

# **POLITICAL CONTROL OF FEDERAL PROSECUTIONS: LOOKING BACK AND LOOKING FORWARD**

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## ABSTRACT

*This Essay explores the mechanisms of control over federal criminal enforcement that the administration and Congress used or failed to use during George W. Bush's presidency. It gives particular attention to Congress, not because legislators played a dominant role, but because they generally chose to play such a subordinate role. My fear is that the media focus on management inadequacies or abuses within the Justice Department during the Bush administration might lead policymakers and observers to overlook the hard questions that remain about how the federal criminal bureaucracy should be structured and guided during a period of rapidly shifting priorities and about the role Congress should play in this process.*

## INTRODUCTION

The federal criminal enforcement bureaucracy casts a large shadow because of the conspicuous cases it occasionally pursues and the attention the national media gives to the work of the storied “feds.” When clear or suspected criminality looms large in the national consciousness—whether in the form of violent gangs or shenanigans in the credit default swap market—calls for Justice Department action grow loud. Yet this bureaucracy is relatively small—relative both to the other criminal justice operations and to the scope of federal criminal jurisdiction.

Although the department's headquarters in Washington, D.C. (often called “Main Justice”), contains a number of litigating divisions

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(including the Criminal Division), most cases are brought by the nearly 5,800 prosecutors in the ninety-three United States Attorneys' offices (who are not formally within the Criminal Division).<sup>1</sup> That sounds like a large force until one remembers that the five district attorneys' offices in New York City have a total of 1,727 prosecutors.<sup>2</sup> This comparison actually understates the boutique nature of the federal system and the uneven distribution of its work. Nearly 68,000 federal criminal cases were filed in 2007.<sup>3</sup> But almost 17,000 of these were immigration cases<sup>4</sup> (not including nearly 2,000 identification fraud cases<sup>5</sup>); over 17,000 were narcotics cases,<sup>6</sup> and over 8,000 were firearms cases.<sup>7</sup> What about white-collar crime? Federal prosecutors filed seventy securities fraud cases in 2007,<sup>8</sup> 569 financial institution fraud cases,<sup>9</sup> and 804 mail and wire fraud cases.<sup>10</sup> But even the combined total of these is smaller than the number of pornography cases (1,544) pursued that year.<sup>11</sup>

If anything, the focus on immigration cases has increased, with a 2008 report finding that they amounted to 49.2 percent of all federal prosecutions.<sup>12</sup> Child pornography cases are up as well.<sup>13</sup> The

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1. OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, AUDIT REPORT 09-03, RESOURCE MANAGEMENT OF UNITED STATES ATTORNEYS' OFFICES 1 (2008), available at <http://www.usdoj.gov/oig/reports/EOUSA/a0903/final.pdf> (reporting that 5,381 United States Attorneys and Assistant United States Attorneys were employed as of April 21, 2008).

2. *NYLJ 100: District Attorneys' Offices*, N.Y.L.J., Dec. 8, 2008, <http://www.nylawyer.com/adgifs/decisions/120808magchart7.pdf> (giving totals for the five counties that comprise New York City).

3. JAMES C. DUFF, ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS 226 tbl.D-2 (2007), available at <http://www.uscourts.gov/judbus2007/JudicialBusinesspdfversion.pdf>.

4. *Id.* at 228 tbl.D-2.

5. *Id.* at 227 tbl.D-2.

6. *Id.*

7. *Id.*

8. *Id.* at 226 tbl.D-2.

9. *Id.* For a sense of the kinds of charges brought in corporate fraud cases, see CORPORATE FRAUD TASK FORCE, REPORT TO THE PRESIDENT 1.3–23 (2008), available at <http://www.usdoj.gov/dag/cftf/corporate-fraud2008.pdf>.

10. See DUFF, *supra* note 3, at 226 tbl.D-2 (noting that there were a total of 464 mail fraud cases and 340 wire, radio, or television fraud cases in 2007).

11. *Id.* at 228 tbl.D-2.

12. Transactional Records Access Clearinghouse Reports, Prosecutions Through June 2008, <http://trac.syr.edu/tracreports/crim/198> (last visited Jan. 30, 2009).

13. See Amir Efrati, *Making Punishments Fit the Most Offensive Crimes—Societal Revulsion at Child-Pornography Consumers Has Led to Stiff Prison Sentences—And Caused Some Judges to Rebel*, WALL ST. J., Oct. 23, 2008, at A14 (“In fiscal 2008, U.S. attorneys’ offices brought 2,211 computer-based child exploitation cases, the vast majority against child

commitment of federal enforcement resources to these cases came while the Justice Department's only unit with authority over the full range of federal cases—the Federal Bureau of Investigation (FBI)<sup>14</sup>—was working hard to recenter itself on counterterrorism programs.<sup>15</sup> In the midst of this recentering has come an economic crisis, accompanied by heavy pressure on the FBI to pursue those with criminal responsibility for it.<sup>16</sup> The federal system has always been in flux, but never more so than in the past eight years.<sup>17</sup>

Enforcer discretion—exercised by prosecutors and investigative agents—has always lain at the heart of federal criminal law, which has

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pornography viewers, who mostly pleaded guilty. That was more than double the number five years earlier.”).

14. See 20 Op. Off. Legal Counsel 242, 243 (1996), 1996 WL 33101185, at \*1 (“[28 U.S.C. § 533] confers on the Attorney General broad general investigative authority with respect to federal criminal offenses. . . . [and she] has delegated her investigative authority to the FBI.” (footnote omitted) (citations omitted)).

15. See *Federal Bureau of Investigation (Part II): Hearing Before the H. Comm. on the Judiciary*, 110th Cong. 20 (2008) (statement of Robert S. Mueller III, Director, Federal Bureau of Investigation) (“In recent years, we have moved away from drug cases and smaller white collar crimes, but we have dedicated more agents and more resources to public corruption, violent crime, civil rights, transnational organized crime, corporate fraud, and crimes against children.”); Kelly Thornton, *Without Lam, U.S. Attorney’s Office Takes Different Tack*, VOICEOFSAN DIEGO.ORG, Dec. 2, 2008, <http://www.voiceofsandiego.org/articles/2008/12/02/news/01usa120308.txt> (reporting a substantial increase in immigration cases and a decrease in white-collar cases in San Diego); see also OFFICE OF THE INSPECTOR GEN., U.S. DEP’T OF JUSTICE, AUDIT REP. 05-37, THE EXTERNAL EFFECTS OF THE FEDERAL BUREAU OF INVESTIGATION’S REPRIORITIZATION EFFORTS i (2005), available at <http://www.usdoj.gov/oig/reports/FBI/a0537/final.pdf> (detailing a three-year period of transformation at the FBI “aimed at focusing the agency on terrorism and intelligence-related matters”); U.S. GEN. ACCOUNTING OFFICE, FBI TRANSFORMATION: FBI CONTINUES TO MAKE PROGRESS IN ITS EFFORT TO TRANSFORM AND ADDRESS PRIORITIES 20 (2004), available at <http://www.gao.gov/new.items/d04578t.pdf> (“Since September 11, the FBI has permanently realigned a substantial number of its field agents from traditional criminal investigative programs to work on counterterrorism and counterintelligence investigations.”).

16. See Eric Lichtblau, David Johnson & Ron Nixon, *F.B.I. Struggling to Handle Wave of Finance Cases: Few Agents Available; Focus on Terror Limits Resources to Pursue Fraud Inquiries*, N.Y. TIMES, Oct. 19, 2008, at A1 (“Current and former officials say the cutbacks [done to shift agents into national security programs] have left the bureau seriously exposed in investigating areas like white-collar crime, which has taken on urgent importance in recent weeks because of the nation’s economic woes.”); Karen Donovan, *Law and Financial Disorder: Despite Calls for C.E.O. Perp Walks, Building a Criminal Case Will Be Very Difficult*, PORTFOLIO.COM, Dec. 28, 2008, <http://www.portfolio.com/news-markets/top-5/2008/12/28/Financial-Crime-Prosecutions#page1>; Patricia Hurtado, *FBI Uses Triage to Shift from Terror to Madoff, Subprime Probes*, BLOOMBERG.COM, Dec. 22, 2008, <http://www.bloomberg.com/apps/news?pid=20601087&sid=aVHDu98R3s6s&refer=home>.

17. See Daniel Richman, *The Past, Present, and Future of Violent Crime Federalism*, 34 CRIME & JUST. 377, 382–407 (2006) (sketching federal efforts against violent crime from the Founding through the September 11, 2001 attacks).

long been characterized by extraordinarily broad substantive statutes enforced by a relatively small bureaucracy that can pick and choose among possible targets.<sup>18</sup> Indeed, practitioners and close observers have come to see federal criminal law less like a compendium of prohibitions than a series of broad criminal jurisdictional grants to agencies. Yet even as Congress has been quick to pass broad and overlapping criminal statutes, particularly since the 1960s, it has used a variety of strategies to influence how and against whom federal criminal resources get deployed. During the eight years of George W. Bush's administration, Congress passed criminal statutes with its usual abandon.<sup>19</sup> What was remarkable, however, was the extraordinary extent to which legislators—at least until 2006—acquiesced in executive projects of centralization and politicization that threatened Congress's long-term institutional interests.

This Essay's exploration of the institutional dynamics within and around the Justice Department during the Bush administration focuses on Congress in part to compensate for all the attention that Justice Department officials—and the White House personnel to whom they were all too subservient—have received in the past year or so. It is not that these officials—both those who left in disgrace, like Alberto Gonzales, Kyle Sampson, and Monica Goodling, and those who acquitted themselves with distinct honor, like James Comey—do not deserve the attention. Rather, I worry that the ease with which some of the Bush administration pathologies can be identified—the attorney general who had barely a clue of what was

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18. See Daniel C. Richman & William J. Stuntz, *Al Capone's Revenge: An Essay on the Political Economy of Pretextual Prosecution*, 105 COLUM. L. REV. 583, 611 (2005) ("Little responsibility and vast jurisdiction mean that federal law enforcers must exercise an extraordinary degree of investigative and prosecutorial discretion in deciding when, and against whom, to invoke that jurisdiction."); see also Samuel W. Buell, *The Upside of Overbreadth*, 83 N.Y.U. L. REV. 1491, 1514 (2008) ("Prosecutors exert enormous influence over the path of substantive criminal law."); Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869, 880 (2009), available at <http://ssrn.com/abstract=1114172> ("Congress . . . routinely passes laws with punishments greater than the facts of the offense would demand to allow prosecutors to use the excessive punishments as bargaining chips and to obtain what prosecutors and Congress would view as the more appropriate sentence via a plea instead of a trial.")

19. See JOHN S. BAKER, JR., HERITAGE FOUND., LEGAL MEMORANDUM NO. 26, REVISITING THE EXPLOSIVE GROWTH OF FEDERAL CRIMES 5 (2008), available at [http://www.heritage.org/research/legalissues/upload/lm\\_26.pdf](http://www.heritage.org/research/legalissues/upload/lm_26.pdf) ("Since the start of 2000, Congress has created at least 452 new crimes."). Among the most recent enactments is the Animal Fighting Prohibition Enforcement Act of 2007, Pub. L. No. 110-22, 121 Stat. 88 (to be codified at 18 U.S.C. § 1 note).

going on in his department<sup>20</sup> or of the difference between his job and that of White House counsel;<sup>21</sup> decisions to fire U.S. Attorneys that lacked clear decisionmakers and were heavily influenced by the pique of staffers;<sup>22</sup> and career-prosecutor hiring processes that flagrantly disregarded civil service law<sup>23</sup>—may lead policymakers and observers to overlook the hard questions that remain about how the federal criminal bureaucracy should be structured and guided.

Analytically, one would like to separate conversations about how power should be allocated within and outside the Justice Department from those about enforcement priorities. Indeed, that is the approach generally taken.<sup>24</sup> One of the goals of this Essay, however, is to show how decisions about enforcement-power allocation have—during the Bush administration and probably inevitably—been inextricably intertwined with preferences about priorities and the vigor with which they are pursued.

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20. David Johnston & Eric Lipton, *Gonzales Endures Harsh Session with Senate Panel; Doubt Is Raised About Honesty and Judgment*, N.Y. TIMES, Apr. 20, 2007, at A1 (noting how during his “more than five hours of often-combative testimony, Mr. Gonzales . . . struggled to offer a coherent explanation for the dismissals” of eight U.S. Attorneys); see also Chitra Ragavan, *The Embattled Attorney General; Gonzales Still Has the President’s Support, For Now*, U.S. NEWS & WORLD REP., Apr. 30, 2007, at 34, 35 (noting how, at the Senate Judiciary Committee hearing, there were “seventy-one times in all” that Gonzales “fell back on a misfiring memory”).

21. See Katy J. Harriger, *Executive Power and Prosecution: Lessons from the Libby Trial and the U.S. Attorney Firings*, 38 PRESIDENTIAL STUD. Q. 491, 503 (2008) (“Career officials within the department described [Gonzales’s] tenure as one in which political considerations seemed to drive most decision making and in which the traditional notion of ‘independence’ of the department was severely undermined.”); Chitra Ragavan, *A General Rebellion; Alberto Gonzales Has Big Troubles, But It Isn’t the Current Flap That Has Made Him Such a Controversial Figure*, U.S. NEWS & WORLD REP., Apr. 9, 2007, at 30, 32 (noting the “view among many career prosecutors that Gonzales is too close to Bush”).

22. See OFFICE OF THE INSPECTOR GEN. & OFFICE OF PROF’L RESPONSIBILITY, U.S. DEP’T OF JUSTICE, AN INVESTIGATION INTO THE REMOVAL OF NINE U.S. ATTORNEYS IN 2006, at 15–51 (2008), available at <http://www.usdoj.gov/oig/special/s0809a/final.pdf>.

