Department of Justice

STATEMENT

OF

THE HONORABLE BENJAMIN R. CIVILETTI

ATTORNEY GENERAL OF THE UNITED STATES

BEFORE

THE

SENATE JUDICIARY COMMITTEE
UNITED STATES SENATE

CONCERNING

CRIMINAL CODE REFORM

ON

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Mr. Chairman and members of the Committee, the opening of this series of hearings marks the formal beginning of the ninth consecutive year of concentrated Senate attention to the reform of our federal criminal laws. My predecessors in office have reviewed with you the serious need for change in our penal laws. Those of us who have held other offices in the Department have been pleased to work with you at length in developing carefully tailored solutions to meet that need. In view of the tremendous progress that has been made over the past nine years, it is my strong hope that I shall be the last Attorney General who appears before you to encourage the enactment of the nation's first comprehensive and rationally structured federal criminal code, and that my successors in office will be able to devote their attention to operating effectively under that code.

The code has been long in developing, and it is now time for its passage. The Federal Government has lagged far behind the states in this important reform. As recently as 1958, Professor Jerome Hall could write:

> "The glaring defect in the criminal law of most states is the disorganization of the statutes .... [T]he fact is that in only a few states has anything approaching systemization of the criminal

> law been attempted. Lawyers and judges are thus handicapped in their work and their effectiveness is seriously impaired." (J. Hall, Studies in Jurisprudence and Criminal Theory 254 (1958)).

At this point in our history, however, a total of 35 states and the Commonwealth of Puerto Rico have revised their criminal codes, the most recent revision being the Code of Criminal Justice of the State of New Jersey which became effective 11 days ago. Of those thirty-five new state codes, three became effective while the National Commission on Reform of the Federal Criminal Laws was developing its "work-basis" for a new federal code, and 28 more came into effect since this Committee first began its consideration of federal code reform in February of 1971. (See, The American Law Institute, Annual Report 21 (1979).) The enactment of so many modern state codes in this short period should provide us with quiet testimony that such a project is politically accomplishable, and should provide us with additional resolve to achieve its completion.

If we do not succeed in achieving a new federal criminal code in this current effort, I am concerned that disappointment may turn to cynicism about the unwieldiness of the legislative process and its capacity to accomplish such a major reform -- with the result that few responsible citizens will still be willing to expend the energy necessary to champion such an effort. That

would be a costly failure for the nation -- both in terms of effective law enforcement and in terms of the fairness of our criminal justice system. Such a coalition of interests in widespread reform may not return soon. It is little recognized today, but the last previous effort for achieving comprehensive federal criminal law reform occurred with the development of a new code in the House of Representatives by Congressman Livingston of the State of Louisiana -- in 1828. Had that code been enacted, its clarity and logic, with periodic amendments, might have served us well to this day. We certainly cannot afford to wait another one hundred and fifty-one years before again undertaking serious work for a new federal criminal code. The current effort must be brought to a successful conclusion now.

Our common call for a new code -- as this Committee recognizes -- is not a call for any new code. The code that the nation needs must be balanced, technically precise, improved in its substantive provisions, and complete.

The code must achieve a balance in fairness. It must be fair to the citizens of the nation who justly expect to be able to live their lives free of the fear and the trauma of widespread crime. It must also be fair to individuals who find themselves

charged with offenses against the public. We in the Department of Justice are very sensitive to these dual directions of fairness. I regret that there are still some who tend to consider our agency only as a department of public prosecution rather than a Department of Justice. That is both unfortunate and inaccurate. We are not an agency of individuals who see the law as simply a tool of their profession. We see the law in all aspects of its theory, and its multiple, practical ramifications are emphasized to us because of our daily participation in its application. We see it as investigators, prosecutors, prison authorities, and administrators. We see it in its grandeur and its failings. We therefore have even a greater interest than most citizens in assuring that we can apply it effectively and can do so proudly. We are not interested -- nor, I know, is this Committee -- in a code that is simply a bag of tools for prosecutors, in penal laws that effectively but blindly encompass all questionable conduct, or in criminal statutes that exceed the power necessary for the effective preservation of the rights of the public.

