

VI.

**THE COURT MUST EITHER SENTENCE BASED UPON THE LOWEST POSSIBLE
BASE OFFENSE LEVEL, WITH NO UPWARD ADJUSTMENT OR DEPARTURES, OR
DECLARE THE GUIDELINES UNCONSTITUTIONAL.**

The foregoing analysis gives the Court two options. It may conduct a severance analysis, and conclude that it may sentence based upon the portions of the Guidelines that are not unconstitutional, or it may strike the Guidelines down as unconstitutional. "Whether an unconstitutional provision is severable from the remainder of the statute in which it appears is largely a question of legislative intent, but the presumption is in favor of severability." *Regan v. Time, Inc.*, 468 U.S. 641, 653 (1984). "'Unless it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law.'" *Buckley v. Valeo*, 424 U.S. 1, 108-09 (1976) (citation omitted). Taken together, *Regan* and *Buckley* make clear that if the government urges the Court to strike down the Guideline system, it must bear the burden of persuasion and overcome the presumption. It cannot.

Applying the *Buckley* test, informed by the *Regan* presumption, it seems clear that Congress would have enacted the post-*Blakely* version of the Guidelines rather than return to the unfettered judicial discretion it had so forcefully rejected in the Sentencing Reform Act. Most importantly, the Congress that

passed the Sentencing Reform Act, like the current Congress (as evidenced by the Protect Act), viewed judicial sentencing discretion as undesirable to say the least. See, e.g., Kate Stith & Steve Y. Koh, *A Decade of the Sentencing Guidelines: Revisiting the Role of the Legislature*, 28 Wake Forest L. Rev. 223, 261 (1993) ("Senator Kennedy decried sentencing disparity and argued that the [pre-Sentencing Reform Act] sentencing regime was 'a national disgrace.'") (hereinafter *A Decade of the Sentencing Guidelines*). A return to the sort of discretionary sentencing mandated by the Sixth Circuit's decision in *Montgomery* would fly in the face of that manifest Congressional intent. A return to a discretionary sentencing that is not ameliorated by parole would be even more contrary to Congressional intent. See *A Decade of the Sentencing Guidelines*, 28 Wake Forest L. Rev. at 229 (the parole system was an "'attempt[] to minimize the effects of sentencing disparity'"). In short, because severance emphasizes Congressional intent, see *Regan*, 468 U.S. at 653, discretionary sentencing is not in the cards.

The unavailability of upward adjustments such as role in the offense, see USSG § 3B1.1, does not undercut these conclusions. First, each guideline range contains an upper limit which can account, to some extent, for the greater culpability of a leader or organizer. When combined with the continuing availability of the currently under-utilized mitigating role adjustment -- in counsel's experience, 4 level reductions are only slightly more

common than World Series championships by the Boston Red Sox -- sentencing courts could easily draw distinctions between leaders, average participants, and less culpable participants.

Moreover, there is no reason to believe that Congress, as opposed to the Sentencing Commission, desired the de-emphasis on the jury trial wrought by the Guidelines. As a practical matter, the government can ensure that sentencing judges can distinguish among more or less culpable actors if the government appropriately charges its cases. A few examples illustrate this point. If the government wishes to account for the use of a gun or for assaultive conduct in a robbery, it can establish those facts by charging offenses under 18 U.S.C. §§ 2113(d) or (e). See also 18 U.S.C. § 2118 (robberies and burglaries involving controlled substances). Similarly, the drug statutes already contain enhancements for recidivism, bodily injury, or death. See, e.g., 21 U.S.C. § 841(b)(1). Prosecutors would also be able to punish the use and carrying of firearms in relation to such offenses, see 18 U.S.C. § 924(c), and to enhance the penalties for drug offenders who engage in a continuing criminal enterprise. See 21 U.S.C. § 848. In short, many of the upward adjustments in the Guidelines are available in statutory provisions, subject only to the requirement that the government respect the Sixth Amendment. And the "Framers would not have thought it too much to demand that." *Blakely*, 124 S. Ct. at 2543.

In addition, the constitutional portions of the Guidelines have been held to be "operative" by at least two courts: they have imposed sentence based upon the portions that do not offend *Blakely*. See *Shamblin*, 2004 WL 1468561 at *8; *Green*, 2004 WL 1381101 at *37-54. Because both *Buckley* criteria are met, the Guidelines are severable, and the remainder is constitutional. In other words, it is not "evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not." *Buckley*, 424 U.S. at 108-09. As a result, "the invalid part may be dropped if what is left is fully operative as a law." *Id.* The government therefore has not rebutted the *Regan* presumption.

Because *Blakely* applies to the Guidelines, the Court should sentence under the Guidelines scheme without any upward adjustments or departures. While this may result in a so-called "wind-fall" for some defendants -- and the defense certainly believes that the term "windfall" grossly misstates the true situation -- the government will be able to restore Guideline orthodoxy by meeting the challenges imposed by the Sixth Amendment.