, rather than a
20 beyond a reasonable doubt standard, that that
21 raised a constitutional problem, and you would
22 have reversed. The rest of the Court was happy to
23 summarily reverse in that case.

24 JUSTICE SCALIA: Mr. Clement, here's the
25 problem I have with the Government's argument

1 insofar as it does not urge that we reverse
2 Blakely, I know that you want us to do that as
3 well. But assuming we adhere to Blakely, it seems
4 to me you have a cure that doesn't correspond to
5 the disease. You say that the reason the right to
6 jury trial does not apply here is because, after
7 all, these sentences have not been prescribed, or
8 these maximums have not been prescribed by the
9 legislature, but rather, have been prescribed by a
10 quasi-judicial agency.

11 But the right of jury trial is meant to
12 protect against whom? Who are you worried about
13 when you say, "I want to be tried by a jury."
14 You're not worried about the legislature, you're
15 worried about the judges, precisely. So I don't
16 care if the upper level of the Guidelines were
17 actually prescribed by a court, as opposed to the
18 Commission which is, I don't know what it is, but
19 it's not a court.

20 But even if it were prescribed by a court,
21 how would that eliminate the jury trial problem?
22 The whole reason for jury trial is we don't trust
23 judges.

24 MR. CLEMENT: With respect, Justice
25 Scalia, I'd like to make two observations. One, I

1 don't think the jury trial right is just a
2 juxtaposition of the role of the jury versus the
3 role of the judge, because if that were the only
4 factor at issue in this Court's Sixth Amendment
5 jurisprudence, it would be very difficult to
6 explain why it is that judicial fact-finding can
7 have the effects that it can under a purely
8 discretionary system, yet this Court has upheld
9 that time and time again.

10 The second point I'd like to make, is I do
11 think that this Court's Apprendi to Blakely line
12 of cases -

13 JUSTICE GINSBURG: Can we just go back to
14 the point you just made, it's a little different
15 when the judge has discretion and there's no --
16 the judge has discretion to take a whole bunch of
17 things into account, but they're not quantified.
18 And I think that was dramatically illustrated, the
19 difference, by the decision of Judge Lynch when he
20 said, "Well, I'll go back to the old ways of doing
21 it, I'll look at the Guidelines for some advice,"
22 he comes out with twenty-four months instead of
23 thirty-three months.

24 So I think there is a huge difference
25 between a judge taking account of many, many

1 factors, not giving them a specific quantity as
2 the Guidelines require.

3 MR. CLEMENT: Well, Justice Ginsburg, I
4 think there -- there certainly is a difference
5 between sentencing under the Guidelines, versus a
6 system of discretionary sentencing, or even a
7 system of discretionary sentencing where the
8 Guidelines have an advisory character, I'd
9 certainly concede that.

10 My point was, though, in making a
11 distinction between the role of the jury and the
12 judge, it's not just as simple as saying that the
13 jury trial right exists precisely to protect the
14 jury from the judge, because if that were the
15 case, the kind of fact-finding that Judge Lynch
16 engaged in, or the kind of fact finding that was
17 commonplace under discretionary sentencing also
18 takes roles away from the jury, and gives them to
19 the judge.

20 JUSTICE SCALIA: Yes, but we're talking
21 here about one precise role of the judge or of the
22 jury, and that is, to find a fact that is
23 necessary to keep you in jail for an additional
24 number of years. And the difference with
25 discretionary sentencing is if it's, you know, ten

1 to twenty years, what you know when you do the
2 crime is that you've laid yourself open to twenty
3 years.

4 Now, if you get a merciful judge, good for
5 you, I mean, that's lagniappe as they say in
6 Louisiana, but if you get a hanging judge, you've
7 got twenty years, and you know that when you
8 commit the crime, whereas we have a system now
9 where you are entitled to no more than so much. And I
10 find it just incompatible with jury trial right
11 to say that that fact must be determined, before
12 you can be kept in jail. And yet we're going let
13 it be determined by a judge. That bears no
14 resemblance to the discretionary sentencing
15 system.

16 MR. CLEMENT: With respect, Justice
17 Scalia, I think you've built in some assumptions
18 into that question, because under our system,
19 generally speaking if somebody wants to know what
20 the maximum exposure for a particular criminal
21 offense is, they would be well-advised to look at
22 the U.S. Code provision that specifies what the
23 maximum sentence is for that offense, because that
24 is their exposure, that's what they're told about
25 in their Rule 11 colloquy if they plead to the

1 crime, and if the judge makes certain findings, to
2 be sure, upward departure, whatever it takes in a
3 particular case, that is the maximum exposure that
4 the individual

5 JUSTICE SCALIA: It's not the maximum
6 exposure. If, for example, one of the factors is
7 whether the crime was committed with a firearm, I
8 know that if I don't use a firearm, under the
9 Guidelines, I can only get so many years, so
10 somebody has to find that I used a firearm, and if
11 I didn't, my maximum exposure is less.

12 MR. CLEMENT: Unless the judge departs for
13 some other reason, or the like. I mean, but certainly
14 that's true -

15 JUSTICE STEVENS: Or he makes a
16 mistake in finding.

17 MR. CLEMENT: I suppose that's true, too.

18 JUSTICE STEVENS: He finds a gun when
19 there really wasn't one.

20 MR. CLEMENT: So there are different ways
21 that you could get that sentence under the
22 Guidelines system. But if there's no mistake, and
23 no departure on some other grounds, we both
24 understand, I think, how the Guidelines work and
25 you're describing it correctly. But still, that

1 is a finding that is only necessary because of the
2 determination of the Commission and the
3 Guidelines, and that brings us back to the
4 question -

5 JUSTICE GINSBURG: Suppose the
6 determination, as is occasionally true of the
7 Guidelines, is made not by the Commission, but by
8 Congress itself? Or made by the Commission at the
9 direction of Congress? Then the distinction that
10 you're making between the maximum set by the
11 legislature and the guidance provided, or the
12 guidance to discretion under the Guidelines,
13 really doesn't stand up. So at least to the
14 extent that Congress directly enacts Guidelines,
15 would you concede that then, the critical finding
16 has to be made by the jury?

17 MR. CLEMENT: I would not concede that,
18 Justice Ginsburg, but let me first make clear that
19 in the case before us today, the Guidelines that
20 we have are promulgated by the Commission, and
21 were not the direct or indirect result of a
22 Congressional act the way that the, say, the
23 Protect Act added particular amendments to the
24 Guidelines, so that question is not directly posed
25 in this case.

1 The reason I would say that even in that
2 case there is a difference is because it is still
3 different when Congress goes in and amends a
4 particular Guideline in a sense in a sea of
5 Guidelines provided by the Commission. And I
6 think that's true, one, because amending a single
7 Guideline doesn't change the overall character of
8 the Guidelines.

9 But also because, when Congress decides to
10 take action not as a statute, but as an amendment
11 to a Guideline, it doesn't change the fundamental
12 character of the Guideline as a Guideline. And so
13 after -- the Protect Act for example, specifies a
14 period in which -- after which the Commission can
15 then amend that Guideline. Which is obviously not
16 a case that you can have with a statute consistent
17 with the Presentment Clause.

18 And to just give you another example, the
19 Sentencing Reform Act that has brought us here
20 today, one of the things it did was make specific
21 amendments to Federal Rule of Criminal Procedure
22 32. I think when Congress does that, it doesn't
23 make Federal Rule of Criminal Procedure 32 a
24 statute, it continues to be a Federal Rule, the
25 Federal Rules Advisory Committee could still modify

1 it after the fact, and so I think even in that
2 case, there's a difference in effect.

3 JUSTICE SOUTER: What is the difference in
4 effect? I mean, that's where I'm having trouble,
5 and I guess others are having trouble. Yes,
6 there's a difference in process, there may be a
7 difference, in some sense, in ultimate status, but
8 there isn't, it seems to me, any difference in
9 effect. The defendant in the courtroom is going
10 to suffer the same effect either necessitated or
11 sufficed by this fact which is just as crucial,
12 whether it's a rule, whether it's a guideline,
13 whether it's a statute, why should that make any
14 difference for the Sixth Amendment?

15 MR. CLEMENT: I think it should make --
16 well, I guess what I would respond to that,
17 Justice Souter, is this. I think that one thing
18 that emerges from this Court's recent Sixth
19 Amendment jurisprudence, is that the impact on the
20 defendant himself or herself is not the only test
21 that this Court looks to. Because from the
22 perspective of an individual defendant, they don't
23 care if they've gotten five extra years because a
24 judge made a finding under a discretionary regime,
25 or they got five extra years because the judge

1 made a finding that the legislature told the judge
2 to make, the practical effect is the same.

3 JUSTICE SOUTER: Well, the practical
4 effect is the same but in the moment before either
5 in theory they commit the crime or in the moment
6 before the trial is over or in the moment before
7 the sentence comes down, there is one big
8 difference in the two classes of cases. The
9 defendant is entitled to claim that he can not be
10 sentenced to the higher range unless a fact is
11 found. In a case of discretionary sentencing
12 range, within that range, he can not make that
13 claim, he can not make that assumption, and the --
14 that, it seems to me, is the point at which the
15 jury trial right has got to focus.

16 MR. CLEMENT: Well, I think again, as
17 Justice Stevens suggested earlier, I mean, that
18 may be true if you focus in on that single fact
19 under the Guideline system, but under the myriad
20 of various ways that your Guidelines sentence can
21 go up or down, it may be inappropriate under the
22 Federal Guideline system to focus in on the point
23 of analysis on that particular interval, of just
24 the one -

25 JUSTICE SOUTER: Why not?

1 MR. CLEMENT: Because, again, as a
2 defendant, you may have a case where there are
3 five or six potential enhancements, and there are
4 five or six potential departures, and your
5 sentence is going to be a product of the judicial
6 fact finding that goes in, in making those various
7 conclusions -

8 JUSTICE SCALIA: And each one is
9 appealable separately, each one is appealable
10 separately, it's a separate legal finding. And
11 the judge doesn't, in discretionary sentencing, he
12 doesn't have to make any factual finding, he can
13 just look at you and say, "I think you're a bad
14 actor, you've got forty years." We have a system
15 here where the judge must make factual findings,
16 and each one is appealable if he's made them
17 incorrectly.

18 MR. CLEMENT: I don't disagree with that
19 characterization of the Guidelines, but I still
20 think that is a difference from a pure
21 statutory scheme, it's different from a scheme
22 like this Court had before it in *Blakely* against
23 Washington, where the statute focuses you in on
24 just a couple of factors and you really can re-
25 conceptualize that regime as providing for a base

1 offense level and one or two aggravated grades of
2 the offense. As Judge Lynch observed in language
3 that we quoted on page four of our reply brief, you
4 really can't re-conceptualize the Guideline system
5 that way.

6 JUSTICE SOUTER: Well, the principal
7 reason you can't, or I think the principle reason
8 that you're advancing is, that the Guideline
9 system is so complicated. There are a myriad of
10 factors. As Justice Scalia says, why isn't each
11 one in that myriad subject to the same claim?
12 Surely, the argument can't be just because it's
13 more complicated, that the Sixth Amendment
14 evaporates.

15 MR. CLEMENT: I agree, Justice Souter, and
16 the point isn't that it's more complicated. If I
17 just continue with Judge Lynch's observation,
18 which, as I say, is quoted on page four of our
19 reply brief, it's not just that it's complicated,
20 it's that the mission of the Guidelines system is,
21 once, assuming that somebody's been convicted of
22 some Federal crime with certain elements defined
23 by Congress, then, what the Guidelines ask the
24 judge to do is evaluate the incident of criminal
25 activity and assess an appropriate punishment

1 without regard to whether it has met the certain
2 elements of a particular Federal crime. And so,
3 the really, the focus is quite different, and in
4 that sense, I think there is, there is more than a
5 difference of form between a set of guidelines
6 produced by a legislature and a set of guidelines
7 produced by the sentencing commission.

8 JUSTICE SCALIA: I find very little
9 difference between telling him to evaluate it with
10 regard to particular elements of a crime and
11 asking him to evaluate it with regard to
12 particular sentencing facts. The result is the
13 same. You're asking him to evaluate it in
14 light of certain facts that he has to find.
15 Whether you call them the one or the other, he's
16 doing the same thing. If he finds this fact you
17 get three more years; if he doesn't find it, you
18 don't. I mean, you know, as far as the real
19 outcome is concerned, what difference does it make
20 whether you call it an "element" or a "required
21 fact for sentencing"?

22 MR. CLEMENT: Well, I think there are
23 differences between the two. I think if you look
24 at the Washington system that you had before you
25 in the Blakely case, it was a product of the

1 legislature, and so, not surprisingly, there was a
2 focus on the crimes as defined by the legislature,
3 there was a presumptive range for each crime, and
4 then there were a handful of things that got you
5 into - added three years, like a firearm, and
6 then there was basically the upward departure
7 authority or the downward departure authority, and
8 that was it. And that makes sense; a legislature
9 is going to be predominantly focused on the
10 statutorily defined crimes.

