Federal Sentencing Guidelines and Prosecutorial Discretion

By Joshua Nave

Federal prosecutors have received a new set of guidelines from Attorney General Eric Holder that will affect the process used by prosecutors to determine what charges to bring against a defendant.

Saying that "[the] reasoned exercise of prosecutorial discretion is essential to the fair, effective, even-handed administration of the federal criminal laws," the memo, which was given to the US Sentencing Commission on May 26th, requires that all charging decisions be accompanied by a memo outlining the options and the rationale for the charging decisions, and must be reviewed by a supervisory attorney.

There appear to be two goals here: First, Holder is attempting to bring some uniformity to the system by ensuring that defendants are charged based solely on the context of their individual case. Second, Holder is bringing the department current with the Supreme Court decision in 2005 that made federal sentence guidelines advisory. According to Sally Yates, a US Attorney in Atlanta, federal prosecutors were continuing to act as though the guidelines were mandatory. Yates told the Sentencing Commission that by pushing always for the advisory sentence without considering each case in its own context, prosecutors were removing themselves from the conversation.

This is the second time this year the issue of federal sentencing guidelines has come up. Earlier in the year the Sentencing Commission recommended new rules that will take effect on Nov 1, barring Congressional override. Under the new guidelines all judges to take into account military service, age, and mental and emotional conditions when passing sentence. This is significant because the commission has historically only recommended increased sentences, not decreases.

Limits on judicial discretion are a threat to the separation of powers. When the legislature interferes with the discretion of judges it inherently weakens the independence of the judicial branch. Although the recent recommendations by the sentencing commission deal with federal judges, the issue of judicial discretion has also arisen in states across the country. Judge Rose Bird, the first female Chief Justice of the California Supreme Court, laid out the argument for judicial discretion in a passionate dissent in People v Tanner, 24 Cal. 3d 514. Mandatory sentences for offenders, whether requirements or guidelines, takes discretion away from the judges that are expected to have the training and experience and places it instead in the hands of prosecutors who have the discretion in choosing the allegations. Judges are expected to be unbiased decision makers, while prosecutors have a vested interest in racking up convictions and longer sentences. Judges are expected to have greater experience than prosecutors, who in some cases may be relatively junior attorneys.

The recent recommendations from the sentencing commission are a step in the right direction. These recommendations allow judges to take more things into account when setting sentences. However the commission itself remains a legislative encroachment on judicial independence. That it has granted some discretion back to the judiciary does not change the fact that such discretion should never have been stripped away in the first place.