Testimony of Daniel P. Collins
before the Subcommittee on Crime, Terrorism, and Homeland Security
of the House Committee on the Judiciary
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Chairman Coble and Members of the Subcommittee, I appreciate the opportunity to testify here today. By declaring the U.S. Sentencing Guidelines to be mere advisory, the United States Supreme Court's decision in *United States v. Booker*, 125 S. Ct. 738 (2005), effectively demolishes in one stroke the entire edifice of federal sentencing reform that has been carefully built over the last 20 years. As the Court made clear, "[t]he ball now lies in Congress' court." 125 S. Ct. at 768. I applaud you, Mr. Chairman, for moving quickly to holding hearings on this important issue, so that the Congress can promptly move to rebuild a "sentencing system, compatible with the Constitution, that Congress judges best for the federal system of justice." *Id*.

My perspective on federal sentencing policy is informed by my service over a total of nearly eight years in various capacities in the Justice Department. During the 1990s, I served three and one-half years as a federal prosecutor in the U.S. Attorney' Office in Los Angeles. More recently, I served from June 2001 until September 2003 as an Associate Deputy Attorney General ("ADAG") in the office of Deputy Attorney General Larry Thompson. During my time as an ADAG, I had the privilege of testifying before this Committee several times concerning a variety of provisions that were ultimately enacted into law in the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today ("PROTECT") Act of 2003. The PROTECT Act enacted some of the most significant reforms in federal sentencing policy since the original enactment of the Sentencing Reform Act of 1984. I also helped to develop the Administration's 2002 proposal to strengthen federal sentencing of identity theft crimes, a proposal that I was pleased to see ultimately enacted into law as the Identity Theft Penalty

Enhancement Act. I also helped coordinate the Department's 2003 review and revision of its policies on charging of criminal offenses, plea bargaining, sentencing recommendations, and sentencing appeals. While my views on federal sentencing policy are influenced by my prior experiences working on such matters in the Government, I am now back in private practice in Los Angeles, and I wish to emphasize that the views I offer today are solely my own.

What is at Stake

I would like to begin my remarks by emphasizing the importance of the issue before you. Federal sentencing policy is not some abstract matter about the mechanics and details of court procedure; it is a grave matter that goes to the heart of one of the Government's first and foremost responsibilities: the protection of public safety.

In my view, it is no accident that the unprecedented and historic declines in crime rates in America have coincided with the rise of determinate sentencing under the federal Sentencing Guidelines and analogous systems at the state level. I recognize that correlation does not *necessarily* equal causation, but I do not think it is just a coincidence — common sense suggests that if you lock up criminals for longer periods of time, and lock up the very worst for very long periods of time, there will be less crime.

In any event, I think the burden of doubt must be cast on the *critics* of the Sentencing Guidelines. We simply cannot be sure that the decisive move towards more determinate sentencing at the federal and state levels has *not* been an important factor in lowering crime rates. Put another way, we simply cannot be sure that, if we heed recent calls for less severity, for smaller prison populations, or for greater flexibility, we will not again see a spike in crime rates. To accede to such measures would be to engage in an irresponsible experiment that would literally gamble with the lives of this Nation's citizens.

Moreover, the ultimate measure for evaluating sentencing policy is not whether individual sentences can be said to meet some pre-conceived notion of a "proportionate" sentence. Proportionality is an important value, to be sure, and it is taken into account in the many gradations made within the guidelines system. But the vast diversity of competing views as to what constitutes a proportionate sentence is precisely what led to the enactment of the Sentencing Reform Act and the creation of the Sentencing Guidelines in the first place, and congressional consideration about how to rebuild the federal sentencing system should not get side-tracked into ultimately irresolvable debates about subjective notions of proportionality. Rather, sentencing policy must ultimately be evaluated in terms of its ability to accomplish the core goal of *ensuring public safety and reducing crime*. By that measure, the Sentencing Guidelines have been a unqualified success. That they have done so while simultaneously respecting and fostering important values of proportionality, consistency, and fairness, makes them all the more worth preserving and restoring.

Rebuilding the Edifice of Federal Sentencing

Accordingly, it is my strong recommendation that the Congress act — and act promptly — to rebuild the federal sentencing system so that it can function most nearly as it did before *Booker*. If federal sentencing policy wasn't broke before *Booker*, don't fix it into something entirely different. The invalidation of the Guidelines in *Booker* does not call into question any of the ultimate values or objectives of federal sentencing policy; it simply found fault with the *mechanisms* by which those values were achieved in certain cases.

In determining how to go about rebuilding the Guidelines system, it is essential to identify precisely what it was about the prior system that led to the constitutional defect identified by the Supreme Court. In *Blakely v. Washington*, 124 S. Ct. 2531 (2004), which

addressed Washington State's sentencing system, the Court was explicit in stating that it was *not* "find[ing] determinate sentencing schemes unconstitutional." *Id*. at 2540. On the contrary, the Court stated that the issue was how determinate sentencing "can be implemented in a way that respects the Sixth Amendment" as construed under the Court's landmark decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000). *See Blakely*, 124 S. Ct. at 2540.