The code that the nation needs must also achieve a balance in permitting differentiation of those offenses that appropriately affect federal interests from those that should be left for enforcement by state and local authorities. The reach of federal

criminal jurisdiction under current statutes is broad. It is broad in part because the reach of federal authority in non-penal areas is broad, and the personnel and the property involved in such governmental operations commonly warrant application of the basic penal laws designed to help protect persons and property. It is broad also because it is intended to serve as a "backstop" to state and local law enforcement efforts -- for use in situations in which state and local governments may find it difficult to act effectively because of their geographically limited authority, or, less commonly, because of the effect of the offense on the operation of the state or local government itself. A new code must recognize the need for adequate breadth while maintaining an effective balance between federal and state penal authority. It may be able to reduce the overlap in some areas; it may be required to expand it marginally in others. However, whatever particular modifications are made by the new code, the statutory law must inevitably continue to place reliance in the first instance upon rational restraint by the executive branch in the application of its "backstop" authority, and in the second instance upon continued congressional alertness to overuse. For our part, we have recently undertaken to develop closer, cooperative working relationships with our state and local counterparts; our common understanding of the extent of our overlapping jurisdictions, and of the best means

of assuring their rational operation, will be improved considerably by the clarity imparted by a new federal criminal code.

The technical accuracy and clarity of a new code is crucial to those of us in the Department. I wish I could convey to you the depth of the concern in the Department of Justice -- at all levels -- with regard to the care to be employed in framing the language of the new provisions. Words and phrases lifted from previous statutes or case decisions may carry with them -- for good or for bad -- more than their ordinary English meaning; they must, of course, be employed with care, and the drafters should plainly explain their purpose in the accompanying legislative history. Even the placement of commas must be watched; for want of a comma more than one line of cases has been lost. (See, e.g. United States v. Bass, 404 U.S. 336 (1971).) Interrelationships with other penal and procedural provisions must be tailored with care. Often it may prove helpful to state the obvious. Moreover, countless thousands of hours of time can be saved in the future if drafting techniques are employed that lead the reader to pertinent provisions with a minimum of effort. These matters -- matters of words, of commas, and of format -- will consume our attention after enactment as we are the ones who will have to enforce the provisions and prosecute under them. Any new code will provide great opportunity for litigation of its finer details, but the extent of that litigation can be minimized

by careful attention at the drafting stage to these seemingly minor matters.

A new code must advance the law if it is to be worthwhile. Codification in the interest of consolidation and simplicity alone would be too costly to undertake. It would be too costly in terms of the time that must be expended in the reeducation of judges, prosecutors, defense counsel, and investigators, who must operate under the provisions of the new code. It would be too costly in terms of the increased litigation that any new code -- no matter how carefully drafted -- would prompt for some period of time. It would also be too costly in terms of the loss of the opportunity presented by codification to make significant advances in numerous areas of law upon which a consensus can readily be obtained. In sum, we are concerned that, without genuine advances in the law, the expenses of a new code would outweigh its benefits.

Finally, a new code must be a complete code, not a partial code. After the time and ability that have been expended in this effort there is no reason why a new code cannot be enacted as a whole. The need exists, the work has been done, and the state precedent is before us. As Professor George has noted in reviewing the recent history of state codification efforts:

> "At an early stage, those who create the drafting organization must decide the scope of the revision effort. The easiest path may appear to be a limited or partial modernization of the criminal law. However, few definitions of crime exist in isolation, so that a fundamental change in the definition of larceny, for example, may have a great impact on crimes like robbery, fraudulent obtaining of property and receiving. Alteration of the language of a homicide statute may affect the scope of traditional defenses like self-defense. Code revision like pregnancy usually goes to term." (B.J. George, Jr., A Guide to State Crimial Code Revision, appearing in E.M. Wise and G. O.W. Mueller, Studies in Comparative Criminal Law 65 (1975)).

There is no reason for the federal effort to be a truncated exception.

Mr. Chairman, the criteria that I have just outlined are met by the code introduced last week, as S. 1722, by you and Senators Thurmond, Hatch, DeConcini, and Simpson. The meeting of such criteria takes time, and over the past nine years this Committee has provided the time necessary to the drafting of a genuinely worthwhile code. The process has been an evolutionary one, with exceedingly careful section-by-section, line-by-line, word-by-word review and improvement. The extraordinary cooperation between the majority members of this Committee, the minority members, and the executive branch, has provided us all with a prolonged opportunity to appreciate each other's interests and to familiarize ourselves with the evolving details of the joint product. It is as a result of that long, cooperative involvement that I can say with assurance that the Department is satisfied that S. 1722 meets the requisite standards.

