

Winter 1990

A Brief Argument for Greater Control of Litigation Discretion - The Public Interest and Public Choice Contexts, 23 J. Marshall L. Rev. 215 (1990)

Walter J. Kendall III

Follow this and additional works at: <https://repository.law.uic.edu/lawreview>



Part of the [Jurisprudence Commons](#), [Law and Politics Commons](#), [Legal History Commons](#), [Legal Profession Commons](#), [Litigation Commons](#), [Organizations Law Commons](#), and the [President/Executive Department Commons](#)

Recommended Citation

Walter J. Kendall, III, A Brief Argument for Greater Control of Litigation Discretion - The Public Interest and Public Choice Contexts, 23 J. Marshall L. Rev. 215 (1990)

<https://repository.law.uic.edu/lawreview/vol23/iss2/5>

This Article is brought to you for free and open access by UIC Law Open Access Repository. It has been accepted for inclusion in UIC Law Review by an authorized administrator of UIC Law Open Access Repository. For more information, please contact repository@jmls.edu.

AFTERWORD

A BRIEF ARGUMENT FOR GREATER CONTROL OF LITIGATION DISCRETION — THE PUBLIC INTEREST AND PUBLIC CHOICE CONTEXTS

WALTER J. KENDALL, III*

One of the most troublesome aspects of the late 20th century United States is the cynical, if not hostile, attitude most people have about politics and politicians.¹ At the same time, we as a people continue to be the most litigious of societies.² One could conclude that litigation and the courts are more trusted to do the right thing than are legislatures. The main purpose of this conference was to expose to public view the inner workings of the Attorney General's office and its impact on the "pursuit of justice". The organizers raised three questions: who is the client, how are priorities set, and what is the place of politics in policy decisions? The answers were expected to provide useful insights into the policy making process of the litigating arms of the national government.

These questions were inspired by a reading of Kelman's *Making Public Policy - A Hopeful View of American Government*,³ and Heymann's *The Politics of Public Management*,⁴ as well as the ex-

* Professor of Law, The John Marshall Law School. B.A., 1962 Brooklyn College; J.D., 1965 St. John's University School of Law. The author wishes to acknowledge the essential role of Professor Seng and Barry Weisberg in putting the subject conference together and for Professor Seng's insightful critique of the questions addressed in this article.

1. Twenty-five years ago the University of Michigan Research Institute asked a sample of the American electorate, "Would you say the government is pretty much run by a few big interests looking out for themselves or that it is run for the benefit of all the people?" Less than a third of those answering said the government was run by and for big interest. By the mid '80's that figure had almost doubled. Farber & Frickey, *The Jurisprudence of Public Choice*, 65 TEX. L. REV. 873 (1987).

2. J. LIEBERMAN, *THE LITIGIOUS SOCIETY* (1981).

3. S. KELMAN, *MAKING PUBLIC POLICY: A HOPEFUL VIEW OF AMERICAN GOVERNMENT* 6-7 (1987).

4. P. HEYMANN, *THE POLITICS OF PUBLIC MANAGEMENT* (1987).

perience of the author in practicing and litigating for and against the government.⁵

POLITICAL SCIENCE

Kelman sets up a "simple roadmap" of the policy process consisting of 5 stages. Each stage feeds back (and forth) on the others: 1. Policy ideas, which are the "raw material" for any action (governmental or otherwise);⁶ 2. Political choice (which is characterized by a) commitment of the authority of the government for or against actions, b) collective decision-making, and c) fundamental disagreement about what is to be done);⁷ 3. Production of a program to carry out the policy; 4. Final government actions that are experienced at the "street-level;"⁸ and 5. Real-world outcomes, including the inevitable unintended effects.⁹

Kelman discusses how the policy-making process works and how well it works. The two normative standards he applies, which the organizers accept enthusiastically, are the ability of the policy process to produce good public policy and the effects of the process on promoting human dignity. Kelman argues that success requires high levels of public spirit (as opposed to self-interested behavior) and that sufficient quantities of public spirit are present, such that the role of government is more admirable than not.¹⁰

The focus in the Conference was the empirical question of how the participants in the policy divisions of the Department of Justice and the U.S. Attorney's offices make decisions about priorities as lawyers and agents for an ill-defined client or principal in a political

5. As indicated above, Professor Michael Seng played a major role in formulating the idea for the Conference and this paper. He is an experienced litigator as well as a constitutional scholar. See Seng, *The Cairo Experience: Civil Rights Litigation in a Racial Powder Keg*, 61 OR. L. REV. 285 (1982).

