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THE NEW ERA OF ADMINISTRATIVE REGULARIZATION: CONTROLLING PROSECUTORIAL DISCRETION THROUGH THE ADMINISTRATIVE PROCEDURE ACT

*Richard K. Neumann, Jr.**

Beginning in 1969, the United States Attorney for the District of Columbia began developing and installing, with the help of management consultants, a computerized record keeping process that came to be known as the Prosecutor's Management Information System, or PROMIS.¹ Unlike other federal prosecutors, the U. S. Attorney in the District of Columbia is responsible for prosecuting felonies under local law² and shares many of the problems of court backlog and scarcity of resources familiar to local prosecutors in other large cities.

PROMIS is a computer data bank in which six kinds of information are collected and correlated with each other for every criminal case litigated by the U. S. Attorney's office. The computer will report information about the defendant (such as aliases, prior arrests and convictions, age, race, sex, and employment status), the crime (such as the amount of violence and property damage, the number of persons accused of working with the defendant, and the date and place of the incident), the arrest (such as the type of arrest and the names of the arresting officers), the offense or offenses charged (such as the charges at arrest, the charges actually placed after initial screening by a prosecutor, and the reasons for any changes), the witnesses (such as name, address, evidentiary value, and assessment of whether there will be problems getting a given witness to testify), and the court history of the case (such as the date and substance of every court event from arraignment to sentencing, the cause of each event, and the names of the prosecutor, defense attorney, and judge involved at each stage).³ Information about the

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1. See Hamilton & Work, *The Prosecutor's Role in the Urban Court System: The Case for Management Consciousness*, 64 J. CRIM. L. & C. 183 (1973); Work, Richman, & Williams, *Toward a Fairer System of Justice: The Impact of Technology on Prosecutorial Discretion*, 12 CRIM. L. BULL. 289 (1976); Comment, *The Systems Approach to Criminal Justice Administration*, 25 BUFFALO L. REV. 303 (1975). The PROMIS system has also been described in a series of 21 briefing papers. INSTITUTE FOR LAW AND SOCIAL RESEARCH, PROMIS BRIEFING SERIES (1974) [hereinafter cited as PROMIS BRIEFING SERIES].

2. D.C.CODE § 23-101 (1973).

3. PROMIS BRIEFING SERIES, *supra* note 1, no. 1, at 4-5.

defendant and the offense of which he is accused is computed through formulae⁴ that produce a case priority rating which allows the office to single out certain cases for special attention⁵ and provides the basis for detailed supervision, through guidelines, of each Assistant U. S. Attorney's discretion.⁶

While PROMIS was being developed, and in conjunction with it, the U. S. Attorney's office put many of its guidelines in the form of a Papering and Screening Manual for its Superior Court⁷ Division and Guidelines for First Offender Treatment.⁸ Neither the existence

4. The formulae are based on the research of Thorsten Sellin and Marvin Wolfgang (regarding the accused) and Don Gottfredson (regarding the alleged offense). WOLFGANG & SELLIN, *THE MEASUREMENT OF DELINQUENCY* (1964), proposed a selection of personal criteria by which the dangerousness of a person could be predicted, and Gottfredson, in a series of papers, suggested a similar set of criteria predicated on characteristics of the particular crime committed by a particular person. See Hamilton & Work, *supra* note 1, at 185.

5. PROMIS BRIEFING SERIES, *supra* note 1, no. 1, at 3-4, and no. 3, at 1-10. For example, the computer would rate at 26 points an assault with a gun (5 points), following threats with the gun (4 points), that resulted in hospitalization of the victim (7 points), and where the accused had been arrested once during the previous five years (10 points). The computer would rate at 19 a burglary (1 point), without violence (0 points), where \$1200 was stolen (3 points) and where the accused had been arrested twice in the preceding five years (15 points). PROMIS BRIEFING SERIES, *supra* note 1, no. 3, at 6-9. When combined with PROMIS' ability to produce the number and nature of other charges pending against a given defendant, the rating system makes it possible for a prosecuting office to prevent incidents such as "the burglary suspect who was arrested and freed on bail 11 times during 17 months without standing trial" and "the suspected thief and forger who was arrested and freed on bail 17 times over 30 months without coming to trial." PROMIS BRIEFING SERIES, *supra* note 1, no. 2, at 3.

6. PROMIS BRIEFING SERIES, *supra* note 1, no. 1, at 13; no. 2, at 11; and no. 8, at 1-8. Discretion can be exercised by a prosecutor throughout criminal litigation, but the most common and most critical stages are at (1) charging or "papering" (when the alleged offense is defined), (2) screening (when the accused is or is not placed in a pre-trial diversion program, successful completion of which may cause the prosecutor to drop the charge, or when the prosecutor decides, usually before charging, that a particular offense will not be prosecuted at all), and (3) plea bargaining (when the prosecutor agrees to make a concession, such as dropping some of several charges or making a lenient sentence recommendation, in return for a guilty plea by the defendant, his cooperation in convicting other defendants, or both). Diversion programs are created and managed either by prosecutors acting independently, by courts, or by both acting together. The First Offender Treatment Program in the District of Columbia "owes its existence and operation solely to prosecutorial discretion." *United States v. Smith*, 354 A.2d 510, 512 (D.C. 1976). The PROMIS computer is programmed to report the information (original charges, changes in charges, reasons for changing charges, identity of the prosecutor, etc.) that will permit a supervising prosecutor to see at a glance whether the office's discretion policy is being observed by each of his subordinates and in each case. PROMIS BRIEFING SERIES, *supra* note 1, no. 1, at 13; no. 2, at 4; and no. 8, at 1-8. See Work, Richman, & Williams, *supra* note 1.

7. Superior Court is the local felony court in the District of Columbia.

8. It is possible that other guidelines exist but are unknown to the author. It is also possible that either of these manuals had more primitive ancestors in use before 1969. For the remainder of this article, these documents will be referred to collectively and interchangeably as prosecutorial discretion guidelines or manuals. Other prosecutors have created similar guidelines, and one even published his in a law review. Kuh, *Plea Bargaining Guidelines for*

nor the contents of these documents was disclosed to the public.

In September 1975, Geraldine Gennet, a Washington, D. C. attorney representing a man charged with possession in his home of marijuana, was told by an Assistant U. S. Attorney, or AUSA, working on the case, that his office's policy permitted pretrial diversion where the total amount of marijuana involved was one ounce or less. When she tried to explore with him the possibilities of pretrial diversion for her client, the AUSA refused, citing an office rule prohibiting any diversions in cases where co-defendants had prior convictions and noting that her client's co-defendant had been convicted of another offense fifteen years before. She was not able to learn whether such a rule in fact existed or whether it was being correctly interpreted by the AUSA.⁹

In October 1975, Gennet again represented a man charged with possession of marijuana. The defendant, who had no criminal record, had been arrested in connection with a sale, even though he was charged only with possession. Once again, she attempted to arrange a pretrial diversion but was refused by an AUSA who told her there was an office policy prohibiting diversion where the defendant had been involved in a sale. Gennet accepted as true that such a rule existed and that the AUSA had correctly applied it in her client's case. Her client, however, fired her and hired another attorney who was able to arrange a diversion for the client. She was never able to learn whether the rule, if it existed, was violated in refusing her request or in granting the second lawyer's request.¹⁰ An honest error might have been made in either instance. On the other hand, favoritism might have led an AUSA to violate the rule by granting

the Manhattan District Attorney's Office, 11 CRIM. L. BULL. 48 (1975); and, *Sentencing Guidelines for the Manhattan District Attorney's Office*, 11 CRIM. L. BULL. 62 (1975). A set of model charging guidelines, correlated to the California penal code and available to any California prosecutor who wants to use them, was published in 1975. CALIFORNIA DISTRICT ATTORNEYS ASSOCIATION, UNIFORM CRIME CHARGING MANUAL AND UNIFORM CRIME CHARGING STANDARDS (1975). Diversion criteria (such as the probable contents of the Guidelines for First Offender Treatment) are usually matters not hidden from the public. See, e.g., Peterson, *The Dade City Pretrial Intervention Project: Formalization of the Diversion Function and Its Impact Upon the Criminal Justice System*, 28 U. MIAMI L. REV. 86 (1973). A methodology of writing prosecutorial discretion guidelines is beginning. See, e.g., Thomas & Fitch, *Prosecutorial Decision Making*, 13 AM. CRIM. L. REV. 507, 518-21 (1976). Many prosecutors, particularly in smaller cities and rural areas, have no guidelines at all, and many more have issued only a series of uncodified directives to their assistants. Often, these directives are confusing, self-contradictory, and only erratically observed.

9. Affidavit of Geraldine Gennet in Support of Plaintiffs' Motion for Partial Summary Judgment at 4, *Jordan v. United States Dep't of Justice*, Civ. No. 76-0276 (D.C. Cir. Jan. 14, 1977), appeal docketed, No. 77-1240 (D.C. Cir. Jan. 26, 1977).

10. *Id.* at 3-4.

the second request, or an AUSA's personal antagonism might have led to a violation by a bad faith denial of the first request. A fourth possibility is that the rule might exist in fact but be enforced only sporadically or not at all.

In February 1976, while discussing with an AUSA a possible diversion, Gennet learned, to her astonishment, that an office policy required a defendant to file his "First Offender Treatment Papers" (a formal application for diversion) at least a week before trial in order to be eligible. She had never heard of such a rule before and the AUSA told her it was a recent one and permitted no exceptions. Only the lucky happenstance of learning by chance of the rule change prevented the client's being prejudiced in this case. Again, Gennet was never able to learn whether such a rule actually existed and whether the AUSA was correctly applying it.¹¹

Finally, after a number of similar incidents, Gennet concluded that the U. S. Attorney's refusal to release the contents of his prosecutorial discretion guidelines left her "helpless to contest, or even knowingly discuss" an AUSA's decision in particular cases, and she joined as co-plaintiff in a suit in the United States District Court for the District of Columbia under the Freedom of Information Act [FOIA]¹² to obtain copies of the Papering and Screening Manual and the Guidelines for First Offender Treatment.¹³ The district court, in *Jordan v. United States Department of Justice*, granted the plaintiffs' motion for partial summary judgment,¹⁴ and the gov-

11. *Id.* at 4.

12. 5 U.S.C. § 552 (Supp. IV 1974).

13. Gennet Affidavit, *supra* note 9, at 2. An incident just after the suit was filed illustrates how essential it is for an attorney to know or have access to the rules of a U.S. Attorney or any other government agency with which he deals. In March, 1976, Gennet happened to learn from an AUSA that cases where the defendant and victim are related are required to be referred to the Family Division of the U.S. Attorney's office, even after charges are brought, where non-criminal dispositions are explored. Two weeks later, in a case where her client, the defendant, was entitled to the benefit of that rule, the AUSA involved refused to refer on the grounds that the victim had adamantly demanded a conviction. "Only the fortuity of having recently learned of the Office rule regarding such cases" enabled her to persuade the AUSA to consult the rule and conform his decision to it. *Id.* at 4-5. Since suit was filed, the U.S. Attorney has offered the plaintiffs all but eight paragraphs of the 178 pages of the Papering and Screening Manual but continued to refuse to disclose those eight paragraphs and the six-page guidelines for First Offender Treatment. Brief for Appellant at 2, *Jordan v. United States Department of Justice*, No. 1240 (D.C. Cir. Jan. 26, 1977) [hereinafter cited as U.S. Attorney's Brief]. Reply Brief for Appellant, *Id.* at 15.

14. No. 1240 (D.C. Cir. Jan. 26, 1977). Since the original request for access before the suit to the Guidelines and Manual came from the other plaintiff, William Jordan, at that time a Georgetown University Law Center student, the District Court dismissed Gennet's claim for lack of standing. *Id.* at 1, 3. On appeal, Jordan, who is now an attorney, remains the only plaintiff.

ernment has appealed to the United States Court of Appeals for the District of Columbia Circuit, which has not yet decided the case.

The logical and jurisprudential extensions of *Jordan* stretch far beyond the question of access to a particular U. S. Attorney's prosecutorial discretion guidelines. The Criminal Division of the Department of Justice has "unsystematically" but for many years made generally undisclosed prosecution policies that U. S. Attorneys must follow.¹⁵ Presumably, other Justice Department divisions follow the same practice. As Part I of this article explains, the statute, the legislative history, and the case law are overwhelmingly on the side of the FOIA requester of prosecutorial discretion guidelines. Unless the Court of Appeals in the D. C. Circuit or the Supreme Court, or both, ignore their own precedents, as well as the Act, a very large proportion, if not all, of these guidelines will become available to opposing counsel for the first time.