This is not to say, of course, that the Department or any one of the principal sponsors might not have preferred to see somewhat different language in particular provisions of the bill. But the compromises made have been principled ones -- progressive compromises designed to further the overall goal.

Basically, S. 1722 is drawn from last year's Senate bill which commanded wide public support -- including the formal support of this Department and of the Administration as a whole, and the overwhelming support of the Senate itself as evidenced by its 72 to 15 passage of the measure in January of last year.

Many worthwhile changes from last year's bill have been made, several of which were adopted from suggestions first raised in the course of House of Representatives consideration in its parallel effort. I note with favor the current bill's complete abolition of our archaic parole system -- an abolition that was strongly urged by former Attorney General Bell on behalf of the Administration. I also note with favor various jurisdictional provisions -- provisions encouraging the relinquishment to state authorities of federal jurisdiction over federally owned lands, giving recognition to the need for thoughtful discretion in exercising concurrent federal jurisdiction without adding complexity to the process, and reducing the reach of federal jurisdiction under the proposed consumer fraud offense in light

of adequate federal coverage through other means. With regard to white collar crime, I am pleased by the addition of the prohibition against permitting a defendant found individually responsible for an offense to have his fine paid from the assets of his corporate employer.

Some changes from last year's bill, however, the Department does not view with similar favor. These are primarily changes made in certain provisions that will affect the prosecution of white collar crimes. They include the deletion of the provision under which a corporate supervisor could be charged with complicity in an offense committed by his subordinates if he recklessly failed to exercise his supervisory responsibilities; the dropping of the alternative fine of double the defendant's gain from the offense; the elimination of the probation condition expressly recognizing the possibility of precluding a corporate defendant from engaging in business directly related to the business offense for which it was convicted; and the retention of the scattered, often disparate attempt and conspiracy provisions appearing in certain of the regulatory laws that remain outside title 18.

I understand that this Committee is subject to a variety of competing pressures in the area of white-collar crime, as in other areas, and that it must strike a reasoned course consistent with practicality and the goals of codification. I hope the

Committee recognizes, in turn, that we in the Department have no interest in expanding the criminal laws to reach individual citizens who marginally transgress the complex provisions of our numerous regulatory laws. We are interested only in assuring that the law itself is adequate to its legitimate purpose, and it is to that end that we have worked with you in the development of the numerous white collar crime provisions that have long been included in the proposed new code. As it now stands, even with the recent deletions, the bill makes major strides in providing the nation with the means of bringing white collar crime under control, while avoiding the pitfalls of overinclusiveness. Although there are still additions in this subject area that I hope you will consider -- and in the near future I would like to suggest to you the inclusion of new provisions to enable the government to prosecute more effectively various kinds of monetary fraud and bribery that occur in federal programs -- on balance the new code is a great advance over the current state of the law in this area as well as in others.

We strongly support S. 1722 as the appropriate vehicle for the new federal criminal code that the nation so greatly needs. In area after area, it provides genuinely major advances for our criminal justice system. While it inevitably will undergo further modification before being signed into law, we place with you our strong hope that each further change will be made only to improve

the overall product, not simply to accommodate a viewpoint that is not adequately supported in fact or in law. The vehicle is sound, and the time for passage is now. Further issues can await future consideration as separate matters, and their resolution can be accommodated easily by the new code's flexible format. This design for future accommodation is significant since, as noted by Mr. Livingston one hundred and fifty-one years ago in the preamble to his proposed federal criminal code: "No act of legislation can be, or ought to be immutable. Changes are required by the alteration of circumstances; amendments, by the imperfection of all human institutions . . . ." (E. Livingston, A System of Penal Law (1828).) The code will provide us with a sound basis for a fair and effective system of federal criminal justice -- both for now and for long into the future.

Mr. Chairman, my testimony today has been of a very general nature, partly because of the great opportunity this Committee has provided in the past for the formal and informal communication of our detailed views, and partly because I recognize that this Committee will, in the course of its further work, feel free to request any additional elaboration on our views with regard to particular issues as they may arise.