Testimony of

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Blakely v. Washington and the Future of the Federal Sentencing Guidelines

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Mr. Chairman and Members of the Committee: Thank you for inviting me to testify before you today on the Supreme Court's recent decision in Blakely v. Washington and its implications for the Federal Sentencing Guidelines. It is an honor to appear before you to discuss this important issue.

In Blakely v. Washington, the Supreme Court reminded all of us that the criminal jury is "no mere procedural formality, but a fundamental reservation of power in our constitutional structure." "Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary." America's citizens have never lost sight of the jury's value. More than three-quarters of those polled believe that the criminal jury provides the fairest way of determining guilt or innocence.

This hearing is, at its core, about the importance of the criminal jury. America's commitment to the criminal jury system is and should be a source of great pride. Before the state can take away someone's liberty and label him a criminal, it must obtain the approval of ordinary citizens - citizens who perform a civic duty and ensure that justice is done. The jury system shows America's great respect for its people and the values of its communities. It is one of the cornerstones of our constitutional structure, and we should all strive to maintain its vitality. Because the Sentencing Guidelines in their current form bypass the important check of the people and violate the Sixth Amendment of the Constitution, reforming them should be an urgent priority.

In these comments I will offer a reform proposal that preserves the criminal jury's role and furthers the goals of the Sentencing Guidelines.

To briefly summarize my conclusions, I recommend that Congress take the following actions: First, Congress should immediately, as an interim measure, make the Guidelines advisory and not legally binding. This will give Congress and the Sentencing Commission sufficient time to devise a sound alternative while respecting and preserving the Constitution's jury guarantee in the meantime. Second, Congress should direct the Sentencing Commission, after notice and comment, to identify those Guidelines factors that are sufficiently important that they should trigger, as a matter of federal law, a sentence enhancement of a specified length. Any factor of such importance is required, by the Constitution, to be treated as an offense element to be found

beyond a reasonable doubt by a jury. Only after the jury makes such a finding can the increased punishment be imposed.

Given the need to keep trials manageable, I would expect - and Congress could insist - that the Sentencing Commission refrain from singling out too many factors to be treated as offense elements. Those Guidelines factors not identified as offense elements could then become part of an advisory Guidelines regime. But they could no longer trigger mandated punishment on the basis of a judge's findings because it is the jury's role to make such findings.

My statement will proceed in four parts. First, I would like to start by explaining what animated the Court's decision in Blakely, namely the fundamental importance of the criminal jury in our constitutional government. Second, I will describe the Supreme Court's decision in Blakely, as well as the related decisions leading up to Blakely. The constitutional analysis in these cases seems to apply to the Sentencing Guidelines in their current form, and, in fact, many lower courts have already concluded that the Guidelines are unconstitutional under Blakely's reasoning. Third, after setting out the constitutional framework, I will describe what I believe to be the best approach for reforming the Guidelines in light of this background. Finally, I will explain why other recommendations for modifying the Guidelines either run afoul of the Constitution or undermine the purpose of having guidelines in the first place.

I. The Enduring Importance of the Criminal Jury

The criminal jury has been a cornerstone of our government since the Nation's founding. Denial of the right to trial by jury was one of the core grievances that led to the American Revolution, and the right to trial by jury was one of the first to be enshrined in the Constitution. Even before the addition of the Bill of Rights, the Constitution provided that "the trial of all Crimes . . . shall be by Jury." Indeed, the right to jury trial in criminal cases was one of the rare subjects on which all the Framers - both the Federalists and the Antifederalists - agreed. As Alexander Hamilton noted, "[t]he friends and adversaries of the plan of the convention, if they agree in nothing else, concur at least in the value they set upon the trial by jury." The Federalists called the jury "a valuable safeguard to liberty" and the Antifederalists viewed the jury as "the very palladium of free government."

Alexis de Tocqueville observed that "[t]he jury system as it is understood in America appears to me to be as direct and as extreme a consequence of sovereignty of the people as universal suffrage." Thomas Jefferson felt the jury was so critical that he claimed, "[w]ere I called upon to decide whether the people had best be omitted in the Legislative or Judiciary department, I would say it is better to leave them out of the Legislative."

The Framers of our Nation held the criminal jury in high esteem because it provides a valuable check against state abuse and places it where it belongs: in the people themselves. This is critical in criminal proceedings, where the danger of state abuse is especially high and the consequences especially grave. The jury stands as a barrier between the state and the individual, ensuring that that no one will lose his or her liberty if it would be contrary to the community's sense of fundamental law and equity.

