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1 P R O C E E D I N G S

2 (11:14 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear  
4 argument next in Case 08-1569, United States v. O'Brien.  
5 Mr. Horwich.

6 ORAL ARGUMENT OF BENJAMIN HORWICH

7 ON BEHALF OF THE PETITIONER

8 MR. HORWICH: Mr. Chief Justice, and may it  
9 please the Court:

10 Section 924(c)(1) starts by defining a  
11 single crime of using or carrying a firearm during and  
12 in relation to a crime of violence or a drug trafficking  
13 crime.

14 Next, it addresses sentencing, and it does  
15 that by giving the judge some rules to channel his  
16 discretion in particular cases, and among those is a  
17 requirement that a, quote, "person convicted of a  
18 violation" ... "shall be sentenced" to a greater minimum  
19 sentence when the firearm is of a particular type.  
20 And --

21 JUSTICE SCALIA: Well wait. There's --  
22 there's some sentencing stuff in -- in the first part  
23 as well. There's sentencing stuff in (A). You can't  
24 say that (A) deals only with elements and (B) deals  
25 with sentencing.

1 MR. HORWICH: Well, no, and, of course --

2 JUSTICE SCALIA: I mean, (A) says, "shall be  
3 sentenced to 5 years." Or to 7 years, or to 10 years.  
4 So there's sentencing stuff in (A).

5 MR. HORWICH: Well, I agree with you that  
6 the phrase "be sentenced" certainly appears in (A) as  
7 well. To the extent a statute is going to direct a  
8 particular sentence, it's going to use those words.

9 But I think the -- we're relying a lot  
10 more on the language in the beginning of subparagraph (B),  
11 that says, "if the firearm possessed by a person convicted  
12 of a violation," which necessarily presupposes, then, that  
13 there has been a conviction --

14 JUSTICE SCALIA: So does -- so does the language  
15 of (A)(ii) and (A)(iii), which is the same language: "if  
16 the firearm is brandished"; "if the firearm is  
17 discharged" -- they all apply to a conviction for carrying  
18 the firearm. There has to be a conviction before those  
19 things apply.

20 MR. HORWICH: Well, I agree. That's true.  
21 That is certainly an accurate statement --

22 JUSTICE SCALIA: So that makes (A) the same  
23 as (B). And -- and you don't claim that the elements in (A)  
24 are just sentencing elements, do you?

25 MR. HORWICH: Well, I certainly don't claim

1     that they -- that the elements in the principal  
2     paragraph of (A) are. The point I'm -- the point I'm  
3     trying to make is that, with respect to firearm type,  
4     which is at issue here, is that the firearm type  
5     provisions are introduced by specific language that  
6     says -- that tells the reader these are relevant to a  
7     person convicted of a violation; these are not relevant  
8     to whether --

9                     JUSTICE SOTOMAYOR: No, but you're  
10    forgetting the words of this subsection. I mean --

11                    MR. HORWICH: Well --

12                    JUSTICE SOTOMAYOR: -- the subsection would be  
13    (B) itself. If you're convicted of carrying a machinegun,  
14    you get -- I'm sorry -- a short-barrel rifle, et cetera,  
15    you get 10 years. If it's a machinegun, you get 30.

16                    What's -- what's irrational about reading  
17    the statute that way when it uses the word "subsection"?  
18    It didn't use "subparagraph."

19                    MR. HORWICH: Well, I agree it doesn't use  
20    "subparagraph." And "subsection" certainly in  
21    conventional use in drafting would refer actually to  
22    924(c) as a whole.

23                    But -- but looking to the word "this  
24    subsection," Justice Sotomayor, is not -- is not useful  
25    for distinguishing among the elements and the sentencing

1 factors, because of course there are, I think --  
2 certainly this Court's holding in Harris says that the  
3 brandishing and the discharge provisions are sentencing  
4 factors. They are part of this subsection.

5 All the courts of appeals have held, and  
6 it's the entirely natural inference of the recidivism  
7 provisions in subparagraph (C), which is also part of  
8 this subsection, are -- are themselves sentencing  
9 factors. So saying that something is in this subsection  
10 means that it might be part of a violation doesn't  
11 actually answer what is or is not part of the violation  
12 versus --

13 JUSTICE SCALIA: But still and all, if -- if  
14 Congress were being precise and if the statute is to be  
15 read the way you suggest, the introduction to capital  
16 (B) should have been "if the firearm possessed by a  
17 person convicted of a violation of paragraph (A) above,"  
18 and then pick it up, "is," so forth.

19 Right? I mean, that would -- would be more  
20 precise.

21 MR. HORWICH: That -- that I think would be so  
22 precise that we wouldn't be here discussing it today. I  
23 agree with that.

24 But, of course, Congress has also used that  
25 same reference to "subsection" throughout -- throughout the

1 entire statute, even if it's not being used in the most  
2 precise sense, in the sense that a violation of this  
3 subsection appears in subparagraph (C), it appears in  
4 subparagraph (D), which is not --

5 JUSTICE SCALIA: Yes.

6 MR. HORWICH: -- which is not then to say that  
7 this subsection -- that everything in this subsection is an  
8 element. The Court has held otherwise already.

9 JUSTICE SCALIA: I guess I agree with you  
10 that if (B) is -- if (B) is an element, (C) would be an  
11 element, too.

12 MR. HORWICH: Well, that certainly would be  
13 the inference. And that would be quite contrary to the  
14 traditional treatment of recidivism.

15 But, more generally, the tradition that  
16 Congress is working within in this new statute -- which,  
17 I want to point out, is significantly different in -- in  
18 a very substantive way from the old statute -- that the  
19 new statute proscribes a statutory maximum of life in  
20 all cases. That is different from the old statute. The  
21 old statute --

22 JUSTICE BREYER: What is this to do -- I  
23 mean, the obvious question, to me, is -- since I wrote  
24 the -- I think I wrote the opinion in Castillo -- is we  
25 looked at the language of the statute, very similar to

1 this, and we said: Machinegun means a separate crime.  
2 And they recodified it. And it looks to me as if all  
3 they did was take the things that we previously said  
4 were separate crimes and put them in (B), and take the  
5 things that are obviously sentencing factors and put  
6 them in (A) and (C).

7 All right. Now, that's what it looks like  
8 if you just read the statute. I didn't find anything in  
9 the history that suggested any other intent. So why do  
10 you think that that change makes the difference?

11 MR. HORWICH: Well, I think there are --  
12 there are several specific changes that Congress made.  
13 And I think it would be, perhaps, useful to look at the  
14 old statute and the new one, the old statute and the new  
15 one together and see why the things that -- that the  
16 Court said in Castillo are gone in the new one. So the  
17 old statute is in the petition appendix at 11a.

18 JUSTICE SCALIA: Right.

19 MR. HORWICH: And then the new statute is in  
20 the appendix to the government's opening brief at 1a and  
21 2a, so you can look at them side by side.

