November 12, 2004

United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2500, South Lobby
Washington, DC 2002-8002

Re: Commission Hearing

Dear Commissioners,

Thank you for this invitation to testify regarding potential changes to the Federal Sentencing Guidelines in light of the Supreme Court's decision in *Blakely v. Washington*,[1] and the upcoming decisions in *U.S. v. Booker* and *U.S. v. Fanfan*.[2] I am going to assume for purposes of this testimony that the Court will affirm *Booker* and *Fanfan* and apply the rule in *Blakely* to the Guidelines.[3] Obviously, if the Court distinguishes the Federal Sentencing Guidelines from the Washington state scheme, no action on the part of this Commission is required. Though there is a circuit split on the issues of constitutionality and severability, for reasons I have previously stated in a recent law review article, I believe the Court will hold that only the judicial-factfinding provisions of the Guidelines must be stricken.[4]

I will focus my testimony today on two issues. First, I will respond in opposition to proposals to turn the Federal Sentencing Guidelines into either mandatory minimums or advisory Guidelines. Second, I will offer my own suggestions on how best to "Blakelyize" the Guidelines in a manner that will satisfy the Fifth and Sixth Amendment concerns of the Court while simultaneously advancing congressional goals of uniformity, proportionality, honesty, and certainty in enacting the Sentencing Reform Act.

Professors Kate Stith from Yale and William Stuntz from Harvard suggest that the best response to *Blakely* is to make the Federal Sentencing Guidelines voluntary.[5] The most obvious reason for rejecting advisory guidelines is feasibility - Congress is highly unlikely to allow this in today's political climate. One of the primary animating purposes underlying the Sentencing Reform Act was

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[1] 124 S.Ct. 2531 (2004) (the five-four breakdown of the Justices in the *Blakely* case was along the same lines as the breakdown in *Apprendi v. New Jersey*; Stevens, Scalia, Souter, Thomas, and Ginsburg, J.J., writing for the majority and O'Connor, Breyer, and Kennedy, J.J. and Rehnquist, C.J., in the dissent)

[2] 542 U.S. ___, 2004 WL 1713654; 542 U.S. ___, 2004 WL 1713655 (*cert. granted* Aug. 2, 2004) (oral arguments held Oct. 4, 2004) (the questions presented in this consolidated certiorari grant were: (1) Whether the Sixth Amendment is violated by the imposition of an enhanced sentence under the Federal Sentencing Guidelines based on the sentencing judge's determination of a fact; and (2) If "yes" then whether the Guidelines as a whole are severable from the judicial factfinding provisions.

[3] The rule in *Blakely* is that the relevant "statutory maximum" that the judge "may impose without any additional findings" is the top of the Guidelines range designated for the offense of conviction alone, not the statutory maximum noted in the United States Code.

[4] *See* Nancy J. King and Susan R. Klein, "Beyond *Blakely*," 16 FED. SENT. RPTR. 413 (June 2004), and the Sept. 8, 2004 revision, attached hereto.

[5] *See, e.g.,* Kate Stith and William Stuntz, "Sense and Sentencing," NEW YORK TIMES, June 29, 2004 at A27; STITH AND CABRANAS, FEAR OF JUDGING (Chicago Univ. Press 1998),

precisely to eliminate wide judicial discretion in sentencing, and recent actions by Congress, such as the Feeney Amendment, have shown an interest in constricting and not expanding the little discretion that federal judges still possess.[6]

More importantly, advisory guidelines will not achieve sentencing uniformity or proportionality. Every player in the criminal justice system prior to 1984 had horror stories about identical offenders brought before different federal district judges, where one received a sentence of probation while another was sentenced to a lengthy term of imprisonment. Whether such disparities were a result of differing judicial philosophies, geography, or invidious reasons such as gender and race, the Sentencing Reform Act of 1984 was the result of overwhelming bipartisan support for ending these disparities.[7] Eliminating unwarranted disparity and attaining proportionate sentences can only be accomplished by a legislature or Commission deciding *ex ante* what facts about an offense and offender are relevant to sentencing, what weight to give each fact, and further by imposing these rules on each member of the judiciary.[8] Regardless of whether we accept the notion that the Commission still resides in the judicial branch, the crucial facts that these normative and policy judgements must be openly debated in advance of their creation and application to a particular case, and that Congress must accept, reject, modify, or amend these penalty decisions, additionally furthers transparency and democracy in the sentencing process. Our elected legislature, delegating to and supervising an expert Commission, is the institution best suited to make such normative and policy judgments as whether rehabilitation is effective, whether a defendant's socioeconomic, drug-addiction, or veteran status should increase or decrease her penalty, or whether white collar offenses are more or less serious than drug or immigration offenses.

