

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 DERRICK KIMBROUGH, :

4 Petitioner :

5 v. : No. 06-6330

6 UNITED STATES :

7 - - - - - x

8 Washington, D.C.

9 Tuesday, October 2, 2007

10

11 The above-entitled matter came on for oral
12 argument before the Supreme Court of the United States
13 at 11:06 a.m.

14 APPEARANCES:

15 MICHAEL S. NACHMANOFF, ESQ., Federal Public Defender, E.
16 District of Virginia Alexandria, Va.; on behalf of
17 the Petitioner.

18 MICHAEL R. DREEBEN, ESQ., Deputy Solicitor
19 General, Department of Justice, Washington, D.C.; on
20 behalf of the Respondent.

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P R O C E E D I N G S

(11:06 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in case 06-6330, Kimbrough versus United States.

Mr. Nachmanoff.

ORAL ARGUMENT OF MICHAEL NACHMANOFF

ON BEHALF OF THE PETITIONER

MR. NACHMANOFF: Mr. Chief Justice, and may it please the Court:

Derrick Kimbrough's case is about what a district court may consider when imposing sentence in conformity with Section 3553(a).

That statute directs sentencing courts to do exactly what Judge Jackson did in this case. He properly calculated and considered the advisory guideline range, the Sentencing Commission's reports, Mr. Kimbrough's personal history and background, and the offense itself, as directed by the statute. He then made case-specific findings to impose an appropriate sentence, and he did not make any categorical determinations.

The Fourth Circuit reversed, applying a per se rule prohibiting disagreement with the crack cocaine guideline. The government, on the other hand, argues that Congress has implicitly directed sentencing

1 courts to adhere to the crack guidelines.

2 Both of these positions are wrong.

3 With respect to the Fourth Circuit, the
4 Fourth Circuit applied a rigid rule that prohibited any
5 disagreement with the crack guideline, which is
6 determined solely by drug type and quantity. They then
7 prohibited the imposition of any sentence outside the
8 guideline range, either above it or below it, unless the
9 court identified facts specific to the defendant or the
10 offense.

11 This ruling is inconsistent with the Court's
12 holdings in Cunningham and Rita, which hold that the
13 courts must be free to disagree with policies.

14 Finally, the Fourth Circuit required that
15 those facts be atypical, which mirrors the exact
16 language that was excised in 3553(b)(1).

17 JUSTICE KENNEDY: Could the Congress have
18 mandated the result and the rationale that the Fourth
19 Circuit used here?

20 MR. NACHMANOFF: Your Honor, Congress can
21 certainly speak explicitly through its statutes to
22 impose further refinements on the penalty structure that
23 it set out in 841.

24 Section 841, on its face, does no more than
25 set mandatory minimums and maximums at two triggering

1 quantities. If Congress wanted to specify further
2 triggering quantities which would cabin the discretion
3 of sentencing courts, they could do so, but they have
4 not done so and there is no canon of statutory
5 construction that the government identifies or that I'm
6 aware of that would justify the notion of the implicit
7 binding directive.

8 JUSTICE ALITO: If Congress made a finding
9 that crack and cocaine are equally dangerous and passed
10 a statute that said, for sentencing purposes, every
11 district judge shall treat cases involving these two
12 substances exactly the same, would there be a Sixth
13 Amendment problem with that? Or do you think every
14 district judge gets the right to make that policy
15 decision individually?

16 MR. NACHMANOFF: Justice Alito, Congress
17 certainly can cabin the discretion of judges. But once
18 they set a floor and a ceiling, pursuant to this Court's
19 remedial holding in Booker, judges must be free to
20 consider the entire range of punishment. And Booker
21 relies on the notion that the Guidelines are now fully
22 advisory and, therefore, judges without having to
23 identify specific facts have to have the discretion to
24 disagree with policies or identify things unique to the
25 case in order to fashion an appropriate punishment.

1 JUSTICE SOUTER: What's your answer simply
2 to the very simple argument that because the floor was
3 set on the assumption of a 100 to 1 ratio, set by
4 Congress, that any other sentencing assumption,
5 regardless of the particular justifications in a given
6 case, is simply incoherent with the statutory scheme and
7 for that reason should be regarded as unreasonable?

8 MR. NACHMANOFF: Yes, Your Honor.

9 JUSTICE SOUTER: It is the coherence problem
10 that is bothering us.

11 MR. NACHMANOFF: Yes. There are several
12 answers to that question, Justice Souter. The first is
13 that this Court has recognized with the same statute
14 which has the same structure that the government argues
15 can only logically be understood one way, that with
16 regard to the weight for LSD in the case of Neal versus
17 United States, it is perfectly appropriate for there to
18 be two different methods of calculating weight for
19 purposes of punishment. The Guidelines calculate weight
20 based on a presumed weight of the combination of the LSD
21 and the blotter paper or the carrier medium. And the
22 statute defines the method for calculating the mandatory
23 minimum by the combined weight of the LSD and the
24 blotter paper, regardless of whether it is heavy or
25 whether it is light.

1 JUSTICE SOUTER: But is that an argument for
2 saying, well, in the LSD case, you approved of
3 incoherence and irrationality, therefore, you want to do
4 it across the board? I mean, there is still an argument
5 here on the merits regardless of Neal that there is an
6 incoherence between the minimum and the kind of
7 discretion that you're talking about.

8 MR. NACHMANOFF: Well, Your Honor, I think
9 what Neal reflects is that there's no implicit binding
10 policy directive in 841 itself that requires either the
11 Commission or sentencing courts to follow in lock step
12 on a graduated proportionate scheme, whatever it is that
13 Congress decided with respect to two specific triggers
14 should be the case.

15 JUSTICE SOUTER: Did we have the cliff
16 problem in the LSD case?

17 MR. NACHMANOFF: Yes, Your Honor. The Court
18 recognized that, in fact, cliffs are the inevitable
19 results of mandatory minimums.

20 JUSTICE SOUTER: So we are in the same boat,
21 then, you say with Neal in that respect, too?

22 MR. NACHMANOFF: Yes, and Your Honor, if I
23 could also point out that there really is a myth here
24 with regard to the 100 to 1 ratio as it stands now and
25 as the Commission created it in 1987. The 100 to 1

1 ratio describes the relative weight of crack cocaine and
2 powder cocaine with regard to the levels in the
3 sentencing table; so that if you compare, for example,
4 the 10-year mandatory minimum trigger, 50 grams of
5 crack, that gets you to a level 32 in the sentencing
6 table and it requires 5 kilos of powder cocaine or 5,000
7 grams. That's the 100 to 1 ratio.

8 And it is true that if one compares the low
9 end of that table -- 5 kilos to 50 grams, you end up
10 with the same punishment, or likewise, if you compare
11 the top of the range, 15 kilos to a 150 grams.

12 But the way the guidelines have been
13 written, there are a multitude of ratios that get
14 applied right now and were applied in the pre-Booker
15 guidelines scheme.

16 In other words, 14.9 kilos of powder
17 compared to 51 grams of crack results in a 292 to 1
18 ratio. You get the exact same punishment, it is a level
19 32.

