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United States Attorneys are the chief law enforcement representatives of the Attorney General in 94 Federal judicial districts throughout the country. U.S. Attorneys handle a wide variety of litigation for the Government, ranging from prosecution of Federal criminal violations to representing the United States in environmental suits and other litigation. In addition, U.S. attorneys develop and investigate cases before grand juries and provide advice and assistance to enforcement and regulatory agencies. Because of increased crime and limited staff resources, far more criminal complaints are received than can be prosecuted, and the U.S. attorneys must decide which cases to prosecute and which to decline. Findings/Conclusions: From 1970 to 1976, U.S. attorneys declined to prosecute about 62% of the 1.2 million criminal complaints referred to them. Many of these complaints could have been prosecuted if the U.S. attorneys had not believed that the circumstances of the cases did not warrant the cost of prosecution and/or staff was not available. In four judicial districts, at least 22% of the declined complaints during 1975 and 1976 were considered prosecutable. For many suspects, a judicial determination of guilt or innocence is never made; and, if guilty, suitable punishment is not imposed. Suspected violations of certain criminal statutes are generally not being prosecuted, and suspected violations of other criminal statutes are not being prosecuted uniformly by U.S. attorneys. Recommendations: The Attorney General should: (1) review the priorities and guidelines of all U.S. attorneys to make them as uniform as possible; and (2) develop for congressional consideration a comprehensive proposal for dealing with complaints which are not being prosecuted because of workload. (RRS)

5576

REPORT TO THE CONGRESS

BY THE COMPTROLLER GENERAL OF THE UNITED STATES

U. S. Attorneys Do Not Prosecute Many Suspected Violators Of Federal Laws

U.S. attorneys decline to prosecute a large number of criminal complaints because of heavy workloads or insufficient staff and/or because the complaint does not warrant the cost of prosecution.

U.S. attorneys have established their own priorities and guidelines for handling the large number of complaints. However, these do not reflect a uniform national policy nor is there assurance that they are fair.

This report describes problems which result from differing decisions by U.S. attorneys to prosecute. For example:

- --Suspected violations of certain criminal statutes are generally not being prosecuted.
- --Suspected violations of other criminal statutes are being prosecuted in one U.S. attorney's district but not in another.
- --Several law enforcement and regulatory agencies are sometimes receiving inadequate support from the Department of Justice.

GAO recommends consideration of alternatives to prosecution.

FEBRUARY 27, 1978

GGD-77-86

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

B-178618

To the President of the Senate and the
Speaker of the House of Representatives

This report discusses certain problems affecting the prosecutive activities of U.S. attorneys. It points out that because of resource constraints, U.S. attorneys are not pursuing numerous cases involving suspected violations of Federal laws. Additional staff would help, but other options are available that would also promote the course of justice.

We made this review to determine the extent of and reasons for criminal prosecutions being declined by U.S. attorneys. Our review was made pursuant to the Budget and Accounting Act, 1921 (31 U.S.C. 53), and the Accounting and Auditing Act of 1950 (31 U.S.C. 67).

Copies of this report are being sent to the Director, Office of Management and Budget, and to the Attorney General.

Elmer B. Staats
Comptroller General
of the United States

COMPTROLLER GENERAL'S
REPORT TO THE CONGRESS

U.S. ATTORNEYS DO NOT PROSECUTE MANY SUSPECTED VIOLATORS OF FEDERAL LAWS

D I G E S T

U.S. attorneys are the chief Federal law enforcement officers in the 94 Federal judicial districts. Their prime responsibility is to prosecute suspected violators of Federal laws. However, because of increased crime and limited staff resources, far more criminal complaints are received than can be prosecuted. Hence, U.S. attorneys have had to be selective in criminal prosecutions. The way prosecutive selectivity is administered affects the entire Federal criminal justice system.

During fiscal years 1970-76, U.S. attorneys declined to prosecute about 62 percent of the 1.2 million criminal complaints referred to them. Many of these complaints were declined because of legal deficiencies, such as lack of evidence, or inability to determine criminal intent. However, many of the declined complaints could have been prosecuted but were declined because the U.S. attorneys believed that the circumstances of the cases did not warrant the cost of prosecution and/or staff was not available to handle heavy workloads.

In the four Federal judicial districts GAO reviewed, at least 22 percent of the complaints that were declined during fiscal years 1975 and 1976 were considered prosecutable. Most of these declined complaints involved nonviolent felonies. As a result, no determination of the suspects' guilt or innocence was ever made. Those suspects who actually committed the offense charged therefore avoided suitable legal action.

Because more complaints are being received than can be handled, many U.S. attorneys have developed their own prosecutive priorities and guidelines. Each U.S. attorney differs on what these should be and how they should be used. As a result:

GGD-77-86

Tear Sheet. Upon removal, the report cover date should be noted hereon.

--Suspected violations of certain criminal statutes are generally not being prosecuted. (See p. 7.)

--Suspected violations of other criminal statutes are being prosecuted in one U.S. attorney's district but not in another. (See p. 17.)

--Several law enforcement and regulatory agencies are sometimes receiving inadequate prosecutive support. (See p. 20.)

What can be done?

Alternatives to prosecution in Federal district courts and improvements in the present system of prosecution need to be considered. (See p. 9.)

GAO recommends that the Attorney General (1) review the priorities and guidelines of all U.S. attorneys to make them as uniform as possible and (2) develop for congressional consideration a comprehensive proposal for dealing with complaints which are not being prosecuted because of workload. This proposal should include the results of consideration by the Department of Justice of any alternatives to handle the problem, such as giving agencies civil fine authority and deferring criminal prosecution for suspects who qualify for a pretrial diversion program.

The Department of Justice agrees that the findings in this report are accurate. It also agrees that it should (1) attempt to eliminate unwarranted disparities in the enforcement of Federal criminal laws and (2) develop alternatives to criminal prosecution for dealing with the overflow of prosecutable complaints. (See app. II.)

The Department said it is developing prosecutive discretion guidelines and studying the prosecutive policies and practices of

the U.S. attorneys' offices. It also said that it is actively engaged in the analysis and evaluation of an experimental pretrial diversion program begun in 1974 and that it had recently developed a statutory proposal to increase the criminal jurisdiction of Federal magistrates by permitting them to try all misdemeanor cases.

The Department voiced some concern over the way GAO addressed certain issues contained in the report. Its concerns and GAO's evaluation are discussed in chapter 3.

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ABBREVIATIONS

FBI Federal Bureau of Investigation
GAO General Accounting Office

CHAPTER 1

INTRODUCTION

One goal of the criminal justice system is to protect individual rights. The prosecutor occupies a critical position in this system. It is the prosecutor who must focus the power of the Government on those who defy its laws. In this regard, in the Federal judicial districts throughout the United States, U.S. attorneys are the chief law enforcement representatives of the Attorney General.

Although States and local jurisdictions carry the greatest share of the burden of fighting violent street crime and administering criminal justice, U.S. attorneys handle a wide variety of litigation for the Government, ranging from prosecution of Federal criminal violations, such as fraud, bank robbery, and interstate crime, to representing the United States in environmental suits and other litigation. In addition to conducting litigation for the United States, U.S. attorneys develop and investigate cases before grand juries and provide advice and assistance to enforcement and regulatory agencies.

Evidence for criminal prosecution is generally developed by various law enforcement and regulatory agencies and is referred directly to the U.S. attorneys' offices. The decision to institute a criminal proceeding is primarily the responsibility of the U.S. attorneys. Usually, this decision is made soon after the referring agency brings the matter to their attention. Often the referring agency will simply call the U.S. attorney, or other attorneys under him who are authorized to accept or decline cases, and explain the facts of the matter.

The U.S. attorney will often make a decision to prosecute or decline the matter based upon this initial discussion of the facts. If a decision has been made to prosecute an individual and the case has been filed with the court, the U.S. attorney can still decide not to pursue the case. For instance, if the U.S. attorney became aware of new evidence that would vindicate the accused, he would apply to the court for a dismissal.

The manner in which U.S. attorneys exercise their prosecutive discretion affects the entire Federal criminal justice system. For example, the U.S. attorney's prosecutive priorities can affect the type of violations to which investigative agencies will commit their resources.

His decisions to prosecute affect the rate of flow of cases into the courts, and, subsequently, have an impact on prison populations and on probation and parole officers' workloads.