11 In the context of the Guidelines, on the
12 other hand, it is a much more widely variant
13 focused, and what it's focusing on is the criminal
14 activity as a whole. There are many factors that
15 can increase it, there's many factors that can
16 decrease it, and

17 JUSTICE GINSBURG: Is that complexity, is
18 the key or, suppose these Guidelines were proposed
19 by the Commission, just as they are, with all
20 their complexity, but they were proposed as
21 legislation, and then Congress enacted these
22 Guidelines, would you be able to make the argument
23 that you're making, still? The Federal system,
24 now legislative guidelines is viable after
25 Blakely?

1 MR. CLEMENT: I don't think so. I think
2 in that, in that context we would be limited to an
3 argument to asking this Court to overrule Blakely.
4 But that is not to say that, that, what I want to
5 make the point, though, is ultimately if pushed -
6 and your hypothetical pushes us - if pushed, the
7 argument is one of form, that the fact that these
8 emanate from the sentencing commission makes a
9 constitutional difference. But I don't want to
10 lose the fact in making that concession that there
11 is still a real difference between the way the
12 Federal Guidelines work and the way the Washington
13 Guidelines work, and the Federal Guidelines work
14 exactly as you would expect: sentencing guidelines
15 promulgated by an entity located in the Article
16 III branch, and consisting of Article III members;
17 and the Washington Guidelines system works

18 JUSTICE GINSBURG: But that's not so clear
19 anymore, it just happens that there are three
20 members, but they don't have to be any judicial
21 members, under the current legislation.

22 MR. CLEMENT: That's true, Justice
23 Ginsburg, but there

24 JUSTICE SCALIA: They're still in the
25 judicial branch, right?

1 MR. CLEMENT: Still in the judicial
2 branch, Justice Scalia, and there are the same
3 number of judicial members on the Commission now
4 as there were when this Court considered the
5 Mistretta decision. And I think Mistretta itself
6 recognized that you could have bodies located in
7 the judicial branch that were auxiliary to the
8 judicial branch, even if they consisted, quote,
9 "solely of non-judges."

10 So I don't think that's what's
11 dispositive. I think what's dispositive
12 ultimately is what this Court recognized in the
13 Mistretta decision. In the Mistretta decision,
14 this Court made clear that the Commission was
15 constitutionally located in the Article III branch
16 precisely because it did not take on the
17 quintessentially legislative tasks of setting
18 maximum punishments and defining the elements of
19 Federal crimes.

20 CHIEF JUSTICE REHNQUIST: Mistretta
21 might have come out the other way had it not been
22 for that observation.

23 MR. CLEMENT: I think that's exactly
24 right, Mr. Chief Justice. And I can talk more
25 about that in terms of the severability issue,

1 which is question two. But I think especially if
2 you get to the point where prospectively the
3 proposal is to treat sentencing enhancement
4 factors under the Guidelines exactly as if they're
5 elements of Federal crimes, they would have to be
6 included in indictments and have to be charged to
7 the jury on beyond a reasonable doubt.

8 Then I don't see how Mistretta survives
9 anymore or at least how Mistretta allows that
10 particular judicial remedy to go forward. Because
11 at that point, you've really had the Commission
12 become transformed into precisely what this Court
13 said it wasn't, as a matter of constitutional law,
14 in the Mistretta case.

15 JUSTICE KENNEDY: The paradigm that the
16 cases discuss in Blakely and in the cases
17 leading up to it from Apprendi, are facts such as
18 the amount of drugs, was there a weapon, was there
19 violence performed against the victim. And if the
20 Court finds that these are so much like an element
21 that they have to be proved, and adheres to its
22 jurisprudence and invalidates the Guidelines to
23 that effect, is there any argument that either the
24 Government makes or that some of the commentators
25 would make, that there are other kinds of

1 sentencing considerations that can be called
2 factual, to be sure, but that should be the
3 judge: say, lack of remorse as demonstrated after
4 the verdict; the fact that after the verdict,
5 investigation shows that of the two defendants,
6 one was the real ringleader, streetwise, the other
7 was kind of a naive dupe; or that there was a
8 failure to cooperate with the person presenting
9 the -- preparing the sentencing report.

10 These are facts in a certain way. Is it
11 for a penny, in for a pound? Do we have to treat
12 all of these as factual, or is there any progress
13 to be made in trying to see if there are some,
14 some facts that are, are like elements and some
15 that are not. That would be a -- it would take a
16 number of cases, I suppose, to elaborate that.

17 MR. CLEMENT: Justice Kennedy, I think
18 that the thrust of respondents' position -- they
19 can obviously speak for themselves to this point,
20 but I think the thrust of their position is in for
21 a penny, in for a pound, that if you extend
22 Blakely to the guidelines, then that's it, the
23 guidelines go out. I think the consequence of
24 accepting the Government's position here, that the
25 guidelines are different, would not foreclose the

1 possibility for a more fine-tuned analysis that
2 focused on the particular effects of particular
3 guidelines ranges, or the particularly enhancing
4 factors and the like.

5 And I think one thing that ought to give
6 the Court caution before it extends *Blakely* all
7 the way to the guidelines is, if you look at the
8 guidelines, there are certainly some enhancing
9 factors or some factors that increase punishment
10 under the guidelines, that look nothing like any
11 traditional element of any crime.

12 JUSTICE KENNEDY: What, what, what tests
13 would you propose, or the commentators? How do we
14 distinguish the permitted kind of fact that the
15 judge can find, and those that must be for the
16 jury?

17 MR. CLEMENT: Well, I mean, two things,
18 Justice Kennedy. I don't want to get too far
19 afield in the sense that we think that for
20 purposes of this case, the Court could distinguish
21 the guidelines and could still maintain the very
22 bright line of *Blakely* as applies to legislative
23 enactments. But if this Court were going to
24 either, with respect to legislative enactments or
25 in the particular field of the guidelines, try to

1 develop another test to differentiate elements
2 from - I'm sorry, elements from sentencing
3 factors, I think this Court could get guidance in
4 the same kind of analysis that it's done in the
5 context of affirmative defenses.

6 As Apprendi itself recognized, in the
7 Patterson case, this Court decided that in that
8 context, it would not adopt one bright line or
9 another and just give up the enterprise of drawing
10 lines in between. And I think a similar
11 enterprise could be done under the guise of
12 dealing with the guidelines. But I think the
13 thrust of the Government's position here today is
14 that you shouldn't accept the Respondent's
15 particular challenge to the guidelines because
16 that does have the effect of "in for a penny, in
17 for a pound," and wiping the guidelines out.

18 JUSTICE STEVENS: Mr. Clement, following
19 up on Justice Kennedy's thought, if we adhere to
20 the strict language in Apprendi itself, as quoted
21 below, any - solely on the fact reflected in the
22 jury verdict or the plea of the plea bargain, that's - that
23 establishes the maximum. What percent of the
24 total number of sentences that are imposed in the,
25 by the Federal system today would violate that

1 rule?

2 MR. CLEMENT: Well, Justice Stevens, let
3 me try to answer it as best as I can. I want to
4 make the observation, though, that the only
5 estimate I can give you is based on retrospective
6 data, obviously, and it could be -

7 JUSTICE STEVENS: Well, let's look at the
8 future and assume that in 97 percent of the cases
9 which are plea bargains, you could agree on what
10 the relevant facts are. That certainly could be
11 done. And in the 3 percent that are trialed, it
12 is my impression that a very small number of those
13 actually involve violations of the Apprendi rule.
14 Is that correct?

15 MR. CLEMENT: I'm not sure that's right,
16 Justice Stevens. Let me answer it this way,
17 because I can only answer it based on the data I
18 have.

19 JUSTICE STEVENS: See, it's relevant
20 because underlying all this is a question do the
21 guidelines fail in toto, or do they only fail with
22 respect to those relatively small number of cases in
23 which there's a violation of the Apprendi rule?

24 MR. CLEMENT: I understand, and let me
25 answer it this way, which is looking

1 retrospectively at the data from 2002. If you
2 consider all the cases that either went to trial
3 or pled and that, they're not differentiated, the
4 two aren't differentiated, then about 65 percent
5 of the cases raise a potential Blakely or Appendi
6 type issue, so that would be the starting point
7 for the analysis. Now, as you pointed -

8 JUSTICE STEVENS: In raising the issue, it
9 depends on what - the issue you describe. A lot
10 of people describe it as an issue when you just
11 use the guidelines at all. Do they raise an
12 issue, involve it in a sentence over and above the
13 amount that would be authorized by either the jury
14 verdict or the plea bargain?

15 MR. CLEMENT: Yes, that's 65 -

16 QUESTION: Do you think 65 percent of the
17 cases do?

18 MR. CLEMENT: The numbers that we have is
19 65 percent. Basically, you have 44 percent of the
20 cases involve some chapter II or chapter III
21 enhancement or adjustment to the base level. And
22 then we've kind of looked, in addition to the 44
23 percent, we've looked at the drug cases, which by
24 the nature of the drug sentencing table, virtually
25 all of the drug cases, if they don't implicate a

1 mandatory minimum, involve a potential Blakely
2 upward adjustment. And so what we've done is, in
3 looking at these numbers, is to basically take all
4 the drug cases and then subtract that

5 JUSTICE STEVENS: They all, of course,
6 involve a potential upward adjustment. But do
7 they all involve actual sentences above the amount
8 that the jury verdict would have authorized?

9 MR. CLEMENT: Well, again, Justice
10 Stevens, I don't know, because that comes to a
11 second question, which is, if I understand your
12 question, which is, we know that 65 percent of the
13 cases raise a potentially, a potential Blakely
14 issue. Then the question is, well, if 97 percent
15 of the cases settle, is there a way to sort of
16 waive Blakely rights and the like, and make this
17 workable going forward? And it's hard to know
18 what the, what, what system will emerge.

19 JUSTICE STEVENS: The thing that -- I'm
20 sorry, but I really, it's important to me.
21 Raising an issue, the issue is always raised when
22 there's a possibility of a higher sentence, but I
23 don't think it's fair to assume that that 65 percent of
24 the sentences of tried cases actually resulted in
25 sentences higher than what the jury verdict would

1 have authorized.

2 MR. CLEMENT: Well, again, I can only give
3 you the numbers -

4 JUSTICE STEVENS: It's potentially that
5 every case does. But if in fact, most sentences
6 come within the maximum anyway, it's of course a
7 serious problem in those cases, but system-wide,
8 it's not nearly the problem that the figures
9 you've mentioned suggest.

10 MR. CLEMENT: Again, Justice Stevens, I
11 want to answer as best I can. The figures I have
12 suggest that 65 percent of the cases do involve an
13 upward adjustment of some kind. And so there is a
14 Blakely problem. So the only real question
15 is, all right, 65 percent of cases in the
16 world where nobody thought Blakely was a problem
17 for the guidelines involve those kind of upward
18 adjustments. There may be ways through plea
19 agreements and the like to have people waive their
20 Blakely rights in certain ways that may make the
21 system work a little bit better or deal with a
22 slightly reduced number of cases. But I think any
23 way you slice this, this is going to have a
24 tremendous impact on the reality of criminal
25 sentencing in the Federal system.

1 JUSTICE SCALIA: Well, as to past. I mean,
2 it may have a significant one-shot impact with
3 respect to cases that were decided without Blakely
4 in mind. But for the future, I, I just don't
5 agree with you that changes could make some
6 reduction. I think changes could provide for jury
7 findings whenever, whenever there's a need for a
8 higher sentence based on facts. I don't know;
9 what is the problem with that?

10 MR. CLEMENT: Well, I, well let me try to
11 address the remedial question then going forward.
12 If this Court were to find that Blakely is fully
13 applicable to the guidelines, then that's going to
14 raise some very serious and complex remedial
15 questions. One question, though, I think ought to
16 be clear, is that one option that shouldn't be on
17 the table is the idea that on a prospective basis,
18 the guidelines are severable in a way that makes
19 all enhancements or all upward adjustments
20 completely unavailable, and all downward
21 departures fully available. Because that system
22 is obviously nothing that Congress intended.

23 Now Respondents, for their part, don't
24 propose that rule, although they want to benefit
25 from effectively that rule for their own cases.

1 What they suggest is that on a going-forward
2 basis, you could include the sentencing enhancing
3 factors as, in the indictment and then send them
4 to the jury as effectively de facto elements of
5 the crime to be found by the jury beyond a
6 reasonable doubt. Now with respect, I think that
7 so-called Blakely-ization of the guidelines
8 creates an enormous amount of judicial lawmaking
9 and raises very serious separation of powers
10 problems.

11 JUSTICE SOUTER: What is, what is the
12 lawmaking part? I mean, if I have a choice -- if
13 I have -- let's put the question this way.
14 Congress has authorized the Commission and the
15 Commission has said, "If fact X is found, then the
16 range is higher." Is there a lot of lawmaking in
17 concluding that Congress and the Commission would
18 have preferred that range to be higher regardless of
19 whether a jury found the fact or a judge found the
20 fact? That doesn't seem like much of a stretch to
21 me. There may be other reasons not to do it. But
22 in terms of judicial lawmaking, it doesn't seem
23 like much to me.

24 MR. CLEMENT: Well, with respect, Justice
25 Souter, I think it is fairly ambitious judicial

1 lawmaking. You do have to take out a fair amount
2 of text to get the sentencing judge effectively
3 out of the business of fact-finding.

4 JUSTICE SCALIA: What text do you have to
5 take out?

6 MR. CLEMENT: You have to take out the
7 reference in 3553(b), that talks about what the
8 court finds, and then it makes a definite
9 reference to the court needing to find things in
10 order to have upward and downward departures.