20 Likewise if you flip it, and you compare 149
21 grams of crack to 5 kilos of powder cocaine, you are
22 still within a level 32, and it is a 34 to 1 ratio.

23 JUSTICE SCALIA: Maybe that was wrong.
24 Maybe the Sentencing Commission should have, in order to
25 be faithful to the Congressional determination, should

1 have done it quite proportionately. I mean, I'm not
2 hung up on what the Sentencing Commission said. I'm
3 hung up on what the courts should do now.

4 MR. NACHMANOFF: I agree, Justice Scalia.
5 And of course, the Sentencing Commission taken to the
6 ultimate extreme would have had to have a proportionate
7 sentencing table by gram or fraction of a gram in order
8 to preserve the 100 to 1 ratio, which simply points out
9 in combination with Neal the fact that this was a choice
10 made by the Commission, a choice, by the way, not
11 grounded on any empirical evidence or any other reason
12 other than what 841 originally indicated.

13 It could have been done differently. It is
14 done differently with regard to other drugs in 841, such
15 as LSD or such as marijuana plants, which have a
16 different method for calculation under the Guidelines as
17 they do for purposes of mandatory minimums. And, of
18 course, what that means is that there is no implicit
19 directive, which is the only rational --

20 JUSTICE SOUTER: That just goes back to
21 Justice Scalia's point. There may very well be an
22 implicit Congressional directive that the Commission did
23 not follow.

24 MR. NACHMANOFF: Well -- Your Honor,
25 Congress has a method --

1 JUSTICE SOUTER: It did not reject them, you
2 are saying? So, therefore, in effect, there was a
3 Congressional ratification?

4 MR. NACHMANOFF: Well, Congress did not
5 reject the original table that was created by the
6 Commission in 1987. That is correct. But Congress also
7 did not at any time in Section 994, which is where it
8 has given other explicit directions to the Commission to
9 fashion guidelines in a particular way, say anything
10 about how to fashion the punishment for crack cocaine or
11 any of the other drugs in Section 841.

12 So Congress understands if it wants to give
13 further guidance to the Commission how to do it.

14 JUSTICE GINSBURG: Mr. Nachmanoff, in the
15 absence of anything further from Congress, and accepting
16 your argument that there's no -- that the Guidelines did
17 not have to adopt the ratio that is applicable to the
18 mandatory minimum, could a district judge then say, I
19 see that this disparity is untenable, but I think drugs
20 are a very bad thing, so I'm going to sentence for
21 powder as high as for crack?

22 MR. NACHMANOFF: Justice Ginsburg, our rule
23 certainly contemplates the fact that there may be
24 circumstances in which district judges may come to
25 conclusions about the appropriate sentence, taking into

1 consideration the purposes of sentencing and the
2 parsimony provision --

3 JUSTICE GINSBURG: But if we throw out the
4 100 to 1, what is the range open to the district
5 judge -- hundred to one is okay, but I have to use
6 the -- I'm going to use the crack for both? Or say
7 there is a difference between the two, so I'm going to
8 set it at 20 to 1 and another judge 5 to 1.

9 What is -- are all those reasonable within
10 the position that you take in this case? Would all
11 those have to pass muster at the court of appeals level?

12 MR. NACHMANOFF: Well those certainly are
13 positions that judges could take. In this particular
14 case, the judge was presented with information that led
15 the court to conclude that reducing the sentence for
16 crack based on the Commission's overwhelming empirical
17 evidence and penological evidence and the statistical
18 evidence that was submitted was relevant to the various
19 factors in 3553(a), in particular the purposes of
20 sentencing. And that the Guidelines would not be
21 appropriate and, therefore, a lower sentence would be
22 appropriate.

23 JUSTICE ALITO: What if the Fourth Circuit
24 sees a number of absolutely identical cases exactly like
25 Mr. Kimbrough's, and it is apparent in one, the

1 sentencing judge either explicitly or implicitly has
2 used a 1 to 1, and the next one used 20 to 1, the next
3 one has used 50 to 1, the next one has used 80 to 1, and
4 the next one has used 100 to 1, what is it to do under
5 reasonableness review?

6 MR. NACHMANOFF: The court of appeals has
7 been given explicit instruction by this Court that it is
8 to review all of those sentences under an abuse of
9 discretion, which means that its job is not to
10 substitute its judgment for the lower court.

11 And if those sentencing courts have
12 articulated reasons and have relied on relevant and
13 reliable --

14 JUSTICE ALITO: But the cases are absolutely
15 identical. Everything is absolutely identical about
16 them, except for the sentences. Can't introduce any new
17 variables. What is the court of appeals to do?

18 This is not a hypothetical situation,
19 really. This is what courts of appeals who have to see
20 dozens of these cases have to do. There's a policy
21 question there. How severely should crack be treated?
22 What is the substantive review that the court of appeals
23 is supposed to provide in that situation?

24 MR. NACHMANOFF: Justice Alito, sentencing
25 courts now are free to consider the full range of

1 punishment and to consider the purposes of sentencing in
2 both issue-specific to the defendant and the offense and
3 also general policy issues. That is the clear holding
4 of the Booker remedial opinion and reaffirmed in
5 Cunningham and in Rita. When judges have that full
6 discretion to consider the guidelines and follow the
7 mandates of 3553(a), but then impose a sentence that
8 meets the purposes of sentencing and is consistent with
9 the parsimony provision, there may well be judges that
10 come to different conclusions, as your hypothetical
11 posits, about what people with similar or even identical
12 records and identical circumstances may -- may do.

13 I would say that the reality is in the
14 lower courts no two cases are alike, and so there are
15 always reasons for judges to make reasoned distinctions
16 in imposing sentences, even where, for example, the drug
17 type and quantity is identical.

18 JUSTICE ALITO: Well, I take it your answer
19 is that all or most of those cases would be affirmed
20 under reasonableness -- under abuse of discretion
21 review?

22 MR. NACHMANOFF: If -- yes.

23 JUSTICE SOUTER: If you were representing
24 the one who got the 80 to 1 ratio you would file an
25 amicus brief, no error in judgment?

1 MR. NACHMANOFF: Well, Justice Souter, if
2 the court followed the procedural requirements of
3 3553(a), if the information was subjected to the
4 adversarial process, and if the court imposed a sentence
5 consistent with the parsimony clause, it would be hard
6 to imagine a basis upon which to object.

7 JUSTICE BREYER: The basis is that that
8 would be the end of the Guidelines. I mean, that --
9 every judge has his own view of policy and there is a
10 vast range. No point having advice -- I mean, fine,
11 but I don't think this Court said it, and I think that
12 the test is supposed to be reasonableness, and I think
13 3553(a) does have a lot of instructions, and one of the
14 major thrusts is follow the Guidelines. It doesn't make
15 them mandatory. But they're in there.

16 All right, so the problem for me is just
17 what Justice Alito was saying: Is there a path here
18 between saying, well, judge, leaving everything special
19 about your case out of it -- we're only talking about a
20 judge who says there's nothing special about my case --
21 I disagree with the policy of the commission.

