NACDL NEWS

NACDL Survey

USAOs deny Ashcroft memo affecting plea bargaining

By G. Jack King, Jr.

Have charging and plea bargaining policies in the federal system gotten tougher under Attorney General John Ashcroft?

Not much, it seems, according to a recent national sampling by NACDL of United States attorney's offices.

Ashcroft, on September 22, sent a memorandum to all U. S. attorneys, purporting to state strick new Justice Department policies on charging and plea bargaining. Early predictions that the new DOJ policies would clog the federal courts have not yet materialized. One reason may be that it is still business as usual in the courthouse — U.S. attorney's offices polled by NACDL indicate that most offices consider their procedures already in compliance with the memo. Several refused to discuss it on the record but none gave any indication that the policies were causing any widespread overhaul of federal prosecution procedures in their districts.

"It has not affected us at all," said Channing Phillips, longtime spokesperson for the U.S. attorney's office in Washington, DC. "Our policies are pretty much the same." Other assistant U.S. attorneys agreed, both on and off the record.

NACDL President E.E. (Bo) Edwards said he was "moderately surprised, that for the most part, these policies have been in effect for some time, and that there have been no significant changes in business as usual.

"But most important, perhaps, is that now we have a better idea of just how the 'Ascroft policy' is affecting things."

Intent to limit prosecutorial discretion?

Part one of the memo, "Department Policy Concerning Charging and Prosecution of Criminal Offenses," states, "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 supervising attorney," with limited exceptions. The second part, "Department Policy Concerning Plea Agreements," states that plea agreements "should" be in writing, and that the court be informed when the parties bargain away "facts" that "result[] in the sentencing court having less than a full understanding of all readily provable facts relevant to sentencing."

The memo states further that when a defendant is to receive a sentencing departure for substantial assistance in the investigation and prosecution of another "[t]he preferred means … is to charge the most serious readily provable offense" and then file an appropriate downward departure motion pursuant to sentencing guidelines §5K1.1 or motion to reduce sentence under Fed.R.Crim.P. 35. However, the memo still allows for pleading to a lesser charge, with permission from main Justice, the U.S. attorney or his designated supervisory attorney "in rare cases" that "properly reflect[] the substantial assistance provided by the defendant."

The memo also acknowledges "fast track" disposition programs in districts with substantial backlogs of certain types of cases, such as illegal re-entry violations in border states. Prosecutors in those programs are specifically permitted offer downward departures of up to four levels in exchange for an early plea.

Particular attention was given to dispositions involving the filing or dismissal of sentencing enhancements, such as prior convictions under 21 U.S.C. §851 or use of a firearm in a crime of violence or drug crime under 18 U.S.C. §924(c). For example, an assistant U.S. Attorney persuaded to "swallow the gun" may "forego or dismiss a [a §924(c) violation] only with the written or otherwise documented approval of an Assistant Attorney General, United States Attorney, or designated supervisory attorney." In the case of multiple §924(c) firearms counts in which the predicate crimes are crimes of violence, prosecutors are to charge and pursue — and not bargain away – at least two §924(c) counts.

The memo's general tone is directory and mandatory, which seems to be a startling departure from the policy directives from past attorneys general, which have assumed a fair amount of autonomy and diverse priorities among the 93 U.S. Attorneys and their assistants. Some federal defenders have warned that micromanagement of plea bargaining by Washington will only clog up the courts as hundreds more defendants opt for jury trials in cases which previously could have proceeded to disposition. Federal prosecutors have been keeping quiet until now, however.

Answers and reactions

NACDL telephoned 15 U.S Attorney's offices around the country between October 22 and November 5 and asked, "Has the September 22 Ashcroft memo on charging and plea bargaining changed your office's policies or procedures in any way?" Included were a fair spectrum of districts, ranging from rural/suburban to hardcore urban, northern and southern, coastal and heartland.

Some offices were taken somewhat aback.

"I don't think that's a question we're allowed to answer," said a spokesman for the Eastern District of Washington in Spokane.

