Federal Bar Council

Department of Justice Charging, Plea Bargaining and Sentencing Policies Under Attorneys General Thornburgh, Reno, and Ashcroft

Committee on Second Circuit Courts
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Exhibit F Ashcroft Memo - Department Principles for Implementing an Expedited Disposition or Fast-Track Prosecution Program in a District (September 22, 2003)

A. Introduction

The exercise of discretion by federal prosecutors in deciding what specific charges to pursue, and under what terms to accept a plea of guilty in resolution of a case, plays a central role in the federal criminal justice system. Arguably, the importance of that role has increased in recent years due to the impact of the United States Sentencing Guidelines and recent changes to federal sentencing laws, both of which are generally intended to limit the discretion exercised by federal judges in sentencing convicted defendants.

Since the passage of the Sentencing Reform Act of 1984 and the subsequent promulgation of the Sentencing Guidelines, there have been three pronouncements by the Attorney General of the United States that have set forth Department of Justice policy regarding the exercise of discretion by prosecutors with regard to charging, plea bargaining and sentencing.[1] Attorney General John Ashcroft issued the most recent directive on September 22, 2003.

Attorney General Ashcroft's memo initially received a fair amount of comment. Much of the press commentary suggested that the Ashcroft memo would result in a substantial reduction in the ability of prosecutors to exercise appropriate discretion in individual cases, and was likely to curtail the use of plea bargaining.[2] Other articles focused on the similarity between the

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[1] Former Attorney General Richard Thornburgh's 1989 "Plea Bargaining Under the Sentencing Reform Act" (the "Thornburgh memo") is attached hereto as Exhibit A. Former Attorney General Janet Reno's 1993 "Bluesheet on Charging and Plea Decisions" (the "Reno memo") is attached hereto as Exhibit B. Attorney General John Ashcroft's 2003 memo entitled "Department Policy Concerning Charging Criminal Offenses, Disposition of Charges, and Sentencing" (the "Ashcroft memo") is attached hereto as Exhibit C.

[2] *See* Eric Lichtblau, *Ashcroft Limiting Prosecutors' Use of Plea Bargains*, THE NEW YORK TIMES, at *http://www.mindfully.org/Reform/2003/Ashcroft-Plea-Bargains23sep03.htm* (Sept. 23, 2003); Mark Hamblett, *Ashcroft's 'Get Tough' Memo Discourages Plea Bargains*, NEW YORK LAW JOURNAL, *at http:www.law.com* (Sept. 23, 2003); *Ashcroft Limits Prosecutor Discretion*, Associated Press, *at* http://www.mindfully.org/Reform/2003/Ashcroft-Plea-Bargains23sep03.htm (Sept. 23, 2003).

Ashcroft memo and the first post-Sentencing Guidelines charging and plea policy directive issued by Attorney General Richard Thornburgh in 1989.[3]

In assessing the potential impact of the Ashcroft memo, it must be recognized that the large majority of federal criminal cases are controlled by the United States Attorneys' offices in each district. These offices — including those in the Second Circuit — have their own established traditions and policies and exercise significant independence in most cases. Policy pronouncements from Washington, D.C. are thus unlikely to have a dramatic effect on the day-to-day workings of the federal criminal justice system. Nevertheless, such policy statements are significant in their own right both for the tone they set and because they can have a significant effect over time. Accordingly, they are worthy of careful attention from practitioners and others with a serious interest in the federal criminal justice system.

The purpose of this report is to analyze Department of Justice pronouncements on charging, plea bargaining and sentencing since the advent of the Sentencing Guidelines to provide historical context and to attempt to identify when and how these policies have changed and where they have remained consistent. The goal of the report is to provide a sound basis for further discourse on these important issues.

B. Historical Perspectives

1. Background Policy – the Principles of Federal Prosecution

Department of Justice policy concerning federal prosecutors' charging and plea decisions was first published in July 1980 in a pamphlet promulgated by former Attorney General

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[3] *See* David Hechler, *Plea Bargains – Some See Little Change, Others A Mired System – Ashcroft Echoes Thornburgh, Circa 1989*, NATIONAL LAW JOURNAL, Vol. 26, No. 5 (September 29, 2003), p.25.

Benjamin R. Civiletti entitled "Principles of Federal Prosecution."[4] Those policies were incorporated into Title 9, Chapter 27 of the United States Attorney's Manual, the handbook of policies and procedures governing the work of federal prosecutors. As set forth therein, Department of Justice policy with respect to selecting charges has long provided that, with limited exceptions, a federal prosecutor should charge or recommend to a grand jury "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."[5] According to the policy, its intent is "to assure regularity without regimentation, to prevent unwarranted disparity without sacrificing flexibility."

The Principles of Federal Prosecution directed prosecutors to consider a number of relevant factors in determining whether to accept a plea agreement (whether before or after the filing of criminal charges). These factors included: the defendant's willingness to cooperate with law enforcement; the defendant's criminal history; the nature and seriousness of the offense conduct; the defendant's remorse and acceptance of responsibility; the desirability of a prompt and certain disposition of the case; the likelihood of obtaining a conviction at trial; the effect on witnesses; the probable sentence or other consequences; the public interest in having a trial; the expense of trial and appeal; and the need to avoid delay in the disposition of other cases.[6] With respect to selecting the specific charges to which the defendant would plead guilty, the Principles required that such charges bear "a reasonable relationship to the nature and extent" of the defendant's criminal conduct; that they have an adequate factual basis; that they "make likely the

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[4] A copy of this pamphlet is attached hereto as Exhibit D.

[5] *See* United States Attorney's Manual (June 15, 1984 edition), 9-27.310.

[6] *Id.*, 9-27.420.

imposition of an appropriate sentence under all the circumstances of the case"; and that they not adversely affect other prosecutions.[7]

The Principles reflected pre-Guidelines practice with regard to sentencing. They directed prosecutors to assist the sentencing court by attempting to ensure that relevant facts are brought to the court's attention "fully and accurately" and by making sentencing recommendations in appropriate cases, while acknowledging that "[s]entencing in federal criminal cases is primarily the function and responsibility of the court."[8] In recognition of the court's primary role, prosecutors were to "avoid routinely taking positions with respect to sentencing" unless required by a plea agreement, doing so only in "unusual cases in which the public interest warrants an expression of the government's view."[9] Determining to make a recommendation in a particular case was to be done with care, preferably after consultation with a supervisor. The prosecutor was directed to take into account whether the court solicited the government's view, and to "weigh the desirability of maintaining a clear separation of judicial and prosecutorial responsibilities." A recommendation could be warranted, whether or not requested by the court, if, for example, a prosecutor had "good reason to anticipate the imposition of a sanction that would be unfair to the defendant or insufficient in terms of society's needs."[10] If a prosecutor decided to make a recommendation, the prosecutor was directed to consider the seriousness of the defendant's conduct, the defendant's background and personal circumstances, the purposes

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[7] *Id.*, 9-27.430.

[8] *Id.*, 9-27.710.

[9] *Id.*, 9-27.730 (B)(2).

[10] *Id.*

of sentencing applicable to the particular case, and the extent to which a particular sentence would serve such purposes.[11]

The policies set forth in the U.S. Attorney's Manual are subject to revision through "Bluesheets" issued on behalf of the Attorney General, which become governing policy. Each of the memoranda discussed herein was issued as a "Bluesheet" by the respective Attorney General. Where provisions of a prior Bluesheet are not superseded by a subsequent Bluesheet or otherwise amended, the revisions put in place by the prior Bluesheet remain in effect.

2. Thornburgh Memo. The Thornburgh memo, issued on March 13, 1989, was the first such directive issued after the passage of the Sentencing Reform Act of 1984 and the subsequent promulgation of the United States Sentencing Guidelines. The Thornburgh memo was issued two months after the United States Supreme Court's 1989 ruling in *Mistretta v. United States*, which upheld the constitutionality of the Sentencing Guidelines.

The Thornburgh memo was concerned with ensuring that the Justice Department's charging and plea practices were consistent with the systemic changes brought about by the Sentencing Guidelines, and would not undermine the Guidelines' efforts to reduce sentencing disparities, to avoid misleading sentences, and to avoid inadequate sentences in "critical areas, such as crimes of violence, white collar crime, drug trafficking and environmental offenses." The stated purpose of the Thornburgh memo was to outline basic departmental policies under the Sentencing Guidelines, and accordingly, it addresses a range of issues associated with plea bargaining under the Guidelines regime.

3. Reno Memo. The "Bluesheet on Charging and Plea Decisions" issued by Attorney General Janet Reno on October 12, 1993 was narrower in scope than the Thornburgh

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[11] *Id.*, 9-27.740.

memo. The Reno memo focuses on the breadth of factors a prosecutor may consider in making decisions regarding charging and plea bargaining under the Sentencing Guidelines. The Reno memo states that "a faithful and honest application of the Sentencing Guidelines is not incompatible with selecting charges or entering into plea agreements on the basis of 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." Accordingly, the Reno memo marked an evolution from the principles stated in the Thornburgh memo, by expressly acknowledging the continued validity of the exercise of individualized discretion by prosecutors in charging and plea bargaining under the Sentencing Guidelines.

4. Ashcroft Memo. The Ashcroft memo was issued on September 22, 2003, as part of a Department of Justice effort to re-examine charging, plea bargaining and sentencing policies in the wake of the passage of the Prosecutorial Remedies and Tools Against the Exploitation of Children Today Act of 2003 (the "PROTECT Act"). The memo explicitly provides that it "supersedes all previous guidance on this subject," thus making plain the Attorney General's intent to displace his predecessors' pronouncements in this area.

The Ashcroft memo begins with a reference to the watershed nature of the passage of the Sentencing Reform Act of 1984 and the promulgation of the Sentencing Guidelines. The memo describes the pre-guidelines sentencing system as one that was characterized by "largely unfettered discretion" and resulted in misleading sentences.

The memo states that the PROTECT Act "reaffirms Congress' intention that the Sentencing Reform Act and the Sentencing Guidelines be faithfully and consistently enforced." According to the memo, the statute also signifies that Congress is committed "to the principles of

consistency and effective deterrence that are embodied in the Sentencing Guidelines." According to the memo, although the PROTECT Act will help insure greater fairness and eliminate disparate sentencing, these goals can only be achieved by "consistency on the part of the federal prosecutors."

The Ashcroft memo stresses that the fairness Congress sought to attain through the Sentencing Reform Act of 1984 and the PROTECT Act can only be achieved if there are reasonably consistent policies regarding the charging and disposition of cases. "Just as the sentence a defendant receives should not depend upon which particular judge presides over the case, so too the charges a defendant faces should not depend upon the particular prosecutor assigned to handle the case."

C. Comparison of the Thornburgh, Reno and Ashcroft Policies

Each of these three pronouncements of federal charging, plea-bargaining and sentencing policies addresses various aspects of the criminal justice decision-making process. This report examines each of them in turn.

1. Selecting Which Charges to File

Once a federal prosecutor has decided to pursue a federal criminal prosecution, selecting which specific charges to file is a vital step.[12] The Thornburgh, Reno and Ashcroft memoranda differ in their treatment of this fundamental issue.

Thornburgh Memo. Consistent with prior Department of Justice Policy under the Principles of Federal Prosecution, the Thornburgh memo provides that "a federal prosecutor should initially charge the most serious, readily provable offense or offenses consistent with the

[12] The more fundamental prosecutorial decision whether or not to pursue any federal criminal charges at all (*see* U.S. Attorney's Manual 9-27.200 – 9-27.270) is not addressed in any of the three Attorney General memoranda discussed herein and is beyond the scope of this report.

defendant's conduct." The Thornburgh memo provides that a charge need not be pursued if the prosecutor "has a good faith doubt as to the government's ability readily to prove a charge for legal or evidentiary reasons." Beyond stating that "the policy is to bring charges that the government should win if there were a trial," the Thornburgh memo expressly declines to further define "readily provable."

Reno Memo. Attorney General Reno's Bluesheet provides for the selection of charges based upon an "individualized assessment" of each case. The Reno memo adheres to the standard of determining "the most serious offense consistent with the nature of the defendant's conduct that is likely to result in a sustainable conviction," but states that in making that determination, the properly considered factors include: (1) the resulting sentencing guideline range; (2) whether the penalty "is proportional to the seriousness of the defendant's conduct"; and (3) whether a certain charge achieves the objectives of the criminal justice system, including punishment, public protection, deterrence (both specific and general) and rehabilitation.

Ashcroft Memo. The Ashcroft memo provides that "federal prosecutors must charge and pursue the most serious, readily provable offense or offenses that are supported by the facts of the case" with five specified exceptions, as discussed further in Section C(3) below. The Ashcroft memo states further that the most serious offense is that which generates the most substantial sentence, as calculated by statutorily-prescribed mandatory minimum sentences or by the Sentencing Guidelines. As to the definition of "readily provable," the Ashcroft memo restates the "good faith doubt" standard set forth in the Thornburgh memo.

2. Filing Charges Solely to Exert Leverage

Thornburgh Memo. The Thornburgh memo states that criminal charges should not be filed with the sole objective of exerting leverage or inducing a plea.

Reno Memo. The Reno memo does not address this issue, thus leaving intact the Thornburgh memo's policy on this subject.

Ashcroft Memo. Attorney General Ashcroft's policy echoes the Thornburgh memo, stating that criminal charges should not be filed with the sole objective of exerting leverage or inducing a plea.

3. Dismissing Charges In Connection with a Plea Bargain

Although the Sentencing Guidelines' relevant conduct rules make the prosecutor's ability to dismiss certain charges as part of a negotiated plea somewhat less important than it was in pre-Guidelines practice, this discretion nevertheless remains central to plea negotiations. The three Attorneys General memoranda have important differences on this issue.

Thornburgh Memo. The Thornburgh memo states that "charges [should] not be abandoned in an effort to arrive at a bargain that fails to reflect the seriousness of the defendant's conduct." After the grand jury has indicted a defendant, prosecutors should not bargain about charges that they have already determined to be readily provable and that reflect the seriousness of the defendant's conduct. The Thornburgh memo allows for charges to be dismissed in three circumstances: (1) if the applicable guideline range would be unaffected by the dismissal of the additional charges; (2) with supervisory approval, "for reasons set forth in the file of the case," in recognition of other "critical aspects of the federal criminal justice system" — for example, if a "United States Attorney's Office is particularly overburdened, the case would be time-consuming to try, and proceeding to trial would significantly reduce the total number of cases disposed of by the office;" or (3) if a prosecutor makes a good-faith determination that, due to a change in the evidence or for another reason (such as the need to protect a witness's identity for

testimony against a more significant defendant), the charged offense is not readily provable or "that an indictment exaggerates the seriousness of an offense or offenses."

Reno Memo. The Reno memo provides that the same "individualized assessment" that a prosecutor undertakes in determining which charges to file should also be utilized in negotiating plea agreements. It also continues to authorize plea bargaining for less than the most serious readily provable offense if the prosecutor determines in good faith that the indictment exaggerates the seriousness of the offense or offenses.

Ashcroft memo. The Ashcroft memo provides that "[o]nce filed, the most serious readily provable charges may not be dismissed" except pursuant to the following "limited exceptions": (1) if the sentence would not be affected; (2) pursuant to a "fast-track" program, authorized by the Attorney General and the United States Attorney for a particular district, that provides for expedited dispositions of certain categories of cases when warranted by local conditions (*see infra* at Section C(9)); (3) where post-indictment circumstances indicate that the most serious offense is not readily provable, because of a change in the evidence or some other justifiable reason such as unavailability of a witness or the need to protect a witness's identity for testimony against a more significant defendant; (4) in "rare circumstances" when necessary to obtain a defendant's substantial assistance in an important investigation or prosecution; (5) in other "rare" and "exceptional circumstances," approved by the appropriate supervisor, in recognition of the "practical limitations of the federal criminal justice system." The examples given for this last exception are if a "United States Attorney's Office is particularly

overburdened, the case would be time-consuming to try, and proceeding to trial would significantly reduce the total number of cases disposed of by the office."[13]

There are three notable differences between the Ashcroft memo, and the Thornburgh and Reno memos. The first is the elimination of the prosecutor's determination "that an indictment exaggerates the seriousness of an offense or offenses" as a valid basis for dropping a charge as part of a plea agreement. The second is the elimination of the provision allowing a prosecutor to enter into a plea agreement based on "an individualized assessment of the extent to which particular charges fit the specific circumstances of the case." The third is that, in describing what "exceptional circumstances" may justify plea-bargaining for less-than-top charges, the Ashcroft memo suggests that it is resource considerations that will drive this determination. While the Thornburgh memo provided that the aims of the Sentencing Reform Act must be sought without ignoring "other critical aspects of the federal criminal justice system," the Ashcroft memo eliminates the phrase "other critical aspects" and inserts the phrase "practical limitations" in its stead. These changes suggest a concerted effort by Attorney General Ashcroft to circumscribe prosecutorial discretion in the plea-bargaining process.

4. Locus of Decision-Making Authority

One important issue that was the subject of some comment after the issuance of the Ashcroft memo is which prosecutors have the authority to make decisions regarding selecting charges and entering into plea agreements, and specifically, the authority to make exceptions to general department-wide policies.

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[13] As discussed *infra* at Section C(8), the Ashcroft memo also allows for the dismissal of statutory enhancements under certain limited circumstances.

Thornburgh Memo. The Thornburgh memo requires the specific approval of "the United States Attorney or other designated supervisory level official" for decisions to drop readily provable charges to meet other needs of the criminal justice system. It also requires the approval of the United States Attorney or designated supervisory officials, "after consultation with the concerned litigating Division" of the Department of Justice, before the government may agree to a departure from the applicable Guidelines sentencing range on a basis that is not specifically enumerated in the Guidelines. Otherwise, the Thornburgh memo does not designate which prosecutorial personnel are required to make charging and plea bargaining decisions.

Reno Memo. The Reno memo provides: "To ensure consistency and accountability, charging and plea agreement decisions must be made at an appropriate level of responsibility and documented with an appropriate record of the factors applied."

Ashcroft Memo. Attorney General Ashcroft's memo provides that "an Assistant Attorney General, United States Attorney or designated supervisory attorney" must authorize any exception to the policy requiring that the most serious readily provable offense or offenses supported by the facts of the case be charged and pursued. Specific "written or otherwise documented approval" of one of these supervisory attorneys is required when making an exception to this policy: (1) due to post-indictment reassessment of the evidence; (2) in connection with an agreement that reflects a defendant's substantial assistance in the investigation or prosecution of another; (3) in connection with an agreement to forego filing a statutory enhancement (see *infra*, Section C(8)); and (4) in other exceptional circumstances in recognition of the practical limitations of the criminal justice system. The approval of an Assistant Attorney General, United States Attorney or designated supervisory attorney is also required for a federal prosecutor to accede to any downward departure.

The phrase "designated supervisory level official" used in the Thornburgh memo is generally understood to allow a United States Attorney to grant such authority to unit chiefs, deputy unit chiefs or any other selected supervisory attorneys. It seems that the phrase "designated supervisory attorney" used in the Ashcroft memo should be interpreted the same way. Larger United States Attorney's offices in the Second Circuit generally already require the approval of supervisory attorneys for the kinds of decisions addressed in the Ashcroft memo.

5. Fact Bargaining

The Sentencing Guidelines include rules requiring sentences to be based on all of a convicted defendant's "relevant conduct," which often will be broader than the specific offense of conviction. The Guidelines also provide for potential upward and downward adjustments to the sentencing range, and for departures from the sentencing range, based on facts that often are not elements of the offense of conviction. As a result, an agreement between the prosecutor and the defendant regarding factual issues other than the offense of conviction — that is, fact bargaining — may have a substantial impact on the sentence the defendant will ultimately receive. The Thornburgh memo and the Ashcroft memo both limit a prosecutor's authority to engage in fact bargaining.

Thornburgh Memo. The Thornburgh memo states that a federal prosecutor should only stipulate to those facts that "accurately represent" the defendant's conduct, and that if a prosecutor "wishes to support a departure from the guidelines, he or she should candidly do so and not stipulate to facts that are untrue." The Thornburgh memo provides that a prosecutor may state if he or she has insufficient facts to contest a defendant's claim for a departure or adjustment to the sentencing range, and should object to findings of fact inconsistent either with any stipulation the prosecutor has joined or with the prosecutor's understanding of the facts.

Reno Memo. The Reno memo left intact the Thornburgh memo's policy on fact bargaining.

Ashcroft Memo. The Ashcroft memo states that federal prosecutors "may not fact bargain," or agree to any presentation of the facts which would result in the court having "less than a full understanding of all readily provable facts relevant to sentencing." The memo makes explicit the prosecutor's obligation to inform the court of all relevant readily provable facts, providing that "if readily provable facts are relevant to calculations under the Sentencing Guidelines, the prosecutor must disclose them to the court, including the Probation Office." The Ashcroft memo incorporates a prior policy pronouncement regarding sentencing recommendations and appeals issued by Attorney General Ashcroft on July 28, 2003, which provides that any sentencing recommendation made by the government "must honestly reflect the totality and seriousness of the defendant's conduct" and must be fully consistent with applicable law "and with the readily provable facts about the defendant's history and conduct."[14]

6. Guideline Range Bargaining

The Sentencing Guidelines contain a sentencing table that is essentially set up in a grid fashion, with the horizontal axis representing a defendant's criminal history and the vertical axis representing the number of levels attributed to the defendant's particular criminal offense or offenses, after accounting for any sentencing adjustments. The intersection of the defendant's criminal history with the appropriate offense level, as determined by the underlying facts, yields a limited sentencing range within which the defendant must be sentenced, absent a departure by the court. The parties may agree to recommend a particular sentence within the applicable guidelines range, but the court makes the ultimate decision as to the specific sentence to impose.

[14] Attorney General Ashcroft's July 28, 2003 memorandum is attached hereto as Exhibit E.

Thornburgh Memo. The Thornburgh memo states that "[p]rosecutors may bargain for a sentence that is within the specified guideline range."

Reno Memo. The Reno memo left intact the Thornburgh memo's policy on sentencing guideline bargaining.

Ashcroft Memo. The Ashcroft memo echoes the Thornburgh memo's policy, stating that "prosecutors may enter into a plea agreement for a sentence that is within the specified guideline range."

