The Lost History of *Apprendi* and the *Blakely* Petition for Rehearing

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The Lost History of Apprendi and the Blakely Petition for Rehearing

Volumes surely will be written about our visions, and the realities, of the post-Blakely world. However, before we all march reluctantly or otherwise into that future, it is valuable to fully acknowledge the past. As the Petition for Rehearing filed on Behalf of Washington State in Blakely (hereinafter “Pet.”) explained, Blakely and Apprendi were undoubtedly founded on an erroneous historical understanding of the Framers’ views in 1790 when they wrote the 6th Amendment’s jury-trial guarantee. The fact that the Framers themselves wrote over a dozen indeterminate sentencing ranges in the first federal crime bill (see 1 Stat. 112–118; Pet. at 3–4), has simply been overlooked by the Court. A full and fair debate about the constitutional rules still being defined (most immediately in Booker and Fanfan) cannot be had if this history is ignored.

Thus we are very grateful to Professor Doug Berman and the editors of the Federal Sentencing Reporter for reprinting the Petition in full below. Although the Petition was denied without opinion on August 23, 2004, the constitutional debate to which it speaks is far from over.

Amid the robust and fruitful policy discussions about sentencing that Blakely has engendered, it is possible to forget that Blakely and Apprendi state constitutional rules. As such, without a firm basis in the Constitutional text, their holdings may not legitimately be applied to the States, whether or not their policy effects are good or bad. Yet the precise steps to reach the constitutional holding of Blakely tend to be ignored. It is worthwhile then to review the relevant constitutional language that allegedly requires Blakely’s result: “The Trial of all Crimes... shall be by jury” (Art. III, sec. 2) and “In all criminal prosecutions, the accused shall enjoy the right... trial, by an impartial jury...” (Sixth Amendment).

Concededly, there is no “plain language” here about sentencing. Thus sentencing has never been viewed part of the “criminal prosecution” for Sixth Amendment purposes (or part of the “Trial” mentioned in Article III), such that jury sentencing would be constitutionally required in all criminal cases. Cabana v. Bullock, 474 U.S. 376, 385 (1986).1 We know this to be true most fundamentally because when the Framers themselves wrote sentencing statutes — in 1790, contemporaneously with drafting the Bill of Rights and sending it to the States for ratification — they did not require jury involvement. Federal sentencings, by judges alone, were subsequently carried out as the living and breathing Framers watched. Silence can sometimes speak volumes. See Pet. at 6 & n.8.

Thus constitutional interpretation is required to determine whether, and when, the Constitution requires jury involvement in punishment determination. And of course, for at least the past quarter-century, the “intent of the Framers” has been thought to be the primary inquiry in constitutional interpretation.2 The principal focus of the Blakely Petition for Rehearing was simply to point out that significant evidence of the Framers’ own sentencing statutes has, so far, been overlooked. Rather than look to English courts or common law, as the Court did at length in Apprendi (530 U.S. at 478–483), the constitutional focus must be on what the Sixth Amendment’s authors thought about sentencing. Our Petition presented undisputable evidence that what they thought is that indeterminate sentencing, without jury involvement, was fine. When this is known (rather than assuming that they were unfamiliar with it, as was repeatedly suggested in Apprendi), the constitutional “leap” needed to say that the Framers nevertheless would have condemned as unconstitutional more precise legislative direction about how to sentence within their ranges, becomes larger than recognized in Blakely. Who knows, had this understanding of the Framers been considered initially, it might even have changed a vote.

A surprising, and significant, point about Blakely, however, is that none of the parties or amici argued to the Court about contemporaneous constitutional history. The briefs are devoid of any historical presentation, even though the question presented in Blakely — within-range sentencing — had been expressly reserved by the Apprendi Court immediately after it presented its historical analysis (erroneously claiming that indeterminate sentencing had been largely unknown to the Framers). Whatever the explanation for this briefing lacuna, it perhaps makes it less surprising that the Blakely Court likewise did not discuss historical sentencing evidence specific to the Framers. Rather, the majority merely said that “we compiled the relevant authorities in Apprendi and need not repeat them here” (124 S.Ct. at 2536–37).

