Department of Justice

REMARKS OF

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AT

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I am going to discuss with you today an important initiative the Department is about to undertake in the criminal justice area. It involves an effort to improve the prosecutorial decision-making process by rationalizing and structuring the exercises of discretion that so often characterize the process. As a preface to that discussion, I would like to describe the new climate within the Department that has permitted and encouraged such a significant development.

Historically, the Department's posture has been for the most part reactive to immediate demands. The primary focus has been on day-to-day operational responsibilities. More recently the Department has taken a more active interest in the functioning of the justice system as a whole. Alongside its traditional, operations-oriented concerns, it has adopted the far-reaching goal of promoting long-range improvements in every aspect of the administration of justice.

The Department's new emphasis on justice system improvement has not been directed solely at the courts, nor has it been limited to seeking Congressional action. As one of the primary actors in the system, the Department recognizes an obligation to ensure the fairness and effectiveness of its own participation. This involves constant attention not only to the substance of positions taken but also continuing concern for the process by which those positions are reached and the manner in which they are communicated.

One of the major guiding themes of the Department during my tenure has been improving the professionalism and training of the Department's lawyers by up-grading the Attorney General's Advocacy Institute. The degree of professionalism within the Department becomes starkly apparent whenever one of our attorneys appears in court, but there is a less visible aspect of professionalism than is manifested in advocacy. That aspect involves the process by which decisions--particularly prosecutorial decisions--are arrived at.

Given the latitude federal prosecutors have in making crucial decisions concerning enforcement of a nationwide system of criminal laws, as well as the need to ensure the fair and effective administration of the system, it is desirable that all federal prosecutors discharge their responsibilities in accordance with generally accepted principles and practices. That is why, next week, I will issue to all United States Attorneys and Department attorneys with criminal law enforcement responsibilities a Statement of Principles of Federal Prosecution.

The Statement of Principles will cover six major areas of prosecutorial activity: initiating or declining prosecution; selecting charges; entering into plea agreements; opposing nolo contendere pleas; entering into non-prosecution agreements in return for cooperation; and participating in the sentencing

process. As to each area, the Statement will set forth general considerations to be taken into account, together with suggested or required practices concerning such matters as the level at which decisions are made, review of decisions, and documentation of decisions.

Let me give you some examples of the kinds of important principles that will be enunciated. First, there is the principle that no prosecution should be initiated against any person unless the government believes that the evidence is legally sufficient and that the person probably will be found guilty. Second, there are the principles that a defendant should ordinarily be charged with the most serious offense that can be proved, and that additional charges should only be brought when necessary to do justice. Third, there are the principles that every plea agreement should be recorded and should permit a demonstration--to the court and the public--both of the nature and extent of the illegal activity and of the defendant's complicity and culpability.

It is expected that each federal prosecutor will be guided by the Principles unless otherwise authorized. However, the Principles are not intended to dictate a particular prosecutorial decision in any given case. Rather, they are provided solely to assist attorneys for the government in determining how best to exercise their authority in the performance of their duties.

Each United States Attorney and each Assistant Attorney General with criminal law enforcement responsibilities will be expected to supplement the guidance provided by the Principles by establishing appropriate internal procedures for his or her office. These internal procedures should ensure consistency in the decisions within each office and guard against serious and unjustified departures from sound prosecutorial principles.

Although the Principles aim to promote consistency in the application of federal criminal laws, they are not intended to produce rigid uniformity among federal prosecutors in all areas of the country at the expense of the fair administration of justice. Different offices face different conditions and have different requirements. In recognition of these realities and to maintain the flexibility needed to respond effectively and fairly to local conditions, the Principles specifically authorize modifications or departures as necessary to accommodate the interests of fair and effective law enforcement within a particular district. But any modifications or departures within a district that are contemplated as a regular practice must be approved by the Deputy Attorney General.

The development of this Statement of Principles has occupied the attention of three successive Attorneys General. The initial efforts of Attorney General Levi resulted early in 1977 in the

development of informal guidelines covering some of the areas addressed by the Statement of Principles. Under Attorney General Bell a detailed written survey was conducted of the policies and practices of all United States Attorneys' offices. Every United States Attorney responded. The responses indicated that there exist variations in their policies and practices. Virtually all of the observed differences appear justified by variations in local or regional law enforcement requirements, or in office size or caseload. Those that cannot be accounted for by such considerations may be explained by ambiguities in some of the questions that were asked. In any event, there is no indication that any of the differences affects the fairness with which individual defendants are treated. Nevertheless, the mere fact that such variations exist permits suspicions to arise that the variations are unwarranted and may result in unfair treatment of defendants.

