

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: UNITED STATES, Petitioner v. GEORGE LaBONTE,
ALFRED LAWRENCE HUNNEWELL AND STEPHEN
DYER

CASE NO: 95-1726

PLACE: Washington, D.C.

DATE: Tuesday, January 7, 1997

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 UNITED STATES, :
4 Petitioner :
5 v. : No. 95-1726
6 GEORGE LaBONTE, ALFRED LAWRENCE :
7 HUNNEWELL AND STEPHEN DYER :

8 - - - - - X
9 Washington, D.C.
10 Tuesday, January 7, 1997

11 The above-entitled matter came on for oral
12 argument before the Supreme Court of the United States at
13 1:00 p.m.

14 APPEARANCES:

15 MICHAEL R. DREEBEN, ESQ., Deputy Solicitor General,
16 Department of Justice, Washington, D.C.; on behalf of
17 the Petitioner.

18 DAVID N. YELLEN, ESQ., Hempstead, New York; on behalf of
19 the Respondents.

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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 argument
4 now in Number 95-1726, United States v. LaBonte.

5 ORAL ARGUMENT OF MICHAEL R. DREEBEN

6 ON BEHALF OF THE PETITIONER

7 MR. DREEBEN: Mr. Chief Justice and may it
8 please the Court:

9 This case involves the validity of commentary in
10 the Federal sentencing guidelines that governs sentencing
11 of career offenders.

12 Congress directed that the sentencing guidelines
13 specify a sentence at or near the maximum term authorized
14 for the identified categories of career offenders. In
15 Amendment 506 to the guidelines, however, the commission
16 specified that the statutory sentence enhancements for
17 recidivists shall not be used in calculating the maximum
18 term authorized under the career offender guideline.

19 Thus, where a Federal narcotics law specifies
20 that a first offender shall receive a sentence with a
21 maximum of 20 years and a second offender shall receive a
22 sentence subject to a 30-year maximum, the commission
23 treats the maximum term authorized as 20 years. In our
24 view, the commission's disregard of recidivist
25 enhancements conflicts with the Sentencing Reform Act and

1 is invalid.

2 The starting point for analysis of this question
3 is the text of the Sentencing Reform Act, which is set out
4 in our brief in the appendix at page 21a, and it provides
5 in section 994(h) of title 28 that the commission shall
6 assure that the guidelines specify a sentence to a term of
7 imprisonment at or near the maximum term authorized for
8 categories of defendants, and then it goes on to specify
9 that the defendants must be 18 years of age or older and
10 be convicted of a felony that was a crime of violence or a
11 specified Federal drug offense and have two prior
12 convictions of the same type.

13 The text of this statute in our view is clear.
14 The maximum term authorized refers to the maximum, the
15 uppermost limit of a range, thus, where there is a range
16 consisting of two possible uppermost limits the higher of
17 the two is the maximum.

18 QUESTION: Your position is that maximum means
19 maximum.

20 MR. DREEBEN: That is absolutely correct,
21 Justice Scalia.

22 QUESTION: But authorized by what?

23 MR. DREEBEN: Maximum term authorized by
24 statute.

25 QUESTION: No, I know, but by what statute? I

1 mean, what we have are, we have statutes that authorize a
2 maximum of 15 years or 30 years for a second offense, this
3 intent with -- possession with intent to distribute a --

4 MR. DREEBEN: Controlled substance.

5 QUESTION: -- controlled substance, and then we
6 have statutes that say if you do this near a school it's
7 an extra thing, and then if you did it with -- another
8 extra thing -- I mean, like, there -- does it mean the
9 maximum authorized by whatever combination of statutes put
10 together produces the most individually tailored,
11 statutorily tailored sentence for this defendant, or does
12 it mean authorized by the statute that deals with the
13 substantive crime, or some combination in between?

14 MR. DREEBEN: Well, I think that it actually
15 means the maximum term authorized by statute for the
16 particular offender.

17 QUESTION: So in other words they have to have a
18 whole proliferating schedule within the guidelines so that
19 you'd have, for a person who, in fact, is a second
20 offender of a cocaine possession with intent to
21 distribute, and in the course of that he injures another
22 person, and he does it near a school, and you know, there
23 you have a footnote with about six other things, and then
24 there are -- and there has to be one schedule for that
25 person.

1 And then you have to have another schedule for
2 somebody who did exactly the same thing but not near a
3 school, and then you have to have another schedule for
4 somebody who did the exact same thing but it didn't
5 involve an injury or death.

6 Is that the view --

7 MR. DREEBEN: I think this would have been the
8 easiest statute in the commission's repertoire for it to
9 implement. All the commission would have had to say is --

10 QUESTION: Yes, but I mean I understand that we
11 could have taken it that way, but I'm --

12 MR. DREEBEN: -- a sentence at or near the
13 maximum is a sentence within 15 or 20 percent or 25
14 percent of the maximum, and for any defendant who's
15 covered by section 994(h), when the sentencing court
16 determines what his authorized statutory maximum term is,
17 the range is X percent less than that up to the top.

18 QUESTION: Well, this is pretty much near a two-
19 thirds. It's two-thirds, or 75 percent --

20 MR. DREEBEN: Well, it is not -- it is not for
21 an offender like LaBonte, and I think that it's important
22 to keep in mind exactly what is going on here.

23 LaBonte is exposed to a maximum term -- I don't
24 think there's any dispute whatsoever -- by statute of 30
25 years, which is 360 months, and under the career offender

1 guideline as it existed prior to the time of
2 Amendment 506, that would have produced a base offense
3 level of 34, which is 262 months to 327 months, or 21 to
4 27 years. That is 72 percent to 90 percent of the 30-
5 year maximum.

6 Under the commission's approach, Amendment 506,
7 an offender like LaBonte is treated as if his maximum term
8 is 20 when it's actually 30, and he's assigned a base
9 offense level of 32, which produces a sentencing range of
10 210 months to 262 months, or 58 percent to 72 percent of
11 the 30-year max, so I think that there's quite a
12 significant drop-off --

13 QUESTION: Yes but -- I'm sorry, I didn't get an
14 answer to my original question, which I -- because I
15 unfortunately got distracted.

16 Is it your view, is it the Government's view
17 that when a person commits a second cocaine offense and a
18 death results, and it occurs within a thousand -- leave
19 the death out, a thousand feet of the highway truck stop
20 with a weapon, that the maximum authorized means the
21 maximum authorized by the combination of those sentences,
22 of all those statutes together?