23. See OFFICE OF THE INSPECTOR GEN. & OFFICE OF PROF’L RESPONSIBILITY, U.S. DEP’T OF JUSTICE, AN INVESTIGATION OF ALLEGATIONS OF POLITICIZED HIRING BY MONICA GOODLING AND OTHER STAFF IN THE OFFICE OF THE ATTORNEY GENERAL 25–35 (2008), available at <http://www.usdoj.gov/oig/special/s0807/final.pdf>.

24. See, e.g., Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 996 (2006) (advocating a “‘formalist’ approach to separation of powers [in the criminal law context], where legislative, executive, and judicial powers are to be separated and novel arrangements that allow a blending of functions or weakening of one branch’s power are disallowed”); Dan M. Kahan, *Reallocating Interpretive Criminal-Lawmaking Power Within the Executive Branch*, 61 LAW & CONTEMP. PROBS. 47, 48 (Winter 1998) (proposing “[f]ormally investing DOJ with interpretive lawmaking power” without discussing substantive enforcement priorities).

## I. CONGRESS AND DELEGATED FEDERAL ENFORCEMENT AUTHORITY

Back in 1999, a more-than-casual observer could look past the extraordinary, ostensible delegation of congressional power to the executive and the federal judiciary entailed by broad federal criminal statutes and suggest that Congress had actually not been so profligate with its legislative authority.<sup>25</sup> The reach of the mail and wire fraud statutes<sup>26</sup> (to take just two examples) is enormous, as is the risk their misuse could chill socially and economically valuable conduct and even threaten longstanding political norms.<sup>27</sup> Yet to look solely at substantive federal criminal law would lead one to seriously underestimate “the richness of Congress’s interactions with the federal enforcement apparatus and the extent to which enforcers’ decisions are likely to reflect legislative preferences.”<sup>28</sup>

That Congress regularly eschewed legislative specificity in its substantive lawmaking did not mean it had abandoned the field. Indeed, there was “considerable evidence that legislators [were] well aware of how to constrain enforcer discretion and [were] willing to do

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25. Daniel C. Richman, *Federal Criminal Law, Congressional Delegation, and Enforcement Discretion*, 46 UCLA L. REV. 757, 811 (1999) (arguing that “those who would claim, based on substantive law, that Congress has utterly failed to restrain prosecutorial discretion . . . [are] looking in the wrong place” because “[i]n Congress’s structuring of and interactions with the law enforcement bureaucracy, one sees clear moves to influence how law enforcement officials exercise delegated authority”); see also Dan M. Kahan, *Is Chevron Relevant to Federal Criminal Law?*, 110 HARV. L. REV. 469, 471–88 (1996) (noting the breadth of congressional delegation of criminal lawmaking authority to agencies and courts).

26. 18 U.S.C. §§ 1341, 1343 & 1346 (2006).

27. For commentary on the breadth of federal mail and wire fraud, see Samuel W. Buell, *Novel Criminal Fraud*, 81 N.Y.U. L. REV. 1971, 1987–88 (2006); John C. Coffee, Jr., *From Tort to Crime: Some Reflections on the Criminalization of Fiduciary Breaches and the Problematic Line Between Law and Ethics*, 19 AM. CRIM. L. REV. 117, 126–30 (1981); John C. Coffee, Jr., *Modern Mail Fraud: The Restoration of the Public/Private Distinction*, 35 AM. CRIM. L. REV. 427 *passim* (1998). Circuits vary on the precise breadth of the honest services provision. *Compare* *United States v. Weyhrauch*, 548 F.3d 1237, 1248 (9th Cir. 2008) (holding that 18 U.S.C. § 1346—the “honest services” provision applicable to federal mail and wire fraud—establishes a “uniform standard . . . that governs every public official” regardless of whether state law was violated), *with* *United States v. Brumley*, 116 F.3d 728, 733–34 (5th Cir. 1997) (“[I]f the official does all that is required under state law, alleging that the services were not otherwise done ‘honestly’ does not charge a violation of the mail fraud statute.”). Justice Scalia recently bemoaned the conflicts among the circuits on this issue. *Sorich v. United States*, No. 08-410, slip op. at 3 (U.S. Feb. 23, 2009) (Scalia, J., dissenting from denial of certiorari).

28. Richman, *supra* note 25, at 788; see also DAVID EPSTEIN & SHARYN O’HALLORAN, *DELEGATING POWERS: A TRANSACTION COST POLITICS APPROACH TO POLICY MAKING UNDER SEPARATE POWERS* 213 (1999) (“Legislators may cede authority to bureaucratic actors, but they also monitor the use of their authority to keep executive agents in line.”).

so when they deem[ed] it appropriate.”<sup>29</sup> By strategically using oversight hearings, budgetary controls, agency design, and restrictions on investigative options, legislators could moderate enforcement in sensitive areas without sacrificing the symbolic and deterrent benefits of broad prohibitions and without tackling the challenges of *ex ante* specification. Internal Revenue Service officials could periodically be raked over the coals for overzealous tactics.<sup>30</sup> Enforcement of federal gun laws could be assigned to a politically vulnerable agency with a small portfolio.<sup>31</sup> Conversely, legislators could use an agency’s small portfolio as a means of ensuring continued enforcement zeal—one reason the Drug Enforcement Administration has survived repeated consolidation attempts.<sup>32</sup>

One potential strategy for influencing the exercise of delegated executive power, however, was notable for its relatively infrequent use. Because Congress could directly regulate decisionmaking in far-flung U.S. Attorneys’ offices only by acting through the Justice Department’s leadership in Washington, one might have expected that legislators would encourage, even require, centralized control over the districts.<sup>33</sup> Indeed, in a few areas—most notably criminal civil rights enforcement—the Justice Department itself ensured that particularly expansive statutes would not be deployed without the participation of a Main Justice component.<sup>34</sup> Yet the involvement of even the Criminal Division in cases not handled by the division itself was the exception rather than the rule. And although Congress from time to time mandated Washington’s involvement or approval,

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29. Richman, *supra* note 25, at 810; *see also* Samuel W. Buell, *The Upside of Overbreadth*, 83 N.Y.U. L. REV. 1491, 1559–60 (2008) (explaining how Congress can employ institutional design strategies, including budget manipulation and other forms of legislative oversight, to control enforcer discretion).

30. Richman, *supra* note 25, at 791.

31. *See id.* at 796–98. The Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) has since been shifted from the Treasury Department to the Justice Department but remains quite separate from the FBI. *See* Jerry Markon, *FBI, ATF Battle for Control of Cases*, WASH. POST, May 10, 2008, at A1 (reporting the turf fight between the FBI and ATF over which agency will be in charge of explosives cases that might be linked to terrorism).

32. Richman, *supra* note 25, at 795–96.

33. *See id.* at 802–03. For discussions by the leading political scientist in the area about the role that U.S. Attorneys’ offices play in the federal enforcement system, *see generally* JAMES EISENSTEIN, *COUNSEL FOR THE UNITED STATES: U.S. ATTORNEYS IN THE POLITICAL AND LEGAL SYSTEMS* (1978); James Eisenstein, *The U.S. Attorney Firings of 2006: Main Justice’s Centralization Efforts in Historical Context*, 31 SEATTLE U. L. REV. 219, 221–23 (2008).

34. Richman, *supra* note 25, at 798–99; *see also id.* at 802 (noting the administratively imposed approval requirement for Racketeer Influenced and Corrupt Organizations cases).

legislators were surprisingly loath to enlist Washington to manage field operations.

The explanation for this congressional reluctance seemed to lie both in the risks—from an institutional perspective—of centralized control and in the concomitant institutional benefits from localization. Any legislative effort to address the agency problems inherent in the historically decentralized U.S. Attorney system would “have the unfortunate effect of rendering enforcement more amenable to control by the attorney general and, ultimately, the president.”<sup>35</sup> Moreover, congressional efforts to foster the autonomy, or least semi-independence, of U.S. Attorneys’ offices were not simply a matter of limiting an administration’s ability to use enforcement assets to further political goals. Legislators also seemed to value district autonomy for its own sake, as a potential source of personal leverage and of localized benefits to their constituents. After all, many of them had played a role in the selection of the local U.S. Attorney.<sup>36</sup> They could also be confident that the U.S. Attorney, in her staff and in her caseload, would be enmeshed in the local political establishment, responsive to the needs of local needs, and amenable to letting local legislators take some credit for helping to address those needs.<sup>37</sup>

## II. CONGRESSIONAL QUIESCENCE DURING THE BUSH ADMINISTRATION

At the start, the Bush administration did not seem particularly committed to centralized management. “Following the precedent set by the Clinton Administration in 1993, though with somewhat less speed, the Administration asked for the resignations of nearly all the U.S. Attorneys.”<sup>38</sup> The new appointees, however, seemed to reflect

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35. *Id.* at 812; *see also* DAVID E. LEWIS, *PRESIDENTS AND THE POLITICS OF AGENCY DESIGN* 28–29 (2003) (discussing congressional efforts to insulate agencies from presidential control).

36. *See* EISENSTEIN, *supra* note 33, at 35–53; Richman, *supra* note 25, at 785; *see also* DAVID E. LEWIS, *THE POLITICS OF PRESIDENTIAL APPOINTMENTS: POLITICAL CONTROL AND BUREAUCRATIC PERFORMANCE* 65 (2008) (“Members of Congress repeatedly refused to give up control over regional appointments, such as U.S. Marshals, U.S. Attorneys, and regional USDA officials, because those persons would set policy regionally in a way that was sensitive to the needs of a members’ [*sic*] reelection coalition.”).

37. *See* Daniel Richman, *Prosecutors and Their Agents, Agents and Their Prosecutors*, 103 COLUM. L. REV. 749, 788 (2003).

38. Daniel Richman, *Federal Sentencing in 2007: The Supreme Court Holds—The Center Doesn’t*, 117 YALE L.J. 1374, 1382 (2008).



the usual degree of senatorial participation.<sup>39</sup> Indeed, one of the most conspicuous importations of a U.S. Attorney from out of the district was done at the behest of a local senator—when Senator Peter Fitzgerald brought Patrick Fitzgerald (no relation) in from New York to preside over the dizzying array of high-level corruption investigations in Chicago.<sup>40</sup> One might have read into the new administration’s embrace of the “unitary executive” theory<sup>41</sup> a commitment to hierarchical control. Yet Clinton administration theorists had embraced the same notion,<sup>42</sup> and its Justice Department was notable for its lack of centralized control in criminal matters.<sup>43</sup>

The attacks on September 11, 2001, made terrorism prevention the department’s top priority and gave Washington a keen interest in managing (or appearing to manage) terrorism cases nationwide.<sup>44</sup> Assistant Attorney General Michael Chertoff—who, as head of the Criminal Division, would not normally have exercised hierarchical authority over the districts—presided over this centripetal reaction and took on an unprecedented operational role.<sup>45</sup> Yet even in the

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39. Although the Constitution calls for the Senate to provide “advice and consent,” U.S. CONST. art. 2, § 2, cl. 2, the usual process is for a home-state Senator to propose candidates to the president, EISENSTEIN, *supra* note 33, at 43. “When both senators belong to the other party, the department consults state party leaders and members of the House of Representatives on appointments.” *Id.* at 45. The Bush administration appears to have continued this tradition. OFFICE OF THE INSPECTOR GEN., U.S. DEP’T OF JUSTICE, REPORT OF INVESTIGATION INTO ALLEGATIONS RELATING TO THE SELECTION OF THE U.S. ATTORNEY FOR GUAM AND THE NORTHERN MARIANA ISLANDS 6–7 (2006), available at <http://www.usdoj.gov/oig/special/s0606a/final.pdf>. For examples of how the process played out in the appointments of Todd Graves in the Western District of Missouri, David Iglesias in the District of New Mexico, and Daniel Bogden in the District of Nevada, see OFFICE OF THE INSPECTOR GEN. & OFFICE OF PROF’L RESPONSIBILITY, U.S. DEP’T OF JUSTICE, *supra* note 22, at 100, 149–50, 201.

40. See John Kass, *Tale of 2 Fitzgeralds: A Gloves-Off Story*, CHI. TRIB., Nov. 10, 2006, at 2.

41. See Richman, *supra* note 38, at 1382 n.25 (citing presentations and critiques of this theory).

42. See Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2248–58 (2001).

43. Richman, *supra* note 38, at 1380–82.

44. *United States v. Koubriti*, 305 F. Supp. 2d 723 (E.D. Mich. 2003), offers a sense of the intensity with which the department’s highest officials monitored one terrorism trial, see *id.* at 724–38; see also Richard B. Schmidt, *Terrorism Trial Triumph Turns into an Embarrassment*, L.A. TIMES, Mar. 7, 2004, at A20 (discussing the launch of a special investigation responding to allegations that an Assistant U.S. Attorney withheld exculpatory evidence in that same terrorism prosecution).