11 JUSTICE SCALIA: It depends on what you
12 mean by the "court," doesn't it?

13 JUSTICE STEVENS: Just consider the word
14 court to mean jury. Jury or a judge.

15 MR. CLEMENT: And I think then -

16 JUSTICE SCALIA: Which - which is sometimes
17 done, there are statutes that refer to the court,
18 that -

19 MR. CLEMENT: And as we point out in our
20 brief, there are plenty of statutes that refer to
21 the court in distinction from the jury. I think
22 then if you look at 3742(e), which is the appeal
23 right, if you look at 3742(e), makes it quite
24 clear that on appeal, courts of appeals are
25 supposed to defer to the, to the fact, the facts

1 found by the district court. Now I think in the
2 context of the overall provision for judicial
3 review, that is clearly a reference to the
4 judge, not to the jury.

5 JUSTICE SCALIA: It seems to me, when
6 there is an ambiguity that construed one way
7 creates a constitutional statute and construed
8 another way creates an unconstitutional one, it's
9 an easy call.

10 MR. CLEMENT: Well, with respect, I don't
11 think there's any way to avoid a potentially
12 unconstitutional system going forward, because if
13 you treat these guideline factors that were
14 clearly created by the Commission and in some
15 cases created by Congress, on the assumption that
16 they would be used for judge fact-finding, and
17 then send them to the jury, then what you've done
18 prospectively -- it's one thing -- let me put it
19 this way. It's one thing to recognize that the
20 guideline factors that are enhancements have the
21 effect of increasing sentences and operate like
22 elements of crimes for retrospective
23 constitutional analysis, for finding a Sixth
24 Amendment problem, but it is quite another thing
25 to prospectively treat those factors exactly as if

1 they're elements of crimes, force them to be
2 included in the indictment, send them to the jury
3 beyond a reasonable doubt.

4 JUSTICE STEVENS: It just means that if a
5 different procedure is followed, you'll reach
6 precisely the same sentences the guidelines
7 reached.

8 MR. CLEMENT: Well, I actually don't think
9 that follows, Justice Stevens, because I think
10 taking guidelines that were clearly designed for
11 judge fact finding and sending them to the jury --

12 JUSTICE STEVENS: You think judges reach
13 different results on factual issues than juries
14 do? Is that part of your submission?

15 MR. CLEMENT: No. What my submission is,
16 is that taking guidelines that were designed for
17 judge fact finding and sending them and using them
18 for jury fact finding is going to have a very
19 disproportionate impact on some cases. Let me
20 give you an example if I could, to make the point.
21 If you think of two fraud cases that under the
22 guidelines

23 JUSTICE STEVENS: But keep it simple
24 because we're assuming that in most cases, there
25 aren't a host of factors but usually just two or

1 three, such as the drug quantity and did he find a
2 gun. Now in those where there's a fairly simple
3 fact to identify, would it make any difference in
4 the ultimate sentence that's imposed whether the
5 jury finds it or the judge finds it?

6 MR. CLEMENT: I think it would, Justice
7 Stevens. And if I could -- I'll keep it a very
8 simple fraud example.

9 JUSTICE STEVENS: Keep to that example
10 I've given you. The gun and the drug quantity.
11 Why would it make a difference?

12 MR. CLEMENT: Well, it might not make as much
13 a difference in the drug case --

14 JUSTICE STEVENS: Wouldn't it make any difference?

15 MR. CLEMENT: Well, here's how
16 it could make a difference,
17 if I could use the fraud example.

18

19 MR. CLEMENT: And then you may be able to
20 see how it could or could not relate to the
21 marijuana example or a drug example. In the
22 context of a fraud case, two fraud cases that are
23 sentenced the exact same way and treated as
24 uniform and proportional under the current system

25 JUSTICE STEVENS: And there's a difference

1 in sentence depending on the amount of
2 money that the fraud involved.

3 MR. CLEMENT: In the number of victims.
4 And what you'll have is -- if you think of one
5 fraud that involved one victim and a slightly
6 higher amount of money, and another fraud that
7 involved many victims and a slightly lower amount
8 of money, the current guideline system basically
9 tries to treat them the same.

10 Now with a single fraud victim, the idea
11 of Blakely-izing the guidelines may be relatively
12 straightforward. You include the loss amount in
13 the indictment. You put a special verdict form
14 with the amount of loss on it. And you call in
15 that one witness, and you can prove up your case
16 beyond a reasonable doubt.

17 But if you have a case of telemarketing --

18 JUSTICE STEVENS: In that case -- let's
19 take them one at a time. In that case, would it
20 make any difference whether the jury made the
21 finding or the judge made the finding?

22 MR. CLEMENT: I don't think it would,
23 Justice Stevens.

24 JUSTICE STEVENS: Okay. Then what

25 MR. CLEMENT: But that's what, what I want

1 to contrast it is with

2 JUSTICE STEVENS: Now can you give me a
3 case in which it would make a difference?

4 MR. CLEMENT: Sure. Imagine that you have
5 a telemarketing fraud where a thousand peoples --
6 a thousand individuals have been milked out of a
7 couple of dollars each. Now under the current
8 system, proving up the fraud amount for the judge
9 is not that difficult because you can get the
10 probation officer to testify, or some other way to
11 get the total amount of the fraud in front of the
12 judge. Under the system that Respondents propose,
13 you're going to have to call in every one of 2,000
14 individuals who was defrauded. Otherwise, I think
15 it's going to be very difficult to prove that
16 fraud amount in front of the jury beyond a
17 reasonable doubt. And that just is one example of
18 the disproportionate and disuniform effects

19 JUSTICE STEVENS: You don't think a very
20 large fraud such as you've described could be
21 proved through two or three witnesses?

22 MR. CLEMENT: I think it would be very

23 JUSTICE STEVENS: They used the Internet
24 and they had all said -- I am not persuaded.

25 MR. CLEMENT: Well, I suppose -

1 JUSTICE SCALIA: And if it can't be, maybe
2 the judges shouldn't go, be going around guessing
3 how many people have been defrauded. Or you know,
4 saying "more likely than not, on the basis of the
5 kind of evidence we usually don't accept in
6 criminal trials." Why is that okay? I don't
7 understand it.

8 MR. CLEMENT: Well, again, I think whatever
9 else is true, what you would be doing with such a
10 system is you'd be taking factors that I think
11 everyone concedes were designed by a Commission
12 that was upheld as constitutional precisely
13 because it did not have the effect of creating new
14 Federal crimes and statutory limits.

15 JUSTICE SCALIA: It doesn't make me feel
16 any good if I spend another 10 years in jail
17 because of it. Say, "Oh, well, don't worry about
18 it, it wasn't an element of the crime, after all."

19 [Laughter.]

20 MR. CLEMENT: No, I understand that,
21 Justice Scalia. I'm trying to talk about the
22 remedial question, though.

23 JUSTICE GINSBURG: May I ask

24

25 JUSTICE GINSBURG: - about practical

1 experience in that regard. I understand the
2 Department of Justice has told prosecutors that
3 now you allege these sentencing enhancers -- like
4 drug quantity, like amount of property stolen --
5 you allege them in the indictment, you prove them
6 beyond a reasonable doubt. Has that proved
7 intractably difficult in cases where it has been
8 attempted?

9 MR. CLEMENT: Well, Justice Ginsburg, I
10 think we don't have enough experience to know. I
11 think I can tell you one thing: that with a lot
12 of enhancements, putting something in the
13 indictment is not necessarily the difficult step.
14 There are some things like relevant conduct that
15 can be very challenging to try to formulate in an
16 indictment. But for a lot of the factors that
17 enhance a sentence, it's relatively easy to put it
18 in the indictment itself.

19 I think the trickier difficulties come up
20 in terms of trying to instruct the jury,
21 especially in cases where there are multiple
22 enhancements.

23 CHIEF JUSTICE REHNQUIST: Well certainly
24 in the case of, say, perjury at trial, you
25 couldn't possibly allege that in the indictment

1 because you won't know.

2 MR. CLEMENT: That's completely right, Mr.
3 Chief Justice. And those cases are just out.

4 JUSTICE SOUTER: They're not out. They've got
5 to be separately prosecuted.

6 MR. CLEMENT: And that's never been the
7 under -- I mean, that's true, there may be some
8 cases that you could bring a separate perjury
9 prosecution, but this court

10 JUSTICE SOUTER: Well, I don't know of any
11 case in which you can't.

12 MR. CLEMENT: Well, there may be
13 situations where there's an obstruction of justice
14 that wouldn't necessarily make out all the
15 elements of a perjury prosecution.

16 JUSTICE SOUTER: Then I guess, we ought
17 to have an obstruction of justice crime with
18 defined elements that can be prosecuted.

19 MR. CLEMENT: Well, Justice Souter, with
20 respect, I mean, this Court, both before the
21 guidelines and after the guidelines, rejected the
22 argument that the only way to enhance a sentence
23 for obstruction of justice was to bring a separate
24 perjury prosecution.

25 JUSTICE SOUTER: And I, I would, I would

1 take the same position today, unless you were
2 going to define it, in terms of a condition that
3 is both necessary and sufficient to expand the
4 sentencing range of the crime that you are
5 nominally prosecuting the person for. I mean,
6 that's the rub.

7 MR. CLEMENT: But that's

8 JUSTICE SOUTER: Let me go --

9 MR. CLEMENT: That's what this Court had
10 before it in Dunnigan. And this Court said that
11 that was not problematic. It was obstruction
12 during the trial. And this Court upheld it on
13 reliance on Grayson, a pre-guidelines case, and
14 this Court said that the additional rigor and
15 predictability instilled by the guidelines did not
16 make a constitutional difference.

17 JUSTICE BREYER: I've listed four
18 categories of things that you think would be very
19 difficult to prove to a jury at the trial, but not
20 to a judge at sentencing. The first is the vast
21 amount of information now and prior to guidelines
22 that were contained in the presentence report.
23 That information, most of which was used since
24 history was begun, maybe a hundred years ago, is
25 simply not available until the trial is over.

1 The second happens to be the things that
2 the Chief brought up, matters committed at trial,
3 such as perjury.

4 The third sort of thing are those things
5 that just get too complicated when you try to list
6 15 in indictment, such as victim -- put them all
7 together -- victim, brandishing the gun, et
8 cetera.

9 And the fourth kind of thing are the
10 things that are too difficult to explain to a
11 jury. Try explaining even "brandishing" to a
12 jury, and if you can do that one, which may be
13 easy, try the multiple-count rules.

14 All right. So I have those four things.
15 Now, are there others?

16 MR. CLEMENT: I think that's a fair
17 summary, Justice Breyer. I think on sort of how
18 complicated it gets to take something that was
19 designed for a judge and then send it before the
20 jury in jury instructions, I would ask the Court
21 to look at the Medas case, which we cite on page
22 15 of our reply brief.

23 JUSTICE BREYER: All right, if I
24 believe that that is just out of the question,
25 it's so complicated, nobody could do it, it would

1 be a radical change, Congress could never have
2 intended that, what about a much simpler approach?
3 What you would do is take 3553(b), and you say,
4 "Read the word 'shall' -- i.e. 'shall apply the
5 guidelines' -- to 'may,'" so that the guidelines
6 become advisory, either because the "shall"
7 becomes a "may" or because you give each judge the
8 power to give any reasonable reason at all as to
9 why the Commission's guideline, they didn't
10 actively consider this factor. In other words,
11 read 3553(b) as permissive.

12 And now, assuming I've expressed myself on
13 the underlying Apprendi questions, so I, but
14 suppose Blakely does apply, would you -- is --
15 what would be wrong with taking that approach?

16 MR. CLEMENT: Assuming I understand the
17 approach you propose, there would be nothing wrong
18 with taking that approach.

19 JUSTICE BREYER: All right, I have thought
20 of one thing that might be wrong.

21 [Laughter.]

22 JUSTICE BREYER: So I'll ask you about it,
23 if you want.

24 [Laughter.]

25 JUSTICE SCALIA: Could it be that "shall"

1 does not mean "may"? Right?

2 [Laughter.]

3 JUSTICE SCALIA: Oh, that's not it?

4 "Shall" --

5 JUSTICE BREYER: All right, well, I -- you
6 see nothing wrong with that. That makes the
7 guidelines advisory, and there are a number of
8 objections -- maybe not, maybe big, maybe small.
9 One objection I was worried about is -- I'm giving
10 you my thought process, you know, and I -- because
11 I'm trying to get a -- your response -- is that if
12 we did take that approach, you'd leave the
13 appellate section in place. That means every time
14 the judge didn't use the guideline, the appeals
15 courts would have to review for reasonableness.
16 Now that would be in place. We would discover
17 judges all over the country having different views
18 on that. Courts of appeals would have different
19 views about was or what was not reasonable. We
20 would be here to review those differences, and we
21 would become the sentencing commission. I thought
22 I had escaped.

23 [Laughter.]

24 JUSTICE BREYER: Now, how, how serious an
25 objection is that? Or do you recommend that, if

1 you lose on this point, we take the approach of,
2 in that way, making the guidelines advisory?

3 MR. CLEMENT: I would -- I would take the
4 approach that you should make the advisory -- the
5 advisory guidelines -- the guidelines as advisory.

