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BLAKELY V. WASHINGTON AND THE FUTURE OF THE SENTENCING GUIDELINES

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BEFORE THE

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BLAKELY V. WASHINGTON AND THE FUTURE OF THE SENTENCING GUIDELINES

TUESDAY, JULY 13, 2004

UNITED STATES SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to notice, at 10:06 a.m., in room SD–226, Dirksen Senate Office Building, Hon. Orrin G. Hatch, Chairman of the Committee, presiding.

Present: Senators Hatch, Sessions, Cornyn, Leahy, Kennedy, and Durbin.

OPENING STATEMENT OF HON. ORRIN G. HATCH, A U.S. SENATOR FROM THE STATE OF UTAH

Chairman HATCH. We are happy to have you all here this morning, so we welcome you to the Judiciary Committee's hearing examining the Supreme Court's recent holding or decision in *Blakely* v. *Washington* and the future of the Federal sentencing guidelines.

As one of the original cosponsors of the United States Sentencing Commission and a proponent of reducing sentencing disparity across the Nation, I have a strong interest in preserving the integrity of the Federal Guidelines against constitutional attack. However, I am also open because I want to hear what you good authorities have to say about this.

As many here may already know, defendants are routinely sentenced by judges who decide sentencing facts based upon a preponderance of the evidence standard. Now, this has all changed in the last two weeks. On June 24, 2004, in *Blakely* v. *Washington*, the Supreme Court held that any fact that increases the maximum penalty under a State statutory sentencing guidelines scheme must be presented to a jury and proved beyond a reasonable doubt, even though the defendant's sentence falls below the statutory maximum sentence.

Although the Supreme Court explicitly stated in a footnote that, quote, "The Federal Guidelines are not before us and we express no opinion on them," unquote, it also characterized the Government's amicus brief as questioning whether differences between the State and Federal sentencing schemes are constitutionally significant. The ambiguity apparent in *Blakely* and the strong suggestions by the dissent that it will apply to the Federal sentencing guidelines has understandably created angst throughout the Federal criminal justice system.

If *Blakely* were to apply to the Federal sentencing guidelines, you would have a clear double standard. Any sentencing fact that

would increase a sentence would have to be presented to a jury and proven beyond a reasonable doubt, but any sentencing fact that would decrease a sentence would be decided by a judge by a preponderance of the evidence. Not only would this be incredibly confusing to everyone involved in this process, but I imagine that crime victims and their families would consider this one-way ratchet to be fundamentally unfair.

In the last two-and-a-half weeks alone, the criminal justice system has begun to run amok. Some judges have thrown out the guidelines and are sentencing defendants with unfettered discretion. Other judges have adopted some of the guidelines, those guidelines that favor defendants, and ignored all guidelines that might increase a defendant's sentence. Still other judges have convened juries to decide sentencing factors that might increase a sentence even though there are no procedures in place to govern such sentencing juries. Prosecutors are submitting verdict forms for juries that are over 20 pages in length because they cover every possible sentencing factor that might be applied in a particular case.

While I believe most Federal judges are trying their hardest to address this issue deliberately and with the utmost fairness, I fear that some judges might view *Blakely* as an opportunity to selfishly garner judicial power in the hopes of restoring unlimited judicial discretion with respect to sentencing. Even among those judges with the best of intentions, however, there is legitimate disagreement about whether Federal sentencing guidelines will be subject to the proof and procedural requirements announced in *Blakely*.

You have heard of circuit splits, but here we have splits within a single district. Not only have the Fifth and Seventh Circuit disagreed on this issue, but in my home State of Utah, district judges have adopted three different approaches to sentencing defendants in light of *Blakely*. As I am sure Judge Cassell will explain in m ore detail in his testimony, he found the Federal guidelines unconstitutional as applied in *United States* v. *Croxford*. But just yesterday, Judge Dee Benson, the chief judge of the Federal district court, upheld the Federal sentencing guidelines.

I am heartened to hear that just yesterday afternoon, the Second Circuit en banc certified a set of three questions for the United States Supreme Court and urged it to adjudicate promptly the threshold issue of whether *Blakely* applies to the Federal sentencing guidelines. I hope the Supreme Court promptly considers this matter.

I know we will hear more about what is going on in the courts from our witnesses, so I will not go on at length about these cases now. I would, however, like to mention just a couple of examples for those who have not been following the issue closely.

I am sure we all recall Dwight Watson, the man who sat in a tractor last year outside the U.S. Capitol for 47 hours and threatened to blow up the area with organophosphate bombs. The day before the *Blakely* opinion, Mr. Watson was sentenced to a 6-year prison sentence. Less than a week after the Supreme Court's opinion, he was re-sentenced to 16 months, which was essentially time served. He is now a free man.

A defendant in West Virginia had an offense level that was off the sentencing charts. Although he would have been subject to a

life sentence under the guidelines, the statutory maximum penalty was 20 years. He was given a 20-year sentence 3 days before *Blakely* was decided. A week later, his sentence was drastically reduced to 12 months. The judge did not rely on any relevant conduct or any sentencing enhancements in calculating the defendant's sentence. In other words, he only applied a portion of the sentencing guidelines—those that he thought remained valid after *Blakely*.

Blakely is potentially harmful to defendants, as well as to prosecutors. Right now, the Federal Rules of Evidence prevent extraneous information about prior bad acts from coming before a jury during a trial. But the Federal Rules of Evidence do not apply at sentencing hearings. If *Blakely* applies to the Federal sentencing guidelines, the rules may need to be amended to ensure that prior bad acts that constitute relevant conduct can be presented to a jury so that they can determine sentencing facts.

In addition, it is possible that some here in Congress may respond by creating new mandatory minimum penalties to compensate for this unfettered discretion. The House already has legislation pending that would do exactly that. It may only take a couple of lenient sentences in high-profile cases to raise enough of a stir to increase mandatory minimum penalties. And I have to say I have real concerns about that.

Another long-term problem for defendants is in negotiating plea agreements. Prosecutors who are better acquainted with sentencing nuances will be in a better position to dictate which factors will apply in the 97 percent of cases that plead out each year. This will result in greater disparity among equally culpable defendants across the Nation.

I have been working with my colleagues on the left, as well as my counterparts in the House, to come up with a temporary bipartisan fix to this sentencing dilemma that now faces our Nation. Although we do not have any legislative language as of yet, we are looking at a proposal that is similar to one that Professor Frank Bowman, one of our witnesses today, proposed to the Sentencing Commission a couple of weeks ago. In addition to raising the maximum penalties within a guideline range to the statutory maximum penalty, we are considering some safeguards to prevent hanging judges from sentencing all defendants to the statutory maximum.

As you can see, this is somewhat of a mess, some of which may have been created by us, and some of which may have by necessity been created by some of you. All I can say is that we need to get together and resolve these matters in ways that are in the best interest of criminal justice in our society.

I have long had problems with the sentencing of the girlfriend couriers to big, stiff jail terms, while the pleading defendant drug king gets off with a much, much more minor sentence. I also have had lots of problems with sentencing people to Federal prison, at a cost of $30,000 to $40,000 a year to the taxpayers, who are not dangerous at all.

I am hopeful that through some of these hearings, we can maybe come to some ways of making sure people pay proper penalties, but yet we don't sock the taxpayers as much as we have been socking them, and that we do more justice in our sentencing approaches. A lot of judges hate the sentencing guidelines; they hate the man-

datory minimums. I can understand why, but the judges themselves were one of the reasons why we went to that form of law because so many of them were disparate in their approach toward sentencing through the years. And some of them were downright dishonorable in some of the sentences that they gave.

So this is an important hearing. We have got very important people here who should be able to enlighten this Committee and help us to go from here and do a better job than we have done in the past.

[The prepared statement of Senator Hatch appears as a submission for the record.]

With that, I will turn the time over to Senator Leahy, and then we will go to our witnesses.

STATEMENT OF HON. PATRICK J. LEAHY, A U.S. SENATOR FROM THE STATE OF VERMONT

Senator LEAHY. Well, thank you, Mr. Chairman. Of course, the main reason we are here today is because of the Supreme Court decision, not because of the decision of any of our panelists, other Federal judges, or decisions of people in the Congress.

We should also point out that regardless of the reasonings for some of the mandatory minimums Congress passed—and I am sure I can find some that, in retrospect, I should not have voted on—many of them were passed because a number of crimes were federalized and mandatory minimums made for great press release back home.

It allowed members of Congress to show just how tough they are on crime. Many found it easy to take the latest issue appearing in the newspaper that day, whether it be violent car-jacking or anything else, and say, "let's make a Federal crime out of this. Even though the State and local police are usually able to handle it fine, we will make a Federal crime out of it and add a mandatory minimum. And, by the way, let's give a speech about the clogged-up Federal courts."

The Supreme Court's ruling last month in *Blakely* v. *Washington*, I believe, threatens to crumble the very foundation of the Federal system of sentencing guidelines that Congress established 20 years ago in the Sentencing Reform Act of 1984. At that time, members of this Committee took the lead in crafting the Sentencing Reform Act. Today, we have to revisit that landmark legislation in the light of the *Blakely* decision.

So to begin, I want to thank all of the witnesses who have taken the time to come here today. We have two very distinguished panels of experts.

The issue in *Blakely* was the constitutionality of a State sentencing system that allowed the judge to impose an exceptional sentence in a kidnapping case above the standard guideline range because the judge found the defendant's conduct involved deliberate cruelty. Those who have read the case would agree, I believe, that the defendant was deliberately cruel.

In a five-to-four decision written by Justice Scalia, the Court held that this sentencing scheme violated the defendant's Sixth Amendment right to a jury trial because the maximum sentence a judge

may impose can only be based on the facts reflected in the jury verdict or admitted by the defendant.

Unfortunately, though, Justice Scalia's opinion raises more questions than it answers. We saw cogent dissents by Justice Breyer and Justice O'Connor, and they articulated many of the critical issues that are now going to flood our already burdened criminal justice system, starting with the obvious one: does *Blakely* apply to the Federal guidelines.

The Seventh Circuit and several district court judges have already ruled, as the Chairman pointed out, that *Blakely* doomed some, if not all of the current Federal guideline system. The Fifth Circuit held that the guidelines survived *Blakely*. The Second Circuit, my circuit, effectively punted; they certified the question to the Supreme Court—something I don't think they had done for 20 years or more.

Now, whether we disagree or not with Justice Scalia's opinion, the Court has spoken and that is the law. Like Federal judges, prosecutors and defense attorneys who must now grapple with the scope and impact of the *Blakely* opinion, we in Congress are concerned. As I started reading over this material last night, I thought to myself, do we have a situation where we have created a prosecutor's nightmare and a defense counsel's dream? Many would read the *Blakely* decision to be just exactly that.

So I hope that this hearing is going to be helpful. I want to find out whether we have a prosecutor's nightmare and a defense counsel's dream. I want to hear from the experts and petitioners who are testifying before us about what aspects, if any, of the Federal sentencing system can or are likely to survive *Blakely*. We need to explore what will happen to the thousands of criminal cases that are currently pending, and actually the hundreds of thousands of cases that were resolved pre-*Blakely*.

Twenty years after the enactment of the Sentencing Reform Act, we have to remind ourselves about the core values and principles that explain the bipartisan popularity of the original Federal guidelines concept. The 1984 Act was enacted against a history of racial, geographical and other unfair disparities in sentencing.

Congress sought to narrow those disparities, while leaving judges enough discretion to do justice in the particular circumstances of each individual case. The task of harmonizing sentencing policies was deliberately placed in the hands of an independent Sentencing Commission. The guidelines, as originally conceived, were about fairness, consistency, predictability, reasoned discretion, and minimizing the role of Congressional politics and the ideology of the individual judge in sentencing.

Unfortunately, Justice Scalia's decision in *Blakely* threatens a return to the bad old days of fully indeterminate sentencing when improper factors such as race, geography and the predilections of the sentencing judge could drastically affect the sentence. While I favor Federal judges exercising their discretion to do individual justice in individual cases, I don't want to see us go back to the bad old days.

I also think we have to avoid moving too far in the other extreme. In recent years, Congress has seriously undermined the

basic structure and fairness of the Federal guidelines system. We have done it with posturing and ideology.

There has been a flood of legislation establishing mandatory minimum sentences for an ever-increasing number of offenses. As I said, many of them should have been left in the State system, but many have become Federal offenses with mandatory minimums as determined by politics rather than any systemic analysis of the relative seriousness of different crimes.

There has been ever-increasing pressure on the Sentencing Commission and on individual district court judges to increase guideline sentences. This culminated in the PROTECT Act, in which this Congress got the Commission out altogether, rewrote large sections of the guidelines manual, and also provided for a judicial blacklist to intimidate judges whose sentences were insufficiently draconian to suit the current Justice Department.

We are all familiar with the assault on judicial independence known as the Feeney amendment to the PROTECT Act. It was forced through Congress, virtually no debate, and without meaningful input from judges, practitioners, prosecutors or defense attorneys. That process was particularly unfortunate, given that the majority's justification for the amendment, a supposed crisis of downward departures, was unfounded. In fact, downward departure rates were below the range contemplated by Congress when it authorized the Federal sentencing guidelines, except for departures requested by the Federal Government, by the current Justice Department.

Having a false factual predicate for forcing significantly flawed Congressional action has become all too familiar during the past few years. The attitude underlying too many of these recent developments seems to be that politicians in Washington are better at sentencing than the Federal trial judges who preside over individual cases, and that longer sentences are always better, no matter what the cost to society might be.

Somewhere along the line, we appear to have forgotten that justice is not just about treating like cases alike. It is also about treating different cases differently. *Blakely* raises real practical problems that unfortunately are going to clog our Federal courts with procedural and constitutional nightmares. But we can use it as a springboard to discuss Federal sentencing practices thoughtfully. As we analyze *Blakely*'s implications, let's keep in mind the simple principles of the 1984 Act, passed with strong support of Republicans and Democrats alike. We must respect the wisdom and good faith of Federal judges, while maintaining the safeguards of structure and transparency to their exercise of discretion. We must remember that consistency and predictability to sentencing are admirable goals. And let us avoid the further politicizing of sentencing.

So I look forward to working with the Chairman and all members of this Committee to see if we can find our way out of this mess.

Thank you, Mr. Chairman.

[The prepared statement of Senator Leahy appears as a submission for the record.]

Chairman HATCH. Thank you.

I am going to turn to Senator Kennedy, who has been Chairman of this Committee, and then to Senator Sessions. Then we will move to our witnesses.

STATEMENT OF HON. EDWARD M. KENNEDY, A U.S. SENATOR FROM THE STATE OF MASSACHUSETTS

Senator KENNEDY. Thank you very much, Mr. Chairman, and thank you for having this hearing. It is enormously important.

In preparing for the hearing, I went back over the time of the consideration of this Committee. It took 10 years for this Committee to actually report out the legislation which I introduced in 1975, and it was reported out in 1984. It had days of hearings, and I think the legislation that was reported out tried to deal with what was the general challenge that we were facing at the time in terms of our sentencing system, characterized by unfettered judicial discretion. It was, in Judge Frankel's words, "lawless."

Similarly situated defendants received dramatically different sentences. Sentences were subject to personal philosophies and biases of individual judges. As a result, substantial disparities based on race, ethnicity, geography and improper factors were prevalent. There was no truth in sentencing. Sentences handed down by judges did not always reflect the actual time a defendant would serve, and there was little transparency or accountability in the sentencing system.

Now, we have to try and find what the next steps will be. We have a short-term challenge and a long-term challenge. I believe that any fair reading of the history of the Sentencing Commission would have to conclude it has been trying to improve the system and trying to find a middle ground. But time and time again, their efforts have been blocked. The Justice Department has worked to squeeze every bit of discretion and humanity out of the system, and now we have a backlash from the Supreme Court and the entire system is in peril and there is a real question about what we have to do next.

It may, in the short term, make sense to do nothing and wait until the Supreme Court gives greater clarification. But over the long term, we have to examine the effectiveness of the mandatory minimums. We ought to look again at the disparity between crack and powder cocaine, which has been out there for years. We ought to take a look at the departure standards and we ought to take a look at the complexity of the guidelines.

I think we have one last chance to fix this system and make it fair and effective. I look forward to working in a bipartisan way with our Chairman, who was very much involved in the development of the sentencing guidelines initially. We did it in a broad bipartisan way. Hopefully, we can do the same and get it right this time. I welcome all of our panelists here today.

Thank you, Mr. Chairman.

[The prepared statement of Senator Kennedy appears as a submission for the record.]

Chairman HATCH. Well, thank you, Senator.

Senator Sessions, we will wind up with you.

STATEMENT OF HON. JEFF SESSIONS A U.S. SENATOR FROM THE STATE OF ALABAMA

Senator SESSIONS. Thank you, Mr. Chairman.

I was, like Mr. Mercer, a United States Attorney prosecuting Federal cases when this Congress passed the sentencing guidelines. I remember distinctly, as referred to in Justice O'Connor's dissent, a bank robbery defendant going before one judge and getting 25 years and going before another judge and getting probation. There were tremendous inconsistencies.

Some judges just had an aversion to sentencing; they didn't believe in sentencing. Some judges were tough sentencers. There was great disparity. There was racial disparity in the system, as Justice O'Connor mentions in her dissent to this *Blakely* case.

The Congress, after great effort, passed the sentencing guidelines, which was a tremendous achievement, in my view. It worked in the real world. Mr. Steer and his commission and others have worked hard to make it a practical and workable system. It worked better than anybody would have thought.

They predicted, you remember, Senators Kennedy and Hatch, that everybody would go to trial and nobody would plead guilty. Now, we have a higher number of guilty pleas than we ever had because people know what they are subjected to if they go to trial and what the options are. The outcome is not a mere crap shoot.

I thought *Apprendi* was a bad decision. This *Blakely* decision is stunning in its impact. It undercuts the basic justice system. It is a complete confusion of law. It indicates to me that members of the Supreme Court do not understand how the criminal justice system works. They think juries are going to sit around and decide these issues. Juries come in, render a verdict, pick up their check and go home. Then the judge has hearings on the facts and renders opinions on what the appropriate sentence is going to be.

They can't bring this evidence before a jury during the trial because often it would bias the outcome of the case. It would impact a jury by causing them to be inflamed, perhaps, and to render a verdict of guilty or not on issues that are irrelevant to the case.

So sentencing has always been in the province of the judge. Judges have always had the ability to sentence within the sentencing maximum range given by Congress or the State legislatures, and now we have this confused and dangerous ruling.

Mr. Chairman, I read the Sixth Amendment: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury in the state and district where the crime shall have been committed"; have the witnesses and compulsory processes and assistance of counsel for a defense. I don't see in there anything that says that a judge can't consider facts and render a sentence based on that. In fact, that is the way it has always been for the most part. Some States allow juries to impose the sentences, but most scholars feel that is not the preferable way. It is better for the judge to impose sentences.

I thank you for having this hearing. I am greatly troubled because this is a constitutionally based decision and it is certainly going to cause havoc in the criminal justice system.

Chairman HATCH. Well, thank you, Senator.

At this time, I would like to introduce our first panel. William Mercer, United States Attorney for the District of Montana, will be testifying on behalf of the United States Department of Justice. Before his current position, Mr. Mercer served as an Assistant U.S. Attorney in Montana for over 6 years and as counselor to the Assistant Attorney General and senior policy analyst in the Office of Policy Development for the U.S. Department of Justice.

We certainly are happy to have you with us today and welcome you to the Committee.

Second, we will hear testimony from Vice Chair and Commissioner of the U.S. Sentencing Commission, John Steer. Prior to his current position, Mr. Steer served as the general counsel for the Sentencing Commission and was legislative director for Senator Strom Thurmond and counsel for the Senate Judiciary Committee from 1979 to 1985.

So we are happy to welcome you back and appreciate the service you give.

Our next witness will be Chief Judge William Sessions, who has served as a district judge in Vermont since 1995. Before that, he was a partner with the law firm of Sessions, Kiner, Dumont and Barnes. Mr. Sessions served in the Office of the Public Defender for Addison County and as a professor at the Vermont Law School.

We are sure happy to have you here, as well.

The next witness will be Hon. Lawrence L. Piersol, Chief Judge of the United States District Court of South Dakota. Before becoming a judge, Chief Judge Piersol was a member of the South Dakota House of Representatives and practiced law with the firm of Davenport, Evans, Hurwitz and Smith.

So, Chief Judge, thanks for being with us today.

Our final witness for the first panel will be Hon. Paul G. Cassell, United States District Court Judge for the District of Utah. Before being appointed to the bench, Judge Cassell was a law professor at the S.J. Quinney College of Law at the University of Utah, where he continues to teach. Before that, he was an Assistant U.S. Attorney for the Eastern District of Virginia, an associate deputy attorney general in the U.S. Department of Justice, and clerked with Chief Justice Warren E. Burger and then-Judge Antonin Scalia.

We are really happy to have you here, as well, Judge Cassell. You have played a pivotal role here lately in some of the thinking here, and so we are looking forward to benefitting from your experience.

Now, we have an extremely talented and experienced panel of witnesses with us today and I am sure we are going to have an interesting discussion regarding this very, very important set of topics. I look forward to hearing each of your remarks. I would like each witness to please limit your remarks to not more than 5 minutes, and each Senator will have 5 minutes to ask questions of you.

So we will start with you, Mr. Mercer, and go right across the table.

STATEMENT OF WILLIAM W. MERCER, UNITED STATES ATTORNEY, DISTRICT OF MONTANA, HELENA, MONTANA

Mr. MERCER. Chairman Hatch, Senator Leahy, members of the Committee, 19 days ago the Supreme Court in *Blakely* v. *Wash-*

ington cast doubt on some of the procedures of Federal sentencing reforms. The *Blakely* decision has caused a tremendous upheaval in the Federal criminal justice system and has put the constitutionality of Federal sentencing guidelines into question, and I can affirm this for the Senate today in my capacity as Chairman of the Attorney General's Advisory Committee and the feedback that I have heard from colleagues all over the country.

I am here today, first and foremost, to reaffirm the commitment of this administration to the principles of sentencing reform that unified this Committee 20 years ago and which we hope will once again unify the Committee today.

Second, I am here to briefly lay out for the Committee why the United States continues to believe that the Federal sentencing guidelines system is significantly distinguishable from the Washington State guidelines system at issue in *Blakely* and meets all constitutional requirements.

Because some lower courts have disagreed with our reasoning, I will, third, discuss the Department's legal position on how Federal sentencing should proceed before the courts that find the Federal guidelines are implicated by *Blakely*.

Finally, I will outline why we believe Congress should take the time to carefully consider any legislative proposals that try to remedy the current uncertainties surrounding Federal sentencing policy.

Twenty years ago, this Committee coalesced around the noble idea of making the Federal criminal justice system fair, honest and more effective. Congress unified under the common recognition that unstructured criminal sentencing had evolved into a vehicle for disparity in actual punishment that simply could not be justified, and uncertainty in sentencing that was contributing to intolerable levels of crime.

Offenders with similar criminal histories who committed similar offenses often received and served substantially different sentences. A substantial percentage of offenders were not sentenced to prison at all, and in many cases sentences were not sufficiently punitive. This system was incompatible with effective crime control.

Under the Sentencing Reform Act of 1984, offenders with similar criminal histories who commit similar offenses receive similar sentences because sentencing courts are directed to evaluate specific enumerated factors in the guidelines and engage in a rigorous and appealable fact-finding to determine whether these factors are present in each case.

The sentences handed down under the guidelines have been predictable. In addition, the guidelines structure allows for targeting longer sentences to especially dangerous or recidivist criminals. The structure designed to calibrate sentences is only part of the story. Congress has established important statutory purposes of punishment. Among other things, sentences must reflect the seriousness of the offense, promote respect for the law, provide just punishment for the offense, afford adequate deterrence to criminal conduct, and protect the public from further crimes of the defendant.

The guidelines are tough, providing appropriately punitive sentences for violent, predatory and other dangerous offenders. We be-

lieve this type of tough sentencing is smart sentencing. While some critics have argued that Federal criminal sentences are too long and that we need to have smarter sentences, the facts demonstrate that they are wrong.

The increase in Federal sentences under the guidelines and the increase in State sentences as States follow the lead of the Federal Government in adopting truth in sentencing regimes have resulted in significant reductions in crime, which is exactly what we would expect to observe.

Sentencing policies contribute to the fact that our Nation is experiencing a 30-year low in crime. We do not believe that it is a coincidence that the sharp decreases in crime started in the 1990's, shortly after the Supreme Court upheld the sentencing guidelines. Over the preceding decade, given the existing levels of crime and trends at the time the Sentencing Reform Act was adopted, statisticians estimate nearly 27.5 million violent crimes were not committed because of the promulgation of this Act.

To try to resolve the current uncertainty in Federal sentencing policy created by *Blakely* in a manner consistent with the principles of sentencing reform, the Department of Justice intends to seek review of an appropriate case in the very short term before the Supreme Court and ask the Court to expedite review of the case.

However, in the event that we are incorrect about the inapplicability of *Blakely* to the Federal sentencing guidelines, Federal prosecutors have begun to charge cases in a prophylactic fashion and a number of Department lawyers are analyzing policy options which might restore the system to its pre-*Blakely* status.

Nonetheless, we think having the Court provide a definitive ruling on the application of *Blakely* to the Federal sentencing guidelines is one important answer necessary to address the somewhat chaotic state of events of the last two weeks.

The Court in *Blakely* applied the rule announced in *Apprendi* v. *New Jersey* to invalidate under the Sixth Amendment an upward departure under the Washington State sentencing guidelines system that was imposed on the basis of facts found by the court at sentencing. The State contended that there was no *Apprendi* violation because *Blakely*'s sentence was within the 10-year statutory maximum.

The Court rejected that argument, holding that the statutory maximum for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant. The Court did not wholly invalidate the Washington State sentencing guidelines, nor did it invalidate the Federal guidelines. The Court reserved whether its Sixth Amendment holding applied to the Federal guidelines, stating that "The Federal guidelines are not before us and we express no opinion on them," close quote.

Much has transpired in the 19 days since the *Blakely* decision. Even though the Supreme Court did not rule on the Federal sentencing guidelines, some lower courts have already—and we believe prematurely—invalidated them. Others have applied the guidelines in ways never contemplated by the Congress or the United States Sentencing Commission.

The results in these cases have at times been quite disturbing. For example, two weeks ago, in West Virginia, a Federal judge reduced the sentence of a dangerous drug dealer from 20 years to 12 months. The dealer, Ronald Shamblin, was not bit player, no courier and no low-level dupe. According to uncontested findings, Shamblin was a leader in an extensive methamphetamine and cocaine manufacturing and distribution conspiracy. He possessed a dangerous weapon during this crime, enlisted a 14-year-old to join his conspiracy, and obstructed justice.

Because of the *Apprendi* decision, the court was limited to a maximum penalty under the statute as charged to 20 years' imprisonment. Because of the court's interpretation of *Blakely*, the court believed it was obligated to sentence Shamblin to no more than 12 months' imprisonment.

In this and other cases, the court severed the aggravating elements from the sentencing calculation and applied only the base guideline sentence and the guideline mitigating factors in a manner we believe was a distortion of the Federal sentencing system, inconsistent with Congressional intent and policy. It is hard to see how such sentences promote respect for the law, provide adequate deterrence, or protect the public.

On the other hand, some courts have continued to uphold and apply the Federal sentencing guidelines, awaiting definitive word from the Supreme Court. Still others have seen fit to invalidate some or all of the procedures of the Federal guidelines, but have nonetheless looked to the guidelines to mete out sentences consistent with Congressional intent and policy.

We believe the Committee and Congress as a whole should be careful and deliberate in considering legislative proposals designed to address *Blakely*. In examining any short-term legislative proposals, we are guided by, and we suggest the Committee consider the following criteria, among others.

One, will legislation provide a clear short- and long-term solution to the many pending litigation issues? Two, is the litigation consistent with the principles of sentencing reform that have been supported by both Republican and Democrat majorities of Congress for 20 years and by Republican and Democrat administrations for 20 years? Third, does the legislation address all of the constitutional issues that remain unresolved or is there a significant likelihood that the court will be reviewing Federal sentencing policies shortly even with the legislative change?

I would be happy to try to answer any questions that the Committee may have. Thank you.

[The prepared statement of Mr. Mercer appears as a submission for the record.]

Chairman HATCH. Thank you.

Mr. Steer, we will turn to you.

STATEMENT OF JOHN R. STEER, VICE CHAIR AND COMMISSIONER, UNITED STATES SENTENCING COMMISSION, WASHINGTON, D.C., AND WILLIAM K. SESSIONS III, CHIEF JUDGE, UNITED STATES DISTRICT COURT FOR THE DISTRICT OF VERMONT, AND VICE CHAIR AND COMMISSIONER, UNITED STATES SENTENCING COMMISSION, WASHINGTON, D.C.

Mr. STEER. Mr. Chairman, members of the Committee, we wish to thank you for timely calling this hearing to assess the impact of the United States Supreme Court decision in *Blakely* v. *Washington* on the Federal sentencing guidelines system.

If I could, I would like to ask that the joint written statement of Judge Sessions and myself on behalf of the commission be placed in the record and we will make a few remarks.

Chairman HATCH. Without objection, we will put all full statements in the record.

Mr. STEER. Thank you.

I would like to note at the outset a point from our side of the table that has already been made from the dais, and that is that the Sentencing Reform Act was very much a bipartisan endeavor. The Congress ultimately passed it overwhelmingly. In the Senate, the vote was 99 to 1, as I recall, and the House vote was also an overwhelming endorsement.

It called for creating a bipartisan sentencing commission in the judicial branch, and that is the manner in which we have worked, our group of commissioners. And I think as a former staff member, I can say that that is the way that the commission has tried to operate from the outset. That is significant because the matters that bring us together today are not partisan in nature. We all have a common interest in effective sentencing policy. We appreciate the way in which with respect to this issue you and your staffs have already started to get their arms around this issue, and we hope that that bipartisan, cooperative manner will continue.

I have several substantive points that I would like to make, and then I will ask to yield to my colleague, Judge Sessions.

First, as has also been noted, *Blakely* has precipitated considerable sentencing uncertainty and disparity. Of course, both of these phenomena are in tension with the Sentencing Reform Act goals. But this said, district and appellate courts are quickly moving to restore a measure of order.

We can already see from examining our sentencing statistics that because many guidelines cases do not involve any sentencing enhancements, and because plea agreements and waivers will adequately handle many others, in fact, only a minority of cases will likely involve *Blakely* problems. Nevertheless, the situation is serious and legal certainty needs to be restored as soon as possible, preferably by the Supreme Court in a clarifying decision, but if necessary by Congress working with the commission, the Department of Justice and others to correct any unconstitutional system defects, if those be found.

Secondly, we believe there is a reasonably good chance the Supreme Court can be persuaded to distinguish *Blakely* and not apply it to the Federal guidelines system. Thus, we are very pleased that the Department of Justice plans a vigorous defense, including seeking expedited Supreme Court review.

Now, why do we think that? To be sure, some would say we have an institutional bias. Well, I think that that is probably true. We believe that the Federal sentencing guidelines system is fundamentally, not perfect, but a good sentencing system that has brought about many improvements.

We are currently engaged in a self-critical 15-year review project, a series of research reports that soon will be available to this Committee and others to highlight some of the important gains that have been made over the last 20 years, as well as point out some areas where work remains to be done.

As to the legal issues, we think it is significant, of course, that the Supreme Court majority in both *Blakely* and in *Apprendi*, on which the former is based, specifically reserved the issues of applicability to the Federal guidelines. More significantly, in a long line of other cases, the Supreme Court has not only upheld the constitutionality of the Federal guidelines, but it has time and again validated the propriety of judges finding facts and guidelines factors relevant to determining the guideline sentence within the legislated statutory range.

These prior cases include, for example, an important case, Edwards, in which the Court approved of judges finding drug type and quantity according to relevant conduct guideline rules, and another case, Watts, in which the Court even validated judges taking into account conduct in another related count of which the defendant was actually acquitted. It is difficult, if not impossible, to square these and other holdings with a literal extension of *Blakely* language to the Federal guidelines system.

Citing these and other precedents, as has been mentioned, the Fifth Circuit yesterday held that *Blakely* does not extend to the Federal guidelines. And although the Seventh Circuit went the other way a few days earlier, a strong dissent by Judge Easterbrook in that case makes the same points.

Third, the Federal guidelines are different in a number of important respects from the Washington State guidelines at issue in *Blakely*. Time will not permit a complete recitation, but there are at least these differences.

First, of course, they are not as a system affirmatively enacted by the legislature as statutory law, as the Washington State guidelines system is. But, rather, the Federal guidelines are sentencing rules promulgated by an independent commission within the judicial branch.

Second, structurally they are very different. Unlike Washington's system of relatively simple, quote, "standard guideline ranges," end quote, that clearly correspond to the offense elements underlying jury verdicts, the Federal guidelines employ multiple steps in a much more nuanced fashion to construct a guideline range based in part on the elements of an offense, but largely on the judge's determination and guideline scoring of the entirety of a defendant's relevant offense conduct and its seriousness.

And to account in a workable and a rational way for the fact that there are, for example, several hundred fraud and embezzlement statutes in the United States Code with widely varying statutory maximums, ranging from a few to 30 years, the sentencing judge in working through the guidelines uses one generic fraud and theft

guideline, but he adjusts the guideline sentence based on characteristics of the offense.

It would be highly inappropriate to assume that the standard guideline range, to analogize again to the Washington system, for each of these statutory offenses is derived solely from the Federal guidelines' base offense level starting point and the defendant's criminal history category. Yet, it is that very inapt rule that is now being urged upon the Federal courts.

The Federal guidelines also differ markedly from State guidelines, including the State of Washington, in their level of detail. Now, this feature, of course, is an effort by both Congress and the commission to appropriately individualize punishment according to the distinguishing characteristics of offenses and offenders. A court's departure authority further augments this key guideline feature.

It would be a strange application of the Sixth Amendment jury trial right to consign all of these features and the bulk of these individualizing distinctions to the scrap heap of sentencing history. But for reasons of practicality, that may be a likely outcome of a literal *Blakely* extension to the Federal guidelines system.

Mr. Chairman, with those points, I would like your permission to yield to Judge Sessions.

Chairman HATCH. Thank you.

Judge Sessions, we will turn to you.

Judge SESSIONS. Thank you, Mr. Chairman, and I on behalf of the commission sincerely appreciate the invitation and the opportunity to speak on this extraordinarily significant issue.

We have had a close working relationship with Congress, really, since its inception and clearly over the past 5 years, as long as I have been on the commission, and I want to say that we would be available and willing to assist in any way as you address these post-*Blakely* questions.

Now, there is no question that the *Blakely* decision temporarily, at least, has caused significant troubles at the district court level. And I am speaking here not as a district court judge at this point, but as a sentencing commissioner. I have actually, for the record, recused myself in regard to any questions dealing with the constitutionality of the guidelines.

But it has caused tremendous difficulties in Vermont. We postponed sentencings for approximately two weeks—in fact, we have not started re-sentencing yet—so that each side could develop responses to *Blakely*. We have asked for supplemental briefing before we actually address the *Blakely* issues.

Blakely causes for those of us who are trial judges enormous difficulty in its application. The fact is the sentencing guidelines are a part of the legal culture. We are adjusted to the way they work. We are adjusted to the definitions. Now, we are put in a situation of having to try to shift that responsibility to juries. That creates, as Senator Sessions has indicated, enormous problems in regard to the kinds of evidence that juries would be told to consider, as well as the definitions. For us, to define such complex terms as loss or the various other enhancements that are applied universally today to a jury is going to create enormous difficulties. So we tread on these issues very delicately.

I will say that there is an additional problem that comes up when you talk about intermittent kinds of solutions, and that is the ex post facto difficulty as well. Even if Congress was to do something right now, of course, that only resolves cases for offenses which were committed as of this date forward, which leaves us in the same hiatus period that existed.

In fact, if you change the guidelines dramatically now, then we have a post-*Blakely* guidelines system and a pre-guideline system to be applied to all others. And then if eventually somewhere down the road there is a much more significant change in the guidelines, then there is a third guideline application or set of applications, which means that forever judges will have to be sensitive to the issue as to exactly when an offense was committed because you have to apply the guideline range, theoretically, that was applicable at the time the person committed the offense.

Now, I know that there have been differences of opinion among district court judges. I know that the circuit split exists between the Fifth and the Seventh Circuits, and hopefully the Supreme Court will take up the challenge as laid out by the Second Circuit. But I want to tell you at this point respectfully that I think that the sky is not falling; that, in fact, we are not in the middle of a crisis. The reason that I say that—well, there are three separate reasons.

The first is we at the Sentencing Commission are trying to follow closely all of the decisions, all of the developments in the law to be able to respond appropriately with some reflection and some deliberation.

Second, the Department of Justice has developed policies which are going to be extraordinarily helpful at this point. Essentially, now, generally speaking, all defendants who are being indicted will be indicted on sentencing factors, and then as a result, when they come to a plea discussion—and, again, in our particular jurisdiction 98 percent of all criminal cases are resolved by pleas. As a part of that plea arrangement, there are either stipulations to facts, sentencing enhancement facts, or waivers to permit the judge to sentence consistent with the guidelines. So from this point forward, it seems that those policies may very well reduce, quite frankly, the impact of *Blakely* until there is an ultimate resolution.

Finally, the courts are stepping in. I want to say that I have only been a judge for 9 years. I have been on the Sentencing Commission for 5 years. Certainly, the reaction of judges universally at the beginning was one of criticism. I don't think that is true any longer. I think, in fact, people rely and depend upon all of the factors that are laid out in the guidelines to weigh their sentencing decisions and, in fact, rely upon that, whether or not the guidelines are mandatory in nature or not.

So my sense is that the judiciary as a body will react to this change; that ultimately, over a relatively short period of time, there will be some internal resolution either by consensus or by direction from the Supreme Court. So I guess what I would urge the Senate on behalf of the Commission is to step cautiously in this area. We would love as a commission to take a very active role in trying to advise you as to any changes which would be positive and construc-

tive and will lead to the guidelines remaining in full force and effect.

Thank you.

[The prepared statement of Mr. Steer and Judge Sessions appears as a submission for the record.]

Chairman HATCH. Well, thank you, Judge.

Judge Piersol, we will turn to you.

STATEMENT OF LAWRENCE L. PIERSOL, CHIEF JUDGE, UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH DAKOTA, AND PRESIDENT, FEDERAL JUDGES ASSOCIATION, SIOUX FALLS, SOUTH DAKOTA

Judge PIERSOL. Good morning, Mr. Chairman and distinguished members of the Committee. Thank you so much for allowing me the privilege to appear before you. My name is Larry Piersol and I am the chief judge in the District of South Dakota, but I am appearing as the president of the Federal Judges Association that is an association comprised of about 70 percent of the members of the Article III judiciary, district and circuit judges.

The Association was formed 20 years ago to preserve judicial independence. Of course, as you know, judicial independence is important for the public. It isn't something just for judges at all, and it is surely at issue in whatever Congress may decide to do or not to do as a result of the Sixth Amendment principles announced in *Blakely* v. *Washington*.

Now, *Blakely* issues are, as I see it, in two main areas. The first is the immediate issues that judges, as well as prosecutors, defendants and victims now face in charging, pleas, trials and sentencings. Secondly, the less immediate issue, although probably more important, is what, if anything, should be changed in the procedures and the substance of Federal sentencing law.

With regard to the immediate issues, let me suggest that a temporary solution legislatively may not be necessary. The Fifth and the Seventh Circuits, as the Chair and others have indicated, has already ruled. The Second has certified questions to the Supreme Court. The Fourth Circuit is soon going to hear argument. Before long, there will be rulings from all the circuits on various issues. We all know that there are splits in circuits all the time. That is one of the bases for the Supreme Court taking jurisdiction. The district courts will simply be following what the circuits are telling them to do, unless and until the Supreme Court tells them otherwise.

Also, in reading the testimony from the second panel, the testimony is at odds as to whether a temporary solution is necessary or desirable, as well as disagreeing on whether a temporary solution would meet the letter, aside from the spirit, of the Constitution. However, if a temporary solution is determined to be necessary, the Federal Judges Association stands ready to provide whatever information and input Congress might desire. I would also point out that we are not attempting to provide information or positions different than the Judicial Conference, although that is possible. But, rather, we are in close contact with our member Article III judges.

The second area of issues is that whatever the reading of the *Blakely* decision, much of Federal sentencing law and practice has at least been put in question by the *Blakely* principles. As a result, now is the time, I would urge, for the examination of the good, as well as the troubling portions of Federal sentencing law. We urge that there be a thorough review of Federal sentencing law and policy by Congress. We hope we will be called upon to participate in that important process.

The Sentencing Commission, prosecutors, defenders and academics can all provide helpful input, but we are the ones more than anyone who look the defendants and the victims in the eye not only at sentencing, but at motion hearings, at trials, at pleas, at revocation hearings, and resentencings if there is a revocation. For example, I sentence about 150 people a year as one Federal judge. We believe that we much to offer before you make whatever final decisions you make.

Now, just one example. You know how complex Federal sentencing law is, how interrelated it is. But for one example, I chaired the Native American advisory group that reported last November to the Sentencing Commission. It was to study the impact of the sentencing guidelines upon Native Americans. Especially in non-Public Law 280 States—and that is a whole other area—the guidelines have a greater impact upon Native Americans. South Dakota is one of those States. For instance, we try juveniles, sexual abuse cases and many other cases, where white people are tried in State court. I use this one example only to illustrate the complexity of dealing with sentencing law, where each day and each sentence is crucial to the lives of many people.

I would attempt to answer any questions that you might have.

[The prepared statement of Judge Piersol appears as a submission for the record.]

Chairman HATCH. Well, thank you, Judge.

We will finally turn to Judge Cassell. Welcome, and we appreciate you coming.

STATEMENT OF PAUL G. CASSELL, UNITED STATES DISTRICT JUDGE FOR THE DISTRICT OF UTAH, SALT LAKE CITY, UTAH

Judge CASSELL. Thank you, Mr. Chairman, members of the Committee. I appreciate the opportunity to come here this morning and discuss the effects of *Blakely* v. *Washington* on our Federal courts. Because I have legal issues relating to *Blakely* pending in front of me right now, I will confine my remarks this morning to simply trying to describe what has been going on in the 19 days since the decision.

As you indicated, Mr. Chairman, Senator Leahy and others, there seems to be a radically changing legal landscape almost hourly in this area. Because of that changing legal landscape, it is tempting to jump to terms like "chaotic" or "crisis" to describe what is going on, as some press accounts have done.

Along with Judge Sessions, I agree that such terms are not appropriate. Federal judges around the country are working diligently now to try to sort out the implications of the *Blakely* decision. To characterize these processes as chaotic, I think, would overlook the

skill, care and resourcefulness with which these issues are being dealt.

At the same time, though, it is fair to say, as Senator Sessions and others have suggested this morning, that the criminal docket in our Federal courts is now operating under tremendous uncertainty after *Blakely*. And whether this uncertainty is so destabilizing as to require remedial legislation, I will leave it to others on these two panels to discuss.

What I would like to do this morning is to focus on the ways in which Federal district courts around the country, and particularly in my home State of Utah, have been trying to deal with questions that *Blakely* raises. My testimony collects reports from various districts, so let me focus in on what we are doing in my own district of Utah to deal with the *Blakely* situation.

My own approach was announced in *United States Croxford* on June 29. In that decision, I held that *Blakely*'s interpretation of the Sixth Amendment prohibited a judge from embarking on fact-finding that would increase a defendant's sentencing guideline range. I concluded that *Blakely* made that approach unconstitutional.

I then sketched out three different options that judges might have for dealing with the *Blakely* situation. The first option was to take matters that judges had made findings on before and submit them to a jury. The second option was to apply only the downward adjustments in the guidelines, but not the upward adjustments that *Blakely* rendered unconstitutional. And then the third option was to return to sentencing as it existed before the enactment of the guideline scheme in its entirety.

I concluded that the Sentencing Reform Act, as has been drafted and enacted by Congress, did not authorize me to use either option one or option two. Instead, I concluded that, by default, I was required to use option three in my sentencing; that is, to determine an appropriate sentence looking at the guidelines as instructive, but not giving them the unconstitutional binding effect that would be problematic under *Blakely*.

Several days later, my capable colleague, Judge Stewart, was the next to rule on this question. In *United States* v. *Montgomery*, he agreed with me that *Blakely* rendered the guidelines unconstitutional. But as a remedy, he selected option two; that is, he felt he could apply downward enhancements, but not upward enhancements.

My capable colleague, Judge Kimball, has also wrestled with what to do with *Blakely*. In *United States* v. *Adams*, a three-week jury trial involving drug and money laundering charges, he put together a very detailed jury verdict form which submitted to the jury a number of questions that would ordinarily have been decided by a judge about how to apply the guidelines. Such things as drug amounts or the amount of money laundered, the role and the offense—he has now submitted those to a jury.

Finally, the latest ruling from Utah came yesterday from our capable chief judge, Dee Benson. In *United States* v. *Olivera-Hernanez*, Judge Benson held that he would continue to apply the sentencing guidelines until he had a definitive statement from an appellate court. He wrote that, like reports of Mark Twain's death,

the predictions of the guidelines' demise might be greatly exaggerated.

However, he recognized that *Blakely* might also be seen as a giant wrecking ball heading directly for the sentencing guidelines. And as a result, he announced that he would impose a "backup" sentence in every case; that is, a guideline sentence and a non-guideline sentence, so that regardless of how the appellate courts resolve the issue, the position of the appropriate sentence would be announced.

These four decisions from Utah provide a fair sampling of the kinds of responses that courts have developed for protecting the Sixth Amendment right to a jury trial, as explained in *Blakely*. Others here today can testify about whether the need for certainty and the need to avoid unwarranted sentencing disparity requires some kind of legislative quick fix.

My concluding observations would be that even if Congress decides that some sort of quick fix is necessary this year, I hope that Congress will revisit this subject in future years. Nothing we do as judges is more important than imposing an appropriate criminal sentence, and I urge you to think of *Blakely* not as a problem not to be overcome, but rather as a spur for discussion about how our criminal sentencing system can be improved.

Thank you, Mr. Chairman.

[The prepared statement of Judge Cassell appears as a submission for the record.]

Chairman HATCH. Well, thank you, Judge. Let me turn to you first. In footnote 9 of the *Blakely* opinion, the Supreme Court explicitly stated that, quote, "The Federal guidelines are not before us and we express no opinion on them." Given this explicit mandate in footnote 9, did you feel that your decision was necessary?

Judge CASSELL. I did, Senator. On Thursday, they announced their ruling, and then on Tuesday I had a sentencing. That sentencing involved a little 11-year-old girl who was going to explain her view about the situation. Now, the Justice Department and the defense attorneys had requested more time to brief these issues, but if I had granted their motion to delay that sentencing, that little girl would have waited several more weeks to have justice reached in that case.

She was represented by a guardian that I had appointed to articulate her interests. He opposed the continuance, and I agreed with him that the sentencing should not be delayed and therefore I had to move forward and resolve the case in controversy that was presented to me by this objection on *Blakely*.

Chairman HATCH. I have listened to your testimony and I appreciate your thorough sampling of what Federal courts across the Nation are currently doing to respond to *Blakely*. It will be extremely helpful to us to weigh our options on what actions are necessary to respond to *Blakely*. You make a point of saying that the judiciary is not in a state of crisis; in fact, a number of you have made that point. Yet, your testimony taken as a whole seems to contradict that very statement.

Although I agree that most, if not all courts are working diligently to come up with a reasoned response to *Blakely*, it does strike me that the Federal criminal justice is fast approaching a

state of crisis, or as Professor Bowman, who is going to testify later, puts it, "profound disarray." It strikes me that we currently have an environment where uncertainty and disparity are rampant.

Do you agree with that or do you not agree with that?

Judge CASSELL. I think the point to focus on is the one that Judge Sessions and John Steer focused on a moment ago. We are certainly in a transition period and there are going to be some problems for all of us in the district courts and other courts in dealing with the *Blakely* issues. But once the Supreme Court gives us some guidance in this area, then I think at that point things will sort themselves out considerably. So what we're dealing with is a transition period, and I guess I would simply urge Congress to think carefully about what to do in that transition period of time.

Chairman HATCH. We could use your advice on that.

Did you have a comment, Judge Piersol?

Judge PIERSOL. I was thinking while you were talking about that. I was thinking about when *Apprendi* came out, there was a flurry of petitions by people who had already been sentenced, and so on, under *Apprendi*, and the circuits went through and worked through the different issues out of *Apprendi*. So there is a short-term problem, but I don't think that there is anything that, as I indicated, necessarily needs a short-term legislative fix, in part because I think the short-term legislative could itself become problematic and I think the courts will work this out.

Chairman HATCH. Mr. Mercer, are you concerned that the *Blakely* decision is going to undercut the goal of the Sentencing Reform Act to do away with unwarranted disparities in sentencing?

Mr. MERCER. Well, Mr. Chairman, I do think that there are significant concerns that when different circuits go in different directions, as we have seen in the course of the last three or 4 days, and when we have seen that even within specific judicial districts that some courts may be going to indeterminate sentencing, some courts may agree with the Department's position that *Blakely* is not applicable to the Federal guidelines, I think there certainly is some risk that that will occur.

The Committee should know, however, that even if district courts determine that they must essentially find that the guidelines are not severable and must sentence in an indeterminate scheme, the Department will be asking for a sentence that would be within the applicable guideline range. So the Department is on record in terms of trying to advance the principles of the Sentencing Reform Act even in this time of uncertainty.

So is there a risk? I think there is certainly a risk, but I also am cognizant of the fact that we are only 19 days post-*Blakely* and the Department has spent more than half that time trying to provide advice to my colleagues around the country in terms of how we can advance those principles of the Sentencing Reform Act. As we get into August, I think it will be much clearer about what sort of legislative fix might be appropriate and whether something like that is necessary.

Chairman HATCH. Now, Mr. Steer, some courts have applied only portions of the Federal sentencing guidelines after *Blakely*. For example, a court might apply the defendant's base offense level based

upon the facts in a plea agreement related to the offense of conviction, but will not consider relevant conduct, any specific offense characteristics, any upward adjustments under Chapter 3 of the guidelines, or any upward departures under Chapter 5 of the guidelines.

As drafters of the guidelines, can you please tell the Committee whether you think it is appropriate for courts to apply only a portion of the guidelines?

Mr. STEER. As a legal matter, I think it is probably best that we leave that to the courts to resolve. As a policy matter, clearly, that is not the way that the guidelines are intended to work. The guidelines typically start with a relatively low base offense level and build from there, using the characteristics of the offense, what we call specific offense characteristics, and other general adjustments to arrive at an appropriate guideline range.

The guideline range for a serious white-collar offender that would typically be appropriate is considerably different and contains a range of sentences that are much more severe than the fraud range that would apply to someone who has maybe taken one Social Security check and cashed it when he was not the rightful owner. So that approach of simply taking the starting point and applying any downward adjustments is very much not the way in which the guidelines were intended to operate.

Chairman HATCH. Thank you. My time is up.

Senator Leahy.

Senator LEAHY. I find this a little bit interesting, and based on what Mr. Mercer and others have said, I want to make sure I am correct. None of the five witnesses here are urging the Congress to step in at this time.

Is that correct, Mr. Mercer?

Mr. MERCER. Yes, that is correct.

Senator LEAHY. Mr. Steer?

Mr. STEER. Yes.

Judge SESSIONS. That is correct.

Judge PIERSOL. That is correct.

Judge CASSELL. I am taking no position on that.

Senator LEAHY. I just want to make sure.

Judge Cassell, you said there was no crisis, but you just held the entire Federal criminal sentencing system unconstitutional. I am sure the defense counsels in your district are probably elated. Are the prosecutors sharing your excitement at this?

Judge CASSELL. Well, I don't think excitement is what any of us are—

Senator LEAHY. Are they sharing your feelings on this?

Judge CASSELL. Well, there is certainly, as I suggested, a great deal of angst in the criminal justice system about how this is going to play out. I guess what I am worried about, Senator, is people describing the system as chaotic. As you know from having been involved in the system for many years, there are always going to be shocks to the system. The Supreme Court ends up resolving many of those and I think we are in that kind of a posture here today.

Senator LEAHY. I think one of the things that works is that, as you know, if all the criminal cases presently before the Federal

courts today—if all of them said, okay, we want our right to a speedy trial and we want a trial, the whole system would collapse. You have to have pleas. I don't know how a prosecutor works out pleas today. I have been both a defense attorney and a prosecutor. Today, in your court especially, I would much rather be the defense attorney than the prosecutor under these circumstances.

Let me ask Mr. Mercer, in the amicus brief in *Blakely*, the Justice Department tried to distinguish the Federal guidelines from the Washington State guidelines by arguing that the Federal guidelines are written by an independent commission with substantial discretion.

Let me quote from the brief, quote, "Because Congress entrusted to the commission the specification of the numerous facts that authorize differing punishments under the guidelines, there is a strong argument that the guidelines do not implicate the concerns addressed by *Apprendi*. Those concerns arise only when the legislature itself dictates the facts that control a defendant's increased exposure to punishment, thereby effectively creating enhanced crimes."

Now, that is the Department of Justice's position in defending the guidelines. But last year, the Department had a different position. It supported—and many people helped write—the so-called Feeney amendment to the PROTECT Act, in which Congress usurped the power of the Sentencing Commission and rewrote substantial portions of the Guidelines Manual, in effect cut out a great deal of the independence of the Sentencing Commission.

So are these positions at odds with each other?

Mr. MERCER. I think they are very separable, in fact, Senator.

Senator LEAHY. But they are different.

Mr. MERCER. I don't think they are different. I think the position—

Senator LEAHY. In the Supreme Court, you are defending the independence of the Sentencing Commission. In Feeney, you are saying they are too independent and we have got to cut in and make a legislative fix to remove independence. I mean, it has got to be one or the other, doesn't it?

Mr. MERCER. Well, certainly, this branch, the legislative branch, has the opportunity to govern in a variety of ways, whether it is—

Senator LEAHY. I am asking about the Department of Justice's position. They have taken two different positions here, one defending the independence of the Sentencing Commission and the other supporting legislation to substantially change the independence and take away the independence of the Sentencing Commission.

On those two positions, not what Congress does, but what the Department of Justice does, are you inconsistent?

Mr. MERCER. Sentencing at the Federal level and sentencing in Washington State are something that can be differentiated. Washington has two different classes that establish the classification of the particular crime. In the Federal system, like in the State of Washington, the legislative branch has the authority to act in a particular way to set minimums and maximums. The same thing happens with the legislative branch here. The narrow question that we were addressing before the Supreme Court certainly is not something that draws into conflict what this body did—

Senator LEAHY. Apparently, you were taking the position because you were trying to protect the Federal system. It wasn't just the Washington State system. You were trying to protect the Federal system with the idea that *Blakely* may be applied to the Federal system as well as the State system.

So aren't you in a position where, in trying to defend the Federal system as being independent today, last year DOJ was saying we want to cut back that independence? Let me ask you this: You don't see any inconsistency. Is that your statement?

Mr. MERCER. My statement is that nothing that we argued in front of the Supreme Court would suggest that all authority to make determinations about sentencing, including minimum penalties, standard review, those sorts of things, are all delegated to the Sentencing Commission.

So, no. I think in terms of both what the Washington State statutes allow for and what the Federal statutes allow for and what we argued in front of the Supreme Court, they are not inconsistent.

Senator LEAHY. Do you see any noticeable differences on working out plea agreements since *Blakely*?

Mr. MERCER. I do think, Senator, that you have raised a number of important points. Of juries are in a position to make findings about everything that is in this 491-page manual—and Commissioner Steer has talked about what governs loss calculations. Juries would be having to consider what constitutes reasonably foreseeable pecuniary harm. The Government would be in the position of needing to prove that beyond a reasonable doubt.

And all jurors making those conclusions for any enhancement that is in this book—and I think that there are going to be significant implications and that is why in my earlier statement I said we are sort of waiting for the precincts to report here.

Senator LEAHY. But my question was are you seeing, as the press has reported today, that in some districts plea bargaining and pleas are at a standstill?

Mr. MERCER. I wouldn't say standstill, but I would say that it is certainly a more—

Senator LEAHY. The press is wrong?

Mr. MERCER. There isn't as much certainty that we had 21 days ago in the current context, and that certainly makes it difficult for defendants to know and prosecutors to know exactly how to proceed. That is why we are monitoring this very carefully and we will be looking forward to working with this Committee.

