

Blakely's Potential

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*"Federal sentencing reform has been long overdue."*¹

I. INTRODUCTION

For a short while, it appeared as though the defining decisions of Supreme Court's last term were its rulings in three monumental terrorism cases.² Each of those cases is related in one way or another to the incarceration practices of the United States government. At a time when the public has focused its attention on foreign incarceration practices related to the war against terrorism, it should not forget that at the end of 2001, 6.6 million Americans — one out of every 32 adults — were in prison, on parole, or on probation.³ American prisons are in a time of crisis, facing a litany of growing problems such as overcrowding, violence, and recidivism. The Federal Sentencing Guidelines ("Guidelines") have fostered some of these conditions and are ripe for reform. Furthermore, the organization in charge of revising and studying the guidelines — the United States Sentencing Commission — has been in desperate need of reformulation.

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1. 129 CONG. REC. S2090 (daily ed. Mar. 3, 1983) (statement by Ted Kennedy arguing in favor of the Sentencing Reform Act of 1984). Ironically, this quote appears in an amicus brief that bears Senator Kennedy's name, which argues for preserving the guidelines. Brief for the Honorable Orrin G. Hatch, Honorable Edward M. Kennedy, and Honorable Dianne Feinstein as Amici Curiae in Support of Petitioner at 14, *United States v. Booker*, No. 04-104 2004 U.S. LEXIS 4788 (Aug. 2, 2004).

2. *Rumsfeld v. Padilla*, 124 S. Ct. 2711 (2004); *Rasul v. Bush*, 124 S. Ct. 2686 (2004); *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004).

3. *Record Number Run Afoul of Law in U.S.*, TORONTO STAR, Aug. 26, 2002, at A03.

These issues deserved our attention. Unfortunately, they rarely reached the top of legislators' agendas. Then came *Blakely v. Washington*.⁴

On June 24th of this year, the Supreme Court decided a case that sent a virtual shockwave through the criminal justice system, particularly regarding the practice of sentencing defendants under the Guidelines. In *Blakely v. Washington*, Ralph Howard Blakely Jr. pled guilty to the crime of kidnapping his wife.⁵ The maximum sentence authorized by the facts contained within the plea was 53 months.⁶ Pursuant to Washington law, however, the judge imposed an "exceptional" sentence of 90 months based on a judicial determination that Blakely had acted with "deliberate cruelty."⁷ Blakely challenged the procedure by which the judge, applying the preponderance of the evidence standard of proof, determined certain facts necessary to increase his sentence from 53 months, the default maximum sentence, to 90 months. He argued that the judicial fact-finding authorized by state law to enhance his sentence violated his Sixth Amendment right to a trial by jury.⁸ The Court agreed. Only a few months later, the Supreme Court agreed to hear arguments in two cases — *United States v. Booker*⁹ and *United States v. Fanfan*¹⁰ — which will likely decide the constitutionality of the Guidelines.

Although the *Blakely* ruling was directed at Washington's sentencing laws, the Justices spent a significant portion of their time during the oral argument and in the opinion discussing the ruling's implications for the federal sentencing system. For the past seventeen years, criminal defendants convicted of federal crimes have been sentenced under the Guidelines. Twenty years ago, in an attempt to make sentencing more consistent and fair, Congress passed the Sentencing Reform Act of 1984, from which the

4. 124 S. Ct. 2531 (2004).

5. *Id.*

6. *Id.*

7. *Id.* Before Blakely's case reached the Supreme Court, Washington recodified and amended the criminal code. For the purposes of this essay, the relevant law cited was the law at the time of sentencing.

8. *Id.*

9. No. 04-104, 2004 U.S. LEXIS 4788 (Aug. 2, 2004) (mem.).

10. No. 04-105, 2004 U.S. LEXIS 4789 (Aug. 2, 2004) (mem.).

current guidelines arose.¹¹ The Guidelines, which resemble a phone book more than a guidebook, direct judges to find certain facts that increase or decrease a defendant's sentence.¹² The result of applying the Guidelines is supposed to be a balanced, fair, and consistent sentencing system. Increasingly, however, voices from both sides of the ideological and political spectrum have decried the Guidelines as excessively harsh, inflexible, and unjust.¹³

The post-*Blakely* legal environment of the past several months has had a flurry of activity, dividing circuit courts and district courts as to *Blakely's* impact on the Guidelines. Out of the *Blakely* chaos,¹⁴ an exceptional opportunity has presented itself to bring sentencing policy to the forefront of our national dialogue, and in an election year no less. Until now, cries for reform and for critical reevaluation of the noble project of determinate sentencing have largely fallen on deaf ears. This nation and its political leaders should seize on the turbulence caused by the *Blakely* decision and use it as a catalyst to honestly debate the merits of determinate sentencing as it currently stands in this country. To date, Congress has rejected any "quick fixes" to the

11. Pub. L. No. 98-473, 98 Stat. 1987 (1984) (codified as amended at 18 U.S.C. §§ 3551–3559, 3561–3566, 3571–3574, 3581–3586 (1988), and 28 U.S.C. §§ 991–998 (1988)).