23 MR. DREEBEN: Yes.

24 QUESTION: So you'd have to go through the --
25 that's the only way -- and you think that's clear? I

1 mean --

2 MR. DREEBEN: I think that the term, maximum
3 statutory term authorized means maximum statutory term
4 authorized --

5 QUESTION: For this individual --

6 MR. DREEBEN: -- for an individual.

7 QUESTION: So one would have to go through and
8 individualize all of these --

9 MR. DREEBEN: Well, that is done, of course --

10 QUESTION: You have to do that in any sentence.

11 MR. DREEBEN: Any time a sentencing court --

12 QUESTION: No, no, that's a --

13 MR. DREEBEN: It will do a presentence --

14 QUESTION: Under that reading, why do you need
15 the word categories?

16 MR. DREEBEN: I don't think the word categories
17 does add a lot under the statute, Justice Kennedy, and I
18 wouldn't suggest to the Court that under our view of the
19 statute it has huge operative significance, but I think in
20 the context of section 994(h) it has plenty of
21 significance in the following respect:

22 994(h) identifies basically two different
23 categories of defendants that Congress singled out from
24 among the welter of other defendants and said, Sentencing
25 Commission, assure that these offenders receive a sentence

1 at or near the maximum: either, you commit a crime of
2 violence, or you commit one of the Federal drug offenses
3 that are identified and listed in the statute, and you
4 have two prior convictions of the same type.

5 So you have the category of violent offenders
6 with two prior convictions, you have the category of drug
7 offenders with two prior convictions, and the structure of
8 section 994(h) supports the view that that is the intended
9 reading of categories, the types of defendants that are
10 covered.

11 QUESTION: May I ask a fact question before you
12 get too deeply into the argument?

13 MR. DREEBEN: Certainly.

14 QUESTION: You say that under the career view of
15 the statute the maximum is 30 years.

16 MR. DREEBEN: Correct.

17 QUESTION: And it's -- under the commission's
18 view the maximum is 20 years.

19 MR. DREEBEN: Correct.

20 QUESTION: Because you're not taking into the
21 career offender factors there.

22 What would the guideline sentence have been when
23 you -- without a requirement that it be at or near the
24 maximum, under a 20-year maximum? Do you understand my
25 question?

1 MR. DREEBEN: Yes. Yes, I do. I don't recall
2 the exact guideline sentence for the three respondents in
3 this case, but suffice it to say that it would have been
4 substantially lower than the career offender sentence.
5 The career --

6 QUESTION: Would it have been roughly a third,
7 or -- a third or a half, something like that?

8 MR. DREEBEN: I'd be willing to accept that.

9 QUESTION: If -- so in other words, if it was a
10 third it might have been 7 or 8 years.

11 MR. DREEBEN: Correct.

12 QUESTION: Whereas -- and if you then say that
13 you should take -- and the normal third of the 30 years
14 would have been 10 years, absent the requirement that it
15 be at or near the maximum, but now the -- under the
16 commission's view it is at or near the maximum of 20 years
17 because of the guideline provision, isn't it?

18 MR. DREEBEN: Right. If the maximum were in
19 fact 20 years we might not have any quarrel with what the
20 commission had done, but the maximum isn't 20 years.

21 QUESTION: No, I understand that, but even
22 interpreting the at or near maximum the way the commission
23 does, you do get a substantially higher sentence for a
24 career offender than you would absent the statute.

25 MR. DREEBEN: Yes, you do.

1 QUESTION: Yes.

2 MR. DREEBEN: And if the statute had only said
3 substantial sentence, or substantially higher sentence, we
4 would have a different case.

5 I was trying to elucidate the meaning of
6 categories, and I think that this will tie in with your
7 question, Justice Stevens. Section 994(i) of the statute,
8 which is on page 22a of our appendix, lists another group
9 of offenders that the commission wanted -- that the
10 Congress wanted the commission to treat in a special way.

11 In section 994(i), the commission is directed to
12 assure that the following categories of defendants receive
13 a substantial term of imprisonment, and then it goes on to
14 list five categories of defendants that are to receive a
15 substantial term of imprisonment.

16 Now, substantial is certainly a qualitative word
17 that admits of a broad range of meanings, and the
18 commission may very well have fulfilled a duty to impose a
19 substantial sentence on the career offenders under the
20 guidelines as it has written it, but Congress has singled
21 out the career offenders identified in section 994(h), the
22 categories of career offenders there, for different
23 treatment.

24 That treatment is perhaps the most specific
25 direction that Congress gave the commission anywhere in

1 the sentencing guidelines. It was to assure a sentence at
2 or near the maximum, and it's our view that that provision
3 means exactly what it says.

4 Now, the implausibility of the commission's
5 approach of disregarding recidivists in the enhancements
6 is particularly implausible in light of the various
7 statutes that are identified in the career offender
8 provision as calling for career offender treatment.

9 QUESTION: Mr. Dreeben, the problem we have in
10 this case stems from a new commentary adopted by the
11 commission to section 4B1.1 of the guidelines.

12 MR. DREEBEN: That is right, Justice O'Connor.

13 QUESTION: And what precisely are you asking us
14 to provide if that commentary is wrong?

15 MR. DREEBEN: Invalidate --

16 QUESTION: What are you asking us to do,
17 invalidate -- invalidate the commentary?

18 MR. DREEBEN: That is right.

19 QUESTION: And we treat the commentary as a rule
20 or regulation or something?

21 MR. DREEBEN: Well, not even so exalted a status
22 as rule or regulation. I think this Court made clear in
23 *Stinson v. United States* that commentary plays generally
24 the role of elucidating what the guidelines mean. They're
25 not legislative rules in their own right. But the

1 Court --

2 QUESTION: Have we ever struck down a
3 commentary? I mean, it just comes --

4 MR. DREEBEN: Well, I think the point of Stinson
5 is that the commentary does carry the force of law in this
6 sense. If it is not inconsistent with the Federal
7 Constitution or a Federal statute, it is to be given
8 controlling weight unless it conflicts with the plain text
9 of the guideline or is otherwise arbitrary.

10 That's what this Court held in Stinson, and our
11 submission here is that this commentary doesn't pass the
12 Stinson test, not because it's inconsistent with the
13 sentencing guideline as written. It is inconsistent with
14 the overarching authorizing statute that Congress directed
15 the commission to follow when it promulgated sentencing
16 guidelines, and because of its direct conflict with a
17 Federal statute it is invalid. The Court strikes it down
18 and leaves in place a totally operative and valid
19 sentencing guideline that governs career offenders.

20 At least insofar as this case is concerned,
21 we're not raising any other issue about the career
22 offender guideline and its compliance with Federal law but
23 for this one precise point. The commission has defined
24 maximum to mean something less than the maximum. The
25 commission can't do that. Now, I would --

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1 QUESTION: It's -- I mean, the ambiguity, if
2 there is one, I think is in the word authorized.
3 Authorized by what? I don't know if there is an
4 ambiguity, but that's where it would be, and the problem
5 that I see is if you -- it's obviously a close question.
6 I'm not sure what I think about it.