Senator LEAHY. You are the expert here. I don't have to worry about those press accounts saying that in some districts it is at a standstill. The press is wrong?

Mr. MERCER. Well, it is really a case-by-case basis. I mean, do I think that right now this is having a significant implication for, say, cases where we are charging gun crimes? There aren't a lot of upward adjustment factors that are applicable above and beyond the base offense level in a case like that, and there are some low-level fraud cases where that is the case.

But then there is another class of cases where, if this book has a number of upward adjustment factors, then I think it is going to be increasingly difficult for the parties to understand the parameters of what we are dealing with. So on a case-by-case basis, it is

much more difficult today to resolve things by pleas or to give *Blakely* waivers because of the decision in the short term.

We will be in touch and hoping to collaborate very closely with you and the staff on these issues.

Senator LEAHY. My time is up. I will go back to that press account and find out where they are wrong.

Chairman HATCH. Senator Sessions.

Senator SESSIONS. This is a big deal. I don't think it should be minimized. I hear, well, we will just minimize this. I think Mr. Cassell said this decision was a spur to discussion. I think it is a lot more than a spur to discussion. Judge Piersol says courts will work this out. Well, I am not sure about that. I think it is a big deal.

I will just ask all of you the panel, if you can think in the history of American criminal law of a decision that has had more impact on the practical working-out of justice in a court than this one.

Judge CASSELL. I can, Senator.

Senator SESSIONS. All right.

Judge CASSELL. I think the *Miranda* decision—

Senator SESSIONS. I don't agree. I thought you might say that. [Laughter.]

Senator SESSIONS. It is right up there with it. I will say that. I think it is beyond *Miranda* because it affects every case, and most cases didn't have a *Miranda* problem, frankly, but a lot of them did.

Sir?

Judge PIERSOL. Sir, I would say this doesn't affect every case. I have sentenced some people already and this didn't have anything to do with the sentencing. It does affect some cases, yes.

Senator SESSIONS. Well, maybe it doesn't affect every case. It is important though, when it affects such a large number of cases on a routine basis that go on in our courts. So I think it is a big deal there.

When you have four judges in the District of Utah all rendering different opinions, it is pretty close to chaos, it seems to me. And I think Senator Leahy is correct. We do have a problem with pleas, and certainly, predictability that we didn't have before in many, cases.

I think it is imperative that the courts realize that it is not some theoretical world in which they operate. Out here in the real world, cases are being tried everyday and lawyers are having to decide whether to plead or not, what sentence to expect their client may get, and how to advise their client. I don't think there is any doubt that Senator Leahy is correct that this has caused great concern.

Judge Sessions, you have handled pleas, and Judge Piersol. When a person comes in and pleads guilty, they are advised of the maximum statutory penalty, are they not?

Judge SESSIONS. Yes, they are.

Senator SESSIONS. They know they have guidelines, but they are advised that 10 years—in this case in Washington, a 10-year maximum statutory offense; no matter what a guideline says, a sentence cannot exceed the 10 years. So they are advised of that, are they not?

Judge SESSIONS. They are.

Senator SESSIONS. So they are told what the maximum sentence is when they enter a plea of guilty. And 98 percent in your district plead. That may be a little high, but it is not far off; over 90 percent plead in America today. They are not being misled. They are aware that a judge could go above maybe the base level offense, are they not, Judge Piersol?

Judge PIERSOL. They are told that the judge has the ability under the guidelines system to depart upward or downward. In addition, they are told, of course, what the maximum penalty is. And if there is a mandatory minimum, they are told what this is, too, and that the mandatory minimum overrides the sentencing guidelines, with the exception of the circuit-breaker.

Senator SESSIONS. But at the plea, they are not specifically told what the guideline range is going to come out to be?

Judge PIERSOL. That is correct. They are not.

Senator SESSIONS. They are told the maximum sentence, which I think is what the Sixth Amendment—if there is any power there, I think that is what it refers to. So I think this opinion is just bad law. I am just shocked. I can't imagine Justice Scalia rendering such an opinion.

Judge Cassell, you are thoughtful on these issues. What is the impact, for example, if a State does not have a sentencing guideline and a judge can give—say Washington State didn't have it and a judge could walk in and give 10 years under the old law in which a judge's sentence was unreviewable. Does this alter that historic procedure?

Judge CASSELL. There certainly are some implications there. I think I may have to defer on that question because in Utah we have a situation similar to what you are describing and I might see that kind of an issue come before me.

Senator SESSIONS. Well, it seems to me if you can't go above a guideline range, then how can a judge impose a maximum sentence without any statement?

I don't know who has been in this business the longest. Judge Piersol, you must have or you wouldn't be elected president of that association. Before the guidelines, were you a judge then?

Judge PIERSOL. No, I wasn't.

Senator SESSIONS. I will just ask, before the guidelines, a sentencing judge in the Federal system could give the maximum statutory sentence and not have to state a basis for that decision and it was unreviewable on appeal. Is that not correct?

Judge PIERSOL. That is my understanding, and I have only done a few.

Senator SESSIONS. And under the guidelines that Senator Hatch and Senator Kennedy and others passed, you have review of sentencing on appeal. A judge, if he goes outside even the guideline range, has to defend it and it is reviewable by an appellate court. That was to help criminal defendants, to give some objectivity, was it not, and did it not do that?

Judge PIERSOL. I believe so.

Senator SESSIONS. So I don't know how this opinion came out.

Mr. Mercer, are your prosecutors now charging cases and putting in a whole lot of new charges and facts in the indictment that they would not have done before to try to comply with this system?

Mr. MERCER. The memo issued by the Deputy Attorney General instructs all Federal prosecutors to charge within any charging document, indictment, information, any sort of offense characteristic that would increase the sentence. So, yes.

Senator SESSIONS. Does that have the danger of making a trial arguably less fair for a defendant, in that more dirt is thrown in against the defendant in the indictment itself than otherwise would be the case?

Mr. MERCER. I am sure that as we proceed here, there will be conversations about whether trials need to be bifurcated and whether we need to have a guilt stage and then a stage where this sort of thing happens. But we will be arguing that in front of district courts, and I imagine on a different case-by-case basis we will see what the outcome is. For instance, in a fraud case, I don't think the fact that we would say the loss equals $250,000 is something that would require bifurcation.

Senator SESSIONS. Well, isn't it true that as a practical matter, you try a case, say a fairly complex fraud case, and the jury returns a verdict of guilty, you then sit down and work on the facts, where the guidelines may play, how much the loss might be? People take memoranda from the defense lawyers on what should this be and how much should be counted, and the judge renders a ruling that is reviewable on appeal. Is that not correct?

Mr. MERCER. That is correct.

Senator SESSIONS. Wouldn't it be very difficult for a jury to be involved in all of that?

Mr. MERCER. I think there isn't any question that it is going to complicate the work of juries. Again, this manual sets forth a number of characteristics that may be relevant to what the individual defendant has done that are going to increase the sentence over the base offense level.

Given this ruling, we are now, as you say, *Blakely*-izing all of our pleadings in order to make sure that we have got the opportunity to have the jury make those findings. But the standard is going to be different; it is no longer preponderance of the evidence. In some of these cases, particularly complex cases, market loss cases where the number of victims and the amount of loss is extraordinary, it is going to certainly complicate proceedings.

Senator SESSIONS. It is going to be beyond a reasonable doubt, is it not?

Mr. MERCER. That is right.

Senator SESSIONS. That is a stunning change in itself. I forgot that.

Chairman HATCH. Senator, you have made a lot of good points. Your time is up, however.

Senator SESSIONS. My time is up. I am sorry.

Chairman HATCH. At this time, I want to submit into the record the following letters, articles and written testimonies: the Federal Public Defenders; National Association of Criminal Defense Lawyers; the American Bar Association; Professors Douglas Berman, Marc Miller, Nora Demleitner and Ronald Wright; and a New York Times editorial dated June 29, 2004, by Kate Stith and William Stuntz.

Senator Kennedy, we will turn to you.

Senator KENNEDY. Thank you very much, Mr. Chairman.

I think on this Committee we have enormous diversity, reflecting different philosophies, but I am enormously interested in how much Senator Sessions and I look at certain aspects of this consistently, and that is about trying to stay away from unfairness and inconsistency. that was the concept behind the guidelines, to have fairness, consistency and transparency. The good Senator went into a number of different areas on that issue, but this is an underlying factor which we wanted in the guidelines.

I was enormously distressed, quite frankly, with the Justice Department and its proposals on the Feeney amendment. We had taken 10 years to develop these guidelines. We had days and weeks and months of hearings and markups. And then right out of the blue, with eight minutes of debate in the House of Representatives, and without an hour of hearing here in the Senate, without an hour's consideration, without a single witness, it was tagged onto the Amber safety bill, which was obviously a matter of enormous importance to families, and just jammed through the Senate of the United States over the opposition of the Judicial Conference, the American Bar Association and the U.S. Sentencing Commission.

We spent a lot of time trying to deal with a complex issue dealing with criminal law. We spent a lot of time trying to do it. We might not have gotten it exactly right, but it did reflect, as has been pointed out here, about as good an effort here, with 99 members of the Senate in support of it.

Mr. Mercer, did you support the judge-specific reporting in that proposal in the Feeney amendment?

Mr. MERCER. I chaired at the time something called the Attorney General Advisory Committee's Subcommittee on Sentencing Guidelines, and we had taken a look—in fact, I am going to make sure to leave a copy of this article. I wrote an article in the Federal—

Senator KENNEDY. I would be interested in that, but this is the one specific aspect on that, on the judge-specific reporting that was included in the legislation. There was strong, strong opposition. It is called basically black-listing. You can characterize whatever you want, but I just want to know your position on that.

Mr. MERCER. Well, we categorically deny that there is any sort of judicial blacklist. That statute has two doors.

Senator KENNEDY. I am not asking about how many doors. I am just asking did you write it or do you support—

Mr. MERCER. Oh, no, no, but—

Senator KENNEDY. Did you support the judge-specific reporting provisions in the Feeney amendment, yes or no? This is pretty simple stuff.

Mr. MERCER. The provision says that the Department of Justice needs to promulgate a directive that would allow all cases that resulted in adverse sentencing departures to be reported for appellate consideration. And the Attorney General issued that memorandum and that is the protocol we have.

Now, sentencing decisions are the same as any other adverse decision. They need to be reported to the Department of Justice for consideration. There is no blacklist.

Senator KENNEDY. There is a listing of those judges that—

Mr. MERCER. No, no, there isn't.

Senator KENNEDY. And how do you know? If no one keeps a list, how in the world do you know who is doing what?

Mr. MERCER. Because if there is an adverse decision in a particular judicial district, if there is a downward departure that undercuts the purposes of the Sentencing Reform Act by saying this defendant is all of a sudden going to get a different sentence than contemplated by the commission, a memorandum is written saying this occurred; let's make a determination about whether an appeal needs to be taken.

That is the same as whether we have an adverse decision in a civil case. That is the way we refer these matters for determinations by the Solicitor General. The way the Sentencing Reform Act was written, no appeal can be taken unless the Solicitor General authorizes an appeal.

Senator KENNEDY. Well, can I ask you, Judge Piersol, why was there such concern about that particular provision?

Judge PIERSOL. Well, I can speak for a lot of judges that I talked to, and that is because the judges felt there was a black-listing. That is why.

Senator KENNEDY. Do you think this ought to be an area that we take another look at?

Judge PIERSOL. I would hope so.

Senator KENNEDY. Let me just ask quickly, because my time is going to be up, just for the panel, who do you think we ought to listen to or talk to in terms of these issues that we are looking at over a longer period of time?

I mean, the idea that we are going to act quickly is, I think, probably extremely unlikely, particularly from what we have heard. We have got another panel with some differing views.

Who should we really listen to? Each of us sort of outlined the different areas that we looked at. I mentioned the mandatory minimums and the disparities in the crack/powder departure standards, complexity of the guidelines. Who do you think we can get the best information from in terms of trying to look at how we can best meet our responsibilities?

The red light is one, but I would ask each of you to maybe just take 30 seconds and tell us what we can do?

Judge SESSIONS. If I could respond to that, I think this is such a significant issue that it is going to take extensive research and development, it seems to me. Turning to judges, turning to prosecutors, turning to the Department, turning to defense lawyers, turning to probation officers and victims, I think you need to look at all of the areas.

But I also think, and I mean I really believe that the United States Sentencing Commission is chartered with the responsibility of advising Congress in regard to changes of this magnitude. My feeling is that the Sentencing Commission should take an active leadership role in addressing sentencing issues in the future.

Judge PIERSOL. I agree with what Judge Sessions says. All those groups should be consulted; most of all, I would say the Sentencing Commission and the judges.

Senator KENNEDY. Judge Cassell?

Judge CASSELL. And I would say—maybe somewhat self-servingly—the district court judges. As has been mentioned, we are

the ones who end up sentencing people everyday and hopefully have some insights.

Mr. STEER. Senator, I agree, and I think you provided the answer to a large degree in the Sentencing Reform Act. It describes a process by which all those who are involved in the criminal justice process are to be involved in shaping sentencing policy.

Senator KENNEDY. Mr. Mercer?

Mr. MERCER. I think that amount of consultation is a good idea. There just may be a need, come the summer, for some sort of action, and we will look forward to talking about that.

Senator KENNEDY. Thank you, Mr. Chairman.

Senator SESSIONS [PRESIDING.] Thank you, Senator Kennedy. I would just note that Congress did create the guidelines and we have a responsibility to monitor how they are working. If they have problems, we ought to fix them. We have not done that. I have offered legislation to modify the crack/powder cocaine problem. I haven't gotten much support for it yet, but the perfect is the enemy of the good. This is a good first step.

I don't mean to say that the guidelines are perfect. They need to be monitored by historical accuracy and realistic experience, and we ought to alter them when it is appropriate to do so. I know Mr. Steer and I have talked about that before.

Senator Durbin, thank you, and we will recognize you.

Senator DURBIN. Thank you, Mr. Chairman.

Thank you to the panel for your testimony.

A few years ago, a Governor in Illinois decided, for reasons of conscience, that he could no longer approve death penalties in my State. That decision by that one person caused, I think, a national and international discussion about the death penalty which was long overdue. I think a lot of us at the State and Federal level have taken a new look at it, as we should have. It was comfortable to stay with the old process, but now we have to question the old process and whether it fits the needs of justice.

It strikes me the same thing is happening here. *Apprendi* and *Blakely* are causing us to take 19 years of accepted practice when it comes to sentencing guidelines and to step back and say is it fair, does it work. We don't like to face these questions. We would rather just continue with the status quo, but we have no choice now. *Blakely* has thrown this all up for grabs.

Judge Sessions, it is not in your testimony; you said this in a statement attached to it that you felt that there was a general consensus and support—I don't want to misstate your position—a general consensus and support by judges of sentencing guidelines. Sitting next to you, Judge Piersol said now is the time for an examination of the good, as well as the troubling portions of the Federal sentencing law.

It seems to me that those two statements are not consistent. And to hear one from the Sentencing Commission and another representing the Federal judges reflects, I think, the need for this debate. I can tell you that whether it is the Feeney amendment or just the sentencing guidelines or the mandatory minimums, many Federal judges have come to me and said, I have been put in unconscionable situations when it comes to sentencing because of es-

tablished guidelines and because of mandatory minimum sentencing.

So I would ask each of you if you would comment on that. Is it time for us to take a fresh look at the whole concept and ask ourselves some hard questions as to whether justice has been served? I would ask Judge Piersol and Judge Sessions.

Judge PIERSOL. Well, I think I was suggesting that it is time to look. I would say—and I am speaking personally for myself now because the association hasn't taken a specific position on this. But I have sentenced 1,500 people or so, so I have got a little experience.

I would say that the concept of sentencing guidelines is a generally accepted concept. That doesn't mean it is working as well as it could or should, because any time you sentence somebody where the sentence, in your best judgment, is inappropriate, that is a tragedy.

Senator DURBIN. Has that happened to you as a judge sentencing?

Judge PIERSOL. Yes.

Senator DURBIN. Under the guidelines?

Judge PIERSOL. Yes.

Senator DURBIN. Where you felt that what you did was not just?

Judge PIERSOL. Yes, and I can't imagine that there is a judge who has sentenced for very long that wouldn't say that. So the real problem is, speaking personally, there isn't enough latitude. There is a need for sentencing guidelines, but they are not guidelines. That is a euphemism. They are not guidelines at all. They have the force of law. So there is need for a system similar to what we have, but it is not one that provides justice as often as it should.

Senator DURBIN. Judge Sessions, have you been through the same experience?

Judge SESSIONS. Sure, I have been through the same experience, and first I would want to say that Judge Piersol and I are great friends and we agree on just about everything in the world. So I think probably if asked to get down to basics, the agreement probably would be quite clear.

What I meant by my comments is that most judges feel that the process, generally speaking, is fair, and it is fair for a number of reasons. Primarily, it provides consistency and a sense of an ability to understand what is happening by a defendant, so that they know exactly what the process is, what the ranges are, generally speaking.

The other advantage of the guidelines is that they provide factors that judges should consider in weighing sentences that are universally applied. That is why the enhancements are so important because it allows judges to go beyond just dollar amounts and drug quantities that focus in upon those things.

Now, having said that, the end product—these are, of course, mandatory guidelines and they are oftentimes based upon mandatory minimums; that is, how the drug quantity arrived at where it did. I know Senator Sessions has raised a bill in regard to low-level drug couriers as a part of the crack cocaine bill that he had proposed a couple of years ago.

In those kinds of situations, oftentimes you are finding yourself restricted by mandatory minimums, in particular, and at that point you feel like you could be doing an injustice. But as to the general perception of the guidelines themselves, I think the vast majority of judges would say they like them.

Senator DURBIN. I would like to really kind of sum up, and I am sorry I couldn't get each panel member to express their own opinions on this. It seems to me that the guidelines are looking for some certainty and, as we have said here, eliminate unwarranted disparities in sentencing. But at the same time, the system is looking for justice which would protect warranted disparities. And the only person who can make that decision ultimately is the judge, or in *Blakely*'s suggestion, the jury as well.

Can we get to the bottom of *Blakely* and *Apprendi* without addressing this core issue of whether or not we are serving justice, as opposed to just serving the need for certainty in sentencing?

Judge PIERSOL. In my view, great injustice could come from some legislative solutions. Justice could also come from some legislative solutions. That is why you have such a heavy charge upon you and that is why we want to be at the table.

Judge SESSIONS. And I would say that just like Congress now is addressing this particular issue as a result of *Blakely*, the Sentencing Commission chose a number of years ago—Judge Castillo was one of the driving forces in this—suggested that we review the guidelines, review how they are working and develop a 15-year study, a part of which has already been released in regard to the crack cocaine report, an idea that the Sentencing Commission itself internally is reviewing this to see if we can improve the process.

Senator DURBIN. Thank you. Thanks, Mr. Chairman.

Senator SESSIONS. Thank you.

Well, it has been an excellent discussion and we thank you for that.

Senator Leahy, do you want to comment?

Senator LEAHY. Just one follow-up question to Judge Sessions and Mr. Steer.

I realize this is broad-brush, but in your testimony you suggest that the Federal guidelines are different from the State guidelines because the Federal guidelines are promulgated by an independent agency in the judicial branch, not by the legislature.

So just for the purposes of the question, assuming this might make a constitutional difference, then, of course, the question I ask is are you sufficiently independent. Think of three facts: first, the Congress has to approve the commission's recommendations for changes to the Guidelines Manual. Secondly, the Congress has made a number of directives over the past few years telling the commission to make changes in the guidelines.

Third, the Feeney amendment, backed by the Department of Justice, actually wrote guidelines and commentary without any input from either the commission or the Federal judiciary, as everybody from the Chief Justice on down has reminded me.

Assuming there is a constitutional difference, because of your independence, from what is seen in *Blakely* are you sufficiently independent?

Judge SESSIONS. Senator, you have asked questions of me in the past that are equally troubling. I think essentially we are as independent as Congress is willing to make us at this particular point. We are, I will say, an independent body in the sense that we deliberate independently. We clearly pass guidelines independently based upon our best assessment, and I think to the extent we are, in fact, an independent body.

Of course, Congress has the power, the absolute power and the right to restrict the Sentencing Commission in any way it deems appropriate at this particular point. But to the extent that decisions are made independently by collaboration and, by the way, by consensus—this is the only body I have ever been on in which politics or your political background plays no part. It is done by consensus. To the extent, I believe that our decisions are made independently.

Mr. STEER. Senator, if I could just add a footnote, I think the reason why that feature might be important—and we don't know whether it is critical. Some judges have already examined it and found it insufficient. It is just one of the things that might be relied on in trying to distinguish the Federal guidelines from *Blakely*. But the reason why it might be important is it derives from a strong statement by the U.S. Supreme Court in the *Mistretta* decision that upheld the constitutionality of the guidelines.

I think historically the Sentencing Commission wants to operate in a way and according to the vision that the Congress laid out in the Sentencing Reform Act. And so when we are constrained by overly detailed directives, we recognize that that is Congress' prerogative. But as we are involved in working with you and your staffs in crafting legislation, we point out the need for flexibility. We prize our discretion as an institution just as judges for different reasons prize theirs in crafting an appropriate sentence.

But I think the bottom line and the reason for it, and the reason why we feel like independence is important is Congress created an expert body here and we want to use that expertise to try to carry out the goals of the Sentencing Reform Act.

Senator LEAHY. Thank you. Thank you, Mr. Chairman.

Senator SESSIONS. Thank you.

Well, Judge Sessions, I think you make a good point, what is justice? Many have asked this question. Consistency and predictability is part of it, at least. Judge Piersol sees occasions when he thinks that consistency created unfairness, but there are some situations in which I have seen judges, before the guidelines and when I was prosecuting cases, render sentences that were incomprehensible. So maybe we have made some progress.

Mr. Mercer, I would just give you briefly an opportunity to comment on the Feeney amendment. Is that consistent with the Sentencing Guidelines, what the Department of Justice proposed or supported there?

Mr. MERCER. Well, it is, Your Honor—yes, it is, Senator.

Senator SESSIONS. That is proof that you are a good lawyer. You have been in court before. I can tell.

Mr. MERCER. The whole principle of the Sentencing Reform Act—the preeminent goal was to make sure that unwarranted disparity was minimized. I was noting for Senator Kennedy—and I will leave

a copy of this—this article tracks downward departure rates. This is not an article that is trying to get at substantial assistance.

The data in these charts are based upon Sentencing Commission data and they track year by year the rates in various districts. A place like Connecticut has never had a non-substantial assistance downward departure rate below 25 percent. In fact, in the current period, sort of year in, year out, it is right around 30 percent. Then you will see in that same table that a place like the Western District of Arkansas, in the 2-year period, was below 3 percent in both years.

So the whole point of the PROTECT Act appears to be that unwarranted sentencing disparity threatens to undercut the purposes of the Sentencing Reform Act. If, in fact, both on an intra-district and on an inter-district basis you have outcomes that are generated based upon a number of circumstances that don't comport with the Sentencing Reform Act, that is a problem. I think that goes to why the Congress said to the commission, we need to make sure that the purpose that departures would be rare is reinforced because these data suggest that that goal has sort of slipped away.

Senator SESSIONS. Well, I just thank all of you. It has been a very, very good discussion. In view, since we have undertaken to direct sentencing from this Congress and have, in effect, done so to a large degree, we have a responsibility to listen to practitioners and those who are out there, and consider what is working and what is not and fix it when it is not working as well as it should. But I strongly believe that the Court ought not to be demolishing this wonderful work that Senator Leahy and his colleagues did 20 years ago.

Senator LEAHY. Thank you.

Senator SESSIONS. Thank you so much. We will go to our next panel.

As you take your seats, I will do the introductions.

The first witness will be Professor Frank Bowman. He teaches at the Indiana University School of Law, has worked for the Department of Justice as a trial attorney in the Criminal Division, and was a deputy district attorney for Denver, Colorado. Professor Bowman also worked in the U.S. Attorney's office for the Southern District of Florida.

That should have kept you busy.

Mr. BOWMAN. It did.

Senator SESSIONS. What years?

Mr. BOWMAN. 1989 to 1996.

Senator SESSIONS. And where you were deputy chief of the criminal division and specialized in complex white-collar crime. He also served as special counsel to the United States Sentencing Commission in Washington, D.C., and was academic adviser to the Criminal Law Committee of the United States Judicial Conference.

So welcome, Professor Bowman. You have a remarkable background on these issues.

Second, we will hear from Professor Rachel Barkow. Professor Barkow is an assistant professor of law at the New York University School of Law. She clerked for Justice Scalia on the U.S. Supreme Court—and maybe you can explain this decision for us—and Judge Laurence Silberman of the D.C. Circuit. Professor Barkow's re-

search and writings focus on criminal and administrative law, with an emphasis on the administration of criminal justice through the use of agencies and commissions.

Professor Barkow, we welcome you to the Committee and look forward to hearing from you.

Next is Ronald Weich. He is a partner in the firm of Zuckerman Spaeder. He has previously held positions as general counsel to the Labor and Human Resources Committee and as chief counsel to Senator Kennedy on this Committee. He also served as special counsel for the U.S. Sentencing Commission and as assistant district attorney in New York.

Were you with Senator Kennedy when the guidelines were passed?

Mr. WEICH. No. I joined Senator Kennedy's staff in 1990. I was at the commission when the guidelines first became effective, and then in the early years of implementation I was with Senator Kennedy.

Senator SESSIONS. Well, you have a valuable perspective, then.

Our final witness will be Mr. Alan Vinegrad, a partner with Covington and Burling in New York. He is a former United States Attorney for the Eastern District of New York. He previously served as the office's chief Assistant U.S. Attorney, chief of the criminal division, and chief of civil rights litigation, which should have given you some experience in the real world. So it is a delight to have you with us.

Professor Bowman, would you start off, please? I must say that we are moving along. If you could attempt to hold your comments to four minutes, we would appreciate that. If you need an extra minute, that will be fine.

STATEMENT OF FRANK O. BOWMAN III, M. DALE PALMER PROFESSOR OF LAW, INDIANA UNIVERSITY SCHOOL OF LAW, INDIANAPOLIS, INDIANA

Mr. BOWMAN. Thank you to you and the other members of the Committee for inviting me to testify.

The imposition of sentences in the Federal criminal justice system is a shared responsibility. We are here today because all of the institutions which share that responsibility have in some measure failed. The catalog of our collective failure is too long for detailed examination today, but its principal components, it seems to me, are these.

First, we have taken a guideline sentencing system that was sound in its conception almost 20 years ago, and which incidentally I have long supported, and made it too complicated. As but one measure, the size of the Sentencing Guidelines Manual has quite literally doubled since 1987 until today.

Second, the process of making sentencing rules, which was designed probably over-optimistically to minimize the influence of narrowly political concerns, has become a one-way upward ratchet. Raising sentences is common and easy. Lowering them is difficult and scarcely ever done.

Third, the result is a system which remains for many cases an excellent vehicle for determining a proper sentence, but which too often generates sentences that seem to judges and to prosecutors

and defense counsel like unjustly severe, or at least higher than necessary.

It is thus no surprise to find, as many studies have done, including some that I have done myself, that judges, prosecutors and defense counsel routinely collude to evade the guidelines mandates. The response of national policymakers to this quiet rebellion by front-line legal professionals against the unreasonable sections of the guidelines has not been to moderate the rules. Instead, the trend has been to make the rules harsher and to enforce compliance by restricting judicial discretion and imposing greater centralized control even on the decisions of line prosecutors.

Everyone involved intimately in the Federal sentencing process knows these things to be true, and every institution involved in Federal sentencing—the judiciary, most particularly included—bears its share of the blame for this condition. But my important point this morning is not to assign blame, but rather to insist that we take a clear-eyed view of the problem that confronts us.

We are gathered here this morning because *Blakely* v. *Washington* has thrown the Federal judicial system into unprecedented disarray. But *Blakely* is not the underlying problem; it is merely a symptom. I happen to think, with Senator Sessions, that *Blakely* is a bad decision. It carries a dubious constitutional premise to absurd lengths and it is breathtaking heedless of both short- and long-term practical consequences.

Senator SESSIONS. Well, don't underestimate the problems with it now.

[Laughter.]

Mr. BOWMAN. I won't.

Senator SESSIONS. Well, you probably did, but go ahead.

Mr. BOWMAN. That said, it also seems reasonably clear that although *Blakely* addresses a State sentencing system, it is really about, in my view, the Federal guidelines, by which I mean that *Blakely* cannot be understood except as an expression of a deep and abiding frustration with the current state of Federal sentencing, a frustration which I think is widely shared both inside and outside the judiciary.

Now, I don't know if the court will declare *Blakely* applicable to Federal sentencing guidelines, though it is really hard to see, frankly, how that result can be avoided, despite the earnest arguments by the commission and various other able judges.

I do know that while we wait for an answer, the Federal criminal justice system is in turmoil. And here, too, I agree with you, Senator Sessions. I think that suggestions to the contrary ignore reality. Judge Cassell points out that in his district, four different judges have arrived at four entirely separate conclusions about how sentencing should be conducted, which leaves us with two questions: what should we do right now, and what should we do for the longer term?

Now, yesterday morning, I probably would have favored immediate legislation because the turmoil in the courts is so crippling and because the prospect of even partial guidance from the Supreme Court in the near future seems to remote.

Yesterday's decisions by the Second and Fifth Circuits have altered my opinion somewhat. We now have rulings from three ap-

pellate courts, one holding the guidelines constitutional, one holding them unconstitutional, and the third certifying the question to the Supreme Court.

Now, I hasten to add that the fact that these courts have moved with such astounding speed—and it is astounding; in 19 days, we have 3 appellate opinions. But the fact that they have moved with such astounding speed is not an indication that everything is just fine and dandy with the system and that the system is coping.

To the contrary, the actions of the circuit courts are the best evidence that we are in the midst of a national judicial train wreck, that the courts know it and that they think they need help really fast. Still, the existence of a circuit split of certification and a general outcry from the lower courts for clarification suggests that we might get rapid action from the Supreme Court.

Accordingly, I think it would probably be sensible to wait not more than a week or two or three to see if the Court is really going to move quickly. If they do, by accepting a case and setting an expedited schedule for resolving it, it might be wise to wait and see what they do.

Now, make no mistake. Even a rapid ruling by the Supreme Court is unlikely to resolve the current crisis unless, contrary to expectation, the Court finds that the guidelines are constitutional, despite *Blakely*. If, on the other hand, the Court invalidates the guidelines, one element of uncertainty will be removed. But we will then be without a constitutionally valid sentencing system and it is highly unlikely—and this, I think, is critical—it is highly unlikely the Court, in its opinion rendering the guidelines unconstitutional, will tell us much about how to create a new one.

So if the Court sits on its hands or if it doesn't, we are all likely to be back here in a few months looking for both short-term and long-term answers. In the short term, if legislation is to be considered either now or a month or 2 months from now, I think it should meet four criteria.

First, it should be simple to draft and understand. Second, it should have easily predictable consequences. Third, it should solve or greatly ameliorate the litigation problem. Fourth, it must be easy to implement and not require extensive revision of current rules and practices. Any proposal that doesn't do all four of those things should not be enacted.

Now, I have put forward one legislative solution that I think meets these criteria. Others have made other suggestions and I am certainly happy to talk about those, should you like to do so, Senator Sessions. But I want to make one final point. There is no entirely satisfactory short-term solution to the problems of the Federal sentencing system. I repeat, *Blakely* is a symptom of profound, ongoing, systemic dysfunction.

I believe two things. First, the orderly functioning of the Federal criminal system must be restored quickly, but once that is done, the underlying problems must be addressed. If they are not, the system will either collapse under the next judicial assault—and rest assured, there will be one—or perhaps worse, struggle on for years as an evermore punitive set of rules increasingly evaded or manipulated by the judges and lawyers who use them.

We can do better than that. We can, if we listen to each other, if we respect the competence and the wisdom and the professionalism of all the participants in the sentencing process—judges, prosecutors, defense lawyers, sentencing commissioners and legislators—if we respect each other and if we listen to each other, we can build a sentencing system that the country can be proud of. We owe it to the country to try.

Thank you.

[The prepared statement of Mr. Bowman appears as a submission for the record.]

Senator SESSIONS. Thank you very much.

Professor Barkow.

STATEMENT OF RACHEL E. BARKOW, ASSISTANT PROFESSOR, NEW YORK UNIVERSITY SCHOOL OF LAW, NEW YORK, NEW YORK

Ms. BARKOW. Thank you, Mr. Chairman and members of the Committee, for inviting me to testify before you today. I am honored to have the opportunity to discuss with you how to fix the Federal sentencing guidelines so that they comply with the bedrock of our criminal process—the jury.

In *Blakely*, the Supreme Court reminded us of the fundamental importance of the criminal jury. Before the state can take away someone's liberty, it must obtain the approval of ordinary citizens. The jury system reflects America's great respect for its people and the values of its communities. That is why 78 percent of Americans believe that the jury system is the fairest way of determining guilt or innocence, and almost 70 percent believe that juries are the most important part of our judicial system.

Because the sentencing guidelines in their current form unconstitutionally interfere with the jury, reforming them should be an urgent priority. But any proposal for revising them must have as its primary goal the preservation of the Constitution's jury guarantee.

Before I offer my own proposal, I would like to spend just a moment addressing the proposal that Professor Bowman has offered because I believe that although it is quite ingenious in its design, it fails to meet that standard of what the Constitution requires for the jury. Its main goal is not to preserve the jury, but to preserve the guidelines in as close to their current form as possible.

The guidelines under this proposal would allow judges to make crucial findings that would increase the range of punishment to which a defendant is exposed. The Court, in its decision in *Apprendi*, made clear that that is unconstitutional, and although Professor Bowman designed his proposal to fit within a loophole created by the Supreme Court's decision in *Harris*, I do not believe that decision sweeps so broadly. In fact, five Justices in that case made clear that *Apprendi* does not allow judges to find facts triggering an increase in a defendant's minimum sentence.

So in my view, Congress can't ignore the logic of *Apprendi* without defying its own independent obligation to uphold the Constitution. Because this proposal is such a calibrated effort to bypass the jury, I believe it would draw the ire of the Court.

In addition to its constitutional problems, I believe there are policy issues with the proposal as well. The proposal would make sen-

tencing ranges sweepingly broad, repeating the very situation that prompted Congress to enact the Sentencing Reform Act in the first place. In fact, the only real difference is that this proposal would also serve to increase sentences because it would raise the ceilings. But there is no evidence that an across-the-board increase of guideline sentences is justified or necessary at this time.

I don't think there is a need to adopt this kind of proposal because I think there is an alternative that both preserves the criminal jury's role and meets the goals of the sentencing guidelines. In the short term, Congress can either opt to wait and see what the Supreme Court is going to do, or if it wants to act, I think the wisest course is to make the guidelines advisory, for as long as they have the force and effect of binding laws, they currently demean our jury system and undermine our criminal process.

They require a multitude of sentencing increases on facts found by judges, including increases for uncharged and even acquitted conduct. As long as they remain in this state of confusion, you will see different district courts dealing with them in different ways, some of which may only look at the base level offenses with no increases, which I think does a disservice to the Government. So a voluntary guidelines system across the board would be fair for both sides.

Now, I don't believe that voluntary guidelines are a sufficient solution for the long term because they wouldn't adequately address the problems of disparity and uncertainty that you spoke of. And, undoubtedly, they would lead to those conditions again to at least some extent. I believe there are some sentencing factors—using a firearm in the commission of an offense, the terrorism enhancement—that are just too important to be left to judicial discretion.

So as a longer-term solution, I recommend that Congress, with the commission's assistance, identify those factors that are sufficiently important that they should trigger in all cases an enhancement of a specified length. Any factor of such importance is then required by the Constitution to be treated as an offense element to be found beyond a reasonable doubt by a jury.

Given the need to keep trials management, I would expect that Congress would not single out every existing guideline factor to be treated as an offense element, and those factors not identified as offense elements could then become part of a guidelines regime that is advisory. If, over time, the Sentencing Commission found there was a lack of judicial attention or compliance with some important factors, it could then recommend that Congress make those offense elements as well.

Thank you very much for the opportunity to testify. I am happy to answer any of your questions.

[The prepared statement of Ms. Barkow appears as a submission for the record.]

Senator SESSIONS. Thank you.

Mr. Weich.

STATEMENT OF RONALD WEICH, ZUCKERMAN SPAEDER LLP, WASHINGTON, D.C.

Mr. WEICH. Thank you, Senator Sessions. In the course of introducing me, you mentioned my Government experiences. Let me

just add that in my private practice, I serve as counsel to the Leadership Conference on Civil Rights regarding criminal justice issues and as counsel to the Constitution Project, a non-profit organization that in this area intends to convene experts to develop recommendations for policymakers. I speak, though, as an individual here today, not on behalf of those organizations.

Senator SESSIONS. I assume your people are happy with the chaos that has resulted.

Mr. WEICH. No, no, actually not. Let me say the Leadership Conference, in particular, is disturbed because the Leadership Conference is about fairness in sentencing. There was a time when groups within the Leadership Conference supported mandatory minimum sentencing because they thought that was the only way to deal with unwarranted judicial discretion in which minorities were greatly disadvantaged.

When the guidelines came in, civil rights groups understood that this was a more sophisticated way to channel judicial discretion and have fairness. The civil rights community continues to support guidelines. We have fought for more fairness, working with you and your staff, for example, on the crack/powder issue. But the Leadership Conference is not at all happy with the chaos, and neither is the Constitution Project or any other organization that I am affiliated with.

Blakely is a very confusing decision for people who care about civil liberties and civil rights. On the one hand, there is a nugget of a principle there that I think we should all agree with, and I know you agree with, which is that if you are accused of committing a burglary, the government should have to put its proof to a jury and find you guilty beyond a reasonable doubt of a burglary before you are sentenced for a burglary.

They can't arrest and convict you for jay-walking, which might have a 10-year maximum sentence, and then ask the judge to sentence you to 10 years because after you crossed the street, you committed a burglary. That, of course, is something of an exaggeration, but it illustrates the kind of thing that is happening day in and day out in Federal court today, or at least until *Blakely*. That problem is what I think the Supreme Court intended to address in *Blakely*.

That said, I, for one, think that the decision goes way too far in saying that every single factor that could possibly increase a sentence has to be put to a jury. That can't be right. The trick, of course, is to find the middle ground, to determine what are elements of an offense that need to be put to a jury and what are sentencing factors that a judge should be able to consider and weigh and use in imposing a just sentence. Finding that middle ground is very difficult. As Justice Breyer said, the decision appears to knock out the middle of the policy spectrum, so that Congress and state legislatures have a much tougher job.

You have, as everyone has said, a short-term and a long-term question before you. I think the short-term question has largely been answered, and to my mind the Justice Department was the reality check here. They are a party in every single criminal case in the country. If they had come in and said to the Congress they need a short-term legislative fix to deal with chaos or bedlam, then

I think Congress would have appropriately acted. They have not said that.

I heard Mr. Mercer refer to some possibility of coming back in the summer. I think that is wrong. I think they either ask for their legislative fix right now or the case is closed until presumably the Supreme Court acts at the end of this year and then the new Congress considers this at the top of its agenda next year. It is a very important subject.

If you do anything short-term, I think, as Professor Barkow said, it should be advisory guidelines. That is a simple, elegant solution. You don't even need to write it that way. You would simply suspend one section of the criminal law that makes the guidelines binding and leave in place the section—it is 18 U.S.C. 3553(a)—which already says that the guidelines are one factor for a judge to consider in arriving at a just sentence.

But in my testimony, I outline what I think are the serious, long-term issues that Congress and the commission and judges and defense lawyers and prosecutors need to grapple with. As Frank Bowman said, this system has been dysfunctional and unjust for a long time.

Judge Sessions and Judge Piersol are right that everybody had come to figure out how to work with the guidelines, and in a rough way justice was meted out. But there were repeated instances of injustice that disturbed even the most hardened prosecutors and judges—long-term issues like crack/powder, long-term issues like the complexity of the guidelines. And I think the most fundamental issue here is Criminal Code reform.

I will take just 15 more seconds. I was a state prosecutor in New York; that is where I began my legal career. New York State criminal law is based on the model penal code. You have assault in the first degree, assault in the second degree, assault in the third degree, and the legislature—this was decades ago—very clearly laid out what elements are a part of each of those offenses.

So the presence of a gun or seroius bodily injury raises you from assault in the second degree to assault in the first degree. Those are elements. The jury has to find each of those elements beyond a reasonable doubt before you are subject to that maximum penalty that attaches.

But the Federal Code a mish-mash, and it gets worse and worse because of the way that the Congress writes the Federal criminal law. I have a perspective on this from having been a staffer to this Committee. I can't tell you how many times I sat in that ante room and staffers would gather to talk about the bill that was going to be marked up the next day and you would see somebody pull out an amendment that said, well, we will increase the maximum from 10 to 20, or the minimum from 5 to 10, or direct the commission to raise a bare offense level in the guidelines manual by another seven levels.

And I would say why? Have you asked the commission? Has the Justice Department asked for this? Have you looked at the empirical evidence? And the staffer often didn't have an answer. There was one time, in particular, when the amendment said no less than 5 years. And I said that is a mandatory minimum penalty and you don't need that anymore. And he struck out "less" and put in

"more," and changed "no less than 5 years" to "no more than 5 years." That is the sloppiness with which—and I say this, of course, with no disrespect to the Chair, but that is the sloppiness with which the Federal Criminal Code has been written in recent years.

That needs to change. There needs to be fundamental reform to make the system fair. *Blakely* makes it more difficult, but it is an opportunity that the Congress must seize.

[The prepared statement of Mr. Weich appears as a submission for the record.]

Senator SESSIONS. Well, I think there are some problems in how we draft statutes. I don't think they are quite as grim as you suggest.

Mr. Vinegrad.

STATEMENT OF ALAN VINEGRAD, COVINGTON AND BURLING, NEW YORK, NEW YORK

Mr. VINEGRAD. Thank you, Senator Sessions. I thank the Committee for giving me the opportunity to be here before you today.

The *Blakely* decision, I believe, warrants consideration of both short-term and potential long-term responses. In the short term, until the constitutionality of the Federal guidelines system is resolved, some action should be considered to remedy the unstable, if not chaotic, state of affairs in the Federal criminal justice system.

Courts around the country are taking, and will likely continue to take many divergent approaches in response to *Blakely*, from upholding the guidelines, to declaring them unconstitutional, to declaring them unconstitutional only insofar as upward adjustments to the base offense level and then sentencing within that level, to authorizing or refusing to authorize juries to resolve disputed sentencing enhancements either as part of the trial or in a separate sentencing proceeding.

The Department of Justice is asking all of its prosecutors to ask judges to announce three separate sentences in every case. Temporary legislation bringing some order to this process is something that should be seriously considered, particularly since the turmoil will not end if the Supreme Court declares the guidelines unconstitutional. It will, in fact, continue until a long-term legislative solution is found.

Others have spoken about possible short-term solutions. I will focus my remarks here on potential long-term solutions, in the event the guidelines are held unconstitutional, because I believe it is important to start that dialogue now.

My views on this issue rest on three basic premises. First, I believe the guidelines generally make sense to the extent that they promote uniformity and predictability in sentencing, with sufficient flexibility for judges to exercise discretion to impose more or less punishment based on the unusual facts of a given case.

Second, juries can and already do have a role to play in determining certain basic facts that are relevant to sentencing. The most obvious example is in capital cases where juries control the determination. However, even in non-capital cases, in the wake of the *Apprendi* decision 4 years ago, juries in Federal cases have

been called upon to decide a number of issues affecting the statutory maximum punishment.

For example, juries determine the type and quantity of narcotics, whether certain violent crimes result in serious bodily injury or death, or whether a dangerous weapon was used to commit a bank robbery. I tried two such cases as a Federal prosecutor.

If the Court holds the guidelines unconstitutional, then Congress, with the assistance of the Sentencing Commission, could designate other factors critical to the sentencing process that would increase a defendant's sentencing guideline range and thus require a jury determination beyond a reasonable doubt. Such factors could include, for example, the amount of loss in a financial crime case or the number of guns in a gun trafficking case. Because these facts typically are already part of the proof in the guilt phase of a criminal trial, I believe that requiring juries to decide these issues would require little additional effort on the part of the various parties to the criminal trial process.

On the other hand, I do not believe that juries should be called upon to decide the many other factors now contained in the sentencing guidelines. A single case can give rise to 5, even 10 or more specific issues under the guidelines, including alternative base offense levels, specific offense characteristics, upward adjustments and upward departures.

Oftentimes, some of these factors are not fully developed or even known about until just before, during or after the trial. It is doubtful that a system requiring juries to decide all of these issues would be workable, let alone desirable.

Instead, sentencing guideline ranges could be calculated based on the offense of conviction, as well as other critical factors either found by a jury or admitted by a defendant during a guilty plea. The size of the guideline ranges could be broadened to allow judges to take into account all the other aggravating factors that are relevant to the sentencing decision, such as role in the offense, the use of a special skill, or obstruction of the prosecution.

Numerical values could continue to be assigned to these factors and could serve as non-binding guidance on how these factors should presumptively be taken into account in determining the defendant's sentence. This sort of sentencing system would satisfy several competing objectives.

First, it would preserve substantial uniformity in the sentencing of similarly situated offenders. Second, it would preserve the jury's role in determining the basic facts that are essential to determining maximum punishment. Third, it would maintain the basic structure of the current guideline system with relatively narrow ranges of presumptive punishment for Federal crimes.

Fourth, it would allow for a reasonable degree of judicial discretion in determining the ultimate sentence. Fifth, it would be relatively feasible to implement. And, finally, it would be constitutional, for it would satisfy *Blakely*'s requirement that factors that increase a defendant's maximum punishment be proven to a jury beyond a reasonable doubt.

Thank you.

[The prepared statement of Mr. Vinegrad appears as a submission for the record.]

Senator SESSIONS. Thank you. That was a very thoughtful discussion and I appreciate it very much.

Mr. Vinegrad, I don't know if just cutting the baby in half is a good solution here.

Mr. VINEGRAD. Somebody told me that was the that kind of thing that happens in these halls.

Senator SESSIONS. Well, we have decided this matter. Five members of the Supreme Court have apparently declared that the Sixth Amendment to the Constitution says that judges can't consider factors to be used in sentencing, that it has to be decided by a jury, which is contrary to our history, and contrary to American policy. Anybody who has ever been in a courtroom knows that.

Many States do not have guidelines at all, correct? I will ask you, Mr. Vinegrad and Mr. Bowman. You all have practiced. A jury comes in and renders a verdict, and the maximum penalty is 1 to 20 years and the judge renders a sentence. Isn't that correct?

Mr. VINEGRAD. Yes, although an increasing number of States not only have guidelines, but others—and I believe Mr. Weich said this—have statutory schemes, like the one in New York, which do give increasing levels of punishment for certain types of crimes.

Senator SESSIONS. Well, that is the way we have always done it. I mean, the Congress has always put the penalties there. We do have jury involvement in some areas, but fundamentally judges sentence.

In the past, Mr. Bowman, you couldn't even appeal. As long as a judge sentenced within the statutory limit, you couldn't appeal. Isn't that correct?

Mr. BOWMAN. Certainly, prior to 1987, in the Federal system, you really couldn't appeal. Indeed, the courts of appeals that ruled on the question customarily said that they lacked jurisdiction to reconsider the sentence of a district court judge within the statutory maximum so long as that decision was not based on some unconstitutional factor. That is certainly correct, Senator.

Senator SESSIONS. That is the deal, so I am not giving up on this opinion. I think Justice O'Connor is going to prevail because her logic and her history is so compelling.

Mr. Weich, to address your comment about the elements of the offense, maybe we are blurring somewhat the elements of the offense. However, if you commit a robbery and the maximum penalty for the robbery is 20 years and someone carries a gun and the judge says, well, you carried a gun in that robbery, I am going to give you 20 years, if you hadn't carried a gun, I might have given you 10 years—I don't see how a constitutional issue is implicated here.

Mr. WEICH. I don't think that it is constitutionally required that the presence of the gun in the crime be an element of the offense. I think that a rational legislature might decide that that is such an important fact in that crime that it is one which should be placed before a jury and then expose the defendant to more punishment if found.

Senator SESSIONS. I agree that you could address it as an element of the offense, but I don't know that it is necessary.

Mr. Bowman, you made some excellent, thoughtful comments about the system being too complicated. Your second point was it

seemed to be always an upward ratchet on sentence. But we want, do we not, the base offense to be moderately low and things that aggravate that offense add to the sentence? Isn't that, as Mr. Steer suggested, the scheme of the guidelines, that if you make the base offense too high and the person has no aggravating circumstances, maybe you have imposed too long a sentence. Isn't it inevitable that we would ratchet up the penalty?

Mr. BOWMAN. Well, I think there are two points here, Senator. Certainly, your observation is a correct description of the guidelines as they function. We start with a base offense level, as Commissioner Steer talked about, and work upward from that point.

But the point I was making was not a point about the design of the guidelines, but, in fact, how policymaking and rulemaking and guidelines-making has proceeded over the last 10 years or so. And the point I was making is that, for a variety of reasons far too complicated to go into right now, it has become politically very easy to raise the sentencing levels stated in the guidelines by either simply increasing base offense levels or adding additional enhancements. It has become very easy to do that, but it has become very difficult to do the reverse, to bring sentencing levels down.

I think a terribly important point needs to be made here. I have been a supporter of the guidelines, both when I was in practice and in my life as an academic, relatively short though it has been. But I have been a supporter of the guidelines because I believe they achieve certainly and they achieve reasonable fairness.

But what we have done is we have created a situation in which the input of the people on the ground—the judges, the lawyers, both prosecutors and defenders, the probation officers—the wisdom of people who actually face defendants everyday has not been listened to by people in Washington. And I don't refer only to the legislature, but I also refer sometimes to the commission and sometimes certainly to the Department of Justice.

National decisionmakers have not listened to the wisdom of the people who are actually doing the job out there, and sometimes the people who are actually doing the job out there convey to the people in Washington, look, we ought to raise some sentences of a particular class. When that message comes forward, that should be listened to.

But sometimes, and increasingly over the past few years at least for some classes of cases, the people who really do the job out there are saying in every way they can to national policymakers that some kinds of sentences are too high; you should do something about that, you should reduce them. And that message is not getting through, Senator.

Senator SESSIONS. Well, it is not getting through, I will admit to you. I have offered legislation to do that. The biggest complaint has been over crack cocaine penalties being too harsh, and I have offered legislation. I got Senator Hatch to agree with me and we have sponsored it. We can't get cosponsors to reduce the penalties for crack cocaine. I would have thought it would have been easy. I think Congress deserves criticism there.

We ought to be looking at all of this. We have sort of taken it over and set these ranges, and we can't just say that we are never

going to reconsider it. So I agree with you fundamentally. We need to listen to that and that is our responsibility.

Professor Barkow, do I understand that since this is a symptom of the problem, according to Mr. Bowman, that we have this opinion, that Justice Scalia is of the view that if Congress doesn't act like he would like them to, he can just create a way to strike down the whole guideline system? Is that what this judge who shows restraint is about?

Ms. BARKOW. I, of course, would make no pretense to speak on behalf of Justice Scalia, but I do think that the opinions in *Blakely* and *Apprendi* are comprised of an interesting coalition of Justices: Justice Scalia, Justice Stevens, Justice Souter, Justice Ginsburg and Justice Thomas. So you have five obviously very intelligent people who have looked at the history and the background of sentencing and at the role of the jury, and have found that these facts that require a sentence to be increased have to go to a jury.

Now, I think it is important to note that the opinion does make clear that Justice Scalia and the Justices who joined the opinion are saying that there is no set way that Congress needs to respond to it and that you are free to make all of these same determinations in the future.

All the opinion is really about is who finds those facts. In our system, who decides what a defendant really did? Who makes that decision? *Blakely* says that is what our jury is for. And it is not the neatest and most efficient way of deciding things, but it is a uniquely American tradition that I think we should be very proud of, and I think that opinion is a great testament to how we try to preserve it.

Senator SESSIONS. We have never understood it that way. We have never understood that juries have to sentence. Sometimes they have and sometimes they haven't. Most criminal justice reformers, as I recall, over the years have favored judge-sentencing rather than jury-sentencing, thinking juries are far more aberrational and are likely to not have the necessary experience or knowledge of how the prison system works. And so we have been encouraged to move away from jury-sentencing.

Ms. BARKOW. Could I just clarify that it is not actually jury-sentencing that the opinion requires. It just says when something is an offense element and when it is a sentencing factor. When it is a offense element, you can set the sentence and it can be that when the jury finds the facts, a very specific sentence can follow and the jury need not have any discretion at all in terms of what the defendant ultimately receives as punishment.

Senator SESSIONS. Right. Justice O'Connor dealt with that a little bit. She said it is not about whether sentencing is constitutional, only about, quote, "how it can be implemented." In effect, as she notes, you make the cost so high and the difficulty so high that it is going to cause us a great deal of trouble as a practical matter.

I don't need to pursue that matter too much more, but maybe we better go back to the principles of the guidelines.

Mr. Weich, do you think Congress needs to be more involved in monitoring how the guidelines work and listen to information from various sources as to how they are working and what can be done to improve them?

Mr. WEICH. I certainly think that the Congress should be involved in monitoring. That sounds right in those terms. As Frank Bowman says, there have been voices crying out for some relief from what everyone agrees are unjust sentences. And hearings on the sentencing system have been few and far between over the years, so monitoring is a good thing.

I think the Congress needs to be much less involved in micromanaging the commission. The point was made before about the Feeney amendment. There were lots of things that were wrong about that Feeney amendment, in my view. The fact that the Congress actually wrote guidelines is a bad thing. The fact that the Congress created what some call a judicial blacklist, I think, is a bad thing.

But to my mind, the worst was when the Congress wrote guideline commentary in the voice of the commission. The statute reads that the commentary accompanying 2A1.-whatever shall read, we have written this guideline because of x, y and z, turning the commissioners into, as I say in my testimony, glorified ventriloquist dummies. And that is a big problem if the Justice Department is now going to defend the guidelines as court rules rather than legislation. You can't create a commission of judges and other experts and turn them just into a mouthpiece for Congress. So monitoring, yes; micromanagement, no.

Senator SESSIONS. You mentioned, Mr. Bowman, and I think Mr. Vinegrad, perhaps widening the discretion of a judge. It is now, what, 25 percent?

Mr. VINEGRAD. Six months or 25 percent, whichever is greater.

Senator SESSIONS. Yes. I have often thought that that is too tight a range. It means if a judge likes you, he gives you 16 years. If he doesn't like you, he gives you 20 years. That is not a lot of range. Is that 25 percent? Yes. That is what the guidelines actually call for.

Do you think justice would be enhanced, Mr. Vinegrad, if that range were widened from 25 percent?

Mr. VINEGRAD. Well, if the Supreme Court would hold the present system unconstitutional, then the answer is yes. I think that would accommodate the need for judicial discretion in determining—

Senator SESSIONS. If they would hold it unconstitutional?

Mr. VINEGRAD. If they held them unconstitutional and something had to be done to change them, then I think in order to accommodate both the need for juries to have some role in finding the important sentencing facts, but have judges take into account all the various detailed enhancements and adjustments that are contained in the guidelines now, then, yes, I think that ranges should be broadened so that a judge has a greater ability to take into account those many factors than the judges have now.

Senator SESSIONS. Well, if they did not declare it unconstitutional, do you still think the range should be widened?

Mr. VINEGRAD. Well, what I think is that these rules, these guidelines have become, like the Criminal Code itself, extraordinarily complex, and far more complex than frankly they need to be. If you look at State analogs—and admittedly States are simpler institutions, but if you look at the Kansas system, for example,

which has been discussed, including the *Blakely* decision, there are about half a dozen aggravating factors, half a dozen mitigating factors, and that is essentially the variation from what otherwise are the standard or presumptive sentences.

To have the plethora of adjustments that are in the guidelines now, I think, has made this far too complex a process. So I would think that with a combination of simplification and expansion of the ranges, you would have a better system.

Mr. BOWMAN. Senator, if I might answer that question, what has come to be known as the 25-percent rule, the piece of the Sentencing Reform Act that requires that the top of the sentencing range be no higher than 6 months or 25 percent below the bottom, is a classic example of the law of unintended consequences.

There is no question why it was put it, at least I think, though I wasn't there. I am sure that Congress was interested in making sure that the ranges within which judges could exercise their discretion were somewhat limited, as that was one of the objectives of the Act. And 25 percent sounds like a considerable range within which a judge can move, and I have made that same argument in defense of the guidelines for years.

