Department of Justice

U.S. Attorney's Office

District of Massachusetts

FOR IMMEDIATE RELEASE Monday, April 8, 2019

14 Defendants in College Admissions Scandal to Plead Guilty

13 parents and one university athletic coach have agreed to plead guilty to charges of mail fraud and honest services mail fraud

BOSTON – Thirteen parents charged in the college admissions scandal will plead guilty to using bribery and other forms of fraud to facilitate their children's admission to selective colleges and universities. One coach also agreed to plead guilty.

The defendants were arrested last month and charged with conspiring with William "Rick" Singer, 58, of Newport Beach, Calif., and others, to use bribery and other forms of fraud to secure the admission of students to colleges and universities. The conspiracy involved bribing SAT and ACT exam administrators to allow a test taker to secretly take college entrance exams in place of students, or to correct the students' answers after they had taken the exam, and bribing university athletic coaches and administrators to facilitate the admission of students to elite universities as purported athletic recruits.

The following defendants were charged in an Information with one count of conspiracy to commit mail fraud and honest services mail fraud and have agreed to plead guilty pursuant to plea agreements:

1. Gregory Abbott, 68, of New York, N.Y., together with his wife, Marcia, agreed to pay Singer $125,000 to participate in the college entrance exam cheating scheme for their daughter;
2. Marcia Abbott, 59, of New York, N.Y.;
3. Jane Buckingham, 50, of Beverly Hills, Calif., agreed to pay Singer $50,000 to participate in the college entrance exam cheating scheme for her son;
4. Gordon Caplan, 52, of Greenwich, Conn., agreed to pay Singer $75,000 to participate in the college entrance exam cheating scheme for his daughter;
5. Robert Flaxman, 62, of Laguna Beach, Calif., agreed to pay Singer $75,000 to participate in the college entrance exam cheating scheme for his daughter;
6. Felicity Huffman, 56, of Los Angeles, Calif., agreed to pay Singer at least $15,000 to participate in the college entrance exam cheating scheme for her oldest daughter;
7. Agustin Huneeus Jr., 53, of San Francisco, Calif., agreed to pay Singer $300,000 to participate in both

the college entrance exam cheating scheme and the college recruitment scheme for his daughter;
8. Marjorie Klapper, 50, of Menlo Park, Calif., agreed to pay Singer $15,000 to participate in the college entrance exam cheating scheme for her son;
9. Peter Jan Sartorio, 53, of Menlo Park, Calif., agreed to pay Singer $15,000 to participate in the college entrance exam cheating scheme for his daughter;
10. Stephen Semprevivo, 53, of Los Angeles, Calif., agreed to pay Singer $400,000 to participate in the college recruitment scheme for his son; and
11. Devin Sloane, 53, of Los Angeles, Calif., agreed to pay Singer $250,000 to participate in the college recruitment scheme for his son.

In addition, Bruce Isackson, 61, and Davina Isackson, 55, of Hillsborough, Calif., were charged in a separate Information and have both agreed to plead guilty to one count of conspiracy to commit mail fraud and honest services mail fraud. Bruce Isackson will also plead guilty to one count of money laundering conspiracy and one count of conspiracy to defraud the IRS. The Isacksons agreed to pay Singer an amount, ultimately totaling $600,000, to participate in the college entrance exam cheating scheme for their younger daughter and the college recruitment scheme for both of their daughters. The Isacksons also underpaid their federal income taxes by deducting the bribe payments as purported charitable contributions. The Isacksons are cooperating with the government's investigation.

Michael Center, 54, of Austin, Texas, the former head coach of men's tennis at the University of Texas at Austin, was charged in a third Information and has agreed to plead guilty to one count of conspiracy to commit mail fraud and honest services mail fraud. In 2015, Center personally accepted $60,000 in cash from Singer, as well as $40,000 directed to the University of Texas tennis program, in exchange for designating the child of one of Singer's clients as a tennis recruit, thereby facilitating his admission to the University of Texas.

All of the defendants who improperly took tax deductions for the bribe payments have agreed to cooperate with the IRS to pay back taxes.

Plea hearings have not yet been scheduled by the Court. Case information, including the status of each defendant, charging documents and plea agreements are available here: https://www.justice.gov/usao-ma/investigations-college-admissions-and-testing-bribery-scheme.

The charge of conspiracy to commit mail fraud and honest services mail fraud provides for a maximum sentence of 20 years in prison, three years of supervised release, and a fine of $250,000 or twice the gross gain or loss, whichever is greater. The charge of conspiracy to commit money laundering provides for a maximum sentence of 20 years in prison, three years of supervised release, and a fine of $500,000 or twice the value of the property involved in the money laundering. The charge of conspiracy to defraud the United States provides for a maximum sentence of five years in prison, three years of supervised release, and a fine of $250,000. Sentences are imposed by a federal district court judge based upon the U.S. Sentencing Guidelines and other statutory factors.

United States Attorney Andrew E. Lelling; Joseph R. Bonavolonta, Special Agent in Charge of the Federal Bureau of Investigation, Boston Field Division; and Kristina O'Connell, Special Agent in Charge of the Internal Revenue Service's Criminal Investigations in Boston, made the announcement today. Assistant U.S. Attorneys Eric S. Rosen, Justin D. O'Connell, Leslie A. Wright, and Kristen A. Kearney of Lelling's Securities and Financial Fraud Unit are prosecuting the cases.

Attachment(s):
Download B_Iasckson_Cooperation_Agreement.pdf
Download B_Isackson_Plea_Agreement.pdf
Download Buckingham_Plea_Agreement.pdf
Download Caplan_Plea_Agreement.pdf
Download Center_Plea_Agreement.pdf
Download D_Isackson_Cooperation_Agreement.pdf
Download D_Isackson_Plea_Agreement.pdf

Download Flaxman_Plea_Agreement.pdf
Download G_Abbott_Plea_Agreement.pdf
Download Huffman_Plea_Agreement.pdf
Download Huneeus_Plea_Agreement.pdf
Download Klapper_Plea_Agreement.pdf
Download M_Abbott_Plea_Agreement.pdf
Download Sartorio_Plea_Agreement.pdf
Download Semprevivo_Plea_Agreement.pdf
Download Sloane_Plea_Agreement.pdf

Download Center_Affidavit.pdf
Download Isackson_Affidavit.pdf
Download Parents_Affidavit.pdf

Topic(s):
Financial Fraud
Tax

Component(s):
USAO - Massachusetts

Updated April 8, 2019

Investigations of College Admissions and Testing Bribery Scheme

Dozens of individuals allegedly involved in a nationwide conspiracy that facilitated cheating on college entrance exams and the admission of students to elite universities as purported athletic recruits were arrested by federal agents in multiple states and charged in documents unsealed on March 12, 2019, in federal court in Boston. Athletic coaches from Yale, Stanford, USC, Wake Forest and Georgetown, among others, are implicated, as well as parents and exam administrators.

Individuals who have questions or inquiries about this case may send an email to the following address: USAMA.VictimAssistance@usdoj.gov

Below is a list of the defendants. The charging documents are attached at the bottom of this page.

Charged by Information			
Defendant	**Charges**	**Case Status**	**Sentencing**
William Rick SINGER 19-CR-10078- RWZ	Racketeering conspiracy; money laundering conspiracy; conspiracy to defraud US; obstruction of justice	10/23/2019 at 2:00 pm – Telephone Conference with J. Zobel 3/12/2019 - The defendant pled guilty and agreed to cooperate with the government's investigation. The defendant has been released on conditions.	Government Recommendation pursuant to the plea agreement: incarceration at the low end of the Guidelines sentencing range, three years of supervised release, a fine and forfeiture
Rudolph "Rudy" MEREDITH 19-CR-10075- MLW	Conspiracy to commit wire fraud and honest services wire fraud; honest services wire fraud	3/28/2019 - The defendant pled guilty and agreed to cooperate with the government's investigation. The defendant has been released on conditions.	Government Recommendation pursuant to the plea agreement: incarceration at the low end of the Guidelines sentencing range, three years of

		There is no sentencing hearing scheduled at this time.	supervised release, a fine and forfeiture
Mark RIDDELL 19-CR-10074-NMG	Conspiracy to commit mail fraud and honest services mail fraud; conspiracy to commit money laundering	11/1/2019 at 11:00 am - Sentencing hearing before Judge Gorton. 4/12/2019 - The defendant pled guilty to all counts. The defendant has been released on conditions.	Government Recommendation pursuant to the plea agreement: incarceration at the low end of the Guidelines sentencing range, three years of supervised release, a fine, forfeiture and restitution
John VANDEMOER 19-cr-10079-RWZ	Conspiracy to commit racketeering	6/12/2019 - Defendant sentenced by Judge Zobel to one day incarceration (deemed served), two years of supervised release with the first six months to be served in home detention, and a $10,000 fine. 3/12/2019 - The defendant pled guilty to all counts.	Sentence: One day incarceration (deemed served), two years of supervised release with the first six months to be served in home detention, and a $10,000 fine Government Recommendation pursuant to the sentencing memo: 13 months in prison and one year of supervised release
Charged by Information - 1:19-cr-10117			
Gregory ABBOTT	Conspiracy to commit mail fraud and honest services mail fraud	10/8/19 at 2:30 pm – Sentencing hearing scheduled before Judge Talwani. 5/22/2019 – Defendant pled guilty to an Information.	Government Recommendation pursuant to the plea agreement: one year and one day in prison, one year of supervised release, a fine of $55,000, forfeiture and restitution
Marcia ABBOTT	Conspiracy to commit mail fraud and honest services mail fraud	10/8/19 at 2:30 pm – Sentencing hearing scheduled before Judge Talwani. 5/22/2019 – Defendant pled guilty to an Information.	Government Recommendation pursuant to the plea agreement: one year and one day in prison, one year of supervised release, a fine of $55,000, forfeiture and restitution

Jane BUCKINGHAM	Conspiracy to commit mail fraud and honest services mail fraud	10/23/19 at 2:30 pm – Sentencing hearing scheduled before Judge Talwani. 5/24/2019 – Defendant pled guilty to an Information.	Government Recommendation pursuant to the plea agreement: incarceration at the low end of the Guidelines sentencing range, one year of supervised release, a fine of $40,000, forfeiture and restitution
Gordon CAPLAN	Conspiracy to commit mail fraud and honest services mail fraud	10/3/19 at 2:30 pm – Sentencing hearing scheduled before Judge Talwani. 5/21/2019 – Defendant pled guilty to an Information.	Government Recommendation pursuant to the plea agreement: incarceration at the low end of the Guidelines sentencing range, one year of supervised release, a fine of $40,000, forfeiture and restitution
Robert FLAXMAN	Conspiracy to commit mail fraud and honest services mail fraud	10/18/19 at 2:30 pm – Sentencing hearing scheduled before Judge Talwani. 5/24/2019 – Defendant pled guilty to an Information.	Government Recommendation pursuant to the plea agreement: incarceration at the low end of the Guidelines sentencing range, one year of supervised release, a fine of $40,000, forfeiture and restitution
Felicity HUFFMAN	Conspiracy to commit mail fraud and honest services mail fraud	9/13/19 at 2:30 pm – Sentencing hearing scheduled before Judge Talwani. 5/13/2019 – Defendant pled guilty to an Information.	Government Recommendation pursuant to the plea agreement: incarceration at the low end of the Guidelines sentencing range, one year of supervised release, a fine of $20,000, forfeiture and restitution
Agustin HUNEEUS Jr.	Conspiracy to commit mail fraud and honest services mail fraud	10/4/19 at 2:30 pm – Sentencing hearing scheduled before Judge Talwani. 5/21/2019 – Defendant	Government Recommendation pursuant to the plea agreement: 15 months in prison, one year of

		pled guilty to an Information.	supervised release, a fine of $95,000, forfeiture and restitution
Marjorie KLAPPER	Conspiracy to commit mail fraud and honest services mail fraud	10/16/19 at 2:30 pm – Sentencing hearing scheduled before Judge Talwani. 5/24/2019 – Defendant pled guilty to an Information.	Government Recommendation pursuant to the plea agreement: incarceration at the low end of the Guidelines sentencing range, one year of supervised release, a fine of $20,000, forfeiture and restitution
Peter Jan SARTORIO	Conspiracy to commit mail fraud and honest services mail fraud	10/11/19 at 2:30 pm – Sentencing hearing scheduled before Judge Talwani. 5/22/2019 – Defendant pled guilty to an Information.	Government Recommendation pursuant to the plea agreement: incarceration at the low end of the Guidelines sentencing range, one year of supervised release, a fine of $9,500, forfeiture and restitution
Stephen SEMPREVIVO	Conspiracy to commit mail fraud and honest services mail fraud	Sentencing hearing scheduled before Judge Talwani on 9/11/19 has been cancelled. a new date has notbeen set. 5/7/2019 – Defendant pled guilty to an Information.	Government Recommendation pursuant to the plea agreement: 18 months in prison, one year of supervised release, a fine of $95,000, forfeiture and restitution
Devin SLOANE	Conspiracy to commit mail fraud and honest services mail fraud	Sentencing hearing scheduled before Judge Talwani on 910/2019 has been cancelled. A new date has not been set yet. 5/13/2019 – Defendant pled guilty to an Information.	Government Recommendation pursuant to the plea agreement: one year and one day in prison, one year of supervised release, a fine of $75,000, forfeiture and restitution
Charged by Information - 1:19-cr-10115			
Davina ISACKSON	Conspiracy to commit mail fraud and honest	11/8/19 at 2:00 pm – Sentencing hearing	Government Recommendation

	services mail fraud	scheduled before Judge Saris. 5/1/2019 – Defendant pled guilty to an Information and agreed to cooperate with the government's investigation.	pursuant to the plea agreement: incarceration at the low end of the Guidelines sentencing range, one year of supervised release, a fine of $100,000, forfeiture and restitution
Bruce ISACKSON	Conspiracy to commit mail fraud and honest services mail fraud; money laundering conspiracy; and conspiracy to defraud the United States	11/8/19 at 2:00 pm – Sentencing hearing scheduled before Judge Saris. 5/1/2019 – Defendant pled guilty to an Information and agreed to cooperate with the government's investigation.	Government Recommendation pursuant to the plea agreement: incarceration at the low end of the Guidelines sentencing range, one year of supervised release, a fine of $150,000, restitution of $139,509 to the IRS, and forfeiture
Charged by Information -19-cr-10131			
Toby MACFARLANE	Conspiracy to commit mail fraud and honest services mail fraud	11/13/19 at 3:00 pm – Sentencing hearing scheduled before Judge Gorton. 6/21/2019 – Defendant pled guilty to an Information.	Government Recommendation pursuant to the plea agreement: 15 months in prison, one year of supervised release, a fine of $95,000, forfeiture and restitution
Charged by Information - 19-cr-10222-DPW			
Jeffrey BIZZACK	Conspiracy to commit mail fraud and honest services mail fraud	10/30/19 at 12:00 pm – Sentencing hearing scheduled before Judge Woodlock. 7/24/2019 – Defendant pled guilty to an Information.	Government Recommendation pursuant to the plea agreement: nine months in prison, one year of supervised release, a fine of $75,000, and restitution
Charged by Information - 1:19-cr-10116			
Michael CENTER	Conspiracy to commit mail fraud and honest services mail fraud	10/30/19 at 2:00 pm – Sentencing hearing scheduled before Judge	Government Recommendation pursuant to the plea

		Stearns. 4/24/2019 – Defendant pled guilty to Information.	agreement: incarceration at the low end of the Guidelines sentencing range, one year of supervised release, a fine, forfeiture and restitution
Charged by Indictment - 19-CR-10081-IT			
Defendant	**Charges**	**Case Status**	
Igor DVORSKIY 19-CR-10081- IT	Conspiracy to commit racketeering	10/01/19 at 2:15 pm – Status conference. Defendant is not required to attend. 3/25/2019 - Defendant arraigned in federal court in Boston and pled not guilty. Defendant was released on conditions, including bond and restricted travel.	
Gordon ERNST 19-CR-10081- IT	Conspiracy to commit racketeering	10/01/19 at 2:15 pm – Status conference. Defendant is not required to attend.	
William FERGUSON 19-CR-10081- IT	Conspiracy to commit racketeering	10/01/19 at 2:15 pm – Status conference. Defendant is not required to attend. 3/25/2019 - Defendant arraigned in federal court in Boston and pled not guilty. Defendant was released on conditions, including bond and restricted travel.	
Martin FOX 19-CR-10081- IT	Conspiracy to commit racketeering	10/01/19 at 2:15 pm – Status conference. Defendant is not required to attend. 3/25/2019 - Defendant	

		arraigned in federal court in Boston and pled not guilty. Defendant was released on conditions, including bond and restricted travel.	
Donna HEINEL 19-CR-10081- IT	Conspiracy to commit racketeering	10/01/19 at 2:15 pm – Status conference. Defendant is not required to attend. 3/25/2019 - Defendant arraigned in federal court in Boston and pled not guilty. Defendant was released on conditions, including bond and restricted travel.	
Laura JANKE 19-CR-10081- IT	Conspiracy to commit racketeering	01/18/202 at 2:30 pm – Sentencing hearing rescheduled before Judge Talwani. 5/14/2019 – Defendant pled and will cooperate with the government's investigation.	Government Recommendation pursuant to the plea agreement: incarceration at the low end of the Guidelines sentencing range, one year of supervised release, a fine, forfeiture and restitution
Ali KHOSROSHAHIN 19-CR-10081- IT	Conspiracy to commit racketeering	01/23/2020at 2:30 pm – Sentencing hearing rescheduled before Judge Talwani. 6/27/19– Defendant pled guilty and will cooperate with the government's investigation.	Government Recommendation pursuant to the plea agreement: incarceration at the low end of the Guidelines sentencing range, one year of supervised release, a fine, forfeiture and restitution
Steven MASERA 19-CR-10081- IT	Conspiracy to commit racketeering	01/22/2020 at 2:30 pm – Sentencing hearing rescheduled before Judge Talwani. 6/27/19 – Defendant pled guilty and will cooperate with the government's	Government Recommendation pursuant to the plea agreement: incarceration at the low end of the Guidelines sentencing range, one year of supervised release, a fine,

		investigation.	forfeiture and restitution
Jorge SALCEDO 19-CR-10081- IT	Conspiracy to commit racketeering	10/01/19 at 2:15 pm – Status conference. Defendant is not required to attend. 3/25/2019 - Defendant arraigned in federal court in Boston and pled not guilty. Defendant was released on conditions, including bond and restricted travel.	
Mikaela SANFORD 19-CR-10081- IT	Conspiracy to commit racketeering	10/01/19 at 2:15 pm – Status conference. Defendant is not required to attend. 3/25/2019 - Defendant arraigned in federal court in Boston and pled not guilty. Defendant was released on conditions, including bond and restricted travel.	
Jovan VAVIC 19-CR-10081- IT	Conspiracy to commit racketeering	10/01/19 at 2:15 pm – Status conference. Defendant is not required to attend. 3/25/2019 - Defendant arraigned in federal court in Boston and pled not guilty. Defendant was released on conditions, including bond and restricted travel.	
Niki WILLIAMS 19-CR-10081- IT	Conspiracy to commit racketeering	10/01/19 at 2:15 pm – Status conference. Defendant is not required to attend. 3/25/2019 - Defendant arraigned in federal court	

		in Boston and pled not guilty. Defendant was released on conditions, including bond and restricted travel.	
Charged by Indictment - 1-19-cr-10080			
Defendant	**Charges**	**Case Status**	
David SIDOO	Conspiracy to commit mail fraud and honest services mail fraud; money laundering conspiracy	10/02/19 at 2:15 pm - Status conference. Defendant is not required to attend. 4/29/2019 – Defendant represented by counsel at arraignment and enters a plea of not guilty	
Amy COLBURN	Conspiracy to commit mail fraud and honest services mail fraud; money laundering conspiracy	10/02/19 at 2:15 pm - Status conference. Defendant is not required to attend. 4/15/2019 - Defendant files motion to dismiss indictment.	
Gregory COLBURN	Conspiracy to commit mail fraud and honest services mail fraud; money laundering conspiracy	10/02/19 at 2:15 pm - Status conference. Defendant is not required to attend. 4/15/2019 - Defendant files motion to dismiss indictment.	
Gamal ABDELAZIZ	Conspiracy to commit mail and wire fraud and honest services mail and wire fraud; conspiracy to commit money laundering	10/02/19 at 2:15 pm - Status conference. Defendant is not required to attend. 4/29/2019 – Defendant represented by counsel at arraignment and enters a plea of not guilty.	

Diane BLAKE	Conspiracy to commit mail and wire fraud and honest services mail and wire fraud; conspiracy to commit money laundering	10/02/19 at 2:15 pm - Status conference. Defendant is not required to attend. 4/29/2019 – Defendant represented by counsel at arraignment and enters a plea of not guilty	
Todd BLAKE	Conspiracy to commit mail and wire fraud and honest services mail and wire fraud; conspiracy to commit money laundering	10/02/19 at 2:15 pm - Status conference. Defendant is not required to attend. 4/29/2019 – Defendant represented by counsel at arraignment and enters a plea of not guilty	
I-Hsin “Joey” CHEN	Conspiracy to commit mail and wire fraud and honest services mail and wire fraud; conspiracy to commit money laundering	10/02/19 at 2:15 pm - Status conference. Defendant is not required to attend. 4/29/2019 – Defendant represented by counsel at arraignment and enters a plea of not guilty	
Mossimo GIANNULLI	Conspiracy to commit mail and wire fraud and honest services mail and wire fraud; conspiracy to commit money laundering	10/02/19 at 2:15 pm - Status conference. Defendant is not required to attend. 8/27/19 at 3:00 pm – Rule 44 hearing before Magistrate Judge Kelley. 4/29/2019 – Defendant represented by counsel at arraignment and enters a plea of not guilty	
Elizabeth HENRIQUEZ	Conspiracy to commit mail and wire fraud and honest services mail and wire fraud; conspiracy to	10/02/19 at 2:15 pm - Status conference. Defendant is not required to attend.	

	commit money laundering	4/29/2019 – Defendant represented by counsel at arraignment and enters a plea of not guilty	
Manuel HENRIQUEZ	Conspiracy to commit mail and wire fraud and honest services mail and wire fraud; conspiracy to commit money laundering	10/02/19 at 2:15 pm - Status conference. Defendant is not required to attend. 4/29/2019 – Defendant represented by counsel at arraignment and enters a plea of not guilty	
Douglas HODGE	Conspiracy to commit mail and wire fraud and honest services mail and wire fraud; conspiracy to commit money laundering	10/02/19 at 2:15 pm - Status conference. Defendant is not required to attend. 4/29/2019 – Defendant represented by counsel at arraignment and enters a plea of not guilty.	
Michelle JANAVS	Conspiracy to commit mail and wire fraud and honest services mail and wire fraud; conspiracy to commit money laundering	10/02/19 at 2:15 pm - Status conference. Defendant is not required to attend. 4/29/2019 – Defendant represented by counsel at arraignment and enters a plea of not guilty	
Elisabeth KIMMEL	Conspiracy to commit mail and wire fraud and honest services mail and wire fraud; conspiracy to commit money laundering	10/02/19 at 2:15 pm - Status conference. Defendant is not required to attend. 4/29/2019 – Defendant represented by counsel at arraignment and enters a plea of not guilty	
Lori LOUGHLIN	Conspiracy to commit mail and wire fraud and	10/02/19 at 2:15 pm - Status conference.	

	honest services mail and wire fraud; conspiracy to commit money laundering	Defendant is not required to attend. 8/27/19 at 3:00 pm – Rule 44 hearing before Magistrate Judge Kelley. 4/29/2019 – Defendant represented by counsel at arraignment and enters a plea of not guilty	
William McGLASHAN	Conspiracy to commit mail and wire fraud and honest services mail and wire fraud; conspiracy to commit money laundering	10/02/19 at 2:15 pm - Status conference. Defendant is not required to attend. 4/29/2019 – Defendant represented by counsel at arraignment and enters a plea of not guilty	
Marci PALATELLA	Conspiracy to commit mail and wire fraud and honest services mail and wire fraud; conspiracy to commit money laundering	10/02/19 at 2:15 pm - Status conference. Defendant is not required to attend. 4/29/2019 – Defendant represented by counsel at arraignment and enters a plea of not guilty	
John WILSON	Conspiracy to commit mail and wire fraud and honest services mail and wire fraud; conspiracy to commit money laundering	10/02/19 at 2:15 pm - Status conference. Defendant is not required to attend. 4/29/2019 – Defendant represented by counsel at arraignment and enters a plea of not guilty	
Homayoun ZADEH	Conspiracy to commit mail and wire fraud and honest services mail and wire fraud; conspiracy to commit money laundering	10/02/19 at 2:15 pm - Status conference. Defendant is not required to attend. 4/29/2019 – Defendant represented by counsel at	

		arraignment and enters a plea of not guilty	
Robert ZANGRILLO	Conspiracy to commit mail and wire fraud and honest services mail and wire fraud; conspiracy to commit money laundering	10/02/19 at 2:15 pm - Status conference. Defendant is not required to attend. 4/29/2019 – Defendant represented by counsel at arraignment and enters a plea of not guilty	

Attachments:

Download center_complaint.pdf
Download complaint.pdf
Download indictment.pdf
Download meredith_information.pdf
Download riddell_information.pdf
Download singer_information.pdf
Download vandemoer_information.pdf
Download sidoo_redacted_indictment.pdf
Download sidoo_colburn_superseding_indictment.pdf
Download center_affidavit.pdf
Download isackson_affidavit.pdf
Download parents_affidavit.pdf
Download b_iasckson_cooperation.pdf
Download b_isackson_plea.pdf
Download buckingham_plea_agreement.pdf
Download caplan_plea_agreement.pdf
Download center_plea_agreement.pdf
Download d_isackson_cooperation.pdf
Download d_isackson_plea.pdf
Download flaxman_plea_agreement.pdf
Download g_abbott_plea_agreement.pdf
Download huffman_plea_agreement.pdf
Download huneeus_plea_agreement.pdf
Download klapper_plea_agreement.pdf
Download m_abbott_plea_agreement.pdf
Download sartorio_plea_agreement.pdf
Download semprevivo_plea_agreement.pdf
Download sloane_plea_agreement.pdf
Download second_superseding_indictment.pdf
Download janke_laura_plea_agreement.pdf
Download macfarlane_toby_information.pdf
Download macfarlane_toby_plea_agreement.pdf

Updated August 29, 2019

Was this page helpful?

Yes No

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA		)	
		)	
v.		)	
		)	
(1)	GREGORY ABBOTT,	)	
(2)	MARCIA ABBOTT,	)	
(3)	JANE BUCKINGHAM,	)	
(4)	GORDON CAPLAN,	)	Criminal No. 19-10117
(5)	ROBERT FLAXMAN,	)	
(6)	FELICITY HUFFMAN,	)	
(7)	AGUSTIN FRANCISCO HUNEEUS,	)	
(8)	MARJORIE KLAPPER,	)	
(9)	PETER JAN "P.J." SARTORIO,	)	
(10)	STEPHEN SEMPREVIVO, and	)	
(11)	DEVIN SLOANE,	)	
		)	
	Defendants	)	

GOVERNMENT'S CONSOLIDATED SENTENCING MEMORANDUM

ANDREW E. LELLING
United States Attorney

ERIC S. ROSEN
JUSTIN D. O'CONNELL
LESLIE A. WRIGHT
KRISTEN A. KEARNEY
Assistant United States Attorneys

Date: September 6, 2019

Table of Contents

INTRODUCTION

Since this case and its companion cases were first charged in March 2019, the "college admissions scandal" has become a national conversation, a kind of Rorschach test for middle class angst about college admissions. The reasons are clear: applying to college is an annual rite of passage for about two million students, each of whom hopes to earn entry to his or her dream school; it is also a rite of passage for millions of parents, each of whom knows that sending their children to a well-known college can positively impact their lives in countless ways. The experience is the same across neighborhoods, states, even income levels: work hard in high school, pursue the right extracurricular activities, nail the SAT or ACT, pick your "safe," "competitive," and "reach" schools, write your essays, send in the applications, wait and hope.

And then there are these defendants. Perched at the apex of wealth, privilege and, in some instances, fame, these defendants were not content with the distinct advantages they already enjoyed in the admissions process: access to the best private schools and tutors; unlimited resources to pursue sports and extracurricular activities; and legacy standing, in several cases, as alumni of the universities they defrauded. Instead of relying on merit, they opted to cheat, by buying their children illegal advantages: fake standardized test scores and guaranteed admission, via fraud, to the schools of their choice. Betraying an astonishing degree of self-entitlement and moral insularity, they corrupted a system that millions of Americans depend on every year, merely so their children could attend one college instead of another.

Some period of incarceration is the only meaningful sanction for these crimes. Not because the defendants' relative wealth has generated public resentment, but because jail is a particularly meaningful response to this kind of offense. For wrongdoing that is predicated on wealth and rationalized by a sense of privilege, incarceration is the only leveler: in prison everyone is treated

the same, dressed the same, and intermingled regardless of affluence, position or fame. To be clear—as reflected in the government's sentencing recommendations—it is the fact of incarceration that matters more than its duration; with limited exceptions, the public interest does not require substantial prison terms for these parents. But no other form of sanction makes plain that all Americans *are equally obligated to play by the rules and must be equally accountable for breaking them*. Home confinement would be a penological joke, conjuring images of defendants padding around impressive homes waiting for the end of curfew; probation with community service is too lenient and too easily co-opted for its "PR" value; and a fine is meaningless for defendants wealthy enough to commit this crime in the first place.

Nor is the fact of prosecution itself a sufficient sanction. Defendants at this level of affluence, like many white-collar defendants, typically argue that they have "suffered enough already" because of the exceptional publicity their cases received. There is no question that embarrassment, loss of position and other social consequences are real collateral effects of prosecution. But to accept this argument is to accept an inverse relationship between affluence and incarceration: it cannot be that the *more* affluent, or famous, the defendant, the *less* of a sanction is warranted. The public has repeatedly witnessed the pernicious impact of wealth and fame on the equal administration of justice. This case should counter that narrative, not reinforce it.

BACKGROUND

The defendants engaged in an elaborate scheme to secure the admission of their children to elite universities through bribery and fraud. Some conspired to bribe standardized test administrators to allow a corrupt proctor to correct their children's SAT and ACT exams, or to take those exams in their place. Others conspired to bribe university coaches and administrators,

and to falsify their children's qualifications, in order to have their children designated as recruited athletes—regardless of their athletic abilities and, in some cases, even though they did not play the sports they were purportedly recruited to play. Still others did both. And some did it more than once.

Several defendants enlisted their children as participants in the scheme. One purchased athletic gear, photographed his son posing as a water polo player in the family swimming pool, and hired a graphic designer to make the photo appear more realistic. Another allowed his son to send an email to Georgetown's tennis coach boasting of false achievements so that the coach, in turn, could use those bogus claims to advance the child's application.

Other defendants deceived their children about the fraud. One administered a practice SAT exam to her son at home, falsely telling him that it was the real thing, even as a co-conspirator took the exam in his place hundreds of miles away.

And there were other lies, and other frauds. One defendant conspired to lie about her son's race on his college application, falsely presenting him as African-American. Another hired a lawyer to pressure the ACT to release his daughter's fraudulent scores. Still others lied to high school guidance counselors, paid bribes in cash or disguised bribes as tax-deductible charitable donations for underprivileged youth. One even pursued a lawsuit against Georgetown after the school threatened to dismiss his (fraudulently admitted) son.

Even as they were stealing admissions slots for their children, the defendants held themselves out publicly as models of integrity. One was the chairman of an international law firm, who boasted of his *pro bono* work helping immigrant children receive medical care while also secretly confiding to a co-conspirator that he was "not worried about the moral issue" of committing fraud. Another was the bestselling author of a "Guide to Motherhood," who duped

her own son into providing a handwriting exemplar so that someone else could take the ACT in his place and mimic his handwriting. A third was an Academy Award-nominated actress who dispensed parenting advice online, while also scheming to deceive her daughter's high school about why she would be taking the SAT somewhere else.

The defendants have admitted to a brazen criminal scheme with widespread and lasting consequences. Exceptional student-athletes were denied recruitment slots at elite schools, and other qualified students were denied admission, because of the defendants' crimes. The reputations of several universities were damaged, institutions that have now spent considerable sums investigating the fraud and implementing measures to prevent it from recurring. In response to this fraud, California is considering legislation to eliminate the use of ACT and SAT tests by state universities. More broadly, the defendants' crimes have undermined faith in the integrity of the college admissions process and demoralized students and parents.

ARGUMENT

I. THE DEFENDANTS SHOULD BE SENTENCED TO SOME PERIOD OF INCARCERATION

In fashioning an appropriate sentence, courts consider the factors set forth in 18 U.S.C. § 3553(a), including the seriousness of the offense, the history and characteristics of each defendant, the need for the sentence imposed to constitute just punishment and provide for adequate deterrence, and the importance of avoiding unwarranted sentencing disparities among similarly situated defendants.

The government has considered these factors, along with other measures of culpability: the magnitude of the bribes they agreed to pay, whether they repeatedly engaged in the scheme, the extent to which individual defendants actively participated in the fraud and contributed to its

success, the extent to which they involved their own children as co-conspirators, the degree to which they occupied positions of trust, and other obstructive or otherwise egregious conduct in which they engaged as the scheme unraveled.

For each defendant, incarceration appropriately reflects the seriousness of the offense and provides just punishment. Likewise, non-jail sentences for these defendants would say to the victims of these crimes—including the applicants denied admission to the colleges of their choice in favor of the defendants' less qualified children—that their losses matter little. Having chosen to buy illegal advantages through bribery and fraud, the defendants should face real consequences for their choices.

A. The Seriousness of the Offense: Systemic Harm to the College Admissions Process and Individualized Harm to Universities and College Applicants

The ACT and the SAT are the flagship exams in a standardized testing system that is critical to millions of college applicants. These exams are required by many universities, particularly the most selective, and they determine eligibility for a variety of awards and academic scholarships, including the National Merit Scholarship and the U.S. Presidential Scholarship. Students prepare extensively for the exams, and many take them more than once, hoping to improve their odds of admission to the colleges of their choice and their ability to afford an education. These students and their families are entirely dependent on the fairness of the testing process.

Beyond standardized tests, most elite schools evaluate applicants on a range of criteria including academic, athletic and extracurricular performance. High school students labor for years to stand out in these areas, because every one of them knows the competition is increasingly intense for the limited number of slots. At Georgetown, for example, nearly 23,000 students applied for admission to the class of 2023. Just 3,202 were admitted—an acceptance rate of approximately

14 percent.[1] At the University of Southern California ("USC"), the acceptance rate was just 11 percent.[2] Amid these daunting odds, for a select few applicants—athletes who endure years of training and competition to rank among the finest of their cohort—that commitment can lead to recruitment to play college sports, dramatically improving the prospects of admission.

The defendants intentionally corrupted this process to steal admissions slots from deserving applicants. For each of the defendants' children who was admitted based on fake test scores or as a recruited athlete, another applicant with legitimate credentials was rejected. The defendants thus directly cheated honest, diligent students out of admission slots in favor of their own less qualified children. In so doing, they stole economic opportunities earned by others.[3] And even where the defendants' children were not actually admitted to college based on falsified test scores—because the scheme was interrupted before their applications were submitted or acted upon—their intent was the same: to steal admissions spots from deserving applicants through deception and fraud.

---

[1] *See* Taylor Kahn-Perry, *Admissions Rate Falls to 14 Percent, Lowest in University History*, THE HOYA (Apr. 5, 2019), https://www.thehoya.com/admit-rate-falls-14-percent-lowest-university-history/.

[2] *See* Natalie Oganesyan, *USC Acceptance Rate Drops to 11 Percent, Record Low*, DAILY TROJAN (Mar. 28, 2019), http://dailytrojan.com/2019/03/28/usc-fall-acceptance-rate-drops-to-11-percent-record-low/.

[3] There is a significant economic return to attending an elite private college such as USC or Georgetown. *See, e.g.*, Domenic J. Brewer et al., *Does It Pay To Attend an Elite Private College? Cross Cohort Evidence on the Effects of College Quality on Earnings*, (Nat'l Bureau of Econ. Research, Working Paper 5613, June 1996), https://www.nber.org/papers/w5613 (noting that "there is strong evidence of significant economic return to attending an elite private institution, and some evidence that this premium has increased over time"). This is particularly true for "racial and ethnic minorities (black and Hispanic students), and for students whose parents have relatively little education," as well as for students from lower socio-economic circumstances. *See* Stacy Dale & Alan B. Krueger, *Estimating the Return to College Selectivity Over the Career Using Administrative Earnings Data* 4–5 (Nat'l Bureau of Econ. Research, Working Paper 17159, June 2011), https://www.nber.org/papers/w17159.pdf; *see generally* Raj Chetty et al., *Mobility Report Cards: The Role of Colleges in Intergenerational Mobility*, Equality of Opportunity Project (June 2017), http://www.equality-of-opportunity.org/papers/coll_mrc_paper.pdf.

The defendants' crimes weakened public trust in the fairness of standardized testing and the larger college admissions process, both outside and inside these universities. Just as vote rigging corrupts democracy and insider trading corrupts markets, the defendants' actions caused *systemic* harm, unfairly tilting the playing field in their favor and contributing to the destabilization of a process on which millions of Americans depend. As one Stanford student told CNN:

> [W]hat's even more disappointing is knowing that among my peers are those who cut in line; those who prevented other first-generation, low-income students who worked just as hard or harder than I had from getting in, just because they had money. It's a slap in the face to the American dream . . . . It makes me question the value of the degree I will receive this June, and it hurts me to my core that other parents who worked hard like mine to see their kids go to a school like Stanford won't be in attendance.[4]

The Executive Director of the American Association of Collegiate Registrars and Admissions Officers put it similarly, warning that the defendants' conduct "compromises the integrity of college admissions and reinforces stereotypes that people of privilege can circumvent the rules," even as it "undermines public confidence in our institutions."[5]

B. The Defendants' History and Characteristics

Each of the defendants is situated somewhat differently, and the government will address their individual backgrounds and characteristics under separate cover. The defendants do have many common traits, though: they are highly successful, well-educated professionals, some with advanced degrees. They include founders or leaders of companies and people prominent in their fields. A few are nationally famous. Several have accumulated enormous wealth, a few from

[4] Jane Carr et al., *We Asked How the College Cheating Scam Made You Feel. Your Stories Were Incredible*, CNN (Mar. 21, 2019), https://www.cnn.com/2019/03/21/opinions/college-admissions-scam-cheating-share-your-story-opinion/index.html.

[5] Scott Jaschik, *The Week that Shook College Admissions*, INSIDE HIGHER ED. (Mar. 18, 2019), https://www.insidehighered.com/admissions/article/2019/03/18/look-how-indictments-shook-college-admissions.

humble beginnings, and some give to charity. All were, until their arrest, respected members of their communities.

These characteristics cut both ways. The defendants' achievements, law-abiding past, and standing in their communities are mitigating factors, but they underscore that all of the defendants and their children—regardless of their wealth, where it came from, or the circumstances of their upbringing—enjoy advantages and opportunities available only to a select few: the best schools and tutors, access to any niche sport or extracurricular activity one could imagine, and—in many cases—legacy at elite schools. That was not enough. In short, the defendants used bribery and fraud to pile illegal advantages atop the other rare advantages they already enjoyed.

It is no answer that the defendants were just trying to help their children get ahead. All parents want to help their kids get ahead, yet most manage to steer clear of conspiracy, bribery and fraud. Most parents have a moral compass and impress upon their children the correlation between hard work and just reward. In contrast, the defendants relied on fraud and bribery, knowing that they were cheating other children out of admissions spots.

C. The Need for Just Punishment

The defendants in this case, as in many cases, have been subject to public scrutiny. Some have lost jobs or suffered other financial setbacks as a result of the charges against them. But these collateral consequences must be put in perspective. Neither reputational harm nor financial reversals are adequate substitutes for meaningful punishment in white-collar cases. They are, for one thing, unexceptional; countless criminals face similar consequences when they are caught. They are also ephemeral. Memories fade, reputations recover. Accordingly, the First Circuit has said that "it is impermissible for a court to impose a lighter sentence on white-collar defendants than on blue-collar defendants because it reasons that white-collar offenders suffer greater

reputational harm or have more to lose by conviction." *United States v. Prosperi*, 686 F.3d 32, 47 (1st Cir. 2012); *see also United States v. Stall*, 581 F.3d 276, 286 (6th Cir. 2009) ("We do not believe criminals with privileged backgrounds are more entitled to leniency than those who have nothing left to lose.").

Similarly, neither probation nor criminal fines are sufficient penalties given the magnitude of the defendants' criminal scheme and the harm flowing from it; criminal defendants "with money or earning potential" should not be able to "buy their way out of jail." *United States v. Mueffelman*, 470 F.3d 33, 40 (1st Cir. 2006) (noting the desirability of minimizing "discrepancies between white- and blue-collar offenses"); *see also United States v. Kuhlman*, 711 F.3d 1321, 1329 (11th Cir. 2013) ("The Sentencing Guidelines authorize no special sentencing discounts on account of economic or social status."); *United States v. Levinson*, 543 F.3d 190, 201 (3d Cir. 2008) ("[I]t has been noted that probationary sentences for white-collar crime raise concerns of sentencing disparities according to socio-economic class."). Nor would home confinement be a meaningful punishment in the circumstances of this case, given the overall prosperity in which most of the defendants reside.

Particularly in light of the systemic aspects of the defendants' crime—that is, that they knowingly corrupted a system on which millions of American families rely—failure to sentence them to prison would send the message "that would-be white collar criminals stand to lose . . . practically none of their liberty." *United States v. Martin*, 455 F.3d 1227, 1240 (11th Cir. 2006); *see also United States v. Stefonek*, 179 F.3d 1030, 1038 (7th Cir. 1999) ("Business criminals are not to be treated more leniently than members of the 'criminal class' just by virtue of being regularly employed or otherwise productively engaged in lawful economic activity."). Such a result would be profoundly unjust.

D. The Avoidance of Unwarranted Sentencing Disparities

The Sentencing Guidelines reflect the consensus that those convicted of economic crimes should not be able to avoid incarceration, even where those crimes are a defendant's first offense. The legislative history of the Sentencing Reform Act of 1984 indicates that one of the Act's goals was to rectify the serious problem that white-collar offenders were not being adequately punished. *See* S. REP. NO. 98-225, at 77 (1983) ("[S]ome major offenders, particularly white-collar offenders . . . frequently do not receive sentences that reflect the seriousness of their offenses."). As then-Judge Breyer, an original member of the Sentencing Commission, explained:

> The Commission found in its data significant discrepancies between pre-Guideline punishment of certain white-collar crimes, such as fraud, and other similar common law crimes, such as theft. The Commission's statistics indicated that where white-collar fraud was involved, courts granted probation to offenders more frequently than in situations involving analogous common law crimes; furthermore, prison terms were less severe for white-collar criminals who did not receive probation. *To mitigate the inequities of these discrepancies, the Commission decided to require short but certain terms of confinement* for many white-collar offenders, including tax, insider trading, and antitrust offenders, who previously would have likely received only probation.

Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1, 20–21 (1988) (emphasis added) (footnotes omitted).

Defendants who perpetrate frauds comparable to this one, including cheating on tests and misrepresenting academic records, are routinely sentenced to terms of incarceration:

Case	Charge(s)	Prison Term
***United States v. Barrington*, 4:08-cr-00050-WS-GRJ (N.D. Fla.)**[6]	Defendant convicted of scheming to access university's online grading system and changing grades for themselves and friends applying to graduate school, as well as changing residencies so non-resident students would qualify for in-state tuition.	84 months

[6] *United States v. Barrington*, 648 F.3d 1178 (11th Cir. 2011) (affirming sentence and noting that co-defendants who pleaded guilty and received substantial assistance departures under U.S.S.G. § 5K1.1 were each sentenced to 22 months in prison and 3 years of supervised release).

Case	Charge(s)	Prison Term
***Connecticut v. Tanya McDowell*, S20N-CR11-0128870 (Norwalk Sup. Ct.)**[7]	Homeless mother pleaded guilty to fraudulently claiming her babysitter's address as her own so her child could attend school in a different district.	60 months
***Indiana v. Roy C. Sun*, *79D02-1304-FC-18* (Tippecanoe Sup. Ct.)**[8]	University student pleaded guilty to inflating grades in classes—by using passwords of his professors and forgery—to obtain credits necessary for graduation.	48 months (suspended to serve 90 days)
***United States v. Lorenzo García*, 3:11-cr-01830-DB-1 (W.D. Tex.)**[9]	El Paso School District Superintendent pleaded guilty to directing staff to "change passing grades to failing grades in an effort to prevent qualified students from taking the 10th grade [Texas Assessment of Knowledge and Skills Test]."	42 months
***United States v. Ozell Clifford Brazil*, CR-02-00882-SVW (C.D. Cal.)**[10]	Reverend who founded program to help minority students get into college convicted of mail fraud for advising students to fraudulently claim on scholarship forms that "they were orphans or came from broken homes."	41 months
***United States v. Patricia Adams Lambert*, 1:15-cr-00004 (E.D. Tx.)**[11]	Beaumont School District Superintendent pleaded guilty to "directly or indirectly, encourag[ing] teachers and staff to manipulate students' standardized test scores or had knowledge that cheating occurred."	40 months

[7] *See* Ann Cammett, *Welfare Queens Redux: Criminalizing Black Mothers in the Age of Neoliberalism*, 25 S. CAL. INTERDISC. L.J. 363, 375–76 (2016), https://gould.usc.edu/why/students/orgs/ilj/assets/docs/25-2-Cammett.pdf.

[8] *See* Irving DeJohn, *Purdue University Graduate Gets Four-Year Sentence for Grade-Changing Scandal*, N.Y. DAILY NEWS (Mar. 3, 2014), http://www.nydailynews.com/news/national/purdue-university-graduate-hit-four-year-sentence-grade-changing-scandal-article-1.1709170.

[9] *Former E.P.I.S.D. Superintendent Garcia Sentenced To Federal Prison*, U.S. Dep't. of Just. (Oct. 5, 2012), https://www.justice.gov/archive/usao/txw/news/2012/EPISD%20Garcia%20sentencing%20final.pdf.

[10] *See* David Rosenzweig, *Minister Is Given Prison Term for Student Aid Fraud*, L.A. TIMES (Oct. 21, 2003), https://www.latimes.com/archives/la-xpm-2003-oct-21-me-scholar21-story.html.

[11] *Former Beaumont ISD Assistant Superintendent Sentenced for Federal Violations*, U.S. Dep't. of Just. (June 8, 2016), https://www.justice.gov/usao-edtx/pr/former-beaumont-isd-assistant-superintendent-sentenced-federal-violations.

Case	Charge(s)	Prison Term
***United States v. Lance Brauman, Neil Elliott, Ryan Cross, & Lyles Lashley*, 6:05-cr-10197-MLB & 6:05-cr-10232-34-MLB (D. Kan.)**[12]	Barton County Community College coaches and athletic director convicted of mail and wire fraud for taking online classes for student-athletes and misrepresenting classes taken by student-athletes to make it appear as if the students were eligible to earn junior college degrees.	Ranging from 12 months and one day to 12 weekends
***California v. Timothy Lai*, (Orange County Sup. Ct.)**[13]	High school tutor pleaded guilty to changing students' grades 19 times by stealing teachers' passwords.	12 months
***United States v. Mellissa Krystynak*, 5:18-cr-00196 (S.D.W. Va.)**[14]	Mother, who was a counselor at her children's school, pleaded guilty to changing 34 of her daughter's grades, which her daughter then used to apply to college.	6 months
***United States v. Joseph Fonge*, 1:14-cr-10194-WGY (D. Mass.)**[15]	Father pleaded guilty to wire fraud for falsifying financial aid applications so that his daughter could attend a university.	4 months

[12] *Investigative Report: Former Barton County Track Coach Lance Brauman Sentenced to 12 Months and a Day in Federal Prison*, U.S. Dep't. of Educ. (Oct. 2, 2006), https://www2.ed.gov/about/offices/list/oig/invtreports/ks102006.html; *see also* Associated Press, *Four Going to Jail for Fraud at Community College*, ESPN (Oct. 2, 2006), https://www.espn.com/college-sports/news/story?id=2611020 (reporting that at sentencing, judge remarked "Some of the fraudulent conduct occurred in the classroom—this is not the message teachers and coaches should be sending to young students").

[13] *See* Hannah Fry, *Tutor Pleads Guilty in Corona del Mar High Cheating Scandal, Gets 1 Year in Jail*, L.A. TIMES (Aug. 4, 2015), https://www.latimes.com/socal/daily-pilot/news/tn-dpt-me-0805-lai-20150804-story.html.

[14] *See Former High School Counselor Sentences for Mail Fraud Scheme Inflating Daughter's Grades to Obtain College Scholarships*, U.S. Dep't of Just. (May 17, 2019), https://www.justice.gov/usao-sdwv/pr/former-high-school-counselor-sentenced-mail-fraud-scheme-inflating-daughters-grades.

[15] *Chelsea Man Pleads Guilty to Student Financial Aid Fraud*, U.S. Dep't. of Just. (Dec. 10, 2014), https://www.justice.gov/usao-ma/pr/chelsea-man-pleads-guilty-student-financial-aid-fraud.; *see also* Judgment, *United States v. Fonge*, No. 1:14-CR-10194-WGY (Dkt. 19).

Case	Charge(s)	Prison Term
***United States v. Bosung Shim*, 1:13-cr-00367-TSE-1 (E.D. Va.)**[16]	Aspiring medical student attempted to hack into multiple computer systems, including the Association of American Medical Colleges system, in order to change his Medical College Admissions Test scores.	3 months, plus 7 months in a halfway house
***California v. Omar Khan*, (Orange County Sup. Ct.)**[17]	Student pleaded guilty to changing his grades and the grades of 12 other students, altering his Advanced Placement exam score, and stealing Advanced Placement exams.	30 days

Even cases involving far less egregious conduct, and defendants with mitigating personal circumstances, have resulted in incarceration. For example, in a 2011 case, a single mother living in an Ohio housing project falsely claimed her father's address to get her children into a nearby suburban school district, and did so while working as a teacher's aide and taking night classes to earn a teaching degree. She was charged with two felony counts and sentenced to five years in prison, a sentence later suspended to ten days in jail, three years' probation, and community service.[18] Still more recently, as set forth below, ten Atlanta public school teachers, principals, and administrators were sentenced to as much as 36 months in prison after being convicted of racketeering and other charges arising out of a conspiracy to inflate students' test scores:[19]

[16] *Hacker Sentenced for Breaking into Medical School Application Computers*, U.S. Dep't of Just. (Sept. 1, 2013), https://www.justice.gov/usao-edva/pr/hacker-sentenced-breaking-medical-school-application-computers.

[17] Scott Martindale, *Student Computer Hacker Pleads Guilty, Gets 30 Days*, O.C. REGISTER (Mar. 22, 2011), https://www.ocregister.com/2011/03/22/student-computer-hacker-pleads-guilty-gets-30-days/.

[18] *See* Lisa Belkin, *Jailed for Choosing a Better School?*, N.Y. TIMES (Jan. 27, 2011), https://parenting.blogs.nytimes.com/2011/01/27/jailed-for-choosing-a-better-school/?scp=1&sq=Williams-Bolar&st=cse.

[19] *See, e.g.*, Richard Fausset & Alan Blinder, *Atlanta School Workers Sentences in Test Score Cheating Case*, N.Y. TIMES (Apr. 14, 2015) https://www.nytimes.com/2015/04/15/us/atlanta-school-workers-sentenced-in-test-score-cheating-case.html.

Individual	Role	Prison Term
Sharon Davis-Williams[20]	School Resource Team Executive Director convicted of RICO.	84 months; reduced to 36 months on appeal
Tamara Cotman[21]	School Resource Team Executive Director convicted of RICO.	84 months; reduced to 36 months on appeal
Michael Pitts[22]	School Resource Team Executive Director convicted of RICO and influencing witnesses.	84 months; reduced to 36 months on appeal
Angela Williamson[23]	Teacher convicted of RICO, false statements, and false swearing.	24 months
Tabeeka Jordan[24]	Assistant Principal convicted of RICO.	24 months
Shani Robinson[25]	Teacher convicted of RICO and false statements.	12 months
Diane Buckner-Webb[26]	Teacher convicted of RICO and false statements.	12 months
Dana Evans[27]	Principal convicted of RICO and false statements.	12 months

[20] *See* Donna Lowry, *Sentences Reduced for 3 in Atlanta Cheating Scandal*, USA TODAY (Apr. 30, 2015), https://www.usatoday.com/story/news/nation/2015/04/30/atlanta-educators-resentenced/26643997/; *Sharon Davis-Williams*, WSB-TV Atlanta (Mar. 26, 2015), https://www.wsbtv.com/news/local/sharon-davis-williams/53733806.