7. Guideline Departures

The discretion of federal judges to depart from the applicable range determined by the Sentencing Guidelines, and therefore to sentence a defendant to a more severe or less severe sentence, has generated much debate since the Sentencing Guidelines were promulgated. A district judge's decision to depart is ordinarily subject to appeal by the aggrieved party. The most common ground for downward departure with the government's consent is the defendant's substantial assistance to law enforcement in the investigation or prosecution of others. The Guidelines also allow prosecutors and defense counsel to stipulate to a downward (or upward) departure in other circumstances.

Thornburgh Memo. The Thornburgh memo requires that any guideline departure be openly identified: "[i]t violates the spirit of the guidelines and Department policy for prosecutors to enter into a plea bargain which is based upon the prosecutor's and the defendant's agreement that a departure is warranted, but that does not reveal to the court the departure and afford an opportunity for the court to reject it." The memo also requires supervisory approval of any government-initiated request for a departure if based on a factor not set forth in Chapter 5, Part K of the Guidelines.

Reno Memo. The Reno memo left intact the Thornburgh memo's policy on guideline departures. In addition, the U.S. Attorney's Manual in effect at the time provided that "[i]f the court is considering a departure for a reason not allowed by the guidelines, the prosecutor should resist." The Manual also directed prosecutors to alert the appellate section of the Department of Justice's Criminal Division if a sentence were imposed in violation of the guidelines, so that an appeal could be considered.[15]

Ashcroft Memo. The Ashcroft memo reflects the new dictates of the PROTECT Act with respect to downward departures. One of the stated objectives of the PROTECT Act was "to ensure that the incidence of downward departures [is] substantially reduced." In addition, the PROTECT Act provides for *de novo* appellate review of decisions to depart from the guidelines range.

The Ashcroft memo provides that prosecutors "should not request or accede to a downward departure" except: (a) where the government has moved for a downward departure based upon the defendant's substantial assistance in an investigation or prosecution; (b) where the defendant pleads guilty as part of an approved "Fast-Track" program, providing that a defendant can receive as much as a four offense-level downward departure (see Section C(9), *infra*); or (c) in other "rare" circumstances, and only if such departure is supported by the facts and law and does not violate the specific restrictions of the PROTECT Act. Otherwise, the prosecutor must "affirmatively oppose" downward departures and must not agree to "stand silent" with respect to such departures.

Attorney General Ashcroft's July 28 memo on sentencing provides additional instruction on the Justice Department's new sentencing policies. It emphasizes that prosecutors must ensure

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[15] United States Attorney's Manual, 9-27.745

that the Guidelines are applied as Congress and the Sentencing Commission intended, "regardless of whether an individual prosecutor agrees with that policy decision." It makes clear that agreements on a specific sentence under Fed. R. Crim. P. 11(c)(1)(C) "must not vitiate relevant provisions of the Sentencing Guidelines." It states that prosecutors "have an affirmative obligation to *oppose* any sentencing adjustments, including downward departures, that are not supported by the facts and the law" (italics in original), and that departures or adjustments that violate the PROTECT Act should be "vigorously opposed."

The PROTECT Act also required the Attorney General to report, to Congress, every non-cooperation downward departure within 15 days - including the identity of the district judge who granted it - but provided that this reporting requirement would not take effect if the Attorney General submitted his own report to Congress on how the Department would ensure that unsupported downward departures would be opposed and appealed. In response, the Attorney General's July 28 memo provides new and detailed procedures on the appeal of downward departures. Among other things, the memo requires prosecutors to report to the appropriate division of the Justice Department in Washington "any adverse sentencing decision" that meets the criteria set forth in the memo. These criteria, in turn, consist of nine different categories of downward departures, including one that requires reporting of downward departures if the basis for departure has "become prevalent in the district or with a particular judge." The memo admonishes that, if an appeal is authorized, prosecutors should "vigorously and professionally pursue the appeal."

8. Statutory Enhancements

Certain criminal statutes provide for substantially increased mandatory minimum sentences, often above the otherwise applicable guideline range, if prosecutors file certain

additional charges. The most common statutory enhancements are pursuant to 21 U.S.C. § 841 and § 851, which provide for substantially increased mandatory minimum sentences in certain narcotics cases when the defendant has a prior felony narcotics conviction and the prosecutor files a prior felony information setting forth such conviction, and pursuant to 18 U.S.C. § 924(c), which provides for escalating additional mandatory consecutive sentences, starting at an additional five years, if a defendant is convicted of using, carrying or possessing a firearm in connection with a narcotics offense or a crime of violence.

Thornburgh Memo. The Thornburgh memo is silent on the issue of statutory enhancements.

Reno Memo. The Reno memo is silent on the issue of statutory enhancements. However, the U.S. Attorney's Manual in effect at the time stated that a prosecutor must file a prior felony information under 21 U.S.C. § 851 if the underlying convictions are readily provable unless (1) the guideline range would not be affected, or (2) a high-ranking supervisor in the U.S. Attorney's Office or Department of Justice authorizes otherwise in the context of a negotiated plea. The Manual also "reminds" prosecutors that appropriate charges in violent crime or drug trafficking cases include 18 U.S.C. § 924(c).

Ashcroft Memo. Attorney General Ashcroft states that the use of statutory sentencing enhancements is "strongly encouraged" and prosecutors must therefore "take affirmative steps to ensure that the increased penalties . . . are sought in all appropriate cases." Prosecutors are authorized to forego the pursuit of statutory enhancements only pursuant to a plea agreement, and only if authorized by a supervisory attorney.

The Ashcroft memo further addresses the sentencing enhancements applicable pursuant to 21 U.S.C. § 851 and 18 U.S.C. § 924(c). With respect to 21 U.S.C. § 851, authorization to

forego filing or to dismiss a prior felony information may be given only "after giving particular consideration to the nature, dates, and circumstances of the prior convictions, and the extent to which they are probative of criminal propensity." A prosecutor must charge and pursue the first readily provable violation of 18 U.S.C. § 924(c) "in all but exceptional cases or where the total sentence would not be affected." If a particular prosecution involves three or more readily provable violations of 18 U.S.C. § 924(c) in which the predicate offenses are crimes of violence, prosecutors must charge and pursue the first two violations "in all but exceptional cases."

9. Expedited Disposition or "Fast-Track" Programs

Expedited disposition, or "fast-track," programs — pursuant to which federal prosecutors agree to reduced charges or sentences in exchange for a timely plea for particular classes of cases that are unusually prevalent in a particular district — have existed for some time. Such programs most commonly cover illegal reentry, alien smuggling, and certain low-level drug trafficking offenses. Fast-track programs are most prevalent in the southwestern border states, but they exist to some degree in up to one-half of the federal judicial districts.[16] For example, the Eastern District of New York has had such a program since the late 1980's for international narcotics courier cases arising at the airports located in the district.

In the PROTECT Act, Congress explicitly recognized such programs and provided that, in order for a defendant to receive a downward departure for pleading guilty pursuant to a fast-track program, the program must be approved by the Attorney General and the United States Attorney in the relevant district.

Thornburgh Memo. The Thornburgh memo does not address fast-track programs.

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[16] United States Sentencing Commission, *Report to Congress: Downward Departures from the Federal Sentencing Guidelines*, October 2003, at 64.

Reno Memo. The Reno memo does not address fast-track programs.

Ashcroft Memo. The Ashcroft memo explains that, pursuant to § 401(m)(2)(B) of the PROTECT Act, Congress instructed the Sentencing Commission to promulgate a policy statement "authorizing a downward departure of not more than 4 levels 'pursuant to an early disposition program authorized by the Attorney General and the United States Attorney.'" Pursuant to this directive, in October 2003 the Sentencing Commission added such a policy statement, in the form of Sentencing Guideline § 5K3.1.

Attorney General Ashcroft's memo provides that the requirement of Attorney General approval also applies to "any fast-track program that relies on 'charge bargaining' — i.e., an expedited disposition program whereby the Government agrees to charge less than the most serious, readily provable offense. Such programs are intended to be exceptional and will be authorized only when clearly warranted by local conditions within a district."

At the same time he issued the Ashcroft memo on charging, plea-bargaining and sentencing decisions, Attorney General Ashcroft issued a separate memo, entitled "Department Principles for Implementing an Expedited Disposition or 'Fast-Track' Prosecution Program in a District" (the "Fast-Track memo"), detailing the specific requirements for implementing a fast-track program.[17] According to the Fast-Track memo, such programs have been developed based upon the premise that defendants who agree to participate in such programs save the government scarce resources while also demonstrating acceptance of responsibility beyond what is normally taken into account under Sentencing Guideline § 3E1.1. According to the Fast-Track memo, these programs are intended to be exceptional and are not to be used "simply to avoid the ordinary application of the Sentencing Guidelines to a particular class of cases."

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[17] A copy of the Fast-Track memo is attached hereto as Exhibit F.

Pursuant to the Fast-Track memo, any district wishing to implement a fast-track program, or to maintain an existing program, must submit a proposal to the Attorney General demonstrating that:

(A) (1) the district confronts an exceptionally large number of a specific class of offenses within the district, and failure to handle such cases on an expedited or "fast-track" basis would significantly strain prosecutorial and judicial resources available in the district; or

(2) the district confronts some other exceptional local circumstances with respect to a specific class of cases that justifies expedited disposition of such cases;

(B) declination of such cases in favor of state prosecution is either unavailable or clearly unwarranted;

(C) the specific class of cases consists of ones that are highly repetitive and present substantially similar fact scenarios; and

(D) the cases do not involve an offense that has been designated by the Attorney General as a "crime of violence."

Once authorization for a fast-track program is obtained, the United States Attorney may implement such a program in the manner he or she deems appropriate, provided that the program is consistent with the law, the Sentencing Guidelines, and Department of Justice policy and regulations.

According to the Fast-Track memo, any program must provide that the defendant be required (a) to enter a guilty plea to a covered offense "within a reasonably prompt period after the filing of federal charges, to be determined based on the practice in the district", and (b) to enter into a plea agreement that includes a factual basis that accurately reflects his or her offense conduct and provides that the defendant agrees not to file any pre-trial motions, to waive appeal, and to waive the right to file a post-conviction challenge under the federal habeas corpus statute except on the issue of ineffective assistance of counsel.

In exchange, a prosecutor may agree to move at sentencing for a downward departure from the offense level found by the district court (after application of the adjustment for acceptance of responsibility), not to exceed four levels. The plea agreement may commit the departure to the discretion of the district court, or the parties may agree to bind the district court to a specific number of levels (up to four levels), pursuant to Rule 11(c)(1)(C) of the Federal Rules of Criminal Procedure. The Fast-Track memo further provides that any "charge bargaining" fast-track program should provide for sentencing reductions that are commensurate with these directives. The parties may otherwise agree to the application of the Sentencing Guidelines "consistently with the provisions of the Sentencing Guidelines" and Rule 11.

D. Conclusion

While the Ashcroft memo echoes certain past policies of the Department of Justice, the memo represents a change – both in tone and in substance – from the policies stated by preceding Attorneys General with respect to the exercise of prosecutorial discretion in charging, plea bargaining and sentencing. These policies, if enforced and applied rigidly, could conceivably result in a marked increase in criminal trials, with a concomitant burden on an already-overloaded federal judiciary.

Nevertheless, there are indications, at least in the Second Circuit, that the immediate impact of the Ashcroft memo may be limited. Southern District of New York United States Attorney David N. Kelley recently stated that the Ashcroft memo was "a continuation of what was already in place in D.O.J. and what was already in place in the S.D.N.Y.", and thus "the defense bar should not expect that the memo will lead to any changes in practices in the S.D.N.Y."[18] Similarly, the United States Attorneys for both the Eastern and Western Districts of New York have indicated that the Ashcroft memo should not be expected to lead to any changes in their offices' charging and plea bargaining practices.

Perhaps more uncertain is the extent to which Justice Department policies may change in the wake of the Supreme Court's recent decision in *Blakely v. Washington*, decided on June 24, 2004. That decision held that a Washington state sentencing scheme that allowed a judge, rather than a jury, to increase a defendant's sentence from the "standard range" for the crime was unconstitutional. This decision arguably calls into question the method by which federal sentences are calculated under the Sentencing Guidelines. If sentencing enhancements must be

[18] M. Peerce, *Focus On: The S.D.N.Y.'s Interim U.S. Attorney*, Federal Bar Council News, Vol. XI, No. 1 (February 2004), at 7.

proven to juries beyond a reasonable doubt, rather than to judges by a preponderance of the evidence, the Justice Department's sentencing policies, if not its plea-bargaining policies, may have to be modified to account for this significant change.

Federal Bar Council
Committee on Second Circuit Courts
Subcommittee on DOJ Policies

Members of the Subcommittee:

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Note: This report is solely a report of the Federal Bar Council and the views expressed herein do not necessarily reflect the views of any member of the subcommittee that prepared this report or of any entity with which such member is associated.

*1 Federal Sentencing Reporter
Volume 6, Number 6
May/June, 1994
THORNBURGH BLUESHEET (1989)

UNITED STATES DEPARTMENT OF JUSTICE

MARCH 13, 1989

PLEA POLICY FOR FEDERAL PROSECUTORS

Plea Bargaining Under the Sentencing Reform Act

In January, the Supreme Court decided Mistretta v. United States and upheld the sentencing guidelines promulgated by the Sentencing Commission pursuant to the Sentencing Reform Act of 1984. The Act was strongly supported by the Department of Justice, and the Department has defended the guidelines since they took effect on November 1, 1987. Under these guidelines, it is now possible for federal prosecutors to respond to three problems that plagued sentencing prior to their adoption: (1) sentencing disparity; (2) misleading sentences which were shorter than they appeared as a result of parole and unduly generous "good time" allowances; and (3) inadequate sentences in critical areas, such as crimes of violence, white collar crime, drug trafficking and environmental offenses. It is vitally important that federal prosecutors understand these guidelines and make them work. Prosecutors who do not understand the guidelines or who seek to circumvent them will undermine their deterrent and punitive force and will recreate the very problems that the guidelines are expected to solve.

This memorandum cannot convey all that federal prosecutors need or should want to know about how to use the guidelines, and it is not intended to invalidate more specific policies which are consistent with this statement of principles and may have been adopted by some litigating divisions to govern particular offenses. This memorandum does, however, set forth basic departmental policies to which all of you will be expected to adhere. The Department consistently articulated these policies during the drafting of the guidelines and the period in which their constitutionality was tested. Compliance with these policies is essential if federal criminal law is to be an effective deterrent and those who violate the law are to be justly punished.

PLEA BARGAINING

Charge Bargaining

Charge bargaining takes place in two settings, before and after indictment. Consistent with the Principles of Federal Prosecution in Chapter 27 of Title 9 of the United States Attorneys' Manual, a federal prosecutor should initially charge the most serious, readily provable offense or offenses consistent with the defendant's conduct. Charges should not be filed simply to exert leverage to induce a plea, nor should charges be abandoned in an effort to arrive at a bargain that fails to reflect the seriousness of the defendant's conduct.

Whether bargaining takes place before or after indictment, the Department policy is the same: any departure from the guidelines should be openly identified rather than hidden between the lines of a plea agreement. It is inevitable that in some cases it will be difficult for anyone other than the prosecutor and the defendant to know whether, prior to indictment, the prosecutor bargained in conformity with the Department's policy. The Department will monitor, together with the Sentencing

Commission, plea bargaining, and the Department will expect plea bargains to support, not undermine, the guidelines.

*2 Once prosecutors have indicted, they should find themselves bargaining about charges which they have determined are readily provable and reflect the seriousness of the defendant's conduct. Should a prosecutor determine in good faith after indictment that, as a result of a change in the evidence or for another reason (e.g., a need has arisen to protect the identity of a particular witness until he testifies against a more significant defendant), a charge is not readily provable or that an indictment exaggerates the seriousness of an offense or offenses, a plea bargain may reflect the prosecutor's reassessment. There should be a record, however, in a case in which charges originally brought are dropped.

Sentence Bargaining

There are only two types of sentence bargains. Both are permissible, but one is more complicated than the other. First, prosecutors may bargain for a sentence that is within the specified guideline range. This means that when a guideline range is 18-24 months, you have discretion to agree to recommend a sentence of 18 or 20 months rather than to argue for a sentence at the top of the range. Similarly, you may agree to recommend a downward adjustment of two levels for acceptance of responsibility if you conclude in good faith that the defendant is entitled to the adjustment.

Second, you may seek to depart from the guidelines. This type of sentence bargain always involves a departure and is more complicated than a bargain involving a sentence within a guideline range. Departures are discussed more generally below.

Department policy requires honesty in sentencing; federal prosecutors are expected to identify for U.S. District Courts departures when they agree to support them. For example, it would be improper for a prosecutor to agree that a departure is in order, but to conceal the agreement in a charge bargain that is presented to a court as a fait accompli so that there is neither a record of nor judicial review of the departure.

In sum, plea bargaining, both charge bargaining and sentence bargaining, is legitimate. But, such bargaining must honestly reflect the totality and seriousness of the defendant's conduct and any departure to which the prosecutor is agreeing, and must be accomplished through appropriate guideline provisions.

Readily Provable Charges

The basic policy is that charges are not to be bargained away or dropped, unless the prosecutor has a good faith doubt as to the government's ability readily to prove a charge for legal or evidentiary reasons. It would serve no purpose here to seek to further define "readily provable." The policy is to bring cases that the government should win if there were a trial. There are, however, two exceptions.

First, if the applicable guideline range from which a sentence may be imposed would be unaffected, readily provable charges may be dismissed or dropped as part of a plea bargain. It is important for you to know whether dropping a charge may affect a sentence. For example, the multiple offense rules in Part D of Chapter 3 of the guidelines and recent changes to the relevant conduct standard set forth in 1B1.3(a)(2) will mean that certain dropped charges will be counted for purposes of determining the sentence, subject to the statutory maximum for the offense or offenses of conviction. It is vital that federal prosecutors understand when conduct that is not charged in an indictment or conduct that is alleged in counts that are to be dismissed pursuant to a bargain may be counted for sentencing purposes and when it may not be. For example, in the case of a defendant who could be charged with five bank robberies, a decision to charge only one or to dismiss four counts pursuant to a bargain precludes any consideration of the four uncharged or dismissed robberies in determining a guideline range, unless the plea agreement

included a stipulation as to the other robberies. In contrast, in the case of a defendant who could be charged with five counts of fraud, the total amount of money involved in a fraudulent scheme will be considered in determining a guideline range even if the defendant pleads guilty to a single count and there is no stipulation as to the other counts.

***3** Second, federal prosecutors may drop readily provable charges with the specific approval of the United States Attorney or designated supervisory level official for reasons set forth in the file of the case. This exception recognizes that the aims of the Sentencing Reform Act must be sought without ignoring other, critical aspects of the federal criminal justice system. For example, approval to drop charges in a particular case might be given because the United States Attorney's office is particularly overburdened, the case would be time-consuming to try, and proceeding to trial would significantly reduce the total number of cases disposed of by the office.

To make guidelines work, it is likely that the Department and the Sentencing Commission will monitor cases in which charges are dropped. It is important, therefore, that federal prosecutors keep records justifying their decisions not to go forward with readily provable offenses.

Departures Generally

In Chapter 5, Part K of the guidelines, the Commission has listed departures that may be considered by a court in imposing a sentence. Some depart upwards and others downwards. Moreover, 5K2.0 recognizes that a sentencing court may consider a departure that has not been adequately considered by the Commission. A departure requires approval by the court. It violates the spirit of the guidelines and Department policy for prosecutors to enter into a plea bargain which is based upon the prosecutor's and the defendant's agreement that a departure is warranted, but that does not reveal to the court the departure and afford an opportunity for the court to reject it.

The Commission has recognized those bases for departure that are commonly justified. Accordingly, before the government may seek a departure based on a factor other than one set forth in Chapter 5, Part K, approval of United States Attorneys or designated supervisory officials is required, after consultation with the concerned litigating Division. This approval is required whether or not a case is resolved through a negotiated plea.

Substantial Assistance

The most important departure is for substantial assistance by a defendant in the investigation or prosecution of another person. Section 5K1.1 provides that, upon motion by the government, a court may depart from the guidelines and may impose a non-guideline sentence. This departure provides federal prosecutors with an enormous range of options in the course of plea negotiations. Although this departure, like all others, requires court approval, prosecutors who bargain in good faith and who state reasons for recommending a departure should find that judges are receptive to their recommendations.

Stipulations of Fact

The Department's policy is only to stipulate to facts that accurately represent the defendant's conduct. If a prosecutor wishes to support a departure from the guidelines, he or she should candidly do so and not stipulate to facts that are untrue. Stipulations to untrue facts are unethical. If a prosecutor has insufficient facts to contest a defendant's effort to seek a downward departure or to claim an adjustment, the prosecutor can say so. If the presentence report states facts that are inconsistent with a stipulation in which a prosecutor has joined, it is desirable for the prosecutor to object to the report or to add a statement explaining the prosecutor's understanding of the facts or the reason for the

stipulation.

***4** Recounting the true nature of the defendant's involvement in a case will not always lead to a higher sentence. Where a defendant agrees to cooperate with the government by providing information concerning unlawful activities of others and the government agrees that self-incriminating information so provided will not be used against the defendant, section 1B1.8 provides that the information shall not be used in determining the applicable guideline range, except to the extent provided in the agreement. The existence of an agreement not to use information should be clearly reflected in the case file, the applicability of section 1B1.8 should be documented, and the incriminating information must be disclosed to the court or the probation officer, even though it may not be used in determining a guideline sentence.

Written Plea Agreements

In most felony cases, plea agreements should be in writing. If they are not in writing, they always should be formally stated on the record. Written agreements will facilitate efforts by the Department and the Sentencing Commission to monitor compliance by federal prosecutors with Department policies and the guidelines. Such agreements also avoid misunderstandings as to the terms that the parties have accepted in particular cases.

Understanding the Options

A commitment to guideline sentencing in the context of plea bargaining may have the temporary effect of increasing the proportion of cases that go to trial, until defense counsel and defendants understand that the Department is committed to the statutory sentencing goals and procedures. Prosecutors should understand, and defense counsel will soon learn, that there is sufficient flexibility in the guidelines to permit effective plea bargaining which does not undermine the statutory scheme.

