SUPREME COURT OF THE UNITED STATES

No. 96–6839

HUGO ROMAN ALMENDAREZ-TORRES, PETITIONER
v. UNITED STATES

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

[March 24, 1998]

JUSTICE BREYER delivered the opinion of the Court.

Subsection (a) of 8 U. S. C. §1326 defines a crime. It forbids an alien who once was deported to return to the United States without special permission, and it authorizes a prison term of up to, but no more than, two years. Subsection (b)(2) of the same section authorizes a prison term of up to, but no more than, 20 years for "any alien described" in subsection (a), if the initial "deportation was subsequent to a conviction for commission of an aggravated felony." §1326(b)(2). The question before us is whether this latter provision defines a separate crime or simply authorizes an enhanced penalty. If the former, *i.e.*, if it constitutes a separate crime, then the Government must write an indictment that mentions the additional element, namely a prior aggravated felony conviction. If the latter, *i.e.*, if the provision simply authorizes an enhanced sentence when an offender also has an earlier conviction, then the indictment need not mention that fact, for the fact of an earlier conviction is not an element of the present crime.

We conclude that the subsection is a penalty provision, which simply authorizes a court to increase the sentence for a recidivist. It does not define a separate crime. Consequently, neither the statute nor the Constitution require the Government to charge the factor that it mentions, an earlier conviction, in the indictment.

I

In September 1995, a federal grand jury returned an indictment charging petitioner, Hugo Almendarez-Torres, with having been "found in the United States . . . after being deported" without the "permission and consent of the Attorney General" in "violation of . . . Section 1326." App. 3. In December 1995, Almendarez-Torres entered a plea of guilty. At a hearing, before the District Court accepted his plea, Almendarez-Torres admitted that he had been deported, that he had later unlawfully returned to the United States, and that the earlier deportation had taken place "pursuant to" three earlier "convictions" for aggravated felonies. *Id.*, at 10–14.

In March 1996, the District Court held a sentencing hearing. Almendarez-Torres pointed out that an indictment must set forth all the elements of a crime. See *Hamling* v. *United States*, 418 U. S. 87, 117 (1974). He added that his indictment had not mentioned his earlier aggravated felony convictions. And he argued that, consequently, the court could not sentence him to more than two years imprisonment, the maximum authorized for an offender without an earlier conviction. The District Court rejected this argument. It found applicable a Sentencing Guideline range of 77 to 96 months, see United States Sentencing Commission, Guidelines Manual §2L1.2; ch. 5, pt. A (sentencing table) (Nov. 1995) (USSG), and it imposed a sentence of 85 months' imprisonment. App. 17.

On appeal the Fifth Circuit also rejected petitioner's argument. 113 F. 3d 515 (1996). Like seven other Cir-

cuits, it has held that subsection (b)(2) is a penalty provision which simply permits a sentencing judge to impose a higher sentence when the unlawfully returning alien also has a record of prior convictions. *United States* v. *Vasquez-Olvera*, 999 F. 2d 943, 945–947 (CA5 1993); see *United States* v. *Forbes*, 16 F. 3d 1294, 1297–1300 (CA1 1994); *United States* v. *DeLeon-Rodriguez*, 70 F. 3d 764, 765–767 (CA3 1995); *United States* v. *Crawford*, 18 F. 3d 1173, 1176–1178 (CA4 1994); *United States* v. *Munoz-Cerna*, 47 F. 3d 207, 210, n. 6 (CA7 1995); *United States* v. *Haggerty*, 85 F. 3d 403, 404–405 (CA8 1996); *United States* v. *Valdez*, 103 F. 3d 95, 97–98 (CA10 1996); *United States* v. *Palacios-Casquete*, 55 F. 3d 557, 559–560 (CA11 1995); cf. *United States* v. *Cole*, 32 F. 3d 16, 18–19 (CA2 1994) (reaching same result with respect to 8 U. S. C. §1326(b)(1)). The Ninth Circuit, however, has reached the opposite conclusion. *United States* v. *Gonzalez-Medina*, 976 F. 2d 570, 572 (1992) (subsection (b)(2) constitutes separate crime). We granted certiorari to resolve this difference among the Circuits.

II

An indictment must set forth each element of the crime that it charges. *Hamling* v. *United States*, *supra*, at 117. But it need not set forth factors relevant only to the sentencing of an offender found guilty of the charged crime. Within limits, see *McMillan* v. *Pennsylvania*, 477 U. S. 79, 84–91 (1986), the question of which factors are which is normally a matter for Congress. See *Staples* v. *United States*, 511 U. S. 600, 604 (1994) (definition of a criminal offense entrusted to the legislature, "particularly in the case of federal crimes, which are solely creatures of statute") (quoting *Liparota* v. *United States*, 471 U. S. 419, 424 (1985)). We therefore look to the statute before us and ask what Congress intended. Did it intend the factor that the statute mentions, the prior aggravated felony convic-

tion, to help define a separate crime? Or did it intend the presence of an earlier conviction as a sentencing factor, a factor that a sentencing court might use to increase punishment? In answering this question, we look to the statute's language, structure, subject matter, context, and history– factors that typically help courts determine a statute's objectives and thereby illuminate its text. See, *e.g.*, *United States* v. *Wells*, 519 U. S. – – , – – (1997) (slip op., at 10–11); *Garrett* v. *United States*, 471 U. S. 773, 779 (1985).

