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## Federal Criminal Law, Congressional Delegation, and Enforcement Discretion

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# FEDERAL CRIMINAL LAW, CONGRESSIONAL DELEGATION, AND ENFORCEMENT DISCRETION

Daniel C. Richman \*

*Much of the literature on federal criminal law bemoans the extent to which Congress has abdicated its legislative responsibilities and left enforcement decisions to prosecutorial discretion. Many critics have sought to compensate for the absence of appropriate legislative specificity by proposing other devices for limiting prosecutorial power, many of which would centralize enforcer authority. Guided by recent work in positive political theory, Professor Daniel Richman argues that such claims of legislative abdication overlook the attention that Congress has given to the organization and activities of the federal enforcement bureaucracy. By showing the extent to which Congress balances concern with enforcer accountability against suspicion of presidential power, the Article cautions against reform proposals that would undermine considered political decisions about the allocation of criminal enforcement authority.*

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## INTRODUCTION

In recent years, the common critique of substantive federal criminal law has been simple but quite devastating. Seduced by the desire to be seen as tough on crime, senators and representatives have engaged in an orgy of ill-considered or unconsidered lawmaking. Giving little thought to the sheer breadth of conduct ostensibly criminalized by their enactments, or the degree to which they were intruding into areas reserved by tradition (even constitutional mandate) to state and local law enforcement authorities, legislators have all but abdicated the responsibility for deciding what conduct really ought to be prosecuted, and prosecuted federally. The consequence of this legislative failure has been to transfer effective criminal lawmaking power to politically unaccountable prosecutors and, on occasion, to judges willing to set some constitutional or statutory limits on prosecutorial discretion.

Spurred by this critique, critics have long sought to compensate for the absence of appropriate legislative specificity—in both federal and state criminal statutes<sup>1</sup>—by looking for other devices for limiting prosecutorial power. Some have called for courts to be more receptive to selective prosecution challenges or more aggressive in applying the “rule of lenity.”<sup>2</sup> Others, like Kenneth Culp Davis,<sup>3</sup> have looked to the administrative process and have called for the government to make prosecutorial decision making more centralized, and perhaps more accountable, through the promulgation of limiting guidelines. Recently, Dan Kahan combined these approaches in a provocative proposal that would enlist the rule of lenity as a means of promoting centralized prosecutorial decision making.<sup>4</sup> Although the proposals for reform vary, they share a common premise: Because the legislative branch has fallen down on its obligation to specify what conduct should *really* be prosecuted, the other branches must take that responsibility, and do so in a way that maximizes democratic accountability.

Rather than enter the debate about how best to compensate for Congress’s abdication of its criminal legislative responsibility, this Article questions the common premise on which that debate is based. On its face,

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1. This critique has hardly been limited to federal criminal lawmaking. See, e.g., Frank J. Remington & Victor G. Rosenblum, *The Criminal Law and the Legislative Process*, 1960 U. ILL. L.F. 481, 483–89. The focus of this Article, however, is on the federal system.

2. See *Rewis v. United States*, 401 U.S. 808, 812 (1971) (noting that “ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity”); see also *Reno v. Koray*, 515 U.S. 50, 65 (1995).

3. KENNETH CULP DAVIS, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY* (1969).

4. See Dan M. Kahan, *Is Chevron Relevant to Federal Criminal Law?*, 110 HARV. L. REV. 469, 469 (1996).

substantive federal criminal law unquestionably delegates a staggering degree of discretionary authority to federal prosecutors. As positive political theorists have argued in other areas, however, the nature and extent of any such delegation cannot be assessed simply by reference to the specificity of substantive lawmaking (or the lack thereof). Indeed, a central theme of this literature has been Congress's sophistication in designing mechanisms to control bureaucratic drift in the wake of broad delegations to administrative agencies.<sup>5</sup> To what extent has Congress deployed such mechanisms in the fragmented and complex federal law enforcement bureaucracy? To what extent does the very design of that bureaucracy reflect gatekeeping strategies that legislators have selected in lieu of legislative specificity? By beginning to answer these questions, this Article provides a far richer account of Congress's role in constraining prosecutorial discretion than has hitherto been recognized and recasts the debate about political accountability in federal criminal law enforcement. Although much more empirical work must be done before the account offered in this Article can be deemed anything more than impressionistic and tentative, it rings far truer than the theories that currently dominate the literature.

Part I briefly examines the breadth of prosecutorial discretion ostensibly permitted by substantive federal criminal law. Part II then reviews some of the standard theories that have been, or might be, offered to explain why Congress has been willing to delegate this extent of effective lawmaking authority to prosecutors. Provisionally assuming that legislators would not be deaf to the interests of a wide array of national interest groups potentially affected by prosecutorial choices, this part explores whether these interests might be served by a legislative strategy of maximal delegation to the executive. Once the peculiar, fragmented design of the federal enforcement bureaucracy is considered, however, this account lacks plausibility, except in the limited context of federal-state relations.

Part III shows that delegation strategies do indeed emerge, not in Congress's substantive lawmaking, but in its interactions with, and manipulation of, the federal enforcement bureaucracy. Through an examination of the mechanisms that Congress uses to constrain prosecutorial discretion without relying on legislative specificity, this part demonstrates that Congress is far more ready to limit enforcement authority in certain areas than the substantive law seems to suggest. In other areas, however, the dominant congressional strategy appears to be defensive—not an assertion of policy preferences, but an effort to limit presidential power.

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5. See Jonathan R. Macey, *Separated Powers and Positive Political Theory: The Tug of War over Administrative Agencies*, 80 GEO. L.J. 671, 671–72 (1992).

The Conclusion suggests how this model of legislative activity should influence our view of proposals to restrain prosecutors.

## I. THE BREADTH OF FEDERAL CRIMINAL LAW

Assessing statutory breadth can be difficult. Federal criminal law certainly reaches a broad range of conduct. Whether it exceeds some optimal degree of criminalization, however, is an issue on which there is little consensus, and on which, as Bill Stuntz has noted, the courts have regrettably refused to give constitutional guidance.<sup>6</sup> In search of another metric, one can ask whether federal criminal legislation is broader than federal statutes in other areas. This does not seem to be the case, given the wholesale delegations that Congress has made to administrative agencies, allowing the effective creation of federal common law in areas of labor law, antitrust, securities, and the like. To be sure, there are powerful arguments, based on the peculiar nature of criminal law, for demanding far more legislative specificity in penal statutes than we tolerate in legislation in other areas.<sup>7</sup> Aside from these normative concerns, however, the extent of delegated enforcement authority in the criminal area is not particularly remarkable in our bureaucratic state.

It is similarly hard to determine whether federal criminal legislation is broader than state criminal legislation. Jerry Lynch has noted that federal criminal law "has been less influenced by academic codifiers than the laws of the states."<sup>8</sup> One might also argue that Congress has gone out of its way to cut federal legislation loose from the common-law moorings that tend to limit the effective scope of state provisions.<sup>9</sup> But it is well-nigh impossible

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6. See William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 66-76 (1997); see also Louis D. Bilionis, *Process, the Constitution, and Substantive Criminal Law*, 96 MICH. L. REV. 1269 (1998).

7. See John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 244-45 (1985); Dan M. Kahan, *Lenity and Federal Common Law Crimes*, 1994 SUP. CT. REV. 345, 353.

8. Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117, 2137 (1998).

9. This is, at least, what the Supreme Court has often found. See, e.g., *Evans v. United States*, 504 U.S. 255, 261 (1992) (stating that, in the Hobbs Act, Congress "unquestionably expanded the common-law definition of extortion to include acts by private individuals pursuant to which property is obtained by means of force, fear, or threats"); *Moskal v. United States*, 498 U.S. 103, 109-11 (1990) (finding that the meaning of prohibition on trafficking in fraudulent securities is not constrained by common law); *Perrin v. United States*, 444 U.S. 37, 45 (1979) (concluding that references to "bribery" in the Travel Act go beyond common-law definition); *Durland v. United States*, 161 U.S. 306, 312-13 (1896) (rejecting a claim that the mail fraud statute could reach only cases that at common law would have been characterized as involving "false pretenses").

to say whether the range of conduct potentially covered by federal law is greater than that reached by state penal laws.

Is federal criminal law broad not merely in the scope of the conduct that it criminalizes, but also in the degree to which it intrudes into areas that traditionally have been considered the sole province of state and local penal law enforcement? Answering this question requires a vision of how federal power can, as a constitutional matter, or should, as a policy matter, be deployed—an issue on which many reasonable minds differ.<sup>10</sup>

This much is clear though: Although the absolute or relative degree of breadth is quite difficult to prove, let alone quantify, anyone with more than a passing familiarity with federal criminal law is struck by the extraordinary extent to which Congress has eschewed legislative specificity in this highly sensitive area.<sup>11</sup> The result, intended or otherwise, has been to transfer a considerable degree of lawmaking authority to the other branches of government. In other areas, such as federal securities, labor, or antitrust law, we are often told that Congress has effectively permitted the courts to engage in common-law legislation.<sup>12</sup> Although the Supreme Court has studiously denied that federal common-law crimes exist,<sup>13</sup> some savvy skeptics have observed that the courts have been allowed the same authority in the criminal area as well.<sup>14</sup>

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10. Compare Kathleen F. Brickey, *Criminal Mischief: The Federalization of American Criminal Law*, 46 HASTINGS L.J. 1135, 1165–74 (1995), and Steven D. Clymer, *Unequal Justice: The Federalization of Criminal Law*, 70 S. CAL. L. REV. 643, 652–68 (1997), and Roger J. Miner, *Crime and Punishment in the Federal Courts*, 43 SYRACUSE L. REV. 681, 681 (1992), with Jamie S. Gorelick & Harry Litman, *Prosecutorial Discretion and the Federalization Debate*, 46 HASTINGS L.J. 967, 972 (1995) (arguing for broad concurrent jurisdiction for state and federal enforcers, Justice Department officials note that, even when an area is “appropriate for state regulation,” a particular case can “call[] out for federal prosecution, which cannot be achieved without a grant of federal criminal jurisdiction”), and Tom Stacy & Kim Dayton, *The Underfederalization of Crime*, 6 CORNELL J.L. & PUB. POL’Y 247, 277–311 (1997).

11. See, e.g., FRANCIS A. ALLEN, *THE HABITS OF LEGALITY: CRIMINAL JUSTICE AND THE RULE OF LAW* 77–93 (1996).

12. See, e.g., HENRY J. FRIENDLY, *In Praise of Erie—and of the New Federal Common Law*, in *BENCHMARKS* 155, 185–95 (1967); Larry Kramer, *The Lawmaking Power of the Federal Courts*, 12 PACE L. REV. 263, 287–90 (1992); Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 44–46 (1985).

13. See *United States v. Lanier*, 117 S. Ct. 1219, 1226 n.6 (1997) (“Federal crimes are defined by Congress, not the courts . . .”); *Whalen v. United States*, 445 U.S. 684, 689 (1980) (“[W]ithin our federal constitutional framework . . . , the power to define criminal offenses and to prescribe the punishments to be imposed upon those found guilty of them, resides wholly with the Congress.”); *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32, 34 (1812).

14. See *McNally v. United States*, 483 U.S. 350, 372–73 (1987) (Stevens, J., dissenting) (“Statutes like the Sherman Act, the civil rights legislation, and the mail fraud statute were written in broad general language on the understanding that [they are] implicit delegations of authority to the courts to fill in the gaps in the common-law tradition of case-by-case adjudication.”); *United States v. Siegel*, 717 F.2d 9, 24 (2d Cir. 1983) (Winter, J., dissenting in

The judiciary is hardly the only branch so empowered. As Kahan has noted, "federal prosecutors, too, end up with a significant share of delegated lawmaking authority."<sup>15</sup> Kahan gives two reasons for this accretion of power. The first is that "prosecutors enjoy the *power of initiative*," the ability to decide which statutory interpretations to urge, and the ability to select which cases to use "as vehicles for novel statutory readings."<sup>16</sup> The second is "the stubborn persistence of the *principal-agent conception* of interpretation," which makes courts chary of narrowing the scope of broadly worded statutes and "empowers individual prosecutors, who face no check in advancing exceedingly broad statutory readings."<sup>17</sup>

If anything, Kahan underestimates the extent to which the executive exercises effective lawmaking power because he does not consider how prosecutors can prevent the judiciary from ever passing on the statutory interpretations on which they rely. With very limited ability to discover the precise contours of the government's case,<sup>18</sup> federal criminal defendants generally cannot seek the equivalent of summary judgment. Unless the government's pretrial filings specify its theory of the case with reasonable specificity—which they seldom do—the only way a defendant can challenge the prosecution's statutory interpretation is to go to trial.<sup>19</sup> Yet the cost and, more importantly, the risk of greater sentence that trials entail<sup>20</sup> will generally deter defendants from exercising this option.<sup>21</sup> Indeed, even

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part and concurring in part) ("If judges perceive a need for a catch-all federal common law crime, the issue should be addressed explicitly with some recognition of the dangers, rather than continue an inexorable expansion of the mail and wire fraud statutes under the pretense of merely discharging Congress' will."); *United States v. Margiotta*, 688 F.2d 108, 142-44 (2d Cir. 1982) (Winter, J., concurring in part and dissenting in part); Kahan, *supra* note 4, at 472-79.

15. Kahan, *supra* note 4, at 479.

16. *Id.* at 479-80; see William F. Baxter, *Separation of Powers, Prosecutorial Discretion, and the "Common Law" Nature of Antitrust Law*, 60 TEX. L. REV. 661, 678, 702 (1982) (noting the same phenomenon in the antitrust area).

17. Kahan, *supra* note 4, at 480-81.

18. See WAYNE R. LAFAVE & JEROLD H. ISRAEL, *CRIMINAL PROCEDURE* 844 (2d ed. 1992) ("The Federal Rules model . . . provides the standard for the narrowest range of prosecution disclosure . . .").

19. See, e.g., *United States v. Alfonso*, 143 F.3d 772, 776-77 (2d Cir. 1998) ("Unless the government has made what can fairly be described as a full proffer of the evidence it intends to present at trial to satisfy the jurisdictional element of the offense, the sufficiency of the evidence is not appropriately addressed on a pretrial motion to dismiss an indictment.")

20. See U.S. SENTENCING COMM'N, *THE FEDERAL SENTENCING GUIDELINES: A REPORT ON THE OPERATION OF THE GUIDELINES SYSTEM AND SHORT-TERM IMPACTS ON DISPARITY IN SENTENCING, USE OF INCARCERATION, AND PROSECUTORIAL DISCRETION AND PLEA BARGAINING* 77-81 (1991) (stating that defendants who plead guilty are likely to receive lower sentences under the guidelines).

21. During fiscal year 1996, of the 53,172 defendants who were either acquitted or convicted in federal district court (i.e., whose cases were not dismissed), 48,196 (91%) were convicted

the defendant who is fully able to articulate a pretrial challenge to the government's theory will frequently give up the chance to do so in exchange for sentencing leniency.<sup>22</sup> Congress's creation (or approval) of a sentencing scheme that puts such a high premium on prosecutorial favor<sup>23</sup> has thus contributed significantly to the movement of effective lawmaking authority from the courts to the executive branch.

The next question is whether the extraordinary degree of discretionary authority that Congress appears to have given to federal enforcers represents a conscious delegation of power. There is no simple answer. The ostensible breadth of many statutes often may just be intentional vagueness or ambiguity—born of legislators' interest in avoiding difficult drafting issues<sup>24</sup> and their recognition of the opportunity costs of specificity in this area.<sup>25</sup> One might also argue that the breadth of federal criminal law owes far less to legislative choices than to creative judicial interpretations, spurred on by prosecutors careful to choose the right cases to advance their agendas.<sup>26</sup> After all, one of the broadest statutes, the mail fraud statute, dates from 1872 and has been used to cover conduct that its drafters

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upon pleas of either guilty or *nolo contendere*. See BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS—1996, at 448 tbl.5.27 (1997).

22. See, e.g., David M. Brodsky, *Think Before You Shred That Document*, N.Y.L.J., July 6, 1998, at 9, 11 (noting that the propriety of unprecedented use of a federal misprison statute against a corporation—in a case in which Daiwa Bank allegedly failed to alert authorities immediately upon learning of an employee's crimes—was never addressed by the courts because the company pleaded guilty).

23. See Jeffrey Standen, *Plea Bargaining in the Shadow of the Guidelines*, 81 CAL. L. REV. 1471, 1475 (1993).

24. See CHARLES R. WISE, *THE DYNAMICS OF LEGISLATION: LEADERSHIP AND POLICY CHANGE IN THE CONGRESSIONAL PROCESS* 178 (1991); Remington & Rosenblum, *supra* note 1, at 487. Frank Remington and Victor Rosenblum concluded that legislatures probably are not greatly dissatisfied with the way the ambiguous criminal statutes are being administered in practice and the advantage of flexibility may well outweigh the desire for clarity and certainty, particularly when the achievement of these may require the legislature to face up to issues which it would rather not confront.

Remington & Rosenblum, *supra* note 1, at 487.

25. See Kahan, *supra* note 4, at 475 (“[T]ime spent enacting criminal legislation necessarily comes at the expense of time that could be spent enacting legislation sought by small, highly organized interest groups, which are more likely than the public at large to reward legislators for benefits conferred and to punish them for disabilities imposed.”).

26. See ALLEN, *supra* note 11, at 72 (“In some areas of legislation, like the federal Mail Fraud and Wire Fraud Acts, the present meanings ascribed to the statutes are largely the products of prosecutorial initiatives.”); Kahan, *supra* note 4, at 480 (“By paying close attention to the facts of the cases they select as vehicles for novel statutory readings, federal prosecutors can highlight the benefits and suppress the costs of the interpretations that they favor.”).



could not possibly have envisioned.<sup>27</sup> Perhaps that statute was hijacked by prosecutors.

The story of congressional activity in this area undoubtedly contains all these elements. However, it is also a story of purposeful efforts to expand the scope of the executive's discretionary enforcement power. The conversation between Congress and the courts<sup>28</sup> is a peculiar one: Expansive statutory interpretations will generally be greeted with silence or, sometimes, ratification.<sup>29</sup> But should the Supreme Court, or even a lower court, significantly restrict the breadth of a criminal provision, Congress will frequently intervene to override the decision.<sup>30</sup> Evidence of ratification can also be found in Congress's readiness to extend the range of two of the most flexible prosecutorial workhorses—the mail fraud statute and the Hobbs Act—by making them predicates for money laundering and RICO prosecutions,<sup>31</sup> or in legislation increasing the penalties in the criminal civil rights statutes after judicial decisions have extended their reach.<sup>32</sup> Even when

27. See, e.g., John C. Coffee, Jr., *Hush!: The Criminal Status of Confidential Information After McNally and Carpenter and the Enduring Problem of Overcriminalization*, 26 AM. CRIM. L. REV. 121 (1988); Daniel J. Hurson, *Limiting the Federal Mail Fraud Statute—A Legislative Approach*, 20 AM. CRIM. L. REV. 423, 424 (1983) (stating that the statute “has been expansively interpreted to invite federal prosecution of virtually every type of untoward activity known to man”); Jed S. Rakoff, *The Federal Mail Fraud Statute (Part I)*, 18 DUQ. L. REV. 771 (1980); Gregory Howard Williams, *Good Government by Prosecutorial Decree: The Use and Abuse of Mail Fraud*, 32 ARIZ. L. REV. 137 (1990); Todd E. Molz, Comment, *The Mail Fraud Statute: An Argument for Repeal by Implication*, 64 U. CHI. L. REV. 983, 983 (1997).

28. See William N. Eskridge, Jr. & Philip P. Frickey, *Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26, 62–65 (1994) (discussing how judicial interpretation of statutes can respond to postenactment legislative signaling).

29. See, e.g., Offenses Against the Postal Service § 215, 35 Stat. 1123, 1130 (1909) (former 18 U.S.C. § 338 (1940)) (ratifying *Durland v. United States*, 161 U.S. 306 (1896)); 18 U.S.C. § 1963(a) (1994) (ratifying *Russello v. United States*, 464 U.S. 16 (1983), with an amendment).

