Criminal Division

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REMARKS* TO THE
EIGHTH CIRCUIT JUDICIAL CONFERENCE

Rapid City, South Dakota
July 16, 2004

*Mr. Wray frequently speaks from notes and may depart from the speech as prepared.

Thank you for that kind introduction and for the invitation to be here. It's a real honor to address this distinguished gathering.

Today, I'd like to talk a little about the Justice Department's efforts to investigate and prosecute terrorists, and to protect the American people from future terrorist attacks. Also, I gather from Judge Wollman that you might be somewhat interested in hearing from me about the Supreme Court's recent *Blakely* decision. So I thought I'd wrap up with some brief remarks about the Government's position on the constitutionality of the federal Sentencing Guidelines.

Over the past two-and-a-half years, the Department of Justice has undergone a paradigm shift in our mission and our methods. It started, of course, in the Fall of 2001, which marked a historic turning point for our country. The September 11 terrorist attacks took over 3,000 innocent lives and forever changed the way that Americans think about security and the way that our government must ensure it.

These events starkly demonstrated to all Americans the grave threat that terrorism poses to our lives and our way of life. This Administration has responded aggressively to this threat, and thankfully, since September 11, we haven't seen another major terrorist attack on American soil.

The War on Terror

Like all of you, I remember where I was on that awful morning as I learned of the attacks on the World Trade Center and the Pentagon. I vividly recall the chill that I felt as I watched television footage of the wounded Manhattan skyline from the Department's Command Center. I'll never forget the first conversations I had with my wife and kids after learning of the tragedy, or the grim faces of my colleagues at the Justice Department.

Just as memorable, though, were the burdens of the next few months. All of us in the Department jolted each time our pagers went off – day or night. Our adrenaline raced with every report of white powder in someone's mail. Every airplane pilot who didn't respond promptly to radio calls brought a cold knot to our stomachs. We were determined not to miss something that would cost more innocent lives, so each of these incidents made us think with dread, "not again."

Nearly three years later, it's easy to be lulled into complacency about the terrorist threat. As September 11 recedes in time, it's natural for it to begin to resemble some hazy, horrible nightmare. But it was no bad dream. Every morning, those of us in the law enforcement, intelligence, and military communities confront the threat on a very

real basis when we meet to review the daily intelligence. We know all too well that there are many who would gladly take the place of the September 11 hijackers, who are just as intent on killing more innocent people. These guys are sophisticated, cunning, disciplined, and utterly committed to mass murder. Figures like Usama bin Laden exhort their followers to kill Americans as their holy duty. The chilling accounts of the deaths of Americans Daniel Pearl, Nicholas Berg, and Paul Johnson, beheaded by Al Qaeda-affiliated militants, underscore the ruthlessness and fanaticism of our enemies.

Our enemy still has both the desire and the capability to strike us at home with little or no warning. In April, for example, just a few weeks after terrorists killed 191 people and wounded 1,900 in the Madrid train bombings, British authorities arrested nine terrorist suspects and seized half a ton of ammonium nitrate fertilizer, a bomb component, in a storage garage near London's Heathrow Airport. And according to intelligence estimates, *15,000 to 20,000* terrorists have been trained in Al Qaeda-affiliated camps in Afghanistan since bin Laden established them in 1996. We need only recall how much harm 19 of those men caused on 9/11 to understand the threat that any one of these thousands poses.

This is especially true when we know that Al Qaeda remains intent on obtaining and using chemical, biological, radiological, and nuclear weapons of mass destruction. And the threat isn't limited to Al Qaeda. Unfortunately, the steady growth of bin Laden's anti-American beliefs through the wider Sunni extremist movement and the broad dissemination of Al Qaeda's destructive expertise ensure that a serious threat is here to stay – with or without Al Qaeda in the picture.

Throughout the past several weeks, senior Administration officials have reported an increased risk for a terrorist attack this summer and beyond. We know that our homeland remains a top Al Qaeda target, and credible reporting now indicates that Al Qaeda is moving forward with plans to carry out a large-scale attack in the U.S. in an effort to disrupt our democratic process. Right now, we lack precise knowledge about when, where, and how they plan to attack, but we're actively working to gain that knowledge. For example, in May, we asked state and local homeland security and law enforcement officials across the country, along with the general public, for their help in identifying seven Al Qaeda associates who are sought in connection with possible terrorist threats within the U.S.

