

PROSECUTION OF CRIMINAL CASES: WHERE EXECUTIVE AND JUDICIAL POWER MEET

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I. INTRODUCTION

Prosecution of a criminal case can be defined as an effort by the Executive Branch through a court proceeding to obtain the determination that someone has violated the law in order to expose that person to a possible loss of life, liberty, or property. This definition makes clear that the prosecutorial function is deeply and inevitably interwoven with the judicial function. While courts have stated that prosecution is quintessentially an executive function,¹ courts are regularly involved in determining the future of criminal cases, even when no controversy exists between the Executive and the Judiciary. For instance, a court may dismiss or remand a case because the indictment fails to state an offense,² because the facts do not permit a jury verdict of guilty,³ or for prosecutorial misconduct,⁴ constitutional considerations such as double jeopardy,⁵ or myriad other reasons.⁶ None of these actions is considered an improper intrusion on the Executive's power to prosecute. Clearly, however, even with respect to the termination of prosecutions, there are limits on judicial power. A court cannot, for example, dismiss a case merely because it thinks the continued prosecution of the case is unworthy of government resources,⁷ because repeated mistrials and the defendant's pregnancy make it cruel to force another trial,⁸ or because the court deems it in the interests of justice to terminate the prosecution.⁹

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1. *E.g.*, *Newman v. United States*, 382 F.2d 479, 480 (D.C. Cir. 1967) (Burger, J.) (stating that "[f]ew subjects are less adapted to judicial review than the exercise by the Executive of his discretion in deciding when and whether to institute criminal proceedings, or what precise charge shall be made, or whether to dismiss a proceeding once brought.").

2. FED. R. CRIM. P. 12(b).

3. FED. R. CRIM. P. 29.

4. *E.g.*, *Brady v. Maryland*, 373 U.S. 83 (1963).

5. *E.g.*, *Brown v. Ohio*, 432 U.S. 161, 166 (1977).

6. For example, a defect in the manner in which the grand jury is selected may justify a dismissal. *E.g.*, *Rabinowitz v. United States*, 366 F.2d 34, 60 (5th Cir. 1966).

7. *United States v. Valle*, 697 F.2d 152, 154 (6th Cir.), *cert. denied*, 461 U.S. 918 (1983).

8. *United States v. Lai Ming Tanu*, 589 F.2d 82, 90 (2d Cir. 1978).

9. *United States v. Weinstein*, 452 F.2d 704, 716 (2d Cir. 1971) (finding that verdict not in interest of justice may permit court, under Rule 33 of Federal Rules of Criminal Procedure, to grant new trial), *cert. denied*, 406 U.S. 917 (1972).

When a court becomes more active and plays an affirmative role in the prosecution of a criminal case, however, separation of powers questions may arise. Such activity occurs in two places, at the initiation and at the termination of prosecution, and poses serious separation of powers questions. In many cases there is no clear answer. Part II of this Article discusses the role of the Judiciary in the initiation of prosecution in the context of Title VI of the Ethics in Government Act of 1978.¹⁰ The Article concludes that the Judiciary's role is merely ministerial, and that, despite the lack of a clear answer in existing law, Title VI is constitutional. Part III discusses the role of the Judiciary in the termination of prosecution, with reference to Federal Rules of Criminal Procedure 11(e) and 48(a). The Article contends that judicial consideration of plea bargains involving a dismissal of charges should be considered under the deferential standard of Rule 48(a) rather than under the *de novo* standard of Rule 11. Accordingly, the Article recommends that both rules be amended. The overall framework for this Article will be the federal system.¹¹

II. INITIATION OF PROSECUTION

A. *At Common Law*

Perhaps the leading case on the initiation of prosecution by the Judiciary is *United States v. Cox*.¹² *Cox* arose after two blacks testified in a voter registration suit regarding the conduct of a voter registrar who allegedly had frustrated their efforts to register.¹³ After hearing conflicting testimony from other witnesses, the trial judge impanelled a grand jury, which, upon the completion of its investigation, indicated its readiness to bring perjury charges against the black witnesses.¹⁴ The Attorney General directed the U.S. Attorney not to sign

10. Pub. L. No. 95-521, 92 Stat. 1824, 1867-75 (Title VI) (codified as amended at 28 U.S.C. §§ 591-598 (1982 & Supp. II 1984)). Title VI was reauthorized and further amended in December, 1987. Independent Counsel Reauthorization Act of 1987, Pub. L. No. 100-191, 101 Stat. 1293 [hereinafter Reauthorization Act of 1987].

On January 22, 1988, the D.C. Circuit held Title VI unconstitutional, primarily on separation of powers grounds. *In re Sealed Case*, Nos. 87-5261, 87-5264, 87-5265 (D.C. Cir. Jan. 22, 1988). One month later, the Supreme Court granted certiorari to review the appellate court's decision. 56 U.S.L.W. 3556 (U.S. Feb. 22, 1988) (No. 87-1279). The Court will hear oral arguments in April, 1988. 56 U.S.L.W. 1128 (1988).

11. The separation of powers into three distinct branches of government is the direct product of the first three articles of the United States Constitution, which divide power among Congress, the President, and the courts. There is no requirement that the states follow the federal structure. "[The] Constitution nowhere requires the states to have a tripartite system of government" *United Beverage Co. v. Indiana Alcoholic Beverage Comm'n*, 760 F.2d 155, 158 (7th Cir. 1985) (citing *Whalen v. United States*, 445 U.S. 684, 689 n.4 (1980)); *Mayor v. Education Equality League*, 415 U.S. 605, 615 & n.13 (1974)). Clearly, however, certain types of separation seem compelled by the due process clause of the Fourteenth Amendment. A state would not be free, for example, to have the prosecutor in a criminal case also serve as the judge.

12. 342 F.2d 167 (5th Cir.), *cert. denied*, 381 U.S. 935 (1965).

13. *Id.* at 194 (Wisdom, J., concurring specially).

14. *Id.* at 194-95 (Wisdom, J., concurring specially).

the perjury indictment,¹⁵ but the trial judge ordered him to sign it.¹⁶ When he refused, the judge held him in contempt,¹⁷ crystalizing the issue: Do the courts have the inherent power to compel the initiation of a criminal prosecution when the Executive decides to forgo it?

The Fifth Circuit, in a landmark decision, vacated the contempt order, finding that the decision to commence prosecution belonged exclusively to the Executive, at least in the absence of corruption.¹⁸ Specifically, the court noted that while the U.S. Attorney was a member of the bar and an officer of the court, he was nevertheless an executive official

and as an officer of the executive department . . . he exercises a discretion as to whether or not there shall be a prosecution in a particular case. It follows, as an incident of the constitutional separation of powers, that the courts are not to interfere with the free exercise of the discretionary powers of the attorneys of the United States in their control over criminal prosecutions.¹⁹

The court further noted that the provision of Rule 7 requiring the U.S. Attorney's signature on an indictment implicitly recognizes the Executive's power to determine whether to bring a charge that the grand jury believes warranted.²⁰ Several other courts have acknowledged *Cox* as authoritative,²¹ and none has rejected its holding.

B. The Ethics in Government Act of 1978

1. Background

Although *Cox* is decisive as to the exclusivity of executive authority in the commencement of criminal cases, one should remember that the case arose where there was a difference of opinion between the Executive and the Judici-

15. *Id.* at 169. It appears that the decision not to prosecute was grounded in both fact and policy. Because the two witnesses had tried on numerous occasions to register to vote, each time without success, attorneys in the Department of Justice felt that erroneous testimony in the voter registration suit was the product of confusion stemming from their numerous unsuccessful attempts at registration, rather than of willfulness. As a matter of policy, the Department of Justice felt that prosecution of the two witnesses for perjury would intimidate potential witnesses in other cases and thereby significantly impede the Department of Justice's voter registration efforts. *Id.* at 196 (Wisdom, J., concurring specially).

16. *Id.* at 169. Rule 7(c) of the Federal Rules of Criminal Procedure requires that an indictment be signed by the United States Attorney.

17. *Id.* at 169-70.

18. *Id.* at 172.

19. *Id.* at 171 (citations omitted).

20. *Id.*

21. *Nathan v. Smith*, 737 F.2d 1069, 1078 (D.C. Cir. 1984) (Bork, J., concurring); *United States v. Vague*, 697 F.2d 805, 807 (7th Cir. 1983); *In re An Application for Appointment of Independent Counsel*, 596 F. Supp. 1465, 1470 (E.D.N.Y. 1984); *In re Grand Jury Impaneled January 1969*, 315 F. Supp. 662, 673 (D. Md. 1970).

ary as to whether criminal charges should be brought and where the district court's exercise presumed an *inherent* judicial power to initiate prosecution. Not all judicial involvement in the decision to initiate a prosecution, however, necessarily involves a conflict with the Executive. Furthermore, not all such involvement must rest on the courts' inherent powers. On the contrary, Congress, through Title VI of the Ethics in Government Act of 1978, has given the courts a ministerial role in the potential initiation of prosecution in certain cases. We turn then to this attempt to legislate a role for the courts in the initiation of a criminal case.

Since prosecution is an inherently executive function,²² a potential conflict arises when the Executive must investigate itself, that is, when the investigator and the investigated are the same entity. The problem is augmented by the historical practice by presidents of both parties of appointing as the Attorney General a close political associate. As a general rule, for the past half century presidents have appointed as Attorney General either their campaign manager or someone as close politically: Franklin Roosevelt and Homer Cummings, Harry Truman and Howard McGrath, Dwight Eisenhower and Herbert Brownell, John Kennedy and Robert Kennedy, Richard Nixon and John Mitchell, Ronald Reagan and Edwin Meese. The exceptions to the general rule are not remarkable: President Johnson retained the Justice Department he inherited from President Kennedy; President Ford, in the aftermath of the Watergate scandal, appointed Edward Levi; and President Carter appointed Griffin Bell, a former Fifth Circuit judge, which was something of an anomaly.²³ This practice obviously compounds the problems posed by Department of Justice investigations of executive officials; potentially embarrassing political consequences may arise precisely because the head of the investigative entity is a political associate of the President.

