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Federal Sentencing in 2007: The Supreme Court Holds – The Center Doesn't

ABSTRACT. This essay takes stock of federal sentencing after 2007, the year of the periphery. On Capitol Hill, Attorney General Alberto Gonzales resigned in the face of widespread criticism over his role in the replacement of several U.S. Attorneys. In the Supreme Court, the trio of *Rita v. United States*, *Gall v. United States*, and *Kimbrough v. United States* clarified and perhaps extended the breadth of license given to district judges in an advisory guideline regime. In contrast to the Supreme Court's sentencing cases, which focus on the allocation of authority between judges and juries, and the bulk of the sentencing literature, which pits prosecutors against judges, the institutional pairing highlighted here is Main Justice versus the districts, with Department of Justice (DOJ) sentencing policies since 2001 considered in the larger context of DOJ efforts to exercise power over U.S. Attorneys' offices. What has often been framed as "judicial discretion" might better be seen as a coordinated exercise in local norm setting – an exercise in which line prosecutors, through charging power and shared control over investments in information gathering (in tandem with agencies) inevitably play a critical role. The extent to which prosecutors will be allowed to explicitly embrace the power they tacitly exercise already, and whether an illusory regime of sentencing uniformity will give way to a real one of collaborative norm articulation and development, remains to be seen. But the suggestion here is that the new sentencing cases may point the way to a healthier federal criminal justice system.

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INTRODUCTION

Last year will go down in the chronicles of federal criminal law as the year of the periphery. On Capitol Hill, Attorney General Alberto Gonzales, dispatched from the White House to preside over the Department of Justice (DOJ), discovered to his chagrin that U.S. Attorneys can bite back—at least when Congress wants them to. After he resigned in the face of widespread legislative and public criticism over his role in the replacement of several U.S. Attorneys (among other things), his post was filled by Michael B. Mukasey, a Washington outsider with deep roots in the Southern District of New York.¹ In the Supreme Court, the trio of *Rita v. United States*,² *Gall v. United States*,³ and *Kimbrough v. United States*⁴ enshrined the reasonable district court as the ineffable place where federal criminal policy, sentencing philosophy, and individualized judgment merge. To be sure, a close reader might consider the trilogy simply an announcement that the Court meant what it said back in 2005 when, relying on the Sixth Amendment right to trial by jury, it declared the hitherto mandatory Federal Sentencing Guidelines to be advisory in *United States v. Booker*.⁵ But reiteration befitted *Booker*, since the message of its two different majority opinions had yet to be fully assimilated by the Justice Department or the appellate law of many circuits. Now the discretionary license given to district courts across the country would be written in larger print. In a world with vanishingly few trials, the ultimate decentralized actor—the jury—in whose name this line of cases started, has pretty much dropped out of the picture except in Justice David Souter's *Gall* concurrence.⁶ The year thus presented a stark contrast between the toppling of the most centralized actor and the celebration of nearly the least.

It is too early to predict precisely how the trio of cases will play out, or what the dynamic between Justice Department headquarters (the amalgam of political leadership and central bureaucracy often referred to as “Main

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1. Sheryl Gay Stolberg & Philip Shenon, *Bush To Appoint Ex-Judge as Head of Justice Dept.*, N.Y. TIMES, Sept. 17, 2007, at 1.
 2. 127 S. Ct. 2456 (2007).
 3. 128 S. Ct. 586 (2007).
 4. 128 S. Ct. 558 (2007).
 5. 543 U.S. 220 (2005).
 6. *Gall*, 128 S. Ct. at 603 (Souter, J., concurring) (“[T]he best resolution of the tension between substantial consistency throughout the system and the right of jury trial” would be a scheme of mandatory guidelines that required “jury findings of all facts necessary to set the upper range of sentencing discretion.”).

Justice²⁷) and the U.S. Attorneys' offices in the far-flung districts will be under Attorney General Mukasey or the next Administration. But it is the perfect time to think about the potential implications for the interaction of sentencing policy and the federal enforcement system.

In contrast to the Supreme Court's sentencing cases, which at least until recently focused on the allocation of authority between judges and juries, and the bulk of the sentencing literature, which pits prosecutors against judges, the institutional pairing I wish to highlight is Main Justice versus the districts. The story of the Federal Sentencing Guidelines ought to be seen not just as an exercise in branch checking—of judges by the legislature, with help from prosecutors—but rather as part of a hierarchical project on the executive side whose contours and consequences were barely dreamed about at the outset. This project did not necessarily have to become intertwined with federal sentencing doctrine and practice. One could imagine a sentencing regulatory regime that gave free rein to prosecutorial discretion and focused only on judges. One could also imagine exertions of authority by the executive center that would not be expressed in sentencing policies. But intertwine the projects indeed did, and we are working through the fallout from their entanglement.

One goal of this essay is to place the Justice Department's recent sentencing policies within the larger context of the Department's efforts to control U.S. Attorneys' offices. A second goal, both normative and diagnostic, is to show the incoherence of those policies, at least when applied to that large part of the federal enforcement docket charging offenders normally prosecuted by state and local authorities. Indeed, the demand for consistency in how federal prosecutors handled those cases nationwide merely reinforced the most problematic aspect of the federal enforcement system—an unaccountability arising out of the insufficient demarcation of its responsibilities. A third goal is tentatively to celebrate the Supreme Court's recent (re)establishment of reasonable judicial discretion as the touchstone of federal sentencing law.

One need not have special confidence in the wisdom of sentencing judges to join this celebration. Appreciation of prosecutorial competencies and capabilities should be enough. What has often been framed as “judicial discretion” might better be seen as a coordinate exercise in local norm setting—an exercise in which line prosecutors, through charging power and shared control (with agencies) over investments in information gathering, inevitably play a critical role. Whether prosecutors will be allowed to embrace the power they tacitly exercise already, and whether an illusory regime of sentencing

7. See, e.g., JIM MCGEE & BRIAN DUFFY, *MAIN JUSTICE: THE MEN AND WOMEN WHO ENFORCE THE NATION'S CRIMINAL LAWS AND GUARD ITS LIBERTIES* (1996).

uniformity will give way to a real one of collaborative norm articulation and development, remains to be seen. But the suggestion here is that the new sentencing cases may point the way to a healthier federal criminal justice system—one in which prosecution and sentencing decisions become something more than an abstract exercise in number generation.

Part I limns the Bush Administration's centralization efforts at the Justice Department. While these efforts initially appeared aimed more at un-decentralization, their direction was pretty clear even before the U.S. Attorney firings. Part II explores how the Administration's centralization project intersected with its sentencing policy, each reinforcing the other, with the Sentencing Guidelines used as a tool of hierarchical control and the Attorney General's authority deployed in service of the Guidelines. Part III takes a normative turn and explains how the Department's sentencing policies, when promulgated against the backdrop of a federal docket largely anchored in local concerns, compounded the lack of consistency inherent in the system. Finally, Part IV explains how the Supreme Court's cases, when coupled with changes in the Department's political leadership and policies, may open up a new space for collaborative sentencing lawmaking at the district level.

I. DOJ CENTRALIZATION UNDER BUSH (II)

While the image of the overzealous prosecutor has its place in any doctrinal or institutional analysis of criminal justice pathologies, the risk of “shirking” looms as large here as in any other bureaucratic context. Prosecutors, and the agents or police officers they work with,⁸ decide what cases to pursue; decide how much evidence to gather; assess the strength of the resulting case file; and conduct the negotiations that, if successful, will produce a guilty plea obviating the need for a trial at which their work could be assessed by others. There might be prosecutors who sometimes hope that negotiations break down and trials ensue. Trials are rare commodities in the United States, and trial experience is eminently marketable.⁹ And there might be occasions in which a prosecutor prefers that a particular defendant gets a particularly high or low sentence. But the principal agency risk when it comes to sentencing is that, having threatened the highest sentence legally possible (or maybe even beyond

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

9. See Richard T. Boylan & Cheryl X. Long, *Salaries, Plea Rates, and the Career Objectives of Federal Prosecutors*, 48 J.L. & ECON. 627 (2005).

that), the prosecutor will treat sentence years as currency to be exchanged for a higher conviction rate and maybe even personal leisure.¹⁰

This generic analysis extends across all U.S. jurisdictions. Yet the federal criminal enforcement system has its own special agency problems. The basic structure and its historical roots are just the beginning of the challenge. The bulk of federal prosecutions are brought by the ninety-four U.S. Attorneys' offices, which are generally staffed by local professionals, many of whom will be leaving government service in the not-too-distant future.¹¹ These offices – which predate the Justice Department by nearly a hundred years – are headed by presidential appointees, who report (on paper at least) only to the Attorney General and his Deputy. Each appointee at least traditionally has had her own local power base, having been selected with considerable input from local political leaders.¹² Cases come to these offices or are suggested by a wide range of agencies that include federal enforcement bureaus, whose field offices may have local ties of their own, and local police departments.¹³ And to add to these institutional design challenges is the very nature of federal criminal jurisdiction, which – with a few exceptional areas where federal responsibility for the “crime rate” is somewhat clear – confounds any effort to devise effective performance measures.¹⁴

How have the federal enforcement bureaucracy's political principals responded to this degree of “slack” in the system? On the legislative side, the response over the past few decades has generally been a mix of acquiescence and self-defensive embrace. Through oversight and targeted funding, Congress

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10. See Manu Raghav, J. Mark Ramseyer & Eric Rasmusen, *Convictions Versus Conviction Rates: The Prosecutor's Choice* 14 (Mar. 30, 2008) (unpublished manuscript), <http://www.rasmusen.org/papers/prosecutors-raghav-ramseyer-rasmusen.pdf> (noting how principals cannot know how many potential cases exist “and so have difficulty evaluating the number of convictions [a prosecutor] achieves, not to mention the average sentence for those convictions”).
 11. See Todd Lochner, *Strategic Behavior and Prosecutorial Agenda Setting in United States Attorneys' Offices: The Role of U.S. Attorneys and Their Assistants*, 23 JUST. SYS. J. 271, 282-83 (2002).
 12. See JAMES EISENSTEIN, *COUNSEL FOR THE UNITED STATES: U.S. ATTORNEYS IN THE POLITICAL AND LEGAL SYSTEMS* 35-53 (1978); H.W. Perry, Jr., *United States Attorneys – Whom Shall They Serve?*, LAW & CONTEMP. PROBS., Winter 1998, at 129, 138-39; Daniel C. Richman, *Federal Criminal Law, Congressional Delegation, and Enforcement Discretion*, 46 UCLA L. REV. 757, 789-90 (1999).
 13. Richman, *supra* note 8, at 767-78.
 14. 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, 611-15 (2005).

regularly tries to shape prosecutorial priorities.¹⁵ And the disclosures in the wake of the U.S. Attorney firings highlight the readiness of at least some legislators to be occasionally quite vocal in demanding zealous pursuit of certain cases or classes of cases.¹⁶ But, at least until recently, the dominant pattern in congressional activity vis-à-vis U.S. Attorneys' offices has been to nurture their independence and their resistance to central control.¹⁷

Efforts by the Chief Executive to exercise such control have varied from administration to administration. That George W. Bush's Administration would be committed to increasing the authority of the Attorney General and his minions in Main Justice over U.S. Attorneys and their assistants was clear from the start, however, and over-determined. Certainly a relative increase in centralization was inevitable given the state of the Department at the end of President Clinton's tenure. That Administration's commitment to presidential authority, so nicely elucidated by Elena Kagan,¹⁸ found comparatively little expression in the federal criminal enforcement area. Indeed, the flip side of the wide berth that the Clinton White House left Attorney General Janet Reno in the wake of politically sensitive investigations became her political weakness in battles with Congress, the FBI, and others.¹⁹ One can fairly speculate that this

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15. Richman, *supra* note 12, at 789-810 (describing the procedural and structural mechanisms through which Congress influences federal enforcement decision making). For a recent funding example, consider the Effective Corruption Prosecutions Act of 2007, S. 118, 110th Cong. (2007), introduced in the first days of the new 110th Congress by the new Senate Judiciary Committee chair, authorizing an annual appropriation of twenty-five million dollars for four years to "increase the number of personnel to investigate and prosecute public corruption offenses." *Id.* § 4.
 16. Justice Department documents indicate sustained efforts by Representatives Darrell Issa and F. James Sensenbrenner, Jr., to get U.S. Attorney Carol Lam to pursue more "coyote prosecutions." E-mail from Carol Lam, U.S. Att'y, S.D. Cal., to Rebecca Seidel, Dep. Ass't Att'y Gen. (Aug. 2, 2006), available at <http://judiciary.house.gov/Printshop.aspx?Section=411> (DOJ document set six). Hearing testimony suggests that Senator Pete Domenici and Representative Heather Wilson of New Mexico badgered U.S. Attorney David Iglesias about a pending corruption investigation involving Democrats. See Kenneth Jost, *Prosecutors and Politics: Has the Justice Department Become Too Political?*, 17 CQ RESEARCHER 555, 558-59 (2007).
 17. See Dan M. Kahan, *Is Chevron Relevant to Federal Criminal Law?*, 110 HARV. L. REV. 469, 497 (1996); Richman, *supra* note 12, at 807-10; see also Richard W. Waterman & Kenneth J. Meier, *Principal-Agent Models: An Expansion?*, 8 J. PUB. ADMIN. RES. & THEORY 173, 175 (1998) ("In the institutional model, if a political principal such as the legislature decides that it is not in its rational self-interest to police or monitor its bureaucratic agents, that principal is unlikely to directly bear any cost incurred by the agent's continued shirking.").
 18. Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001).
 19. See Lincoln Caplan, *Hyper Hacks: What's Really Wrong with the Bush Justice Department*, SLATE, Mar. 14, 2007, <http://www.slate.com/id/2161804/> (noting that the departure of

lack of political clout affected the Department's authority over the districts. What is clear, though, is that there were few conspicuous assertions of that authority.²⁰

Moreover, the Clinton Justice Department's enforcement priorities themselves engendered a devolution of power. A federal focus on violent crime will not always come with a commitment to increased district authority. Indeed, case-counting from Washington became a hallmark of the "accountability" measures in Project Safe Neighborhood, the Bush Administration's national gun violence program.²¹ However, as federal enforcement agencies lack the manpower and informational resources to go after episodic criminal activity, and therefore depend on local police departments in this regard, the extent of the Reno Justice Department's commitment to violent crime itself had a centrifugal effect.²² Gun possession cases, car-jackings, or street drug sales will rarely come to federal agents unless the local police make the arrests and turn over the defendants. That effect was magnified by the frankness and enthusiasm with which the Department ceded control of its "Anti-Violent Crime Initiative" to the districts and celebrated

Associate Attorney General Webster Hubbell and "the arrival of the Whitewater scandal loosened the department's political leash"); David S. Cloud, *Polite Prosecutor: The Attorney General Gets Little Respect; What's Her Problem?*, WALL ST. J., Jan. 27, 2000, at A1; Jeffrey Goldberg, *What Is Janet Reno Thinking?*, N.Y. TIMES, July 6, 1997, § 6 (Magazine), at 16; Diana R. Gordon, *Can Reno Be the People's Lawyer? Justice Watch*, NATION, Mar. 21, 1994, at 370; John F. Harris & David A. Vise, *With Freeh, Mistrust Was Mutual*, WASH. POST, Jan. 10, 2001, at A1; Melinda Henneberger, *As Pressure Builds, Reno Appears Calm*, N.Y. TIMES, Sept. 4, 1999, at A9; David A. Vise & Lorraine Adams, *Hatch, Reno, and the "Palace Guard"*, WASH. POST, Oct. 29, 1999, at A29; David A. Vise & Lorraine Adams, *Revelations Inflamm Rift Between Justice Dept. and FBI*, WASH. POST, Sept. 27, 1999, at A3; see also Richman, *supra* note 8, at 773 n.110.