[21] *See* Lowry, *supra* note 20; *Tamara Cotman*, WSB-TV Atlanta (Mar. 26, 2015), https://www.wsbtv.com/news/local/tamara-cotman/53731018.

[22] *See* Lowry, *supra* note 20; *Michael Pitts*, WSB-TV Atlanta (Mar. 26, 2015), https://www.wsbtv.com/news/local/michael-pitts/53732959.

[23] *See Angela Williamson*, WSB-TV Atlanta (Mar. 26, 2015), https://www.wsbtv.com/news/local/angela-williamson/53731513.

[24] *See Tabeeka Jordan*, WSB-TV Atlanta (Mar. 26, 2015), https://www.wsbtv.com/news/local/tabeeka-jordan/53731094.

[25] *See Shani Robinson*, WSB-TV Atlanta (Mar. 26, 2015), https://www.wsbtv.com/news/local/shani-robinson/53733845.

[26] *See Diane Buckner-Webb*, WSB-TV Atlanta (Mar. 26, 2015) https://www.wsbtv.com/news/local/diane-buckner-webb/53730752,

[27] *See Dana Evans*, WSB-TV Atlanta (Mar. 26, 2015), https://www.wsbtv.com/news/local/dana-evans/53730379.

Individual	Role	Prison Term
Donald Bullock[28]	Testing Coordinator convicted of RICO, false statements, and false swearing.	Weekends in jail for 6 months

There are educational fraud cases in which defendants have received probationary sentences—particularly in instances involving foreign nationals who were deported as a result of their conduct. But the cases most analogous to this one—involving organized schemes and multiple co-conspirators—have typically resulted in the imposition of meaningful terms of incarceration. Frequently, those cases involved defendants who are members of racial and ethnic minorities and/or from disadvantaged socioeconomic backgrounds. A different result in this case, particularly given the history and characteristics of these defendants, would not be appropriate. Rather, "short but certain" terms of incarceration, such as those the government is requesting, would avoid unjustified disparities, be proportional, consonant with the spirit and letter of the Sentencing Guidelines, and not more than necessary to see justice done.

E. **The Need for Specific and General Deterrence**

These particular defendants are unlikely to repeat the specific crime charged here. But merely because they are unlikely to again cheat the college admissions process does not mean they are unlikely to re-offend. The criminal conduct here was multi-faceted: it involved bribery, false statements, laundering funds through a sham charity and scheming to take fraudulent tax deductions. These are crimes that are, by their nature, easy to commit and difficult to detect. They occur quietly, in conference rooms, living rooms, and over the phone. They are rationalized by those who commit them.

[28] *See Donald Bullock*, WSB-TV Atlanta (Mar. 26, 2015), https://www.wsbtv.com/news/local/donald-bullock/53733873.

The defendants engaged in bribery and deceit because another wealthy parent referred them to the conspiracy's mastermind, William "Rick" Singer, they could afford the illicit service he provided, and they thought they could get away with it. Despite their public personae, they willfully broke the law because it was easy and they thought no one was looking. This time, the context was college admissions; it could just as well have been tax fraud, insurance fraud, accounting fraud, or securities fraud. Incarceration is the best and surest way to deter these defendants in the future.

Incarceration will also effectively deter similarly situated individuals from engaging in similar crimes, not least because the resolution of these cases will be widely reported. Courts recognize "the critical deterrent value of imprisoning serious white collar criminals, even where those criminals might themselves be unlikely to commit another offense." *United States v. Martin*, 455 F.3d at 1240. The fact that perpetrators of fraud crimes are "rational, cool, and calculated," makes them "prime candidate[s] for general deterrence." *Id*. (quoting Stephanos Bibas, *White-Collar Plea Bargaining and Sentencing After Booker*, 47 WM. & MARY L. REV. 721, 724 (2005)) (internal quotation marks omitted). Sentences of incarceration here will make unambiguously clear that everyone is accountable to the law regardless of status, and will deter others from buying illegal advantages in the college admissions process.

II. INDIVIDUAL SENTENCING RECOMMENDATIONS

Beyond properly reflecting the gravity of the offense and the other factors in Section 3553(a), the defendants' sentences should also account for relative culpability within the group. What follows is a short summary of each defendant's offense conduct, a discussion of the methodology the government used to assess relative culpability, and a table setting forth the government's sentencing recommendations. Prior to each sentencing in the case, the government

will submit a supplemental memorandum addressing other individualized factors relevant to each defendant in greater detail.

A. The Offense Conduct

All of the defendants knowingly and intentionally paid bribes and other monies, and engaged in other forms of fraud, as part of the scheme to facilitate their children's admission to elite colleges and universities over more qualified applicants. Set forth below is a brief synopsis of each defendant's conduct.

i. *Gregory and Marcia Abbott*

In 2018, Gregory Abbott, a retired corporate executive, and his wife, Marcia Abbott, arranged with Singer to pay a total of $125,000 to facilitate cheating on two separate sets of standardized tests: the ACT and the SAT II subject tests. On both occasions, the Abbotts disguised the payments as donations to Singer's sham charitable organization, the Key Worldwide Foundation ("KWF"). In April 2018, the Abbotts paid $50,000 to have a corrupt proctor, Mark Riddell, correct their daughter's ACT exam; Riddell ultimately achieved a near perfect score. Then, in September 2018, the Abbotts paid $75,000 to have Riddell cheat on the SAT II subject tests. On that occasion, Marcia Abbott specifically requested that Riddell "administer" the test based on his earlier performance. The scheme also involved bribing a corrupt test site administrator, Igor Dvorskiy, to permit the cheating to occur.

ii. *Jane Buckingham*

In 2018, Jane Buckingham, a prominent Los Angeles entrepreneur and the best-selling author of a book titled *The Modern Girl's Guide to Motherhood*, agreed to pay $50,000, funneled through KWF, to have Riddell correct her son's ACT exam. As originally conceived, the scheme involved Buckingham flying with her son from Los Angeles to Houston, where a corrupt test site

administrator, Niki Williams, would allow the cheating in exchange for a bribe. When Buckingham's son became ill, however, Buckingham asked that Riddell simply take the test himself.

To facilitate the fraud, she obtained a handwriting sample from her son so Riddell could mimic his script on the actual exam. Riddell then took the test alone in his hotel room, earning Buckingham's son a near-perfect score. Buckingham, meanwhile, gave her son a practice exam at home, in order to deceive him into thinking he had taken the test himself. Pleased with the results, Buckingham later told Singer she would like to cheat on the ACT test on behalf of her daughter, although these plans were interrupted by Buckingham's arrest.

iii. *Gordon Caplan*

In 2018, Gordon Caplan, the chairman of a large international law firm, agreed to pay $75,000 as a purported contribution to KWF to participate in the college entrance exam cheating scheme. Singer told Caplan that his daughter would need to be evaluated by a psychologist for a "learning difference" to justify extending her time on the exam in order to facilitate the fraud. Singer advised that the goal of the evaluation was "to be stupid . . . to be slow, to be not as bright . . . so we show discrepancies." Caplan then flew from his home in the New York City area to Los Angeles, where his daughter was evaluated by a psychologist recommended by Singer. Having succeeded in getting extra time for the exam, Caplan and his daughter flew to Los Angeles a second time in December 2018, so that she could take the ACT at the test center operated by Dvorskiy, the corrupt test administrator, and have Riddell correct her answers. When the ACT ultimately notified Caplan that it was retracting its decision to grant Caplan's daughter extended time and intended to cancel her score, Caplan retained a lawyer to pressure ACT to release the fraudulent score.

iv. *Robert Flaxman*

In or about October 2016, Robert Flaxman, the chief executive of a Los Angeles-based real estate development firm, caused his company to pay Singer $75,000, disguised as a contribution to KWF, in exchange for having Riddell cheat on his daughter's ACT exam. Flaxman's daughter flew to Houston so she could take the exam at the Houston test center operated by Williams, the second of Singer's corrupt test administrators. During the exam, Riddell instructed Flaxman's daughter and another student taking the test at the same time to answer different questions incorrectly so that they did not have the same incorrect answers on their tests and the ACT would not suspect cheating.

v. *Felicity Huffman*

In 2017 and 2018, the actress Felicity Huffman agreed to pay Singer $15,000, disguised as a contribution to KWF, to participate in the college entrance exam scheme for her oldest daughter. Huffman, who before her arrest operated a website on which she offered parenting advice, worked with Singer to fabricate reasons why her daughter needed to take the SAT at Dvorskiy's test center instead of at her own high school, where it would have been supervised by a legitimate proctor. After obtaining the fraudulent score, Huffman discussed with Singer pursuing the cheating scheme a second time for her younger daughter, although she ultimately decided not to do so.

vi. *Agustin Huneeus*

In 2017 and 2018, Agustin Huneeus, the owner of several well-known vineyards, agreed to pay Singer a total of $300,000, disguised as donations to KWF, to participate in both the entrance exam cheating scheme and the college recruitment scheme. In or about August 2018, after Riddell fraudulently achieved an SAT score placing Huneeus's daughter in the 96th percentile nationally, Huneeus complained to Singer that the score was too low. Huneeus also made plans with Singer,

which he later abandoned, to cheat on the ACT. Huneeus then engaged in the college recruitment scheme, agreeing to pay a bribe totaling $250,000 in exchange for having his daughter "recruited" to USC as a purported water polo player, a sport she did not play competitively. Ultimately, Huneeus was arrested before he could make the final payment of $200,000.

vii. *Marjorie Klapper*

In 2015, the College Board invalidated Ms. Klapper's older son's SAT score because the score had increased markedly relative to his performance on the PSAT and there was "substantial agreement between [his] answers . . . and those of another test taker" seated nearby. Klapper then conspired with Singer to create a fake tutoring invoice to make it appear that her son had achieved a high score due to diligent preparation, which she detailed in a letter to ETS.

Later, in 2017, Klapper agreed to make a fake charitable contribution of $15,000 to KWF to participate in the college entrance exam cheating scheme for her younger son. Klapper also approved various falsehoods on her younger son's college application—including that he was Mexican and African-American and a first-generation college student—with the expectation that doing so would improve his admissions prospects.

viii. *Peter Jan "P.J." Sartorio*

In 2017, Peter Jan "P.J." Sartorio, a packaged food entrepreneur, agreed to pay Singer $15,000 to participate in the college entrance exam cheating scheme for his daughter. In June 2017, Sartorio and his daughter flew to Los Angeles, where Riddell corrected the answers to her ACT exam after she had finished. Sartorio then made payments to Singer in cash, to make it harder to trace, and structured his bank withdrawals into three separate transactions over the course of four days. Sartorio later told Singer, "There is nothing on my end that shows that your company,

Rick, or anybody, received any cash payments. . . . But anything that was done verbally, that was verbal and there's no record. There's nothing. There's nothing."

ix. *Stephen Semprevivo*

In 2015 and 2016, Stephen Semprevivo, a business executive, agreed to pay Singer $400,000 to defraud Georgetown University into admitting Semprevivo's son by falsely presenting his son as a competitive tennis player. Semprevivo's son, on Singer's direction and with the awareness of Semprevivo, sent an email to Gordon Ernst, the corrupt Georgetown tennis coach, about his purported interest in playing tennis, so that Ernst could use the email to further the fraudulent application. Semprevivo also knew that his son's application essay included falsehoods about his son's tennis experience. After Semprevivo entered his guilty plea, his attorney sued Georgetown on behalf of Semprevivo's son, seeking an injunction to prevent his dismissal from the university. The lawsuit was later dropped.

x. *Devin Sloane*

In 2017 and 2018, Devin Sloane, a successful entrepreneur and business executive, agreed to pay Singer $250,000 to have his oldest son fraudulently recruited to USC as a water polo player, notwithstanding the fact that Sloane's son did not play the sport, in which USC is nationally ranked. Sloane made the payments in two parts: a $50,000 payment to a fund at USC controlled by athletics administrator Donna Heinel, who facilitated the fraudulent recruitment, and a $200,000 sham donation to KWF, which Singer used, in part, to make additional payments to Heinel personally. Sloane later boasted to Singer about how he misled a USC advancement officer about the reason for the $50,000 payment by telling him that Sloane's mother "was an Olympic

athlete and she just passed away last year, and we as a family decided that we wanted to support women's sports."

As part of the scheme, Sloane bought water polo gear, photographed his son posing in the gear in the family swimming pool, and hired a graphic designer to make the photo look more realistic. Sloane also approved a falsified athletic profile submitted to USC that portrayed his son as an experienced and talented water polo player. When a high school guidance counselor questioned why Sloane's son was being admitted to USC as a water polo player, Sloane expressed outrage at her inquiry, and conspired with Singer to come up with an explanation to hide the scheme from the school.

Sloane later suggested to Singer that they not discuss the scheme over the phone, and asked Singer to send him some "marketing materials" for Singer's fake charity, so that Sloane could use them to support misrepresentations to the Internal Revenue Service about the reason for his purported $200,000 contribution.

B. Key Factors Considered To Determine Relative Culpability

For each defendant, the government's recommended sentence begins with the recognition that the defendants are first-time offenders who accepted responsibility almost immediately following their arrests, and waived both indictment and substantial Rule 16 discovery. The government's recommendations also take into account the individual circumstances of each defendant. The government considered several additional factors, as set forth below.

i. *Amount of the Bribes and Other Payments*

In assessing relative culpability, the government considered, as a starting point, the magnitude of the bribes and other payments the defendants agreed to make, consistent with the Sentencing Guidelines' mandate that "loss serves as a measure of the seriousness of the offense

and the defendant's relative culpability." U.S. Sentencing Guidelines Manual § 2B1.1, Commentary, Background (U.S. Sentencing Comm'n 2018). Placing weight on the bribe amount—which the parties have stipulated is an appropriate substitute for loss—is consistent with the Guidelines' treatment of bribery schemes generally, *see* U.S.S.G. §§ 2B4.1, 2C1.1, as well as with the Guidelines' purpose of achieving "greater equivalence between penalties for white collar crimes like fraud and violent crimes like robbery." *Prosperi*, 686 F.3d at 38 (noting that "'[o]ne means chosen by the Sentencing Commission to accomplish this goal was by giving greater weight to the amount of loss involved in a scheme to defraud.'") (quoting *United States v. Prosperi*, No. 06-10116-RGS, 2010 WL 1816346, at *1 (D. Mass. May 6, 2010) (Stearns, J.)).

ii. *Repeat Players*

The government took into account the extent to which the defendants were "repeat players," that is, their willingness to engage in defrauding the system more than once. Thus, for example, the government recommends that Huneeus serve a term of incarceration modestly longer than Semprevivo, despite the fact that Semprevivo paid bribes totaling $100,000 more than Huneeus, because Huneeus willfully engaged in both the exam cheating and bogus recruitment schemes while Semprevivo was involved only in the latter.

Likewise, the government recommends a sentence of one month of incarceration for Huffman, who agreed to pay $15,000 for the exam cheating scheme for her older daughter, and considered doing it again for her younger daughter, but ultimately chose not to do so. By contrast, the government recommends a sentence of four months for Klapper—who, like Huffman, agreed to pay $15,000 in connection with the exam cheating scheme—because Klapper participated in the scheme for her younger son *after* the College Board invalidated her older son's exam score based on suspicion of cheating, and *after* she enlisted Singer in a fraudulent attempt to cover it up.

In short, Klapper pursued a more sophisticated cheating scheme that would reduce the odds of detection. Moreover, she agreed to falsely represent her son in his applications as a Mexican and African-American first-generation college student in order to gain a competitive edge in the admissions process.

iii. *Active Versus Passive Participation*

The government's recommendations also take into account the extent to which each defendant was an active rather than passive participant in the scheme, including steps taken independently to advance the fraud and conceal it. Sloane, for example, merits a comparatively greater sentence because—rather than merely funneling bribe payments through Singer's purported charity—he took steps to affirmatively mislead USC, including by buying water polo equipment for his son to wear in a staged photograph, hiring a graphic designer to make the photo look more realistic, lying to a high school guidance counselor about why his son was recruited as a water polo player, and independently misleading a USC advancement officer about the reasons for his purported donation to a fund administered by Heinel. Likewise, the recommendation for Buckingham accounts for her independent suggestion that Riddell take the exam without her son even being there, and her effort to deceive and manipulate her own son by administering a practice exam to him at home and telling him it was the real thing.

iv. *Involvement of Children*

Stiffer sentences are appropriate for defendants who enlisted their children in the scheme. For example, as noted above, Semprevivo allowed his son to send an e-mail to the Georgetown tennis coach boasting of invented tennis accomplishments and falsely expressing his interest in playing tennis at Georgetown, even though he did not play tennis competitively. Similarly, Huneeus and his daughter had at least one in-person conversation with Singer in which they

explicitly discussed the athletic recruitment fraud, and Huneeus instructed his daughter to keep quiet about it.

v. *Positions of Trust*

The government considered the extent to which the defendants occupied positions of trust in the community. Caplan, for example, was a prominent attorney and the chairman of an international law firm employing more than 700 attorneys. Caplan was also a member of the New York Bar and an officer of the court. Attorneys who flagrantly disregard the law—as underscored by Caplan's private admission that he was "not worried about the moral issue" of committing fraud—merit particular sanction.

Likewise, other defendants were senior corporate executives with heightened responsibilities to investors, employees, and business counter-parties for honesty and fair-dealing. Still others used their positions of prominence to anoint themselves as authorities on parenting. Buckingham literally wrote a book on the subject, while Huffman offered advice to thousands of her followers on the internet. Brazen hypocrisy weighed in the government's calculus.

vi. *Other Conduct*

Lastly, the government considered the defendants' conduct as the scheme unraveled and following its exposure, ranging from public expressions of post-arrest contrition at one end to defiant efforts to retain the benefits of the fraud at the other, including through abuse of the legal system. As the scheme neared its end, for example, Caplan retained a lawyer to pressure the ACT to release his daughter's fraudulently-obtained scores, while Sloane advised Singer that they should not speak on the phone as they discussed ways to mislead the IRS about the purpose of Sloane's payment to Singer's sham charity. Semprevivo, even after pleading guilty, countenanced *suing Georgetown*—the school he conspired to defraud—to retain his son's fraudulently obtained

admission. These efforts show a determined interest in protecting the fruits of patently illegal activity and merit relatively longer terms of incarceration.

C. Sentencing Recommendations

For each defendant, the government's recommended sentence is near or below the low end of the Sentencing Guidelines as calculated by the parties. For some defendants, the government's recommendation is also below what the government agreed to recommend as part of the relevant plea agreement. The most severe sentence the government seeks is 15 months; the least severe, 1 month. These recommendations are set forth in the following table:

Defendant	Bribe/Payment Amount	Stipulated Guidelines Range (Plea Agreement)	Final Sentencing Recommendation
Gregory **ABBOTT**	$125,000 (college entrance exam cheating scheme – ACT and SAT subject tests)	12–18 months (total offense level of 13)	9 months
Marcia **ABBOTT**	$125,000 (college entrance exam cheating scheme – ACT and SAT subject tests)	12–18 months (total offense level of 13)	9 months
Jane **BUCKINGHAM**	$50,000 (college entrance exam cheating scheme – ACT)	8–14 months (total offense level of 11)	8 months
Gordon **CAPLAN**	$75,000 (college entrance exam cheating scheme – ACT)	8–14 months (total offense level of 11)	8 months
Robert **FLAXMAN**	$75,000 (college entrance exam cheating scheme – ACT)	8–14 months (total offense level of 11)	8 months

Defendant	Bribe/Payment Amount	Stipulated Guidelines Range (Plea Agreement)	Final Sentencing Recommendation
Felicity **HUFFMAN**	$15,000 (college entrance exam cheating scheme – SAT)	0-6 months (total offense level of 7)	1 month
Agustin Francisco **HUNEEUS**	$300,000 ($50,000 college entrance exam cheating scheme – SAT; $250,000 college recruitment scheme – USC water polo)	21–27 months (total offense level of 16)	15 months
Marjorie **KLAPPER**	$15,000 (college entrance exam cheating scheme – ACT)	4–10 months (total offense level of 9)	4 months
Peter Jan **SARTORIO**	$15,000 (college entrance exam cheating scheme – ACT)	0–6 months (total offense level of 7)	1 month
Stephen **SEMPREVIVO**	$400,000 (college recruitment scheme – Georgetown tennis)	21–27 months (total offense level of 16)	15 months
Devin **SLOANE**	$250,000 (college recruitment scheme – USC water polo)	15–21 months (total offense level of 14)	12 months

CONCLUSION

This case is a singular opportunity to assure the general public that the college admissions system—a system millions of Americans rely on each year—will be as level a playing field as the law can realistically make it. The Court should hold these men and women accountable for their callous disregard for others, and for the systemic and individualized harm they caused.

Respectfully submitted,

ANDREW E. LELLING
United States Attorney

By: */s/ Eric S. Rosen*
ERIC S. ROSEN
JUSTIN D. O'CONNELL
LESLIE A. WRIGHT
KRISTEN A. KEARNEY
Assistant United States Attorneys

Date: September 6, 2019

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the above document was served upon the attorney of record for each other party by CM/ECF on September 6, 2019.

/s/ Eric S. Rosen
ERIC S. ROSEN

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA v. (6) FELICITY HUFFMAN, Defendant	Criminal No.: 19-10117-IT-6

GOVERNMENT'S SUPPLEMENTAL SENTENCING MEMORANDUM CONCERNING DEFENDANT FELICITY HUFFMAN

The government respectfully submits this supplemental memorandum in connection with the sentencing of defendant Felicity Huffman.

Under the Sentencing Guidelines, Huffman's advisory Guidelines range is zero to six months of incarceration, in addition to supervised release and a fine. For the reasons set forth below and in the government's Consolidated Sentencing Memorandum, the Court should sentence Huffman to a term of one month of incarceration, followed by 12 months of supervised release and a fine of $20,000.[1]

I. Background

The essential facts of Huffman's criminal activity are not in dispute: She agreed with a co-conspirator, William "Rick" Singer, to pay $15,000 to have another co-conspirator purport to proctor her daughter's SAT exam, but in fact correct the daughter's answers and thereby

[1] As to any fine ordered by the Court, the government is trying to arrange for those amounts to be applied to federal government programs supporting educational opportunities for under-privileged Americans. The issue is complicated by the Anti-Deficiency Act and certain other federal regulations. If the Court does impose a fine, the government respectfully requests 30 days to submit a proposed order concerning disposition of the fine proceeds.

fraudulently inflate the score. In so doing, she defrauded both the College Board and the Educational Testing Service ("ETS"), the non-profit organizations that develop and administer the SAT. And because she intended for her daughter to submit the fake scores as part of college applications, she likewise sought to defraud the colleges to which her daughter applied and to deprive competing applicants of a fair shot at admission. In the process, she also misled her daughter, who was unaware of the scheme, and her daughter's high school where, but for Huffman's actions, the SAT would have been administered by a legitimate proctor.

Huffman's decision to cheat was deliberate and knowing. Her own contemporaneous notes—which she took on her laptop computer following an August 2017 meeting with Singer at her home—reflect her understanding that for "15 grand," Singer could "[c]ontrol the outcome of the SAT."[2] She wrote: "get a proctor in the room with her and she gets the answer she needs to get[.] At the end of the test – the proctor makes sure." And, she noted, for "75 grand guy will make the scores perfect."

Huffman's notes also show that she knew what she was doing was wrong, and she conspired with Singer to avoid arousing suspicion. She wrote: "If we start taking it multiple time – college board will only allow you a certain amount of increase – between tests – they would investigate you." For her older daughter, who had already taken the PSAT ten months earlier, Huffman chose the $15,000 option, that is, she decided to buy an improved score, but not a perfect

[2] Huffman produced the notes to the government in connection with a disagreement about the amount of the payment Huffman agreed to make to facilitate the bribe scheme. They are submitted herewith under seal as Exhibit A. In making its sentencing recommendation, the government has accepted Huffman's representation, as reflected in the notes, that she understood the agreed-upon payment to be $15,000. It has, accordingly, reduced its recommended sentence from four months, as set forth in the plea agreement, to one month—near the low end of the agreed-upon range.

one. With respect to her younger daughter, she wrote: "If we decide to do it – don't do PSAT's – just take SAT in October."

Over the next several months, Huffman took multiple steps to facilitate the scheme. Just days after Singer instructed her, at their August 2017 meeting, to "insist" that her daughter receive 100 percent extended time to take the exam over multiple days, she directed a psychologist to contact the College Board to secure that approval. While the psychologist had concluded that Huffman's daughter did, in fact, qualify for extended time due to a learning difference, this step was critical to enable the next step in the plot: switching the test location from her daughter's high school—where it would be legitimately proctored—to a test center in West Hollywood, California that Singer "controlled" through another co-conspirator, Igor Dvorskiy.

And when Huffman later learned that, despite the grant of extended time, her daughter's high school still intended to have its own proctor administer the SAT, she emailed Singer with obvious alarm: "Ruh Ro! Looks like [the high school] wants to provide own proctor."

Thereafter, Huffman agreed with Singer to lie to the high school guidance counselor by falsely telling the counselor that her daughter would take the test elsewhere over a weekend so that she would not have to miss any school. The *sole purpose* of that lie was to enable the corrupt proctor, Mark Riddell, to correct her daughter's answers at the test center operated by Dvorskiy, the corrupt administrator. And Huffman went further: calling ETS directly to confirm that the exam would be shipped to Dvorskiy, and not to her daughter's high school.

In February 2018, after learning that the scheme had succeeded in improving her daughter's score by about 400 points, Huffman reimbursed Singer for the costs of paying Riddell and bribing Dvorskiy by making a purported contribution of $15,000 to Singer's sham charitable organization, the Key Worldwide Foundation ("KWF").

One year later, having succeeded in cheating once, Huffman took steps to cheat again, this time for her younger daughter. Over the course of multiple calls, she and Singer reviewed the mechanics of the scheme, and how to pull it off without alerting her daughter's SAT tutor. For example, the following is an excerpt from a call with Singer on February 13, 2019, which was consensually recorded:

HUFFMAN	And, you know, [the tutor] gave her that practice test, and as I said to you, you know, she came in at around 1200 and she said, "But I think, you know, we can bring that--"
Singer	We can go 14--
HUFFMAN	--yeah, we can bring that up." But I just didn't know if it'd be odd for [the tutor] if we go, "Oh, she did this in-- in March 9th, but she did so much better in May." I don't know if that'd be like-- if [the tutor] would be like "Wow."
Singer	--[the tutor] is just doing her job so I don't think she gets well-engaged in that kind of world.
HUFFMAN	Okay.
Singer	So I wouldn't worry about that.

Ultimately, in March 2019, Huffman chose not to pursue the scheme a second time.

II. Huffman Should be Sentenced to One Month in Prison, Followed By One Year of Supervised Release and a Fine of $20,000

Huffman's extended effort to defraud the College Board, ETS and the colleges and universities to which her daughter applied, warrants a sentence of imprisonment. She should be sentenced to a term of one month—within the applicable Guidelines range—followed by 12 months of supervised release and a $20,000 fine. This disposition is sufficient, but not greater than necessary, to achieve the goals of sentencing, while recognizing Huffman's nearly immediate

acceptance of responsibility, individual circumstances, and culpability relative to her co-conspirators.

Huffman's conduct was deliberate and manifestly criminal: it was wrong, she knew it was wrong, and she actively participated in manipulating her daughter's guidance counselor, the testing services and the schools to which her daughter applied. Her efforts weren't driven by need or desperation, but by a sense of entitlement, or at least moral cluelessness, facilitated by wealth and insularity. Millions of parents send their kids to college every year. All of them care as much as she does about their children's fortunes. But they don't buy fake SAT scores and joke about it ("Ruh Ro!") along the way.

Moreover, while Huffman has publicly expressed remorse for her actions since the time of her arrest, she has more recently submitted a version of the offense conduct to the Court that quibbles with certain details. She contends, for example, that she did not agree to engage in the scheme until October 2017, three months after Singer first proposed it. (PSR ¶ 68). She suggests that she was not initially aware of the connection between obtaining 100 percent extended time on the exam and enabling the fraud by switching the exam location from her daughter's high school to the corrupt test center. (PSR ¶ 65). And she argues that "Singer never told her (and she had no knowledge about) his financial relationship with Dvorskiy and Riddell." (PSR ¶ 69).

The cumulative import of these arguments is to imply that Huffman is somehow less guilty—that she participated in fraud only reluctantly, without fully understanding it. That is false. Huffman is a sophisticated businessperson. She was clearly aware that Riddell and Dvorskiy weren't helping her cheat on the SAT for free. From the first moments of her involvement in the scheme, she knew that for "15 grand" the proctor would "make[] sure" that her daughter "gets the answer she needs to get," while for "75 grand" he would "make the scores perfect." When she

wrote a check to Singer's fake charity to cover the agreed-upon price for the scam, she obviously knew that (a) she was paying for these services while (b) masking the true nature and purpose of the payment.

But the bigger point is this: even according to Huffman's version of events, her decision to engage in crime was deliberate and considered. As early as August 2017, she knew that what was on the table was an illicit scheme to corrupt the SAT system. She thought about it, and decided to commit fraud only after a period of reflection. This was not some impulsive act.

And, of course, it wasn't a single act at all. It was a scheme that, as Huffman's own notes make clear, unfolded gradually, over months, requiring her to repeatedly re-commit to deception and fraud. There were endless opportunities for her to reconsider her participation between August, when Singer proposed the plan, and December, when her daughter took the exam and Riddell corrected it. And yet she not only pursued the fraud, but actively assisted the effort. She agreed to manipulate her daughter's high school counselor to facilitate the switch in testing locations. She personally called ETS to make sure the test was sent to the test administrator whose services she was corrupting through the payment of a bribe.

And after engaging in the fraud once, she committed to it anew for her younger daughter, backing out only in March 2019—more than *18 months* after her August 2017 meeting with Singer.

Huffman also pursued this fraud despite the staggering advantages that she, and so her daughter, already enjoyed by virtue of Huffman's enormous wealth and fame. She could buy her daughter every conceivable legitimate advantage, introduce her to any number of useful personal connections, and give her a profound leg up on the competition simply because she would be applying to college as the daughter of a movie star. But Huffman opted instead to use her daughter's legitimate learning differences in service of a fraud on the system, one that Huffman

knew, by definition, would harm some other student who would be denied admission because Huffman's daughter was admitted in his or her place, under false pretenses. In doing so, Huffman not only fueled skepticism over such diagnoses, potentially making it more difficult for students with legitimate disabilities to obtain the accommodations they need, but also undermined confidence in the college admissions process generally.[3]

Moreover, even as Huffman was taking steps to avoid detection of her fraud, she was affirmatively cultivating, and monetizing, a public persona as a likeable everywoman and trustworthy purveyor of parenting wisdom. Through a website and blog bearing her nickname, she dispensed "urban mom survival tips" and "hard earned advice from one girl to another." For example:

> Now that I have been out of school for a thousand years, I realize it wasn't the STUFF in school; the subjects, the facts or the rote knowledge (90% of which I have forgotten) that really impacted me. It was being forced into new situations and subjects and those life lessons that really educated me.
>
> Problem solving, making hard work habitual, learning how to be a good friend, making stupid mistakes, figuring out how much of a "yes" is in that "no," learning how the power system works and how to make it work for me; were my true education. . . .
>
> This is all to say, I salute and celebrate kids for walking into a building every day full of the unknown, the challenging, the potential of failure and the constant question, "Why am I doing this?"

[3] *See, e.g.*, https://www.insidehighered.com/admissions/article/2019/03/14/advocates-students-learning-disabilities-fear-impact-admissions. As the Learning Disabilities Association of America has noted, "These actions hurt all individuals with disabilities, including those with learning disabilities, by perpetuating the misperceptions that many students who obtain accommodations on college admissions do not have disabilities and that this abuse is widespread." *Id.*

> Maybe we all need to show up for the first day of 2nd grade. It's good to step out and be scared, to not know the answer. It sure makes me feel alive, awake and expands me.[4]

The subtext of this passage, and others like it, is that parents should tell their children to take a forthright approach to life's challenges, tackling the ups and downs with perspective and integrity. But at the very same time that she was extolling the virtues of imperfection and the "potential of failure," Huffman was paying corrupt testing officials to cheat on her daughter's SAT, an effort that involved manipulating her own daughter along with everyone else.

Huffman's parenting website—which has been taken down since her arrest—was not designed simply to maintain a public image at odds with her private reality. It was a business. She sold advertising on the site and also used it to sell t-shirts, mugs and trinkets bearing inscriptions like "Good Enough Mom" and "Mom Knows Best."[5] In short, while her recent expressions of regret are commendable, in real time she profited from fundamental duplicity.

Finally, other considerations also support the government's proposed sentence of one month of incarceration. In the context of this case, neither probation nor home confinement (in a large home in the Hollywood Hills with an infinity pool) would constitute meaningful punishment or deter others from committing similar crimes. Nor is a fine alone sufficient to reflect the seriousness of the offense or to promote respect for the law. Even a fine at the high end of the applicable Guidelines range would amount to little more than a rounding error for a defendant with a net worth measured in the tens of millions of dollars. *See, e.g., United States v. Zukerman*, 897 F.3d 423, 431 (2d Cir. 2018) ("A fine can only be an effective deterrent if it is painful to pay, and

[4] *See* "Felicitations for September: Happy New Year," *available at* https://web.archive.org/web/20180118102954/http://whattheflicka.com:80/felicitations/2015/.

[5] *See* "What the Flicka?" *available at* https://web.archive.org/web/20190205010342/https://cznd.co/collections/what-the-flicka.

whether a given dollar amount hurts to cough up depends upon the wealth of the person paying it."), *cert. denied* 139 S. Ct. 1262 (2019). Likewise, community service, especially for the famous, is hardly a punishment—which is why many *non*-felons gladly perform it in the absence of court orders.

The government's recommended sentence of incarceration for a term of one month is sufficient but not more than necessary to achieve the goals of sentencing. It would provide just punishment for the offense, make clear that this was a real crime, causing real harm, and reinforce the vital principle that all are equally subject to the law regardless of wealth or position.

Conclusion

For all these reasons, the government respectfully requests that the defendant be sentenced to a term of incarceration of one month, a fine of $20,000, and 12 months of supervised release.

Respectfully submitted,

ANDREW E. LELLING
United States Attorney

By: */s/ Eric S. Rosen*
ERIC S. ROSEN
JUSTIN D. O'CONNELL
LESLIE A. WRIGHT
KRISTEN A. KEARNEY
Assistant United States Attorneys

Date: September 6, 2019

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA	)	Criminal No. 19-10117
	)	
	)	
v.	)	
	)	
FELICITY HUFFMAN,	)	
Defendant	)	

DEFENDANT FELICITY HUFFMAN'S REPLY
TO GOVERNMENT'S SENTENCING MEMORANDUM

The government's Consolidated Sentencing Memorandum (Doc. No. 423) argues that "[d]efendants who perpetrate frauds comparable to this one, including cheating on tests and misrepresenting academic records, are routinely sentenced to terms of incarceration." *Id*. at 10. But the cases the government cites to support that proposition are very different from this case. The government does not describe the sentencing guidelines ranges applicable in any of the federal cases it cites, although most of those ranges are matters of public record. The government's omission is telling; in fact, the guidelines ranges in each of those cases was higher than Ms. Huffman's—*much* higher in most cases. The defendants in the cases the government cites were also typically the masterminds of the schemes—the equivalent of Rick Singer in this case. And in the cases the government cites, individuals like Ms. Huffman—retail customers of the scheme's ringleader—were often not prosecuted at all.

By choosing cases so remarkably different than this case, the government's Consolidated Sentencing Memorandum in fact reinforces what defendant's Sentencing Memorandum demonstrates: that Judges almost always impose probationary sentences on similarly situated defendants in cases like these.

This Memorandum quotes the government's description of the 11 federal cases cited in its Consolidated Sentencing Memorandum, then sets forth critical facts the government omitted about each of those cases. Because Judges imposing sentence in these cases are all bound to follow 18 U.S.C. §3553(a), and PACER provides reliable information about the results in these cases, federal cases provide the best source for comparative sentencing data. Official court data from state prosecutions is much less readily available, but news reports and other public information shows that the state cases the government cites are likewise readily distinguishable from the government's case against Ms. Huffman.

A. FEDERAL CASES:

Case	Charge(s)	Prison Term
United States v. Barrington, 4:08-cr-00050-WS-GRJ (N.D. Fla.)[1]	Defendant convicted of scheming to access university's online grading system and changing grades for themselves and friends applying to graduate school, as well as changing residencies to non-resident students would quality for in-state tuition.	84 months

What the Government left out:

Defendant Barrington was convicted, after trial, for leading a group who installed a "keylogger"—a device that captures and transmits every key stroke a computer makes, on the computers at the Registrar's Office at Florida A&M University. *United States v. Barrington*, 648 F.3d 1178, 1184-87 (11th Cir. 2011). He used the device to access and falsify over 650 grades for at least 90 students, charging at least some of the students $600 for each of the grades he changed. *Id* at 1184 n.3[2] The jury found Barrington guilty of each count of a five-count indictment charging

[1] *See* government's Consolidated Sentencing Memorandum at 10.

[2] *See also* WCTC.tv, *FAMU Student Sentenced To 84 Months In Prison In Computer Intrusion, Grade Changing Scam* (Sep. 22, 2009 (quoting United States Attorney's Office Press Release)), https://www.wctv.tv/home/headlines/60273627.html

him with conspiracy to commit wire fraud using a protected computer in violation of 18 U.S.C. §§ 371 and 1349; fraud using a protected computer in violation of 18 U.S.C. §§ 1030(a)(4) and (c)(3)(A) and 2; and three counts of aggravated identity theft in violation of 18 U.S.C. §§ 1028A and 2. *Id.* at 1183. The Court of Appeals concluded that the defendant's "84-month sentence was within the advisory Guidelines range as to Counts 1 and 2, and statutorily mandated as to Counts 3, 4, and 5." *Id.*, n.1. Defense counsel has found nothing in the public record suggesting that the government prosecuted any of Barrington's customers.

Case	Charge(s)	Prison Term
United States vs. Lorenzo Garcia, 3:11-cr-01830-DB-1 (W.D. Tex.)[3]	El Paso School District Superintendent pleaded guilty to directing staff to "change passing grades to failing grades in an effort to prevent qualified students from taking the 10th grade [Texas Assessment of Knowledge and Skills Test]."	42 months

What the Government left out:

In *United States v. Garcia*, 3:11-cr-01830 (W.D. Tex.), the defendant, a former school superintendent, submitted false information to the district in order to steer a lucrative contract to a vendor owned by a woman with whom he had a relationship. (Doc. No. 3). In order to bypass ordinary school district contracting procedures and eliminate competition, the defendant conspired with the vendor to submit a false affidavit claiming it was the "sole source" of educational services provided. *Id.* He pleaded guilty to conspiracy to commit mail fraud. Because of enhancements for sophisticated means, status as organizer and leader of the fraud, and abuse of a position of trust, the resulting guidelines range was 78-97 months. *Id.* (Doc. No. 114).

[3] *See* government's Consolidated Sentencing Memorandum at 11.

The defendant also pleaded guilty to an information filed in a separate matter, charging that he manipulated school testing data and statistics in order to obtain performance bonuses tied to compliance with federal funding requirements. *See United States v. Garcia*, 3:12-cr-1362 (Doc. No. 1). Garcia manipulated information concerning the demographic makeup and grade classification of his district, which had a large population of foreign students with limited English proficiency. The fraudulent scheme involved denying foreign students properly earned credits and discouraging other students from enrolling in school. The guidelines range in the second cases was 235-293 months. *United States v. Garcia*, 3:11-cr-01830 (W.D. Tex.)(Doc. No. 114). The court sentenced Garcia to a below guidelines sentence: 42 months' imprisonment, to be served concurrently on the two cases. *Id.*

Case	Charge(s)	Prison Term
United States v. Ozell Clifford Brazil, CR-02-00882-SVW (C.D. Cal.)[4]	Reverend who founded program to help minority students get into college convicted of mail fraud for advising students to fraudulently claim on scholarship forms that "they were orphans or came from broken homes."	41 months

What the Government left out:

Brazil was convicted, after trial, of seven counts of mail fraud and seven counts of federal student financial assistance fraud. CR-02-00882-SVW (C.D. Cal.)(Doc. No. 72). The indictment charged that Brazil assisted college students and prospective college students in submitting financial aid applications to the Department of Education that falsely claimed the students were orphans or wards of the court, misrepresented family income, and concealed the parents' true income and assets. Brazil also provided students with letters to college financial aid personnel that falsely represented that the students did not get financial support from their parents. *Id.* (Doc. No 129). The

[4] *See* government's Consolidated Sentencing Memorandum at 11.

public record does not disclose the guidelines range, but it was clearly much higher than 0 to 6 months. Brazil's fraud was extensive: according to a Department of Education press release issued after sentencing, the government "identified approximately 400 students who went through Brazil's program. Those individuals received well over $10 million in financial aid. Investigators obtained detailed information from 22 students, who received $716,179 in grants and $382,393 in loans."[5] The Judge imposed a 41-month sentence. CR-02-00882-SVW(C.D. Cal.)(Doc. No. 72). The government did not prosecute the students.[6] Nothing in the public record suggests that any of the students' parents were prosecuted.

Case	Charge(s)	Prison Term
United States v. Patricia Adams Lambert, 1:15-cr-00004 (E.D. Tx.)[7]	Beaumont School District Superintendent pleaded guilty to "directly or indirectly encourag[ing] teachers and staff to manipulate students' standardized tests scores or had knowledge that cheating occurred."	40 months

What the government left out:

In *United States v. Lambert*, 1:15-cr-00004 (E.D. Tex.) the defendant, an Assistant Superintendent, orchestrated a sophisticated scheme to defraud her school district. *Id.* (Doc. No. 2). She diverted and stole money from school booster clubs and awarded vendor contracts to companies owned by family members who would mark up goods and services by as much as 300%. *Id.* The defendant also ordered teachers to correct students' answers on standardized testing to boost scores and secure federal funding. *Id.* She pleaded guilty to defrauding a federal program and conspiracy

[5]*See Student Aid Scam Results in Three Years' Prison for LA Minister,* U.S. Department of Education, Investigative Reports (Oct. 21,2013) ,https://www2.ed.gov/about/offices/list/oig/invtreports/ca102003.html

[6]*Id.*

[7] *See* government's Consolidated Sentencing Memorandum at 11.

to defraud the government. *Id.* The guidelines range calculation does not appear in the docket, but the parties stipulated to enhancements for sophisticated means, abuse of a position of trust, and a loss amount of $500,000 (Doc. Nos. 63, 100), so they must have been at least 33 to 41 months.[8] The Court imposed a 40-month sentence. *Id*. (Doc. 109).

Case	Charge(s)	Prison Term
United States v. Lance Brauman, Neil Elliott, Ryan Cross & Lyles Lashley, 6:05-cr-10197-MLB & 6:05-cr-10232-34-MLB (D. Kan.)[9]	Barton County Community College coaches and athletic director convicted of mail and wire fraud for taking online classes for student-athletes to make it appear as if the students were eligible to earn junior colleges degrees.	Ranging from 12 months and one day to 12 weekends

What the government left out:

These related cases concern a scheme by college coaches and an athletic director who arranged to have athletes obtain admission or academic credit by purporting taking correspondence course; in fact, the work would be done by others. *See United States v. Cross*, 05-cr-10232 (D. Kan.) (Doc. No 1).[10] Cross was sentence to one year and one day *following trial*. While the guidelines calculation does not appear on the docket for defendants Brauman, *see* 05-cr-10197 (D.Kan); Elliott, *see* 05-cr-10233 (D. Kan.); or Lashley, *see* 05-cr-10234 (D. Kan.), the docket reveals that for defendant Cross (who was *not* alleged to have been a leader of the scheme), the Probation Department calculated the range as 18 to 24 months. *United States v. Cross*, 05-cr-10232 (D. Kan.) (Doc. No 17).

[8] The math is as follows: BOL=7, plus 2 (abuse of position of trust), plus 2 (sophisticated means) plus 12 (loss amount), minus 3 (acceptance of responsibility) equals an adjusted offense level of 20.

[9] *See* government's Consolidated Sentencing Memorandum at 12.

[10]See also https://www.espn.com/college-sports/news/story?id=2611020

In addition, the government fails to mention that three other coaches, part of the same scheme, received sentences of probation. See *United States v. Wolf,* 6:04-cr-10257 (D. Kan.)*; United States v. Skillman,* 6:05-cr-10060 (D. Kan.)*; United States v. Campbell*, 6:05-cr-10087 (D. Kan.). In *Wolf*, the government moved for a substantial assistance departure. But no such motion was filed in the *Skillman* or *Campbell* cases. Nothing in the public record indicates that the government prosecuted any of the athletes involved in the scheme (or their parents).

Case	Charge(s)	Prison Term
United States v. Mellissa Krystynak, 5:18-cr-00196 (S.D.W. Va.)	Mother, who was a counselor at her children's school, pleaded guilty to changing 34 of her daughter's grades, which her daughter then used to apply to college.	6 months

What the government left out:

In *United States v. Krystynak,* 5:18-cr-00196 (W.D. Va.), a high school counselor, used her position and access to the school's electronic grading program to change her daughters' grades at least 34 times. *Id.* (Doc. No. 45). The falsely inflated grades were transmitted to colleges and universities. *Id*. One of the defendant's daughters was accepted to a school and received $10,000 in merit-based scholarships. The defendant pleaded guilty to mail fraud. Based in part on an enhancement for abuse of trust, the guidelines range was 8-14 months. *Id.* The Court imposed a below guidelines sentence: six months' imprisonment. *Id.* (Doc. No. 50).

Case	Charge(s)	Prison Term
United States v. Joseph Fonge, 1:14-cr-10194-WGY (D. Mass.)[11]	Father pleaded guilty to wire fraud for falsifying financial aid applications so that his daughter could attend a university.	4 months

What the government left out:

The government charged the defendant with falsifying financial aid applications and thereby obtaining more than $170,000 in financial aid from Harvard over three years. *United States v. Fonge,* 14-cr-10194-WGY (D. Mass.) (Doc. No. 1). The Court adopted the Probation Department's guidelines calculation, which established the guidelines range as 8 to 14 months. *Id.* (Doc. Nos. 15). Judge Young imposed a below guidelines sentence: four months.

Case	Charge(s)	Prison Term
United States v. Bosung Shim, 1:13-cr-00367-TSE-1 (E.D. Va.)	Aspiring medical student attempted to hack into multiple computer systems, including the Association of American Medical Colleges system, in order to change his Medical College Admission Test scores.	3 months, plus 7 months in a halfway house

What the government left out:

The defendant, intending to change his medical school test score, hired hackers to launch a distributed denial of service attack again the Association of American Medical Colleges system, and, thereafter, to repeatedly gain access the Association's computers, causing $31,653.24 of damage to those computers. *Id.* (Doc. Nos. 2, 7). The PSR calculated the guidelines range as 10 to 16 months. *Id*. (Doc. No. 14). The Court imposed a sentence at the low end of the guidelines range: three months' imprisonment, followed by seven months' community confinement. *Id*. (Doc. No. 16).

[11] *See* government's Consolidated Sentencing Memorandum at 12.

B. STATE CASES

The government's Consolidated Memorandum also cites several state prosecutions. None are comparable, and the government's descriptions of those cases fails to mention significant information facts that undermine its position.

For example, the Consolidated Memorandum cites the sentences imposed on nine defendants in the widely publicized Atlanta school system cheating scandal.[12] Each was prosecuted and convicted for violating Georgia's RICO statute following the longest trial in Georgia's history.[13] The defendants the government identifies each participated (and some led) a scheme, ongoing for at least seven years, to boost standardized test scores for Atlanta high school students—scores that were tied to the defendants' obtaining tenure and performance bonuses.[14] The scheme was far-reaching: an independent investigation ordered by Georgia's governor resulted in an 800-page report implicating 178 teachers and principals, including 82 who confessed to cheating.[15] State prosecutors indicted 35 defendants. The government correctly describes the sentences imposed on the nine defendants its listed in its Consolidated Sentencing Memorandum—all convicted after trial. But the government fails to inform the Court that most of the 35 defendants who accepted

[12] *See* government's Consolidated Sentencing Memorandum at 14-15, describing sentences imposed on Sharon Davis-Williams; Tamara Cotman; Michael Pitts; Angela Williamson; Tabeeka Jordan; Shani Robinson; Diane Buckner-Webb; Dana Evans; Donald Bullock.

[13] See Rhonda Cook & Ty Tagami, *Judge Reduces Sentences for 3 Educators in Atlanta Cheating Scandal,* Governing (May 1, 2015), https://www.governing.com/topics/education/tns-atlanta-cheating-resentencing.html

[14] Michael Winerip, *Ex-Schools Chief in Atlanta is Indicted in Testing Scandal,* New York Times, March 29, 2013, https://www.nytimes.com/2013/03/30/us/former-school-chief-in-atlanta-indicted-in-cheating-scandal.html; Alan Blinder, *Atlanta Educators Convicted in School Cheating Scandal,* New York Times, April 1, 2015, https://www.nytimes.com/2015/04/02/us/verdict-reached-in-atlanta-school-testing-trial.html

[15] *Id.*

responsibility and pleaded guilty were sentence to probation, community service, and ordered to repay the bonuses they received.[16]

In three of the state cases the government cites, the defendants were sentenced to prison terms after they broke into schools, installed spyware on computers, then accessed those computers to change grades—either their own, or others:

- In *California v. Lai* (Orange County Sup. Ct)[17], the defendant was sentenced to a one-year prison term after he pleaded guilty to 20 felony counts of computer access and fraud and one felony count of second-degree commercial burglary. Lai, a tutor, broke into the high school and installed a keystroke recording device on a teacher's computer. Lai then hacked into the school's grading program to change grades. When he learned he was under investigation, Lai fled to South Korea and destroyed evidence.[18] Defense counsel has located nothing in the public recording suggesting that any of his student customers, or their parents, were charged.
- In *Indiana v. Sun*, 79D02-1304-FC-18 (Tippecanoe Sup. Ct. 2018), the Court sentenced the defendant to 90 days' imprisonment following his guilty plea to felony conspiracy to commit computer tampering and felony computer tampering. *See Sun v. State*, 2016 Ind. App. Unpub. LEXIS 801. Sun broke into his professors' offices, planted a key-stroke recording device, and used the devise to change his grades.[19]
- In *California v. Khan* (Orange County Superior Ct.), the defendant was sentenced to 30 days after he broke into his school on multiple occasions, installed spyware on the

[16] Associated Press, *6 more former Atlanta Public Schools employees plead guilty in test-cheating scandal*, Fox News Channel (Jan. 6. 2014), https://www.foxnews.com/us/6-more-former-atlanta-public-schools-employees-plead-guilty-in-test-cheating-scandal

[17] *See* government's Consolidated Sentencing Memorandum at 12.

[18] Matt Coker, Timothy Lance Lai Gets Year in Jail for Massive Corona Del Mar High School Cheating Scandal, OC Weekly, https://ocweekly.com/timothy-lance-lai-gets-year-injail-for-massive-corona-del-mar-high-school-cheating-scandal-6463442/; Hannah Fry, Tutor Pleads Gutily in Corona del Mar High Cheating Scandal; Gets 1 Year in Jail, https://www.latimes.com/social/daily-pilot/news/tn-dpt-me-0805-lai-2-150804-story.html.

[19] *See* Ron Wilkins, *Grade□altering Scheme Sends ex□Purdue Student to Jail*, Journal & Courier (Feb. 28, 2014); https://www.jconline.com/story/news/crime/2014/02/27/gradealtering-scheme-sends-ex-purdue-student-to-jail-/5875821/

> computers of teachers and administrators, and used the passwords he obtained in the process to change grades and test scores.[20]

Finally, the government cites *Connecticut v. McDowell,* S20N-CR11-0128770 (Norwalk Sup. Ct.), which it describes as involving a "homeless mother [who] pleaded guilty to fraudulently claiming her babysitter's address as her own so her child could attend school in a different district."[21] The government neglects to mention, however, that these charges were consolidated for sentencing with defendant's conviction for distributing crack cocaine to undercover officers (including, on one occasion, at her son's sixth birthday party). [22] And most notably, the government omits mention of the defendant's criminal history, which includes prior convictions, in separate incidents, for bank robbery and firearms possession. *Id.*

C. CONCLUSION

Stated simply, a review of the cases cited by the government in its Consolidated Sentencing Memorandum show that those cases are very different than this one. Those cases do *not* support the government's contention that "[d]efendants who perpetrate frauds comparable to this one, including cheating on tests and misrepresenting academic records, are routinely sentenced to terms

---

[20] Peter Schelden, *Former Tesora Student Sentenced for Stealing Tests, Changing Grades*, Patch (Aug. 6, 2011), https://patch.com/california/missionviejo/former-tesoro-student-sentenced-for-test-stealing-gra2b1af820cd

[21] *See* government's Consolidated Sentencing Memorandum at 11

[22] *See* John Nickerson, *Affidavit: Tanya McDowell offered to sell drugs, pimp out prostitutes to undercover cops,* Stamford Advocate (June 14, 2011), *https://www.stamfordadvocate.com/news/article/Affidavit-Tanya-McDowell-offered-to-sell-drugs-1421618.php; see also* Ta-Nehisi Coates, *Woman Sentenced to Twelve Years for Drug Dealing, 'Stealing Education,'* The Atlantic (Feb. 7. 2012), https://www.theatlantic.com/national/archive/2012/02/woman-sentenced-to-twelve-years-for-drug-dealing-stealing-education/253742.

of incarceration." *Id*. at 10. Ms. Huffman respectfully requests that the Court reject the government's invitation to compare apples to oranges.