The Attorney General exercises general supervision of U.S. attorneys through the Executive Office for U.S. Attorneys. This office maintains liaison between U.S. attorneys and other Department of Justice divisions, bureaus, and offices, as well as with other Federal agencies.

U.S. attorneys are appointed for a 4-year term by the President with the advice and consent of the Senate. When the 4-year term expires, a U.S. attorney continues to perform the duties of his office until a successor is appointed and is found to have the qualifications for the office. Each U.S. attorney is subject to removal by the President. Assistant U.S. attorneys are appointed by the Attorney General and are subject to removal by him.

There are 94 U.S. attorneys, 1 for each Federal judicial district and 1 for each U.S. territory. Their approved budget for fiscal year 1976 was about $90 million, and they were supported by 1,517 assistant U.S. attorneys and 1,755 non-attorney personnel. The average number of assistant U.S. attorneys assigned to each district, the number of criminal and civil filings, and the number of grand jury proceedings vary considerably among the districts. The following table shows the differences in the number of attorneys for the eight districts we reviewed and the total criminal and civil filings and grand jury proceeding for all districts.

	Fiscal year 1976			
Judicial district	Average number of assistant U.S. attorneys	Criminal filings	Civil filings	Grand jury proceedings
Reviewed in detail:				
California Central	85	2,191	1,562	1,482
California Southern	30	1,810	343	908
New York Southern	98	1,427	1,223	854
Michigan Eastern	28	1,533	903	811
Limited audit work performed:				
Pennsylvania Eastern	36	862	1,079	646
Kentucky Western	8	418	472	259
Alaska	5	140	146	60
Arizona	25	1,453	715	1,017
Total	315	9,834	6,443	6,037
Total for the 94 districts	1,517	44,172	49,472	23,735
Average for the 94 districts	16.1	470	526	252
Range for the 94 districts	1 to 157	29 to 2,191	3 to 1,971	0 to 1,482

CHAPTER 2

SUSPECTED VIOLATORS OF FEDERAL

LAWS ARE NOT PROSECUTED

U.S. attorneys are being selective in the criminal complaints they prosecute. As a result, suspected violators of certain Federal criminal statutes are generally not being prosecuted because U.S. attorneys are declining cases that could be prosecuted. Because U.S. attorneys do not have sufficient resources to prosecute all cases, we believe that the Federal justice system should comprehensively address this problem and develop alternative techniques to make sure that suitable legal actions are brought against people who violate Federal laws.

Under the current system, more complaints are received than can be prosecuted; thus, U.S. attorneys must decide which cases to prosecute and which to decline. Prosecutors use guidelines to make this decision. However, instead of a uniform set of guidelines, U.S. attorneys establish and implement their own priorities and guidelines, which often results in:

--Suspected violations of certain criminal statutes not generally being prosecuted.

--Suspected violations of other criminal statutes being prosecuted in one U.S. attorney's district but not in another.

--Several law enforcement and regulatory agencies sometimes receiving inadequate prosecutive support.

The Department of Justice should assess these priorities and guidelines as well as monitor how well they are being implemented to identify problem areas that promote inequities.

THE PROBLEM

U.S. attorneys and law enforcement officials have stated that more suspects are apprehended than can be prosecuted with the current resources of the Federal criminal justice system. For example, in fiscal year 1976 there were an estimated 54,000 Federal enforcement and investigative personnel who referred about 172,000 criminal complaints to about 1,500 assistant U.S. attorneys who, in turn, had to determine whether to prosecute the cases before about 400 Federal district judges. This did not include thousands of other

criminal complaints that were not referred for prosecution by law enforcement officials and 56,000 civil matters received by the U.S. attorneys.

The U.S. attorney in each of the eight districts we visited expressed concern over the staff and workload conditions in his district. Officials from one district stated that staff constraints in both professional and support personnel, together with an overburdening workload, had made it impossible to prosecute all infractions of the law.

Officials of the Department of Justice also believe that the number of assistant U.S. attorneys is entirely too small to prosecute all suspects. In commenting on this, the Department, in its fiscal year 1976 budget request, stated:

> "* * * it is not difficult to see where the bottleneck is located in processing federal criminal matters, nor is it difficult to understand why approximately 106,000 criminal matters have either been declined or deferred to the already heavily burdened state and local prosecuters.
>
> "This last point is particularly significant in that the crime rate has increased throughout the country. As a consequence, the workload of state and local prosecutors, including an alarming increase in crimes of violence, has risen to overwhelming proportions. State and local budgets, under current economic conditions, do not provide for more law enforcement personnel. In fact, some localities are reducing their staffs. Referrals of federal criminal matters to the state and local authorities cannot be made with frequency and assurance of prosecution. This will result in a greater number of cases being prosecuted by the federal government or not at all."

In a May 1976 memorandum to the Deputy Attorney General, the Administrator of the Drug Enforcement Administration, commenting on the staff situation in one district, stated:

> "The caseload of the Controlled Substances Unit * * * has reached crisis proportions. This unit is composed of four Assistant United States Attorneys, one of whom will be resigning July 1, 1976. Although he will be replaced, there will be a loss in continuity and experience. Each attorney now carries an average caseload of 125 cases.

"This situation is further aggravated by the change in emphasis in the enforcement program. The new program produces large numbers of multiple defendant and/or complex conspiracy cases, limiting the time each attorney has been able to devote to his entire case inventory."

* * * * *

" * * * More than 175 cases, with over 300 defendants, are awaiting Grand Jury action, but due to the impossible workload of the Controlled Substances Unit Attorneys, investigations are delayed and investigative leads grow cold. The Chief of the Controlled Substances Unit * * * estimates that many of the cases will not be presented to the Grand Jury for a minimum of three to six months, notwithstanding that other staff attorneys help out whenever possible."

* * * * *

"* * * [The U.S. attorney] has advised us that the total criminal workload of the United States Attorney's Office * * * is so heavy that it is impossible to commit any more attorneys from the present staff to the Controlled Substances Unit * * *."

FUTURE GROWTH IN CRIME RATE EXPECTED

U.S. attorneys do not expect their workloads to decrease. Rather, they point out that the incidence of crime is growing. According to FBI statistics, the number of serious crimes committed nationwide has substantially increased. Other factors, such as the growing number of investigators, increasing prosecution of complex white-collar crimes, and more and longer trials, increase U.S. attorneys' workloads. Also, the number of criminal appeals has increased.

In addition, new laws enacted by the Congress have also increased U.S. attorneys' workloads by creating new Federal violations or by changing the procedures for handling cases.

For example, the Speedy Trial Act, 1/ when fully implemented, may force U.S. attorneys to become more selective in their criminal prosecutions, which could result in an increase of declinations. They believe that more attorneys will be needed to handle cases and meet the time requirements of the act. The Department of Justice, in its 1978 budget justification, stated:

> "The resources required for U.S. attorney criminal prosecutions have increased steadily in recent years as speedy trial rules have become more restrictive and the number of criminal appeals has increased. The implementation of the Speedy Trial Act (Public Law 93-619) has resulted in more attorneys being assigned to individual cases, more cases coming to trial, and more sessions being held at remote locations all requiring the diversion of U.S. attorney staff from other purposes and the expenditure of additional funds. The increase in criminal appeals by 15 percent from FY 75 to FY 76 reflects further requirements for staff which U.S. attorneys have obliged to divert from other purposes. The steadily accelerating demands of speedy trial rules and the requirements imposed by an increasing number of appeals can be met through the application of additional resources as contained in this request."

The following schedule indicates the increasing workloads and the size of U.S. attorneys' staffs.

Fiscal year	Criminal complaints filed	Civil cases filed	Criminal and civil trials	Hours in court	Assistant U.S. attorneys
1970	39,497	28,034	5,245	239,601	866
1976	44,172	49,472	6,412	551,418	1,517
Percent of increase	11.8	76.5	22.2	130.1	75.1

1/The Speedy Trial Act of 1974, 18 U.S.C. 3161-3174 (Supp. V, 1975), provides, in part, that by July 1, 1979, each criminal defendant will be indicted within 30 days of arrest, arraigned within 10 days of indictment, and brought to trial within 60 days following arraignment. If the act's net time limits are not met, the court may dismiss the complaint against the defendant and bar future prosecutions arising out of the same incident.

MANY SUSPECTED VIOLATORS OF FEDERAL STATUTES ARE NOT PROSECUTED

U.S. attorneys declined to prosecute 62 percent of the criminal complaints available for prosecution during fiscal years 1970-76. The following table shows the criminal complaints available for prosecution and the percentage declined by U.S. attorneys during fiscal years 1970-76.

