

Prosecutorial Decision-Making and Racial/Ethnic Disparities in the Federal Criminal Justice System: Principles and Guidelines

A PROJECT OF THE BRENNAN CENTER FOR JUSTICE AT NYU SCHOOL OF LAW AND THE NATIONAL INSTITUTE FOR LAW AND EQUITY*

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The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

—U.S. Supreme Court Justice Sutherland,
Berger v. United States, 295 U.S. 78, 88 (1935)

Federal prosecutors are respected members of a respected profession. Despite an occasional misstep, the excellence of their work abundantly justifies the presumption that "they have properly discharged their official duties." Nevertheless, the possibility that political or racial animosity may infect a decision to institute criminal proceedings cannot be ignored. For

that reason, it has long been settled that the prosecutor's broad discretion to determine when criminal charges should be filed is not completely unbridled.

—U.S. Supreme Court Justice Stevens, dissenting,
United States v. Armstrong,
517 U.S. 456, 476 (citations omitted)

PREAMBLE

Our country was founded on the principle that all are created equal. We are a nation of laws that promote liberty and justice for all without regard to race, ethnic origin, religion, creed, or gender. We are mindful that our nation's racial history has sorely tested those beliefs of equality, liberty, and justice, and that there should be no room for the vestiges of racial or ethnic discrimination in our criminal justice system.

The federal criminal justice system is often viewed with great distrust because of the disproportionate numbers of African Americans, Hispanics, American Indians, and other racial or ethnic minorities in our jails and prisons—and especially because of the disproportionate severity in their sentences. The role of the federal prosecutor in the system is one of gatekeeper to ensure that as s/he “strike[s] hard blows” in the name of justice,¹ s/he does so in a manner that is fair and free from racial/ethnic bias or stereotyping. Doing what is just is not measured simply by the number of convictions obtained but also by the public's trust that the U.S. Attorney seeks and declines prosecutions based upon law, justice, and equality.

As former U.S. Attorneys, we know that the men and women who are the legal representatives of the U.S. government pursue the highest ethical standards with the goal of protecting our communities and preserving the rule of law. However, existing federal prosecutorial guidelines do not adequately address unwarranted racial/ethnic disparities in the criminal justice system or propose ways in which prosecutors may reduce such disparities.²

We introduce these principles and guidelines not as a cure-all for racial/ethnic and social inequalities but as a way to begin the process of eliminating unwarranted racial/ethnic disparities in the federal criminal justice system. Leadership from the top, by each U.S. Attorney, must set the tone for equal justice under the law, and the following principles and guidelines are intended to challenge and encourage all federal prosecutors to take action within their spheres of influence to ensure that law enforcement priorities and initiatives, charging decisions, and sentencing recommendations are not influenced by racial/ethnic bias or stereotyping, and do not exacerbate unnecessary disparate effects of facially neutral laws or policies.

It is against this backdrop that we trust our colleagues will recognize the need to increase public confidence in the fairness of the federal criminal justice system, will embrace these principles and guidelines, and will promote them within their offices and law enforcement communities.

GENERAL PRINCIPLES OF EQUAL JUSTICE

- The pursuit of justice requires the fair application of the law to ensure public confidence and trust in the criminal justice system.
- Justice means observing the highest ethical standards by ensuring that racial bias and stereotyping do not play a role in federal prosecutions.
- Fairness and equality demand that similarly situated defendants be treated equally and that unwarranted racially disparate impact be eliminated.
- Prosecutorial decision-making should be well-reasoned and transparent.

GUIDANCE ON REDUCING RACIAL/ETHNIC DISPARITIES IN FEDERAL PROSECUTIONS

I. Prosecutorial Decision-making

- The U.S. Attorney should be conscious of potential racially disparate impact when setting district prosecution priorities.
- The U.S. Attorney should consider statistical evidence of community crime indicators and qualitative evidence of community concerns in setting prosecution priorities and initiatives.
- The U.S. Attorney should be proactive in his/her leadership and partnership with law enforcement agencies to prevent racial and ethnic bias and ensure that similarly situated defendants receive similar charges and sentences.
- The U.S. Attorney should consider the racial effects of his/her charging and disposition policies and ensure that racially disparate effects are tolerated only where strongly justified by legitimate law enforcement needs.

Comment: The conscious, informed exercise of prosecutorial discretion should mitigate the illegitimate use of race/ethnicity, including stereotypes or proxies for race/ethnicity (such as class/socio-economic status or geography), in decision-making. Well-reasoned discretionary decisions should avoid unwarranted racially/ethnically disparate effects of facially neutral policies.

The U.S. Attorney has broad jurisdiction and cannot be involved in every case brought by the prosecutors in their offices. However, as the leaders of federal law enforcement in their districts, the priorities, policies, and missions established by U.S. Attorneys carry great weight with others. U.S. Attorneys set many priorities during their tenure. State and federal street crime initiatives often marginalize federal resources that could be focused on crime that the U.S. Attorney is well-suited to prosecute, such as redlining by banks, environmental dumping in poor neighborhoods, and gun or drug trafficking as opposed to street crimes such as simple possession of drugs or illegal firearms.

