

1 you can tell me there's a guideline on this particular
2 application of the mandatory minimum. And the statute
3 and the guidelines both say a judge can depart for a
4 reason not taken adequately into consideration by the
5 commission.

6 So unless you can point to me someplace
7 where they take this into consideration, although they
8 might in the future, I would say they didn't take it
9 into consideration at all.

10 MR. YANG: I -- I think the --

11 JUSTICE BREYER: And therefore the language
12 allows it. The language allows it, and indeed the
13 theory allows it, because the theory is you could have a
14 person there who's convicted of 19 multiple counts, you
15 know, and -- and the judge is given considerable power
16 to work all this out so that you have overall a fair
17 sentence. All right? That's the whole argument.

18 So what's your response?

19 MR. YANG: Well, I guess to the whole
20 argument, we have a few responses.

21 JUSTICE BREYER: I know you do.

22 MR. YANG: But -- but I think -- first of
23 all, on the -- on the guidelines point, the guidelines
24 have taken this into account since the very beginning
25 when you were on the Sentencing Commission.

1 JUSTICE BREYER: Where?

2 MR. YANG: Well --

3 JUSTICE BREYER: Where did you take this?
4 Where.

5 MR. YANG: Well, the guidelines specifically
6 address in Section 2K2.4, comment note 4, they talk
7 about how you -- and as well as in Chapter 5 about
8 determining a total sentence based on aggregate
9 sentences, multiple terms of imprisonment. The
10 guidelines said that what you do with the predicate is
11 you determine the predicate under the guidelines, but
12 you don't include the specific offense --

13 JUSTICE KAGAN: That's --

14 MR. YANG: -- characteristic of --

15 JUSTICE KAGAN: That's --

16 CHIEF JUSTICE ROBERTS: I'm -- I'm going to
17 let you get back to a fuller answer to Justice Breyer.
18 But that certainly cuts against you, the idea that they
19 recognize that, yes, you do have to look to the
20 mandatory minimums. You should take that into account
21 in imposing the sentence. And now you say when it gets
22 down to what the actual sentence is, you can't look at
23 the mandatory minimums at all.

24 MR. YANG: I don't think it cuts against us,
25 as in -- in we're going to have multiple discussions

1 about these various factors.

2 First, I don't think the guidelines shed a
3 lot of light on the statutory question here. If you
4 were to disagree with our understanding of the
5 guidelines, that would not mean that the statute's
6 wrong; it means that the guidelines would have to give
7 way. We are defending the commentary in the guidelines,
8 which, again, have existed since the very beginning.

9 JUSTICE BREYER: You look at 2.4. I missed
10 it. Where -- where is the place on --

11 MR. YANG: 2K2.4, comment note 4. And --
12 and then subsequently, this is also cited in our brief
13 back in the pages around the 40s when we discussed the
14 guidelines.

15 But about the guidelines in the statute, the
16 guidelines would have to give way. And we are defending
17 the commentary because we think, not only have this
18 commentary been around since 1987 when the guidelines
19 were first sent to Congress, and had since been there,
20 we think this is a sensible distinction between the
21 conduct that the court considers when determining the
22 sentencing of the predicate, and knowing that the
23 conduct is accounted for separately in the 924(c), and
24 considering the total aggregate sentence. That is
25 something different.

1 Congress specified where courts look to the
2 total aggregate sentence in Section 3584. In Section
3 3584, Congress said, "When there are multiple terms of
4 imprisonment, the court shall, with respect to each
5 offense, consider the 3554 -- 3553A factors when
6 deciding whether to make the total sentence by making
7 them concurrent or consecutive."