22 JUSTICE SCALIA: Isn't the old one in your  
23 brief, too, in your --

24 MR. HORWICH: It is.

25 JUSTICE SCALIA: It's 3a of the government's



1 brief.

2 MR. NORWICH: It is, although, of course,  
3 you have to turn the page, and I --

4 JUSTICE SCALIA: All right. Okay.

5 MR. HORWICH: Perhaps it's helpful to look  
6 at them next to each other, because the differences are  
7 quite stark --

8 JUSTICE SCALIA: All right.

9 MR. HOWICH: -- when you do that.

10 So the first thing is, as you suggested,  
11 Justice Breyer, the firearm type provisions were moved.  
12 But I think that that move signals something contrary to  
13 what this Court had perceived in Castillo. In Castillo,  
14 the firearm type provisions were part of the initial  
15 sentence that defined the elements. The sentence is  
16 rolling along, talking about using or carrying a  
17 firearm, and then in the same breath it goes on to start  
18 talking about specific weapons. And that is what, in my  
19 reading of Castillo, drove the Court's impression that  
20 the they -- that the machinegun provision there should be  
21 an element.

22 The difference in the new statute is -- is  
23 that Congress has moved it away, textually,  
24 conceptually, structurally, away from the elements,  
25 which ought to suggest that Congress doesn't think --

1 JUSTICE SOTOMAYOR: But it didn't. It kept  
2 in (A) the subdivisions of use and brandishing, which  
3 we all agree are elements of the crime. So I don't know  
4 what it means to say that it moved it away from the  
5 elements. It mixed up in (A) elements and sentencing  
6 factors, and so what we have to discern was, did it  
7 intend to make (B) sentencing factors or not?

8 And I think what Justice Breyer was asking  
9 you: What in the legislative history shows that? Where  
10 do we read, outside of Castillo, a conclusion that  
11 somehow Congress radically changed the assumptions we  
12 identified in Castillo, which is historically it's not a  
13 sentencing element?

14 MR. HORWICH: So a few answers there.

15 First of all, in the new -- in the new  
16 structure of the statute, on the government's view, the  
17 elements finish in the principal paragraph, and then --  
18 then we're into sentencing factors. So brandishing and  
19 discharge were held in Harris and acknowledged in Dean  
20 to be sentencing factors. So we are sort of, at that  
21 point, on to sentencing factors.

22 So I take from what this Court said in  
23 Harris, about the separation of brandishing and discharge  
24 from the elements in the principal paragraph to indicate  
25 that they are sentencing factors, would apply even more

1 strongly to subparagraph (C), which is even farther  
2 away. There's -- there's a period, a structural break,  
3 a new sentence. The thought in the principal paragraph is  
4 certainly complete. We've already been through some  
5 other sentencing factors, and now we're --

6 JUSTICE SCALIA: Well, except that with --  
7 with (C), you -- you could say that traditionally  
8 recidivism has been a sentencing factor, and you cannot  
9 say with respect to (B) that whether it's a  
10 short-barreled rifle or a machinegun has traditionally  
11 been a sentencing factor. To the contrary, it was an  
12 element.

13 MR. HORWICH: Well, I disagree with that,  
14 Justice Scalia, because the tradition, as I understand  
15 it, is relevant because it might indicate what Congress  
16 was thinking or what suppositions it had in mind when it  
17 passed a statute.

18 And there's a very -- there was a very  
19 different tradition at the time of the 1986 enactment of  
20 the old statute and the 1998 enactment of the new one,  
21 which is -- the big difference is that the sentencing  
22 guidelines came into effect in between those two times.

23 And the sentencing guidelines -- sentencing  
24 guideline 2K2.1, the principal determinant of base  
25 offense level in the sentencing guidelines for

1 firearm-centric offenses in the Federal criminal law, was  
2 firearm type. So it was unmistakably that -- it was  
3 unmistakable at the time in 1998 when Congress enacted  
4 these -- these firearm-type provisions, that the  
5 sentencing guidelines were already making firearm type a  
6 sentencing consideration for the judge.

7 JUSTICE SCALIA: Let's -- let's talk about  
8 the guidelines. Without the application of (B), the  
9 guidelines would provide for a much shorter sentence,  
10 wouldn't they?

11 MR. HORWICH: Well, the guidelines -- as  
12 before and as now for this offense, the guidelines level  
13 is the minimum.

14 JUSTICE SCALIA: The guidelines -- do you  
15 think that if under the guidelines the sentence was  
16 30 years because of a machinegun, do you think that that  
17 would be upheld?

18 MR. HORWICH: I'm sorry. And your -- if I  
19 understand you --

20 JUSTICE SCALIA: Do you think it would be  
21 upheld as a reasonable sentence under our Booker/Fanfan  
22 theory of -- of how the guidelines are to be applied?

23 MR. HORWICH: A reasonable -- well,  
24 certainly courts have, since Booker, imposed even up to  
25 a life sentence for offenses that did not otherwise

1 trigger the elevated minimums. There's at least one  
2 case in the few years since Booker that implied a --  
3 that imposed a life sentence for a -- for an offense  
4 that would have been subject only to the base 5-year  
5 maximum. There are several that imposed -- imposed a  
6 life sentence for --

7 JUSTICE SCALIA: Where -- where is the life  
8 sentence maximum, by the way? I -- you say this is a  
9 minimum. It's just a mandatory minimum because the  
10 maximum is specified to be life. Where is that specified?

11 MR. HORWICH: The -- the maximum is not  
12 textually in the statute, but all courts that have looked  
13 at this have understood that. Certainly, it seems to be  
14 the supposition of this Court's statutory holding in Harris  
15 that the nature of -- the structure of this -- of the  
16 sentencing provision here is that there's a life maximum,  
17 and then the firearm --

18 JUSTICE SCALIA: Where -- where do you get  
19 the life maximum? I -- I'm reading through, and there's  
20 -- it mentions nothing about life.

21 MR. HORWICH: Well, it is certainly the  
22 case, if we simply take (a)(1) --

23 JUSTICE SCALIA: And if it mentions nothing  
24 about life, then these are not mandatory minimums. To  
25 the contrary, they are -- they are new maximums.

1                   MR. HORWICH: I absolutely disagree. If it  
2   says "at least," that can only mean that there can be some  
3   -- a sentence higher than that.

4                   JUSTICE GINSBURG: Is the life part of  
5   the --

6                   MR. HORWICH: Or not less than.

7                   JUSTICE GINSBURG: -- what the substantive  
8   crime was? Is it the attempted robbery or whatever it was?  
9   Is that -- because this is -- you're -- you're saying this  
10  is an add-on to an underlying offense.

11                  MR. HORWICH: Well, I wouldn't describe it  
12  as an add-on. It is a separate Federal crime, in -- in  
13  the sense -- in the sense that it is bad enough and  
14  dangerous enough to commit a drug trafficking offense  
15  or engage in a crime of --

16                  JUSTICE GINSBURG: Well, then -- then you  
17  wouldn't be relying on what might be a life sentence  
18  for the underlying crime.