Prosecutors must weigh multiple factors in determining prosecution policies and priorities. Such factors include: legislative mandates, Department of Justice initiatives, human and financial resources, local law

enforcement priorities, and community priorities. In weighing priorities, prosecutors should avoid racial bias at all stages in the prosecutorial decision-making process. They must use their best judgment in pursuit of justice by making conscious and informed use of their discretion in order to eliminate the illegitimate use of race in setting prosecution priorities.

In addition to evaluating the racial impact of prosecutorial priorities, every U.S. Attorney should review his/her office's charging, plea, and sentence recommendation policies and ask the following questions: "Is this policy focused predominantly in a particular racial or ethnic group community?" and "Is the focus justified because crime data and community members demand the resources of the federal government?" In response, the U.S. Attorney may establish additional policies, such as setting minimum drug quantity guidelines for crack cocaine prosecution in a medium-sized city, where cases involving small quantities can be adequately prosecuted by local and state law enforcement.

The U.S. Attorney should establish periodic review of prosecutorial charging, plea, and sentencing decisions to ask tough questions about the role race may or may not have played in the decision to prosecute. This will help ensure that their staff and task forces are consciously making decisions that treat similarly situated defendants the same. This recommendation to periodically review the decisions of the U.S. Attorney's Office applies as much to lenient treatment as it does to harsh treatment.

II. Law Enforcement/Task Forces

- The U.S. Attorney should provide oversight of all law enforcement task forces operating under his/her jurisdiction and encourage diversity of membership, leadership, policymakers, and decision-makers in each task force enterprise.
- The U.S. Attorney should charge task forces with the obligation to consciously review their rationales for conducting or declining to conduct investigations in order to eliminate racially disparate treatment and effects.

Comment: U.S. Attorneys have sole responsibility to determine what cases to prosecute. Accordingly, U.S. Attorneys in their partnership with law enforcement cannot lose sight of their role as gatekeepers with responsibility to screen cases for and to prevent racial disparities.

The U.S. Attorney is the top federal law enforcement official in the district and should lead the way in making certain that law enforcement task force membership reflects the diversity of the communities the task force serves. The U.S. Attorney has the obligation to ensure that Assistant United States Attorneys and task force members understand the negative effects of racial bias and stereotyping in law enforcement operations—including ineffective crime prevention. Each initial legal briefing to task force members should include a reminder and affir-

mation of the requirement of equal treatment of similarly situated individuals, regardless of race or ethnicity.

III. Training

- All training of federal prosecutors should incorporate education about the role of racism in our history and criminal justice system.
- The U.S. Attorney should provide training to all supervisors, attorneys, and other staff that is specifically directed toward eliminating racial bias and racial stereotyping in recruitment, hiring, retention, promotion, supervision, and prosecutorial decision-making.
- The U.S. Attorney should provide or advocate for racial disparity/profiling training for law enforcement agencies and advocate conditioning the receipt of federal funding for law enforcement efforts on agents' participation in such training.

Comment: Eliminating racial bias, racial stereotyping, and disparate racial effects from prosecution requires raising consciousness and awareness about the role and history of race in discretionary decision-making.

The U.S. Attorney should identify and advocate for racial disparity/profiling training resources, including training at the National Advocacy Center, in order to provide orientation and education to new and experienced staff about the negative effects of racial profiling and stereotyping in prosecutorial and law enforcement decisions. There is successful precedent in at least one jurisdiction conditioning the receipt of federal funds by state and local law enforcement agencies upon the completion of racial profiling training for state and local law enforcement officers. The U.S. Attorney can and should help identify opportunities for law enforcement education and training (e.g., through Byrne grant funding, Department of Justice Bureau of Justice Assistance funding, or funding for High Intensity Drug Trafficking Areas (HIDTA)).

IV. Management/Accountability

- The U.S. Attorney should support office policies that ensure diversity among his/her professional and support staff, including the active recruitment, hiring, retention, and promotion of African-Americans, Hispanics, American Indians, and other racial and ethnic minorities.
- Every prosecutor should review his/her own personal beliefs and biases, including use of racial and ethnic stereotypes or use of proxies for race and ethnicity (such as class/socio-economic status or geography).
- The U.S. Attorney should take affirmative steps to eliminate racial/ethnic bias or stereotyping that is within his/her control and supervision.
- As an internal office management tool, the U.S. Attorney should collect and analyze quantitative and qualitative data on the race and ethnicity of the defendant and victim at each stage of prosecution, including but not limited to: case intake, bail

requests, declinations, selection of charges, diversion from prosecution or incarceration, plea offers, sentencing recommendations, fast-track sentencing, and use of alternative sanctions. Such data need not be public, but may provide the U.S. Attorney with data on individual prosecutions and in the aggregate to identify any systemic racial disparities, ensure unbiased prosecutorial decision-making, and reduce unwarranted racially or ethnically disparate effects in the future.

