Testimony of Frank O. Bowman, III*

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A Counsel of Caution

I. Introduction

I am grateful to the Subcommittee for the opportunity to testify today regarding the impact on the federal sentencing system of the U.S. Supreme Court's recent decision in *United States v. Booker*, __ U.S. __, 125 S.Ct. 738 (Jan. 12, 2005), and the nature of an appropriate congressional response to that decision. I appear today primarily in my individual capacity, but also as a representative of the Sentencing Initiative of the Constitution Project.

The Constitution Project is a bipartisan, nonprofit organization that seeks consensus-based solutions to difficult legal and constitutional issues through study, consultation, and policy advocacy. Last summer, in response to the Supreme Court's decision in *Blakely v. Washington*, __ U.S. __, 124 S.Ct. 2531 (June 24, 2004), the Constitution Project created the Sentencing Initiative, a group co-chaired by former Attorney General Edwin Meese, now of the Heritage Foundation, and Philip Heymann, James Barr Ames Professor of Law at Harvard and former Deputy Attorney General of the United States. The members of the group represent a broad cross-section of institutional interests and political views. Professor David Yellen of Hofstra University and I are reporters to the Sentencing Initiative. Attorney General Meese and Professor Heymann have already forwarded a letter to Chairman Sensenbrenner expressing the consensus of the Constitution Project group that Congress should respond to the *Booker* opinion with caution. The Constitution Project anticipates issuing a more detailed report addressing the state of the federal sentencing system, the impact of *Blakely* and *Booker*, and recommendations about how the system might be improved.

I agree wholeheartedly with the position expressed in the Constitution Project letter and will be happy to answer any questions about the letter and the ongoing work of the Constitution Project's Sentencing Initiative. That said, the particulars of the analysis contained in the remainder of this testimony represent my personal views and not those of the Constitution Project's Sentencing Initiative or any of its members.

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II. From *Blakely* to *Booker*

This is the second time in the past seven months that I have had the honor of appearing before this Subcommittee. On July 6, 2004, I testified about H. 4547, a bill involving drug crime, and about the impact of the immediate predecessor to the *Booker* decision, *Blakely v. Washington*, __ U.S. __, 124 S.Ct. 2531 (June 24, 2004).[1] On that occasion, and again the following week in the Senate Judiciary Committee,[2] I analyzed the *Blakely* opinion, concluded that it probably rendered the Federal Sentencing Guidelines unconstitutional as then applied, and offered a proposal to cure the apparent constitutional defect.[3] That proposal, sometimes referred to colloquially as "topless guidelines," and other suggested responses to *Blakely* have been the subject of ongoing debate. Today, in the wake of *Booker*, I find myself in the curious position of recommending that Congress not do what I recommended that it should do after *Blakely*. In short, along with the other members of the Constitution Project, I urge Congress to be cautious, to monitor the effects of the *Booker* decision on the operation of federal sentencing, and not to legislate unless and until it is clear that legislation is absolutely necessary and that any proposed legislation will withstand constitutional scrutiny.

My views on what Congress should do have changed because the *Booker* decision changed the legal landscape in ways that virtually no one anticipated. The balance of this testimony is devoted to explaining *Booker*'s surprising outcome and its implications for sentencing policy.

A. *Blakely v. Washington*

The legal tempest that brings us here today began on June 24, 2004, with *Blakely v. Washington*. The case involved a challenge to the Washington state sentencing guidelines. In Washington, a defendant's conviction of a felony produced two immediate sentencing consequences -- first, the conviction made the defendant legally subject to a sentence within the upper boundary set by the statutory maximum sentence

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[1] *Defending America's Most Vulnerable: Safe Access to Drug Treatment and Child Protection Act of 2004, Hearing on H.R. 4547 Before the Subcommittee on Crime, Terrorism, and Homeland Security, House Comm. on the Judiciary*, 108th Cong. (2004) (testimony of Frank O. Bowman, III), *available at* http://www.house.gov/judiciary/bowman070604.pdf.

[2] *Blakely v. Washington and the Future of the Federal Sentencing Guidelines, Hearing Before the Senate Comm. on the Judiciary*, 108th Cong. (2004) (testimony of Frank O. Bowman, III), *available at* http://judiciary.senate.gov/testimony.cfm?id=1260&wit_id=647.