Congress wisely considered and rejected advisory guidelines based upon data showing such regimes unsuccessful at the state levels.[9] While the initial reaction of federal judges to advisory guidelines might be, for the most part, to sentence in conformity with these guidelines, I do not believe that these results would hold for the long term. Once an Article III judge is confirmed, she is not democratically accountable to the people in her district, to Congress, or to the President. Attorneys who seek and are appointed to such positions, and who are treated with the respect and almost reverence accorded members of the federal bench, naturally tend to believe they have very good judgment, and that it is their job to employ such judgment in the cases before them. Over time, as they become accustomed to the guidelines being advisory rather than mandatory, they will substitute their individual judgment as to the best sentence in the case before them for the judgment of Congress and the Commission. This became apparent to me in one of my presentations to a large group of federal district court judges through the Federal Judicial Center. One federal district judge noted that several judges who are imposing alternative sentences are reaching similar sentences under both systems. Several other federal judges, however, made clear that their hands were tied only because jurisdictions were either bound by an appellate court case holding that *Blakely* does not apply to the Federal Sentencing Guidelines or by a moratorium on sentencing until the *Booker* and *Fanfan* decisions are rendered. When they disagree with the Commission on policy choices, that rehabilitation is not a goal of sentencing, or that family circumstances are irrelevant, for example, they will sentence accordingly.

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6 *See, e.g.*, PROTECT Act, Pub. L. No. 108-21, sec. 401(b), (g), (i) 117 Stat. 650, 668-69, 671-73 (2003) (amending guidelines regarding child pornography, curbing judicial discretion to depart downward, limiting the number of judges on the Federal Sentencing Commission to no more than three rather that at least three, and changing the appellate standard of review of criminal sentences).

7 *See* Brief of the U.S. Senate as *Amicus Curiae* in *Mistretta v. United States*, 488 U.S. 351, 366 (1989).

8 Critics and champions agree that the Federal Sentencing Guidelines have succeeded in securing adherence to the policy choices contained therein. Most criticism reflects disagreement with those policy choices, and chagrin at the heavy influence of federal prosecutors over the criminal justice system. *See* Klein Steiker, *The Search for Equality in Criminal Justice Sentencing*, 2002 Supreme Court Rev. 223 (2003) (collecting studies and commentary).

9 *See* Brief for the United States, *United States v. Mistretta*, 488 U.S. 361 (1989).

Thus, in a world of advisory guidelines we will see a marked decrease in uniformity, predictability, and proportionality of sentences -- it will again depend upon what judge a particular defendant draws.

Unfortunately, this cannot be effectively controlled through appellate review. As a practical matter, 97% of defendants plead guilty, and a large percentage of those sign appeal waivers as a condition of their pleas. More significantly, no effective basis or standard of review is possible. Under present law, the district judge must impose a sentence as set forth in the Guidelines, unless the defendant fits within the safety valve provision or the judge wishes to depart upwards or downwards.[10] The defendant and the government can both appeal on the ground that the sentence does not meet the requirements of the Guideline.[11] If the Guidelines become truly voluntary, an appellate court would have to affirm any sentence that was within the statutory maximum as provided in the U.S. Code, unless such sentence were otherwise unconstitutional.[12] Even if Congress amended 18 U.S.C. § 3742 to permit review based upon some notion of "reasonableness," this system would still affirm widely disparate sentences for similarly situated defendants. On the other hand, if appellate courts rigorously review sentences for conformity with the Guidelines, this would again give the Guidelines the force of legislatively-enacted law, and turn them back into elements of offenses under *Blakely*.[13]