"On many occasions," the Supreme Court has observed, "fully known to the Founders of this country, jurors - plain people - have manfully stood up in defense of liberty against the importunities of judges and despite prevailing hysteria and prejudices." "[T]he premise underlying the constitutional method for determining guilt or innocence in federal courts is that laymen are better than specialists to perform this task."

Given its history and value, it is no wonder that the criminal jury continues to enjoy broad support from the American people. Polls have found that 78 percent of Americans believe the "[t]he jury system is the most fair way to determine the guilt or innocence of a person accused of a crime." Sixty-nine percent believe that "[j]uries are the most important part of our judicial system."

In order to preserve this critically important part of our heritage and ensure that the jury continues to act as a barrier between the accused and the state, the jury must retain the authority to apply all laws that peg criminal punishment to particular findings of fact. And, indeed, that was the system we had for virtually all of the Nation's history. If a law mandated that a specific punishment was to be imposed upon the finding of a given set of facts, that punishment could be imposed only after the jury found those facts beyond a reasonable doubt and concluded that the law properly applied. If a law established that a given set of facts could lead to a range of punishment, judges could sentence anywhere within the range, but only after the jury determined beyond a reasonable doubt that the law setting the range properly applied to a defendant's case.

II. Distinguishing Offense Elements and Sentencing Factors: The Supreme Court's Cases

When Congress sought to reform federal sentencing by passing the Sentencing Reform Act of 1984, its focus was on reigning in judges, not juries. In particular, Congress was troubled by the fact that the broad sentencing ranges established by many statutes gave judges too much discretion, which led to unjust disparity and weakened deterrence. The Sentencing Commission was therefore charged with establishing Guidelines that would guide the discretion of judges, not with eliminating the jury's traditional power in criminal cases. Congress and the Commission gave little, if any, thought to what the new sentencing laws would mean for the jury. And when the Supreme Court initially passed upon the constitutionality of the Sentencing Guidelines in Mistretta v. United States, it also did not consider the effect of the Guidelines on the criminal jury's constitutional power.

It was not until 2000, when the Supreme Court issued its decision in Apprendi v. New Jersey, that the Guidelines' encroachment on the jury's power began to draw the attention of the Court. Apprendi involved a state statute that allowed a judge to increase a defendant's sentence if he or she found that the defendant committed a crime with a biased purpose. Under this "hate-crime" statute, a judge could increase a sentence even above the statutory maximum for the underlying conviction because the enhancement was deemed a sentencing factor, not an offense element.

The Court concluded that "when the term 'sentencing enhancement' is used to describe an increase beyond the maximum authorized statutory sentence, it is the functional equivalent of an element of a greater offense than the one covered by the jury's guilty verdict." Accordingly, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable

doubt." The Court explained that "[t]he degree of criminal culpability the legislature chooses to associate with particular, factually distinct conduct has significant implications both for a defendant's very liberty, and for the heightened stigma associated with an offense the legislature has selected as worthy of greater punishment." According to Apprendi, it is the jury's function to ensure that such laws properly apply to a defendant.

Although the majority emphasized that it was not passing judgment on the Sentencing Guidelines," the dissent argued that the majority's analysis would lead to their demise. According to the dissent, the Court's reasoning would apply "to all determinate-sentencing schemes in which the length of a defendant's sentence within the statutory range turns on specific factual determinations (e.g., the federal Sentencing Guidelines)."

The Court revisited the offense element/sentencing factor issue again in its 2002 Term. In Ring v. Arizona, the Court considered the Arizona death penalty scheme, which required a judge to find an aggravating factor before the death penalty could be imposed. The Court struck down the statute, again reasoning that "[i]f a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact - no matter how the State labels it - must be found by a jury beyond a reasonable doubt."

That same Term, the Court decided Harris v. United States, in which five Justices allowed facts triggering mandatory minimum sentences to be found by judges, not juries. The five Justices who reached that decision, however, did so for different reasons. Only four Justices believed that result was consistent with Apprendi. Justice Breyer provided the fifth vote to allow mandatory minimum sentences, but he could see no logical basis for distinguishing Apprendi. In his view (and the view of the four dissenting Justices in Harris) there was no distinction between facts increasing the minimum of a sentencing range and facts increasing the maximum. Justice Breyer accepted the mandatory minimum scheme in Harris only because he stated he "cannot yet accept" Apprendi's rule. Thus, despite its bottom line, Harris provided additional grounds for believing that Apprendi's logic extended to the Guidelines.

