BY THE COMPTROLLER GENERAL

Report To The Honorable Max Baucus United States Senate

OF THE UNITED STATES

Greater Oversight And Uniformity Needed In U.S. Attorneys' Prosecutive Policies

U.S. attorneys' policies for accepting or declining cases for prosecution, for using pretrial diversion, and for reaching plea agreements are inconsistent and result in disparate treatment of defendants within the Federal criminal justice system.

Even though many Federal law violations are also prosecutable by State and local authorities, U.S. attorneys have not always referred federally declined cases to their local counterparts. This results in suspected violators going unprosecuted.

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Federal criminal law enforcement.

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COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON D.C. 20548

B-197228

The Honorable Max Baucus
United States Senate

Dear Senator Baucus:

This report is in response to your September 17, 1979, request to examine the Justice Department's management of prosecutive discretion exercised by U.S. attorneys. The report addresses the need for the Justice Department to (1) ensure that U.S. attorneys coordinate with State and local authorities in concurrent jurisdiction cases, (2) establish more consistent prosecutive policies regarding case declinations and plea agreements, (3) improve the use of pretrial diversion as a viable alternative to prosecuting or declining a case, and (4) improve management oversight of U.S. attorneys' operations.

As agreed with your office, unless you publicly announce the contents of the report earlier, we plan no further distribution of this report until 30 days from the date of the report. At that time we will send copies to the Department of Justice, to congressional committees having a jurisdictional interest in the matters discussed, and to other interested parties. Additionally, we will make copies available to others upon request.

Sincerely yours,

Charles A. Bowsher

Comptroller General
of the United States

COMPTROLLER GENERAL'S REPORT TO THE HONORABLE MAX BAUCUS UNITED STATES SENATE

GREATER OVERSIGHT AND UNIFORMITY NEEDED IN U.S. ATTORNEYS' PROSECUTIVE POLICIES

D I G E S T

Senator Max Baucus asked GAO to review the manner in which Justice manages the use of prosecutive discretion exercised by U.S. attorneys--the chief Federal prosecutors at the local level. Even though U.S. attorneys, by statute, are subject to the supervision and control of the Attorney General, the Justice Department has not provided close oversight nor routinely evaluated their activities. This has resulted in the establishment of differing prosecutive policies and practices throughout the 94 U.S. Attorneys' Offices. The different policies and practices have resulted in

--declination policies not being coordinated with State and local authorities and federally declined cases not being referred to such authorities for prosecutive decisions;

--declination policies not being compatible with Federal law enforcement priorities; and

--the inconsistent treatment of similarly situated Federal offenders because of varying decisions to prosecute or not, to use pretrial diversion or not, or to use plea agreements or not.

GAO believes that Justice needs to establish more uniform prosecutive policies to guide U.S. attorneys and minimize prosecutive disparities, accumulate better data on cases handled by U.S. Attorneys' Offices, and increase its oversight of U.S. attorneys' operations.

DECLINATION POLICIES NEED BETTER COORDINATION AND CONSISTENCY

Many violations of Federal criminal law are also violations of State and local laws. Such concurrent jurisdiction cases can either be prosecuted by Federal authorities or State and local authorities. GAO found that Justice was not

coordinating its declination policies and procedures with State and local jurisdictions nor was it ensuring that all appropriate cases were referred to these authorities for their prosecutive consideration. Thus, cases not federally prosecuted nor referred to State and local authorities go unprosecuted. (See p. 10.)

To reduce this problem, Justice, to its credit, has required each U.S. Attorney's Office to establish a Federal-State Law Enforcement Committee to strengthen the referral process and to enhance the coordination of the fight against crime. (See p. 16.)

U.S. attorneys' policies for declining cases are not always compatible with Federal law enforcement priorities. As a result, cases are pursued and resources expended that are not consistent with law enforcement priorities. (See p. 17.)

In the past, a lack of data prevented close scrutiny of U.S. attorneys' caseloads and types of cases declined or prosecuted thereby making it difficult to analyze the impact and reasonableness of declination policies as well as enforcement priorities. Justice is currently upgrading its management information system to require more extensive data. This data could be used to monitor, assess, and revise the declination policies of U.S. attorneys. To make this system useful, Justice must ensure that all U.S. Attorneys' Offices comply with its reporting requirements. (See pp. 20 to 22.)

Recommendations

To better coordinate declination policies with State and local authorities and make them more consistent with Federal investigative priorities, GAO recommends that the Attorney General (1) establish such policies that will help focus the use of Federal law enforcement resources on crimes designated as priority offenses, (2) establish requirements to provide for evaluating the operation of Federal-State Law Enforcement Committees to ensure, among other things, that procedures are implemented so that concurrent jurisdiction cases declined for Federal prosecution are referred to State and/or local

authorities, and (3) ensure that U.S. attorneys adhere to management information reporting requirements so that caseload data will be accurate. (See p. 24.)

U.S. ATTORNEYS' PROSECUTIVE POLICIES RESULT IN DISPARATE TREATMENT OF DEFENDANTS

Although U.S. attorneys operate under broad guidelines and policies set forth by the Attorney General, they also establish their own policies and procedures and have broad discretion (1) to accept or decline a case for prosecution; (2) to use pretrial diversion for a suspected violator; and (3) to enter into a variety of plea agreements. As a result, suspected violators of Federal laws are treated differently among the 94 U.S. Attorneys' Offices.

Declination policies differ

Many U.S. attorneys have established written declination policies which identify cases that do not warrant Federal prosecution. GAO's review at seven U.S. Attorneys' Offices showed that although each had established policies for some violations, there were inconsistencies among these policies. As a result, disparities are created in the Federal system because certain suspected violators are prosecuted in some U.S. Attorneys' Offices but not in others. (See p. 7.)

Pretrial diversion policies and practices differ

Pretrial diversion, as an alternative to Federal prosecution, is not mandatory and Justice has only established general guidelines on its use. As a result, pretrial diversion is used to varying degrees or not at all by U.S. Attorneys' Offices. In those offices where pretrial diversion is used, different policies have been established regarding the eligibility of offenders to participate in the program. Therefore, depending on which U.S. Attorney's Office handles the matter, the offender may or may not be provided the opportunity to enter into a pretrial diversion program. (See p. 31.)

Plea agreement practices differ

Each U.S. attorney has the authority to establish his/her own plea agreement policies, thereby resulting in different policies among the 94 offices. Because U.S. attorneys' plea agreement policies differ, defendants under similar circumstances can be treated differently by U.S. Attorneys' Offices. (See p. 46.)

Recommendations

To minimize the disparate treatment of defendants that come in contact with the Federal criminal justice system, GAO recommends that the Attorney General establish (1) declination policies that will minimize disparities, (2) more specific guidance on the use of pretrial diversion, and (3) more specific plea agreement policies. (See pp. 24, 40 and 60.)

EVALUATIONS OF U.S. ATTORNEYS' OFFICES NEEDED

The Executive Office for U.S. Attorneys is responsible for evaluating the performance of U.S. Attorneys' Offices and providing the Attorney General with feedback on the effectiveness of U.S. attorneys' operations. GAO's examination showed that systematic evaluations were not being made of U.S. attorneys' operations to determine how efficiently and effectively they operate.

Recommendations

GAO recommends that the Attorney General upgrade the capability of the Executive Office to perform systematic evaluations of the performance of U.S. Attorneys' Offices and require the Executive Office to work with Justice's Internal Audit Staff to identify review areas where internal audits are needed to supplement management oversight. (See p. 72.)

AGENCY COMMENTS AND GAO'S EVALUATION

The Department of Justice was in general agreement with GAO's recommendations to improve field

evaluations of U.S. Attorney Office operations, data reporting requirements, and coordination of prosecutive policies. It disagreed with GAO's recommendations to provide greater uniformity in declination, pretrial diversion, and plea agreement policies of U.S. attorneys because prosecutors need the flexibility to adapt policies that reflect local needs and standards and other circumstances. (See app. IV.)

The Secret Service said that it is skeptical of any attempt at standardization of declination policies because the individual merits of a case tend to be forgotten and expressed its hope that declination policies of U.S. attorneys would be sensitive to its priority enforcement programs. (See p. 24 and app. II.)

GAO recognizes that U.S. attorneys are confronted with a wide variety of circumstances surrounding prosecutive decisions. For this reason, GAO believes that prosecutive policies should not be rigid but should allow prosecutors some flexibility. However, an effort should be made to minimize disparities that occur among U.S. Attorneys' Offices. GAO believes Justice should provide closer oversight to identify opportunities to minimize disparities and to ensure that differences that exist are justified. (See pp. 24, 41, and 61.)

The Administrative Office of the U.S. Courts agreed that U.S. attorneys are not increasing their use of pretrial diversion and that serious attention should be given this program as an alternative to prosecution in appropriate cases. (See p. 41 and app. III.) The Administrative Office, while not disagreeing with GAO's conclusions regarding U.S. attorneys' plea agreement practices, said that Federal judges can, under certain circumstances, reject plea agreements of U.S. attorneys and thus have some moderating influence in avoiding disparities under the present system. (See p. 59 and app. III.)

Contents

ABBREVIATIONS

FBI	Federal Bureau of Investigation
GAO	General Accounting Office
IAS	Internal Audit Staff
OMB	Office of Management and Budget
PROMIS	Prosecutor Management Information System

CHAPTER 1

INTRODUCTION

U.S. attorneys are the chief Federal prosecutors at the local level. As representatives of the Attorney General, each U.S. attorney occupies a critical position in the Federal criminal justice system. U.S. attorneys decide who and on what charges individuals who allegedly violate Federal laws will be prosecuted. The U.S. attorney establishes and implements Federal prosecutive policy and establishes and maintains the relationship between the Department of Justice and the Federal investigative agencies as well as State and local authorities. Justice has stated in appropriation hearings that in their capacity:

> "* * * the U.S. attorneys are not only the field representatives of the Department of Justice - they are the sole instruments through which the Federal laws are enforced * * *. The effectiveness of their work materially influences the degree of respect and compliance which the citizenry accords the Nation's laws."

Our review was requested by Senator Max Baucus. (See app. I.) The Senator requested that we examine the manner in which Justice manages the use of prosecutive discretion by U.S. attorneys in making decisions to (1) prosecute or decline criminal cases, (2) use pretrial diversion as an alternative to prosecution, and (3) reach plea agreements. In addition, he requested that we examine the relationship between U.S. attorneys and other components of the Justice Department, such as the Executive Office for U.S. Attorneys and the Criminal Division. We performed audit work at seven U.S. Attorneys' Offices--northern districts of California and Texas, southern districts of Ohio and Texas, eastern districts of California and Kentucky, and the district of Maryland. Our review work was conducted in accordance with GAO's current "Standards for Audits of Governmental Organizations, Programs, Activities, and Functions." See pages 4, 5, and 74 to 77 for a more detailed discussion of our scope and methodology.

APPOINTMENT OF U.S. ATTORNEYS

The 94 U.S. attorneys are responsible for prosecuting Federal crimes in the 95 Federal judicial districts. 1/ Each is appointed by the President for a 4-year term with the advice and consent of the Senate. By statute they are subordinate to the Attorney General and subject to his supervision. However, because U.S. attorneys are subject to removal only by the President and are geographically separated from Justice headquarters, they have traditionally conducted their operations with a great deal of autonomy.

The manner in which U.S. attorneys are appointed has been subject to considerable interest by the Congress as well as the public. In 1978, the Subcommittee on Courts, Civil Liberties, and the Administration of Justice, House Committee on the Judiciary, held hearings on several bills to modify the procedures to appoint and remove U.S. attorneys. These bills called for (1) appointment and removal of U.S. attorneys by the Attorney General and (2) establishment of a U.S. Selection Commission to assist in appointing U.S. attorneys on the basis of merit.

The primary objective of the proposed legislation was to establish procedures to better ensure the selection of U.S. attorneys from the best qualified persons available. During the 1978 hearings, it was stated that the present method of selecting and appointing U.S. attorneys creates the impression that political patronage, not merit, is the chief reason for appointment, and that the executive branch of the Government is required to be overly responsive to the legislative branch in selecting these officials. The bills were never reported out of committee. Since 1978, no legislation dealing with the selection or removal of U.S. attorneys has been introduced.

RELATIONSHIP OF U.S. ATTORNEYS TO THE EXECUTIVE OFFICE FOR U.S. ATTORNEYS AND THE CRIMINAL DIVISION

The Attorney General exercises general supervision of U.S. attorneys through the Executive Office for U.S. Attorneys (Executive Office). In addition, Justice's legal divisions, such as the Criminal Division, exercise certain authorities enumerated in the U.S. Attorneys' Manual over specific types of cases handled by U.S. Attorneys' Offices.

1/As of March 31, 1982, the Federal district court in the Canal Zone was closed. Although there are currently 94 U.S. Attorneys' Offices, there are only 93 U.S. attorneys because one U.S. attorney administers the activities performed by the judicial districts in Guam and the Northern Mariana Islands. For purposes of this report we will refer to the 95 U.S. Attorneys' Offices and 94 U.S. attorneys in effect at the time of our review.

Executive Office for U.S. Attorneys

The Executive Office was established on April 6, 1953, and is under the immediate supervision and control of the Associate Attorney General. The responsibilities of the Executive Office, as stated in the Code of Federal Regulations, are to:

--Provide general executive assistance and supervision to the offices of the U.S. attorneys and coordinate and direct the relationship of other organizational units of Justice with such offices.

--Publish and maintain a U.S. Attorneys' Manual for the internal guidance of the U.S. Attorneys' Offices and those other organizational units of Justice concerned with litigation.

--Supervise the operation of the Attorney General's Advocacy Institute and develop, conduct, and authorize professional training for U.S. attorneys and their assistants.

In fiscal year 1981, the Executive Office was authorized 88 positions and had an operating budget of about $8.8 million. It supervised a budget of about $168 million for the 95 U.S. Attorneys' Offices, which consisted of 1,978 assistant U.S. attorneys, 237 paralegals, and 2,108 administrative personnel.

Criminal Division

The Criminal Division exercises general supervision over the enforcement of all Federal criminal laws with the exception of those statutes specifically assigned to other divisions such as the Antitrust and Tax Divisions. The Criminal Division is headed by an Assistant Attorney General and is organized into 14 sections. Several of the division's sections, such as the Public Integrity Section and the Organized Crime and Racketeering Section, have the primary responsibility to supervise Justice's prosecutive efforts against violators of specific statutes or particular types of crimes. Division attorneys conduct prosecutive efforts themselves and/or direct and coordinate the enforcement efforts with U.S. attorneys as well as participate with U.S. attorneys in grand jury proceedings and trial or appellate litigation. The division's managerial and administrative sections are involved in, among other things, identifying, assessing, and recommending positions on issues affecting the mission of the division; evaluating the operations and impact of the division's policies and programs; and maintaining effective liaison with Federal, State, and local enforcement authorities.

With the exception of specific violations, much of the authority with regard to Federal criminal matters has been delegated by the Attorney General to the U.S. attorneys. U.S. attorneys have the full authority and discretionary power to

--decline or authorize prosecution;

--utilize alternatives to prosecution, such as pretrial diversion which is aimed at diverting offenders from the traditional criminal justice system into programs of supervision and services; and

--determine the manner of prosecuting cases, including their disposition through plea agreements whereby in return for a guilty plea by the defendant the U.S. attorney agrees to prosecute a less serious charge or make other forms of concessions.

However, for certain violations and/or circumstances, the U.S. Attorneys' Manual requires that U.S. attorneys obtain approval from the Criminal Division before proceeding with litigative action.

U.S. ATTORNEYS' WORKLOADS

During fiscal year 1981, the 95 U.S. Attorneys' Offices exclusively handled approximately 93 percent of all criminal cases and matters and about 79 percent of all civil cases and matters received by Justice. During this same time period, the 95 U.S. Attorneys' Offices terminated 27,588 criminal cases and 61,438 civil cases. They also received 99,067 criminal complaints from investigative and other agencies of which 39,779 were immediately declined for prosecution and 12,828 matters were declined after further investigation.

OBJECTIVES, SCOPE, AND METHODOLOGY

We conducted our review to determine the manner in which Justice and U.S. attorneys manage the use of prosecutive discretion in disposing of criminal violations of Federal law. Specifically, we examined:

--The declination policies established by U.S. attorneys to guide assistant U.S. attorneys and investigative agencies.

--The degree of coordination with and the practices followed by U.S. attorneys in referring cases declined for Federal prosecution to State and local authorities for their prosecutive consideration.

--The use made of pretrial diversion and policies followed by U.S. attorneys in entering defendants into pretrial diversion.

--The policies and practices followed by U.S. attorneys in reaching plea agreements in criminal cases.

--How Justice oversees and monitors the operations of U.S. Attorneys' Offices.

At each location, we identified and reviewed the prosecutive policies and practices followed in making decisions to decline cases for prosecution, to enter defendants into pretrial diversion, and to enter into plea agreements with defendants in criminal cases. We reviewed and analyzed a random sample of 367 of the 580 pretrial diversion cases that occurred from October 1, 1977, through March 31, 1980, at six of the seven offices included in our review. The seventh office did not use pretrial diversion. In addition, we reviewed and analyzed a random sample of (1) 436 of the 6,348 complaints referred by investigative agencies that were immediately declined upon receipt by the U.S. Attorneys' Offices, and (2) 226 of an estimated 3,154 criminal cases which included plea agreements during the period October 1, 1978, through March 31, 1980, at four of the seven U.S. Attorneys' Offices visited. We decided during our review not to examine immediate declinations and plea agreement cases at the other three offices. We believed that further detailed case examination was unnecessary to substantiate the existence of disparate U.S. attorney prosecutive policies. We did, however, identify and review office policies and examine office procedures and practices at these three offices.

We held discussions with agency officials from the Criminal Division and the Executive Office and examined agency records and documents, including a Justice study on U.S. attorneys' prosecutive policies and practices. We researched and reviewed pertinent literature on Federal criminal law enforcement and on prosecutive discretion. We also examined records and held discussions with officials from seven U.S. Attorneys' Offices.

During our review we spoke with Federal judges, public defenders, U.S. probation officers, agents of Federal investigative agencies, and State and local prosecutors. Our fieldwork at the U.S. Attorneys' Offices was completed in November 1980, and updated at Justice headquarters through November 1981. In addition, after receiving agency comments in March 1982, we updated through June 1982 information on activities that Justice stated it has taken to better oversee and coordinate operations of U.S. Attorneys' Offices. More detailed information on the scope and methodology is contained on pages 74 to 77.

CHAPTER 2

DECLINATION POLICIES NEED TO BE MORE UNIFORM, BETTER COORDINATED WITH STATE AND LOCAL AUTHORITIES, AND MORE CONSISTENT WITH FEDERAL ENFORCEMENT PRIORITIES

U.S. attorneys are responsible for prosecuting suspected violators of Federal law as well as ensuring the efficient use of prosecutive and investigative resources. Although criminal statutes and Justice policies provide some direction, U.S. attorneys, to varying degrees, have independently formulated their own policies for making prosecutive decisions. These policies differ among U.S. attorneys and therefore differing approaches to Federal prosecution exist throughout the 95 Federal judicial districts. Our work in seven U.S. Attorneys' Offices showed that although individually established declination policies help guide prosecutive decisions within a district, the lack of uniformity among districts creates disparities in the treatment of suspected violators because the probability of a suspected violator being prosecuted varies depending on which U.S. Attorney's Office handles the case.

Better coordination is needed on cases involving concurrent jurisdiction offenses which can be prosecuted either by Federal authorities or by State or local authorities. This is necessary to ensure that cases declined by Federal prosecutors are referred to local prosecutors for their prosecutive consideration. Even though Justice has advocated close coordination with State and local authorities, we found that U.S. attorneys' declination policies were not always coordinated with State and local authorities.

Justice needs to ensure that U.S. attorneys' declination policies are more consistent with Federal law enforcement priorities. Even though a primary reason given by U.S. attorneys for establishing declination policies was to direct investigative resources to priority offenses, our analysis showed that such policies were not always consistent with established national law enforcement priorities. Therefore, law enforcement resources were being expended on cases that did not meet established priority criteria. In the past Justice has been handicapped in monitoring the relationship between declination policies and law enforcement priorities, as well as the nature of cases prosecuted, because it lacked adequate data. In light of this problem Justice recently began to accumulate more complete data and we believe it should use the data to assess and revise, when necessary, the declination policies of U.S. attorneys and/or the law enforcement priorities.

DECLINATION POLICIES ARE NOT UNIFORM AND ARE NOT COORDINATED WITH STATE AND LOCAL AUTHORITIES

Nationwide, U.S. attorneys decline to prosecute about 56 percent of all criminal complaints because of heavy workloads, insufficient staff, and/or because the complaint does not merit Federal prosecution. To assist U.S. attorneys' staffs in making declination decisions, 83 of the 94 U.S. attorneys have established written declination policies which identify particular crimes that will not normally be prosecuted. Although these policies guide assistant U.S. attorneys in the individual districts in making declination decisions and guide investigative agencies in determining appropriate cases for Federal prosecution, they differ considerably among districts. Consequently, suspected Federal offenders are subject to different treatment within the Federal criminal justice system for the same offenses. In addition, although many of the cases declined by U.S. attorneys pursuant to established declination policies might be prosecutable by State and local authorities, better procedures are needed to ensure that these cases are referred to State and local authorities for prosecutive consideration. Even though Justice has advocated close coordination with State and local authorities, we found that U.S. attorneys' declination policies were not always coordinated with State and local authorities.

Different declination policies cause disparate treatment of suspected offenders

The seven U.S. Attorneys' Offices we visited had established written declination policies for some Federal offenses. Some of the policies established were only for the internal use by assistant U.S. attorneys in evaluating complaints received from investigative agencies. Others delegated authority to the investigative agencies to administratively close cases without receiving prior approval from the U.S. Attorneys' Office if the cases met certain established standards. These policies are referred to as blanket declinations. Our analysis showed that policies governing prosecution for similar offenses differed among districts, resulting in suspected Federal offenders being subject to different treatment in the Federal criminal justice system.

In all seven districts, the primary reason for establishing declination policies was to enable the investigators and prosecutors to concentrate their resources on major offenses that have been designated as priorities by the Justice Department. The table on the next page shows, by district, the monetary cutoff points that must be exceeded for various offenses before a case will ordinarily be accepted for prosecution.