30. See, e.g., Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, tit. VII, § 7603(a), 102 Stat. 4181, 4508 (1988) (codified at 18 U.S.C. § 1346) (passed in the wake of *McNally v. United States*, 483 U.S. 350 (1987)); Taxpayer Browsing Protection Act of 1997, Pub. L. No. 105-35, 111 Stat. 1104 (1997) (passed in wake of *United States v. Czubinski*, 106 F.3d 1069, 1077 (1st Cir. 1997), which rejected the use of the computer and mail fraud statutes against an IRS employee who abused his access to taxpayer records); False Statements of Accountability Act of 1996, Pub. L. No. 104-292 § 2, 110 Stat. 3459 (1996) (responding to *Hubbard v. United States*, 514 U.S. 695 (1995)); Money Laundering Suppression Act of 1994, Pub. L. No. 103-325, tit. IV, § 411, 108 Stat. 2160, 2243, 2253 (1994) (amendment to 31 U.S.C. § 5322(a) designed to overrule *Ratzlaf v. United States*, 510 U.S. 135 (1994)); cf. William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 359 (1991) (“Congress will generally not override a Supreme Court decision without painstaking deliberation over whether the decision undermines its policies and whether alternative approaches are desirable.”).

31. See 18 U.S.C. §§ 1956, 1961–1963.

32. See *United States v. Lanier*, 117 S. Ct. 1219, 1226 n.6 (1997) (noting the lower court's conclusion that Congress never intended 18 U.S.C. § 242 “to extend to ‘newly-created constitutional rights,’ . . . is belied by the fact that Congress has increased the penalties for the section's violation several times . . . without contracting its substantive scope”).

Congress passes a criminal statute that narrowly addresses conduct hitherto prosecuted under a broader statute, it will not preclude prosecutors from exercising the discretion to invoke the harsher penalties of the broader statute.<sup>33</sup> The availability of such choices not only enhances the ability of prosecutors to obtain guilty pleas, but also suggests a conscious legislative tolerance for the scope of the broader provisions.

When we combine the breadth of federal criminal legislation with the relatively small size of the federal enforcement apparatus and the absence of any Continental “principle of legality” that would compel enforcement in any particular case,<sup>34</sup> we are left with what appears (at least at first glance) to be a world of virtually unfettered executive discretion.<sup>35</sup> This is the world condemned so strongly by observers like Francis A. Allen:

The purpose of crime definition is not simply to facilitate the unleashing of governmental powers against persons and groups but also, at the same time, to make evident the behaviors that are immune from the onerous intrusions of the state. It is this central and elementary definitional obligation that is increasingly neglected in the lawmaking of American legislatures and courts.<sup>36</sup>

It is not too hard to figure out why federal enforcers might like this state of affairs. With maximal jurisdiction but limited resources, they have the best of both worlds. Their resource limitations generally allow them to

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33. See Molz, *supra* note 27, at 986 (arguing for the rule of repeal by implication). The rule that Congress does not repeal the more general statute by implication in this case is not simply a judicial creation. During Prohibition, the Supreme Court interpreted the Volsted Act as setting up a comprehensive enforcement scheme that precluded prosecutions under the more general, and harsher, revenue laws of conduct covered by the act. Congress acted within a month and soon thereafter produced a statute effectively overruling the decision and reinstating a regime in which prosecutors could freely choose which statute to invoke. See KENNETH M. MURCHISON, *FEDERAL CRIMINAL LAW DOCTRINES: THE FORGOTTEN INFLUENCE OF NATIONAL PROHIBITION* 132 (1994).

34. See DAVIS, *supra* note 3, at 194 (“Whenever the evidence that the defendant has committed a serious crime is reasonably clear and the law is not in doubt, the German prosecutor, unlike the American prosecutor, is without discretionary power to withhold prosecution.” (footnote omitted) (emphasis omitted)); see also John H. Langbein, *Controlling Prosecutorial Discretion in Germany*, 41 U. CHI. L. REV. 439, 455–67 (1974); William T. Pizzi, *Understanding Prosecutorial Discretion in the United States: The Limits of Comparative Criminal Procedure as an Instrument of Reform*, 54 OHIO ST. L.J. 1325, 1332–34 (1993).

35. See Lynn N. Hughes, *Don't Make a Federal Case Out of It: The Constitution and the Nationalization of Crime*, 25 AM. J. CRIM. L. 151, 161 (1997) (observing that “[t]he most forceful, unchecked power in America is prosecutorial discretion,” a federal judge urges that “[w]e need to limit the range and number of laws a prosecutor has to use”).

36. ALLEN, *supra* note 11, at 91; see Williams, *supra* note 27, at 149 (“Allowing federal prosecutors unfettered discretion to expand the meaning of fraud under the mail fraud statute clearly violates the principle of legality.”).

avoid taking responsibility for crime on any particular "beat,"<sup>37</sup> but, at the same time, they can be confident that they will have a criminal statute to fit any antisocial conduct they choose to pursue (with "antisocial" defined fairly broadly). As James Q. Wilson found:

An FBI agent's workload . . . is not determined by objective circumstances over which he has no control, such as the number of crimes reported to the Bureau by citizens, but by organizational policies and the incentives operating on the agent. His workload consists of those cases that Bureau policy requires him to accept or those cases that, within Bureau guidelines, he has chosen to accept.<sup>38</sup>

When, for example, the Justice Department and the FBI, sensitive to the post-Watergate "crises of confidence,"<sup>39</sup> decided to make white-collar crime a priority in the mid-1970s, they did not need Congress to pass any new laws; the necessary statutes had long been in place.<sup>40</sup>

Enforcement chiefs have worked hard to maintain this balance between authority and responsibility. Even as the federal government began to take on a large criminal enforcement role with Prohibition, Attorney General Mitchell, who later opposed passage of the federal kidnapping statute in the wake of the Lindburgh case, was careful to point out that

[d]ealing with organized crime . . . is largely a local problem . . . [T]he fact that these criminal gangs incidentally violate some federal statute does not place the primary duty and responsibility of punishing them upon the Federal Government, and until state police and magistrates, stimulated by public opinion, take hold of this problem, it will not be solved.<sup>41</sup>

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37. Some beats are associated with federal enforcers: securities violations, immigration, international drug smuggling, counterfeiting, federal tax offenses, espionage, and terrorism are only a few. But prosecutions in these areas are only a fraction of the narcotics, fraud, firearms, theft, and racketeering cases brought by the Department of Justice each year. See BUREAU OF JUSTICE STATISTICS, *supra* note 21, at 420 tbl.5.5; see also JAMES Q. WILSON, *THE INVESTIGATORS: MANAGING FBI AND NARCOTICS AGENTS* 25 (1978) ("The reason for the [FBI's] relative scarcity of individual complainants is that, in almost every criminal matter, the FBI shares jurisdiction with local police authorities, and it is to these authorities that citizens first turn when they have been raped, assaulted, robbed, burgled, or had their cars stolen.").

38. WILSON, *supra* note 37, at 29; see also *id.* at 165 (referring to a study finding that "when confronted with a choice, many if not most bureaus prefer greater autonomy to greater resources").

39. Tony G. Poveda, *White-Collar Crime and the Justice Department: The Institutionalization of a Concept*, 17 CRIME, L. & SOC. CHANGE 235, 246 (1992).

40. See *id.* at 236 ("[W]hat was involved in the process [of targeting white-collar crime] was not the passage of a law by a legislative body, . . . but rather the social construction of an entire crime category by an executive agency using existing statutes.").

41. HOMER CUMMINGS & CARL MCFARLAND, *FEDERAL JUSTICE: CHAPTERS IN THE HISTORY OF JUSTICE AND THE FEDERAL EXECUTIVE* 478 (1937).

J. Edgar Hoover fended off many congressional efforts to increase the FBI's jurisdiction and regularly decried anything that looked like an effort to create a "national police force."<sup>42</sup> More recently, the current FBI Director, Louis Freeh, successfully opposed an amendment to the 1994 Crime Bill, offered by Senator Alphonse D'Amato, that would have made almost every state crime committed with a gun a federal offense.<sup>43</sup> If the dominant theme of this century has been the expansion of federal jurisdiction, an important subtheme has been the efforts of federal enforcers to limit expectations of federal power. They have been largely successful in these efforts and in ensuring that federal criminal statutes are seen, not as legislatively imposed enforcement programs, but as grants of discretionary authority.<sup>44</sup>

The harder question is why Congress tolerates this state of affairs. The situation becomes even more curious when viewed in the broader context of administrative law. The criminal area is hardly the only one in which Congress finds itself forced to delegate policy making and enforcement discretion to bureaucrats who may have their own personal or political agendas. What sets this area apart, however, is that Congress cannot use many of the tools for monitoring and managing delegated criminal enforcement authority that it can draw on to constrain bureaucratic discretion in other areas.

Leading positive political theorists, writing under the name "McNollgast," have, for example, suggested how elected public officials can use administrative process to ensure that bureaucrats comply with their policy intentions.<sup>45</sup> By tinkering with standing rules and other aspects of the procedures for challenging administrative actions, Congress can "reduce the informational costs of following agency activities and especially facilitate 'fire-alarm' monitoring through constituencies affected by an agency's policies."<sup>46</sup> McNollgast may have overestimated the efficacy of administrative procedure as a means of political control, or at least the extent to

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42. SANFORD J. UNGAR, FBI 79 (1976).

43. See Brickey, *supra* note 10, at 1169 n.183.

44. See Gorelick & Litman, *supra* note 10, at 973. Justice Department officials have argued that Congress should criminalize conduct "even though it intends the jurisdiction it authorizes to be exercised in only a small percentage of cases. The exercise of prosecutorial discretion, then, becomes the most important and effective brake on the federalization of crime." *Id.*

45. See Matthew D. McCubbins et al., *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243, 243 (1987) [hereinafter McCubbins et al., *Administrative Procedures*]; see also Arthur Lupia & Mathew D. McCubbins, *Designing Bureaucratic Accountability*, 57 LAW & CONTEMP. PROBS. 91 (1994); Mathew D. McCubbins et al., *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431, 440-44 (1989) [hereinafter McCubbins et al., *Structure and Process*].

46. McCubbins et al., *Administrative Procedures*, *supra* note 45, at 273.

which it has been used for this purpose.<sup>47</sup> However, one thing is clear: This tool cannot be (or at least has not been) used to control criminal law enforcers. On those occasions when the Justice Department promulgates prosecution guidelines, there is no formal rule-making process. In the adjudicatory context, affected parties lack the standing, and therefore the incentive, to contest failures to prosecute.<sup>48</sup> And even when the government does prosecute a defendant, he will have very few legal avenues to pursue a claim that law enforcement officials abused their discretion.<sup>49</sup> Moreover, while in other areas Congress's broad delegations are really conditional, in the sense that it retains power to review and override an agency decision if it so desires,<sup>50</sup> Congress cannot, as a practical matter, undo criminal adjudications.<sup>51</sup> Congress will find it quite difficult to undo even expansive statutory interpretations because of the political infeasibility of protecting those individuals previously identified as criminals.<sup>52</sup>

At first blush, the extent of Congress's abdication of its lawmaking responsibilities in the criminal area thus seems astounding, and well

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47. See JERRY L. MASHAW, *GREED, CHAOS, AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW* 123-30 (1997) (questioning the empirical basis of the McNollgast theory).

48. See *Linda R.S. v. Richard D.*, 410 U.S. 614, 617-19 (1973); see also *Inmates of Attica Correctional Facility v. Rockefeller*, 477 F.2d 375, 378-79 (2d Cir. 1973). In administrative law, an agency's refusal to initiate an enforcement proceeding is presumptively unreviewable, but that presumption can be rebutted when the substantive statute provides guidelines for the agency's exercise of enforcement powers. See *Heckler v. Chaney*, 470 U.S. 821, 832-33 (1985); see also *Dunlop v. Bachowski*, 421 U.S. 560, 566 (1975) (upholding review of the secretary of labor's refusal to challenge a union election when the underlying statute had ordered the secretary to bring suit if there was probable cause to believe that a violation had occurred).

49. See *United States v. Armstrong*, 517 U.S. 456, 464-68 (1996); *Wayte v. United States*, 470 U.S. 598, 607-10 (1985); Anne Bowen Poulin, *Prosecutorial Discretion and Selective Prosecution: Enforcing Protection After United States v. Armstrong*, 34 AM. CRIM. L. REV. 1071, 1088-108 (1997).

50. See John Ferejohn & Charles Shipan, *Congressional Influence on Bureaucracy*, 6 J.L. ECON. & ORG. 1, 8 (1990).

51. As a theoretical matter, Congress may well have the power to confer amnesty on a convicted offender. See Harold J. Krent, *Executive Control over Criminal Law Enforcement: Some Lessons from History*, 38 AM. U. L. REV. 275, 283-84 & n.41 (1989) (citing *Brown v. Walker*, 161 U.S. 591, 601 (1896)).

52. See Carol A. Bergman, *The Politics of Federal Sentencing on Cocaine*, 10 FED. SENTENCING REP. 196, 197-98 (1998) ("The importance of appearing harsh on crime cannot be over-estimated in a tough race . . . . Most Members of Congress are only too aware that any action—especially a vote—which can be used against them in campaign advertisements usually will be.").

A rare instance in which Congress has rolled back a criminal provision—the 1981 Firearms Owners Protection Act, which weakened provisions covering firearms trafficking—is the sort of exception that proves the rule, evidence of the exceptional power of the gun lobby. See WILLIAM J. VIZZARD, *IN THE CROSS FIRE: A POLITICAL HISTORY OF THE BUREAU OF ALCOHOL, TOBACCO AND FIREARMS* 92 (1997).

deserving of critics' condemnation.<sup>53</sup> The usefulness of positive political theory, however, does not end once one recognizes that the Administrative Procedure Act does not limit the law enforcement bureaucracy. The theory, which derives its insights by presuming that institutional actors act rationally in a manner calculated to advance their policy preferences,<sup>54</sup> demands that we probe beyond the face of the substantive law and ask some basic questions: First, what might explain legislators' willingness to write such broad statutes in an area in which notice is so important, penalties so severe, and conduct so easily chilled? Second, to what extent do legislators rely on means other than substantive law to constrain enforcement, and, third, to what ends do they use these means? Logically, these basic questions of political economy ought to be answered before one proceeds to a fourth inquiry that presumes the suboptimality of the existing dynamic and asks what doctrines or institutional reforms should be implemented to change it.

The focus of most commentary, however, has been on the last of these questions. The range of solutions suggested has been broad and of varying effectiveness. Many involve recruiting the courts to hold Congress's feet to the fire. While doctrines like void-for-vagueness and the rule of lenity can be quite malleable, they still might be invoked to bar prosecutions that Congress did not clearly authorize, thus depriving the legislation of the benefits of intentional ambiguity and vagueness.<sup>55</sup> Courts might also use principles of federalism, embodied either in constitutional restrictions on federal power<sup>56</sup> or in rules of statutory interpretation,<sup>57</sup> to ensure that Congress turned square corners before authorizing federal enforcers to venture

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53. See Remington & Rosenblum, *supra* note 1, at 481 ("The dominant view of criminal-law specialists has been that the legislature should assume major responsibility for making basic policy decisions in the field of criminal law.")

54. See Daniel A. Farber & Philip P. Frickey, *Foreword: Positive Political Theory in the Nineties*, 80 GEO. L.J. 457, 462 (1992) (defining positive political theory as a collection of "non-normative, rational-choice theories of political institutions" (emphasis omitted)).

55. See Jeffries, *supra* note 7, at 197; Kahan, *supra* note 7, at 404-06.

56. See *United States v. Lopez*, 514 U.S. 549, 577 (1995); Kathleen F. Brickey, *Crime Control and the Commerce Clause: Life After Lopez*, 46 CASE W. RES. L. REV. 801, 802-04 (1996); George D. Brown, *Should Federalism Shield Corruption?—Mail Fraud, State Law and Post-Lopez Analysis*, 82 CORNELL L. REV. 225, 226-27 (1997); Barry Friedman, *Legislative Findings and Judicial Signals: A Positive Political Reading of United States v. Lopez*, 46 CASE W. RES. L. REV. 757, 758 (1996).

57. See *United States v. Bass*, 404 U.S. 336, 344-50 (1971); see also *McElroy v. United States*, 455 U.S. 642, 658-59 (1982); *Barrett v. United States*, 423 U.S. 212, 221-25 (1976); Vicki C. Jackson, *Federalism and the Uses and Limits of Law: Printz and Principle?*, 111 HARV. L. REV. 2180, 2245 (1998) (arguing that judicial inquiry into whether a federal law regulating private conduct exceeds federal power should focus on whether Congress has adequately considered the need for federal intervention).

into areas traditionally reserved for state authorities. Other solutions would dispense with any obeisance to Congress's legislative supremacy and would more directly attack prosecutorial power with reinvigorated doctrines of selective prosecution<sup>58</sup> or demands that prosecutors tie their own hands by publicly announcing guidelines.<sup>59</sup> The administrative control model also might be taken one step further, as Kahan recently proposed, by importing the *Chevron* doctrine to centralize prosecutorial lawmaking power in the most politically accountable part of the Justice Department.<sup>60</sup> We might even consider injecting a greater measure of accountability into the process by making jurors more aware of their legislative powers.<sup>61</sup>

Before urging one or more of these diverse solutions, however, or even thinking some solution necessary, we ought to give more consideration to the degree to which Congress really has abdicated responsibility in the criminal area and the reasons behind its strategy (to the extent it has one). The approach is, first, to examine what, if any, strategies can be discerned in Congress's substantive lawmaking itself. The lack of satisfactory answers to this inquiry sets the stage for a second inquiry, which continues the search for legislative strategies by looking beyond substantive law.

## II. CONGRESSIONAL DELEGATION STRATEGIES: THE EVIDENCE FROM SUBSTANTIVE LAW

How might one explain legislators' willingness to eschew legislative specificity in an area in which specificity is deemed so important and to

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58. See Poulin, *supra* note 49.

59. See DAVIS, *supra* note 3, at 188-214; Norman Abrams, *Internal Policy: Guiding the Exercise of Prosecutorial Discretion*, 19 UCLA L. REV. 1, 25-34 (1971); Charles D. Breitell, *Controls in Criminal Law Enforcement*, 27 U. CHI. L. REV. 427, 432-35 (1960); James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1543-45 (1981).

60. See Kahan, *supra* note 4; see also Sanford N. Greenberg, *Who Says It's a Crime?: Chevron Deference to Agency Interpretations of Regulatory Statutes That Create Criminal Liability*, 58 U. PITT. L. REV. 1 (1996). The *Chevron* doctrine "requires courts to defer to administrative interpretations of ambiguous statutes as binding exercises of delegated lawmaking authority." Kahan, *supra* note 4, at 469; see *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-45 (1984).

It should be noted that the reluctance of most defendants to take their cases to trial, see *supra* notes 18-23 and accompanying text, would limit the effectiveness of Kahan's *Chevron* proposal because it relies on the litigation of prosecution theories.

61. See Darryl K. Brown, *Plain Meaning, Practical Reason, and Culpability: Toward a Theory of Jury Interpretation of Criminal Statutes*, 96 MICH. L. REV. 1199, 1267-68 (1998) (proposing that instructions be redesigned to aid jurors' interpretative efforts); see also Daniel C. Richman, *Old Chief v. United States: Stipulating Away Prosecutorial Accountability?*, 83 VA. L. REV. 939, 973-74 (1997) (concluding that the need for a prosecutor to "make all her decisions in the shadow of projected jury responses" gives the community "a far greater say in how prosecutors deploy their resources than it has through any more direct mechanism of political accountability").

allow enforcers so much freedom in selecting targets for “community condemnation”?<sup>62</sup> Obviously, there is no single answer to this question. Federal criminal law encompasses narcotics trafficking, securities fraud, environmental crimes, firearms offenses, and taking the name of “Smokey the Bear” in vain.<sup>63</sup> It would be indeed odd if Congress took the same approach to criminal enforcement in all of these, and other, policy areas. And it would be just as odd if there were any clear consensus among all its constituent legislators in any one of these areas. We nonetheless can review a number of possible motivations that would explain the readiness of one or more legislators broadly to delegate enforcement authority in one or more areas of substantive law.

#### A. The Rewards of Criminal Lawmaking

To be fair to Congress, one must begin by conceding that diverse local conditions and offender creativity might well lead public-regarding legislators to see a special virtue in having broad criminal statutes, or at least some such statutes. Just as Chief Justice Burger once touted the breadth of the mail fraud statute as providing a “first line of defense” “against the new varieties of fraud that the ever-inventive American ‘con artist’ is sure to develop,”<sup>64</sup> so might legislators generally seek to give enforcers maximal discretion to combat the infinite variety of antisocial conduct.