8 But we know that Section 924(c) wholly
9 removed that power. And in doing so, it removed the
10 power of the court to tailor the total aggregate
11 sentence, which is a power that was set to --

12 JUSTICE GINSBURG: But the government must
13 recognize that 924(c) can influence the sentence on the
14 predicate offense because -- I think I'm correct in
15 saying the government takes the position if 924(c) drops
16 out if it's not proved, then when it goes back to the
17 district court --

18 MR. YANG: Right.

19 JUSTICE GINSBURG: -- the district court can
20 enlarge the original sentence for the predicate offense.

21 MR. YANG: And because we think -- and this
22 is what happens in -- in courts, courts are applying the
23 guidelines. And the guideline says when you're
24 calculating the sentence for the predicate, you ignore
25 the offense conduct with respect to the gun because we

1 don't want to double-count it. But if you drop the
2 924(c), it should -- it should go back for the court to
3 consider the offense conduct as it considers the -- the
4 -- the sentence for the predicate.

5 This is a --

6 JUSTICE BREYER: Where? Where? I mean,
7 I -- my quick reading of 4, I promise I didn't memorize
8 the guidelines. I used to know them pretty well, but I
9 don't know them perfectly, by any means, and never did.

10 But it seems to me that comment 4 in 2K2.4
11 is saying that -- that defendant, you have committed a
12 crime, and in our guideline as punishment for the crime,
13 part of it is increased because you had a gun. And so
14 if we're going to apply the mandatory over here, which
15 is our special statute here, don't apply that. But I
16 don't see anything there that says you can't subtract.

17 MR. YANG: Well, when you go to 5G1.2, which
18 governs the total sentence, the -- when you have
19 multiple offenses with terms of imprisonment, it says
20 you -- you calculate the total sentence with respect to
21 the non-924(c)'s and then you tack on --

22 JUSTICE BREYER: 5G?

23 MR. YANG: 1.2, I believe. This is
24 addressed in pages --

25 JUSTICE BREYER: Right --

1 MR. YANG: I think around page 42 of our
2 brief. 43. Nope. 42.

3 JUSTICE BREYER: Maybe I'll find it.

4 MR. YANG: So the -- the point is the --
5 this is the way that the guidelines have been applied,
6 and they were applied, in fact, in this way in this
7 case. The district court calculated the sentencing
8 guidelines range, which is 84 to 105 months, based on
9 the guidelines.

10 No one is disputing that's what the
11 guidelines required. In fact, they conceded that that
12 was the proper guideline sentence in district court.
13 And then the district court then varied downward, and I
14 think the provision that you're talking about, about
15 3553(b) --

16 JUSTICE BREYER: Yeah. Yeah.

17 MR. YANG: -- part of that was, of course,
18 rendered inoperative under --

19 JUSTICE BREYER: Yeah. Yeah. That's --

20 MR. YANG: -- under Booker -- Booker. And
21 then -- and what the court did here is a post-Booker
22 thing, vary. It's not a technical departure, it's a
23 variance because he is applying --

24 JUSTICE BREYER: No. He varied here. He
25 varied.

1 MR. YANG: He varied. He varied down to 40
2 months. And then he additionally said, if I had
3 discretion, I'd go down to one day because I think 30
4 years is enough. But that is essentially a -- just a
5 disagreement with the policy judgment.

6 JUSTICE BREYER: No. And that's harder for
7 you. It's harder for you, because after all, if it's a
8 variance, he's not applying the guidelines. If he's not
9 applying the guidelines, all this stuff in the
10 guidelines that supports you is out the window. And --
11 and -- including the sentence I read. And if it's out
12 the window, all we're trying to do is back where we
13 started, is the statute -- does the statute, which
14 doesn't mention this, forbid it, or is it otherwise
15 unfair?

16 MR. YANG: Well, I would, I guess -- first
17 of all, we're not relying on the --

18 JUSTICE BREYER: My fault, not your fault.

19 MR. YANG: We're not relying on the
20 guidelines as an affirmative. We just wanted to point
21 out in our brief we think the guidelines are consistent.

22 JUSTICE KAGAN: But what are you suggesting
23 ought to happen? I mean, presumably, the guidelines
24 reflect an idea that there shouldn't be any
25 double-counting of the gun, right? So what does -- how

1 does the court do the -- the sentence on the underlying
2 crime, taking away the fact of the gun?