6. S. KELMAN, *supra* note 3. See also R. WEAVER, *IDEAS HAVE CONSEQUENCES* (Midway reprint 1976).

7. S. KELMAN, *supra* note 3, at 6.

8. Book Note, 79 MICH. L. REV. 811 (1981) (reviewing M. LIPSKY, *STREET-LEVEL BUREAUCRACY: DILEMMAS OF THE INDIVIDUAL IN PUBLIC SERVICES* (1980)).

9. GAYLIN, GLASSER, MARCUS & ROTHMAN, *DOING GOOD—THE LIMITS OF BENEVOLENCE* (1978).

10. S. Kelman, *supra* note 3, at 10. Another commentator has posed this explanation:

Another point that America demonstrates is that virtue is not, as has been claimed for so long, the only thing that can maintain a republic. Enlightenment, more than anything else, makes the social state possible. The Americans are no more virtuous than other people, but they are infinitely more enlightened than any other people I know.

The mass of people who understand public affairs, who are acquainted with laws and precedents, who have a sense for the interests, will understand of the nation, and the faculty to understand them is greater here than in any other place in the world

A. JARDIN, *TOCQUEVILLE: A BIOGRAPHY* 162 (2d ed. 1989).

setting. We did not focus directly on institutional or structural questions, but they clearly have a significant effect on policy.¹¹ Kelman argues correctly that choices about institutional design matter "a great deal."¹² The structure either advantages or disadvantages participants by determining *who* decides and *how* they decide. Kelman accepts the general anarchy of today's jurisprudence and political theory and defines "good" public policy, not in substantive terms, but as the result of proper process.¹³ Proper process requires first that people try to achieve "good" public policy, i.e. that they be public spirited. Second, it requires that there be "controls" to keep final governmental action in at least a form that resembles earlier political choices.

The query of whether the process itself builds our dignity and character, Kelman's other criteria, seeks opportunity for meaningful participation by those formulating, implementing, and being affected by the policy. Structure also influences the degree of other-regardness present and thereby *what* is decided.

We did not consciously focus directly on an other major variable, the participant. Participants tend to see only one face of an issue and generally have various power resources available or different strategies for getting things done. Thus, the process of formulating and implementing policy is a very complex dynamic that can only be studied synchronically, knowing full well that it operates diachronically. Study is further complicated by a sense that the Heisenberg effect¹⁴ is perhaps of greatest impact in the social sciences.

Heymann, who coincidentally was a division chief in the Department of Justice, tried to get beyond these two limitations by studying "scores" of cases,¹⁵ focusing primarily on sixteen cases of political and managerial actions of government officials compiled by the Kennedy School of Government. Heymann was looking for principals or criteria to guide a governmental unit towards "effective performance," defined as maintaining legislative and public support for the agency and the goals of its leader.¹⁶

In a sense, Heymann answers the three questions we raised for

11. *The Federalist Papers*, Nos. 10-51; H. DESOTO, *THE OTHER PATH* (Paperback ed. 1989).

12. S. KELMAN, *supra* note 7, at 16.

13. *Id.* at 208.

14. The Heisenberg uncertainty or indeterminacy principle was first set forth by Werner Heisenberg, a German physicist, in 1927. Its substance is that "any attempt to measure precisely the velocity of a subatomic particle, such as an electron, will knock it about in an unpredictable way, so that a simultaneous measurement of its position has no validity." *THE NEW ENCYCLOPAEDIA BRITANNICA* 125 (15th ed. 1988).