Much more important, however, will be the effect of finally holding, as the *Jordan* trial court did, and as the statutes and case law oblige the appeals courts to do — that prosecutorial discretion in federal criminal cases is subject to the Administrative Procedure Act [APA],¹⁶ of which the Freedom of Information Act is merely a part. A U. S. Attorney's office is an "agency" within the meaning of the APA,¹⁷ and therefore is subject to its provisions. Each prosecutorial discretion guideline, furthermore, is a "rule" under the APA's definition: "an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency."¹⁸

Are the Justice Department and U. S. Attorneys required to publish their prosecutorial discretion guidelines in the Federal Register, after notice and comment, as other agencies must under the APA? Where the Justice Department and U. S. Attorneys have not

15. Abrams, *Internal Policy: Guiding the Exercise of Prosecutorial Discretion*, 19 U.C.L.A. L. REV. 1, 8-9 (1971).

16. 5 U.S.C. §§ 551-59 (Supp. VI 1976).

17. An "agency" is any "authority of the Government of the United States, whether or not it is within or subject to review by another agency," excepting Congress; the courts; governments of territories, possessions, and the District of Columbia; and, for FOIA purposes, a number of miscellaneous entities, mostly military and all unrelated to a U.S. Attorney or the Department of Justice. 5 U.S.C. § 551(1) (1970). All U.S. Attorneys are part of the Justice Department, supervised by the Attorney General. 28 U.S.C. §§ 541-545, 549-550 (1970).

18. 5 U.S.C. § 551(4) (1970). Gennet's experiences, text at notes 9-13 *supra*, illustrate how fundamentally the guidelines in *Jordan* "implement," "interpret" and "prescribe" agency policy and "describe" agency "organization," "procedure," and "practice requirements."

established guidelines or other regulations to define and structure prosecutorial discretion, must they do so? Must federal prosecutors provide hearings or the opportunity somehow for victims, defendants, or potential defendants to be heard before screening, charging, or plea bargaining decisions are made? Are federal prosecutors required by the APA to explain their reasons for declining a defendant's plea bargain offer or for refusing to bring criminal charges requested by a victim? Perhaps most importantly, does the APA provide a basis for judicial review of prosecutorial discretion? Part II of this article is a preliminary exploration of these issues, all of which are bound to occur in future litigation. Part III discusses how some European prosecutors have operated under discretion restraints similar to but stricter than those in the Administrative Procedure Act and concludes with some tentative observations regarding the future of prosecutorial discretion in the United States.

I. DISCLOSURE OF PROSECUTORIAL DISCRETION GUIDELINES UNDER THE FREEDOM OF INFORMATION ACT

The plaintiffs in *Jordan* sued under sub-sections (a)(2)(B) and (C) of FOIA,¹⁹ which require an agency "to make available for public inspection and copying . . . those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register" [§(a)(2)(B)] and "administrative staff manuals and instructions to staff that affect a member of the public" [§(a)(2)(C)], and under sub-section (a)(3),²⁰ an all-inclusive provision requiring disclosure of all "records" not made available by the more narrowly-defined sections (a)(1) and (2).²¹

19. 5 U.S.C. §§ 552(a)(2)(B) & (C) (Supp. IV 1974).

20. 5 U.S.C. § 552(a)(3) (Supp. IV 1974).

21. Only one court has ruled sections (a)(2) and (a)(3) to be mutually exclusive. *City of Concord v. Ambrose*, 333 F. Supp. 958, 960 (N.D. Cal. 1971). Not only is *Concord* an isolated pronouncement by a trial court in a district not noted for its volume of FOIA litigation, but it is not a logical reading of the statute. The court's sole statement of rationale was to "preserve the detailed scheme of classification," and the remainder of the opinion does not explain exactly what that phrase is intended to mean, other than to refer to sections (a)(1), (2), and (3). The fault in logic is caused by a failure to notice that the three sections are differentiated not merely by the various descriptions of the documents to which each applies, but also by the varying obligations of the government to produce the different kinds of documents. Section (a)(1) describes five categories of documents that must be published in the Federal Register; a person seeking any of them need only go to a comprehensive library to get what he or she wants. Section (a)(2) covers three categories of documents that are presumably less important and less in demand by the public and which the government must index and "make available for public inspection and copying." A person wanting one of these documents must do more: he must contact the agency involved, but the agency is to have the document already available, perhaps in a public information office or library, and there

Since the district court granted relief under all three sub-sections, the only issue on appeal should be whether the guidelines need not be disclosed because of one of the exemptions in section (b) of FOIA. Instead, the government has resisted disclosure claiming not only exemptions 2²² and 5²³ of section (b) but also on a theory that the guidelines are neither "statements of policy and interpretations which" the U. S. Attorney has adopted, nor "administrative staff manuals and instructions to staff that affect a member of the public" within the meaning of sub-sections (a)(2)(B) and (C),²⁴ respectively.

The government has taken the position that if sub-section (a)(2)(C) administrative staff manuals or instructions to staff affecting a member of the public involve law enforcement, they need not be disclosed, although the government itself admits that the Act does not so provide.²⁵ The government bases its position on the

must be an index he or she can use personally to find the document. Section (a)(3) does not describe the kind of documents to which it applies. Rather, it differs from sections (a)(1) and (a)(2) only in terms of the government's obligation. Where the government has not fulfilled an obligation under the other two sections, the requestor must make an application that "reasonably describes the records" and is "in accordance with published rules stating the time, place" and so forth, and he or she must then wait while files are searched for them. This could apply to documents not described under sections (a)(1) and (a)(2) or to documents described under those sections but not made available with the conveniences prescribed, and the logical interpretation is that it applies to both. *Tax Analysis and Advocates v. IRS*, 362 F. Supp. 1298, 1306 (D.D.C. 1973), *remanded on other issues*, 505 F.2d 350 (D.C. Cir. 1974).

22. FOIA "does not apply to matters that are . . . related solely to the internal personnel rules and practices of an agency." 5 U.S.C. § 552(b)(2) (Supp. IV 1974). *See note 25 infra*.

23. FOIA "does not apply to matters that are . . . inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5) (Supp. IV 1974). *See note 25 infra*.

24. U.S. Attorney's Brief, *supra* note 13, at 5-28.

25. *Id.* at 12. There are nine exceptions in FOIA to the disclosure requirements of § 552(a). A document need not be disclosed if it is properly classified as a national security secret under specifically defined criteria in an executive order (§ 552(b)(1)); if it is "related solely to the internal personnel rules and practices of an agency" (§ 552(b)(2)); if it is "specifically exempted from disclosure by statute" (§ 552(b)(3)); if it contains "trade secrets and commercial or financial information obtained from a person and privileged or confidential" (§ 552(b)(4)); if it is an "inter-agency or intra-agency" memorandum or letter that would be privileged from civil discovery (§ 552(b)(5)); if it is, or is similar to, a personnel or medical file and disclosure "would constitute a clearly unwarranted invasion of personal privacy" (§ 552(b)(6)); if it is a law enforcement *investigatory* record and disclosure would cause any of five specified harms (§ 552(b)(7)); if it is, under specified conditions, involved in "the regulation or supervision of financial institutions" (§ 552(b)(8)); or if it contains geological or geophysical information "concerning wells" (§ 552(b)(9)). FOIA specifically provides that these exemptions are the only basis on which documents can be withheld from the public. 5 U.S.C. § 552(c); *Department of the Air Force v. Rose*, 425 U.S. 352, 361 (1976). Where a document is not exempted specifically by FOIA, courts must order the government to disclose it, even if to do so might be thought inequitable, unwise, or against some worthy

Senate and House Reports that are part of the legislative history of the Freedom of Information Act, and on two cases, one each from the Fifth Circuit and the Sixth Circuit. The entire House Report has been rejected by the courts as unreliable because it describes a bill that was never enacted into law.²⁶ The passage relied upon in the Senate Report is the following:

The limitation of the staff manuals and instructions affecting a member of the public which must be made available to the public to those which pertain to administrative matters rather than law enforcement matters protects the traditional confidential nature of instructions to government personnel *prosecuting violations of law in court*, while permitting a public examination of the basis for administrative action. (emphasis added)²⁷

This passage, however, by its own words refers only to the process of presenting contested cases for adjudication, a task that occurs *after* a prosecutor has exercised his discretion to prosecute and specifically after the charging, screening, and diverting decisions regulated by the Papering and Screening Manual and the Guidelines for First Offender Treatment.²⁸ The disclosure the Senate would rather have avoided is disclosure of trial tactics and perhaps of detection tactics, not of the process of deciding on what terms the government will treat alleged offenders it has already detected but not yet brought to trial. The latter is an administrative decision, not qualitatively different from a decision, for instance, to grant, deny, or revoke a license, parole, or some other benefit or disadvantage within the powers of the executive branch of government.²⁹

policy. *Tax Analysts and Advocates v. IRS*, 505 F.2d 350, 355 (D.C. Cir. 1974); *Soucie v. David*, 448 F.2d 1067, 1076-77 (D.C. Cir. 1971).

26. "Almost all of the courts that have considered the difference between the [House and Senate] Reports have concluded that the Senate Report more accurately reflects the congressional purpose." *Department of the Air Force v. Rose*, 425 U.S. 352, 363 (1976); *Vaughn v. Rosen*, 523 F.2d 1136, 1141 (D.C. Cir. 1975) (slight differences in wording). The House Report is H.R. REP. NO. 1497, 89th Cong., 2d Sess. (1966), and the passage in question is at 7-8.

27. S. REP. NO. 813, 89th Cong., 1st Sess. 2 (1965), cited at U.S. Attorney's Brief, *supra* note 13, at 18.

28. For example, see note 13 *supra*.

29. A prosecutor's duties are divided into two discrete functions. The function the Senate Report refers to is that of trial attorney for the government. The function it does not refer to is that of the administrator who determines what charges are to be brought against whom and which defendants will receive special treatment after they have been indicted or otherwise formally accused. "The prosecutor is both an administrator of justice and an advocate . . ." ABA STANDARDS RELATING TO THE PROSECUTION FUNCTION, § 1.1(b) (1971). See ABA CODE OF PROFESSIONAL RESPONSIBILITY, EC 7-13 (1976). The case law is unanimous that

The two cases relied upon by the government³⁰ are *Stokes v. Brennan*³¹ and *Hawkes v. IRS*.³² In *Stokes*, the plaintiff had requested access to all materials used in training inspectors for the Occupational Health and Safety Administration, while, in *Hawkes*, the material sought was, *inter alia*, portions of the Internal Revenue Manual that included instructions for investigating the truthfulness and accuracy of income tax returns. It is surprising to find the government looking for support in these cases, since it had raised the law enforcement manual argument in both and prevailed in neither. In *Stokes*, the Fifth Circuit was willing to recognize a law enforcement manual exception "in the abstract,"³³ and the Sixth Circuit, in *Hawkes*, agreed that such an exception exists.³⁴ Both circuits, however, found that the government's interpretation of the exception, just as in *Jordan*, goes far beyond the intent shown in the legislative history. Both circuits held that the exception does not lasso the whole law enforcement process, but rather is "a very narrow one and is to be applied *only* where the *sole* effect of disclosure would be to enable law violators to escape *detection*."³⁵ The Sixth Circuit went on to explain:

Far from impeding the goals of law enforcement, in fact, the disclosure of information clarifying an agency's substantive or procedural law serves the very goals of enforcement by encouraging knowledgeable and voluntary compliance with the law. Such clarifying information is found . . . in many cases in manuals and instructions like those sought here, which are addressed specifically to agency personnel. It may be found . . . in standards for evaluation and so forth. Materials providing such information are administrative in character and clearly disclosable under (a)(2)(C).³⁶

The government also insists that prosecutorial discretion guidelines are not sub-section (a)(2)(B) statements of policy or interpretation, on a theory that they are instead "law enforcement strat-

other administrators must disclose guidelines governing their discretion. For example, "a registrant cannot determine if the Selective Service System followed its own rules and policies in processing his induction unless he has an opportunity to know what those rules and policies are." *United States v. Leichtfuss*, 331 F. Supp. 723, 739 (N.D. Ill. 1971).

30. U.S. Attorney's Brief, *supra* note 13, at 20-21.

31. 476 F.2d 699 (5th Cir. 1973).

32. 467 F.2d 787 (6th Cir. 1972).

33. 476 F.2d at 701.

34. 467 F.2d at 794. No other circuits have taken the same position.

35. *Stokes v. Brennan*, 476 F.2d 699, 701 (5th Cir. 1973); and *Hawkes v. IRS*, 467 F.2d 787, 795 (6th Cir. 1972) (emphasis added).