6 Now, with respect to whether or not you've
7 escaped from the burden of serving on the
8 sentencing commission, I don't think that the
9 reading of 3742, the appeal provision, that you've
10 envisioned is necessarily foreordained. I think -
11 -

12 JUSTICE KENNEDY: Well, have you escaped
13 Apprendi? If discretion is cabined by guidelines
14 and appellate courts review, for the abuse of
15 discretion in applying those guidelines, why isn't
16 that the same kind of entitlement that the
17 Apprendi/Blakely opinion is predicated on to begin
18 with?

19 JUSTICE SCALIA: Absolutely. Vote me for
20 that. I mean, after all, judges used to define
21 the elements of crimes, didn't they? And the mere
22 fact that the elements at common law were defined
23 by judges rather than by the legislature didn't
24 mean that you didn't have to have a jury find
25 them. So if courts are going to establish the

1 guidelines, so long as they are still binding, it
2 seems to me you still need a jury finding, or you
3 haven't escaped Apprendi.

4 MR. CLEMENT: A couple of observations,
5 Justice Scalia. First of all, you're exactly
6 right, since 1812 we've abandoned a system where
7 judges can define the elements of crimes. And
8 that's why, if I leave you with one thought on the
9 remedy, I would think that it's inappropriate to
10 allow an entity within the judicial branch to have
11 that effect on a prospective basis. I think that
12 would be a very serious separation of powers
13 problem. I think it would dwarf the separation of
14 powers problem that at least you found quite
15 significant in the Mistretta case.

16 Now, if I can address Justice Kennedy's
17 question about the appeals system simply
18 replicating the Apprendi or the Blakely problem.
19 First of all, we would suggest that the appeal
20 process that you've envisioned would not violate
21 Apprendi and Blakely. And that's one of the
22 reasons that we think the Commission wouldn't
23 violate Blakely. Because what we see is a
24 distinction in this court's cases. They have said
25 this Court has said that judicial discretionary

1 sentencing doesn't implicate the Sixth Amendment.
2 This Court has said that legislative-directed
3 sentencing does implicate the Sixth Amendment.
4 What the guidelines present is a situation of
5 judicial sentencing that's directive. We would
6 suggest -- we would suggest --

7 JUSTICE SCALIA: Judicial discretionary
8 sentencing, as I understood it, never permitted an
9 appellate court to increase the sentence given by
10 the district judge. Do you have any cases,
11 where an appellate court said the district judge
12 did not give enough years, where there was
13 discretionary sentencing?

14 MR. CLEMENT: Well, Justice Scalia, I can
15 point you to the DiFrancesco case, where this
16 Court approved an earlier Federal statute that
17 allowed for appeals in sentencing.

18 JUSTICE SCALIA: That may be under
19 statute, but I do not know, at common law, that
20 when you talked about the discretion in the
21 courts, it meant that in a criminal case a court
22 of appeals could increase the sentence because of
23 a -- because of an abuse of discretion by the
24 sentencing judge. I'm unfamiliar with any such
25 case.

1 JUSTICE BREYER: Well, there are lots.
2 There are lots, actually. If you -- if -- I ask,
3 "Is it right, that?"

4 [Laughter.]

5 JUSTICE BREYER: But, I mean, if you take
6 common law to mean England, as well as the United
7 States, there weren't here, because the sentences
8 weren't appealable, but in England, they were
9 appealable, and they had a common law work out of
10 what they called the "tariff," which is what the
11 range of reasonableness was or wasn't. And the
12 prosecution, I believe, could appeal it of being
13 too low; and the defense, being too high. And the
14 question was, Was the sentence reasonable? The
15 appellate court could set it.

16 Now, if we had a system like that -- and
17 this is my serious question -- is it
18 unconstitutional under Apprendi if appeals court
19 judges reviewing a sentence could say, "This is
20 the range of reason, this is arbitrary up here, or
21 this is arbitrary down there"?

22 MR. CLEMENT: Well, I think our position
23 would be that that kind of system would be
24 constitutional. As I was suggesting to Justice
25 Kennedy, we think, because that system would be

1 constitutional, we think the guidelines are also
2 constitutional. I think Justice Kennedy is right,
3 though, that somebody that says that that system
4 is unconstitutional and the guidelines is
5 unconstitutional is not going to be particularly
6 impressed by that reading of 3742 that gets you to
7 that result.

8 And that's why I want to leave you with an
9 important thought, which is, that reading of 3742
10 is not foreordained. This court could say that
11 the guidelines should be applied in an advisory
12 fashion, and that all that would be left of the
13 Government --

14 JUSTICE O'CONNOR: That just seems so contrary
15 to what Congress intended. There's no evidence
16 that they intended this scheme to be advisory.
17 They told the Commission to set up a scheme that
18 would be applied, because they wanted to make
19 sentencing more uniformly applied in the Federal
20 scheme of things. I think it's a real stretch to
21 try to argue for the position taken by some
22 Federal judges in one of the amicus briefs that,
23 "It's just advisory, don't worry." And I find it
24 very difficult to understand how appellate review
25 could be applied to such a scheme.

1 MR. CLEMENT: But, Justice O'Connor,
2 that's why, to be clear, we've only argued in
3 favor of an advisory view of the guidelines if we
4 get to the remedial question, because I think
5 you're absolutely right, if you look at what
6 Congress actually intended, it's crystal clear
7 they did not intend the guidelines to be advisory.
8 But it's equally crystal clear they didn't intend
9 the guidelines to be the basis for jury fact-
10 finding.

11 CHIEF JUSTICE REHNQUIST: Well, what if
12 this Court said the guidelines are
13 unconstitutional, period, and then judges simply
14 looked to the guidelines, figuring, well, this is
15 as good an idea as anybody else has about
16 sentencing?

17 [Laughter.]

18 MR. CLEMENT: I think that actually would
19 be the proper remedy. That's effectively what we
20 ask for, Mr. Chief Justice. And --

21 JUSTICE GINSBURG: And if it were done
22 that way, why would it be that you would try to
23 change the word "shall" to "may" in (b)? Why not
24 just have Section 3553(a), which does list the

1 judges may take into account in sentencing, one of
2 -- among three or four others?

3 MR. CLEMENT: No, I think that's fair,
4 Justice Ginsburg. I mean, in responding to
5 Justice Breyer's hypothetical, I didn't mean that
6 was the only way to get to the result we've
7 propose. And the particular way, in our briefs,
8 that we suggest that you would get to an advisory
9 use of the guidelines on a prospective basis is
10 precisely as you suggest. You don't read 3553(b)
11 to change "may" to "shall"; instead, you read it,
12 unfortunately, I guess, if we've reached the
13 remedial question, to be unconstitutional. And
14 then, at that point, you focus in on 3553(a) --

15 JUSTICE GINSBURG: Which has the
16 guidelines --

17 MR. CLEMENT: Absolutely. Absolutely.

18 JUSTICE GINSBURG: -- as one of other
19 factors.

20 MR. CLEMENT: Exactly. And then if I
21 could just --

22 JUSTICE SCALIA: Except that that, as
23 Justice O'Connor suggests, deprives the statute of
24 its principal purpose, which was to constrain --
25 to constrain judicial discretion. If there's

1 anything clear about it, that was clear about, it
2 was that they did not want judges to have as much
3 discretion as they had. And now you say these
4 things are just advisory. It seems to me much
5 easier to -- I wanted to ask you one very precise
6 question. Assuming I think "court" can mean
7 "jury" -- it doesn't have to mean "the judge" --
8 where in, in the whole guideline system, how many
9 sections do not permit the use of "court" to mean
10 "jury"?

11 MR. CLEMENT: Well, I think --

12 JUSTICE SCALIA: I think there's only one
13 where, where it may not work.

14 MR. CLEMENT: Well, I don't see how it
15 works in 3742(e), because if you read that section
16 in context it's talking about determinations made
17 by the court, it's talking about determinations
18 made by the court after the presentence report
19 comes in --

20 JUSTICE SCALIA: That -- that may be the
21 one.

22 MR. CLEMENT: -- and so I think that
23 3742(e) has to go. I think the fairer --

24 JUSTICE SCALIA: All right. Anything else
25 has to go?

1 MR. CLEMENT: Well, I think the fairer
2 reading of 3553(b) is that it has to go, too. I
3 know that you don't agree with --

4 JUSTICE SCALIA: I don't know about fairer.

5 MR. CLEMENT: I think you disagree with me
6 on that. I think 994 -- 99 -- 994(a), in Title
7 28, which talks about the guidelines being for the
8 use of the sentencing court, I would suggest that
9 has to go, but I assume you would say sentencing
10 court can mean sentencing judge. Then at that
11 point, there's a provision of rule 32 of the
12 Federal Rules of Criminal Procedure that must go,
13 because it talks about the role of the district
14 court in a way that I don't think you can, sort
15 of, find to mean the jury. And then I think,
16 obviously, the sentencing guidelines provision
17 that makes clear that it is the judge that's to
18 make the findings by a preponderance of the
19 evidence, has to go, as well. So I think that is
20 -- that is -- that is the sum total of the carnage
21 of deciding --

22 [Laughter.]

23 MR. CLEMENT: -- that the guidelines are
24 fully applicable with Blakely.

25 JUSTICE KENNEDY: If you -- if you

1 interpret "court" to mean "jury," how many of the
2 sentencing factors which will be submitted to the
3 jury are -- would be a radical departure from the
4 tradition, the role of the jury in the criminal
5 system in the Anglo-American tradition?

6 MR. CLEMENT: I think very, very many of
7 them. I mean, I can't give you a better answer
8 than that, in terms of the number. But the Medas
9 case, on page 15 of a reply brief that I suggested
10 the Court look at, provides one example. There,
11 you had a case where it had already gone to the,
12 to the jury on a general verdict, and it had the
13 typical kind of general verdict form you see.
14 It's had a six-count indictment. There were 12 boxes,
15 guilty/non-guilty for each of the six crimes in
16 the indictment. Then when there was a concern
17 that Blakely might require jury findings on all
18 the various enhancements, the Government tried to
19 put in a 20-page supplemental special verdict that
20 tried to walk through the various factors that the
21 jury would try to find. I think that just, in
22 miniature, shows you the kind of transformation
23 you're talking about. You go from a 12-line
24 general verdict form, which is the classic kind of
25 verdict form used in the criminal system, to 20

1 pages of a supplemental special verdict form.

2 JUSTICE SCALIA: Well, you ought to get
3 rid of that prosecutor. That didn't seem to me
4 very sensible at all.

5 MR. CLEMENT: With respect, Justice
6 Scalia, I think if you look at that supplemental
7 verdict form, and you look at the guidelines,
8 there's no other way to do it. And I think, as
9 the judge in that case said, one of the things
10 that comes up in virtually every guidelines case
11 is the issue of relevant conduct. Now, that is a
12 very, very difficult thing to try to instruct the
13 jury on. The application notes that the
14 Commission itself have come up in span eight and a
15 half pages of very small, single spaced text. To
16 try to give that as jury instructions, I think,
17 would leave the jury completely bewildered.

18 Then, you'd also, though, even if you
19 could get past the instruction problems, the
20 effect of considering relevant conduct is going to
21 have a transformative effect on what goes before
22 the jury, because relevant conduct asks the jury
23 not to focus on the elements of the specific
24 crime; the relevant conduct focuses on the other
25 acts of that individual defendant and, if there's

1 joint criminal, if there's a joint criminal
2 undertaking, the reasonably foreseeable events of
3 acts of others taken in furtherance of the joint
4 undertaking. Now, the effect of using that
5 guideline, designed for judges, and sending it to
6 the jury, is effectively to transform many, many
7 cases from individual defendant cases to scheme
8 cases or conspiracy cases.

9 So in tallying up the carnage and the
10 wreckage of applying these guidelines designed
11 clearly for judge fact-finding and willy - nilly
12 sending them to the jury, I think you have to
13 include the confusion and the difficulty of that.

14 JUSTICE STEVENS: Mr. Clement can I -- you
15 don't have an awful lot of time left, and I want
16 to ask you one rather important question, to me.
17 There's been a lot of talk about severability of
18 the statute, and I can understand the concept that
19 we'll only apply it in certain categories of
20 cases. But normally when I consider severability,
21 I'm thinking of the text of a written statute. Is
22 there a particular provision of the sentencing
23 guidelines that you think can be severed from the
24 rest of the statute?

25 MR. CLEMENT: Well, Justice Stevens, I

1 think with respect to the Sentencing Reform Act
2 itself, the statute, the provision that we think
3 needs to be severed is 3553(b). Then, with
4 respect to the Guidelines, I think our view on the
5 guidelines --

6 JUSTICE STEVENS: Just sticking to the
7 statute, take out 3553(b) in its entirety, you
8 just --

9 MR. CLEMENT: Well, the specific reference
10 to "shall" -- this is basically the "shall/may"
11 issue -- I think that needs to be severed. I'm
12 not quite sure what of 3553(b) is left after you
13 do that, but that's -- that's the important thing.

14 JUSTICE STEVENS: I'm just not sure what's
15 left of the whole statute if you take that
16 provision out entirely.

17 MR. CLEMENT: Well, I think, as Justice
18 Ginsburg suggests, 3553(a) still stands alone as
19 telling the court that it should consider that.
20 And I think, in fact, if you look at the
21 legislative history, I actually think the language
22 in 3553(b) was, was a floor amendment that was
23 added later. So it certainly doesn't pull the
24 whole statute down to take that one provision out
25 of the statute.