For example, when a prosecutor recommends a two level downward adjustment for acceptance of responsibility (e.g., from level 20 to level 18), judicial acceptance of this adjustment will reduce a sentence by approximately 25%. If a comparison is made between the top of one level (e.g., level 20) and the bottom of the relevant level following the reduction (e.g., level 18), it would show a difference of approximately 35%. At low levels, the reduction is greater. In short, a two level reduction does not mean two months. Moreover, the adjustment for acceptance of responsibility is substantial, and should be attractive to defendants against whom the government has strong cases. The prosecutor may also cooperate with the defendant by recommending a sentence at the low end of a guideline range, which will further reduce the sentence.

It is important for prosecutors to recognize while bargaining that they must be careful to make all appropriate Chapter Three adjustments-e.g., victim related adjustments and adjustments for role in the offense.

Conclusion

With all available options in mind, and with full knowledge of the availability of a substantial assistance departure, federal prosecutors have the tools necessary to handle their caseloads and to arrive at appropriate dispositions in the process. Honest application of the guidelines will make sentences under the Sentencing Reform Act fair, honest, and appropriate.

6 Fed.Sent.R. 347, 1994 WL 440704 (Vera Inst.Just.)

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*1 Federal Sentencing Reporter
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RENO BLUESHEET (1993)

RENO BLUESHEET ON ON CHARGING AND PLEA DECISIONS

October 12, 1993

TO: Holders of U.S. Attorneys' Manual, Title 9
FROM: Janet Reno, Attorney General
RE: Principles of Federal Prosecution

PURPOSE: The purpose of this bluesheet is to clarify the Department's policy concerning the principles that should guide federal prosecutors in their charging decisions and plea negotiations.

As first stated in the preface to the original 1980 edition of the Principles of Federal Prosecution, "they have been cast in general terms with a view to providing guidance rather than to mandating results. The intent is to assure regularity without regimentation, to prevent unwarranted disparity without sacrificing flexibility."

It should be emphasized that charging decisions and plea agreements should reflect adherence to the Sentencing Guidelines. However, a faithful and honest application of the Sentencing Guidelines is not incompatible with selecting charges or entering into plea agreements on the basis of 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. Thus, for example, in determining "the most serious offense that is consistent with the nature of the defendant's conduct, that is likely to result in a sustainable conviction," [as set forth in 9-27.310], it is appropriate that the attorney for the government consider, inter alia, such factors as the sentencing guideline range yielded by the charge, whether the penalty yielded by such sentencing range (or potential mandatory minimum charge, if applicable) is proportional to the seriousness of the defendant's conduct, and whether the charge achieves such purposes of the criminal law as punishment, protection of the public, specific and general deterrence, and rehabilitation. Note that these factors may also be considered by the attorney for the government when entering into the plea agreements [9- 27.400].

To ensure consistency and accountability, charging and plea agreement decisions must be made at an appropriate level of responsibility and documented with an appropriate record of the factors applied.

6 Fed.Sent.R. 352, 1994 WL 440706 (Vera Inst.Just.)

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

September 22, 2003

TO: All Federal Prosecutors

FROM: John Ashcroft
Attorney General

SUBJECT: Department Policy Concerning Charging Criminal Offenses, Disposition of Charges, and Sentencing

INTRODUCTION

The passage of the Sentencing Reform Act of 1984 was a watershed event in the pursuit of fairness and consistency in the federal criminal justice system. With the Sentencing Reform Act's creation of the United States Sentencing Commission and the subsequent promulgation of the Sentencing Guidelines, Congress sought to "provide certainty and fairness in meeting the purposes of sentencing." 28 U.S.C. § 991(b)(1)(B). In contrast to the prior sentencing system – which was characterized by largely unfettered discretion, and by seemingly severe sentences that were often sharply reduced by parole – the Sentencing Reform Act and the Sentencing Guidelines sought to accomplish several important objectives: (1) to ensure honesty and transparency in federal sentencing; (2) to guide sentencing discretion, so as to narrow the disparity between sentences for similar offenses committed by similar offenders; and (3) to provide for the imposition of appropriately different punishments for offenses of differing severity.

With the passage of the PROTECT Act earlier this year, Congress has reaffirmed its commitment to the principles of consistency and effective deterrence that are embodied in the Sentencing Guidelines. The important sentencing reforms made by this legislation will help to ensure greater fairness and to eliminate unwarranted disparities. These vital goals, however, cannot be fully achieved without consistency on the part of federal prosecutors in the Department of Justice. Accordingly, it is essential to set forth clear policies designed to ensure that all federal prosecutors adhere to the principles and objectives of the Sentencing Reform Act, the PROTECT Act, and the Sentencing Guidelines in their charging, case disposition, and sentencing practices.

The Department has previously issued various memoranda addressing Department policies with respect to charging, case disposition, and sentencing. Shortly after the constitutionality of the Sentencing Reform Act was sustained by the Supreme Court in 1989, Attorney General Thornburgh issued a directive to federal prosecutors to ensure that their practices were consistent with the principles of equity, fairness, and uniformity. Several years

later, Attorney General Reno issued additional guidance to address the extent to which a prosecutor's individualized assessment of the proportionality of particular sentences could be considered.

The recent passage of the PROTECT Act emphatically reaffirms Congress' intention that the Sentencing Reform Act and the Sentencing Guidelines be faithfully and consistently enforced. It is therefore appropriate at this time to re-examine the subject thoroughly and to state with greater clarity Department policy with respect to charging, disposition of charges, and sentencing. One part of this comprehensive review of Department policy has already been completed: on July 28, 2003, in accordance with section 401(*l*)(1) of the PROTECT Act, I issued a Memorandum that specifically and clearly sets forth the Department's policies with respect to sentencing recommendations and sentencing appeals. The determination of an appropriate sentence for a convicted defendant is, however, only half of the equation. The fairness Congress sought to achieve by the Sentencing Reform Act and the PROTECT Act can be attained only if there are fair and reasonably consistent policies with respect to the Department's decisions concerning what charges to bring and how cases should be disposed. Just as the sentence a defendant receives should not depend upon which particular judge presides over the case, so too the charges a defendant faces should not depend upon the particular prosecutor assigned to handle the case.

Accordingly, the purpose of this Memorandum is to set forth basic policies that all federal prosecutors must follow in order to ensure that the Department fulfills its legal obligation to enforce faithfully and honestly the Sentencing Reform Act, the PROTECT Act, and the Sentencing Guidelines. This memorandum supersedes all previous guidance on this subject.

I. Department Policy Concerning Charging and Prosecution of Criminal Offenses

A. General Duty to Charge and to Pursue the Most Serious, Readily Provable Offense in All Federal Prosecutions

It is the policy of the Department of Justice that, in all federal criminal cases, federal prosecutors must charge and pursue the most serious, readily provable offense or offenses that are supported by the facts of the case, except as authorized by an Assistant Attorney General, United States Attorney, or designated supervisory attorney in the limited circumstances described below. The most serious offense or offenses are those that generate the most substantial sentence under the Sentencing Guidelines, unless a mandatory minimum sentence or count requiring a consecutive sentence would generate a longer sentence. A charge is not "readily provable" if the prosecutor has a good faith doubt, for legal or evidentiary reasons, as to the Government's ability readily to prove a charge at trial. Thus, charges should not be filed simply to exert leverage to induce a plea. Once filed, the most serious readily provable charges may not be dismissed except to the extent permitted in Section B.

B. Limited Exceptions

The basic policy set forth above requires federal prosecutors to charge and to pursue all charges that are determined to be readily provable and that, under the applicable statutes and Sentencing Guidelines, would yield the most substantial sentence. There are, however, certain limited exceptions to this requirement:

1. ***Sentence would not be affected.*** First, if the applicable guideline range from which a sentence may be imposed would be unaffected, prosecutors may decline to charge or to pursue readily provable charges. However, if the most serious readily provable charge involves a mandatory minimum sentence that exceeds the applicable guideline range, counts essential to establish a mandatory minimum sentence must be charged and may not be dismissed, except to the extent provided elsewhere below.

2. ***"Fast-track" programs.*** With the passage of the PROTECT Act, Congress recognized the importance of early disposition or "fast-track" programs. Section 401(m)(2)(B) of the Act instructs the Sentencing Commission to promulgate, by October 27, 2003, a policy statement authorizing a downward departure of not more than 4 levels "pursuant to an early disposition program *authorized by the Attorney General* and the United States Attorney." Pub. L. No. 108-21, § 401(m)(2)(B), 117 Stat. 650, 675 (2003) (emphasis added). Although the PROTECT Act requirement of Attorney General authorization only applies by its terms to fast-track programs that rely on downward departures, the same requirement will also apply, as a matter of Department policy, to any fast-track program that relies on "charge bargaining" — *i.e.*, an expedited disposition program whereby the Government agrees to charge less than the most serious, readily provable offense. Such programs are intended to be exceptional and will be authorized only when clearly warranted by local conditions within a district. The specific requirements for establishing and implementing a fast-track program are set forth at length in the Department's "Principles for Implementing An Expedited or Fast-Track Prosecution Program." In those districts where an approved "fast-track" program has been established, charging decisions and disposition of charges must comply with those Principles and with the other requirements of the approved fast-track program.

3. ***Post-indictment reassessment.*** In cases where post-indictment circumstances cause a prosecutor to determine in good faith that the most serious offense is not readily provable, because of a change in the evidence or some other justifiable reason (*e.g.*, the unavailability of a witness or the need to protect the identity of a witness until he testifies against a more significant defendant), the prosecutor may dismiss the charge(s) with the written or otherwise documented approval of an Assistant Attorney General, United States Attorney, or designated supervisory attorney.

4. ***Substantial assistance.*** The preferred means to recognize a defendant's substantial assistance in the investigation or prosecution of another person is to charge the most serious readily provable offense and then to file an appropriate motion or motions under U.S.S.G. § 5K1.1, 18 U.S.C. § 3553(e), or Federal Rule of Criminal Rule of Procedure 35(b).

However, in rare circumstances, where necessary to obtain substantial assistance in an important investigation or prosecution, and with the written or otherwise documented approval of an Assistant Attorney General, United States Attorney, or designated supervisory attorney, a federal prosecutor may decline to charge or to pursue a readily provable charge as part of plea agreement that properly reflects the substantial assistance provided by the defendant in the investigation or prosecution of another person.

5. ***Statutory enhancements.*** The use of statutory enhancements is strongly encouraged, and federal prosecutors must therefore take affirmative steps to ensure that the increased penalties resulting from specific statutory enhancements, such as the filing of an information pursuant to 21 U.S.C. § 851 or the filing of a charge under 18 U.S.C. § 924(c), are sought in all appropriate cases. As soon as reasonably practicable, prosecutors should ascertain whether the defendant is eligible for any such statutory enhancement. In many cases, however, the filing of such enhancements will mean that the statutory sentence exceeds the applicable Sentencing Guidelines range, thereby ensuring that the defendant will not receive any credit for acceptance of responsibility and will have no incentive to plead guilty. Requiring the pursuit of such enhancements to trial in every case could therefore have a significant effect on the allocation of prosecutorial resources within a given district. Accordingly, an Assistant Attorney General, United States Attorney, or designated supervisory attorney may authorize a prosecutor to forego the filing of a statutory enhancement, but *only* in the context of a negotiated plea agreement, and subject to the following additional requirements:

a. Such authorization must be written or otherwise documented and may be granted only after careful consideration of the factors set forth in Section 9-27.420 of the United States Attorneys' Manual. In the context of a statutory enhancement that is based on prior criminal convictions, such as an enhancement under 21 U.S.C. § 851, such authorization may be granted only after giving particular consideration to the nature, dates, and circumstances of the prior convictions, and the extent to which they are probative of criminal propensity.

b. A prosecutor may forego or dismiss a charge of a violation of 18 U.S.C. § 924(c) only with the written or otherwise documented approval of an Assistant Attorney General, United States Attorney, or designated supervisory attorney, and subject to the following limitations:

(i) In all but exceptional cases or where the total sentence would not be affected, the first readily provable violation of 18 U.S.C. § 924(c) shall be charged and pursued.

(ii) In cases involving three or more readily provable violations of 18 U.S.C. § 924(c) in which the predicate offenses are crimes of violence, federal prosecutors shall, in all but exceptional cases, charge and pursue the first two such violations.

6. *Other Exceptional Circumstances.* Prosecutors may decline to pursue or may dismiss readily provable charges in other exceptional circumstances with the written or otherwise documented approval of an Assistant Attorney General, United States Attorney, or designated supervisory attorney. This exception recognizes that the aims of the Sentencing Reform Act must be sought without ignoring the practical limitations of the federal criminal justice system. For example, a case-specific approval to dismiss charges in a particular case might be given because the United States Attorney's Office is particularly over-burdened, the duration of the trial would be exceptionally long, and proceeding to trial would significantly reduce the total number of cases disposed of by the office. However, such case-by-case exceptions should be rare; otherwise the goals of fairness and equity will be jeopardized.

II. Department Policy Concerning Plea Agreements

A. Written Plea Agreements

In felony cases, plea agreements should be in writing. If the plea agreement is not in writing, the agreement should be formally stated on the record. Written plea agreements will facilitate efforts by the Department of Justice and the Sentencing Commission to monitor compliance by federal prosecutors with Department policies and the Sentencing Guidelines. The PROTECT Act specifically requires the court, after sentencing, to provide a copy of the plea agreement to the Sentencing Commission. 28 U.S.C. § 994(w). Written plea agreements also avoid misunderstandings with regard to the terms that the parties have accepted.

B. Honesty in Sentencing

As set forth in my July 28, 2003 Memorandum on "Department Policies and Procedures Concerning Sentencing Recommendations and Sentencing Appeals," Department of Justice policy requires honesty in sentencing, both with respect to the facts and the law:

> Any sentencing recommendation made by the United States in a particular case must honestly reflect the totality and seriousness of the defendant's conduct and must be fully consistent with the Guidelines and applicable statutes and with the readily provable facts about the defendant's history and conduct.

This policy applies fully to sentencing recommendations that are contained in plea agreements. The July 28 Memorandum further explains that this basic policy has several important implications. In particular, if readily provable facts are relevant to calculations under the Sentencing Guidelines, the prosecutor must disclose them to the court, including the Probation Office. Likewise, federal prosecutors may not "fact bargain," or be party to any plea agreement that results in the sentencing court having less than a full understanding of all readily provable facts relevant to sentencing.

The current provision of the United States Attorneys' Manual that addresses charging policy and that describes the circumstances in which a less serious charge may be appropriate includes the admonition that "[a] negotiated plea which uses any of the options described in this section must be made known to the sentencing court." *See* U.S.A.M. § 9-27.300(B); *see also* U.S.A.M. § 9-27.400(B) ("it would be improper for a prosecutor to agree that a departure is in order, but to conceal the agreement in a charge bargain that is presented to a court as a fait accompli so that there is neither a record of nor judicial review of the departure"). Although this Memorandum by its terms supersedes prior Department guidance on this subject, it remains Department policy that the sentencing court should be informed if a plea agreement involves a "charge bargain." Accordingly, a negotiated plea that uses any of the options described in Section I(B)(2), (4), (5), or (6) must be made known to the court at the time of the plea hearing and at the time of sentencing, *i.e.*, the court must be informed that a more serious, readily provable offense was not charged or that an applicable statutory enhancement was not filed.

C. Charge Bargaining

Charges may be declined or dismissed pursuant to a plea agreement only to the extent consistent with the principles set forth in Section I of this Memorandum.

D. Sentence Bargaining

There are only two types of permissible sentence bargains.

1. ***Sentences within the Sentencing Guidelines range.*** Federal prosecutors may enter into a plea agreement for a sentence that is within the specified guideline range. For example, when the Sentencing Guidelines range is 18-24 months, a prosecutor may agree to recommend a sentence of 18 or 20 months rather than to argue for a sentence at the top of the range. Similarly, a prosecutor may agree to recommend a downward adjustment for acceptance of responsibility under U.S.S.G. § 3E1.1 if the prosecutor concludes in good faith that the defendant is entitled to the adjustment.

2. ***Departures.*** In passing the PROTECT Act, Congress has made clear its view that there have been too many downward departures from the Sentencing Guidelines, and it has instructed the Commission to take measures "to ensure that the incidence of downward departures [is] substantially reduced." Pub. L. No. 108-21, § 401(m)(2)(A), 117 Stat. 650, 675 (2003). The Department has a duty to ensure that the circumstances in which it will request or accede to downward departures in the future are properly circumscribed.

Accordingly, federal prosecutors must not request or accede to a downward departure except in the limited circumstances specified in this memorandum and with authorization from an Assistant Attorney General, United States Attorney, or designated supervisory attorney. Likewise, except in such circumstances and with such authorization, prosecutors may not simply stand silent when a downward departure motion is made by the defendant.

An Assistant Attorney General, United States Attorney, or designated supervisory attorney may authorize a prosecutor to request or accede to a downward departure at sentencing only in the following circumstances:

a. ***Substantial assistance.*** Section 5K1.1 of the Sentencing Guidelines provides that, upon motion by the Government, a court may depart from the guideline range. A substantial assistance motion must be based on assistance that is *substantial* to the Government's case. It is not appropriate to utilize substantial assistance motions as a case management tool to secure plea agreements and avoid trials.

b. ***"Fast-track" programs.*** Federal prosecutors may support a downward departure to the extent consistent with the Sentencing Guidelines and the Attorney General's "Principles for Implementing An Expedited or Fast-Track Prosecution Program." The PROTECT Act specifically recognizes the importance of such programs by requiring the Sentencing Commission to promulgate a policy statement specifically authorizing such departures.

c. ***Other downward departures.*** As set forth in my July 28 Memorandum, "[o]ther than these two situations, however, Government acquiescence in a downward departure should be, as the Sentencing Guidelines Manual itself suggests, a "rare occurenc[e]." *See* U.S.S.G., Ch. 1, Pt. A, ¶ (4)(b). Prosecutors must affirmatively oppose downward departures that are not supported by the facts and the law, and must not agree to "stand silent" with respect to such departures. In particular, downward departures that would violate the specific restrictions of the PROTECT Act should be vigorously opposed.

Moreover, as stated above, Department of Justice policy requires honesty in sentencing. In those cases where federal prosecutors agree to support departures, they are expected to identify departures for the courts. For example, it would be improper for a prosecutor to agree that a departure is warranted, without disclosing such agreement, so that there is neither a record of nor judicial review of the departure.

In sum, plea bargaining must honestly reflect the totality and seriousness of the defendant's conduct, and any departure must be accomplished through the application of appropriate Sentencing Guideline provisions.

CONCLUSION

Federal criminal law and procedure apply equally throughout the United States. As the sole federal prosecuting entity, the Department of Justice has a unique obligation to ensure that all federal criminal cases are prosecuted according to the same standards. Fundamental fairness requires that all defendants prosecuted in the federal criminal justice system be subject to the same standards and treated in a consistent manner.

cc: The Acting Deputy Attorney General
The Associate Attorney General
The Solicitor General
The Assistant Attorney General, Criminal Division
The Assistant Attorney General, Antitrust Division
The Assistant Attorney General, Civil Rights Division
The Assistant Attorney General, Environment and Natural Resources Division
The Assistant Attorney General, Tax Division
The Assistant Attorney General, Civil Division
The Director, Executive Office of United States Attorneys

Principles of Federal Prosecution

SEE United States Attorneys' Manual,
Principles of Federal Prosecution, 9.27

PREFACE

The publication of these Principles of Federal Prosecution is a significant event in the history of federal criminal justice. It provides to federal prosecutors, for the first time in a single authoritative source, a statement of sound prosecutorial policies and practices for particularly important areas of their work. As such, it should promote the reasoned exercise of prosecutorial authority, and contribute to the fair, evenhanded administration of the federal criminal laws.

The manner in which federal prosecutors exercise their decision-making authority has far-reaching implications, both in terms of justice and effectiveness in law enforcement and in terms of the consequences for individual citizens. A determination to prosecute represents a policy judgment that the fundamental interests of society require the application of the criminal laws to a particular set of circumstances—recognizing both that serious violations of federal law must be prosecuted, and that prosecution entails profound consequences for the accused and the family of the accused whether or not a conviction ultimately results. Other prosecutorial decisions can be equally significant. Decisions, for example, regarding the specific charges to be brought, or concerning plea dispositions, effectively determine the range of sanctions that may be imposed for criminal conduct. Consent to pleas of nolo contendere may affect the success of related civil suits for recovery of damages. Also, the government's contribution during the sentencing process may assist the court in imposing a sentence that fairly accommodates the interests of society with those of convicted individuals.

These Principles of Federal Prosecution have been designed to assist in structuring the decision-making process of attorneys for the government. For the most part, they have been cast in general terms with a view to providing guidance rather than to mandating results. The intent is to assure regularity without regimentation, to prevent unwarranted disparity without sacrificing flexibility.

The availability of this statement of Principles to federal law enforcement officials and to the public should serve two important purposes: ensuring the fair and effective exercise of prosecutorial responsibility by attorneys for the government, and promoting confidence on the part of the public and individual defendants that

important prosecutorial decisions will be made rationally and objectively on the merits of each case. The Principles will provide convenient reference points for the process of making prosecutorial decisions; they will facilitate the task of training new attorneys in the proper discharge of their duties; they will contribute to more effective management of the government's limited prosecutorial resources by promoting greater consistency among the prosecutorial activities of the 95 United States Attorneys' offices and between their activities and the Department's law enforcement priorities; they will make possible better coordination of investigative and prosecutorial activity by enhancing the understanding of investigating departments and agencies of the considerations underlying prosecutorial decisions by the Department; and they will inform the public of the careful process by which prosecutorial decisions are made.

Important though these Principles are to the proper operation of our federal prosecutorial system, the success of that system must rely ultimately on the character, integrity, sensitivity, and competence of those men and women who are selected to represent the public interest in the federal criminal justice process. It is with their help that these principles have been prepared, and it is with their efforts that the purposes of these principles will be achieved.

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Attorney General

July 28, 1980

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PART A. GENERAL PROVISIONS

1. The principles of federal prosecution set forth herein are intended to promote the reasoned exercise of prosecutorial discretion by attorneys for the government with respect to:

(a) initiating and declining prosecution;
(b) selecting charges;
(c) entering into plea agreements;
(d) opposing offers to plead nolo contendere;
(e) entering into non-prosecution agreements in return for cooperation; and
(f) participating in sentencing.

