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Hoist with their Own Petard?
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In 2003, Congress and the Department of Justice tried to increase their control over the United States Sentencing Commission and federal sentencing generally. Congress appeared to have achieved this goal when it passed the Prosecutorial Remedies and Tools Against the Exploitation of Children Today Act of 2003 (“PROTECT Act”),¹ which resulted in reduced grounds for downward departures, Congressionally-revised text of the Federal Sentencing Guidelines, and a constrained Sentencing Commission potentially devoid of judges. Yet pro-government interpretations of the PROTECT Act may have been premature because the Supreme Court has now struck down parts of Washington State’s legislatively-enacted sentencing guidelines in *Blakely v. Washington*.² In an effort to save the Federal Sentencing Guidelines from *Blakely*’s grasp, the Department of Justice has emphasized that they are *administratively* enacted, in contrast to Washington’s *legislatively*-enacted guidelines. As a factual matter, however, the PROTECT Act blurred the federal administrative versus legislative distinction. Thus, Congress and the Department – the architects of the PROTECT Act – may find themselves hoist with their own petard.

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¹ Pub. L. No. 108-21, 117 Stat. 667 (April 30, 2003).

² *Blakely v. Washington*, 124 S. Ct. 2531 (2004).

I. Introduction

Blakely v. Washington is the case that launched a thousand quips – as well as plenty of metaphors, clichés, and knotty legal questions. Many thought that it was just supposed to be the final step limiting the potential impact of the Supreme Court’s controversial 2000 decision in *Apprendi v. New Jersey*.³ Instead, *Blakely* invalidated a key aspect of Washington’s sentencing guidelines and delivered a body blow that has dazed American criminal justice systems generally.

Blakely concluded that Washington’s legislatively-enacted sentencing guidelines ranges created so-called “statutory maximums” that can only be transcended based on a jury’s factual finding (or a defendant’s admission) of an aggravating factor, irrespective of the higher, traditional statutory maximum for the offense of conviction. Thus, the state trial judge in *Blakely* should not have imposed a sentence above the presumptive sentencing range based on judicially-found facts.

What about the federal system? The *Blakely* Court expressly left that question open. Defenders of the Federal Sentencing Guidelines point to ways in which these Guidelines differ from the Washington State guidelines at issue in *Blakely*. They note that, unlike the Washington State guidelines, the Federal Sentencing Guidelines are not statutes passed by Congress, but rather are administratively issued by an independent Sentencing Commission within the Judicial Branch.⁴

³ 530 U.S. 466 (2000).

⁴ See, e.g., Brief for the United States as Amicus Curiae Supporting Respondent, *United States v. Blakely*, No. 02-1632, 2004 WL 177025, at *9.

Nevertheless, by passing the PROTECT Act, Congress – with the support of the Department of Justice – may have given the Court extra ammunition to discount these distinctions and perhaps invalidate part or all of the Guidelines. Congress undermined the administrative character of the Federal Sentencing Guidelines when it adopted the PROTECT Act, which directly amended the Guidelines text, restricted the power of the United States Sentencing Commission, and diminished the role of federal judges. Providing what was then-perceived as a tactical advantage for the government, the PROTECT Act decreased both the Commission’s involvement in setting sentencing policy, and the judges’ discretion in setting specific sentences. In the process, however, Congress and the Department may well have inadvertently helped to destroy the very system they were trying to dominate.

II. Life in *Blakely*’s Wake

In a few short weeks, *Blakely* has “discombobulate[d] the whole criminal-law docket”⁵ in federal courts across the country. *Blakely* is one of the most, if not *the* most, significant constitutional criminal procedure decisions in generations.⁶ Arguably, *Blakely* changed the entire landscape of criminal sentencing in the United States, but it did so in an opaque manner. Several basic questions remain. To what kind of system does *Blakely* apply? Does it invalidate all of an affected system or just part of it?

⁵ *United States v. Booker*, No. 03-4225, 2004 WL 1535858, at *11 (7th Cir. July 9, 2004) (Easterbrook, J., dissenting).

⁶ Professor Douglas Berman has gone even further and argued that “*Blakely* is the biggest criminal justice decision not just of this past term, not just of this decade, not just of the Rehnquist Court, but perhaps in the history of the Supreme Court.” Douglas Berman, *Supreme Court Cleanup in Aisle 4*, SLATE, July 16, 2004, available at <http://slate.msn.com/id/2104014>.

Answers to these and a myriad of other questions are, at present, elusive. In fact, as of this writing in early August 2004, it may be better to think of *Blakely* as casting a dark storm cloud over virtually all determinate sentencing guidelines systems. Which guideline systems get the rain and which do not remains to be seen.

Apprendi required every fact that increases an individual's statutory maximum sentence – other than the fact of prior conviction – to be proven to the jury beyond a reasonable doubt.⁷ Despite claims that *Apprendi* could spark the downfall of the Federal Sentencing Guidelines,⁸ the lower federal courts uniformly concluded that when the Supreme Court said “statutory maximum” it actually meant the legislatively-imposed statutory maximum for the grade of the conviction offense.⁹ Furthermore, several commentators thought that the Supreme Court's 2002 opinion in *Harris v. United States*,¹⁰ upholding the use of mandatory *minimums* against an *Apprendi* attack, had removed the sword of Damocles that had been hanging over the Federal Sentencing Guidelines since *Apprendi*.¹¹ Accordingly, many people were taken by surprise when

⁷ *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.”).