The next set of proposals suffer from similar problems. Judge Paul Cassell, in one of the first post-*Blakely* cases, suggested that Congress might respond by "replacing the carefully-calibrated Guidelines with a series of flat mandatory minimum sentences."[14] Professor Frank Bowman has suggested a similar quick fix, recommending that the Commission raise the top of each Guidelines range to the current statutory maximum for the offense of conviction.[15] The first and in my opinion less important danger of these proposal is that they bring the Federal Sentencing Guidelines into compliance with the Sixth Amendment only if *Harris v. United States*, a four-one-four plurality opinion, remains good law.[16] Justice Breyer concurred in *Harris* and upheld mandatory minimum penalties against an *Apprendi* challenge after admitting that he could not distinguish *Apprendi* from *Harris* by logic, only because he had not *yet* accepted *Apprendi*.[17] As I have argued elsewhere, Justice Breyer refused to designate mandatory minimums elements of an offense because of his concern that the enhancements under the Federal Sentencing Guidelines could not be distinguished from mandatory minimums.[18] If the Guidelines, crafted in large party by Justice Breyer, were sufficiently damaged by the Court in *Booker* and *Fanfan*, he might be ready to accept *Apprendi* and reverse course on mandatory minimum. This would render the Bowman and Cassell approaches unconstitutional.

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10 *See* 18 U.S.C. § 3553(a)(4) (requiring imposition of a sentence with the Guideline range); 18 U.S.C. § 3553(b) (permitting upwards or downwards departures where the court finds there exists an aggravating or mitigating circumstance not taken into consideration by the Commission); 18 U.S.C. § 3553(f) (safety valve provision).

11 18 U.S.C. § 3742.

12 For example, the judge sentenced based upon race or religious affiliation.

13 *See, e.g.*, *Stinson v. United States*, 508 U.S. 36 (1993).

Theoretically, the judiciary could create its own internal guidelines, and appellate courts could perhaps enforce them, without legislative action. This may be permissible under *Blakely*, as both the majority and dissenters noted that the exercise of judicial discretion within wide statutory ranges is constitutional without additional factfinding by a jury.

14 *United States v. Croxford*, 2004 WL 1521560 at *21 (Dist. of Utah, July 7, 2004); 2004 WL 1551564 (Dist. of Utah, July 12, 2004).

15 Memorandum from Professor Frank O. Bowman, Indiana Univ. (copy online at Sentencing Law and Policy).

16 536 U.S. 545 (2002). Justice Scalia joined the four dissenters from *Blakely* and *Apprendi* -- Chief Justice Rehnquist and Justices Kennedy, O'Connor, and Breyer, to make up the plurality.

17 "Because applying *Apprendi* to mandatory minimums would have adverse practical as well as legal consequences, I cannot *yet* accepts its rule." *Id.*

18 *See* Susan R. Klein and Jordan Steiker, "The Search for Equality in Criminal Sentencing," 2002 SUP. CT. REV. 223, 255-61 (2003) (suggesting that the *Harris* decision is best explained not by its internal logic but by fear of its application to determinate sentencing regimes).

More importantly, such a proposal would fail to advance Congress' stated goals of uniformity and proportionality in sentences, and would likewise fail to achieve what I consider to be the great advantages of the Federal Sentencing Guidelines over the previous system -- transparency, equality, and democracy. While many judges might employ the Guidelines in an advisory manner and offer approximately the same sentence as before, many more would stick with the minimum sentence (in reaction to the widespread perception that the penalties in the Guidelines are too harsh), while others may sentence at or near the maximum provided by the U.S. Code. As in the pre-1987 days, a sentence would depend upon what judge a particular defendant drew in her case. Appellate review of this system runs into the same problems I noted for an advisory Guidelines system. If the appeal forces a judge to sentence in conformity with the Guidelines, then it runs afoul of *Blakely*. If the appeal does not mandate conformity with the Guidelines, it will be a rubber stamp and fail to ensure uniform sentences nationwide.

Finally, before I offer my own proposal, I advise against the temptation to invert the Guidelines and turn all aggravators into mitigators, thus bypassing *Blakely*. Aside from the semantical difficulties,[19] the Court made clear in *Apprendi* that if the criminal code were revised in such a manner, there would be serious doubt as to constitutionality.[20] It is perhaps for this reason that no legislature, on the state or federal levels, has amended its code in this manner to avoid *Apprendi*.

