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POLITICAL CONTROL OF FEDERAL PROSECUTIONS – LOOKING BACK AND LOOKING FORWARD

DANIEL RICHMAN[†]

ABSTRACT

This essay—written for the annual Duke Law Journal Administrative Law Symposium—explores the mechanisms of control over federal criminal enforcement activity that the Administration and Congress used or failed to use during George W. Bush’s presidency. Particular attention is given to Congress, not because it played a dominant role but because it generally chose to play such a subordinate role. My fear is that the recent focus on management inadequacies or abuses within the Justice Department 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 there is a centralized superstructure (often called “Main Justice”) in Washington, where there are also litigating “divisions” (including the Criminal Division), most cases are

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brought by the nearly 5800 prosecutors in the ninety-three United States attorney's offices (who are not formally within the Criminal Division).¹ That sounds like a lot until one remembers that as of 2001 the Brooklyn District Attorney's office had 630 prosecutors.² 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. But almost 17,000 of these were immigration cases (not including nearly 2000 identification fraud cases); over 17,000 were narcotics cases, and over 8000 were firearms cases.³ What about "white collar" crime? The total of 70 securities cases in 2007 understates the activity in the area, since such offenses may be included in the 804 mail and wire fraud cases and the 569 "financial institution" fraud cases.⁴ But even the combined total is smaller than number of pornography cases (1544) pursued that year.⁵

If anything, the focus on immigration cases has only been increasing, with a 2008 report finding that they amounted to 49.2 percent of all federal prosecutions.⁶ Child pornography cases are up as well.⁷ The 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 FBI⁸—was

¹ Dep't of Justice, Office of the Inspector General, Audit Division, Resource Management of United States Attorney's Office ["Resource Management Report"], 1 (Audit Report 09-03, Nov. 2008) (5,381 United States Attorneys and Assistant United States Attorneys employed as of April 21, 2008), available at <http://www.usdoj.gov/oig/reports/EOUSA/a0903/final.pdf>

² Update. See http://bjsdata.ojp.usdoj.gov/dataonline/Search/Prosecutors/bycouprof_table.cfm

³ Administrative Office of U.S. Courts, Judicial Business of the U.S. Courts, 2007, tbl. D-2, available at <http://www.uscourts.gov/judbus2007/appendices/D02CSep07.pdf>

⁴ For a sense of the kinds of charges brought in "corporate fraud" cases, see Corporate Fraud Task Force, Report to the President 13.-1.23 (2008), available at <http://www.usdoj.gov/dag/cftf/corporate-fraud2008.pdf>

⁵ Id.

⁶ TRAC Reports, Prosecutions for 2008, at 2 available at <http://trac.syr.edu/tracreports/crim/198/>

⁷ 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 ___. ("In fiscal 2008, U.S. attorneys' offices brought 2,211 computer-based child exploitation cases, the vast majority against child pornography viewers, who mostly pleaded guilty. That was more than double the number five years earlier.")

⁸ See Office of Legal Counsel, Mem. Op. for the Acting Ass't Att'y Gen. Crim. Div.: FBI Authority to Investigate Violations of Subtitle E of Title 26 or 18 U.S.C. Sections 921-930 (June. 21, 1996) (Attorney General has "broad general investigative authority with respect to federal criminal offenses, and :has delegated her investigative authority to the FBI"), available at http://www.usdoj.gov/olc/fbijur_002.htm

was working hard to recenter itself on counterterrorism programs.⁹ Now, 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.¹⁰ The federal system has always been in flux, but never more so in the past eight years.¹¹

Enforcer discretion—exercised by prosecutors and investigative agents—has always lain at the heart of federal criminal law, which has long been characterized by extraordinarily broad substantive statutes enforced by a relatively small bureaucracy that has been left to pick and chose among possible targets.¹² 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 in the last four decades, it has used a variety of strategies to influence how and against

⁹ See Kelly Thornton, Without Lam, U.S. Attorney's Office Takes Different Tack, (Dec. 2, 2008) (reporting substantial increase in immigration cases and decrease in white collar cases in San Diego), available at <http://www.voiceofsandiego.org/articles/2008/12/02/news/01usa120308.txt>; Statement of FBI Director Robert Mueller before the House Judiciary Committee, Apr. 23, 2008 (noting "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."), available at <http://www.fbi.gov/congress/congress08/mueller042308.htm>; see also U.S. Dep't of Justice, Office of the Inspector General, Audit Div., The External Effects of the Federal Bureau of Investigation's Reprioritization Efforts (2005); General Accounting Office, FBI Transformation: FBI Continues to Make Progress in Its Effort to Transform and Address Priorities (2003), available at <http://www.gao.gov/new.items/d04578t.pdf>

¹⁰ See Eric Lichtblau, David Johnson, & Ron Nixon, F.B.I. Struggles to Handle Financial Fraud Cases, N.Y. Times, Oct. 19, 2008, at ___ ("Current and former officials say the cutbacks [done in order to shift agent 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."); Patricia Hurtado, FBI Uses Triage to Shift From Terror to Madoff, Subprime Probes, Bloomberg.com, Dec. 22, 2008, available at <http://www.bloomberg.com/apps/news?pid=20601087&sid=aVHDu98R3s6s&refer=home>; Karen Donovan, Law and Financial Disorder, Portfolio Magazine, Dec. 28, 2008, at ___.

¹¹ See Daniel Richman, The Past, Present, and Future of Violent Crime Federalism, 34 Crime & Justice 377, 382-407 (2006) (briefly discussing federal efforts against violent crime from Founding through the September 11, 2001, attacks).

¹² 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)

whom federal criminal resources get deployed.¹³ During the eight years of George W. Bush's administration, Congress passed criminal statutes with its usual abandon.¹⁴ 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's 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—don't deserve the attention. Rather, my worry is that the ease with which some of the recent pathologies can be identified—the attorney general who had barely a clue of what was going on in his Department¹⁵ or of the difference between his job and that of White House Counsel;¹⁶ decisions to fire U.S. attorneys that

¹³ See Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, March 2008 draft (SSRN) at 3. (forthcoming *Stan L. Rev.* 2009).

¹⁴ See John S. Baker, Jr., *Revisiting the Explosive Growth of Federal Crimes* (Heritage Foundation Legal Memorandum, June 16, 2008) (“Since the start of 2000, Congress has created at least 452 new crimes.”), available at http://www.heritage.org/research/legalissues/upload/lm_26.pdf. Among the most recent enactments is the Animal Fighting Prohibition Enforcement Act, Pub. L. 110-22 (May 3, 2007).

¹⁵ See Chitra Ragavan, *The Embattled Attorney General; Gonzales Still Has the President's Support, For Now*, U.S. News & World Report, April 30, 2007, at 34, 35 (noting how, at Senate Judiciary hearing, Gonzales “fell back on a misfiring memory” “seventy-one times in all”); David Johnston & Eric Lipton, *Gonzales Endures Harsh Session with Senate Panel*, N.Y. Times, Apr. 20, 2007, at ___, (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).