Fiscal year	Criminal complaints available for prosecution	Criminal complaints declined for prosecution	Percentage declined
1976	171,000	108,000	63
1975	171,000	106,000	62
1974	172,000	103,000	60
1973	181,000	112,000	62
1972	190,000	119,000	63
1971	156,000	94,000	60
1970	139,000	89,000	64
Total	1,180,000	731,000	62

Many of these complaints were not prosecuted because of legal deficiencies, such as a lack of evidence or inability to determine intent; however, U.S. attorneys said that many others were prosecutable. In the four districts we reviewed in detail, 13,745 complaints were declined during fiscal years 1975 and 1976. These included 9,623 complaints that were declined by the U.S. attorney when they were initially brought to his attention (immediate declination) and 4,122 that were declined after the U.S. attorney had spent at least one hour reviewing the complaint (docketed complaints). An examination of all immediate declinations and a random sample of the declined, docketed complaints showed that U.S. attorneys considered about 22 percent of the complaints to be prosecutable. An additional 28 percent of the complaints may have been federally prosecutable but were referred instead to local prosecutive authorities or to Federal agencies for administrative action. The following table summarizes the disposition of the 13,745 declined complaints.

Analysis of Declined Complaints

Complaints	Percentages		
	Immediate declination	Docketed complaints declined	Combined
Prosecutable	27	11	22
May have been federall prosecutable	26	32	28
Nonprosecutable	34	43	37
Administrative action taken by Federal agency or was nonfederally prosecuted	13	14	13
Total	100	100	100

	Immediate declinations	Docketed complaints declined	Total	U.S. attorney immediate declinations	
				Complaints considered prosecutable	Complaints may have been prosecutable (note a)
Theft of Government property	504	106	610	88	121
Interstate transportation of a stolen vehicle (Dyer Act)	920	84	1,004	210	280
Interstate transportation of stolen property	530	127	657	81	134
Impersonation	289	10	299	80	70
Bank fraud and embezzlement	667	184	851	311	85
Crime aboard aircraft	236	0	236	27	39
Fraud against Government	495	244	739	165	80
Crime on a Government reservation	529	112	641	117	193
Nonsufficient fund checks	188	0	188	58	52
All other violations (note b)	5,265	3,255	8,520	1,457	1,491
Total	9,623	4,122	13,745	2,594	2,545

a/U.S. attorneys referred these complaints to local prosecutive authorities or other Federal agencies for disposition.

b/Includes complaints pertaining to narcotics, customs, immigration, and other miscellaneous violations.

For the most part, the declined cases that were prosecutable involved nonviolent felonies. These violations were declined for three general reasons: they either (1) lacked prosecutive merit, 1/ (2) involved small amounts, or (3) did not meet guidelines established by certain U.S. attorneys. According to U.S. attorneys we interviewed, the primary reasons for declining prosecutable complaints were heavy workloads, insufficient staffs, and/or the cost of prosecution was not warranted.

The Department of Justice is aware of this problem. The Department, in its 1978 budget justification, referring to the large number of criminal declinations stated:

"Many were, of course, declined for reasons of legal defect, but many others were declined because the U.S. attorney has had to tailor his prosecutive policies to fit within the resources available to him. Additional resources can produce further benefits for the Government, not only through more cases prosecuted but also in the quality of prosecutions."

PROSECUTION CAPABILITY COULD BE INCREASED BUT ALTERNATIVES MUST BE CONSIDERED

Many suspects who are considered prosecutable are released without being prosecuted, thereby avoiding possible punishment if they were tried and found guilty. Increasing the number of assistant U.S. attorneys would be one way to alleviate this problem. However, because of the workload of the Federal courts, even an increase in staff may not result in a significantly increased number of prosecutions. Although the number of investigators and the size of U.S. attorney staffs have greatly increased between 1970 and 1976, the number of authorized Federal district judges has remained almost constant. In addition, some violations were considered so minor they did not even warrant the cost of prosecution.

We believe that if the size of U.S. attorneys' staffs are significantly increased, the number of Federal district judges and supporting judicial personnel would also have to be increased to handle the number of prosecutable cases that

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1/Lacks prosecutive merit--U.S. attorneys in exercising their discretion believe that, for overriding reasons, prosecution should not be initiated.

are now being declined. In addition, the effect of an increased number of prosecutions on Federal prison and correctional institutions would also need to be taken into consideration.

One way to increase the number of prosecutions without increasing the number of judgeships would be to expand the authority of Federal magistrates 1/ and/or increase their use.

In a previous report 2/ we recommended, in part, that district judges make greater use of magistrates under existing legislation and that the Congress further define the authority of magistrates. Also, we said the Congress should consider modifying the Federal Magistrates Act to expand the magistrates' trial jurisdiction to include most misdemeanors. (See app. I.) By increasing the magistrates' criminal jurisdiction to include all misdemeanors, the district judges' workload could be reduced and, therefore, allow them to spend more time on felony and civil matters.

The Department of Justice has also endorsed the expansion of the magistrates' authority and trial jurisdiction. The Attorney General in two addresses given on May 4, 1977, stated:

> "We are developing a proposal to expand duties of U.S. Magistrates. The magistrates would assume a heavier criminal jurisdiction, as well as a broader civil role. At present, in the main, magistrates have criminal jurisdiction over only petty offenses and civil authority over only motions. We are proposing that magistrates be able to decide misdemeanors and impose a sentence of up to 1 year and fines of any allowable amount. In addition,

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1/Since 1969, the year the magistrate system began, several bills concerning the authority of magistrates have been introduced in the Congress. Public Law 94-577, 90 Stat. 2729, was enacted in October 1976. It defined the pretrial jurisdiction of magistrates but did not increase their trial jurisdiction. The 95th Congress is currently considering a bill (S. 1613), which would enlarge the civil and criminal jurisdiction of U.S. magistrates.

2/"The U.S. Magistrates: How Their Services Have Assisted Administration of Several District Courts; More Improvements Needed," B-133322, September 19, 1974.

they would be given some jurisdiction to decide civil cases, with the right to appeal to the District Judge and then by certiorari only to the Courts of Appeals."

A bill (S. 1613), based on the Department's proposal, recently passed the Senate and is currently being considered by the House of Representatives.

We also recognize that many suspected violators who are not prosecuted are charged with crimes that may not warrant the expense of prosecution. Examples of such crimes include a suspected violator accused of forging a $25 Government check, or a bank fraud and embezzlement case involving only $40. Although the magnitude of these cases may not justify prosecution, alternative actions are needed to deal with such conduct. Therefore, we believe that alternatives to traditional prosecution may in some cases be in the Government's best interest since they (1) could be less costly, (2) have a deterrent effect on misconduct, or (3) may be more suitable for the misconduct involved.

Also, under current Federal law, some agencies have no alternative to criminal prosecution--a suspect is either prosecuted or avoids legal action. Since limited resources prevent U.S. attorneys from prosecuting many suspected violators, alternatives are needed. Several alternatives, including civil fine authority and pretrial diversion, have been suggested.

Civil fine authority

Officials of several agencies said that civil fines would be a useful enforcement tool and would be a deterrent to suspected violators who cannot be prosecuted. The Administrative Conference of the United States 1/ has a similar view. In 1972 the Conference recommended that Federal agencies consider requesting the Congress to give them authority to use civil fines or other substitute sanctions.

1/The Conference was established to study and make recommendations concerning the efficiency, adequacy, and fairness of Federal agencies' administrative procedures.

The Conference did not propose eliminating criminal penalties; but, rather, it suggested alternatives to criminal penalties. It stated that civil fines are an important and useful enforcement tool for agencies with a large number of cases to be processed; and more severe penalties should be pursued for use when appropriate. Civil fines could contribute to agencies' obtaining quicker corrective action for civil violations.

The Conference stated that the use of civil fines would not reduce or eliminate the due process protection now being provided under criminal penalty situations. Civil fines would be assessed in accordance with the Administrative Procedure Act (5 U.S.C. 554), and if appealed, reviewed by a Federal court in accordance with that act (5 U.S.C. 702). The Conference also suggested that agencies be allowed to compromise or mitigate any civil fine either before or after assessment.

Most U.S. attorneys and Department of Justice officials we interviewed agreed that civil fines would be a plausible alternative to criminal prosecution of certain misconduct.

