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Legal Sidebar

Federal Prosecutorial Discretion: A Brief Overview

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The exercise of prosecutorial discretion has frequently been a matter of congressional interest. For example, on February 15, 2025, the Department of Justice (DOJ) dismissed a pending criminal case against New York City Mayor Eric Adams, prompting inquiries from some Members of Congress into whether the dismissal came in exchange for Adams's assistance with enforcing the Trump Administration's immigration policies. DOJ has also recently commenced several high-profile criminal cases against public officials, including a Member of Congress, who have allegedly impeded federal immigration authorities. During the Biden Administration, DOJ's plea bargaining with President Biden's son Hunter Biden drew congressional scrutiny, as did the indictment of then-former President Trump. From broad law enforcement priorities embraced by different presidential Administrations to individual choices by DOJ attorneys about what charges to bring in specific cases, the executive branch wields broad discretion in how to enforce federal criminal laws. This Legal Sidebar provides an overview of the sources and extent of federal prosecutorial discretion, as well as Congress's potential options for exercising influence in this sphere.

The Take Care Clause in Article II of U.S. Constitution provides that the President "shall take Care that the Laws be faithfully executed[.]" Courts have interpreted the clause to recognize the President and the federal officials who exercise delegated executive authority as having broad discretion to determine how to appropriately enforce the nation's criminal laws. This discretion can take the form of setting general enforcement priorities in recognition of the fact that resource limitations preclude universal enforcement. With respect to federal prosecutors' individual prosecutorial discretion, the Supreme Court has emphasized that "so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to bring before a grand jury, generally rests entirely in his discretion." Courts have found that this discretion inheres not just in prosecutors' decisions about whether and how to bring charges, but also in prosecutors' negotiation of guilty pleas and diversion agreements, decisions about whom to immunize, and sentencing recommendations. As the Supreme Court has explained, charging decisions are particularly difficult for courts to review because the factors prosecutors might consider—such as the strength of the case and the enforcement priorities of a particular Administration—often involve practical considerations rather than legal analysis.

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Limitations on Federal Prosecutorial Discretion

Some limitations on prosecutorial discretion exist, particularly at the individual case level (as opposed to broader policy choices about law enforcement priorities). Constitutional due process and equal protection requirements limit prosecutors' discretion in charging decisions. DOJ policy provides further guidance for federal prosecutors on how to exercise their discretion, and professional responsibility rules for attorneys specifically impose a duty to act in the event of wrongful convictions. Certain statutory provisions impose procedural requirements on prosecutors without governing their ultimate decisionmaking. Congress has also enacted laws imposing substantive requirements on prosecutors, but courts have tended to read these laws narrowly to limit incursions on executive discretion. Broadly speaking, what limits exist on prosecutorial discretion tend to constrain prosecutors' ability to bring charges, not their discretion to decline to pursue criminal enforcement.

The Fifth Amendment

The Fifth Amendment to the Constitution places certain constitutional constraints on the exercise of federal prosecutorial discretion. With respect to charging decisions, the Fifth Amendment requires that prosecutors obtain an indictment from a grand jury for any felony offense. To do so, prosecutors must present evidence sufficient for the grand jurors to find probable cause that an offense has been committed. The Fifth Amendment also requires that no one be charged more than once for the same offense. The Due Process Clause of the Fifth Amendment further states that no person may "be deprived of life, liberty, or property, without due process of law[.]" Courts have held that this provision prohibits prosecutors from engaging in selective or vindictive prosecution. *Selective prosecution* refers to a decision to prosecute based on "an unjustifiable standard such as race, religion, or other arbitrary classification." *Vindictive prosecution* refers to a prosecution in retaliation for the exercise of a legal right (such as the right to a trial by jury). Both types of constitutional violations carry high burdens of proof. Defendants alleging selective prosecution have to present "clear evidence" to the effect that prosecutorial policy had both a discriminatory purpose and effect, and defendants alleging vindictive prosecution have to show a "realistic likelihood" of vindictiveness. Only defendants subject to alleged prosecutorial misconduct have standing to challenge prosecutors' actions on these bases, and those defendants must also overcome the "presumption of regularity"—courts' baseline presumption that public officers have "properly discharged their official duties."

DOJ Policy

DOJ has developed principles to "promote the reasoned exercise of prosecutorial discretion." DOJ's Justice Manual instructs federal prosecutors to bring cases where the evidence will likely lead to a conviction "unless (1) the prosecution would serve no substantial federal interest; (2) the person is subject to effective prosecution in another jurisdiction; or (3) there exists an adequate non-criminal alternative to prosecution." Factors prosecutors are instructed to consider include federal law enforcement priorities; the nature and seriousness of the offense; the deterrent effect of prosecution; and the person's culpability, criminal history, and personal circumstances, among others. These principles are non-binding, though U.S. Attorneys are instructed not to deviate from them "as a matter of policy or regular practice" without approval from DOJ leadership.