1 If I could reserve the remainder of my
2 time.

3 CHIEF JUSTICE REHNQUIST: Very well, Mr.
4 Clement.

5 Mr. Kelly, we'll hear from you.

6 ORAL ARGUMENT OF T. CHRISTOPHER KELLY
7 ON BEHALF OF RESPONDENT BOOKER

8 MR. KELLY: Thank you, Mr. Chief Justice,
9 and may it please the Court:

10 The first 22 years of Freddie Booker's
11 sentence punished him for crimes that were proved
12 to a jury. But the judge added another eight
13 years to his sentence, years that were only
14 authorized by the judge's finding that Booker
15 probably committed other crimes. Like thousands
16 of other Federal defendants, Booker's sentence was
17 increased based on crimes that were never proved
18 to a jury beyond a reasonable doubt. The final
19 years of a Federal sentence are as worthy of
20 constitutional protections against undeserved
21 punishment as are the first years.

22 JUSTICE BREYER: Suppose that the judge
23 had simply sentenced the defendant, let's say, to
24 ten years, but looked at these other crimes and
25 said, "In my practice, I go to 15." All right?

1 That's the basic situation. Is that
2 unconstitutional?

3 MR. KELLY: Under the guidelines or under
4 the --

5 JUSTICE BREYER: No, no, there are no
6 guidelines.

7 MR. KELLY: No, that is not
8 unconstitutional.

9 JUSTICE BREYER: All right. Now suppose
10 the people who do exactly the same thing is the
11 Court of Appeals applying the word "reasonable,"
12 these officials of the judicial branch. See,
13 they're reviewing the sentence for reasonableness.
14 They say, "In our practice when a person commits
15 bank robbery, if it's just an ordinary case, we think
16 it's reasonable five years; but if he has a gun,
17 seven years." So if there's no gun, five years is
18 the most that isn't arbitrary. But if there's a
19 gun, you can go to seven years. In other words,
20 an English-type tariff system. Is that
21 unconstitutional?

22 MR. KELLY: I believe it would be, Justice
23 Breyer.

24 JUSTICE BREYER: You would think it would be.
25 So --

1 MR. KELLY: Right.

2 JUSTICE BREYER: -- now suppose the people
3 who do it are the parole commission -- as happen
4 to be in the United States, executive branch
5 officials. For the last hundred years, they get
6 sentences, for example, that were indeterminate,
7 or might have been for 30 years. And what they
8 say, "It is our practice, assuming good behavior,
9 that if it was just an ordinary bank robbery we'll
10 keep him in for five years, but if he had a gun,
11 he's going to stay in for seven." Is that
12 unconstitutional?

13 MR. KELLY: Parole commissions don't
14 increase sentences. Parole commissions decrease
15 sentences.

16 JUSTICE BREYER: No, what they have is an
17 indeterminate sentence.

18 MR. KELLY: Right.

19 JUSTICE BREYER: California.

20 MR. KELLY: Yes.

21 JUSTICE BREYER: And what they say is, "In
22 our practice, what we do is, we think it's
23 reasonable, and we will keep a person in prison
24 for five years in an ordinary bank robbery, but
25 for seven years if he has a gun." I'm asking if

1 that's constitutional. Because that's the
2 practice that they follow under parole commission
3 guidelines, and they've done it now for a decade,
4 I make up.

5 MR. KELLY: That is constitutional, Your
6 Honor. And the reason is --

7 JUSTICE BREYER: That's constitutional.

8 JUSTICE SCALIA: Does he have an
9 entitlement to a certain number of years under any
10 of these questions?

11 MR. KELLY: As I --

12 JUSTICE SCALIA: When you're sentenced to
13 an indeterminate sentence, he's not entitled to
14 parole at any time --

15 MR. KELLY: Other than venues --

16 JUSTICE SCALIA: -- is he?

17 MR. KELLY: No, not at all. And as I --

18 JUSTICE BREYER: What I'm trying to drive
19 at -- and I'll be -- is that I can't imagine a
20 court holding that a parole commission in the
21 executive branch that has exactly this same system
22 would be behaving unconstitutionally. It's
23 difficult for me to imagine -- though you say I'm
24 wrong on that -- a court holding it's
25 unconstitutional when a court of appeals does the

1 same thing reviewing for arbitrariness.

2 MR. KELLY: Well, perhaps I misunderstood
3 your second hypothetical, Your Honor. But my
4 understanding of the hypothetical was that if the
5 judge gave five years and the appellate court
6 said, "No, you should have given seven years
7 because of the existence of a certain fact" --

8 JUSTICE BREYER: You know, I --

9 MR. KELLY: "you must -- you must increase
10 the sentence --"

11 JUSTICE BREYER: I'm not phrasing the
12 question well. I'm trying to imagine sentencing
13 guidelines run by a parole commission, executive
14 branch officials. I'm trying to imagine
15 sentencing guidelines run under the word arbitrary
16 by ordinary courts of appeals panels reviewing the
17 sentences. And if those are both constitutional,
18 then, I would ask, why is it unconstitutional to
19 put the executive branch and judicial branch
20 officials together in one group called the
21 sentencing commission?

22 MR. KELLY: The relevant constitutional
23 principle doesn't have to do with whether it's the
24 executive branch of Government or the judicial
25 branch of Government; it has to do whether a fact

1 is necessary in order to increase a sentence.

2 JUSTICE BREYER: I understand that. And -
3 - well, maybe I'm just not going to get my
4 question across. I am trying to imagine Apprendi.
5 Would Apprendi apply to parole commission
6 guidelines? I should think the answer, unless
7 we're going to reverse a hundred years of history,
8 is no. Would Apprendi apply to a court of appeals
9 panel with the power to review sentences for
10 arbitrariness?

11 MR. KELLY: No.

12 JUSTICE BREYER: I would think the answer
13 is no. And, therefore, I wonder why it applies if
14 we take judicial officials and executive branch
15 officials, and they do exactly the same thing
16 under the heading Sentencing Commission.

17 MR. KELLY: In your hypotheticals, Justice
18 Breyer, as I understand them, each of those
19 entities is decreasing a sentence. We're talking
20 about a sentencing commission that authorizes a
21 court and, in fact -- well, authorizes a court to
22 increase a sentence after finding a particular
23 fact, and that is what triggers the Sixth
24 Amendment protection. It's the fact that a judge
25 is authorized to give a longer sentence because of

1 the existence of a fact than he would otherwise be
2 authorized to impose. And that is the essential
3 protection against which the Sixth Amendment jury
4 trial right protects. That is a fact that has to
5 be found by a jury, not by a judge.

6 JUSTICE KENNEDY: But what is your
7 position if judges simply have complete discretion
8 to sentence within a maximum range, and Judge A
9 gives a lot of maximum sentences, and Judge B
10 doesn't? Is that system constitutional?

11 MR. KELLY: There is no Sixth Amendment
12 problem with that system, Your Honor.

13 JUSTICE KENNEDY: What is it in our legal
14 tradition -- what policies are served by
15 preferring unexplained, unarticulated,
16 standardless discretion to a system in which the
17 judge gives reasons and follows careful standards
18 and follows -- and follows standards that give
19 consistency from one sentence to the other? Why
20 should the former be preferred? What are we doing
21 here?

22 MR. KELLY: I think, Justice Kennedy, that
23 Blakely answers that question. Blakely
24 distinguishes between a discretionary system in
25 which the judge has the authority to consider a

1 number of different factors in order to do what
2 the judge thinks is fair, but is not required to -
3 -

4 JUSTICE KENNEDY: What policies --

5 MR. KELLY: -- give any particular weight
6 --

7 JUSTICE KENNEDY: -- are being furthered
8 by that, other than wooden adherence to Apprendi
9 and Blakely?

10 MR. KELLY: The policy is that if a
11 judge's sentencing authority increases by finding
12 of fact, which is not the case in a discretionary
13 system. That fact is the kind of finding that we
14 leave to a jury, because juries --

15 JUSTICE KENNEDY: But isn't that, isn't
16 that ultimately formalistic and contrary to our
17 whole design of our system, which is to learn over
18 experience and to codify and to explain what
19 considerations we take into account in applying
20 the law?

21 MR. KELLY: I don't think it's contrary to
22 our system, Your Honor, to say that if a more
23 serious sentence attaches to a more serious crime,
24 or to a more serious version of a crime, that it's
25 up to the jury to decide whether the more serious

1 crime or more serious version was committed. In
2 fact, that is essential to our system.

3 JUSTICE KENNEDY: So suppose, in Justice
4 Breyer's hypothetical -- like the California
5 indeterminate sentencing regime which applied
6 until about 20 years ago, after an indeterminate
7 sentence, the parole board interviews two people
8 convicted for the same crime; one was the
9 ringleader, street-hardened offender, and the
10 other was just a novice, a guy that went along,
11 although he -- they both committed the same crime.
12 Under the California system, the former would be
13 given a projected release date of ten years; and
14 the other, a projected release date of about two
15 years. Would that be constitutional?

16 MR. KELLY: Yes, it would, because, again,
17 under a discretionary system, the judge's
18 sentencing authority is unaffected by the finding
19 of a fact. If the parole commission determines
20 that one offender's sentence should be decreased
21 and the other offender's should not be decreased,
22 that has no Sixth Amendment application or Sixth
23 Amendment --

24 JUSTICE BREYER: Look, we're trying to go
25 to the same point, and I think you're actually

1 given me a pretty good answer. The --

2 MR. KELLY: Thank you.

3 JUSTICE BREYER: I'm imagining my system
4 being the system that Apprendi forbids. So I'm
5 not doing increase/decreases. I'll think of the
6 very kind of system. And I take it your answer is
7 this -- and remember, I dissented in Apprendi.

8 MR. KELLY: I remember.

9 JUSTICE BREYER: I didn't agree with it.
10 Right. But there we are. And so I'm trying to
11 see how far it goes. So I wonder, we take our
12 Apprendi system and now it's being administered by
13 a parole commission. We take our Apprendi system,
14 and now it's being administered by a court of
15 appeals using the legal standard arbitrariness.
16 And I take it your answer is those are just as
17 unconstitutional.

18 MR. KELLY: No, no, again, I'm not --

19 JUSTICE BREYER: Now you understand what
20 I'm doing, because I'm saying you either have to
21 follow the force of your logic and make those
22 unconstitutional, too, or you have to say there's
23 a difference. And, by definition, the only
24 difference is who promulgated it. And then, of
25 course, I'm going to ask you, if there's a

1 difference right there, why doesn't this one,
2 which is executive plus judicial, fall on my side
3 of the difference?

4 MR. KELLY: Well, maybe I -- maybe I don't
5 understand your hypothetical, Justice Breyer,
6 because parole commissions do not increase
7 sentences; parole commissions decrease sentences.

8 JUSTICE BREYER: No, I -- in my imaginary
9 parole commission --

10 MR. KELLY: Okay.

11 [Laughter.]

12 JUSTICE BREYER: -- I will argue a
13 different point.

14 MR. KELLY: Yes.

15 JUSTICE BREYER: I mean, I will argue it
16 another time. I've seen a lot of parole
17 commission guidelines, and I would say they, a lot
18 of them did fall within the Apprendi boundaries.
19 But if we did take it and have the parole
20 commission do it -- "it," being the Apprendi
21 forbidden system, in your view, is it
22 unconstitutional?

23 MR. KELLY: It would certainly be
24 unconstitutional for a parole commission to find a
25 fact that increased a sentence.

1 JUSTICE BREYER: All right. Okay.

2 MR. KELLY: Yes.

3 JUSTICE BREYER: And then the same thing
4 is true of a -- of a court of appeals panel.

5 MR. KELLY: If it could find a fact that
6 increased a sentence, yes, because those facts
7 must be found by a jury.

8 JUSTICE SCALIA: Mr. Kelly, I would be
9 interested in hearing you address some of the
10 severability problems that the Government has been
11 raising.

12 JUSTICE KENNEDY: If I could just ask one
13 more question, because this is important to me.

14

15 JUSTICE KENNEDY: What about the previous
16 California system in which it was an indeterminate
17 sentence and the correctional authority made
18 findings which set the sentence? They were --
19 they were committed to the California --

20 MR. KELLY: Sure.

21 JUSTICE KENNEDY : -- correctional authority
22 for the term prescribed by law, and that was set
23 after the fact, post hoc, by the California Adult
24 Authority.

25 MR. KELLY: If the agency were increasing

1 an authorized sentence --

2 JUSTICE KENNEDY: They're not increasing
3 it.

4 MR. KELLY: -- on the basis of a finding -
5 -

6 JUSTICE KENNEDY: It's an indeterminate
7 sentence.

8 MR. KELLY: Right.

9 JUSTICE KENNEDY: They set the sentence.

10 MR. KELLY: After the -- instead of the
11 judge or after the judge?

12 JUSTICE KENNEDY: Yes. It was just
13 sentenced, the judge, for the term prescribed by
14 law. And an agency, after interviewing the
15 defendant, after looking at the probation report,
16 set the sentence. The term prescribed by law
17 could be for life.