¹⁶ See Katy J. Harriger, *Executive Power and Prosecution: Lessons from the Libby Trial and the U.S. Attorney Firings*, 38 *Presidential Studies Quarterly* 491, 503 (2008) (“Career officials within the department described [Gonzales'] 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 Report, Apr. 9, 2007, at 30, 32 (noting “view among many career prosecutors that Gonzales is too close to Bush”).

lack clear decision makers and were heavily influenced by the pique of staffers;¹⁷ a line prosecutor hiring processes in flagrant disregard for civil service law¹⁸—may lead policymakers and observers 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.¹⁹ One of the goals of this essay, however, is to show how decisions about enforcement power allocation have—in recent years and probably inevitably—been inextricably intertwined with preferences about priorities and the vigor with which they are pursued.

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.²⁰ The reach of the mail and wire fraud statutes²¹ (to take just two examples) is of course enormous, as is the risk their misuse could chill socially and economically valuable

¹⁷ See Dep't of Justice, Office of the Inspector General & Office of Professional Responsibility, *An Investigation into the Removal of Nine U.S. Attorneys in 2006* (Sept. 2008) ("Removal Report"), available at <http://www.usdoj.gov/oig/special/s0809a/final.pdf>

¹⁸ See Dep't of Justice, Office of the Inspector General & Office of Professional Responsibility, *An Investigation of Allegations of Politicized Hiring by Monica Goodling and Other Staff in the Office of the Attorney General* (July 28, 2008), available at <http://www.usdoj.gov/oig/special/s0807/final.pdf>

¹⁹ See, e.g., Dan M. Kahan, *Reallocating Interpretive Criminal-Lawmaking Power Within the Executive Branch*, 61 *J. Law & Contemp. Probs.* 47 (1998); Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 *Stan. L. Rev.* 989 (2006).

²⁰ 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 Kahan, *Is Chevron Relevant to Federal Criminal Law?*, 110 *Harv. L. Rev.* 469, 471-88 (1996) (noting breadth of delegation).

²¹ 18 U.S.C. §§ 1341, 1343 & 1346.

conduct, and even threaten longstanding political norms.²² 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.”²³

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 so when they deem[ed] it appropriate.”²⁴ 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. IRS officials could periodically be raked over the coals for overzealous tactics.²⁵ Enforcement of federal gun laws could be assigned to a politically vulnerable agency with a small portfolio.²⁶ Conversely, legislators could use an agency’s small portfolio as a means of ensuring continued enforcement zeal – one reason the Drug Enforcement Administration has continued to survive consolidation attempts.²⁷

²² For comments on the breadth of federal mail and wire fraud, see John C. Coffee, Jr., *Modern Mail Fraud: The Restoration of the Public/Private Distinction*, 35 *Am. Crim. L. Rev.* 427 (1998); 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 (1981); Samuel Buell, *Novel Criminal Fraud*, 81 *N.Y.U. L. Rev.* 1971 (2006); see also *United States v. Weyhrauch*, ___ F.3d. ___ (9th Cir. 2008) (11/26/08) (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).

²³ Richman, *Federal Criminal Law*, *supra* note 20, 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.”).

²⁴ Richman, *Federal Criminal Law*, *supra* note 20, at 810; see also Samuel Buell, *The Upside of Overbreadth*, 83 *NYU Law Rev.* 1491, 1559-60 (2008)

²⁵ Richman, *Federal Criminal Law*, *supra* note 20, at 791.

²⁶ *Id.* at 796-98. ATF has since been shifted from Treasury 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 ___ (reporting turf fight between FBI and ATF & E over which agency will be in charge of explosives cases that might be linked to terrorism).

²⁷ Richman, *Federal Criminal Law*, *supra* note 20, at 795-96.

One potential strategy for influencing the exercise of delegated executive power, however, was notable for the relative infrequency of its use. In a few areas – most notably criminal civil rights enforcement – the Justice Department ensured that particularly expansive statutes would not be deployed without the participation of a Main Justice component.²⁸ Yet the involvement of the Criminal Division in charging decisions involving cases not handled by the Division itself was the exception rather than the rule. Congress itself from time to time would mandate Washington’s involvement or approval when it wanted to moderate exercises of discretion by the far-flung U.S. attorneys’ offices.²⁹ Legislators were generally loathe, however, to enlist Washington as a manager of operations in these field offices.

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.”³⁰ Yet congressional efforts to foster the autonomy, or least semi-independence of U.S. Attorneys’ Offices were not simply a matter of limiting the political uses to which enforcement assets could be put by Washington. Legislators also seemed to value district autonomy as a potential source of personal leverage and of localized benefits to their constituents. After all, many of them had

²⁸ Richman, *Federal Criminal Law*, supra note 20, at 798-99; see also id. at 802 (noting administratively imposed approval requirement for RICO cases).

²⁹ See Richman, *Federal Criminal Law*, supra note 20, at 802-803. For discussions by the leading political scientist in the area about the role that U.S. attorneys’ office place in the federal enforcement system, see 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 Univ. L. Rev.* 219, 221-23 (2008).

³⁰ 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).

played a role in the selection of the local U.S. Attorney.³¹ 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.³²

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.”³³ The new appointees, however, seemed to reflect the usual degree of senatorial participation.³⁴ 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.³⁵ One might have read into the new Administration’s embrace of the “unitary executive” theory³⁶ a commitment to hierarchical control. Yet Clinton

³¹ See James Eisenstein, *Counsel for the United States: U.S. Attorneys in the Political and Legal Systems* 35-53 (1978); Richman *Federal Criminal Law*, supra note 20, 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.”).

³² See Daniel Richman, *Prosecutors and Their Agents, Agents and Their Prosecutors*, 103 *Colum. L. Rev.* 749, 788 (2003).

³³ Daniel Richman, *Federal Sentencing in 2007, The Supreme Court Holds—The Center Doesn’t* [“Federal Sentencing”], 117 *Yale L. J.* 1374, 1382 (2008).

³⁴ For an account of the process in the early years of Bush Administration, see generally Dep’t of Justice, Office of the Inspector General, *Report of Investigation into Allegations Relating to the Selection of the U.S. Attorney for Guam and the Northern Mariana Islands* 6-7 (June 2006) (explaining how Bush Administration sought recommendations for U.S. attorney positions: “If not Republican Senator represented a particular judicial district,” White House staff contacted whomever it had designated as the “political lead” for that district.”), <http://www.usdoj.gov/oig/special/s0606a/final.pdf> To get a sense of how this process worked in particular cases, see, e.g. Removal Report, supra note 17, at 100 (recommendation of Todd Graves in W.D. Mo.); 149-50 (recommendation of David Iglesias in D.N.Mex.); 201 (recommendation of Daniel Bogden in D.Nev.).

³⁵ See John Kass, *Tale of 2 Fitzgeralds*, *Chicago Tribune*, Nov. 10, 2006, at 2.

³⁶ See Richman, *Federal Sentencing*, supra note 20, at 1382 n.25 (citing presentations and critiques of this theory).