Historically this problem has been resolved on a pragmatic basis. The United States Attorney for the Southern District of New York, Emory Buckner, investigated possible criminal conduct by President Harding's Attorney General.²⁴ The Teapot Dome Affair, another Harding Administration scandal, this time involving the Departments of the Interior and Navy, was uncovered by legislative hearings.²⁵ Congress adopted a resolution calling for the appointment of a special prosecutor, and President Coolidge appointed a Republican and a Democrat who pursued the investigations to their conclusion.²⁶ Teapot

22. See *supra* note 1 (quoting *Newman v. United States*, 362 F.2d 479, 480 (D.C. Cir. 1967)).

23. See Tuerkheimer, *The Executive Investigates Itself*, 65 CALIF. L. REV. 597, 601 & n.28 (1977) (stating that most recent presidents have appointed a close political associate to office of Attorney General); see also N.Y. Times, Nov. 23, 1963, § 1, at 1, col. 2 (reporting that President Johnson, in aftermath of President Kennedy's assassination, asked Kennedy's Cabinet members to remain); N.Y. Times, Jan. 23, 1984, at A16, col. 6 (describing Attorney General Meese as "long-time associate of President Reagan"); see generally N.Y. Times, Jan. 30, 1984, at A14, col. 3 (describing close relationship between Attorney General Meese and President Reagan).

24. M. MAYER, EMORY BUCKNER 209-36 (1968); Tuerkheimer, *supra* note 16, at 604.

25. Tuerkheimer, *supra* note 23, at 605.

26. *Id.* at 605-06.

Dome, however, involved criminality in the Harding Administration which was investigated and prosecuted under the successor administration of President Coolidge. Thus, the Teapot Dome investigation did not in the strict sense present the case of an administration investigating its own officials.

The Watergate scandal, however, exemplified the problem of the Executive investigating itself and provided the impetus for Title VI of the Ethics in Government Act of 1978.²⁷ The investigation into the cover-up of the Watergate burglary involved potential targets who were high officials in the Nixon Justice Department, including the President's former Attorney General and campaign manager, John Mitchell, and, of course, the President himself. The investigation took place during the end of President Nixon's first term and the beginning of his second. Several months after the second inauguration, and upon the resignation of Mitchell's successor, Richard Kleindeinst, Attorney General-designate Elliott Richardson promised the Senate Judiciary Committee during the confirmation process that, if confirmed, he would appoint a special prosecutor to handle the Watergate investigation. He specifically promised that such a prosecutor would be independent of the Administration and assured the Committee that he would be removed only for gross improprieties. Shortly thereafter, Archibald Cox was appointed.

Cox, whose term lasted less than six months, was fired for acts hardly constituting gross improprieties. When Cox refused to cooperate with the Administration and insisted on obtaining White House tape recordings to which the courts said he was entitled, President Nixon directed Richardson to fire Cox. Richardson, because of the commitment he had made to the Senate Judiciary Committee, refused and resigned. His deputy, William Ruckelshaus had made an identical commitment to the Committee during his confirmation process. He also refused to fire Cox and was himself fired. Finally, Solicitor General Robert Bork, whose appointment antedated the Watergate controversy and who therefore had made no commitments about a special prosecutor to anyone, fired Cox.²⁸

The matter did not end there. The political firestorm that resulted from what is called the "Saturday Night Massacre" compelled the President to appoint a new special prosecutor. In appointing Leon Jaworski, Nixon gave even more emphatic guarantees of prosecutorial independence than in appointing Cox.²⁹ While the District Court for the District of Columbia subsequently found the Cox firing illegal,³⁰ it did not do so until months after the firing. The implications of presidential control over a special prosecutor employed by the Executive Branch was not lost on Congress. With this recent history in mind, Congress passed the Ethics in Government Act of 1978.

27. *E.g.*, S. REP. NO. 170, 95th Cong., 2d Sess. 3 (1978).

28. WATERGATE SPECIAL PROSECUTION FORCE REPORT 4-5, 9 (1975); Tuerkheimer, *supra* note 23, at 610-11.

29. WATERGATE SPECIAL PROSECUTION FORCE REPORT 11, 183 (1975); Tuerkheimer, *supra* note 23, at 611.

30. *Nader v. Bork*, 366 F. Supp. 104, 110 (D.D.C. 1973).

2. Provisions and Constitutionality

Title VI of the Ethics Act addresses the Executive's conflict of interest by creating a division of the United States Court of Appeals for the District of Columbia Circuit (the "Special Division"),³¹ and requiring it to appoint an independent counsel on the application of the Attorney General.³² The Act directs the Attorney General to initiate a preliminary investigation on receipt of information "sufficient to constitute grounds to investigate"³³ whether certain high-level executive officials³⁴ have violated a serious federal law.³⁵ The Attorney General must apply to the Special Division for the appointment of an independent counsel if, after completing the preliminary investigation, he "determines that there are reasonable grounds to believe that further investigation is warranted"³⁶ or if he fails to make any determination within ninety days of the initiation of the preliminary investigation.³⁷

Title VI vests independent counsel with "full power and independent authority to exercise all investigative and prosecutorial functions and powers of the

31. Pub. L. No. 95-521, § 602(a), 92 Stat. 1824, 1873 (1978) (codified as amended at 28 U.S.C. § 49 (1982)), amended by Reauthorization Act of 1987, *supra* note 10, § 4, 101 Stat. 1293, 1307. The Special Division is comprised of three judges, appointed by the Chief Justice of the U.S. Supreme Court, one of whom must be a judge on the D.C. Circuit Court. *Id.* § 49(a), (d). Members of the Special Division serve two year terms. *Id.* § 49(a).

32. 28 U.S.C. § 593(b), amended by Reauthorization Act of 1987, *supra* note 10, § 2, 101 Stat. 1293, 1298.

33. *Id.* § 591(a), amended by Reauthorization Act of 1987, *supra* note 10, § 2, 101 Stat. 1293, 1293.

34. Potential subjects of a preliminary investigation include the President, Vice-President, Director of the CIA, Cabinet-level officials, senior Justice Department officers, *id.* § 591(b)(1)-(5), certain former executive officials, *id.* § 591(b)(6)-(7), high-level officials in the President's national campaign committee, *id.* § 591(b)(8), and any other person, the investigation of whom by the Department of Justice "may result in a personal, financial, or political conflict of interest." *Id.* § 591(c), amended by Reauthorization Act of 1987, *supra* note 10, § 2, 101 Stat. 1293, 1294.

35. *Id.* § 591(a) ("any Federal criminal law other than a violation classified as a Class B or C misdemeanor or an infraction."), as amended by Reauthorization Act of 1987, *supra* note 10, § 2, 101 Stat. 1293, 1293.

The Attorney General has fifteen days after receiving the information to determine whether grounds for a preliminary investigation exist, Reauthorization Act of 1987, *supra* note 10, § 2, 101 Stat. 1293, 1294 (to be codified at 28 U.S.C. § 591(d)(2)), and in making this determination may consider only the specificity of the information and the credibility of its source. Reauthorization Act of 1987, *supra* note 10, § 2, 101 Stat. 1293, 1294 (to be codified at 28 U.S.C. § 591(d)(1)). If the Attorney General has a "current or recent personal or financial relationship" with the subject of the information, he must recuse himself and delegate his investigative duties. Reauthorization Act of 1987, *supra* note 10, § 2, 101 Stat. 1293, 1294-95 (to be codified at 28 U.S.C. § 591(e)).

36. 28 U.S.C. § 592(c)(1)(A), as amended by Reauthorization Act of 1987, *supra* note 10, § 2, 101 Stat. 1293, 1296. In making this determination, the Attorney General must comply with established Department of Justice policies. *Id.* § 592(c)(1), as amended by Reauthorization Act of 1987, *supra* note 10, § 2, 101 Stat. 1293, 1296.

37. *Id.* § 591(c)(1)(B), as amended by Reauthorization Act of 1987, *supra* note 10, § 2, 101 Stat. 1293, 1296.

Department of Justice"³⁸ A counsel may obtain Department assistance,³⁹ but must comply with Department policies.⁴⁰ However, the Department must suspend any investigation or other proceeding regarding any matter within the prosecutorial jurisdiction of the independent counsel.⁴¹ The Special Division defines the counsel's jurisdiction initially, and may expand it on the request of the Attorney General.⁴² The counsel must make periodic reports to the Special Division⁴³ and, as he considers appropriate, to Congress.⁴⁴ An independent counsel may be removed from office only by the Attorney General and only for good cause.⁴⁵ If the Attorney General removes an independent counsel, he must report to the Special Division and the Senate and House Judiciary Committees, specifying the grounds for removal,⁴⁶ and the counsel may obtain judicial review of the Attorney General's action.⁴⁷ An *office* of an independent counsel may be terminated by the Special Division⁴⁸ or the counsel himself.⁴⁹

The constitutional basis for Title VI is the Inferior Appointments Clause, which, after spelling out the presidential appointment powers, states that "the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads

38. *Id.* § 594(a), amended by Reauthorization Act of 1987, *supra* note 10, § 2, 101 Stat. 1293, 1300.

39. *Id.* § 594(d), amended by Reauthorization Act of 1987, *supra* note 10, § 2, 101 Stat. 1293, 1301.

40. *Id.* § 594(f), amended by Reauthorization Act of 1987, *supra* note 10, § 2, 101 Stat. 1293, 1301.

41. *Id.* § 597, amended by Reauthorization Act of 1987, *supra* note 10, § 2, 101 Stat. 1293, 1306.

