SUPREME COURT OF THE UNITED STATES

Nos. 04–104 and 04–105

UNITED STATES, PETITIONER

04–104 *v.*

FREDDIE J. BOOKER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

UNITED STATES, PETITIONER

04–105 *v.*

DUCAN FANFAN

ON WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

[January 12, 2005]

JUSTICE BREYER delivered the opinion of the Court in part.*

The first question that the Government has presented in these cases is the following:

> "Whether the Sixth Amendment is violated by the imposition of an enhanced sentence under the United States Sentencing Guidelines based on the sentencing judge's determination of a fact (other than a prior conviction) that was not found by the jury or admitted by the defendant." Pet. for Cert. in No. 04–104, p. I.

The Court, in an opinion by JUSTICE STEVENS, answers this question in the affirmative. Applying its decisions in *Apprendi* v. *New Jersey*, 530 U. S. 466 (2000), and *Blakely* v. *Washington*, 542 U. S. ___ (2004), to the Federal Sen-

*THE CHIEF JUSTICE, JUSTICE O'CONNOR, JUSTICE KENNEDY, and JUSTICE GINSBURG join this opinion.

tencing Guidelines, the Court holds that, in the circumstances mentioned, the Sixth Amendment requires juries, not judges, to find facts relevant to sentencing. See *ante,* at 1–2, 20 (STEVENS, J., opinion of the Court).

We here turn to the second question presented, a question that concerns the remedy. We must decide whether or to what extent, "as a matter of severability analysis," the Guidelines "as a whole" are "inapplicable . . . such that the sentencing court must exercise its discretion to sentence the defendant within the maximum and minimum set by statute for the offense of conviction." Pet. for Cert. in No. 04–104, p. I.

We answer the question of remedy by finding the provision of the federal sentencing statute that makes the Guidelines mandatory, 18 U. S. C. A. §3553(b)(1) (Supp. 2004), incompatible with today's constitutional holding. We conclude that this provision must be severed and excised, as must one other statutory section, §3742(e) (main ed. and Supp. 2004), which depends upon the Guidelines' mandatory nature. So modified, the Federal Sentencing Act, see Sentencing Reform Act of 1984, as amended, 18 U. S. C. §3551 *et seq.,* 28 U. S. C. §991 *et seq*., makes the Guidelines effectively advisory. It requires a sentencing court to consider Guidelines ranges, see 18 U. S. C. A. §3553(a)(4) (Supp. 2004), but it permits the court to tailor the sentence in light of other statutory concerns as well, see §3553(a) (Supp. 2004).

I

We answer the remedial question by looking to legislative intent. See, *e.g.*, *Minnesota* v. *Mille Lacs Band of Chippewa Indians*, 526 U. S. 172, 191 (1999); *Alaska Airlines, Inc.* v. *Brock*, 480 U. S. 678, 684 (1987); *Regan* v. *Time, Inc.*, 468 U. S. 641, 653 (1984) (plurality opinion). We seek to determine what "Congress would have intended" in light of the Court's constitutional holding.

Denver Area Ed. Telecommunications Consortium, Inc. v. *FCC*, 518 U. S. 727, 767 (1996) (plurality opinion) ("Would Congress still have passed" the valid sections "had it known" about the constitutional invalidity of the other portions of the statute? (internal quotation marks omitted)). In this instance, we must determine which of the two following remedial approaches is the more compatible with the legislature's intent as embodied in the 1984 Sentencing Act.

One approach, that of JUSTICE STEVENS' dissent, would retain the Sentencing Act (and the Guidelines) as written, but would engraft onto the existing system today's Sixth Amendment "jury trial" requirement. The addition would change the Guidelines by preventing the sentencing court from increasing a sentence on the basis of a fact that the jury did not find (or that the offender did not admit).

The other approach, which we now adopt, would (through severance and excision of two provisions) make the Guidelines system advisory while maintaining a strong connection between the sentence imposed and the offender's real conduct—a connection important to the increased uniformity of sentencing that Congress intended its Guidelines system to achieve.

Both approaches would significantly alter the system that Congress designed. But today's constitutional holding means that it is no longer possible to maintain the judicial factfinding that Congress thought would underpin the mandatory Guidelines system that it sought to create and that Congress wrote into the Act in 18 U. S. C. A. §§3553(a) and 3661 (main ed. and Supp. 2004). Hence we must decide whether we would deviate less radically from Congress' intended system (1) by superimposing the constitutional requirement announced today or (2) through elimination of some provisions of the statute.

To say this is not to create a new kind of severability analysis. *Post*, at 21–22 (STEVENS, J., dissenting).

Rather, it is to recognize that sometimes severability questions (questions as to how, or whether, Congress would intend a statute to apply) can arise when a legislatively unforeseen constitutional problem requires modification of a statutory provision as applied in a significant number of instances. Compare, *e.g.*, *Welsh* v. *United States*, 398 U. S. 333, 361 (1970) (Harlan, J., concurring in result) (explaining that when a statute is defective because of its failure to extend to some group a constitutionally required benefit, the court may "either declare it a nullity" or "extend" the benefit "to include those who are aggrieved by exclusion"); *Heckler* v. *Mathews*, 465 U. S. 728, 739, n. 5 (1984) ("Although . . . ordinarily 'extension, rather than nullification, is the proper course,' the court should not, of course, 'use its remedial powers to circumvent the intent of the legislature . . . .'" (quoting *Califano* v. *Westcott*, 443 U. S. 76, 89 (1979) and *id.* at 94 (Powell, J., concurring in part and dissenting in part) (citation omitted))); *Sloan* v. *Lemon*, 413 U. S. 825, 834 (1973) (striking down entire Pennsylvania tuition reimbursement statute because to eliminate only unconstitutional applications "would be to create a program quite different from the one the legislature actually adopted"). See also *post*, at 9, 11 (THOMAS, J., dissenting) ("[S]everability questions" can "arise from unconstitutional applications" of statutes, and such a question "is squarely presented" here); Vermeule, Saving Constructions, 85 Geo. L. J. 1945, 1950, n. 26 (1997).

