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OVERVIEW OF FEDERAL PROSECUTION IN THE US. From Investigation to Trial.

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EXECUTIVE SUMMARY

All ROLP reports are required to have a short, concise executive summary about the report. An executive summary is a brief summary of the report and should typically not be more than two pages.

The executive summary should include the purpose of the report, if it is a supporting document to other reports, and summarize any conclusions that are made in the report.



I. CONSTITUTIONAL AND STATUTORY FRAMEWORK

A. Constitutional Framework: The Three Branches of Government (Legislative, Executive, Judicial)

Constitutionally, there is substantial interplay between the branches.

1. *Legislative Branch (Congress: House and Senate)*

- Raise revenue. U.S. CONST. ART. I, § 7.
- Collect taxes; borrow money, regulate commerce; coin money. U.S. CONST. ART. I, § 8.
- Constitute courts inferior to the Supreme Court. ART. I, § 8.
- (By statute, Congress established federal trial and appeals courts.)
- Commerce power and other enumerated powers define what laws Congress can pass.
- Basically has the budget power for all branches.

2. *Executive Branch (The President and Agencies)*

- “Require the opinion of the principal Officer in each of the Executive Departments.” ART. II, § 2.
- With the advice and consent (approval) of Senate, nominate Supreme Court Judges and all other

Officers of the United States. ART. II, § 2, Cl, 2.

- Congress may vest the appointment of inferior officers in the office of the President alone. ART. II,

§ 2, Cl, 2. (Note: President can delegate hiring authority to, for example, agency heads.)

- President also nominates federal trial and appeals judges with the approval of the Senate.
- High-level agency heads and cabinet posts require the approval of the Senate.

3. *Judicial Branch*

- Article III establishes Supreme Court; allowed Congress to establish inferior courts. ART. III, § 1.
- By statute, Congress established district (trial) courts and appeals courts. Life tenure for judges.
- 93 geographic districts for trial courts; 12 appeals courts (Circuits 1 to 11 & D.C. Circuit).
- Jury trials for all felonies and one-year misdemeanors. Bench trial for six-month misdemeanors.
- Judiciary passes on constitutionality of all laws. *Marbury v. Madison*, 5 U.S. 137 (1803).
- So Congress legislates but the courts (ultimately the Supreme Court) decides whether statutes and, indeed, any executive action (like prosecutions) are constitutional.

= separation of powers; checks and balances



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B. Statutory Framework

- U.S. Department of Justice (DOJ) is part of the Executive Branch. 5 U.S.C. § 301.
- One United States Attorney (chief prosecutor) for each of 93 districts. 28 U.S.C. § 541.
- Congress defined responsibilities of the U.S. Attorneys by statute. 28 U.S.C. §§ 541-550.
- Each United States Attorney is appointed by the President with the consent of the Senate.
- Four-year term subject to renewal.

C. Statutory Duties of the United States Attorney 28 U.S.C. § 547.

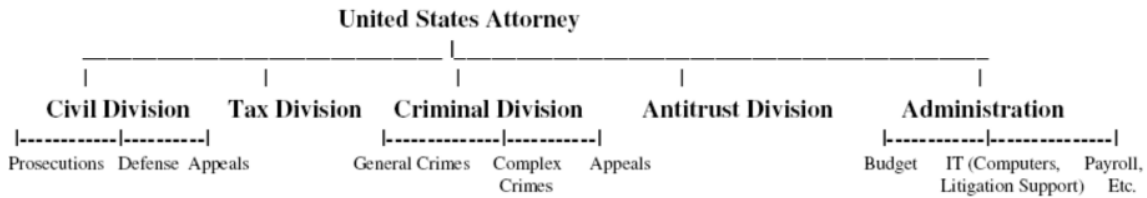
- prosecute all federal crimes in that district.
- prosecute (or defend) for the government all civil actions where the United States is a party.
- bottom line: the United States Attorney is the chief prosecutor for the particular district