The directly relevant portions of the statute as it existed at the time of petitioner's conviction included subsection (a), which Congress had enacted in 1952, and subsection (b), which Congress added in 1988. See 8 U. S. C. §1326 (1952 ed.) (as enacted June 27, 1952, §276, 66 Stat. 229); 8 U. S. C. §1326 (1988 ed.) (reflecting amendments made by §7345(a), 102 Stat. 4471). We print those portions of text below:

> "§1326. Reentry of deported alien; criminal penalties for reentry of certain deported aliens.
>
> "(a) Subject to subsection (b) of this section, any alien who–
>
> "(1) has been . . . deported . . . , and thereafter
>
> "(2) enters . . . , or is at any time found in, the United States [without the Attorney General's consent or the legal equivalent],
>
> "shall be fined under title 18, or imprisoned not more than 2 years, or both.
>
> "(b) Notwithstanding subsection (a) of this section, in the case of any alien described in such subsection–
>
> "(1) whose deportation was subsequent to a conviction for commission of [certain misdemeanors], or a felony (other than an aggravated felony), such alien shall be fined under title 18, imprisoned not more than 10 years, or both; or

"(2) whose deportation was subsequent to a conviction for commission of an aggravated felony, such alien shall be fined under such title, imprisoned not more than 20 years, or both." 8 U. S. C. §1326.

A

Although the statute's language forces a close reading of the text, as well as consideration of other interpretive circumstances, see *Wells*, *supra*, we believe that the answer to the question presented– whether Congress intended subsection (b)(2) to set forth a sentencing factor or a separate crime– is reasonably clear.

At the outset, we note that the relevant statutory subject matter is recidivism. That subject matter– prior commission of a serious crime– is as typical a sentencing factor as one might imagine. See, *e.g.*, USSG §§4A1.1, 4A1.2 (Nov. 1997) (requiring sentencing judge to consider an offender's prior record in every case); 28 U. S. C. §994(h) (instructing Commission to write Guidelines that increase sentences dramatically for serious recidivists); 18 U. S. C. §924(e) (Armed Career Criminal Act of 1984) (imposing significantly higher sentence for felon-in-possession violation by serious recidivists); 21 U. S. C. §§841(b)(1)(A)–(D) (same for drug distribution); United States Sentencing Commission, 1996 Sourcebook of Federal Sentencing Statistics 35, 49 (for year ending Sept. 30, 1996, 20.3% of all federal cases involved offenders with substantial criminal records (criminal history categories IV–VI); 44.2% of drug cases involved offenders with prior convictions). Perhaps reflecting this fact, the lower courts have almost uniformly interpreted statutes (that authorize higher sentences for recidivists) as setting forth sentencing factors, not as creating new crimes, (at least where the conduct, in the absence of the recidivism, is independently unlawful). *E.g.*, *United States* v. *McGatha*, 891 F. 2d 1520, 1525 (CA11 1990) (18 U. S. C. §924(e)); *United States* v. *Arango-*

Montoya, 61 F. 3d 1331, 1339 (CA7 1995) (21 U. S. C. §841(b)); *United States* v. *Jackson*, 824 F. 2d 21, 25, and n. 6 (CADC 1987). And we have found no statute that clearly makes recidivism an offense element in such circumstances. But cf. 18 U. S. C. §922(g)(1) (prior felony conviction an element but conduct *not* otherwise unlawful).

With recidivism as the subject matter in mind, we turn to the statute's language. In essence, subsection (a) says that "any alien" once "deported," who reappears in the United States without appropriate permission, shall be fined or "imprisoned not more than 2 years." Subsection (b) says that "any alien described in" subsection (a), "whose deportation was subsequent to a conviction" for a minor, or for a major, crime, may be subject to a much longer prison term.

The statute includes the words "subject to subsection (b)" at the beginning of subsection (a), and the words "[n]otwithstanding subsection (a)" at the beginning of subsection (b). If Congress intended (b) to set forth substantive crimes, in respect to which (a) would define a lesser included offense, see *Blockburger* v. *United States*, 284 U. S. 299, 304 (1932), what are those words doing there? The dissent believes that the words mean that the substantive crime defined by "subsection (a) is inapplicable to an alien covered by subsection (b)," *post*, at 18, hence the words represent an effort to say that a defendant cannot be punished for both substantive crimes. But that is not what the words say. Nor has Congress ever (to our knowledge) used these or similar words anywhere else in the federal criminal code for such a purpose. See, *e.g.*, 18 U. S. C. §113 (aggravated and simple assault); §§1111, 1112 (murder and manslaughter); §2113 (bank robbery and incidental crimes); §§2241, 2242 (aggravated and simple sexual abuse). And this should come as no surprise since, for at least 60 years, the federal courts have presumed that Congress does *not* intend for a defendant to be

cumulatively punished for two crimes where one crime is a lesser included offense of the other. See *Whalen* v. *United States*, 445 U. S. 684, 691–693 (1980); *Blockburger*, *supra*.