This was an odd dodge, however, because the issue of legislative sentencing directions given to judges, for

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sentencing within statutory ranges, was (as the Apprendi Court repeatedly stressed, see 530 U.S. at 481-483), a significantly different one from increasing a statutory maximum range. Indeed, every federal Court of Appeals to consider the within-range question after Apprendi decided that the distinction made a constitutional difference, and upheld the federal Guidelines. To omit relevant Framer-written history that bears directly on sentencing within ranges thus seems like an interpretive error, one that made asking for rehearing seem more than an idle request.

Readers and scholars will have to draw their own conclusion about whether the Framers’ endorsement of indeterminate sentencing ranges, without ever mentioning any conception of jury involvement although they were composing the Sixth Amendment at the very same time, has constitutional import. We do not contend that this history settles the issue, only that it is too important to ignore. Sadly, it is likely to be discounted at this late date — we seem to be too far down the Blakely road, though it has been only a few months, to re-consider the constitutional issue afresh. At the very least, however, this unconsidered evidence shows that the Framers were fully aware that judicial fact-finding would be necessary to set precise sentences for the federal crimes they were defining. Yet they never connected their within-range sentencing regime to any aspect of their Constitutional jury guarantees. Further responses to some of Justice Scalia’s criticisms of the dissenters’ constitutional views can be found in the Petition at pages 6-7 & n. 9.

On the Cutting Room Floor

The Supreme Court’s rules provide that a Petition for Rehearing can be only 10 pages long, and that no supportive amicus briefs are permitted. Washington State was thus somewhat constrained in how much it could offer in its Petition. Moreover, we were rushing to file the Petition so that it could be considered at the same time as the Solicitor General’s expedited certiorari petitions in Booker and Fanfan. (In fact our Petition was listed for the same Court conference as Booker and Fanfan; we do not know if it was actively considered at that time. It was not denied until three weeks later.) Consequently, we were compelled to cut three pages (close to 25%) of our draft on the morning of its printing. Two of the arguments we eliminated may be of interest.

The first “cut” argument noted the possible irony that a guidelines system enacted directly by a legislature (Washington’s) might be struck down, while a “sentencing commission’s” administrative construct might yet be upheld:

“Washington State is committed to its guideline system, developed after many years of study and well before the federal system. Washington’s system represents a democratic legislative choice, rather than the views of an administrative commission. Indeed, Washington’s system is more discretionary than, and free of criticisms leveled against, the federal system. Washington’s structure does not mandate any upward adjustment, no matter what the facts; has few and reasonable mandatory minimums; and prohibits aggravated sentences based on facts that would establish any additional or more serious crime.”

Our second “cut” argument addressed the specific facts of Mr. Blakely’s case, and the “harmlessness” of any non-jury sentencing determination, a la United States v. Cotton, 535 U.S. 625 (2002). The aggravating factor in Mr. Blakely’s case was “deliberate cruelty.” But Blakely never contested his actions: he kidnapped his estranged wife at gunpoint, and as he compelled his terrified 13 year-old son to watch, Blakely put his wife (the boy’s mother with whom he lived) in a coffin-sized box in the back of his pickup. Blakely then ordered the boy to drive a following car, alone, for many miles or he would kill the boy’s mother. (Indeed, Mr. Blakely is currently back in custody on charges that he subsequently hired a killer to murder his wife and daughter.) Blakely’s only argument at sentencing was that his cruelty was not “deliberate,” but the sentencing judge found that that particular argument had been waived. With the basic facts conceded, the only remaining issue to be decided under the Washington statute was whether the facts amounted to cruelty “substantial and compelling” enough to warrant an aggravated sentence. This seems plainly to be an issue of judgment, not fact, of the sort traditionally reserved for judicial determination. Moreover, wasn’t the evidence on this factor “overwhelming” and “essentially uncontroversed,” which Cotton says is the standard for harmless Apprendi error?

Ah, well, such are the choices any appellate briefwriter makes. And it didn’t seem to matter — the Court continued its unbroken 40-year history of denying Petitions for Rehearing. But whether or not a formal rehearing petition was granted, there is no doubt that this Fall’s cases will require the Justices to reconsider the constitutional theory of Blakely. As Justice Breyer suggested in his dissent (counseling “further argument”), it would have been fairer to allow Washington State to participate in that reconsideration, rather than be the sole jurisdiction, at this moment, whose sentencing system has been declared unconstitutional (although experts believe that over 20 other States may be affected).

One further thought. Supreme Court rule 44.1 suggests that Blakely’s dissenting Justices could not take part in any rehearing evaluation. The same will not be true this Fall in Booker and Fanfan. Perhaps the “lost” history of Apprendi will be considered there.