36. *Hawkes v. IRS*, 467 F.2d 787, 795 (6th Cir. 1972).

egy.”³⁷ The ideas of a statement of policy and a law enforcement strategy are not mutually exclusive, and a strategy regularly and consistently used becomes a policy. FOIA does not include a law enforcement strategies exception. The government cites no cases to support one,³⁸ and, since all documents must be disclosed unless specifically exempted,³⁹ it is not surprising that no cases have recognized one for law enforcement strategies. If anything, the courts have taken a clear and affirmative position that, although detection techniques might not be “policy” or “interpretation,”⁴⁰ the discretionary standards of law enforcement agencies of the federal government are “precisely the kind of agency law in which the public is so vitally interested and which Congress sought to prevent the agency from keeping secret.”⁴¹

The government’s theory is that the release of prosecutorial discretion guidelines would encourage crime.⁴² Even if the possible effect on law enforcement efficiency were a legitimate consideration in FOIA cases,⁴³ prosecutorial discretion guidelines have been disclosed many times without provoking discernible waves of criminality.⁴⁴ If anything, disclosure may help reduce criminality by making

37. U.S. Attorney’s Brief, *supra* note 13, at 6-12.

38. *Id.*

39. See note 25 *supra*.

40. *Cuneo v. Schlesinger*, 484 F.2d 1086 (D.C. Cir. 1973).

41. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 155-56 (1975) (National Labor Relations Board General Counsel’s Appeals and Advice Memoranda explaining decisions not to file complaints where violations of law have been alleged). *Accord*, *Ash Grove Cement Co. v. FTC*, 511 F.2d 815 (D.C. Cir. 1975) (Federal Trade Commission’s “chronological minutes”); *Cuneo v. Schlesinger*, 484 F.2d 1086 (D.C. Cir. 1973) (Defense Contract Audit Agency’s Defense Contract Audit Manual); *Sterling Drug, Inc. v. FTC*, 450 F.2d 698 (D.C. Cir. 1971) (Federal Trade Commission orders and interpretations).

42. U.S. Attorney’s Brief, *supra* note 13, at 6-12.

43. “The Freedom of Information Act was not designed to increase administrative efficiency, but to guarantee the public’s right to know how the government is discharging its duty to protect the public interest.” *Wellford v. Hardin*, 444 F.2d 21, 24 (4th Cir. 1971). Public scrutiny itself is perhaps the most effective means of promoting “administrative efficiency.”

44. In 1938, Thurman Arnold, who was then in charge of the Justice Department’s Anti-Trust Division, began making and publishing prosecutorial discretion guidelines for anti-trust matters. Although the idea was favorably received by the public, the Justice Department lost interest and the practice died out. A similar practice was started in the Anti-Trust Division in 1968, on the theory that the Division should “bring only the cases it ought to win, not those it could win under existing law,” but with the change of administrations after the 1968 election, interest was lost again. DAVIS, *ADMINISTRATIVE LAW TREATISE* 191-93 (Supp. 1970). See note 8 *supra*, for other examples. The government refers to only a single instance of increased criminality resulting from disclosure of a prosecutorial discretion guideline:

That such persons would take advantage of this knowledge was readily demonstrated when the United States Attorney’s so-called “five-joint” policy was leaked to the newspapers in 1974. In order to avoid flooding the courts with misdemeanor prosecu-

punishment seem more certain for those offenses for which an AUSA's discretion is restricted.⁴⁵ It may also encourage public commitment to and trust in the criminal adjudication system, where secrecy now creates suspicion, resentment, and pessimism.

Even if the guidelines are held to be neither adopted policy or interpretations nor administrative staff manuals or instructions to staff affecting the public, *Jordan*, who sued also under sub-section (a)(3) ("records"), will win access unless the guidelines fall within exemption 2 or exemption 5.⁴⁶

According to the Senate Report on the Freedom of Information Act, exemption 2 includes only material such as "rules as to personnel's use of parking facilities or regulation of lunch hours, statements of policy as to sick leave, and the like."⁴⁷ The House Report, which the government relies upon in *Jordan*,⁴⁸ has been rejected by virtually all courts⁴⁹ and, even if it were a legitimate part of the legislative history, would not authorize non-disclosure of prosecutorial discretion guidelines. The House Report would exempt "[o]perating rules, guidelines and manuals of procedure for Gov-

tions for simple possession of marijuana, the United States Attorney determined that persons with no criminal record possessing five or fewer marijuana cigarettes would generally not be prosecuted. When this policy was published, the result was many instances of open violation of the law against possession of marijuana. Publication of the guidelines thus had the effect of encouraging violations of the law and was a primary factor in the eventual rescission of the policy.

U.S. Attorney's Brief, *supra* note 13, at 9-10. Press reports at the time of these events note instead that the policy was dropped because the Attorney General and the Washington police did not like it, and because the police threatened to continue arresting everyone found with any amount of marijuana, which would have put the U.S. Attorney in a humiliating position. In fact, no one could have committed an offense with impunity because the policy was cancelled before it was to have become effective. *Washington Post*, Nov. 30, 1974, at A-1, col. 3. It was made public in the *Washington Post*, Nov. 16, 1974, at A-1, col. 6. Even if more people had been arrested for possessing five or fewer "joints" during the two weeks between November 16 and November 30, 1974, it is easily possible that the number of offenses remained the same while the arrests increased as police dramatized their ability to defy the U.S. Attorney, and the government cites no evidence proving that the existence of a publicized guideline did or would have encouraged offenses.

45. Although empirical data tends to be anecdotal, it is virtually a universal assumption that deterrence is greater where the person to be deterred is convinced that the risk of punishment is high. Andenaes, *The General Preventive Effects of Punishment*, 114 U. PA. L. REV. 949, 960-64 (1966); Crampton, *Driver Behavior and Legal Sanctions: A Study of Deterrence*, 67 MICH. L. REV. 421, 426-27 (1969). At present, the criminal adjudication system operates so ponderously and there is so much plea bargaining that it does not require much wishful thinking for a potential offender to conclude that the chances of his arrest and punishment (other than by probation) are rather small.

46. See notes 21-23 *supra*.

47. S. REP. No. 813, 89th Cong., 1st Sess. 8 (1965).

48. U.S. Attorney's Brief, *supra* note 13, at 22-25.

49. See note 26 *supra*. *Rose and Vaughn*, cited in note 26, are both exemption 2 cases.

ernment *investigators* or *examiners*,"⁵⁰ a description, once again, carefully worded to include only detection techniques and to exclude all other phases of law enforcement. The Supreme Court has held that "at least where the situation is not one where disclosure may risk circumvention of agency regulation," the "general thrust" of exemption 2 "is simply to relieve agencies of the burden of assembling and maintaining for public inspection matter in which the public could not reasonably be expected to have an interest."⁵¹

Exemption 5 protects from disclosure "only those documents normally privileged in a civil discovery context,"⁵² and the only privileges there available to the government cover attorney work product and pre-decisional memoranda.⁵³ Pre-decisional memoranda are part of the intellectual free-for-all that should precede decision-making in a bureaucracy; the only such memoranda that are exempt are those that explore options that the agency involved has either disregarded or not yet chosen.⁵⁴ The government has taken the position that prosecutorial discretion guidelines are protected by exemption 5 as pre-decisional memoranda, attorney work product, and non-discoverable in criminal litigation.⁵⁵ The last claim borders on the incredible, since the case law defines exemption 5 solely in terms of civil litigation and since prosecutorial discretion guidelines *are* discoverable in criminal litigation.⁵⁶ The

50. H.R. REP. NO. 1497, 89th Cong., 2d Sess. 10 (1966) (emphasis supplied).

51. *Department of the Air Force v. Rose*, 425 U.S. 352, 369-70 (1975). The words, "circumvention of agency regulation," are vague, but in view of the Supreme Court's rejection in the same opinion, *Id.* at 366-67, of the House Report's interpretation of exemption 2, the Court could have meant no more than to avoid excluding forever the possibility that detection techniques might someday become exempt from disclosure under exemption 2. "The policy of the Act requires that the disclosure requirements be construed broadly, the exemptions narrowly." . . . Thus, faced with a conflict in the legislative history, the recognized principle purpose of the FOIA requires us to choose that interpretation most favoring disclosure." *Vaughn v. Rosen*, 523 F.2d 1136, 1142 (D.C. Cir. 1975), *quoting* *Vaughn v. Rosen*, 484 F.2d 820, 823 (D.C. Cir. 1973).

52. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975).

53. *Id.* at 150-54.

54. *Id.* "[T]he public is vitally concerned with the reasons which did supply the basis for an agency policy already adopted. These reasons, if expressed within the agency, constitute the 'working law' of the agency. . . ." *Id.* at 152-53.

55. U.S. Attorney's Brief, *supra* note 13, at 25-27. It is possible that the government has withdrawn its pre-decisional memoranda and attorney work product arguments. The confusion arises from a statement in the U.S. Attorney's *Jordan* Reply Brief at 14, that the government has not taken the position that the guidelines are pre-decision or attorney work product, although pre-decisional and work product arguments are clearly made in the main brief.

56. At 26-27, the U.S. Attorney's Brief, *supra* note 13, cites six cases for the proposition that "a defendant in a criminal case is not permitted to discover the thought processes and policies which went into the decision to bring the prosecution," but all of these cases actually

guidelines are not attorney work product, either. Attorney work product is not everything on which an attorney has worked; it is an individual attorney's preparation for a specific litigation⁵⁷ and includes material such as exhibits, statements from witnesses, questions to be asked on cross-examination, and so forth. Prosecutorial discretion guidelines, on the other hand, are generalized instructions as to the treatment to be given to persons who have been arrested. Pre-decisional memoranda are only advice from subordinates to superiors, and the sole rationale for exempting them is to encourage subordinates to be candid.⁵⁸ Rather than suggestions ascending a bureaucratic ladder, prosecutorial discretion guidelines are policies descending from the top and binding on subordinates. Some suggestions subordinates might have made before the guidelines were promulgated and advising what their content should be might be exempt as pre-decisional memoranda, but the "decision" is the guidelines themselves, not the determination of how to treat each defendant.⁵⁹ If it were otherwise, exemption 5 would swallow the entire Freedom of Information Act, and a citizen would never get access to statements of general applicability flowing from the top of an agency even though sub-sections (a)(1) and (a)(2) specifically provide for it.⁶⁰

What will really happen to criminal adjudication in the District of Columbia if these guidelines become available under the Freedom of Information Act? Since prosecutorial discretion guidelines have been disclosed in other jurisdictions⁶¹ without reported problems, the effect on the courts themselves will probably be negligible. The U. S. Attorney has hinted that if he is forced to disclose his guide-

hold that any defendant who can "present evidence from which at least an inference of the use of improper standards can be drawn" is entitled to discover exactly those thought processes and policies. *United States v. Berrigan*, 482 F.2d 171, 181 (3d Cir. 1973); *United States v. Swanson*, 509 F.2d 1205 (8th Cir. 1975); *United States v. Berrios*, 501 F.2d 1207 (2d Cir. 1974); *United States v. Alarik*, 439 F.2d 1349 (8th Cir. 1971); *Spillman v. United States*, 413 F.2d 527 (9th Cir. 1969); *Washington v. United States*, 401 F.2d 915 (D.C. Cir. 1968).

57. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 159-60 (1975).

58. *Vaughn v. Rosen*, 523 F.2d 1136, 1146 (D.C. Cir. 1975).

59. *Bristol-Myers Co. v. FTC*, 424 F.2d 935, 937-39, *cert. denied*, 400 U.S. 824 (1970). See note 54 *supra*.

60. In fact, where an agency cites or incorporates by reference an internal document in a statement of decision, as was regularly done in regard to Gennet's clients, *supra* notes 9-11 and 13, the document loses any exemption 5 protection it had to begin with. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 161 (1975); *Bristol-Myers Co. v. FTC*, 424 F.2d 935, 939 (D.C. Cir.), *cert. denied*, 400 U.S. 824 (1970); *American Mail Line, Ltd. v. Gulick*, 411 F.2d 696, 703 (D.C. Cir. 1969).

61. See notes 8 and 44 *supra*.

lines, he might abolish them,⁶² but that seems an unwise and unlikely event, in view of his office's investment in the guidelines, their role in the PROMIS system, and his need for them in order to supervise his Assistants.⁶³ The only changes likely to occur involve the day-to-day work of Assistant U. S. Attorney's, whose discretionary decisions would be reviewed by defense lawyers for conformity to office policy. Those defense counsel with special familiarity with the prosecutor's office (such as those who have recently been Assistants themselves) would lose their informational advantages, and their clients would not be better protected than clients of other lawyers diligent enough to get copies of the guidelines. Finally, the guidelines themselves, under criticism from the bar and public, would improve gradually in quality, and the public, for the first time aware of what its prosecutor's policies are, would have some influence over their meaning. The overall result would be a more professionalized prosecutor staff, attentive to the precise realization of policy and disdainful of decisions made according to whim, folklore, "gut reaction," or vague recollection of the content of agency law.

