Testimony of

The Honorable Alan Vinegrad

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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.