D. Interplay Between Statutory Authority and Policy

- By statute, DOJ Attorney General (AG) has supervisory authority over U.S. Attorneys
- By statute, Attorney General also coordinates administration (allocating positions, budget)
- Basically, the President has delegated his executive authority to the AG
- AG sets national policies (set forth in United States Attorneys Manual (USAM))
- USAM Title 9: all the policies of the Criminal Division (how to charge, settle, try cases)
- http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/title9.htm = web site
- Also outlines when the US Attorney must get approval from Main Department of Justice
- Not all cases require approval; only certain ones (for ex., matters of national security)
- Lots of discretion in individual districts for the United States Attorney
- Separate titles govern administration, discipline, other rules

II. ORGANIZATIONAL STRUCTURE OF THE UNITED STATES ATTORNEY'S OFFICE

- varies depending on size of office, but pretty simple; also mimics basic DOJ structure
- also, appeals section in some offices is for both criminal and civil (true at Main Dept of Justice)
- every group has lawyers in it (except for administration = generally support staff)
- appeals can be handled by trial lawyers OR specially-designated appeals lawyers
- but all appeals are reviewed internally in the office
- DOJ has to approve any appeal by a local United States Attorney
- Reason: to coordinate national policy and strategy



- Because of national issues, Tax and Antitrust divisions (civil and criminal) report to DOJ too
- by contrast, most other crimes and civil matters are about local issues
- More limited approval requirements, but always coordinate with national policy in USAM

III. LAW ENFORCEMENT AGENCIES

- there are lots of different law enforcement agencies (known as agents or police officers)
- local cities have police officers; states have agents; federal agencies have law enforcement agents
- Example: Post Office has Postal agents who investigate thefts of mails, crimes using the mails
- Example: Dept of Health and Human Services investigates health care fraud (often, misuse of federal \$)
- Example.: The Internal Revenue Service has revenue agents (criminal and civil) regarding tax violations
- Example: Immigration and Customs has immigration and customs agents (smuggling, illegal entry)
- The Department of Justice also has investigative agencies
- Main DOJ agencies = Federal Bureau of Investigation (FBI) and Drug Enforcement (DEA)
- Congress defines by statute what each agency can investigate
- Ex.: FBI can investigate almost everything, DEA investigates drugs, Postal = mails
- Agencies investigate civil and criminal matters
- we work with all agencies

IV. INVESTIGATION OF A CASE

- prosecutors work with agents/police officers to investigate cases
- the reason: prosecutors decide whether to charge a case, so vested interest
- Another reason: some investigation techniques require a prosecutor to issue them
- Note: some investigative tools require judicial approval (reviewed below)
- The court also reviews the propriety of investigative techniques after the case is charged



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- In some circumstances, court can review investigative techniques before the case is charged

- Practical reality: often initial investigation is done by the police officer/agent
- But prosecutor always reviews evidence before charging a case
- Prosecutor in federal system always meets with witnesses before witnesses testify in court

Note: Propriety of investigation always subject to judicial review once case is charged
People can sue for money based in improper police tactics

V. INVESTIGATIVE TOOLS

- witness interviews
 - subpoenas = issued by the grand jury at request of prosecutor
- = can't use to harass, but otherwise, easily obtainable
= need DOJ approval for some (to attorneys, media)
= subpoenaed party can go to court and ask for relief
= can use for documents or testimony by witnesses before grand jury
= some agencies also have subpoena power (generally for documents)
- searches of home/business/computer/private place with probable cause and court order
 - interception of phone calls (wiretaps = listening in): need probable cause, necessity, court order
 - court orders for certain telephone information (list of numbers called/received)
 - undercover agent or informant (can wear a wire): need prosecutor approval in certain situations
 - court order for tax returns
 - mail covers (post office gives addresses on outside of mail); trash

VI. CHARGING A CASE

- crimes are defined by statute; procedures are defined by statute/criminal rules

A. Jurisdiction and Venue

1. Jurisdiction: is it a federal crime (did Congress criminalize it, and does the Constitution permit it)

2. Venue: can charge a crime only in the district where crime occurred

- complex cases often span many districts
 - federal statutes criminalize “conspiracy” and “schemes to defraud”
- = can charge case in any district where part of conspiracy/scheme occurred

B. Need Formal Charging Document: Indictment or Information

- Formal accusation is filed in court; called a “charging document”
- The charging document can be an indictment or an information
- Indictment is signed by grand jury; information is signed by prosecutor



