



On December 16, 2022, U.S. Attorney General Merrick Garland issued a [memorandum](#) (the Garland memo) to all federal prosecutors, reflecting a significant new policy regarding charging, pleas, and sentencing in federal criminal cases.

The Garland memo replaces prior U.S. Department of Justice (DOJ) policy and applies to all federal criminal prosecutions initiated on or after January 17, 2023.



Under the new DOJ policy, federal prosecutors making charging decisions must consider whether the consequences of those charges *for sentencing* would yield a result that "is proportional to the seriousness of the defendant's conduct, and . . . achieves such purposes of the criminal law as punishment, protection of the public, specific and general deterrence, and rehabilitation." The new policy makes clear that the goal of any prosecution is a sanction that is "sufficient, but not greater than necessary" to satisfy these considerations. The Garland memo further provides that prosecutors should not file charges, or threaten to do so, simply to exert leverage to induce a plea.

The Garland memo reflects a continued departure from the [prior administration's policy](#), which provided that federal prosecutors "should charge and pursue the most serious, readily provable offense." The prior policy was [revoked](#) in January 2021 by then-acting U.S. Attorney General Monty Wilkinson.

The Garland memo, in short, appears to be embracing a policy of prosecutorial lenity, and could prove to be a useful tool going forward for the defense bar in plea negotiations and at sentencing.

## **Prosecutors Should Only Commence a Prosecution if it Serves a Substantial Federal Interest**

The Garland memo reiterates the longstanding requirement of the [Principles of Federal Prosecution](#), which provides that a prosecutor may not commence a prosecution unless it is probable that the admissible evidence will be sufficient to sustain a conviction. Even when that threshold requirement is satisfied, however, a prosecutor should not commence a prosecution unless it would serve a "substantial federal interest." In determining whether a prosecution would meet that standard, prosecutors should weigh all relevant considerations, including:

- Federal law enforcement priorities;
- The nature and seriousness of the offense;
- The deterrent effect of prosecution;
- The person's culpability in connection with the offense;
- The person's history with respect to criminal activity;
- The person's willingness to cooperate in the investigation or prosecution of others;
- The person's personal circumstances;
- The interests of any victims; and
- The probable sentence or other consequences if the person is convicted.

Notably, the Garland memo directs each U.S. Attorney's Office to "develop an appropriate pretrial diversion policy" – an alternative to prosecution which seeks to divert certain defendants from traditional prosecution into a program of supervision and services administered by the U.S. Probation Service. If the defendant successfully completes the program, he or she will not be charged with an offense.

Finally, as noted, the Garland memo expressly prohibits prosecutors from filing charges, or from threatening to file charges, simply to exert leverage to induce a plea.

## **Prosecutors Should Select Charges that Would Yield a Proportional Sentence**

In a marked departure from prior DOJ policy, the Garland memo calls into question [Section 9-27.300](#) of the Justice Manual, which provides that a prosecutor "should charge and pursue the most serious, readily provable offenses . . . carry[ing] the most substantial guidelines sentence[.]" The memo also disfavors charging offenses that carry mandatory minimum sentences, indicating that prosecutors should bring such charges only if other charges (*i.e.*, those not carrying mandatory minimum sentences) would not sufficiently reflect the seriousness of the defendant's conduct.

Instead, the Garland memo directs prosecutors to charge offenses that would result in a sanction that "is proportional to the seriousness of the defendant's conduct, and . . . achieves such purposes of the criminal law as punishment, protection of the public, specific and general deterrence, and rehabilitation." Put differently, under the new DOJ policy, instead of simply charging the most serious offense that is readily provable, prosecutors are directed to exercise their discretion, and, if appropriate, charge an offense that would yield a sentence proportional to the seriousness of the crime.

## **Prosecutors Must Obtain Supervisory Approval of Charging Decisions**

An overarching objective of the Garland memo appears to be greater consistency in charging decisions across U.S. Attorneys' offices. To achieve this goal, the memo requires that each U.S. Attorney's Office and litigating division of the DOJ promulgate written guidance describing their internal indictment and plea review process. Additionally, the memo mandates that line prosecutors obtain supervisory approval of all charging and plea agreement decisions.

Going forward, the Garland memo suggests that the DOJ will heavily scrutinize cases where prosecutors bring charges carrying mandatory minimum sentences. More specifically, the DOJ will begin developing and implementing a software program that will enable real-time, trackable reporting of all such charges by districts and litigating divisions. In the interim, each U.S. Attorney's Office and litigating division must report semi-annually to the DOJ the number and percentage of charging documents and plea agreements containing mandatory minimum charges.

## **Conclusion**

In sum, the Garland memo represents a significant departure from the prior administration's policy, and appears to be embracing a policy of prosecutorial lenity. As the Garland memo itself notes, federal prosecutors have enormous discretion to enforce the federal criminal laws. The aim of the memo appears to be to be two-fold. First, to cause prosecutors to charge offenses that would yield a sentence proportional to the defendant's conduct, as opposed to merely charging the most serious readily provable offense. Second, to provide greater consistency *vis-à-vis* charging decisions and greater accountability for line prosecutors. The memo also disfavors the charging of offenses carrying mandatory minimum sentences.

While the memo is unlikely to provide much comfort to repeat offenders or violent criminals who likely would receive a significant sentence regardless of the particular offense charged, the memo could potentially provide some relief to first-time offenders and white-collar defendants, where prosecutors are particularly prone to stacking charges.

The memo also may provide the defense bar with an important tool in plea negotiations and at sentencing, especially where a prosecutor is charging an offense carrying a mandatory minimum sentence, stacking charges, or charging the most serious offense solely for the purpose of obtaining a longer sentence.

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