22 In such a case, is there a choice between
23 saying that no matter what the commission says, the
24 court of appeals must insist that their district judges
25 follow in terms of a policy; and the opposite, which is

1 to say they don't have to do anything that the
2 commission says, because the commission is always
3 choosing among reasonable choices. Very rarely -- maybe
4 you have one in this case -- but very rarely is it
5 totally unreasonable.

6 How do we thread the channel?

7 MR. NACHMANOFF: Justice Breyer, the Booker
8 remedial opinion makes it crystal-clear that to avoid
9 the Sixth Amendment problem with the mandatory
10 Guidelines, judges must be free to disagree with the
11 Guidelines.

12 JUSTICE BREYER: To the extent that it's
13 reasonable, and where we're talking about individual
14 cases we've already said, given the history of our legal
15 system, it's very reasonable to give lots of discretion
16 to the district judge.

17 Now we're talking about what's reasonable in
18 the context of 3553(a); and I don't think Booker says
19 one way or the other on that, nor I do believe Rita says
20 one way or the other.

21 MR. NACHMANOFF: Your Honor, 3553(a) is
22 driven by the purposes of sentencing.

23 JUSTICE BREYER: Driven by a Congress that
24 wrote guidelines; and at the last minute, in a separate
25 matter that we've taken out and wasn't put in the

1 initial draft added the word "mandatory." So the
2 history of 3553(a) is a history of a statute that is
3 seeking uniformity through guidelines.

4 At least that's my view of it. And for
5 purposes of the question, which is an important question
6 to me, let's assume that.

7 MR. NACHMANOFF: Well, Your Honor, the
8 appellate courts still have a role to play and that role
9 is to ensure that the sentencing courts have followed
10 the mandate of 3553(a), and that --

11 JUSTICE SCALIA: Indeed, it may be quite
12 impossible to achieve uniformity through advisory
13 guidelines, which is why Congress made them mandatory.

14 (Laughter.)

15 MR. NACHMANOFF: That very well may be,
16 Justice Scalia. In -- this Court even in the remedial
17 opinion in Booker recognized that uniformity as it was
18 understood in the pre-Booker days would be reduced, and
19 that there might be more sentences that have different
20 results --

21 JUSTICE BREYER: In other words, I'm
22 assuming now you have not -- you don't have a good
23 answer to my question. You're saying either we have to
24 make it unconstitutional, which I don't think they are,
25 or you have to say anything goes, and that my question

1 has no answer in your view?

2 MR. NACHMANOFF: Well, Justice Breyer, your
3 question certainly is a difficult one. Let me say this:
4 With regard to uniformity, Congress has the power to
5 make sentences more uniform. They can do it in a
6 variety of ways and they have done it where they've
7 thought it was important. They haven't done it with
8 regard to the 100 to 1 ratio beyond the mandatory
9 minimum or the statutory maximum.

10 JUSTICE SCALIA: And you don't say -- you
11 don't say anything goes. I mean, the hypothetical that
12 Justice Alito gave is -- is easy, only because Congress
13 has created the 100 to 1 ratio as presumably reasonable.
14 If Congress enacted it as a statute, it has to be
15 reasonable.

16 So that enables you to say anything from 1
17 to 1 to 100 to 1 is reasonable. But your position is
18 not anything goes. It's anything that's reasonable
19 goes.

20 MR. NACHMANOFF: That is correct, Justice
21 Scalia. And --

22 JUSTICE KENNEDY: And is "reasonable"
23 defined as an appropriate interpretation of
24 congressional intent, or does "reasonable" mean
25 something else, like a just sentence? What -- how do we

1 define "reasonable"?

2 MR. NACHMANOFF: Well, Your Honor, I think
3 that that --

4 JUSTICE KENNEDY: Whether or not the
5 commission and then the district judge reasonably
6 interpret the congressional intent, and if the
7 commission reasonably interprets the congressional
8 intent is the district court allowed to disregard that?

9 MR. NACHMANOFF: Sentencing courts must be
10 able to disagree with the commission's conclusions about
11 congressional intent.

12 JUSTICE KENNEDY: Assuming the commission
13 was reasonable, can they still disagree?

14 MR. NACHMANOFF: Yes, Your Honor. I think
15 that is the essence of the Booker remedial holding, that
16 in order to cure the constitutional problem with
17 mandatory guidelines, judges must be free to reject,
18 must be free to reject those guidelines. And in fact
19 Cunningham makes that clear, that in the California
20 determinate sentencing area it was the inability of
21 judges to impose a higher sentence based on the general
22 objectives of sentencing, as opposed to particular
23 factors or circumstances in aggravation, that made it
24 unconstitutional. So whether the commission concluded
25 that the congressional intent was to import the 100 to 1

1 ratio or not -- and clearly there is no statutory
2 construction that can be inferred or understood from 841
3 by itself. It is not explicit and the government
4 concedes that.

5 JUSTICE KENNEDY: So in your case you ask us
6 to establish the proposition that in any case, a
7 sentencing judge must always be free to disregard a
8 reasonable interpretation of the Commission, a
9 reasonable interpretation of a congressional statute?

10 JUSTICE STEVENS: May I interrupt before you
11 answer. The question isn't whether they can justify a
12 reasonable. It's whether they can justify not following
13 one that creates unwarranted disparities within the
14 meaning of the statute.

15 MR. NACHMANOFF: That's -- that's correct,
16 Justice Stevens.

17 JUSTICE KENNEDY: You would go further --
18 you would go further and -- and submit to us the
19 proposition that I -- that I just stated?

20 MR. NACHMANOFF: Well, Your Honor, if -- if
21 I understood it correctly, the question is whether or
22 not when the commission concludes this is what Congress
23 intended --

24 JUSTICE KENNEDY: Reasonably.

25 MR. NACHMANOFF: -- reasonably -- does it

1 somehow imbue that particular guideline with some
2 special binding nature. And my response would be that
3 the Booker remedial opinion makes it clear that the
4 Guidelines as a whole must be viewed as advisory. The
5 government tries to argue that if some Guidelines are
6 special and are binding, and others are advisory,
7 there's no Sixth Amendment problem. But that ignores
8 the fundamental principle of the Booker remedial hearing
9 -- holding, which is that the Guidelines as a whole must
10 be advisory and judges must be able to disagree with
11 them. And of course here is perhaps the paradigmatic
12 example of a time when the commission's original
13 guidelines got it wrong, didn't further the purposes of
14 sentencing; and, of course, they themselves have made
15 that conclusion, and for sentencing purposes --

16 JUSTICE KENNEDY: But -- and I take it your
17 submission is that the district court must be able to
18 make the determination that the commission's policy is
19 to be disregarded in every case to come before the
20 court?

21 MR. NACHMANOFF: Well, Your Honor, 3553(a)
22 requires individualized sentencing. There's no question
23 that judges are required to follow in every case the
24 mandates of 3553(a) and to calculate the advisory
25 Guidelines correctly.

1 Now, there is no reason why judges cannot in
2 a certain class of cases conclude that the Guideline
3 gets it wrong; that it overstates the seriousness of the
4 offense; that it creates an unwarranted disparity; and
5 that they are going to impose a sentence outside of that
6 guideline range.