On the other hand, what happens when you actually go and do the math, if you will, is that if you start at the bottom with zero months and you go up to the top sentence allowed for by Federal law, which is essentially 30 or 40 years, and you try to work your way up mathematically going only 25 percent at a time, you have to have a very complicated system; you have to have a lot of boxes.

When you create all those boxes, incentives arise to fill them and the result is the complexity that we see. Perversely, if we had wider ranges and a smaller number of boxes, that would in itself force simpler guidelines.

Senator SESSIONS. It would allow judges who are complaining that they don't have enough freedom, or who say that they have some intuitive feeling that a sentence is too harsh, to have a little more freedom, would they not?

Mr. BOWMAN. They certainly would.

Senator SESSIONS. Would that make the judges happier?

Mr. BOWMAN. I think it would make them happier. I think it would make all of us who are interested in improving the system happier, because I have to say again this is a technical matter, but it is an important one. If indeed, after *Blakely* and the Supreme Court's next decision—if indeed we get, as I hope we will, to the point of seriously thinking about how the Federal sentencing system can be improved, how the guidelines can be improved, one considerable structural impediment to doing anything meaningful is that 25-percent rule. As long as it is there, the guidelines will probably remain more complicated than they need to be.

Senator SESSIONS. They are complicated, but a lot of it is the result of requests of professionals who say, well, with regard to this sentence, you didn't put in that they took advantage of an elderly person that a judge would normally consider. It allows a judge to go upward, but a judge isn't always required to go upward. I have been amazed at how well the courts have accommodated and followed fairly consistently these guidelines.

Do you agree, Mr. Vinegrad? You have tried cases and supervised cases. When you want to estimate what a judge is going to do, are you pretty confident that they will follow the guidelines and, as a prosecutor and defense lawyer, pretty much confident of what the defendant may get if they are tried and convicted?

Mr. VINEGRAD. Generally speaking, I think that is right, and I think the vast majority of judges conscientiously apply the guidelines as they are written. Frankly, to the extent that a sentence comes out of a case that is either unexpected, or worse, that one party thinks is wrong, they have a right of appeal, which to me is sort of the solution which is preferable to some of the other ones that we have seen lately in some of the sentencing legislation such as the PROTECT Act.

If a party thinks that the sentencer exercised discretion in one way or the other wrongly, they can take an appeal. But I think in the vast majority of the cases—and the data from the Sentencing Commission proves this out—apart from cases involving cooperation where the government asks for the departure, judges are by and large sentencing within the guidelines.

Senator SESSIONS. Any further comments on any of that?

Mr. WEICH. Senator, may I include something in the record? Mr. Mercer on the first panel asked that a letter that he wrote at the time of the PROTECT Act be included in the record. That letter complains about specific cases where there are departures. That complaint is actually at the heart of the discussion here: how flexible should the guidelines be? The Department of Justice, I think, has been overly rigid about trying to squeeze out judicial discretion by limiting departures.

I would like to include in the record an August 1, 2003, letter from the organization Families Against Mandatory Minimums, which, in the interest of full disclosure, is an organization that was founded by my wife, Julie Stewart. It is addressed to then-Chair of the Sentencing Commission, Judge Murphy, and it rebuts case by case the allegations of unwarranted judicial leniency. I think that for the record to be complete, this should be included as well.

Senator SESSIONS. We would be glad to have that made a part of the record.

I frankly think some judges have had coffee with their brothers and a few have decided they are not going to be very respectful of the guidelines. But for the most part, as I just said, I think judges are following it consistently. I don't blame the Department of Justice, who is an advocate here, for being concerned if they note a trend by certain judges to consistently evade or skirt or avoid the guidelines. But that is not really the problem. I think we can deal with that and we can deal with most of these issues, but I still remain really disappointed in the Supreme Court's ruling.

I don't think it is consistent with good constitutional law. It shows a lack of understanding of how criminal justice works in America. I don't see how and when you would call a jury back to determine whether the white-collar fraud person was a manager or a leader.

When would that happen, Mr. Vinegrad?

Mr. VINEGRAD. Never, in my experience.

Senator SESSIONS. Would they stay and continue the deliberations before the issues are ripe, or come back two weeks later?

Mr. VINEGRAD. There actually is a drug statute that does call for that sort of determination in continuing criminal enterprise cases, where one of the elements is that somebody had an organizational role. But by and large, in the vast majority of Federal crimes, I agree with you that that is not something the jury is going to be called upon to decide.

Senator SESSIONS. A judge determines now whether or not the white-collar crime defendant was a manager or not. They decide on their own.

Mr. VINEGRAD. Correct.

Senator SESSIONS. And it is subject to review on appeal if the evidence doesn't support it, but it does not require a jury. I would say it is going to have a tremendous impact on the system if we can't figure a way to avoid what appears to be the logical impact of *Blakely*.

If anyone else has anything to add to this, we will keep the record open until next Tuesday. Senator Leahy indicated he will be submitting some questions to you, and I hope that you will be willing to answer those. Thank you for an excellent discussion.

We are adjourned.

[Whereupon, at 12:45 p.m., the Committee was adjourned.]

[Questions and answers and submissions for the record follow.]

[Additional material is being retained in the Committee files.]

QUESTIONS AND ANSWERS

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

April 1, 2005

The Honorable Arlen Specter
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

Enclosed please find responses to questions posed to Mr. William W. Mercer, United States Attorney for the District of Montana, following Mr. Mercer's appearance before the Committee on July 13, 2004. The hearing concerned "*Blakely v. Washington* and the Future of the Federal Sentencing Guidelines."

We hope that this information is helpful to you . Please do not hesitate to call upon us if we may be of additional assistance in connection with this or any other matter.

Sincerely,

William E. Moschella
Assistant Attorney General

Enclosure

cc: The Honorable Patrick J. Leahy
Ranking Minority Member

UNITED STATES SENATE
COMMITTEE ON THE JUDICIARY

JULY 13, 2004

CONCERNING

"*BLAKELY V. WASHINGTON* AND THE FUTURE OF THE FEDERAL SENTENCING GUIDELINES"

QUESTIONS FOR WILLIAM W. MERCER
U.S. ATTORNEY, DISTRICT OF MONTANA

1. QUESTION: At the hearing, I read from the Justice Department's amicus brief filed in *Blakely* as it tried to distinguish the Federal Guidelines from the Washington State guidelines by arguing that the Federal Guidelines are written by an independent Commission with substantial discretion:

> **"Because Congress entrusted to the Commission the specification of the numerous facts that authorize differing punishments under the Guidelines, there is a strong argument that the Guidelines do not implicate the concerns addressed by *Apprendi*. Those concerns arise only when the legislature itself dictates the facts that control a defendant's increased exposure to punishment, thereby effectively creating enhanced crimes."**

As I also noted during the hearing, however just last year, the Department supported – and some suspect drafted – the so-called Feeney Amendment to the PROTECT Act, in which Congress usurped the power of the Sentencing Commission and rewrote substantial portions of the Guidelines Manual, including commentary. I remain concerned that the Feeney Amendment undermines the Department's position that the Federal Guidelines are distinguishable from the Washington State guidelines. You did not answer my concerns directly, but commented that you believed the two positions "separable" and "not inconsistent." You explained: "My statement is that nothing that we argued in front of the Supreme Court would suggest that all authority to make determinations about sentencing, including minimum penalties, standard review, those sorts of things, are all delegated to the Sentencing Commission." I did not follow your reasoning, but given time limitations, was not able to explore the issue with you more at the hearing.

(A) Please explain your response further – how do you reconcile the Department's positions? (B) Did the Department participate in the drafting of the Feeney

Amendment and if so, to what extent? (C) In the future, would you agree that Congress needs to respect the independence of the Sentencing Commission?

1(a). RESPONSE: The Department argued before the Supreme Court that the *Blakely* rule does not apply to the Federal Sentencing Guidelines because aggravating factors found in the Sentencing Guidelines do not raise the otherwise-applicable statutory maximum sentence. Instead, they are a product of the Sentencing Commission, a body in the Judicial Branch, promulgated to guide judicial discretion within the statutory limits set by Congress. We did not believe the heart of this argument was undermined by the fact that in both the original Sentencing Reform Act of 1984, and subsequent legislation addressing federal sentencing policy, Congress saw fit to direct the Commission to review, promulgate, or amend the Guidelines to address a particular sentencing policy preference. We also argued that the changes that result from such directions – or from direct amendment of the Guidelines by Congress – do not alter the statutory maximum penalties that are defined in title 18 and elsewhere in the U.S. Code, and thus did not implicate the rule of *Blakely*.

In addition, the record of the Commission's work belies the allegations of some that the PROTECT Act represents just the latest in a longstanding and substantial line of legislative interference with the Commission's work. For example, of the 69 "congressional directives" listed in the appendix to the National Association of Criminal Defense Lawyers amicus brief in *U.S. v. Booker* and *Fanfan*, a number involved only downward adjustments or departures, and thus do not implicate the Sixth Amendment. Many of the others merely directed the Commission to review particular guidelines and amend them "as appropriate," sometimes offering a statement of "Congress's sense" of an appropriate revision and sometimes not. Indeed, of the 662 amendments adopted since the Guidelines went into effect, it appears that only 18 involve base offense levels or upward adjustments specifically mandated by Congress.

1(b). As you know, Congress and the Executive Branch work very closely on legislation, including crime legislation. The consideration of the PROTECT Act occurred over many months, beginning in the 108th Congress in the Senate as "the Hatch-Leahy PROTECT Act." We worked closely with you, Senator Hatch, and other authors of the legislation, including members of the House of Representatives, to ensure that the bill became law and that it addressed all of the important crime policy issues surrounding child sex offenses. I did not interact with Congressional staff in the development of the Feeney amendment.

1(c). As the Supreme Court noted in Mistretta v. United States, 488 U.S. 361 (1989), sentencing is a shared responsibility. As the Sentencing Commission has said on numerous occasions over its 20-year existence, and as the Supreme Court acknowledged in *Booker*, Congress retains the ultimate authority over federal sentencing policy despite the existence of the Commission. We believe that Congress ought to give due respect to the independence of the Commission, while at the same time fulfilling its own

responsibility to review amendments promulgated by the Commission and to be the ultimate arbiter of federal sentencing policy.

2. QUESTION: Based on the position you took at the hearing, it is my understanding that the Department will not be asking Congress for corrective legislation any time soon. While I understand the Department's position that *Blakely* does not apply to the Federal Sentencing Guidelines, I believe that Congress must be prepared for any eventuality. Please comment on the various legislative approaches that were proposed at the hearing. The first approach is that we temporarily suspend the Guidelines - in effect, make them advisory. The second approach, proposed by Professor Bowman and others, is that we raise the upper limits of all Guideline ranges to the statutory maximum of the offense of conviction. The third approach, known as "Kansas Plan," is to convert Guideline factors into offense elements that must be pled and proven at trial. How practical are these approaches, and what difficulties might they pose for Federal prosecutors?

2. RESPONSE: Between the time that the Supreme Court rendered its decisions in *Blakely v. Washington* and *U.S. v. Booker*, the Department had been preparing for the possibility that the sentencing guidelines would have to be substantially changed in order to comply with the Supreme Court's ruling. Now that the Supreme Court has decided that the sentencing guidelines are advisory in nature, rather than mandatory, policymakers in the executive and legislative branches of government can begin making informed judgments, rather than engaging in conjecture and speculation, about which course of action to follow. It is the Department's position that the decision in *U.S. v Booker* threatens to undermine the principles of the Sentencing Reform Act. Congress explicitly chose against making the guidelines advisory, because compliance with advisory guidelines would be inconsistent. Unless corrective action is taken, sentences will once again be plagued by the lack of predictability, transparency, and uniformity that characterized sentencing before the guidelines. The preeminent goal of the Sentencing Reform Act -- minimization of unwarranted disparity in the sentences of offenders with similar criminal histories who committed similar crimes -- will be compromised with advisory sentencing guidelines.

The Department of Justice has an unwavering commitment to the guiding principles set forth in the Sentencing Reform Act. Although the Department has not endorsed any specific proposal, there are a number of ways to vindicate the key principles of the Sentencing Reform Act, in light of *Booker*. For example, to minimize disparity of defendants convicted of the same crime, Congress could enact legislation that creates a series of statutory minimum sentences, and thereby help maintain a system in which defendants found guilty of similar crimes face similar sentences. This type of straightforward system would promote a consistent and predictable sentencing regime that may help to achieve the sentencing goals of incapacitation and deterrence.

In addition, there appear to be advantages to the so-called "Bowman proposal," which would preserve the traditional roles of judges and juries in criminal cases and retain the role of the Sentencing Commission. Under this proposal, advisory maximum sentences could be issued as part of the guidelines manual, which would give district and circuit courts across the country the benefit of the Commission's collective wisdom and statistical analysis regarding sentencing and would provide a suggested, though not legally mandated, maximum sentence similar to the current maximum. One advantage of the Bowman proposal is that in practice it would come close to duplicating sentences under the sentencing guidelines as they existed before *Blakely*.

While there may be yet additional proposals that would bring similar benefits, the Department of Justice still has not endorsed any particular proposal and will continue to evaluate all such proposals in terms of their ability to accomplish the intended purposes of Sentencing Reform Act.

3. QUESTION: The *Washington Post* reported that a Federal judge in New York scheduled a jury trial to decide a defendant's sentence. (A) What is the Department's view of jury trials of sentencing issues in non-capital cases? (B) What, if any, statutory or other legal basis already exists in the law for such a practice? (C) What rules of evidence and discovery should apply in such a system?

3. RESPONSE: We believe so-called "Blakely-ization" – requiring proof of all the Guidelines' aggravating factors to a jury – had several significant barriers and would have significantly altered the role of judges and juries. Had Booker required Blakely-ization, a number of areas in the federal criminal practice (e.g., fraud cases) would have been seriously impacted. On the other hand, in some categories of cases, the inpact would have been minimal. The Department of Justice is pleased that the Supreme Court did not mandate "Blakely-ization" of all criminal trials in the federal courts.

4. QUESTION: You noted in your testimony a recent West Virginia case, in which the district judge reduced the sentence of a convicted drug offender from 20 years to 12 months, based on the judge's reading of the *Blakely* decision. At least in the short term, this sort of bargain basement sentence is an inevitable by-product of *Blakely* – not because judges *want* to exercise their discretion in this fashion but because they feel constrained by the Court's decision. Congress could potentially reduce these occurrences through corrective legislation, but the Justice Department is not seeking corrective legislation at this time. Will you assure me that the Justice Department will not use the sentences imposed during this interim period, while courts are struggling to respond to *Blakely* on a case-by-case basis, to push for more mandatory minimums and less judicial discretion in sentencing?

4. RESPONSE: As indicated above, we have been preparing for the possibility that the sentencing guidelines may have to be substantially changed in order to comply with the Supreme Court's holding regarding their constitutionality. As part of this work, we have

been monitoring federal sentencing practices in the federal courts across the country since the *Blakely* decision, and will continue to do so in light of the *Booker* decision. We will, appropriately we believe, use the information we have been gathering about the practices in federal courts since *Blakely* and *Booker* to formulate our position on the need for, and the shape of, any remedial legislation. This information will also be very useful to Congress as it decides what type of legislative response might be appropriate. At this point, we have not ruled out any particular reform proposals, including an expansion of mandatory minimums.

5. QUESTION: You stated at the hearing you did not think that the *Blakely* decision and the uncertainty it has caused has had a significant impact on the plea negotiation process. Based on what I am hearing from various U.S. Attorney's Offices across the country, I find this hard to believe. (A) At this time, have federal prosecutors either at Main Justice or at any U.S. Attorney's Office noted any discernable post-*Blakely* difficulty in their ability to obtain plea and cooperation agreements? If so, what specific problems have been noted, and what if anything has been done to address them? (B) the Justice Department has instructed prosecutors to pursue so-called "*Blakely* waivers" as part of plea agreements. Have defendants agreed to such waivers? Have courts accepted them?

5. RESPONSE: At the outset, it is important to draw a distinction between the post-*Blakely* and the post-*Booker* period. In the aftermath of *Blakely*, federal prosecutors sought and obtained indictments that contained special allegations charging guideline sentencing factors that would have enhanced the defendant's sentence if proven. While U.S. Attorney's Offices were successful in negotiating post-*Blakely* guilty pleas on terms generally favorable to the Government, numerous offices identified difficulties in establishing the total amount of loss in financial crimes, such as large scale corporate and health care fraud cases, the amount of drugs as relevant conduct in controlled substances cases, and enhancements for role in the offense and for multiple victims due to the increased burden of proving such factors beyond a reasonable doubt that was perceived to be required by *Blakely*. Other districts mentioned difficulties in identifying all appropriate sentencing allegations relating to the computation of defendant's criminal history prior to indictment. When dealing with multiple victims and witnesses in large complex cases, there was concern that proof of some sentencing factors would have been problematic, time consuming, and expensive. In firearms cases, some districts reported difficulties in proving beyond a reasonable doubt the enhancement for possessing a firearm in connection with another felony offense.

To be sure, the Department is pleased that *Booker* did not require the government to prove all of the Guidelines' aggravating factors to a jury. Nevertheless, the *Booker* decision is likely to complicate and impede efforts by U.S. Attorneys to negotiate favorable plea agreements. For example, with advisory guidelines, defendants no longer have the guaranteed incentive of receiving benefits under the Sentencing Guidelines for an early acceptance of responsibility. In addition, the circuit courts may come to different

conclusions about appellate standards of "reasonableness," which in turn, might encourage defendants to go to trial in the belief that they are better off being sentenced by a judge, rather than agreeing with the government to cooperate in conjunction with a stipulated sentence.

Lastly, as mentioned earlier, the Department remains very concerned that the *Booker* decision is likely to lead to an era of vast sentencing disparities across the country. Once again, defendants found guilty of similar crimes will face vastly disparate sentences depending on where they committed the crime and which judge imposes sentence, which is precisely what Congress hoped to end when it passed the Sentencing Reform Act over 20 years ago.

At the time of the hearing, we had nineteen days of experience with Blakely. My perspective -- and that of my 92 colleagues -- was limited at that point. However, over the remainder of 2004 we learned a great deal about the difficulties presented by Blakely. All relevant sentencing enhancements were added to indictments. It was not unduly burdensome to note the number of victims in the indictment. However, it was very difficult to describe "relevant conduct." It was impossible to allege obstruction of justice in the indictment if the perjurious behavior occurred at trial (after the indictment was returned and, therefore, unchargeable). Asking juries to find the greater of intended or actual loss or gain was difficult given the complicated definitions required for inclusion in the jury instructions.

Blakely waivers were sought and obtained in a number of cases. They were accepted by Montana courts.

6. QUESTION: *Blakely's* holding turns on the question of what constitutes the relevant "statutory maximum" for *Apprendi* purposes. As far as I can tell, post-*Blakely* cases analyze this question only with respect to terms of imprisonment. Assuming for purposes of this question that *Blakely* applies to the Federal Sentencing Guidelines, would there also be an impact on other parts of defendant's sentences, such as fines, supervised release, and restitution?

6. RESPONSE: The Court did not address specifically other aspects of a defendant's sentences, such as fines, supervised release, and restitution. To the extent that those types of issues are addressed in the federal sentencing guidelines, the *Booker* decision appears to make them advisory rather than mandatory.

Hearing Before the Senate Judiciary Committee
"Blakely v. Washington and the Future of the Federal Sentencing Guidelines"
July 13, 2004

Responses by Vice Chair William K. Sessions and Vice Chair John R. Steer to Questions from Ranking Member Patrick Leahy

1. **What if anything is the Sentencing Commission considering in response [to] the Court's decision in *Blakely*? In particular, is the Commission considering any changes to the Guidelines Manual respecting the use of relevant or acquitted conduct in sentencing? Is the Commission considering any recommendations to Congress to incorporate some factors now determined at sentencing into the statutes defining the offenses? Even assuming the Federal Sentencing Guidelines survive *Blakely*, should they be adjusted in any way to better safeguard the constitutional rights of defendants?**

   Response: The Commission, of course, cannot predict precisely what changes to the Federal sentencing guidelines would be required in the event the Supreme Court extends *Blakely* to the federal system. The extent of any changes to the guidelines would depend in great part on the breadth of any such holding, but the Commission has directed its staff to begin developing proposals that could be considered in the event *Blakely* is held to apply to the federal system. If *Blakely* does apply, it is likely that some relevant conduct rules likely would require reexamination because of their fundamental nature to the guideline system, but at this early juncture it is not clear what modifications might be needed.

   The Commission strongly believes that the Sentencing Reform Act, the associated Federal Rules of Criminal Procedure, and the Federal sentencing guidelines adequately protect the constitutional rights of defendants, advance the statutory purposes of sentencing, and provide certainty, uniformity, and proportionality in sentencing. If, as we believe, *Blakely* does not apply to the Federal system, that should not foreclose the opportunity for Congress, the Commission, and other interested parties to consider whether improvements can be made to the Federal criminal justice system. With respect to relevant conduct, the Commission is aware both of criticisms by some that the relevant conduct rules are overly broad and, on the other hand, legislation recently introduced in the House of Representatives that actually would expand relevant conduct in certain cases, which suggests that relevant conduct is one area that may be ripe for review.

2. **In expressing the opinion that "even if *Blakely* is found to apply to the federal guidelines, the waters are not as choppy as some would make them out to be," the Commission wrote it is worth noting that "a majority of cases sentenced under the federal guidelines do not receive sentencing enhancements that could potentially**

implicate *Blakely*." I'm not sure I understand this point because nearly all of the offenses discussed in the federal sentencing guidelines contain some sort of sentencing enhancement in the form of a specific offense adjustment or a chapter III adjustment. Could you please elaborate? What sentencing enhancements does the Commission believe potentially implicate *Blakely*?

Response: Predicting the breadth of a Supreme Court holding that *Blakely* applies to the Federal sentencing guidelines is very difficult at this time. This lack of clarity greatly complicates any analysis to (1) identify which Federal sentencing guideline provisions could be implicated and (2) estimate the potential impact of an extension of *Blakely* to the Federal sentencing guidelines.

If *Blakely* were held to apply broadly to the Federal sentencing guidelines at its broadest, however, potentially every heightened base offense level, Chapter Two enhancement, Chapter Three adjustment, upward departure, and cross reference based on relevant conduct could be implicated. Base offense levels and adjustments based solely on the offense of conviction or particular elements of the offense of conviction presumably would remain unaffected. *See, e.g.,* U.S.S.G. §2B1.1(b)(13)(A)(ii) (which provides a 4 level enhancement "[i]f the defendant was convicted of an offense under 18 U.S.C. § 1030(a)(5)(A)(I); U.S.S.G. §2D1.1(a)(2) (which provides a heightened base offense level of level 38 "if the defendant is convicted under 21 U.S.C. § 841(b)(1)(A), (b)(1)(B), or (b)(1)(C), or 21 U.S.C. § 960(b)(1), (b)(2), or (b)(3), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance").

Assuming a broad application of *Blakely* to the Federal sentencing guidelines, at first blush the potential impact could be estimated by identifying all cases in which a Chapter Two enhancement, Chapter Three adjustment, upward departure, or a cross reference applied (excluding adjustment based solely on prior convictions, which seem to be excluded from any possible *Blakely* infirmity at this time). The Commission estimates that approximately 33,976 cases — representing 65 percent of the cases sentenced in fiscal year 2002 — meet this broad criteria.

The Commission believes, however, that this figure significantly overstates that actual future impact of extending *Blakely,* even broadly, to the Federal sentencing guidelines. The Commission expects a much more manageable impact in great part because the federal criminal justice system already has begun to adjust to the post-Blakely era by instituting procedures that should protect the overwhelming majority of future cases from questions of *Blakely* infirmity. The Department of Justice has issued guidelines that should insulate plea agreements, which account for over 97 percent of the cases sentenced under the Federal sentencing guidelines, from *Blakely* challenges. Precautions include alleging facts that would support sentencing enhancements in indictments, requiring defendants to stipulate to facts that would support sentencing enhancements, and requiring defendants to waive any potential *Blakely* rights in plea agreements.

3. ***Blakely's* holding turns on the question of what constitutes the relevant "statutory maximum" for *Apprendi* purposes. As far as I can tell, post-*Blakely* cases analyze this question only with respect to terms of imprisonment. Assuming for purposes of this question that *Blakely* applies to the Federal Sentencing Guidelines, would there also be an impact on other parts of the defendant's sentences, such as fines, supervised release, and restitution?**

Response: The Commission also is not aware of any case extending the *Blakely* analysis beyond terms of imprisonment. The Commission's preliminary analysis, however, is that the supervised release and restitution provisions of the Federal sentencing guidelines would be unaffected by such an extension. The determinations of whether to impose a term of supervised release and the length of the term to be imposed generally are based on the statutorily authorized maximum term of imprisonment, *see* U.S.S.G. §5D1.1 (Imposition of a Term of Supervised Release) and the grade of the offense, *see* U.S.S.G. §5D1.2 (Term of Supervised Release) and, therefore, do not depend on factual findings that could be implicated by *Blakely*. Similarly, the guideline restitution provisions set forth at U.S.S.G. §5E1.1 (Restitution) generally follow statutory provisions and would appear to be protected from *Blakely* concerns. Additionally, when considering other issues (*e.g.*, *ex post facto* questions), a number of courts have ruled that restitution is not "punishment" in the same sense as imprisonment.

The fine table set forth at U.S.S.G. §5E1.2(c) (Fines for Individual Defendants) calculates the fine guideline range based upon defendant's offense level determination. As discussed in response to Question #2, there would be implications for the offense level determination should *Blakely* apply to the Federal sentencing guidelines. Whether those implications would carry over in turn to the fine guideline range determination is unclear at this time, but would seem to depend on the threshold question of whether courts extend the *Blakely* requirements beyond terms of imprisonment. If *Blakely* is extended in such a manner, other areas of the Federal sentencing guidelines, such as terms of probation and the guidelines pertaining to organizations, also might have to be reexamined.

SUBMISSIONS FOR THE RECORD

THE UNIVERSITY OF CHICAGO
THE LAW SCHOOL
1111 EAST 60TH STREET
CHICAGO • ILLINOIS 60637-2786

Albert W. Alschuler
Julius Kreeger Professor of Law and Criminology

Telephone: 773 702 3586
FAX: 773 702 0730

July 6, 2004

Senator Orrin G. Hatch
104 SHOB
Washington, D.C. 20510-4402

Dear Senator Hatch:

The Supreme Court's June 24 decision in *Blakely v. Washington* requires an emergency response from Congress.

Blakely held that all facts necessary as a matter of law to increase a criminal sentence must be found by a jury beyond a reasonable doubt. This decision almost certainly prevents federal judges from increasing an offender's sentence on the basis of the enhancements specified in the United States Sentencing Guidelines. Even such supporters of the Guidelines as Justice O'Connor and Justice Breyer, dissenting in *Blakely*, recognized that the government's efforts to distinguish federal-Guideline enhancement from the state enhancement at issue in that case were "half-hearted." These justices charged the majority with "ignor[ing] the havoc it is about to wreak on trial courts across the country."

The most obvious judicial response to *Blakely* is to impose the sentence required by the Guidelines for the offense found by the jury (or admitted by the defendant's guilty plea) without any upward adjustment or enhancement. To judge from the newspapers, this response has been the most common response of federal judges in the days following *Blakely*.

In Charleston, West Virginia, for example, Judge Joe Goodwin reduced the 20-year Guidelines sentence of a methamphetamine dealer to one year. He remarked, "At 240 months, Shamblin's sentence represented much that is wrong about the sentencing guidelines; at 12 months, it is almost certainly inadequate."

In the District of Columbia, Judge Thomas Penfield Jackson withdrew the six-year sentence he had imposed a day before *Blakely* in the case of a North Carolina tobacco farmer who had driven his tractor onto the Mall and threatened to detonate explosives. This defendant's actions had led to the closing of several government offices, the deployment of SWAT teams, and road closings that disrupted four consecutive rush hours. In imposing his initial sentence, Judge Jackson called the

defendant a "one-man weapon of mass destruction." When he substituted a sentence of 16 months for his initial six-year sentence, the judge declared, "The Supreme Court has told me that what I did a week ago was plainly illegal."

In Maine, Judge D. Brock Hornby imposed a sentence of six-and-one-half years in a drug case in which the Guidelines sentence would have been at least fifteen-and-one-half years. In Baltimore, Judge Marvin J. Garbis rescinded the sentence he had imposed in the case of a former Navy physicist who had attempted to seduce a girl over the internet. He observed that, in light of *Blakely*, the six-year prison term he had ordered was "clear error." In Manhattan, Judge Deborah A. Batts did what many other judges have done in the wake of *Blakely* – postpone a scheduled sentencing hearing to allow the parties to consider the effect of the Supreme Court's decision. She noted, however, "[T]he Court is currently of the mind to sentence the Defendant 'solely on the basis of the facts admitted by the Defendant' during his guilty plea."

In Salt Lake City, Judge Paul G. Cassell took a different and I think wiser approach to implementing *Blakely*. He noted that, under *Blakely*, defendants remain entitled to downward Guideline adjustments. The resulting sentences, affording defendants the benefits of favorable Guidelines provisions without the burdens of unfavorable provisions, are likely to be far from the sentences Congress, the Sentencing Commission, or anyone else intended. (Judge Goodwin in West Virginia, while rejecting Judge Cassell's approach, recognized that his own imposition of a sentence on the basis of downward but not upward adjustments was "an artificial application of the guidelines.")

Judge Cassell also noted that *Blakely* reaffirmed the permissibility of discretionary judicial sentencing. Although discretionary sentencing involves fact-finding by judges who need not make their determinations beyond a reasonable doubt, judges have rested sentencing decisions on mixed judgments of fact and law throughout our history. In *Blakely*, the Supreme Court reaffirmed a decision approving this practice, *Williams v. New York*. *Blakely* requires proof beyond a reasonable doubt before a jury only when a specific finding of fact leads to an otherwise unauthorized increase in sentence.

Judge Cassell concluded that, rather than impose skewed, artificial sentences that no one had approved (or, indeed, would approve), the proper remedy for the constitutional violation the Supreme Court found in *Blakely* was simply to declare the current Federal Sentencing Guidelines unconstitutional. This remedy would restore the system of discretionary sentencing that preceded the Guidelines with one significant difference. In exercising their discretion to select a sentence within the range authorized by Congress, judges would be guided but not bound by the Guidelines. (In Brooklyn, a ruling by Judge I. Leo Glasser approved Judge Cassell's approach, and

Judge Glasser developed one of Judge Cassell's themes in detail. His opinion demonstrated the manifest unworkability of still a third possible response to *Blakely* – using juries to administer the current Federal Sentencing Guidelines.)

The issue addressed by Judge Cassell, Judge Glasser, and others was one of remedy or severability. If Congress had known that the sentencing regime it approved would be declared unconstitutional, what would Congress's second choice have been? Would Congress have preferred the application of only some Guidelines (those prescribing the sentences for the "base" offenses found by juries or admitted by defendants and those reducing these sentences on the basis of mitigating circumstances – but not Guidelines increasing sentences on the basis of aggravating circumstances)? Or would Congress have favored discretionary sentencing that could take account of all relevant circumstances and the Guidelines as well? Congress, by acting promptly, can save the courts from this counterfactual inquiry by making clear what its second choice is in fact.

Whether Judge Cassell's remedy should be approved by the courts is contestable, but a statute endorsing this approach would certainly be valid. Moreover, a judicial restoration of the pre-Guidelines regime would leave gaps that legislation would be needed to fill. Judge Cassell could not, for example, provide for the appellate review of sentences – something that was not part of the pre-Guidelines regime and that *Blakely* does not call into question.

Congress might enact legislation with the following provisions:

1) The sentences of defendants whose convictions and sentences were final prior to June 24, 2004 shall remain undisturbed. [The *Blakely* dissenters expressed concern that the Supreme Court might apply *Blakely* retroactively to the date of its decision four years ago in *Apprendi*. Such a ruling seems unlikely, however, and Congress could make this ruling even more unlikely by expressly affirming the validity of pre-*Blakely* sentences.]

2) Defendants whose cases have been or will be filed on or after June 24, 2004 and defendants whose convictions and sentences were not final on that date shall be sentenced (or resentenced) to any punishment between the minimum and maximum penalties authorized by Congress, subject to the limitations of the following paragraph.

3) In imposing sentences within the range of penalties authorized by Congress, judges shall consider the provisions of the Sentencing Reform Act of 1984 and the United States Sentencing Guidelines as nonbinding guides to the exercise of their discretion. No offender whose crime occurred prior to the

effective date of this enactment shall be sentenced more severely, however, than he or she would have been sentenced under the Sentencing Reform Act and the Guidelines. [Although Judge Cassell did not say that the prescribed Guidelines sentence would "cap" the punishment imposed on an offender whose crime was committed while the Guidelines were in effect, imposing greater punishment than Congress had authorized at the time of this offender's crime would probably be unconstitutional.]

4) Judges shall provide reasons for their sentencing decisions, and either the defendant or the government may appeal a sentence to the United States Court of Appeals. To promote justice to the public and to the defendant, and also to promote the development of a common law of sentencing, the Court of Appeals shall review sentences for reasonableness and proportionality. The Court may increase or decrease any sentence. Following a Court of Appeals decision, either party may seek review on certiorari in the Supreme Court.

5) The United States Sentencing Commission may develop guidelines for the system of discretionary sentencing approved by this enactment without regard to the limitations of the Sentencing Reform Act of 1984. For example, the Commission may describe the appropriate treatment of recurring, paradigmatic cases and enable judges to treat these descriptions in the same manner as nonbinding judicial precedents.

If approved, this legislation might not be Congress's final word on the subject of sentencing. Judge Cassell noted Congress's apparent reluctance to afford federal judges greater discretion and suggested that Congress might respond to *Blakely* by enacting new mandatory minimum sentences – a development that virtually every serious student of criminal justice would oppose. New mandatory minimums would be controversial, however, not only in concept but in specifics. If the enactment of new mandatory minimum sentences or other detailed sentencing legislation proved possible, it might take years.

Justice O'Connor noted in her *Blakely* dissent that on March 31, 2004, "there were 8,320 federal criminal appeals pending in which the defendant's sentence was at issue" and that "[b]etween June 27, 2000, when *Apprendi* was decided, and March 31, 2004, there have been 272,191 defendants sentenced in federal court." Prosecutors, defense attorneys, and judges have described *Blakely* as "a tidal wave," a "brave new world," a "legal haymaker," as "throwing everything into flux," and as a source of "chaos," "upheaval," and "mass uncertainty." A broad reassessment of federal sentencing policy can wait until Congress has provided the immediate response the federal courts need.

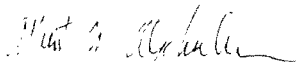
Judge Cassell, a champion of the Federal Sentencing Guidelines, apparently regrets the *Blakely* decision and the remedy this decision led him to approve. I, however, have opposed the Federal Sentencing Guidelines from the beginning, and I applaud the decision in *Blakely*. I believe the proposed legislation would improve the administration of justice. In my view, contrary to the claims of Justice Breyer, *Blakely* does not "mean[] that legislatures cannot both permit judges to base sentencing upon real conduct and seek, through guidelines, to make the results more uniform." It merely endorses the far from radical idea that guidelines should be *guidelines*, not unyielding rules, and that when guidelines go to the point of dictating substantial increases in sentence on the basis of specific facts, the Constitution entitles defendants to have those facts determined by juries beyond a reasonable doubt.

The proposed legislation would not return the federal courts to the pre-Guidelines system of unguided sentencing discretion. It would promote equal treatment not only through sentencing guidelines but also through the appellate review of sentences. In addition, this legislation would further the discussion among the courts, Congress, and Sentencing Commission whose threatened loss was the principal concern of another *Blakely* dissenter, Justice Kennedy.

Whether one agrees with me or Judge Cassell about the foregoing issues is not crucial. Despite our differences, Judge Cassell and I are in accord about what the immediate response to *Blakely* should be. A discretionary sentencing system in which judges use the Guidelines simply as guidelines is immeasurably better than one systematically imposing sentences approved by no one. I hope that, like Judge Cassell and me, Senators and Members of Congress with differing perspectives will agree about the resolution of this pressing question, deferring their long-term battles until later.

I would be pleased to provide documentation and elaboration for any of the statements made in this letter.

Sincerely yours,



Dennis W. Archer
President

AMERICAN BAR ASSOCIATION

750 North Lake Shore Drive
Chicago, Illinois 60611
(312) 988-5109
FAX: (312) 988-5100
E-mail: abapresident@abanet.org

July 12, 2004

The Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary
United States Senate
Washington, D.C. 20510

The Honorable Patrick Leahy
Ranking Democrat
Committee on the Judiciary
United States Senate
Washington, DC 20510

RE: *Blakely v. Washington* and the Future of the Federal Sentencing Guidelines

Dear Chairman Hatch and Senator Leahy:

Thank you for your letter of July 2, 2004, soliciting the views of the American Bar Association on the impact of the Supreme Court's decision in *Blakely v. Washington* on the federal sentencing system.

On behalf of the ABA, I urge the Committee not to respond in haste to the decision in *Blakely* and its holding that "a judge may impose [a sentence] *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*" (emphasis in original). Though the implications of *Blakely* may be considerable, prudence counsels that congressional action should await development of case law on the applicability of *Blakely* to the Federal Sentencing Guidelines, which Justice Scalia correctly noted were not before the Court.

The Sentencing Reform Act of 1984, upon which the current federal guidelines system is predicated, was enacted only after years of meaningful debate and compromise. Likewise, federal sentencing law and policy have evolved gradually over the past 17 years in response to changing priorities and reasoned deliberation. Thus, should one or more of the United States Courts of Appeal, or the Supreme Court, ultimately hold *Blakely* applicable to the federal guidelines, Congress's consideration of suitable remedial measures must be measured against the constitutional magnitude and practical complexity of the issues involved, and informed by the thorough deliberations and recommendations of its various constituencies.

The judiciary, the Department of Justice, the defense bar, and countless organizations and academics are currently devoting considerable resources to assessing *Blakely*'s potential

ramifications for the federal system, and to discerning what, if any, reforms may be appropriate. Hearings such as those your Committee is holding this week are a constructive first step in understanding the true meaning of the issues presented and in beginning a public dialogue about them. At the same time, however, too hurried a response may result in unintended consequences that run counter to the fundamental tenets of prevailing sentencing theory and *Blakely*'s constitutional underpinnings.

Appreciating the turmoil that *Blakely* has evidently produced in the federal courts, Congress may wish to declare the federal guidelines temporarily advisory. Under this short-term approach, any judicial finding of sentencing facts would not have the force and effect of law and would therefore, presumably, not contravene *Blakely*.

In the longer term, our established ABA policy, which is reflected in the Criminal Justice Standards on Sentencing (3d ed.), supports an individualized sentencing system that guides, yet encourages, judicial discretion while advancing the goals of parity, certainty and proportionality in sentencing. Such a system need not, and should not, inhibit judges' ability to exercise their informed discretion in particular cases to ensure satisfaction of these goals.

We are particularly opposed to any reform measures, whether interim or permanent, that compel waiver of *Blakely* rights. For example, a system that would require the court to impose the maximum sentence unless the defendant moved to be sentenced pursuant to the guidelines, would burden the constitutional right to a jury trial recognized in *Blakely*, and might well be regarded as an attempt to evade *Blakely*'s holding. In any case, any law or policy that relies upon the ability to force defendants to waive their constitutional rights for its effect must be regarded as extremely problematic in a just society.

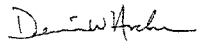
We are also not persuaded that one proposal presently circulating, which would establish a guidelines system with ranges whose upper limit would coincide with the statutory maximum, would achieve the necessary balance between guidelines rule and judicial discretion. Under this alternative, judges would be able to sentence a defendant anywhere within a presumably wide range—from the base of the guideline range all the way to the statutory maximum—and would be free to exercise discretion using a wide range of enhancements and upward adjustments. There would be no upward departures to serve as the basis for appeal, and thus no judicial review except under an abuse of discretion standard. Such a system arguably addresses *Blakely*'s concern that judges sentence only on the basis of facts found by a jury, but it is conducive to the very sort of unbridled judicial discretion that guidelines sentencing was intended to eliminate.

If nothing else, *Blakely* presents an opportunity to revisit priorities and, possibly, to develop even more humane and just sentencing policies and procedures that incorporate the invaluable lessons learned over the past two decades on both the state and federal level. The ABA stands ready to assist Congress in whatever way it can in this important endeavor. We will, for example, be considering at our Annual Meeting next month a comprehensive set of recommendations developed by our "Justice Kennedy Commission," in response to concerns expressed by Justice Anthony Kennedy at our 2003 Annual Meeting about the nation's corrections and sentencing systems. These recommendations will address in preliminary fashion

the issues raised by the *Blakely* decision, and we anticipate undertaking a more in-depth consideration of the implications of *Blakely* for federal sentencing in the coming year.

We hope we may provide further guidance to you as we each continue to address these important matters. In the interim, we ask that this letter by made a part of the record of your hearing.

Sincerely,



Dennis W. Archer

Blakely v. Washington and the Future of the Federal Sentencing Guidelines

Statement of Rachel E. Barkow
Assistant Professor, New York University School of Law

Before the Senate Committee on the Judiciary

July 13, 2004

Mr. Chairman and Members of the Committee: Thank you for inviting me to testify before you today on the Supreme Court's recent decision in *Blakely v. Washington* and its implications for the Federal Sentencing Guidelines. It is an honor to appear before you to discuss this important issue.

In *Blakely v. Washington*, the Supreme Court reminded all of us that the criminal jury is "no mere procedural formality, but a fundamental reservation of power in our constitutional structure."[1] "Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary."[2] America's citizens have never lost sight of the jury's value. More than three-quarters of those polled believe that the criminal jury provides the fairest way of determining guilt or innocence.[3]

This hearing is, at its core, about the importance of the criminal jury. America's commitment to the criminal jury system is and should be a source of great pride. Before the state can take away someone's liberty and label him a criminal, it must obtain the approval of ordinary citizens – citizens who perform a civic duty and ensure that justice is done. The jury system shows America's great respect for its people and the values of its communities. It is one of the cornerstones of our constitutional structure, and we should all strive to maintain its vitality. Because the Sentencing Guidelines in their current form bypass the important check of the people and violate the Sixth Amendment of the Constitution, reforming them should be an urgent priority.

In these comments I will offer a reform proposal that preserves the criminal jury's role and furthers the goals of the Sentencing Guidelines.

To briefly summarize my conclusions, I recommend that Congress take the following actions: First, Congress should immediately, as an interim measure, make the Guidelines advisory and not legally binding. This will give Congress and the Sentencing Commission sufficient time to devise a sound alternative while respecting and preserving the Constitution's jury guarantee in the meantime. Second, Congress should direct the Sentencing Commission, after notice and comment, to identify those Guidelines factors that are sufficiently important that they should trigger, as a matter of federal law, a sentence enhancement of a specified length. Any factor of such importance is required, by the Constitution, to be treated as an offense

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[1] *Blakely v. Washington*, 2004 WL 1402697, *6 (U.S. June 24, 2006).
[2] *Id.*
[3] *See, e.g.*, Am. Bar Ass'n, Perceptions of the U.S. Justice System (1999), at http://www.abanet.org/media/perception/perception40.html.

element to be found beyond a reasonable doubt by a jury. Only after the jury makes such a finding can the increased punishment be imposed.

Given the need to keep trials manageable, I would expect – and Congress could insist – that the Sentencing Commission refrain from singling out too many factors to be treated as offense elements. Those Guidelines factors not identified as offense elements could then become part of an advisory Guidelines regime. But they could no longer trigger mandated punishment on the basis of a judge's findings because it is the jury's role to make such findings.

My statement will proceed in four parts. First, I would like to start by explaining what animated the Court's decision in *Blakely*, namely the fundamental importance of the criminal jury in our constitutional government. Second, I will describe the Supreme Court's decision in *Blakely*, as well as the related decisions leading up to *Blakely*. The constitutional analysis in these cases seems to apply to the Sentencing Guidelines in their current form, and, in fact, many lower courts have already concluded that the Guidelines are unconstitutional under *Blakely*'s reasoning. Third, after setting out the constitutional framework, I will describe what I believe to be the best approach for reforming the Guidelines in light of this background. Finally, I will explain why other recommendations for modifying the Guidelines either run afoul of the Constitution or undermine the purpose of having guidelines in the first place.

I. The Enduring Importance of the Criminal Jury

The criminal jury has been a cornerstone of our government since the Nation's founding.[4] Denial of the right to trial by jury was one of the core grievances that led to the American Revolution, and the right to trial by jury was one of the first to be enshrined in the Constitution. Even before the addition of the Bill of Rights, the Constitution provided that "the trial of all Crimes . . . shall be by Jury."[5] Indeed, the right to jury trial in criminal cases was one of the rare subjects on which all the Framers – both the Federalists and the Antifederalists – agreed. As Alexander Hamilton noted, "[t]he friends and adversaries of the plan of the convention, if they agree in nothing else, concur at least in the value they set upon the trial by jury."[6] The Federalists called the jury "a valuable safeguard to liberty" and the Antifederalists viewed the jury as "the very palladium of free government."[7]

Alexis de Tocqueville observed that "[t]he jury system as it is understood in America appears to me to be as direct and as extreme a consequence of sovereignty of the people as universal suffrage."[8] Thomas Jefferson felt the jury was so critical that he claimed, "[w]ere I called upon to decide whether the people had best be omitted in the Legislative or Judiciary department, I would say it is better to leave them out of the Legislative."[9]

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[4] For a detailed discussion of the jury's historical and constitutional role, see Rachel E. Barkow, *Recharging the Jury: The Criminal Jury's Constitutional Role in an Era of Mandatory Sentencing*, 152 U. PA. L. REV. 33, 46-84 (2003).
[5] U.S. CONST. art. III.
[6] THE FEDERALIST No. 83 (Alexander Hamilton).
[7] *Id.*
[8] ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 293-94 (Knopf 1945).
[9] Letter from Thomas Jefferson to the Abbé Arnoux (July 19, 1789) in 15 THE PAPERS OF THOMAS JEFFERSON 283 (Julian P. Boyd & William H. Gaines, Jr. eds., 1958).

The Framers of our Nation held the criminal jury in high esteem because it provides a valuable check against state abuse and places it where it belongs: in the people themselves. This is critical in criminal proceedings, where the danger of state abuse is especially high and the consequences especially grave. The jury stands as a barrier between the state and the individual, ensuring that that no one will lose his or her liberty if it would be contrary to the community's sense of fundamental law and equity.

"On many occasions," the Supreme Court has observed, "fully known to the Founders of this country, jurors – plain people – have manfully stood up in defense of liberty against the importunities of judges and despite prevailing hysteria and prejudices."[10] "[T]he premise underlying the constitutional method for determining guilt or innocence in federal courts is that laymen are better than specialists to perform this task."[11]

Given its history and value, it is no wonder that the criminal jury continues to enjoy broad support from the American people. Polls have found that 78 percent of Americans believe the "[t]he jury system is the most fair way to determine the guilt or innocence of a person accused of a crime."[12] Sixty-nine percent believe that "[j]uries are the most important part of our judicial system."[13]

In order to preserve this critically important part of our heritage and ensure that the jury continues to act as a barrier between the accused and the state, the jury must retain the authority to apply all laws that peg criminal punishment to particular findings of fact. And, indeed, that was the system we had for virtually all of the Nation's history. If a law mandated that a specific punishment was to be imposed upon the finding of a given set of facts, that punishment could be imposed only after the jury found those facts beyond a reasonable doubt and concluded that the law properly applied.[14] If a law established that a given set of facts could lead to a range of punishment, judges could sentence anywhere within the range, but only after the jury determined beyond a reasonable doubt that the law setting the range properly applied to a defendant's case.

II. Distinguishing Offense Elements and Sentencing Factors: The Supreme Court's Cases

When Congress sought to reform federal sentencing by passing the Sentencing Reform Act of 1984,[15] its focus was on reigning in judges, not juries. In particular, Congress was troubled by the fact that the broad sentencing ranges established by many statutes gave judges too much discretion, which led to unjust disparity and weakened deterrence.[16] The Sentencing

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[10] *Toth v. Quarles*, 350 U.S. 11, 18-19 (1955).
[11] *Id.* at 18.
[12] *See, e.g.*, Am. Bar Ass'n, Perceptions of the U.S. Justice System (1999), at http://www.abanet.org/media/perception/perception40.html.
[13] *Id.*
[14] Prior to 1930, the jury trial right could not even be waived. Barkow, *supra* note 4, at 69-70. The Supreme Court allowed waivers if both parties agreed in *Patton v. United States*, 281 U.S. 276 (1930).
[15] Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (1984).
[16] Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223 (1993).

Commission was therefore charged with establishing Guidelines that would guide the discretion of judges, not with eliminating the jury's traditional power in criminal cases. Congress and the Commission gave little, if any, thought to what the new sentencing laws would mean for the jury. And when the Supreme Court initially passed upon the constitutionality of the Sentencing Guidelines in *Mistretta v. United States*,[17] it also did not consider the effect of the Guidelines on the criminal jury's constitutional power.

It was not until 2000, when the Supreme Court issued its decision in *Apprendi v. New Jersey*,[18] that the Guidelines' encroachment on the jury's power began to draw the attention of the Court. *Apprendi* involved a state statute that allowed a judge to increase a defendant's sentence if he or she found that the defendant committed a crime with a biased purpose. Under this "hate-crime" statute, a judge could increase a sentence even above the statutory maximum for the underlying conviction because the enhancement was deemed a sentencing factor, not an offense element.

The Court concluded that "when the term 'sentencing enhancement' is used to describe an increase beyond the maximum authorized statutory sentence, it is the functional equivalent of an element of a greater offense than the one covered by the jury's guilty verdict."[19] Accordingly, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."[20] The Court explained that "[t]he degree of criminal culpability the legislature chooses to associate with particular, factually distinct conduct has significant implications both for a defendant's very liberty, and for the heightened stigma associated with an offense the legislature has selected as worthy of greater punishment."[21] According to *Apprendi*, it is the jury's function to ensure that such laws properly apply to a defendant.[22]

Although the majority emphasized that it was not passing judgment on the Sentencing Guidelines,"[23] the dissent argued that the majority's analysis would lead to their demise. According to the dissent, the Court's reasoning would apply "to all determinate-sentencing schemes in which the length of a defendant's sentence within the statutory range turns on specific factual determinations (*e.g.*, the federal Sentencing Guidelines)."[24]

The Court revisited the offense element/sentencing factor issue again in its 2002 Term. In *Ring v. Arizona*,[25] the Court considered the Arizona death penalty scheme, which required a judge to find an aggravating factor before the death penalty could be imposed. The Court struck down the statute, again reasoning that "[i]f a State makes an increase in a defendant's authorized

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[17] 488 U.S. 361 (1989).
[18] 530 U.S. 466 (2000).
[19] *Id.* at 494 n.19.
[20] *Id.* at 490.
[21] *Id.* at 495.
[22] *Id.*
[23] *Id.* at 497 n.21.
[24] *Id.* at 544 (O'Connor, J., dissenting).
[25] 536 U.S. 584 (2002).

punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt."[26]

That same Term, the Court decided *Harris v. United States*,[27] in which five Justices allowed facts triggering mandatory minimum sentences to be found by judges, not juries. The five Justices who reached that decision, however, did so for different reasons. Only four Justices believed that result was consistent with *Apprendi*. Justice Breyer provided the fifth vote to allow mandatory minimum sentences, but he could see no logical basis for distinguishing *Apprendi*. In his view (and the view of the four dissenting Justices in *Harris*) there was no distinction between facts increasing the minimum of a sentencing range and facts increasing the maximum.[28] Justice Breyer accepted the mandatory minimum scheme in *Harris* only because he stated he "cannot yet accept" *Apprendi*'s rule.[29] Thus, despite its bottom line, *Harris* provided additional grounds for believing that *Apprendi*'s logic extended to the Guidelines.

The strongest case casting doubt on the constitutionality of the Guidelines is, of course, *Blakely*. The same five Justices who formed the majority in *Apprendi* – Justices Stevens, Scalia, Souter, Thomas, and Ginsburg – concluded that the Washington State sentencing guidelines scheme violated the Constitution's jury guarantee. The defendant, Blakely, had entered a plea of guilty to a kidnapping offense that carried a maximum penalty of ten years. But that was not the only law that governed sentencing in Blakely's case. Washington passed a Sentencing Reform Act in 1981 that created a grid of presumptive sentences based on the seriousness of the offense and the criminal history of the offender. That sentencing law dictates that a judge is required to impose a sentence within the standard ranges set out in the grid unless the judge finds "'substantial and compelling reasons justifying an exceptional sentence.'"[30] The Act also provides factors that may justify an exceptional sentence. Under the grid, Blakely could receive a maximum sentence of 53 months. The judge, however, sentenced Blakely to 90 months, relying on one of the enumerated factors for an exceptional sentence.

Blakely argued that the sentencing enhancement violated the jury guarantee, and the Supreme Court agreed. The Court rejected the State of Washington's argument that the enhancement was acceptable because it was well within the 10 year maximum for the kidnapping offense to which Blakely pleaded guilty. The Court reasoned as follows: "Our precedents make clear . . . that the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*."[31]

The importance of the jury in our constitutional government animated the Court's decision. "The jury," the Court stated, "could not function as a circuitbreaker in the State's machinery of justice if it were relegated to making a determination that the defendant at some

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[26] *Id.* at 602.
[27] 536 U.S. 545 (2002).
[28] *Id.* at 569 (Breyer, J., concurring in part and concurring in the judgment).
[29] *Id.*
[30] *Blakely*, 2004 WL 1402697, at *2 (quoting Wash. Rev. Code Ann. § 9.94A.120(2)).
[31] *Id.* at *4.

point did something wrong, a mere preliminary inquiry to a judicial inquisition into the facts of the crime the State *actually* seeks to punish."[32]

Although the Court again cautioned that it was not passing judgment on the constitutionality of the Federal Sentencing Guidelines,[33] the dissent warned that the Court's opinion "casts constitutional doubt" over all sentencing guideline regimes, including the federal one.[34] Moreover, *Blakely* has prompted courts across the country to conclude that the Guidelines do, in fact, unconstitutionally interfere with the criminal jury.[35] The Seventh Circuit, in an opinion by Judge Posner, noted that the federal Guidelines follow the same pattern as the Washington sentencing regime and "it is hard to believe that the fact that the guidelines are promulgated by the U.S. Sentencing Commission rather than by a legislature can make a difference."[36] As Judge Paul Cassell stated, "the inescapable conclusion of *Blakely* is that the federal sentencing guidelines have been rendered unconstitutional" in cases in which the Guidelines mandate an increase in a defendant's sentence on the basis of facts not found by the jury or to which the defendant has not pleaded guilty.[37]

III. Reforming the Guidelines and Preserving the Jury

It is clear, in light of the criminal jury's constitutional role and the Supreme Court's cases, that the federal Sentencing Guidelines must be revised in fundamental respects. Because this is such an important and enormous undertaking, this is not an overhaul that should be done in haste.

Accordingly, I recommend a bifurcated approach to reforming the Guidelines, one that provides both an immediate interim solution and a longer-term resolution of the Guidelines' constitutional problems.

A. The Short Term Solution: Strip the Guidelines of Legal Force

The Guidelines in their current form are plainly unconstitutional and an affront to the jury's constitutional role. The Guidelines require a multitude of sentencing increases based on facts not currently found by juries and under a preponderance of the evidence standard.

