Balancing the Duty to Prosecute and the Obligation to Do Justice

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He thanks his partner, Stephanie Dunn, for her editorial assistance.

American Amanda Knox and her former boyfriend were prosecuted in Italy for the vicious and sensational murder of her English roommate. Even if the Italian prosecutor had wanted to charge Amanda with a less serious offense, he had no discretion to do so. In civil-law countries, such as Italy, prosecutorial discretion is limited and controlled by the judiciary. Prosecutors generally do not have the discretion to open an investigation, decline prosecution, or determine what, if any, charges to file or drop. There is, rather, a constitutional principle of mandatory prosecution. Thus, if there is sufficient evidence to bring a case, a prosecutor must seek charges, and all such decisions are within the sole province of the judiciary.

Prosecutors in Italy and other civil-law countries are, therefore, not faced with the struggle to balance the duty to prosecute with the obligation to do justice, or with other competing concerns such as the need to make charging concessions to further an ongoing criminal investigation. As a result, prosecutors in civil-law jurisdictions are often criticized unfairly for blindly prosecuting every case that the judiciary directs them to prosecute.

Unlike civil-law countries, in the United States, prosecutors are part of the executive branch of government and, therefore, independent of the judiciary. In our system, prosecutors inherently have broad discretion when making all of the decisions related to the prosecution of an individual or entity. Given such discretion, former Attorney General Robert H. Jackson said, "The prosecutor has more control over life, liberty and reputation than any other person in America. His discretion is tremendous. He can have citizens investigated and, if he is that kind of person, he can have this done to the tune of public statements and veiled or unveiled intimations. . . . Therein is the most dangerous power of the prosecutor: that he will pick people that he thinks he should get, rather than pick cases that need to be prosecuted." It's no wonder then that prosecutors in the United States are some of the most powerful and feared public officials in our state and federal governments. And because they are public officials, there are always suspicions about whether their decisions are politically motivated or influenced. Yet, given these two competing systems, I favor ours.

Why do I think our system works so well? First, prosecutors are lawyers who take seriously their professional oath and their oath of office to uphold the Constitution and laws of the state and nation. Second, they also take seriously the professional codes of conduct and ethical mandates. Third, in my experience,

Illustration by A. Richard Allen

our adversarial system generally drives prosecutors to do the right thing. Prosecutors in this country know that if they act without sufficient evidence or in an unlawful or unethical manner, they may lose the case or, in egregious cases, be sanctioned. Finally, although most people use the term "political" in a pejorative sense when describing a prosecutor, I believe that "political" concerns can be desirable and can assist a prosecutor in properly exercising his or her discretion. When I use the term "political," I don't mean the personal aspirations of a prosecutor; rather, I mean a prosecutor's concern for the legitimate public policies of the body politic—the values and goals of a given community. For example, a community's collective desire to protect women and children from domestic abuse is a value worth promoting by a prosecutor.

Prosecutors are indeed part of the political system whether they are elected or appointed. In many states, prosecutors are elected in partisan races. By definition, they are political officials, but, as noted, that is not necessarily undesirable. Although a U.S. attorney is not an elected official, he nonetheless is political in the sense that he is appointed by the president of the United States and confirmed by the Senate. When a U.S. attorney is making prosecution decisions, he is guided by the priorities and goals of the Department of Justice. Not unlike a district attorney, U.S. attorneys are also influenced by the political concerns of the constituents in their districts. For example, if drugs are a big problem in a particular district, the U.S. attorney for that district should take that fact into consideration when making prosecution decisions and directing the limited resources of that office. Prosecutors at the state and federal level know that if they exercise their prosecutorial discretion improperly, they very well may not be re-elected or re-appointed.