If, however, Congress intended subsection (b) to provide additional penalties, the mystery disappears. The words "subject to subsection(b)" and "[n]otwithstanding subsection (a)" then are neither obscure nor pointless. They say, without obscurity, that the crime set forth in (a), which both defines a crime and sets forth a penalty, is "subject to" (b)'s different penalties (where the alien is also a felon or aggravated felon). And (b)'s higher maximum penalties may apply to an offender who violates (a) "notwithstanding" the fact that (a) sets forth a lesser penalty for one who has committed the same substantive crime. Nor is it pointless to specify that (b)'s punishments, not (a)'s punishment, apply whenever an offender commits (a)'s offense in a manner set forth by (b).

Moreover, the circumstances of subsection (b)'s adoption support this reading of the statutory text. We have examined the language of the statute in 1988, when Congress added the provision here at issue. That original language does not help petitioner. In 1988, the statute read as follows (with the 1988 amendment underscored):

> "§1326. Reentry of deported alien; *criminal penalties for reentry of certain deported aliens*.
>
> *"(a) Subject to subsection (b) of this section*, any alien who–
>
> "(1) has been . . . deported . . . , and thereafter
>
> "(2) enters . . . , or is at any time found in, the United States [without the Attorney General's consent or the legal equivalent],
>
> "shall be guilty of a felony, and upon conviction thereof, be punished by imprisonment of not more than two years, or by a fine of not more than $1,000, or both.
>
> *"(b) Notwithstanding subsection (a) of this section, in*

> *the case of any alien described in such subsection—*
>
> *"(1) whose deportation was subsequent to a conviction for commission of a felony (other than an aggravated felony), such alien shall be fined under title 18, imprisoned not more than 5 years, or both; or*
>
> *"(2) whose deportation was subsequent to a conviction for commission of an aggravated felony, such alien shall be fined under such title, imprisoned not more than 15 years, or both."* 8 U. S. C. §1326 (1988 ed.) (emphasis added).

Thus, at the time of the amendment, the operative language of subsection (a)'s ordinary reentering-alien provision said that a re-entering alien *"shall be guilty of a felony*, and *upon conviction thereof*, be punished by imprisonment of not more than two years, or by a fine of not more than §1,000." The 1988 amendment, subsection (b), by way of contrast, referred only to punishment— an increased punishment for the felon, or the aggravated felon, whom (a) has "described." Although one could read the language, "any alien described in [subsection (a)]," standing alone, as importing (a)'s elements into new offenses defined in (b), that reading seems both unusual and awkward when taken in context, for the reasons just given. Linguistically speaking, it seems more likely that Congress simply meant to "describe" an alien who, in the words of the 1988 statute, was "guilty of a felony" defined in subsection (a) and "convict[ed] thereof."

As the dissent points out, *post* at 19, Congress later struck from subsection (a) the words just quoted, and added in their place the words, "shall be fined under title 18, or imprisoned not more than two years." See Immigration Act of 1990 (1990 Act), §543(b)(3), 104 Stat. 5059. But this amendment was one of a series in the 1990 Act which uniformly updated and simplified the phrasing of various, disparate civil and criminal penalty provisions in the Immigration and Naturalization Act. See, *e.g.*, 1990

Act, §543(b)(1) (amending 8 U. S. C. §1282(c)); §543(b)(2)(C) (amending 8 U. S. C. §1325); §543(b)(4) (amending 8 U. S. C. §1327); §543(b)(5) (amending 8 U. S. C. §1328). The section of the Act that contained the amendment is titled "Increase in Fine Levels; Authority of the INS to Collect Fines," and the relevant subsection, simply "Criminal Fine Levels." 1990 Act, §543(b), 104 Stat. 5057, 5059. Although the 1990 amendment did have the effect of making the penalty provision in subsection (a) (which had remained unchanged since 1952) parallel with its counterparts in later-enacted subsection (b), neither the amendment's language, nor the legislative history of the 1990 Act, suggests that in this housekeeping measure, Congress intended to change, or to clarify, the fundamental relationship between the two subsections.

We also note that "the title of a statute and the heading of a section" are "tools available for the resolution of a doubt" about the meaning of a statute. *Trainmen* v. *Baltimore & Ohio R. Co.*, 331 U. S. 519, 528–529 (1947); see also *INS* v. *National Center for Immigrants' Rights, Inc.*, 502 U. S. 183, 189 (1991). The title of the 1988 amendment is "Criminal *penalties* for reentry of certain deported aliens." §7345, 102 Stat. 4471 (emphasis added). A title that contains the word "penalties" more often, but certainly not always, see *post*, at 14–15, signals a provision that deals with penalties for a substantive crime.

In this instance the amendment's title does not reflect careless, or mistaken, drafting, for the title is reinforced by a legislative history that speaks about, and only about, the creation of new penalties. See S. 973, 100th Cong., 1st Sess. (1987), 133 Cong. Rec. 8771 (1987) (original bill titled, "A bill to provide for additional criminal penalties for deported aliens who reenter the United States, and for other purposes"); 134 Cong. Rec. 27429 (1988) (section-by-section analysis referring to Senate bill as increasing penalties for unlawful reentry); *id.*, at 27445 (remarks of Sen.

