

Investigations, Compliance and Defense

The Sessions Memorandum: DOJ Largely Affirms Prior Justice Department Charging and Sentencing Policy

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On May 10, 2017, Attorney General Jeff Sessions issued a memorandum (the “Sessions memorandum”) to all federal prosecutors setting out Department of Justice charging and sentencing policy under the Trump Administration. Many accounts in the media describe the Sessions memorandum as making “new” policy on charging and sentencing. However, apart from certain tonal shifts, and a substantive change in terms of drug cases, the Sessions memorandum largely represents a continuation of longstanding Justice Department charging and sentencing policy.

The Sessions Memorandum Continues Longstanding Department Policy Directing Prosecutors To Charge the Most Serious Offense

Citing prosecutors’ responsibility to enforce the law, seek consistent results, and take advantage of all the criminal-enforcement tools Congress provided the Justice Department, the Sessions memorandum directs that, in most cases, “prosecutors should charge and pursue the most serious, readily provable offense.” “By definition,” the memorandum explains, “the most serious offenses are those that carry the most substantial guidelines sentence, including mandatory minimum sentences.” In both the memorandum and in a speech before the Sergeants Benevolent Association of New York City on May 12, 2017, General Sessions emphasized the discretion and judgment of federal prosecutors to apply charging policy based on the facts of each case.

The Sessions memorandum describes the policy of charging the most serious offense as “a core principle” of the Justice Department, emphasizing its longstanding pedigree. Indeed, Section 9-27.300 of the U.S. Attorneys’ Manual and memoranda issued by former Attorneys General John Ashcroft and Eric Holder set out the same policy for charging decisions. General Sessions, in his May 12, 2017 speech, also stated that, “unlike previous charging memoranda,” the Sessions memorandum provides “prosecutors discretion to avoid sentences that would result in an injustice.” Absent from the Sessions memorandum (but not from the memoranda issued by Generals Ashcroft and Holder) is a directive that charges should not be filed simply to exert leverage to induce a plea. However, because the comments to Section 9-27.300 contain this directive, it will likely remain part of Justice Department charging policy. This suggests that, when it comes to charging decisions, the Sessions memorandum largely represents a continuation of longstanding Justice Department policy under which charging decisions will turn mainly on the facts and circumstances of the case, as well as the most serious, readily provable offense.

The Sessions Memorandum Continues Longstanding Sentencing Policy With a Modification in Sentencing Policy for Drug Cases

The Sessions memorandum directs that “prosecutors must disclose to the sentencing court all facts that impact the sentencing guidelines or mandatory minimum sentences, and should in all cases seek a reasonable sentence under the factors in 18 U.S.C. § 3553.” “In most cases,” the memorandum explains, a sentence within the applicable range under the U.S. Sentencing Guidelines will be appropriate, although sentencing departures or variances may be warranted, so long as prosecutors first obtain supervisory approval.

In this regard, the Sessions memorandum is also consistent with Justice Department sentencing policy under former General Holder. Although sentencing policy formulated by General Holder emphasized

individualized assessment of the facts and circumstances of a particular case, the Sessions memorandum implicitly and the U.S. Attorneys' Manual explicitly recognize this feature of Department of Justice sentencing policy.

Perhaps the only real change in sentencing policy in the Sessions memorandum exists in the drug context. Under the Obama Administration, General Holder directed that prosecutors should decline to seek mandatory minimum sentences based on drug quantity, or recidivist enhancements, unless the defendant is involved in conduct that makes the case an appropriate one for such sanctions, and further set out factors that prosecutors should consider in making this determination. The Sessions memorandum, by contrast, contains no guidance on seeking such mandatory minimum sentences or the use of these enhancements and provides that “[a]ny inconsistent previous policy of the Department of Justice relating to [charging or sentencing] is rescinded,” explicitly referencing as examples General Holder’s policy on drug cases. Notably, the Sessions memorandum is less aggressive in this regard than the Ashcroft memorandum which instructed prosecutors to charge counts essential to establish a mandatory minimum sentence in all cases and “strongly encouraged” the use of sentencing enhancements in drug cases.



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