- As an external office management tool, the Executive Office for United States Attorneys should, during routine evaluations and reviews of U.S. Attorney's Offices, analyze the race and ethnicity of the defendant and victim at each stage of prosecution, including but not limited to: case intake, bail requests, declinations, selection of charges, diversion from prosecution or incarceration, plea offers, sentencing recommendations, fast-track sentencing, and use of alternative sanctions in order to ensure consistency in applying the law and prosecutorial policies.

Comment: Office recordkeeping, data analysis, and oversight can ensure diversity in hiring, recruitment, retention, and promotion; careful consideration of the racial effects of strategic planning and prosecution priorities; and a culture of understanding of the benefits of addressing racial disparities in prosecution.

Our society has long struggled to ensure racial equality, yet African Americans, Hispanics, and American Indians are disproportionately represented in our jails and prisons. They have also been disproportionately represented in prosecutors' offices. The 94 Federal Judicial Districts are unique in many ways, but they all encompass diverse populations. U.S. Attorneys have a responsibility to hire qualified staff that reflect the diverse communities they serve. Public confidence in our justice system is vital to our ability to ensure that justice is done.

U.S. Attorneys have an independent obligation to ensure that all those employed by the office, regardless of race, do not make decisions based on race or stereotypes. Introspection is a difficult task, as no one intends to bring prosecutions based solely upon race. Prosecutors need to consciously ask themselves the question, "If the defendant was of a different race or ethnicity, would I seek the same penalty?"

Given existing correlations between race and class, decisions to target only poor neighborhoods for street drug sales and ignoring drug sales and drug use in affluent neighborhoods ensures that most drug arrests will be of racial or ethnic minorities. Assistant U.S. Attorneys ("AUSAs") should be able to explain their charging decisions to their supervisors when there are racial or ethnic disparities in charging and dispositions.

Management must regularly inspect the work of the U.S. Attorney's Office to ensure that the U.S. Attorney's expectations are being met. The goal of good management is to ensure that the mission of the organization is being

accomplished within the rules and regulations. If the U.S. Attorney expects AUSAs and law enforcement to bring prosecutions that are free from racial bias, then the U.S. Attorney must have some mechanism in place to determine that the policies against race-based use of discretion are effective. The Department of Justice has instituted strategic planning and continuing education for all managers, including the U.S. Attorney and all senior managers. The Department of Justice Evaluation and Review Teams are but one tool that could be used to measure the effective management of U.S. Attorney's Offices.

V. Community

- The U.S. Attorney should meet with community members, including members of the bar and criminal justice professionals, to obtain their input on crime problems and effective solutions.
- The U.S. Attorney should adopt measures that allow lay community members to voice their concerns about real or perceived disparate treatment in prosecutorial policies and disparities in their final results.

Comment: The perception of fairness is as important as the exercise of fairness. U.S. Attorneys should recognize the roles of community members and stakeholders in apprising the U.S. Attorney of the community impact of office policies and discretionary decisions.

U.S. Attorneys are selected both for their legal acumen and their standing in the community. The U.S. Attorney is often required to bring tough and unpopular prosecutions, and having the trust and confidence of community members is an important goal of the Department of Justice. It is in the U.S. Attorney's interest that crime prevention and intervention programs involve the community in making neighborhoods safe.

VI. Influencing Legislation/Policy

- Each U.S. Attorney has the affirmative obligation to raise the racially disparate effects of legislation and policy with the Executive Office for United States Attorneys, the Attorney General's Advisory Committee of United States Attorneys, and the Department of Justice Office of Legislative Affairs.
- The U.S. Attorney should advocate sentencing alternatives and reforms that lessen the impact on those adversely affected by racial disparities in the federal criminal justice system.

Comment: The U.S. Attorney is the practitioner on the ground level who sees first-hand the effect of legislation that creates racial/ethnic disparities in sentencing. While federal prosecutors face limits on their ability to play an active role in legislative affairs, they should keep abreast of pending legislative and policy developments that will affect their role as enforcers of the law and should take advantage of opportunities within the Department of Justice to address these issues.

Notes

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¹ *Berger v. United States*, 295 U.S. 78, 88 (1935).

² Existing guidelines state only that a "person's race, religion, sex, national origin, or political association, activities or beliefs" may not influence a federal prosecutor's decision "whether to commence or recommend prosecution or take other action against a person." U.S. Dep't of Justice, United States Attorneys' Manual, Title 9, Criminal Resource Manual, Chapter 27, Principles of Federal Prosecution, 9-27.260, "Initiating and Declining Charges—Impermissible Considerations," available at http://www.usdoj.gov/usao/ecusa/foia_reading_room/usam/title9/27mcrm.htm#9-27.260 (last visited Nov. 17, 2006). Further commentary clarifies that, "[o]f course," in a case in which race or ethnicity "is pertinent to the offense (for example, in an immigration case the fact that the offender is not a United States national, or in a civil rights case the fact that the victim and the offender are of different races), the provision would not prohibit the prosecutor from considering it for the purpose intended by the Congress." *Id.*