7 But the authorized, if you take your
8 interpretation of it you'll suddenly discover a, you know,
9 very bizarre set of sentences, what I would think of. For
10 example, if you distribute cocaine or amphetamines or
11 barbiturates, or one ounce of marijuana near a truck stop,
12 and you do that twice, you're going to get three times the
13 normal sentence.

14 The normal sentence has already been doubled
15 because you did that twice, so you're going to end up with
16 life sentences for things like an ounce of cocaine, or
17 let's say an ounce of marijuana distributed twice in a
18 truck stop.

19 And moreover, rather than what Congress
20 suggested, that these are maxes, so you could have a
21 lesser sentence, they suddenly become mandatory minimums.
22 They're mandatory minimums because nobody would have any
23 choice, and are we really to attribute that intent to
24 Congress, that they wanted to turn all these things like
25 truck stop distributions and so forth into life sentences?

1 MR. DREEBEN: Well, I think, Justice Breyer,
2 that the only thing that you can clearly attribute to
3 Congress is that it identified a category of repeat
4 offenders who are worse than other categories of repeat
5 offenders --

6 QUESTION: Yes.

7 MR. DREEBEN: -- that came to the legislature's
8 mind.

9 QUESTION: All right. Tell me the argument
10 against the other way. The argument the other way is,
11 what they meant by maximum authorized was maximum
12 authorized by the statute that describes the substantive
13 crime.

14 MR. DREEBEN: Okay. That is an alternative
15 meaning that one could advance.

16 QUESTION: Yes.

17 MR. DREEBEN: The court of appeals advanced
18 something similar.

19 QUESTION: No, they didn't get -- yes, all
20 right. That's --

21 MR. DREEBEN: They did it on the basis of --

22 QUESTION: Right. Right. Right.

23 MR. DREEBEN: -- the word categories, but their
24 point was there was some ambiguity here because you could
25 either look to the highest sentencing statute or you could

1 just look at the category of offenders who were covered by
2 the basic statutory violation. That doesn't work, I
3 think, on anybody's theory if you look at it closely.

4 Under section 841(a), which is the basic Federal
5 drug law covered in the career offender guideline, there
6 is one violation. The violation is possession of a
7 controlled substance, any controlled substance, with
8 intent to distribute. That is the statutory violation.

9 Section 841(b) is the sentencing provision.

10 QUESTION: Right.

11 MR. DREEBEN: And if you lump together everybody
12 who violates section 841(a) and say, what is the highest
13 sentence that all of them could receive under
14 section 841(b), you end up with 5, or maybe 10 years under
15 section 841(b)(1)(D), which covers marijuana offenders
16 who -- first time offenders get 5 years, second time
17 offenders get 10 years, and it can't possibly be that
18 Congress intended that these most serious offenders in the
19 Federal system would be subject to a maximum that lumps
20 together everybody, no matter what kind of drug they
21 distributed, no matter how many prior offenses they had.

22 The point of our case here is that in section
23 841(b), as well as section 952(a) and the maritime drug
24 law, which is also referenced in the career offender
25 guideline, Congress has tiered the maximum --

1 QUESTION: Wait, where did you get -- my -- the
2 code at that time says that in the case of the controlled
3 substance in schedule 1 or 2, that's the cocaine, the max
4 that I have here is not more than 15 years, so at that
5 time in '84 I'd suppose if you read it to apply just to
6 the -- you call it the first offense, the crime of
7 substance. It would have mandated a 15-year sentence.
8 Now, why is that odd?

9 MR. DREEBEN: Well, actually I don't -- I'm
10 not --

11 QUESTION: I'm reading -- what I have is
12 841(b) -- 841(b)(1)(A), which --

13 MR. DREEBEN: Well, Congress didn't freeze the
14 maximum terms.

15 QUESTION: No.

16 MR. DREEBEN: And in fact it revised --

17 QUESTION: Well, then, what --

18 MR. DREEBEN: -- what the maximum terms were.

19 Some of them went up, some of them went down. It
20 recalibrated basically how the maximum terms worked in
21 section 841(b), and it's done that over time, but right
22 now, which is the operative time for assessing what
23 somebody would get if the theory of the statute were
24 accepted that you proposed, section 841(b)(1)(D) says that
25 for less than 50 grams of marijuana zero to 5 years is the

1 range, one prior felony, zero to 10.

2 And remember, the kind of controlled substance
3 is not an element of the offense.

4 QUESTION: That's for less than -- that's for an
5 ounce of marijuana.

6 MR. DREEBEN: That's right. That's right.

7 And since all violators of any Federal -- who
8 possess any kind of Federal controlled substance violate
9 section 841(a), and then you have to look for 841(b) for
10 the sentencing factors, I don't think it's possibly
11 reasonable to suppose that Congress intended a category
12 consisting of all 841(a) violators without regard to their
13 recidivist enhancements, or without regard to the kind of
14 controlled substance that they possess.

15 Congress very carefully calibrated the statutory
16 maximums that are applicable to a controlled substance
17 offender depending on the type of controlled substance,
18 the harm that resulted, and the prior record.

19 Now, what makes it particularly inapposite to
20 adopt the commission's view is that section 840 -- section
21 994(h) is designed to target recidivist offenders. The
22 statutes that are referenced in section 994(h), the
23 controlled substance sentences, each provide higher
24 maximum terms for recidivist offenders, and in the context
25 of that specific reference, Congress could not have meant

1 by maximum term authorized to mean the term for first
2 offenders.

3 The legislature would have had every reason to
4 expect that there would be few, if any, first time drug
5 offenders covered by the statute.

6 It was logically possible to have somebody with
7 two prior crimes of violence and then committing a Federal
8 drug offense and be covered by the statute, but most of
9 the offenders who are covered by the career offender
10 guideline and who have violated Federal drug law will have
11 a prior conviction, and their maximum term will be the
12 enhanced maximum. That seems to us to be exactly what
13 Congress had in mind.

14 QUESTION: I don't -- maybe I shouldn't pursue
15 this, but let me try once more. My understanding of the
16 structure of 841 drugs, then and now, is you have a basic
17 crime in (a).

18 MR. DREEBEN: Correct.

19 QUESTION: And then (b) has a whole set of
20 categories of punishments, and in each -- and they have
21 several subsets, really distinguished one from the other
22 by the seriousness of the drug and the amounts, and as to
23 each subset you have it broken typically into two parts.

24 One is a punishment for a first offender, and
25 the second part is a punishment for a subsequent offender,

1 and so what would be odd in Congress thinking what we mean
2 by this word authorized is the part that is authorized for
3 a first offender of the substantive crime?

4 What would be the odd result you would be
5 distinguishing if you took that, among all the different
6 categories of drugs, because A, B, C and D do that, and
7 you would have quite different -- you'd have quite
8 different maximums authorized for a marijuana person from
9 a cocaine person, from a big guy, from a little guy, all
10 for the first offense, so what would be odd about Congress
11 meaning that?