Administration theorists had embraced the same notion,³⁷ and its Justice Department was notable for its lack of centralized control in criminal matters.³⁸

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.³⁹ 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.⁴⁰ Yet even in the 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 would be 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, 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.⁴¹ Otherwise the Bush(II) Justice Department responded to other widely reported financial scandals in much the same way as the Bush(I) Justice Department

³⁷ See Elena Kagan, *Presidential Administration*, 114 Harv. L. Rev. 2245 (2001).

³⁸ Richman, *supra* note 33 at 1380-82.

³⁹ For a sense of the intensity with which the Department's highest officials monitored one terrorism trial, see *United States v. Koubiti*, 305, F. Supp.2d 723, 724-38 (E.D. Mich. 2003) (opinion and order regarding defendants' motion to require Attorney General to show cause why he should not be held in contempt); see also Richard B. Schmidt, *Terrorism Trial Triumph Turns Into an Embarrassment*, L.A. Times, March 07, 2004, at A-20.

⁴⁰ Cites, including to Office of the Inspector General, 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*, 11-15 (April 2003), available at <http://www.usdoj.gov/oig/special/0306/full.pdf>

⁴¹ See John R. Kroger, *Enron and Multi-Jurisdictional Fraud*, 28 Cardozo L. Rev. 1657, 1659 (2007); see also Paul Duggan, *Tex. Prosecutors Disqualified from Probe by Personal Ties; U.S. Attorney Launched Inquiry 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.”). Given the flexibility of federal venue statutes, it is unclear from the public record why the Enron case was not

responded to the Savings & 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.⁴² Although rolled out with considerable fanfare in 2002,⁴³ 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.”⁴⁴

It would not be long, however, before the Bush(II) Justice 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 encompassed by this effort. Evidence of the degree to which Main Justice officials were closely monitoring 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,⁴⁵ and we lack a full set of such communications.⁴⁶ While we know 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

⁴² See Bruce A. Green, *After the Fall: The Criminal Enforcement Response to the S & L Crisis*, 59 *Fordham L. Rev.* S155 (1991); Kitty Calavita and Henry N. Pontell, *The State and White-Collar Crime: Saving the Savings and Loans*, 28 *Law & Society Review* 297 (1994).

⁴³ See Executive Order Establishment of the Corporate Fraud Task Force. <http://www.whitehouse.gov/news/releases/2002/07/20020709-2.html>

⁴⁴ Richman, *Federal Sentencing*, supra note 33, at 1383; see Daphne Eviatar, *What’s Behind the Drop in Corporate Fraud Indictments?*, *Am. Lawyer*, Nov. 1, 2007 (“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.”).

⁴⁵ See Removal Report, supra note 17 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.”).

⁴⁶ See Richman, *Federal Sentencing*, supra note 33, at ___.

prosecution program,⁴⁷ the extent of the pressure on districts to fill numerical quotas (or “goals”) with respect to other sorts of cases cannot be determined.

What is far clearer is the extent to which the Federal Sentencing Guidelines and the data generated by compliance with them seemed to facilitate (and perhaps fostered) this attempt at active management. The Guidelines themselves, which explicitly constrained sentencing judges,⁴⁸ did not inevitably constrain prosecutors. And they did not particularly do so under Attorney General Janet Reno, whose directives allowed the districts and line prosecutors considerable discretion in the plea dispositions that they negotiated.⁴⁹ 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.⁵⁰

The Bush Administration was indeed inclined, and it had willing helpmates in Congress. In 2003, the so-called “Feeney Amendment” to the PROTECT Act⁵¹ tightened the appellate standard of review for all judicial departures from the Sentencing Guidelines and called on the Justice

⁴⁷ OIG/OPR Removal Report, *supra* note 17, at 273.

⁴⁸ Under the Sentencing Reform Act of 1984, 18 U.S.C. §§ 3551-3626; 28 U.S.C. §§ 991-998, federal judges were required to apply the Sentencing Guidelines promulgated by the U.S. Sentencing Commission. For a good review of the initiation and development of the federal guidelines system, see Frank O. Bowman, III, *The Failure of the Federal Sentencing Guidelines: A Structural Analysis*, 105 *Colum L. Rev.* 1315 (2005); see also Kate Stith & José A. Cabranes, *Fear of Judging: Sentencing Guidelines in the Federal Courts* (1998). In *Booker v. United States*, 543 U.S. 220 (2005), the Supreme Court held unconstitutional those parts of the Sentencing Reform Act that required judges to adhere to those sentences mandated by the Guidelines. Henceforth, the Guidelines were to be only “advisory.” *Id.*, at 244-68.

⁴⁹ See Kate Stith, *The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion*, 117 *Yale L.J.* 1420, 1441 (2008).

⁵⁰ Richman, *Federal Sentencing*, *supra* note 33, 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 deployed by states to make activities and relationships more “legible,” and thus more amenable to control).

⁵¹ *Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today (PROTECT) Act*, Pub. L. No. 108-21, 117 Stat. 650 (2003). 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 (2004).

Department “to take a more aggressive role in policing guidelines compliance resisting downward departures ‘not supported by the facts and the law.’”⁵² 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.⁵³ In other aspects of the legislation—such as the provision that 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.⁵⁴

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.⁵⁵ In form, the Ashcroft Memorandum presented itself as a laudable effort to even-handedly constrain prosecutors to the same extent as judges were already constrained, binding both actors to the available facts and Guideline calculations that flowed from them.⁵⁶ 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

⁵² Michael M. O’Hear, *The Original Intent of Uniformity in Federal Sentencing*, 74 U. Cin. L. Rev. 749, 789 (2006) (quoting PROTECT Act § 401(l)(1), 117 Stat. At 674).

⁵³ See Richman, *Federal Sentencing*, supra note 33, at 1388; see also Michael Gerber, *Down with Discretion*, Legal Affairs, Mar./Apr. 2004, at 72, 74.

⁵⁴ Richman, *Federal Sentencing*, supra note 33, at 1389.

⁵⁵ Memorandum from John Ashcroft, Attorney General, to All Federal Prosecutors (Sept. 22, 2003), available at http://www.usdoj.gov/opa/pr/2003/September/03_ag_516.htm.

⁵⁶ See Stephanos Bibas, *The Feeney Amendment and the Continuing Rise of Prosecutorial Power to Plea Bargain*, 94 J. Crim. L. & Criminology 295, 301-02 (2004); see also Richman, *Federal Sentencing*, supra note 33, at 1390.

“adopting the language of neutrality and efficiency at the core of the Weberian account of neutrally competent modern bureaucracy.”⁵⁷ Huber notes how central management can be enhanced through “[c]entrally directed and largely uniform field implementation,”⁵⁸ and administrative centralization indeed seems to have been a goal here.

