Go Slow: A Recommendation for Responding to *Blakely v. Washington* in the Federal System

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On June 24, 2004, a legal earthquake struck the national sentencing reform landscape in the form of the Supreme Court's decision in *Blakely v. Washington*.[1] This earthquake has fractured structured sentencing reforms in federal and state systems. Indeed, the federal sentencing regime might appear to be in ruins from the aftershocks of numerous lower court decisions finding that *Blakely* renders parts of the federal guidelines unconstitutional.

In our view, the *Blakely* ruling is not a disastrous event for the federal sentencing system. Justice O'Connor is wrong when she concludes in her *Blakely* dissent that "[o]ver 20 years of sentencing reform are all but lost." We believe instead that the *Blakely* ruling presents a remarkable opportunity to build upon the federal sentencing reform experiences of the last two decades. *Blakely* creates an historic moment in which all three branches of government can take stock and reconsider the law, policy and practices of federal sentencing.

As editors of the leading casebook[2] and journal[3] on sentencing law, and as scholars with longstanding interest in federal sentencing, we have a simple and straightforward recommendation for how the Senate Committee on the Judiciary and Congress should respond to this historic moment: go slow.

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[1] Blakely v. Washington, No. 02-1632, 2004 WL 1402697 (S. Ct. June 24, 2004).
[2] NORA V. DEMLEITNER, DOUGLAS A. BERMAN, MARC L. MILLER & RONALD F. WRIGHT, SENTENCING LAW AND POLICY: CASES, STATUTES AND GUIDELINES (Aspen Publishers 2004).
[3] *Federal Sentencing Reporter* (University of California Press / Vera Institute of Justice) (Douglas A. Berman & Nora V. Demleitner, Managing Editors; Marc L. Miller, Founding Editor; Ronald F. Wright, Advisory Board).

The Challenge *Blakely* Creates

By holding that "all facts essential to punishment" must be found by a jury or admitted by the defendant, *Blakely* disrupts the ability of judges alone to find facts that increase sentences under applicable laws. Judicial fact-finding of aggravating facts is a pervasive aspect of many guideline systems and is central to the current structure of federal sentencing guidelines. Thus it might seem that *Blakely* irreparably disrupts the operation of guideline sentencing schemes.

But as Justice Scalia astutely observed for the Court, the *Blakely* decision does not render guideline and other determinate sentencing systems unconstitutional, it simply forces them "to be implemented in a way that respects the Sixth Amendment." After *Blakely*, guideline and other determinate sentencing systems must be structured to ensure that sentences are increased "*solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*." *Blakely*, slip op. at 7 (emphasis in original).

The challenge now for this Committee and for Congress is to devise an effective and just federal sentencing structure that complies with the requirements of *Blakely*. This is a daunting task not only because the meaning and impact of the *Blakely* decision are uncertain, but also because sentencing realities are often determined by how sentencing laws are administered as much as by how they are written. Crafting a measured and appropriate response to *Blakely* calls for studied deliberation, not hasty action.

Voices of Experience from the Federal Courts

With the dust from the *Blakely* earthquake and its aftershocks still in the air, and with strongly worded opinions highlighting *Blakely*'s apparent impact, it is easy to think that Congress must do something fast. The many unsettled questions in sentencing at the present moment—combined perhaps with a (mistaken) belief that the ceiling (on sentences) is (literally) falling—might lead this Committee or Congress as a whole to believe that immediate legislative action *is* necessary.

However, actors in the federal sentencing system are demonstrating their ability to cope effectively with the immediate issues and concerns generated by *Blakely*. Indeed, the speed of developments in response to *Blakely* is breathtaking. Lawyers and federal courts have begun to wrestle with the implications of *Blakely* and are quickly framing and resolving key issues. New judicial opinions appear from U.S. District and Circuit courts every day.

The vast majority of federal felony convictions—more than 97 percent—are obtained through guilty pleas.[4] Federal prosecutors have already altered charging and plea procedures to

[4] *See* UNITED STATES SENTENCING COMMISSION, 2002 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, FIGURE C (May 2004) (indicating that 97.1 percent of federal felony convictions are obtained through guilty pleas).

account for *Blakely*.[5] The Department of Justice can stabilize the legal terrain through its charging and plea policies, and courts can also review plea agreements for legality under *Blakely*. In a July 9, 2004 opinion, Judge Ted Stewart of the U.S. District Court of Utah explained his view that the *Blakely* fallout in the federal system is manageable:

> "[The] government maintains numerous effective tools for the prosecution of criminal cases to permit appropriately severe sentences.... Indeed, *Blakely* set forth numerous options for the government, and the Department of Justice has set about developing methods for pursuing criminal prosecution, post-*Blakely*."

United States v. Montgomery, Case No. 2:03-CR-801, at 10 (D. Utah July 9, 2004).

In the initial responses to *Blakely* there will be some divergent sentencing practices in different parts of the country. But, in this particular context, the legal variety within the federal system is healthy. In the course of devising a measured and appropriate response to *Blakely*, Congress will be able to draw on the efforts and experiences of judges and attorneys around the country creating and applying various post-*Blakely* rules. Some approaches will likely prove more workable than others, and Congress should benefit from such a testing period before creating a longer-term solution.

