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Criminal Justice Issues and Prisoners' Rights

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Public Facing Advocacy Writing

U.SJustice Department tradition over the last 37 years generally includes the new Attorney General issuing his or her own charging and sentencing policya fundamental part of the DOJ's criminal justice program. This administration is no exception.

On May 10th, Attorney General Jeff Sessions announced the DOJ's new policy,[1]though "new" is something of a misnomer. Short in size and skimpy on details, the policy nevertheless resembles iterations of prior Republican administration policies that stressed pursuit of the most serious charges and harshest punishments, while preserving elements of prosecutorial discretion (read: leniency) in unspecified types of cases. This is no surprise, given the Attorney General's public statements on crime (particularly drug and violent crime) and his own prior experience as the U.S. Attorney in a staunchly conservative state (Alabama). But how his policy will affect the federal criminal justice landscape will depend in large measure on how the policy is actually implemented by federal prosecutors throughout the country and how other constituents in the federal criminal justice community respond.

Policy History

The federal prosecutor's responsibility to pursue the most serious readily provable offense has been a bedrock element of DOJ policy for decades. It was first formally announced by Attorney General Benjamin Civiletti in 1980[2]and endorsed by Attorney General Richard Thornburgh in 1989.[3]In 1993, Attorney General Janet Reno adhered to this policy but added that the charging decision should also be based on "an individualized assessment of the extent to which particular charges fit the specific circumstances of the case, are consistent with the purposes of the federal criminal code, and maximize the impact of federal resources on crime."[4]Ten years later, Attorney General John Ashcroft eliminated the "individualized assessment" element of the policy and, further, instructed prosecutors that they "must" (not merely "should", as in the past) charge the most serious readily provable offense[5]a directive reiterated by his deputy, James Comey, two years later.[6]

Fast forward to the Obama administration. Attorney General Eric H. Holder Jr. reverted back to the standard of his former boss, Reno. He stated that while prosecutors "should ordinarily charge" the most serious offense, that decision "must always be made" in the context of the "individualized assessment" of factors set forth in Reno's policy.[7]But Holder went further, in two memos, issued in 2013[8]and 2014.[9]In the first, he "refine[d]" the DOJ's charging policy for crimes carrying a mandatory minimum term of imprisonment by directing that such charges should not be brought for low-level drug offenders whose conduct did not involve violence, weapons or minors and who had little or no criminal history. In the second, he circumscribed the use of so-called851 enhancements (a reference to 21 U.S.C.851, which significantly increases the mandatory minimum and potential maximum sentences for drug offenders with a prior felony drug conviction), including discouraging prosecutors from using the prospect of such an enhancement in plea bargaining.

Sentencing policy has undergone similar fluctuations. Under Civiletti's pre-Sentencing Guidelines policy, prosecutors were given a limited role: to assist the sentencing court and only rarely make sentencing recommendations, given that "sentencing in criminal cases is primarily the function and responsibility of the court." And although the advent of the Guidelines in 1987 brought about a sea change in federal sentencing, with a more regimented and arithmetic approach to determining sentences and oftentimes harsher results, Thornburgh's post-Guideline policy authorized prosecutors to engage in sentence bargaining and to seek departures from the Guidelinesa policy continued under Reno.

Ashcroft took a harsher approach. His policy forbid prosecutors from seeking or agreeing to downard departures except for cooperating defendants, so-called "fast-track" programs (for districts with exceptionally high volumes of immigration or drug cases), or other, unspecified "rare" cases. This strict policy was reiterated in 2005 by Ashcroft's deputy, Comey, even after the Supreme Court declared in*United States v. Booker*[10]that the Guidelines were merely advisory; Comey commanded prosecutors to continue to seek Guideline sentences in "all but extraordinary cases." Holder moderated that policy considerably, stating that while prosecutors "should generally continue to advocate" for a Guideline sentence, determining what sentence to advocate must follow an "individualized assessment" of the facts of each case. Lest there was any doubt about his intentions, Holder's memo expressly superseded those of his predecessors.

The Sessions Memo

Sessions' memo reiterates the "core principle" that prosecutors "should charge and pursue the most serious, readily provable offense." The memo makes clear that this includes offenses carrying the highest Guideline range and mandatory minimum sentences. But the policy also acknowledges that "[t]here will be circumstances in which good judgment would lead a prosecutor to conclude that a strict applicatoin" of the policy "is not warranted." In such cases, prosecutors "should carefully consider whether an exception may be justified."

As for sentencing, the policy provides that prosecutors "should in all cases seek a reasonable sentence under the factors in 18 U.S.C.3553(e)" (the statute which, particularly in the post-*Booker*world, drives the sentencing process) and that in "most" cases, recommending a Guideline sentence will be appropriate. But it does allow prosecutors to recommend departures or variances from the Guidelines.