To be sure, the conception of centralized control engendered by the Ashcroft Memorandum was pretty thin since 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—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.”⁵⁹ At least in the gun and immigration areas -- where cases, at least by the time they get to federal prosecutors, are commodities fitting standard fact-patterns⁶⁰—the combined effect of the PROTECT Act, the Ashcroft Memorandum, and such 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. There may be many

⁵⁷ Gregory A. Huber, *The Craft of Bureaucratic Neutrality: Interests and Influence in Governmental Regulation of Occupational Safety* 1 (2007).

⁵⁸ *Id.*, at 26.

⁵⁹ OIG/OPR Removal Report, *supra* note 17, at 285.

⁶⁰ See Nicole Gaouette, *Federal Prosecution of Illegal Immigrants Soars*, *L.A. Times*, June 14, 2008, A8 (discussing “Operation Streamline”); Lisa L. Miller & James Eisenstein, *The Federal/State Criminal Prosecution Nexus: A Case Study in Cooperation and Discretion*, 30 *Law & Social Inq.* 239, 252-54 (2005) (describing how gun prosecutions get presented to federal prosecutors by local police).

reasons why a U.S. Attorney pursues such cases—personal ambition, public interest, recruiting, deep appreciation of the plight of unidentifiable victims. But on the margin, unnuanced case counting from above will (unless balanced by other signals) cut against activity in such resource-intensive areas, and likely did so here.⁶¹ Between 2003 and 2007, the “percentage of white collar crime matters accepted for prosecution steadily declined,” decreasing from 50 percent of total matters referred to 28 percent.⁶² The percentage of public corruption matters filed for prosecution similarly fell during this period.⁶³

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. Attorneys⁶⁴—Attorneys General Ashcroft and Gonzales regularly overruled line decisions as to whether to seek the death penalty.⁶⁵ Yet 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.”⁶⁶ Every state drug case could have been prosecuted federally. So could

⁶¹ On this general institutional point, see Avinash Dixit, *Incentives and Organizations in the Public Sector: An Interpretative Review*, 37 *J. Human Resources* 696 (2002); see also Bengt Holmstrom & Paul Milgrom, *Multitask Principal-Agent Analyses: Incentive Contracts, Asset Ownership, and Job Design*, 24 *J. L. Econ. & Org.* 24 (1991); Eric Biber, *Too Many Things to Do: How to Deal with the Dysfunctions of Multiple-Goal Agencies*, at 9 (2008 SSRN draft).

⁶² Resource Management Report, *supra* note 1, at 44-45.

⁶³ *Id.* at 46-47.

⁶⁴ See OIG/OPR Removal Report *supra* note 17 at 227- 45 re Charlton (Ariz)

⁶⁵ 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 (2003); Richman, *Yale* at 1393.

⁶⁶ Richman, *Federal Sentencing*, *supra* note 17, at 1393 (making the point with respect to federal homicide cases).

a great many robbery cases (under some sort of asset depletion theory).⁶⁷ Just about every instance of fraud or corruption involves a mailing or wire communication that could give federal authorities jurisdiction, were they so inclined.⁶⁸ Yet for all the Bush Justice Department's efforts to regulate federal sentences, it left investigators and prosecutors with largely untrammelled discretion about what cases went federal. Moreover, even had one overlooked this essential incoherence and sought uniformity within just those cases pursued federally, the evidence suggests that the Ashcroft Memorandum had only middling success in curbing "locally convenient plea bargaining practices."⁶⁹ The important point (for our purposes), however, is how hard it tried, and how willing Congress – for all its historic interest in decentralized prosecutorial authority — abetted the process.⁷⁰

In a recent paper, Andrew Rudalevige and David Lewis hypothesized that centralization and politicization may be complementary strategies in 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 went on to 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."⁷¹

⁶⁷ See, e.g. *United States v. Jimenez-Torres*, 435 F.3d 3, __ (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.").

⁶⁸ See *United States v. Hebshie*, __ F.3d __ (1st Cir. 2008) (explaining relationship that a mailing must have to a fraud for federal mail fraud to occur); *United States v. Turner*, __ F.3d __ (7th Cir. 2008) (12/30/08) (same).

⁶⁹ Frank O. Bowman, III, *Beyond Band-Aids: A Proposal for Reconfiguring Federal Sentencing After Booker*, 2005 *U. Chi. Legal F.* 149, 193.

⁷⁰ 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*, 542 U.S. 200 (2005), and, perhaps even more, *Kimbrough v. United States*, 128 S. Ct. 558 (2007). See Richman, *Federal Sentencing*, supra note 33.

⁷¹ Andrew Rudalevige & David E. Lewis, *Parsing the Politicized Presidency: Centralization and Politicization as Presidential Strategies for Bureaucratic Control* at 8-9 (draft paper 2005), available at <http://www.princeton.edu/~delewis/Papers/rudalevigelewis.pdf>.

Perhaps Rudalevige and Lewis are right that presidents will 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 “politicalized” 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 prosecutors, argue before judges, and appear before juries in settings where 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. Think Edward Levi, who having been plucked from academia to serve as attorney “soon wide acclaim for his stewardship of the Justice Department in the post-Watergate era.”⁷² But prior service as a line federal prosecutor—particularly when such service was under a different administration—is evidence of an appointee’s pre-commitment to a general federal enforcement project or, at the very least, to her desire to develop specialized human capital in the federal litigation area.

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 House Republican Judiciary staffer who had been dispatched in Bush’s first term to be U.S. Attorney in the Eastern District of Virginia (a politically

⁷²Neil 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, 2008, 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”).

sensitive spot because, among other things, the office was prosecuting a flagship terrorist case against Zacharias Moussaoui).⁷³ 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.⁷⁴ In response to Fisher’s nomination, Senator Arlen Specter 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 he waved them aside.⁷⁵ Second-term Bush Administration efforts to ensure the political loyalty of its appointees – both positively (through the selection of those with White House ties) and negatively (through avoidance of 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.⁷⁶ What many miss, however, is the unprecedented degree to which the entire chain of command itself had been packed with appointees who had hitched their star to the fortunes of the White House. This included the “Attorney General’s Advisory Council” the

⁷³ See Eric Lichtblau, White House Nears Choice on No.2 Justice Position, N.Y. Times, Oct. 21, 2005, at ___ (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”).

⁷⁴ See Vanessa Blum, Latham & Watkins Partner to Head DOJ Criminal Division, Legal Times, Apr. 1, 2005, at ___ (“To many observers, the choice of a lawyer with no prosecutorial experience to run the Criminal Division is a surprising one.”).

⁷⁵ Eric Lichtblau, Tension Builds Between F.B.I. and Congress, N.Y. Times, Aug. 15, 2005, at ___. Specter made this comment when 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 ___, might be said to have prosecutorial experience, since 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 OIG/OPR Removal Report supra note 17 at 12; see also Jason McLure and Emma Schwartz, Help Wanted: Deputy AG McNulty Leaves Troubled DOJ: With Deputy Attorney General on his Way Out, Who Will Face the Department’s Problems?, Legal Times, May 21, 2007, at ___ (noting McNulty “lacks any real trial experience”). Also note that William Mercer, Principal Associate Deputy Attorney General from June 2005 to July 2006, had been an AUSA 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 the Legislative Affairs. See OIG/OPR Removal Report, supra note 17 at 13-14.