It is important to note at the outset that the reason the Guidelines are replete with judge-made increases based on facts outside the charged offense is not because of any decision of Congress. Congress never mandated or even suggested the current structure of the Guidelines. Rather, it was the Sentencing Commission, on its own, that decided that the Guidelines should adopt a modified version of so-called "real" offense sentencing as opposed to "charge" offense sentencing. Under a charge offense system, punishments are keyed to the offense for which the

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[32] *Id.* at *6.
[33] *Id.* at *6 n.9.
[34] *Id.* at *16 (O'Connor, J., dissenting).
[35] *See, e.g.*, *United States v. Booker*, No. 03-4225, slip op. (7th Cir, July 9, 2004); *United States v. Croxford*, __ F.Supp.2d ___, 2004 WL 1521560 (D. Utah, July 2, 2004); *United States v. Shamblin*, __ F.Supp.2d ___, 2004 WL 1468561 (S.D. W.Va., June 30, 2004).
[36] *Booker*, slip op. at 3.
[37] *Croxford*, 2004 WL 1521560, at *6.

defendant was convicted. Under real offense sentencing, in contrast, punishment is not tied directly to the offense for which the defendant was convicted but is based instead on what the defendant "really" did.[38]

Of course, our constitutional system is based on the ideal that it is for the jury to decide, beyond a reasonable doubt, what the defendant "really" did. To have judges – agents of the state – make such a determination based on a preponderance of the evidence standard is to render the jury a nullity. But the Sentencing Commission nevertheless decided that judges could make such determinations. In particular, the Commission opted for a modified real offense sentencing scheme in which the charged offense is but one factor that can determine the presumptive guideline sentence. Relevant conduct that has not been charged – indeed, relevant conduct that has been charged but of which the defendant has been acquitted – can also determine the base offense level under the Guidelines and can lead to upward adjustments and upward departures. Relevant conduct in many cases is the primary determinant of the length of a defendant's sentence and the charged offense plays a minor role.

Even before the *Apprendi* line of cases, judges and scholars expressed outrage over the Commission's decision to use this real offense sentencing model.[39] And, notably, no state sentencing commission made the same choice in devising their guidelines.[40]

After *Apprendi* and *Blakely*, it should be clear that the Commission's decision to use real offense sentencing factors can no longer stand. Moreover, because this modified real offense sentencing approach forms the backbone of the entire Guidelines design, it is impossible to separate those factors from the rest of the scheme and be left with anything resembling coherence. As Judge Cassell has noted, once the Guidelines are stripped of those provisions that violate the jury guarantee, applying what is left would distort the Guidelines and could result in a regime that is unfair to the government.[41]

Accordingly, I recommend that Congress waste no time in rendering the Guidelines in their entirety advisory only. Congress never mandated or advised that the Commission use relevant conduct in the way that it has, and the Supreme Court has made clear that the practice must end. As long as they have the force and effect of binding laws, the Guidelines as currently promulgated demean our jury system and undermine our criminal process.

B. The Long Term Solution: Defining Offense Elements

Although making the Guidelines advisory will provide a short term solution to their constitutional problems, it is an insufficient solution for the long term. That is because purely advisory Guidelines could put us back to where we were before the Sentencing Reform Act was

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[38] *See* Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises upon Which They Rest*, 17 HOFSTRA L. REV. 1, 9 (1988).
[39] Barkow, *supra* note 4, at 94.
[40] *See* Richard S. Frase, *Is Guided Discretion Sufficient? Overview of State Sentencing Guidelines*, 44 ST. LOUIS L. J. 425, 439 (2000). The Washington state regime described in *Blakely* is typical in this regard. It sets its presumptive sentences largely on the basis of the offense of conviction and a defendant's criminal history. There are relatively few aggravating factors that can also increase a sentence.
[41] *Croxford*, 2004 WL 1521560, at *12.

passed. It does not follow automatically, of course, because federal judges in the pre-Guidelines world had little knowledge of what other judges were doing, and a set of voluntary guidelines could bridge the information gap.

Nevertheless, it seems likely that a purely advisory system will lead to too much disparity and uncertainty. Moreover, there are some sentencing factors that should not be left to unbounded judicial discretion but instead should mandate an increase in a defendant's sentence as a matter of law.

Thankfully, there is a solution that fully complies with the Constitution while also curbing unwarranted disparity and imposing sentences that reflect the seriousness of a crime. Nothing in the Constitution or the Supreme Court's opinions prevents Congress from identifying those facts that should result in increased punishment. What the Constitution and the Supreme Court require is that any facts so identified be found by a jury on the basis of proof beyond a reasonable doubt.

Congress, therefore, should seek to identify what sentencing factors in the Guidelines should become offense factors to be decided by juries. This is, admittedly, not a small task because the Guidelines contain a multitude of sentencing factors. Because not all of the Guidelines are of sufficiently fundamental importance to warrant retention as offense elements and because jury trials could become unmanageable if all such factors became offense elements, Congress should attempt to single out the most important ones. In conducting this inquiry, Congress should make use of the Commission's expertise and wealth of data. Specifically, Congress should order the Commission, after notice and comment, to recommend those factors it believes Congress should deem offense elements. The ultimate decision, however, would rest with Congress.

Once these factors are identified as offense elements, they can be incorporated into existing criminal procedure with ease. They would be charged in the indictment and if a defendant did not stipulate to them in a plea bargain, juries would need to find them beyond a reasonable doubt. If necessary, some of these factors can be determined in a bifurcated proceeding.

Kansas provides a helpful illustration of how simple this model is to apply. In 2001, the Kansas Supreme Court issued a decision along the lines of *Blakely*, holding that aggravating facts under the Kansas Sentencing Guidelines must be found by juries, not judges. The legislature complied with the decision by establishing a procedure that requires juries to find those facts beyond a reasonable doubt in a bifurcated proceeding.

Those factors currently in the Sentencing Guidelines that are not singled out as offense elements would remain advisory factors, for a sentencing judge to consider in a particular case as he or she deems appropriate. If, over time, the Sentencing Commission observes a lack of judicial attention to certain factors, it can then recommend to Congress that those factors also be deemed offense elements.

To the extent there are any doubts about this approach to sentencing, Congress need look no further than the states to see how successful it can be. My proposal essentially mirrors the approach already taken by states with sentencing guidelines. These states have not opted to rely on a real offense sentencing model that seeks to have judges find what a defendant "really" did. Instead, states with sentencing guidelines have used the offense of conviction and the defendant's criminal history[42] to set guideline ranges. States have singled out only a few additional aggravating factors.

These state sentencing models are widely viewed as superior to the federal system because they have brought about equity and proportionality without creating a needlessly rigid regime that undercuts the jury. *Blakely* presents Congress and the Commission with a prime opportunity to learn and benefit from these successful state schemes.[43]

IV. Concerns Raised by Other Approaches

Because Congress is likely to consider a variety of possibilities for reforming the Guidelines, I would like to conclude by noting the shortcomings of what I see as the main alternatives.

A. Replacing Guideline Ceilings with Statutory Maximums

In a memorandum to the Sentencing Commission, Professor Frank Bowman has advanced a proposal that would increase the top of each Guideline range to the statutory maximum of the offense(s) of conviction. The defendant's minimum sentence, however, would continue to be set by the Guidelines. Under one iteration of this proposal, the judge could sentence a defendant anywhere above the Guidelines floor, without giving a reason and without facing appellate review. Another variant of the proposal would require the judge to provide a reason for the particular sentence selected, and there would be some kind of appellate review for abuse of discretion.

This proposal has as its top priority the preservation of the Guidelines. But as discussed above, the Guidelines plainly undercut the jury's fundamental role. The criminal jury is not something that should be bypassed through clever drafting. It is the bedrock of our constitutional structure, and Americans overwhelmingly support it. Any proposal should have as its first goal the preservation of the jury guarantee – yet this proposal erodes the jury's authority even further.

Under this proposal, judges would still be required to increase a defendant's sentence on the basis of so-called "real offense" sentencing factors – factors the jury never found beyond a reasonable doubt and even factors of which the defendant was acquitted. The only difference is

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[42] As of right now, a defendant's criminal history can be treated as a sentencing factor instead of an offense element because *Almendarez-Torres v. United States*, 523 U.S, 224 (1998), has not been overruled. But Justice Thomas provided the fifth vote in *Almendarez-Torres*, and he stated in his concurrence in *Apprendi* that he now believes the case was wrongly decided.

[43] They are proof of Justice Brandeis' famous prediction that states can serve as "laboratories" of democracy. *See New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory, and try novel social and economic experiments without risk to the rest of the country.").

that now these increases would be capped in all cases by the statutory maximum for the convicted offense and the Guidelines themselves would no longer provide a different ceiling. Thus, a judge would be free to increase a defendant's sentence even above the prior Guidelines ceiling. If anything, then, this proposal exacerbates the existing constitutional problems.

The rationale behind the proposal is that it will bring the Guidelines within the loophole created by *Harris* because no matter how much a defendant's sentence is increased as a matter of law, in no event will the defendant's maximum sentence change.

Congress should flatly reject this proposal as unconstitutional. As I have expressed elsewhere, I believe that Members of Congress take seriously their oath to uphold the Constitution.[44] In this instance, obeying the oath requires rejection of Professor Bowman's proposal because it unconstitutionally interferes with the jury guarantee. *Apprendi* made clear that "it is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed *range* of penalties to which a criminal defendant is exposed."[45] A range is increased either by raising its upper limit or its lower one. In both instances, "[t]he degree of criminal culpability the legislature chooses to associate with particular, factually distinct conduct has significant implications both for a defendant's very liberty, and for the heightened stigma associated with an offense the legislature has selected as worthy of greater punishment."[46]

That is why five Justices – a *majority* of the Court – stated in *Harris* that *Apprendi*'s logic applies to factors that increase a minimum sentence just as it does to factors that increase a maximum sentence. Congress cannot ignore the logic of *Apprendi* without defying its independent obligation to uphold the Constitution.

Moreover, it is far from clear that the same five Justices that approved of the mandatory minimum law in *Harris* would uphold this proposal. One of the votes upholding the defendant's sentence in *Harris* was Justice Breyer's. As noted, Justice Breyer stated that *Apprendi*'s logic applied, but he was not yet prepared to accept the outcome of *Apprendi* because he "believe[d] that extending *Apprendi* to mandatory minimums would have adverse practical, as well as legal consequences."[47] Justice Breyer was concerned that taking *Apprendi* to its logical conclusion would lead to the destruction of the Sentencing Guidelines. Now that *Blakely* makes that all but a foregone conclusion, the premise of Justice Breyer's vote in *Harris* is undermined. Accordingly, it is uncertain if not unlikely that Justice Breyer would accept a modification of the Guidelines along the lines suggested by Professor Bowman.

Justice Scalia may also disapprove of the proposal. He joined the plurality opinion in *Harris*, but he also joined the Court's opinion in *Apprendi*. The Court's opinion in *Apprendi* makes clear that, if a legislature revised the its criminal code in an attempt to duck the Court's rule, the Court would then "be required to question whether the revision was constitutional under

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[44] *See* Rachel E. Barkow, *More Supreme Than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237, 324-325 (2002).
[45] *Apprendi*, 530 U.S. at 490 (internal quotation and citation omitted) (emphasis added).
[46] *Id.* at 495.
[47] *Harris*, 536 U.S. at 569 (Breyer, J., concurring in part and concurring in the judgment).

this Court's prior decisions"[48] There was no evidence in *Harris* that Congress enacted the mandatory minimum provision with any intent to bypass the criminal jury. In contrast, there is no other reason for adopting Professor Bowman's proposal. The Court is likely to view the two situations very differently.

The unconstitutionality of this proposal should make it a dead letter. But it is fundamentally flawed in a second respect. It also undermines the reasons for having guidelines in the first place and would have disastrous policy consequences. Under this proposal, a judicial decision to sentence a defendant below the Guidelines floor would be subject to *de novo* appellate review while a decision to increase a sentence above the floor would be subject either to no review or abuse of discretion review. This asymmetry has no rational basis and would lead to precisely the kind of unwarranted disparity the Guidelines were intended to eliminate.

There was a good reason behind the Sentencing Reform Act's mandate that the maximum sentence for each range would not exceed the minimum by more than the six months or 25 percent, whichever is greater.[49] Sentencing ranges were narrowed precisely because the existing statutory ranges were seen as too broad and creating too much disparity. This proposal would recreate the potential for unwarranted disparity. The only difference is that this proposal would also serve to increase sentences. But there is no evidence that an across-the-board increase of Guidelines sentences is justified or wise. It would be unnecessarily costly and unjust to introduce such a scheme without some showing that sentences need to be increased to effectuate the purposes of punishment.

Indeed, it goes against the entire purpose and structure of the Guidelines to engage in such asymmetric manipulation. Judge Cassell has eloquently explained the dangers of an approach that favors departures in one direction. To paraphrase his opinion, under such a scheme the government would be able to say to each defendant, "'what's mine is mine, what's yours is negotiable.'"[50] This undercuts the entire premise of the Guidelines, which, as Judge Cassell explains, "are a holistic system, calibrated to produce a fair sentence by a series of both downward *and* upward adjustments."[51] Judge Cassell cautions against "look[ing] at only one half of the equation,"[52] as Professor Bowman's proposal does, because it would inevitably pull criminal sentences in one direction. In this case, sentences would be pulled ever upward, and there is no reason to believe the resulting punishment would be either just or rational. Judge Cassell states that "[t]he Congress would never have adopted such a one-sided approach."[53] It certainly should not do so now.

B. Enacting Additional Mandatory Minimum Sentencing Laws

Another proposal that may arise is one that relies on the enactment of additional mandatory minimum sentencing laws. This option may be considered because of the loophole

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[48] *Apprendi*, 530 U.S. at 490 n.16.
[49] 28 U.S.C. § 994(b)(2).
[50] *Croxford*, 2004 WL 1521560, at *12.
[51] *Id.*
[52] *Id.*
[53] *Id.*

that *Harris* seems to create. Any such suggestion should be rejected for the same reasons that Congress should reject Professor Bowman's proposal. Indeed, this option is significantly worse.

First, it raises the same constitutional problems. As noted, five Justices in *Harris* agree that *Apprendi*'s constitutional analysis applies to factors that increase a minimum sentence just as it does to factors that increase a maximum sentence. An attempt to use mandatory minimum sentencing laws to evade the jury's constitutional province will undoubtedly cause the Court to view them with a skeptical eye.

Second, this option would result in practical consequences that are even more troublesome than Professor Bowman's proposal. Mandatory minimums have been criticized by almost everyone concerned with sentencing policy, from the Honorable Chairman of this Committee[54] to the Sentencing Commission,[55] judges,[56] and scholars.[57] I will not attempt to catalog all those criticisms in these brief comments. But the criticisms highlight mandatory minimums' inequity and inconsistent application, which undermine the goals of uniformity and certainty. And because mandatory minimums create an even greater asymmetry, they exacerbate the problems caused by Professor Bowman's proposal.

C. Instituting Permanent Voluntary Guidelines

Another possible approach to the constitutional infirmities of the Guidelines is to make them advisory in their entirety on a permanent basis. As discussed above, this proposal is problematic.

First, we do not yet have sufficient evidence that a purely voluntary guidelines system adequately would eliminate unwarranted disparity. Although compliance with voluntary guidelines could be high enough to produce such a result, it is at least doubtful and certainly premature to reach that conclusion at this point. At a minimum, voluntary guidelines should undergo a trial period in which the rate of compliance is monitored. Only then should permanent voluntary guidelines be considered.

Second, voluntary guidelines would lead to greater uncertainty in punishment. The more uncertain the punishment, the weaker the deterrent effect of a law. While this may be acceptable

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[54] The Honorable Orrin G. Hatch, *The Role of Congress in Sentencing: The United States Sentencing Commission, Mandatory Minimum Sentences, and the Search for a Certain and Effective Sentencing System*, 28 WAKE FOREST L. REV. 185, 193-195 (1993).

[55] U.S. Sentencing Comm'n, *Special Report to Congress: Mandatory Minimum Penalties in the Criminal Justices System* (1991).

[56] *See, e.g.*, Associate Justice Anthony M. Kennedy, Speech at the American Bar Association Annual Meeting (Aug. 9, 2003), available at http://www.supremecourtus.gov/publicinfo/speeches/sp_08-09-03.html ("By contrast to the guidelines, I can accept neither the necessity nor the wisdom of federal mandatory minimum sentences. In too many cases, mandatory minimum sentences are unwise and unjust".); *Harris*, 536 U.S. at 570 (Breyer, J., concurring in part and concurring in the judgment) ("During the past two decades, as mandatory minimum sentencing statutes have proliferated in number and importance, judges, legislators, lawyers, and commentators have criticized those statutes, arguing that they negatively affect the fair administration of the criminal law, a matter of concern to judges and to legislators alike."). *See also* Remarks of Chief Justice William H. REHNQUIST, Nat. Symposium on Drugs and Violence in America 9-11 (June 18, 1993).

[57] *See, e.g.*, Stephen J. Schulhofer, *Rethinking Mandatory Minimums*, 28 WAKE FOREST L. REV. 199 (1993).

for some existing guideline factors, there are many factors that are too important to be deemed "advisory." Those factors should be singled out and made offense elements that are determined by a jury, beyond a reasonable doubt.

V. Conclusion

As the Court noted in *Blakely*:

> The Framers would not have thought it too much to demand that, before depriving a man . . . of his liberty, the States should suffer the modest inconvenience of submitting its accusation to the "unanimous suffrage of twelve of his equals and neighbours," rather than a lone employee of the State.[58]

I look forward to a return to the Framers' vision and a reinvigoration of the criminal jury, one of America's finest institutions and one that its citizens still zealously revere.

Thank you again for allowing me to testify and share my thoughts on this fundamentally important area of criminal justice. I would be happy to answer any questions that you might have.

[58] *Blakely*, 2004 WL 1402697, *10 (quoting 4 BLACKSTONE, COMMENTARIES, at 343).

Go Slow: A Recommendation for Responding to *Blakely v. Washington* in the Federal System

Written testimony submitted to the Senate Committee on the Judiciary
Tuesday, July 13, 2004, at 10:00 a.m.
Room 226 of the Senate Dirksen Office Building

Douglas A. Berman, Professor of Law, The Ohio State University Moritz College of Law
Marc L. Miller, Associate Dean for Faculty and Scholarship and Professor of Law, Emory University School of Law
Nora V. Demleitner, Professor of Law, Hofstra University School of Law
Ronald F. Wright, Professor of Law, Wake Forest University School of Law

On June 24, 2004, a legal earthquake struck the national sentencing reform landscape in the form of the Supreme Court's decision in *Blakely v. Washington*.[1] This earthquake has fractured structured sentencing reforms in federal and state systems. Indeed, the federal sentencing regime might appear to be in ruins from the aftershocks of numerous lower court decisions finding that *Blakely* renders parts of the federal guidelines unconstitutional.

In our view, the *Blakely* ruling is not a disastrous event for the federal sentencing system. Justice O'Connor is wrong when she concludes in her *Blakely* dissent that "[o]ver 20 years of sentencing reform are all but lost." We believe instead that the *Blakely* ruling presents a remarkable opportunity to build upon the federal sentencing reform experiences of the last two decades. *Blakely* creates an historic moment in which all three branches of government can take stock and reconsider the law, policy and practices of federal sentencing.

As editors of the leading casebook[2] and journal[3] on sentencing law, and as scholars with longstanding interest in federal sentencing, we have a simple and straightforward recommendation for how the Senate Committee on the Judiciary and Congress should respond to this historic moment: go slow.

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[1] Blakely v. Washington, No. 02-1632, 2004 WL 1402697 (S. Ct. June 24, 2004).
[2] NORA V. DEMLEITNER, DOUGLAS A. BERMAN, MARC L. MILLER & RONALD F. WRIGHT, SENTENCING LAW AND POLICY: CASES, STATUTES AND GUIDELINES (Aspen Publishers 2004).
[3] *Federal Sentencing Reporter* (University of California Press / Vera Institute of Justice) (Douglas A. Berman & Nora V. Demleitner, Managing Editors; Marc L. Miller, Founding Editor; Ronald F. Wright, Advisory Board).

The Challenge *Blakely* Creates

By holding that "all facts essential to punishment" must be found by a jury or admitted by the defendant, *Blakely* disrupts the ability of judges alone to find facts that increase sentences under applicable laws. Judicial fact-finding of aggravating facts is a pervasive aspect of many guideline systems and is central to the current structure of federal sentencing guidelines. Thus it might seem that *Blakely* irreparably disrupts the operation of guideline sentencing schemes.

But as Justice Scalia astutely observed for the Court, the *Blakely* decision does not render guideline and other determinate sentencing systems unconstitutional, it simply forces them "to be implemented in a way that respects the Sixth Amendment." After *Blakely*, guideline and other determinate sentencing systems must be structured to ensure that sentences are increased "*solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*" *Blakely*, slip op. at 7 (emphasis in original).

The challenge now for this Committee and for Congress is to devise an effective and just federal sentencing structure that complies with the requirements of *Blakely*. This is a daunting task not only because the meaning and impact of the *Blakely* decision are uncertain, but also because sentencing realities are often determined by how sentencing laws are administered as much as by how they are written. Crafting a measured and appropriate response to *Blakely* calls for studied deliberation, not hasty action.

Voices of Experience from the Federal Courts

With the dust from the *Blakely* earthquake and its aftershocks still in the air, and with strongly worded opinions highlighting *Blakely*'s apparent impact, it is easy to think that Congress must do something fast. The many unsettled questions in sentencing at the present moment—combined perhaps with a (mistaken) belief that the ceiling (on sentences) is (literally) falling—might lead this Committee or Congress as a whole to believe that immediate legislative action *is* necessary.

However, actors in the federal sentencing system are demonstrating their ability to cope effectively with the immediate issues and concerns generated by *Blakely*. Indeed, the speed of developments in response to *Blakely* is breathtaking. Lawyers and federal courts have begun to wrestle with the implications of *Blakely* and are quickly framing and resolving key issues. New judicial opinions appear from U.S. District and Circuit courts every day.

The vast majority of federal felony convictions—more than 97 percent—are obtained through guilty pleas.[4] Federal prosecutors have already altered charging and plea procedures to

[4] *See* UNITED STATES SENTENCING COMMISSION, 2002 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, FIGURE C (May 2004) (indicating that 97.1 percent of federal felony convictions are obtained through guilty pleas).

account for *Blakely*.[5] The Department of Justice can stabilize the legal terrain through its charging and plea policies, and courts can also review plea agreements for legality under *Blakely*. In a July 9, 2004 opinion, Judge Ted Stewart of the U.S. District Court of Utah explained his view that the *Blakely* fallout in the federal system is manageable:

> "[The] government maintains numerous effective tools for the prosecution of criminal cases to permit appropriately severe sentences.... Indeed, *Blakely* set forth numerous options for the government, and the Department of Justice has set about developing methods for pursuing criminal prosecution, post-*Blakely*."

United States v. Montgomery, Case No. 2:03-CR-801, at 10 (D. Utah July 9, 2004).

In the initial responses to *Blakely* there will be some divergent sentencing practices in different parts of the country. But, in this particular context, the legal variety within the federal system is healthy. In the course of devising a measured and appropriate response to *Blakely*, Congress will be able to draw on the efforts and experiences of judges and attorneys around the country creating and applying various post-*Blakely* rules. Some approaches will likely prove more workable than others, and Congress should benefit from such a testing period before creating a longer-term solution.

Understanding the impact of the *Blakely* holding, let alone crafting a measured and effective response, requires time and deliberation. In our view, *any* legislative fix at this time would come at an unwarranted cost. Federal legislation at this moment could short-circuit the experience and creativity of thousands of lawyers and judges now working through these problems. Furthermore, because legislative action now will only have prospective application, hurried short-term solutions may only further destabilize the legal terrain and may disrupt a proper survey of the new legal environment.

By moving slow, waiting perhaps for future rulings from the Supreme Court about the reach of *Blakely*, Congress will allow the fermentation of facts, knowledge and wisdom that can provide a stronger foundation for further reform in the near future. Congress should also ask the U.S. Sentencing Commission, the body entrusted to draft and study the guidelines, to propose and assess legislative options available in light of judicial decisions. Congress should indeed reconsider the legal superstructure for federal sentencing, but it should not do so in haste with an inaccurate belief that a short-term fix is absolutely needed.

Justice Kennedy in his *Blakely* dissent lamented the decision's impact on the "institutional dialogue" that drove sentencing reform for the past two decades. We believe Justice Kennedy has it backwards, and that the *Blakely* decision can in fact reinvigorate the "dynamic and fruitful dialogue" that marked the initial passage of the Sentencing Reform Act under the extended and thoughtful leadership of Congress. We believe such a dialogue is a critical element to the continued positive evolution of modern sentencing reforms.

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[5] *See* Memorandum From Deputy Attorney General James Comey to All Federal Prosecutors, Department Legal Positions and Policies in Light of *Blakely v. Washington* (July 2, 2004).

Dialogue with States Responding to *Blakely* Issues

When the proper time arrives to reconsider the fundamentals of federal sentencing, Congress can and will be able to draw insights and wisdom from the experiences of states, particularly those with sentencing systems affected by *Blakely*. Congress can already find possible models for creating an effective and just federal sentencing structure after *Blakely* from the experiences in Kansas. Following a 2001 ruling by its state Supreme Court that was similar to *Blakely*,[6] the Kansas legislature created a dual jury system, asking for jury fact-finding on the relevant sentencing facts only after a defendant is convicted.[7] The Kansas solution is only one possibility. Other arrangements for respecting the Sixth Amendment jury right in sentencing procedures are also possible. State legislatures, commissions, and courts will surely generate a variety of special verdict forms for juries and specialized plea agreement procedures.

Waiting to learn not only the response of federal actors but also the response of states can be invaluable to wise legislative reform of the federal system. State governments have already created extremely promising, flexible, and effective sentencing guideline systems that have produced far more consensus and cooperative improvements over time than the federal guidelines. There is every reason to believe that these states with a proven record of success will generate a worthwhile set of models that the Congress can consider down the road in seeking a more permanent solution to *Blakely* issues. And state sentencing systems will generate useful ideas for the federal system on a timely basis. Many of the affected states have sentencing commissions with full-time staff already working on these issues.

Leaders in some states affected by *Blakely* have already explained the dangers of reacting too quickly to the decision. In Arizona, prosecutors decided not to request a special session to change the state's criminal sentencing laws. Ed Cook, the executive director of the Arizona Prosecuting Attorneys Advisory Council, said that the legislature should take enough time "to assure that a legislative fix arises from a thoughtful discussion and a reasoned discussion."[8] In Minnesota, a state rightly praised for leading the development of sound guideline sentencing reforms,[9] Governor Tim Pawlenty has asked the state's sentencing commission to make both short-term recommendations and a long-term analysis concerning possible changes to sentencing laws in response to *Blakely*. The short-term recommendations will be issued by August 1 and a more thorough analysis will be completed by September 30.[10] Congress should similarly charge the U.S. Sentencing Commission.

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[6] State v. Gould, 23 P.3d 801 (Kan. 2001).
[7] Kansas Stat. §§ 21-4716 & 21-4718.
[8] *See* Paul Davenport, *Prosecutors Delay Seeking Special Session on Sentences*, ARIZONA REPUBLIC, July 4, 2004.
[9] *See* Richard Frase, *Sentencing Guidelines in Minnesota, Other States, and the Federal Courts: A Twenty-Year Retrospective*, 12 FEDERAL SENTENCING REPORTER 69 (1999).
[10] *See* Conrad Defebrie, *State to Study Sentencing Ruling*, MINNEAPOLIS STAR TRIBUNE, July 2, 2004.

Twenty Years of Learning

The Sentencing Reform Act of 1984 was one of the most significant law reform efforts in American history, transforming the structure and substance of all federal sentencing decisions. The SRA was produced after almost a decade of hearings, reports and careful discussion by both houses of Congress. Courts may come to recognize that while some or all of the guidelines are no longer valid, Congress' direction to judges in 18 U.S.C § 3553(a) remains valid law and a valuable guide to sentencing decision-making. Under no view will *Blakely* return the federal system to a pre-guidelines world. Federal judges and prosecutors, left alone, can and will draw upon fifteen years of structured sentencing experience, the experience of dozens of states, the now deeply familiar federal guidelines (whether binding or not), the Sentencing Reform Act, and the existence of a substantial body of sentencing concepts, practices, commentary, research and scholarship that did not exist before.

For all of these reasons, we encourage Congress to wait on any legislative action in response to *Blakely*: in short, we encourage Congress to go slow.

Testimony of Frank O. Bowman, III[1]
M. Dale Palmer Professor of Law
Indiana University School of Law - Indianapolis

Before the
Committee on the Judiciary
United States Senate
July 13, 2004

Blakely v. Washington and the Federal Sentencing System

I am grateful to the Committee for the opportunity to testify today regarding the U.S. Supreme Court's very recent decision in *Blakely v. Washington* and its effect on the federal sentencing system. My testimony will address four questions: (1) Does *Blakely v. Washington* apply to the Federal Sentencing Guidelines? (2) Should Congress take any immediate legislative action in response to the *Blakely* decision? (3) If Congress acts in the near term, what sensible options are available to it? (4) Regardless of whether Congress acts in the near term, should the *Blakely* decision act as a catalyst for a thorough re-evaluation of the state of federal sentencing?

I. The Effect of Blakely v. Washington on the Federal Sentencing System

A detailed analysis of the Supreme Court's opinion in Blakely v. Washington, __ U.S. __, 2004 WL 1402697 (June 24, 2004), is beyond the scope of this testimony.[2] In summary, the case involved a challenge to the Washington state sentencing guidelines. In Washington, a defendant's conviction of a felony produces two immediate sentencing consequences -- first, the conviction makes the defendant legally subject to a sentence within the upper boundary set by the statutory maximum sentence for the crime of conviction, and second, the conviction places the defendant in a presumptive sentencing range set by the state sentencing guidelines. This range will be within the statutory minimum and maximum sentences. Under the Washington state sentencing guidelines, a judge is obliged (or at least entitled) to adjust this range upward, but not beyond the statutory maximum, upon a post-conviction judicial finding of additional facts. For example, Blakely was convicted of second degree kidnapping with a firearm, a crime that carried a statutory maximum sentence of ten years. The fact of conviction generated a "standard range" of 49-53 months; however, the judge found that Blakely had committed the crime with "deliberate cruelty," a statutorily enumerated factor that permits imposition of a sentence above the standard range, and imposed a sentence of 90 months.

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[1] M. Dale Palmer Professor of Law, Indiana University School of Law – Indianapolis. Formerly Trial Attorney for the Criminal Division of the U.S. Department of Justice (1979-82); Deputy District Attorney, Denver, Colorado (1983-87); Assistant U.S. Attorney for the Southern District of Florida (Miami) (1989-96); Special Counsel, U.S. Sentencing Commission (1995-96) (on detail from U.S. Department of Justice).

[2] The best currently available judicial analysis of *Blakely's* effect on the federal system is Judge Paul Cassell's opinion in U.S. v. Croxford, Case No. 2:02-CR-00302PGC (D. Utah June 29, 2004), holding the Federal Sentencing Guidelines unconstitutional in light of Blakely. No assessment of the current state of affairs would be complete with reading this opinion.

The Supreme Court found that imposition of the enhanced sentence violated the defendant's Sixth Amendment right to a trial by jury.

In reaching its result, the Court relied on a rule it first announced four years ago in *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000): "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." In the years since *Apprendi*, many observers (including myself) assumed that *Apprendi's* rule applied only if a post-conviction judicial finding of fact could raise the defendant's sentence higher than the maximum sentence allowable by statute for the underlying offense of conviction. For example, in *Apprendi* itself, the maximum statutory sentence for the crime of which Apprendi was convicted was ten years, but under New Jersey law the judge was allowed to raise that sentence to twenty years if, after the trial or plea, he found that the defendant's motive in committing the offense was racial animus. The Supreme Court held that increasing Apprendi's sentence beyond the ten-year statutory maximum based on a post-conviction judicial finding of fact was unconstitutional.

In *Blakely*, however, the Court found that the Sixth Amendment can be violated even by a sentence below what we have always before thought of as the statutory maximum. Henceforward, "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*." *Blakely v. Washington*, supra (Opinion of Justice Scalia; emphasis in original).

Accordingly, the Federal Sentencing Guidelines seem to fall within the *Blakely* rule. A defendant convicted of a federal offense is nominally subject to any sentence below the statutory maximum; however, the actual sentence which a judge may impose can only be ascertained after a series of post-conviction findings of fact. The maximum guideline sentence applicable to a defendant increases as the judge finds more facts triggering upward adjustments of the defendant's offense level. In their essentials, therefore, the Federal Sentencing Guidelines are indistinguishable from the Washington guidelines struck down by the Court.[3] Thus, although the Court reserved ruling on the application of its opinion to the Guidelines, there seems little question that it does impact the Guidelines.

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[3] There are, of course, many differences in the two systems, but most of those differences would seem to be either immaterial or to render the federal guidelines more, not less, objectionable under the *Blakely* analysis. For example: (1) Various observers have pointed out that the Washington guidelines are statutory, while the Guidelines are the product of a Sentencing Commission nominally located in the Judicial Branch. However, the federal guidelines were authorized by statute and amendments must be approved by Congress (at least through the negative sanction of inaction). More importantly, the institutional source of the rules seems immaterial to the Court's Sixth Amendment concern about the role of the jury in determining sentencing facts. (2) The federal guidelines are far more detailed than their Washington counterparts, but that seems only to make them a greater offender against the Sixth Amendment principle enunciated in *Blakely*. (3) The modified real-offense structure of the Guidelines, in particular their reliance on uncharged, or even acquitted, relevant conduct, is different than the Washington system, but surely much more offensive to the *Blakely* rule than the Washington scheme.

This basic assessment seems to be born out by the actions of federal district and appellate courts over the last two weeks. As related in illuminating detail in the written testimony of Judge Paul Cassell for the morning's hearing, and as documented on an up-to-the-minute basis on Professor Doug Berman's marvelous website, http://sentencing.typepad.com, it appears that every federal district judge who has ruled so far has held *Blakely* applicable to the federal sentencing guidelines, rendering them either facially unconstitutional or unconstitutional as heretofore applied. The consensus on the applicability of *Blakely* to federal sentencing was joined last Friday by the Seventh Circuit. *United States v. Booker*, __ F.3d __, No. 03-4225 (7th Cir. July 9, 2004), slip op. at 10.[4]

Unfortunately, although there seems to be wide agreement that *Blakely* applies to the federal system, there is no agreement whatever on how to apply it. In the last two weeks, federal sentencings all over the country have stopped or been postponed while courts and litigants assess the situation.[5] As judges begin to rule, they face three basic options: (a) find that Blakely does not apply to the federal sentencing guidelines and proceed as though nothing has happened; (b) find that the Sentencing Guidelines survive, but that each guideline factor which produces an increase in sentencing range above the base offense level triggered by conviction of the underlying offense is now an "element" that must be pled and proven to a jury or agreed to as part of the plea; or (c) find that the Guidelines are facially unconstitutional, in which case judges can sentence anywhere within the statutory minimum and minimum sentences of the crime(s) of conviction.

Consider these options and their practical consequences:

(a) *Blakely* does not apply to the Federal Sentencing Guidelines: So far, the only federal judge to articulate this position in writing has been Seventh Circuit Judge Frank Easterbrook, dissenting from Judge Richard Posner's opinion holding *Blakely* applicable to the guidelines. *United States v. Booker*, __ F.3d __, No. 03-4225 (7th Cir. July 9, 2004). Of the district court judges who have so far issued opinions addressing the Blakely's impact on the Guidelines, none has found that *Blakely* does not apply.

(b) Blakely transforms the Guidelines into a part of the federal criminal code: The second possibility is that the guidelines remain constitutional as a set of sentencing rules, but that the facts necessary to apply the rules must be found beyond a reasonable doubt by a jury or be agreed to by the defendant as a condition of his or her plea. In effect, all Guidelines rules whose application would increase a defendant's sentencing range[6] would be treated as "elements" of a crime for purposes of indictment, trial, and plea.

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[4] As noted in the text below, the panel in *Booker* was divided, with Judge Frank Easterbrook entering a spirited dissent in which he opined that the applicability of *Blakely* to the federal guidelines was not a foregone conclusion.

[5] Similar stoppages have occurred in many state courts, but the implications of *Blakely* for state sentencing are beyond the scope of this testimony.

[6] Probably excluding rules on criminal history, since the Court has previously held that sentence-enhancing facts relating to criminal history need not be proven to a jury.

If this approach is adopted, it has different effects on two classes of cases: (1) those who have already been convicted by trial or plea, and (2) those who have not yet been convicted. For those in the first category, treating the Guidelines as elements of the offense will, in many cases, produce sentencing windfalls. If guidelines enhancements are elements requiring a jury verdict or a defendant admission, judges cannot apply guidelines provisions -- such as those involving role in the offense, loss amount in fraud cases, drug amounts greater than those triggering mandatory minimums, vulnerable victim enhancements, and a host of others – that were not decided by a jury or admitted by the defendant himself as part of the plea. During the last week, several district court judges have used essentially this approach to reduce the sentences of convicted defendants whose cases were awaiting sentencing or pending appeal.[7]

For cases in the second category, those where guilt has not yet been adjudicated, the problems are far more vexing. If Guidelines adjustments were henceforward to be treated as elements of a crime to be proven beyond a reasonable doubt at trial, a host of new rules and procedures would have to be devised. At this point, no one has fully mapped out all the modifications that would be required; however, the list would seem to include at least the following:

- The government would presumably have to include all guidelines elements in the indictment. However, this is not certain. Perhaps guidelines enhancements sought by the prosecution could be enumerated in separate sentencing informations; but if so, such a procedure would presumably have to be authorized by statute and might not pass constitutional muster.
- If guidelines elements were required to be stated in indictments, grand juries as well as trial juries would have to find guidelines facts, and thus grand jurors would have to be instructed on the meanings of an array of guidelines terms of art – "loss," reasonable foreseeability, sophisticated means, the differences between "brandishing" and "otherwise using" a weapon, etc.
- Grand juries have hitherto been prevented from considering sentencing factors, both because they have been legally irrelevant and because many such factors were thought prejudicial to the defendant. Several U.S. Attorney's Offices have begun considering whether it will be necessary to bifurcate grand jury indictments and presentations by presenting the "substantive" section of the indictment in one session, and then, after the grand jury has returned a true bill on the substantive offense, presenting the sentencing portion of the indictment with supporting evidence.

[7] See, e.g., United States v. Shamblin, Crim. Action No. 2:03-00217 (S.D. W.Va. June 30, 2004) (Goodwin, J.). Judge Cassell's testimony lists several other instances of this phenomenon.

- Since guidelines enhancements would be elements for proof at trial, the Federal Rules of Criminal Procedure and local discovery rules and practices would have to be revised to provide discovery regarding those elements.
- New trial procedures would have to be devised. Either every trial would have to be bifurcated into a guilt phase and subsequent sentencing phase, or pre-*Blakely* offense elements and post-*Blakely* sentencing elements would all be tried to the same jury at the same time.[8] There is now no provision in federal statutes or rules for bifurcated sentencing proceedings, except in capital cases, and there is at least some doubt that such bifurcated trials would even be legal in the absence of legislation authorizing them.
- If a unitary system of trial were adopted, the judge would be required to address motions to dismiss particular guidelines elements at the close of the government's case and of all the evidence,[9] before sending to the jury all guidelines elements that survived the motions to dismiss.
- In either a unitary or bifurcated system, the judge would be obliged to instruct the jury on the cornucopia of guidelines terms and concepts, and the jury would have to produce detailed special verdicts.

The prospect of redesigning pleading rules, discovery and motions practice, evidentiary presentations, jury instructions, and jury deliberations to accommodate the manifold complexities of the Guidelines should give any practical lawyer pause. It is doubtful that judges alone could effect the transformation. Legislation and Sentencing Commission action would almost certainly be required to modify the Sentencing Reform Act, the Guidelines, and the Federal Rules of Criminal Procedure to accommodate the new constitutional model, a process that would take months or years to accomplish. In the interim, uncertainty would be endemic.[10]

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[8] Alternatively, perhaps only those Guidelines elements thought particularly prejudicial to fair determination of guilt on the purely statutory elements would have to be bifurcated, but that option would require a long, messy process of deciding which Guidelines facts could be tried in the "guilt" phase and which could be relegated to the bifurcated sentencing phase.

[9] Unlike other conventional "elements" of a crime, "guidelines elements" would presumably be subject to dismissal at any point in the proceedings without prejudice to the defendant's ultimate conviction of the core statutory offense. For example, in a unitary trial system, if the government failed to prove drug quantity in its case-in-chief, the drug quantity "element" could (and presumably should) be dismissed pursuant to the F.R.Cr. P. at the close of the government's case without causing dismissal of the entire prosecution. By contrast, a failure to prove the "intent to distribute" element of a 21 U.S.C. § 841 "possession with intent to distribute" case would require dismissal of the entire prosecution.

[10] Even when the new system settled in, the sheer complexity of a regime that grafted hundreds of pages of guidelines rules onto the trial process would dramatically increase the potential for trial error. One of the many perverse results of such a complex system would be the creation of a powerful new disincentive to trials, and thus a probable diminution of the already rare phenomenon of jury fact-finding that the *Blakely* majority presumably meant to encourage.

A second consequence of treating all Guidelines sentencing enhancements as elements would be to markedly alter the plea bargaining environment. This reading of *Blakely* would transform every possible combination of statutory elements and guidelines sentencing elements into a separate "crime" for Sixth Amendment purposes. This has two consequences for plea bargaining: (a) As a procedural matter, each Guidelines factor that generates an increase in sentencing range would have to be stipulated to as part of a plea agreement before a defendant could be subject to the enhancement. (b) More importantly, negotiation between the parties over sentencing facts would no longer be "fact bargaining," but would become charge bargaining. Because charge bargaining is the historical province of the executive branch, the government would legally free to negotiate every sentencing-enhancing fact, effectively dictating whatever sentence the government thought best within the broad limits set by the interaction of the evidence and the Guidelines. The government would no longer have any obligation to inform the court of all the relevant sentencing facts and the only power the court would have over the negotiated outcome would be the extraordinary (and extraordinarily rarely used) remedy of rejecting the plea altogether.[11]

A plea bargaining system that operated in this way might benefit some defendants with particularly able counsel practicing in districts with particularly malleable prosecutors. On the other hand, making sentencing factor bargaining legitimate would dramatically increase the leverage of prosecutors over individual defendants and the sentencing process as a whole, leading to worse results for some individual defendants and a general systemic tilt in favor of prosecutorial power.

In any case, any benefit to defendants would inevitably be uneven, varying widely from district to district and case to case. To the extent that the Guidelines have made any gains in reducing unjustifiable disparity, a system in which all sentencing factors can be freely negotiated would surely destroy those gains. (Prevention of this outcome was, after all, the point of the Guidelines' "relevant conduct" rules, see U.S.S.G. §1B1.3.) It might be suggested that the Justice Department's own internal policies regarding charging and accepting pleas to only the most serious readily provable offense would protect against disparity; however, the experience of the last decade, during which variants of the same policy have always been in place, strongly suggests that local U.S. Attorney's Offices cannot be meaningfully restrained by Main Justice from adopting locally

[11] And even this remedy would be of little practical use. If the judge rejected a plea because she felt it was unduly punitive, she could not prevent the government from presenting its case to a jury. If a judge were to reject a plea on the ground that it did not adequately reflect the full extent of the defendant's culpability under Guidelines rules, the judge could not force the government to "charge" the defendant with additional Guidelines sentencing elements. The most the court could do is force the case to trial on whatever combination of statutory and guidelines elements the government was willing to charge – a weak and self-defeating remedy because the two possible outcomes of a trial on such charges are a guilty verdict on the charges the judge thought inadequate in the first instance or a not guilty verdict on some or all of the charges, which would produce even less punishment.

convenient plea bargaining practices.[12] Once previously illegitimate "fact bargaining" becomes legally permissible charge bargaining, no amount of haranguing from Washington will prevent progressively increasing local divergence from national norms.

Ironically, if *Blakely* were ultimately determined to require (or at least permit) the Guidelines to be transformed into a set of "elements" to be proven to a jury or negotiated by the parties, the effect would be to markedly reduce judicial control over the entire federal sentencing process. Not only would district court judges be stripped of the power to determine sentencing facts and apply the Guidelines to their findings, but appellate courts would be stripped of any power of review. Neither jury findings of fact nor the terms of a negotiated plea are subject to appellate review in any but the rarest instances. Thus, the interpretation of *Blakely* discussed here would have the perverse effect of exacerbating one of the central judicial complaints about the current federal sentencing system – the increase of prosecutorial control over sentencing outcomes at the expense of the judiciary.

(c) <u>*Blakely* renders the Federal Sentencing Guidelines facially unconstitutional</u>: The third reading of *Blakely* open to judges is that it renders the Federal Sentencing Guidelines in their present form facially unconstitutional, at least within the current framework of procedural rules governing criminal trials, sentencings, and appeals. Several district court judges have issued rulings to this effect, including an elegant and persuasive opinion by Judge Paul Cassell who is appearing before you today.[13] I think Judge Cassell is right and that the Supreme Court is likely to agree.

Blakely appears to require this result. *Blakely* finds it unconstitutional for the maximum sentence to which a defendant is exposed based purely on the facts found by a jury or admitted in a plea agreement to be increased based on post-conviction judicial findings of fact.[14] The linchpin of the entire federal

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[12] A number of studies have found evidence of significant local variation in plea negotiation and other sentencing practices among different districts and circuits. See, e.g., Frank O. Bowman, III, *Quiet Rebellion II: An Empirical Analysis of Declining Federal Drug Sentences Including Data from the District Level*, 87 IOWA L. REV. 477, 531-34, 560 (2002) (noting inter-district and inter-circuit disparities in average drug sentences and discussing the "stubborn localism of judicial and prosecutorial behavior").

[13] United States v. Croxford, No. 2:02-CR-00302PGC (D. Utah June 29, 2004) (Cassell, J.); United States v. Medas, 2004 U.S. Dist. LEXIS 12135 (E.D. N.Y. July 1, 2004) (adopting the reasoning and conclusions of Judge Cassell in Croxford).

[14] It is not only judicial fact-finding that offends the Sixth Amendment under *Blakely*, though that alone is surely enough. Recall that under the Washington sentencing scheme, a judge who found the presence of a gun was not legally obliged to sentence the defendant in the aggravated range, but had to make the additional determination that the fact found merited an increase. Justice Scalia found that element of judicial choice present in the Washington statute did not save it from constitutional oblivion. A post-conviction judicial finding of fact that enabled the judge to exercise his judgment to impose a higher sentence was, in Justice Scalia's view, constitutionally impermissible. The fact that an increased offense level is an automatic consequence of most factual determinations under the federal guidelines certainly seems to make them more objectionable, rather than less.

sentencing guidelines system is precisely such post-conviction judicial findings. The Guidelines model has three basic components: (1) post-conviction findings of fact by district court judges; (2) application of Guidelines rules to those findings by district court judges; and (3) appellate review of the actions of the district court. Both the Guidelines themselves and important components of statutes enabling and governing the Guidelines were written to effectuate this model. Although it is intellectually possible to isolate the Guidelines rules from the web of trial court decisions and appellate review procedures within which the rules were designed to operate, doing so does such violence to the language, legislative history, and fundamental conception of the Guidelines structure that one could save them only by transforming them by judicial fiat into something that neither the Sentencing Commission nor Congress ever contemplated that they would become.[15] It is certainly true that when construing statutes facing constitutional objections that courts will attempt to save so much of the statute as can be saved consistent with the constitution. On the other hand, if the reading of a statute required to render it constitutional transforms the statute into something entirely at odds with its original design and conception, courts may properly strike down the statute in its entirety.

Not only does the reasoning and language of *Blakely* seem to require invalidation of the Guidelines, but the real world effects of the alternative Guidelines-as-elements interpretation outlined in the previous section will give thoughtful judges reason to shy away from it. Not only would such a system be remarkably ungainly, but far more importantly, it would, as noted, exacerbate those features of the current system that federal judges find most galling. If the only options facing the Court were (a) preserving a simulacrum of the Guidelines system that would make the features judges now find most objectionable even worse, or (b) striking the system down in its entirety and starting anew, it is hard to imagine that a majority of the justices would not strike down the system given a plausible constitutional argument for doing so.

Thus, while the Supreme Court could adopt a saving interpretation of the Guidelines which transformed them into elements of a new set of guidelines crimes, the Court could, without any violence to ordinary principles of constitutional adjudication, just as easily find the whole structure invalid.

If the Court finds the Guidelines as a whole unconstitutional, a different form of uncertainty would result. Presumably, district judges would then be free to

[15] Time and space preclude a detailed exegesis of this point, but consider as but two examples the relevant conduct rules, U.S.S.G. §1B1.3, and the provisions of the Sentencing Reform Act (both in its original form and as amended by the recent PROTECT Act) providing for appellate review. The relevant conduct rules plainly contemplate sentences based on judicial determinations of facts not found by jury beyond a reasonable doubt. Similarly, provisions of the Sentencing Reform Act governing appellate review of guidelines determinations are effectively nullified by a guidelines-as-elements-of-the-offense application of *Blakely* because if all upward guidelines adjustments must be determined either by jury verdict or by stipulation, there is virtually nothing left to review.

sentence defendants anywhere within the statutory minimum and maximum sentences applicable to the offense(s) of conviction. Some judges might view the Sentencing Guidelines as being advisory and might continue to make factual findings called for by the Guidelines in order to aid them in using the Guidelines to guide their sentencing discretion. Other judges might conclude that the Guidelines, being unconstitutional, were of no further use to the judiciary.

Some have characterized this eventuality as a return to the legal regime that predated the enactment of the Sentencing Reform Act of 1984. However, it would differ in at least one critical respect. Prior to the SRA and the Guidelines, federal parole authorities exercised substantial authority over actual release dates of convicted prisoners. Their parole guidelines and discretionary judgments often had the salutary effect of evening out inter-judge sentencing disparities and reducing unreasonably high judicial sentences to more reasonable levels. This backstop on judicial sentencing authority would no longer be in place if the Guidelines were simply cast aside.

II. Should Congress Take Action in the Short Term?

Although, as discussed below, I have advanced a proposal for a legislative response to *Blakely*, there exists a real and substantial question about whether Congress should take any action in the near term.

1. The argument for legislating

The argument for taking some immediate action is straightforward. The Supreme Court has issued a decision that almost certainly renders the Federal Sentencing Guidelines unconstitutional, at least as now written and applied. However, the Court neither addressed the federal system in particular, nor gave any general guidance about how its opinion should be applied in the courts. Consequently, the federal criminal justice system is in a state of turmoil from which it is unlikely to emerge even after the Supreme Court adjudicates the applicability of *Blakely* to the Guidelines. Consequently, it would be desirable for Congress to pass legislation that would restore order to the federal sentencing process, at least while more permanent and fundamental reforms are considered.

2. The arguments against legislating

The arguments against taking prompt legislative action sound five basic themes, which I have labeled (a bit facetiously) as follows:

a. *"Wait for the Supreme Court."*

The first instinct of most of us before seeking legislation in response to *Blakely* is to look to the Supreme Court for additional guidance on two critical points: Are

the Sentencing Guidelines constitutional under *Blakely*? If not, how can we fix the system to make it constitutional? The difficulty is that the Court will not tell us the answer to the first question for months, perhaps many months, even though the answer seems reasonably clear. The bigger difficulty is that if the Court does the expected and declares the Guidelines unconstitutional facially or as applied, the Court will probably not tell us very much about how to fix the problem. In which case, we will be in very much the same fix we are now.

b. *"Don't worry. We've got everything under control."*

At least some folks have been heard to suggest that *Blakely* just isn't that big a practical problem. That the Department of Justice and the courts will, in short order, work out procedures that bring the existing sentencing regime into conformity with Blakely and everything will soon be just fine. While I yield to no one in my respect for the problem-solving capabilities of the Justice Department and the federal bench and bar, this diagnosis seems unduly sanguine. Judge Cassell and others are surely right that the federal system is not in "chaos," at least if chaos means either utter paralysis or the absence of any thoughtful problem-solving, but even a cursory reading of Judge Cassell's testimony or Professor Berman's website shows a justice system in profound disarray. Any system in which judges are routinely issuing two, or even three,[16] alternative sentences in a single case has big troubles. And the issues so far encountered have been mostly confined to dealing with cases where defendants have already been found guilty. The really tough problems will start to unfold as the system tries to make *Blakely* and the Guidelines co-exist in grand jury, discovery, trial, and appellate practice.

Whatever the official organs may say, the front line actors I have talked to recognize that no one has any clear idea how to proceed, and that even intelligent efforts to craft constitutionally acceptable procedures are quite likely to prove either constitutionally unacceptable or practically unworkable in the end.

c. *"Let 100 flowers bloom."*

The third school of thought is more realistic in that it does not pretend that achieving post-*Blakely* stability will necessarily be easy or quick. Rather, folks in this school tend to think the current sentencing system is badly flawed and that permitting a period of legal uncertainty would allow the collective talents of judges and lawyers to fashion new ad hoc sentencing models that would advance the general project of sentencing reform. The idea here is that sentencing policymakers would profit from studying the solutions arrived at in the field as they strive to apply *Blakely* and replace the current Guidelines model with something better.

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[16] Judge Cassell's description of the policy adopted by Chief Judge Walter S. Smith, Jr. of the Western District of Texas. Testimony of the Hon. Paul G. Cassell, p. 14.

I confess to some sympathy with this approach. I agree that the current federal sentencing system needs significant reform. As an academic, I think it would be intellectually interesting to see what judges, prosecutors, and defense counsel would do given the chance. I don't doubt that policymakers and their advisors would surely find valuable the many interesting solutions to the variety of problems created by *Blakely* that would doubtless emerge. The difficulty is that those solutions would inevitably vary from judge to judge, district to district, circuit to circuit, and week to week. Only some of the solutions would ultimately survive constitutional challenge and all the cases applying the ones that didn't would have to be re-sentenced. Therefore, as a practical lawyer, I recoil from consciously turning the federal criminal system into a social science experiment.

d. *"Don't make a bad situation worse."*

Some are concerned that legislating hastily risks creating even more problems than letting the system try to figure things out on an ad hoc basis. I agree entirely. Even uncertainty would be better than legislating a solution that would make the current situation worse. As I will discuss below, I believe that several of the proposed legislative solutions, notably the "Kansas plan" endorsed by the Federal Defenders, have that effect. However, at least two of the proposed legislative alternatives – making the guidelines advisory for a set period, and the proposal outlined below to raise the top of guideline ranges to the statutory maximum.

e. *"Don't waste the moment."*

A good deal of the opposition to any early legislation stems from a widespread feeling that the current sentencing system is badly flawed, but astoundingly resistant to change, and that the *Blakely* opinion represents a long-sought opportunity to fundamentally restructure the system. Those who seek such reform worry that any "temporary" legislative solution to the *Blakely* problem would, if constitutionally sound, tend to become permanent, thus delaying much-needed reform for years. I share this desire for reform, and the worry that the legislation I have suggested below will at least delay it. However, two considerations give me some assurance that in advancing this proposal I am not doing a disservice. First, I think the just and equitable operation of the federal criminal justice system requires stability and predictability, which it will not attain for at least several years without some legislative action. Second, I think those worried that an opportunity may be lost overestimate the transience of the political moment. I venture to predict that *Blakely* is the beginning of the end of the guidelines in their current form and that, if Congress, the Sentencing Commission, the Justice Department, and others do not move reasonably expeditiously in a cooperative and professional way to make necessary changes, subsequent judicial decisions will force change upon us. My objective is to help, in a small way, to create an orderly process for desirable change.

Therefore, taking everything into consideration and being acutely conscious that I may be dead wrong, I conclude that some legislative action is probably desirable. Absent congressional action, in the near term, the federal courts will continue in turmoil as judges try to negotiate the labyrinth created by *Blakely*. In the longer term, absent congressional action, either the Guidelines will be transformed by judicial decisions into an unwieldy annex to the criminal code, augmenting the power of prosecutors and decreasing the authority of judges, or more likely the whole structure will be invalidated as unconstitutional and the process of creating a federal sentencing system would have to begin anew. Such a process carries great risks for all those interested in federal sentencing. For Congress and the Sentencing Commission, seventeen years of work would be nullified. For prosecutors, the Guidelines have been a boon; acceding by inaction to the collapse of the current structure with no guarantee of what might replace it would present, at the least, a tremendous gamble. Even those who have no investment in the Guidelines and every interest in radical reform should be very concerned that any replacement could be even more punitive and more restrictive of judicial discretion than the Guidelines themselves.

III. What Legislative Options Does Congress Have?

If Congress wishes to act in the near term, it should only seriously consider legislation that meets four basic criteria:

- First, it has to be simple. Simple to write into statute, simple to understand.
- Second, it has to have easily predictable consequences for the sentencing system. If we can't really predict exactly how something will work in practice, we should not rush to enact it into law.
- Third, it has to solve, or at least greatly ameliorate, the short-term litigation crisis.
- Fourth, and closely related to the third point, it has to be easy to implement. Most importantly, implementing it cannot require immediate massive rethinking of interlocking sets of sentencing, trial, evidence, and appellate rules.

If we can't come up with an interim solution that meets all these criteria pretty well, we're probably better off doing nothing.