20. Two Clinton Administration U.S. Attorneys resigned under fire, one after being videotaped grabbing a television reporter by the throat and the other "amid accusations that he bit a topless dancer on the arm during a visit to an adult club after losing a big drug case." KEVIN M. SCOTT, CONG. RESEARCH SERV., U.S. ATTORNEYS WHO HAVE SERVED LESS THAN FULL FOUR-YEAR TERMS, 1981-2006, at 6-7 (2007) (quoting Associated Press, *U.S. Attorney Resigns amid Turmoil*, TULSA WORLD, May 18, 1996, at A13), available at http://assets.opencrs.com/rpts/RL33889_20070222.pdf.
21. For examples of intense case-counting by the DOJ, see USAO District Review, Project Safe Neighborhoods 24-28 (Mar. 6, 2006), available at <http://judiciary.house.gov/Printshop.aspx?Section=411> (DOJ document set one).
22. See Daniel C. Richman, *"Project Exile" and the Allocation of Federal Law Enforcement Authority*, 43 ARIZ. L. REV. 369, 378 (2001).

heterogeneous district strategies.²³ Indeed, the Reno Justice Department went further, allowing even international terrorism cases to be primarily run out of the districts – principally the Southern District of New York.²⁴

The new management style of the Bush/Ashcroft Justice Department was not simply a response to the reduced baseline of the prior administration, however. It also reflected an embrace of unitary executive theory that both justified and presaged a broad-based effort to subordinate all prosecutorial decision making to centralized control.²⁵ And it was of a piece with the Bush White House's efforts in other areas of executive policy.²⁶

Evidence that the Bush Administration would be tightening the reins on the districts came early, although it was not overwhelming. Following the precedent set by the Clinton Administration in 1993, though with somewhat less speed,²⁷ the Administration asked for the resignations of nearly all the U.S. Attorneys.²⁸ The number of replacement appointees with ties closer to the

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23. *Id.* at 378-83; see also OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, U.S. DEP'T OF JUSTICE, PROMISING STRATEGIES TO REDUCE GUN VIOLENCE (1999), available at http://ojjdp.ncjrs.org/pubs/gun_violence/173950.pdf.
 24. See NAT'L COMM'N ON TERRORIST ATTACKS UPON THE UNITED STATES, THE 9/11 COMMISSION REPORT 71-74 (2004), available at http://govinfo.library.unt.edu/911/report/911Report_Ch3.pdf; ANDREW C. MCCARTHY, WILLFUL BLINDNESS: A MEMOIR OF THE JIHAD (2008).
 25. For explorations of the theory and its ramifications, see, for example, Steven G. Calabresi & Saikrishna Prakash, *The President's Power To Execute the Laws*, 104 YALE L.J. 541 (1994); Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153 (1992); Thomas W. Merrill, *The Constitutional Principle of Separation of Powers*, 1991 SUP. CT. REV. 225; and Saikrishna Prakash, *The Chief Prosecutor*, 73 GEO. WASH. L. REV. 521 (2005). For critiques of the theory, see Susan Low Bloch, *The Early Role of the Attorney General in Our Constitutional Scheme: In the Beginning There Was Pragmatism*, 1989 DUKE L.J. 561; Harold J. Krent, *Executive Control over Criminal Law Enforcement: Some Lessons from History*, 38 AM. U. L. REV. 275 (1989); and Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1 (1994).
 26. See Sidney M. Milkis & Jesse H. Rhodes, *George W. Bush, the Republican Party, and the "New" American Party System*, 5 PERSP. ON POL. 461, 472 (2007) ("Already executive-centered in its approach to politics and policy, the Bush White House became even more insulated from Congress and the Republican Party as it planned and fought the war against terrorism."); see also Tim Conlan & John Dinan, *Federalism, the Bush Administration, and the Transformation of American Conservatism*, 37 PUBLIUS 279, 280 (2007); Stuart Shapiro, *An Evaluation of the Bush Administration Reforms to the Regulatory Process*, 37 PRESIDENTIAL STUD. Q. 270 (2007).
 27. See David Johnston, *Attorney General Seeks Resignations from Prosecutors*, N.Y. TIMES, Mar. 24, 1993, at A1.
 28. See Andy Newman, *White House Seeks Resignations of 3 Prosecutors in New York*, N.Y. TIMES, Mar. 16, 2001, at B3.

White House than to local power bases was interesting but not remarkable. So too was the stature of the new Criminal Division head, Michael Chertoff.²⁹

The Department's response to Enron's collapse and other financial debacles made clear that Washington would not always prevail—or at least that Washington could be persuaded of the virtues of decentralization in some areas. In July 2002 with great fanfare, President Bush announced the formation of the Corporate Fraud Task Force.³⁰ What was most noteworthy about this “Task Force” was what it was not. Although a team of Assistant U.S. Attorneys (AUSAs) was brought together under Criminal Division supervision to pursue the Enron investigations and any prosecutions flowing therefrom, corporate fraud cases generally would still be handled by U.S. Attorneys' offices in much the same way as before. More than anything, the Task Force was 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.³¹

However, the creation of the Corporate Fraud Task Force occurred against the backdrop of 9/11—an extraordinary shock to the federal system and one that implicated or could be claimed to have implicated national security concerns in all future interactions between Washington and the districts.³² Terrorism prevention would now be at the top of the Department's priorities and would exert considerable centripetal force.³³ Even as they recognized the coordinating role that U.S. Attorneys' offices would have to play in the creation

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29. See David Johnston, *Bush Chooses Chief for Federal Prosecutions*, N.Y. TIMES, Mar. 15, 2001, at A23.
30. See David E. Sanger, *Bush, on Wall St., Offers Tough Stance*, N.Y. TIMES, July 10, 2002, at A1 (reporting that President Bush announced that the Corporate Fraud Task Force would “function as a financial crimes SWAT team”).
31. See David Johnston, *The Task Force; Big Names but No Authority To Prosecute*, N.Y. TIMES, July 10, 2002, at C6 (“[L]aw enforcement officials said that the new unit would have little effect on how corporate crime is investigated by the F.B.I. and the Justice Department.”); David Voreacos & Bob Van Voris, *Bush Fraud Probes Jail Corporate Criminals Less Than Two Years*, BLOOMBERG, Dec. 13, 2007, <http://www.bloomberg.com/apps/news?pid=20601103&sid=awztp90u5kEo&refer=us#> (recounting that Main Justice officials involved in the Corporate Task Force recall that they “closely tracked cases, advising on tactics and sending Justice Department prosecutors from Washington to help U.S. attorneys nationwide”).
32. Daniel Richman, *The Past, Present, and Future of Violent Crime Federalism*, 34 CRIME & JUST. 377, 408 (2006).
33. See Richman & Stuntz, *supra* note 14, at 618-19; see also OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, THE EXTERNAL EFFECTS OF THE FEDERAL BUREAU OF INVESTIGATION'S REPRIORITIZATION EFFORTS, AUDIT REPORT 05-37 (2005), available at <http://www.usdoj.gov/oig/reports/FBI/a0537/final.pdf>.

of a domestic intelligence “network,”³⁴ Justice officials worked hard to run the operation from the top.

Although there is no clear evidence that the Bush Administration initially selected U.S. Attorneys with an eye toward centralized control, there is evidence it started doing so by Bush’s second term once Alberto Gonzales became Attorney General.³⁵ As for the firings that occurred in late 2006, it is hard to assess actual causation based on the current state of the evidence.³⁶ Not only does there appear to be a different story behind each firing, but some of the stories, particularly those of Carol Lam in San Diego and David Iglesias in New Mexico, involved exertions of power by local legislators.³⁷ Nonetheless, the available evidence does depict a significant level of dissatisfaction on the part of DOJ apparatchiks with efforts by the fired U.S. Attorneys to exercise and extend decentralized authority. In Arizona, Paul Charlton had the temerity to seek reconsideration of the determination that the death penalty be sought in one of his cases.³⁸ In Washington State, John McKay annoyed Main Justice officials by touting a local intelligence-sharing network.³⁹ And there was some

34. See Richman, *supra* note 32, at 408.

35. See Amy Goldstein & Dan Eggen, *Prosecutor Posts Go to Bush Insiders; Less Preference Shown for Locals, Senators’ Choices*, WASH. POST, Apr. 1, 2007, at A1 (“About one-third of the nearly four dozen U.S. attorney’s jobs that have changed hands since President Bush began his second term have been filled by the White House and the Justice Department with trusted administration insiders.”). *But see* Andrew Rudalevige & David E. Lewis, *Parsing the Politicized Presidency: Centralization and Politicization as Presidential Strategies for Bureaucratic Control* (Sept. 1, 2005) (unpublished manuscript), available at <http://www.princeton.edu/~delewis/Papers/rudalevigelewis.pdf> (suggesting that centralization and politicization are substitute, not complementary, strategies).

36. Without the baseline that the e-mail traffic involving retained U.S. Attorneys would provide, it is hard to tell whether the policy conflicts revealed in the e-mail traffic relating to the fired U.S. Attorneys were relatively serious or similarly provided post hoc justifications. Further light doubtlessly will be shed on the firings by any report that emerges out of the pending joint investigation by the Justice Department’s Office of the Inspector General and Office of Professional Responsibility.

37. Although the legislators involved seem to have given little thought to the matter, efforts by local politicians to recruit Washington’s muscle to serve local political ends may well undermine the long-term institutional interests of Congress. See Richman, *supra* note 12, at 808 (noting Congress’s “appreciation of decentralized authority”); see also DAVID E. LEWIS, *PRESIDENTS AND THE POLITICS OF AGENCY DESIGN* 28-29 (2003) (discussing the congressional calculus with respect to the insulation of agencies from presidential control).

38. See Richard A. Serrano, *Listing Reasons for the Firings*, L.A. TIMES, Mar. 21, 2007, at A18.

39. See Paul Shukovsky, *Ex-U.S. Attorney McKay Was Forced To Resign*, SEATTLE POST-INTELLIGENCER, Feb. 8, 2007, at B1; see also John McKay, *Train Wreck at the Justice Department*, 31 SEATTLE U. L. REV. 265, 278-79 (2008); Richman, *supra* note 32, at 423 (describing program).

dissatisfaction in Washington with Carol Lam's failure to hit the right number of immigration cases.⁴⁰

One cannot speak in definitively comparative terms because no other recent Justice Department leadership has suffered the compelled disclosure of so broad a range of internal communications. Yet it is hard to peruse the hearing testimony and the documents released in connection with the legislative probes of the U.S. Attorney firings without getting the overwhelming impression that what may have begun as a response to Attorney General Reno's policies had, under Alberto Gonzales, developed into a concerted effort to rein in district initiative and authority.

II. "UNIFORMITY" IN FEDERAL SENTENCING: THE EXECUTIVE PERSPECTIVE

Although most critiques of the Bush Administration's sentencing policies have focused on how they affected the allocation of authority between judges and prosecutors, the Department's sustained campaign against judicial sentencing discretion also ought to be seen in the context of the executive centralization project just described. If Washington were to tame the districts, it would need a mechanism of control far more pervasive than the replacement of allegedly recalcitrant political appointees. In this effort, the Bush Administration found itself a willing partner in Congress, and an alluring tool in Congress's commitment to the notion of "uniformity" in federal sentencing.

Having given scant thought to which cases within the ever-growing jurisdiction of federal enforcers ought to be pursued, Congress had nonetheless decided that it wanted "uniformity" in their handling. Such was the message of the Sentencing Reform Act (SRA) of 1984.⁴¹ To be sure, the SRA also reflected the same distrust of judges and their characteristic leniency that inspired the statutory mandatory minimum provisions that began to proliferate in the late 1980s. But there is no reason to doubt Congress's commitment to uniformity — albeit an extremely thin notion of uniformity, one that made no attempt to limit executive decisions about which cases to prosecute but simply sought to ensure that similar defendants so selected would be treated similarly.

40. *But see Q & A: Legal Matters with Carol Lam*, STAN. LAW., Fall 2007, at 24, 27 (quoting Lam recalling DOJ satisfaction with her focus on alien smuggling organizations instead of individual illegal re-entry cases).

41. Pub. L. No. 98-473, ch. II, 98 Stat. 1987 (codified at 18 U.S.C. §§ 3551-3673 (2000); 28 U.S.C. §§ 991-998 (2000)).

As Kate Stith notes, the Sentencing Guidelines and the statutory mandatory minimum provisions with which they were intertwined certainly created the potential for a vast transfer of discretionary power from judges to line prosecutors.⁴² The new scheme was supposed to constrain prosecutors as well. Although they would still have the ability either not to bring a case or to drop it thereafter, the purpose of the modified real offense sentencing approach of the Guidelines was to limit prosecutorial leverage in plea negotiations by requiring judges to base a defendant's sentence on all relevant conduct, not just the subset of it specified by the prosecutor.⁴³ But this was not to be, as judges largely abandoned the field to the parties and particularly to prosecutors. Stith has elsewhere explained:

Probation officers soon learned that it is time-consuming and often unproductive to attempt to learn "facts" from sources other than the attorneys in the case, while judges generally had no interest in forcing the parties to prove or disprove 'facts' that neither party wanted the sentence to be based upon.⁴⁴

With substantial control over the flow of offense-related facts to the judge, and even over the investment of resources in the discovery of facts to begin with, prosecutors were left with unprecedented sway over sentencing.

Yet even as judges chafed at having their hands tied by a regime that left line prosecutors free to manipulate sentences, the Justice Department leadership came to see the regime as a means of regulating those same line prosecutors. Those decrying the increase in prosecutorial power caused by the Guidelines project often forget that, particularly in the federal system, prosecutorial power is not monolithic. And what to judges seemed like a constraint on their discretion could also be viewed as an effort to constrain

42. Kate Stith, *The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion*, 117 YALE L.J. 1420, 1434 (2008); see also Frank O. Bowman, III, *The Failure of the Federal Sentencing Guidelines: A Structural Analysis*, 105 COLUM. L. REV. 1315, 1338-39 (2005) (describing mechanisms through which prosecutors could exercise discretionary authority).

