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Mr. Chairman and Members of the Sentencing Commission,

Thank you for inviting me here today to testify on the future of the Sentencing Guidelines after *Blakely v. Washington*.<sup>1</sup> We stand at a watershed moment in sentencing law, when Congress and the Commission must confront fundamental issues about the appropriate role of juries at sentencing, the complexity of the present Guidelines, and the role of rules versus rules-of-thumb versus discretion. The Guidelines have done much to standardize sentencing and promote equality, but some of their provisions appear to transgress the Supreme Court's understanding of Sixth Amendment values. The Commission, I submit, should heed these concerns by simplifying and broadening the Guidelines, leaving more room for discretion without eliminating their binding force. Doing so would bring the Federal Guidelines closer to state sentencing guidelines, which have many fewer *Blakely* problems in part because many fewer state cases require upward adjustments or departures to achieve a just sentence.

As my starting point, I join most other commentators in predicting that the Supreme Court will apply *Blakely* to invalidate the Guidelines, either in whole or in part. The severability issues are complicated, and it is possible that the Court will invalidate them in whole or in part. Either way, this Commission must prepare to act quickly, to limit the transitional period of chaos.

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<sup>1</sup>124 S. Ct. 2531 (2004).

## I. The Bowman Proposal

The easiest and most attractive short-term fix is known as the Bowman proposal, after its author, Professor Frank Bowman. He proposes leaving the minimum of each guideline range in place while raising the guidelines maximum all the way to the statutory maximum.<sup>2</sup> Before this Commission could do so, Congress would first have to repeal the 25% rule. The Bowman proposal can work only if the Supreme Court stands by its decisions in *McMillan v. Pennsylvania*<sup>3</sup> and *Harris v. United States*,<sup>4</sup> which held that judges may find by a preponderance of the evidence facts that trigger statutory minima. Many commentators have questioned the continued vitality of those decisions after *Blakely*, but I predict that they are likely to remain good law. Chief Justice Rehnquist and Justices O'Connor and Kennedy have been consistent critics of the *Apprendi* and *Blakely* line of cases, and all three joined Justice Kennedy's opinion in *Harris* that distinguished minima from maxima. Justice Scalia, the author of the *Blakely* majority, also joined Justice Kennedy's opinion in *Harris*. Justice Scalia believes the two decisions are consistent for three reasons. First, there is no historical practice of having juries find facts that trigger minima. Second, minima, unlike increased maxima, do not exceed the punishment of which the defendant had fair warning in the indictment. Third, minima constrain judicial sentencing

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<sup>2</sup>Memorandum from Frank Bowman to U.S. Sentencing Commission, *Memorandum Presenting a Proposal for Bringing the Federal Sentencing Guidelines into Conformity with Blakely v. Washington*, 16 FED. SENTENCING REP. 364 (2004).

<sup>3</sup>477 U.S. 79, 89-90 (1986).

<sup>4</sup>536 U.S. 545 (2002).

discretion, whereas increased maxima increase judicial discretion.<sup>5</sup> Thus, I seriously doubt that Justice Scalia would invalidate the Bowman proposal's so-called topless guidelines, in which the defendant's sentence never exceeds the guidelines or statutory maximum.

Perhaps Justice Breyer, the fifth member of the *Harris* majority, might change his vote. In his *Harris* concurrence, Justice Breyer said he could see no distinction between facts that raise minima and those that raise maxima. He was one of the dissenters in *Apprendi* (as well as *Blakely*), and he "cannot yet accept its rule," for fear of *Apprendi*'s "adverse practical, as well as legal, consequences."<sup>6</sup> While Justice Breyer suggested that he might revisit this rule if Congress passed a proliferation of rigid mandatory minimum statutes, this criticism would not apply to a more subtle and finely graduated set of sentencing guidelines. Thus, I am reasonably confident that five members of the current Court would reaffirm *Harris* and find the Bowman proposal constitutional. Of course, the Court's personnel may change in the near future, and it is hard to forecast how that might shift the fine balance on the Court.

Assuming that *Harris* remains good law, the Commission must take care not to word policy statements or appellate review in a way that might make them tantamount to maxima. I believe that mere suggestions or recommendations to sentence toward the lower end of the range in ordinary cases should suffice, though I would be wary of quantifying the breadth of that lower end. That policy statement could include an illustrative list of factors that a judge should consider in deciding whether to sentence "substantially" above the minimum; those factors could

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<sup>5</sup>See Stephanos Bibas, *Back from the Brink*, 15 FED. SENTENCING REP. 79, 80-81 (2002).