II. PROSECUTORIAL DISCRETION UNDER THE ADMINISTRATIVE PROCEDURE ACT

It is commonly believed, perhaps most earnestly by prosecutors themselves, that prosecutorial discretion is unlimited by any rule of law. Insofar as it is applied to federal prosecutors, this idea is mythical. There are a number of constraints on federal prosecutors' discretion, most of them in the Administrative Procedure Act and underutilized in litigation.

A. *Must Federal Prosecutors Publish Their Discretion Guidelines in the Federal Register and Submit Them to Notice and Comment?*

Sub-section (a)(1) of the Freedom of Information Act requires every agency to:

publish in the Federal Register for the guidance of the public —

...
(B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(C) rules of procedure. . . ;

62. U.S. Attorney's Brief, *supra* note 13, at 11-12

63. See text accompanying notes 81-92 *infra*.

- (D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and
- (E) each amendment, revision, or repeal of the foregoing.⁶⁴

One of the plaintiffs in *Jordan* was confronted with guidelines that were statements of the general course of agency functioning, rules of procedure, and generally applicable substantive rules and policies (the last in the form of discretionary criteria).⁶⁵ These guidelines are not merely records that must be made accessible under sub-section (a)(3), or statements of policy, administrative staff manuals, or instructions to staff that must already be available and waiting for any person who cares to read them under sub-section (a)(2). They in fact are literally the material that FOIA requires to be published in the Federal Register.⁶⁶

Under FOIA, failure to publish virtually nullifies a procedural rule or a generally applicable policy or substantive rule.⁶⁷ For example, "[n]o administrative action taken pursuant to unpublished procedures can be allowed to stand against a person adversely affected thereby."⁶⁸ The Immigration and Naturalization Service has not been permitted to alter, to the disadvantage of applicants, its discretionary policies on treatment of applications for extended vol-

64. 5 U.S.C. § 552 (1970).

65. See notes 9-11 and 13 *supra*.

66. For instance, the Bureau of Prisons' regulations on prisoner conduct are subsection (a)(1)(D) statements of general policy. *Remer v. Saxbe*, 522 F.2d 695, 698 (D.C. Cir. 1975) (dicta). Similarly, an agency's licensing discretion procedures are subsection (a)(1)(C) rules of procedure. *North American Van Lines, Inc. v. United States*, 412 F. Supp. 782, 795 (N.D. Ind. 1976). An agency does not have a defense that those who frequently deal with it, such as defense attorneys familiar with a prosecutor's office, have an informal understanding of the agency's methods of decision-making. "What is contemplated is a reasonably complete code of procedures set out in advance by which actions can be guided, and strategies planned." *Northern Cal. Power Agency v. Morton*, 396 F. Supp. 1187, 1191 (D.D.C. 1975), *aff'd sub nom.* *Northern Cal. Power Agency v. Kleppe*, 539 F.2d 243 (D.C. Cir. 1976). FOIA thus requires the U.S. Attorney for the District of Columbia, for example, to publish not only the Papering and Screening Manual and the Guidelines for First Offender Treatment in the Federal Register, but to compile all other procedural rules, such as the one described in note 13 *supra*, and generally applicable policies and substantive rules, even if promulgated only orally to his staff, and to publish that compilation in the Federal Register as well. (Statements of Policy that are not generally applicable need only be made available under subsection(a)(2)(B).)

67. "Except to the extent that a person has actual and timely notice thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published." 5 U.S.C. § 552 (a)(1) (Supp. IV 1974).

68. *Northern Cal. Power Agency v. Morton*, 396 F. Supp. 1187, 1191 (D.D.C. 1975), *aff'd sub nom.* *Northern Cal. Power Agency v. Kleppe*, 539 F.2d 243 (D.C. Cir. 1976); *accord*, *W.G. Cosby Transfer & Storage Corp. v. Froehke*, 480 F.2d 498 (4th Cir. 1973).

untary departure until the changes have been properly published in the Federal Register.⁶⁹ The Indian Health Service has not been able to deny benefits on the basis of eligibility criteria not published in the Federal Register;⁷⁰ nor has the Agriculture Department been able to reduce a farm emergency loan program without a publication in the Federal Register.⁷¹

In addition to publication in the Federal Register, substantive rules, under section 4 of the Administrative Procedure Act,⁷² must be created through the notice and comment procedure of rulemaking.⁷³ There are four categories of exceptions to the requirement for rulemaking: "military or foreign affairs" functions;⁷⁴ matters "relating to agency management or personnel or to public property, loans, grants, benefits, or contracts";⁷⁵ instances where "the agency for good cause finds . . . that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest";⁷⁶ and "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice."⁷⁷ The exception for impracticability, lack of necessity, and contrariness to the public interest is applied only grudgingly by the courts. The Cost of Living Council, for instance, was able to avoid notice and comment only as much as absolutely required by national economic emergency.⁷⁸ It is difficult to estimate the extent to which prosecutorial discretion guidelines are subject to rulemaking because, depending on the par-

69. *United States ex rel. Parco v. Morris*, 426 F. Supp. 976, 985 (E.D. Pa. 1977).

70. *Lewis v. Weinberger*, 415 F. Supp. 652, 658-59 (D. N.M. 1976).

71. *Berends v. Butz*, 357 F. Supp. 143 (D. Minn. 1973).

72. 5 U.S.C. § 553 (1970). *Morton v. Ruiz*, 415 U.S. 199, 231-36 (1974).

73. A statement ("notice") is published in the Federal Register specifying "either the terms or substance of the proposed rule or a description of the subjects and issues involved," a "reference to the legal authority under which the rule is proposed," and the method by which public opinion ("comment") is to be received, including the time and place of any hearings. 5 U.S.C. § 553(b) & (c) (1970). Kenneth Culp Davis believes the process of rulemaking to be "one of the greatest inventions of modern government," *DAVIS, supra* note 44, at 283, and it is not difficult to see how government regulation can be enriched where the regulators have an open-minded approach to the thoughts of people who will be affected by rules or who are expert in the field being regulated. Rulemaking has proliferated phenomenally throughout the federal government, and by 1976 Davis was able to add that the United States "is entering the age of rulemaking, and the rest of the world, in governments of all kinds, is likely to follow. The main tool for getting governmental jobs done will be rulemaking, authorized by legislative bodies and checked by courts." *DAVIS, ADMINISTRATIVE LAW OF THE SEVENTIES* 167-68 (1976).

74. 5 U.S.C. § 553 (a)(1) (1970).

75. 5 U.S.C. § 553 (a)(2) (1970).

76. 5 U.S.C. § 553 (b)(B) (1970).

77. 5 U.S.C. § 553 (b)(A) (1970).

78. *Tasty Baking Co. v. Cost of Living Council*, 529 F.2d 1005, 1014-15 (D.C. Cir. 1975).

ticular guidelines, there may be no clear distinction between substantive rules, which are not exempt, and policy and procedural rules, which are. However, in a remarkably analogous case, discretionary parole selection criteria were held to be substantive.⁷⁹ Some courts, the exceptions notwithstanding, have even required notice and comment where a rule has a substantial impact, as prosecutorial discretion does, on the lives of individuals.⁸⁰

B. Must Federal Prosecutors Who Have Not Created Discretionary Guidelines for Their Subordinates Do So?

During recent years, federal courts, particularly the D. C. Circuit, have begun to adopt a suggestion by Kenneth Culp Davis⁸¹ that the nondelegation doctrine evolve from a requirement of standards in legislation to a requirement of standards in administrative rules except where the legislature has already put them in a governing statute, so "that an administrator will be forbidden to exercise discretionary power in an individual case unless he has done what he reasonably can do to formulate, through rulemaking or otherwise, standards to guide his determination."⁸² In *Environmental Defense Fund, Inc. v. Ruckelshaus*,⁸³ for instance, the D. C. Circuit held, in a suit to compel the Environmental Protection Agency to prohibit DDT, that federal courts have "an obligation to ensure that the administrative standards conform to the legislative purpose and that they are uniformly applied in individual cases."⁸⁴ Pointing out that judicial review of individual cases "can correct only the most egregious abuses," the court concluded that judicial review must "ensure that the administrative process itself will confine and control the exercise of discretion" and that the only way that can be done is for courts to:

[R]equire administrative officials to articulate the standards and principles that govern their discretionary decisions in as much detail as possible. . . . When administrators provide a framework for principled decision-making, the result will be to diminish the importance of judicial review by enhancing the integrity of the administrative

79. *Pickus v. United States Bd. of Parole*, 507 F.2d 1107 (D.C. Cir. 1974).

80. *Pharmaceutical Mfrs. Ass'n v. Finch*, 307 F. Supp. 858 (D. Del. 1970); *National Motor Freight Traffic Ass'n, Inc. v. United States*, 268 F. Supp. 90 (D.D.C. 1967), *aff'd*, 393 U.S. 18 (1969). *Contra*, *Shell Oil Co. v. FPC*, 491 F.2d 82 (5th Cir. 1974).

81. See Davis, *supra* note 73, at 20, 26-29, 175-76, and 223-30.

82. *Id.* at 20.

83. 439 F.2d 584 (D.C. Cir. 1971).

84. *Id.* at 596.

process, and to improve the quality or judicial review in those cases where judicial review is sought.⁸⁵

Any argument that criminal cases could be distinguished from *Environmental Defense Fund* disappeared when the same circuit shortly afterward, in *United States v. Bryant*,⁸⁶ required federal criminal investigators to promulgate and enforce "rigorous and systematic procedures designed to preserve all discoverable evidence gathered in the course of a criminal investigation."⁸⁷

The statutes defining the duties of U. S. Attorneys literally require them to prosecute every offense that comes to their attention,⁸⁸ although courts have been shy to interpret them as they were written.⁸⁹ If ⁹⁰ the statutes are not mandatory, U. S. Attorneys have no legislative standards to define their discretion, and the new form of the nondelegation doctrine would require them to create standards of their own. Whether these standards ultimately are classified as substantive rules or as general policies and procedural rules, or as both, they must be published in the Federal Register, and, if they are substantive rules or come under the substantial impact test, they must be offered for the notice and comment process.⁹¹ A U. S. Attorney or other federal prosecutor who has already made guidelines that completely and meaningfully encompass his discretion need only compile and publish them and submit for notice and comment those not exempted, but the nondelegation doctrine would require any federal prosecutor whose guidelines are incomplete or non-existent⁹² to draw up comprehensive guidelines until his discretion is defined.

85. *Id.* at 598. In dicta, the court added that "[r]ules and regulations should be more freely formulated by administrators, and revised when necessary," and that "[d]iscretionary decisions should more often be supported with findings of fact and reasoned opinions." *Id.*

86. 439 F.2d 642 (D.C. Cir. 1971).

87. *Id.* at 652.

88. "Except as otherwise provided by law, each United States attorney, within his district, shall — (1) prosecute for all offenses against the United States. . . ." 28 U.S.C. § 547 (1970) (emphasis supplied). No legislative history even implies that "shall" and "all" are not intended to have their ordinary meanings, and no other statute provides "otherwise" to create a general discretion to decide who and what to prosecute. "The United States attorneys . . . are authorized and required" to prosecute violations of the Civil Rights Act of 1870. 42 U.S.C. § 1987 (1970) (emphasis supplied). Again, nothing in the legislative history suggests that "required" does not mean "required."

89. See, e.g., *Attica Correction Facility v. Rockefeller*, 477 F.2d 375 (2d Cir. 1973), and *Moses v. Kennedy*, 219 F. Supp. 762 (D.D.C. 1963), *aff'd sub nom. Moses v. Katzenbach*, 342 F.2d 931 (D.C. Cir. 1965).

90. See note 132 *infra*.

91. See text accompanying notes 63 to 79 *supra*.

92. The author is not aware of any federal prosecutor who has guidelines completely defining his and his assistants' discretion.

C. Must Federal Prosecutors Provide Hearings or Other Opportunity for Victims, Defendants, or Potential Defendants to be Heard before Discretionary Decisions are Made?