Respectfully submitted,

FELICITY HUFFMAN
By her attorneys,

/s/ Martin F. Murphy
Martin F. Murphy BBO # 363250
Julia Amrhein BBO # 684912
Foley Hoag LLP
155 Seaport Boulevard
Boston, Massachusetts 02210-2600
Telephone: 617-832-1000
Facsimile: 617-832-7000
mmurphy@foleyhoag.com
jamrhein@foleyhoag.com

DATED: September 11, 2019

CERTIFICATE OF SERVICE

I hereby certify that this document filed through the CM/ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non-registered participants on this 11th day of September 2019.

Martin F. Murphy
Martin F. Murphy

U.S. Department of Justice

Andrew E. Lelling
United States Attorney
District of Massachusetts

Main Reception: (617) 748-3100

John Joseph Moakley United States Courthouse
1 Courthouse Way
Suite 9200
Boston, Massachusetts 02210

March 27, 2019

Martin Murphy, Esq.
Foley Hoag LLP
155 Seaport Boulevard
Boston, Massachusetts 02210

Re: United States v. Felicity Huffman

Dear Mr. Murphy:

The United States Attorney for the District of Massachusetts ("the U.S. Attorney") and your client, Felicity Huffman ("Defendant"), agree as follows:

1. Change of Plea

No later than April 30, 2019, Defendant will waive Indictment and plead guilty to count one of the Information charging her with conspiracy to commit mail fraud and honest services mail fraud, in violation of Title 18, United States Code, Section 1349. Defendant admits that she committed the crime specified in that count and is in fact guilty of that crime. Defendant also agrees to waive venue, to waive any applicable statute of limitations, and to waive any legal or procedural defects in the Information. Defendant does not contest the accuracy of the Information.

The U.S. Attorney agrees that, based upon the information known to the U.S. Attorney's Office at this time, no further criminal charges will be brought against the defendant in connection with the conduct set forth in the Information

2. Penalties

Defendant faces the following maximum penalties: incarceration for 20 years; supervised release for three years; a fine of $250,000, or twice the gross gain or loss, whichever is greater; a mandatory special assessment of $100; restitution; and forfeiture to the extent charged in the Information.

3. Sentencing Guidelines

The United States Attorney agrees, based on the following calculations, that Defendant's total "offense level" under the Guidelines is 9:

a) Defendant's base offense level is 7, because Defendant is pleading guilty to an offense of conviction that has a statutory maximum term of imprisonment of 20 years or more (USSG § 2B1.1(a)(1));

b) Defendant's offense level is increased by 4, because the gain or loss from the offense of conviction is more than $15,000 but not more than $40,000 (USSG § 2B1.1(b)(1)(C)); and

c) Defendant's offense level is decreased by 2, because Defendant has accepted responsibility for her crime (USSG §3E1.1(a)).

Defendant agrees that the base offense level is 7, but reserves the right to argue that her offense level should be increased by 2, pursuant to USSG § 2B1.1(b)(1)(B), not 4 as set forth above, because the loss or gain amount is more than $6,500 but not more than $15,000. This would result in a total offense level under the Guidelines of 7, after adjusting for acceptance of responsibility.

Defendant understands that the Court is not required to follow this calculation, and that Defendant may not withdraw her guilty plea if Defendant disagrees with how the Court calculates the Guidelines or with the sentence the Court imposes.

Defendant also understands that the government will object to any reduction in her sentence based on acceptance of responsibility if: (a) at sentencing, Defendant does not clearly accept responsibility for the crime she is pleading guilty to committing; or (b) by the time of sentencing, Defendant has committed a new federal or state offense, or has in any way obstructed justice.

If, after signing this Agreement, Defendant's criminal history score or Criminal History Category are reduced, the U.S. Attorney reserves the right to seek an upward departure under the Guidelines.

Nothing in this Plea Agreement affects the U.S. Attorney's obligation to provide the Court and the U.S. Probation Office with accurate and complete information regarding this case.

4. Sentence Recommendation

The U.S. Attorney agrees to recommend the following sentence to the Court:

a) incarceration at the low end of the Guidelines sentencing range as calculated by the U.S. Attorney in Paragraph 3;

b) a fine or other financial penalty of $20,000;

c) 12 months of supervised release;

d) a mandatory special assessment of $100, which Defendant must pay to the Clerk of the Court by the date of sentencing;

e) restitution in an amount to be determined by the Court at sentencing; and

f) forfeiture as set forth in Paragraph 6.

5. Waiver of Appellate Rights and Challenges to Conviction or Sentence

Defendant has the right to challenge her conviction and sentence on "direct appeal." This means that Defendant has the right to ask a higher court (the "appeals court") to look at what happened in this case and, if the appeals court finds that the trial court or the parties made certain mistakes, overturn Defendant's conviction or sentence. Also, in some instances, Defendant has the right to file a separate civil lawsuit claiming that serious mistakes were made in this case and that her conviction or sentence should be overturned.

Defendant understands that she has these rights, but now agrees to give them up. Specifically, Defendant agrees that:

a) She will not challenge her conviction on direct appeal or in any other proceeding, including in a separate civil lawsuit; and

b) She will not challenge her sentence, including any court orders related to forfeiture, restitution, fines or supervised release, on direct appeal or in any other proceeding, including in a separate civil lawsuit.

Defendant understands that, by agreeing to the above, she is agreeing that her conviction and sentence will be final when the Court issues a written judgment after the sentencing hearing in this case. That is, after the Court issues a written judgment, Defendant will lose the right to appeal or otherwise challenge her conviction and sentence, regardless of whether she later changes her mind or finds new information that would have led her not to agree to give up these rights in the first place.

Defendant acknowledges that she is agreeing to give up these rights at least partly in exchange for concessions the U.S. Attorney is making in this Agreement.

The parties agree that, despite giving up these rights, Defendant keeps the right to later claim that her lawyer rendered ineffective assistance of counsel, or that the prosecutor engaged in misconduct serious enough to entitle Defendant to have her conviction or sentence overturned.

6. Forfeiture

Defendant hereby waives and releases any claims Defendant may have to any vehicles, currency, or other personal property seized by the United States, or seized by any state or local law enforcement agency and turned over to the United States, during the investigation and prosecution of this case, and consents to the forfeiture of all such assets.

7. Civil Liability

This Plea Agreement does not affect any civil liability, including any tax liability, Defendant has incurred or may later incur due to her criminal conduct and guilty plea to the charge specified in Paragraph 1 of this Agreement.

8. Breach of Plea Agreement

Defendant understands that if she breaches any provision of this Agreement, Defendant cannot use that breach as a reason to withdraw her guilty plea. Defendant's breach, however, would give the U.S. Attorney the right to be released from his commitments under this Agreement, and would allow the U.S. Attorney to pursue any charges that were, or are to be, dismissed under this Agreement.

If Defendant breaches any provision of this Agreement, the U.S. Attorney would also have the right to use against Defendant any of Defendant's statements, and any information or materials she provided to the government during investigation or prosecution of her case. The U.S. Attorney would have this right even if the parties had entered any earlier written or oral agreements or understandings about this issue.

Finally, if Defendant breaches any provision of this Agreement, she thereby waives any defenses based on the statute of limitations, constitutional protections against pre-indictment delay, and the Speedy Trial Act, that Defendant otherwise may have had to any charges based on conduct occurring before the date of this Agreement.

9. Who is Bound by Plea Agreement

This Agreement is only between Defendant and the U.S. Attorney for the District of Massachusetts. It does not bind the Attorney General of the United States or any other federal, state, or local prosecuting authorities.

10. Modifications to Plea Agreement

This Agreement can be modified or supplemented only in a written memorandum signed by both parties, or through proceedings in open court.

* * *

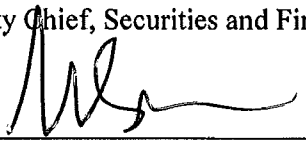
If this letter accurately reflects the agreement between the U.S. Attorney and Defendant, please have Defendant sign the Acknowledgment of Plea Agreement below. Please also sign below as Witness. Return the original of this letter to Assistant U.S. Attorney Eric S. Rosen.

Sincerely,

ANDREW E. LELLING
United States Attorney

By 

STEPHEN E. FRANK
Chief, Securities and Financial Fraud Unit
JORDI DE LLANO
Deputy Chief, Securities and Financial Fraud Unit



ERIC S. ROSEN
JUSTIN D. O'CONNELL
KRISTEN A. KEARNEY
LESLIE A. WRIGHT
Assistant U.S. Attorneys

ACKNOWLEDGMENT OF PLEA AGREEMENT

I have read this letter and discussed it with my attorney. The letter accurately presents my agreement with the United States Attorney's Office for the District of Massachusetts. There are no unwritten agreements between me and the United States Attorney's Office, and no United States government official has made any unwritten promises or representations to me in connection with my guilty plea. I have received no prior offers to resolve this case.

I understand the crime I am pleading guilty to, and the maximum penalties for that crime. I have discussed the Sentencing Guidelines with my lawyer and I understand the sentencing ranges that may apply.

I am satisfied with the legal representation my lawyer has given me and we have had enough time to meet and discuss my case. We have discussed the charge against me, possible defenses I might have, the terms of this Agreement and whether I should go to trial.

I am entering into this Agreement freely and voluntarily and because I am in fact guilty of the offense. I believe this Agreement is in my best interest.

Felicity Huffman
Defendant

Date: 4/4/19

I certify that Felicity Huffman has read this Agreement and that we have discussed what it means. I believe Felicity Huffman understands the Agreement and is entering into it freely, voluntarily, and knowingly. I also certify that the U.S. Attorney has not extended any other offers regarding a change of plea in this case.

Martin Murphy, Esq.
Attorney for Defendant

Date: April 5, 2019

U.S. Department of Justice

Andrew E. Lelling
United States Attorney
District of Massachusetts

Main Reception: (617) 748-3100

John Joseph Moakley United States Courthouse
1 Courthouse Way
Suite 9200
Boston, Massachusetts 02210

April 5, 2019

John Pappalardo, Esq.
Greenberg Traurig, LLP
One International Place, Suite 2000
Boston, MA 02110

Re: United States v. Devin Sloane

Dear Mr. Pappalardo:

The United States Attorney for the District of Massachusetts ("the U.S. Attorney") and your client, Devin Sloane ("Defendant"), agree as follows:

1. Change of Plea

No later than April 30, 2019, Defendant will waive Indictment and plead guilty to count one of the Information charging him with conspiracy to commit mail fraud and honest services mail fraud, in violation of Title 18, United States Code, Section 1349. Defendant admits that he committed the crime specified in that count and is in fact guilty of that crime. Defendant also agrees to waive venue, to waive any applicable statute of limitations, and to waive any legal or procedural defects in the Information. Defendant does not dispute the accuracy of the Information.

The U.S. Attorney agrees that, based upon the information known to the U.S. Attorney's Office at this time, no further criminal charges will be brought against Defendant in connection with the conduct set forth in the Information.

2. Penalties

Defendant faces the following maximum penalties: incarceration for 20 years; supervised release for three years; a fine of $250,000, or twice the gross gain or loss, whichever is greater; a mandatory special assessment of $100; restitution; and forfeiture to the extent charged in the Information.

3. Sentencing Guidelines

The parties agree, based on the following calculations, that Defendant's total "offense level" under the Guidelines is 14:

a) Defendant's base offense level is 7, because Defendant is pleading guilty to an offense of conviction that has a statutory maximum term of imprisonment of 20 years or more (USSG § 2B1.1(a)(1));

b) Defendant's offense level is increased by 10, because the gain or loss from the offense of conviction is more than $150,000 but not more than $250,000 (USSG § 2B1.1(b)(1)(F)); and

c) Defendant's offense level is decreased by 3, because Defendant has accepted responsibility for his crime (USSG § 3E1.1(b)).

Defendant understands that the Court is not required to follow this calculation, and that Defendant may not withdraw his guilty plea if Defendant disagrees with how the Court calculates the Guidelines or with the sentence the Court imposes.

Defendant also understands that the government will object to any reduction in his sentence based on acceptance of responsibility if: (a) at sentencing, Defendant does not clearly accept responsibility for the crime he is pleading guilty to committing; or (b) by the time of sentencing, Defendant has committed a new federal or state offense, or has in any way obstructed justice.

If, after signing this Agreement, Defendant's criminal history score or Criminal History Category are reduced, the U.S. Attorney reserves the right to seek an upward departure under the Guidelines.

Nothing in this Plea Agreement affects the U.S. Attorney's obligation to provide the Court and the U.S. Probation Office with accurate and complete information regarding this case.

4. Sentence Recommendation

The U.S. Attorney agrees to recommend the following sentence to the Court:

a) incarceration for a period of 12 months and one day;

b) a fine or other financial penalty of $75,000;

c) 12 months of supervised release;

d) a mandatory special assessment of $100, which Defendant must pay to the Clerk of the Court by the date of sentencing;

e) restitution in an amount to be determined by the Court at sentencing; and

f) forfeiture as set forth in Paragraph 6.

In addition, the parties agree jointly to recommend the following special condition of any term of supervised release or probation:

During the period of supervised release or probation, Defendant must, within six months of sentencing or release from custody, whichever is later:

a) cooperate with the Examination and Collection Divisions of the IRS;

b) provide to the Examination Division all financial information necessary to determine Defendant's prior tax liabilities;

c) provide to the Collection Division all financial information necessary to determine Defendant's ability to pay;

d) file accurate and complete tax returns for those years for which returns were not filed or for which inaccurate returns were filed; and

e) make a good faith effort to pay all delinquent and additional taxes, interest, and penalties.

5. Waiver of Appellate Rights and Challenges to Conviction or Sentence

Defendant has the right to challenge his conviction and sentence on "direct appeal." This means that Defendant has the right to ask a higher court (the "appeals court") to look at what happened in this case and, if the appeals court finds that the trial court or the parties made certain mistakes, overturn Defendant's conviction or sentence. Also, in some instances, Defendant has the right to file a separate civil lawsuit claiming that serious mistakes were made in this case and that his conviction or sentence should be overturned.

Defendant understands that he has these rights, but now agrees to give them up. Specifically, Defendant agrees that:

a) He will not challenge his conviction on direct appeal or in any other proceeding, including in a separate civil lawsuit; and

b) He will not challenge his sentence, including any court orders related to forfeiture, restitution, fines or supervised release, on direct appeal or in any other proceeding, including in a separate civil lawsuit.

Defendant understands that, by agreeing to the above, he is agreeing that his conviction and sentence will be final when the Court issues a written judgment after the sentencing hearing in this case. That is, after the Court issues a written judgment, Defendant will lose the right to appeal or otherwise challenge his conviction and sentence, regardless of whether he later changes his mind or finds new information that would have led him not to agree to give up these rights in the first place.

Defendant acknowledges that he is agreeing to give up these rights at least partly in exchange for concessions the U.S. Attorney is making in this Agreement.

The parties agree that, despite giving up these rights, Defendant keeps the right to later claim that his lawyer rendered ineffective assistance of counsel, or that the prosecutor engaged in misconduct serious enough to entitle Defendant to have his conviction or sentence overturned.

6. Forfeiture

Defendant hereby waives and releases any claims Defendant may have to any vehicles, currency, or other personal property seized by the United States, or seized by any state or local law enforcement agency and turned over to the United States, during the investigation and prosecution of this case, and consents to the forfeiture of all such assets.

7. Civil Liability

This Plea Agreement does not affect any civil liability, including any tax liability, Defendant has incurred or may later incur due to his criminal conduct and guilty plea to the charge specified in Paragraph 1 of this Agreement.

8. Breach of Plea Agreement

Defendant understands that if he breaches any provision of this Agreement, Defendant cannot use that breach as a reason to withdraw his guilty plea. Defendant's breach, however, would give the U.S. Attorney the right to be released from his commitments under this Agreement, and would allow the U.S. Attorney to pursue any charges that were, or are to be, dismissed under this Agreement.

If Defendant breaches any provision of this Agreement, the U.S. Attorney would also have the right to use against Defendant any of Defendant's statements, and any information or materials he provided to the government during investigation or prosecution of his case. The U.S. Attorney would have this right even if the parties had entered any earlier written or oral agreements or understandings about this issue.

Finally, if Defendant breaches any provision of this Agreement, he thereby waives any defenses based on the statute of limitations, constitutional protections against pre-indictment delay,

and the Speedy Trial Act, that Defendant otherwise may have had to any charges based on conduct occurring before the date of this Agreement.

9. Who is Bound by Plea Agreement

This Agreement is only between Defendant and the U.S. Attorney for the District of Massachusetts. It does not bind the Attorney General of the United States or any other federal, state, or local prosecuting authorities.

10. Modifications to Plea Agreement

This Agreement can be modified or supplemented only in a written memorandum signed by both parties, or through proceedings in open court.

* * *

If this letter accurately reflects the agreement between the U.S. Attorney and Defendant, please have Defendant sign the Acknowledgment of Plea Agreement below. Please also sign below as Witness. Return the original of this letter to Assistant U.S. Attorney Eric S. Rosen.

Sincerely,

ANDREW E. LELLING
United States Attorney

By: _____
STEPHEN E. FRANK
Chief, Securities and Financial Fraud Unit
JORDI DE LLANO
Deputy Chief, Securities and Financial Fraud Unit

_____
ERIC S. ROSEN
JUSTIN D. O'CONNELL
KRISTEN A. KEARNEY
LESLIE A. WRIGHT
Assistant U.S. Attorneys

ACKNOWLEDGMENT OF PLEA AGREEMENT

I have read this letter and discussed it with my attorney. The letter accurately presents my agreement with the United States Attorney's Office for the District of Massachusetts. There are no unwritten agreements between me and the United States Attorney's Office, and no United States government official has made any unwritten promises or representations to me in connection with my guilty plea. I have received no prior offers to resolve this case.

I understand the crime I am pleading guilty to, and the maximum penalties for that crime. I have discussed the Sentencing Guidelines with my lawyer and I understand the sentencing ranges that may apply.

I am satisfied with the legal representation my lawyer has given me and we have had enough time to meet and discuss my case. We have discussed the charge against me, possible defenses I might have, the terms of this Agreement and whether I should go to trial.

I am entering into this Agreement freely and voluntarily and because I am in fact guilty of the offense. I believe this Agreement is in my best interest.

Devin Sloane
Defendant

Date: 4/5/19

I certify that Devin Sloane has read this Agreement and that we have discussed what it means. I believe Devin Sloane understands the Agreement and is entering into it freely, voluntarily, and knowingly. I also certify that the U.S. Attorney has not extended any other offers regarding a change of plea in this case.

John Pappalardo

John Pappalardo, Esq.
Attorney for Defendant

Date: 4/5/19

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA	)	Criminal No.: 19-10080-NMG
	)	
v.	)	Violations:
	)	
(1) DAVID SIDOO,	)	Count One: Conspiracy to Commit Mail and Wire Fraud and Honest Services Mail and Wire Fraud (18 U.S.C. § 1349)
(2) GREGORY COLBURN,	)	
(3) AMY COLBURN,	)	
(4) GAMAL ABDELAZIZ,	)	
(5) DIANE BLAKE,	)	
(6) TODD BLAKE,	)	Count Two: Money Laundering Conspiracy (18 U.S.C. § 1956(h))
(7) I-HSIN "JOEY" CHEN,	)	
(8) MOSSIMO GIANNULLI,	)	
(9) ELIZABETH HENRIQUEZ,	)	Forfeiture Allegations: (18 U.S.C. § 981(a)(1)(C) and 28 U.S.C. § 2461)
(10) MANUEL HENRIQUEZ,	)	
(11) DOUGLAS HODGE,	)	
(12) MICHELLE JANAVS,	)	
(13) ELISABETH KIMMEL,	)	Money Laundering Forfeiture Allegations: (18 U.S.C. § 982(a)(1))
(14) LORI LOUGHLIN,	)	
(15) WILLIAM McGLASHAN, Jr.,	)	
(16) MARCI PALATELLA,	)	
(17) JOHN WILSON,	)	
(18) HOMAYOUN ZADEH, and	)	
(19) ROBERT ZANGRILLO,	)	
	)	
Defendants		

SECOND SUPERSEDING INDICTMENT

At all times relevant to this Superseding Indictment:

General Allegations

1. Defendant DAVID SIDOO ("SIDOO") was a resident of Vancouver, Canada.

2. Defendant GREGORY COLBURN was a resident of Palo Alto, California.

3. Defendant AMY COLBURN was a resident of Palo Alto, California.

4. GREGORY COLBURN and AMY COLBURN (together, "the COLBURNS") were a married couple.

5. Defendant GAMAL ABDELAZIZ, also known as "Gamal Aziz," was a resident of Las Vegas, Nevada.

6. Defendant DIANE BLAKE was a resident of Ross, California.

7. Defendant TODD BLAKE was a resident of Ross, California.

8. DIANE BLAKE and TODD BLAKE (together, "the BLAKES") were a married couple.

9. Defendant I-HSIN "JOEY" CHEN was a resident of Newport Beach, California.

10. Defendant MOSSIMO GIANNULLI was a resident of Los Angeles, California.

11. Defendant LORI LOUGHLIN was a resident of Los Angeles, California.

12. MOSSIMO GIANNULLI and LORI LOUGHLIN (together, "the GIANNULLIS") were a married couple.

13. Defendant ELIZABETH HENRIQUEZ was a resident of Atherton, California.

14. Defendant MANUEL HENRIQUEZ was a resident of Atherton, California.

15. ELIZABETH HENRIQUEZ and MANUEL HENRIQUEZ (together, "the HENRIQUEZES") were a married couple.

16. Defendant DOUGLAS HODGE was a resident of Laguna Beach, California.

17. Defendant MICHELLE JANAVS ("JANAVS") was a resident of Newport Coast, California.

18. Defendant ELISABETH KIMMEL was a resident of Las Vegas, Nevada and La Jolla, California.

19. Defendant WILLIAM McGLASHAN, Jr. was a resident of Mill Valley, California.

20. Defendant MARCI PALATELLA was a resident of Hillsborough, California.

21. Defendant JOHN WILSON was a resident of Lynnfield, Massachusetts.

22. Defendant HOMAYOUN ZADEH was a resident of Calabasas, California.

23. Defendant ROBERT ZANGRILLO was a resident of Miami, Florida.

Other Relevant Persons and Entities

24. The Edge College & Career Network, LLC, also known as "The Key," was a for-profit college counseling and preparation business based in Newport Beach, California that was established in or about 2007 and registered in California in or about 2012.

25. The Key Worldwide Foundation ("KWF") was a non-profit corporation founded in or about 2012 and based in Newport Beach, California. In or about 2013, the Internal Revenue Service ("IRS") approved KWF as an exempt organization under Section 501(c)(3) of the Internal Revenue Code, meaning that KWF was exempt from paying federal income tax, and that individuals who contributed to KWF could deduct those contributions from their taxable income, subject to certain limitations.

26. ACT, Inc. was a non-profit organization headquartered in Iowa City, Iowa that administered the ACT, a standardized test that is widely used as part of the college admissions process in the United States.

27. The College Board was a non-profit organization headquartered in New York, New York. Together with Educational Testing Service ("ETS"), a non-profit organization headquartered in Lawrence Township, New Jersey, the College Board developed and administered the SAT, a standardized test that, like the ACT, is widely used as part of the college admissions process in the United States. The College Board and ETS also developed and administered SAT subject tests, which are also used as part of the college admissions process.

28. Georgetown University ("Georgetown") was a highly selective private university located in Washington, D.C.

29. Stanford University ("Stanford") was a highly selective private university located in Palo Alto, California.

30. The University of California at Los Angeles ("UCLA") was a highly selective public university located in Los Angeles, California.

31. The University of Southern California ("USC") was a highly selective private university located in Los Angeles, California.

32. The athletic teams of Georgetown, Stanford, UCLA, and USC (collectively, "the Universities") compete in most sports at the Division I level, the highest level of intercollegiate athletics sanctioned by the National Collegiate Athletic Association ("NCAA").

33. William "Rick" Singer was a resident, variously, of Sacramento and Newport Beach, California. Singer founded and, together with others, operated The Key and KWF.

34. Mark Riddell was a resident of Palmetto, Florida. Riddell was employed at relevant times as the director of college entrance exam preparation at a private college preparatory school and sports academy in Bradenton, Florida.

35. Igor Dvorskiy was a resident of Sherman Oaks, California. Dvorskiy was employed as the director of a private elementary and high school located in West Hollywood, California (the "West Hollywood Test Center"). Dvorskiy also served as a compensated standardized test administrator for ACT, Inc. and the College Board.

36. Niki Williams was a resident of Houston, Texas. Williams was employed as an assistant teacher at a public high school in Houston (the "Houston Test Center"). Williams also served as a compensated standardized test administrator for ACT, Inc. and the College Board.

37. Gordon Ernst was a resident of Chevy Chase, Maryland and Falmouth, Massachusetts. Until January 2018, Ernst was employed as the head coach of men's and women's tennis at Georgetown.

38. Martin Fox was a resident of Houston, Texas. Fox was employed as the president of a private tennis academy and camp in Houston.

39. Steven Masera was a resident of Folsom, California. Masera was employed as an accountant and financial officer for The Key and KWF.

40. Mikaela Sanford was a resident of Sacramento, California. Sanford was employed in various capacities for The Key and KWF.

41. Donna Heinel was a resident of Long Beach, California. Heinel was employed as the senior associate athletic director at USC.

42. Ali Khosroshahin was a resident of Fountain Valley, California. Until November 8, 2013, Khosroshahin was employed as the head coach of women's soccer at USC.

43. Laura Janke was a resident of North Hollywood, California. Janke was employed as an assistant coach of women's soccer at USC. Janke reported to Khosroshahin until his departure from the university.

44. Jovan Vavic was a resident of Rancho Palos Verdes, California. Vavic was employed as the water polo coach at USC.

45. Jorge Salcedo was a resident of Los Angeles, California. Salcedo was employed as the head coach of men's soccer at UCLA.

46. John Vandemoer was a resident of Palo Alto, California. Vandemoer was employed as the head sailing coach at Stanford.

General Background on Standardized Testing and the College Admissions Process

47. Most selective colleges and universities in the United States require prospective students to submit standardized test scores—typically, either the ACT or the SAT—as part of their application packages. When submitted, standardized test scores are a material part of the admissions process.

48. The ACT includes sections on English, mathematics, reading, and science, and is scored on a scale of 1 to 36

49. The SAT includes sections on writing, critical reading, and mathematics. Between 2005 and January 2016, the SAT was scored on a scale of 600 to 2400. As of March 2016, the SAT has been scored on a scale of 400 to 1600.

50. The ACT and the SAT are typically administered to large groups of students on specified dates and under strict time limits. In some instances, however, students with certain learning or other disabilities may qualify for testing accommodations, including extended time, and, in such circumstances, may take the test alone, under the supervision of a test administrator retained by ACT, Inc. or the College Board.

51. Compensated ACT and SAT administrators owe a duty of honest services to ACT, Inc. and/or the College Board.

52. Prior to administering the ACT, test administrators must typically certify that they will administer the test in accordance with the ACT Administration Manual, and that they will ensure that the "test materials are kept secure and confidential, used for this examinee only, and returned to ACT immediately after testing."

53. Similarly, prior to administering the SAT, test administrators must typically certify that they will administer the test in accordance with the SAT coordinator's manual, that the SAT

test is the property of the College Board, and that no one other than the student can "open the test book and see the test content."

54. The ACT tests are typically sent to and from the testing sites via Federal Express, a private, interstate commercial carrier.

55. The SAT tests are typically sent to and from the testing sites via United Parcel Service ("UPS"), a private, interstate commercial carrier.

56. The ACT and SAT tests, and the scores students earn on those tests, are the intellectual and physical property of ACT, Inc. and the College Board, respectively.

57. Many selective colleges and universities in the United States, including all of the Universities, recruit students with demonstrated athletic abilities, and typically apply different criteria when evaluating applications from such students, with the expectation that recruited athletes will be contributing members of the Universities' athletic teams once enrolled. Typically, the admissions offices at the Universities allot a set number of admission slots to each head coach of a sport for that coach's recruited athletes. At each of the Universities, the admissions prospects of recruited athletes are higher—and in some cases substantially higher—than those of non-recruited athletes with similar grades and standardized test scores.

58. University athletic coaches and administrators owe a duty of honest services to the universities where they are employed.

59. At each of the Universities, admissions slots, the determination of which students to admit, and the resulting composition of undergraduate classes are important assets of the University.

The Fraud Conspiracy

60. From in or about 2011 through in or about February 2019, the defendants conspired with others known and unknown to the Grand Jury to use bribery and other forms of fraud to facilitate their children's admission to selective colleges and universities in the District of Massachusetts and elsewhere.

Objects and Purposes of the Fraud Conspiracy

61. The principal objects and purposes of the fraud conspiracy were to commit mail and wire fraud, and honest services mail and wire fraud, in violation of Title 18, United States Code, Sections 1341, 1343 and 1346, by, among other things:

a. Cheating on college entrance exams, including in many instances by bribing exam administrators to permit such cheating;

b. Bribing university athletic coaches and administrators to designate applicants as purported athletic recruits, regardless of their athletic abilities and, in some cases, even though they did not play the sport they were purportedly recruited to play, in violation of the coaches' and administrators' duties of honest services to their employers;

c. Having a third party take classes in place of the actual students, with the understanding that grades earned in those classes would be submitted as part of the students' college applications; and

d. Submitting falsified applications for admission to universities in the District of Massachusetts and elsewhere that, among other things, included the fraudulently obtained exam scores and class grades, and often listed fake awards and athletic activities.

Manner and Means of the Fraud Conspiracy

62. Among the manner and means by which the defendants and others known and unknown to the Grand Jury carried out the fraud conspiracy were the following:

a. Seeking extended time for their children on college entrance exams, including by having the children purport to have learning disabilities in order to obtain the medical documentation that ACT, Inc. and the College Board typically require before granting students extended time;

b. Changing the location of the exams to one of two test centers: the Houston Test Center or the West Hollywood Test Center;

c. Bribing college entrance exam administrators at the Houston Test Center and the West Hollywood Test Center to permit cheating, in violation of their duty of honest services to ACT, Inc. and/or the College Board;

d. Paying Riddell or another third party to pose as an ACT or SAT exam proctor, or as a student taking the exam, so that he could secretly provide students with answers during the exam, replace the students' exam responses with his own, or take the exam in place of the students;

e. Submitting the fraudulently obtained ACT and SAT scores as part of the college admissions process, including to colleges and universities in the District of Massachusetts;

f. Bribing athletic coaches and university administrators to designate students as purported athletic recruits or as members of other favored admissions categories;

g. Fabricating athletic "profiles" containing falsified athletic credentials—including fake honors the students purportedly received, elite athletic teams they purportedly played on, and staged photographs of the students purportedly engaged in athletic activity—to submit in support of the students' college applications; and

h. Explaining to clients and prospective clients of The Key that these fraudulent schemes were tried-and-true methods of improving exam scores and gaining admission to college that had been successfully employed by many other clients.

Acts in Furtherance of the Fraud Conspiracy

63. On various dates from in or about 2011 through in or about February 2019, the defendants and others known and unknown to the Grand Jury committed and caused to be committed the following acts, among others, in furtherance of the fraud conspiracy:

DAVID SIDOO

64. In or about the fall of 2011, SIDOO agreed with Singer to pay $100,000 to have Riddell secretly take the SAT in place of SIDOO's older son.

65. In or about September 2011, SIDOO e-mailed Singer copies of his older son's driver's license and student identification card for the purpose of creating a falsified identification card for Riddell.

66. Singer used the documents to obtain a falsified identification card bearing Riddell's likeness and the name of SIDOO's older son.

67. On or about December 2, 2011, Riddell flew from Tampa, Florida to Vancouver, Canada to take the SAT in place of SIDOO's older son.

68. In order to minimize suspicion and reduce the chance of getting caught, Singer directed Riddell not to obtain too high a score, because SIDOO's older son had previously taken the exam himself and obtained a total score of 1460 out of a possible 2400.

69. On or about December 3, 2011, Riddell used the falsified identification card to pose as SIDOO's older son in order to secretly take the SAT in his place. Riddell earned a total score of 1670 out of a possible 2400.

70. On or about December 23, 2011, Singer e-mailed a copy of the SAT score Riddell secretly obtained to an administrator at Chapman University, a private university in Orange, California, on behalf of SIDOO's older son.

71. SIDOO paid Singer $100,000, as agreed, for having Riddell take the SAT for SIDOO's older son.

72. In or about 2012, SIDOO agreed to pay Singer to have Riddell secretly take a Canadian high school graduation exam in place of SIDOO's older son.

73. On or about May 15, 2012, Singer purchased plane tickets for Riddell to fly from Tampa to Vancouver on June 8, 2012, and to return to Tampa shortly thereafter.

74. On or about June 9, 2012, Riddell posed as SIDOO's older son in order to secretly take the Canadian high school graduation exam in his place.

75. In or about the fall of 2012, SIDOO agreed with Singer to pay $100,000 to have Riddell secretly take the SAT in place of SIDOO's younger son.

76. On or about October 31, 2012, SIDOO emailed Singer a document listing his younger son's address and other biographical information for the purpose of creating a falsified identification card for Riddell.

77. Singer used the information to obtain a falsified identification card bearing Riddell's likeness and the name of SIDOO's younger son.

78. On or about November 22, 2012, Singer purchased a plane ticket for Riddell to fly from Tampa to Los Angeles, California on November 29, 2012, in order to take the SAT for SIDOO's younger son.

79. Singer directed Riddell to obtain a high score because SIDOO's younger son had not previously taken the SAT.

80. On or about December 1, 2012, Riddell used a falsified identification card to pose as SIDOO's younger son in order to secretly take the SAT in his place at a high school in Orange County, California. Riddell earned a total score of 2280 out of a possible 2400.

81. On or about January 21, 2013, SIDOO sent an e-mail to Singer asking for wire transfer instructions.

82. On or about January 22, 2013, an employee of The Key provided SIDOO with wire instructions for a company bank account in California.

83. On or about January 23, 2013, SIDOO wired $100,000 to the account, as agreed, for having Riddell take the SAT for SIDOO's younger son.

84. In 2013 and 2014, the SAT scores Riddell secretly obtained on behalf of SIDOO's younger son were submitted as part of his applications to colleges and universities in the United States, including on or about March 12, 2014 to Georgetown University in Washington, D.C.

85. Singer paid Riddell approximately $5,000 plus travel expenses for each of the three exams Riddell took in place of SIDOO's children.

86. On or about October 25, 2018, Singer called SIDOO from Boston, Massachusetts. During the call, SIDOO noted that his older son was applying to business school, adding, "I

thought you were gonna call me and say I got a 2100 on my GMAT"—a reference to a standardized test that is widely used as part of the business school admissions process, which is scored on a scale of 200 to 800. Singer responded, "They don't have a 2100 for the GMAT. But I would do my best to get it for ya." SIDOO replied, "I know."

GREGORY COLBURN and AMY COLBURN

87. In or about the fall of 2017, GREGORY COLBURN and AMY COLBURN agreed with Singer to pay $25,000 to have Riddell pose as a proctor for their son's SAT exam and secretly correct his answers.

88. On or about October 10, 2017, AMY COLBURN e-mailed Singer that she was waiting to hear back from the College Board about whether her son would be granted extended time to take the SAT.

89. On or about December 31, 2017, Singer e-mailed AMY COLBURN an admission ticket for the COLBURNS' son for an SAT exam with extended time to be administered on or about March 10, 2018.

90. On or about March 9, 2018, Riddell flew from Tampa to Los Angeles to purport to proctor the SAT for the COLBURNS' son and another student who took the test at the West Hollywood Test Center that same day.

91. Singer directed Riddell not to obtain too high a score on the COLBURNS' son's SAT, so that the child would not be alerted to the cheating on his behalf.

92. After the students had completed the exam, Riddell reviewed and corrected their answers.

93. Riddell earned a total score of 1190 out of a possible 1600 for the COLBURNS' son.

94. On or about March 12, 2018, Dvorskiy sent the completed SAT exams, via UPS, to the College Board in New Jersey.

95. On or about March 14, 2018, Singer caused KWF to issue a payment of $20,000 to Dvorskiy for facilitating Riddell's cheating on behalf of the COLBURNS' son and another student.

96. On or about March 23, 2018, Singer caused KWF to issue a payment of $20,000 to Riddell for correcting the SAT answers for the COLBURNS' son and another student.

97. In or about 2018, the SAT score Riddell secretly obtained on behalf of the COLBURNS' son was submitted as part of his applications to various colleges and universities.

GAMAL ABDELAZIZ

98. Beginning in or about the summer of 2017, GAMAL ABDELAZIZ agreed with Singer to pay an amount, ultimately totaling $300,000, for facilitating his daughter's admission to USC as a purported basketball recruit.

99. On or about July 16, 2017, in an e-mail bearing the subject line "For Me to complete USC athletic profile," Singer asked ABDELAZIZ to send biographical information about his daughter. The e-mail indicated that the profile would include falsified honors related to basketball.

100. On or about July 27, 2017, Singer requested that ABDELAZIZ provide an action photo of his daughter to be used in the athletic profile. ABDELAZIZ e-mailed the photo that same day.

101. On or about August 7, 2017, Janke e-mailed Singer a draft of the profile, which falsely described ABDELAZIZ's daughter as having received numerous athletic honors. In the cover e-mail, Janke wrote: "Profile for [ABDELAZIZ's daughter]. . . . Let me know if you want me to add any other awards to her profile or if you think that is enough." Singer forwarded Janke's e-mail and false profile to ABDELAZIZ.

102. On or about October 5, 2017, Heinel presented ABDELAZIZ's daughter to the USC subcommittee for athletic admissions, and—based on the falsified athletic credentials—obtained the subcommittee's approval to admit her to USC as a basketball recruit.

103. On or about December 4, 2017, Heinel instructed Singer that a payment of $200,000 for ABDELAZIZ's daughter should be directed to the gift account for the Galen Center, the arena for USC's basketball and volleyball programs. Subsequently, Heinel and Singer agreed that instead of directing this money to USC, Heinel would receive payments of $20,000 per month personally in exchange for her assistance in securing the admission of ABDELAZIZ's daughter, and the children of other Singer clients, to USC as purported athletic recruits.

104. On or about March 26, 2018, after USC mailed ABDELAZIZ's daughter a formal acceptance letter, ABDELAZIZ wired $300,000 to KWF.

105. In or about July 2018, KWF began paying Heinel $20,000 per month in exchange for facilitating the admission of ABDELAZIZ's daughter, and the children of other Singer clients, to USC as purported athletic recruits. The payments included at least one check that Singer mailed from Massachusetts to Heinel in California on or about January 3, 2019.

106. On or about January 3, 2019, Singer called ABDELAZIZ from Boston, Massachusetts. During the call, Singer told ABDELAZIZ, in substance, that Heinel, when asked why ADBELAZIZ's daughter was not playing basketball for USC, had responded that she had suffered an injury. ADBELAZIZ confirmed that he would provide the same cover story if questioned.

DIANE BLAKE and TODD BLAKE

107. Beginning in or about 2017, DIANE BLAKE and TODD BLAKE agreed with Singer to pay an amount, ultimately totaling $250,000, to facilitate their daughter's admission to USC as a purported volleyball recruit.

108. On or about January 29, 2017, DIANE BLAKE e-mailed Singer, copying TODD BLAKE, noting that their daughter was interested in attending USC but that DIANE BLAKE assumed the school was "in the reach stretch category." Singer responded: "There is a way to garner a guarantee at USC if that is first choice but best to discuss without [your daughter] being present." DIANE BLAKE replied, copying TODD BLAKE: "Look forward to discussing."

109. On or about June 28, 2017, DIANE BLAKE e-mailed Singer, copying TODD BLAKE: "We are fully committed to the USC plan."

110. On or about August 7, 2017, Janke e-mailed Singer a falsified volleyball profile for the BLAKES' daughter. Approximately one week later, Singer forwarded the profile to Heinel.

111. Heinel presented the BLAKES' daughter to the USC subcommittee for athletic admissions as a purported volleyball recruit on or about September 7, 2017.

112. On or about September 14, 2017, Heinel e-mailed Singer a letter, addressed to the BLAKES' daughter, notifying her of her conditional admission to USC as a student athlete. Singer forwarded the letter to the BLAKES that same day. TODD BLAKE responded by thanking Singer and stating that he would register his daughter with the NCAA Eligibility Center as instructed in the letter.

113. On or about September 16, 2017, Singer instructed TODD BLAKE to send a check for $50,000 to "USC Women's Athletics c/o Senior Women's Administrator Donna Heinel." TODD BLAKE mailed a $50,000 check to USC Women's Athletics that same day.

114. On or about February 5, 2018, TODD BLAKE wired $200,000 to one of the KWF charitable accounts.

115. In a call on or about February 22, 2019, Singer told DIANE BLAKE that USC had received a subpoena for athletic records for the past 12 years. Singer said he wanted to let DIANE BLAKE know about the subpoena "since [the BLAKES' daughter] was accepted through volleyball, but wasn't really a volleyball player in reality at [the] USC level[.]" DIANE BLAKE responded: "Yeah."

I-HSIN "JOEY" CHEN

116. In or about the spring of 2018, CHEN agreed with Singer to pay $75,000 to have Riddell pose as a proctor for his son's ACT exam and secretly correct his answers.

117. On or about April 13, 2018, Riddell flew from Tampa, Florida to Los Angeles, California.

118. The following day, CHEN's son took the ACT at the West Hollywood Test Center. Riddell purported to proctor the exam and, after CHEN's son had completed it, corrected his answers.

119. On or about April 16, 2018, CHEN wired $75,000 to a bank account in the name of The Key. Singer caused The Key to provide CHEN with an invoice falsely indicating that the payment was for consulting services.

120. On or about April 17, 2018, Singer caused KWF to pay Dvorskiy $20,000 for facilitating Riddell's cheating on behalf of the CHEN's son and another student.

121. On or about April 18, 2018, Dvorskiy sent the completed exams, via Federal Express, to ACT, Inc. in Iowa City.

122. On or about May 14, 2018, Singer caused KWF to pay Riddell $20,000 for correcting the ACT answers or CHEN's son and another student.

123. In or about 2018, the ACT score Riddell secretly obtained on behalf of CHEN's son was submitted as part of his applications to various colleges and universities, including on or about October 8, 2018 to Emerson College in Boston, Massachusetts.

124. On or about February 21, 2019, Singer called CHEN and asked: "[W]e both agree that Mark took the test for [your son], right?" CHEN responded: "Yeah."

MOSSIMO GIANNULLI and LORI LOUGHLIN

125. In or about 2016 and 2017, GIANNULLI and LOUGHLIN agreed with Singer to pay an amount, ultimately totaling $500,000, to facilitate the admission of their two daughters to USC as purported crew recruits.

126. On or about April 22, 2016, GIANNULLI, copying LOUGHLIN, sent an e-mail to Singer, noting "I have some concerns and want to fully understand the game plan and make sure we have a roadmap for success as it relates to [our older daughter] and getting her into a school other than ASU!" Singer responded: "If you want [U]SC I have the game plan ready to go into motion. Call me to discuss."

127. On or about September 7, 2016, GIANNULLI sent Singer an e-mail attaching a photograph of his older daughter on an ergometer.

128. On or about October 27, 2016, Heinel presented the GIANNULLIS' older daughter to the USC subcommittee for athletic admissions, and—based on falsified athletic credentials—obtained the subcommittee's approval to admit her to USC as a crew recruit.

129. On or about October 29, 2016, Singer e-mailed GIANNULLI: "Please send $50K payment to the person below[:] Donna Heinel, Senior Women[']s Associate Athletic Director[,] c/o of USC Athletics[.]"

130. On or about November 1, 2016, GIANNULLI told Singer "I told biz mgr to Fed Ex [the payment] today."

131. On or about April 10, 2017, after the GIANNULLIS' daughter received a formal acceptance letter from USC, GIANNULLI wired $200,000 to KWF.

132. On or about July 14, 2017, Singer directed Janke to prepare a falsified crew profile for the GIANNULLIS' younger daughter.

133. On or about July 16, 2017, Singer e-mailed GIANNULLI and LOUGHLIN requesting that they send an "action picture" for the crew profile. Singer indicated that the profile would present their younger daughter, falsely, as a crew coxswain for the L.A. Marina Club team.

134. On or about July 28, 2017, GIANNULLI, copying LOUGHLIN, e-mailed Singer a photograph of their younger daughter on an ergometer.

135. On or about November 2, 2017, Heinel presented the GIANNULLIS' younger daughter to the USC subcommittee for athletic admissions, and—based on the falsified athletic credentials—obtained the subcommittee's approval to admit her to USC as a crew recruit.

136. On or about November 29, 2017, Singer directed the GIANNULLIS to "send a 50K check to USC and the address is below. Additionally the rest of the 200k will be paid to our foundation a 501 3C [sic] after [your younger daughter] receives his [sic] final letter in March."

137. On or about November 30, 2017, GIANNULLI directed his business manager to send a $50,000 check to Heinel.

138. On or about February 6, 2018, GIANNULLI wired $200,000 to KWF.

139. On or about October 25, 2018, Singer called GIANNULLI from Boston, Massachusetts. During that call, Singer told GIANNULLI: "Donna called me couple weeks ago and says, 'Hey, uh,' you know, 'going forward, can you use the same format you used for [the GIANNULLIS' older daughter] and [their younger daughter], and the regattas that you put in there, for any girls, going forward, that don't row crew?' So it's funny how-- I thought I was just makin' stuff up." GIANNULLI replied: "Uh, right."

140. On or about November 29, 2018, Singer called LOUGHLIN from Boston, Massachusetts. During the call, Singer said, in sum and substance, that KWF was being audited by the IRS, which was asking about the two payments of $200,000 by the GIANNULLIS. Singer added: "So I just want to make sure that you know that, one, that you're probably going to get a call and that I have not told them anything about the girls going through the side door, through crew, ever though they didn't do crew to get into USC. So I—that is—all I told them was that you guys made a donation to our foundation to help underserved kids." LOUGHLIN replied, "Um-hmm."

ELIZABETH HENRIQUEZ and MANUEL HENRIQUEZ

141. In or about the fall of 2015, ELIZABETH HENRIQUEZ and MANUEL HENRIQUEZ agreed to pay Singer $25,000 to have Riddell pose as a proctor for their older daughter's SAT exam and provide her with answers to the exam questions.

142. On or about August 19, 2015, Singer e-mailed Riddell a round-trip plane ticket from Tampa, Florida to San Francisco, California. At or about the same time, Singer made arrangements for Riddell to serve as an exam proctor at the private college preparatory school in Belmont, California attended by the HENRIQUEZES' older daughter.

143. On or about October 3, 2015, Riddell purported to proctor the SAT exam for the HENRIQUEZES' older daughter. During the exam, Riddell provided the HENRIQUEZES' daughter with answers to the questions.

144. On or about November 24, 2015, the Henriquez Family Trust wired $15,000 to Singer's personal bank account and $10,000 to an account in the name of The Key. After receiving the funds, Singer caused KWF to pay Riddell a total of $10,000 in three separate installments.

145. Beginning in or about 2015, the HENRIQUEZES agreed to pay Singer an amount, ultimately totaling $400,000, for their older daughter's admission to Georgetown as a purported tennis recruit.

146. On or about August 19, 2015, Singer e-mailed ELIZABETH HENRIQUEZ and her daughter, directing the daughter to send an e-mail to Ernst, in her own name, stating, among other things: "I have been really successful this summer playing tennis around the country. I am looking forward to having a chance to be part of the Georgetown tennis team and make a positive contribution to your team's success." ELIZABETH HENRIQUEZ responded to Singer that her daughter was "on it."

147. On or about August 20, 2015, the HENRIQUEZES' older daughter sent Singer's message to Ernst, who forwarded it to a Georgetown admissions officer.

148. On or about October 22, 2015, the HENRIQUEZES' older daughter e-mailed Ernst her fraudulently obtained SAT scores.

149. On or about November 6, 2015, Georgetown issued a letter to the HENRIQUEZES' older daughter indicating that the university had "conducted an initial review of [her] application to the Class of 2019 at the request of Mr. Gordie Ernst, tennis coach," and that her admission had been rated "likely."

150. On or about May 4, 2016, the Henriquez Family Trust made a purported donation of $400,000 to KWF.

151. On or about May 9, 2016, Singer caused a donation receipt letter to be sent to ELIZABETH HENRIQUEZ falsely stating that "no goods or serves were exchanged" for the purported donation.

152. Between approximately September 11, 2015 and November 30, 2016, KWF paid Ernst $950,000 in exchange for Ernst's designation of the HENRIQUEZES' older daughter and several other students as purported tennis recruits.

153. In or about the fall of 2016, the HENRIQUEZES agreed with Singer to have Riddell purport to proctor their younger daughter's ACT exam at the Houston Test Center and assist her in cheating on the exam.

154. On or about September 13, 2016, ELIZABETH HENRIQUEZ e-mailed a counselor at her younger daughter's high school falsely stating, in substance, that her daughter wanted to take the ACT on October 22, 2016, but that "we have to be in Houston" on that date.

155. Riddell flew from Tampa, Florida to Houston, Texas for the ACT exam, which occurred on or about October 22, 2016. Riddell purported to proctor the exam for the HENRIQUEZES' younger daughter and another student. During the exam, Riddell discussed the answers with the two students.

156. On or about October 24, 2016, Singer paid $50,000 to Martin Fox, so that Fox, in turn, could pay Williams for facilitating Riddell's cheating.

157. On or about October 31, 2016, Singer paid Riddell $20,000 for purporting to proctor the ACT exam for the HENRIQUEZES' younger daughter and the other student.

158. In lieu of paying for the cheating, MANUEL HENRIQUEZ agreed to help Singer secure the admission of an applicant to Northeastern University, in Boston, Massachusetts.

159. MANUEL HENRIQUEZ took a number of steps to facilitate the Northeastern applicant's admission, including e-mailing a senior development officer at Northeastern on or about October 26, 2016.

160. In or about 2017, the HENRIQUEZES paid Singer at least $25,000 in cash to arrange for an individual, referred to herein as "Proctor 2," to facilitate cheating on the SAT subject tests and the ACT for their younger daughter.

161. On or about June 3, 2017, the HENRIQUEZES' younger daughter took the SAT subject tests at the West Hollywood Test Center, with Proctor 2 purporting to proctor the tests and providing the HENRIQUEZES' younger daughter with answers to certain questions.

162. On or about June 3, 2017, Singer mailed Proctor 2 a check for $2,000.

163. On or about June 5, 2017, Singer mailed Dvorskiy a check for $40,000, drawn on one of the KWF charitable accounts.

164. The following weekend, Proctor 2 purported to proctor the ACT for the HENRIQUEZES' younger daughter at the West Hollywood Test Center.

165. After the ACT, Singer mailed Proctor 2 a check for $4,000.

166. In or about October and November 2017, the SAT subject test scores fraudulently obtained by the HENRIQUEZES younger daughter were submitted to various colleges and universities, including, on or about October 31, 2017, to Northeastern University in Boston.

DOUGLAS HODGE

167. Beginning in or about the 2012, HODGE agreed to pay Singer an amount, ultimately totaling $200,000, to facilitate his younger daughter's admission to USC as a purported soccer recruit.

168. On or about September 26, 2012, Singer forwarded high school transcripts for HODGE's younger daughter to Janke, then an assistant coach of women's soccer at USC.

169. On or about October 15, 2012, Singer directed a payment of $50,000 from an account in the name of The Key to an account in the name of a private soccer club controlled by Khosroshahin, then the head coach of women's soccer at USC, and Janke.

170. On or about December 16, 2012, HODGE's younger daughter's application was submitted to USC. The application included falsified soccer credentials.

171. On or about February 12, 2013, Singer directed another $50,000 payment from an account in the name of The Key to an account in the name of a private soccer club controlled by Janke and Khosroshahin.

