DEPARTMENT OF JUSTICE GUIDELINES: BALANCING "DISCRETIONARY JUSTICE"[1]

By: Ellen S. Podgor[*]

I. Introduction

Prosecutors are afforded enormous discretion in a multitude of decisions.[2] For example, they decide who will be charged with crimes,[3] what crimes will be charged,[4] what evidence will be submitted to a grand jury,[5] whether discovery materials will be released earlier than mandated by statute,[6] whether an accused will receive the benefits for cooperation with the government,[7] and whether cases will be plea bargained, dismissed, or tried.[8] The law sets the external boundaries for many of these functions, but prosecutors may move relatively freely within these boundaries in exercising their executive function.[9]Norman Abrams, *Internal Policy: Guiding the Exercise of Prosecutorial Discretion*, 19 UCLA LAW REV. 1, 2 (1971). Seldom do constitutional constraints impede the discretionary power of prosecutors.[10]

Internal guidelines of the Department of Justice (DOJ) operate to assist federal prosecutors in making the decisions that fall within the discretionary realm.[11] These internal guidelines, usually found in the United States Attorneys' Manual, provide Government prosecutors with guidance in making decisions.[12] They also offer an element of consistency to the decision-making process, provide education for newcomers to the department, and can serve as a restraint on prosecutorial discretion.[13]

Prosecutors however, do not always adhere to these guidelines.[14] Since courts routinely find these guidelines strictly internal and unenforceable at law, the accused has no judicial recourse when prosecutors fail to

abide by the guidelines. Thus, when it comes to Department of Justice guidelines, a failure to follow office procedure is an error that cannot be used by the accused who might suffer as a result of this violation.[15]

This Article focuses on criminal cases involving violations of Department of Justice internal guidelines. It uses as examples three guidelines that are routinely violated by attorneys in the Justice Department and examines the judicial response to these transgressions. It contrasts this judicial response to how violations of guidelines committed in other administrative agencies are treated by the courts.[16] After discussing the guideline violations and court responses to these transgressions, this Article focuses on why compliance with the guidelines is important and how it can be improved.

This Article advocates for a heightened review by the judiciary, legislature, and executive when Department of Justice guidelines are ignored. This oversight, however, needs to be sensitive to the benefits of continuing the practice of having the Department of Justice construct meaningful internal guidelines. The Article examines remedies that find a balance between continuing the practice of having guidelines and yet also having meaningful policies that are adhered to by department employees.

II. Department of Justice Guidelines

Department of Justice guidelines are written internally within the department. They are subject to change at the will of the Attorney General, and for the most part, they are enforceable only as the department chooses to enforce them. Unlike the Federal Sentencing Guidelines, which are mandatory in nature and subject to judicial imposition and review, the justice department guidelines are internally created and enforced. They are not a part of

the Code of Federal Regulations and they carry no legislative authority.[17]

Most of the internal guidelines of the Department of Justice are found in the United States Attorneys' Manual.[18] The Manual describes itself as a "looseleaf text" that "contains general policies and some procedures relevant to the work of the United States Attorneys' offices and to their relations with the legal divisions, investigative agencies, and other components within the Department of Justice."[19] The U.S. Attorneys' Manual is not a stagnant document, as sections within the Manual are continually being revised. These revisions include "policy" changes that require several layers of departmental review before being added to the Manual,[20]U.S. ATTYS. MAN. 1-1.600. and "procedural" changes[21] that are not subject to a similar scrutiny prior to insertion in the Manual. The Manual is "prepared under the general supervision of the Attorney General and under the direction of the Deputy Attorney General, by the United States Attorneys, the Litigating Divisions, the Executive Office for the United States Attorneys, and the Justice Management Division."[22]

Publication of prosecutorial guidelines is relatively new. In a 1971 article, Professor Norman Abrams advocated for a comprehensive prosecutorial policy.[23]Abrams, *supra* note 8, at 57. Although he offered eight arguments that might discourage publishing internal policy,[24] he stressed the need to move in this direction. He predicted that "making prosecutorial policy public" would "subject it to scrutiny, evaluation, and criticism by outsiders."[25]

His prediction has proved to be accurate. Today federal prosecution policy is easily accessible in both hard text and online.[26] Also apparent is a growing number of appellate decisions that raise issues premised upon a violation of the Justice Department policies. Irrespective of whether there is a correlation between the publication of

the guidelines and its increased use by defense counsel, there are enormous benefits to the adoption and use of the guidelines.