12. Though this interpretation of the Guidelines is the one most courts have adopted since *Blakely*, Phil Fortino argues persuasively that the Guidelines do not require judicial fact-finding, nor the application of a specific burden of proof. *See generally* Phil Fortino, *A Post-Blakely Era or Post-Blakely Error?*, 38 COLUM. J.L. & SOC. PROBS. 1 (2004).

13. Academic commentaries criticizing the guidelines are legion. For a small sample, *see* REPORT OF THE ABA JUSTICE KENNEDY COMMISSION (2004), <http://www.abanet.org/media/jkcrecs.html> (last visited Aug. 31, 2004) (criticizing a variety of sentencing policies such as mandatory minimum sentences and the curtailment of judicial discretion); Albert W. Alschuler, *Departures and Plea Agreements under the Sentencing Guidelines*, 117 F.R.D. 459, 467 (1988) (criticizing "muddled methodology" of the Guidelines); Marc Miller, *Purposes at Sentencing*, 66 S. CAL. L. REV. 413, 419 (1992) (criticizing the Sentencing Commission for failing to articulate a sentencing philosophy); KATE STITH & JOSE A. CABRANES, *FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS* (1998) (criticizing the Guidelines for, *inter alia*, restricting judicial discretion).

14. I use the word "chaos" with reservation, noting that there is a debate as to whether the post-*Blakely* environment is chaotic. Without delving into this issue, I note that the post-*Blakely* rhetoric is at times amusing. One commentator has noted that, "Prosecutors, defense attorneys, and judges have described *Blakely* as 'a tidal wave,' a 'brave new world,' a 'legal haymaker,' a 'monkey wrench,' 'a number 10 earthquake,' and a source of 'chaos,' 'upheaval,' and 'mass uncertainty.'" Albert W. Alschuler, *To Sever Or Not To Sever? Why Blakely Requires Action By Congress*, 17 FED. SENT. REP. (forthcoming Oct. 2004) (manuscript at 17), *available at* <http://www.ussguide.com/members/BulletinBoard/Blakely/Articles/Alschuler.pdf> (last visited Aug. 31, 2004).

Guidelines which would have forestalled the current round of *Blakely* litigation. Still uncertain, in the event the Court rules that the Guidelines do not withstand the *Blakely* decision, is whether our political leaders will reach for a quick solution, basically restoring the status quo ante, or seize this opportunity to comprehensively reform determinate sentencing.

The purpose of this essay is to urge those in the legal community, our elected public officials, and the public in general to demand a rigorous and comprehensive national discussion of sentencing policy. The *Blakely* decision has provided the impetus for meaningful reform of a sentencing system which is sound in its philosophy, but significantly flawed in its execution. This essay focuses on both legal and policy aspects of sentencing. On the legal front, *Blakely* has the potential to clarify the distinction between an element and a sentencing factor. This distinction is at the root of the *Blakely* controversy and is indispensable to policymakers who will be charged with the task of designing a post-*Blakely* sentencing regime. On the policy side, this essay suggests revisiting the role of the United States Sentencing Commission as the primary source of modifications to the Guidelines. The Sentencing Commission should be a more transparent, independent, and democratic institution, which embraces meaningful dialogue with academics, judges, and the public.

II. BLAKELY'S POTENTIAL TO REFORM FEDERAL SENTENCING

Twenty years ago, the right combination of public outcry and political will coalesced to produce the Sentencing Reform Act of 1984 ("SRA"). Its intentions — to ensure fairness and uniformity in sentencing — were noble, and few have argued that we should abandon determinate sentencing.¹⁵ The Court has signaled that determinate sentencing regimes are sound. The question, in Justice Scalia's words, is how a determinant sentencing system "can be implemented in a way that respects the Sixth Amendment."¹⁶

15. For the purposes of this essay, "determinate" sentencing refers to a system of sentencing in which judicial discretion is guided by predetermined factors (either legislatively or judicially promulgated) commonly used to sentence defendants. "Indeterminate" sentencing refers to a sentencing system by which judges are free to assign weight to any factors the judge feels is relevant to calculating the defendant's sentence.

16. *Blakely v. Washington*, 124 S. Ct. 2531, 2540 (2004).

Some have suggested legislative solutions to defuse the sentencing crisis. While those proposals would put an end to the uncertainty of the status quo, they come at the expense of substantive reform. Currently, the groundwork for a reform movement is coming together, largely due to the *Blakely* decision.

At the time of this writing, all but four of the Courts of Appeals have taken a position on *Blakely's* impact on the guidelines.¹⁷ For years prior to the *Blakely* decision, numerous federal judges voiced their discontent with the Guidelines because they severely restrict judicial discretion. Justice Kennedy, a conservative Reagan appointee, is one of the leaders of the judicial movement to reform the Guidelines. Fortuitously, the commission that bears his name recently released a report that advocates alternatives to incarceration, the repeal of many mandatory minimum sentences, and greater judicial discretion in sentencing.¹⁸

The efforts of Justice Kennedy, as well as other federal judges, are indispensable to fostering the conditions needed for brave sentencing reforms. Law professor and former federal prosecutor David Zlotnick believes that “[judges] can help to lay the foundation for the reeducation of the public about federal criminal justice policy. . . . [T]hrough their institutional and individual voices, they can provide political cover for a politician brave and unconventional enough to take on this issue.”¹⁹ Now that *Blakely* has put sentencing on the national radar, it is more likely that judges will provide this political cover.