42. *Id.* § 593(b)(3), (c)(1), as amended by Reauthorization Act of 1987, *supra* note 10, § 2, 101 Stat. 1293, 1298.

43. Reauthorization Act of 1987, *supra* note 10, § 2, 101 Stat. 1293, 1301-02 (to be codified at 28 U.S.C. § 594(h)(1)). The Special Division may release these reports as it deems appropriate. *Id.*, 101 Stat. 1293, 1302 (to be codified at 28 U.S.C. § 594(h)(2)).

44. 28 U.S.C. § 595, amended by Reauthorization Act of 1987, *supra* note 10, § 2, 101 Stat. 1293, 1304.

45. *Id.* § 596(a)(1), amended by Reauthorization Act of 1987, *supra* note 10, § 2, 101 Stat. 1293, 1304-05.

46. *Id.* § 596(a)(2), amended by Reauthorization Act of 1987, *supra* note 10, § 2, 101 Stat. 1293, 1305.

47. *Id.* § 596(a)(3), amended by Reauthorization Act of 1987, *supra* note 10, § 2, 101 Stat. 1293, 1305.

Conceivably, a controversy might arise between the Judiciary and the Executive over the circumstances of a counsel's removal that necessarily involves a decision whether to prosecute. However, such a speculative and unlikely controversy should not affect the constitutionality of Title VI.

48. The Special Division may terminate the office "on the ground that the investigation of all matters within the prosecutorial jurisdiction of such independent counsel . . . and any resulting prosecutions, have been completed or so substantially completed that it would be appropriate for the Department of Justice to complete such investigations and prosecutions." *Id.* § 596(b)(2), as amended by Reauthorization Act of 1987, *supra* note 10, § 2, 101 Stat. 1293, 1305.

49. An independent counsel may terminate his own office on substantially the same ground as the Special Division. *Id.* § 596(b)(1), amended by Reauthorization Act of 1987, *supra* note 10, § 2, 101 Stat. 1293, 1305.

of Departments."⁵⁰ Whether the Special Division may constitutionally appoint independent counsel under Title VI is the subject of pending litigation in the District of Columbia.⁵¹

The caselaw does not provide a clear resolution of this question. The Supreme Court spoke its first word on the authority of Congress to permit judicial appointments in 1839 in *In re Hennen*,⁵² a case dealing with a statute giving the Judiciary the power to appoint court clerks. The Court said that the appointment power under the Inferior Appointments Clause "was, no doubt, intended to be exercised by the department of the government to which the officer to be appointed most appropriately belonged."⁵³ The Court went on to note that court clerks obviously "belong" to the courts of law, and that therefore Congress could give the courts the power to appoint such functionaries.⁵⁴ Since the courts were properly vested with the power to appoint, the Court noted, the power of removal was incident to the power of appointment.⁵⁵ The removal of the clerks, therefore, was justified.

Standing alone, *Hennen* does not suggest any landmark constitutional doctrine. It seems clear that the courts should have the power to appoint their clerks and, in appropriate circumstances, to remove them. The quoted language in *Hennen*, however, suggests that the powers granted under the Inferior Appointments Clause are limited to instances where the officer to be appointed would exercise powers which most appropriately belong to the department in which the officer is to be appointed. *Hennen*, however, has not been narrowly construed.

In a later Supreme Court case, *Ex parte Siebold*,⁵⁶ the Court evaluated the constitutionality of a provision authorizing federal courts to appoint election supervisors.⁵⁷ Specifically, the statute provided that judges appoint two election supervisors for every election district in certain cities or towns.⁵⁸ The appointment of such election supervisors was challenged on the ground that the authorizing statute imposed upon the court duties that were not judicial.⁵⁹ The

50. U.S. CONST. art II, § 2, cl. 2.

51. Michael Deaver, the first person indicted by an independent counsel, *infra* note 75 and accompanying text, challenged the constitutional authority of the counsel on separation of powers grounds. The district court denied Deaver's motion to enjoin the prosecution and Deaver appealed to the United States Court of Appeals for the District of Columbia Circuit. In an order dated March 17, 1987, the court affirmed the district court's denial of a preliminary injunction without reaching the constitutional questions. No. 87-5056 (D.C. Cir. June 15, 1987).

The D.C. Circuit court recently held Title VI unconstitutional, and the Supreme Court will here the issue in April. See *supra* note 10 (discussing procedural history of *In re Sealed Case*).

52. 38 U.S. (13 Pet.) 230 (1839).

53. *Id.* at 258.

54. *Id.*

55. *Id.* at 259.

56. 100 U.S. 371 (1879).

57. The provision in question appears to have been a law passed during Reconstruction aimed at insuring black participation in elections.

58. 100 U.S. at 379.

59. *Id.* at 397.

argument was specifically advanced that no power can be conferred upon the courts to appoint officers whose duties are not judicial in nature.⁶⁰

The *Siebold* Court, in addressing this argument, quoted the Inferior Appointments Clause and then added that

it is no doubt usual and proper to vest the appointment of inferior officers in that department of the government, executive or judicial, or in that particular executive department to which the duties of such officers appertain. But there is no absolute requirement to this effect in the Constitution, and if there were, it would be difficult in many cases to determine to which department an office properly belonged.⁶¹

The Court cited the example of a United States Marshal with the observation that a Marshal is an executive officer in the Department of Justice, but also, "pre-eminently," an officer of the courts.⁶² After dwelling on the ambiguity of the Marshal's position, the Court noted that "as the Constitution stands, the selection of the appointing power, as between the functionaries named, is a matter resting in the discretion of Congress."⁶³

This could have ended the discussion, but for the precedent of *Hennen*. The *Siebold* Court directed its attention to that part of *Hennen* which stated that appointments under Article II, Section 2, were "no doubt, intended to be exercised by the department of the government to which the officer to be appointed most appropriately belonged."⁶⁴ In addressing this argument, the *Siebold* Court stated that the quoted language "was not intended to define the constitutional power of Congress in this regard, but rather to express the law or rule by which it should be governed."⁶⁵ Despite this rather ambiguous, and seemingly tautological language, the *Siebold* Court did not retract the language in *Hennen* that there should be congruity between the entity appointing the official and the function to be exercised by the appointed official.

Continuing to examine precedent, the *Siebold* Court noted that the kind of appointment power granted by Congress that the courts declined to exercise in earlier cases was different from the appointment of election supervisors.⁶⁶ It referred to a 1792 law which required the circuit courts to examine claims to pensions arising from the American Revolution and an 1849 law authorizing Florida judges to examine and adjudicate claims for injuries to inhabitants of Florida caused by the American army in 1812.⁶⁷ The Court then simply concluded that "in the present case there is no such incongruity in the duty re-

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.* at 397-98.

64. *In re Hennen*, 38 U.S. (13 Pet.) at 257.

65. *Ex parte Siebold*, 100 U.S. at 398.

66. *Id.*

67. *Id.*

quired as to excuse the courts from its performance, or to render their acts void."⁶⁸

It would seem that the supervision of elections by court-appointed officers is at least as far removed from the judicial function as the adjudication of claims for injuries attributable to the United States Army or the examination of pension claims, functions which the Supreme Court has held to be legitimately declined by the Judiciary. *Siebold* therefore is a departure from the language of *Hennen* and supports the constitutionality of judicial appointees functioning in a non-judicial setting. Given the way *Siebold* interprets *Hennen*, however, the extent of the departure and its conceptual basis are not clear.

This lack of clarity can be seen in *Hobson v. Hansen*,⁶⁹ a three-judge panel decision which upheld the power of Congress to authorize the District of Columbia District Court judges to appoint members of the District of Columbia Board of Education.⁷⁰ The panel split, the majority finding that the broader language of *Siebold* permitted the judicial appointment of members of the Board of Education,⁷¹ and the dissenting opinion concluding that the incongruity standard of *Siebold* made such an appointment unconstitutional.⁷²

There is very little in the history of Article II to assist in resolving the scope of the appointment power that Congress can give to the courts. The Inferior Appointments Clause was presented, rejected by an equal vote, reconsidered, and adopted all on the same day with no indication as to its intended scope.⁷³ In discussing the clause in the First Congress, Roger Sherman, who seconded the motion to adopt it, said

the convention, who formed this constitution, thought it would tend to secure liberties of the people, if they prohibited the President from the sole appointment of all officers. They knew that the Crown . . . , by having that prerogative has been enabled to swallow up the whole Administration . . . but this Government is different, and intended by the people to be different.⁷⁴

This may explain why the clause is found in Article II. Most powers of Congress are delineated in Article I; Article II deals with the powers of the President. The presence of a grant of power to Congress in Article II may well suggest, as Sherman stated, that it was intended to dilute the power of the President.

It seems, therefore, that the constitutionality of Title VI is not inexorably resolved by existing law, although *Ex parte Siebold* and the scant historical background point toward its constitutionality. While the congruity test relied

68. *Id.*

69. 265 F. Supp. 902 (D.D.C. 1967).

70. *Id.* at 906.

71. *Id.* at 912-15.

72. *Id.* at 921 (Skelly, J., dissenting).

73. II M. FARRAND, RECORDS OF THE FEDERAL CONVENTION OF 1787, at 627 (1974).

74. III M. FARRAND, *supra* note 73, at 357.

on by the dissent in *Hobson* would suggest that Congress cannot authorize the judicial appointment of an independent counsel, the congruity test has never been formally adopted by the Supreme Court in a case in which it found a lack of congruity. Certainly, the functions exercised by the judicial appointees in *Siebold* and *Hobson* were not judicial functions in the conventional sense. Within this thin historical and inconclusive precedential setting, it is this writer's conclusion that Title VI of the Ethics in Government Act should be upheld.