45. See OFFICE OF THE INSPECTOR GEN., U.S. DEP’T OF JUSTICE, THE SEPTEMBER 11 DETAINEES: A REVIEW OF THE TREATMENT OF ALIENS HELD ON IMMIGRATION CHARGES IN CONNECTION WITH THE INVESTIGATION OF THE SEPTEMBER 11 ATTACKS 12–15 (2003), available at <http://www.usdoj.gov/oig/special/0306/full.pdf>.

post-9/11 world, the Justice Department's leadership still seemed to appreciate the virtues of decentralization in at least one critical area—corporate fraud. To be sure, the investigation of Enron executives and others implicated in the collapse of that energy firm was handled by a special task force operating out of the Criminal Division—ostensibly because the entire Southern District of Texas U.S. Attorney's office was conflicted out,<sup>46</sup> but more likely, in the opinion of one task force member, because Chertoff “wanted to maintain closer control over the pace and strategy of the investigation than would have been possible had it been assigned to New York,” where venue was also available.<sup>47</sup> Otherwise the George W. Bush Justice Department responded to other widely reported financial scandals in much the same way as the George H.W. Bush Justice Department responded to the savings and loan scandals of the early 1990s: the political leadership in Washington would take on the roles of cheerleader and banner cutter, but actual prosecutions would be left to the districts whenever possible.<sup>48</sup> Although rolled out with considerable fanfare in 2002,<sup>49</sup> the vaunted Corporate Fraud Task Force was mostly “a branding device that allowed the Administration to take political credit for the far-flung activities of the districts without taking on much responsibility or operational control.”<sup>50</sup>

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46. See, e.g., Paul Duggan, *Tex. Prosecutors Disqualified from Probe by Personal Ties; U.S. Attorney Launched Inquiry into Enron Only to Be Recused*, WASH. POST, Jan. 19, 2002, at A6; David Johnston, *Justice Dept.'s Inquiry into Enron Is Beginning to Take Shape, Without Big Names*, N.Y. TIMES, Jan. 16, 2002, at C7 (“With Attorney General John Ashcroft and virtually the entire legal staff of the United States attorney's office in Houston disqualified from the Enron criminal investigation, the Justice Department has been forced to rapidly assemble a pickup team of prosecutors and investigators to unravel Enron's collapse.”).

47. See John R. Kroger, *Remarks: Enron and Multi-Jurisdictional Fraud*, 28 CARDOZO L. REV. 1657, 1659 (2007).

48. See Kitty Calavita & Henry N. Pontell, *The State and White-Collar Crime: Saving the Savings and Loans*, 28 LAW & SOC'Y REV. 297, 301–02 (1994) (stating that, “hop[ing] to gain political mileage,” President George H.W. Bush and Congress devoted “considerable attention to the savings and loan fraud” by providing a generous funding for the Justice Department's prosecutorial efforts); see also Bruce A. Green, *After the Fall: The Criminal Enforcement Response to the S & L Crisis*, 59 FORDHAM L. REV. S155, S170–71 (1991) (describing congressional efforts to encourage the Justice Department to exercise “plenary enforcement” of banking crime provisions).

49. See, e.g., George W. Bush, *Remarks on Corporate Responsibility in New York City*, 38 WEEKLY COMP. PRES. DOC. 1158, 1160 (July 9, 2002) (announcing the establishment of the Corporate Fraud Task Force).

50. Richman, *supra* note 38, at 1383; see also Daphne Eviatar, *Case Closed?*, AM. LAW., Fall 2007, at 19, 24 (“Many prosecutors say that while Justice officials turned up for press conferences at which corporate fraud indictments were announced, they typically provided little assistance in the actual prosecutions.”).

Terrorism investigations aside (quite a large caveat), it thus did not initially seem that the George W. Bush Justice Department would radically differ from the Clinton department in how it sought to allocate authority between the center and the periphery.

It was not long, however, before the department's political leadership embarked on a sustained campaign to more actively manage prosecutorial decisionmaking across all districts in all cases. From this distance, it is difficult to discern the precise sequence or nature of all the measures this effort encompassed. Evidence of the degree to which Main Justice officials closely monitored district prosecution data in gun and immigration cases, for example, has emerged only as a result of the probes into the late-2006 U.S. Attorney firings,<sup>51</sup> and the disclosures the department made in those inquiries are not likely to have covered all such monitoring (since that was not the focus of the inquiries).<sup>52</sup> Although we know, for example, that “[i]n early 2004, the Office of the Attorney General began to identify those United States Attorneys’ offices that it believed were ‘underperforming’ in implementing” the department’s gun-prosecution program,<sup>53</sup> the extent of the pressure on districts to fill numerical quotas (or goals) for other sorts of cases cannot be determined.

What is far clearer is the extent to which the Federal Sentencing Guidelines and the data that compliance with them generated seemed to facilitate (and perhaps fostered) this attempt at active management. The guidelines themselves, which explicitly constrained sentencing judges,<sup>54</sup> did not inevitably constrain prosecutors. And

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51. See OFFICE OF THE INSPECTOR GEN. & OFFICE OF PROF'L RESPONSIBILITY, *supra* note 22, at 1 (recounting how, after learning “in late 2006 and early 2007” that nine U.S. Attorneys had been directed by senior Justice Department officials to resign—seven on December 7, 2006, and two “earlier in 2006”—“members of Congress began to raise questions and concerns about the reasons for the removals, including whether they were intended to influence certain prosecutions”).

52. See Richman, *supra* note 38, at 1385.

53. OFFICE OF THE INSPECTOR GEN. & OFFICE OF PROF'L RESPONSIBILITY, *supra* note 22, at 273.

54. Under the Sentencing Reform Act of 1984, Pub. L. No. 98-473, tit. II, ch. 2, 98 Stat. 1837, 1987 (codified as amended in scattered sections of 18 and 28 U.S.C.), federal judges were required to apply the Sentencing Guidelines that the U.S. Sentencing Commission promulgated. For excellent accounts of the initiation and development of the federal guidelines system, see generally KATE STITH & JOSÉ A. CABRANES, *FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS* (1998); Frank O. Bowman III, *The Failure of the Federal Sentencing Guidelines: A Structural Analysis*, 105 COLUM. L. REV. 1315 (2005). In *Booker v. United States*, 543 U.S. 220 (2005), the Supreme Court held unconstitutional those parts of the Sentencing

they did not particularly do so under Attorney General Janet Reno, whose directives allowed the districts, and the line prosecutors within them, considerable discretion in the plea dispositions that they negotiated.<sup>55</sup> Yet practice under the guidelines held out the promise, to an administration so inclined, of an executive management tool that might give distant overseers a metric for assessing what kinds of cases were being pursued and with what intensity.<sup>56</sup>

The Bush administration was indeed inclined, and it had willing helpmates in Congress. In 2003, the Feeney Amendment to the PROTECT Act<sup>57</sup> tightened the appellate standard of review for all judicial departures from the Sentencing Guidelines and called on the Justice Department “to take a more aggressive role in policing guidelines compliance resisting downward departures ‘not supported by the facts and the law.’”<sup>58</sup> Although the initiative seemed to come from Congress, any appearance that legislators were calling the department to account was deceptive. The provision’s sponsor, Congressman Tom Feeney was simply “carrying water” for a drafting group that included Justice Department officials and a former federal prosecutor, now House Judiciary staffer, who would soon be hired back into the department under the auspices of high departmental officials.<sup>59</sup> In other aspects of the legislation—such as a provision that

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Reform Act that required judges to adhere to the sentencing ranges that the guidelines mandated, *id.* at 244–68. Henceforth, the guidelines were to be only “advisory.” *Id.* at 245; *see also* Spears v. United States, 129 S. Ct. 840, 843–44 (2009) (*per curiam*) (reaffirming sentencing discretion of district judges).

55. *See* Kate Stith, *The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion*, 117 YALE L.J. 1420, 1441 (2008).

56. Richman, *supra* note 38, at 1387; *see also* Jeffery T. Ulmer & John H. Kramer, *The Use and Transformation of Formal Decision-Making Criteria: Sentencing Guidelines, Organizational Contexts, and Case Processing Strategies*, 45 SOC. PROBS. 248, 262–65 (1998) (discussing how state sentencing guidelines can be used by a district attorney’s office as a management tool); *cf.* JAMES C. SCOTT, SEEING LIKE A STATE: HOW CERTAIN SCHEMES TO IMPROVE THE HUMAN CONDITION HAVE FAILED 44 (1998) (discussing measurement, mapping, and other devices states have deployed to make activities and relationships more “legible” and thus more amenable to control).

57. Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act (PROTECT Act), Pub. L. No. 108-21, tit. IV, 117 Stat. 650, 667 (2003) (codified as amended at 18 U.S.C. § 3553, 28 U.S.C. §§ 991, 994 (2006)). For the story of the amendment to the PROTECT Act that was proposed by Representative Tom Feeney (R-Fla.), *see* Stephanos Bibas, *The Feeney Amendment and the Continuing Rise of Prosecutorial Power to Plea Bargain*, 94 J. CRIM. L. & CRIMINOLOGY 295, 295–97 (2004).

58. Michael M. O’Hear, *The Original Intent of Uniformity in Federal Sentencing*, 74 U. CIN. L. REV. 749, 789 (2006) (quoting PROTECT Act § 401(I)(1)(A), 117 Stat. at 674).

59. *See* Richman, *supra* note 38, at 1388; *see also* Michael Gerber, *Down with Discretion*, LEGAL AFF., Mar./Apr. 2004, at 72, 74 (explaining that the primary author of the Feeney

restricted the use of fast-track programs for the speedy and lenient disposition of certain cases, particularly in the immigration area, to those districts that had received explicit permission from the attorney general—the administration’s hand was even more evident.<sup>60</sup>

Six months later, Attorney General Ashcroft followed up with a memorandum enjoining all federal prosecutors to “charge and pursue the most serious, readily provable offense or offenses that are supported by the facts of the case, except as authorized by an Assistant Attorney General, United States Attorney, or designated supervisory attorney” in certain limited circumstances.<sup>61</sup> In form, the Ashcroft Memorandum presented itself as a laudable effort to evenhandedly constrain prosecutors to the same extent as judges were already constrained, binding both actors to the available facts and guidelines calculations that flowed from them.<sup>62</sup> Yet in its design and intent, the memorandum, like the Feeney Amendment, presents a lovely instance of what Gregory Huber has called strategic neutrality—the posture through which an agency advances its political ends by “adopting the language of neutrality and efficiency at the core of the Weberian account of neutrally competent modern bureaucracy.”<sup>63</sup> Huber notes how central management can be enhanced through “[c]entrally directed and largely uniform field implementation,”<sup>64</sup> and administrative centralization indeed seems to have been a goal here.

To be sure, the conception of centralized control the Ashcroft Memorandum engendered was pretty thin because it gave no directives as to case types. Case types are amenable to close statistical monitoring, however, and—if the documents disclosed to Congress in connection with the U.S. Attorney firings are any indication—

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Amendment, Jay Apperson, was an “aide to F. James Sensenbrenner, the 13-term Republican congressman from Wisconsin who chairs the House Judiciary Committee”).

60. Richman, *supra* note 38, at 1389.

61. Memorandum from John Ashcroft, U.S. Att’y Gen., to All Fed. Prosecutors (Sept. 22, 2003), available at [http://www.usdoj.gov/opa/pr/2003/September/03\\_ag\\_516.htm](http://www.usdoj.gov/opa/pr/2003/September/03_ag_516.htm).

62. See Bibas, *supra* note 57, at 301–02; see also Richman, *supra* note 38, at 1390 (“[I]f readily provable facts are relevant to calculations under the Sentencing Guidelines, the prosecutor must disclose them to the court, because prosecutors could not ‘fact bargain, or be party to any plea agreement that results in the sentencing court having less than a full understanding of all readily provable facts.’” (internal quotation marks omitted) (quoting Memorandum from John Ashcroft, *supra* note 61)).

63. GREGORY A. HUBER, *THE CRAFT OF BUREAUCRATIC NEUTRALITY: INTERESTS AND INFLUENCE IN GOVERNMENTAL REGULATION OF OCCUPATIONAL SAFETY 1* (2007).

64. *Id.* at 26.

apparatchiks in the Bush Justice Department did just that. Indeed, Carol Lam, the U.S. Attorney in the Southern District of California was put on the removal list and fired “because of the Department’s concerns about her office’s gun and immigration prosecution statistics.”<sup>65</sup> At least in the gun and immigration areas—in which cases, at least by the time they get to federal prosecutors, are commodities fitting standard fact patterns<sup>66</sup>—the combined effect of the PROTECT Act, the Ashcroft Memorandum, and case counting from Washington was thus to inject a new degree of uniformity into the federal system.

Less obvious but perhaps as important was the effect that the Bush administration’s fixation with case counting had in areas that were less amenable to such top-down regulation. When districts pursued gun, low-level drug, and immigration prosecutions, they dipped into a virtually inexhaustible supply of relatively easily made cases. Other kinds of cases, like corruption and white-collar fraud, take far more effort and result in far fewer convictions. A U.S. Attorney may pursue these cases for many reasons—personal ambition, public interest, recruiting, deep appreciation of the plight of unidentifiable victims. But on the margin, unnuanced case counting from above (unless balanced by other signals) cuts against activity in such resource-intensive areas, and likely did so here.<sup>67</sup> Between 2003 and 2007, the “percentage of white collar crime matters accepted for prosecution steadily declined,” decreasing from 50 percent of total

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65. OFFICE OF THE INSPECTOR GEN. & OFFICE OF PROF’L RESPONSIBILITY, *supra* note 22, at 285.

66. See Lisa L. Miller & James Eisenstein, *The Federal/State Criminal Prosecution Nexus: A Case Study in Cooperation and Discretion*, 30 LAW & SOC. INQUIRY 239, 252–54 (2005) (describing how local police present gun cases to federal prosecutors); Nicole Gaouette, *Federal Prosecution of Illegal Immigrants Soars*, L.A. TIMES, June 14, 2008, at A8 (discussing “Operation Streamline”).

