

# On the National Front: The Wilkinson Memo and Expanded Prosecutorial Discretion

## WRITTEN BY

Lauren H. Geiser

---

On January 29, President Biden's Acting Attorney General Monty Wilkinson issued a [memorandum](#) to all federal prosecutors titled, "Interim Guidance on Prosecutorial Discretion, Charging, and Sentencing" (Wilkinson Memo).

Notably, the Wilkinson Memo:

- **Rescinded** the May 10, 2017 Trump-era [directive](#), which had limited prosecutors' discretion by requiring prosecutors to charge defendants with the most serious provable offense or, alternatively, seek supervisory approval to charge a less serious offense and seek a lesser sentence.
- **Reinstated** the May 19, 2020 Obama-era [policy](#), which had expanded prosecutorial discretion, stating: "[D]ecisions regarding charging, plea agreements, and advocacy at sentencing must be made on the merits of each case, taking into account the *individualized assessment* of the defendant's conduct[.]"

The Wilkinson Memo signals the Biden administration's early commitment to undoing the Trump administration's limitations on prosecutorial discretion, and also to giving prosecutors wider latitude to charge offenses and seek sentences based on an individual defendant's conduct and circumstances.

Importantly, individual and corporate defendants alike should be aware that the Wilkinson Memo has removed a layer of predictability from prosecutors' behavior. Going forward, how a prosecutor charges an offense, as well as which sentences he or she seeks, will largely depend on that prosecutor's individualized assessment of that defendant's conduct. While many may interpret the Wilkinson Memo as primarily applying to drug offenses, it does not.

At the state level, it is likely that any newly elected or appointed Democratic attorneys general aligned with the objectives of the Biden administration will likely follow suit in expanding their office's prosecutorial discretion. Going forward, any defendant charged with criminal conduct should expect wider discretion from the federal prosecutor or state attorney general, and this new era of wider prosecutorial discretion is just beginning.

## RELATED INDUSTRIES + PRACTICES

- [State Attorneys General](#)