Pretrial diversion

Pretrial diversion is a voluntary program which removes charged suspects from the traditional criminal justice process before trial and places them in a program of supervision, generally by the Federal Probation System, for a specified period of time. Successful participants have their charges dismissed, while unsuccessful participants are returned for prosecution.

The major objectives of pretrial diversion are:

1. To prevent future criminal activity among certain defendants against whom prosecutable cases exist by diverting them from traditional processing into community supervision and services.

2. To save prosecutive and judicial resources for concentration on major cases.

Although U.S. attorneys are using the pretrial diversion alternative to some extent, the majority of prosecutable suspects who are not prosecuted are simply released. Declining to prosecute suspected offenders may reduce U.S.

attorneys' workloads; however, it has little, if any, deterrent effect on crime.

PROSECUTIVE DISCRETION NEEDS GUIDANCE AND CONTROL

The courts have recognized that U.S. attorneys have considerable latitude in determining their prosecutive priorities through the exercise of prosecutive discretion. We also recognize that prosecutive discretion is essential to the efficient and effective application of the U.S. attorney's responsibilities. The U.S. attorney must have the latitude to decide which violations deserve the commitment of his limited resources, although we also believe that his decisions should be in consonance with definitive priorities and guidelines established by the Department of Justice. Such departmental priorities and guidelines are needed to give national direction and control to Federal enforcement efforts.

What has not been recognized, however, is the impact prosecutive discretion has on the criminal justice system. The Department of Justice does not exercise control over this discretion, and there is no mechanism to monitor prosecutive discretion to insure that the discretionary mechanism operates fairly. The Deparment of Justice has not provided prosecutors with policy or guidelines to be used as a framework to mold prosecutive discretion. Thus, current prosecution philosophy, priorities, and guidelines reflect individual district thinking rather than a nationwide policy. Consequently, differing applications of justice occur.

U.S. attorneys establish their own priorities and guidelines

Staff constraints and the large number of criminal suspects have forced U.S. attorneys to be increasingly selective in the criminal complaints they prosecute. Prosecutive priorities and guidelines are established by individual U.S. attorneys and are based, in part, on their opinions of which violations are the most significant, as well as on workloads, Department of Justice input, local conditions and needs, discussion with enforcement agencies, and suggestions from district judges.

There is no set form for priorities or guidelines. They may be written or verbal, general or specific, for the U.S. attorney's use only, or provided to referring agencies.

Some guidelines which U.S. attorneys have issued to enforcement agencies automatically decline (blanket declinations) certain types of complaints, thus screening these complaints out of the criminal justice system at the investigative level. For example, the U.S. attorney in one district, due to the large number of immigration violations, issued guidelines to the Immigration and Naturalization Service detailing the types of immigration cases that would be considered for prosecution. It is not known to what extent guidelines have screened out complaints because U.S. attorneys may or may not require enforcement agencies to report the number of complaints they decline under blanket declinations.

The certainty of conviction is another aspect that some U.S. attorneys consider when determining whether or not to prosecute. Heavy workloads and crowded court dockets prevent the prosecution of some complaints with a lower certainty of conviction unless there are compelling reasons to prosecute, such as lengthy criminal record, extreme violence of the crime, or other aggravating circumstances.

Prosecutive guidelines have, to varying extents, substantially limited enforcement of certain criminal statutes

U.S. attorneys' prosecutive priorities and guidelines have, to varying extents, substantially limited enforcement of some Federal criminal statutes by screening some suspected violators of these laws out of the criminal justice system. For example, many alleged Dyer Act violations (interstate transportation of stolen vehicles) and suspected violations of statutes dealing with bank fraud, embezzlement, and fraud against the Government are not prosecuted.

The Dyer Act (18 U.S.C. 2312) provides

> "Whoever transports in interstate or foreign commerce a motor vehicle or aircraft, knowing the same to have been stolen, shall be fined not more than $5,000 or imprisoned not more than 5 years, or both."

In June 1970, the Department of Justice issued guidelines that, in effect, limit prosecution of Dyer Act violations to organized crime ring cases and multitheft operations unless exceptional circumstances are involved. Under the guidelines, individual theft cases are ordinarily not to be federally prosecuted.

The following table shows that since 1967 prosecutions of suspected Dyer Act violations have steadily declined, with a dramatic drop in 1971--the first full year the guidelines were in effect. Since 1967 Dyer Act prosecutions declined about 68 percent, while motor vehicle thefts increased about 52 percent.

Nationwide Statistics Concerning Dyer Act Prosecutions and Motor Vehicle Thefts

Fiscal year	Number of Dyer Act cases filed	Percent of total cases filed	Number of motor vehicle thefts (note a)
1967	4,888	16.0	659,800
1968	4,722	15.4	783,600
1969	4,139	12.3	878,500
1970	4,090	10.7	928,400
1971	2,408	5.8	948,200
1972	2,350	5.0	887,200
1973	1,960	4.9	923,800
1974	1,790	4.8	977,100
1975	1,591	3.9	1,000,500
Percent of change 1967-75	-67.5	-75.6	+51.6

a/Number of motor vehicle thefts are national theft statistics from the FBI's "Uniform Crime Reports" and include Dyer Act violations.

An analysis of Dyer Act complaints in one district showed that of 733 complaints, the U.S. attorney prosecuted 102 during fiscal years 1975 and 1976. Of the complaints not federally prosecuted, about 196 were considered prosecutable but were not pursued because of priorities or guidelines; 237 were prosecuted by local courts; and the remaining 198 complaints had some type of prosecutive problem, such as lack of evidence.

The following is an example of a Dyer Act complaint that was declined yet considered prosecutable:

> Three suspects were arrested in possession of a late model vehicle stolen in another State. All three suspects admitted transporting the vehicle interstate. However, the assistant U.S. attorney declined prosecution because the case did not fall within departmental Dyer Act guidelines, i.e., did not involve an organized crime ring and was not part of a multitheft operation.

Guidelines are essential to cope with the heavy court workloads. However, guidelines should be reevaluated periodically to see if certain types of crimes which are not being prosecuted should be because of increased activity.

The bank fraud and embezzlement statute, 18 U.S.C. 656, provides that any bank employee or officer who embezzles, abstracts, or willfully misapplies bank funds shall be fined not more than $5,000 or imprisoned not more than 5 years, or both; but if the amount embezzled does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than 1 year, or both.

However, in one district the U.S. attorney has decided that bank embezzlement of $500 or less generally will not be federally prosecuted. Although 279 bank fraud and embezzlement cases were prosecuted in this district during fiscal years 1975 and 1976, about 400 bank embezzlement complaints were declined. Of these complaints, 150 were considered prosecutable but were declined because of the U.S. attorney's guidelines. For example:

> A bank employee issued cashier's checks totaling $246 without paying for the checks. When confronted, the employee made partial restitution and signed a termination form acknowledging that the dismissal was for cause and that the reason for discharge was "shortages or irregularities in accounts." The assistant U.S. attorney declined prosecution, stating that the facts of the case did not meet the guidelines for prosecution because of the nominal amount of money involved.

In another district, the U.S. attorney has decided that bank embezzlements under $5,000 will not be prosecuted when the suspect is not a bank supervisor or an officer. During fiscal years 1975 and 1976, the U.S. attorney in the district, although he prosecuted 199 complaints, declined to prosecute 198 bank fraud and embezzlement complaints. Seventy-four of the declined complaints involved bank fraud and embezzlements ranging between $100 and $2,000 and were considered prosecutable but were declined because of prosecutive priorities and guidelines.

The use of guidelines or dollar minimums is not a uniform practice for handling violations of the fraud and embezzlement statute. For example, one district which has no guidelines for bank fraud and embezzlement violations considers such violations to be extremely serious and handles them on a case-by-case basis.

The fraud against the Government (false statements) statute, 18 U.S.C. 1001, provides that whoever knowingly makes any false, fictitious, or fraudulent statement or representations to any department or agency of the United States shall be fined not more than $10,000 or imprisoned not more than 5 years, or both.

Although Government job applications, travel vouchers, security clearance questionnaires, social security forms, and various other agency forms and documents contain a warning that false statements are punishable under the statute, several U.S. attorneys have established guidelines or set priorities that minimize enforcement of the statute. For example, in one district 106 complaints were declined during fiscal years 1975 and 1976. Of these complaints, 90 were prosecutable but were declined because the U.S. attorney gave the complaints a low prosecutive priority.

