STATEMENT OF

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BEFORE THE
UNITED STATES SENTENCING COMMISSION

MID-WESTERN REGIONAL HEARING ON
THE STATE OF FEDERAL SENTENCING

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Introduction

Mr. Chairman and members of the Commission, thank you for allowing me to address you on the important topic of federal sentencing. Having worked in the American criminal justice system for over 36 years as both a prosecutor and defense lawyer, I bring a long term perspective to this subject. At the same time, I am under no illusion that experience is any substitute for expertise. My current position as U.S. Attorney for the Middle District of Tennessee has taught me that sound federal sentencing policy is essential to the safety of our nation. Yet currently, federal sentencing presents many vexing issues to judges, prosecutors and all whose task it is to fashion proper sentences in serious cases.

In my early years as a state prosecutor, I was surprised to learn how much of the sentencing decision-making fell to young assistant district attorneys as a result of plea bargaining. In those days, the trial court had very little control over sentences, because sentences were fixed by juries in all cases that went to trial (without the benefit of a separate hearing) and by prosecutors in all cases that were settled. Later, as judge-imposed sentencing was implemented in Tennessee by statute, and as I began my practice in federal court, the issue of disparity of sentences among defendants emerged.

One of the principal purposes underlying the U.S. Sentencing Guidelines is to limit unfair disparity of sentences among defendants with similar records in federal courts nationwide. However well one may think this goal was being attained under the presumptive guidelines, the *Booker* case and its progeny have significantly muddied the water, and many have questioned whether the present system can and should be saved. My hope is to provide some information to the Commission from my experience that may aid you in meeting the challenges of this new and evolving era of sentencing.

Role of the Guidelines in a Post-*Booker* World

Some have suggested that advisory guidelines are not necessary any longer; and that unless the guidelines can be made mandatory again, a totally new system should be devised. Others have suggested keeping the advisory guidelines but eliminating mandatory minimum sentencing statutes. As you know, a few months ago, the Attorney General created a Sentencing and Corrections Working Group within the Department to study these and other policy options.

The Working Group has been reviewing the available research, surveying the U.S. Attorney community, meeting with outside stakeholders, and reviewing the relevant literature, all in hopes of giving the Attorney General all the information he needs to develop a new sentencing policy for the Administration. The policy options under review will build on the nearly twenty-five years of experience under the guidelines. No reasonable expert could argue that the science of criminal punishment has not been furthered by the experience under the guidelines.

As you know, judges are now free to both vary and depart from the sentences suggested by the guidelines. Our experience has been that appellate review is a costly, time consuming, and now fairly ineffective remedy for any perceived incorrect sentences. The Sixth Circuit has affirmed a wide range of decisions, sometimes approving a total rejection of the methodology, basis and objectives underlying the ranges provided by the guidelines for certain offenses, such as for crack cocaine and immigration violations. Whether the Commission or Congress can address some of this decisional law without violating the underlying principles of *Booker* remains to be seen.

My early mentor, Criminal Court Judge Raymond H. Leathers, often was heard to opine that, "It is not the length of the sentence but the certainty of punishment that deters crime." He was not fond of sentencing and decided to retire when Tennessee enacted a judicial sentencing law in 1982. Jury sentencing had produced a sad history of wildly disparate punishments for crime, but he wanted no part of the remedy even though he was a stern judge and demanded strict enforcement of the law. Eventually Tennessee developed a grid and loosely structured

guidelines to address most issues of enhancement and mitigation such that sentencing is now relatively uniform within the state.

Could the federal courts use a more relaxed system of guidelines like that in Tennessee to accomplish uniformity without violence to defendants' rights under *Booker*? That is what the Sentencing and Corrections Working Group is exploring. Some have suggested that guidelines with broader sentencing ranges that allow judges to use sound discretion within a consistent paradigm would combine the virtues of the wisdom gained in twenty-five years of research with case by case analysis typically done in the courtroom. It is worth considering and we are doing just that.

Recent decisions from the U.S. Supreme Court still stress the need for "nationwide consistency" and commend the guidelines as a "starting point and initial benchmark" for sentencing, so it is obvious that the Court values the importance of federal sentencing guidelines in the post-*Booker* era. However, the ability of a defendant to appeal his sentence for lack of "reasonableness" has generated a huge appellate caseload where the issues have no bearing on the issue of guilt or innocence; and in my experience, this kind of deferential appellate review has not been an effective mechanism for the review of district court sentencing decisions.