⁸ See, e.g., Jane A. Dall, Note, “‘A Question for Another Day’: The Constitutionality of the U.S. Sentencing Guidelines Under *Apprendi v. New Jersey*,” 78 NOTRE DAME L. REV. 1617, 1618 (2003) (“A broad reading of the *Apprendi* rationale prompts questions as to the constitutionality of sentencing under the U.S. Sentencing Guidelines.”); Jeffrey Standen, *The End of the Era of Sentencing Guidelines: Apprendi v. New Jersey*, 87 IOWA L. REV. 775, 797 (2002) (“*Apprendi* will initiate the demise of guidelines sentencing”).

⁹ See, e.g., *United States v. Meritt*, 361 F.3d 1005, 1015 (7th Cir. 2004); *United States v. Parmelee*, 319 F.3d 588, 592 (3d Cir. 2003); *United States v. Ortiz*, 318 F.3d 1030, 1039 (11th Cir. 2003).

¹⁰ 536 U.S. 545, 568 (2002) (reaffirming *McMillan v. Pennsylvania* and holding that judges may find facts at a standard less than beyond a reasonable doubt to support a mandatory minimum); see also *id.* at 570 (Breyer, J., concurring in part and concurring in the judgment) (“I join [the majority's] opinion to the extent that it holds that *Apprendi* does not apply to mandatory minimums.”).

¹¹ See, e.g., Stephanos Bibas, *Back from the Brink: The Supreme Court Balks at Extending Apprendi to Upset Most Sentencing*, 15 FED. SENT. REP. 79, 79 (2002) (“The upshot is that *Apprendi*,

the *Blakely* Court struck down parts of the Washington State sentencing guidelines as violative of the Sixth Amendment.¹²

Blakely held that Washington’s legislatively-enacted, presumptive guideline ranges were themselves “statutory maximums” that can only be exceeded based on a jury’s authorization (or a defendant’s admission). Although the traditional statutory maximum for the grade of the offense involved was higher, the Court concluded that a jury needed to find all facts necessary to increase the defendant’s sentence beyond the presumptive guideline range.

Justice Scalia’s majority opinion in *Blakely* thus turns, in large part, on his definition of “statutory maximum.” He stated 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.*”¹³ Justice Scalia went on to note that “the relevant ‘statutory maximum’ is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings.”¹⁴ Despite the fact that no sentencing guidelines system of which I am aware was ever created with the intention of establishing a controlling, silent statutory sub-maximum, Justice Scalia viewed Washington’s sentencing guidelines as doing just that.

which once threatened the sentencing guidelines and the national trend toward determinate sentencing, is now a caged tiger.”).

¹² Cf. Tony Mauro, *The “Sleeper” Cases with the Wide Ripple Effect*, LEGAL TIMES, July 6, 2004 (“This term’s Supreme Court ruling that may have the broadest impact was on few radar screens before it was announced June 24: *Blakely v. Washington*, which could upend federal and state sentencing laws nationwide.”).

¹³ *Blakely*, 124 S. Ct. at 2537.

¹⁴ *Id.*

Unlike the federal Sentencing Reform Act, which delegated specific guideline creation to the United States Sentencing Commission,¹⁵ the Washington Sentencing Reform Act directly provided for “presumptive sentencing ranges.”¹⁶ Although *Blakely* was written against the backdrop of the Federal Sentencing Guidelines, Justice Scalia dispensed with them in an already-famous footnote: “The Federal Guidelines are not before us, and we express no opinion on them.”¹⁷

In the initial days and weeks after *Blakely*, the lower federal courts split over whether the Federal Sentencing Guidelines survived.¹⁸ At first, the majority of the circuits held that *Blakely* invalidates at least the full use of the Guidelines in those cases where facts must be found to increase a defendant’s guideline range. The various resolutions of the resulting severability questions were even more fractured.

Twenty-seven days after the Court decided *Blakely*, the United States filed two petitions for certiorari in Guidelines cases and requested expedited briefing. The government asked the Court to review the Seventh Circuit’s decision in *United States v. Booker*,¹⁹ in which a divided panel struck down the Guidelines when they required a judge to find facts to increase a defendant’s sentencing range but remanded on the

¹⁵ *Mistretta v. United States*, 488 U.S. 361, 412 (1989) (“The Constitution’s structural protections do not prohibit Congress from delegating to an expert body located within the Judicial Branch the intricate task of formulating sentencing guidelines consistent with such significant statutory direction as is present here.”).

¹⁶ See WASH. REV. CODE § 9.94A.010 *et seq.* (1997).

¹⁷ *Blakely*, 124 S. Ct. at 2538, n.9. Justice O’Connor appeared to believe that this approach missed the point. See, e.g., *id.* at 2549 (O’Connor, J., dissenting) (“It is no answer to say that today’s opinion impacts only Washington’s scheme and not others, such as, for example, the Federal Sentencing Guidelines.”).