D'Amato) (law would "increas[e] current penalties for illegal reentry after deportation"); *id.*, at 27462 (remarks of Sen. Chiles) (law would "impose stiff penalties" against deported aliens previously convicted of drug offenses); 133 Cong. Rec. 28840–28841 (1987) (remarks of Rep. Smith) (corresponding House bill creates three-tier penalty structure). The history, to our knowledge, contains no language at all that indicates Congress intended to create a new substantive crime.

Finally, the contrary interpretation– a substantive criminal offense– risks unfairness. If subsection (b)(2) sets forth a separate crime, the Government would be required to prove to the jury that the defendant was previously deported "subsequent to a conviction for commission of an aggravated felony." As this Court has long recognized, the introduction of evidence of a defendant's prior crimes risks significant prejudice. See, *e.g.*, *Spencer* v. *Texas*, 385 U. S. 554, 560 (1967) (evidence of prior crimes "is generally recognized to have potentiality for prejudice"). Even if a defendant's stipulation were to keep the name and details of the previous offense from the jury, see *Old Chief* v. *United States*, 519 U. S. ___, ___ (1997) (slip op., at __), jurors would still learn, from the indictment, the judge, or the prosecutor, that the defendant had committed an *aggravated* felony. And, as we said last Term, "there can be no question that evidence of the . . . *nature* of the prior offense," here, that it was "aggravated" or serious, "carries a risk of unfair prejudice to the defendant." *Id.*, at ___ (slip op., at 13) (emphasis added). Like several lower courts, we do not believe, other things being equal, that Congress would have wanted to create this kind of unfairness in respect to facts that are almost never contested. See, *e.g.*, *United States* v. *Forbes*, 16 F. 3d, at 1298–1300; *United States* v. *Rumney*, 867 F. 2d 714, 718–719 (CA1 1989); *United States* v. *Brewer*, 853 F. 2d 1319, 1324–1325 (CA6 1988) (en banc); *United States* v. *Jackson*,

824 F. 2d, at 25–26; *Government of Virgin Islands* v. *Castillo*, 550 F. 2d 850, 854 (CA3 1977).

In sum, we believe that Congress intended to set forth a sentencing factor in subsection (b)(2) and not a separate criminal offense.

B

We must also consider several additional arguments that have been or might be made for a contrary interpretation of the statute. First, one might try to derive a congressional intent to establish a separate crime from the *magnitude* of the increase in the maximum authorized sentence. The magnitude of the change that Congress made in 1988, however, proves little. That change– from a 2-year maximum to 5- and 15-year maximums– is well within the range set forth in other statutes that the lower courts have generally interpreted as providing for sentencing enhancements. Compare 8 U. S. C. §1326 (1988 ed.) with 21 U. S. C. §§841(b)(1)(B) and (D) (distributing less than 50 kilograms of marijuana, maximum 5 years; distributing 100 or more kilograms of marijuana, 5 to 40 years), §§841(b)(1)(A) and (C) (distributing less than 100 grams of heroin, maximum 20 years; distributing 1 kilogram or more of heroin, maximum of life imprisonment), §841(b)(1)(B) (distributing 500 grams or more of cocaine, 5 to 40 years; same, with prior drug felony conviction, 10 years to life); §962 (doubling maximum term for second and subsequent violations of drug importation laws); 18 U. S. C. §844 (using or carrying explosive device during commission of felony, maximum 10 years; subsequent offense, maximum 20 years); §2241(c) (sexual abuse of children, maximum life; second offense, mandatory life); §2320(a) (trafficking in counterfeit goods, maximum 10 years; subsequent offense maximum 20 years). Congress later amended the statute, increasing the maximums to 10 and to 20 years, respectively. Violent Crime Control and

Law Enforcement Act of 1994, §§130001(b)(1)(B) and (b)(2), 108 Stat. 2023. But nothing suggests that, in doing so, Congress intended to transform that statute's basic nature. And the later limits are close to the range suggested by other statutes regardless.

Second, petitioner and the dissent point, in part, to statutory language that did not exist when petitioner was convicted in 1995. Petitioner, for example, points out that in 1996, Congress added two new subsections, (b)(3) and (b)(4), which subsections, petitioner says, created new substantive crimes. See Antiterrorism and Effective Death Penalty Act of 1996, §401(c), 110 Stat. 1267 (adding subsection (b)(3)); Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), §305(b), 110 Stat. 3009–606 to 3009–607 (adding subsection (b)(4)). Both petitioner and the dissent also refer to another 1996 statutory provision in which Congress used the word "offense" to refer to the subsection now before us. See IIRIRA, §334, 110 Stat. 3009–635.