67. See Avinash Dixit, *Incentives and Organizations in the Public Sector: An Interpretative Review*, 37 J. HUM. RESOURCES 696, 707, 711–17 (2002) (discussing this general institutional point); see also Bengt Holmstrom & Paul Milgrom, *Multitask Principal-Agent Analyses: Incentive Contracts, Asset Ownership, and Job Design*, 24 J.L. ECON. & ORG. 24, 26–28, 33 (1991) (“[I]f [an] agent increases the amount of time or attention devoted to one activity, the marginal cost of attention to . . . other activities will grow larger.”); Eric Biber, *Too Many Things to Do: How to Deal with the Dysfunctions of Multiple-Goal Agencies*, 33 HARV. ENVTL. L. REV. 1, 11 (2009) (“[T]asks that are more easily measured are more likely to be performed at a higher level by an agent as compared to tasks that are harder to measure – at least where the principal’s incentives for the agent are based on those measurements.”).

matters referred to 28 percent.<sup>68</sup> The percentage of public corruption matters filed for prosecution similarly fell during this period.<sup>69</sup>

When it came to the federal death penalty, the department's leadership was ready to go beyond the wholesale efforts of the Ashcroft Memorandum and attempt retail case management. With increasing regularity—and sometimes over protests that played a role in the firing of several U.S. Attorneys<sup>70</sup>—Attorneys General Ashcroft and Gonzales regularly overruled line recommendations against the death penalty.<sup>71</sup> Here again the posture was one of strategic neutrality, with the articulated goal of horizontal equity in sentencing promoted through efforts to level up rather than down.

To what extent did the Justice Department leadership, aided by Congress, actually succeed in promoting uniformity in the districts across cases? The answer is far from clear. There is “an essential incoherence in the notion of ‘uniformity’ when the universe of potential federal cases has never been prespecified.”<sup>72</sup> Virtually every state drug case can be prosecuted federally. So can a great many robbery cases (under some sort of asset depletion theory).<sup>73</sup> Just about every instance of fraud or corruption involves a mailing or wire communication that can give federal authorities jurisdiction, if they are so inclined.<sup>74</sup> Yet for all the Bush Justice Department's efforts to regulate federal sentences,<sup>75</sup> it left investigators and prosecutors with largely untrammelled discretion about what cases went federal.

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68. OFFICE OF THE INSPECTOR GEN., *supra* note 1, at 44–45.

69. *Id.* at 46–47.

70. See OFFICE OF THE INSPECTOR GEN. & OFFICE OF PROF'L RESPONSIBILITY, *supra* note 22, at 227–45.

71. See John Gleeson, *Supervising Federal Capital Punishment: Why the Attorney General Should Defer When U.S. Attorneys Recommend Against the Death Penalty*, 89 VA. L. REV. 1697, 1697 (2003); Richman, *supra* note 38, at 1393.

72. Richman, *supra* note 22, at 1393 (making this point with respect to federal homicide cases).

73. See, e.g., *United States v. Jimenez-Torres*, 435 F.3d 3, 9 (1st Cir. 2006) (“Depletion of the assets of a business engaged in interstate commerce is a common method for demonstrating that a robbery had an effect on interstate commerce.”).

74. See *United States v. Turner*, 551 F.3d 657, 666–68 (7th Cir. 2008) (holding that even routine wire transfers can form the basis of a wire fraud conviction); *United States v. Hebshie*, 549 F.3d 30, 37–40 (1st Cir. 2008) (explaining the relationship that a mailing must have to a fraud for federal mail fraud to occur).

75. The department's efforts to make prosecutors and sentences judges comply with the guidelines have largely fallen victim to developments in federal sentencing law since *United States v. Booker*, 543 U.S. 220 (2005), and, perhaps even more, *Kimbrough v. United States*, 128 S. Ct. 558 (2007). See Richman, *supra* note 38, at 1376–78.

Moreover, even if one overlooks this essential incoherence and considers uniformity among just those cases pursued federally, the evidence suggests that the Ashcroft Memorandum had only middling success in curbing “locally convenient plea bargaining practices.”<sup>76</sup> The important point (for our purpose), however, is how hard it tried and how willingly Congress—for all its historic interest in decentralized prosecutorial authority—abetted the process.

In a 2005 paper, Professors Andrew Rudalevige and David Lewis hypothesize that centralization and politicization may be complementary strategies for an administration trying to maximize presidential power. Noting that an important cost of centralization is “that centralized formulation strategies tend to harm policy proposals’ chances of Congressional enactment,” they suggest, “[I]f a bureau is sufficiently politicized, the president can trust it to carry out his preferences without the additional costs of centralizing that process.”<sup>77</sup>

Perhaps Professors Rudalevige and Lewis are right that presidents trade off centralization and politicization at the margin. When managing the Justice Department, however, the Bush administration evidently felt no pressure from Congress to operate at the margin and politicized the department even as it strove to centralize it. One facet of this process entailed the selection of a departmental leadership in Washington with proven track records of political service and without the prior experience in the department that would have exposed them to cross-cutting departmental norms.

Past service as a line federal prosecutor in a previous administration—someone required to collaborate with agents and other prosecutors, argue before judges, and appear before juries in settings in which appeals to partisan preference would be radically out of place—is hardly a talismanic indicator of diminished allegiance to the White House. Neither is a political appointee’s lack of such prior experience a clear indicia of subservience. Consider Edward Levi, who, having been plucked from academia to serve as attorney general, soon “won wide acclaim for his stewardship of the Justice

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76. Frank O. Bowman III, *Beyond Band-Aids: A Proposal for Reconfiguring Federal Sentencing After Booker*, 2005 U. CHI. LEGAL F. 149, 193.

77. Andrew Rudalevige & David E. Lewis, *Parsing the Politicized Presidency: Centralization and Politicization as Presidential Strategies for Bureaucratic Control* 8–9 (2005) (unpublished manuscript), available at <http://princeton.academia.edu/DavidELewis/Papers/26144/Parsing-the-Politicized-Presidency—Centralization—Politicization—and-Presidential-Strategies-for-Bureaucratic-Control>.



Department in the post-Watergate era.”<sup>78</sup> But prior service as a line federal prosecutor—particularly when the service was under a different administration—is evidence of an appointee’s precommitment to a general federal enforcement project or, at the very least, to developing a reputation in the relatively small world of federal litigation.

By the end of 2005—the first year of Bush’s second term—the attorney general was Alberto Gonzales (the president’s former lawyer and White House Counsel). The deputy attorney general was Paul McNulty, a long-term, Republican House Judiciary Committee staffer who had been dispatched in Bush’s first term to be U.S. Attorney in the Eastern District of Virginia (a politically sensitive spot because, among other things, the office was prosecuting a flagship terrorist case against Zacharias Moussaoui).<sup>79</sup> The assistant attorney general in charge of the Criminal Division was Alice Fisher, a protégé whom Michael Chertoff had brought to the Criminal Division from his law firm.<sup>80</sup> In response to Fisher’s nomination, Senate Judiciary Committee members noted concerns that, “for the first time in memory, none of the most senior officials at the Justice Department . . . would have experience as a criminal prosecutor,” but they confirmed her anyway.<sup>81</sup>

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78. Neil A. Lewis, *Edward H. Levi, Attorney General Credited with Restoring Order After Watergate, Dies at 88*, N.Y. TIMES, Mar. 8, 2000, at C25; see also Martin Weil, *Edward Levi Dies at 88; U.S. Attorney General After Watergate*, WASH. POST, Mar. 8, 2000, at B8 (recalling Levi as “the bow-tie-wearing legal scholar and university administrator who was credited with setting a standard for integrity and impartiality as U.S. attorney general in the years after Watergate”).

79. See Eric Lichtblau, *White House Nears Choice on No. 2 Justice Position*, N.Y. TIMES, Oct. 21, 2005, at A18 (noting that McNulty had led the Bush transition at the Justice Department and, before that, had been “deeply involved in the impeachment proceedings against President Bill Clinton as chief counsel for the House Judiciary Committee”).

80. See Vanessa Blum, *Latham & Watkins Partner to Head DOJ Criminal Division*, LEGAL TIMES, Apr. 1, 2005, <http://www.law.com/jsp/article.jsp?id=1112263511555> (“To many observers, the choice of a lawyer with no prosecutorial experience to run the Criminal Division is a surprising one.”).

81. Eric Lichtblau, *Complaints Signal Tension Between F.B.I. and Congress*, N.Y. TIMES, Aug. 15, 2005, at A13. When Senate Judiciary Committee members noted this concern, Timothy Flanigan was the nominee for the deputy slot. Paul McNulty, who was named after Flanigan’s nomination ran aground, see Eric Lichtblau, *President Picks 2nd Nominee for Justice Post*, N.Y. TIMES, Oct. 22, 2005, at A15, might be said to have prosecutorial experience because he was U.S. Attorney in the Eastern District of Virginia. But he never had tried a case and had never served as anything other than a political appointee. See OFFICE OF THE INSPECTOR GEN. & OFFICE OF PROF’L RESPONSIBILITY, *supra* note 22, at 12; see also Jason McLure & Emma Schwartz, *At DOJ, a Hard Job to Fill*, LEGAL TIMES, May 21, 2007, at 1 (noting that McNulty “lacks any real trial experience”).

Second-term Bush administration efforts to ensure the political loyalty of its appointees—both positively (by selecting those with White House ties) and negatively (by avoiding appointees who had been exposed to line-prosecutor norms)—extended beyond the top slots in Washington, to the districts. In the wake of the U.S. Attorney firings and subsequent revelations about hiring practices, much has been made of the caliber of people surrounding Attorney General Gonzales and Deputy Attorney General McNulty.<sup>82</sup> What many miss, however, is the unprecedented degree to which the Bush administration had packed the entire chain of command with appointees who had hitched their star to the fortunes of the White House. These included the leader of the Attorney General’s Advisory Council, the body within the department explicitly designed to “give[] United States Attorneys a voice in Department policies and advise[] the Attorney General of the United States.”<sup>83</sup> In 2006, Gonzales named as its chairman Johnny Sutton, the U.S. Attorney for the Western District of Texas who had previously been then-Governor Bush’s criminal justice policy director in Texas.<sup>84</sup>

The second Bush term also brought changes within the ranks of U.S. Attorneys—changes that reinforced the efforts in Washington to make the federal enforcement bureaucracy more responsive to signals from above. According to one report in April 2007, about “one-third of the nearly four dozen U.S. Attorneys’ jobs that have changed hands since [the beginning of Bush’s] second term have been filled by the White House and Justice Department with trusted administration

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William Mercer, the principal associate deputy attorney general from June 2005 to July 2006, had been an Assistant U.S. Attorney in Montana. In October 2006, however, he was replaced with William Moschella, a longtime House staffer who had previously been the assistant attorney general in charge of legislative affairs. See OFFICE OF THE INSPECTOR GEN. & OFFICE OF PROF’L RESPONSIBILITY, *supra* note 22, at 13–14.

82. See John McKay, *Train Wreck at the Justice Department: An Eyewitness Account*, 31 SEATTLE U. L. REV. 265, 276–77 (2008); Alan Cooperman, *Bush Loyalist Rose Quickly at Justice*, WASH. POST, Mar. 30, 2007, at A15; Eric Lipton, *Fast-Riser’s High Hopes and Sudden Fall*, N.Y. TIMES, Mar. 13, 2007, at A15.

83. U.S. DEP’T OF JUSTICE, UNITED STATES ATTORNEYS’ MANUAL § 3-2.530 (1997); see also OFFICE OF THE INSPECTOR GEN., *supra* note 1, at 3 n.15 (“The AGAC, which is comprised of 16 U.S. Attorneys and 1 AUSA: (1) provides a mechanism for U.S. Attorneys to provide input on DOJ policies, and (2) advises the Attorney General on a variety of operational and programmatic issues affecting U.S. Attorneys.”).

84. Press Release, U.S. Dep’t of Justice, Attorney General Gonzales Appoints Johnny Sutton and Susan Brooks to Lead Attorney General’s Advisory Committee of U.S. Attorneys 1 (Mar. 28, 2006), [http://www.usdoj.gov/usao/ins/press\\_releases/Pressrelease06/20060329.Brooks%20AGAC.pdf](http://www.usdoj.gov/usao/ins/press_releases/Pressrelease06/20060329.Brooks%20AGAC.pdf).

insiders.”<sup>85</sup> The desire to align the districts with administration preference may not have been the only reason for these appointments. As Professor David Lewis has noted, “recent administrations have self-consciously promoted from within during their second terms partly as a way of building a farm team of both future elected office holders and future agency officials.”<sup>86</sup> But deference to, even reliance on, local Republican legislators would have been consistent with the “farm team” approach, and that does not appear to have occurred.

That the White House and the political leadership of the department would try to put insiders into U.S. Attorneys’ offices is not that surprising. To be sure, a policy of dispatching proconsuls to the provinces might have long-term costs in a system in which—to my mind at least—the U.S. Attorney’s main function is to mediate between national priorities and local needs and politics. In the short term, however, an administration might not be concerned about such costs. (Also, this was an administration for which long-term planning was not a strength.<sup>87</sup>) What is more surprising (given legislators’ traditional interest in some degree of district autonomy) is the extent to which Congress, and particularly Republican legislators, acquiesced in the selection of U.S. Attorneys whose ties were far closer to Washington than to the districts.<sup>88</sup>

The extent to which the Republican Congress would acquiesce in a new level of executive control over the districts was highlighted by the nondebate over the introduction into the 2006 USA PATRIOT Act reauthorization legislation of a provision changing the procedures for the appointment of interim U.S. Attorneys.<sup>89</sup> When a U.S.

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85. Amy Goldstein & Dan Eggen, *Prosecutor Posts Go to Bush Insiders; Less Preference Shown for Locals, Senators’ Choices*, WASH. POST, Apr. 1, 2007, at A1.