12 MR. DREEBEN: What would be odd about it,
13 Justice Breyer, is that this is a statute that targets all
14 people who are not first offenders. All of these
15 people --

16 QUESTION: Oh, that's true.

17 MR. DREEBEN: -- who are targeted by the career
18 offender guideline are recidivists. The drug recidivists
19 may have no prior drug crime. They may have two prior
20 crimes of violence, but most of the people who are Federal
21 drug offenders covered by the career offender guideline
22 are going to have prior offenses.

23 And Congress, at the same time that it enacted
24 section 994(h), also deliberately went back to section 841
25 and changed the structure of the statute not to include

1 recidivist enhancements for the first time -- it had done
2 that -- but it changed the exact amounts of those
3 recidivist enhancements.

4 So what you have is Congress, on its mind at the
5 time it passes the Sentencing Reform Act, what are the
6 maximum terms authorized for these categories of drug
7 offenders, let's raise them, and then a separate statute
8 telling the commission here you have repeat offenders of
9 specified Federal drug offenders -- and we're going to
10 list them in the statute -- sentence these people distinct
11 from all others, add on your maximum terms authorized, and
12 in that context I think that it becomes entirely
13 implausible to suggest that Congress meant the first
14 offender sentence that is applicable to someone who does
15 not have prior crimes.

16 QUESTION: Mr. Dreeben, you had a point in your
17 brief that intrigued me. You were responding to the
18 double counting argument, and this is on page 27 of your
19 brief, and you said, conceivably the commission could
20 devise an alternative computation mechanism consistent
21 with section 994(h) yet avoid the double counting of prior
22 convictions. What would the -- what could the commission
23 have done?

24 MR. DREEBEN: Justice Ginsburg, that depends in
25 part on what one thinks the purported double counting

1 objection might be. The Sentencing Commission didn't say.

2 There are two possible variations. One is, the
3 same conviction is used under section 841(b) to enhance
4 the maximum term and to send somebody into the career
5 offender guideline. That form of alleged double counting,
6 if it is double counting, cannot be eliminated by the
7 Sentencing Commission. It must do that, because the law
8 specifies that the same conviction may have the effect of
9 increasing the maximum term and making somebody a career
10 offender.

11 But the other possible double counting objection
12 is that the same prior conviction is used both to enhance
13 an offender's offense level and to increase his criminal
14 history, and that that might have seemed to the commission
15 to be double counting for some reason.

16 QUESTION: I speculated that what you had in
17 mind -- maybe this is the first thing you said -- is that
18 the commission could say criminal history -- essentially
19 criminal history is not relevant in the guidelines when
20 you have a maximum term under this statute.

21 MR. DREEBEN: I think that's exactly right,
22 Justice Kennedy. What the commission could do in that
23 situation is simply say, if you're a career offender, go
24 to the statute books, find the maximum term authorized,
25 and sentence within 10 percent or 15 percent of that

1 maximum term, instead using the grid provided in the
2 sentencing table for most offenders.

3 The commission was not required to use the grid
4 for everybody. Career offenders are clearly to be treated
5 differently than almost everybody else sentenced under the
6 guidelines. In fact, there's no other provision that was
7 handed to the Sentencing Commission to implement that is
8 anywhere near as specific as this on how particular
9 identified offenders are to be treated, and the commission
10 could have quite easily said, sentence them all at their
11 maximum.

12 The commission in fact had proposals before it
13 before the guidelines were promulgated that said all
14 career offenders shall be sentenced at their maximum.

15 QUESTION: The other reason against doing
16 that -- I'd be curious if you'd comment on it. The -- I
17 mean, the choice is really between saying what Congress
18 meant was where it says a first offender gets up to 20
19 years, up to, what they meant by this is, he gets 20
20 years, period, or what you're arguing.

21 And one concern was, if you take what you argue,
22 that really turns the power to decide what the sentence is
23 directly over to the prosecutor, because in most of these
24 cases you can't go beyond 20 years unless the prosecutor
25 files a specific piece of paper, and that decision, which

1 is totally the prosecutor's, is totally contrary to the
2 whole philosophy of the guidelines.

3 MR. DREEBEN: Well --

4 QUESTION: I'm just putting that to you so
5 you --

6 MR. DREEBEN: I'm not sure, Justice Breyer, that
7 it is totally contrary to the whole philosophy of the
8 guidelines.

9 The impetus of the guidelines was to eliminate
10 unwarranted disparity by different judges who have
11 different sentencing philosophies. The guidelines do not
12 and cannot eliminate prosecutorial discretion and, given
13 that Congress has vested the prosecutor with the
14 authority, as you say, to raise the maximum by filing a
15 reply or pretrial notice of crimes, Congress has vested
16 discretion in the prosecutor.

17 I don't think the commission can say that is an
18 unwarranted disparity. That is a product of prosecutorial
19 discretion which is an endemic and universal feature of
20 Federal criminal law, and the Sentencing Commission was
21 not given the task, which would probably be
22 unconstitutional anyway, of attempting to eliminate
23 prosecutorial discretion in the enforcement of Federal
24 criminal law, and so I don't think that there's any
25 argument there that the disparity is unwarranted.

1 For the reason that I expressed earlier, I don't
2 think that there's any ambiguity in the intent of Congress
3 when it said maximum term authorized to mean the
4 recidivist term for career offenders.

5 If the Court has no further questions, I'll
6 reserve the remainder of my time.

7 QUESTION: Very well, Mr. Dreeben. Mr. Yellen,
8 we'll hear from you.

9 ORAL ARGUMENT OF DAVID N. YELLEN

10 ON BEHALF OF THE RESPONDENTS

11 MR. YELLEN: Mr. Chief Justice, and may it
12 please the Court:

13 Justice Breyer's colloquy with Mr. Dreeben I
14 think fairly clearly points out that there are various
15 ways of reading the language of the maximum term
16 authorized for categories of offenders, and a critical
17 point that did not come out in the Government's argument
18 is that Congress considered and expressly rejected giving
19 a directive to sentencing courts to impose a maximum,
20 ordinary maximum term.

21 That was in the 1982 bill that passed the Senate
22 but the Senate the next time, the next year rejected that
23 and instead gave this more general instruction to the
24 Sentencing Commission, putting this obligation under
25 994(h) in the context of all of the commission's

1 obligations.

2 And what the Sentencing Commission did here was
3 looked at all of its obligations, including first and
4 foremost under the statute to provide certainty and
5 fairness and reducing unwarranted sentencing disparity,
6 and the commission decided that the prosecutor having the
7 ability to in effect determine the sentence by this 851
8 mechanism was something that would contribute to
9 unwarranted disparity.