Comment

Under the federal criminal justice system, the prosecutor has wide latitude in determining when, whom, how, and even whether to prosecute for apparent violations of federal criminal law. The prosecutor's broad discretion in such areas as initiating or foregoing prosecutions, selecting or recommending specific charges, and terminating prosecutions by accepting guilty pleas has been recognized on numerous occasions by the courts. See, e.g., *Oyler* v. *Boles*, 368 U.S. 448 (1962); *Newman* v. *United States*, 382 F.2d 479 (D.C. Cir. 1967); *Powell* v. *Katzenbach*, 359 F.2d 234 (D.C. Cir. 1965), *cert. denied*, 384 U.S. 906 (1966). This discretion exists by virtue of his status as a member of the Executive Branch, which is charged under the Constitution with ensuring that the laws of the United States be "faithfully executed." U.S. CONST. art. II, § 3. See *Nader* v. *Saxbe*, 497 F.2d 676, 679 n.18 (D.C. Cir. 1974).

Since federal prosecutors have great latitude in making crucial decisions concerning enforcement of a nationwide system of criminal justice, it is desirable, in the interest of the fair and effective administration of justice in the federal system, that all federal prosecutors be guided by a general statement of principles that summarizes appropriate considerations to be weighed, and desirable practices to be followed, in discharging their prosecutorial responsibilities. Although these principles deal with the specific situations

indicated, they should be read in the broader context of the basic responsibilities of federal attorneys: making certain that the general purposes of the criminal law—assurance of warranted punishment, deterrence of further criminal conduct, protection of the public from dangerous offenders, and rehabilitation of offenders—are adequately met, while making certain also that the rights of individuals are scrupulously protected.

2. In carrying out criminal law enforcement responsibilities, each Department of Justice attorney should be guided by the principles set forth herein, and each United States Attorney and each Assistant Attorney General should ensure that such principles are communicated to the attorneys who exercise prosecutorial responsibility within his office or under his direction or supervision.

Comment

It is expected that each federal prosecutor will be guided by these principles in carrying out his criminal law enforcement responsibilities unless a modification of, or departure from, these principles has been authorized pursuant to paragraph 4 below. However, it is not intended that reference to these principles will require a particular prosecutorial decision in any given case. Rather, these principles are set forth solely for the purpose of assisting attorneys for the government in determining how best to exercise their authority in the performance of their duties.

3. Each United States Attorney and responsible Assistant Attorney General should establish internal office procedures to ensure:

- **(a) that prosecutorial decisions are made at an appropriate level of responsibility, and are made consistent with these principles; and**
- **(b) that serious, unjustified departures from the principles set forth herein are followed by such remedial action, including the imposition of disciplinary sanctions when warranted, as are deemed appropriate.**

Comment

Each United States Attorney and each Assistant Attorney General responsible for the enforcement of federal criminal law should supplement the guidance provided by the principles set forth herein by establishing appropriate internal procedures for his office. One purpose of such procedures should be to ensure consistency in the decisions within each office by regularizing the decision making process so that decisions are made at the appropriate level of responsibility. A second purpose, equally important, is to provide appropriate remedies for serious, unjustified departures from sound prosecutorial principles. The United States Attorney or Assistant Attorney General may also wish to establish internal procedures for appropriate review and documentation of decisions.

4. A United States Attorney may modify or depart from the principles set forth herein as necessary in the interests of fair and effective law enforcement within the district. Any significant modification or departure contemplated as a matter of policy or regular practice must be approved by the appropriate Assistant Attorney General and the Deputy Attorney General.

Comment

Although these materials are designed to promote consistency in the application of federal criminal laws, they are not intended to produce rigid uniformity among federal prosecutors in all areas of the country at the expense of the fair administration of justice. Different offices face different conditions and have different requirements. In recognition of these realities, and in order to maintain the flexibility necessary to respond fairly and effectively to local conditions, each United States Attorney is specifically authorized to modify or depart from the principles set forth herein, as necessary in the interests of fair and effective law enforcement within the district. In situations in which a modification or departure is contemplated as a matter of policy or regular practice, the appropriate Assistant Attorney General and the Deputy Attorney General must approve the action before it is adopted.

5. The principles set forth herein, and internal office procedures adopted pursuant hereto, are intended solely for the guidance of attorneys for the government. They are not intended to, do not, and may not be relied upon to create a right or benefit, substantive or procedural, enforceable at law by a party to litigation with the United States.

Comment

This statement of principles has been developed purely as a matter of internal Departmental policy and is being provided to federal prosecutors solely for their own guidance in performing their duties. Neither this statement of principles nor any internal procedures adopted by individual offices pursuant hereto creates any rights or benefits. By setting forth this fact explicitly, paragraph 5 is intended to foreclose efforts to litigate the validity of prosecutorial actions alleged to be at variance with these principles or not in compliance with internal office procedures that may be adopted pursuant hereto. In the event that an attempt is made to litigate any aspect of these principles, or to litigate any internal office procedures adopted pursuant to these materials, or to litigate the applicability of such principles or procedures to a particular case, the United States Attorney concerned should oppose the attempt and should notify the Department immediately.

PART B. INITIATING AND DECLINING PROSECUTION

1. If the attorney for the government has probable cause to believe that a person has committed a federal offense within his jurisdiction, he should consider whether to:

(a) request or conduct further investigation;
(b) commence or recommend prosecution;
(c) decline prosecution and refer the matter for prosecutorial consideration in another jurisdiction;
(d) decline prosecution and initiate or recommend pretrial diversion or other non-criminal disposition; or
(e) decline prosecution without taking other action.

Comment

Paragraph 1 sets forth the courses of action available to the attorney for the government once he has probable cause to believe that a person has committed a federal offense within his jurisdiction. The probable cause standard is the same standard as that required for the issuance of an arrest warrant or a summons upon a complaint (see Rule 4(a), F.R.Cr.P.), for a magistrate's decision to hold a defendant to answer in the district court (see Rule 5.1(a), F.R.Cr.P.), and is the minimal requirement for indictment by a grand jury (see *Branzburg* v. *Hayes*, 408 U.S. 665, 686 (1972)). This is, of course a threshold consideration only. Merely because this requirement can be met in a given case does not automatically warrant prosecution; further investigation may be warranted, and the prosecutor should still take into account all relevant considerations, including those described in the following provisions, in deciding upon his course of action. On the other hand, failure to meet the minimal requirement of probable cause is an absolute bar to initiating a federal prosecution, and in some circumstances may preclude reference to other prosecuting authorities or recourse to non-criminal sanctions as well.

2. The attorney for the government should commence or recommend federal prosecution if he believes that the person's conduct

constitutes a federal offense and that the admissible evidence will probably be sufficient to obtain and sustain a conviction, unless, in his judgment, prosecution should be declined because:

(a) no substantial federal interest would be served by prosecution;
(b) the person is subject to effective prosecution in another jurisdiction; or
(c) there exists an adequate non-criminal alternative to prosecution.

Comment

Paragraph 2 expresses the principle that, ordinarily, the attorney for the government should initiate or recommend federal prosecution if he believes that the person's conduct constitutes a federal offense and that the admissible evidence probably will be sufficient to obtain and sustain a conviction. Evidence sufficient to sustain a conviction is required under Rule 29(a), F.R.Cr.P., to avoid a judgment of acquittal. Moreover both as a matter of fundamental fairness and in the interest of the efficient administration of justice, no prosecution should be initiated against any person unless the government believes that the person probably will be found guilty by an unbiased trier of fact. In this connection, it should be noted that, when deciding whether to prosecute, the government attorney need not have in hand all the evidence upon which he intends to rely at trial; it is sufficient that he have a reasonable belief that such evidence will be available and admissible at the time of trial. Thus, for example, it would be proper to commence a prosecution though a key witness is out of the country, so long as the witness's presence at trial could be expected with reasonable certainty.

The potential that—despite the law and the facts that create a sound, prosecutable case—the fact-finder is likely to acquit the defendant because of the unpopularity of some factor involved in the prosecution or because of the overwhelming popularity of the defendant or his or her cause, is not a factor prohibiting prosecution. For example, in a civil rights case or a case involving an extremely popular political figure, it might be clear that the evidence of guilt—viewed objectively by an unbiased fact-finder—would be sufficient to obtain and sustain a conviction, yet the prosecutor might reasonably doubt whether the jury would convict. In such a

case, despite his negative assessment of the likelihood of a guilty verdict (based on factors extraneous to an objective view of the law and the facts), the prosecutor may properly conclude that it is necessary and desirable to commence or recommend prosecution and allow the criminal process to operate in accordance with its principles.

Merely because the attorney for the government believes that a person's conduct constitutes a federal offense and that the admissible evidence will be sufficient to obtain and sustain a conviction, does not mean that he necessarily should initiate or recommend prosecution; paragraph 2 notes three situations in which the prosecutor may properly decline to take action nonetheless: when no substantial federal interest would be served by prosecution; when the person is subject to effective prosecution in another jurisdiction; and when there exists an adequate non-criminal alternative to prosecution. It is left to the judgment of the attorney for the government whether such a situation exists. In exercising that judgment, the attorney for the government should consult one of the following three paragraphs of Part B as appropriate.

3. In determining whether prosecution should be declined because no substantial federal interest would be served by prosecution, the attorney for the government should weigh all relevant considerations, including:

(a) federal law enforcement priorities;
(b) the nature and seriousness of the offense;
(c) the deterrent effect of prosecution;
(d) the person's culpability in connection with the offense;
(e) the person's history with respect to criminal activity;
(f) the person's willingness to cooperate in the investigation or prosecution of others; and
(g) the probable sentence or other consequences if the person is convicted.

Comment

Paragraph 3 lists factors that may be relevant in determining whether prosecution should be declined because no substantial federal interest would be served by prosecution in a case in which the person is believed to have committed a federal offense and the admissible evidence is expected to be sufficient to obtain and sustain

a conviction. The list of relevant considerations is not intended to be all-inclusive. Obviously, not all of the factors listed will be applicable to every case, and in any particular case one factor may deserve more weight than it might in another case.

(a) Federal law enforcement priorities—Federal law enforcement resources and federal judicial resources are not sufficient to permit prosecution of every alleged offense over which federal jurisdiction exists. Accordingly, in the interest of allocating its limited resources so as to achieve an effective nationwide law enforcement program, from time to time the Department establishes national investigative and prosecutorial priorities. These priorities are designed to focus federal law enforcement efforts on those matters within the federal jurisdiction that are most deserving of federal attention and are most likely to be handled effectively at the federal level. In addition, individual United States Attorneys may establish their own priorities, within the national priorities, in order to concentrate their resources on problems of particular local or regional significance. In weighing the federal interest in a particular prosecution, the attorney for the government should give careful consideration to the extent to which prosecution would accord with established priorities.

(b) Nature and seriousness of offense—It is important that limited federal resources not be wasted in prosecuting inconsequential cases or cases in which the violation is only technical. Thus, in determining whether a substantial federal interest exists that requires prosecution, the attorney for the government should consider the nature and seriousness of the offense involved. A number of factors may be relevant. One factor that is obviously of primary importance is the actual or potential impact of the offense on the community and on the victim.

The impact of an offense on the community in which it is committed can be measured in several ways: in terms of economic harm done to community interests; in terms of physical danger to the citizens or damage to public property; and in terms of erosion of the inhabitants' peace of mind and sense of security. In assessing the seriousness of the offense in these terms, the prosecutor may properly weigh such questions as whether the violation is technical or relatively inconsequential in nature, and what the public attitude is toward prosecution under the circumstances of the case. The public may be indifferent, or even opposed, to enforcement of the controlling statute, whether on substantive grounds, or because of a history of non-enforcement, or because the offense involves essentially a minor matter of private concern and the victim is

disinterested in having it pursued. On the other hand, the nature and circumstances of the offense, the identity of the offender or the victim, or the attendant publicity, may be such as to create strong public sentiment in favor of prosecution. While public interest, or lack thereof, deserves the prosecutor's careful attention, it should not be used to justify a decision to prosecute, or to take other action, that cannot be supported on other grounds. Public and professional responsibility sometimes will require the choosing of a particularly unpopular course.

Economic, physical, and psychological considerations are also important in assessing the impact of the offense on the victim. In this connection, it is appropriate for the prosecutor to take into account such matters as the victim's age or health, and whether full or partial restitution has been made. Care should be taken in weighing the matter of restitution, however, to ensure against contributing to an impression that an offender can escape prosecution merely by returning the spoils of his crime.

(c) Deterrent effect of prosecution—Deterrence of criminal conduct, whether it be criminal activity generally or a specific type of criminal conduct, is one of the primary goals of the criminal law. This purpose should be kept in mind, particularly when deciding whether a prosecution is warranted for an offense that appears to be relatively minor; some offenses, although seemingly not of great importance by themselves, if commonly committed would have a substantial cumulative impact on the community.

(d) The person's culpability—Although the prosecutor has sufficient evidence of guilt, it is nevertheless appropriate for him to give consideration to the degree of the person's culpability in connection with the offense, both in the abstract and in comparison with any others involved in the offense. If, for example, the person was a relatively minor participant in a criminal enterprise conducted by others, or his motive was worthy, and no other circumstances require prosecution, the prosecutor might reasonably conclude that some course other than prosecution would be appropriate.

(e) The person's criminal history—If a person is known to have a prior conviction or is reasonably believed to have engaged in criminal activity at an earlier time, this should be considered in determining whether to initiate or recommend federal prosecution. In this connection, particular attention should be given to the nature of the person's prior criminal involvement, when it occurred, its relationship if any to the present offense, and whether he previously avoided prosecution as a result of an agreement not to prosecute in return for

cooperation or as a result of an order compelling his testimony. By the same token, a person's lack of prior criminal involvement or his previous cooperation with the law enforcement officials should be given due consideration in appropriate cases.

(f) The person's willingness to cooperate—A person's willingness to cooperate in the investigation or prosecution of others is another appropriate consideration in the determination whether a federal prosecution should be undertaken. Generally speaking, a willingness to cooperate should not, by itself, relieve a person of criminal liability. There may be some cases, however, in which the value of a person's cooperation clearly outweighs the federal interest in prosecuting him. These matters are discussed more fully below, in connection with plea agreements and non-prosecution agreements in return for cooperation.

(g) The person's personal circumstances—In some cases, the personal circumstances of an accused may be relevant in determining whether to prosecute or to take other action. Some circumstances peculiar to the accused, such as extreme youth, advanced age, or mental or physical impairment, may suggest that prosecution is not the most appropriate response to his offense; other circumstances, such as the fact that the accused occupied a position of trust or responsibility which he violated in committing the offense, might weigh in favor of prosecution.

(h) The probable sentence—In assessing the strength of the federal interest in prosecution, the attorney for the government should consider the sentence, or other consequence, that is likely to be imposed if prosecution is successful, and whether such a sentence or other consequence would justify the time and effort of prosecution. If the offender is already subject to a substantial sentence, or is already incarcerated, as a result of a conviction for another offense, the prosecutor should weigh the likelihood that another conviction will result in a meaningful addition to his sentence, might otherwise have a deterrent effect, or is necessary to ensure that the offender's record accurately reflects the extent of his criminal conduct. For example, it might be desirable to commence a bail-jumping prosecution against a person who already has been convicted of another offense so that law enforcement personnel and judicial officers who encounter him in the future will be aware of the risk of releasing him on bail. On the other hand, if the person is on probation or parole as a result of an earlier conviction, the prosecutor should consider whether the public interest might better be served by instituting a proceeding for violation of probation or revocation of parole, than

by commencing a new prosecution. The prosecutor should also be alert to the desirability of instituting prosecution to prevent the running of the statute of limitations and to preserve the availability of a basis for an adequate sentence if there appears to be a chance that an offender's prior conviction may be reversed on appeal or collateral attack. Finally, if a person previously has been prosecuted in another jurisdiction for the same offense or a closely related offense, the attorney for the government should consult existing departmental policy statements on the subject of "successive prosecution" or "dual prosecution", depending on whether the earlier prosecution was federal or nonfederal (see U.S. Attorney's Manual, 9-2.142).

* * *

Just as there are factors that it is appropriate to consider in determining whether a substantial federal interest would be served by prosecution in a particular case, there are considerations that deserve no weight and should not influence the decision. These include the time and resources expended in federal investigation of the case. No amount of investigative effort warrants commencing a federal prosecution that is not fully justified on other grounds.

4. In determining whether prosecution should be declined because the person is subject to effective prosecution in another jurisdiction, the attorney for the government should weigh all relevant considerations, including:

- **(a) the strength of the other jurisdiction's interest in prosecution;**
- **(b) the other jurisdiction's ability and willingness to prosecute effectively; and**
- **(c) the probable sentence or other consequences if the person is convicted in the other jurisdiction.**

Comment

In many instances, it may be possible to prosecute criminal conduct in more than one jurisdiction. Although there may be instances in which a federal prosecutor may wish to consider deferring to prosecution in another federal district, in most instances

the choice will probably be between federal prosecution and prosecution by state or local authorities. Paragraph 4 sets forth three general considerations to be taken into account in determining whether a person is likely to be prosecuted effectively in another jurisdiction: the strength of the jurisdiction's interest in prosecution; its ability and willingness to prosecute effectively; and the probable sentence or other consequences if the person is convicted. As indicated with respect to the considerations listed in paragraph 3, these factors are illustrative only, and the attorney for the government should also consider any others that appear relevant to him in a particular case.

(a) The strength of the jurisdiction's interest—The attorney for the government should consider the relative federal and state characteristics of the criminal conduct involved. Some offenses, even though in violation of federal law, are of particularly strong interest to the authorities of the state or local jurisdiction in which they occur, either because of the nature of the offense, the identity of the offender or victim, the fact that the investigation was conducted primarily by state or local investigators, or some other circumstance. Whatever the reason, when it appears that the federal interest in prosecution is less substantial than the interest of state or local authorities, consideration should be given to referring the case to those authorities rather than commencing or recommending a federal prosecution.

(b) Ability and willingness to prosecute effectively—In assessing the likelihood of effective prosecution in another jurisdiction, the attorney for the government should also consider the intent of the authorities in that jurisdiction and whether that jurisdiction has the prosecutorial and judicial resources necessary to undertake prosecution promptly and effectively. Other relevant factors might be legal or evidentiary problems that might attend prosecution in the other jurisdiction. In addition, the federal prosecutor should be alert to any local conditions, attitudes, relationships, or other circumstances that might cast doubt on the likelihood of the state or local authorities conducting a thorough and successful prosecution.

(c) Probable sentence upon conviction—The ultimate measure of the potential for effective prosecution in another jurisdiction is the sentence, or other consequence, that is likely to be imposed if the person is convicted. In considering this factor, the attorney for the government should bear in mind not only the statutory penalties in the jurisdiction and sentencing patterns in similar cases, but also the particular characteristics of the offense or of the offender that might

be relevant to sentencing. He should also be alert to the possibility that a conviction under state law may in some cases result in collateral consequences for the defendant, such as disbarment, that might not follow upon a conviction under federal law.

5. In determining whether prosecution should be declined because there exists an adequate non-criminal alternative to prosecution, the attorney for the government should consider all relevant factors, including:

(a) the sanctions available under the alternative means of disposition;

(b) the likelihood that an appropriate sanction will be imposed; and

(c) the effect of non-criminal disposition on federal law enforcement interests.

Comment

When a person has committed a federal offense, it is important that the law respond promptly, fairly, and effectively. This does not mean, however, that a criminal prosecution must be initiated. In recognition of the fact that resort to the criminal process is not necessarily the only appropriate response to serious forms of antisocial activity, Congress and state legislatures have provided civil and administrative remedies for many types of conduct that may also be subject to criminal sanction. Examples of such non-criminal approaches include civil tax proceedings; civil actions under the securities, customs, antitrust, or other regulatory laws; and reference of complaints to licensing authorities or to professional organizations such as bar associations. Another potentially useful alternative to prosecution in some cases is pretrial diversion (see U.S. Attorney's Manual, 1-12.000).

Attorneys for the government should familiarize themselves with these alternatives and should consider pursuing them if they are available in a particular case. Although on some occasions they should be pursued in addition to the criminal law procedures, on other occasions they can be expected to provide an effective substitute for criminal prosecution. In weighing the adequacy of such an alternative in a particular case, the prosecutor should consider the nature and severity of the sanctions that could be imposed, the likelihood that

an adequate sanction would in fact be imposed, and the effect of such a non-criminal disposition on federal law enforcement interests. It should be noted that referrals for non-criminal disposition, other than to Civil Division attorneys or other attorneys for the government, may not include the transfer of grand jury material unless an order under Rule 6(e), F.R.Cr.P., has been obtained.

6. In determining whether to commence or recommend prosecution or take other action, the attorney for the government should not be influenced by:

(a) the person's race; religion; sex; national origin; or political association, activities, or beliefs;
(b) his own personal feelings concerning the person, the person's associates, or the victim; or
(c) the possible effect of his decision on his own professional or personal circumstances.

Comment

Paragraph 6 sets forth various matters that plainly should not influence the determination whether to initiate or recommend prosecution or take other action. They are listed here not because it is anticipated that any attorney for the government might allow them to affect his judgment, but in order to make clear that federal prosecutors will not be influenced by such improper considerations. Of course, in a case in which a particular characteristic listed in subparagraph (a) is pertinent to the offense (for example, in an immigration case the fact that the offender is not a United States national, or in a civil rights case the fact that the victim and the offender are of different races), the provision would not prohibit the prosecutor from considering it for the purpose intended by the Congress.

7. Whenever the attorney for the government declines to commence or recommend federal prosecution, he should ensure that his decision and the reasons therefor are communicated to the investigating agency involved and to any other interested agency, and are reflected in the files of his office.

Comment

Paragraph 7 is intended primarily to ensure an adequate record of disposition of matters that are brought to the attention of the government attorney for possible criminal prosecution, but that do not result in federal prosecution. When prosecution is declined in serious cases on the understanding that action will be taken by other authorities, appropriate steps should be taken to ensure that the matter receives their attention and to ensure coordination or follow-up. This might be done, for example, through the appropriate Federal-State Law Enforcement Committee.

PART C. SELECTING CHARGES

1. Except as hereafter provided, the attorney for the government should charge, or should recommend that the grand jury 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.