The federal guidelines used by Department of Justice attorneys today are comprehensive and detailed. The guidelines provide guidance in a wide array of areas such as charging,[27] when it is necessary to seek approval from superiors,[28] procedures regarding international prosecutions,[29] and department policy on sentencing.[30]

Some of the Department of Justice guidelines have been criticized, such as those for law office searches[31] and for grand jury subpoenas to defense counsel.[32] Some of the rules authorize conduct that might be frowned upon by the general public. For example, the Department of Justice guidelines defines "lures" as "a subterfuge to entice a criminal defendant to leave a foreign country so that he or she can be arrested in the United States . . . or in a third country for subsequent extradition, expulsion, or deportation to the United States." The guidelines permit prosecutors to use "lures" and merely require that the prosecuting attorney "consult with the Office of International Affairs before undertaking a lure to the United States or a third country."[33]

In many instances, the guidelines offer the accused benefits that exceed constitutional mandates. For example, although prosecutors have no constitutional obligation to give grand jury witnesses advice warnings informing them when they are a "potential defendant in danger of indictment,"[34] the guidelines mandate attorneys to provide an "advice of rights" form to witnesses who are likely to be indicted.[35] In this, and other instances, the accused receives clear benefits by the enactment of these guidelines.

In some cases the guidelines offer internal constraints to overly broad statutes.[36] For example, the Racketeer Influenced and Corrupt Organization Act[37] has been criticized as overly broad and having draconian

penalties, especially in the forfeiture area.[38] The Department of Justice provides extensive policy to monitor and control the filing of cases by its office.[39] In contrast, no guidelines exist to control filings by private parties using the civil provisions of RICO. Congress has intervened in the civil context to place a statutory restriction on how private parties may use the statute.[40] Few Congressional restraints, however, have been placed on prosecutors who bring criminal RICO cases. Former Assistant Attorney General Edward S.G. Dennis, Jr. noted that "[t]he key to our use of RICO in prosecuting white-collar crime is to confine the statute's use to those cases where the unlawful conduct was both continuous and egregious and where there is the prospect of significant forfeiture of ill-gotten proceeds or of interests in a tainted enterprise." [41]

Guidelines have also been used to stop controversial practices that might be implemented by individual Assistant United States Attorneys or the offices that they work within.[42] For example, mail fraud is included as a predicate act for a RICO charge.[43] Tax fraud is not on the list of predicates for RICO. Since prosecutors could not directly use tax fraud to obtain the increased RICO penalties, they creatively made the tax fraud charge into mail fraud[44] by claiming that the mailing of a false tax return to be mail fraud.[45] By making tax fraud into mail fraud, the crime became a predicate for RICO and when the conduct formed a pattern of racketeering it became subject to an increased sentence. This practice was criticized.[46] In 1989, the Department of Justice added a guideline that stated that "only in exceptional circumstances" would authorization be granted for a RICO charge when a mail fraud predicate was being premised upon the mailing of a false tax return.[47] *See* U.S.ATTYS.MANUAL § 6-4.211(1) (footnote omitted). This guideline, however, has not ended this creative prosecutorial charging of mail fraud for the mailing of a false tax return.[48]

[Although the article is complete, it would not transfer to a WORD document. If this portion of the article interests you, I can email a WordPerfect file or overnight a hard copy of the entire Article. I am prepared to transfer it to WORD if that is required by the law review that I agree to publish it with.]