Prosecutorial Discretion

What then is prosecutorial discretion? It embodies all of the decisions that a prosecutor makes, including deciding who and what to investigate; whether to use a grand jury; whom to interview and subpoena to the grand jury; whom to charge and the number and type of charges to bring; whether to grant immunity; whether to drop some charges or dismiss all of the charges; whether to offer or accept a plea bargain; whether to charge a lesser offense; and, if there is a conviction, what sentence to recommend.

Because prosecutors are responsible to the public, it is important for them to use their discretion in deciding how to perform their job to satisfy the public's legitimate expectations and interests. That often requires balancing the interests of the community against the interests of defendants and victims. Until the latter half of the twentieth century, there were very few formal rules to guide prosecutors' decisions. Toward the end of the twentieth century, formal laws and rules were developed to provide standards and guidelines for the exercise of prosecutorial discretion. Under the various state and federal rules and standards, some basic principles have emerged that now guide prosecutors in exercising their discretion.

Specifically, a prosecutor must make a decision about whether to file charges based on the evidence and applicable law, the seriousness of the offense, judicial economy, the suspect's record and background, the record and background of the victim, the suspect's intent to commit the crime, and the willingness of the defendant to cooperate in other prosecutions, as well as any other possible alternatives to prosecution. Even in light of these general principles, a prosecutor retains a good deal of individual discretion in deciding the course of a criminal prosecution. Therefore, while written guidelines and standards are helpful to prosecutors exercising their discretion, innumerable human judgments still must be made at both the federal and state levels.

Inherent in state and federal rules and guidelines is the principle that when making charging decisions, prosecutors should do justice. To that end, very few cases have successfully set aside a prosecutor's charging decisions. Courts generally find that prosecutors act in good faith and in a nondiscriminatory manner and have not engaged in selective prosecution. For a defendant to bring a case for selective prosecution, he must be able to show that he received disparate treatment and that his prosecution was improperly motivated. Disparate treatment arises if others similarly situated are not prosecuted, and an improper motivation exists when a defendant is prosecuted based on an unjustifiable standard such as race, religion, or other arbitrary classifications. Very few defendants can meet this burden.

To be sure, there are prosecutors who abuse their discretion, and certainly the prosecutors of former Alaska Senator Ted Stevens fall within that category, but in my nearly 20 years as a judge advocate general (JAG) officer and a prosecutor at both the state and federal levels, I did not personally observe abuse of prosecutorial discretion. In my experience, prosecutors for the most part struggle mightily to exercise their discretion in a fair and just manner, which, in some cases, is neither easy nor obvious. I personally struggled daily to balance my duty to prosecute with the need to do justice. Here are some of the guiding principles that I discovered as I grappled with "doing the right thing."

Trust Your Instincts

A few weeks before I was due to be discharged from the U.S. Air Force, the base's staff judge advocate (SJA) asked me to consider extending my tour of duty for several months to try a large and unusual case. Of course, my curiosity was aroused. He told me

that it concerned a master sergeant who had just completed a tour of duty in Vietnam and returned to our base to retire after 20 years of service. The sergeant had served in the Finance Office at the Tan Son Nhut Air Base in Saigon. He was there early in the conflict before the Air Force had completely organized the accounting system in Vietnam. Government officials became suspicious when, upon his return to the United States, the sergeant began spending large amounts of cash. He bought a farm for himself and a car for each member of his family, all paid for in cash. The sergeant had no money before he left for Vietnam. In fact, before leaving, he had borrowed $100 to repair his car.

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Rumors had been rampant, and there was some reliable information about a black market scheme that operated out of the Air Force Finance Office at Tan Son Nhut. A preliminary investigation revealed that in the early stages of organizing the finance operation, the Air Force used three forms of currency—scrip (which was like Monopoly money), U.S. dollars, and piasters (local Vietnamese money). They had not yet devised a way to account separately for each type of currency. In other words, each of the three types of money was used interchangeably and accounted for as if they all had the same value. The sergeant, and apparently others working there, quickly saw an opportunity to make some fast and easy money. At the time, a dollar was worth at least three piasters. The sergeant took 4,000 U.S. dollars to the Saigon Cleaners and exchanged the dollars for 12,000 piasters. He then brought the piasters back and replaced the $4,000 he took with 4,000 piasters, pocketing the "extra" 8,000 piasters for himself. He worked this scheme over an extended period of time, filling shoe boxes with the dollars he obtained. He then shipped the boxes home to his family to hold for him. During his tour in Saigon, he amassed several hundred thousand dollars.