Notes

1 Accord, McMillan v. Pennsylvania, 477 U.S. 79, 93 (1986) (although the ineluctable force of the Apprendi-Blakely engine may well put the result in McMillan at risk, as explained in
Justice Breyer's concurrence in United States v. Harris, 536 U.S. 545, 569 (2002). Even Justice Stevens' dissenting views regarding constitutionally-required jury sentencing have been limited to the capital context, in Spaziano v. Florida, 468 U.S. 447, 476, 482 (1984). Justice Stevens' early-stated views in Spaziano also go far to explain his steady, if unusual, alliance with Justice Scalia over a decade later in the Apprendi doctrinal line.  

On this point, one of the many ironies of Blakely is that its newly discovered constitutional limit on legislatively-directed sentencing schemes comes principally from Justice Scalia, who of course has been the Court's leading proponent of constitutional originalism and "plain language" limitation. Compare, for example, Justice Scalia's dissenting opinion in Dickerson v. United States, 530 U.S. 428, 465 (2000), issued the same day as Apprendi: "The proposition that the Supreme Court has power to impose extra-constitutional constraints upon the States" is "not the system that was established by the Framers."

3 We think it is clear that this history can influence the Blakely issue without requiring overruling Apprendi. Indeed, a constitutional distinction between facts that simply direct discretion within a clear and reasonable statutory range, versus facts that can increase the range, seems unremarkable. It is quite simply the basic distinction between separate offenses and a single offense that provides for individualized distinctions within an indeterminate sentencing range.

4 A separate "Motion for Expedited Consideration and Argument in Tandem with the Federal Cases" was filed concurrently with our Petition (and was likewise denied on August 23).


I. The Historical Evidence the Court Has Relied On to Interpret the Meaning of the Fifth and Sixth Amendments is Inaccurate and Incomplete

II. Because this Court Will Soon Again Hear Arguments About Apprendi, Fairness to the State of Washington Supports Reargument in this Case

[Page 1] "The Court has rightly been parsimonious in ordering rehearings, but the occasions on which important and difficult cases have been reargued have, I believe, enhanced the deliberative process." City of Detroit v. Murray Corp., 357 U.S. 913, 915 (1958) (Frankfurter, J., dissenting from denial of rehearing).

In dissent to this Court's June 24, 2004, ruling in this case (Blakely "Slip Op."). Justice Breyer proposed that this case be scheduled for "further argument." Slip Op. at 21 (Breyer, J., dissenting). In addition to the serious concerns Justice Breyer raised, Washington State now provides to the Court significant historical evidence not considered in Apprendi v. New Jersey, 530 U.S. 466 (2000), or in this case. See Slip Op. at 6 ("we compiled the relevant [historical] authorities in Apprendi... and need not repeat them here"). This evidence bears directly on the Framers' intent regarding indeterminate sentencing statutes. It indicates that an historical assumption that was centrally relied upon in Apprendi (and incorporated in Blakely) was erroneous. Consideration of this new, precept-altering historical evidence merits reargument. See Reid v. Covert, 352 U.S. 901 (1956) (granting rehearing in right to jury trial case, in part to consider "historical evidence" bearing on Framers' intent).

In addition, the unprecedented turmoil and confusion that this Court's June 24 decision engendered was not fully appreciated when the ruling was issued. See Stern, Gressman, et al., Supreme Court Practice, (8th ed. 2002) at 729. For example, although the Court referenced possible effects on the sentencing structures of nine States (see Slp Op. at 11, O'Connor, J., dissenting), it is now clear that the number of States that will be adversely affected is at least double that number. 1 It is also becoming increasingly clear [Page 2] that the effects of this Court's opinion will be adverse to the long-term interests of criminal defendants.

Finally, since June 24, 2004, two expedited certiorari petitions have been filed by the United States, requesting "guidance" about the federal sentencing guidelines. See Petitions for Certiorari in United States v. Booker, No. 03-104 and United States v. Fanfan, No. 03-105 (filed July 21, 2004). It seems clear that this Court will very soon be readdressing the constitutional underpinnings of its June 24 decision. Rather than being narrowly limited to the federal regime, the upcoming arguments will surely have to address the "deep structure" of Blakely and Apprendi, and will directly impact the interests of dozens of States.