[3] The most completely developed version of the proposal appears in my written Senate testimony, *id.* *See also*, Frank O. Bowman, III, *A Proposal for Bringing the Federal Sentencing Guidelines Into Conformity with Blakely v. Washington*, 16 FED. SENT. REP. 364 (2004). For critiques of the proposal, see *Blakely v. Washington and the Future of the Federal Sentencing Guidelines, Hearing Before the Senate Comm. on the Judiciary*, 108th Cong. (July 13, 2004) (testimony of Rachel Barkow), *available at* http://judiciary.senate.gov/testimony.cfm?id=1260&wit_id=3684; *Id.* (testimony of Ronald Weich), *available at* http://judiciary.senate.gov/testimony.cfm?id=1260&wit_id=3685. *See also*, Douglas Berman, "The 'Bowman Proposal': White Knight or Force of Darkness?," *available at* http://sentencing.typepad.com/sentencing_law_and_policy/2004/07/white_knight_or.html, and other critiques posted or referenced on Professor Berman's invaluable blog, Sentencing Law & Policy, http://www.sentencing.typepad.com.

for the crime of conviction, and second, the conviction placed the defendant in a presumptive sentencing range set by the state sentencing guidelines. This guideline range was within the statutory minimum and maximum sentences. Under the Washington state sentencing guidelines, a judge was entitled to adjust this range upward, but not beyond the statutory maximum, if after conviction the judge found certain additional facts. For example, Blakely was convicted of second degree kidnapping with a firearm, a crime that carried a statutory maximum sentence of ten years. The fact of conviction generated a "standard range" of 49-53 months; however, after conviction, the judge found that Blakely had committed the crime with "deliberate cruelty," a statutorily enumerated factor that permitted imposition of a sentence above the standard range, and imposed a sentence of ninety months. The U.S. Supreme Court found that imposition of the enhanced sentence violated the defendant's Sixth Amendment right to a trial by jury.

In reaching its result, the Court relied on a rule it had announced four years before in *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000): "Other 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." In the years following *Apprendi*, most observers assumed that *Apprendi's* rule applied only if a post-conviction judicial finding of fact could raise the defendant's sentence higher than the maximum sentence allowable by statute for the underlying offense of conviction. For example, in *Apprendi* itself, the maximum statutory sentence for the crime of which Apprendi was convicted was ten years, but under New Jersey law the judge was allowed to raise that sentence to twenty years if, after the trial or plea, he found that the defendant's motive in committing the offense was racial animus. The Supreme Court held that increasing Apprendi's sentence beyond the ten-year statutory maximum based on a post-conviction judicial finding of fact was unconstitutional.

In *Blakely*, however, the Supreme Court found that the Sixth Amendment can be violated even by a sentence below what we had always thought of as the statutory maximum. Writing for a five-member majority, Justice Scalia held 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*."[4] Any fact that had the effect of increasing this newly defined "statutory maximum" must be found by a jury.

Accordingly, the Federal Sentencing Guidelines seemed to violate the *Blakely* rule. A defendant convicted of a federal offense is nominally subject to any sentence between the minimum and maximum sentences provided by statute; however, under the Guidelines, the actual sentence which a judge may impose can only be ascertained after a series of post-conviction findings of fact. The maximum guideline sentence applicable to a defendant increases as the judge finds more facts triggering upward adjustments of the defendant's offense level. In their essentials, therefore, the Federal Sentencing Guidelines are indistinguishable from the Washington guidelines struck down by the Court.

[4] Blakely v. Washington, 124 S. Ct. 2531, 2537 (2004) (emphasis in the original).

Although in *Blakely* the Supreme Court reserved ruling on the applicability of its holding to the federal guidelines, the obvious implications of the opinion for the guidelines caused immediate consternation. Within weeks after *Blakely*, dozens of federal trial and appellate courts issued opinions on whether it affected the federal sentencing system, and if so how. A legion of commentators added their voices to the conversation.[5] From this cascade of analysis, three basic possibilities seemed to emerge.

First, the Department of Justice and a number of courts of appeals contended that the federal sentencing system should survive *Blakely* intact. They attempted to distinguish the federal system from the Washington state system at issue in *Blakely* because Washington's guideline sentencing ranges were set by statute while the federal guidelines were drafted by a sentencing commission.