10 QUESTION: Well, how -- why was Congress -- why
11 was the commission in a position to second guess Congress
12 on that? If the prosecutorial discretion comes from the
13 very provisions that the commission is supposed to be
14 proposing sentences for, why is that any business of the
15 commission?

16 MR. YELLEN: Mr. Chief Justice, the discretion
17 that the prosecutor has under 851 and 841 is to raise the
18 ceiling, to raise the maximum term allowed, and it's then
19 not up to the prosecutor to decide what the actual
20 sentence is. That's the way the 851 mechanism has always
21 worked. It authorizes the judge to apply -- to impose a
22 sentence longer than the unenhanced maximum but only if
23 it's a truly bad case that warrants a longer sentence.

24 If Congress wishes to impose a specific sentence
25 enhancement, they know how to do that. They've passed

1 mandatory minimums, and they've passed mandatory
2 sentences.

3 QUESTION: When they passed 994(h).

4 MR. YELLEN: That's right, and 994(h) directs a
5 sentence at or near the maximum applicable to the
6 categories of defendants, not defined clearly as Mr.
7 Dreeben suggested in this statute, but very broadly.

8 I think it's quite plausible to read that
9 language to say that one way to categorize all of the
10 offenders defined in 994(h) is to take everyone who's been
11 convicted of violating the same statute and treat them as
12 one category, and then those defendants against whom the
13 Government has filed 851 information and are therefore
14 eligible for, say a 30-year sentence rather than a 20-
15 year sentence, they will receive that longer sentence if
16 there are aggravating factors --

17 QUESTION: Well --

18 MR. YELLEN: -- under the guidelines or
19 aggravating factors that warrant a departure above the
20 guidelines.

21 QUESTION: Well, that goes to explain the
22 ambiguity, I guess, but even assuming the ambiguity -- I
23 do assume the ambiguity -- it's difficult for me to
24 understand why the authorization would be to eliminate the
25 possibility, if not the effect of prosecutorial discretion

1 when Congress has expressly granted prosecutorial
2 discretion.

3 Congress in effect says prosecutorial discretion
4 is a good thing. Why, therefore, is it appropriate for
5 the commission to say we should somehow, if not eliminate,
6 at least liminate -- limit the effects of this discretion
7 which Congress has expressly conferred?

8 MR. YELLEN: Well, Justice Souter, the
9 discretion -- the prosecutorial discretion that Congress
10 has said is to be enhanced is the prosecutor's discretion
11 to seek a higher maximum term, not to seek a higher
12 specific term.

13 The 851 mechanism, the way it always worked
14 before the guidelines came into effect and the way it
15 continues to work today for people who are not career
16 offenders is that the filing of the information allows a
17 sentence of more than 20, to use the facts of these cases,
18 and up to 30 years, but not automatically at the
19 prosecutor's choice. The prosecutor gets to --

20 QUESTION: Well, that's quite true, but the
21 presumed effect will be, by giving prosecutors that
22 discretion and by giving courts authority based upon the
23 prosecutorial exercise of that discretion, the natural
24 effect in the mind run of cases will be to increase
25 sentences, and why should -- why is it an appropriate

1 policy to eliminate an effect which has so explicitly been
2 granted and, I have to assume, intended?

3 MR. YELLEN: But the effect is still there, the
4 effect of raising the ceiling, that all of the defenders
5 in this case could have received sentences -- under the
6 commission's Amendment 506 they could have received
7 sentences longer than 20 years, up to and including 30
8 years, if, as is very commonly the case with career
9 offenders, there was a large quantity of drugs, or there
10 was the use of a gun, or there were any other aggravating
11 factors.

12 If I could answer Justice Stevens' question
13 before on the facts of the case, because I think it
14 illustrates something here, this was not a threefold
15 increase from the original guideline range based on
16 Amendment 506 interpretation of the career offender level,
17 but in respondent Dyer's case it was a 13-fold increase.

18 It took -- the regular guideline range for Dyer
19 was 18 to 24 months. After applying the career offender
20 guideline with Amendment 506 the range would be 210 months
21 to 262 months, a 13-fold increase.

22 QUESTION: Well, that was because in addition to
23 his violation of 841 he had, what, two prior convictions?

24 MR. YELLEN: That's right, Mr. Chief Justice,
25 and --

1 QUESTION: What were those for?

2 MR. YELLEN: One was another drug offense and
3 one was a commercial burglary that the lower court
4 considered to be a crime of violence.

5 But even including all of his prior criminal
6 record he was a category 6 under the guidelines, but his
7 drug offense on this occasion was so minor that the
8 Sentencing Guideline said even though you're in the
9 highest criminal history category, your guideline range is
10 18 to 24 months, but because you're a career offender, it
11 now goes all the way up to 210 months to --

12 QUESTION: Mr. Yellen, why is that unthinkable?
13 I mean, there are jurisdictions in the country which are
14 passing things called three-strikes-you're-out laws. Now,
15 they may be wise, they may be unwise, and in those cases,
16 I mean, you're out, it means you're in permanently.

17 They may be very unwise, but I don't know that I
18 can say that when that seems to be the fairest reading of
19 the statute as a judge I can say well, since it's unwise
20 I'm not going to adopt the fairest reading.

21 MR. YELLEN: Justice Scalia, I'm not saying it's
22 unwise at all. In fact, my -- the numbers I gave you, 210
23 to 262, that's the range that Mr. Dyer will be eligible
24 for on remand if we win here, so if we prevail in this
25 case the commission's --

1 has put his QUESTION: Well then, give me the more horrible
2 example that will apply if you will lose -- the fairest
3 reading of MR. YELLEN: His sentence -- what's really at
4 stake is QUESTION: -- and I will make the same comment.
5 You know, it may be very unwise, but is that the fairest
6 reading of the statute is the question before us, and if
7 the fairest reading is three strikes you're out and you're
8 in jail permanently, so be it.

9 MR. YELLEN: Certainly, I understand that
10 position completely, but the issue here is not what any
11 member of this Court thinks is the appropriate sentence,
12 of course, but did Congress intend precisely to answer
13 this question about -- session clearly has engaged in a

14 permissible QUESTION: I'm saying I'm not shocked by the
15 notion that they would have been -- much of your argument
16 has gone to that Congress couldn't have meant to increase
17 the sentence. They very well may have meant that. Many
18 States have done worse. lower courts have generally said

19 that and MR. YELLEN: I don't suggest that they -- ting
20 the commis QUESTION: Or better, depending on whether you
21 like it or don't like it. on has very broad authority.