Neither the Administrative Procedure Act nor any other statute includes a requirement that a prosecutor hold a hearing or otherwise invite affected persons to communicate with him or her before making a discretionary decision,⁹³ and any obligation to do so would have to be derived from the due process clause.⁹⁴ Aside from some cases holding that the due process clause does not require a prosecutor to hold a hearing before deciding whether or not to prosecute a juvenile as an adult,⁹⁵ there are virtually no decisions reflecting on the extent to which a prosecutor must hold hearings before making discretionary decisions. It is indeed hard to imagine an appeals

93. Section 5 of the APA sets out hearing procedures only for "adjudication required by statute to be determined on the record after opportunity for an agency hearing," 5 U.S.C. § 554(a) (1970). "Adjudication," as a term of art within the APA, is defined as "agency process for formulation of an order," and an order is "the whole or a part of a final disposition . . . in a matter other than rulemaking," 5 U.S.C. § 551(6) & (7) (1970). Under these definitions, an AUSA adjudicates when he or she declines to charge a person with a crime, terminates an already existing criminal charge through diversion, denies a request for diversion or an offer of a plea bargain, or makes a plea agreement, since all of these finally dispose, from the prosecutor's point of view, of a criminal case or a discrete stage of it. In *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 158 (1975), the Supreme Court interpreted the APA in exactly this way in regard to a civil prosecutor in a regulatory agency, the General Counsel of the National Labor Relations Board. DAVIS, *supra* note 73, at 4-6, criticizes the APA definition of adjudication as "unsound" and points out that the Supreme Court also used the common law definition of adjudication in regard to another issue in *Sears*, 421 U.S. at 138-39, and that lower courts have often ignored the APA definition in cases like *Soucie v. David*, 448 F.2d 1067, 1073 (D.C. Cir. 1971). This criticism overlooks, however, the necessity of legislators and other law-givers at times using familiar words as codes for unfamiliar meanings, because of the tendency of language to expand by mutation and evolution more than by invention and because of the occasional duty of legislators to create wholly new idea systems where none before existed. The APA was such an idea system; its purpose was to regularize bureaucratic decision-making, and it is predictable that in any exercise so radical a word such as adjudication might be called upon to transmit a radically new, if not exotic, meaning. If the APA definition is less favored by courts than the common law definition, it may be more because of failure to appreciate the definition's role in the Act's general plan than because the definition has a defect of logic. Section 5, however, does not cover prosecutorial discretion because no statute requires a decision on the record or a hearing. Even if there were such a statute, decisions not terminating a case would not need a hearing because there is an exception in Section 5 for matters "subject to a subsequent trial of the law and the facts de novo in a court." 5 U.S.C. § 554(a)(1) (1970).

94. U.S. CONST., amend. V.

95. *United States v. Quinones*, 516 F.2d 1309, 1311 (1st Cir.), *cert. denied*, 423 U.S. 852 (1975); *Cox v. United States*, 473 F.2d 334, 336 (4th Cir.), *cert. denied*, 414 U.S. 869 (1973); *United States v. Bland*, 472 F.2d 1329, 1333-34 (D.C. Cir. 1972), *cert. denied*, 412 U.S. 909 (1973). "The due process clause of the fifth amendment . . . has never been held applicable to the processes of prosecutorial decision-making." *Cox v. United States*, 473 F.2d 334, 336 (4th Cir.), *cert. denied*, 414 U.S. 869 (1973) (footnotes omitted).

court ever ruling that a prosecutor must give an interested party the full range of procedural due process rights,⁹⁶ but, as Judge Friendly of the Second Circuit Court of Appeals has pointed out, "after *Goss v. Lopez* it becomes pertinent to ask whether government can do anything to a citizen without affording him 'some kind of hearing.'"⁹⁷ In the due process balancing test, the public's need to resolve criminal litigation expeditiously will weigh heavily against requiring "some kind of hearing" before a prosecutor can exercise his or her discretion, although the individual's needs for protection from abuse of prosecutorial discretion are rather like the factors favoring a hearing that have prevailed in other cases. A hearing is now required before dismissal from a government job where the dismissal creates a stigma,⁹⁸ while a prosecutor's refusal to divert a case or plea bargain a felony to a misdemeanor will often result in an even more stigmatizing criminal conviction. Diverted defendants whose diversions are revoked by prosecutors for allegedly unsatisfactory performance are in circumstances quite similar to those of persons whose paroles or probations are revoked on the same grounds, yet it is a violation of the due process clause to terminate parole⁹⁹ or probation¹⁰⁰ without a hearing. In sum, it is not the law now that a prosecutor must provide a hearing before he can exercise his discretion, but it might become the law in very narrowly defined situations in the future, especially if court reform makes criminal adjudication more rapid and if social conditions ever improve sufficiently to permit unhysterical discussion of crime.

96. A process that provides all procedural due process rights would include: (1) notice of the hearing place and time; (2) the opportunity to be present; (3) the opportunity to present evidence and arguments of one's own; (4) the opportunity to know in advance, comment upon, and challenge (such as by cross-examination) the evidence and arguments against oneself; (5) the assistance of counsel; (6) an unbiased adjudicator of fact and law; (7) a record, including a record of the rationale of the result; (8) the opportunity for the public to view the hearing; and (9) the opportunity to appeal. See *Goldberg v. Kelly*, 397 U.S. 254, 267-71 (1970). The right to an unbiased adjudicator, to be complete, includes the right to be opposed by an advocate of some kind, since otherwise the adjudicator is tempted to assume the role of the absent advocate. *Figueroa Ruiz v. Delgado*, 359 F.2d 718 (1st Cir. 1966) (criminal defendant has a due process right to the presence of a prosecutor in the courtroom).

97. Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1275 (1975) (footnote omitted) (quoting Justice White's opinion for the Court in *Wolff v. McDonnell*, 418 U.S. 539, 557-58 (1974)). *Goss v. Lopez*, 419 U.S. 565 (1975), required notice and hearing before students could be suspended for ten days from a public school.

98. *Board of Regents v. Roth*, 408 U.S. 564 (1972); *Perry v. Sinderman*, 408 U.S. 593 (1972).

99. *Morrissey v. Brewer*, 408 U.S. 471 (1972).

100. *Gagnon v. Scarpelli*, 411 U.S. 778 (1973).

D. Must Federal Prosecutors Explain Reasons for Denying Requests that they Exercise Their Discretion?

A prosecutor is the target of several categories of people with requests for discretionary decisions to their liking. Victims, witnesses, and police or other investigating officials will ask that other people be charged with criminal offenses, and defendants or their attorneys will offer plea bargains or apply for placement in diversionary programs. The rationales prosecutors use to decide individual requests are usually mysterious to the public and the principals involved in given cases, if not to the prosecutors themselves, and the mystery creates suspicion. The absence of a requirement to explain themselves may also encourage prosecutors to ignore important but troublesome considerations, to base decisions on unacceptable factors (such as race or social class), to make sloppy and incomplete analyses, and to be uncritical of their own motivations and work. As long ago as 1913, a former Maine Chief Justice urged that every prosecutor "be required to file in each case of a *nolle prosequi* a signed statement of the facts upon which he bases his action."¹⁰¹

Of the two provisions in the APA¹⁰² requiring explanations in administrative adjudication, one applies only where hearings are held pursuant to the APA and therefore does not apply to prosecutorial discretion.¹⁰³ Under the other, section 6(e):

[P]rompt notice shall be given of the denial in whole or in part of a written application, petition, or other request of an interested person made in connection with any agency proceeding. Except in affirming a prior denial or when the denial is self-explanatory, the notice shall be accompanied by a brief statement of the grounds for the denial.¹⁰⁴

The APA defines "agency proceeding" as, *inter alia*, administrative adjudication.¹⁰⁵ Courts have not yet determined whether a victim, witness, or police officer is an "interested person," but a criminal defendant undeniably is an interested party to his or her own case. Thus, at the very least, a federal prosecutor must, for instance, provide "a brief statement of the grounds for denial" of a defendant's written plea bargain offer or request for diversion.¹⁰⁶ Some

101. Emery, *The Nolle Prosequi in Criminal Cases*, 6 ME. L. REV. 199, 203-04 (1913).

102. Administrative Procedure Act § 8(c), 5 U.S.C. § 557(c) (1970).

103. See note 92 *supra*.

104. 5 U.S.C. § 555(c) (1970).

105. 5 U.S.C. § 551(7) & (12) (Supp. VI 1976). See note 92 *supra*.

106. Before Congress, in § 2 of the Parole Commission and Reorganization Act, 18 U.S.C. § 4218 (Supp. VI 1976), expressly exempted the new Parole Commission from 5 U.S.C.

federal prosecutors may already be making such statements for their own records,¹⁰⁷ and need only provide them to interested parties and, under FOIA,¹⁰⁸ to the public as well.

Even if due process does not require a prosecutor to hold a hearing before making a discretionary decision, it does seem to oblige him to make a statement of "the reasons for his determination and the evidence he relied on"¹⁰⁹ whenever he revokes a benefit already provided, such as placement in a diversion program, or refuses to provide a benefit that can be provided, such as a diversion or a plea bargain. Three circuits have already taken the position that parole application denials must be accompanied by such statements,¹¹⁰ and a fourth has ruled generally that the due process clause applies to parole decisions.¹¹¹ Two circuits have held to the contrary,¹¹² and the Supreme Court has avoided resolving the issue.¹¹³

E. Does the APA Provide a Basis for Judicial Review of the Discretion of Federal Prosecutors?

Section 10 of the Administrative Procedure Act¹¹⁴ provides for judicial review of "agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court,"¹¹⁵ except where "statutes preclude judicial review"¹¹⁶ or

§ 555 and certain other provisions of the APA, similar explanations had been required, under § 555(c), where the old Parole Board had denied applications for parole. *Mower v. Britton*, 504 F.2d 396, 399 (10th Cir. 1974); *King v. United States*, 492 F.2d 1337, 1345 (7th Cir. 1974).

107. The PROMIS system has the capability of recording these statements by computer, PROMIS BRIEFING SERIES, *supra* note 1, no. 1, at 7, and no. 8, at 4, and the case files and jackets used in the U. S. Attorney's office in the District of Columbia have spaces for recording rationales.

108. "Each agency . . . shall make available for public inspection and copying . . . orders, made in the adjudication of cases." 5 U.S.C. § 552(a)(2)(A) (Supp. IV 1974).

109. *Goldberg v. Kelly*, 397 U.S. 254, 271 (1970).

110. *Zurak v. Regan*, 550 F.2d 86 (2d Cir. 1977); *United States ex rel. Richerson v. Wolff*, 525 F.2d 797 (7th Cir. 1975), *cert. denied*, 425 U.S. 914 (1976); *Childs v. United States Bd. of Parole*, 511 F.2d 1270 (D.C. Cir. 1974); *United States ex rel. Johnson v. Chairman, N.Y. State Bd. of Parole*, 500 F.2d 925 (2d Cir.), *vacated as moot sub nom. Regan v. Johnson*, 419 U.S. 1015 (1974).

111. *Bradford v. Weinstein*, 519 F.2d 728 (4th Cir. 1974), *vacated as moot*, 423 U.S. 147 (1975).

112. *Brown v. Lundgren*, 525 F.2d 1050 (5th Cir. 1976); *Scott v. Ky. Bd. of Parole*, No. 74-1899 (6th Cir. 1975), *remanded for consideration of mootness*, 429 U.S. 60 (1976).

113. See notes 110-12 *supra*.

114. 5 U.S.C. §§ 701-706 (1970 & Supp. VI 1976).

115. 5 U.S.C. § 704 (1970). "Agency action" is defined as "the whole or a part of an agency . . . order, . . . sanction, relief, or the equivalent or denial thereof, or failure to act." 5 U.S.C. § 551(13) (Supp. VI 1976). An "order" is "the whole or a part of a final disposition

"agency action is committed to agency discretion by law."¹¹⁷ Review is available to any person "suffering legal wrong because of agency action or adversely affected,"¹¹⁸ and such a person can sue in "any applicable form of legal action, including actions for declaratory judgments or writs of prohibition or mandatory injunction," and, except where "prior, adequate, and exclusive opportunity for judicial review is provided by law," can obtain review in the form of a defense to "civil or criminal proceedings for judicial enforcement."¹¹⁹ The court must, *inter alia*, "compel agency action unlawfully withheld"¹²⁰ and "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."¹²¹ Jurisdiction, however, is not derived from section 10.¹²²

In recent years, a number of lower federal courts have held that the constitutional doctrine of separation of powers precludes judicial review of prosecutorial discretion.¹²³ These decisions are based

. . . in a matter other than rule making." 5 U.S.C. § 551(6) (1970). A "sanction" is "the whole or a part of an agency — (A) prohibition, requirement, limitation, or other condition affecting the freedom of a person; (B) withholding of relief; (C) imposition of a penalty . . . (G) taking other compulsory or restrictive action." 5 U.S.C. § 551(10) (1970). "Relief" means "the whole or a part of an agency — (A) grant of . . . exemption, exception, privilege, or remedy; (B) recognition of a . . . privilege, exemptions or exception; or (C) taking of other action on the application or petition of, and beneficial to, a person." 5 U.S.C. § 551(11) (1970). "Agency" is defined for §§ 701-706 differently than for the rest of the APA. The definition includes "each authority of the Government . . . whether or not it is within or subject to review by another agency" and excludes the legislative and judicial branches, certain military functions, and a variety of miscellaneous entities, none of them related to U. S. Attorneys or the Department of Justice. 5 U.S.C. § 701(b)(1) (1970).

116. 5 U.S.C. § 701(a)(1) (1970).

117. 5 U.S.C. § 701(a)(2) (1970).

