

BREYER, 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 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 (2000), and *Blakely* v. *Washington*, 542 U. S. ____ (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

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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 (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 the defendant*.” 542 U. S., at ___ (slip op., at 7) (emphasis in original). Today, the Court applies its *Blakely* definition to the Federal Sentencing Guidelines. I continue to disagree with the constitutional 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 ___ (O’CONNOR, J., dissenting); *id.*, at ___ (KENNEDY, J., dissenting); *id.*, at ___ (BREYER, J., dissenting); *Harris v. United States*, 536 U. S. 545, 549–550 (2002) (KENNEDY, J., opinion of the Court); *id.*, at 569–572 (BREYER, J., concurring in part and concurring in judgment); *Apprendi*, 530 U. S., at 523–554 (O’CONNOR, J., dissenting); *id.*, at 555–556 (BREYER, J., dissenting); *Jones v. United States*, 526 U. S. 227, 264–272 (1999) (KENNEDY, J., dissenting); *Monge v. California*, 524 U. S. 721, 728–729 (1998) (O’CONNOR, J., opinion of the Court); *McMillan v. Pennsylvania*, 477 U. S. 79, 86–91 (1986) (REHNQUIST, C. J., opinion of the Court).

For one thing, we have found the Court’s historical argument unpersuasive. See *Blakely*, *supra*, at ___ (slip op., at 10) (O’CONNOR, J., dissenting); *Apprendi*, *supra*, at 525–528 (O’CONNOR, J., dissenting). Indeed, the Court’s opinion today illustrates the historical mistake upon

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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 14 (opinion of STEVENS, J.) (quoting *Apprendi, supra*, at 477) (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 (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 (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 (1998); *Witte v. United States*, 515 U. S. 389, 399 (1995); *United States v. Watts*, 519 U. S. 148, 154 (1997) (*per curiam*); *United States v. Dunnigan*, 507 U. S. 87, 97 (1993); *Mistretta v. United States*, 488 U. S. 361, 396 (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 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

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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 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 14 (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 (1949); cf., e.g., 375 F. 3d 508, 514 (CA7 2004) (case below) (“*Blakely* redefined ‘statutory maximum’”); *United States v. Ameline*, 376 F. 3d 967, 973 (CA9 2004) (“*Blakely* court worked a sea change in the body of sentencing law”); *United States v. Pineiro*, 377 F. 3d 464, 468–469 (CA5 2004) (same); see also *United States v. Penaranda*, 375 F. 3d 238, 243, n. 5 (CA2 2004) (same, collecting cases).

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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 ____ (slip op., at 3–13) (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 ____ (slip op., at 3) (O'CONNOR, J., dissenting). These consequences would seem perverse when viewed through the lens of a Constitution that seeks a fair criminal process.

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 ____ (KENNEDY, J., dissenting); *Apprendi*, 530 U. S., at 544–545 (O'CONNOR, J., dissenting); *id.*, at 560–564 (BREYER, J., dissenting). The “sentencing function long has been a peculiarly shared responsibility among the Branches of Government.” *Mistretta*, *supra*, at 390. 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*, 523 U. S., at 228; *McMillan*, 477 U. S., at 85.

This last mentioned power is not absolute. As the Court suggested in *McMillan*, confirmed in *Almendarez-Torres*,

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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 ____ (slip op., at 11) (emphasis in original); cf. *Almendarez-Torres, supra*, at 228 (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 (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 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 ____ (slip op., at 11), 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, supra*, at ____ (O’CONNOR, J., dissenting); *id.*, at ____ (KENNEDY, J., dissenting); *id.*, at ____ (BREYER, J., dissenting); *Harris*, 536 U. S., at 549–550, 569–572; *Apprendi, supra*, at 523–554, 555–556; *McMillan, supra*, at 86–91. I need not elaborate them further.

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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 generations—impose sentences within the broad limits established by Congress.” *Mistretta*, 488 U. S., at 396; see also USSG §5G1.1; cf. *Witte*, 515 U. S., at 399 (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 (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 ____ (slip op., at 7) (emphasis omitted). But the

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Court need not read this language as extending the scope of *Apprendi*. *Blakely* purports to follow, not to extend, *Apprendi*. 542 U. S., at ____ (slip op., at 5). 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 5 (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. 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 criminal statutes at all. See 28 U. S. C. §994(a); cf. *Blakely, supra*, at ____ (slip op., at 2–3, 7–8).

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,

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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.

Second, the sentencing statutes at issue in *Blakely* imposed absolute constraints on a judge's sentencing discretion, while the 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 ____ (slip op., at 2–3, 7–8). 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 ____ (slip op., at 3) (quoting *State v. Gore*, 143 Wash. 2d 288, 315–316, 21 P. 3d 262, 277 (2001)).

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), 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*,

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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*, 515 U. S., at 399; 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.