15. P. HEYMAN, *supra* note 4, at xiii.

16. *Id.*

the attorney general. The client is the President, all decisions are political (as defined by Kelman), and the priorities are those of the leader. In another sense the answers aren't clear. For the Department of Justice, the client is the Attorney General, but his client is the President; priorities include the laws passed by Congress which must be "faithfully executed;" and organizational needs, which must conflict at times with the priorities of the "temporary" leaders.

As a framework for both analysis and guidance, Heymann proposes a series of six questions to be asked over and over again, because "times will change and demand changes."¹⁷ In our opinion, these questions are all focused on political choice, stage two of Kelman, and are most helpful when so viewed:

The first question is related to goals: how are goals initially chosen; what is monitored, and how does one recognize the need for change?

The second question is about hierarchal relationships: what does a manager owe to his or her superiors, and how much independent judgment should managers exercise?

The third question concerns internal matters: what is the special identity and role of the organization?

The fourth question is about vertical relationships: what other entities are working on the same or related matters?

The fifth question is how does one deal with inevitable controversy: (The answer to this question requires particular sensitivity to legitimacy of process and substance, their reality and appearances, and the status of other related or affected players.)

The final question is—how does one keep sub-units from getting themselves into trouble, so that this reflects adversely on their superiors? The answer to this question requires intense questioning about organizational vulnerabilities.

According to Heymann, most of the activities of a large multi-functional agency like the Department of Justice will not change, despite changes in presidents and attorney generals. The legal structures that create and limit an agency in large measure remain in place; institutional values and shared functions provide the glue that keeps a large entity together. Yet the President relies on each department to express his campaign themes concretely. Thus, choices are made that dramatically change at least a few of the activities of each Department.¹⁸

The model or metaphor Heymann suggested is that of "a

17. *Id.* at 10.

18. *Id.* at 56.

loosely structural conglomerate corporation—a collection of goods and activities (Departmental personal, Presidential, and constitutional) related to each other only in the administrative convenience or the pattern of political opportunities provided on joint handling.”¹⁹ In one sense, a comparison of the Department of Justice from the Carter years to the Reagan years would have as its “most striking fact . . . how much continuity there was.”²⁰ Despite the apparent differences, “the changes in the Department of Justice under Attorneys General Smith and Meese represented a mere shift in the sources of congressional and constituency support and a change in the pattern of benefits provided and symbols embraced.”²¹ To Heymann service to the law (“scrupulous fairness, equality, and concern about the neutrality and regularity with which governmental powers are exercised”²²) and service to the President (as embodiment of the legitimate political interests of a democratic society), are common duties acknowledged to be in a dynamic tension.

While apparently not Heymann’s view,²³ it can be argued from Heymann’s contrasts between Attorney General Bell and Attorney Generals Smith and Meese, that each opted for the opposite pole and both failed to respect the legitimacy of the other duty. Bell talked of “an independent Department of Justice, or neutral zone in the government, where decisions will be made on the merits free of political interference or influence.”²⁴ On the other end of the spectrum Smith and Meese “determined to set the department on the path of advocacy of the president’s policy views even when these were opposed to the firmly-arrived-at decisions of the courts [and Congress].”²⁵

Neither can succeed and both are inconsistent with the traditional more balanced role of the Attorney General and the Department. Why can’t they succeed?

The answer is because of the permanence of the institutions and interests that structure our pluralism. Authority, persuasive bargaining, centrality, reciprocity, and loyalty are the basic forms of influence in any society,²⁶ Especially in our heterogeneous electoral system, despite any broad hegemony, each of these forms operates

19. *Id.* at 61.

20. *Id.* at 57.

21. *Id.* at 61.

22. *Id.* at 63.

23. “An overriding and single-minded dedication to the job of advocate for the president where his views or interest are implicated, without pretence of a competing responsibility to the courts and to the law as they have interpreted it, is a defensible role of the Department.” *Id.* at 65 (emphasis added).

24. *Id.* at 63 (quoting G. BELL & R. OSTROW, *TAKING CARE OF THE LAW* (1982)).