Second, some courts and commentators suggested that the Supreme Court could "*Blakely*-ize" the federal guidelines by holding that their sentencing rules survive, but requiring substitution of a system of jury trials and jury waivers for the structure of post-conviction judicial fact-finding and appellate review created by the Sentencing Reform Act.

Third, other courts and commentators argued that the Guidelines' sentencing rules cannot be severed from the procedure of post-conviction judicial fact-finding contemplated by the Sentencing Reform Act and formalized in the Guidelines. In this view, *Blakely* rendered the Guidelines unconstitutional *in toto*. The practical effect of such a ruling was thought to be that the Guidelines would become either wholly void and legally nugatory or at most advisory.

My reaction to these three apparent options was that the first was logically unsupportable and the latter two were practically undesirable. First, it seemed unlikely that the Supreme Court would distinguish the federal system from the Washington state system based on the institution that drafted the sentencing rules.

Second, judicial "*Blakely*-ization" of the existing federal guidelines was not an attractive prospect. It would require the courts, the Sentencing Commission, and Congress to reconfigure the entire process of adjudicating and sentencing criminal cases, from the Guidelines themselves to indictment and grand jury practice, discovery, plea negotiation practice, trial procedure, evidence rules, and appellate review. The simple fact is that the current Guidelines were never meant to be administered through jury trials. Trying to engraft them onto the jury system would be both a practical and theoretical nightmare.

Finally, the possibility that the Court would void the Guidelines entirely or declare them in some sense advisory seemed equally unattractive. Having no guidelines at all

[5] For discussion of the *Blakely* opinion and lower federal court opinions construing it, see Frank O. Bowman, III, *Train Wreck? Or Can the Federal Sentencing System Be Saved" A Plea for Rapid Reversal of Blakely v. Washington*, 41 AMER. CRIM. L. REV. 217 (2004)

would confer even more discretion on sentencing judges than was true before the Sentencing Reform Act. Prior to the SRA, judges had largely unconstrained discretion to impose sentences, while the Parole Commission retained substantial authority over actual release dates. But the SRA abolished parole, and in a world with neither sentencing guidelines nor a Parole Commission, judicial sentencing authority would be absolute. Alternatively, "advisory guidelines" produced by constitutional invalidation of mandatory guidelines seemed almost indistinguishable from no guidelines at all. I, at least, could not see how the guidelines, once declared unconstitutional, could be anything more than useful, but legally nonbinding, suggestions.

B. **"Topless Guidelines"**

Faced with these three unappealing possibilities and the prospect of a long period of turmoil in the federal criminal courts, I suggested an interim legislative alternative. I proposed that the Guidelines structure could be brought into compliance with *Blakely* and preserved essentially unchanged by amending the sentencing ranges on the Chapter 5 Sentencing Table to increase the top of each guideline range to the statutory maximum of the offense(s) of conviction.

This proposal depended on a peculiarity of the constitutional structure erected in *Blakely*. As written, *Blakely* necessarily affects only cases in which post-conviction judicial findings of fact mandate or authorize an increase in the *maximum* of the otherwise applicable sentencing range. Prior to *Blakely*, the Supreme Court had held in *McMillan v. Pennsylvania*, 477 U.S. 79, 89-90 (1986), and reaffirmed in *Harris v. United States*, 536 U.S. 545 (2002), that a post-conviction judicial finding of fact could raise the *minimum* sentence, so long as that minimum was itself within the legislatively authorized statutory maximum. Therefore, so long as facts found by judges applying the sentencing guidelines increase only the minimum sentence to be served by a defendant, and not the maximum sentence to which he was exposed, there would be no constitutional violation. In effect, the "topless guidelines" approach would convert the Guidelines into a system of permeable mandatory minimums. That is, the Guidelines would continue to function exactly in the way they always have, except that the sentencing range produced by guidelines calculations in any given case would have the same lower value now specified by the Chapter Five sentencing table, while the upper value would be set at the statutory maximum. Judges would still be able to depart downwards using the existing departure mechanism, but would not have to formally "depart" to impose a sentence higher than the top of the ranges now specified in the sentencing table.

