DOJ Charging Memo Rescission Aids Prosecutorial Discretion

By Marc Levin (February 9, 2021, 4:28 PM EST)

On Jan. 29, the U.S. Department of Justice announced it rescinded a 2017 memo[1] by former U.S. Attorney General Jeff Sessions[2] that required prosecutors to charge federal defendants with the readily provable offenses that would carry the most severe penalties.

This memo reversed a 2013 memo[3] by then-U.S. Attorney General Eric Holder that recommended prosecutors only bring charges that trigger long federal drug mandatory minimums when the evidence indicates the defendant is, in layman's terms, a big fish.

At stake is more than a battle of memos; it is the fundamental role and enduring value of prosecutorial discretion. Perhaps most importantly, discretion must not be a one-way ratchet toward harshness.

Yet, while prosecutors have always declined cases, recently elected prosecutors in urban and even some suburban jurisdictions face backlash for presumptively declining to pursue certain categories of cases, such as low-level drug possession and trespassing on public property.

Of course, exercising discretion on which charges to bring in a particular case is not the same as designating categories of cases in which the default policy will be nonprosecution.

Critics charge that the latter displaces the role of legislative bodies in criminalizing conduct. However, even policies that presumptively decline prosecution for certain offenses can be consistent with the rule of law, provided they operate within constraints that ensure accountability, individualized review and transparency.

First, even if a person is not prosecuted, they are subject to arrest and in any civil action that may ensue, unlawful conduct is generally considered negligence per se.[4] More importantly, prosecutorial decisions not to pursue whole categories of offenses are nothing new.

In about half the states, adultery or fornication remain crimes, but prosecutions are unheard of.[5] Reflecting the consensus that such conduct is not worthy of the criminal sanction, no district attorney has been criticized for ignoring these laws.

Default nonprosecution policies, even if implicit rather than announced, are routinely applied to such antiquated statutes, but also are required by the dramatic growth of criminal law in recent decades. As a result, countless obscure crimes are largely unknown and unpursued.

Many are regulatory offenses affecting business and recreational activities, such as federal laws criminalizing ketchup that isn't thick enough, bringing too many nickels when traveling overseas or writing a check for less than $1.[6] Like trespassing on public property or drug possession, these obscure offenses often lack an identifiable victim.

A last-minute executive order[7] by former President Donald Trump rightfully urges that
civil, rather than criminal, penalties be pursued for unknowing violations of regulations.

Given that there are more than 4,500 federal statutory crimes[8] and hundreds of thousands[9] of additional federal regulations carrying criminal penalties, with similar totals in many states,[10] no individual or business can keep track of all these laws and prosecuting every possible case would be both impossible and undesirable.

For example, ostensibly no one has been or will be prosecuted under the federal law that makes it a crime to advertise wine in a manner that suggests it has intoxicating qualities;[11] the South Carolina crime that forbids work on Sundays;[12] or the Michigan law that criminalizes transporting a Christmas tree without a bill of sale.[13]

This executive order also encourages prosecutors not to bring charges for such crimes if the prospective defendant did not have a culpable mental state, even though it is not required by the law or regulation. While laudable, this is not fundamentally different than presumptively declining to prosecute an offense altogether, since it effectively restricts the scope of an offense that, as written, creates strict criminal liability.

If prosecutors indeed have the rightful authority to decline pursuing these categories of obscure offenses, then local district attorneys can presumptively not prosecute drug possession or public trespassing. The ubiquity of the latter is simply not a meaningful philosophical distinction.

Some would argue another difference is that those who tend to be subject to drug and trespassing laws are much less powerful. Others would point to the neighborhood quality-of-life concerns as a distinguishing factor, but that goes to the question of whether prosecution or other strategies are most effective, not the legitimacy of prosecutorial declinations.

Prosecutors must decide not just whether laws have been violated, but whether prosecution is in the public interest, taking into account the trade-off in pursuing other cases and whether prosecution would be more likely than other approaches to advance goals such as public safety and public confidence in the justice system.

In military terms, lawmakers give prosecutors ammunition, but prosecutors decide not only when to shoot but which battles should be fought.

Prosecutorial discretion cannot hinge on whose ox is being gored. The same discretion that prosecutors use in declining to charge a destitute mom who steals diapers[14] should have also been used in a case involving a janitor[15] who unknowingly violated an environmental law. It allows prosecutors to prioritize resources, manage their workloads, and ensure all relevant aspects of each case to be considered, including whether the prospective defendant had an intent to violate the law.

How can discretion be laudable in some contexts but not others? Self-styled tough-on-crime prosecutors, including the National Association of Assistant U.S. Attorneys,[16] embraced the Sessions memo even though it precludes line prosecutors from pursuing less serious charges.

However, historically most prosecutors have opposed legislation such as a Texas proposal[17] that in low-level drug possession cases would have created a presumption of drug court or other form of probation instead of incarceration. Here, prosecutors argued that even such presumptive guidance would unduly undermine their discretion.
Powerful prosecutors associations[18] should embrace prosecutorial discretion as a two-way street, even when it may lead to leniency. On one side of the ledger, prosecutors zealously guard their discretion to invoke the harshest punishments, such as the death penalty and life without parole.

Indeed, in 2020 Ohio prosecutors lost their bid to derail bipartisan legislation[19] banning the execution of severely mentally ill people, which was signed[20] in January by Gov. Mike DeWine. Yet traditional prosecutor groups celebrated the Sessions memo that hamstrings their discretion and reject recently elected district attorneys in metropolitan counties who campaigned on a default position of not prosecuting certain offenses.

