

## SENTENCING GUIDELINES

## Expert Analysis

# Justice Department's New Charging, Plea Bargaining and Sentencing Policy

On May 19, 2010, Attorney General Eric H. Holder Jr. announced the Justice Department's new policy on charging, plea bargaining and sentencing.<sup>1</sup> "New" is a bit of an overstatement, as Mr. Holder's memo notes that its purpose is to "reaffirm the guidance" provided by the principles of federal prosecution that were first memorialized 30 years ago. That said, the new policy does reflect a number of subtle, and substantive, changes in text and tone from the policies of Mr. Holder's recent predecessors. This article will summarize notable changes in charging, plea bargaining and sentencing policy—with an emphasis (consistent with the nature of this column) on the last.

Thirty years ago, Attorney General Benjamin R. Civiletti published the Justice Department's "Principles of Federal Prosecution"—containing specific guidance on how federal prosecutors should decide what charges to bring, what plea bargains to strike, and what sentences to seek.<sup>2</sup> Many of his successor Attorneys General followed suit, with Richard Thornburgh,<sup>3</sup> Janet Reno<sup>4</sup> and John Ashcroft<sup>5</sup> each issuing his or her own iteration of these policies.<sup>6</sup>

Even Deputy Attorney General James Comey got into the act, issuing two memos on sentencing policy just before and after the Sentencing Guidelines were declared unconstitutional by the U.S. Supreme Court in *Booker v. United States*.<sup>7</sup> Mr. Holder's recent memo continues this laudable trend of setting forth, in writing with full transparency, the general principles by which the most critical decisions in the federal criminal justice system are made.

### Charging Policy

Among the three major components of these policies, the department's charging policy has remained the most consistent over time. The bedrock principle—first announced by Mr. Civiletti and incorporated into Title 9, Chapter 27 of the U.S. Attorneys' Manual, and endorsed by Mr. Thornburgh—is that prosecutors are supposed to charge a defendant with the most serious readily provable offense that is likely to lead to conviction. That said, examining the fine print of the policies reveals some distinctions. For example, Ms. Reno adhered to this general standard in her 1993 memo but also stated that the charging decision, in reflecting adherence to the Sentencing Guidelines, should also be based on

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"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."

The notion of an "individualized assessment" of charge-related factors was eliminated by Mr. Ashcroft in his 2003 revision of the policy. Moreover, under the Ashcroft Memo prosecutors were instructed that they "must" (not merely that they "should," as prior Attorneys General had advised) charge the most serious readily provable offense, with any exception requiring written supervisory approval. This non-discretionary command was reiterated in Mr. Comey's 2005 memo.

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Mr. Holder's memo reflects a return to the more flexible standard of Ms. Reno (for whom he served as Deputy Attorney General). Without noting the semantic deviation, the Holder Memo states that a prosecutor "should ordinarily charge" the most serious offense and notes that this decision "must always be made" in the context of the same "individualized assessment" of factors set forth in the Reno Memo.

### Plea Bargaining Policy

A similar pattern emerges from examination of the various plea bargaining policies of the last 30 years. Mr. Civiletti's original iteration of the policy stated simply that a prosecutor should strike a plea bargain to a charged offense "or a lesser or related offense" and that the plea-bargain offense should "bear[] a reasonable relationship to the nature and extent" of the defendant's conduct and "make[] likely the imposition of an appropriate sentence

under all the circumstances of the case." The policy also provided that the "reasonable relationship" standard was "not inflexible" and that in "many" (not all) cases a plea to the most serious offense will "probably" be required.

The Thornburgh Memo refined the plea-bargaining standard. While the memo instructed that a defendant should generally be required to plead guilty to the most serious readily provable offense, adherence to this policy was not required if (1) the prosecutor determined that the charge was not readily provable or the indictment "exaggerates the seriousness of an offense or offenses," (2) the applicable Guideline range would be unaffected, or (3) a supervisor approved the plea bargain "for reasons set forth in the file of the case"—for example, because the U.S. Attorney's Office was overburdened, the case would be time-consuming to try, and proceeding to trial would significantly reduce the number of cases disposed of by the office.

The Reno Memo on its face was intended to "clarify" the department's charging and plea-bargaining policy. As noted above, however, the Reno Memo introduced the "individualized assessment" standard, and applied it to plea bargaining as well as the initial charging decision.

The Ashcroft Memo reflected a somewhat more rigid plea bargaining policy. The Memo authorized prosecutors to negotiate a plea for less than the most serious readily provable charge only in one of the following enumerated instances: (1) the sentence would be unaffected, (2) the case is part of a so-called "fast track" program (typically used to dispose of immigration cases in high-volume districts), (3) the charge was no longer readily provable, (4) in "rare circumstances" to secure a defendant's cooperation, or (5) in other "rare" and "exceptional" cases, with written supervisory approval (citing, as an example, the same resource-driven factors set forth in the Thornburgh Memo).