Little guidance is provided for when prosecutors can pursue lesser charges or lower sentences. The policy states merely that such decisions should be "justified by unusual facts" and, as with prior charging and sentencing policies, be approved by supervisors and documented. With respect to drug cases, however, the policy explicitly rescinds Holder's policies on mandatory minimums and851 enhancements and thus seemingly takes the DOJ back to the days in which both were employed more regularly. More guidance may be forthcoming, as the policy authorizes the Deputy Attorney General to issue any clarification or guidance he deems appropriate.

Potential Impact

Perhaps the policy's greatest potential impact is on drug cases. They are the most frequently prosecuted federal crimes, accounting for 32 percent of DOJ's criminal docket. And it is also the area of greatest recent attention from every major stakeholder in the criminal justice world. The most concerted recent efforts at sentencing reform have focused on harsh sentences in drug cases and the resulting incarceration of increasing numbers of lower-level offendersa phenomenon decried by numerous stakeholders and well-summarized by Holder's statement that, in our country, "[too] many Americans go to too many prisons for far too long, and for no truly good law enforcement reason."[11]Remarkable (in this day and age) is the fact that recent efforts at reform were bipartisan, drawing support from both sides of the aisle and ideological spectrum.

To be sure, those reform efforts have their fair share of detractors, ranging from numerous former high-ranking DOJ prosecutors from various prior administrations,[12]the National Association of Assistance United States Attorneys[13]and various members of Congressincluding then-Senator Jeff Sessions.[14]It is no surprise, then, that Attorney General Sessions has picked up where Senator Sessions left off. Indeed, the current policy was foreshadowed two months ago, when Sessions issued a directive to all federal prosecutors that they focus on aggressively prosecuting violent crime and the drug trafficking that oftentimes accompanies it.[15]It seems plain, then, that the DOJ is poised to revert back, at least to some degree, to an era of harsher punishment in drug cases. To be clear, the policy's impact is not limited to drug cases. For example, the memo has the potential to leverage the steady increase in recommended Guideline sentences for white-collar crimes and the severe sentences (including mandatory minimums) for child pornography crimes, with the potential for increased sentences there as well. And if the DOJ parallels the administration's stated commitment to stopping illegal immigration, the policy's impact on immigration casesat 29 percent, the second-largest part of the DOJ's criminal docketcould be sizeable indeed, both in the number of cases brought as well as the punishment meted out.

The key word here is "could." The policy has little explication of the standards by which decisions are to be made to vary from the general rule that prosecutors should pursue the most serious charge and a Guideline sentence. But one would think (hope?) that, in certain areas, well-established practices will survive.

From a programmatic perspective, districts awash in immigration or drug importation cases would be well-advised to continue to employ fast-track programs to promote the efficient disposition of numerous cases, exacting meaningful punishment while freeing up resources to pursue more serious offensessuch as terrorism and cybercrimethat, regrettably, now constitute an increasing portion of the DOJ's criminal docket. On a more granular level, there always have beenand will continue to becases in which, for various reasons (such as weaknesses in the evidence; resolving multi-defendant, time-consuming cases against less serious offenders; and extenuating circumstances warranting either a downward departure or variance), the exercise of discretion will be warranted. How much of that will happen may depend on the combination of prosecutorial "good judgment" (which Sessions' memo endorses) and zealous advocacy by defense counsel.

Executive branch policy, moreover, cannot alone reverse recent prosecutorial trends. Examples abound. Congress's enactment of the so-called "safety valve"[16]in 1994 provided a path for low-level, non-violent, first-time drug offenders to receive sentences below a mandatory minimum; indeed, the criteria closely mirror those in Holder's 2013 memo circumscribing the pursuit of drug charges with mandatory minimums. The Fair Sentencing Act of 2010[17]reduced the penalties for crack offenses.

The judiciary also plays a role in moderating punishment. The U.S. Supreme Court's decisions in Booker and its progenyauthorize judges to impose non-Guideline sentences so long as the resulting sentence is reasonable. Courts have accepted the invitation to use their judicial discretion, imposing below-Guidelines sentences 50 percent of the time (29 percent of the time with government support, 21 percent of the time without it).18 Similarly, the Sentencing Commission, through a series of amendments to the Guidelines, has significantly lowered punishment for a wide variety of drug offenses.

Conclusion

The DOJs new charging and sentencing policy reflects the Attorney Generals effort, at a high level, to recalibrate federal prosecutions in a more aggressive direction. But federal prosecutions do not occur at a high level. They proceed case by case, and the results in those cases will depend largely on how prosecutors exercise their authority under the policyand how the other branches of government react. Time will tell.

Footnotes