While it is heartening that federal prosecutors are no longer under the thumb of the Sessions memo when making charging decisions, the controversy over local district attorneys presumptively not prosecuting certain offenses will continue.

Against this backdrop, is there a philosophically consistent approach that safeguards discretion while also upholding the rule of law? There is, but it requires obtaining a mandate from the public, ensuring all police reports are considered, providing meaningful alternatives to prosecution that result in accountability and treatment, operating transparently and tracking results.

In nearly every state, district attorneys are elected by the public, and in cities from Boston[21] to St. Louis,[22] recently elected district attorneys campaigned on the promise that they would presumptively not prosecute a list of certain offenses, ranging from low-level drug possession to trespassing.

Prosecution and punishment in such matters has often proven to be more of a revolving door than a panacea. In fact, research[23] suggests that contact with the justice system increases delinquency for youths, largely through the stigma that accompanies a conviction. Still, the existence and scope of such lists are debatable, as are the merits of electing prosecutors in partisan elections.

 Nonetheless, much of the value in electing district attorneys is to provide legitimacy that comes from the consent of the community. Given that such pledges were prominent in these campaigns, why should voters' decisions be subjugated to critics from outside these jurisdictions?

Second, cases in these categories, particularly those that, unlike drug possession or trespassing on public property, involve an identifiable victim, must be reviewed to determine if in fact traditional prosecution is warranted given the circumstances. This safeguard, an overlooked caveat that is part of such presumptive nonprosecution policies, gives assurance to police officers that their efforts will not be discarded.

Individualized review must always remain a hallmark of the justice system and it is a two-way ratchet. Thus, it sometimes reveals cases that involve more serious underlying facts or an individual with a long track record of property offenses and prior failures to complete alternatives to prosecution.

For example, while Dallas County District Attorney John Creuzot is largely declining to prosecute the majority of trespass and loitering cases that occur on public property such as transit stations,[24] the 12% of such cases[25] that involve residences are excluded from this presumptive nonprosecution policy.
Prior this change, these individuals experiencing homelessness languished in jail for a month on average, costing taxpayers more than $1,800[26] for each stay only to have the cycle often restart again upon discharge.

Prosecutorial decisions cannot be divorced from the imperative for effective and widely available alternatives that promote accountability and behavior change without the stigma of punishment. Many of these offramps from prosecution target defendants who suffer from mental illness and substance use disorders, some of whom are also experiencing homelessness.

In some instances, a policy that is characterized as a refusal to prosecute actually involves pretrial prosecutor-led diversion[27] in which a charge may still be filed if the individual does not complete a treatment program.

The Association of Prosecuting Attorneys, a group of reform-minded prosecutors, published a national survey[28] of many such promising diversion programs and a study found diversion of low-level drug cases reduced recidivism by 50%[29] in Harris County, Texas. In other contexts, the case is dropped or the person is referred to a service provider without the future threat of prosecution.

Prosecutors generally do not oversee budgets for treatment programs, but by publicly prioritizing alternatives, they throw down a gauntlet that may lead to more resources being directed elsewhere, such as mental health agencies. Also, by partnering with both other government agencies and nonprofit providers, prosecutors can connect individuals with services that reduce recidivism and enhance positive outcomes in domains such as health and employment.

Finally, as approaches taken by district attorneys increasingly diverge, transparency and tracking outcomes becomes ever more important so that constituents have the best information with which to evaluate their policies. This means prosecutor offices should regularly publish data on the dispositions of their cases.[30] This includes data on the percentage of various types of cases that are being prosecuted and the use and effectiveness of diversion programs.

Prosecutorial dashboards with 55 metrics have now been deployed from Jacksonville to Milwaukee, demonstrating how transparent performance measures appeal to communities with both a conservative and progressive prosecutor respectively.[31]

Melissa Nelson, the state's attorney for Florida's Fourth Judicial District based in Jacksonville, noted in the Council on Criminal Justice’s National Commission on COVID-19 and Criminal Justice report: "We have to become as targeted and surgical as we can when making decisions about where to allocate our law enforcement resources."[32]

Ultimately, prosecution is just one tool in the arsenal of interventions needed to promote the rule of law, ensure accountability for violating community norms and provide a pathway for rehabilitation. When lawmakers create thousands of criminal statutes, many of which are dated, duplicative or overlapping, they cannot anticipate the details of every incident, each of which involves different defendants and circumstances.[33]

Prosecutors should also consider the varying wishes of victims in each case, something which no legislator can do. Research shows victims are most likely to prefer restitution,[34] treatment[35] and community service.[36] Furthermore, victim satisfaction,[37] restitution[38] and recidivism reduction[39] are more likely result from victim-offender
mediation than from traditional prosecution.

From the early 1970s through 2010, the U.S. increased incarceration fivefold, partly because of laws that gave prosecutors the discretion to pursue more and more severe maximum sentences in an ever-growing number of cases.[40]

Now, the shoe is on the other foot and some of this discretion is being used to promote alternatives in cases at the other end of the spectrum.

As long as is this discretion is exercised within a consistent framework that ensures legitimacy, transparency and accountability, the bulwark of prosecutorial discretion does not deserve to become a bogeyman.

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20 Death Penalty Information Center, Ohio Bars Death Penalty for People with Severe Mental Illness (January 11, 2021) https://deathpenaltyinfo.org/news/ohio-passes-bill-to-
bar-death-penalty-for-people-with-severe-mental-illness.


[36] Id.