43. See Julie R. O'Sullivan, *In Defense of the U.S. Sentencing Guidelines' Modified Real-Offense System*, 91 NW. U. L. REV. 1342, 1359-60 (1997); see also Frank O. Bowman, III, *Mr. Madison Meets a Time Machine: The Political Science of Federal Sentencing Reform*, 58 STAN. L. REV. 235, 244 (2005) (describing relevant conduct rules "designed to ensure that prosecutors did not manipulate their control of the facts into absolute control over sentencing outcomes"); David Yellen, *Just Deserts and Lenient Prosecutors: The Flawed Case for Real-Offense Sentencing*, 91 NW. U. L. REV. 1434, 1435 (1997) (noting that the scheme might "negate undercharging by prosecutors").

44. Kate Stith, *United States v. Mistretta: The Constitution and the Sentencing Guidelines*, in CRIMINAL PROCEDURE STORIES 455, 472 (Carol S. Steiker ed., 2006).

prosecutors, with the judges involuntarily enlisted as monitors on behalf of prosecutorial hierarchs in service of centralization of executive power.⁴⁵

Herein lay the promise of the Guidelines as an executive management tool: with the inflexibility of the scheme would come a degree of “legibility”⁴⁶ hitherto unimaginable in the system. Perhaps now an interested observer—be she a supervisor, legislator, or member of the public—would be able to tell how much of a “bargain” a plea deal was. To be sure, as seems inevitable in all such top-down legibility projects,⁴⁷ the data demanded and presumably generated by the Guidelines would not capture all the local knowledge of the courtroom “workgroup.”⁴⁸ And if all the members of the group—judge, prosecutor, and defense counsel—colluded to give a defendant an inordinately deep discount, the record might not reveal it. But collusion might become rarer over time. Having had their own hands tied, judges might not be so ready to help renegade prosecutors circumvent the system. The scheme thus seemed to offer a new degree of transparency and perhaps even a metric for assessing negotiated dispositions. Even if the outsider could not necessarily assess the justification for the discount—since, for instance, the constitutionality of a stop, search, or confession could have been contestable—she could at least recognize it as one.

Kate Stith adeptly tells how, from the start, the Justice Department became a cosponsor of the Sentencing Guideline project, in service of some mix of executive and legislative goals. Attorney General Thornburgh was quite clear in demanding adherence in the field to both the letter and the spirit of the Sentencing Guidelines. In keeping with her management style, Attorney General Reno allowed the districts and line prosecutors somewhat more discretion.⁴⁹ The change from Reno to Ashcroft was particularly dramatic. One is hard pressed to figure out the degree to which the sentencing policies of the Bush (II) Administration followed from its commitment to hierarchical

45. See Daniel Richman, *Institutional Coordination and Sentencing Reform*, 84 TEX. L. REV. 2055, 2055-57 (2006); 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).

46. JAMES C. SCOTT, *SEEING LIKE A STATE: HOW CERTAIN SCHEMES TO IMPROVE THE HUMAN CONDITION HAVE FAILED* (1998) (exploring measurement, mapping, and other devices deployed by states to make activities and relationships more “legible,” and thus more amenable to control). I thank Peter Schuck for directing me to Scott’s work.

47. *Id.* at 44.

48. See JAMES EISENSTEIN & HERBERT JACOB, *FELONY JUSTICE: AN ORGANIZATIONAL ANALYSIS OF CRIMINAL COURTS* 20 (1991).

49. Stith, *supra* note 42, at 1441.

control. Perhaps the arrow went in the other direction, with commitment to sentencing uniformity sparking increased interest in hierarchical control. In any event, the two projects dovetailed nicely.

Consider the story of the Feeney Amendment to the PROTECT Act of 2003,⁵⁰ which tightened the appellate standard of review for all departures from the Sentencing Guidelines, and in particular, called on the U.S. Sentencing Commission to reduce the incidence of downward departures. Perhaps because the measure required the DOJ “to take a more aggressive role in policing guidelines compliance and resisting downward departures ‘not supported by the facts and the law,’”⁵¹ the Amendment is generally portrayed as a legislative initiative, albeit one with considerable DOJ support.⁵² Particularly in hindsight, however, the measure might be better characterized as a DOJ project in which congressional allies willingly joined. The sponsor, Congressman Tom Feeney (R-Fla.), appears to have been carrying water for a drafting group that included Justice Department officials and a former AUSA working for House Judiciary Chairman F. James Sensenbrenner, Jr. When that aide later resigned after improperly using his boss’s name in a letter asking that a drug defendant receive a higher sentence, four senior DOJ officials intervened to get him hired as an AUSA in the District of Columbia.⁵³ Here, as on other

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

51. See 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).

52. See, e.g., Stephanos Bibas, *The Feeney Amendment and the Continuing Rise of Prosecutorial Power To Plea Bargain*, 94 J. CRIM. L. & CRIMINOLOGY 295 (2004). But see Frank O. Bowman, III, *No Time for Judges: With Feeney Amendment, Justice Department Seeks Control of Federal Sentencing*, LEGAL TIMES, Apr. 21, 2003, at 67 (noting the extent to which Congress was a cat’s paw for the DOJ).

53. See Michael Gerber, *Down with Discretion*, LEGAL AFFAIRS, Mar./Apr. 2004, at 72, 74 (“The primary author of the Feeney Amendment is Jay Apperson, who worked . . . in the Virginia U.S. attorney’s office for a decade before becoming one of Kenneth Starr’s deputies in the independent counsel’s office that investigated the Clintons As an aide to F. James Sensenbrenner, the 13-term Republican congressman from Wisconsin who chairs the House Judiciary Committee, Apperson drafted a bill to reduce judicial discretion and lengthen sentences. He worked closely with Justice Department lawyers.”); Carol D. Leonnig, *Hiring Process Was Bypassed for Prosecutor*, WASH. POST, May 8, 2007, at A4 (“When he was counsel to a House subcommittee in 2005, Jay Apperson resigned after writing a letter to a federal judge in his boss’s name, demanding a tougher sentence for a drug courier [But] when Apperson was looking for a job recently [after working in the interim for a Senate Republican], four senior Justice Department officials urged Jeffrey A. Taylor, the top federal prosecutor for the District of Columbia, to hire him. Taylor did, and allowed him to skip the rigorous vetting process that the vast majority of career federal prosecutors face.”); Jeffrey Rosen, *The Court’s Fancy Footwork: Breyer Review*, NEW REPUBLIC, Jan. 31, 2005, at 10

occasions in which the precise executive role has not been obvious,⁵⁴ congressional activity ranged somewhere between abdication and acquiescence.⁵⁵

This is not to suggest that the Feeny Amendment itself was at odds with demonstrated legislative interests. It was quite consistent with Congress's commitment to the Guidelines project, with its substantial disregard for the value of judicial discretion, and with its tradition of providing enforcement resources to federal prosecutors at the lowest cost (to the fisc, at least).⁵⁶ After all, the provision was primarily about judicial discretion, and by limiting judges' ability to depart from Guidelines calculations that reflected a high degree of prosecutorial input, it essentially endowed prosecutors with additional bargaining power that could be flexed for more and speedier dispositions.

Once one recognizes the Justice Department's role in the Feeny Amendment, other features of that measure are similarly redolent of the Department's willful conflation of sentencing and centralization policies. Consider the provision that conditioned further use of "fast-track" programs – used in a number of hard-pressed districts to obtain speedy dispositions and broad waivers, generally in immigration cases, by offering extraordinarily lenient sentences – on explicit permission from the Attorney General.⁵⁷ Perhaps the measure was simply an effort to give "legitimacy and legislative support to

(suggesting that the Feeny Amendment was "[l]argely drafted by the Ashcroft Justice Department").

54. See Doo-Rae Kim, *Political Control and Bureaucratic Autonomy Revisited: A Multi-Institutional Analysis of OSHA Enforcement*, 18 J. PUB. ADMIN. RES. & THEORY 33, 34 (2008) ("[E]mpirical research into regulatory behavior has traditionally underestimated the importance of joint actions among political principals to an agency.").
55. See Keith E. Whittington & Daniel P. Carpenter, *Executive Power in American Institutional Development*, 1 PERSP. POL. 495 (2003) (noting the need for scholars to go beyond models of legislative abdication and delegation to consider acquiescence).
56. See O'Hear, *supra* note 51, at 786-90 (discussing the legislative intent behind the Feeny Amendment); see also Max Schanzenbach, *Have Federal Judges Changed Their Sentencing Practices? The Shaky Empirical Foundations of the Feeny Amendment*, 2 J. EMPIRICAL LEGAL STUD. 1 (2005).
57. See Albert Llosas Barrueco, *Fast-Tracking United States v. Booker: Why Judges Should Not Fix Fast Track Disparities*, 6 CONN. PUB. INT. L.J. 65, 75 (2006); Evan W. Bolla, *An Unwarranted Disparity: Granting Fast-Track Departures in Non-Fast-Track Districts*, 28 CARDOZO L. REV. 895 (2006); Michael M. O'Hear, *Localization and Transparency in Sentencing: Reflections on the New Early Disposition Departure*, 27 HAMLINE L. REV. 357 (2004); *Charging, Plea, and Early Disposition Policies Before the U.S. Sent'g Comm'n* (2003) (statement of Paul Charlton, U.S. Attorney, District of Arizona), available at http://www.ussc.gov/hearings/9_23_03/Charlton.pdf.

an already existing practice.”⁵⁸ But it can also be seen as an effort by Main Justice to prevent U.S. Attorneys’ offices from responding to local conditions or drifting away from departmental priorities – an effort that would essentially recruit sentencing judges as monitors in service of top-down regulation.

So too with the Ashcroft Memorandum, promulgated six months after the passage of the Feeny Amendment. In it, the Attorney General enjoined 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.⁵⁹ Moreover, “if readily provable facts are relevant to calculations under the Sentencing Guidelines, the prosecutor must disclose them to the court,” because prosecutors could not “‘fact bargain,’ or be party to any plea agreement that results in the sentencing court having less than a full understanding of all readily provable facts.”⁶⁰ The Memorandum can be seen as a laudable effort to even-handedly constrain prosecutors to the same extent as judges, binding both actors to the available facts and the Guidelines calculations that flow from them.⁶¹ But it also fit nicely with departmental efforts to reduce consideration of local realities in the districts.

Even the now infamous provision in the 2006 USA PATRIOT Act reauthorization that changed the procedures for the appointment of interim U.S. Attorneys⁶² may have reflected parallel sentencing and political control goals, as well as utter congressional acquiescence in an executive project. The measure certainly strengthened the hands of the Attorney General and the White House in firing and replacing U.S. Attorneys. Previously, if the new U.S. Attorney whom the Attorney General had picked to fill a vacancy 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

58. Barrueco, *supra* note 57, at 75.

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

60. *Id.*

61. See Bibas, *supra* note 52, at 301-02 (“[T]he many critics of Ashcroft’s new restrictions on plea bargaining fail to see how they actually improve the balance of power. By limiting charge bargaining, he is limiting line prosecutors’ arbitrariness and partially offsetting the Feeny Amendment’s lopsidedness.”).

62. 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).

permit[ted] the Attorney General's temporary designee to serve until the vacancy [had been] filled by confirmation and appointment."⁶³ Yet according to Daniel Collins, for whom the move to allow interim U.S. Attorneys to stay in their posts indefinitely was a pet project while at the Justice Department, it was judicial anger at the Feeney Amendment that led him to push for eliminating judges from the interim appointments process.⁶⁴ The Department's then-congressional liaison, William Moschella, got a staffer on the Senate Judiciary Committee, Brett Tolman, to slip the provision into the USA PATRIOT Act reauthorization. Tolman thereafter was appointed U.S. Attorney for Utah.⁶⁵

So how does one determine what role centralization goals have played in the Department's sentencing policies? Institutional mind-reading is always a challenge. Sometimes one can work backwards and presume intentionality from the natural result of a program. But this line of reasoning does not go far when dealing with measures that no informed observer would expect to be very successful. Any theoretical model would predict that the informational costs on this hierarchical control project would be prohibitive.⁶⁶ And a practitioner would agree. As Frank Bowman has noted: "the experience of the

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63. BRIAN T. YEH & CHARLES DOYLE, CONG. RESEARCH SERV., USA PATRIOT IMPROVEMENT AND REAUTHORIZATION ACT OF 2005: A LEGAL ANALYSIS 49 (updated Dec. 21, 2006), available at <http://www.fas.org/sgp/crs/intel/RL33332.pdf>.
64. See Chitra Ragavan, *Change in Naming Interim U.S. Attorneys Was Benign, Former Justice Official Says*, U.S. NEWS & WORLD REP., Apr. 12, 2007, <http://www.usnews.com/usnews/news/articles/070412/12gonzales.htm>.
65. See *id.*; see also E-mail Correspondence Between William Moschella, Brett Tolman & Daniel Collins (assorted dates), available at <http://judiciary.house.gov/Media/pdfs/dag1990-2062.pdf> (DOJ document set three).
66. See John T. Scholz, Jim Twombly & Barbara Headrick, *Street-Level Political Controls over Federal Bureaucracy*, 85 AM. POL. SCI. REV. 829, 847 (1991) (finding, based on a study of county-level enforcement activities of the federal Occupational Safety and Health Administration, that "[t]he inevitable discretion of street-level bureaucrats occurs even in enforcement agencies, despite the volumes of regulations that govern their behavior and sophisticated management information systems that monitor their activities"). The management control problems faced by the Justice Department would not be surprising to anyone familiar with large bureaucracies. See Martin Landau & Russell Stout, Jr., *To Manage Is Not To Control: Or the Folly of Type II Errors*, 39 PUB. ADMIN. REV. 148, 152 (1979) ("The history of American bureaucracy instructs us that efforts to 'impose' control and 'force' compliance lead to disaster."); Paul A. Sabatier, John Loomis & Catherine McCarthy, *Hierarchical Controls, Professional Norms, Local Constituencies, and Budget Maximization: An Analysis of U.S. Forest Service Planning Decisions*, 39 AM. J. POL. SCI. 204, 207 (1995) ("[T]op officials have less control over 'street-level bureaucrats' than the Progressives envisioned . . . particularly when field officials are professionals whose job commitment is contingent upon their ability to exercise substantial discretion." (internal citations omitted)).

last decade, during which variants of the same policy [regarding charging and accepting pleas to only the most serious provable offense] have always been in place, strongly suggests that the Justice Department cannot meaningfully restrain local United States Attorney's Offices from adopting locally convenient plea bargaining practices."⁶⁷

The best evidence of the challenges to top-down management comes from federal death penalty cases, where the Department's commitment to national uniformity long predates the Ashcroft Memorandum. A very large proportion of homicides in the United States, including those committed in connection with drug trafficking, racketeering, civil rights offenses, and even some robberies, can potentially be charged federally with a death sentence sought. Yet comparatively few are. Since 1988, when the federal death penalty was reinstated, the Attorney General has authorized its use against only 435 defendants.⁶⁸ Until 1994, the Attorney General would not consider a case unless a U.S. Attorney's office had decided that the death penalty would be appropriate. Thereafter, in an effort to ensure greater uniformity in administration, the federal protocol was revised to require that federal prosecutors submit for review by the Attorney General all cases in which the death penalty could have been sought based on the federal offenses being charged, regardless of whether the U.S. Attorney wished to seek that penalty.⁶⁹ Attorney General Reno also directed a study of demographic and geographic differences in the 682 such "death-eligible" cases that had been submitted by U.S. Attorneys' offices for review between January 1995 and July 2000.⁷⁰ Upon finding ethnic minorities overrepresented in these 682 cases, Attorney General Reno went one step further and directed that the universe of inquiry be expanded to include cases in which a death-eligible charge would have been factually supportable but had not been brought. Attorney General Ashcroft,

67. Frank O. Bowman, III, *Beyond Band-Aids: A Proposal for Reconfiguring Federal Sentencing After Booker*, 2005 U. CHI. LEGAL F. 149, 193; see also Albert W. Alschuler, *Disparity: The Normative and Empirical Failure of the Federal Guidelines*, 58 STAN. L. REV. 85, 113-14 (2005).