19                  MR. HORWICH: I -- oh, I'm sorry. I -- I  
20  may have -- may have misspoken.

21                  In response to Justice Scalia's question, my  
22  answer -- my answer was directed to imposing a life  
23  sentence on the 924(c) conviction, separate from  
24  whatever sentence may have been imposed on the --

25                  JUSTICE GINSBURG: Yes, but where do you get

1 the maximum? You say, oh, these are just minimums.

2 MR. HORWICH: Well, they are minimums  
3 because they say "not less than 5 years." That applies --

4 JUSTICE GINSBURG: But where is -- where is  
5 the maximum?

6 MR. HORWICH: The -- well, because there is  
7 no stated maximum, the -- the assumption then must be  
8 that a sentence higher than 5 years is appropriate.  
9 There is no --

10 JUSTICE SOTOMAYOR: Is there a Sixth  
11 Amendment problem with reading a statute this way,  
12 with -- with reading a statute to provide for an  
13 unlimited maximum when Congress hasn't specified it, and  
14 now you're going to have the judge find the minimum and  
15 the maximum?

16 MR. HORWICH: Well, I don't -- I disagree  
17 that the judge is finding the maximum. The -- the  
18 implied maximum term here is -- is life. Congress --

19 JUSTICE SCALIA: I don't find that implied  
20 at all. I don't see why it's implied.

21 MR. HORWICH: Well, the trouble,  
22 Justice Scalia, is then that I don't otherwise know what  
23 the maximum would be.

24 JUSTICE SCALIA: That's right. That's --

25 MR. HORWICH: The maximum --

1 JUSTICE SCALIA: That's her question.

2 JUSTICE SOTOMAYOR: But isn't there a Sixth  
3 Amendment problem with not knowing what you are exposed  
4 to? And then doesn't the minimum in that case sort of  
5 become de facto the maximum?

6 JUSTICE SCALIA: I think what you are  
7 exposed to, as I read the statute, (c)(1)(A) does not  
8 impose a new sentence at all. It just says there will  
9 be added to whatever the sentence is for the crime of  
10 violence or the drug trafficking crime -- there will be  
11 added to that sentence. Then it says you'll add 7  
12 years; you'll add 25 years; you'll add 30 years.

13 Those are not mandatory minimums. Those are  
14 add-ons to the sentence provided by the substantive  
15 crime to which (c)(1)(A) refers. That way, the whole  
16 thing makes sense.

17 MR. HORWICH: Well, I don't think it would  
18 make sense to treat them, as you are describing them, as  
19 add-ons. There's no question that this -- that this  
20 statute defines an offense that someone can be convicted  
21 of. That certainly is the implication of this Court's  
22 holding in Deal. It is a separate offense which  
23 therefore should carry its own punishment. And the  
24 contrast --

25 JUSTICE SCALIA: I'll amend what I said.



1 It is a mandatory minimum if the substantive crime  
2 referred to in (c)(1)(A) is above what is specified  
3 in -- in this statute. But if it -- if it is below  
4 that, if the drug trafficking crime only provided for  
5 15 years, and you did the crime with a machinegun, you  
6 get 30 years, that's an add-on.

7 MR. HORWICH: Well, I -- I think it would be  
8 helpful then to compare this to the -- the language of  
9 the prior statute, which describes exactly what you are  
10 describing.

11 JUSTICE SCALIA: I got it.

12 MR. HORWICH: Which is -- which is that  
13 whoever during or in relation, et cetera, et cetera,  
14 uses or carries a firearm --

15 JUSTICE KENNEDY: Can you give us the page?

16 MR. HORWICH: I'm sorry, this is at 11a of  
17 the petition appendix.

18 JUSTICE SCALIA: It's also on 3a of the  
19 government's brief.

20 MR. HORWICH: Or 3a of the -- of the  
21 government's -- the government's brief.

22 The old statute said exactly what you are  
23 describing, Justice Scalia, which is that whoever during  
24 or in relation to a crime of violence, et cetera, uses  
25 or carries a firearm shall, in addition to the

1 punishment provided for such crime of violence, et  
2 cetera -- and then it specifies --

3 JUSTICE SCALIA: Right.

4 MR. HORWICH: -- particular determinate  
5 sentences.

6 JUSTICE SCALIA: Right.

7 MR. HORWICH: If Congress had wanted to  
8 continue that approach, I assume it would have kept that  
9 language. It didn't. It changed the language. The new  
10 language says "be sentenced to a term of imprisonment of  
11 not less than 5 years," which leaves -- which leaves --

12 JUSTICE SCALIA: It says "in addition to" at  
13 the end of (c)(1)(A): "Who, in furtherance ... possesses a  
14 firearm shall, in addition to the punishment provided  
15 for by such crime of violence, be sentenced to" 5  
16 years, 7 years, 10 years. And then if the  
17 firearm, blah, blah, blah, is blah, blah, blah -- since  
18 your -- I assume that that introductory language "in  
19 addition to the punishment provided for" is implicit in  
20 (B). It's expressed in (A), but I think it's implicit  
21 in (B).

22 MR. HORWICH: That -- I understand that  
23 language, the in -- the "in addition to" language, to  
24 have -- to have been to make clear that this is a  
25 separate offense. There is separate punishment for a

1 separate conviction of this separate offense.

2 JUSTICE SCALIA: Yes.

3 MR. HORWICH: And that then it is a  
4 separate -- then from there it is a question what is the  
5 appropriate sentence for a conviction on the offense  
6 described in 924(c)(1), which is to say, well, it's a  
7 term of imprisonment of not less than 5 years, which  
8 holds open --

9 JUSTICE SCALIA: In addition to the term  
10 that's -- that exists for the substantive offense.

11 MR. HORWICH: I -- I agree. And if you look  
12 in subparagraph (D)(ii) it says that the term of  
13 imprisonment imposed under this subsection shall run  
14 consecutive to the other one, which -- which again shows  
15 that -- that the considerations for sentencing in this  
16 -- in this law are distinct from the -- it is a -- it is  
17 a separate question what the sentence on the 924(c) --

18 JUSTICE BREYER: To make your life a little  
19 more complicated and difficult, though perhaps it makes  
20 it easier, we reach the questions that Justice Scalia  
21 was raising, I think, and they are important only if you  
22 win, only if we say that it is a sentencing factor. If  
23 it is a new crime, we don't have any problem, because if  
24 it's a new crime, the jury has to find the fact.

25 But if it's a sentencing factor, then we get

1 into the problem of Harris versus Apprendi. And then you  
2 have to decide whether it's maximum, minimum, et cetera.  
3 But in Harris, I said that I thought Apprendi does cover  
4 mandatory minimums, but I don't accept Apprendi. Well,  
5 at some point I guess I have to accept Apprendi, because  
6 it's the law and has been for some time.

7               So if and in fact, unfortunately for  
8 everyone, I was -- it was 5-4 in that, I think, so my vote  
9 mattered, and I don't know what other people think  
10 but in -- on this Court. But if that becomes an issue,  
11 if that should become an issue about whether mandatory  
12 minimums are treated like the maximums for Apprendi  
13 purposes, should we reset the case for argument? Or do  
14 you feel, in your opinion that -- that you've had  
15 enough of an argument because you devoted two or three  
16 pages to this topic?

