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REMARKS

OF

THE HONORABLE EDWIN MEESE III
ATTORNEY GENERAL OF THE UNITED STATES

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THE SENTENCING COMMISSION'S GUIDELINES

BEFORE

THE AMERICAN LAW INSTITUTE

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NOTE: Because Mr. Meese often speaks from notes, the speech as delivered may vary from the text. However, he stands behind this speech as printed.

Thank you, Mr. Perkins. It's a great honor to be with the American Law Institute once again. I was last before you just a little over two years ago, very shortly after I became Attorney General.

This afternoon I would like to share with you some reflections on an important and realistic goal, not just of my tenure at the Justice Department, but of the whole Reagan administration. I am referring to the reform of federal criminal law, with particular regard to sentencing. As many of you know, the U.S. Sentencing Commission, which was created by the Sentencing Reform Act of 1984, has recently submitted to the Congress a set of guidelines, in fulfillment of its congressional mandate.

One result that we anticipate from the implementation of these guidelines -- which I support, as I will explain in a moment -- one result will be an increase in the inmate population of federal prisons. Another factor contributing to that increase

will be the Anti-Drug Abuse Act of 1986. A third will be the Armed Career Criminal Act, passed in 1984 and expanded in 1986. And since federal prisons are already over-filled by a factor of around 50 percent, there will be an urgent need to build more of them. This, of course, will require additional funds at a time of necessary budget restraint. While prisons are not popular items in the budget, we must be willing to pay the costs of such a direct boon to the safety of our citizens. After all, law enforcement is one of the most fundamental and inalienable functions of government.

Now, my main purpose today is to express my strong support for the Sentencing Commission's guidelines, and for implementing them according to schedule. There is room for improvement, to be sure, and I will discuss a few ideas on that. But any changes needed in the present draft can and should be made by the Sentencing Commission itself, in the course of the annual amendment period specified by the 1984 Act. The guidelines now before us represent significant progress towards more rational sentencing, and they should become the law of the land.

I note, by the way, that next Sunday, May 24th, marks the 25th anniversary of the Model Penal Code, in which the American Law Institute played such a key part. That Model Penal Code was an early effort to create a consistent and standardized sentencing system, and all those who participated in its creation deserve a salute, especially now that, a quarter of a century

later, we are on the point of achieving many of their worthy goals. The work of the Sentencing Commission is a logical successor to those efforts.

As I begin these remarks, I would like to briefly explain the origins of the Sentencing Commission and the problems that led Congress, with strong support from the Executive Branch, to create it. At the time that overwhelming congressional majorities in both houses of Congress passed the Sentencing Reform Act of 1984, there was general agreement that sentencing in federal criminal cases needed improvement. This view prevailed among observers with very different political views as well as those with varying views concerning the criminal justice process.

For one thing, there was a problem at the theoretical level, inasmuch as sentencing practices continued to rely too heavily on the rehabilitation model. This model was influential from the 19th Century through the 1960s. Subsequent research and practice in criminology and penology, has shown, however, that, while rehabilitation remained a worthwhile goal, the likelihood of its achievement was too uncertain and too variable from case to case to permit it to be the dominant factor in sentencing. If emphasized too heavily, the objective of rehabilitation could tend to detract from the punitive and incapacitation functions of sentencing, and thus would be counter-productive with regard to the need to protect society as a whole.

Another major problem in sentencing, on a more practical level, was the issue of judicial discretion, whereby in too many instances the same crime may be treated very differently by different judges.

It is regrettable when the selection of a judge for a particular case unduly varies the character of sentencing in the event of conviction. By contrast, the principle behind the Sentencing Reform Act, is that convictions in like cases should yield substantially similar results. This is an important aspect of the fairness and predictability that is among the goals of a society that adheres to the rule of law. The public deserves to be sure that variations in sentences arise from differences in the facts, not in the judges.

These concerns, and other similar ones, prompted Congress to vote overwhelmingly for the Sentencing Reform Act of 1984. That Act, among its other provisions, called for the appointment of a Sentencing Commission, to be appointed by the President in consultation with representatives of judges, prosecutors, and others involved in the criminal justice process. The Attorney General or his designee was appointed as an ex officio non-voting member.

Traditionally, the aims of sentencing are fourfold: punishment, deterrence, incapacitation, and rehabilitation. The need for punishment arises from the abstract and objective requirements of justice. As the Athenian Stranger puts it in

Plato's Laws: "The law, like a good archer, should aim at the right measure of punishment, and in all cases at the deserved punishment."

Deterrence, meanwhile, raises the chances that someone considering perpetrating a similar offense will decide not to.

Incapacitation provides that an individual who is a proven danger to society may be removed from it, at least for a period of time commensurate with the gravity of his offense and the demands of justice.

Finally, rehabilitation obviously remains a worthwhile goal when it can be accomplished.

Against this backdrop, it is instructive to recall the words of the Senate Judiciary Committee in its report on the legislation that created the Sentencing Commission. Here is how it viewed the Sentencing Commission's mandate:

> First, sentencing legislation should contain a comprehensive and consistent statement of the Federal law of sentencing, setting forth the purposes to be served by the sentencing system, and a clear statement of the kinds and lengths of sentences available for Federal offenders.
>
> Second, it should assure that sentences are fair both to the offender and to society, and that such fairness is reflected both in the individual case and

in the pattern of sentences in all Federal criminal cases.

Third, it should assure that the offender, the Federal personnel charged with implementing the sentence, and the general public are certain about the sentence and the reasons for it.