¹⁸ Compare *United States v. Booker*, 2004 WL 1535858 (7th Cir. 2004) (finding federal guidelines unconstitutional), with *United States v. Pineiro*, 2004 WL 1543170 (5th Cir. 2004) (finding federal guidelines constitutional).

¹⁹ *United States v. Booker*, 2004 WL 1535858 (7th Cir. 2004).

question of severability, and a similar District of Maine decision in *United States v. Fanfan*,²⁰ in which the trial judge found that the Guidelines violated *Blakely*. On August 2, 2004, the Supreme Court granted certiorari in those two cases, and so will squarely address the question of whether *Blakely* applies to the Federal Sentencing Guidelines.²¹ It is considerably less clear that the Supreme Court will fully address the tangled severability questions. If *Blakely* applies to the Federal Sentencing Guidelines, how much of the federal system will be invalidated? The severability issues, though complex, are narrowly framed in the government's questions presented, which the Court adopted.²²

²⁰ *United States v. Fanfan*, 04-47P- H (D. Maine) (June 28, 2004).

²¹ *United States v. Booker*, 2004 WL 1713654 (2004); *United States v. Fanfan*, 2004 WL 1713655 (2004).

²² The government simply asks the Court to address whether the Guidelines should be applied in a truncated form (*i.e.*, without upward adjustment but in all other respects) or abandoned (*i.e.*, allowing judges to sentence anywhere within the statutory range for the offense of conviction) in cases where the Guidelines would call for a judge to find a fact that increases the defendant's guideline range. *United States v. Booker*, No. 04-104, Petition for Writ of Certiorari at I ("whether, in a case in which the Guidelines would require the court to find a sentence-enhancing fact, the Sentencing Guidelines as a whole would be inapplicable, as a matter of severability analysis, such that the sentencing court must exercise its discretion to sentence the defendant within the maximum and minimum set by statute for the offense of conviction."). Fanfan's reformulated question presented would have cast a wider net. *United States v. Fanfan*, No. 04-105, Brief in Opposition at I ("What role do the Sentencing Reform Act, the Sentencing Guidelines, and Federal Rule of Criminal Procedure 32 continue to play in federal criminal sentencing?"). A District Court in Orlando has highlighted a concern that may follow from the government's narrow approach and observed that the "suggestion that courts use the Guidelines in some cases but not others is at best schizophrenic and at worst contrary to the basic principles of justice, practicality, fairness, due process, and equal protection." *United States v. King*, No. 6:04-cr-35-Orl-31KRS, Sentencing Memorandum Opinion, Slip-op at 14 (July 19, 2004); *see also id.* ("Such a structure not only seems to violate equal protection principles but would lead to the perverse result that both Government and criminal defense attorneys would plot to finagle their way into the determinate system or indeterminate system depending on the judge and the various factors relevant to the particular defendant's sentence.").

Thus, confusion may endure even after the Supreme Court rules. For example, if the Federal Sentencing Guidelines fall, is the system that remains an unguided but determinate one (presumably with up to 15% reductions for good time) or an unguided indeterminate one with parole release? *See United States v. Mueffleman*, No. 01-CR-10387-NG, Memorandum and Order re: United States Supreme Court's Decision in *Blakely v. Washington*, Slip-op at 38 (July 26, 2004) ("I conclude that the elimination of parole was part of a comprehensive Guidelines system and not severable. At the same time, since no parole system is currently in place, I will take that into account in determining sentencing ranges. I will

Despite *Blakely*'s freshness, several insightful commentaries have already been penned cataloging many of *Blakely*'s consequences and potential consequences.²³ Given that, I will not dwell on the current chaos it has injected into the federal sentencing system. The relevant question now is the future of the Federal Sentencing Guidelines after *Blakely*.

III. The Future of the U.S. Sentencing Guidelines

Although the initial judicial opinions and academic prognosticating seem to foretell the demise of the United States Sentencing Guidelines as we know them,²⁴ no one knows for certain. In the words of one District Judge, “[a]s Mark Twain observed in 1897 that ‘the reports of my death are greatly exaggerated,’ the Sentencing Guidelines may similarly defy present expectations of their impending demise.”²⁵ Yet, we need not to go back to the time of Samuel Langhorne Clemens to grasp the uncertainty that lies before us. All we need to do is remember the world before June 24, 2004. In that world, many commentators on and observers of criminal sentencing were

assume that a defendant will serve virtually all of the term of imprisonment I am imposing.”) (citations omitted). If the Supreme Court strikes down the Federal Sentencing Guidelines but does not fully address the severability issues, the uncertainty in the lower courts will not abate any time soon. Under that scenario, Congress may feel greater pressure to step in quickly with a fix. Quick Congressional fixes on criminal justice issues do not have a particularly illustrious pedigree.

²³ See, e.g., Nancy J. King & Susan R. Klein, *Beyond Blakely*, 16 FED. SENT. REP. 316 (2004); Stephanos Bibas, *Blakely's Federal Aftermath*, 16 FED. SENT. REP. 333 (2004).