172. On or about February 13, 2013, Khosroshahin e-mailed Heinel an athletic profile for HODGE'S daughter containing falsified soccer credentials.

173. On or about February 14, 2013, Heinel presented HODGE's younger daughter to the USC subcommittee for athletic admissions, and—based on the falsified credentials provided by Khosroshahin—obtained the subcommittee's approval to admit her to USC as a soccer recruit.

174. On or about April 9, 2013, after HODGE's younger daughter received a formal acceptance letter from USC, HODGE wired $150,000 to The Key and $50,000 to KWF.

175. On or about May 15, 2013, Singer directed another $50,000 payment from KWF to the private soccer club controlled by Janke and Khosroshahin.

176. Beginning in or about the 2014, HODGE agreed with Singer to pay an amount, ultimately totaling $325,000, to facilitate his son's admission to USC as a purported football recruit.

177. On or about January 30, 2015, Singer e-mailed two falsified athletic profiles of HODGE's son created by Janke—one relating to football, the other relating to tennis—to HODGE and instructed him to e-mail them to Heinel "and ask her to use whichever one she likes." Singer added: "Obviously we have stretched the truth but this is what is done for all kids. Admissions just needs something to work with to show he is an athlete. They do not follow up after Donna presents."

178. On or about February 12, 2015, Heinel presented HODGE's son to the USC subcommittee for athletic admissions, and—based on the falsified athletic credentials—obtained the subcommittee's approval to admit him to USC as a football recruit.

179. On or about March 31, 2015, after HODGE'S son received a formal acceptance letter from USC, HODGE mailed Heinel a $75,000 check made payable to USC "Womens Athletic Board."

180. On or about April 1, 2015, HODGE wired $125,000 to The Key and $125,000 to KWF.

181. On or about April 15, 2015, Singer directed a payment of $50,000 from KWF to a bank account, controlled in part by Janke, in the name of a private soccer team.

182. On or about November 30, 2018, Singer called HODGE from Boston, Massachusetts. During the call, Singer noted that HODGE's daughter "got in even though she wasn't a legit soccer player and [your son] not a legit-- I think we did football for [him]." HODGE responded: "Right."

MICHELLE JANAVS

183. Beginning in or about 2016, JANAVS agreed to pay Singer an amount, ultimately totaling $400,000, to facilitate her son's admission to Georgetown as a purported tennis recruit.

184. On or about November 16, 2016, JANAVS's son submitted his application to Georgetown. On the same day, Singer e-mailed JANAVS: "I just spoke to Gordie and let him know."

185. On or about December 19, 2016, Georgetown mailed JANAVS's son a conditional acceptance letter noting that "[t]he Committee on Admissions has conducted an initial review of your application to the Class of 2021 at the request of Mr. Gordie Ernst, Tennis Coach. I am pleased to report that the Committee has rated your admission as 'likely.'"

186. On or about May 12, 2017, a foundation controlled by JANAVS's father wired $400,000 to KWF. That same day, KWF issued a letter to JANAVS falsely indicating that "no goods or services were exchanged" for the purported donation.

187. Beginning in or about the summer of 2017, JANAVS agreed to pay Singer $50,000 to have Riddell pose as a proctor for her older daughter's ACT and secretly correct her answers.

188. On or about August 31, 2017, JANAVS received an e-mail from ACT, Inc. with instructions on how to register her daughter to take the ACT, with extended time, at her high school. JANAVS forwarded the e-mail to Singer.

189. On or about October 24, 2017, Dvorskiy e-mailed ACT, Inc. to change the location of the test for JANAVS's daughter to the West Hollywood Test Center.

190. On or about October 28, 2017, after JANAVS's older daughter took the ACT at the West Hollywood Test Center, Riddell reviewed and corrected her answers.

191. On or about October 29, 2017, Singer caused KWF to pay $18,000 to Riddell and $13,000 to Dvorskiy for facilitating the cheating for JANAVS's older daughter and another student.

192. On or about November 1, 2017, Dvorskiy sent the completed ACT exams, via Federal Express, to ACT, Inc. in Iowa City.

193. On or about November 30, 2017, JANAVS sent a check for $50,000 to KWF.

194. Beginning in or about 2018, JANAVS agreed with Singer to pay an amount, ultimately totaling $200,000, to facilitate her older daughter's admission to USC as a purported volleyball recruit.

195. On or about August 26, 2018, JANAVS e-mailed Singer photos of her older daughter playing beach and indoor volleyball.

196. On or about October 3, 2018, Heinel presented JANAVS's older daughter's to the USC subcommittee for athletic admissions, and—based on the falsified athletic credentials—obtained the subcommittee's approval to admit her to USC as a volleyball recruit.

197. On or about October 26, 2018, Singer instructed JANAVS to mail a $50,000 check to Heinel payable to the USC Women's Athletics Fund. JANAVS advised Singer that she mailed the check to Heinel that same day.

198. Beginning in or about the fall of 2018, JANAVS agreed to pay Singer $50,000 to have Riddell pose as a proctor for her younger daughter's ACT and secretly correct her answers.

199. On or about November 26, 2018, JANAVS called Singer to discuss the college entrance exam scheme. JANAVS said of her younger daughter: "She's smart, she's going to figure this out. Yeah, she's going to say to me-- she already thinks I'm up to, like, no good."

200. On or about February 5, 2019, JANAVS mailed KWF a check in the amount of $25,000.

201. On or about February 9, 2019, after JANAVS' younger daughter took the ACT at the West Hollywood Test Center, Riddell reviewed and corrected her answers.

202. On or about February 12, 2019, JANAVS wired $25,000 to a Boston, Massachusetts account in the name of KWF.

ELISABETH KIMMEL

203. Beginning in or about 2012, KIMMEL agreed to pay Singer an amount, ultimately totaling $275,000, to facilitate her daughter's admission to Georgetown as a purported tennis recruit.

204. On or about December 20, 2012, the Georgetown admissions department sent KIMMEL's daughter a letter stating that the "Committee on Admissions ha[d] conducted an initial review of [her] application to the Class of 2017 at the request of Mr. Gordie Ernst, Tennis Coach" and "had rated [her] admission as 'likely.'"

205. On or about April 15, 2013, KIMMEL caused the Meyer Charitable Foundation, a family foundation on which KIMMEL and her spouse served as officers, to issue a check to KWF in the amount of $100,000.

206. On or about June 27, 2013, KIMMEL caused the Meyer Charitable Foundation to issue a second check to KWF in the amount of $170,000.

207. On or about July 16, 2013, KIMMEL caused the Meyer Charitable Foundation to issue a third check to KWF in the amount of $5,000.

208. Between on or about September 5, 2012 and on or about September 6, 2013, Singer caused The Key, and later KWF, to pay Ernst $244,000 in monthly installments.

209. Beginning in or about 2017, KIMMEL agreed with Singer to pay an amount, ultimately totaling $250,000, to facilitate her son's admission to USC as a purported track and field recruit.

210. On or about August 10, 2017, Singer directed Janke to create a falsified athletic profile for KIMMEL's son. The profile falsely described KIMMEL's son as an elite high school pole vaulter and including a photograph purporting to be of KIMMEL's son pole vaulting but which, in fact, depicted another individual.

211. On or about October 5, 2017, Heinel presented KIMMEL's son to the USC subcommittee for athletic admissions, and—based on the falsified athletic credentials—obtained the subcommittee's approval to admit him to USC as a track and field recruit.

212. On or about October 23, 2017, the Meyer Charitable Foundation issued a $50,000 check to the USC Women's Athletics Board. The check was signed by KIMMEL's spouse.

213. On or about February 23, 2018, KIMMEL caused the Meyer Charitable Foundation to issue a check to KWF in the amount of $200,000.

214. On or about July 26, 2018, KIMMEL and her spouse called Singer to explain that their son's advisor at USC had inquired about his status as a track athlete. KIMMEL asked Singer: "[S]o we have to hope this advisor doesn't start poking around?"

WILLIAM McGLASHAN, Jr.

215. In or about the fall of 2017, McGLASHAN agreed to pay Singer $50,000 to arrange for Riddell to purport to proctor his son's ACT exam and secretly correct his answers.

216. On or about December 6, 2017, McGLASHAN made a purported donation of $50,000 to KWF from his personal charitable donation fund.

217. On or about December 8, 2017, Riddell traveled from Tampa, Florida to Los Angeles, California to purport to proctor the ACT exam for McGLASHAN's son and two other students.

218. On or about December 9, 2017, McGLASHAN's son took the ACT exam at the West Hollywood Test Center. After McGLASHAN's son completed the exam, Riddell corrected his answers.

219. On or about December 13, 2017, Dvorskiy sent McGLASHAN's son's completed ACT exam, via Federal Express, to ACT, Inc. in Iowa City.

220. On or about December 19, 2017, Singer caused KWF to pay Dvorskiy $40,000.

221. On or about December 27, 2017, Singer caused KWF to pay Riddell $35,000.

222. Beginning in or about the summer of 2018, McGLASHAN agreed with Singer to pay an amount, ultimately totaling $250,000, to facilitate his son's admission to USC as a purported football recruit.

223. In a call on or about August 22, 2018, Singer told McGLASHAN that he would create a fake football profile for McGLASHAN's son, and would need "pictures of him playing multiple sports, or something where you can kind of see his face a little bit in action" so that he could "Photoshop him onto a kicker."

224. On or about August 25, 2018, McGLASHAN sent Singer his son's fraudulently obtained ACT score, his high school transcript, and photos.

225. On or about October 24, 2018, the ACT score Riddell secretly obtained on behalf of McGLASHAN's son was submitted as part of his applications to various colleges and universities, including Northeastern University in Boston, Massachusetts.

MARCI PALATELLA

226. Beginning in or about 2016, PALATELLA agreed to pay Singer $75,000 to arrange for Riddell to pose as a proctor for her son's SAT exam and secretly correct his answers. PALATELLA also agreed with Singer to pay an amount, ultimately totaling $500,000, to facilitate her son's admission to USC as a purported football recruit.

227. On or about February 27, 2017, after her son was granted extended time on the SAT, PALATELLA e-mailed her son's high school that he would be "taking his SAT test at [the West Hollywood Test Center] in Los Angeles on March 11 and 12, 2017."

228. On or about March 7, 2017, PALATELLA's company wired $75,000 to KWF.

229. On or about March 8, 2017, Singer caused KWF to issue a payment of $25,000 to Dvorskiy for facilitating Riddell's cheating on behalf PALATELLA's son.

230. On or about March 10, 2017, Riddell flew from Tampa to Los Angeles to purport to proctor the SAT for PALATELLA's son at the West Hollywood Test Center.

231. On or about March 11, 2017, after PALATELLA's son completed the SAT exam at the West Hollywood Test Center, Riddell reviewed and corrected his answers.

232. On or about March 13, 2017, Dvorskiy sent the completed SAT exams, via UPS, to the College Board in New Jersey.

233. On or about March 27, 2017, Singer caused KWF to issue a payment of $10,000 to Riddell for correcting the SAT answers for PALATELLA's son.

234. On or about July 27, 2017, PALATELLA e-mailed Singer a photo of her son in his football uniform and asked, "Will this work?" Singer forwarded the photo to Janke, together with PALATELLA's son's grades and the fraudulently obtained SAT score. Janke created an athletic profile for PALATELLA's son that included falsified football credentials.

235. On or about November 16, 2017, Heinel presented PALATELLA's son to the USC subcommittee for athletic admissions, and—based on the falsified athletic credentials—obtained the subcommittee's approval to admit him to USC as a football recruit.

236. On or about December 1, 2017, PALATELLA mailed Heinel a check in the amount of $100,000.

237. On or about May 1, 2018—after PALATELLA's son received a formal acceptance letter from USC—PALATELLA's company wired $400,000 to KWF.

238. On or about October 24, 2018, Singer called PALATELLA from Boston, Massachusetts. During the call, PALATELLA agreed to mislead the IRS if anyone inquired about her payments to KWF.

JOHN WILSON

239. Beginning in or about 2013, WILSON agreed to pay Singer an amount, ultimately totaling $220,000, to facilitate his son's admission to USC as a purported water polo recruit. Beginning in or about 2018, WILSON agreed to pay Singer an amount, ultimately totaling $1.5 million, to facilitate his daughters' admissions to Stanford and Harvard University as purported athletic recruits.

240. On or about February 10, 2013, WILSON e-mailed Singer and asked for the "deadline to decide on side door for USC or BC or Georgetown etc. this year" and to "confirm for which schools is side door option really viable." Singer responded that the deadline for USC and Boston College was "mid July."

241. On or about August 24, 2013, WILSON e-mailed Singer about the timing of his payments to Vavic, the USC water polo coach, to secure his son's admission as a purported water

polo recruit. WILSON wrote: "What does Jovan need by [S]ept 20? Do u have what we need? Do I make the first payment to u then?"

242. On or about October 3, 2013, Vavic advised Singer that he needed an athletic profile for WILSON's son and that it "needs to be a good resume." Singer subsequently provided Vavic with a falsified profile that included fabricated swimming times and awards.

243. On or about February 26, 2014, Vavic e-mailed a USC athletics administrator that WILSON's son "would be the fastest player on our team, he swims 50 y in 20 [seconds], my fastest players are around 22 [seconds], this kid can fly."

244. On or about February 28, 2014, the USC subcommittee for athletic admissions approved the admission of WILSON's son as a water polo recruit based on the falsified athletic credentials.

245. On or about March 1, 2014, WILSON e-mailed Singer under the subject line "USC fees." WILSON wrote:

> Thanks again for making this happen! Pls give me the invoice. What are the options for the payment? Can we make it for consulting or whatever from the [K]ey so that I can pay it from the corporate account?

Singer replied that he could make the invoice for business consulting fees, so that WILSON could "write [it] off as an expense."

246. On or about April 7, 2014, after USC mailed WILSON's son a formal acceptance letter, WILSON's company wired a total of $220,000 to Singer, including $100,000 to KWF, $100,000 to The Key, and $20,000 to Singer directly.

247. On or about April 16, 2014, Singer withdrew a $100,000 cashier's check, made out to "USC Men's Water Polo," from The Key's account. The "Purpose/Remitter" identified on the check was "Wilson Family."

248. On or about September 29, 2018, WILSON asked Singer about "side door" opportunities for his daughters. During this call, Singer explained, in sum and substance, that "by the side door" he may be able to tell the sailing coach: "'Hey, this family's willing to make the contributions. She could be on your team. She is a sailor. She may not be up to the level you are, but she can con-- you know, you're gonna get a benefit, and the family's gonna get benefit.'"

249. On or about October 15, 2018, Singer called WILSON to discuss various "side door" options for WILSON's daughters and noted that for any of those options, WILSON's daughters "don't have to play. They just-- that's the path I'm gonna get 'em in on." WILSON responded: "Gotcha."

250. On or about October 17, 2018, WILSON's company wired $500,000 to an account in the name of KWF in the District of Massachusetts.

251. On or about October 27, 2018, Singer told WILSON that he had secured a "side door" deal for one of WILSON's daughters with the Stanford sailing coach, John Vandemoer, and that the deal with Vandemoer was hidden from Stanford.

252. On or about November 29, 2018, Singer told WILSON that he had secured an admissions spot at Harvard through a fictitious "senior women's administrator," and that, in exchange for an initial $500,000 payment to her, as well as a subsequent payment, the administrator would designate one of WILSON's daughters as an athletic recruit.

253. On or about December 11, 2018, WILSON's company wired another $500,000 to the Massachusetts account in the name of KWF.

HOMAYOUN ZADEH

254. Beginning in or about 2016, Zadeh agreed with Singer to pay an amount, ultimately totaling $150,000, to facilitate his daughter's admission to USC as a purported lacrosse recruit.

255. On or about December 16, 2016, ZADEH provided Singer with a photograph of his daughter cheerleading. Singer forwarded the photograph to Janke and directed her to fabricate a lacrosse profile for ZADEH's daughter.

256. On or about March 15, 2017, Heinel present ZADEH's daughter to the USC subcommittee for athletic admissions, and—based on falsified athletic credentials—obtained the subcommittee's approval to admit her to USC as a lacrosse recruit.

257. In a text message on or about March 20, 2017, ZADEH told Singer that his daughter was concerned that "she did not get in on her own merits. I have not shared anything about our arrangement but she somehow senses it."

258. During the same text exchange, Singer told ZADEH that he could "make the 100k payment over the next 6 months starting April 1st. You can send to my foundation as a donation/write off or if you have your own company we can invoice you as a business consulting fee from our profit business and you write off as an expense."

259. On or about March 27, 2017, after USC mailed ZADEH's daughter her formal acceptance letter, KWF sent $50,000 to the USC Women's Athletics Board.

260. Between May 30, 2017 and September 7, 2018, ZADEH made the following payments to KWF:

Date Posted to KWF Account	Amount
5/30/2017	$5,000
9/25/2017	$10,000
10/23/2017	$10,000
12/27/2017	$10,000
2/15/2018	$5,000
3/26/2018	$5,000
4/27/2018	$5,000
9/7/2018	$5,000

261. On or about October 25, 2018, Singer called ZADEH from Boston, Massachusetts. During the call, Singer told ZADEH, in sum and substance, that KWF was being audited by the IRS. Singer said: "I'm not going to tell the IRS that we got [your daughter] in through lacrosse." ZADEH responded: "Right." Singer continued: "And Donna Heinel at USC." ZADEH replied: "Right." Singer also said: "[Y]ou know, we created a profile that wasn't real." ZADEH responded: "Right."

ROBERT ZANGRILLO

262. Beginning in or about 2018, ZANGRILLO agreed with Singer to pay an amount, ultimately totaling $250,000, to facilitate his daughter's transfer to USC as a purported crew recruit.

263. On or about February 1, 2018, ZANGRILLO's daughter's transfer application was submitted to USC. The application included falsified athletic credentials.

264. In a call with ZANGRILLO, ZANGRILLO's daughter and Sanford, on or about June 11, 2018, Singer explained, in sum and substance, that he had asked members of the USC athletics department to facilitate ZANGRILLO's daughter's admission "as though she's been sculling and rowing," and that the crew coach had agreed to designate her as a purported crew recruit, provided that "[y]ou guys help us."

265. During the same call, ZANGRILLO directed Sanford to take a biology and an art history class for his daughter.

266. On or about September 20, 2018, after USC mailed ZANGRILLO's daughter an acceptance letter, ZANGRILLO wired $200,000 to one of the KWF charitable accounts.

267. On or about that same day, ZANGRILLO mailed a check in the amount of $50,000 to "USC Women's Athletics."

268. In a call with Singer on or about January 3, 2019, ZANGRILLO confirmed that his daughter would not say anything to her USC advisor about being admitted through athletics.

Other Co-Conspirators

269. In addition to the exams Singer paid Riddell to take for the children of the defendants, Singer likewise paid Riddell to cheat on the SAT and ACT for the children of other co-conspirators known and unknown to the Grand Jury and, in many of those instances, bribed exam administrators, including Dvorskiy and Williams, to permit Riddell to do so.

270. Singer likewise bribed athletic coaches and university administrators on behalf of other co-conspirators known and unknown to the Grand Jury to designate the children of those co-conspirators as athletic recruits.

The Money Laundering Conspiracy

271. The defendants also conspired with others known and unknown to the Grand Jury to conceal their fraud scheme by funneling bribe and other payments through the façade of The Key or KWF, including via payments to and from accounts in the District of Massachusetts, and to promote their fraud scheme via payments to The Key and KWF from outside the United States.

Objects and Purposes of the Money Laundering Conspiracy

272. The principal objects and purposes of the money laundering conspiracy were: (a) to conceal and disguise the nature, location, source, ownership, and control of bribe and other payments in furtherance of the fraud scheme, in violation of Title 18, United States Code, Section 1956(a)(1)(B)(i); and, (b) to transport, transmit, and transfer funds to a place in the United States

from and through a place outside the United States, with the intent to promote the fraud scheme, in violation of Title 18, United States Code, Section 1956(a)(2)(A).

Manner and Means of the Money Laundering Conspiracy

273. Among the manner and means by which the defendants and others known and unknown to the Grand Jury carried out the money laundering conspiracy were the following:

a. Making purported charitable donations to KWF or payments to The Key to fund the bribe and other payments in furtherance of the fraud scheme;

b. Having KWF issue letters falsely attesting that the purported donations would help "provide educational and self-enrichment programs to disadvantaged youth," and that "no goods or services were exchanged" for the money;

c. Having The Key issue falsified "consulting" agreements and invoices stating that payments made in furtherance of the fraud scheme were instead for legitimate services; and

d. Issuing bribe and other payments in furtherance of the fraud scheme from accounts in the name of The Key and KWF.

Acts in Furtherance of the Money Laundering Conspiracy

274. On various dates from in or about 2011 through in or about February 2019, the defendants and others known and unknown to the Grand Jury committed and caused to be committed the following acts, among others, in furtherance of the money laundering conspiracy:

DAVID SIDOO

275. On or about January 23, 2013, SIDOO wired $100,000 from an account in Canada to an account in California in the name of The Key, in exchange for Singer's facilitation of the SAT cheating scheme for SIDOO's younger son.

GREGORY COLBURN and AMY COLBURN

276. In or about December 2017, GREGORY COLBURN initiated a transfer of stock to KWF with a value of $24,443.50, in exchange for Singer's facilitation of the SAT cheating scheme for the COLBURNS' son.

277. GREGORY COLBURN subsequently issued a check in the amount of $547.45 to KWF, and wrote "charitable donation" in the memo line.

278. On or about December 29, 2017, KWF issued a letter to GREGORY COLBURN falsely indicating that "no goods or services were exchanged" for the purported donation.

279. In a call on or about October 24, 2018, Singer told AMY COLBURN, "So what I've stated to the IRS, [is] that your payment went to our foundation to help underserved kids." AMY COLBURN responded, "Okay." During the same call, Singer told GREGORY COLBURN, "I just wanted to make sure that we don't-- we're all on the same page." GREGORY COLBURN replied, "Right. It was to help underserved kids. . . . Got it. No problem."

GAMAL ABDELAZIZ

280. On or about March 26, 2018, ABDELAZIZ wired a payment of $300,000 to KWF in exchange for Singer's facilitation of his daughter's admission to USC as a purported basketball recruit.

281. On or about March 26, 2018, KWF issued a letter to ABDELAZIZ falsely indicating that "no goods or services were exchanged" for the purported donation.

DIANE BLAKE and TODD BLAKE

282. On or about September 16, 2017, TODD BLAKE mailed a $50,000 check to Heinel, payable to USC Women's Athletics, in exchange for facilitating his daughter's admission as a purported volleyball recruit.

283. On or about February 5, 2018, TODD BLAKE wired $200,000 to one of the KWF charitable accounts, in exchange for Singer facilitating his daughter's admission to USC as a purported volleyball recruit.

284. In call on or about October 25, 2018, TODD BLAKE asked Singer: "[W]ill I get contacted [by the IRS], and if so how would you like me to answer?" Singer responded: "[W]hat I want you to say is that your money went to our foundation, which it did." TODD BLAKE replied: "Yeah. Okay." Singer then said, "You made a donation to help underserved kids." TODD BLAKE responded: "Right. Okay, good."

285. In a call on or about February 22, 2019, Singer told DIANE BLAKE, in reference to her daughter's acceptance to USC, "but [your daughter] got in with you guys making a payment, you know for $50,000 to USC women's athletics directly and then $200[,000] to my foundation." DIANE BLAKE responded "right," and further acknowledged that "that was the payment to get her in."

I-HSIN "JOEY" CHEN

286. On or about April 16, 2018, CHEN wired $75,000 to The Key in exchange for Singer arranging the ACT cheating scheme on behalf of his son.

287. Singer caused The Key to provide CHEN with an invoice falsely indicating that the payment was for consulting services.

MOSSIMO GIANNULLI and LORI LOUGHLIN

288. On or about April 10, 2017, GIANNULLI wired $200,000 to KWF in exchange for Singer facilitating his older daughter's admission to USC as a purported crew recruit.

289. On or about March 26, 2018, KWF issued a letter to GIANNULLI and LOUGHLIN falsely indicating that "no goods or services were exchanged" for the purported donation of $200,000.

290. On or about February 6, 2018, GIANNULLI wired $200,000 to KWF in exchange for Singer facilitating his younger daughter's admission to USC as a purported crew recruit.

291. On or about February 7, 2018, KWF issued a letter to the GIANNULLIS falsely indicating that "no goods or services were exchanged" for the purported donation of $200,000.

ELIZABETH HENRIQUEZ and MANUEL HENRIQUEZ

292. On or about May 4, 2016, the Henriquez Family Trust sent $400,000 to KWF in exchange for Singer facilitating the HENRIQUEZES' older daughter's admission to Georgetown as a purported tennis recruit.

293. On or about May 9, 2016, Singer caused KWF to send a receipt letter to ELIZABETH HENRIQUEZ falsely stating that "no goods or serves were exchanged" for the purported donation.

294. On or about October 24, 2018, Singer called ELIZABETH HENRIQUEZ from Boston, Massachusetts. During the call, Singer told ELIZABETH HENRIQUEZ that the IRS was conducting an audit of KWF and had asked about "the large sums of money" from the HENRIQUEZES. ELIZABETH HENRIQUEZ asked: "So what's your story?" Singer responded: "So my story is, essentially, that you gave your money to our foundation to help underserved kids." ELIZABETH HENRIQUEZ responded: "Of course."

DOUGLAS HODGE

295. On or about April 9, 2013, HODGE wired $50,000 to KWF in exchange for Singer facilitating his daughter's admission to USC as a purported soccer recruit.

296. On or about April 10, 2013, KWF issued a letter to HODGE falsely indicating that "no goods or services were exchanged" for the purported donation.

297. On or about April 1, 2015, HODGE wired $125,000 to KWF and $125,000 to The Key in exchange for Singer facilitating his son's admission to USC as a purported football recruit.

298. On or about April 10, 2015, KWF issued a letter to HODGE falsely representing that "no goods or services were exchanged" for his purported contribution of $125,000.

MICHELLE JANAVS

299. On or about May 12, 2017, a foundation controlled by JANAVS's father wired $400,000 to KWF in exchange for Singer facilitating JANAVS's son's admission to Georgetown as a purported tennis recruit.

300. On or about May 12, 2017, KWF issued a letter to JANAVS falsely indicating that "no goods or services were exchanged" for the purported donation of $400,000.

301. On or about November 30, 2017, JANAVS sent a check for $50,000 from her foundation to KWF in exchange for Singer facilitating cheating for JANAVS's older daughter on the ACT.

302. On or about February 5, 2019, JANAVS mailed KWF a check in the amount of $25,000 for facilitating the ACT cheating scheme for JANAVS's younger daughter.

303. On or about February 12, 2019, JANAVS wired $25,000 to a Boston, Massachusetts account in the name of KWF as further payment for Singer facilitating the ACT cheating scheme for JANAVS's younger daughter.

ELIZABETH KIMMEL

304. On or about April 15, 2013, KIMMEL caused the Meyer Charitable Foundation to issue a check to KWF in the amount of $100,000 in exchange for Singer facilitating her daughter's admission to Georgetown as a purported tennis recruit.

305. Masera thereafter sent a letter to the Meyer Charitable Foundation falsely indicating that "no goods or services were exchanged" for the purported donation.

306. On or about June 27, 2013, and on or about July 16, 2013, KIMMEL caused the Meyer Charitable Foundation to issue additional checks to KWF in the amounts of $170,000 and $5,000, respectively as further payment for the recruitment scheme.

307. On or about February 23, 2018, KIMMEL caused the Meyer Charitable Foundation to issue a check to KWF in the amount of $200,000 in exchange for Singer facilitating her son's admission to USC as a purported track and field recruit.

WILLIAM McGLASHAN, Jr.

308. On or about December 6, 2017, McGLASHAN sent $50,000 to KWF from his personal charitable donation fund in exchange for Singer facilitating the ACT cheating scheme for McGLASHAN's son.

MARCI PALATELLA

309. On or about March 7, 2017, PALATELLA's company wired $75,000 to KWF in exchange for Singer facilitating the SAT cheating scheme for PALATELLA's son.

310. On or about May 1, 2018, PALATELLA's company wired $400,000 to KWF in exchange for Singer facilitating her son's admission to USC as a purported football recruit.

JOHN WILSON

311. On or about March 1, 2014, WILSON asked Singer, in substance, whether he could pay Singer from his corporate account for facilitating WILSON's son's admission to USC as a water polo recruit, so that the payment would be deductible as a purported consulting fee.

312. On or about April 7, 2014, WILSON's company wired $100,000 to KWF, $100,000 to The Key, and $20,000 to Singer personally.

313. On or about July 28, 2014, USC sent WILSON and his spouse a gift receipt for their purported $100,000 charitable contribution to USC Athletics, which was, in fact, a payment in exchange for facilitating their son's admission as a purported athletic recruit.

HOMAYOUN ZADEH

314. On or about April 5, 2017, Masera e-mailed an invoice to ZADEH and his spouse for their purported "pledge" of $100,000, which was in fact a payment for facilitating ZADEH's daughter's admission to USC as a purported lacrosse recruit.

315. Between on or about May 30, 2017 and September 7, 2018, ZADEH made eight payments totaling $55,000 to KWF.

316. On or about December 27, 2017, KWF issued a letter to ZADEH and his spouse falsely attesting that "no goods or services were exchanged" for their donations.

317. On or about March 6, 2019, ZADEH's spouse e-mailed Singer, copying ZADEH, noting that she had sent an additional $5,000 to KWF and requesting a tax receipt for the money ZADEH and his spouse had purportedly contributed to KWF in 2018.

ROBERT ZANGRILLO

318. On or about September 20, 2018, ZANGRILLO wired $200,000 to one of the KWF charitable accounts in exchange for Singer facilitating his daughter's admission to USC as a purported crew recruit.

319. In a call from Boston, Massachusetts on or about October 25, 2018, Singer told ZANGRILLO, in sum and substance, that the IRS was auditing KWF. ZANGRILLO asked: "What was [my daughter's] payment for? Just so I know, so we have the story straight." Singer responded, in substance, that the payments would appear to be "for our programs that handle underserved kids." ZANGRILLO replied: "Okay, great, perfect."

Other Co-Conspirators

320. Singer likewise funneled bribes through KWF and The Key to athletic coaches and university administrators in the District of Massachusetts and elsewhere, on behalf of other co-conspirators known and unknown to the Grand Jury, in order to conceal and disguise the nature, location, source, ownership, and control of bribe and other payments in furtherance of the fraud scheme.

321. Other co-conspirators known and unknown to the Grand Jury also transported, transmitted, and transferred monetary instruments and funds from a place outside the United States to and through KWF and The Key accounts inside the United States in furtherance of the fraud scheme.

COUNT ONE
Conspiracy to Commit Mail and Wire Fraud
and Honest Services Mail and Wire Fraud
(18 U.S.C. § 1349)

The Grand Jury charges:

322. The Grand Jury re-alleges and incorporates by reference paragraphs 1-270 of this Second Superseding Indictment.

323. From in or about 2011 through in or about February 2019, in the District of Massachusetts and elsewhere, the defendants,

(1) DAVID SIDOO,
(2) GREGORY COLBURN,
(3) AMY COLBURN,
(4) GAMAL ABDELAZIZ,
(5) DIANE BLAKE,
(6) TODD BLAKE,
(7) I-HSIN "JOEY" CHEN,
(8) MOSSIMO GIANNULLI,
(9) ELIZABETH HENRIQUEZ,
(10) MANUEL HENRIQUEZ,
(11) DOUGLAS HODGE,
(12) MICHELLE JANAVS,
(13) ELISABETH KIMMEL,
(14) LORI LOUGHLIN,
(15) WILLIAM McGLASHAN, Jr.,
(16) MARCI PALATELLA,
(17) JOHN WILSON,
(18) HOMAYOUN ZADEH, and
(19) ROBERT ZANGRILLO,

conspired with others known and unknown to the Grand Jury to commit the following offenses:

a. mail fraud and honest services mail fraud, that is, having devised and intending to devise a scheme and artifice to defraud and to obtain money and property, to wit, ACT and SAT tests and test scores, and admission to the Universities, by means of materially false and fraudulent pretenses, representations, and promises, and to defraud and deprive, variously, ACT, Inc., the College Board, and the Universities of their right to

the honest and faithful services of their test administrators, athletic coaches and university administrators, through bribes and kickbacks, did, for the purpose of executing and attempting to execute the scheme, deposit and cause to be deposited any matter and thing whatever to be sent and delivered by any private and commercial interstate carrier, in violation of Title 18, United States Code, Sections 1341 and 1346;

b. wire fraud and honest services wire fraud, that is, having devised and intending to devise a scheme and artifice to defraud and to obtain money and property to wit, ACT and SAT tests and test scores, and admission to the Universities, by means of materially false and fraudulent pretenses, representations, and promises, and to defraud and deprive, variously, ACT, Inc., the College Board, and the Universities, of their right to the honest and faithful services of their test administrators, athletic coaches and university administrators, through bribes and kickbacks, did transmit and cause to be transmitted, by means of wire communications in interstate and foreign commerce, writings, signs, signals, pictures, and sounds, for the purpose of executing the scheme to defraud, in violation of Title 18, United States Code, Sections 1343 and 1346.

All in violation of Title 18, United States Code, Section 1349.

COUNT TWO
Money Laundering Conspiracy
(18 U.S.C. § 1956(h))

The Grand Jury further charges:

324. The Grand Jury re-alleges and incorporates by reference paragraphs 1-321 of this Second Superseding Indictment.

325. From in or about 2011 through in or about February 2019, in the District of Massachusetts and elsewhere, the defendants,

(1) DAVID SIDOO,
(2) GREGORY COLBURN,
(3) AMY COLBURN,
(4) GAMAL ABDELAZIZ,
(5) DIANE BLAKE,
(6) TODD BLAKE,
(7) I-HSIN "JOEY" CHEN,
(8) MOSSIMO GIANNULLI,
(9) ELIZABETH HENRIQUEZ,
(10) MANUEL HENRIQUEZ,
(11) DOUGLAS HODGE,
(12) MICHELLE JANAVS,
(13) ELISABETH KIMMEL,
(14) LORI LOUGHLIN,
(15) WILLIAM McGLASHAN, Jr.,
(16) MARCI PALATELLA,
(17) JOHN WILSON,
(18) HOMAYOUN ZADEH, and
(19) ROBERT ZANGRILLO,

conspired with others known and unknown to the Grand Jury to commit the following offenses:

a. to conduct and attempt to conduct financial transactions, to wit, bribe payments and other payments funneled through a purported charitable organization and a for-profit corporation, knowing that that the property involved in such transactions represented the proceeds of some form of unlawful activity and which, in fact, involved the proceeds of specified unlawful activity, that is, mail and wire fraud and honest services

mail and wire fraud, in violation of Title 18, United States Code, Sections 1341, 1343 and 1346, and knowing that the transactions were designed, in whole and in part, to conceal and disguise the nature, location, source, ownership and control of the proceeds of specified unlawful activity, in violation of Title 18, United States Code, Section 1956(a)(1)(B)(i);

b. to transport, transmit, and transfer, and attempt to transport, transmit, and transfer, monetary instruments and funds, to wit, bribes and other payments, to a place in the United States from and through a place outside the United States, with the intent to promote the carrying on of specified unlawful activity, that is, mail and wire fraud and honest services mail and wire fraud, in violation of Title 18, United States Code, Sections 1341, 1343 and 1346, in violation of Title 18, United States Code, Section 1956(a)(2)(A).

All in violation of Title 18, United States Code, Section 1956(h).

FORFEITURE ALLEGATION
(18 U.S.C. § 981(a)(1)(C) and 28 U.S.C. § 2461(c))

The Grand Jury further finds:

326. Upon conviction of the offense in violation of Title 18, United States Code, Section 1349, set forth in Count One of this Second Superseding Indictment, the defendants,

(1) DAVID SIDOO,
(2) GREGORY COLBURN,
(3) AMY COLBURN,
(4) GAMAL ABDELAZIZ,
(5) DIANE BLAKE,
(6) TODD BLAKE,
(7) I-HSIN "JOEY" CHEN,
(8) MOSSIMO GIANNULLI,
(9) ELIZABETH HENRIQUEZ,
(10) MANUEL HENRIQUEZ,
(11) DOUGLAS HODGE,
(12) MICHELLE JANAVS,
(13) ELISABETH KIMMEL,
(14) LORI LOUGHLIN,
(15) WILLIAM McGLASHAN, Jr.,
(16) MARCI PALATELLA,
(17) JOHN WILSON,
(18) HOMAYOUN ZADEH, and
(19) ROBERT ZANGRILLO,

shall forfeit to the United States, pursuant to Title 18, United States Code, Section 981(a)(1)(C), and Title 28, United States Code, Section 2461(c), any property, real or personal, which constitutes or is derived from proceeds traceable to the offense.

327. If any of the property described in Paragraph 326, above, as being forfeitable pursuant to Title 18, United States Code, Section 981(a)(1)(C), and Title 28, United States Code, Section 2461(c), as a result of any act or omission of the defendants --

a. cannot be located upon the exercise of due diligence;

b. has been transferred or sold to, or deposited with, a third party;

c. has been placed beyond the jurisdiction of the Court;

d. has been substantially diminished in value; or

e. has been commingled with other property which cannot be divided without difficulty;

it is the intention of the United States, pursuant to Title 28, United States Code, Section 2461(c), incorporating Title 21, United States Code, Section 853(p), to seek forfeiture of any other property of the defendants up to the value of the property described in Paragraph 326 above.

All pursuant to Title 18, United States Code, Section 981(a)(1)(C), and Title 28, United States Code, Section 2461(c).

MONEY LAUDERING FORFEITURE ALLEGATION
(18 U.S.C. § 982(a)(1))

The Grand Jury further finds:

328. Upon conviction of the offense in violation of Title 18, United States Code, Section 1956(h), set forth in Count Two of this Second Superseding Indictment, the defendants,

(1) DAVID SIDOO,
(2) GREGORY COLBURN,
(3) AMY COLBURN,
(4) GAMAL ABDELAZIZ,
(5) DIANE BLAKE,
(6) TODD BLAKE,
(7) I-HSIN "JOEY" CHEN,
(8) MOSSIMO GIANNULLI,
(9) ELIZABETH HENRIQUEZ,
(10) MANUEL HENRIQUEZ,
(11) DOUGLAS HODGE,
(12) MICHELLE JANAVS,
(13) ELISABETH KIMMEL,
(14) LORI LOUGHLIN,
(15) WILLIAM McGLASHAN, Jr.,
(16) MARCI PALATELLA,
(17) JOHN WILSON,
(18) HOMAYOUN ZADEH, and
(19) ROBERT ZANGRILLO,

shall forfeit to the United States, pursuant to Title 18, United States Code, Section 982(a)(1), any property, real or personal, involved in such offense, and any property traceable to such property.

329. If any of the property described in Paragraph 328, above, as being forfeitable pursuant to Title 18, United States Code, Section 982(a)(1), as a result of any act or omission of the defendants --

a. cannot be located upon the exercise of due diligence;

b. has been transferred or sold to, or deposited with, a third party;

c. has been placed beyond the jurisdiction of the Court;

d. has been substantially diminished in value; or

e. has been commingled with other property which cannot be divided without difficulty;

it is the intention of the United States, pursuant to Title 18, United States Code, Section 982(b), incorporating Title 21, United States Code, Section 853(p), to seek forfeiture of any other property of the defendants up to the value of the property described in Paragraph 328 above.

All pursuant to Title 18, United States Code, Section 982(a)(1).

A TRUE BILL,

FOREPERSON

ERIC S. ROSEN
JUSTIN D. O'CONNELL
KRISTEN A. KEARNEY
LESLIE A. WRIGHT
Assistant United States Attorneys
District of Massachusetts

District of Massachusetts: APRIL 9, 2019
Returned into the District Court by the Grand Jurors and filed.

DEPUTY CLERK

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA	)	Criminal No.: 19-10080-NMG
	)	
v.	)	Violations:
	)	
(1) DAVID SIDOO,	)	Count One: Conspiracy to Commit Mail and Wire Fraud and Honest Services Mail and Wire Fraud (18 U.S.C. § 1349)
(2) GREGORY COLBURN,	)	
(3) AMY COLBURN,	)	
(4) GAMAL ABDELAZIZ,	)	
(5) DIANE BLAKE,	)	
(6) TODD BLAKE,	)	Count Two: Money Laundering Conspiracy (18 U.S.C. § 1956(h))
(7) I-HSIN "JOEY" CHEN,	)	
(8) MOSSIMO GIANNULLI,	)	
(9) ELIZABETH HENRIQUEZ,	)	Forfeiture Allegations: (18 U.S.C. § 981(a)(1)(C) and 28 U.S.C. § 2461)
(10) MANUEL HENRIQUEZ,	)	
(11) DOUGLAS HODGE,	)	
(12) MICHELLE JANAVS,	)	
(13) ELISABETH KIMMEL,	)	Money Laundering Forfeiture Allegations: (18 U.S.C. § 982(a)(1))
(14) LORI LOUGHLIN,	)	
(15) WILLIAM McGLASHAN, Jr.,	)	
(16) MARCI PALATELLA,	)	
(17) JOHN WILSON,	)	
(18) HOMAYOUN ZADEH, and	)	
(19) ROBERT ZANGRILLO,	)	
	)	
Defendants		

RECORD OF THE NUMBER OF GRAND JURORS CONCURRING IN A SECOND SUPERSEDING INDICTMENT

As the foreperson of the grand jury of this court at a session held at _____ on _____, I certify that *(specify number)*_____ grand jurors concurred in the second superseding indictment in this case. Under Fed. R. Crim. P. 6(c), this record is being filed with the court and will *not* be made public unless the court orders otherwise.

Date: April 9, 2019

_____
Foreperson

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA	*	
	*	
v.	*	Criminal No. 19-cr-10117-IT
	*	
GREGORY ABBOTT, et al.	*	
	*	
Defendants.	*	

MEMORANDUM AND ORDER

September 13, 2019

TALWANI, D.J.

This Memorandum addresses the advisory United States Sentencing Guidelines (the "Guidelines") that may be applicable in sentencing Defendants in this matter.

I. Background

At sentencing, the court is required to consider and take into account the sentencing range for the offense committed, as set by the United States Sentencing Commission. United States v. Booker, 543 U.S. 220, 264 (2005); see also 18 U.S.C. § 3553(a)(4)(A) (in sentencing, the court must consider "the applicable category of offense committed . . . as set forth in the guidelines"). "The Guidelines are not the only consideration, however," and are effectively advisory. Booker, 543 U.S. at 246. Accordingly, after determining the applicable Guideline, and "after giving both parties an opportunity to argue for whatever sentence they deem appropriate, the district judge should then consider all of the [18 U.S.C.] § 3553(a) factors to determine whether they support the sentence requested by a party." Gall v. United States, 552 U.S. 38, 49 (2007). In so doing, the court "may not presume that the Guidelines range is reasonable," and "must make an

individualized assessment based on the facts presented." Id. at 50 (citing Rita v. United States, 551 U.S. 338, 351 (2007)).

The starting point, however, is a correct Guidelines calculation. "[A] district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range." Id. at 49 (citing Rita, 551 U.S. at 347-48). "As a matter of administration and to secure nationwide consistency, the Guidelines should be the starting point and the initial benchmark." Id.

In this case, the court's Probation Office, in connection with preparing Presentence Reports (see Fed. R. Crim. P. 32(d)), calculated the applicable base guideline offense level for the offense charged as a level 7. The Probation Office further determined that there were no specific offense characteristics under the applicable guidelines to increase or decrease the base level. After the United States Attorney notified the court that "there is significant disagreement between the parties and Probation on the applicable offense level," see Letter [#411], the court held a hearing to consider the applicable offense level under the Guidelines. The court has also reviewed the government's Memorandum Regarding Methodology for Calculating Gain or Loss Under the Sentencing Guidelines [#420], [#422], the Response [#429] filed by Defendant Marjorie Klapper, the Response [#432], [#435] filed by Defendant Semprevivo, and the Probation Office's Responsive Submission [#440] to the government's objection 1, excerpted from the most recent PSR.

II. The Applicable Guideline

The Guidelines direct the court to first "[d]etermine, pursuant to § 1B1.2 (Applicable Guidelines), the offense guideline section from Chapter Two (Offense Conduct) applicable to the offense of conviction" and then "[d]etermine the base offense level and apply any appropriate specific offense characteristics, cross references, and special instructions contained in the

particular guideline in Chapter Two in the order listed." United States Sentencing Commission, Guidelines Manual § 1B1.1(a)(1), (2) (2018) (USSG).

To determine the applicable guideline section, the court uses the offense of conviction—that is, the offense conduct charged in the count of the indictment or information of which the defendant was convicted—unless the plea agreement stipulates to a more serious offense. USSG § 1B1.1(a). Here, in their plea agreements, the Defendants stipulate only to the offense charged in the Information [#312], violation of 18 U.S.C. § 1349, conspiracy to commit mail fraud and honest services mail fraud in violation of 18 U.S.C. §§ 1341 and 1346. The Defendants do not stipulate to a different offense. Information [#312]. The Guidelines direct the court to use the Statutory Index to determine the Chapter Two offense guideline, but if the offense involved a conspiracy, to refer to USSG § 2X1.1 (Attempt, Solicitation, or Conspiracy) as well as the guideline referenced in the Statutory Index for the substantive offense. USSG § 1B1.2(a). USSG § 2X1.1(a) directs the court to use the base offense level from the guideline for the substantive offense, plus any adjustments from such guideline for any intended offense conduct that can be established with reasonable certainty. The substantive offense of mail fraud under 18 U.S.C. § 1341—which penalizes a "scheme or artifice" to defraud using the mail—is listed with a reference to USSG §§ 2B1.1 and 2C1.1. USSG Appendix A. The substantive offense at 18 U.S.C. § 1346 provides that the term "scheme or artifice to defraud" includes a scheme or artifice to deprive another of the intangible right of honest services, and has no separate reference.

The Commentary to USSG § 2C1.1 states that the provision should be used for violations of 18 U.S.C. § 1341 "if the scheme or artifice to defraud was to deprive another of the intangible

right of honest services of a public official." Here, no public official was involved, and accordingly, this section is not applicable.

The remaining Guideline, USSG § 2B1.1, is thus the applicable guideline.[1] Under USSG § 2B1.1(a), the base offense level for an offense that has a statutory maximum term of imprisonment of 20 years or more is level 7.

The next step is to determine if a specific offense characteristic applies. The government argues that the court should increase each Defendant's offense level based on the loss table set forth at USSG § 2B.1.1(b)(1). Application Note 3 explains that the loss is the greater of actual loss—that is, the "reasonably foreseeable pecuniary harm that resulted from the offense"—or the intended loss—which is the "pecuniary harm that the defendant purposefully sought to inflict." App. Note 3(A)(i), (ii). "Pecuniary harm" in turn means "harm that is monetary or that otherwise

[1] Although the government has agreed in the plea agreements here that USSG § 2B1.1(a) applies, the government still contends that "the First Circuit and at least four other circuits have in similar circumstances applied USSG Section § 2B4.1." See Government Mem. 14 and n. 25 [#422] (citing United States v. Poirer, 321 F.3d 1024, 1035 (11th Cir. 2003); United States v. Rybicki, 38 F. App'x 626, 633 (2d Cir. 2002); United States v. Montani, 204 F.3d 761 (7th Cir. 2000); United States v. Josleyn, 99 F.3d 1183, 1198 (1st Cir. 1996); United States v. Winters, 62 F.3d 1418, 1995 WL 462415 (6th Cir. Aug. 3, 1995) (unpublished); United States v. Kelly, No. 17-cr-547001-RWS, 2018 WL 2411593, at *4 (S.D.N.Y. May 29, 2018) (unpublished); United States v. Hendershot, 150 F.Supp. 2d 965, 968 (N.D. Ill. 2001). The court is required, however, to use the version of the guidelines in effect at the time of sentencing. USSG § 1B1.11(a). Accordingly, the version the court must apply is the 2018 version. Appendix A in the current Guidelines does *not* list USSG § 2B4.1 as an offense guideline for 18 U.S.C. § 1341. All but one of the cases cited by the government are analyzing earlier versions of the Guidelines and not the language presently at issue. Material changes since the earliest of these cases include: (1) the November 2000 Amendment to the Sentencing Guideline, which amended USSG § 1B1.2, a clarification "intended to emphasize that the sentencing court must apply the offense guideline referenced in the Statutory Index for the statute of conviction" unless a limited exception applies; (2) the November 2001 Amendment which replaced a former § 2B1.1 with entirely new language and a different listing for 18 U.S.C. § 1341 in the Appendix; and (3) the November 2004 Amendment which amended USSG § 2C1.1, and again gave a different listing for 18 U.S.C. § 1341 in the Appendix. The single district court case that post-dates these amendments, Kelly, 2018 WL 2411593, at *4, simply asserts that USSG § 2B4.1 applies, without a word of analysis and is of no persuasive value.

is readily measurable in money," and accordingly, "does not include emotional distress, harm to reputation, or other non-economic harm." App. Note 3(A)(iii). Excluded from any such loss are costs incurred by victims primarily to aid the government in the prosecution and criminal investigation of an offense. App. Note 3(D)(ii). The court "need only make a reasonable estimate of the loss." App. Note 3(C).

Here, the government argues that the universities and testing companies incurred pecuniary harm caused by harm to their reputations, investigations they undertook separate from the government's investigation, and the loss of the value of the honest services of their agents or employees. The first two categories may well be harm these institutions suffered, but do not amount to harm that is "reasonably foreseeable" and "readily measurable in money" and are thus excluded under the Application Notes. The loss of the value of the honest services of agents or employees is a more concrete harm, but even there, the court is hard-pressed to evaluate the value of those portions of the universities or testing companies' employees or agents whose services were compromised by each Defendant.

The government acknowledges that any loss incurred by the universities and testing companies cannot be determined. It points to Application Note 3(B) providing that the court "shall use the gain that resulted from the offense as an alternative measure of loss only if there is a loss but it reasonably cannot be determined." But even assuming that there is a pecuniary loss that reasonably cannot be determined, the record does not support the government's argument that the amounts paid by the Defendants are "gains" under the Guidelines. Certainly, the Defendants before the court did not "gain" these amounts, but instead paid them to a co-conspirator. Nor did the conspiracy as a whole gain these moneys. Instead, the amounts were passed between the co-conspirators, and cannot stand in as an alternative measure for any loss

incurred by the universities or testing companies. The cases cited by the government do not suggest otherwise. See United States v. Offill, 666 F.3d 168, 173 (4th Cir. 2011) (measuring loss by using the millions of dollars the conspirators gained by selling shares of stock to the public); see also United States v. Gordon, 710 F.3d 1124 (10th Cir. 2013) (same).

III. Conclusion

In sum, the court finds no specific characteristics under the Guidelines to increase the applicable base offense level of 7. The court's determination of the applicable Guidelines, however, does not end the inquiry. The final sentence will be determined with consideration of all of the factors set forth at 18 U.S.C. § 3553(a).

IT IS SO ORDERED.

September 13, 2019

/s/ Indira Talwani
United States District Judge

latimes.com

Battle in college admissions scandal: Should parents who paid the biggest bribes get the biggest punishment?

By Joel RubinStaff Writer

9-11 minutes

As a judge in Boston prepares to sentence parents in the college admissions cheating scandal, prosecutors, defense lawyers and others are battling over unresolved questions: Is prison the right punishment? And, if so, should the amount of money a parent paid in the scam determine their time behind bars?

So far, 15 of the nearly three dozen parents charged with conspiring to commit fraud with the scam's leader, college admission consultant William "Rick" Singer, have pleaded guilty. The first two in the group were slated to be sentenced this week, but U.S. District Judge Indira Talwani hit pause in the proceedings to resolve a stark disagreement over how she should calculate the parents' culpability.

The dispute revolves around whether Singer caused the universities and testing companies he exploited any financial loss. Under federal sentencing guidelines, prison terms for fraud are typically pegged to a victim's financial loss. If the loss cannot be tallied, the amount a perpetrator gained can be used instead. Singer has pleaded guilty to four felonies, acknowledging that he

rigged SAT and ACT exams for his clients and misrepresented their children as recruits for sports they didn't play.

At a hearing Tuesday, Talwani pressed the lead prosecutor in the case, Assistant U.S. Atty. Eric Rosen, to explain his reasoning for why she should use the amount of money a parent paid into Singer's operation to determine where the parent falls in the range of prison sentences established by the guidelines.

Rosen reiterated a basic premise of the government's case against Singer, his alleged accomplices and parents: The universities and companies that administer college entrance exams are victims in the case and have taken a considerable financial hit because of Singer's scheme. Rosen argued that because it is "impossible" to calculate the loss that any particular parent caused a school or testing agency, Talwani needed to rely on how much the parents paid.

As part of their guilty pleas, parents agreed to the government using their payments as the basis for calculating prison sentences under the guidelines, Rosen said.