17               MR. HORWICH: Well, to answer -- well, first  
18 of all, there certainly has not been in -- in the  
19 briefing or argument here, any opportunity for this Court  
20 to consider what it would need to consider to overrule  
21 McMillan. We're not talking about overruling Harris.  
22 We're talking about overruling McMillan. And --

23               JUSTICE BREYER: Well, I think basically  
24 Apprendi did significantly change McMillan, but that's --

25               MR. HORWICH: Well, and that's -- and that

1 would be my -- my second point, is that -- is that since  
2 -- I think it has been become clearer since Harris that  
3 the rule in McMillan and the rule in Appendi coexist  
4 quite well and coexist in a principled fashion, and  
5 that there is -- and that there is no -- Harris was  
6 correct in light of Appendi, which is -- which is in  
7 the following respect.

8 JUSTICE BREYER: Does the government believe  
9 that it has sufficiently argued this, or would you suggest  
10 on the government's behalf that if it becomes an issue  
11 it's set for reargument? That was really my question.

12 MR. HORWICH: Well, yes, we would certainly  
13 want to set it for reargument --

14 JUSTICE SCALIA: That's the right answer.

15 MR. HORWICH: -- obviously.

16 (Laughter.)

17 MR. HORWICH: But -- but I -- again, I don't  
18 even think that's necessary. Respondents have offered  
19 nothing in the way of a justification for overruling  
20 Harris. And again, the distinction is --

21 JUSTICE GINSBURG: Why can't we just say, as  
22 Judge Boudin did, they weren't -- this revision was on  
23 the books before Castillo was decided, so obviously  
24 Congress wasn't trying to adjust the statute in response  
25 to Castillo. And they -- they made it read more easily.

1 We know the one thing Congress was concerned with was adding  
2 possession, which was not there before. So they added  
3 possession. They made it more readable.

4 Some of the concerns that were expressed in  
5 Castillo are certainly present here. There is a huge  
6 jump from a 5-year add-on to a 30-year add-on for -- for  
7 the machinegun. So why don't we just say, well, this  
8 statute has been revised, but it wasn't in response to  
9 Castillo? It's not all that different.

10 MR. HORWICH: Well, I disagree that it's  
11 not all that different. And -- and for the following  
12 three -- for three reasons. First of all, setting aside  
13 my disagreement with Justice Scalia, if you accept that  
14 the statutory maximum is life, as I believe every court  
15 to have confronted this understands it to be, then this  
16 statute belongs to an entirely different tradition than  
17 the tradition that Castillo belonged to, which is to  
18 say that this statute -- the -- the role of firearm type  
19 in this statute is to channel the sentencing judge's  
20 discretion by ruling out certain low sentences when  
21 certain facts are present, such as the presence of a  
22 machinegun.

23 That is something that when Congress wants  
24 to channel --

25 JUSTICE SOTOMAYOR: Isn't a minimum always a

1 maximum?

2 MR. HORWICH: No, I --

3 JUSTICE SOTOMAYOR: In -- to the person who  
4 would otherwise, in the judge's discretion, qualify for a  
5 lower sentence, doesn't it become that person's maximum  
6 once you have indiscretion?

7 MR. HORWICH: I disagree with that because  
8 the principle -- the background -- the basic principle  
9 behind Apprendi and our criminal law is that what you  
10 can rely on is what Congress has said in the statute or  
11 in -- as Booker holds --

12 JUSTICE SOTOMAYOR: What you can rely on in  
13 an indeterminate sentencing regime without a minimum is  
14 that you've got a statutory maximum, whatever it may  
15 be, but a judge's discretion to start from zero. If  
16 that judge was inclined to give you zero, isn't the  
17 minimum then your statutory maximum? You're -- because  
18 that's what the judge has to give you.

19 MR. HORWICH: I disagree with that, because  
20 it is not the only thing the judge can give you. The  
21 full range of punishment above those minimums is  
22 available. I was indicating earlier that --

23 CHIEF JUSTICE ROBERTS: Counsel -- counsel,  
24 I think you had said you had three responses to Justice  
25 Ginsburg --

1 MR. HORWICH: Yes.

2 CHIEF JUSTICE ROBERTS: -- and only got one out.

3 MR. HORWICH: Right, and perhaps only  
4 half of that one, which is -- which is that in the -- on  
5 the question of -- of tradition, Congress apparently  
6 exclusively uses sentencing factors when it wants to do  
7 nothing more than give some rules to the judge to  
8 channel his discretion with minimum sentences. We  
9 observed this in our opening brief, and Respondents said  
10 nothing in response.

11 As far as we know, every time Congress wants  
12 to channel a sentencing judge's discretion, it does it  
13 with a sentencing factor. That is a difference.

14 CHIEF JUSTICE ROBERTS: All right. Number two?

15 MR. HORWICH: Number two is that the -- is  
16 that the -- the -- the linguistic change here, the  
17 textual change, the fact that subparagraph (D) says "a  
18 person convicted of a violation of this subsection."  
19 That presupposes there has been a conviction, that the  
20 jury has been charged with whatever the elements of the  
21 offense are and that now what's going to be stated in  
22 clauses (B)(i) and (B)(ii) are things that are relevant  
23 at sentencing.

24 And then the third -- and then the third  
25 point is -- is that -- is essentially the structural



1 change from -- that I alluded to earlier, of moving  
2 firearm type wholly away from the elements of the  
3 offense. That made a difference to this Court in  
4 Harris. It is -- it would be, I think, irreconcilable  
5 with this Court's holding in Harris to say that  
6 brandishing and discharge have been moved far enough  
7 away from the elements to make them sentencing factors,  
8 or rather are stated far enough away from the elements,  
9 structurally separated enough to make them  
10 sentencing factors, but then to --

11 CHIEF JUSTICE ROBERTS: Those are all -- all  
12 three of those are -- are pretty subtle ways for  
13 Congress to change the view in Castillo.

14 MR. HORWICH: Well, I would agree that --

15 CHIEF JUSTICE ROBERTS: Moving something  
16 from the body of the paragraph to a separate section and  
17 so on.

18 MR. HORWICH: Well, I would -- I would point  
19 out -- of course, one has to -- one has to recognize what  
20 Congress had before it when it -- when it made the  
21 change, which is to say, when it -- when it embarked on  
22 these revisions, there was a one-to-one circuit split on  
23 the question. And by the time it had finished making  
24 the changes, it was actually three to one in favor of  
25 sentencing factor interpretation in the old statute.

1           Now, I agree that if Castillo had been on  
2   the books and Congress had said nothing about it, that  
3   might be a basis to say that Congress was acquiescing in  
4   that interpretation. But it's -- it's -- Congress was  
5   certainly concerned with much more substantial issues in  
6   the revisions. And the fact that it did not comment  
7   further should not be a reason to -- to not pay  
8   attention to the structural and textural changes that it  
9   did make.

