July 12, 2004

The Honorable Orrin G. Hatch  
Chairman, Committee on the Judiciary  
United States Senate  
Washington, D.C. 20510

The Honorable Patrick Leahy  
Ranking Democrat  
Committee on the Judiciary  
United States Senate  
Washington, DC  20510


Dear Chairman Hatch and Senator Leahy:

Thank you for your letter of July 2, 2004, soliciting the views of the American Bar Association on the impact of the Supreme Court’s decision in *Blakely v. Washington* on the federal sentencing system.

On behalf of the ABA, I urge the Committee not to respond in haste to the decision in *Blakely* and its holding that “a judge may impose [a sentence] solely on the basis of the facts reflected in the jury verdict or admitted by the defendant” (emphasis in original). Though the implications of *Blakely* may be considerable, prudence counsels that congressional action should await development of case law on the applicability of *Blakely* to the Federal Sentencing Guidelines, which Justice Scalia correctly noted were not before the Court.

The Sentencing Reform Act of 1984, upon which the current federal guidelines system is predicated, was enacted only after years of meaningful debate and compromise. Likewise, federal sentencing law and policy have evolved gradually over the past 17 years in response to changing priorities and reasoned deliberation. Thus, should one or more of the United States Courts of Appeal, or the Supreme Court, ultimately hold *Blakely* applicable to the federal guidelines, Congress’s consideration of suitable remedial measures must be measured against the constitutional magnitude and practical complexity of the issues involved, and informed by the thorough deliberations and recommendations of its various constituencies.

The judiciary, the Department of Justice, the defense bar, and countless organizations and academics are currently devoting considerable resources to assessing *Blakely*’s potential...
ramifications for the federal system, and to discerning what, if any, reforms may be appropriate. Hearings such as those your Committee is holding this week are a constructive first step in understanding the true meaning of the issues presented and in beginning a public dialogue about them. At the same time, however, too hurried a response may result in unintended consequences that run counter to the fundamental tenets of prevailing sentencing theory and *Blakely*'s constitutional underpinnings.

Appreciating the turmoil that *Blakely* has evidently produced in the federal courts, Congress may wish to declare the federal guidelines temporarily advisory. Under this short-term approach, any judicial finding of sentencing facts would not have the force and effect of law and would therefore, presumably, not contravene *Blakely*.

In the longer term, our established ABA policy, which is reflected in the Criminal Justice Standards on Sentencing (3d ed.), supports an individualized sentencing system that guides, yet encourages, judicial discretion while advancing the goals of parity, certainty and proportionality in sentencing. Such a system need not, and should not, inhibit judges’ ability to exercise their informed discretion in particular cases to ensure satisfaction of these goals.

We are particularly opposed to any reform measures, whether interim or permanent, that compel waiver of *Blakely* rights. For example, a system that would require the court to impose the maximum sentence unless the defendant moved to be sentenced pursuant to the guidelines, would burden the constitutional right to a jury trial recognized in *Blakely*, and might well be regarded as an attempt to evade *Blakely*'s holding. In any case, any law or policy that relies upon the ability to force defendants to waive their constitutional rights for its effect must be regarded as extremely problematic in a just society.

We are also not persuaded that one proposal presently circulating, which would establish a guidelines system with ranges whose upper limit would coincide with the statutory maximum, would achieve the necessary balance between guidelines rule and judicial discretion. Under this alternative, judges would be able to sentence a defendant anywhere within a presumably wide range—from the base of the guideline range all the way to the statutory maximum—and would be free to exercise discretion using a wide range of enhancements and upward adjustments. There would be no upward departures to serve as the basis for appeal, and thus no judicial review except under an abuse of discretion standard. Such a system arguably addresses *Blakely*’s concern that judges sentence only on the basis of facts found by a jury, but it is conducive to the very sort of unbridled judicial discretion that guidelines sentencing was intended to eliminate.

If nothing else, *Blakely* presents an opportunity to revisit priorities and, possibly, to develop even more humane and just sentencing policies and procedures that incorporate the invaluable lessons learned over the past two decades on both the state and federal level. The ABA stands ready to assist Congress in whatever way it can in this important endeavor. We will, for example, be considering at our Annual Meeting next month a comprehensive set of recommendations developed by our “Justice Kennedy Commission,” in response to concerns expressed by Justice Anthony Kennedy at our 2003 Annual Meeting about the nation’s corrections and sentencing systems. These recommendations will address in preliminary fashion
the issues raised by the *Blakely* decision, and we anticipate undertaking a more in-depth consideration of the implications of *Blakely* for federal sentencing in the coming year.

We hope we may provide further guidance to you as we each continue to address these important matters. In the interim, we ask that this letter by made a part of the record of your hearing.

Sincerely,

Dennis W. Archer