Thus far, three basic legislative options have been suggested:

A. Make the Guidelines advisory for a time certain

This option will be ably discussed by Ron Weich. I will not expand upon it here other than to say that it seems to meet all four criteria listed above. It is simple. It's effect on the sentencing system (if not on individual cases) is easily predictable. It would solve the short-term litigation crisis by removing the taint of uncertainty that now attends every sentencing proceeding. Finally, and critically, it would be easy to implement. Because guidelines enhancements would no longer have a necessary effect on a defendant's sentence, *Blakely* would not be implicated and there would be no need to redesign the entire plea, trial, and sentencing process to ram the round peg

of the Guidelines into the square hole of *Blakely*. The objections to this proposal will doubtless be articulated by others. For myself, I think there is a great deal to be said for a period of advisory guidelines. Indeed, if politically possible, it seems to me a desirable and perhaps the best interim solution.

B. Raise the top of Guideline ranges to statutory maxima

Assuming that one is unwilling to confer increased sentencing discretion on judges, even for a short and experimental period, I believe that the Guidelines structure can be preserved essentially unchanged with a simple modification – *amend the sentencing ranges on the Chapter 5 Sentencing Table to increase the top of each guideline range to the statutory maximum of the offense(s) of conviction.*

As written, *Blakely* necessarily affects only cases in which post-conviction judicial findings of fact mandate or authorize an increase in the *maximum* of the otherwise applicable sentencing range. To the extent that *Blakely* itself may be ambiguous on the point, the Supreme Court expressly held in *McMillan v. Pennsylvania*, 477 U.S. 79, 89-90 (1986), and reaffirmed in *Harris v. United States*, 536 U.S. 545, 122 S.Ct. 2406 (June 24, 2002), that a post-conviction judicial finding of fact could raise the *minimum* sentence, so long as that minimum was itself within the legislatively authorized statutory maximum. It bears emphasis that *Harris* was decided only two years ago, and was decided after *Apprendi* and on the very same day as *Ring v. Arizona*, 536 U.S. 584 (June 24, 2002), the case whose reading of *Apprendi* Justice Scalia found so important in his *Blakely* opinion. Thus, the change I suggest would render the federal sentencing guidelines entirely constitutional under *Blakely* and *Harris*.

This proposal could not be effected without an amendment of the Sentencing Reform Act because it would fall afoul of the so-called "25% rule," 28 U.S.C. § 994(b)(2), which mandates that the top of any guideline range be no more than six months or 25% greater than its bottom. The ranges produced by this proposal would ordinarily violate that provision.

I have attached to this testimony as an appendix an annotated version of statutory language that would effectuate this proposal. Detailed discussion of the proposal is contained in the annotations. In addition to raising the top of the guideline range, this proposal contains the following major features:

1. The proposed bill would direct the Sentencing Commission to enact a policy statement providing non-binding guidance to district courts that would read roughly as follows:

(A) the typical case is a combination of offense and offender characteristics adequately represented by a sentencing range the maximum

of which should not exceed the minimum by the greater of 25 percent or 6 months;

(B) a sentence that exceeds the minimum of the guideline range by the greater of 25 percent or 6 months should be based on one or more factors that—

(I) are legally permissible;

(II) advance the statutory purposes of sentencing as set forth in 18 U.S.C. § 3553(a)(2); and

(III) result in a reasonable sentence.

2. The bill would make any sentence above the guideline minimum appealable on an abuse of discretion standard. The fact that a judge imposed a sentence higher than that suggested by the policy statement for a typical case would be a factor in the determination of whether the judge had abused his or her discretion.

3. The bill would sunset after approximately 18 months.

The practical effect of such a bill would be to preserve current federal practice almost unchanged. Guidelines factors would not be elements. They could still constitutionally be determined by post-conviction judicial findings of fact. No modifications of pleading or trial practice would be required. The only theoretical difference would be that judges could sentence defendants above the top of the current guideline ranges without the formality of an upward departure. However, for the reasons discussed in more detail in the attached annotated version of the proposed bill, the likelihood that judges would use their newly granted discretion to increase the sentences of very many defendants above now-prevailing levels seems, at best, remote.

C. The "Kansas Plan"

The Federal Public Defenders and several other groups have expressed interest in attempting to amend federal law to convert Guideline factors into offense elements that must be pled and proven at trial, or admitted in a plea agreement. This suggestion is modeled on the approach taken by the State of Kansas when its court found state guidelines unconstitutional under *Apprendi v. New Jersey*. The same approach has sometimes been referred to as "Blakely-izing" the Guidelines.

The most important thing to realize about any effort to "Blakely-ize" the Guidelines is that the Guidelines as now written cannot, as a practical matter, be administered through the vehicle of jury trials and detailed plea agreements. If commanded by statute to treat guidelines factors as elements, judges will work together with lawyers in their districts

and will cobble together various arrangements and accommodations in an effort to make the system work. And in due course, sentencings will proceed again. But the effort to make the system work will inevitably require that some sections of the guidelines be ignored or tortured into unrecognizable shapes. Rules will have to be amended, some probably by Congress. Procedures will have to be altered. Some of the resulting arrangements may be better than the Guidelines system we have, some may be worse. But such arrangements will differ markedly from district to district and they will bear only a cousinly resemblance to the Guidelines system now in place.

Perhaps the best way to summarize my views regarding the Kansas plan as interim legislation is that it fails every one of the conditions set out above for desirable near-term legislation.

- It is not simple. Although the defenders have put forward simple-seeming legislative language amending the SRA to implement the scheme, passing those few lines would in short order require revisiting a plethora of other statutes and court rules.
- It is not easy to predict the consequences for the sentencing system or even how it would work in practice.
- It would not solve the short-term litigation crisis, but would surely make it worse.
- Finally, it would not be easy to implement and would indeed require immediate massive rethinking of interlocking sets of sentencing, trial, evidence, and appellate rules.

IV. **Conclusion**

For reasons I hope to explain in more detail in my oral testimony, I do not see the problem created by the *Blakely* decision as a short-term glitch for a smooth-running federal criminal sentencing system. Rather, in my view at least, *Blakely* was decided because the federal sentencing system suffers from serious, long-term, structural problems. The question is not whether reform is needed, but how reform is to be accomplished. My preference is to enable the justice system to work smoothly while reform is crafted. It is to that end that I have offered my proposal and these remarks.

Appendix

[Annotated version of proposed legislation, with comments interlineated in boldface type. F. Bowman]

A BILL

To amend title 18 and title 28, United States Code, with regard to sentencing and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. AMENDMENTS TO TITLES 18 AND 28, UNITED STATES CODE.

(a) AMENDMENT TO SECTION 3551.—Section 3551 of title 18, United States Code, is amended by—

(1) redesignating subsection (a) as subsection (a)(1); and

(2) inserting after subsection (a)(1), as redesignated by this amendment, the following:

"(2) Upon a finding of guilt—

(A) the statutory maximum sentence that may be imposed upon a defendant is (i) the maximum penalty provided by the statute defining the offense of conviction, including any applicable statutory enhancement; or (ii) if the statute defining the offense of conviction does not set forth a maximum statutory penalty, the maximum penalty authorized by this chapter for the grade of the offense;

(B) in a case involving multiple counts of conviction, the statutory maximum sentence that may be imposed upon a defendant is the sum of the maximum penalties provided by (i) the statute or statutes defining the offenses of conviction, or (ii) if one or more of the statutes defining an offense of conviction does not set forth a maximum statutory penalty, the

maximum penalty authorized by this chapter for the grade of the offense; and

(C) the minimum sentence that may be imposed upon a defendant, if any, is the minimum sentence provided by the statute defining an offense of conviction, except as otherwise provided in this chapter."

[The original version of this provision was suggested by the U.S. Sentencing Commission. The basic idea behind it is that Blakely places great emphasis on the concept of "statutory maximum sentence," but the Sentencing Reform Act can be read to imply by its silence on the point that guidelines maxima have become the new de facto statutory maxima. This amendment would express in no uncertain terms that the statutory maximum sentence under federal law is the maximum sentence provided by statute. It might be suggested that such a provision would be unnecessary under the amended version of the guidelines because the guidelines maxima will be equal to the statutory maxima. However, what we want to stave off is a judicial finding that the new, much softer, 25% suggested ceiling is some form of "statutory maximum." With the addition of this provision, the Court would have to hold that the phrase "statutory maximum sentence" does not mean what Congress has expressly said it means. Indeed, if Congress enacts nothing else in the near term, it might consider enacting this provision. The mere presence of this language in federal statutory law would make it more difficult for a Court applying Blakely to find even the existing guidelines unconstitutional.

I have revised the original Commission language to include the phrase "statutory maximum sentence," and thus to make the effect of the amendment crystal clear.

I have also included language designed to deal with the problem of multiple count convictions. Commission drafters did not think the multiple count provision was necessary because of the

existence of case law on consecutive sentences. I do not think it absolutely critical, just clarifying.]

(b) AMENDMENT TO SECTION 3553.—Section 3553 of title 18, United States Code, is amended –

(1) in subsection (a), by striking "The court shall " and inserting "Consistent with any applicable statutory maximum or statutory minimum sentence authorized under section 3551 of this subchapter, the court shall".

(2) in subsection (b)(1), by striking "an aggravating or" and inserting "a";

(3) in subsection (b)(2)(A), by striking clause (i) and by redesignating clauses (ii) and (iii) as clauses (i) and (ii), respectively; and

(4) in subsection(c), by striking "if the sentence—" and all that follows through "is not of the kind," and inserting " if the sentence is not of the kind,".

(c) AMENDMENT TO SECTION 3742.— Section 3742 of title 18, United States Code is amended –

(1) by striking subsection (a)(3) and substituting a new subsection (a)(3) as follows:

"(3) is greater than the sentence specified as the minimum of the applicable guideline range to the extent that the sentence includes a greater fine or term of imprisonment, probation, or supervised release than the minimum established by the applicable guideline range, or includes a more limiting condition of probation or supervised release under section 3563(b)(6) than the minimum established in the guideline range."

(2) in subsection (e), by redesignating subsection (e)(4) as subsection (e)(5) and inserting a new subsection (e)(4), as follows:

"(4) if within the applicable guideline range, adequately reflects the statutory purposes of sentencing as set forth in 18 U.S.C. § 3553(a)(2), is otherwise consistent with the guidelines and policy statements set forth in the applicable Guidelines Manual, and is a reasonable sentence."

(3) in the paragraph following current section (e)(4), redesignated herein as (e)(5), by adding at the end the following — "With respect to determinations

under subsection (4), the court of appeals shall review the district court's imposition of a sentence within the applicable guideline range on an abuse of discretion standard."

(4) in subsection (f)(2), following "and is plainly unreasonable," by inserting "or a sentence imposed within the applicable guideline range constituted an abuse of the district court's discretion,".

[The foregoing amendments to 18 USC 3742 create a right of appeal on an abuse of discretion standard for sentences between the guidelines minimum and the guideline/statutory maximum. There are three categories of concern about such a right of appeal.

FIRST, will any constraint on judicial discretion within the new guideline range violate Blakely? I believe that if one were to specify, by statute, a numerical or percentage range (such as six months or 25% above the minimum) that triggered a right of appeal which was not available below that threshold, such a provision would run considerable risk of violating Blakely. In effect, the existence of such a numerical trigger of appellate review would create a presumptive sentencing range immune to appellate scrutiny not dissimilar from current guideline ranges. I have consulted widely on this point with academics, practitioners, and others. Some feel that a numerical appellate trigger of abuse of discretion review would not necessarily violate Blakely, but the majority seem to feel that such a trigger is a feature to be avoided, if possible.

The language suggested here creates no statutorily-endorsed range free from appellate inspection. Instead, it grants district courts discretion to sentence anywhere within the newly expanded range, while granting a right of appeal of any sentence within that range.

SECOND, will an abuse of discretion standard of review be sufficient to ensure (a) that district courts will not begin routinely sentencing above the current guidelines ranges, and (b) that defendants who are sentenced substantially above the current guideline ranges have some meaningful appellate recourse? I think the answer to both parts of the question is yes.

Evidence of judicial behavior over the last decade demonstrates that judges almost never sentence higher than the existing guideline ranges. In 2002, the upward departure rate was 0.8%. US Sentencing Commission, 2002 Sourcebook of Federal Sentencing Statistics, tbl. 27 (2004). And even among defendants sentenced within existing guideline ranges, 60% were sentenced at the bottom of the existing guideline range and an additional 15% were sentenced in the lower half of the range. US Sentencing Commission, 2002 Sourcebook of Federal Sentencing Statistics, tbl. 29 (2004). Only 10% of those sentenced within the existing guideline range (or roughly 6% of all defendants) were sentenced at the top of existing ranges, thus suggesting at least the possibility that, unconstrained by the guidelines, the judge might have gone still higher. *Id.*

It is certainly possible that some judges in some classes of cases may be disposed to impose longer sentences than they did before. However, the discretion to do so accorded the district court under the proposed law is not without limits. The Guideline policy statements recommended to the Commission in Section 2 below will, if adopted (and they surely would be), express the view of both Congress and the Commission that sentences within the 6-month or 25% range will ordinarily be about right. Because that view will be a part of the Guidelines, a judge's decision to sentence above the suggested range will become one of the factors to be taken into account by a court of appeals reviewing the district court's exercise of its discretion under newly-amended Section 2742(e)(4) above. That is, under the new law, an appellate court determining if a district court abused its discretion will be required to consider whether a sentence within the newly expanded guideline range "adequately reflects the statutory purposes of sentencing as set forth in 18 U.S.C. § 3553(a)(2), *is otherwise consistent with the guidelines and policy statements* set forth in the applicable Guidelines Manual, and is a reasonable sentence." In short, if a judge imposes a sentence more than 25% above the minimum, that would be one factor suggesting an unreasonable exercise of sentencing discretion.

In my opinion, the strong signal regarding congressional intent embodied in the proposed legislation and resulting policy statement will have a significant limiting effect on judicial disposition to sentence higher than the 25% range.

<u>THIRD, will a right of appeal of all sentences above the guidelines minimum generate a flood of frivolous litigation?</u> I think the answer is no, for several reasons: (a) Under current practice, roughly 35% of all cases are sentenced below the guideline minimum as a result of downward departures. US Sentencing Commission, 2002 Sourcebook of Federal Sentencing Statistics, tbl. 27 (2004). As noted above, of those cases sentenced within the existing guideline range, roughly 60% are sentenced at the guideline minimum. US Sentencing Commission, 2002 Sourcebook of Federal Sentencing Statistics, tbl. 29 (2004). This means that roughly 75% of all cases are now sentenced at or below the guideline minimum. Thus, assuming that current trends continue, at most 25% of current defendants would even be theoretically eligible to appeal under the new law. (b) Once the new right of appeal went into effect, it would create an incentive for prosecutors to agree to sentences at the low end of the range and for judges to sentence at the low end to avoid appeals. I strongly suspect that the effect of this legislation would be to reduce still further the percentage of cases sentenced above the minimum of the guideline range. (c) 96% of all cases are now resolved by plea. An increasingly common feature of such plea agreements is appeal waivers. I have no reason to doubt that U.S. Attorney's Offices will amend their plea waiver language to embrace the new right of appeal. DOJ might attempt to require waiver of any appeal for any sentence in the newly expanded range. However, given the extreme risks that would pose for defendants (who could be sentenced to astronomically high sentences with no recourse) and given the amendment to the guideline policy statements creating a "typical case" zone of 25% or 6 months, the more likely approach will be to require defendants to waive an appeal for any sentence within that zone. (d) In any case, challenges to a district court's sentencing discretion within the newly expanded range will very rarely be successful and only if the sentence is markedly higher than the now-existing ranges. In those cases where challenges are raised to sentences within the newly expanded range, appellate courts will deal with them summarily in the overwhelming majority of cases and give serious attention only to the outliers -- which is, after all, exactly what we want them to do.

(d) AMENDMENTS TO TITLE 28, UNITED STATES CODE.—Section 994 is amended– (1) by striking subsection (b)(2) and by redesignating subsection (b)(1) as subsection (b); and

(2) in subsection (w)(3), after "these documents," by inserting "including an analysis of district courts' sentences in criminal cases within a guideline range,".

SEC. 2. DIRECTIVE TO THE UNITED STATES SENTENCING COMMISSION.

(a) IN GENERAL.—The United States Sentencing Commission shall—

(1) amend the Federal sentencing guidelines to provide that the sentencing ranges established in Chapter Five, Part A consist of—

(A) the minimum sentence provided for each category of offense and offender characteristics set forth in the United States Sentencing Commission, Guidelines Manual, effective November 5, 2003; and

(B) a maximum sentence equal to the maximum term of imprisonment authorized by the statutory offense of conviction, or in a case involving multiple counts of conviction, the sum of the maximum terms of imprisonment authorized by the statutory offenses of conviction.

(2) consider promulgating a policy statement providing guidance to the court regarding imposition of a particular sentence within the guideline sentencing range providing that:

(A) the typical case is a combination of offense and offender characteristics adequately represented by a sentencing range the maximum of which should not exceed the minimum by the greater of 25 percent or 6 months;

(B) a sentence that exceeds the minimum of the guideline range by the greater of 25 percent or 6 months should be based on one or more factors that—

(I) are legally permissible;

(II) advance the statutory purposes of sentencing as set forth in 18 U.S.C. § 3553(a)(2); and

(III) result in a reasonable sentence.

(b) EMERGENCY AMENDMENT AUTHORITY.—The United States Sentencing Commission shall promulgate amendments pursuant to subsection (a) not later than the effective date of this Act in accordance with the procedure set forth in section 21(a) of the Sentencing Act of 1987 (Public Law 100–182), as though the authority under that Act had not expired.

(c) RECOMMENDATIONS. The United States Sentencing Commission shall, as soon as reasonably possible, make recommendations to the Congress regarding additional amendments to the relevant titles of the United States Code necessitated by enactment of this Act. In accordance with 28 U.S.C. § 994(o), the United States Sentencing Commission shall also study, review and analyze whether any guideline amendments or statutory changes are necessary or desirable in light of *Blakely v. Washington*, __ U.S. __ , Supreme Court Docket No. 02-1632 (June 24, 2004), or any subsequent related Supreme Court decision and report its recommendations as soon as reasonably possible to Congress. It is the sense of Congress that the United States Sentencing Commission would be materially aided in carrying out the recommendations of this subsection by convening an ad hoc advisory group consisting of individuals and representatives of institutions and professional groups concerned with and knowledgeable about federal sentencing to work with the Commission in formulating appropriate recommendations.

[The first two sentences in this section are drawn from Sentencing Commission language and language suggested by congressional staff. I think there are two phases here. First, the Commission is going to have a prompt 14-day turnaround for the immediate guideline language; nonetheless, there may be statutory wrinkles that we haven't thought of. The Commission's first job should be to study that point and see if there are any other conforming statutory changes that need to be made to make this Act consistent with other statutes. Second, after that job is done, the Commission should turn its attention to the bigger issues posed by Blakely and get hopping on a broad-based study of the implications of Blakely and related cases. Finally, I am not sure that a suggestion to form an advisory group is necessary. I suspect the Commission would do it anyway; still, such a suggestion

might serve to ensure that the Commission's study and deliberations are not kept in-house, but reach out to a wide circle of interested persons and institutions.]

SEC. 3. EFFECTIVE DATE.—This Act shall take effect 14 days after the date of the enactment of this Act and shall apply to all federal sentencings occurring on or after its effective date.

[The original Sentencing Commission draft proposed an effective date of 90 days post-enactment. This seems too long. A primary reason for legislating now is to provide immediate relief and certainty to a system in chaos. Waiting 90 days to some extent vitiates the point of the bill. A 14-day period would be too short if the Commission were being asked to do anything very complicated in the interim, but all they are directed to do before the effective date is (a) knock the tops off the guideline ranges, and (b) promulgate a policy statement whose text is set forth in the Act, and which in any case the Commission itself drafted. The text of the guideline amendments necessary to accomplish (a) will take a little thought, but since the Commission knows this bill might be coming, it is not unreasonable to expect them to have a drafting solution in place immediately.

That said, it does make sense to set the effective date off some short period in the future in order for the Commission to pass its guideline amendments and policy statements and get them into effect on the same day as the statutory provisions of the bill. You don't want a hiatus where the statutory changes have become effective but the guidelines change have not.

Finally, the bill should expressly apply to sentencings on or after its effective date. There will be some sentencings to which the bill may not be applicable for ex post facto reasons, but because the bill essentially reenacts the existing Guidelines, there will be very few defendants who will be able to claim that they are adversely affected by application of the new rules.]

SEC. 4 SUNSET.— Effective on and after January 1, 2006, the provisions of this Act and the amendments to statutes made pursuant to this Act shall no longer have the force of law unless reenacted by Congress, and the amendments to the Federal Sentencing Guidelines and policy statements made pursuant to section 2(a) of this Act shall no longer

have the force of law unless repromulgated by the U.S. Sentencing Commission and approved by Congress pursuant to law.

[The sunset language suggested by congressional staff would sunset the bill if the Supreme Court finds the original guideline constitutional. The following language was suggested: "This Act shall cease to have effect if the United States Supreme Court determines that the United States Sentencing Guidelines are not subject to the jury and evidentiary proof requirements set forth in Blakely v. Washington." This approach has two effects that may be thought objectionable.

First, as we discussed in Washington on Wednesday, it is very difficult to craft language that would really be self-executing. By which I mean that the Supreme Court in addressing the application of Blakely to the Guidelines could do all sorts of things not easily captured in the suggested language, or indeed in any statutory language. For example, assume that the Court finds that Blakely applies to "upward departures" under the guidelines (which is what the upward adjustments in the Washington scheme were called), but not to determinations of guidelines factors generating ranges? Although such an approach would be illogical, it's precisely the sort of face-saving compromise the Court might reach for if one of the Blakely majority recoils from wrecking the guidelines but wants to seem consistent with Blakely. If that were to be the Court's conclusion, the Court would have found that the jury and proof requirements applied to one part of the Guidelines, but not to the rest of it. Would the bill sunset or not? Alternatively, suppose that the Court were to impose SOME new jury and proof requirements on the Guidelines, but slightly different ones than those "set forth in Blakely v. Washington." Would the bill sunset or not? Or suppose you get a 4-1-4 decision with four justices applying Blakely to the Guidelines and one concurring in the result on ambiguous grounds. Does the bill sunset or not? I do not think we should introduce this sort of uncertainty into an already complicated situation. Hence, any sunset provision should involve a date certain, rather than a difficult-to-define contingency.

Second, it has been my impression that a number of participants in this process are desirous of ensuring that any legislation sunset in order that an interim

solution to an immediate problem does not become the permanent condition of the sentencing system without further careful deliberation and legislative action. I agree with this approach. I think the approach I am suggesting serves the purpose of restoring stability to a system in crisis. However, many of the underlying conditions that created the crisis will persist for the foreseeable future. I believe a sunset provision is necessary to focus the attention of Congress, the Commission, and other sentencing actors on the need for prompt and careful re-evaluation of the federal sentencing system in light of Blakely and other factors.

I have selected a roughly 18-month sunset period because at least that much time will certainly be required for the Court to make a decision, for the rest of us to absorb it, and for the Commission and others to consult meaningfully on what changes to the existing system would be desirable. January 1, 2006 also seems a reasonably felicitous point in the political cycle because it would require action in late 2005, the calendar year prior to the next election.]

SEC. 5 SEVERABILITY.--- If any provision of this Act, an amendment made by this Act, or the application of such provision or amendment to any person or circumstance is held to be unconstitutional, the remainder of this Act, the amendments made by this Act, and the application of the provisions of such to any person or circumstance shall not be affected thereby.

MEMORANDUM

TO: U.S. Sentencing Commission
FROM: Frank Bowman
RE: Legislative solutions to *Blakely*
DATE: July 16, 2004

I. INTRODUCTION

In the aftermath of this week's Senate Judiciary Committee hearing, I am increasingly concerned that an opportunity to stabilize the operations of the federal criminal justice system is being lost. At the hearing, representatives of the primary institutional actors in the sentencing system -- the Sentencing Commission, the Justice Department, and the judiciary -- all expressed the view that the federal criminal system is not in "crisis" as a result of *Blakely v. Washington*, and that Congress need not act immediately to pass legislation in response to that decision. While I understand and sympathize with the caution that produced those sentiments, the confidence expressed by the official witnesses in the ability of the system to handle the current situation had a certain air of unreality. The essence of the scene was nicely captured by Senator Leahy's incredulous question: "Judge Cassell, you say there's no crisis but you just held the entire criminal justice system unconstitutional?"

While neither Judge Cassell nor anyone else has held the entire criminal justice system unconstitutional, the Blakely decision is nearly unprecedented because it affects every single case in federal court (not to speak of its effects in the states, which are beyond the scope of this discussion). Every case has to be sentenced. Even more important than the number of cases affected by Blakely is the fact that the Supreme Court has provided absolutely no guidance to the lower courts about how to handle the situation. Unless we understand *how* sentencing is to be conducted, the parties cannot meaningfully negotiate pleas and courts cannot conduct trials, or at least cannot do so with any confidence that the results will withstand appeal. The degree of prevailing disruption is impossible to fully catalogue, but is suggested by the fact that, three weeks after *Blakely*, we have four circuit court opinions about *Blakely* reaching four different results and districts such as Utah where four district judges have reached four different conclusions (which incidentally are not the same four reached by the circuit courts). And the judicial disagreements which have surfaced so far deal almost exclusively with cases where guilt has already been determined -- courts haven't even begun to address the problems of applying *Blakely* to cases pending trial or plea.

In short, with apologies to Judge Sessions, the sky *is* falling, at least as much as legal skies can. The question addressed in this memorandum is whether some legislative solution is a desirable response.

I think that part of the reluctance to move forward with an immediate legislative response stems from a failure to map out the most likely consequences in the near and middle term of the available options. This memo attempts to provide such a map.

II. OPTION 1: Let the Supreme Court and the lower courts solve the problem

The Supreme Court created this mess by deciding *Blakely*, but failing to determine its applicability to the federal sentencing guidelines and failing to give even general guidance about how the newly announced constitutional regime is supposed to be administered. It is the Court's omissions even more than the *Blakely* decision itself that are causing disruption. Thus, it is not unnatural for everyone else to want further guidance from the Court before making any definitive move. And at least some voices in the current debate seem to be suggesting that the courts as an institution can work through the problems created by *Blakely* and arrive by common law development at a new sentencing regime. This seems to me highly unrealistic.

First, even waiting for the Supreme Court to clarify the situation has two significant drawbacks:

(1) There is no guarantee that the Court will move expeditiously. Indeed, it is very likely that no decision will be forthcoming from the Court until at least November. The Court is in recess. Its new term does not begin until October. It could order an extraordinary procedure of expedited briefing and argument before October, but so far shows no indication that it will. Even if the Court grants certiorari and places a *Blakely* case on the argument calendar for the first week in October, given the difficulty of the issues and their far-reaching effects, it is doubtful that an opinion would issue before sometime in November, and it might well take longer -- perhaps into the spring.
(2) When a decision comes, it will probably not help very much. Presumably, the Court will decide once and for all whether Blakely applies to the Guidelines (though one can envision 4-1-4 decisions that leave even that basic question in some doubt). The answer to the basic question would be helpful to know; however, with the sole exception of the Fifth Circuit, every other court already assumes that *Blakely* applies. The hard part is figuring out what to do about it -- and there is no guarantee whatever that the Court will provide any meaningful advice on *how* to make a post-*Blakely* world work. Indeed, given the Court's performance in *Blakely* itself, despite the plea of the dissenters for some attention to practical questions, there is every reason to suspect that the Court will find *Blakely* applicable to the Guidelines and leave the details to the rest of us. And even if the Court wanted to be helpful, the number of issues raised by *Blakely* is so large that it is difficult to imagine a test case that would present even a significant fraction of them in a form ripe for review. In which event, from a practical point of view, we will be little better off after a Court decision than we are right now.

Second, because the issues presented by *Blakely* are so complex and the process of resolving them through litigation so slow, the idea that courts can solve the problem without legislation is an illusion, at least unless we are prepared to accept a state of constant roiling uncertainty for several years to come.

III. OPTION 2: Wait for the Supreme Court and then legislate

If one is going to legislate, it would be nice to have *some* guidance from the Supreme Court, at least on the fundamental issue of whether *Blakely* applies to the Guidelines. However, as noted above, getting that guidance will probably take months, perhaps many months, and when the guidance comes, it may not be very detailed. Of equal practical importance is the fact that any decision by the Court would probably come at a time in the legislative calendar when prompt responsive action will probably be impossible.

If the Court renders a decision in late November, we will have a lame-duck Congress with only a few weeks of legislative life remaining, and perhaps a lame-duck Administration. Thus, the prospects for remedial legislation before the opening of a new session of Congress in January 2005 would appear dim. Given the inevitable dislocation surrounding post-election congressional reorganizations (and possibly the installation of a new Administration), legislation probably would not go forward until February 2005 or even later.

In my Senate testimony, I suggested that it might be advisable to wait at least a week or two to see if the Supreme Court might take extraordinary action. On reflection, and having been reminded of the congressional calendar, I now think this suggestion was impractical. As a practical matter, if legislation does not proceed by roughly Friday, July 23, 2004, Congress will go on its August recess and will not be able to consider legislation until after Labor Day. At that point, if the Supreme Court has accepted certiorari and set argument on a *Blakely* case for early October, the chorus of voices suggesting delay will grow louder -- even though, as demonstrated above, a Supreme Court decision is likely to come too late and be too uninformative to be of much help.

Back down from [illegible]

IV. OPTION 3: Legislate now

The following discussion focuses primarily on the particular legislative suggestion I have put forward, with some passing mention of the other prominent options. It will address the principal objections I have heard to acting promptly:

A. <u>Should we layer another potentially unconstitutional system on top of the current one?</u>

A number of people have voiced the concern that the current confusion might be made worse by passing an interim legislative fix. This is not, on its surface, an unreasonable concern. However, it is of doubtful force in the case of the proposal I have made. Three different issues have been raised: (1) a new system might itself be found unconstitutional by the Supreme Court, (2) lower courts might find the "fix" unconstitutional, thus compounding confusion in the lower courts, and (3) the "fix" would be different both from

the existing system and from any more permanent system later enacted, thus engendering confusion in the administration of sentencing.

1. *Constitutionality of fix itself*: The constitutionality of the proposal I have made hinges on the continued viability of the *Harris* decision. If it is impermissible for post-conviction judicial findings of fact to raise minimum sentences, both the current federal guidelines and the amended version I suggest would be unconstitutional. Although, various voices have suggested that the Court might not only apply *Blakely* to the guidelines, but also overturn *Harris*, this seems to me unlikely. I concede that *Harris* seems at odds with the emphasis placed by Justice Scalia in *Blakely* on the importance of the jury as indispensable sentencing fact-finder. However, *Harris* was equally at odds with the spirit of *Apprendi*, a point which did not deter the Court, including Justice Scalia from deciding *Harris* as it did.

   It seems to me, and I think to most seasoned observers of the Court, at the least unlikely that the Justices would reverse themselves only two years after *Harris*. I believe the likelihood of reversal decreases if the occasion for revisiting *Harris* was a review of a piece of congressional legislation passed in express reliance on *Harris*. For the Court to flip-flop in that setting would be so obviously political a response as to cast its own institutional integrity as a non-political interpreter of the Constitution into serious question.

   Moreover, particularly if one is concerned about the continuing viability of *Harris*, it seems to me better to legislate a *Harris*-based fix now, rather than after the Court addresses the applicability of *Blakely* to the current guidelines. As matters stand, the Court is quite likely to render a decision finding the guidelines unconstitutional because they operate by raising the tops of sentencing ranges, but not addressing the *Harris* issue. If the Court knows that the replacement for the Guidelines depends on the validity of *Harris*, they would have some incentive to address the continuing vitality of *Harris* immediately, rather than leaving that question hanging. Moreover, since any challenge to the current guidelines necessarily raises the *Harris* question -- because under the current guidelines post-conviction judicial findings of fact raise sentencing ranges which have both tops and bottoms -- the Court could address the *Harris* question without waiting for a case arising under the newly enacted statutory fix.

2. *Lower courts might find the fix unconstitutional*: Even if the High Court ultimately refused to recede from *Harris* and found the fix constitutional, there would undoubtedly be litigation in the lower courts in which defendants argued that the fix was unconstitutional because *Harris* should not survive. Constitutional challenges will be an unavoidable concomitant of any legislative response to *Blakely*. The important question is not whether such arguments will be made, but whether they are likely to be successful in any more than a handful of aberrant cases. I think the answer here is no. Until *Harris* is overturned by the U.S. Supreme Court, it remains the law of the land. A few lower court judges may get adventurous and find *Harris* no longer good law, but the overwhelming majority will follow the law as it exists until directed otherwise by the Supreme Court.

3. *We should avoid having three different systems in quick succession*: The most intuitively appealing objection to changing the law now is the general proposition that having three sentencing systems in quick succession -- the guidelines, an interim legislatively created system, and a permanent revised system that emerges after the Court and Congress have had their final say -- would be more disruptive than taking no immediate action. This argument would have force *if* the interim solution were notably different in its operation and effects than the current system. Thus, if for example, Congress were to adopt as an interim solution the "Kansas plan" espoused by the Federal Public Defenders, one really would be faced with three successive systems -- the guidelines, the Kansas plan, and whatever emerged at the end of the period of judicial and legislative uncertainty. The same could be said, albeit to a lesser degree, of the proposal to make the Guidelines advisory for one year while things get sorted out.

   Indeed, the same could be said, with greater force, of the option of taking no action at all. If we take no legislative action, we will have, not three, but many successive sentencing systems -- the guidelines, the multiple regional variations that will emerge while the Supreme Court cogitates and the Congress waits, and the final modified legislatively-mandated version that will ultimately be required.

   By contrast, the proposal I have put forward does not suffer from this difficulty. Although it modifies the Guidelines in a way that renders them constitutional under *Blakely*, the proposal would change virtually nothing about the way federal sentencing operates on a day-to-day basis. The sentencing process would be

absolutely identical to what existed before *Blakely* up the point at which the sentencing range is determined. Grand jury and pleading practice would be the same. Trials would be the same. Even sentencings would be the same. PSRs would be written. Judges would find guidelines facts in the same way they did before and apply the same guideline rules to determine the final sentencing range. The *only* difference would be that the sentencing judge would have a theoretically expanded range within which to exercise his or her sentencing discretion. And even here, historical evidence suggests that judges would sentence defendants at or near the bottom of the newly expanded ranges, thus producing sentencing outcomes statistically indistinguishable from those generated by pre-*Blakely* guidelines.

Indeed, it is precisely the fact that my proposal so completely preserves the status quo that has generated the greatest opposition against it. Folks eager to radically reform the guidelines system fear this proposal because it changes nothing. And many folks (not excluding myself) fear that instituting a system that saves the guidelines in the short run will forestall needed change in the medium to long run. I understand the force of the argument, but in the end I cannot justify leaving the federal criminal justice system in chaos for many months on the uncertain hope that something better will emerge.

B. Does immediate legislation help solve the litigation crisis?

If a legislative proposal does not materially assist the courts in handling the current litigation crisis, there is no point in adopting it. Both advisory guidelines and the proposal I have made do, I believe, materially assist in resolving the short-term problem. None of the other proposals I have heard do so.

1. Neither the "Kansas plan" nor the "guidelines inversion" plan help in the short run

a. *The Kansas Plan*: The Defenders' "Kansas Plan" is essentially a legislative version of "Blakely-zing" the guidelines by converting guidelines factors into elements to be pled and proven to a jury. Time does not permit a full analysis of the complications that Blakely-ization entails present, but among the difficulties are these:

- The government would presumably have to include all guidelines elements in the indictment. However, this is not certain. Perhaps guidelines enhancements sought by the prosecution could be enumerated in separate sentencing informations; but if so, such a

procedure would presumably have to be authorized by statute and might not pass constitutional muster.

- If guidelines elements were required to be stated in indictments, grand juries as well as trial juries would have to find guidelines facts, and thus grand jurors would have to be instructed on the meanings of an array of guidelines terms of art – "loss," reasonable foreseeability, sophisticated means, the differences between "brandishing" and "otherwise using" a weapon, etc.
- Grand juries have hitherto been prevented from considering sentencing factors, both because they have been legally irrelevant and because many such factors were thought prejudicial to the defendant. Several U.S. Attorney's Offices have begun considering whether it will be necessary to bifurcate grand jury indictments and presentations by presenting the "substantive" section of the indictment in one session, and then, after the grand jury has returned a true bill on the substantive offense, presenting the sentencing portion of the indictment with supporting evidence.
- Since guidelines enhancements would be elements for proof at trial, the Federal Rules of Criminal Procedure and local discovery rules and practices would have to be revised to provide discovery regarding those elements.
- New trial procedures would have to be devised. Either every trial would have to be bifurcated into a guilt phase and subsequent sentencing phase, or pre-*Blakely* offense elements and post-*Blakely* sentencing elements would all be tried to the same jury at the same time.[1] There is now no provision in federal statutes or rules for bifurcated sentencing proceedings, except in capital cases, and there is at least some doubt that such bifurcated trials would even be legal in the absence of legislation authorizing them.
- If a unitary system of trial were adopted, the judge would be required to address motions to dismiss particular guidelines elements at the close of the government's case and of all the evidence,[2] before sending to the jury all guidelines elements that survived the motions to dismiss.
- In either a unitary or bifurcated system, the judge would be obliged to instruct the jury on the cornucopia of guidelines terms and

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[1] Alternatively, perhaps only those Guidelines elements thought particularly prejudicial to fair determination of guilt on the purely statutory elements would have to be bifurcated, but that option would require a long, messy process of deciding which Guidelines facts could be tried in the "guilt" phase and which could be relegated to the bifurcated sentencing phase.

[2] Unlike other conventional "elements" of a crime, "guidelines elements" would presumably be subject to dismissal at any point in the proceedings without prejudice to the defendant's ultimate conviction of the core statutory offense. For example, in a unitary trial system, if the government failed to prove drug quantity in its case-in-chief, the drug quantity "element" could (and presumably should) be dismissed pursuant to the F.R.Cr. P. at the close of the government's case without causing dismissal of the entire prosecution. By contrast, a failure to prove the "intent to distribute" element of a 21 U.S.C. § 841 "possession with intent to distribute" case would require dismissal of the entire prosecution.

concepts, and the jury would have to produce detailed special verdicts.

The prospect of redesigning pleading rules, discovery and motions practice, evidentiary presentations, jury instructions, and jury deliberations to accommodate the manifold complexities of the Guidelines should give any practical lawyer pause. Judges alone could not effect the transformation. Legislation and Sentencing Commission action would almost certainly be required to modify the Sentencing Reform Act, the Guidelines, and the Federal Rules of Criminal Procedure to accommodate the new model, a process that would take months or years to accomplish. In the interim, uncertainty would be endemic.

In short, Blakely-izing the guidelines either by legislative fiat or through legislative inaction is not a solution to the short-term litigation problem.

b. *The Guidelines inversion plan*: Various persons have suggested that a post-Blakely sentencing scheme could be created by making all defendants presumptively subject to the statutory maximum sentence which would be reduced upon proof of enumerated mitigating factors. I have the gravest doubts about such a proposal, even for the long term. But one thing that is absolutely clear is that designing such a system would be the work of many months. It is not a candidate for a near-term solution of the litigation problem.

2. My proposal does help solve the short-term litigation problem.

First, the proposal I have offered has the advantage, noted above, of being functionally identical to the current system. Thus, no procedural alterations would be required to implement it.

Second, a provisional ex post facto analysis suggests that it would cover virtually all federal defendants, both those who have been convicted and those who have not. The version of the legislation that is now circulating among congressional staff would make the bill applicable to all sentencings occurring on or after its effective date. Therefore, any defendant who has been convicted by plea or trial, but not sentenced, would be covered. Similarly, any defendant whose case is pending on direct appeal, but is remanded for resentencing in light of *Blakely*, would also be covered. In addition, any defendant who has not yet been convicted would be covered.

The question that immediately arises is whether the Ex Post Facto Clause would bar the application of new legislation to many or all of

the defendants to which the legislative language would make it facially applicable. I think not, for the following reasons.

i. It seems to me exceedingly unlikely that the Supreme Court would, even if it finds the Guidelines unconstitutional in a post-*Blakely* ruling, make *Blakely* itself retroactive. Therefore, any case that was sentenced and had completed direct appeal before *Blakely* would be unaffected and would not be eligible for collateral review.
ii. If *Blakely* is not retroactive, that also means that persons who committed criminal conduct before June 24, 2004 were lawfully subject to sentencing under the Guidelines at the time of their offenses.
iii. The Ex Post Facto Clause does not prohibit application of all after-enacted legislation to defendants who committed their offenses before the legislation. The Clause only prohibits application of laws that disadvantage a defendant in comparison to the law in effect at the time of the crime.
iv. Therefore, any defendant who committed an offense prior to June 24, 2004, and who wanted to raise an Ex Post Facto challenge to sentencing under the proposal I have offered would have to establish that the new law would disadvantage him as compared to the old Guidelines. Because the proposal I have made would reinstitute the Guidelines effectively unchanged, such an arguments would fail in virtually every case. This is so because the guidelines calculations leading to determination of a sentencing range would be identical before and after the legislative change. The only difference in the new system is that it would be theoretically easier for a judge to sentence above what is now the top of the guideline range, because doing so under the current guidelines would require a "departure," while doing so under the revised system would not. Thus, so long as the judge imposed a sentence within the current guideline range, i.e., did not impose a sentence which under current law would represent an upward departure, the defendant would have no ground of complaint. The new law would not disadvantage him, but would instead restore the law in effect at the time he committed the crime and generate a sentence identical to the one to which he was subject when he committed the crime.
v. Therefore, the only defendants who could not be sentenced under the proposal on ex post facto grounds would be defendants who committed their crimes between the date on which *Blakely* was decided and the date of enactment of the proposal. *This group is currently relatively small, but it grows with each day that passes without legislative action.*

C. What happens if the Supreme Court blinks?

The final concern about acting now is the lingering doubt that the Court will really follow Blakely to its logical conclusion and invalidate the Guidelines. If they were to do that, one would not want to have panicked and passed a wholly new sentencing regime. From this perspective, the beauty of the suggestion I have offered is precisely that it is functionally indistinguishable from the existing system. If the Court upheld the Guidelines, Congress could immediately repeal the fix or let it sunset without any material impact on life in the courts.

V. CONCLUSION

There remain real questions about whether to enact the proposal I have made. If one wants the Guidelines to be abolished, my proposal should not be enacted. If one believes that a long period of crippling turmoil in the courts is not too high a price to pay for the destruction of the guideline system, my proposal should not be enacted. If one believes that "Blakely-izing" the guideline system would be a good thing, my proposal should not be enacted. (Though I would implore prosecutors, defense counsel, and particularly judges who favor Blakely-ization to take a very long look at what it would really entail before arriving at that conclusion. For judges in particular, Blakely-ization seems to me to produce the very opposite of what judges say they want because it would reduce judicial sentencing discretion dramatically even in comparison to the existing guidelines.)

If on the other hand, one favors the continuation of the Guideline regime, a failure to proceed immediately not only prolongs uncertainty in the courts, but decreases the chances of successful legislation. And if one believes that meaningful federal sentencing reform is more likely to result from an interim period of systemic stability than from a period of politically volatile turmoil, one should seriously consider pushing for the solution I have advanced.

BLAKELY v. WASHINGTON and the FEDERAL SENTENCING SYSTEM

July 20, 2004

Senator Orrin Hatch,
Chairman
Senator Patrick J. Leahy,
Ranking Minority Member
Committee on the Judiciary
United States Senate

Representative F. James Sensenbrenner, Jr.,
Chairman
Representative John Conyers, Jr.,
Ranking Minority Member
Committee on the Judiciary
U.S. House of Representatives

Re: *Blakely v. Washington* and the federal sentencing system

Dear Senators and Representatives:

On June 24, 2004, in *Blakely* v. *Washington*, the U.S. Supreme Court struck down aspects of the sentencing guideline scheme of the State of Washington as violating the Sixth Amendment right to trial by jury. While the majority opinion did not directly address *Blakely*'s effect, if any, on the Federal Sentencing Guidelines, the decision has caused many to question at least some aspects of our federal sentencing system. At this time, our various organizations have no agreement on what action, if any, Congress should ultimately take with respect to the *Blakely* decision. We are all agreed, however, that immediate legislative action is not warranted.

At a Senate Judiciary Committee hearing on July 13, representatives of the Justice Department, the Sentencing Commission and the Federal Judges Association all testified that no immediate legislative action is needed. It appears that the criminal justice system is reacting and adjusting to this decision just as it has to many past watershed decisions. Several U.S. District Courts have interpreted *Blakely* as striking down at least some aspects of the federal guidelines while other courts have ruled, as the Department of Justice maintains, that *Blakely* has no effect on the Federal Sentencing Guidelines. In the coming weeks, the federal courts will begin to resolve these conflicts, and the Supreme Court will ultimately review these lower court decisions. This litigation is not only beneficial – it is unavoidable because under the Constitution's *ex post facto* clause, criminal defendants may not be exposed to a harsher penalty based on a subsequently enacted law.

Indeed, a short term legislative "fix" may backfire by creating new complexity and litigation. Any attempt to evade the Sixth Amendment right identified in *Blakely* will itself be challenged. New legislation also raises new *ex post facto* and retroactivity issues. The federal criminal justice system does not need additional and unnecessary complications.

As Justice Breyer noted in his dissent, "The simple fact is that the design of any fair sentencing scheme must involve efforts to make practical compromises among competing goals."

Striking the balance among those competing goals, and making the necessary compromises must be done carefully. The proper response to *Blakely* is potentially as complex as health insurance reform, campaign finance reform or other matters that the Congress has appropriately taken time to refine. It would be a grave mistake to jump onto one approach or another without carefully considering the implications for a host of fundamental constitutional protections that will flow from legislation to address the problems raised by *Blakely.*

Blakely also gives Congress an opportunity to address the concerns raised in recent years about the fairness of the current federal sentencing system. Last month, the American Bar Association "Kennedy Commission," after ten months of study, unveiled an extensive critique of the federal sentencing regime, which, among other recommendations, called for the repeal of mandatory minimum sentences. (This report will be voted on by the Association's House of Delegates in August). The need for extensive and careful analysis in establishing the proper balance between competing values and interests within the criminal justice system is underscored by the *Blakely* decision, the responses of courts trying to follow *Blakely*, and the ABA's report.

The undersigned organizations commend you for turning to the hearing process to examine the scope of the issues involved. But we urge you not to allow the short legislative calendar to spur the Congress to premature resolution of the issues *Blakely* has raised. We look forward to participating in a comprehensive, bi-partisan process to determine how best to address sentencing in the wake of *Blakely*.

Brennan Center for Justice at NYU School of Law
Correctional Education Association
Drug Policy Alliance
Families Against Mandatory Minimums
Justice Policy Institute
Leadership Conference on Civil Rights
Maryland Justice Coalition
National Association of Criminal Defense Lawyers
National Association of Federal Defenders
National Association of Sentencing Advocates
National Black Police Association
National Council of La Raza
National CURE (Citizens United for Rehabilitation of Errants)
Penal Reform International
Rebecca Project for Human Rights
The Sentencing Project
Virginia C.U.R.E.

STATEMENT

OF

PAUL G. CASSELL

UNITED STATES DISTRICT JUDGE FOR THE DISTRICT OF UTAH

BEFORE

THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

CONCERNING

THE EFFECT OF *BLAKELY V. WASHINGTON* ON THE FEDERAL COURTS

ON

JULY 13, 2004

Mr. Chairman and Distinguished Members of the Committee:

I am pleased to be here this morning to describe the impact of *Blakely v. Washington*[1] in the federal courts.

In my testimony I try to describe the current state of affairs in the federal courts in the wake of *Blakely*. *Blakely* has created considerable uncertainty in the federal criminal justice system. One Circuit Court of Appeals (the Seventh) and a number of District Courts have already declared the federal sentencing guidelines unconstitutional. One Circuit Court of Appeals (the Fifth) has upheld the Guidelines. These rulings and others like them have required the federal courts to devote considerable time and energy to new and novel issues and have unsettled expectations in the criminal justice system.

It would, however, be unfair to describe this situation as a "crisis" or "chaotic." Such a description might demean the skills of hard-working federal judges around the country who will ensure that criminal cases are decided fairly and appropriately under controlling legal principles. But when the legal principles are in such flux – as they are in the wake of *Blakely* – Congress may wish to consider whether it is appropriate to bring whatever certainty can be brought to the system. Obviously that decision must be made by those who are in the political arena. My hope is that whatever is done in the short term will not block on-going dialog between Congress, the Executive, and the Judiciary about appropriate criminal sentencing policy for the future.

As the Committee knows, I am currently serving as a United States District Court Judge for the District of Utah. Before being appointed to the bench, I was a law professor at the S.J. Quinney College of Law at the University of Utah (where I continue to teach in the evenings), an Assistant United States Attorney for the Eastern District of Virginia, an Associate Deputy Attorney General in the U.S. Department of Justice, and a law clerk to Chief Justice Warren E. Burger and then-Judge Antonin Scalia.

At the outset, I should clarify that my testimony is on my own behalf, not on behalf of the Judicial Conference. I am reporting what my experience has been under *Blakely* and, to the extent I have been able to glean it, the experience of other judges around the country. My intent today is to be purely *descriptive* of the situation that the courts face, leaving it to others to provide any detailed *prescriptive* advice as to how Congress might act. This limited role is consistent with the Canons of Judicial Ethics, which permits a judge to participate in public hearings regarding issues connected to judicial administration.[2] Nothing I say today comments on the merits of pending or future cases before me or takes a position on any legal issues arising from *Blakely*.

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[1] – U.S. –, 2004 WL 1402697 (June 24, 2004).

[2] *See* Canon 4B, Code of Conduct for United States Judges.

I. Application of Blakely to the Federal Guidelines

In the wake of *Blakely*, federal courts have been forced to wrestle with implications. In this section, I attempt to describe what is happening around the country with respect to constitutional challenges to the Guidelines. I have had only a limited amount of time to assemble this information, as I received an invitation to testify only last Friday. As a result, the information collected here is admittedly tentative and fragmentary. Compounding the difficulties is that many sentencing decisions are not officially reported in the Federal Reporter system, but are picked up in press accounts or internet reports. Finally, *Blakely* was handed down a little more than two weeks ago, and many federal courts are still struggling to analyze its implications.

In collecting these materials, I am greatly indebted to the efforts of Professor Douglas Berman at the Ohio State University, whose excellent website (http://sentencing.typepad.com) is devoted to tracking post-*Blakely* developments, as well as to the very helpful website (www.ussguide.com) prepared by Punch and Jurists, Ltd. – a lively weekly newsletter that tries to track significant new developments in Federal Criminal Law.

A. The District of Utah.

Within my own District of Utah, the effect of *Blakely* was prompt and significant. Five days after *Blakely*, I released what may have been the first opinion in the country analyzing the effects of *Blakely* on the Federal Guidelines.[3] Rather than attempt to summarize the opinion or comment on the opinion, I will simply quote some relevant parts:

> Defendant Brent Croxford is before the court for sentencing on the offense of sexual exploitation of a child in violation of 18 U.S.C. § 2251(a). For more than fifteen years, sentencings such as Croxford's have been governed by the federal sentencing guidelines. Last Thursday, however, the United States Supreme Court ruled that portions of the State of Washington's sentencing guidelines were unconstitutional. The Court held that Washington's guidelines scheme deprived a defendant of his Sixth Amendment right to a jury trial by increasing his presumptive sentence based on a judge's, rather than a jury's, factual findings regarding sentencing factors. Because the federal sentencing guidelines suffer from the same constitutional infirmity, the court holds that, as applied to this case, the federal sentencing guidelines are unconstitutional and cannot govern defendant Croxford's sentencing. Because of the potentially cataclysmic implications of such a holding, the reasoning underlying this conclusion will be set out at some length. . . .
>
> While this court has searched diligently for a way to disagree with the warnings of the dissenters, the inescapable conclusion of *Blakely* is that the

[3] *United States v. Croxford*, 2004 WL 1521560 (D. Utah July 7, 2004), *superceding* 2004 WL 146211 (D. Utah June 29, 2004).

> federal sentencing guidelines have been rendered unconstitutional in cases such as this one. The rule set forth by the Supreme Court in *Blakely* was that "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." A sentence may not be enhanced when doing so requires the judge to make factual findings which go beyond the defendant's plea or the verdict of the jury. Given this rule, there is no way this court can sentence Croxford under the federal sentencing guidelines without violating his right to trial by jury as guaranteed by the Sixth Amendment.[4]

Having found that the Guidelines could not be constitutionally applied to Croxford, I then faced the question of the appropriate remedy to apply. I held:

> the court believes that three options for dealing with *Blakely* are worthy of consideration: (1) the court could convene a sentencing jury, which would determine (presumably by proof beyond a reasonable doubt) whether the facts underlying the enhancement could be proven; (2) the court could continue to follow the other sections of the Guidelines apart from the defective upward enhancement provisions; or (3) the court could treat the Guidelines as unconstitutional in their entirety in this case and sentence Croxford between the statutory minimum and maximum. The court believes that the third option is the only viable one.[5]

I also recommended that judges issue a "backup" sentence in all cases – that is, a sentencing in which it was assumed the Guidelines were unconstitutional and another sentence in which it was assumed they were constitutional. This might help reduce the need for complicated resentencing hearings regardless of which way the Supreme Court would rule in the future. To facilitate this process, I am using the following form in my cases:

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[4] *Id.* (internal citations omitted).

[5] *Id.*

☐ The court finds that the application of the sentencing guidelines to this defendant is not permitted by *Blakely v. Washington*. Therefore, the sentence in this judgment is a non-guideline sentence. Should the sentencing guidelines later be found to be constitutional, it will be the judgment and order of the Court that the defendant be committed to the custody of the United States Bureau of Prisons for a term of _____.
All other terms and conditions of the judgment will remain the same.
☐ The court finds that the application of the sentencing guidelines to this defendant is permitted by *Blakely v. Washington*. Therefore, the sentence in this judgment is a guideline sentence. Should the sentencing guidelines later be found to be unconstitutional in their entirety, it will be the judgment and order of the Court that the defendant be committed to the custody of the United States Bureau of Prison for a term of _____.
All other terms and conditions of the judgment will remain the same.
☐ The defendant has waived any rights under *Blakely v. Washington*.

I also issued another ruling on *Blakely* in *United States v. Thompson*.[6] In that case, I held that a defendant could not raise a challenge to his sentence under *Blakely* for the following reasons:

> it is possible for the court to fully and completely apply the Guidelines to this case without looking beyond the facts found within the four corners of the plea agreement. Indeed, the court need look no further than the four corners of the indictment to arrive at a Guideline calculation. As a result, *Blakely* does not invalidate application of the Guidelines, and the court must, therefore, follow the statutory command to impose a sentence consistent with the Guidelines.[7]

I also held that it was not permissible for Thompson to raise a facial challenge to the Guidelines.[8]

Even within my own District, there is a conflict regarding the appropriate way in which to analyze *Blakely*. Several days after my decision, my colleague Ted Stewart released his decision in *United States v. Montgomery*.[9] He agreed that the federal sentencing Guidelines were unconstitutional in that case. He further agreed with me that there are three options for dealing with Blakely. Judge Stewart, however, selected the second of the three options. He explained:

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[6] No. 2:04-CR-95-PGC (D. Utah 2004), Dckt. #26-1.

[7] *See id.* at 4.

[8] *Id.* at 5.

[9] __ F.Supp.2d ___, 2004 WL 1535646 (D. Utah July 8, 2004).

> the third option would accomplish precisely what *Blakely* sought to preclude, by allowing judicial determination of the same fact-driven enhancements and departures to achieve the same sentence as would have applied pre-*Blakely* (albeit now with the minimum and maximum sentences defined by the criminal statute, rather than the federal sentencing guidelines).[10]

Accordingly, Judge Stewart applied the Sentencing Guidelines but without upward enhancements.