The strongest case casting doubt on the constitutionality of the Guidelines is, of course, Blakely. The same five Justices who formed the majority in Apprendi - Justices Stevens, Scalia, Souter, Thomas, and Ginsburg - concluded that the Washington State sentencing guidelines scheme violated the Constitution's jury guarantee. The defendant, Blakely, had entered a plea of guilty to a kidnapping offense that carried a maximum penalty of ten years. But that was not the only law that governed sentencing in Blakely's case. Washington passed a Sentencing Reform Act in 1981 that created a grid of presumptive sentences based on the seriousness of the offense and the criminal history of the offender. That sentencing law dictates that a judge is required to impose a sentence within the standard ranges set out in the grid unless the judge finds "'substantial and compelling reasons justifying an exceptional sentence.'" The Act also provides factors that may justify an exceptional sentence. Under the grid, Blakely could receive a maximum sentence of 53 months. The judge, however, sentenced Blakely to 90 months, relying on one of the enumerated factors for an exceptional sentence.

Blakely argued that the sentencing enhancement violated the jury guarantee, and the Supreme Court agreed. The Court rejected the State of Washington's argument that the enhancement was acceptable because it was well within the 10 year maximum for the kidnapping offense to which

Blakely pleaded guilty. The Court reasoned as follows: "Our precedents make clear . . . that the 'statutory maximum' for Apprendi purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant."

The importance of the jury in our constitutional government animated the Court's decision. "The jury," the Court stated, "could not function as a circuitbreaker in the State's machinery of justice if it were relegated to making a determination that the defendant at some point did something wrong, a mere preliminary inquiry to a judicial inquisition into the facts of the crime the State actually seeks to punish."

Although the Court again cautioned that it was not passing judgment on the constitutionality of the Federal Sentencing Guidelines, the dissent warned that the Court's opinion "casts constitutional doubt" over all sentencing guideline regimes, including the federal one. Moreover, Blakely has prompted courts across the country to conclude that the Guidelines do, in fact, unconstitutionally interfere with the criminal jury. The Seventh Circuit, in an opinion by Judge Posner, noted that the federal Guidelines follow the same pattern as the Washington sentencing regime and "it is hard to believe that the fact that the guidelines are promulgated by the U.S. Sentencing Commission rather than by a legislature can make a difference." As Judge Paul Cassell stated, "the inescapable conclusion of Blakely is that the federal sentencing guidelines have been rendered unconstitutional" in cases in which the Guidelines mandate an increase in a defendant's sentence on the basis of facts not found by the jury or to which the defendant has not pleaded guilty.

III. Reforming the Guidelines and Preserving the Jury

It is clear, in light of the criminal jury's constitutional role and the Supreme Court's cases, that the federal Sentencing Guidelines must be revised in fundamental respects. Because this is such an important and enormous undertaking, this is not an overhaul that should be done in haste.

Accordingly, I recommend a bifurcated approach to reforming the Guidelines, one that provides both an immediate interim solution and a longer-term resolution of the Guidelines' constitutional problems.

A. The Short Term Solution: Strip the Guidelines of Legal Force

The Guidelines in their current form are plainly unconstitutional and an affront to the jury's constitutional role. The Guidelines require a multitude of sentencing increases based on facts not currently found by juries and under a preponderance of the evidence standard.

It is important to note at the outset that the reason the Guidelines are replete with judge-made increases based on facts outside the charged offense is not because of any decision of Congress. Congress never mandated or even suggested the current structure of the Guidelines. Rather, it was the Sentencing Commission, on its own, that decided that the Guidelines should adopt a modified version of so-called "real" offense sentencing as opposed to "charge" offense sentencing. Under a charge offense system, punishments are keyed to the offense for which the defendant was convicted. Under real offense sentencing, in contrast, punishment is not tied

directly to the offense for which the defendant was convicted but is based instead on what the defendant "really" did.