In today's context—a highly complex statute, interrelated provisions, and a constitutional requirement that creates fundamental change—we cannot assume that Congress, if faced with the statute's invalidity in key applications, would have preferred to apply the statute in as many other instances as possible. Neither can we determine likely congressional intent mechanically. We cannot simply approach the problem grammatically, say,

by looking to see whether the constitutional requirement and the words of the Act are linguistically compatible.

Nor do simple numbers provide an answer. It is, of course, true that the numbers show that the constitutional jury trial requirement would lead to additional decision-making by juries in only a minority of cases. See *post,* at 7 (STEVENS, J., dissenting). Prosecutors and defense attorneys would still resolve the lion's share of criminal matters through plea bargaining, and plea bargaining takes place without a jury. See *ibid.* Many of the rest involve only simple issues calling for no upward Guidelines adjustment. See *post*, at 5. And in at least some of the remainder, a judge may find adequate room to adjust a sentence within the single Guidelines range to which the jury verdict points, or within the overlap between that range and the next highest. See *post*, at 8–9.

But the constitutional jury trial requirement would nonetheless affect every case. It would affect decisions about whether to go to trial. It would affect the content of plea negotiations. It would alter the judge's role in sentencing. Thus we must determine likely intent not by counting proceedings, but by evaluating the consequences of the Court's constitutional requirement in light of the Act's language, its history, and its basic purposes.

While reasonable minds can, and do, differ about the outcome, we conclude that the constitutional jury trial requirement is not compatible with the Act as written and that some severance and excision are necessary. In Part II, *infra*, we explain the incompatibility. In Part III, *infra,* we describe the necessary excision. In Part IV, *infra*, we explain why we have rejected other possibilities. In essence, in what follows, we explain both (1) why Congress would likely have preferred the total invalidation of the Act to an Act with the Court's Sixth Amendment requirement engrafted onto it, and (2) why Congress would likely have preferred the excision of some of the Act, namely the

Act's mandatory language, to the invalidation of the entire Act. That is to say, in light of today's holding, we compare maintaining the Act as written with jury factfinding added (the dissenters' proposed remedy) to the total invalidation of the statute, and conclude that Congress would have preferred the latter. We then compare our own remedy to the total invalidation of the statute, and conclude that Congress would have preferred our remedy.

II

Several considerations convince us that, were the Court's constitutional requirement added onto the Sentencing Act as currently written, the requirement would so transform the scheme that Congress created that Congress likely would not have intended the Act as so modified to stand. First, the statute's text states that "[t]he court" when sentencing will consider "the nature and circumstances of the offense and the history and characteristics of the defendant." 18 U. S. C. A. §3553(a)(1) (main ed. and Supp. 2004). In context, the words "the court" mean "the judge without the jury," not "the judge working together with the jury." A further statutory provision, by removing typical "jury trial" evidentiary limitations, makes this clear. See §3661 (ruling out any "limitation . . . on the information concerning the [offender's] background, character, and conduct" that the "court . . . may receive"). The Act's history confirms it. See, *e.g.*, S. Rep. No. 98–225, p. 51 (1983) (the Guidelines system "will guide *the judge* in making" sentencing decisions) (emphasis added); *id.*, at 52 (before sentencing, "the judge" must consider "the nature and circumstances of the offense"); *id.*, at 53 ("the judge" must conduct "a comprehensive examination of the characteristics of the particular offense and the particular offender").

This provision is tied to the provision of the Act that makes the Guidelines mandatory, see §3553(b)(1) (Supp.

2004). They are part and parcel of a single, unified whole—a whole that Congress intended to apply to all federal sentencing.

This provision makes it difficult to justify JUSTICE STEVENS' approach, for that approach requires reading the words "the court" as if they meant "the judge working together with the jury." Unlike JUSTICE STEVENS, we do not believe we can interpret the statute's language to save its constitutionality, see *post*, at 16 (STEVENS, J., dissenting), because we believe that any such reinterpretation, even if limited to instances in which a Sixth Amendment problem arises, would be "plainly contrary to the intent of Congress." *United States* v. *X–Citement Video*, *Inc.,* 513 U. S. 64, 78 (1994). Without some such reinterpretation, however, this provision of the statute, along with those inextricably connected to it, are constitutionally invalid, and fall outside of Congress' power to enact. Nor can we agree with JUSTICE STEVENS that a newly passed "identical statute" would be valid, *post,* at 13 (dissenting opinion). Such a new, identically worded statute would be valid only if (unlike the present statute) we could interpret that new statute (without disregarding Congress' basic intent) as being consistent with the Court's jury factfinding requirement. Compare *post*, at 13–14 (STEVENS, J., dissenting). If so, the statute would stand.