These kinds of national partnerships and cooperation are more important than ever because terrorists have gained footholds everywhere, even in our own backyards. The threat of terrorism isn't limited to downtown Manhattan or Washington, D.C. We've pursued terrorism cases in places like Lackawanna, New York; Columbus, Ohio; Minneapolis, Minnesota; and Tampa, Florida. And those are just some of the cases I

can talk about. The terrorist cells aren't limited to aliens, either: Some of our own citizens are implicated. In February, we teamed up with the military to catch a National Guardsman in Washington state now charged with trying to feed information to Al Qaeda. Chillingly, the arrest came as his unit was getting ready to deploy to Iraq.

Despite these challenges, we're making significant progress and scoring key victories in the war on terror. Since September 11, we've charged 340 defendants as a result of terrorism investigations. To date, 189 have already been convicted. We've broken up terrorist cells in Buffalo, Charlotte, Portland, and northern Virginia. Through unprecedented interagency and international cooperation, nearly two-thirds of Al Qaeda's leadership worldwide has been captured or killed.

Pursuing and prosecuting terrorists *after* an attack is part of our mission, but it's not the focus of our efforts. A good defense is important, but it's just not enough. We've got to be *pro*active, not *re*active, and take the fight *to* the enemy. If we're left picking up the pieces after an attack, then we've failed in our preventive mission. That sounds obvious enough, but old models of law enforcement and deterrence won't work with adversaries who not only accept, but glorify killing themselves in the course of attacking thousands of innocent people. We need to play offense – disrupting terrorism through aggressive investigation, comprehensive intelligence gathering, and real-time analysis of that data.

By far, the single greatest boost to our efforts against terrorism has been the PATRIOT Act's removal of the barrier between law enforcement and intelligence efforts on international terrorism investigations. Thanks to the elimination of this "wall," we're far better equipped to "connect the dots" in time to identify and disrupt terrorist threats. I can tell you from firsthand experience that the post-9/11 FBI has made dramatic strides to fully integrate intelligence and law enforcement capabilities and protect American lives.

Aided by our new ability to share information with our colleagues in other agencies, we can use every tool in our arsenal to deter, disrupt, and defeat terrorists – from intelligence collection to immigration exclusion or deportation, to criminal prosecution, to diplomatic pressure, to military force. On a personal note, I can tell you that the head of the Criminal Division's job has changed dramatically from that of my pre-9/11 predecessors: Not a day goes by that I or someone on my behalf isn't in operational discussions with counterparts at the CIA, the Defense Department, the National Security Council, and, of course, the new Department of Homeland Security.

Our offensive strategy extends beyond the actual perpetrators of violence to their supporters as well. We need to address the entire terrorist network, from the front-line

killers to the fundraisers, to maximize our chances of taking out those upon whom terrorist operations depend. Another way to see and understand our approach is to recognize the chronology of a terrorist plot as a continuum – from idea, to planning, to preparation (including fundraising and other support, training, reconnaissance, and other logistics), to execution and attack. We need to strike earlier on that continuum – we'd much rather catch terrorists with their hands on a check than on a bomb.

The harder it is for a terrorist to reach our shores, or communicate with co-conspirators, or buy a bomb, or learn how to build one, the less likely it is that some device will explode in one of our cities and kill innocent Americans. Our front-line investigators and prosecutors, armed by Congress with the critical tools of the PATRIOT Act, are doing everything they can to prevent such a tragedy. By fostering better information sharing, responding to advances in technology, and providing stronger tools for the investigation and prosecution of terrorists, the PATRIOT Act has been indispensable to our efforts to deter and disrupt terrorist activity.

Even Jeffrey Battle, a member of the terrorist cell broken up in Portland, understood the importance of the PATRIOT Act. In a recorded conversation with an FBI informant, Battle explained why his enterprise was not as organized as he thought it should have been because – and I'm quoting him now:

". . . we don't have support. Everybody's scared to give up any money to help us. . . . Because that law that Bush wrote about . . . Everybody's scared . . . He made a law that says for instance I left out of the country and I fought, right, but I wasn't able to afford a ticket but you bought my plane ticket, you gave me the money to do it . . . By me going and me fighting, by this new law, they can come and take you and put you in jail."

Within the realm of criminal prosecution, we'll use any offense that the law and the evidence support – a variation on the "spitting on the sidewalk" approach that Bobby Kennedy's Justice Department used against the Mob – in order to disrupt terrorist activity. We're using every tool that the laws, the evidence, and the Constitution allow us – the public deserves no less.