18 MR. KELLY: If there were facts which were
19 necessary to authorize --

20 JUSTICE STEVENS: He sets the sentence
21 within the range authorized by the jury's verdict.
22 That's the question.

23 MR. KELLY: Right, that's fine. If it's
24 within the range authorized by the jury's verdict,
25 it's fine.

1 CHIEF JUSTICE REHNQUIST: Well.
2 What if, what if the statute says "every felony in
3 this state shall be punished by a term of not less
4 than one year, or, on the other side, life," and
5 you're committed to the parole authority, and the
6 parole authority will decide between those
7 boundaries?

8 MR. KELLY: Assuming that authority is
9 given to the parole commission to select a
10 sentence, and no further findings need to be made
11 beyond those made by the jury, there's no Sixth
12 Amendment problem with that.

13 JUSTICE SCALIA: There might be a due
14 process problem.

15 MR. KELLY: In fact, there might be a lot
16 of other constitutional problems, but not a Sixth
17 Amendment problem.

18 JUSTICE GINSBURG: I hope you will go over
19 to the -- to the severability problem, because, as
20 I understood it, you and the Government were very
21 much at odds about what should be severed and what
22 shouldn't, and we didn't get to ask Mr. Clement
23 about his severance, which was going to be that to
24 the extent no plus factors are involved, no
25 sentence-enhancing factors are involved, the

1 guidelines remain binding. He didn't get a chance
2 to say that in his argument, and I hope he'll
3 address it.

4 And you say, "Whatever you do, don't make
5 it half binding and half advisory."

6 MR. KELLY: Yes.

7 JUSTICE GINSBURG: And why would it be so
8 terrible to say, "Well, to the extent that there
9 are no sentencing enhancing factors, let's
10 preserve what Congress did, let's make them
11 binding when the jury doesn't have to find
12 anything"?

13 MR. KELLY: For a couple of reasons,
14 Justice Ginsburg. The first is that Congress
15 certainly didn't intend to have dual systems.
16 That destroys the congressional purpose of
17 uniformity because you would have sentences, I
18 suppose, being uniform under systems -- the system
19 where guidelines applied, but certainly not under
20 the system where the guidelines don't apply,
21 because there are guideline facts that need to be
22 found. So that congressional purpose is not
23 advanced.

24 The second problem is that it's such an
25 easily manipulable system, particularly by the

1 Government. If the Government wants to be in the
2 guidelines, it doesn't allege a sentence-enhancing
3 fact, or a guideline fact. If the Government
4 doesn't want to be bound by the guidelines, it
5 alleges a guideline fact, and that takes
6 sentencing out of the guidelines. And that cannot
7 be what Congress intended.

8 JUSTICE SOUTER: Is it any less uniform,
9 any more manipulable, than on your proposal?

10 MR. KELLY: Our --

11 JUSTICE SOUTER: I mean, uniformity is
12 gone. A certain manipulability has got to be
13 faced as a fact, and I'm not sure that you're
14 proposing a better solution, I gather.

15 MR. KELLY: Well, I think our proposal
16 doesn't really allow for any manipulation at all,
17 Justice Souter. We're simply saying that the fact
18 finder must be a jury instead of a judge.

19 JUSTICE SOUTER: Well, except that the
20 manipulation, at that point, is the manipulation,
21 in a way, in the present system, and that is it's
22 the manipulability of charge bargaining.

23 MR. KELLY: Well, that's certainly true,
24 and that exists under the guidelines. It exists
25 without the guidelines. It exists in

1 discretionary systems.

2 JUSTICE SOUTER: Yeah.

3 JUSTICE BREYER: It does exist under the
4 guidelines? How does it?

5 MR. KELLY: I think it does, because --

6 JUSTICE BREYER: How?

7 MR. KELLY: Well, certainly, to the extent
8 that prosecutors make decisions about what charges
9 they're going to bring --

10 JUSTICE BREYER: No, only, only, only if
11 you have statutes that have mandatory minimums or
12 that have lesser sentences. That's true.

13 MR. KELLY: Right.

14 JUSTICE BREYER: But compared to the
15 status quo, if you have the guidelines alone, one
16 of their basic objectives was to prevent that kind
17 of manipulation. And, by and large, I thought
18 they had succeeded on that point.

19 JUSTICE SCALIA: Well, hasn't charge
20 bargaining simply been replaced with fact
21 bargaining?

22 MR. KELLY: It has, to a large extent.

23 JUSTICE BREYER: Is that lawful under the
24 guideline? Is the judge required to accept the
25 facts as the -- as the prosecution and defense

1 agree to present them?

2 MR. KELLY: The judge is not required to -
3 -

4 JUSTICE BREYER: No.

5 MR. KELLY: -- accept the facts. The
6 judge typically does.

7 JUSTICE STEVENS: I'm not sure that I
8 understand why you wouldn't have the same
9 alternatives under your view. Because is it not
10 correct that if the, if the sentence -- the change
11 under consideration is a decrease, those findings
12 could be made by a judge. Whereas, if it's an
13 increase, you'd say they have to be found by a
14 jury. So why don't you have the same possibility
15 of a two-track system under your view?

16 MR. KELLY: I guess -- I wouldn't view
17 that as a two-track system, because the guidelines
18 would continue to apply in either case. It would
19 not be a situation in which the guidelines apply
20 to some criminal sentencings, but don't apply to
21 other criminal sentencings. The guidelines will
22 apply in every criminal sentencing. Whether a
23 fact finder needs to be a judge or a jury depends
24 upon whether the fact to be found increases the
25 judge's sentencing authority.

1 JUSTICE STEVENS: So you would say -- you
2 would say your proposal is closer to what Congress
3 really wanted, because it would leave in place all
4 of the sentences that would be commanded by the
5 guidelines, but just require a different fact
6 finder in some of the cases.

7 MR. KELLY: That's exactly right, Justice
8 Stevens. You --

9 JUSTICE GINSBURG: But then what about all
10 the factors -- Justice Breyer outlined four
11 categories of, of guideline factors that are not
12 easily, if at all, presented to the jury. The
13 Chief Justice mentioned the one of perjury at the
14 trial itself. Could never give that to a jury
15 because it hasn't happened until the trial. And
16 some of the others that become very complicated,
17 like he mentioned, other -- other relevant
18 conduct, relevant conduct, yeah.

19 MR. KELLY: I agree that perjury is not
20 something that could be submitted to a jury --
21 perjury during trial is not something that could
22 be submitted to a jury. That's --

23 JUSTICE GINSBURG: So that would just be
24 out.

25 MR. KELLY: That would be out. That's one

1 of the very few.

2 JUSTICE GINSBURG: It would have to be
3 prosecuted as a separate --

4 MR. KELLY: It would have to be prosecuted
5 as a separate crime.

6 JUSTICE SCALIA: Well couldn't he have a
7 sentencing phase afterwards? I don't know.

8 JUSTICE STEVENS: Could I interrupt for
9 that?

10 JUSTICE SCALIA: Sure.

11 JUSTICE STEVENS: There's one thing that's
12 running through my mind. What if the defendant
13 gets on the stand and testifies to a version of
14 the events that the jury must have disbelieved in
15 order to convict? Could not the judge -- in
16 effect, he would be making the finding -- he would
17 say, "The jury has really found this fact, and,
18 therefore, I can rely on it."

19 MR. KELLY: I don't think so, Justice
20 Stevens, because the judge is still making the
21 finding that the witness deliberately lied, as
22 opposed to being mistaken in his testimony. And
23 that is a finding of fact that increases
24 sentencing authority. So I don't think that a
25 jury returning a guilty verdict in every case

1 means that the jury disbelieved, or thought at
2 least, that the defendant was lying.

3 JUSTICE BREYER: What is your answer to
4 Justice Ginsburg's question? And I'd appreciate
5 your focusing on what I thought were the two most
6 important ones, which is, first, the -- I thought
7 that sentencing for a hundred years had gone on
8 primarily on the basis of the presentence report.
9 And the idea was, the person is convicted and now
10 we're going to decide what to do with this
11 individual who's convicted, and we're going to
12 read what the probation officer writes about it,
13 and he'll go interview people after, as he does.
14 And many, many, many, if not most, of the facts in
15 that presentence report were not available at the
16 time of trial. They're about the history of the
17 individual, and they're more about the manner in
18 which the crime was carried out.

19 And the other main thing is the -- is the
20 vast number of really complex operations,
21 multiple-count rules, relevant conduct, all kinds
22 of things that -- try even "brandishing." I mean,
23 that's the second thing, the complexity.

24 So the presentence report --

25 MR. KELLY: Sure.

1 JUSTICE BREYER: -- and the complexity.

2 JUSTICE KENNEDY: In other words, the
3 tradition was that we asked the jury to determine
4 what crime was committed, and the sentencing judge
5 to determine the context in which it was
6 committed.

7 MR. KELLY: And that still happens, even
8 under our proposal, to a large extent, Your Honor,
9 because the presentence report has historically
10 guided a judge in exercising his discretion at
11 sentencing. To the extent that the judge
12 exercises discretion in selecting a sentence
13 within a guideline range, the judge will still
14 rely upon the presentence report. And, frankly,
15 most of what's in a presentence report doesn't
16 have to do with finding extra facts; it has to do
17 with guiding discretion in selecting a sentence.
18 So I don't think that that really changes under
19 our system.

20 With regard to the complexity, it's been
21 my experience in defending Federal criminal cases
22 that although the guidelines are lengthy, there
23 are only two or three that are likely to apply in
24 any particular case, and it's not particularly
25 complex to figure out what those are, and it

1 wouldn't be all that complex to charge a jury with
2 regard to how to determine facts that are required
3 by the guidelines. We give juries jury
4 instructions that are complicated all the time.
5 We do it in RICO --

6 JUSTICE BREYER: Congress's basic --
7 that's a good answer. Congress's basic objective
8 here is -- was uniformity. I think it was a noble
9 objective, whether or not it's been achieved or,
10 but are you saying to Congress, Sorry, the
11 Constitution prohibits you, in Congress, from
12 trying to create uniformity, or greater
13 uniformity, of sentencing among district judges?
14 There's just no way you can do it, because if you
15 throw everything to a jury, you know, you throw it
16 right into the hands of the prosecutor to
17 determine what to charge, what not to charge, what
18 facts to agree upon, et cetera, no way to do it?
19 We're back to our two cellmates -- one day served,
20 50 years served -- though the real conduct was the
21 same.

22 MR. KELLY: The real conduct can still be
23 proved to a jury, as long as it's charged and
24 proved to a jury.

25 CHIEF JUSTICE REHNQUIST: How about the

1 form of verdict under your system? Is there one
2 line for the basic offense, and then other lines
3 for each additional factor that's alleged in the
4 indictment?

5 MR. KELLY: There may be, depending on
6 the case. There may be cases in which a general
7 verdict is adequate because there are no guideline
8 facts to find that would increase sentencing --

9 CHIEF JUSTICE REHNQUIST: But you're
10 suggesting, then, a special -- a special verdict
11 in every case where there are guideline facts to
12 be found.

13 MR. KELLY: Just as special verdicts have
14 been used since Apprendi to find drug quantities
15 and other facts that increase maximum sentences.

16 JUSTICE GINSBURG: But a special verdict
17 wouldn't do from the point of view of the
18 defendant, I think would resist it very heavily,
19 if what the findings have to be are, say, a much
20 larger drug quantity, the relevant conduct. These
21 are things that could be damning for a defendant.
22 So a defendant surely would not want that, all of
23 this to be tried to the jury that's going to try
24 the basic case. The defendant would much prefer
25 to have the jury not know about that it wasn't

1 five ounces, that it was 500 grams, or that, at
2 the same time, the defendant did a lot of other
3 bad things.

4 MR. KELLY: Your Honor, I think we can
5 trust district judges to fashion procedural
6 protections that assure that trials are fair.
7 That might, in some cases, mean bifurcating the
8 underlying elements of the offense and the
9 determination of those elements from the finding
10 of guideline facts --

11 JUSTICE GINSBURG: So you would have to
12 have, then, essentially two trials.

13 MR. KELLY: In some cases, yes.

14 JUSTICE SOUTER: Well, isn't it -- isn't
15 it -- isn't that going to be so in every relevant
16 conduct case in which the Government thinks the
17 relevant conduct is a serious factor? There's
18 either going to have to be a separate jury verdict
19 on sentencing, or the district judge is going to
20 be limited simply to whatever range the jury fact
21 finding provides as the maximum range. There are
22 no other possibilities, are there?

23 MR. KELLY: Well, in some of those cases,
24 Your Honor, the additional facts would come in on
25 the main trial anyway, as 404(b) kind of evidence

1 that is relevant to proving the underlying
2 charges. And if it's going to come in anyway,
3 then there probably wouldn't be a second part of
4 the trial. So I think --

5 JUSTICE SOUTER: But isn't the defendant
6 in that case going to say look, I, I'm claiming a
7 serious problem, if you're asking the jury to make
8 a specific finding that I committed relevant facts
9 A, B, C, D, and E, even though I don't happen to
10 have been subjected to a criminal guilty verdict
11 with respect to each one. By, by requiring those
12 findings, you're going to skew the jury's mind to
13 the point where I'm not going to get a fair shake
14 on the guilty/not guilty finding or special fact
15 finding most immediately relevant to this case.
16 Every defendant is going to demand a separate jury
17 proceeding for that, isn't he?