DISTRICT	Bank fraud and embezzlement	Interstate transportation of stolen property	Theft from interstate shipment	Forgery of U.S. Treasury checks	Stolen Personal Property	Breaking and entering	Theft of government property
1	$2,000	$2,000	$5,000	$ 400	(b)	(b)	(b)
2	$1,500	$ 500	$ 600	(a)	$ 600	(b)	$ 500
3	$2,000	$2,000	$5,000	(a)	$1,000	(b)	(b)
4	$1,500	$5,000	$5,000	$ 500	$1,000	(b)	$1,000
5	$5,000	$ 500	$1,000	(a)	$ 500	(b)	$ 500
6	$ 500	$1,000	$1,000	(a)	$ 500	$1,000	$ 500
7	$5,000	$1,000	$1,000	(a)	$ 500	(b)	$ 500

a/Not stated in dollars.

b/No cutoff point established.

Comparison of the above policies shows that they differ as to what crimes normally will or will not be prosecuted in specific districts. For example, a bank fraud and embezzlement case of $1,500 would normally be declined in several districts because it falls below the cutoff point--$2,000 or $5,000 depending on the district. However, it would be prosecuted in other districts having cutoff points of $1,500 or less. Thus, although these policies help achieve the goal of guiding assistant U.S. attorneys in making prosecutive decisions and guiding law enforcement resources, they also create disparities in the treatment of suspected Federal offenders because whether or not a suspected violator is prosecuted varies depending on which U.S. Attorney's Office handles the case.

The magnitude of disparities created by differing declination policies cannot be determined because Justice does not maintain sufficient data. Our work in the seven districts did show, however, that disparities exist and do occur. For example, a common violation deals with forging and passing U.S. Treasury checks. In one U.S. Attorney's Office, the minimum dollar amount necessary for prosecution is $400; in a neighboring office there is no minimum dollar amount. Our analysis of sampled cases showed the following cases were prosecuted in the latter district.

--A defendant was indicted for forging a $198 U.S. Treasury check. This charge was later reduced to obstruction of the mails, and the defendant was convicted and placed on probation.

--A defendant was originally indicted for possession of a stolen U.S. Treasury check for $99.09. He was subsequently charged and sentenced under 18 U.S.C. 1701 - Obstruction of Mail. The defendant was sentenced to 5 years' probation.

--A defendant was indicted for possession and forgery of two stolen U.S. Treasury checks totaling $296.70. A plea agreement resulted in a conviction for possession of stolen mail for one of the checks. The defendant was sentenced to 5 years' probation.

None of the above cases would have been prosecuted in the neighboring Federal judicial district, absent aggravating circumstances such as a prior serious criminal history, because the dollar amounts involved in the violation were below the blanket declination policy of $400.

Another declination policy deals with bank fraud and embezzlement cases. Justice has reported to the Congress that 51 of the 95 U.S. Attorneys' Offices had established written declination policies for this offense as of November 1979, most of which used cutoff points that ranged from $100 to $5,000. All seven offices that we visited had established policies which had cutoff points that ranged from $500 to $5,000. Violations involving less money are routinely declined unless there are aggravating circumstances such as a prior serious criminal history. For example, one U.S. attorney's policy provides for the routine declination of bank fraud and embezzlement cases of less than $5,000. We identified declinations in this district involving such cases as (1) an embezzlement by a bank employee of $2,056 and (2) an unauthorized $2,000 savings withdrawal by a teller from a depositor's account. These cases would have met the dollar cutoff points in five of the seven U.S. Attorneys' Offices included in our review and would have been likely candidates for prosecution.

Officials from the districts visited told us that the primary reasons for establishing the declination policies were to free prosecutive and investigative resources from minor crimes to concentrate on offenses designated as high priorities by Justice, such as major white collar crime. Other considerations included feedback from the courts and insufficient resources to handle all crimes. Aside from these considerations, most declination policies established were primarily based on the judgment and experience of U.S. attorneys as to what types of complaints merit

Federal prosecution rather than on any hard data or scientific analysis of the capabilities of the investigative agencies, the U.S. Attorneys' Offices, or the local prosecutors.

We recognize that prosecutive resources are limited and prosecution of all Federal offenses is prohibitive. However, we are concerned that because of the differing declination policies suspected Federal offenders are treated differently, and in some cases suspected offenders are not prosecuted. Consistency and equal justice require that offenders be treated similarly for similar offenses throughout the Federal system. As discussed below and later in this chapter, we believe Justice needs to ensure that more uniformity exists among the declination policies of U.S. attorneys not only to eliminate disparate treatment of suspected offenders but to better ensure that prosecutive policies are coordinated with local authorities as well as with national law enforcement priorities.

Better coordination needed with State and local authorities

Many crimes declined for Federal prosecution are also subject to prosecution by State and/or local authorities. Even though Justice has advocated that U.S. attorneys establish close coordination with local officials and that cases declined for Federal prosecution be referred for local prosecutive consideration, we found that U.S. attorneys did not routinely ensure that concurrent jurisdiction cases were referred. As a result, concurrent jurisdiction cases that have prosecutive merit are not always brought to the attention of local prosecutors. We believe that Justice needs to take steps to ensure that adequate coordination exists and that all concurrent jurisdiction cases declined for Federal prosecution are referred to State or local authorities for their prosecutive consideration.

Until recently Justice has not required U.S. attorneys to develop standard practices and procedures to ensure that concurrent jurisdiction cases federally declined are referred to local authorities. Currently, complete information is not available because neither the U.S. attorneys nor investigative agencies maintain statistics. The data that was available showed that at least 2,500 cases were declined by investigative agencies in the seven districts reviewed during the period October 1, 1978, through March 31, 1980.

In two districts where we were able to determine the number of cases referred, we found that very few cases were referred because the law enforcement agencies had not been given specific instructions by U.S. attorneys on how to handle the cases. The

table below shows the number of cases declined and referred in the two districts by the Secret Service and the Federal Bureau of Investigation (FBI) during the period October 1, 1978, through March 31, 1980.

District	Number declined		Number referred to local authorities	
	Secret Service	FBI	Secret Service	FBI
1	47	57	-	1
2	185	134	29	17

We discussed the referral process used in these two districts with Secret Service and FBI agents and concluded that more communication is needed between the investigative agencies and the U.S. Attorneys' Offices on which cases to refer. For example, in one district the Secret Service and FBI referred only 46 of 319 declined cases to local authorities. Agents from both agencies told us that they had not received any instructions from the U.S. Attorney's Office on referring such cases to local authorities. On the other hand, our analysis of the second district's internal declination guidelines, which have not been provided to the investigative agencies, showed that the U.S. attorney has policies on referring cases to local authorities as indicated below:

--Thefts of U.S. Treasury checks where the amount is under $400 should be routinely declined and referred for local prosecution absent other aggravating circumstances.

--Check cases involving juveniles or family members should be routinely declined or referred for local prosecution.

--Thefts of Government property involving less than $1,000 will be routinely declined and referred for local prosecution absent aggravating circumstances.

--Local thefts of interstate shipments not involving officers in a company and not involving continuous criminal activity should be referred for local prosecution.

In the above district, although the FBI and Secret Service have been granted the authority to decline cases, they have not been provided with the U.S. attorney's instructions on when to

refer cases to local authorities and consequently, make their decisions subjectively, on a case-by-case basis.

In the first district above, the blanket declination guidelines provided to both the Secret Service and the FBI by the U.S. attorney did not specifically instruct the agents to refer cases to local authorities and consequently cases were not referred. Only 1 of 104 cases declined by the two agencies in this district was referred to local authorities. We discussed the referral process with the Commonwealth Attorney in the district who expressed his belief that cases were falling through the cracks. Although he did not have any statistical data available, he believed that not all cases were being referred because there is insufficient communication between State and Federal agencies. He believed there is a need for a Federal-State Law Enforcement Committee to resolve jurisdictional issues and to ensure that violators do not go unprosecuted. At the time we completed our fieldwork, no such committee existed in this district.

Problems with the referral of concurrent jurisdiction cases to local authorities have existed for years. For example, Justice has long had a national policy to refer individual or isolated auto theft cases to local authorities. However, a federally funded study by the Blackstone Institute, surveying referrals of interstate auto theft cases for a 2-month period in 1977, disclosed that nearly half of the sampled interstate car cases declined by U.S. attorneys were not referred to local authorities.

Our discussions with agency officials revealed that Justice has become increasingly aware of the need to ensure that concurrent jurisdiction cases declined for Federal prosecution are referred for local prosecutive consideration. As of June 1, 1982, a private consulting firm was completing a contract with Justice to examine what happens to cases that are referred to local authorities. We believe such efforts are necessary. Until Justice takes appropriate steps to ensure that cases, once declined by Federal authorities, are referred to local authorities, we believe violators can inadvertently go unprosecuted and the interests of justice will not be served.

In establishing better procedures to ensure that cases are referred to local authorities, Justice also needs to ensure that effective liaison and coordination exists with State and local prosecutors. Since 1972 Justice has advocated the establishment of Federal-State Law Enforcement Committees, consisting of principal Federal and State and local prosecutors and other law

enforcement officers, to coordinate the investigation and prosecution of concurrent jurisdiction crimes. Its handbook on such committees points out:

> "* * * U.S. attorneys frequently decline prosecution because the offense does not fall within the Department's prosecutive guidelines. Does the local prosecutor proceed against the offender, or does the violator go unprosecuted? If the local prosecutor does not prosecute, does the U.S. attorney know why? Does the U.S. attorney even know of the local declination? In the area of concurrent jurisdiction, neither the Federal nor State prosecutor can set the outer limits of his prosecutive responsibility and assume that the "other fellow" will prosecute those offenses falling outside this circumscribed area. With such an approach, lapses in enforcement inevitably result."

Despite such an acknowledged need for close coordination, Justice has not in the past accorded high priority nor provided close direction to the formation of such committees. As such there was no assurance that committees were established or that policies were effectively coordinated with local authorities.

For example, one U.S. attorney established declination policies and then called a meeting of that district's informal Federal-State Law Enforcement Committee, and presented the policies to district attorneys. We contacted four members of the Federal-State Law Enforcement Committee who made the following observations.

- --An Assistant State Attorney General said that the policies came as a surprise and represented a shift from a longstanding local policy as to what offenses the U.S. attorney would prosecute. This official believed the policies were forced on the locals with little consideration of the impact on the local prosecutors or local police.

- --A District Attorney of one county said that although his office had not been adversely affected, he was concerned that the declination policies were made in a vacuum without input from locals.

- --An Assistant District Attorney in another county said that he believed the coordination to be very poor and believed the U.S. Attorney's Office was being selective in its prosecutions. This official also expressed a strong reluctance to prosecute cases declined by the U.S. attorney because he did not want

to handle the "leavings" of the U.S. Attorney's Office.

--Another District Attorney also expressed concern that the declination policies were established without input from either local prosecutors or local police.

As a result of establishing declination policies without adequate coordination with local officials, some cases go unprosecuted. In the above district, one of the blanket declination policies established provides that bank fraud and embezzlement cases under $5,000 involving bank employees will not be prosecuted and are to be referred to local authorities. The FBI determined that it referred approximately 315 complaints to local authorities during calendar year 1979 under this policy. The FBI "referrals" were merely copies of a letter to the banks involved stating that because the U.S. attorney would not prosecute complaints under $5,000 under any circumstances, the FBI would not investigate the complaints. A copy of this letter was also sent to the appropriate local police department. The FBI did not follow up on these cases and the U.S. attorney did not require any followup.

We tracked 30 of the 315 complaints referred to local police departments to determine their disposition and found that none of them were investigated or prosecuted. Such cases consisted of

--the theft by a teller of money paid by customers for eight personal money orders totaling $1,218.87;

--an abstraction of cash totaling $1,237.63 from two customers' deposits; and

--an embezzlement totaling $2,400 by two employees.

According to local police officials, they, in some instances, contacted the banks but were not requested to begin an investigation. In other instances the police treated the FBI letters as information but neither contacted the bank nor began an investigation. Officials from five banks confirmed that no action had been taken on these cases at the time of our fieldwork. These bank officials said that they were confused when initially informed by the FBI about the declinations. They expressed some doubts about the interest and resources of the local police to investigate such cases and as a result the banks were initially reluctant to press charges at the local level. Officials from three of the banks stated that because bank fraud and embezzlement is a Federal offense they believed the U.S. attorney should prosecute the case.

In another district the U.S. attorney established a committee in October 1980, and the U.S. attorney used it as a forum to communicate his policies to local officials. Although several of the local officials we spoke with in this district voiced no serious problems with the policies, we found that they had not been fully informed about the extent of the U.S. attorney's policies. For example, a Deputy State's Attorney said that agreement had been reached with the U.S. Attorney's Office regarding two types of offenses but she was unaware of any policies affecting other offenses. When we informed her of the U.S. attorney's policies to defer other violations to State authorities, the Deputy State's Attorney was upset that the U.S. attorney was not forthright in conveying his policies especially since they would affect local authorities. She said that such action by the U.S. attorney could change their working relationship.

Of the other U.S. Attorneys' Offices visited, three had not established coordinating committees and the other two, within the same State, met quarterly with the other two U.S. attorneys within the State as well as District Attorneys, the State Attorney General, and local and Federal enforcement officials.

The need for effective coordination between Federal, State and local law enforcement authorities was also voiced by the Attorney General's Task Force on Violent Crime. In its preliminary report the Task Force pointed out that a satisfactory level of cooperation between Federal, State, and local enforcement officials does not presently exist. As one measure of the impact of the present state of intergovernmental law enforcement relations on criminal cases, the Task Force cited data on current declination practices by U.S. attorneys and the fate of declined cases. On the basis of a representative sample of cases from 14 Federal judicial court districts, the Task Force pointed out that the percentage of cases declined by U.S. attorneys and not referred to local prosecutors ranged from 5 percent of the bank robbery cases to 33 percent of the thefts from interstate shipments. The Task Force concluded that the quality of Federal, State, and local law enforcement cooperation varies throughout the country from good to nonexistent and that Justice should direct U.S. attorneys to establish law enforcement committees in their districts.

Subsequently, on July 21, 1981, the Attorney General issued an order instructing each U.S. attorney to establish a Law Enforcement Coordinating Committee to improve cooperation and coordination among Federal, State, and local law enforcement authorities. Pursuant to instructions issued on October 6, 1981, by the Associate Attorney General, each U.S. attorney is required to establish a committee consisting of Federal, State, and local

authorities. On the basis of the information presented during meetings of this committee the U.S. attorney is to prepare, subject to the approval of the Associate Attorney General, a district Federal law enforcement plan which specifies the law enforcement priorities of that district. According to Justice's October 6 instructions, both the Law Enforcement Coordinating Committees and the district law enforcement plan are to address the issue of referral of concurrent jurisdiction crimes. The committees are to establish and enter into agreements to govern the referral of cases from one level of government to another after declination. The district law enforcement plans are also to contain the development or clarification of procedures for the referral of all Federal cases which are declined for prosecution, but which have merit or potential, to State or local authorities for their consideration for prosecution or further investigation.

As of June 1, 1982, the initial meeting of the prescribed Law Enforcement Coordinating Committees had been held in 69 districts, including 6 of the 7 districts we visited. An official told us that each of the plans submitted will be reviewed and, if necessary, modified before approval by the Department. The official told us that the Department has not yet determined how, after plans have been approved, it will monitor and evaluate their effectiveness and possible need for further modification.

BETTER DATA NEEDED TO EVALUATE THE REASONABLENESS OF DECLINATION POLICIES AND FEDERAL ENFORCEMENT PRIORITIES

Similar to U.S. attorney practices of establishing declination policies to guide decisions whether or not to prosecute, Justice and some investigative agencies have also designated certain offenses involving certain dollar levels as law enforcement priorities. In some instances, however, the declination policies established by U.S. attorneys and the law enforcement priorities established by Justice or investigative agencies for the same offense are not compatible. Consequently, cases are pursued that involve amounts above a U.S. attorney's declination policy, even though they are significantly below an established investigative priority level. In order to be in a position to assess both the impact and reasonableness of declination policies and law enforcement priority designations, Justice needs to accumulate better data on the cases prosecuted. Justice is in the process of accumulating better data and should use it to assess and revise, when necessary, the declination policies and/or priority designations so they are more compatible.

U.S. attorneys' declination policies significantly differ from Federal enforcement priorities

To ensure that Federal resources are devoted to significant and quality cases, investigative agencies have designated violations involving certain dollar amounts as priorities; for example, bank fraud and embezzlement cases involving over $10,000 have been designated by the FBI as priority investigations. On the other hand, U.S. attorneys' declination policies for the same offense provide for prosecution of crimes involving smaller sums of money. Consequently, even though cases are investigated and prosecuted because they involve dollar amounts above the established declination policies, such cases and the resources expended to develop them may not be reflective of law enforcement priorities.

We compared the declination policies of the seven U.S. Attorneys' Offices visited with the priorities established by the FBI. As shown below, in nearly all cases the dollar amounts for the priority designation and the amounts included in the declination policies differ significantly.

U.S. Attorney Office	Theft from interstate shipment	Bank fraud and embezzlement	Interstate transportation of stolen property
1	$ 5,000	$ 2,000	$2,000
2	600	1,500	500
3	5,000	2,000	2,000
4	5,000	1,500	5,000
5	1,000	5,000	500
6	1,000	500	1,000
7	1,000	5,000	1,000
Priority level designated by the FBI	$50,000	$10,000	$5,000

In our report titled "From Quantity to Quality: Changing FBI Emphasis On Interstate Property Crime" (GGD-80-43, May 8, 1980), we reported that the failure to coordinate U.S. attorneys' prosecutive policies with Federal investigative priorities prevented the FBI from obtaining its objective of pursuing quality interstate property matters, which had been defined as any theft over $50,000 or thefts where violence was involved. Despite this definition, the prosecutive policies and practices of all 15 U.S. Attorneys' Offices we visited during that review contradicted the FBI's quality case criteria and resulted in investigation of cases involving much lower dollar values. We reported that such prosecutive policies prompted the FBI to spend its resources on matters that our sample showed were highly unlikely to be solved, were not Federal violations, and were ultimately not prosecuted. Of the 15 U.S. attorneys contacted during that review, 11 had blanket declination agreements with the FBI. The remaining four U.S. attorneys did not use blanket declination agreements generally because they wanted to decide each case on its own merits.

The blanket declination dollar amounts for thefts from interstate shipments established in the 11 U.S. attorneys' districts follow.

District	Subject unknown	Subject identified
1	$1,000	$1,000
2	5,000	(a)
3	5,000	5,000
4	1,000	1,000
5	1,500	(a)
6	5,000	5,000
7	1,000	(a)
8	5,000	5,000
9	2,500	500
10	1,000	1,000
11	200	200

a/No blanket declination exists when a subject has been identified in the complaint, regardless of the dollar amount.

Four of the 11 U.S. attorneys commented that their declination agreement dollar levels were low and 3 of the 4 were contemplating increasing the dollar amounts to $10,000. However, to correspond with the FBI's quality case criteria, existing dollar levels needed to be increased to $50,000. As shown on the following page, only 38 out of 145, about 26 percent, of the FBI's fiscal year 1978 investigations of thefts from interstate shipment met the $50,000 monetary test for quality. This 26 percent of the caseload accounted for about 56 percent of the theft from interstate shipment cases prosecuted by U.S. attorneys.

	Total	Range of dollar value: Less than $50,000	Range of dollar value: $50,000 and over
Number of cases with known dollar value	145	107	38
Number of cases prosecuted	18	8	10

In the eight cases that were prosecuted involving less than $50,000, the need for Federal involvement was questionable because the circumstances did not justify a Federal presence or because the local police were already investigating the case.

We pointed out in our prior report that the low percentage of cases under $50,000 that were prosecuted raises the question of why U.S. attorneys' declination policies and FBI standards for quality cases could not be more compatible. Justice has maintained that U.S. attorneys must have the flexibility to establish guidelines depending on the conditions in their districts. However, crime statistics, discussions with law enforcement officials, and analysis of U.S. attorney work plans and prosecutive priorities all indicated that theft from interstate shipments was a widespread crime and not unique to only particular regions of the United States. Thus, although uniform declination guidelines might not be feasible for all crimes, their establishment for theft from interstate shipments violations has merit.

When U.S. attorneys' declination policies are inconsistent with investigative priorities, the most advantageous application of resources will not be assured. Bank fraud and embezzlement has been and continues to be a primary focus of Federal investigative and prosecutive resources. During fiscal year 1980 the FBI devoted over $9 million or approximately 20 percent of its white collar crime resources to investigations of this crime. Cases involving over $10,000 were designated as priorities. However, despite this priority designation, Justice has reported that 51 of the 95 U.S. Attorneys' Offices operate under written declination policies, many of which establish prosecution limits that range from $5,000 to $9,900 lower than the FBI's priority designation. As the table on page 17 shows, the seven districts we visited had declination policies for bank fraud and embezzlement cases which provided for prosecution in cases involving amounts ranging from $500 and over to $5,000 and over.

An important benefit of declination guidelines is to prevent the expenditure of resources on low priority cases. However, because U.S. attorney declination policies are inconsistent with law enforcement priority designations, their full benefits will not be achieved. Agents will still be called upon to investigate and

U.S. Attorneys' Offices will continue to prosecute cases that fall between the U.S. attorney's declination limit and the established law enforcement priority limit. This can be seen by the following analysis of FBI resources devoted to bank fraud and embezzlement cases involving various dollar amounts during fiscal year 1980.

Dollar range of cases	Investigative hours	Cost	Percent of cost
$10,000 and above	513,455	$6,909,537	76
$1,500 - 9,999	133,558	1,777,141	19
$1,499 and below	32,740	433,144	5
Total	679,753	$9,119,822	100

As shown, 24 percent of the resources devoted to bank fraud and embezzlement cases were directed to cases having lower dollar amounts than the designated priority level of $10,000. Similar to thefts from interstate shipments, bank fraud and embezzlement is a widespread crime and not unique to particular regions of the United States, and therefore it would be appropriate to have greater uniformity between U.S. attorneys' prosecutive policies and the investigative priority designation.