In contrast, several proposals have been offered that would “save” the Guidelines. Foremost among the reform measures is Professor Frank Bowman’s proposal to raise the top of the base level offense to the statutory maximum by amending the Sentencing Table found in Chapter 5 of the Guidelines.²⁰ Professor Bowman’s proposal relies on the viability of the Supreme Court’s de-

17. The circuits that have not opined are the First, Third, Tenth, and D.C. Circuits.

18. REPORT OF THE ABA JUSTICE KENNEDY COMMISSION, *supra* note 13.

19. David M. Zlotnick, *The War Within the War on Crime: The Congressional Assault on Judicial Sentencing Discretion*, 57 SMU L. REV. 211, 260 (2004). In particular, he argues that, “Statements by Supreme Court Justices, the organized judiciary, and prominent judicial associations garner the most press and therefore are likely to have the greatest impact.” *Id.* at 261–62 (footnote omitted).

20. See Memorandum from Frank O. Bowman to the United States Sentencing Commission, June 27, 2004, at <http://www.goldsteinhowe.com/blog/files/BowmanProposalJune2004.doc> (last visited Sept. 10, 2004).

cision in *Harris v. United States*,²¹ which held that the rule expressed in *Apprendi v. New Jersey*²² does not proscribe judicial fact-finding that leads to a mandatory minimum sentence. Assuming that *Harris* is still valid, Professor Bowman's proposal would allow a judge to use the Guidelines to enhance a defendant's sentence while not running afoul of *Blakely*.²⁴ Both the brilliance and detriment of the Bowman proposal is that it would return the practice of sentencing to "business as usual."²⁵ The Bowman proposal would also cost legislators very little political capital, since all they would be doing is preserving the Guidelines as they stood prior to *Blakely*. These proposals have been rejected thus far, allowing the courts to think through the post-*Blakely* fallout and setting the stage for a national sentencing debate.

What Congress will do, assuming the Supreme Court declares the Guidelines unconstitutional, is anyone's guess. Some have speculated that *Blakely* "may be a sort of trigger for rethinking the entire federal system."²⁶ That prediction may come true, but, at the very least, the *Blakely* decision may have provided the needed "political cover" for our elected representatives to take on a task of that magnitude.

21. 536 U.S. 545 (2002).

22. 530 U.S. 466 (2000).

24. Professor Rachel Barkow of N.Y.U. has argued that the Bowman proposal is unwise because *Harris*'s viability is questionable after *Blakely* and because the Justices would not look upon Professor Bowman's end-run around the guidelines favorably. See *Blakely v. Washington and the Future of the Federal Sentencing Guidelines: Hearing Before the Senate Committee on the Judiciary*, 108th Cong. (2004) (statement of Rachel E. Barkow); available at <http://www.blakelyblog.com/TestimonyBarkow.pdf> (last visited Aug. 31, 2004).

25. The Bowman proposal would require amending the Sentencing Reform Act, which currently requires the top of each sentencing range to be no more than twenty-five percent or six months above the bottom of the range, whichever is greater, except that, if the minimum term of the range is thirty years or more, the maximum may be life imprisonment. See 28 U.S.C. § 994(b)(2).

26. John Gibeaut, *Compound Sentencing Problems: High Court to Take Another Crack at Federal Guidelines*, ABA J. REP., August 6, 2004, available at <http://www.abanet.org/journal/ereport/au6blakely.html> (last visited Aug. 31, 2004).

Most politicians fear being perceived as “soft on crime.” The fear of being tagged with the “soft on crime” label has undoubtedly muted prior calls for sentencing reform. Although recent calls for reform have crossed ideological divides, few politicians are willing to risk facing the “Willie Horton” political advertisement run against Democratic Presidential nominee Michael Dukakis in 1988.²⁷ Carol A. Bergman, former Director of Legislative Affairs for the Office of National Drug Control Policy, has stated: “If the goal is to make it possible for Members of Congress to vote to change sentencing policy, some will need political cover, but most will need pressure.”²⁸ If the Court unravels the Guidelines, Congress will have an opportunity to start over again. The Court’s ruling will certainly restrict the options available to policymakers, but most significantly, it will give politicians the opportunity to reconsider virtually every aspect of sentencing. Absent a ruling like *Blakely*, reforms of this magnitude have proven too costly for reformers to mount. With a public demand for reform, the right combination of circumstances might produce an environment conducive to substantial revision of the Guidelines.

What follows is a discussion of two related aspects of sentencing reform. For legislators to fulfill *Blakely’s* promise, they will need the Supreme Court to answer a deceptively simple question: what makes a fact an element or a sentencing factor? The direction of post-*Blakely* sentencing will hinge, to a large degree, on the answer to that question. Even if the Court fails to answer that question clearly, however, a strong case can be made for reforming the role of the Sentencing Commission. The Commission’s independence has eroded over time, to the point where it has become a political shield for members of Congress. Congress should reform the Commission to operate independently and openly.