²⁴ See, e.g., *United States v. Booker*, 2004 WL 1535858 (7th Cir. 2004); *United States v. Croxford*, 2004 WL 1551564 (D. Utah 2004); King & Klein, *supra* note 23, at ____.

²⁵ *United States v. Olivera-Hernandez*, No. 2:04CR0013, Order, Slip-Op at 5 (July 12, 2004), available at <http://www.utd.uscourts.gov/reports/olivera-hernandez.pdf>; see also Pamela Manson, *Judge: Sentencing Guidelines to Stay*, THE SALT LAKE TRIBUNE, July 13, 2004, available at <http://166.70.44.66/2004/Jul/07132004/utah/utah.asp>.

lulled into thinking that *Blakely* would be a non-event.²⁶ So, the wisest course would be to tread lightly in predicting how the Supreme Court will deal with the Federal Sentencing Guidelines in a post-*Blakely* world.

A. Drawing Lines in the Sand

Can the Federal Sentencing Guidelines be distinguished from the Washington State guidelines? Many courts and commentators think not.²⁷ Although it is possible to draw lines between these two sentencing schemes, should those lines matter? Might the differences in the two systems prove to be important? Distinctions have been highlighted by the Second Circuit in an opinion certifying *Blakely* questions to the

²⁶ See, e.g., Stephanos Bibas, *Apprendi in the States: The Virtues of Federalism as a Structural Limit on Errors*, 94 J. CRIM. L. & CRIMINOLOGY 1, 9 (2003) (noting that *Harris v. United States* “implicitly held that judges can find facts that raise sentencing guidelines ranges, as the fact at issue in *Harris* raised *Harris*’s guidelines sentence by two years,” although acknowledging that the Court had granted cert. in *Blakely*). Cf. Bibas, *supra* note 11, at 79 (“And the irony is that Justice Antonin Scalia, the only Justice who voted to strike down the Sentencing Guidelines fourteen years ago, provided the fifth vote that ensures that the Guidelines will survive today.”); Andrew M. Levine, *The Confounding Boundaries of “Apprendi-Land”; Statutory Minimums and the Federal Sentencing Guidelines*, 29 AM. J. CRIM. L. 377, 427 (2002) (“While the Court seems very unlikely to extend *Apprendi* to the Guidelines, especially in light of *Harris*, this article considers the ultimate fate of the Guidelines to be the most challenging post-*Apprendi* conundrum.”); Rachel E. Barkow, *Recharging the Jury: The Criminal Jury’s Constitutional Role in an Era of Mandatory Sentencing*, 152 U. PA. L. REV. 33, 103 (2003) (“Unless the Court shifts gears in *Blakely* and distinguishes mandatory minimums from binding sentencing guidelines, a legislature is free to raise statutory maxima as high as it wants--subject only to the Eighth Amendment and the political process itself--and then allow mandatory minimums and Sentencing Guidelines to do all the real work of sentencing.”); *id.* at 105 (“Barring a change of course in *Blakely*, a legislature can increase the overall statutory maxima and use sentencing guidelines to dictate sentences for specific conduct.”).

FEDERAL SENTENCING REPORTER co-Managing Editor Professor Douglas Berman was suspicious that the Supreme Court was up to something. The week before the decision came down, on June 18, he speculated on his blog, *Sentencing Law and Policy*, that “the decision might prove to be . . . a blockbuster along the lines of *Ring v. Arizona*[, 536 U.S. 584, 602 (2002)], and not a big nothing like *Harris v. United States*. Stay Tuned.” *Sentencing Law and Policy*, “Blakely Blockbuster?,” at http://sentencing.typepad.com/sentencing_law_and_policy/2004/06/blakely_blockbu.html.

²⁷ See, e.g., *United States v. Booker*, 2004 WL 1535858 (7th Cir. 2004); King & Klein, *supra* note 23, at ____.

Supreme Court,²⁸ and by Judge Frank Easterbrook in his dissent in *United States v. Booker*.²⁹

The Second Circuit, in *United States v. Penaranda*,³⁰ raised the question of whether the U.S. Sentencing Commission's nature and role distinguished the Federal Sentencing Guidelines from the Washington State guidelines. The *Penaranda* Court did not resolve the question of *Blakely*'s applicability to the Federal Sentencing Guidelines as it chose to certify questions to the Supreme Court.³¹ Nevertheless, the Second Circuit observed that a common feature of cases like *Apprendi* and *Blakely* is "that a state legislature had made the critical decisions setting the boundaries that the Court held the sentencing judge was not permitted to exceed without either a jury's fact-finding or a defendant's admission."³² It noted that the Federal Sentencing Guidelines, while issued pursuant to a statute, and acting like laws "are not themselves prescribed by statute."³³ The *Penaranda* Court stated that the Supreme Court has previously described the Guidelines as "the equivalent of legislative *rules* adopted by federal agencies."³⁴ Similarly, it observed that "the distinct administrative provenance of the federal Sentencing Guidelines may place them outside the ambit of the *Blakely*

²⁸ *United States v. Penaranda*, 2004 WL 1551369 (2d Cir. July 12, 2004) (in banc).

²⁹ 2004 WL 1535858 at *9 (Easterbrook, J., dissenting).