For all its advantages, a strategy of maximal delegation would still be politically dangerous, were there a serious risk that legislators would be held responsible by the public, or interested segments thereof, in the event that criminal charges were brought in a marginal case (however defined). Long-standing traditions of prosecutorial independence, however, combined with legal doctrines that free enforcers from the obligation to pursue a case,<sup>65</sup> ensure that legislators face little risk in this regard. The rewards for legislative precision will thus be low in the criminal area, and lawmakers will always be safer if they err on the side of overinclusion.<sup>66</sup> Moreover, to the

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62. Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 404 (1958) (stating that the difference between criminal and civil penalties is that “judgment of community condemnation” accompanies criminal sanction).

63. See 18 U.S.C. § 711 (1994) (providing that the unauthorized use of the “Smokey the Bear” name for profit is a misdemeanor).

64. *United States v. Maze*, 414 U.S. 395, 405, 407 (1974) (Burger, C.J., dissenting).

65. See *supra* notes 34–35 and accompanying text.

66. See Richman, *supra* note 61, at 959 n.69; see also Donald A. Dripps, *Criminal Procedure, Footnote Four, and the Theory of Public Choice; Or, Why Don't Legislatures Give a Damn About the Rights of the Accused?*, 44 SYRACUSE L. REV. 1079, 1090 (1993) (“Executive discretion . . . operates as an important shock-absorber that protects legislatures from hostile reaction to law enforcement operations.”).



extent that they expect to be held accountable for prosecutions, legislators will be confident in the fact that "a far larger number of persons, of much greater political influence, rationally adopt the perspective of a potential crime victim rather than the perspective of a suspect or defendant."<sup>67</sup>

Freed from the need to internalize the costs of broad enactments, the theory goes, legislators can pursue such statutes without even considering their enforcement consequences. Many have bemoaned the tendency of representatives (and presidents) to use criminal statutes for symbolic and politically profitable purposes that do not even require that any prosecutions ever be brought under them.<sup>68</sup> In the political climate of the last quarter century, and even before, the normal legislative editing process simply has not worked very well. There are perceived political rewards for supporting all criminal legislation, particularly if aimed in the direction of some recent outrage, and political penalties for opposing or seeking to narrow all such laws.<sup>69</sup>

This cluster of theories has considerable explanatory power. Immune from any political fallout, legislators have vied to target whatever criminal activity has captured the public's attention. It was Congress, after all, that forced a reluctant Hoover Administration to accept federal jurisdiction over kidnappings, in the wake of the Lindbergh case.<sup>70</sup> The theories may also

67. Dripps, *supra* note 66, at 1089.

68. See, e.g., KATHERINE BECKETT, *MAKING CRIME PAY: LAW AND ORDER IN CONTEMPORARY AMERICAN POLITICS* 31-43 (1997); NANCY E. MARION, *A HISTORY OF FEDERAL CRIME CONTROL INITIATIVES, 1960-1993*, at 13-14 (1994); STUART S. SCHEINGOLD, *THE POLITICS OF LAW AND ORDER* 37-58 (1984); LORD WINDLESHAM, *RESPONSES TO CRIME: LEGISLATING WITH THE TIDE* 182 (1996); Joel Rosch, *Crime as an Issue in American Politics*, in *THE POLITICS OF CRIME AND CRIMINAL JUSTICE* 19-32 (Erika S. Fairchild & Vincent J. Webb eds., 1985); Sara Sun Beale, *What's Law Got to Do With It? The Political, Social, Psychological and Other Non-Legal Factors Influencing the Development of (Federal) Criminal Law*, 1 *BUFF. CRIM. L. REV.* 23, 40-44 (1997); Sanford H. Kadish, *Comment: The Folly of Overfederalization*, 46 *HASTINGS L.J.* 1247, 1248-49 (1995); Nancy E. Marion, *Symbolic Policies in Clinton's Crime Control Agenda*, 1 *BUFF. CRIM. L. REV.* 67 (1997); see also Daniel Shaviro, *Beyond Public Choice and Public Interest: A Study of the Legislative Process as Illustrated by Tax Legislation in the 1980s*, 139 *U. PA. L. REV.* 1, 111 (1990) (discussing "voters' taste for symbolic legislation").

Whether legislators are correct in thinking that sponsoring or voting for criminal statutes has political pay-offs may be an open question. See Gerald F. Seib, *Who Cares?: Many Americans View Washington as a Mess and Just Tune It Out—Scandals, Negative Races, Policy Flops All Hurt*, *WALL ST. J.*, June 4, 1997, at A1 (discussing the lack of public interest in what Washington does and spotlighting a congresswoman who, finding no constituent interest in pending youth crime legislation, spends more time on "local issues").

69. See Bergman, *supra* note 52, at 196 (observing the relationship between election years and omnibus crime bills, a former House staffer reports that "[e]specially noteworthy is the amount of floor time spent repeatedly on anecdotal horrific state crimes to justify enactment of federal law").

70. See CUMMINGS & MCFARLAND, *supra* note 41, at 478-79; RICHARD GID POWERS, *SECRECY AND POWER: THE LIFE OF J. EDGAR HOOVER* 175 (1988).

help explain, for example, the passage of the federal carjacking statute in the wake of the widely publicized Maryland case in which the victim of an auto theft was dragged to her death,<sup>71</sup> the especially punitive treatment given to crack cocaine following the overdose death of basketball star Len Bias,<sup>72</sup> and the decision to make it a felony for someone convicted of a domestic violence misdemeanor to possess a firearm—a decision made without considering the effect that this would have on law enforcement officers.<sup>73</sup>

These theories also go far in explaining legislators' approach to a far broader substantive law program—the Federal Sentencing Guidelines. When Congress finally heeded the sustained campaign for federal sentencing reform,<sup>74</sup> its chief contribution was to create the Federal Sentencing Commission and to delegate vast lawmaking powers to it.<sup>75</sup> Cloaked with the mantle of “expertise,” the commission not only freed legislators from the labors of guideline specification,<sup>76</sup> but also insulated them from the risk that a political opponent would cite the promulgation of a guideline below a statutory maximum as evidence of inappropriate leniency. Yet the establishment of the commission did not foreclose legislators from acting in the area. When legislators found it politically expedient to reject a commission decision for being insufficiently punitive—as occurred when the commission recommended a change in the crack cocaine penalties<sup>77</sup>—they did so,

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71. See 18 U.S.C. § 2119 (1994); see also Brickey, *supra* note 10, at 1162 n.154.

72. See Bergman, *supra* note 52, at 196; William Spade, Jr., *Beyond the 100:1 Ratio: Towards a Rational Cocaine Sentencing Policy*, 38 ARIZ. L. REV. 1233, 1249–56 (1996) (describing the background to the passage of the Anti-Drug Abuse Act of 1986, which established the 100:1 ratio between crack penalties and those for powder cocaine).

73. See Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, § 658, 110 Stat. 3009-371 to 372 (1996) (codified at 18 U.S.C. § 922(g)(9)); *Fraternal Order of Police v. United States*, 152 F.3d 998, 1004 (1998) (holding that Congress's failure to extend the “public interest” exception—applicable to other portions of § 922(g)—to the domestic violence provision violates the Equal Protection Clause); Richman, *supra* note 61, at 953 n.51; Roberto Suro & Philip P. Pan, *Law's Omission Disarms Some Police: Domestic Violence Act Has Some Officers Hanging Up Their Guns*, WASH. POST, Dec. 27, 1996, at A16 (describing how the blanket exception for official use was dropped during the rush to pass appropriations legislation that included the new domestic violence provision); see also ALLEN, *supra* note 11, at 81 (discussing the inadequacy of congressional deliberation on criminal provisions).

74. See generally Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223 (1993).

75. See Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (1984); *Mistretta v. United States*, 488 U.S. 361, 374 (1989) (upholding the constitutionality of delegation to the sentencing commission).

76. See Ronald F. Wright, *Sentencers, Bureaucrats, and the Administrative Law Perspective on the Federal Sentencing Commission*, 79 CAL. L. REV. 1, 10–11 (1991).

77. See U.S. SENTENCING COMM'N, SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY (1995).

notwithstanding the commission's supposed expertise.<sup>78</sup> Nor, for similar reasons, have they shrunk from imposing guidelines-trumping statutory mandatory minimums, particularly in the narcotics area.<sup>79</sup> These and other examples have led many to see the process of criminal lawmaking in recent years as more akin to the publication of campaign literature than to a considered deployment of federal enforcement resources.

## B. Interest Groups and the Enforcement Bureaucracy

Any tale of legislative insouciance, however, has some clear limitations. Much federal enforcement activity does target groups without significant political power.<sup>80</sup> Yet a considerable amount of legislative activity potentially affects constituencies with real political clout (not to mention the legislators themselves).<sup>81</sup> And if one were to pick out the federal criminal statutes whose breadth and vagueness were most likely to raise troubling issues of prosecutorial license and to chill legitimate economic activity, or sensitive intergovernmental relationships, one would start, not with carjacking or narcotics laws, but with the mail fraud, Hobbs Act, money laundering statutes, and RICO—all standards in the prosecutor's white-collar arsenal.<sup>82</sup> One need not be a card-carrying public choice theorist to believe

78. See Spade, *supra* note 72.

79. See Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE L.J. 1681, 1752 (1992) ("Congress gave the . . . Sentencing Commission a difficult task to perform and not much time to begin carrying it out. At the same time, Congress began enacting numerous mandatory minimum penalties, a preoccupation that eight years later has cast a depressing shadow over the Commission's task."); Wright, *supra* note 76, at 78 ("Statutes containing new mandatory minima may constitute the single largest threat by Congress to administrative development of sentencing guidelines."); see also U.S. SENTENCING COMM'N SPECIAL REPORT TO THE CONGRESS, MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM (1991).

80. See William J. Stuntz, *Race, Class, and Drugs*, 98 COLUM. L. REV. 1795, 1816–24 (1998) (noting structural sources of bias).

81. One legislator currently "tak[ing] aim at prosecutorial power" is Representative Joseph McDade (R. Pa.), recently acquitted of charges that he accepted bribes in exchange for funneling defense contracts to certain firms. See T.R. Goldman, *For McDade, Life Fuels Legislation*, LEGAL TIMES, May 18, 1998, at 1.

82. See Lynch, *supra* note 8, at 2137 ("Mail fraud, money laundering, and a host of strict liability regulatory offenses are only the most notorious examples of statutes that are ill-defined, overbroad, or insufficiently concerned with culpability."); see also ALLEN, *supra* note 11, at 86–89; Jimmy Gurule, *The Money Laundering Control Act of 1986: Creating a New Federal Offense or Merely Affording Federal Prosecutors an Alternative Means of Punishing Specified Unlawful Activity?*, 32 AM. CRIM. L. REV. 823 (1995); Peter J. Henning, *Maybe It Should Just Be Called Federal Fraud: The Changing Nature of the Federal Mail Fraud Statute*, 36 B.C. L. REV. 435, 460–76 (1995); Geraldine Szott Moohr, *Mail Fraud and the Intangible Rights Doctrine: Someone to Watch over Us*, 31 HARV. J. LEGIS. 153, 188–99 (1994); Robert G. Morvillo & Barry A. Bohrer, *Checking the Balance: Prosecutorial Power in an Age of Expansive Legislation*, 32 AM. CRIM. L. REV. 137 (1995);

that securities, tax, campaign finance, and other regulatory legislation are at least in part shaped by assertions of political power by the interest groups most directly affected. Should one assume that these groups' lobbying efforts grind to a halt at the civil-criminal divide (a divide that has become all too hazy),<sup>83</sup> and that they make no effort to limit broad legislation that threatens them with the most severe stigma and sanctions?<sup>84</sup> Given how much administrative and legislative activity has centered around finetuning prohibitions that have parallel civil and criminal applications, like insider-trading provisions under the securities laws,<sup>85</sup> why has there been so little effort to restrict the freedom of prosecutors to pursue the same conduct using the mail or wire fraud statutes?<sup>86</sup> Even if one believes that legislators are spectacularly public regarding in the criminal area, a story that completely omits the many politically powerful interest groups potentially affected by broad criminal statutes is hard to accept.

It is not very surprising that one rarely sees high-profile efforts by interest groups to limit purely criminal statutes. Expectations that federal enforcers will appropriately exercise their gatekeeping authority put a special burden on a group that wants statutory immunization. To make a compelling case, the group publicly has to argue not only that its socially

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Terrance G. Reed, *The Defense Case for RICO Reform*, 43 VAND. L. REV. 691, 693-707 (1990); Peter D. Hardy, Note, *The Emerging Role of the Quid Pro Quo Requirement in Public Corruption Prosecutions Under the Hobbs Act*, 28 MICH. J.L. REFORM 409, 411 (1995); Michael D. Paley, Note, *Prosecuting Failed Attempts to Fix Prices as Violations of the Mail and Wire Fraud Statutes: Elliot Ness is Back!*, 73 WASH. U. L.Q. 333, 345-65 (1995); Rachel Ratliff, Comment, *Third-Party Money Laundering: Problems of Proof and Prosecutorial Discretion*, 7 STAN. L. & POL'Y REV. 173 (1996).

83. See Kenneth Mann, *Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law*, 101 YALE L.J. 1795, 1798 (1992).

84. See DAVID O. FRIEDRICH, *TRUSTED CRIMINALS: WHITE COLLAR CRIME IN CONTEMPORARY SOCIETY* 249 (1996) ("The more limited legal response to white collar crime (relative to conventional crime) reflects in part the considerable input businesspeople have in the making and implementation of white collar crime laws . . .").

85. See David D. Haddock & Jonathan R. Macey, *Regulation on Demand: A Private Interest Model, with an Application to Insider Trading Regulation*, 30 J.L. & ECON. 311 (1987); Richard W. Painter et al., *Don't Ask, Just Tell: Insider Trading After United States v. O'Hagan*, 84 VA. L. REV. 153 (1998); Steve Thel, *Statutory Findings and Insider Trading Regulation*, 50 VAND. L. REV. 1091, 1107-15 (1997); see also Richard J. Lazarus, *Meeting the Demands of Integration in the Evolution of Environmental Law: Reforming Environmental Criminal Law*, 83 GEO. L.J. 2407 (1995). Richard Lazarus notes that the "vast majority of existing environmental crime provisions . . . are defined as violations of existing statutory or regulatory requirements. The only distinction between a civil and a criminal violation is that criminal defendants act with a culpable state of mind . . ." Lazarus, *supra*, at 2448-49.

86. Cf. *Carpenter v. United States*, 484 U.S. 19 (1987) (dividing equally on the application of the securities fraud statute to insider-trading cases—an issue the Court later resolved in *United States v. O'Hagan*, 117 S. Ct. 2199 (1997)—the Court upheld mail fraud convictions based on the same conduct); *United States v. Bryan*, 58 F.3d 933 (4th Cir. 1995) (rejecting the government's securities fraud theory but affirming mail fraud convictions).

valuable activities theoretically can be prosecuted under the law in question, and will therefore be chilled, but also that there is a real possibility that prosecutors will actually pursue such conduct.<sup>87</sup> These arguments can sound perilously close to admissions that a group plans to pursue an anti-social or immoral course of conduct. While concentrated interest group power can be publicly deployed to *criminalize* conduct,<sup>88</sup> groups might well prefer less-visible means of *restraining* criminal enforcement.

One way to harmonize interest group activity with the breadth of substantive criminal law would be to draw on the explanation that positive political theorists often offer for broad congressional delegation in areas of significant interest group concern. Such delegations do not merely allow a legislator to seek credit for addressing some problem and to shift blame to agencies for any unpopular action. They also allow him opportunities for "vote-winning casework" wherein he earns credit from constituents or interest groups by intervening with the agency on their behalf.<sup>89</sup>

The explanatory power of this theory is pretty limited in the criminal context, however, because such casework will generally not be much of an option. There may well be easy points to be made with constituents and contributors by intervening with enforcers to encourage the initiation of a prosecution.<sup>90</sup> But intervention to discourage a single prosecution or class

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87. When a federal criminal statute can be invoked without such gatekeeping, as in the case of RICO, groups have not been shy about condemning statutory breadth. See *infra* note 144.

88. Perhaps such a story lies behind the Economic Espionage Act of 1996, 18 U.S.C. §§ 1831-1832 (Supp. II 1996), which appears to criminalize, and federalize, the "entire law of trade secrets." Otto G. Obermaier & Ronald R. Rossi, *Too Many Federalized Crimes?*, N.Y.L.J., July 6, 1998, at 9, 10; see Joseph F. Savage, Jr., *I Spy: The New Economic Espionage Act Can Be Risky Business*, CRIM. JUST., Fall 1997, at 12, 13; see also Lanier Saperstein, *Copyrights, Criminal Sanctions and Economic Rents: Applying the Rent Seeking Model to the Criminal Law Formulation Process*, 87 J. CRIM. L. & CRIMINOLOGY 1470 (1997) (explaining the use of criminal sanctions in the copyright area as a product of rent seeking by interest groups favored by enforcement).

89. See GLEN O. ROBINSON, *AMERICAN BUREAUCRACY: PUBLIC CHOICE AND PUBLIC LAW* 76-77 (1991); see also MORRIS P. FIORINA, *CONGRESS: KEYSTONE OF THE WASHINGTON ESTABLISHMENT* 41-49 (1977); Morris P. Fiorina & Roger G. Noll, *Voters, Bureaucrats and Legislators: A Rational Choice Perspective on the Growth of Bureaucracy*, 9 J. PUB. ECON. 239, 251-53 (1978); Shaviro, *supra* note 68, at 92.

90. See COMMITTEE ON GOV'T OPERATIONS, *COMBATTING FRAUD, ABUSE, AND MISCONDUCT IN THE NATION'S FINANCIAL INSTITUTIONS: CURRENT FEDERAL EFFORTS ARE INADEQUATE*, H.R. REP. NO. 100-1088, at 18-20 (1988) [hereinafter *COMBATTING FRAUD*] (criticizing the Justice Department for insufficient zeal in prosecuting fraud cases arising out of the savings and loan crisis); Williams, *supra* note 27, at 147-48 (recounting how independent automobile manufacturer Preston Tucker was prosecuted with the encouragement of Michigan Senator Warren Ferguson, who had received substantial campaign support from the "big three" auto manufacturers of Detroit); Theodora Galacatos, Note, *The United States Department of Justice Environmental Crimes Section: A Case Study of Inter- and Intra-branch Conflict over Congressional Oversight and the Exercise of Prosecutorial Discretion*, 64 FORDHAM L. REV. 587, 612-28 (1995) (recounting efforts by legislators to investigate instances of allegedly unwarranted prosecutorial

of prosecutions can be quite expensive politically. They may not always be deterred, but politicians can expect a public outcry if any hint of tampering emerges, both because the public values prosecutorial independence and because the parties most likely to need congressional intervention will generally have done obviously bad (indeed criminal) things.<sup>91</sup> In her valuable study of the Antitrust Division, Suzanne Weaver found that the division's chiefs frequently declined to discuss particular cases during oversight hearings, explaining that "these are prosecutorial matters to be held in confidence."<sup>92</sup> Recognizing that "[i]f senators do not want to be seen delving into the internal operations of a law enforcement agency, one should look to the more private contacts" between senators and their staff and the division, Weaver looked further.<sup>93</sup> She found, however, that even in their informal, low-visibility contacts, legislators had a "fear of entanglement in prosecutorial matters."<sup>94</sup> In his study of U.S. Attorneys' Offices, James Eisenstein similarly found that "[s]enators, local politicians, even some defendants, believe it would be improper to try to influence a U.S. attorney's decisions directly."<sup>95</sup> This is not to say that such political interference never occurs.<sup>96</sup> But the principle of prosecutorial independence runs deep

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leniency); Clifford Krauss, *Senate Urges Federal Inquiry on Crown Heights*, N.Y. TIMES, Sept. 30, 1993, at B5 (reporting unanimous Senate resolution, offered by Senators Dole and D'Amato, that called for the Justice Department to investigate the killing of Yankel Rosenbaum in Crown Heights, Brooklyn).

91. Even in the regulatory area, the political costs when an elected official is found to have interceded on behalf of a suspected criminal can be high, as the plight of the "Keating Five" demonstrated. See Phil Kuntz & Janet Hook, *Even Without New Guidelines, Senators Tiptoe to Safe Side*, CONG. Q. WKLY. REP., Mar. 2, 1991, at 524. A RICO "reform" bill received significant negative publicity when its chief sponsor, Senator DeConcini, was linked to Charles Keating. See MARION, *supra* note 68, at 208.

92. SUZANNE WEAVER, *DECISION TO PROSECUTE: ORGANIZATION AND PUBLIC POLICY IN THE ANTITRUST DIVISION* 151 (1977).

93. *Id.*

94. *Id.* at 153.