---

[1] KENNETH CULP DAVIS, DISCRETIONARY JUSTICE (1969).

[*] Visiting Professor of Law, The George Washington University Law School. Professor of Law, Georgia State University College of Law. John S. Stone, Visiting Endowed Chairholder, University of Alabama School of Law, Fall 2001, Visiting Professor of Law, University of Georgia School of Law, fall 2000. Visiting Scholar, Yale Law School, fall 1998. The author thanks Professors Leslie Griffin, Peter Henning. The author also thanks past research assistants Edward Pfsiter and Raina Schactman and the Georgia State University College of Law for its financial assistance during the writing of this article.

[2] There has been an enormous amount of scholarship on issues related to prosecutorial discretion. *See* DAVIS, *supra* note 1; *see also* Fred C. Zacharias & Bruce A. Green, *The Uniqueness of Federal Prosecutors*, 88 GEO. L. J. 207 (2000); Gerald E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117 (1998); Robert L. Misner, *Recasting Prosecutorial Discretion*, 86 J. CRIM. L. & CRIMINOLOGY 717 (1996); Robert G. Morvillo & Barry A. Bohrer, *Checking the Balance: Prosecutorial Power in an Age of Expansive Legislation*, 32 AM. CRIM. L. REV. 137 (1995); Kenneth J. Melilli, *Prosecutorial Discretion in an Adversary System*, 1992 B.Y.U. L. REV. 669 (1992); Abraham Goldstein, *The Victim and Prosecutorial Discretion: The Federal Victim and Witness Protection Act of 1982*, 47 L. & CONT. PROB. 225 (1984) (discussing discretion as it relates to victims); James Vorenberg, *The Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521 (1981); Richard S. Frase, *The Decision to File Federal Criminal Charges: A Quantitative Study of Prosecutorial Discretion*, 47 U. CHI. L. REV. 246 (1980).

[3] *See* Wayte v. United States, 470 U.S. 598, 608 (1985)(holding that absent an impermissible standard such as race or religion, prosecutors have discretion to decide who will be charged with a crime). *See also* Robert Heller, *Selective Prosecution and the Federalization of Criminal Law: The Need for Meaningful Judicial Review of Prosecutorial Discretion*, 145 U. OF PA. L. REV. 1309 (1997) (discussing prosecutorial discretion in charging); Mark Lemle Amsterdam, *The One-Sided Sword: Selective Prosecution In Federal Courts*, 6 RUTGERS-CAMDEN L.J. 1 (1974) (discussing selective prosecution in federal courts).

[4] *See* United States v. Armstrong, 517 U.S. 456 (1996) (holding that a defendant is not entitled to a discovery claim for a selective prosecution argument).

[5] *See* United States v. Williams, 504 U.S. 36 (1992) (holding that the government is not required to disclose "substantial exculpatory evidence" to a grand jury).

[6] *See, e.g.*, United States v. Green, 151 F.3d 1111, 1115 (8th Cir. 1998) (holding that although the government has no obligation to release Jencks discovery material early, it has this option).

[7] The government has the exclusive authority to offer a reduction in sentence premised upon cooperation. *See* U.S. Sentencing Guidelines Manual § 5K1.1. *See also* Cynthia Kwei Yung Lee, *Prosecutorial Discretion, Substantial Assistance, and the Federal Sentencing Guidelines*, 42 UCLA L. REV. 105 (1994).

[8] *See* WAYNE R. LAFAVE ET AL., 4 CRIMINAL PROCEDURE § 13.2(a), at 10 (2d ed. 1999) (discussing the range of discretionary decisions afforded to prosecutors); *see also* Fred C. Zacharias, *Justice in Plea Bargaining*, 39 WM. & MARY L. REV. 1121 (1998); James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521 (1981).

[9] Professor Norman Abrams, in a 1971 article, noted the benefits of this prosecutorial

discretion as:

> The major advantage of such discretion is that it provides early in the decision-making process a flexibility and sensitivity not available in a system where prosecutorial decisions must be made according to predetermined rules. It permits a prosecutor in dealing with individual cases to consider special facts and circumstances not taken into account by the applicable rules.