The sergeant was just days from retirement when the SJA told me about this scheme. Because this meant the military would soon lose jurisdiction over him, the SJA wanted to file general court-martial charges immediately. I asked the SJA what charges could be brought under the Uniform Code of Military Justice (UCMJ), given that it would be nearly impossible to charge the sergeant for theft due to the horrible accounting system (or lack thereof) that the base used. The sergeant's obvious defense would be that he had not stolen anything because the books balanced and the Air Force treated piasters and U.S. dollars the same. The SJA said they were considering filing charges under General Article 134 of the UCMJ, which prohibits, among other things, "all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty." 10 U.S.C. § 934 (UCMJ art. 134).

I was not sure how that article could be applied to the facts of the case. The SJA indicated that there had been some thought of involving the Internal Revenue Service and charging the sergeant with income tax evasion by showing how his net worth had increased by several hundred thousand while he was in Vietnam. He had not paid taxes on the increased income, and this failure to pay income taxes would violate Article 134. There was no precedent so holding, but the Internal Revenue Service had offered to assign a regional counsel to help build the case. Though novel, this strategy did seem promising. Also affecting my decision was the fact that if something was not done, the sergeant would go unpunished and other members of the Air Force Finance Offices around the world would not be deterred from such conduct.

The temptation and challenge were too great. I agreed to extend my tour, and we charged the sergeant under Article 134. At the last minute, I added a couple of counts of theft and forgery because my brief preliminary investigation showed that the sergeant, on two occasions, got sloppy and took small checks made out to the government, forged an endorsement, and kept the cash. Those two charges certainly didn't seem all that important at the time.

After several months of investigation and preparation, my team was ready for trial. We had been able to confirm the details of the scheme through many of the sergeant's coworkers. (Sadly, we discovered that this scheme was not used only by the sergeant.) Our investigation showed that the sergeant's net worth increased by $300,000 during his tour of duty in Vietnam. Over four weeks of trial, we were able to show how the sergeant went from being a pauper to owning a farm and being able to buy every member of his family a new car.

The court found the sergeant guilty on all counts. He was dishonorably discharged from the Air Force and lost his retirement benefits. He also was given significant time in the brig. The SJA and base commander held a public ceremony and presented me with the Air Force Commendation Medal for my trial work in this precedent-setting case.

The U.S. Supreme Court subsequently issued an opinion concluding that the military does not have jurisdiction over a service member for "civilian" offenses committed off base. Ironically, the case I had just tried against the sergeant was used by Justice William O. Douglas to support the decision of the Court. After the Supreme Court's decision, it was obvious that the sergeant's article 134 charges would not survive appeal. The Air Force agreed to dismiss all article 134 convictions, leaving only the counts of theft and forgery that I had added at the last minute. The sentence was significantly reduced, but the sergeant's dishonorable discharge and loss of retirement benefits remained in place. Sometimes a prosecutor's exercise of discretion is helpful even if he does not totally evaluate it at the time he exercises it. In this case, the Air Force was very happy that I had decided to add the two extra counts when I drafted the charges.

Think about the big questions when you decide whether to prosecute. After leaving the JAG Corps, one of the first cases presented to me as district attorney of Weld County, Colorado, concerned a husband and wife who lived in a residential part of the city. Around midnight they awakened to the sound of breaking glass and discovered that a window had been broken. Because they had been burglarized previously, the man decided to get his shotgun and wait to see if anybody returned. Within a few minutes, two teenagers appeared at the broken window and attempted to gain entry. The man stepped out and yelled at the boys. They took off running. He fired a warning shot in the air, and when the boys failed to stop, he fired a second shot and then a third. A few shotgun pellets hit one of the teenagers. The parents of the boy who had been hit were irate and wanted to prosecute the homeowner.