For example, actress Felicity Huffman, who is scheduled to be sentenced Friday, admitted to paying Singer $15,000 to rig her daughter's exam score. Based on that amount, prosecutors asked Talwani to send Huffman to prison for one month — a penalty at the low end of the zero-to-six-month range called for by sentencing guidelines.

But for Stephen Semprevivo, a father who confessed to paying Singer $400,000 to sneak his son in to Georgetown, the government used the larger dollar figure to boost his sentencing range under the guidelines to 21 to 27 months. Prosecutors

ultimately decided to show the business executive leniency by asking Talwani to go below the guideline's range and put him behind bars for 15 months.

That, however, is not how probation officials think the parents' punishment should be decided.

The federal probation office, which typically recommends sentences to judges, concluded that the universities and test companies suffered no financial loss, according to a memo Rosen filed in court last week. As a result, Rosen wrote, probation officials have recommended to Talwani that all the parentsbe given a range of prison sentences of zero to six months, regardless of how much they paid.

Probation reports are filed under seal and Talwani did not ask the probation officer in the case to speak Tuesday. A spokeswoman for the U.S. attorney's office in Boston declined to comment. Calls to the probation office were not returned.

Attorneys for each of the parents filled the jury box and other seats in Talwani's courtroom, but none opted to address the judge when she offered them the chance.

Talwani had been scheduled to sentence Semprevivo and another father this week, but put off those decisions to hold Tuesday's hearing. The judge did not say when she would announce her decision on the sentencing issue or whether it would come before Huffman's sentencing on Friday.

How she rules will reverberate throughout the case, which prosecutors have said is the largest ever criminal probe into college admissions.

Although federal judges can issue sentences above or below a guideline range, if Talwani sides with the probation office it is likely Semprevivo and others in similar scenarios will be given significantly lighter sentences than what prosecutors are seeking.

The fight has implications for the 19 parents charged with paying Singer who have maintained their innocence. The judges handling those cases are likely to be influenced by how Talwani rules, since judges in the same federal district typically try to avoid issuing contradictory rulings.

With that in mind, a parent who was contemplating a guilty plea may decide instead to risk a trial if Talwani sides with the probation office, since they'll have a better chance of avoiding a harsh sentence if they're convicted.

Prosecutors lost an earlier round in the legal tussle over whether Singer's scheme caused actual financial loss to colleges. In June, John Vandemoer, the former sailing coach at Stanford, avoided prison time despite pleading guilty to taking hundreds of thousands of dollars in bribes in exchange for designating Singer's clients as competitive sailors to boost their chances of winning admission.

Because Vandemoer had put the money into university athletic accounts instead of pocketing it personally, the judge in his case found the school had not been harmed financially and rebuffed prosecutors' request for a 13-month sentence.

The legal fight over sentencing rules is playing out amid the government's broader push to persuade Talwani that prison time, instead of probation or home detention, is the appropriate punishment for parents in the case.

In memos filed Friday, Rosen asked the judge for each of the

parents to spend one month to 15 months in prison. Even a short time locked up, he argued, was important in light of the crimes they've admitted to committing.

"Some period of incarceration is the only meaningful sanction for these crimes. … For wrongdoing that is predicated on wealth and rationalized by a sense of privilege, incarceration is the only leveler: in prison everyone is treated the same, dressed the same, and intermingled regardless of affluence, position or fame," Rosen wrote. "No other form of sanction makes plain that all Americans are equally obligated to play by the rules and must be equally accountable for breaking them."

Home confinement, he wrote, would be "a penological joke," while probation with community service "is too lenient and too easily co-opted for its "PR" value."

Attorneys for the parents, meanwhile, are certain to ask Talwani to spare their clients from time behind bars. Huffman's attorney did just that in a filing Friday, arguing the actress was "deeply remorseful" for paying Singer.

Rosen pushed back against the probation office's finding, arguing to Talwani that the universities and testing agencies have in fact been hurt financially. The schools, he wrote, paid salaries to coaches and others who were allegedly working with Singer to get undeserving students coveted admission spots, paid for costly internal investigations and audits in light of the scam, and will lose money from application fees if fewer students apply to attend because of the scandal.

James Felman, an attorney not involved in the admissions case who has testified repeatedly before the U.S. Sentencing

Commission about the guidelines for financial crimes, said he believed the government would be hard pressed to convince Talwani those types of losses should be placed at the feet of the parents. The expected dip in applications, for example, is more the fault of the coach who took the bribe from Singer, not the parent who paid Singer, he said.

“They are very smart folks in Boston, but I don’t buy any of these arguments,” he said.

In general, the concept of using a victim’s loss to benchmark culpability is imperfect since people who commit fraud can have different levels and types of intent, Felman and others said. As an example, Felman said a person who deliberately preys on a victim to bilk them out of their money and another who lies on a loan application and can’t repay the money should not be viewed equally.

“It can be really oversold that we can just add up the loss and use it to punish people,” he said. “Here, it strikes me as a particularly bad fit.”

In his memo, however, Rosen argued that using financial loss as a measuring stick in fraud and bribery cases is an accepted practice and cited other federal cases with parallels to this one to bolster his point. He zeroed in on what he said would be the inherent unfairness of putting all the parents on an equal plane.

The “conclusion that the bribe amount has no impact on the calculation of the Guidelines means that a defendant who pays a $10 million bribe will have the same offense level as a defendant who pays a $10,000 bribe, and that a defendant who commits a fraud that causes pecuniary harm of $6,501 will have a higher

offense level than a defendant who pays a $65 million bribe. The government respectfully submits that such an approach is neither logical nor just.”

125 S.Ct. 738
Supreme Court of the United States

UNITED STATES, Petitioner,
v.
Freddie J. BOOKER.
United States, Petitioner,
v.
Ducan Fanfan.

Nos. 04–104, 04–105.
|
Argued Oct. 4, 2004.
|
Decided Jan. 12, 2005. *

Synopsis
Background: First defendant was convicted in the United States District Court for the Western District of Wisconsin, John C. Shabaz, J., for possession with intent to distribute at least 50 grams of cocaine base. The United States Court of Appeals for the Seventh Circuit, 375 F.3d 508, reversed and remanded for resentencing. Certiorari was granted. Second defendant was convicted by jury of conspiracy to distribute and to possess with intent to distribute at least 500 grams of cocaine, and the United States District Court for the District of Maine, Hornby, J., 2004 WL 1723114, imposed sentence. The Supreme Court granted certiorari before judgment to the United States Court of Appeals for the First Circuit.

Holdings: The Supreme Court, Justice Stevens, delivering the opinion of the court in part, held that:

[1] federal sentencing guidelines are subject to jury trial requirements of the Sixth Amendment; and

[2] in an opinion by Justice Breyer, delivering the opinion of the court in part, held further that Sixth Amendment requirement that jury find certain sentencing facts was incompatible with Federal Sentencing Act, thus requiring severance of Act's provisions making guidelines mandatory and setting forth standard of review on appeal;

[3] proper standard of appellate review for sentencing decisions was review for unreasonableness; and

[4] holdings as to Sixth Amendment applicability and remedial interpretation of the Sentencing Act were applicable to all cases on direct review.

Judgment of the Court of Appeals affirmed and remanded; judgment of the District Court vacated and remanded.

Justice Stevens dissented in part and filed opinion in which Justice Souter joined and Justice Scalia joined in part.

Justice Scalia dissented in part and filed opinion.

Justice Thomas dissented in part and filed opinion.

Justice Breyer dissented in part and filed opinion in which Chief Justice Rehnquist, Justice O'Connor, and Justice Kennedy joined.

West Headnotes (15)

[1] Criminal Law
Reasonable Doubt

The Constitution protects every criminal defendant against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.

32 Cases that cite this headnote

[2] Jury
Sentencing Matters

The Constitution gives a criminal defendant the right to demand that a jury find him guilty of all the elements of the crime with which he is charged. U.S.C.A. Const.Amend. 6.

27 Cases that cite this headnote

[3] Jury
Sentencing Matters

Sentencing and Punishment
Factors enhancing sentence

If a State makes an increase in a defendant's authorized punishment contingent on the finding

of a fact, that fact, no matter how the State labels it, must be found by a jury beyond a reasonable doubt. U.S.C.A. Const.Amend. 6.

273 Cases that cite this headnote

[4] Jury
Sentencing Matters

Sentencing and Punishment
Operation and effect of guidelines in general

Federal sentencing guidelines, which have force and effect of laws, are subject to jury trial requirements of the Sixth Amendment, notwithstanding availability of sentencing departures, which, although available in specified circumstances, are unavailable in most cases. U.S.C.A. Const.Amend. 6; 18 U.S.C.A. § 3553(b); U.S.S.G. § 1B1.1 et seq., 18 U.S.C.A.

1204 Cases that cite this headnote

[5] Jury
Sentencing Matters

When a trial judge exercises his discretion to select a specific sentence within a defined range, the defendant has no right to a jury determination of the facts that the judge deems relevant.

760 Cases that cite this headnote

[6] Jury
Sentencing Matters

Fact that federal sentencing guidelines were promulgated by Sentencing Commission, rather than Congress, did not negate applicability of Sixth Amendment's jury trial guarantee to the guidelines. U.S.C.A. Const.Amend. 6; U.S.S.G. § 1B1.1 et seq., 18 U.S.C.A.

960 Cases that cite this headnote

[7] Constitutional Law
Sentencing and punishment

Sentencing and Punishment
Validity

Sentencing Commission's authority to identify facts relevant to sentencing decisions and to determine impact of such facts on federal sentences is the same whether such facts are labeled as "sentencing factors" or "elements" of crimes, so requiring certain sentencing factors to be proved to a jury beyond a reasonable doubt would not amount to unconstitutional grant to Commission of inherently legislative power to define criminal elements, in violation of separation of powers doctrine. U.S.C.A. Const.Amend. 6.

2036 Cases that cite this headnote

[8] Jury
Sentencing Matters

Sentencing and Punishment
Factors enhancing sentence

Any fact, other than a prior conviction, which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt. U.S.C.A. Const.Amend. 6.

3320 Cases that cite this headnote

[9] Sentencing and Punishment
Validity

Sixth Amendment requirement that any fact, other than a prior conviction, which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt was incompatible with Federal Sentencing Act, which called for promulgation of federal sentencing guidelines and made such guidelines mandatory, so Act could not remain valid in its entirety, and provisions of Act that made guidelines mandatory and set forth standard of review on appeal would be severed and excised. U.S.C.A. Const.Amend. 6; 18 U.S.C.A. §§ 3553(b)(1), 3742(e); U.S.S.G. § 1B1.1 et seq., 18 U.S.C.A.

15011 Cases that cite this headnote

[10] Sentencing and Punishment

Purpose

Congress's basic goal in passing the Federal Sentencing Act was to move the sentencing system in the direction of increased uniformity, a uniformity that does not consist simply of similar sentences for those convicted of violations of the same statute, but consists of similar relationships between sentences and real conduct. 28 U.S.C.A. §§ 991(b)(1)(B), 994(f).

338 Cases that cite this headnote

[11] Statutes

Effect of Partial Invalidity; Severability

Supreme Court must refrain from invalidating more of statute than is necessary and retain those portions of the statute that are constitutionally valid, capable of functioning independently, and consistent with Congress's basic objectives in enacting the statute.

50 Cases that cite this headnote

[12] Criminal Law

Constitutional and statutory provisions

A statute that does not explicitly set forth a standard of review may nonetheless do so implicitly.

3 Cases that cite this headnote

[13] Criminal Law

Constitutional and statutory provisions

Where statute does not explicitly set forth a standard of review, court infers appropriate review standards from related statutory language, the structure of the statute, and the sound administration of justice.

30 Cases that cite this headnote

[14] Criminal Law

Sentencing

Following excision from Federal Sentencing Act of provision setting forth standards of review on appeal, proper standard of appellate review for sentencing decisions was review for unreasonableness. 18 U.S.C.A. § 3742.

664 Cases that cite this headnote

[15] Courts

In general; retroactive or prospective operation

Supreme Court's holdings that federal sentencing guidelines were subject to Sixth Amendment jury trial requirement, and that Federal Sentencing Act would be severed to excise those portions of Act making application of guidelines mandatory, would apply to all cases on direct review, although not every sentence would necessarily give rise to a Sixth Amendment violation, nor would every appeal necessarily lead to a new sentencing hearing, in light of ordinary prudential doctrines. U.S.C.A. Const.Amend. 6; 18 U.S.C.A. §§ 3553(b)(1), 3742(e); U.S.S.G. § 1B1.1 et seq., 18 U.S.C.A.

14749 Cases that cite this headnote

West Codenotes

Held Unconstitutional

18 U.S.C.A. §§ 3553(b) (1), 3742(e)

Limited on Constitutional Grounds

U.S.S.G §§ 1B1.1, 1B1.2, 1B1.3, 1B1.4, 1B1.5, 1B1.6, 1B1.7, 1B1.8, 1B1.9, 1B1.10, 1B1.11, 1B1.12, 2A1.1, 2A1.2, 2A1.3, 2A1.4, 2A1.5, 2A2.1, 2A2.2, 2A2.3, 2A2.4, 2A3.1, 2A3.2, 2A3.3, 2A3.4, 2A4.1, 2A4.2, 2A5.1, 2A5.2, 2A5.3, 2A6.1, 2A6.2, 2B1.1, 2B1.4, 2B1.5, 2B2.1, 2B2.3, 2B3.1, 2B3.2, 2B3.3, 2B4.1, 2B5.1, 2B5.3, 2B6.1, 2C1.1, 2C1.2, 2C1.3, 2C1.5, 2C1.6, 2C1.7, 2C1.8, 2D1.1, 2D1.2, 2D1.5, 2D1.6, 2D1.7, 2D1.8, 2D1.9, 2D1.10, 2D1.11, 2D1.12, 2D1.13, 2D2.1, 2D2.2, 2D2.3, 2D3.1, 2D3.2, 2E1.1, 2E1.2, 2E1.3, 2E1.4, 2E2.1, 2E3.1, 2E4.1, 2E5.1, 2E5.3, 2G1.1, 2G2.1, 2G2.2, 2G2.3, 2G2.4, 2G2.5, 2G3.1, 2G3.2, 2H1.1, 2H2.1, 2H3.1, 2H3.2, 2H3.3, 2H4.1, 2H4.2, 2J1.1, 2J1.2, 2J1.3, 2J1.4, 2J1.5, 2J1.6, 2J1.7, 2J1.9, 2K1.1, 2K1.3, 2K1.4, 2K1.5, 2K1.6, 2K2.1, 2K2.4, 2K2.5, 2K3.2, 2L1.1, 2L1.2, 2L2.1, 2L2.2, 2L2.5, 2M1.1, 2M2.1, 2M2.3, 2M3.1, 2M3.2, 2M3.3, 2M3.4, 2M3.5, 2M3.9, 2M4.1, 2M5.1, 2M5.2, 2M5.3, 2M6.1, 2M6.2, 2N1.1, 2N1.2, 2N1.3, 2N2.1, 2N3.1, 2P1.1,

2P1.2, 2P1.3, 2Q1.1, 2Q1.2, 2Q1.3, 2Q1.4, 2Q1.6, 2Q2.1, 2R1.1, 2S1.1, 2S1.3, 2T1.1, 2T1.4, 2T1.6, 2T1.7, 2T1.8, 2T1.9, 2T2.1, 2T2.2, 2T3.1, 2T4.1, 2X1.1, 2X2.1, 2X3.1, 2X4.1, 2X5.1, 3A1.1, 3A1.2, 3A1.3, 3A1.4, 3B1.1, 3B1.2, 3B1.3, 3B1.4, 3B1.5, 3C1.1, 3C1.2, 3D1.1, 3D1.2, 3D1.3, 3D1.4, 3D1.5, 3E1.1, 4A1.1, 4A1.2, 4A1.3, 4B1.1, 4B1.2, 4B1.3, 4B1.4, 4B1.5, 5B1.1, 5B1.2, 5B1.3, 5C1.1, 5C1.2, 5D1.1, 5D1.2, 5D1.3, 5E1.1, 5E1.2, 5E1.3, 5E1.4, 5E1.5, 5F1.1, 5F1.2, 5F1.3, 5F1.4, 5F1.5, 5F1.6, 5F1.7, 5G1.1, 5G1.2, 5G1.3, 5H1.1, 5H1.2, 5H1.3, 5H1.4, 5H1.5, 5H1.6, 5H1.7, 5H1.8, 5H1.9, 5H1.10, 5H1.11, 5H1.12, 5J1.1, 5K1.1, 5K1.2, 5K2.0, 5K2.1, 5K2.2, 5K2.3, 5K2.4, 5K2.5, 5K2.6, 5K2.7, 5K2.8, 5K2.9, 5K2.10, 5K2.11, 5K2.12, 5K2.13, 5K2.14, 5K2.16, 5K2.17, 5K2.18, 5K2.19, 5K2.20, 5K2.21, 5K2.22, 5K2.23, 5K3.1, 6A1.1, 6A1.2, 6A1.3, 6B1.1, 6B1.2, 6B1.3, 6B1.4, 7B1.1, 7B1.2, 7B1.3, 7B1.4, 7B1.5, 8A1.1, 8A1.2, 8B1.1, 8B1.2, 8B1.3, 8B1.4, 8C1.1, 8C2.1, 8C2.2, 8C2.3, 8C2.4, 8C2.5, 8C2.6, 8C2.7, 8C2.8, 8C2.9, 8C2.10, 8C3.1, 8C3.2, 8C3.3, 8C3.4, 8C4.1, 8C4.2, 8C4.3, 8C4.4, 8C4.5, 8C4.6, 8C4.7, 8C4.8, 8C4.9, 8C4.10, 8C4.11, 8D1.1, 8D1.2, 8D1.3, 8D1.4, 8D1.5, 8E1.1, 8E1.2, 8E1.3, 18 U.S.C.A.

****741** *Syllabus* [**]

Under the Federal Sentencing Guidelines, the sentence authorized by the jury verdict in respondent Booker's drug case was 210–to–262 months in prison. At the sentencing hearing, the judge found additional facts by a preponderance of the evidence. Because these findings mandated a sentence between 360 months and life, the judge gave Booker a 30–year sentence instead of the 21–year, 10–month, sentence he could have imposed based on the facts proved to the jury beyond a reasonable doubt. The Seventh Circuit held that this application of the Guidelines conflicted with the *Apprendi v. New Jersey,* 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435, holding that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Relying on *Blakely v. Washington,* 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), the court held that the sentence violated the Sixth Amendment and instructed the District Court either to sentence Booker within the sentencing range supported by the jury's findings or to hold a separate sentencing hearing before a jury. In respondent Fanfan's case, the maximum sentence authorized by the jury verdict under the Guidelines was 78 months in prison. At the sentencing hearing, the District Judge found by a preponderance of the evidence additional facts authorizing a sentence in the 188–to–235–month range, which would have required him to impose a 15– or 16–year sentence instead of the 5 or 6 years authorized by the jury verdict alone. Relying on *Blakely's* majority opinion, statements in its dissenting opinions, and the Solicitor General's brief in *Blakely,* the judge concluded that he could not follow the Guidelines and imposed a sentence based solely upon the guilty verdict in the case. The Government filed a notice of appeal in the First Circuit and a petition for certiorari before judgment in this Court.

Held: The judgment of the Court of Appeals in No. 04–104 is affirmed, and the case is remanded. The judgment of the District Court in No. 04–105 is vacated, and the case is remanded.

***221** No. 04–104, 375 F.3d 508, affirmed and remanded; and No. 04–105, vacated and remanded.

Justice STEVENS delivered the opinion of the Court in part, concluding that the Sixth Amendment as construed in *Blakely* applies to the Federal Sentencing Guidelines. Pp. 748–756.

(a) In addressing Washington State's determinate sentencing scheme, the *Blakely* Court found that *Jones v. United States,* 526 U.S. 227, 119 S.Ct. 1215, 143 L.Ed.2d 311; *Apprendi v. New Jersey,* 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435; and *Ring v. Arizona,* 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556, made clear "that the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*" 542 U.S., at 303, 124 S.Ct., at 2537. As *Blakely's* dissenting opinions recognized, there is no constitutionally significant distinction between the Guidelines and the Washington procedure at issue in that case. This conclusion rests on the premise, common to both systems, that the relevant sentencing rules are mandatory and impose binding requirements on all sentencing judges. Were the Guidelines merely advisory—recommending, but not requiring, the selection of particular sentences in response to differing sets of facts—their use would not implicate the Sixth Amendment. However, that is not the case. Title 18 U.S.C. § 3553(b) directs that a court "*shall* impose a sentence of the kind, and within the range" established by the Guidelines, subject to departures in specific, limited cases. Because they are binding on all judges, this Court has consistently held that the Guidelines have the force and effect of laws. Further, the availability of a departure where the judge "finds ... 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," § 3553(b)(1), does not avoid the constitutional issue. Departures are unavailable in most cases because the Commission will have adequately taken all relevant factors into account, and no departure will be legally permissible. In those instances, the judge is legally bound to impose a sentence within the Guidelines range. Booker's case illustrates this point. The jury found him guilty of possessing at least 50 grams of crack cocaine, based on evidence that he had 92.5 grams. Under those facts, the Guidelines required a possible 210–to–262–month sentence. To reach Booker's actual sentence—which was almost 10 years longer—the judge found that he possessed an additional 566 grams of crack. Although the jury never heard any such evidence, the judge found it to be true by a preponderance of the evidence. Thus, as in *Blakely,* "the jury's verdict alone does not authorize the sentence. The judge acquires that authority only upon finding some additional fact." 542 U.S., at 305, 124 S.Ct., at 2538. Finally, because there were no factors the Sentencing ***222** Commission failed to adequately consider, the judge was required to impose a sentence within the higher Guidelines range. Pp. 748–752.

(b) The Government's arguments for its position that *Blakely's* reasoning should not be applied to the Federal Sentencing Guidelines are unpersuasive. The fact that the Guidelines are promulgated by the Sentencing Commission, rather than Congress, is constitutionally irrelevant. The Court has not previously considered the question, but the same Sixth Amendment principles apply to the Sentencing Guidelines. Further, the Court's pre-*Apprendi* cases considering the Guidelines are inapplicable, as they did not consider the application of *Apprendi* to the Sentencing Guidelines. Finally, separation of powers concerns are not present here, and were ****743** rejected in *Mistretta v. United States,* 488 U.S. 361, 109 S.Ct. 647, 102 L.Ed.2d 714. In *Mistretta* the Court concluded that even though the Commission performed political rather than adjudicatory functions, Congress did not exceed constitutional limitations in creating the Commission. *Id.,* at 388, 393, 109 S.Ct. 647. That conclusion remains true regardless of whether the facts relevant to sentencing are labeled "sentencing factors" or "elements" of crimes. Pp. 752–756.

Justice BREYER delivered the opinion of the Court in part, concluding that 18 U.S.C. § 3553(b)(1) which makes the Federal Sentencing Guidelines mandatory, is incompatible with today's Sixth Amendment "jury trial" holding and therefore must be severed and excised from the Sentencing Reform Act of 1984 (Act). Section 3742(e), which depends upon the Guidelines' mandatory nature, also must be severed and excised. So modified, the Act makes the Guidelines effectively advisory, requiring a sentencing court to consider Guidelines ranges, see § 3553(a)(4), but permitting it to tailor the sentence in light of other statutory concerns, see § 3553(a). Pp. 757–769.

(a) Answering the remedial question requires a determination of what "Congress would have intended" in light of the Court's constitutional holding. *E.g., Denver Area Ed. Telecommunications Consortium, Inc. v. FCC,* 518 U.S. 727, 767, 116 S.Ct. 2374, 135 L.Ed.2d 888. Here, the Court must decide which of two approaches is the more compatible with Congress' intent as embodied in the Act: (1) retaining the Act (and the Guidelines) as written, with today's Sixth Amendment requirement engrafted onto it; or (2) eliminating some of the Act's provisions. Evaluation of the constitutional requirement's consequences in light of the Act's language, history, and basic purposes demonstrates that the requirement is not compatible with the Act as written and that some severance (and excision) is necessary. Congress would likely have preferred the total invalidation of the Act to an Act with the constitutional requirement engrafted onto it, but would likely have preferred the excision of the Act's mandatory language to the invalidation of the entire Act. Pp. 757–759.

***223** b) Several considerations demonstrate that adding the Court's constitutional requirement onto the Act as currently written would so transform the statutory scheme that Congress likely would not have intended the Act as so modified to stand. First, references to "[t]he court" in § 3553(a)(1)—which requires "[t]he court" when sentencing to consider "the nature and circumstances of the offense and the history and characteristics of the defendant"—and references to "the judge" in the Act's history must be read in context to mean "the judge without the jury," not "the judge working together with the jury." That is made clear by § 3661, which removes typical "jury trial" limitations on "the information" concerning the offender that the sentencing "court ... may receive." Second, Congress' basic statutory goal of diminishing sentencing disparity depends for its success upon judicial efforts to determine, and to base punishment upon, the *real conduct* underlying the crime of conviction. In looking to real conduct, federal sentencing judges have long relied upon a probation officer's presentence report, which is often unavailable until *after* the trial. To engraft the

Court's constitutional requirement onto the Act would destroy the system by preventing a sentencing judge from relying upon a presentence report for relevant factual information uncovered after the trial. Third, the Act, read to include today's constitutional requirement, would create a system far more complex than Congress could have intended, thereby greatly complicating ****744** the tasks of the prosecution, defense, judge, and jury. Fourth, plea bargaining would not significantly diminish the consequences of the Court's constitutional holding for the operation of the Guidelines, but would make matters worse, leading to sentences that gave greater weight not to real conduct, but rather to counsel's skill, the prosecutor's policies, the caseload, and other factors that vary from place to place, defendant to defendant, and crime to crime. Fifth, Congress would not have enacted sentencing statutes that make it more difficult to adjust sentences *upward* than to adjust them *downward,* yet that is what the engrafted system would create. For all these reasons, the Act cannot remain valid in its entirety. Severance and excision are necessary. Pp. 759–764.

(c) The entire Act need not be invalidated, since most of it is perfectly valid. In order not to "invalidat[e] more of the statute than is necessary," *Regan v. Time, Inc.,* 468 U.S. 641, 652, 104 S.Ct. 3262, 82 L.Ed.2d 487, the Court must retain those portions of the Act that are (1) constitutionally valid, *ibid.*, (2) capable of "functioning independently," *Alaska Airlines, Inc. v. Brock,* 480 U.S. 678, 684, 107 S.Ct. 1476, 94 L.Ed.2d 661, and (3) consistent with Congress' basic objectives in enacting the statute, *Regan, supra,* at 653, 104 S.Ct. 3262. Application of these criteria demonstrates that only § 3553(b)(1), which requires sentencing courts to impose a sentence within the applicable Guidelines range (absent ***224** circumstances justifying a departure), and § 3742(e), which provides for *de novo* review on appeal of departures, must be severed and excised. With these two sections severed (and statutory cross-references to the two sections consequently invalidated), the rest of the Act satisfies the Court's constitutional requirement and falls outside the scope of *Apprendi v. New Jersey,* 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435. The Act still requires judges to take account of the Guidelines together with other sentencing goals, see § 3553(a)(4); to consider the Guidelines "sentencing range established for ... the applicable category of offense committed by the applicable category of defendant," pertinent Sentencing Commission policy statements, and the need to avoid unwarranted sentencing disparities and to restitute victims, §§ 3553(a)(1), (3)-(7); and 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 training and medical care, § 3553(a)(2). Moreover, despite § 3553(b)(1)'s absence, the Act continues to provide for appeals from sentencing decisions (irrespective of whether the trial judge sentences within or outside the Guidelines range). See §§ 3742(a) and (b). Excision of § 3742(e), which sets forth appellate review standards, does not pose a critical problem. Appropriate review standards may be inferred from related statutory language, the statute's structure, and the " 'sound administration of justice.' " *Pierce v. Underwood,* 487 U.S. 552, 559–560, 108 S.Ct. 2541, 101 L.Ed.2d 490. Here, these factors and the past two decades of appellate practice in cases involving departures from the Guidelines imply a familiar and practical standard of review: review for "unreasonable[ness]." See, *e.g.,* 18 U.S.C. § 3742(e)(3) (1994 ed.). Finally, the Act without its mandatory provision and related language remains consistent with Congress' intent to avoid "unwarranted sentencing disparities ... [and] maintai[n] sufficient flexibility to permit individualized sentences when warranted," 28 U.S.C. § 991(b)(1)(B), in that the Sentencing Commission remains in place to perform its statutory duties, see § 994, the ****745** district courts must consult the Guidelines and take them into account when sentencing, see 18 U.S.C. § 3553(a)(4), and the courts of appeals review sentencing decisions for unreasonableness. Thus, it is more consistent with Congress' likely intent (1) to preserve the Act's important pre-existing elements while severing and excising §§ 3553(b) and 3742(e) than (2) to maintain all of the Act's provisions and engraft today's constitutional requirement onto the statutory scheme. Pp. 764–768.

(d) Other possible remedies—including, *e.g.,* the parties' proposals that the Guidelines remain binding in cases other than those in which the Constitution prohibits judicial factfinding and that the Act's provisions ***225** requiring such factfinding at sentencing be excised—are rejected. Pp. 768–769.

(e) On remand in respondent Booker's case, the District Court should impose a sentence in accordance with today's opinions, and, if the sentence comes before the Seventh Circuit for review, that court should apply the review standards set forth in this Court's remedial opinion. In respondent Fanfan's case, the Government (and Fanfan should he so choose) may seek resentencing under the system set forth in today's opinions. As these dispositions indicate, today's Sixth Amendment holding and the Court's remedial interpretation of the Sentencing Act must be applied to all cases on direct review. See, *e.g.,*

Griffith v. Kentucky, 479 U.S. 314, 328, 107 S.Ct. 708, 93 L.Ed.2d 649. That does not mean that every sentence will give rise to a Sixth Amendment violation or that every appeal will lead to a new sentencing hearing. That is because reviewing courts are expected to apply ordinary prudential doctrines, determining, *e.g.,* 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. P. 769.

STEVENS, J., delivered the opinion of the Court in part, in which SCALIA, SOUTER, THOMAS, and GINSBURG, JJ., joined. BREYER, J., delivered the opinion of the Court in part, in which REHNQUIST, C.J., and O'CONNOR, KENNEDY, and GINSBURG, JJ., joined, *post,* p. 756. STEVENS, J., filed an opinion dissenting in part, in which SOUTER, J., joined, and in which SCALIA, J., joined except for Part III and footnote 17, *post,* p. 771. SCALIA, J., *post,* p. 789, and THOMAS, J., *post,* p. 795, filed opinions dissenting in part. BREYER, J., filed an opinion dissenting in part, in which REHNQUIST, C.J., and O'CONNOR and KENNEDY, JJ., joined, *post,* p. 802.

Attorneys and Law Firms

T. Christopher Kelly, Madison, WI, for the respondent in No. 04-104.

Rosemary Scapicchio, for the respondent in No. 04–105.

Dean A. Strang, Brian T. Fahl, Federal Defender, Services of Wisconsin, Inc., Milwaukee, WI, T. Christopher Kelly, Counsel of Record, Kelly & Habermehl, S.C., Madison, WI, Brief of Respondent.

Paul D. Clement, Acting Solicitor General, Counsel of Record, Christopher A. Wray, Assistant Attorney General, Michael R. Dreeben, Deputy Solicitor General, James A. Feldman, Dan Himmelfarb, Assistants to the Solicitor General, Nina Goodman, Elizabeth A. Olson, Attorneys, Department of Justice, Washington, D.C., Brief for the United States.

Opinion

Justice STEVENS delivered the opinion of the Court in part.***

***226** The question presented in each of these cases is whether an application of the Federal Sentencing Guidelines violated the Sixth Amendment. In each case, the courts below held that binding rules set forth in the Guidelines limited the severity of the sentence that the judge could lawfully impose on the defendant based on the facts found by the jury at his trial. In both cases the courts rejected, on the basis of our decision in *Blakely v. Washington,* 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), the Government's recommended application of the Sentencing Guidelines because the proposed sentences were based on additional facts that the sentencing judge found by a preponderance of the evidence. We hold that both courts correctly concluded that the Sixth Amendment as construed in ***227** Blakely does apply to the Sentencing Guidelines. In a separate opinion authored by Justice BREYER, the Court concludes that in light of this holding, two provisions of the Sentencing Reform Act of 1984(SRA) that have the effect of making the Guidelines mandatory must be invalidated in order to allow the statute to operate in a manner consistent with congressional intent.

I

Respondent Booker was charged with possession with intent to distribute at least 50 grams of cocaine base (crack). Having heard evidence that he had 92.5 grams in his duffel bag, the jury found him guilty of violating 21 U.S.C. § 841(a)(1). That statute prescribes a minimum sentence of 10 years in prison and a maximum sentence of life for that offense. § 841(b)(1)(A)(iii).

Based upon Booker's criminal history and the quantity of drugs found by the jury, the Sentencing Guidelines required the District Court Judge to select a "base" sentence of not less than 210 nor more than 262 months in prison. See United States Sentencing Commission, Guidelines Manual §§ 2D1.1(c)(4), 4A1.1 (Nov. 2003) (USSG). The judge, however, held a post-trial sentencing proceeding and concluded by a preponderance of the evidence that Booker had possessed an additional 566 grams of crack and that he was guilty of obstructing justice. Those findings mandated that the judge select a sentence between 360 months and life

imprisonment; the judge imposed a sentence at the low end of the range. Thus, instead of the sentence of 21 years and 10 months that the judge could have imposed on the basis of the facts proved to the jury beyond a reasonable doubt, Booker received a 30–year sentence.

Over the dissent of Judge Easterbrook, the Court of Appeals for the Seventh Circuit held that this application of the Sentencing Guidelines conflicted with our holding in *Apprendi v. New Jersey,* 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), that "[o]ther than the fact of a prior conviction, any fact that increases ***228** the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 375 F.3d 508, 510 (2004). The majority relied on our holding in *Blakely,* 542 U.S. 296, 124 S.Ct. 2531, that "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a ****747** judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*" *Id.,* at 303, 124 S.Ct., at 2537. The court held that the sentence violated the Sixth Amendment, and remanded with instructions to the District Court either to sentence respondent within the sentencing range supported by the jury's findings or to hold a separate sentencing hearing before a jury.

Respondent Fanfan was charged with conspiracy to distribute and to possess with intent to distribute at least 500 grams of cocaine in violation of 21 U.S.C. §§ 846, 841(a)(1), and 841(b)(1)(B)(ii). He was convicted by the jury after it answered "Yes" to the question "Was the amount of cocaine 500 or more grams?" App. C to Pet. for Cert. in No. 04–105, p. 15a. Under the Guidelines, without additional findings of fact, the maximum sentence authorized by the jury verdict was imprisonment for 78 months.

A few days after our decision in *Blakely,* the trial judge conducted a sentencing hearing at which he found additional facts that, under the Guidelines, would have authorized a sentence in the 188–to–235–month range. Specifically, he found that respondent Fanfan was responsible for 2.5 kilograms of cocaine powder, and 261.6 grams of crack. He also concluded that respondent had been an organizer, leader, manager, or supervisor in the criminal activity. Both findings were made by a preponderance of the evidence. Under the Guidelines, these additional findings would have required an enhanced sentence of 15 or 16 years instead of the 5 or 6 years authorized by the jury verdict alone. Relying not only on the majority opinion in *Blakely,* but also on the categorical statements in the dissenting opinions and in the Solicitor ***229** General's brief in *Blakely,* see App. A to Pet. for Cert. in No. 04–105, pp. 6a–7a, the judge concluded that he could not follow the particular provisions of the Sentencing Guidelines "which involve drug quantity and role enhancement," *id.,* at 11a. Expressly refusing to make "any blanket decision about the federal guidelines," he followed the provisions of the Guidelines that did not implicate the Sixth Amendment by imposing a sentence on respondent "based solely upon the jury verdict in this case." *Ibid.*

Following the denial of its motion to correct the sentence in Fanfan's case, the Government filed a notice of appeal in the Court of Appeals for the First Circuit, and a petition in this Court for a writ of certiorari before judgment. Because of the importance of the questions presented, we granted that petition, 542 U.S. 956, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), as well as a similar petition filed by the Government in Booker's case, *ibid*. In both petitions, the Government asks us to determine whether our *Apprendi* line of cases applies to the Sentencing Guidelines, and if so, what portions of the Guidelines remain in effect. [1]

In this opinion, we explain why we agree with the lower courts' answer to the first question. In a separate opinion for the Court, Justice BREYER explains the Court's answer to the second question.

***230** II

[1] **[2]** It has been settled throughout our history that the Constitution protects every criminal defendant "against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship,* 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). It is equally clear that the "Constitution gives a criminal defendant the right to demand that a jury find him guilty of all the elements of the crime with which he is charged." *United States v. Gaudin,* 515 U.S. 506, 511, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995). These basic precepts, firmly rooted in the common law, have provided the basis for recent decisions interpreting modern criminal statutes and sentencing procedures.

In *Jones v. United States,* 526 U.S. 227, 230, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999), we considered the federal carjacking statute, which provides three different maximum sentences depending on the extent of harm to the victim: 15 years in jail if there was no serious injury to a victim, 25 years if there was

"serious bodily injury," and life in prison if death resulted. 18 U.S.C. § 2119 (1988 ed., Supp. V). In spite of the fact that the statute "at first glance has a look to it suggesting [that the provisions relating to the extent of harm to the victim] are only sentencing provisions," 526 U.S., at 232, 119 S.Ct. 1215, we concluded that the harm to the victim was an element of the crime. That conclusion was supported by the statutory text and structure, and was influenced by our desire to avoid the constitutional issues implicated by a contrary holding, which would have reduced the jury's role "to the relative importance of low-level gatekeeping." *Id.,* at 244, 119 S.Ct. 1215. Foreshadowing the result we reach today, we noted that our holding was consistent with a "rule requiring jury determination of facts that raise a sentencing ceiling" in state and federal sentencing guidelines systems. *Id.,* at 251–252, n. 11, 119 S.Ct. 1215.

In *Apprendi v. New Jersey,* 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), the defendant pleaded guilty to second-degree possession of a firearm for an unlawful purpose, which carried a prison term ***231** of 5–to–10 years. Thereafter, the trial court found that his conduct had violated New Jersey's "hate crime" law because it was racially motivated, and imposed a 12–year sentence. This Court set aside the enhanced sentence. We held: "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.,* at 490, 120 S.Ct. 2348.

The fact that New Jersey labeled the hate crime a "sentence enhancement" rather than a separate criminal act was irrelevant for constitutional purposes. *Id.,* at 478, 120 S.Ct. 2348. As a matter of simple justice, it seemed obvious that the procedural safeguards designed to protect Apprendi from punishment for the possession of a firearm should apply equally to his violation of the hate crime statute. Merely using the label "sentence enhancement" to describe the latter did not provide a principled basis for treating the two crimes differently. *Id.,* at 476, 120 S.Ct. 2348.

[3] In *Ring v. Arizona,* 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), we reaffirmed our conclusion that the characterization of critical facts is constitutionally irrelevant. There, we held that it was ****749** impermissible for "the trial judge, sitting alone" to determine the presence or absence of the aggravating factors required by Arizona law for imposition of the death penalty. *Id.,* at 588–589, 122 S.Ct. 2428. "If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact—no matter how the State labels it—must be found by a jury beyond a reasonable doubt." *Id.,* at 602, 122 S.Ct. 2428. Our opinion made it clear that ultimately, while the procedural error in Ring's case might have been harmless because the necessary finding was implicit in the jury's guilty verdict, *id.,* at 609, n. 7, 122 S.Ct. 2428, "the characterization of a fact or circumstance as an 'element' or a 'sentencing factor' is not determinative of the question 'who decides,' judge or jury," *id.,* at 605, 122 S.Ct. 2428.

In *Blakely v. Washington,* 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), we dealt with a determinate sentencing scheme similar to the Federal ***232** Sentencing Guidelines. There the defendant pleaded guilty to kidnaping, a class B felony punishable by a term of not more than 10 years. Other provisions of Washington law, comparable to the Federal Sentencing Guidelines, mandated a "standard" sentence of 49–to–53 months, unless the judge found aggravating facts justifying an exceptional sentence. Although the prosecutor recommended a sentence in the standard range, the judge found that the defendant had acted with " 'deliberate cruelty' " and sentenced him to 90 months. *Id.,* at 300, 124 S.Ct., at 2534.

For reasons explained in *Jones, Apprendi,* and *Ring,* the requirements of the Sixth Amendment were clear. The application of Washington's sentencing scheme violated the defendant's right to have the jury find the existence of " 'any particular fact' " that the law makes essential to his punishment. 542 U.S., at 301, 124 S.Ct., at 2536. That right is implicated whenever a judge seeks to impose a sentence that is not solely based on "facts reflected in the jury verdict or admitted by the defendant." *Id.,* at 303, 124 S.Ct., at 2537 (emphasis deleted). We rejected the State's argument that the jury verdict was sufficient to authorize a sentence within the general 10–year sentence for class B felonies, noting that under Washington law, the judge was *required* to find additional facts in order to impose the greater 90–month sentence. Our precedents, we explained, make clear "that the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*" *Ibid.* (emphasis in original). The determination that the defendant acted with deliberate cruelty, like the determination in *Apprendi* that the defendant acted with racial malice, increased the sentence that the defendant could have otherwise received. Since this fact was found by a judge

using a preponderance of the evidence standard, the sentence violated Blakely's Sixth Amendment rights.

[4] ***233** As the dissenting opinions in *Blakely* recognized, there is no distinction of constitutional significance between the Federal Sentencing Guidelines and the Washington procedures at issue in that case. See, *e.g.,* 542 U.S., at 325, 124 S.Ct., at 2540 (opinion of O'CONNOR, J.) ("The structure of the Federal Guidelines likewise does not, as the Government halfheartedly suggests, provide any grounds for distinction. ... If anything, the structural differences that do exist make the Federal Guidelines more vulnerable to attack"). This conclusion rests on the premise, common to both systems, that the relevant sentencing rules are mandatory ****750** and impose binding requirements on all sentencing judges.

[5] If the Guidelines as currently written could be read as merely advisory provisions that recommended, rather than required, the selection of particular sentences in response to differing sets of facts, their use would not implicate the Sixth Amendment. We have never doubted the authority of a judge to exercise broad discretion in imposing a sentence within a statutory range. See *Apprendi,* 530 U.S., at 481, 120 S.Ct. 2348; *Williams v. New York,* 337 U.S. 241, 246, 69 S.Ct. 1079, 93 L.Ed. 1337 (1949). Indeed, everyone agrees that the constitutional issues presented by these cases would have been avoided entirely if Congress had omitted from the SRA the provisions that make the Guidelines binding on district judges; it is that circumstance that makes the Court's answer to the second question presented possible. For when a trial judge exercises his discretion to select a specific sentence within a defined range, the defendant has no right to a jury determination of the facts that the judge deems relevant.

The Guidelines as written, however, are not advisory; they are mandatory and binding on all judges.[2] While subsection ***234** a) of § 3553 of the sentencing statute[3] lists the Sentencing Guidelines as one factor to be considered in imposing a sentence, subsection (b) directs that the court "*shall* impose a sentence of the kind, and within the range" established by the Guidelines, subject to departures in specific, limited cases. (Emphasis added.) Because they are binding on judges, we have consistently held that the Guidelines have the force and effect of laws. See, *e.g., Mistretta v. United States,* 488 U.S. 361, 391, 109 S.Ct. 647, 102 L.Ed.2d 714 (1989); *Stinson v. United States,* 508 U.S. 36, 42, 113 S.Ct. 1913, 123 L.Ed.2d 598 (1993).

The availability of a departure in specified circumstances does not avoid the constitutional issue, just as it did not in *Blakely* itself. The Guidelines permit departures from the prescribed sentencing range in cases in which the judge "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." 18 U.S.C. § 3553(b)(1) (2000 ed., Supp. IV). At first glance, one might believe that the ability of a district judge to depart from the Guidelines means that she is bound only by the statutory maximum. Were this the case, there would be no *Apprendi* problem. Importantly, however, departures are not available in every case, and in fact are unavailable in most. In most cases, as a matter of law, the Commission will have adequately taken all relevant factors into account, and no departure will be legally permissible. In those instances, the judge is bound to impose a sentence within the Guidelines range. It was for this reason that we rejected a similar argument in *Blakely,* holding that although the Washington statute allowed the judge to impose a sentence outside the sentencing range for " 'substantial and compelling reasons,' " that exception was not available for Blakely himself. 542 U.S., at 299, 124 S.Ct., at 2535. The sentencing ****751** judge ***235** would have been reversed had he invoked the departure section to justify the sentence.

Booker's case illustrates the mandatory nature of the Guidelines. The jury convicted him of possessing at least 50 grams of crack in violation of 21 U.S.C. § 841(b)(1)(A)(iii) based on evidence that he had 92.5 grams of crack in his duffel bag. Under these facts, the Guidelines specified an offense level of 32, which, given the defendant's criminal history category, authorized a sentence of 210–to–262 months. See USSG § 2D1.1(c)(4). Booker's is a run-of-the-mill drug case, and does not present any factors that were inadequately considered by the Commission. The sentencing judge would therefore have been reversed had he not imposed a sentence within the level 32 Guidelines range.

Booker's actual sentence, however, was 360 months, almost 10 years longer than the Guidelines range supported by the jury verdict alone. To reach this sentence, the judge found facts beyond those found by the jury: namely, that Booker possessed 566 grams of crack in addition to the 92.5 grams in his duffel bag. The jury never heard any evidence of the additional drug quantity, and the judge found it true by a preponderance of the evidence. Thus, just as in *Blakely,* "the jury's verdict alone does not authorize the sentence. The judge

acquires that authority only upon finding some additional fact." 542 U.S., at 305, 124 S.Ct., at 2538. There is no relevant distinction between the sentence imposed pursuant to the Washington statutes in *Blakely* and the sentences imposed pursuant to the Federal Sentencing Guidelines in these cases.

In his dissent, *post,* at 803–804, Justice BREYER argues on historical grounds that the Guidelines scheme is constitutional across the board. He points to traditional judicial authority to increase sentences to take account of any unusual blameworthiness in the manner employed in committing a crime, an authority that the Guidelines require to be exercised consistently throughout the system. This tradition, ***236** however, does not provide a sound guide to enforcement of the Sixth Amendment's guarantee of a jury trial in today's world.

It is quite true that once determinate sentencing had fallen from favor, American judges commonly determined facts justifying a choice of a heavier sentence on account of the manner in which particular defendants acted. *Apprendi,* 530 U.S., at 481, 120 S.Ct. 2348. In 1986, however, our own cases first recognized a new trend in the legislative regulation of sentencing when we considered the significance of facts selected by legislatures that not only authorized, or even mandated, heavier sentences than would otherwise have been imposed, but increased the range of sentences possible for the underlying crime. See *McMillan v. Pennsylvania,* 477 U.S. 79, 87–88, 106 S.Ct. 2411, 91 L.Ed.2d 67 (1986). Provisions for such enhancements of the permissible sentencing range reflected growing and wholly justified legislative concern about the proliferation and variety of drug crimes and their frequent identification with firearms offenses.

The effect of the increasing emphasis on facts that enhanced sentencing ranges, however, was to increase the judge's power and diminish that of the jury. It became the judge, not the jury, who determined the upper limits of sentencing, and the facts determined were not required to be raised before trial or proved by more than a preponderance.

As the enhancements became greater, the jury's finding of the underlying crime became less significant. And the enhancements became very serious indeed. See, ****752** *e.g., Jones,* 526 U.S., at 230–231, 119 S.Ct. 1215 (judge's finding increased the maximum sentence from 15 to 25 years); respondent Booker's (from 262 months to a life sentence); respondent Fanfan's (from 78 to 235 months); *United States v. Rodriguez,* 73 F.3d 161, 162–163 (C.A.7 1996) (Posner, C.J., dissenting from denial of rehearing en banc) (from approximately 54 months to a life sentence); ***237** *United States v. Hammoud,* 381 F.3d 316, 361–362 (C.A.4 2004) (en banc) (Motz, J., dissenting) (actual sentence increased from 57 months to 155 years).

As it thus became clear that sentencing was no longer taking place in the tradition that Justice BREYER invokes, the Court was faced with the issue of preserving an ancient guarantee under a new set of circumstances. The new sentencing practice forced the Court to address the question how the right of jury trial could be preserved, in a meaningful way guaranteeing that the jury would still stand between the individual and the power of the government under the new sentencing regime. And it is the new circumstances, not a tradition or practice that the new circumstances have superseded, that have led us to the answer first considered in *Jones* and developed in *Apprendi* and subsequent cases culminating with this one. It is an answer not motivated by Sixth Amendment formalism, but by the need to preserve Sixth Amendment substance.

III

The Government advances three arguments in support of its submission that we should not apply our reasoning in *Blakely* to the Federal Sentencing Guidelines. It contends that *Blakely* is distinguishable because the Guidelines were promulgated by a Commission rather than the Legislature; that principles of *stare decisis* require us to follow four earlier decisions that are arguably inconsistent with *Blakely;* and that the application of *Blakely* to the Guidelines would conflict with separation-of-powers principles reflected in *Mistretta v. United States,* 488 U.S. 361, 109 S.Ct. 647, 102 L.Ed.2d 714 (1989). These arguments are unpersuasive.

Commission v. Legislature:

[6] In our judgment the fact that the Guidelines were promulgated by the Sentencing Commission, rather than Congress, lacks constitutional significance. In order to impose the defendants' sentences under the Guidelines, the judges in these ***238** cases were required to find an additional fact, such as drug quantity, just as the judge found the additional fact of serious bodily injury to the victim in *Jones.* As far as the defendants are concerned, they face significantly higher sentences—in Booker's case almost 10 years higher—because a judge found true by a preponderance

of the evidence a fact that was never submitted to the jury. Regardless of whether Congress or a Sentencing Commission concluded that a particular fact must be proved in order to sentence a defendant within a particular range, "[t]he Framers would not have thought it too much to demand that, before depriving a man of [ten] more years of his liberty, the State should suffer the modest inconvenience of submitting its accusation to 'the unanimous suffrage of twelve of his equals and neighbours,' rather than a lone employee of the State." *Blakely,* 542 U.S., at 313–314, 124 S.Ct., at 2543 (citation omitted).

The Government correctly notes that in *Apprendi* we referred to " 'any fact that increases the penalty for a crime *beyond the prescribed statutory maximum* (4)27' " Brief for United States 15 (quoting *Apprendi,* 530 U.S., at 490, 120 S.Ct. 2348 (emphasis in Brief for United States)). The simple answer, of course, is that we were only considering a statute in that ****753** case; we expressly declined to consider the Guidelines. See *Apprendi,* 530 U.S., at 497, n. 21, 120 S.Ct. 2348. It was therefore appropriate to state the rule in that case in terms of a "statutory maximum" rather than answering a question not properly before us.

More important than the language used in our holding in *Apprendi* are the principles we sought to vindicate. Those principles are unquestionably applicable to the Guidelines. They are not the product of recent innovations in our jurisprudence, but rather have their genesis in the ideals our constitutional tradition assimilated from the common law. See *Jones,* 526 U.S., at 244–248, 119 S.Ct. 1215. The Framers of the Constitution understood the threat of "judicial despotism" that could arise from "arbitrary punishments upon arbitrary convictions" ***239** without the benefit of a jury in criminal cases. The Federalist No. 83, p. 499 (C. Rossiter ed.1961) (A. Hamilton). The Founders presumably carried this concern from England, in which the right to a jury trial had been enshrined since the Magna Carta. As we noted in *Apprendi:*

> "[T]he historical foundation for our recognition of these principles extends down centuries into the common law. '[T]o guard against a spirit of oppression and tyranny on the part of rulers,' and 'as the great bulwark of [our] civil and political liberties,' trial by jury has been understood to require that '*the truth of every accusation,* whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of [the defendant's] equals and neighbours ....' " 530 U.S., at 477, 120 S.Ct. 2348 (citations omitted).

Regardless of whether the legal basis of the accusation is in a statute or in guidelines promulgated by an independent commission, the principles behind the jury trial right are equally applicable.

Stare Decisis:

The Government next argues that four recent cases preclude our application of *Blakely* to the Sentencing Guidelines. We disagree. In *United States v. Dunnigan,* 507 U.S. 87, 113 S.Ct. 1111, 122 L.Ed.2d 445 (1993), we held that the provisions of the Guidelines that require a sentence enhancement if the judge determines that the defendant committed perjury do not violate the privilege of the accused to testify on her own behalf. There was no contention that the enhancement was invalid because it resulted in a more severe sentence than the jury verdict had authorized. Accordingly, we found this case indistinguishable from *United States v. Grayson,* 438 U.S. 41, 98 S.Ct. 2610, 57 L.Ed.2d 582 (1978), a pre-Guidelines case in which we upheld a similar sentence increase. Applying *Blakely* to the Guidelines would invalidate ***240** a sentence that relied on such an enhancement if the resulting sentence was outside the range authorized by the jury verdict. Nevertheless, there are many situations in which the district judge might find that the enhancement is warranted, yet still sentence the defendant within the range authorized by the jury. See *post,* at 774–776 (STEVENS, J., dissenting in part). Thus, while the reach of *Dunnigan* may be limited, we need not overrule it.