Understanding the impact of the *Blakely* holding, let alone crafting a measured and effective response, requires time and deliberation. In our view, *any* legislative fix at this time would come at an unwarranted cost. Federal legislation at this moment could short-circuit the experience and creativity of thousands of lawyers and judges now working through these problems. Furthermore, because legislative action now will only have prospective application, hurried short-term solutions may only further destabilize the legal terrain and may disrupt a proper survey of the new legal environment.

By moving slow, waiting perhaps for future rulings from the Supreme Court about the reach of *Blakely*, Congress will allow the fermentation of facts, knowledge and wisdom that can provide a stronger foundation for further reform in the near future. Congress should also ask the U.S. Sentencing Commission, the body entrusted to draft and study the guidelines, to propose and assess legislative options available in light of judicial decisions. Congress should indeed reconsider the legal superstructure for federal sentencing, but it should not do so in haste with an inaccurate belief that a short-term fix is absolutely needed.

Justice Kennedy in his *Blakely* dissent lamented the decision's impact on the "institutional dialogue" that drove sentencing reform for the past two decades. We believe Justice Kennedy has it backwards, and that the *Blakely* decision can in fact reinvigorate the "dynamic and fruitful dialogue" that marked the initial passage of the Sentencing Reform Act under the extended and thoughtful leadership of Congress. We believe such a dialogue is a critical element to the continued positive evolution of modern sentencing reforms.

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[5] *See* Memorandum From Deputy Attorney General James Comey to All Federal Prosecutors, Department Legal Positions and Policies in Light of *Blakely v. Washington* (July 2, 2004).

Dialogue with States Responding to *Blakely* Issues

When the proper time arrives to reconsider the fundamentals of federal sentencing, Congress can and will be able to draw insights and wisdom from the experiences of states, particularly those with sentencing systems affected by *Blakely*. Congress can already find possible models for creating an effective and just federal sentencing structure after *Blakely* from the experiences in Kansas. Following a 2001 ruling by its state Supreme Court that was similar to *Blakely*,[6] the Kansas legislature created a dual jury system, asking for jury fact-finding on the relevant sentencing facts only after a defendant is convicted.[7] The Kansas solution is only one possibility. Other arrangements for respecting the Sixth Amendment jury right in sentencing procedures are also possible. State legislatures, commissions, and courts will surely generate a variety of special verdict forms for juries and specialized plea agreement procedures.

Waiting to learn not only the response of federal actors but also the response of states can be invaluable to wise legislative reform of the federal system. State governments have already created extremely promising, flexible, and effective sentencing guideline systems that have produced far more consensus and cooperative improvements over time than the federal guidelines. There is every reason to believe that these states with a proven record of success will generate a worthwhile set of models that the Congress can consider down the road in seeking a more permanent solution to *Blakely* issues. And state sentencing systems will generate useful ideas for the federal system on a timely basis. Many of the affected states have sentencing commissions with full-time staff already working on these issues.

Leaders in some states affected by *Blakely* have already explained the dangers of reacting too quickly to the decision. In Arizona, prosecutors decided not to request a special session to change the state's criminal sentencing laws. Ed Cook, the executive director of the Arizona Prosecuting Attorneys Advisory Council, said that the legislature should take enough time "to assure that a legislative fix arises from a thoughtful discussion and a reasoned discussion."[8] In Minnesota, a state rightly praised for leading the development of sound guideline sentencing reforms,[9] Governor Tim Pawlenty has asked the state's sentencing commission to make both short-term recommendations and a long-term analysis concerning possible changes to sentencing laws in response to *Blakely*. The short-term recommendations will be issued by August 1 and a more thorough analysis will be completed by September 30.[10] Congress should similarly charge the U.S. Sentencing Commission.

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[6] State v. Gould, 23 P.3d 801 (Kan. 2001).
[7] Kansas Stat. §§ 21-4716 & 21-4718.
[8] *See* Paul Davenport, *Prosecutors Delay Seeking Special Session on Sentences*, ARIZONA REPUBLIC, July 4, 2004.
[9] *See* Richard Frase, *Sentencing Guidelines in Minnesota, Other States, and the Federal Courts: A Twenty-Year Retrospective*, 12 FEDERAL SENTENCING REPORTER 69 (1999).
[10] *See* Conrad Defebrie, *State to Study Sentencing Ruling*, MINNEAPOLIS STAR TRIBUNE, July 2, 2004.

Twenty Years of Learning

The Sentencing Reform Act of 1984 was one of the most significant law reform efforts in American history, transforming the structure and substance of all federal sentencing decisions. The SRA was produced after almost a decade of hearings, reports and careful discussion by both houses of Congress. Courts may come to recognize that while some or all of the guidelines are no longer valid, Congress' direction to judges in 18 U.S.C § 3553(a) remains valid law and a valuable guide to sentencing decision-making. Under no view will *Blakely* return the federal system to a pre-guidelines world. Federal judges and prosecutors, left alone, can and will draw upon fifteen years of structured sentencing experience, the experience of dozens of states, the now deeply familiar federal guidelines (whether binding or not), the Sentencing Reform Act, and the existence of a substantial body of sentencing concepts, practices, commentary, research and scholarship that did not exist before.

For all of these reasons, we encourage Congress to wait on any legislative action in response to *Blakely*: in short, we encourage Congress to go slow.