Better data needed to facilitate coordination of U.S. attorneys' declination policies and law enforcement priorities

To effectively coordinate declination policies with Federal law enforcement priorities Justice needs accurate feedback on the cases both prosecuted and declined by U.S. Attorneys' Offices. Such data would provide a basis for assessing the reasonableness of priority designations as well as the extent and types of cases being declined. The degree of prosecutive effort devoted to cases falling between the criteria in established declination policies and those in investigative priority designations would also provide insight into the need to revise existing declination policies to be more compatible with investigative priority designations. Justice is currently upgrading its management information system to record more detailed information on U.S. attorneys' caseloads. In addition, because our work identified instances in four districts where U.S. Attorneys' Offices reported inaccurate workload data, we believe Justice needs to ensure that its data reporting requirements are being met.

Although Justice's management information system has collected information on districts' workloads--the number of criminal matters by broad program category and by Federal offense-the system has had limited use to management because it failed

to designate cases by the dollar amount involved. Consequently, although Justice had gross statistics on the workloads of all U.S. Attorneys' Offices, it had no basis to compare the cases actually prosecuted with the established declination policies or with established law enforcement priorities to determine their reasonableness and the need, if any, for revision.

At the time of our fieldwork Justice was in the process of modifying its management reporting system to include additional workload data by (1) expanding its program reporting codes to better differentiate cases as white collar crime, fraud against the government, etc., and (2) requiring categorization of cases by estimated dollar loss. In August 1980, Justice also issued national priorities for the investigation and prosecution of white collar crime. At the time of our fieldwork Justice and U.S. attorneys were refining these national priorities by establishing prosecutive priorities for each district. As of June 1, 1982, 20 districts had established such priorities. A Justice official told us that the other U.S. Attorneys' Offices are developing white collar crime priorities as part of their district law enforcement plans. (See p. 16 of this report.)

An official of the Criminal Division told us that once the priorities are established this information will be used to monitor and assess the efforts of the U.S. Attorneys' Offices in meeting their white collar crime priorities and to determine whether there is a need to modify them. For instance, if a priority level for a particular offense is $10,000, and a district's workload data reflects a significant number of cases below that amount, the Criminal Division and the U.S. attorney will be able to assess the reasonableness of the $10,000 level and/or determine whether assistant U.S. attorneys and investigators need better guidance in the form of revised declination policies to prevent prosecutive and investigative resources from being devoted to nonpriority offenses.

Although these new reporting requirements should enable Justice to accumulate necessary data to evaluate the impact of declination policies on district workloads and law enforcement priorities, Justice needs to ensure that they are implemented by all U.S. Attorneys' Offices. Our work identified instances in four U.S. Attorneys' Offices where workload and other statistics were not accurately reported; consequently management reports generated by Justice's Docket and Reporting System inaccurately reflected districts' workloads. For example, we found the following situations in the four districts.

--Two districts failed to report all declinations to Justice. Our comparison of records on matters referred by Federal investigators and declined by

attorneys in these two districts with the data reported to Justice by the districts during the period October 1, 1978, through March 31, 1980, showed that they understated the number of declinations by 35 and 27 percent, respectively.

--One U.S. Attorney's Office failed to routinely update the status of criminal cases and matters pending. After we brought this to the attention of the U.S. attorney, approximately 845 cases and matters had to be updated to reflect their current status--declined, prosecuted, or pending.

--Another district had identified that its criminal cases and matters reported to Justice as pending were overstated by 29 percent as of June 30, 1979. This district was aware that about 1,200 criminal cases and matters had been inaccurately reported and it was in the process of correcting its records during the time of our visit.

Although an important, if not the primary, reason for establishing declination policies was to direct limited prosecutive and investigative resources to higher priority crimes, the fact that declination policies have not been compatible with investigative priorities has hindered the achievement of this objective. In the absence of adequate data, however, Justice and U.S. attorneys have not had the means to assess the extent of this impact or whether a need exists to adjust the dollar level criteria in declination policies. Although recent efforts to improve its management information system are aimed at accumulating more detailed data on the caseloads of U.S. Attorneys' Offices, Justice needs to ensure that its reporting requirements are met and caseload data are kept up to date by U.S. Attorneys' Offices.

CONCLUSIONS

The use of declination policies by U.S. attorneys is an acknowledged management tool to help guide assistant U.S. attorneys in making prosecutive decisions and to guide investigative agents towards the more significant Federal crimes. However, such declination policies have only been established individually by U.S. attorneys with the result that

--declination policies differ among U.S. attorneys, thereby creating disparities in the treatment of suspected violators of Federal law;

--declination policies and procedures have not been adequately coordinated with State and local prosecutors who can also prosecute many concurrent jurisdiction crimes and, consequently, some cases that were declined for Federal prosecution have fallen through the cracks and have gone unprosecuted; and

--declination policies and Federal law enforcement priorities have not always been compatible and, consequently, Federal resources have been used to investigate and prosecute nonpriority offenses.

These conditions will continue unless Justice coordinates and reconciles the differing declination policies established by U.S. attorneys. Although some offenses are peculiar to a given district and thereby require Federal involvement, other crimes are widespread and not unique to particular regions and consequently merit more uniform prosecutive policies. Justice should identify and establish for those offenses more uniform declination policies that can be followed nationwide in order to eliminate unwarranted disparities.

Closer communication and cooperation are also needed with State and local prosecutors. Justice has directed each U.S. attorney to establish coordinating committees to facilitate coordination and communication with State and local authorities and, among other things, establish a district law enforcement plan, including procedures for the referral of cases declined for Federal prosecution to local authorities for their prosecutive consideration. Justice should establish requirements which, after plans are approved, provide for evaluating the operation of the committees to ensure, among other things, that procedures are implemented so that cases declined for Federal prosecution are referred to local authorities for their prosecutive consideration.

Finally, Justice needs to better ensure that declination policies are compatible with law enforcement priorities. Declination policies are not always compatible with law enforcement priority designations. Consequently, many cases are pursued and resources are expended that are not reflective of law enforcement priorities. In the past, a lack of data has prevented close scrutiny of the U.S. attorneys' caseloads and types of cases declined or prosecuted. Although Justice is currently upgrading its management information system to require more extensive data on the cases handled by U.S. Attorneys' Offices, it needs to take the necessary steps to ensure that its revised information

reporting requirements are adhered to by all U.S. Attorneys' Offices. Such information should be used to monitor, assess, and revise, when necessary, the declination policies of U.S. attorneys.

RECOMMENDATIONS TO THE ATTORNEY GENERAL

We recommend that the Attorney General

--establish declination policies that will minimize disparities and help focus the use of Federal law enforcement resources on crimes designated as priority offenses;

--establish requirements to provide for evaluating the operation of Federal-State Law Enforcement Coordinating Committees to ensure, among other things, that procedures are implemented so that concurrent jurisdiction cases declined for Federal prosecution are referred to State and/or local authorities; and

--ensure that U.S. attorneys adhere to management information reporting requirements so that caseload data will be accurate and will provide the means to monitor, assess, and revise, when necessary, the declination policies of U.S. attorneys.

AGENCY COMMENTS AND OUR EVALUATION

The Justice Department, in commenting on the report (see app. IV), generally agreed with our recommendations that more emphasis can be placed on reporting requirements and coordination of Federal prosecutive policies. It stated that data should be available to the Department for the purposes of monitoring prosecutive policies and case flow throughout the United States. The Department agreed that coordination and control can be improved and that the establishment of Law Enforcement Coordinating Committees and the Prosecutor Management Information System (PROMIS) are designed to achieve these goals. However, the Department disagreed with our recommendation that it develop more centralization and uniform declination policies.

The Secret Service, in commenting on the report (see app. II), said it has always been somewhat skeptical of any attempt at standardization of declination policies because the individual merits of a case tend to be forgotten. However, it added that it realizes that 94 different U.S. attorneys cannot be all things to all agencies and that a significant number of cases will by necessity go unprosecuted. The Secret Service acknowledged that it will, like every other Federal law enforcement agency, have to

share in the casualties because there are simply too many violators and too few prosecutors. The Service concluded that it can accept this reality along with the proposal that it is now necessary to re-examine Federal declination policies on a nationwide basis.

Disparate declination policies

Justice agreed that our data supports the view that different declination policies cause disparate treatment of offenders. However, it added that such a situation was not necessarily a problem.

The Department stated that its policies are designed to allow each U.S. attorney to develop priorities and criteria for resource allocation that are most responsive to the serious crime problems in his/her district. It said that there are several reasons why a particular type of offense committed by a particular type of defendant will be more deserving of prosecution in one district than in another. For example, Justice pointed out that a certain type of crime may be of more concern to citizens in one district than in another, and local enforcement may be more capable of responding to a particular type of offense in one district than another. The result of such situations may be, if only the Federal cases are examined, that declination policies cause disparate treatment of offenders. However, Justice added that if the Federal, State, and local criminal justice systems are observed as a whole the conclusion reached will be altogether different.

We agree that such factors must be considered. However, Justice's position does not explain or mitigate the disparities discussed in our report (see pp. 7 to 16). In our opinion, Justice's position that certain offenses may be of special concern to the local citizens and that disparities may not occur because cases may ultimately be prosecuted by local authorities assumes close cooperation and coordination between Federal and local authorities in formulating and implementing declination policies. However, this is not what we found in the districts visited.

To the contrary, some Federal officials told us that their policies were based on judgment without any detailed analyses of the State and/or local enforcement authorities' capabilities. For example, one U.S. attorney's bank fraud and embezzlement declination policy was implemented over the objections of local prosecutors and despite their concern over the impact on the local police. (See p. 13 of the report.) In another district, the U.S. attorney told us that his declination policies were not discussed with local law enforcement officials before or after their implementation and were unknown by any organization other than his office, the Secret Service, and the FBI. He also said

his office had not communicated to Federal investigative agencies any formal policy on referring declinations to State/local enforcement authorities.

As noted above, we agree that local situations must be considered if the Federal Government is to supplement local law enforcement needs. However, as previously noted, U.S. attorneys' declination policies do not always consider the local needs. Disparities exist in many cases not because of differing local situations but because the formulation and implementation of prosecutive policies are not controlled or monitored from a central point. Therefore, we continue to believe that Justice must minimize the disparities, improve State and local cooperation, and monitor and revise its declination policies as needed. Our recommendations are directed at accomplishing these objectives.

State and local cooperation

Justice agreed that greater cooperation is needed among Federal, State, and local enforcement authorities and pointed out that the Attorney General has instructed each U.S. attorney to establish a Law Enforcement Coordinating Committee. It added that the committees have served as a forum for the exchange of operational and administrative information and have provided all of the participants with new and valuable perspectives on the crime and law enforcement situation and should result in a more effective use of investigative resources. These committees are to develop formal procedures for cooperation between Federal, State, and local prosecutive and police agencies.

We compliment Justice on its efforts to establish such committees throughout the country. We agree that, if used properly, these committees will enhance the coordination and cooperation among Federal, State, and local agencies involved in the fight against crime. However, the need for coordinating committees has been recognized since 1972. Although we believe the concept is sound, we believe that Justice must monitor and evaluate the operations of the committees to ensure procedures are implemented so that concurrent jurisdiction cases declined for Federal prosecution are referred to State and/or local authorities.

Justice believes that our criticism of U.S. attorneys for not developing declination policies in cooperation with local authorities is inconsistent with our implication that there should be a "single national policy for the Federal system." We disagree with Justice on this matter. First, we are not recommending the creation of a "single national policy," but rather that policies be narrowed to eliminate the broad disparities that now exist. We recognized (see p. 19) Justice's position that U.S. attorneys must have the flexibility to establish prosecutive guidelines

depending upon the conditions in their districts. However, such conditions do not necessarily vary among U.S. Attorneys' Offices for every offense. As discussed on pages 19 and 20, some offenses are widespread and not unique to only particular regions of the United States. Thus, although uniform declination policies might not be feasible for all crimes, their establishment for some offenses has merit. We believe that for those appropriate offenses more uniform declination policies are feasible and could enhance the utilization of Federal investigative resources. Second, in contrast to Justice's position, we believe that coordination and cooperation with State and local authorities is necessary in order to identify the incidences and nature of offenses in particular districts. Through greater coordination with State and local authorities, we believe Justice should have available the necessary information to identify regional similarities and dissimilarities, to establish declination guidelines which will narrow the disparities now existing in the Federal system, and to determine what deviations might be necessary because of local circumstances.

Justice stated that coordination with State and local authorities could result in a different policy for each county in a Federal judicial district. Although, theoretically, this could happen if carried to the extreme, as Justice also pointed out, resources are important considerations in formulating prosecutive policies. Inevitably some hard decisions have to be made regarding what crimes can and cannot be pursued by Federal authorities in a given district. In this regard, the Secret Service, in commenting on the report, said that it realizes that 94 different U.S. attorneys cannot be all things to all agencies and that a significant number of cases will, by necessity, go unprosecuted. We believe that Justice must ensure that local authorities understand what types of offenses the Federal Government will not handle so local authorities can direct their resources accordingly. In essence, if the local authorities consider it a problem, public pressure will cause them to devote their resources to handle it. For this reason we believe Justice should accumulate data to enable it to monitor, assess, and revise declination policies as resources and workload dictate. We believe that greater coordination with local authorities would provide a more justifiable basis for Justice's decisions.

Justice also cited resource constraints as factors influencing policies at the district level. However, Justice should also consider resource issues across district lines. More uniform policies for appropriate offenses would have beneficial results among districts by alleviating some of the pressure on existing resources to prosecute cases of varying and/or marginal significance. Justice's report entitled "United States Attorneys' Written Guidelines for the Declination of Alleged Violations of

Federal Criminal Laws" reveals that numerous districts have established declination policies for cases involving heroin, cocaine, amphetamines and barbituates, and other controlled substances. Resources are used, however, to prosecute cases involving such crimes as automobile thefts and small embezzlements. By establishing more uniform declination policies for appropriate offenses, we believe resources would become free to handle more significant cases. A better application of resources both in and among districts would benefit not only the district involved but could also benefit other districts. For example, some districts with a high level of drug smuggling have established policies that call for declining the prosecution of cases involving certain quantities of narcotics which are low in relation to the level being smuggled into these districts, but nevertheless involve significant quantities that are likely to be distributed in other districts. Thus, reallocating resources could allow cases that will have a beneficial impact across the district lines to be prosecuted.

Justice stated that it should be recognized that local authorities (1) are free to choose whether or not they will prosecute referred cases, (2) are faced with workload and resource pressures of their own, and (3) may resent the referral of minimally significant cases. However, Justice acknowledged that local coordinating committees may remedy these concerns. The Secret Service, in its comments, noted that State and local authorities are faced with resource constraints and believes for this reason that all Federal remedies should be explored before a referral is made to local authorities.

We agree with Justice that greater use of coordination committees may remedy or at least reduce such concerns. If referred cases cannot be handled locally and if information is available on the cause and the extent of the problem, U.S. attorneys working through local coordinating committees would have the means to resolve the problem, possibly through the use of alternative measures such as pretrial diversion, civil, or administrative remedies. The Secret Service suggested another potential alternative--the use of a misdemeanor plan whereby qualified offenders plead guilty to a misdemeanor charge before a U.S. magistrate. We believe one of the benefits that would result from effective coordinating committees will be the discussion and resolution with local authorities of concerns regarding the impact of Federal declination and referral policies, as well as alternative sanctions available. For this reason we believe Justice should monitor and evaluate the operation of these committees to ensure their full utilization in resolving such matters.

Need to monitor relationship between declination policies and investigative priorities

Justice said that we confused the purpose of investigative priorities and declination policies and that we implied they should be identical. We disagree. However, we did suggest that because resources are a vital consideration in formulating policies, and one of the reasons for declination policies is to direct resources to priority cases, Justice needs to obtain the necessary data to evaluate the impact that its declination policies have on law enforcement resources. Rather than confusing the purposes of declination policies and investigative priorities, we pointed out (see pp. 20 and 21) how they can be used as criteria for monitoring and assessing the workload of a district and the utilization of its resources.

As stated in our report, (see pp. 20 and 21), Justice has traditionally had little empirical data upon which to base resource allocation or policy decisions. Although its management information system collects gross statistics on workloads of all U.S. Attorneys' Offices, it has had no basis to differentiate cases by significance or to compare cases prosecuted with established declination policies or law enforcement priorities. However, at the time of our fieldwork (see p. 21) Justice was in the process of modifying its management information system to capture greater detail on the caseloads of U.S. attorneys and was in the process of establishing prosecutive priorities for each U.S. Attorney's Office. This new system can be used to monitor the offices' caseloads, the adequacy of their resources, as well as the reasonableness of the policies and priorities themselves.

The Secret Service, for example, said that it depends upon support from U.S. attorneys and that declination policies can adversely affect enforcement efforts and such policies should be sensitive to the Service's priority enforcement programs. With better information Justice and an investigative agency would be in position to assess the positive or negative impact of a declination policy on a priority enforcement program and take corrective action, as necessary. As mentioned previously, one of the benefits of Law Enforcement Coordinating Committees will be to provide a forum to discuss and resolve potential adverse impacts of declination policies.

Additionally, the information would be useful to Justice in comparing the relative significance of offenses being declined for prosecution as well as prosecuted among districts and in making resource allocation decisions among districts. Also, Justice would have data to determine resource needs of the districts and make appropriate changes where resources and workloads are resulting in significant differences in policies and priorities.

We believe such decisions should be made at the national level and should be based on careful evaluation and assessment of adequate data. Thus, we believe our recommendation is still valid that reporting requirements pertaining to caseloads must be met and input data must be accurate so that Justice will have the means to monitor, assess, and revise the policies, when necessary.

Variables that may impact on decisions to prosecute

Justice said that there are numerous factors that must be considered by the prosecutors in deciding whether to prosecute. These include the violator's criminal history, evidence, aggravating circumstances, and deterrent effect of minimal prosecution. We recognized that there are a variety of factors that must be considered by prosecutors in deciding whether to prosecute a case and cite such factors in our report. For instance, we pointed out (see p. 9) that declination policies are not inflexible and certain cases may be prosecuted because of aggravating circumstances such as serious prior criminal history. We also recognized the value of minimal prosecution. Chapter 3 (see p. 31) discusses the use of pretrial diversion as an alternative to formal prosecution and actions that Justice needs to take to maximize its use.

Justice also expressed concern that evidentiary problems may have affected the disposition of the cases cited on pages 8 and 37 of our report. However, this was not the case; the cases were declined because of other than evidentiary problems.

In discussing the variables that may impact prosecutions, the Secret Service suggested that to ensure consideration of all the merits of a case, a standardized questionnaire be developed for prosecutors' use. Prosecutors would be required to consider a range of issues before declining Federal prosecution, including prior criminal history, any family relationship involved, and other aggravating circumstances. The universal use of such a questionnaire would help ensure that all factors have been considered and would avoid a situation where a single element, such as dollar amount, would unduly influence a decision to decline prosecution. Its use would also assist in the evaluation of declination policies and their impact on the workload of the U.S. Attorneys' Offices.

CHAPTER 3

GREATER OVERSIGHT IS NEEDED TO ENSURE THE MAXIMUM AND CONSISTENT USE OF PRETRIAL DIVERSION

Pretrial diversion can be used by U.S. attorneys as an alternative to formally prosecuting or declining to prosecute an individual charged with a criminal offense. It results in offenders being diverted from traditional criminal justice processing into a program of supervision or other services. If the offender successfully completes the requirements established, prosecution is declined and no criminal record is established. If, on the other hand, the offender does not successfully comply with the requirements, prosecution can be initiated.

Disparities can and do occur with the use of pretrial diversion among the 95 U.S. Attorneys' Offices because Justice has provided only broad guidelines to U.S. attorneys on the use of pretrial diversion. Therefore, some U.S. attorneys have established policies regarding offenders' eligibility for diversion in their districts. These policies differ among districts. Further, not all U.S. attorneys use pretrial diversion as an alternative. As a result, cases that would have been appropriate for diversion in some districts must be either declined or prosecuted in those districts that do not use pretrial diversion.

Even though Justice has endorsed the use of pretrial diversion as an alternative to prosecution, it has not actively provided oversight and direction to ensure its maximum use. Justice needs to do more to maximize the use of pretrial diversion because not every Federal offense can be prosecuted with existing resources, and diversion can serve as a valuable alternative to prosecution.

DISPARATE PRETRIAL DIVERSION POLICIES AND PRACTICES EXIST

Because U.S. attorneys' policies for using pretrial diversion differ, some defendants are diverted from the traditional criminal justice process while others, although their circumstances are similar or identical, are subject to Federal prosecution or their cases are declined.

Justice authorized the use of pretrial diversion in 1974 and issued broad guidelines governing its use. According to the guidelines, which were developed by an intradepartmental task force, diversion serves as an alternative to prosecution and seeks to divert offenders from prosecution into programs of supervision

and/or services. Generally, defendants are to be diverted before they are formally charged by the prosecutor in order to avert contact with the formal judicial process and thereby save court time and resources. The guidelines authorize U.S. attorneys, at their discretion, to divert any individual against whom a prosecutable case exists and who is not

--accused of an offense which, under existing Justice guidelines, should be diverted to the State for prosecution;

--a person with two or more prior felony convictions;

--a narcotics addict;

--a public official or former public official accused of an offense arising out of an alleged violation of a public trust; or

--accused of an offense related to national security or foreign affairs.

In the absence of more specific criteria many U.S. attorneys have established policies for their individual offices to use in deciding when pretrial diversion is appropriate. For the most part these policies are communicated to staff attorneys either orally or both orally and in writing. In 1979, Justice sent questionnaires to all U.S. attorneys requesting information on their policies which would either permit or prohibit diversion with respect to certain offenses or circumstances. The analysis of U.S. attorneys' responses, as shown below, emphasizes the differences among U.S. attorneys' policies in permitting or prohibiting the use of pretrial diversion.

Type of offense	Permitting the use of pretrial diversion (percent)	Prohibiting the use of pretrial diversion (percent)
Felonies	94	6
Felonies involving violence	34	66
White collar crime offenses	75	25
Organized crime offenses	21	79
Narcotics trafficking offenses	34	66

Some U.S. attorneys had general policies that would allow the use of pretrial diversion for certain offenses while other

U.S. attorneys would not allow diversion for the same offense. For example, approximately two-thirds of the U.S. attorneys have general policies that do not allow offenders accused of felonies involving violence to be diverted, while one-third allow diversion. Similarly, about two-thirds had policies prohibiting the use of diversion for narcotics trafficking offenses while one-third permit diversion in such cases. The existence of such policies that permit diversion does not mean that diversion is automatic, because an analysis of the defendant's record and acceptability into the program still must be made. However, the existence of different policies contributes to disparities because some offenders would be automatically excluded from possible diversion in some districts but not in others. For example, six of the seven districts included in our review had established policies and practices dealing with narcotics trafficking offenses (the remaining district did not allow pretrial diversion at all). Of the six districts, two allowed diversion for narcotics offenses while the other four would not use it for narcotics offenses. In the two districts allowing diversion, we identified 16 cases involving narcotics-related offenses, including

--the illegal smuggling of 134 pounds of marijuana,

--the illegal manufacture of methamphetamines,

--conspiracy to secure prescription drugs and unlawfully distribute controlled substances, and

--the illegal sale of prescription drugs by a street dealer.