[10] To reach a constitutional level requires a showing of a due process violation or a discretionary decision that violated equal protection mandates such as a charging decision that used an impermissible criteria such as race or religion. *See* Wayte v. United States, 470 U.S. 598, 608 (1985). Guidelines adopted by the Department of Justice, however, do need to stay within the limits of Constitution. *See* United States v. Schmucker, 721 F.2d 1046, 1049 (6th Cir. 1983) (stating that the "government cannot adopt a prosecution policy which, if adopted by Congress as a statute, would be unconstitutional").
[11] *See infra* Part II.
[12] *Id.* (discussing the development of the guidelines and the different forms of guidelines used by the Department of Justice).
[13] *See generally* Michael A. Simons, *prosecutorial Discretion and Prosecution Guidelines: A Case Study in Controlling Federalization*, 75 N.Y.U. L. REV. 893 (2000) (discussing how DOJ guidelines can serve as a restraint on federalization).
[14] *See infra* Part III.
[15] *See infra* notes 49 - 101 and accompanying text.
[16] *See infra* notes 138-158 and accompanying text.
[17] In some instances the Code of Federal Regulations may overlap with the guidelines. *See* 28 C.F.R. § 50.10 ("Policy with regard to issuance of subpoenas to members of the news media, subpoenas for telephone toll records of members of the news media, and the interrogation, indictment, or arrest of, members of the news media.").
[18] On occasion the Department of Justice will issue policy via a handbook or office directive. *See, e.g,* United States v. Craveiro, 907 F.2d 260 (1st Cir. 1990) (describing Department of Justice Handbook issued after the passage of the Comprehensive Crime Control Act of 1984).
[19] U.S. ATTYS'. MAN. 1-1.100 (1997).
[20] Policy changes are designated "bluesheets" and require:

> Policy changes are submitted by the Attorney General, Deputy Attorney General, Associate Attorney General, a litigating division or the Executive Office for United States Attorneys (EOUSA). Policy changes submitted by an Assistant Attorney General for a litigating division or the Director EOUSA must be reviewed by the Attorney General's Advisory Committee (AGAC) before being incorporated into the Manual. If the AGAC objects to the proposed policy change, it will meet with the litigating division or EOUSA to resolve. Unresolved issues will be resolved by the Deputy Attorney General or Attorney General. Policy changes issued by the Attorney General, Deputy Attorney General, and Associate Attorney General are effective upon issuance.

[21] "Procedural changes to the Manual do not require review by the Advisory Committee and can be incorporated directly into the Manual." U.S. ATTYS. MAN. 1-1.600 (1997).
[22] U.S. ATTYS'. MAN. 1.1.200 (1997).
[23] Professor Abrams stated:

> [I]t is both feasible and desirable to develop comprehensive and detailed policy statements governing the exercise of prosecutorial decision-making and that significant prosecution resources should be allocated to the task of developing

such policy.