Fourth, it should assure the availability of a full range of sentencing options from which to select the most appropriate sentence in a particular case.

Fifth, it should assure that each stage of the sentencing and corrections process, from the imposition of sentence by the judge, and as long as the offender remains within the criminal justice system, is geared towards the same goals for the offender and for society.

To sum up, then: the new sentencing guidelines were to be rational, consistent, certain, adaptable to particular cases, and they were to combine toughness with fairness.

The Sentencing Commission has now turned in a draft that takes a major step toward meeting those tough criteria. While we have some suggestions for improvement, we believe the Commissions's guidelines deserve to go into effect this November, as scheduled.

While the guidelines may seem complex at first, in fact they represent a rather straight-forward attempt to fulfill the

statutory mandate in a manner that is easily applied. They establish 43 offense levels and six prior criminal history categories within each of those levels. If the offense level is below level 10, the judge retains the option of probation in lieu of a prison sentence.

How would a judge determine which of the 43 levels applies? Well, the Commission has provided a base offense level (or levels) for each major federal offense. This base level can then be adjusted up or down in accordance with particular details of the offense in question. Once a final level is determined, the proper criminal history category is determined by a detailed system that assigns points for various types of prior convictions. You then "find the box," so to speak, and you see what the allowable sentencing range is.

On the whole, some may criticize the guidelines for retaining too much judicial discretion, rather than for leaving too little. They list some 15 circumstances justifying departures upwards or downwards in response to factors not covered in the guidelines. Some of the factors treated as departures could have been treated as specific adjustments and handled in a more uniform manner. But that will be clearer when the guidelines are put into practice, and the Commission itself will be able to make any necessary corrections.

Many of the draft's guidelines are quite firm on punishment. As for those instances where they are perhaps not strong enough,

one may rely on the periodic revision that the Sentencing Reform Act provides for. We know that the present draft is still tentative, and that the commissioners envision that work remains to be done. There is thus every reason to hope for further improvements in the future, provided the guidelines are implemented, which will happen unless Congress acts to stop or delay them before November of this year.

These guidelines substantially meet the basic goals set forth by Congress in the Sentencing Reform Act. Under them, sentencing practices will be much more uniform than ever before, and most sentencing levels will be adequate to ensure that the goals of just punishment, deterrence, protection of the community, and potential rehabilitation are satisfied. To cite one example: Drug dealers will be incarcerated for lengthy periods of time. Above all, there will be greater certainty of punishment, perhaps the most overall effective deterrent to future crime.

While these results would be reason enough to favor implementation of the guidelines on schedule, there is also the additional reason that the work of the Sentencing Commission is part of the overall Sentencing Reform Act, and the Act provides for concomitant long-needed reforms such as abolishing early-release on parole in the federal system. Parole, which is based on the substantially discredited theory of rehabilitation, has had the effect of giving the lie to all attempts at tough

sentencing, with predictable ill effects on the deterrent power of federal law. It is high time we achieved "truth in sentencing."

If the work of the Commission is rejected by Congress, there could occur a hasty and ill-advised reversal of some of the provisions that were passed by such overwhelming majorities in 1984. Such a case of Congressional cold feet would be most unfortunate for the federal criminal justice system, and therefore, for the American public.

I should note, in this regard, that we oppose the suggestion made by some commissioners that the implementation of the report should be delayed by nine months. This would postpone the effective date until the middle of a presidential election calendar. Congressional action in such a highly charged atmosphere could be subject to heavy political pressures in all directions. Under such conditions, the federal criminal justice system might well come out the loser.

Nor is it the case that judges need extra time to familiarize themselves with the guidelines. The guidelines will be applied only to crimes committed after November 1, 1987, so there will be a built-in lag time anyway, while those cases go through the process of detection and indictment.

What, then, about the shortcomings that some have found in the guidelines? Such problems that become evident upon implementation can be corrected by the Commission itself during

the regularly scheduled amendment periods. Some of the Commissioners are already sensitive to these areas.

One issue deserving attention is the claim that the guidelines are not yet sophisticated enough in the way they take into account various aggravating or mitigating factors. For example, in treating the crime of tampering with consumer products, the guidelines at present do not require a difference in sentencing for tampering that leads to death and tampering that does not. But it seems that such a distinction in sentencing ought to be mandated.

Another possible difficulty is the omission from the last draft of the section entitled "General Provisions," which was present in the previous draft. This section provided a series of general aggravating and mitigating factors that would have applied across the board. The deletion of that section considerably widens the scope of judicial discretion, which the guidelines are supposed to narrow, and which they do narrow for the most part. The General Provisions would have ensured that more serious punishment is meted out for more serious offenses. We were sorry to see the General Provisions section go, and we would welcome its return.

We must remember that the commissioners were in effect being asked to delve deeply into law, societal values, and legal precedents. It would have been a daunting task even if the commission had had much more than eighteen months, which in fact

is all the time it did have once procedural details were ironed out. Where the results fall short, the Commission will have ample opportunity to improve them.

These guidelines mark a decisive turning point in the history of the federal criminal justice system. They point us towards the sound, predictable, tough yet rational sentencing structure that the federal system long has needed. All of us interested in improving the criminal justice system must now work for a smooth development and implementation of such a system, and the speedy implementation of the guidelines is a critical first step towards that goal.

Ladies and gentlemen of the American Law Institute, I am glad to see you all here, and I am pleased, too, that ALI has proved over the years to be such a steadfast worker in the cause of criminal law reform.

Thank you very much.