⁷⁶ See John McKay, Train Wreck at the Justice Department: An Eyewitness Account, 31 Seattle 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 ___.

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.”⁷⁷ 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.⁷⁸

.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. attorney’s jobs that have changed hands since [the beginning of Bush’s] second term have been filed by the White House and Justice Department with trusted administration insiders.”⁷⁹ The desire to align the districts with Administration preference may not have been the only reason for these appointments. As 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.”⁸⁰ 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. Attorney’s 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

⁷⁷ U.S Attorney’s Manual, § 3-2.530; see also OIG, Resource Management of United States Attorneys’ Offices, 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.”).

⁷⁸ Dep’t of Justice, Press Release, Attorney General Gonzales Appoints Johnny Sutton and Susan Brooks to Lead Attorney General’s Advisory Committee of U.S. Attorneys, Mar. 28, 2006, available at http://www.usdoj.gov/usao/txw/press_releases/2006/SuttonAGAC.pdf

⁷⁹ Amy Goldstein & Dan Eggen, Prosecutor Posts Go To Bush Insiders; Less Preference Shown for Locals, Senators’ Choices, Wash. Post, Apr. 1, 2007, at A1.

⁸⁰ David E. Lewis, Presidential Appointments, supra note 31, at 196.

politics, but in the short term, an administration might not be concerned about such costs. (Also, this was an administration for which long term planning was not a strength.)⁸¹ 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.⁸²

The extent to which the Republican Congress would acquiesce in a new level of Executive control over the districts was highlighted by the non-debate that marked the introduction into the 2006 USA PATRIOT Act reauthorization of the provision changing the procedures for the appointment of interim U.S. attorneys.⁸³ If a U.S. attorney vacancy had occurred under the old system, the Attorney General would name someone, but if that person had not been confirmed by the Senate within 120 days, the district court could appoint someone else. 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.”⁸⁴ This sounds like technical stuff. The upshot, however, was to give the White House and the Department’s political leaders confidence that, were they to fire (or otherwise lose) a U.S. attorney, they would be able to put their own person indefinitely, without facing a pressing need either to satisfy the local district court or even gain Senate confirmation.⁸⁵

⁸¹ See, e.g., Dexter Filkins, *The Forever War* (2008); Thomas E. Ricks, *Fiasco: The American Military Adventure in Iraq* (2006).

⁸² See Philip Shenon, *Amid Turmoil, U.S. Attorney Will Shift to Headquarters*, N.Y. Times, Nov. 20, 2007, at ___ (noting how, under Attorney General Gonzales, “experienced prosecutors were succeeded by relatively young and inexperienced lawyers seen as fiercely loyal to the administration”).

⁸³ 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 (2007).

⁸⁴ Brian T. Yuh & Charles Doyle, Congressional Research Service, *USA PATRIOT Reimprovement and Reauthorization Act of 2005, A Legal Analysis* 49 (updated Dec. 21, 2006).

⁸⁵ 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.” OIG/OPR Removal Report *supra* note 17 at 36; see also *id.*, at 145-47.

The provision passed with nary a peep from Congress.⁸⁶ The Justice Department’s congressional liaison got 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 Utah.⁸⁷

Notwithstanding this collective Congressional apathy in protecting its institutional interests, the subsequent U.S. attorneys firings—unprecedented in the absence of any change in administration⁸⁸—are hardly evidence that individual legislators had abandoned the field when it came to protecting or advancing their own interests.⁸⁹ Indeed, the narratives behind some of the firings, particularly those of Carol Lam in San Diego and David Iglesias in New Mexico, clearly include exertions of influence by local legislators.⁹⁰ The recent OIG/OPR Report found that the U.S. Attorney in Missouri (the brother of a congressman) was forced out as a result of complaints to the White House by the staff of Senator Bonds.⁹¹ Conversely, even some U.S. attorneys deemed “mediocre” were taken off the removal list because one of the lists’ masterminds, Gonzales’ chief of staff Kyle Sampson (and perhaps others), thought the home senators of those

⁸⁶ See Interim Appointment of United States Attorneys, House Judiciary Committee Report, 110-58, at 5 (Mar. 20, 2007) (noting that the interim appointment provision “was inserted quietly into the conference report on the 2005 Act without debate”), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_reports&docid=f:hr058.110.pdf

⁸⁷ Richman, Federal Sentencing, *supra* note 33, 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, available at <http://www.slate.com/id/2161260/pagnum/all/>

⁸⁸ See Kevin M. Scott, Congressional Research Service, U.S. Attorneys Who Have Served Less Than Full Four-Year Terms, 1981-2006 (2007).

⁸⁹ When the replacement of 15-20 percent of U.S. Attorneys—the “underperforming” ones—was being contemplated in January 2005, Kyle Sampson (who had just moved from the White House to the Justice Department and would soon be Gonzales’ 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.’” OIG/OPR Removal Report *supra* note 17 at 17.

⁹⁰ See OIG/OPR Removal Report *supra* note 17, at 190-94 (Iglesias); *id.* at 277-83 (recounting legislative complaints about the level of immigration enforcement in Carol Lam’s district).

⁹¹ See OPR/OIG USA report 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 Let to Prosecutor’s Firing, *Wash. Post*, Oct. 3, 2008, at A2.

officials would put up a fuss.⁹² 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 do with advancing Congress's institutional interest in insulating U.S. Attorney's offices from presidential control.⁹³

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 centralization efforts but the prior acquiescence of Republican legislators. That said, the attorney general did not step down until after former Deputy Attorney General James Comey told his unnerving story of Gonzales' effort in March 2004 to extract permission from a grievously ill Ashcroft for an NSA surveillance program.⁹⁴ Perhaps the extraordinary length of time Gonzales seemed to twist in the wind was just a reflection of his close relationship with the President,⁹⁵ 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"⁹⁶ really did amount to an unprecedented exercise of executive power and threat to the U.S. attorney system.

⁹² OIG/OPR Removal Report, *supra* note 17, at 330.

⁹³ See David E. Lewis, *Presidents and the Politics of Agency Design* 28-29 (2003) (discussing congressional calculus with respect to insulating agencies from presidential control).