27. Many commentators felt that the Willie Horton political advertisements, which literally depicted a “revolving door” prison, greatly undermined Dukakis’s bid for the White House.

28. Carol A. Bergman, *Rethinking the Crack/Cocaine Ratio: The Politics of Federal Sentencing on Cocaine*, 10 FED. SENT. REP. 196, 198 (1998).

III. WHAT'S IN A NAME? THE ELEMENT/SENTENCING FACTOR DISTINCTION

The distinction between an element of an offense and a sentencing factor is clear in terms of the consequences attached to each classification. Every element of an offense must be alleged in an indictment and proven to the jury beyond a reasonable doubt.²⁹ Sentencing factors need not be alleged in the indictment and are considered by the judge under the preponderance of the evidence standard of proof.³⁰ What is not clear, however, is the anterior question of how to determine which facts are essential elements and which are sentencing factors. This question has perplexed the Supreme Court for some time, but is at the heart of the *Blakely* decision. “Since the Court first started addressing ‘sentencing factors’ in *Williams v. New York*, the Court’s opinions have vacillated between imposing constitutional limitations on the substance of criminal law and granting deference to legislatures.”³¹

The *Blakely* decision may have answered the question by rendering the element/sentencing factor distinction irrelevant. The majority’s *Blakely* opinion seemingly transformed most sentencing factors into elements, with some notable exceptions.³² It is unlikely that sentencing factors will vanish from the legal landscape all together. Some kind of judicial fact-finding is likely to survive *Blakely*; the question is, in what form will it appear? The line currently drawn by *Blakely* is not completely consistent. Prior convictions, for example, enhance a defendant’s sentence

29. *Hamling v. United States*, 418 U.S. 87, 117 (1974) (an indictment must charge all elements of the offense); *Patterson v. New York*, 432 U.S. 197, 210 (1977) (“the Due Process Clause requires the prosecution to prove beyond a reasonable doubt all of the elements included in the definition of the offense of which the defendant is charged.”).

30. *Apprendi v. New Jersey*, 530 U.S. 466, 492 (2000) (noting that *McMillan v. Pennsylvania*, 477 U.S. 79 (1986), held that “the legislature can authorize a judge to find a traditional sentencing factor on the basis of a preponderance of the evidence”).

31. Derek S. Bentsen, Note, *Beyond Statutory Elements: The Substantive Effects of the Right to a Jury Trial on Constitutionally Significant Facts*, 90 VA. L. REV. 645, 649 (2004).

32. Prior convictions stand out as an example. In *Almendarez-Torres v. United States*, the Court ruled that prior convictions are sentencing factors that can be determined by the judge. 523 U.S. 224, 244–46 (1998). In *Apprendi*, however, one of the five members of the majority questioned the logic of *Almendarez-Torres*. 530 U.S. at 520–51 (Thomas, J., concurring).

but are not elements under the *Blakely* rule. In any event, legislators will need a clear answer to the element/sentencing factor question if they are to fashion a post-*Blakely* sentencing regime. Even if the Court upholds the Guidelines, and all *Blakely* does in the federal system is get us closer to understanding what makes a fact an element or a sentencing factor, we will have made significant progress toward clarifying the criminal code.³³

It is apropos that the Court granted certiorari in *Booker* and *Fanfan*, both federal drug cases.³⁴ The National Association of Criminal Defense Lawyers and the National Association of Federal Defenders (“NACDL/NAFD”) noted in their amici curiae brief to the Court that the “federal drug laws comprise, by far, the nation’s most complicated sentencing scheme . . . [which] include [] a series of escalating statutory maximums and minimums.”³⁵ The somewhat tortured history of the role played by drug quantity in federal drug crimes illustrates the need for clarification by the Court. Drug quantity is somewhat of a legal chameleon, appearing sometimes as an element and sometimes as a sentencing factor. The malleable application of drug quantity determinations in federal courts is foreign to the state courts, which have for the most part statutorily declared drug quantity to be an element of the offense.³⁶

Before the *Apprendi* decision, all federal circuits considered drug quantity a sentencing factor, to be determined by the judge.³⁷ Following the *Apprendi* decision, the circuit courts heard

33. Professors King and Klein argued recently that the *Blakely* opinion seems to indicate that facts that are the basis for enhancements are now to be treated as elements. I agree with this assessment, but that analysis leaves open the question of whether they are indeed elements, or rather as they put it, “superfacts” which are *treated* like elements. See Nancy J. King & Susan R. Klein, *Beyond Blakely*, 16 FED. SENT. REP. (forthcoming 2004) (manuscript at 6), available at http://sentencing.typepad.com/sentencing_law_and_policy/files/latest_king_klein_beyond_blakely.pdf (last visited Oct. 1, 2004).

34. The primary federal drug law is 21 U.S.C. § 841, popularly referred to as the Controlled Substances Act (“CSA”). Both *Booker* and *Fanfan* were charged with violations of 21 U.S.C. § 841.