After studying the facts and interviewing the homeowner, I decided that the husband and wife were rightfully scared, given their past history with burglaries. The fact that it was late at night and that they had no idea what might happen next were also important factors. The man insisted that he had not aimed at the boys and never intended to hit them—only scare them. His story was credible, and I believed him. While the homeowner had no prior record, I discovered that the teenagers did have prior misdemeanor records.

At that time, Colorado law allowed a person to use reasonable force to defend his property. It was obvious that the teenagers were attempting a burglary, which was a felony. Although the homeowner may have overreacted, Colorado law supported the proposition that a person could take reasonable efforts to stop a crime. Finally, I considered the following factors: At the time, residential burglaries were a significant problem in the community, and prosecuting the homeowner would not deter future burglaries; in my mind, it would be a waste of judicial and prosecution resources to prosecute the man because I believed that a Weld County jury would not convict him. Taking these factors into consideration and weighing them against the boy's injury and the teenagers' combined actions, I believed justice weighed in favor of the homeowner, and I refused to prosecute him. I charged both boys with offenses in juvenile court. They were convicted, adding further charges to their juvenile records. The parents of the teenager who had been hit with the shotgun pellets were very upset with my decision, but the community sentiment seemed to support my decision not to prosecute the homeowner.

Listen to the Body Politic

Shortly after the incident I described above, I was faced with another burglary that required me to weigh various factors. This burglary, however, was different in many respects. This time an uninhabited church had been burglarized in the middle of the day. Again, it was a teenager who broke into the church and stole some money. Some neighbors saw him flee and immediately called the police. A police officer in the vicinity responded quickly, leaving his police car to chase the boy. He yelled for the boy to stop, but the boy ignored the instruction and kept running. The policeman took aim and fired his service revolver, hitting the boy in the back and paralyzing him.

I thought about all the factors that I had applied in the earlier burglary case; this time, however, I decided to prosecute the police officer. In so doing, I considered the following factors: It was the middle of the day; a church was the target, not an inhabited residence, and therefore there was little threat of personal injury to a victim; the boy was not armed, was running away, and was not likely to hurt anybody; the police officer aimed at the boy and intended to shoot him; I believed the officer used excessive force given the circumstances; and in my view, this conduct needed to be deterred.

The case went to trial, and the jury deliberated for only a few minutes. They returned with a not guilty verdict and asked to speak to the prosecutor. The jury proceeded to criticize him and our office for bringing charges against a police officer whom, they thought, was doing his duty to apprehend a criminal. Although I believed that I had correctly viewed the case as involving criminal conduct requiring prosecution, in making my charging decision I had not properly evaluated the community's values and the chance of actually convicting the defendant. This was a lesson that I would soon get to apply.

Learn from your experience. A third case somewhat similar to the burglary cases occurred a short time later. A filling station owner had been repeatedly burglarized at night. He set up a bed in the back room of his filling station and slept there so that he could catch the culprits. He also had a gun. After a few nights of waiting, he heard a window break. He jumped up and yelled.

Once again, it was a boy who attempted to flee on his bicycle. The filling station owner ran outside and yelled for the boy to stop. When the boy continued peddling his bike, the man took aim and shot him, wounding him in the shoulder.

My inclination was to charge the station owner. He had obviously planned to catch the burglar and shoot him. In fact, unlike the burglarized homeowner whom I declined to prosecute, this man intended to hurt, if not kill, the culprit. In my view, the station owner could and should have called the police to help him instead of simply shooting the boy. Given the jury's comments following the prosecution of the police officer, however, I decided to submit this case to a grand jury. I thought it was better to get the community's input at the investigative stage rather than after using limited resources to try the case.