³⁰ 2004 WL 1551369 (2d Cir. July 12, 2004) (in banc).

³¹ In contrast, the Fifth Circuit upheld the Federal Sentencing Guidelines and took the view that the "United States Code, and not the *Guidelines*, establishes maximum sentences for offenses." *United States v. Pineiro*, 2004 WL 1543170, at *9 (5th Cir. 2004) (emphasis added). Ironically, given the supreme formalism of the *Blakely* decision, some courts have rejected this view as itself being "overly formalistic." *United States v. King*, No. 6:04-cr-35-Orl-31KRS, Sentencing Memorandum Opinion, Slip-op at 6, n.11 (July 19, 2004).

³² *Penaranda*, 2004 WL 1551369 at *4.

³³ *Id.* at *5.

³⁴ *Id.* (quoting *Stinson v. United States*, 508 U.S. 36, 45 (1993)).

principle.”³⁵ In other words, the Second Circuit asked whether perhaps the Federal Sentencing Guidelines are not statutes and, if so, whether that distinction matters in the context of a Sixth Amendment analysis.

Furthermore, the Second Circuit pointed to the structural composition of the U.S. Sentencing Commission as an independent entity located in the Judicial Branch.³⁶ This, too, makes it less likely that the federal Guidelines are statutes. Finally, it recounted that in *Mistretta v. United States*, the Supreme Court rejected both the argument that “Congress combined legislative and judicial power within the Judicial Branch,”³⁷ and that Congress improperly delegated its authority to the Sentencing Commission.³⁸ While avoiding resolution of this important question (and marshaling counterarguments), the *Penaranda* Court noted that the fact “[t]hat the Sentencing Guidelines are not promulgated by Congress could prove critical to the determination of whether or not they are affected by *Blakely*.”³⁹

Judge Easterbrook took a similar, but more aggressive, stance. As part of his *Booker* dissent, Judge Easterbrook asserted that the Federal Sentencing Guidelines survive *Blakely*.⁴⁰ He argued that the Guidelines are not *Blakely* “statutory maximums”

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Mistretta v. United States*, 488 U.S. at 394.

³⁸ *Penaranda*, 2004 WL 1551369, at *5

³⁹ *Id.*

⁴⁰ 2004 WL 1535858, at *9 (Easterbrook, J., dissenting).

because the Guidelines are not statutes. The *Booker* majority rejected this view,⁴¹ but Judge Easterbrook's argument deserves further examination. He said:

Blakely arose from a need to designate one of two statutes as the "statutory maximum." Washington called its statutes "sentencing guidelines," but names do not change facts. Nonetheless, the reading my colleagues give to this passage is that it does not matter whether the maximum is statutory; any legal rule, of any source (statute, regulation, guideline) that affects a sentence must go to a jury. Certainly *Blakely* does not hold that; it *could not* "hold" that given that it dealt with statutes exclusively. Attributing to *Blakely* the view that it does not matter whether a given rule appears in a statute makes hash of "statutory maximum." Why did the Justices deploy that phrase in *Apprendi* and repeat it in *Blakely* (and quite a few other decisions)? Just to get a chuckle at the expense of other judges who took them seriously and thought that "statutory maximum" might have something to do with statutes?⁴²

The United States, in its amicus brief in *Blakely*, presented arguments consistent with both Judge Easterbrook's position in support of the Guidelines and the Second Circuit's comments discussed above. The government argued that "[t]here are possible distinctions between the federal guidelines and the state statutory systems. Most prominently, the federal guidelines are promulgated by an administrative commission, not by Congress."⁴³ On this basis, the Solicitor General argued that:

The Guidelines are thus not statutes but sentencing rules, the unique product of a special and limited delegation of authority to the Commission. "Congress granted the Commission substantial discretion in formulating guidelines." [*Mistretta*, 488 U.S.] at 377. Because Congress entrusted to the Commission the specification of the numerous facts that authorize differing punishments under the Guidelines, there is a strong argument that the Guidelines do not implicate

⁴¹ *Id.* at *2 ("The Commission is exercising power delegated to it by Congress, and if a legislature cannot evade what the Supreme Court deems the commands of the Constitution by a multistage sentencing scheme neither, it seems plain, can a regulatory agency.").

⁴² *Id.* at *9.

⁴³ Brief for the United States as Amicus Curiae Supporting Respondent, *United States v. Blakely*, No. 02-1632, 2004 WL 177025, at *9. See also *id.* at *26 ("[U]nlike the Washington system, the federal Guidelines are not enacted by a legislature but are promulgated by the Sentencing Commission, 'an independent commission in the judicial branch of the United States.' 28 U.S.C. 991(a); see *Mistretta v. United States*, 488 U.S. 361, 385 (1989).").

the concerns addressed by *Apprendi*. . . . [T]hose concerns arise only when the legislature itself dictates the facts that control a defendant’s increased exposure to punishment, thereby effectively creating enhanced crimes. . . . There is thus good reason to conclude that the Guidelines “do not *** establish[] minimum and maximum penalties” for crimes. *Mistretta*, 488 U.S. at 396.⁴⁴

We can expect to hear similar arguments from the United States in its merit briefs for *Booker* and *Fanfan*.