In other districts cases similar to these would either have been declined or prosecuted because U.S. attorneys' policies do not provide for diversion under such circumstances.

Differences in the treatment of individuals will also arise because some U.S. attorneys do not use pretrial diversion at all. Justice reported in its 1979 study of U.S. attorneys' prosecutive policies and practices that 12 percent of the U.S. Attorneys' Offices do not use pretrial diversion. One of the districts we visited did not use pretrial diversion. Consequently, individuals who would be suitable for diversion in this district are not afforded the opportunity. Our comparison of sample cases prosecuted in the district that did not use diversion (District A) with the pretrial diversion cases in another district (District B) showed the following:

--A credit union employee accused of embezzling $2,500 was prosecuted in District A and sentenced to 24 months' probation and ordered to make restitution of

$500. A bank employee accused of embezzling $2,900 was also prosecuted in this district, sentenced to a 36-month split sentence (1 month in jail and 35 months on probation), and ordered to make restitution. Conversely, in District B a bank employee accused of embezzling $1,500 was granted pretrial diversion with supervision for 12 months by the U.S. Probation Office.

--A defendant in District A was prosecuted for forging a $239 U.S. Treasury check and sentenced to 36 months' probation. In District B a defendant accused of stealing and forging two U.S. Treasury checks totaling almost $470 was granted pretrial diversion. The divertee was placed under the supervision of the probation office for 12 months and was required to participate in a program for alcohol abusers.

--A postal employee was prosecuted for theft of mail and sentenced to 36 months' probation in District A. In comparison, a postal employee accused of misappropriation of postal funds (taking almost $126 in stamps from a post office) was granted pretrial diversion by District B and placed on 12 months' probation.

Such examples show the disparity that exists when pretrial diversion is used in one district and not in another. The failure to use pretrial diversion gives the prosecutor only two choices--prosecute or decline the case--despite Justice's emphasis on using diversion as an alternative to either prosecuting or declining cases.

SUFFICIENCY OF USE IS QUESTIONABLE

Although diversion is an alternative between declination and prosecution, there is inadequate assurance that it is used to its fullest potential. First, the use of diversion is not mandatory; and second, its use is subject to the personal philosophies of both U.S. attorneys and assistant U.S. attorneys. Although our discussions with Federal public defenders and U.S. probation officers revealed the general belief that diversion was being used for appropriate types of cases, several officials voiced concerns that it was not being applied as extensively as possible or consistently by all assistant U.S. attorneys. Because resource constraints prevent prosecutors and the courts from pursuing all Federal violations, and because as a consequence many offenses are declined which might or might not be handled at the local

level, we believe diversion offers a viable substitute in appropriate cases and Justice should emphasize its use to U.S. attorneys.

Our work at seven districts showed that a total of 581 defendants were diverted between October 1, 1977, and March 31, 1980. As shown in the following table, these seven districts also declined a total of 14,854 cases during the same period and terminated a total of 11,155 criminal cases during the 3 fiscal years ending September 30, 1980.

District	Declinations	Pretrial diversions (defendants)	Criminal cases terminated in district court (note a)
1	1,904	b/1	954
2	848	14	803
3	3,436	186	1,645
4	2,257	181	1,144
5	1,900	64	3,762
6	2,120	36	1,350
7	2,389	99	1,497
Total	14,854	581	11,155

a/Cases terminated represent the 3 fiscal years ending September 30, 1980.

b/The U.S. attorney in this district does not permit the use of pretrial diversion. The one diversion that occurred was authorized by an assistant U.S. attorney in a branch office without the knowledge and approval of the U.S. attorney.

Because specific criteria does not exist on who should be provided pretrial diversion, it is not possible to determine the sufficiency of its use. As the above statistics show, however, it was used in a relatively small percentage of cases. Our discussions with the six U.S. attorneys that used pretrial diversion showed a general lack of emphasis on its use. Only one U.S. attorney said that the use of diversion has expanded in his district. Comments made during our discussions with other U.S. attorneys follow.

--One U.S. attorney said its use should be restricted to juveniles.

--One U.S. attorney said that diversion was used mostly for cases which otherwise would be declined,

except that something was needed to deter the subject from future crimes.

--One U.S. attorney said that diversion is used very rarely because it does not have the full support of the court.

--One U.S. attorney said its use will be falling off because, subject to his declination policies, cases that would be appropriate will not be brought to the U.S. attorney's attention.

--One U.S. attorney said he neither encourages nor discourages its use and leaves the decision to assistant U.S. attorneys and recognizes that some will use it while others will not.

We examined 367 of 580 diversions in the six districts which used diversion and found that most often it was used for relatively minor violations and first-time offenders or for offenders who did not have extensive or serious prior records. The terms of the diversion agreement generally called for supervision by probation officers for terms ranging from 6 to 12 months and in some instances called for medical treatment, counseling, or restitution. The primary purpose of diversion was to provide some deterrent from future criminal activities.

We discussed the use of diversion with probation officers and Federal public defenders in these six districts. They generally believed that diversion, when used, was used for appropriate cases, but some expressed concern about whether diversion was being used as extensively as possible and whether it was being applied consistently by assistant U.S. attorneys. The following opinions were expressed.

--Several Federal public defenders believed there was little assurance that diversion was used as extensively and consistently as possible because not all assistants used it and policy guidance was inadequate.

--The director of the Pretrial Services Agency in one district who, like probation officers in other districts, is responsible for supervising divertees, said that he was not aware that declination policies would screen out some potential candidates for diversion and was concerned because some persons who could benefit from the program would not be involved. He also said that some assistants are more receptive to diversion than others and some have made it clear they do not favor it or will not use it.

--The probation officer in another district stated that there are not a lot of cases appropriate for diversion because the majority of cases are declined before reaching the prosecution stage. He believed diversion could be utilized more effectively with better guidelines.

In our opinion, the observations made by some U.S. attorneys and other officials concerned with pretrial diversion demonstrate that even though diversion might be an appropriate alternative to prosecution it might not always be used. In addition we compared pretrial diversion cases with other cases in which assistant U.S. attorneys declined any prosecutive action. The following comparison shows that little difference exists between the cases and raises the question of why some cases are diverted and why similar cases are declined for prosecution.

	Pretrial diversion cases	Declined cases
1.	Subject embezzled $150 from the bank where she worked. Subject was placed under pretrial diversion supervision for 12 months.	Suspect embezzled $2,000 from a bank. The case was declined for prosecution because of the small amount of money involved.
2.	Subject forged a U.S. Treasury check in the amount of $236.30 which belonged to a relative. Subject was placed under supervision for 12 months.	Subject forged son-in-law's Federal tax refund check of $745. This case was declined because of the family relationship involved.
3.	Subject received $193 in rental assistance because of false statements of income. Subject was placed under pretrial diversion supervision for 12 months.	Subject and family received $1,326 in public assistance grants for which they were not entitled because the subject was gainfully employed. The case was declined because of the small amount of money involved.

As shown above, some cases are declined outright while in similar cases offenders are placed in pretrial diversion. Consequently, some defendants have no involvement in the Federal judicial process and face no sanctions for violating Federal laws, while others

are diverted and are subject to prosecution if they fail to complete the requirements of the diversion agreement. Because specific mandatory criteria does not exist as to when pretrial diversion should be considered, there is no assurance that diversion will be used in all appropriate cases.

GREATER OVERSIGHT AND MORE DIRECTION ON THE USE OF PRETRIAL DIVERSION IS NEEDED

Greater oversight of and direction to U.S. attorneys regarding the use of pretrial diversion is needed. This would ensure that diversion is used effectively and identify areas that need further improvement to enhance the use of pretrial diversion. Although Justice officials expressed concern to us about whether pretrial diversion was being used effectively, Justice does not monitor the use of diversion and therefore is not in a position to know whether corrective action or further policy direction is needed.

Justice's pretrial diversion guidelines require U.S. attorneys to follow certain practices. These include

--reporting all diversions to Justice's Criminal Division; and

--timing the diversion process, whenever possible, to divert offenders prior to indictment.

Our review in the six districts which used pretrial diversion as an alternative showed that such provisions are not always adhered to. For example, contrary to Justice's guidelines, five of the six districts did not routinely submit pretrial diversion reports to Justice's Criminal Division, and two districts routinely diverted offenders only after formal charges were filed in court, despite Justice's objective to divert, whenever possible, prior to indictment.

We discussed these matters and the need for greater oversight with an official from Justice's Criminal Division and an official from the Executive Office for U.S. Attorneys. The official from the Criminal Division told us that since the promulgation of the guidelines the task force has disbanded and no group has assumed full oversight responsibility. He said that he still acts as a focal point when questions are received from U.S. attorneys, but he performs no overall supervision of the use of pretrial diversion.

He told us he was aware that Justice had not enforced the requirement that U.S. attorneys report to the Criminal Division all cases in which pretrial diversion is used. This official

receives some reports and said that in the past he had notified U.S. attorneys when reported diversions did not appear to be in conformance with the objectives of the program. For example, he has received reports of diversions for extremely minor offenses, such as the theft of a bottle of nail polish from a military post exchange having the value of $1.20, and has notified the U.S. Attorney's Office that such cases are inappropriate for diversion. He said such actions are taken on an ad hoc basis, however, because not all diversions are reported and he has other full-time responsibilities.

We also discussed the timing of diversion in the two U.S. Attorneys' Offices that diverted offenders after indictment because officials believed it provided greater leverage over the divertees. The Criminal Division official said he did not believe that districts should routinely follow a practice of diverting offenders after indictment because the intent of diversion is to preclude individuals from formal contact with the judicial system and to minimize the use of court time and resources. He said such practices do not accomplish these objectives.

An official from the Executive Office told us that the Executive Office plans to emphasize the use of pretrial diversion during the orientation of newly appointed U.S. attorneys and believes this approach will succeed in expanding the use of the program. In addition, he said that Justice's management information system has recently been modified to capture more information on the extent diversion is used by U.S. attorneys, which will facilitate monitoring its use.

CONCLUSIONS

Although pretrial diversion offers a viable alternative to prosecuting or declining a case, Justice has not ensured that it is being used to its maximum advantage or that its use is consistent under similar circumstances. Disparities and inadequacies have occurred in the use of diversion because (1) not all U.S. attorneys use diversion, (2) U.S. attorneys have established differing criteria for using diversion, and (3) some U.S. attorneys, although providing for the use of diversion, do not emphasize its use.

These conditions will continue until Justice increases its oversight and provides U.S. attorneys with better policy guidance on its use. To provide such oversight, we believe Justice needs to assign the responsibility for monitoring and evaluating its use to a specific organizational unit. Although the Criminal Division receives some pretrial diversion notification forms and sporadically reviews them, the official we spoke with said this is conducted on an ad hoc basis and as an adjunct to other full-time

responsibilities. While emphasizing the use of diversion during the orientation of newly appointed U.S. attorneys will assist in familiarizing them with the concept, we do not believe Justice's efforts should stop there. Justice needs to routinely assess how the concept is being used and ensure that U.S. attorneys comply with the guidelines.

Justice should provide U.S. attorneys with further policy direction on the types of individuals and the offenses committed for which diversion should be considered as an alternative. This is necessary not only to ensure fairness to the individuals involved but also to maximize the usefulness of diversion as an alternative to prosecution or declination. Although not every offense can be prosecuted, outright declination provides no deterrent to future criminal activity or respect for Federal laws and declares that the conduct involved will be tolerated. Diversion offers an alternative. We recognize that it might not be feasible to establish specific criteria for every offense or contingency that can be used as a means for using diversion. However, Justice should provide guidance to U.S. attorneys in order to avoid situations where a U.S. attorney automatically prohibits its use for a particular type of offense while another U.S. attorney permits diversion for the same type of offense.

Because many U.S. attorneys have established declination policies for certain offenses which in their judgment do not warrant the cost of Federal prosecution, we believe that as a start Justice should consider establishing diversion policies regarding these categories of offenses. Furthermore, as Justice implements our recommendation to establish, for appropriate offenses, uniform declination policies for use by all U.S. attorneys, we believe it should establish complementing policies to guide U.S. attorneys in considering diversion as a means of handling appropriate cases which would otherwise be declined pursuant to declination policies.

RECOMMENDATIONS TO THE ATTORNEY GENERAL

We recommend that the Attorney General:

--Establish more specific guidance for U.S. attorneys to follow in determining which individuals, depending on the offenses committed, are considered appropriate for pretrial diversion in order to ensure its consistent and maximum application.

--Require the Criminal Division to routinely monitor and evaluate the use of pretrial diversion throughout the U.S. Attorneys' Offices in order to (1) ensure that U.S. attorneys comply with established guidelines,

(2) identify and resolve disparities in the use of pretrial diversion, and (3) identify further improvements needed in the use of pretrial diversion.

AGENCY COMMENTS AND OUR EVALUATION

In commenting on a draft of this report, the Administrative Office of the U.S. Courts said it has an active interest in pretrial diversion because probation officers cooperate in supervising such cases and because cases diverted from the criminal pipeline lessen the criminal case backlog in the courts. The Administrative Office said that during the last 5 years U.S. Attorneys' Offices have not increased their use of the program and that serious attention should be given to the program as an alternative to prosecution in appropriate cases. The Administrative Office suggested that Justice establish guidelines on diversion and communicate with U.S. probation officers on them. Justice, on the other hand, disagreed with our evaluation of pretrial diversion. It believes we failed to recognize certain underlying principles of the program, as follows.

--Justice's broad guidelines and supervision were designed to provide flexibility to each U.S. attorney in meeting his/her district's needs.

--The program is offender, not offense, oriented and the goal is to identify offenders who have not adopted a pattern of criminal behavior and who would be most susceptible to rehabilitation early in the criminal justice process.

--U.S. attorneys are asked to select only individuals whose cases could be successfully prosecuted to avoid allowing diversion to become an outlet for punishing offenders whose cases are of insufficient merit for trial.

Broad guidelines and supervision over pretrial diversion is by design

Justice stated that pretrial diversion was intended to provide U.S. attorneys additional flexibility in making prosecutive decisions. It said that it has purposely not provided detailed guidelines and close supervision because it wants to provide U.S. attorneys with the flexibility to meet local needs.

We agree that pretrial diversion serves as an alternative to prosecution and allows U.S. attorneys additional flexibility in making prosecutive decisions. However, Justice's position that

broad flexibility is needed to meet local needs runs counter to what we found during our review. The opportunity for diversion is highly dependent on the personal philosophies of the U.S. attorneys and assistant U.S. attorneys and may differ within a district depending on which assistant U.S. attorney handles the case. On page 35 of this report we discuss the comments made by U.S. attorneys we interviewed regarding pretrial diversion. In our opinion, these comments do not reflect consideration of local needs. For example, the U.S. attorneys held different opinions regarding its use, including that it should be restricted for juveniles or that its use should be left to the philosophy of the assistant handling the case. Another U.S. attorney told us that he does not use pretrial diversion because the court does not support its use, even though the chief judge of the Federal district court told us that the U.S. attorney had not discussed diversion with him.

Justice also stated that detailed guidelines would hinder the development of the program but, on the other hand, said that it would seem appropriate to encourage the probation office to participate in developing guidelines for use of the program.

We believe that participation by the probation office in developing guidelines is a viable suggestion. Rather than hindering development of the program, greater guidance should broaden its use. As stated on page 36, a probation officer and other professionals involved in the diversion program told us that the lack of guidelines contributed to their concerns about whether diversion was being used as extensively as possible and whether it was being applied consistently.

Justice further stated that it cannot monitor every U.S. Attorney's Office to determine the conditions that make this program effective. However, in order to develop the use of diversion and share the experiences and ideas of professionals involved in administering it, as well as to ensure that its use is in line with the intent of the program, a centralized group must be responsible for overseeing its operations. Therefore, we are recommending (see p. 40) that the Criminal Division be given this responsibility. We recognize that monitoring the operations of the program would require an additional demand on resources but we do not believe that the Criminal Division would have to bear the entire burden. In its comments Justice said that (1) it is implementing an improved management information system to track the disposition of criminal cases (see p. 91), (2) senior assistant U.S. attorneys have and will continue to assist in evaluating the operations of U.S. Attorneys' Offices (see p. 95), and (3) the internal audit staff will seek input on areas where it can assist in evaluating operations (see p. 95). We believe each of these

steps can be used to assist the Criminal Division in overseeing the pretrial diversion program.

The Department's program is offender oriented

Justice stated that diversion is offender oriented, not offense oriented, with the objective of identifying offenders who have not adopted a pattern of criminal behavior and who are susceptible to rehabilitation. Justice contends that any comparisons by type or quantity of offense are irrelevant and that a successfully run program is one in which trained social science personnel review the offenders at an early stage and attempt to screen out individuals best suited for diversion.

We agree with Justice's position that diversion should be offender oriented. However, as we discussed on page 34 of this report, use of diversion is largely based on the personal philosophy of U.S. attorneys or assistant U.S. attorneys. We noted other instances where diversion was granted as part of a plea agreement which, in our opinion, has questionable rehabilitative value. Finally, while trained social science personnel would be helpful in screening individuals, as noted by Justice, they are not used for this purpose by U.S. attorneys we visited. U.S. attorneys told us that the initial decision to allow diversion is made by the assistant U.S. attorney. Subsequently, probation office officials are asked to evaluate the candidate and provide their recommendation, which may be overruled by the U.S. attorney. Thus, although Justice's position that diversion should be offender oriented has merit, its position regarding how the program should be operated is not reflected in the operations at the U.S. Attorneys' Offices. As we conclude on page 39, until Justice conducts the necessary oversight functions it will not be able to accurately assess and modify the program as necessary.

Diversion should be used for prosecutable cases

Justice stated that it has asked U.S. attorneys to select for diversion only cases that could be successfully prosecuted. Justice believes this approach is necessary to avoid allowing diversion to become an outlet for punishing offenders whose cases are of insufficient merit for trial or allowing the program to act as a "dragnet" to gather "clients" for many social programs. It contended that any question regarding whether the use of diversion is sufficient must be in relation to the number of prosecutable cases worthy of trial rather than in relation to overall numbers of criminal referrals or declinations.

Justice's comments, in our opinion, indicate why greater guidance and oversight of U.S. attorneys is necessary and would be beneficial. Such terms as "worthy of trial" are subject to individual interpretation not only by U.S. attorneys but also by assistant U.S. attorneys handling the cases. Because Justice is concerned about the prosecutive merit of cases diverted, we believe the Department should provide greater guidance and oversight to ensure that such guidance is not misinterpreted.

Such guidance and oversight is also necessary before Justice can adequately monitor the use of pretrial diversion. As shown in the table on page 35, diversion is used in a relatively small number of cases compared to the number of declinations or case terminations and, as further discussed on page 37, little difference exists between the types of cases diverted and cases declined. While we do not intend to imply that every case declined should be diverted, we believe such comparisons show the similarities between cases declined and diverted and the need for further guidance by Justice to assist in identifying appropriate cases for diversion.

Justice also suggests that increased use of diversion can cause investigative agencies to spend time on less significant crimes. Investigative agencies currently spend a portion of their time handling cases that ultimately are not prosecuted, as the table on page 35 shows. Such agencies, we believe, recognize that not every crime can be prosecuted but nonetheless remain concerned about nonprosecution of offenses. Justice pointed out in its comments regarding the deterrent value of minimal prosecution that even the most minor offense category may require some prosecutive attention. Investigative agencies may help U.S. attorneys formulate policies by identifying offenses that need some prosecutive attention, such as pretrial diversion. This would benefit the enforcement programs of investigative agencies by expanding their deterrent value. It would also alleviate Justice's concern that investigative agencies may spend time on less significant cases that are not prosecuted.

Impact on probation and U.S. attorney staffs

Justice stated that increased use of pretrial diversion could place additional strains on the probation system. It also said that additional staff might be needed by U.S. attorneys if additional cases are considered for diversion.

Our discussions with probation officers in the districts we visited revealed a willingness and capability to supervise additional divertees. For the most part these officials pointed out that by nature of the offender, the typical divertee does not

require extensive supervision and would not overburden the probation officer. Because the Administrative Office expressed a serious concern over the lack of increased use of diversion by U.S. attorneys, we believe it is reasonable to expect it to work with Justice to resolve Justice's concern that the program could strain the probation system. Also, we believe that increased policy guidance and involvement by probation officers, as well as investigative officials, would help mitigate the possibility that U.S. attorneys would need additional staff, as suggested by Justice, if diversion was used more often.

CHAPTER 4

PLEA AGREEMENTS ARE SUBJECT TO DISPARATE POLICIES AND MINIMUM CONTROLS

Plea agreements have become a common tool of U.S. attorneys to dispose of criminal cases and generally consist of an agreement between the prosecutor and the defendant whereby in return for a defendant's guilty plea to a lesser charge, the prosecutor agrees not to press a more serious charge which he believes he could prove at a trial. Because plea agreements have an impact on the ultimate sentence imposed on the defendant, the consistency of its application directly influences the equity of justice and treatment of defendants.

Although plea agreements are used by all U.S. Attorneys' Offices, Justice has not provided extensive policy direction or oversight on its use; consequently, U.S. attorneys have established their own policies and practices. Our review showed that

--U.S. attorneys have established their own policies, which differ among offices and create disparities in the types of plea agreements available to defendants;

--authority for making plea agreement decisions has been delegated by U.S. attorneys to their assistants and these decisions are not always subject to supervisory review; and

--Justice does not maintain the necessary data to systematically monitor the use of plea agreements in U.S. Attorneys' Offices and assess and resolve the existence of disparities.