22 MR. YELLEN: Congress has certainly enacted in a
23 statutes that are more punitive than this. I agree
24 completely, but -- a has a great deal of authority to make

25 decisions QUESTION: But that's -- Justice Scalia I think

1 has put his finger on what's really the difficult
2 underlying question here, because he said the fairest
3 reading of the statute, and I suppose what's really at
4 stake is -- and sometimes you'll be on one side of this
5 and sometimes the other side. What's really at stake is
6 how much authority to give the Sentencing Commission to
7 interpret its authorizing legislation, and you might want
8 to comment on that.

9 MR. YELLEN: Yes. I think the question here is
10 not what is the fairest reading of the statute, but has
11 the commission engaged in a permissible reading of the
12 statute, and that's a very different question, and I think
13 in this case the commission clearly has engaged in a
14 permissible reading of this statute.

15 QUESTION: Have we said the commission enjoys
16 full-fledged Chevron deference?

17 MR. YELLEN: The Court has not said that
18 specifically, but the lower courts have generally said
19 that and the statute, 994(h) in particular, instructing
20 the commission to do all of these things, says quite
21 clearly that the commission has very broad authority.

22 And whether or not Chevron per se applied, in a
23 case like this where Congress has said in so many words
24 that the commission has a great deal of authority to make
25 decisions that used to be made much more independently by

1 individual sentencing judges and individual prosecutors, I
2 think deference to the commission is entirely consistent
3 with Chevron and other -- and well-established principles.

4 QUESTION: Mr. Yellen, before we get to Chevron,
5 Judge Stahl on the First Circuit said that he didn't
6 consider the reading you're proposing a plausible one. He
7 said that he found it inherently implausible because it
8 effectively nullifies criminal history enhancements
9 carefully enacted into statute by 841, and I think you
10 have agreed that it does do that. The Sentencing
11 Commission has effectively taken away the effect of the
12 enhancements.

13 MR. YELLEN: No, Justice Ginsburg, I disagree
14 with that, and maybe I haven't said it clearly. I'll try
15 again. I disagree with that very strongly. When the
16 sentence enhancements of 841 with the 851 mechanism were
17 enacted, what it did was, if the prosecutor files under
18 851 the maximum is higher.

19 Before the guidelines, no defendant was required
20 ever to receive one day longer in prison because the
21 prosecutor bumped up the maximum. That was up to the
22 judge, and that's the way that rule continues to exist
23 today for people who are not career offenders.

24 So under the commission's interpretation of
25 section 4B1.1, it works like this. The defendant

1 committed a crime that would have had a 20-year maximum.
2 Because of his prior record and the Government's filing
3 under 851, he now could receive a 30-year sentence.

4 The guideline is based on the 20-year maximum,
5 but if there are any aggravating factors in the case that
6 make him a worse than normal offender -- large amount of
7 drugs, use of a weapon, a leadership role in the offense,
8 or anything else that the guidelines don't consider which
9 warrant a departure -- the judge can impose a sentence
10 above the career offender level, above 20 years all the
11 way up to 30 years, so in fact it's the Government's view
12 of the case that would dramatically alter the intended
13 effect of an 851 filing.

14 Congress in 851 isn't saying we want prosecutors
15 to have the power to set sentences. They're saying we
16 want prosecutors to have the power to raise the maximum,
17 and it's up to the other actors in the system, judges and
18 now the Sentencing Commission --

19 QUESTION: Mr. Yellen, I'm not sure I fully
20 grasp your answer, because I thought the very purpose of
21 the Sentencing Commission's exercise here was to treat
22 alike cases where the prosecutor had asked for enhancement
23 and cases where they hadn't where the defendant's conduct
24 was the same.

25 MR. YELLEN: They're only alike as a starting

1 point. The way the career offender guideline works is,
2 you get a level 32. But you only get a level 32 if the
3 regular application of the guidelines isn't higher. The
4 judge also has to go through the regular routine rules of
5 the guidelines -- look at the amount of drugs, the use of
6 a weapon, injury, leadership role -- and if that comes out
7 to a level 34 or 5 or 6, that's the sentence the judge
8 must impose, not the level 32 that the career offender
9 guideline points to.

10 Secondly, if there are other aggravating factors
11 that the guidelines don't take into account, the judge can
12 decide under the standards in Koon that this is a case
13 that warrants an upward departure, so level 32 isn't high
14 enough because this guy is not only a career offender but
15 he's got a criminal record a mile long, and therefore
16 level 32 is not enough. I want to go all the way up to 30
17 years.

18 QUESTION: But it's still -- it lets the judge
19 then treat alike two defendants who have the same history
20 in every respect, but in one case the prosecutor went for
21 enhancement and the other the prosecutor didn't.

22 MR. YELLEN: That's right, and the commission's
23 rationale for that is to do otherwise would be to invite
24 unwarranted disparity. We've provided records from the
25 Sentencing Commission --

1 QUESTION: But why is the disparity unwarranted
2 when the authority which is the predicate of the
3 disparity -- that is, the prosecutor's discretion -- is
4 specifically conferred by law? Why does the commission
5 have the authority to say that that is an unwarranted
6 disparity?

7 MR. YELLEN: In the commission's view it's
8 unwarranted because you have, under the Government's view
9 of the statute, two defendants who have committed the same
10 crime. They have the same criminal record. The only
11 difference is that the defendant in one of the cases is
12 one of the 2.5 percent of eligible people against whom the
13 Government has filed --

14 QUESTION: Oh, I think I understand that. The
15 commission I take it is really saying, look, we have an
16 obligation here within certain limits to equalize
17 sentences for given offenses, and we're taking that
18 obligation seriously.

19 But in taking that obligation seriously, as they
20 do here, they are in effect saying the obligation to
21 equalize sentences for a given offense, forgetting
22 extraneous details which might raise it up or raise it
23 down, is more important than the effect of the
24 specifically conferred prosecutorial discretion in
25 authorizing judges to go higher than they might otherwise

1 do for that offense.

2 Is that a legitimate choice for the commission
3 to make?

4 MR. YELLEN: It is, because Congress has not
5 expressly answered this question before the court.

6 QUESTION: Well, it hasn't expressly answered
7 it, but what it has done is to give a general rule and
8 then a very specific authorization to prosecutors, which
9 will in the natural course have an effect of creating, in
10 fact, two different levels of sentencing for the base
11 offense, and don't we generally say the specific governs
12 the general, and if that's the case here, does the
13 commission really have a legitimate option to say no, we
14 think the general philosophy is more important than the
15 effect of the specific authorization to prosecutors?

16 MR. YELLEN: The specific authorization to
17 prosecutors in 851, as I've tried to suggest, doesn't
18 mandate any sentencing --

19 QUESTION: It doesn't mandate it, but its
20 natural effect is to facilitate it, and it must have been
21 the intention of Congress that in a certain number of
22 cases that judicial option would be exercised.