⁹⁴ See David Stout, *Gonzales Pressed Ailing Ashcroft on Spy Plan*, *Aide Says*, *N.Y. Times*, May 15, 2007, at ___. For a fuller narrative of this incident, see Barton Gellman, *Angler: The Cheney Vice Presidency* (2008); see also *Preserving Prosecutorial Independence: Is the Department of Justice Politicizing the Hiring and Firing of U.S. Attorneys?*, Hearings before the Senate Judiciary Committee, Serial J-110-14, S. Hrg. 110-495, at 213-40 (May 15, 2007) (testimony of James B. Comey); available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_senate_hearings&docid=f:35800.pdf

⁹⁵ See Steven Lee Myers & Philip Shenon, *Embattled Attorney General Resigns*, *N.Y. Times*, Aug. 27, 2007, at ___ (noting that Gonzales "had rebuffed calls for his resignation for months"); Emily Bazelon, John Dickerson, and Dahlia Lithwick, *Deathwatch: Gonzo-Meter: Is Alberto Gonzales Going Down?*, *Slate*, Mar. 20, 2007, (tracking Gonzales' status during the months in which many called for his resignation) <http://www.slate.com/id/2162289/>

⁹⁶ See 28 U.S.C. § 541 (U.S. attorney "subject to removal by the President"); see also *President Bush Addresses Resignations of U.S. Attorneys*, Mar. 20, 2007 (noting that U.S. attorney's "serve at the pleasure of the President"), available at <http://www.whitehouse.gov/news/releases/2007/03/print/20070320-8.html>

Yet even as members of the new Congress excoriated the political leadership of the Justice Department for disrespecting the U.S. attorney system,⁹⁷ many of them simultaneously pursued another, very different project – indeed one quite at odds with their embrace of local autonomy during the hearings sparked by the U.S. attorney firings. 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. That such a campaign was pursued against the backdrop of the public celebration of U.S attorney autonomy might sound odd. And its pursuit in an enforcement area—corporate crime—marked throughout this post-Enron period by bursts of fierce rhetoric and substantive legislation hiking sentences and creating new offenses⁹⁸ sounds even more curious. Yet for those used to seeing Congress deploy procedural restraints that undercut the ostensible sweep of substantive criminal statutes,⁹⁹ the action in this area has been less surprising. The more remarkable part has been the breadth of the legislative alliance favoring (at least until the current financial melt-down) 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

⁹⁷See, e.g. Preserving Prosecutorial Independence: Is the Department of Justice Politicizing the Hiring and Firing of U.S. Attorneys?, Hearings before the Senate Judiciary Committee, Serial J-110-14, S. Hrg. 110-495 (Mar. 6 – Aug. 2, 2007); available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_senate_hearings&docid=f:35800.pdf; United States Dep’t of Justice, Hearing before the House Judiciary Committee, Serial No. 110-58 (May 10, 2007), available at <http://judiciary.house.gov/hearings/printers/110th/35245.PDF>

⁹⁸ See 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 (Apr. 4, 2007, draft) (“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.”), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=967482

⁹⁹ See Richman, Federal Criminal Law, *supra* note 20, at 800-802.

group activity, and an impressionistic sketch will have to suffice here.¹⁰⁰ Corporate criminal liability is mostly a matter of federal common law and spectacularly expansive, based essentially on respondeat superior.¹⁰¹ 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.¹⁰² And enforcement resources will often be scarce, particularly in recent years with the competition from other priorities like counter-terrorism and violent crime.¹⁰³ 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.¹⁰⁴

For their part, corporate entities have responded to the breadth of firm liability and the drum-beat of criminal and regulatory enforcement activity (even though not that many enforcement actions or prosecutions are actually pursued) by commissioning internal investigations whenever there is a whiff of misconduct.¹⁰⁵ Where 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

¹⁰⁰ A more elaborate discussion of the issues can be found in Daniel Richman, *Decisions About Coercion: The Corporate Attorney-Client Privilege Waiver Problem*, 57 DePaul L. Rev. 295 (2008); see also Preet Bharara, *Corporations Cry Uncle and Their Employees Cry Foul: Rethinking Prosecutorial Pressure on Corporate Defendants*, 44 Am. Crim. L. Rev. 53 (2007).

¹⁰¹ See 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, (1981); V.S. Khanna, *Corporate Criminal Liability: What Purpose Does It Serve?*, 109 Harv. L. Rev. 1477(1996).

Bharara, *supra* note 100, at 61-65 (2007) (tracing history of corporate criminal liability).

¹⁰² See Kenneth Mann, *Defending White Collar Crime: A Portrait of Attorneys at Work* (1985).

¹⁰³ Relying on articulated departmental priorities, the DOJ Office of the Inspector General listed violent crime and counter-terrorism as two of the "top management and performance challenges" for 2007, and made no mention of corporate or white collar crime (save for "cyber crime"). *Top Management and Performance Challenges in the Department of Justice - 2007*, available at <http://www.usdoj.gov/oig/challenges/2007/index.htm>

¹⁰⁴ See Darryl K. Brown, *Third-Party Interests in Criminal Law*, 80 Tex. L. Rev. 1383 (2002).

¹⁰⁵ See Michael N. Levy, Michael L. Spafford & Lothlórien S. Redmond, *The Changing Nature of Internal Probes*, *Financial 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.").

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 will be under severe economic pressure to cooperate with corporate counsel – since they may lose their jobs if they do not -- the only attorney-client privilege protecting their communications will be owned by the firm, which always has the option of waiving it to advance its interests in discussions with regulators or prosecutors.¹⁰⁶

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.¹⁰⁷ Prosecutors were particularly prone to impose such conditions 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 the time under which they would be under scrutiny. But they doubtless preferred that their decisional calculus not include explicit 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.¹⁰⁸

¹⁰⁶ See Lisa Kern Griffin, *Compelled Cooperation and the New Corporate Criminal Procedure*, 82 N.Y.U. L. Rev. 311 (2007); see also *Upjohn v. United States* 449 U.S. 383 (1981) (setting out contours of corporate attorney-client privilege); *In re Grand Jury Jury Subpoena: Under Seal*, 415 F.3d 333, 340 (4th Cir. 2005).

¹⁰⁷ Memorandum from Larry D. Thompson, Deputy Attorney General, to Heads of Department Components and United States Attorneys (Jan. 20, 2003), available at http://www.usdoj.gov/dag/cftf/business_organizations.pdf; see also Christopher A. Wray & Robert K. Hur, *Corporate Criminal Prosecution in a Post-Enron World: The Thompson Memo In Theory and Practice*, 43 Am. Crim. L. Rev. 1095 (2006)

¹⁰⁸ See, e.g. 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 (2000); William R. McLucas, Howard M. Shapiro & Julie J. Song, *The Decline of the Attorney-Client Privilege in the Corporate Setting*, 96 J. Crim. L. & Crim. 621 (2006)

Until the end of 2006, however, 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 area¹⁰⁹ during this period contrasts starkly with the Department’s contemporaneous efforts, via Sentencing Guidelines policy, to curtail district 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 her assistants.¹¹⁰

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.¹¹¹ A directive by Deputy Attorney General Paul McNulty—which he announced on December 12 in a speech to a New York-based business and defense lawyer group—imposed a new degree of centralized supervision of prosecutorial waiver demands.¹¹² Before asking for the most frequently sought privileged materials—primarily factual in nature—prosecutors had to get 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.¹¹³

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,”

¹⁰⁹ 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 U.S. 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, 51 U.S. Attorneys’ Bull. 1, 1-2 (Nov. 2003), available at http://www.usdoj.gov/usao/eousa/foia_reading_room/usab5106.pdf

¹¹⁰ Memorandum to Heads of Department Components and United States Attorneys, dated October 21, 2005, from Robert D. McCallum, Jr., available at http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/crm00163.htm

¹¹¹ See Sarah Johnson, Senator Takes on DoJ’s Thompson Memo, CFO.com (Sept. 14, 2006).