Eliminated from the department's plea-bargaining policy was the notion that plea bargains could be struck based on an "individualized assessment" of the facts of the case, or that a prosecutor could strike a deal for less than the most serious charge based on a determination that the initial indictment exaggerated the seriousness of the offense.

As with the charging policy, the Holder Memo's plea-bargaining policy reflects a return to the Reno era. The memo provides that a plea agreement "should reflect the totality of a defendant's conduct"—meaning that while a prosecutor "should seek a plea to the most serious offense," that decision should be "informed by an individualized assessment of the specific facts and circumstances of each particular case."

## Sentencing Policy

Of the three policies, the sentencing policy has undergone the most variation. This is not surprising. The Civiletti Memo was issued in 1980, during the pre-Guidelines era; the Thornburgh Memo followed on the heels of the Supreme Court's 1989 decision upholding the constitutionality of the Guidelines; the Ashcroft Memo was issued soon after Congress passed the PROTECT Act in 2003 (constricting courts' ability to downwardly depart under the Guidelines); the Comey Memos were issued in 2004 and 2005, within weeks of the Supreme Court's decisions in *Blakely v. Washington*<sup>8</sup> (putting the federal Sentencing Guidelines in constitutional jeopardy) and *Booker* (declaring the Guidelines unconstitutional); and the Holder Memo follows a Supreme Court trilogy of post-*Booker* cases—*Rita v. United States*,<sup>9</sup> *Gall v. United States*<sup>10</sup> and *Kimbrough v. United States*<sup>11</sup>—which more forcefully put the Guidelines in their proper constitutional place.

The Civiletti Memo is striking for its focus on the prosecutor's role, rather than substantive outcomes—and the limited role envisioned for the prosecutor. The Memo provides that the prosecutor's function is "to assist the sentencing court" (and Parole Commission), in recognition of the fact that "sentencing in federal criminal cases is primarily the function and responsibility of the court."

A prosecutor was authorized to make a sentencing recommendation only when (1) the plea agreement required it, or (2) the public interest warranted an expression of the government's view. More significant, however, was the Memo's notable limitations on this prerogative: prosecutors were instructed to "avoid routinely taking positions with respect to sentencing," with recommendations to be made only in "unusual cases"—again in recognition of the "clear separation of judicial and prosecutorial responsibilities."

The Civiletti Memo's substantive guidance is similarly noteworthy. In those instances where a prosecutor made a sentencing recommendation, the prosecutor was instructed to consider, among other factors, a defendant's background and personal circumstances. Indeed, the Memo specifically notes that, in addition to a defendant's criminal history and cooperation, "it may also be appropriate to consider the defendant's age, education, mental and physical condition (including drug dependence), vocational skills, employment record, family ties and responsibilities, roots in the community, remorse or contrition, and willingness to assume responsibility for his conduct." The inclusion of these factors is striking, for many of them are among the very same factors that the Sentencing Commission declared, seven years later, were generally irrelevant in determining whether a court could depart from a guideline range in imposing sentence.<sup>12</sup>

The Thornburgh Memo's post-Guideline sentencing policy authorized prosecutors to bargain for a Guideline sentence but also stated that a prosecutor "may seek to depart from the guidelines"—with supervisory approval required for any departure not set forth in Chapter 5, Part K of the Guidelines. The Memo also stated that a prosecutor may "cooperate with the defendant" by recommending a sentence at the low end of a guideline range.

The Ashcroft Memo represented a decidedly harsher view of sentencing policy. Prosecutors were told that they "must not request or accede to a downward

departure except in the limited circumstances specified in this memorandum" and with supervisory approval. Supervisors, in turn, were authorized to allow a prosecutor to seek or consent to such a departure only (1) if the defendant cooperated, (2) pursuant to an Attorney-General-authorized "fast track" program, or (3) in other unspecified "rare" instances. In all other cases, prosecutors were instructed to "affirmatively oppose" downward departures and not to agree to "stand silent" in the face of a defendant's request for such a departure.

The Comey Memos represented an effort to maintain departmental allegiance to the Guidelines in the face of their potential (and actual) demise. After *Blakely*, which struck down the State of Washington's sentencing scheme, the 2004 Comey Memo stated the Justice Department's position that *Blakely* did not apply to the federal sentencing guidelines. But it went further, instructing prosecutors that even in cases where the court decided that the Guidelines were unconstitutional, they should nevertheless argue that a sentence "consistent with what would have been the Guidelines sentence" should be imposed. More remarkably, even after the

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Guidelines were declared unconstitutional in *Booker*, prosecutors were told that they "must take all steps necessary to ensure adherence to the Sentencing Guidelines." Thus, prosecutors were told that they "must actively seek sentences within the range established by the Sentencing Guidelines in all but extraordinary cases" and must obtain supervisory approval to recommend or agree to a sentence outside the Guideline range.