This proposal would require legislation because the expanded sentencing ranges produced by the proposal would fall afoul of the so-called "25% rule," 28 U.S.C. § 994(b)(2), which mandates that the top of any guideline range be no more than six months or 25% greater than its bottom.[6]

[6] The proposal in its original form would have made any sentence above the guideline minimum appealable on an abuse of discretion standard. The fact that a judge imposed a sentence higher than that suggested by the policy statement for a typical case would be a factor in the determination of whether the judge had

The proposal for "topless guidelines" was subject to a number of criticisms. The idea suffers from the notable disadvantage to defendants of imposing enforceable limits on judges' ability to sentence below the bottom of guideline ranges, while removing restrictions on judges' power to impose sentences above the top of the guideline range. Moreover, whatever its substantive merits, the constitutionality of this approach depends on the continued viability of *Harris v. United States*. Following the *Blakely* decision, many observers questioned the continued viability of *Harris*, a 5-4 decision about which even Justice Breyer (a member of the *Harris* majority) has expressed some doubt.

Thus far, of course, Congress has responded to *Blakely* with caution and has not adopted either "topless guidelines" or any other legislative approach. The question before the Subcommittee today is whether, now that *Booker* has found the Guidelines unconstitutional as formerly applied, Congress should act

C. *Booker v. United States*

The principle thrust of my testimony is that the *Booker* decision has altered the landscape in at least three critical respects, all of which suggest that Congress should respond with caution.

1. <u>The meaning of Booker is not yet clear</u>

As the Subcommittee is aware, in *Booker*, a five-member majority found that the Guidelines process of post-conviction judicial fact-finding was unconstitutional under the Sixth Amendment, but an almost completely different five-member majority wrote the opinion describing the proper remedy for the constitutional violation.[7] Justice Breyer, writing for the remedial majority, did not require juries to find all sentencing-enhancing guidelines facts, nor did he invalidate the Guidelines *in toto*. Instead, he merely excised two short sections of the Sentencing Reform Act,[8] leaving the remainder of the SRA intact, and thus keeping the guidelines intact but rendering them "effectively advisory."[9] Perhaps even more importantly, the remedial opinion found that both the government and defendants retained a right to appeal sentences, and that appellate courts should review sentences for "reasonableness."

The remedial opinion lends itself to different interpretations. Some have read "advisory" to mean that the Guidelines are no longer legally binding on trial judges and that the Guidelines are now merely useful advice to sentencing courts. However, a closer reading of the opinion suggests something quite different. First, because the opinion leaves virtually the entire SRA and all of the Guidelines intact, the requirement that judges find facts and making guideline calculations based on those facts survives.

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abused his or her discretion. I also recommended that the legislation creating "topless guidelines" sunset after eighteen months.

[7] Only Justice Ginsburg joined both halves of the Court's opinion.

[8] 18 U.S.C. § 3553(b)(1) and 18 U.S.C. § 3742(e).

[9] Booker, 2005 WL 50108, at *16.

Second, because the remedies opinion retains a right of appeal of sentences and imposes a reasonableness standard of review, appellate courts will have to determine what is reasonable. The remedies opinion left undisturbed 18 U.S.C. § 3553(a), which lists the factors a judge must consider in imposing a sentence and includes on that list the type and length of sentence called for by the guidelines. Thus, the determination of "reasonableness" under the statute will necessarily include consideration of whether a sentence conforms to the Guidelines. The unresolved question is the weight that will be accorded to the guidelines sentence – will it be considered at least presumptively correct or will it be reduced to the status of only one among many other factors?

We do not know how the courts will resolve this critical question. Still, there are good reasons to think that the vast majority of judges will accord great weight to the sentencing guidelines. For example, in a thoughtful decision issued the day after *Booker* was announced, Judge Paul Cassell examined *Booker* and concluded that he was obliged to continue to sentence within the applicable guidelines range unless there were exceptional aggravating or mitigating circumstances.[10] Other judges have concluded that they have more flexibility after *Booker*,[11] but no court has held that the guidelines could be ignored. Appellate courts have just begun addressing Booker, but there is every reason to think that they will move expeditiously to resolve the questions it presents and that they will give adherence to the Guidelines a prominent place in their analysis of sentence reasonableness. For example, the United States Court of Appeals for the Second Circuit recently held in that judges do not have "unfettered discretion" after Booker and that the congressionally-mandated factors set forth in the Sentencing Reform Act, prominently including the Guidelines, still constrain the imposition of criminal sentences.[12]

In short, we don't yet know what the post-*Booker* sentencing regime will look like. At a minimum, Congress should abstain from legislative intervention long enough for the courts to clarify what *Booker* means in practice. If Congress is to legislate, it should have a clear understanding of the situation it is setting out to correct.