[24] *Id.* at 28-34.
[25] *Id.* at 27.
[26] The Department of Justice Manual, was initially published by Prentice Hall in 1987 and remained a Prentice Hall publication until 1999. In the Editor's Introduction to the multi-volume treatise it stated that this was "not itself an official publication of the Department." *See* DEPARTMENT OF JUSTICE MANUAL xxiii. In 2000, a Manual was published in text form by Aspen Publishers. The official Manual "is published by the Executive Office for United States Attorneys and is distributed to each United States Attorney's Office and Litigating Division of the Department of Justice." U.S. ATTYS.' MAN. 1-1.500. Today, the guidelines can also be found online in both the Westlaw and Lexis retrieval systems. Additionally, the Department of Justice website, accessible to the general public, contains the entire Manual. *See* http://www.usdoj.gov/usao/eousa/foia _reading_room/usam/(last visited Aug. 14, 2003). The Manual is a government document, and as such, is available to the public. U.S. ATTYS.' MAN. 1-1.300.
[27] *See* U.S. ATTYS. MAN. 9-27.230 (1997) ("Initiating and Declining Charges - - Substantial Federal Interest); *see also* Memorandum From: Deputy Attorney General; Subject: Principles of Federal Prosecution of Business Organizations (Janurary 20, 2003). <http://www.usdoj.gov/dag/ cftf/corporate_guidelines.htm>.
[28] *See* U.S. ATTYS. MAN. 9-2.400 (listing a prior approvals chart). One also finds requirements of seeking approvals within specific guidelines. For example, prior to filing a case under the Racketeer Influenced and Corrupt Organization Act (RICO), it is necessary to obtain approval from department supervisors. *See* U.S. ATTYS. MANUAL § 9-110.101 (1999).
[29] For example, there are specific guidelines regarding extraditions. *See, e.g.*, U.S. ATTYS.' MAN. 9-15.620 (providing the guideline for "extradition for a third country"); U.S. ATTYS.' MAN. 0-15.240 (providing a guideline on the "documents required in support of request for extradition").
[30] *See* Letter of John Ashcroft, Attorney General, *Departmental Policies and Procedures Concerning Sentencing Recommendations and Sentencing Appeals*, July 28, 2003.
[31] *See* Steven J. Enwright, Note, *The Department of Justice Guidelines to Law Office Searches: The Need to Replace the "Trogan Horse" Privilege Team with Neutral Judicial Review*, 43 WAYNE ST. L. REV. 1855 (1997) (advocating that the DOJ law office search guidelines are contrary to the attorney-client privilege).
[32] *See* Michael F. Orman, Note, *A Critical Appraisal of the Justice Department Guidelines for Grand Jury Subpoenas Issued to Defense Attorneys*, 1986 DUKE L.J. 145 (1986).
[33] U.S. ATTYS.' MAN. 9-15.630. Actual practice shows that the government participates in "luring" activities. *See Russian Hacker Sentencing to 3 Years in Prison*, AP, Oct. 5, 2002, *at* http://www.modbee.com/24hour/technology/story/ 562860p-4430289c.html (discussing how the United States set up a bogus company and then invited the defendants to the United States to the United States to demonstrate their hacking skills); *see also* United States v. Yunis, 924 F.2d 1086 (D.C. Cir. 1991).
[34] *See* United States v. Washington, 431 U.S. 181, 182 (1976) (holding that "[t]he constitutional guarantee is only that the witness be not *compelled* to give self-incriminating testimony"). It should be noted, however, that in the *Washington* case, the "respondent was explicitly advised that he had a right to remain silent and that any statements he did make could be used to convict him of a crime." *Id.* at 188.
[35] U.S. ATTYS.' MAN. 9-11.151 (2000). *See infra* notes 80 - 94 and accompanying text.
[36] *See* Thomas J. Maroney, *Fifty Years of Federalization of Criminal Law: Sounding the Alarm or "Crying Wolf,"* 50 SYR. L. REV. 1317. 1372 (2000) (discussing how guidelines serve as reinforcement).
[37] 18 U.S.C. § 1961 et. seq. *See generally* Barry Tarlow, *RICO Revisited*, 17 GA. L. REV. 291 (1983) (providing a history and general overview of the RICO statute).
[38] *See generally* Gerald E. Lynch, *RICO: The Crime of Being Criminal, Parts I & II,* 87

COLUMBIA L. REV. 661 (1987) (noting the attention RICO has received "because of its draconian penalties").

[39] The preface to the RICO guidelines reflect the policy rationale of restricting government use of this statute:

The decision to institute a federal criminal prosecution involves a balancing process, in which the interests of society for effective law enforcement are weighed against the consequences for the accused. Utilization of the RICO statute, more so than most other federal criminal sanctions, requires particularly careful and reasoned application, because, among other things, RICO incorporates certain state crimes. One purpose of these guidelines is to reemphasize the principle that the primary responsibility for enforcing state law rests with the state concerned.