In *Witte v. United States,* 515 U.S. 389, 115 S.Ct. 2199, 132 L.Ed.2d 351 (1995), we held that the Double Jeopardy Clause did not bar a prosecution for conduct that had provided the basis for an enhancement of the defendant's sentence in a prior case. "We concluded that "consideration of information about the defendant's character and conduct at sentencing does not result in 'punishment' for any offense other than the one of which the defendant was convicted." ****754** Rather, the defendant is 'punished only for the fact that the present offense was carried out in a manner that warrants increased punishment ....' " *United States v. Watts,* 519 U.S. 148, 155, 117 S.Ct. 633, 136 L.Ed.2d 554 (1997) *(per curiam)* (quoting *Witte,* 515 U.S., at 401, 403, 115 S.Ct. 2199; emphasis deleted). In *Watts,* relying on *Witte,* we held that the Double Jeopardy Clause permitted a court to consider acquitted conduct in sentencing a defendant under the Guidelines. In neither *Witte* nor *Watts* was there any contention that the sentencing enhancement had exceeded the sentence authorized by the jury verdict in violation of the

Sixth Amendment. The issue we confront today simply was not presented. [4]

Finally, in *Edwards v. United States,* 523 U.S. 511, 118 S.Ct. 1475, 140 L.Ed.2d 703 (1998), the Court held that a jury's general verdict finding the defendants guilty of a conspiracy involving either cocaine or crack supported a sentence based on their involvement with ***241** both drugs. Even though the indictment had charged that their conspiracy embraced both, they argued on appeal that the verdict limited the judge's sentencing authority. We recognized that the defendants' statutory and constitutional claims might have had merit if it had been possible to argue that their crack-related activities were not part of the same conspiracy as their cocaine activities. But they failed to make that argument, and, based on our review of the record which showed "a series of interrelated drug transactions involving both cocaine and crack," we concluded that no such claim could succeed. [5] *Id.,* at 515, 118 S.Ct. 1475.

None of our prior cases is inconsistent with today's decision. *Stare decisis* does not compel us to limit *Blakely's* holding.

Separation of Powers:

[7] Finally, the Government and, to a lesser extent, Justice BREYER's dissent, argue that any holding that would require Guidelines sentencing factors to be proved to a jury beyond a reasonable doubt would effectively transform them into a code defining elements of criminal offenses. The result, according to the Government, would be an unconstitutional grant to the Sentencing Commission of the inherently legislative power to define criminal elements.

There is no merit to this argument because the Commission's authority to identify the facts relevant to sentencing ***242** decisions and to determine the impact of such facts on federal sentences is precisely the same whether one labels such facts "sentencing factors" or "elements" of crimes. Our decision in *Mistretta,* 488 U.S., at 371, 109 S.Ct. 647, upholding the validity of the delegation of that authority, ****755** is unaffected by the characterization of such facts, or by the procedures used to find such facts in particular sentencing proceedings. Indeed, we rejected a similar argument in *Jones:*

> "Contrary to the dissent's suggestion, the constitutional proposition that drives our concern in no way 'call[s] into question the principle that the definition of the elements of a criminal offense is entrusted to the legislature.' The constitutional guarantees that give rise to our concern in no way restrict the ability of legislatures to identify the conduct they wish to characterize as criminal or to define the facts whose proof is essential to the establishment of criminal liability. The constitutional safeguards that figure in our analysis concern not the identity of the elements defining criminal liability but only the required procedures for finding the facts that determine the maximum permissible punishment; these are the safeguards going to the formality of notice, the identity of the factfinder, and the burden of proof." 526 U.S., at 243, n. 6, 119 S.Ct. 1215 (citation omitted).

Our holding today does not call into question any aspect of our decision in *Mistretta.* That decision was premised on an understanding that the Commission, rather than performing adjudicatory functions, instead makes political and substantive decisions. 488 U.S., at 393, 109 S.Ct. 647. We noted that the promulgation of the Guidelines was much like other activities in the Judicial Branch, such as the creation of the Federal Rules of Evidence, all of which are nonadjudicatory activities. *Id.,* at 387, 109 S.Ct. 647. We also noted that "Congress may delegate to the Judicial Branch nonadjudicatory functions that do not trench upon the prerogatives of another Branch and ***243** that are appropriate to the central mission of the Judiciary." *Id.,* at 388, 109 S.Ct. 647. While we recognized that the Guidelines were more substantive than the Rules of Evidence or other nonadjudicatory functions delegated to the Judicial Branch, we nonetheless concluded that such a delegation did not exceed Congress' powers.

Further, a recognition that the Commission did not exercise judicial authority, but was more properly thought of as exercising some sort of legislative power, *ibid.,* was essential to our holding. If the Commission in fact performed adjudicatory functions, it would have violated Article III because some of the members were not Article III judges. As we explained:

> "[T]he 'practical consequences' of locating the Commission within the Judicial Branch pose no threat of undermining the integrity of the Judicial Branch or of expanding the powers of the Judiciary beyond constitutional bounds by uniting within the Branch the political or quasi-legislative power of the Commission with the judicial power of the courts. [The Commission's] powers are not united with the powers of the Judiciary in a way that has meaning for separation-of-powers analysis. Whatever constitutional problems might arise if the powers

of the Commission were vested in a court, the Commission is not a court, does not exercise judicial power, and is not controlled by or accountable to members of the Judicial Branch." *Id.,* at 393, 109 S.Ct. 647.

We have thus always recognized the fact that the Commission is an independent agency that exercises policymaking authority delegated to it by Congress. Nothing in our holding today is inconsistent with our decision in *Mistretta.*

IV

All of the foregoing supports our conclusion that our holding in *Blakely* applies to the Sentencing Guidelines. We ****756** ***244** recognize, as we did in *Jones, Apprendi,* and *Blakely,* that in some cases jury factfinding may impair the most expedient and efficient sentencing of defendants. But the interest in fairness and reliability protected by the right to a jury trial—a common-law right that defendants enjoyed for centuries and that is now enshrined in the Sixth Amendment—has always outweighed the interest in concluding trials swiftly. *Blakely,* 542 U.S., at 313, 124 S.Ct., at 2542–2543. As Blackstone put it:

"[H]owever *convenient* these [new methods of trial] may appear at first, (as doubtless all arbitrary powers, well executed, are the most *convenient*) yet let it be again remembered, that delays, and little inconveniences in the forms of justice, are the price that all free nations must pay for their liberty in more substantial matters; that these inroads upon this sacred bulwark of the nation are fundamentally opposite to the spirit of our constitution; and that, though begun in trifles, the precedent may gradually increase and spread, to the utter disuse of juries in questions of the most momentous concerns." 4 Commentaries on the Laws of England 343–344 (1769).

[8] Accordingly, we reaffirm our holding in *Apprendi:* Any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt.

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

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

***245** "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, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), and *Blakely v. Washington,* 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), to the Federal Sentencing 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 746, 756 (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. § 3553(b)(1) (Supp. IV), incompatible with today's constitutional holding. We conclude that this provision must be severed and excised, as must one other statutory section, § 3742(e) (2000 ed. and Supp. IV), which depends ****757** upon the Guidelines' mandatory nature. So modified, the federal sentencing statute, see Sentencing Reform Act of 1984 (Sentencing Act), 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).

***246** 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, 119 S.Ct. 1187, 143 L.Ed.2d 270 (1999); *Alaska Airlines, Inc. v. Brock,* 480 U.S. 678, 684, 107 S.Ct. 1476, 94 L.Ed.2d 661 (1987); *Regan v. Time, Inc.,* 468 U.S. 641, 653, 104 S.Ct. 3262, 82 L.Ed.2d

487 (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, 116 S.Ct. 2374, 135 L.Ed.2d 888 (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 ***247** Guidelines system that it sought to create and that Congress wrote into the Act in 18 U.S.C. §§ 3553(a) and 3661 (2000 ed. and Supp. IV). 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 782–783 (STEVENS, J., dissenting in part). 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, 90 S.Ct. 1792, 26 L.Ed.2d 308 (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"); ****758** *Heckler v. Mathews,* 465 U.S. 728, 739, n. 5, 104 S.Ct. 1387, 79 L.Ed.2d 646 (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, 99 S.Ct. 2655, 61 L.Ed.2d 382 (1979), and *id.,* at 94, 99 S.Ct. 2655 (Powell, J., concurring in part and dissenting in part))); *Sloan v. Lemon,* 413 U.S. 825, 834, 93 S.Ct. 2982, 37 L.Ed.2d 939 (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 799, 800–801 (THOMAS, J., dissenting in part) ("[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).

***248** 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 decisionmaking by juries in only a minority of cases. See *post,* at 774 (STEVENS, J., dissenting in part). 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 773. 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 775–776.

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 ***249** 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 ****759** 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

[9] 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. § 3553(a)(1) (2000 ed. and Supp. IV). 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" ***250** 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) (2000 ed., Supp. IV). 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 779–780 (opinion dissenting in part), 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, 115 S.Ct. 464, 130 L.Ed.2d 372 (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 778 (opinion dissenting in part). 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 778 (STEVENS, J., dissenting in part). 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 ***251** 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 ****760** 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, 117 S.Ct. 633, 136 L.Ed.2d 554 (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, 117 S.Ct. 633; see also *id.,* at 152–153, 117 S.Ct. 633 (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 ***252** 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 ****761** 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, ***253** the judge would have to impose similar punishments. See, *e.g., post,* at 789–790 (SCALIA, J., dissenting in part).

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 789–790 (SCALIA, J., dissenting in part).

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.

[10] 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 ***254** 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 780–781 (opinion dissenting in part) (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 "[i]nexplicabl[e]" concerns for the "*manner* of achieving uniform sentences," *post,* at 790 (SCALIA, J., dissenting in part), 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, ****762** 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 ***255** 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 772 (STEVENS, J., dissenting in part). 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 toward 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), p. s. This system has not worked perfectly; judges have often simply accepted an agreed-upon account of the conduct at ***256** 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 759–760 with *post,* at 780–781 (STEVENS, J., dissenting in part). It would tend to defeat, not to further, Congress' basic statutory goal.

Such a system would have particularly troubling consequences 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 ***257** 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 ***258** 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 Sen. Orrin G. Hatch et al. as *Amici Curiae* 22. Yet that is the system that the dissenters' remedy would create. Compare *post,* at 782 (STEVENS, J., dissenting in part) (conceding asymmetry but stating belief ****764** 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

[11] 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 783 (STEVENS, J., dissenting in part). Most of the statute is perfectly valid. See, *e.g.,* 18 U.S.C. § 3551 (2000 ed. and Supp. IV) (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, 104 S.Ct. 3262 (plurality opinion). Indeed, we must retain

those portions of the Act that are (1) constitutionally valid, *id.,* at 652–653, 104 S.Ct. 3262, (2) capable of "functioning independently," ***259** *Alaska Airlines,* 480 U.S., at 684, 107 S.Ct. 1476, and (3) consistent with Congress' basic objectives in enacting the statute, *Regan, supra,* at 653, 104 S.Ct. 3262.

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) (2000 ed., Supp. IV), 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) (2000 ed. and Supp. IV) (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 749–750 (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 795–799 (THOMAS, J., dissenting in part).

The remainder of the Act "function[s] independently." *Alaska Airlines, supra,* at 684, 107 S.Ct. 1476. 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. § 3553(a) (2000 ed., Supp. IV). 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," ***260** § 3553(a)(4)(A), the pertinent Sentencing Commission policy statements, the need to avoid unwarranted sentencing disparities, ****765** and the need to provide restitution to victims, §§ 3553(a)(1), (3), (5)-(7) (2000 ed. and Supp. IV). 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) (2000 ed. and Supp. IV) (see Appendix, *infra,* for text of § 3553(a)).

Moreover, despite the absence of § 3553(b)(1) (Supp. 2004), 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) (2000 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) (2000 ed. and Supp. IV), 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.

[12] **[13]** **[14]** 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, 108 S.Ct. 2541, 101 L.Ed.2d 490 (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, 110 S.Ct. 2447, 110 L.Ed.2d 359 (1990) (same); *Koon v. United States,* 518 U.S. 81, 99, 116 S.Ct. 2035, 135 L.Ed.2d 392 (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 ***261** administration of justice.' " *Pierce, supra,* at 559–560, 108 S.Ct. 2541. 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). ****766** 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 ***262** 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 793 (opinion dissenting in part). 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 (C.A.8 2004); *United States v. Tsosie,* 376 F.3d 1210, 1218–1219 (C.A.10 2004); *United States v. Salinas,* 365 F.3d 582, 588–590 (C.A.7 2004); *United States v. Cook,* 291 F.3d 1297, 1300–1302 (C.A.11 2002) *(per curiam); United States v. Olabanji,* 268 F.3d 636, 637–639 (C.A.9 2001); *United States v. Ramirez–Rivera,* 241 F.3d 37, 40–41 (C.A.1 2001). That is why we think it fair (and not, in Justice SCALIA's words, a "gross exaggera ***263** tio[n]," *post,* at 794 (opinion dissenting in part)) 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 794–795 (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. § 994 (2000 ed. and Supp. IV).

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 ****767** 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 791 (SCALIA, J., dissenting in part) (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 ***264** 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 791 (SCALIA, J., dissenting in part). 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 761–762.

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 (emphasis 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. § 994 (2000 ed. and Supp. IV). 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 791 (SCALIA, J., dissenting in part) (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 ***265** 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 782–785 (STEVENS, J., dissenting in part). 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* ****768** *today's holding.* See, *e.g., Denver Area Ed. Telecommunications Consortium, Inc.,* 518 U.S., at 767, 116 S.Ct. 2374. 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 ***266** 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 777 (STEVENS, J., dissenting in part) (asserting that no

party or *amicus* sought the remedy we adopt); *post,* at 793 (SCALIA, J., dissenting in part) (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 Sen. Orrin G. Hatch et al. as *Amici Curiae* 22; see also *supra,* at 761. 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. ***267** 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 ****769** 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, *supra.* 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 Guidelines, 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 ***268** the judgment of the District Court and remand the case for further proceedings consistent with this opinion.

[15] 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, 107 S.Ct. 708, 93 L.Ed.2d 649 (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, 115 S.Ct. 1745, 131 L.Ed.2d 820 (1995) (civil case); *Harper v. Virginia Dept. of Taxation,* 509 U.S. 86, 97, 113 S.Ct. 2510, 125 L.Ed.2d 74 (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

Title 18 U.S.C. § 3553(a) (2000 ed. and Supp. IV) 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 ****770** sentence to be imposed, shall consider—

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

***269** "(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 ***270** 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. § 3553(b)(1) (Supp. IV) 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 ****771** 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."

***271** Title 18 U.S.C. § 3742(e) (2000 ed. and Supp. IV) 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."

Justice STEVENS, with whom Justice SOUTER joins, and with whom Justice SCALIA joins except for Part III and footnote 17, dissenting in part.

***272** Neither of the two Court opinions that decide these cases finds any constitutional infirmity inherent in any provision of the Sentencing Reform Act of 1984(SRA) or the Federal Sentencing Guidelines. Specifically, neither 18 U.S.C. § 3553(b)(1) (Supp. IV), which makes application of the Guidelines mandatory, nor § 3742(e) (2000 ed. and Supp. IV), which authorizes appellate review of departures from the Guidelines, is even arguably unconstitutional. Neither the Government, nor the respondents, nor any of the numerous *amici* has suggested that there is any need to invalidate either provision in order to avoid violations of the Sixth Amendment in the administration of the Guidelines. The Court's decision to do so represents a policy choice that Congress has considered and decisively rejected. While it is perfectly clear that Congress has ample power to repeal these two statutory provisions if it so desires, this Court should not make that choice on Congress' behalf. I respectfully ****772** dissent from the Court's extraordinary exercise of authority.

Before explaining why the law does not authorize the Court's creative remedy, why the reasons it advances in support of its decision are unpersuasive, and why it is abundantly clear that Congress has already rejected that very remedy, it is appropriate to explain how the violation of the Sixth Amendment that occurred in Booker's case could readily have been avoided without making any change in the Guidelines. Booker received a sentence of 360 months' imprisonment. His sentence was based on four factual determinations: (1) the jury's finding that he possessed 92.5 grams of crack (cocaine base); (2) the judge's finding that he possessed an additional 566 grams; (3) the judge's conclusion that he had obstructed justice; and (4) the judge's evaluation of his prior criminal record. Under the jury's 92.5 grams finding, the maximum sentence authorized by the Guidelines ***273** was a term of 262 months. See United States Sentencing Commission, Guidelines Manual § 2D1.1(c)(4) (Nov.2003) (USSG).

If the 566 gram finding had been made by the jury based on proof beyond a reasonable doubt, that finding would have authorized a Guidelines sentence anywhere between 324 and 405 months—the equivalent of a range from 27 to nearly 34 years—given Booker's criminal history. § 2D1.1(c)(2). Relying on his own appraisal of the defendant's obstruction of justice, and presumably any other information in the presentence report, the judge would have had discretion to select any sentence within that range. Thus, if the two facts, which in this case actually established two separate crimes, had both been found by the jury, the judicial factfinding that produced the actual sentence would not have violated the Constitution. In other words, the judge could have considered Booker's obstruction of justice, his criminal history, and all other real offense and offender factors without violating the Sixth Amendment. Because the Guidelines as written possess the virtue of combining a mandatory determination of sentencing ranges and discretionary decisions within those

ranges, they allow ample latitude for judicial factfinding that does not even arguably raise any Sixth Amendment issue.

The principal basis for the Court's chosen remedy is its assumption that Congress did not contemplate that the Sixth Amendment would be violated by depriving the defendant of the right to a jury trial on a factual issue as important as whether Booker possessed the additional 566 grams of crack that exponentially increased the maximum sentence that he could receive. I am not at all sure that that assumption is correct, but even if it is, it does not provide an adequate basis for volunteering a systemwide remedy that Congress has already rejected and could enact on its own if it elected to.

When one pauses to note that over 95% of all federal criminal prosecutions are terminated by a plea bargain, and the ***274** further fact that in almost half of the cases that go to trial there are no sentencing enhancements, the extraordinary overbreadth of the Court's unprecedented remedy is manifest. It is, moreover, unique because, under the Court's reasoning, if Congress should decide to reenact the exact text of the two provisions that the Court has chosen to invalidate, that reenactment would be unquestionably constitutional. In my judgment, it is therefore clear that the Court's creative remedy is an exercise of legislative, rather than judicial, power.

I

It is a fundamental premise of judicial review that all Acts of Congress are presumptively valid. See *Regan v. Time,* ****773** *Inc.,* 468 U.S. 641, 652, 104 S.Ct. 3262, 82 L.Ed.2d 487 (1984). "A ruling of unconstitutionality frustrates the intent of the elected representatives of the people." *Ibid.* In the past, because of its respect for the coordinate branches of Government, the Court has invalidated duly enacted statutes —or particular provisions of such statutes—"only upon a plain showing that Congress has exceeded its constitutional bounds." *United States v. Morrison,* 529 U.S. 598, 607, 120 S.Ct. 1740, 146 L.Ed.2d 658 (2000); see also *El Paso & Northeastern R. Co. v. Gutierrez,* 215 U.S. 87, 97, 30 S.Ct. 21, 54 L.Ed. 106 (1909). The exercise of such power is traditionally limited to issues presented in the case or controversy before the Court, and to the imposition of remedies that redress specific constitutional violations.

There are two narrow exceptions to this general rule. A facial challenge may succeed if a legislative scheme is unconstitutional in all or nearly all of its applications. That is certainly not true in these cases, however, because most applications of the Guidelines are unquestionably valid. A second exception involves cases in which an invalid provision or application cannot be severed from the remainder of the statute. That exception is inapplicable because there is no statutory or Guidelines provision that is invalid. Neither exception supports the majority's newly minted remedy.

***275** *Facial Invalidity:*

Regardless of how the Court defines the standard for determining when a facial challenge to a statute should succeed, [1] it is abundantly clear that the fact that a statute, or any provision of a statute, is unconstitutional in a portion of its applications does not render the statute or provision invalid, and no party suggests otherwise. The Government conceded at oral argument that 45% of federal sentences involve no enhancements. Cf. United States Sentencing Commission, 2002 Sourcebook of Federal Sentencing Statistics 39–40 (hereinafter Sourcebook). [2] And, according to two U.S. Sentencing Commissioners who testified before Congress shortly after we handed down our decision in *Blakely v. Washington,* 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), the number of enhancements that would actually implicate a defendant's Sixth Amendment rights is even smaller. See Hearings on *Blakely v. Washington* and the Future of the Federal Sentencing Guidelines before the Senate Committee on the Judiciary, 108th Cong., 2d Sess., 2 (2004) (hereinafter Hearings on *Blakely*) (testimony of Commissioners John R. Steer and Hon. William K. Sessions III) ("[A] majority of the cases sentenced under the federal guidelines do not receive sentencing enhancements that could potentially implicate *Blakely*"), available at http://www.ussc.gov/hearings/BlakelyTest.pdf (all Internet materials as visited Jan. 7, 2005, and available in Clerk of Court's case file). Simply stated, the Government's ***276** submissions to this Court and to Congress demonstrate ****774** that the Guidelines could be constitutionally applied in their entirety, without any modifications, in the "majority of the cases sentenced under the federal guidelines." *Ibid.* On the basis of these submissions alone, this Court should have declined to find the Guidelines, or any particular provisions of the Guidelines, facially invalid. [3]

Accordingly, the majority's claim that a jury factfinding requirement would "destroy the system," *ante,* at 760 (opinion of BREYER, J.), would at most apply to a *minority* of sentences imposed under the Guidelines. In reality, given

that the Government and judges have been apprised of the requirements of the Sixth Amendment, the number of unconstitutional applications would have been even smaller had we allowed them the opportunity to comply with our constitutional holding. This is so for several reasons.

First, it is axiomatic that a defendant may waive his Sixth Amendment right to trial by jury. *Patton v. United States,* 281 U.S. 276, 312–313, 50 S.Ct. 253, 74 L.Ed. 854 (1930). In *Blakely* we explained that "[w]hen a defendant pleads guilty, the State is free to seek judicial sentence enhancements so long as the defendant ***277** either stipulates to the relevant facts or consents to judicial factfinding." 542 U.S., at 310, 124 S.Ct. at 2541. Such reasoning applies with equal force to sentences imposed under the Guidelines. As the majority concedes, *ante,* at 758, only a tiny fraction of federal prosecutions ever go to trial. See Estimate, at 2 ("In FY02, 97.1 percent of cases sentenced under the guidelines were the result of plea agreements"). If such procedures were followed in the future, our holding that *Blakely* applies to the Guidelines would be consequential only in the tiny portion of prospective sentencing decisions that are made after a defendant has been found guilty by a jury.

Second, in the remaining fraction of cases that result in a jury trial, I am confident that those charged with complying with the Guidelines—judges, aided by prosecutors and defense attorneys—could adequately protect defendants' Sixth Amendment rights without this Court's extraordinary remedy. In many cases, prosecutors could avoid an *Apprendi v. New Jersey,* 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), problem simply by alleging in the indictment the facts necessary to reach the chosen Guidelines sentence. Following our decision in *Apprendi,* and again after our decision in *Blakely,* the Department of Justice advised federal prosecutors to adopt practices that would enable them "to charge and prove to the jury facts that increase the statutory maximum—for example, drug type and quantity ****775** for offenses under 21 U.S.C. 841." [4] Enhancing the specificity of indictments would be a simple matter, for example, in prosecutions under the federal drug statutes (such as Booker's prosecution). The Government has already directed its prosecutors to allege facts such as the ***278** possession of a dangerous weapon or "that the defendant was an organizer or leader of criminal activity that involved five or more participants" in the indictment and prove them to the jury beyond a reasonable doubt. [5]

Third, even in those trials in which the Guidelines require the finding of facts not alleged in the indictment, such factfinding by a judge is not unconstitutional *per se.* To be clear, our holding in Parts I–III, *ante,* at 755–756 (STEVENS, J., opinion of the Court), that *Blakely* applies to the Guidelines does not establish the "impermissibility of judicial factfinding." Brief for United States 46. Instead, judicial factfinding to support an offense level determination or an enhancement is *only unconstitutional when that finding raises the sentence beyond the sentence that could have lawfully been imposed by reference to facts found by the jury or admitted by the defendant.*This distinction is crucial to a proper understanding of why the Guidelines could easily function as they are currently written.

Consider, for instance, a case in which the defendant's initial sentencing range under the Guidelines is 130–to–162 months, calculated by combining a base offense level of 28 and a criminal history category of V. See USSG ch. 5, pt. A (Table). Depending upon the particular offense, the sentencing judge may use her discretion to select any sentence within this range, even if her selection relies upon factual determinations beyond the facts found by the jury. If the defendant described above also possessed a firearm, the Guidelines would direct the judge to apply a two-level enhancement under § 2D1.1, which would raise the defendant's total offense level from 28 to 30. That, in turn, would raise the defendant's eligible sentencing range to 151–to–188 months. That act of judicial factfinding would comply with the Guidelines and the Sixth Amendment so long as the sentencing ***279** judge then selected a sentence between 151–to–162 months—the lower number (151) being the bottom of offense level 30 and the higher number (162) being the maximum sentence under level 28, which is the upper limit of the range supported by the jury findings alone. This type of overlap between sentencing ranges is the rule, not the exception, in the Guidelines as currently constituted. See 1 Practice Under the Federal Sentencing Guidelines § 6.01[B], p. 7 (P. Bamberger & D. Gottlieb eds. 4th ed.2003 Supp.) (noting that nearly all Guidelines ranges overlap and that "because of the overlap, the actual sentence imposed can theoretically be the same no matter which guideline range is chosen"). Trial courts have developed considerable expertise in employing overlapping provisions in such a manner as to avoid unnecessary resolution of factual disputes, see § 7.03[B][2], at 34 (2004 Supp.), and lower courts have shown themselves capable of distinguishing proper from improper applications of sentencing enhancements under ****776** *Blakely,* see, *e.g., United States v. Mayfield,* 386 F.3d 1301 (C.A.9 2004)

(upholding a two-level enhancement for firearm possession from offense level 34 to 36 because the sentencing judge selected a sentence within the overlapping range between the two levels). The interaction of these various Guidelines provisions demonstrates the fallacy in the assumption that judicial factfinding can never be constitutional under the Guidelines.

The majority's answer to the fact that the vast majority of applications of the Guidelines are constitutional is that "we must determine likely intent not by counting proceedings, but by evaluating the consequences of the Court's constitutional requirement" on every imaginable case. *Ante,* at 758 (opinion of BREYER, J.). That approach ignores the lessons of our facial invalidity cases. Those cases stress that this Court is ill suited to the task of drafting legislation and that, therefore, as a matter of respect for coordinate branches of ***280** Government, we ought to presume whenever possible that those charged with writing and implementing legislation will and can apply "the statute consistently with the constitutional command." *Time, Inc. v. Hill,* 385 U.S. 374, 397, 87 S.Ct. 534, 17 L.Ed.2d 456 (1967). Indeed, this Court has generally refused to consider "every conceivable situation which might possibly arise in the application of complex and comprehensive legislation," *Barrows v. Jackson,* 346 U.S. 249, 256, 73 S.Ct. 1031, 97 L.Ed. 1586 (1953), because "[t]he delicate power of pronouncing an Act of Congress unconstitutional is not to be exercised with reference to hypothetical cases thus imagined," *United States v. Raines,* 362 U.S. 17, 22, 80 S.Ct. 519, 4 L.Ed.2d 524 (1960). The Government has already shown it can apply the Guidelines constitutionally even as written, and Congress is perfectly capable of redrafting the statute on its own. Thus, there is no justification for the extreme judicial remedy of total invalidation of any part of the SRA or the Guidelines.

In sum, it is indisputable that the vast majority of federal sentences under the Guidelines would have complied with the Sixth Amendment without the Court's extraordinary remedy. Under any reasonable reading of our precedents, in no way can it be said that the Guidelines are, or that any particular Guidelines provision is, facially unconstitutional.

Severability:

Even though a statute is not facially invalid, a holding that certain specific provisions are unconstitutional may make it necessary to invalidate the entire statute. See generally Stern, Separability and Separability Clauses in the Supreme Court, 51 Harv. L.Rev. 76 (1937) (hereinafter Stern). Our normal rule, however, is that the "unconstitutionality of a *part* of an Act does not necessarily defeat or affect the validity of its remaining provisions. Unless it is evident that the legislature would not have enacted *those provisions* which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative ***281** as a law." *Champlin Refining Co. v. Corporation Comm'n of Okla.,* 286 U.S. 210, 234, 52 S.Ct. 559, 76 L.Ed. 1062 (1932) (emphasis added). [6]

Our "severability" precedents, however, cannot support the Court's remedy because there is no provision of the SRA or the Guidelines that falls outside of Congress' power. See *Alaska Airlines, Inc. v. Brock,* 480 U.S. 678, 684, 107 S.Ct. 1476, 94 L.Ed.2d 661 (1987). Accordingly, severability analysis simply does not apply.

The majority concludes that our constitutional holding requires the invalidation of §§ 3553(b)(1) and 3742(e). The first ***282** of these sections uses the word "shall" to make the substantive provisions of the Guidelines mandatory. See *Mistretta v. United States,* 488 U.S. 361, 367, 109 S.Ct. 647, 102 L.Ed.2d 714 (1989). The second authorizes *de novo* review of sentencing judges' applications of relevant Guidelines provisions. Neither section is unconstitutional. While these provisions can in certain cases, when combined with other statutory and Guidelines provisions, result in a violation of the Sixth Amendment, they are plainly constitutional on their faces.

Rather than rely on traditional principles of facial invalidity or severability, the majority creates a new category of cases in which this Court may invalidate any part or parts of a statute (and add others) when it concludes that Congress would have preferred a modified system to administering the statute in compliance with the Constitution. This is entirely new law. Usually the Court first declares unconstitutional a particular provision of law, and only then does it inquire whether the remainder of the statute can be saved. See, *e.g., Regan v. Time,* 468 U.S., at 652, 104 S.Ct. 3262; *Alaska Airlines,* 480 U.S., at 684, 107 S.Ct. 1476. Review in this manner *limits* judicial power by *minimizing* the damage done to the statute by judicial fiat. There is no case of which I am aware, however, in which this Court has used "severability" analysis to do what the majority does today: determine that *some* unconstitutional applications of a statute, when viewed in light of the Court's reading of "likely" legislative intent, justifies the invalidation of certain statutory sections in their

entirety, their constitutionality notwithstanding, in order to save the parts of the statute the Court deemed most important. The novelty of this remedial maneuver perhaps explains why *no party* or *amicus curiae* to this litigation has requested the remedy the Court now orders. In addition, ****778** none of the federal courts that have addressed *Blakely's* application to the Guidelines has concluded that striking down § 3553(b)(1) is a proper solution.

***283** Most importantly, the Court simply has no authority to invalidate legislation absent a showing that it is unconstitutional. To paraphrase Chief Justice Marshall, an "act of the legislature" must be "repugnant to the constitution" in order to be void. *Marbury v. Madison,* 1 Cranch 137, 177, 2 L.Ed. 60 (1803). When a provision of a statute is unconstitutional, that provision is void, and the Judiciary is therefore not bound by it in a particular case. Here, however, the provisions the majority has excised from the statute are perfectly valid: Congress could pass the identical statute tomorrow and it would be binding on this Court so long as it were administered in compliance with the Sixth Amendment. [7] Because the statute itself is not repugnant to the Constitution and can by its terms comport with the Sixth Amendment, the Court does not have the constitutional authority to invalidate it.

The precedent on which the Court relies is scant indeed. It can only point to cases in which a provision of law was unconstitutionally extended to or limited to a particular class; in such cases it is necessary either to invalidate the provision or to require the legislature to extend the benefit to an excluded class. [8] Given the sweeping nature of the ***284** remedy ordained today, the majority's assertions that it is proper to engage in an *ex ante* analysis of congressional intent in order to select in the first instance the statutory provisions to be struck down is contrary to the very purpose of engaging in severability analysis—the Court's remedy expands, rather than limits, judicial power.

There is no justification for extending our severability cases to cover this situation. The SRA and the Guidelines can be read—and are being currently read—in a way that complies with the Sixth Amendment. If Congress wished to amend the statute to enact the majority's vision of how the Guidelines should operate, it would be perfectly free to do so. There is no need to devise a novel and questionable method of invalidating statutory provisions that can be constitutionally applied.

II

Rather than engage in a wholesale rewriting of the SRA, I would simply allow the Government to continue doing what it has done since this Court handed down *Blakely*—prove any fact that is *required* to increase a defendant's sentence ***285** under the Guidelines to a jury beyond a reasonable doubt. As I have already discussed, a requirement of jury factfinding for certain issues can be implemented without difficulty in the vast majority of cases. See *supra,* at 774–776.

Indeed, this already appears to be the case. "[T]he Department of Justice already has instituted procedures which would protect the overwhelming majority of future cases from *Blakely* infirmity. The Department of Justice has issued detailed guidance for every stage of the prosecution from indictment to final sentencing, including alleging facts that would support sentencing enhancements and requiring defendants to waive any potential *Blakely* rights in plea agreements." Hearings on *Blakely* 1–2. [9] Given this experience, I think the Court dramatically overstates the difficulty of implementing this solution.

The majority advances five reasons why the remedy that is already in place will not work. First, the majority points to the statutory text referring to "the court" in arguing that jury factfinding is impermissible. While this text is no doubt evidence that Congress *contemplated* judicial factfinding, it does not demonstrate that Congress thought that judicial factfinding was so essential that, if forced to choose between a system including jury determinations of certain facts in certain cases on the one hand, and a system in which the Guidelines would cease to restrain the discretion of federal judges on the other, Congress would have selected the latter.

***286** As a textual matter, the word "court" can certainly be read to include a judge's selection of a sentence as supported by a jury verdict—this reading is plausible either as a pure matter of statutory construction or under principles of constitutional avoidance. Ordinarily, " 'where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter.' " *Jones v. United States,* 526 U.S. 227, 239, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999) (quoting *United States ex rel. Attorney General v. Delaware & Hudson Co.,* 213 U.S. 366, 408, 29 S.Ct. 527, 53 L.Ed. 836 (1909)). This principle, which "has for so long been applied by this Court that it is beyond

debate," *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Constr. Trades* ****780** *Council,* 485 U.S. 568, 575, 108 S.Ct. 1392, 99 L.Ed.2d 645 (1988), is intended to show respect for Congress by presuming it "legislates in the light of constitutional limitations," *Rust v. Sullivan,* 500 U.S. 173, 191, 111 S.Ct. 1759, 114 L.Ed.2d 233 (1991).

The Court, however, reverses the ordinary presumption. It interprets the phrase "[t]he court ... shall consider" in 18 U.S.C. § 3553(a) (Supp. IV) to mean: The judge shall consider and impose the appropriate sentence, but the judge shall not be constrained by any findings of a jury. See *ante,* at 759 (opinion of BREYER, J.) (interpreting the word "court" to mean " 'the judge without the jury' "). The Court's narrow reading of the statutory text is unnecessary. Even assuming that the word "court" should be read to mean "judge, and only the judge," a requirement that certain enhancements be supported by jury verdicts leaves the ultimate sentencing decision exclusively within the judge's hands—the judge, and the judge alone, would retain the discretion to sentence the defendant anywhere within the required Guidelines range and within overlapping Guidelines ranges when applicable. See *supra,* at 775–776. The judge would, no doubt, be limited by the findings of the jury in *certain cases,* but the fact that such a limitation would be required by the Sixth Amendment in those limited circumstances is not ***287** a reason to adopt such a constrained view of an Act of Congress. [10]

In adopting its constrictive reading of "court," the majority has manufactured a broader constitutional problem than is necessary, and has thereby made necessary the extraordinary remedy it has chosen. I pause, however, to stress that it is not this Court's holding that the Guidelines must be applied consistently with the Sixth Amendment that has made the majority's remedy necessary. Rather, it is the Court's miserly reading of the statutory language that results in "constitutional infirmities." See *ante,* at 761–762 (opinion of BREYER, J.)

Second, the Court argues that simply applying *Blakely* to the Guidelines would make "real conduct" sentencing more difficult. While that is perhaps true in some cases, judges could always consider relevant conduct obtained from a presentence report pursuant to 18 U.S.C. § 3661 and USSG § 6A1.1 in selecting a sentence within a Guidelines range, and of course would be free to consider any such circumstances in cases in which the defendant pleads guilty and waives his *Blakely* rights. Further, in many cases the Government could simply prove additional facts to a jury beyond a reasonable doubt—as it has been doing in some cases since *Apprendi*—or the court could use bifurcated proceedings in which the relevant conduct is proved to a jury after it has convicted the defendant of the underlying crime.

***288** The majority is correct, however, that my preferred holding would undoubtedly affect "real conduct" sentencing in certain cases. This is so because the goal of such sentencing—increasing a defendant's sentence on the basis of conduct not proved at trial—is contrary to the very core of ****781** *Apprendi.* That certain applications of "relevant conduct" sentencing are unconstitutional should not come as a complete surprise to Congress: The House Report recognized that "real offense" sentencing could pose constitutional difficulties. H.R.Rep. No. 98–1017, p. 98 (1984). In reality, the majority's concerns about relevant conduct are nothing more than an objection to *Apprendi* itself, an objection that this Court rejected in Parts I–III, *ante* (opinion of STEVENS, J.).

Further, the Court does not explain how its proposed remedy will ensure that judges take real conduct into account. While judges certainly may do so in their discretion under § 3553(a), there is no indication as to how much or to what extent "relevant conduct" should matter under the majority's regime. Nor is there any meaningful standard by which appellate courts may review a sentencing judge's "relevant conduct" determination—only a general "reasonableness" inquiry that may discourage sentencing judges from considering such conduct altogether. The Court's holding thus may do just as much damage to real conduct sentencing as would simply requiring the Government to follow the Guidelines consistent with the Sixth Amendment.

Third, the majority argues that my remedy would make sentencing proceedings far too complex. But of the very small number of cases in which a Guidelines sentence would implicate the Sixth Amendment, see *supra,* at 773–774, most involve drug quantity determinations, firearm enhancements, and other factual findings that can readily be made by juries. I am not blind to the fact that some cases, such as fraud prosecutions, would pose new problems for prosecutors and trial judges. See *ante,* at 760–761 (opinion of BREYER, J.). In such cases, I am confident that federal trial ***289** judges, assisted by capable prosecutors and defense attorneys, could have devised appropriate procedures to impose the sentences the Guidelines envision in a manner that is consistent with the Sixth Amendment. We have always trusted juries to sort through complex facts in various areas of law. This may not be the most efficient system imaginable, but the Constitution

does not permit efficiency to be our primary concern. See *Blakely v. Washington,* 542 U.S., at 312–313, 124 S.Ct., at 2542–43.

Fourth, the majority assails my reliance on plea bargaining. The Court claims that I cannot discount the effect that applying *Blakely* to the Guidelines would have on plea-bargained cases, since the specter of *Blakely* will affect those cases. However, the majority's decision suffers from the same problem to a much greater degree. Prior to the Court's decision to strike the mandatory feature of the Guidelines, prosecutors and defendants alike could bargain from a position of reasonable confidence with respect to the sentencing range into which a defendant would likely fall. The majority, however, has eliminated the certainty of expectations in the plea process. And, unlike my proposed remedy, which would potentially affect only a fraction of plea bargains, the uncertainty resulting from the Court's regime change will infect the entire universe of guilty pleas which occur in 97% of all federal prosecutions.

The majority also argues that applying *Blakely* to the Guidelines would allow prosecutors to exercise "a power the Sentencing Act vested in judges," *ante,* at 763 (opinion of BREYER, J.), by giving prosecutors the choice whether to "charge" a particular fact. Under the remedy I favor, however, judges would still be able to reject factually false plea agreements under USSG § 6B1.2(a), and could still consider relevant information about the offense and ****782** the offender in every single case. Judges could consider such characteristics as an aid in selecting the appropriate sentence within the Guidelines range authorized by the jury verdict, determining the defendant's ***290** criminal history level, reducing a defendant's sentence, or justifying discretionary departures from the applicable Guidelines range. The Court is therefore incorrect when it suggests that requiring a supporting jury verdict for certain enhancements in certain cases would place certain sentencing factors "beyond the reach of the judge entirely." See *ante,* at 763 (opinion of BREYER, J.).

Moreover, the premise on which the Court's argument is based—that the Guidelines as currently written prevent fact bargaining and therefore diminish prosecutorial power—is probably not correct. As one commentator has noted:

> "[P]rosecutors exercise nearly as much control when guidelines tie sentences to so-called 'real-offense' factors .... One might reasonably assume those factors are outside of prosecutors' control, but experience with the Federal Sentencing Guidelines suggests otherwise; when necessary, the litigants simply bargain about what facts will (and won't) form the basis for sentencing. It seems to be an iron rule: guidelines sentencing empowers prosecutors, even where the guidelines' authors try to fight that tendency." Stuntz, Plea Bargaining and Criminal Law's Disappearing Shadow, 117 Harv. L.Rev. 2548, 2559–2560 (2004) (footnote omitted).

Not only is fact bargaining quite common under the current system, it is also clear that prosecutors have substantial bargaining power.[11] And surely, contrary to the Court's response ***291** to this dissent, *ante,* at 763 (opinion of BREYER, J.), a prosecutor who need only prove an enhancing fact by a preponderance of the evidence has more bargaining power than if required to prove the same fact beyond a reasonable doubt.

Finally, the majority argues that my solution would require a different burden of proof for enhancements above the maximum authorized by the jury verdict and for reductions. This is true because the requirement that guilt be established by proof beyond a reasonable doubt is a constitutional mandate. However, given the relatively few reductions available in the Guidelines and the availability of judicial discretion within the applicable range, this is unlikely to have more than a minimal effect.

In sum, I find unpersuasive the Court's objections to allowing Congress to decide in the first instance whether the Guidelines should be converted from a mandatory into a discretionary system. Far more important than those objections is the overwhelming evidence that Congress has already considered, and unequivocally rejected, the regime that the Court endorses today.

III

Even under the Court's innovative approach to severability analysis when confronted ****783** with unconstitutional applications of a statute, its opinion is unpersuasive. It assumes that this Court's only inquiry is to "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." *Ante,* at 757 (opinion of BREYER, J.). I will assume, consistently with the majority, that in this exercise we should never use our "remedial powers to

circumvent the intent of the legislature," *Califano v. Westcott,* 443 U.S. 76, 94, 99 S.Ct. 2655, 61 L.Ed.2d 382 (1979) (Powell, J., concurring in part and dissenting in part), and that we must not create "a program quite different ***292** from the one the legislature actually adopted," *Sloan v. Lemon,* 413 U.S. 825, 834, 93 S.Ct. 2982, 37 L.Ed.2d 939 (1973).

In the context of this framework, in order to justify "excising" 18 U.S.C. §§ 3553(b)(1) (Supp. IV) and 3742(e) (2000 ed. and Supp. IV), the Court has the burden of showing that Congress would have preferred the remaining system of discretionary Sentencing Guidelines to not just the remedy I would favor, but also to *any* available alternative, including the alternative of total invalidation, which would give Congress a clean slate on which to write an entirely new law. The Court cannot meet this burden because Congress has already considered and overwhelmingly rejected the system it enacts today. In doing so, Congress revealed both an unmistakable preference for the certainty of a binding regime and a deep suspicion of judges' ability to reduce disparities in federal sentencing. A brief examination of the SRA's history reveals the gross impropriety of the remedy the Court has selected.

History of Sentence Reform Efforts:

In the mid–1970's, Congress began to study the numerous problems attendant to indeterminate sentencing in the federal criminal justice system. After nearly a decade of review, Congress in 1984 decided that the system needed a comprehensive overhaul. The elimination of sentencing disparity, which Congress determined was chiefly the result of a discretionary sentencing regime, was unquestionably Congress' principal aim. See Feinberg, Federal Criminal Sentencing Reform: Congress and the United States Sentencing Commission, 28 Wake Forest L.Rev. 291, 295–296 (1993) ("The first and foremost goal of the sentencing reform effort was to alleviate the perceived problem of federal criminal sentencing disparity .... Quite frankly, all other considerations were secondary"); see also Breyer, Federal Sentencing Guidelines Revisited, 2 Fed. Sentencing Rptr. 180 (1999) ("In seeking 'greater fairness,' Congress, acting in bipartisan ***293** fashion, intended to respond to complaints of unreasonable disparity in sentencing—that is, complaints that differences among sentences reflected *not simply* different offense conduct or different offender history, but the fact that *different judges* imposed the sentences" (emphasis added)). As Senator Hatch, a central participant in the reform effort, has explained: "The discretion that Congress had conferred for so long upon the judiciary and the parole authorities was *at the heart of sentencing disparity.*" The Role of Congress in Sentencing: The United States Sentencing Commission, Mandatory Minimum Sentences, and the Search for a Certain and Effective Sentencing System, 28 Wake Forest L.Rev. 185, 187 (1993) (hereinafter Hatch) (emphasis added).

Consequently, Congress explicitly rejected as a model for reform the various proposals for advisory guidelines that had been introduced in past Congresses. One example of such legislation was the bill ****784** introduced in 1977 by Senators Kennedy and McClellan, S. 1437, 95th Cong., 1st Sess. (as reported by the Senate Judiciary Committee on Nov. 15, 1977) (hereinafter S. 1437), which allowed judges to impose sentences based on the characteristics of the individual defendant and granted judges substantial discretion to depart from recommended guidelines sentences. See Stith & Koh, The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines, 28 Wake Forest L.Rev. 223, 238 (1993) (hereinafter Stith & Koh). That bill never became law and was refined several times between 1977 and 1984: Each of those refinements made the regime more, not less, restrictive on trial judges' discretion in sentencing. [12]

***294** *Passage of the Sentencing Reform Act of 1984:*

Congress' preference for binding guidelines was evident in the debate over passage of the SRA itself, which was predicated entirely on the move from a discretionary guidelines system to the mandatory system the Court strikes down today. The SRA was the product of competing versions of sentencing reform legislation: the House bill, H.R. 6012, 98th Cong., 2d Sess., authorized the creation of discretionary guidelines whereas the Senate bill, S. 668, 98th Cong., 2d Sess., provided for binding guidelines and *de novo* appellate review. The House was splintered regarding whether to make the Guidelines binding on judges, but the vote in the Senate was an overwhelming 85 to 3 in favor of binding Guidelines. 130 Cong. Rec. 1649 (1984); see generally Stith & Koh 261–266. Eventually, the House substituted the Senate version for H.R. 6012, and the current system of mandatory Guidelines became law. 130 Cong. Rec. 29730 (1984).

The text of the law that actually passed Congress (including §§ 3553(b)(1) and 3742(e)) should be more than sufficient to demonstrate Congress' unmistakable commitment to a binding Guidelines system. That text *requires* the sentencing judge to impose the sentence dictated by the Guidelines

("[T]he court shall impose a sentence of the kind, and within the range" provided in the Guidelines unless there is a circumstance "not adequately taken into consideration by the" ***295** Guidelines), and § 3742(e) gives § 3553(b)(1) teeth by instructing judges that any sentence outside of the Guidelines range without adequate explanation will be overturned on appeal. [13] Congress' chosen regime was carefully designed to produce uniform compliance with the Guidelines. Congress surely would not have taken the pains to create such a regime had it found the Court's system of ****785** discretionary guidelines acceptable *in any way.*

The accompanying Senate Report and floor debate make plain what should be obvious from the structure of the statute: Congress refused to accept the discretionary system that the Court implausibly deems most consistent with congressional intent. [14] In other words, given the choice between the statute created by the Court today or a clean slate ***296** on which to write a wholly different law, Congress undoubtedly would have selected the latter.

Congress' Method of Reducing Disparities:

The notion that Congress had any confidence that *judges* would reduce sentencing disparities by considering relevant conduct—an idea that is championed by the Court, *ante,* at 761 (opinion of BREYER, J.)—either ignores or misreads the political environment in which the SRA passed. It is true that the SRA instructs sentencing judges to consider real offense and offender characteristics, 28 U.S.C.A. § 994 (2000 ed. and Supp. IV), but Congress only wanted judges to consider those characteristics within the limits of a mandatory system. [15] The Senate Report on which the Court relies, see *ante,* at 759, clearly concluded that the existence of sentencing disparities "can be traced directly to the unfettered discretion the law confers on those judges ... responsible for imposing and implementing the sentence." S.Rep. No. 98–225, p. 38 (1983). Even in a system in which judges could not impose sentences based on "relevant con ***297** duct" determinations ****786** (absent a plea agreement or supporting jury findings), sentences would still be every bit as certain and uniform as in the status quo—at most, the process for imposing those sentences would be more complex. The same can hardly be said of the Court's chosen system, in which *all* federal sentencing judges, in *all* cases, regain the unconstrained discretion Congress eliminated in 1984.

The Court's conclusion that Congress envisioned a sentencing judge as the centerpiece of its effort to reduce disparities is remarkable given the context of the broader legislative debate about what entity would be responsible for drafting the Guidelines under the SRA. The House version of the bill preferred the Guidelines to be written by the Judicial Conference of the United States—the House Report accompanying that bill argued that judges had vast experience in sentencing and would best be able to craft a system capable of providing sentences based on real conduct without excessive disparity. See H.R.Rep. No. 98–1017, at 93–94. Those in the Senate majority, however, favored an independent Commission. They did so, whether rightly or wrongly, based on a belief that federal judges could not be trusted to impose fair and uniform sentences. See, *e.g.,* 130 Cong. Rec. 976 (1984) (remarks of Sen. Laxalt) ("The present problem with disparity in sentencing ... stems precisely from the failure of [f]ederal judges—individually and collectively—to sentence similarly situated defendants in a consistent, reasonable manner. There is little reason to believe that judges will now begin to do what they have failed to do in the past"). And, at the end of the debate, the few remaining Members in the minority recognized that the battle to empower judges with more discretion had been lost. See, *e.g., id.,* at 973 (remarks of Sen. Mathias) (arguing that "[t]he proponents of the bill ... argue in essence that judges cannot be trusted. You cannot trust a judge ... you must not trust a judge"). I find it impossible to believe that a Congress in which these ***298** sentiments prevailed would have ever approved of the discretionary sentencing regime the Court enacts today.

Congressional Activity Since 1984:

Congress has not wavered in its commitment to a binding system of Sentencing Guidelines. In fact, Congress has rejected each and every attempt to loosen the rigidity of the Guidelines or vest judges with more sentencing options. See Hatch 189 ("In ensuing years, Congress would maintain its adherence to the concept of binding guidelines by consistently rejecting efforts to make the guidelines more discretionary"). Most recently, Congress' passage of the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003 (PROTECT Act), Pub.L. 108–21, 117 Stat. 650, reinforced the mandatory nature of the Guidelines by expanding *de novo* review of sentences to include all departures from the Guidelines and by directing the Commission to limit the number of available departures. The majority admits that its holding has made the PROTECT Act irrelevant. See *ante,* at 765

(opinion of BREYER, J.) (admitting that after the Court's remedy, the PROTECT Act's provisions "have ceased to be relevant"). Even a cursory reading of the legislative history of the PROTECT Act reveals the absurdity of the claim that Congress would find acceptable, under any circumstances, the Court's restoration of judicial discretion through the facial invalidation of §§ 3553(b)(1) and 3742(e).[16] In sum, despite ****787** Congress' ***299** unequivocal demand that the Guidelines operate as a binding system, and in the name of avoiding any reduction in the power of the sentencing judge vis-à-vis the jury (a subject to which Congress did not speak), the majority has erased the heart of the SRA and ignored in their entirety all of the Legislative Branch's postenactment expressions of how the Guidelines are supposed to operate.

The majority's answer to this overwhelming history is that retaining a mandatory Guidelines system "is not a choice that remains open" given our holding that *Blakely* applies to the Guidelines. *Ante,* at 767. This argument—essentially, that the *Apprendi* rule makes determinate sentencing unconstitutional—has been advanced repeatedly since *Apprendi.* See, *e.g.,* 530 U.S., at 549–554, 120 S.Ct. 2348 (O'CONNOR, J., dissenting); *Blakely,* 542 U.S., at 314, 124 S.Ct., at 2534 (O'CONNOR, J., dissenting); *id.,* at 345–346, 124 S.Ct., 2560–2561 (BREYER, J., dissenting). These prophecies were self-fulfilling. It is not *Apprendi* that has brought an end to determinate sentencing. This Court clearly had the power to adopt a remedy that both complied with the Sixth Amendment and also preserved a determinate sentencing regime in which judges make regular factual determinations regarding a defendant's sentence. It has chosen instead to exaggerate the constitutional problem and to expand the scope of judicial invalidation far beyond that which is even arguably necessary. Our holding that *Blakely* applies to the Sentencing Guidelines did not dictate the Court's unprecedented remedy.