There is still another approach to these questions within my district. In *United States v. Olivera-Hernanez*,[11] Chief Judge Dee Benson held that he would continue to recognize the Sentencing Guidelines as valid law. He concluded:

> The predictions of the Guideline's demise are many and they may well be true. It is difficult to read *Blakely* and not see the same wrecking ball heading directly for the sentencing features of the Comprehensive Crime Control Act of 1984. But predictions don't always hold; even sure things sometimes surprise us. Just last October, thousands of Chicago Cubs fans were certain of their teams's first World Series appearance in ninety-five years, with a mere five out to make against the Florida Marlins. Then one of the Cubs' own fans interfered with the catch of a foul ball, and the unraveling began. As Mark Twain observed in 1897 that "the reports of my death are greatly exaggerated," the Sentencing Guidelines may similarly defy present expectations of their impending demise. A distinction, however fine, may be drawn between the Federal Guidelines and the State of Washington's Guidelines. Other issues could become involved. A vote could switch. And so on.[12]

Judge Benson accordingly held that he would apply the Guidelines. As a precautionary measure, however, he would announce a backup sentence in each case.

One final note: In a fourteen-day jury drug trafficking and money laundering trial that concluded last Friday, Judge Kimball expanded his special verdict form to take into account some things that would ordinarily have been handled by a judge. In particular, in addition to rendering verdicts on seventeen counts in the indictment, the verdict form asks the jury to determine: (1) volumes of any illegal drugs distributed; (2) amounts of money money laundered; (3) the defendant's role in the offenses (e.g., organizer/leader or manager/supervisor); and (4) whether a "dangerous weapon possessed in connection with a drug trafficking offense.

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[10] *Id.* at *2.

[11] No. 2:04-CR-13 (July 12, 2004).

[12] *Id.* at 4.

Other judges within the District of Utah continue to consider these questions. A number of sentencings have been delayed because of *Blakely* and various change of plea hearings have been rescheduled.

B. The Seventh Circuit.

On July 9, 2004, the Seventh Circuit held that the Guidelines were unconstitutional under *Blakely*. In a decision written by Judge Posner, the Seventh Circuit concluded that "the application of the guidelines in this case violated the Sixth Amendment as interpreted in *Blakely*."[13] The Circuit explained that it had expedited its decision "in an effort to provide some guidance to the district judges (and our own court's staff), who are faced with an avalanche of motions for resentencing in light of *Blakely* . . . , which has cast a long shadow over the federal sentencing guidelines.[14] The Circuit cautioned that "[w]e cannot of course provide definitive guidance; only the Court and Congress can do that; our hope is that an early opinion will help speed the issue to a definitive resolution."[15] The opinion concluded:

> To summarize: (1) The application of the guidelines in this case violated the Sixth Amendment as interpreted in *Blakely*; (2) in cases where there are no enhancements — that is, no factual findings by the judge increasing the sentence — there is no constitutional violation in applying the guidelines unless the guidelines are invalid in their entirety; (3) we do not decide the severability of the guidelines, and so that is an issue for consideration on remand should it be made an issue by the parties; (4) if the guidelines are severable, the judge can use a sentencing jury; if not, he can choose any sentence between 10 years and life and in making the latter determination he is free to draw on the guidelines for recommendations as he sees fit; (5) as a matter of prudence, the judge should in any event select a nonguidelines alternative sentence.[16]

Judge Easterbrook dissented, arguing that the invalid guidelines in Washington were constitutionally distinct from the federal guidelines. He concluded: "Today's decision will discombobulate the whole criminal-law docket. I trust that our superiors will have something to say about this. Soon."[17]

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[13] *United States v. Booker*, __ F.3d __, No. 03-4225 (7th Cir. July 9, 2004), slip op. at 10.

[14] *Id.* at 2.

[15] *Id.*

[16] *Id.* at 11.

[17] *Id.* at 17 (Easterbrook, J., dissenting).

C. The Fifth Circuit.

As the testimony was about to be finalized, the Fifth Circuit upheld the Guidelines. Chief Judge King, writing for a unanimous panel that included Judges Barksdale and Pickering, stated:

> This court assuredly will not be the final arbiter of whether *Blakely* applies to the federal Guidelines, but the unremitting press of sentencing appeals requires us to produce a decision. We have undertaken to discern, consistent with our role as an intermediate appellate court, what remains the governing law in the wake of *Blakely*. Having considered the *Blakely* decision, prior Supreme Court cases, and our own circuit precedent, we hold that Blakely does not extend to the federal Guidelines and that [the defendant's] sentence did not violate the Constitution.[18]

D. The Eleventh Circuit.

On July 9, 2004, the Eleventh Circuit held that a prisoner could not file a second or successive habeas petition seeking to challenge his sentence.[19] On July 8, 2004, the Eleventh Circuit held that *Blakely* does not affect mandatory minimum sentences.[20] Presumably these rulings will lead to further litigation.

E. Districts Around the Country.

Here is the information I have been able to gather about other federal district courts around the country. For convenience, I will simply put the districts in alphabetical order. This list is almost surely not comprehensive, as events in this area seem to progress almost hourly. Nor is this is a scientific sample, as I have simply done my best to gather information from acquaintances and opinions that have been drawn to my attention.

District of Connecticut

In *United States v. Toro*,[21] Judge Peter C. Dorsey agreed that with *Croxford* that the Sentencing Guidelines were unconstitutional. He then adopted what *Croxford* described as "option 2" – that is, applying the Guidelines minus the upward enhancements. He emphasized that courts should construe statutes to avoid constitutional questions.

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[18] *United States v. Pineiro*, No. 03-30437 (July 12, 2004).

[19] *In re Dean*, __ F.3d __, 2004 WL 1534788 (11th Cir.) (No. 04-13244).

[20] *Spero v. United States*, ___ F.3d ___, 2004 WL 1516863 (11th Cir.) (No. 03-14586).

[21] No. 3:02-CR-362 (PCD) (D. Conn. July 8, 2004).

District of Delaware

Judge Kent Jordan reports that the challenges he has encountered (or anticipates encountering) include the following: (1) delayed guilty pleas, while plea negotiations are reconsidered in light of *Blakely*; (2) extended plea colloquies, requiring the defendant to acknowledge that the sentencing guidelines may be found inapplicable and that the defendant may be subject to statutory maximums; (3) delayed sentencing hearings, while defendants file briefs seeking to come within the parameters of *Blakely* and post-*Blakely* precedent invalidating upward enhancements; (4) extended sentencing hearings, requiring decisions on constitutional challenges to proposed applications of the guidelines; (5) added burdens on the Pre-sentence/Probation Office, as probation officers are required to write reports in the alternative, assuming guideline application and assuming sentencing without the guidelines; (6) a flood of § 2254 and § 2255 petitions challenging the state guideline system and challenging the federal guidelines, including upward enhancements and anything and everything else a creative inmate can conjure up; and (7), though it would be harder to measure, a general drag on court time associated with *Blakely*-related issues (for example, added time and effort spent on cases which would have resulted in a plea but now require trial, added time and effort spent on cases requiring resentencing after appeal, as the courts sort out what the new rules of the process are, and added time and effort doing the extra research and reading necessary to stay on top of the shifting legal terrain). Judge Jordan hastens to add that nothing in this description should be taken as saying that any of these added costs are unjustified. Some added costs will remain even when the uncertainty is washed out of the system, and those remaining costs presumably are the ones that a constitutional reading of the right to a jury trial requires. But many of the costs are solely a function of uncertainty and adjustment, and they look to be significant, particularly in the absence of legislation to address the constitutional concerns raised by *Blakely*.

District of the District of Columbia

In *United States v. Watson*,[22] Judge Thomas P. Jackson held that an earlier sentence he had imposed (in the so-called "Tractor Man Case") was unconstitutional under *Blakely*. He accordingly imposed a substantially reduced non-guideline sentence. I understand that the U.S. Courts of Appeals for the D.C. Circuit has declined to issue a stay in the matter.

District of Kansas

Senior Judge G. Thomas VanBebber reports that at this moment his court has not come to any consensus about post-*Blakely* sentencings. Presently, the judges are working through sentencings on a case-by-case basis. Changes of pleas and sentencings have almost come to a halt in the district, with most defense counsel asking for continuances in order to attempt to analyze the effect of *Blakely* (if any) on their cases. A meeting among the judges to discuss the problem may be held soon.

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[22] No. CR 03-0146 (D.D.C. June 30, 2004).

District of Maine

In *United States v. Fanfan*,[23] Judge D. Brock Hornby reduced a defendant's sentencing guideline range from a level 36 to a level 26 based on *Blakely*. In holding that the federal guidelines were unconstitutional, Judge Hornby concluded that *Blakely* did not permit a judge to conduct additional fact-finding that would increase a defendant's sentence.

District of Maryland

In the District of Maryland, Judge Deborah K. Chasanow has described the situation in the wake of *Blakely* as "unprecedented" and as "definitely creating problems." In her court, judges have apparently adopted widely varying approaches to *Blakely*. Some judges have decided to give alternate sentences to cover different contingencies that might arise. Other judges, however, believe that this approach is tantamount to giving impermissible advisory opinions and therefore is not proper. Some judges have also increased the interrogatories that they have criminal juries answer. One judge has even held a bifurcated proceeding in which a jury was asked to make determination as to the defendant's "role in the offense," an enhancing factor under the Guidelines. It may also be worthy of noting that later today, Judge Chasanow will participate in the taping of a nationwide teleconference being broadcast by the Federal Judicial Center to judges around the country, in which she and other participants will attempt to describe the varying approaches that courts are taking to resolving the issues posed by *Blakely*.

District of Massachusetts

In *United States v. Mikutowicz*,[24] Judge Rya Zobel rejected a motion for re-sentencing under *Blakely* because the defendant's "notice of appeal has effectively deprived this Court of jurisdiction." Judge Zobel noted, however, that "since the sentence is based in part on facts determined by the Court, it may well be illegal."

Judge Gertner reports that she sentences in cases since *Blakely* in cases in which a) there were no enhancements, b) the defendant had explicitly admitted to the enhancement, c) the defendant waived any Blakely issues (i.e. the Guideline sentence was likely to be less than the amount he or she had already served.) As to all other defendants who have been convicted or have plead guilty (and as to whom she has accepted the plea), she has issued a procedural order to determine if they intend to challenge the constitutionality of the Guidelines or proceed in some other fashion. She has arguments scheduled for next week on a group of cases raising the constitutionality and severability issue.

District of New Mexico

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[23] No. 03-47-P-H (D. Me. June 28, 2004).

[24] 2004 U.S. Dist. LEXIS 12516 (July 7, 2004).

Judge James O. Browning reports that *Blakely* is having various unsettling effects. In an attempt to respond to *Blakely*, Judge Browning (and possibly others) are using a modified Judgment and Conviction Order in New Mexico that include language reflecting alternative sentences. Moreover, the probation office is preparing a separate section in pre-sentence reports that determines "*Blakely* computations" (e.g., enhancements without jury fact-finding).

District of New York (Eastern)

In *United States v. Medas*,[25] Judge I. Leo Glasser found my analysis in *United States v. Croxford* to be persuasive. Accordingly, he found the Guidelines unconstitutional. He also found *Croxford*'s analysis about the difficulties in turning these matters over to a jury to be persuasive. Accordingly, he declined the governments request for a new 20-page Supplemental Verdict Sheet.

A newspaper account also reports that on Friday, Judge Nina Gershon has also found the sentencing guidelines unconstitutional.[26]

District of New York (Southern)

In *United States v. Gonzalez*,[27] Judge Deborah A. Batts postponed the sentencing of the defendant for two weeks following *Blakely*, but noted she was "currently of the mind to sentence the Defendant solely on the facts admitted by the defendant during his guilty plea."[28] She observed that "*Blakely* calls into serious question the long-standing practices of federal courts in implementing the United States Sentencing Guidelines."[29]

In *United States v. Mikelinich*,[30] Judge Colleen McMahon reportedly adopted my argument in the *Croxford* decision, and found the sentencing guidelines unconstitutional. She reduced a defendant's sentence from 37 months to 15 months.[31]

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[25] 2004 U.S. Dist. LEXIS 11760 (S.D.N.Y. June 25, 2004).

[26] Tom Perrotta, *Another New York Judge Finds Sentencing Guidelines Unconstitutional*, N.Y. LAWYER, July 12, 2004.

[27] __ F.Supp.2d ___, 2004 WL1444872 (S.D.N.Y. June 28, 2004).

[28] *Id.* at *2.

[29] *Id.*

[30] No. 03-CR-950 (S.D.N.Y.).

[31] Email from James E. Long, Esq., of Albany, New York, reported on www.ussguide.com.

District of Oklahoma (Northern)

Chief Judge Sven Erik Holmes has announced a four-point plan on a going-forward basis in order to maintain a fair and workable process under the federal sentencing guidelines, while fully protecting each Defendant's Sixth Amendment jury trial rights as articulated in *Blakely v. Washington*. Here is the plan in its entirety:

1. This Court will only accept a plea of guilty accompanied by a Sixth Amendment waiver of jury that expressly applies to both guilt or innocence and to sentencing. If the Defendant does not desire to waive his or her Sixth Amendment rights in all respects, a jury trial on all relevant issues will ensue. Such a waiver and consent to judicial factfinding is contemplated by the Constitution, *Blakely v. Washington* and sound public policy.

2. For those cases resolved by a plea pursuant to such a comprehensive waiver, judicial factfinding at sentencing will require that any contested adjustment or departure, both upward and downward, must be based on facts established beyond a reasonable doubt. The Court recognizes this may have significant consequences, particularly in the areas of relevant conduct and determining amounts (e.g. drug quantities; dollar amounts of intended loss). Nevertheless, the Court believes the language in *Blakely* equating judicial factfinding with jury factfinding as a matter of Sixth Amendment jurisprudence implicitly, if not explicitly, requires this enhanced evidentiary standard. Moreover, experience tells us that most such sentencing adjustments are not difficult to establish beyond a reasonable doubt, but that it will simply require more time, energy, and effort to do so.

3. For those cases that go to trial, facts necessary to support relevant sentencing adjustments and departures will be set forth on the verdict form for the jury to find beyond a reasonable doubt. A mechanism will be established whereby all parties have full notice of such possible adjustments prior to trial. The Court will give the jury such instructions as are necessary and appropriate to make these findings of fact. This judicial officer, having met with the jury in every case during my last nine years on the bench, has great confidence in the jury's ability to address these issues fairly and effectively.

4. The United States should include significantly more detail in its charging documents. For those cases that are resolved by entry of a plea, this will reduce the amount of judicial factfinding needed at sentencing. For those cases that go to trial, the jury will have a more complete understanding of the matters that will be presented on the verdict form as items to be proved beyond a reasonable doubt.

Moreover, the Court anticipates that in some cases that go to trial involving relevant conduct, evidence of such conduct may not be admissible because it may be of limited probative value in proving the crime charged and highly prejudicial. Only in the

> most unique case will the Court permit a bifurcated procedure whereby guilt or innocence will be considered in a first phase and relevant conduct will be offered in a second phase. Since the United States hereafter must prove all relevant conduct beyond a reasonable doubt in any event, the United States should consider simply including any such relevant conduct allegations as part of the crime or crimes being charged. Of course, only time will tell whether, and to what extent, relevant conduct will continue to play a significant role in federal sentencing after *Blakely*. But, in this regard, it should be noted that most everyone involved in our criminal justice system, at least to some extent, has concerns about the manner and degree to which relevant conduct has impacted federal sentencing under the current system.
>
> This four-point plan will maintain the workablity and fairness of the federal guideline system, while addressing the legitimate concerns expressed in *Blakely* that in certain instances judicial factfinding by a lower standard of proof is inconsistent with a Defendant's Sixth Amendment rights.

In Judge Holmes' judgment, if the four-point plan is followed the federal sentencing guidelines are constitutional. Judge Holmes has stated in court that, if the plan is implemented, the constitutionality of the guidelines can be maintained.

District of Oklahoma (Western)

Chief Judge Robin J. Cauthron reports that almost every sentencing has been continued in the wake of *Blakely*, with these requests generally being joint or unopposed applications. Various meetings between interested parties are on-going and the court expects to rule on the legal issues in the near future. Essentially the system has been paralyzed in the short term, with the long term implications yet to be determined.

District of Rhode Island

Judge William Smith reports that the three active judges have meet several times in an effort to maintain a coordinated approach. No final decision has been reached. In the mean time, a number of criminal proceedings have been postponed. Some pleas continue to be taken, but only in those cases where no *Blakely* issue is apparent. It appears that a majority of these new cases have a potential *Blakely* issue.

District of South Carolina

Judge Cameron Currie reports that the post-*Blakely* situation is more serious than anything she has seen in her 26 years as, variously, federal prosecutor, magistrate judge, federal practitioner, and district judge. Justice O'Connor said that the decision would "wreak havoc," and it has done that in South Carolina. South Carolina does not have a district-wide approach. Several judges initially cancelled sentencings and others forged ahead. As for the Columbia

Division (where Judge Currie sits), judges are generally trying to move ahead with sentencings. Federal prisoners here are housed in local jails under contracts with the USMS. Due to overcrowding and cost issues Judge Currie notes that "we simply do not have the luxury of delaying sentencings."

The first judge to sentence after *Blakely* simply removed the *Blakely* enhancement and gave a lower sentence. One of the other judges, who initially cancelled his sentencings, has now rescheduled 20 of them. He intends to advise all counsel by memo to evaluate the impact of *Blakey*, discuss it with their clients and submit additional objections to the pre-sentence report (PSR) if warranted. This will require a new addendum to each PSR where there is a Blakely issue. Judge Currie has not cancelled any sentencings, but has had to continue a few when *Blakely* issues were complex. Her procedure has been to review the PSR to determine if there is a *Blakely* issue and, if so, to advise the Probation Officer to discuss the matter with the defense and prosecution to see if it can be worked out. In a number of cases, she has taken *"Blakely* waivers" and proceeded to sentence. In these cases, she has offered defendants the right to withdraw their pleas, but no one has taken her up on that. In cases where there is no consensual resolution, she is holding that *Blakely*does apply to the U.S. Sentencing Guidelines and finding the Guidelines unconstitutional rather than apply them in a piecemeal fashion. She then sentencing under the general statutes. At the same time, she is ruling on all guidelines objections and stating what her sentence would have been under the guidelines. She is not pronouncing an alternative sentence as she believes there are legal impediments to that procedure. Finally, she is stating what the much lower sentence would have been if she had simply removed the enhancements that are problematic under *Blakely* but otherwise followed the guildelines. In cases where Guideline enhancements derive from criminal history, such as career offender, she has ruled that *Blakely* does not apply per the *Apprendi* reservation re fact of a prior conviction.

This week, Judge Currie anticipates have pre-trial conferences involving 30 - 35 defendants. She further anticipates that the Government will ask for *Blakely* continuances so that they can recall the grand jury to supercede the indictments. Thus, those detained pending trial will be held even longer in local jails. Some of the Federal Public Defenders are advising their clients not to sign plea agreements stipulating to relevant conduct. Judge Currie expects there will be more trials and that some will be bifurcated.

Blakely will add dramatically to the District of South Carolina's budget needs, as the court may need to transport and resentence hundreds of inmates. The workload will increase at the district and appellate levels, trials for those in the pretrial stages will be delayed as indictments are superceded, and there will be more trials which will take longer. The consequent impact on the cost of defender services , fees of jurors, and the U.S. Marshals budget there may be quite significant.

Finally, Judge Currie reports that the Fourth Circuit will hold a hearing *en banc* on a *Blakely* case the first week of August. Even though the case is being expedited, it is not known when a decision will be issued or whether subsequent Supreme Court review will be sought.

District of Texas (Northern)

Judge Barbara M.G. Lynn of the Northern District of Texas reports that *Blakely* is having "considerable unsettling effects." She has held one sentencing hearing since *Blakely*, in which she issued a "backup" sentence under the both the Guidelines and a non-Guidelines approach. A number of other sentencing matters have been continued.

District of Texas (Western)

According to a newspaper report, District Judge W. Royal Furgeson announced at Raja Kaki's sentencing last Thursday that he agreed that *Blakely* had essentially shifted responsibility for enhancing punishment on defendants from judges to juries. San Antonio's three other federal judges said they would issue dual sentences — one under the federal guidelines and a backup not incorporating them — in the event the guidelines are thrown out.[32]

Judge Frank Montalvo reports that the Chief Judge of the District was the first one to encounter a *Blakely* objection. In *United States v. Rucker* (as of yet unpublished and unreported), Chief Judge Walter S. Smith, Jr., dealt with it in a manner similar to *Croxford*, ultimately imposing three sentences. One sentence would assume the Sentencing Guidelines are valid and would be determined by reference thereto. One sentence would assume that *Blakely* applies to the Sentencing Guidelines and that the defendant's sentence must be determined by reference only to facts proved beyond a reasonable doubt or admitted to by the defendant. The last sentence would assume the Sentencing Guidelines are unconstitutional, and the court would then impose a sentence within the statutory sentencing range under indeterminate sentencing. By doing this, Judge Smith attempt to ensure that at least one of the sentences will survive appeal, and that no defendants will have to be resentenced once it is finally determined what application *Blakely* will have to federal sentencing. Judge Montalvo further reports that since *Blakely* he has taken up seventeen sentences and there were no *Blakely* issues in any of them. He intends to seriously consider following an approach similar to Judge Smith's.

District of Virginia (Eastern)

Judges Henry Hudson and Gerald Lee report that the most conspicuous impact of *Blakely* is a lack of uniformity in sentencing. All eleven judges in the District seem to be adopting different approaches. Moreover, each case requires a separate analysis to determine if the Guidelines are constitutional as applied to that case. The most pressing issues seem to be arising from cases coming up for sentencing following jury trial with significant potential enhancements. It is not immediately clear what solutions will be totally equitable or satisfactory in these circumstances. In addition, a number of guilty pleas have been entered where eliminating upward enhancements might distort the outcome to the extent that it may undermine the "basis of

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[32] http://www.mysanantonio.com/news/crime/stories/ MYSA071004.1B.arsonsentencing.25fb589d.html.

the bargain" – requiring the plea to be set aside on the ground of mutual mistake of law. Needless to say, the U.S. Attorney's Office is struggling to figure out how to include all relevant conduct in the indictment without diverting the jury on time consuming collateral side-trips. Judges are also bracing for the tidal wave of cases returned from the Fourth Circuit for resentencing after it rules on *Blakely*.

District of West Virginia (Southern)

In *United States v. Shamblin*,[33] Judge Joseph R. Goodwin agreed with *Croxford* that "any fact that increases the penalty for a crime beyond the statutory maximum" must be proven beyond a reasonable doubt.[34] According, the federal guidelines were unconstitutional. Judge Goodwin went on to reduce Shamblin's sentence from 240 months under the Guidelines to 12 months under the "option 2" approach described in *Croxford*. Judge Goodwin concluded: "Today, Shamblin's case illustrates the upheaval that *Blakely* will cause in federal courts, at least for a time. At 240 months, Shamblin's sentence represented much that is wrong about the Sentencing Guidelines; at 12 months, it is almost certainly inadequate. My duty, however, is only to apply the law as I find it."[35]

District of Wyoming

Chief Judge William Downes reports that two hearings were continued last week because of *Blakely*, as neither side knew how to handle the issue. He reports that there is "more confusion and more angst about *Blakely* any other decision in recent memory."

II. Possible Congressional Responses to *Blakely*.

The description of varying responses around the country may provide support for the conclusion that *Blakely* had considerable unsettling effects on the federal courts around the country. In such circumstances, it is easy to use terms such as "crisis" or "chaotic" to describe the result. For instance, *USA Today* reported on Monday that some "legal experts" believe the results of *Blakely* "could be chaos in the U.S. Court system."[36] Indeed, one federal judge in Washington State has reportedly described *Blakely* as producing "complete and utter chaos,"[37]

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[33] __ F.Supp.2d ___, 2004 WL 1468561 (S.D.W.Va. June 30, 2004).

[34] *Id.* at *7.

[35] *Id.* at *9.

[36] Joan Biskupic, *High Court Ruling Sows Confusion*, USA TODAY, July 12, 2004.

[37] Tracy Johnson, *"Utter Chaos" Means Less-Severe Sentences for Serious Crimes*, SEATTLE POST-INTELLIGENCER REPORTER, July 12, 2004.

while another in Florida has reportedly said things are "very chaotic."[38]

In my view, such apocalyptic terms as "chaos" are inappropriate, at least with respect to describing the federal system. To describe federal criminal practice today as "chaotic" would unfairly minimize the efforts of the capable judges who are laboring to avoid such an outcome. As my description of their efforts hopefully indicates, they are at least having success in resolving the cases before them and, within each individual district, producing an appropriate sentence in light of the law as the judge understands it.

I will leave it to others to decide whether the current situation is worthy of a legislative "quick fix" and, if so, whether such a fix can be drafted consistently with constitutional commands. I would suggest, however, that any short term solution should not lead this Committee and the Congress to ignore the vital issues surrounding criminal sentencing.

In recent months, federal criminal sentencing has been a vibrant topic of discussion. Some have argued that the federal sentencing guidelines are too tough and should be generally adjusted downward. For example, Justice Anthony Kennedy argued at the American Bar Association's Annual Convention last summer that the federal sentencing guidelines should be revised downward.[39] Others believe that the guidelines still result in unduly lenient sentences in some circumstances. For instance, Congressman Sensenbrenner has introduced H.R. 4547, "Defending America's Most Vulnerable: Safe Access to drug treatment and Child Protection Act of 2004." The bill includes a broad slate of tough mandatory sentences for a wide range of drug crimes. Between these various positions, an almost infinite array of positions is possible. I recently espoused my own general view that the federal sentencing guidelines generally produce appropriate sentences, but that the mandatory minimum sentences may conflict with the goals of a guidelines structure.[40] Other arguments for reform have also been advanced.[41]

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[38] Elaine Silvestrini, *Confusion Rules in Federal Courts*, TAMPA BAY OBSERVER, July 12, 2004.

[39] Associate Justice Anthony M. Kennedy, Speech at the American Bar Association Annual Meeting, at 4 (Aug. 9, 2003), *available at* www.supermecourtus.gov/publicinfo/speeches/sp_08–09-03.html.

[40] Paul G. Cassell, *Too Severe?: A Defense of the Federal Sentencing Guidelines (and a Critique of the Federal Mandatory Minimums)*, 56 STAN. L. REV. 1017 (2004).

[41] *See, e.g.*, Orrin G. Hatch, *The Role of Congress in Sentencing: The United States Sentencing Commission, Mandatory Minimum Sentences, and the Search for a Certain and Effective Sentencing System*, 28 WAKE FOREST L. REV. 185 (1993); REPORTS OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 13 (Mar. 1993); U.S. SENTENCING COMM'N, MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM (1991).

Today is not the day for finally resolving what the federal sentencing system should look like in the coming decades. My modest suggestion is only that this determination should be made only after a full and informed dialog between Congress, the Executive, the Judiciary, and other interested parties. In other words, while *Blakley* may be viewed as a short term problem requiring an immediate solution, perhaps with longer perspective it can viewed as spur for discussion and improvement.

I would be happy to answer any questions that the Committee might have about my description of the effects of *Blakely*, consistent with my obligation to avoid comment on pending legal issues.

August 1, 2003

The Honorable Diana E. Murphy
Chair
United States Sentencing Commission
One Columbus Circle, N.E.
Washington, D.C. 200002-8002

Re: Issue for Comment: Downward Departures

Dear Judge Murphy:

We write to provide you our perspective as you respond to the directive contained in the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003, Pub. L. 108-21 ("Protect Act"). Specifically we focus on section 401(m) which directs the Sentencing Commission to review the grounds on which downward departures are based and appropriately amend the guidelines to substantially reduce the incidence of downward departures.

As you know, FAMM is a champion of judicial discretion. Because discretion is built into the guidelines, we have always taken an active interest in the Commission and supported the guidelines as preferable to mandatory minimums. FAMM and other civil rights and criminal justice organizations wrote you shortly after passage of the Protect Act urging that the Commission do everything in its power to preserve judicial departure authority. Departures are necessary to the health of the federal sentencing guidelines, particularly in light of the guidelines' relative rigidity and complexity. We specifically urged you to conduct a comprehensive review of judicial departures to develop a thorough understanding of the underlying reasons for current departure rates. *See* Letter to Diana E. Murphy from Leadership Conference on Civil Rights, *et al.* of April 28, 2003. We encouraged you to use this information and the insights you develop to reduce the incidence of departures without disturbing departure authority.

Compelling support for that position is presented in the letter submitted to you by the Practitioners' Advisory Group and we endorse its perspective and recommendations. *See* letter from James Felman and Barry Boss to Diana E. Murphy of August 1, 2003. The PAG presents evidence of the role that government-supported "fast-track" departures have played in driving departure rates and debunks the government's use of statistics to support their case that judicial departures are lawless and excessive and must be limited. *Id.* at 2-3. The PAG believes that the Commission will find that courts are granting departures not sought by or acquiesced in by the government in only 7.5 to 12 percent of all cases.

1612 K Street, NW • Suite 700 • Washington, D.C. 20006 • (202) 822-6700 • fax (202) 822-6704 • FAMM@famm.org • http://www.famm.org

We write separately to advise you of the Departure Study Project sponsored by FAMM and share with you our very preliminary findings. The Departure Study Project was prompted by U.S. Attorney William Mercer's testimony before the Commission on March 25, 2003. You will recall that Mr. Mercer discussed the perspective of the Department of Justice on the Commission's response to directives contained in the Sarbanes-Oxeley Act.

Mr. Mercer devoted part of his testimony to the subject of judicial departures in white collar cases. He decried what he described as a pattern of judicial abuse of departure authority. Mr. Mercer identified several departures, those for charitable or civic work, aberrant behavior, employment record, family ties, post-offense rehabilitation, diminished capacity, mental condition and other, unmentioned departures as "fodder in virtually every sentencing of a white collar defendant . . . ." Testimony of William W. Mercer, U.S. Attorney, District of Montana, and Paul K. Charlton, U.S. Attorney, District of Arizona at 9 (March 25, 2003) ("Mercer Testimony"). As evidence of these alleged judicial evasions, he presented the Commission with summaries of 78 "troubling" cases from 49 federal districts. He advised the Commission that "the pattern now seems clear that federal judges are using downward departures frequently, in some cases nearly routinely, as a way of avoiding imposing the prescribed guideline sentence." Mercer Testimony at 8 (March 25, 2003).

He advised the Commission that the Department of Justice would take steps in light of these "troubling" departures and the failure of the Sentencing Commission to fulfill its responsibility to prevent departures from "becoming an obstacle to reaching the statutory goals of sentencing." Specifically, the Department would "seek legislation . . . to address the unacceptably high levels of non-substantial assistance downward departures." Mercer Testimony at 9-10.

That promise was fulfilled when Rep. Thomas Feeney introduced what came to be known as the Feeney Amendment to the Amber Alert bill, today incorporated into the Protect Act.

FAMM is perhaps best known for bringing the human face of sentencing to policy-makers, members of Congress, the public and, of course, the Sentencing Commission. We decided to examine as many of the 78 cases as we could to develop a fuller understanding of these most troubling of departures and tell the stories of the defendants they benefitted. We were particularly interested to learn why these cases were presented by Mr. Mercer as examples of widespread use of departures to evade appropriate guideline sentences.

Methodology:

Our study involves the following steps:

- Locate and contact the defense attorney by telephone, describe the project and provide the DOJ case summary and links to Mr. Mercer's testimony on the

Commission website.

- Conduct a scripted interview with defense counsel to determine why the departure was sought and to request relevant documents.[1]
- Review all documents provided, available court opinions, including appellate opinions, and any media coverage.[2]
- Draft narrative summaries, with citations to the available record, describing the offenses, explaining why the departures were sought and why they were granted, and noting whether the departures were appealed, and if so, the outcomes.
- Have defense counsel review narrative summaries for accuracy.

We strived for objectivity and refrained from making judgments in the narratives about the conclusions Mr. Mercer drew from the cases. We relied as much as possible on court documents, pleadings, orders, and similar record materials in drafting our narratives. We were alsocommitted to learning about and telling the stories of the circumstances that led the defendants to seek and the judges to grant the departures. Of course, there is tension between our roles as researchers and advocates. While we do not presume to endorse the propriety of any given departure in the DOJ example cases, we felt it important to explain why they were sought and why they were granted. The narratives that are attached to this letter at Tabs A - F tell those stories in 2-4 page summaries.[3]

This letter presents the DOJ examples verbatim followed by thumbnail sketches of the narratives found at Tabs A- F. We draw some conclusions about the DOJ examples, particularly where it appears the DOJ example omits what we consider relevant information as documented by our review. We have many cases to complete and present only the handful we have so far completed for your review. Our conclusions are necessarily preliminary.

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[1] We are grateful to our volunteers, including summer associates from two area law firms, who are assisting us with the interviews, gathering and analyzing sentencing documents and drafting narrative summaries.

[2] We did not request Pre-sentence Investigation reports in light of their confidential character.

[3] We do not include with this letter the court documents we gathered for each case as they are extensive. We are happy to provide them if you wish to review them.

The DOJ Cases and our findings:

TAB A *United States v. Sarmiento*, 01-40185, Northern District of California, Judge Claudia Wilken.

DOJ description: *In **United States v. Sarmiento,** the defendant pled guilty to fraud in connection with access devices. Defendant stole credit card applications belonging to 50-100 of his employer's customers and used the information to purchase roughly $250,000 of merchandise and credit over the internet. Defendant moved for a downward departure based on extraordinary acceptance of responsibility, family ties and a combination of factors. The defendant's offense level was 13 (Zone D, 12-18 months imprisonment). Over the government's objection, the Court departed to a level 10 (6-12 months) and sentenced the defendant to five-years' probation and 12- months' community confinement.*

Our findings: The DOJ summary of the *Sarmiento* case neglects to describe the profoundly disturbing circumstances that led the defendant to seek and the judge to grant a departure. Mr. Sarmiento's wife lost their first baby in childbirth because the obstetrician failed to recognize the fact that the child was too large. The baby strangled in the birth canal while the doctor attempted to perform a caesarian section and Mrs. Sarmiento nearly died on the operating table. The couple became profoundly depressed, and the stress on Mr. Sarmiento was exacerbated when he lost his job. Mrs. Sarmiento became pregnant again and Mr. Sarmiento, unemployed, began to support his family through criminal activity, and lost himself in gambling and drug use. His wife gave birth a year to the day after the first baby died. Too deeply depressed to take an interest in motherhood, she left all caregiving to her husband who is, by all accounts, a loving father. When Mr. Sarmiento was arrested, he made every effort to cooperate, confessing, preserving evidence and offering to participate in a sting. The target would not deal with him despite his repeated efforts, and he was unable to secure a substantial assistance departure. He turned his life around following his arrest. He sought the departure for a variety of factors, especially to care for his infant son.

The government did not appeal the departure.

TAB B *United States v. Checoura*, No. 01-149, D.N.J., Judge Stephen M. Orlofsky.

DOJ description: *In **United States v. Checoura,** the defendant, a bookkeeper for S&S X-Ray Products, was convicted of interstate transportation of stolen property. Pursuant to Section 5K2.13 (diminished capacity), the defendant received a two-level downward departure from an offense level of 20 because the*

defendant's compulsive gambling disorder significantly impaired her ability to control her embezzlement of over $4 million from her employer over a five-year period. This reduced the guideline range from 33-41 to 27-33.

Our findings: This description, while correctly noting that Ms. Checoura's gambling addiction was the underlying basis for the departure, fails to acknowledge the extensive evidence of her mental illness, the painstaking approach the court took in considering the departure or the fact that, having granted a two-level downward departure, Judge Orlofsky sentenced Ms. Checoura to the middle of the sentencing range. Ms. Checoura was sexually abused as a child and beaten violently by her first husband. She began gambling while still in the Philippines to "escape a tremendous workload and a marriage that (quite literally) nearly killed her." In the United States, she gambled almost daily, wagering up to $50,000 monthly. Ms. Checoura's expert witness submitted a written evaluation that included diagnostic tests and the results of three examinations and testified in support of the conclusion that she suffered from, *inter alia,* Pathological Gambling, Post-traumatic Stress Disorder, and Recurrent and Severe Major Depression. Judge Orlofsky concluded in a thorough and thoughtful published opinion after a full sentencing hearing, four supplemental briefs and full consideration of the government's policy arguments that Ms. Checoura suffered from a significantly reduced mental capacity that was sufficiently linked to her criminal conduct. As further evidence of his balanced approach to the sentencing, he sentenced Ms. Checoura, who was 67 years old, to the middle to the guideline range explaining that "[a]lthough I have determined that Checoura possessed significantly reduced mental capacity, that is not to say she is entirely blameless." Ms. Checoura's counsel described Judge Orlofsky as a conservative judge, not easily given to departures.

The government did not appeal the departure.

TAB C *United States v. Jacobson*, No. 02-115, W.D.N.Y, Judge Michael A. Telesca.

*In **United States v. Jacobson,** a psychiatrist charged in a health care fraud matter, received a probationary sentence after a seven-level downward departure (from a Zone D sentencing range of 24-30 months) principally on the grounds of diminished capacity. The Court concluded that a prison sentence would be inappropriate and departed to an offense level of 10 (which provided for a range within Zone B of 6-12 months). The five-year probationary sentence, $50,000 fine and restitution order ($786,585), included special conditions of probation that the defendant serve his first six months in home detention, perform 250 hours of volunteer community service per year for five years, and submit to psychiatric care. An appeal is pending. A sentence of incarceration would have removed the doctor from practice. Now the doctor is fighting to retain his medical license with the state medical board and using the fact that the district court ordered him to*

perform community service as a reason to maintain his license. The Court relied primarily on the defendant's diminished capacity motion, finding that the hypomanic condition diagnosed by defendant's expert "caused him to be unable to control this drive to act as he did" in overbilling. The Court, however, also cited "other factors" coupled with the illness resulting in his diminished capacity to justify the departure. While the Court stated that the restitution agreed to by Jacobson "does not warrant any special consideration for his sentence" and concluded "that fact alone" does not entitle defendant to a downward departure, the court found the acceptance of responsibility reflected by that restitution "noteworthy" and apparently included it as one of the factors leading to the sentence imposed. More clearly cited were the Court's conclusions that "[t]he defendant is a valuable asset to this community in that he takes care of a large number of mental patients" and that removing him from the community "would cause a deep hardship to his patients who rely upon continuity of care in rendering psychotherapy and would put a tremendous burden on other psychiatrists to absorb the patient load."

Our findings: While the facts presented are accurate, if incomplete, this DOJ summary mentions that the government appealed the downward departure, but does not reveal that the departure was affirmed in January 2003 in a published opinion. The record we reviewed characterized Dr. Jacobson as a highly skilled psychiatrist who was well known for his self-sacrificing philosophy of treatment and extraordinary commitment to those in need. He turned no patient away. He was known for treating difficult patients other psychiatrists refused and he was the only doctor of his skill level in the community who would always accept patients regardless of conditions, finances or insurance status. Dr. Jacobson's expert described a man who was himself severely depressed and who kept his illness a secret, treating himself with anti-depressants that in turn induced a manic-depressive, bi-polar cycle. These swings drove his ability to work productively and also compelled him to act on the drive to compensate himself for his irresistible self-sacrifice. The government did not contradict this evidence, examine Dr. Jacobson, or offer any expert opinion to contradict the defense expert. It did argue the facts were insufficient to support a downward departure. The government also suggested on appeal that Judge Michael A. Telesca used the departure to avoid a guideline he disagreed with It was clear that Judge Telesca struggled with this case. He opened the sentencing by telling the court "[t]his is probably one of the most difficult cases I have ever had." Over thirty pages of sentencing transcript, the judge never expressed displeasure with the guidelines and repeatedly invoked them as he made his decisions and specific findings. *See* Brief for Defendant-Appellee at 26.

TAB D *United States v. Hauck*, 02-63, M.D. Fl., Judge Anne C. Conway

DOJ Description: *In **United States v. Hauck**, the defendant pled guilty to bank fraud. The PSR calculated defendant's offense level to be 18 even though the*

government recommended an offense level of 13 (based on its belief that the loss overstated defendant's culpability). The Court, however, departed downward below even the government's recommendation to a level 10 (range of 6-12 months) based on aberrant behavior. It sentenced defendant to three- years' probation with a special condition of six-months' home detention.

Our findings: The DOJ description is confusing if not inaccurate. Judge Conway, who denied two of Mr. Hauck's motions for departure based on extraordinary acceptance of responsibility and multiple causation of loss, granted two downward departures. One motion for a three-level departure was supported by the government. That departure was based on the parties' agreement that the loss calculated under the guidelines overstated the seriousness of the offense. The other departure granted by the court was three levels for aberrant behavior. Mr. Hauck, who was sixty-nine years old, argued that he had never offended in the past, had not engaged in significant planning of the crime and his criminal conduct was of limited duration. The Statement of Reasons is perfunctory. That said, the judge considered objections to the PSR, sentencing memoranda, and multiple briefs from both sides addressing the four motions. According to defense counsel, Judge Conway is not seen as a judge who routinely grants departures. Attorneys are expected to provide sound and documented reasons if they hope to convince the court. The government opposed three of the downward departures and the court only granted one of the three over the objection.

The government did not appeal the departures.

TAB E *United States v. Sadolsky*, 99-5780, W.D.Ky., John G. Heyburn, II

DOJ description: ***In United States v. Sadolsky,*** *a regional carpet manager with Sears fraudulently credited his personal credit card account with $39,477 in returned merchandise. He was convicted of computer fraud because he accessed the corporation's computers thirteen times and fraudulently credited his personal credit card for returned merchandise. Although the statute required a minimum term of imprisonment of six months, the Court departed downward two levels under Section 5K2.13, based on defendant's gambling disorder. The defendant received a term of six months' home confinement (not imprisonment) in violation of the statutory requirement. The government appealed. The judgment was affirmed in an opinion published at 234 F.3d 938 (6th Cir. 2000).*

Our findings: This description refers to a six-month mandatory minimum sentence prescribed by the statute and states the judge ignored that minimum. That argument was not raised by the government on appeal. The six-month sentence was a guideline provision under then section 2F1.1(c)(1), not a statutory mandatory minimum, which may explain why the government did not appeal on that ground. As discussed by the government, Mr. Sadolsky had a

gambling disorder. He was consumed by his gambling addiction. He earned $30,000 annually and could gamble that amount in one week. He stole to support his habit and was so desperate at one point that he sold his wife's wedding ring. When confronted with his thefts, he immediately confessed, entered into a plea agreement, agreed to upward adjustments, and began making regular restitution. The plea agreement permitted him to seek a downward departure for significantly reduced mental capacity. Judge Heyburn held a lengthy sentencing hearing at which Mr. Sadolsky presented unrebutted evidence of his addiction and argued that his compulsion led to the theft. Judge Heyburn granted a two-level departure, one level more than requested. The government argued that gambling disorders are not proper departure grounds and that there was an insufficient nexus between Mr. Sadolsky's illness and his criminal conduct. The Court of Appeals for the Sixth Circuit carefully reviewed circuit precedent and the 1998 amendment to U.S.S.C. § 5K2.13 in a thorough opinion affirming the challenged departure.

TAB F *United States v. Sanders*, 01-0045, N.D. Al., Edwin Nelson

DOJ description: *In **United States v. Sanders**, a bank vice president defrauded her employer and two other victims out of monies in excess of $200,000. Although only losses related to the bank's loss were set forth in the indictment, the other thefts were covered in the plea agreement relating to restitution. The defendant sought a departure based upon charitable works, family ties and responsibilities, aberrant behavior, diminished capacity, and extraordinary efforts at rehabilitation. The Court departed seven levels from an offense level of 15 to 8 on the basis of defendant's alleged diminished capacity and aberrant behavior. This established a guideline range of 0-6 months. He sentenced the defendant to eight hours in custody. The government appealed the sentence. The Eleventh Circuit reversed and remanded requiring the district court to explain why her mental condition took the case outside the heartland of similar cases. The Court imposed the same sentence on remand. Although she had a high paying job and spent much of the money on herself, the Court found that the defendant embezzled money to "buy love in her close relationships" which permitted her to function in a "carefully built facade of success and normality." The government has taken another appeal.*

Our findings: While the DOJ summary mentions the government's appeal of the sentence imposed on remand, it neglects to mention that Ms. Sanders' sentence, including the seven-level departure for diminished capacity, was upheld by the Eleventh Circuit prior to the March 25, 2003 Commission hearing. On remand, Judge Nelson issued a thorough and detailed description of his reasons for granting the departure that is not captured in the DOJ selections from the sentencing opinion. For example, the quote reproduced above is taken out of context. What Ms. Sanders' expert witness, a psychologist for twenty yeas and once the chief psychologist for a state department of correction, said was that Ms. Sanders' "illegal behavior

functioned to allow [her] to preclude experiencing overwhelming feelings of depression and the likely suicidal behavior that would surely have resulted if her lifelong, carefully built facade of success and normality were disrupted even for a scintilla of time." He also said that "her illegal behavior functioned as a massive, almost psychotic, cry for help." Judge Nelson made explicit findings based on the evidence presented and also explicitly found, based on his experience of twenty-five years on the bench, that "few if any defendants suffer from the type of psychological pathologies with which Sanders has been diagnosed. The court finds that even fewer suffer from pathologies as prevalent and extensive as those from which Sanders suffers. Thus, the court finds that this case lies outside of the 'heartland' of cases that are contemplated by the Sentencing Guidelines."

Preliminary Conclusions

We cannot draw any conclusions about whether the cases submitted to the Commission by the DOJ that we have not yet reviewed are reliable examples of judicial guideline evasion. We can say that the cases we have explored so far do not strike us as obvious examples of judicial avoidance of the prescribed guidelines.

We generally found records rich in detail. We saw evidence of thoughtful judges presented with compelling cases and balancing difficult decisions. For example, in Ms. Checoura's case, the court considered numerous briefs, held a full sentencing hearing, and published a thoughtful, well-reasoned opinion granting the departure but sentencing the defendant to the middle of the guideline range. This did not strike us as an example of judicial evasion. Nor did the actions of Judge Telesca in the *Jacobson* case, in which the judge stated on the record how difficult he found the case to be. Similarly, in the *Sanders* case, a case successfully appealed by the government, Judge Nelson on remand wrote a thorough, detailed and well-supported opinion explaining the departure for diminished capacity. Judge Conway, in Mr. Hauck's case, considered and rejected two defendant motions for departure, granted one unopposed by the government and another over the government's objections. This careful parsing of the grounds suggested an appropriate and deliberate consideration. In other cases, we learned about defendant circumstances that simply were not captured in the government's summaries to this Commission. The Sarmiento family's tragedies and Ms. Checoura's terrible circumstances, while not conveyed in the DOJ descriptions, were before the courts that imposed those sentences.

We expected to see more appeals by the government. The government declined to appeal three of the six cases we reviewed. Of the three appealed, the Courts of Appeals affirmed the departures in two cases. In the third, *United States v. Sanders*, the Eleventh Circuit Court of Appeals overruled one departure and vacated the other, remanding it for a fuller explanation. On appeal, the court affirmed the sentence on remand. We know that among the cases on which we have yet to report that approximately 30 were appealed and, of those about which we have information, about half were reversed on appeal. This suggests to us that in the cases considered the most egregious examples of judicial evasion, the system of seeking appeals works to find and

correct unwarranted departures. We do not yet know why the government chose not to appeal the other approximately 48 cases that it presented in summary form to the Commission as examples of unwarranted departures.

Admittedly, this is a very small sample – fewer than ten percent of the cases presented to the Commission by Mr. Mercer. We are continuing to review the remaining cases and when finished, will make our final report available to the Commission. Our initial impression, however, based on the cases that we have reviewed, is that the departures appear to have been sought and granted in good faith. They do not strike us as supporting the proposition that judges are using departures as a way to avoid imposing the sentences prescribed by the guidelines as feared by Mr. Mercer. We thus continue to urge that you take a most delicate and moderate approach to the task set you by the Protect Act and leave undisturbed the ability of judges to depart when the facts warrant.

Thank you for considering our views.

Sincerely,

Julie Stewart
President

Mary Price
General Counsel

FEDERAL PUBLIC DEFENDER
Western District of Washington

Thomas W. Hillier, II
Federal Public Defender

July 8, 2004

Senator Edward Kennedy
Committee on Judiciary
224 Dirksen Senate Office Building
Washington DC 20510

Senator Patrick Leahy
Committee on Judiciary
224 Dirksen Senate Office Building
Washington DC 20510

Dear Senators Leahy and Kennedy:

Thank you for requesting input from Federal Public and Community Defenders concerning legislative proposals in the wake of the United States Supreme Court's decision in Blakely v. Washington. Federal Public and Community Defenders represent tens of thousands of individuals in federal courts throughout the country each year. The Blakely decision struck down a state sentencing scheme that essentially mirrors the federal sentencing guidelines. Thus, your committee is considering proposals that seek to harmonize the federal sentencing guidelines with the principles of Blakely. Because the sentencing function dominates our work, we welcome the opportunity to provide our perspective and a proposal for your consideration.

While the Blakely decision has provoked considerable controversy, it rests on a simple, fundamental constitutional principle: the deprivation of a person's liberty requires that an accusation be proven to a jury, by competent evidence, beyond a reasonable doubt. This bedrock constitutional guarantee applies with equal force to sentence-increasing facts. The Blakely decision resuscitates these ideals by invalidating infirm legislative sentencing processes that ignore and imperil constitutional safeguards against deprivation of one's liberty. The Blakely decision deserves the full measure of respect and effort required to sustain a system premised on limited government and equal justice under the law.

It is troubling that the proposed legislation before your committee suggest that the Blakely decision is "problematic" and requires a "fix." These proposals are designed to avoid Blakely, not embrace it. If any of these we have reviewed thus far is adopted, the current flawed sentencing regime which allows enhanced sentences based upon information that has not been subject to the strictures of due process, considered by a jury

1601 Fifth Avenue, Suite 700, Seattle, Washington 98101 - Telephone (206) 553-1100 Fax (206) 553-0120

nor proven beyond a reasonable doubt will flourish and grow worse. We already know many of the adverse effects of the current system. Last August at the American Bar Association annual conference, Justice Anthony Kennedy observed that our guidelines system unfairly imprisons too many people for periods of time that are too long. This unseemly consequence occurs because sentences can be increased under our system without requiring presentation of compelling evidence to a jury.

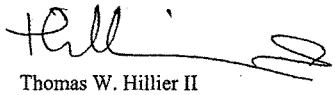
Our proposal simply incorporates the principle of Blakely in the current statute that governs the use and application of the federal sentencing guidelines, 18 U.S.C. § 3553(b). The language we have added to that statute is lifted in large part from state of Kansas statutes that govern its sentencing law. The state legislature in Kansas incorporated Blakely-like language in response to a decision from its own Supreme Court which invalidated the previous sentencing scheme for the same reason that our Supreme Court struck down the state of Washington's scheme in Blakely. The proposal is simple and straightforward and achieves two worthy objectives. It comports with the requirements of our constitution and it will address Justice Kennedy's concern with sentences that are too long by prohibiting sentence enlargement based on facts not provable beyond a reasonable doubt.

We recognize that other suggested "remedies" currently before your committee are in a state of evolution. Nevertheless, none seems to appreciate the importance of embracing the fundamental constitutional rights that underlie Blakely. Rather, all are focused on either making the guidelines advisory or tinkering with the question of what constitutes a statutory maximum. Such options are doomed to failure because they aggravate rather than solve the problem addressed in Blakely. Judges will be asked to increase sentences based on facts that have not been tested and without the opportunity for meaningful appellate review. Even under the current system, a judge is required to hold a hearing on contested sentencing factors and have his or her decision subject to review. Making the guidelines advisory or allowing unfettered judicial discretion in imposing sentences up to the statutory maximum only serves to further denigrate the constitutional guarantees Blakely protects.

We respectfully believe that the best legislative course is to acknowledge and embrace Blakely rather than attempting to sidestep or avoid its principle. We would welcome the opportunity to present further testimony to the Committee concerning our proposal and its probable impact on the federal sentencing system. Not only can we offer practical insight, we can rebut notions advanced by the Department of Justice and others that are contrary to our experience and, we believe, law. Our proposal will produce the tempering effect of the Fifth and Sixth Amendments and ultimately result in a much simpler and more constitutionally sound criminal justice system.

Again, we appreciate the invitation to offer our comments and proposal and look forward to further conversations with your Committee.

Very truly yours,



Thomas W. Hillier II
Federal Public Defender

:ph
Enclosure

18 U.S.C. § 3553

§ 3553. Imposition of a sentence

(a) Factors to be considered in imposing a sentence.– The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider –

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed –

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for –

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines –

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement –

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

(b) Application of guidelines in imposing a sentence. –

(1) In General. – Except as provided in paragraph (2), the court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described. In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission.

(2) Child Crimes and Sexual Offenses. –

(A) Sentencing. – In sentencing a defendant convicted of an offense under section 1201 involving a minor victim, an offense under section 1591, or an offense under chapter 71, 109A, 110, or 117, the court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless–

(i) the court finds that there exists an aggravating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence greater than that described;

(ii) the court finds that there exists a mitigating circumstance of a kind or to a degree, that –

(I) has been affirmatively and specifically identified as a permissible ground of downward departure in the sentencing guidelines or policy statements issued under section 994(a) of title 28, taking account of any amendments to such sentencing guidelines or policy statements by Congress;

(II) has not been taken into consideration by the Sentencing Commission in formulating the guidelines; and

(III) should result in a sentence different from that described; or

(iii) the court finds, on motion of the Government, that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense and that this assistance established a mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence lower than that described.

In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official

commentary of the Sentencing Commission , together with any amendments thereto by act of Congress. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission, together with any amendments to such guidelines or policy statements by act of Congress.

(3) Imposition of Presumptive Sentence. – Subject to the provisions of subsection (c), any fact that would increase the penalty for a crime beyond the presumptive statutory maximum, including the sentence referred to in subsection (a)(4) shall be deemed a functional equivalent of an element of the offense that must be alleged in the indictment, submitted to a jury and proved beyond a reasonable doubt. [Apprendi v. New Jersey, 530 U.S. 466, 494 n.19 (2000)].

(4) Definition.– For purposes of this subsection, the term "presumptive statutory maximum" means the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant. [Blakely v. Washington, 542 U.S. ___, slip op. at 7 (2004)].

(c) Procedures for Imposing Sentence. –

(1) Separate Sentencing Proceeding.– If the court determines it is in the interest of justice in any case, or upon entry of a plea of guilty, the court shall conduct a separate sentencing proceeding to determine whether the defendant may be subject to a sentence above the presumptive statutory maximum. Such proceeding shall be conducted by the court before the trial jury as soon as practicable. If the jury at the separate sentencing proceeding has been waived, the separate sentencing proceeding shall be conducted by the court.

(2) Relevant Evidence.– During a sentencing proceeding, all evidence, consistent with the due process and confrontation clause of the Constitution of the United States, may be presented concerning any matter that the court deems relevant to the question of determining if any specific facts exist that may serve to enhance the sentence above the presumptive statutory maximum. No evidence secured in violation of the Constitution of the United States shall be admissible. No testimony by the defendant at the sentencing proceeding shall be admissible against the defendant at any subsequent criminal proceeding. At the conclusion of the evidentiary hearing, the court shall allow the parties a reasonable period of time in which to present oral arguments.

(3) Jury Instructions.– The court shall provide oral and written instructions to the jury to guide its deliberations.

(4) Jury Findings.– If, by unanimous vote, the jury finds beyond a reasonable doubt that one or more specific factors exist that may serve to enhance the presumptive statutory maximum sentence, the defendant may be sentenced pursuant to section 3553(b). The jury, if its verdict is a unanimous recommendation that one or more of the specific facts that may serve to enhance the presumptive maximum sentence exists, shall designate in writing, signed by the foreperson of the jury, the specific facts which the jury found beyond a reasonable doubt. If, after a reasonable time for deliberation, the jury is unable to reach a verdict finding any of the specific facts, the court shall dismiss the jury and shall only impose a sentence as provided by law. In nonjury cases, the court shall follow the requirements of this subsection in determining if one or more of the specific facts exist that may serve to enhance the presumptive statutory maximum sentence.

[Renumber the remaining subsections of 3553 to account for the new 3553(c).]

Statement of Chairman Orrin G. Hatch
Before the United States Senate Judiciary Committee
Hearing on

"*BLAKELY V. WASHINGTON* AND THE FUTURE OF THE FEDERAL SENTENCING GUIDELINES"

Good morning and welcome to the Senate Judiciary Committee's hearing examining the Supreme Court's recent decision in Blakely v. Washington and the future of the Federal Sentencing Guidelines. As one of the original co-sponsors of the United States Sentencing Commission, and a proponent of reducing sentencing disparity across the nation, I have a strong interest in preserving the integrity of the federal guidelines against constitutional attack.

