Statement of

The Honorable Orrin Hatch

United States Senator
Utah
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"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.