

Department Policy on Charging and Sentencing




Office of the Attorney General
Washington, D. C. 20530



**ATTORNEY
GENERAL
ERIC H.
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MEMORANDUM TO ALL FEDERAL PROSECUTORS

From:  Eric H. Holder, Jr.
Attorney General

Subject: Department Policy on Charging and Sentencing

The reasoned exercise of prosecutorial discretion is essential to the fair, effective, and even-handed administration of the federal criminal laws. Decisions about whether to initiate charges, what charges and enhancements to pursue, when to accept a negotiated plea, and how to advocate at sentencing, are among the most fundamental duties of federal prosecutors. For nearly three decades, the Principles of Federal Prosecution, as reflected in Title 9 of the U.S. Attorneys' Manual, Chapter 27, have guided federal prosecutors in the discharge of these duties in particular and in their responsibility to seek justice in the enforcement of the federal criminal laws in general. The purpose of this memorandum is to reaffirm the guidance provided by those Principles.

Persons who commit similar crimes and have similar culpability should, to the extent possible, be treated similarly. Unwarranted disparities may result from disregard for this fundamental principle. They can also result, however, from a failure to analyze carefully and distinguish the specific facts and circumstances of each particular case. Indeed, equal justice depends on individualized justice, and smart law enforcement demands it. Accordingly, decisions regarding charging, plea agreements, and advocacy at sentencing must be made on the merits of each case, taking into account an individualized assessment of the defendant's conduct and criminal history and the circumstances relating to commission of the offense (including the impact of the crime on victims), the needs of the communities we serve, and federal resources and priorities. Prosecutors must always be mindful of our duty to ensure that these decisions are made without unwarranted consideration of such factors as race, gender, ethnicity, or sexual orientation.

Charging Decisions: Charging decisions should be informed by reason and by the general purposes of criminal law enforcement: punishment, public safety, deterrence, and rehabilitation. These decisions should also reflect the priorities of the Department and of each district. Charges should ordinarily be brought if there is probable cause to believe that a person has committed a federal offense and there is sufficient admissible evidence to obtain and sustain a conviction, unless "no substantial Federal interest" would be served, the person is subject to

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“effective prosecution” elsewhere, or there is “an adequate non-criminal alternative to prosecution” [USAM 9-27.200 et seq.].

Moreover, in accordance with long-standing principle, a federal prosecutor should ordinarily charge “the most serious offense that is consistent with the nature of the defendant’s conduct, and that is likely to result in a sustainable conviction” [USAM 9-27.300]. This determination, however, must always be made in the context of “an individualized assessment of the extent to which particular charges fit the specific circumstances of the case, are consistent with the purpose of the Federal criminal code, and maximize the impact of Federal resources on crime” [USAM 9-27.300]. In all cases, the charges should fairly represent the defendant’s criminal conduct, and due consideration should be given to the defendant’s substantial assistance in an investigation or prosecution. As a general matter, the decision whether to seek a statutory sentencing enhancement should be guided by these same principles.

All charging decisions must be reviewed by a supervisory attorney. All but the most routine indictments should be accompanied by a prosecution memorandum that identifies the charging options supported by the evidence and the law and explains the charging decision therein. Each office shall promulgate written guidance describing its internal indictment review process.¹

Plea Agreements: Plea agreements should reflect the totality of a defendant’s conduct. These agreements are governed by the same fundamental principle as charging decisions: prosecutors should seek a plea to the most serious offense that is consistent with the nature of the defendant’s conduct and likely to result in a sustainable conviction, informed by an individualized assessment of the specific facts and circumstances of each particular case. Charges should not be filed simply to exert leverage to induce a plea, nor should charges be abandoned to arrive at a plea bargain that does not reflect the seriousness of the defendant’s conduct. All plea agreements should be consistent with the Principles of Federal Prosecution and must be reviewed by a supervisory attorney. Each office shall promulgate written guidance regarding the standard elements required in its plea agreements, including the waivers of a defendant’s rights.

Advocacy at Sentencing: As the Supreme Court has recognized, Congress has identified the factors for courts to consider when imposing sentences pursuant to 18 U.S.C. §3553. Consistent with the statute and with the advisory sentencing guidelines as the touchstone, prosecutors should seek sentences that reflect the seriousness of the offense, promote respect for the law, provide just punishment, afford deterrence, protect the public, and offer defendants an opportunity for effective rehabilitation. In the typical case, the appropriate balance among these purposes will continue to be reflected by the applicable guidelines range, and prosecutors should generally continue to advocate for a sentence within that range. The advisory guidelines remain important in furthering the goal of national uniformity throughout the federal system. But consistent with the Principles of Federal Prosecution and given the advisory

¹ This memorandum has no impact on the guidance provided in the September 22, 2003 memorandum and elsewhere regarding “fast-track” programs. In those districts where an approved “fast-track” program has been established, charging decisions and disposition of charges must comply with the Department’s requirements for that program.

nature of the guidelines, advocacy at sentencing—like charging decisions and plea agreements—must also follow from an individualized assessment of the facts and circumstances of each particular case. All prosecutorial requests for departures or variances—upward or downward—must be based upon specific and articulable factors, and require supervisory approval. Each office shall provide training for effective advocacy at sentencing.

With respect to charging decisions, plea agreements, and advocacy at sentencing, the mechanisms established for obtaining supervisory approval should be designed to ensure, as much as possible, adherence to the Principles of Federal Prosecution and the guidance provided by this memorandum, as well as district-wide consistency. Supervisory attorneys selected to review exercises of discretion should be skilled, experienced, and thoroughly familiar with Department and district-specific policies, priorities, and practices. All guidance described above must be shared with the Executive Office for U.S. Attorneys upon promulgation.

This memorandum supersedes previous Department guidance on charging and sentencing including the September 22, 2003 memorandum issued by Attorney General John Ashcroft (“Department Policy Concerning Charging Criminal Offenses, Disposition of Charges, and Sentencing”), the July 2, 2004 memorandum issued by Deputy Attorney General James Comey (“Department Legal Positions and Policies in Light of *Blakely v. Washington*”), and the January 28, 2005 memorandum issued by Deputy Attorney General James Comey (“Department Policies and Procedures Concerning Sentencing”).