These later-enacted laws, however, are beside the point. They do not declare the meaning of earlier law. Cf. *Federal Housing Administration* v. *Darlington, Inc.*, 358 U. S. 84, 90 (1958). They do not seek to clarify an earlier enacted general term. Cf. *Red Lion Broadcasting Co.* v. *FCC*, 395 U. S. 367, 380–381 (1969). They do not depend for their effectiveness upon clarification, or a change in the meaning of an earlier statute. Cf. *Seatrain Shipbuilding Corp.* v. *Shell Oil Co.*, 444 U. S. 572, 595–596 (1980). They do not reflect any direct focus by Congress upon the meaning of the earlier enacted provisions. Cf. *ibid.; Darlington*, *supra*, at 86. Consequently, we do not find in them any forward looking legislative mandate, guidance, or direct suggestion about how courts should interpret the earlier provisions.

Regardless, it is not obvious that the two new subsections to which petitioner points create new crimes (a mat-

ter on which we express no view) nor, in adding them, did Congress do more than leave the legal question here at issue where it found it. The fact that Congress used a technical, crime-suggesting word– "offense"– eight years later in a different, and minor, statutory provision, proves nothing– not least because it is more than offset by different words in the same later statute that suggest with greater force the exact opposite, namely, the precise interpretation of the relation of subsection (b) to subsection (a) that we adopt. See IIRIRA, §321(c), 110 Stat. 3009–628 (stating that a new definition of "aggravated felony" applies *"under"* subsection (b) *"only to violations"* of subsection (a)).

Finally, petitioner and the dissent argue that the doctrine of "constitutional doubt" requires us to interpret subsection (b)(2) as setting forth a separate crime. As Justice Holmes said long ago, "[a] statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score." *United State* v. *Jin Fuey Moy*, 241 U. S. 394, 401 (1916) (citing *United States ex rel. Attorney General* v. *Delaware & Hudson Co.*, 213 U. S. 366, 408 (1909)); see also *Ashwander* v. *TVA*, 297 U. S. 288, 348 (1936) (Brandeis, J., concurring). "This canon is followed out of respect for Congress, which we assume legislates in light of constitutional limitations." *Rust* v. *Sullivan*, 500 U. S. 173, 191 (1991); see also *FTC* v. *American Tobacco Co.*, 264 U. S. 298, 305–307 (1924). The doctrine seeks in part to minimize disagreement between the Branches by preserving congressional enactments that might otherwise founder on constitutional objections. It is not designed to aggravate that friction by creating (through the power of precedent) statutes foreign to those Congress intended, simply through fear of a constitutional difficulty that, upon analysis, will evaporate. Thus, those who invoke the doctrine must believe that the alternative is a serious likeli-

hood that the statute will be held unconstitutional. Only then will the doctrine serve its basic democratic function of maintaining a set of statutes that reflect, rather than distort, the policy choices that elected representatives have made. For similar reasons, the statute must be genuinely susceptible to two constructions after, and not before, its complexities are unraveled. Only then is the statutory construction that avoids the constitutional question a "fair" one.

Unlike the dissent, we do not believe these conditions are met in the present case. The statutory language is somewhat complex. But after considering the matter in context, we believe the interpretative circumstances point significantly in one direction. More important, even if we were to assume that petitioner's construction of the statute is "fairly possible," *Jin Fuey Moy*, *supra*, the constitutional questions he raises, while requiring discussion, simply do *not* lead us to doubt gravely that Congress may authorize courts to impose longer sentences upon recidivists who commit a particular crime. The fact that we, unlike the dissent, do not gravely doubt the statute's constitutionality in this respect is a crucial point. That is because the "constitutional doubt" doctrine does not apply mechanically whenever there arises a significant constitutional question the answer to which is not obvious. And precedent makes clear that the Court need not apply (for it has not always applied) the doctrine in circumstances similar to those here– where a constitutional question, while lacking an obvious answer, does not lead a majority gravely to doubt that the statute is constitutional. See, *e.g.*, *Rust*, 500 U. S., at 190–191 (declining to apply doctrine although petitioner's constitutional claims not "without some force"); *id.*, at 204–207 (Blackmun, J., dissenting); *United States* v. *Monsanto*, 491 U. S. 600, 611 (1989); *id.*, at 636 (Blackmun, J., dissenting); *United States* v. *Locke*, 471 U. S. 84, 95 (1985); *id.*, at 120 (STEVENS, J.,

dissenting).

III

Invoking several of the Court's precedents, petitioner claims that the Constitution requires Congress to treat recidivism as an element of the offense– irrespective of Congress' contrary intent. Moreover, petitioner says, that requirement carries with it three subsidiary requirements that the Constitution mandates in respect to ordinary, legislatively intended, elements of crimes. The indictment must state the "element." See, *e.g.*, *Hamling* v. *United States*, 418 U. S., at 117. The Government must prove that "element" to a jury. See, *e.g.*, *Duncan* v. *Louisiana*, 391 U. S. 145, 149 (1968). And the Government must prove the "element" beyond a reasonable doubt. See, *e.g.*, *Patterson* v. *New York*, 432 U. S 197, 210 (1977). We cannot find sufficient support, however, in our precedents or elsewhere, for petitioner's claim.