Comment

Once it has been determined to initiate prosecution, either by filing a complaint or an information, or by seeking an indictment from the grand jury, the attorney for the government must determine what charges to file or recommend. When the conduct in question consists of a single criminal act, or when there is only one applicable statute, this is not a difficult task. Typically, however, a defendant will have committed more than one criminal act and his conduct may be prosecuted under more than one statute. Moreover, selection of charges may be complicated further by the fact that different statutes have different proof requirements and provide substantially different penalties. In such cases, considerable care is required to ensure selection of the proper charge or charges. In addition to reviewing the concerns that prompted the decision to prosecute in the first instance, particular attention should be given to the need to ensure that the prosecution will be both fair and effective.

At the outset, the attorney for the government should bear in mind that at trial he will have to produce admissible evidence sufficient to obtain and sustain a conviction, or else the government will suffer a dismissal. For this reason, he should not include in an information or recommend in an indictment charges that he cannot reasonably expect to prove beyond a reasonable doubt by legally sufficient evidence at trial.

In connection with the evidentiary basis for the charges selected, the prosecutor should also be particularly mindful of the different requirements of proof under different statutes covering similar conduct. For example, the bribery provisions of 18 U.S.C. 201

require proof of "corrupt intent," while the "gratuity" provisions do not. Similarly, the "two witness" rule applies to perjury prosecutions under 18 U.S.C. 1621 but not under 18 U.S.C. 1623.

Paragraph 1 of Part C expresses the principle that the defendant should be charged with the most serious offense that is encompassed by his conduct and that is likely to result in a sustainable conviction. Ordinarily, this will be the offense for which the most severe penalty is provided by law. This principle provides the framework for ensuring equal justice in the prosecution of federal criminal offenders. It guarantees that every defendant will start from the same position, charged with the most serious criminal act he commits. Of course, he may also be charged with other criminal acts (as provided in paragraph 2), if the proof and the government's legitimate law enforcement objectives warrant additional charges.

In assessing the likelihood that a charge of the most serious offense will result in a sustainable conviction, the attorney for the government should bear in mind some of the less predictable attributes of those rare federal offenses that carry a mandatory, minimum term of imprisonment. In many instances, the term the legislature has specified certainly would not be viewed as inappropriate. In other instance, however, unusually mitigating circumstances may make the specified penalty appear so out of proportion to the seriousness of defendant's conduct that the jury or judge in assessing guilt, or the judge in ruling on the admissibility of evidence, may be influenced by the inevitable consequence of conviction. In such cases, the attorney for the government should consider whether charging a different offense that reaches the same conduct, but that does not carry a mandatory penalty, might not be more appropriate under the circumstances.

The exception noted at the beginning of paragraph 1 refers to pre-charge plea agreements provided for in paragraph 3 below.

2. Except as hereafter provided, the attorney for the government should also charge, or recommend that the grand jury charge, other offenses only when, in his judgment, additional charges:

(a) are necessary to ensure that the information or indictment:

(i) adequately reflects the nature and extent of the criminal conduct involved; and

(ii) provides the basis for an appropriate sentence under all the circumstances of the case; or

(b) will significantly enhance the strength of the government's case against the defendant or a codefendant.

Comment

It is important to the fair and efficient administration of justice in the federal system that the government bring as few charges as are necessary to ensure that justice is done. The bringing of unnecessary charges not only complicates and prolongs trials, it constitutes an excessive—and potentially unfair—exercise of power. To ensure appropriately limited exercises of the charging power, paragraph 2 outlines three general situations in which additional charges may be brought: when necessary adequately to reflect the nature and extent of the criminal conduct involved; when necessary to provide the basis for an appropriate sentence under all the circumstances of the case; and when an additional charge or charges would significantly strengthen the case against the defendant or a codefendant.

(a) Nature and extent of criminal conduct—Apart from evidentiary considerations, the prosecutor's initial concern should be to select charges that adequately reflect the nature and extent of the criminal conduct involved. This means that the charges selected should fairly describe both the kind and scope of unlawful activity; should be legally sufficient; should provide notice to the public of the seriousness of the conduct involved; and should negate any impression that, after committing one offense, an offender can commit others with impunity.

(b) Basis for sentencing—Proper charge selection also requires consideration of the end result of successful prosecution—the imposition of an appropriate sentence under all the circumstances of the case. In order to achieve this result, it ordinarily should not be necessary to charge a person with every offense for which he may technically be liable (indeed, charging every such offense may in some cases be perceived as an unfair attempt to induce a guilty plea). What is important is that the person be charged in such a manner that, if he is convicted, the court may impose an appropriate sentence. The phrase "all the circumstances of the case" is intended to include any factors that may be relevant to the sentencing decision. Examples of such factors are the basic purposes of sentencing (deterrence, protection of the public, just punishment, and rehabilitation); the penalty provisions of the applicable statutes; the gravity of the offense in terms of its actual or potential impact, or in terms of the defendant's motive; mitigating or aggravating

factors such as age, health, restitution, prior criminal activity, and cooperation with law enforcement officials; and any other legitimate legislative, judicial, prosecutorial, or penal or correctional concern, including special sentencing provisions for certain classes of offenders and other post-conviction consequences such as disbarment or disqualification from public office or private position.

(c) Effect on government's case—When considering whether to include a particular charge in the indictment or information, the attorney for the government should bear in mind the possible effects of inclusion or exclusion of the charge on the government's case against the defendant or a codefendant. If the evidence is available, it is proper to consider the tactical advantages of bringing certain charges. For example, in a case in which a substantive offense was committed pursuant to an unlawful agreement, inclusion of a conspiracy count is permissible and may be desirable to ensure the introduction of all relevant evidence at trial. Similarly, it might be important to include a perjury or false statement count in an indictment charging other offenses, in order to give the jury a complete picture of the defendant's criminal conduct. Failure to include appropriate charges for which the proof is sufficient may not only result in the exclusion of relevant evidence, but may impair the prosecutor's ability to prove a coherent case, and lead to jury confusion as well. In this connection, it is important to remember that, in multi-defendant cases, the presence or absence of a particular charge against one defendant may affect the strength of the case against another defendant.

In short, when the evidence exists, the charges should be structured so as to permit proof of the strongest case possible without undue burden on the administration of justice.

3. The attorney for the government may file or recommend a charge or charges without regard to the provisions of paragraphs 1 and 2, if such charge or charges are the subject of a pre-charge plea agreement entered into under the provisions of Part D of this statement of principles.

Comment

Paragraph 3 of Part C addresses the situation in which there is a pre-charge agreement with the defendant that he will plead guilty to a certain agreed-upon charge or charges. In such a situation, the charge or charges to be filed or recommended to the grand jury may

be selected without regard to the provisions of paragraphs 1 and 2 of Part C. Before filing or recommending charges pursuant to a pre-charge plea agreement, the attorney for the government should consult the plea agreement provisions of Part D, and should give special attention to paragraph 3 thereof, relating to the selection of charges to which a defendant should be required to plead guilty.

PART D. ENTERING INTO PLEA AGREEMENTS

1. The attorney for the government may, in an appropriate case, enter into an agreement with a defendant that, upon the defendant's plea of guilty or nolo contendere to a charged offense or to a lesser or related offense, he will move for dismissal of other charges, take a certain position with respect to the sentence to be imposed, or take other action.

Comment

Paragraph 1 permits, in appropriate cases, the disposition of federal criminal charges pursuant to plea agreements between defendants and government attorneys. Such negotiated dispositions should be distinguished from situations in which a defendant pleads guilty or nolo contendere to fewer than all counts of an information or indictment in the absence of any agreement with the government. Only the former type of disposition is covered by the provisions of Part D.

Negotiated plea dispositions are explicitly sanctioned by Rule 11 (e) (1), F.R.Cr.P., which provides that:

> The attorney for the government and the attorney for the defendant or the defendant when acting pro se may engage in discussions with a view toward reaching an agreement that, upon the entering of a plea of guilty or nolo contendere to a charged offense or to a lesser or related offense, the attorney for the government will do any of the following:
>
> (A) move for dismissal of other charges; or
> (B) make a recommendation, or agree not to oppose the defendant's request, for a particular sentence, with the understanding that such recommendation or request shall not be binding upon the court; or
> (C) agree that a specific sentence is the appropriate disposition of the case.

Three types of plea agreements are encompassed by the language of paragraph 1: agreements whereby, in return for the defendant's plea

to a charged offense or to a lesser or related offense, other charges are dismissed ("charge agreements"); agreements pursuant to which the government takes a certain position regarding the sentence to be imposed ("sentence agreements"); and agreements that combine a plea with a dismissal of charges and an undertaking by the prosecutor concerning the government's position at sentencing ("mixed agreements").

It should be noted that the provision relating to "charge agreements" is not limited to situations in which the defendant is the subject of charges to be dismissed. Although this will usually be the case, there may be situations in which a third party would be the beneficiary of the dismissal of charges. For example, one family member may offer to plead guilty in return for the termination of a prosecution pending against another family member, or a corporation may tender a plea in satisfaction of its own liability as well as that of one of its officers. Although plea agreements of this sort are permitted under paragraph 1 they can easily be misunderstood as manifestations of a double standard of justice. Accordingly, they should not be entered into routinely, but only after careful consideration of all relevant factors, including those specifically set forth in paragraph 2 below.

The language of paragraph 1 with respect to "sentence agreements" is intended to cover the entire range of positions that the government might wish to take at the time of sentencing. Among the options are: taking no position regarding the sentence; not opposing the defendant's request; requesting a specific type of sentence (e.g., a fine, probation, or sentencing under a specific statute such as the Youth Corrections Act), a specific fine or term of imprisonment, or not more than a specific fine or term of imprisonment; and requesting concurrent rather than consecutive sentences.

The concession required by the government as part of a plea agreement, whether it be a "charge agreement," a "sentence agreement," or a "mixed agreement," should be weighed by the responsible government attorney in the light of the probable advantages and disadvantages of the plea disposition proposed in the particular case. Particular care should be exercised in considering whether to enter into a plea agreement pursuant to which the defendant will enter a nolo contendere plea. As discussed in Part D below, there are serious objections to such pleas and they should be opposed unless the responsible Assistant Attorney General concludes that the circumstances are so unusual that acceptance of such a plea would be in the public interest.

2. In determining whether it would be appropriate to enter into a plea agreement, the attorney for the government should weigh all relevant considerations, including:

- **(a) the defendant's willingness to cooperate in the investigation or prosecution of others;**
- **(b) the defendant's history with respect to criminal activity;**
- **(c) the nature and seriousness of the offense or offenses charged;**
- **(d) the defendant's remorse or contrition and his willingness to assume responsibility for his conduct;**
- **(e) the desirability of prompt and certain disposition of the case;**
- **(f) the likelihood of obtaining a conviction at trial;**
- **(g) the probable effect on witnesses;**
- **(h) the probable sentence or other consequences if the defendant is convicted;**
- **(i) the public interest in having the case tried rather than disposed of by a guilty plea;**
- **(j) the expense of trial and appeal; and**
- **(k) the need to avoid delay in the disposition of other pending cases.**

Comment

Paragraph 2 sets forth some of the appropriate considerations to be weighed by the attorney for the government in deciding whether to enter into a plea agreement with a defendant pursuant to the provisions of Rule 11 (e), F.R.Cr.P. The provision is not intended to suggest the desirability or lack of desirability of a plea agreement in any particular case or to be construed as a reflection on the merits of any plea agreement that actually may be reached; its purpose is solely to assist attorneys for the government in exercising their judgment as to whether some sort of plea agreement would be appropriate in a particular case. Government attorneys should consult the investigating agency involved in any case in which it would be helpful to have its views concerning the relevance of particular factors or the weight they deserve.

(a) **Defendant's cooperation**—The defendant's willingness to provide timely and useful cooperation as part of his plea agreement should be given serious consideration. The weight it deserves will vary, of course, depending on the nature and value of the cooperation offered and whether the same benefit can be obtained

without having to make the charge or sentence concession that would be involved in a plea agreement. In many situations, for example, all necessary cooperation in the form of testimony can be obtained through a compulsion order under Title 18, U.S.C. 6001-6003. In such cases, that approach should be attempted unless, under the circumstances, it would seriously interfere with securing the person's conviction.

(b) Defendant's criminal history—One of the principal arguments against the practice of plea-bargaining is that it results in leniency that reduces the deterrent impact of the law and leads to recidivism on the part of some offenders. Although this concern is probably most relevant in non-federal jurisdictions that must dispose of large volumes of routine cases with inadequate resources, nevertheless it should be kept in mind by federal prosecutors, especially when dealing with repeat offenders or "career criminals". Particular care should be taken in the case of a defendant with a prior criminal record to ensure that society's need for protection is not sacrificed in the process of arriving at a plea disposition. In this connection, it is proper for the government attorney to consider not only the defendant's past convictions, but also facts of other criminal involvement not resulting in conviction. By the same token, of course, it is also proper to consider a defendant's absence of past criminal involvement and his past cooperation with law enforcement officials.

(c) Nature and seriousness of offense charged—Important considerations in determining whether to enter into a plea agreement may be the nature and seriousness of the offense or offenses charged. In weighing these factors, the attorney for the government should bear in mind the interests sought to be protected by the statute defining the offense (e.g., the national defense, constitutional rights, the governmental process, personal safety, public welfare, or property), as well as nature and degree of harm caused or threatened to those interests and any attendant circumstances that aggravate or mitigate the seriousness of the offense in the particular case.

(d) Defendant's attitude—A defendant may demonstrate apparently genuine remorse or contrition, and a willingness to take responsibility for his criminal conduct by, for example, efforts to compensate the victim for injury or loss, or otherwise to ameliorate the consequences of his acts. These are factors that bear upon the likelihood of his repetition of the conduct involved and that may properly be considered in deciding whether a plea agreement would be appropriate.

It is particularly important that the defendant not be permitted to enter a guilty plea under circumstances that will allow him later to proclaim lack of culpability or even complete innocence. Such consequences can be avoided only if the court and the public are adequately informed of the nature and scope of the illegal activity and of the defendant's complicity and culpability. To this end, the attorney for the government is strongly encouraged to enter into a plea agreement only with the defendant's assurance that he will admit the facts of the offense and of his culpable participation therein. A plea agreement may be entered into in the absence of such an assurance, but only if the defendant is willing to accept without contest a statement by the government in open court of the facts it could prove to demonstrate his guilt beyond a reasonable doubt. Except as provided in paragraph 4 below, the attorney for the government should not enter into a plea agreement with a defendant who admits his guilt but disputes an essential element of the government's case.

(e) Prompt disposition—In assessing the value of prompt disposition of a criminal case, the attorney for the government should consider the timing of a proffered plea. A plea offer by a defendant on the eve of trial after the case has been fully prepared is hardly as advantageous from the standpoint of reducing public expense as one offered months or weeks earlier. In addition, a last-minute plea adds to the difficulty of scheduling cases efficiently and may even result in wasting the prosecutorial and judicial time reserved for the aborted trial. For these reasons, government attorneys should make clear to defense counsel at an early stage in the proceedings that, if there are to be any plea discussions, they must be concluded prior to a certain date well in advance of the trial date. However, avoidance of unnecessary trial preparation and scheduling disruptions are not the only benefits to be gained from prompt disposition of a case by means of a guilty plea. Such a disposition also saves the government and the court the time and expense of trial and appeal. In addition, a plea agreement facilitates prompt imposition of sentence, thereby promoting the overall goals of the criminal justice system. Thus, occasionally it may be appropriate to enter into a plea agreement even after the usual time for making such agreements has passed.

(f) Likelihood of conviction—The trial of a criminal case inevitably involves risks and uncertainties, both for the prosecution and for the defense. Many factors, not all of which can be anticipated, can affect the outcome. To the extent that these factors can be identified, they should be considered in deciding whether to accept a plea or go to trial. In this connection, the prosecutor should weigh

the strength of the government's case relative to the anticipated defense case, bearing in mind legal and evidentiary problems that might be expected, as well as the importance of the credibility of witnesses. However, although it is proper to consider factors bearing upon the likelihood of conviction in deciding whether to enter into a plea agreement, it obviously is improper for the prosecutor to attempt to dispose of a case by means of a plea agreement if he is not satisfied that the legal standards for guilt are met.

(g) **Effect on witnesses**—Although the public has "the right to every man's evidence," attorneys for the government should bear in mind that it is often burdensome for witnesses to appear at trial and that, sometimes, to do so may cause them serious embarrassment or even place them in jeopardy of physical or economic retaliation. The possibility of such adverse consequences to witnesses should not be overlooked in determining whether to go to trial or attempt to reach a plea agreement. Another possibility that may have to be considered is revealing the identity of informants. When an informant testifies at trial, his identity and relationship to the government become matters of public record. As a result, in addition to possible adverse consequences to the informant, there is a strong likelihood that the informant's usefulness in other investigations will be seriously diminished or destroyed. These are considerations that should be discussed with the investigating agency involved, as well as with any other agencies known to have an interest in using the informant in their investigations.

(h) **Probable sentence**—In determining whether to enter into a plea agreement, the attorney for the government may properly consider the probable outcome of the prosecution in terms of the sentence or other consequences for the defendant in the event that a plea agreement is reached. If the proposed agreement is a "sentence agreement" or a "mixed agreement", the prosecutor should realize that the position he agrees to take with respect to sentencing may have a significant effect on the sentence that is actually imposed. If the proposed agreement is a "charge agreement," the prosecutor should bear in mind the extent to which a plea to fewer or lesser offenses may reduce the sentence that otherwise could be imposed. In either event, it is important that the attorney for the government be aware of the need to preserve the basis for an appropriate sentence under all the circumstances of the case.

(i) **Trial rather than plea**—There may be situations in which the public interest might better be served by having a case tried rather than by having it disposed of by means of a guilty plea. These include situations in which it is particularly important to permit a

clear public understanding that "justice is done" through exposing the exact nature of the defendant's wrong-doing at trial, or in which a plea agreement might be misconstrued to the detriment of public confidence in the criminal justice system. For this reason, the prosecutor should be careful not to place undue emphasis on factors which favor disposition of a case pursuant to a plea agreement.

(j) **Expense of trial and appeal**—In assessing the expense of trial and appeal that would be saved by a plea disposition, the attorney for the government should consider not only such monetary costs as juror and witness fees, but also the time spent by judges, prosecutors, and law enforcement personnel who may be needed to testify or provide other assistance at trial. In this connection, the prosecutor should bear in mind the complexity of the case, the number of trial days and witnesses required, and any extraordinary expenses that might be incurred such as the cost of sequestering the jury.

(k) **Prompt disposition of other cases**—A plea disposition in one case may facilitate the prompt disposition of other cases, including cases in which prosecution might otherwise be declined. This may occur simply because prosecutorial, judicial, or defense resources will become available for use in other cases, or because a plea by one of several defendants may have a "domino effect," leading to pleas by other defendants. In weighing the importance of these possible consequences, the attorney for the government should consider the state of the criminal docket and the speedy trial requirements in the district, the desirability of handling a larger volume of criminal cases, and the workloads of prosecutors, judges, and defense attorneys in the district.

3. If a prosecution is to be concluded pursuant to a plea agreement, the defendant should be required to plead to a charge or charges:

- **(a) that bears a reasonable relationship to the nature and extent of his criminal conduct;**
- **(b) that has an adequate factual basis;**
- **(c) that makes likely the imposition of an appropriate sentence under all the circumstances of the case; and**
- **(d) that does not adversely affect the investigation or prosecution of others.**

Comment

Paragraph 3 sets forth the considerations that should be taken into account in selecting the charge or charges to which a defendant

should be required to plead guilty once it has been decided to dispose of the case pursuant to a plea agreement. The considerations are essentially the same as those governing the selection of charges to be included in the original indictment or information.

(a) Relationship to criminal conduct—The charge or charges to which a defendant pleads guilty should bear a reasonable relationship to the defendant's criminal conduct, both in nature and in scope. This principle covers such matters as the seriousness of the offense (as measured by its impact upon the community and the victim), not only in terms of the defendant's own conduct but also in terms of similar conduct by others, as well as the number of counts to which a plea should be required in cases involving offenses different in nature or in cases involving a series of similar offenses. In regard to the seriousness of the offense, the guilty plea should assure that the public record of conviction provides an adequate indication of the defendant's conduct. In many cases, this will probably require that the defendant plead to the most serious offense charged. With respect to the number of counts, the prosecutor should take care to assure that no impression is given that multiple offenses are likely to result in no greater a potential penalty than is a single offense.

The requirement that a defendant plead to a charge that bears a reasonable relationship to the nature and extent of his criminal conduct is not inflexible. There may be situations involving cooperating defendants in which considerations such as those discussed in Part F take precedence. Such situations should be approached cautiously, however. Unless the government has strong corroboration for the cooperating defendant's testimony, his credibility may be subject to successful impeachment if he is permitted to plead to an offense that appears unrelated in seriousness or scope to the charges against the defendants on trial. It is also doubly important in such situations for the prosecutor to ensure that the public record of the plea demonstrates the full extent of the defendant's involvement in the criminal activity giving rise to the prosecution.

(b) Factual basis—The attorney for the government should also bear in mind the legal requirement that there be a factual basis for the charge or charges to which a guilty plea is entered. This requirement is intended to assure against conviction after a guilty plea of a person who is not in fact guilty. Moreover, under Rule 11 (f), F.R.Cr.P., a court may not enter a judgment upon a guilty plea "without making such inquiry as shall satisfy it that there is a factual basis for the plea." For this reason, it is essential that the charge or charges selected as the subject of a plea agreement be such as could

be prosecuted independently of the plea under these principles. However, as noted below, in cases in which *Alford* or nolo contendere pleas are tendered, the attorney for the government may wish to make a stronger factual showing. In such cases there may remain some doubt as to the defendant's guilt even after the entry of his plea. Consequently, in order to avoid such a misleading impression, the government should ask leave of the court to make a proffer of the facts available to it that show the defendant's guilt beyond a reasonable doubt.