7 That does not in any way remove the
8 requirement that they subject every sentencing to the
9 adversarial process to give the parties the opportunity
10 to convince them that the guidelines should be followed,
11 or not followed, or to be reconsidered.

12 JUSTICE GINSBURG: And Mr. Nachmanoff, I
13 think that you are agreeing, although you don't want to
14 come right out and say it, with Justice Scalia's point;
15 that is, anything from a hundred to one down to one to
16 one is open to the district judge; and within that
17 range, there is no abuse of discretion.

18 MR. NACHMANOFF: Your Honor, I certainly
19 agree that that full range is available to the
20 sentencing court.

21 JUSTICE SCALIA: Only because Congress has
22 said 100 to 1. That strikes me as utterly unreasonable.
23 But if Congress has said it, it can't be unreasonable.
24 That's what makes that an easy hypothetical, but that
25 would not be the normal case, that a 100 to 1 disparity

1 wouldn't be -- would not be unreasonable.

2 MR. NACHMANOFF: Yes, Your Honor.

3 JUSTICE GINSBURG: In any case, your answer
4 is anything from what Congress has said, down to one to
5 one, would be a reasonable sentence that would be --
6 that would pass muster on appeal because it is not an
7 abuse of discretion.

8 MR. NACHMANOFF: Well, if I can be clear,
9 Justice Ginsburg, sentencing courts must have available
10 to them the full range of punishment as defined by
11 Congress. And that range, for purposes of 841, are
12 broad ranges based on triggering quantities at 5 grams
13 and 50 grams for crack cocaine. Within those ranges, as
14 long as the court follows the requirements of 3553(a),
15 considers all the purposes of sentencing, engages in an
16 individualized sentencing process, and relies on
17 relevant and reliable information, there would be no
18 basis under abuse of discretion review to reverse the
19 sentencing court in that instance.

20 JUSTICE GINSBURG: But you've given me a
21 bunch of hand holds that, quite frankly, are quite easy
22 for a district judge to say: Here's my laundry list;
23 and I'm going to go through every one of them; but in
24 the end I think the ratio should be 20 to 1; and that's
25 what I'm going to impose.

1 MR. NACHMANOFF: Well, again, Your Honor,
2 Congress certainly has the power to cabin that
3 discretion. They just need to do it explicitly, and
4 they have not done so.

5 JUSTICE GINSBURG: So -- Congress not having
6 done that, then the range is open to the district
7 judges, 100 to 1 to 1 to 1.

8 MR. NACHMANOFF: That's correct, Your Honor.
9 If I may reserve the remainder of my time for rebuttal.

10 CHIEF JUSTICE ROBERTS: Thank you, Mr.
11 Nachmanoff. Mr. Dreeben?

12 ORAL ARGUMENT BY MICHAEL R. DREEBEN

13 ON BEHALF OF THE RESPONDENT

14 MR. DREEBEN: Mr. Chief Justice, and may it
15 please the court:

16 The question in this case is essentially,
17 can a district court reasonably disagree with the
18 judgment of Congress concerning the ratio between the
19 quantity-based sentences for crack and powder.

20 JUSTICE STEVENS: Mr. Dreeben, can I ask a
21 question right at the outset that is critical for me. I
22 think this case may well be controlled by the decision
23 in Neal against the United States, which is not cited in
24 the government brief and wasn't cited in the blue brief.

25 But there the Court held that a policy

1 judgment by Congress fixing mandatory minimums on the
2 basis of the weight of the carrier rather than the drug
3 did not justify guidelines based on that ratio -- based
4 on the same principle -- if that would produce
5 unwarranted disparities.

6 And, as I understand the facts of this case,
7 the Commission has told us actually in some of its
8 reports that the 100 to 1 ratio does produce unwarranted
9 disparities. Therefore, we should disregard the entire
10 guideline as we did in Neal, and the reason the Neal
11 case is controlling in this case.

12 MR. DREEBEN: Justice Stevens, let me start
13 with the Neal decision, because I think Neal is
14 fundamentally unlike this case. In Neal this Court had
15 to determine whether its prior construction of a
16 statute, Section 841, survived the Commission's
17 decision --

18 JUSTICE STEVENS: But that is a construction
19 of what Congress intended, and for purposes of decision
20 we assumed that Congress intended what we held the
21 statute meant.

22 MR. DREEBEN: Justice Stevens, the only
23 question presented in Neal was, did the Commission's
24 weight guideline for LSD require this Court to change
25 its interpretation of Section 841. And the Court held

1 no.

2 There was no question before the Court about
3 whether the Sentencing Commission had legitimately
4 adopted a different formula than the mixture or
5 substance rule that this Court had held governed the
6 statute.

7 The LSD guideline was not in play in Neal.
8 The government never challenged it. Its rationality was
9 not at issue. All the Court had to hold was that
10 whatever the Sentencing Commission did --

11 JUSTICE STEVENS: It does hold that a
12 guideline that does not conform with a congressional
13 judgment merely expressed in a mandatory minimum is a
14 guideline that would survive.

15 MR. DREEBEN: Well, I disagree with that,
16 Justice Stevens, because no one challenged the guideline
17 in Neal. There was nothing at issue in the Court to
18 decide about whether that Guideline was valid. But even
19 if the Court thought that Neal does involve some sort of
20 a principle that the Sentencing Commission has greater
21 freedom to vary from the procedures laid out in a
22 mandatory minimum sentencing statute, Neal does not
23 control this case, because there is more data about what
24 Congress intended the ratio between crack and powder to
25 be, and because Congress changed the basic, organic

1 statute that governs the Sentencing Commission's --

2 JUSTICE STEVENS: Yes, but there's also more
3 data that the Commission has reflected on all this and
4 still concludes that the 100 to 1 ratio creates an
5 unwarranted disparity which is contrary to the statute.

6 MR. DREEBEN: Well, the statute, itself,
7 Section 841, establishes the ratio of a 100 to 1. When
8 the Commission first considered creating drug
9 guidelines --

10 JUSTICE STEVENS: It establishes the ratio
11 for mandatory minimum purposes only, is what Neal held.

12 MR. DREEBEN: Well I disagree with that,
13 Justice Stevens, and I'm trying to explain why the legal
14 context is different from the legal context in Neal.

15 Let me start with a couple of points about
16 this. First of all, when the Commission promulgated the
17 drug Guideline initially, it conformed it to the 100 to
18 1 ratio that existed under the mandatory minimum
19 sentencing statute, because it recognized -- and these
20 were the Commission's words -- that a logical and
21 coherent sentencing scheme required that there be
22 consistent proportionality throughout the sentencing
23 process.

24 When the Commission later studied the
25 crack-powder ratio and concluded that Congress had

1 gotten it wrong and, therefore, the Commission, itself,
2 had gotten it wrong by conforming to what Congress did,
3 it proposed a Guideline that would have changed the
4 ratio for Guideline's purposes only to one to one
5 between crack and powder.