35. Brief Amici Curiae of National Association of Criminal Defense Lawyers and National Association of Federal Defenders in Support of Petition for Certiorari at 15, *United States v. Booker*, No. 04-104 2004 U.S. LEXIS 4788 (Aug. 2, 2004).

36. See Richard Singer, *The Model Penal Code and Three Two (Possibly Only One) Ways Courts Avoid Mens Rea*, 4 BUFF. CRIM. L. REV. 139, 209 (2000) (the results of a fifty-state survey reveal that a majority of states consider drug quantity an element of the offense).

37. See *United States v. Thomas*, 204 F.3d 381, 383 (2d Cir. 2000) (per curiam) (collecting cases), *vacated and remanded by* 531 U.S. 1062 (2001).

several appeals from sentences imposed under Section 841(b), demanding consistency with *Apprendi*. The stage was set for the circuit courts to decide whether drug amount was an element of the offense or a sentencing factor. However, rather than interpreting the federal drug statute, most circuit courts were content to test the viability of judicial findings of drug quantity with the *Apprendi* rule. Post-*Apprendi*, only the Ninth³⁸ and DC Circuits³⁹ reversed their prior holdings that drug quantity was a mere sentencing factor. The remaining circuits, focused on the constitutional rule of *Apprendi*, held that *Apprendi* required drug quantity to be considered an element only when the judicial fact-finding brought the defendant's sentence above the statutory maximum.⁴⁰

The unique status of drug quantity in federal drug offenses prompted the NACDL/NAFD to petition the Court to take a non-drug case, but the Court declined the amici's invitation. The NACDL/NAFD argued, "While it would certainly be worthwhile for this Court to resolve Section 841's ambiguities post-*Blakely*, the statute's unique and complex provisions present a poor test case for the constitutionality of the full gamut of Guideline provisions."⁴¹ In one respect, the NACDL/NAFD's position is sound — the Court should choose a vehicle that will allow the clearest possible exposition of *Blakely*'s application to the Guidelines. On the other hand, drug convictions consume a vast proportion of the federal docket.⁴² It is hard to see how a ruling on a contentious

38. *United States v. Buckland*, 289 F.3d 558, 568 (9th Cir. 2002).

39. *United States v. Fields*, 242 F.3d 393, 396 (D.C. Cir. 2001).

40. At the time, the courts understood the term "statutory maximum" to mean the highest possible penalty for the offense prescribed by the legislature. *See United States v. Goodine*, 326 F.3d 26, 32 (1st Cir. 2003) (finding that drug quantity is a "classic sentencing factor"); *United States v. Wade*, 318 F.3d 698, 705 (6th Cir. 2003); *United States v. Lott*, 310 F.3d 1231, 1242–43 (10th Cir. 2002); *United States v. Smith*, 308 F.3d 726, 740 (7th Cir. 2002); *United States v. Thomas*, 274 F.3d 655 (2d Cir. 2001); *United States v. Sanchez*, 269 F.3d 1250, 1279 (11th Cir. 2001); *United States v. Vazquez*, 271 F.3d 93, 99–100 (3d Cir. 2001) (holding that Vazquez's sentence under Section 841 violated *Apprendi* but failing to reverse and remand because the evidence of drug quantity was overwhelming, failing plain error review); *United States v. Promise*, 255 F.3d 150, 156 (4th Cir. 2001); *United States v. Doggett*, 230 F.3d 160, 164–5 (5th Cir. 2000); *United States v. Aguayo-Delgado*, 220 F.3d 926, 933 (8th Cir. 2000).

41. Amici Curiae Brief of the National Association of Criminal Defense Lawyers and National Association of Federal Defenders, *supra* note 35, at 16.

42. In 2001, the United States Sentencing Commission reported that 24,223 defendants were sentenced for violating federal drug laws out of 59,897 total Guideline cases. U.S. SENTENCING COMM'N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, 2001 Fiscal

issue like drug quantity would not be a positive development. The question is largely one for academic commentary, however, since the Court has decided to hear *Booker* and *Fanfan*.

If the Court draws a clear distinction between an element and a sentencing factor, it would pave the way for a total revision of the federal criminal code. Congress could confidently identify elements and sentencing factors in the federal code with some clarification from the Court. Even if the Court does not make the distinction clear, the *Blakely* decision has already given us a reasonable understanding of the limits of judicial fact-finding. The question then becomes, what do we do with this new understanding? Thus far, prosecutors have largely engaged in two types of behavior with respect to sentencing: alleging sentencing factors in indictments with the intention of submitting the enhancements to the jury,⁴³ or charge bargaining.⁴⁴ The first of these phenomena has been documented in cases across the country, whereas charge bargaining is a more subtle technique that is difficult to report upon at this stage. Aside from the temporary wrangling and maneuvering of prosecutors to avoid (or comply with) *Blakely*, once the ball moves into Congress' court, a complete overhaul is not out of the question.

