THE NEW RENO BLUESHEET: A LITTLE MORE CANDOR REGARDING PROSECUTORIAL DISCRETION

Sara Sun Beale*

In October 1993 Attorney General Janet Reno issued a blue sheet to "clarify the Department's policy concerning the principles that should guide federal prosecutors in their charging decisions and plea negotiations."[1] Noting that the "charging decision and plea agreements should reflect adherence to the Sentencing Guidelines," the Attorney General stated that federal prosecutors are nonetheless authorized to make

> an individualized assessment of the extent to which particular charges fit the specific circumstance of the case, are consistent with the purposes of the federal criminal code, and maximize the impact of federal resources on crime.

Specifically, the Reno memorandum authorized federal prosecutors to consider whether the guideline penalty for a given offense "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."

HISTORICAL CONTEXT

Between 1987 and the issuance of the Reno memorandum in 1993 a series of statements governed federal prosecutorial charging and bargaining policies: the Department of Justice Redbook,[2] which took effect with the guidelines on November 1, 1987, a 1989 memorandum by Attorney General Richard Thornburgh,[3] and a 1992 memorandum by Acting Deputy Assistant Attorney General George Terwilliger.[4]

In assessing the prior policies and comparing them to the Reno memorandum, it is useful to focus on two issues:

> 1) whether the policy obliged federal prosecutors to pursue all serious charges where sufficient evidence was available to obtain a conviction, and
>
> 2) what enforcement or oversight mechanisms, if any, were available to ensure that the restrictions were observed?

The Department initially took the position that implementing the guidelines required prosecution of all provable offenses. The Redbook was clearly intended to strip away virtually all of federal prosecutors' traditional discretion in charging. It stated that the existence of "real doubt as to ultimate provability of the charge" was the "sole legitimate ground for agreeing not to pursue a charge." This seemingly absolute standard survived for about 18 months.

The 1989 Thornburgh memorandum gave local United States Attorneys offices discretion to determine grounds upon which readily provable charges could be dropped. The only ground enumerated was that caseload pressures would qualify as a adequate basis for dropping charges. Given the universal nature of caseload pressures, this reference sent a strong signal that the absolute rule of the Redbook had been very significantly limited.

The Department's policies regarding enforcement evolved over time. The Redbook, surprisingly, included no mechanism to ensure that individual prosecutors observed the new and seemingly absolute limits on their charging and bargaining authority. Indeed one critic of that policy, Professor Stephen Schulhofer, charged that the Redbook "combined a superficially stringent rule against charge bargaining with a regime that virtually encouraged low-visibility avoidance of that rule."[5]

The first Departmental attempt to enforce the new limits came in the Thornburgh memorandum. It reiterated that plea bargaining and charging must "support, not undermine, the guidelines," and required supervisory approval for departure motions (other than those under §5K) and for dropping provable charges.

The Terwilliger memorandum strengthened the procedures for oversight, while leaving the substantive task of identifying the grounds to local federal prosecutors. The procedural changes were the requirement that federal plea agreements be in writing and be approved by the prosecutor's supervisor, and the requirement of supervisory review of §5K motions. No standards were provided to determine when such approval should be granted.

Perhaps more important than the scope of the discretion authorized under the various statements of policy was the reality that federal prosecutors continued to exercise discretion outside the guidelines and departmental policies. While it is difficult to document the extent of such underground discretion, it is quite clear that it was significant. For example, Professor Stephen Schulhofer and Commissioner Ilene Nagel found that evasion of the proper guidelines sentence occurred in approximately 20-35% of guilty plea cases they studied.[6] The Commission itself concluded that charge manipulation affected sentences in 17% of all cases, and 26% of drug cases.[7]

How was this underground discretion carried out? Empirical studies and anecdotal evidence suggest that this answer varied greatly from place to place and time to time. One major factor was an attempt to compensate for "insufficient flexibility in the treatment of offender characteristics" and "unduly sparing use of departure authority" under the guidelines.[8] Under the policies issued by prior

* *Professor of Law, Duke University School of Law.*

administrations many avenues existed for ad hoc leniency, and for the reintroduction of low visibility disparity.[9]

ASSESSING THE NEW STANDARDS

The chief virtue of the Reno memorandum is that it is clearer about what federal prosecutors have traditionally done—and continue to do—than its predecessor statements. Regardless of rhetoric, no administration has aggressively prosecuted every readily provable federal offense. While the Redbook stated that evidentiary sufficiency was the only legitimate reason for failing to pursue charges, the Reagan Administration made no effort to enforce this standard. Why not?

Congress did not then (and has never) made available the resources that would be necessary to fulfill the standard stated in the Redbook. In light of the limited resources available, it is quite natural that the first efforts at enforcement in the Thornburgh memorandum were coupled with recognition that prosecutors could, as a matter of discretion, decline to pursue certain charges as a result of caseload pressures. In this context, the phrase caseload pressures was simply another way of saying insufficient resources to process provable cases.

There is a difference between the Reno memorandum and the Thornburgh and Terwilliger memoranda: Attorney General Reno has explicitly addressed the perceived failure of the guidelines regime to account sufficiently for the differences between offenders, as well as the lack of flexibility that might render the only available penalty disproportionate to a particular offender, particularly under a mandatory minimum statute.

