

# "Garland Memo May Curb A Powerful Prosecutorial Tool," *Law360*

## Publications

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In December, Attorney General Merrick Garland implemented a policy that the US Department of Justice should not file charges "simply to exert leverage to induce a plea," and that federal prosecutors should consider the seriousness of the offense when deciding whether to charge a mandatory minimum offense. Many commentators have focused on how this new policy will affect federal prosecution of drug cases. In an article for *Law360*, Partner Brandon Fox and Associate Sasha Peters discuss the ramifications of the policy to the DOJ's prosecution of white collar crimes, including the use of 18 U.S.C. § 1028A — the aggravated identity theft statute — and how it should no longer be used to induce plea bargains.

This policy is a departure from the DOJ's previous standard, articulated in its principles of federal prosecution, that "the defendant should be charged with the most serious offense that is encompassed by his conduct and that is likely to result in a sustainable conviction."<sup>[1]</sup>

Garland now urges prosecutors to make proportionality the foremost consideration in charging decisions.

Many commentators have focused on how this new policy will affect federal prosecution of drug cases. But the DOJ should also apply the policy to the prosecution of white collar crimes, including the use of Title 18 of the US Code, Section 1028A — the aggravated identity theft statute — to induce plea bargains.

Congress passed Section 1028A in 2004 in response to increasing identity theft and, in the words of a US House of Representatives report, "the potential threat to security" such crimes presented in the wake of Sept. 11, 2001.<sup>[2]</sup>

The statute imposes a mandatory two-year sentence, which would be served consecutively to the sentence imposed for the conviction of the underlying offense, for anyone who "knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person"

in connection with certain felonies. The consecutive sentence increases to five years if the underlying crime is terrorism-related.

But in the years since Section 1028A became law, prosecutors have increasingly charged the offense in cases that have nothing to do with terrorism or the traditional sense of identity theft.

Prosecutors can do this because of the breadth of the statute's language: To use another person's identity without permission in the commission of a crime encompasses a much broader universe than identity theft.

One of us once has heard a creative prosecutor argue that a defendant's use of a dollar bill would be enough to sustain a Section 1028A offense because of George Washington's picture on the currency.

The US Supreme Court has already considered whether prosecutors' liberal use of the statute is proper. In *Flores-Figueroa v. U.S.*,<sup>[3]</sup> the Supreme Court in 2009 ruled that the DOJ must prove the defendant knew that the identification at issue actually belonged to someone else.

The Supreme Court recently **agreed to review** prosecutors' use of the statute again. In *Dubin v. U.S.*, the appellant, a manager for a mental health practitioner, was convicted of aggravated identity theft for using the names of real patients to request Medicaid reimbursements for services that were never performed.<sup>[4]</sup>

The Supreme Court **will decide** whether David Dubin's use of patients' names constitutes aggravated identity theft for the purposes of Section 1028A, resolving a split among circuit courts.<sup>[5]</sup>

Regardless of the outcome of *Dubin*, Garland's memo immediately should reduce Section 1028A charges by forcing prosecutors consider whether a two-year mandatory charge is in line with the new DOJ policy, or whether it is being used to improperly exert leverage to induce a plea.

Before the policy change, prosecutors often charged Section 1028A not because it reflects the seriousness — or even the nature — of the underlying offense, but because it is so effective at getting offenders, faced with the possibility of a mandatory extra two years of jail time, to plead guilty.

Indeed, mandatory sentences are some of the most powerful prosecutorial tools<sup>[6]</sup> — and aggravated identity theft is by far the most frequently used charge that carries a mandatory consecutive sentence in fraud cases.

This helps explain why, in a 2008 bulletin to US attorneys, a federal prosecutor from the Eastern District of Pennsylvania stated that "the Office has adopted a policy of charging aggravated identity theft, with its mandatory minimum sentence, whenever possible." [7]

Alleged offenders and their lawyers need only look at the statistics to know that pleading guilty to the underlying crime will be much more beneficial than a conviction for the crime and a Section 1028A conviction.

The US Sentencing Commission has said that, on average, a conviction under Section 1028A more than doubles the amount of time an offender will spend in jail.

In 2016, for example, the average sentence for offenders convicted of identity theft was 22 months, while the average sentence for offenders convicted of at least one count under Section 1028A was 51 months. [8]

It is impossible to calculate the number of times federal prosecutors have used Section 1028A in the past to exert leverage in plea negotiations. Unfortunately, neither the DOJ nor the US Sentencing Commission provides data on the number of Section 1028A charges that prosecutors later dropped.

Nor does DOJ collect information on the number of times before indictment that prosecutors convince defendants to plead guilty by threatening to bring a Section 1028A charge should the defendant not capitulate.

But actual convictions under the statute show that prosecutors have used the statute increasingly, despite the Supreme Court and appellate courts limiting their creative theories. [9]

This suggests that — prior to Garland's memorandum — absent defendants agreeing to a preindictment plea, prosecutors have used Section 1028A as often as they legally can.

Indeed, in an era where the number of cases brought by the DOJ has gone down, [10] the rate of Section 1028A has increased significantly.

In 2007, 108 offenders were convicted under Section 1028A; [11] in 2021, 414 offenders were convicted under Section 1028A. [12]

This data suggests that unless serious identity theft crimes have exploded, prosecutors have charged Section 1028A even if it doesn't always "reflect the seriousness of the defendant's criminal conduct," to use Garland's words, but instead because it is such a readily available bargaining chip.

Garland's memo should change all that. The breadth of the statute's language, along with the

mandatory consecutive sentence it imposes, have made Section 1028A a powerful tool in white collar prosecutions — one that the DOJ has used increasingly for almost two decades.

But with his recent memo, Garland has taken aim at prosecutorial use of the very aspects of Section 1028A that make it so attractive.

Now that Garland has encouraged prosecutors to consider the purpose of a charge before filing and barred using such a charge to give the DOJ leverage to induce a guilty plea, prosecutions for aggravated identity theft should decline.

Without risking a two-year mandatory sentence for a conviction, white collar defendants might feel more emboldened to go to trial.

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