10           I'd like to reserve.

11           CHIEF JUSTICE ROBERTS: Thank you, counsel.

12           JUSTICE SCALIA: We have tall lawyers today.  
13   What is this, tall lawyer day?

14           (Laughter.)

15           CHIEF JUSTICE ROBERTS: Mr. Fisher.

16           ORAL ARGUMENT OF JEFFREY L. FISHER

17           ON BEHALF OF THE RESPONDENTS

18           MR. FISHER: Mr. Chief Justice, and may it  
19   please the Court:

20           I think it's important at the outset to set  
21   the context for this case. The government cannot point  
22   to a single defendant under this provision for the  
23   conduct at issue who has ever received more than  
24   10 years in prison absent the use of a machinegun.

25           We cited a long string of cases in the

1 O'Brien brief and the government's response in its reply  
2 brief was silent. So, therefore, the government is here  
3 today claiming that it is entitled, based on the fact of  
4 a machinegun, to get 20 years more than any defendant  
5 that perpetrated this conduct has ever gotten, and  
6 indeed 18 more years than the government itself asked  
7 the district judge in this case for, once the machinegun  
8 provision was off the table, under the guise that this  
9 is nothing more than a sentencing factor.

10 We think that this Court's statutory  
11 interpretation jurisprudence as well, if necessary, this  
12 Court's constitutional jurisprudence foreclose such a  
13 result.

14 Let me start with statutory interpretation.  
15 On the government's theory in 1998, Congress stepped in  
16 and took a statute that made machinegun use an element  
17 and transformed it into -- into a sentencing factor. In  
18 other words, Congress, without a peep, a mutter, or  
19 anything, and in -- in the course of doing something  
20 entirely different, which was reacting to this Court's  
21 Bailey decision, stepped in and took a fact that  
22 formerly had to be proved to a jury beyond a reasonable  
23 doubt to trigger a 30-year sentence and left that same  
24 sentence in place but now allowed it to be proved to a  
25 judge by a preponderance, based on a presentence report,

1 and, indeed, according to the government, also stripped  
2 away the mens rea requirement that attached to the  
3 statute when it was an element.

4 JUSTICE GINSBURG: How about the short --  
5 what is it, the one that gets 10 years, the  
6 short-barreled rifle? That's -- that's -- those two  
7 are together in the statute, and you said that it would  
8 be startling because of the difference between 10 years  
9 and the 30 years, but the short-barreled rifle is the  
10 same amount of time in discharging, and discharging is a  
11 sentencing factor.

12 MR. FISHER: We think, Justice Ginsburg,  
13 that if this Court had to construe that statute in a  
14 different case, that provision, it would find it's still  
15 an element. Now, I grant that it's a difference, a  
16 very significant difference between 10 and 30 years, but  
17 structurally it is an element.

18 And I think an -- a good way to go about  
19 understanding this -- I heard my -- my opponent today say  
20 that this would be indistinguishable from Harris or fly  
21 in the face of Harris.

22 Well, there's three very important  
23 differences between the machinegun provision at issue  
24 here and the discharge provision in Dean and the  
25 brandishing provision in Harris. The first difference

1 is that this an entirely separate subparagraph.

2 Now, if you imagine somebody amending the  
3 statute and wanting to accomplish what the government  
4 says was accomplished here, why wouldn't the firearm  
5 type provisions just have been (iv) and (v) under  
6 capital letter (A)? They're not.

7 What the draftsperson did instead is break  
8 them out into an entirely separate, stand-alone  
9 provision. As the AUSA described it, when he charged  
10 them in the alternative in the district of  
11 Massachusetts, he said I think it's a greater and lesser  
12 offense situation. And that's what we think.

13 JUSTICE SCALIA: Oh, I guess I'm not  
14 following the ball here. I thought the government had  
15 conceded that sub (i), sub (ii), sub (iii) under (A) are  
16 not sentencing factors but are elements. Is that not --

17 MR. FISHER: I don't understand that to be  
18 what the government has said. I believe the  
19 government's argument is that the big paragraph with  
20 capital letter (A) sets forth the elements, and then sub  
21 (i), (ii), and (iii) are merely sentencing factors.

22 JUSTICE GINSBURG: Now, they have to because  
23 that's what Harris said, brandished --

24 JUSTICE KENNEDY: That's -- yes, that's Harris.

25 JUSTICE GINSBURG: -- brandished is a

1 sentencing factor.

2 MR. FISHER: That's right. That's right,  
3 Justice Ginsburg.

4 JUSTICE SCALIA: Well, that's even worse,  
5 then. I agree with you.

6 (Laughter.)

7 MR. FISHER: So what sub (B) does, as I  
8 said, is it creates a greater offense, and so, it's  
9 broken out in a way that incorporates the earlier  
10 elements up above in the main paragraph by using the  
11 phrase: If a "firearm possessed by a person  
12 convicted of a violation of this subsection."

13 That phrase, we believe, incorporates the  
14 earlier elements. Remember in Harris this Court  
15 emphasized that the brandishing provision just kept  
16 going in the sentence and did not incorporate earlier  
17 elements.

18 So when the government stands here today and  
19 says, well, when you incorporate the earlier elements,  
20 that shows it's a sentencing factor, too, it seems to me a  
21 situation of heads, I win; tails, you lose.

22 JUSTICE BREYER: No, their -- their -- their  
23 basic argument is look at the statute. (A) has what is  
24 undoubtedly a set of sentencing factors. Brandishing and  
25 discharging are as traditional as they come. Then look

1 at (C), and you find some other ones that are sentencing  
2 factors, because recidivism is as traditional as it  
3 comes. And between those two they put (B).

4 So since the neighbors, (A) and (C), are  
5 certainly sentencing, they must have meant (B) to be a  
6 sentencing factor, too. I -- as I understand it, that  
7 is one of their basic arguments.

8 MR. FISHER: Right. And let me -- let me  
9 give two responses to that. First of all, if you --  
10 if you look again at the appendix of the government's  
11 main brief, which is 1a and 2a, the guts of the  
12 statute is the "use or carry" language or "possesses a firearm"  
13 language in the main paragraph.

14 And then, the -- from the "possessed" language  
15 down through sub (iii), what you have is the Bailey fix  
16 right there. So, then what happens --

17 JUSTICE SCALIA: And you believe there is a  
18 background of life sentence? You agree with the  
19 government that --

20 MR. FISHER: I don't think that's  
21 necessarily the case, Justice Scalia. This Court --

22 JUSTICE SCALIA: Well, it either is or  
23 isn't. You --

24 MR. FISHER: -- has said a couple of times  
25 that this is a theoretical maximum sentence, but, surely,

1 if nothing else, the Sentencing Reform Act sets a  
2 maximum sentence here if it's not just a straight  
3 determinant sentence.