6 And Congress, for the first time in the
7 history of its review of Guidelines amendments, rejected
8 that proposal; and it did so with legislation that made
9 clear that it believed that if the commission wanted to
10 come back with something new, it should propose
11 something that would change both the Guidelines and the
12 sentencing statutes so that they would continue to work
13 in tandem -- that it would preserve a higher ratio of
14 punishment for crack than powder because it believed
15 that crack was more serious, and that it believed that
16 any ratio should apply consistently across the
17 Guidelines and the statute.

18 CHIEF JUSTICE ROBERTS: And if -- you're
19 talking about Public Law 104-38?

20 MR. DREEBEN: That's correct.

21 CHIEF JUSTICE ROBERTS: Well, they also
22 said, quote, "The sentence imposed for trafficking in
23 crack cocaine should generally exceed the sentence for
24 powder cocaine."

25 MR. DREEBEN: Correct.

1 CHIEF JUSTICE ROBERTS: Well, that's fine,
2 but that's pretty far from 100 to 1. "Generally
3 exceed," it suggests to me that Congress itself, in
4 terms -- you are relying on this implicit directive from
5 Congress. And that's the latest expression of
6 congressional implicit direction, and it just says
7 "generally exceed." So, you know, two to one.

8 MR. DREEBEN: This, Mr. Chief Justice, is
9 what Congress instructed the Commission to consider in
10 making recommendations to change the existing state of
11 the law.

12 We don't dispute --

13 CHIEF JUSTICE ROBERTS: Well I know, but you
14 are relying on an implicit directive anyway. So as you
15 are looking at that vague direction, it seems to me that
16 their last expression on what they wanted the Commission
17 to do is more probative than a much older pre-existing
18 100 to 1 ratio.

19 MR. DREEBEN: But they have never changed
20 the 100 to 1 ratio. And what I think is significant
21 about this statute is what it continues to say, and this
22 is on page 124-A of the government's brief -- that "the
23 recommendations concerning an appropriate change to the
24 ratio that the Commission might believe is warranted
25 shall apply both to the relevant statutes and to the

1 Guidelines." This is on the carryover sentence on pages
2 24-A to 25-A.

3 And what I think that this reflects is
4 Congress' recognition that, so long as the mandatory
5 minimum statutes are pegged at 100 to 1, the Guidelines
6 need to follow suit. Now if they're going to change,
7 that's fine. But they should change in a manner that's
8 consistent so as to avoid unwarranted disparities
9 between defendants who are governed by the literal
10 mandatory minimum statute and defendants who are not.

11 The alternative is you end up with various
12 serious cliff effects which the Commission itself was
13 trying to avoid, where a defendant who has 50 grams of
14 crack is sentenced to a minimum of 10 years. But if you
15 drop the ratio to one to one, a defendant who has
16 49.9 grams --

17 JUSTICE STEVENS: But those are the same
18 cliff effects that are the product of Neal, precisely
19 the same.

20 MR. DREEBEN: But this Court didn't consider
21 whether those cliff effects were legally valid in Neal
22 because it had no guideline before it. And I did want
23 to get to the other point that I think distinguishes the
24 legal context in Neal from the legal context today, and
25 that is, in 2003, Congress amended the organic statute

1 that governs the Sentencing Commission's promulgation of
2 Guidelines to require that the commission make AUDIO
3 STARTS its Guidelines consistent with all pertinent
4 provisions of the United States Code.

5 At the time of Neal, that statute only
6 required the commission to be consistent with Title 18
7 and Title 28, and the drug statute is found in Title 21.
8 And the legislative evolution of this provision reflects
9 that there was concern that the commission did not have
10 to honor --

11 JUSTICE STEVENS: In response to that
12 statute, did the commission revise the guideline that
13 was involved in Neal?

14 MR. DREEBEN: It did not, and the government
15 --

16 JUSTICE STEVENS: Shouldn't it have done it?

17 MR. DREEBEN: I think it should have, and I
18 think that the commission's decoupling of its guidelines
19 from the mandatory minimums that Congress has provided
20 produces an irrational disconnect between guideline
21 sentencing and sentencing --

22 JUSTICE BREYER: Well, that's because of the
23 cliff. But the cliff is undoubtedly a negative, but the
24 cliff is not as important as sometimes suggested, for
25 the numbers after all, which relate punishment to

1 amounts of drug, reflect, (a), more seriousness than
2 what you have -- I mean more people likely to take it --
3 but also the role that the person is likely to play in
4 the organization, high or low, and the likelihood that
5 he is or this -- these groups of people are big deal
6 offenders or not, and many other things.

7 Therefore, a system that really is basically
8 flat or only rises slowly until you get to the cliff,
9 and then it again rises slowly to the next rise, is not
10 an irrational system. It depends on what those other
11 correlations are. I say that because suppose a judge,
12 noticing the horrendous effects of this -- that the
13 commission itself has listed and understanding that
14 cliffs are not the end-all and the be-all of Guidelines
15 that are rough correlations, suppose a judge said: My
16 system, which we have before us, which doesn't have the
17 absolute numerical progression, is far more reasonable
18 than the commission's system. There it is. He's
19 reviewed the commission's policy.

20 Well, Rita says sometimes courts could. And
21 so what is the law that forbids the judge from doing
22 that, at least on occasion?

23 MR. DREEBEN: Justice Breyer, as a general
24 matter, the government accepts that a sentencing judge
25 can revisit, challenge the Sentencing Commission's

1 policy determinations as an intrinsic feature of an
2 advisory guideline system. It's not because we welcome
3 that result, but because we think that it followed from
4 this Court's decision in Cunningham and that was
5 expressly stated in Rita.

6 But this is not an area where the sentencing
7 courts would be merely second-guessing a commission
8 judgment. They would be second-guessing a judgment of
9 Congress itself.

10 JUSTICE BREYER: No, because Congress has
11 nowhere said that you can't have cliffs.

12 You see, Congress could say, our rough
13 judgment is that 5 Gs of hard -- of crack really is kind
14 of a correlation with a medium-level gang, and 50 Gs is
15 probably a correlation with a fairly high-level gang.
16 And what has Congress actually thought about this?
17 Nothing. They never thought about it.

18 So I can't find an instruction there that
19 tells the commission that they can't do it this way.

20 MR. DREEBEN: But, Justice Breyer, the one
21 time when the commission tried to do that --

22 JUSTICE BREYER: They wanted to abolish the
23 whole thing.

24 MR. DREEBEN: They wanted to make it one to
25 one, and Congress recognized that that would produce

1 severe cliffs and said not appropriate; if you want to
2 change the sentencing statutes and guidelines in tandem,
3 that's fine, make a recommendation. And so the
4 government's fundamental position here is that Congress
5 has made a judgment that until it says otherwise,
6 sentencing ratios of 100 to 1 are appropriate to reflect
7 the increased harms of crack.

8 JUSTICE SOUTER: Isn't your answer also to
9 Justice Breyer's question the post-Neal amendment to the
10 statute which in effect says, you know, make your
11 Guidelines consistent with the statute?