95. JAMES EISENSTEIN, *COUNSEL FOR THE UNITED STATES: U.S. ATTORNEYS IN THE POLITICAL AND LEGAL SYSTEMS* 204 (1978).

96. See DAVID BURNHAM, *ABOVE THE LAW: SECRET DEALS, POLITICAL FIXES AND OTHER MISADVENTURES OF THE U.S. DEPARTMENT OF JUSTICE* 228-29 (1996). Despite this book's sensational title, it offers few examples of straightforward political interference on behalf of a prosecution target. It does recount how, in 1908, a Republican national committeeman enlisted President Theodore Roosevelt's aid in trying to derail (at least temporarily) the department's investigation of price fixing in the electrical supply business. See *id.* Attorney General Charles Bonaparte was not deterred, however. "I may be unduly nervous on the subject," he wrote to Roosevelt, "but it seems to me that the danger to be guarded against in this campaign is any appearance of solidarity with the trusts." *Id.* at 229 (internal quotation marks omitted). He noted that intervention by people like the committeeman "in matters of this description may be called to the attention of the hostile press." *Id.* (internal quotation marks omitted).

and makes it highly unlikely that the hope of serving constituents lies beyond the extent of congressional delegation in this area.

Even if casework is not a real option in the criminal area, positive political theory offers another way in which broad delegation can serve powerful private interests and therefore may be done at their behest. "[T]ransfer of political power to the bureaucracy," Glen Robinson has suggested, "encourages private interests at the expense of the broad public" because "broad delegations favor concentrated groups relative to those more diffusely organized" and "the agency offers the interest group . . . a more effect[ive] forum for action."<sup>97</sup> Because "[i]nterest groups have more confidence in their ability to influence agency outcomes than to influence congressional outcomes,"<sup>98</sup> perhaps they encourage Congress to write broad criminal statutes that allow enforcers to exercise sweeping discretion in a low-visibility setting.<sup>99</sup>

There may be something to such a theory of direct influence. A great deal of secrecy surrounds the criminal process, particularly with respect to who does not get prosecuted.<sup>100</sup> The complexities of plea bargaining also make it quite difficult for an outsider to determine whether a person or entity that did get prosecuted received unduly lenient treatment from the government. Rather than seek the specific exclusion of their conduct from broad white-collar prohibitions—a legislative favor that would be quite expensive, maybe politically impossible, to obtain—perhaps "respectable" special interests prefer to obtain their exemptions in the relative privacy of an enforcer's office. In this setting, their ability to inflict costs on the government, and the skill and influence of their lawyers, recruited from the

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97. ROBINSON, *supra* note 89, at 78–79; see also Jonathan R. Macey, *Public Choice and the Legal Academy*, 86 GEO. L.J. 1075, 1082–83 (1998) (reviewing JERRY L. MASHAW, GREED, CHAOS, AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW (1997)) ("[W]hen an issue is highly complex and lacks salience with voters, and when there are few competing groups interested in defining policy, a vague statute coupled with a broad delegation would appear desirable.").

98. Macey, *supra* note 97, at 1088.

99. See Dripps, *supra* note 66, at 1090–91 ("Legislatures may authorize police and prosecutors to investigate and punish in ways that might in theory offend powerful interest groups, but police and prosecutors in practice are likely to exercise their discretion so as to avoid such unpleasant collisions.").

100. See *United States v. Armstrong*, 116 S. Ct. 1480, 1486 (1996) (citing the need to avoid unnecessary imposition on "performance of a core executive constitutional function" when explaining its reluctance to allow discovery into prosecutorial files); *Wayte v. United States*, 470 U.S. 598, 607 (1985) ("Examining the basis of a prosecution . . . may undermine prosecutorial effectiveness by revealing the Government's enforcement policy."); Steven Alan Reiss, *Prosecutorial Intent in Constitutional Criminal Procedure*, 135 U. PA. L. REV. 1365, 1373 (1987).

elite white-collar bar, could be brought to bear most effectively.<sup>101</sup> And the expectation of many federal prosecutors that they will join this elite bar could play a critical role in ensuring that the government exercises “reasonable restraint.”<sup>102</sup>

There are, however, significant problems with this theory. First, it gives little consideration to the ideological motivations that may have drawn federal prosecutors to their jobs.<sup>103</sup> Moreover, even were one to assume that personal economic interest dominates the prosecutorial calculus, it would not necessarily guarantee restraint. It is, after all, the dogged prosecutor who wins guilty verdicts in close cases against powerful defendants whose talents are often considered the most valuable by the private sector.<sup>104</sup> Finally, and most importantly, the fragmentation of federal enforcement authority would substantially undercut the effectiveness of any such system of low-visibility lobbying.

Powerful interest groups might indeed have important advantages when dealing with an agency that exercises centralized rule making or even adjudicatory authority.<sup>105</sup> However, there is no agency in the federal criminal apparatus that would allow such one-stop shopping. Investigative authority in the federal system is famously fragmented, with more than fifty

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101. See KENNETH MANN, *DEFENDING WHITE-COLLAR CRIME: A PORTRAIT OF ATTORNEYS AT WORK* 78–79 (1985); see also EISENSTEIN, *supra* note 95, at 171–82 (describing patterns of interaction between federal prosecutors and defense attorneys); Lynch, *supra* note 8, at 2124–29 (describing the process through which well-financed white-collar defendants negotiate with prosecutors).

102. See EISENSTEIN, *supra* note 95, at 174–75 (“The cooperation and cordiality that typify assistants’ interactions with private attorneys reflect at least in part their eagerness to enhance their career prospects.”); WEAVER, *supra* note 92, at 160–61 (noting that Antitrust Division lawyers regard the “close connections” that they “maintain with their colleagues in the private antitrust bar” as a “powerful constraint on their actions”).

103. See Mark Kelman, *On Democracy-Bashing: A Skeptical Look at the Theoretical and “Empirical” Practice of the Public Choice Movement*, 74 VA. L. REV. 199, 219–20 (1988) (“Survey evidence seems to support the commonsensical view that leaders quite frequently sacrifice financially when entering public life or care less about money than people who stay in the private sector, but this evidence is largely ignored [by public choice theorists.]” (footnotes omitted)); Richman, *supra* note 61, at 988.

104. See Richman, *supra* note 61, at 987 n.168; see also Richard A. Posner, *The Federal Trade Commission*, 37 U. CHI. L. REV. 47 (1969).

The principal attraction of [FTC] service to lawyers who wish to use it as a steppingstone to private practice lies in the opportunities it affords to gain trial experience . . . . It is the experience of trying cases, the more the better, not the social payoff from the litigation, that improves the professional skills and earning prospects of FTC lawyers.

Posner, *supra*, at 86.

105. This is the context in which Glen Robinson speaks. See ROBINSON, *supra* note 89, at 78 (“[T]he agency rule-making forum is probably superior to the legislative forum for those well-organized groups that seek active government intervention simply because it is cheaper and easier to obtain effective results.”).



federal "police" agencies and "as many as 200 . . . that have some criminal enforcement role."<sup>106</sup> To be sure, many types of crimes—the typical white-collar ones, for instance—do not fall within the jurisdiction of most of these agencies. But if potential white-collar targets desired a rapprochement with all those agencies most likely to initiate fraud cases against them, they would be ill-advised to deal only with the FBI and to ignore the Postal Inspection Service and the Secret Service, to name just two. This is not to say that an agency-based strategy will never work. Indeed, as discussed later,<sup>107</sup> it is perfectly suited to an area of enforcement—such as firearms—dominated by a single, politically weak agency (although to put it this way may mix up cause with effect). The point is only that such a strategy would probably not be effective in a great many enforcement areas, when one agency can rush in to occupy space left by the restraint of another.<sup>108</sup>

One might respond that the fragmentation of investigative authority poses no obstacle to interest groups seeking restraint because they can still deal with the prosecutors at the Justice Department, who serve as gatekeepers in every criminal case. But this is not at all clear. Some agencies, particularly the FBI, have a considerable degree of independence and political power.<sup>109</sup> Moreover, the relationship between federal investigative agencies and federal prosecutors is coordinate, not hierarchical.<sup>110</sup> Should an agency decide to make the pursuit of certain criminal conduct a high priority, the refusal of departmental prosecutors to seek indictments will doom the agency's initiative, but the cost to the prosecutors may be high.<sup>111</sup> Most

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106. NORMAN ABRAMS & SARA SUN BEALE, *FEDERAL CRIMINAL LAW AND ITS ENFORCEMENT* 6 (2d ed. 1993); see also William A. Geller & Norval Morris, *Relations Between Federal and Local Police*, in 15 *MODERN POLICING* 231, 243 (Michael Tonry & Norval Morris eds., 1992).

107. See *infra* Part III.B.

108. See Geller & Morris, *supra* note 106, at 247–49 (discussing turf battles between federal law enforcement agencies).

109. See *infra* notes 169–173 and accompanying text. In this status, as in much else, the FBI benefits from the work of its chief image maker. Soon after taking over the Bureau of Investigation, Director Hoover required the heads of the agency's field offices "to visit the U.S. attorney in their district at least once a month to remind them that the special agents detailed to assist in investigations were really working for Hoover." POWERS, *supra* note 70, at 152; see also Geller & Morris, *supra* note 106, at 299 (noting that Hoover's objections to organized crime strike forces in the 1960s and 1970s reflected his "characteristic opposition to having FBI agents supervised by anyone other than Bureau personnel").

110. On the Justice Department's organizational chart, the lines of authority for prosecutors and investigative agencies meet only at the level of the deputy attorney general and the attorney general. See ABRAMS & BEALE, *supra* note 106, at 11. Other investigative agencies, such as the IRS, Secret Service, ATF, and Customs Service, are housed within the Treasury Department and formally do not report to any Justice Department officials.

111. See EISENSTEIN, *supra* note 95, at 150–62 (discussing interactions between U.S. Attorneys' Offices and enforcement agencies).

importantly, though, federal prosecutorial authority is itself famously fragmented. The huge majority of criminal cases are brought, not by the litigating divisions under the direct control of assistant attorneys general, but by the ninety-four U.S. Attorneys' Offices, whose chiefs are appointed by the president, usually with considerable local input. These offices, whose prosecutorial authority predates the Justice Department's,<sup>112</sup> have a long tradition of independence from Washington.<sup>113</sup>

The freedom of the U.S. Attorneys' Offices is far from absolute, and there are many mechanisms through which "Main Justice"<sup>114</sup> can assert its authority over a recalcitrant office. At least in theory, Washington can reduce funding, resolve jurisdictional conflicts in favor of other offices, use the disciplinary process or removal power, and give the cold shoulder to U.S. attorneys when they return to private practice.<sup>115</sup> And recent years have seen an effort by Main Justice to "exercise greater supervisory control over decision-making by United States attorneys in the field, with a view to making federal prosecutive policy more uniform nationwide."<sup>116</sup> Yet, U.S. attorneys retain a remarkable degree of power.<sup>117</sup> This is particularly true of the U.S. attorneys in the large metropolitan districts, where cases involving powerful economic groups are perhaps most likely to arise.<sup>118</sup>

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112. See CUMMINGS & MCFARLAND, *supra* note 41, at 218–29; Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 14–22 (1994).

113. See COMPTROLLER GENERAL OF THE UNITED STATES, REPORT TO THE CONGRESS: U.S. ATTORNEYS DO NOT PROSECUTE MANY SUSPECTED VIOLATORS OF FEDERAL LAWS (1978); EISENSTEIN, *supra* note 95, at 54–100; Nancy V. Baker, *The Attorney General as a Legal Policy-Maker: Conflicting Loyalties*, in GOVERNMENT LAWYERS: THE FEDERAL LEGAL BUREAUCRACY AND PRESIDENTIAL POLITICS 31, 40 (Cornell W. Clayton ed., 1995).

114. This is the term most insiders use to refer to the central bureaucracy of the Justice Department in Washington, D.C. See JIM MCGEE & BRIAN DUFFY, MAIN JUSTICE: THE MEN AND WOMEN WHO ENFORCE THE NATION'S CRIMINAL LAWS AND GUARD ITS LIBERTIES 7 (1996). I must admit, though, that in the Southern District of New York, we usually spoke of "the Justice Department" when referring to Washington—making clear that we thought of ourselves as working for some other entity.

115. See EISENSTEIN, *supra* note 95, at 76–100.

116. ABRAMS & BEALE, *supra* note 106, at 8.

117. See 7 U.S. DEPT OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL § 9-2.000 (1997) (giving U.S. attorneys "plenary authority" over prosecutions in their districts).

118. See EISENSTEIN, *supra* note 95, at 116 ("The size of the office provides the best single indication of the relationship between a U.S. attorney and the department. The larger the office, the more likely it is to be . . . 'semiautonomous.'"); see also *id.* at 108 (noting that the Southern District of New York "serves as a constant reminder to the department that its field offices can achieve a position of semiautonomy and it provides other U.S. attorneys with a model of how much independence is possible"); Todd S. Purdum, *Former Special Counsels See Need to Alter Law That Created Them*, N.Y. TIMES, Aug. 11, 1998, at A1 (noting that he had "no more leeway as independent counsel [in the Michael K. Deaver matter] than he had earlier had as United States Attorney in Manhattan in the Nixon Administration," Whitney North Seymour, Jr. observed that "[t]he United States Attorney for the Southern District has almost unlimited power"). See

Given this state of affairs and the fact that the flexibility of federal venue requirements often expose potential targets (particularly in the white-collar area) to prosecution in several different districts,<sup>119</sup> it seems unlikely, as a general matter, that the idea behind Congress's broad delegation is to move the effective legislative process to a low-visibility arena in which special interest groups are more likely to exercise influence directly. Were this the case, one would expect that, at the very least, Congress would do a lot more to subordinate U.S. Attorneys' Offices to departmental control and move policy making to the wholesale, rather than the retail level. This, Congress has been quite loathe to do, despite its keen awareness of the extent of U.S. attorney independence.<sup>120</sup> (The measures Congress has taken in this regard are discussed in Part III.)

This is not to say that particular entities are not well served by the fragmentation of federal enforcement authority. And the favorable treatment that a military contractor, for example, is able to get from a local U.S. Attorney's Office that is aware of the firm's importance to the local economy, or that a local politician can get in recognition of his clout in Washington, may be one of the things Congress has in mind when it embraces these institutional structures. The point is simply that fragmentation makes it much harder for a geographically dispersed group comprising many such entities to lobby federal enforcers directly for restraints that benefit all the members of the group, and that any such restraints, if obtained, are not likely to be reliable. As a general matter, then, it is difficult to explain the breadth of congressional delegation as an effort to facilitate such direct influence.

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generally JAMES B. STEWART, *THE PROSECUTORS: INSIDE THE OFFICES OF THE GOVERNMENT'S MOST POWERFUL LAWYERS* (1987).

119. Offenses "begun in one district and completed in another" may be "prosecuted in any district in which [the] offense was begun, continued, or completed." 18 U.S.C. § 3237(a) (1994); see *United States v. Cabrales*, 118 S. Ct. 1772, 1776 (1998).

120. See, e.g., *COMBATTING FRAUD*, *supra* note 90, at 144-47 (faulting several U.S. attorneys for failing to give financial institution fraud the priority being demanded by the attorney general); *COMPTROLLER GENERAL OF THE UNITED STATES*, *supra* note 113, at 13 ("[C]urrent prosecution philosophy, priorities, and guidelines reflect individual district thinking rather than a nationwide policy. Consequently, differing applications of justice occur."); *GENERAL ACCOUNTING OFFICE*, GAO/GGD-95-150, *U.S. ATTORNEYS: MORE ACCOUNTABILITY FOR IMPLEMENTING PRIORITY PROGRAMS IS DESIRABLE* 11 (1995) (quoting one U.S. attorney as saying "that he does not pay much attention to national priorities, preferring to trust his staff's judgment, focus on local interests, and prosecute anything that is big enough to warrant his office's attention").

### C. State Governmental Interests

There is one special interest for which the fragmentation of federal prosecutorial authority does offer great advantages: state and local law enforcement authorities. For this group, the extent of federal intrusion authorized by Congress into their traditional areas of responsibility brings enormous benefits. First, of course, are those benefits directly from the cases that the feds prosecute, cases that would often be prohibitively expensive for the local authorities. The federal resources devoted to street crime, drug crimes, and even organized crime and corruption may themselves be limited, but they can be strategically invested—in such expensive tools as electronic surveillance, witness protection, and prosecutorial support for investigations—because federal agencies are largely excused from the political obligation to patrol an expansive beat in these areas.<sup>121</sup> Federal prosecutors can also bring cases that would be procedurally impossible in state court and that generally result in higher sentences for defendants.<sup>122</sup>

The shadow that the possibility of federal intervention casts over the state system, however, brings advantages to state enforcers going far beyond slightly lightening their caseload.<sup>123</sup> Some advantages inure to the citizens they serve: The threat of federal charges carrying higher effective penalties can be used by state prosecutors to extract guilty pleas from defendants in their own system and may also enhance the deterrent effect of state penal laws.<sup>124</sup> Other advantages inure chiefly to the enforcers and may even ill-serve the citizenry. While responsibility for street crime and most other traditionally local offenses may never get shifted to the federal government, the possibility of federal intervention will often allow state enforcers to evade some accountability for failures to prosecute a particular case or class

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121. See Charles F.C. Ruff, *Federal Prosecution of Local Corruption: A Case Study in the Making of Law Enforcement Policy*, 65 GEO. L.J. 1171, 1211 (1977) (noting the ability of federal enforcers to focus on a small number of cases).

122. See Clymer, *supra* note 10, at 668–75; John C. Jeffries, Jr. & John Gleeson, *The Federalization of Organized Crime: Advantages of Federal Prosecution*, 46 HASTINGS L.J. 1095, 1103–25 (1995) (discussing the advantages of federal prosecution).

123. See Clymer, *supra* note 10, at 676 (“Although prosecution under duplicative federal statutes constitutes a substantial portion of federal prosecutors’ caseloads, most offenders who are eligible for both federal and state prosecution are charged in state court. Indeed, federal prosecutors lack the resources to bring charges in more than a small percentage of such cases.” (footnotes omitted)).

124. See Brickey, *supra* note 10, at 1159 nn.138–39 (describing the theory behind Rudolph Giuliani’s “federal day” initiative and noting that Senator Biden once introduced legislation that would have created “a national federal day each month to bring all locally arrested drug offenders into the federal system”). *But see* Robert Heller, Comment, *Selective Prosecution and the Federalization of Criminal Law: The Need for Meaningful Judicial Review of Prosecutorial Discretion*, 145 U. PA. L. REV. 1309, 1334–37 (1997) (questioning the empirical validity of this theory).

of cases.<sup>125</sup> By coordinating their activities with federal enforcers, state authorities can also profit economically by gaining access to federal funds and equipment<sup>126</sup> and, in recent years, using federal "equitable sharing" procedures to retain proceeds from forfeitable property that might otherwise go to state treasuries.<sup>127</sup>

These diverse benefits, however, could potentially come at considerable cost if federal enforcers used their broadly delegated power to cherry-pick the most politically rewarding cases in order to advance a bureaucratic agenda or their careers. They doubtless do this on some occasions.<sup>128</sup> Yet one rarely sees state enforcers complaining to Congress about the extent of concurrent jurisdiction.<sup>129</sup> The deafening silence is not merely because the

125. See *New York v. United States*, 505 U.S. 144, 169 (1992) (finding accountability diminished when citizens cannot easily determine which level of government is responsible for a particular regulatory decision); Barry Friedman, *Valuing Federalism*, 82 MINN. L. REV. 317, 394-97 (1997); Lawrence Lessig, *Translating Federalism: United States v. Lopez*, 1995 SUP. CT. REV. 125. *But see* Brown, *supra* note 56, at 284 (arguing that federal enforcement of state norms in the corruption area would "further accountability" because "citizens . . . will ask why their own officials are not enforcing their law").

It is noteworthy that during Prohibition, perhaps the first period of significant concurrent criminal jurisdiction, most states were quite content to leave primary enforcement responsibility to the federal government. See CLAIRE BOND POTTER, *WAR ON CRIME: BANDITS, G-MEN, AND THE POLITICS OF MASS CULTURE* 17-19 (1998); Louis B. Boudin, *The Place of the Anti-Racketeering Act in Our Constitutional-Legal System*, 28 CORNELL L.Q. 261, 273-74 (1943).