3 In other words, most robberies have guns in
4 them, and the sentences are written to reflect that they
5 have guns in them, don't they? Aren't they?

6 MR. YANG: No, actually. The guidelines
7 take into account things like Hobbs Act robbery and
8 separately account for the gun with a two-level
9 enhancement. And so the guidelines range, when you
10 commit a Hobbs Act robbery without a gun, will just be
11 the standard Hobbs Act robbery range.

12 Now, there are going to be other offense
13 characteristics if you injure someone or -- you know,
14 these things can affect --

15 JUSTICE KAGAN: What you think ought to
16 happen is that the -- is that the judge should say,
17 okay, imagine a robbery without a gun, what would be a
18 reasonable sentence for that.

19 MR. YANG: I think the judge should do --
20 take into account what judges normally do under a real
21 offense sentencing approach, which is you look at the
22 offense conduct, you look at the history and
23 characteristics of the defender --

24 JUSTICE KAGAN: Well, offense conduct, does
25 that mean without a gun?

1 MR. YANG: But -- but without the gun. We
2 say -- we think the judge has discretion, ultimately, to
3 either consider it with the gun or -- or not because
4 Congress hasn't expressly prohibited that. But the
5 guidelines approach, which we think is permissible, is
6 to consider it; you consider it without the gun and then
7 you -- the reason for that is the guidelines say
8 Congress has separately provided -- remember, the
9 legislative history, I think, there are -- Senator
10 Mansfield, that kind of was the -- the main proponent of
11 the relevant text, the very stringent sentencing
12 provisions, made clear that the whole purpose of this
13 was to impose this additional sentence and require
14 additional time in prison solely for the choice to use
15 the gun, so the guidelines --

16 JUSTICE KENNEDY: Well, that -- that's an
17 excerpt from the legislative history that, it seems to
18 me, is unimportant in light of what 3553 says. 3553(a)
19 says, you know, well, that the judge at the end of the
20 day has to consider the need for the sentence imposed to
21 reflect the seriousness of the offense and so forth. And --

22 MR. YANG: But the 3553 --

23 JUSTICE KENNEDY: And it seems to me you're
24 asking us to say that 924(c) really supersedes 3553.

25 MR. YANG: No. What we say is 3553 doesn't

1 apply on its own terms. It doesn't apply on its own
2 terms. If you look through the Sentencing Reform Act,
3 there are at least nine provisions, all of which, when
4 you're looking at them, fine or imprisonment or
5 probation or whatever it might be, the court -- the
6 provision says, the court shall, in setting this
7 sentence, consider the 3553(a) factors.

8 In addition, with respect to multiple terms
9 of imprisonment -- and this is on page -- I believe it's
10 5A of our -- excuse me -- 11A of our appendix. If you
11 look at 3584(b), it says, "The court, in determining
12 whether terms imposed to be" -- "are to be ordered
13 concurrently or consecutively, shall consider for each
14 offense" -- remember, this is multiple offenses -- "each
15 offense for which a term of imprisonment is being
16 imposed the factors set forth in 3553(a)."

17 So, normally, what happens is the courts
18 will determine individual sentences. So you could have
19 a sentence of seven years and a sentence of another
20 seven years, and then maybe one is capped at five. And
21 then the court says, I've got these individual
22 sentences. I sentence for each offense. What's the
23 total sentence? You could make that five and seven and
24 seven. You could make it 19. Or you could just make it
25 seven. It depends on whether you make them consecutive

1 or concurrent.

2 So the question about the total imprisonment
3 when you have multiple terms of -- of -- with multiple
4 offenses with terms of imprisonment is 3554(b) affects
5 that, and it says that's where you apply the 3553(a)
6 factors to determine the total length. But Congress
7 took that power away. Congress took that power away
8 totally in 924(c) by directing that you cannot do that.
9 You must impose them consecutively.