Concerns over the broad discretion to enter into plea agreements have been voiced in recent years during congressional hearings on proposals for criminal code reform. A major objective of such proposed legislation was to help eliminate sentencing disparities by establishing sentencing guidelines for use by Federal judges in determining appropriate sentences. Numerous experts who commented on early proposals, such as S. 1437, 95th Congress, voiced concerns that disparities may continue to occur despite the existence of sentencing guidelines because of plea agreement decisions of U.S. attorneys. To address this problem, legislative proposals during the 97th Congress (H.R. 1647 and S. 1555) have included provisions to assist judges in reviewing plea agreements entered into by the prosecutor in order to ensure that they do not result in unwarranted sentencing disparities and to

evaluate and report on the impact that sentencing guidelines have on plea agreements and disparities in sentences. In addition to these provisions, we believe that Justice should provide U.S. attorneys with the policies and procedures to govern the use of plea agreements so that plea agreement practices are applied as consistently as practical among U.S. Attorneys' Offices. Justice also needs to routinely collect data on the types of plea agreements used in U.S. Attorneys' Offices and periodically study the adequacy, consistency, and consequences of such decisions so it can identify and minimize any disparities.

PLEA AGREEMENTS ARE CONDUCTED UNDER DIFFERING POLICIES AND MINIMAL CONTROLS

U.S. attorneys have established their own policies regarding the use of plea agreements. However, these policies differ among U.S. Attorneys' Offices and consequently some allow certain types of plea agreements, such as dropping, reducing, or withholding criminal charges, while others do not. Because the final charges are those on which the ultimate sentence is based, people with similar criminal histories who are guilty of similar offenses can receive markedly different sentences because of plea agreements. In addition, while plea agreements are frequently used to dispose of criminal cases, their use is not normally guided by written office procedures and policies and is not always subject to supervisory review and approval.

U.S. attorneys differ in the types of plea agreements they allow

No one knows the full extent and impact of disparities in the use of plea agreements. However, the opportunity for disparities can be demonstrated by comparing plea agreement policies that have been established by U.S. attorneys. Such policies were included in a 1979 draft Justice report on prosecutive policies and practices of U.S. attorneys. As illustrated on the following page, U.S. attorneys' policies vary in the types of plea agreements they usually permit.

Type of plea	Percent of offices that permit the plea	Percent of offices that prohibit the plea
Plea to fewer than all charges of single indictment	99	1
Plea to a lesser included offense	84	16
Plea to misdemeanor in lieu of felony	80	20
Plea conditioned on receiving a specific sentence	41	59
Plea conditioned on receiving not more than a specific sentence	48	52
Plea conditioned on no sentence recommendation	79	21
Plea by one family member rather than another	58	42
Plea by corporation rather than individual	48	52
Plea by unrelated co-defendant rather than defendant	40	60

All of the above forms of plea agreements are acceptable under the Federal Rules of Criminal Procedure. Rule 11 applies to plea agreements and states:

> "The attorney for the government and the attorney for the defendant or the defendant when acting pro se may engage in discussions with a view toward reaching an agreement that, upon the entering of a plea of guilty or nolo contendere to a charged offense or to a lesser or related offense, the attorney for the government will do any of the following:
>
> (A) move for dismissal of other charges; or
>
> (B) make a recommendation, or agree not to oppose the defendant's request, for a particular

sentence, with the understanding that such recommendation or request shall not be binding upon the court; or

(C) agree that a specific sentence is the appropriate disposition of the case."

Under Rule 11, courts are prohibited from participating in plea agreement discussions. The court is free, however, to accept or reject plea agreements reached between the prosecutor and the defendant and/or defendant's counsel, to prohibit partie from presenting plea agreements to it, and to determine for itself the extent to which plea agreements may be entered into within its jurisdiction.

Although such plea agreements are acceptable under the Federal Rules, the table on page 48 shows that U.S. attorneys diffe in the types of plea agreements they permit and will present to the court. Such differences in plea agreement policies create disparities in terms of the types of concessions defendants will receive in return for a guilty plea. For example, a case in one U.S. Attorney's Office demonstrates this. The defendant had a lengthy criminal record and was indicted on felony counts carrying a maximum penalty of 5 years' imprisonment. The individual was able to negotiate a plea agreement, pursuant to the district's policy, whereby in return for a guilty plea to a one count misdemeanor charge the U.S. Attorney's Office dropped the felony charges. This individual received a 4-month jail sentence. In other districts which do not allow pleas to a misdemeanor in lieu of a felony charge, similar defendants would not be provided this opportunity.

In some instances, plea agreement practices of U.S. attorneys are governed by the Federal district court. For example, pleas conditioned on the defendant receiving a specific sentence or on U.S. attorneys making a recommendation for a particular sentence are allowed in some districts but are not permitted in others. Officials in three of the districts we visited told us their offices do not permit plea agreements conditioned on a defendant receiving a specific sentence because the judges will not allow that type of plea agreement. However, some judges in the other four districts permit such pleas. In one of these latter four districts we identified a plea agreement which resulted in a significant benefit to the defendant. The defendant was indicted for smuggling 15 pounds of cocaine and faced a potential sentence, if found guilty, of up to 15 years' incarceration. The assistant U.S. attorney handling the case entered into a plea agreement with the defendant to plead guilty to the charge on the condition that he would not receive a sentence of

more than 3 years. The court accepted the plea agreement and the defendant received the agreed upon sentence. This plea agreement would not have been allowed in other districts where the Federal judges do not allow plea agreements conditioned on specific sentences.

As the table on page 48 shows, the plea agreements allowed most universally by U.S. attorneys are those involving (1) pleas to fewer than all charges of a single indictment and (2) pleas to a lesser included offense. In some instances such plea agreements may be anticipated by the assistant U.S. attorney at the time the original charges are filed. For instance, in its study of prosecutive policies and practices of U.S. attorneys, Justice asked U.S. attorneys whether a defendant who committed multiple offenses arising out of the same incident is ordinarily charged with every offense. Fifty-seven percent of all offices indicated that they ordinarily charge all offenses, sometimes for plea agreement purposes. According to Justice's report,

--one office indicated that "count stacking" was sometimes used to "cajole" offenders into supplying information;

--one office stated that it would probably charge most counts for purposes of reaching plea agreements;

--another commented that charging every offense within a reasonable limit may induce guilty pleas;

--another office observed that although "stacking offenses" seemed to reduce credibility with the court, it charged "sufficiently numerous counts to allow for negotiation."

According to Justice's study, 69 percent of the U.S. Attorneys' Offices reported that the extent to which the charge would facilitate plea agreements was considered at least fairly important in deciding upon the original charges.

Management controls over plea agreements are minimal

Justice has not established extensive requirements or management procedures to govern the use of plea agreements and therefore each district office operates independently. Our review in seven districts showed that plea agreements are not normally

--guided by written office policies or procedures, or

--reviewed by supervisory personnel.

For the most part the U.S. attorneys visited communicated plea agreement policies to their staffs orally rather than in writing and did not routinely require that assistant U.S. attorneys' plea agreement decisions be reviewed. The practices followed by these seven offices are summarized below.

District	Communication of office policy to staff	Routine mandatory review
1	Oral	No
2	Oral	No
3	Oral/Written	Yes
4	Oral/Written	No
5	Oral	Yes
6	Oral	No
7	Oral/Written	No

In all districts, the assistant U.S. attorney handling the case decided what, if any, plea agreements would be entered into. Only one of the districts had an office manual that contained requirements and guidance for plea agreements. In addition, only two districts had routine mandatory policies requiring review of plea agreements entered into by assistant U.S. attorneys.

Justice's study of U.S. attorney prosecutive policies also identified the degree of management controls exercised by U.S. attorneys which are described below.

Management controls	U.S. attorney responses (percent)
Authority for making plea agreement decisions:	
Assistant U.S. attorneys	74
Supervisory assistant U.S. attorneys	10
U.S. attorneys	16
Existence of internal review procedures:	
Yes	69
No	31

In addition, 60 percent of the U.S. attorneys reported that they communicated plea agreement policies to staff orally; 7 percent communicated the policies in written form; and 33 percent communicated policies to their staffs in both written and oral fashion. The 69 percent of the U.S. attorneys who reported having internal review procedures used these as either a routine practice or for unusual or high visibility cases.

Our discussions with officials from two U.S. Attorneys' Offices which we visited indicated that review procedures as well as written policies can serve important purposes. For example, a senior assistant U.S. attorney in one district pointed out that although the district allows plea agreements contingent on the defendant receiving a specific sentence, he believes it important to review such plea agreements prior to the time they are finalized in order to assure some consistency in the plea agreement process. He cited the case, described on page 49, where an assistant U.S. attorney entered into a plea agreement with the defendant who was charged with smuggling about 15 pounds of cocaine. The defendant was allowed to plead guilty to the charge on the condition that he would not receive a sentence of more than 3 years. The court accepted the plea agreement and the defendant received the agreed-upon sentence. According to the senior assistant U.S. attorney, this sentence was too lenient and he would not have allowed the plea agreement if he had been aware of it. The senior assistant U.S. attorney told us that as a result of this plea agreement he reinstituted a district policy requiring his prior review and approval of such plea agreements.

Subsequent to a case involving a plea agreement that was successfully appealed in March 1979, the other district issued a written policy requiring that plea agreements be reduced to writing. The first assistant U.S. attorney explained that such efforts were the result of a previous problem experienced regarding a plea agreement. In this case an assistant U.S. attorney orally offered a plea agreement to a defense counsel in which the Government would, among other things, drop three counts of an indictment in return for a guilty plea to one count. At the time the defendant accepted, however, the assistant's supervisor withdrew the offer. The defendant was later convicted on four counts and sentenced to a total of 15 years' imprisonment. The defendant appealed. The appeals court ruled in March 1979 in favor of the defendant pointing out that under the circumstances of that case constitutional considerations of fairness required the Government to honor the plea agreement. The court vacated the judgment and remanded the case with instructions that the defendant be given the opportunity to (1) enter a plea of guilty to one of the counts to obstruction of justice upon which he was convicted and (2) be sentenced by a different Federal judge.

As a result of this case, the U.S. attorney established a policy prohibiting his staff from making oral plea offers that are binding on the Government. The policy states that each defendant and his/her attorney is to be notified that while assistants can continue to engage in oral plea "negotiations," no plea is to be considered binding unless and until it is communicated in writing.

In July 1980, Justice issued its "Principles of Federal Prosecution" which provides a statement of prosecutive practices to guide attorneys in plea agreements as well as in applying other forms of discretion. The publication addresses factors, such as seriousness of the offense and prior criminal record, which are to be considered in entering into a plea agreement. The publication does not, however, require management practices or procedures governing plea agreements, and officials from several of the offices we visited told us that the publication will not affect their plea agreement practices. Thus, in general plea agreements will continue to be subject to minimum controls and oversight.

LACK OF DATA INHIBITS IDENTIFICATION OF PROBLEMS IN THE USE OF PLEA AGREEMENTS

Justice has not routinely monitored the use of plea agreements, established data reporting procedures, nor developed a reporting mechanism to provide a basis for identifying disparities in the use of plea agreements. Lacking these tools, Justice is hampered in making a comprehensive assessment of the extent and impact of undesirable disparities in the criminal justice system through the use of plea agreements.

Although Justice's Docket and Reporting System collects a variety of information on criminal case dispositions, it does not show the extent or types of plea agreements occurring throughout the districts and consequently is not useful to policymakers in monitoring the use of such agreements. To be in a position to properly assess the use of plea agreements Justice must

--identify the types and frequency of plea agreements entered into by the U.S. Attorneys' Offices, and

--compare plea agreement policies and practices among districts to determine the existence and resolution of disparities.

To facilitate the effective monitoring of plea agreements, Justice also needs to identify and assess the specific reasons that plea agreements are entered into. Several authorities, such as the National District Attorneys Association, have recommended that prosecutors make records of the reasons for the plea agreements and maintain them in their case files. Another commentator points out:

> "The negotiating prosecutor should draft a plea-opinion in which he justifies the agreement reached in terms of the substantive criteria and note compliance with all the relevant procedural criteria. The plea-opinion will serve several useful purposes. The collected plea-opinions will first provide the office with more thorough and sophisticated guidance as the general policies are interpreted and applied over time. For example, the office will gradually develop precedents for the disposition of troublesome cases. Second, the need to justify the disposition may prevent an attorney from ignoring guidelines with which he disagrees. Third, the opinion should satisfy any judicial curiosity about the propriety of the prosecutor's action." 1/

Contrary to these views, however, our review of plea agreements in four U.S. Attorneys' Offices revealed that complete documentation justifying the plea agreements did not always exist. Thus, Justice officials will not have the means to review and assess plea agreement decisions. For instance, one case we reviewed, in a district where we conducted limited work, involved a police officer who was indicted on three felony counts of filing false income tax returns for 3 years. Each count had a maximum sentence of a $10,000 fine and not more than 5 years' imprisonment, or both. During a trial recess, the U.S. Attorney's Office entered into a plea agreement whereby in return for a guilty plea to two misdemeanor counts, the Government agreed to dismiss the indictment and its three felony counts.

The case file contained no information on why the above plea agreement was entered into. The Chief of the Criminal Division told us that the attorneys who handled the case are no longer with Justice and no information is available as to why the case was disposed of the way it was. Consequently, without documentation in case files regarding plea agreement decisions, the reasons for the decisions are not available and therefore later evaluation is not possible.

1/J.E. Bond, Plea Bargaining and Guilty Pleas (New York: Clark Boardman Company, Ltd., 1978), pp. 265-266.

CRIMINAL CODE REFORM PROPOSALS WILL PROVIDE INCREASED JUDICIAL REVIEW OF PLEA AGREEMENTS

An objective of legislative proposals to revise and recodify Federal criminal laws is to minimize sentencing disparities. Early proposals--such as S. 1437, 95th Congress--called for a Sentencing Commission that would promulgate sentencing guidelines to be used by Federal judges. Its intent was to guide the discretion exercised by judges in order to avoid unwarranted sentence disparities. Much concern, however, has been voiced regarding the advisability of promulgating sentencing guidelines without similar guidance and control over prosecutive discretion to reach plea agreements in criminal cases. Because of the broad discretion of U.S. attorneys and Justice's lack of monitoring the use of plea agreements, concerns exist that disparate sentences could still occur, not because of judicial sentencing practices, but due to prosecutive discretion to reach plea agreements. In light of such concerns, proposals during the 97th Congress--H.R. 1647 and S. 1555--provided for such measures as (1) guidelines to assist Federal judges in determining whether or not to accept plea agreements or (2) for the proposed Sentencing Commission to evaluate and report on the impact that sentencing guidelines have on plea agreements and disparities in sentences.

Plea agreements reduce sentencing discretion

A defendant's motivation for entering into a plea agreement is to limit the judge's sentencing discretion or options in hopes of receiving a lesser sentence. Almost all successful plea agreements result in minimizing the sentencing discretion of the judge.

The impact on potential sentences can be seen by analyzing cases where plea agreements have been reached. We analyzed 226 cases which include plea agreements in four U.S. Attorneys' Offices. As shown below, we classified a variety of different plea agreements into three major categories.

District	Reduction of charges	Withholding of charges	Dropping of equivalent or lesser charges in multi-count indictment	Other	Total
1	17	3	15	3	38
2	17	27	33	2	79
3	11	2	10	11	34
4	23	1	48	3	75
Total	68	33	106	19	226

A comparison of the maximum potential sentences under the original charges and the final charges shows that plea agreements can have a significant impact on reducing the sentencing discretion of the judge. For example, plea agreements that result in a reduction in charges include those situations in which the final charge(s) carry a lower maximum sentence than the original charge(s) and, thus, the judge has a narrower sentence range from which to choose an appropriate sentence. Withholding of charges narrows sentencing discretion because certain charges of offenses committed by the defendant are never introduced in the court and therefore cannot be included in the final judgment. The dropping of equivalent charges on multicount indictments also affects potential sentences. For example, because the court can impose sentences under each count to run consecutively, the dropping of one of three counts each having a maximum sentence of 3 years can reduce the full sentence potential from 9 to 6 years.

As shown in the table, 68 of the 226 cases reviewed, or 30 percent, involved plea agreements in which the defendants pled guilty to and were sentenced under charges that carried lower maximum sentences than the defendants may have received if convicted of the violations for which they were originally charged. In addition, 106, or 47 percent of the cases reviewed, resulted in agreements by the prosecutors to drop one or more counts in a multicount indictment. As shown on the following page, for selected defendants, plea agreements that result in reductions of charges, withholding of charges, and dropping of equivalent charges can yield significant benefits to defendants by reducing their maximum potential sentence.

Defendant	Violation	Original charges	Final charges	Difference in potential sentence (in years) note a
1	Defrauded employer of a total of $72,000	(1) 14 counts each carrying a potential of 5 years/ $1,000 fine (2) 4 counts each carrying a potential of 10 years/$10,000 fine	1 count carrying a potential of 5 years/ $1,000 fine	5 years' imprisonment
2	Possession of stolen firearms by convicted felon	(1) 1 count carrying a potential of 5 years/$5,000 fine (2) 1 count carrying a potential of 2 years/$10,000 fine	1 count carrying a potential of 2 years/ $10,000 fine	3 years' imprisonment
3	Embezzled $5,600 from bank	(1) 1 count carrying a potential of 5 years/$5,000 fine	1 count carrying a potential of 1 year/ $1,000 fine	4 years' imprisonment
4	Defendant with a prior record robbed a bank	(1) 1 count carrying a potential of 20 years/$5,000 fine (2) 1 count carrying a potential of 10 years/$5,000 fine	1 count carrying a potential of 10 years/ $5,000 fine	10 years' imprisonment

a/Reflects only the difference in years between the one count with the maximum sentence and the one count with the lesser sentence. This comparison does not consider the effect of dropping multicounts. For example, defendant number 1 was subject under the 18 original counts to 110 years' incarceration if sentenced to consecutive terms. The difference in comparing this potential sentence to the final charge of one count with a maximum sentence of 5 years would be 105 years.

Such plea agreement decisions are left to the discretion of the U.S. Attorney's Office. Officials from the districts visited also pointed out that some forms of plea agreements--most often those relating to sentence recommendations--depend heavily on the courts' acceptance and, therefore, the use of this type of plea agreement is usually subject to the policy of the judge.

Concerns over plea agreements and Criminal Code Reform

Early versions of proposed Criminal Code Reform legislation provided for sentencing guidelines which would restrict the sentencing discretion of the judges. Numerous individuals who testified before the Congress on this proposed legislation voiced concerns that sentencing guidelines would not by themselves eliminate sentence disparities. They pointed out that such constraints upon the court's discretion would only transfer the court's responsibility to other nonjudicial components of the Government, principally the prosecutor. For example, in testifying before Congress, representatives of the Federal Public Defenders pointed out:

> "Placing this discretion with the prosecutor may be severely criticized because it is exercised in an atmosphere of low visibility and is generally not the subject of review. Another strong criticism we have is that it has been placed in the hands of an advocate. The transfer of the sentencing discretion to the charging authority moves sentencing one step away from the courtroom and one step closer to the police station."

They also expressed doubts whether Justice would be able to control the use of such discretion by U.S. attorneys. They quoted a 1972 study conducted by Stanford University Law Professor Robert Rabin under commission by the Administrative Conference of the United States which concluded:

> "Although the Justice Department's supervisory capacity provides a potential alternative means of safeguarding against arbitrariness, the Department has failed to develop either an accurate system of aggregate data collection or an effective system of individualized internal review. As a consequence, the Department does not serve as a watchdog over prosecutorial activity. Hence, the present system provides virtually no safeguards against abuse of discretion."

In response to these and other concerns, subsequent versions of both the House and Senate bills have included provisions for increased review of plea agreements.

The House Report on the Criminal Code Revision Act of 1980 (Report No. 96-1396, September 25, 1980,) recognized that plea agreements in the Federal system severely limit the range of permissable punishments available to a judge and stated that people with similar criminal histories who are convicted of similar offenses should not receive markedly different sentences merely because they were more successful in negotiating plea agreements. 1/ Consequently, H.R. 6915, the Criminal Code Revision Act of 1980, provided for a Committee on Sentencing to recommend "charge reduction" standards to assist Federal judges in determining whether to accept plea agreements in which a defendant pleads guilty to a charged offense and the Government refrains from bringing or agrees to drop other charges. Although the House Report recognized that current Federal law authorizes judges to accept or reject plea agreements, it pointed out that there are currently no meaningful standards to guide these decisions. Criminal Code Reform legislation was reintroduced on February 4, 1981, as H.R. 1647, the Criminal Code Revision Act of 1981. This bill also includes provisions establishing standards for Federal judges to use in accepting plea agreements.

In addition, the Criminal Sentencing Reform Act of 1981--S. 1555--was introduced on July 31, 1981. This bill also calls for establishing a Sentencing Commission and sentencing guidelines. It also calls for the Commission to evaluate the impact of sentencing guidelines on prosecutive discretion and plea agreements and to issue a report of its findings to all appropriate courts, the Department of Justice, and the Congress.

Legislation to revise the Federal Criminal Code has not yet become law. However, proposed revisions have been extensively considered by the Congress over the past several years and during hearings it has become apparent that plea agreement practices must be coordinated with any proposed sentencing guidelines in order to minimize disparate treatment of offenders in similar circumstances.

1/In its comments (see p. 85) the Administrative Office of the U.S. Courts said that under the Federal Rules of Criminal Procedure, judges have the authority to defer rejecting or accepting plea agreements until a presentence report is prepared and thus, judges have some moderating influence in avoiding plea agreement disparities under the present system.

CONCLUSIONS

Plea agreements represent an exercise in prosecutive discretion and have become a fundamental part of the Federal criminal justice system. Because plea agreements have an impact on the maximum potential sentence that can be given a defendant, it can limit the sentencing discretion of the court and contribute to the disparate treatment of Federal offenders.

Despite the importance and potential impact of plea agreements on the administration of justice, Justice has not closely controlled or monitored its use by U.S. attorneys. Justice has not provided specific policy direction on the use of plea agreements to ensure consistency in their use or established reporting or other management requirements regarding their use. U.S. attorneys have been left to their own discretion in determining the forms of plea agreements to be used by their offices as well as the degree to which they manage and control its use by their staffs. As a result, the policies regarding the use of plea agreements and management control vary among U.S. attorneys. Consequently, some forms and benefits of plea agreements are available to some Federal defendants but not to others. Because Justice does not routinely gather data on the types and frequency of plea agreements, it cannot monitor and control its use or identify and resolve disparities.