126. See, e.g., GENERAL ACCOUNTING OFFICE, GAO/GGD-96-150, REPORT TO THE ATTORNEY GENERAL: VIOLENT CRIME FEDERAL LAW ENFORCEMENT ASSISTANCE IN FIGHTING LOS ANGELES GANG VIOLENCE 2-3, 6 (1996) (surveying local law enforcement officers reports that, according to them, the chief benefits of federal involvement are overtime pay, manpower, office space, wiretaps, equipment, money for informants and drug/gun purchases, and federal prosecution of cases).

127. See DAVID W. RASMUSSEN & BRUCE L. BENSON, *THE ECONOMIC ANATOMY OF A DRUG WAR: CRIMINAL JUSTICE IN THE COMMONS* 132-39 (1994) (analyzing the efforts of state law enforcement authorities to use federal forfeiture provisions as a means of evading restrictions imposed by local laws and politics); Eric Blumenson & Eva Nilsen, *Policing for Profit: The Drug War's Hidden Economic Agenda*, 65 U. CHI. L. REV. 35, 106-08 (1998).

128. See, e.g., Ronald Smothers, *In Millionaire's Killing, Debate on Trying Youths as Adults*, N.Y. TIMES, Nov. 17, 1997, at B4 ("[L]awyers familiar with juvenile cases . . . said it was probably the prominence of the case [involving the kidnapping and murder of a millionaire] that accounted for its moving into the Federal courts. Such cases, the lawyers said, can help prosecutors burnish an image of being tough on crime."); see also EISENSTEIN, *supra* note 95, at 230-31 (noting career paths of U.S. attorneys); Kahan, *supra* note 4, at 486 ("U.S. Attorneys are extraordinarily ambitious and frequently enter electoral politics after leaving office.").

129. See Geller & Morris, *supra* note 106, at 312-13 (finding those in the system content with the current federal-state division of policing authority); Geraldine Szott Moohr, *The Federal Interest in Criminal Law*, 47 SYRACUSE L. REV. 1127, 1130 (1997) (noting that states are generally "loath to complain about federal encroachment"). *But see* William L. Murphy, Letter to the Editor, *Eschewing Intrusive Federal Help*, LEGAL TIMES, Mar. 16, 1998, at 30 (District attorney of Richmond County, New York, and president of the National District Attorneys Association notes: "When the Congress enacts new criminal statutes that duplicate state efforts it leads to

benefits of federal activity outweigh the costs, but because the costs are small. There are several reasons for the small costs. First, the fragmentation of federal enforcement authority ensures that prosecutorial discretion is primarily exercised by U.S. Attorneys' Offices, led by appointees beholden to legislators,<sup>130</sup> who in turn nurture ties to state and local institutions.<sup>131</sup> In contrast to political interference intended to shield a target from prosecution, intervention on behalf of state enforcers carries no risk, and legislators are not shy about demanded cooperation with the authorities in their home districts.<sup>132</sup>

The possibility of such intervention, however, is merely a backup for state authorities. Their primary means of ensuring federal cooperation lies in their control of informational networks on which federal law enforcement agencies must rely when pursuing episodic criminal activity of the sort that state enforcers traditionally handle.<sup>133</sup> When federal agencies pursue organized criminal groups, such as Mafia families or drug-trafficking networks, they can develop their own informants and work up.<sup>134</sup> Federal agencies can similarly develop information sources in the special areas that

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conflicting priorities and allocation of assets that causes both federal and local law enforcement organizations to be less effective and efficient than we could or want to be.”)

130. See EISENSTEIN, *supra* note 95, at 35–53 (discussing the U.S. attorney appointment process); cf. Griffin B. Bell & Daniel J. Meador, *Appointing United States Attorneys*, 9 J.L. & POL. 247 (1993) (arguing that vesting the attorney general with complete control over the selection of U.S. attorneys would remove the influence of local politics and therefore be beneficial).

131. See Larry Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485, 1545 (1994) (“[Federal] administrators are beholden to members of Congress who can be prevailed upon to intervene on behalf of the states.”); see also *Impounded (Juvenile R.G.)*, 117 F.3d 730, 740 (3d Cir. 1997) (Weis, J., dissenting) (observing that “parochial concerns become more influential” at the U.S. attorney level, as opposed to the national level).

132. James Q. Wilson noted:

[B]y and large, at least among the knowledgeable legislators serving on the relevant committees, the congressional interest is in whether, and to what extent, a federal agency serves constituent needs that are, if not locally defined, then illustrated by local examples. FBI and DEA budget hearings are . . . dominated . . . by questions about the drug or crime situation in particular localities, the needs of local police departments for aid and cooperation, allegations of misconduct in various communities, and the work of the agency in handling named crimes, extremist activities, and drug-trafficking groups.

WILSON, *supra* note 37, at 196–97.

133. The Lindbergh kidnapping case offers an example of how these restraining influences converged in the FBI's early years. Annoyed at efforts of J. Edgar Hoover's newly galvanized Division of Investigation to intervene, the chief of the New Jersey state police, Colonel Norman Schwartzkopf, banned division agents from New Jersey state patrol cars assigned to the investigation. Schwartzkopf also introduced a resolution at a national meeting of state police chiefs that condemned the division for its “lack of cooperation” in the case, and the attorney general heard complaints from both New Jersey senators. Federal activity in the case virtually ceased soon thereafter. See POTTER, *supra* note 125, at 114–15.

134. See WILSON, *supra* note 37, at 61–88 (discussing the development and use of informants by the FBI and DEA).

they regularly patrol, like the securities markets or diplomatic communities. As federal interest moves down to more episodic criminal activity, like street crimes, agencies become more dependent on local police departments, the only entities whose tentacles reach every street corner. Even the FBI, whose esprit (critics might use a different term) is legendary among law enforcement agencies, has long recognized the need to cultivate, and not alienate, local police forces.<sup>135</sup> Thus, while federal enforcers have professional and personal reasons to compete with their state counterparts for the "hottest" cases, they can rarely afford to do so.<sup>136</sup>

Viewed this way, the breadth of the delegation to federal enforcers in areas of traditional state authority emerges not as an intrusion, but as a form of aid-in-kind to state enforcers.<sup>137</sup> Indeed, the extent of delegation, coupled with the informational asymmetry from which state authorities derive their power, may well serve state enforcer interests better than would direct grants of the sort given in Law Enforcement Assistance Administration (LEAA) programs. With direct grants<sup>138</sup> comes the obligation to account for expenditures, an obligation likely to be taken seriously in the wake of

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135. See *id.* at 195 (stating that the DEA and FBI must "cultivate the goodwill of, and provide some services to" local and state police departments "in part because federal agencies are to a degree dependent on local ones for investigatory assistance—checking out names, recruiting informants, gathering intelligence").

The FBI has long offered numerous enticements to local police agencies. Some, like centralized data banks and interstate assistance, generally aid the enforcement activities of those agencies. See *id.* at 289–98. Others, like slots in the FBI's National Academy, have the added effect of directly advancing the careers of participating officers. See POWERS, *supra* note 70, at 217 ("This training school had the practical political effect of creating a strong constituency for Hoover and the FBI within local police leadership throughout the country, since an academy diploma was a powerful aid to a police officer's advancement."). The days when the agency would offer cash rewards to police officers for information appear to be over. See POTTER, *supra* note 125, at 194 (recommending that two police officers be given \$500 each, the head of the Los Angeles office noted, in 1934, that the money "would be one of the best investments the Division could make to stimulate active interest in police officers in this district to give information directly to this Division").

136. See Geller & Morris, *supra* note 106, at 249 ("The main problems today are not federal-local; they're federal-federal." (quoting the past president of the International Association of Chiefs of Police) (internal quotation marks omitted)); see also *id.* at 266 n.18 (noting that an organized crime expert attributes the successes of U.S. Attorney Giuliani in that area to his sensitivity to the needs of police department hierarchy).

137. Explaining how his agency determined whether to take a case to federal or to state prosecutors, Captain William Robertson of the City of Richmond, Virginia, Police Department noted, in 1998, that "it's like buying a car: we're going to the place we feel we can get the best deal. We shop around." Charles D. Bonner, Comment, *The Federalization of Crime: Too Much of a Good Thing?*, 32 U. RICH. L. REV. 905, 930 (1998).

138. There are a number of direct grant programs to localities currently administered by the Justice Department, the most famous being those to put more police officers on the streets. See 1997 ATT'Y GEN. ANN. REP. 33–34.

the claims of waste and inefficiency that were leveled at the LEAA.<sup>139</sup> Coordinated operations with federal agencies bring assistance without any such accountability. If any entities are indeed being “commandeered”<sup>140</sup> when politically rewarding “overfederalization” puts federal agents and prosecutors into the battle against street crime, they are federal, not state and local.<sup>141</sup>

#### D. Beyond Substantive Lawmaking

If, putting aside the special case of state and local governments, the breadth of Congress’s delegation to federal enforcers cannot be seen as motivated by a general effort to enable interest groups to influence prosecutorial policies directly, how then are we to explain legislators’ strategy? There are a number of possibilities: The first, of course, is that our initial curiosity was misplaced. This is the one legislative area in which there is no interest group story to be told. Once they satisfy the perceived popular demand for the criminalization of a broad range of conduct<sup>142</sup> and for the establishment of an enforcement apparatus empowered to make its own targeting choices, legislators find that the costs of further work in this area outweigh the returns.

A second, somewhat related, possibility is that legislators find such costs particularly unnecessary because they are largely satisfied with the choices that enforcers make. Perhaps the fragmented system that has Main Justice tied, through the president, to national political forces; U.S. Attorneys’ Offices’ reflecting a mix of local and national politics, and

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139. See MARION, *supra* note 68, at 136.

140. This is the sin said to occur when state officials are required to help execute federal law. See *Printz v. United States*, 117 S. Ct. 2365, 2384 (1997) (striking down a provision of the Brady Act that, according to the Court, conscripted state officers to enforce a federal regulatory program); Saikrishna Bangalore Prakash, *Field Office Federalism*, 79 VA. L. REV. 1957, 1995–96 (1993).

141. See *Role of Federal Law Enforcement, Hearing of the Crime Subcomm. of the House Judiciary Comm.*, Federal News Service, Nov. 15, 1995, available in LEXIS, News Library, Arcnws File (quoting a General Accounting Office (GAO) official who notes that FBI activities coordinated with local enforcement agencies are funded out of the FBI’s regular operating funds).

142. The demand for broad symbolic condemnation of certain conduct could come from special interests as well, such as market professionals who would like the appearance of regulation to attract investment. However, as Michael Levi found when studying antifraud regulation in Great Britain, groups and even individuals may be conflicted on this matter:

[T]he desire to protect public confidence in the legitimacy of the system is countered by the fear of damaging the volume of trade and of putting themselves and their colleagues at risk of being convicted of criminal offences; and many groups have conflicting short-term and long-term interests which are not resolvable in a self-evident way.

MICHAEL LEVI, *REGULATING FRAUD: WHITE-COLLAR CRIME AND THE CRIMINAL PROCESS* 84 (1987).



enforcement agencies caught somewhere in between, happens to work tolerably enough. After all, this system allows flexible responses to local circumstances and a moderating balance of power between prosecutors and agencies, and between Washington and the districts. Under these circumstances, legislators and interest groups might have considerable confidence that enforcers will exercise their discretion appropriately, pursuing only those "bad apples" deserving of punishment.<sup>143</sup> This perhaps would explain why, for instance, most of the efforts of business and labor groups to reform the RICO statute have been directed at its civil provisions, with spokesmen often contrasting civil abuses with the Justice Department's responsible gatekeeping.<sup>144</sup>

There may be considerable truth in these hypotheses. But like so many other analyses of congressional activity in the criminal area—particularly those that simply focus on the apparent sweep of prosecutorial power engendered by substantive federal criminal law—they all underestimate the richness of Congress's interactions with the federal enforcement apparatus and the extent to which enforcers' decisions are likely to reflect legislative preferences.

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143. See JOACHIM J. SAVELSBERG & PETER BRÜHL, *CONSTRUCTING WHITE-COLLAR CRIME: RATIONALITIES, COMMUNICATION, POWER* 147-48 (1994) ("There is reason to believe that much of the white-collar initiative [in the late 1970s and early 1980s] simply expanded punitive responses to members of the lower middle and middle classes."); Poveda, *supra* note 39, at 237 (noting that structuralist theory understands white-collar crime enforcement "as a symbolic way of maintaining legitimacy" of a state and legal system that protects capitalism); *id.* at 247 (finding that studies confirm that "the vast majority of offenders who are arrested for certain designated 'white-collar crime' statutes . . . are overwhelmingly not elite offenders").

144. See *RICO Reform, Hearings Before the Subcomm. on Criminal Justice of the Comm. on the Judiciary House of Representatives*, 99th Cong. 491 (1987) [hereinafter *RICO Reform*] (A securities industry representative notes: "The explosion of civil RICO cases stands in stark contrast to the self-discipline imposed by the Justice Department in its employment of RICO in criminal prosecutions."); see also *id.* at 3 (stating that accountants are interested only in civil reform); *id.* at 191. A lawyer for insurance groups noted:

In the hands of responsible prosecutors, those very broad statutes [mail, wire, and securities fraud] can be used with discretion in appropriate cases, but where private parties lured by treble damages and attorneys' fees, and unrestrained by prosecutorial discretion, can initiate private RICO actions based on allegations of fraud, there is no responsible limitation on the claims that they can bring.

*Id.*; see MARION, *supra* note 68, at 208; Steven A. Holmes, *Congress to Take New Look at Racketeering Law*, N.Y. TIMES, Sept. 14, 1990, at B18 (stating that a RICO reform bill, supported by lobbying efforts of "[a]n unlikely coalition of business and labor groups and the American Civil Liberties Union," "would leave intact the statute's criminal provisions"); cf. Private Securities Litigation Reform Act of 1995, Pub. L. 104-67, tit. I, § 107, 109 Stat. 758 (1995) (codified at 18 U.S.C.A. § 1964(c) (Supp. 1998)) (barring the use of securities fraud predicate in civil RICO actions, absent prior criminal conviction).

### III. STRUCTURAL AND PROCEDURAL MECHANISMS OF CONTROL

In other contexts, positive political theorists have noted Congress's remarkable sophistication in designing administrative structures and processes to ensure that agencies "produce policy outcomes that legislators deem satisfactory."<sup>145</sup> There is considerable room for debate on this point. If the ostensible breadth of legislative delegation stems from Congress's inability to formulate or agree on particular policy choices, it is a bit odd to suggest that legislators somehow will "agree on structural and procedural arrangements that are sufficiently specific as to direct policy choices."<sup>146</sup> Nonetheless, inquiry into such mechanisms of legislative influence, even control, can still advance our understanding of the federal criminal system. An account of these mechanisms might help us assess the degree to which the lack of statutory specificity is actually attributable to the challenges of assembling majorities, as opposed to other factors, like the political pressures that make it hard for even a solid majority to fine-tune criminal legislation. Moreover, we would advance our understanding of the constraints on executive power even if it turned out that these devices were being deployed by a small subset of legislators at the behest of special interests. The account offered here is impressionistic. It suggests, however, that Congress's influence on enforcement decisions is far greater than those whose criticism of its delegation has been based on the absence of legislative specificity have recognized.

#### A. Appointments and Hearings

Some aspects of the "incentive system"<sup>147</sup> that legislators use to promote their enforcement preferences and priorities can hardly be called low visibility. The process for selecting U.S. attorneys, for example, has long been recognized as a means through which senators influence prosecutorial behavior in their respective states—at least when they are members of the president's party.<sup>148</sup> Their power over the administration's choice of

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145. McCubbins et al., *Structure and Process*, *supra* note 45, at 432; see Jonathan R. Macey, *Organizational Design and Political Control of Administrative Agencies*, 8 J.L. ECON. & ORG. 93 (1992); Macey, *supra* note 5, at 671–72; Barry R. Weingast & Mark J. Moran, *Bureaucratic Discretion or Congressional Control? Regulatory Policymaking by the Federal Trade Commission*, 91 J. POL. ECON. 765 (1983).

146. ROBINSON, *supra* note 89, at 97–98.

147. Weingast & Moran, *supra* note 145, at 769.

148. See EISENSTEIN, *supra* note 95, at 45.

When both senators belong to the other party, the department consults state party leaders and members of the House of Representatives on appointments. Although such individuals may be as important as senators to the president's political coalition, they lack

nominee is far from absolute, but as James Eisenstein has noted, senatorial courtesy "provides enough leverage to offset partially the resources of the department so that a good deal of give-and-take bargaining occurs."<sup>149</sup>

Exactly how this process affects decision making in U.S. Attorneys' Offices is difficult to determine. By backing a prospective appointee whose enforcement priorities match her own, a senator can promote an agenda, or protect a special interest, without directly intervening in cases. Her influence may extend even to appointees who do not share her priorities, because allegiance to the source of one's preferment is often a safe strategy for advancement.<sup>150</sup> These aspects of legislative power are chancy because U.S. attorneys have been known to "proceed with cases that they know will generate tremendous pressures and ruin their subsequent careers."<sup>151</sup> What this process does generally (though not always) ensure, however, is that U.S. attorneys have firm roots in the local power structure and at least appreciate the preferences of the special interests that dominate it.

The ability of legislators to influence prosecutorial policy making through the appointment process extends beyond U.S. attorneys to the attorney general and her division chiefs, who are all subject to Senate confirmation. There is a Kabuki aspect to most confirmation hearings,<sup>152</sup> but they do give legislators an opportunity to apprise the nominee of their own priorities, if not to impose them.<sup>153</sup> At least in recent years, the exercise has probably not been an empty ritual, given the difficulties that the Clinton's Administration's Justice Department nominees have faced in the Senate.<sup>154</sup>

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the power to block Senate confirmation of nominees and consequently exert less influence on appointments.

*Id.*

149. *Id.* at 42.

150. See *id.* at 206 ("Undoubtedly, politically astute men who owe their appointment and allegiance to an influential individual shape their decisions on their own initiative with no communication whatsoever.")

151. *Id.* at 205.

152. For a sardonic description of the process, see ROBERT B. REICH, *LOCKED IN THE CABINET* 37-41 (1997).

153. See *Senators Poised to Confirm Nominee to Long-Vacant Top Job in Criminal Division*, 63 BNA CRIM. L. RPT. 117 (1998) (describing concerns raised by senators during confirmation hearings for James K. Robinson, the Clinton Administration's nominee for assistant attorney general for the Criminal Division).

154. After Jo Ann Harris resigned on August 31, 1995, the position of assistant attorney general for the Criminal Division remained open for almost three years, in part because of Republican opposition to Robert Litt, the Clinton Administration's first nominee for the job. See *id.*; Sam Skolnik, *DOJ's Robert Litt: Clinton Tool or GOP Scapegoat*, LEGAL TIMES, Aug. 10, 1998, at 1; Editorial, *Vacancy at Justice*, WASH. POST, Oct. 27, 1997, at A24. The administration's difficulties in obtaining confirmation for its nominations to the Civil Rights Division have been in the news often. See John M. Broder, *Clinton, Softening Slap at Senate, Names "Acting" Civil Rights Chief*, N.Y. TIMES, Dec. 16, 1997, at A1 (nomination of Bill Lann Lee); Lynne Duke, *Attorney*

Oversight hearings also give legislators in the relevant committees the chance to impose costs if enforcers are insufficiently attentive to their concerns. Here, too, the solicitude that enforcers show to legislators is often limited to the duration of the hearing itself.<sup>155</sup> The ability to shine the spotlight on executive activities may confer an extraordinary degree of power on legislators in the criminal area, however, because it challenges the virtual monopoly that enforcers, by invoking investigative secrecy and privacy, usually can maintain over information concerning their activities.

Because the committee system gives a small subset of legislators the power to force enforcement agencies to internalize the political costs of a prosecution or nonprosecution strategy, the oversight process arguably "enhances the likelihood of an outcome favoring special-interest groups insofar as these are the natural objects of a legislator's bounty."<sup>156</sup> Yet, whether done in the service of special interests or the public at large, the process undoubtedly has been used to deter or restrain enforcement in certain sensitive areas.<sup>157</sup> One has only to look at the recent hearings into IRS abuses,<sup>158</sup> or into the conduct of ATF and FBI agents at the Branch Davidian compound in Waco.<sup>159</sup> Characteristically, these hearings focused

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*Named to Rights Post: Ex-NAACP Litigator Deval Patrick to Fill Long-Vacant Position*, WASH. POST, Feb. 2, 1994, at A1 (nomination of Deval Patrick); Neil A. Lewis, *Senate Democrats Urge Withdrawal of Rights Nominee*, N.Y. TIMES, June 2, 1993, at A1 (nomination of Lani Guinier).