2. <u>The post-*Booker* system may be preferable to the uncertainties of legislating a new sentencing system</u>

If *Booker* produces a system in which the federal sentencing guidelines are strongly presumptive, that may be a satisfactory outcome for many, at least in the short to medium

[10] United States v. Wilson, Case No. 2:03-CR-00882 PGC (D. Utah).

[11] *See, e.g.*, United States v. Nellum, 2005 US Dist LEXIS 1568 (N.D. Ind. Feb. 3, 2005).

[12] United States v. Crosby, 2005 WL 240916 (2d Cir. Feb. 2, 2005). *See also*, United States v. Hughes, __F.3d __ , 2005 WL 147059 at *3 (4th Cir. Jan. 24, 2005) (holding that "[c]onsistent with the remedial scheme set forth in *Booker*, a district court *shall first calculate* (after making the appropriate findings of fact) *the range prescribed by the guidelines.* Then, the court shall consider that range as well as other relevant factors set forth in the guidelines and those factors set forth in § 3553(a) before imposing the sentence.") (emphasis added).

term. Such a system would operate very much as the Guidelines always have, with the undoubted difference that judges would have somewhat greater freedom to sentence outside the guideline range. So long as the judges do not employ the increased flexibility to excess, and so long as both the Department of Justice and Congress are prepared to view some modest increase in judicial variance from the guidelines with a wary but tolerant eye, the system could work surprisingly well. At a minimum, it could work well enough to give all the institutional actors time to study and consider thoroughgoing reform of the Guideline system in the post-*Booker* era.

With respect to "topless guidelines" in particular, I suggested them in July 2004 because I was troubled by the prospect of prolonged turmoil in the federal courts following *Blakely*, and because neither of the seemingly likely results of applying *Blakely* to the federal system – "*Blakely*-ized" guidelines run through juries or purely advisory guidelines-as-non-binding-suggestions – was desirable. Both of these considerations have altered. First, a good deal of the disruption I hoped might be avoided through rapid legislation in July 2004 has already happened, cannot be undone, and may be compounded by over-hasty legislation. Second, in *Booker*, the Court adopted neither "Blakely-ized" nor purely advisory guidelines, but a system that in the vast majority of cases will probably work just like the pre-*Booker* guidelines. At worst, *Booker* seems to have created a system that is not an obvious disaster in need of immediate legislation, but a workable system whose strengths and weaknesses have yet to be determined.

3. <u>*Booker* creates tremendous uncertainty about the basic constitutional rules governing sentencing and thus raises doubts about the constitutional viability of legislative responses to that decision.</u>

As noted in the Constitution Project's letter, "If Congress decides to act, the most basic requirement for a new system is reasonable certainty that it will survive constitutional challenge." *Booker* throws the basic constitutional rules governing criminal sentencing into even greater confusion than did *Blakely*. *Blakely* laid out a simple, almost mechanical, rule: Any fact that increases a defendant's maximum sentencing exposure must be found by a jury. This rule seemed so absolute that it would render unconstitutional any structured sentencing system in which judicial fact-finding could raise the top of a defendant's guideline sentencing range, even if as was the case under the Washington guidelines, that range was only strongly presumptive.

However, *Booker* seems to take an entirely different approach. The federal guidelines survive. Judges must find facts and use those fact findings to determine guidelines ranges with both tops and bottoms. Some courts have interpreted *Booker* to mean that the guideline ranges – including their tops – are at least presumptively reasonable. It would appear that Justice Breyer is trying to shift this line of cases away from Justice Scalia's narrow focus on the role of juries toward a world in which guidelines setting *presumptive* sentencing ranges are constitutionally valid. At a minimum, the Court is struggling mightily to define its direction and until it speaks more definitively, it will be difficult, if not impossible, for Congress to enact any remedial legislation with real confidence in its constitutionality.

Even more particularly, I think the *Booker* decision casts additional doubt on the continued viability of *Harris v. United States* and thus on the desirability of turning immediately to "topless guidelines." We know that *Booker* authorizes guideline ranges, with tops, determined by post-conviction judicial fact-finding. If the Court ultimately accords those ranges at least some measure of legally presumptive effect, then the distinction between constitutional and unconstitutional guideline systems becomes the degree of presumptiveness of the tops of the guideline ranges. Put another way, the constitutional distinction between a "statutory maximum" which must be determined by a jury under *Blakely* and the top of a presumptive guideline range that can be determined by a judge under *Booker* can only be the degree of discretion afforded the judge to sentence above the top of the range. If the Court decides that presumptive limits on maximum sentences are constitutionally acceptable, it is hard to see why the same reasoning should not apply to minimum sentences.