***300** IV

As a matter of policy, the differences between the regime enacted by Congress and the system the Court has chosen are stark. Were there any doubts about whether Congress would have preferred the majority's solution, these are sufficient to dispel them. First, Congress' stated goal of uniformity is eliminated by the majority's remedy. True, judges must still *consider* the sentencing range contained in the Guidelines, but that range is now nothing more than a suggestion that may or may not be persuasive to a judge when weighed against the numerous other considerations listed in 18 U.S.C. § 3553(a) (2000 ed., and Supp. IV). The result is certain to be a return to the same type of sentencing disparities Congress sought to eliminate in 1984. Prior to the PROTECT Act, rates of departure from the applicable Guidelines sentence (via upward or downward departure) varied considerably depending upon the Circuit in which one was sentenced. See Sourcebook 53–55 (Table 26) (showing that 76.6% of sentences in the ****788** Fourth Circuit were within the applicable Guidelines range, whereas only 48.8% of sentences in the Ninth Circuit fell within the range). Those disparities will undoubtedly increase in a discretionary system in which the Guidelines are but one factor a judge must consider in sentencing a defendant within a broad statutory range.

Moreover, the Court has neglected to provide a critical procedural protection that existed prior to the enactment of a binding Guidelines system. Before the SRA, the sentencing judge had the discretion to impose a sentence that designated a minimum term "at the expiration of which the prisoner shall become eligible for parole." 18 U.S.C. § 4205(b) (1982 ed.) (repealed by Pub.L. 98–473, § 218(a)(5), 98 Stat. 2027). Sentencing judges had the discretion to reduce a minimum term of imprisonment upon the recommendation of the Bureau of Prisons. § 4205(g). Through these provisions ***301** and others, see generally §§ 4201–4215, all of which were effectively repealed in 1984, it was the Parole Commission—not the sentencing judge—who was ultimately responsible for determining the length of each defendant's real sentence. See, *e.g.,* S.Rep. No. 98–225, at 38. Prior to the Guidelines regime, the Parole Commission was designed to reduce sentencing disparities and to provide a check for defendants who had received excessive sentences. Today, the Court reenacts the discretionary Guidelines system that once existed without providing this crucial safety net.

Other concerns are likely to arise. Congress' demand in the PROTECT Act that departures from the Guidelines be closely regulated and monitored is eviscerated—for there can be no "departure" from a mere suggestion. How will a judge go about determining how much deference to give to the applicable Guidelines range? How will a court of appeals review for reasonableness a district court's decision that the need for "just punishment" and "adequate deterrence to criminal conduct" simply outweighs the considerations contemplated by the Sentencing Commission? See 18 U.S.C. §§ 3553(a)(2)(A)-(B). What if a sentencing judge determines that a defendant's need for "educational or vocational training, medical care, or other correctional treatment in the most

effective manner," § 3553(a)(2)(D), requires disregarding the stiff Guidelines range Congress presumably preferred? These questions will arise in every case in the federal system under the Court's system. Regrettably, these are exactly the sort of questions Congress hoped that sentencing judges would not ask after the SRA.

The consequences of such a drastic change—unaided by the usual processes of legislative deliberation—are likely to be sweeping. For example, the majority's unnecessarily broad remedy sends every federal sentence back to the drawing board, or at least into the novel review for "reasonableness," regardless of whether those individuals' constitutional ***302** rights were violated. It is highly unlikely that the mere application of "prudential doctrines" will mitigate the consequences of such a gratuitous change.

The majority's remedy was not the inevitable result of the Court's holding that *Blakely* applies to the Guidelines. Neither *Apprendi,* nor *Blakely,* nor these cases made determinate sentencing unconstitutional. [17] Merely requiring all applications ****789** of the Guidelines to comply with the Sixth Amendment would have allowed judges to distinguish harmless error from error requiring correction, would have required no more complicated procedures than the procedural regime the majority enacts today, and, ultimately, would have left most sentences intact.

Unlike a rule that would merely require judges and prosecutors to comply with the Sixth Amendment, the Court's systematic overhaul turns the entire system on its head *in every case,* and, in so doing, runs contrary to the central purpose that motivated Congress to act in the first instance. Moreover, by repealing the right to a determinate sentence that Congress established in the SRA, the Court has effectively eliminated the very constitutional right *Apprendi* sought to vindicate. No judicial remedy is proper if it is "not commensurate with the constitutional violation to be repaired." *Hills v. Gautreaux,* 425 U.S. 284, 294, 96 S.Ct. 1538, 47 L.Ed.2d 792 (1976). The Court's system fails that test, frustrates Congress' principal goal in ***303** enacting the SRA, and violates the tradition of judicial restraint that has heretofore limited our power to overturn validly enacted statutes.

I respectfully dissent.

Justice SCALIA, dissenting in part.

I join the portions of the opinion of the Court that are delivered by Justice STEVENS. I also join Justice STEVENS's dissent, with the exception of Part III [1] and footnote 17. I write separately mainly to add some comments regarding the change that the remedial majority's handiwork has wrought (or perhaps—who can tell?—has not wrought) upon appellate review of federal sentencing.

The remedial majority takes as the North Star of its analysis the fact that Congress enacted a "judge-based sentencing system." *Ante,* at 768 (opinion of BREYER, J.). That seems to me quite misguided. Congress did indeed expect judges to make the factual determinations to which the Guidelines apply, just as it expected the Guidelines to be mandatory. But which of those expectations was central to the congressional purpose is not hard to determine. No headline describing the Sentencing Reform Act of 1984(Act) would have read "Congress reaffirms judge-based sentencing" rather than "Congress prescribes standardized sentences." Justice BREYER's opinion for the Court repeatedly acknowledges that the primary objective of the Act was to reduce ***304** sentencing disparity. [2] Inexplicably, ****790** however, the opinion concludes that the *manner* of achieving uniform sentences was more important to Congress than actually achieving uniformity—that Congress was so attached to having *judges* determine "real conduct" on the basis of bureaucratically prepared, hearsay-riddled presentence reports that it would rather lose the binding nature of the Guidelines than adhere to the old-fashioned process of having *juries* find the facts that expose a defendant to increased prison time. See *ante,* at 761, 767–768. The majority's remedial choice is thus wonderfully ironic: In order to rescue from nullification a statutory scheme designed to eliminate discretionary sentencing, it discards the provisions that eliminate discretionary sentencing.

That is the plain effect of the remedial majority's decision to excise 18 U.S.C. § 3553(b)(1) (Supp. IV). See *ante,* at 764. District judges will no longer be told they "shall impose a sentence ... within the range" established by the Guidelines. § 3553(b)(1). Instead, under § 3553(a), they will need only to "consider" that range as one of many factors, including "the need for the sentence ... to provide just punishment for the offense," § 3553(a)(2)(A) (2000 ed.), "to afford adequate deterrence to criminal conduct," § 3553(a)(2)(B), and "to protect the public from the further crimes of the defendant," § 3553(a)(2)(C). The statute provides no order ***305** of priority among all those factors, but since the three just mentioned are the fundamental criteria governing penology,

the statute—absent the mandate of § 3553(b)(1)—authorizes the judge to apply his own perceptions of just punishment, deterrence, and protection of the public even when these differ from the perceptions of the Commission members who drew up the Guidelines. Since the Guidelines are not binding, in order to comply with the (oddly) surviving requirement that the court set forth "the specific reason for the imposition of a sentence different from that described" in the Guidelines, § 3553(c)(2), the sentencing judge need only state that "this court does not believe that the punishment set forth in the Guidelines is appropriate for this sort of offense." [3] That is to say, district courts have discretion to sentence anywhere within the ranges authorized by statute—much as they were generally able to do before the Guidelines came into being. To be sure, factor (6) is "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct," § 3553(a)(6) (2000 ed.), but this would require a judge to adhere to the Guidelines only if all other judges had to adhere to the Guidelines (which they certainly do not, as the Court holds today) or if all other judges could at least be expected to adhere to the Guidelines (which they ****791** certainly cannot, given the notorious unpopularity of the Guidelines with many district judges). Thus, logic compels the conclusion that the sentencing judge, after considering the recited factors (including the Guidelines), has full discretion, as full as what he possessed before the Act was passed, to sentence anywhere within the statutory range. If the ***306** majority thought otherwise—if it thought the Guidelines not only had to be "considered" (as the amputated statute requires) but had generally to be followed—its opinion would surely say so. [4]

As frustrating as this conclusion is to the Act's purpose of uniform sentencing, it at least establishes a clear and comprehensible regime—essentially the regime that existed before the Act became effective. That clarity is eliminated, however, by the remedial majority's surgery on 18 U.S.C. § 3742 (2000 ed. and Supp. IV), the provision governing appellate review of sentences. Even the most casual reading of this section discloses that its purpose—its *only* purpose—is to enable courts of appeals to enforce conformity with the Guidelines. All of the provisions of that section that impose a review obligation beyond what existed under prior law [5] are related to the district judge's obligations under the Guidelines. If the Guidelines are no longer binding, one would think that the provision designed to ensure compliance with them would, in its totality, be inoperative. The Court holds otherwise. Like a black-robed Alexander cutting the Gordian knot, it simply severs the purpose of the review provisions from their text, holding that only subsection (e), which sets forth the determinations that the court of appeals must make, is inoperative, whereas all the rest of § 3742 subsists—including, *mirabile dictu,* subsection (f), ***307** entitled "Decision and disposition," which *tracks* the determinations required by the severed subsection (e) and specifies *what disposition* each of those determinations is to produce. This is rather like deleting the ingredients portion of a recipe and telling the cook to proceed with the preparation portion. [6]

Until today, appellate review of sentencing discretion has been limited to instances prescribed by statute. Before the Guidelines, federal appellate courts had little experience reviewing sentences for anything but legal error. "[W]ell-established ****792** doctrine," this Court said, "bars [appellate] review of the exercise of sentencing discretion." *Dorszynski v. United States,* 418 U.S. 424, 443, 94 S.Ct. 3042, 41 L.Ed.2d 855 (1974). "[O]nce it is determined that a sentence is within the limitations set forth in the statute under which it is imposed, appellate review is at an end." *Id.,* at 431–432, 94 S.Ct. 3042 (citing cases). When it established the Guidelines regime, Congress expressly provided for appellate review of sentences in specified circumstances, but the Court has been appropriately chary of aggrandizement, refusing to treat § 3742 as a blank check to appellate courts. Thus, in 1992, the Court recognized that Congress's grant of "*limited* appellate review of sentencing decisions ... did not alter a court of appeals' traditional deference to a district court's exercise of its sentencing discretion." *Williams v. United States,* 503 U.S. 193, 205, 112 S.Ct. 1112, 117 L.Ed.2d 341 (emphasis added). ***308** Notwithstanding § 3742, much remained off limits to the courts of appeals: "The selection of the appropriate sentence from within the guideline range, as well as the decision to depart from the range in certain circumstances, are decisions that are left *solely* to the sentencing court." *Ibid.* (emphasis added). Similarly, in 1996, the Court took pains to note that the § 3742 power to engage in "limited appellate review" of Guidelines *departures* did not "vest in appellate courts wide-ranging authority over district court sentencing decisions." *Koon v. United States,* 518 U.S. 81, 97, 116 S.Ct. 2035, 135 L.Ed.2d 392. The Court repeated its caution that " '[t]he development of the guideline sentencing regime' " did not allow appellate review " 'except to the extent specifically directed by statute.' " *Ibid.* (quoting *Williams, supra,* at 205, 112 S.Ct. 1112).

Today's remedial opinion does not even pretend to honor this principle that sentencing discretion is unreviewable except

pursuant to specific statutory direction. The discussion of appellate review begins with the declaration that, "despite the absence of § 3553(b)(1) (Supp. 2004), the Act continues to provide for appeals from sentencing decisions (irrespective of whether the trial judge sentences within or outside the Guidelines range ...)," *ante,* at 765 (citing §§ 3742(a) and (b)); and the opinion later announces that the standard of review for all such appeals is "unreasonableness," *ante,* at 765, 767. This conflates different and distinct statutory authorizations of appeal and elides crucial differences in the statutory scope of review. Section 3742 specifies four different kinds of appeal,[7] setting forth for each the grounds of ***309** appeal permitted to the defendant and the Government (§§ 3742(a) and (b)), the manner in which each ground should be considered (§ 3742(e)), and the permissible dispositions (§ 3742(f)). There is no one-size-fits-all "unreasonableness" review. The power to review a sentence for reasonableness arises only when the sentencing court has departed from "the applicable guideline range." § 3742(f)(2); cf. *United States v. Soltero–Lopez,* 11 F.3d 18, 19 (C.A.1 1993) (Breyer, C.J.) ("[T]he sentencing statutes ... provide ****793** [a defendant] with only a very narrow right of appeal" because the power "to set aside a departure that is 'unreasonable' " appears "in the context of other provisions that permit defendants to appeal only upward ... departures"). This Court has expressly rejected the proposition that there may be a "reasonable[ness]" inquiry when a sentence is imposed as a result of an incorrect application of the Guidelines. See *Williams, supra,* at 201, 112 S.Ct. 1112.

The Court claims that "a statute that does not *explicitly* set forth a standard of review may nonetheless do so *implicitly.*" *Ante,* at 765 (opinion of BREYER, J.). Perhaps so. But we have before us a statute that *does* explicitly set forth a standard of review. The question is, when the Court has *severed* that standard of review (contained in § 3742(e)), does it make any sense to look for some congressional "implication" of a *different* standard of review in the remnants of the statute that the Court has left standing? Only in Wonderland. (This may explain in part why, as Justice STEVENS's dissent correctly observes, *ante,* at 777–778, *none* of the numerous persons and organizations filing briefs as parties or *amici* in these cases —all of whom filed this side of the looking-glass—proposed, or I think even imagined, the remedial majority's wonderful disposition.) Unsurprisingly, none of the three cases cited by the Court used the power of implication ***310** to fill a gap created by the Court's own removal of an explicit standard.[8] The Court's need to create a new, "implied" standard of review—however "linguistically" "fair," *ante,* at 766—amounts to a confession that it has exceeded its powers. According to the "well established" standard for severability, the unconstitutional part of a statute "may be dropped if what is left is *fully operative* as a law." *Alaska Airlines, Inc. v. Brock,* 480 U.S. 678, 684, 107 S.Ct. 1476, 94 L.Ed.2d 661 (1987) (emphasis added and internal quotation marks omitted). Severance is not possible "if the balance of the legislation is incapable of functioning independently." *Ibid.* The Court's need to supplement the text that remains after severance suggests that it is engaged in "redraft[ing] the statute" rather than just implementing the valid portions of it. *United States v. Treasury Employees,* 513 U.S. 454, 479, and n. 26, 115 S.Ct. 1003, 130 L.Ed.2d 964 (1995); see also *id.,* at 502, and n. 8, 115 S.Ct. 1003 (REHNQUIST, C.J., dissenting); *Reno v. American Civil Liberties Union,* 521 U.S. 844, 884–885, 117 S.Ct. 2329, 138 L.Ed.2d 874 (1997).

Even assuming that the Court ought to be inferring standards of review to stanch the bleeding created by its aggressive severance of § 3742(e), its "unreasonableness" standard is not, as it claims, consistent with the "related statutory language" or with "appellate sentencing practice during the last two decades." *Ante,* at 765, 766. As already noted, sentences within the Guidelines range have not previously been reviewed for reasonableness. Indeed, the very concept of having a unitary standard of review for all kinds of appeals authorized by §§ 3742(a) and (b) finds no support in statutory language or established practice of the last two decades. Although a "reasonableness" standard did appear in § 3742(e)(3) until 2003, it never extended beyond review of deliberate departures from the Guidelines range. See 18 U.S.C. § 3742(e)(3) (2000 ed.); see also ****794** §§ 3742(f)(2)(A), (B) (prescribing how to dispose on appeal of a sentence that ***311** is "outside the applicable guideline range and is unreasonable"). According to the statistics cited by the Court, that standard applied to only 16.7% of federal sentencing appeals in 2002, see *ante,* at 766 (opinion of BREYER, J.), but the Court would now have it apply across the board to all sentencing appeals, even to sentences within "the applicable guideline range," where there is no legal error or misapplication of the Guidelines.

There can be no doubt that the Court's severability analysis has produced a scheme dramatically different from anything Congress has enacted since 1984. Sentencing courts are told to "provide just punishment" (among other things), and appellate courts are told to ensure that district judges are not "unreasonable." The worst feature of the scheme is that no one knows—and perhaps no one is meant to

know—how advisory Guidelines and "unreasonableness" review will function in practice. The Court's description of what it anticipates is positively Delphic: "These features of the remaining system ... continue to move sentencing in Congress' preferred direction, helping to avoid excessive sentencing disparities while maintaining flexibility sufficient to individualize sentences where necessary. We can find no feature of the remaining system that tends to hinder, rather than to further, these basic objectives." *Ante,* at 767 (citation omitted).

As I have suggested earlier, any system which held it *per se* unreasonable (and hence reversible) for a sentencing judge to reject the Guidelines is indistinguishable from the mandatory Guidelines system that the Court today holds unconstitutional. But the remedial majority's gross exaggerations (it says that the "practical standard of review" it prescribes is "already familiar to appellate courts" and "consistent with appellate sentencing practice during the last two decades," *ante,* at 765, 766)[9] may lead some courts of appeals to conclude ***312** may indeed be designed to lead courts of appeals to conclude—that little has changed. Bear in mind that one of the most significant features of the remedial majority's scheme of "unreasonableness" review is that it requires courts of appeals to evaluate each sentence *individually* for reasonableness, rather than apply the cookie-cutter standards of the mandatory Guidelines (within the correct Guidelines range, affirm; outside the range without adequate explanation, vacate and remand). A court of appeals faced with this daunting prospect might seek refuge in the familiar and continue (as the remedial majority invites, though the merits majority forbids) the "appellate sentencing practice during the last two decades," *ante,* at 766 (opinion of BREYER, J.). At the other extreme, a court of appeals might handle the new workload by approving virtually any sentence within the statutory range that the sentencing court imposes, so long as the district judge goes through the appropriate formalities, such as expressing his consideration of and disagreement with the Guidelines sentence. What I anticipate will happen is that "unreasonableness" review will produce a discordant symphony of different standards, varying from court to court and judge to judge, giving the lie to the remedial ****795** majority's sanguine claim that "no feature" of its avant-garde Guidelines system will "ten[d] to hinder" the avoidance of "excessive sentencing disparities." *Ante,* at 767.

In *Blakely v. Washington,* 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), the four dissenting Justices accused the Court of ignoring "the havoc it is about to wreak on trial courts across the country." *Id.,* at 324, 124 S.Ct., at 2549 (opinion of O'CONNOR, J.). And that harsh assessment, of course, referred to just a temporary and unavoidable ***313** uncertainty, until the Court could get before it a case properly presenting the constitutionality of the mandatory Guidelines. Today, the same Justices wreak havoc on federal district and appellate courts quite needlessly, and for the indefinite future. Will appellate review for "unreasonableness" preserve *de facto* mandatory Guidelines by discouraging district courts from sentencing outside Guidelines ranges? Will it simply add another layer of unfettered judicial discretion to the sentencing process? Or will it be a mere formality, used by busy appellate judges only to ensure that busy district judges say all the right things when they explain how they have exercised their newly restored discretion? Time may tell, but today's remedial majority will not.

I respectfully dissent.

Justice THOMAS, dissenting in part.

I join Justice STEVENS' opinion for the Court, but I dissent from Justice BREYER's opinion for the Court. While I agree with Justice STEVENS' proposed remedy and much of his analysis, I disagree with his restatement of severability principles and reliance on legislative history, and thus write separately.

The Constitution prohibits allowing a judge alone to make a finding that raises the sentence beyond the sentence that could have lawfully been imposed by reference to facts found by the jury or admitted by the defendant. Application of the Federal Sentencing Guidelines resulted in impermissible factfinding in Booker's case, but not in Fanfan's. Thus Booker's sentence is unconstitutional, but Fanfan's is not. Rather than applying the usual presumption in favor of severability, and leaving the Guidelines standing insofar as they may be applied without any constitutional problem, the remedial majority converts the Guidelines from a mandatory system to a discretionary one. The majority's solution fails to tailor the remedy to the wrong, as this Court's precedents require.

***314** I

When a litigant claims that a statute is unconstitutional as applied to him, and the statute is in fact unconstitutional as applied, we normally invalidate the statute only as applied to

the litigant in question. We do not strike down the statute on its face. In the typical case, "we neither want nor need to provide relief to nonparties when a narrower remedy will fully protect the litigants." *United States v. Treasury Employees,* 513 U.S. 454, 478, 115 S.Ct. 1003, 130 L.Ed.2d 964 (1995); see also *Renne v. Geary,* 501 U.S. 312, 323–324, 111 S.Ct. 2331, 115 L.Ed.2d 288 (1991); *Board of Trustees of State Univ. of N.Y. v. Fox,* 492 U.S. 469, 484–485, 109 S.Ct. 3028, 106 L.Ed.2d 388 (1989); *Brockett v. Spokane Arcades, Inc.,* 472 U.S. 491, 501–504, 105 S.Ct. 2794, 86 L.Ed.2d 394 (1985). Absent an exception such as First Amendment overbreadth, we will facially invalidate a statute only if the plaintiff establishes that the statute is invalid in all of its applications. *United States v. Salerno,* 481 U.S. 739, 745, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987).

Booker's case presents an as-applied challenge. Booker challenges Guidelines ****796** enhancements that, based on factfinding by a judge alone, raised his sentence above the range legally mandated for his base offense level, determined by reference to the jury verdict. In effect, he contends that the Guidelines supporting the enhancements, and the Sentencing Reform Act of 1984(SRA) that makes the Guidelines enhancements mandatory, were unconstitutionally applied to him. (Fanfan makes no similar contention, as he seeks to uphold the District Court's application of the Guidelines.)

A provision of the SRA, 18 U.S.C. § 3553(b)(1) (Supp. IV), commands that the court "*shall* impose a sentence of the kind, and within the range, referred to in subsection (a)(4)," which in turn refers to the Guidelines. (Emphasis added.) The Court reasons that invalidating § 3553(b)(1) would render the Guidelines nonbinding and therefore constitutional. ***315** Hence, it concludes, § 3553(b)(1) must fall on its face. [1]

The majority's excision of § 3553(b)(1) is at once too narrow and too broad. It is too narrow in that it focuses only on § 3553(b)(1), when Booker's unconstitutional sentence enhancements stemmed not from § 3553(b)(1) alone, but from the combination of § 3553(b)(1) and individual Guidelines. Specifically, in Booker's case, the District Court increased the base offense level [2] under these Guidelines: [3] USSG § 1B1.3(a)(2), which instructs that the base offense level shall (for certain offenses) take into account all acts "that were part of the same course of conduct or common scheme or plan as the offense of conviction"; § 2D1.1(c)(2), which sets the offense level for 500g to 1.5kg of cocaine base at 36; and § 3C1.1, which provides for a two-level increase in the offense level for obstruction of justice. The court also implicitly applied § 1B1.1, which provides general instructions for applying the Guidelines, including determining the base offense level and applying appropriate adjustments; § 1B1.11(b)(2), ***316** which requires that "[t]he Guidelines Manual in effect on a particular date shall be applied in its entirety"; § 6A1.3(b) p. s., [4] which provides that "[t]he court shall resolve disputed sentencing factors at a sentencing hearing in accordance with Rule 32(c)(1), Fed.R.Crim.P."; and Rule 32(c)(1), [5] which in turn provided:

> "At the sentencing hearing, the court ... must rule on any unresolved objections to the presentence report .... For each matter controverted, the court must make either a finding on the allegation or a determination that no finding is necessary because the controverted matter will not be taken into account in, or will not affect, sentencing."

Section 3553(b)(1), the listed Guidelines and policy statement, and Rule 32(c)(1) are unconstitutional as applied to Booker. Under their authority, the judge, rather than the jury, found the facts necessary to increase Booker's offense level pursuant to the listed provisions; the judge found those facts by a preponderance of the evidence, rather than beyond a reasonable doubt; and, on the basis of these findings, the judge imposed a sentence above the maximum legally permitted by the jury's findings. Thus, in Booker's case, the concerted action of § 3553(b)(1) *and* the operative Guidelines *and* the relevant Rule of Criminal Procedure resulted in unconstitutionaljudicial ***317** factfinding. The majority cannot pinpoint § 3553(b)(1) alone as the source of the violation.

At the same time, the majority's remedy is far too broad. We have before us only a single unconstitutional application of § 3553(b)(1) (and accompanying parts of the sentencing scheme). In such a case, facial invalidation is unprecedented. It is particularly inappropriate here, where it is evident that § 3553(b)(1) is entirely constitutional in numerous other applications. Fanfan's case is an example: The judge applied the Guidelines to the extent supported by the jury's findings. This application of § 3553(b)(1) was constitutional. To take another example, when the Government seeks a sentence within the Guidelines range supported by the jury's verdict, applying § 3553(b)(1) to restrict the judge's discretion to that Guidelines range is constitutional.

Section 3553(b)(1) is also constitutional when the Government seeks a sentence above the Guidelines range

supported by the jury's verdict, but proves the facts supporting the enhancements to a jury beyond a reasonable doubt. Section 3553(b)(1) provides that "the court shall *impose* a sentence of the kind, and within the range," set by the Guidelines. (Emphasis added.) It says nothing, however, about the procedures the court must employ to determine the sentence it ultimately "impose[s]." It says nothing about whether, before imposing a sentence, the court may submit sentence-enhancing facts to the jury; and it says nothing about the standard of proof. Because it does not address at all the procedures for Guidelines sentencing proceedings, § 3553(b)(1) comfortably accommodates cases in which a court determines a defendant's Guidelines range by way of jury factfinding or admissions rather than judicial factfinding.

The Constitution does not prohibit what § 3553(b)(1) accomplishes—binding district courts to the Guidelines. It prohibits allowing a judge alone to make a finding that raises the sentence beyond the sentence that could have lawfully ***318** been imposed by reference to facts found by the jury or admitted by the defendant. Many applications of § 3553(b)(1) suffer from no such vice. Yet the majority, by facially invalidating the statute, also invalidates these unobjectionable applications of the statute and thereby ignores the longstanding ****798** distinction between as-applied and facial challenges.

Just as there is no reason to strike § 3553(b)(1) on its face, there is likewise no basis for striking any Guideline at issue here on its face. Respondents have not established that USSG § 1B1.3(a)(2), § 2D1.1(c)(2), § 3C1.1, or § 1B1.11(b)(2) is invalid in all its applications, as *Salerno* requires. To the contrary, numerous applications of these provisions are valid. Such applications include cases in which the defendant admits the relevant facts or the jury finds the relevant facts beyond a reasonable doubt. Like § 3553(b)(1), USSG §§ 1B1.3(a)(2), 2D1.1(c)(2), 3C1.1, and 1B1.11(b)(2) say nothing about who must find the facts supporting enhancements, or what standard of proof the prosecution must satisfy. They simply attach effects to certain facts; they do not prescribe procedures for determining those facts. Even § 1B1.1, which provides instructions for applying the Guidelines, directs an order in which the various provisions are to be applied ("[d]etermine the base offense level," § 1B1.1(b), then "[a]pply the adjustments," § 1B1.1(c)), but says nothing about the specific procedures a sentencing court may employ in determining the base offense level and applying adjustments.

Moreover, there is no basis for facially invalidating § 6A1.3 or Rule 32(c)(1). To be sure, § 6A1.3(b) and Rule 32(c)(1) prescribe procedure: They require the judge, acting alone, to resolve factual disputes. When Booker was sentenced, § 6A1.3(b) provided that "[t]he court shall resolve disputed sentencing factors at a sentencing hearing in accordance with Rule 32(c)(1), Fed.R.Crim.P." At the time, the relevant portions of Rule 32(c)(1) provided:

> ***319** "At the sentencing hearing, the court ... must *rule* on any unresolved objections to the presentence report .... For each matter controverted, the court must make either a finding on the allegation or a determination that no finding is necessary because the controverted matter will not be taken into account in, or will not affect, sentencing." (Emphasis added.)

The natural meaning of "the court ... must rule" is that the *judge,* without the jury, must resolve factual disputes as necessary. This Rule of Criminal Procedure, as applied at Booker's sentencing hearing, required the judge to make findings that increased Booker's offense level beyond the Guidelines range authorized by the jury. The application of the Rule to Booker therefore was unconstitutional.

Nonetheless, the Rule has other valid applications. For example, the Rule is valid when it requires the sentencing judge, without a jury, to resolve a factual dispute in order to decide where within the jury-authorized Guidelines range a defendant should be sentenced. The Rule is equally valid when it requires the judge to resolve a factual dispute in order to support a downward adjustment to the defendant's offense level. [6]

Given the significant number of valid applications of all portions of the current sentencing scheme, we should not facially invalidate any particular section of the Federal Rules of Criminal Procedure, the ****799** Guidelines, or the SRA. Instead, we should invalidate only the application to Booker, ***320** at his previous sentencing hearing, of § 3553(b)(1); USSG §§ 1B1.3(a)(2), 2D1.1(c)(2), 3C1.1, 1B1.1, 1B1.11(b)(2), and 6A1.3(b); and Rule 32(c)(1).

II

Invalidating § 3553(b)(1), the Guidelines listed above, and Rule 32(c)(1) *as applied* to Booker by the District Court leaves the question whether the scheme's unconstitutional

application to Booker can be severed from the scheme's many other constitutional applications to defendants like Fanfan. Severability doctrine is grounded in a presumption that Congress intends statutes to have effect to the full extent the Constitution allows.[7] *Regan v. Time, Inc.,* 468 U.S. 641, 652, 104 S.Ct. 3262, 82 L.Ed.2d 487 (1984); Vermeule, Saving Constructions, 85 Geo. L.J. 1945, 1959–1963 (1997) (hereinafter Vermeule). The severability issue may arise when a court strikes either a provision of a statute or an application of a provision. Severability of provisions is perhaps more visible than severability of applications in our case law. See, e.g., *Alaska Airlines, Inc. v. Brock,* 480 U.S. 678, 684–697, 107 S.Ct. 1476, 94 L.Ed.2d 661 (1987) (severing unconstitutional legislative veto provision from other provisions).[8]

However, severability questions arise from unconstitutional applications of statutes as well. Congress often expressly provides for severance of unconstitutional applica ***321** tions.[9] This Court has acknowledged the severability of applications in striking down some applications of a statute while leaving others standing. In *Brockett,* 472 U.S., at 504–507, 105 S.Ct. 2794, the Court invalidated a state moral nuisance statute only insofar as it reached constitutionally protected materials, relying ****800** on the statute's severability clause. And in *Tennessee v. Garner,* 471 U.S. 1, 4, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985), the Court considered a state statute that authorized police to use " 'all the necessary means to effect [an] arrest.' " The Court held the statute unconstitutional insofar as it allowed the use of deadly force against an unarmed, nondangerous suspect; but it declined to invalidate the statute on its face, specifically noting that the statute could be applied constitutionally in other circumstances. *Id.,* at 11–12, 105 S.Ct. 1694. In *Brockett* and *Garner,* then, the Court recognized that the unconstitutional applications of the statutes were severable from the constitutional applications. The Court fashioned the remedy narrowly, in keeping with the usual presumption of severability.

***322** I thus disagree with Justice STEVENS that severability analysis does not apply. *Ante,* at 776, and n. 6 (opinion dissenting in part).[10] I acknowledge that, as a general matter, the Court often disposes of as-applied challenges to a statute by simply invalidating particular applications of the statute, without saying anything at all about severability. See *United States v. Grace,* 461 U.S. 171, 183, 103 S.Ct. 1702, 75 L.Ed.2d 736 (1983) (concluding that statute that prohibited carrying banners in the United States Supreme Court Building and on its grounds was unconstitutional as applied to the sidewalks surrounding the building); *Edenfield v. Fane,* 507 U.S. 761, 763, 113 S.Ct. 1792, 123 L.Ed.2d 543 (1993) (striking down a solicitation ban on certified public accountants as applied "in the business context"); *Treasury Employees,* 513 U.S., at 501–503, 115 S.Ct. 1003 (REHNQUIST, C.J., joined by SCALIA and THOMAS, JJ., dissenting) (expressing view that injunction against honoraria ban should be tailored to unconstitutional applications).

Such decisions (in which the Court is silent as to applications not before it) might be viewed as having conducted an implicit severability analysis. See *id.,* at 485–489, 115 S.Ct. 1003 (O'CONNOR, J., concurring in judgment in part and dissenting in part). A better view is that the parties in those cases could have raised the issue of severability, but did not bother, because (as is often the case) there was no arguable reason to defeat the presumption of severability. The unconstitutional applications of the statute were fully independent of ***323** and severable from the remaining constitutional applications. Here, the question is squarely presented: The parties press it, and there is extraordinary reason to clarify the remedy, namely, that our decision potentially affects every sentencing by the federal courts.

I therefore proceed to the severability question—whether the unconstitutional application of § 3553(b)(1); USSG §§ 1B1.3, 2D1.1(c)(2), 3C1.1, 1B1.1, 1B1.11(b)(2), and 6A1.3; and Rule 32(c)(1) to Booker is severable from the constitutional applications of these provisions. That is, even though we have invalidated the application of these provisions to Booker, may other defendants ****801** be sentenced pursuant to them? We presume that the unconstitutional application is severable. See, *e.g., Regan,* 468 U.S., at 653, 104 S.Ct. 3262. This presumption is a manifestation of *Salerno's* general rule that we should not strike a statute on its face unless it is invalid in all its applications. Unless the Legislature clearly would not have enacted the constitutional applications independently of the unconstitutional application, the Court leaves the constitutional applications standing. 468 U.S., at 653, 104 S.Ct. 3262.

Here, the presumption of severability has not been overcome. In light of the significant number of constitutional applications of the scheme, it is far from clear that Congress would not have passed the SRA or allowed Rule 32 to take effect, or that the Commission would not have promulgated the particular Guidelines at issue, had either body known that

the application of the scheme to Booker was unconstitutional. *Ante,* at 772–776 (STEVENS, J., dissenting in part). As noted above, many applications of the Guidelines are constitutional: The defendant may admit the necessary facts; the Government may not seek enhancements beyond the offense level supported by the jury's verdict; the judge may find facts supporting an enhancement but (taking advantage of the overlap in Guidelines ranges) sentence the defendant within the jury-authorized range; or the jury may find the necessary facts.

***324** Certainly it is not obvious that Congress would have preferred the entirely discretionary system that the majority fashions. The text and structure of the SRA show that Congress meant the Guidelines to bind judges. One of the purposes of the Commission, as set forth in the SRA, was to

> "provide *certainty* and fairness in meeting the purposes of sentencing, *avoiding unwarranted sentencing disparities* among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices." 28 U.S.C. § 991(b)(1)(B) (emphasis added).

Accordingly, Congress made the Guidelines mandatory and closely circumscribed courts' authority to depart from the Guidelines range. 18 U.S.C. § 3553(b)(1) (Supp. IV). Congress also limited appellate review of sentences imposed pursuant to the Guidelines to instances in which the sentence was (1) in violation of law, (2) a result of an incorrect application of the Guidelines, (3) outside the applicable Guidelines range, or (4) in the absence of an applicable Guideline, plainly unreasonable. § 3742(e) (2000 ed. and Supp. IV). Striking down § 3553(b)(1) and the Guidelines only as applied to Booker (and other defendants who have received unconstitutional enhancements) would leave in place the essential framework of the mandatory system Congress created. Applying the Guidelines in a constitutional fashion affords some uniformity; total discretion, none. To suggest, as Justice BREYER does, that a discretionary system would do otherwise, *ante,* at 759–761, 767 (opinion of the Court), either supposes that the system is discretionary in name only or overlooks the very nature of discretion. Either assumption is implausible.

***325** The majority says that retaining the SRA and the Guidelines "engraft [s]" a jury trial requirement onto the sentencing scheme. *Ante,* at 757 (opinion of BREYER, J.). I am, of course, aware that, though severability analysis may proceed "by striking out or disregarding words [or, ****802** here, applications] that are in the [challenged] section," it may not proceed "by inserting [applications] that are not now there"; that would constitute legislation beyond our judicial power. *United States v. Reese,* 92 U.S. 214, 221, 23 L.Ed. 563 (1876). By allowing jury factfinding in some cases, however, we are no more "engrafting" a new requirement onto the statute than we do every time we invalidate a statute in some of the applications that the statute, on its face, appears to authorize. See, *e.g., Brockett v. Spokane Arcades, Inc.,* 472 U.S. 491, 105 S.Ct. 2794, 86 L.Ed.2d 394 (1985). I therefore do not find the "engraftment" label helpful as a means of judging the correctness of our severability analysis.

Granted, part of the severability inquiry is "whether the statute [as severed] will function in a *manner* consistent with the intent of Congress." *Alaska Airlines, Inc.,* 480 U.S., at 685, 107 S.Ct. 1476. Applying the Guidelines constitutionally (for instance, when admissions or jury findings support all upward enhancements) might seem at first glance to violate this principle. But so would the Government's proposal of applying the Guidelines as a whole to some defendants, but not others. The Court's solution violates it even more clearly by creating a system that eliminates the mandatory nature of the Guidelines. In the end, nothing except the Guidelines as written will function in a manner perfectly consistent with the intent of Congress, and the Guidelines as written are unconstitutional in some applications. While all of the remedial possibilities are thus, in a sense, second best, the solution Justice STEVENS and I would adopt does the least violence to the statutory and regulatory scheme.

* * *

***326** I would hold that § 3553(b)(1), the provisions of the Guidelines discussed above, and Rule 32(c)(1) are unconstitutional as applied to Booker, but that the Government has not overcome the presumption of severability. Accordingly, the unconstitutional application of the scheme in Booker's case is severable from the constitutional applications of the same scheme to other defendants. I respectfully dissent from the Court's contrary conclusion.

Justice BREYER, with whom THE CHIEF JUSTICE, Justice O'CONNOR, and Justice KENNEDY join, dissenting in part.

The Court today applies its decisions in *Apprendi v. New Jersey,* 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), and *Blakely v. Washington,* 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), to the Federal Sentencing Guidelines. The Court holds that the Sixth Amendment requires a jury, not a judge, to find sentencing facts—facts about the *way* in which an offender committed the crime—where those facts would move an offender from lower to higher Guidelines ranges. I disagree with the Court's conclusion. I find nothing in the Sixth Amendment that forbids a sentencing judge to determine (as judges at sentencing have traditionally determined) the *manner* or *way* in which the offender carried out the crime of which he was convicted.

The Court's substantive holding rests upon its decisions in *Apprendi, supra,* and *Blakely, supra.* In *Apprendi,* the Court held that the Sixth Amendment requires juries to find beyond a reasonable doubt the existence of "any fact that increases the penalty for a crime" beyond "*the prescribed statutory maximum.*" 530 U.S., at 490, 120 S.Ct. 2348 (emphasis added). In *Blakely,* the Court defined the latter term as "the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by* ****803** *the defendant.*" 542 U.S., at 303, 124 S.Ct., at 2537 (emphasis in original). Today, the Court applies its *Blakely* definition to the Federal Sentencing Guidelines. I continue to disagree with the constitutional ***327** analysis the Court set forth in *Apprendi* and in *Blakely.* But even were I to accept that analysis as valid, I would disagree with the way in which the Court applies it here.

I

THE CHIEF JUSTICE, Justice O'CONNOR, Justice KENNEDY, and I have previously explained at length why we cannot accept the Court's constitutional analysis. See *Blakely,* 542 U.S., at 314–326, 124 S.Ct. 2531 (O'CONNOR, J., dissenting); *id.,* at 326–328, 124 S.Ct. 2531 (KENNEDY, J., dissenting); *id.,* at 328–347, 124 S.Ct. 2531 (BREYER, J., dissenting); *Harris v. United States,* 536 U.S. 545, 549–550, 122 S.Ct. 2406, 153 L.Ed.2d 524 (2002) (KENNEDY, J., opinion of the Court); *id.,* at 569–572, 122 S.Ct. 2406 (BREYER, J., concurring in part and concurring in judgment); *Apprendi,* 530 U.S., at 523–554, 120 S.Ct. 2348 (O'CONNOR, J., dissenting); *id.,* at 555–556, 120 S.Ct. 2348 (BREYER, J., dissenting); *Jones v. United States,* 526 U.S. 227, 264–272, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999) (KENNEDY, J., dissenting); *Monge v. California,* 524 U.S. 721, 728–729, 118 S.Ct. 2246, 141 L.Ed.2d 615 (1998) (O'CONNOR, J., opinion of the Court); *McMillan v. Pennsylvania,* 477 U.S. 79, 86–91, 106 S.Ct. 2411, 91 L.Ed.2d 67 (1986) (REHNQUIST, C.J., opinion of the Court).

For one thing, we have found the Court's historical argument unpersuasive. See *Blakely, supra,* at 323, 124 S.Ct., at 2548 (O'CONNOR, J., dissenting); *Apprendi, supra,* at 525–528, 120 S.Ct. 2348 (O'CONNOR, J., dissenting). Indeed, the Court's opinion today illustrates the historical mistake upon which its conclusions rest. The Court reiterates its view that the right of " 'trial by jury has been understood to require' " a jury trial for determination of " '*the truth of every accusation.*' " *Ante,* at 753 (opinion of STEVENS, J.) (quoting *Apprendi, supra,* at 477, 120 S.Ct. 2348; emphasis in original). This claim makes historical sense insofar as an "*accusation*" encompasses each factual *element* of the crime of which a defendant is accused. See, *e.g., United States v. Gaudin,* 515 U.S. 506, 509–510, 522–523, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995). But the key question here is whether that word also encompasses *sentencing facts*—facts about the offender (say, recidivism) or about the way in which the offender committed the crime ***328** say, the seriousness of the injury or the amount stolen) that help a sentencing judge determine a convicted offender's specific sentence.

History does not support a "right to jury trial" in respect to sentencing facts. Traditionally, the law has distinguished between facts that are elements of crimes and facts that are relevant only to sentencing. See, *e.g., Almendarez–Torres v. United States,* 523 U.S. 224, 228, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998); *Witte v. United States,* 515 U.S. 389, 399, 115 S.Ct. 2199, 132 L.Ed.2d 351 (1995); *United States v. Watts,* 519 U.S. 148, 154, 117 S.Ct. 633, 136 L.Ed.2d 554 (1997) *(per curiam); United States v. Dunnigan,* 507 U.S. 87, 97, 113 S.Ct. 1111, 122 L.Ed.2d 445 (1993); *Mistretta v. United States,* 488 U.S. 361, 396, 109 S.Ct. 647, 102 L.Ed.2d 714 (1989). Traditionally, federal law has looked to judges, not to juries, to resolve disputes about sentencing facts. See, *e.g.,* Fed. Rule Crim. Proc. 32(a). Traditionally, those familiar with the criminal justice system have found separate, postconviction *judge*-run sentencing procedures sensible given the difficulty of obtaining relevant sentencing information before the ****804**

moment of conviction. They have found those proceedings practical given the impracticality of the alternatives, say, two-stage (guilt, sentence) jury procedures. See, *e.g.,* Judicial Conference of the United States, Committee on Defender Services, Subcommittee on Federal Death Penalty Cases, Federal Death Penalty Cases: Recommendations Concerning the Cost and Quality of Defense Representation 9–10 (May 1998). And, despite the absence of jury determinations, they have found those proceedings fair as long as the convicted offender has the opportunity to contest a claimed fact before the judge, and as long as the sentence falls within the maximum of the range that a congressional statute specifically sets forth.

The administrative rules at issue here, Federal Sentencing Guidelines, focus on *sentencing facts.* They circumscribe a federal judge's sentencing discretion in respect to such facts, but in doing so, they do not change the nature of those facts. The sentencing courts continue to use those facts, not to convict a person of a crime as a statute defines it, but to help ***329** determine an appropriate punishment. Thus, the Court cannot ground today's holding in a "constitutional tradition assimilated from the common law" or in "the Magna Carta." *Ante,* at 753 (opinion of STEVENS, J.). It cannot look to the Framers for support, for they, too, enacted criminal statutes with indeterminate sentences, revealing their own understanding and acceptance of the judge's factfinding role at sentencing. See Act of Apr. 30, 1790, ch. 9, 1 Stat. 112–118.

Indeed, it is difficult for the Court to find historical support other than in two recent cases, *Apprendi* and *Blakely*—cases that we, like lower courts, read not as confirming, but as confounding a pre-*Apprendi,* pre-*Blakely* legal tradition that stretches back a century or more. See, *e.g., Williams v. New York,* 337 U.S. 241, 246, 69 S.Ct. 1079, 93 L.Ed. 1337 (1949); cf., *e.g.,* 375 F.3d 508, 514 (C.A.7 2004) (case below) ("*Blakely* redefined 'statutory maximum' "); *United States v. Ameline,* 376 F.3d 967, 973 (C.A.9 2004) ("*Blakely* court worked a sea change in the body of sentencing law"); *United States v. Pineiro,* 377 F.3d 464, 468–469 (C.A.5 2004) (same); see also *United States v. Penaranda,* 375 F.3d 238, 243, n. 5 (C.A.2 2004) (same, collecting cases).

For another thing, applied in the federal context of *mandatory* Guidelines, the Court's Sixth Amendment decision would risk unwieldy trials, a two-tier jury system, a return to judicial sentencing discretion, or the replacement of sentencing ranges with specific mandatory sentences. Cf. *Blakely,* 542 U.S., at 330–340, 124 S.Ct., at 2552–2558 (BREYER, J., dissenting). The decision would pose a serious obstacle to congressional efforts to create a sentencing law that would mandate more similar treatment of like offenders, that would thereby diminish sentencing disparity, and that would consequently help to overcome irrational discrimination (including racial discrimination) in sentencing. See *id.,* at 315–316, 124 S.Ct., at 2544 (O'CONNOR, J., dissenting). These consequences would seem perverse when viewed through the lens of a Constitution that seeks a fair criminal process.

***330** The upshot is that the Court's Sixth Amendment decisions—*Apprendi, Blakely,* and today's—deprive Congress and state legislatures of authority that is constitutionally theirs. Cf. *Blakely, supra,* at 326–328, 124 S.Ct. 2531 (KENNEDY, J., dissenting); *Apprendi,* 530 U.S., at 544–545, 120 S.Ct. 2348 (O'CONNOR, J., dissenting); *id.,* at 560–564, 120 S.Ct. 2348 (BREYER, J., dissenting). The "sentencing function long has been a peculiarly shared responsibility among the Branches ****805** of Government." *Mistretta, supra,* at 390, 109 S.Ct. 647. Congress' share of this joint responsibility has long included not only the power to define crimes (by enacting statutes setting forth their factual elements) but also the power to specify sentences, whether by setting forth a range of individual-crime-related sentences (say, 0–to–10 years' imprisonment for bank robbery) or by identifying sentencing factors that permit or require a judge to impose higher or lower sentences in particular circumstances. See, *e.g., Almendarez–Torres, supra,* at 228, 118 S.Ct. 1219; *McMillan,* 477 U.S., at 85, 106 S.Ct. 2411.

This last mentioned power is not absolute. As the Court suggested in *McMillan,* confirmed in *Almendarez–Torres,* and recognized but rejected in *Blakely,* one might read the Sixth Amendment as permitting "legislatures" to "establish legally essential [judge-determined] sentencing factors *within* [say, due process] *limits.*" *Blakely, supra,* at 307, 124 S.Ct., at 2539 (emphasis in original); cf. *Almendarez–Torres, supra,* at 228, 118 S.Ct. 1219 (distinguishing between "elements" and "factors relevant only to ... sentencing," and noting that, "[w]ithin limits, the question of which factors are which is normally a matter for Congress" (citation omitted)); *McMillan, supra,* at 88, 106 S.Ct. 2411 (upholding a Pennsylvania statute in part because it gave "no impression of having been tailored to permit the [sentencing factor] finding to be a tail which wags the dog of the substantive offense"). But the power does give Congress a degree of freedom (within constraints of fairness) to choose to characterize a fact as a "sentencing factor," relevant only to punishment, or as an element of a crime, relevant to guilt or ***331**

innocence. The Court has rejected this approach apparently because it finds too difficult the judicial job of managing the "fairness" constraint, *i.e.,* of determining when Congress has overreached. But the Court has nowhere asked, "compared to what?" Had it done so, it could not have found the practical difficulty it has mentioned, *Blakely, supra,* at 307–308, 124 S.Ct., at 2539, sufficient to justify the severe limits that its approach imposes upon Congress' legislative authority.

These considerations—of history, of constitutionally relevant consequences, and of constitutional authority—have been more fully discussed in other opinions. See, *e.g., Blakely,* 542 U.S., at 314, 326, 124 S.Ct. 2531 (O'CONNOR, J., dissenting); *id.,* at 327–328, 124 S.Ct. 2531 (KENNEDY, J., dissenting); *id.,* at 328–347, 124 S.Ct. 2531 (BREYER, J., dissenting); *Harris,* 536 U.S., at 549–550, 569–572, 122 S.Ct. 2406; *Apprendi, supra,* at 523–554, 555–556, 120 S.Ct. 2348; *McMillan, supra,* at 86–91, 106 S.Ct. 2411. I need not elaborate them further.

II

Although the considerations just mentioned did not dissuade the Court from its holdings in *Apprendi* and *Blakely,* I should have hoped they would have dissuaded the Court from extending those holdings to the statute and Guidelines at issue here. See Sentencing Reform Act of 1984, as amended, 18 U.S.C. § 3551 *et seq.,* 28 U.S.C. § 991 *et seq.;* United States Sentencing Commission, Guidelines Manual (Nov. 2003) (USSG). Legal logic does not require that extension, for there are key differences.

First, the Federal Guidelines are not statutes. The rules they set forth are *administrative,* not statutory, in nature. Members, not of Congress, but of a Judicial Branch Commission, wrote those rules. The rules do not "establis[h] minimum and maximum penalties" for individual crimes, but guide sentencing courts, only to a degree, "fetter[ing] the discretion of sentencing judges to do what they have done for ****806** generations—impose sentences within the broad limits established by Congress." *Mistretta,* 488 U.S., at 396, 109 S.Ct. 647; see ***332** also USSG § 5G1.1; cf. *Witte,* 515 U.S., at 399, 115 S.Ct. 2199 (explaining that the Guidelines range "still falls within the scope of the legislatively authorized penalty"). The rules do not create a new set of legislatively determined sentences so much as they reflect, organize, rationalize, and modify an old set of judicially determined pre-Guidelines sentences. See 28 U.S.C. § 994(a); USSG § 1A1.1, editorial note, § 3, pp. 2–4 (describing the Commission's empirical approach). Thus, the rules do not, in *Apprendi's* words, set forth a "prescribed *statutory* maximum," 530 U.S., at 490, 120 S.Ct. 2348 (emphasis added), as the law has traditionally understood that phrase.

I concede that *Blakely* defined "prescribed statutory maximum" more broadly as "the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." 542 U.S., at 303, 124 S.Ct., at 2537 (emphasis deleted). But the Court need not read this language as extending the scope of *Apprendi. Blakely* purports to follow, not to extend, *Apprendi.* 542 U.S., at 301, 124 S.Ct., at 2536. And *Blakely,* like *Apprendi,* involved sentences embodied in a statute, not in administrative rules.

More importantly, there is less justification for applying an *Apprendi*-type constitutional rule where administrative guidelines, not statutes, are at issue. The Court applies its constitutional rule to statutes in part to avoid what *Blakely* sees as a serious problem, namely, a legislature's ability to make of a particular fact an "element" of a crime or a sentencing factor, at will. See *ante,* at 748 (opinion of STEVENS, J.). That problem—that legislative temptation—is severely diminished when Commission Guidelines are at issue, for the Commission cannot create "elements" of crimes. It cannot write rules that "bind or regulate the primary conduct of the public." *Mistretta, supra,* at 396, 109 S.Ct. 647. Rather, it must write rules that reflect what the law has traditionally understood as sentencing factors. That is to say, the Commission cannot switch between "elements" and "sentencing factors" at will because it cannot write substantive ***333** criminal statutes at all. See 28 U.S.C. § 994(a); cf. *Blakely, supra,* at 301–302, 306–307, 124 S.Ct., at 2534–2535, 2537–2538.