I presented all of the evidence to the grand jury, including the station owner's testimony, and asked the grand jury to return an indictment for assault against the station owner. For the first and only time in my career as a prosecutor, the grand jury returned a No True Bill, indicating that, in their view, criminal charges were not appropriate. I considered filing direct charges against the station owner but decided that it would be a waste of time and judicial resources because I would undoubtedly get jurors with views similar to those of the grand jurors who would acquit the station owner if we tried him. From these three experiences, I became acutely aware of the importance of considering the community's attitudes while exercising my prosecutorial discretion.

Be patient; you might eventually get the bad guys. Just before leaving the Weld County District Attorney's Office to become U.S. attorney for the District of Colorado, I was confronted with an unusual case. A parachutist was beaten to death at a stock car racetrack after the winds carried him off course during his jump. He had the misfortune of landing in the middle of a Sons of Silence motorcycle gang rally where he was brutally battered and kicked to death by an unknown number of motorcycle gang members.

We used every investigative resource at our disposal to try to pin down the specific gang members who did the beating and kicking. We interviewed several gang members, but the code of silence prevailed, and we were unable to identify the specific persons who delivered the fatal blows. When it was time for me to move on to the U.S. Attorney's Office, no one had been charged for this brutal crime. My chief deputy, who had led the investigation of the parachutist's death, accompanied me to the U.S. Attorney's Office, and we agreed we would continue to work to resolve that crime. We did not have to wait long for our chance.

Almost immediately upon our arrival, the FBI reported that it had reliable information about the Sons of Silence operating a major drug distribution network in Colorado. The FBI had developed sufficient evidence to obtain a wiretap and plant a listening device in the gang's "safe house," which we had been able to locate and surveil. The FBI "soundman" went to the isolated house in the middle of the night when nobody was there, installed the wiretap, and planted the bug in one of the walls. Those devices allowed us to acquire a mountain of new evidence. In the meantime, we also developed an informant who was the wife of one of the gang's lieutenants. The lieutenant himself later became an informant. With the information they provided and the evidence we acquired from the wire and bug, we were able to indict nine gang members on various drug distribution charges, but not for murder.

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The chief of the Criminal Division led the prosecution effort. This was a formidable task because all nine gang members were tried together. The defendants had extremely competent individual defense attorneys, which made for a crowded courtroom presided over by one of the best federal judges in the country. The evidence was introduced largely from the wire and bug, and the informants tied it all together with their testimony. When the informants finished testifying, they were put in the federal witness protection program and may still be there. The jury found all of the defendants guilty of some of the drug charges against them. They were sent to federal prison for varying lengths of time. Unfortunately, we were never able to put together enough evidence to prosecute any of the Sons of Silence for the senseless death of the Weld County parachutist. Though we ended up prosecuting the suspects for serious drug offenses instead of murder, I believe the streets are safer because of our efforts.

Work Together

Shortly after becoming the U.S. attorney, I received a call from a district attorney in a large metropolitan office. He asked me if the federal government could assist his office in an unsolved murder case that had occurred at a local savings and loan. One evening after hours, a teller was left alone to close the bank. Someone gained entry into the savings and loan and robbed it. The teller was found dead later that night in the bank vault,

strangled and with her skull crushed. Several thousand dollars were missing. The only witness investigators had developed was the wife of a bank security guard. She told the police that her husband came home late on the night in question with a pillowcase full of money. He dumped the money out on the bed. The total was over $14,000—which was the amount that had been taken. He told his wife that he had robbed the facility. She then helped him destroy some of the evidence and spend the money, partly on her new boyfriend.