The Statement of Principles was drafted with the results of the survey and these considerations in mind. An Advisory Task Force representative of all federal criminal law enforcement interests was consulted throughout. The final product was reviewed closely by the Office of the Deputy Attorney General, the Criminal Division, and the Attorney General's Advisory Committee of United States Attorneys. In addition, I

personally have participated in the formulation of the Statement of Principles, both as Deputy Attorney General and as Attorney General. I am satisfied that it constitutes a fair statement of sound prosecutorial principles and practices, and that its promulgation is in the best interest of the administration of justice.

I have already mentioned the primary justification for the Statement of Principles--the need to ensure the fair and effective exercise of prosecutorial authority. The Principles should enable us to realize this overriding goal and others as well. First, they will fill a significant gap in the educational material presently available to Assistant United States Attorneys and other federal prosecutors. In light of the annual turnover rate of about fifteen percent among Assistants, it is important that there be available to fledgling prosecutors a concise statement of the basic principles of sound prosecution. Appropriate steps will be taken to ensure the permanence and ready accessibility of the Principles, as well as their use in the presentations of the Attorney General's Advocacy Institute and at United States Attorneys' conferences and other forums for the discussion of prosecutorial policy and practice.

A second important benefit to be expected is more efficient management of the limited prosecutorial resources available to the federal government. The Statement of Principles has been

designed in part to ensure consistency not only among the prosecutorial activities of the 95 United States Attorneys, but between those activities and the Department's law enforcement priorities as well. Thus, we expect that adherence to the Principles will ensure the sensible exercise of federal jurisdiction and prevent wasteful expenditures of scarce federal resources on inconsequential cases or unnecessary charges.

A third advantage relates to the investigating departments and agencies. They will better understand and appreciate the considerations underlying Departmental decisions to prosecute or not, both generally and in individual cases. The result should be better coordination between investigative activity and prosecutive activity, whether the investigations are conducted by employees of the Department, such as FBI or DEA agents, or by representatives of other departments, such as IRS agents or Postal Inspectors.

Finally, we count on the Statement of Principles to bolster public confidence in the administration of justice, particularly the administration of criminal justice in the federal courts. One of the most corrosive influences that now affects the system is the notion that criminal cases are brought and disposed of at

least in part on the basis of the defendant's race, economic circumstances, or other factors extraneous to guilt or innocence. Passing contact with the justice system may tend to confirm such suspicion, for it shows what appears on the surface to be unwarranted disparity in the treatment of similar offenders who commit similar offenses. Unless one is familiar with the system and how it operates in individual cases, it is easy to be misled by superficial similarities in cases to the erroneous conclusion that differences in the way they are handled by prosecutors and judges are the result of improper or at least capricious influences.

The Statement of Principles addresses this situation by providing--for all to see--an authoritative declaration of the considerations on which federal criminal prosecutions should be and are based. It is intended to provide assurances to defendants and to the public generally that important prosecutorial decisions will be made even-handedly on the merits of each case. It demonstrates the Department's commitment to the fair and rational operation of the federal criminal justice system.

Last, I would be remiss if I did not mention one further matter relating to the Statement of Principles, a matter that we regard as crucial to their effectiveness. This is the non-litigability of the Principles. We have developed this Statement

of Principles purely as a matter of internal Department policy and solely for the guidance of federal prosecutors. All federal prosecutors will be instructed to resist any attempt to litigate the Principles or to litigate prosecutorial conduct claimed to be at variance with them. If, for, example, courts were to entertain challenges to indictments or to plea agreements on the grounds of alleged failure by the prosecutor to observe one of the Principles, the resulting delays and inefficiences in the criminal process would probably be intolerable. In light of last year's Supreme Court decision in United States v. Caceres (440 U.S. 741) and other available precedents, we are confident that the courts will not countenance any such spurious efforts by defendants to avoid legitimate issues of guilt or innocence.

This is the first time in its history that the Department has developed and promulgated a comprehensive statement of prosecutorial principles. The effort demonstrates the seriousness of our commitment to making significant improvements in the administration of justice. It is not often that substantial benefits can be achieved by Executive Branch action alone or at minimal cost to the public treasury. This is such an event.