University of Pennsylvania Law Professor Paul Robinson has suggested that a fundamental reexamination of the entire federal code may be the best course of action.⁴⁵ The federal code is a hodgepodge of legislation, with amendment upon amendment piled on each year. Combined with the complexity of the Guidelines, which one commentator has described as a "258-box Parcheesi-style grid,"⁴⁶ the federal code is anything but clear and concise. In the 1960s and 1970s, several states began rewriting their criminal statutes following the example of the Model Penal Code. As laboratories of democracy, the states have experimented with various sentencing reforms, and several have

Year, available at <http://www.ussc.gov/ANNRPT/2001/fig-a.pdf>, <http://www.ussc.gov/ANNRPT/2001/fig-b.pdf> (last visited Sept. 4, 2004).

43. See *United States v. Medas*, 323 F. Supp. 2d 436 (E.D.N.Y. 2004).

44. Charge bargaining is the process by which prosecutors negotiate the charge, rather than the enhancements. See Stephanos Bibas, *Blakely's Federal Aftermath*, 16 FED. SENT. REP. 333, 338 (2004).

45. Gibeaut, *supra* note 26.

46. Erik Luna, Editorial, *Let Judges Do Their Job*, THE PHILADELPHIA INQUIRER, Aug. 9, 2004, available at <http://www.philly.com/mld/inquirer/news/editorial/9352559.htm>.

avoided the complexity of the federal system. A much clearer body of criminal law resulted.

Furthermore, many of the states have simplified their criminal code by writing sentencing factors into the substantive offense as elements. For example, many states have explicitly named the quantity of drugs as an element of the offense of distribution or possession.⁴⁷ Several state codes use elements such as drug quantity to categorize various degrees of the offense, reserving the greatest penalties for the most serious degrees of the offense. However desirable it may be for the federal government to “start over,” one must be circumspect about the prospects of Congress discarding the entire federal code. In fact, Congress could possibly allow the Sentencing Commission to reconstruct the Guidelines, a maneuver which would largely short-circuit a meaningful sentencing debate.

In addition to the inherent difficulty of getting Congress to agree on a complete revision of the federal criminal code, the timing of any reform faces one additional barrier: the possibility of a lame duck president. In November, Americans will head to the polls to elect the next President of the United States. The Court could issue an opinion in *Booker* and *Fanfan* near the election, creating the possibility that a lame duck president will have a *Blakely* gift basket dropped on the steps of 1600 Pennsylvania Avenue. Under such a scenario, it strains credulity to imagine that the President would have the political muscle to pass sentencing legislation of any magnitude. It is also hard to imagine that President Kerry’s first task in office would be to address the Guidelines. Would he have any choice? Perhaps we would be better guided in answering these questions if we knew how either President Bush or Senator Kerry stood on the Guidelines. To date, neither has commented publicly.

Only the Court can resolve the ambiguities surrounding the elements/sentencing factor question. Congress can reform the Sentencing Commission, however, without guidance from the Court. The next section of this essay argues in favor of restructuring the Sentencing Commission to more faithfully fulfill the goals of the SRA.

47. See Singer, *supra* note 36, at 209.

IV. THE SENTENCING COMMISSION — FROM JUNIOR VARSITY TO VARSITY SQUAD

In Justice Scalia's lone dissent in *Mistretta*, he famously dubbed the Sentencing Commission a "sort of junior-varsity Congress."⁴⁸ The *Mistretta* Court rejected a separation of powers and non-delegation challenge to the Guidelines; the Sixth Amendment was not before the Court in *Mistretta*. Justice Scalia's "junior-varsity" comment was illustrative of his view that Congress had unconstitutionally delegated its authority to the Sentencing Commission. Unfortunately, unlike the "varsity" Congress, the members of the Sentencing Commission are appointed by the President and approved by the Senate to six year terms of service. The Commission operates largely outside of the public eye and is beholden to Congress and the President. At the time of this writing, the Sentencing Commission had barely acknowledged the *Blakely* decision, although it had surely been working on little else for the last few months. It is time for the Commission to start playing on the varsity squad and accept the responsibility the promotion entails.

One commentator has speculated that *Blakely* may portend the end of the U.S. Sentencing Commission as we know it.⁴⁹ Interestingly enough, the Commission's death knell could come on non-delegation grounds — the same grounds upon which Justice Scalia dissented in *Mistretta*. The non-delegation issue presents an interesting intersection between the element/sentencing factor divide and the role of the Commission. Although the Sentencing Commission can, and frequently does, propose amendments to the Guidelines,⁵⁰ only Congress can define the elements of a crime.⁵¹ If *Blakely* has turned all the previous sentencing factors

48. *Mistretta v. United States*, 488 U.S. 361, 427 (1989) (Scalia, J., dissenting).

49. Mark H. Allenbaugh, *The Supreme Court's Decision in Blakely v. Washington: A Watershed Ruling that Will Usher In Much Needed Sentencing Reform*, Findlaw.com, July 6, 2004, at <http://writ.news.findlaw.com/allenbaugh/20040706.html>.

50. Amendments to the guidelines emanating from the Commission are sent to Congress. If the Congress does not affirmatively disapprove of the proposed amendments after 180 days, they become an official guideline amendment. 28 U.S.C. § 994(o) (2003).