This lack of control and the adverse effects that disparities can have on the judiciary's ability to provide for more uniform sentencing practices have been recognized by the Congress in its efforts to revise the Federal Criminal Code. As a result, House and Senate versions of proposed Criminal Code Reform legislation have included provisions for increased judicial review over plea agreements entered into by Federal prosecutors.

Justice should take steps to better control the use of plea agreements by U.S. attorneys. In this regard Justice should establish policies regarding the types of plea agreements and concessions that are appropriate to ensure that as much consistency as practical is achieved throughout all districts. In addition Justice needs to establish a reporting mechanism to collect data on plea agreement decisions so that it will have a basis to periodically study the adequacy and consistency of such decisions and make changes when necessary.

RECOMMENDATIONS TO THE ATTORNEY GENERAL

We recommend that the Attorney General:

--Establish more specific plea agreement policies to guide U.S. attorneys regarding the types of plea agreements that can be used to ensure greater consistency in plea agreement practices and thereby

minimize disparities in the types of plea agreements and concessions that are made available by Federal prosecutors to defendants.

--Establish reporting requirements that will provide information on the types and frequency of plea agreements and require that this data be used to monitor and periodically evaluate the use of plea agreements by U.S. attorneys.

AGENCY COMMENTS AND OUR EVALUATION

Justice, in its comments, said that there are a number of reasons for plea agreement practices to vary from one district to another. It said that plea agreements, as presently used by U.S. Attorneys' Offices, are conducted in a proper fashion and that the Department provides the necessary supervision of U.S. Attorneys' Offices. The Department said that there is no evidence that the current plea agreement process has resulted in unfairness or injustice to Federal defendants, but it agreed with us that better information is necessary and said that improvements are being made.

Reasons for plea agreement practices to differ

Justice stated that there are necessary and proper reasons for plea agreement practices to vary from one district to another. It said that such differing practices reflect efforts by Federal prosecutors to fairly apply the complex Federal criminal law to a variety of facts and regions of the country. We agree that Federal criminal law is complex and that prosecutors must apply the statutes to a wide variety of criminal behavior. Indeed, we believe the complexity of the Federal criminal law is an important reason for close oversight by Justice of the plea agreement practices and policies of U.S. attorneys. If Justice has information on the frequency and types of plea agreements entered into as well as the reasons for the plea agreements, as discussed on page 53 of our report, it would be in a position to provide guidance on potentially troublesome violations or circumstances and to ensure consistency in applying the complex statutes.

Justice stated that disparate plea agreement procedures and practices of U.S. attorneys are often the result of disparate sentencing practices employed by Federal district courts and that U.S. attorneys may be promoting fairness and uniformity by adopting differing plea negotiation practices. The lack of uniformity in sentencing is certainly a concern and has received serious attention by Congress as part of the efforts to revise the Federal Criminal Code and establish sentencing guidelines. Our

review of literature as well as testimony on the subject of sentencing guidelines indicates, however, that plea agreement practices and procedures can, contrary to Justice's view, hinder rather than promote uniformity in sentencing. As stated on page 58, because plea agreements are recognized as having the potential to create disparate sentences, legislative proposals for establishing sentencing guidelines have also contained provisions to minimize the impact of plea agreements.

Justice pointed out that some courts will accept different types of pleas than others. We recognize on page 49 the courts' authority under the Federal Rules of Criminal Procedure to allow or disallow plea agreements presented within their jurisdiction. We also point out on page 49 that some judges did not allow plea agreements contingent on the defendant receiving a specific sentence because such agreements limit their judicial sentencing discretion. They believed it was their responsibility to provide the sentence based on the facts and not be limited by a plea agreement entered into by the prosecutor and defense counsel.

Justice further stated that local needs and values vary around the country and that it may be appropriate in one section of the country to treat certain conduct less severely than in another section. It added that an important value of the system of U.S. attorneys is that it places in each district a senior official responsible for developing and implementing litigation policy in the manner best suited for that district.

We do not believe that Justice's reference to the variance in local needs and values negates the need to provide greater oversight and consistency in the plea agreement policies of U.S. attorneys. We recognize that it is appropriate to consider these factors, especially at the time the case is considered for prosecution and when it is determined what charges will be brought (see p. 25). However, problems could arise if U.S. attorneys, with the intention of obtaining a plea agreement, accept cases and select charges which would not be prosecuted because they are not reflective of local needs and values. If the defendant rejected the plea agreement, the U.S. attorney would be faced with either having to proceed on charges he normally would not prosecute, or dismiss the charges. While there may be on occasion circumstances whereby a result of a plea agreement would be to better reflect the local needs and values, by and large such needs and values should normally be considered at the time of the initial prosecutive and charging decisions. As such, we do not believe that local needs and values would normally bear on plea agreements.

Justice's position regarding the value of the U.S. attorney system as it relates to litigation policy implies that there is little need to oversee and/or direct the establishment and implementation of a nationwide litigation policy. We agree with

Justice that U.S. attorneys are in the best position to understand the unique features of given districts. However, because the Congress has established a uniform set of Federal criminal laws, we believe there continues to be a need to oversee and direct the operations of all U.S. Attorneys' Offices to ensure that litigation policies are designed to ensure as much consistency as possible as well as help law enforcement agencies reach their goals.

Justice also cites the FBI's opinion that specific plea negotiation policies are neither practical nor advisable because in such instances as organized crime the U.S. attorneys need discretion to offer concessions to cooperative subjects in return for information. We do not believe this argument diminishes the need for better policy guidance and closer oversight. First, the vast majority of organized crime cases are handled by Organized Crime Strike Forces which are subject to a policy requiring prior approval of plea agreements by Justice's Criminal Division. The intent of this requirement is to ensure that plea agreement concessions are reasonable and to provide as much uniformity as possible. In the case of U.S. attorneys, who handle a much larger volume and wider variety of cases, centralized approval of each plea agreement is not feasible, although the concept of ensuring the reasonableness of concessions and uniformity of plea agreements is still applicable. For these reasons, we are recommending that Justice provide greater policy direction and obtain better data so that plea agreement practices of U.S. attorneys can be monitored and evaluated.

Justice is obtaining better data on plea agreements and maintains it exercises the necessary control over plea agreements

Justice acknowledged that in the past it has had limited information on the details of cases handled in U.S. Attorneys' Offices. It expects to obtain better data through increased field reviews by the Executive Office and the use of PROMIS which will provide management data on criminal cases and matters. We compliment Justice for taking steps to obtain additional data on plea agreement practices to allow better oversight of operations. We believe the evaluation of plea agreement activities during field reviews offers a valuable opportunity for Justice to oversee these operations, which account for the vast majority of criminal case dispositions. However, we also believe that Justice needs to take several actions to enhance its ongoing efforts.

First, it should establish criteria regarding plea agreement practices to ensure compliance with Department policy. These can be used both during field reviews as a means to compare the operations of the U.S. Attorneys' Offices being reviewed as well

as by the U.S. attorneys in monitoring and assessing their own operations.

Second, Justice should require U.S. attorneys to document reasons for plea agreements. For example, on page 53 we state that plea opinions and justifications are important to management in monitoring plea agreement decisions, yet they are rarely maintained by U.S. Attorneys' Offices. Such information, if maintained, would serve useful purposes during evaluations and would assist U.S. attorneys in managing their activities. Reasons for plea agreements--such as resource constraints, time or cost of trial, unusual or mitigating circumstances surrounding the offense--would be documented and available for scrutiny by Justice and the U.S. attorney. If, for instance, resource constraints became a dominant factor affecting the prosecution of significant crimes, U.S. attorneys would have documentation justifying resource requests and the Department would be in a better position to make resource allocation decisions among U.S. Attorneys' Offices.

Third, Justice needs better statistical data on plea agreements. The implementation of PROMIS should provide Justice the capability to monitor case disposition as well as compile and compare data between offices. While Justice points out that there is no evidence that the plea agreement process has resulted in unfairness or injustice to Federal defendants, it acknowledges that it has not historically had reliable data on the frequency or types of plea agreements used to dispose of criminal cases. Thus, with the exception of cases appealed because of alleged plea agreement abuses or errors by prosecutors, there is little data available by which to evaluate the plea agreement process. Once such data is obtained, Justice can use it as a basis to compare operations among offices, identify and rationalize differences, and direct modifications where necessary. Such data can also be used during onsite evaluations to identify particular types of cases or plea agreements that are prevalent or troublesome and that should be subject to evaluation. By obtaining better data we believe Justice will be in the position, with the proper commitment, to actively monitor and assess plea agreement practices of U.S. Attorneys' Offices.

Despite its acknowledged need for better data, Justice said that it has exercised the degree of control needed over plea agreements and provided two examples. It said that (1) certain types of cases can only be initiated and disposed of, including plea agreements, with explicit authorization from the Department; and (2) it has published the Principles of Federal Prosecution, which discusses the plea agreement process.

We recognized both of these matters. On page 4 we noted that prior approval must be obtained by U.S. Attorneys' Offices in the handling of certain offenses. In addition, we discussed the Principles of Federal Prosecution on page 53. Regarding Justice's two examples, however, several additional factors should be recognized. While some categories of criminal cases--most notably criminal tax cases--are subject to Department approval requirements, the majority of criminal cases are not. The U.S. Attorneys' Manual, which capsulizes the Department's policies affecting U.S. attorneys, authorizes U.S. attorneys to handle most cases themselves and consequently most cases are not subject to Departmental review and approval. It must also be noted that the Principles of Federal Prosecution discuss only in general terms the factors that should be considered in applying prosecutive discretion. They are advisory and are not mandatory. They place no requirements on U.S. attorneys, and the officials we talked with stated the Principles would not affect their plea agreement practices.

It should also be noted that Justice needs to monitor U.S. attorneys' plea practices in order to ensure its requirements are adhered to. For example, a recent news article reported that a U.S. Attorney's Office had followed a practice over a 10-year period of entering into secret plea agreements with defendants. These agreements were unknown to Justice until it was notified by the U.S. attorney in January 1981. In addition, the agreements were contrary to Department policy which advocates that agreements be disclosed in open court. In our view, such practices could be identified and resolved if they were subject to more routine oversight by Justice.

CHAPTER 5

EVALUATIONS OF U.S. ATTORNEYS' OFFICES NEED TO BE IMPROVED

Justice has estimated that the 95 U.S. Attorneys' Offices account for about 93 percent of the Department's criminal case workload and about 79 percent of its civil case workload. Because of the extensiveness and importance of U.S. attorneys' operations, evaluations are necessary to provide Justice management with feedback on the effectiveness of operations as well as to identify areas needing improvement. Although the Executive Office's field activities section is responsible for this mission, it has not effectively met this responsibility because of a shortage of resources. In addition, although Justice's Internal Audit Staff (IAS) has audit authority over U.S. attorneys' activities, few reviews have been conducted. Because effective evaluations are important management tools in conducting oversight functions, we believe Justice should take the necessary steps to upgrade the capability of the Executive Office to perform effective evaluations of U.S. Attorneys' Offices. In addition, we believe the Executive Office should work with IAS to identify review areas where internal audits can supplement management oversight of U.S. attorneys' operations.

FULL PERFORMANCE EVALUATIONS HAVE NOT BEEN PERFORMED

The Executive Office has not been able to fulfill its responsibility to perform evaluations of U.S. Attorneys' Offices and consequently Justice management has not received routine feedback on the effectiveness of U.S. attorneys' operations or areas needing improvement. Although Executive Office officials have been concerned with the lack of evaluative capability and have proposed to the Deputy Attorney General, as early as 1978, that this function be upgraded, it has not received the necessary increase in personnel. In an effort to augment its capability, the Executive Office has enlisted the help of senior assistant U.S. attorneys to, on an experimental basis, supplement its field activities staff in reviewing U.S. Attorneys' Offices' operations.

Since 1953, the Executive Office has been carrying out a mission to maintain a check upon the overall performance of the U.S. Attorneys' Offices. This is conducted by the field activities section, whose mission statement provides that it is:

"* * * responsible for evaluating the performance of U.S. Attorney offices in terms of the U.S. attorneys' stewardship of their statutory responsibilities and duties and their fidelity to the priorities and programs of the Attorney General, for providing onsite litigative and administrative assistance, and for identifying or verifying problems and recommending correcting action."

Although the mission of this section relates mostly to performance evaluation, the work performed has not represented detailed evaluation or management reviews. We reviewed 21 written evaluation reports that were prepared during 1978 and 1979 and found that they dealt mostly with observations regarding the qualifications of U.S. attorneys and their staffs and with organizational and administrative aspects of the U.S. Attorneys' Offices. The reports did not indicate that detailed evaluations of litigative and program goals of the Department had been made.

In addition, not all evaluations, or "visits" to U.S. Attorneys' Offices, resulted in written reports. In a May 1980 report 1/ on the activities of the Executive Office, Justice's IAS stated that written reports had not been prepared for 31 of the 92 visits made to U.S. Attorneys' Offices by the field activities section during the period from May 1977 through June 15, 1979. The IAS also stated that even when reports were prepared, they had not been routinely sent to the U.S. attorneys. The U.S. attorney whose office was evaluated, however, was provided a letter containing a capsulized version of the report. However, the U.S. attorney was not required to respond to the recommendations made in the letter and no followup was conducted by the Executive Office.

Our discussions with the Assistant Director for Field Activities also confirmed these limitations. He said that prior to 1976, evaluations followed a formalized evaluation program covering most of the litigative and administrative functions of U.S. Attorneys' Offices. However, he said that the staffing for this function has been reduced to two attorneys and the basic function of the section has been to visit new U.S. attorneys and to familiarize them with the procedures and general administration of the office. He acknowledged that their evaluations are informal and do not entail detailed reviews of operations. He said that since the May 1980 internal audit report, written reports of all visits

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1/U.S. Department of Justice, Efficiency and Effectiveness of the Executive Office For United States Attorneys (Washington, D.C.: May 1980.)

have been prepared and U.S. attorneys are requested to inform the Executive Office of actions taken on any recommendations made.

The Executive Office has been unsuccessful in upgrading its evaluation function

We also discussed the limitations of the field activities section and the need for onsite evaluations of U.S. Attorneys' Offices with the acting Deputy Director of the Executive Office. He told us that the Executive Office has been concerned over the inability to conduct detailed evaluations of U.S. Attorneys' Offices and proposed to the Deputy Attorney General as early as March 1978 that this section's capability be upgraded. According to this official, no action was taken on the proposal until the fiscal year 1981 budget submission when the Executive Office received departmental approval for six additional positions. Because of cutbacks in the U.S. attorneys' overall budget, however, the intended positions for this function were deleted.

The Executive Office's 1978 proposal for upgrading the field activities section's evaluations provided for both systematic evaluations as well as the capability to assist in the orientation of newly appointed U.S. attorneys and special projects. It also called for increased staff from the current level of 2 attorneys to 10 professionals. The recognized need for increased evaluations was also demonstrated in an August 8, 1980, memorandum from the Acting Director of the Executive Office to the Deputy Attorney General which pointed out:

> "Since the phasing down of our evaluation activities in the last year of the previous Administration and throughout the present Administration, I have become increasingly concerned over our lack of information as to developing problems which, in some instances, could have been averted or tempered if we had had our representatives making evaluation visits to the field on a regular basis."

To implement its proposed upgrading of the field activities section, the Executive Office believed it was necessary to increase the staffing to 12 professionals--attorneys and auditors. The Office's fiscal year 1981 budget request provided for six additional positions to begin upgrading and it was planned to seek additional positions in future budget requests. An Executive Office official told us, however, that although Justice and the Office of Management and Budget (OMB) approved the six additional positions, the Congress cut back the Executive Office's overall

budget request, and the additional positions for the field activities section were not filled. Executive Office officials told us that Justice did not request additional positions for fiscal year 1982.

In the absence of sufficient staffing the field activities section has been unable to routinely review and monitor U.S. Attorney Office operations and, consequently, the Executive Office and Justice management officials have not had sufficient information to oversee operations and resolve problems. Of the seven U.S. Attorneys' Offices included in our review, for example, only two had been reviewed by the field activities section during the 3 years previous to our review. One evaluation, conducted in April 1981, evidences the need for routine reviews. This was the first review conducted by the Executive Office of this U.S. Attorney's Office since 1978. Among the conclusions drawn from this review were that

--there was no effective case management system,

--the office was considerably behind in monitoring collection payment cases and in collecting debts due the United States,

--there were indications that assistant U.S. attorneys have failed to promptly act on some investigations referred by the FBI, and

--the office operated under a loose unstructured legal operation with broad discretion delegated to individual assistant U.S. attorneys.

As concluded in the field activities section's report, the new U.S. attorney, when appointed, will have to give immediate attention to problems identified in this office's operations. Thus, rather than assuming responsibility for an efficiently run district the new U.S. attorney will have to immediately attend to problems which were unknown even to the Executive Office.

In an effort to augment its field activities section the Executive Office, in April 1981, enlisted the assistance of 12 senior assistant U.S. attorneys to supplement the field activities staff in visiting and reviewing U.S. Attorneys' Offices. According to the Executive Office, 82 U.S. Attorneys' Offices had been reviewed as of August 16, 1982, and reviews were scheduled for the other 12 offices during September 1982. The primary objective is to obtain a baseline assessment of the operations and personnel of each office before new U.S. attorneys are appointed in order to orient the new appointees and identify any major problems they may

encounter or need to resolve after assuming office. According to the Assistant Director for Field Activities, this effort and the recruitment of senior assistant U.S. attorneys is necessary because, with the current staffing, his office has not been able to keep current on the operations of each U.S. Attorney's Office.

The Assistant Director said that the use of senior assistant U.S. attorneys to review U.S. attorney operations may continue after this initial round of visits is completed. He does not foresee any permanent increase in the staffing of the field activities section and believes some supplemental assistance will continue to be necessary in order to routinely visit each office. He recognizes such visits are not detailed evaluations and the assistants are not trained in evaluation or audit techniques, but he believes their assistance is valuable and such visits will provide at least a minimum oversight and feedback on how U.S. Attorneys' Offices are functioning.

GREATER COVERAGE BY INTERNAL AUDIT CAN SUPPLEMENT OVERSIGHT

Justice management can receive greater feedback on U.S. attorneys' operations through more extensive coverage of their operations by Justice's IAS. Our review showed that IAS has not conducted extensive reviews of U.S. Attorneys' Offices. Although IAS officials expressed a willingness to provide such audit service, they told us greater coverage has not occurred because of other priorities. In addition, they said that although they have sought input from the Executive Office on areas where audit coverage is needed, no input has been received. Because of the inability of the Executive Office's field activities section to review all U.S. Attorneys' Offices and because prudent management practices require independent examination of Federal programs, we believe that Justice needs to obtain greater coverage of U.S. Attorneys' Offices by IAS.

Since 1975 IAS has issued 11 reports dealing with U.S. attorneys' operations. As shown below, these have dealt primarily with administrative operations of specific offices and/or other related matters.

--Six reports dealt with the Docket and Reporting System in six different U.S. Attorneys' Offices.

--Two reports dealt with compliance with Justice orders in two U.S. Attorneys' Offices.

--Two reports dealt with administrative activities in two U.S. Attorneys' Offices.

--One report dealt with the acquisition of transcripts by selected U.S. Attorneys' Offices.

We discussed this coverage with officials from IAS. They acknowledged that in the past IAS had not extensively covered U.S. attorneys' operations. They explained that due to limited resources and the need to provide audit services throughout the entire Department, they have concentrated on other organizations within Justice. In addition, they said that in planning future audit efforts they requested input from the various divisions and offices throughout Justice, including the Executive Office. According to IAS officials, no suggestions or requests have been received from the Executive Office or other Department managers for work to be conducted at U.S. Attorneys' Offices and consequently they have not emphasized this area.

We discussed this situation with the Acting Deputy Director of the Executive Office. He said that the Executive Office has not recommended audit areas to the IAS because it was believed that review responsibilities for U.S. Attorneys' Offices rested with the Executive Office and not IAS. Although he acknowledged that the Executive Office has not in the past been able to effectively review U.S. attorneys' operations, he said that the Executive Office has not discussed the possibility of IAS assistance. He agreed however that IAS could effectively evaluate many U.S. attorney operations, such as case management, collection of fines, penalties and judgments, and program effectiveness.

OMB Circular No. A-73, "Audit of Federal Operations and Programs", requires all agencies of the executive branch to conduct financial and compliance reviews, economy and efficiency reviews, and program results reviews. The circular also points out that each agency should establish procedures requiring periodic review of its programs and operations to determine the coverage, frequency, and priority of internal audits. Among factors to be considered are

--the dollar magnitude and sensitivity of the program;

--timeliness, reliability, and coverage of audit reports prepared by others; and

--management needs to be met, as developed in consultation with responsible program officials.

We believe these factors dictate greater audit coverage of U.S. Attorneys' Offices. By the nature of their operations, U.S. attorneys represent the Attorney General as the chief Federal law enforcement official at the local level and directly affect the success of Federal law enforcement efforts. During fiscal year

1981, the 95 U.S. Attorneys' Offices accounted for about 63 percent of the personnel of all the litigating divisions within Justice and handled approximately 93 percent of the criminal case workload and approximately 79 percent of the civil case workload. Despite the magnitude and impact that U.S. Attorneys' Offices have on Federal law enforcement, evaluations of U.S. Attorneys' Offices have not been routinely conducted. The Executive Office's staff--only two attorneys assigned to this function--has not been able to conduct detailed reviews of U.S. attorneys' operations.

CONCLUSIONS

Onsite evaluations of U.S. attorneys' operations are necessary to provide the Attorney General and other management officials with feedback on the manner in which operations are conducted by U.S. attorneys as well as to identify areas needing improvement. Although the field activities section within the Executive Office has this responsibility, it has not been able to effectively perform evaluations of U.S. Attorneys' Offices. This section has been understaffed and its role relegated to visiting U.S. attorneys and making general observations about office operations.

Although management can also receive feedback on U.S. attorneys' operations through reviews made by IAS, our review showed that detailed internal reviews of U.S. attorneys' operations have not been conducted. Even though the IAS has sought input from the Executive Office in identifying potential review areas which would assist management in monitoring operations, no input has been received.