Second, Congress' basic statutory goal—a system that diminishes sentencing disparity—depends for its success upon judicial efforts to determine, and to base punishment upon, the *real conduct* that underlies the crime of conviction. That determination is particularly important in the federal system where crimes defined as, for example, "obstruct[ing], delay[ing], or affect[ing] commerce or the movement of any article or commodity in commerce, by . . . extortion," 18 U. S. C. §1951(a), or, say, using the mail "for the purpose of executing" a "scheme or artifice to defraud," §1341 (2000 ed., Supp. II), can encompass a vast range of

very different kinds of underlying conduct. But it is also important even in respect to ordinary crimes, such as robbery, where an act that meets the statutory definition can be committed in a host of different ways. Judges have long looked to real conduct when sentencing. Federal judges have long relied upon a presentence report, prepared by a probation officer, for information (often unavailable until *after* the trial) relevant to the manner in which the convicted offender committed the crime of conviction.

Congress expected this system to continue. That is why it specifically inserted into the Act the provision cited above, which (recodifying prior law) says that

> "[n]o limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence." 18 U. S. C. §3661.

This Court's earlier opinions assumed that this system would continue. That is why the Court, for example, held in *United States* v. *Watts,* 519 U. S. 148 (1997) (*per curiam*), that a sentencing judge could rely for sentencing purposes upon a fact that a jury had found *unproved* (beyond a reasonable doubt). See *id.,* at 157; see also *id*., at 152–153 (quoting United States Sentencing Commission, Guidelines Manual §1B1.3, comment., backg'd (Nov. 1995) (USSG), which "describes in sweeping language the conduct that a sentencing court may consider in determining the applicable guideline range," and which provides that "'[c]onduct that is not formally charged or is not an element of the offense of conviction may enter into the determination of the applicable guideline sentencing range'").

The Sentencing Guidelines also assume that Congress

intended this system to continue. See USSG §1B1.3, comment., backg'd (Nov. 2003). That is why, among other things, they permit a judge to reject a plea-bargained sentence if he determines, after reviewing the presentence report, that the sentence does not adequately reflect the seriousness of the defendant's actual conduct. See §6B1.2(a).

To engraft the Court's constitutional requirement onto the sentencing statutes, however, would destroy the system. It would prevent a judge from relying upon a presentence report for factual information, relevant to sentencing, uncovered after the trial. In doing so, it would, even compared to pre-Guidelines sentencing, weaken the tie between a sentence and an offender's real conduct. It would thereby undermine the sentencing statute's basic aim of ensuring similar sentences for those who have committed similar crimes in similar ways.

Several examples help illustrate the point. Imagine Smith and Jones, each of whom violates the Hobbs Act in very different ways. See 18 U. S. C. §1951(a) (forbidding "obstruct[ing], delay[ing], or affect[ing] commerce or the movement of any article or commodity in commerce, by . . . extortion"). Smith threatens to injure a co-worker unless the co-worker advances him a few dollars from the interstate company's till; Jones, after similarly threatening the co-worker, causes far more harm by seeking far more money, by making certain that the co-worker's family is aware of the threat, by arranging for deliveries of dead animals to the co-worker's home to show he is serious, and so forth. The offenders' behavior is very different; the known harmful consequences of their actions are different; their punishments both before, and after, the Guidelines would have been different. But, under the dissenters' approach, unless prosecutors decide to charge more than the elements of the crime, the judge would have to impose similar punishments. See, *e.g.*, *post*, at 2–3 (SCALIA, J.,

dissenting).

Now imagine two former felons, Johnson and Jackson, each of whom engages in identical criminal behavior: threatening a bank teller with a gun, securing $50,000, and injuring an innocent bystander while fleeing the bank. Suppose prosecutors charge Johnson with one crime (say, illegal gun possession, see 18 U. S. C. §922(g)) and Jackson with another (say, bank robbery, see §2113(a)). Before the Guidelines, a single judge faced with such similar real conduct would have been able (within statutory limits) to impose similar sentences upon the two similar offenders despite the different charges brought against them. The Guidelines themselves would ordinarily have required judges to sentence the two offenders similarly. But under the dissenters' system, in these circumstances the offenders likely would receive different punishments. See, *e.g.*, *post*, at 2–3 (SCALIA, J., dissenting).

Consider, too, a complex mail fraud conspiracy where a prosecutor may well be uncertain of the amount of harm and of the role each indicted individual played until after conviction—when the offenders may turn over financial records, when it becomes easier to determine who were the leaders and who the followers, when victim interviews are seen to be worth the time. In such a case the relation between the sentence and what actually occurred is likely to be considerably more distant under a system with a jury trial requirement patched onto it than it was even prior to the Sentencing Act, when judges routinely used information obtained after the verdict to decide upon a proper sentence.

This point is critically important. Congress' basic goal in passing the Sentencing Act was to move the sentencing system in the direction of increased uniformity. See 28 U. S. C. §991(b)(1)(B); see also §994(f). That uniformity does not consist simply of similar sentences for those convicted of violations of the same statute—a uniformity

consistent with the dissenters' remedial approach. It consists, more importantly, of similar relationships between sentences and real conduct, relationships that Congress' sentencing statutes helped to advance and that JUSTICE STEVENS' approach would undermine. Compare *post*, at 18 (dissenting opinion) (conceding that the Sixth Amendment requirement would "undoubtedly affect 'real conduct' sentencing in certain cases," but minimizing the significance of that circumstance). In significant part, it is the weakening of this real-conduct/uniformity-in-sentencing relationship, and not any "inexplicabl[e]" concerns for the "*manner* of achieving uniform sentences," *post*, at 2 (SCALIA, J., dissenting), that leads us to conclude that Congress would have preferred *no* mandatory system to the system the dissenters envisage.