- It reads in the language of the statute and can refer to some of the evidence

- It charges a defendant by name
- Prosecutor decides whether to charge a case
- Can charge by sworn affidavit of police officer; need indictment/information within 10/20 days

C. For Either Indictment or Information, Prosecutor Must Establish Probable Cause

- For either charging document, prosecutor must establish probable cause of crime
- With the indictment system, grand jury finds probable cause
- With the information system, there is a court “probable cause” hearing
- Probable Cause: under the totality of the circumstances, whether the person probably committed

the crime

- Note DOJ policy below: need more than probable cause; need beyond a reasonable doubt

D. Probable Cause Is Decided by a Grand Jury (Indictment) or Magistrate Judge (Information)

- If before a grand jury, prosecutor presents evidence there (23 jurors, 16 need to be present)
- If before magistrate judge, prosecutor presents evidence in court at a “probable cause hearing”
- In federal system, defendant has a right to indictment under 5th amendment
- No federal constitutional right in state court to an indictment (though all other federal constitutional rules apply in state court too)
 - Many states proceed by way of information, using grand jury only if they need to investigate
 - Defendant can waive indictment, agree to an information even in federal court
 - Misdemeanors require only an information; no probable cause hearing under rules

E. Hearsay is Admissible Before Grand Jury or Magistrate Judge Probable Cause Hearing

- In either situation, police officer usually testifies about the investigation and what he’s found
- “Hearsay” is admissible, meaning, the police officer can testify about what other people said
- Otherwise, hearsay is inadmissible in court generally (subject to some exceptions)
- The prosecution does not need to present all of its witnesses
- The grand jury can ask to hear from a witness; prosecutor can’t say “no”

F. Department of Justice (DOJ) Policy

- per DOJ policy, not enough to just have probable cause to charge a case



- To convict, Constitution requires proof of crime “beyond a reasonable doubt”

- DOJ policy therefore requires a prosecutor to charge a case only if there is sufficient evidence to prove a defendant guilty beyond a reasonable doubt (set forth in USAM)

VI. PRETRIAL HEARINGS

- System is an adversarial system

A. Initial Appearance before Magistrate Judge: Timing set by Federal Rule of Criminal Procedure 5.1

- defendant appears, advised of charges and penalty; counsel appointed if can't afford
- set for bail or detention hearing unless parties have already agreed to bail/release/detention
- court can order bail at initial appearance
- if charged by sworn affidavit of police officer only, set over for initial appearance on indictment
- that means the prosecutor has to get the indictment in 10 days if in custody, 20 if released
- in state system, can proceed by information, so have probable cause hearing on similar schedule

B. Bail/Detention: Procedures set forth in 18 U.S.C. § 3141 et seq. (at initial hearing or within 3 days)

- Court “shall order” release unless flight risk or danger to community
- Presumption shifts to defendant to rebut these factors for certain crimes (violent crimes, drugs)
- Prosecution always carries the burden of proof
- Up to the magistrate judge to decide
- Prosecution can appeal to district court for felonies and some misdemeanors in some situations
- Appeals to the circuit court of appeals are governed by same rules as any appeals

C. Initial Appearance in District Court

- Magistrate judges hear certain misdemeanors 28 U.S.C. § 636
- Magistrate judges cannot hear felonies
- At initial appearance in district court, further hearings are scheduled (motions, trial)
- 70-day speedy trial right of defendant 18 U.S.C. § 3161
- Parties can ask for more time based on complexity, need of defense to prepare, etc.
- Other statutory extensions exist for reasons like evaluating a defendant's competency for trial

D. Subsequent Pre-trial Hearings



1. *Motion to Suppress Evidence*

- can challenge prosecution or police's seizure of evidence
- often allege violations of 4th amendment (unreasonable search or seizure) or 5th amendment

(involuntary confession) or prosecutorial misconduct (violation of due process)

- remedy for violation: court can suppress evidence, sometimes dismiss case; appeal allowed

2. *Discovery Disputes*

- discovery obligations defined by rule and statute: Rule 16; Jencks Act, other statutes
- also case law (*Brady*) requires prosecutor to turn over all material, exculpatory evidence
- high ethical obligation of prosecutor: justice, not just convictions