Of course, our constitutional system is based on the ideal that it is for the jury to decide, beyond a reasonable doubt, what the defendant "really" did. To have judges - agents of the state - make such a determination based on a preponderance of the evidence standard is to render the jury a nullity. But the Sentencing Commission nevertheless decided that judges could make such determinations. In particular, the Commission opted for a modified real offense sentencing scheme in which the charged offense is but one factor that can determine the presumptive guideline sentence. Relevant conduct that has not been charged - indeed, relevant conduct that has been charged but of which the defendant has been acquitted - can also determine the base offense level under the Guidelines and can lead to upward adjustments and upward departures. Relevant conduct in many cases is the primary determinant of the length of a defendant's sentence and the charged offense plays a minor role.

Even before the Apprendi line of cases, judges and scholars expressed outrage over the Commission's decision to use this real offense sentencing model. And, notably, no state sentencing commission made the same choice in devising their guidelines.

After Apprendi and Blakely, it should be clear that the Commission's decision to use real offense sentencing factors can no longer stand. Moreover, because this modified real offense sentencing approach forms the backbone of the entire Guidelines design, it is impossible to separate those factors from the rest of the scheme and be left with anything resembling coherence. As Judge Cassell has noted, once the Guidelines are stripped of those provisions that violate the jury guarantee, applying what is left would distort the Guidelines and could result in a regime that is unfair to the government.

Accordingly, I recommend that Congress waste no time in rendering the Guidelines in their entirety advisory only. Congress never mandated or advised that the Commission use relevant conduct in the way that it has, and the Supreme Court has made clear that the practice must end. As long as they have the force and effect of binding laws, the Guidelines as currently promulgated demean our jury system and undermine our criminal process.

B. The Long Term Solution: Defining Offense Elements

Although making the Guidelines advisory will provide a short term solution to their constitutional problems, it is an insufficient solution for the long term. That is because purely advisory Guidelines could put us back to where we were before the Sentencing Reform Act was passed. It does not follow automatically, of course, because federal judges in the pre-Guidelines world had little knowledge of what other judges were doing, and a set of voluntary guidelines could bridge the information gap.

Nevertheless, it seems likely that a purely advisory system will lead to too much disparity and uncertainty. Moreover, there are some sentencing factors that should not be left to unbounded judicial discretion but instead should mandate an increase in a defendant's sentence as a matter of law.

Thankfully, there is a solution that fully complies with the Constitution while also curbing unwarranted disparity and imposing sentences that reflect the seriousness of a crime. Nothing in the Constitution or the Supreme Court's opinions prevents Congress from identifying those facts that should result in increased punishment. What the Constitution and the Supreme Court require is that any facts so identified be found by a jury on the basis of proof beyond a reasonable doubt.

Congress, therefore, should seek to identify what sentencing factors in the Guidelines should become offense factors to be decided by juries. This is, admittedly, not a small task because the Guidelines contain a multitude of sentencing factors. Because not all of the Guidelines are of sufficiently fundamental importance to warrant retention as offense elements and because jury trials could become unmanageable if all such factors became offense elements, Congress should attempt to single out the most important ones. In conducting this inquiry, Congress should make use of the Commission's expertise and wealth of data. Specifically, Congress should order the Commission, after notice and comment, to recommend those factors it believes Congress should deem offense elements. The ultimate decision, however, would rest with Congress.

Once these factors are identified as offense elements, they can be incorporated into existing criminal procedure with ease. They would be charged in the indictment and if a defendant did not stipulate to them in a plea bargain, juries would need to find them beyond a reasonable doubt. If necessary, some of these factors can be determined in a bifurcated proceeding.

Kansas provides a helpful illustration of how simple this model is to apply. In 2001, the Kansas Supreme Court issued a decision along the lines of Blakely, holding that aggravating facts under the Kansas Sentencing Guidelines must be found by juries, not judges. The legislature complied with the decision by establishing a procedure that requires juries to find those facts beyond a reasonable doubt in a bifurcated proceeding.

Those factors currently in the Sentencing Guidelines that are not singled out as offense elements would remain advisory factors, for a sentencing judge to consider in a particular case as he or she deems appropriate. If, over time, the Sentencing Commission observes a lack of judicial attention to certain factors, it can then recommend to Congress that those factors also be deemed offense elements.

To the extent there are any doubts about this approach to sentencing, Congress need look no further than the states to see how successful it can be. My proposal essentially mirrors the approach already taken by states with sentencing guidelines. These states have not opted to rely on a real offense sentencing model that seeks to have judges find what a defendant "really" did. Instead, states with sentencing guidelines have used the offense of conviction and the defendant's criminal history to set guideline ranges. States have singled out only a few additional aggravating factors.