10 JUSTICE KAGAN: Well that's where I don't
11 understand your -- your answer to Justice Kennedy,
12 because you said, no, you're not saying that 924
13 supersedes 3553. I think you have to be saying that.
14 You might still be right, but you have to be saying that
15 there's this background principle, which is 3553, which
16 is this parsimony principle and all these factors, and
17 then 924 comes along and says, but not here.

18 MR. YANG: I guess in a sense we are saying
19 that, but I don't think it -- it operates directly on
20 3553(a), because I don't think 3553(a) operates as a
21 freestanding -- freestanding provision. It comes into
22 play at various points in the Sentencing Reform Act
23 where the court -- the Congress has said, you consider
24 these factors in making this determination. In
25 setting -- deciding whether to set on the amount of a

1 fine, you look at the 35 --

2 JUSTICE KAGAN: One way you might look at
3 this, and this goes back to what the Chief Justice said,
4 he said, well, when there's a 30-year sentence
5 implicated, you better be pretty clear. And also when
6 you're legislating against a fairly strong background
7 principle of 3553, you better be pretty clear that
8 you're displacing that background principle.

9 MR. YANG: But the --

10 JUSTICE KAGAN: And here, you're just not --
11 you just have not been clear enough. You were clear
12 enough in 1028(a). We know what that looks like. But
13 here, you just haven't been clear enough to upset this
14 background presumption.

15 MR. YANG: We think that it's clear enough
16 because 3553(a) applies by -- when you -- for purposes
17 of setting the total term of imprisonment, the only
18 reason 3553(a) applies is because Congress provided that
19 they are to be considered in 3584(b) in setting the
20 consecutive or concurrent sentence. And so that has
21 been removed. That has been removed.

22 If it were true that 3553(a) just generally
23 was a free-floating provision that applied everywhere,
24 then all the nine provisions of the Sentencing Reform
25 Act that specifically say you must consider the 353 --

1 53 factors with respect to these specific types of
2 sentences would be superfluous.

3 JUSTICE ALITO: If this case had arisen
4 before the Sentencing Reform Act was adopted, I -- I
5 think that Dean's argument would certainly be correct,
6 would it not?

7 MR. YANG: I think we would have a more
8 difficult --

9 JUSTICE ALITO: The judge would have
10 complied with the statute, the term wasn't consecutive,
11 and other than that, it was discretionary. So it was
12 completely within the judge's discretion.

13 MR. YANG: I think what we would have to
14 argue in that case is that the Congress would have known
15 that the traditional place that judges determine the
16 aggregate length of a sentence, when there are multiple
17 offenses carrying terms of imprisonment, is in the
18 determination that -- of whether the sentences run
19 concurrently or consecutively.

20 JUSTICE ALITO: At a minimum, you would have
21 had a very tough argument. On the other hand, if this
22 case had arisen before we decided Booker, if you read
23 the guidelines correctly -- and it does seem to be --
24 they do seem to say what you say they say -- then you
25 would clearly be correct.

1 MR. YANG: Yeah.

2 JUSTICE ALITO: So we're in this kind of
3 weird -- we're -- we're in this weird world that this
4 Court has created where the guidelines are advisory, but
5 then they're not advisory, and so that's why we have
6 this problem; is that correct?

7 MR. YANG: Well --

8 JUSTICE ALITO: You don't want to say that
9 because --

10 (Laughter.)

11 JUSTICE ALITO: -- nobody but me would agree
12 with you.

13 MR. YANG: We -- we -- we obviously accept
14 Booker as the proper interpretation of the law -- of the
15 Constitution. But I think what I would say is that the
16 guidelines -- there might be a slightly different
17 analysis. And I think the guidelines would then provide
18 yet an additional --

19 JUSTICE SOTOMAYOR: Mr. Yang --

20 MR. YANG: -- reason that we're correct.

21 JUSTICE SOTOMAYOR: -- I mean, the lack of
22 beauty of the guidelines is they're so artificial on so
23 many levels; all right? What differentiates a normal
24 theft from a robbery is the use of force. And the
25 guidelines, in defining the guidelines range for a

1 theft, starts at a much, much lower base level. Starts
2 at a seven, okay? For a robbery, it starts at a base
3 level of 20.