<sup>6</sup>535 U.S. at 569 (Breyer, J., concurring in part and concurring in the judgment).

include the current grounds for upward departures. If, however, courts of appeals applied more stringent appellate review to sentences that were, say, 25% or more above the bottom end of the range, that number would start to look too much like a legal maximum. Justice Scalia might interpret such a provision as giving a defendant notice of his ordinary maximum sentence and vesting a right to a sentence no higher than that, absent jury findings beyond a reasonable doubt. I do not think the Commission needs to risk giving such constricting guidance, as the vast majority of current Guideline sentences are at or below the bottom of the range, and fewer than 1% of current sentences are above the range. Evidently, most judges find existing ranges adequate or even too harsh, and few seek to go higher. Appellate review should suffice to police the relatively few judges who might incline toward excessive harshness.<sup>7</sup> The Guidelines would then need to be amended to permit appellate review of sentencing decisions within the range, not just of departures and adjustments to the range. The PROTECT Act requires de novo review of the decision to depart but deferential review of the extent of justified departures,<sup>8</sup> and I can see arguments for using either standard here. An abuse-of-discretion standard would allow for more

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<sup>7</sup>It is possible that removing the tops of the guideline ranges would change plea-bargaining behavior, as parties might mentally anchor on the theoretical statutory maximum and thus view plea bargains below that maximum as good deals. See Stephanos Bibas, *Blakely's Federal Aftermath*, 16 FED. SENTENCING REP. 331, 337 (2004). I am unsure how much this effect would matter in practice, as most lawyers can predict that most judges are likely to sentence near the bottom of the guideline range. Nonetheless, there is a real danger that some defendants will think that a run-of-the-mill plea bargain for a sentence at the bottom of the range looks like a particularly good deal because it promised a large percentage reduction below the nominal sticker price. See Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2518-19 (2004). Thus, I endorse the Bowman proposal only tentatively, as a short-term fix rather than a lasting reform.

<sup>8</sup>PROTECT Act, Pub. L. No. 108-21, § 401(d), 117 Stat. 650, 670-71 (2003) (codified as amended at scattered statutes of 18 U.S.C.A. & 28 U.S.C.A.).

individualization, and it would underscore the absence of vested rights within the sentencing range. But the PROTECT Act evidences Congress's desire for more stringent appellate oversight, and even this review would not violate *Blakely* so long as it applied over the whole range and not just to the upper portion of the range.

The Bowman proposal strikes me as more desirable than the system of advisory guidelines that many Guidelines critics have proposed. My understanding is that states with advisory guidelines have achieved only modest success in ensuring equality and reducing disparity. Moreover, the PROTECT Act strongly suggests that Congress wants more, not less, limits on judicial discretion, and a system of voluntary or advisory guidelines might seem so soft as to be worthless. If the Guidelines lack teeth, Congress may feel it has no choice but to pass a series of mandatory minimum statutes. Even a set of rule-of-thumb guidelines coupled with de novo appellate review probably would not be clear and stringent enough to guarantee uniformity and certainty. I doubt, in short, that advisory guidelines will work or will satisfy Congress. Moreover, advisory guidelines seem to violate the rule-of-law spirit of *Blakely*. In order to avoid vesting enforceable rights in defendants, the law would give them even less fair warning and less legal protection against arbitrariness. *Blakely* and *Apprendi* permit this dodge, but it seems to undercut the due-process values that those cases purport to uphold.

The Bowman proposal also strikes me as sturdier than various proposals to invert the Guidelines by rephrasing aggravating facts as mitigating ones. True, the wording of the holdings in *Apprendi* and *Blakely* would permit such an evasion. But *Apprendi*'s infamous footnote 16 hinted that if legislatures attempted wholesale evasion, the Court would likely extend its rule to

reach mitigators as well as aggravators.<sup>9</sup> In short, inverted guidelines strike me as too gimmicky and might well provoke the Court to extend *Apprendi* and *Blakely* even further, thus depriving courts of their existing flexibility to mitigate sentences.

## II. Procedural Protections for Fact-Finding

Whatever the final Guidelines look like, they will require more procedural protections than the current ones do. Facts that underlie a court's decision to depart upward clearly qualify as elements under *Blakely*, as do aggravating specific-offense characteristics. Drug quantities, dollar amounts, weapon and injury enhancements, aggravating roles in offenses, obstruction of justice—after *Blakely*, all of these facts are now elements that juries must find beyond a reasonable doubt. Even the multiple-count rules might require these procedural protections, in situations where the rules require judges to do more than the ministerial act of reading the face of the rap sheet and statutes.