(c) Basis for sentencing—In order to guard against inappropriate restriction of the court's sentencing options, the plea agreement should provide adequate scope for sentencing under all the circumstances of the case. To the extent that the plea agreement requires the government to take a position with respect to the sentence to be imposed, there should be little danger since the court will not be bound by the government's position. When a "charge agreement" is involved, however, the court will be limited to imposing the maximum term authorized by statute for the offense to which the guilty plea is entered. Thus, the prosecutor should take care to avoid a "charge agreement" that would unduly restrict the court's sentencing authority. In this connection, as in the initial selection of charges, the prosecutor should take into account the purposes of sentencing, the penalties provided in the applicable statutes, the gravity of the offense, any aggravating or mitigating factors, and any post conviction consequences to which the defendant may be subject. In addition, if restitution is appropriate under the circumstances of the case, a sufficient number of counts should be retained under the agreement to provide a basis for an adequate restitution order, since the court's authority to order restitution as part of the sentence it imposes is limited to the offenses for which the defendant is convicted, as opposed to all offenses that were committed. See 18 U.S.C. 3651; *United States* v. *Buechler*, 557 F.2d 1002, 1007 (3rd Cir. 1977); U.S. Attorney's Manual, 9-16.210.

(d) Effect on other cases—In a multiple-defendant case, care must be taken to ensure that the disposition of the charges against one defendant does not adversely affect the investigation or prosecution of co-defendants. Among the possible adverse consequences to be avoided are the negative jury appeal that may result when relatively less culpable defendants are tried in the absence of a more culpable defendant or when a principal prosecution witness appears to be equally culpable as the defendants but has been permitted to plead to a significantly less serious offense; the possibility that one defendant's absence from the case will render useful evidence

inadmissible at the trial of co-defendants; and the giving of questionable exculpatory testimony on behalf of the other defendants by the defendant who has pled guilty.

4. The attorney for the government should not, except with the approval of the Assistant Attorney General with supervisory responsibility over the subject matter, enter into a plea agreement if the defendant maintains his innocence with respect to the charge or charges to which he offers to plead guilty. In a case in which the defendant tenders a plea of guilty but denies that he has in fact committed the offense to which he offers to plead guilty, the attorney for the government should make an offer of proof of all facts known to the government to support the conclusion that the defendant is in fact guilty.

Comment

Paragraph 4 concerns plea agreements involving *"Alford"* pleas–guilty pleas entered by defendants who nevertheless claim to be innocent. In *North Carolina* v. *Alford*, 400 U.S. 25 (1970), the Supreme Court held that the Constitution does not prohibit a court from accepting a guilty plea from a defendant who simultaneously maintains his innocence, so long as the plea is entered voluntarily and intelligently and there is a strong factual basis for it. The Court reasoned that there is no material difference between a plea of nolo contendere, where the defendant does not expressly admit his guilt, and a plea of guilty by a defendant who affirmatively denies his guilt.

Despite the constitutional validity of *Alford* pleas, such pleas should be avoided except in the most unusual circumstances, even if no plea agreement is involved and the plea would cover all pending charges. Such pleas are particularly undesirable when entered as part of an agreement with the government. Involvement by attorneys for the government in the inducement of guilty pleas by defendants who protest their innocence may create an appearance of prosecutorial overreaching. As one court put it, "the public might well not understand or accept the fact that a defendant who denied his guilt was nonetheless placed in a position of pleading guilty and going to jail." *United States* v. *Bednarski*, 445 F.2d 364, 366 (1st Cir. 1971). Consequently, it is preferable to have a jury resolve the factual and legal dispute between the government and the defendant, rather than have government attorneys encourage defendants to plead guilty under circumstances that the public might regard as questionable or

unfair. For this reason, government attorneys should not enter into *Alford* plea agreements without the approval of the responsible Assistant Attorney General.

Apart from refusing to enter into a plea agreement, however, the degree to which the Department can express its opposition to *Alford* pleas may be limited. Although a court may accept a proffered plea of nolo contendere "only after due consideration of the views of the parties and the interest of the public in the effective administration of justice" (Rule 11 (b), F.R.Cr.P.), at least one court has concluded that it is an abuse of discretion to refuse to accept a guilty plea "solely because the defendant does not admit the alleged facts of the crime." *United States* v. *Gaskins*, 485 F.2d 1046, 1048 (D.C. Cir. 1973); but see *United States* v. *Bednarski*, 445 F.2d 364 (1st Cir. 1971); *United States* v. *Biscoe*, 518 F.2d 95 (1st Cir. 1975). Nevertheless, government attorneys can and should discourage *Alford* pleas by refusing to agree to terminate prosecutions where an *Alford* plea is proffered to fewer than all of the charges pending. As is the case with guilty pleas generally, if such a plea to fewer than all the charges is tendered and accepted over the government's objection, the attorney for the government should proceed to trial on any remaining charges not barred on double jeopardy grounds unless the United States Attorney or, in cases handled by departmental attorneys, the responsible Assistant Attorney General, approves dismissal of those charges.

Government attorneys should also take full advantage of the opportunity afforded by Rule 11 (f) in an *Alford* case to thwart the defendant's efforts to project a public image of innocence. Under Rule 11 (f), the court must be satisfied that there is "a factual basis" for a guilty plea. However, the Rule does not require that the factual basis for the plea be provided only by the defendant. *United States* v. *Navedo*, 516 F.2d 293 (2d Cir. 1975); *Irizarry* v. *United States*, 508 F.2d 960 (2d Cir. 1974); *United States* v. *Davis*, 516 F.2d 574 (7th Cir. 1975). Accordingly, attorneys for the government in *Alford* cases should endeavor to establish as strong a factual basis for the plea as possible not only to satisfy the requirement of Rule 11 (f), but also to minimize the adverse effects of *Alford* pleas on public perceptions of the administration of justice.

5. If a prosecution is to be terminated pursuant to a plea agreement, the attorney for the government should ensure that the case file contains a record of the agreed disposition, signed or initialed by the defendant or his attorney.

Comment

Paragraph 5 is intended to facilitate compliance with Rule 11, F.R.Cr.P., and to provide a safeguard against misunderstandings that might arise concerning the terms of a plea agreement. Rule 11 (e) (2) requires that a plea agreement be disclosed in open court (except upon a showing of good cause, in which case disclosure may be made in camera), while Rule 11 (e) (3) requires that the disposition provided for in the agreement be embodied in the judgment and sentence. Compliance with these requirements will be facilitated if the agreement has been reduced to writing in advance, and the defendant will be precluded from successfully contesting the terms of the agreement at the time he pleads guilty, or at the time of sentencing, or at a later date. If time does not permit the preparation of a record of the plea agreement in advance, as when the plea disposition is agreed to on the morning of arraignment or trial, the attorney for the government should subsequently include in the case file a brief notation concerning the fact and terms of the agreement.

PART E. OPPOSING OFFERS TO PLEAD NOLO CONTENDERE

1. The attorney for the government should oppose the acceptance of a plea of nolo contendere unless the Assistant Attorney General with supervisory responsibility over the subject matter concludes that the circumstances of the case are so unusual that acceptance of such a plea would be in the public interest.

Comment

Rule 11(b), F.R.Cr.P., requires the court to consider "the views of the parties and the interest of the public in the effective administration of justice" before it accepts a plea of nolo contendere. Thus, it is clear that a criminal defendant has no absolute right to enter a nolo contendere plea. The Department has long attempted to discourage the disposition of criminal cases by means of nolo pleas. The basic objections to nolo pleas were expressed by Attorney General Herbert Brownell, Jr., in a departmental directive in 1953:

> "One of the factors which has tended to breed contempt for federal law enforcement in recent times has been the practice of permitting as a matter of course in many criminal indictments the plea of nolo contendere. While it may serve a legitimate purpose in a few extraordinary situations and where civil litigation is also pending, I can see no justification for it as an everyday practice, particularly where it is used to avoid certain indirect consequences of pleading guilty, such as loss of license or sentencing as a multiple offender. Uncontrolled use of the plea has led to shockingly low sentences and insignificant fines which are no deterrent to crime. As a practical matter it accomplishes little that is useful even where the Government has civil litigation pending. Moreover, a person permitted to plead nolo contendere admits his guilt for the purpose of imposing punishment for his acts and yet, for all other purposes, and as far as the public is concerned, persists in his denial of wrongdoing. It is no wonder that the public regards consent to such a plea by the Government as an admission that it has only a technical case at most and that the whole proceeding was just a fiasco."

For these reasons, government attorneys have been instructed for more than twenty-five years not to consent to nolo pleas except in the most unusual circumstances, and to do so then only with departmental approval. However, despite continuing adherence to this policy by attorneys for the government, and despite the continuing validity of the policy's rationale, the federal criminal justice system continues to suffer from misuse of nolo contendere pleas, particularly in white collar crime cases.

As federal prosecutors focus more of their attention on white collar crime activities, greater numbers of defendants seek to dispose of the charges against them by means of nolo pleas, and the frequency with which such pleas are accepted by the courts is increasing. The acceptance of nolo pleas from affluent white collar defendants, as opposed to other types of defendants, lends credence to the view that a double standard of justice exists. Moreover, even though a white collar defendant whose nolo plea is accepted may not be sentenced more leniently than one who is required to plead guilty, such a defendant often persists in his protestations of innocence, maintaining that his plea was entered solely to avoid litigation and save business expense.

The continued adverse consequences to the criminal justice system of the misuse of nolo pleas—diminished respect for law, impairment of law enforcement efforts, and reduced deterrence—warrant re-examination of the government's response to such pleas. Heretofore, it was believed that a posture of non-consent by government attorneys would prevent the acceptance of nolo pleas except in extraordinary cases. Now the forthright expression of opposition is required. Accordingly, as stated in paragraph 1 above, federal prosecutors should henceforth oppose the acceptance of a nolo plea, unless the responsible Assistant Attorney General concludes that the circumstances are so unusual that acceptance of the plea would be in the public interest. Such a determination might be made, for example, in an unusually complex antitrust case if the only alternative to a protracted trial is acceptance of a nolo plea.

2. In any case in which a defendant seeks to enter a plea of nolo contendere, the attorney for the government should make an offer of proof of the facts known to the government to support the conclusion that the defendant has in fact committed the offense charged.

Comment

If a defendant seeks to avoid admitting guilt by offering to plead nolo contendere, the attorney for the government should make an offer of proof of the facts known to the government to support the conclusion that the defendant has in fact committed the offense charged. This should be done even in the rare case in which the government does not oppose the entry of a nolo plea. In addition, as is the case with respect to guilty pleas, the attorney for the government should urge the court to require the defendant to admit publicly the facts underlying the criminal charges. These precautions should minimize the effectiveness of any subsequent efforts by the defendant to portray himself as technically liable perhaps, but not seriously culpable.

3. If a plea of nolo contendere is offered over the government's objection, the attorney for the government should state for the record why acceptance of the plea would not be in the public interest; and should oppose the dismissal of any charges to which the defendant does not plead nolo contendere.

Comment

When a plea of nolo contendere is offered over the government's objection, the prosecutor should take full advantage of Rule 11(b) to state for the record why acceptance of the plea would not be in the public interest. In addition to reciting the facts that could be proved to show the defendant's guilt, the prosecutor should bring to the court's attention whatever arguments exist for rejecting the plea. At the very least, such a forceful presentation should make it clear to the public that the government is unwilling to condone the entry of a special plea that may help the defendant avoid legitimate consequences of his guilt. If the nolo plea is offered to fewer than all charges, the prosecutor should also oppose the dismissal of the remaining charges.

PART F. ENTERING INTO NON-PROSECUTION AGREEMENTS IN RETURN FOR COOPERATION

1. Except as hereafter provided, the attorney for the government may, with supervisory approval, enter into a non-prosecution agreement in exchange for a person's cooperation when, in his judgment, the person's timely cooperation appears to be necessary to the public interest and other means of obtaining the desired cooperation are unavailable or would not be effective.

Comment

In many cases, it may be important to the success of an investigation or prosecution to obtain the testimonial or other cooperation of a person who is himself implicated in the criminal conduct being investigated or prosecuted. However, because of his involvement, the person may refuse to cooperate on the basis of his Fifth Amendment privilege against compulsory self-incrimination. In this situation, there are several possible approaches the prosecutor can take to render the privilege inapplicable or to induce its waiver.

First, if time permits, the person may be charged, tried, and convicted before his cooperation is sought in the investigation or prosecution of others. Having already been convicted himself, the person ordinarily will no longer have a valid privilege to refuse to testify, and will have a strong incentive to reveal the truth in order to induce the sentencing judge to impose a lesser sentence than that which otherwise might be found appropriate.

Second, the person may be willing to cooperate if the charges or potential charges against him are reduced in number or degree in return for his cooperation and his entry of a guilty plea to the remaining charges. Usually such a concession by the government will be all that is necessary, or warranted, to secure the cooperation sought. Since it is certainly desirable as a matter of policy that an offender be required to incur at least some liability for his criminal conduct, government attorneys should attempt to secure this result in all appropriate cases, following the principles set forth in paragraph 3 of Part D to the extent practicable..

The third method for securing the cooperation of a potential defendant is by means of a court order under sections 6001-6003 of Title 18, United States Code. Those statutory provisions govern the

conditions under which uncooperative witnesses may be compelled to testify or provide information notwithstanding their invocation of the privilege against compulsory self-incrimination. In brief, under the so-called "use immunity" provisions of those statutes, the court may order the person to testify or provide other information, but neither his testimony nor the information he provides may be used against him, directly or indirectly, in any criminal case except a prosecution for perjury or other failure to comply with the order. Ordinarily, these "use immunity" provisions should be relied on in cases in which attorneys for the government need to obtain sworn testimony or the production of information before a grand jury or at trial, and in which there is reason to believe that the person will refuse to testify or provide the information on the basis of his privilege against compulsory self-incrimination. (See U.S. Attorney's Manual, 1-11.000).

Finally, there may be cases in which it is impossible or impractical to employ the methods described above to secure the necessary information or other assistance, and in which the person is willing to cooperate only in return for an agreement that he will not be prosecuted at all for what he has done. The provisions set forth hereafter describe the conditions that should be met before such an agreement is made, as well as the procedures recommended for such cases.

It is important to note that these provisions apply only if the case involves an agreement with a person who might otherwise be prosecuted. If the person reasonably is viewed only as a potential witness rather than a potential defendant, and the person is willing to cooperate, there is no need to consult these provisions.

Paragraph 1 of Part F describes three circumstances that should exist before government attorneys enter into non-prosecution agreements in return for cooperation: the unavailability or ineffectiveness of other means of obtaining the desired cooperation; the apparent necessity of the cooperation to the public interest; and the approval of such a course of action by an appropriate supervisory official.

(a) Unavailability or ineffectiveness of other means—As indicated above, non-prosecution agreements are only one of several methods by which the prosecutor can obtain the cooperation of a person whose criminal involvement makes him a potential subject of prosecution. Each of the other methods—seeking cooperation after trial and conviction, bargaining for cooperation as part of a plea agreement, and compelling cooperation under a "use immunity" order—involves prosecuting the person or, at least, leaving open the possibility of prosecuting him on the basis of independently obtained

evidence. Since these outcomes are clearly preferable to permitting an offender to avoid any liability for his conduct, the possible use of an alternative to a non-prosecution agreement should be given serious consideration in the first instance.

Another reason for using an alternative to a non-prosecution agreement to obtain cooperation concerns the practical advantage in terms of the person's credibility if he testifies at trial. If the person already has been convicted, either after trial or upon a guilty plea, for participating in the events about which he testifies, his testimony is apt to be far more credible than if it appears to the trier of fact that he is getting off "scot free". Similarly, if his testimony is compelled by a court order, he cannot properly be portrayed by the defense as a person who has made a "deal" with the government and whose testimony is, therefore, suspect; his testimony will have been forced from him, not bargained for.

In some cases, however, there may be no effective means of obtaining the person's timely cooperation short of entering into a non-prosecution agreement. The person may be unwilling to cooperate fully in return for a reduction of charges, the delay involved in bringing him to trial might prejudice the investigation or prosecution in connection with which his cooperation is sought, and it may be impossible or impractical to rely on the statutory provisions for compulsion of testimony or production of evidence. One example of the latter situation is a case in which the cooperation needed does not consist of testimony under oath or the production of information before a grand jury or at trial. Other examples are cases in which time is critical, as where use of the procedures of 18 U.S.C. 6001-6003 would unreasonably disrupt the presentation of evidence to the grand jury or the expeditious development of an investigation, or where compliance with the statute of limitations or the Speedy Trial Act precludes timely application for a court order.

Only when it appears that the person's timely cooperation cannot be obtained by other means, or cannot be obtained effectively, should the attorney for the government consider entering into a non-prosecution agreement.

(b) Public Interest—If he concludes that a non-prosecution agreement would be the only effective method for obtaining cooperation, the attorney for the government should consider whether, balancing the cost of foregoing prosecution against the potential benefit of the person's cooperation, the cooperation sought appears necessary to the public interest. This "public interest" determination is one of the conditions precedent to an application

under 18 U.S.C. 6003 for a court order compelling testimony. Like a compulsion order, a non-prosecution agreement limits the government's ability to undertake a subsequent prosecution of the witness. Accordingly, the same "public interest" test should be applied in this situation as well. Some of the considerations that may be relevant to the application of this test are set forth in paragraph 2 below.

(c) Supervisory approval—Finally the prosecutor should secure supervisory approval before entering into a non-prosecution agreement. Prosecutors working under the direction of a United States Attorney must seek the approval of the United States Attorney or a supervisory Assistant United States Attorney. Departmental attorneys not supervised by a United States Attorney should obtain the approval of the appropriate Assistant Attorney General or his designee, and should notify the United States Attorney or Attorneys concerned. The requirement of approval by a superior is designed to provide review by an attorney experienced in such matters, and to ensure uniformity of policy and practice with respect to such agreements. This section should be read in conjunction with paragraph 4 below concerning particular types of cases in which an Assistant Attorney General or his designee must concur in or approve an agreement not to prosecute in return for cooperation.

2. In determining whether a person's cooperation may be necessary to the public interest, the attorney for the government, and those whose approval is necessary, should weigh all relevant considerations, including:

- **(a) the importance of the investigation or prosecution to an effective program of law enforcement;**
- **(b) the value of the person's cooperation to the investigation or prosecution; and**
- **(c) the person's relative culpability in connection with the offense or offenses being investigated or prosecuted and his history with respect to criminal activity.**

Comment

This paragraph is intended to assist federal prosecutors, and those whose approval they must secure, in deciding whether a person's cooperation appears to be necessary to the public interest. The considerations listed here are not intended to be all-inclusive or to require a particular decision in a particular case. Rather, they are

meant to focus the decision-maker's attention on factors that probably will be controlling in the majority of cases.

(a) Importance of case—Since the primary function of a federal prosecutor is to enforce the criminal law, he should not routinely or indiscriminately enter into non-prosecution agreements, which are, in essence, agreements not to enforce the law under particular conditions. Rather, he should reserve the use of such agreements for cases in which the cooperation sought concerns the commission of a serious offense or in which successful prosecution is otherwise important in achieving effective enforcement of the criminal laws. The relative importance or unimportance of the contemplated case is therefore a significant threshold consideration.

(b) Value of cooperation—An agreement not to prosecute in return for a person's cooperation binds the government to the extent that the person carries out his part of the bargain. *United States* v. *Carter*, 454 F.2d 426 (4th Cir. 1972); cf; *Santobello* v. *New York*, 404 U.S. 257 (1971). Since such an agreement forecloses enforcement of the criminal law against a person who otherwise may be liable to prosecution, it should not be entered into without a clear understanding of the nature of the quid pro quo and a careful assessment of its probable value to the government. In order to be in a position adequately to assess the potential value of a person's cooperation, the prosecutor should insist on an "offer of proof" or its equivalent from the person or his attorney. The prosecutor can then weigh the offer in terms of the investigation or prosecution in connection with which the cooperation is sought. In doing so, he should consider such questions as whether the cooperation will in fact be forthcoming, whether the testimony or other information provided will be credible, whether it can be corroborated by other evidence, whether it will materially assist the investigation or prosecution, and whether substantially the same benefit can be obtained from someone else without an agreement not to prosecute. After assessing all of these factors, together with any others that may be relevant, the prosecutor can judge the strength of his case with and without the person's cooperation, and determine whether it may be in the public interest to agree to forego prosecution under the circumstances.

(c) Relative culpability and criminal history—In determining whether it may be necessary to the public interest to agree to forego prosecution of a person who may have violated the law, in return for that person's cooperation, it is also important to consider the degree of his apparent culpability relative to others who are subjects of the

investigation or prosecution, as well as his history of criminal involvement. Of course, it would not be in the public interest to forego prosecution of a high-ranking member of a criminal enterprise in exchange for his cooperation against one of his subordinates, nor would the public interest be served by bargaining away the opportunity to prosecute a person with a long history of serious criminal involvement in order to obtain the conviction of someone else on less serious charges. These are matters with regard to which the attorney for the government may find it helpful to consult with the investigating agency or with other prosecuting authorities who may have an interest in the person or his associates.

It is also important to consider whether the person has a background of cooperation with law enforcement officials, either as a witness or an informant, and whether he has previously been the subject of a compulsion order under 18 U.S.C. 6001-6003 or has escaped prosecution by virtue of an agreement not to prosecute. The latter information may be available by telephone from the Witness Records Unit of the Criminal Division.

3. In entering into a non-prosecution agreement, the attorney for the government should, if practicable, explicitly limit the scope of the government's commitment to:

(a) non-prosecution based directly or indirectly on the testimony or other information provided; or

(b) non-prosecution within his district with respect to a pending charge or to a specific offense then known to have been committed by the person.

Comment

The attorney for the government should exercise extreme caution to ensure that his non-prosecution agreement does not confer "blanket" immunity on the witness. To this end, he should, in the first instance, attempt to limit his agreement to non-prosecution based on the testimony or information provided. Such an "informal use immunity" agreement has two advantages over an agreement not to prosecute the person in connection with a particular transaction: first, it preserves the prosecutor's option to prosecute on the basis of independently obtained evidence if it later appears that the person's criminal involvement was more serious than it originally appeared to be; second, it encourages the witness to be as forthright as possible

since the more he reveals the more protection he will have against a future prosecution. To further encourage full disclosure by the witness, it should be made clear in the agreement that the government's forbearance from prosecution is conditioned upon the witness's testimony or production of information being complete and truthful, and that failure to testify truthfully may result in a perjury prosecution.