68. See Dick Burr, David Bruck & Kevin McNally, Fed. Death Penalty Res. Counsel Project, An Overview of the Federal Death Penalty Process (Apr. 1, 2008), http://capdefnet.org/fdprc/contents/shared_files/docs/1__overview_of_fed_death_process.asp. Determining the appropriate denominator to use for this numerator is, as will be seen, a daunting question.

69. See STEPHEN P. KLEIN, RICHARD A. BERK & LAURA J. HICKMAN, RAND CORP., RACE AND THE DECISION TO SEEK THE DEATH PENALTY IN FEDERAL CASES 3 (2006); Rory K. Little, *The Federal Death Penalty: History and Some Thoughts About the Department of Justice's Role*, 26 FORDHAM URB. L.J. 347, 406-40 (1999).

70. See U.S. DEP'T OF JUSTICE, THE FEDERAL DEATH PENALTY SYSTEM: A STATISTICAL SURVEY 1988-2000 (2000), available at http://www.usdoj.gov/dag/pubdoc/_dp_survey_final.pdf (looking only at death-eligible cases).

who had assumed the leadership of the Department in the interim, issued a report on the cases in this expanded universe, and directed that efforts be made to assess how this universe was constructed.⁷¹

The problem is that the truly relevant universe—that of homicide cases that could be pursued federally but usually are not—is not so amenable to study and regulation. The best a recent qualitative study commissioned by the Justice Department could do was to draw on “the analogy of a window that is cracked open (or slammed shut) to let in homicide cases.”⁷² It further observed that “the degree to which the window to federal involvement is open depends on two conditions: openness of both local and federal authorities to potential federal involvement and interaction and coordination between them.”⁷³ Emphasizing the extent to which local authorities played a gatekeeping role, the study noted: “One city adamantly refused federal assistance with homicides or local crimes in general, while a neighboring city had learned to use federal assistance and capabilities as an integral part of both law enforcement and prosecutorial practices.”⁷⁴

Under Attorneys General Ashcroft and Gonzales, the Justice Department’s quest for strict horizontal equity and “uniformity” in capital cases was accompanied by a readiness to overrule local decision making⁷⁵—a readiness that may have contributed to the firing of several of the U.S. Attorneys.⁷⁶ There is, however, an essential incoherence in the notion of “uniformity” when the universe of potential federal cases has never been prespecified, and when decisions to put homicide cases on the federal radar screen are so idiosyncratic. It is not altogether meaningless to command that a subordinate treat like cases alike, yet give her untrammelled discretion about what becomes a “case.” But it comes close.

71. U.S. DEP’T OF JUSTICE, THE FEDERAL DEATH PENALTY SYSTEM: SUPPLEMENTARY DATA, ANALYSIS AND REVISED PROTOCOLS FOR CAPITAL CASE REVIEW (2001), *available at* <http://www.usdoj.gov/dag/pubdoc/deathpenaltystudy.htm>.

72. PHYLLIS J. NEWTON, CANDACE M. JOHNSON & TIMOTHY M. MULCAHY, NAT’L OPINION RESEARCH GROUP, INVESTIGATION AND PROSECUTION OF HOMICIDE CASES IN THE U.S.: THE PROCESS FOR FEDERAL INVOLVEMENT 40 (2006), *available at* <http://www.ncjrs.gov/pdffiles1/nij/grants/214753.pdf>.

73. *Id.* at 41.

74. *Id.* at 43.

75. For a critique, 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).

76. See Jost, *supra* note 16; Richard A. Serrano, Tom Hamburger & Ralph Vartabedian, *At Justice, Life-and-Death Frictions*, L.A. TIMES, Mar. 26, 2007, at A10.

The Justice Department's Guidelines project represented an effort to scale up this quixotic quest for uniformity from capital cases to all cases. The level of monitoring would be far lower outside the capital context. But the intense focus on what made it onto the federal radar screen, and concomitant disregard for what never did was the same. Indeed, the project's chance of success might be underestimated by those who do not consider how organizational cultures can change. Life-tenured judges had, over time and through self-selection, become increasingly inured to the way the Guidelines and mandatory minimums cut to the heart of what their predecessors saw as the judge's role.⁷⁷ Surely it was not far-fetched to expect that hierarchically-controlled line prosecutors with far shorter tenures would soon begin thinking that cases came into the office with sentences attached to them, at least where the prosecutor did little to develop the cases herself.

Then came *Booker*, which struck at the core of the uniformity project by relieving sentencing judges of the obligation to adhere to the Guidelines.

In the immediate aftermath of *Booker*, the DOJ's chief stratagem was to pretend nothing had happened. A memo to all federal prosecutors enjoined them to "take all steps necessary to ensure adherence to the sentencing guidelines."⁷⁸ The Department's position led one district judge to complain that "the executive branch [was] continuing to campaign for . . . a supposedly scientific equation of justice, without mentioning the wholly unscientific and overwhelming discretion it exercises over the sums that equation produces."⁷⁹ He went on to chide "the executive" for wanting "to be prosecutor and judge" and for "arbitrarily claim[ing] that any sum lesser than what it contrives is unreasonable and contrary to law."⁸⁰ In an apparent response to this sort of resistance, and to the post-*Booker* legal uncertainty, Attorney General Gonzales

77. See Richard T. Boylan, *Do the Sentencing Guidelines Influence the Retirement Decisions of Federal Judges?*, 33 J. LEGAL STUD. 231 (2004); David M. Zlotnick, *Republican Appointees and Judicial Discretion: Case Studies from the Federal Sentencing Guidelines Era* (June 2007) (unpublished manuscript), <http://faculty.rwu.edu/dzlotnick/OSI-Report-june2007.pdf>.

78. Memorandum from Deputy Att'y Gen. James B. Comey to All Federal Prosecutors (Jan. 28, 2005), available at http://sentencing.typepad.com/sentencing_law_and_policy/files/dag_jan_28_comey_memo_on_booker.pdf; see also Laurie P. Cohen, *Justice Department Is Pressuring Judges on Sentencing Guidelines*, WALL ST. J., Feb. 2, 2005, at A4.

79. *United States v. Williams*, 372 F. Supp. 2d 1335, 1338 (M.D. Fla. 2005) (finding a guidelines sentence inappropriate in part because of the disparity between crack and powder cocaine sentences), *vacated*, 456 F.3d 1353 (11th Cir. 2006).

80. *Id.*

went further and proposed turning the Guidelines into mandatory minimums.⁸¹

The change of party control in Congress and the flap over the U.S. Attorney firings have taken a toll on the Department's efforts, however. The Department's principal legislative goal these days is to avoid the retroactive application of the new crack cocaine guidelines.⁸² Any plans for undoing *Booker* have at least been put in abeyance. With a likely lull on the legislative and executive sides, this is a good time to reassess the project.

III. CRITIQUE OF THE DOJ'S GUIDELINES PROJECT

Regardless of its motives, the Justice Department's effort to promote rigid "compliance" with the Federal Sentencing Guidelines—to the degree it had any effect at all—would reinforce the most problematic features of the federal criminal enforcement system: its minimal political accountability and the related absence of adequate performance measures.⁸³

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81. See Att'y Gen. Alberto Gonzales, Sentencing Guidelines Speech (June 21, 2005), available at <http://www.usdoj.gov/archive/ag/speeches/2005/06212005victimssofcrime.htm> (noting that loss of "mandatory guidelines system . . . threatens the progress we have made in ensuring tough and fair sentences for federal offenders"); see also David M. Zlotnick, *The Future of Federal Sentencing Policy: Learning Lessons from Republican Judicial Appointees in the Guidelines Era*, 79 U. COLO. L. REV. 1, 16 (2008) (describing the Justice Department's reaction to *Booker*); Press Release, U.S. Dep't of Justice, Attorney General Alberto R. Gonzales Announces Expansion of Justice Department Efforts and Proposes New Legislation To Help Prevent and Combat Violent Crime (June 1, 2007), available at http://www.usdoj.gov/opa/pr/2007/June/07_ag_398.html (proposing the Violent Crime and Anti-Terrorism Act of 2007).
82. U.S. SENT'G COMM'N, AMENDMENTS TO THE SENTENCING GUIDELINES (2007), available at <http://www.ussc.gov/2007guid/finalamendo7.pdf> (amending § 2D1 and making the new Guidelines retroactive); U.S. SENT'G COMM'N, AMENDMENTS TO § 1B1.10 REDUCTION IN TERM OF IMPRISONMENT AS A RESULT OF AMENDED GUIDELINE RANGE (2007), available at <http://www.ussc.gov/2007guid/030308rf.pdf>. It is worth noting that even as Attorney General Mukasey voiced opposition to the retroactivity provision, some U.S. Attorneys' offices had already consented to retroactive application in several cases. See Richard B. Schmitt, *Confusion Arises over Crack Cases, Mukasey and Some U.S. Attorneys Are Not on the Same Page*, L.A. TIMES, Feb. 8, 2008, at A14; see also *United States v. Herndon*, No. 3:01CR00063, 2008 U.S. Dist. LEXIS 22277, at *1 n.1 (W.D. Va. Mar. 19, 2008) (complaining that the U.S. Attorney's "blanket objection in all cases" in which a sentence reduction based on the retroactivity provision was being considered "does not assist the court in making [a particularized determination], and, in fact hinders it").
83. See Richman & Stuntz, *supra* note 14, at 609 (suggesting that the "two central truths of federal criminal law enforcement" are "a very small sphere of responsibility coupled with a very large sphere of jurisdiction").

As Kate Stith has written, the notion of consistency is illusory even when it comes to *judicial* decisionmaking across federal districts.⁸⁴ But at least the informational universe for assessing judges is a closed one. Not so for prosecutors, who play a leading role in the construction of this universe. In theory, federal enforcement agencies, such as the FBI, the Bureau of Alcohol, Tobacco, Firearms, and Explosives, and the Drug Enforcement Administration, could play a significant role in ensuring consistency. Given that federal cases are generally a function of team production involving prosecutors and law enforcement agencies, it might be enough for Washington to monitor and regulate how cases get presented for prosecution.⁸⁵ Yet in large swathes of the federal docket, the extent to which federal enforcement authority has been leveraged or outsourced through task forces, deputization, or other formal or informal mechanisms of collaboration with the local police⁸⁶ means that the ties of agency field offices to local authorities have become particularly close—and at the expense of centralized control.

Is the reliance of U.S. Attorneys' offices on local informational networks and their close connection to the local politico-legal community a "bug" or a "feature" of the federal enforcement system? The question is relative because the very nature of a criminal justice project, which relies on localized investments in information gathering, and the very nature of the American adjudicatory process,⁸⁷ which relies on local juries applying local norms, would engender connections to the local community irrespective of bureaucratic structure. Yet in the federal context—where the local prosecutors lack the political and legal independence that most district attorneys have in state systems⁸⁸—the relationship between the districts and the center is open to manipulation at the margins and is worth considering as a normative matter.

The "bug" position is implicit in many analyses of the federal enforcement bureaucracy and in the DOJ Guidelines project itself. And there is something to

84. See Stith, *supra* note 42, notes 99-100 and accompanying text.

85. See Richman, *supra* note 8, at 808-09 (drawing on team production literature to understand relationships between prosecutors and law enforcement agents).

86. See MALCOLM RUSSELL-EINHORN, SHAWN WARD & AMY SEEHERMAN, FEDERAL-LOCAL LAW ENFORCEMENT COLLABORATION IN INVESTIGATING AND PROSECUTING URBAN CRIME, 1982-1999: DRUGS, WEAPONS, AND GANGS (2000); see also Richman, *supra* note 32, at 394-407 (pre-9/11 dynamic); *id.* at 408-15 (post-9/11 dynamic).