The government did, however, acknowledge in its *Blakely* amicus brief that the “administrative nature of the Guidelines” is not necessarily a complete protection against *Apprendi*, and, by implication, now against *Blakely*.⁴⁵ The Solicitor General quoted from *Mistretta* for the proposition that the Commission “is fully accountable to Congress, which can revoke or amend any or all of the Guidelines as it sees fit.”⁴⁶ The government then, to its credit, specifically acknowledged that in the PROTECT Act, “Congress has in fact exercised its authority to amend the Guidelines.”⁴⁷ Indeed, as described below, the PROTECT Act presents a high – and perhaps insurmountable – hurdle for the government to clear in *Booker* and *Fanfan*.

While the government may offer other potential justifications to uphold the Federal Sentencing Guidelines despite *Blakely*, this administrative Guidelines rationale can be boiled down to two related arguments. First, the Guidelines survive *Blakely* because, unlike the Washington State guidelines, they are not statutory laws enacted by Congress. Second, the Guidelines are constitutional because they were promulgated by

⁴⁴ *Id.* at *26-27.

⁴⁵ *Id.* at *30.

⁴⁶ *Id.* (quoting *Mistretta*, 488 U.S. at 393-394).

⁴⁷ *Id.*

an independent commission located in the Judicial Branch. Both of these claims are *factually* questionable because of the PROTECT Act.

B. The PROTECT Act Blurs the Lines

In April 2003, Congress passed the PROTECT Act.⁴⁸ This legislation was primarily designed to help investigate and prosecute cases of child abduction. However, the PROTECT Act included a last minute addition that revamped federal sentencing law. In these sentencing provisions, Congress took several steps to increase the power of the Department of Justice – at the expense of both the United States Sentencing Commission and federal district judges – to set criminal sentences.

By passing the PROTECT Act, Congress derided the roles of both the Commission and the judges. In addition to sharply limiting the ability of judges to depart downward (but not upward), Congress stepped into the shoes of the Commission to re-write specific Guidelines text, prevented the Commission from making various new Guidelines, and limited the involvement of judges on the Commission itself. The sentencing provisions of the PROTECT Act have had a tremendous impact – both substantively and psychologically – on the federal sentencing world.⁴⁹ While some commentators at the time saw the PROTECT Act as “eviscerat[ing] a crucial

⁴⁸ Pub. L. No. 108-21, 117 Stat. 667 (April 30, 2003).

⁴⁹ David M. Zlotnick, *The War Within the War on Crime: The Congressional Assault on Judicial Sentencing Discretion*, 57 SMU L. REV. 211, 231-232 (2004) (“[T]hese changes are symbolically important because they illustrate just how Congress has abandoned its original conception of the Sentencing Commission.”).

component of the [federal] sentencing system,”⁵⁰ perhaps no one realized that the PROTECT Act might turn against the Congress and be part of the downfall of the Federal Sentencing Guidelines themselves.

In late March 2003, acting at the urging of the Chairman of the House Judiciary Committee and the Department of Justice, Representative Tom Feeney of Florida introduced an amendment on the floor of the House of Representatives that became known as the Feeney Amendment.⁵¹ Introduced with virtually no notice and approved with little debate in the House, the Feeney Amendment proposed to radically re-write federal sentencing law in part by severely curtailing the power of federal judges to depart downward. Strong protest followed.⁵² While the sentencing provisions ultimately incorporated into the PROTECT Act were somewhat milder than the original Feeney Amendment, the changes to the landscape of federal sentencing were still dramatic and unprecedented in the Guidelines era.⁵³

For post-*Blakely* purposes, the sentencing provisions of the PROTECT Act made three important changes in federal sentencing law. Each of these changes arguably reflected unfortunate “firsts” in the era of the Federal Sentencing Guidelines. First, Congress directly amended the Federal Sentencing Guidelines by drafting

⁵⁰ Letter from Law Professors to Senators Hatch and Leahy (April 2, 2003), *reprinted at* 15 FED. SENT. REP. 351, 351 (2003) (criticizing the PROTECT Act’s restrictions on downward departures).

⁵¹ Zlotnick, *supra* note 49, at 229.

⁵² *See, e.g.*, Steven L. Chanenson, *The Return of Hammurabi*, 26 PLW 390 (2003) (“The U.S. Senate and President George W. Bush should reject the Feeney Amendment.”); Letter from Law Professors to Senators Hatch and Leahy (April 2, 2003), *reprinted at* 15 FED. SENT. REP. 351, 351 (2003) (“As law teachers, most of whom specialize in criminal law and procedure, we write to express our deep concerns regarding the Feeney Amendment to H.R. 1104.”).

⁵³ Alan Vinegrad, *The New Federal Sentencing Law*, 15 FED. SENT. REP. 310 (2003) (describing the sentencing portion of the PROTECT Act as “containing the most far-reaching changes to the federal sentencing laws since the creation of the Sentencing Guidelines”).