155. See HERBERT KAUFMAN, *THE ADMINISTRATIVE BEHAVIOR OF FEDERAL BUREAU CHIEFS* 165 (1981) (noting that all the bureau chiefs in his study "were alert to the moods of Congress, sensitive to the attitudes of their committees, and careful not to give offense even when demands could not be fully met"); ROBINSON, *supra* note 89, at 98.

[B]eing stubborn does not necessarily entail being stupid about it. The FDA commissioner who has just been berated for his failings by Congressman John Dingell may or may not change his ways, but he is unlikely to make a public show of defiance that would only prolong the confrontation and possibly force the congressman to take more drastic measures.

ROBINSON, *supra* note 89, at 98.

156. ROBINSON, *supra* note 89, at 101.

157. There are limits to legislators' power in this area. Suzanne Weaver found that chiefs of the Antitrust Division were frequently able to "excuse . . . themselves from discussing particular case decisions in any detail," merely by noting that "these are prosecutorial matters to be held in confidence." WEAVER, *supra* note 92, at 151.

Oversight hearings have also investigated instances of allegedly inappropriate prosecutorial leniency, such as that involving E.F. Hutton in 1985-96. See *WHITE COLLAR CRIME (E.F. HUTTON): HEARINGS BEFORE THE COMM. ON THE JUDICIARY*, S. REP. NO. 99-1026, pt. 3, at 3 (1986); Nicholas M. Horrock, *Prosecutor Denies U.S., Hutton Made Deal*, CHI. TRIB., Dec. 7, 1985, at C1; see also Galacatos, *supra* note 90, at 612-28 (discussing hearings into the handling of environmental prosecutions).

158. See Albert B. Crenshaw, *Senate Panel Told of IRS Abuses; Witnesses Allege Harassment, Mistakes, Fabricated Evidence*, WASH. POST, Sept. 25, 1997, at E3; David Cay Johnston, *Senate Committee Is Told of a Vast Range of Abuses by I.R.S.*, N.Y. TIMES, Apr. 29, 1998, at A16.

159. See *Activities of Fed. Law Enforcement Agencies Toward the Branch Davidians*, Joint Hearings Before the Subcomm. on Crime of the Comm. on the Judiciary House of Representatives and

more on tactics than on targeting. In deference to widely shared notions of prosecutorial independence— notions that also provide Congress with political cover— legislators are quite reluctant explicitly to challenge exercises of prosecutorial discretion. The message on targeting was nonetheless clear in these hearings because it is highly unlikely that the use of the same tactics on, for instance, narcotics traffickers, would have triggered similar scrutiny. When legislators want to put an enforcement agency in the spotlight in a more sustained and systematic way, they can also deploy investigators from the General Accounting Office (GAO), as they did following the Waco hearings.<sup>160</sup> Such audits can operate as a powerful restraint on agency activity.<sup>161</sup>

Legislators also occasionally impose reporting requirements on the department, which allow them to track caseload and other matters without resorting to the hearing process.<sup>162</sup> While the effectiveness of such measures as a monitoring tool is probably rather limited,<sup>163</sup> they are yet another powerful signal of legislative priorities. Statutory penalties are used as another such symbol by legislators who apparently presume (like some theorists)<sup>164</sup> that prosecutors seek to maximize convictions weighted by sentence.<sup>165</sup>

Nearly every congressional session in recent times has seen oversight inquiries into criminal enforcement activities. Given the range of possibilities, however, the number is relatively small. This is as one would expect.

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*the Subcomm. on Nat'l Sec., Int'l Affairs, and Criminal Justice of the Comm. on Gov't Reform and Oversight, 104th Cong. (1996).*

160. See GENERAL ACCOUNTING OFFICE, GAO/T-GGD-96-104, ALCOHOL, TOBACCO AND FIREARMS: ISSUES RELATED TO USE OF FORCE, DEALER LICENSING, AND DATA RESTRICTIONS (1996).

161. The same GAO report that examined ATF's use of force policies in the wake of the Branch Davidian raid also looked into allegations that ATF's firearms enforcement policy had reduced the number of licensed firearms dealers. See *id.* at 3.

162. See 1997 ATT'Y GEN. ANN. REP. 24, 85 app. II (1998) (providing statistics on criminal intellectual property crimes, pursuant to congressional mandate). Congress imposed a similar reporting requirement for the first three years of its computer crime statute. See 18 U.S.C. § 1030(h) (1994).

163. See Ruff, *supra* note 121, at 1227 ("[R]eporting provisions . . . are often only sops to those concerned about excessive delegation of decisionmaking authority to executive agencies.").

164. See Frank H. Easterbrook, *Criminal Procedure as a Market System*, 12 J. LEGAL STUD. 289, 295-96 (1983); William M. Landes, *An Economic Analysis of the Courts*, 14 J.L. & ECON. 61, 63 (1971); see also Richman, *supra* note 61, at 982-83.

165. See H.R. REP. NO. 99-845, pt. 1, at 11-12 (1986) (stating that creation of five- and ten-year mandatory minimum drug sentences would create incentives for prosecutors to focus on the most serious drug traffickers); VIZZARD, *supra* note 52, at 140-44 (noting that the effect of the reduction of a firearms offense from a felony to a misdemeanor was to reduce the incentive of federal prosecutors to pursue such cases because they prefer not to charge petty offenses).

As Berry Weingast and Mark Moran have noted: "Public hearings and investigations are resource-intensive activities, so they will hardly be used by congressmen for those policy areas that are operating smoothly (i.e., benefiting congressional clientele). Their real purpose is to police those areas functioning poorly."<sup>166</sup> The more effective the legislative controls on agency behavior are, "the less often we should observe sanctions in the form of congressional attention through hearings and investigations."<sup>167</sup> Let us turn then to these other controls.

### B. Budget Controls and Agency Structure

To what extent does Congress's power of the purse provide a source of influence over criminal enforcement decision making? Here, as with oversight hearings, the inquiry is bedeviled by the problem of "observational equivalence" noted by Weingast and Moran: The absence of any pattern of punitive budget cuts can equally be evidence of bureaucratic power or of congressional dominance.<sup>168</sup> One might argue that Congress cannot easily flex its appropriations muscle in the criminal area: Just as legislators find it politically difficult to narrow the scope of criminal statutes that have been "abused" by prosecutors, so would they risk being called "soft on crime" if they reduced appropriations to enforcement agencies. The structural organization of the enforcement bureaucracy, however, provides strong circumstantial evidence that Congress's budgetary powers operate as a powerful constraint in this area.

If one is looking to see how Congress can use its appropriations authority to affect agency targeting decisions, the place to start is not the FBI. This is not because the Bureau's political power makes it immune from such efforts.<sup>169</sup> Historians are in fact only beginning to unravel the rich

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166. Weingast & Moran, *supra* note 145, at 768–69.

167. *Id.* at 769.

168. *See id.* at 767. Barry Weingast and Mark Moran note that both theories are "observationally equivalent," in the sense that

they lead to the same observations about the relationship between agencies and Congress during periods of stable policy: (1) the lack of oversight hearings; (2) the infrequency of congressional investigations and policy resolutions; (3) the perfunctory nature of confirmation hearings of agency heads; (4) the lack of ostensible congressional attention to or knowledge about the ongoing operation and policy consequences of agency choice; and (5) the superficiality of annual appropriations hearings.

*Id.*

169. *See, e.g.,* COMBATTING FRAUD, *supra* note 90, at 146–59 (criticizing FBI field office priorities and the improper allocations of staff in connection with the savings and loan investigations).

interaction between the agency's most powerful director and legislators. As James Q. Wilson has noted:

Part of the reason [the FBI under Hoover] achieved such substantial freedom from criticism or threats to its resources or powers is that it anticipated the needs and cultivated the support of key elected officials, chiefly congressmen. Those who were later to suggest that somehow the Bureau had achieved its power by duping, ignoring, or intimidating Congress have simply not read, or have misread, the historical record.<sup>170</sup>

The point is only that, of all the federal enforcement agencies, the FBI is probably the one most insulated from these pressures.

Some of this insulation doubtless is rooted in history, deriving from the public image that J. Edgar Hoover so assiduously cultivated.<sup>171</sup> Hoover's legacy in this regard, however, proved less than enduring when, in the wake of Watergate and COINTELPRO disclosures, "[t]he unchallenged prestige of the FBI, the basis for its extraordinary autonomy, collapsed utterly," and legislators vied for the chance to criticize and control the agency.<sup>172</sup> Their concerns stemmed as much from discovering the extent to which the Bureau had been responsive to the president's bidding, as from discovering the degree to which it had infringed on civil liberties.<sup>173</sup> The long climb back up to respectability and power that the Bureau has made since the mid-1970s surely owes something to the agency's subsequent record and leadership. Yet it also owes much to the nature and breadth of the Bureau's jurisdiction, which extends to a number of areas that individually or in combination are politically sacrosanct, such as counterintelligence, domestic terrorism, bank robbery, and organized crime.

There is, of course, some circularity here: The Bureau has jurisdiction (often exclusive) in these areas because Congress granted it or, at least, allowed it. But some federal agency had to have authority in each of these areas, and, from legislators' perspective, the fewer such agencies, the better.

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170. WILSON, *supra* note 37, at 166.

171. See POTTER, *supra* note 125; POWERS, *supra* note 70, at 196-214 (recounting Hoover's efforts at image creation during the New Deal); WILSON, *supra* note 37, at 168 (noting that, in the 1920s, "the Bureau earned the prestige that made every congressman both respectful of its stature and eager to enhance it further").

172. WILSON, *supra* note 37, at 180. Wilson notes that the Bureau's prestige and ability to assert autonomy were so severely threatened that "[t]here was even a suggestion, unthinkable in Hoover's time, that the Department of Justice might demand use of some of the parking spaces beneath the new FBI headquarters building." *Id.* at 181.

173. It should be remembered, however, that it was Hoover's refusal to make the Bureau an instrument of Nixon's will that led the White House to create the "Plumbers." See 6 *Hearings Before the U.S. Senate Select Comm. to Study Governmental Operations with Respect to Intelligence Activities*, 94th Cong., at 57-65 (1975); POWERS, *supra* note 70, at 469-70.

And, having allowed the development of a single agency with these concerns, Congress has proceeded to use it as a precommitment device—one that both conveys legislators' enthusiasm for enforcement in that area and binds successors to a policy of relative noninterference. The same might be said for the Secret Service, whose blue-chip portfolio of protection and anticounterfeiting duties was recently expanded to include credit card and computer fraud offenses.<sup>174</sup>

This provisional presumption of the legislative intent behind such jurisdictional decisions gains some support when one looks at other law enforcement agencies. It cannot be a coincidence that in three areas in which legislators have evinced the greatest ambivalence (at best) about enforcement zeal—tax, immigration, and firearms—investigative authority is exclusively confined in agencies with the narrowest of portfolios. As usual, we cannot discount the role of historical accident here. Yet neither can we discount the evidence that legislators use the organizational separation of enforcement functions as a means of political control—a way to confine gatekeeper authority in a particular area to a single agency and to ensure that the agency is amenable to legislative influence.

An exchange between then-Representative Charles Schumer and Norman Rabkin, of the GAO, during recent hearings on the organization of the federal law enforcement agencies is quite revealing:

Rep. Schumer: In terms of budget resources, we don't tell the FBI how much of its resources go to healthcare fraud, how much of its resources go to each specific area. They have pretty much freedom to switch that among themselves so . . . let us just assume the DEA were folded into the FBI, we could [send] a lot of letters to an administration saying make sure you focus on drugs, but . . . would we have that much clout? In fact, when the agency's broken out is when we have

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174. See 18 U.S.C. § 1029(d) (1994) (giving the Secret Service authority to investigate "access device" fraud); *id.* § 1030(d) (giving the Secret Service authority to investigate computer fraud); VIZZARD, *supra* note 52, at 83 ("Because the Secret Service has a relatively small and non-controversial law enforcement jurisdiction, the agency has little experience with hostile congressional oversight."); *id.* at 201 ("[The Secret Service's] primary law enforcement function, counterfeiting suppression, generates virtually no controversy or turf conflicts. The more predominant protection function is virtually immune from political attack and is afforded almost unlimited resources and broad authority.").

The recent debate about whether Secret Service agents should be able to assert a special "protective privilege" to avoid giving testimony in Independent Counsel Kenneth Starr's investigation—even though the agency did not prevail in the courts, see James Bennet, *Clinton Guards Begin Testimony in Starr Inquiry*, N.Y. TIMES, July 18, 1998, at A1; Stephen Labaton, *Judges Turn Down Justice Dept. in Bid to Block Agents' Testimony*, N.Y. TIMES, July 17, 1998, at A1—was more testament to the agency's power than its weakness. See Jacob M. Schlesinger, *Secret Service's Code of Silence May Be Tested by Starr*, WALL ST. J., Feb. 19, 1998, at A24.



the budget authority issue because we can say this much for DEA; this much for FBI. Do you agree with that?

Mr. Rabkin: You certainly can give it more visibility that way, but once the caveats that are attached to the funds that are appropriated, appropriation committees can direct the funds to be used in [] specific programs and through oversight or reprogramming rules keep sight of where that money is actually spent.

Rep. Schumer: As chairman of the crime committee before my esteemed colleague took over, I can tell you that we might be able to say all the report language we want, have a hearing to do that, and we don't have much say over it if it's not a separate agency. Believe me.<sup>175</sup>

The DEA's continued existence as a separate agency thus appears to be testament to legislators' enthusiasm for drug enforcement. The preference that other agencies be so separated, however, reflects a desire for restraint. The Bureau of Alcohol, Tobacco and Firearms (ATF) has never been a particularly powerful agency on Capital Hill, to put it mildly.<sup>176</sup> In 1981, the Reagan Administration, responding to years of lobbying, proposed that the agency be eliminated. It appeared that the National Rifle Association (NRA) had "scored a major victory."<sup>177</sup> Then the organization learned that ATF's enforcement personnel and functions were to be assigned to the Secret Service. ATF agents "welcomed the proposal as a means of ending their perceived vulnerability to political attack from the firearms lobby."<sup>178</sup> The NRA immediately rued its campaign, recognizing that the Secret Service "might be a more vigorous enforcer and, given its positive public image, less vulnerable to political attack."<sup>179</sup> The organization changed its

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175. *Role of Federal Law Enforcement, Hearing of the Crime Subcomm. of the House Judiciary Comm.*, Federal News Service, Nov. 15, 1995, available in LEXIS, News Library, Arcnws File.

176. One way ATF has responded to its political weakness is to work particularly hard at assisting local enforcers. See VIZZARD, *supra* note 52, at 89 (observing that the agency's cooperative behavior "was born of a reality formed by ATF's lack of exclusive jurisdiction [in street crime and drug enforcement], limited resources, and weak political support"); Geller & Morris, *supra* note 106, at 247 n.8 (noting ATF's reputation in this regard among local police).

177. Helen Dewar, *Treasury's Firearms Bureau Is Targeted for Elimination*, WASH. POST, Sept. 19, 1981, at A1; see Paul Taylor, *Chief NRA Lobbyist's Ouster Seen, Triggered by Opposition to Meese*, WASH. POST, Apr. 17, 1982, at A4.

178. VIZZARD, *supra* note 52, at 80.

179. Taylor, *supra* note 177; see MARION, *supra* note 68, at 167-68; VIZZARD, *supra* note 52, at 81. In the slightly partisan account of a retired ATF agent: "Congressional committees debated the proposal until 1982 when the NRA, realizing that slaying the ATF beast would pit them against the competent executives of the government's most prestigious service, hastened to revive the crippled bureau. A compliant Senate supported the abrupt about-face. The proposal was dead." JAMES MOORE, *VERY SPECIAL AGENTS* 239 (1997).

position on consolidation, the measure died in the Senate, and the NRA's chief lobbyist lost his job.<sup>180</sup>

ATF may also owe its continued existence, in part, to a quieter story of agency capture. When ATF was broken out as a separate entity from the IRS in 1972, the alcoholic beverage industry lobbied hard to ensure that its regulation would fall within the new agency's bailiwick, "apparently because [it] feared that a division charged only with alcohol regulation could not maintain independence within the IRS."<sup>181</sup> The industry's hopes for a cooperative relationship with ATF were apparently fulfilled, and, in 1981, it championed the agency's cause.<sup>182</sup>

The immunity of the IRS from the influence of interest groups and legislators acting either on their behalf or pursuant to a different political agenda is only relative, however. And the separation of the Service's functions may reflect an effort to control it. Although congressional critics have promised to end the IRS "as we know it," and there are arguments for separating criminal and civil enforcement activities,<sup>183</sup> Congress has made little effort to shift or spread the Service's criminal enforcement functions among other agencies. A congressional critic even once proposed "liberating' the bureau" from the Treasury Department in order to "make it more responsive to" his committee.<sup>184</sup> Similarly, while the Clinton Administration and many members of Congress have disagreed about whether the Immigration and Naturalization Service (INS) should be retained or demolished, both sides agree that the INS's law enforcement functions—frequently the subject of legislative scrutiny and criticism—should be addressed by a dedicated bureau, not reassigned to any other existing agency.<sup>185</sup>

By thus configuring agency responsibilities to minimize the adverse political fallout from an appropriations cut, Congress makes such cuts unnecessary. Indeed, the senator who played a critical role in blocking ATF's merger soon began to push for increases in the agency's budget.<sup>186</sup>

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180. See Taylor, *supra* note 177.

181. VIZZARD, *supra* note 52, at 12.

182. See *id.* at 80. ATF's jurisdiction over arson investigations also "provided constituencies in the form of the insurance industry and fire departments." *Id.* at 65.

183. See DAVID BURNHAM, A LAW UNTO ITSELF: POWER, POLITICS, AND THE IRS 358 (1989) (proposing that the Criminal Investigation Division be removed from the IRS and established as a separate agency within the Treasury or Justice Department).

184. KAUFMAN, *supra* note 155, at 162.

185. See H.R. 3904, 105th Cong. (1998) (describing a bill sponsored by chair of House appropriations subcommittee controlling INS funding that would have created a new Bureau for Immigration Enforcement with the Department of Justice); Michael Higgins, *Border War*, A.B.A. J., July 1998, 62, 62–66.

186. See VIZZARD, *supra* note 52, at 87.

Once separated from the rest of the enforcement apparatus, an agency will be particularly sensitive to congressional cues relating to targeting or to cues from the special interests perceived as having influence on the Hill. Committing criminal enforcement of controversial laws to stand-alone agencies with small portfolios also brings the dividend (from the perspective of legislators seeking restraint) of giving the agencies morale challenges that can affect recruitment and tenure.

Strategies like these, which give politically vulnerable investigative agencies exclusive or primary jurisdiction in certain areas, provide Congress with a way to promote enforcement restraint without going through U.S. Attorneys' Offices. This is just as well, because the historical independence of U.S. Attorneys' Offices and the informality of their internal structures make it hard for Congress to use any other structural mechanisms of control outside Washington. When Congress wants to encourage U.S. Attorneys' Offices to pursue certain kinds of cases, it can, and has, funded dedicated slots in those offices.<sup>187</sup> But preventing an office from pursuing certain kinds of cases is a far more difficult matter. The budgets of the component units of an office's criminal division will not be amenable to easy legislative manipulation because they are generally not separate budget lines and can be created or merged without congressional authorization. As a result, the areas in which Congress can most effectively influence prosecutorial choices directly are those in which a unit in Main Justice—like the Civil Rights or Antitrust Division—has exclusive authority (or approval power).

The claim is not that Congress actually creates small-portfolioed prosecutorial units in Main Justice so that it can better monitor their activities through hearings and control them through appropriations. It is not even that the executive creates such units as a bonding device to assure Congress that it will tread carefully in a sensitive area. The historical record, for example, makes quite clear that Attorney General Frank Murphy created the Civil Rights Section of the Criminal Division in 1939 out of a commitment to the enforcement of the criminal civil rights laws, not as an instrument of restraint.<sup>188</sup> The point is only that the effect of such a move on prosecutorial accountability could hardly have been lost on legislators.<sup>189</sup>

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187. See *infra* note 227.

188. See BRIAN K. LANDSBERG, ENFORCING CIVIL RIGHTS: RACE DISCRIMINATION AND THE DEPARTMENT OF JUSTICE 9 (1997). The section obtained division status in 1957, during the Eisenhower Administration. See *id.* at 10; see also WEAVER, *supra* note 92, at 27 (suggesting that the creation of the antitrust unit was a testament to Theodore Roosevelt's commitment to antitrust enforcement).

189. See LANDSBERG, *supra* note 188, at 106 ("The decision to concentrate enforcement of the civil rights laws in the Civil Rights Division rendered it easier to exercise the budgetary technique of ensuring adherence to priorities.").