Even if it is not practicable to obtain the desired cooperation pursuant to an "informal use immunity" agreement, the attorney for the government should attempt to limit the scope of the agreement in terms of the testimony and transactions covered, bearing in mind the possible effect of his agreement on prosecutions in other districts. In *United States* v. *Carter*, 454 F.2d 426 (4th Cir. 1972), the court held that a conviction in the Eastern District of Virginia on charges of forgery and conspiracy involving stolen Treasury checks must be vacated and the case remanded for an evidentiary hearing to determine whether, in a prior related investigation and prosecution in the District of Columbia involving stolen government checks, a promise had been made to the defendant by an Assistant United States Attorney for the District of Columbia that he would not be prosecuted in that district or elsewhere for any related offense if he would plead guilty to one misdemeanor count and cooperate with federal investigators in naming his accomplices. The court indicated that if the facts were as the defendant contended, then the conviction in the Virginia district would have to be reversed and the indictment dismissed. No issue of double jeopardy was involved. The effect of this decision is that a non-prosecution agreement by a government attorney in one district may be binding in other judicial districts even though the United States Attorneys in the other districts are not privy to, or aware of, the agreement.

In view of the *Carter* decision, it is important that non-prosecution agreements be drawn in terms that will not bind other federal prosecutors without their consent. Thus, if practicable, the attorney for the government should explicitly limit the scope of his agreement to non-prosecution within his district. If such a limitation is not practicable and it can reasonably be anticipated that the agreement may affect prosecution of the person in other districts, the attorney for the government contemplating such an agreement should communicate the relevant facts to the Assistant Attorney General with supervisory responsibility for the subject matter.

Finally, the attorney for the government should make it clear that his agreement relates only to non-prosecution and that he has no

independent authority to promise that the witness will be admitted into the Department's Witness Security program or that the Marshal's Service will provide any benefits to the witness in exchange for his cooperation. This does not mean, of course, that the prosecutor should not cooperate in making arrangements with the Marshal's Service necessary for the protection of the witness in appropriate cases. The procedures to be followed in such cases are set forth in Chapter 9-21 of the U.S. Attorney's Manual.

4. The attorney for the government should not enter into a non-prosecution agreement in exchange for a person's cooperation without first obtaining the approval of the Assistant Attorney General with supervisory responsibility over the subject matter, or his designee, when:

(a) prior consultation or approval would be required by a statute or by Departmental policy for a declination of prosecution or dismissal of a charge with regard to which the agreement is to be made; or

(b) the person is:

(i) a high-level federal, state, or local official;

(ii) an official or agent of a federal investigative or law enforcement agency; or

(iii) a person who otherwise is, or is likely to become, of major public interest.

Comment

Paragraph 4 sets forth special cases that require approval of non-prosecution agreements by the responsible Assistant Attorney General or his designee. Subparagraph (a) covers cases in which existing statutory provisions and departmental policies require that, with respect to certain types of offenses, the Attorney General or an Assistant Attorney General be consulted or give his approval before prosecution is declined or charges are dismissed. See U.S. Attorney's Manual, 6-2.410, 6-2.420 (tax offenses); 9-2.111 (bankruptcy frauds); 9-2.132, 9-2.146 (internal security offenses); and 9-2.158(5) (air piracy). An agreement not to prosecute resembles a declination of prosecution or the dismissal of a charge in that the end result in each case is similar: a person who has engaged in criminal activity is not prosecuted or is not prosecuted fully for his offense. Accordingly, attorneys for the government should obtain the approval of

the appropriate Assistant Attorney General, or his designee, before agreeing not to prosecute in any case in which consultation or approval would be required for a declination of prosecution or dismissal of a charge.

Subparagraph (b) sets forth other situations in which the attorney for the government should obtain the approval of an Assistant Attorney General, or his designee, of a proposed agreement not to prosecute in exchange for cooperation. Generally speaking, the situations described will be cases of an exceptional or extremely sensitive nature, or cases involving individuals or matters of major public interest. In a case covered by this provision that appears to be of an especially sensitive nature, the Assistant Attorney General should, in turn, consider whether it would be appropriate to notify the Attorney General or the Deputy Attorney General.

5. In a case in which a non-prosecution agreement is reached in return for a person's cooperation, the attorney for the government should ensure that the case file contains a memorandum or other written record setting forth the terms of the agreement. The memorandum or record should be signed or initialed by the person with whom the agreement is made or his attorney, and a copy should be forwarded to the Witness Records Unit of the Criminal Division.

Comment

The provisions of this section are intended to serve two purposes. First, it is important to have a written record in the event that questions arise concerning the nature or scope of the agreement. Such questions are certain to arise during cross-examination of the witness, particularly if the existence of the agreement has been disclosed to defense counsel pursuant to the requirements of *Brady* v. *Maryland*, 373 U.S. 83 (1965) and *Giglio* v. *United States*, 405 U.S. 150 (1972). The exact terms of the agreement may also become relevant if the government attempts to prosecute the witness for some offense in the future. Second, such a record will facilitate identification by government attorneys (in the course of weighing future agreements not to prosecute, plea agreements, pre-trial diversion, and other discretionary actions) of persons whom the government has agreed not to prosecute.

The principal requirements of the written record are that it be sufficiently detailed that it leaves no doubt as to the obligations of the parties to the agreement, and that it be signed or initialed by the

person with whom the agreement is made and his attorney, or at least by one of them.

A copy of each non-prosecution agreement should be sent to the Criminal Division's Witness Records Unit. The Witness Records Unit will then be able to identify persons who have been the subject of such agreements, as well as to provide federal prosecutors, on request, with copies of the types of agreements used in the past.

PART G. PARTICIPATING IN SENTENCING

1. During the sentencing phase of a federal criminal case, and the initial parole hearing phase, the attorney for the government should assist the sentencing court and the Parole Commission by:

(a) attempting to ensure that the relevant facts are brought to their attention fully and accurately; and
(b) making sentencing and parole release recommendations in appropriate cases.

Comment

Sentencing in federal criminal cases is primarily the function and responsibility of the court. This does not mean, however, that the prosecutor's responsibility in connection with a criminal case ceases upon the return of a guilty verdict or the entry of a guilty plea; to the contrary, the attorney for the government has a continuing obligation to assist the court in its determination of the sentence to be imposed and to aid the Parole Commission in its determination of a release date for a prisoner within its jurisdiction. In discharging these duties, the attorney for the government should, as provided in paragraphs 2 and 6 below, endeavor to ensure the accuracy and completeness of the information upon which the sentencing and release decisions will be based. In addition, as provided in paragraphs 3 and 6 below, in appropriate cases the prosecutor should offer recommendations with respect to the sentence to be imposed and with respect to the granting of parole.

2. In order to ensure that the relevant facts are brought to the attention of the sentencing court fully and accurately, the attorney for the government should:

(a) cooperate with the Probation Service in its preparation of the presentence investigation report;
(b) review material in the presentence investigation report that is disclosed by the court to the defendant or his attorney;
(c) make a factual presentation to the court when:
(i) sentence is imposed without a presentence investigation and report;

(ii) it is necessary to supplement or correct the presentence investigation report;
(iii) it is necessary in light of the defense presentation to the court; or
(iv) it is requested by the court; and

(d) be prepared to substantiate significant factual allegations disputed by the defense.

Comment

(a) Cooperation with Probation Service–To begin with, if sentence is to be imposed following a presentence investigation and report, the prosecutor should cooperate with the Probation Service in its preparation of the presentence report for the court. Under Rule 32(c)(2), F.R.Cr.P., the report should contain "any criminal record of the defendant and such information about his characteristics, his financial condition and the circumstances affecting his behavior as may be helpful in imposing sentence or in granting probation or in the correctional treatment of the defendant, and such other information as may be required by the court." While much of this information may be available to the Probation Service from sources other than the government, some of it may be obtainable only from prosecutorial or investigative files to which probation officers do not have access. For this reason, it is important that the attorney for the government respond promptly to Probation Service requests by providing the requested information whenever possible. The attorney for the government should also recognize the occasional desirability of volunteering information to the Probation Service; especially in a district where the Probation Office is overburdened, this may be the best way to ensure that important facts about the defendant come to its attention. In addition, the prosecutor should be particularly alert to the need to volunteer relevant information to the Probation Service in complex cases, since it cannot be expected that probation officers will obtain a full understanding of the facts of such cases simply by questioning the prosecutor or examining his files.

The relevant information can be communicated orally, or by making portions of the case file available to the probation officer, or by submitting a sentencing memorandum or other written presentation for inclusion in the presentence report. Whatever method he uses, however, the attorney for the government should bear in mind that since portions of the report may be shown to the defendant or defense counsel, care should be taken to prevent disclosures that might be harmful to law enforcement interests.

(b) Review of presentence report—Rule 32(c)(3)(A), F.R.Cr.P., requires the court, upon request, to permit the defendant or his counsel to read and comment upon such portions of the presentence report as do not reveal diagnostic opinion, confidential sources of information, or information which if disclosed might result in harm to the defendant or others. Pursuant to section (c)(3)(C) of the Rule, any material disclosed to the defendant or his counsel must also be disclosed to the attorney for the government. Consequently, if the defense inspects portions of the presentence report, the attorney for the government should not forego his opportunity to examine the same material. Such examination may reveal factual inaccuracies in, or omissions from, the report that should be corrected. And even if no inaccuracies or omissions appear, such an examination will enable the attorney for the government to assess the validity of any comments made by the defense and, under Rule 32(a)(1), F.R.Cr.P., to respond appropriately.

(c) Factual presentation to court—In addition to assisting the Probation Service with its presentence investigation and reviewing the portions of the presentence report disclosed to the defense, the attorney for the government may find it necessary in some cases to make a factual presentation directly to the court. Such a presentation is authorized by Rule 32(a)(1), F.R.Cr.P., which permits the defendant and his counsel to address the court and states that "[t]he attorney for the government shall have an equivalent opportunity to speak to the court." It has been suggested that failure to permit the government to address the court after the defense presentation may necessitate a remand for resentencing in order to afford the government its opportunity to speak to the court. See *United States* v. *Jackson*, 563 F.2d 1145, 1148 (4th Cir. 1977).

The need to address the court concerning the facts relevant to sentencing may arise in four situations: (1) when sentence is imposed without a presentence investigation and report; (2) when necessary to correct or supplement the presentence report; (3) when necessary in light of the defense presentation to the court; and (4) when requested by the court.

(i) Furnishing information in absence of presentence report—Rule 32(c)(1), F.R.Cr.P., authorizes the imposition of sentence without a presentence investigation and report, if the defendant consents or if the court finds that the record contains sufficient information to permit the meaningful exercise of sentencing discretion. Imposition of sentence pursuant to this provision usually occurs when the defendant has been found guilty by the court after a non-jury trial, when the case is relatively simple and straightforward,

when the defendant has taken the stand and has been cross-examined, and when it is the court's intention not to impose a prison sentence. In such cases, and any others in which sentence is to be imposed without benefit of a presentence investigation and report (such as where a report on the defendant has recently been prepared in connection with another case), it may be particularly important that the attorney for the government take advantage of the opportunity afforded by Rule 32(a)(1) to address the court, since there will be no later opportunity to correct or supplement the record. Moreover, even if government counsel is satisfied that all facts relevant to the sentencing decision are already before the court, he may wish to make a factual presentation for the record that makes clear the government's view of the defendant, the offense, or both.

(ii) Correcting or supplementing presentence report—As noted above, whenever portions of the presentence report are shown to the defense, the attorney for the government should take advantage of his opportunity to examine the same material. If he discovers any significant inaccuracies or omissions, he should bring them to the court's attention at the sentencing hearing, together with the correct or complete information.

(iii) Responding to defense assertions—Having read the presentence report prior to the sentencing hearing, the defendant or his attorney may dispute specific factual statements made therein. More likely, without directly challenging the accuracy of the report, the defense presentation at the hearing may omit reference to the derogatory information in the report, while stressing any favorable information and drawing all inferences beneficial to the defendant. Some degree of selectivity in the defense presentation is probably to be expected, and will be recognized by the court. There may be instances, however, in which the defense presentation, if not challenged, will leave the court with a view of the defendant or of the offense significantly different from that appearing in the presentence report. If this appears to be a possibility, the attorney for the government should respond by correcting factual errors in the defense presentation, pointing out facts and inferences ignored by the defense, and generally reinforcing the objective view of the defendant and his offense expressed in the presentence report.

(iv) Responding to court's requests—There may be occasions when the court will request specific information from government counsel at the sentencing hearing (as opposed to asking generally whether the government wishes to be heard). When this occurs, the attorney for the government should, of course, furnish the requested

information if it is readily available and no prejudice to law enforcement interests is likely to result from its disclosure.

(d) Substantiation of disputed facts—In addition to providing the court with relevant factual material at the sentencing hearing when necessary, the attorney for the government should be prepared to substantiate significant factual allegations disputed by the defense. This can be done by making the source of the information available for cross-examination or, if there is good cause for nondisclosure of his identity, by presenting the information as hearsay and providing other guarantees of its reliability, such as corroborating testimony by others. See *United States* v. *Fatico*, 579 F.2d 707, 713 (2d Cir. 1978).

3. The attorney for the government should make a recommendation with respect to the sentence to be imposed when:

(a) the terms of a plea agreement require him to do so; or
(b) the public interest warrants an expression of the government's view concerning the appropriate sentence.

Comment

Paragraph 3 describes two situations in which an attorney for the government should make a recommendation with respect to the sentence to be imposed: when the terms of a plea agreement require him to do so, and when the public interest warrants an expression of the government's view concerning the appropriate sentence. The phrase "make a recommendation with respect to the sentence to be imposed" is intended to cover tacit recommendations (i.e., agreeing to the defendant's request or not opposing the defendant's request) as well as explicit recommendations for a specific type of sentence (e.g., probation, a fine, incarceration); for imposition of sentence under a specific statute (e.g., the Youth Corrections Act, 18 U.S.C. 5005 *et seq.*, or the Narcotic Addict Rehabilitation Act, 18 U.S.C. 4251 *et seq.*); for a specific condition of probation, a specific fine, or a specific term of imprisonment; and for concurrent or consecutive sentences.

The attorney for the government should be guided by the circumstances of the case and the wishes of the court concerning the manner and form in which sentencing recommendations are made. If the government's position with respect to the sentence to be imposed is related to a plea agreement with the defendant, that position must be made known to the court at the time the plea is entered. In other

situations, the government's position might be conveyed to the probation officer, orally or in writing, during the presentence investigation; to the court in the form of a sentencing memorandum filed in advance of the sentencing hearing; or to the court orally at the time of the hearing.

(a) Recommendations required by plea agreement—Rule 11(e)(1), F.R.Cr.P., authorizing plea negotiations, implicitly permits the prosecutor, pursuant to a plea agreement, to make a sentence recommendation, agree not to oppose the defendant's request for a specific sentence, or agree that a specific sentence is the appropriate disposition of the case. If the prosecutor has entered into a plea agreement calling for the government to take a certain position with respect to the sentence to be imposed, and the defendant has entered a guilty plea in accordance with the terms of the agreement, the prosecutor must perform his part of the bargain or risk having the plea invalidated. See *Machibroda* v. *United States*, 368 U.S. 487, 493 (1962); *Santobello* v. *United States*, 404 U.S. 257, 262 (1971).

(b) Recommendations warranted by the public interest—From time to time, unusual cases may arise in which the public interest warrants an expression of the government's view concerning the appropriate sentence, irrespective of the absence of a plea agreement. In some such cases, the court may invite or request a recommendation by the prosecutor, while in others the court may not wish to have a sentencing recommendation from the government. In either event, whether the public interest requires an expression of the government's view concerning the appropriate sentence in a particular case is a matter to be determined with care, preferably after consultation between the prosecutor handling the case and his supervisor—the United States Attorney or a supervisory Assistant United States Attorney, or the responsible Assistant Attorney General or his designee.

In considering the public interest question, the prosecutor should bear in mind the attitude of the court towards sentencing recommendations by the government, and should weigh the desirability of maintaining a clear separation of judicial and prosecutorial responsibilities against the likely consequences of making no recommendation. If he has good reason to anticipate the imposition of a sanction that would be unfair to the defendant or inadequate in terms of society's needs, he may conclude that it would be in the public interest to attempt to avert such an outcome by offering a sentencing recommendation. For example, if the case is one in which the imposition of a term of imprisonment plainly would be inappropriate, and the court has requested the government's view, the

prosecutor should not hesitate to recommend or agree to the imposition of probation. On the other hand, if the responsible government attorney believes that a term of imprisonment is plainly warranted and that, under all the circumstances the public interest would be served by his making a recommendation to that effect, he should make such a recommendation even though the court has not invited or requested him to do so. Recognizing, however, that the primary responsibility for sentencing lies with the judiciary, government attorneys should avoid routinely taking positions with respect to sentencing, reserving their recommendations instead for those unusual cases in which the public interest warrants an expression of the government's view.

In connection with sentencing recommendations, the prosecutor should also bear in mind the potential value in some cases of the imposition of innovative conditions of probation. For example, in a case in which a sentencing recommendation would be appropriate and in which it can be anticipated that a term of probation will be imposed, the responsible government attorney may conclude that it would be appropriate to recommend, as a specific condition of probation, that the defendant make full restitution for actual damage or loss caused by the offense of which he was convicted, that he participate in community service activities, or that he desist from engaging in a particular type of business.

4. In determining what recommendation to make with respect to the sentence to be imposed, the attorney for the government should weigh all relevant considerations, including:

- **(a) the seriousness of the defendant's conduct;**
- **(b) the defendant's background and personal circumstances;**
- **(c) the purpose or purposes of sentencing applicable to the case; and**
- **(d) the extent to which a particular sentence would serve such purpose or purposes.**

Comment

When a sentencing recommendation is to be made by the government—whether as part of a plea agreement or as otherwise warranted in the public interest—the recommendation should reflect the best judgment of the prosecutor as to what would constitute an appropriate sentence under all the circumstances of the case. In making this judgment, the attorney for the government should

consider any factors that he believes to be relevant, with particular emphasis on the four considerations specifically set forth in paragraph 4: the seriousness of the defendant's conduct; the defendant's background and personal circumstances; the purpose or purposes of sentencing applicable to the particular case; and the extent to which a particular sentence would serve such purpose or purposes. In this connection, the prosecutor should bear in mind that, by offering a recommendation, he shares with the court the responsibility for avoiding unwarranted sentence disparities among defendants with similar backgrounds who have been found guilty of similar conduct.

(a) **Seriousness of defendant's conduct**—The seriousness of the defendant's conduct should be assessed not only with reference to the type of crime committed and the penalty provided for the offense in the abstract, but also in terms of factors peculiar to the commission of the offense in the particular case. Among such factors might be circumstances attending the commission of the offense that aggravate or mitigate its seriousness, such as: the age of the victim; the number of victims; the defendant's motivation and culpability; the nature and degree of harm caused or threatened by the offense, including the reparability or irreparability of any damage caused; the extent to which the defendant profited from the offense; the degree to which the offense involved a breach of special trust, particularly public trust; the complicity of the victim; and public concern generated by the offense.

(b) **Defendant's background and personal circumstances**—In formulating a sentence recommendation, the attorney for the government should always consider the defendant's criminal history, the degree of his dependence on criminal activity for a livelihood, and his timely cooperation in the investigation or prosecution of others. Beyond these factors, 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.

(c) **Applicable sentencing purposes**—The attorney for the government should consider the seriousness of the defendant's conduct, and his background and personal circumstances, in the light of the four purposes or objectives of the imposition of criminal sanctions: (1) to deter the defendant and others from committing crime; (2) to protect the public from further offenses by the defendant; (3) to assure just punishment for the defendant's conduct; and (4) to promote the correction and rehabilitation of the defendant. The

attorney for the government should recognize that not all of these objectives may be relevant in every case and that, for a particular offense committed by a particular offender, one of the purposes, or a combination of purposes, may be of overriding importance. For example, in the case of a young first offender who commits a non-violent offense, the primary or sole purpose of sentencing might be rehabilitation. On the other hand, the primary purpose of sentencing a repeat violent offender might be to protect the public, and the perpetrator of a massive fraud might be sentenced primarily to deter others from engaging in similar conduct.

(d) Relationship between sentence and purpose of sentencing– Having in mind the purpose or purposes sought to be achieved by sentencing in a particular case, the attorney for the government should consider the available sentencing alternatives in terms of the extent to which they are likely to serve such purpose or purposes. For example, if the prosecutor believes that the primary objective of the sentence should be to encourage the rehabilitation of the defendant, he may conclude that a term of imprisonment would not be appropriate. If, on the other hand, the primary purpose of the sentence is to incapacitate the defendant from committing additional crimes, then a substantial term of imprisonment might be warranted. And, in a case involving neither the need for rehabilitation nor for protection of the public from further criminal acts by the defendant, the objectives of deterrence and just punishment might best be achieved by a substantial fine, with or without a short period of imprisonment.

5. The attorney for the government should disclose to defense counsel, reasonably in advance of the sentencing hearing, any factual material not reflected in the presentence investigation report that he intends to bring to the attention of the court.

Comment

Due process requires that the sentence in a criminal case be based on accurate information. See, e.g., *Moore* v. *United States*, 571 F.2d 179, 182-184 (3rd Cir. 1978). Accordingly, the defense should have access to all material relied upon by the sentencing judge, including memoranda from the prosecution (to the extent that considerations of informant safety permit), as well as sufficient time to review such material and an opportunity to present any refutation that can be mustered. See, e.g., *United States* v. *Perri*, 513 F.2d 572, 575 (9th Cir. 1975); *United States* v. *Rosner*, 485 F.2d 1213, 1229-30 (2d Cir. 1973), *cert. denied*, 417 U.S. 950 (1974); *United States* v. *Robin*, 545 F.2d 775 (2d Cir. 1976). Paragraph 5 is intended to facilitate satisfaction of these requirements by providing the defendant with notice of information not contained in the presentence report that the government plans to bring to the attention of the sentencing court.

6. If the sentence imposed includes a term of confinement that subjects the defendant to the jurisdiction of the Parole Commission, the attorney for the government should:

- **(a) forward to the Commission information necessary to ensure the proper application of the Commission's parole guidelines; and**
- **(b) make a recommendation with respect to parole if required to do so by the terms of a plea agreement, or if there exist particularly aggravating or mitigating circumstances that justify a period of confinement different from that recommended in the parole guidelines.**

Comment

The Parole Commission has authority to set release dates for federal prisoners who have been sentenced to a term of imprisonment for more than one year or who have been incarcerated pursuant to the Narcotic Addict Rehabilitation Act (18 U.S.C. 4251 *et. seq.*) or the Youth Corrections Act (18 U.S.C. 5005 *et seq.*). The Commission's determination in a particular case is made with reference to parole guidelines that "indicate the customary range of time to be served before release for various combinations of offense (severity) and offender (parole prognosis) characteristics." 28 C.F.R. 2.20(b).