18 MR. KELLY: It's certainly possible that
19 they'll demand separate, or bifurcation --

20 JUSTICE SOUTER: Yes, but you wouldn't sit
21 back and allow that focus, if you're the defense
22 lawyer you're not going to allow that focus to be
23 made at the time of the basic guilty/non guilty
24 finding, are you?

25 MR. KELLY: Well, I've had experience with

1 that. And my experience has been, as I've said
2 before, I might ask for a bifurcated trial, but if
3 the judge thinks that that evidence is going to
4 come in against my client anyway, the judge is
5 going to deny bifurcation. If the judge says
6 you're right, this would be prejudicial to
7 introduce this evidence in the main case, then
8 we'll bifurcate the trial, and we'll let the jury
9 find guilty not guilty and then find
10 sentencing facts if a guilty verdict is
11 returned.

12 JUSTICE GINSBURG: Do you know what the
13 Kansas system is? I mean, right after Apprendi,
14 they transformed their guideline system into one
15 where the jury makes the findings, but are all of
16 their trials bifurcated?

17 MR. KELLY: I don't know if they bifurcate
18 all their trials. My understanding is that it
19 works in a way that's similar to what I'm
20 suggesting could happen in Federal court.

21 JUSTICE BREYER: As long as you're on the
22 subject, I'm quite --- you're going to --- what is
23 your reaction to what I've written, which you've,
24 you're just going to say wrong, wrong, wrong, but I want to
25 know why. And what I know why in particular is I

1 speculated somewhat, that the reason that this
2 might work, your side of it, if it works despite
3 the, the complication, the bifurcated trials,
4 etc., is that 97 percent of the cases are handled
5 through plea bargaining, and this will give you a
6 little bit of a leg up, which I speculated the
7 defense bar likes. I'm not surprised. But then,
8 I thought with in the long run, you just can't
9 have a system of justice that depends for its
10 workable nature upon plea bargaining, which in
11 fact depends on the weapons you give to
12 prosecutors. And so I ended
13 up thinking, I just can't
14 underwrite such a thing. And I'd like to get
15 your, your, your reaction to that.

16 MR. KELLY: Your Honor, here's how plea
17 bargaining works now. The prosecutor charges the
18 easiest crime to prove that he can prove. There
19 is no effective plea bargaining in most of those
20 cases because the prosecutor knows he's going to
21 win that trial. So the defendant pleads guilty
22 because he doesn't want to lose his, his reduction
23 for acceptance of responsibility. I think what
24 changes is probably if our proposal is accepted,
25 that there is more meaningful negotiation and that

1 prosecutors and defense attorney's will come to an
2 understanding in most cases of what sentencing facts
3 are provable, and what are not, and cases will
4 continue to plead out much the same as they do
5 right now, except more effectively because we
6 eliminate the problem of the prosecutor being able
7 to prove the easiest charge and save the heart of
8 the case for sentencing.

9 I think with that, Your Honor, I will,
10 unless there are other questions, defer to my
11 colleague.

12 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
13 Kelly. Ms. Scapicchio.

14 ORAL ARGUMENT OF ROSEMARY SCAPICCHIO
15 ON BEHALF OF RESPONDENT FANFAN

16 MS. SCAPICCHIO: As to question one,
17 there's no meaningful difference between the
18 Federal Sentencing Guidelines and the Washington
19 State Guidelines. The Government conceded as much
20 in their brief to this Court in Blakely. When
21 they filed an amicus brief in Blakely they told
22 this Court, or they urged this Court not to
23 invalidate the Washington State Guidelines
24 because, they told this Court, if you do, they are
25 so similar to the Federal Guidelines that the

1 Federal Guidelines will fall as well. And here
2 they are, less than five months later, standing
3 before the same Court, saying something completely
4 different. Now, it's not that they're so similar
5 to the Washington State Guidelines, but that
6 they're completely different, and that they don't
7 operate in the same manner at all.

8 And what it comes down to is that for
9 Sixth Amendment purposes, the source of the law
10 doesn't matter. The Government got it right when
11 they filed their amicus brief in Blakely. It
12 doesn't matter to a defendant whether or not the
13 source of the law is legislative, or the source of
14 the law is by commission or regulatory body. If
15 the sentence is going to increase, based on a fact
16 that, that the law makes essential to punishment,
17 that fact must be pled and proved to a jury beyond a
18 reasonable doubt.

19 JUSTICE BREYER: So can I ask you the same
20 question? Imagine that the statute says bank
21 robbery is zero to twenty years. Case one, a
22 separate statute says a guideline commission will
23 make distinctions, and the guideline commission
24 says, "five years in the ordinary case, seven
25 years with a gun." Case two, the same thing but a

1 parole commission does it. Case three, the same
2 thing, but a court of appeals panel does it, under
3 the guise of what's arbitrary, what isn't.
4 They're all, in your opinion, to be treated alike.

5 MS. SCAPICCHIO: If there's a fact
6 necessary to increase the sentence --

7 JUSTICE BREYER: Well, there is just what
8 I said, just what I said.

9 MS. SCAPICCHIO: Then yes.

10 JUSTICE BREYER: Okay.

11 MS. SCAPICCHIO: With respect to Mr.
12 Fanfan in this case, Mr. Fanfan's sentence was
13 promulgated based on the jury verdict alone. Mr.
14 Fanfan, the Government chose to indict Mr. Fanfan
15 on a single count of conspiracy. He went to trial
16 on a single count of conspiracy.

17 CHIEF JUSTICE REHNQUIST: Conspiracy to
18 what?

19 MS. SCAPICCHIO: Conspiracy to distribute
20 500 grams of cocaine. The Government knew at the
21 time of trial that Mr. Fanfan was arrested with
22 281 grams of crack cocaine at the time of his
23 arrest. The Government chose not to indict him
24 for that 281 grams of crack cocaine, and instead,
25 they chose to prove the easiest possible

1 indictment before the jury. Once the jury was
2 dismissed in this case, the Government then sought
3 to increase Mr. Fanfan's sentence by 157 months,
4 based on the possession of the crack cocaine that
5 they knew about at the very beginning, and we're
6 suggesting that Judge Hornby did the right thing
7 in limiting Mr. Fanfan's sentence to that which
8 was supported by the jury verdict alone and
9 nothing else.

10 JUSTICE GINSBURG: Judge Hornby had some
11 distress in doing that, didn't he, because the
12 difference was quite large? Based on what the
13 judge found, it would have been fifteen or sixteen
14 years as opposed to five or six years?

15 MS. SCAPICCHIO: What Judge Hornby did for
16 Mr. Fanfan was, he conducted what he called a
17 presentence, a pre-Blakely hearing, and at the
18 pre-Blakely hearing he allowed the prosecutor to
19 present evidence relative to relevant conduct
20 involved in the offense. And the prosecutor
21 presented evidence that the relevant conduct
22 included this possession of 281 grams of crack
23 cocaine, as well as a case agent who claimed that
24 Mr. Fanfan was the leader of this entire
25 conspiracy. And then Judge Hornby went on to say,

1 based on everything that he heard in the pre-
2 Blakely hearing, if given the opportunity, he
3 would sentence my client to between 188 to 235
4 months.

5 JUSTICE GINSBURG: He didn't say it, that
6 that was his discretionary choice. He said that --
7 -

8 MS. SCAPICCHIO: He was required.

9 JUSTICE GINSBURG: He made, he made those
10 findings of fact, that -- leadership role and the
11 quantity of drugs.

12 MS. SCAPICCHIO: He did.

13 JUSTICE GINSBURG: And on the basis of
14 those two he said the guidelines would require me
15 to come up with this higher sentence, not that
16 using the guidelines as advisory he would have
17 gotten --

18 MS. SCAPICCHIO: Absolutely. It was the
19 guidelines required him to impose sentence between
20 188 to 235 months.

21 JUSTICE GINSBURG: And then the other,
22 that's the high range, and the low range is, I'll
23 just stick with the crime that he was indicted
24 for, and that's five or six years.

25 MS. SCAPICCHIO: He, what Judge Hornby did

1 is, is he sentenced Mr. Fanfan based solely on the
2 jury's verdict. The jury only heard evidence of
3 the conspiracy to distribute 500 grams of crack
4 cocaine. Because the jury only heard evidence,
5 and thus returned a verdict based solely on the
6 500 grams of crack cocaine, then Mr. Fanfan's
7 sentence, according to Judge Hornby after this
8 Court decided Blakely, was limited to the jury
9 verdict alone.

10 JUSTICE GINSBURG: That's quite a windfall
11 for Mr. Fanfan, isn't it?

12 MS. SCAPICCHIO: Well, in this particular
13 case I would say no, because the Government
14 knew when this Court decided Apprendi,
15 and certainly knew by the time this
16 Court decided Ring, that if they wanted
17 to increase a defendant's sentence beyond the
18 statutory max, that they should plead it and prove
19 it in the indictment. And in this case, they
20 chose not to. And so, whether or not Mr. Fanfan
21 may -- get some benefit because of this
22 Court's decision in Blakely, certainly he does.
23 I'm not denying that he doesn't. But only because
24 the Government didn't do what this Court told them
25 they should do in both Apprendi and Ring.

1 CHIEF JUSTICE STEVENS: Did the trial
2 judge give any indication of what sentence he
3 would have imposed if he were not constrained by
4 the guidelines?

5 MS. SCAPICCHIO: He did not. He indicated
6 that, if the guidelines applied, that he believed
7 Mr. Fanfan fell between 188 and 235 months. There
8 was no discussion at all as to whether or not he
9 had discretion to sentence anywhere outside the
10 guidelines during this proceeding.

11 And, with respect to question two in this
12 case, whether or not the guidelines are severable,
13 which of course is the more difficult question
14 before the Court, our proposal to sever out those
15 portions of the guidelines that require judicial
16 fact finding by a preponderance of the evidence
17 will accomplish the sentencing reform goals. The
18 goals of the sentencing reform were uniformity,
19 proportionality, and certainty.

20 CHIEF JUSTICE REHNQUIST: You wouldn't
21 sever out the ones that would permit a downward
22 departure, would you?

23 MS. SCAPICCHIO: Would we sever the
24 portions of the statute that require ---

25 CHIEF JUSTICE REHNQUIST: You would leave

1 in place the provisions for downward departures?

2 MS. SCAPICCHIO: We would leave in place
3 the majority of the sentencing guidelines.

4 CHIEF JUSTICE REHNQUIST: Well, and -- but
5 could you answer my question?

6 MS. SCAPICCHIO: Mr. Chief Justice, would
7 I sever out --

8 CHIEF JUSTICE REHNQUIST: Would you leave
9 in place the provisions for downward departure?

10 MS. SCAPICCHIO: Yes.

11 JUSTICE STEVENS: How can you do that?

12 The statute that makes the guidelines mandatory
13 applies to both upwards and downwards departures,
14 so I have always had trouble knowing what
15 provision of the statute anybody severs. I can
16 understand your saying that there's a bunch of
17 unconstitutional applications of the statute, and
18 you have to set aside the sentences in those
19 particular cases, but I simply don't understand
20 severing a single provision that covers both
21 upward and downward departures. How do you sever
22 it?

23 MS. SCAPICCHIO: Well, I think you sever it
24 by severing out the unconstitutional portions of
25 it. And you sever it by getting rid of anything

1 that indicates that it's a judicial fact
2 finding by a preponderance of the evidence.

3 JUSTICE STEVENS: But that's the same,
4 that's the same provision that allows departures
5 for the same -- by the same procedure.

6 MS. SCAPICCHIO: Well, the departures in -
7 --

8 JUSTICE STEVENS: It seems to me you're not
9 severing a piece of a statute, you're just
10 severing a bunch of applications of the statute
11 you think are invalid.

12 MS. SCAPICCHIO: The applications of the
13 statute that are invalid in this case are the ones
14 that require judicial fact finding by a
15 preponderance of the evidence.

16 JUSTICE STEVENS: Correct. I understand.

17 MS. SCAPICCHIO: Those under Blakely need
18 to be severed. What we're left with now is a
19 statute that needs to, that needs to function in
20 terms of saving the guidelines.

21 CHIEF JUSTICE REHNQUIST: But would it --
22 would it really save the guidelines in the way
23 that Congress intended them, to strike basically
24 the provision for enhancements, and leaving in
25 place the provisions for downward departures?

1 MS. SCAPICCHIO: It's not going to operate
2 exactly the way Congress intended. Because
3 Congress never intended to pass a statute that was
4 unconstitutional. And so it has to undergo some
5 change. And in this particular case, what we're
6 saying is, minimize the amount of changes that the
7 statute has to undergo in order to preserve it.

8 JUSTICE O'CONNOR: Well, maybe we should
9 just leave it to Congress to decide, because it
10 doesn't sound like the scheme Congress intended.

11 MS. SCAPICCHIO: Well, Congress intended a
12 mandatory system. It's clear that Congress
13 intended a mandatory system. The Government --

14 JUSTICE O'CONNOR: And it intended fact
15 finding by a preponderance for both upward
16 adjustments and downward.

17 MS. SCAPICCHIO: Not necessarily fact
18 finding by the judiciary. It's not one of the
19 listed goals of the sentencing reform act. Those
20 listed goals are uniformity, proportionality and
21 certainty, and those goals can still be met under
22 the proposal that we're suggesting the Court
23 adopt. There will still be uniformity in
24 sentencing, there will still be proportionality
25 and there will still be certainty of sentence.