118. 5 U.S.C. § 702 (1970).

119. 5 U.S.C. § 703 (Supp. VI 1976).

120. 5 U.S.C. § 706(1) (1970).

121. 5 U.S.C. § 706(2)(A) (1970).

122. It was once thought that § 10 of the APA, 5 U.S.C. §§ 701-706, was a grant of jurisdiction independent of Title 28, U.S.C.. See *Sanders v. Weinberger*, 522 F.2d 1167 (7th Cir. 1975), *rev'd sub nom. Califano v. Sanders*, 97 S. Ct. 980 (1977). In October 1976, Congress amended 28 U.S.C. § 1331(a) in regard to the amount-in-controversy requirement by adding the words, "except that no such sum or value shall be required in any action brought against the United States, any agency thereof, or any officer or employee thereof in his official capacity." Pub. L. No. 94-574, 90 Stat. 2721. Four months later the Supreme Court, in *Califano v. Sanders*, 97 S. Ct. 980, 983-85 (1977), held that § 10 of the APA does not create jurisdiction.

123. *E.g.*, *Inmates of Attica Correctional Facility v. Rockefeller*, 477 F.2d 375 (2d Cir. 1973); *Newman v. United States*, 382 F.2d 479 (D.C. Cir. 1967); *Smith v. United States*, 375 F.2d 243 (5th Cir.), *cert. denied*, 389 U.S. 841 (1967); *Powell v. Katzenbach*, 359 F.2d 234 (D.C. Cir. 1965), *cert. denied*, 384 U.S. 906, *rehearing denied*, 384 U.S. 967 (1966); *United States v. Cox*, 342 F.2d 167 (5th Cir.), *cert. denied sub nom. Cox v. Hauberg*, 381 U.S. 935

on the ideas that "[t]he discretion of the Attorney General in choosing whether to prosecute or not to prosecute, or to abandon a prosecution already started, is absolute,"¹²⁴ and that "it is not the function of the judiciary to review the exercise of executive discretion."¹²⁵ Neither of these statements is the law. Not since *Yick Wo v. Hopkins*¹²⁶ has prosecutorial discretion been absolute,¹²⁷ and the Supreme Court has held repeatedly since 1902¹²⁸ that courts do have the power, and often the duty, to review the exercise of executive discretion.¹²⁹ The Court has ignored the separation-of-powers theory entirely in ruling "that only upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review."¹³⁰ Not only has the Supreme Court never ruled that the separation-of-powers doctrine exempts prosecutorial discretion from judicial review,¹³¹ it has, to the contrary, in a case where officials enforced a criminal statute only against whichever violators it pleased them to arrest, held that "completely uncontrolled discretion . . . is clearly unconstitutional."¹³²

(1965); *Goldberg v. Hoffman*, 225 F.2d 463 (7th Cir. 1955); *Moses v. Kennedy*, 219 F. Supp. 762 (D.D.C. 1963), *aff'd sub nom. Moses v. Katzenbach*, 342 F.2d 931 (D.C. Cir. 1965); *Pugach v. Klein*, 193 F. Supp. 630 (S.D.N.Y. 1961).

124. *Smith v. United States*, 375 F.2d 243, 247 (5th Cir.), *cert. denied*, 389 U.S. 841 (1967).

125. *Newman v. United States*, 382 F.2d 479, 482 (D.C. Cir. 1967).

126. 118 U.S. 356 (1886) (discriminatory enforcement violates equal protection).

127. *E.g.*, *United States v. Falk*, 479 F.2d 616 (7th Cir. 1973). Further, in a case interpreting FED. R. CR. P. 48(a). ("The . . . United States Attorney may by leave of court file a dismissal of an indictment . . ."), the Court of Appeals for the District of Columbia Circuit has held that a judge can deny a U. S. Attorney permission to dismiss an indictment where the judge concludes that the prosecutor has abused his discretion and dismissal would be unfair to the defendant or the public and where the judge puts on the record his reasons for so concluding. *United States v. Ammidown*, 497 F.2d 615 (D.C. Cir. 1973). "We do not think Rule 48(a) intends the trial court to serve merely as a rubber stamp for the prosecutor's discretion." *Id.* at 622. (Abuse of discretion is grounds for judicial overturning of administrative action under the APA as well. 5 U.S.C. § 706(2)(A) (1970). See also *United States v. Cowan*, 524 F.2d 504 (5th Cir. 1975).

128. *American School of Magnetic Healing v. McAnnulty*, 187 U.S. 94 (1902).

129. *E.g.*, *Dunlop v. Bachowski*, 421 U.S. 560 (1975); *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971); *Abbott Labs., Inc. v. Gardner*, 387 U.S. 136 (1967); *Rusk v. Cort*, 369 U.S. 367 (1962); *Stark v. Wickard*, 321 U.S. 288 (1943).

130. *Abbott Labs., Inc. v. Gardner*, 387 U.S. 136, 141, *quoting* *Rusk v. Cort*, 369 U.S. 367, 379-80 (emphasis added).

131. The Court has, however, spoken approvingly of plea bargaining without taking any position on whether the separation of powers precludes judicial review. *Santobello v. New York*, 404 U.S. 257, 261 (1971) (dicta). See text accompanying note 153 *infra*.

132. *Cox v. Louisiana*, 379 U.S. 536, 557 (1965). See also *Giaccio v. Pennsylvania*, 382 U.S. 399 (1966), where the Court struck down on similar grounds a statute authorizing criminal juries to assess court costs but not setting out any standards for them to follow in doing so. Thus, if the cases cited in note 89 *supra*, are correct in holding that the statutes

How have some¹³³ of the lower courts ventured so far from the Supreme Court's view of judicial review? One reason is that parties seeking review of prosecutorial discretion have almost never relied on the Administrative Procedure Act,¹³⁴ although it seems inconceivable that any court would strike down section 10 of the APA as a violation of the Constitution. A second is that the Supreme Court has never granted a petition for *certiorari* in a case where it would have to approve or disapprove the separation-of-powers theory. A third reason is that the separation-of-powers cases are a total misconstruction of earlier case law on the subject.

cited in note 88 *supra* do not compel prosecution of every offense, the statutes themselves are unconstitutional because, deprived of the normal meanings of the words "shall," "all," and "required," they set out no standards of any kind. See, however, text at notes 81-92 *supra*, for a method of salvaging the statutes.

133. Some of the lower courts seem to be moving away from the separation-of-powers theory. For example, in *Nader v. Kleindienst*, 375 F. Supp. 1138 (D.D.C. 1973), the plaintiffs, who were voters, sued, *inter alia*, to mandamus the Justice Department to enforce the old 1925 Federal Corrupt Practice Act, which, they alleged, it had made a practice of neglecting, and the district court denied relief, basing its decision on the separation-of-powers doctrine. The Court of Appeals for the District of Columbia Circuit affirmed on the grounds that the plaintiffs lacked standing and that the statute in question had been repealed after the District Court's ruling. The Court of Appeals expressly declined to base its affirmation on the separation-of-powers doctrine. *Nader v. Saxbe*, 497 F.2d 676 (D.C. Cir. 1974). In *Medical Comm. for Human Rights v. SEC*, 432 F.2d 659 (D.C. Cir. 1970), *vacated as moot*, 404 U.S. 403 (1972), the circuit court reviewed, on complaint of the victim, the Securities and Exchange Commission's prosecutorial discretion in a proxy statement case, and in *Guerrero v. Garza*, 418 F. Supp. 182 (W.D. Wis. 1976), a district court held that if the plaintiffs were able to prove that the Department of Labor had followed a pattern and practice of not investigating and prosecuting violations of the Farm Labor Contractor Registration Act, 7 U.S.C. §§ 2041-2055 (Supp. IV 1974), they would have proved a violation of the Act, 7 U.S.C. §§ 2046-2048, deserving judicial remedy. The Labor Department had tried to moot the case by seeking an injunction against the grower involved in the plaintiffs' complaint, but the court ruled that a single enforcement does not end a pattern or practice. 418 F. Supp. at 183. (English law has followed a similar approach. See *R. v. Metropolitan Police Comm'r*, *ex parte Blackburn*, [1968] 1 All E.R. 763 (C.A.).) Since the separation-of-powers theory is based on the President's constitutional duty to "take Care that the Laws be faithfully executed," Art. II, § 3, a duty which does not distinguish between criminal and civil laws, it would apply no less to civil statutes than to criminal ones. If there is judicial review, it would be required less in civil than in criminal cases, where the harm that can result from prosecutorial abuse is much greater. The Confiscation Cases, 74 U.S. (7 Wall.) 454 (1868), from which the modern unreviewability decisions purport to be derived, were condemnation proceedings.

134. A district court and Fourth Circuit panel have agreed that the APA applies to the Justice Department's decisions about whether to charge defendants as juveniles or adults, and that the procedures used to make those decisions are judicially reviewable. *Cox v. United States*, 473 F.2d 334, 342, *cert. denied*, 414 U.S. 869 (1973). The full bench of the Fourth Circuit decided not to consider the APA argument on the grounds that the facts in the case could not have constituted an abuse of discretion and on the seemingly mistaken impression that the issue had not been raised in the district court. 473 F.2d at 337. Neither the Fourth Circuit, *en banc*, nor the Fourth Circuit panel, nor the district court would hold that prosecutorial discretion was not reviewable under the APA.

Prior to 1955, no court had ever reported a decision holding that the separation-of-powers doctrine precluded judicial review of prosecutorial discretion. In that year, the Seventh Circuit, although it seemed to recognize an abuse of discretion, held in *Goldberg v. Hoffman*¹³⁵ that a court lacks authority to "review the exercise of administrative discretion."¹³⁶ Other cases followed beginning in 1961,¹³⁷ and a characteristic of nearly all of them is that they misapply every decision older than *Goldberg*. The *Confiscation Cases*¹³⁸ and all other pre-*Goldberg* federal decisions declining to review prosecutorial discretion do so on the basis of the common law rule that the English Attorney General and his institutional descendants in the United States were not subject to mandamus,¹³⁹ although the separation-of-powers opinions rely on the earlier cases for a constitutional holding instead.¹⁴⁰ The Supreme Court held in the

135. 225 F.2d 463 (7th Cir. 1955).

136. *Id.* at 465. The opinion, as do many other separation-of-power decisions, includes logic that would require the court to hold § 10 of the APA unconstitutional: "Discretion is always subject to abuse, but the framers of our Constitution have indicated their conviction that the danger of abuse by the executive is a lesser evil than to render the acts left to executive control subject to judicial encroachment." *Id.* at 466.

137. See note 123 *supra*. The leading separation-of-powers decisions were written in the early and middle 1960's, a period in which the public's trust of the executive branch was perhaps higher than at any other time since the Depression. The leading case is *United States v. Cox*, 342 F.2d 167 (5th Cir.), *cert. denied*, 381 U.S. 935 (1965), where a federal grand jury in Mississippi had voted to return indictments that it had been told the Justice Department would refuse to allow. The district court judge ordered the U. S. Attorney to draw up the indictments and sign them, which, under orders from the Department, he refused to do. A contempt citation and appeal followed. Although the Fifth Circuit overturned the contempt citation, it is difficult to draw any law out of the case at all. The seven judges wrote four opinions, hopelessly mixing up issues of common law, constitutional law, and the Federal Rules of Criminal Procedure so that no single rationale is identifiable. Three judges, including the present Attorney General, Griffin B. Bell, believed the district judge had authority to order the U. S. Attorney to draft and sign the indictments. 342 F.2d at 173-81. A fourth judge concluded that the U. S. Attorney could be compelled to draft, but not to sign them, but concurred in reversal nonetheless. *Id.* at 182-85. Thus, since a majority of the Fifth Circuit concluded that a U. S. Attorney is subject to judicial review, the case can hardly be cited for the opposite point of view.

138. 74 U.S. (7 Wall.) 454 (1869).

139. *United States v. Thompson*, 251 U.S. 407 (1920); *Milliken v. Stone*, 16 F.2d 981 (2d Cir.), *cert. denied*, 274 U.S. 748 (1927) (equity); *United States v. Woody*, 2 F.2d 262 (D. Mont. 1924); *United States v. Stowall*, 27 F. Cas. 1350 (C.C.D. Mass. 1854) (No. 16, 409); *United States v. Brokaw*, 60 F. Supp. 100 (S.D. Ill. 1945).