I propose that the Commission accept the Court's Sixth Amendment requirement of jury factfinding, and streamline the Manual to make this feasible. Such facts will be treated precisely as any other elements - charged in the indictment, subject to the Rules of Criminal Procedure and Evidence, and found by the jury beyond a reasonable doubt. There was no indication from the Court in *Apprendi*,[21] *Ring*,[22] or *Blakely*, and no reason grounded in history, precedent, or common sense, for the Court to create a new category of facts which are treated like elements of a criminal offense for purposes of the right to a jury trial but treated in a lesser manner for purposes of the Confrontation Clause or the Fourth Amendment.

While there is presently a 258 box grid based upon six criminal history categories and 43 offense levels, this could be relatively easily remedied. Only a small subset of enhancements are regularly employed, and many of these involve facts appropriate for jury resolution. For example, after *Apprendi* judges now send drug quantity[23] to the jury, and sending value in fraud, theft, money laundering[24] would be as simple (and is already done by civil juries determining compensatory damage awards). Chapter 3 adjustments likewise could be send for jury resolution if simplified - for example victim-related adjustments in Part A could be consolidated into a single 2 level increase; role in the offense in Part B could be consolidated into a 2 level increase or decrease. Similarly, adjustments in Chapter 2 concerning injury and gun use could be simplified into a 3 point increase. Finer gradations could be made by the judge at sentencing by increasing the discretionary range within each grid from 25 - 40%.

While some judges might bifurcate proceedings and try the aggravating elements at the end, I see no constitutional or practical reason to do so in the ordinary case. Defendants are already in the position of having to argue "I did not commit a drug trafficking offense, but if I did it was less than 150

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[19] It would be more than passing strange to structure a statute such that all defendants receive 20 years imprisonment, unless they did *not* use a gun, did *not* act with racial animus, did *not* injure a victim, etc.

[20] See King & Klein, *Essential Elements*, 54 Vanderbilt Law Rev. 1467, 1486 (2001) (quoting *Apprendi*, 120 S.Ct. at 2363, n. 16.

[21] *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

[22] *Ring v. Arizona*, 536 U.S. 584 (2002).

[23] See 21 U.S.C. § 841(b); U.S.S.G. Manual § 2D1.1,

[24] U.S.S.G. Manual § 2S1.1 (money laundering).

kilograms of cocaine," just as they have historically been required to challenge both theft and amount in distinguishing grand from petty larceny, and as they must argue "I didn't commit the offense, but if I did I wasn't predisposed" in arguing an entrapment offense in federal court.

Certain other changes would be required, but for the most part I see these as beneficial. Judges could not impose longer sentence based upon cross-referencing - the prosecutor must charge the cross-referenced crime if she wishes the judge to sentence for that crime. Prosecutors could not seek enhancements for obstruction, perjury, or intimidation of witnesses committed during trial. However, the government could instead institute contempt proceedings, or bring subsequent additional charges.[25]

The Commission could safely eliminate or retain the relevant conduct provisions - it will make little difference at trials (assuming I am correct that facts establishing relevant conduct must be treated as any other element). This is because the same conduct that was formerly used to increase the base offense level under U.S.S.G. § 1B1.3 has become new offenses after *Blakely*, and the standards for finding "relevant conduct" under U.S.S.G. Manual § 3B1.3 and for joinder of offenses under Fed. Rule of Crim. Proc. 8 are similar. Relevant conduct includes foreseeable acts of co-conspirators under 1B1.3(a)(1)(B) and counts that would group under 3D1.2(d) and which are part of the "same course of conduct or common scheme or plan" as the offense of conviction under 1B1.3(a)(2)). Rule 8 permits joinder of offenses where they "are of the same or similar character, or based on the same act or transaction, or are connected with or constitute parts of a common scheme or plan". As a practical matter, it makes no difference whether conduct is labeled "relevant conduct" or a "new offense," as both cases demand that the conduct be charged as elements in the same indictment and proven to the jury.

I hope the Commission has found this testimony to be helpful. I am now available to answer questions on these issues or any other matters of interest to the Commission.

Sincerely,

Susan R. Klein
Baker & Botts Professor in Law

[25] See Wright, King & Klein, Federal Practice and Procedure, Vol. 3A, §§ 701-720 (Criminal 3d ed., 2004) (criminal contempt); 18 U.S.C. §§ 1503, 1505-1513 (obstruction); 18 U.S.C. §§ 1621 - 1623).