23 MR. YELLEN: In a certain number of cases.

24 QUESTION: Right.

25 MR. YELLEN: In the worst cases.

1 QUESTION: And the effect of the commission's
2 interpretation here is to minimize or to nullify the
3 effect of that discretion which the court has as a result
4 of the prosecutorial discretion. That's true, isn't it?

5 MR. YELLEN: I don't agree with that, Justice
6 Souter --

7 QUESTION: I think that was the premise of
8 Justice Ginsburg's question --

9 MR. YELLEN: Yes.

10 QUESTION: -- and I make the same assumption.

11 QUESTION: Yes.

12 MR. YELLEN: Yes, and it gets to the --

13 QUESTION: Well, why are we wrong?

14 MR. YELLEN: It gets to what Congress did here.
15 When Congress raises --

16 QUESTION: No, but --

17 QUESTION: No.

18 MR. YELLEN: -- the maximum sentence --

19 QUESTION: No -- answer the question. I think
20 you're not answering the question.

21 QUESTION: I want to hear what you say, but
22 before you get there, Justice Ginsburg and I seem to be
23 making in your view just an incorrect assumption about how
24 the law works in fact, and if we are wrong, we need to
25 know that first.

1 MR. YELLEN: Yes. The -- I -- the way the law
2 works is that when a prosecutor seeks an enhanced maximum
3 it does not automatically enhance the sentence.

4 QUESTION: All right, but in those cases in
5 which the judge says I am going to exercise this authority
6 which the prosecutorial option has provided me with --

7 MR. YELLEN: Right.

8 QUESTION: -- and I'm going to impose a higher
9 sentence than I would otherwise do, in those cases, isn't
10 it true that the commission's interpretation either
11 minimizes or nullifies, I'm not mathematically sure how it
12 works, the effect of the judge's option which he's
13 exercised or she's exercised to go higher?

14 MR. YELLEN: No.

15 QUESTION: Isn't that true?

16 MR. YELLEN: No, it is not, Justice Souter.

17 QUESTION: Okay. Then that's what we need to
18 understand.

19 QUESTION: The strongest argument -- I think
20 this is the same point, but I thought one of the strongest
21 arguments the SG made was in the very same statute where
22 the sentencing guidelines were enacted into law, there --
23 Congress enacted a provision that said 20 years for a
24 first offender, being cocaine, or -- up to 20 years, or up
25 to 40 years for a second, okay.

1 Now, why would they have done that if, in fact,
2 this provision that we're talking about is keyed to the
3 first offense, because the provision keyed to the first
4 offense would have given everybody, everybody who is the
5 second offender the 20 years that's the max for the first
6 offender?

7 And your response to that is, oh, but there are
8 some cases where you would have wanted to go higher,
9 namely a case of a departure, or a case where the
10 underlying substantive offense is in fact like
11 distributing a pound of crack in a prison with a gun, so
12 you get to level 36 or 38 anyway.

13 At which point Justice Souter says, yes, that's
14 true, I'm not saying there are no such cases, but there
15 are so few that how could we really think that Congress
16 meant the interpretation that you're advancing, or
17 wouldn't it have viewed this as a kind of unnecessary
18 provision to stick in?

19 Am I -- I'm trying to basically rephrase,
20 perhaps not as articulately as the SG phrased -- in other
21 words -- all right. I intended to help. I don't know if
22 I have.

23 MR. YELLEN: I would disagree that these cases
24 are rare, where we have serious drug offenders and violent
25 offenders. There are many cases in which the judge would

1 want to exercise his discretion to go higher and is able
2 to under the guidelines, but the judge can only do that
3 under the system of guidelines if there is an aggravating
4 factor in the guidelines or a basis for a departure, so
5 the commission's reading -- the commission's
6 implementation of 4B1.1 doesn't change that at all.

7 All unwarranted disparity that Congress was
8 after came from the exercise of lawful discretion.
9 Congress was concerned about judicial discretion, the
10 impact it had on disparity, but that was lawful, all
11 lawful exercise of discretion.

12 Similarly here, prosecutors can through their
13 exercise of discretion wind up with disparities that the
14 commission is charged with trying to regulate.

15 I was mentioning before that in only 2.5 percent
16 of all cases, according to Sentencing Commission data that
17 we submitted to the Court, does the Government seek these
18 enhanced maximums, so you wind up with a case where two
19 defendants who have committed the same violation and have
20 the same criminal record can get vastly different
21 sentences, not because the judge or the Sentencing
22 Commission thinks that any difference is appropriate, but
23 rather simply because the Government has filed the
24 enhancement.

25 QUESTION: As Congress authorized them to do.

1 MR. YELLEN: But Congress authorized them to
2 increase the maximums, not to increase the sentence.
3 Congress has on many occasions given prosecutors the tools
4 to actually increase sentences. The Government can get a
5 mandatory --

6 QUESTION: But the fact that the prosecutor
7 makes the filing can result in a more severe sentence.

8 MR. YELLEN: Absolutely, under the guideline
9 that we're debating. That's exactly the result.

10 QUESTION: Mr. Yellen, I'm -- explain to me why
11 it is that the only thing you excise from the precise
12 offense for which the individual is being sentenced is
13 this element that the prosecutor has the ability to
14 increase or not to increase.

15 Why is it not the case, as Mr. Dreeben was
16 saying, that if you're going to be consistent you would
17 have to excise from the particular characteristics of the
18 defendant's crime other elements as well, so that if
19 you're doing 841, for example, you would not be able to
20 include the particularized factors of how many grams, or
21 what kind of a drug?

22 Why aren't those factors equally
23 particularizing, and if you're going to be consistent as
24 to the meaning of -- well, are you using the phrase
25 categories, or whether you're relying on that or not, why

1 doesn't it bring you all the way down to the most minimum
2 offense possible under 841?

3 MR. YELLEN: I think that would be a permissible
4 reading, but my view of it doesn't matter. What matters
5 is the Sentencing Commission, which has been delegated
6 this authority, has said that we think this is the
7 logical, rational --

8 QUESTION: I don't see how it's logical. I
9 mean, I can see how that reading is logical, produces an
10 extraordinary result, and I can see how the Government's
11 reading is logical, but I can't see how something in the
12 middle -- we're going to pick and choose among the
13 individuating characteristics of the crime.

14 I think you can say none of the individuating
15 characteristics is taken account of. It's only the base
16 crime, and therefore you end up with nothing but a 3-year
17 sentence under 841. Or you can say everything's included,
18 which is the way the Government does it. But I don't see
19 how you can possibly say, we're going to pick something in
20 between.

21 MR. YELLEN: Your Honor, I think it's very
22 logical to say, as the commission did, that the most
23 important category is what is the crime you committed, and
24 what is your criminal record? That's the whole structure
25 of the guidelines, so what they did here was really try

1 and integrate the career offender provision into the
2 overall structure.

3 QUESTION: But when you say what is the crime
4 you committed, you're willing to include within the crime
5 you committed many factors that are not within the base
6 crime.