87. See Mirjan Damaška, *Structures of Authority and Comparative Criminal Procedure*, 84 YALE L.J. 480, 511-15 (1975).

88. See Robert L. Misner, *Recasting Prosecutorial Discretion*, 86 J. CRIM. L. & CRIMINOLOGY 717, 750 (1996) (discussing the lack of hierarchical authority that most state attorneys general have over local prosecutors); Richman, *supra* note 45, at 2064 (same).

be said for it. History is hardly a source of confidence in the suitability of the Department's structure. With offices created at a time of minimal federal criminal enforcement activity,⁸⁹ the U.S. Attorneys were not put under the supervision of the Attorney General until 1861,⁹⁰ and the Justice Department was not created until 1870. The next hundred years saw the commitment of federal enforcement resources to a variety of new areas, with Congress and Presidents increasingly ready to target white slavers, bootleggers, highway gangsters, and big-city racketeers.⁹¹ But the federal portfolio remained small—and activity within that portfolio spotty. The exception to all this was, of course, Prohibition, when the U.S. Attorney system faced its first extended challenge, with state and local enforcers perfectly happy to leave unpopular enforcement to federal authorities.⁹² During this period, by all accounts,

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89. Judiciary Act of 1789, ch. 20, § 435, 1 Stat. 73, 93 (codified as amended at 28 U.S.C. § 1651 (2000)); DWIGHT F. HENDERSON, CONGRESS, COURTS, AND CRIMINALS: THE DEVELOPMENT OF FEDERAL CRIMINAL LAW, 1801-1829, at 13 (1985); Adam H. Kurland, *First Principles of American Federalism and the Nature of Federal Criminal Jurisdiction*, 45 EMORY L.J. 1 (1996); see also STEPHEN MIHM, A NATION OF COUNTERFEITERS: CAPITALISTS, CON MEN AND THE MAKING OF THE UNITED STATES 57 (2007) (suggesting that Jeffersonian Republicans' distrust of centralized authority "may account for why the federal government did so little to prevent, prosecute, or punish counterfeiting of any sort in the years after 1800").
90. See Bruce A. Green & Fred C. Zacharias, "The U.S. Attorneys Scandal" and the Allocation of Prosecutorial Power, 69 OHIO ST. L.J. (forthcoming May 2008) (manuscript at 10, on file with The Yale Law Journal); see also Jerry L. Mashaw, *Administration and The Democracy: Administrative Law from Jackson to Lincoln, 1829-1861*, 117 YALE L.J. (forthcoming June 2008) (manuscript at 13-14, on file with The Yale Law Journal); Jerry L. Mashaw, *Recovering American Administrative Law: Federalist Foundations, 1787-1801*, 115 YALE L.J. 1256, 1289-91 (2006) (describing the status of the Attorney General at the time of the Founding).
91. See Daniel C. Richman & William J. Stuntz, *Defining Federal Crimes* 4 (Nov. 2007) (unpublished manuscript, on file with author).
92. See Lincoln C. Andrews, *Prohibition Enforcement as a Phase of Federal Versus State Jurisdiction in American Life*, 129 ANNALS AMER. ACAD. POL. & SOC. SCI. 77 (1927) (complaining, as Assistant Secretary of the Treasury, in charge of Prohibition, about the failure of state and local authorities to enforce Prohibition); Louis B. Boudin, *The Place of the Anti-Racketeering Act in Our Constitutional-Legal System*, 28 CORNELL L.Q. 261, 273-74 (1943) (describing how state and local authorities left Prohibition enforcement to the federal authorities); Robert Post, *Federalism, Positive Law, and the Emergence of the American Administrative State: Prohibition in the Taft Court Era*, 48 WM. & MARY L. REV. 1 (2006); Albert E. Sawyer, *The Enforcement of National Prohibition*, 163 ANNALS AM. ACAD. POL. & SOC. SCI. 10, 11 (1932) ("[W]ith the steady enlargement of Federal police jurisdiction, culminating in the Eighteenth Amendment, has come the necessity for concerted action on the part of [the] heretofore entirely independent groups in the enforcement of a single law."). The story before Prohibition is one of challenges that were regrettably not faced, like civil rights enforcement after Reconstruction, see ROBERT J. KACZOROWSKI, THE POLITICS OF JUDICIAL INTERPRETATION: THE FEDERAL COURTS, DEPARTMENT OF JUSTICE AND CIVIL RIGHTS, 1866-1876 (1985); Frederick M. Lawrence, *Civil Rights and Criminal Wrongs: The Mens Rea of*

dysfunction reigned. Forced to scale up their operations and perhaps not sharing Washington's commitment to the project, U.S. Attorneys' offices compromised cases at fire-sale prices.⁹³

Scale was not the only source of institutional tension within the Department during Prohibition, however. One vignette from New York City in 1928 highlights the organic disjunction between local and national offices on issues of enforcement priorities, and in particular the way a U.S. Attorney's office's ties to local elites can moderate its commitment to a national program. During the quiet days of late August 1928, while U.S. Attorney Charles Tuttle was out of town, a special assistant reporting to Mabel Walker Willebrandt, the redoubtable Assistant Attorney General in charge of Prohibition enforcement, had grand jury subpoenas served on 125 "society leaders, bankers, police and prohibition agents said to have been patrons of twenty-six night clubs raided recently by the Federal dry forces."⁹⁴ Immediately upon hearing of this conspicuous shift to a demand-side strategy, Tuttle shut down the inquiry, declaring: "As long as I am United States Attorney here, . . . citizens will not be called in wholesale lots in this way. I am here to protect the citizenry of New York."⁹⁵ By the next day, Willebrandt had responded, insisting that Tuttle had known of the subpoenas. She declared, "Nothing will be allowed to handicap the Government's investigation."⁹⁶ The inquiry went forward under Willebrandt's direction, with Tuttle and his staff notably absent from the grand jury room. The *New York Times* observed, "It is believed here that a serious departmental situation would result if Mr. Tuttle should intervene in any way with the Grand Jury investigation. Heretofore, in controversies between Mrs. Willebrandt and United States Attorneys, the former has almost invariably been sustained."⁹⁷ A year later, however, the *Times* reported, "Mr.

Federal Civil Rights Crimes, 67 TULANE L. REV. 2113, 2133-66 (1993), and that did not substantially materialize—like sabotage and treason during the First World War.

93. See John F. Padgett, *Plea Bargaining and Prohibition in the Federal Courts, 1908-1934*, 24 LAW & SOC'Y REV. 413 (1990); Ronald F. Wright, *Trial Distortion and the End of Innocence in Federal Criminal Justice*, 154 U. PA. L. REV. 79, 127 (2005) ("Apparently, in the liquor cases, federal prosecutors had to offer larger concessions in their recommended sentences before defendants would give up their valuable trial rights."); see also Edward Rubin, *A Statistical Study of Federal Criminal Prosecutions*, 1 LAW & CONTEMP. PROBS. 494, 497 tbl.1 (1934) (finding that in 1930, roughly sixty-five percent of the 87,305 federal criminal cases were for Prohibition violations).
94. *Tuttle Halts Drive on Clubs' Patrons; Scores Dry Tactics*, N.Y. TIMES, Aug. 21, 1928, at 1.
95. *Id.*
96. *Mrs. Willebrandt Insists Tuttle Knew of Club Subpoenas*, N.Y. TIMES, Aug. 22, 1928, at 1.
97. *Willebrandt Aide Pushes Dry Inquiry in Spite of Tuttle*, N.Y. TIMES, Aug. 23, 1928, at 1, 10.

Tuttle won out, and the grand jury ended this phase of its work,” a victory that Mrs. Willebrandt later attributed to Tuttle’s “political ambitions.”⁹⁸

Following repeal, the federal prosecutorial establishment was able to return to its vagarious pursuits, with the “agenda” (a charitable description) reflecting enforcement agencies seeking to boost their statistics⁹⁹ or status;¹⁰⁰ the preferences of local U.S. Attorneys, and the occasional administration initiative.¹⁰¹ In 1976, a public administration scholar, having spent a year working in the Justice Department, concluded that “the federal justice system acts peculiarly as if it were a non-system.”¹⁰² He observed that “despite their apparent interdependence with each other—investigative, enforcement, prosecutorial, judicial, corrections, and parole segments of federal justice—the structured pressures of decentralized decision making allows [sic] for enormous independence and disparities among these Justice units.”¹⁰³

The last quarter of the twentieth century saw a dramatic expansion of the federal enforcement establishment and its ostensible responsibilities, particularly in the areas of white collar crime, narcotics, and violent crime. Perhaps the decentralization of the federal system itself facilitated this growth. This possibility seems particularly likely in the local corruption area where innovative prosecutorial theories—only later sanctioned by congressional action¹⁰⁴—arose out of district experimentation in an enforcement space in

98. *Tuttle Newcomer to Political Fray*, N.Y. TIMES, Sept. 27, 1930, at 4. U.S. Attorney Tuttle soon ran for governor of New York as an “outspokenly wet Republican” candidate against incumbent Democrat Franklin Roosevelt. MICHAEL A. LERNER, DRY MANHATTAN: PROHIBITION IN NEW YORK CITY 295 (2007).

99. EISENSTEIN, *supra* note 12, at 106 tbl.6.2 (1978) (showing that Dyer Act, 18 U.S.C. § 2311-13 (1970), prosecutions constituted between a sixth and an eighth of all federal prosecutions between 1964 and 1970); Richman & Stuntz, *supra* note 14, at 614; Richard J. Stillman, II, *The Bureaucracy Problem at DOJ*, 36 PUB. ADMIN. REV. 429, 429 (1976) (noting “[p]ressure on FBI offices around the country ‘to make their statistics look good’”); see also JAMES Q. WILSON, *THE INVESTIGATORS: MANAGING FBI AND NARCOTICS AGENTS* 172 (1978) (noting how FBI Director J. Edgar Hoover touted Dyer Act (interstate car theft) statistics).

100. See Kathleen J. Frydl, *Kidnapping and State Development in the United States*, 20 STUD. IN AM. POL. DEV. 18, 20-44 (2006) (assessing J. Edgar Hoover’s “institutional transformation” achievements at the FBI during the 1930s).

101. See generally EISENSTEIN, *supra* note 12, at 76-100 (describing the dynamics of interaction between Washington and U.S. Attorneys).

102. Stillman, *supra* note 99, at 429.

103. *Id.*

104. See, e.g., 18 U.S.C. § 666 (2000) (federal program bribery); 18 U.S.C. § 1346 (2000) (intangible rights deprivation as a basis for federal mail and wire fraud prosecutions); see also Richman & Stuntz, *supra* note 14, at 617.

which local norm-generation offered some insurance against federal overreaching.¹⁰⁵

Yet given that this scale-up was not accompanied by any significant change in the Justice Department's structure, it is entirely possible that the present path-dependent U.S. Attorney scheme is just not "fit for purpose," as the Brits are wont to say. The more that can be done to rein in these appendages, the argument goes, the better, particularly with respect to case selection and plea bargaining.¹⁰⁶ To expand on Frank Bowman's "sticker price" metaphor,¹⁰⁷ one might see Washington facing all the problems endemic to a far-flung vertical distribution chain with franchisees that cannot be trusted to report and develop demand. After all, federal sentences are effectively the price at which federal prosecutors "sell" convictions. And resale price maintenance—which is one way of characterizing the Ashcroft Memorandum and the promotion of Guidelines "compliance"—might be one way of protecting the "quality" of federal prosecutions. By monitoring the kinds of cases brought by the districts and preventing line prosecutors from offering discounts, Washington can ensure that prosecutors, forced to demand full price from defendants, will invest more in making the cases.¹⁰⁸ In this elegant, albeit surreal, model, defense lawyers are effectively recruited as quality monitors of prosecutorial efforts, as a prosecution will either lead to a full-price sentence or an acquittal.

Another argument for maximal control from Washington was cogently made by Dan Kahan when he noted the risk of "prosecutorial overreaching" inherent in the U.S. Attorney system and the benefits that the reallocation of

105. See Sara Sun Beale, *Comparing the Scope of the Federal Government's Authority To Prosecute Federal Corruption and State and Local Corruption: Some Surprising Conclusions and a Proposal*, 51 HASTINGS L.J. 699 (2000); Michael W. Carey, Larry R. Ellis & Joseph F. Savage, Jr., *Federal Prosecution of State and Local Public Officials: The Obstacles to Punishing Breaches of the Public Trust and a Proposal for Reform* (pt. 1), 94 W. VA. L. REV. 301 (1991-92); Charles F.C. Ruff, *Federal Prosecution of Local Corruption: A Case Study in the Making of Law Enforcement Policy*, 65 GEO. L.J. 1171 (1977).

106. For an argument along these lines, see Mark Osler, *This Changes Everything: A Call for a Directive, Goal-Oriented Principle To Guide the Exercise of Discretion by Federal Prosecutors*, 39 VAL. U. L. REV. 625 (2005).

107. See *Only Suckers Pay the Sticker Price: The Effect of "Fast Track" Programs on the Future of the Sentencing Guidelines as a Principled Sentencing System: Hearing Before the U.S. Sent'g Comm'n* (Sept. 23, 2003) (statement of Frank O. Bowman, III, M. Dale Palmer Professor of Law, Indiana University School of Law), available at http://www.ussc.gov/hearings/9_23_03/fbowman.pdf.

108. See Benjamin F. Blair & Tracy R. Lewis, *Optimal Retail Contracts with Asymmetric Information and Moral Hazard*, 25 RAND J. ECON. 284 (1994) (discussing joint-profit-maximizing retail contracts where the manufacturer can observe neither the level of service supplied by dealer nor the state of demand).

“lawmaking authority” to Main Justice would offer: “Distant and largely invisible bureaucrats within the Justice Department lack the incentives that individual U.S. Attorneys have to bend the law to serve purely local interests,” and “the Department is more likely than are U.S. Attorneys to internalize the social costs of bad readings.”¹⁰⁹ Although Kahan made these points in the context of giving Washington greater control over how federal criminal statutes are interpreted, concerns about suboptimal U.S. Attorney drift might easily extend beyond statutory interpretation to federal prosecutorial discretion more generally. While U.S. Attorneys have some connection to local or national elected officials, the fact remains that only the President has direct political accountability for federal prosecutorial decision making, and the more taut the lines of control to his Attorney General and in turn to departmental supervisory minions, the better.

But how does this political accountability actually work? On paper, the scheme is clear: “Our democratically elected representatives have decided to enact uniform national criminal laws to address national problems and enforce them with one voice through one agency—the U.S. Department of Justice.”¹¹⁰ And the democratically elected President, generally through his Attorney General but perhaps directly, is charged with “taking care” that this occurs.¹¹¹ Yet even if one accepts these general propositions in support of broad centralized authority—and not everyone does¹¹²—one still needs to confront the fundamental truth about the current federal enforcement system: it is not a system at all, but in large part just an adjunct to state or, more often, local criminal justice systems.¹¹³

109. Kahan, *supra* note 17, at 497.

110. Stephanos Bibas, *Regulating Local Variations in Federal Sentencing*, 58 STAN. L. REV. 137, 140 (2005).

111. See Prakash, *The Chief Prosecutor*, *supra* note 25, at 539.

112. See, e.g., Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461 (2003) (arguing that the “presidential control” model does not adequately protect against the arbitrary decisionmaking that would delegitimize agency action); Edward Rubin, *The Myth of Accountability and the Anti-Administrative Impulse*, 103 MICH. L. REV. 2073, 2080 (2005) (noting the “highly attenuated nature of electoral accountability”); Peter L. Strauss, *Overseer, or “The Decider”? The President in Administrative Law*, 75 GEO. WASH. L. REV. 696 (2007).

113. See Daniel Richman, Response, *Judging Untried Cases*, 156 U. PA. L. REV. PENNUMBRA 219, 222 (2007), <http://www.pennumbra.com/issues/articles/154-1/Richman.pdf>; see also Lisa L. Miller & James Eisenstein, *The Federal/State Criminal Prosecution Nexus: A Case Study in Cooperation and Discretion*, 30 LAW & SOC. INQUIRY 239 (2005); Gerard E. Lynch, *Letting Guidelines Be Guidelines (and Judges Be Judges)*, OSCJL AMICI: VIEWS FROM THE FIELD (Jan. 2008), http://moritzlaw.osu.edu/osjcl/blog/Articles_1/Lynch-final-12-28-07.pdf.