Rules of Professional Responsibility

All practicing attorneys, including federal prosecutors, are subject to rules of professional responsibility imposed by the state bars in which they are licensed to practice. American Bar Association Model Rule of Professional Conduct 3.8, which has been adopted in most U.S. jurisdictions, addresses the special

responsibilities of prosecutors. That rule obliges prosecutors to adhere to the constitutional provisions surrounding probable cause and defendants' right to counsel, and the rule also imposes an affirmative obligation on prosecutors to remedy wrongful convictions. Violations of the rules of professional responsibility can lead to prosecutors being suspended or disbarred.

Procedural Requirements

Certain federal laws impose procedural constraints on prosecutorial activity. Under 18 U.S.C. § 851, for example, prosecutors must file a notice before seeking an enhanced penalty for drug offenses based on prior convictions, and under 18 U.S.C. § 3593(a), prosecutors must file notice of intent to seek the death penalty a "reasonable time" before a trial or guilty plea.

One statute that places a number of procedural impositions on prosecutors is the Crime Victims' Rights Act (CVRA), which affords victims of crime a reasonable opportunity to confer with federal prosecutors. The CVRA places an affirmative burden on prosecutors to ensure that victims are advised of and accorded their rights under the Act and to advise victims of their option to consult with an attorney about their rights under the CVRA. Although the CVRA imposes no obligation on prosecutors to acquiesce to crime victims' wishes and explicitly states that it should not be construed to impair prosecutorial discretion, the statute does allow victims to intervene in criminal cases in certain circumstances when their rights under the CVRA have been infringed.

The Supreme Court has not addressed whether the right to confer under the CVRA arises prior to charges being filed, such as in a case where the government negotiates a resolution with a defendant before seeking an indictment. In one high-profile case, though, the Eleventh Circuit discussed the implications for prosecutorial discretion if such a right did exist. In 2007, prior to charges being filed, federal prosecutors entered a non-prosecution agreement (NPA) with Jeffrey Epstein (who was later convicted of sex trafficking in another district). One of Epstein's victims later filed a civil action, *In re: Wild*, challenging the NPA and arguing that her CVRA right to confer had been violated. The U.S. Court of Appeals for the Eleventh Circuit dismissed the case on the grounds that reading the CVRA to authorize victims to commence legal proceedings outside of an existing criminal case would impermissibly impair prosecutorial discretion. This was in part because, absent an open criminal case, a court would have no way to enforce victims' rights other than a civil order to prosecutors to "conduct their prosecution of a particular matter in a particular manner" in contravention of both the CVRA and "the background expectation of executive exclusivity."

Substantive Limitations on Discretion

The Eleventh Circuit's logic in *Wild*, and the court's comment that allowing victims a pre-charge right of action "would work an extraordinary expansion of an already-extraordinary statute," demonstrate the powerful presumption against legislative intrusion into prosecutors' decisions about whether and how to proceed with a case. Nonetheless, certain statutes and rules do impose constraints on such discretion.

One statutory enforcement provision, 42 U.S.C. § 1987, states that U.S. Attorneys are "authorized and required" to prosecute violators of certain civil rights laws. In discussing whether this language effectively created a congressional mandate to prosecute, the U.S. Court of Appeals for the Second Circuit found that this language did not "evince a broad Congressional purpose to bar the exercise of executive discretion in the prosecution of federal civil rights crimes." The court further noted that several other statutes that include nominal mandates—such as the standing statutory instruction to U.S. Attorneys at 28 U.S.C. § 547 that they "shall" prosecute for "all" offenses against the United States or the statement in 33 U.S.C. § 413 that "it shall be the duty of United States attorneys to vigorously prosecute all offenders"—similarly did not actually preclude the exercise of prosecutorial discretion. Having determined that Congress did not intend for § 1987 to remove prosecutorial discretion, the court did not decide whether it

would be theoretically proper for Congress to explicitly "remove all prosecutorial discretion with respect to certain crimes." In another context, specifically in discussing the contempt-of-Congress law instructing the Attorney General to commence grand jury proceedings against individuals referred by Congress for contempt, DOJ has argued that the law could not be constitutionally interpreted to deprive DOJ of prosecutorial discretion.