25. *Id.* at 65.

26. *Id.* at 148-56.

subject to many pressures and constraints. Even an entity having substantial authority and a central role in many decisions, like the Justice Department has, cannot forgo any forms of influence without losing it, influence that is.

While the influence of friends and foes can be changed over time, and often rapidly,²⁷ changing interests, perceptions and beliefs is more difficult.²⁸ Since these considerations are the major tools for "reshaping the political environment," such reshaping is a long-term phenomenon. Because of "human nature" and nature itself, it is probable that such reshaping is beyond the control of "temporary" public officials.

POLITICS

All this may seem a bit abstract but it is the theoretical context within which the normative aspects of the conference must be evaluated. What about the empirical aspects? Heymann's questions are focused on what Kelman calls "political choice," that is collective decision-making about committing the coercive authority of the state, when there is fundamental disagreement about what is to be done. Just how political is government litigation and how political should it be? The toughest question is: is there any place for partisan politics in the exercise of prosecutorial discretion? Asking the question seems to elicit an almost pavlovian negative as a response. This is a government of laws, not people; law is autonomous; law is a science; there is a gulf between law and politics. One of the participants at the conference discussion on the role of the United States Attorneys said, "the United States Attorney's Office, the Department of Justice at every level, . . . even at the level of the Attorney General, should be. . . absolutely apolitical."²⁹

On the other hand, another participant said, "politics, in a way, is what makes democracy function: And. . . it's (not) realistic to think that people do not come to political office through some political activity of some kind. . . And I think (the President has) a right. . . to pick [U.S. Attorneys] who are good, competent attor-

27. *Id.* at 166-74.

28. *Id.* at 174-83.

29. Attorney General Symposium at 46 (Valukas) (transcript available at the John Marshall Law Review Office) (hereinafter Symposium). The participants in the symposium included: Justice Harlington Wood, Jr., of the United States Circuit Court of Appeals for the Seventh Circuit; the Honorable Anton R. Valukas, former United States Attorney for the Northern District of Illinois; the Honorable John Sietanka, United States Attorney for the Western District of Michigan; Barbara A. Babcock, Ernest W. McFarland Professor of Law, Stanford University; Roger C. Cramton, Robert S. Stevens Professor of Law, Cornell Law School; and Wallace H. Johnson, partner at the law firm of Kutak, Rock & Campbell, Omaha, Neb.

neys, but who agree with his program that he has been elected on."³⁰ This is a good thing because "some of our greatest blunders as a society, governmental, have been by pulling people in and having them make decisions theoretically ('we are not going to make them politically'). They produce terrible tragedies in terms of policy and in terms of personal suffering."³¹

The articles and discussion of the former Division chiefs particularly illustrate the tensions between the two views of politics. We think it can be fairly said that reasonable people can draw the lines in different places.³²

Even in the more mundane world of state and local government, drawing the line is a sensitive and troublesome challenge. The following description of the early experience of the reformer and (future Mayor) Fiorello LaGuardia, as an assistant Attorney General in New York State, illustrates this succinctly:

One of his cases dealt with the noxious fumes that regularly wafted over the Hudson from New Jersey factories. For years neighborhood associations had collected evidence and pressured officials to restrict the emission of foul pollutants.

Finally, unable to ignore the issue, the attorney general undertook prosecution. Even LaGuardia was surprised that someone as inexperienced as he should be assigned to so complex a case. Technical evidence had to be studied, the legal questions were knotty, and the implications for relations between the states and the influential industries involved all had to be sifted and weighed. Nonetheless, only eight weeks after his appointment on January 1, 1915, Fiorello was in Washington filing complaints against seven offending factories in the U.S. Supreme Court.

Despite his quick work, his superiors appeared less than delighted, and Fiorello thought he understood why. "The party big shots were closely connected with this matter," La Guardia wrote. "The corporations had used their tremendous influence and I was given orders to take no action from now on," unless instructed by the attorney general. Other explanations for the squelching are possible. After all, the two states should have been able to negotiate a settlement out of court, but Fiorello immediately suspected that the 'big interests' had reached into the attorney general's office to protect their dangerous practices.