For all these reasons, Washington hereby respectfully requests that rehearing be granted in its case and (by an accompanying Motion) that reargument be scheduled in tandem with the upcoming federal cases.

I. The Historical Evidence the Court Has Relied On to Interpret the Meaning of the Fifth and Sixth Amendments is Inaccurate and Incomplete

Underlying both the Blakely majority opinion and the principal dissent was an assumption that the Framers
were unfamiliar with judicial discretion in criminal sentencing, i.e., indeterminate sentencing schemes. The Blakely majority merely incorporated what Apprendi said on this point. Blakely Slip Op. at 6; see, e.g., Apprendi, 530 U.S. at 481 (asserting that at the time of the framing of the Constitution and the Bill of Rights, “statutes provided fixed-term sentences”). The dissenters here also accepted this assumption, see Slip Op. at 10 (O’Connor, J., dissenting) (“Because broad judicial sentencing discretion was foreign to the Framers, . . .”).

However, the Court was in error insofar as the Framers themselves were concerned. Historical records confirm that, whatever may have been the situation in English courts or at common law, the Framers themselves wrote discretionary, indeterminate criminal sentencing provisions. In 1789–90, the First Congress — the same legislators who contemporaneously adopted the Bill of Rights, see 1 Stat. 97 (Sept. 1789), — enacted numerous indeterminate sentencing provisions. For example, that legislation (endorsed by influential Framers who were in that Congress such as James Madison) defined the following federal crimes and yoked them to the following indeterminate punishments:

- Misprision of treason, “shall be imprisoned not exceeding seven years” (1 Stat. 112, Sec. 2), thus creating a sentencing range of zero to 84 months;
- Misprision of felony, “shall be imprisoned not exceeding three years, and fined not exceeding five hundred dollars” (1 Stat. 113, Sec. 6), thus creating a fine range and an imprisonment range of zero to 36 months;
- Stealing or falsifying court records, “shall be . . . imprisoned not exceeding seven years, and whipped not exceeding 39 stripes” (1 Stat. 115–116, Sec. 15), thereby creating a range of zero to 84 months and recognizing alternative sanctions.

Similar indeterminate sentencing ranges were enacted for an additional 11 federal crimes. Rather than being “foreign” to the Framers, it was the consistent pattern of their legislation.

The erroneous notion that precise criminal sentences were “invariab[ly] link[ed]” with the statutory definition of the crime “during the years surrounding our Nation’s founding” (Apprendi, 530 U.S. at 478), was not expressed merely in passing. Rather, it was repeated over and over in the Court’s six-page historical discussion.

This historical error takes on great significance, when one compares the questions presented in Apprendi and Blakely. In Apprendi, the erroneous historical assumption may have gone unexplored because it could be viewed as inconsequential to the question of facts directed by a legislature to increase the statutory range tied to a crime. Indeed, the Apprendi Court stressed this distinction immediately after canvassing common law — not federal — history. See 530 U.S. at 481 (stressing that Apprendi did not involve “imposing a judgment within the range prescribed by statute”) (emphasis in original). However, when Blakely directly presented the question of legislatively-directed sentencing within a prescribed statutory range, the erroneous historical assumption was simply incorporated by reference without analysis.

Because the history that Washington now presents bears directly on the Framers’ understandings as they wrote the Fifth and Sixth Amendments, and has never been examined by this Court, rehearing is appropriate. Reid v. Covert, supra, 352 U.S. at 901; accord Flora v. United States, 362 U.S. 145, 167 (1960) (granting rehearing because a factual assertion in the Court’s prior opinion was shown to have been erroneous).

This Court has recognized that giving interpretive content to Bill of Rights provisions should be “guided by the meaning ascribed to [the words] by the Framers of the Amendment[s].” Wilson v. Arkansas, 514 U.S. 927, 931 [Page 6] (1995). But in this case, direct evidence of the Framers’ understandings about criminal sentencing, contemporaneous with their consideration of the Fifth and Sixth Amendments, has been overlooked by the Court. It simply is not accurate that the Framers were relying on a practice of “fixed-term sentences” when they enshrined the constitutional right to jury trial. Rather, the Bill of Rights’ authors wrote indeterminate criminal sentencing provisions. Yet they said nothing to suggest that the jury trial right they were simultaneously advocating would apply to facts relevant to such sentences.