86. LEWIS, *supra* note 36, at 196.

87. See, e.g., THOMAS E. RICKS, *FIASCO: THE AMERICAN MILITARY ADVENTURE IN IRAQ* 3 (2006) (suggesting that the 2003 invasion of Iraq was “launched recklessly, with a flawed plan for war and a worse approach to occupation”). See generally DEXTER FILKINS, *THE FOREVER WAR* (2008) (recounting difficulties American troops have faced in Afghanistan and Iraq).

88. See Philip Shenon, *Amid Turmoil, U.S. Attorney Will Shift to Headquarters*, N.Y. TIMES, Nov. 20, 2007, at A14 (noting how, under Attorney General Gonzales, “experienced prosecutors were succeeded by relatively young and inexperienced lawyers seen as fiercely loyal to the administration”).

89. USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177, § 502, 120 Stat. 192, 246 (2006) (amending 28 U.S.C. § 546 (2000)). The provision has since been amended via the Preserving United States Attorney Independence Act of 2007, Pub. L. 110-34, § 2, 121 Stat. 224, 224 (to be codified at 28 U.S.C. § 546).

Attorney vacancy occurred under the old system, the attorney general named someone, but if the Senate had not confirmed that person within 120 days, the district court could appoint someone else.<sup>90</sup> The new legislation “repeal[ed] the authority of the court and permit[ted] the Attorney General’s temporary designee to serve until the vacancy [had been] filled by confirmation and appointment.”<sup>91</sup> The change thus gave the White House and the department’s political leaders confidence that, were they to fire (or otherwise lose) a U.S. Attorney, they could fill the vacancy indefinitely with their own person without facing a pressing need either to satisfy the local district court or even gain Senate confirmation.<sup>92</sup>

The provision passed with nary a peep from Congress.<sup>93</sup> The Justice Department’s congressional liaison arranged for a staffer on Chairman Arlen Specter’s Senate Judiciary Committee, Brett Tolman, to slip the provision into the bill. And the White House thereafter appointed Tolman U.S. Attorney for the District of Utah.<sup>94</sup>

Notwithstanding this collective congressional apathy toward protecting its institutional interests, the subsequent U.S. Attorney firings—unprecedented in the absence of any change in presidential administration<sup>95</sup>—are hardly evidence that individual legislators had abandoned the field when it came to protecting or advancing their own interests.<sup>96</sup> Indeed, the narratives behind some of the firings,

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90. BRIAN T. YEH & CHARLES DOYLE, CONG. RESEARCH SERV., USA PATRIOT IMPROVEMENT AND REAUTHORIZATION ACT OF 2005, A LEGAL ANALYSIS 49 (2006), available at <http://www.fas.org/sgp/crs/intel/RL33332.pdf>.

91. *Id.*

92. In a September 2006 email, Kyle Sampson explained the benefit of the new interim appointment procedure: “By not going the PAS [Senate confirmation] route, we can give far less deference to home-State Senators and thereby get (1) our preferred person appointed and (2) do it far faster and more efficiently, at less political cost to the White House.” OFFICE OF THE INSPECTOR GEN. & OFFICE OF PROF’L RESPONSIBILITY, *supra* note 22, at 36; *see also id.* at 145–47 (describing how Sampson and other Justice Department staffers considered using the interim appointment authority to bypass the Senate confirmation process).

93. *See* H.R. REP. NO. 110-58, at 5 (2007) (noting that the interim appointment provision “was inserted quietly into the conference report on the 2005 Act, without debate”).

94. Richman, *supra* note 38, at 1391; *see also* Dahlia Lithwick, *Specter Detector: U.S. Attorney Scandal Update: Who’s to Blame for Those Alarming Patriot Act Revisions*, SLATE, Mar. 5, 2007, <http://www.slate.com/id/2161260/pagenum/all> (“[T]he requested change had come from the Department of Justice . . . it had been handled by Brett Tolman, who is now the U.S. attorney for Utah.”).

95. *See* KEVIN M. SCOTT, CONG. RESEARCH SERV., U.S. ATTORNEYS WHO HAVE SERVED LESS THAN FULL FOUR-YEAR TERMS, 1981–2006, at 5–7 (2007).

96. When the replacement of 15 to 20 percent of U.S. Attorneys—the “underperforming” ones—was being contemplated in January 2005, Kyle Sampson (who had just moved from the

particularly those of Carol Lam in San Diego and David Iglesias in New Mexico, clearly include exertions of influence by local legislators.<sup>97</sup> The recent OIG/OPR Report found that the U.S. Attorney in Missouri (the brother of a member of Congress) was forced out as a result of complaints to the White House by the staff of Senator Christopher Bond.<sup>98</sup> Conversely, even some U.S. Attorneys deemed “mediocre” were taken off the removal list because one of the lists’ masterminds, Gonzales’s chief of staff Kyle Sampson (and perhaps others), thought the home senators of those officials would complain.<sup>99</sup> As an institution, however, Congress was remarkably complacent. And regardless of the personal and political calculus of the legislators who resorted to Washington for relief, their interventions certainly had nothing to with advancing Congress’s institutional interest in insulating U.S. Attorneys’ offices from presidential control.<sup>100</sup>

### III. CONGRESS WAKES UP

Given Congress’s long-term institutional interests and strategies, the furor that the U.S. Attorney firings unleashed in 2007 was thus overdetermined. Indeed, the interesting part is not the reaction of a newly elected Democratic Congress to the Bush administration’s centralization efforts but the prior acquiescence of Republican legislators. That said, the attorney general did not step down until

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White House to the Justice Department and would soon be Gonzales’s chief of staff) “predicted that ‘as a political matter . . . I suspect that when push comes to shove, home-State Senators likely would resist wholesale (or even piecemeal) replacement of U.S. Attorneys they recommended . . . if Karl [Rove] thinks there would be political will to do it, then so do I.’” OFFICE OF THE INSPECTOR GEN. & OFFICE OF PROF’L RESPONSIBILITY, *supra* note 22, at 17 (alterations in original).

97. See *id.* at 190–94 (discussing the firing of Iglesias); *id.* at 277–83 (recounting legislative complaints about the level of immigration enforcement in Carol Lam’s district).

98. See *id.* at 113 (“The fact that the impetus for Graves’s removal appears to have stemmed from his decision not to intervene in a personnel dispute between Senator Bond’s staff and staff in Representative Sam Graves’s office is a disturbing commentary on the Department of Justice’s support for U.S. Attorneys.”); see also R. Jeffrey Smith, *How Political Warfare in Missouri Led to Prosecutor’s Firing*, WASH. POST, Oct. 3, 2008, at A2 (describing how a little over a year after U.S. Attorney Todd P. Graves refused to intervene on Sen. Christopher S. Bond’s behalf, Graves “was bounced from his Kansas City office after Bond’s staff made repeated complaints to the White House counsel’s office”).

99. OFFICE OF THE INSPECTOR GEN. & OFFICE OF PROF’L RESPONSIBILITY, *supra* note 22, at 330.

100. See LEWIS, *supra* note 35, at 28–29 (discussing congressional calculus with respect to insulating agencies from presidential control).

after former Deputy Attorney General James Comey told his unnerving story of Gonzales's effort in March 2004 to extract permission from a grievously ill Ashcroft for an NSA surveillance program.<sup>101</sup> Perhaps the extraordinary length of time Gonzales seemed to twist in the wind was just a reflection of his close relationship with the president,<sup>102</sup> but maybe it also reflected the difficulty legislators and others had in explaining how the haphazard termination of appointees who "served at the pleasure of the president"<sup>103</sup> really did amount to an unprecedented exercise of executive power and threat to the U.S. Attorney system.

Yet even as members of the new Congress excoriated the political leadership of the Justice Department for disrespecting the U.S. Attorney system,<sup>104</sup> many of them simultaneously pursued another, very different project—one quite at odds with their embrace of local autonomy during the hearings that the U.S. Attorney firings sparked. In this far quieter, more technical-sounding campaign, they eschewed the virtues of decentralized enforcement decisionmaking and were not even satisfied with close central monitoring, but rather sought to radically limit enforcement discretion by statute.<sup>105</sup> That legislators would pursue such a campaign against the backdrop of the public celebration of U.S. Attorney autonomy might sound odd. That they did so in an enforcement area—corporate crime—marked

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101. See David Stout, *Gonzales Pressed Ailing Ashcroft on Spy Plan, Aide Says*, N.Y. TIMES, May 15, 2007, [http://www.nytimes.com/2007/05/15/washington/15cnd-attorneys.html?\\_r=2&hp&oref=slogin](http://www.nytimes.com/2007/05/15/washington/15cnd-attorneys.html?_r=2&hp&oref=slogin). For a fuller narrative of this incident, see *Preserving Prosecutorial Independence: Is the Department of Justice Politicizing the Hiring and Firing of U.S. Attorneys?: Hearings Before the S. Comm. on the Judiciary*, 110th Cong. 213–40 (2007) (testimony of James B. Comey, former Deputy Att'y Gen., United States Department of Justice); BARTON GELLMAN, ANGLER: THE CHENEY VICE PRESIDENCY 302–05 (2008).

102. See Emily Bazelon, John Dickerson & Dahlia Lithwick, *Deathwatch: Gonzalo-Meter: Is Alberto Gonzales Going Down?*, SLATE, Mar. 20, 2007, <http://www.slate.com/id/2162289> (tracking Gonzales's status during the months in which many called for his resignation); Steven Lee Myers & Philip Shenon, *Embattled Attorney General Resigns*, N.Y. TIMES, Aug. 27, 2007, <http://www.nytimes.com/2007/08/27/washington/27cnd-gonzales.html> (noting that Gonzales "had rebuffed calls for his resignation for months").

103. Press Release, President Bush Addresses Resignations of U.S. Attorneys (Mar. 20, 2007), <http://www.whitehouse.gov/news/releases/2007/03/print/20070320-8.html> (noting that U.S. Attorneys "serve at the pleasure of the President"); see also 28 U.S.C. § 541 (2006) (declaring that a U.S. Attorney is "subject to removal by the President").

104. See, e.g., *Preserving Prosecutorial Independence*, *supra* note 101, at 495 (testimony of J. Scott Jennings, Special Assistant to the President); *United States Department of Justice: Hearing Before the H. Comm. on the Judiciary*, 110th Cong. 33–38 (2007) (statement of Sen. John Conyers, Jr., Chairman, H. Comm. on the Judiciary).

105. For a discussion of the Feeny Amendment, see *supra* note 57 and accompanying text.

throughout this post-Enron period by bursts of fierce rhetoric and substantive legislation hiking sentences and creating new offenses<sup>106</sup> sounds even more curious. Yet for those used to seeing Congress deploy procedural restraints that undercut the ostensible sweep of substantive criminal statutes,<sup>107</sup> the action in this area has been less surprising—just a return to the old legislative dynamic. The only remarkable part has been the breadth of the legislative alliance favoring (at least until the current financial meltdown) this restraining effort.

A brief doctrinal detour is necessary. Indeed, the challenges of explaining substantive and procedural doctrine in this area has long made it particularly amenable to low visibility interest group activity, and an impressionistic sketch must suffice.<sup>108</sup> Corporate criminal liability, based essentially on respondeat superior, is mostly a matter of federal common law and is spectacularly expansive.<sup>109</sup> Investigating corporate crime is resource intensive, however, in part because targets, witnesses, and innocent bystanders generally seek (and can afford) counsel as soon as they become aware of the government's interest.<sup>110</sup> And enforcement resources are often scarce, particularly in recent years, with competition from other priorities like

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106. See, e.g., Frank O. Bowman III, *Pour Encourager les Autres? The Curious History and Distressing Implications of the Criminal Provisions of the Sarbanes-Oxley Act and the Sentencing Guidelines Amendments That Followed*, 1 OHIO ST. J. CRIM. L. 373, 375 (2004) (“[T]he Sarbanes-Oxley saga began with a frenzied determination by some legislators to shoot a few of the erring admirals of American business in response to the eruption of corporate scandals in 2002, and culminated in a 2003 round of sentencing guideline amendments that extended the original punitive impulse to virtually everyone convicted in federal court of some form of stealing . . . .”); see also John C. Coffee, Jr., *Law and the Market: The Impact of Enforcement* 68 n.137 (Columbia Law & Econ., Working Paper No. 304, 2007), available at <http://ssrn.com/abstract=967482> (“The political preference of U.S. voters for strong enforcement and punitive punishments is shown not just by the Sarbanes-Oxley Act, which vastly elevated penalty levels, but by earlier legislation as well.”).

107. See Richman, *supra* note 25, at 800–02.

108. See Daniel Richman, *Decisions About Coercion: The Corporate Attorney-Client Privilege Waiver Problem*, 57 DEPAUL L. REV. 295 *passim* (2008) (providing a more elaborate discussion of these issues); see also Preet Bharara, *Corporations Cry Uncle and Their Employees Cry Foul: Rethinking Prosecutorial Pressure on Corporate Defendants*, 44 AM. CRIM. L. REV. 53 *passim* (2007).

109. See Bharara, *supra* note 108, at 61–65 (tracing the history of corporate criminal liability); John C. Coffee, Jr., “No Soul to Damn, No Body to Kick”: *An Unscandalized Inquiry into the Problem of Corporate Punishment*, 79 MICH. L. REV. 386, 444 (1981); V.S. Khanna, *Corporate Criminal Liability: What Purpose Does It Serve?*, 109 HARV. L. REV. 1477, 1482 (1996).