Guidelines text.⁵⁴ In the past, Congress often had been content to issue directions to and requests for study from the Commission, but left it to the Commission to craft specific Guidelines text.⁵⁵ This time, Congress completely ignored the *expert* role the Sentencing Commission was designed to play, cut the Commission out of the process entirely, and directly wrote Guidelines text to its own specifications.⁵⁶ Congress went so far as to write Commentary for its new Guidelines.⁵⁷

⁵⁴ See, e.g., Pub. L. No. 108-21, § 401(b), (g), (i); Zlotnick, *supra* note 49, at 232 (noting that the PROTECT Act “was the first time that Congress actually wrote Guidelines language itself”).

⁵⁵ See Zlotnick, *supra* note 49, at 232 n.144 (2004) (“Other bills directed the Commission to implement policy goals but stayed away from mandating offense levels and writing specific language for the Commission to incorporate.”). However, Congress has previously instructed the *Commission* to increase offense levels in particular ways. U.S. SENTENCING COMMISSION, SPECIAL REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 71-72 (1991) (summarizing directives). For example, Congress did direct the *Commission* to add specific offense characteristics for the offense of kidnapping, abduction or unlawful restraint, and specified the extent of the offense level increases for those characteristics. Pub. L. No. 101-647, § 401. Yet even in this example, unlike the PROTECT Act, the Commission was not simultaneously barred by statute from making other changes to the Guidelines that might mitigate the relevant sentence. *But cf.* U.S. SENTENCING COMMISSION, SPECIAL REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 71 n.150 (1991) (noting that as “a policy matter, although not necessarily as a matter of law, the Commission generally viewed the directive as setting forth enhancements that it should neither reduce or exceed.”). Compare Pub. L. No. 108-21, § 401(j)(2) (PROTECT Act) (“On or before May 1, 2005, the Sentencing Commission shall not promulgate any amendment to the sentencing guidelines, policy statements, or official commentary of the Sentencing Commission that is inconsistent with any amendment made by subsection (b) or that adds any new grounds of downward departure to Part K of chapter 5.”); Pub. L. No. 108-21, § 401(j)(3) (“With respect to cases covered by the amendments made by subsection (i) of this section, the Sentencing Commission may make further amendments to the sentencing guidelines, policy statements, or official commentary of the Sentencing Commission, except that the Commission shall not promulgate any amendments that, with respect to such cases, would result in sentencing ranges that are lower than those that would have applied under such subsection.”).

Furthermore, although Congress had never directly written Guidelines text before, it had rejected Commission-drafted Guidelines on rare occasion. For example, Congress previously rejected the Sentencing Commission’s efforts to alter the 100 to 1 powder to crack cocaine sentencing differential. See U.S. SENTENCING COMMISSION, SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY (1997), *reprinted at* 10 FED. SENT. REP. 184, 184 (1998).

⁵⁶ See, e.g., Letter from the Judicial Conference of the United States to Senator Orrin G. Hatch (April 3, 2003), *reprinted at* 15 FED. SENT. REP. 343, 343 (2003) (“Neither the Judicial Conference nor the Sentencing Commission has been given a fair opportunity to consider and comment on this proposal.”).

⁵⁷ See, e.g., Pub. L. No. 108-21, § 401(g).

Second, Congress prohibited the Sentencing Commission from creating certain new Guidelines. Specifically, Congress barred the Commission from changing some of Congress’s legislative additions to the Guidelines or adding any new grounds for downward departure until after May 1, 2005.⁵⁸ Furthermore, Congress forever prevented the Commission from changing the acceptance-of-responsibility Guideline which Congress directly amended as part of the PROTECT Act.⁵⁹ Former U.S. Attorney Alan Vinegrad noted that “the statute is the most significant effort to marginalize the role of the Sentencing Commission in the federal sentencing process since the Commission was created by Congress nearly 20 years ago.”⁶⁰

Finally, Congress reduced the minimum number of judges required to be members of the Commission – to zero.⁶¹ Before the PROTECT Act, there needed to be at least three judges on the Commission. After the PROTECT Act (though not applicable to the then-current judicial members of the Commission), there can be no *more* than three judges on the Commission. Thus, there need not be any judges on the United States Sentencing Commission despite the fact that the Commission is located in the Judicial Branch of the government.⁶²

⁵⁸ Pub. L. No. 108-21, § 401(j)(2). Given the Commission’s typical amendment cycle, this prohibits most changes from taking effect until November 1, 2006. In Pub. L. No. 108-21, § 401(j)(3), Congress did allow the Commission to increase the punishment for child pornography (which Congress had increased by directly amending the Guidelines text) but not to decrease it.

⁵⁹ Pub. L. No. 108-21, § 401(j)(4) (“At no time may the Commission promulgate any amendment that would alter or repeal the amendments made by subsection (g) of this section.”).

⁶⁰ Alan Vinegrad, *The New Federal Sentencing Law*, 15 FED. SENT. REP. 310, 315 (2003).

⁶¹ Pub. L. No. 108-21, § 401(n).