In contrast, prior administrations permitted, but did not explicitly authorize, the exercise of the same forms of discretion at the option of individual prosecutors and individual United States Attorneys' offices. Though such discretion was being exercised on a widespread basis, neither administration acknowledged it or made any creditable effort to stop it.

This "see no evil, hear no evil, speak no evil" position was reminiscent of the bad old days before the Supreme Court recognized the constitutional validity of plea bargaining.[10] Caseload pressures made plea bargaining inevitable, yet the caselaw and procedural rules denied its existence, forcing the judiciary and the bar into the unseemly—though nearly universal—practice of concluding plea bargaining by requiring the defendant to state on the record that his plea had not been influenced by any promises.

The damage to the system was not limited to the corrosive influence of the sentencing judge and the parties colluding to falsify the record. A system that refused to recognize the legitimacy of plea bargaining could not create safeguards to ensure that defendant understood the terms of a bargain and its effects, could not review the fairness of bargains, and could not enforce the bargain in case of breach. It seems clear in retrospect that it was an enormous step forward to recognize the existence and legitimacy of plea bargaining in order to regulate and police it, as well as to end the hypocrisy of denying its existence.

The Reno memorandum brings welcome candor about what was already going on in United States Attorneys' offices throughout the country. It also opens the door for productive discussion of how to add flexibility and appropriate regard for differences among defendants without sliding into standardless disparity, with the danger of arbitrariness or invidious discrimination.

The Reno memorandum unfortunately does not capitalize on this opportunity to address the thorny issue of how to individualize within a guidelines framework. It provides no guidance on how to balance the twin aims of eliminating disparity and introducing an individualized assessment. It identifies no particular factors that may be overlooked in the current guidelines analysis.

Does the Department believe that family responsibilities or successful pursuit of drug treatment should be given greater weight than they currently receive under the guidelines? Does the Department believe that guideline emphasis on drug quantity may be offset by consideration of other factors bearing on individual culpability? Should a prosecutor's authority be more constrained when the offense involves a mandatory minimum statute?

Many more questions can be asked. The problem is that the Reno Bluesheet does not answer any of them. It has the virtue of candor, but it fails to take the follow up steps necessary to regulate how the reauthorized discretion should be exercised.

It is not difficult to account for this omission. It is hard to formulate standards that can balance the competing aims of uniformity and individualization. More important, public discussion of these issues may be impossible in the current political climate. The Clinton Administration clearly does not want to be labeled soft on crime.

Indeed, the phrase soft on crime is the epithet of choice in political campaigns. Given the political climate, it is not surprising that the administration is backing a crime bill that includes more mandatory minimum sentencing provisions, despite the Sentencing Commission's devastating critique of the existing mandatory statutes. Indeed, politics provides the most likely explanation of both the low key distribution of the blue sheet (which was sent to United States Attorneys but not made public), and the effort to characterize it as a mere "clarification" of the Thornburgh memorandum. Perhaps the general signal in the Reno Bluesheet is all that can reasonably be expected from the political branches in the current climate.

FOOTNOTES

[1] The Reno Bluesheet is reprinted at page 352.

[2] U.S. Dept. of Justice, Prosecutor's Handbook on Sentencing Guidelines and Other Provisions of the Sentencing Reform Act of 1984 (Nov. 1, 1987) (the Redbook).

[3] Attorney General Richard Thornburgh, Memorandum to Federal Prosecutors (Mar. 13, 1989).

[4] George J. Terwilliger, III, Acting Deputy Attorney General, Memorandum to Federal Prosecutors (Feb. 7, 1992).

[5] Stephen Schulhofer, Sentencing Issues Facing the New Department of Justice, 5 Fed. Sent. R. 225 (1993).

[6] Stephen Schulhofer, Assessing the Federal Sentencing Process: The Problem Is Uniformity Not Disparity, 29 Am. Crim. L. Rev. 833, 845 (1992) (identifying structural defects in the guidelines and in mandatory sentencing laws that place pressure on prosecutors to use plea bargaining and other techniques to avoid unacceptable sentences).

[7] United States Sentencing Commission, The Federal Sentencing Guidelines: A Report on the Operation of the Guidelines System and Short-Term Impacts on Disparity in Sentencing, Use of Incarceration, and Prosecutorial Discretion and Plea Bargaining, Executive Summary 31-54 (December 1991).

[8] Schulhofer, Assessing the Federal Sentencing Process, supra note 7 at 858-870.

[9] For a description of several such avenues, see Schulhofer, Sentencing Issues Facing the New Department of Justice, supra note 5.

[10] There is a rich literature on plea bargaining. For a discussion of practices before and after the Supreme Court recognized the legitimacy of bargaining, see, e.g., Thomas R. McCoy & Michael J. Mirra, Plea Bargaining as Due Process in Determining Guilt, 32 Stan. L. Rev. 887 (1980), and the Law & Society Review's special feaure on plea bargaining, 13 Law & Soc. Rev. 1987 et seq. (1978). Professor Albert Alschuler's work on plea bargaining has been especially influential. Citations to the various articles are collected in Albert W. Alschuler, Implementing the Criminal Defendant's Right to Trial: Alternatives to the Plea Bargaining System, 50 Chi. L. Rev. 931, 932 n. 4 (1983).