Consider the current federal criminal docket. In fiscal year 2006, drug trafficking defendants comprised 34.6% of those receiving federal sentences (25,086 defendants out of a total 72,518), and firearm cases constituted another 11.6% (8384 defendants).¹¹⁴ Most of the narcotics defendants were not international drug traffickers. A sampling of drug cases in 2005 found that 76.5% of the crack cases were “neighborhood” or “local,” as were 25.8% of the powder cases. This already reflected a shift on the powder side from street-level dealing to wholesaling between 2000 and 2005.¹¹⁵ The prevalence of firearms cases reflects the Bush Administration’s (and before it, the Clinton Administration’s) commitment to street violence programs coordinated with local police departments.¹¹⁶ As for the 1166 robbery defendants who comprised 1.6% of all federally sentenced offenders in 2006, a review of the reported cases leaves one hard pressed to figure out what is essentially “federal” about the robberies that are pursued by AUSAs.¹¹⁷ Moreover, any effort to separate out what would otherwise be indistinguishable “local” cases from obviously “federal” cases is likely to undercount the former. What, for example, is one to make of the 1293 (1.8% of the 72,518 federally sentenced offenders) pornography/prostitution defendants, the 1714 (2.4%) larceny defendants, or even the 6958 (9.6%) fraud defendants, since “[w]hat constitutes a major

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114. See 2006 U.S. SENT’G COMM’N ANNUAL REPORT, available at <http://www.ussc.gov/ANNRPT/2006/table3.pdf>; see also 2006 U.S. ATTORNEYS’ ANNUAL STATISTICAL REPORT 14 (2006), available at http://www.usdoj.gov/usao/reading_room/reports/asr2006/06statrpt.pdf (showing that all drug crimes, including possession and trafficking, constituted 26.2% of federal criminal cases filed in FY2006, and violent crime constituted 18.6%).
115. See U.S. SENTENCING COMM’N REPORT TO CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY (2007), available at http://www.ussc.gov/r_congress/cocaine2007.pdf; see also *United States v. Williams*, 372 F. Supp. 2d 1335, 1336 (M.D. Fla. 2005) (noting how the DEA and the Osceola County Sheriff’s office, “[a]pparently frustrated with the state’s lenient treatment” of the defendant, “for many years, a petty drug dealer,” arranged for an undercover agent to buy crack from him), *vacated*, 456 F.3d 1353 (11th Cir. 2006).
116. See DEP’T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, PSN IN PRACTICE II (2006), available at http://www.psn.gov/pubs/pdf/PSN_InPracticeII.pdf; Sara Sun Beale, *The Unintended Consequences of Enhancing Gun Penalties: Shooting Down the Commerce Clause and Arming Federal Prosecutors*, 51 DUKE L.J. 1641 (2002); Richman, *supra* note 22, at 379-85; Richman, *supra* note 32, at 396-98.
117. See, e.g., *United States v. Parkes*, 497 F.3d 220 (2d Cir. 2007) (robbery for drugs and drug proceeds); *United States v. Jimenez-Torres*, 435 F.3d 3 (1st Cir. 2006) (home invasion, robbery, and murder of a gas station owner); *United States v. Turner*, 272 F.3d 380, 384-85 (6th Cir. 2001) (robbery of an illegal lottery operator; convictions reversed for lack of interstate commerce nexus).

fraud in one district may not be a big deal in another”¹¹⁸ That there are no certainties in this regard reflects another fundamental truth about current enforcement realities: no citizen or scholar has a good idea of exactly what federal enforcement resources are deployed and to what end.¹¹⁹

The story of how we came to this point has been extensively told elsewhere¹²⁰ and is frequently followed by a normative analysis of why the extension of federal enforcement activity into areas of traditional local concern is an abuse of Commerce Clause authority, an affront to federalism, and a source of unnecessary jurisdictional conflict. No such normative claims are made here. Recognizing that a large chunk of federal enforcement activity is simply aid-in-kind to localities, for which federal elected officials are often eager to take credit,¹²¹ ought to be the beginning, not the end, of the analysis. After all, criminal charges can be as much an information-gathering tool as a deterrence and incapacitation mechanism. In the absence of frictionless institutional coordination across jurisdictions or even across agencies, even quintessentially “federal” investigations into large-scale interstate or international criminal enterprises will often take root from ostensibly “local crime” prosecutions. Moreover, to the extent that federal prosecutors are targeting street crime in and of itself, one might still see the value of using federal enforcers as a “strategic reserve”¹²² against local bad guys. In any case, pork is in the eye of the beholder.¹²³

The point—here, at least—is not that federal prosecutors ought to avoid bringing these otherwise local cases, but rather that the idea of consistency and uniformity across these cases nationwide is an odd one.¹²⁴ The defendants are

118. Voreacos & Van Voris, *supra* note 31 (quoting Leslie Caldwell, former head of the Enron Task Force); see U.S. SENT’G COMM’N, 2006 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl.3 (2006), available at <http://sentencing.nj.gov/downloads/pdf/articles/2007/Apr2007/document03.pdf>.

119. See Richman & Stuntz, *supra* note 14, at 613–15.

120. See Daniel C. Richman, *The Changing Boundaries Between Federal and Local Law Enforcement*, in CRIMINAL JUSTICE: BOUNDARY CHANGES IN CRIMINAL JUSTICE ORGANIZATIONS 81 (Charles M. Friel ed., 2000); Richman, *supra* note 32, at 382–407.

121. Richman, *supra* note 12, at 786; Richman, *supra* note 32, at 401–02.

122. Richman, *supra* note 22, at 405.

123. See Kenneth A. Shepsle & Barry R. Weingast, *Political Preferences for the Pork Barrel: A Generalization*, 25 AM. J. POL. SCI. 96 (1981).

124. See Jeffrey S. Sutton, *An Appellate Perspective on Federal Sentencing After Booker and Rita*, 85 DENV. U. L. REV. 79, 91 (2007) (“Anyone interested in balancing consistency with individualized sentencing ought to acknowledge that the task is harder for the Federal Government than for a State, and ought to keep that in mind each time someone proposes federalizing a new area of crime.”).

indistinguishable from those sentenced in the local courts, which themselves are governed by state schemes with their own peculiar local disparities. The selection process that puts these defendants in federal court may be a matter of happenstance (e.g., the victim called the feds rather than the locals), idiosyncratic coordination between federal and local authorities, or random dipping by federal officials into the inexhaustible local pool.¹²⁵ And the futile efforts of Washington to supervise the federal death penalty¹²⁶—where the number of cases is lower, the stakes higher, and the political will likely greater—should leave no doubt about Washington’s inability to monitor the selection process of these noncapital cases across districts.

It is troubling enough when, in the face of this inability, Washington grades districts by the number of cases they bring. The Main Justice apparatchiks who tried to identify “underperforming” districts based on the number of federal gun prosecutions¹²⁷ may have simply sought to ensure that one of several federal enforcement priorities was pursued with adequate zeal nationwide. But the availability of an easily satisfied performance metric—there will often be, after all, an inexhaustible supply of gun cases—will skew a compliant manager’s attention away from those aspects of his job less amenable to quantification.¹²⁸ And for U.S. Attorneys interested in hitting the numbers, that would mean diminished attention to the kinds of investigations for which numerical targets are less likely to be set, like complex fraud and corruption cases.

125. See Kathleen F. Brickey, *Criminal Mischief: The Federalization of American Criminal Law*, 46 HASTINGS L.J. 1135, 1159 (1995) (discussing then-U.S. Attorney Giuliani’s “federal day” program); see also *United States v. Cherer*, 513 F.3d 1150, 1163 (9th Cir. 2008) (Noonan, J., concurring and dissenting) (“The paucity of [sexual offense cases in Sentencing Commission database] is accounted for by the limited number of places under federal jurisdiction where sex crimes could occur.”).

126. See *supra* notes 68–74 and accompanying text.

127. See Memorandum from John S. Irving, Counsel to Deputy Attorney Gen., to Paul McNulty, Deputy Attorney Gen. 22 (Mar. 6, 2006), available at <http://judiciary.house.gov/Printshop.aspx?Section=411> (DOJ document set eight) (“While prosecution statistics alone were never meant to be the sole measure of district performance, they have evolved into a benchmark. This is in part because prosecution numbers have been increasing at such astronomical rates that they have been convenient tools to illustrate the Department’s PSN efforts.”).

128. See Avinash Dixit, *Incentives and Organizations in the Public Sector: An Interpretative Review*, 37 J. HUM. RESOURCES 696, 722 (2002) (“Most incentives schemes are designed to focus on the few dimensions thought of by the policymaker. But the agents respond by changing their activities in all dimensions, and the effects on the other dimensions affect some other principals or stakeholders adversely.”).

To require national consistency, however quixotically, in how these fungible local cases are handled once brought is simply to increase the level of dysfunction.¹²⁹ While as offenders, the defendants in these cases might be indistinguishable from those prosecuted in state court, their selection (for whatever reason) for federal “treatment” places them within the ambit of a boutique system in which calls for toughness are loud and the sounds of real people faint. It is hard enough to assess the efforts of the federal government in such clear priority areas as counterterrorism and corporate fraud. How can one possibly expect political accountability to hold sway when it comes to street crime? In this realm, neither federal legislators nor enforcers will be held responsible for the crime rate. Those offenders who are prosecuted federally can be made politically valuable examples by a jurisdiction that lacks the budgetary pressures faced by state and local authorities.¹³⁰ Indeed, because federal sentences are essentially a variant of local pork, the tendency of federal legislators seeking to benefit their districts will be to “overspend.”¹³¹ And these defendants will seem so much more menacing than the nonviolent offenders who populate most of the federal docket.

Viewed from this perspective, the extent to which U.S. Attorneys’ offices are embedded in the local legal-political economy is a source of needed modulation, not regrettable disparity. U.S. Attorneys’ offices have their own reasons to push for maximal sentencing. This, after all, is how they get their leverage to obtain cooperation or quick guilty pleas from defendants. But they are also subject to balancing factors like local exigencies, the interests of local enforcement officials, community preferences (which might be expressed in judge and jury receptivity), and the immediate availability of local criminal justice systems as reference points.¹³² If one is looking for accountability in the kinds of cases discussed here, it is far better to embrace the derivative accountability that arises out of the network of connections a U.S. Attorney’s office has to its district than the ostensibly direct accountability that runs from

129. See Erik Luna, *Gridland: An Allegorical Critique of Federal Sentencing*, 96 J. CRIM. L. & CRIMINOLOGY 25, 61 (2005) (“Something might even be said for reasonable variations among methodologies and/or outcomes by *federalizing* federalism, viewing individual circuits and even districts as pseudo-states within the federal system.”).

130. See Rachel E. Barkow, *Administering Crime*, 52 UCLA L. REV. 715, 806-12 (2005) (comparing criminal justice budget pressure on states to that faced by federal authorities).

131. See Timothy Besley & Stephen Coate, *Centralized Versus Decentralized Provision of Local Public Goods: A Political Economy Approach*, 87 J. PUB. ECON. 2611 (2003).

132. See Gleeson, *supra* note 75, at 1714 (“[I]f the U.S. Attorney and federal law enforcement agencies determine that law enforcement needs in the district require the diversion of resources to particular cases or investigations, offering favorable plea bargains to avoid time-consuming trials of unrelated cases is an entirely acceptable means of doing so.”).

a U.S. Attorney through the Attorney General to the President. It is only this network of district connections that will hold a U.S. Attorney's office's feet to the fire in any meaningful way that goes beyond case counting.

Dan Kahan was surely right to suggest that Main Justice will do better than the scattered U.S. Attorneys' offices at internalizing the costs of prosecution theories that can chill viable economic conduct and even, perhaps, political expression. But when it comes to the prosecution of street crime, low-level drug crime, and so much of the other "local" crime that finds its way into U.S. Attorneys' offices, the federal deterrence message and the real nature of federal responsibility are likely to be noise swallowed up by local enforcement choices. Practically speaking, the only performance metric will be within the contours of the case brought, and there almost always *will* be a conviction, probably on a guilty plea, because of the resources the feds can bring to bear and the discounts offered to those who so plead or cooperate against others. Federal officials will be happy to take some credit for helping (a lovely, vague word) to reduce the crime rate when it is falling, but there will be no large-scale internalization of the costs of a few high sentences. Those most aggrieved—the unlucky defendants and, to a lesser degree, the federal courts¹³³—will be hard pressed to shift the costs they bear.

Need the choice between district variation and top-down control be so stark in this area? Perhaps not, at least to the extent that one envisions a new governance model unfolding across the federal enforcement bureaucracy, with Washington fostering experimentation in the districts and promoting the "best practices"¹³⁴ that will put local knowledge in the service of broad, national goals. But this cannot happen without agreed upon and determinable performance metrics, something we have never had in the federal criminal

133. See Richman, *supra* note 32, at 402-04 (discussing burdens placed on the federal judiciary and the response to them).

134. See Michael C. Dorf & Charles F. Sabel, *Drug Treatment Courts and Emergent Experimentalist Government*, 53 VAND. L. REV. 831 (2000) (arguing that drug treatment courts are a harbinger of open and evolving experimentalist institutions); Daniel Richman, *Decisions About Coercion: The Corporate Attorney-Client Privilege Waiver Problem*, 57 DEPAUL L. REV. 295, 327 (2008); Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1015 (2004) (describing the transition from top-down, fixed rule bureaucracy to an experimentalist approach); William H. Simon, *After Confidentiality: Rethinking the Professional Responsibilities of the Business Lawyer*, 75 FORDHAM L. REV. 1453, 1469-70 (2006) ("Prosecutors should articulate standards for the exercise of discretion, measure their own performance under the standards, provide transparent procedures for revising the standards in the light of experience, and provide remedies for targets that believe they have been harmed by violations of the standards.").

justice system, particularly with respect to street crime.¹³⁵ Even to the extent that a crime drop can be fairly attributed to an enforcement program,¹³⁶ questions will remain about the federal role in that program—questions for which the responsive information will be controlled and generated by local authorities, particularly the ones who benefit from the federal intervention.¹³⁷ At any rate, no one would accuse the Ashcroft Department of experimentalist tendencies. And had its top-down effort to curb sentencing flexibility in the districts been successful, the policy would have driven discretion down to the intake level—the least transparent part of the adjudicative process—in those cases where the exercise of enforcement discretion is most in need of regulation.