¹¹² See Richman, DePaul at 301.

¹¹³ Memorandum from Paul J. McNulty, Deputy Attorney General, to Heads of Department Components and United States Attorneys (December 12, 2006) (hereinafter “McNulty Memo”), available at http://www.usdoj.gov/dag/speech/2006/mcnulty_memo.pdf

which among other things, barred the government from demanding the waiver of an organizational attorney-client privilege, and barred it from considering an entity's assertion of that privilege when deciding whether to pursue criminal (or civil) charges.¹¹⁴ Although no longer Judiciary chair (in the wake of the 2006 mid-term elections), Senator Specter reintroduced the bill as soon as the new Congress convened in 2007.¹¹⁵

Underneath the 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 was exclusively for the benefit of firms and the (generally) white collar employees who would be implicated by corporate cooperation. After all, even in a criminal justice world in which the waiver of all sorts of rights is (for better or worse) the norm, attorney-client privilege waivers are just about never sought from individual defendants and are unlikely to ever be.¹¹⁶ Perhaps this fact was not widely recognized. It certainly did not stop the American Civil Liberties Union from backing the bill¹¹⁷ and joining a coalition that, by July 2008, included the Business Roundtable, the National Association of Manufacturers, and the U.S. Chamber of Commerce.¹¹⁸ With this broad backing, the bill gained support from both anti-regulation 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 bi-partisan co-sponsors including John Conyers, the new Chair of House

¹¹⁴ S. 30, 109th Cong., 2d Sess. ("Attorney-Client Privilege Protection Act of 2006") (introduced December 8, 2006).

¹¹⁵ Senator Specter reintroduced his "Attorney-Client Privilege Protection Act" in 2007. S.186, 110th Cong., 1st Sess. And again in 2008. S. 3217, 110th Cong.

¹¹⁶ See Richman, DePaul L. Rev. at 311-12 (suggesting reasons why government forbears from seeking privilege waivers from individual cooperators).

¹¹⁷ The ACLU opined that the legislation was "necessary to in order to protect against overzealous government investigations that have violated the constitutional rights guaranteed to all Americans." See Press Release, ACLU Supports Legislation Aimed at Protecting Attorney-Client Privilege (July 12, 2007), available at <http://www.aclu.org/crimjustice/gen/30559prs20070712.html>

¹¹⁸ Coalition Praises Introduction of New Attorney-Client Privilege Protection Act, June 26, 2008, available http://www.nam.org/~media/Files/s_nam/docs/240800/240702.pdf.ashx

Judiciary Committee—introduced similar legislation in the House¹¹⁹ 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.¹²⁰ Among the co-sponsors of the 2008 “Attorney-Client Privilege Protection Act of 2008” were Senators Biden, Dole, Graham, Kerry, and Feinstein.¹²¹ At time of writing (January 2009), however, the front is quiet. Moves to deprive the government of critical enforcement powers in the white collar area have gone radically out of fashion and may not return for at least a little while.¹²²

Even as legislators mulled over a measure that would have restrained 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 prosecutions be pursued in the area.¹²³ 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 report – commissioned by ranking Republican Congressman – soon identified one source of the problem. Intellectual property (IP) enforcement, it found, “is not a top priority” for most of the “key federal agencies with IP enforcement roles.”

¹¹⁹ http://www.house.gov/list/press/va03_scott/pr_070713a.html

¹²⁰ See Letter from Deputy Attorney General Mark Filip to Senators Leahy and Specter, dated 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; Mark J. Stein and Joshua A. Levine, The Filip Memorandum: Does It Go Far Enough? N.Y. Law Journal, Sept. 11, 2008, at ___. For the DOJ guidelines promulgated in September 2008, see http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/28mcrm.htm

¹²¹ S. 3217, 110th Cong., available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_bills&docid=f:s3217is.txt.pdf

¹²² See Grant McCool, Lifting the Lid—Wall Street Probes Target Complex Securities, Forbes, Oct 8, 2008, at ___ (“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.”)

¹²³ See Richman, Federal Criminal Law, *supra* note 20, at 792 (noting that this is the rare area in which congress has, by statute, required tallies of cases in the Attorney General’s Report).

And 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.”¹²⁴ The GAO went on to chide agencies for failing to “take key steps to assess IP enforcement achievements.” Agencies simply looked at outputs (i.e. cases brought) without “performance measures related to these statistics”¹²⁵

Congress moved into action with the Prioritizing Resources and Organization for Intellectual Property Act of 2007.¹²⁶ Over Justice Department objections, legislators sought -- among other measures to beef up 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.¹²⁷ IP enforcement units in U.S. attorney’s offices were to be beefed up, and every U.S. attorney would be required to review her “standards for accepting or declining prosecution of criminal IP cases.”¹²⁸ 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 not “control or direct any law enforcement agency, including the Department of Justice, in the exercise of its investigative or prosecutorial authority.”¹²⁹ Nor would there be any new IP Division. Congress

¹²⁴ GAO Report, Intellectual Property: Federal Enforcement Has Generally Increased, but Assessing Performance Could Strengthen Law Enforcement Efforts, March 2008; Report to Ranking Member (Republican) Subcomm. of Homeland Security and Govt Affairs Committee.

¹²⁵ Id. at 35.

¹²⁶ See Prioritizing Resources and Organization for Intellectual Property Act of 2007, H.R. 4279; see House Judiciary Committee Report, H.Rep. 110-617, at 21 n.3 (2008) (noting findings of GAO report), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_reports&docid=f:hr617.110.pdf

¹²⁷ For Justice Department reaction, see Statement of Sigal P. Mandelker, Deputy Ass’t A.G., Crim. Div., before the Subcommittee on Courts, the Internet, and Intellectual Property, House Judiciary Committee, Dec. 13, 2007, available at <http://judiciary.house.gov/hearings/pdf/Mandelker071213.pdf>; see also Frank Ahrens, House Bill to Create Anti-Piracy Czar Advances, Wash. Post, May 1, 2008, at D1.

¹²⁸ See House Judiciary Committee Report, H.Rep. 110-617, at 44 (explaining “Transparency of Prosecutorial Decision-Making” provision of House bill, sec. 513.).

¹²⁹ Pub. L. 110-403, sec. 301(b)(2), 122 Stat. 4256, 4265 (Oct. 13, 2008).

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 here. 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 legislature worthy of condemnation.¹³⁰ As before, 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 matters for negotiated dispositions. Legislators would be committed to decentralized enforcement authority and would celebrate the independence of U.S.attorney's offices. Except when a policy preference would trump this generalized institutional interest.