The Speedy Trial Act (STA) provides for some judicial involvement in deferred prosecution agreements (DPAs), a form of pre-trial diversion in which prosecutors agree to dismiss charges against a defendant after a period of demonstrated compliance with the conditions of the DPA. In recognition of the Sixth Amendment right to a "speedy and public trial," the STA requires that defendants in federal criminal cases be tried within 70 days, unless an exception applies. One such exception excludes from the 70-day period "[a]ny period of delay during which prosecution is deferred by the attorney for the Government pursuant to written agreement with the defendant, with the approval of the court, for the purpose of allowing the defendant to demonstrate his good conduct." The Senate report accompanying the STA specified that this exclusion allowed for "deferral of prosecution" and noted that the "approval of the court" language "assures that the court will be involved in the decision to divert and that the procedure will not be used by prosecutors and defense counsel to avoid the speedy trial time limits." Two U.S. courts of appeals have held that the "approval of the court" called for under the STA is limited to ensuring that the DPA is "*bona fide*" (and not a delay tactic). Those courts emphasized that a broader reading of "approval"—empowering trial judges "to evaluate the substantive merits of a DPA or to supervise a DPA's out-of-court implementation"—would intrude on prosecutorial discretion and raise separation of powers concerns.

Rule 11 of the Federal Rules of Criminal Procedure, which governs guilty pleas, also contemplates a role for judges in negotiated resolutions to criminal cases. Under that rule, if a plea agreement includes promises from the government that it will "not bring, or will move to dismiss, other charges," the trial judge "may accept the agreement, reject it, or defer a decision" until later in the proceedings. Acknowledging that this provision inserts judges into the charge bargaining process, one court cautioned that judges must make the decision to accept or reject a plea agreement "with due regard to prosecutorial prerogatives." Judges may not, therefore, adopt a categorical rule against charge bargain agreements. In evaluating particular agreements, courts may properly consider, among other things, whether an agreement "reflects the seriousness of the actual offense behavior." For example, after one defendant attempted to recruit others to assist him in terrorizing a minority community, prosecutors offered to allow him to plead guilty to "one count of transmitting a threat to kill or injure someone in interstate commerce, carrying a statutory maximum of five years." The judge rejected the plea on the basis that it "did not adequately reflect the severity of [the defendant's] conduct."

Considerations for Congress

The Supreme Court has recognized criminal prosecution as a "core executive power," and as a result, Congress's ability to control the executive's exercise of prosecutorial discretion is constitutionally constrained by separation of powers principles. Still, there appear to be several avenues by which Congress may influence prosecutorial discretion. In a 1984 Office of Legal Counsel (OLC) memorandum, DOJ observed that Congress "may establish standards for the exercise of" prosecutorial discretion, even if it "may not removal all Presidential authority" over that exercise. For example, OLC suggested that Congress might permissibly "impose certain qualifications on how the Executive should select individuals for prosecution," even though Congress could not "identify the particular individuals who must be prosecuted." In addition, federal statutes like the CVRA and STA establish procedural requirements that prosecutors must follow when bringing a criminal case.

Powers traditionally vested in Congress, such as oversight and appropriations, are also viable means of exercising influence over prosecutorial decisionmaking. With respect to oversight, Congress may require

DOJ to collect and report data related to prosecutorial discretion. For example, Congress has previously required DOJ to report on the number of, and justifications for, DPAs and NPAs under the Bank Secrecy Act. Congress has authority to issue subpoenas for documents and testimony in conducting oversight, though DOJ has previously invoked the law enforcement privilege to resist attempts to obtain documents reflecting prosecutors' decisions about whether and how to charge specific cases. Broader oversight can also be performed by a commission tasked with investigating and reporting on federal law enforcement agencies and practices.

Congress has used its appropriations power to limit federal prosecutorial discretion by prohibiting the use of appropriated funds for particular purposes. For example, Congress has enacted a medical marijuana appropriations rider, prohibiting DOJ from spending appropriated funds to prevent states from implementing their own state laws authorizing medical marijuana. Courts have held this rider to preclude DOJ from prosecuting individual marijuana cases in certain circumstances. In the immigration context, a proposed amendment to an appropriations bill would have prohibited appropriated funds from being used to implement certain enforcement discretion policies. Another avenue for using appropriations to broadly influence enforcement would be to structure and fund DOJ's litigating divisions to prioritize prosecutions in certain subject matter areas.

In sum, while courts have been wary of legislative and judicial encroachment on executive branch discretion in criminal law enforcement, Congress fashions the laws and rules that govern the criminal judicial process and can influence the exercise of prosecutorial discretion in the course of conducting oversight of, and appropriating funds for, federal law enforcement.

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