110. See KENNETH MANN, *DEFENDING WHITE COLLAR CRIME: A PORTRAIT OF ATTORNEYS AT WORK* 21 (1985).

counterterrorism and violent crime. Perhaps of even more concern to thoughtful prosecutors are the collateral consequences that a criminal conviction would have on shareholders, employees, and diverse third parties.<sup>111</sup>

For their part, corporate entities have responded to the breadth of firm liability and the drumbeat of criminal and regulatory enforcement activity (even though the number of actual enforcement actions or prosecutions has been relatively small) by commissioning internal investigations whenever there is a whiff of misconduct.<sup>112</sup> When there is any issue of criminal liability, these investigations allow corporate counsel the means to appease the government by offering up malefactors if necessary, or at least to have a better sense of potential firm liability when they deal with prosecutors—as they almost invariably will during the early stages of an investigation. Although the employees and executives questioned during the internal investigation are under severe economic pressure to cooperate with corporate counsel—because they may lose their jobs if they do not—the only attorney-client privilege protecting their communications is owned by the firm, which always has the option of waiving the privilege to advance its interests during discussions with regulators or prosecutors.<sup>113</sup>

Early in the Bush administration, Deputy Attorney General Larry Thompson issued a directive—largely echoing policy guidance issued during the Clinton administration—that seemed (to many) to require that a firm seeking to avoid prosecution by cooperating with the government waive its attorney-client privilege.<sup>114</sup> Prosecutors were

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111. See Darryl K. Brown, *Third-Party Interests in Criminal Law*, 80 TEX. L. REV. 1383, 1387 (2002).

112. See Michael N. Levy, Michael L. Spafford & Lothlórien S. Redmond, *The Changing Nature of Internal Probes*, FIN. EXECUTIVE, Jan./Feb. 2007, at 51, 51 (“When even seemingly routine allegations of wrongdoing arise, corporations almost inevitably launch internal investigations. The proliferation of such investigations is a direct result of today’s more stringent regulatory environment.”).

113. See Lisa Kern Griffin, *Compelled Cooperation and the New Corporate Criminal Procedure*, 82 N.Y.U. L. REV. 311, 326–37 (2007); see also *Upjohn Co. v. United States*, 449 U.S. 383, 396–97 (1981) (setting out the contours of corporate attorney-client privilege); *In re Grand Jury Subpoena: Under Seal*, 415 F.3d 333, 340 (4th Cir. 2005) (noting that the formation of an attorney-client privilege with employees of a publicly traded corporation would preclude full investigation and candid reporting to management).

114. Memorandum from Larry D. Thompson, Deputy Att’y Gen., U.S. Dep’t of Justice, to Heads of Dep’t Components & U.S. Att’ys 6 (Jan. 20, 2003), available at [http://www.usdoj.gov/dag/cftf/business\\_organizations.pdf](http://www.usdoj.gov/dag/cftf/business_organizations.pdf); see also Christopher A. Wray & Robert K. Hur, *Corporate*



particularly prone to seek these waivers as political leaders in Washington called for corporate scalps; free riding off the investigative efforts of corporate counsel seemed both sensible and easy. For their part, firms recognized that turning over their investigative haul to the government would probably limit how long they would be under scrutiny. But they doubtless preferred to make that choice on their own, without explicit (or even implicit) government pressure. And, swelled by the voices of white-collar counsel who represented either corporations or individual clients who could only lose from corporate-privilege waivers, the Chamber of Commerce and other business groups began to complain loudly of this “erosion” of the attorney-client privilege.<sup>115</sup>

Until the end of 2006, the department’s political leaders made little effort to rein in waiver demands (explicit or tacit) in the districts. Indeed, the department’s continued embrace of decentralized prosecutorial decisionmaking in the white-collar area<sup>116</sup> during this period contrasts starkly with the department’s contemporaneous efforts, through Sentencing Guidelines policy, to curtail the districts’ bargaining discretion. An October 2005 directive issued in the face of widespread criticism from the white-collar bar simply enjoined each U.S. Attorney to retain and exercise discretion over line assistants.<sup>117</sup>

The department began to run into a legislative headwind, however. And by December 2006, it had to shift course in the face of pressure from Senator Specter (and perhaps others).<sup>118</sup> A directive by Deputy Attorney General Paul McNulty—which he first announced on December 12 in a speech to a New York–based business and

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*Criminal Prosecution in a Post-Enron World: The Thompson Memo in Theory and Practice*, 43 AM. CRIM. L. REV. 1095, 1096–97 (2006).

115. See, e.g., William R. McLucas, Howard M. Shapiro & Julie J. Song, *The Decline of the Attorney-Client Privilege in the Corporate Setting*, 96 J. CRIM. L. & CRIMINOLOGY 621, 629 (2006); David M. Zornow & Keith D. Krakauer, *On the Brink of a Brave New World: The Death of Privilege in Corporate Criminal Investigations*, 37 AM. CRIM. L. REV. 147, 147–48 (2000).

116. To defend its waiver policy in 2003, the department deployed someone from the field: James Comey—then the U.S. Attorney for the Southern District of New York. *Interview with United States Attorney James B. Comey Regarding Department of Justice’s Policy on Requesting Corporations Under Criminal Investigation to Waive the Attorney Client Privilege and Work Product Protection*, U.S. ATTORNEYS’ BULL. (U.S. Dep’t of Justice, Washington, D.C.), Nov. 2003, at 1, 1–2, available at [http://www.usdoj.gov/usao/eousa/foia\\_reading\\_room/usab5106.pdf](http://www.usdoj.gov/usao/eousa/foia_reading_room/usab5106.pdf).

117. Memorandum from Robert D. McCallum, Jr., Acting Deputy Att’y Gen., U.S. Dep’t of Justice, to Heads of Dep’t Components & U.S. Att’ys 1 (Oct. 21, 2005), available at [http://lawprofessors.typepad.com/whitecollarcrime\\_blog/files/AttorneyClientWaiverMemo.pdf](http://lawprofessors.typepad.com/whitecollarcrime_blog/files/AttorneyClientWaiverMemo.pdf).

118. See Sarah Johnson, *Senator Takes on DoJ’s Thompson Memo*, CFO.COM, Sept. 14, 2006, <http://www.cfo.com/article.cfm/7929239?f=related>.

defense lawyer group—imposed a new degree of centralized supervision of prosecutorial waiver demands.<sup>119</sup> The McNulty Memorandum required prosecutors, before asking for the most frequently sought privileged materials (primarily factual in nature), to obtain written authorization from the U.S. Attorney, who in turn was supposed to consult with Washington in each case. Before seeking privilege waivers for legal advice materials, prosecutors had to get explicit permission from the deputy attorney general personally.<sup>120</sup>

The McNulty Memorandum was not strong enough for Senator Specter, who did not even wait for its announcement to introduce the Attorney-Client Privilege Protection Act of 2006, which, among other things, barred the government from demanding the waiver of an organizational attorney-client privilege. The Act also barred prosecutors from considering an entity's assertion of that privilege when deciding whether to pursue criminal (or civil) charges.<sup>121</sup> Although no longer Senate Judiciary Committee chair (in the wake of the 2006 midterm elections), Senator Specter reintroduced the bill as soon as the new Congress convened in 2007.<sup>122</sup>

Underneath backers' broad rhetoric about the sanctity of privilege and the sweeping extension of the bill's protections to all potential defendants lay the ugly fact that the legislation exclusively benefitted firms (and other such organizations), as well as the (generally) white-collar employees who would be implicated by corporate cooperation. After all, even in a criminal justice world in which waiving all sorts of rights is (for better or worse) the norm, prosecutors just about never seek attorney-client privilege waivers from individual defendants and are unlikely to ever do so.<sup>123</sup> Perhaps this fact was not widely recognized. It certainly did not stop the

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119. See Richman, *supra* note 108, at 301.

120. Memorandum from Paul J. McNulty, Deputy Att'y Gen., U.S. Dep't of Justice, to Heads of Dep't Components & U.S. Att'ys 9 (Dec. 12, 2006), available at [http://www.usdoj.gov/dag/speeches/2006/mcnulty\\_memo.pdf](http://www.usdoj.gov/dag/speeches/2006/mcnulty_memo.pdf).

121. Attorney-Client Privilege Act of 2006, S. 30, 109th Cong. § 3(b) (as referred to the Comm. on the Judiciary, Dec. 8, 2006).

122. Attorney-Client Privilege Protection Act of 2007, S. 186, 110th Cong. (as referred to the Comm. on the Judiciary, Jan. 4, 2007). Senator Specter introduced the bill again in 2008. See Attorney-Client Privilege Act of 2008, S. 3217, 110th Cong. (as referred to the Comm. on the Judiciary, June 26, 2008).

123. See Richman, *supra* note 108, at 311–12 (suggesting reasons why the government refrains from seeking privilege waivers from individual cooperators).

American Civil Liberties Union from backing the bill<sup>124</sup> and joining a coalition that, by July 2008, included the Business Roundtable, the National Association of Manufacturers, and the U.S. Chamber of Commerce.<sup>125</sup> With this broad backing, the bill gained support from both antiregulation legislators and those who saw (or purported to see) it as a civil liberties issue. In July 2007, “Bobby” Scott, a Democrat of Virginia—with a host of bipartisan cosponsors including John Conyers, the new chair of the House Judiciary Committee—introduced similar legislation in the House<sup>126</sup> that soon passed by a large margin.

The spring of 2008 brought another push by Senator Specter and his allies and another effort by the department to mollify them.<sup>127</sup> Among the cosponsors of the Attorney-Client Privilege Protection Act of 2008 were Senators Biden, Dole, Graham, Kerry, and Feinstein.<sup>128</sup> As of February 2009, however, the front is quiet, even though Senator Specter just reintroduced his bill.<sup>129</sup> I suspect that moves to deprive the government of critical enforcement powers in

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124. The ACLU opined that the legislation was “necessary in order to protect against overzealous government investigations that have violated the constitutional rights guaranteed to all Americans.” Press Release, Am. Civil Liberties Union, ACLU Supports Legislation Aimed at Protecting Attorney-Client Privilege (July 12, 2007), <http://www.aclu.org/crimjustice/gen/30559prs20070712.html>.

125. Press Release, The Coalition to Preserve Att’y-Client Privilege, Coalition Praises Introduction of New Attorney-Client Privilege Protection Act (June 26, 2008), [http://www.nam.org/~media/Files/s\\_nam/docs/240800/240702.pdf.ashx](http://www.nam.org/~media/Files/s_nam/docs/240800/240702.pdf.ashx).

126. Press Release, Congressman Robert “Bobby” C. Scott, Rep. Scott Introduces the Attorney-Client Privilege Protection Act of 2007 (July 13, 2007), [http://www.house.gov/list/press/va03\\_scott/pr\\_070713a.html](http://www.house.gov/list/press/va03_scott/pr_070713a.html).

127. See Letter from Mark Filip, Deputy U.S. Att’y Gen., to Patrick J. Leahy, Chairman, Senate Comm. on the Judiciary & Arlen Specter, Ranking Member, Senate Comm. on the Judiciary 2 (July 9, 2008), available at <http://www.gibsondunn.com/publications/Documents/FilipLetter070908.pdf>; see also Carrie Johnson, *Corporate Crime Probes to Get New Guidelines*, WASH. POST, July 10, 2008, at D3 (describing the prosecutorial guidelines promulgated in the Filip memo); Mark J. Stein & Joshua A. Levine, *The Filip Memorandum: Does It Go Far Enough?*, N.Y.L.J., Sept. 10, 2008, at 4 (commenting on the Filip Memo). For the DOJ guidelines promulgated in September 2008, see generally U.S. DEP’T OF JUSTICE, *supra* note 83, at tit. IX.

128. Attorney-Client Privilege Act of 2008, S. 3217, 110th Cong. (as referred to the Comm. on the Judiciary, June 26, 2008).

129. Attorney-Client Privilege Protection Act of 2009, S. 445, 111th Cong. (as referred to the Comm. on the Judiciary, Feb. 13, 2009) (introduced by Senator Specter, with co-sponsoring Senators Landrieu, Carper, Kerry, McCaskill, and Cochran).

the white-collar area have gone radically out of fashion and will not return for at least a little while.<sup>130</sup>

Even as legislators considered restraining federal prosecutors in corporate crime enforcement, they took pains to ensure that the Justice Department committed additional resources to intellectual property criminal enforcement. Congress has created a broad range of criminal intellectual property offenses in recent years and has vociferously demanded that federal prosecutors pursue cases in the area.<sup>131</sup> In 2007, spurred, perhaps, by industry complaints, legislators started to push hard for more enforcement zeal and, true to (pre-Bush administration) form, they looked to institutional design.

A Government Accountability Office (GAO) report—commissioned by a ranking Republican member of Congress—soon identified one source of the problem. Intellectual property (IP) enforcement, it found, “is not a top priority”<sup>132</sup> for most of the “key federal agencies with IP enforcement roles.”<sup>133</sup> It noted, “We were not able to identify the total resources allocated to IP enforcement across the agencies because few staff are dedicated solely to IP enforcement, and only certain agencies track the time spent on IP criminal investigations by non-dedicated staff who carry out this function.”<sup>134</sup> The GAO went on to chide agencies for failing to “take key steps to assess IP enforcement achievements.”<sup>135</sup> Agencies simply looked at outputs (that is, cases brought) without “performance measures related to these statistics.”<sup>136</sup>

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130. See Grant McCool, *Lifting the Lid—Wall Street Probes Target Complex Securities*, REUTERS, Oct. 8, 2008, <http://www.reuters.com/article/rbssConsumerFinancialServices/idUSN0851166420081008> (“U.S. authorities have started a new slate of probes spurred by the financial industry meltdown, investigations that come as politicians and the public are calling for heads to roll on Wall Street.”). On February 11, 2009, the Senate Judiciary Committee held a hearing entitled *The Need for Increased Fraud Enforcement in the Wake of the Economic Downturn: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. (2009); see also Carrie Johnson, *Justice Department Putting New Focus on Combating Corporate Fraud*, WASH. POST, Feb. 12, 2009, at A6.