Onsite evaluations are a requisite for proper management control of U.S. attorneys' operations. Without feedback, management cannot monitor the consistency in the performance of U.S. Attorneys' Offices or identify the need for improvements. If the Executive Office is to maintain the responsibility to perform such evaluations, it is necessary to upgrade the staffing of this section to allow for systematic and routine evaluations. In addition, the IAS can also be an effective resource for evaluating U.S. attorneys' operations and supplement the Executive Office's efforts. In this respect the Executive Office should work together with IAS to identify review areas where IAS can supplement this function.

RECOMMENDATIONS TO THE ATTORNEY GENERAL

We recommend that the Attorney General upgrade the capability of the Executive Office to perform systematic evaluations of the performance of U.S. Attorneys' Offices and require the Executive

Office to work with the IAS to identify review areas where internal audits are needed to supplement management oversight of U.S. attorneys' operations.

AGENCY COMMENTS AND OUR EVALUATION

Justice agreed with our recommendation that the Executive Office's capability to evaluate U.S. Attorneys' Offices' operations be upgraded but said that the budget climate is austere for fiscal year 1984. As an alternative to requesting an increase for improving the Executive Office's evaluation capability, Justice said it has taken steps to use existing resources by using senior assistant U.S. attorneys to supplement the field activities staff in conducting evaluations. Justice recognized that this does not provide for a permanent solution. Justice also noted that the Executive Office has been given formal responsibility to perform inspections and reviews, and that the Department's internal audit staff (IAS) will continue to seek input from the Executive Office on areas where internal audits can be of assistance to management in overseeing U.S. attorney operations.

While we recognize the austere fiscal climate, we believe Justice should continue its efforts to upgrade its field evaluation capabilities. Meanwhile, we believe the use of assistant U.S. attorneys to supplement the Executive Office's field activities staff will provide needed feedback on U.S. Attorneys' Offices' operations.

Although the Department pointed out IAS' continued involvement with the Executive Office in planning audits, it did not address our recommendation that the Executive Office be directed to work with IAS and determine how to maximize its capabilities to supplement management oversight of U.S. Attorneys' Offices. We continue to believe that Justice should go one step further by requiring the Executive Office to coordinate its field evaluations with the IAS and utilize, to the extent possible, its resources and capabilities. We believe such steps are particularly important because, as acknowledged by Justice, (1) the Executive Office does not have the resources and it is unlikely that additional resources will become available under the current budget climate and (2) the Executive Office is formally charged with the responsibility to inspect and review the operations of U.S. Attorneys' Offices. We believe the delegation of formal responsibility to the Executive Office carries with it the obligation to take the initiative and utilize available resources to conduct meaningful evaluations and provide management with the necessary feedback to oversee the operations of U.S. Attorneys' Offices.

CHAPTER 6

SCOPE AND METHODOLOGY

Our review of the manner in which Justice manages the use of prosecutive discretion was requested by Senator Max Baucus.

SELECTION OF LOCATIONS AND WORK PERFORMED

The 95 U.S. Attorneys' Offices are located in the respective 95 Federal judicial districts and differ in personnel size as well as workload. Justice's fiscal year 1979 Statistical Report on U.S. Attorneys' Offices showed the average number of assistant U.S. attorneys by office ranged from 2 to 114 and criminal cases filed ranged from 43 to 1,155 cases. Fifty-eight U.S. Attorneys' Offices, or 61 percent, had an average number of assistant U.S. attorneys ranging from 6 to 39 and were categorized by Justice as being medium to large offices. These 58 offices accounted for 20,713, or 67 percent, of the 30,653 criminal cases filed by U.S. attorneys during fiscal year 1979. In conducting our work we selected seven U.S. Attorneys' Offices from this category. The seven offices selected filed 3,534, or 12 percent, of all criminal cases filed by U.S. attorneys during fiscal year 1979. These seven offices accounted for approximately 12 percent of all criminal cases filed in fiscal year 1980 and about 13 percent of all criminal cases filed in fiscal year 1981.

U.S. Attorney Office	Average number of assistant U.S. attorneys	Criminal cases filed
Southern Ohio	15.6	248
Eastern Kentucky	11.0	217
Northern California	39.1	503
Eastern California	13.4	417
Southern Texas	33.1	1,134
Northern Texas	25.8	500
Maryland	24.8	515
Other offices		27,119
Total		30,653

Our selection of locations also represented distinct geographic sections of the country. These included two offices from the West, two from the Southwest, two from the Midwest, and one from the East.

At each location, we identified the prosecutive policies and practices followed in making decisions to decline prosecution, enter defendants into pretrial diversion, and enter into plea agreements. We reviewed and analyzed a sample of pretrial diversions occurring from October 1, 1977, through March 31, 1980, at the six offices included in our review that used this alternative to prosecution. The seventh office (southern Ohio) did not use pretrial diversion. In addition, we reviewed and analyzed a sample of immediate declinations and criminal cases disposed of through plea agreements during the period October 1, 1978, through March 31, 1980, at four (Maryland, southern Texas, southern Ohio, and northern California) of the U.S. Attorneys' Offices. During our review we decided not to review immediate declinations and plea agreements at the other three offices. We believed that further detailed case examination was unnecessary to substantiate the existence of disparate U.S. attorney prosecutive policies. However, we identified and reviewed office policies and examined office procedures and practices at these three offices.

We discussed office operations and management techniques, as well as prosecutive policies and practices, with the U.S. attorney and officials from each office. In each district, we spoke with Federal judges and representatives from the U.S. Probation Office, the Federal Public Defenders Office, State and/or local prosecutive agencies, and the Secret Service and Federal Bureau of Investigation. Comments from these officials were obtained on such topics as: U.S. attorney prosecutive policies and practices, case referral procedures, and coordination of prosecutive policies. We examined agency records and held discussions with Justice officials from the Executive Office for U.S. Attorneys and the Criminal Division. We reviewed the U.S. Attorneys' Manual, Justice regulations, internal audit reports, and a Justice study on U.S. attorneys' prosecutive policies and practices. In addition we researched and reviewed pertinent literature on Federal criminal law enforcement and prosecutive discretion.

SELECTION OF SAMPLE

We sampled pretrial diversion cases, immediate declinations, and cases involving plea agreements.

At the six U.S. Attorneys' Offices included in our review which used pretrial diversion as an alternative to prosecution we identified with assistance from personnel from each U.S. Attorney's Office the total universe of pretrial diversion defendants (580). We selected 367 defendants to review so as to achieve a

confidence level of 95 percent. In three districts we reviewed all diversions and in the other three we took a random sample.

U.S. Attorney Office	Pretrial diversions	
	Universe	Sample
Eastern Kentucky	14	14
Maryland	99	49
Northern Texas	186	134
Southern Texas	64	64
Eastern California	36	36
Northern California	181	70
Total	580	367

We sampled immediate declinations made during fiscal year 1979 and the first 6 months of fiscal year 1980 at four U.S. Attorneys' Offices. Using U.S. attorneys' files of declinations we identified the universe (6,348 cases) and randomly selected a total of 436 cases to review so as to achieve a 95 percent confidence level.

U.S. Attorney Office	Immediate declinations	
	Universe	Sample
Maryland	1,190	125
Southern Texas	3,110	86
Southern Ohio	991	100
Northern California	1,057	125
Total	6,348	436

Justice's management information system does not categorize criminal cases involving plea agreements and consequently a universe of such cases could not be identified. To ascertain the effect plea agreements have on judicial discretion, we selected and examined a random sample of cases where plea agreements were reached (226) in four U.S. Attorneys' Offices during the period October 1, 1978, through March 31, 1980. We used the universe of cases (3,154) terminated during this period.

U.S. Attorney Office	Calculated universe	Sample
Maryland	575	38
Southern Texas	1,745	75
Southern Ohio	373	79
Northern California	461	34
Total	3,154	226

APPENDIX I

United States Senate

COMMITTEE ON THE JUDICIARY
WASHINGTON, D.C. 20510

79 SEP 18 P2:37

September 17, 1979

Honorable Elmer B. Staats
Comptroller General
General Accounting Office
Washington, D. C. 20548

Dear Mr. Comptroller General:

As part of my ongoing oversight work dealing with Justice Department activities, a number of questions have been posed regarding the role, activities and oversight of the 95 U.S. Attorneys around the country. Many questions focus on the Executive Office for U.S. Attorneys within the Justice Department. I seek a report from the General Accounting Office that will answer the following questions:

1. What role does the Executive Office for U.S. Attorneys play in directing and monitoring the activities of the 95 U.S. Attorneys' Offices?

2. What type of controls or oversight does the Executive Office utilize to specifically evaluate these activities?

3. How does this organization interact with the Civil and Criminal Divisions of Justice in exercising oversight and direction of U.S. Attorneys' operations? 1/

4. What are the pros and cons of having career U.S. Attorneys appointed on the basis of merit as opposed to political appointment? 2/

5. Considering the fact that the Attorney General is also a political appointee, what control can or does such an official exercise over any U.S. Attorney beyond the power to recommend his removal?

1/Per agreement with the Senator's office, this report does not address civil litigation or the interaction of the Civil Division, the Executive Office and U.S. attorneys in conducting civil litigation.

2/Pursuant to agreement with the Senator's office, we did not analyze the pros and cons of merit selection of U.S. attorneys. As agreed, we reviewed hearings held in 1978 by the Subcommittee on Courts, Civil Liberties, and the Administration of Justice, House Committee on the Judiciary, on the subject of merit selection of U.S. attorneys, as discussed on page 2 of this report.

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6. What kind of management and oversight does the Executive Office have U.S. Attorneys perform relating to case declination, plea bargaining activities, pretrial diversion activities, and the like?

7. Could this unit's activites be absorbed by other organizational entities within the Justice Department?

Any further recommendations that you choose to make are most welcome. Agency comments are not required. The contact on my subcommittee will be Franklin Silbey. If for any reason, such as workload, the job cannot be immediately commenced, I am content to wait for a short while until adequate GAO personnel become available.

Thank you.

Sincerely,

Max Baucus, Chairman
Subcommittee on Limitations of
Contracted and Delegated Authority

DEPARTMENT OF THE TREASURY
UNITED STATES SECRET SERVICE
WASHINGTON, D.C. 20223
DIRECTOR

February 18, 1982

Mr. William J. Anderson
Director
U. S. General Accounting Office
441 G Street, N.W., Room 3866
Washington, D.C. 20548

Dear Mr. Anderson:

I read with interest the draft report prepared by your agency on the subject of the prosecutive policies of U. S. Attorneys.

I would like to comment on the contents of Chapter 2 which specifically deals with declination policies. In that chapter, the study group reached the conclusion that "declination policies need to be uniform, better coordinated with State and local authorities, and more consistent with Federal enforcement priorities."

On the issue of uniform declination policies, the Secret Service has always been somewhat skeptical of any attempt at standardization because the individual merits of a case tend to be forgotten. At the same time, we realize that ninety-four different U. S. Attorneys cannot be all things to all agencies and that a significant number of cases will, by necessity, go unprosecuted. It follows that our agency, just like every other Federal law enforcement agency, will have to share in the casualties because there are simply too many violators and too few prosecutors.

The Secret Service can accept this reality along with the proposal that it is now necessary to re-examine Federal declination policies on a nationwide basis. However, we would strongly urge that any new declination policy which originates from within the Department of Justice should not fail to take into consideration the individual merits of a case. A standardized questionnaire could be developed whereby prosecutors would be required to consider a range of issues before they could properly decline Federal prosecution. Some of the questions which I feel should influence their decision are as follows:

1) Does the alleged offender have a prior criminal history?

2) If so, does the alleged offender have a history for prior and similar offenses?

APPENDIX II

3) Is the offender known, or suspected, to have a history of drug addiction?

4) Did the investigation reveal a history of criminal activity not otherwise apparent in the form of a criminal record?

5) Is there any evidence to indicate that the alleged offender is part of a larger criminal conspiracy which would merit the investment of additional resources?

6) Will another law enforcement entity benefit from the prosecution of the alleged offender?

7) To what extent have others suffered from the commission of this crime?

8) What is the total dollar amount involved in this investigation?

9) Has the alleged offender provided a signed, sworn statement or an oral admission which implicates his or her guilt?

10) What is the likelihood that the alleged offender will enter a plea of guilty if Federal charges are pursued?

11) Is the offender a juvenile?

12) Was there a family relationship developed during the investigation that would complicate prosecution?

13) Is there a history of mental illness for the offender?

14) Are there any other compelling reasons why this case merits prosecution?

The above list of questions is by no means all-inclusive. It represents a variety of factors that the Secret Service would like to have considered before a U. S. Attorney's office elects to decline Federal prosecution. We believe that this process will help preserve the individuality of a case while avoiding the situation where a single element, such as the dollar amount, unduly influences the decision to decline prosecution.

Before leaving the topic of standardized or uniform declination policies, I would like to cite several examples where short-sighted declination policies would adversely affect our enforcement programs. Take, for instance, the example of a new counterfeit note that is being passed during the initial stages of a conspiracy to manufacture and distribute counterfeit currency. Our agents know from experience that the passers of new counterfeit notes are very often close to the manufacturer because they are first generation participants.

APPENDIX II

Therefore, it is extremely important that investigators pay careful attention to the passers in these situations. If, however, a U. S. Attorney elected to decline prosecution of an early note passer, because of the minimal dollar amount involved, this Service would lose invaluable leverage and momentum - both of which are key ingredients in a successful investigation.

Another example can be cited where it is important to look beyond the dollar amount associated with a criminal violation. It is not uncommon for distributors and passers of counterfeit currency to deal in small packages, less than $5,000.00. If U. S. Attorneys were encouraged to decline prosecution based on a standardized dollar amount, the Secret Service would again be hard-pressed to maintain the momentum of an investigation and to move quickly across a network of passers and distributors. We view the responsibility to detect and suppress the counterfeiting of currency as one that should be shared with the U. S. Attorneys. When an aggressive investigator is teamed with a resourceful prosecutor, the results speak for themselves.

On the issue of better coordination with State and local authorities, the Secret Service is of the opinion that all Federal remedies should be explored before a referral is made to a non-Federal entity. Throughout the draft report, there is little or no mention of one alternative which has been successfully used in a number of judicial districts. I am referring to the misdemeanor plan whereby qualifying offenders plead guilty to a misdemeanor charge before a U. S. Magistrate who has been designated as the sentencing authority. This plan is especially suited for those forgery investigations which call for an alternative course of action - something less than felony prosecution but more than outright declination. A number of our field offices have successfully participated in the magistrate plan (despite the lack of a misdemeanor forgery statute); however, many others have not been able to take advantage of the program because it is not widely implemented.

We would suggest that the Department of Justice explore the implementation of this alternative on a nationwide basis rather than the current policy where it is left to the discretion of the individual U. S. Attorney. In making this recommendation, we are not suggesting that the typical forgery case is suited to misdemeanor prosecution. On the contrary, Title 18, U.S.C. proscribes felony penalties for the forgery and fraudulent negotiation of U. S. Treasury checks and other obligations. Absent mitigating circumstances, violators of the forgery statutes should expect to face the full extent of the felony penalties as set forth in the Criminal Code. The misdemeanor or magistrate plan would simply constitute an alternative to, not a replacement for, felony prosecution.

Although concurrent jurisdiction cases should be referred to State or local authorities when circumstances permit, all Federal remedies should have been explored. State and local authorities have their own set of priorities where, they too, have to contend with limited resources.

APPENDIX II

One Assistant District Attorney was quoted during the study to say that he was reluctant to prosecute cases declined by the U. S. Attorney because he did not want to handle someone else's "leavings." I suspect that many of his peers share the same sentiments, particularly if the vast majority of referrals represent low priority cases. For this reason, I am less than optimistic that State and local prosecutors will be able to take up where the Federal system leaves off - a conclusion that was not necessarily drawn by the study group.

Finally, on the issue that declination policies should be more consistent with enforcement priorities, the Secret Service would hope that any standardized declination policy would be sensitive to our priority enforcement programs: protective intelligence and counterfeiting investigations. Both are unique program areas which require an investment of resources on the part of the Secret Service. As previously stated, our success in these areas depends to a large extent on the support received from the ninety-four different U. S. Attorneys throughout the Federal system.

Thank you for the opportunity to respond to your draft report. I will be more than happy to entertain any questions generated by these comments.

Sincerely,

John R. Simpson
Director

APPENDIX III

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS
WASHINGTON, D.C. 20544

WILLIAM E. FOLEY
DIRECTOR

JOSEPH F. SPANIOL, JR.
DEPUTY DIRECTOR

February 25, 1982

Mr. William J. Anderson
Director, General Government Division
United States General Accounting Office
Washington, D. C. 20548

Dear Mr. Anderson:

In your letter of January 29, 1982, you ask for my comments concerning the draft of a proposed report entitled "Oversight and Uniformity of U.S. Attorneys' Prosecutive Policies Needed."

In studying this report, I note that much of it concerns policy matters which, though they may impact on the federal court caseload, are matters basically committed to Department of Justice control. This is particularly true of Chapters 1, 2, 5 and 6 which deal generally with the overview of United States attorneys' offices and with declination policies. As to such matters, it would be inappropriate for me to comment.

In respect to Chapter 3 relating to pretrial diversion, we do have an active interest since probation officers in the judicial branch cooperate in supervising these cases, and the success of the program largely hinges on their efforts. Also, cases diverted from the criminal pipeline lessen the criminal case backlog in the courts.

Appended hereto is a page from my Annual Report of the Director, 1981, verifying that for the last five years, the number of pretrial diversions has leveled off. We would, therefore, agree that United States attorneys' offices are not increasing their use of the program and that serious attention should be given the program as an alternative to prosecution in appropriate cases.*

I make two suggestions in this regard. One is that the United States Attorney should establish some guidelines on the subject and communicate with the probation offices with respect thereto. We note that this suggestion was made by one probation officer (Draft, p. 37). Also, a federal public defender made a similar observation with respect to a lack of policy guidance (Ibid).

*GAO Note: The enclosure has been deleted.

GAO Note: Page numbers cited in this appendix were changed to correspond to the final report.

APPENDIX III

A factor even more important, however, relates to the absence of pretrial services agencies which are staffed and fully equipped to implement the preliminary investigatory program essential to make informed decisions on the diversion alternative. As you know, we have current authority to establish on a demonstration basis ten pretrial service agencies (28 U.S.C. § 3152). Our experience has been that these agencies not only can substantially reduce bail jumping with its consequent risks to the community, but that at least four of the ten districts (Michigan (E), Maryland, New York (S) and Texas (N)) have been closely involved in the pretrial diversion program in cooperation with the United States attorneys' offices. The Chief of my Pretrial Services Branch, Guy Willetts, has described this program as highly successful in those four districts.

Unfortunately, pretrial services officers are not available for this purpose elsewhere at present. Legislation has been pending to extend this program to other courts through S. 923 (which has passed the Senate) and H.R. 3481 (pending in the House). Until we have this legislation, however, the task of intelligently and quickly identifying and investigating prospects for pretrial diversion will remain difficult, and particularly so where a busy United States attorney undertakes the task without adequate assistance from pretrial service officers. 1/

I might offer also a brief comment on Chapter 4 with respect to plea agreements. As you observe, the court cannot, under Rule 11(e)(1), Federal Rules of Criminal Procedure, participate in discussions leading up to the agreement. Therefore, it would be inappropriate for me to comment on the policies of individual United States attorneys in negotiating such pleas or their procedures up to the time that the agreement is disclosed to the court.

However, the report at one point (p. 59) observes "that plea bargaining in the federal system severely limits the range of permissible punishments available to a judge" and concludes "that people with similar criminal histories who are convicted of similar offenses should not receive markedly different sentences merely because they were more successful in plea bargaining." I would not quarrel with the latter conclusion.

But I would point out in respect to the first observation that Rule 11(e) was carefully crafted to allow the judge properly to inform himself before passing sentence and does not contemplate that he abrogate his normal sentencing function. Under Rule 11(e)(2), the court may order the investigation and preparation of a presentence report by the probation office of the court and defer acceptance or rejection of the agreement until there has

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1/We did not examine the merits of pretrial services agencies as part of our work and consequently cannot respond to the Administrative Office's views.

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been an opportunity to consider the presentence report. This invokes the procedures of Rule 32(c)(3). If the plea agreement includes a specific sentence as the appropriate disposition of the case, the court can weigh it against the probation office's presentence report, and reject the agreement if it is disparate pursuant to Rule 11(e)(4). If the agreement does not contain a sentence recommendation, the court still has the presentence report by which to measure the appropriate sentence and can make further inquiries under Rule 11(f). In short, while I do not comment on the general merits of plea agreements, I set forth these further observations to offset the impression which might be gleaned from Chapter 4 that the judges have no modulating influence in avoiding disparities under the present system.

Sincerely,

William E. Foley
Director

Enclosure

APPENDIX IV

U.S. Department of Justice

Washington, D.C. 20530

MAR 1 5 1982

Mr. William J. Anderson
Director
General Government Division
United States General Accounting Office
Washington, D.C. 20548

Dear Mr. Anderson:

This letter is in response to your request to the Attorney General for the comments of the Department of Justice (Department) on your draft report entitled "Oversight and Uniformity of U.S. Attorneys' Prosecutive Policies Needed."

The General Accounting Office (GAO) report discusses the use of prosecutive discretion by U.S. Attorneys relating to declination policies, pretrial diversion policies and practices, and plea negotiations. In addition, GAO discusses the need for systematic evaluations of U.S. Attorneys' operations to determine how efficiently and effectively they operate. In responding to the report, the Department's comments are organized to parallel the chapters of the report.

Chapter 2 - Declination Policies

This chapter contains a number of findings relating to the declination policies of U.S. Attorneys' offices. A review of these findings reveals that they either relate to matters on which remedial actions have already been taken or are essentially unfounded.

GAO's first finding states that "Different declination policies cause disparate treatment of offenders." The data gathered by GAO supports this statement with respect to certain property crime offenses. However, we do not view such a situation as being necessarily a critical finding. The policies of the Department are designed to allow each U.S. Attorney to develop office priorities and criteria for resource allocation that are most responsive to the serious crime problems in that district. A result of this policy will be, in some instances, differences between districts in the way Federal prosecutions are brought for particular types of offenses.

There are several reasons why a particular type of offense committed by a particular type of defendant will be more deserving of Federal prosecution in one Federal district than in another. For example, a certain type of crime may be of special concern to citizens of one district. It may, however, be a cause of considerably less apprehension on the part of persons living in other sections of the country. In addition, local law enforcement may be fully capable of responding to a particular type of offense in one locality and ill equipped in another. In the latter situation, it may be appropriate for a greater portion of Federal law enforcement resources to be devoted to that type

GAO Note: Page numbers cited in this appendix were changed to correspond to the final report.