Despite the broad statutory language of RICO and the legislative intent that the statute ". . . shall be liberally construed to effectuate remedial purpose," it is the policy of the Criminal Division that RICO be selectively and uniformly used. It is the purpose of these guidelines to make it clear that not every case in which technically the elements of a RICO violation exist, will result in the approval of a RICO charge. Further, it is not the policy of the Criminal Division to approve "imaginative" prosecutions under RICO which are far afield from the congressional purpose of the RICO statute. Stated another way, a RICO count which merely duplicates the elements of proof of a traditional Hobbs Act, Travel Act, mail fraud, wire fraud, gambling or controlled substances cases, will not be added to an indictment unless it serves some special RICO purpose as enumerated herein.

Further, it should be noted that only in exceptional circumstances will approval be granted when RICO is sought merely to serve some evidentiary purpose, rather than to attack the activity which Congress most directly addressed — the infiltration of organized crime into the nation's economy.

These guidelines provide only internal Department of Justice guidance. They are not intended to, do not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal. Nor are any limitations hereby placed on otherwise lawful litigative prerogatives of the Department of Justice.

U.S.ATTYS.MANUAL § 9-110.200. There are also guidelines restricting the use of RICO in certain contexts. *See* U.S. ATTYS. MANUAL § 9-110.340 (providing that "[n]o indictment shall be brought charging a violation of 18 U.S.C. § 1962(c) based upon a pattern of racketeering activity growing out of a single criminal episode or transaction."). In hearings regarding asset forfeiture, the United States Attorney's Office has touted its guidelines as showing that its forfeiture policy is "administered fairly and effectively, with all appropriate consideration given to the rights of property owners." *See* Testimony of Stephan D. Cassella, Assistant Chief Asset Forfeiture and Money Laundering Section, Criminal Division, June 11, 1997, Concerning H.R. 1835, The Civil Asset Forfeiture Reform Act, Comm. On the Judiciary. (1997 WL 311709 (F.D.C.H.) (discussing the "detailed policy guidelines governing the use of the administrative, civil judicial, and criminal forfeiture laws of all agencies of the Department.").

[40] Congress added language to the civil RICO statute, 18 U.S.C. § 1964(c) restricting its use by stating that "no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of section 1962."

[41] Edward S.G. Dennis, Jr., *Current RICO Policies of the Department of Justice*, 43 VAND. L. REV. 651, 671 (1990). *See also* Paul E. Coffey, *The Selection, Analysis, and Approval of Federal RICO Prosecutions*, 65 NOTRE DAME L. REV. 1035 (1990).

[42] Guidelines can also be used to stop controversial practices of investigating agencies. For example, new guidelines were implemented to include DOJ attorneys in determining whether individuals may be "accepted as informants." *See Informants Who Corrupt the Law*, N.Y. TIMES, March 24, 2001, at A.26 (editorial).

[43] 18 U.S.C. § 1961.
[44] *See, e.g.*, Busher v. United States, 817 F.2d 1409 (9th Cir. 1987).
[45] 18 U.S.C. § 1341.
[46] *See generally* Ellen S. Podgor, *TaxFraud-Mail Fraud: Synonymous, Cumulative or Diverse*?, 57 U. CINN. L. REV. 903 (1989) (discussing the use of mail fraud when the crime was actually the filing of a fraudulent tax return).
[47] The guidelines states in part:

> The authorization of the Tax Division is required before charging mail fraud counts either independently or as predicates acts to a RICO charge: (1) when the only mailing charged is a tax return or other internal revenue form or document; or (2) when the mailing charged is a mailing used to promote or facilitate a scheme which is essentially only a tax fraud (e.g., a tax shelter). Such authorization will be granted only in exceptional circumstances . . .

[48] *See, e.g.*, Helmsley v. United States, 941 F.2d 71 (2d Cir. 1991) (charging mail fraud for the failing of alleged false state tax returns).