12 MR. DREEBEN: Yes, it --

13 JUSTICE SOUTER: Quite -- quite apart from
14 the specific rejection of the proposal they came up
15 with.

16 MR. DREEBEN: The two of them work together
17 in tandem, I think.

18 JUSTICE BREYER: Why? Why? That's my
19 question. Everyone's assuming that "consistent with the
20 statute" means a sentencing system that's smooth without
21 cliffs. And I'm sure every mathematician would agree
22 with you, but I'm not at all certain that prosecutors
23 and defendants who have actual experience in this would
24 agree with you, because there are lots of arguments that
25 it's perfectly consistent with the objective of the stat

1 tute to have a few cliffs.

2 MR. DREEBEN: Well, I think I want to rely
3 on what the Sentencing Commission itself did before it
4 concluded that it disagreed with the 100 to 1 ratio in
5 the statute. And this is set forward -- forth at page
6 50A of the same brief, the Kimbrough brief. This was
7 the commission's original commentary where it explained,
8 in the first full paragraph, how it set the basic levels
9 for drug crimes. And it said that it set them because
10 they were either provided directly by Section 841 of
11 Title 21 or, quote, "are proportional to the levels
12 established by statute," and it said, further refinement
13 of the drug amounts beyond those mandatory minimums was
14 essential to provide a logical sentencing structure for
15 drug offenses. And I think what the commission --

16 JUSTICE SCALIA: Well, that's why -- and the
17 1993 statute that you said, that you referred to, did
18 indeed require the guidelines to track the -- the
19 statutory prescriptions for sentencing.

20 MR. DREEBEN: 2003, I believe.

21 JUSTICE SCALIA: Pardon me?

22 MR. DREEBEN: It's 2003.

23 JUSTICE SCALIA: 2003. Sorry. I misspoke.

24 But -- but the fact remains that the
25 Guidelines are only guidelines and that still doesn't--

1 doesn't convert to an obligation for the district courts
2 to follow that scheme so long as that scheme is only
3 reflected in the guidelines. The guidelines themselves
4 are still just advisory.

5 MR. DREEBEN: What distinguishes this area,
6 Justice Scalia, I believe, from other guidelines is that
7 the backdrop for sentencing for drug crimes is a
8 mandatory minimum statute that goes directly to the
9 sentencing court. It's not subject to the commission's
10 intervention and it's not subject to a district court's
11 power to disagree with. The sentencing court must use a
12 100 to 1 ratio in applying the mandatory minimums.

13 JUSTICE SCALIA: Well, why don't you just
14 skip the Guidelines and say that the effect of the
15 sentencing statute is to make it unreasonable for a
16 sentencing judge -- never mind the Guidelines -- to do
17 anything other than follow the 100 to 1 prescription
18 that Congress has established?

19 MR. DREEBEN: Well, I'm happy to do just --

20 JUSTICE SCALIA: I don't know what the
21 Guidelines add to -- to your game except another --
22 another stage.

23 MR. DREEBEN: Well, if -- if it's sufficient
24 for the Court that Section 841 itself establishes the
25 100 to 1 ratio and that's something that's off-limits

1 for the district courts to disagree with, I'm content.

2 I think there is additional data that
3 indicates that Congress vetoed attempts by the
4 Sentencing Commission to vary from that range and made
5 it clear that the Guidelines formulations and the
6 statute worked in tandem, which together expresses a
7 notion of quantity proportionality tied to the 100 to 1
8 ratio.

9 JUSTICE SCALIA: Well, I would say that that
10 statute reflects Congress's desire that sentencing,
11 whether it's through the commission or not, be based on
12 the 100 to 1 ratio.

13 MR. DREEBEN: And I agree with that, Justice
14 Scalia. And the upshot of disagreeing with that, which
15 is what various district courts have done but no court
16 of appeals has endorsed, is that every district court
17 could come up with its own ratio and that that ratio
18 would have to be accepted as reasonable so long as there
19 is a cogent, logical data support for it. And here --

20 JUSTICE STEVENS: But is it not true that
21 that only affects about 20 percent of the crack cocaine
22 cases, because they say -- maybe I'm wrong on this --
23 that 80 percent of the sentences are actually fixed by
24 the mandatory minimum?

25 MR. DREEBEN: There's a floor in the

1 mandatory minimum, but I think that there are quite a
2 few sentences that are above the mandatory minimum and
3 there are sentences that are below the mandatory
4 minimum. And in those cases --

5 JUSTICE STEVENS: I was -- and correct me if
6 I'm wrong. I was under the impression that 80 percent
7 of the sentences that are actually imposed are at the
8 mandatory minimum.

9 MR. DREEBEN: I didn't get that out of my
10 attempt to plumb the data, Justice Stevens. The
11 Sentencing Commission's most recent report has a chart
12 that didn't, to my mind, break down adequately the
13 figures so I could answer your question.

14 But I do think that, even if it's true, even
15 if 80 percent were at the mandatory minimum, that would
16 mean that as to those 20 percent that are not governed
17 by a mandatory minimum, you could have one district
18 judge say, I'm going to use one to one, like the
19 commission proposed in 1995. Another could say I'm
20 going to use five to one, like the commission proposed
21 in 1997. A third could use 20 to 1, as the commission
22 proposed in 2002. And each one of those would have a
23 reasonable --

24 JUSTICE STEVENS: Isn't this another
25 alternative? If the district judge concluded, as some

1 scholars have, that the 100 to 1 ratio itself creates
2 unwarranted disparities, could not a district judge
3 sentence by just disregarding the guideline for this
4 particular substance? And then use just ordinary
5 principles, what's appropriate sentencing in this case.

6 MR. DREEBEN: I don't think so, because I
7 think here we're talking about a matter of statutory
8 construction. Because the courts of appeals are
9 reviewing sentences for reasonableness.

10 JUSTICE STEVENS: You have a conflict in the
11 statute. One says await the guideline. Another says
12 avoid unwarranted disparities.

13 MR. DREEBEN: That wasn't the two statutes I
14 was thinking of. What I was thinking of is that
15 Congress itself has said a 100 to 1 disparity --

16 CHIEF JUSTICE ROBERTS: No, Mr. Dreeben,
17 your office used to argue that when Congress wants to do
18 something, there's a way to do it. They pass a law
19 through both houses, then the President signs it.
20 That's the only way they can give legal effect to their
21 intent.

22 Now you are arguing that there's some
23 binding intent simply because they set mandatory
24 minimums and mandatory maximums that carry beyond that.
25 I'm wondering how that's consistent with the positions

1 the office has taken before.

2 MR. DREEBEN: Our position here, I think, is
3 consistent with our view that you read statutes both for
4 what they say and for what they mean. And here we are
5 not relying just on Section 841, although I'm certainly
6 happy if members of the Court believe that 841 alone
7 dictates a proportionality rule, I'm also relying on the
8 fact that Congress vetoed the Commission's attempt to
9 break apart the Guidelines in the sentencing --

10 CHIEF JUSTICE ROBERTS: We should read a
11 negative pregnant in the Congress' vetoing of what the
12 Commission wanted to do?

13 MR. DREEBEN: At least the Court should do
14 this much, that when a court of appeals is reviewing for
15 reasonableness a sentence imposed by a district judge,
16 the court of appeals should refract the Section 3553(a)
17 factors through Congress' existing judgment that a 100
18 to 1 ratio is warranted.