1 CHIEF JUSTICE REHNQUIST: Well, but will
2 there be proportionality if the sentences,
3 sentences can be downward, the jury verdict could
4 be adjusted downward, but not upward?

5 MS. SCAPICCHIO: If it turns out, Mr.
6 Chief Justice, that there is some, some difference
7 in the severity of a sentence that a defendant
8 receives, certainly Congress could, could come in
9 and make the appropriate changes if that's the
10 result of the proposal that we're suggesting, but
11 the proportionality wouldn't change. You know,
12 the degree of crimes is still going to line up in
13 the exact same manner.

14 CHIEF JUSTICE REHNQUIST: But you can say
15 the same thing if we simply said that the whole
16 guidelines fall, and they're simply there for
17 judges to apply if they wish. You can say, "Well,
18 if Congress doesn't like that they can come in and
19 put a new system." That's true any time Congress
20 acts.

21 MS. SCAPICCHIO: But -- absolutely, Mr.
22 Chief Justice, it is true any time Congress acts,
23 but in this particular case, the Government has
24 the burden of proving the inseverability of the
25 statute. We're attempting to show that the

1 statute is severable to save the guidelines in
2 this case, and we're attempting to show that by
3 suggesting to the Court that you don't have to
4 throw out twenty years of sentencing reform. That
5 the guidelines should still be mandatory; we're
6 suggesting that the mandatory portions of the
7 guidelines remain, the bulk of the guidelines
8 remain, and we're changing the fact finder.

9 JUSTICE SCALIA: Why do you -- why do you
10 have to call it severability? Suppose we just
11 said it's clear that whenever these facts have not
12 been found by a jury, the guidelines cannot be
13 applied? That the guidelines are
14 unconstitutional, as applied, when there's been no
15 jury finding, and leave it. We're not severing
16 any particular language, we're just saying that
17 that portion, that proceeding in that fashion
18 produces an unconstitutional sentence. And then
19 let the Government work out how it wants to find
20 its way around that problem.

21 MS. SCAPICCHIO: That's certainly an
22 option that the Court could consider.

23 JUSTICE SCALIA: I'm just not sure, I share
24 Justice Stevens' perplexity as to whether that's
25 really properly described as severing part of the

1 statute.

2 JUSTICE STEVENS: And may I add this
3 thought, that it seems to me, I don't know whether
4 this is true; Mr. Clement and I had a dialogue
5 that was inconclusive; I had been under the
6 impression, perhaps erroneous, that in fact the
7 number of unconstitutional departures if one
8 follows Apprendi as being the constitutional rule,
9 is actually a small percentage of the total, and
10 if it should follow that only three, four, five,
11 six percent of the sentences that have heretofore
12 been imposed or will be imposed in the future
13 would be unconstitutional, that's a pretty weak
14 reason for saying the whole statute is
15 unconstitutional on its face, or even in one
16 provision of the statute. It seems to me you just
17 say, "Oh, okay, you can't impose those sentences
18 in those three percent of the cases." I don't
19 know why that's a departure from our prior
20 practice.

21 MS. SCAPICCHIO: I, Well, I think because
22 what's left is, is that the system will then be
23 open to some manipulation, under that scenario.
24 If the Government can control who it is that will
25 be sentenced under the guidelines and who will not

1 be sentenced under the guidelines, then the system
2 is, is ripe for manipulation.

3 JUSTICE STEVENS: No, my suggestion is
4 everybody is going to be sentenced under the Guidelines;
5 the only difference is that in three or four
6 percent of the cases you may have to bring a jury
7 in to get an enhanced sentence.

8 MS. SCAPICCHIO: In, under that scenario,
9 if any fact that needed to increase a defendant's
10 sentence was pled and proved to a jury, that would
11 suffice.

12 JUSTICE SCALIA: You wouldn't care whether
13 you call this severing, severability or not, would
14 you?

15 MS. SCAPICCHIO: Absolutely not.

16 JUSTICE SCALIA: I didn't think you would.

17 MS. SCAPICCHIO: It produces the same
18 results, whether it's, you call it severance or
19 the way that the statute works.

20 JUSTICE SCALIA: And I assume, don't you,
21 that any solution we come up to is likely to be an
22 interim solution anyway?

23 MS. SCAPICCHIO: It's very likely to be
24 an interim solution and the legislature will tell us
25 what they really want us to do and we'll all make

1 the appropriate adjustments.

2 JUSTICE BREYER: But the idea is that this
3 works because most cases are plea bargained.

4 MS. SCAPICCHIO: Most cases are plea
5 bargained.

6 JUSTICE BREYER: So what you'll do if
7 you're right, is all you would say is any time
8 that the prosecutor wants to say that you
9 committed the bank robbery or you committed the
10 drug offense with more than a minimal amount of
11 money or more than a minimal amount of drug, or
12 there were guns, they get into a bargain, and they
13 end up with a sentence once they bargain -- if
14 that's the sentence, because they're not even
15 going to contest it before the judge, both sides
16 will come in and agree. But in those few cases
17 where they do contest it, you would have to have
18 the jury find the facts.

19 MS. SCAPICCHIO: Yes.

20 JUSTICE BREYER: Now, the only reason that
21 I find it disturbing is to think that Congress
22 could have wanted such a system is given other
23 developments in Congress, mandatory minimums and
24 all kinds of things, that seems to me to be a
25 system that would really, might make non-

1 uniformity in reality, worse than it was before
2 1986. See, I mean, my goodness, every
3 prosecutor's going to be doing something
4 different, every defense attorney; everything will
5 depend upon the bargains. The judges when they
6 come in will think different things. I mean --

7 MS. SCAPICCHIO: The --

8 JUSTICE BREYER: Should we uphold
9 something like that in the face of a Congress that
10 wanted uniformity?

11 MS. SCAPICCHIO: Yes, and I'll tell you
12 why. Because that's exactly the way that the
13 guidelines operate now. The only thing that's
14 changing is the identity of the fact finder. That
15 the Government can come in now and charge whatever
16 it wants, because it's free to charge whatever it
17 wants, and that, the Government in this case, or
18 in any case, could then bargain with defense
19 counsel and the defendant as to which facts they
20 may want to plead to, as to which portions of the
21 indictment they may want to plead to, happens
22 every day. And, and, and so, if that's the case,
23 changing the identity of the fact finder isn't
24 going to change that process at all.

25 JUSTICE BREYER: Did you find out anything

1 in your research on this where anybody in the --
2 this discussion on the guidelines began, I think,
3 in the early 70's, it's been around for 30 years.
4 The guidelines have been law for 17 years, and
5 until recently with Apprendi, is there a history
6 of anything being written on the guidelines
7 being unconstitutional for the Sixth Amendment
8 reason? Did any group of judges, or defense
9 attorneys, or academics or anybody write anything
10 that we could look at until quite recently in
11 which they thought this was a possibility?

12 MS. SCAPICCHIO: Before quite -- before
13 this Court's decision in Apprendi?

14 JUSTICE BREYER: Yeah, before we began with
15 Apprendi? .

16 MS. SCAPICCHIO: I don't believe so.

17 JUSTICE BREYER: Nothing.

18 MS. SCAPICCHIO: I'm not aware of any.

19 JUSTICE STEVENS: Have you read Justice
20 Thomas's opinion in Apprendi? He's got a lot of
21 prior law that's in there that maybe would be of
22 interest to you.

23 MS. SCAPICCHIO: And with respect to Mr.
24 Fanfan in this case, Your Honors, we're asking
25 that this Court give intelligible content to the

1 jury's verdict by affirming the district court's
2 imposition of a 78-month sentence based solely on
3 the facts found by the jury beyond a reasonable
4 doubt.

5 JUSTICE STEVENS: May I ask just one, one
6 last question? Do you agree that within the
7 guidelines ranges, which sometimes are fairly
8 large, the judge does have the discretion to
9 impose any sentences he wants to based on the
10 conduct of the defendant, whether or not it's
11 proved by the jury?

12 MS. SCAPICCHIO: Within the guideline
13 range? Yes.

14 JUSTICE STEVENS: You get to the range by
15 the jury finding, the judge still retains
16 substantial discretion within the, within the
17 range.

18 MS. SCAPICCHIO: Substantial discretion
19 within the range, yes. If there are no further
20 questions.

21 CHIEF JUSTICE REHNQUIST: Thank you Ms.
22 Scapicchio. Mr. Clement, you have four minutes
23 remaining.

24 REBUTTAL ARGUMENT OF PAUL D. CLEMENT
25 ON BEHALF OF PETITIONER

1 MR. CLEMENT: Thank you, Mr. Chief
2 Justice.

3 This Court in *Mistretta* expressed its
4 understanding that the commission was
5 constitutional because it would pursue traditional
6 judicial tasks related to sentencing, and it would
7 not get involved in quintessentially legislative
8 acts of setting maximum penalties, or defining the
9 elements of the crime. Now, we of course, think
10 that's quite relevant for the Sixth Amendment
11 issue that's raised in question one; but even if
12 you disagree with us on that, even if you think
13 the non-legislative origins of the guidelines
14 don't matter for purposes of question one, surely
15 they do matter for purposes of the severability
16 analysis under question two. Because if one takes
17 those elements, those enhancement factors in the
18 guidelines, and treats them like true elements of
19 crimes that must go to the jury, then you are
20 giving this non-legislative body's work product
21 the effect of Federal criminal statutes, and
22 that's something that not only *Mistretta* suggests
23 is problematic, but *United States v. Hudson* in
24 1812 suggests is problematic. And the effect is
25 really breathtaking; it is an understatement to

1 say that the effect of that judicial remedial
2 decision would be to create thousands of new
3 Federal crimes.

4 Now, let me talk just for a second about
5 the language of severability. There's been some
6 questions about whether what we're really talking
7 about is severability. First of all you're going
8 to have some cases where there's going to be no
9 enhancing factor at all. And in those cases you
10 don't need to talk about severability. If there's
11 no Sixth Amendment issue raised in a case, there's
12 no reason to strike anything down and that would
13 be a simple matter of traditional principles of
14 third party standing and facial challenges. The
15 fact that you might have a constitutional problem
16 in this case, doesn't mean that you invalidate the
17 guidelines in those other cases, where they apply
18 without problem.

19 The real question becomes, what do you do
20 in a case where there is a Sixth Amendment
21 problem, assuming Blakely applies to the
22 guidelines? At that point, I think severability
23 is the right way to talk about it. One way of
24 dealing with the case at the point you recognize
25 there's a Sixth Amendment problem in this case is

1 to say, "Well, there's nothing we can do about it,
2 we can't sentence this individual to any more than
3 the upper bound of the sentencing range." The
4 second thing you can do is you can say, "Well,
5 okay, there's a constitutional problem, but the
6 result is that we sever 3553(b), we don't make the
7 guidelines mandatory, and we allow the judge to
8 impose a discretionary sentence within the range
9 of the statute." That is what we think is the
10 appropriate solution.

11 As a couple of you have mentioned, what we
12 may be talking about here is an interim solution
13 Anyway. Congress may well get involved. That's
14 why in considering what regime of remediability or
15 severability best serves the interests of Congress
16 in uniformity and proportionality, it pays to pay
17 particular attention to the cases that are in the
18 pipeline now. And on those cases, there's no
19 question which proposal better serves the interest
20 of uniformity and proportionality. Respondents
21 have to admit that they are seeking a huge
22 sentencing windfall here.

23 One other point that bears mention is this
24 idea of, the suggestion that because the
25 guidelines will not be binding in every case, the

1 Government somehow controls the decision as to
2 whether or not it's a guidelines case or not.
3 That is not the case. That decision under the
4 system will rest with the judge. If there is an
5 enhancement sought, but it's not found in the
6 basis of the judge, then there's no Sixth
7 Amendment problem in that case, and the case can
8 go forward.

9 The irony, of course, is that the
10 consequence of applying Blakely to the guidelines
11 is to create more power with the prosecutor,
12 because as Justice Breyer pointed out, under the
13 current system of the guidelines, the prosecutor
14 cannot control through the indictment exactly what
15 sentencing factors the judge will consider. The
16 Burns case, for example, that this Court had
17 involved a situation where the judge sua sponte took
18 notice of sentencing factors that neither the
19 prosecutor nor the defendant very much wanted in
20 front of the court. That will no longer be
21 possible under a system where everything has to be
22 in the indictment, so the result is to strengthen
23 the hand of the Government.

24 The last thing is this idea of bifurcation
25 is not a panacea. I know Justice Scalia, you've

1 thrown that out in a number of instances, but the
2 traditional rule in cases with real elements of
3 real Federal crimes is that you don't get to
4 bifurcate out one element that the defendant
5 doesn't want to put before the jury. That's the,
6 that's the binding law in cases like Collamore out
7 of the First Circuit and Barker out of the Ninth
8 Circuit. So, I think it's wrong to simply suggest that,
9 that bifurcation is going to solve all these
10 problems. Thank you, Mr. Chief Justice.

11 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
12 Clement, the case is submitted.

13 (Whereupon at 2:46 p.m., the case in the
14 above-entitled matter was submitted.)

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