Although the evidence may have seemed clear, the district attorney had a big problem. In Colorado, the spousal privilege prevented the state from calling the wife as a witness. Because the bank was federally insured, the district attorney asked me to look at federal law to see if there was any way my office could assist in prosecuting the guard. After some research, I determined that federal law allowed an attorney to call the spouse to the stand. While she could not testify about communications with her husband, she could testify about her observations of him. The fact that she helped him get rid of evidence made her an accessory after the fact, allowing us to argue the crime fraud exception to the spousal confidential communication privilege.

Because of the horrendous nature of this crime, the victim's family's need for justice, the importance of deterring similar crimes, and the importance of getting a murderer off the streets, I decided to prosecute the security guard for murder during the robbery of a federally insured savings and loan. To strengthen our argument, we exercised our discretion to grant the wife immunity and compel her to testify. The bank guard was indicted, and after lengthy hearings on motions regarding the use and extent of testimony from his spouse, he went on trial. The wife testified that on the evening of the murder, her husband came home with a bag of money. He dumped the bag's contents on the bed, and they counted it. There was more than $14,000. She did not testify about any communications between her and her husband. Her testimony was essentially our entire case, but it was enough. The bank guard was convicted and sentenced to 90 years in prison. The Tenth Circuit Court of Appeals upheld the conviction and affirmed our use of the wife's testimony.

Be Creative

In the mid-1980s, the Aryan Nations was one of the most feared and notorious organizations in the United States. Part of that organization, the Order, had operations in Colorado. The Order was a modern-day remnant of the Klu Klux Klan (KKK), and it subscribed to some Nazi and KKK beliefs regarding the inferiority of minorities and Jewish people. Essentially, it was a domestic terrorist group. The Order had grown and supported itself with all sorts of criminal activity, including thefts, counterfeiting, and even bank robberies. The head of the Order was Robert Mathews.

The Order kept a list of perceived enemies, many of whom were liberals and members of minority groups. One of the people on this list was Alan Berg, a Jewish attorney who was a controversial talk show host on several Denver radio stations. He would berate callers, call them names, and hang up on them. His vitriol was often directed toward people who were intolerant of minorities. He was particularly hostile to members of the Aryan Nations, and he relentlessly belittled members of the Order.

> Although I felt vindicated by my decision not to charge the little fish, it had personal repercussions.

Around 9 o'clock one June evening in 1984, Berg drove home to his house in Denver. He got out of his Volkswagen bug and was met with a hail of machine gun fire from a Mac-10. Berg was hit 13 times and instantly killed. Berg's death was investigated based on evidence, primarily shell casings, left at the scene. The casings were tracked back to the weapon, and an informant was developed who helped implicate the Order. Because Berg's case appeared to be a murder and that is not a federal crime, it was assumed that the Denver District Attorney's Office would file the case against the members of the Order. Several months passed, however, and no charges were brought. One of the Denver prosecutors called and asked if he could come over and discuss the case with me. He told me that the Denver DA's office was choosing not to prosecute because, in his office's opinion, some of the evidence had been obtained illegally. I did not believe that the legal issues presented were fatal to the case. We argued about those issues for a while, but it was obvious to me that the Denver DA was not going to charge members of the Order with the slaying of Alan Berg.

That bothered me a great deal. A group of "political" murderers were not going to be prosecuted in state court for a murder as they should have been. So I had my office review the evidence. It looked solid against four members of the Order, who had been identified through other investigations in various states. Because I thought justice required us to try to figure out a way to bring charges, my office finally decided to proceed. The factors that influenced my decision to seek federal charges were, among others, the senseless and brutal nature of the crime, the

notion that somebody should pay for this crime, the fact that we knew who did it, the notion that society should be protected from further senseless and brutal crimes, and a belief that a deterrent message needed to be sent.