This Court has explicitly held that the Constitution's Due Process Clause "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U. S. 358, 364 (1970). But *Winship*, the case in which the Court set forth this proposition of constitutional law, does not decide this case. It said that the Constitution entitles juveniles, like adults, to the benefit of proof beyond a reasonable doubt in respect to the *elements* of the crime. It did not consider whether, or when, the Constitution requires the Government to treat a particular fact as an element, *i.e.*, as a "fact necessary to constitute the crime," even where the crime-defining statute does not do so.

Mullaney v. *Wilbur*, 421 U. S. 684 (1975), provides petitioner with stronger support. The Court there struck down a state homicide statute under which the State presumed that all homicides were committed with "malice,"

punishable by life imprisonment, unless the defendant proved that he had acted in the heat of passion. *Id.*, at 688. The Court wrote that "if *Winship* were limited to those facts that constitute a crime as defined by state law, a State could undermine many of the interests that decision sought to protect" just by redefining "the elements that constitut[ed] different crimes, characterizing them as factors that bear solely on the extent of punishment." *Id.*, at 698. It simultaneously held that the prosecution must establish "beyond a reasonable doubt" the nonexistence of "heat of passion"– the fact that, under the State's statutory scheme, distinguished a homicide punishable by a life sentence from a homicide punishable by a maximum of 20 years. *Id.*, at 704. Read literally, this language, we concede, suggests that Congress cannot permit judges to increase a sentence in light of recidivism, or any other factor, not set forth in an indictment and proved to a jury beyond a reasonable doubt.

This Court's later case, *Patterson* v. *New York*, *supra*, however, makes absolutely clear that such a reading of *Mullaney* is wrong. The Court, in *Patterson*, pointed out that the State in *Mullaney* made the critical fact– the absence of "heat of passion"– *not* simply a potential sentencing factor, *but also* a critical part of the definition of "malice aforethought," which was itself in turn "part of" the statute's definition of "homicide," the crime in question. *Patterson*, 432 U. S., at 215–216. (The Maine Supreme Court, in defining the crime, had said that "malice" was "presumed" unless "rebutted" by the defendant's showing of "heat of passion." *Id.*, at 216.) The Court found this circumstance extremely important. It said that *Mullaney* had considered (and held "impermissible") the shifting of a burden of proof *"with respect to a fact which the State deems so important that it must be either proved or presumed."* 432 U. S., at 215 (emphasis added). And the Court then held that similar burden-shifting *was* permis-

sible with respect to New York's homicide-related sentencing factor "extreme emotional disturbance." *Id.*, at 205–206. That factor was not a factor that the state statute had deemed "so important" in relation to the crime that it must be either "proved or presumed." *Id.*, 205–206, 215.

The upshot is that *Mullaney*'s language, if read literally, suggests that the Constitution requires that most, if not all, sentencing factors be treated as elements. But *Patterson* suggests the exact opposite, namely that the Constitution requires scarcely any sentencing factors to be treated in that way. The cases, taken together, cannot significantly help the petitioner, for the statute here involves a sentencing factor– the prior commission of an aggravated felony– that is neither "presumed" to be present, nor need be "proved" to be present, in order to prove the commission of the relevant crime. See 8 U. S. C. §1326(a) (defining offense elements). Indeed, as we have said, it involves one of the most frequently found factors that effects sentencing– recidivism.

Nor does *Specht* v. *Patterson*, 386 U. S. 605 (1967), which petitioner cites, provide significant additional help, for *Specht* was decided before *Patterson* (indeed before *Winship*); it did not consider the kind of matter here at issue; and, as this Court later noted, the Colorado defendant in *Specht* was "confronted with 'a radically different situation' from the usual sentencing proceeding." *McMillan* v. *Pennsylvania*, 477 U. S., at 89. At most, petitioner might read all these cases, taken together, for the broad proposition that *sometimes* the Constitution does require (though sometimes it does not require) the State to treat a sentencing factor as an element. But we do not see how they can help petitioner more than that.

We turn then to the case upon which petitioner must primarily rely, *McMillan* v. *Pennsylvania*, *supra*. The Court there considered a Pennsylvania statute that set

forth a sentencing factor– "visibly possessing a firearm"– the presence of which required the judge to impose a minimum prison term of five years. The Court held that the Constitution did *not* require the State to treat the factor as an element of the crime. In so holding, the Court said that the State's "link[ing] the 'severity of punishment' to 'the presence or absence of an identified fact'" did *not* automatically make of that fact an "element." 477 U. S., at 84 (quoting *Patterson* v. *New York*, *supra*, at 214). It said, citing *Patterson*, that "the state legislature's definition of the elements of the offense is usually dispositive." 477 U. S., at 85. It said that it would not "define precisely the constitutional limits" of a legislature's power to define the elements of an offense. *Id*., at 86. And it held that, whatever those limits might be, the State had not exceeded them. *Ibid*. Petitioner must therefore concede that "firearm possession" (in respect to a mandatory minimum sentence) does not violate those limits. And he must argue that, nonetheless, "recidivism" (in respect to an authorized maximum) does violate those limits.