As many here may already know, defendants are routinely sentenced by judges who decide sentencing facts based upon a preponderance of the evidence standard. This has all changed in the last two weeks. On June 24, 2004, in Blakely v. Washington, the Supreme Court held that any fact that increases the maximum penalty under a state statutory sentencing guidelines scheme must be presented to a jury and proved beyond a reasonable doubt even though the defendant's sentence falls below the statutory maximum sentence.

Although the Supreme Court explicitly stated in a footnote that "The Federal Guidelines are not before us, and we express no opinion on them," it also characterized the government's amicus brief as questioning whether differences between the state and federal sentencing schemes are constitutionally significant. The ambiguity apparent in Blakely and the strong suggestions by the dissent that it will apply to the federal sentencing guidelines, has understandably created angst throughout the federal criminal justice system.

If Blakely were to apply to the federal sentencing guidelines, you would have a clear double standard. Any sentencing fact that would increase a sentence would have to be presented to a jury and proven beyond a reasonable doubt. But any sentencing fact that would decrease a sentence could be decided by a judge by a preponderance of the evidence. Not only would this be incredibly confusing to everyone involved in this process but I imagine that crime victims and their families would consider this one way ratchet to be fundamentally unfair.

In the last two and a half weeks alone, the criminal justice system has begun to run amok. Some judges have thrown out the guidelines and are sentencing defendants with unfettered discretion. Other judges have adopted some of the guidelines—those guidelines that favor defendants—and ignored all guidelines that might increase a defendant's sentence. Still other judges have convened juries to decide sentencing factors that might increase a sentence—even though there are no procedures in place to govern such sentencing juries. Prosecutors are submitting verdict forms for juries that are

over 20 pages in length because they cover every possible sentencing factor that might be applied in a particular case.

While I believe most federal judges are trying their hardest to address this issue deliberately and with the utmost fairness, I fear that some judges might view Blakely as an opportunity to selfishly garner judicial power in the hopes of restoring unlimited judicial discretion with respect to sentencing. Even among those judges with the best intentions, however, there is legitimate disagreement about whether the federal sentencing guidelines will be subject to the proof and procedural requirements announced in Blakely.

You've heard of circuit splits, but here we have splits even within a single district. Not only have the Fifth and Seventh Circuit disagreed on this issue, but, in my home of Utah, district judges have adopted three different approaches to sentencing defendants in light of Blakely. As I am sure Judge Cassell will explain in more detail in his testimony, he found the federal sentencing guidelines unconstitutional as applied in United States v. Croxford, but just yesterday, Judge Dee Benson upheld the sentencing guidelines.

I am heartened to hear that, just yesterday afternoon, the Second Circuit, en banc, certified a set of three questions for the United States Supreme Court and urged it to adjudicate promptly the threshold issue of whether Blakely applies to the federal sentencing guidelines. I hope the Supreme Court promptly considers the matter.

I know we will hear more about what is going on in the courts from our witnesses, so I will not go on at length about those cases now. I would, however, like to mention just a couple of examples for those who have not been following the issue closely. I'm sure we all recall Dwight Watson, the man who sat in a tractor last year outside the U.S. Capitol for 47 hours and threatened to blow up the area with organophosphate bombs. The day before the Blakely opinion, Mr. Watson was sentenced to a 6 year prison sentence. Less than a week after the Supreme Court's opinion, he was re-sentenced to 16 months, which was essentially time served. He is now a free man.

A defendant in West Virginia had an offense level that was off the sentencing charts. Although he would have been subject to a life sentence under the guidelines, the statutory maximum penalty was 20 years. He was given a 20 year sentence three days before Blakely was decided. A week later, his sentence was drastically reduced to 12 months. The judge did not rely on any relevant conduct or any sentencing enhancements in calculating the defendant's sentence. In other words, he only applied a portion of the sentencing guidelines—those that he thought remained valid after Blakely.

And Blakely is potentially harmful to defendants as well as to prosecutors. Right now, the Federal Rules of Evidence prevent extraneous information about prior bad acts from coming before a jury during a trial. But the Federal Rules of Evidence do not apply at sentencing hearings. If Blakely applies to the federal sentencing guidelines, the Rules

may need to be amended to ensure that prior bad acts that constitute relevant conduct can be presented to a jury so they can determine sentencing facts.

In addition, it is possible that some here in Congress may respond by creating new mandatory minimum penalties to compensate for the unfettered discretion. The House already has legislation pending that would do exactly that. It may only take a couple of lenient sentences in high profile cases to raise enough of a stir to increase mandatory minimum penalties.

Another long term problem for defendants is in negotiating plea agreements. Prosecutors, who are better acquainted with sentencing nuances, will be in a better position to dictate which factors will apply in the 97 percent of cases that plead out every year. This will result is greater disparity among equally culpable defendants across the nation.

I have been working with my colleagues on the left as well as my counterparts in the House to come up with a temporary, bi-partisan fix to this sentencing dilemma that now faces our nation. Although we do not have any legislative language as of yet, we are looking at a proposal that is similar to one that Professor Frank Bowman, one of our witnesses today, proposed to the Sentencing Commission a couple of weeks ago. In addition to raising the maximum penalties within a guideline range to the statutory maximum penalty, we are considering some safeguards to prevent hanging judges from sentencing all defendants to the statutory maximum.

from the office of

Senator Edward M. Kennedy

of Massachusetts

FOR IMMEDIATE RELEASE
July 13, 2004

CONTACT: David Smith/ Jim Manley
(202) 224-2633

STATEMENT OF SENATOR EDWARD M. KENNEDY
SENATE JUDICIARY COMMITTEE
"BLAKELY V. WASHINGTON AND THE FUTURE OF THE FEDERAL SENTENCING GUIDELINES"

I commend Chairman Hatch for calling this important and necessary hearing.

The Supreme Court's sudden 5-4 ruling last month in the Blakely case has put the entire federal sentencing system in serious constitutional trouble. Already, the U.S. Court of Appeals for the Seventh Circuit and dozens of district courts have concluded that the current sentencing guidelines can't survive under the ruling, and yesterday the *in banc* Second Circuit issued an extraordinary opinion certifying to the Supreme Court three questions on the applicability of Blakely to the guidelines.

The Supreme Court's holding raises large doubts about the longstanding discretion of judges, in sentencing defendants convicted of crimes, to impose longer sentences based on facts not decided by the jury.

In Blakely, the Court considered the sentencing system of Washington state, whose guidelines are substantially similar to those in the federal system. In a 5-4 decision, the Court rejected the argument that the judge's sentence of seven and a half years was constitution because it did not exceed the statutory maximum of 10 years. Instead, the court ruled that since some of the facts used by the judge in deciding on the sentence had not been decided by the jury, the entire sentence was unconstitutional.

The federal sentencing guidelines allocate sentencing authority to judges in much the same way as the state of Washington did. Judges are authorized to consider a wide range of "relevant conduct" in deciding sentences, including information not presented to the jury. Under the guidelines, judges routinely increase sentences by making factual findings under a preponderance of the evidence standard and by applying factors that allow for enhanced sentences.

<more>

The four dissenting Supreme Court justices pointed with alarm to the likelihood that the Court's decision jeopardized the entire federal guideline system and many state systems, and might affect tens of thousands of pending cases.

In assessing how we got to this point, there is more than enough blame to go around. The Supreme Court majority clearly intended to give full respect to the right to a jury trial under the Sixth Amendment. Throughout our history, this right has been a critical protection against injustice and a basic part of our democracy.

Nevertheless, the Court's ruling is difficult to reconcile with its earlier rulings upholding mandatory minimums and authorizing judges to make factual findings when setting the low end of guideline ranges.

It's no secret, however, that recent controversial changes by Congress in the federal guidelines have upset the federal judiciary. Chief Justice Rehnquist had said that the changes sought by the Bush Administration in the Feeney Amendment were likely to "do serious harm to the basic structure of the sentencing guideline system and . . . seriously impair the ability of courts to impose just and responsible sentences."

The Judicial Conference of the United States, the American Bar Association, the U.S. Sentencing Commission, and prosecutors, defense attorneys, law professors, civil rights organizations, and business groups vigorously opposed the changes. Democrats succeeded in easing some of the worst provisions, but it was still a serious mistake to pass this sweeping amendment without proper consultation and consideration of the judiciary's strongly held views, and without the benefit of hearings and full debate in either the House or the Senate.

If courts continue to rule that the Federal Sentencing Guidelines cannot stand, and if judges, prosecutors, and defense attorneys are unable to adapt their current practices to a new system of jury-based sentencing, then it may become necessary for Congress to step in and devise a new sentencing scheme to deal with the constitutional issue.

If that's necessary, I hope we can approach the problem with the same kind of careful deliberation and bipartisan cooperation that led to the enactment of the Sentencing Reform Act of 1984. In developing this legislation, in our Committee over several years, Senator Thurmond, Senator Hatch, Senator Biden, and I worked with both the Carter and Reagan Administrations to achieve a sensible balance between the goal of consistent sentencing and the need to give federal judges enough discretion to make each sentence fit the crime.

The goals of fairness and consistency are still the same. We need to work together to resolve these questions. This hearing is a good first step, and I look forward to the witnesses' testimony.

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COMMITTEE ON CRIMINAL LAW
of the
JUDICIAL CONFERENCE OF THE UNITED STATES
9535 Bob Casey United States Courthouse
515 Rusk Avenue
Houston, Texas 77002

Honorable Donetta W. Ambrose
Honorable William M. Catoe, Jr.
Honorable William F. Downes
Honorable Richard A. Enslen
Honorable David F. Hamilton
Honorable Henry M. Herlong, Jr.
Honorable James B. Loken
Honorable A. David Mazzone
Honorable William T. Moore, Jr.
Honorable Norman A. Mordue
Honorable Wm. Fremming Nielsen
Honorable Emmet G. Sullivan

Honorable Sim Lake, Chair

TELEPHONE
(713) 250-5177

FACSIMILE
(713) 250-5010

August 11, 2004

Honorable Orrin G. Hatch
Chairman
Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, DC 20510

Honorable Patrick J. Leahy
Ranking Member
Committee on the Judiciary
152 Dirksen Senate Office Building
Washington, DC 20510

Dear Mr. Chairman and Senator Leahy:

I write in response to your letter to Chief Justice William H. Rehnquist seeking the judiciary's views on the impact of *Blakely v. Washington,* 124 S.Ct. 2531 (2004). Your inquiry has been forwarded to the Judicial Conference Committee on Criminal Law. The Judicial Conference has no position with respect to the *Blakely* decision, although we will continue to closely monitor the courts' responses to *Blakely* as they unfold.

As you know, the Supreme Court has granted the government's petitions for certiorari in *United States v. Booker* and *United States v. Fanfan*. Oral argument is set for Monday, October 4, 2004. The Committee strongly believes that before we can assess *Blakely*'s impact on the federal sentencing guidelines and determine if any legislative response is necessary, we must await the decision of the Supreme Court. However, in the event Congress contemplates legislative action, we would like to be consulted and given an opportunity to provide input.

On behalf of the Judicial Conference Committee on Criminal Law, we thank you for your interest and for soliciting the views of the judiciary.

Yours very truly,

Sim Lake

cc: Honorable William H. Rehnquist
Mr. Leonidas Ralph Mecham

Leadership Conference on Civil Rights

1629 K Street, NW
10th Floor
Washington, D.C. 20006

Phone: 202-466-3311
Fax: 202-466-3435
www.civilrights.org

FOUNDERS
Arnold Aronson*
A. Philip Randolph*
Roy Wilkins*
OFFICERS
CHAIRPERSON
Dorothy I. Height
National Council of Negro Women
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COMPLIANCE ENFORCEMENT COMMITTEE
Karen K. Narasaki
National Asian Pacific American Legal Consortium
EXECUTIVE DIRECTOR
Wade J. Henderson

August 13, 2004

The Honorable Orrin G. Hatch
Chairman
Senate Judiciary Committee
SD-224 Dirksen Senate Office Building
Washington, DC 20510-6275

The Honorable Patrick J. Leahy
Ranking Minority Member
Senate Judiciary Committee
SD-224 Dirksen Senate Office Building
Washington, DC 20510-6275

Dear Senators Hatch and Leahy:

On behalf of the Leadership Conference on Civil Rights (LCCR), the nation's oldest, largest, and most diverse civil and human rights coalition, I write to share our views regarding the effect of *Blakely v. Washington*, ___ S. Ct. ___ (2004), on the federal sentencing system and to recommend that Congress take no action in response to *Blakely* until the Supreme Court has had an opportunity to rule on *Blakely*'s application to the federal sentencing system.

As you know, LCCR represents a coalition of over 180 organizations representing persons of color, women, children, organized labor, persons with disabilities, the elderly, gays and lesbians, and major religious groups, and has a long-standing interest in federal sentencing issues. Four years ago we published a report entitled "Justice on Trial" which highlighted pervasive racial disparities in the American criminal justice system, including the notorious inequality between powder and crack cocaine sentences mandated by federal statutes and guidelines.

On July 13, 2004, the Senate Judiciary Committee held a hearing on the federal sentencing system in the wake of *Blakely*. When hearing witness Ronald Weich identified himself as an outside counsel to LCCR, Senator Jeff Sessions (R-AL) said: "I assume your people are happy with the chaos that has resulted" from *Blakely* (Unedited Hearing Transcript at 102). As Mr. Weich was quick to inform Senator Sessions, LCCR is not happy about chaos in the administration of federal criminal law. To the contrary, LCCR supports order and regularity in sentencing to combat the racial disparities that result from excessive judicial and prosecutorial discretion. In "Justice on Trial," we

endorsed the concept of guideline sentencing and urged that the federal guideline system be improved to eliminate provisions that fuel racial disparity, including the repeal of mandatory minimum sentencing laws.

In the short term, we oppose any short-term legislative "fix" in response to *Blakely*. Now that the Supreme Court has granted expedited review of two cases that present the question of whether *Blakely* applies to the federal sentencing guidelines, it would be especially unwise for Congress to act prematurely and therefore add an additional layer of confusion and uncertainty to the federal system just weeks before the Court hears argument.

However, if the Court holds the federal guidelines unconstitutional under *Blakely*, Congress will need to respond. Post-*Blakely* reforms should be guided by several principles:

- *Ensure balance*. One attribute of the current guideline system is that it constrains judicial discretion both downward and upward from a presumptive sentencing range. In contrast, mandatory sentencing laws only prevent the exercise of downward discretion. LCCR would oppose any sentencing system that does not limit excessive harshness as well as excessive leniency.

- *Preserve judicial discretion.* The widespread use of uncharged and even acquitted conduct in the current guideline system undermines a defendant's Sixth Amendment right to a jury trial. But Congress should not redress that flaw by eliminating judicial discretion altogether. A fair and effective sentencing system should divide sentencing responsibility among the legislature, the jury and the judge. The legislature defines the crime, the jury decides all elements of the offense, but in the end only an independent judge can impose a just sentence.

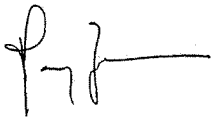
- *Redress racial disparities*. Under current law, draconian statutory and guideline penalties are triggered by possession or sale of a small amount of crack cocaine – one hundred times less crack cocaine than the amount of powder cocaine that triggers the same penalties. The Sentencing Commission has twice concluded that there is no empirical basis for the 100 to 1 ratio, yet it persists. Meanwhile, in fiscal year 2000, *93.7% of defendants convicted of federal crack distribution offenses were black or Hispanic and only 5.6% were white.* This unfair situation is part of a pattern of inequity that threatens the credibility of the justice system in minority communities. Laws and practices such as these that fuel racial disparity must be addressed in any post-*Blakely* reform package.

LCCR respectfully requests an opportunity to participate in congressional deliberations regarding the federal sentencing system. If the Supreme Court holds the guidelines unconstitutional, civil rights concerns should be at the heart of the debate over how to restructure the sentencing system. LCCR is uniquely situated to offer that important perspective to federal policy makers. Unfair federal sentencing laws are a civil rights challenge that can no longer be ignored.

If you have any questions or would like more information, please contact Julie Fernandes, LCCR Senior Policy Analyst, at (202) 263-2856.

Thank you for your consideration.

Sincerely,



Wade Henderson
Executive Director

Nancy Zirkin
Deputy Director

Statement of Senator Patrick Leahy
Ranking Member, Senate Judiciary Committee
Hearing on *Blakely v. Washington* and the Future of the Federal Sentencing Guidelines
July 13, 2004

The Supreme Court's ruling last month in *Blakely v. Washington* threatens to crumble the very foundation of the Federal system of sentencing guidelines that Congress established 20 years ago in the Sentencing Reform Act of 1984. At that time, members of this Committee took the lead in crafting the Sentencing Reform Act. Today, we must revisit that landmark legislation in light of the *Blakely* decision.

At the start, I want to thank our witnesses for coming today to help us try to make some sense out of the Court's decision. We have two very distinguished panels of experts and I look forward to hearing the testimony.

At issue in *Blakely* was the constitutionality of a State sentencing system that allowed the judge to impose an "exceptional" sentence in a kidnapping case above the standard guideline range because the judge found the defendant's conduct involved "deliberate cruelty." In a 5-4 decision written by Justice Scalia, the Court held that this sentencing scheme violated the defendant's Sixth Amendment right to a jury trial because "the maximum sentence a judge may impose" can only be based on "the facts reflected in the jury verdict or admitted by the defendant."

Unfortunately, Justice Scalia's opinion raises more questions than it answers. Cogent dissents by Justice Breyer and Justice O'Connor articulate many of the critical issues that will now flood our already burdened criminal justice system, starting with whether *Blakely* applies to the Federal Guidelines. The Seventh Circuit and several district court judges have already ruled that *Blakely* dooms some if not all of the current Federal guidelines system. The Fifth Circuit held that the Guidelines survive *Blakely*. The Second Circuit effectively punted, certifying the question to the Supreme Court.

While we may disagree with Justice Scalia's opinion, we must recognize that a majority of the Court has spoken. Like the federal judges, prosecutors and defense attorneys who must now grapple with the scope and impact of the *Blakely* opinion, we in Congress are concerned.

I hope that today's hearing will be helpful. I look forward to hearing from the experts and practitioners who are testifying before us about what aspects, if any, of the Federal sentencing system can or are likely to survive the *Blakely* decision. We need to explore

what will happen to the thousands of criminal cases that are currently pending, and to the hundreds of thousands of cases resolved pre-*Blakely*.

Twenty years after the enactment of the Sentencing Reform Act, we must remind ourselves about the core values and principles that explained the bipartisan popularity of the original Federal Guidelines concept. The 1984 Act was enacted against a history of racial, geographical, and other unfair disparities in sentencing. Congress sought to narrow these disparities while leaving judges enough discretion to do justice in the particular circumstances of each individual case. The task of harmonizing sentencing policies was deliberately placed in the hands of an independent, expert Sentencing Commission.

The Guidelines as originally conceived were about fairness, consistency, predictability, reasoned discretion, and minimizing the role of congressional politics and the ideology of the individual judge in sentencing. *Blakely* threatens a return to the bad old days of fully indeterminate sentencing when improper factors such as race, geography and the predilections of the sentencing judge could drastically affect the sentence. While I favor Federal judges exercising their discretion to do individual justice in individual cases, I do not want to see a return to the bad old days.

We must also avoid moving too far in the other extreme. In recent years, Congress has seriously undermined the basic structure and fairness of the Federal Guidelines system with posturing and ideology. There has been a flood of legislation establishing mandatory minimum sentences for an ever-increasing number of offenses, determined by politics rather than any systemic analysis of the relative seriousness of different crimes.

There has been ever-increasing pressure on the Sentencing Commission and on individual district court judges to increase Guidelines sentences. This culminated in the PROTECT Act, in which this Congress cut the Commission out altogether and rewrote large sections of the Guidelines Manual, and also provided for a judicial "black list" to intimidate judges whose sentences were insufficiently draconian to suit the current Justice Department.

We are all familiar with the assault on judicial independence known as the Feeney Amendment to the PROTECT Act. The Feeney Amendment was forced through the Congress with virtually no debate, and without meaningful input from judges or practitioners. That process was particularly unfortunate, given that the majority's justification for the Feeney Amendment – a supposed "crisis" of downward departures – was unfounded. In fact, downward departure rates were well below the range contemplated by Congress when it authorized the Federal Sentencing Guidelines, except for departures requested by the government. But having a false factual predicate for forcing significantly flawed congressional action has become all too familiar during the last few years.

The attitude underlying too many of these recent developments seems to be that politicians in Washington are better at sentencing than the Federal trial judges who

preside over individual cases, and that longer sentences are always better. Somewhere along the line we appear to have forgotten that justice is not just about treating like cases alike; it is also about treating different cases differently.

Blakely raises real practical problems that unfortunately threaten to clog our Federal courts with procedural and constitutional nightmares. But we can use it as a springboard to discuss Federal sentencing practices thoughtfully. As we analyze *Blakely*'s implications, we are well advised to keep the simple principles of the 1984 Act in mind. We must respect the wisdom and good faith of Federal judges, while maintaining the safeguards of structure and transparency to their exercise of discretion. We must remember that consistency and predictability to sentencing are admirable goals. And we must avoid the further politicizing of sentencing.

I look forward to working with the Chairman and other interested Members of this Committee and with our counterparts in the House.

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WILLIAM W. MERCER
UNITED STATES ATTORNEY FOR THE DISTRICT OF MONTANA
AND
CHAIRMAN, ATTORNEY GENERAL'S ADVISORY COMMITTEE

COMMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

THE U.S. SENTENCING GUIDLELINES AND BLAKELY V. WASHINGTON

JULY 13, 2004

INTRODUCTION

Chairman Hatch, Senator Leahy, members of the Committee–

Twenty years ago, in the spring and summer of 1984, this Committee, in this very room, coalesced around the noble idea of making the federal criminal justice system more honest, more fair, and more effective. Members of both political parties, liberals and conservatives – some of whom are still members of the Committee – unified under the common recognition that unstructured criminal sentencing had evolved into a vehicle for disparity in sentencing that simply could not be justified and uncertainty in sentencing that was contributing to intolerable levels of crime.

Together with states such as Minnesota, Pennsylvania, and Washington, this Committee and the federal government as a whole embarked on what was then considered a novel venture – reform of criminal sentencing. The enacted reforms would transform the criminal justice system. While prior to the Sentencing Reform Act of 1984, similar offenders who committed similar offenses received and served substantially different sentences with disturbing regularity, under

the Act and the federal sentencing guidelines it spawned, sentencing courts are directed to evaluate specific enumerated factors grounded in judicial experience and reason and to engage in rigorous and appealable factfinding to determine whether these factors are present in each case. The sentences handed down under the Act are now predictable and tough. While there are still points of debate over sentencing policy, a genuine consensus has emerged in support of the Act and around the principles of determinate sentencing and sentencing reform.

A few weeks ago, some twenty years after federal sentencing reform, the Supreme Court, in Blakely v. Washington,[1] cast doubt on some of the procedures of federal sentencing reform as well as some of the procedures of state sentencing reforms. I am here today first and foremost, to reaffirm the commitment of this Administration to the principles of sentencing reform that unified this Committee twenty years ago and which we hope will once again unify the Committee now – we remain steadfastly dedicated to certainty, truth, and greater justice in sentencing. Second, I am here to briefly lay out for the Committee why the United States continues to believe – and is now arguing in courts throughout the country – that the federal sentencing guidelines system is significantly distinguishable from the Washington state guidelines system at issue in Blakely. We believe the design of Congress and the United States Sentencing Commission for arriving at federal sentences – utilized in hundreds of thousands of cases over the past 15 years – meets all constitutional requirements.

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[1]Blakely v. Washington, 2004 WL 1402697 (June 24, 2004).

Because some lower courts have disagreed with our reasoning, I will, third, discuss the Department's legal position on how federal sentencings should proceed before courts that find the federal guidelines are implicated by Blakely. Finally, I will outline why we at the Department of Justice believe Congress should take the time to carefully consider any legislative proposals that try to remedy the current uncertainty surrounding federal sentencing policy. We believe Congress should closely monitor the emerging litigation and continue the dialogue begun by this hearing with the Department of Justice, the United States Sentencing Commission, and the federal criminal justice community as a whole.

To try to resolve the current uncertainty in federal sentencing policy created by Blakely in a manner consistent with the principles of sentencing reform, the Department of Justice intends to seek review of an appropriate case – in the very short term – before the Supreme Court and to ask the Court to expedite review of the case. However, in the event that we are incorrect about the inapplicability of Blakely to the Federal Sentencing Guidelines, federal prosecutors have begun to charge cases in a prophylactic fashion and a number of Department lawyers are analyzing policy options which might restore the system to its pre-Blakely status. Nonetheless, we think having the Court provide a definitive ruling on the application of Blakely to the federal sentencing guidelines is one important answer necessary to address the somewhat chaotic state of events of the last two weeks.

THE FEDERAL SENTENCING REFORM EFFORT

Before I turn to the Blakely case, I would like to review briefly the history of federal sentencing reform and the benefits that have accrued from it. The federal sentencing system in place before sentencing reform was almost entirely discretionary. Choosing a sentence for those convicted of federal offenses was left to the discretion of federal judges and essentially was ungoverned by law. Beyond a statutory direction limiting the maximum sentence, judges had the discretion to decide what factors in a case were relevant to sentencing and how such factors should be weighed.

After much study, Congress, the Department of Justice, a good number of academics, commentators, and judges found the largely unfettered sentencing discretion that characterized the former system resulted too often in unacceptable outcomes and unwarranted sentencing disparity. The unwarranted disparity problem was exacerbated by a parole system that incarcerated some offenders for all of their sentences and others for as little as one-third; this often led to judges trying to outguess expected parole decisions. In addition, a substantial percentage of offenders were not sentenced to prison at all. The result was that similar offenders who committed similar offenses often received and served substantially different sentences. And, in many cases, sentences were not sufficiently punitive. Congress, the Department, and other analysts recognized that such inconsistency and uncertainty in federal sentencing practices were incompatible with effective crime control.

In response to these findings and persistent concerns, a bi-partisan Congress passed the Sentencing Reform Act as part of the Comprehensive Crime Control Act of 1984. The Act created the United States Sentencing Commission and mandated that the Commission design sentencing guidelines to bring consistency and certainty to federal sentencing law. Although a number of factors made the development of federal sentencing guidelines difficult, the Commission accomplished this task in 18 months, and the guidelines took effect in November 1987, after the requisite six months' congressional review. The guidelines and the Sentencing Commission withstood constitutional challenges with the Supreme Court decision in Mistretta v. United States, 488 U.S. 362 (1989).

The federal sentencing system in place under the Sentencing Reform Act has been very different from the inconsistent and uncertain system in place before the Sentencing Reform Act. Its guiding principle has been similar treatment of defendants with similar criminal records who have been convicted of similar criminal conduct.[2] It has been a structured and tough sentencing system. Under the guidelines, sentencing courts are directed to evaluate enumerated factors and engage in appropriate factfinding to determine whether these factors are present in each case. If they are, the guidelines and Commission policy statements provide the court with substantial guidance as to how these factors should contribute to the sentence. This structure provides fairness, predictability, and appropriate uniformity. In addition, the guidelines structure allows for targeting longer sentences to especially dangerous or recidivist criminals. In 2002, over 63,000 convicted defendants were sentenced in federal courts under the sentencing guidelines.

And because of the guidelines sentences in their cases did not depend on the district where they committed the offense or the judge who imposed the sentence, the guidelines minimized the probability that similarly-situated defendants were subject to unwarranted disparity in punishment.

The structure designed to calibrate sentences is only part of the story. Congress has established important statutory purposes of punishment. Among other things, sentences must reflect the seriousness of the offense, promote respect for the law, provide just punishment for the offense, afford adequate deterrence to criminal conduct, and protect the public from further crimes of the defendant.[3] The guidelines are tough, providing appropriately punitive sentences for violent, predatory, and other dangerous offenders, sentences substantially longer than those meted out before the guidelines. Studies have shown, for example, that since the guidelines have been in place, sentences for drug and violent offenders have increased substantially. In addition, the Commission in its original guidelines specifically raised penalties for white collar offenses and civil rights crimes, including police brutality offenses. The Commission determined that before the guidelines sentences for these classes of offenses were simply too low and did not provide sufficient deterrence. Also, as part of the original guidelines, the Commission developed and implemented a "three-strikes" provision that ensured penalties near the statutory maximum for serious repeat offenders.

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[2] 18 U.S.C. § 3553(a)(6); 28 U.S.C. § 991(b)(1)(B).

[3] 18 U.S.C. §§ 3553(a)(2)(A-C)

We believe this type of tough sentencing is smart sentencing. While some critics have argued that federal criminal sentences are too long and that we need to have "smarter" sentences, the facts demonstrate that they are wrong. The increase in federal sentences under the guidelines, and the increase in state sentences as states followed the lead of the federal government in adopting truth-in-sentencing regimes, have resulted in significant reductions in crime, which is exactly what we would expect to observe. The more offenders who are incapacitated, the less crime. Sentencing policy has contributed to the fact that our nation is experiencing a 30-year low in crime. We do not believe it is a coincidence that the stark decreases in crime started in the 1990's, shortly after the Supreme Court upheld the sentencing guidelines. Over the preceding decade, nearly 27.5 million violent crimes[4] were not committed because of the reduction in crime.

It should not surprise anyone that tough sentencing produces less crime. Again according to the Bureau of Justice Statistics, more than 90 percent of prison inmates had a criminal record prior to their current imprisonment or were in prison for a violent crime. Given the active criminal careers of the vast majority of prisoners, incarceration works. And social scientists have validated through research the common sense that imprisonment is effective at crime reduction. For example, two studies published in 2000 come to similar conclusion about the effect of

[4] Lawrence A. Greenfield, Director, Bureau of Justice Statistics, Address at the BJS/BRSA Conference (October 2, 2003).

tougher sentencing policies: more than one quarter of the reduction in the homicide rate and crime rate during the 1990s can be attributed to tougher sentencing policies.[5]

THE BLAKELY DECISION AND ITS IMMEDIATE AFTERMATH

As you may already know, the Blakely decision has caused a tremendous upheaval in the federal criminal justice system and has put the constitutionality of federal sentencing guidelines into question. Before discussing this further, I want to take just a moment to let this Committee know of the tremendous dedication, public spirit, and commitment to justice of the career prosecutors of the Department of Justice and the tremendous response to Blakely these prosecutors have made for the people of the United States. From the Solicitor General's Office, to the litigating divisions of the Department, to every single United States Attorney's Office in every state of this country, career federal prosecutors have spent innumerable hours and sacrificed countless time to represent the United States and to try to ensure justice in the tens of thousands of criminal cases about which Blakely questions will surely be raised. These career civil servants are among the most talented, disciplined, and creative legal minds in the country. From the Attorney General on down, we are extremely proud of and honored to work with these prosecutors, and we believe this Committee and the American people should be equally proud.

[5]See the chapters by William Spelman and Richard Rosenfeld in Blumstein & Wallman, eds., The Crime Drop in America (Cambridge Univ. Press 2000).

It is absolutely vital to be clear on what the Supreme Court held in Blakely and what it did not. The Court in Blakely applied the rule announced in Apprendi v. New Jersey[6] to invalidate, under the Sixth Amendment, an upward departure under the Washington state sentencing guidelines system that was imposed on the basis of facts found by the court at sentencing. The Court did not wholly invalidate the Washington state sentencing guidelines nor did it invalidate the federal guidelines. In fact, Justice Scalia noted in the majority opinion: "By reversing the judgment below, we are not, as the State would have it, 'find[ing] determinate sentencing schemes unconstitutional.' This case is not about whether determinate sentencing is constitutional, only about how it can be implemented in a way that respects the Sixth Amendment. Several policies prompted Washington's adoption of determinate sentencing, including proportionality to the gravity of the offense and parity among defendants. Nothing we have said impugns those salutary objectives."

It is also, we believe, important to understand the facts of Blakely and the structure of the Washington state sentencing system to best evaluate alternative litigation. The defendant in Blakely pleaded guilty to second degree kidnapping. A state statute provided that the maximum sentence for that offense was 10 years imprisonment. Another statute established a grid of "standard" sentence ranges, based on the seriousness of the offense and the defendant's criminal

[6] Apprendi v. New Jersey, 530 U.S. 466, 490 (2000).

history. The statute also authorized a sentencing court to depart upward from the standard range, and impose a sentence up to the statutory maximum, if it found substantial and compelling reasons warranting an exceptional sentence. Among such reasons was the fact that the defendant acted with "deliberate cruelty." Blakely's standard sentencing range was 49 to 53 months' imprisonment, but the sentencing court found that he had acted with deliberate cruelty and departed upward, sentencing him to 90 months' imprisonment.

Blakely argued that because he was sentenced above the maximum standard sentence of 53 months based on a finding made by the court, the upward departure violated Apprendi's holding that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."[7] The State contended that there was no Apprendi violation because Blakely's sentence was within the 10-year statutory maximum. The Court rejected that argument, holding that "the 'statutory maximum' for Apprendi purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant."[8]

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[7]Apprendi v. New Jersey, 530 U.S. 466, 490 (2000).

[8]Blakely v. Washington, 2004 WL 1402697, at *4 (emphasis in original). Blakely did not overrule Harris v. United States, 536 U.S. 545 (2002). In Harris, the Court reaffirmed the holding of McMillan v. Pennsylvania, 477 U.S. 79 (1986), that a fact that increases a statutory minimum sentence within the authorized range may be found by the sentencing judge by a preponderance of the evidence, and limited the Apprendi rule to facts that increase a statutory maximum. 536 U.S. at 568-569; id. at 556-568 (opinion of Kennedy, J.); id. at 569-572 (opinion of Breyer, J.); see Blakely, 2004 WL 1402697, at *5 (distinguishing McMillan).

The Court observed that the United States, as *amicus curiae* in Blakely, "notes differences between Washington's sentencing regime and the federal sentencing guidelines," although it questioned whether those differences are constitutionally significant.[9] The Court then reserved whether its Sixth Amendment holding applied to the federal guidelines, stating that "[t]he Federal Guidelines are not before us, and we express no opinion on them."[10]

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Much has transpired in the two and a half weeks since the Blakely decision was handed down by the Court. Even though the Supreme Court did not rule on the federal sentencing guidelines, some lower courts have already – and we believe prematurely – invalidated them. Others, have applied the guidelines in ways never contemplated by the Congress or the United States Sentencing Commission. The results in these cases have been at times quite disturbing. A number of courts have imposed dramatically inadequate sentences for serious and dangerous offenders, severing parts of the guidelines system and then applying the remainder in a manner inconsistent with the clear intent of Congress.

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[9]Blakely at *6 n.9.

[10]Ibid.

For example, two weeks ago in West Virginia, a federal judge reduced the sentence of a dangerous drug dealer from 20 years to 12 months.[11] The dealer, Ronald Shamblin, was no bit player, no courier, no low-level dupe. According to uncontested findings of the U.S. Probation Office and the court, Shamblin was a leader in an extensive methamphetamine and cocaine manufacturing and distribution conspiracy. He possessed a dangerous weapon during his crime, enlisted a 14-year-old to join his conspiracy, and obstructed justice. All told, under the sentencing guidelines, Shamblin should have been sentenced to life imprisonment. Because of the Apprendi decision, the court was limited to a maximum penalty under the statute as charged to 20 years imprisonment. Because of the court's interpretation of Blakely, the court believed it was obligated to sentence Shamblin to no more than 12 months imprisonment.[12]

Here in Washington, about ten days ago, Dwight Ware Watson, the tobacco farmer who created havoc in the city by crashing his tractor into a pond on the National Mall, was released from prison also after a judge felt compelled to reduce his sentence.[13] If you recall, Mr. Watson created major disruptions in the Nation's Capital for days in a standoff with the police. Under the sentencing guidelines, Watson was at first sentenced to six years in prison for his crime. However, after Blakely, the court resentenced Watson to just 16 months imprisonment. In both

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[11] United States v. Shamblin, Criminal Action No. 2:03-00217 (D. WV, June 30, 2004); see, http://www.wvsd.uscourts.gov/district/opinions/pdf/2004-Blakely%20FINAL.pdf.

[12] Ibid.

[13] See, e.g., Carol D. Leonnig and Neely Tucker, 'Tractor Man' Expected to Be Released, Federal Appeals Court Refuses to Block Shortened Jail Term, http://www.washingtonpost.com/wp-dyn/articles/A20935-2004Jul1.html

of these cases, the courts proceeded without complete briefing on the significant issues involved, severed the aggravating elements from the sentence calculation, and then applied only the base guideline sentence and the guideline mitigating factors, in a manner we believe was a distortion of the federal sentencing system and requiring a twisted reading of federal law that is inconsistent with congressional intent and policy. It is hard to see how either sentence promotes respect for the law, provides adequate deterrence, or protects the public. Both of these sentences, and many others like them, if not reversed on appeal, will result not only in manifest injustices to those involved in the individual cases, but almost certainly, as well, in additional, unnecessary crimes and additional, unnecessary victims as offenders are released prematurely.

On the other hand, some courts have continued to uphold and apply the federal sentencing guidelines, awaiting definitive word from the Supreme Court. Still others have seen fit to invalidate some or all of the procedures of the federal guidelines, but have nonetheless looked to the guidelines to mete out sentences consistent with congressional intent and policy.

THE DEPARTMENT'S LEGAL POSITION CONCERNING APPLICATION OF BLAKELY TO THE FEDERAL SENTENCING GUIDELINES

The legal position of the United States is that the rule announced in Blakely does not apply to the federal sentencing guidelines, and that the guidelines may continue to be constitutionally applied in their intended fashion, i.e., through factfinding by a judge, under the preponderance of the evidence standard, at sentencing. The government's legal argument is twofold: first, that the lower federal courts are not free to invalidate the guidelines given the prior

Supreme Court decisions upholding their constitutionality, and second, that, on the merits, the guidelines are distinguishable from the Washington State system invalidated in Blakely.

The Department of Justice has traditionally adhered to the principle that it will defend the constitutionality of Acts of Congress in all but the rarest of instances. The government vindicates that principle here by defending the constitutionality of the federal sentencing guidelines, and all federal prosecutors are now arguing in favor of the continued constitutional validity of the federal sentencing guidelines as a system requiring the imposition of sentences by judges.[14]

We take this position – that the federal guidelines are distinguishable – for several reasons that we have set forth in detail in a variety of pleadings before a variety of courts. Simply put for this hearing, we note that the Washington State system of legislatively passed guidelines that set legislatively directed maximum penalties for individual crimes is just not how

[14]Applying Blakely to the federal guidelines would overrule a host of Supreme Court cases, which is inappropriate for lower courts to do. What the Supreme Court has already held about the federal guidelines continues to provide the governing principles for the lower courts. These rulings have consistently upheld the guidelines against constitutional attack and underscored their unique status within our constitutional scheme. See, e.g., Mistretta v. United States, 488 U.S. 361 (1989). Indeed, the Court has found that so long as a sentence does not exceed the statutory maximums established by Congress for the offense of conviction, a guidelines sentence can (in fact, sometimes must) be based on judge-found conduct not proved to a jury, see Edwards v. United States, 523 U.S. 511, 514-15 (1998); conduct not charged in the indictment, see Witte v. United States, 515 U.S. 389, 399-401 (1995); and conduct of which a defendant is acquitted but is established by a preponderance of the evidence. See United States v. Watts, 519 U.S. 148, 156-57 (1997) (per curium). Moreover, the Court has explicitly held that courts are bound not only by the Guidelines, but by their policy statements and commentary as well. Stinson v. United States, 508 U.S. 36, 42 (1993).

the federal sentencing system operates. Congress has only created one set of statutory maximums for federal crimes. The guidelines operate within those maximums, see USSG §5G1.1, and set forth a host of factors (the current Guidelines Manual runs some 491 pages) that courts are to consider, both in aggravation and mitigation, in individualizing a particular sentence. These factors correspond to those that judges have always taken into account – such as the manner in which a crime was committed, the nature of the victim, the defendant's role in the offense, whether he obstructed justice at trial, and whether he accepted responsibility for his actions – in fashioning sentences. As the Supreme Court has previously indicated, the federal guidelines were never intended to operate on the same footing as the statutory maximums. Indeed, that very assumption sits at the heart of the guidelines: "they do not bind or regulate the primary conduct of the public or . . . establish[] minimum and maximum penalties for every crime. They do no more than fetter the discretion of sentencing judges to do what they have done for generations – impose sentences within the broad limits established by Congress." Mistretta v. United States, 488 U.S. 361, 396 (1989).

As I mentioned above, courts have already disagreed with the government's legal position on the inapplicability of Blakely to the guidelines. In those courts, the next question that has arisen is what sentencing consequences ensue. The position of the United States is that, if a court finds that Blakely applies to the federal sentencing guidelines, thus rendering the guidelines' method of judicial factfinding unconstitutional, the guidelines cannot be applied at all in many cases. Those cases consist of prosecutions in which the application of the guidelines requires the resolution of contested factual issues to determine whether upward adjustments or upward

departures should be imposed above the maximum sentence based solely on the facts admitted by the defendant in a guilty plea or established by the jury's verdict. In such cases, overlaying the Blakely/jury procedures on the guidelines would distort the operation of the sentencing system – creating a one-way road where sentences move more easily downward than upward – in a manner that would not have been intended by Congress or the United States Sentencing Commission. Thus, if Blakely applies, we do not believe the constitutional aspects of the guidelines can be severed from the unconstitutional ones. In that event, the court cannot constitutionally apply the guidelines, but instead should impose a sentence, in its discretion, within the maximum and minimum terms established by statute for the offense of conviction. In all such cases, government prosecutors are arguing that, in the exercise of its discretion, the sentencing court should impose a sentence consistent with what would have been the guidelines sentence.

There are three critical components of this position. First, the guidelines remain constitutional and applicable if the guidelines sentence can be calculated without the resolution of factual issues beyond the jury verdict on the elements of the offense of conviction. Thus, in cases where a court, applying the guidelines as they were intended, finds that there are no applicable upward adjustments under the guidelines beyond the jury verdict on the elements of the offense, the guidelines are constitutional and should be applied. Second, in a case in which the defendant agrees to waive his right to resolution of contested factual issues under the Blakely procedural requirements, the guidelines should be applied. Thus, waivers of "Blakely rights" in connection with plea agreements and guilty pleas may be made. Third, in a case in which there

are applicable upward adjustments under the guidelines, and the defendant contests the underlying facts under the Blakely procedures, the guidelines system as a whole cannot be constitutionally applied. In that event, we believe the court should impose sentence, exercising traditional judicial discretion, within the applicable statutory sentencing range. The government's sentencing recommendation in all such cases will be that the court exercise its discretion to impose a sentence that conforms to a sentence under the guidelines (including justifiable upward departures), as determined without regard to Blakely.

This approach of having judges exercise discretion within the minimum and maximum statutory terms, rather than applying the guidelines piecemeal, does not in any way represent a departure from the Department's commitment to guidelines sentencing or the principles of sentencing reform. The Department will continue to urge that the guidelines are constitutional in that Blakely is inapplicable. The government's alternative position that Blakely cannot be integrated into the existing sentencing scheme represents a recognition that the application of the Blakely charging, jury-trial, and reasonable-doubt procedures to the guidelines distorts them in ways that render the guidelines system, as currently configured, unworkable, and that Congress and the Commission would not have intended such a hybrid system. The conclusion that the entire system must fall, if Blakely applies in a particular case, permits prosecutors to urge that sentencing courts impose appropriately severe sentences within the statutory maximum and minimum terms as a matter of their discretion.

The sentencing courts then can, as a matter of discretion, consider the same factors that the guidelines make relevant to sentencing. Blakely explicitly recognizes the constitutionality of such a discretionary sentencing process that considers all relevant facts. That interim solution, until definitive clarification is obtained from the Supreme Court and Congress, is legally and practically preferable to applying Blakely piecemeal so as to radically disfigure the operation of the guidelines and in certain cases produce grossly inadequate sentences. Moreover, you should be assured that at least until the constitutional issues are definitively resolved, the rulings of individual sentencing courts regarding Blakely will have no effect on the Department's sentencing recommendations in court. Department attorneys will neither draw back from the guidelines, nor attempt to take advantage of opportunities for indeterminate sentencing, but will continue to adhere to the guidelines in every case.

Because the final legal outcome is far from certain, we have asked prosecutors to immediately begin to include in indictments all readily provable guidelines upward adjustment or upward departure factors (except for prior convictions that are exempt from the Blakely and Apprendi rules). While the legal position of the government is that inclusion of such factors is not constitutionally required in order to enhance a guidelines sentence, in light of the unpredictable future path of court rulings, we believe it is prudent for the government to protect against the possibility that such allegations in indictments will be held necessary. Taking these prophylactic measures - more complex indictments, grand jury proceedings, and trials - will be extremely difficult and time-consuming both for prosecutors and judges. But until the effects of

Blakely on the sentencing guidelines are more clearly understood, Department attorneys will be required to adopt these measures to protect the public to the greatest extent possible.

PROPOSED LEGISLATION

Within days after the Blakely decision was handed down, legislative proposals were being suggested to address the uncertainty in federal sentencing policy and the tremendous litigation that would follow the decision. We believe this Committee, and Congress as a whole, should be careful and deliberate in considering legislative proposals designed to address Blakely. Sentencing policy impacts nearly every single one of the more than 66,000 federal defendants charged on average with felonies or Class A misdemeanors each year.

In examining any short term legislative proposal, we are guided by, and we suggest that the Committee consider, the following criteria, among others: 1. Will the legislation provide a clear short- and long-term solution to the many pending litigation issues? 2. Is the legislation consistent with the principles of sentencing reform that have been supported by both Republican and Democratic majorities of Congress for 20 years and by Republican and Democratic administrations for 20 years? 3. Does the legislation address all of the constitutional issues that remain unresolved or is there a significant likelihood that the Court will be reviewing federal sentencing policy shortly even with the legislative change?

CONCLUSION

The Department of Justice is committed to ensuring that the federal criminal justice system continues to impose just and appropriate sentences that meet the goals of the Sentencing Reform Act. Despite the current uncertainty about the implications of Blakely, we are confident that federal sentencing policy can and will continue to play its vital role in bringing justice to the communities of this country and effectively vindicating federal criminal law.

I would be happy to try to answer any questions that the Committee may have.

NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

July 12, 2004

The Honorable Orrin Hatch
United States Senate
Washington, DC 20510

The Honorable Patrick Leahy
United State Senate
Washington, DC 20510

Re: *Blakely v. Washington* and the Future of the Federal Sentencing Guidelines

Dear Senators Hatch and Leahy:

We are writing on behalf of the National Association of Criminal Defense Lawyers (NACDL) to address the complex questions raised by the Supreme Court's decision in *Blakely v. Washington*, a case in which the NACDL participated as *amicus curiae* in support of the petitioner Blakely. The NACDL, a professional bar association with more than 11,000 direct members and thousands more affiliate members, is the preeminent organization in the United States advancing the mission of the nation's criminal defense lawyers to ensure justice and due process for persons accused of crime. We commend the Chairman for scheduling this hearing to consider the implications of *Blakely* for the Federal Sentencing Guidelines, and we offer our assistance as the Committee moves forward in an effort to develop a sentencing system that respects the fundamental constitutional right of jury trial.

Any examination of federal sentencing must start with the Sentencing Reform Act of 1984 (SRA). While the SRA arose from well-intentioned concerns regarding indeterminate sentencing, judges, practitioners, and academics have long questioned the efficacy and fairness of the resulting sentencing system, the Federal Sentencing Guidelines. Reducing "unwarranted sentencing disparity" was the primary purpose for the SRA, and, by this measure, few would describe the Guidelines as an unqualified success. Indeed, their most prominent effect has been a dramatic shift in power from the judiciary to prosecutors. In a prescient decision issued a week prior to *Blakely*, Chief Judge William G. Young painstakingly describes a criminal justice system in which the focus "has shifted far away from trials and juries and adjudication to a massive system of sentence bargaining that is heavily rigged against the accused citizen." *United States v. Green*, (D. Mass., June 18, 2004) (holding the Federal Sentencing Guidelines unconstitutional).

1150 18th Street, NW ◆ Suite 950 ◆ Washington, DC 20036
(202) 872-8600 Fax (202) 872-8690 assist@nacdl.org www.nacdl.org

The need for thorough deliberation.

We agree with Judge Young's characterization – and with like views expressed by the majority in *Blakely* – and we believe that a careful and comprehensive reevaluation of the entire federal sentencing system is necessary. We note that the ABA Justice Kennedy Commission recently completed its year-long review of issues confronting the state and federal criminal justice systems. Formed to address problems identified by Justice Anthony Kennedy at the association's 2003 annual meeting, the Commission issued a report that was sharply critical of inflexible and wastefully long federal sentences for nonviolent offenders. We recommend that Congress establish a similar commission -- comprised of practitioners, prosecutors, judges and academics -- to study the future of federal sentencing in the wake of *Blakely*.

One guiding principle for this process must be, as Justice Scalia writes in *Blakely*, "the need to give intelligible content to the right of jury trial" because "[t]hat right is no procedural formality, but a fundamental reservation of power in our constitutional structure." This means exploring fully the experience of so-called "real-offense" sentencing under the Guidelines and the consequences of such an approach for due process and the right of jury trial. Under the current regime, uncharged allegations and allegations that may have been rejected by a jury are relied upon to increase significantly the defendant's sentence without the basic procedural protections of a trial. Without any warning in the indictment or at the time of plea, evidence that flouts basic rules designed to ensure the reliability of fact-finding may add years or decades to a prison sentence if it seems more likely accurate than not. As Judge Young explains, the cornerstone of this so-called "real offense" sentencing system is "relevant conduct" and that concept is "naught but the Department's theory of the offense."

Any system that fails to rectify these problems, and thus fails to honor the spirit as well as the letter of the *Blakely* decision, is constitutionally suspect. In our view, the only way to vindicate the *Blakely* jury-trial guarantee is to give meaning to the "*right* to insist that the prosecutor prove to a jury all facts legally essential to the punishment."

Giving meaning to the constitutional right recognized in *Blakely*: The Kansas approach

The majority in *Blakely* notes with approval the measures adopted by the Kansas State legislature following invalidation of its state sentencing guidelines. Through modest amendments to its sentencing statutes, Kansas made the *Blakely* jury-trial right operative within the State's existing sentencing regime. We strongly commend this approach to the Committee's consideration.

Some may discount this approach based on the specious argument that the federal guidelines are more complicated than those used by Kansas. There are several reasons for rejecting this view. Requiring a jury to determine the facts legally relevant to the punishment is no more complicated – indeed, probably less so – than the statutory duty that a federal capital jury must perform: determine what aggravating and mitigating factors are present and then decide whether the aggravating factors "sufficiently outweigh" any mitigating factors so as to "justify a sentence of death." Several district courts have voluntarily adopted a Kansas-like

approach in the aftermath of *Blakely*. To the extent some enhancements prove unduly confusing for juries, this approach would have the added benefit of encouraging simplification of the Sentencing Guidelines.

That the Federal Sentencing Guidelines are amenable to this straightforward approach is implicit in post-*Blakely* charging policies adopted by the Department of Justice. In his July 2 memorandum to all federal prosecutors, Deputy Attorney General James Comey directs, "Prosecutors should immediately begin to include in indictments all readily provable Guidelines upward adjustments and upward departure factors (except for prior convictions that are exempt from the *Blakely* and *Apprendi* rules)." While this may be seen as a defensive litigation strategy (and one that the NACDL does not endorse without congressional authorization), it is not the first time the Department of Justice has conceded the workability of such a system. *See Harris v. United States*, 536 U.S. 545, 581-82 (2002) (Thomas, J., dissenting) ("The United States concedes, with respect to prospective application, that it can charge facts upon which a mandatory minimum sentence is based in the indictment and prove them to a jury.").

The dangers inherent in any approach that evades *Blakely*.

We adamantly oppose an approach that would increase the top of each guideline range to the statutory maximum sentence for the offense of conviction (the so-called "Bowman approach"). Converting the guidelines maximum to the statutory maximum not only eliminates important protections against unwarranted disparity in sentencing, it evades the jury-trial right enunciated in *Blakely* and will be subject to serious constitutional challenge, creating confusion and new avenues for litigation that belie its rationale as a provisional set of rules.

While Professor Frank Bowman has argued that this approach would preserve the status quo, we think this prediction greatly underestimates the unwarranted disparities that will result in some jurisdictions. Permitting unbridled discretion to impose sentences upward to the statutory maximum, while maintaining current restrictions on mitigation, will compound the problems highlighted in *Blakely* and escalate sentences that are already too high (as denounced by Justice Anthony Kennedy at the American Bar Association's 2003 annual meeting and by the association's Justice Kennedy Commission in its recent report).

Regardless whether judges change their sentencing practices based on the dramatically higher maximum sentences, many prosecutors will use them to unfair advantage in plea bargaining by threatening to request sentences above the former guidelines maximums. Increasing the already disparate plea bargaining power in the hands of federal prosecutors would seriously undermine the core constitutional teaching of *Blakely*: "The Framers would not have thought it too much to demand that, before depriving a man of . . . his liberty, the State should suffer the modest inconvenience of submitting its accusation to 'the unanimous suffrage of twelve of his equals and neighbours . . . rather than a lone employee of the State.'"

These concerns are not assuaged by the various proposals -- such as directives to the Department of Justice and the courts and the right to appeal under an abuse-of-discretion standard -- to discourage sentences above the minimum guideline sentence. With respect to the

right to appeal above-minimum sentences, we doubt that the deferential abuse-of-discretion standard of review will have the intended deterrent effect. In any event, the Department of Justice is likely to render this protection meaningless through pre-existing plea-agreement practices that exact waivers of the defendant's right to appeal.

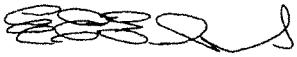
Even if subject to a sunset clause, this approach rests on infirm constitutional footing and would undoubtedly produce more uncertainly and litigation. It requires that the Supreme Court maintain the distinction between minimum and maximum sentences – a doubtful proposition after *Blakely*. *See Harris*, 536 U.S. at 579-80 (Thomas, J., dissenting) ("there are no logical grounds for treating facts triggering mandatory minimums any differently than facts that increase the statutory maximum.").

A short-term legislative fix is unnecessary.

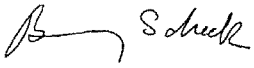
We do not think immediate, short-term legislation is necessary. Indeed, at the time of this writing, one circuit court of appeals has held that *Blakely* does not apply to the Federal Sentencing Guidelines. *United States v. Pineiro*, (5th Cir., July 12, 2004). Some states with guidelines systems that run afoul of *Blakely* have announced their intention to consider the issue over time while the courts, prosecutors and defense counsel adapt current practices to conform to the law. If a short-term fix is deemed absolutely necessary, advisory guidelines are preferable to the so-called "Bowman approach." Most importantly, advisory guidelines would avoid the constitutional infirmity and asymmetrical departure authority of the Bowman approach. Several states and the District of Columbia have adopted advisory sentencing guidelines, and we believe that such a system would be coherent, balanced and workable in the short-term. We note, however, that such an approach remains inconsistent with the spirit of *Blakely* and should be subject to a sunset clause.

We would welcome the opportunity to provide additional input regarding the various proposals for addressing *Blakely* and our view that any long-term approach must embrace the jury-trial guarantee announced in that decision. If you have any questions or would like further information regarding NACDL's position, please contact Legislative Director Kyle O'Dowd: (202) 872-8600 x226 or kyle@nacdl.org.

Sincerely,



E.E. (Bo) Edwards
President



Barry Scheck
President-Elect

cc: Members, Senate Judiciary Committee

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300 Newport Avenue
Williamsburg, VA 23185-4147
(757) 259-1841
FAX: (757) 259-1520
E-mail: bwilliams@ncsc.dni.us

July 9, 2004

Honorable Orrin G. Hatch
United States Senator
104 Hart Office Building
Washington, DC 20510

Honorable Patrick Leahy
United States Senator
433 Russell Senate Office Building
United States Senate
Washington, DC 20510

Dear Senator Hatch and Senator Leahy:

Thank you for your letter of July 2, 2004, inquiring about the impact of the United States Supreme Court's decision in *Blakely v. Washington* on state court sentencing decisions. We appreciate very much your interest in state court comment on federal actions that would affect our work. Fortunately, I can report that our staff at the National Center for State Courts (NCSC) is conducting a preliminary study on this issue. They expect to have a report ready for general distribution by the end of next week. I will ensure that a copy of the report is forwarded to you as soon as it is available. Their report will also appear on the NCSC Web page at http://www.ncsconline.org/WCDS/topiclisting.htm.

