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Memorandum Presenting the Case for Rapid Congressional Action in Response to *Blakely v. Washington*



Editor's Note: At the Senate Judiciary Committee July 13, 2004 hearing on "Blakely v. Washington and the Future of the Federal Sentencing Guidelines," witnesses from the Department of Justice, the U.S. Sentencing Commission, and the judiciary downplayed the seriousness of the situation and urged caution in any congressional action. Concerned that the situation in the courts was more dire than the institutional witnesses had been willing to admit, Professor Frank Bowman subsequently sent the following memorandum to the Sentencing Commission, the Justice Department and others. It analyzes the case for a prompt legislative response to Blakely, with particular emphasis on the proposal offered by Professor Bowman several days after the Blakely decision.

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 funda-

mental 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.

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. Should we layer another potentially unconstitutional system on top of the current one?

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 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 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.

Notes

- 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.