There are several reasons for its constitutionality, aside from the support that can be drawn from Roger Sherman's remarks and *Ex parte Siebold*. First, the actual degree of judicial involvement in the prosecutorial process is minimal: the Special Division appoints an independent counsel only on the application of the Attorney General. It makes no judicial determination about the appropriateness of bringing a charge. Indeed, until the Deaver indictment, in every case where the Act had been invoked, the counsel's decision was not to charge.⁷⁵

This is not a minor consideration. *Cox* involved a clear conflict between two branches of government and an effort by the Judiciary to resolve that conflict by assuming the power to compel the initiation of prosecution. Under Title VI, the Judiciary assumes no such power and may not, by statutory definition, presume to act on a difference of opinion with the Executive.⁷⁶ The Judiciary's role is entirely ministerial, much like its role in the immunity setting, where the courts must confer immunity if the Executive has followed the prescribed procedures.⁷⁷ Once the appointment has been made, the independent counsel is under no control by the Special Division and is removable only by the Attorney General.⁷⁸ The exercise by the Judiciary of prosecutorial power under Title VI is both minimal and not in conflict with the Executive.⁷⁹

If one proceeds on the theory that powers are separated to insure that an individual cannot be overwhelmed by the exercise of total governmental muscle

75. N.Y. Times, Feb. 25, 1987, § 1, at 1, col. 1. On July 17, 1987, a second person, Lyn Nofziger, was indicted by a different independent counsel. N.Y. Times, July 18, 1987, § 1, at 1, col. 1.

76. See 28 U.S.C. § 593(b)(1), (3), as amended by Reauthorization Act of 1987, *supra* note 10, § 2, 101 Stat. 1293, 1298 (providing Special Division with no discretion in decision whether to appoint independent counsel and directing Special Division to define counsel's prosecutorial jurisdiction in accordance with scope of Attorney General's application).

77. See generally 18 U.S.C. §§ 6001-6005 (1982) (federal immunity statute).

78. 28 U.S.C. § 596(a), amended by Reauthorization Act of 1987, *supra* note 10, § 2, 101 Stat. 1293, 1304-05.

79. See The FEDERALIST, No. 47, at 337-38 (J. Madison) (Wright ed. 1961) ("On the slightest view of the British Constitution, we must perceive that the legislative, executive, and judiciary departments are by no means totally separate and distinct from each other. . . . His [Montesquieu's] meaning . . . can amount to no more than this, that where the whole power of one department is exercised by the same hands which possess the whole power of another department, the fundamental principles of a free constitution are subverted." (emphasis in original)); see also 1 N. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 3.06, at 52 (4th ed. 1985) (stating that exercise of power is permitted if essential to discharge of primary function, if not assumption of whole power of another department, and if it does not jeopardize individual liberty).

by one entity, then the constitutionality of the Act is equally evident. The spectre of a hybrid form of governmental power unchecked by traditional restraints is simply inappropriate imagery for an independent counsel appointed under Title VI. Aside from the restraint provided by the public spotlight inevitable in these cases, the courts provide the identical check on the actions of an independent counsel that they otherwise provide, safeguarding not just individual rights⁸⁰ but institutional rights as well.⁸¹ Ultimately, of course, the President retains the power to pardon, which provides another restraint.

Finally, there is a pragmatic consideration. The Act's authorization of judicial appointment of an independent counsel is an effort to resolve what is otherwise an insoluble dilemma: how to preserve public respect for and acceptance of prosecutorial decisions involving high-level political figures where the colleagues and political peers of those figures would otherwise make the prosecutorial judgment.⁸² In the last analysis, a political Executive cannot investigate itself and hope to retain public confidence in the fairness of the investigation, especially where the investigation, as will often be appropriate, does not result in prosecution. Public confidence in the fair application of the criminal law is necessary to any system of law. The actual intrusion of the Judiciary into the executive function of prosecution is minimal under Title VI. Congress drafted an elaborate and perhaps cumbersome system in order to resolve an otherwise intractable problem. Whatever gaps in reasoning may appear in *Siebold*, the Supreme Court may have been right when it said that when it comes to the power to appoint, it is best to defer to the discretion of Congress.⁸³ Indeed, that is the very wording of the Inferior Appointments Clause: "Congress may by Law vest the Appointment of such inferior Officers *as they think proper* . . . in the Courts of Law"⁸⁴

III. TERMINATION OF PROSECUTION

Most criminal cases end either with a finding by the trier of fact or with a guilty plea. In either case, the prosecutorial and judicial functions mesh per-

80. See, e.g., *United States v. DeMarco*, 550 F.2d 1224, 1227-28 (5th Cir.) (affirming dismissal of indictment obtained by Watergate Special Prosecutor Force on ground of improper prosecutorial intimidation of defendants), *cert. denied*, 434 U.S. 827 (1977).

81. In *United States v. Deaver*, an independent counsel appointed under Title VI sought to subpoena an official of the Canadian Embassy to testify as a witness against the defendant, claiming that diplomatic immunity had been waived. The Justice Department concurred in the position of the Canadian Government that there had been no waiver, and the court quashed the subpoena. *N.Y. Times*, June 23, 1987, § 1, at 13, col. 1.

82. The present situation with Attorney General Meese affords a perfect illustration of the need for an investigative entity separate from the Attorney General. His possible illegal involvement in Wedtech, *N.Y. Times*, June 17, 1987, § 1, at 1, col. 4, his role in the "Iran-Contra" matter and certainly his involvement at the early stages of the investigation of this matter, when documents were shredded, *N.Y. Times*, June 26, 1987, § 1, at 1, col. 1, each might justify the appointment of an independent counsel. It would be hard to imagine an independent investigation conducted either by Meese or someone acting under his authority.

83. *Ex parte Siebold*, 100 U.S. at 397-98; see *supra* text accompanying note 63 (discussing and quoting *Siebold*).

84. U.S. CONST. art. II, § 2, cl. 2.

fectly. When, however, the prosecution moves to dismiss charges, under Federal Rule of Criminal Procedure 48(a), or there is a guilty plea to some but not all charges, under Rule 11, the possibility for collision exists and from time to time surfaces.

A. *Rule 48(a): Dismissal of Pending Charges*

Federal Rule of Criminal Procedure 48(a) provides the framework for the dismissal of pending criminal charges. Rule 48(a) authorizes the prosecution, with leave of court, to file a dismissal of an indictment, information or complaint. If filed during the trial, the consent of the defendant is required.⁸⁵ At common law, the Attorney General was free to dismiss a case without court approval.⁸⁶ By the time Rule 48(a) was adopted, however, thirty states had modified the common law rule to require court approval for dismissal of pending criminal charges.⁸⁷ This change was not reflected in the first draft of Rule 48(a), which contained no requirement for judicial sanctioning of dismissals.⁸⁸ The Supreme Court, reacting to the first draft, asked whether the proposal was the law "and should it be the law, any more than that the Government can confess error on appeal in a criminal case without consent of the court?"⁸⁹ In a resubmitted draft of Rule 48(a) the Committee still made no changes. The Court, however, on its own initiative, deleted language that would have given the Attorney General the absolute right to dismiss and inserted instead the wording requiring consent of the court for dismissal.⁹⁰ While it is clear that the Supreme Court, in altering Rule 48(a), intended to change the common law rule, it is not obvious what standard the courts are to use in ruling on a Rule 48(a) application. An early decision under Rule 48(a) suggested that the court should exercise "a sound discretion in the premises,"⁹¹ which is not a very helpful guide on such a fundamental question.

Perhaps the first clear and expansive discussion of the substantive import of the words "by leave of court" as they appear in Rule 48(a) came in *United States v. Greater Blouse, Skirt and Neckwear Contractors Association*.⁹² In

85. FED. R. CRIM. P. 48(a) provides:

(a) By Attorney for Government. The Attorney General or the United States attorney may by leave of court file a dismissal of an indictment, information or complaint and the prosecution shall thereupon terminate. Such a dismissal may not be filed during the trial without the consent of the defendant.

86. *Confiscation Cases*, 74 U.S. (7 Wall) 454, 457 (1868).

87. *United States v. Cowan*, 524 F.2d 504, 509-10 & nn.11-13 (5th Cir. 1975), *cert. denied*, 425 U.S. 971 (1976).

88. *Id.* at 510.

89. *Id.* (citing *Young v. United States*, 315 U.S. 257, 259 (1942) (holding that confession of error by Solicitor General in case then before Supreme Court did not preclude review of case by Court on merits)).

90. *Id.*

91. *United States v. Doe*, 101 F. Supp. 609, 611 (D. Conn. 1951).

92. 228 F. Supp. 483 (S.D.N.Y. 1964) [hereinafter *Greater Blouse*]. *Greater Blouse* appears odd in that one of the defendants contested the government's motion for a dismissal, but virtually every contested dismissal motion will involve an unusual case.

Greater Blouse, an antitrust suit had been filed against a number of defendants. After the suit had been pending for several years, the government moved to dismiss on the ground that its case was insufficient. One of the defendants, which felt that it had been coerced into violations of the antitrust laws by the others and therefore had a viable defense, opposed the motion to dismiss because it found that the continued existence of the indictment had caused the coercive practices of the other defendants to abate. As the district court expressed it, the indictment served as an "*in terrorem* force" working for the benefit of the defendant opposing the motion to dismiss.⁹³ Nevertheless, the court noted, the purpose of an indictment is not to aid the private interests of the parties.⁹⁴

In ruling on the motion to dismiss, the district court noted initially that the judgment of the Attorney General that the evidence was insufficient had to be given great weight.⁹⁵ This weight was augmented by the presumption that he was acting in good faith. The court also noted, however, that these two premises alone could not be conclusive. If they were, then the court approval required under Rule 48(a) would have no effect.⁹⁶ The district court then stated that to deny the request of the Executive, "it must clearly and convincingly appear that the public interest requires its refusal."⁹⁷

After noting the absence of criteria in Rule 48(a) and the "scant" historical material as to its intended scope, the court stated that the rule contemplated public exposure of the reasons for dropping criminal charges.⁹⁸ If such public disclosure reveals that there were substantial and real grounds for the proposed dismissal, other than the harassment of the defendant, the court must grant the motion.⁹⁹ It ruled that in the case before it, the government had adequately spelled out the reasons for dismissal of the seven-year-old charges and it granted the motion to dismiss. After the court granted the motion, it asked the obvious question: "Should the motion be denied, what next?" It observed that the Attorney General could simply decide not to move the case for trial and "in that circumstance [the court] would be without power to issue a mandamus or other order to compel prosecution of the indictment, since such a direction would invade the traditional separation of powers doctrine."¹⁰⁰ In that posture, the case would lie dormant and each defendant would eventually be able to move successfully, under Rule 48(b), for a dis-

93. *Id.* at 490.