At the same time, to extend *Blakely's* holding to administratively written sentencing rules risks added legal confusion and uncertainty. Read literally, *Blakely's* language would include within *Apprendi's* strictures a host of nonstatutory sentencing determinations, including appellate court decisions delineating the limits of the legally "reasonable." (Imagine an appellate opinion that says a sentence for ordinary robbery greater than five years is unreasonably long unless a special factor, such as possession of a gun, is present.) Indeed, read literally, *Blakely's* holding would apply to a single judge's determination of the factors that make a particular sentence disproportionate

or proportionate. (Imagine a single judge setting forth, as a binding rule of law, the legal proposition about robbery sentences just mentioned.) Appellate courts' efforts to define the limits of the "reasonable" of course would fall outside *Blakely's* scope. But they would do so *not because they escape Blakely's literal language,* but because they are not *legislative* efforts to create limits. Neither are the Guidelines *legislative* efforts. See *Mistretta, supra,* at 412, 109 S.Ct. 647.

Second, the sentencing statutes at issue in *Blakely* imposed absolute constraints on a judge's sentencing discretion, while the ****807** federal sentencing statutes here at issue do not. As the *Blakely* Court emphasized, the Washington statutes authorized a higher-than-standard sentence on the basis of a factual finding *only if* the fact in question was a new fact —*i.e.,* a fact that did not constitute an element of the crime of conviction or an element of any more serious or additional crime. 542 U.S., at 301–302, 306–307, 124 S.Ct., at 2534–2535, 2537–2538. A judge applying those statutes could not even consider, much less impose, an exceptional sentence, unless he found facts " 'other than those which are used in computing the standard range sentence for the offense.' " *Id.,* at 299, 124 S.Ct., at 2535 (quoting *State v. Gore,* 143 Wash.2d 288, 315–316, 21 P.3d 262, 277 (2001)).

***334** The federal sentencing statutes, however, offer a defendant no such fact-related assurance. As long as "there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission," 18 U.S.C. § 3553(b)(1) (Supp. IV), they permit a judge to depart from a Guidelines sentence based on facts that constitute elements of the crime (say, a bank robbery involving a threat to use a weapon, where the weapon in question is nerve gas). Whether departure-triggering circumstances exist in a particular case is a matter for a court, not for Congress, to decide.

Thus, as far as the federal *statutes* are concerned, the federal system, unlike the state system at issue in *Blakely,* provides a defendant with no guarantee that the jury's finding of factual elements will result in a sentence lower than the statutory maximum. Rather, the statutes put a potential federal defendant on notice that a judge conceivably might sentence him anywhere within the range provided by *statute*—regardless of the applicable Guidelines range. See *Witte, supra,* at 399, 115 S.Ct. 2199; see also Comment, Sixth Amendment—State Sentencing Guidelines, 118 Harv. L.Rev. 333, 339–340 (2004). Hence as a practical matter, they grant a potential federal defendant less assurance of a lower Guidelines sentence than did the state statutes at issue in *Blakely.*

These differences distinguish these cases from *Apprendi* and *Blakely.* They offer a principled basis for refusing to extend *Apprendi's* rule to these cases.

III

For these reasons, I respectfully dissent.

All Citations

543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621, 73 USLW 4056, 05 Cal. Daily Op. Serv. 315, 2005 Daily Journal D.A.R. 410, 18 Fla. L. Weekly Fed. S 70

Footnotes

* Together with No. 04–105, *United States v. Fanfan*, on certiorari before judgment to the United States Court of Appeals for the First Circuit.

** The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

*** Justice SCALIA, Justice SOUTER, Justice THOMAS, and Justice GINSBURG join this opinion.

1 The questions presented are:

"1. 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.

"2. If the answer to the first question is 'yes,' the following question is presented: whether, in a case in which the Guidelines would require the court to find a sentence-enhancing fact, the Sentencing Guidelines as a whole would be inapplicable, as a matter of severability analysis, 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." E.g., Pet. for Cert. in No. 04–104, p. (I).

2 In *Mistretta v. United States,* 488 U.S. 361, 109 S.Ct. 647, 102 L.Ed.2d 714 (1989), we pointed out that Congress chose explicitly to adopt a "mandatory-guideline system" rather than a system that would have been "only advisory," and that the statute "makes the Sentencing Commission's guidelines binding on the courts." *Id.,* at 367, 109 S.Ct. 647.

3 18 U.S.C. § 3553(a) (2000 ed. and Supp. IV).

4 *Watts,* in particular, presented a very narrow question regarding the interaction of the Guidelines with the Double Jeopardy Clause, and did not even have the benefit of full briefing or oral argument. It is unsurprising that we failed to consider fully the issues presented to us in these cases. See 519 U.S., at 171, 117 S.Ct. 633 (KENNEDY, J., dissenting).

5 We added: "Instead, petitioners argue that the judge *might* have made different factual findings if only the judge had known that the law required him to assume the jury had found a cocaine-only, not a cocaine-and-crack, conspiracy. It is sufficient for present purposes, however, to point out that petitioners did not make this particular argument in the District Court. Indeed, they seem to have raised their entire argument for the first time in the Court of Appeals. Thus, petitioners did not explain to the sentencing judge how their 'jury-found-only-cocaine' assumption could have made a difference to the judge's own findings, nor did they explain how this assumption (given the judge's findings) should lead to greater leniency." *Edwards,* 523 U.S., at 515–516, 118 S.Ct. 1475.

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

1 We have, on occasion, debated the proper interpretation of various precedents concerning facial challenges to statutes. Compare *Chicago v. Morales,* 527 U.S. 41, 54–55, n. 22, 119 S.Ct. 1849, 144 L.Ed.2d 67 (1999) (plurality opinion), with *id.,* at 78–83, 119 S.Ct. 1849 (SCALIA, J., dissenting), and *United States v. Salerno,* 481 U.S. 739, 745, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987). That debate is immaterial to my conclusion here, because it borders on the frivolous to contend that the Guidelines can be constitutionally applied "only in a fraction of the cases [they were] originally designed to cover." *United States v. Raines,* 362 U.S. 17, 23, 80 S.Ct. 519, 4 L.Ed.2d 524 (1960).

2 See also Lodging of Government, Estimate of Number of Cases Possibly Impacted by the *Blakely* Decision, p. 2 (hereinafter Estimate).

3 See, *e.g., Webster v. Reproductive Health Services,* 492 U.S. 490, 524, 109 S.Ct. 3040, 106 L.Ed.2d 410 (1989) (O'CONNOR, J., concurring in part and concurring in judgment) (arguing that a statute cannot be struck down on its face whenever the statute has "some quite straightforward applications [that] would be constitutional"); *Secretary of State of Md. v. Joseph H. Munson Co.,* 467 U.S. 947, 977, 104 S.Ct. 2839, 81 L.Ed.2d 786 (1984) (REHNQUIST, J., dissenting) ("When a litigant challenges the constitutionality of a statute, he challenges the statute's application to him .... If he prevails, the Court invalidates the statute, not *in toto,* but only as applied to those activities. The law is refined by preventing improper applications on a case-by-case basis. In the meantime, the interests underlying the law can still be served by its enforcement within constitutional bounds"); cf. *Raines,* 362 U.S., at 21, 80 S.Ct. 519 (this Court should never " 'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied' "); *Ohio v. Akron Center for Reproductive Health,* 497 U.S. 502, 514, 110 S.Ct. 2972, 111 L.Ed.2d 405 (1990) (plurality opinion) (statutes should not be invalidated "on a facial challenge based upon a worst-case analysis that may never occur").

4 Memorandum from Christopher A. Wray, Assistant Attorney General, U.S. Department of Justice, Criminal Division, to All Federal Prosecutors, re: Guidance Regarding the Application of *Blakely v. Washington* to Pending Cases, p. 8, available at http://sentencing.typepad.com/sentencing_ law_and_policy/files/chris_wray_doj_memo.pdf (hereinafter Application of *Blakely*); see also Brief for National Association of Federal Defenders as *Amicus Curiae* 9–12.

5 See Application of *Blakely* 9.

6 There is a line of cases that some commentators have described as standing for the proposition that the Court must engage in severability analysis if a statute is unconstitutional in only some of its applications. See Stern 82. However, these cases simply hold that a statute that may apply both to situations within the scope of Congress' enumerated powers and also to situations that exceed such powers, the Court will sustain the statute only if it can be validly limited to the former situations, and will strike it down if it cannot be so limited. Compare *United States v. Reese,* 92 U.S. 214, 221, 23 L.Ed. 563 (1876) (invalidating in its entirety statute that punished individuals who interfered with the right to vote, when the statute applied to conduct that violated the Fifteenth Amendment and conduct outside that constitutional prohibition), and *Trade–Mark Cases,* 100 U.S. 82, 98, 25 L.Ed. 550 (1879) (concluding that the Trade–Mark Act must be read to "establish a universal system of trade-mark registration" and thus was invalid in its entirety because it exceeded the bounds of the Commerce Clause), with *The Abby Dodge,* 223 U.S. 166, 175, 32 S.Ct. 310, 56 L.Ed. 390 (1912) (construing language to apply only to waters not within the jurisdiction of the States, and therefore entirely valid), and *NLRB v. Jones & Laughlin Steel Corp.,* 301 U.S. 1, 30–31, 57 S.Ct. 615, 81 L.Ed. 893 (1937) (holding that the National Labor Relations Act applied

only to interstate commerce, and upholding its constitutionality on that basis). These cases are thus about constitutional avoidance, not severability.

In a separate dissent, Justice THOMAS relies on this principle to conclude that the proper analysis is whether the unconstitutional applications of the Guidelines are sufficiently numerous and integral to warrant invalidating the Guidelines in their entirety. See *post,* at 800–801. While I understand the intuitive appeal of Justice THOMAS' dissent, I do not believe that our cases support this approach. In any event, given the vast number of constitutional applications, see *supra,* at 774, it is clear that Congress would, as Justice THOMAS concludes, prefer that the Guidelines not be invalidated. I therefore do not believe that any extension of our severability cases is warranted.

7 The predicate for the Court's remedy is its assumption that Congress would not have enacted mandatory Guidelines if it had realized that the Sixth Amendment would require some enhancements to be supported by jury factfinding. If Congress should reenact the statute following our decision today, it would repudiate that premise. That is why I find the Court's professed disagreement with this proposition unpersuasive. See *ante,* at 759 (opinion of BREYER, J.). Surely Congress could reenact the identical substantive provisions if the reenactment included a clarifying provision stating that the word "court" shall not be construed to prohibit a judge from requiring jury factfinding when necessary to comply with the Sixth Amendment. Indeed, because in my view such a construction of the word "court" is appropriate in any event, see *infra,* at 779–780, there would be no need to include the clarifying provision to save the statute.

8 In *Sloan v. Lemon,* 413 U.S. 825, 93 S.Ct. 2982, 37 L.Ed.2d 939 (1973), the Court concluded that legislation reimbursing parents for tuition paid to private schools ran afoul of the Establishment Clause and struck down the law in its entirety, even as applied to parents of students in secular schools. The Court did not, as the majority would have us do, strike down particular parts of the statute. In *Welsh v. United States,* 398 U.S. 333, 361–363, 90 S.Ct. 1792, 26 L.Ed.2d 308 (1970), Justice Harlan, writing alone, concluded that a statutory provision that allowed conscientious objectors to be exempt from military service only if their views were religiously based violated the Establishment Clause. He then concluded that, rather than deny the exception to religiously based objectors, it should be extended to moral objectors, in large part because "the broad discretion conferred by a severability clause" was not present in the case. *Id.,* at 365, 90 S.Ct. 1792. Finally, in *Heckler v. Mathews,* 465 U.S. 728, 739, n. 6, 104 S.Ct. 1387, 79 L.Ed.2d 646 (1984), the Court stated the obvious rule that when a statute provides a benefit to one protected class and not the other, the Court is faced with the choice of requiring the Legislature to extend the benefits, or nullifying the benefits altogether. None of these cases stands for the sweeping proposition that where parts of a statute are invalid in certain applications, the Court may opine as to whether Congress would prefer facial invalidation of some, but not all, of the provisions necessary to the constitutional violation.

9 The Commissioners went on to note that, "[e]ven if *Blakely* is found to apply to the federal guidelines, the waters are not as choppy as some would make them out to be. The viability of the [Guidelines] previously was called into question by some after [*Apprendi v. New Jersey,* 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000)]. After an initial period of uncertainty, however, the circuit courts issued opinions and the Department of Justice instituted procedures to ensure that future cases complied with *Apprendi*'*s* requirements and also left the guidelines system intact." Hearings on *Blakely* 1.

10 This argument finds support in the Government's successful adaptation to our decision in *Apprendi.* After that decision, prosecutors began to allege more and more "sentencing factors" in indictments. See *supra,* at 774–775. The Government's ability to do so suggests that the Guidelines are far more compatible with "jury factfinding" than the Court admits. And, the fact that Congress is presumably aware of the Government's practices in light of *Apprendi,* yet has not condemned the practices or taken any actions to reform them, indicates that limited jury factfinding is, contrary to the majority's assertion, compatible with legislative intent. See *ante,* at 759 (opinion of BREYER, J.).

11 See M. Johnson & S. Gilbert, The U.S. Sentencing Guidelines: Results of the Federal Judicial Center's 1996 Survey 7–9 (1997) (noting that among federal judges and probation officers, there is widespread "frustration with the power and discretion held by prosecutors under the guidelines" and that "guidelines are manipulated through plea agreements"); Saris, Have the Sentencing Guidelines Eliminated Disparity? One Judge's Perspective, 30 Suffolk U.L.Rev. 1027, 1030 (1997); see also Nagel & Schulhofer, A Tale of Three Cities: An Empirical Study of Charging and Bargaining Practices Under the Federal Sentencing Guidelines, 66 S. Cal. L.Rev. 501, 560 (1992) (arguing that fact bargaining is common under the Guidelines and has resulted in substantial sentencing disparities).

12 Incidentally, the original version of S. 1437 looked much like the regime that the Court has mandated today—it directed the sentencing judge to consider a variety of factors, only one of which was the sentencing range established by the Guidelines, and subjected the ultimately chosen sentence to appellate review under a "clearly unreasonable" standard. See S. 1437, § 101 (proposed 18 U.S.C. §§ 2003(a), 3725(e)). That law was amended twice before it passed, the first time to include a mandatory directive to trial judges to impose a sentence within the Guidelines range, and the second time to change the standard of review from " 'clearly unreasonable' " to " 'unreasonable.' " See Stith & Koh 245 (detailing

amendments to S. 1437 prior to passage). It is worth noting that Congress had countless opportunities over the course of seven years of debate to enact the law the Court creates today. Congress' repeated rejection of proposed legislation constitutes powerful evidence that Congress did not want it to become law.

13 See *id.,* at 269–270; see also Wilkins, Newton, & Steer, Competing Sentencing Policies in a "War on Drugs" Era, 28 Wake Forest L.Rev. 305, 313 (1993) (same).

14 See, *e.g.,* 133 Cong. Rec. 33109 (1987) (remarks of Sen. Hatch) ("[T]he core function of the guidelines and the underlying statute ... is to reduce disparity in sentencing and restore fairness and predictability to the sentencing process. Adherence to the guidelines is therefore properly required under the law except in ... rare and particularly unusual instances ... "); *id.,* at 33110 (remarks of Sen. Biden) ("That notion of allowing the courts to, in effect, second-guess the wisdom of any sentencing guideline is plainly contrary to the act's purpose of having a sentencing guidelines system that is mandatory, except when the court finds a circumstance meeting the standard articulated in § 3553(b). It is also contrary to the purpose of having Congress, rather than the courts, review the sentencing guidelines for the appropriateness of authorized levels of punishment"); S.Rep. No. 98–223, p. 76 (1983) (noting that the Senate Judiciary Committee "resisted [the] attempt to make the sentencing guidelines more voluntary than mandatory, because of the poor record of States reported in the National Academy of Science Report which have experimented with 'voluntary' guidelines"); *id.,* at 34–35 (citing the "urgent need for" sentencing reform because of sentencing disparities caused "directly [by] the unfettered discretion the law confers on [sentencing] judges and parole authorities responsible for imposing and implementing the sentence"); *id.,* at 36–43, 62 (cataloging the "astounding" variations in federal sentencing and criticizing the unfairness of sentencing disparities).

15 Indeed, the Court's contention that real conduct sentencing was the principal aim of the SRA finds no support in the legislative history. The only authority the Court cites is 18 U.S.C. § 3661, which permits a judge to consider any information she considers relevant to sentencing. See *ante,* at 759 (opinion of BREYER, J.). That provision, however, was enacted in 1970, see Pub.L. 91–452, § 1001(a), 84 Stat. 951 (there numbered § 3577), and thus provides *no evidence whatsoever* of Congress' intent when it passed the SRA in 1984. Clearly, Congress thought that real conduct sentencing could not effectively address sentencing disparities without a binding Guidelines regime. For this reason, traditional sentencing goals have always played a minor role in the Guidelines system: "While the thick-as-your-wrist Guideline Manual specifically directs sentencing judges to make thousands of determinations on discrete points, not *once* does it expressly direct that a specific decision leading to the applicable guideline range on the 256–box grid should or must turn on an individualized consideration of the traditional goals of sentencing." Osler, Uniformity and Traditional Sentencing Goals in the Age of Feeney, 16 Fed. Sentencing Rptr. 253, 253–254 (2004).

16 Although there was no accompanying committee report attached to the PROTECT Act, the floor debates over the PROTECT Act's relevant provisions belie the majority's contention that a discretionary Guidelines system is more consistent with Congress' intent than the holding I would adopt. See 149 Cong. Rec. 9345, 9353, 9354 (2003) (remarks of Sen. Hatch) (arguing that the PROTECT Act "says the game is over for judges: You will have some departure guidelines from the Sentencing Commission, but you are not going to go beyond those, and you are not going to go on doing what is happening in our society today on children's crimes, no matter how softhearted you are. That is what we are trying to do here.... We say in this bill: We are sick of this, judges. You are not going to do this anymore except within the guidelines set by the Sentencing Commission"); *id.,* at 9354 ("[T]rial judges systematically undermine the sentencing guidelines by creating new reasons to reduce these sentences"); *id.,* at 12357 (2003) (remarks of Sen. Kennedy) ("The Feeney Amendment effectively strips Federal judges of discretion to impose individualized sentences, and transforms the longstanding sentencing guidelines system into a mandatory minimum sentencing system. It limits in several ways the ability of judges to depart downwards from the guidelines").

17 Moreover, even if the change to an indeterminate system were necessary, the Court could have minimized the consequences to the system by limiting the application of its holding to those defendants on direct review who actually suffered a Sixth Amendment violation. *Griffith v. Kentucky,* 479 U.S. 314, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987), does not require blind application of every part of this Court's holdings to all pending cases, but rather, requires that we apply any new "rule to all *similar cases* pending on direct review." *Id.,* at 323, 107 S.Ct. 708. For obvious reasons, not *all* pending cases are made *similar* to Booker's and Fanfan's merely because they involved an application of the Guidelines.

1 Part III of Justice STEVENS's dissent relies in large part on legislative history. I agree with his assertion that "[t]he text of the law that actually passed Congress ... should be more than sufficient to demonstrate Congress' unmistakable commitment to a binding Guidelines system." *Ante,* at 784. I would not resort to committee reports and statements by various individuals, none of which constitutes action taken or interpretations adopted *by Congress.* "One determines what

Congress would have done by examining what it did." *Legal Services Corporation v. Velazquez,* 531 U.S. 533, 560, 121 S.Ct. 1043, 149 L.Ed.2d 63 (2001) (SCALIA, J., dissenting).

2 See, *e.g., ante,* at 757 (noting that Congress intended the Guidelines system to achieve "increased uniformity of sentencing"); *ante,* at 759 (referring to "diminish[ing] sentencing disparity" as "Congress' basic statutory goal"); *ante,* at 762 ("Congress enacted the sentencing statutes in major part to achieve greater uniformity in sentencing"); *ante,* at 768 (referring to "Congress' basic objective of promoting uniformity in sentencing"); see also United States Sentencing Commission, Fifteen Years of Guidelines Sentencing xvi (Nov.2004) ("Sentencing reform has had its greatest impact controlling disparity arising from the source at which the guidelines themselves were targeted—judicial discretion"); *id.,* at 140 ("[T]he guidelines have succeeded at the job they were principally designed to do: reduce unwarranted disparity arising from differences among judges").

3 Although the Guidelines took pre-existing sentencing practices into account, they are the product of *policy decisions* by the Sentencing Commission—including, for instance, decisions to call for sentences "significantly more severe than past practice" for the "most frequently sentenced offenses in the federal courts." *Id.,* at 47. If those policy decisions are no longer mandatory, the sentencing judge is free to disagree with them.

4 The closest the remedial majority dares come to an assertion that the Guidelines must be followed is the carefully crafted statement that "[t]he district courts, while not bound to apply the Guidelines, must consult those Guidelines and take them into account when sentencing." *Ante,* at 767. The remedial majority also notes that the Guidelines represent what the Sentencing Commission "finds to be better sentencing practices." *Ante,* at 766. True enough, but the Commission's view of what is "better" is no longer authoritative, and district judges are free to disagree—as are appellate judges.

5 Paragraph (e)(1) requires a court of appeals to determine whether a sentence "was imposed in violation of law." 18 U.S.C. § 3742. Courts of appeals had of course always done this.

6 In the face of this immense reality, it is almost captious to point out that some of the text of the preserved subsection (f) plainly assumes the binding nature of the Guidelines—for example, the reference to a "sentence ... imposed as a result of an incorrect application of the sentencing guidelines," § 3742(f)(1) (Supp.2004), and the reference to a "departure ... based on an impermissible factor," § 3742(f)(2). Moreover, paragraph (f)(1) requires the appellate court to "remand ... for further sentencing proceedings" any case in which the sentence was imposed "as a result of an incorrect application of the sentencing guidelines." It is incomprehensible how or why this instruction can be combined with an obligation upon the appellate court to conduct its own independent evaluation of the "reasonableness" of a sentence.

7 The four kinds of appeal arise when, respectively,

(1) the sentence is "imposed in violation of law," §§ 3742(a)(1), (b)(1), (e)(1), (f)(1) (2000 ed. and Supp. IV);

(2) the sentence is "imposed as a result of an incorrect application of the sentencing guidelines," §§ 3742(a)(2), (b)(2), (e)(2), (f)(1);

(3) the sentence is either above or below "the applicable guideline range," §§ 3742(a)(3), (b)(3), (e)(3), (f)(2); and

(4) no guideline is applicable and the sentence is "plainly unreasonable," §§ 3742(a)(4), (b)(4), (e)(4), (f)(2).

8 *Pierce v. Underwood,* 487 U.S. 552, 558–560, 108 S.Ct. 2541, 101 L.Ed.2d 490 (1988), *Cooter & Gell v. Hartmarx Corp.,* 496 U.S. 384, 403–405, 110 S.Ct. 2447, 110 L.Ed.2d 359 (1990), and *Koon v. United States,* 518 U.S. 81, 99, 116 S.Ct. 2035, 135 L.Ed.2d 392 (1996).

9 Deciding whether a departure from a mandatory sentence (for a reason not taken into account in the Guidelines) is "unreasonable" (as § 3742(e)(3) required), or whether a sentence imposed for one of the rare offenses not covered by the Guidelines—though surrounded by *mandatory* sentences for related and analogous offenses—is "plainly unreasonable" (as § 3742(e)(4) required), differs *toto caelo* from determining, in the absence of *any mandatory scheme,* that a particular sentence is "unreasonable."

1 Because the majority invalidates 18 U.S.C. § 3553(b)(1) (Supp. IV) on its face, it is driven also to invalidate § 3742(e) (2000 ed. and Supp. IV), which establishes standards of review for sentences and is premised on the binding nature of the Guidelines. See, *e.g.,* § 3742(e)(2) (2000 ed.) (directing the court of appeals to determine whether the sentence "was imposed as a result of an incorrect application of the sentencing guidelines"); § 3742(e)(3) (directing the court of appeals to determine whether the sentence "is outside the applicable guideline range" and satisfies other factors). Given that (as I explain) there is no warrant for striking § 3553(b)(1) on its face, striking § 3742(e) as well only does further needless violence to the statutory scheme.

2 Booker's base offense level (supported by the facts the jury found) was 32. See United States Sentencing Commission, Guidelines Manual § 2D1.1(c)(4) (Nov.2003) (USSG) (setting the base offense level for the crime of possession with intent to sell 50 to 150 grams of cocaine base at 32).

3 The District Court applied the version of the Guidelines effective November 1, 2003.

4 I take no position on whether USSG § 6A1.3, a policy statement, bound the District Court. Cf. *Stinson v. United States,* 508 U.S. 36, 42–43, 113 S.Ct. 1913, 123 L.Ed.2d 598 (1993); *Williams v. United States,* 503 U.S. 193, 200–201, 112 S.Ct. 1112, 117 L.Ed.2d 341 (1992). In any case, Rule 32(c)(1), which had the same effect as § 6A1.3, certainly bound the court.

5 In 2002, Rule 32(c)(1) was amended and replaced with Rule 32(i)(3). The new Rule provides, in substantially similar fashion, that at sentencing, the court "must—for any disputed portion of the presentence report or other controverted matter—rule on the dispute or determine that a ruling is unnecessary either because the matter will not affect sentencing, or because the court will not consider the matter in sentencing." Fed. Rule Crim. Proc. 32(i)(3)(B) (2003).

6 The commentary to § 6A1.3 states that "[t]he Commission believes that use of a preponderance of the evidence standard is appropriate to meet due process requirements and policy concerns in resolving disputes regarding application of the guidelines to the facts of a case." The Court's holding today corrects this mistaken belief. The Fifth Amendment requires proof beyond a reasonable doubt, not by a preponderance of the evidence, of any fact that increases the sentence beyond what could have been lawfully imposed on the basis of facts found by the jury or admitted by the defendant.

7 I assume, without deciding, that our severability precedents—which require a nebulous inquiry into hypothetical congressional intent—are valid, a point the parties do not contest. I also assume that our doctrine on severability and facial challenges applies equally to regulations and to statutes. See *Reno v. Flores,* 507 U.S. 292, 300–301, 113 S.Ct. 1439, 123 L.Ed.2d 1 (1993).

8 See also 2 U.S.C. § 454 ("If *any provision of this Act,* or the application thereof to any person or circumstance, is held invalid, the validity of *the remainder of the Act* and the application of such provision to other persons and circumstances shall not be affected thereby" (emphasis added)); 5 U.S.C. § 806(b) (similar); 6 U.S.C. § 102 (2000 ed., Supp. II) (similar); 7 U.S.C. § 136x (similar); 15 U.S.C. § 79z–6 (similar); 29 U.S.C. § 114 (similar); 21 U.S.C. § 901 ("If a provision of this chapter is held invalid, all valid provisions that are severable shall remain in effect").

9 See 2 U.S.C. § 454 ("If any provision of this Act, or the *application* thereof to any person or circumstance, is held invalid, the validity of the remainder of the Act and the *application of such provision to other persons and circumstances* shall not be affected thereby" (emphasis added)); 5 U.S.C. § 806(b) (similar); 6 U.S.C. § 102 (2000 ed., Supp. II) (similar); 7 U.S.C. § 136x (similar); 15 U.S.C. § 79z–6 (similar); 29 U.S.C. § 114 (similar); 21 U.S.C. § 901 (in relevant part, "[i]f a provision of this chapter is held invalid in one or more of its applications, the provision shall remain in effect in all its valid applications that are severable"); see also Vermeule 1950, n. 26 ("There is a common misconception that severability analysis refers only to the severance of provisions or subsections enumerated or labeled independently in the official text of the statute. In fact, however, severability problems arise not only with respect to different sections, clauses or provisions of a statute, but also with respect to applications of a particular statutory provision when some (but not all) of those applications are unconstitutional"); Stern, Separability and Separability Clauses in the Supreme Court, 51 Harv. L.Rev. 76, 78–79 (1937) ("One [type of severability question] relates to situations in which some *applications* of the same language in a statute are valid and other applications invalid").

10 I do, however, agree with Justice STEVENS that Justice BREYER grossly distorts severability analysis by using severability principles to determine which provisions the Court should strike as unconstitutional. *Ante,* at 777–779 (STEVENS, J., dissenting in part). Justice BREYER's severability analysis asks which provisions must be cut from the statute to fix the constitutional problem. *Ante,* at 756–759, 764 (opinion of the Court). Normally, however, a court (1) declares a provision or application unconstitutional, using substantive constitutional doctrine (not severability doctrine), and only then (2) asks (under severability principles) whether the remainder of the Act can be left standing. Justice BREYER skips the first step, which is a necessary precursor to proper severability analysis.

United States Code Annotated
Title 18. Crimes and Criminal Procedure (Refs & Annos)
Part I. Crimes (Refs & Annos)
Chapter 63. Mail Fraud and Other Fraud Offenses (Refs & Annos)

18 U.S.C.A. § 1341

§ 1341. Frauds and swindles

Effective: January 7, 2008
Currentness

<Notes of Decisions for 18 USCA § 1341 are displayed in two separate documents.>

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation occurs in relation to, or involving any benefit authorized, transported, transmitted, transferred, disbursed, or paid in connection with, a presidentially declared major disaster or emergency (as those terms are defined in section 102 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5122)), or affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

CREDIT(S)

(June 25, 1948, c. 645, 62 Stat. 763; May 24, 1949, c. 139, § 34, 63 Stat. 94; Pub.L. 91-375, § 6(j)(11), Aug. 12, 1970, 84 Stat. 778; Pub.L. 101-73, Title IX, § 961(i), Aug. 9, 1989, 103 Stat. 500; Pub.L. 101-647, Title XXV, § 2504(h), Nov. 29, 1990, 104 Stat. 4861; Pub.L. 103-322, Title XXV, § 250006, Title XXXIII, § 330016(1)(H), Sept. 13, 1994, 108 Stat. 2087, 2147; Pub.L. 107-204, Title IX, § 903(a), July 30, 2002, 116 Stat. 805; Pub.L. 110-179, § 4, Jan. 7, 2008, 121 Stat. 2557.)

18 U.S.C.A. § 1341, 18 USCA § 1341
Current through P.L. 116-65.

End of Document

United States Code Annotated
Title 18. Crimes and Criminal Procedure (Refs & Annos)
Part I. Crimes (Refs & Annos)
Chapter 63. Mail Fraud and Other Fraud Offenses (Refs & Annos)

18 U.S.C.A. § 1343

§ 1343. Fraud by wire, radio, or television

Effective: January 7, 2008
Currentness

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation occurs in relation to, or involving any benefit authorized, transported, transmitted, transferred, disbursed, or paid in connection with, a presidentially declared major disaster or emergency (as those terms are defined in section 102 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5122)), or affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

CREDIT(S)

(Added July 16, 1952, c. 879, § 18(a), 66 Stat. 722; amended July 11, 1956, c. 561, 70 Stat. 523; Pub.L. 101-73, Title IX, § 961(j), Aug. 9, 1989, 103 Stat. 500; Pub.L. 101-647, Title XXV, § 2504(i), Nov. 29, 1990, 104 Stat. 4861; Pub.L. 103-322, Title XXXIII, § 330016(1)(H), Sept. 13, 1994, 108 Stat. 2147; Pub.L. 107-204, Title IX, § 903(b), July 30, 2002, 116 Stat. 805; Pub.L. 110-179, § 3, Jan. 7, 2008, 121 Stat. 2557.)

18 U.S.C.A. § 1343, 18 USCA § 1343
Current through P.L. 116-65.

End of Document

United States Code Annotated
Title 18. Crimes and Criminal Procedure (Refs & Annos)
Part I. Crimes (Refs & Annos)
Chapter 63. Mail Fraud and Other Fraud Offenses (Refs & Annos)

18 U.S.C.A. § 1346

§ 1346. Definition of “scheme or artifice to defraud”

Currentness

For the purposes of this chapter, the term “scheme or artifice to defraud” includes a scheme or artifice to deprive another of the intangible right of honest services.

CREDIT(S)

(Added Pub.L. 100-690, Title VII, § 7603(a), Nov. 18, 1988, 102 Stat. 4508.)

18 U.S.C.A. § 1346, 18 USCA § 1346
Current through P.L. 116-65.

End of Document

United States Code Annotated
Title 18. Crimes and Criminal Procedure (Refs & Annos)
Part I. Crimes (Refs & Annos)
Chapter 63. Mail Fraud and Other Fraud Offenses (Refs & Annos)

18 U.S.C.A. § 1349

§ 1349. Attempt and conspiracy

Effective: July 30, 2002
Currentness

Any person who attempts or conspires to commit any offense under this chapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

CREDIT(S)

(Added Pub.L. 107-204, Title IX, § 902(a), July 30, 2002, 116 Stat. 805.)

18 U.S.C.A. § 1349, 18 USCA § 1349
Current through P.L. 116-65.

End of Document

United States Code Annotated
Title 18. Crimes and Criminal Procedure (Refs & Annos)
Part I. Crimes (Refs & Annos)
Chapter 95. Racketeering (Refs & Annos)

18 U.S.C.A. § 1956

§ 1956. Laundering of monetary instruments

Effective: October 7, 2016
Currentness

(a)(1) Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity--

(A)(i) with the intent to promote the carrying on of specified unlawful activity; or

(ii) with intent to engage in conduct constituting a violation of section 7201 or 7206 of the Internal Revenue Code of 1986; or

(B) knowing that the transaction is designed in whole or in part--

(i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity; or

(ii) to avoid a transaction reporting requirement under State or Federal law,

shall be sentenced to a fine of not more than $500,000 or twice the value of the property involved in the transaction, whichever is greater, or imprisonment for not more than twenty years, or both. For purposes of this paragraph, a financial transaction shall be considered to be one involving the proceeds of specified unlawful activity if it is part of a set of parallel or dependent transactions, any one of which involves the proceeds of specified unlawful activity, and all of which are part of a single plan or arrangement.

(2) Whoever transports, transmits, or transfers, or attempts to transport, transmit, or transfer a monetary instrument or funds from a place in the United States to or through a place outside the United States or to a place in the United States from or through a place outside the United States--

(A) with the intent to promote the carrying on of specified unlawful activity; or

(B) knowing that the monetary instrument or funds involved in the transportation, transmission, or transfer represent the proceeds of some form of unlawful activity and knowing that such transportation, transmission, or transfer is designed in whole or in part--

(i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity; or

(ii) to avoid a transaction reporting requirement under State or Federal law,

shall be sentenced to a fine of not more than $500,000 or twice the value of the monetary instrument or funds involved in the transportation, transmission, or transfer, whichever is greater, or imprisonment for not more than twenty years, or both. For the purpose of the offense described in subparagraph (B), the defendant's knowledge may be established by proof that a law enforcement officer represented the matter specified in subparagraph (B) as true, and the defendant's subsequent statements or actions indicate that the defendant believed such representations to be true.

(3) Whoever, with the intent--

(A) to promote the carrying on of specified unlawful activity;

(B) to conceal or disguise the nature, location, source, ownership, or control of property believed to be the proceeds of specified unlawful activity; or

(C) to avoid a transaction reporting requirement under State or Federal law,

conducts or attempts to conduct a financial transaction involving property represented to be the proceeds of specified unlawful activity, or property used to conduct or facilitate specified unlawful activity, shall be fined under this title or imprisoned for not more than 20 years, or both. For purposes of this paragraph and paragraph (2), the term “represented” means any representation made by a law enforcement officer or by another person at the direction of, or with the approval of, a Federal official authorized to investigate or prosecute violations of this section.

(b) Penalties.--

(1) In general.--Whoever conducts or attempts to conduct a transaction described in subsection (a)(1) or (a)(3), or section 1957, or a transportation, transmission, or transfer described in subsection (a)(2), is liable to the United States for a civil penalty of not more than the greater of--

(A) the value of the property, funds, or monetary instruments involved in the transaction; or

(B) $10,000.

(2) Jurisdiction over foreign persons.--For purposes of adjudicating an action filed or enforcing a penalty ordered under this section, the district courts shall have jurisdiction over any foreign person, including any financial institution authorized under the laws of a foreign country, against whom the action is brought, if service of process upon the foreign person is made under the Federal Rules of Civil Procedure or the laws of the country in which the foreign person is found, and--

(A) the foreign person commits an offense under subsection (a) involving a financial transaction that occurs in whole or in part in the United States;

(B) the foreign person converts, to his or her own use, property in which the United States has an ownership interest by virtue of the entry of an order of forfeiture by a court of the United States; or

(C) the foreign person is a financial institution that maintains a bank account at a financial institution in the United States.

(3) Court authority over assets.--A court may issue a pretrial restraining order or take any other action necessary to ensure that any bank account or other property held by the defendant in the United States is available to satisfy a judgment under this section.

(4) Federal receiver.--

(A) In general.--A court may appoint a Federal Receiver, in accordance with subparagraph (B) of this paragraph, to collect, marshal, and take custody, control, and possession of all assets of the defendant, wherever located, to satisfy a civil judgment under this subsection, a forfeiture judgment under section 981 or 982, or a criminal sentence under section 1957 or subsection (a) of this section, including an order of restitution to any victim of a specified unlawful activity.

(B) Appointment and authority.--A Federal Receiver described in subparagraph (A)--

(i) may be appointed upon application of a Federal prosecutor or a Federal or State regulator, by the court having jurisdiction over the defendant in the case;

(ii) shall be an officer of the court, and the powers of the Federal Receiver shall include the powers set out in section 754 of title 28, United States Code; and

(iii) shall have standing equivalent to that of a Federal prosecutor for the purpose of submitting requests to obtain information regarding the assets of the defendant--

(I) from the Financial Crimes Enforcement Network of the Department of the Treasury; or

(II) from a foreign country pursuant to a mutual legal assistance treaty, multilateral agreement, or other arrangement for international law enforcement assistance, provided that such requests are in accordance with the policies and procedures of the Attorney General.

(c) As used in this section--

(1) the term "knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity" means that the person knew the property involved in the transaction represented proceeds from some form, though not necessarily which form, of activity that constitutes a felony under State, Federal, or foreign law, regardless of whether or not such activity is specified in paragraph (7);

(2) the term "conducts" includes initiating, concluding, or participating in initiating, or concluding a transaction;

(3) the term "transaction" includes a purchase, sale, loan, pledge, gift, transfer, delivery, or other disposition, and with respect to a financial institution includes a deposit, withdrawal, transfer between accounts, exchange of currency, loan, extension of credit, purchase or sale of any stock, bond, certificate of deposit, or other monetary instrument, use of a safe deposit box, or any other payment, transfer, or delivery by, through, or to a financial institution, by whatever means effected;

(4) the term "financial transaction" means (A) a transaction which in any way or degree affects interstate or foreign commerce (i) involving the movement of funds by wire or other means or (ii) involving one or more monetary instruments, or (iii) involving the transfer of title to any real property, vehicle, vessel, or aircraft, or (B) a transaction involving the use of a financial institution which is engaged in, or the activities of which affect, interstate or foreign commerce in any way or degree;

(5) the term "monetary instruments" means (i) coin or currency of the United States or of any other country, travelers' checks, personal checks, bank checks, and money orders, or (ii) investment securities or negotiable instruments, in bearer form or otherwise in such form that title thereto passes upon delivery;

(6) the term "financial institution" includes--

(A) any financial institution, as defined in section 5312(a)(2) of title 31, United States Code, or the regulations promulgated thereunder; and

(B) any foreign bank, as defined in section 1 [1] of the International Banking Act of 1978 (12 U.S.C. 3101);

(7) the term "specified unlawful activity" means--

(A) any act or activity constituting an offense listed in section 1961(1) of this title except an act which is indictable under subchapter II of chapter 53 of title 31;

(B) with respect to a financial transaction occurring in whole or in part in the United States, an offense against a foreign nation involving--

(i) the manufacture, importation, sale, or distribution of a controlled substance (as such term is defined for the purposes of the Controlled Substances Act);

(ii) murder, kidnapping, robbery, extortion, destruction of property by means of explosive or fire, or a crime of violence (as defined in section 16);

(iii) fraud, or any scheme or attempt to defraud, by or against a foreign bank (as defined in paragraph 7 of section 1(b) of the International Banking Act of 1978)); [2]

(iv) bribery of a public official, or the misappropriation, theft, or embezzlement of public funds by or for the benefit of a public official;

(v) smuggling or export control violations involving--

(I) an item controlled on the United States Munitions List established under section 38 of the Arms Export Control Act (22 U.S.C. 2778); or

(II) an item controlled under regulations under the Export Administration Regulations (15 C.F.R. Parts 730-774);

(vi) an offense with respect to which the United States would be obligated by a multilateral treaty, either to extradite the alleged offender or to submit the case for prosecution, if the offender were found within the territory of the United States; or

(vii) trafficking in persons, selling or buying of children, sexual exploitation of children, or transporting, recruiting or harboring a person, including a child, for commercial sex acts;

(C) any act or acts constituting a continuing criminal enterprise, as that term is defined in section 408 of the Controlled Substances Act (21 U.S.C. 848);

(D) an offense under section 32 (relating to the destruction of aircraft), section 37 (relating to violence at international airports), section 115 (relating to influencing, impeding, or retaliating against a Federal official by threatening or injuring a family member), section 152 (relating to concealment of assets; false oaths and claims; bribery), section 175c (relating to the variola virus), section 215 (relating to commissions or gifts for procuring loans), section 351 (relating to congressional or Cabinet officer assassination), any of sections 500 through 503 (relating to certain counterfeiting offenses), section 513 (relating to securities of States and private entities), section 541 (relating to goods falsely classified), section 542 (relating to entry of goods by means of false statements), section 545 (relating to smuggling goods into the United States), section 549 (relating to removing goods from Customs custody), section 554 (relating to smuggling goods from the United States), section 555 (relating to border tunnels), section 641 (relating to public money, property, or records), section 656 (relating to theft, embezzlement, or misapplication by bank officer or employee), section 657 (relating to lending, credit, and insurance institutions), section 658 (relating to property mortgaged or pledged to farm credit agencies), section 666 (relating to theft or bribery concerning programs receiving Federal funds), section 793, 794, or 798 (relating to espionage), section 831

(relating to prohibited transactions involving nuclear materials), section 844(f) or (i) (relating to destruction by explosives or fire of Government property or property affecting interstate or foreign commerce), section 875 (relating to interstate communications), section 922(l) (relating to the unlawful importation of firearms), section 924(n) (relating to firearms trafficking), section 956 (relating to conspiracy to kill, kidnap, maim, or injure certain property in a foreign country), section 1005 (relating to fraudulent bank entries), 1006 [3] (relating to fraudulent Federal credit institution entries), 1007 [3] (relating to Federal Deposit Insurance transactions), 1014 [3] (relating to fraudulent loan or credit applications), section 1030 (relating to computer fraud and abuse), 1032 [3] (relating to concealment of assets from conservator, receiver, or liquidating agent of financial institution), section 1111 (relating to murder), section 1114 (relating to murder of United States law enforcement officials), section 1116 (relating to murder of foreign officials, official guests, or internationally protected persons), section 1201 (relating to kidnaping), section 1203 (relating to hostage taking), section 1361 (relating to willful injury of Government property), section 1363 (relating to destruction of property within the special maritime and territorial jurisdiction), section 1708 (theft from the mail), section 1751 (relating to Presidential assassination), section 2113 or 2114 (relating to bank and postal robbery and theft), section 2252A (relating to child pornography) where the child pornography contains a visual depiction of an actual minor engaging in sexually explicit conduct, section 2260 (production of certain child pornography for importation into the United States), section 2280 (relating to violence against maritime navigation), section 2281 (relating to violence against maritime fixed platforms), section 2319 (relating to copyright infringement), section 2320 (relating to trafficking in counterfeit goods and services), section 2332 (relating to terrorist acts abroad against United States nationals), section 2332a (relating to use of weapons of mass destruction), section 2332b (relating to international terrorist acts transcending national boundaries), section 2332g (relating to missile systems designed to destroy aircraft), section 2332h (relating to radiological dispersal devices), section 2339A or 2339B (relating to providing material support to terrorists), section 2339C (relating to financing of terrorism), or section 2339D (relating to receiving military-type training from a foreign terrorist organization) of this title, section 46502 of title 49, United States Code, a felony violation of the Chemical Diversion and Trafficking Act of 1988 (relating to precursor and essential chemicals), section 590 of the Tariff Act of 1930 (19 U.S.C. 1590) (relating to aviation smuggling), section 422 of the Controlled Substances Act (relating to transportation of drug paraphernalia), section 38(c) (relating to criminal violations) of the Arms Export Control Act, section 11 (relating to violations) of the Export Administration Act of 1979, section 206 (relating to penalties) of the International Emergency Economic Powers Act, section 16 (relating to offenses and punishment) of the Trading with the Enemy Act, any felony violation of section 15 of the Food and Nutrition Act of 2008 [7 U.S.C.A. § 2024] (relating to supplemental nutrition assistance program benefits fraud) involving a quantity of benefits having a value of not less than $5,000, any violation of section 543(a)(1) of the Housing Act of 1949 [42 U.S.C.A. § 1490s(a)(1)] (relating to equity skimming), any felony violation of the Foreign Agents Registration Act of 1938, any felony violation of the Foreign Corrupt Practices Act, section 92 of the Atomic Energy Act of 1954 (42 U.S.C. 2122) (relating to prohibitions governing atomic weapons), or section 104(a) of the North Korea Sanctions Enforcement Act of 2016 (relating to prohibited activities with respect to North Korea);

ENVIRONMENTAL CRIMES

(E) a felony violation of the Federal Water Pollution Control Act (33 U.S.C. 1251 et seq.), the Ocean Dumping Act (33 U.S.C. 1401 et seq.), the Act to Prevent Pollution from Ships (33 U.S.C. 1901 et seq.), the Safe Drinking Water Act (42 U.S.C. 300f et seq.), or the Resources Conservation and Recovery Act (42 U.S.C. 6901 et seq.);

(F) any act or activity constituting an offense involving a Federal health care offense; or

(G) any act that is a criminal violation of subparagraph (A), (B), (C), (D), (E), or (F) of paragraph (1) of section 9(a) of the Endangered Species Act of 1973 (16 U.S.C. 1538(a)(1)), section 2203 of the African Elephant Conservation Act (16 U.S.C. 4223), or section 7(a) of the Rhinoceros and Tiger Conservation Act of 1994 (16 U.S.C. 5305a(a)), if the endangered

or threatened species of fish or wildlife, products, items, or substances involved in the violation and relevant conduct, as applicable, have a total value of more than $10,000;

(8) the term "State" includes a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States; and

(9) the term "proceeds" means any property derived from or obtained or retained, directly or indirectly, through some form of unlawful activity, including the gross receipts of such activity.

(d) Nothing in this section shall supersede any provision of Federal, State, or other law imposing criminal penalties or affording civil remedies in addition to those provided for in this section.

(e) Violations of this section may be investigated by such components of the Department of Justice as the Attorney General may direct, and by such components of the Department of the Treasury as the Secretary of the Treasury may direct, as appropriate, and, with respect to offenses over which the Department of Homeland Security has jurisdiction, by such components of the Department of Homeland Security as the Secretary of Homeland Security may direct, and, with respect to offenses over which the United States Postal Service has jurisdiction, by the Postal Service. Such authority of the Secretary of the Treasury, the Secretary of Homeland Security, and the Postal Service shall be exercised in accordance with an agreement which shall be entered into by the Secretary of the Treasury, the Secretary of Homeland Security, the Postal Service, and the Attorney General. Violations of this section involving offenses described in paragraph (c)(7)(E) may be investigated by such components of the Department of Justice as the Attorney General may direct, and the National Enforcement Investigations Center of the Environmental Protection Agency.

(f) There is extraterritorial jurisdiction over the conduct prohibited by this section if--

(1) the conduct is by a United States citizen or, in the case of a non-United States citizen, the conduct occurs in part in the United States; and

(2) the transaction or series of related transactions involves funds or monetary instruments of a value exceeding $10,000.

(g) Notice of conviction of financial institutions.--If any financial institution or any officer, director, or employee of any financial institution has been found guilty of an offense under this section, section 1957 or 1960 of this title, or section 5322 or 5324 of title 31, the Attorney General shall provide written notice of such fact to the appropriate regulatory agency for the financial institution.

(h) Any person who conspires to commit any offense defined in this section or section 1957 shall be subject to the same penalties as those prescribed for the offense the commission of which was the object of the conspiracy.

(i) Venue.--(1) Except as provided in paragraph (2), a prosecution for an offense under this section or section 1957 may be brought in--

(A) any district in which the financial or monetary transaction is conducted; or

(B) any district where a prosecution for the underlying specified unlawful activity could be brought, if the defendant participated in the transfer of the proceeds of the specified unlawful activity from that district to the district where the financial or monetary transaction is conducted.

(2) A prosecution for an attempt or conspiracy offense under this section or section 1957 may be brought in the district where venue would lie for the completed offense under paragraph (1), or in any other district where an act in furtherance of the attempt or conspiracy took place.

(3) For purposes of this section, a transfer of funds from 1 place to another, by wire or any other means, shall constitute a single, continuing transaction. Any person who conducts (as that term is defined in subsection (c)(2)) any portion of the transaction may be charged in any district in which the transaction takes place.

CREDIT(S)

(Added Pub.L. 99-570, Title I, § 1352(a), Oct. 27, 1986, 100 Stat. 3207-18; amended Pub.L. 100-690, Title VI, §§ 6183, 6465, 6466, 6469(a)(1), 6471(a), (b), Title VII, § 7031, Nov. 18, 1988, 102 Stat. 4354, 4375, 4377, 4378, 4398; Pub.L. 101-647, Title I, §§ 105 to 108, Title XII, § 1205(j), Title XIV, §§ 1402, 1404, Title XXV, § 2506, Title XXXV, § 3557, Nov. 29, 1990, 104 Stat. 4791, 4792, 4831, 4835, 4862, 4927; Pub.L. 102-550, Title XV, §§ 1504(c), 1524, 1526(a), 1527(a), 1530, 1531, 1534, 1536, Oct. 28, 1992, 106 Stat. 4055, 4064 to 4067; Pub.L. 103-322, Title XXXII, § 320104(b), Title XXXIII, §§ 330008(2), 330011(l), 330012, 330019, 330021(1), Sept. 13, 1994, 108 Stat. 2111, 2142, 2145, 2146, 2149, 2150; Pub.L. 103-325, Title IV, §§ 411(c)(2)(E), 413(c)(1), (d), Sept. 23, 1994, 108 Stat. 2253 to 2255; Pub.L. 104-132, Title VII, § 726, Apr. 24, 1996, 110 Stat. 1301; Pub.L. 104-191, Title II, § 246, Aug. 21, 1996, 110 Stat. 2018; Pub.L. 104-294, Title VI, §§ 601(f)(6), 604(b)(38), Oct. 11, 1996, 110 Stat. 3499, 3509; Pub.L. 106-569, Title VII, § 709(a), Dec. 27, 2000, 114 Stat. 3018; Pub.L. 107-56, Title III, §§ 315, 317, 318, 376, Title VIII, § 805(b), Title X, § 1004, Oct. 26, 2001, 115 Stat. 308, 310, 311, 342, 378, 392; Pub.L. 107-273, Div. B, Title IV, §§ 4002(a)(11), (b)(5), (c)(2), 4005(d)(1), (e), Nov. 2, 2002, 116 Stat. 1807, 1809, 1812, 1813; Pub.L. 108-458, Title VI, § 6909, Dec. 17, 2004, 118 Stat. 3774; Pub.L. 109-164, Title I, § 103(b), Jan. 10, 2006, 119 Stat. 3563; Pub.L. 109-177, Title III, § 311(c), Title IV, §§ 403(b), (c)(1), 405, 406(a)(2), 409, Mar. 9, 2006, 120 Stat. 242 to 244, 246; Pub.L. 110-234, Title IV, §§ 4002(b)(1)(B), (D), (2)(M), 4115(c)(1)(A)(i), (B)(ii), May 22, 2008, 122 Stat. 1096, 1097, 1109; Pub.L. 110-246, § 4(a), Title IV, §§ 4002(b)(1)(B), (D), (2)(M), 4115(c)(1)(A)(i), (B)(ii), June 18, 2008, 122 Stat. 1664, 1857, 1858, 1870; Pub.L. 110-358, Title II, § 202, Oct. 8, 2008, 122 Stat. 4003; Pub.L. 111-21, § 2(f)(1), May 20, 2009, 123 Stat. 1618; Pub.L. 112-127, § 6, June 5, 2012, 126 Stat. 371; Pub.L. 114-122, Title I, § 105(c), Feb. 18, 2016, 130 Stat. 101; Pub.L. 114-231, Title V, § 502, Oct. 7, 2016, 130 Stat. 956.)

Footnotes

1 So in original. Probably should read “section 1(b)”.

2 So in original. The second closing parenthesis probably should not appear.

3 So in original. Probably should be preceded by “section”.

18 U.S.C.A. § 1956, 18 USCA § 1956

Current through P.L. 116-65.

End of Document