Third, the sentencing statutes, read to include the Court's Sixth Amendment requirement, would create a system far more complex than Congress could have intended. How would courts and counsel work with an indictment and a jury trial that involved not just whether a defendant robbed a bank but also how? Would the indictment have to allege, in addition to the elements of robbery, whether the defendant possessed a firearm, whether he brandished or discharged it, whether he threatened death, whether he caused bodily injury, whether any such injury was ordinary, serious, permanent or life threatening, whether he abducted or physically restrained anyone, whether any victim was unusually vulnerable, how much money was taken, and whether he was an organizer, leader, manager, or supervisor in a robbery gang? See USSG §§2B3.1, 3B1.1. If so, how could a defendant mount a defense against some or all such specific claims should he also try simultaneously to maintain that the Government's evidence failed to place him at the scene of the crime? Would the indictment in a mail fraud case have to allege the number of victims, their

vulnerability, and the amount taken from each? How could a judge expect a jury to work with the Guidelines' definitions of, say, "relevant conduct," which includes "all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant; and [in the case of a conspiracy] all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity"? §§1B1.3(a)(1)(A)–(B). How would a jury measure "loss" in a securities fraud case—a matter so complex as to lead the Commission to instruct judges to make "only . . . a reasonable estimate"? §2B1.1, comment., n. 3(C). How would the court take account, for punishment purposes, of a defendant's contemptuous behavior at trial—a matter that the Government could not have charged in the indictment? §3C1.1.

Fourth, plea bargaining would not significantly diminish the consequences of the Court's constitutional holding for the operation of the Guidelines. Compare *post,* at 3 (STEVENS, J., dissenting). Rather, plea bargaining would make matters worse. Congress enacted the sentencing statutes in major part to achieve greater uniformity in sentencing, *i.e.*, to increase the likelihood that offenders who engage in similar real conduct would receive similar sentences. The statutes reasonably assume that their efforts to move the trial-based sentencing process in the direction of greater sentencing uniformity would have a similar positive impact upon plea-bargained sentences, for plea bargaining takes place *in the shadow of* (*i.e.*, with an eye towards the hypothetical result of) a potential trial.

That, too, is why Congress, understanding the realities of plea bargaining, authorized the Commission to promulgate policy statements that would assist sentencing judges in determining whether to reject a plea agreement after reading about the defendant's real conduct in a presentence report (and giving the offender an opportunity to

challenge the report). See 28 U. S. C. §994(a)(2)(E); USSG §6B1.2(a). This system has not worked perfectly; judges have often simply accepted an agreed-upon account of the conduct at issue. But compared to pre-existing law, the statutes try to move the system in the right direction, *i.e.*, toward greater sentencing uniformity.

The Court's constitutional jury trial requirement, however, if patched onto the present Sentencing Act, would move the system backwards in respect both to tried and to plea-bargained cases. In respect to tried cases, it would effectively deprive the judge of the ability to use post-verdict-acquired real-conduct information; it would prohibit the judge from basing a sentence upon any conduct other than the conduct the prosecutor chose to charge; and it would put a defendant to a set of difficult strategic choices as to which prosecutorial claims he would contest. The sentence that would emerge in a case tried under such a system would likely reflect real conduct less completely, less accurately, and less often than did a pre-Guidelines, as well as a Guidelines, trial.

Because plea bargaining inevitably reflects estimates of what would happen at trial, plea bargaining too under such a system would move in the wrong direction. That is to say, in a sentencing system modified by the Court's constitutional requirement, plea bargaining would likely lead to sentences that gave greater weight, not to real conduct, but rather to the skill of counsel, the policies of the prosecutor, the caseload, and other factors that vary from place to place, defendant to defendant, and crime to crime. Compared to pre-Guidelines plea bargaining, plea bargaining of this kind would necessarily move federal sentencing in the direction of diminished, not increased, uniformity in sentencing. Compare *supra,* at 7–8 with *post,* at 18 (STEVENS, J., dissenting). It would tend to defeat, not to further, Congress' basic statutory goal.

Such a system would have particularly troubling conse-

quences with respect to prosecutorial power. Until now, sentencing factors have come before the judge in the presentence report. But in a sentencing system with the Court's constitutional requirement engrafted onto it, any factor that a prosecutor chose not to charge at the plea negotiation would be placed beyond the reach of the judge entirely. Prosecutors would thus exercise a power the Sentencing Act vested in judges: the power to decide, based on relevant information about the offense and the offender, which defendants merit heavier punishment.

In respondent Booker's case, for example, the jury heard evidence that the crime had involved 92.5 grams of crack cocaine, and convicted Booker of possessing more than 50 grams. But the judge, at sentencing, found that the crime had involved an additional 566 grams, for a total of 658.5 grams. A system that would require the jury, not the judge, to make the additional "566 grams" finding is a system in which the prosecutor, not the judge, would control the sentence. That is because it is the prosecutor who would have to decide what drug amount to charge. He could choose to charge 658.5 grams, or 92.5, or less. It is the prosecutor who, through such a charging decision, would control the sentencing range. And it is different prosecutors who, in different cases—say, in two cases involving 566 grams—would potentially insist upon different punishments for similar defendants who engaged in similar criminal conduct involving similar amounts of unlawful drugs—say, by charging one of them with the full 566 grams, and the other with 10. As long as different prosecutors react differently, a system with a patched-on jury factfinding requirement would mean different sentences for otherwise similar conduct, whether in the context of trials or that of plea bargaining.