94. *Id.*

95. *Id.* at 486.

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.* at 486-87. Since jeopardy does not attach until a jury is impanelled, *Crist v. Bretz*, 437 U.S. 28, 35 (1978), or when the first witness is sworn in a non-jury case, *id.* at 37 n.15, there is at least a theoretical possibility of harassment in pre-trial dismissal and recharging.

100. *Greater Blouse*, 228 F. Supp. at 489-90 (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 165-66 (1803) (defining traditional separation of powers doctrine which states that only President and officers appointed by him may perform executive duties)).

missal because of a delayed trial.¹⁰¹ The court's discussion reveals the fragile nature of the judicial power granted under Rule 48(a). While for reasons of comity the prosecution may accede to a judicial refusal to dismiss,¹⁰² the Executive has not always done so.

In *United States v. Cowan*,¹⁰³ the Executive's desire to end an ongoing case and the Judiciary's desire to continue collided head on. *Cowan* is significant not only in its resolution of this collision, but in its demonstration of the interplay between Rule 48(a) and Rule 11(e),¹⁰⁴ which relates to judicial involvement in guilty pleas. In *Cowan*, the defendant had been charged in a multi-count indictment in the Northern District of Texas. Subsequently, he reached a plea agreement with the Watergate Special Prosecution Force which required that he plead guilty to a two-year felony charge in the District of Columbia, that he cooperate in a criminal case there, and that the government move to dismiss the Texas charges.¹⁰⁵ The motion to dismiss was made under Rule 48(a), and the reasons for the motion were brought to the attention of the judge: the defendant would cooperate on a major public corruption case and plead guilty to the felony charge in Washington.¹⁰⁶

The district court denied the motion, finding that the disparity in maximum prison terms (thirty-five years on the Texas charges compared with two years on the District of Columbia charges) was significant.¹⁰⁷ Further, the decision by local Texas authorities to drop their investigation and cooperate with the federal government "alone" warranted denial of the motion.¹⁰⁸ The court proceeded on the assumption that "every indication is that the United States will go forward in this case upon the court's overruling the motion to dismiss."¹⁰⁹

The court was wrong. Pursuant to directions from the Justice Department in Washington, the United States Attorney for the Northern District of Texas refused to prepare the case for trial, and filed a notice to that effect.¹¹⁰ Thus, the scenario contemplated in *Greater Blouse* materialized. Presumably in reliance on the language of the dissent in *Cox* that "in the unlikely event of bad faith or irrational action . . . it may be that the court could appoint counsel to prosecute the case,"¹¹¹ the district court in *Cowan* appointed two special prosecutors. The court vested the prosecutors with "full authority to control the course of investigation and litigation related to the offenses charged in the

101. *Id.*

102. See *infra* note 162 and accompanying text (discussing cases in which appeal was made by defendant after court rejected plea agreement).

103. 524 F.2d 504 (5th Cir. 1975). The author of this article was responsible for the Government's brief in *Cowan* and argued the case before the Fifth Circuit.

104. See *infra* notes 134-68 and accompanying text (discussing relationship between Rule 11(e) and Rule 48(a)).

105. *United States v. Cowan*, 524 F.2d at 506.

106. *Id.*

107. *United States v. Cowan*, 381 F. Supp. 214, 222-23 (N.D. Tex. 1974).

108. *Id.* at 223.

109. *Id.*

110. *United States v. Cowan*, 524 F.2d at 507.

111. *United States v. Cox*, 342 F.2d 167, 179 (5th Cir.) (Rives, Gewin, and Bell, JJ., concurring in part and dissenting in part), *cert. denied*, 381 U.S. 935 (1965).

indictment and to handle all aspects of the case to the same extent as a United States Attorney in any criminal prosecution."¹¹²

The Fifth Circuit extensively reviewed the limited material available as to the scope of Rule 48(a). It concluded that the Supreme Court intended to give federal courts discretion broad enough to protect the public interest in the fair administration of criminal justice.¹¹³ It noted also, however, that "[f]ew subjects are less adapted to judicial review than the exercise by the Executive of his discretion in deciding when and whether to institute criminal proceedings, or what precise charge shall be made, or whether to dismiss a proceeding once brought."¹¹⁴ The court concluded that Rule 48(a):

was [not] intended to confer on the Judiciary the power and authority to usurp or interfere with the good faith exercise of the Executive power to take care that the laws are faithfully executed. The rule was not promulgated to shift absolute power from the Executive to the Judicial Branch. Rather, it was intended as a power to check power. The Executive remains the absolute judge of whether a pending prosecution should be terminated. The exercise of its discretion with respect to the termination of pending prosecutions should not be judicially disturbed unless clearly contrary to manifest public interest.¹¹⁵

This language is not materially different from that in *Greater Blouse*, where the court said that denial of a motion to dismiss must be clearly and convincingly justified by the public interest.¹¹⁶ The main thrust of the analysis of the *Cowan* court is the same as that of *Greater Blouse*: A reviewing court must ask whether the Executive's determination that the public interest requires dismissal is "clearly erroneous." If not, the court must acquiesce. When the *Cowan* court applied this standard to the facts before it, it found a clear public interest basis for the motion to dismiss. Since it found that the district court had abused its limited discretion in denying the motion to dismiss, the Fifth Circuit did not reach the constitutional issue raised by the appointment of the two special prosecutors.¹¹⁷

Subsequent cases dealing strictly with Rule 48(a) have followed *Cowan*. For example, in *United States v. Friedman*,¹¹⁸ a variant of the *Greater Blouse* situation arose. Friedman, who had been convicted on labor racketeering charges, was sentenced to three years imprisonment and fined. After his appeal, while serving his sentence, he brought a new trial motion alleging that pertinent discovery material had been improperly withheld from him. The government con-

112. *United States v. Cowan*, 396 F. Supp. 803, 806 (N.D. Tex. 1974).

113. *United States v. Cowan*, 524 F.2d at 512.

114. *Id.* (quoting *Newman v. United States*, 382 F.2d 479, 480 (D.C. Cir. 1967) (Burger, J.)).

115. *Id.* at 513.

116. *Greater Blouse*, 228 F. Supp. at 486.

117. *United States v. Cowan*, 524 F.2d at 515.

118. 107 F.R.D. 736 (N.D. Ohio 1985).

ceded the allegations and applied for a dismissal under Rule 48(a). It asserted that although the discovery material should have been turned over, this action would have compromised government informants.¹¹⁹ Friedman objected to the motion to dismiss because he sought vindication.¹²⁰

The *Friedman* court explicitly adopted the conclusion in *Cowan* that the power given to the courts under Rule 48(a) was for the purpose of checking the exercise of power by the Executive.¹²¹ The standard was whether the reasons given for dismissal were clearly contrary to public interest.¹²² The court first found that the government was proceeding in good faith.¹²³ Noting the government's desire to protect informants in an area as volatile as labor racketeering, the court stated that "[i]t cannot be said then that the reasons advanced for dismissal here are 'clearly contrary to the manifest public interest.'" ¹²⁴

Thus, when the issue is purely one of dismissal of pending charges, the standard is clear: Is there a rational basis for the executive determination that the public interest compels dismissal? The judicial role is minimal.

B. Rule 11(e): Plea Agreements

I. Introduction

Very few criminal cases end with Rule 48(a) applications. Most end with some plea agreement between the defense lawyer and the prosecutor. Under federal procedure, such agreements are subject to Rule 11(e) of the Federal Rules of Criminal Procedure. Rule 11(e)(1) contemplates three types of plea agreement: dismissal of other charges, recommendations as to sentence, or definite agreements as to sentence. The court is prohibited from participating in any discussions leading to such agreements.¹²⁵ Under Rule 11(e)(2), any agree-

119. *Id.* at 737.

120. *Id.* at 739.

121. *Id.* at 740 (citing *United States v. Cowan*, 524 F.2d at 512-13; *United States v. Cox*, 342 F.2d at 190).

122. *Id.* (quoting *United States v. Cowan*, 524 F.2d at 513).

123. *Id.*

124. *Id.* at 742 (quoting *United States v. Cowan*, 524 F.2d at 513).

125. Federal Rule of Criminal Procedure 11(e) provides:

(e) Plea Agreement Procedure.

(1) In General. The attorney for the government and the attorney for the defendant or the defendant when acting pro se may engage in discussions with a view toward reaching an agreement that, upon the entering of a plea of guilty or nolo contendere to a charged offense or to a lesser or related offense, the attorney for the government will do any of the following:

(A) move for dismissal of other charges; or

(B) make a recommendation, or agree not to oppose the defendant's request, for a particular sentence, with the understanding that such recommendation or request shall not be binding upon the court; or

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

The court shall not participate in any such discussions.

ment entered into under subdivision (e)(1) must be disclosed to the court. If the agreement relates to the dismissal of charges or contains a commitment as to sentence, "the court may accept or reject the agreement, or may defer its decision as to the acceptance or rejection until there has been an opportunity to consider the presentence report." If the agreement contains only a recommendation as to sentence, the court must indicate to the defendant that if the court does not follow the recommendation, the defendant has no right to withdraw the plea.¹²⁶ Nothing in Rule 11 defines criteria for acceptance or rejection of a plea agreement; the decision is left to the discretion of the judge.¹²⁷

2. *The Sentencing Function*

The general scheme for sentence and release involves all three branches of government. Initially, Congress defines certain conduct as criminal and provides for corresponding penalties. The United States Attorneys office, together with the grand jury, when they charge, determine the maximum penalty and, where the statute provides for a mandatory minimum, the minimum penalty as well. The court imposes, within the range of minimum and maximum, the defendant's sentence. The Justice Department, through the Department of Parole, decides when, within the existing statutory framework, an incarcerated person shall be released. The President, ultimately, has the power to pardon.