Not infrequently, we'll charge terrorism suspects with non-terrorism crimes – not because their links to terrorism are lacking. In certain cases, evidence of terrorist connections or activity may not be sufficient to prove a terrorism crime beyond a reasonable doubt, or proving some criminal offenses may require the disclosure of sensitive sources or classified information. In situations like these, the best alternative from a national security perspective is to get the defendant off the streets by bringing other charges against him – charges that can be proved beyond a reasonable doubt

without disclosing sensitive information. This is often the best way to achieve our most important objective: preventing terrorist attacks.

We're also using the legal tools available to us to strengthen the country's anti-terrorism infrastructure. For example, hundreds of airport and seaport workers have been charged with violating immigration laws and falsifying documents like Social Security applications. At Dulles and Reagan airports alone, 94 workers have been arrested on those kinds of offenses. Even where not tied to terrorism, these cases address dangerous vulnerabilities that terrorists seek to exploit. This kind of prompt, proactive, and preventive strategy is the only way we're going to win the war on terror.

As the head of the Criminal Division, I work to ensure that the Department takes these responsible, appropriate, and, yes, aggressive measures in the war on terror. We're duty-bound to zealously represent the United States and to obtain justice through every legal and constitutional means at our disposal. At the same time, our authorities aren't unbridled. I often marvel at those who criticize our actions as overly aggressive when they ignore altogether that almost all of these very actions are subject to judicial review. As a matter of law, the Department's actions are routinely reviewed by the courts.

As judges, therefore, you face the very same weighty questions that we confront when our laws and actions in the war on terrorism are challenged. You review the criminal charges that we bring, like the material support to terrorism charge. You authorize the detention of material witnesses. You review our implementation of the important new authorities and tools provided by the PATRIOT Act. For example, all of the electronic surveillance techniques authorized by the PATRIOT Act are subject to judicial review. So is the ability of law enforcement agents to delay notification that a search warrant has been executed; this authority can only be used with a court order. Sometimes criticized as so-called "sneak and peek" authority, this is a tool that – as most of you know – has existed for years but was clarified and codified by the Act, still requiring judicial approval in all instances.

The same goes for orders to compel production of records pursuant to the Foreign Intelligence Surveillance Act, or FISA. To use the authority of Section 215 of the PATRIOT Act – sometimes misleadingly criticized as the "library" provision, even though the word "library" appears nowhere in it – FBI agents have to get a court order to compel the production of any records in investigations of international terrorism or clandestine intelligence activities. By contrast – as most of you know – grand jury subpoenas, even for the same records, are typically issued without any prior judicial review or approval.

And, as the Supreme Court recently held, even the President's detention of U.S. citizens designated as enemy combatants, while "clearly and unmistakably authorized by Congress," is still subject to some review by a neutral decisionmaker.

So the Judiciary is essential to the process. Although we may not always agree with every one of your rulings, we know and appreciate that judicial review is an essential element of a freedom-loving democracy.

Blakely and the Federal Sentencing Guidelines

I'd like to turn now to the Supreme Court's ruling in *Blakely* v. *Washington* – what it held, what it didn't, and the Department's response.

Before the sentencing reform of the last 20 years, we had a system that was almost entirely discretionary; generated widespread, unwarranted and unfair disparity; allowed unacceptably high crime rates; left everyone from the defendant, to the government, to the public, to the court itself in the dark about how much time any offender would actually serve – if any; provided effectively no appellate review of sentences; and was roundly and rightly criticized by judges, Congress, the Department, and academics alike.

The Sentencing Reform Act of 1984, creating the Sentencing Commission, which then created the Guidelines, was a bipartisan, sensible, and long-overdue response. The Guidelines system has brought consistency, predictability and certainty – "truth in sentencing" – in a way that was sorely lacking before. The principle that similar offenses and similar offenders should get similar sentences was finally put into practice through a comprehensive and integrated structure designed to channel the sentencing judge's discretion.

But the structure designed to calibrate sentences is only part of the story. As we all know, the Guidelines are also tough, providing appropriately punitive sentences for violent, predatory, and other dangerous offenders. Studies have shown, for example, that since the Guidelines have been in place, sentences for drug and violent offenders have increased substantially. I know that there are those who worry that federal criminal sentences are too long and complain that we need "smarter" sentences, but the facts show that tough sentencing *is* smart sentencing. Guidelines sentences and sentences established by state legislatures – which have followed the federal government's lead in adopting truth-in-sentencing regimes – have resulted in significant reductions in crime, which is exactly what we'd expect. The more offenders who are incapacitated, the less crime afflicts our communities. This

sentencing policy has contributed to the fact that our Nation is experiencing a 30-year low in crime.