131. See Richman, *supra* note 25, at 792 (noting that this is the rare area in which Congress has, by statute, required tallies of cases in the Attorney General’s Annual Report).

132. U.S. GOV’T ACCOUNTABILITY OFFICE, INTELLECTUAL PROPERTY: FEDERAL ENFORCEMENT HAS GENERALLY INCREASED, BUT ASSESSING PERFORMANCE COULD STRENGTHEN LAW ENFORCEMENT EFFORTS 3 (2008), available at <http://www.gao.gov/new.items/d08157.pdf>.

133. *Id.* at 9.

134. *Id.*

135. *Id.* at 32.

136. *Id.* at 35.

Congress moved into action with the Prioritizing Resources and Organization for Intellectual Property Act of 2007.<sup>137</sup> Over Justice Department objections, legislators sought—among other measures to increase IP enforcement—to create a new Intellectual Property Division within the department, with a chief reporting directly to the deputy attorney general, and a White House office with exclusive cross-agency powers.<sup>138</sup> IP enforcement units in U.S. Attorneys’ offices were to be beefed up, and all U.S. Attorneys would be required to review their “standards for accepting or declining prosecution of criminal IP cases.”<sup>139</sup> The administration was able to hold some ground. When the bill ultimately passed, in October 2008, it specified that the new “Intellectual Property Enforcement Coordinator” in the White House would not “control or direct any law enforcement agency, including the Department of Justice, in the exercise of its investigative or prosecutorial authority.”<sup>140</sup> Nor would there be any new Intellectual Property Division. Congress did, however, take pains in the final bill to hold the department’s feet to the fire, demanding annual reports from the attorney general and the FBI director on what had been done with the new resources that the final legislation committed to IP enforcement.

There is no grand theme that ties these legislative forays together. The last two years of the Bush administration simply saw Congress returning to its “normal” interaction with the executive in the federal criminal enforcement area: as before, there would be broad substantive law legislation that severely punished whatever conduct the legislature deemed worthy of condemnation.<sup>141</sup> As before,

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137. H.R. 4279, 110th Cong. (2008); *see also* H.R. REP. NO. 110-617, at 21 n.3 (2008) (noting the findings of the GAO report).

138. For the Justice Department’s reaction, *see Prioritizing Resources and Organization for Intellectual Property Act of 2007: Hearing on H.R. 4279 Before the Subcomm. on Courts, the Internet, and Intellectual Property of the H. Comm. on the Judiciary*, 110th Cong. 38–53 (2007) (statement of Sigal Mandelker, Deputy Assistant Att’y Gen., Criminal Division), *available at* <http://judiciary.house.gov/hearings/pdf/Mandelker071213.pdf>; Frank Ahrens, *House Bill to Create Anti-Piracy Czar Advances*, WASH. POST, May 1, 2008, at D1.

139. *See* H.R. REP. NO. 110-617, at 44 (explaining section 513, the “Transparency of Prosecutorial Decision-Making” provision of the House bill).

140. Prioritizing Resources and Organization for Intellectual Property Act of 2008, Pub. L. No. 110-403, § 301(b)(2), 122 Stat. 4256, 4265 (to be codified at 15 U.S.C. § 8101).

141. *See* Providing Resources, Officers, and Technology to Eradicate Cyber Threats to Our Children Act of 2008, Pub. L. No. 110-401, 122 Stat. 4229 (to be codified in scattered sections of 18, 42 U.S.C.); Effective Child Pornography Prosecution Act of 2007, Pub. L. No. 110-358, tit. I, 122 Stat. 4001, 4001–03 (2008) (to be codified at 18 U.S.C. § 2251); Animal Fighting Prohibition Enforcement Act of 2007, Pub. L. No. 110-22, 121 Stat. 88 (to be codified at 18 U.S.C. § 1).

too, Congress would—when legislators thought it served their (or the “public’s”) interest—pay attention to the design of the enforcement bureaucracy, to how power would be allocated within it, and even to what otherwise would be matters for negotiated dispositions. Legislators would be committed to decentralized enforcement authority and would celebrate the independence of U.S. Attorneys’ offices—except when a policy preference trumped this generalized institutional interest.

The issue thus becomes whether we can do better than “normal”?

#### IV. GOING FORWARD

The Bush administration did have one thing right: the last eight years *should* have been a time of fundamental change in the Justice Department. In the wake of the September 11 attacks, the FBI had to shift resources to intelligence functions, and to conduct even its criminal enforcement activities with counterterrorism goals in mind.<sup>142</sup> The need for these shifts, coupled with a significant decline in violent crime rates nationwide, presented a golden opportunity to reconsider the extent to which federal agents and prosecutors should be pursuing crimes falling within the normal remit of state and local enforcers.<sup>143</sup> Immigration policy questions also had to be faced: What level of immigration law enforcement would there be, and how much would be pursued through criminal charges? And what about white-collar enforcement? Even given the regrettable tendency of our political leaders to think seriously about corporate crime only after a large-scale debacle,<sup>144</sup> the collapse of Enron should have counted as such a policy moment. And the question of how offenses would be prosecuted should have loomed as large as that of whether new white-collar offenses should be created.

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142. See Richman, *supra* note 17, at 408–09.

143. *Id.* at 416.

144. See Mark J. Roe, *Delaware’s Politics*, 118 HARV. L. REV. 2491, 2530 (2005) (noting that Congress intervenes in corporate law primarily when “constituents scream, fire alarms go off, and the media spots a big issue”); see also Lucian Bebchuk & Assaf Hamdani, *Federal Corporate Law: Lessons from History*, 106 COLUM. L. REV. 1793, 1833 (2006) (“[S]ome federal interventions—most importantly, those that require Congress to act—often take place in response to a financial or other crisis providing lawmakers with compelling reasons to respond to the public outcry and restore confidence.”); Larry E. Ribstein, *Bubble Laws*, 40 HOUS. L. REV. 77, 79–83 (2003) (describing corporate-crime prosecution as following a “boom-bubble-bust-regulate cycle”).

These challenges remain. Here are some tentative thoughts on how the Obama administration and Congress should confront a system beset by shifting and underarticulated national priorities and primarily comprised of field institutions that have only recently started to recover from haphazard centralization efforts.

The Obama administration should give due attention to making U.S. Attorneys' offices bastions of professionalism.<sup>145</sup> This entails, among other things, considering competence as well as loyalty when appointing U.S. Attorneys and placing severe limitations on telephone calls from legislators and the White House about specific cases.<sup>146</sup> Yet even as Congress supports what will amount to a devolution of the centralized power sought by the Bush Justice Department, it should still collaborate with Attorney General Eric Holder and the Obama administration to set and promote an enforcement agenda. Indeed, Congress's decisions about the allocation of authority within the Justice Department and on the exercise of prosecutorial discretion will likely have more impact on who gets prosecuted and for what than its substantive lawmaking; there are diminishing marginal returns in devising yet another way to say that already criminalized conduct violates yet another statute or should be punished by thirty years in prison rather than twenty. If, for example, legislators are now serious about pursuing corporate crime,<sup>147</sup> they not only should allow the Attorney Client Protection Act to die in committee but should also embrace U.S. Attorneys' offices as engines of zeal in these cases, much as Attorney General Mukasey did when he refused to create a special task force to investigate alleged misconduct relating to the financial crisis that began in 2008.<sup>148</sup>

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145. See Sara Sun Beale, *Rethinking the Identity and Role of United States Attorneys*, 6 OHIO ST. J. CRIM. L. (forthcoming 2009) (manuscript at 53–60, on file with the *Duke Law Journal*) (discussing potential controls that might minimize improper partisan motivations in U.S. Attorneys' offices).

146. Immediately upon taking office, Attorney General Mukasey made significant moves in this direction. See Dan Eggen, *Mukasey Limits Agency's Contacts with White House*, WASH. POST, Dec. 20, 2007, at A3.

147. See Fraud Enforcement and Recovery Act of 2009, S. 386, 111th Cong. (introduced Feb. 5, 2009) (proposing additional funding and personnel dedicated to prosecuting financial crimes); Zachary A. Goldfarb, *Senators Call for Fraud Probes*; Schumer, Shelby Propose More Spending on Investigations, WASH. POST, Jan. 23, 2009, at D2; Paul Shukovsky, *Senators Push for More FBI Funding; \$75 Million Sought to Reverse Bush-Era "Lack of Balance,"* SEATTLE POST-INTELLIGENCER, Feb. 2, 2009, at A1.

148. See Eric Lichtblau, *Mukasey Declines to Create a U.S. Task Force to Investigate Mortgage Fraud*, N.Y. TIMES, June 6, 2006, at A1; see also Robert Schmidt, *FBI Halts Some*

Even those most committed to putting the carefree days of deregulation behind us, however, ought to recognize that simply licensing U.S. Attorneys' offices to go forth and smite corporate malefactors is yet another path to economic chaos. The general jurisdiction that allows U.S. Attorneys' offices to develop reputational capital across a broad range of cases and train future securities fraud assistants with drug and gun cases comes with its own institutional-competence limitations. The risk that a hard-charging prosecutor's righteous indignation will have serious collateral consequences in the marketplace is all too real.<sup>149</sup> The goal, therefore, is to balance the contributions that U.S. Attorneys' offices can make as insulated islands of professional commitment, local knowledge, and dedicated human capital with the contributions that they can make as the leading edge of a broader regulatory effort. To tightly tether federal prosecutors to the decisionmaking of the Securities and Exchange Commission's (or the Environmental Protection Agency's) enforcement division deprives the system of the benefits of overlapping jurisdiction and reduces the system's resilience (to capture or other dampening influences) to that of its weakest member.<sup>150</sup> But a substantial disjunction between regulatory agencies and criminal prosecutors sends inefficiently noisy signals about government policy to regulatory subjects and creates confusing, sometimes even bad, law.<sup>151</sup>

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*Cases to Investigate Mortgage Frauds*, BLOOMBERG.COM, June 13, 2008, <http://www.bloomberg.com/apps/news?pid=20601109&refer=patrick.net&sid=abmYcBtoJT1Q> (reporting that "confronting a surge in mortgage fraud," the FBI "has ordered more than two dozen of its field offices to stop probing some financial crimes so agents can focus on the subprime crisis").

149. See Brown, *supra* note 111, at 1412–13; Brandon L. Garrett, *Structural Reform Prosecution*, 93 VA. L. REV. 853, 879 (2007).

150. See Mariano-Florentino Cuéllar, *The Institutional Logic of Preventative Crime* 25 (Stanford Pub. Law, Working Paper No. 1272235, 2008), available at <http://ssrn.com/abstract=1272235> ("Unlike other agencies, the bureaucracies charged with crime prevention are likely to enjoy a greater degree of political insulation and influence owing to the perceived sensitivity of their law enforcement mission and their ability to strategically leverage responsibilities widely perceived as involving high social value.").

151. Emil J. Bove III, *Institutional Factors Bearing on Criminal Charging Decisions in Complex Regulatory Environments*, 45 AM. CRIM. L. REV. 1347, 1381 (2008) (noting that prosecutors' "lack of experience with the structure and norms of the [regulatory] environment may lead to mixed signals and conflicting interpretations"); see also, e.g., Margaret V. Sachs, *Harmonizing Civil and Criminal Enforcement of Federal Regulatory Statutes: The Case of the Securities Exchange Act of 1934*, 2001 U. ILL. L. REV. 1025, 1043–44 (suggesting that some criminal uses of securities statutes in the 1980s broke new legal ground); Gerard E. Lynch, *The Role of Criminal Law in Policing Corporate Misconduct*, 60 LAW & CONTEMP. PROBS. 23, 54 (Summer 1997) ("The EPA or SEC lawyer may be better able to compare each case with other



Structures like the Corporate Fraud Task Force offer the best vehicle for navigating between these two extremes. That particular task force may have been intended as a branding device and did not amount to much more than that during the Bush administration. Yet its basic conception—neither an additional bureaucratic overlay on U.S. Attorneys’ efforts nor a complete embrace of decentralization—offers a helpful framework for coordinating across enforcement agencies and between Washington and the districts. Such entities offer a forum in which prosecutors join regulators to figure out the role that criminal prosecutions can play within an integrated regulatory program.<sup>152</sup> Moreover, given that corporate targets frequently come to Washington anyway, trying to avert indictment or intense prosecutorial attention with complaints of district overreaching, close coordination between Washington and the districts would prevent cycling between extreme decentralization and central intervention.

The Obama administration and Congress also have to decide how much of the federal criminal docket should be devoted to immigration cases. This decision will be driven by considerations of immigration policy, which must be reinstated on the political agenda. Yet policymakers independently need to recognize the distorting effects that the prioritization of easily made and counted prosecutions like those involving illegal reentry (as well as gun and pornography

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violations of securities or environmental laws, in terms of its importance to operating honest capital markets or protecting environmental quality, but the prosecutor is better equipped to compare the violation with other types of crime in terms of the moral blameworthiness of conduct, the degree of departure from general standards of citizenship, and the equity of imposing stigmatizing punishment.”).