⁶² Although not raised in *Booker* or *Fanfan*, the potential absence of judges from the United States Sentencing Commission presents another possible problem for the Federal Sentencing Guidelines. The *Mistretta* Court upheld the Guidelines in part because of the role played by the judiciary in formulating the Guidelines. *Mistretta*, 488 U.S. at 390-91. The potential absence of that judicial involvement casts a separate shadow over the continued viability of the Federal Sentencing Guidelines. *Cf. id.* at 391 n. 17

The PROTECT Act is powerful evidence that the post-*Blakely* administrative distinction advocated by the Department of Justice – even if accepted as a matter of constitutional theory – may well be illusory as a factual matter. It may be, as Judge Easterbrook contends, that *Blakely*'s “statutory maximum” relates to *statutes* and not to *administrative* Guidelines. Yet, at least some of the text of the Federal Sentencing Guidelines has been written directly by Congress as part of a typical statute in the form of the PROTECT Act.⁶³ Thus, that administrative feature may no longer fully describe the Federal Sentencing Guidelines. It may also be, as the Second Circuit wondered, that independent judicially-based sentencing commissions can promulgate sentencing guidelines like the Federal Sentencing Guidelines without offending the Sixth Amendment to the Constitution. Yet, it is difficult to call the United States Sentencing Commission either particularly independent or particularly judicial when Congress has prevented it – by statute – from issuing certain Guidelines and permitted its judicial complement to be eliminated entirely.

C. Congress Starts to Line Up

Thus far, Congressional reaction to *Blakely* has included great concern, but little action. In late July 2004, the Senate passed a concurrent resolution urging the Supreme Court to resolve the confusion surrounding *Blakely* as soon as possible, and essentially

(“Indeed, had Congress decided to confer responsibility for promulgating sentencing guidelines on the Executive Branch, we might face the constitutional questions whether Congress unconstitutionally had assigned judicial responsibilities to the Executive or unconstitutionally had united the power to prosecute and the power to sentence within one Branch.”).

⁶³ Pub. L. No. 108-21, § 401; *see also* Bibas, *supra* note 23, at __ (noting PROTECT Act amendments to Guidelines “makes the Federal Guidelines look more like statutes.”).

arguing that the Court should end that confusion by finding the Guidelines constitutional.⁶⁴ For example, the resolution states that the “statutory maximum penalty is the maximum penalty provided by the statute defining the offense of conviction, including any applicable statutory enhancement, and not the upper end of the guideline sentencing range promulgated by the Sentencing Commission and determined to be applicable to a particular defendant.”⁶⁵ The resolution describes the United States Sentencing Commission as being established as an “independent commission in the Judicial branch” without acknowledging that this *judicial* commission may now be devoid of judges, cannot pass certain kinds of Guidelines, and has had the text of its own Guidelines Manual re-written in detail by Congress without meaningful consultation.

As part of the discussion of this July 2004 resolution, Senator Patrick Leahy lamented that “Congress has seriously undermined the basic structure and fairness of the Federal guidelines system through posturing and ideology. . . . The culmination of these unfortunate trends was the so-called Feeney Amendment to the PROTECT Act, in which this Congress cut the Commission out altogether and rewrote large sections of the Guidelines manual, including commentary.”⁶⁶ He went on to observe that “[i]t may be that the *Blakely* decision was occasioned in part by recent tinkering with the Sentencing Reform Act that went too far.”⁶⁷ Senator Leahy’s insights are profound.

⁶⁴ S. Con. Res. 130 (Passed by the Senate July 21, 2004).

⁶⁵ *Id.*

⁶⁶ 108 CONG. REC. S8573 (daily ed. July 21, 2004).

⁶⁷ *Id.*

Indeed, his concerns may find a receptive audience in the Supreme Court as it decides *Booker* and *Fanfan*.

IV. Conclusion

The Supreme Court of the United States will soon tell us whether, and if so how, the Federal Sentencing Guidelines survive *Blakely*. Although the Guidelines have beaten the odds before, the smart money seems to be against them.⁶⁸ The destruction of the Federal Sentencing Guidelines as we now know them will not be the end of the world. Viable options for structured sentencing exist.⁶⁹ Yet the irony cannot be lost on Congress and the Department of Justice that their effort to further control federal sentencing through the PROTECT Act may well play a role in the demise of the sentencing system that both the Legislative and Executive Branches want to preserve.

In *United States v. Green*,⁷⁰ Chief Judge Young described a series of objections to the Federal Sentencing Guidelines, and, almost one week before *Blakely*, declared them unconstitutional. Significantly, Chief Judge Young called the Feeney Amendment, which evolved into the relevant portions of the PROTECT Act, “the saddest and most counterproductive episode in the evolution of federal sentencing doctrine.”⁷¹ Given the strength of the competition, reasonable minds can clearly differ on whether the PROTECT Act is *the* saddest episode in the evolution of federal sentencing doctrine. Nevertheless, Congress’s reckless disregard for the United States

⁶⁸ See, e.g., King & Klein, *supra* note 23, at ___; Bibas, *supra* note 23, at ___.

⁶⁹ See, e.g., King & Klein, *supra* note 23, at ___; Bibas, *supra* note 23, at ___.

⁷⁰ 2004 WL 1381101 (D. Mass. 2004).

⁷¹ *Id.* at *12.

Sentencing Commission and open contempt for the judiciary may indeed prove to be one of the most *counterproductive* acts in recent sentencing history.