The Holder Memo reflects a long-overdue (five years, to be precise) statement of departmental policy that better reflects the post-Guideline federal sentencing world. Unlike its predecessor, the Holder Memo explicitly recognizes that sentences are now governed not by the Guidelines but by 18 USC §3553. To be sure, the Memo does not deviate radically from its predecessors; prosecutors are told that in the "typical case" the purposes of sentencing "will continue to be reflected by the applicable guidelines range" and thus prosecutors "should generally continue to advocate for a sentence within that range." However, the Memo goes on to state that, "given the advisory nature of the guidelines, advocacy at sentencing—like charging and plea agreements—must also follow from an individualized assessment of the facts and circumstances of each particular case." In an apparent effort to ensure an appropriate and consistent approach, supervisory approval is required for all prosecutorial requests for either departures or variances, and all U.S. Attorney's Offices are required to provide training for effective sentencing advocacy.

The new policy is not perfect. Implicit in the notion that supervisors must approve only deviations from the Guideline range is that a Guideline sentence is normally acceptable and reasonable and that a prosecutor's decision to seek such a sentence does not require supervisory review.

Yet the Supreme Court (most notably in *Rita*) has eschewed such a presumption of reasonableness, and there are many cases—for example, certain large-loss fraud cases, low-level drug offender cases or child pornography possession cases—in which numerous courts have recognized the draconian nature of the Guidelines and imposed sentences well below them. Why shouldn't a prosecutor's decision to seek a Guideline-recommended life sentence for a mid-level executive in a public company securities fraud case, perhaps even in the face of mitigating factors, also be required to be reviewed by a supervisor?

## Reflections

Seemingly for avoidance of doubt, the final paragraph of the Holder Memo expressly supersedes the Ashcroft and Comey Memos on charging, plea bargaining and sentencing policy. But the change in policies is more than technical. The Holder Memo reflects the abandonment of the stricter approach of the previous administration's Justice Department and a return to the more flexible approaches of earlier ones on both sides of the aisle. Once again, individualized assessments matter, and prosecutors (with appropriate supervision) are trusted to use their discretion to make sound decisions designed to achieve the various objectives of the federal criminal justice system. In these respects, the Holder Memo is both a step backward—and one in the right direction.



1. The memo ("Holder Memo") can be found at <http://sentencing.typepad.com/files/holder-charging-memo.pdf>.

2. See Principles of Federal Prosecution (U.S. Dept. of Justice, July 1980) ("Civiletti Memo").

3. See Memorandum from Dick Thornburgh, Attorney General, to Federal Prosecutors, Plea Bargaining Under the Sentencing Reform Act (March 13, 1989) ("Thornburgh Memo").

4. See Memorandum from Janet Reno, Attorney General, to Holders of U.S. Attorneys' Manual, Title 9, Principles of Federal Prosecution (Oct. 12, 1993) ("Reno Memo").

5. See Memorandum from John Ashcroft, Attorney General, to All Federal Prosecutors, Department Policy Concerning Charging Criminal Offenses, Disposition of Charges, and Sentencing (Sept. 22, 2003) ("Ashcroft Memo").

6. For a detailed analysis of these memos, see Federal Bar Council, Committee on Second Circuit Courts, Department of Justice Charging, Plea Bargaining and Sentencing Policies Under Attorneys General Thornburgh, Reno, and Ashcroft (July 2004).

7. 543 U.S. 220 (2005). See Memorandum from James Comey, Deputy Attorney General, to All Federal Prosecutors, Departmental Legal Positions and Policies in Light of *Blakely v. Washington* (July 2, 2004) ("2004 Comey Memo"); Memorandum from James B. Comey, Deputy Attorney General, to All Federal Prosecutors, Departmental Policies and Procedures Concerning Sentencing (Jan. 28, 2005) ("2005 Comey Memo").

8. 542 U.S. 296 (2004).

9. 551 U.S. 338 (2007).

10. 552 U.S. 38 (2007).

11. 552 U.S. 85 (2007).

12. The Commission's view in this respect was recently revised to some extent when it adopted amendments reflecting that a defendant's age, mental and emotional condition, and physical condition, as well as prior military service, may be relevant in determining whether a court should depart from the now-advisory Guidelines. See <http://www.uscc.gov/2010guid/finalamend10.pdf>.