Where there is some structural integrity to the federal “beat”—put differently, where federal responsibility for pursuing criminal activity is clear and where discretionary decision making by an AUSA is not the sole origin of a case’s designation as “federal”—the arguments for centralized management are far stronger. Here is where, for better or worse, Washington is more likely to bear the costs of enforcement decisions across districts since one can at least conceive of performance metrics based on something other than adjudicative success. These will, not coincidentally, also be cases in which the diffuse benefits engendered by the enforcement program of which they are a part have led to either the explicit reservation of prosecuting authority to the federal government or to a simple lack of interest or capacity on the part of state and

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135. See Daniel Richman, *Institutional Competence and Organizational Prosecutions*, 93 VA. L. REV. IN BRIEF 115 (2007), available at <http://www.virginialawreview.org/inbrief.php?s=inbrief&p=2007/06/18/richman>.
136. See also Andrew V. Papachristos, Tracey L. Meares & Jeffrey Fagan, *Attention Felons: Evaluating Project Safe Neighborhoods in Chicago*, 4 J. EMPIRICAL LEGAL STUD. 223 (2007); Philip J. Cook, *Assessing Urban Crime and Its Control: An Overview* 15-19 (Nat’l Bureau of Econ. Research, Working Paper No. 13,781, 2008) (reviewing efforts to evaluate policing programs), available at <http://papers.nber.org/papers/w13781>; cf. Richman, *supra* note 32, at 400-01 (noting the debate about the role that federal COPS funding played in the national crime drop). Compare Steven Raphael & Jens Ludwig, *Prison Sentence Enhancements: The Case of Project Exile*, in EVALUATING GUN POLICY: EFFECTS ON CRIME AND VIOLENCE 251 (Jens Ludwig & Philip J. Cook eds., 2003) (finding that Project Exile had little or no effect on Richmond’s homicide rate), with Richard Rosenfeld, Robert Fornango & Eric Baumer, *Did Ceasefire, Compstat, and Exile Reduce Homicide?*, 4 CRIMINOLOGY & PUB. POL’Y 419, 436-38 (2005) (finding a decline in crime in Richmond after Project Exile).
137. See Rubin, *supra* note 112, at 2126-29 (discussing a superior’s choice between procedural and substantive accountability standards, and noting the pitfalls of each). For discussion of DOJ accountability efforts in Project Safe Neighborhoods, see Edmund F. McGarrell, *Strategic Problem Solving and Project Safe Neighborhoods* (Dec. 2005) (unpublished manuscript), available at http://www1.cj.msu.edu/~outreach/psn/Strategic_Problem_Solving_PSN_WP1%5B1%5D.pdf.

local authorities. Conversely, the federal government may bring special competences to the program, because of its ability to invest resources selectively, its transnational range, and its unique ability to coordinate nationwide activity—all competences that rely to some extent on centralized control.

Interestingly enough, in immigration, the largest category of cases¹³⁸ in which federal responsibility is clear, even the Ashcroft and Gonzales Justice Departments were not averse to interdistrict variation. In those high-volume districts in which U.S. Attorneys' offices had to act like local prosecutors—with possible performance metrics and an infeasible political obligation to pursue cases—the rigors of the Ashcroft Memorandum and the ostensible allegiance to national uniformity soon gave way to “fast-track” programs that offered deep discounts to defendants willing to enter quick guilty pleas.¹³⁹ Put differently, where AUSAs exercised less discretion on case intake, they were allowed more discretion in case disposition. To be sure, even as it pushed districts to bring immigration prosecutions,¹⁴⁰ the Justice Department retained control over licenses for such programs, since no district could invoke this rubric as a basis for sentencing departures in the absence of explicit Justice Department authorization.¹⁴¹ But the history of “fast-track” immigration programs suggests that where the federal system has some structural integrity (i.e., clear responsibility), we can expect a degree of responsiveness to local conditions across districts.

Where does this leave white collar crime? When we think in terms of institutional design, should it be treated more like violent crime or more like

138. 2006 U.S. ATTORNEYS' ANNUAL STATISTICAL REPORT, *supra* note 114, at 14.

139. See *United States v. Mejia*, 461 F.3d 158, 160-61 (2d Cir. 2006) (holding that fast-track programs are a permissible exercise of prosecutorial discretion); *Charging, Plea and Early Disposition Policies: Hearing Before the U.S. Sentencing Comm'n* (Sept. 23, 2003) (statement of Paul Charlton, U.S. Attorney for the District of Arizona) (stating that “fast track” programs are reserved for “exceptional circumstances, such as where the resources of a district would otherwise be significantly strained by a persistently large volume of a particular category of cases, or where state or local prosecution is unavailable or unlikely”); see also Barrueco, *supra* note 57; Bibas, *supra* note 110, at 148 (describing congressional control of fast-track programs); Bowman, *supra* note 42, at 1339 n.113 (discussing the creation of fast-track programs).

140. See Memorandum from Daniel Friedman, Counsel to the Deputy Attorney Gen., to Paul McNulty, Deputy Attorney Gen. (May 26, 2006), available at <http://judiciary.house.gov/Printshop.aspx?Section=411> (DOJ document sets 11-4 to 11-5).

141. By August 2006, fast-track authority had been given to, among other districts, the District of Kansas for “fraudulent document use to gain employment.” See Memorandum from Paul McNulty, Deputy Attorney Gen., to Various U.S. Attorneys (Aug. 3, 2006), available at <http://judiciary.house.gov/Printshop.aspx?Section=411> (DOJ document set twenty-seven).

immigration? The answer turns on the degree to which there is a coherent federal program cutting across districts with ascertainable responsibilities and spillover effects. That some nonviolent malfeasance can be charged as mail or wire fraud certainly does not mark it as identifiably “federal.”¹⁴² Yet there is a strong argument for consistent cross-district federal white collar enforcement of some prespecified (or at least conceptually clear) classes of cases in support of a national deterrence model.

Federal income tax evasion cases are one obvious class of such cases.¹⁴³ Others might include accounting fraud in publicly traded companies, insider trading in the shares of such companies, and other similarly unsurprising categories of offenses with clear national market implications. Were interested observers – legislators, corporate executives, and others – to have a sense of the federal project in this area, accountability and deterrence might well be promoted through national consistency in sentencing. Such uniformity would also have a salutary tendency to remove venue selection incentives from the government when it decides whether, say, a corporate fraud case should be brought in the district where the corporate headquarters is located or in the one where the bulk of the employees who lost their jobs as a result of the fraud live and work. Is it possible that efforts to reduce inter-district variation in this area would lead to inappropriately high sentences for certain white collar defendants, particularly those with the temerity not to either cooperate or at least plead guilty with alacrity?¹⁴⁴ Perhaps. The analysis here provides no direct answer to those troubled by the sentence given to Jamie Olis.¹⁴⁵ But the

142. See, e.g., John C. Coffee, Jr., *Modern Mail Fraud: The Restoration of the Public/Private Distinction*, 35 AM. CRIM. L. REV. 427 (1998); Richman & Stuntz, *supra* note 91, at 7.

143. See *United States v. Cutler*, No. 05-2516, 2008 WL 706633 (2d Cir. Mar. 17, 2008). In the course of reversing a below-guideline sentence on the government’s appeal in a bank fraud and tax evasion case, the panel quoted Sentencing Commission commentary: “Recognition that the sentence for a criminal tax case will be commensurate with the gravity of the offense should act as a deterrent to would-be violators.” *Id.* at *26 (quoting the introductory comment to chapter 2, Part T of the U.S. Sentencing Guidelines).

144. See Stephanos Bibas, *White-Collar Plea Bargaining and Sentencing After Booker*, 47 WM. & MARY L. REV. 721, 737 (2005).

145. Olis, a mid-level executive at Dynegy, initially received a sentence of more than twenty-four years after going to trial in an accounting fraud case. *Id.* at 727-28; see also *United States v. Olis*, 429 F.3d 540 (5th Cir. 2005) (reversing Olis’s sentencing); Kathleen F. Brickey, *In Enron’s Wake: Corporate Executives on Trial*, 96 J. CRIM. L. & CRIMINOLOGY 397 (2006); Samuel W. Buell, *Reforming Punishment of Financial Reporting Fraud*, 28 CARDOZO L. REV. 1611, 1629-30 (2007); cf. Christine Hurt, *The Undercivilization of Corporate Law*, 33 J. CORP. L. 27 (2008) (discussing the claim that corporate law has been “overcriminalized”). Olis eventually received a non-Guidelines sentence of six years’ imprisonment. *United States v. Olis*, Crim. No. H-03-217-01, 2006 U.S. Dist. LEXIS 68281 (S.D. Tex. Sept. 22, 2006).

systemic goal should be to have federal corporate crime enforcement and sentencing reflect legitimate assessments by politically responsible officials about the threats posed by corporate fraud.¹⁴⁶ And it is inevitable that, in the absence of a long-term consensus on the matter, there will be under- and overreactions. The concerns expressed by the recent “Interim Report of the Committee On Capital Market Regulation”¹⁴⁷ that federal public enforcement activity might drive market activity overseas may bear reassessment in light of the role that under-regulation may have played in the current credit crisis.¹⁴⁸ Yet the notion that centralized federal actors ought to and are the best placed to set the level and nature of prosecutorial activity in this sensitive policy area seems right.

It should be clear by now that my measured embrace of decentralization in federal criminal enforcement is historically contingent and politically contestable: to the extent the DOJ were to commit itself to some national outcome measure that went beyond cases brought and dispositions obtained, a considerable degree of centralized control would make sense. It certainly made sense for the Secret Service and the Treasury Department to preside from Washington over the treatment of counterfeiting during the critical decades following the creation of a national currency and the establishment of the Secret Service.¹⁴⁹ And although any effective domestic intelligence network will inevitably have to rely on state and local authorities for information gathering and dissemination (and will therefore need to be sensitive to the concerns of

146. 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 (2004); Buell, *supra* note 145, at 1612 (“In a federal system of policing and punishing financial fraud, concerns include that uncoordinated actions of multiple sanctioning authorities could lead to over-sanctioning of fraud, resulting in over-deterrence and unjust punishment. Additionally, lack of coordination could lead to discord and confusion in the expressive effects of punishing white-collar crime. These concerns cannot be addressed in the absence of rough consensus across jurisdictions, around a focal point in law, about scale and methodology for measuring and aligning a given group of cases eligible for punishment.”).

147. INTERIM REPORT OF THE COMMITTEE ON CAPITAL MARKETS REGULATION (Nov. 30, 2006), available at http://www.capmktreg.org/pdfs/11.30Committee_Interim_ReportREV2.pdf; see also Jenny Anderson, *Sharply Divided Reactions to Report on U.S. Markets*, N.Y. TIMES, Dec. 1, 2006, at C8.

148. See Edmund L. Andrews & Stephen Labaton, *Split Is Forming over Regulation of Wall Street*, N.Y. TIMES, Mar. 23, 2008, at 1 (noting political debate “over how to strengthen oversight of financial institutions after decades of deregulation”); Elizabeth Williamson, *Political Pendulum Swings Toward Stricter Regulation*, WALL ST. J., Mar. 24, 2008, at 1.

149. See MIHM, *supra* note 89, at 340-74 (recounting efforts of the Secret Service to protect federal currency after the introduction of greenbacks in 1861).

the periphery),¹⁵⁰ the diffuse benefits flowing from counterterrorism prosecutions and the clear federal responsibility for them counsels a high degree of centralized control, or at least supervision. But in a world in which, even after the 9/11 attacks and the consequent prioritization of counterterrorism programs, street crime and other ordinary “local” criminal activity occupies such a large part of the federal criminal docket, the likely demise of DOJ’s Guidelines Project ought not be regretted.

IV. THE PROMISE OF THE FUTURE

To what extent can we expect the Supreme Court’s latest sentencing cases—*Rita*, *Kimbrough*, and *Gall*—to assist in an appropriate recalibration of the allocation of power between Washington and the districts, and between U.S. Attorneys’ offices and other district actors?

Predictions are a challenge in this area. After all, the response of sentencing judges to the discretionary license offered by *Booker* has been rather measured. Of the 63,841 defendants sentenced between October 1, 2006, and September 30, 2007, 61% received sentences “within guideline range,” according to the Sentencing Commission’s most recent report—a figure that becomes impressive when combined with the 25.7% who received “government sponsored below range sentences,” generally because of cooperation or fast-track disposition.¹⁵¹ The effective “compliance” rate nationwide is thus 86.7%, with considerable inter-district and inter-circuit variation on the degree to which judges “comply” by sentencing defendants within the range specified by the Sentencing Guidelines. To be sure, the whole notion of “compliance” is dubious: the judge whose fact-finding is heavily influenced by her desire to give a defendant an inordinately high or low sentence will be “compliant” so long as she thereafter invokes the standard Guideline provisions; the judge who follows *Booker* and, after calculating the Guidelines sentence, carefully works through the sentencing factors in § 3553(a) is not. Nor is the judge who departs upward or downward based on a factor that even before *Booker* would have been easily accepted by an appellate court as a ground for departure. Moreover, certain institutional dynamics will continue to favor “compliance”—as a matter of form, at least—particularly when it comes to downward departures. More and more judges have become accustomed to the

150. See Richman, *supra* note 32, at 422-26.

151. U.S. SENT’G COMM’N, PRELIMINARY QUARTERLY DATA REPORT, FOURTH QUARTER RELEASE 1 (2007), available at http://www.ussc.gov/sc_cases/Quarter_Report_4th_07.pdf.

Guidelines.¹⁵² If the government is at all strategic in the downward departures that it appeals, the appellate docket will still be dominated by cases in which the sentencing judge might well have acted “unreasonably.”

Yet the data so far may be a function of a number of factors likely to change in the near future. In a number of circuits, the strict appellate review given to non-Guidelines sentences can be expected to change in light of *Gall* and *Kimbrough*.¹⁵³ After all, the *Kimbrough* Court noted that “as a general matter, ‘courts may vary’ [from Guidelines ranges] based solely on policy considerations, including disagreements with the Guidelines.”¹⁵⁴ Such language from the Supreme Court recently led a Fifth Circuit panel to observe in the course of affirming an upward departure, that the “argument that a disagreement with the Guidelines is not a sufficient reason to impose a non-Guidelines sentence has lost most of its force.”¹⁵⁵

The reviewing hand may lighten even in circuits that have not been so strict.¹⁵⁶ Consider *United States v. Cavera*, where a Brooklyn district judge had sentenced a gun trafficking defendant with a recommended Guidelines range of twelve to eighteen months to a substantially higher non-Guidelines sentence of twenty-four months’ imprisonment and three years’ supervised release.¹⁵⁷ Noting that New York state law would have given the defendant and his co-defendant a “substantially more severe sentence than that called for by the Guidelines,” Judge Charles P. Sifton observed that the “disparity created by imposing a longer sentence for firearms trafficking into large metropolitan

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152. Indeed, an impressive level of “compliance” might have been obtained even had the Guidelines been advisory from the start. See John F. Pfaff, *The Continued Validity of Structured Sentencing Following Blakely: The Effectiveness of Voluntary Guidelines*, 54 UCLA L. REV. 235 (2006) (presenting state data suggesting that voluntary guidelines can reduce sentencing variation).
153. For a helpful survey of the recent cases, see Memorandum from Jennifer Coffin to Nat’l Fed. Defender Sentencing Res. Counsel (Jan. 16, 2008), available at http://www.fd.org/pdf_lib/case%20review%20post%20gall_kimbrough%201_16_08.pdf; see also *United States v. Carty*, No. 05-10200, 2008 WL 763770 (9th Cir. Mar. 24, 2008); *United States v. Williams*, 517 F.3d 801 (5th Cir. 2008).
154. 128 S. Ct. 558, 570 (2007) (citing Brief for United States at 16, *Kimbrough*, 128 S. Ct. 558 (No. 06-633) (alteration in original)).
155. *United States v. Herrera-Garduno*, No. 07-40327, 2008 WL 625010 (5th Cir. Mar. 10, 2008).
156. Only 50.6% of sentences in the Second Circuit are “within Guidelines range.” See U.S. SENT’G COMM’N, *supra* note 151, at 2.
157. *United States v. Lucania*, 379 F. Supp. 2d 288 (E.D.N.Y. 2005) (Sifton, J.), *rev’d sub nom.*, *United States v. Cavera*, 505 F.3d 216 (2d Cir. 2007). The Second Circuit is considering *Cavera* en banc. Twelve years earlier, Judge Sifton had expressed his views on local variation in Charles P. Sifton, *Theme and Variations: The Relationship Between National Sentencing Standards and Local Conditions*, 5 FED. SENT’G RPTR. 303 (1993).

