Statement of

The Honorable Patrick Leahy

United States Senator
Vermont
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The Supreme Court's ruling last month in Blakely v. Washington threatens to crumble the very foundation of the Federal system of sentencing guidelines that Congress established 20 years ago in the Sentencing Reform Act of 1984. At that time, members of this Committee took the lead in crafting the Sentencing Reform Act. Today, we must revisit that landmark legislation in light of the Blakely decision.

At the start, I want to thank our witnesses for coming today to help us try to make some sense out of the Court's decision. We have two very distinguished panels of experts and I look forward to hearing the testimony.

At issue in Blakely was the constitutionality of a State sentencing system that allowed the judge to impose an "exceptional" sentence in a kidnapping case above the standard guideline range because the judge found the defendant's conduct involved "deliberate cruelty." In a 5-4 decision written by Justice Scalia, the Court held that this sentencing scheme violated the defendant's Sixth Amendment right to a jury trial because "the maximum sentence a judge may impose" can only be based on "the facts reflected in the jury verdict or admitted by the defendant."

Unfortunately, Justice Scalia's opinion raises more questions than it answers. Cogent dissents by Justice Breyer and Justice O'Connor articulate many of the critical issues that will now flood our already burdened criminal justice system, starting with whether Blakely applies to the Federal Guidelines. The Seventh Circuit and several district court judges have already ruled that Blakely dooms some if not all of the current Federal guidelines system. The Fifth Circuit held that the Guidelines survive Blakely. The Second Circuit effectively punted, certifying the question to the Supreme Court.

While we may disagree with Justice Scalia's opinion, we must recognize that a majority of the Court has spoken. Like the federal judges, prosecutors and defense attorneys who must now grapple with the scope and impact of the Blakely opinion, we in Congress are concerned.

I hope that today's hearing will be helpful. I look forward to hearing from the experts and practitioners who are testifying before us about what aspects, if any, of the Federal sentencing system can or are likely to survive the Blakely decision. We need to explore what will happen to the thousands of criminal cases that are currently pending, and to the hundreds of thousands of cases resolved pre-Blakely.

Twenty years after the enactment of the Sentencing Reform Act, we must remind ourselves about the core values and principles that explained the bipartisan popularity of the original Federal Guidelines concept. The 1984 Act was enacted against a history of racial, geographical, and other

unfair disparities in sentencing. Congress sought to narrow these disparities while leaving judges enough discretion to do justice in the particular circumstances of each individual case. The task of harmonizing sentencing policies was deliberately placed in the hands of an independent, expert Sentencing Commission.

The Guidelines as originally conceived were about fairness, consistency, predictability, reasoned discretion, and minimizing the role of congressional politics and the ideology of the individual judge in sentencing. Blakely threatens a return to the bad old days of fully indeterminate sentencing when improper factors such as race, geography and the predilections of the sentencing judge could drastically affect the sentence. While I favor Federal judges exercising their discretion to do individual justice in individual cases, I do not want to see a return to the bad old days.

We must also avoid moving too far in the other extreme. In recent years, Congress has seriously undermined the basic structure and fairness of the Federal Guidelines system with posturing and ideology. There has been a flood of legislation establishing mandatory minimum sentences for an ever-increasing number of offenses, determined by politics rather than any systemic analysis of the relative seriousness of different crimes.

There has been ever-increasing pressure on the Sentencing Commission and on individual district court judges to increase Guidelines sentences. This culminated in the PROTECT Act, in which this Congress cut the Commission out altogether and rewrote large sections of the Guidelines Manual, and also provided for a judicial "black list" to intimidate judges whose sentences were insufficiently draconian to suit the current Justice Department.

We are all familiar with the assault on judicial independence known as the Feeney Amendment to the PROTECT Act. The Feeney Amendment was forced through the Congress with virtually no debate, and without meaningful input from judges or practitioners. That process was particularly unfortunate, given that the majority's justification for the Feeney Amendment - a supposed "crisis" of downward departures - was unfounded. In fact, downward departure rates were well below the range contemplated by Congress when it authorized the Federal Sentencing Guidelines, except for departures requested by the government. But having a false factual predicate for forcing significantly flawed congressional action has become all too familiar during the last few years.

The attitude underlying too many of these recent developments seems to be that politicians in Washington are better at sentencing than the Federal trial judges who preside over individual cases, and that longer sentences are always better. Somewhere along the line we appear to have forgotten that justice is not just about treating like cases alike; it is also about treating different cases differently.

Blakely raises real practical problems that unfortunately threaten to clog our Federal courts with procedural and constitutional nightmares. But we can use it as a springboard to discuss Federal sentencing practices thoughtfully. As we analyze Blakely's implications, we are well advised to keep the simple principles of the 1984 Act in mind. We must respect the wisdom and good faith of Federal judges, while maintaining the safeguards of structure and transparency to their

exercise of discretion. We must remember that consistency and predictability to sentencing are admirable goals. And we must avoid the further politicizing of sentencing.

I look forward to working with the Chairman and other interested Members of this Committee and with our counterparts in the House.