It is difficult to estimate the extent of the effect on individual litigation in the states because of the wide variations in approach. It is clear that in some states the basic sentencing scheme will be invalidated by the decision, but we do not know the number of states that will be affected.

If, after reviewing the material from NCSC, you have additional questions, feel free to call me or our CCJ government relations staff in Arlington, Virginia, Thomas Henderson (703-841-5600) and Kay Farley (703-841-5601).

Thank you for soliciting our input on this important issue.

Sincerely,

Ronald M. George
President, Conference of Chief Justices

Good morning, Mr. Chairman and distinguished members of the Committee

Thank you for allowing me the privilege of appearing before you. My name is Larry Piersol and I am the Chief Judge for the District of South Dakota. I am appearing as the President of the Federal Judges Association, an association of about 70% of the Article III judges, district and circuit judges. The association was formed 20 years ago to preserve judicial independence. As you know, judicial independence is an important principle for the public, not just for judges. Judicial independence is surely at issue for what Congress might or might not do as a result of the 6th Amendment principles as stated in Blakely v. Washington.

The Blakely issues are in 2 main areas:

1. The immediate issues judges as well as prosecutors, defendants and victims now face in charging, pleas, trials and sentencings.

2. The less immediate issues of what, if anything, should be changed in the procedures and the substance of federal sentencing law.

With regard to the immediate issues, let me suggest that a "temporary solution" may not be necessary. The 5th and the 7th Circuits have ruled, the 2nd has provided questions to the Supreme Court. The 4th Circuit is soon going to hear argument. Before long there will be rulings from all circuits on various issues.

We already know there will be splits of authority between the circuits. There is nothing unusual about splits of authority and that is a basis for the Supreme Court exercising jurisdiction. The district courts will simply follow the law as established in their circuit unless and until the Supreme Court says otherwise.

The testimony is also at odds as to whether a temporary solution is necessary or desirable as well as disagreeing on what temporary solution would meet the letter as well as the spirit of the Constitution.

However, if a temporary legislative solution is determined to be necessary, the Federal Judges Association stands ready to provide whatever information and input Congress desires.

The FJA is not attempting to provide information or positions different from the Judicial Conference, although that is possible, but rather we are a resource in close contact with our member judges.

The second area of issues is that, whatever your reading of the Blakely decision, much of federal sentencing law and practice has at least been put in question by Blakely principles. As a result, now is the time for an examination of the good as well as the troubling portions of federal sentencing law. We urge that there be a thorough review of federal sentencing law and policy by Congress. We hope that we will be called upon to participate in that important process. The Sentencing Commission, prosecutors, defenders and academics can all provide helpful input, but we are the ones, more than anyone, who look the defendants and the victims in the eye, not only at sentencing, but in motion hearings, in trial, at pleas, at revocation hearings and resentencings. We believe we have much to offer you before you make your final decisions.

You know how complex and interrelated federal sentencing law is. For just one example, I chaired the Native American Advisory Group that reported last November to the Sentencing Commission. The study was of

the impact of the sentencing guidelines upon native americans. Especially in non-public law 280 states, the guidelines have a greater impact upon native americans. We try juveniles, sexual abuse cases and many other cases where white people are tried in state court. I use that one example only to illustrate the complexity of dealing with sentencing law, where each day and each sentence is crucial to the lives of many people.

I will attempt to answer any questions you may have.

Thank you

TESTIMONY
United States Senate Committee on the Judiciary
***Blakely v. Washington* and the Future of the Federal Sentencing Guidelines**
13 July 2004

Commissioner John R. Steer
U.S. Sentencing Commission

Honorable William K. Sessions, III
U.S. Sentencing Commission

Joint Prepared Testimony of
Commissioner John R. Steer and Judge William K. Sessions, III
13 July 2004

Mr. Chairman and Distinguished Members of the Committee, we are here this morning as Vice Chairs of the United States Sentencing Commission. We want to thank you for holding this very timely hearing and inviting us to testify today regarding the impact of the U.S. Supreme Court's decision in *Blakely v. Washington* on the current and future operation of the federal sentencing guidelines. The *Blakely* decision represents potentially the most significant case affecting the federal guidelines system since the Supreme Court upheld the Sentencing Reform Act in *Mistretta v. United States*, particularly if it is, in fact, extended to the federal sentencing guidelines. The *Blakely* decision already has raised significant concerns regarding the validity of the federal guideline system.

Over the past three weeks, the Sentencing Commission has worked intensively with Congress, the Department of Justice, representatives of the federal judiciary, and other interested persons to analyze the impact of the Supreme Court's decision and help guide the discussion concerning the future of the federal sentencing guidelines system. We, along with Vice Chair Judge Ruben Castillo, chair-nominee Judge Ricardo Hinojosa, Commissioners Michael O' Neill and Michael Horowitz, and the entire Sentencing Commission staff stand ready to assist Congress as you navigate the post-*Blakely* waters.

Even if *Blakely* is found to apply to the federal guidelines, the waters are not as choppy as some would make them out to be. The viability of the federal guidelines previously was called into question by some after the Supreme Court decided *Apprendi v. New Jersey*.[1] After an initial period of uncertainty, however, the circuit courts issued opinions and the Department of Justice instituted procedures to ensure that future cases complied with *Apprendi's* requirements and also left the guidelines system intact.

In light of the *Blakely* decision, the Department of Justice already has instituted procedures which would protect the overwhelming majority of future cases from *Blakely*

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[1]530 U.S. 466 (2000).

infirmity. The Department of Justice has issued detailed guidance for every stage of the prosecution from indictment to final sentencing, including alleging facts that would support sentencing enhancements and requiring defendants to waive any potential *Blakely* rights in plea agreements.[2] It is also worth noting that a majority of the cases sentenced under the federal guidelines do not receive sentencing enhancements that could potentially implicate *Blakely*.

The court system also appears to be working expeditiously on the *Blakely* issue, as we would expect. In the last two business days, two circuits – the Fifth and Seventh Circuits – have issued opinions regarding the applicability of *Blakely* to the federal sentencing guidelines. A Fifth Circuit panel issued a 3-0 decision finding that *Blakely* does not apply to the federal guidelines,[3] and a well-respected judge in the Seventh Circuit reached a similar conclusion in a dissenting opinion.[4]

Our testimony today focuses on some of the unique characteristics of the federal sentencing guidelines system, offers some observations about what we understand are some of the legislative ideas Congress may be considering to remedy temporarily any potential *Blakely* problems that may exist within the federal sentencing system, and expresses our critical need for a chair and a full slate of confirmed commissioners to assist in meeting these new challenges.

The Federal Sentencing Guidelines Remain Valid

At the outset, we wish to state our belief that the federal sentencing guidelines remain valid despite the *Blakely* decision. We understand, however, that the federal district, circuit appellate, and ultimately, the U.S. Supreme Court will have to make that determination. We simply point out that the Supreme Court majority in *Blakely* reserved judgment on the applicability of its holding to the federal guidelines. And until that case clearly applies, we will continue to work under the umbrella of presumed constitutionality afforded by the Supreme Court in a long line of other cases.

Thus, we are pleased that the Department of Justice plans to work with us and offer a vigorous defense of the guidelines. We concur in its position that *Blakely* is inapplicable to the federal sentencing guidelines and that our system is distinguishable from the Washington state system that the *Blakely* court found to be constitutionally infirm.

The Sentencing Commission is not, however, operating with willful blindness to the significant impact *Blakely* already has had on the federal sentencing system. The Sentencing

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[2]In fiscal year 2002, 97.1 percent of federal defendants were sentenced pursuant to plea agreements.

[3]*United States v. Pineiro*, No. 03-30437 (5th Cir. July 12, 2004).

[4]*United States v. Booker*, No. 03-4225 (7th Cir. July 9, 2004).

Commission stands ready to work with Congress, the Department of Justice, and others on contingency plans in the event that the Supreme Court determines that *Blakely* does in fact apply to the federal system.

Supreme Court Precedent Validates the Federal Sentencing Guidelines

What must be kept in mind for today's purposes is the well settled Supreme Court admonition that it is the prerogative of that Court alone to overrule its precedents.[5] Accordingly, and until that day comes, the long line of cases upholding our guidelines system stands firm.

Since shortly after the inception of the Sentencing Commission and the federal guidelines system, the Supreme Court repeatedly has upheld their constitutionality and, in a variety of contexts, has validated the appropriateness of judicial fact-finding to determine an applicable, guideline-based sentence within statutory parameters. The *Blakely* decision does not alter that extensive body of law.

The federal guidelines system endured its first constitutional challenge in 1989. In *Mistretta*,[6] the Supreme Court upheld the constitutionality of both the federal guidelines system and the Sentencing Commission against both nondelegation and separation of powers challenges.[7]

Since establishing the constitutionality of the overall federal sentencing scheme, the Supreme Court has reviewed various federal sentencing guidelines' applications and upheld sentences based on factors determined by a sentencing judge rather than a jury. Throughout the course of its decisions, the Supreme Court has not retreated from its declaration that the federal sentencing guidelines are constitutional.[8]

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[5]*See State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997)(the prerogative to overrule one of its precedents rests solely with the Supreme Court); *Agostini v. Felton*, 521 U.S. 203, 237 (1997)(courts of appeals must leave to the Supreme Court the prerogative of overruling its own decisions, even if such decision "appears to rest on reasons rejected in some other line of decisions")(quotations and citations omitted).

[6]488 U.S. 361 (1989).

[7]*Mistretta*, 488 U.S. at 412.

[8]*See, e.g.*, *United States v. Nichols*, 511 U.S. 738 (1994)(upholding use of an uncounseled misdemeanor conviction to enhance punishment for a subsequent conviction because recidivism is an important factor in determining appropriate sentence); *Witte v. United States*, 515 U.S. 389 (1995)(upholding federal sentencing guidelines relevant conduct scheme); *United States v. Watts*, 519 U.S. 148 (1997)(upholding consideration of acquitted conduct by sentencing court so long as conduct proved by preponderance of the evidence); *Edwards v. United States*, 523 U.S. 511

This long line of cases and the massive body of law flowing from it over the last fifteen years has neither been overruled nor distinguished by the Supreme Court in the decisions that have brought us together today. In *Apprendi*, for example, the Court "expressed no view" on the federal guidelines beyond "what this Court has already held,"[9] which was the constitutionality of the federal sentencing guidelines and the Sentencing Commission. Likewise, the Supreme Court did not address the federal guidelines in *Blakely*. Specifically, the Supreme Court majority stated: "The federal Guidelines are not before us, and we express no opinion on them."[10]

The Federal Sentencing Guidelines System Is Distinguishable from State Systems

Those who would extend *Blakely* to the federal sentencing system must understand that the federal system is different in many important respects from the guideline system employed by Washington state.

Structurally, the federal sentencing guidelines are distinct from those of states like Washington. The federal guidelines are not enacted in total by a legislature but, for the most part, are promulgated by the Sentencing Commission, "an independent commission in the judicial branch of the United States."[11] The federal sentencing guidelines, therefore, are not statutes but sentencing rules; the unique product of a special and limited delegation of authority to the Sentencing Commission from Congress.[12]

Another structural difference relates to what is built into the final guideline range and the way in which a sentencing court arrives at that final range. The Washington state system, for example, requires application of an offense level and, in turn, a "standard guideline range." In the Washington system, therefore, the *Blakely* holding (that the maximum punishment for *Apprendi* purposes is the maximum sentence that may be imposed based solely on facts found by the jury) makes more sense.

(1998)(upholding federal sentencing guidelines against 6th Amendment challenge by noting that a maximum sentence set by statute trumps a higher sentence set forth in the guidelines); *Harris v. United States*, 536 U.S. 545 (2002)(holding that the 5th and 6th Amendment guarantee a defendant will never get more punishment than bargained for; but do not promise "anything less" than that; therefore, not all facts affecting a defendant's punishment are elements subject to indictment, jury, and proof requirements).

[9]*Apprendi*, 530 U.S. at 497n.21 (citing *Edwards v. United States*, 523 U.S. 511, 515 (1998)).

[10]*Blakely*, 542 U.S. __ slip op. 9n.9 (June 24, 2004).

[11]*Mistretta*, 488 U.S. at 385; 28 U.S.C. § 991(a).

[12]*Id.*; *see also Stinson v. United States*, 508 U.S. 36, 45 (1993).

The federal sentencing guidelines are structured quite differently. They start with a base offense level that typically applies to commission of an offense in its simplest form, and they result in an adjusted offense level that generally is somewhat less than the statutory maximum penalty for the offense of conviction. That final offense level is based on a number of sentencing factors that historically judges, in their discretion, considered. In the historical, pre-guidelines world, judges took into account many factors relating to the offense and the offender, including conduct beyond the elements of the statutory offense that was nevertheless relevant to the offense, and even post-offense conduct. These are critically important distinctions that make the *Blakely* holding impractical when an attempt is made to apply it to the federal system. In the federal sentencing system, the statutory maximum penalty legislated by Congress remains the effective maximum penalty to which a defendant can be exposed upon a finding of guilt. The final guideline offense level and upper end of the ultimately determined guideline range act as checks on the judge's discretion to impose a sentence within the bounds of the statutory penalty.

Looking at the structural differences more broadly, state sentencing systems like Washington's tend to establish standard sentencing ranges with little deviation, whereas the federal sentencing guidelines, following the mandates set forth in the Sentencing Reform Act and refined through Congressional directives, contain subtle nuances designed to individualize sentences. For example, the *Guidelines Manual* currently contains three pages of application notes devoted solely to assisting the sentencing court in making a determination of "loss" for the variety of complex economic crimes federal judges confront.

It also is important to understand that the federal system places the burden on the Government to prove sentencing enhancements and that it also contains a number of downward adjustments that can benefit a defendant. By contrast, state systems typically start at standardized punishment midpoints and provide scant room to navigate throughout a particular guideline, up or down. Thus, they do little to individualize punishment to the facts of the real offense conduct and characteristics of the offender (other than criminal history).

If the assumption behind applying *Blakely* to the federal sentencing guidelines system is a desire to enhance fairness and a defendant's rights, it must be noted that the federal guidelines system has done much to move in that direction already. The *Blakely* Court recognizes that a defendant's Sixth Amendment rights are not violated by a judge's unfettered discretion to impose a sentence the judge might deem fit within broad statutory parameters. That kind of system, as recognized by the Supreme Court in *Mistretta*, was the system that existed in federal courts prior to the advent of the federal sentencing guidelines system.[13]

The federal guidelines system answers concern (by Congress and others) about unfettered judicial discretion in a number of ways. Judges do make factual and guideline application decisions, but both defendants and the Government have an opportunity to contest application of the guidelines before the judge as neutral arbitrator. In addition, the Sentencing Reform Act, as

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[13]*Mistretta,* 488 U.S. at 364.

adjusted by the PROTECT Act, requires a sentencing judge to state with specificity reasons for imposing a sentence. Additionally, the Sentencing Reform Act, for the first time, provided sentence appellate rights for both defendants and the Government. The federal guidelines system thus minimizes the role a judge's personal philosophy may play in sentencing. These are just some of the ways in which the federal guidelines seek to assure fairness, uniformity, and certainty in sentencing.

It is important to note, moreover, that the federal sentencing system does not strip away all judicial discretion in sentencing. In fact, the federal system is designed to give judges maximum discretion within the parameters set forth in the Sentencing Reform Act,[14] as well as to allow them to check prosecutorial charging discretion, to an extent, by constructing a guideline sentence based on the defendant's actual offense conduct. Additionally, rather than construct a unique guideline for each of the hundreds of criminal statutes contained in the United States Code (as many of the state systems do), the federal sentencing guidelines are generic and often cover a broad array of conceptually similar crimes scattered throughout the criminal code.

For example, several hundred fraud crimes are found throughout the United States Code and carry statutory maximum penalties ranging from five to thirty years. Instead of having a separate guideline for each of these disparate offenses, the federal sentencing guidelines have one applicable guideline that uses particular enhancements to capture the individualized nature of the offense conduct. The federal sentencing guidelines, therefore, try to rationalize penalties and further the Sentencing Reform Act's goal of ensuring similar punishment for similar offenses.

If *Blakely* were to apply to the federal sentencing guidelines, it could result in a much more cumbersome system, a significant increase in prosecutorial discretion at the charging stage of the criminal process, and increasing uncertainty in sentencing.

To be sure, the Sentencing Commission recognizes that the federal guidelines system is not without its problems. The Sentencing Commission always welcomes debate and input on how to improve the system. But we hope that there will be common interest among policymakers in preserving a viable guidelines system, rather than seeking to use the current uncertainty as an opportunity to press a favorite sentencing policy agenda.

Legislative Proposals under Consideration

The Sentencing Commission believes that the federal sentencing guidelines, as currently promulgated, further the purposes of sentencing set forth in the Sentencing Reform Act, are constitutionally sound, and will withstand *Blakely* scrutiny, but it is planning for the possibility that *Blakely* may be held to apply to the federal system. The Sentencing Commission appreciates Congress' prompt but careful attention to this issue as it reviews a number of legislative

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[14]28 U.S.C. § 994(b)(2) generally limits the maximum width of guideline ranges to the greater of six months or 25 percent.

proposals under consideration.

At this early juncture, we are not prepared to endorse either the necessity of immediate legislative action or any particular model. If Congress decides to act, however, we hope that the legislation will preserve the core principles of the Sentencing Reform Act and, to the extent possible, avoid a wholesale rewriting of a system that has operated well for nearly two decades.

Moreover, if Congress determines that legislation is appropriate, it should be the goal of any legislation to address problem areas as definitively as possible without burdening the system with a host of new issues that have to be litigated. Finally, we suggest that any corrective legislation contain, as one element, an amendment to the Sentencing Reform Act expressly stating that the guidelines operate within the statutory parameters set by Congress. While this implicit rule has been recognized by the courts, its express statement by Congress would address a key *Blakely* issue by making clear that the federal guidelines do not establish their own "statutory" maximum penalties.

As we move forward in the wake of *Blakely*, it may be necessary for the Sentencing Commission to receive emergency amendment authority to address expeditiously congressional concerns. We remain ready to work with Congress, the Department of Justice, and others in further scrutinizing any legislative proposals.

The Sentencing Commission Remains in Critical Need of a Full Slate of Commissioners

Both of us have had the privilege of serving on the Sentencing Commission since 1999. When we arrived, the Sentencing Commission had been without commissioners for over one year. As a body, and under the leadership of Judge Diana E. Murphy, we came together to set an aggressive agenda that addressed the significant backlog of work that had accumulated as a result of those vacancies. We continue to set aggressive agendas and are pleased to state that we have no significant backlog of congressional directives.

What we do have, however, is a critical leadership void that is only worsened by the *Blakely* decision. In January of this year, Judge Murphy resigned as chair and member of the Sentencing Commission. The President has nominated Judge Ricardo Hinojosa to succeed her.

In addition to being without a chair, two Commissioners' terms have expired and they currently serve in the final months of their statutory holdover period. The President has nominated Commissioner Michael O'Neill and Judge Ruben Castillo for reappointment.

We raise this internal concern with you because, in the period of uncertainty wrought by the *Blakely* decision, it is all the more important that the Sentencing Commission have a chair and a full slate of commissioners.

As we have indicated, the Sentencing Commission is as fully operational as it can be

given the above-described position. We have announced a tentative list of priorities for the coming amendment cycle, and will include a thorough review of the impact of the *Blakely* decision on the federal guidelines and a host of other important sentencing issues (including immigration, criminal history, environmental offenses, drugs, and compassionate release), if resources allow. We continue to respond promptly to congressional initiatives necessitating guidelines amendments.

Mr. Chairman and Members of the Committee, thank you again for holding this very important hearing on matters of critical importance to the federal criminal justice system. We will be glad to try to answer any questions you may have.

UNITED STATES SENTENCING COMMISSION
ONE COLUMBUS CIRCLE, N.E.
SUITE 2-500, SOUTH LOBBY
WASHINGTON, D.C. 20002-8002
(202) 502-4500
FAX (202) 502-4699

July 14, 2004

Honorable Orrin G. Hatch
Chairman
Senate Committee on the Judiciary
SD-224 Dirksen Senate Office Building
Washington, D.C. 20150-6275

Honorable Patrick J. Leahy
Ranking Member
Senate Committee on the Judiciary
SD-152 Dirksen Senate Office Building
Washington, D.C. 20150-6275

Dear Chairman Hatch and Ranking Member Leahy:

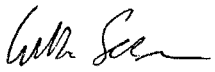
As an initial response to your letter dated July 2, 2004, we would like to reiterate the Commission's views expressed in our written statement and oral testimony at the July 13, 2004, hearing on the impact of *Blakely v. Washington* on the federal sentencing guidelines.

In *Blakely* the Supreme Court expressed no opinion on the federal sentencing guidelines. There are a number of important distinctions between the federal system and that of the State of Washington suggesting that the *Blakely* holding ultimately may not extend to the federal sentencing guidelines. The Commission is actively analyzing the impact of *Blakely* by closely monitoring caselaw, collecting data on sentences imposed post-*Blakely*, and participating in a special task force established by the Administrative Office of the United States Courts. We also are undertaking a thorough examination of the federal guidelines, as well as state guidelines systems, in the event the Supreme Court ultimately extends *Blakely* to the federal system, making changes necessary.

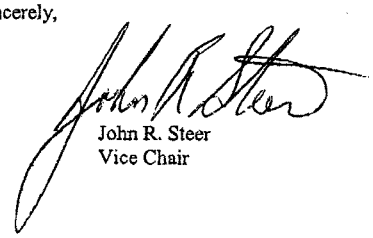
Accordingly, at this early juncture, the Commission is not prepared to endorse either the necessity of immediate legislative action or any particular legislative model. Although the Commission acknowledges that *Blakely* has cast uncertainty on federal sentencing, the federal courts and the Department of Justice are acting expeditiously to return certainty to federal sentencing.

If Congress determines that legislation is appropriate, we hope that any such legislation would preserve the core principles of the Sentencing Reform Act and, to the extent possible, avoid the wholesale rewriting of a system that has operated well for nearly two decades. The Commission and its staff remain ready to assist Congress in any way it deems appropriate, and we will keep Congress advised on this important matter.

Sincerely,



William K. Sessions, III
Vice Chair



John R. Steer
Vice Chair

UNITED STATES SENATE
COMMITTEE ON THE JUDICIARY

***"Blakely v. Washington* and the Future of the Federal Sentencing Guidelines"**

July 13, 2004

TESTIMONY OF ALAN VINEGRAD

Chairman Hatch, Senator Leahy, members of the Senate Judiciary Committee: Thank you for giving me the opportunity to appear before you today. I was a federal prosecutor for 12 years, most recently serving as the United States Attorney for the Eastern District of New York (Senator Schumer's district). I now practice white collar criminal defense law at the firm of Covington & Burling and have written and spoken frequently on federal sentencing.

The *Blakely* decision warrants consideration of short-term and potential long-term responses. In the short-term, until the constitutionality of the federal guidelines system is resolved, some action should be taken to remedy the unstable, if not chaotic, state of affairs in the federal criminal justice system. Courts around the country are taking, and will likely continue to take, many divergent approaches in response to *Blakely* - from upholding the Guidelines, to declaring them unconstitutional, to declaring them unconstitutional only insofar as upward adjustments to the base offense level and then sentencing within that level, to authorizing (or refusing to authorize) juries to resolve disputed sentencing

enhancements. The Department of Justice is asking judges to announce three sentences in every case. Temporary legislation bringing order to this process seems warranted.

One possible, temporary solution is to direct judges to impose sentences within statutory minimums and maximums, using the guidelines as presumptive but non-binding rules for determining what sentences should be. This is the approach adopted by the Department of Justice for cases in which the Guidelines are declared unconstitutional, and embodied in Judge Cassell's decision in the *Croxford* case, which held the Guidelines unconstitutional as applied in that case. This solution, or some other, would also allow Congress to give careful and unhurried consideration to how federal sentencing law may need to be changed more comprehensively in the event the Supreme Court declares the Guidelines to be unconstitutional. If the Supreme Court holds that *Blakely* does not apply to the Guidelines, then this legislation can expire and no further legislation would be constitutionally required.

If, however, the Court invalidates the current Guidelines system, then a long-term solution will be necessary. My views on this issue rest on three basic premises. First, I believe the Guidelines generally make sense, to the extent that they promote uniformity and predictability in sentencing, with sufficient flexibility

for judges to exercise discretion to impose more, or less, punishment based on the unusual facts of a given case.

Second, juries can, and already do, have a role to play in determining certain basic facts that are relevant to sentencing. The most obvious example is in capital cases, where juries control the determination. However, even in non-capital cases, in the wake of the *Apprendi* decision four years ago, juries in federal cases have been called upon to decide a number of issues affecting the statutory maximum punishment. For example, juries determine the type and quantity of narcotics; whether certain violent crimes resulted in serious bodily injury or death; or whether a dangerous weapon was used to commit a bank robbery. If the Court holds the Guidelines unconstitutional, then Congress, with the assistance of the Sentencing Commission, could designate other factors critical to the sentencing process that would increase a defendant's sentencing guideline range, and thus require a jury determination beyond a reasonable doubt. Such factors could include, for example, the amount of loss in a financial crime case, or the number of guns in a gun-trafficking case. Because these facts typically are already part of the proof in the guilt phase of a criminal trial, requiring juries to decide these issues would require little additional effort on the part of the various parties to the criminal trial process.

On the other hand, I do not believe that juries should be called upon to decide the many other factors now contained in the sentencing guidelines. Even a seemingly simple case can give rise to five, ten or more specific issues under the Guidelines, including alternative base offense levels, specific offense characteristics, upward adjustments, and upward departures. Oftentimes, some of these factors are not fully developed, or even known about, until just before, during or after the trial. Moreover, requiring juries to determine whether factors such as relevant conduct have been proven beyond a reasonable doubt would likely require multiple trials to determine whether the defendant engaged in multiple acts of criminal conduct, separate and apart from any other sentencing issues the jury was required to decide. It is doubtful that a system requiring juries to decide all of these issues would be workable, let alone desirable.

Instead, sentencing guideline ranges could be calculated based on the offense of conviction as well as other critical factors either found by a jury or admitted by a defendant during a guilty plea. The size of the guideline ranges could be broadened - for example, from 12-18 months to 12-24 or 30 months - to allow judges to take into account all the other aggravating factors that are relevant to the sentencing decision, such as role in the offense, the use of a special skill, or obstruction of the prosecution. Numerical values could continue to be assigned to

these factors, and could serve as non-binding guidance on how these factors should presumptively be taken into account in determining the defendant's sentence.

I am not suggesting that this sentencing system is better than the one we have today. However, it would satisfy several competing objectives. First, it would preserve substantial uniformity in the sentencing of similarly situated offenders. Second, it would preserve the jury's role in determining the basic facts that are essential to determining maximum punishment. Third, it would maintain the basic structure of the current Guidelines system, with relatively narrow ranges of presumptive punishment for federal crimes. Fourth, it would allow for a reasonable degree of judicial discretion in determining the ultimate sentence. Fifth, it would be feasible to implement. And finally, it would be constitutional, for it would satisfy *Blakely*'s requirement that factors that increase a defendant's maximum punishment be proven to a jury beyond a reasonable doubt.

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Testimony of

RONALD WEICH

Zuckerman Spaeder LLP

before the

UNITED STATES SENATE
COMMITTEE ON THE JUDICIARY

"BLAKELY V. WASHINGTON
AND THE FUTURE OF
THE FEDERAL SENTENCING GUIDELINES"

July 13, 2004

Chairman Hatch and Members of the Committee: My name is Ronald Weich and I am a partner in the law firm of Zuckerman Spaeder LLP. I appreciate the opportunity to testify today about the fate of the federal sentencing guidelines in the wake of the Supreme Court's recent decision in *Blakely v. Washington,* 2004 WL 1402697 (June 24, 2004).

I testify today as an individual, not on behalf of any organization. However I have several professional experiences and affiliations that inform my perspective on this issue.

I began my legal career as an Assistant District Attorney in New York City. From 1987 to 1989 I served as Special Counsel to the United States Sentencing Commission. I worked at the Commission as the guidelines took effective in November 1987 and I helped to draft early guideline amendments. I also represented the Commission in a number of lower court arguments that preceded the Supreme Court decision in *Mistretta v. United States*, 488 U.S. 361 (1989), which upheld the constitutionality of the Sentencing Reform Act against separation of powers challenges. From 1989 to 1997 I held various Senate staff positions, first with Senator Specter and ultimately as Chief Counsel to Senator Kennedy on this Committee. During those eight years I played a role in virtually all legislation related to federal sentencing.

Now in private practice, I am an advisor to several organizations concerned about sentencing fairness and rationality. First, I serve as counsel to the Leadership Conference on Civil Rights, the nation's largest coalition of civil and human rights organizations. In 2000 I co-authored a report for LCCR entitled *Justice on Trial*, which examined racial disparities in the criminal justice system, including those in the federal sentencing system. Second, I serve as counsel to the Constitution Project, a nonprofit organization affiliated with Georgetown University's Public Policy Institute which seeks to create bipartisan consensus on controversial legal and governance issues. Last week the Constitution Project announced a new sentencing initiative which will convene experts to develop principles to guide post-*Blakely* reforms in Congress and state legislatures.

Finally, I am a Trustee of the New York-based Vera Institute of Justice, a respected source of objective, non-partisan assistance to federal, state and local government agencies on criminal justice issues. Last week Vera announced an initiative to assist states in dealing with the fallout from *Blakely*. The Vera Institute and the Constitution Project will closely coordinate their separate efforts to harness expert opinion and develop useful recommendations for policy makers.[1]

As a result of my work over the last 17 years at the Commission, here in the Senate, and for my clients, I have become a strong believer in the concept of sentencing guidelines. My experiences have taught me that sentencing policy is developed from a spectrum of options. At one end is the spectrum is a system of unfettered judicial discretion like the federal sentencing system prior to enactment of the Sentencing Reform Act of 1984. At the other end of the spectrum is a regime of mandatory statutory penalties. In the middle of the spectrum is a flexible sentencing guidelines system in which an expert agency develops general rules to guide judicial discretion toward a presumptive sentencing range; in unusual cases judges may depart from the applicable range after providing a reason which is subject to appellate review.

The two extremes on the policy spectrum are each unacceptable. Judge Marvin Frankel famously labeled a system of unfettered judicial discretion as "lawless." Such a system permits the whims, personal philosophies and biases of individual judges to generate unwarranted disparity among similarly situated defendants. At the other end of the continuum, a system of legislatively mandated penalties is lawless in its own way because it is arbitrary, subject to manipulation by prosecutors and also results in racial and other disparities.[2] A well-constructed guideline system strikes the proper balance between the competing goals of individualized sentencing and standardized sentencing.

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[1] In the interest of full disclosure I bring to the attention of the Committee one additional affiliation that some might think bears on my testimony: I am married to Julie Stewart, president of the advocacy group Families Against Mandatory Minimums (FAMM). I note, however, that my views on mandatory minimums were formed prior to both the founding of FAMM in 1991 and my marriage to Julie in 1999. *See, e.g.*, Weich, *Plea Agreements, Mandatory Minimum Penalties and the Guidelines*, 1 Fed. Sent. Rep. 266 (1988).

[2] *See generally* U.S. Sentencing Commission, *Mandatory Minimum Penalties in the Federal Criminal Justice System* (August 1991).

Both mandatory minimums and sentencing guidelines limit judicial discretion, but guidelines do so in a more balanced and sophisticated fashion. Guidelines take account of far more sentencing factors than mandatory minimums, which are typically triggered by a single factor like the quantity of drugs sold or the use of a gun. Also the departure mechanism in a guidelines system preserves needed judicial discretion; mandatory minimums, in contrast, can only be avoided by the actions of the prosecutor through charging decisions, plea practices and cooperation agreements. For this reason mandatory sentencing laws, more so than sentencing guidelines, transfer sentencing power from the judge to the prosecutor.

While guidelines are the right policy choice in theory, the federal guideline system has had a troubled history. The federal guidelines are widely viewed by judges and practitioners as mechanical, harsh and unduly complex. Some of the flaws result from the Sentencing Reform Act itself; for example, 28 U.S.C. 994(b)(2) dictates that the top end of a guideline range may not exceed the bottom end by more than 25%. This rule caused the Commission to develop a dense sentencing grid of unhelpfully fine distinctions unlike the simpler grids in most state systems. Other problems stem from Congress' penchant for micromanaging the guidelines through endless directives and its unwillingness to repeal the pre-1987 mandatory minimums.

But even flawed guidelines are preferable to a regime of mandatory minimums. Advocacy against mandatory minimums in Congress and in many states is grounded on the existence of sentencing guidelines as a plausible alternative way to structure judicial discretion. For example, the 1994 safety valve provision, 18 U.S.C. 3553(f), has exempted thousands of low-level drug defendants from harsh mandatory penalties, but those defendants are then sentenced within the guideline system. I can report with confidence that the safety valve would never have been enacted if Congress had not been assured that the guidelines serve as a backstop against excessive judicial discretion.

Blakely vindicates an important constitutional principle, one I will return to later in my testimony. But if the decision is read to render all guideline systems constitutionally invalid, it cuts the middle out of the policy spectrum and leaves Congress and state legislatures with the

unhappy choice between the two extremes of unfettered judicial discretion or mandatory minimums. Like Justice Breyer, "I cannot believe the Constitution forbids the state legislatures and Congress to adopt [guideline] systems and to try to improve them over time." *Blakely v. Washington*, *supra* (dissent of Breyer, J.) (slip op. at 18). As a supporter of the guideline concept, I hope the Court will eventually allow some version of guidelines – perhaps less rigid standards that can be fairly characterized as a set of court rules rather than legislation.

In any event, *Blakely* presents a golden opportunity for Congress to undertake a top-to-bottom reexamination of the federal sentencing system. The system had deteriorated badly and seemed impervious to reform. Now reform will come -- it only remains to be seen how radical the reform must be to satisfy the Supreme Court's new reading of the Sixth Amendment.

I leave for other witnesses at this hearing any predictions about how the Supreme Court might eventually apply *Blakely* to the federal guidelines. My testimony proceeds from the here-and-now reality that numerous federal courts, including the Seventh Circuit, have already held the Sentencing Reform Act to be unconstitutional in whole or in part. The uncertainty surrounding the validity of the guidelines has prompted Congress to consider (1) short-term legislation to stabilize the federal criminal justice system; and (2) long-term reforms to remedy constitutional flaws and otherwise improve federal sentencing law. In the remainder of my testimony I will offer my thoughts on the short-term "fixes" under discussion and suggest some principles to guide long-term reform.

I. **Short-term Options**

Blakely has already caused much confusion and unrest in the federal criminal justice system, to say nothing of the situation in affected states. Judge Easterbrook, dissenting from a Seventh Circuit decision holding the guidelines unconstitutional, warned of "bedlam." *Booker v. United States*, ___ F.3d ___ (July 9, 2004) (slip. op. at 12). Already a number of judges, including Judge Cassell, have found the guidelines to be unconstitutional as applied to particular defendants, or on their face. Charging and plea bargaining practices are in a state of flux.

At first blush, it seems unacceptable for Congress to allow the system to operate without a clear set of rules to govern sentencing proceedings in federal courts throughout the country. Ferment is a good thing, but chaos in the administration of justice is not. Still, there may be good reasons for Congress to wait.

Short-Term Option 1: Do Nothing

In the first few days following *Blakely* there was something of a panic-induced assumption among practitioners that Congress would need to step in to calm the waters. But over the last week I sense growing support among sentencing experts for the position that the system can right itself and that any short-term fix might be counter-productive.

The system has already adjusted itself to incorporate *Blakely* in the day-to-day work of the federal courts. The Department of Justice has issued detailed guidance to its prosecutors about how to structure indictments that may satisfy *Blakely*. Some courts have complied with *Blakely* by treating guideline factors as elements of the offense and presenting them to the jury for adjudication. Prosecutors and defense attorneys are negotiating plea agreements that include a waiver of the defendant's *Blakely* rights.

Meanwhile the guidelines may yet be constitutional. The Department of Justice has advanced the argument that the federal system is distinguishable from *Blakely* because the federal guidelines are court rules, not statutes. Judge Easterbrook offered a plausible endorsement of this view in dissent from the Seventh Circuit's *Booker* opinion last week. It would be ironic and damaging if Congress upended the sentencing system unnecessarily.

In any event there are limits to how much of the current uncertainty Congress can settle. The Ex Post Facto Clause of the Constitution will limit the applicability of any new system to many of the cases already in the pipeline. Certainly every defendant whose crime was committed before enactment of the new law and who believes that he or she might have received a lower sentence under the guideline system as it existed before *Blakely* (or under the guideline system as affected by *Blakely*, before the *Blakely* fix) will make an ex post facto claim. *Blakely*

retroactivity and ex post facto litigation will work its way through the courts for a long time to come, and there is nothing Congress can do now to head it off.

While Congress may seek to stabilize the situation, any "patch" that evades the Sixth Amendment dictates of *Blakely* will engender its own constitutional challenges and therefore cause a new layer of destabilizing litigation. The more complicated the fix, the more complicated the litigation to incorporate it.

Finally, there is one virtue to the chaos: experimentation. Yale Law School Professor Daniel J. Freed, one of the fathers of the modern sentencing reform movement, has argued that "the creative uncertainty *Blakely* has introduced into a long flawed system should be viewed as a distinct virtue. Since no model solution seems to be available at the moment, why not let the inventive forces that *Blakely* has unleashed educate all of us, in and out of government?"

Notwithstanding these considerations, Congress may choose to act, if for no other reason than to set clear rules for cases not yet in the pipeline. I will comment on each of the several options I understand to be under consideration.

Short-Term Option 2: Advisory Guidelines

One relatively simple way to address uncertainty about the constitutionality of the sentencing guidelines is to temporarily suspend operation of the statutory provision that makes the guidelines binding, 18 U.S.C. 3553(b). Left intact would be 18 U.S.C. 3553(a) which requires courts to consider the applicable guideline range as one of several factors relevant to the imposition of sentence.

Advisory guidelines are not at all a radical notion. An early version of the Sentencing Reform Act provided for advisory guidelines under 3553(a), reinforced by the reasons requirement and appellate review. The binding language in 3553(b) was added during Senate debate in 1978, several years after the bill was first introduced. *See* S. Rep. 98-225 at 78, fn. 172 and accompanying text. Since passage of the Act, many states and the District of Columbia have

formulated advisory guidelines in direct reaction to the federal experience with overly rigid binding rules. Indeed, the post-*Blakely* memos from Deputy Attorney General Comey and Assistant Attorney General Wray recognize that advisory guidelines are a suitable fallback position in cases where 18 U.S.C. 3553(b) has been struck down under *Blakely*.

Any legislation to make the guidelines advisory should retain a right of appeal for both the defendant and the government based on a trial court's abuse of discretion or misapplication of 3553(a). Under such a scheme, the imposition of a sentence within the guideline range would likely be viewed as presumptively reasonable and insulated from appellate review. Such a "soft" incentive to comply with the guidelines should in no way offend the dictates of *Blakely*.

Seventeen years of mandatory guidelines have changed the sentencing culture in federal courts forever. I believe that most sentences imposed under an advisory guideline system would fall within the guideline range or be very close to it. Sentencing is a responsibility that judges find daunting. Most judges find (and would continue to find in an advisory system) comfort in knowing that the sentence is consistent with the views of an authority such as the Sentencing Commission. In any event, a temporary suspension of 3553(b) would make for a worthwhile experiment -- the Sentencing Commission could monitor sentencing decisions, compile data, and report to Congress, which would be free to reimpose binding constraints even before the expiration of the temporary period.

Some have suggested that the combination of court decisions and DOJ guidance will have the effect of rendering the guidelines advisory and such legislation unnecessary. But swift congressional action to suspend 3553(b) might calm the waters more authoritatively than a patchwork of court decisions and DOJ memos without in any way prejudicing long-term thinking about needed reforms.

I want to emphasize that this or any other short-term "*Blakely* fix" should be just that: short-term. I recommend that any legislation along these lines include a one year sunset provision. Congress should require itself to return to this important subject in one year and consider the wealth of experience and recommendations that will have been developed by then.

If more time to develop legislation is needed, the one year "fix" could be extended for a short time. Under no circumstances should Congress allow a short-term stabilization measure become the long-term response to *Blakely* through inaction.

Short-Term Option 3: Half-Advisory Guidelines (the Bowman Proposal)

Professor Frank Bowman, my fellow panelist at this hearing, has put forward another "*Blakely* fix" that is receiving serious consideration. Professor Bowman suggests that Congress could enact legislation converting the current maximum point of each guideline range to the statutory maximum instead. Sentences above the "phantom" guideline range, or perhaps above the minimum of the range, would be subject to appellate review on an abuse of discretion standard. Thus, the maximum guideline sentence that triggers *Blakely* would be removed, but judges would be encouraged to sentence within the range.

I consider the Bowman proposal to be ingenious but imbalanced. In effect it is a half-advisory system. Like the advisory guideline proposal I just discussed (Short-Term Option 2), the Bowman system would retain the guidelines; they would be advisory with respect to upward departures but binding with respect to downward departures. This solves (or rather evades) the *Blakely* problem but does so in a manner that upsets the careful balance of the original Sentencing Reform Act. Such a system transforms the guidelines into a web of "soft" minimum sentences, preferable to mandatory minimums of course but lacking the corresponding protection against unjustifiably lengthy sentences.

If Congress chooses to adopt an advisory guideline system in the short-term, I submit that the fair and appropriate way for it to do so is to make the guidelines fully advisory, not half-advisory. And if the Bowman proposal moves forward, I urge that it be revised to establish an abuse of discretion standard of review for downward departures, thus offering a modicum of the balance that characterizes the Sentencing Reform Act itself. And, as noted, the Bowman proposal should be subject to the same one year sunset as any other short-term response to *Blakely*.

Short-Term Option 4: The Kansas Model

The Federal Public Defenders have put forward yet a different idea for short-term legislation. They propose that Congress follow the lead of the Kansas legislature which responded to a *Blakely*-like Kansas Supreme Court decision by instituting procedures for putting sentencing enhancements before the jury for adjudication following conviction.

In my view the Kansas model warrants serious consideration as a long-term response to *Blakely*. Unlike either advisory guidelines or the Bowman proposal, it is not an evasion of *Blakely* but rather an incorporation of *Blakely* into federal criminal procedure. But I do not see the Kansas model as a practical short-term solution because it transforms a guideline system that was never intended to be applied by juries into a jury-based system. Rather, as I discuss below, the Kansas model should be accompanied by federal criminal code reform and guideline simplification, both longer-term endeavors.

Not an Option: New Mandatory Minimums

There is another possible "fix" that I want to note and then reject: the enactment of new mandatory minimum sentencing laws. Opponents of mandatory minimums have argued for years that these laws became obsolete when the federal sentencing guideline system became functional. Now proponents of mandatory sentencing laws will argue that new mandatory minimums are needed to constrain judicial discretion, since guidelines may no longer be up to that task.

Mandatory sentencing laws were ineffective and harmful before *Blakely* and remain ineffective and harmful in the aftermath of *Blakely*. While they certainly constrain judicial discretion, mandatory minimums are applied unevenly by prosecutors, fostering unwarranted disparity. When they are applied, mandatory sentencing laws often cause defendants with differing levels of culpability to be sentenced to identically harsh prison terms. Finally, enactment of new mandatory sentencing laws in the wake of *Blakely* will only add a new layer of complexity to an already stressed federal criminal justice system.

For these reasons, any of the other short-term options discussed above are preferable to the enactment of new mandatory sentencing laws.

II. **Principles for Long Term Reform**

Whether or not Congress enacts short-term legislation, it should undertake a long-term review of the federal sentencing system to address the constitutional issue presented by *Blakely* and otherwise to improve the system. I have previously described initiatives by the Constitution Project and the Vera Institute of Justice to harness the views of experts and practitioners in order to formulate recommendations for policy makers. Public and private efforts such as these will inform congressional deliberations.

If *Blakely* means that all guideline systems are invalid, Congress will find itself with few options for reform. If, on the other hand, the Sixth Amendment can accommodate a flexible court-based guideline system that respects the right to jury trial, then Congress has room to legislate. Such a guideline system should be more simple and more flexible than the current system, although it may still include legally enforceable rules.

Any long-term review of federal sentencing should not be limited to the immediate issues raised by *Blakely*. Rather, Congress should seize the opportunity presented by the *Blakely* decision to reconsider various aspects of the current system, address long-standing concerns and develop much-needed improvements.

Toward that end, I respectfully offer a series of principles that might contribute to a comprehensive reform of federal sentencing policies. The first two principles are procedural in nature, the remainder are substantive.

Principle 1: Provide a Meaning Opportunity for Input to All Participants in the Criminal Justice System

It seems an unremarkable and non-controversial proposition to insist that all voices of criminal justice expertise be heard during the formulation of such profound sentencing reforms. But in fact, federal sentencing policy has too often been characterized by a failure to communicate with – or listen to – key stakeholders.

To begin with, the Sentencing Reform Act itself contains a structural imbalance that has stifled input from an important group of experts: criminal defense lawyers. 28 U.S.C. § 991 designates the Attorney General as a non-voting ex officio member of the Sentencing Commission, but there is no parallel institutional representation of the defense bar. Thus the Justice Department participates in closed-door deliberations of the Commission, while federal public defenders and other members of the defense bar provide only after-the-fact input. Proposals to add a defense representative to the Commission have foundered.

In addition, the sentencing expertise of the federal judiciary has not always been welcomed. During debate on the so-called Feeney Amendment that eventually became Title IV of the PROTECT Act (Pub. L. 108-021), Chief Justice Rehnquist wrote to Congress that the legislation under consideration would "seriously impair the administration of justice" and complained that the views of the judiciary had not adequately been considered. Chairman Hatch improved the legislation partly in response to the Rehnquist letter, but in his next State of the Judiciary report the Chief Justice made clear the judiciary's disappointment that it did not have a fuller opportunity to be heard on a matter of fundamental importance to federal judges.

A third source of criminal justice expertise deserves an amplified voice in the process of developing long-term post-*Blakely* reforms: the states. In the criminal justice arena Congress has been quick to create funding programs that encourage states to replicate federal policies such as truth in sentencing. But in the sentencing guidelines arena, states have been more successful than the federal government in creating simple, effective systems. Some states have pioneered the use of prison capacity constraints that the federal government does not utilize. As states work alongside the federal government in coming to grips with Blakely, there should be a two-way dialogue between state and federal policy makers.

Principle 2. Rely on Empirical Information

One of the key tenets of the Sentencing Reform Act is that sentencing policy should be the product of empirical, scientific evidence. The Sentencing Commission maintains an impressive research capacity, but in my experience sentencing laws are too often written on the back of an envelope in committee markup or during floor debate without drawing on the available evidence about sentencing trends and efficacy. For example, the legislative process that produced the mandatory minimum threshold levels in 1986 was notoriously devoid of scientific analysis.[3] The Commission, in contrast, undertook a rigorous empirical analysis of cocaine penalties in its 1995 and 2002 reports to Congress on that subject, taking into account pharmacological, sociological, economic and other scientific evidence. But the recommendations that resulted from that review were first rejected (1995) and then ignored (2002) by Congress.

In considering post-Blakely reforms, Congress should take seriously the need for sentencing policy to reflect "advancement in knowledge of human behavior as it relates to the criminal justice process." Reforms should emerge from the data and other empirical evidence developed during 17 years of guideline sentencing.

Principle 3. Retain Judicial Discretion in Whatever Sentencing System Emerges

The problem Congress sought to address in the Sentencing Reform Act was not that judges had too much discretion – it was that federal law provided judges with too little guidance in how to exercise their discretion. But after 17 years of guideline sentencing, it is apparent that even an extensive system of sentencing rules does not result in consistently fair sentences when the court lacks sufficient authority to mold the sentence to fit the offender and the offense.

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[3] The Commission's 1995 cocaine report observes that in formulating the 1986 law which codified the 100 to 1 ratio, "Congress dispensed with much of the typical deliberative legislative process, including committee hearings…the legislative history does not include any discussion of the 100-to-1 powder cocaine/crack quantity ratio *per se*." U.S. Sentencing Commission, *Cocaine and Federal Sentencing Policy* (February 1995).

In sponsoring the legislation that eventually became the mandatory minimum safety valve, 18 U.S.C. § 3553(f), then-Senator Alan Simpson made the astute observation that Congress puts judges through a "grueling" confirmation process but then fails to let them exercise needed discretion on the bench. 139 Cong. Rec. S14537 (daily ed. October 27, 1993). Some measure of judicial discretion is an essential element of sentencing justice. The art of making sentencing policy is to strike the right balance between standardized rules and the imperative of individualized sentences.

Different options for post-*Blakely* reform will provide for different degrees of judicial discretion. For example, a overly rigid reading of *Blakely* might result in jury sentencing rather than jury fact-finding. Even after the jury finds facts, the judge should be able to assign the proper weight to the fact, within whatever guidelines may exist. And just as in the short-term, long-term reforms should not include enactment of new mandatory sentencing laws. Mandatory sentencing effectively delegates to the prosecutor the power to determine the penalty, an undesirable result.

Principle 4. Respect the Essence of Blakely

In the two weeks since *Blakely* was decided, there has been much discussion of how to "solve" *Blakely*. But long-term reforms should not be designed to evade *Blakely*; rather, they should incorporate the rights enunciated in *Blakely* in a new, more effective federal sentencing system. Constitutional principles are to be respected, not evaded.

In my view, *Blakely* goes too far in suggesting that every sentencing factor, including such subjective, intangible factors as the defendant's role in the offense or whether the defendant abused a position of trust must be put before the jury as though they were elements of the offense. But the Sixth Amendment principle in *Blakely* seems entirely valid as applied to objective facts that contribute significantly to the length of the sentence, such as whether the defendant possessed a gun, or the quantity of drugs sold.

Under the pre-*Blakely* guideline system, too many of these major facts were never put to a jury and were subject to judicial fact-finding on a preponderance of the evidence standard. The concept of "relevant conduct" in the guidelines, which I consider a useful check on prosecutorial fact bargaining, has been stretched to unhealthy extremes. Separate crimes for which the defendant was never charged, or even conduct of which the defendant was acquitted, can lead to a doubling or tripling of the length of a sentence. *See United States v. Watts*, 519 U.S. 148 (1997) (upholding the use of acquitted conduct to increase a sentence).

One reason why the Kansas model warrants long-term rather than short-term consideration is that the federal criminal code is unduly complicated. Congress began and then abandoned criminal code reform in the late 70's and early 80's but it may be time to resuscitate that effort. Criminal code reform should include drawing more rigorous distinctions between elements of an offense and sentencing factors, assuming that at least one member of the *Blakely* majority will tolerate such distinctions in a future case. Similarly, the guidelines themselves need to be simplified if the Kansas model is to be implemented at the federal level.

Principle 5: Respect the Independent Role of the Sentencing Commission

Will there be a Sentencing Commission in the post-*Blakely* world? I think there should be. There will always be the need for monitoring and adjustments in a sentencing system. Indeed, according to the Department of Justice and Judge Easterbrook, guidelines that are promulgated by a sentencing commission or other agency may be constitutional even if statutory guidelines are not.

I earlier discussed how congressional micromanagement has hindered the work of the U.S. Sentencing Commission. For example, in the PROTECT Act Congress not only dictated the text of specific guidelines; it even wrote guideline commentary in the voice of the Sentencing Commission, transforming the commissioners into glorified ventriloquist dummies. That type of interference in the work of the Commission must cease if the guidelines are to be plausibly defended as court rules rather than legislative enactments.

Principle 6: Reduce reliance on drug quantity and fraud loss in federal sentencing

Under current statutes and guidelines, drug sentences are largely determined by reference to the quantity of drugs involved in the transaction and fraud sentences are largely determined by reference to the amount of monetary loss. To be sure, both of these factors are relevant to the length of sentence. But undue reliance on these factors prevents the proper consideration of other factors such as the defendant's role in the offense.

Drug quantity is a particularly unsatisfying sentencing factor because it is a variable subject to manipulation by law enforcement officers, especially in undercover drug cases and in observation cases where the police may consciously wait to arrest the defendant, permitting drug sales to accumulate until a triggering quantity of drugs has been sold. Drug quantity is also a poor proxy for culpability in conspiracy cases, because a defendant with relatively less culpability may be legally accountable for a large quantity of drugs.

In the same way, white collar sentences can be affected too dramatically by the calculation of offense loss. Recently a 37 year old mid-level executive at the Dynegy Corporation named Jamie Olis was convicted of accounting fraud and sentenced to 24 years in prison based on the amount of loss calculated for the offense. No matter how much money was involved in the fraud, a 24 year sentence seems too harsh for a non-violent first time offender.

These are the very factors that have fueled the steady increase in prison populations which Justice Kennedy decried in his landmark address to the American Bar Association last year. A more rational sentencing system will recognize that drug quantity and loss amount are relevant sentencing factors but not the end of the inquiry.

Principle 7: Address racial disparities in federal sentencing

It is well documented that mandatory sentencing laws and quantity-driven guidelines, exacerbated by the unjustifiably harsh treatment of crack cocaine cases in both the statutes and

the guidelines, have resulted in unwarranted racial disparities in federal sentencing.[4] According to Sentencing Commission statistics, minorities comprise over 93% of all federal crack defendants.

In 1995 the Sentencing Commission recommended urgently needed changes to these laws but Congress blocked guideline amendments. The Commission returned to Congress with more modest recommendations in 2002 but the Justice Department declared current cocaine sentences to be proper and Congress failed to act. Last Congress, Chairman Hatch and Senator Sessions introduced a bill acknowledging that the federal cocaine penalty structure is unjustified, yet these rules have still not changed.

The time is long past due to remedy the intolerable disparity between crack and powder cocaine sentences and related racial disparities. Any post-*Blakely* reform package should include a more equitable crack-powder ratio and should address more generally the racial disparities that undermine respect for the law in minority communities.

Principle 8: Consider End-of-Sentence Reforms as Well

As Congress and expert bodies consider revised systems to ascertain the length of a prison sentence, the time is also ripe to consider what happens at the end of that sentence. As reflected in bipartisan legislation recently introduced in the House (H.R. 4676) and soon to be introduced in the Senate, there is a growing awareness of the importance of prisoner reentry in reducing recidivism. And that trend has led some to question whether unyielding truth-in-sentencing rules should be modified to take account of changed circumstances during the course of a defendant's imprisonment.

For example, the Bureau of Prisoner had traditionally placed prisoners in community corrections facilities toward the end of their sentences to allow for a supervised transition from prison to the community. But in December 2002 the Department of Justice adopted a new policy

[4] *See generally* Leadership Conference on Civil Rights, Justice on Trial: Racial Disparities in the American Criminal Justice System (2000).

limiting such placements, in part based on an overly rigid interpretation of truth-in sentencing rules. Similarly, a 1994 provision allowing the Bureau to award a sentence reduction of up to one year for successful completion of a drug treatment program has been narrowly construed and proposals to expand it to other forms of treatment have not advanced. Without revisiting the Sentencing Reform Act provisions abolishing federal parole, there are useful modifications to federal sentencing and corrections rules that would enhance prisoner rehabilitation and reentry without damaging the concept of truth-in-sentencing.

More generally, there is widespread evidence that some federal sentences are "greater than necessary" to achieve the legitimate purposes of punishment. 18 U.S.C. § 3553(a). Earlier I alluded to the 24 year sentence imposed on Jamie Olis. In addition, then-Bureau of Prisons Director Kathy Hawk Sawyer testified before Congress in 2000 that "70-some percent of our female population are low-level, nonviolent offenders. The fact that they even have to come into prison is a question mark for me. I think it has been an unintended consequence of the sentencing guidelines and the mandatory minimums."[5] And in an extraordinary 1997 letter to Congress, 27 federal judges who previously served as United States Attorneys complained that crack cocaine sentences are unjust and do not serve society's interest.[6]

The appropriate length of incarceration and the rigidity of truth-in-sentencing requirements are analytically distinct questions from the sentencing process questions posed by *Blakely*. But at this unique moment in time when the fundamental structure of the federal sentencing system is under review, these very important related questions deserve scrutiny as well.

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[5] Testimony of Kathy Hawk Sawyer, House Appropriations Committee, *Hearings on Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations for 2001*, at 698 (2000).

[6] Letter to the House and Senate Judiciary Committees from Judge John S. Martin, Jr. and 26 other judges, September 16, 1997.

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