We decided to file on a federal civil-rights violation: The violation of Berg's civil rights was his murder. That meant that we had to prove not only that the Order murdered Berg but also that Berg was murdered because he was Jewish. This was a challenging task. Filing such charges required approval of the Justice Department, in this case, the Civil Rights Division. Initially, the Civil Rights Division was not convinced that we would succeed at trial on those admittedly novel charges. I went back to Washington, D.C., and met with the head of the Civil Rights Division and several of the lawyers in that division in an effort to convince them that these charges should be brought, and that if they were not brought, Berg's killers would go unpunished. After lengthy and serious debates, the Civil Rights Division finally agreed that my office could bring the charges. They sent an attorney to Denver to assist in the prosecution.

We prepared an indictment for the violation of Berg's civil rights as well as racketeering and conspiracy. Four people were indicted. Although we were convinced that others were involved, we only had strong enough evidence against Jean Craig, David Lane, Bruce Pierce, and Richard Scutari. After a lengthy trial, Lane and Pierce were convicted of the civil-rights violation of killing Berg. They were also convicted of racketeering and conspiracy. The two remaining defendants were later convicted of other unrelated crimes. All went to prison. Lane was sentenced to 190 years and Pierce to 252 years. Both died in prison, Lane in 2007 and Pierce in 2010.

These people would not have been prosecuted for Alan Berg's death if we had not stepped forward and figured out a way to proceed after the DA's office refused to prosecute. Ironically, the DA's exercise of discretion resulted in my office becoming involved and exercising its discretion in a different manner. I believe that my decision to insist that federal charges be pursued allowed justice to be done.

Do the Right Thing, Even When It Hurts

I again grappled with charging decisions in a series of highway bid-rigging cases in Colorado in 1984. Millions of dollars were allegedly lost by the state due to rigged bids. The Antitrust Division of the Department of Justice (DOJ) began a months-long investigation in Colorado. Although the DOJ led the investigation, my office cooperated. Ultimately, 11 different cases were brought and several companies indicted—mainly construction firms and highway paving companies, along with some officers of the corporate entities. As was customary, my office signed the indictments although they were brought by the DOJ. Initially, the Antitrust Division granted immunity to the largest paving company involved in the transactions. A few individuals entered pleas, and one case was dismissed entirely. The Antitrust Division lost 7 of the 11 cases. The DOJ then decided to indict an additional mom-and-pop paving company in northern Colorado. They presented the indictment to me to sign. I had serious concerns, however. Specifically, the DOJ had lost 7 of 11 cases, the largest contractor had been given immunity, and some of the evidence was weak. I concluded that the case was not prosecutable and that it would be unjust to charge a very "small fish."

Another DOJ official signed the indictment, and the case proceeded to trial. After the prosecution rested, the judge dismissed the case on a motion for judgment of acquittal because the only conclusion a jury could reach based on the evidence was that of reasonable doubt. I had seen that happen on only a couple of other occasions—federal charges are rarely dismissed at "half-time." After the dismissal, one juror told a newspaper that the jury did not believe the government had proven its case beyond a reasonable doubt and that the jury was very critical of the government's decision to grant immunity to the large contractor. He stated, "They had the big fish snitch on the little fish." Although I felt vindicated by my decision not to charge the small paving company, it had personal repercussions.

Some months later, I was nominated to the United States District Court for the District of Colorado. My nomination was stalled because the DOJ was critical of my refusal to sign the indictment. Ultimately, I withdrew my name from nomination and later resigned my position as U.S. attorney for the District of Colorado. Although that was a very trying time in my career, I do not regret my decision to refuse to sign the indictment. I believe justice was done. When balancing the duty to prosecute against the obligation of doing justice, that is the ultimate test.

The exercise of prosecutorial discretion is an awesome responsibility and, to be sure, can and has been abused. Frankly, however, I, along with other prosecutors I have known and worked with, have always attempted to follow Justice Sutherland's advice that the prosecution's interest "is not that it shall win a case, but that justice shall be done." Although this is great advice, it is not always easy for prosecutors to apply in making their everyday decisions. I would like to think that over nearly two decades as a prosecutor, I did my level best to exercise my prosecutorial discretion so that in the end justice was done. I hope I succeeded. ■