It certainly was not lost on the Justice Department, which effectively used the recently created section's vulnerability as a sword when arguing for a broad interpretation of the criminal civil rights statutes in *Screws v. United States*.<sup>190</sup> This structural development, coupled with the requirement that "all United States Attorneys . . . submit cases . . . for approval before prosecutions or investigations are instituted,"<sup>191</sup> gave some bite to the government's claim that Congress would "supervise the Department's policies and curb excesses [in civil rights prosecutions] by withdrawal of funds."<sup>192</sup> Since then, the relatively small number of criminal civil rights prosecutions brought under these expansive statutes has much to do with the resource allocations under which the division has long labored.<sup>193</sup>

In her insightful study of the Antitrust Division, Suzanne Weaver found that Congress's "power of the purse seems rarely to be used to shape division policies or decisions about resource allocation."<sup>194</sup> She noted that on the rare occasions when the relevant subcommittee recommended cutting the division's appropriations, the move was usually justified by concerns, like inflation, "external to the performance of the division itself," and that "subcommittee members have usually felt bound to appear in these hearings as public partisans of the general goals of the division and of 'the fine job the division does.'"<sup>195</sup> Yet she also noted one analyst's suspicion that the division's "self-restraint . . . [was] due in part to a division perception that the general political climate would be hostile to large increases in division activity."<sup>196</sup>

The evidence adduced here is concededly rather sketchy. It highlights, however, how any inquiry into the degree to which Congress uses appropriations to control enforcement agencies cannot stop at asking whether legislators actually make or even threaten budget cuts. The explicit or tacit bargaining over enforcement power between the executive and legislative branches is far more subtle. Whether used as a signaling device or as an actual mechanism for restraining enforcement activity, decisions about organizational structure seem to be an important aspect of this bargaining and seem to reflect a degree of legislative regulation of delegation not obvious in substantive federal criminal law.

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190. 325 U.S. 91 (1945).

191. *Id.* at 159 (Roberts, Frankfurter, Jackson, JJ., dissenting).

192. *Id.* at 158.

193. See Laurie L. Levenson, *The Future of State and Federal Civil Rights Prosecutions: The Lessons of the Rodney King Trial*, 41 UCLA L. REV. 509, 561 (1994).

194. WEAVER, *supra* note 92, at 138.

195. *Id.* at 146.

196. *Id.* at 141 (comment of Office of Management and Budget budget examiner).

### C. Procedural and Investigative Limitations

Bill Stuntz has suggested that one reason Congress passes such broad criminal statutes, particularly in areas in which defendants have the wherewithal to assert their rights, is to "make proof of guilt easier, which converts otherwise contestable cases into guilty pleas, thereby avoiding most of the costs criminal procedure creates."<sup>197</sup> The relationship between substance and procedure that Stuntz has so perceptively noted works both ways: Just as Congress may expand the reach of substantive law to limit the costs of procedural rules, so may it impose procedural costs or limit investigative options to restrict the reach of substantive law.

Here too, some of the best evidence comes from the area of firearms enforcement—perhaps because the political costs of explicitness are lowest in this area. The Supreme Court recently had occasion to note the breadth of the felon-in-possession statute, which makes it a crime, punishable by imprisonment for up to ten years, for anyone previously convicted of a felony, whether state or federal, to possess a firearm.<sup>198</sup> Although, particularly after the Brady Bill, a great many criminals with prior felony records obtain firearms through the unregulated secondary market,<sup>199</sup> numerous prosecutions could be brought under this statute if ATF simply did computer runs comparing past firearms sales with criminal records registries. No such systematic program is possible, however, because Congress has prevented ATF from creating a centralized computerized registry for various firearms records. Since fiscal year 1979, Congress has passed provisions prohibiting ATF from using appropriated funds in connection with consolidating or centralizing dealer records containing purchaser names.<sup>200</sup> And in 1986, it passed the Firearms Owners' Protection Act,<sup>201</sup> which prohibits ATF from

197. Stuntz, *supra* note 6, at 56; see also William J. Stuntz, *Substance, Process, and the Civil-Criminal Line*, 7 J. CONTEMP. LEGAL ISSUES 1 (1996).

198. See 18 U.S.C. § 922(g)(1) (1994); *Old Chief v. United States*, 117 S. Ct. 644, 655 (1997) (noting that the statute applies regardless of whether a defendant's prior felony was "possession of short lobsters" or "the most aggravated murder"); see also *Scarborough v. United States*, 431 U.S. 563, 579 & n.1, 580 (1977) (Stewart, J., dissenting) (observing that the statute is so broad that it reaches the bookkeeper who owns a hunting rifle, gets convicted of embezzlement, and fails to relinquish possession); Richman, *supra* note 61, at 952–53, 980–81.

199. See JAMES D. WRIGHT & PETER H. ROSSI, *ARMED AND CONSIDERED DANGEROUS: A SURVEY OF FELONS AND THEIR FIREARMS* 12–16 (1986) (noting that, in a sample of 1874 incarcerated felons, only 21% had obtained their most recent handgun from a customary retail outlet, while 44% had obtained it from family or friends and 26% from gray and black market sources); Philip J. Cook et al., *Regulating Gun Markets*, 86 J. CRIM. L. & CRIMINOLOGY 59 (1995).

200. See GENERAL ACCOUNTING OFFICE, *GAO/GGD-96-174, FEDERAL FIREARMS LICENSING DATA: ATF'S COMPLIANCE WITH STATUTORY RESTRICTIONS* 1 (1996) [hereinafter *GAO REPORT, FEDERAL FIREARMS*].

201. Pub. L. No. 99-308, § 107(a), 100 Stat. 460 (1986) (codified at 18 U.S.C. § 926a).

issuing any new regulations requiring that firearms licensee records be recorded at or transferred to any government facility and bars the establishment of any new registration system for firearms, firearm owners, or firearms transactions. In 1996, a House committee ordered a GAO audit to ensure that ATF was complying with these directives.<sup>202</sup> Congress has considered even broader agency-based procedural restraints as well: The House bill that would have substantially relaxed the effects of the exclusionary rule in federal prosecutions was careful to exclude seizures by ATF and IRS from its purview.<sup>203</sup>

The House proposal highlights a general point. While the political costs of narrowing the scope of substantive law appear to be prohibitive, the costs of proposals to restrict enforcer activities are not, even when such limitations disproportionately affect particular classes of cases or defendants. This fact would explain the otherwise curious logic of some legislators after the ABSCAM investigation ended with the conviction of several members of Congress: Scrutiny and possible reform of the undercover tactics used by law enforcement agencies in political corruption investigations was necessary, they explained, because such probes deal with crimes that are "somewhat vague."<sup>204</sup>

Nothing approaching a comprehensive canvassing of Congress's forays into procedural and investigative issues will be attempted here. The extent to which these efforts influence, and are likely intended to influence, enforcer priorities ought not be minimized, however. A recent move in Congress to prevent federal prosecutors from avoiding ethical restrictions on contacts with represented parties, for example, will tend to give special insulation from investigation to individuals or entities with lawyers on retainer.<sup>205</sup> Interestingly, one of the leading backers of such legislation was a representative whose suspicion of prosecutorial power stemmed, at least in part, from having recently been the subject of bribery charges (on which he was acquitted).<sup>206</sup>

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202. See GAO REPORT, *FEDERAL FIREARMS*, *supra* note 200.

203. See VIZZARD, *supra* note 52, at 202; Holly Idelson, *House GOP Crime Bills Win Easy Passage*, 53 CONG. Q. WKLY. REP. 456, 456-58 (1995).

204. Katherine Goldwasser, *After Abscam: An Examination of Congressional Proposals to Limit Targeting Discretion in Federal Undercover Investigations*, 36 EMORY L.J. 75, 111 n.127 (1987) (citing STAFF OF HOUSE SUBCOMM. ON CIVIL AND CONSTITUTIONAL RIGHTS OF THE COMM. ON THE JUDICIARY, EXECUTIVE SUMMARY OF REPORT ON FBI UNDERCOVER OPERATIONS, 98th Cong. (Comm. Print 1984)).

205. See Ethical Standards for Federal Prosecutors § 801, Pub. L. No. 105-277, 112 Stat. 2681 (1998); Elkan Abramowitz, *Ex Parte Contacts from the Justice Department*, N.Y.L.J., Mar. 3, 1998, at 3.

206. See T.R. Goldman, *For McDade, Life Fuels Legislation*, LEGAL TIMES, May 18, 1998, at 1.

For perhaps the most dramatic evidence of the difference between the consideration legislators give to procedural or investigative proposals and the consideration they give to substantive law, one need look only at the legislative reaction to the Oklahoma City bombing. Although that crime was certainly as atrocious and infamous as the outrages that have inspired some of the greatest excesses of substantive federal lawmaking,<sup>207</sup> the antiterrorism legislation offered in its wake by the Clinton Administration, which focused more on investigative measures than on changes in substantive law, soon ran into severe difficulties in Congress. One casualty of the debate was a provision that would have required manufacturers to make black and smokeless powder with "taggants" that would help authorities trace denoted explosives.<sup>208</sup>

#### D. Approval Systems

Another sort of procedural restraint technically does not restrict executive authority but instead requires that Main Justice approve certain prosecutions before they can proceed. Congress has resorted to these provisions on certain occasions when it is particularly concerned about excessive prosecutorial zeal in a politically sensitive area. In order to ensure that the Anti-Racketeering Act of 1934 would not be used against organized labor, for example, Congress provided that "[p]rosecutions under this Act shall be commenced only upon the express direction of the Attorney General of the United States."<sup>209</sup> Such statutory approval requirements are comparatively rare. However, that may be because the Justice Department has itself imposed similar requirements through regulations in such diverse areas as civil rights, RICO,<sup>210</sup> and economic espionage prosecutions. The Justice Department regularly cites these regulations to Congress (or to

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207. See *supra* pp. 772-73.

208. See Thomas L. Friedman, *House G.O.P. Madness*, N.Y. TIMES, Apr. 3, 1996, at A15; Jerry Gray, *Republicans Weaken House Bill on Combating Terrorism*, N.Y. TIMES, Aug. 3, 1996, at L7; see also RANDALL KENNEDY, RACE, CRIME, AND THE LAW 5 n.\* (1997) (questioning "whether the response of right-wing members of Congress would have been different had the paramilitary groups [targeted by the bill] been mainly black instead of mainly white").

209. Pub. L. No. 73-376, 48 Stat. 979 (1934). This provision was added in the House of Representatives. See CRIME AND CRIMINAL PRACTICES, S. REP. NO. 75-1189, at 24 (1937). Current statutes that mandate similar approvals from an assistant attorney general or higher official include 18 U.S.C. § 1073 (1994) (dealing with flight to avoid prosecution or giving testimony) and 18 U.S.C. §§ 1119, 2332 (addressing the murder of U.S. nationals abroad).

210. See 7 U.S. DEP'T OF JUSTICE, *supra* note 117, § 9-110.320; MCGEE & DUFFY, *supra* note 114, at 132-44 (discussing Paul Coffey's role in approving RICO cases); Paul E. Coffey, *The Selection, Analysis, and Approval of Federal RICO Prosecutions*, 65 NOTRE DAME L. REV. 1035 (1990).

courts)<sup>211</sup> as a guarantee that broad prosecutorial discretion will be exercised prudently.<sup>212</sup> While U.S. Attorneys' Offices—particularly in the more independent districts—may not always abide by these departmental regulations,<sup>213</sup> they surely constrain prosecutorial zeal, at least at the margin.

The theory behind these statutory and self-imposed restraints appears to be largely the one articulated by Kahan in the context of statutory interpretation:

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. In addition, the Department is more likely than are U.S. Attorneys to internalize the social costs of bad readings. Because the Department, through the President, is accountable to the national electorate, it is more likely to be responsive to interests hurt by adventurous readings, particularly readings that discourage socially desirable market activities. The Department also has much more reason to care about the impact of such interpretations on the public fisc.<sup>214</sup>

Kahan's normative take on centralized prosecutorial authority is a function of his tentative adoption of a highly partisan critique of the Wall Street cases brought by Rudolph Giuliani's U.S. Attorney's Office in New

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211. See *Screws v. United States*, 325 U.S. 91, 159 (1945) (Roberts, Frankfurter, Jackson, JJ., dissenting) (quoting the Justice Department brief: "To assure consistent observance of this policy [of first encouraging state officials to take action] in the enforcement of the civil rights statutes, all United States Attorneys have been instructed to submit cases to the Department for approval before prosecutions or investigations are instituted."); see also 7 U.S. DEPT OF JUSTICE, *supra* note 117, § 9-110.320.

212. See, e.g., 142 CONG. REC. S12,214 (1996) (Letter from Attorney General Janet Reno to Sen. Orrin G. Hatch) (stating that the attorney general pledges to Congress that all prosecutions under the Economic Espionage Act of 1996, Pub. L. No. 104-294, 110 Stat. 3488 (1996) (codified at 18 U.S.C §§ 1831-1832), in its first five years will have to be specifically approved by herself, the deputy attorney general, or the assistant attorney general for the Criminal Division); *RICO Reform*, *supra* note 144, at 261 (Deputy assistant attorney general for the Criminal Division notes that, "[b]ecause of RICO's potency, we have a special obligation to use the statute responsibly" and points to regulation that "[n]o RICO indictment may be filed unless it is approved by the Organized Crime and Racketeering Section."); Galacatos, *supra* note 90, at 622-28 (recounting changes in departmental approval policies for environmental cases).

It should be noted that the attorney general's promise that all prosecutions under the Economic Espionage Act of 1996 would be approved at the highest departmental levels came after an earlier version of the bill that would have required such approval as a matter of statute. See H.R. 3723, 104th Cong. (1996) (version 6) (proposed § 1838).

213. See EISENSTEIN, *supra* note 95, at 66-67 (discussing the range of responses by U.S. Attorneys' Offices to departmental directives); Richard S. Frase, *The Decision to File Federal Criminal Charges: A Quantitative Study of Prosecutorial Discretion*, 47 U. CHI. L. REV. 246, 250 n.16 (1980); Kahan, *supra* note 4, at 486-87; Ruff, *supra* note 121, at 1207-08 (noting that, according to a former Justice Department official, directives to U.S. Attorneys' Offices are "most often honored in the breach").

214. Kahan, *supra* note 4, at 497.



York in the mid-1980s.<sup>215</sup> Other stories would have produced different paradigms. An account based on Main Justice's refusal to authorize the prosecution of certain military contractors or financial services firms might bewail the consequences of centralized authority overly responsive to the national political process.<sup>216</sup> Reliance on stories from the Watergate era would similarly highlight the dangers of centralization.<sup>217</sup> And an account rooted in the record of the Kennedy Justice Department would see insulation from local politics as a source of appropriate zeal, not moderation.<sup>218</sup> Kahan is surely right, however, as a descriptive matter: For better or worse, Main Justice is likely far more sensitive to the interests of geographically dispersed groups than is any U.S. Attorney's Office.<sup>219</sup>

This sensitivity is in part a function of the relationship between the department and the White House that Kahan notes. The political appointees at Main Justice owe their jobs to the president, and their subordinates may be similarly inclined toward caution: Functionaries who intend to make a career in the Washington bureaucracy may be far more protective of departmental interests than prosecutors in the U.S. Attorneys' Offices with eyes on private practice or local politics.<sup>220</sup> Moreover, even under the unlikely assumption that U.S. attorneys were as sensitive to the preferences of their district's legislative contingent (or certain members thereof) as the political leadership of the Justice Department is to the preferences of the president, geographically dispersed special interests would still tend to do

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215. See *id.* at 487, 498 (relying on criticism of Giuliani in DANIEL R. FISCHER, *PAYBACK* 98-127 (1995)).

216. See STEWART, *supra* note 118, at 62-86 (relating the decision by Main Justice not to prosecute executives at firms, including McDonnell Douglas, for violations of the Foreign Corrupt Practices Act); see also Nicholas M. Horrock, *When E.F. Hutton Talked, Did Justice Listen?*, CHI. TRIB., Sept. 9, 1985, at C1 (recounting how the decision to prosecute only E.F. Hutton for a massive check-kiting scheme, and not individuals at the firm, followed lunch between the attorney general and Hutton's chairman, and the subsequent transfer of the case from the U.S. Attorney's Office to Main Justice).

217. See EISENSTEIN, *supra* note 95, at 209-10 ("The fact that Republican U.S. attorneys indicted former Attorney General John Mitchell, Vice-President Spiro Agnew, and the Republican chairman in New Jersey illustrates that the current decentralization of the department insulates its branch offices from political potential pressures as well as reduces the capacity for implementing uniform policy.").

218. See VICTOR S. NAVASKY, *KENNEDY JUSTICE* (1971).

219. Giuliani's career may offer some evidence of these differing perspectives. The same person who Kahan alleges was so blind to the social costs of prosecutions as U.S. attorney was, when associate attorney general, criticized for aborting the prosecution of several McDonald Douglas executives for overseas bribes. That case, Giuliani later explained, reflected a "prejudice against business." Michael Winerip, *High-Profile Prosecutor*, N.Y. TIMES, June 9, 1985, § 6 (Magazine), at 37.

220. It would be interesting to compare data on how long Main Justice personnel serve and where they go afterward to similar data for one or more U.S. Attorney's Office. However, I have been unable to obtain this information.

better in Washington. There, the costs of organization on a national level, and the structures of Washington politics,<sup>221</sup> promise a far more sympathetic hearing than they would likely get were they to proceed district by district.

By enacting statutory approval requirements, or by encouraging Main Justice to impose them administratively, legislators can restrain prosecutorial zeal, not just by adding an additional level of supervision whose only impact will be to reduce the cases brought in a particular area, but by giving that gatekeeping role to officials who are likely to be far more sensitive to legislative (or executive) pressure on behalf of special interests—or to political pressure from those interests directly. This mechanism—like its more extreme version, the Main Justice division that itself brings all (or virtually all) the enforcement cases in an area, such as the Antitrust or Tax Divisions—thus goes far in addressing the agency problems the decentralized U.S. attorney system creates.

#### E. The Benefits of Dispersed Authority

The interesting question is not why legislators impose or welcome approval requirements when they do. After all, when enforcer restraint is the goal, these measures are pale, but arguably cheap, substitutes for legislative specificity. It is why legislators do not demand them more often, in many other sensitive areas. Why is the Fraud Section not given more of a say about what securities prosecutions are brought by the U.S. Attorneys' Offices under the mail fraud statute? Although the FBI does steer cases involving federal corruption to the Public Integrity Section—which has been criticized for being all too restrained<sup>222</sup>—why has that section not been given a general veto power over all corruption cases? An argument turning on the

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221. See Andrzej Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism After Garcia*, 1985 SUP. CT. REV. 341.

[W]hile the states are more easily captured by relatively undifferentiated majoritarian interests intent on suppressing small minorities, the federal government may be a more likely subject of capture by a set of special minoritarian interests, precisely because the majority interest of the national constituency is so large, diffuse, and enormously difficult to organize.

*Id.* at 386; see Richard B. Stewart, *Federalism and Rights*, 19 GA. L. REV. 917, 963 (1985) (“The various organized economic and ideological factions have divided national power among themselves, parceling it out to individual bureaucratic and congressional committee fiefdoms.”).

222. See Susan Schmidt & Roberto Suro, *Troubled from the Start: Basic Conflict Impeded Justice Probe of Fund-Raising*, WASH. POST, Oct. 3, 1997, at A1. “Public Integrity is widely regarded as one of the most bureaucratic outfits at Justice,’ said a department official, ‘but they work that way for a reason.’ A major justification for their style, this official and others said, is that it protects the department from accusations of partisanship.” *Id.*

expertise of Main Justice practitioners is as strong here, perhaps stronger, than it is for RICO and civil rights cases. Why has it not carried the day?

Obviously, there is unlikely to be any single explanation for Congress's approval of, or acquiescence in, this degree of decentralization. Legislators might believe that approval requirements do not accomplish much, perhaps because the line prosecutors or case agents closest to the facts end up dominating the decision-making process. Alternatively, legislators might prefer maximal supervision by Main Justice, all things being equal, but find the costs of such supervision prohibitive. The already large bureaucracy in Washington would have to be increased significantly if it were to review a large proportion of cases from the districts. The intangible costs would also be high: The ability of U.S. Attorneys' Offices to recruit top-flight legal talent to work at less than private practice salaries may in part depend on the degree of responsibility and independence that a U.S. attorney and her assistants are allowed. Temporary political configurations may also figure into the calculus: In a period of divided government, a Congress controlled by one party might well prefer in the short term that power not be centralized in an executive controlled by the other party.