Thus, the entire process of sentencing and release is not simply an exercise of judicial power. In the third phase of the process, however, the sentencing phase, it seems clear that the power that is exercised is exclusively judicial. "Sentencing is the exclusive function of the judge . . . ; the prosecutor has no authority to guarantee any aspect of sentencing."¹²⁸ Any effort to bind the

126. Federal Rule of Criminal Procedure 11(e)(2) provides:

(2) Notice of Such Agreement. If a plea agreement has been reached by the parties, the court shall, on the record, require the disclosure of the agreement in open court or, on a showing of good cause, in camera, at the time the plea is offered. If the agreement is of the type specified in subdivision (e)(1)(A) or (C), the court may accept or reject the agreement, or may defer its decision as to the acceptance or rejection until there has been an opportunity to consider the presentence report. If the agreement is of the type specified in subdivision (e)(1)(B), the court shall advise the defendant that if the court does not accept the recommendation or request the defendant nevertheless has no right to withdraw his plea.

127. FED. R. CRIM. P. 11, advisory committee note; see *United States v. Bean*, 564 F.2d 700, 703 (5th Cir. 1977) (stating that court considering plea bargain has same broad discretion as sentencing court, which is not subject to review unless "a gross abuse of discretion is involved.") (citing *United States v. Weiner*, 418 F.2d 849 (1969)).

128. *United States v. McCord*, 664 F.2d 60, 62 (5th Cir. 1981).

A significant separation of powers question has been raised with respect to the proposed sentencing guidelines. See Morrison, Nat'l L.J., Jan. 26, 1987, at 15. This article will not explore that question since it deals with a possibly illegal delegation of legislative, rather than executive, authority to a judicial officer.

court with a sentence negotiated under Rule 11(e)(1)(B) would impermissibly intrude on the judicial function. As the Ninth Circuit stated in *United States v. Hernandez-Salazar*,¹²⁹ "to shackle [the judge] with mandatory enforcement of agreements between counsel would result in a dangerous inroad in our system of justice."¹³⁰ Therefore, where a plea agreement contemplates a specific sentence (not a recommended sentence), the judge must "accept or reject" the agreement. In exercising the power to accept or reject a negotiated sentence under Rule 11(e)(2), the judge is not exercising a review power over the decision of the prosecutor and defense lawyer, but rather is dealing with an exclusively judicial subject. Consistent with the mandate that sentencing in this phase of a criminal case is an exclusively judicial function, the judge should, essentially, make a de novo determination on the appropriateness of the negotiated sentence. Thus, with respect to an agreement under Rule 11(e)(1)(C), the words "accept or reject" in Rule 11(e)(2) should connote a de novo standard of review. Any narrower standard would impermissibly intrude on the sentencing function. This broad standard appears to have been followed.¹³¹

3. Dismissal of Charges

As noted earlier, Rule 11(e)(2) requires the court to "accept or reject" plea agreements involving dismissal of charges.¹³² Since the terms "accept or reject" are equally applicable to plea bargains involving a negotiated sentence, one would ordinarily assume that the same broad standard is applicable to the dismissal of charges. We have noted, however, that with respect to Rule 48(a) motions, the courts are to defer to the Executive's judgment unless it is clear that there is no valid public interest in dismissal.¹³³ Rule 11(e)(1)(A) cases, that is, those involving partial dismissals, cannot, therefore, be considered independently of Rule 48(a).

C. The Interplay Between Rules 11(e)(1)(A) and 48(a)

When a plea agreement involves the dismissal of certain charges, the sentencing options of the judge are reduced, conceivably to a level below that

129. 471 F.2d 1209 (9th Cir. 1972) (upholding denial of request to modify sentence in accordance with plea agreement).

130. *Id.* at 1210.

131. Agreements that guarantee the defendant a specific sentence are relatively infrequent in federal criminal practice. They tend to surface in cases of some notoriety. In the prosecution of former Vice-President Spiro Agnew, the Court determined that the imposition of a suspended sentence in conjunction with the defendant's resignation from the office was an appropriate sentence. R. COHEN & J. WITCOVER, *A HEARTBEAT AWAY* 347-48, 352 (1974). In *United States v. Bhagwan Shree Rajneesh* (D. Ore. Cr. No. 85-183-LE Nov. 14, 1985), the disposition included a suspended sentence and the effective deportation of the defendant from the United States. The court stated that "it's the finding of the Court that the specific sentence agreed to by the parties is an appropriate disposition of this case." Transcript of Change of Plea, at 33, *id.*

132. See *supra* note 126 (quoting Rule 11(e)(2) in full).

133. See *supra* notes 115-17 and accompanying text (discussing review of executive decisions to dismiss).

which the judge thinks is the appropriate minimum. Should such a plea agreement be viewed as an executive effort to curtail the exclusively judicial function of sentencing, or as a legitimate exercise of executive power to terminate an existing prosecution subject only to the limited review power enunciated in *Cowan*? *United States v. Ammidown*¹³⁴ and *United States v. Bean*¹³⁵ offer striking illustrations of two different approaches to this issue.

Ammidown had been charged with first degree murder in the death of his wife.¹³⁶ The crux of the charge was that he had contracted for a hired killer—Richard Anthony Lee—to murder his wife, and that Lee did so.¹³⁷ Prior to trial, Ammidown, who was forty-nine at the time, agreed with the prosecution to testify against Lee and to plead guilty to second-degree murder, an offense carrying a possible term of life imprisonment with eligibility for parole in fifteen years. In exchange for the plea, the prosecution agreed to move to dismiss the first-degree murder charge. The government's fear that Lee, if released, would murder again was obviously its principal concern. The trial judge, however, found Ammidown's crime so heinous and the evidence of his guilt so overwhelming that the public interest would have been ill-served by a second-degree murder conviction, and so refused to accept the plea. Ammidown then went to trial on the first-degree murder and felony-murder charges. He was convicted and sentenced to two consecutive life imprisonment terms. His appeal turned on the judge's failure to accept the plea agreement.¹³⁸

The D.C. Circuit noted immediately that while Rule 11 governs pleadings in criminal cases, "we would err were we to circumscribe our inquiry so narrowly. Plea bargaining telescopes into one transaction three distinct stages of the criminal proceeding: plea to one charge; dismissal of a greater one; and sentencing."¹³⁹ After finding a total absence of authority on the first question, the court noted that the issue arose most often in the context of the second, and therefore went directly to the issue of dismissals.¹⁴⁰ With respect to dismissals, the court noted the familiar standard that

the court does not have primary responsibility but rather the role of guarding against abuse of prosecutorial discretion. The rule contemplates exposure of the reasons for dismissal "in order to prevent abuse of the uncontrolled power of dismissal [The court] should be satisfied that the reasons advanced for the proposed dismissal are substantial."¹⁴¹

With respect to the sentencing power, the court noted that this was the exclusive domain of the courts: "The prosecutor has no role beyond the advisory,

134. 497 F.2d 615 (D.C. Cir. 1973).

135. 564 F.2d 700 (5th Cir. 1977).

136. *United States v. Ammidown*, 497 F.2d at 617.

137. *Id.* at 618.

138. *Id.*

139. *Id.* at 618-19.

140. *Id.* at 619.

141. *Id.* at 620 (quoting *Greater Blouse*, 228 F. Supp. at 487 n.7).

and even that is frowned on in the District Court for the District of Columbia."¹⁴²

The D.C. Circuit then synthesized these considerations. It noted that where vigorous prosecution of one case threatened to undermine the successful prosecution of another, traditionally the prosecutor has decided which option to choose and the courts have deferred to that decision. "The question is not what the judge would do if he were the prosecuting attorney, but whether he can say that the action of the prosecuting attorney is such a departure from sound prosecutorial principle as to mark it an abuse of prosecutorial discretion."¹⁴³ In this particular case, the appellate court found the decision to prosecute a contract killer with total vigor to be well within the prosecutor's discretion.¹⁴⁴ The D.C. Circuit also reasoned that the constraints on the trial judge's sentencing prerogatives were minimal in that he could sentence Ammidown to life imprisonment as easily under a second-degree conviction as under a first-degree conviction, even if Ammidown would be eligible for parole five years earlier under the former charge. Thus, the judgment of conviction was reversed on the ground that the plea agreement had been impermissibly rejected.¹⁴⁵

Ammidown is both an easy and a difficult case. To the circuit court's credit, it did not focus narrowly on the case as a Rule 11 issue but rather attempted to consider the plea agreement process in its totality. Once the broader perspective was taken, the prosecution's clear basis for reaching an agreement with Ammidown and the minimal discrepancy in the maximum sentence—a five year difference in parole *eligibility*—rendered the decision to reverse unavoidable. *Ammidown* was clearly decided correctly. Precisely because the case was so clear, however, it affords meager help in resolving more difficult problems. According to the *Ammidown* court, deference must be paid both to the prosecutorial judgment regarding dismissals and to the court's sentencing prerogatives. How does one mix the two? What if the plea agreement restricted the court to a twenty-year term for Ammidown? A ten-year term? How does one reconcile deference to the prosecution's judgment on dismissal and the court's sentencing prerogatives? *Ammidown* does not provide a method for such reconciliation because it did not have to. Joint deference was possible because the sentencing prerogative was only minimally affected.