La Guardia also moved to enforce state conservation laws prohibiting the harvest of young scallops from the oceans and beaches, but despite strong evidence he lost several of these cases. Long Island juries just refused to deliver a guilty finding. Fiorello learned that the local population resented the fact that this law was strictly used against the small fishermen, while the commercial fisheries always seemed to fill their quotas. La Guardia agreed that this was wrong and

30. *Id.* at 49 (Wood).

31. *Id.* at 45 (Smietanka).

32. *Id.* at 11-12 (Babcock).

directed his staff to prosecute the larger offenders first. As the case was being prepared, however, the state legislature added an amendment to the law permitting scallop fishing on private beaches. The wealthier fisheries could afford to purchase these rights, while the smaller concerns were forced to continue breaking the law in order to compete. Disapproving of this inequity, La Guardia ordered his staff to drop any further prosecutions under this law.

Another occasion brought him into court opposite 'my neighbor in Greenwich Village, State Senator James J. Walker,' in a case where the technical wording of a state consumer protection law was the central point of contention. Walker asked to address the court, advising that as author of the law under discussion he could testify that it was never intended for the particular situation before the court. The judge, whom La Guardia remembered as 'an affable Tammany Judge, . . . went out of his way to be nice to Jimmy,' and summarily dismissed the case. After the trial the judge, Walker, and La Guardia all went off for a drink. Fiorello, still upset by the verdict, pressed Walker, asking how he could defeat his own law. And LaGuardia recalled that Jimmy, in his urbane way, said: 'Fiorello, when are you going to get wise? Why do you suppose we introduce bills? We introduce them sometimes just to kill them. Other times we even have to pass a bill in the Attorney General's office? You're not going to stay there all your life. You make your connections now, and later on you can pick up a lot of dough defending cases you are now prosecuting. What are you in politics for, for love?'³³

In many states the chief government lawyers are elected.³⁴ How can elected officials be anything but political? But does that mean there is more or less prosecutorial discretion in the elected position? The participants in this symposium had conflicting views, but it is clear that both elected and appointed government litigators are subject to partisan pressures.³⁵

PUBLIC CHOICE

Contemporary interest group and public choice research demonstrates that legislators are influenced by special interests and are faced with the possibility of incoherence.³⁶ In public choice terms, the special interests are "rent-seeking" coalitions. Rent-seeking has been defined as:

the attempt to obtain . . . payments for the use of an economic asset in excess of the market price through government intervention in the

33. KESSNER, FIORELLO LA GUARDIA AND THE MAKING OF THE MODERN NEW YORK 36-37 (1989). This book is recommended reading for those who doubt that idealism is possible in an electoral context. See also Mikva, *Symposium on the Theory of Public Choice*, 74 VA. L. REV. 167 (1988).

34. See, e.g., Illinois, where the Attorney General of the state and the States Attorney of each county are elected.

35. Symposium, *supra* note 29, at 50 (Valukas U.S. Attorney freer), and at 52 (Smietanka States attorney freer).

36. See generally I. McLEAN, PUBLIC CHOICE (1987).

market. A classic example of rent-seeking is industry's attempt to obtain monopolies created by government (licensing or regulators schemes). Such monopolies allow firms to raise prices above competitive levels.³⁷

The incoherence allegation follows, again in public choice terms, from Arrow's Impossibility Theorem.³⁸ The question is asked, "does any voting system get us reliably from the preference ordering of each citizen to the preference ordering of a nation?" and is answered by Arrow, "No." Arrow argued that if there are at least three options and a finite number of voters, there is no voting system which satisfies three fundamental conditions which are essential to fairness and legitimacy. The conditions are: 1. that the voting method deal with every individual preference ordering, 2. that if every individual prefers x to y, then the social ordering also prefers x to y, and 3. that only pairs of voters be compared to each step and that there be no dictator.