Fifth, Congress would not have enacted sentencing statutes that make it more difficult to adjust sentences *upward* than to adjust them *downward*. As several

United States Senators have written in an *amicus* brief, "the Congress that enacted the 1984 Act did not conceive of—much less establish—a sentencing guidelines system in which sentencing judges were free to consider facts or circumstances not found by a jury or admitted in a plea agreement for the purpose of adjusting a base-offense level *down*, but not *up,* within the applicable guidelines range. Such a one-way lever would be grossly at odds with Congress's intent." Brief for Senator Orrin G. Hatch et al. as *Amici Curiae* 22. Yet that is the system that the dissenters' remedy would create. Compare *post,* at 18 (STEVENS, J., dissenting) (conceding asymmetry but stating belief that this "is unlikely to have more than a minimal effect").

For all these reasons, Congress, had it been faced with the constitutional jury trial requirement, likely would not have passed the same Sentencing Act. It likely would have found the requirement incompatible with the Act as written. Hence the Act cannot remain valid in its entirety. Severance and excision are necessary.

III

We now turn to the question of *which* portions of the sentencing statute we must sever and excise as inconsistent with the Court's constitutional requirement. Although, as we have explained, see Part II, *supra,* we believe that Congress would have preferred the total invalidation of the statute to the dissenters' remedial approach, we nevertheless do not believe that the entire statute must be invalidated. Compare *post*, at 22 (STEVENS, J., dissenting). Most of the statute is perfectly valid. See, *e.g.*, 18 U. S. C. A. §3551 (main ed. and Supp. 2004) (describing authorized sentences as probation, fine, or imprisonment); §3552 (presentence reports); §3554 (forfeiture); §3555 (notification to the victims); §3583 (supervised release). And we must "refrain from invalidating more of the statute than is necessary." *Regan,* 468

U. S., at 652. Indeed, we must retain those portions of the Act that are (1) constitutionally valid, *id.*, at 652–653, (2) capable of "functioning independently," *Alaska Airlines*, 480 U. S., at 684, and (3) consistent with Congress' basic objectives in enacting the statute, *Regan, supra*, at 653.

Application of these criteria indicates that we must sever and excise two specific statutory provisions: the provision that requires sentencing courts to impose a sentence within the applicable Guidelines range (in the absence of circumstances that justify a departure), see 18 U. S. C. §3553(b)(1) (Supp. 2004), and the provision that sets forth standards of review on appeal, including *de novo* review of departures from the applicable Guidelines range, see §3742(e) (main ed. and Supp. 2004) (see Appendix, *infra,* for text of both provisions). With these two sections excised (and statutory cross-references to the two sections consequently invalidated), the remainder of the Act satisfies the Court's constitutional requirements.

As the Court today recognizes in its first opinion in these cases, the existence of §3553(b)(1) is a necessary condition of the constitutional violation. That is to say, without this provision—namely the provision that makes "the relevant sentencing rules . . . mandatory and impose[s] binding requirements on all sentencing judges"—the statute falls outside the scope of *Apprendi*'s requirement. *Ante,* at 10 (STEVENS, J., opinion of the Court); see also *ibid.* ("[E]veryone agrees that the constitutional issues presented by these cases would have been avoided entirely if Congress had omitted from the [Sentencing Reform Act] the provisions that make the Guidelines binding on district judges"). Cf. *post*, at 2–8 (THOMAS, J., dissenting).

The remainder of the Act "function[s] independently." *Alaska Airlines, supra*, at 684. Without the "mandatory" provision, the Act nonetheless requires judges to take account of the Guidelines together with other sentencing

goals. See 18 U. S. C. A. §3553(a) (Supp. 2004). The Act nonetheless requires judges to consider the Guidelines "sentencing range established for . . . the applicable category of offense committed by the applicable category of defendant," §3553(a)(4), the pertinent Sentencing Commission policy statements, the need to avoid unwarranted sentencing disparities, and the need to provide restitution to victims, §§3553(a)(1), (3), (5)–(7) (main ed. and Supp. 2004). And the Act nonetheless requires judges to impose sentences that reflect the seriousness of the offense, promote respect for the law, provide just punishment, afford adequate deterrence, protect the public, and effectively provide the defendant with needed educational or vocational training and medical care. §3553(a)(2) (main ed. and Supp. 2004) (see Appendix, *infra*, for text of §3553(a)).

Moreover, despite the absence of §3553(b)(1), the Act continues to provide for appeals from sentencing decisions (irrespective of whether the trial judge sentences within or outside the Guidelines range in the exercise of his discretionary power under §3553(a)). See §3742(a) (main ed.) (appeal by defendant); §3742(b) (appeal by Government). We concede that the excision of §3553(b)(1) requires the excision of a different, appeals-related section, namely §3742(e) (main ed. and Supp. 2004), which sets forth standards of review on appeal. That section contains critical cross-references to the (now-excised) §3553(b)(1) and consequently must be severed and excised for similar reasons.