In *United States v. Bean*, the defendant was charged with automobile theft and burglary. After an initial plea of not guilty to both counts, Bean and the prosecution reached an agreement whereby Bean would plead guilty to the theft charge and cooperate with the prosecution in its investigation of others involved in the burglary. The prosecution in turn would move to dismiss the burglary charge. The district court refused to accept the agreement, stating it

142. *Id.* at 621.

143. *Id.* at 622.

144. *Id.* at 623.

145. *Id.*

was "contrary to the manifest public interest."¹⁴⁶ Bean was then tried on both charges and sentenced to five years on the theft count, and ten on the burglary count, the terms to run concurrently.¹⁴⁷ His appeal concerned the correctness of the decision to reject the plea agreement.

Unlike the D.C. Circuit in *Ammidown*, the Fifth Circuit in *Bean* took a narrower approach to the applicable standard of review. After noting the absence of any articulated standard under Rule 11, the court stated that "in considering plea bargains, courts may be governed by the same broad standards that apply in sentencing. The trial court's control over the length of sentence is analogous to that in plea bargains since in plea bargaining the defendant is ultimately concerned with the duration of imprisonment."¹⁴⁸ The court then reviewed authorities delineating the sentencing court's broad discretion.¹⁴⁹ Rule 48(a) did not go unmentioned in the court's decision. The court cited *Cowan* and Rule 48(a) but concluded its discussion by noting that because plea agreements such as Bean's limit the court's discretion over the duration of imprisonment, "the standard for review . . . should be closer to the standards for review of sentencing than for review of a dismissal which does not involve a plea bargain under Rule 48(a)."¹⁵⁰ It then affirmed the court's refusal to accept the plea bargain.¹⁵¹

There are many difficulties with *Bean*. First, it makes no sense to deal with a dismissal under a plea bargain as a Rule 11 issue, subject to sentencing standards, when in fact the issue is more appropriately considered under Rule 48(a). Suppose Bean had been charged with theft in one jurisdiction and burglary in another and one of the two jurisdictions wanted his cooperation in expanding the burglary investigation. In that case, had an identical plea agreement been reached, the court in which the burglary charge was pending would

146. *United States v. Bean*, 564 F.2d at 701.

147. *Id.*

148. *Id.* at 703.

149. *Id.* (citing *United States v. Weiner*, 418 F.2d 849 (5th Cir. 1969); *United States v. Gamboa*, 543 F.2d 545, 546 (5th Cir. 1976); *United States v. Bernstein*, 546 F.2d 109, 110 (5th Cir. 1977)).

150. *Id.* at 704.

151. *Id.* at 705. The *Bean* court distinguished *Ammidown* on the ground that it was decided before the 1974 amendments to Rule 11. *Id.* at 703 n.4. It noted that *Ammidown* went further than any other circuit in limiting the discretion of judges regarding plea bargains. *Id.* The 1974 amendments to Rule 11, however, had nothing to do with standards to be applied. The Fifth Circuit's decision in *Bean* has been criticized and its effort to distinguish and reject *Ammidown* found wanting. See generally Note, *United States v. Bean*, 6 AM. J. CRIM. LAW 319 (1978) (criticizing *Bean* for failing to delineate factors to be considered by trial court in evaluating plea bargains, for focusing on single standard of review, and for failing to require trial courts to state reasons for their rejection of plea bargains).

The *Bean* court is undoubtedly correct in observing that burglary is a more serious crime than car theft because of the invasion of the home and the risk of violence in the event of discovery. *United States v. Bean*, 564 F.2d at 701. It was undoubtedly for such reasons that the prosecution chose to reach an agreement with Bean as part of its effort to prosecute others involved in the more serious crime of burglary.

be dealing solely with a Rule 48(a) issue. There is no reason why a different standard should apply solely because the two charges were filed in one district. Indeed, the hypothetical case is indistinguishable from *Cowan*, where the sentencing discrepancy was thirty-five years in Texas to two years in the District of Columbia,¹⁵² a significantly larger discrepancy than that between the ten years Bean received after conviction on both charges and the five he could have received on the theft charge alone.

Second, by substituting its judgment for the prosecution's on the value of the cooperation in the burglary investigation, the court invited circumvention of its ruling. The prosecution in *Bean* could have refused to produce any evidence on the burglary charge or, alternatively, moved to dismiss it separately under Rule 48(a). This is essentially what happened in *United States v. Hamm*,¹⁵³ where the defendants pleaded guilty to a one-count charge involving the importation of a large amount of marijuana.¹⁵⁴ Due to their extensive cooperation, the government later reached agreements with Hamm and other defendants to limit the sentences they would receive: two years in Hamm's case, six months for the others.¹⁵⁵ When the court indicated it would not go along with the agreement, the defendants moved to withdraw their guilty pleas and the prosecution then moved to dismiss the existing charge. The district court denied both requests and sentenced the defendants on the outstanding charge.¹⁵⁶

Despite its earlier rejection of the *Ammidown* approach in *Bean*, the Fifth Circuit in *Hamm* found that it had to balance the constitutional power of government prosecutors with the constitutional powers of the courts. It found that a Rule 48(a) application should be granted if there was no evidence of harassment, unless the prosecution's proposed action involved a "betrayal of the public interest."¹⁵⁷ Due to the value of the defendant's cooperation in ongoing narcotics importation investigations, and because there was no indication that the prosecution's request for dismissal was in bad faith or intended to harass, the appellate court held that the district court must defer to the prosecution's judgment as to what the public interest required. "[T]he motion should be granted unless the trial court has an affirmative reason to believe that the dismissal motion was motivated by considerations contrary to the public interest."¹⁵⁸ By the seven-to-four vote of an en banc panel, the lower court's refusal to dismiss under Rule 48(a) was reversed.¹⁵⁹

152. *United States v. Cowan*, 381 F. Supp. 214, 222 (N.D. Tex. 1974).

153. 659 F.2d 624 (5th Cir. 1981) (en banc), *rev'g* *United States v. Butler*, 486 F. Supp. 1285 (E.D. Tex. 1980).

154. *Id.* at 625-26.

155. *Id.* at 626.

156. *Id.* at 627-28 & n.10.

157. *Id.* (quoting *United States v. Cowan*, 524 F.2d at 514).

158. *Id.* at 631.

159. *Id.*

United States v. Noble, 653 F.2d 34 (1st Cir. 1981), is somewhat in conflict with *Hamm*. In *Noble*, the defendant had pleaded not guilty to a felony drug charge but later reached a plea

We have seen that when a court determines whether to accept or reject a plea agreement dealing with a binding sentence provision, it applies a *de novo* standard.¹⁶⁰ When determining whether to accept or reject a plea agreement dealing with a request for dismissal of charges, however, some courts apply the same standard, while others apply the Rule 48(a) standard.¹⁶¹ It makes little sense for a court to ignore Rule 48(a) in dealing with a request for dismissal as part of a Rule 11 plea agreement. The only reason to ignore Rule 48(a) is out of the assumption that the prosecution will ignore it also. It is not unheard of for the prosecution to acquiesce in the exercise of judicial muscle,¹⁶² as the *Cowan* court apparently expected the prosecution to do.¹⁶³ An

agreement with the prosecution on a misdemeanor drug charge. The reason for the change of perspective by the prosecution was simply the defendant's minimal role in the drug importation conspiracy. *Id.* at 35. The district court refused to dismiss the felony charge and the First Circuit affirmed, noting the absence of any evidence of cooperation and that the plea agreement was designed solely to limit the court's sentencing power. The argument that the public interest, as seen by the prosecution, did not warrant felony charges against a person only minimally involved in crime did not prevail. *Id.* at 36.

A similar issue arose in *United States v. Carrigan*, 778 F.2d 1454 (10th Cir. 1985), where the government had brought charges against Otis Elevator Company and an employee in connection with over \$600,000 in false claims. The prosecution tendered a plea agreement involving a plea of guilty by the corporate defendant to all three counts, dismissal of the case against the individual defendant and a release of civil claims by the government in exchange for a payment to the United States by Otis of \$900,000. *Id.* at 1456-57. The trial court rejected the plea agreement, principally because it felt that the imposition of \$30,000 in fines, the maximum it could impose on the corporate defendant, was too drastic a curtailment of its sentencing powers for a \$629,000 fraud. *Id.* at 1457-60. The court stated it had the power to reject the agreement under Rule 11(e), specifically noting that no Rule 48(a) question was before it. *Id.* at 1460. Whether such a fragmented approach makes any sense is doubtful. See *Greater Blouse*, 228 F. Supp. at 489 (inquiring "Should the motion [to dismiss] be denied, what next?").

160. See *supra* note 131 and accompanying text (discussing judicial consideration of plea agreements).

161. Compare *United States v. Hamm*, 659 F.2d 624 (5th Cir. 1981) (holding that trial court must approve plea agreement dismissing charge pursuant to Rule 48(a), in absence of bad faith or intent to harass) with *United States v. Carrigan*, 778 F.2d 1454 (10th Cir. 1985) (rejecting plea agreement dismissing charges against individual defendant because legal limit on corporate fines would curtail court's sentencing power) and *United States v. Noble*, 653 F.2d 34 (1st Cir. 1981) (rejecting plea agreement dismissing charges against defendant with minimal role in conspiracy due to absence of cooperation with authorities and apparent intent to limit court's sentencing power).

162. In *Hamm*, *Bean*, and *Ammidown*, the judicial gauntlet was not taken up by the prosecution. Rather, it was the defendant, on appeal after conviction, who raised the issue. *United States v. Hamm*, 659 F.2d at 625; *United States v. Bean*, 564 F.2d at 701; *United States v. Ammidown*, 497 F.2d at 618.