In another district, the U.S. attorney established guidelines limiting the prosecution of Department of Health, Education, and Welfare fraud cases to essentially the following circumstances:

--Defendant is or was a Government employee and (1) the fraud is over $500 and (2) a false statement is present or, when completing a required form, the prospective defendant leaves blank a question requiring an answer.

--Defendant is a nongovernment employee and (1) the fraud is over $5,000 and (2) a false statement is present or the prospective defendant leaves blank a question which requires an answer on three forms.

Uniformity in prosecution
lacking among U.S. attorneys' offices

In addition to substantially limiting the enforcement of certain statutes, prosecutive priorities established independently by each U.S. attorney have resulted in violations of the same type being prosecuted by one U.S. attorney while not being prosecuted by others. Thus, whether or not a suspect is federally prosecuted may depend more on the district handling the complaint than on the quality of the case. The extent of the problem is unknown because the prosecutive priorities, guidelines, and practices of the various U.S. attorneys are not fully reported to, nor compiled by, the Department of Justice.

The following schedule shows how the magnitude of the offense affects the probability of prosecution in some districts.

Amount Necessary for Prosecution

District	Marijuana	Heroin	Bank embezzlement	Theft from interstate shipment	Obscene matter
1	2.2 lbs.	No guidelines	No guidelines	No guidelines	Large commercial venture
2	25 lbs.	1/2 oz.	No guidelines	$ 500	Large commercial venture
3	Must be distributor	1 gram	$5,000	$1,500	No prosecution
4	100 lbs.	No guidelines	$1,000	$5,000	Large commercial venture
5	100 lbs.	2 oz.	$ 500	No guidelines	Large commercial venture
6	50 lbs.	No guidelines	$1,000	$1,000	No guidelines

Certain prosecutive differences are simply caused by the fact that various U.S. attorneys have different priorities. However, other differences are due to the activities of local prosecutors. For example, the local prosecutor in one district is unwilling to prosecute drug complaints because most of the complaints involve smuggling at the border; and he believes that border-related complaints are a Federal problem and not a local one. Thus, in this district, drug complaints declined by the U.S. attorney and referred to the local district attorney are likely to go unprosecuted. In another district the local prosecutor appears willing to prosecute small drug complaints. Therefore, the U.S. attorney

can decline these complaints with some assurance that local officials will prosecute them. However, U.S. attorneys have not initiated followup systems to determine the extent to which local prosecutors are prosecuting referred complaints.

The American Bar Association, in its "Standards Relating to the Prosecution Function and the Defense Function" commented on the principle of uniformity stating that:

> "In all States there could be coordination of the prosecution policies of local prosecution offices to improve the administration of justice and assure the maximum law through the State."

Most U.S. attorney's office officials interviewed agreed that uniformity of prosecution is desirable from a legal standpoint. One U.S. attorney said that Federal statutes are the same in all districts and should be enforced equally. However, the same officials generally viewed complete uniformity of prosecution as impracticable.

The following problems and differences between districts were among those mentioned as creating obstacles to complete uniformity:

--Workload variances in some instances permit prosecution in one distict and prevent it in another.

--The types of cases judges are willing to accept vary among districts.

--Individual district court decisions create differences in legal and evidential requirements among districts.

--State sovereignty questions arise when State statutes provide penalties different from the corresponding Federal statutes.

--Values and mores of individual communities differ.

Department of Justice officials pointed out that districts have different crime problems which require variant prosecutive guidelines. They noted, for example, that drug smuggling and illegal entry of foreign nationals were large problems in several districts along the U.S. southwest border. Because of the size of the problem, they believed that prosecutive guidelines far different than those in other districts of the country were needed and justified.

Although it may not be practicable to achieve complete uniformity of prosecution, we believe that the Department of Justice should strive for the maximum practicable uniformity of prosecution among districts. Each citizen has the right to expect that Federal law will be applied equally to all. A former U.S. attorney expressed a similar opinion, stating that the lack of direction and coordination in some areas points up the great need for national enforcement priorities.

Some referring agencies do not receive needed prosecutive support

Prosecutive support that U.S. attorneys provide to Federal enforcement and regulatory agencies varies among districts. In large districts, some agencies have a problem obtaining prosecution while in other districts, prosecution is usually not a problem.

The Administrator of the Drug Enforcement Administration pointed out this problem in his 1976 testimony before the Permanent Subcommittee on Investigations, Senate Committee on Government Operations, stating:

> "Some other changes that I think need to be made involve our relationship with the United States attorneys' offices * * *. Our criminal investigators need to have experienced prosecutors to develop good cases. There have been instances where we have had attorneys assigned who have had, frankly, no experience in narcotic work and, in some parts of the country, the United States attorneys look upon drug enforcement as less than a major priority, despite the fact that it is stated as such by the Department of Justice."

Customs officials stated that obtaining prosecution of fraud cases is difficult. They said that because the cases are very complex and involve intricate areas of customs law, assistant U.S. attorneys are reluctant to prosecute them.

Consumer Product Safety Commission officials stated that the low priorty given to the prosecution of their cases by U.S. attorneys and the Department of Justice severely hampers their enforcement efforts. Since many companies falling under the jurisdiction of the Commission are not reviewed or are reviewed only every 3 to 5 years, the Commission relies on prosecution of selected manufacturers to obtain overall compliance.

The Interstate Commerce Commission has had limited success in obtaining prosecution of its cases in some districts. The following excerpts from the Commission's Regional Counsel memorandum describe its relationship with U.S. attorneys in different areas of the country.

> "In the past 5 years, we have been unable to get the United States Attorney in either district to accept a criminal rate case.
>
> "This leads to an attitude, albeit unfortunate, that if immediate enforcement action is required that the U.S. attorneys' offices are the last place one will garner such.
>
> "To continue to forward recommendations (for criminal prosecution) to these two (U.S. attorney's) offices is, in my opinion, a futile exercise unless you or the proper representative of the Commission advise the Department of Justice (Washington) and obtain some assurance that the cases we submit will be acted upon."

The Bureau of Alcohol, Tobacco and Firearms has found that it is generally more difficult to obtain prosecution in large metropolitan areas than in smaller districts. Because large metropolitan areas have major crime problems, some Bureau cases are given a low priority and are less likely to be accepted for prosecution.

Even when U.S. attorneys had good relationships with enforcement agencies, insufficient staffing prevented them from responding to agency needs. For example, the Federal Bureau of Investigation (FBI) in one district believed that the U.S. attorney was totally committed to prosecuting its cases. However, a limited staff prevented the U.S. attorney from always backing up his commitment, resulting in a backlog of quality cases awaiting prosecution.

Enforcement and regulatory agencies are also concerned about the effect of the Speedy Trial Act. They believe the act's time requirements could force U.S. attorneys to become more selective in their criminal prosecutions and result in an increased number of declinations.

Because of guidelines and prosecutive selectivity, some enforcement agencies do not investigate or develop certain cases and, if they do investigate, some agencies will not refer certain kinds of complaints to U.S. attorneys.

For example, in one district an official of the Bureau of Alcohol, Tobacco and Firearms stated that no attempt is made to develop certain firearms cases, such as the purchase of a firearm by a convicted felon, because the U.S. attorney does not have time to prosecute all Bureau cases. The official estimated that the Bureau could develop enough of these cases to require all the resources of the district's U.S. attorney.

In another district the FBI, with the consent of the U.S. attorney, does not investigate the following offenses unless the perpetrator is apparent or the circumstances are aggravated:

--Thefts of less than $1,500 from interstate shipments.

--Interstate transportation of stolen property under $1,000.

--Bank fraud and embezzlement matters under $1,000.

Agency decisions not to investigate are another way criminals are screened out of the criminal justice system. The large number of complaints declined by U.S. attorneys indicates that more coordination between U.S. attorneys and law enforcement agencies is necessary. All agencies should be made aware of which offenses the Government will or will not prosecute so that valuable investigative resources are not squandered on developing cases U.S. attorneys will not prosecute. However, in such cases, other alternatives, for example, referring these offenses directly to local law enforcement authorities or possibly providing administrative actions should be available.

CONCLUSIONS

The Federal criminal justice system faces a dilemma--more prosecutable complaints are received than U.S. attorneys can or will prosecute. As a result, for many suspects, a judicial determination of guilt or innocence is never made; and, if guilty, suitable punishment is not imposed.

