

SCALIA, J., dissenting in part

SUPREME COURT OF THE UNITED STATES

Nos. 04–104 and 04–105

04–104 UNITED STATES, PETITIONER
v.
FREDDIE J. BOOKER

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

04–105 UNITED STATES, PETITIONER
v.
DUCAN FANFAN

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

[January 12, 2005]

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 III¹ 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

¹Part 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 25. 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 (2001) (SCALIA, J., dissenting).

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analysis the fact that Congress enacted a “judge-based sentencing system.” *Ante*, at 22 (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 sentencing disparity.² Inexplicably, 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 pre-sentence 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 10–11, 22. The majority’s remedial choice is thus wonderfully ironic: In order to rescue from nullification a statutory scheme

²See, e.g., *ante*, at 3 (noting that Congress intended the Guidelines system to achieve “increased uniformity of sentencing”); *ante*, at 7 (referring to “diminish[ing] sentencing disparity” as “Congress’ basic statutory goal”); *ante*, at 12 (“Congress enacted the sentencing statutes in major part to achieve greater uniformity in sentencing”); *ante*, at 24 (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”).

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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. A. §3553(b)(1) (Supp. 2004). See *ante*, at 16. 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) (main 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 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

³Although 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.

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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)(2)(6) (main 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 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 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. A. §3742 (main ed. and Supp. 2004), 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

⁴The 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 21–22. The remedial majority also notes that the Guidelines represent what the Sentencing Commission “finds to be better sentencing practices.” *Ante*, at 20. 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.

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to enforce conformity with the Guidelines. All of the provisions of that section that impose a review obligation beyond what existed under prior law⁵ 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), 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

⁵Paragraph (e)(1) requires a court of appeals to determine whether a sentence “was imposed in violation of law.” 18 U. S. C. A. §3742 (main ed.). Courts of appeals had of course always done this.

⁶In 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, subsection (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.

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experience reviewing sentences for anything but legal error. “[W]ell-established doctrine,” this Court said, “bars [appellate] review of the exercise of sentencing discretion.” *Dorszynski v. United States*, 418 U. S. 424, 443 (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 (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 (emphasis added). 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. 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).

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), the Act continues

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to provide for appeals from sentencing decisions (irrespective of whether the trial judge sentences within or outside the Guidelines range . . .),” *ante*, at 17 (citing §§3742(a) and (b)); and the opinion later announces that the standard of review for all such appeals is “unreasonableness,” *ante*, at 18, 22. 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 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 (CA1 1993) (Breyer, C. J.) (“[T]he sentencing statutes . . . provide [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.

⁷The 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) (main ed. and Supp. 2004);

(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).

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The Court claims that “a statute that does not *explicitly* set forth a standard of review may nonetheless do so *implicitly*.” *Ante*, at 17 (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 12, *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 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 19—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 (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 (1995);

⁸*Pierce v. Underwood*, 487 U. S. 552, 558–560 (1988), *Cooter & Gell v. Hartmarx Corp.*, 496 U. S. 384, 403–405 (1990), and *Koon v. United States*, 518 U. S. 81, 99 (1996).

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see also *id.*, at 502, and n. 8 (REHNQUIST, C. J., dissenting); *Reno v. American Civil Liberties Union*, 521 U. S. 844, 884–885 (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 18, 19. 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 §§3742(f)(2)(A), (B) (prescribing how to dispose on appeal of a sentence that 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 19, 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

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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 22 (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 18, 19)⁹ may lead some courts of appeals to conclude—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

⁹Deciding 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.”

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continue (as the remedial majority invites, though the merits majority forbids) the “appellate sentencing practice during the last two decades,” *ante*, at 19 (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 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 22.

In *Blakely v. Washington*, 542 U. S. ____ (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 ____ (opinion of O’CONNOR, J.) (slip op., at 12). And that harsh assessment, of course, referred to just a temporary and unavoidable 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.