Excision of §3742(e), however, does not pose a critical problem for the handling of appeals. That is because, as we have previously held, a statute that does not *explicitly* set forth a standard of review may nonetheless do so *implicitly*. See *Pierce* v. *Underwood*, 487 U. S. 552, 558–560 (1988) (adopting a standard of review, where "neither a clear statutory prescription nor a historical tradition" existed, based on the statutory text and structure, and on

practical considerations); see also *Cooter & Gell* v. *Hartmarx Corp.*, 496 U. S. 384, 403–405 (1990) (same); *Koon* v. *United States*, 518 U. S. 81, 99 (1996) (citing *Pierce* and *Cooter & Gell* with approval). We infer appropriate review standards from related statutory language, the structure of the statute, and the "sound administration of justice." *Pierce*, *supra,* at 559–560. And in this instance those factors, in addition to the past two decades of appellate practice in cases involving departures, imply a practical standard of review already familiar to appellate courts: review for "unreasonable[ness]." 18 U. S. C. §3742(e)(3) (1994 ed.).

Until 2003, §3742(e) explicitly set forth that standard. See §3742(e)(3) (1994 ed.). In 2003, Congress modified the pre-existing text, adding a *de novo* standard of review for departures and inserting cross-references to §3553(b)(1). Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003, Pub. L. 108–21, §401(d)(1), 117 Stat. 670. In light of today's holding, the reasons for these revisions—to make Guidelines sentencing even more mandatory than it had been—have ceased to be relevant. The pre-2003 text directed appellate courts to review sentences that reflected an applicable Guidelines range for correctness, but to review other sentences—those that fell "outside the applicable Guideline range"—with a view toward determining whether such a sentence

> "*is unreasonable*, having regard for . . . the factors to be considered in imposing a sentence, as set forth in chapter 227 of this title; and . . . the reasons for the imposition of the particular sentence, as stated by the district court pursuant to the provisions of section 3553(c)." 18 U. S. C. §3742(e)(3) (1994 ed.) (emphasis added).

In other words, the text told appellate courts to determine whether the sentence "is unreasonable" with regard to

§3553(a). Section 3553(a) remains in effect, and sets forth numerous factors that guide sentencing. Those factors in turn will guide appellate courts, as they have in the past, in determining whether a sentence is unreasonable.

Taking into account the factors set forth in *Pierce*, we read the statute as implying this appellate review standard—a standard consistent with appellate sentencing practice during the last two decades. JUSTICE SCALIA believes that only in "Wonderland" is it possible to infer a standard of review after excising §3742(e). See *post*, at 8 (dissenting opinion). But our application of *Pierce* does not justify that characterization. *Pierce* requires us to judge the appropriateness of our inference based on the statute's language and basic purposes. We believe our inference a fair one linguistically, and one consistent with Congress' intent to provide appellate review. Under these circumstances, to refuse to apply *Pierce* and thereby retreat to a remedy that raises the problems discussed in Part II, *supra* (as the dissenters would do), or thereby eliminate appellate review entirely, would cut the statute loose from its moorings in congressional purpose.

Nor do we share the dissenters' doubts about the practicality of a "reasonableness" standard of review. "Reasonableness" standards are not foreign to sentencing law. The Act has long required their use in important sentencing circumstances—both on review of departures, see 18 U. S. C. §3742(e)(3) (1994 ed.), and on review of sentences imposed where there was no applicable Guideline, see §§3742(a)(4), (b)(4), (e)(4). Together, these cases account for about 16.7% of sentencing appeals. See United States Sentencing Commission, 2002 Sourcebook of Federal Sentencing Statistics 107 n. 1, 111 (at least 711 of 5,018 sentencing appeals involved departures), 108 (at least 126 of 5,018 sentencing appeals involved the imposition of a term of imprisonment after the revocation of supervised release). See also, *e.g.*, *United States* v. *White Face*, 383

F. 3d 733, 737–740 (CA8 2004); *United States* v. *Tsosie*, 376 F. 3d 1210, 1218–1219 (CA10 2004); *United States* v. *Salinas*, 365 F. 3d 582, 588–590 (CA7 2004); *United States* v. *Cook*, 291 F. 3d 1297, 1300–1302 (CA11 2002); *United States* v. *Olabanji*, 268 F. 3d 636, 637–639 (CA9 2001); *United States* v. *Ramirez-Rivera*, 241 F. 3d 37, 40–41 (CA1 2001). That is why we think it fair (and not, in JUSTICE SCALIA's words, a "gross exaggeratio[n]," *post,* at 10 (dissenting opinion)), to assume judicial familiarity with a "reasonableness" standard. And that is why we believe that appellate judges will prove capable of facing with greater equanimity than would JUSTICE SCALIA what he calls the "daunting prospect," *ibid.*, of applying such a standard across the board.

Neither do we share JUSTICE SCALIA's belief that use of a reasonableness standard "will produce a discordant symphony" leading to "excessive sentencing disparities," and "wreak havoc" on the judicial system, *post*, at 10 (internal quotation marks omitted). The Sentencing Commission will continue to collect and study appellate court decisionmaking. It will continue to modify its Guidelines in light of what it learns, thereby encouraging what it finds to be better sentencing practices. It will thereby promote uniformity in the sentencing process. 28 U. S. C. A. §994 (main ed. and Supp. 2004).