4 And we've argued at length in the O'Brien  
5 brief that the reasonableness requirement under 3553 of  
6 the Sentencing Reform Act would have to set a maximum  
7 sentence. And for the reason I said at the outset,  
8 given that no one has ever received more than 10 years  
9 absent a machinegun here, certainly that maximum  
10 sentence would be far less than life and far less than  
11 30 years. But --

12 JUSTICE KENNEDY: What's the -- I don't want  
13 to interrupt your nice organization here. But what is  
14 the principle, the general rule, that you articulate to  
15 support the distinction between 30 being necessarily an  
16 element and 7 a sentencing factor? What's the general  
17 rule here?

18 MR. FISHER: Let me answer it --

19 JUSTICE KENNEDY: Other than, this is  
20 just --

21 MR. FISHER: If I might say one more --

22 JUSTICE KENNEDY: -- other than how awful this is.

23 MR. FISHER: If I might say one more  
24 sentence to Justice Breyer, and then I'll answer that.

25 JUSTICE KENNEDY: Please.



1           MR. FISHER: Justice Breyer, the other thing  
2 I'd point out is that, so therefore, once you make the  
3 Bailey fix, you just come -- in the old statute, then  
4 you come to the machinegun provision, and you just leave  
5 it where it was. And, in fact, there are plenty of  
6 statutes that we've cited in both briefs where there are  
7 elements in the middle, sandwiched between sentencing  
8 factors.

9           Now, Justice Kennedy, you asked the general  
10 principle. The general principle is this, at least in  
11 terms of this Court's Sixth Amendment law, is that: The  
12 critical question to ask is whether the defendant could  
13 receive the sentence the government seeks without the  
14 fact at issue.

15           Seven years is a sentence the defendant here  
16 could receive without the machinegun finding. Thirty years  
17 is absolutely off bounds.

18           JUSTICE KENNEDY: Is that just based on  
19 empirical studies or is there guideline support for  
20 that?

21           MR. FISHER: There is both, Your Honor. Of  
22 course, the guidelines are not binding --

23           JUSTICE KENNEDY: I understand. I understand  
24 that.

25           MR. FISHER: -- but the guideline sentences

1 as -- as to this statute are pegged exactly to the  
2 mandatory minimums.

3 CHIEF JUSTICE ROBERTS: I'm sorry. Could  
4 otherwise receive under what? The sentence -- you say  
5 7 years is a sentence he could otherwise receive.

6 MR. FISHER: Under the facts that either we  
7 prove to the jury or are admitted by the defendant.  
8 So -- so in this case, the defendant could receive 7  
9 years, and we've conceded that.

10 JUSTICE SCALIA: There must be some  
11 statutory provision that you -- that you -- that you  
12 rely upon.

13 MR. FISHER: Oh, certainly, Justice Scalia.

14 JUSTICE SCALIA: Where does 7 years come  
15 from?

16 MR. FISHER: Seven years comes from -- comes  
17 from the statute, for brandishing, which is what both  
18 defendants had admitted that they did. Seven years --

19 CHIEF JUSTICE ROBERTS: Yes, but we know  
20 that's a sentencing factor.

21 MR. FISHER: But they've admitted it. So  
22 they've waived any Sixth Amendment right as to that  
23 sentencing factor. We're willing to concede that. But  
24 then you go to the guidelines, which sets a  
25 7-year -- a 7-year recommended sentence.

1           Under this Court's jurisprudence following  
2   Booker, we know that we take that recommendation and we  
3   plug it into section 3553(a), which, if you want the  
4   statutory language, directs that a sentence "no greater  
5   than necessary to serve the following factors" be  
6   introduced -- I'm sorry, be imposed. And when you look  
7   at those factors, disparity is a factor this Court has  
8   left in place and emphasized at every term since Booker,  
9   and the guideline sentence. And when you put -- plug  
10  those things into the facts here, we simply suggest  
11  there is no way that it would be upheld as substantively  
12  reasonable if the defendant got 30 years absent the  
13  machinegun fact here.

14           And we've also cited in our brief several  
15  places where the government itself makes this -- the  
16  mirror image of the argument that I'm making in the  
17  post-Booker, Gall, Rita world, when judges deviate  
18  downward from the guidelines. They emphasize -- we  
19  quoted one Eleventh Circuit case in our brief where the  
20  government got overturned, as substantively unreasonable,  
21  a downward variance from a guideline recommendation,  
22  because no defendant had ever received such a low  
23  sentence.

24           But I don't have to, of course, hang my hat  
25  on this -- on the strict application of Apprendi here.

1 We think there's also an even deeper problem that  
2 predates this Court's Apprendi jurisprudence, which was  
3 flagged by this Court as early as McMillan, where this  
4 Court said that if what Congress does is step in  
5 and manipulate the elements of a crime in order  
6 to relieve the government of its obligation to prove  
7 ordinary and traditional elements, then we have a pure  
8 due process problem, irrespective of any Sixth Amendment  
9 problem.

10 Now, this Court has never found such a  
11 problem, but I would emphasize that the --

12 JUSTICE SOTOMAYOR: How do we find it with  
13 this statute, if there's a 10-year minimum/maximum  
14 under (A) subdivision (iii) if the firearm is  
15 discharged, and it's 10 years; and if it's a  
16 short-barreled rifle under (B), it's also an equal  
17 amount, of 10 years? I think that's what  
18 Justice Ginsburg was pointing to.

19 So the question I have for you is: How do  
20 we find substantive unreasonableness?

21 MR. FISHER: How do we find substantively  
22 unreasonable after Booker?

23 JUSTICE SOTOMAYOR: Unreasonableness, that  
24 there was an act of manipulation here, or intent to  
25 manipulate.

1           MR. FISHER: Well, if you're asking me the  
2 question -- I want to be sure I understand and answer the  
3 question. If you're asking me how applying the  
4 principle this Court first articulated in McMillan, and  
5 you apply it here --

6           JUSTICE SOTOMAYOR: Exactly.

7           MR. FISHER: I don't think you have to look  
8 any further -- well, there is two places you can look.  
9 You can look both at the intent of Congress and the  
10 effect of what it did.

11           The intent of Congress, at least as  
12 hypothesized by the Solicitor General, is laid out at  
13 page 33 of its merits brief, where it says: What  
14 Congress was intending to do here is, quote, "simplify  
15 and streamline guilt-stage proceedings" by relieving the  
16 government of its burden to prove this case -- this fact  
17 beyond a reasonable doubt to the judge. So that strikes  
18 one as, as this Court put it in Harris, an intent to  
19 evade the ordinary requirements in the Fifth and Sixth  
20 Amendments.

21           Then, as to effect, you can look at what  
22 I've also -- what I've already emphasized, which is that  
23 this sentence simply is not otherwise available, absent  
24 that fact. And that, on its own, ought to tell this Court  
25 that it's dealing with an element.