4 Once you start with that huge difference
5 between the use of force and the nonuse of force,
6 obviously, the robbery guideline is always going to
7 include the use of force. The fact that it might be
8 with a gun as opposed to a knife as opposed to a threat
9 of violence or whatever else you want to define it, the
10 use of force is inherent already in the guideline
11 calculation because, otherwise, that -- there's no
12 reason. They could have just had one table and said, if
13 you rob someone, if it was a pure calculation, as you
14 suggest it, without thinking about the gun, it would
15 have been \$20,000 is taken, we're all going to start at
16 a offense level of five years and build up from there.
17 That's not what the guidelines do.

18 So when you're taking discretion away from a
19 judge, I think that's one of the reasons we often
20 require specificity, because the guidelines are
21 artificial in so many different ways. And there are
22 gyrations that we go through as judges to comply with
23 dictates that are not very often very clear.

24 MR. YANG: Well, I think -- I'm not here to
25 criticize the guidelines. I think the guidelines have

1 worked for quite some time and have brought some
2 rationality to sentencing that didn't previously exist,
3 which was an important thing. The guidelines post
4 Booker, of course, advisory -- are advisory.

5 JUSTICE BREYER: That's -- that's what I'm
6 trying -- I'm not criticizing, not criticizing. I'm
7 trying to figure out what's the right system, putting
8 this case aside.

9 MR. YANG: Well, we --

10 JUSTICE BREYER: Now, if we had the
11 guidelines there -- try this. If the guidelines were
12 here, it wouldn't be such a problem, because they would
13 have -- the commission could look into this and it could
14 take the factor into account. And then we'd have
15 3553(b) and we'd follow that in the future unless it's
16 irrational.

17 But they're out the window. Okay. They're
18 out the window because it was a variance. So now we're
19 left with 924(c), you know, the statute, and we're also
20 left with the provision that says that a -- a court of
21 appeals has to look at a departure or a variance and see
22 if it's reasonable. Is that the right word? Reasonable
23 or rational or something. What's the word?

24 MR. YANG: Well, I think --

25 JUSTICE BREYER: -- on the appellate part.

1 MR. YANG: -- that you'd have to look to the
2 reasonableness of the sentence overall.

3 JUSTICE BREYER: Over -- what -- what is
4 it -- there's a word in the appellate part when they're
5 doing the review. Is it reasonable or -- you know, I'll
6 look it up.

7 MR. YANG: I think it is reasonable.

8 JUSTICE BREYER: Yeah, I think it is too.
9 Okay. So now --

10 MR. YANG: Reasonable always is a good word.

11 JUSTICE BREYER: Correct, correct, correct.
12 (Laughter.)

13 JUSTICE BREYER: So that's the -- that's
14 the -- the question in this case beyond the case is
15 really, how do we do that? And so -- so what I would
16 try out is, it would be obvious if you're right and the
17 statute is clear; okay? The -- the 924(c). Then you
18 win. That's the end of it. That's what you think. I
19 don't think it's clear.

20 If it's not clear, what do we do?

21 MR. YANG: Well, I think --

22 JUSTICE BREYER: And now -- now, what about
23 looking -- looking to see what the commission said about
24 it, noting that this is an individual case, not general,
25 not general where the district court has more power or

1 other things. Now you tell me. Those are floating
2 around in my mind. I'd like to know what's floating
3 around in your mind.

4 MR. YANG: I -- I don't believe the
5 commission gets any deference with respect to construing
6 Federal statutes.

7 CHIEF JUSTICE ROBERTS: Well, I --

8 MR. YANG: With respect to the guidelines,
9 yes, but with respect to construing Federal statutes,
10 I -- I don't think so. And so what we're back to is
11 924(c) and its interaction to the various provisions of
12 the Sentencing Reform Act.