The sole possible exception is recidivism. *Almendarez-Torres v. United States*<sup>10</sup> held that sentencing judges may find prior convictions by a preponderance of the evidence, and *Apprendi* preserved this exception to its rule.<sup>11</sup> This exception is on shaky ground, as Justice Thomas has suggested that he erred in providing the fifth vote in that case.<sup>12</sup> In any event, *Apprendi*'s

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<sup>9</sup>See *Apprendi v. New Jersey*, 530 U.S. 466, 490-91 n. 16 (2001).

<sup>10</sup>*Almendarez-Torres v. United States*, 523 U.S. 224 (1998).

<sup>11</sup>*Apprendi*, 530 U.S. at 489-90.

<sup>12</sup>*Id.* at 520-21 (Thomas, J., concurring).

wording suggests a narrow reading of *Almendarez-Torres*, limiting it to facts that have already enjoyed the safeguards of jury trial and proof beyond a reasonable doubt at the earlier proceeding.<sup>13</sup> If the judge can determine the recency of the prior conviction or the defendant's criminal justice status simply by looking at his rap sheet, then the judge is finding no additional facts and the enhancement should fall within the *Almendarez-Torres* exception. But if an enhancement requires a judge to go behind the face of the jury verdict or defendant's admissions in a prior case to determine whether a prior crime was violent, for example, then *Apprendi's* strictures would apply.

*Blakely*, of course, requires proof beyond a reasonable doubt to a jury. Currently, federal district judges have no clear statutory authority to convene sentencing juries in noncapital cases, though many judges have found that they have inherent authority to do so. Congress should pass a statute authorizing sentencing juries. I do not, however, think that sentencing juries and bifurcation ought to be routine. *Apprendi* and *Blakely* make all facts that raise maximum sentences into elements. These elements belong in the indictment and the guilt phase of trial, like any other elements. (Indeed, Congress should eventually codify them in the United States Code. There is something incongruous about having this Commission, an unelected agency, create many elements of many crimes, and the principle of legality favors giving clear notice of them in the statute itself.) If a defendant has a particularized fear of prejudice, he can consent to redaction of the indictment and request a bifurcated second phase for the sentencing facts. Courts should not grant this motion lightly, however, because bifurcation is cumbersome and

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<sup>13</sup>*See id.* at 488.

very expensive. As a rule of thumb, all offense facts are relevant and ought to be tried together; facts about the offender's background, personal circumstances, and criminal record seem more logically distinct and may sometimes deserve separate treatment.<sup>14</sup>

By its terms, *Blakely* does not require the full panoply of evidentiary rules, discovery, et cetera at sentencing, though the Court might eventually extend *Blakely* to guarantee rights to confrontation, cross-examination, and compulsory process. Even if the Constitution does not require these guarantees, at a minimum defendants should enjoy the rights to cross-examination, compulsory process, and discovery of the facts underlying the presentence report. All of these changes would require amendments to the Federal Rules of Criminal Procedure. I would not, however, woodenly extend all the rules of evidence to sentencing, particularly for those facts still found by judges. Hearsay can be a valuable source of sentencing information, and many European criminal justice systems rely on it extensively to provide judges with full information. So long as the defendant has advance notice and an opportunity to respond and to subpoena the declarant, I see nothing fundamentally unfair in letting judges use uncontradicted hearsay contained in presentence reports.<sup>15</sup> A contrary rule would greatly disrupt the presentence investigation process, and this Commission should not take that step unless the Court requires it.

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<sup>14</sup>Cf. Douglas A. Berman, *Conceptualizing Blakely*, 17 FED. SENTENCING REP. 1 (2004) (distinguishing between offense characteristics, to which *Blakely* should apply, and offender characteristics, to which *Blakely* should not apply).

<sup>15</sup>Stephanos Bibas, *Judicial Fact-Finding and Sentence Enhancements in a World of Guilty Pleas*, 110 YALE L.J. 1097, 1177-78 (2001).

### III. Relevant Conduct

Guidelines critics persistently target the relevant-conduct rules as subverting the charge of conviction. I have defended the Guidelines' modified real-offense sentencing system,<sup>16</sup> and the Supreme Court's pre-*Apprendi* case law upheld the use of relevant conduct.<sup>17</sup> Those cases reasoned that an acquittal means only that the trial jury found a reasonable doubt, and the Government can try to prove the same facts again at sentencing under the lower preponderance standard. *Apprendi* and *Blakely*, by raising the standard of proof at sentencing, undercut this reasoning, at least when acquitted conduct is being used to raise the maximum sentence. Now, because the standards of proof are the same, an acquittal should collaterally estop the government from trying to re-prove the acquitted conduct at sentencing. I suppose the judge could still consider the conduct in deciding where to sentence within the range, but could not make findings on relevant conduct that increased the top of the range.