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

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, FBI resources would have to be shifted to intelligence functions, and even criminal enforcement activities would have to be conducted with counter-terrorism goals in mind.¹³¹ 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 continue to collaborate (and have occasional turf wars with) state and local enforcers going after violent and

¹³⁰ See Animal Fighting Prohibition Enforcement Act of 2007, Pub. L. 110-22, 121 Stat. 88 (May 3, 2007); Effective Child Pornography Prosecution Act of 2007, Pub. L. 110-358, 122 Stat. 4001 (Oct. 8, 2008); Providing Resources, Officers and Technology to Eradicate Cyber Threats to Our Children Act of 2008, Pub. L. 110-401, 122 Stat. 4229 (Oct. 13, 2008).

¹³¹ See Richman, Violent Crime Federalism, *supra* note 111, at 408-09.

low-level drug crime.¹³² Immigration policy questions also had to be faced: What level of immigration law enforcement would there be, and how much would be pursued via criminal charges? And what about white collar enforcement? Even were we to take for granted our regrettable tendency think seriously about corporate crime only after a large-scale debacle,¹³³ the collapse of Enron should have counted as such a policy moment, with the question of how offenses would be prosecuted looming as large as that of whether new offenses should be created.

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

The new Administration will have to give due attention to making U.S. Attorneys' offices bastions of professionalism.¹³⁴ 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.¹³⁵ Yet even as Congress supports what will amount to a devolution of the centralized power sought by the Bush Justice Department, it will still need to collaborate with the Obama Administration in setting and promoting 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

¹³² *Id.*, at 416.

¹³³ 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) ("some federal interventions – most importantly, those that require Congress to act – often take place in response to financial or other crisis providing lawmakers with compelling reasons to respond to the public outcry and restore confidence"); Larry E. Ribstein, *Bubble Laws*, 40 *Houston L. Rev.* 77, 79-83 (2003).

¹³⁴ See Sara Sun Beale, *Rethinking the Identity and Role of United States Attorneys*, *Ohio St. J. of Crim. L.* (2009) (forthcoming)

¹³⁵ 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.

gets prosecuted and for what than its substantive law-making; 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 30 years in prison rather than 20. If, for example, legislators are now serious about pursuing corporate crime,¹³⁶ they not only will allow the “Attorney Client Protection Act” to die in committee but will 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 current financial crisis.¹³⁷

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.¹³⁸ Just as we worry that the Justice Department’s political leadership will be too quick to focus on the economic costs of a prosecution, so too should we should recognize that line assistants and even U.S. Attorneys may be too slow. The goal 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 with the contributions that can make as the leading edge of a broader regulatory effort. To tightly tether federal prosecutors to the decisionmaking of the SEC (or EPA) Enforcement

¹³⁶ See Evan Perez, *FBI Investigates Four Firms at the Heart of the Mess*, Wall St. J., Sept. 24, 2008, at ___ (“Pressure is building for the FBI and regulators to hold top executives accountable for the crisis that has crippled the nation’s financial sector.”).

¹³⁷ See Eric Lichtblau, *Mukasey Declines to Create a U.S. Task Force to Investigate Mortgage Fraud*, N.Y. Times, June 6, 2006, at ___; Robert Schmidt, *FBI Halts Some Cases to Investigate Mortgage Frauds*, Bloomberg, June 13, 2008 (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.”).

¹³⁸ See Darryl Brown, *supra* note 104; Brandon L. Garrett, *Structural Reform Prosecution*, 93 Va. L. Rev. 853 (2007).

Division deprives the system of the benefits overlapping jurisdiction and reduces the system's resilience (to capture or other dampening influences) to that of its weakest member. 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.

The "Corporate Fraud Task Force" offers the best vehicle for navigating between these two extremes. It may have been intended as a branding device, and certainly did not amount to much more than that. 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 coordination across enforcement agencies and between Washington and the districts. Given that corporate targets will frequently come to Washington anyway, trying to avert indictment or intense prosecutorial attention with complaints of district "over-reaching," close coordination between Washington and the districts would prevent cycling between extreme decentralization and central intervention.

The Obama Administration and Congress will 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 obviously will have to be reinstated on the political agenda. Yet policymakers will independently need to recognize the distorting effects that the prioritization of easily made and counted prosecutions like those involving illegal re-entry (as well as gun and pornography possession) have on the rest of a district's workload.¹³⁹ The story of Nevada U.S. Attorney Dan Bogden, who told the crusading former Utah U.S. attorney in charge of

¹³⁹ 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 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").

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.¹⁴⁰

That the whole notion of opportunity cost seems foreign to legislators is particularly odd given the challenges of figuring out enforcement levels in any particular area. The GAO complaint (noted above) that federal enforcers simply touted the numbers of intellectual property cases they brought, without performance measures capturing either the problem sought to be addressed or the extent the feds 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 in tandem 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 often cited by the Department without any admission of opportunity costs. 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 enforcement activity. 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.

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 cross-hairs, either publicly or quietly. In part because of the White House’s failure to fully cooperate in the Justice Department investigation,¹⁴¹ we still lack the evidence to assess claims that various Democratic politicians—including former Governor Don Siegelman of Alabama—were targeted for federal prosecution

¹⁴⁰ OIG/OPR Removal Report *supra* note 17, at 205-17.

¹⁴¹ *Id.* at __.

Yet so are the democracy-reinforcing benefits that crusading outsiders (who are insiders vis a vis the national party) can bring to local politics. In the end, we can try to prevent politicians like Domenici and Wilson from calling a U.S. Attorney about a pending investigation, and establish other prophylactic rules to heighten our confidence that partisan targeting is not occurring. Indeed, the Justice Department rules—already in place but beefed up by Attorney General Mukasey—that require local federal elected officials to go through the Department’s Office of Legislative Affairs, rather than calling U.S. Attorneys directly,¹⁴⁶ 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 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.

Let us hope that the new 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 to the extent to which U.S. attorneys represent the Department at oversight or other hearings.¹⁴⁷ While one would expect a U.S. attorney to hew to the Administration line when she appears as a departmental witness, her appearance is at least some evidence that she played a part in developing that line.

¹⁴⁶ For a discussion of departmental efforts to regulate conduct between federal prosecutors and political actors, see Sara Sun Beale, *supra* note 134 at 67-70.

¹⁴⁷ See Morton Rosenberg, Congressional Research Service Report for Congress, *Congressional Investigations of the Department of Justice, 1920-2007: History, Law, and Practice* (Oct. 3, 2007), available at <http://www.fas.org/sgp/crs/misc/RL34197.pdf>

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, 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.¹⁴⁸

¹⁴⁸ Robert Jackson, *The Federal Prosecutor*, 24 J. Am. Jud. Soc’y 18 (1940), reprinted at <http://www.roberthjackson.org/Man/theman2-7-6-1/>

This balancing challenge is far greater now than it was in 1940, or even in 1980. The federal docket is larger and federal jurisdiction far broader. Perhaps even more significant is that the periphery seems far closer to the center. The 24-hour news cycle sparks interest from Washington on far more cases. And developments in information technology offer the (probably illusory) 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.