NEW DEPARTMENT OF JUSTICE
"BLUESHEET" DOA

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Heralded by defense attorneys, welcomed by some newly appointed United States Attorneys, applauded by opponents of mandatory minimum sentences, a new "bluesheet" to guide federal prosecutions was issued by Attorney General Janet Reno on October 12, 1993. It was issued to "further clarify" DOJ policy set forth in Principles of Federal Prosecution provided in the United States Attorney's Manual, the "bible" for United States Attorneys.

The Principles were first issued by Attorney General Benjamin Civiletti during the Carter Administration. Quoting from Civiletti's preface to the original 1980 edition, Reno reiterates in the bluesheet that "[t]hese principles 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." However, in one paragraph, Attorney General Reno appeared to reverse, sub silentio, the policy of the Bush Justice Department that directed federal prosecutors to charge defendants with the most serious crime or crimes that could be proved.

While emphasizing that "charging decisions and plea agreements should reflect adherence to the Sentencing Guidelines," Reno returned to prosecutors the discretion to "select[] charges and enter[] into plea agreements on the basis of an individualized assessment of the extent to which particular charges fit the specific circumstances of the case." Reno included among the factors a prosecutor may consider the sentencing guideline range yielded by the charge, whether the penalty yielded by such a 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.

Whether a sentence is "proportional to the seriousness of the defendant's conduct" seems to be a subjective judgment not recognized under the 1989 approach to charging mandated by former Attorney General Thornburgh. That phrase signaled a sea change in the policy of the Clinton/Reno Department of Justice.

Read broadly, the new bluesheet returned to federal prosecutors the authority to draft indictments that look beyond the provable "facts" to the sentencing phase, and to assess the probable punishment under the federal sentencing guidelines on a particular defendant. In other words, the crime charged and punishment imposed should fit the defendant's act and personal culpability. The AUSA prosecuting a case was given the authority and discretion to consider the fairness and proportionality of the probable result in deciding what charges to bring.

Not surprisingly, the issuance of the bluesheet did not go unnoticed in Congress. On January 13, 1994, Senator Orrin Hatch (R-Utah) wrote to Attorney General Reno to express his "strong opposition" to the change in prosecutorial policy. Senator Hatch interpreted the new policy to be in conflict with the Sentencing Reform Act of 1984 and the sentencing guidelines. Further, the Senator advised the Attorney General that "[i]f the Administration believes that existing sentences for drug cases and violent crimes are too severe, then it should seek to change the law or the relevant sentencing guidelines--not ignore them."

When the bluesheet was attacked, the Department of Justice provided no support for it and the policy is now in a sort of limbo. In a March 8, 1994, letter responding to Senator Hatch, Attorney General Reno disclaims the policy she authored.

In her letter, Reno emphasized that it remains the directive of the Department of Justice that prosecutors charge the most serious offense that is consistent with the nature of the defendant's conduct, that is likely to result in a sustainable conviction; that prosecutors adhere to the Sentencing Guidelines; and that charging and plea agreements be made at an appropriate level of responsibility with appropriate documentation.

Reno makes no mention of her belief, expressed in the bluesheet, that a "faithful and honest adherence to the Sentencing Guidelines" can be compatible with an "individualized assessment of the extent to which particular charges fit the specific circumstances of the case."

What remains of the October 1993 bluesheet? The answer, from a criminal defense perspective, is that it is dead, although it has not been withdrawn or revised.

Why did the Clinton/Reno Administration abandon its new policy? Maybe because it was engaged in lobbying for passage of its crime bill and suddenly perceived itself vulnerable to partisan allegations that it was soft on crime. Perhaps it was the wrong moment to suggest that federal prosecutors could round off some of the hard and unfair edges of the Sentencing Reform Act of 1984 and the guidelines.

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Attorney General Reno wrote Senator Hatch that the Administration was committed to "ensur[ing] that criminal law enforcement and sentencing policies are having their intended effect." Attorney General Reno may have recognized that her October 1993 bluesheet was inconsistent with the Administration's support for its pending crime bill which added mandatory penalties, including life imprisonment without parole for "dangerous recidivists"—the so-called "three-strikes, you're out" provision.