It cannot be ignored that the Framers were Legislators as well as Constitution-writers. While venerating the right to trial by jury, they also strongly believed in the authority of legislation. It is difficult to imagine that the same legislators who wrote the Sixth Amendment as well as many indeterminate criminal sentencing statutes would have, at the same time, thought unconstitutional legislative directions given to judges as to how to sentence within the ranges they wrote. Rather, it seems likely that the Framers would have approved of giving legislative direction to sentencing judges, had they seen any need for it.

The Court’s June 24 opinion took Justice O’Connor to task for an absence of “any [historical] evidence.” Slip Op. at 6 n.6 (emphasis in original). But it now appears that, in fact, the Court’s own historical account was incomplete and erroneous. Moreover, silence can sometimes “speak volumes;” it can be powerful evidence of the absence of definitive constitutional or legislative intent. Had the Framers believed that aggravating facts relevant to sentencing within the ranges they wrote would be required, under any scenario, to be the special province of [Page 7] the jury, one imagines that they might have said something about it.

It must be emphasized, however, that the Court need not decide now what bearing its historical misunderstanding in Apprendi has on the ultimate issues presented here.
Rather, this new historical evidence is sufficient to counsel 
rehearing. Reid v. Covert, supra. The appropriate occasion 
for full investigation and evaluation should be a reharing, 
not merely the glimpse this Petition provides. The issues 
are too weighty, and the impact on the States too disruptive, 
not to merit the fullest and fairest hearing opportunity.

II. Because this Court Will Soon Again Hear Arguments 
About Apprendi, Fairness to the State of Washington 
Supports Reargument in this Case

Since Almendarez-Torres v. United States, 532 U.S. 224, 
250–260 (1998) (Scalia, J., dissenting), the law of criminal 
sentencing in the United States has been in turmoil. Six 
years later — and four weeks after this court’s June 24 
opinion — the situation is no better. Unprecedented [Page 
8] turmoil and uncertainty in theory and in practice reign. 
It is inevitable that this Court will soon have to confront 
again the underlying constitutional theory of the Apprendi 
line of cases. See Booker and Fanfan Petitions, supra.

The Fall arguments this Court is likely to allow cannot, 
however, realistically be restricted to the narrow question 
of “does Blakely invalidate the federal guidelines?” Instead, 
the Court will be compelled to analyze the roots of 
Apprendi, to address the question whether various 
distinctions presented by the United States make any 
constitutional difference.

Accordingly, not just the federal sentencing guidelines, 
but also the guideline systems in at least 19 states (see 
n.i, supra), will be at issue in this Court’s Fall arguments. 
Many unanswered questions — including severability 
of guidelines, facts that initially establish sentencing 
guideline ranges, prior convictions, consecutive sentences, 
mandatory minimums, retroactivity, and harmless error 
doctrines — will be pressed upon the Court. These issues 
are vital to the 19 affected States and are present in 
Washington State’s case. If the Court does not revise its 
initial ruling in this case — although the new historical 
evidence presented above provides ample occasion to do 
so — reargument would present a full and fair opportunity 
to address these issues as they affect the States.

Washington is a sovereign jurisdiction no less than 
the federal government. So too are the 18 other States 
whose chosen sentencing systems are now affected. 
“Fair federalism” should not countenance Washington’s 
underlying misunderstanding about the Framers; and (2) its June 24 decision has produced 
greater disruption, and more adverse consequences for 
defendants, than the majority had anticipated. The issues 
are too important to over a third of the States not to permit 
full consideration of the accurate historical record, and 
to permit a well-represented State to participate in the 
expedited consideration that is forthcoming.

Thus the State of Washington respectfully requests 
this Court to grant it rehearing and expedited scheduling 
of argument in tandem with the federal cases (or, in the 
alternative, “hold” this Petition, see n.10 supra).

Respectfully submitted,

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Notes to Petition for Rehearing


2 In this sense the Framers themselves were progressive sentencing reformers, making it even harder to imagine that they would have thought unconstitutional the progressive “guided discretion” sentencing reforms of the past 25 years.

3 The bill, entitled “An Act for the Punishment of Certain Crimes Against the United States,” 1 Stat. 112–119, was under consideration from May 13, 1789, when a Senate Committee was appointed to “report a bill defining the crimes and offences that shall be cognizable under the authority of the United States, and their punishment” (1 Annals of Congress 36, emphasis added), until passage by both Houses of Congress in April 1790, see id. at 999, 1001; 2 Annals of Congress 1522.