In applications we get this: assume that three voters, Able, Baker, and Charlie, must decide on which program to cut to balance the budget—welfare, weapons, or women's programs. Their respective orders of preference are: Able—weapons, welfare, and women, Baker—welfare, women, and weapons; and Charlie—women, weapons, and welfare. If pair voting is required, the majority cannot settle on a program. Able and Charlie will vote to cut weapons rather than welfare; Able and Baker will vote for cuts in welfare rather than women's programs; and Baker and Charlie will vote for cuts in women's programs rather than weapons.

Obviously reality is much more complex on both aspects. A recent major study of interest group politics by Kay Lehman Schlozman and John T. Tierney has reviewed the work of some of the more sophisticated theories about interest groups.³⁹ Their study, suggests that the key to understanding and predicting the role and influence of interest groups depends on the distribution of costs and benefits of the proposed policy. This study based on consideration of almost 10,000 organizations active in politics, has been summarized on this point in an extended footnote in these terms:

When both the costs and benefits of legislation are widely distributed in society, interest groups ordinarily would be expected to play a subordinate role to ideological and partisan considerations. Medicare

37. Macey, *Promoting Public—Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223, 224 n.6 (1986).

38. McLean, *supra* note 36, at 165-168.

39. The theorists reviewed include Lowi, *American Business, Public Policy, Case-Studies, and Political Theory*, 16 World Pol. 677 (1964); M. HAYES, *LOBBYIST AND LEGISLATORS: A THEORY OF POLITICAL MARKETS* (1981); J. WILSON, *POLITICAL ORGANIZATION* (1973); and *See generally* SCHLOZMAN & TIERNEY, *ORGANIZED INTERESTS AND AMERICAN DEMOCRACY* (1986).

is an example of such legislation. When both costs and benefits are narrowly concentrated—for example, a subsidy to sugar beet farmers that imposes higher production costs on candy makers—the group conflict will be intense, and the general public is likely to remain uninvolved. When benefits are concentrated and costs are distributed—for example, veterans' benefits—the group that would receive the benefits will be active, but the general public has little incentive to organize in opposition. Finally, when the benefits are distributed but costs are concentrated—for example, environmental regulation—one would expect the group on which the costs are to fall to be quite politically active and the general public, again, to have difficulty in organizing support for the measure.⁴⁰

The issue of incoherence or fundamental rationality is or should be of greater concern in dealing with decisions of appointed officials rather than elected officials.⁴¹ This seems especially true when there is a tradition of independence from partisan electoral policy choices in the office being considered,⁴² and *a fortiori* when the position involves wide discretion and enormous power.⁴³

In the discussion of the role of the U.S. Attorney's office and the pursuit of justice, all the participants frankly acknowledged that, absent a matter of conscience requiring resignation,⁴⁴ ultimately the governmental lawyer was the final arbiter of prosecutorial discretion.⁴⁵ At the same time, each also acknowledged that there was a need (duty) to make the resources of the office available to those protected by federal laws.⁴⁶

40. Faber & Fricker, *The Jurisprudence of Public Choice*, 65 TEX. L. REV. 873, 886, n.72 (1987). This article is a valuable summary of the literature.

41. "We do not view as equivalent the presumption of constitutionality afforded legislation drafted by Congress and the presumption of regularity afforded an agency in fulfilling its statutory mandate." *Motor Vehicle Mfrs. Ass'n*, 463 U.S. 29, n.9 (1983).

42. In *Branti v. Frankel*, 445 U.S. 507 (1980) the Court prohibited a newly selected Public Defender from firing assistant public defenders from the other political party. The Court asserted that because any policy-making pertains to individual clients and not partisan political interests, and because access to confidential information was client specific and not relevant to party considerations, "it would undermine rather than promote the effective performance of an assistant public defenders office to make his tenure dependent on his allegiance to the dominant political party." *Id.* at 519-20.