areas such as New York City is at least as well justified as the disparity created by . . . fast-track programs.”¹⁵⁸ Indeed, he noted, the rationale for fast-track programs—“the limited resources that certain judicial districts have in relation to their overwhelming caseloads”—“is an ‘extra legal’ consideration only arguably related to the purposes of criminal sentencing.”¹⁵⁹ In contrast, the imposition of “[l]engthier sentences based on an increased likelihood of harm in a given locality . . . is tied to the congressionally authorized purposes of sentencing contained in § 3553(a) such as providing adequate deterrence and reflecting the seriousness of the offense.”¹⁶⁰

On appeal, a Second Circuit panel reversed. Rejecting the district court’s effort to draw support for the consideration of local conditions from the law relating to fast-track programs, the panel noted in its 2007 decision: “While fast-track programs forsake uniformity to obtain other benefits, congressional participation ensures that other goals of the SRA, including transparency, are preserved.”¹⁶¹ It concluded that the individualized sentencing allowed by *Booker* “does not authorize a district court to inject into sentencing decisions its policy preferences with respect to the category of offense in question or the kind of community in which it is perpetrated.”¹⁶²

Less than two months later, *Kimbrough* came down. There, a district judge, faced with a defendant convicted for trafficking in crack cocaine, had found that the guidelines-specified range of 228 to 270 months would have been “greater than necessary” to accomplish the purposes of sentences set forth by the Sentencing Reform Act.¹⁶³ The court noted that the case “exemplified the ‘disproportionate and unjust effect that crack cocaine guidelines have in sentencing,’”¹⁶⁴ since, had the defendant been accountable for the same amount of powder cocaine (cocaine hydrochloride), his Guideline range would have been 97 to 106 months. In fact, the Guidelines, following the lead set by Congress in statutory provisions, generally “treated every gram of crack cocaine

158. *Lucania*, 379 F. Supp. 2d at 296, 297.

159. *Id.*

160. *Id.*

161. *Cavera*, 505 F.3d at 222. It seems odd for the court to focus on congressional participation when Congress’s involvement was limited to delegating power to the Attorney General to license fast-track programs.

162. *Id.* at 225; see also *United States v. Cavera*, No. 05-4591, 2007 U.S. App. LEXIS 13003, at *25 (2d Cir. June 6, 2007) (Calabresi, J., concurring dubitante), *opinion withdrawn by, substituted opinion*, 505 F.3d 216 (2007).

163. *Kimbrough v. United States*, 128 S. Ct. 558, 565 (2007).

164. *Id.*

as the equivalent of 100 grams of powder cocaine.”¹⁶⁵ Bound by the statutory mandatory minimum provision to give 180 months, the district court gave that and no more.¹⁶⁶ On appeal, the Fourth Circuit reversed, finding that a reduction of sentence on these grounds was “per se unreasonable.”¹⁶⁷

At oral argument in the Supreme Court, commenting on the possibility raised by Justice Alito that one sentencing judge in a crack case might use a one-to-one ratio; another judge, twenty-to-one; the next, fifty-to-one; the next, eighty-to-one; and the next, one hundred-to-one,¹⁶⁸ Justice Breyer suggested that it would “be the end of the Guidelines” if “every judge has his own view of policy and there is a vast range.”¹⁶⁹ But when the case was decided, the only safeguards that the *Kimbrough* opinion itself offered against such policy fragmentation were snips of catechism from *Booker*: “Advisory Guidelines combined with appellate review for reasonableness and ongoing revision of the Guidelines in response to sentencing practices will help to ‘avoid excessive sentencing disparities.’”¹⁷⁰ Perhaps when it decides the case en banc (oral argument was held on March 27, 2008), the Second Circuit will not explicitly repudiate *Cavera* in light of *Kimbrough* and *Gall*. But it should, since the “policy preferences” that the *Cavera* panel barred a sentencing judge from injecting into its sentencing decisions cannot persuasively be distinguished from those that the Supreme Court subsequently freed sentencing judges to consider in *Kimbrough*.

Cavera was the product of a peculiar juxtaposition—a sentencing judge feeling liberated by *Booker* to consider local criminal justice norms and a U.S. Attorney’s office bound by the Justice Department’s mandate that prosecutors adhere to the Guidelines and maintain a studious disregard for such local circumstances. To what extent will such pairings continue to occur? The answer will in part come from district judges, who in the wake of *Kimbrough* and *Gall* may well play a larger role in the district enforcement ecology. Some judges will push the envelope. Thus, even before those decisions came down, Judge Jack B. Weinstein relied on *Booker* and invoked state enforcement norms when a drug addict defendant, on supervised release from a federal murder conspiracy conviction, was charged with violating his release terms after several

165. *Id.* at 567.

166. *Id.* at 565.

167. *Id.*

168. Transcript of Oral Argument at 11-12, *Kimbrough*, 128 S. Ct. 558 (No. 06-6330).

169. *Id.* at 14.

170. *Kimbrough*, 128 S. Ct. at 573-74 (quoting *United States v. Booker*, 543 U.S. 220, 264 (2004)).

state drug possession arrests.¹⁷¹ The New York State system, he noted, has drug treatment courts designed to divert offenders with drug addictions away from incarceration; the federal system lacks such a program. When considering “the impact of sentencing on specific and general deterrence and on reducing recidivism rates,” he reasoned, “state-vertical coordination is more important than national-horizontal uniformity.”¹⁷² Moreover, taking account of “the disparity between state and federal sentences” would also address “the concern that the federal courts are overwhelmed with matters that can and should be tried in the states.”¹⁷³ And it would “moderate the power of prosecutors to whipsaw defendants—federal prosecutors intervening in state matters, and state prosecutors threatening deferral to federal prosecutions with the prospect of higher sentences.”¹⁷⁴ On these grounds, Judge Weinstein “deferred,” to state authorities and adjourned the federal proceeding for a year.¹⁷⁵ While Judge Weinstein did not stand alone in his readiness to consider “vertical” disparities between federal and state sentencing practices in a particular locality,¹⁷⁶ his remained the minority position when *Gall* and *Kimbrough* were decided.¹⁷⁷ It remains to be seen whether circuit law will change in their wake.

Yet the unresolved and probably more significant variable will be the positions that U.S. Attorneys’ offices take and the freedom that the Justice Department explicitly gives them.¹⁷⁸ The extent to which U.S. Attorneys’ offices assist and even spearhead the movement of district judges into the legal space created by *Gall* and *Kimbrough* may end up being a function of how discretionary authority is generally allocated between the districts and the

171. *United States v. Brennan*, 468 F. Supp. 2d 400 (E.D.N.Y. 2007).

172. *Id.* at 407.

173. *Id.* at 406 (quoting Christine DeMaso, Note, *Advisory Sentencing and the Federalization of Crime: Should Federal Sentencing Judges Consider the Disparity Between State and Federal Sentences Under Booker?*, 106 COLUM. L. REV. 2095, 2128 (2006)).

174. 468 F. Supp. 2d at 407-08.

175. *Id.* at 402. Although the precise legal basis for this “deference” is somewhat unclear, it does not appear that the government has appealed Judge Weinstein’s decision.

176. See *United States v. Wilkerson*, 411 F.3d 1 (1st Cir. 2005) (remanding a case where the district judge expressed concern about disparate state and federal sentences but stated that the Guidelines barred consideration of that fact).

177. See *United States v. Malone*, 503 F.3d 481, 485 (6th Cir. 2007) (collecting cases).

178. Those, like Doug Berman and a *Harvard Law Review* commentator who understandably bemoan circuit adherence to guidelines even after *Rita*, might welcome the encouragement and substantive contributions that prosecutors might bring to sentencing law development. See Douglas A. Berman, *Rita, Reasoned Sentencing, and Resistance to Change*, 85 DENV. U. L. REV. 7, 19 (2007); The Supreme Court, 2006 Term—Leading Cases, 121 HARV. L. REV. 245, 252 (2007).

center in the new administration. What “lessons” about the virtues of district independence, if any, will be drawn from the Bush Administration’s travails remain to be seen. But there are strong arguments for the authorized collaboration of U.S. Attorneys’ offices with sentencing judges and appellate courts in the development of district-specific sentencing policy. One argument simply rests on institutional competence. With all due respect to Judge Sifton in *Cavera* and Judge Weinstein in *Williams*, district judge enforcement policymaking is bound to be less informed than it would be with prosecutorial input. So long as they do not use “national uniformity” as a substitute for nuanced analysis, prosecutors can also illuminate the effects of particular enforcement and sentencing policies outside of the district.

A second argument rests on necessity: the collaboration is bound to happen anyway, and, in many cases, the issue is only whether prosecutorial input comes in the form of winks and nods or explicit policy articulation. Absent large-scale institutional change, line prosecutors will play a dominant role in the construction of the sentencing information universe, and their priorities and preferences will inevitably shape what is before a court. To this extent, they too may be beneficiaries of the advisory regime confirmed by *Gall* and *Kimbrough*, regardless of what authorization they have from their executive superiors.

A principled argument for explicit collaboration between district judges and district prosecutors in the development of district-specific sentencing norms can also be made—one that draws on the pathologies¹⁷⁹ of the federal enforcement “system” discussed above.¹⁸⁰ Balance in a criminal justice system will inevitably be elusive when legislators or distant bureaucrats hurl sentencing numbers at crimes that are well worthy of their condemnation but for which they take scarcely any responsibility.¹⁸¹ Moreover, even were federal “uniformity” obtainable in the prosecution of such crimes, it would depend on

179. William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505 (2001); see also William J. Stuntz, *Unequal Justice*, 121 HARV. L. REV. (forthcoming June 2008).

180. Given how U.S. Attorneys’ independence from Washington serves congressional purposes, see Richman, *supra* note 12, the Supreme Court’s sentencing cases may be likened to administrative law cases in which the Court, according to Lisa Schultz Bressman, “might see its role as mediating the needs of both political branches for control of agency decisionmaking, consistent with separation of powers.” Lisa Schultz Bressman, *Procedures As Politics in Administrative Law*, 107 COLUM. L. REV. 1749, 1753 (2007).

181. For a nice example of federal sentencing numbers being thrown at a street crime problem, one need look no further than the story of the crack penalties. See David A. Sklansky, *Cocaine, Race, and Equal Protection*, 47 STAN. L. REV. 1283, 1296 (1995) (describing how the crack-cocaine ratio jumped from the 20:1 ratio proposed by the Reagan Administration to the 100:1 ratio proposed by the Senate Democratic leadership).

willful blindness to the world that exists behind the odd subclass of offenders caught in the federal beam. Let us, then, embrace rather than bewail the organic roots of U.S. Attorneys' offices in the districts they serve, and see district courts as transparent sites for the development of sentencing norms that have some meaning beyond statistics maintained in Washington.

What would the world look like were Washington's fetters removed and line prosecutors explicitly licensed to join the rest of the courtroom working group in articulating sentencing norms? Even were the circuits to relax the virtually *per se* prohibition on the *ad hoc* consideration of local enforcement conditions, one would not expect prosecutors, as a starting matter, to seek or acquiesce in parity with state sentences—at least where those sentences are lower, as they usually are. The predictable sting of federal sentences may be the most potent information-gathering tool in the prosecutorial arsenal. And even in cases in which this leverage is not needed, a district has a strong incentive to protect the federal “brand” (its reputational capital among repeat-player defense lawyers) for use in cases where it is needed. Over time, however, where local sentences present ready comparators to judges and defense lawyers, the high Guideline sentences will no longer be so predictable, and prosecutors, having lost some of that advantage, might well see offsetting benefits in sentencing flexibility, which might allow them to handle more local cases. Or perhaps fewer, since in the absence of a clear federal sentencing premium, the federal forum might be less alluring for local enforcers. One need not spin out more hypothetical scenarios to see that each district and perhaps even each district judge will reach its own equilibrium, which will be a function of local conditions, bargaining strategies, and the ease with which resources flow between institutions (state and local, local and federal, prosecutors and police). At the very least, prosecutors will find it much harder to hide behind the Guidelines when defending their decisions to federal and local agencies, judges, defense lawyers, and perhaps even the public.

Once locally focused federal enforcement activity is better grounded in the local criminal enforcement ecology, it is entirely possible that the in-kind contribution represented by federal adjudication and sentencing will be of less interest to local enforcers and of less use to federal officials. This would not be a bad thing, as it might recommit U.S. Attorneys' offices to enforcement programs with more diffused benefits and help give the federal enforcement bureaucracy a clarity of mission that it has lacked for some time. This clarity of mission would also make the Justice Department's political leadership far more accountable. And it would give the Department a far stronger justification for seeking sentencing “uniformity” across districts than it has had up to now.

CONCLUSION

What criminal enforcement concerns are “national” and which are merely “local”? The question has dogged courts and commentators since the Founding and has received renewed judicial attention since *United States v. Lopez*.¹⁸² Few would claim that the Supreme Court (or the lower courts) have had marked success since *Lopez* in drawing such lines as a constitutional matter.¹⁸³ Moreover, even to the extent lines could be drawn, deference to the political branches would require that the federal realm be defined expansively, with the inevitable inclusion of many offenses of the sort generally pursued by local enforcement authorities and for which the locals will be held responsible politically.

That courts can play only a limited role in patrolling federal criminal jurisdiction as a statutory or constitutional matter, however, does not mean that they cannot contribute significantly to making federal authorities more accountable for their enforcement choices. And the federal courts have been given a significant tool to make such a contribution by the Supreme Court’s recent sentencing cases, which have freed judges to consider the interaction of federal and local criminal justice norms when imposing sentences. U.S. Attorneys’ Offices—which have a long history of mediating between national priorities and local needs and norms—are perfectly suited to collaborate with sentencing judges in this institutional negotiation of what is “really” federal. The extent to which they will be permitted to play this role and how transparently they will play it will depend on how much Washington has learned from recent experience, and particularly from 2007, the year of the periphery.

182. 514 U.S. 549, 557 (1995) (stating that the “scope of the interstate commerce power” should not be allowed to “effectually obliterate the distinction between what is national and what is local and create a completely centralized government” (quoting *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937))); H. Geoffrey Moulton, Jr., *The Quixotic Search for a Judicially Enforceable Federalism*, 83 MINN. L. REV. 849 (1999).

183. See Thomas W. Merrill, *Rescuing Federalism After Raich: The Case for Clear Statement Rules*, 9 LEWIS & CLARK L. REV. 823 (2005).