STATEMENT OF
DISTRICT JUDGE ROBERT L. HINKLE
BEFORE THE
UNITED STATES SENTENCING COMMISSION

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Introduction

Judge Hinojosa and members of the Commission: thank you for inviting district judges to provide comments this morning. With the press of business, we who are involved in federal sentencing on a day-to-day basis rarely have occasion to step back and reflect on the overall process. The 25th anniversary of the Sentencing Reform Act provides an occasion for a long view, and I commend the Commission for taking that on.

When I was asked to testify, I was reluctant, because it has been my practice never to comment publicly on the wisdom of the guidelines or of congressional or Sentencing Commission actions affecting sentencing. I like it when the Congress and the Commission do not comment on particular decisions of mine, and I try to return the courtesy. But you of course won't know how the guidelines are really working in the hinterlands unless we tell you, and so I accepted the invitation.

The views I express are mine alone, and I should add that for the most part, these views have no effect on my sentencing decisions.

Overall Assessment of Guideline Sentencing

I suspect if you put to a vote the question whether we should retain the

guidelines or go back to judicial discretion as it existed prior to 1984, most prosecutors would vote to keep the guidelines, but most defense attorneys would not. If you divided every guideline range by 10, however, so that a range of 121 to 151 became instead 12 to 15, I think the vote would flip. Most defense lawyers but few prosecutors would vote to keep the guidelines. As prosecutors or defense lawyers comment in favor of or in opposition to the guidelines, I suspect the motivating force will most often be the length of sentences, not the wisdom of having guidelines.

For myself, I would retain the guidelines, though not without some reservations. I think the state of guideline sentencing is better since *Booker*. My reasoning departs somewhat from that usually offered in support of the guidelines.

The most common theme trumpeted by guideline advocates is the need to eliminate unwarranted sentence disparity. One hears often that in the old days there were substantial unwarranted disparities from district to district and even from judge to judge within the same courthouse. The guidelines have reduced the disparity. But much disparity remains—and it did, even before *Booker*. There is disparity that your statistics do not and cannot measure. By happenstance, one defendant provides information to the prosecutor first and benefits from § 1B1.8, but a codefendant comes in later and thus faces a markedly higher offense level. In one district a defendant is tagged only with the drugs involved in a specific transaction; in another the concept of relevant conduct is applied more broadly, and

the offense level skyrockets. In one district the government files a notice of the defendant's prior convictions under 21 U.S.C. § 851 and the defendant thus faces a long minimum mandatory sentence; in another district the government chooses not to file the notice. A thousand other examples could be given. Your statistics showing the number of sentences within the guideline range do not pick up these disparities, because they are disparities in the calculation of the guideline range.

I suggest, though, that too much attention is given to the issue of disparity. What we should be talking about is not how to reduce disparity but how to improve the quality—the justice and wisdom—of a given sentence. It is better to have five good sentences and five bad ones than to have ten bad but consistent sentences. And it would be better still to have ten good sentences—even if they could be explained only as the considered judgment of a good and honest and experienced district judge whose goal was to get it right, and even if that explanation could not be fit into the grids on a guideline chart.

The guidelines contribute to the quality—the justice and wisdom—of sentences not primarily because they reduce unwarranted disparity, but because they provide a good starting point and a good reality check. My mother used to tell me to proceed cautiously when everyone seemed out of step but me. It was advice I didn't always heed, and I don't always heed it now. But when my initial view on a sentence is out of step with the guidelines, I think twice, as well I should. It makes for better sentencing.

To be sure, there are hundreds of district judges, and there are some among us who didn't have my mother's wise counsel. A few may pay little attention to the guidelines. Most of us, however, find the guidelines useful. It would be a mistake to govern for the outliers—to design a sentencing system to rein in a few judges at the margins rather than to make the system work well for the vast majority.

With that overall assessment as background, let me try to make three other points and then conclude. You should be pleased to hear that I have not attempted a comprehensive assessment of the guidelines.

Craftsmanship

First, I think the level of craftsmanship exhibited in the guidelines is excellent. For the most part, the guidelines say what they mean, and they are easy enough to understand, even in the sometimes hectic pace of a sentencing proceeding. This is, of course, something the Commission works on constantly, and overall I think you get an "A" for craftsmanship.

Extrapolating from Statutes

Second, I am not as high on the Commission's implementation of at least some congressional policy decisions. Congress adopted minimum mandatory sentences for some drug offenses, and the Commission extrapolated them much more broadly into the guidelines. Congress adopted a career offender provision, and the Commission, with the help of the circuit courts, gave the statute a broad

application. Here in the Eleventh Circuit, prior to the recent Supreme Court decisions to the contrary, carrying a concealed weapon and failing to return to a halfway house were deemed crimes of violence, and some defendants who otherwise would have faced a guideline sentence of under five years were instead deemed career offenders with a range of 262 to 327 months. At least in the days before *Booker*, this sometimes resulted in longer sentences than most would have thought just—but Congress adopted a statute, the Commission and the circuits implemented it broadly, and some district judges departed sparingly. For a defendant sentenced to 262 months, it was hard to say who really made the decision or why, but the sentence was imposed nonetheless.

My suggestion is to implement Congress's decisions, as you of course must, but not to expand them, unless in your independent judgment you conclude that an expansion is appropriate. If you could persuade Congress not to amend the guidelines directly, but instead to let your process—including public comments—play out, it would be that much better.