43. In *U.S. v. Mendoza*, 464 U.S. 154 (1984), the Court held that nonmutual offensive collateral estoppel does not apply against the government. In so doing the Court explicitly recognized that "policy choices are made by one administration, and often reevaluated by another." The Court frankly admitted

It would be idle to pretend that the conduct of Government litigation in all its myriad features, from the decision to file a complaint in the United States District Court to the decision to petition for certiorari to review a judgment of the court of appeals, is a wholly mechanical procedure which involves no policy choices whatever.

Id. at 161.

44. Symposium, *supra* note 29, at 6 (Wood), and at 16 (Crampton).

45. *Id.* at 3 (Valukas); at 26 (Johnson).

46. *Id.* at 32-3 (Wood).

Further, other public choice or law and economics research makes a compelling case that there are too few incentives for either private or "public interest" lawsuits.⁴⁷ In a recent study of attorney fee shifting statutes the author states that if such theoretical analysis is sound, "it should be clear that prospective supply of civil rights enforcement by the federal government is bound to be suboptimal."⁴⁸ Citing substantial empirical and opinion data, the same author concludes that "The performance of the Enforcement Division of the Justice Department and the Legal Services Corporation, two governmental organizations deeply involved in civil rights enforcement, reinforces this prediction."⁴⁹

SETTING PRIORITIES

One of the speakers, when asked how one chooses between a major narcotics case, an adulterated food case, and, hypothetically the United States Attorney's favorite, a securities case, when all the assistants are stretched to their limits, said, "that is probably the single most difficult thing that a U.S. Attorney has to do."⁵⁰

All of the participants struggled with this question. Some matters are so big, because of publicity, that they have to be handled.⁵¹ Relationships with other entities of government obviously require that certain cases be given priority. The influence of the FBI on the priorities of the U.S. Attorney's office was acknowledged to be significant.⁵²

Some of the priorities are set by the Attorney General. One of the participants illustrated the complexity of the relationships between D.C. and the field and the role of political or electoral priorities in exercising litigation discretion.

An Attorney General, it seems to me, just like the United States Attorney, may come in with an agenda in terms what he or she perceives to be important in law enforcement. Attorney General Meese felt pornography prosecutions were a very significant matter and should be of great concern. Not all the United States Attorneys would have necessarily set that high on their priorities, and I think there was a practical response to that. I think that the Attorney General set up a task force which was to deal with nationwide pornography prosecutions. In my district, while I prosecuted some organized crime related

47. Coffee, *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669 (1986).

48. Mureiko, *A Public Goods Approach to Calculating Reasonable Fees Under Attorney Fee Shifting Statutes*, 1989 DUKE L.J. 438, 458 (1989).

49. *Id.*

50. Symposium, *supra* note 29, at 21 (Valukas).

51. *Id.* at 28 (Valukas) (Savings and Loan matters).

52. *Id.*

pornography cases which dealt with child porn, it was not a major priority. But if the Attorney General said this was an area in which we should at least look for cases which we felt were worthy of prosecution, obviously, you are going to pay attention to it.⁵³

Yet there was an insistence that the Washington people never dictated priorities.⁵⁴

One of the speakers stated, "access is the key to power."⁵⁵ Does the ordinary citizen have access, and therefore a direct influence on priorities? Again one story can be used to illustrate the shared view of the participants that "nobody comes into our office and leaves unsatisfied in this sense. . . [w]hen you have a problem that no one else will solve, we are not going to pass you on."⁵⁶

I have made it a policy of going into the community and speaking to groups about areas in which they have concern. A group of people came in complaining about panic peddling in their neighborhood. Realtors typically would panic peddle by going into old ethnic neighborhoods and say: Do you know who is moving in next door? And then the houses would be sold for one tenth of what they were worth.

We went out and spoke to a number of community groups. And a number of community groups went to see the United States Attorney. I didn't know whether there were going to be prosecuted or what these cases were really about. It ultimately ended up that there was wholesale bribery of HUD inspectors who were falsifying mortgage reports, et cetera, to help fund this whole operation. Those prosecutions, led to not only the prosecution of HUD, but all of the suburban corruption probes which took place in the early '70s in the Northern District of Illinois.