Increasing the size of U.S. attorneys' staffs would help alleviate the problems caused by increased workloads, but probably only if the number of Federal district judges and supporting personnel is also increased. There are alternatives, such as expanding Federal magistrates' authority, giving agencies civil fine authority, and deferring criminal prosecution for suspects who qualify for a pretrial

diversion program, that could provide at least partial relief to the problem.

There are many prosecutable cases, however, that are minor and are declined because they do not warrant the cost of prosecution. There are currently no alternatives to prosecution available that would be less costly, have some deterrent effect, and be suitable for these minor crimes. Suspects in these cases will continue to escape prosecution until a comprehensive policy is established to deal with them.

RECOMMENDATIONS

We recommend that the Attorney General review the prosecutive priorities and guidelines of the U.S. attorneys to see that the maximum practicable uniformity in prosecution among Federal jurisdictions is achieved.

As an important adjunct to this review, we recommend that the Attorney General develop for consideration by the Congress a comprehensive proposal for dealing with the overflow of prosecutable complaints received by U.S. attorneys. This proposal should present the results of the Department of Justice's consideration of all the following alternatives as well as any others the Department may identify.

--Giving agencies civil fine authority.

--Deferring criminal prosecution for suspects who qualify for a pretrial diversion program.

CHAPTER 3

AGENCY COMMENTS AND OUR EVALUATION

The Department of Justice generally believes that the findings presented in this report are accurate. It agrees that it should (1) attempt to eliminate unwarranted disparities in the enforcement of Federal criminal laws and (2) develop alternatives to criminal prosecution for dealing with the overflow of prosecutable complaints received by U.S. attorneys. (See app. II.) The Department said that in the area of unwarranted disparities in the enforcement of Federal criminal law, the Office for Improvements in the Administration of Justice is currently engaged in two major projects: the development of prosecutive discretion "guidelines," and an empirical study of the prosecutive policies and practices of the U.S. attorneys' offices.

The prosecutive discretion guidelines project was begun by a Department task force in 1975. Based on the work of the task force, the Office drafted proposed guidelines relating to several areas of prosecutive discretion, including decisions to prosecute or decline prosecution. These guidelines were distributed informally to U.S. attorneys. The Attorney General has recently requested that the Office examine the possibility of developing additional guidelines for areas of prosecutive discretion other than those covered earlier and reexamine the desirability of formal distribution of the proposed guidelines already developed.

As a corollary to developing prosecutive discretion guidelines, the Office has formulated a research project designed to study the prosecutive policies and practices of a selected sample of U.S. attorneys' offices. This study is scheduled to commence in early 1978 and to be completed within 12 to 18 months. It is aimed at establishing empirically the extent of disparities in the exercise of prosecutive discretion in the Federal criminal justice system and developing a means for achieving uniformity and consistency in the discretionary decisions of Federal prosecutors.

The Department also said that, with respect to the development of alternatives to criminal prosecution, the Office has been actively engaged in the analysis and evaluation of an experimental pretrial diversion program begun by the Department in 1974. Pursuant to that program, U.S. attorneys have been authorized to use pretrial diversion as an alternative to prosecution except in certain types of cases. More than 30 districts have participated in the

program, and in five demonstration districts the program has been conducted under controlled conditions for study purposes. Early in 1977 a survey of all U.S. attorneys' offices was conducted by the Office to gather data concerning the operation of the program. Analysis of the data is now under way, and an evaluation of the program is expected to be completed this fall.

In addition to these major projects, the Office is considering ways to develop an information system that would enable the Department to monitor prosecutions in all U.S. attorneys' offices. Such a retrieval system would make possible the rapid identification of the types of cases presented to and prosecuted by the U.S. attorneys and would facilitate efforts by the Department to ensure the maximum practicable uniformity in prosecution between Federal districts.

The Department has recently developed a statutory proposal which would make more effective use of judicial resources. The criminal jurisdiction of Federal magistrates would be increased by permitting them to try all misdemeanor cases. It said that a bill based on this proposal recently passed the Senate (S. 1613) and is expected to receive favorable consideraton by the House of Representatives.

The Department voiced some concerns over the way we addressed certain important issues contained in the report. Their concerns and our analysis follow.

The Department stated that we did not give adequate treatment to an important aspect of excessive U.S. attorney workloads--U.S. attorneys cannot prosecute more cases than Federal district judges can handle. We disagree with this observation. We state on pages 9 and 10 and in our conclusion on page 22 that if the number of U.S. attorneys is significantly increased, the number of Federal judges and supporting personnel will also have to be increased to handle the number of prosecutable cases. We also state that prosecution capability could be increased as a part of the solution but that other alternatives must be considered.

The Department also stated that we did not give adequate treatment to the importance of prosecutive discretion. We agree that prosecutive discretion is an important aspect of U.S. attorney responsibilities. We state on page 13 of this report that prosecutive discretion is essential but that, in order to give national direction and control to Federal enforcement efforts, it needs to be exercised within definitive priorities and guidelines developed by the Department.

The Department said the report implies that not prosecuting suspected violators of Federal statutes is an unacceptable condition. It said that since most Federal crimes are also State crimes, the vast majority of prosecutable offenses declined by U.S. attorneys do not merit Federal prosecution and the tying up of the limited resources. What the report does state is that suspected violators of Federal statutes go without prosecution and that something must be done to deal with these suspected violators. We recognize that many violations of Federal statues are also violations of similar State statutes and are prosecuted by State and local prosecutors. These cases are not in question. We question the cases that are not prosecuted by U.S. attorneys or State and local prosecutors. It would be an injustice to create the impression that State and local prosecutors eagerly await all cases referred to them by U.S. attorneys. Many of the conditions described in this report which limit Federal prosecutive efforts apply in many instances equally or even in a greater degree to State and local prosecutive efforts. Our concern lies in those cases which "fall through the cracks" and are never prosecuted by any authority.

The Department stated that we implicitly criticized its Dyer Act policy. The policy limits U.S. attorney prosecution under this statute generally to only organized crime ring cases and multiagency operations unless exceptional circumstances are involved. It was not our intent to criticize the rationale of this policy. Our point in addressing the Dyer Act policy was twofold:

--This policy allows suspected violators of the statute to go without prosecution. The Government should work toward identifying alternatives to prosecution for such offenders.

--This policy has been in effect since 1970. As stated on pages 15 and 16 of the report, since 1967 car theft violations have increased 52 percent yet a reevaluation of the policy to reflect this increase has not been made.

The Department stated that the report leaves the impression that the Department has not issued any guidelines to assist the various U.S. attorneys in establishing priorities and criteria. On page 13 of the report, we state that U.S. attorneys based their guidelines and priorities on input from the Department of Justice, local conditions, workloads, etc. We believe, however, that direction provided by the

Department has been inadequate. It has not provided a comprehensive statement of policy which U.S. attorneys could use to adjust their priorities and guidelines to achieve national consistency. We recognize that many conditions affect the establishment of priorities and that U.S. attorneys must be flexible in prosecution. We believe, however, that the Department of Justice should monitor these priorities and guidelines to achieve the maximum practicable uniformity in prosecution among Federal districts.

We did not audit the investigative expertise of the agencies referring criminal matters to U.S. attorneys; therefore, it would be difficult to argue with the Department's statement that agencies' submissions are often inadequate and incomplete. However, as discussed on pages 20 to 22, the Federal Bureau of Investigation, the Drug Enforcement Administration, and the Bureau of Alcohol, Tobacco and Firearms are among the agencies not receiving prosecutive support in some districts.

The Department stated that the alternative mechanisms discussed in the report are presented as alternatives to prosecution which may be required because of U.S. attorney manpower and resource limitations. It stated that this analysis exaggerates the importance of manpower and does not give adequate consideration to the need for the sound exercise of prosecutive discretion. We do not intend to slight the importance of prosecutive discretion.

As we have stated on page 13, prosecutive discretion within defined national guidelines is essential to the efficient and effective fulfillment of U.S. attorneys' responsibilities. The importance of manpower and resource shortages should not be exaggerated, but neither should their significance be underestimated. Each of the eight U.S. attorneys interviewed expressed concern over staff constraints and workload conditions in his district. Also, Department of Justice budget justifications have recognized the need for additional staff resources.

We did not intend to imply that increasing the number of assistant U.S. attorneys or the number of Federal prosecutions is the only solution to these problems. Rather, our point is that suspected violators of Federal laws are not being prosecuted and, although in many cases the crimes may not warrant the expense of prosecution, appropriate alternatives are needed to deal with the overflow of prosecutable complaints received by U.S. attorneys.