Observations from Middle Tennessee

The Middle District consists of thirty-two counties and contains the capital city of Nashville, Tennessee's largest metropolitan area. Federal crimes that have been recently

prosecuted within the district include RICO charges against fourteen members of the MS-13 gang, multiple cases of investor fraud involving millions of dollars in loss to victims, scores of felon in possession of firearms cases, including the individual who allegedly provided the gun that killed former NFL football star Steve McNair, many immigration cases generated in part by an aggressive 287(g) program being run by a local sheriff, multi-defendant drug cases involving cocaine, heroin, marijuana and methamphetamine, as well as the typical array of crimes common to districts throughout the country.

Overall the guidelines have worked well and continue to work well in our district. Judges continue to give careful attention to the calculation of ranges and consistently apply the various mitigating and enhancing factors. Yet a trend has developed to treat the top end of the range as a maximum while departures and variances are not uncommon to the downside.

A notable exception to this trend is a recent case that received national attention as a TARP related mini-Madoff case in which investors lost their life savings to a Ponzi scheme. This defendant entered a quick plea of guilty and attempted to gain favorable consideration by cooperating with investigators. He did not qualify for a departure under § 5K1.1 of the guidelines but argued for a low sentence nonetheless. My assistant called a number of victims to the stand to relate their stories of deceit, fraud and avarice to the judge. The result was a sentence substantially above the guideline range and a speech from the judge regarding the defendant's callous treatment of his victims.

This example demonstrates both the value of guidelines and their limitations. While a term of imprisonment was clearly warranted and the multi-million dollar loss figure netted a guideline range that called for incarceration, the judge weighed the human cost and rendered a rare upward departure that might have been more appealable when the guidelines were mandatory. We obviously agree with the sentence but it might not have occurred before the *Booker* decision.

As federal prosecutors, one of our highest responsibilities is to give clear voice to the concerns of victims of crime. While vulnerability and loss are taken into account by the guidelines, only specific testimony from actual victims can convey the depth of feeling many victims have concerning their damages. These damages often include physical injury, loss of loved ones, financial ruin, disruption of life and other consequences caused by a defendant's actions.

The opposing view has merit as well. Sometimes the valid ends of justice would be better served by probation or other forms of alternative sentencing. In drug cases particularly, we often see defendants who need treatment as well as incarceration, but sometimes no workable accommodation is available to the court. The Department is considering providing for greater flexibility in certain areas to open the door to more creative use of treatment alternatives without losing sight of the legitimate ends of justice and the need for punishment and deterrence.

Where Do We Go from Here?

Most of us would probably agree that one of the dangers of being a rule maker is that we might make too many rules. No one wants the manual containing the U. S. Sentencing Guidelines to become another Internal Revenue Service Code. Since the *Booker* decision has placed a significant limitation on the power to enact mandatory sentencing guidelines, it would seem prudent to review all the various options so we can construct a system that provides a level of structure and guidance to eliminate unwarranted disparity, provides appropriate certainty and fairness in punishment, and does all of that without impinging on the Sixth Amendment right to trial by jury.

One way to do this might be to add to the mandatory minimum sentencing statutes already present in federal statutes. However, the Commission and others have suggested in the past that this may not be the best way of achieving the goals and purposes of sentencing. Mandatory minimums have had a place in the federal criminal justice system for some time. Traditionally, though, mandatory minimums have been reserved for offenses that pose particularized threats to public safety and for which incarceration is seen as the necessary punishment.

If we retain the existing guidelines as presently promulgated, one reform worth considering might be placing some reasonable restrictions on the appellate process. In Middle Tennessee, we find that close to half of all appeals relate to sentences and the trend is increasing since the *Booker* decision. Litigation over guideline calculations and actual sentences now

consumes a significant portion of court time whereas this was not the case in the pre-guidelines era. Perhaps some statutory changes could remedy this.

The Department of Justice is committed to a system of sentencing jurisprudence that protects the public, is fair to both victims and defendants, eliminates unwarranted disparities in prison terms and reduces recidivism. It is my hope that these lofty goals can be attained without sacrificing the body of law surrounding the U.S. Sentencing Guidelines and without placing undue burdens on the court system in our country. Certainly my office stands ready to assist the Commission in its important work as we all strive to create a strategy that best serves the people whom we are sworn to protect.