Blurring Institutional Roles

My third point is perhaps the most important. I suggest that the Commission—and for that matter Congress and the courts—should keep in mind the proper institutional roles of the participants in the sentencing process. Since *Booker*, we are doing better. But troublesome issues remain.

For example, a defendant has a right to be present at sentencing and to

allocute. The right is meaningful only if the judge who is in the room—looking the defendant in the eye and listening to the allocution—is actually the person who will make the sentencing decision. Before *Booker*, Congress adopted a statute providing for *de novo* appellate review of departures. We were close to rendering the right to be present and to allocute meaningless. The statute did not survive *Booker*, and the Supreme Court has continued to issue decisions restoring the district judge's role. Perhaps the problem has passed. But when we consider the scope of appellate review, we should bear in mind that more is at stake than how closely we will ride herd on district judges.

More problematic is the blurring of the line between the roles of the judge and the prosecutor. In *Booker* and related cases, the Supreme Court disapproved assigning the jury's function to the judge. Judge and jury, at least, are both neutrals. Much more worrisome, at least to me, is assigning the *judge's* role to the *prosecutor*. Sentencing is a judge's role, subject to limits imposed by Congress and standards put in place by the Sentencing Commission. Congress can adopt minimum mandatory sentences. But in some drug cases, Congress has given the prosecutor the unfettered discretion to impose a minimum mandatory sentence or not. This is so because under 21 U.S.C. § 851, a minimum mandatory sentence based on a defendant's prior convictions applies if and only if the government files a notice of the prior convictions. In some districts, like mine, the government almost always files the notice, but in others it doesn't. This introduces

unwarranted disparity, and, more fundamentally, this is just not a decision properly assigned to the prosecutor.

Another example—though one of limited practical significance—is the third point for acceptance of responsibility. A defendant who accepts responsibility gets a two-level reduction. The defendant gets another level—a third point—for "timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the government and the court to allocate their resources efficiently." U.S. Sentencing Guidelines Manual § 3E1.1(b) (2008). As mandated by Congress, the defendant gets this third point if and only if the government files a motion saying the defendant qualifies. This is a question of historic fact—did the defendant notify authorities in time for the government to avoid preparing for trial and in time for the government and the court to allocate resources efficiently? When there is a disputed issue of historic fact that affects sentencing, the dispute is properly resolved by the judge, if not by the jury. But Congress assigned *this* factual decision to the *prosecutor*. The third point is rarely disputed, and after *Booker* it might not matter much anyway. Even so, it seems remarkable that we have given this core judicial function—finding the facts—to the prosecutor, and more remarkable still that nobody seems to have noticed.

In treating the third point for acceptance in this manner, Congress adopted the approach long taken for substantial assistance. A minimum mandatory

sentence need not be imposed on a defendant who has provided substantial assistance to the government in the investigation or prosecution of others. Congress long ago allocated to the prosecutor the decision whether this standard has been met in a given case. The theory, apparently, is that the prosecutor is better able to determine whether the defendant has substantially assisted the government. It is a curious theory. One might have thought the Constitution allocated fact finding to judges and juries not because they know more than the lawyers but partly because they don't—and so must rely only on information provided through fair procedures in which both sides participate. And one might have thought the Constitution allocated fact finding to judges and juries in part because they are unbiased. Letting the prosecutor decide the facts without disclosing all of the information on which the decision is based is a dramatic departure from the usual approach.

Even so, I do not suggest that the Commission should reexamine the government's monopoly on substantial-assistance motions. For one thing, it was Congress, not the Commission, that put this system in place. For another, the issue is far more complicated than my brief comments suggest, and of enormous importance. In federal sentencing, the substantial-assistance motion is the coin of the realm. Giving the government control of the process raises issues, but it is also quite effective from a law-enforcement perspective. Individuals provide information and testimony that otherwise would be unavailable—and providing

access to every person's evidence is usually good, other things being equal. My sense of it is that many cooperating witnesses tell the truth, and when they don't, the jury usually can figure it out. If the alternative is to require the imposition of a minimum mandatory sentence with no way out, then eliminating the government-controlled substantial-assistance motion would not lead to better sentencing.

Still, the system works only because prosecutors act in good faith. In my district, I'm not sure removing the government's control of the process would make much difference in who receives a substantial-assistance reduction. My point is only that a system that relies on the prosecutor's good faith may not be the system the founders envisioned, and that in any event we should allow an expansion of government control—as illustrated by the third point for acceptance—only with great caution. Note, for example, that on the third point, we have the prosecutor deciding whether the defendant entered a guilty plea in time to allow *the court*—not just the government—to allocate its resources effectively. One would be hard pressed to articulate a ground on which the prosecutor should be the fact finder on the issue of the court's allocation of its resources.

In any event, assigning fact finding to the prosecutor is a slippery slope. As it goes about its day-to-day functions, the Commission should keep in mind always the proper allocation of functions between the judge and the prosecutor.

Conclusion

Now let me conclude. Sentencing is the hardest thing I do. I am less

confident that I have gotten it right when I choose a sentence than when I make a decision of any other kind. The district judges I know take sentencing very seriously, as I do, and they work hard at it, as I do. We sometimes have different perspectives and sometimes impose disparate sentences. But a scheme cannot be devised that determines a proper sentence by objective criteria articulated in advance. Taking the judge—and judicial discretion—out of the process would be a bad idea. The guidelines are best when they are *guidelines*, when they give us an idea of a reasonable sentence in a given set of circumstances. We ought not ask the guidelines to do more.

I thank the Commission for its good work.