Federal prosecutors and defense attorneys must now figure out how to conform their practice to a "clarification" of prosecutorial policy that no longer has the backing of the administration that issued it.

What is the effect of the quick demise of the bluesheet? In the District of Maryland, it failed to take hold so its confusion is barely felt. We saw virtually no change in prosecutorial policy during the early months after the bluesheet was issued.

Two kinds of cases provide support for this conclusion: drug prosecutions where the quantity of the controlled substance required imposition of mandatory minimum sentences, and offenses where a firearm was involved, permitting a charge under 18 U.S.C. §924(c). In Maryland, federal prosecutors seldom involved defense attorneys in substantive negotiations over charging decisions. In drug prosecutions, once there was evidence to establish drug quantities calling for mandatory minimum sentences, prosecutors were reluctant to negotiate a plea agreement to a lesser quantity—which would require them to withhold drug quantity information from probation officers preparing presentence investigations. More often than not, prosecutors refused to negotiate a plea which "ignored" drug quantities above the mandatory minimum sentence level, no matter how sympathetic a particular defendant.

Where guns and drugs were commingled, and a section 924(c) count was approved by the grand jury, the charge was rarely negotiable. Prosecutorial discretion not to charge a section 924(c) offense was sometimes exercised before a defense attorney entered the case. But if a prosecutor chose to bring a section 924(c) count to the grand jury, and that count was indicted, its dismissal was seldom subject to negotiation. Neither of these policies changed in the first months of the new Administration.

WHAT IS THE LEGACY OF THE "BLUESHEET"?

Career Assistant United States Attorneys must be confused by the shifting political winds. When initially directed to exercise their charging discretion by considering the sentencing results, veteran prosecutors must have thought that a return to the "old days" (pre-Thorburn) was being announced. Now, after the letter to Senator Hatch, those same prosecutors must be left wondering exactly what Reno meant in the bluesheet.

AUSAs may now be hesitant to negotiate pleas with any consideration toward punishment because Reno has said that "individual prosecutors are not free to follow their own lights or to ignore legislative directives." This means that individual AUSAs may fear that their supervisors will reject plea agreements they have preliminarily negotiated with defense attorneys. This is especially true because Reno told Hatch that "charging and plea agreements [must be] made at an appropriate level of responsibility and with appropriate documentation." Does this mean Attorney General Reno is promising close supervision of any AUSA who proposes to conclude a case with "faithful and honest application of the Sentencing Guidelines" that also makes an "individualized assessment of the extent to which particular charges fit the specific circumstances of the case?"

In the District of Maryland, it is clear that "prosecutors are not free to follow their own lights." Plea agreements negotiated with individual AUSAs are routinely rejected by supervisory AUSAs, resulting in the awkward situation where defense attorneys must present to their clients a written plea offer that may be substantially more onerous than the understanding initially reached with the AUSA prosecuting the case. In some cases, AUSAs must back out of negotiated terms because they have learned from their supervisors that they have no authority to offer such terms. These problems can be avoided only when defense attorneys wait until a proposed plea has been "approved" by supervisors before taking it to the client for consideration.

In uncomplicated cases the need for supervisor approval is a nuisance that can be worked around. In complicated matters where plea negotiations go on for weeks, the need to involve the supervisor late in the process makes the negotiation a cumbersome, inefficient and frustrating experience. Often it seems the line prosecutor who knows the most about the case ends up having the least to say about the government's final plea position.

Experienced practitioners occasionally find means of bypassing the difficult plea policies outlined above. In some cases, however, no matter what strategy is pursued the deal cannot improve without manipulating the guidelines or ignoring prosecutorial policy. The demise of the Reno bluesheet is bad news to defense attorneys who try to negotiate dispositions that are appropriate for their clients' unique offense and personal circumstances. For defense lawyers the resulting (post Reno-to-Hatch letter) posture of most Assistant United States Attorneys is familiar—it is the same that prosecutors assumed during the preceding five years.