Those who doubted the continued viability of *Harris* have noted that Justice Breyer was the fifth vote for preserving statutes that set minimum sentences through post-conviction judicial fact-finding, and that he expressed doubt about how *Harris* could be squared with *Apprendi*. Before *Booker*, it seemed plausible that Justice Breyer and other members of the Court who favor keeping the Constitution hospitable to structured sentencing systems would hold on to *Harris* because it provided at least one tool of structured sentencing. A system that constrains judicial discretion only by setting minimums is awkward and asymmetrical, but not wholly useless. After *Booker*, it is no longer clear that the weird asymmetry of *Blakely* and *Harris* is necessary. It would make far greater sense for the Court to hold that real, hard, impermeable statutory maximum *and minimum* sentences can only result from facts found by juries or admitted by plea, while at the same time permitting structured sentencing systems that use judicial fact-finding to generate sentencing ranges, presumptive at both top and bottom, inside the statutory limits. Such an approach would appeal to many members of the Court because it treats minimum and maximum sentences consistently, gives a meaningful role to juries in setting the actual minimum sentences that matter more to defendants than theoretical maximums, preserves the accomplishments of the structured sentencing movement, and confers constitutional status on judicial sentencing discretion.[13] If this is the direction the Court is heading, then *Harris* is in danger and "topless guidelines" could be found unconstitutional in short order.

III. Beyond Booker – the Future of Federal Sentencing

The Federal Sentencing Guidelines have been immensely controversial since their advent in 1987. They have actually enjoyed many successes, but the chorus of criticism has grown over the years. As my professional biography suggests, I believe that vigorous law enforcement and the imposition of meaningful terms of incarceration on serious criminal violators are crucial tools in the fight against crime. Likewise, I am not a

[13] For a more complete outline of how this constitutional model of sentencing might work, see Frank O. Bowman, III, *Function Over Formalism: A Provisional Theory of the Constitutional Law of Crime and Punishment*, 17 FEDERAL SENTENCING REPORTER 1 (October 2004).

proponent of unchecked judicial sentencing discretion. My practice experience, my time with the Sentencing Commission, and my subsequent work in the academy have convinced me of the importance of sentencing guidelines and other mechanisms of structured sentencing in achieving just, equitable, and effective criminal sentences. More particularly, I have been a vocal advocate of the federal sentencing guidelines. [14] Nonetheless, even I have reluctantly concluded that the federal sentencing system has in recent years developed in such unhealthy and dysfunctional ways that serious rethinking of the guidelines is now called for.[15] The *Blakely* and *Booker* decisions have provided the crisis that public institutions sometimes require before they engage in careful self-examination. I enlisted as reporter to the Constitution Project because it seemed an ideal forum for considering the state of federal sentencing working with a remarkably diverse and talented group of people. Our work so far has confirmed what I, and I think all of us, suspected – that the difficulties with federal sentencing are serious and can be seen and agreed upon by well-informed legal professionals of widely divergent political and institutional perspectives.

My counsel to the Subcommittee is a counsel of caution. Do not act precipitously because doing so may make an uncertain situation worse. Instead, study what *Booker* has wrought. Direct others, notably the Sentencing Commission and the Department of Justice, to gather the information and perform the analysis that will assist you in your study. And take the opportunity created by *Blakely* and *Booker* to work together with all the many people of goodwill who are eager to work with Congress, with the Justice Department, with the judiciary, and with the Sentencing Commission to improve the administration of federal criminal justice.

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[14] *See, e.g., Id.*; Frank O. Bowman, III, *Fear of Law: Thoughts on 'Fear of Judging' and the State of the Federal Sentencing Guidelines,* 44 ST. LOUIS L.J. 299 (2000) (defending the federal sentencing guidelines as a beneficial set of constraints on judicial sentencing authority).

[15] See Frank O. Bowman, III, The Failure of the Federal Sentencing Guidelines: A Functional Analysis, -- Columbia L. Rev. __ (forthcoming Spring 2005).