Regardless, in this context, we must view fears of a "discordant symphony," "excessive disparities," and "havoc" (if they are not themselves "gross exaggerations") with a comparative eye. We cannot and do not claim that use of a "reasonableness" standard will provide the uniformity that Congress originally sought to secure. Nor do we doubt that Congress wrote the language of the appellate provisions to correspond with the mandatory system it intended to create. Compare *post*, at 5 (SCALIA, J., dissenting) (expressing concern regarding the presence of §3742(f) in light of the absence of §3742(e)). But, as by

now should be clear, that mandatory system is no longer an open choice. And the remedial question we must ask here (as we did in respect to §3553(b)(1)) is, which alternative adheres more closely to Congress' original objective: (1) retention of sentencing appeals, or (2) invalidation of the entire Act, including its appellate provisions? The former, by providing appellate review, would tend to iron out sentencing differences; the latter would not. Hence we believe Congress would have preferred the former to the latter—even if the former means that some provisions will apply differently from the way Congress had originally expected. See *post*, at 5 (SCALIA, J., dissenting). But, as we have said, we believe that Congress would have preferred even the latter to the system the dissenters recommend, a system that has its own problems of practicality. See *supra*, at 11–12.

Finally, the Act without its "mandatory" provision and related language remains consistent with Congress' initial and basic sentencing intent. Congress sought to "provide certainty and fairness in meeting the purposes of sentencing, [while] avoiding unwarranted sentencing disparities . . . [and] maintaining sufficient flexibility to permit individualized sentences when warranted." 28 U. S. C. §991(b)(1)(B); see also USSG §1A1.1, application note (explaining that Congress sought to achieve "honesty," "uniformity," and "proportionality" in sentencing (emphases deleted)). The system remaining after excision, while lacking the mandatory features that Congress enacted, retains other features that help to further these objectives.

As we have said, the Sentencing Commission remains in place, writing Guidelines, collecting information about actual district court sentencing decisions, undertaking research, and revising the Guidelines accordingly. See 28 U. S. C. A. §994 (main ed. and Supp. 2004). The district courts, while not bound to apply the Guidelines, must consult those Guidelines and take them into account when

sentencing. See 18 U. S. C. A. §§3553(a)(4), (5) (Supp. 2004). But compare *post,* at 4 (SCALIA, J., dissenting) (claiming that the sentencing judge has the same discretion "he possessed before the Act was passed"). The courts of appeals review sentencing decisions for unreasonableness. These features of the remaining system, while not the system Congress enacted, nonetheless continue to move sentencing in Congress' preferred direction, helping to avoid excessive sentencing disparities while maintaining flexibility sufficient to individualize sentences where necessary. See 28 U. S. C. §991(b). We can find no feature of the remaining system that tends to hinder, rather than to further, these basic objectives. Under these circumstances, why would Congress not have preferred excision of the "mandatory" provision to a system that engrafts today's constitutional requirement onto the unchanged pre-existing statute—a system that, in terms of Congress' basic objectives, is counterproductive?

We do not doubt that Congress, when it wrote the Sentencing Act, intended to create a form of mandatory Guidelines system. See *post,* at 21–26 (STEVENS, J., dissenting). But, we repeat, given today's constitutional holding, that is not a choice that remains open. Hence we have examined the statute in depth to determine Congress' likely intent *in light of today's holding*. See, *e.g.*, *Denver Area Ed. Telecommunications Consortium, Inc.*, 518 U. S., at 767. And we have concluded that today's holding is fundamentally inconsistent with the judge-based sentencing system that Congress enacted into law. In our view, it is more consistent with Congress' likely intent in enacting the Sentencing Reform Act (1) to preserve important elements of that system while severing and excising two provisions (§§3553(b)(1) and 3742(e)) than (2) to maintain all provisions of the Act and engraft today's constitutional requirement onto that statutory scheme.

Ours, of course, is not the last word: The ball now lies in Congress' court. The National Legislature is equipped to devise and install, long-term, the sentencing system, compatible with the Constitution, that Congress judges best for the federal system of justice.

IV

We briefly explain why we have not fully adopted the remedial proposals that the parties have advanced. First, the Government argues that "in any case in which the Constitution prohibits the judicial factfinding procedures that Congress and the Commission contemplated for implementing the Guidelines, the Guidelines as a whole become inapplicable." Brief for United States in No. 04–104, p. 44. Thus the Guidelines "system contemplated by Congress and created by the Commission would be inapplicable in a case in which the Guidelines would require the sentencing court to find a sentence-enhancing fact." *Id.*, at 66–67. The Guidelines would remain advisory, however, for §3553(a) would remain intact. *Ibid.* Cf. Brief for New York Council of Defense Lawyers as *Amicus Curiae* 15, n. 9 (A "decision that Section 3553(b) . . . is unconstitutional . . . would not necessarily jeopardize the other reforms made by the Sentencing Reform Act, including . . . 18 U. S. C. §3553(a)"); see also *ibid.* (recognizing that the remainder of the Act functions independently); Brief for Families Against Mandatory Minimums as *Amicus Curiae* 29, 30.

As we understand the Government's remedial suggestion, it coincides significantly with our own. But compare *post,* at 11 (STEVENS, J., dissenting) (asserting that no party or *amicus* sought the remedy we adopt); *post,* at 8 (SCALIA, J., dissenting) (same). The Government would render the Guidelines advisory in "any case in which the Constitution prohibits" judicial factfinding. But it apparently would leave them as binding in all other cases.