4 See 1 Stat. 113, Sec. 5 (rescue of executed body, “not exceeding twelve months”) and Sec. 7 (manslaughter on federal property, “not exceeding three years”), id. at 114, Sec. 11 (accessory after the fact to piracy or robbery, “not exceeding three years”), id. at 115, Sec. 12 (confederacy to piracy, or ship’s revolt, “not exceeding three years”) and Sec. 13 (maiming, “not exceeding seven years”); id. at 116, Sec. 16 (larceny, “fine not exceeding the four-fold value of the property . . . and be publically whipped, not exceeding thirty-nine stripes”), Sec. 17 (same for receipt of stolen goods); and Sec. 18 (perjury, “not exceeding three years”), id. at 117, Sec. 21 (bribery, “shall be fined and imprisoned at the discretion of the court”), Sec. 22 (obstruction of process, “not exceeding twelve months”), Sec. 23 (rescue of federal offenders, “not exceeding one year”), id. at 118, Sec. 25 (“violators of the laws of nations, . . . not exceeding three years”), Sec. 28 (violation of ambassador, “not exceeding three years”). See also 1 Stat. 83, Sec. 19 (emphasis added) (“it shall be the duty of circuit courts, in cases in equity and of admiralty and maritime jurisdiction, to cause the facts on which they found their sentence or decree, fully to appear upon the record . . . .”); 1 Stat. 175 (customs bribery or false entry, “fine or imprisonment or both, in the discretion of the court . . . not [to] exceed twelve months”).

6 Thus, every Circuit to consider the Blakely issue after Apprendi, and even after Ring v. Arizona, 536 U.S. 584 (2002), concluded that legislatively-directed sentencing systems, directing judges how to sentence within statutory ranges, were constitutional. See Booker Cert. Pet., supra, at 10 n.3.

7 Washington has not previously brought this evidence to the Court’s attention. However, “acquir[ing] new wisdom,” particularly in the still-evolving Apprendi era, is to be encouraged. Ring v. Arizona, 536 U.S. at 611 (Scalia, J., concurring). This Court may consider grounds not previously raised by a respondent defending its judgment. United States v. Estate of Romani, 523 U.S. 517, 526 (1998). The Court should do so here, where the questions are so important, the evidence of historical error is so clear, and the constitutional precepts have been so fluid since Apprendi.


9 As for providing a “coherent alternative meaning for the jury-trial guarantee,” Slip Op. at 6 n.6, it would be merely the simple one with which the Framers were familiar: the Legislature defines the crime, and the defendant has the right to ask a jury whether the facts prove him or her guilty. Thus here, Blakely was charged with kidnapping, a simple common-law crime, and he pled guilty, thereby authorizing a sentence of up to 10 years imprisonment. All the facts “essential” to a punishment up to 10 years were encompassed by his plea: Washington’s legislature has declared that only the elements of kidnapping simpliciter are “essential” to authorize that full punishment. Cf. Slip Op. at 5, 7 (facts “essential to the punishment” must be found by the jury). The rest is merely legislative direction about the details of within-range sentencing, transmitted directly to sentencing judges. As this Court recognized in Apprendi, the Framers designed “structural democratic constraints” that would block extreme abuses of these principles. 530 U.S. at 490 n.16.

10 Given the relatively small number of crimes extant in 1790 and the clarity and simplicity of their elements, the Framers had no need to consider, or intend, more meaning than this. Their simple understanding ought to control interpretation of the Sixth Amendment here.

11 For this reason, even if the Court does not grant rehearing, we entreat the Court to “hold” this Petition for Rehearing until the results in Booker and Fanfan are announced. Allowing final judgment to issue against Washington now, while a major examination of the area is scheduled for the coming Fall, is simply unfair.

12 For articles and testimony detailing the impacts of, and proposed responses to, this Court’s June 24 decision, see, e.g., Mark Osler, “The 3x Solution;” Stephanos Bibas, “Blakely’s Federal Aftermath;” and King & Klein, “Beyond Blakely,” all forthcoming in 16 Fed. Sent. Rep. (Summer 2004) and available at the Berman website, supra n.1; and Frank Bowman, “Memoranda to U.S. Sentencing Commission” (June 27 and July 16, 2004), also available on the Berman website.