The information necessary to determine a prisoner's offense and offender characteristics may be available to the Commission through the presentence report. In some cases there may be no presentence report, however. In other cases the report may not reflect all the facts about the offender or the offense that the prosecutor believes are necessary to the informed application of the Parole Commission's guidelines. For example, the report may not contain an adequate description of the defendant's cooperation with the government, or it may omit information relating to charges that have been or will be dropped as part of a plea agreement. There may also be cases in which the attorney for the government does not have

access to the presentence report and, consequently, cannot judge its adequacy in terms of the Parole Commission's requirements. Moreover, the prosecutor should bear in mind that the Parole Commission will not know what took place at the sentencing hearing unless one of the parties provides it with a transcript of the proceedings. Finally, if the defendant is released on bail pending appeal, the attorney for the government should bear in mind the possibility that the defendant's post-sentence conduct may be pertinent to the Parole Commission's determination.

To ensure that the Parole Commission has all the information it needs, the attorney for the government should forward to the Chief Executive Officer of the institution to which the defendant will be committed U.S.A. Form 792 ("Report on Convicted Prisoner"), setting forth such information as he believes is necessary to ensure the proper application of the parole guidelines (see U.S. Attorney's Manual, 9-34.220, 9-34.221). The Form 792 submission should be made promptly after the sentencing hearing, and may be supplemented thereafter if necessary, since the Commission's initial parole determination ordinarily will be made within a short time after the defendant's incarceration.

In supplying information to the Parole Commission, the prosecutor should bear in mind that the Commission, like the sentencing judge, is permitted to consider unadjudicated charges in assessing the seriousness of an individual's criminal behavior. *Billiteri* v. *United States Board of Parole*, 541 F.2d 938, 944-945 (2d Cir. 1976). Accordingly, the information supplied need not be related solely to the offense or offenses for which the person was convicted, but should reflect the full range and seriousness of the conduct that could have been charged and proved. On the other hand, Commission regulations require that the information it considers meet "a threshold test of reliability." 44 Fed. Reg. 12692-93 (March 8, 1979). Thus, the same standard should be applied to Form 792 submissions as is applied to factual presentations at judicial sentencing hearings and, with respect to contested facts, there should be included a summary of corroborating information sufficient to overcome a denial by the prisoner.

Recommendations by the prosecutor concerning parole should be made when, as a part of a plea agreement, the prosecutor has agreed to make a recommendation, or when the prosecutor concludes, preferably after consultation with his supervisor, that the period of confinement recommended in the parole guidelines would be inappropriate in light of particularly aggravating or mitigating circumstances of the case. In the latter situation, the recommendation should be accompanied by a statement of the aggravating or mitigating circumstances and, if the severity rating of the criminal conduct involved is at issue, should specify the severity rating that the prosecutor believes to be applicable.

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

July 28, 2003

TO: All Federal Prosecutors

FROM: John Ashcroft
Attorney General

SUBJECT: Department Policies and Procedures Concerning Sentencing Recommendations and Sentencing Appeals

I. INTRODUCTION

Earlier this year, the President signed into law the PROTECT Act, a landmark piece of legislation that comprehensively strengthens the Government's ability to prevent, investigate, prosecute, and punish violent crimes committed against children. Pub. L. No. 108-21, 117 Stat. 650 (2003). The PROTECT Act also contains an important amendment, sponsored by Representative Feeney and supported by the Department of Justice, that enacts several key reforms designed to ensure that the Sentencing Guidelines would be more faithfully and consistently enforced, thereby achieving the consistency and predictability that Congress sought in the Sentencing Reform Act (which established the Guidelines System). *See id.*, § 401. Specifically, the legislation includes a number of reforms designed to reduce the number of "downward departures" from the Sentencing Guidelines, and it further instructs the Sentencing Commission to adopt additional measures "to ensure that the incidence of downward departures [is] substantially reduced." *Id.*, § 401(m)(2)(A). In our constitutional democracy, these fundamental policy choices as to the range of permissible sentences are ultimately for the Congress to make. As Chief Justice Rehnquist recently remarked:

> It is well settled that not only the definition of what acts shall be criminal, but the prescription of what sentence or range of sentences shall be imposed on those found guilty of such acts, is a legislative function – in the federal system, it is for Congress. Congress has recently indicated rather strongly, by the Feeney Amendment, that it believes there have been too many downward departures from the Sentencing Guidelines. It has taken steps to reduce that number. Such a decision is for Congress, just as the enactment of the Sentencing Guidelines nearly twenty years ago was.

Remarks of the Chief Justice, Federal Judges Association Board of Directors Meeting (May 5, 2003), available at <http://www.supremecourtus.gov/publicinfo/speeches/sp_05-05-03.html>.

Because it is a party to every federal sentencing proceeding, the Justice Department has a duty to ensure that its future actions fully support the important reforms enacted by the PROTECT Act. Few things that the Department does are more important than the hard work tirelessly performed by its prosecutors, and the Department is presently undertaking a careful review of its overall policies in this vital area. However, in light of the recent passage of the PROTECT Act and its focus on sentencing practices, it is appropriate at this time to provide clear guidance that specifically addresses the Department's policies with respect to sentencing recommendations and sentencing appeals.

II. DEPARTMENT POLICIES AND PROCEDURES CONCERNING SENTENCING RECOMMENDATIONS AND APPEALS

The Sentencing Reform Act's key purposes were to "provide certainty and fairness in meeting the purposes of sentencing," and to "avoid[] unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct." 28 U.S.C. § 991(b)(1)(B). The recent passage of the PROTECT Act strongly reaffirms Congress' commitment to these goals. In order to fulfill these purposes, all Department attorneys must adhere to the following policies and procedures with respect to sentencing recommendations, sentencing hearings, and sentencing appeals.

A. *The Department's actions with respect to sentencings must in all respects be supported by the facts and the law.*

Department of Justice policy requires honesty in sentencing, both with respect to the facts and the law. Accordingly, prosecutors' actions and recommendations with respect to sentencings must in all respects be consistent with the relevant facts and the applicable law. Several requirements follow from this general principle.

1. *The sentencing recommendations of the Department must be supported by the facts and the law.*

Department attorneys must ensure that the Sentencing Guidelines are applied as Congress and the Sentencing Commission intended them to be applied, regardless of whether an individual prosecutor agrees with that policy decision. Any sentencing recommendation made by the United States in a particular case must honestly reflect the totality and seriousness of the defendant's conduct and must be fully consistent with the Guidelines and applicable statutes and with the readily provable facts about the defendant's history and conduct.

Accordingly, if readily provable facts are relevant to calculations under the Sentencing Guidelines, the prosecutor must disclose them to the court, including the Probation Office. Thus, for example, a prosecutor may not fail to bring readily provable facts about relevant conduct to the court's attention (*e.g.*, additional drug amounts or fraud losses). Concealment of such facts from the court imperils a cardinal principle of the Guidelines: that sentences are in large measure based upon the "real offense" instead of the "charge offense." *See* U.S.S.G. Ch. 1, Pt. A, ¶ 4(a).

Similarly, in negotiating plea agreements that address sentencing issues, federal prosecutors may not "fact bargain," or be party to any plea agreement that results in the sentencing court having less than a full understanding of all readily provable facts relevant to sentencing. Nor may prosecutors reach agreements about Sentencing Guidelines factors that are not fully consistent with the readily provable facts. For example, a prosecutor may not agree to a reduction for role in the offense that is not consistent with the readily provable facts about a defendant's actual role. Likewise, if the United States agrees to make a non-binding recommendation for a particular sentence under Rule 11(c)(1)(B), or if the agreement is for a specific sentence under Rule 11(c)(1)(C), the agreement must not vitiate relevant provisions of the Sentencing Guidelines.

Prosecutors should be thoroughly familiar with how the relevant statutes and Guidelines apply to their cases. In particular, prosecutors must not recommend downward departures unless they are fully consistent with the Sentencing Reform Act, the PROTECT Act, and the applicable provisions of the Guidelines Manual. Section 5K1.1 of the Sentencing Guidelines specifically provides that, upon motion by the Government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person, a court may depart from the guideline range, and § 401(m)(2)(B) of the PROTECT Act specifically recognizes the importance of downward departures pursuant to authorized "early disposition" or "fast-track" programs. Other than these two situations, however, Government acquiescence in a downward departure should be, as the Guidelines Manual itself suggests, a "rare occurenc[e]." *See* U.S.S.G., Ch. 1, Pt. A, ¶ (4)(b).

2. *Department attorneys must oppose sentencing adjustments that are not supported by the facts and the law.*

Department attorneys also have an affirmative obligation to *oppose* any sentencing adjustments, including downward departures, that are not supported by the facts and the law. This obligation extends to all such improper adjustments, whether requested by the defendant or made *sua sponte* by the court. In particular, downward departures or other adjustments that would violate the specific restrictions of the PROTECT Act should be vigorously opposed.

In any case in which a sentencing adjustment, including a downward departure, is not supported by the facts and the law, Department attorneys must take all steps necessary to ensure that the district court record is sufficient to permit the possibility of an appeal with respect to the improper adjustment. Moreover, prosecutors must not enter into plea agreements that waive the Government's right to object to adjustments that are not supported by the facts and the law. For example, a prosecutor may not enter into a plea agreement that binds the Government to "stand silent" with respect to a defendant's request for a particular adjustment, unless the prosecutor determines in good faith that the adjustment is supported by the facts and the law.

B. *Reporting and appeal of adverse sentencing decisions.*

In the sentencing reform provisions of the PROTECT Act, Congress reaffirmed its commitment to the principles underlying the Sentencing Reform Act of 1984, including the goal of reducing unwarranted disparities in sentencing among similarly situated defendants. To promote uniformity in sentencing across various districts, Congress provided for *de novo* appellate review of decisions to depart from the Sentencing Guidelines, and restricted departure authority in several additional respects. The Department of Justice has a responsibility to litigate vigorously in the district courts, and to pursue appeals in appropriate cases, so as to ensure that the policies of the Sentencing Reform Act and the PROTECT Act are faithfully implemented.

Accordingly, Department attorneys must adhere to the following policies and procedures with respect to adverse sentencing decisions:

First, Department attorneys must promptly notify the appropriate division at the Department of Justice in Washington ("Main Justice"), as specified in the United States Attorneys' Manual ("USAM"), concerning any adverse sentencing decision that meets the objective criteria set forth in § 9-2.170(B) of the USAM. In order to delineate such objective criteria, I am directing that, effective immediately, § 9-2.170(B) is amended as described in the attached Appendix to this memorandum. Such criteria may be amended only in accordance with § 1-1.600 of the USAM.

Second, Department attorneys must diligently comply with the procedures set forth in the USAM with respect to the pursuit and conduct of appeals. *See, e.g.*, USAM Title 2; USAM § 9-2.170. In particular, when a Government appeal is under consideration, the Government's right to appeal should be protected by the filing of a timely notice of appeal.

Third, upon notification of an adverse decision described in § 9-2.170(B), the appropriate division at Main Justice should carefully review the decision to determine whether an appeal would be appropriate and meritorious. If the appropriate division or the United States attorney recommends an appeal, the Solicitor General's Office should carefully review the decision and determine whether an appeal would be appropriate and meritorious.

Fourth, if an appeal is authorized by the Solicitor General of an adverse decision described in § 9-2.170(B), Department attorneys should vigorously and professionally pursue the appeal.

III. CONCLUSION

The Department of Justice has a solemn obligation to ensure that the laws concerning criminal sentencing are faithfully, fairly, and consistently enforced. The public in general and crime victims in particular rightly expect that the penalties established by law for specific crimes will be sought and imposed by those who serve in the criminal justice system.

cc: The Deputy Attorney General
The Associate Attorney General
The Solicitor General
The Acting Assistant Attorney General, Criminal Division
The Assistant Attorney General, Antitrust Division
The Acting Assistant Attorney General, Civil Rights Division
The Assistant Attorney General, Environment and Natural Resources Division
The Assistant Attorney General, Tax Division
The Assistant Attorney General, Civil Division

APPENDIX

AMENDMENT TO § 9-2.170(B) OF THE U.S. ATTORNEYS' MANUAL (Effective July 28, 2003)

Effective July 28, 2003, section 9-2.170(B) of the United States Attorneys' Manual is amended by striking the last two sentences of the first paragraph ("USAOs need only report adverse district court Sentencing Guidelines decisions if they wish to obtain authorization to appeal that decision. Other adverse sentencing decisions should be reported.") and inserting the following:

USAOs must report the following categories of adverse sentencing decisions to the Appellate Section of the Criminal Division or other appropriate division as soon as possible, but in no event later than 14 days of judgment. This requirement only applies to *adverse* decisions, *i.e.*, decisions made over the objection of the Government. The categories of adverse decisions required to be reported are as follows:

(1) *Departures that change the "Zone" in the Sentencing Table*: An adverse decision must be reported if the following three criteria are met:
   (a) the court departed downward on any ground;
   (b) the departure reduces the sentencing range from Zone C or D to a lower zone; and
   (c) no term of imprisonment was imposed.

(2) *Departures based on criminal history*: An adverse decision must be reported if the following three criteria are met:
   (a) the court departed downward on the ground that the defendant's criminal history category over-represents the seriousness of the defendant's criminal history, *see* U.S.S.G. § 4A1.3;
   (b) the Government asserted that no such departure was justified on the facts of the case at all, *cf.* 18 U.S.C. § 3742(e)(3)(B)(iii) (thus triggering the de novo appellate review provisions of the PROTECT Act); and
   (c) the extent of the departure was two or more criminal history categories or the equivalent.

(3) *Departures based on "discouraged" or "unmentioned" factors*: An adverse decision must be reported if the following four criteria are met:
   (a) the court departed downward based on a discouraged factor, *see, e.g.*, U.S.S.G. Ch. 5, Pt. H, a factor not mentioned in the Guidelines, or a combination of factors where no single factor justifies departure;
   (b) the basis for departure constitutes an "impermissible" ground as defined in 18 U.S.C. § 3742(j)(2) (and is therefore subject to de novo review under the PROTECT Act);
   (c) the offense level prior to departure was 16 levels or more; and
   (d) the extent of the departure was three or more offense levels.

(4) *Departures in child victim and sexual abuse cases*: An adverse decision must be reported if the following two criteria are met:

(a) the court departed downward on any ground; and

(b) the case is one in which the sentencing of the offense of conviction is governed by 18 U.S.C. § 3553(b)(2), as amended by the PROTECT Act (i.e., "an offense under section 1201 involving a minor victim, an offense under section 1591, or an offense under chapter 71, 109A, 110, or 117").

(5) *Illegal adjustments for "acceptance of responsibility"*: An adverse decision must be reported if the following two criteria are met:

(a) the court granted a three-level downward adjustment for acceptance of responsibility; and

(b) the Government did not move for the third level of the adjustment. *See* U.S.S.G. § 3E1.1(b), as amended by the PROTECT Act.

(6) *Departures on remand*: An adverse decision must be reported if the following two criteria are met:

(a) the court imposed the sentence on remand from the court of appeals; and

(b) the sentence does not comply with the PROTECT Act's requirements for sentencing after remand. *See* 18 U.S.C. § 3742(g).

(7) *Recurring illegal departures*: An adverse decision must be reported if the following two criteria are met:

(a) the court improperly departed downward in a manner that is not otherwise required to be reported; and

(b) the basis for departure has become prevalent in the district or with a particular judge.

(8) *Sentences below statutory minimum*: Any decision in which the court imposed a sentence that is illegally below the statutory minimum must be reported.

(9) *Any other case for which authority to appeal is sought*: The USAO must report any other adverse sentencing decision that is not supported by the law and the facts and that the United States Attorney wishes to appeal.

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

September 22, 2003

TO: All United States Attorneys

FROM: John Ashcroft
Attorney General

SUBJECT: Department Principles for Implementing an Expedited Disposition or "Fast-Track" Prosecution Program in a District

Section 401(m)(2)(B) of the 2003 Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act ("PROTECT Act") instructs the Sentencing Commission to promulgate, by October 27, 2003, a policy statement authorizing a downward departure of not more than 4 levels "pursuant to an early disposition program *authorized by the Attorney General* and the United States Attorney." Pub. L. No. 108-21, § 401(m)(2)(B), 117 Stat. 650, 675 (2003). Although the PROTECT Act requirement of Attorney General authorization only applies by its terms to fast-track programs that rely on downward departures, the Memorandum I have issued on "Department Policy Concerning Charging Criminal Offenses, Disposition of Charges, and Sentencing" likewise requires Attorney General approval for any "fast-track" program that relies upon "charge bargaining" — *i.e.*, a program whereby the Government agrees to charge less than the most serious, readily provable offense. This memorandum sets forth the general criteria that must be satisfied in order to obtain Attorney General authorization for "fast-track" programs and the procedures by which U.S. Attorneys may seek such authorization.[1]

I. REQUIRED CRITERIA FOR ATTORNEY GENERAL AUTHORIZATION OF A "FAST-TRACK" PROGRAM.

Early disposition or "fast-track" programs are based on the premise that a defendant who promptly agrees to participate in such a program has saved the government significant and scarce resources that can be used in prosecuting other defendants and has demonstrated an acceptance of responsibility above and beyond what is already taken into account by the adjustments contained in U.S.S.G. § 3E1.1. These programs are properly reserved for exceptional circumstances, such as where the resources of a district would otherwise be significantly strained by the large volume of a particular category of cases. Such programs are not to be used simply to avoid the ordinary application of the Guidelines to a particular class of cases.

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[1] The requirement that a fast-track program be approved by the "Attorney General" under the PROTECT Act or under these Principles may also be satisfied by obtaining the approval of the Deputy Attorney General. *See* 28 U.S.C. § 510; 28 C.F.R. § 0.15(a).

In order to obtain Attorney General authorization to implement a "fast track" program, the United States Attorney must submit a proposal that demonstrates that —

(A) (1) the district confronts an exceptionally large number of a specific class of offenses within the district, and failure to handle such cases on an expedited or "fast-track" basis would significantly strain prosecutorial and judicial resources available in the district; or

(2) the district confronts some other exceptional local circumstance with respect to a specific class of cases that justifies expedited disposition of such cases;

(B) declination of such cases in favor of state prosecution is either unavailable or clearly unwarranted;

(C) the specific class of cases consists of ones that are highly repetitive and present substantially similar fact scenarios; and

(D) the cases do not involve an offense that has been designated by the Attorney General as a "crime of violence." *See* 28 C.F.R. § 28.2 (listing offenses designated by the Attorney General as "crimes of violence" for purposes of the DNA collection provisions of the USA PATRIOT Act).

These criteria will ensure that "fast-track" programs are implemented only when warranted. Thus, these criteria specify more clearly the circumstances under which a fast-track program could properly be implemented based on the high incidence of a particular type of offense within a district — one of the most commonly cited reasons for justifying fast-track programs. Paragraph (A)(2), however, does not foreclose the possibility that there may be some other exceptional local circumstance, other than the high incidence of a particular type of offense, that could conceivably warrant "fast-track" treatment.

II. REQUIREMENTS GOVERNING UNITED STATES ATTORNEY IMPLEMENTATION OF FAST-TRACK PROGRAMS.

Once a United States Attorney has obtained authorization from the Attorney General to implement a fast-track program with respect to a particular specified class of offenses, the United States Attorney may implement such program in the manner he or she deems appropriate for that district, provided that the program is otherwise consistent with the law, the Sentencing Guidelines, and Department regulations and policy. Any such program must include the following elements:

A. *Expedited disposition.* Within a reasonably prompt period after the filing of federal charges, to be determined based on the practice in the district, the Defendant must agree to plead guilty to an offense covered by the fast-track program.

B. *Minimum requirements for "fast-track" plea agreement.* The Defendant must enter into a written plea agreement that includes at least the following terms:

i. The defendant agrees to a factual basis that accurately reflects his or her offense conduct;

ii. The defendant agrees not to file any of the motions described in Rule 12(b)(3), Fed. R. Crim. P.

iii. The defendant agrees to waive appeal; and

iv. The defendant agrees to waive the opportunity to challenge his or her conviction under 28 U.S.C. § 2255, except on the issue of ineffective assistance of counsel.

C. *Additional provisions of plea agreement.* In exchange for the above, the attorney for the Government may agree to move at sentencing for a downward departure from the adjusted base offense level found by the District Court (after application of the adjustment for acceptance of responsibility) of a specific number of levels, not to exceed 4 levels. The plea agreement may commit the departure to the discretion of the district court, or the parties may agree to bind the district court to a specific number of levels, up to four levels, pursuant to Rule 11(c)(1)(C), Fed. R. Crim. P. A "charge bargaining" fast-track program should provide for sentencing reductions that are commensurate with the foregoing. The parties may otherwise agree to the application of the Sentencing Guidelines consistently with the provisions of the Sentencing Guidelines and Rule 11.

III. PROCEDURES WITH RESPECT TO IMPLEMENTATION OF FAST-TRACK PROGRAMS.

Procedures for Attorney General approval. Before implementing a fast-track program, a district must submit to the Director of the Executive Office for United States Attorneys (EOUSA), for Attorney General approval, its proposal to implement a fast-track program. Likewise, any such program in existence on the date of this Memorandum may not be continued after October 27, 2003, unless a fast-track proposal has been submitted and approved. Any fast-track proposal must contain the following elements:

A. An identification of the specific category of violations to be covered by the fast-track program.

B. A detailed explanation of why the criteria described in Section I are satisfied with respect to such offenses. If the district has previously implemented a fast-track program for such offenses (*i.e.*, prior to the date of this memorandum), the explanation should include a detailed discussion of the experience under such program in the district.

Notice to EOUSA of compliance with additional requirements for fast-track programs. The district must notify EOUSA of any fast-track programs it adopts. The district must also identify in the Case Management System any case disposed of pursuant to an approved fast-track program, so that the number of cases and their dispositions may be determined for reporting or other statistical purposes.

cc: The Acting Deputy Attorney General
The Associate Attorney General
The Solicitor General
The Assistant Attorney General, Criminal Division
The Director, Executive Office for United States Attorneys