19 JUSTICE BREYER: If Congress passes a
20 statute that says the mandatory minimum sentence of
21 eight years for possessing a 12-inch shotgun unlawfully,
22 does that mean it wants four years for a 6-inch shotgun?

23 (Laughter.)

24 MR. DREEBEN: It doesn't. But, Justice
25 Breyer, that's, for two different reasons, not an apt

1 analogy for this. First of all, Congress applied the
2 100 to 1 ratio at two different points in the sentencing
3 spectrum.

4 Then if there was a rational basis for
5 viewing shotgun culpability as turning on the length of
6 the barrel, then perhaps there would be a better
7 analogy. But I think here what Congress was focused on
8 was the relative culpability of crack offenders and
9 powder offenders.

10 JUSTICE BREYER: At the cliff. But, of
11 course, I've been through -- I hope not being hypnotized
12 by numbers myself -- that these numbers reflect
13 underlying realities that are far closer to the shotgun
14 case than you are prepared to admit.

15 MR. DREEBEN: No, but I think that Congress
16 doesn't view the Guidelines quantity determinations as
17 being independent from its mandatory minimum
18 determinations. And that's why it vetoed the
19 Commission's unilateral attempt to impose a one to one
20 ratio --

21 JUSTICE GINSBURG: And then are you saying
22 that either the guidelines are out of it and the statute
23 controls, the ratio is a 100 to 1, or that Congress has,
24 in effect, made a particular guideline, the one setting
25 the drug quantity, made that mandatory? That

1 guideline -- I mean, it sounds to me that if you must
2 adhere to the 100 to 1, then that's a mandatory
3 guideline.

4 MR. DREEBEN: They do come down to the same
5 thing, Justice Ginsburg, in the sense that the guideline
6 as it exists today incorporates the 100 to 1 ratio. And
7 I believe that Congress well understood that it was
8 preserving a guideline that maintains fidelity and
9 consistency with its sentencing statute while sending
10 the Commission back to the drawing board and saying if
11 we're going to change this scheme, let's change it in a
12 consistent coherent way. And every district court does
13 not get the power to say we're going to change what
14 Congress has prohibited the Commission from changing,
15 even though we can't change the mandatory minimum
16 statute.

17 That is Congress' sentencing policy. We
18 have to impose that in cases at the mandatory minimum.
19 But in cases that aren't at the mandatory minimum, the
20 position of the petitioner is basically district judges
21 can say to Congress, you're completely wrong. And our
22 position is that under a sympathetic attempt to
23 construct reasonableness review that is consistent with
24 Congressional intent, a district court can't do that.

25 CHIEF JUSTICE ROBERTS: Why doesn't

1 Congress -- why didn't Congress, in fact, do what you
2 say they implicitly did explicitly? They could impose
3 the 100 to 1 ratio throughout as opposed to simply as a
4 minimum and a maximum. And they did not do that.

5 MR. DREEBEN: Because they had no reason to
6 do it. Until this Court decided Booker, the Guidelines
7 were mandatory. And they fully understood by leaving in
8 place a crack guideline that mirrored the statutory --

9 JUSTICE SOUTER: Congress has legislated in
10 this area after Booker. They have not imposed the 100
11 to 1 ratio throughout the -- other than as a mandatory
12 minimum and maximum.

13 MR. DREEBEN: I'm not aware that they have
14 legislated in this area after Booker, Mr. Chief Justice.
15 And I think that since all the court of appeals have
16 agreed with the single position that district courts are
17 not free to substitute their own ratios for the 100 to 1
18 ratio, Congress would not have had a great deal of
19 reason to intervene in this area.

20 And what this case will tell Congress and
21 sentencing courts is within an advisory guidelines
22 regime, can Congress make certain policy judgments and
23 place certain limits on what a district court can do
24 that it otherwise would have freedom to do in an
25 advisory range.

1 JUSTICE SOUTER: But that, as you say, in
2 effect, makes a certain element mandatory. And why
3 doesn't that come up against the same Sixth Amendment
4 judgement that we made in Booker?

5 MR. DREEBEN: The only requirement, I
6 believe, that exists under Booker is that judge not in
7 all cases be required to find a fact in order to exceed
8 the guidelines range that would be based on the jury
9 verdict alone or the admission of guilt alone.

10 Booker did not say that Congress had to
11 tolerate every single policy judgment that individual
12 district courts might make to vary upward. For example,
13 socioeconomic status. If a particular judge felt in my
14 courtroom college students and white collar
15 professionals deserve an automatic bump up in their
16 sentences above what I would give anyone else because
17 they betrayed the advantages that they have, I think
18 Congress could come along and say that's not right. We
19 don't want socioeconomic status to be a variable that
20 affects how long someone goes to prison.

21 JUSTICE SCALIA: It seems to me that the gap
22 in your argument is that whatever Congress legislated,
23 it did not legislate the manner in which you transferred
24 this 100 to 1 ratio onto the sentencing chart.

25 And as your opponent points out, it isn't

1 done proportionally. It could have been done in a lot
2 of different ways.

3 MR. DREEBEN: It is done in a logically
4 proportional manner --

5 JUSTICE SCALIA: Maybe. But there are other
6 logically proportional manners of doing it. Why would
7 the district court be bound to the particular one that
8 the Sentencing Commission chose?

9 MR. DREEBEN: The Sentencing Commission at
10 least started where Congress did.

11 JUSTICE SCALIA: That's fine. I'm granting
12 that they got a start where Congress did. I'm assuming
13 that. But why do they have to follow it through the way
14 the Sentencing Guidelines did?

15 MR. DREEBEN: I don't think they do have to
16 follow it through exactly the way the Sentencing
17 Commission did it, because they don't -- sentencing
18 courts today which are sentencing under advisory
19 guidelines need not use exactly the same base offense
20 levels when they come down to final sentences after
21 they've considered what the Commission has done. But
22 what they cannot do, I submit -- and it is more of a
23 negative -- they cannot say fundamentally the Commission
24 has pointed this out and Congress has enacted, but the
25 crack and powder guidelines are way out of whack. I

1 think that they're wrong.

2 I think Congress was wrong. And I'm going
3 to do everything I can to try to eliminate that degree
4 of disparity. And I may not be able to do everything I
5 want to. This judge here was limited by the 120 months
6 that was the mandatory minimum. But essentially, he, as
7 I read the sentencing transcript, thought it was crazy
8 for Congress to treat crack and powder differently. For
9 a judge to say Congress is crazy, I think, is a sort of
10 textbook example of an unreasonable sentencing factor.

11 The ultimate sentence will turn on how the
12 judge applies all of the facts of the case to the
13 particular --

14 JUSTICE STEVENS: Is it not a fact that this
15 guideline is also unique in that it was not based on a
16 history of other similar crimes like all the other --
17 most of the guidelines were? There's no expert
18 interpretation of the history of sentencing in this
19 particular area?

20 MR. DREEBEN: True. But this is an area
21 where I don't think Congress chose to rely on the
22 administrative expertise of the commission. It made its
23 own policy judgment on crack.