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of offense than in the district where local law enforcement is better able to deal with the problem. The result of such a situation may be, if only the Federal cases are examined, that "declination policies cause disparate treatment of offenders." However, if the Federal, State, and local criminal justice system is observed as a whole, the conclusion reached will be altogether different.

In addition, the manner in which a particular offense is treated in a given district may depend upon where it fits into the relationship between Federal law enforcement resources and the overall level of crime in a district. In districts with comparable levels of crime there may be different levels of Federal law enforcement resources available. Or, in districts with similar levels of particular type of crime, there may be significant differences in other types of crimes. The other types of crimes may be of a high priority and may cause a draining of available Federal law enforcement resources. For example, this situation could exist in a district that has an unusually high level of drug smuggling, to which Federal law enforcement agencies may have to devote significant resources, resulting in lower priorities to other types of offenses. In this regard, the Drug Enforcement Administration points out that while Federal law enforcement priorities and declination policies should be consistent within a judicial jurisdiction, it is equally important in enforcement of the Controlled Substances Act to allow variances in prosecutive thresholds in different geographical areas. Declination policies in the drug enforcement area presently differ from one judicial district to another and should continue to allow for regional differences.

In discussing the differences that occur across districts, GAO contrasts the treatment given to apparently comparable offenses in different districts. We are concerned that the omission of relevant variables in making these case comparisons has affected their conclusions. Earlier, we discussed some of the reasons why identical treatment of identical offenses may not be appropriate. It is also important to note that the nature of the offense is an insufficient basis for making comparisons. In assessing the appropriate treatment of a case, the prosecutor must consider other factors to which GAO gives only passing attention. The most important of these are:

1. Criminal history. The Criminal Division has encouraged the U.S. Attorneys to adopt a practice increasingly common among local prosecutors, which is to target career criminals for special handling. This concept focuses on criminal record rather than the offense. If a targeted career criminal has committed a comparatively minor offense and cannot be prosecuted locally, Federal attorneys have been urged to accept the case even if it does not meet the usual guidelines.

2. Evidence. The nature of the available evidence is a critical factor in the prosecutors' decisions. Although GAO provides some information on declination reasons in certain comparisons (e.g., page 31), most of the time they do not make it clear whether evidentiary problems may have affected the disposition of the case (e.g., pages 9, 39, and 49).

3. Special aggravating or mitigating circumstances. In considering only the nature of the offense, GAO does not deal with the possibility that special circumstances influence the outcome of the case. For instance, such factors

as a family emergency or payment of restitution could encourage more lenient treatment; use of a weapon or public concern could suggest a more strict disposition.

4. Deterrent effect of minimal prosecution. GAO seems to have ignored the difference in the deterrent effect of minimal prosecution as compared to no prosecution. We believe that every "blanket declination" policy has to have a set of exceptions, e.g., for offense frequency rather than severity. Even the most minor offense category may require some prosecutorial attention (or the use of civil or administrative remedies) when the frequency of the offense increases to unreasonable levels.

With respect to actions being taken in this area, Federal priorities in general, and declination policies in particular, are now being established in every district in the context of the district Law Enforcement Coordinating Committee, which committees are discussed further below.

The second finding of the GAO report is that "Better coordination [is] needed with State and local authorities." As the GAO report notes, the need for more effective coordination among Federal, State, and local law enforcement authorities was recognized by the Attorney General's Task Force on Violent Crime. In response to the report of that Task Force, the Attorney General, on July 21, 1981, issued an order instructing each U.S. Attorney to establish a Law Enforcement Coordinating Committee. As of March 1, 1982, 50 U.S. Attorneys have had the first meeting of their Law Enforcement Coordinating Committees. In the remaining districts, the process of establishing the committees is well underway, except for those few districts in which the transition to new U.S. Attorneys is not complete. In those latter districts, the Law Enforcement Coordinating Committee program will be initiated promptly by the new U.S. Attorney soon after assuming office. From the reports of the first meetings that have taken place, it is evident that the local response to these committees has been enthusiastic. In addition, the committees have served as a forum for the exchange of operational and administrative information that has provided all of the participants with new and valuable perspectives on the crime and law enforcement situation in each district and should result in a more effective use of investigative resources. A regular and frank dialogue between prosecutors and investigators will greatly enhance the mission of these equal partners in the criminal justice process.

A number of cooperative activities already have been adopted in a number of districts. This includes joint operational activities and undertakings such as the cross-designation of Federal and State or local prosecutors. Moreover, as the draft report briefly notes, another function of the Law Enforcement Coordinating Committees is to develop formal procedures for cooperation between Federal, State, and local prosecutorial and police agencies. The development of these new policies and procedures should be one of the major accomplishments of the Law Enforcement Coordinating Committee program.

We wish to point out what we conceive as a serious fallacy in GAO's severe criticism of U.S. Attorneys for failing to develop declination guidelines in cooperation with State and local authorities (see, for example, pages 13-15), while at the same time implying that there should be a single national policy for the Federal system. GAO's description of the negative reception of local prosecutors to an inflexible announcement of a U.S. Attorney's guidelines

demonstrates the problem inherent in rigid national guidelines. If Federal prosecution guidelines are developed through consultation with local authorities, the result could conceivably be a different policy for each county in a U.S. Attorney's district. These variations would serve, rather than hinder, the interests of justice. The U.S. Attorneys must be able to consider State and local laws and enforcement resources in developing their prosecution policies (State firearms laws, for instance, vary widely and create different needs for Federal prosecution).

Also, with respect to Federal, State and local coordination efforts, we are concerned that GAO is apparently under the implicit assumption that all cases declined Federally and referred locally will be prosecuted locally, not recognizing that the local prosecutors are free to choose exactly what they will prosecute, and may actually resent being referred only cases of a minimally significant nature. This factor certainly should be, and most likely is, considered by U.S. Attorneys on each case declined in favor of local prosecution. GAO also states that U.S. Attorneys declined to prosecute 57 percent of all criminal complaints because of "heavy workloads, insufficient staff, and/or because the complaint lacks prosecutive merit." The obvious inference is that all declined cases with concurrent jurisdiction should be referred to State and local agencies. No acknowledgement is made, however, of State and local agencies' "heavy workloads and insufficient staffs." Again, local coordinating committees may well remedy these concerns.

In consideration of our comments above, we believe that the problem indentified in the GAO report of inadequate coordination between Federal, State and local law enforcement is being fully resolved through establishment of the Law Enforcement Coordinating Committees, with implementation of these committees well underway.

The next finding of the report reads "U.S. Attorneys' declination policies significantly differ from Federal enforcement priorities." In this section GAO asserts that "until U.S. attorney declination policies are consistent with law enforcement priority designations, their full benefits will not be achieved because agents will still . . . investigate and U.S. Attorneys' Offices will continue to prosecute cases that fall between the U.S. attorney's declination limit and the established law enforcement priority limit" (pages 19-20). Although it is not always made clear, the concern that apparently underlies GAO's statement is that investigators and prosecutors do not adequately coordinate their policies. While this is a valid concern, GAO exhibits some confusion as to the purpose of national priorities. National priorities are not intended as blanket declination policies. They are intended as a framework to assist in identifying the most important cases. However, cases that do not meet the priority designations may still be quality cases. The suggestion that U.S. Attorneys should adopt blanket declination policies consistent with the Federal Bureau of Investigation's priorities (see page 18) fails to recognize that priorities and guidelines serve different purposes.

The development of Federal enforcement priorities is being accomplished through the District Law Enforcement Plans. The plans are a part of the overall Law Enforcement Coordinating Committee program. The draft report takes only brief note of these plans. The most important purpose of these plans is to assure that in each district Federal investigative and prosecutorial agencies will be proceeding with the same priorities. These priorities will differ

from district to district. In addition, they will take into account, but will not mirror, national law enforcement priorities of either the Department or the Federal investigative agencies. The plans will be developed through a process of consultation between the U.S. Attorneys and the local heads of Federal investigative agencies, plus consultation between the Department in Washington and headquarters elements of the Federal investigative agencies. Through this process of consultation in the development of the plans, it is expected that all agencies will express a willingness and desire to adhere to them. This procedure should result in an increase in the efficiency and effectiveness of Federal law enforcement in every district.

The final finding of this section reads "Better data needed to facilitate coordination of U.S. Attorneys' declination policies and law enforcement priorities." The report finds that the Department does not collect information in sufficient detail concerning the work and workload of U.S. Attorneys' offices. It focuses particularly on the dollar amounts involved in a variety of criminal offenses.

It should be noted first that the centralized collection of data by the Department is not a cost-free endeavor. Resources that U.S. Attorneys' offices allocate to the collection and transmission of data to Washington concerning the activities of their offices are resources not used to prosecute criminals. In a time of limited resources, this consideration should not be overlooked. Nevertheless, the Department has recognized the importance of complete and adequate management information and statistics concerning the operation of U.S. Attorneys' offices. Such information allows the Department to both provide proper oversight of U.S. Attorneys, and give U.S. Attorneys the information necessary to properly manage their offices. As a result, the Department has embarked upon a major program to provide U.S. Attorneys' offices with a better management information system, referred to as the Prosecutor Management Information System (PROMIS). Implementation of the system is underway now. This system will provide more complete and more reliable information on both civil and criminal matters, cases and collections activities.

Secondly, a considerable amount of information on the priorities and activities of U.S. Attorneys' offices and other Federal investigative agencies is now being obtained through the reports on the Law Enforcement Coordinating Committee program. These reports are being used both by the U.S. Attorneys to properly manage the Law Enforcement Coordinating Committee in their district and by the Department in Washington to oversee the program as a whole.

Through these new management information sources, the Department expects that it will have all the necessary information to properly oversee Attorneys' offices in the exercise of their prosecutorial functions. In addition, U.S. Attorneys will have the information they need to properly manage their offices and programs.

With respect to the recommendations to the Attorney General cited in this section, the foregoing discussion has established that there is no need to create uniform, nationwide declination policies. Indeed, the imposition of such uniform national policies would do more harm than good. In addition, the recommendation that the Attorney General monitor and evaluate the Law Enforcement Coordinating Committees to ensure that concurrent jurisdiction matters are properly handled is currently underway. This effort will continue to receive careful and close attention by the Department. The third recommendation, that all U.S. Attorneys be required

to report more adequate information on their caseload to the Department, is partially implemented through the Law Enforcement Coordinating Committees and will be more fully implemented via the PROMIS program.

Chapter 3 - Pretrial Diversion

GAO's evaluation of pretrial diversion is in error in that it fails to recognize certain underlying principles upon which the program was begun. To wit:

(1) Pretrial diversion was intended as an "additional tool to increase their [U.S. Attorneys'] flexibility in prosecutional decision-making". (See Departmental comments on S-2705 and related Bills). If the Department has failed by "only" providing broad guidelines and supervision, it is not by omission, but by design. The widely varying criminal caseloads found in 95 districts requires an ability on the part of each U.S. Attorney to meet his district's own special needs (and the requirements of his court) by adopting necessary local rules. Accordingly, we perceive the establishment of local policies--policies that fall within the Department's guidelines--as an appropriate and proper result. It is not the goal of this office to impose, from afar, detailed guidelines which will only restrict and hinder the development of the program. The conditions that make this program effective, particularly the availability of trained personnel to screen individuals for admission and supervise them thereafter, cannot be known and monitored by this office for every U.S. Attorneys' office and suboffice.

The amount of discretion left to prosecutors in these matters is relatively small considering the wide discretion they enjoy in obtaining indictments, filing civil suits and otherwise exercising the authority needed to effectively run their office. The trend has been, and should continue, as one designed to enhance the Federal officers' ability to be flexible in meeting local differences and not in imposing Federal standards on unique local circumstances.

(2) The Department's program is offender oriented, not offense oriented. The goal is to identify offenders who have not adopted a pattern of criminal behavior, and who would therefore be most susceptible to rehabilitation early in the criminal justice process. Any comparisons by type or quantity of offense are irrelevant. The successfully run program is one in which trained social science personnel review the offenders at an early stage and attempt to screen out persons best suited for community based rehabilitation programs, while allowing those who have slipped into the criminal subculture to face trial and sentencing.

(3) To avoid allowing pretrial diversion becoming an outlet for punishing offenders whose cases are of insufficient merit for trial, or, allowing the program to simply act as a "dragnet" for the "clients" the administrators of many social programs seek, U.S. Attorneys are asked to only select cases for diversion that could be successfully prosecuted. Any question of the sufficiency of use of the program must be in relation to prosecutable cases worthy of trial, not in relation to a bulk figure of criminal referrals or declinations.

Chapter 4 - Plea Negotiation

This chapter discusses plea negotiation practices of U.S. Attorneys. It first should be noted that the term "plea bargaining," which is used throughout this chapter, is not an accurate label for the process under discussion. The activity

of plea negotiations, which may or may not result in plea agreements, does not result in a "bargain" for either party. Rather, if properly employed, it results in a proper disposition of a criminal case without the necessity of an expensive and time-consuming trial. Limited Government resources make it impossible to prove at trial every criminal violation that the Government has sufficient evidence to sustain. In addition, going forward with a multiplicity of charges in many instances would not serve the cause of justice. The term plea bargain carries a pejorative connotation and the use of it decreases the level of objectivity of the report. 1/

The first finding of this chapter is that "U.S. attorneys differ in the types of plea bargains they allow." There are a number of necessary and proper reasons for plea negotiation practices to vary from one district to another. First, such differing practices reflect an effort by Federal prosecutors to fairly apply the complex Federal criminal law to a wide variety of facts and circumstances that arise in the different areas of the United States. Not only does this country encompass many different regions with different needs and different values, but the Federal criminal law itself is a convoluted concatenation of confusing criminal sanctions. The urgent need to rationalize the Federal criminal law is one reason the Department so strongly supports enactment of the proposed Federal Criminal Code. In the meantime, U.S. Attorneys are faced with the necessity of applying the statutes as they now stand to a wide variety of courses of conduct that constitute criminal behavior. In the present circumstance, discussions with defendants concerning possible pleas of guilty to certain charges, even though other charges technically might be possible to prove as well, are entirely proper.

The Federal Bureau of Investigation points out that it is the U.S. Attorneys who are most knowledgeable of the prosecutive merits of a case and any established specific plea negotiation policies would be neither practical nor advisable. Retention of substantial prosecutorial discretion by U.S. Attorneys is essential. This is exemplified in the instances of organized crime cases and cooperative subjects, who are in fact confidential sources. The potential information available via plea negotiation often results in "ascending the criminal conspiracy ladder." Concessions are necessary to permit utilization of such sources in penetrating highly complex and sophisticated organized crime and undercover operations.

With respect to the disparity in procedures that different U.S. Attorneys employ, this is most often the result of disparate sentencing practices employed by the Federal district courts involved. Some courts will accept different types of pleas than others. In addition, certain courts or judges are known to impose differing levels of sentences for the same conduct. U.S. Attorneys indeed may be promoting fairness and uniformity by adopting differing plea negotiation practices where those practices have the effect of offsetting the differing sentencing practices of the judges involved. It also should be noted that local needs and values vary around the country, and it may be appropriate in one section of the country to treat certain conduct less severely than in another section of the country. An important value of the system of U.S. Attorneys is that it places in each district a senior official with responsibility for litigation policy and a responsibility to implement that policy in the manner best suited for that district.

1/We have changed the terminology in our report from plea bargain to plea agreement to avoid any negative connotation.

The Department, however, does exercise the degree of control that is needed over U.S. Attorneys with respect to plea bargaining. Certain types of cases may be initiated and disposed of only by, or with explicit authorization from, the Department. This includes the terms of plea agreements.

In addition, the Department has promulgated a set of Principles of Federal Prosecution which contain a full discussion of the plea negotiation process. This document sets forth for U.S. Attorneys, as well as for other Department attorneys, the considerations to be taken into account when engaged in plea negotiation and when entering into plea agreements.

Finally, the Executive Office for U.S. Attorneys (EOUSA) has undertaken a program of field reviews of all U.S. Attorneys' offices. This program is discussed at length in the comment on Chapter 5, below. It shows that the Department is making substantial efforts to review and evaluate the performance of U.S. Attorneys' offices in all areas, including that of plea negotiations.

This section of the report also finds that a "lack of data" inhibits identification of problems in the use of plea bargains. It has been true in the past that the Department has had limited information available on the details of case handling in U.S. Attorneys' offices. However, a number of steps are underway to remedy this situation. First, there is the program of U.S. Attorneys' office field evaluations that is discussed in the comments to Chapter 5 of this report. In addition, the EOUSA has embarked upon the installation of the PROMIS system in each U.S. Attorneys' office. Through the PROMIS system, more complete and more reliable information on criminal matters and cases will be collected by U.S. Attorneys for their internal use and for submission to the Department in a manner that will allow for the compilation and comparison of data between offices. When the PROMIS system is operational, U.S. Attorneys will be better able to manage the cases within their own offices and the Department will be able to provide better oversight of the activities of all the U.S. Attorneys' offices.

In conclusion, the Department's response to the recommendations in Chapter 4 is that plea negotiations as presently conducted by U.S. Attorneys' offices are conducted in a proper fashion, particularly in view of the present state of the Federal criminal law and Federal criminal justice system. The Department provides the necessary supervision of U.S. Attorneys in the exercise of their plea negotiation discretion. And, finally, there is no evidence that the process of plea negotiation as presently carried on has resulted in unfairness or injustice to Federal defendants. With respect to data on plea negotiations, there is a need for somewhat better information than is now available, but a program for obtaining that information has been developed and is in the process of being implemented.

Chapter 5 - Field Evaluations of U.S. Attorneys' Offices

This chapter concerns EOUSA evaluations of U.S. Attorneys' offices. The report finds that the EOUSA has not had the resources to conduct an adequate program of field evaluations of U.S. Attorneys' offices. GAO's review of 1978 and 1979 EOUSA evaluation activity found that few evaluations took place. Those that did were very limited in scope.

The report recommends that the EOUSA's capacity to perform evaluations of U.S. Attorneys' offices be upgraded. The Department supports GAO's recommendation, but the fiscal year 1983 budget contains few program increases and the fiscal climate for fiscal year 1984 increases is expected to remain austere. As an alternative to requesting a program increase for improving the EOUSA's evaluation capability, steps have been taken to use existing resources. While this does not provide for a permanent solution to the EOUSA's evaluation capability, it is an example of alternatives the Department is attempting to implement.

The report notes that a program for reviewing U.S. Attorneys' offices using senior Assistant U.S. Attorneys was begun in fiscal year 1981. Through this evaluation program, the EOUSA has been able to resolve most of the problems identified in the report. To date, all but 15 of the 94 U.S. Attorneys' offices have been evaluated by the EOUSA field activities staff or by senior Assistant U.S. Attorneys who volunteered for that task.

A 2-day orientation and training session was held in Washington for the evaluators. Evaluations were then conducted by on-site visits followed by the preparation of a formal written report. A copy of the report is given to the U.S. Attorney. The field activities staff has developed a follow-up system using a diary for each U.S. Attorneys' office. Through this system the progress of each office in correcting the weaknesses found in the evaluation are monitored. The EOUSA believes that by using senior Assistant U.S. Attorneys as evaluators and the field activity staff to follow up on the evaluations, high quality evaluations have been conducted. The follow up is expected to ensure that identified deficiencies are corrected.

It also should be noted that the EOUSA has been given formal responsibility to perform inspections and reviews of the U.S. Attorneys' offices through an amendment to the EOUSA section of the Code of Federal Regulations. This amendment will help ensure that the inspection and evaluation function will continue to receive the attention it deserves.

The report notes that the Departmental Audit Staff requested input from the EOUSA as to areas where audit coverage is needed. The Audit Staff will continue to seek such information in order to assist the EOUSA in expanding their coverage of U.S. Attorneys' offices. The Audit Staff follows the criteria outlined in OMB Circular No. A-73, "Audit of Federal Operations and Programs," in developing its annual audit plans, and is now initiating a series of limited internal control surveys in four Department organizations, one of which is the U.S. Attorneys' offices. The results of these surveys will be considered, along with agency requests and other factors, in setting priorities for the fiscal year 1983 audit plan.

Need for GAO to Consider all Components of the Federal Justice System

GAO's analysis and recommendations in this report focus almost exclusively on Federal prosecutors. The failure to consider the variations in State and local laws and resources was noted earlier in the discussion of district guidelines. Similarly, the recommendations on plea negotiation focus on the prosecutors without fully exploiting the implications of GAO's findings on the role of the courts in determining district practices (page 60 and 61). Unfortunately, this narrow focus weakens GAO's many useful suggestions for increasing use of

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the deferred prosecution program. The addition of considerations concerning other components of the criminal justice system could enhance the usefulness of the report. Points that might be added include:

1. The report fails to note, however, that expanded use of diversion can cause investigative agencies to devote a portion of their time to cases that do not warrant the attention of Federal law enforcement, rather than spending that time on more fully investigating the more serious Federal matters already before them.

2. In discussing the need for guidelines for the diversion program, the report does not note the role of the probation office in approving cases recommended by the prosecutors. It would seem appropriate to encourage the participation of the probation office in developing guidelines for use of the program.

3. Increased use of the deferred prosecution program could place additional strains on the probation system (and, to a lesser extent, on such services as alcohol and drug rehabilitation programs). Additional staff might be needed by the U.S. Attorneys as well if cases are to be considered for diversion that are not currently screened for prosecution. The possible need for additional resources to handle the extra caseload should be noted.

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In summary, the Department is in general agreement with GAO's recommendations that more emphasis can be placed on improving field evaluations, reporting requirements, and coordination of Federal prosecutive policies. Clearly, data should be available to the Department for the purposes of monitoring prosecutive policies and case flow throughout the United States. However, as noted in our discussion of the issues concerning declination policies, pretrial diversion and plea negotiation, we disagree with some of the objectives which the Department is urged to accomplish through centralization and uniformity of policies. We do agree that coordination and control can be improved, and the establishment of Law Enforcement Coordinating Committees and the PROMIS system are designed to assist in achieving these goals.

We appreciate the opportunity to comment on the draft report. Should you desire any additional information pertaining to our response, please feel free to contact me.

Sincerely,

Kevin D. Rooney
Assistant Attorney General
for Administration

(181670)

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