In assessing petitioner's claim, we have examined *McMillan* to determine the various features of the case upon which the Court's conclusion arguably turned. The *McMillan* Court pointed out: (1) that the statute plainly "does not transgress the limits expressly set out in *Patterson*," *id*., at 86; (2) that the defendant (unlike *Mullaney*'s defendant) did not face "'a differential in sentencing ranging from a nominal fine to a mandatory life sentence,'" 477 U. S., at 87 (quoting *Mullaney*, 421 U. S., at 700); (3) that the statute did not "alte[r] the maximum penalty for the crime" but "operates solely to limit the sentencing court's discretion in selecting a penalty within the range already available to it," 477 U. S., at 87–88; (4) that the statute did not "creat[e] a separate offense calling for a separate penalty," *id*., at 88; and (5) that the statute gave "no impression of having been tailored to permit the

visible possession finding to be a tail which wags the dog of the substantive offense," but, to the contrary, "simply took one factor that has always been considered by sentencing courts to bear on punishment . . . and dictated the precise weight to be given that factor," *id.*, at 88, 89–90.

This case resembles *McMillan* in respect to most of these factors. But it is different in respect to the third factor, for it does "alte[r] the maximum penalty for the crime," 477 U. S., at 87; and, it also creates a wider range of appropriate punishments than did the statute in *McMillan*. We nonetheless conclude that these differences do not change the constitutional outcome for several basic reasons.

First, the sentencing factor at issue here– recidivism– is a traditional, if not the most traditional, basis for a sentencing court's increasing an offender's sentence. See, *e.g.*, *Parke* v. *Raley*, 506 U. S. 20, 26 (1992) (Recidivism laws "have a long tradition in this country that dates back to colonial times" and currently are in effect in all 50 States); U. S. Dept. of Justice, Office of Justice Programs, Statutes Requiring the Use of Criminal History Record Information 17–41 (June 1991) (50-state survey); USSG §§4A1.1, 4A1.2 (Nov. 1997) (requiring sentencing court to consider defendant's prior record in every case). Consistent with this tradition, the Court said long ago that a State need *not* allege a defendant's prior conviction in the indictment or information which alleges the elements of an underlying crime, even though the conviction was "necessary to bring the case within the statute." *Graham* v. *West Virginia*, 224 U. S. 616, 624 (1912). That conclusion followed, the Court said, from *"the distinct nature of the issue,"* and the fact that recidivism "does not relate to the commission of the offense, *but goes to the punishment only*, and therefore . . . may be subsequently decided." *Id.*, at 629 (emphasis added). The Court has not deviated from this view. See *Oyler* v. *Boles*, 368 U. S. 448, 452 (1962) (due process does

not require advance notice that trial for substantive offense will be followed by accusation that the defendant is an habitual offender); *Parke*, *supra*, at 27 ("[A] charge under a recidivism statute does not state a separate offense, but goes to punishment only"). And, as we said before, *infra*, at 5–6, Congress, reflecting this tradition, has never, to our knowledge, made a defendant's recidivism an element of an offense where the conduct proscribed is otherwise unlawful. See *United States* v. *Jackson*, 824 F. 2d 21, 25, and n. 6 (CADC 1987) (R. Ginsburg, J.) (referring to fact that few, if any, federal statutes make "prior criminal convictions . . . elements of another criminal offense to be proved before the jury"). Although these precedents do not foreclose petitioner's claim (because, for example, the state statute at issue in *Graham* and *Oyler* provided for a jury determination of disputed prior convictions), to hold that the Constitution requires that recidivism be deemed an "element" of petitioner's offense would mark an abrupt departure from a longstanding tradition of treating recidivism as "go[ing] to the punishment only." *Graham*, *supra*, at 629.

Second, the major difference between this case and *McMillan* consists of the circumstance that the sentencing factor at issue here (the prior conviction) triggers an increase in the maximum permissive sentence, while the sentencing factor at issue in *McMillan* triggered a mandatory minimum sentence. Yet that difference– between a permissive maximum and a mandatory minimum– does not systematically, or normally, work to the disadvantage of a criminal defendant. To the contrary, a statutory minimum binds a sentencing judge; a statutory maximum does not. A mandatory minimum can, as JUSTICE STEVENS dissenting in *McMillan* pointed out, "mandate a *minimum* sentence of imprisonment more than twice as severe as the *maximum* the trial judge would otherwise have imposed." *McMillan*, *supra*, at 95. It can eliminate a

sentencing judge's discretion in its entirety. See, *e.g.*, 18 U. S. C. §2241(c) (authorizing maximum term of life imprisonment for sexual abuse of children; mandating life imprisonment for second offense). And it can produce unfairly disproportionate impacts on certain kinds of offenders. See United States Sentencing Commission, Mandatory Minimum Penalties in the Federal Criminal Justice System 26–34 (Aug. 1991) (discussing "tariff" and "cliff" effects of mandatory minimums). In sum, the risk of unfairness to a particular defendant is no less, and may well be greater, when a mandatory minimum sentence, rather than a permissive maximum sentence, is at issue.