24 JUSTICE STEVENS: I understand. This
25 guideline is pretty much unique in that regard. It is

1 not based on experience in sentencing in comparable
2 cases.

3 MR. DREEBEN: Well, the drug guideline was
4 based on --

5 JUSTICE STEVENS: The 100 to 1 ratio is not
6 based on history?

7 MR. DREEBEN: No. But entire drug --

8 JUSTICE STEVENS: Therefore, none of the
9 sentencing guidelines relating to crack are based on
10 history.

11 MR. DREEBEN: They are based on the fact
12 that Congress made a supervening policy judgment. And
13 in our system, the policy judgments ultimately
14 pertaining to sentencing belong to Congress.

15 JUSTICE STEVENS: So there is really an
16 entirely different rationale for defending these
17 guidelines than any other guidelines in the system?

18 MR. DREEBEN: Well, there are some other
19 guidelines where Congress has directly intervened, but
20 my fundamental point here is that so long as Congress
21 has made a determination that it has not changed, that
22 it wants 100 to 1 as a mandatory minimum set point,
23 district courts should not be free to say I think
24 Congress got it wrong, I'm going to sentence on a
25 different paradigm. The Commission didn't think that

1 was appropriate when it promulgated the original drug
2 guideline, which is why that guideline is not based on
3 the same sorts of empirical data that other guidelines
4 might be deemed to be responsive to. But that only
5 reflected that the Commission in its original guideline
6 respected that its role was to carry out congressional
7 policy, not to disagree with or supplant congressional
8 policy, and so long as the Commission was operating in
9 that vein -- which I think was correct -- it follows a
10 fortiori that sentencing courts should do the same
11 thing.

12 JUSTICE KENNEDY: Does the Guidelines
13 supersede the parsimony provision, because the parsimony
14 provision is general and the Guidelines -- the ratio is
15 specific?

16 MR. DREEBEN: Well, I would put it
17 differently, Justice Kennedy. I would say that Congress
18 has made a legislative judgment that for crack purposes,
19 this ratio is what is needed to have a sufficient
20 sentence, and the Congress that decided that might be
21 wrong. And if the present-day Congress decides to
22 change that, a new policy will be established, but I
23 think that reading the two statutes together, Section
24 3553(a) and Section 841, produces the conclusion that
25 this is a legislative judgment of reasonableness; and

1 even if every judge in the Federal system holds a
2 different personal view, that doesn't mean that the
3 statute has validated their position over the one that
4 Congress expressed in Title 21, in a manner that binds
5 sentencing courts irrespective of how the Commission
6 sorts out its policy judgments.

7 JUSTICE KENNEDY: Suppose experience shows
8 that the ratio is not consistent with the parsimony
9 provision -- we find that over a course of time?

10 MR. DREEBEN: Well, I don't think that the
11 Court can interpret Congress in Section 3553(a) to make
12 unreasonable what Congress did in Section 841. I think
13 reading all of the statutes together would produce the
14 conclusion that Congress deemed that this was the way to
15 achieve the purposes of sentencing.

16 Crack is more corrosive in the inner cities.
17 It has different kinds of problems than powder. They
18 should be addressed in this more severe sentencing
19 manner, and if that's a policy judgment that warrants
20 being revisited, the appropriate body to do it is
21 Congress, not each individual sentencing judge,
22 formulating his or her own ratio, subject to blanket
23 affirmance by the court of appeals.

24 Thank you.

25 CHIEF JUSTICE ROBERTS: Thank you,

1 Mr. Dreeben.

2 Mr. Nachmanoff, you have three minutes
3 remaining.

4 REBUTTAL ARGUMENT BY MICHAEL S. NACHMANOFF
5 ON BEHALF OF PETITIONER

6 MR. NACHMANOFF: Thank you, Mr. Chief
7 Justice.

8 If I can respond, Justice Stevens, I think
9 -- you asked about the percentage of cases in crack that
10 are at the mandatory minimum or near it. I would point
11 the Court to page 33, footnote 10 of our opening brief.
12 It is approximately 70 percent or just over that that
13 hit at the mandatory minimum or just one or two levels
14 above that.

15 So the large majority of cases involving
16 crack cocaine end up being subjected to the mandatory
17 minimum.

18 With regard to the Government's argument
19 regarding Section 994(a) and the fact that direction was
20 given to the Commission to be consistent with pertinent
21 statutes, of course, that's reflected in Section 5(g)
22 which says that mandatory minimums trump the Guidelines,
23 and the Commission recognizes that and of course
24 sentencing judges recognize that, and Judge Jackson
25 recognized it here.

1 To suggest that Judge Jackson concluded that
2 Congress was crazy, I think is unfair. What Judge
3 Jackson did was, in a very reasoned opinion, explained
4 that the information from the Sentencing Commission,
5 which has been persuasive not just to Judge Jackson, but
6 to judges across the country and to many others, was
7 that the 100 to 1 ratio overstates the seriousness of
8 the offense, and he understood that Congress had spoken
9 clearly with regard to mandatory minimums, and he
10 honored them.

11 Finally, Mr. Chief Justice, you point out
12 the heart of the problem with the Government's case.
13 Congress has not spoken explicitly in the way the
14 Government suggests. They are --

15 CHIEF JUSTICE ROBERTS: But I was wrong that
16 they legislated after Booker.

17 MR. NACHMANOFF: Well, Your Honor, Congress
18 has failed completely to address this particular
19 problem, and they have understood since Booker that if
20 they wanted to address the issue of the discretion that
21 sentencing courts must have with regard to the advisory
22 guidelines, they have a way of fixing the problem. They
23 can change the statute. And so long as they then
24 require the Government to include in the indictment and
25 prove to the jury beyond a reasonable doubt the specific

1 drug type and drug quantity over and above the current
2 mandatory minimum and maximums, they're free to do that,
3 and there would no Sixth Amendment problem and there
4 would no problem with the advisory guidelines.

5 In other words, right now, the Government
6 simply alleges that a person engaged in the distribution
7 of either 5 grams or 50 grams of crack cocaine -- that's
8 what they have to do to meet the thresholds for the
9 5-year and the 10-year mandatory minimums -- in
10 virtually every case the Government will present
11 evidence or a court will find under relevant conduct
12 that there was some greater quantity. And if the
13 Government's theory were to be accepted, those
14 guidelines would be mandatory, and it would be in direct
15 conflict with the remedial holding in Booker to require
16 courts to adhere to that, absent the procedural
17 protections which are not currently in place.

18 Judge Jackson did it right in this case. He
19 imposed a sentence consistent with the parsimony
20 provision and the purposes of sentencing and all of the
21 factors in 3553(a).

22 He imposed a long sentence, 15 years, but he
23 honored Congress's explicit mandate, and we would ask
24 the Court to reverse the court of appeals and affirm the
25 district court.

1 Thank you.

2 CHIEF JUSTICE ROBERTS: Thank you, Mr.

3 Nachmanoff. The case is submitted.

4 (Whereupon, at 12:06 p.m., the case in the
5 above-entitled matter was submitted.)

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