These state sentencing models are widely viewed as superior to the federal system because they have brought about equity and proportionality without creating a needlessly rigid regime that undercuts the jury. Blakely presents Congress and the Commission with a prime opportunity to learn and benefit from these successful state schemes.

IV. Concerns Raised by Other Approaches

Because Congress is likely to consider a variety of possibilities for reforming the Guidelines, I would like to conclude by noting the shortcomings of what I see as the main alternatives.

A. Replacing Guideline Ceilings with Statutory Maximums

In a memorandum to the Sentencing Commission, Professor Frank Bowman has advanced a proposal that would increase the top of each Guideline range to the statutory maximum of the offense(s) of conviction. The defendant's minimum sentence, however, would continue to be set by the Guidelines. Under one iteration of this proposal, the judge could sentence a defendant anywhere above the Guidelines floor, without giving a reason and without facing appellate review. Another variant of the proposal would require the judge to provide a reason for the particular sentence selected, and there would be some kind of appellate review for abuse of discretion.

This proposal has as its top priority the preservation of the Guidelines. But as discussed above, the Guidelines plainly undercut the jury's fundamental role. The criminal jury is not something that should be bypassed through clever drafting. It is the bedrock of our constitutional structure, and Americans overwhelmingly support it. Any proposal should have as its first goal the preservation of the jury guarantee - yet this proposal erodes the jury's authority even further.

Under this proposal, judges would still be required to increase a defendant's sentence on the basis of so-called "real offense" sentencing factors - factors the jury never found beyond a reasonable doubt and even factors of which the defendant was acquitted. The only difference is that now these increases would be capped in all cases by the statutory maximum for the convicted offense and the Guidelines themselves would no longer provide a different ceiling. Thus, a judge would be free to increase a defendant's sentence even above the prior Guidelines ceiling. If anything, then, this proposal exacerbates the existing constitutional problems.

The rationale behind the proposal is that it will bring the Guidelines within the loophole created by Harris because no matter how much a defendant's sentence is increased as a matter of law, in no event will the defendant's maximum sentence change.

Congress should flatly reject this proposal as unconstitutional. As I have expressed elsewhere, I believe that Members of Congress take seriously their oath to uphold the Constitution. In this instance, obeying the oath requires rejection of Professor Bowman's proposal because it unconstitutionally interferes with the jury guarantee. Apprendi made clear that "it is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed." A range is increased either by raising its upper limit or its lower one. In both instances, "[t]he degree of criminal culpability the legislature chooses to associate with particular, factually distinct conduct has significant implications both for a defendant's very liberty, and for the heightened stigma associated with an offense the legislature has selected as worthy of greater punishment."

That is why five Justices - a majority of the Court - stated in Harris that Apprendi's logic applies to factors that increase a minimum sentence just as it does to factors that increase a maximum sentence. Congress cannot ignore the logic of Apprendi without defying its independent obligation to uphold the Constitution.

Moreover, it is far from clear that the same five Justices that approved of the mandatory minimum law in Harris would uphold this proposal. One of the votes upholding the defendant's sentence in Harris was Justice Breyer's. As noted, Justice Breyer stated that Apprendi's logic applied, but he was not yet prepared to accept the outcome of Apprendi because he "believe[d] that extending Apprendi to mandatory minimums would have adverse practical, as well as legal consequences." Justice Breyer was concerned that taking Apprendi to its logical conclusion would lead to the destruction of the Sentencing Guidelines. Now that Blakely makes that all but a foregone conclusion, the premise of Justice Breyer's vote in Harris is undermined. Accordingly, it is uncertain if not unlikely that Justice Breyer would accept a modification of the Guidelines along the lines suggested by Professor Bowman.

Justice Scalia may also disapprove of the proposal. He joined the plurality opinion in Harris, but he also joined the Court's opinion in Apprendi. The Court's opinion in Apprendi makes clear that, if a legislature revised the its criminal code in an attempt to duck the Court's rule, the Court would then "be required to question whether the revision was constitutional under this Court's prior decisions" There was no evidence in Harris that Congress enacted the mandatory minimum provision with any intent to bypass the criminal jury. In contrast, there is no other reason for adopting Professor Bowman's proposal. The Court is likely to view the two situations very differently.