We agree with the first part of the Government's suggestion. However, we do not see how it is possible to leave the Guidelines as binding in other cases. For one thing, the Government's proposal would impose mandatory Guidelines-type limits upon a judge's ability to *reduce* sentences, but it would not impose those limits upon a judge's ability to *increase* sentences. We do not believe that such "one-way lever[s]" are compatible with Congress' intent. Cf. Brief for Senator Orrin G. Hatch et al. as *Amicus Curiae* 22; see also *supra,* at 10–11. For another, we believe that Congress would not have authorized a mandatory system in some cases and a nonmandatory system in others, given the administrative complexities that such a system would create. Such a two-system proposal seems unlikely to further Congress' basic objective of promoting uniformity in sentencing.

Second, the respondents in essence would take the same approach as would JUSTICE STEVENS. They believe that the constitutional requirement is compatible with the Sentencing Act, and they ask us to hold that the Act continues to stand as written with the constitutional requirement engrafted onto it. We do not accept their position for the reasons we have already given. See Part II, *supra*.

Respondent Fanfan argues in the alternative that we should excise those provisions of the Sentencing Act that require judicial factfinding at sentencing. That system, however, would produce problems similar to those we have discussed in Part II, see *ibid*. We reject Fanfan's remedial suggestion for that reason.

V

In respondent Booker's case, the District Court applied the Guidelines as written and imposed a sentence higher than the maximum authorized solely by the jury's verdict. The Court of Appeals held *Blakely* applicable to the Guide-

lines, concluded that Booker's sentence violated the Sixth Amendment, vacated the judgment of the District Court, and remanded for resentencing. We affirm the judgment of the Court of Appeals and remand the case. On remand, the District Court should impose a sentence in accordance with today's opinions, and, if the sentence comes before the Court of Appeals for review, the Court of Appeals should apply the review standards set forth in this opinion.

In respondent Fanfan's case, the District Court held *Blakely* applicable to the Guidelines. It then imposed a sentence that was authorized by the jury's verdict—a sentence lower than the sentence authorized by the Guidelines as written. Thus, Fanfan's sentence does not violate the Sixth Amendment. Nonetheless, the Government (and the defendant should he so choose) may seek resentencing under the system set forth in today's opinions. Hence we vacate the judgment of the District Court and remand the case for further proceedings consistent with this opinion.

As these dispositions indicate, we must apply today's holdings—both the Sixth Amendment holding and our remedial interpretation of the Sentencing Act—to all cases on direct review. See *Griffith* v. *Kentucky*, 479 U. S. 314, 328 (1987) ("[A] new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases . . . pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a 'clear break' with the past"). See also *Reynoldsville Casket Co.* v. *Hyde*, 514 U. S. 749, 752 (1995) (civil case); *Harper* v. *Virginia Dept. of Taxation*, 509 U. S. 86, 97 (1993) (same). That fact does not mean that we believe that every sentence gives rise to a Sixth Amendment violation. Nor do we believe that every appeal will lead to a new sentencing hearing. That is because we expect reviewing courts to apply ordinary prudential doctrines, determining, for example, whether the issue was raised below and whether it fails the "plain-

error" test. It is also because, in cases not involving a Sixth Amendment violation, whether resentencing is warranted or whether it will instead be sufficient to review a sentence for reasonableness may depend upon application of the harmless-error doctrine.

It is so ordered.

APPENDIX TO OPINION OF THE COURT

Title 18 U. S. C. A. §3553(a) (main ed. and Supp. 2004) provides:

"Factors to be considered in imposing a sentence.—The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—

"(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

"(2) the need for the sentence imposed—

"(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

"(B) to afford adequate deterrence to criminal conduct;

"(C) to protect the public from further crimes of the defendant; and

"(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

"(3) the kinds of sentences available;

"(4) the kinds of sentence and the sentencing range established for—

"(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—

"(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

"(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

"(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

"(5) any pertinent policy statement—

"(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

"(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.

"(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

"(7) the need to provide restitution to any victims of the offense."

Title 18 U. S. C. A. §3553(b)(1) (Supp. 2004) provides: "Application of guidelines in imposing a sentence.—(1) In general.—Except as provided in paragraph (2), the court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described. In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements,

and official commentary of the Sentencing Commission. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission."

Title 18 U. S. C. A. §3742(e) (main ed. and Supp. 2004) provides:

"Consideration.—Upon review of the record, the court of appeals shall determine whether the sentence—

"(1) was imposed in violation of law;

"(2) was imposed as a result of an incorrect application of the sentencing guidelines;

"(3) is outside the applicable guideline range, and

"(A) the district court failed to provide the written statement of reasons required by section 3553(c);

"(B) the sentence departs from the applicable guideline range based on a factor that—

"(i) does not advance the objectives set forth in section 3553(a)(2); or

"(ii) is not authorized under section 3553(b); or

"(iii) is not justified by the facts of the case; or

"(C) the sentence departs to an unreasonable degree from the applicable guidelines range, having regard for the factors to be considered in imposing a sentence, as set forth in section 3553(a) of this title and the reasons for the imposition of the particular sentence, as stated by the district court pursuant to the provisions of section 3553(c); or

"(4) was imposed for an offense for which there is no

applicable sentencing guideline and is plainly unreasonable.

"The court of appeals shall give due regard to the opportunity of the district court to judge the credibility of the witnesses, and shall accept the findings of fact of the district court unless they are clearly erroneous and, except with respect to determinations under subsection (3)(A) or (3)(B), shall give due deference to the district court's application of the guidelines to the facts. With respect to determinations under subsection (3)(A) or (3)(B), the court of appeals shall review de novo the district court's application of the guidelines to the facts."