The Department stated that it considered our study to be a limited overview of a significant issue and that it did not adequately consider (1) the many Federal criminal offenses which are of ancient vintage and no longer warrant serious prosecutive effort, (2) the impact of proposed recodifications of Federal criminal laws, and (3) the effects of the President's Reorganization Project, as it relates to litigation.

We agree that there may be Federal criminal offenses that no longer warrant serious prosecutive effort; however, as our report points out, some other suitable alternative to prosecution should be considered. Where laws are of ancient vintage and no longer applicable, action should be initiated to remove or revise them. In this regard, the recodification of Federal criminal laws now underway could resolve some of the problem. However, we believe that the recodification, if achieved, would not have a significant impact on the issues discussed in this report because prosecutive decisions will still have to be made.

The President's Reorganization Project is studying whether it would be more efficient to concentrate the authority to represent the Government in court solely in the Justice Department or perhaps to allocate it to several Federal agencies. Since this study is still under way, we could not evaluate the impact of any changes that might be proposed by the President's Reorganization Project.

CHAPTER 4

SCOPE OF REVIEW

We reviewed the extent of and reasons for criminal prosecutions being declined by U.S. attorneys. The review was conducted in the central and southern districts of California, the southern district of New York, and the eastern district of Michigan. It included:

--Interviewing U.S. attorneys, assistant U.S. attorneys, and officials from various law enforcement and regulatory agencies.

--Examining available records on immediate declinations and a sample of docketed cases that were declined during fiscal years 1975 and 1976.

--Reviewing written prosecutive guidelines, declination statistics, and other pertinent documents.

We did limited work in the eastern district of Pennsylvania, the western district of Kentucky, the district of Alaska, and the district of Arizona. This consisted of interviewing U.S. attorneys and various law enforcement officials and examining prosecutive guidelines and declination statistics.

We also reviewed pertinent laws and regulations and interviewed Department of Justice and other law enforcement and regulatory agency officials in Washington, D.C.

COMPTROLLER GENERAL'S REPORT TO THE CONGRESS

THE U.S. MAGISTRATES: HOW THEIR SERVICES HAVE ASSISTED ADMINISTRATION OF SEVERAL DISTRICT COURTS; MORE IMPROVEMENTS NEEDED
Judicial Branch
B-133322

DIGEST

WHY THE REVIEW WAS MADE

The Federal Magistrates Act of 1968 abolished the position of U.S. commissioners and created in their place a new level of officials within Federal district courts known as U.S. magistrates. The objective of the act was to provide for the disposition by magistrates of a greater range of minor offenses and relieve district judges of as many minor judicial duties as possible.

GAO reviewed the effect of this change in six Federal court districts to determine the impact magistrates have had on the Federal judicial system and whether opportunities exist for increasing magistrates' assistance to Federal district courts.

FINDINGS AND CONCLUSIONS

The full effect of the magistrate system is difficult to measure. Many variables affect the workload of district courts. The full benefits of the act, as intended by the Congress, are not yet being achieved.

However, there are indications that the new system is providing valuable assistance by providing for the disposition of a greater number of minor criminal offenses and by relieving district court judges of some judicial duties.

During fiscal year 1973, 88 full-time and 426 part-time magistrates handled 251,218 matters. More than 77,000 of these would not have been within the jurisdiction of commissioners and would have added to the district judges' workload.

The assistance provided by magistrates has contributed to the increase in cases terminated by district judges despite an increase in the relative difficulty of cases prosecuted.

Duties assigned

The duties actually performed by magistrates varied considerably among district courts reviewed.

The magistrates' trial jurisdiction includes all petty offenses, regardless of where they were committed, and most minor offenses.

The act provides that district courts may assign to magistrates other duties not inconsistent with the Constitution and law of the United States. (See p. 6.)

Determining what is or is not inconsistent with such laws frequently raises questions which

have been referred to the U.S. Courts of Appeals. The Courts of Appeals have not, however, provided needed clarification because of conflicting decisions.

Limitations

By increasing the magistrates' criminal jurisdiction to include all misdemeanors, the district judges' workload could be reduced and allow them to spend more time on felony and civil matters. The Federal Magistrates Act limits the magistrates' trial jurisdiction to those misdemeanors with penalties that do not exceed a 1-year imprisonment and/or a fine of $1,000.

GAO identified 165 other misdemeanors which have maximum fines ranging from $2,000 to $100,000. (See app. VII.) For example, a first offense for simple possession of a controlled substance (drugs) is a misdemeanor with a maximum penalty of 1 year and/or a fine of $5,000. During fiscal year 1973, 1 district heard 210 of these cases, about 10 percent of its total criminal caseload. Giving magistrates trial jurisdiction over most misdemeanors could greatly increase their assistance to district courts. (See pp. 16 and 18.)

Review of prisoner petitions

The Congress, in providing that duties of the magistrates may include review of prisoner petitions, indicated that this would afford some degree of relief to district judges and their law clerks who were burdened with these petitions.

Magistrates in three of the six district courts spent a large portion of their time reviewing petitions of Federal and State prisoners for posttrail relief. This duty consumed up to 30 percent of the magistrates' workload in these districts, whereas the other three districts used experienced law clerks to handle this function.

GAO believes that magistrates could have a greater impact upon the workload of district judges if the judges would have their law clerks assist magistrates in reviewing prisoner petitions in those districts where they are not now doing so. This would provide magistrates with more time to perform other judicial duties which could be assigned by the district judges.

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The Director of the Administrative Office of the U.S. Courts and the chief judges who responded to the report generally agreed with GAO's conclusions.

RECOMMENDATIONS

The Judicial Conference of the United States should take the lead to encourage district judges to (1) make greater use of magistrates under the existing legislation and (2) use law clerks to assist in reviewing prisoner petitions.

MATTERS FOR CONSIDERATION BY THE CONGRESS

Because of the varying interpretations of magistrates' authority by the circuit courts, GAO recommends that the Congress further define the authority of magistrates.

APPENDIX I

Also, the Congress may wish to consider amending the Federal Magistrates Act to expand the trial jurisdiction of magistrates to include most misdemeanors.

UNITED STATES DEPARTMENT OF JUSTICE

WASHINGTON, D.C. 20530

Address Reply to the
Division Indicated
and Refer to Initials and Number

Mr. Victor L. Lowe
Director
General Government Division
United States General Accounting Office
Washington, D.C. 20548

Dear Mr. Lowe:

This letter is in response to your request for comments on the draft report entitled "Crime Can Pay--U.S. Attorneys Turning Away Prosecutable Cases Because of Excessive Workloads."

We have carefully reviewed the report and generally believe the findings in the report are accurate. We agree that the Department should attempt to eliminate unwarranted disparities in the enforcement of Federal criminal laws and should develop alternatives to criminal prosecution for dealing with the overflow of prosecutable complaints received by U.S. attorneys. Although the report deals with a difficult area, its conclusions are somewhat oversimplified and to some extent misleading because they do not give adequate treatment to other significant aspects of prosecutable workload, such as the inability of the U.S. attorneys to prosecute more cases than Federal judges can handle and, more importantly, the exercise of the U.S. attorneys' prosecutorial discretion.

The report indicates that U.S. attorneys have declined to prosecute about 62 percent of the criminal complaints referred to them during fiscal years 1970 through 1976. The report acknowledges that many of those cases were declined for legal deficiencies. On the other hand, it also finds that many of the declined cases were prosecutable but not pursued because of a lack of resources or because the circumstances were not believed to warrant the cost of prosecution. The report further states that, because the U.S. attorneys cannot handle a "substantial" number of prosecutable cases, violators go unpunished, investigatory and regulatory agencies are not receiving adequate prosecutive support, and laws are unevenly enforced; ultimately, it is said, "crime can pay."

The executive branch of the Government has the constitutional responsibility to take care that the laws be faithfully enforced. The courts have recognized, however, as the report indicates, that U.S. attorneys have great latitude in determining their prosecutive priorities through the exercise of their prosecutorial discretion. By exercising that discretion, cases are brought into, and weeded from, the criminal justice system. It is one of the few ways in which the U.S. attorney can control the workload in his office. But the fact that the Government has only limited resources available at any given time is only one of a number of factors to be weighed in making prosecutive decisions. Other factors include whether the case already has been prosecuted by local authorities; whether local authorities intend to prosecute; whether the subject is already serving a sentence on another conviction and is unlikely to get additional time if convicted; whether there is a better but unrelated State or Federal case pending against the subject; whether the violation is of a de minimis nature; and whether alternative handling, such as preindictment diversion, juvenile proceedings, or restitution would be more appropriate than criminal prosecution.