The unconstitutionality of this proposal should make it a dead letter. But it is fundamentally flawed in a second respect. It also undermines the reasons for having guidelines in the first place and would have disastrous policy consequences. Under this proposal, a judicial decision to sentence a defendant below the Guidelines floor would be subject to de novo appellate review while a decision to increase a sentence above the floor would be subject either to no review or abuse of discretion review. This asymmetry has no rational basis and would lead to precisely the kind of unwarranted disparity the Guidelines were intended to eliminate.

There was a good reason behind the Sentencing Reform Act's mandate that the maximum sentence for each range would not exceed the minimum by more than the six months or 25 percent, whichever is greater. Sentencing ranges were narrowed precisely because the existing statutory ranges were seen as too broad and creating too much disparity. This proposal would recreate the potential for unwarranted disparity. The only difference is that this proposal would also serve to increase sentences. But there is no evidence that an across-the-board increase of Guidelines sentences is justified or wise. It would be unnecessarily costly and unjust to introduce such a scheme without some showing that sentences need to be increased to effectuate the purposes of punishment.

Indeed, it goes against the entire purpose and structure of the Guidelines to engage in such asymmetric manipulation. Judge Cassell has eloquently explained the dangers of an approach that favors departures in one direction. To paraphrase his opinion, under such a scheme the government would be able to say to each defendant, "'what's mine is mine, what's yours is negotiable.'" This undercuts the entire premise of the Guidelines, which, as Judge Cassell explains, "are a holistic system, calibrated to produce a fair sentence by a series of both downward and upward adjustments." Judge Cassell cautions against "look[ing] at only one half of the equation," as Professor Bowman's proposal does, because it would inevitably pull criminal

sentences in one direction. In this case, sentences would be pulled ever upward, and there is no reason to believe the resulting punishment would be either just or rational. Judge Cassell states that "[t]he Congress would never have adopted such a one-sided approach." It certainly should not do so now.

B. Enacting Additional Mandatory Minimum Sentencing Laws

Another proposal that may arise is one that relies on the enactment of additional mandatory minimum sentencing laws. This option may be considered because of the loophole that Harris seems to create. Any such suggestion should be rejected for the same reasons that Congress should reject Professor Bowman's proposal. Indeed, this option is significantly worse.

First, it raises the same constitutional problems. As noted, five Justices in Harris agree that Apprendi's constitutional analysis applies to factors that increase a minimum sentence just as it does to factors that increase a maximum sentence. An attempt to use mandatory minimum sentencing laws to evade the jury's constitutional province will undoubtedly cause the Court to view them with a skeptical eye.

Second, this option would result in practical consequences that are even more troublesome than Professor Bowman's proposal. Mandatory minimums have been criticized by almost everyone concerned with sentencing policy, from the Honorable Chairman of this Committee to the Sentencing Commission, judges, and scholars. I will not attempt to catalog all those criticisms in these brief comments. But the criticisms highlight mandatory minimums' inequity and inconsistent application, which undermine the goals of uniformity and certainty. And because mandatory minimums create an even greater asymmetry, they exacerbate the problems caused by Professor Bowman's proposal.

C. Instituting Permanent Voluntary Guidelines

Another possible approach to the constitutional infirmities of the Guidelines is to make them advisory in their entirety on a permanent basis. As discussed above, this proposal is problematic.

First, we do not yet have sufficient evidence that a purely voluntary guidelines system adequately would eliminate unwarranted disparity. Although compliance with voluntary guidelines could be high enough to produce such a result, it is at least doubtful and certainly premature to reach that conclusion at this point. At a minimum, voluntary guidelines should undergo a trial period in which the rate of compliance is monitored. Only then should permanent voluntary guidelines be considered.

Second, voluntary guidelines would lead to greater uncertainty in punishment. The more uncertain the punishment, the weaker the deterrent effect of a law. While this may be acceptable for some existing guideline factors, there are many factors that are too important to be deemed "advisory." Those factors should be singled out and made offense elements that are determined by a jury, beyond a reasonable doubt.

V. Conclusion

As the Court noted in Blakely:

The Framers would not have thought it too much to demand that, before depriving a man . . . of his liberty, the States should suffer the modest inconvenience of submitting its accusation to the "unanimous suffrage of twelve of his equals and neighbours," rather than a lone employee of the State.

I look forward to a return to the Framers' vision and a reinvigoration of the criminal jury, one of America's finest institutions and one that its citizens still zealously revere.

Thank you again for allowing me to testify and share my thoughts on this fundamentally important area of criminal justice. I would be happy to answer any questions that you might have.