What, then, is the source of the flaw? *Blakely* and *Booker* are quite clear on that point. In *Blakely*, the Court stated that the crucial factor that distinguished Washington's sentencing system from an admittedly constitutional system of complete judicial discretion was the fact that, in the absence of additional factual findings beyond those admitted or found by the jury, "the defendant has a legal *right* to a lesser sentence." 124 S. Ct. at 2540 (emphasis in original). Indeed, the Court gave an example in order to illustrate its point:

> "In a system that says the judge may punish burglary with 10 to 40 years, every burglar knows he is risking 40 years in jail. In a system that punishes burglary with a 10-year sentence, with another 30 added for use of a gun, the burglar who enters a home unarmed is *entitled* to no more than a 10-year sentence — and by reason of the Sixth Amendment the facts bearing upon that entitlement must be found by a jury."

Id. (emphasis in original). Likewise, in extending *Blakely* to the Sentencing Guidelines, the *Booker* Court emphasized that the defect in the Guidelines is that "[i]t became the judge, not the jury, that determined the *upper limits* of sentencing, and the facts determined were not required to be raised before trial or proved by more than a preponderance." 125 S. Ct. at 751 (emphasis added).

Accordingly, the flaw in the Guidelines under *Booker* and *Blakely* is that, in the absence of particular findings, the Guidelines set a legally enforceable *maximum* sentence that is *below* the theoretical statutory maximum.

By contrast, the Supreme Court has squarely held that basing a *minimum* sentence on additional facts found solely by the judge does *not* violate the Sixth Amendment as construed in *Apprendi*. *See Harris v. United States*, 536 U.S. 545, 568 (2002).

If the goal is, as I think it should be, to preserve the practical substance of the Guidelines system to the greatest extent possible and with as little alteration as possible, the question about how to do that almost answers itself: if the problem is created only by the Guideline's use of ranges with legally enforceable *maxima* below the statutory maximum, then the solution is to get rid of those maxima. In other words, the Sentencing Guidelines would be fully restored exactly as they were before, with the sole exception that, in *every* case, the top of the authorized range would be the statutory maximum. Because *Booker* is unambiguously clear in stating that the Court has "never doubted the authority of a judge to exercise broad discretion in imposing a sentence within a statutory range," 125 S. Ct. at 750, there can be little doubt that this revised system would satisfy *Booker* and *Blakely*.

The only objection that I can perceive to this approach is the *policy* argument that the revised system would eliminate the ability to ensure sentencing uniformity and fairness at the *top* as well as at the *bottom* of the Guidelines. Put simply, it eliminates the protection the Guidelines had previously conferred against a "hanging" judge. For a number of reasons, this objection cannot carry the day. As an initial matter, this objection ignores the obvious fact that, *as matters currently stand*, a defendant has no protection against a hanging judge other than the Court's newly fashioned appellate review of sentences for "reasonableness." *Booker*, 125 S. Ct. at 765-67, But the objection is wide of the mark for a more fundamental reason. We now have accumulated 15 years of experience under the Sentencing Guidelines, and that practical experience confirms that there is very little need to worry about this sort of excessive severity.

For example, in the last fiscal year for which data are publicly available, upward departures occurred in only 457 of 58,684 cases sentenced nationwide — a grand total of 0.8%. In this system, the hanging judge is a myth. We should not make fundamental structural changes solely to accommodate a problem that does not occur in 99.2% of the cases.

On the contrary, as I have testified before in my previous appearances before this Committee, the problems with disparity have all been in the other direction. With the Guidelines now being purely advisory, we can only expect these problems to reappear and to worsen. It is therefore urgent that the Congress act promptly to restore the Guidelines system so that, as before, judges will at least be bound by the highly reticulated and carefully tailored system of minimum sentences that it contains. We should not abandon the highly successful system of Guidelines sentencing.

Ensuring that a Rebuilt System Survives

There is one additional aspect that I think ought to be addressed in any legislation that seeks to rebuild the Guidelines system after *Booker* and *Blakely*.

As I have noted, the Supreme Court held in *Harris* that *Apprendi* does not apply to mandatory minima. The Court has also continued to state that it does not apply to the mere fact of a prior conviction. *Blakely*, 124 S. Ct. at 2536; *cf*. *Almendarez-Torres v. United States*, 523 U.S. 224 (1998). Both *Harris* and *Almendarez-Torres* were 5-4 decisions, and Justice Breyer's concurrence in *Harris* and Justice Thomas' concurrence in *Apprendi* are alone enough to raise a question whether a future Court might, despite the force of *stare decisis*, see these matters differently. Were the Court to do so, it would be a travesty to have a replay of *Booker* in which a future Court might decide, once again, to "sever" the mandatory nature of the Guidelines so as to eliminate the constitutional difficulty.

Accordingly, I urge the Congress to give serious consideration to adding a title to whatever legislation emerges that would specifically address the severability issue. In other words, the Congress should add language that would have the effect of providing what system would go into effect if either *Harris* or *Almendarez-Torres* are overruled. There are a variety of options Congress could choose. For example, you might provide for a graded system of statutorily prescribed mandatory minima for all offenses (if *Harris* were overruled) or for submission of prior convictions to the jury (in the event *Apprendi* were extended to prior convictions). There is recent precedent, in the McCain-Feingold Act, for taking a more proactive approach toward the issue of possible severability. The Congress should likewise act to ensure that the system it puts in place here will survive for the long term. Indeed, the case for being proactive on severability is uniquely compelling here, because the Ex Post Facto Clause will prevent Congress from retroactively fixing the problem for the many thousands of cases decided in the interim.

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I would be pleased to answer any questions the Committee may have.