Although *McMillan* pointed to a difference between mandatory minimums and higher authorized maximums, it neither, "rested its judgment" on that difference, nor "rejected" the above analysis, as the dissent contends, *post*, at 7. Rather, *McMillan* said that the petitioners' argument in that case would have had "more *superficial* appeal" if the sentencing fact "exposed them to greater or additional punishment." 477 U. S., at 88 (emphasis added). For the reasons just given, and in light of the particular sentencing factor at issue in this case– recidivism– we should take *McMillan*'s statement to mean no more that it said, and therefore not to make a determinative difference here.

Third, the statute's broad permissive sentencing range does not itself create significantly greater unfairness. Judges (and parole boards) have typically exercised their discretion within broad statutory ranges. See, *e.g.*, *supra*, at 6, 9 (statutory examples); National Institute of Justice, Sentencing Reform in the United States (Aug. 1985) (survey of sentencing laws in the 50 States); L. Friedman, Crime and Punishment in American History 159–163 (1993) (history of indeterminate sentencing). And the Sentencing Guidelines have recently sought to channel that discretion using "sentencing factors" which no one

here claims that the Constitution thereby makes "elements" of a crime.

Finally, the remaining *McMillan* factors support the conclusion that Congress has the constitutional power to treat the feature before us– prior conviction of an aggravated felony– as a sentencing factor for this particular offense (illegal entry after deportation). The relevant statutory provisions do not change a pre-existing definition of a well-established crime, nor is there any more reason here, than in *McMillan*, to think Congress intended to "evade" the Constitution, either by "presuming" guilt or "restructuring" the elements of an offense. Cf. *McMillan*, *supra*, at 86–87, 89–90.

For these reasons, we cannot find in *McMillan* (a case holding that the Constitution *permits* a legislature to *require* a longer sentence for gun possession) significant support for the proposition that the Constitution *forbids* a legislature to *authorize* a longer sentence for recidivism.

Petitioner makes two basic additional arguments in response. He points to what he calls a different "tradition"– that of courts having treated recidivism as an element of the related crime. See, *e.g.*, *Massey* v. *United States*, 281 F. 293, 297–298 (CA8 1922); *Singer* v. *United States*, 278 F. 415, 420 (CA3 1922); *People* v. *Sickles*, 51 N. E. 288, 289 (N. Y. 1898); see also *post*, at 9–10 (citing authority). We do not find this claim convincing, however, for any such tradition is not uniform. See *Spencer* v. *Texas*, 385 U. S., at 566 ("The method for determining prior convictions . . . varies between jurisdictions affording a jury trial on this issue . . . and those leaving that question to the court"); Note, Recidivist Procedures, 40 N. Y. U. L. Rev. 332, 347 (1965) (as of 1965, eight States' recidivism statutes provide for determination of prior convictions by judge, not jury). Nor does it appear modern. Compare *State* v. *Thorne*, 129 Wash. 2d 736, 776–784, 921

P. 2d 514, 533–538 (1996) (upholding state recidivism law against federal constitutional challenge) with *State* v. *Furth*, 5 Wash. 2d 1, 11–19, 104 P.2d 925, 930–933 (1940). And it nowhere (to our knowledge) rested upon a federal constitutional guarantee. See, *e.g.*, *Massey* v. *United States*, *supra*, at 297 (applying federal law, noting jury determination of prior offense applied "unless the statute designates a different mode of procedure").

Petitioner also argues, in essence, that this Court should simply adopt a rule that any significant increase in a statutory maximum sentence would trigger a Constitutional "elements" requirement. We have explained why we believe the Constitution, as interpreted in *McMillan* and earlier cases, does not impose that requirement. We add that such a rule would seem anomalous in light of existing case law that permits a judge, rather than a jury, to determine the existence of factors that can make a defendant eligible for the death penalty, a punishment far more severe than that faced by petitioner here. See *Walton* v. *Arizona*, 497 U. S. 639, 647 (1990) (rejecting capital defendant's argument that every finding of fact underlying death sentence must be made by a jury); *Hildwin* v. *Florida*, 490 U. S. 638, 640–641 (1989) *(per curiam)* (judge may impose death penalty based on his finding of aggravating factor because such factor is not element of offense to be determined by jury); *Spaziano* v. *Florida*, 468 U. S. 447, 465 (1984) (same). And we would also find it difficult to reconcile any such rule with our precedent holding that the sentencing-related circumstances of recidivism are not part of the definition of the offense for double jeopardy purposes. *Graham*, 224 U. S., at 623–624.

For these reasons, we reject petitioner's constitutional claim that his recidivism must be treated as an element of his offense.

IV

We mention one final point. Petitioner makes no separate, subsidiary, standard of proof claims with respect to his sentencing, perhaps because he admitted his recidivism at the time he pleaded guilty and would therefore find it difficult to show that the standard of proof could have made a difference to his case. Accordingly, we express no view on whether some heightened standard of proof might apply to sentencing determinations which bear significantly on the severity of sentence. Cf. *United States* v. *Watts*, 519 U. S. ___, ___ and n. 2 (1997) *(per curiam)* (slip op., at 8, and n. 2) (acknowledging, but not resolving, "divergence of opinion among the Circuits" as to proper standard for determining the existence of "relevant conduct" that would lead to an increase in sentence).

The judgment of the Court of Appeals is

Affirmed.