3. *Dismissals by Prosecutor After Charging*

- governed by Federal Rule of Criminal Procedure 48
- prosecutor does not have to obtain court permission, but needs "leave of the Court"
- prosecutor specifies if "with prejudice" (ends litigation) or "without prejudice"
- court reviews "without prejudice" to avoid vindictive prosecution of a defendant

E. Federal Rules Permit Guilty Pleas (No Trial) = Federal Rule of Criminal Procedure 11

1. General Principle: Defendant Can Waive Constitutional Right to a Trial

- defendant has a right to a jury trial but can waive trial and plead guilty
- can plead guilty as charged (no written plea agreement with prosecutor)
- or can plead guilty with a written plea agreement with the prosecutor
- before pleading guilty, defendant is advised of and waives all rights
- rights include right to jury trial, right to lawyer at trial, right to cross-examine witnesses, right to testify or not to testify (with no adverse inferences from not testifying), right to present evidence
- guilty plea must be voluntary and not coerced

2. Written Plea Agreements

- the written plea agreement contains the agreements of the prosecution and defense

a. Agreement about charges that defendant will plead guilty to

- Often, parties agree to have the defendant plead guilty only to certain charges
- Judge can't force prosecutor to proceed on a charge
- reason: separation of powers; complete prosecutorial charging discretion



b. Recommendations to judge about sentencing

- the parties recommend, but the judge sentences
- Maximum (and some minimum) sentences set forth by statute
- Statutory minimum sentences exist for certain violent crimes, certain other categories
- Often just a maximum
- There also are sentencing guidelines that the judge must consider
- The guidelines recommend certain sentences based on factors
- Some factors increase a sentence for, for ex., a management role, violence, amount of fraud
- Other factors can decrease a sentence too (small role, extraordinary circumstances) ultimately, the judge can reject the parties' recommendation about the sentence

c. If judge rejects the sentence in the plea agreement

- the rules permit two kinds of plea agreements as to the parties' sentencing recommendation
- type 1: if the judge rejects the parties' sentence, the parties accept the judge's sentence
- type 2: if the judge rejects the sentence, the defendant withdraws his guilty plea and goes to trial

VII. TRIAL

A. Right to a Jury Trial by Defendant and by Prosecution

- if both waive right, can have trial before judge
- jury trial by 12 jurors (alternates are picked in case jurors get sick)

B. Trial Procedures

- Set forth generally in the Criminal Rules and in the Rules of Evidence
- court rules on any objections to evidence, instructions to jury, etc.
- no appeals during trial of court rulings; appeal only after trial

1. Opening Statement

- Parties each preview evidence

2. Trial

- Prosecutor goes first, presents evidence (physical evidence, witness testimony)
- Defense can cross-examine
- Defense goes second; does not have to put on defense; prosecution cross-examines
- burden on prosecutor to prove defendant guilty beyond a reasonable doubt



- “beyond a reasonable doubt” means “firmly convinced of guilt”

3. *Closing Arguments*

- parties can argue what evidence means
- parties can argue that evidence does or does not establish elements of the crime
- no improper arguments especially by prosecutor under rules

VII. SENTENCINGS

- as described in plea agreement section on sentencing, statutes defines maxes and some minimums
- certain sentencing guidelines must be considered
- after trial/plea and before sentencing, a complete presentence report is prepared
- report is called a presentence investigation and is prepared by U.S. Probation (part of court)
- it discusses the circumstances of the crime (relies on what the prosecution says for pleas)
- it also discusses the personal characteristics of the defendant
- it recommends a sentence
- court decides what the sentence is (subject to what the law requires)

VII. APPEALS

- appeal as of right by defendant (10 days to appeal); gets free lawyer on appeal if can't afford
- government's appeal requires DOJ approval; no appeal of acquittals under the law
- appeals court reviews (1) fact findings for clear error, (2) evidence, suppression and other “judgment call” rulings for abuse of discretion, and (3) legal issues de novo
- Supreme Court can choose to review if a defendant files a petition for certiorari
- Granted only for novel issues of law and to resolve circuit disputes