13 The -- the key provisions, they rely on
14 3553(a) and they say look, you have to consider all
15 these factors, but 3553(a) applies in very specific
16 places of the Sentencing Reform Act, including when
17 there are multiple terms of imprisonment and a court has
18 to decide what the total imprisonment is going to be.

19 JUSTICE KAGAN: Counsel --

20 MR. YANG: That's 3584, and that's been
21 taken away because Congress took away the power to -- to
22 have concurrent sentences.

23 CHIEF JUSTICE ROBERTS: If you think the
24 case is resolved at a higher level, it seems to me that
25 your -- your friend has a very good technical argument

1 that says these sentences have to run concurrently. One
2 day, they run concurrently, end of case.

3 And your argument is, you know, you look at
4 the drafting history, the commentary to 2K2.4, all the
5 other arguments you got and you make -- make -- and the
6 basic one is well, that's technically correct, but it's
7 obviously not what Congress had in mind. Congress
8 obviously had in mind adding the mandatory onto a normal
9 sentence, one way or another, under -- under the
10 guidelines in 30 and all the provisions we've been
11 talking about.

12 So if you view the case that way,
13 technically correct, you know, contrary to the obvious
14 policy, what -- what case can you give me that tells us
15 how to approach a conflict like that?

16 MR. YANG: Well, our --

17 CHIEF JUSTICE ROBERTS: What's your --
18 what's your best case when you have a very significant
19 sanction in the balance, and you have technical
20 compliance on one hand, but clearly contrary to purpose?

21 MR. YANG: We don't think that the -- that
22 they're technically correct.

23 CHIEF JUSTICE ROBERTS: Well, I understand
24 that.

25 MR. YANG: We -- we think that there is a

1 plausible argument that they make on the text, but we
2 think that the proper approach is you always have to
3 approach statutes holistically. You look at the
4 statutory text; you look at the Congress's text
5 structure, the context --

6 CHIEF JUSTICE ROBERTS: Well, but then there
7 are also these basic rules they -- I mean, you insist
8 when citizens deal with the government that they turn
9 square corners, and I think it's right for a criminal
10 defendant when they're facing 30 additional years to
11 insist that the government turn square corners.

12 MR. YANG: Well, I think what you might be
13 referring to is the principle of lenity. But the Court
14 has repeatedly emphasized -- I think Abramski; one of
15 Justice Kagan's recent opinions explains this -- that
16 lenity applies only if there's a grievous ambiguity that
17 you might -- at the end of the day you --

18 JUSTICE KAGAN: But I don't think you have
19 to go to a principle of lenity for Mr. Stoler to be
20 right. I mean, you were just saying this is very much
21 along the lines of what the Chief Justice was saying.
22 You would just say something like, look, if we're going
23 to be strictly textualist here, this does not have the
24 kind of requirement you wish it had, which is to say it
25 doesn't have the language that's in 1028A. Your

1 essential argument is that, read Mr. Stoler's way, this
2 would utterly eviscerate (c)(1)(D)(ii), the consecutive
3 requirement. And I'm quite sympathetic to that. But
4 there's still this question of when a statute doesn't
5 say what you would like it to say and you're reduced to
6 saying if you read it the other guy's way, it would
7 eviscerate what we -- what we meant when we passed
8 another provision, you know, what -- what should we do
9 and where do you point us?

10 MR. YANG: I would say that it's true that
11 it -- it eviscerates the purpose and the whole structure
12 of the statute, but the statute says a lot by removing
13 authority. So the question is what authority was
14 removed. I -- I think it's helpful to look at page 11A
15 of the government's appendix, 3584. 3584(b) governs the
16 discretionary decision of a judge when there are
17 multiple terms of imprisonment, how do you decide the
18 total length. The total length is set by making them
19 concurrent or consecutive, and 3554(b) -- or 3584(b),
20 sorry, specifically says that in deciding the total
21 length by making consecutive or concurrent, you apply
22 the factors set forth in 3553(a). That's what they rely
23 on.