A spokesman for the Northern District of Georgia replied, "For Atlanta — 'no answer, could not contact … check off that box on your clipboard.'"

"Do you have authority from the Department of Justice to ask that?" Chicago assistant U.S. attorney Randall Samborn, S.D. Ill., asked. He then added, "No comment."

Two offices, Miami (S.D. Fla.) and St. Louis (E.D. Mo.), referred NACDL back to Ashcroft spokesman Mark Corallo. Corallo, who was officially appointed DOJ's director of public affairs September 23, did not respond to requests for an interview.

On the other hand, five offices — Los Angeles (C.D. Cal.), Denver (D. Colo.), Washington, D.C. (D. D.C.), Albuquerque (D. N.M.) and Pittsburgh (W.D. Pa.) — said that they had not initiated any substantive changes in procedures.

"There are certain requirements in the memo regarding procedures that I'm sure we've fine-tuned, but charging the most readily-provable offense has been our office's policy," said AUSA Paul Brysh, Pittsburgh. (In fact the practice of charging the most serious "readily provable offenses" goes back at least to Attorney General Richard Thornburgh, as more than one AUSA noted.) "Our charging and plea policies have remained fairly constant over the years, with small wrinkles from administration to administration. The fundamentals … haven't changed that much."

Survey Results	Responses
"Yes" change in policy/procedure	0
"No Change" in policy/procedure	5
"No Comment"[1]	4
No response[2]	6
Total offices responding	9
Total offices contacted[3]	15

Notes

1. Includes referrals to DOJ (2).
2. Includes office(s) that responded off-the-record/on background-only.
3. C.D.Cal., D.Colo., D.D.C., D.Me., S.D.Fla., N.D.Ga., N.D.Ill., S.D.Miss., E.D.Mo., D.Mont., D.N.M., W.D.Pa., S.D.N.Y., E.D.Va., E.D.Wash

Public Affairs Director Daniel Dodson and NACDL intern Regina Lauranzano contributed to this report.

AUSA Norm Cairns, Albuquerque, said that the supposedly new policy was "already in place."

"We may have changed our reporting requirements, but as for our plea bargaining system — I don't think you could even call it a system — has not really changed." Last spring, Congress passed the PROTECT Act, restricting downward departures. Ashcroft issued a directive July 28 requiring all U.S. attorney's offices to file a notice of appeal and report to DOJ any and all "adverse" sentencing decisions, *i.e.*, downward departures to which the prosecution did not consent.

One office, which asked not to be identified, noted that the Ashcroft memo was more or less a reiteration of policy instituted by Thornburgh in 1989 after the Supreme Court upheld the constitutionality of the federal sentencing guidelines in *Mistretta v. United States*, 488 U.S. 361 (1989). A subsequent revision to the *U.S. Attorneys Manual* by Janet Reno during the Clinton administration gave more plea bargaining discretion to the districts, but largely left the directive to charge the most serious "readily provable" offenses intact.

The requirement that plea deals be approved by an assistant attorney general, the U.S. attorney, or a designated supervisory attorney suggests that for the time being, most charging and plea decisions will still be made at the local level. Earlier this year, however, Ashcroft overruled federal prosecutors in several cases in New York and Connecticut who had decided not to seek the death penalty in their jurisdictions.

Left open for now is the question of what number of the offices responding "no comment," or not responding at all, have actually had to overhaul their case disposition machine – or need to. Off the record, several suggested that any changes that may be in the works would be minor at best. NACDL will continue to monitor federal charging and sentencing throughout the coming year. Members are invited to share their own experiences.

Some NACDL members said privately that they had not seen any changes in charging and plea bargaining yet either, but that it was too soon to make any assumptions. NACDL President Edwards was optimistic. "It wouldn't surprise me that as a result of this [poll] NACDL members probably have a better grasp of the impact of the Ashcroft memo nationwide than the U.S. attorneys do," he said.

The September 22 memorandum, and other federal sentencing materials, can be found on the NACDL Web site at *www.nacdl.org/departures* under "Legal Resources."