51. See, e.g., *H. J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 249 (1989) ("[if the omission of an organized crime nexus in RICO] is a defect . . . it is one 'inherent in the statute as written,' and hence beyond our power to correct."); *United States v. Culbert*, 435 U.S. 371, 374 (1978) ("Respondent . . . argues that we should read a racketeering requirement into the [Hobbs Act]. To do so, however, might create serious constitutional prob-

into elements, a significant portion of the Commission's work is now unconstitutional.

Assuming that the Court strikes down the Guidelines, what is next for the Sentencing Commission? The Commission serves several important functions,⁵² but any substantive reform of federal sentencing policy should include the Commission itself as a target of reform. The Sentencing Commission has become an insular group, shielding itself from criticism, and seemingly unwilling to listen to the growing voices of academics, lawyers and judges that have criticized the Guidelines for the restrictions they impose on judges.⁵³ Perhaps the Commission's unwillingness to accept reform proposals is a symptom of political restraints that the legislative and executive branches have imposed. If these political restraints are the root of the problem, the need for restructuring the Commission is even more pressing.

From a political perspective, the Sentencing Commission may serve to insulate members of Congress from public criticism. Most amendments to the Guidelines come from the Commission, giving their recommendations a faceless quality, which may serve as a parapet for cautious legislators. Consider the alternative, when members of Congress propose legislation to amend the

lems, in view of the absence of any definition of racketeering in the statute."); *but see* Bibas, *supra* note 44, at 344 (noting that the SEC's rule 10b-5, which criminalizes insider trading, demonstrates that Congress can delegate to agencies the power to implement legislation by defining crimes). As Professor Bibas notes, however, never before has an agency taken on the task of constructing an entire federal criminal code. *Id.*

52. According to the Commission, those functions are "(1) to establish sentencing policies and practices for the federal courts, including guidelines prescribing the appropriate form and severity of punishment for offenders convicted of federal crimes; (2) to advise and assist Congress and the executive branch in the development of effective and efficient crime policy; and (3) to collect, analyze, research, and distribute a broad array of information on federal crime and sentencing issues, serving as an information resource for Congress, the executive branch, the courts, criminal justice practitioners, the academic community, and the public." UNITED STATES SENTENCING COMM'N, AN OVERVIEW OF THE UNITED STATES SENTENCING COMMISSION, at <http://www.ussc.gov/general/USSCoverview.pdf>.

53. United States Circuit Judge for the Eighth Circuit and former Chair of the Sentencing Commission, Diana E. Murphy, recently wrote that the Commission has become a more open institution, obtaining information "from experts, members of the public, the bar, and various interest groups who respond to our published notices with written submissions or testify at our public hearings." Diana E. Murphy, *Inside The United States Sentencing Commission: Federal Sentencing Policy In 2001 And Beyond*, 87 IOWA L. REV. 359, 387 (2002). While these developments are positive, they are limited to prospective Guideline concerns. Much of the Commission's prior work is not "on the table" for discussion.

Guidelines, most notably the Feeney Amendment.⁵⁴ When members of Congress propose amendments to the Guidelines, the opportunity for committee hearings, open debate, sponsorship and co-sponsorship provide avenues of accountability to the voters. Admittedly, Congress must tacitly approve all of the Commission's recommendations. Although the effect of the Commission's independent status within the judiciary may have a minor impact on a legislator's accountability to the voters, the Commission's lack of transparency and "independence" can serve to deflect political criticism. The result thus far has been a one-way-street of Guideline amendments, increasing penalties and restricting judicial discretion. Jeffrey Parker, a former Deputy Chief Counsel at the United States Sentencing Commission, has voiced similar concerns about the Commission's role in the federal system:

Members of Congress also are members of government, and, as such, share an interest with members of the Commission in aggrandizing public power at the expense of private autonomy. It may not be simply that Congress wishes to avoid the troubling features of the Guidelines; Congress itself may have an affirmative interest in facilitating the Commission's agenda, under the political cover of the "expert" agency.⁵⁵

Despite the Commission's placement within the judiciary, Congress has increasingly used the Commission to undermine the authority of the judiciary. The Feeney Amendment has notoriously reduced the influence of the judiciary by ensuring that federal judges will not make up a majority of the commissioners.⁵⁶ The Feeney Amendment also includes controversial data collection requirements, which some have feared may give rise to a ju-

54. The Feeney Amendment, named after its sponsor, Tom C. Feeney (R-FL), amended the Prosecutorial Remedies And Other Tools To End The Exploitation Of Children Today Act Of 2003 (PROTECT Act), Pub. L. No. 108-21, § 401, 117 Stat. 650 (2003).

55. Jeffrey S. Parker, *Rules Without . . . : Some Critical Reflections On The Federal Corporate Sentencing Guidelines*, 71 WASH. U. L.Q. 397, 440 (1993); see also, Samuel Issacharoff, *Judging Politics: The Elusive Quest for Judicial Review of Political Fairness*, 71 TEX. L. REV. 1643, 1666 (1993) (noting that Congress may delegate particularly difficult problems, such as closing a military base, "to an administrative apparatus removed from immediate partisan appeals.").

