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October 13, 2011

The Honorable James Sensenbrenner, Chairman
U.S. House of Representatives
Subcommittee on Crime, Terrorism, and Homeland Security
B-370B Rayburn House Office Building
Washington, DC 20515

The Honorable Robert Scott, Ranking Member
U.S. House of Representatives
Subcommittee on Crime, Terrorism, and Homeland Security
111 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Sensenbrenner and Congressman Scott:

I write in anticipation of your upcoming hearing on October 12th to consider the role of the United States Sentencing Commission (USSC) and the operation of the federal sentencing guidelines six years after *United States v. Booker*. Recently, some commentators and policymakers have recommended abolishing or reducing the role of the USSC. I urge Congress to resist calls to abolish the USSC and to avoid taking steps to curtail its jurisdiction. Furthermore, regarding the functioning of the current federal sentencing guidelines system, I urge you to oppose any law that would increase undue rigidity in federal sentencing.

I serve as President of The Constitution Project (TCP), a bipartisan organization that seeks consensus-based solutions to difficult legal and constitutional issues. Several years ago, TCP established a Sentencing Initiative in response to the U.S. Supreme Court's decisions in *Blakely v. Washington* and *United States v. Booker*. The Sentencing Initiative brought together a group representing a broad cross-section of institutional interests and political views. Each member had significant experience in the American criminal justice and special expertise in the challenges facing federal and state criminal sentencing systems.

The Sentencing Initiative's 2005 report, *Principles for the Design and Reform of Sentencing Systems*, states that Congress, as an institution, is "ill-suited" to the task of developing, drafting, studying, and amending detailed federal sentencing guidelines.¹ Rather, it is properly the role and responsibility of the USSC to develop federal sentencing guidelines (regardless of whether those guidelines are mandatory or advisory). Although the changing role of the USSC and the impact of advisory guidelines merit continued study, Congress should not take drastic, far-reaching action to abolish or dramatically change the role of the USSC at this time.

I also urge Congress not respond to the advisory guidelines in such a way that dramatically increases their rigidity. The 2005 report also noted that the federal guidelines, at least as they existed before *Booker* and its progeny, are overly complex and rigid.² They "place undue emphasis on quantifiable factors" like monetary loss and not enough on other important measures of culpability.³ Although sentencing guidelines represent one of the great advancements in criminal justice in the past several decades, the federal guidelines have not been nearly as successful as many state guidelines systems for these reasons. Similarly, while our Sentencing Initiative certainly recognized the legislative authority of Congress to enact mandatory minimums, they concluded that mandatory minimums are "generally incompatible with the operation of a guidelines system and thus should be enacted only in the most extraordinary circumstances."⁴ I recommend that Congress exercise caution in enacting new mandatory minimum sentences.

Finally, I hope you will carefully consider and study the meaning behind the rate of departures from the guidelines and not automatically accept the premise that an increased rate of downward departures is problematic. The Sentencing Initiative's 2005 report was followed in 2006 by *Recommendations for Federal Criminal Sentencing in a Post-Booker World*, in which our Sentencing Initiative recommended that any Congressional response to *Booker* be cautious and well-informed. Specifically, that report noted that sentencing judges—who have direct knowledge of the case before them and extensive experience applying the Guidelines—are the actors best situated to determine occasional exceptions to general rules.⁵ Further, "[d]eparture patterns provide important evidence on the question of whether those most familiar with the federal sentencing system feel that particular guidelines are properly calibrated for most cases."⁶ For example, departures can be an appropriate remedy for the Guidelines' overreliance on quantitative factors, such as monetary loss or drug quantity, for determination of offense levels.⁷ It is too early to conclude that any increased rates of departures and variances since *Booker* are symptoms of a problem with advisory guidelines, rather than indications of appropriately reduced Guideline rigidity.

¹ SENTENCING COMMITTEE OF THE CONSTITUTION PROJECT, PRINCIPLES FOR THE DESIGN AND REFORM OF SENTENCING: A BACKGROUND REPORT (Frank O. Bowman and David Yellen reporters, The Constitution Project 2000), at 32, *available at* <http://www.constitutionproject.org/pdf/34.pdf>.

² *Id.* at 32.

³ *Id.*

⁴ *Id.* at 27.

⁵ SENTENCING COMMITTEE OF THE CONSTITUTION PROJECT, RECOMMENDATIONS FOR FEDERAL SENTENCING IN A POST-BOOKER WORLD. REPORT (Frank O. Bowman and David Yellen reporters, The Constitution Project 2006), at 18, *available at* <http://www.constitutionproject.org/pdf/33.pdf>.

⁶ *Id.*

⁷ *Id.* at 10.

I respectfully urge caution in deciding whether to amend the federal sentencing guidelines and hope that Congress will resist calls to abolish the United States Sentencing Commission. Careful study and deliberation, rather than drastic legislative action, is most likely to lead to a stable, just, and effective federal sentencing system.

Respectfully,

A handwritten signature in black ink, appearing to read "Virginia E. Sloan". The signature is written in a cursive, flowing style.

Virginia E. Sloan

cc: Members, Subcommittee on Crime, Terrorism, and Homeland Security