All of these factors may well play a part in Congress's acquiescence in U.S. attorney independence. But another factor appears to dominate, and to highlight the significance of those cases in which Congress imposes or encourages approval requirements: As a general matter, legislators appear to *want* decentralized prosecutorial authority, with all the loss of bureaucratic restraint that such a system entails.<sup>223</sup> They sometimes say so explicitly, in the context of a specific enforcement area, as in 1993, when Representative Dingell, believing that the Environmental Crimes Section of the Environment and Natural Resources Division had inappropriately compromised a number of cases against corporations and corporate officials, "strongly recommended . . . shifting decision-making power away from Main Justice to the local USAOs."<sup>224</sup> Even when legislators have expressed dissatisfaction with U.S. attorneys' policies in an area, as the House Committee on Government Operations did in 1988 when it castigated certain offices for failing to give financial institution cases sufficient attention in the wake of the savings and loan crisis, they have eschewed structural change. Their solu-

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223. Some administrations appear to want decentralization as well. See MCGEE & DUFFY, *supra* note 114, at 23-24 (noting that, according to a report prepared by the Clinton transition team, "[t]he Bush administration . . . made a conscious effort to limit the [Criminal] division's role and even went so far as to bring politically appointed U.S. attorneys from across the country to manage programs at Main Justice").

224. Galacatos, *supra* note 90, at 650. In August 1994, Attorney General Reno responded to legislative pressure by shifting authority back to the U.S. Attorneys' Offices. See *id.* at 625.

tion in a "particularly egregious" case was simply to call for "the Attorney General or the Deputy Attorney General [to] summon the U.S. Attorney . . . for consultations."<sup>225</sup> Although Congress established a Financial Institutions Fraud Unit in the Attorney General's Office and authorized the attorney general to establish task forces for financial institutions,<sup>226</sup> these moves merely supplemented activity in the U.S. Attorneys' Office without increasing centralization. Indeed, most of the expenditures that Congress authorized for financial institution prosecutions in 1991 through 1992 were earmarked for the FBI and the U.S. Attorneys' Offices.<sup>227</sup>

There is also considerable support for an across-the-board shift of power. In 1996, for example, Congress capped the number of personnel that could work in Main Justice, without similarly limiting hiring in U.S. Attorneys' Offices.<sup>228</sup> Some legislators would go further and have since proposed that personnel from Main Justice be transferred to the districts.<sup>229</sup>

This legislative enthusiasm for decentralized, and less moderated, prosecutorial power doubtless reflects some deep-seated political norms that extend beyond the peculiar circumstances of federal prosecutorial authority.<sup>230</sup> After all, the entire American criminal justice system is characterized by an almost instinctive embrace of fragmented authority, with the tensions between police and prosecutors, attorneys general and district attorneys usually seen as a virtue, rather than a vice.<sup>231</sup> And the ideal of locally based law enforcement is embedded in the system as well, reflected in the prevalence of elected district attorneys,<sup>232</sup> venue rules, and jury composition

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225. COMBATTING FRAUD, *supra* note 90, at 146.

226. See Bruce A. Green, *After the Fall: The Criminal Law Enforcement Response to the S&L Crisis*, 59 FORDHAM L. REV. S155, S171 (1991).

227. See *id.* The congressional response to health care fraud appears similarly to rely on activity in U.S. Attorneys' Offices. See H.R. 2584, 105th Cong. § 105 (1997) (proposing "Health Care Fraud Prosecution Act of 1997," which authorizes appropriations only for the FBI, the Department of Health and Human Services, and U.S. Attorneys' Offices, not Main Justice).

228. See Timothy J. Burger, *A Matter of Style*, LEGAL TIMES, Apr. 20, 1998, at 1.

229. See H.R. REP. NO. 105-526, at § 151 (1998) (proposing the "Department of Justice Appropriations Authorization Act, Fiscal Years 1999, 2000, and 2001," which would allow the attorney general to appoint 200 new assistant U.S. attorneys from the ranks of Main Justice, with each position in Washington terminated upon the appointment of its incumbent to a U.S. Attorney's Office).

230. See SUSAN HUNTER & RICHARD W. WATERMAN, ENFORCING THE LAW: THE CASE OF THE CLEAN WATER ACTS 196 (1996) ("[T]he more diverse the regulatory environment, the broader the discretion agency personnel will require to enforce the law.").

231. See Pizzi, *supra* note 34, at 1336-39; see also Mirjan Damaška, *Structures of Authority and Comparative Criminal Procedure*, 84 YALE L.J. 480, 487-507 (1975).

232. See JOHN M. DAWSON ET AL., U.S. DEP'T OF JUSTICE, PROSECUTORS IN STATE COURTS, 1992, at 2 (1993) (noting that more than 95% of state and local chief prosecutors are elected); Pizzi, *supra* note 34, at 1342-44; Richman, *supra* note 61, at 961-63.

doctrines. The U.S. attorney system thus offers federal legislators the neat ability to criminalize conduct, with all the political advantages such legislation entails, without rejecting the virtues of localism in criminal enforcement.

The ideal of decentralized criminal enforcement, however, has acquired a special power in the context of the federal system, in which even legislators of the president's party see U.S. attorneys as providing a critical counterweight to Washington politics. The independent performance of U.S. Attorneys' Offices during the Watergate era, just as the department's leadership appeared to have "succumbed to political pressures," reduced the impetus for imposing more controls.<sup>233</sup> This appreciation of decentralized authority continues, as evidenced in the recent history of the campaign finance investigation. When Attorney General Reno—in an apparent effort to give the investigation a nonpartisan cast without invoking the Independent Counsel statute—brought in Charles LaBella, of the U.S. Attorney's Office in San Diego and formerly of the Southern District of New York office, to replace personnel from the Public Integrity Section,<sup>234</sup> Republican legislators, after initial resistance, soon embraced his independent voice. There doubtless was some result-orientation in their reaction because LaBella recommended the appointment of an independent counsel. However, support for his efforts and parallel criticism for the conduct of the Public Integrity Division in the investigation do not reflect just a belief that the White House is less likely to control assistant U.S. attorneys, but also a belief that they will generally be more zealous, not mere "bureaucrats."<sup>235</sup> Viewed in this light, legislators' general support for the decentralization of prosecutorial power could be quite public regarding—a rejection of the cost-internalization advantages offered by Main Justice and an effort to

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233. EISENSTEIN, *supra* note 95, at 124–25.

234. See Schmidt & Suro, *supra* note 222; Roberto Suro, "Crisis in Confidence" Prompted Reno's Decision: Shake-Up of Campaign Finance Task Force Intended to Inject Aggressiveness into Probe, WASH. POST, Sept. 18, 1997, at A10 ("By bringing in a top prosecutor and veteran FBI agent from outside the main Justice building to supervise the investigation, Reno is trying to 'inject the task force with a more aggressive spirit,' an official said.")

It appears that LaBella's selection was largely at the instance of FBI Director Freeh. See Johnston, *infra* note 252.

235. See James Dao, *Reno Defends Her Decision About Inquiry on Finances*, N.Y. TIMES, May 4, 1998, at A16 ("She ought to pay more attention to the career prosecutors," [Senator Hatch] said, referring to Mr. LaBella and Louis J. Freeh, Director of the Federal Bureau of Investigation, who has also recommended the appointment of an outside prosecutor."); Don Van Natta, Jr., *F.B.I. Chief Still Sees Need for Campaign Finance Prosecutor*, N.Y. TIMES, May 2, 1998, at A10 ("Republican Congressional leaders said today that they were satisfied with the investigation's recent pace . . .").

minimize the influence of national or presidential politics on enforcement decision making.<sup>236</sup>

U.S. attorney independence can serve other legislative purposes as well. It can, in the white-collar area, for instance, help insulate legislators from allegations of excessive regulatory laxity. During the savings and loan crisis, for example, legislators with an interest in convincing the public that criminal wrongdoing, rather than “either bad legislation or inattention from federal legislators” was responsible for the savings and loan failures,<sup>237</sup> found it convenient not merely to create new criminal offenses and raise the penalties for bank frauds,<sup>238</sup> but also to chastise a number of U.S. Attorneys’ Offices for insufficient zeal in pursuing such cases.<sup>239</sup> This criticism was said to have cost at least one U.S. attorney his job, when Texas Senator Phil Gramm thereafter refused to recommend him for another term.<sup>240</sup> Here, one sees the corollary of U.S. attorneys’ independence: Main Justice, and the administration generally, may not be disposed to provide political cover to decision making it did not control. By promoting or acquiescing in decentralized prosecutorial authority, Congress can, if necessary, distance itself more easily from enforcement decisions than it could if enforcement authority were centralized. The attorney general, after all, can fight back far more effectively than can a beleaguered U.S. attorney.<sup>241</sup> The legislator seeking not control over enforcement policy, but the freedom to loudly second-guess it, might thus be a great supporter of U.S. attorneys’ independence.

As always, one is hard-pressed to discern the “real” story or stories behind the apparent refusal of legislators to reduce the independence of U.S. Attorneys’ Offices.<sup>242</sup> Moreover, a complete account of congressional efforts to manipulate the relationship between these offices and Main Jus-

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236. See EPA’s *Criminal Enforcement Program: Hearing Before the Subcomm. on Oversight and Investigations of the House Comm. on Energy and Commerce*, 103rd Cong. 208 (1993). Representative Dingell notes the “perception that centralizing decision-making on environmental cases in Washington, D.C., opens the door to special preference, influence peddling, and invites the use of pressures and special privilege . . . on behalf of the rich and powerful.” *Id.*

237. Green, *supra* note 226, at S167.

238. See *id.* at S173–76.

239. See COMBATTING FRAUD, *supra* note 90, at 18, 141–46.

240. See Gary Taylor, *S&L Bar in Houston Braces for the Attack*, NAT’L L.J., Jan. 28, 1991, at 8.

241. Cf. Posner, *supra* note 104, at 54 (“If an independent agency is less subject to presidential direction than is the Attorney General, it is by the same token in a poorer position to enlist presidential support.”).

242. See MASHAW, *supra* note 47, at 203 (“Interest group explanations of legislative, bureaucratic and, even judicial outcomes have often been little more than examples of post hoc, ergo propter hoc (‘after that, therefore because of that’) logical fallacies.”).

tice must also reckon with parallel moves tending to enhance Washington's ability to set prosecutorial priorities for the districts. Even while expressing a general preference for decentralized enforcement activity, for example, Congress passed the Government Performance and Results Act of 1993,<sup>243</sup> which requires all federal agencies to establish and report on program performance plans. A recent GAO report notes that this provision "reinforces the importance" of the attorney general's responsibility for ensuring that "national law enforcement priorities are addressed appropriately" and requires the department to do more to monitor whether those priorities are being implemented in the U.S. Attorneys' Offices.<sup>244</sup> What the evidence strongly suggests, however, is that Congress gives considerable attention to the balance of power between Washington and the districts, and that its failure to impose more approval requirements reflects, not apathy or thrift, but a conscious selection of a particular equilibrium.

### CONCLUSION

Having explored, albeit all too cursorily, the structural dynamics that lie underneath the sweeping provisions of substantive federal criminal law, let us now consider how those dynamics should color our assessment of, and reaction to, statutory breadth. Some of the observations here support the telling of a rather straightforward story: Driven by the political rewards of symbolism and the high costs of legislative specificity to pass broad criminal statutes, legislators nonetheless seek to reduce the effects of such breadth on favored interest groups. This, they do through a variety of mechanisms—of various degrees of visibility—including the appointment process, oversight hearings, and manipulation of institutional structures. There is thus considerable evidence that legislators are well aware of how to constrain enforcer discretion and are willing to do so when they deem it appropriate. These mechanisms offer special advantages over statutory specificity because they require less upfront effort, allow enforcers the freedom to respond to local conditions and the infinite variety of criminal activity, and preserve the symbolic, and deterrent, benefits of broad prohibitions.<sup>245</sup>

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243. Pub. L. No. 103-62, 107 Stat. 285 (1993).

244. GENERAL ACCOUNTING OFFICE, *supra* note 120, at 21.

245. See Lynch, *supra* note 8, at 2138.

Most people want exactly what we now have: a system in which criminal prohibitions can function as symbolic condemnation of behavior we seriously disapprove of, but without imposing severe sanctions on every ordinary law-abiding person who on occasion indulges in it; in which criminal laws have sufficient flexibility that those who violate core moral precepts cannot escape through loopholes in narrowly-crafted statutes . . . .

The frequency with which legislators deploy these mechanisms, and their efficacy, is difficult to determine. A kind of uncertainty principle operates here. The examples of “low-visibility” controls referred to in this Article actually were never particularly concealed. Had they been so, I probably would not have found them. Nonetheless, the fact that most deployments of control mechanisms discussed here tend to restrain enforcement activity in areas—like firearms, immigration, and tax—in which there is reasonably broad political support for restraint, leads one to suspect that legislators may well use similar, but quieter, tools when restraint would favor a more concentrated interest group. Part of the answer to those who would claim, based on substantive law, that Congress has utterly failed to restrain prosecutorial discretion is thus that the critics are looking in the wrong place. In Congress’s structuring of and interactions with the enforcement bureaucracy, one sees clear moves to influence how law enforcement officials exercise delegated authority.

Even assuming that we know only a fraction of the instances in which these tools are used, however, the explanatory power of this control-mechanism story is limited. It simply cannot explain legislators’ willingness to steer so much enforcement business to U.S. Attorneys’ Offices and the FBI, the institutions in the federal criminal bureaucracy that seem most immune from political control—or, as Kahan would have it, least likely to internalize the political cost of their decisions.<sup>246</sup> The claim is not that legislators have no influence over these institutions, for surely they do. As a comparative matter, though, enforcement authority delegated to these institutions is least amenable to legislative control—save in the limited sense each legislator will have some degree of influence over the U.S. attorney—and perhaps the agency field offices<sup>247</sup>—in her district.

To the extent that legislators want to ensure that federal law does not infringe upon the interests of state and local enforcers in their traditional spheres of concern, the absence of such control is not a barrier to broad

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246. Dramatic evidence of the FBI’s perceived independence can be found in the readiness of Independent Counsel Kenneth Starr and his staff to rely on FBI agents in their investigation, while maintaining a more-than-arm’s-length distance from Justice Department prosecutors. And congressional outrage at a threat to the FBI’s independence lay at the heart of the White House Travel Office debacle, which involved allegedly improper contacts between the White House and FBI officials. See COMM. ON GOV’T REFORM AND OVERSIGHT, INVESTIGATION OF THE WHITE HOUSE TRAVEL OFFICE FIRINGS AND RELATED MATTERS, H.R. REP. NO. 104-849, at 3 (1996); see also Editorial, *Myopia at the White House: The F.B.I. Abused*, N.Y. TIMES, May 26, 1993, at A20.

247. See WILSON, *supra* note 37, at 202 (“[F]ield administrators are likely to have strong ties to local authorities including, possibly, governors, congressmen, and police chiefs, and these alliances are disrupted only at the [central agency] executive’s peril.”).



delegation because the informational advantages of those groups work to ensure the cooperation of federal agencies. There are no such restraints in many areas of great concern to other interest groups, however. And in those areas, U.S. Attorneys' Offices—often way stations for lawyers seeking to advance their careers with conspicuous litigation victories against well-represented targets—are far more likely to be bastions of zeal rather than restraint. Even if one does not take the “war” on white-collar crime to be a challenge to entrenched economic interests,<sup>248</sup> it is still worth noting that the movement within the Justice Department against white-collar crime came from U.S. Attorneys' Offices, not Washington.<sup>249</sup>

If the enthusiasm that legislators have often shown for decentralization does not reflect a strategy of straightforward legislative control, how can it be explained? The critical fact here is that Main Justice represents not merely a source of restraint, but also a tool of presidential power.<sup>250</sup> The very tools that Congress can use to restrain enforcer activity have the unfortunate effect of rendering enforcement more amenable to control by the attorney general and, ultimately, the president. Unwilling or unable to alter the legislative dynamic favoring sweeping substantive prohibitions, Congress manages not the scope of the authority it delegates, but the locus of that authority.<sup>251</sup> By placing enforcement discretion in what, comparatively speaking, is a sort of “blind trust,” legislators sacrifice much of their own influence in order to limit the president's. Congress may not always approve of the greater zeal that relatively independent entities like U.S. Attorneys' Offices and the FBI bring to certain enforcement areas. But its primary goal may well be to prevent the president's people from doing, and being rewarded for doing, the “cost internalization” that Kahan thinks is so

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248. See *supra* note 143.

249. See Poveda, *supra* note 39, at 246. It should be noted that, in making white-collar crime a priority, Main Justice and the FBI were also responding to pressure from members of congress, who complained about the absence of an adequately funded and coordinated national strategy in this area. See *id.* at 244. This is a reminder that all legislative demands for increased centralization do not necessarily reflect a desire for restraint.

250. See EISENSTEIN, *supra* note 95, at 115 (“An astute career official in Washington . . . observed that a U.S. attorney's ties to senators and local political figures gave him a sense of independence. The president also appoints assistant attorneys general, but they have no political base upon which to anchor independence from the attorney general.”).

251. Congress's strategy here can be contrasted with the approach that, according to Lawrence Lessig and Cass Sunstein, it may take to independent agencies generally. They suggest that “Congress might make agencies independent not to create real independence, but in order to diminish presidential authority over their operations precisely in the interest of subjecting those agencies to the control of congressional committees.” Lessig & Sunstein, *supra* note 112, at 115. As a general matter, U.S. attorneys would seem to be far less amendable to legislative control than Main Justice.

sorely lacking from federal enforcement. This, as much as short-term political gain, explains the zeal with which, for example, legislators on occasion foment separation between the FBI and its supposed political masters—as some have been doing with respect to the pending campaign finance investigation.<sup>252</sup> What is lost in accountability<sup>253</sup> is, under this analysis, gained in limiting the political uses to which these enforcement assets can be put.<sup>254</sup>

At first blush, any effort to present the patchwork of legislative constraints and acquiescence in the absence of restraints as evidence of a legitimate congressional “strategy” smacks of naiveté. After all, there is evidence that the oversight and budget process is generally controlled by a handful of interested legislators.<sup>255</sup> Indeed, the comparatively low visibility of many of the control mechanisms discussed here hardly gives one confidence that decisions about their deployment are the product of true legislative deliberation.

The problem with these objections is not that they are empirically wrong, but that their normative relevance is questionable. After all, the process of substantive criminal lawmaking in the federal system is hardly a model of democratic accountability either. In the absence of a constitutional vision of what should be criminal, it would seem no more legitimate to tinker with Congress’s gatekeeping choices than it is to tinker with its substantive legislation, for the two are really part of an integral whole. It turns out that Congress is quite interested in *who* exercises the extraordinary enforcement power it delegates. And before we consider reform

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252. See, e.g., Neil A. Lewis, *Freeh Says Reno Clearly Misread Prosecutor Law*, N.Y. TIMES, July 16, 1998, at A1 (noting that a Republican senator disclosed that FBI Director Freeh forcefully warned Attorney General Reno that she was misreading the Independent Counsel statute). One article recounts:

Early in his tenure without widespread Republican support, Mr. Freeh was criticized sharply by lawmakers for allowing confidential personnel files to be released to a low-level White House aide. Under pressure, he was forced to rescind his promotion of Larry Potts, a key figure in the Ruby Ridge disaster, to the bureau’s No. 2 position. But that criticism has abated in recent months since Mr. Freeh let it be known that he agreed with the Republicans over appointing an independent counsel.

David Johnston, *F.B.I.’s Chief Tries to Influence Reno*, N.Y. TIMES, Dec. 2, 1997, at A1.

253. While Jerry Mashaw has touted the virtues of administrative policy-making discretion, his argument assumes a high degree of presidential control over the bureaucracy. See Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81, 81–82 (1985); see also Lessig & Sunstein, *supra* note 112, at 105–06.

254. This analysis also suggests that there may be an inherent tension between legislators’ desire to use the IRS as a whipping boy, see *supra* p. 797, and their desire to prevent the White House from using it as a tool of presidential policy. See BURNHAM, *supra* note 183, at 226–54 (recounting the instances in which the IRS’s power was abused for political purposes).

255. See ROBINSON, *supra* note 89, at 97–101.

proposals—like guidelines or *Chevronization*—that would increase the centralization of authority in the federal enforcement bureaucracy, we should give Congress's political decisions in this regard as much respect as we give its decisions to criminalize conduct in the first place.