7 QUESTION: What? What?

8 QUESTION: Such as, the crime under 841 is,
9 knowingly or intentionally manufacture, distribute, to
10 create, distribute, dispense. That's the base crime. And
11 then you get different sentences under 841(b), depending
12 upon how many grams, what kind of a drug, and so forth.
13 Those are all individuating characteristics.

14 Now, I can see taking them all into account or
15 taking none of them into account, but to sort of
16 arbitrarily say we're going to take into account some and
17 not others doesn't seem to me a manner of interpreting the
18 statute, but a matter of writing one.

19 MR. YELLEN: Well, in fact the commission is
20 there deferring to Congress. Congress has said drug
21 amounts matter a lot, and it would have been more
22 presumptuous of the commission to say that --

23 QUESTION: But Congress said prosecutors have
24 the discretion to go after the enhancement, and
25 Mr. Yellen, frankly I don't have a clear answer to my

1 question, and I think Justice Souter has the same problem.
2 I can understand you saying, yes, that Judge
3 Stahl was right, it effectively nullifies the enhancement,
4 but that is exactly what the commission was trying to get
5 at, because it wanted two people who committed identical
6 conduct, who had the identical history, to be treated
7 alike, and you can't have both. You can't treat two
8 people who are exactly alike in every other respect the
9 same unless you -- unless you erase what the prosecutor
10 has done. QUESTION: And you could say -- is it right you
11 say to be MR. YELLEN: Justice Ginsburg, it does not
12 nullify the prosecutor's choice. It nullifies the
13 automatic sentence enhancement effect of the prosecutor's
14 choice that the Government asks for, but it does not at
15 all nullify the effect of the prosecutor's choice -- your
16 sentence. QUESTION: Yes, but that is the effect that the
17 statute prescribes. I mean, you say -- in other words, in
18 the automatic sense, it has been effective; what the
19 statute prescribes is that the sentence will be enhanced
20 automatically. MR. YELLEN: Well, there's not one statute here,
21 of course. You're talking about the relationships between
22 two statutes, 851, which is the mechanism for the
23 prosecutor to get the enhancement, and then there's
24 994(h), which directs the Sentencing Commission to devise
25

1 a guideline at or near the maximum.

2 851 does not authorize the Government to obtain
3 a higher sentence. If they have that power under the
4 Government's view it's only because 994(h) mandates it.

5 QUESTION: All right, let's just change the
6 phraseology. It authorizes the court to impose a higher
7 sentence, and that authorization is effectively
8 eliminated.

9 MR. YELLEN: No, Justice Souter. The --

10 QUESTION: And you could say -- is it right you
11 say no because --

12 QUESTION: Let him answer Justice Souter's
13 question.

14 MR. YELLEN: The -- when the Government files
15 under 851 the authorization is there to impose a 30-year
16 sentence. The court has that power, and the court will do
17 that if it either exercises its discretion to depart, or
18 if there are aggravating --

19 QUESTION: But the effect of that, when the
20 court then switches to the career offender provisions, is
21 effectively nullified, is it not?

22 MR. YELLEN: No, Justice Souter. Maybe I didn't
23 explain this well. The career offender guidelines
24 presents an alternative method of computing the guideline
25 sentence.

1 For these defendants under Amendment 506 the
2 career offender level is 32 criminal history category 6,
3 okay, which is 210 months to 262 months, but the judge
4 can -- is required to compute the guideline range without
5 regard to the career offender guideline, look at the
6 amount of drugs, the weapon, and all of the other factors.

7 And the way the guidelines were written, in many
8 cases, particularly for career offenders who have long
9 criminal records and are likely to be involved in very
10 serious drug crimes, unlike the respondents in this case,
11 those offenders will very often have guideline ranges that
12 are above the unenhanced statutory minimum.

13 QUESTION: But I think you're saying that there
14 are bases other than the exercise of prosecutorial
15 discretion to file the information upon which the court
16 may nonetheless raise the sentence, and Justice Ginsburg's
17 question and mine is, other things being equal, if we look
18 only at the effect that the prosecutor's discretion to go
19 after the person for the enhanced sentence has, that
20 effect on at least the judge's discretion is minimized or
21 eliminated.

22 MR. YELLEN: And again I respectfully disagree,
23 Justice Souter. If you're at level 32 and you have no
24 enhancement motion filed under 851 the maximum is 20
25 years, or 240 months, so you could not even go to the top

1 of the guideline range lawfully, the level 32. You could
2 not go to 262 months. You would be capped, the judge
3 would be capped at 240 months.

4 If the Government has filed under 851, now the
5 judge can go above 240 months all the way up to 360
6 months, so it retains -- the effect of the enhanced
7 maximum remains precisely the way it has always operated,
8 and operates for anyone who is not a career offender.

9 The -- I hope I've explained that clearly.

10 The -- of categories.

11 QUESTION: I don't know if there's really a
12 disagreement in that it seems to me, too, that it cuts the
13 heart out of the jump from 20 to 40 years. I agree with
14 you that there remain some circumstances where it was
15 important to raise the cap. The circumstances where it
16 was important are where you depart, or where the crime at
17 issue is greater than the 20 years under the guideline,
18 and where you want to use the career offender and go all
19 the way up to 262 months.

20 You characterize that as a big role for raising
21 the cap to play. I think Justice Souter was
22 characterizing it as a role for it to play, but not the
23 whole heart of the matter, and is that a fair -- is that
24 fair?

25 MR. YELLEN: It will -- yes. Longer sentences

1 will be less common under the commission's amendment,
2 absolutely.

3 But the question here is not whether that's a
4 good idea or a bad idea but whether, rather looking at the
5 sentencing format in its entirety, and all the
6 commission's obligations, it's a decision that it would
7 have the authority to make, and again I point to the fact
8 that Congress specifically decided to frame this as a
9 general instruction to the commission and introduce the
10 concept of categories.

11 The Government's reading of this statute
12 completely eliminates the meaning of the word categories.
13 It reads as if the commission was directed to call for a
14 sentence at or near the maximum for any defendant who is
15 18 years of age or older, and Congress had to mean
16 something by --

17 QUESTION: Thank you, Mr. Yellen.

18 Mr. Dreeben, you have 3 minutes remaining.

19 MR. DREEBEN: Unless the Court has any
20 questions, the Government waives rebuttal.

21 CHIEF JUSTICE REHNQUIST: The case is submitted.

22 (Whereupon, at 1:57 p.m., the case in the above-
23 entitled matter was submitted.)

24

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CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

UNITED STATES, Petitioner v. GEORGE LaBONTE, ALFRED LAWRENCE HUNNEWELL AND STEPHEN DYER
Case # 95-1726

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Don Nani Fedilo

(REPORTER)