Violent crime in particular has declined dramatically since the 1990s, shortly after the Supreme Court upheld the Guidelines. This is not a coincidence. According to the Bureau of Justice Statistics, more than 90 percent of prison inmates had a criminal record prior to their current imprisonment or were in prison for a violent crime. And social scientists have validated through research the common sense notion that imprisonment does, in fact, reduce crime. For example, two studies published in 2000 come to similar conclusions about the effect of tougher sentencing policies: More than a quarter of the reduction in the homicide rate and crime rate during the 1990s can be attributed to tougher sentencing policies.

Then came *Blakely*. As you've no doubt already experienced firsthand, it's caused a huge upheaval and has thrown a shadow on 20 years of sentencing reform. In thinking about *Blakely*, it's very important to be clear on what the Supreme Court held and what it didn't. The Court in *Blakely* applied the rule announced in *Apprendi* to invalidate, under the Sixth Amendment, a sentencing enhancement imposed under the Washington state sentencing guidelines. The Court held that "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." The Court *didn't* wholly invalidate the Washington state sentencing guidelines, *nor* did it invalidate the federal Guidelines. Instead, the Court expressed *no* opinion on the federal Guidelines; it didn't overrule *Mistretta*, didn't overrule *Edwards* (which held that the court rather than the jury could increase the sentencing range as long the range was within the statutory maximum), and didn't overrule a slew of other cases upholding judicial fact-finding at sentencing.

A lot has already happened in the three weeks since *Blakely* was decided. Although the Supreme Court itself didn't rule on the federal Guidelines, some lower courts have already – and we believe prematurely – invalidated them. Others have applied the Guidelines in a piecemeal fashion, contrary to the intent of Congress and the Sentencing Commission.

In West Virginia, for example, a judge cited *Blakely* to reduce the sentence of a dangerous drug dealer from 20 *years* to 12 *months*. The dealer, Ronald Shamblin, was no bit player, no courier, no mule, no low-level dupe. According to uncontested findings of the Probation Office and the court, Shamblin was a leader of an extensive methamphetamine and cocaine manufacturing and distribution conspiracy. He possessed a dangerous weapon during his crime, enlisted a 14-year-old to join his conspiracy, and obstructed justice.

Similarly, in Washington D.C., Dwight Watson, the tobacco farmer who held the Capitol hostage for days in a standoff with police, was released from prison altogether when a judge reduced his sentence from 6 *years* to 16 *months*, or time served, under *Blakely*. As you may recall, Watson crashed his tractor into a pond on the National Mall and threatened to detonate explosives. I'm told that Watson shouted "Hallelujah" as he left the courtroom and his lawyer was thanking the Supreme Court.

In each of these cases, the courts severed the aggravating elements from the sentence calculation and applied only the base offense level and the mitigating factors. We believe that this approach distorts the federal sentencing system and produces results that neither Congress nor the Sentencing Commission ever intended.

Other courts have continued to uphold and apply the federal sentencing Guidelines, awaiting definitive word from the Supreme Court. Still others have thrown out some or all of the procedures of the federal Guidelines, but have nonetheless looked to the Guidelines as *advisory* rules to hand out sentences consistent with congressional intent and policy.

In order to resolve the current uncertainty in federal sentencing policy that *Blakely* has created in a manner consistent with the principles of sentencing reform, the Department intends to seek expedited review of an appropriate case in the Supreme Court. We're looking for the best case in which to seek it. Of course, the Supreme Court also has the option of accepting the questions certified by the Second Circuit. Either way, we are hopeful that the Supreme Court will give us some guidance sometime this fall.

In the meantime, our legal position is that the rule announced in *Blakely* does *not* apply to the federal Sentencing Guidelines, and that the Guidelines can still be constitutionally applied in their intended fashion. The Justice Department has traditionally adhered to the principle that it will defend the constitutionality of Acts of Congress in all but the rarest of instances. We believe we're vindicating that principle here by defending the constitutionality of the federal Sentencing Guidelines. Our legal argument has two basic parts:

First, *stare decisis* precludes lower courts from invalidating the Guidelines in the face of uniform case law, both in the Supreme Court and in every circuit holding that the Guidelines are constitutional. Case law in the Supreme Court and every circuit also expressly states that lower courts are bound by a higher court – even when it appears that a subsequent Supreme Court case undermines the rationale of a prior one.