24 But 924(c) removes that authority. 924(c)
25 removes the authority to be able to set the total length

1 of imprisonment when there are multiple terms of
2 imprisonment.

3 JUSTICE KENNEDY: So you're saying that in
4 this case, the judge says I can't look at 3553(a)?

5 MR. YANG: No, he does. The -- the judge --
6 there are various other places, but for the total --

7 JUSTICE KENNEDY: But -- but -- but other
8 than for the initial downward departure.

9 MR. YANG: But -- but -- but for the total.
10 You -- for -- you can look at 3553(a) in setting the
11 individual terms, but Congress separately addressed how
12 you make those terms, how you add them, make them -- the
13 total, it depends on the aggregate; right? You --
14 whether you add them or run them concurrently or with
15 each other. So that is what 3554(b) -- or 3584(b)
16 addresses, and that's where the 3553(a) factors are
17 applied, but Congress took that authority away.

18 That's -- that's what I think speaks
19 volumes. And -- and when you look at the structure of
20 the Sentencing Reform Act, the -- the Sentencing Reform
21 Act kind of has a modified real offense sentencing
22 approach. You take a look at the -- the offender, the
23 characteristics of the offender, the history. Not only
24 the offense conduct, you look beyond this particular
25 offense, conduct broadly, what's all the relevant

1 conduct, critic conduct --

2 JUSTICE KENNEDY: You're -- you're asking
3 the judge to say, in calculating the sentence for the
4 underlying offense, I'm going to look at all these
5 factors. Frankly, it's meaningless, because what I'm
6 going to do in the 924(c), but I'll do something
7 meaningless.

8 MR. YANG: No, no, no, not at all. If --
9 if, for instance, a judge would say, as in this case, an
10 appropriate sentence is 40 months, right? The judge
11 says an appropriate sentence for this -- each of these
12 four has a 40-month term. In a normal world, if there
13 was also a five-year sentence, the judge would then go
14 to 3584(b) and say I'm going to consider the 3553
15 factors to decide if I'm going to add the 40 to the five
16 years, or I'm going to just run them concurrently so
17 it's five years total. That's what normally happens.

18 Section 924(c) says you can't do that. You
19 have to add it. It is add -- in addition to the
20 punishment, the punishment for the predicate offense.
21 And so we think that simply underscores what -- what has
22 always been the -- the thrust, the understanding of --
23 of 924(c).

24 It is a harsh provision. There is no doubt.
25 But Congress intended that to be harsh because of the

1 extreme danger presented when you add a gun to either a
2 crime of violence or a drug trafficking offense. And
3 Congress made that determination that it's going to be
4 at least five additional years for the gun, and if
5 there's a second or subsequent, 25 years. Disagreement
6 with that length of an imprisonment simply circumvents
7 what Congress was doing in 924(c).

8 JUSTICE BREYER: If -- if you -- if you're
9 in the realm of what's reasonable and the judge is
10 looking at, well, you are under the appellate provision
11 because he's varied from the guidelines, of course, you
12 have to give the mandatory minimum, there it is, the
13 gun, 25 years. And now the judge thinks, you know, this
14 is way beyond what this guy did. It's fine for the gun,
15 but his total conduct here was -- doesn't warrant such a
16 long sentence.

17 MR. YANG: On appellate --

18 JUSTICE BREYER: It's in -- it's in the
19 other part, it's a reasonable thing given this
20 individual who may suffer certain individual things, da,
21 da, da.

22 MR. YANG: Congress --

23 JUSTICE BREYER: A reasonable thing to give
24 him one day.

25 MR. YANG: Congress made the determination.

1 You don't do a reasonable --

2 JUSTICE BREYER: Yeah, yeah.

3 MR. YANG: -- analysis.

4 JUSTICE BREYER: If think that, then you
5 win; that's the end of it.

6 MR. YANG: And -- and that's why, you know,
7 when you have a predicate offense that Congress said add
8 this additional mandatory on, you don't look to the
9 length of the total, because maybe -- maybe 30 years, in
10 the judge's view, is not reasonable, but Congress
11 required that.