The report implies that the fact many violators of Federal statutes are not prosecuted is an unacceptable condition. However, in view of the fact that most Federal crimes are also State crimes, the vast majority of the prosecutable offenses which are declined by U.S. attorneys' offices do not merit Federal prosecution and the utilization of the limited resources within the Federal criminal justice system. Furthermore, the U.S. attorneys are not the only ones in the system who have inadequate resources. Resource needs are felt throughout the Federal criminal justice system. This is not to say that U.S. attorneys do not need more manpower. However, generally speaking, U.S. attorneys have or can borrow adequate resources to prosecute those cases meriting Federal prosecution that can be handled by the Federal judges. U.S. attorneys cannot prosecute more cases than the Federal judges can handle. The availability of judge time is also a critical factor in the entire criminal justice system.

For the past several years the number of criminal complaints referred to U.S. attorneys has been declining. This may be attributed to a re-focusing of investigative and prosecutive resources toward quality cases rather

than quantity of cases. The Attorney General is directing emphasis towards combating organized crime, white collar crime, public official corruption, fraud in government programs, narcotics trafficking, and other significant areas. The investigation and prosecution of these types of complex cases require a great deal of dedicated investigative and prosecutive manpower. However, when one considers that the vast majority of traditional Federal crimes are also State crimes, it seems appropriate that scarce Federal resources should be devoted to those complex cases which often have multi-district ramifications and other specialized needs that can be best met by Federal attention. The Department's guideline policy with respect to the Dyer Act--that Federal prosecutions will generally be limited to cases involving organized rings or multi-theft operations, absent exceptional circumstances--is a good example of a serious effort by the Department to focus Federal prosecutive resources where they can have the greatest impact. This policy is implicitly criticized in the report.

The report recommends that the Attorney General review the prosecutive priorities and guidelines of the U.S. attorneys in order to ensure that the maximum practicable uniformity in prosecution between Federal jurisdictions is achieved. We agree that, to the maximum practicable extent, there should be uniformity in the prosecution of certain Federal criminal laws. The Department has issued a number of prosecutive guidelines that establish minimum criteria for Federal criminal prosecution of different offenses. Some U.S. attorneys have developed more restrictive guidelines for those offenses, or guidelines for prosecutions of other offenses, to accommodate variations in local situations. The report leaves the impression, however, that there are no guidelines at all. Further, differences in formal prosecutive policy among U.S. attorneys do not necessarily result in a wide divergence in actual prosecution of criminal conduct, since much of the difference is accounted for by State or local prosecution of offenders not prosecuted federally. In addition, variations in local conditions and local needs require some distinctions in prosecutive policies and priorities throughout the country.

In the area of unwarranted disparities in the enforcement of Federal criminal law, the Office for Improvements in the Administration of Justice (OIAJ) is currently engaged in two major projects: the development of prosecutorial

discretion "guidelines," and an empirical study of the prosecutive policies and practices of the U.S. attorneys' offices.

The prosecutorial discretion guidelines project was begun by a Department task force in 1975. Based on the work of the task force, OIAJ drafted proposed guidelines relating to several areas of prosecutorial discretion, including decisions to prosecute or decline prosecution. These guidelines were distributed informally to U.S. attorneys for their use. The Attorney General has recently requested that OIAJ examine the possibility of developing additional guidelines for areas of prosecutorial discretion other than those covered earlier and re-examine the desirability of formal distribution of the proposed guidelines already developed.

As a corollary to developing prosecutorial discretion guidelines, OIAJ has formulated a research project designed to study the prosecutive policies and practices of a selected sample of U.S. attorneys' offices. This study is scheduled to commence in 1978 and to be completed within 12 to 18 months. It is aimed at establishing empirically the extent of disparities in the exercise of prosecutorial discretion in the Federal system and providing an additional basis for the development of means of ensuring uniformity and consistency in the discretionary decisions of Federal prosecutors.

The report suggests a variety of alternative mechanisms to handle certain types of criminal cases that are not now receiving the full attention of U.S. attorneys. These include expanding the authority and increasing the use of Federal magistrates, making greater use of civil fines in place of criminal prosecutions, and enlarging pretrial diversion programs. All of those suggestions merit serious consideration. However, they are presented in the report as alternatives to prosecution that may be required because of U.S. attorney manpower and resource shortages. That analysis exaggerates the importance of manpower and does not give adequate consideration to the need for the sound exercise of prosecutive discretion. For example, although it is correct to consider replacing criminal sanctions with civil penalties in certain areas of the law, it is not correct to assume that resource shortages alone account for certain statutes not being fully enforced. With respect to Federal magistrates, we do consider it an excellent idea to expand their jurisdiction not only to conserve judicial resources, but also to provide a forum for minor cases that do not require the attention of a Federal judge.

As for the development of alternatives to criminal prosecution, OIAJ has been actively engaged in the analysis and evaluation of an experimental pretrial diversion program begun by the Department in 1974. Pursuant to that program, U.S. attorneys have been authorized to use pretrial diversion as an alternative to prosecution except in certain types of cases. More than 30 districts have participated in the program, and in five demonstration districts the program has been conducted under controlled conditions for study purposes. Earlier this year a survey of all U.S. attorneys' offices was conducted by OIAJ to gather data concerning the operation of the program. Analysis of the data is now under way and an evaluation of the program is expected to be completed this fall.

In addition to these major projects, OIAJ is considering ways in which to develop an information system that will enable the Department to monitor prosecutions in all U.S. attorneys' offices. Such a retrieval system will make possible the rapid identification of the types of cases presented to and prosecuted by the U.S. attorneys and will facilitate efforts by the Department to ensure the maximum practicable uniformity in prosecution between Federal districts.

Related to the goal of making more effective use of existing judicial resources in the processing of criminal cases, the Department recently developed a statutory proposal to increase the criminal jurisdiction of Federal magistrates by permitting them to try all misdemeanor cases. A bill based on our proposal recently passed the Senate (S. 1613) and is expected to receive favorable consideration by the House of Representatives early next year.

The draft report states on page 20 that some referring agencies do not receive needed prosecutive support. Although investigative expertise is increasing, sufficient numbers of qualified criminal investigators are still lacking in many Federal agencies. Those agencies that do not have the investigation of criminal laws as their primary mission often submit inadequate and incomplete criminal violation referrals to the U.S. attorneys for prosecutive consideration. Additionally, many of those referred violations were of a de minimis nature and would have been best handled through administrative procedures. The standards for criminal prosecution are necessarily much higher than they are for civil procedures.

Finally, we consider this study to be a limited overview of a very significant issue that does not adequately consider (1) many Federal criminal offenses which are of ancient vintage and may no longer warrant serious prosecutive effort, (2) the impact of the proposed recodification of Federal criminal laws, and (3) the effects of the President's Reorganization Project, particularly in the areas of litigation management and investigative reorganization, which we believe will focus on priority-setting needs for the entire Government and law enforcement community.

We appreciate the opportunity to comment on the draft report. Should you have any further questions, please feel free to contact us.

Sincerely,

Kevin D. Rooney
Assistant Attorney General
for Administration

PRINCIPAL OFFICIALS RESPONSIBLE FOR ADMINISTERING ACTIVITIES DISCUSSED IN THIS REPORT

	Tenure of office	
	From	To
DEPARTMENT OF JUSTICE		
ATTORNEY GENERAL OF THE UNITED STATES:		
Griffin B. Bell	Jan. 1977	Present
Edward H. Levi	Feb. 1975	Jan. 1977
William B. Saxbe	Jan. 1974	Feb. 1975
ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION:		
Benjamin R. Civiletti	Mar. 1977	Present
Richard L. Thornburgh	July 1975	Mar. 1977
John C. Keeney (acting)	Jan. 1975	July 1975
DIRECTOR, EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS:		
William P. Tyson (acting)	Aug. 1977	Present
William B. Gray	Dec. 1975	Aug. 1977
Gerald D. Fines (acting)	Feb. 1975	Dec. 1975
Philip H. Modlin	Aug. 1971	Feb. 1975

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