56. PROTECT Act § 401(n).

dicial blacklist,⁵⁷ and further curtails judicial discretion to sentence defendants by narrowing the grounds for departures.⁵⁸ These developments have eroded the Commission's independence, which has become more and more of a political football for members of Congress.

In addition to the increasingly strained relationship between Congress and the judiciary, political battles over appointments to the Commission demonstrate the highly partisan nature of the Commission's work. In the late 1990s, Congress came to a political impasse over the appointment of commissioners. At one point, the Commission was operating without a single commissioner, prompting Chief Justice Rehnquist to remark that the vacancies were "paralyzing a critical component of the federal criminal justice system."⁵⁹ The partisanship that plagued the Commission appointments in the late 1990s is unlikely to subside now that Congress has provided that judges will not form a majority of the Commission.

It is worth noting that the Sentencing Commission did not get off to a very good start. Several states implemented determinate sentencing regimes before the federal government did. The Sentencing Commission had more than a few sentencing models to choose from, including that of Minnesota. The Sentencing Commission largely dismissed the experience of the various states.⁶⁰ Minnesota, for example, presented an excellent potential model for the federal system at the time:

Minnesota's success in revising its sentencing system was well documented: guidelines created more uniform and proportional sentences than those of the pre-guidelines era; appellate review fine-tuned and complemented the guidelines; and nonviolent offenders became more likely to receive community sanctions as punishment, thereby averting prison crowding and disruption of court workloads. In

57. PROTECT Act § 401(h).

58. PROTECT Act § 401(b).

59. William H. Rehnquist, *The 1998 Year-End Report of the Federal Judiciary*, reprinted in 11 FED. SENT. REP. 134 (1998), available at <http://www.uscourts.gov/ttb/jan99ttb/january1999.html> (last visited Sep. 30, 2004).

60. Dale G. Parent, *What Did The United States Sentencing Commission Miss?*, 101 YALE L.J. 1773, 1774-75 (1992).

short, Minnesota's achievements closely paralleled outcomes Congress sought at the federal level.⁶¹

Notably, the role of the Minnesota Sentencing Commission is radically different from that of the Federal Sentencing Commission. Minnesota developed its guidelines with input from affected organizations and allowed individuals to participate and influence the Commission's decisions. "During the early stages of the process, the U.S. Sentencing Commission held numerous hearings around the country to solicit information and opinions about sentencing policy from judges, prosecutors, defenders, and interested members of the public."⁶² But since those early days, the Commission has been less receptive to public comment and more protective of the Guidelines. The Sentencing Commission does conduct occasional public meetings where individuals are permitted to comment, but the occasional meeting is no substitute for a meaningfully open forum.

The Sentencing Commission erred by closing its doors to the public. Early in the Commission's history, it charted a course that it has shown little sign of reconsidering. It "took an ideological, even political, approach to guideline development that disavowed constraints, suppressed discussions of purpose, closed decision-making to interested and affected parties, and departed substantially from past sentencing norms."⁶³ By contrast, Minnesota's commission used an open process of guideline development, one that allowed all organizations and interested individuals to participate in the commission's deliberations and to influence its decisions.⁶⁴ The Minnesota commission saw itself as an actual "junior-varsity" Congress, meaning that members of the commission felt compelled to include the public, debate proposals in a public forum, and agree on a unifying theory of punishment.⁶⁵ The Federal Commission lacks all of these democratic qualities. Perhaps *Blakely* will expose these shortcomings.

The efforts of Judge Marvin Frankel to put an end to the intolerable disparity in sentencing prior to the SRA produced a system

61. *Id.* at 1774.

62. *Id.* at 1775.

63. *Id.* at 1788.

64. *Id.* at 1775-76.

65. *Id.*

designed to result in fair sentences. Liberals endorsed the Guidelines because they wanted to put an end to the racial disparity in sentencing under an indeterminate system. Conservatives favored the SRA because it would constrain judges who were too soft on criminals. Over time, the Guidelines have substituted rigidity and diminishing judicial discretion for fairness, uniformity, and predictability.⁶⁶ Today, conservatives and liberals are increasingly speaking with one voice, imploring Congress to correct the swing of the sentencing pendulum, which has gone too far astray from the goals of the SRA. One important step on the road to reform, in addition to examining the operation of the Guidelines, is an examination of how the guardians of the Guidelines go about their business and to whom they are accountable.

V. CONCLUSION

The Guidelines are ripe for a comprehensive re-evaluation, in which politicians usually loathe to engage for fear of appearing “soft” on crime. The *Blakely* ruling may provide the needed political cover to open the debate over sentencing, but politicians are unlikely to engage in meaningful debate if the public does not take the issue seriously. A great deal is at stake, and opportunities to substantively reform the entire federal criminal code are rare.

The time to have a national discussion on sentencing is now.

66. The two entities that can make sentencing rigid are the Sentencing Commission by eliminating grounds for departure, and the Congress, by passing mandatory minimums.