1                   But if it wants to dig even deeper, it could  
2   -- it could describe it in terms of a 20-year increase  
3   over what the defendant would otherwise get or what,  
4   indeed, as we've said, anyone has ever gotten for this act,  
5   absent a machinegun. It could do it in terms of percentage  
6   and say it's 83 percent higher; the Court used the phrase once,  
7   "tail wagging the dog." I don't think it matters  
8   exactly what exact avenue this Court would pick. Again,  
9   if it were doing a constitutional analysis -- I'm  
10   speaking right now constitutionally instead of  
11   statutorily -- it would all end up at the same place.

12                  But I want to make sure that I understood  
13   your question also, with due respect to you, Justice  
14   Ginsburg, because what I was talking about was 10 years under  
15   (A)(iii), of course, is a sentencing factor, as this Court  
16   held in Dean, whereas under (B)(i), the same length of a  
17   sentence might be an element. That was a matter -- that  
18   was a statutory answer, and I think, as a matter of  
19   statutory construction, which is, of course, the first  
20   thing you're going to address in this case, what we  
21   think we can win on without even reaching the  
22   constitutional questions. And the differences would be,  
23   apart from the same sentence, you have the structural  
24   difference that I've emphasized. You have the tradition.

25                  And let me say a word about tradition, if I

1 might. The government emphasizes the guidelines and  
2 other kinds of statutes. When this Court applies the  
3 tradition canon that it established in Almendarez-Torres  
4 and Castillo, I don't know why you have to look any  
5 further than Castillo itself to answer the tradition  
6 question. In Jones, as this Court put it, the reason we  
7 look to tradition is because if it's a close case, we're  
8 going to not assume that Congress intended a radical  
9 departure from past practice. Well, the past practice  
10 here is absolutely unequivocal. This Court held in  
11 Castillo, 9-0, that Congress intended this to be an  
12 element.

13 CHIEF JUSTICE ROBERTS: Well, the Court's --  
14 the Court's opinion in Castillo quite carefully noted  
15 that it wasn't addressing this statute. I think it's a  
16 little bit of a bait-and-switch to say that, well,  
17 Castillo decides this case.

18 MR. FISHER: I don't contend that Castillo  
19 absolutely decides the case. My contention that I was  
20 trying to make is that when this Court looks to  
21 tradition for purposes of construing the new amendments,  
22 that Castillo gives the answer on -- at least on  
23 tradition, at least as applying that particular  
24 question. Because Congress, we know, intended it to be  
25 an element at least until 1998.

1           But I think that even -- even if you were to  
2   step back from the Castillo analysis itself and the  
3   Castillo factors themselves, you would also, I think, do  
4   well to give -- again, not dispositive, but -- but  
5   careful treatment to Castillo, because Congress steps  
6   in, of course, and amends statutes all the time. They  
7   step in and they amend one portion of a statute, and  
8   while they are at it, we know from the manuals that we've  
9   cited and from the examples in the back of the O'Brien  
10   brief that Congress often, while they're amending one  
11   part, they reorganize or reword other parts of the  
12   statute.

13           And this Court, across its statutory  
14   interpretation jurisprudence, within criminal law and  
15   outside, has always said that once we say the law means  
16   something, we're not going to assume that Congress  
17   changed the law unless we get some sort of clear  
18   indication from Congress that it -- that it intended to  
19   change the law.

20           Now, here, as I think has been emphasized,  
21   but I'll just reiterate, there's not a peep of  
22   anything in the legislative history or anything to  
23   suggest that Congress was -- was intending to change the  
24   law here. And, in fact, it's not even a mere silence  
25   case. We know quite clearly and affirmatively that



1 Congress was intending to do something entirely  
2 different, which was respond to this Court's Bailey  
3 decision.

4 But even in the language -- and the only  
5 thing I think the Solicitor General even has for it in  
6 this case is the language and structure, which are some  
7 different words and different placement that it can at  
8 least build an argument off of, because the other four  
9 of the five Castillo factors are entirely unchanged.  
10 But even the language, we submit, is a far cry from the  
11 kind of change this Court ought to require before it  
12 does a 180-degree switch as to what it had said the  
13 prior law meant.

14 Just for purposes of stability in the law,  
15 if nothing else, I think this -- it behooves this Court  
16 to take its prior decisions seriously and to -- and to  
17 engage in a dialogue with Congress that encourages  
18 Congress to be clear when it wants to change what the  
19 prior law is.

20 JUSTICE SCALIA: The prior statute -- which  
21 was 18 U.S.C. 924(c)(1), right? That did deal with  
22 short-barreled rifle, short-barreled shotgun,  
23 machinegun, and so forth, but that's -- that provision  
24 didn't say anything about brandishing or discharge.  
25 Where -- what was -- how were they treated under the

1 prior law?

2 MR. FISHER: They -- as you say, they were  
3 not in the statute itself. My understanding is that  
4 judges as -- on an ad hoc basis, would have treated  
5 those as sentencing factors.

6 And what Congress did -- when it came in to  
7 respond to this Court's Bailey decision, I think it  
8 codified all of the different manners of using the gun  
9 in the context of one of these crimes. So it not just  
10 dealt with, yes, possessing ought to be covered, but it  
11 talked about other manners, brandishing and discharging.  
12 In Castillo, this Court emphasized again the big  
13 difference between manner of using a gun and the type of  
14 firearm which lies at the core of this offense.

15 If I would turn -- if I would leave the  
16 Court with nothing else, let me emphasize again to the  
17 Court the difference between this statute, which I think  
18 the government wants you to think is no different in  
19 intent, effect, or operation than the two that this  
20 Court prior -- dealt with in Harris, as a matter of both  
21 statutory construction and constitutional law, and in  
22 McMillan, as a matter of constitutional law.

23 What this Court emphasized in both of those  
24 cases was that there was a preexisting law on the books  
25 that criminalized certain activity. And then a

1 legislature later stepped in and set a mandatory minimum  
2 for a particular fact that could accompany the crime at  
3 issue. And it did so in a very minor way. For example,  
4 in Pennsylvania, the various crimes covered by the  
5 firearm mandatory minimum in that case gave 10-, 20-year  
6 sentences routinely, and all the Pennsylvania  
7 legislature did was step in and say: If he uses a gun,  
8 we want at least 5 years. And in Harris, as I've  
9 just emphasized, I think, in discussing with  
10 Justice Scalia, the Court dealt with a bump of just 2  
11 years. Again, what judges were already customarily  
12 doing, I think, under the statute.

13 Here, this is entirely and dramatically  
14 different. Here, the fact allows a sentence -- indeed,  
15 requires a sentence -- that is 20 years longer than  
16 anyone has ever gotten for this conduct at issue. That  
17 is a difference not just -- it's not a minor difference.  
18 It is a categorically different difference that we think  
19 is enough, combined with other principles of statutory  
20 and constitutional interpretation, to -- I'm sorry,  
21 statutory interpretation to resolve this case on the  
22 statute alone.

23 But if you need to look to the Constitution,  
24 we think that the Sixth Amendment, either as the  
25 bright-line rule articulated in Apprendi dictates that

1 any fact that allows a greater sentence than the  
2 defendant could otherwise receive is subject to the  
3 Sixth Amendment, or sort of plain, pure due process,  
4 tail-that-wags-the-dog analysis, that this Court  
5 emphasized in McMillan -- either of those would be  
6 enough, and indeed require, a finding of  
7 unconstitutionality here and a finding this Court  
8 can avoid.