A similar deference by prosecutors to arguably *ultra vires* judicial conduct appears in Jencks Act cases. Under the Jencks Statute, 18 U.S.C. 3500 (1982), the courts cannot compel the prosecution to turn over Jencks material until after the witness has testified on direct examination. *Id.* § 3500(a). Nevertheless, court orders compelling pre-trial turnover are frequently followed. See *United States v. Campagnuolo*, 592 F.2d 852, 858-59 n.3 (5th Cir. 1979) (encouraging practice by prosecutors of delivering material to defense attorneys before trial, to avoid disruption of trial)

argument can even be made that where the prosecution acquiesces, the system is working well since the issue obviously was not vital enough for the prosecution to challenge the court. From one perspective, this argument makes sense. Perhaps the remarks of a judge on the seriousness of the crimes that the prosecution wants to have dismissed would cause the prosecution to entertain second thoughts. Perceiving a judicial determination that the plea agreement is a bad idea, the prosecution may acquiesce and withdraw the agreement. It should be evident, however, that this argument assumes that the prosecutorial judgment exercised by the court is correct. Essentially, the court is acting as a final reviewing body on a prosecutorial judgment, that is, as the prosecutor. The court, however, is not the prosecutor. If the prosecutor makes a mistake, especially at the federal level, there may be avenues of appeal, but they are internal to the Executive. While there is room for some informal feedback on questionable judgment calls,¹⁶⁴ the raw exercise of judicial muscle grounded on a nonexistent review function is a perversion of separation of powers principles.¹⁶⁵

It seems, therefore, that the determination to accept or reject a plea agreement that contemplates dismissal of charges should be governed by the standard of Rule 48(a) applications. This means, however, that when the prosecution offers such a plea agreement to the judge and acceptance or rejection of that agreement involves a difficult decision, the offering must include affidavits setting forth the reasons for the dismissal. If the prosecution wishes to secure the increased power conveyed under Rule 48(a), it should approach the Rule 11 proceeding as it would a proceeding under Rule 48(a). Then technical issues of form would not determine the outcome of the case.¹⁶⁶

Applying the Rule 48(a) standard to dismissal of charges under plea agreements has a number of advantages. First, it avoids incompatible results where more than one district is involved. If the *Cowan* court had applied the Rule

(citing *United States v. Murphy*, 569 F.2d 771, 773 n.5, 774 n.10 (3d Cir.), cert. denied, 435 U.S. 955 (1978)).

163. See *United States v. Cowan*, 524 F.2d at 507 (noting that trial court appointed private special prosecutors in response to U.S. Attorney's refusal to continue prosecution after trial court denied motion for leave to dismiss indictment).

164. It is entirely plausible and even proper for a judge who concludes that a U.S. Attorney is making a series of judgment errors in plea bargains to informally talk to the U.S. Attorney about the issue, hoping to trigger at least a review of the decisions, and perhaps provoke a change. Such a conversation, however, does not occur in a formal review setting and, theoretically at least, any person familiar with the plea bargains could have a similar conversation with the U.S. Attorney. Such informal contact with the prosecutor is a far cry from a formal, in-court confrontation on the fundamental question of who decides what cases get prosecuted.

165. See *Bradner v. Hammond*, 553 P.2d 1, 7 (Alaska 1976) (holding unconstitutional statute requiring legislative approval of appointment of subordinate executive officers, stating that "the separation of powers doctrine requires that the blending of governmental powers will not be inferred in the absence of an express constitutional provision.").

166. See *United States v. Carrigan*, 778 F.2d 1454, 1461 (10th Cir. 1985) (rejecting plea agreement under Rule 11(e), specifically noting absence of Rule 48(a) question).

48(a) standard, then it would have reached the same result as if all charges had been filed in the same district. Second, application of the Rule 48(a) standard to dismissals sought under Rule 11(e) plea bargains obviates the conceptual problem suggested in *Ammidown*.¹⁶⁷ If the prosecution could get Ammidown's cooperation against Lee only in exchange for a significantly reduced charge, and the agreement was found by the court to be "rational," then this result would justify a significant reduction in the court's sentencing power. Third, application of the Rule 48(a) standard acknowledges the prosecutor's underlying power to refuse to prosecute, which, absent some evidence of corruption or bad faith, the court is powerless to penalize.¹⁶⁸

This result fits the logic of Rule 48(a) and the cases that interpret it. Essentially, the monitoring power vested in the courts by Rule 48(a) compels public disclosure of the reasons for which the prosecution seeks a dismissal. Public disclosure means public accountability. Where difficult decisions must be made and where reasonable people might differ, there is no great harm in having the decision-maker more directly responsible to the electorate.

D. Recommendation

As presently worded, Rule 11(e)(2) provides that "the court may accept or reject" an 11(e)(1)(a) dismissal or (e)(1)(c) sentence agreement. The use of the word "may" to define the court's role in two such radically different situations without an effort to accommodate the real difference between dismissals and sentencing makes no sense. In sentencing, the court has exclusive power, while in considering dismissals, the court's power is the far more limited "power that checks power."¹⁶⁹ Rule 11(e), however, does not reflect this important distinction. The second sentence of Rule 11(e)(2) should be amended to read:

If the agreement is of the type specified in subdivision (e)(1)(a), the court may accept or reject the agreement, or may defer its decision as to the acceptance or rejection until there has been an opportunity to consider the presentence report. In accepting or rejecting the agreement, the court should consider that portion of the agreement seeking a dismissal as if it were an application under Rule 48(a) and accept the agreement unless it finds, and so states at the time of rejection, that the prosecution's conclusion that the public interest requires dismissal is clearly erroneous. If the agreement is of the type specified in subdivision (e)(1)(c), the court may accept or reject the agreement, or may defer its decision as to the acceptance or

167. See *United States v. Ammidown*, 497 F.2d 615, 619 (D.C. Cir. 1973) (stating issue of case as "whether the plea [agreement,] endorsed by the prosecutor, may nonetheless be rejected by the trial judge because of his conclusion that the defendant should be tried on the higher charge").

168. See *Rinaldi v. United States*, 434 U.S. 22, 30 (1977) (stating that, in absence of bad faith, government's request to terminate prosecution must be granted).

169. *United States v. Cowan*, 524 F.2d at 513.

rejection until there has been an opportunity to consider the presentence report. The court should accept the agreement if the agreed-upon sentence is the same as the court would impose utilizing the guidelines and standards otherwise applicable. If the agreement involves both a predetermined sentence and the dismissal of pending charges, the court may accept or reject the agreement, or may defer its decision as to the acceptance or rejection until there has been an opportunity to consider the presentence report. In accepting or rejecting the agreement, the court should consider each part separately as provided in this Rule.¹⁷⁰

This change would recognize and take account of the differing degrees of judicial power being exercised.

The decisions required when plea agreements are entered into, when charges are dropped, and when defendants are sentenced are among the most difficult to make in the administration of criminal justice. It is important that the framework for such decisions be clear and that the role of the courts and the prosecutor be delineated with as much precision as possible. This is presently not the case. The recommended changes should help in clarifying the lines of authority between the Executive and Judicial Branches on this vital point of interaction.

IV. CONCLUSION

As this brief discussion of the initiation and termination of criminal cases has shown, there is indeed a conflict between executive and judicial power. It is important to remember, however, that points of conflict are the focus of this inquiry, and a smooth functioning of the branches is far more prevalent than is suggested by the areas examined here. There are hundreds of federal judges in ninety-four federal districts, and many if not most of them preside over criminal trials on a daily basis. Given the enormous quantity of close contact between the two branches, the amount of conflict is relatively minimal. Therefore, the most pertinent observation on the collision of executive and judicial power in the general conduct of criminal cases is that such collisions are rare and that the two branches of government have learned to coexist quite well. Where there is a conflict in the exercise of power, it tends to arise either on questions of public importance, such as in Title VI of the Ethics in Government Act or *United States v. Cox*, or matters of trivial public importance involving basic emotional issues, such as in *United States v. Am-*

170. Rule 48(a) should likewise be amended to incorporate the *Cowan* standard: "Leave of the court should be granted unless the court finds, and so states at the time leave is denied, that the prosecution's conclusion that the public interest requires dismissal is clearly erroneous." *United States v. Cowan*, 524 F.2d at 512.

midown. While relatively rare, such conflicts raise issues that must be resolved rationally to promote "workable government."¹⁷¹

The judicial appointment of an independent counsel under Title VI of the Ethics in Government Act is, technically, an exercise of prosecutorial power. It is only minimally so, however. A judgment whether there is a rational basis for dismissal under Rule 48(a) is also a minimal exercise of such power. Neither of these minimal involvements is constitutionally infirm because, as the Supreme Court has said, "absolute independence" among different branches of government is not constitutionally required.¹⁷² Given a constitutional background that calls for separation, but allows overlap in the interest of a "workable government," points of collision must be analyzed in the context of that objective and the fundamental concern as to where the essential power lies. It is for that reason that concerns about the constitutionality of the Ethics in Government Act should be resolved in favor of the minimal exercise of prosecutorial power by the Judiciary. Similarly, Rules 11 and 48(a) should be applied in a way that acknowledges the ultimate and dispositive authority of the Executive to prosecute.

The Constitution itself is, of course, the core document that sets down the basic ground rules for the operation of our government. When one grapples with separation of powers issues, one is, in a real sense, at the core of the core. A certain solemnity, if not awe, accompanies such efforts and heightens the obligation to act rationally and carefully. It is hoped that this Article will assist such a process.

171. The Supreme Court has repeatedly alluded to the goal of "workable government" in cases involving separation of powers issues. *E.g.*, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) ("While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the disbursed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity."); *United States v. Nixon*, 418 U.S. 683, 707 (1974) (quoting *Youngstown*).

172. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. at 635; *United States v. Nixon*, 418 U.S. at 707.