140. See, for example, *Smith v. United States*, 375 F.2d 243, 247 (5th Cir.), *cert. denied*, 389 U.S. 841 (1967), where the *Confiscation Cases*, 74 U.S. (7 Wall.) 454 (1868), are cited, along with two recent separation-of-powers cases, as holding that judicial review would violate the separation of powers. Sometimes, separation-of-powers cases casually throw common law cases and other separation-of-powers cases together in support of a vague conclusion that might be derived from either train of authority. In *Powell v. Katzenbach*, 359 F.2d 234, 234-35 (D.C. Cir. 1965), *cert. denied*, 384 U.S. 906, *rehearing denied*, 384 U.S. 967 (1966), the

Confiscation Cases that “[p]ublic prosecutions . . . are within the exclusive direction of the district attorney, *except in cases where it is otherwise provided in some act of Congress.*”¹⁴¹ That was in 1868, the last time the Supreme Court ruled on the issue, and in the interim Congress has passed the Administrative Procedure Act, of which the Court has since held that the “‘generous review provisions’ must be given a ‘hospitable interpretation.’”¹⁴²

No federal statute precludes judicial review of prosecutorial discretion. Are discretionary prosecutorial decisions “committed to agency discretion by law” and therefore exempt from judicial review under the second of the APA’s two exceptions¹⁴³ to reviewability? In *Citizens to Preserve Overton Park, Inc. v. Volpe*,¹⁴⁴ the Supreme Court held that the exception for decisions committed to agency discretion is a “very narrow” one, “applicable in those rare instances where ‘statutes are drawn in such broad terms that in a given case there is no law to apply.’”¹⁴⁵ The D. C. Circuit has already held to be uncommitted by law to agency discretion the civil prosecutorial authority of the Securities and Exchange Commission¹⁴⁶ and the responsibility of the Department of Health, Education, and

Confiscation Cases, *United States v. Brokaw*, 60 F. Supp. 100 (S.D. Ill. 1945), and two separation-of-powers cases are used as authority for the proposition that “the question of whether and when prosecution is to be instituted is within the discretion of the Attorney General.” Some separation-of-powers opinions, such as *Pugach v. Klein*, 193 F. Supp. 630 (S.D.N.Y. 1961), cite no authority at all other than to refer to the President’s duty in Article II, Section 3 of the constitution to “take Care that the Laws be faithfully executed” (about which see note 133 *supra*). There is a tendency among prosecuting counsel to construe decisions not resulting in restrictions on prosecution as unlimited grants of unreviewable power. In *U.S. Attorney’s Brief*, *supra* note 13, at 10-11, for instance, *Oyler v. Boles*, 368 U.S. 448 (1962), is cited to prove that “there exists inherent unreviewable discretion in the executive to decide which cases are worthy of prosecution” even though *Oyler*, at 455-56, actually holds instead that the *state* prosecution at issue did not violate the *equal protection clause*, implying that others might. See note 56 *supra*.

141. 74 U.S. 454, 457 (1868) (emphasis supplied). The other common law decisions rest on similar rationales. For example, in *United States v. Brokaw*, 60 F. Supp. 100, 101-02 (S.D.N.Y. 1945), the court held that a U. S. Attorney derives his authority from the common law, that wherever he exercises his discretion he “acts in an administrative capacity,” and that “no legislative . . . acts have limited such powers.” (Congress enacted the Administrative Procedure Act in 1946.)

142. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 141 (1967) quoting *Shaughnessy v. Pedreiro*, 349 U.S. 48, 51 (1955).

143. See text accompanying notes 116-17, *supra*.

144. 401 U.S. 402 (1971).

145. *Id.* at 410 quoting S. REP. NO. 752, 79th CONG., 1st Sess. 26, reprinted in [1946] U.S. CODE CONQ. & AD. NEWS 1195.

146. *Medical Comm. for Human Rights v. SEC*, 432 F.2d 659, 673-76 (1970), *vacated as moot*, 404 U.S. 403 (1972).

Welfare¹⁴⁷ to enforce Title VI of the Civil Rights Act of 1964.¹⁴⁸ The Third Circuit, in a suit to compel the Secretary of Labor to sue to overturn a union election for violation of the Labor-Management Reporting and Disclosure Act of 1959,¹⁴⁹ held that "the fact that an agency action involves some discretion does not make it unreviewable" and that the decision of whether or not to sue for enforcement of the Act is not committed to agency discretion by law.¹⁵⁰ The Supreme Court upheld this determination¹⁵¹ but reversed the Third Circuit's holding that the district court was not limited to reviewing the Secretary's rationale and could conduct a fact-finding inquiry of its own.¹⁵² The Supreme Court assumed that the Secretary would sue for enforcement if the reviewing court were to hold his prior decision unlawful, and it reserved for later resolution the issue of whether the reviewing court has authority to order the Secretary to bring an enforcement action.¹⁵³ What kinds of people would have standing to seek review? Since the Supreme Court has ruled that "a citizen lacks standing to contest the policies of the prosecuting authority when he himself is neither prosecuted nor threatened with prosecution,"¹⁵⁴ victims, witnesses, and the public generally are clearly not entitled to judicial review, but a member of a grand jury might be. The D. C. Circuit has determined that a United States Senator has standing, at least for the purposes of a declaratory judgment, "to protect the effectiveness of his vote."¹⁵⁵ The APA explicitly provides standing for defendants.¹⁵⁶

It is possible to conclude now only that the APA does provide a basis for judicial review of prosecutorial discretion unless: (1) prosecutorial charging, screening, and plea bargaining decisions are

147. *Adams v. Richardson*, 480 F.2d 1159, 1161-62 (D.C. Cir. 1973).

148. 42 U.S.C. § 2000d (1970).

149. 29 U.S.C. § 482(b)(1970).

150. *Bachowski v. Brennan*, 502 F.2d 79, 86 (3rd Cir. 1974), *modified sub nom.*, *Dunlop v. Bachowski*, 421 U.S. 560 (1975). The *government* took the position that the discretion at issue was prosecutorial discretion, even though civil, but the Third Circuit distinguished common law and separation-of-powers unreviewability cases on a theory that the latter involved "the vindication of societal or governmental interests, rather than the protection of individual rights." *Id.* at 86-88. The court referred to no authority in support of the distinction and did not account for the fact that the protection of individual rights is one of the most important societal and governmental interests.

151. *Dunlop v. Bachowski*, 421 U.S. 560, 566 (1975).

152. *Id.* at 572-74.

153. *Id.* at 575-76.

154. *Linda R. S. v. Richard D.*, 410 U.S. 614, 619 (1973).

155. *Kennedy v. Sampson*, 511 F.2d 430, 435 (D.C. Cir. 1974).

156. *Buckeye Power, Inc. v. EPA*, 481 F.2d 162, 173 (6th Cir. 1973). See text accompanying notes 118-19, *supra*.

ultimately held to be committed by law to agency discretion, (2) the Supreme Court agrees to the creation of a new constitutional doctrine that is contrary to its own decisions, or (3) the Supreme Court never agrees to rule on the separation-of-powers theory, *and* the incipient trend away from that theory does not mature in the lower courts. The Supreme Court often avoids settling a point of law until a substantial history of litigation in the lower courts provides the experience required for an ultimate determination. Although the Court was wise not to intervene prematurely in the separation-of-powers cases, a final ruling is now both possible and necessary.

III. A GLIMPSE AT THE FUTURE OF PROSECUTORIAL DISCRETION

The trend in federal courts, particularly in the D. C. Circuit,¹⁵⁷ toward regularization of prosecution and other forms of executive enforcement suggests a future in which executive decision-making becomes more and more structured and the administrator's discretionary margin shrinks. In a world of rules, will prosecutors find that they have lost the flexibility needed to do their work? The creation of rules and review inevitably reduces some flexibility, but it is possible to frame rules that retain it where required and eliminate it where it is counterproductive. Rules on administrative decision-making really do no more than define options and rate them according to their acceptability. Absolute power is not necessary for efficiency, and it is often true that an official with a plan for his decisions clearly worked out in rules can be more effective than a more powerful official who has unlimited discretion but no methodology for using it. "Rules," Davis has pointed out, "that limit and guide discretion while allowing individualizing, are especially useful."¹⁵⁸ If the rules and review under which prosecutors find themselves in the future are wisely determined, prosecutors may become more and not less effective.

157. For example, see *Pickus v. United States Bd. of Parole*, 507 F.2d 1107 (D.C. Cir. 1974) (see text accompanying note 79, *supra*); *Nader v. Saxbe*, 497 F.2d 676 (D.C. Cir. 1974) (see note 133, *supra*); *United States v. Ammidown*, 497 F.2d 615 (D.C. Cir. 1973) (see note 127, *supra*); *Adams v. Richardson*, 480 F.2d 1159 (D.C. Cir. 1973) (see text accompanying notes 147-48, *supra*); *United States v. Bryant*, 439 F.2d 642 (D.C. Cir. 1971) (see text accompanying notes 86-87, *supra*); *Environmental Defense Fund v. Ruckelshaus*, 439 F.2d 584 (D.C. Cir. 1971) (see text accompanying notes 83-85 *supra*); *Medical Comm. for Human Rights v. SEC*, 432 F.2d 659 (D.C. Cir. 1970), *vacated as moot*, 404 U.S. 403 (1972) (see note 133, *supra*). See also *Dunlop v. Bachowski*, 421 U.S. 560 (1975) (see text accompanying notes 149-53, *supra*); *Cox v. United States*, 473 F.2d 334 (4th Cir.), *cert. denied*, 414 U.S. 869 (1973) (see note 137, *supra*); *Guerrero v. Garza*, 418 F. Supp. 182 (W.D. Wis. 1976) (see note 133 *supra*).

158. Davis, *supra* note 73, at 127.

Many of the countries of Western Europe have structured their prosecutors' discretion quite successfully for decades. The West German experience has been amply described in the United States.¹⁵⁹ "The startling fact is that the German prosecutor's discretion is consistently controlled all along the line, and that the American prosecutor's discretion is consistently uncontrolled all along the line."¹⁶⁰ Further perspective can be gained by briefly explaining the regularization of prosecutorial discretion in another country, Sweden.¹⁶¹ Not part of either the common law or continental civil law families, Swedish (and Scandinavian) law has historically followed a path that is independent from, but stands mid-way between the two major western legal systems, sharing characteristics of each.¹⁶² Sweden's successful management of structured discretion, similar to that of West Germany, presents more evidence that the same thing can be done practically, if not easily, in common law jurisdictions.

159. DAVIS, *American Comments on American and German Prosecutors*, in DISCRETIONARY JUSTICE IN EUROPE AND AMERICA 60 (K. Davis ed. 1976); HERRMANN, *The German Prosecutor*, in DISCRETIONARY JUSTICE IN EUROPE AND AMERICA 16 (K. Davis ed. 1976); Herrmann, *The Rule of Compulsory Prosecution and the Scope of Prosecutorial Discretion in Germany*, 41 U.CHI. L. REV. 468 (1974); Langbein, *Controlling Prosecutorial Discretion in Germany*, 41 U. CHI. L. REV. 439 (1974); K. DAVIS, DISCRETIONARY JUSTICE 191-95 (1971); Jescheck, *The Discretionary Powers of the Prosecuting Attorney in West Germany*, 18 AM. J. COMP. L. 508 (1970); Schram, *The Obligation to Prosecute in West Germany*, 17 AM. J. COMP. L. 627 (1969). (The two Herrmann articles are similar.)

160. DAVIS, *American Comments on American and German Prosecutors*, *supra* note 159, at 61. "The principle governing prosecution for felonies [in West Germany] is compulsory prosecution, but the main element in the prosecution of minor crimes or misdemeanors is controlled discretion, not compulsory prosecution." *Id.* at 60. The obligation to prosecute wherever an offense can be proved is set forth in the West German Code of Criminal Procedure and called the principle of legality. Exceptions under the principle of opportunity, mainly for minor offenses and where specific circumstances indicate discretion should be exercised, are narrowly defined elsewhere in the Code of Criminal Procedure. Administrative regulations further refine these exceptions, and judicial and administrative review are available. The Juvenile Court Act provides complete discretion where the defendant is underage. See Langbein or Herrmann, *supra* note 159.

161. Sweden is an urbanized and industrialized society like the United States. The crime rate is high and troubling, although violent crimes seem to occur less frequently and property crimes more often in Sweden than in America. Compare the offense rate tables at 1972 STATISTICAL ABSTRACT OF THE UNITED STATES 143 with those at 1972 STATISK ARSBOK 296. The common impression of Sweden as a homogeneous culture spared the tensions of diversity is an incorrect one. Immigrants constitute six per cent of the general population and seventeen per cent of the prison population. Moyer, *The Mentally Abnormal Offender in Sweden: An Overview and Comparison with American Law*, 22 AM. J. COMP. L. 71, 72 (1974).

162. Malmström, *The System of Legal Systems*, 13 SCAND. STUD. L. 127 (1969); Pontopidan, *A Mature Experiment: The Scandinavian Experience*, 9 AM. J. COMP. L. 344 (1960); Schmidt, *Preface*, 1 SCAND. STUD. L. 5 (1957). *Contra*, Sundberg, *Civil Law, Common Law, and the Scandinavians*, 13 SCAND. STUD. L. 179 (1969). Perhaps the largest difference between Swedish and American law is that the former does not recognize the doctrine of *stare decisis*.