9 And if nothing else, Justice Breyer, I would  
10 say that we think that this case can be resolved on statutory  
11 grounds. We think there are narrower constitutional  
12 arguments that would either require reading it narrowly  
13 or striking it down if you had to, on even narrower  
14 grounds. But if nothing else, then we would ask this  
15 Court to revisit Harris, if necessary.

16 We don't think it's necessary to resolve the  
17 case for us here, but we think that would be appropriate  
18 if it -- if it needed to get there.

19 JUSTICE KENNEDY: It's a collateral point:  
20 Does the government have to show, or does the -- don't  
21 you have to find that the machinegun is operable?

22 MR. FISHER: I assume so, but I don't know  
23 the specific answer to that, Justice Kennedy. What  
24 there is a dispute about, of course, is whether the --  
25 if it were a sentencing factor, whether the government

1 has to prove knowledge. And we do emphasize that that  
2 would be an alternative basis for this Court to decide  
3 this case, by saying you at least have to prove  
4 knowledge even if it's a sentencing factor.

5 And let me just leave you with this, unless  
6 there are any further questions: The government makes a  
7 couple points in its reply brief suggesting that certain  
8 arguments were not preserved or made properly in this  
9 case. The knowledge argument that I just referred to is  
10 raised in the brief in opposition for Mr. O'Brien at  
11 pages 23 to 25. So under rule 15 of this Court, that  
12 argument was properly presented at the cert stage. You  
13 will also find that argument at pages 34 to 37 of the Joint  
14 Appendix.

15 Also with respect to the Sixth Amendment  
16 substantive reasonableness as-applied argument, the  
17 government suggests that for some reason, that would be  
18 inappropriate for this Court to reach or rely on.  
19 Again, we disagree. First of all, we can't understand  
20 why it would be inappropriate to reach or rely on that  
21 constitutional argument, whereas it is apparently  
22 appropriate for this Court to address the McMillan  
23 argument or the "overrule Harris" argument. They're  
24 all three constitutional arguments that are present in  
25 this case. And, again, if there were any doubt they

1 were raised below, pages 38 and 39 of Mr. Burgess's  
2 First Circuit brief, pages 32 to 35 of Mr. O'Brien's  
3 First Circuit brief, and in the brief in opposition,  
4 which the government, in its reply brief at the cert  
5 stage, responded to without claiming any error or any  
6 waiver problems. So we think absolutely all the  
7 arguments that are made in the blue -- in the red briefs  
8 are clearly before you.

9 If the Court has any additional questions, I  
10 would be happy to entertain them. Otherwise, I am  
11 prepared to submit the case.

12 CHIEF JUSTICE ROBERTS: Thank you,  
13 Mr. Fisher.

14 Mr. Horwich, you have 4 minutes remaining.

15 REBUTTAL ARGUMENT OF BENJAMIN HORWICH

16 ON BEHALF OF THE PETITIONER

17 MR. HORWICH: Thank you.

18 Justice Kennedy, just to answer your  
19 question: The definition of "firearm" in 921(a)(3)  
20 includes a weapon that is designed to expel a  
21 projectile, so one that can be restored to do so also  
22 qualifies as a firearm for purposes of the statute.

23 My friend made the comment that brandishing  
24 and discharge would have been treated, under the old  
25 statute, as sentencing factors. But they couldn't be,

1     because the old statute had determinant sentences, and  
2     brandishing and discharge weren't relevant to it. So  
3     there wouldn't be a higher sentence for those.

4             And that -- that reveals sort of a basic  
5     flaw in this notion that somehow those can be treated as  
6     sentencing factors, but Congress wasn't embarking on a  
7     general litany of sentencing factors. Congress inserted  
8     those to be sentencing factors, as the Court recognized  
9     in Harris. Then what it did is move the firearm-type  
10    provisions next in line, because that's what it thought  
11    of them as, not as elements. It moved them away. And  
12    then it goes on to recidivism, which is also a sentencing  
13    factor.

14            So the overall result, then, of the statute  
15    is that it's sort of an instruction manual. The first  
16    thing that comes up is the elements; that's what the  
17    judge uses to charge the jury or take a plea. That  
18    ends. The statute takes up the next topic, which is  
19    sentencing. The judge needs to ascertain the limits of  
20    his discretion. And then the statute ends with some  
21    technical considerations.

22            That -- that approach is entirely in line  
23    with the sentencing factor tradition, and that's --  
24    that seems to be what Congress intended. But my friend's  
25    understanding of the statute is sort of this disorganized

1 jumble, and he's making very much of the idea that when  
2 Congress revises a statute, it tries to confront -- it  
3 tries to make it better, on his view.

4 JUSTICE BREYER: Is there anything  
5 other -- do we have anything other than the statute  
6 itself? When I looked at the statute itself, I thought,  
7 well, all that's happened here is nobody's thought of  
8 this issue at all; nobody's read Castillo. What really  
9 happened is somebody in the legislative drafting section  
10 was focusing on what he said they were focusing on,  
11 Bailey, and then they have a form manual. So they  
12 followed the form manual.

13 Now, is there anything to suggest that isn't  
14 what happened?

15 MR. HORWICH: Well, there is no legislative  
16 history, but there is the fact that the form manual says  
17 if you're going to embark on this, here are some ideas  
18 for how to do it. But it doesn't tell you -- it does  
19 not tell Congress substantively what it should do.  
20 Someone had to make a choice to write that introductory  
21 language, "a person convicted of a violation." And that  
22 is what Congress passed, and so Congress intended that  
23 those things, firearm type, that follow that are  
24 relevant after the person has been convicted of a  
25 violation.



1                   One final answer to your question  
2   Justice Scalia, about the life maximum. This Court  
3   held -- in *Custis v. United States* interpreted the same  
4   language, "not less than" a certain number of years.  
5   That's in 924(e) of the Armed Career Criminal Act. The  
6   Court held that to have a life maximum sentence there.  
7   So I think the same would apply -- the same would apply  
8   here.

9                   And so the final thing I would want the  
10  Court to take away then from this is that Congress is  
11  using firearm type to channel a sentencing judge's  
12  discretion. The life maximum exists in all cases.  
13  There have been cases sentenced up to life even where  
14  that was far above the minimum. And when Congress does  
15  that, it uses a sentencing factor. It doesn't create  
16  greater and lesser included offenses for the jury; it  
17  does it by addressing the person who is in charge of  
18  sentencing, which is the judge, and giving him a rule of  
19  decision. That's what the text and the structure  
20  indicate here and that's what the Court should hold.

21                  Thank you.

22                  CHIEF JUSTICE ROBERTS: Thank you, counsel.

23                  The case is submitted.

24                  (Whereupon, at 12:05 p.m., the case in the  
25  above-entitled matter was submitted.)

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