12 That is a separate -- that is for Congress
13 to decide what the minimum is going to be for the
14 924(c). What would be reasonable is when you take a
15 look at the predicate offense and you say would this be
16 a reasonable -- one day for four felonies, would that be
17 reasonable? And the answer to that is of course not,
18 as -- as my brother conceded at -- in his argument.

19 So, again, I think the whole -- the idea
20 that a judge would go down to one day because of a
21 disagreement with the length of the mandatory minimum
22 simply circumvents the statute and is inconsistent with
23 924(c)'s text.

24 Thank you.

25 CHIEF JUSTICE ROBERTS: Thank you, counsel.

1 Five minutes, Mr. Stoler.

2 REBUTTAL ARGUMENT OF ALAN G. STOLER

3 ON BEHALF OF THE PETITIONER

4 MR. STOLER: There's no affirmative ban in
5 district courts considering 924(c) sentencing when
6 considering the predicate offenses, and given the
7 overarching theme of -- of discretion and parsimony
8 pervades.

9 The -- the -- counsel for the government
10 seems to indicate that we look at 3584(b), we agree that
11 it limits -- that there has to be that 30-year
12 consecutive sentence, but it just guides the court's
13 discretion with respect to the 3553(a) factors. It
14 doesn't say that they only apply to each count, not the
15 aggregate sentence. And you look at 3584 and you read
16 the third provision, it talks about the aggregate
17 sentence in itself.

18 So the -- the reliance by the government on
19 3584 is -- we -- we say is misplaced and does not affect
20 whether or not the -- the total sentencing scheme that
21 the parsimony requirements put on ends the result of the
22 court determining what sentence is sufficient, but not
23 greater than necessary.

24 We don't quarrel that 30 years must be
25 imposed under the mandatory minimums. What we do

1 quarrel with is whether or not the court should be able
2 to take that -- those factors into consideration, as
3 well as all those other factors that are set forth in
4 3553(a), 3551, 3661, which gives us the -- the
5 determination to be made as to what the -- what should
6 be the appropriate sentence in this case.

7 If there's no other questions.

8 JUSTICE BREYER: Well, I was thinking of at
9 a deep level of what Thomas Reed Powell said about the
10 law. He wants us to think of this second part, you
11 know, as related, but really no. Look at the second
12 part, keep it totally separate, and the statute means
13 that the part about robbery has to be done separately.
14 Reed Powell said if the -- you can think of a thing that
15 is inextricably related to another thing without
16 thinking of the thing to which it is inextricably
17 related, you then have the legal mind.

18 (Laughter.)

19 JUSTICE BREYER: That's what he wants us to
20 do. He says that's what the statute requires.

21 MR. STOLER: We submit that the statute
22 shouldn't be read that way in this instance, Your Honor.

23 JUSTICE ALITO: Do you think it matters that
24 it's a 30-year mandatory minimum? What if it was a
25 one-year mandatory minimum. Would the result be

1 different?

2 MR. STOLER: It may. I mean, that's the
3 court's --

4 JUSTICE ALITO: It would? Really?

5 MR. STOLER: Well, it -- it may be different
6 from the standpoint -- no. The one-year has to be
7 imposed.

8 JUSTICE ALITO: A year and a day would be
9 okay?

10 MR. STOLER: If, under the -- the total test
11 of reasonableness and applying the factors the court's
12 supposed to apply, makes that decision that he thinks
13 that -- that that -- he or she thinks that's the
14 appropriate sentence, that -- that may be right, but
15 it's going to be subject to the test of substantive
16 reasonableness on appeal. And the -- here in the
17 instance, it's -- it's a different scenario because it's
18 30 years, Your Honor, and that's what we're saying.

19 CHIEF JUSTICE ROBERTS: Thank you, counsel.
20 The case is submitted.

21 (Whereupon, at 11:02 a.m., the case in the
22 above-entitled matter was submitted.)

23

24

25

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