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November 29, 2004

The Honorable Orrin G. Hatch
Chairman, Judiciary Committee
United States Senate
104 Hart Senate Office Building
Washington, DC 20515

The Honorable F. James Sensenbrenner, Jr.
Chairman, Committee on the Judiciary
United States House of Representatives
2138 Rayburn House Office Building
Washington, D.C. 20515

**RE: Legislative Reaction to *United States v. Booker*, 04-104
and *United States v. Fanfan*, 04-105**

Dear Chairmen Sensenbrenner and Hatch:

On behalf of the Federal Sentencing Guidelines Task Force for the Federal Bar Association-District of Columbia Chapter, I write to urge your committees to act with careful deliberation, as you consider the U.S. Supreme Court's anticipated decisions in *United States v. Booker* and *United States v. Fanfan*. These cases may very well require fundamental revisions to federal sentencing in general and the Federal Sentencing Guidelines in particular.

Whatever the Constitution demands, the goals of proportionality, parity and certainty in sentencing that underlie the Guidelines, should animate their revision. We particularly encourage you to avoid quick "fixes" and resist resort to mandatory minimum sentencing.

While the Court's decision may require broad reform, it will not require haste. In fact, the more significant the change, the more tempered should be the approach. Congress worked for years to construct our current sentencing system. That system cannot and should not be replaced without hearing from and involving the experts: judges, sentencing commissioners, prosecutors, defense attorneys, academics and other interested persons. By receiving input from them, your committees will be better able to guide

Congress to fully informed decisions about how best to ensure that federal sentencing comports with defendants' due process protections and the goals underlying the Guidelines.

The federal criminal justice system, which has dealt admirably with the uncertainty following *Blakely v. Washington*, 124 S. Ct. 2531 (2004) in late June, will as quickly adjust in the interim following the release of *Booker* and *Fanfan*. For example, following *Blakely*, the Department of Justice amended its charging procedures and courts constructed sentencing procedures or alternatives where necessary. The Supreme Court is bound to provide the federal courts with the guidance they will need to continue to do their job following the release of *Booker* and *Fanfan*. Congress did not act precipitously following *Blakely* and we respectfully suggest such admirable restraint is called for again.

However you choose to approach systemic reform, we urge that you avoid resort to a system characterized by widespread mandatory minimum sentencing. Legislation that would broaden the applicability of mandatory minimum penalties, or that would otherwise increase their reach or severity, undermines the goal of fairness advanced by the Supreme Court's Fifth and Sixth Amendment jurisprudence. Congress should embrace the opportunity these cases present and reject old, discredited approaches such as mandatory sentencing.

In his address to the American Bar Association at its 2003 Annual Meeting, Justice Kennedy stated that, in contrast to the Guidelines, he could "accept neither the necessity nor the wisdom of federal mandatory minimum sentences. In too many cases, mandatory minimum sentences are unwise and unjust." Accordingly, Justice Kennedy implored the ABA to say to Congress: "Please do not say in cases like these the offender must serve five or ten years. Please do not use our courts but then say the judge is incapable of judging. Please, Senators and Representatives, repeal federal mandatory minimums." Hon. Anthony M. Kennedy, Speech at the American Bar Association Annual Meeting (Aug. 9, 2003; rev. Aug. 14, 2003).

Justice Kennedy's remarks were preceded by a long history of discourse questioning the place of mandatory minimum penalties in overall federal sentencing policy.

- In advocating for H.R. 13583, the Comprehensive Drug Abuse Prevention and Control Act of 1970, then-Representative and future President George H. W. Bush argued in favor of "eliminat[ing] mandatory minimum penalties, except for professional criminals." 116 Cong. Rec. H 33314 (reproduced in 3 FED. SENT. REP. 108 (1990)). According to Rep. Bush, "[c]ontrary to what one might imagine [eliminating mandatory minimum penalties]. . . will result in better justice and more appropriate sentences." *Id.*
- According to empirical research by the U.S. Sentencing Commission, mandatory minimum penalties are not applied uniformly, are often disproportionately severe, compromise the goal of certainty in sentencing, are applied more often to blacks than to whites, undermine deterrence, and result in the transference of sentencing

power from the courts to prosecutors. *U.S. Sentencing Comm'n, Special Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* i-iv, 31-33 (1991); see also *U.S. Sentencing Comm'n, Cocaine and Federal Sentencing Policy* (2002) (identifying unwarranted sentencing disparity inherent in crack versus powder cocaine mandatory minimum penalties).

- Over ten years ago, Senator Hatch wrote that “Congress, in its pursuit of uniform, certain, and effective sentencing, has lately begun to reevaluate its use of mandatory minimum sentences as a means of shaping sentencing policy. A growing tendency exists among those members of Congress most familiar with the criminal justice system to seek alternatives that are more compatible with the sentencing guidelines and with the purpose of sentencing articulated in the [Sentencing Reform Act].” Hon. Orrin G. Hatch, *The Role of Congress in Sentencing: The United States Sentencing Commission, Mandatory Minimum Sentences, and the Search for a Certain and Effective Sentencing System*, 28 WAKE FOREST L. REV. 185, 196 (1993).
- Quoting the Chief Justice, Justice Breyer, a former U.S. Sentencing Commissioner, stated in a speech at the University of Nebraska College of Law that “one of the best arguments against any more mandatory minimums, and perhaps against some of those that we already have, is that they frustrate the careful calibration of sentences, from one end of the spectrum to the other, which the Sentencing Guidelines were intended to accomplish.” Hon. Stephen Breyer, Speech at the University of Nebraska, College of Law (Nov. 18, 1998) (available at <http://www.pbs.org/wgbh/pages/frontline.shows/snitch/readings/breyer.html>).
- Former Drug Czar Barry McCaffrey is on record that he is “unalterably opposed to the system of mandatory minimums. I think we need to give this authority back to the judges.” *Behind Bars: Substance Abuse and America's Prison Population*, Nat'l Center on Addiction and Substance Abuse, Columbia U., Jan. 1998 (quote from NY TIMES, Jan. 8, 2001, at A10).
- President George W. Bush is on record that he believes “a lot of people are coming to the realization that maybe long minimum sentences for the first-time users may not be the best way to occupy jail space and/or heal people from their disease. And I'm willing to look at that.” Inside Politics, CNN, Jan. 18, 2001.
- Justice Breyer noted in his concurrence in *Harris v. United States*, 536 U.S. 545, 570-71 (2002) (citations omitted) that:

During the past two decades, as mandatory minimum sentencing statutes have proliferated in number and importance, judges, legislators, lawyers, and commentators have criticized those statutes, arguing that they negatively affect the fair administration of the criminal law, a matter of concern to judges and to legislators alike.

Mandatory minimum statutes are fundamentally inconsistent with Congress' simultaneous effort to create a fair, honest, and rational sentencing system through the use of Sentencing Guidelines. Unlike Guideline sentences, statutory mandatory minimums generally deny the judge the legal power to depart downward, no matter how unusual the special circumstances that call for leniency. They rarely reflect an effort to achieve sentencing proportionality--a key element of sentencing fairness that demands that the law punish a drug "kingpin" and a "mule" differently. They transfer sentencing power to prosecutors, who can determine sentences through the charges they decide to bring, and who thereby have reintroduced much of the sentencing disparity that Congress created Guidelines to eliminate. And there is evidence that they encourage subterfuge, leading to more frequent downward departures (on a random basis), thereby making them a comparatively ineffective means of guaranteeing tough sentences.

- A unique alliance of "29 former United States District Court judges, United States Circuit Court judges and United States Attorneys" recently filed an amici curiae brief in *United States v. Angelos*, 02-CR-708 (D. Utah 2004), urging the court to conclude that the 55-year mandatory minimum and consecutive sentence for a 24-year-old first-time drug offender "does not punish justly and is not meant to rehabilitate Angelos so that he may return to society at some point and be a useful and law-abiding citizen; instead, it denies Angelos a second chance that would benefit him and his community and does nothing more than ruin a life."
- In ruling on the *Angelos* case, Judge Paul Cassell "reluctantly" imposed the 55-year mandatory minimum sentence, but nevertheless stated

The court believes that to sentence Mr. Angelos to prison for the rest of his life is unjust, cruel, and even irrational. Adding 55 years on top of a sentence for drug dealing is far beyond the roughly two-year sentence that the congressionally-created expert agency (the United States Sentencing Commission) believes is appropriate for possessing firearms under the same circumstances. The 55-year sentence substantially exceeds what the jury recommended to the court. It is also far in excess of the sentence imposed for such serious crimes as aircraft hijacking, second degree murder, espionage, kidnapping, aggravated assault, and rape. It exceeds what recidivist criminals will likely serve under the federal 'three strikes' provision.

United States v. Angelos, _ F. Supp. 2d. _, 2004 WL 2591971, *1 (D. Utah 2004).

- Finally, in its recently-published report *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the*

Goals of Sentencing Reform (Nov. 2004), the United States Sentencing Commission found that “[r]esearch over the past fifteen years has consistently found that mandatory penalty statutes are used inconsistently in cases in which they appear to apply.” *Id.* at 89. According to the Commission, this is a result of Department of Justice charging and sentencing policies, which “vests in prosecutors discretion to make sentencing judgments that were traditionally vested in judges.” *Id.* at 90. Because “[p]resent practices . . . lead to strict application [of mandatory minimums] in some cases and avoidance in others,” they “result in disparity that cannot be accounted for by existing data and may be unwarranted.” *Id.* at 91. Consequently, “[n]ot seeking statutory minimum penalties can lead to *more* proportionate sentencing, because statutory penalties would often trump the otherwise applicable guideline range and prevent mitigating adjustments contained in the guidelines from being taken into account.” *Id.* (emphasis in original).

As Justice Scalia, writing for the majority in *Blakely* emphasized, “[t]his case is not about whether determinate [guidelines-based] sentencing is constitutional, only about how it can be implemented in a way that respects the Sixth Amendment. Several policies prompted Washington’s adoption of determinate sentencing, including proportionality to the gravity of the offense and parity among defendants. Nothing we have said impugns those salutary objectives.” *Blakely*, 124 S. Ct. at 2540 (citation omitted).

Congress now has the opportunity to carefully and deliberately re-evaluate a generation of federal sentencing reform while preserving the salutary objectives of such reform. Thus, while this is an opportunity for improvement, hasty legislation could exacerbate existing deficiencies and injustices, and may in any event require revision again in a few years’ time.

The Task Force therefore urges the Committees to act carefully in considering and passing legislation that would further the goals of proportionality, parity and certainty in federal sentencing; increasing the number and severity of mandatory minimum penalties, however, is not a viable solution.

Thank you for considering our views. The Task Force stands ready to assist the Committees in any way that it can.

Most respectfully yours,

A handwritten signature in black ink, appearing to read 'Mark H. Allenbaugh', with a long horizontal line extending to the right.

Mark H. Allenbaugh
Chair, Federal Sentencing Guidelines Task Force