152. Such integration can be hard even within a regulatory agency. A report on the Environmental Protection Agency’s Office of Criminal Enforcement, Forensics and Training (OCEFT), prepared during the Bush administration, noted that the unit’s “immediate challenge . . . is how to target available resources so that environmental crimes cases are productive from a prosecutorial standpoint, promote justice, and reduce pollution. This will involve more integration with civil enforcement and even regulatory development than OCEFT has historically done, to produce better outcomes than each individual program can do alone.” U.S. ENVTL. PROT. AGENCY, REVIEW OF THE OFFICE OF CRIMINAL ENFORCEMENT, FORENSICS AND TRAINING 55 (2003), available at <http://www.epa.gov/compliance/resources/publications/criminal/oceft-review03.pdf>. In the wake of this report and changes it provoked, congressional investigators found that centralized control within the Environmental Protection Agency had “slowed agents’ ability to make referrals.” See John Solomon & Juliet Eilperin, *Bush’s EPA Is Pursuing Fewer Polluters; Probes and Prosecutions Have Declined Sharply*, WASH. POST, Sept. 30, 2007, at A1.

possession) have on the rest of a district's workload.<sup>153</sup> The story of Nevada U.S. Attorney Dan Bogden, who told the crusading former Utah U.S. Attorney in charge of the department's pornography task force that competing priorities (like counterterrorism) precluded him from adding to the task force's tally by bringing an adult obscenity prosecution in Las Vegas, and was probably fired for his temerity, drives the point home.<sup>154</sup>

That the whole notion of opportunity cost seems foreign to legislators is particularly odd given the challenges of figuring out enforcement levels in any prespecified area. The GAO complaint<sup>155</sup> that federal enforcers simply touted the numbers of intellectual property cases they brought, without performance measures capturing either the precise problem that the enforcers were seeking to address or the extent they were addressing it, is pretty much true across the entire range of federal criminal enforcement. And Congress has not seemed to mind. Let us hope that the Obama administration works with Congress to set priorities that will be backed by clear commitments of resources and that will have identifiable effects on areas not so prioritized—not the fake priorities the department often cites without specifying resource commitments or admitting any opportunity costs.<sup>156</sup> Unless the size of the federal criminal footprint is radically increased, performance measures will indeed be hard to devise for a great many areas of potential criminal

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153. See Spencer S. Hsu, *Immigration Prosecutors Hit New High*, WASH. POST, June 2, 2008, at A1 (noting warnings of unnamed "federal officials" that "the focus on immigration is distorting the functions of law enforcement and the courts" but also reporting the Justice Department claim that "the government has not seen decreases in all other types of prosecutions and is increasing resources to support five border-area U.S. attorney's offices").

154. OFFICE OF THE INSPECTOR GEN. & OFFICE OF PROF'L RESPONSIBILITY, *supra* note 22, at 205–17.

155. See *supra* notes 132–36 and accompanying text.

156. In May 2005, the head of the Criminal Division announced the establishment of an "Obscenity Prosecution Task Force dedicated exclusively to the investigation and prosecution of obscenity cases." Press Release, U.S. Dep't of Justice, Obscenity Prosecution Task Force Established to Investigate, Prosecute Purveyors of Obscene Materials (May 5, 2005), [http://www.usdoj.gov/opa/pr/2005/May/05\\_crm\\_242.htm](http://www.usdoj.gov/opa/pr/2005/May/05_crm_242.htm). By 2008, department watchdogs reported that the "task force" had consisted of "approximately two to four attorneys" and that, in internal communications, the director had "vociferously complained that obscenity prosecutions were not, in fact, a Department priority." OFFICE OF THE INSPECTOR GEN. & OFFICE OF PROF'L RESPONSIBILITY, *supra* note 22, at 205; see also Joe Mozingo, *Obscenity Task Force's Aim Disputed*, L.A. TIMES, Oct. 9, 2007, at B1 ("Many federal prosecutors . . . feel obscenity cases are not worth the time and resources they take away from their main missions, such as stemming terrorism and organized crime.").

enforcement activity.<sup>157</sup> Still, Congress, working with the GAO, should make more of any effort or should at least try to squeeze some useful metrics out of the department that go beyond case or scalp counting.<sup>158</sup>

Any call for serious and more explicit national political deliberation about federal enforcement priorities must reckon with the unique ability of federal enforcers to directly influence the political process by putting politicians in their crosshairs, either publicly or quietly. In part because of the Bush White House's failure to fully cooperate in the Justice Department investigation,<sup>159</sup> there is still insufficient evidence to assess claims that various Democratic politicians—including former Governor Don Siegelman of Alabama—were targets of politically motivated federal prosecutions during the Bush administration.<sup>160</sup> The internal Justice Department probes did suggest that complaints by New Mexico Republican Party stalwarts like Senator Domenici and Representative Heather Wilson about the failure of New Mexico U.S. Attorney Iglesias to prosecute some Democrats in time for the 2006 elections was a causal factor in Iglesias' termination.<sup>161</sup> At least until we are able to distinguish the fire from the smoke in other cases in which partisan motivation has

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157. See MALCOLM K. SPARROW, *THE REGULATORY CRAFT: CONTROLLING RISKS, SOLVING PROBLEMS, AND MANAGING COMPLIANCE* 109–22 (2000) (exploring the challenges of assessing regulatory performance).

158. For a rather dated effort by the GAO, as commissioned by Congress, to think systematically about federal enforcement, see generally GEN. ACCOUNTING OFFICE, *FEDERAL CRIMINAL JUSTICE SYSTEM: A MODEL TO ESTIMATE SYSTEM WORKLOAD* (1991), available at <http://archive.gao.gov/d20t9/143920.pdf>.

159. OFFICE OF THE INSPECTOR GEN. & OFFICE OF PROF'L RESPONSIBILITY, *supra* note 22, at 338 (noting that the White House counsel refused to cooperate with the investigation and declined to provide internal documents for review).

160. See MAJORITY STAFF OF THE H. COMM. ON THE JUDICIARY, 110TH CONG., *ALLEGATIONS OF SELECTIVE PROSECUTION IN OUR FEDERAL CRIMINAL JUSTICE SYSTEM* 10, 12 (Comm. Print 2008), available at <http://judiciary.house.gov/hearings/pdf/SelProsReport080417.pdf>. Siegelman's conviction has been affirmed on appeal, *United States v. Siegelman*, No. 07-13163, 2009 WL 564659, at \*29 (11th Cir. Mar. 6, 2009), but the House Judiciary inquiry continues. See Adam Nossiter, *Judges Uphold Bribery Conviction of a Former Alabama Governor*, N.Y. TIMES, Mar. 7, 2008, at A9.

161. OFFICE OF THE INSPECTOR GEN. & OFFICE OF PROF'L RESPONSIBILITY, *supra* note 22, at 168–200. The report recommended that Attorney General Mukasey appoint a special counsel to pursue this matter, and he did so. See Press Release, U.S. Dep't of Justice, Statement by Attorney General Michael B. Mukasey on the Report of an Investigation into the Removal of Nine U.S. Attorneys in 2006 (Sept. 29, 2008), <http://www.usdoj.gov/opa/pr/2008/September/08-opa-859.html>.

been alleged,<sup>162</sup> however, we ought to suspend judgments on allegations that have long been a standard defense ploy in public corruption cases.<sup>163</sup>

One also needs to be careful when considering relations between Washington and the districts through the lens of public corruption cases. For all the ugliness of partisan targeting allegations, differences between the party in power nationally and the party controlling locally have played a critical role in making the federal “brand.” For better or worse, the rise of federal criminal enforcement as a distinct and valuable component of local ecologies, particularly in urban areas, owes a lot to disjunctions between those with national political power and those who hold sway locally.<sup>164</sup> The risk that partisan prosecutors with allegiance to the president’s party will target local political opponents—either at the behest of the White House or on their own—is real. Yet so are the democracy-reinforcing benefits that crusading outsiders (who may be insiders vis-à-vis the national party) can bring to local politics. The Justice Department rules—already in place but beefed up by Attorney General Mukasey<sup>165</sup>—that require local federal elected officials to go through the department’s Office of Legislative Affairs, rather than calling U.S. Attorneys directly,<sup>166</sup> should have the salutary effect of both limiting partisan interference in specific cases and channeling legislative solicitude for local appointees into general support for U.S. Attorney autonomy. But

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162. See, e.g., Sanford C. Gordon, *Assessing Partisan Bias in Federal Corruption Prosecutions* 3 (July 21, 2008) (unpublished manuscript), available at <http://ssrn.com/abstract=1166343> (finding evidence of partisan bias under both the George W. Bush and Clinton Justice Departments but noting that results may understate extent of bias under Bush while overstating it under Clinton).

163. See NICHOLAS DEB. KATZENBACH, *SOME OF IT WAS FUN: WORKING WITH RFK AND LBJ* 103 (2008) (“Cases involving criminal offenses by public officials are often particularly difficult because the press and the public are quick to point out political reasons for prosecuting a political opponent or not prosecuting a political friend.”).

164. For the fascinating story of how, soon after the creation of the Justice Department in 1870, federal election law enforcement quickly started to skew away from protecting freedmen in the South and toward advancing Republican interests in northern cities, see generally Scott C. James & Brian L. Lawson, *The Political Economy of Voting Rights Enforcement in America’s Gilded Age: Electoral College Competition, Partisan Commitment, and the Federal Election Law*, 93 AM. POL. SCI. REV. 115 (1999); David Quigley, *Constitutional Revision and the City: The Enforcement Acts and Urban America, 1870–1894*, 20 J. POLICY HIST. 64 (2008).

165. See Memorandum from Michael Mukasey, U.S. Att’y Gen., U.S. Dep’t of Justice, to Heads of Dep’t Components & U.S. Att’ys, Communications with the White House 1 (Dec. 19, 2007), <http://www.usdoj.gov/ag/readingroom/ag-121907.pdf>.

166. For a discussion of departmental efforts to regulate conduct between federal prosecutors and political actors, see Beale, *supra* note 145 (manuscript at 41–60).

even with these rules, there is no substitute for a U.S. Attorney in whose judgment there is wide, and deserved, confidence, based on a long record across cases.

I hope the Obama administration, working with local legislators, picks such people. Moreover, if legislators, deterred from contacting U.S. Attorneys directly, want to assess whether the appointees they may have helped select are actually playing the roles they are supposed to be playing in setting department policy, they might look to proxy measures, like how the department is using the Attorney General's Advisory Committee and who is on it. Or they could consider the extent to which U.S Attorneys represent the department at oversight or other hearings.<sup>167</sup> Although one would expect U.S. Attorneys to hew to the administration line when they appear as departmental witnesses, their appearances are at least some evidence that they helped develop that line. Were the major news organizations better at covering the interaction between the districts and Washington, legislators would not have to work so hard.<sup>168</sup> But the separation between local and national news beats may have taken its toll on the coverage of the U.S. Attorney firings by the national news media. It is telling that the best and earliest coverage of the story came from a blog. Whether the achievement of "Talking Points Memo" (which won a George Polk Award for its coverage)<sup>169</sup> offers the promise of better external monitoring of the department in the future or simply highlights the inadequacies of the print media remains to be seen.

When Attorney General Robert Jackson gave his now-famous speech in 1940 to the assembled U.S. Attorneys, he highlighted the tension between centralization and local autonomy at the center of the federal criminal enforcement bureaucracy:

Your responsibility in your several districts for law enforcement and for its methods cannot be wholly surrendered to Washington,

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167. See MORTON ROSENBERG, CONG. RESEARCH SERV., CONGRESSIONAL INVESTIGATIONS OF THE DEPARTMENT OF JUSTICE, 1920–2007: HISTORY, LAW, AND PRACTICE 43 (2007), available at <http://www.fas.org/sgp/crs/misc/RL34197.pdf>.

168. See Nelson W. Polsby, *The Political System*, in UNDERSTANDING AMERICA: THE ANATOMY OF AN EXCEPTIONAL NATION 3, 25 (Peter H. Schuck & James Q. Wilson eds., 2008) (noting extent to which the American "decision makers in many policy areas" rely "on the national news media to send signals among them").

169. See Noam Cohen, *Blogger, Sans Pajamas, Racks Muck and a Prize*, N.Y. TIMES, Feb. 25, 2008, at C1 (noting the award of the George Polk Award for legal reporting to Joshua Micah Marshall, creator of Talking Points Memo, <http://www.talkingpointsmemo.com>).

and ought not to be assumed by a centralized department of justice. It is an unusual and rare instance in which the local district attorney should be superseded in the handling of litigation, except where he requests help of Washington. It is also clear that with his knowledge of local sentiment and opinion, his contact with and intimate knowledge of the views of the court, and his acquaintance with the feelings of the group from which jurors are drawn, it is an unusual case in which his judgment should be overruled.

Experience, however, has demonstrated that some measure of centralized control is necessary. In the absence of it different district attorneys were striving for different interpretations or applications of an Act, or were pursuing different conceptions of policy. Also, to put it mildly, there were differences in the degree of diligence and zeal in different districts. To promote uniformity of policy and action, to establish some standards of performance, and to make available specialized help, some degree of centralized administration was found necessary.

Our problem, of course, is to balance these opposing considerations. I desire to avoid any lessening of the prestige and influence of the district attorneys in their districts. At the same time we must proceed in all districts with that uniformity of policy which is necessary to the prestige of federal law.<sup>170</sup>

This balancing challenge is far greater in 2009 than it was in 1940, or even in 1980. The federal docket is larger and federal jurisdiction far broader. Perhaps even more significantly, the periphery seems far closer to the center. The twenty-four-hour news cycle sparks interest from Washington on far more cases. And developments in information technology offer the (probably illusionary) promise of management from the center. Yet a lot of the wisdom needed in Main Justice (and in Congress) lies in understanding how to embrace the tensions that Jackson described so well, even while recognizing that federal enforcement activity is a scarce and valuable national resource.

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170. Robert Jackson, *The Federal Prosecutor*, 24 J. AM. JUDICATURE SOC'Y 18, 18 (1940).