We indicted and convicted over 150 public officials — as a result of those HUD complaints which started with the complaints by the citizens whose houses were being turned over in a panic peddle.⁵⁷

These stories show the positive side of litigation discretion. Obviously that is not the only side. Questions about underenforcement of civil rights matters, or overuse of RICO, are frequent in the press. Again there is difficulty in drawing the line. However, one fixed star exists and that is the constitutional requirement and oath of public officials to see that the laws be faithfully executed.⁵⁸

53. *Id.* at 21-2.

54. *Id.* at 25-26 (Wood).

55. *Id.* at 9 (Johnson).

56. *Id.* at 36 (Smietanka).

57. *Id.* at 34-5 (Valukas).

58. *Train v. City of New York*, 420 U.S. 35 (1975); Biden, *Balancing Law and Politics: Senate Oversight of the Attorney General Office*, 23 J. MARSHALL L. REV. 151, 159-60 (1990).

CONCLUSIONS

In our opinion, there should be⁵⁹ a three part check on Justice Department activities similar to that used in review of legislative⁶⁰ or administrative agency action.⁶¹ It should create "rights" preventing or requiring exercise of litigation discretion;⁶² it should protect those who are disadvantaged in the political realm;⁶³ and it should encourage deliberation in the policy-making process.⁶⁴

In our view Heymann has adopted *sub silentio* the public choice views of Mancur Olson⁶⁵ and others. He does, however, struggle to find "good" in public policy formulation and implementation,⁶⁶ unlike others who see only "decline" from continued governmental involvement in the market.⁶⁷ We believe, with Kelman,⁶⁸ that there is an effective residue of public spiritedness in public policy formulation and implementation. This Aristotilean or public interest view of human nature contrasts with the Hobbesian or private interest view underlying the public choice or economic model referred to above. Obviously sorting out such a contrast and persuading anyone of which view is correct would turn this afterword into a forward for a new book on political theory. Thus we stop.⁶⁹

59. We are not entering the debate whether the Congress or the Court should impose these checks. See *Heckler v. Chaney*, 470 U.S. 821 (1985) (discussion of *Dunlop v. Bachowski*, 421 U.S. 560 (1975)).

60. See Faber & Fricker, *supra* note 40, at 876-77.

61. Administrative Procedure Act § 706, 5 U.S.C. § 706 (1982).

62. *Megdal v. Oregon St. Bd. of Dental Examiners*, 288 Or. 293, 605 P.2d 275 (1980).

63. *Adams v. Richardson*, 480 F.2d 1159 (D.C. Cir. 1973). *Adams* is the bete noir of the politico-judicial right wing. See generally Rabkin, *Judicial Compulsions—How Public Law Distorts Public Policy* 147 (1989), wherein the case is referred to as a "judicial monstrosity." But see *Heckler v. Chaney*, 470 U.S. 821 (1985) (which describes *Adams* as "a situation where it could justifiably be found that the agency has consciously and expressly adopted a general policy that is so extreme as to amount to an abdication of its statutory responsibilities.").

64. See, e.g., *Strycker's Bay Neighborhood Council v. Karlen*, 444 U.S. 223 (1980); *Rodway v. U.S.D.A.*, 514 F.2d 809 (D.C. Cir. 1975).

65. M. OLSON, *THE LOGIC OF COLLECTIVE ACTION* (rev. ed. 1971).

66. P. HEYMAN, *supra* note 15, p. 189 ("The [public] manager who is prepared to seek new directions for her organization and new meanings for government activity in the area of concern, who envisages her task as creating form out of, rather than simply accepting and negotiating with, the powers and constraints surrounding her and her organization, is inevitably the agent of democratic forces.").

67. M. OLSON, *THE RISE AND DECLINE OF NATIONS* (1982).

68. S. KELMAN, *supra* note 3, chapters 10 and 11.

69. The question and answer phases of the Conference have been transcribed. There are approximately 50 pages of discussion of the 3 basic questions of the conference. Copies of the materials are available at the John Marshall Law Review offices for the cost of reproduction.