It is less clear whether prosecutors may try to prove dismissed conduct at sentencing. In theory, the estoppel argument should not apply. In practice, however, use of dismissed conduct plays into the *Apprendi* majority's fears that sentencing will circumvent trial protections.<sup>18</sup> To be on the safe side, the Commission may choose to exclude conduct underlying dismissed charges

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<sup>16</sup>*Id.* at 1168-70.

<sup>17</sup>United States v. Watts, 519 U.S. 148 (1997) (*per curiam*); Witte v. United States, 515 U.S. 389 (1995).

<sup>18</sup>See *Monge v. California*, 524 U.S. 721, 738 (1998) (Scalia, J., dissenting) (raising slippery-slope fear that a legislature could define a crime as "knowingly causing injury" and then remit all other enhancing facts to sentencing, thereby evading jury-trial protections).

from its relevant conduct rule.

I do not, however, think the Commission need retreat wholesale from its relevant conduct rule, so long as relevant conduct that raises the maximum sentence enjoys the *Apprendi* and *Blakely* procedural safeguards where appropriate. These must include notice in the indictment, which in practice means that the relevant conduct effectively becomes part of the offense(s) of conviction. But under the Bowman proposal, relevant conduct would never raise the maximum sentence. In that case, the concerns about relevant conduct are less constitutional than policy ones. How illegitimate is the use of relevant conduct? My own sense is that the use of acquitted (and to a lesser extent, dismissed) relevant conduct is the real problem here; the use of other uncharged relevant conduct occurs all the time in indeterminate-sentencing states.

#### **IV. The Balance of Plea-Bargaining Power**

Moreover, I fear that eliminating the relevant-conduct rules would give even freer rein to prosecutorial charge bargaining. The more that sentences depend on prosecutorial charging decisions, the less power judges have to check prosecutorial harshness or leniency. Wider ranges would give judges more of a counterweight to prosecutorial bargaining; elimination of relevant conduct would give them less, allowing collusive charge bargains. These bargains disproportionately benefit defendants who can afford experienced and aggressive defense counsel, disadvantaging poorer defendants who must rely on overburdened court-appointed counsel. The defense bar may like charge bargains because they result in lower sentences, and prosecutors may like them because they transfer power to prosecutors. But they come at the cost of equality and

uniformity, the prime goals of the Sentencing Reform Act.

The best way to offset prosecutorial dominance of the plea-bargaining process is to give trial judges more leeway. And the Bowman proposal, like the various advisory-guidelines proposals, does exactly that. Judges would be free to move upward to offset prosecutorial leniency in charging. And judges could perhaps receive some limited, reviewable discretion to depart downward if a defendant's guidelines sentence was substantially higher than that of almost all similarly situated defendants.

The cornerstones of sentencing reform ought to be those that have worked well in the states, our laboratories of experimentation. First, guidelines ranges ought to be moderately wider than the Federal Guidelines are right now. Second, the Guidelines ought to be simpler and more transparent, with fewer moving parts and adjustments over which prosecutors and defense lawyers can bargain. Third, searching appellate review ought to ensure consistency, checking the increased flexibility and preventing it from degenerating into rampant disparity. These three principles would give prosecutors fewer plea-bargaining chips, give trial judges more leeway to counterbalance prosecutors, and give appellate judges more power over both. Ultimately, history teaches us that rules alone can neither eliminate plea bargaining nor keep it in check.<sup>19</sup> The best we can do is to create a balance of power, so that no one actor dominates the process. My fear is that an overly rigid and complex system of guidelines, or worse yet a proliferation of new mandatory minima, would only exacerbate the imbalance of bargaining power. Though I am a former prosecutor and believe most prosecutors are honorable, I also heed Lord Acton's

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<sup>19</sup>For the best history of plea bargaining, one that emphasizes these themes, see GEORGE FISHER, *PLEA BARGAINING'S TRIUMPH: A HISTORY OF PLEA BARGAINING IN AMERICA* (2003).

aphorism: “Power corrupts, and absolute power corrupts absolutely.” An enforceable yet moderately broader and more flexible set of sentencing rules would best check unilateral prosecutorial control, restoring some balance of plea-bargaining power in the process.