Like West Germany, Sweden subscribes to the principle of legality,¹⁶³ and, as in Germany,¹⁶⁴ plea-bargaining is a crime on the part of the prosecutor.¹⁶⁵ Under the theory of procedural legality,¹⁶⁶ a contractual form of adjudication would violate the rights of the defendant because he or she would suffer in proportion to the relative bargaining strengths of the parties, rather than as a consequence of objective determinations as to guilt and the appropriate sanction.¹⁶⁷ Swedish law allows ten exceptions to the rule of compulsory prosecution, some of which are diversions and others define opportunities not to prosecute.

One exception is that for some crimes, such as defamation, a prosecutor is prohibited from bringing charges unless the victim voluntarily makes an accusation.¹⁶⁸ Second, a prosecutor can abstain from prosecuting certain other crimes if he can make a reasonable justification in the record that prosecution would not serve the public interest. Frequently, a crime is flagged in the criminal code as being non-prosecutable unless the victim complains or the public interest would be served. Examples are assault and battery of a nature that is not "grave," breaking and entering that is not "grave," rape, all fraud that is not "grave," and all embezzlement that is not "grave."¹⁶⁹ Frequently, the flagging provides guidelines

163. See note 160, *supra*.

164. See Langbein, *supra* note 159, at 450.

165. BROTTSBALKEN [BrB] 20:1 and JUSTITIEOMBUDSMANNAÄMBETET 1964:115.

166. Procedural legality is in German an aspect of the *Rechtsstaat*, in Danish *retssikkerhed*, in Swedish *rättssäkerhet*. "[N]o English word conveys exactly the meaning that lawyers and administrators connect with the word 'retssikkerhed.' The literal translation of the word 'sikkerhed' is security, safety, or safeguard. The word 'ret' . . . as a legal term . . . means law in the sense of . . . the law of the land In Anglo-Saxon debates about public administration the term . . . 'rule of law' is normally used in the same sense as 'retssikkerhed' in the Scandinavian debate." Christensen, *Efficiency and the Rule of Law in Public Administration*, 17 SCAND. STUD. L. 51, 53 (1973). "Security of law" implies something more than "rule of law": that decisions affecting an individual are to be made with strict adherence to precisely defined legal rules and procedures. It is a legality principle in both the substantive and procedural senses. It includes procedural due process and may go further in requiring a decision to be made according to a formula provided by law. Since discretion breeds arbitrariness, in this theory, the formula should allow no more discretion than is necessary, and the discretion should, where possible, be structured by guidelines.

167. The same point has been made in the United States. Note, *The Unconstitutionality of Plea Bargaining*, 83 HARV. L. REV. 1387 (1970). If due process is aimed at a determination of status (guilty or innocent, punishable or unpunishable), an analysis of plea bargaining can be used to challenge Maine's famous assertion that the maturing of civilization is a trek from status to contract. See H. MAINE, *ANCIENT LAW: ITS CONNECTION WITH THE EARLY HISTORY OF SOCIETY AND ITS RELATION TO MODERN IDEAS* 168-70 (1861).

168. BrB 5:5 and RÄTTEGÅNGSBALKEN[RB] 20:3.

169. BrB 3:11, 4:11, 6:11, 9:13, and 9:10, respectively.

as to "gravity." For example, criteria for separating grave from ordinary fraud and embezzlement are whether a public trust was abused, whether fake documentation or misleading accounting or bookkeeping was used, whether the crime was particularly dangerous in nature, and whether the loss was substantial in size or keenly felt.¹⁷⁰

Third, wherever a prosecutor believes that if a case were brought to trial the maximum sentence would be a fine, he or she may refrain from prosecuting if a conviction would not serve a public purpose.¹⁷¹ Fourth, in exceptional circumstances the Chief State Prosecutor may give a local prosecutor permission not to prosecute where there is a special reason to believe that conviction is not needed to rehabilitate the offender.¹⁷² Fifth, where a person has committed an offense between the time he was charged with and the time he completed a sentence for another offense, a prosecutor can refrain from prosecuting the second offense if the sentence that would result would be meaningless compared to the first sentence.¹⁷³

Sixth, where an accused suffers from such an emotional or mental problem that he would be confined regardless of how the case is resolved, a prosecutor may decline to prosecute.¹⁷⁴ Seventh, a prosecutor need not prosecute a person who commits a crime while under the supervision of a temperance board if the maximum sentence for the crime is not more than six months imprisonment or if the offender is not older than eighteen.¹⁷⁵ Eighth, where a child welfare board has placed a youth in a reform school, prosecution need not occur for any crime he or she commits before release.¹⁷⁶

Ninth, where a youth not in a reform school has committed a crime, a prosecutor has three options:¹⁷⁷

(a) if the crime is petty and appears to be due to immature, but not really criminal behavior, the prosecutor can refuse to prosecute; but

(b) if a more criminal behavior is apparent, the prosecutor must prosecute; although

170. BrB 9:3 and 10:3.

171. RB 20:7 p 1.

172. RB 20:7 p 3.

173. RB 20:7 p 2.

174. RB 20:7 p 4.

175. *Lagen om nykterhetsvård*, SVENSK FÖRFATTNINGSSAMLING [SFS] 1954:579, § 57. A temperance board is a local administrative authority treating addicts and alcoholics.

176. *Lagen om samhällets vård om barn och ungdom*, SFS 1960:97, § 69. A child welfare board is a local administrative authority treating juveniles in need of supervision.

177. *Lagen med särskilda bestämmelser om unga lagöverträdare*, SFS 1964:167.

(c) there is a large middle area of behavior in which the prosecutor can divert the accused to a child welfare board. The prosecutor receives a report from the board which includes its proposed actions if prosecution is withheld, and he or she must explain in the case records what factors — inside and outside that report — lead to the decision of whether or not to prosecute.

Finally, for any crime punishable only by fine and for certain crimes punishable by no more than six months imprisonment, the prosecutor may propose a fine, and if the accused pays it, the case is closed.¹⁷⁸ The accused cannot make a counter-offer. Use of this procedure has grown dramatically in recent years. During 1971, for instance, it occurred in 165,156 cases, while courts imposed fines in only 51,418 instances.¹⁷⁹

Wherever a Swedish prosecutor elects not to bring a case to trial, he or she must make a reasoned explanation why not, and in every instance it is the prosecutor — not the prosecuting office — that is responsible. A prosecutor can ask advice of his superiors, but he or she remains personally answerable for the result.¹⁸⁰ Advice, in

178. RB 48:4 and *Strafföreläggandekungörelse*, SFS 1970:60.

179. KRIMINALSTATISTIK 1971 DEL 2, DOMSTOLS- O. ÅKLAGARSTATISTIK 20, 60-5. Excluding the first two exceptions, for which statistics are not available, prosecutors used these options 192,856 times in 1971, although prosecutor fines were the only category utilized in more than 9,000 cases. *Id.* During the same year, the total number of convictions under the criminal code was 71,393. *Id.* at 52-54. Although the exceptions were applied to offenses found outside as well as inside the criminal code, it is clear that Swedish prosecutors, even though held to strict rules, are doing far more sentencing than Swedish courts are.

180. A Swedish official commits a crime if, for any reason, he disregards, to the detriment of the public or a private person, a rule set out in a statute or regulation. BrB 20:1. Yet, a Swedish official can be dismissed from office only for proven misbehavior, unless he or she is hired on a short-term contract or performing a largely unskilled job. The power of a superior to influence the decisions of a subordinate is limited to the opportunity to persuade, knowledge of the weight of the superior's opinion when promotions are considered, the possibility of reporting the subordinate for misconduct, and, in certain narrowly defined situations, the authority to give orders. The true supervisor of a Swedish official is the law itself and the administrative regulations that implement it. Even though the practicalities of organizational life may encourage an official to conform somewhat to the desires of his superiors, "to a degree far beyond the generally accepted concepts of modern administration, a Swedish official is bound to apply statute law as he alone believes it demands. If his belief differs from others, it is his that counts." W. GELLHORN, *OMBUDSMEN AND OTHERS* 197-98 (1966). See also P. VINDE, *THE SWEDISH CIVIL SERVICE* 15 (1970); N. HERLITZ, *ELEMENTS OF NORDIC PUBLIC LAW* 148 (1969); MOLIN, MÄNSSON & STRÖMBERG, *ÖFFENTLIG FÖRVALTNING* 211 (1969); Jägerskiöld, *Swedish State Officials and Their Position under Public Law and Labour Law*, 4 SCAND. STUD. L. 101 (1960). Provisions holding individual officials personally responsible have begun to appear in American legislation. Federal prosecutors can be fined, for instance, for violating the Speedy Trial Act. 18 U.S.C. § 3162(b)(C) (Supp. V 1975). A prosecutor or other government employee who violates certain portions of the Privacy Act commits a misdemeanor for every violation. 5 U.S.C. § 552a(i) (Supp. V 1975). Arbitrary or capricious withholding of documents accessible

fact, as a matter of professionalism is not to be sought more than it is really needed. In the most publicized Swedish criminal case of the 1960's, a spy scandal which eventually cost the government millions of dollars in revised military strategy and equipment and caused international repercussions, the prosecutor involved sought advice not only from his immediate supervisors, but ultimately from the cabinet as well. "What a silly fellow," recalled a judge. "At the time, we all thought: what pleasure can he get from his job if he does not make decisions without becoming dependent on others?"¹⁸¹

The Swedish prosecutor's explanation for his or her discretionary decisions is available not merely to the defendant,¹⁸² but, as an official document, to the public as well.¹⁸³ Discretion guidelines are also open to the public,¹⁸⁴ and they are subject to the Swedish version of notice and comment.¹⁸⁵

The movement in the United States toward regularization of prosecutorial discretion has come not only from courts, but from prosecutors themselves. Some have confined their own discretion through guidelines.¹⁸⁶ In Honolulu, New Orleans, Black Hawk County, Iowa, and Maricopa County, Arizona, for example, plea bargaining is no longer unrestricted,¹⁸⁷ and an attempt is being

under the Freedom of Information Act can lead to administrative discipline of responsible employees. 5 U.S.C. § 552(a)(4)(F) (Supp. V 1975). See Vaughn, *The Sanctions Provision of the Freedom of Information Act Amendments*, 25 AM. U. L. REV. 7 (1975), and Vaughn, *The Personal Accountability of Public Employees*, 25 AM. U. L. REV. 85 (1975). The doctrine of personal official responsibility gives remarkable freedom to each prosecutor to follow his conscience's view of the law. It would have been impossible under such a rule for a President, for example, to undermine a criminal investigation, conducted by determined career prosecutors, of his closest aides.

181. Interview with Judge Gunvor Bergström, Stockholm (June 27, 1974).

182. RB 23:21.

183. TRYCKFRIHETSFÖRORDNINGEN and *Lag om inskränkningar i rätten att utbekomma allmänna handlingar (Sekretesslagen)*, SFS 1935:249. See Anderson, *Public Access to Government Files in Sweden*, 21 AM. J. COMP. L. 419 (1973).

184. The exceptions to the rule of obligatory prosecution are all found in legislation, and a volume of these and other statutes of general applicability, SVERIGES RIKES LAG, is published every year and available for purchase in bookstores. Administrative regulations interpreting the exceptions are public document and can be read and copied by anyone who visits a prosecutor's office. See authorities cited in note 183, *supra*.

185. REGERINGSFORMEN 7:2. See R. GINSBURG & A. BRUZELIUS, *CIVIL PROCEDURE IN SWEDEN* 19 (1965).

186. See note 8, *supra*.

187. H. MILLER, W. McDONALD, & J. CRAMER, *PLEA BARGAINING IN THE UNITED STATES: PHASE I REPORTS* 9-11, 38 (forthcoming 1978) (pagination tentative). See also Berger, *The Case Against Plea Bargaining*, 62 A. B. A. J. 621 (1976), and Comment, *The Elimination of Plea Bargaining in Black Hawk County: A Case Study*, 60 IOWA L. REV. 1053 (1975).

made in Alaska to eliminate it altogether.¹⁸⁸ Whatever the source of locomotion, American prosecutors in general and federal prosecutors in particular are entering the era of administrative regularization that has been so familiar to and effective for prosecutors in much of Europe. The transition will not be an easy one, however. Not only are many prosecutors reluctant to permit limitations on their authority, but, as Davis has observed, prosecutors "are so exceedingly backward" at the use of rules and review that "the knowledge of the advanced agencies needs to be transferred to them."¹⁸⁹

188. ALASKA JUDICIAL COUNCIL, INTERIM REPORT ON THE ELIMINATION OF PLEA BARGAINING (1977).

189. Davis, *Supra* note 73, at 130.