Second, on the merits, the Guidelines are distinguishable from the Washington state system invalidated in *Blakely*. We've explained this position in a number of briefs. Simply put, the Washington state system consisted of *legislatively* passed statutes setting maximums for individual crimes. In contrast, Congress has only created *one* set of statutory maximums for federal crimes. The federal Guidelines operate within those maximums and lay out a whole bunch of factors – I think the current Guidelines Manual runs almost 500 pages – that courts are to consider, both in aggravation and mitigation, when individualizing a particular sentence. These factors correspond to those that judges have always taken into account when fashioning sentences.

In the days since *Blakely*, our lawyers have already argued this position in the Second, Fifth, and Seventh Circuits. A few days ago, a Fifth Circuit panel agreed unanimously with us in *United States* v. *Pineiro*, relying on *stare decisis* and finding itself bound by *Mistretta* and *Edwards* to uphold the Guidelines' constitutionality. A week ago, Judge Easterbrook over in the Seventh Circuit also agreed with our arguments in *United States* v. *Booker*, and forcefully articulated both the procedural and substantive reasons why the Guidelines remain constitutional.

Unfortunately, he did so in a dissenting opinion.

Recently, the Second Circuit, sitting *en banc* in *United States* v. *Penaranda* and *Rojas*, also noted the strength of our arguments and certified three questions about the vitality of the federal Guidelines to the Supreme Court. Whether or not the Supreme Court accepts the Second Circuit's invitation to resolve this issue, we look forward to articulating the Government's position there in the months to come.

Even if a court holds that *Blakely* applies to the federal Guidelines, our position is that the Guidelines can still be applied in several circumstances: <u>first</u>, if the case doesn't involve upward enhancements; <u>second</u>, if all of the upward enhancements are encompassed in facts reflected in the jury verdict or the defendant's admissions; and <u>third</u>, if the defendant waives his *Blakely* rights.

If, however, a case involves contested upward enhancements that aren't included in the jury verdict or the defendant's admissions, it's our position that the Guidelines can't be applied in a piecemeal fashion. That's because the Guidelines are an integral whole that can't be severed without doing violence to congressional intent. To sever the upward enhancements from the rest of the Guidelines would distort the operation of the sentencing system – creating a one-way road on which sentences move downward more easily than upward – in a manner never intended by Congress or the Sentencing Commission. So if *Blakely* applies, we don't believe the

constitutional aspects of the Guidelines can be severed from the unconstitutional ones. In these cases, we believe that the court should exercise traditional judicial discretion and impose a sentence within the applicable statutory range. Our sentencing recommendation in all of these cases will be to recommend a Guidelines sentence, including justifiable upward enhancements, and to urge the court to rely on the collective wisdom of the Guidelines in an advisory fashion and to exercise the court's discretion to impose a sentence that conforms to a Guidelines one. The Sixth Circuit adopted this approach a couple of days ago in *United States* v. *Montgomery*.

While we continue to believe that the federal Guidelines remain constitutional, in light of the unpredictable path of future court rulings, we believe it prudent to protect against the possibility that specific sentencing allegations in indictments will be held necessary. Thus, we've already asked prosecutors to start including in indictments all readily provable upward adjustments or departures, except for prior convictions, which are exempt from *Blakely* and *Apprendi*. These protective measures will require prosecutors and courts to adapt and adjust their pre-*Blakely* procedures, but until the effects of *Blakely* on the federal Guidelines are more clearly understood, we believe it's necessary to adopt these measures in order to protect both the integrity of our criminal prosecutions and the safety of the public, to the greatest extent possible.

Finally, I'd like to emphasize that the Department is committed to ensuring that the federal criminal justice system continues to impose just and appropriate sentences that meet the goals of the Sentencing Reform Act. Despite the uncertainty that *Blakely* has inflicted on all of us, we'll continue to do everything we can to bring justice to the communities of this country.

Conclusion

These are unprecedented times but exciting ones to be a litigator for the Government. We're dealing with new challenges that demand new approaches. The issues we're grappling with today could not be more important – indeed many are matters of life and death – and they deserve our utmost attention.

I want to conclude by saying that we're also constantly learning from the courts. While you sometimes disagree with us, I'd like to humbly add that we do our very best to maintain the excellence and professionalism of the advocacy of the Department's lawyers that appear before you. It's an honor to participate in this democratic process together.

Again, thank you for inviting me to speak here this morning.