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# “PROJECT EXILE” AND THE ALLOCATION OF FEDERAL LAW ENFORCEMENT AUTHORITY

Daniel C. Richman\*

## I. INTRODUCTION

With each report of violent crime statistics (whether rising or falling) or of the latest firearms outrage, we hear the antiphony of the gun control debate. Advocates of increased federal regulation decry the inadequacies of a regime that permits relatively free access to firearms and argue that the availability of guns is itself a spur to more deadly violence. Advocates of minimal regulation, for their part, condemn measures that, they say, will primarily penalize law-abiding citizens, and instead call for more vigorous enforcement of existing laws, targeting “criminals,” not their weapons. When the antiphony intrudes on funerals, the effect can be jarring. But these are time-honored themes, which can be heard as loudly in the debate surrounding the Gun Control Act of 1968<sup>1</sup> as they can today.

These themes echoed (albeit in muted form) in the 2000 presidential and congressional campaigns,<sup>2</sup> in Attorney General John Ashcroft’s confirmation

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\* Professor, Fordham University School of Law. Thanks to Sara Sun Beale, Jim Comey, Susan Ginsberg, Jerry Lynch, Bill Stuntz for their insightful comments. Also thanks to Bernard Harcourt for organizing the 2001 conference on Guns, Crime, and Punishment at the James E. Rogers College of Law, University of Arizona (Jan. 26–27, 2001).

1. Pub. L. No. 90-618, 82 Stat. 1213 (1968).

2. See Juliet Eiperin & Thomas B. Edsall, *For Democrats, Gun Issue Is Losing Its Fire*, WASH. POST, Oct. 20, 2000, at A1 (“Many House and Senate Democrats have found that gun control is not resonating in many key contests like other issues, such as prescription drugs.”); see also James Dao, *The 2000 Campaign: Endorsements; To Help Bush, N.R.A. Withholds Backing*, N.Y. TIMES, Sept. 12, 2000, at A23; *Excerpts from Platform Approved by Democratic National Convention*, N.Y. TIMES, Aug. 16, 2000, at A26; *Excerpts From Platform Approved by Republican National Convention*, N.Y. TIMES, Aug. 1, 2000, at A16; Joan Lowy, *Presidential Hopefuls Far Apart on Means to Curb Gun Violence*, STAR TRIB. (Minneapolis, Minn.), Apr. 16, 2000, at 12A; Megan Twohey, *Bush and Gore’s Positions on Gun Control*, 32 NAT’L J. 1036 (2000); Peter Wallsten, *Gun Laws Gain Prominence in Campaigns As Democrats Seek to Regain Control of Congress*, CONG. Q. WEEKLY, Mar. 18, 2000, at 1–3.

hearings,<sup>3</sup> and will surely be heard in the future. There is one note of virtual unanimity however: The Eastern District of Virginia United States Attorney's Office's Project Exile has been a stupendous success and ought to be replicated (to one degree or another) wherever gun violence threatens the social fabric.

Conceived in late 1996, Project Exile (in its original form) targeted gun violence in the Richmond area by funneling all gun arrests made by state and local authorities to federal court, where, if at all possible, defendants were to be prosecuted under federal firearm statutes. Among other things, these statutes criminalize the possession of a firearm by those previously convicted of felonies or crimes of domestic violence,<sup>4</sup> and the use or possession of a firearm in connection with drug trafficking.<sup>5</sup> Exile also had "an innovative community outreach and education initiative, using various media to get the message to the criminals that illegal guns are unacceptable, and will not be tolerated."<sup>6</sup>

Project Exile's political reviews have varied in intensity (and perhaps, as we will see, in candor), but hardly in partiality. In May 1999, Attorney General Janet Reno touted the Richmond program during congressional testimony.<sup>7</sup> A week later, in a radio address, President Clinton announced that he had just directed Reno and Treasury Secretary Robert Rubin to use every available tool to increase the prosecution of gun criminals and shut down illegal gun markets:

I'm asking them to work closely with local, state, and federal law enforcement officials, and to report back to me with a plan to reduce gun violence by applying proven local strategies to fight gun crime nationwide.

Look what federal prosecutors and the ATF are doing in Richmond, Virginia, in an effort they call Project Exile. Under the leadership of U.S. Attorney Helen Fahey, Project Exile has used the threat of tough federal statutes...to reduce gun crime and take

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3. See *Day IV, Panel II of a Hearing of the Senate Judiciary Committee, Nomination of John Ashcroft to Be U.S. Attorney General*, Jan. 19, 2001, available in LEXIS, Federal News Service file.

4. 18 U.S.C. § 922(g) (1994). Although the provision requires that the possession was in or affecting interstate commerce, the government can usually prove this element with ease, using expert testimony from an ATF agent. See, e.g., *United States v. Rawls*, 85 F.3d 240, 243 (5th Cir. 1996); *United States v. Ware*, 914 F.2d 997, 998 (7th Cir. 1990); *United States v. Wallace*, 889 F.2d 580, 583-84 (5th Cir. 1989).

5. 18 U.S.C. § 924(c) (1994 & Supp. II 1996).

6. *Review of Dep't of Justice Firearm Prosecutions, Hearing Before the Subcomm. on Criminal Justice Oversight and the Subcomm. on Youth Violence, Senate Judiciary Comm.*, 106<sup>th</sup> Cong. 201 (1999) [hereinafter *Firearm Prosecutions*], available at <[http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgr?dbname=106\\_senate\\_hearings&docid=f:59738.wais](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgr?dbname=106_senate_hearings&docid=f:59738.wais)> at 36 (statement of Helen F. Fahey).

7. See *Hearing Before the Committee on the Judiciary United States Senate Concerning Justice Department Oversight* (May 5, 1999), available at <<http://www.usdoj.gov/archive/ag/testimony/1999/agjudic050599.htm>> (statement of Attorney General Janet Reno).

serious gun criminals off the street. And gun murders are down in Richmond by a remarkable forty-one percent.<sup>8</sup>

During the election campaign, Vice President Gore was a little more circumspect, though he generally avowed the need for "tough penalties for gun trafficking, and all crimes committed with guns" and pledged to "work with the states that want to end the practice of plea bargaining for crimes committed with guns."<sup>9</sup> But congressional Democrats have been quite explicit in their support. On March 21, 2000, three of the Party's gun reform stalwarts, Senator Charles Schumer (D-N.Y.), Representative John Conyers (D-Mich.), and Representative Carolyn McCarthy (D-N.Y.) introduced the "Act for Effective, National Firearms Objectives for Responsible, Common Sense Enforcement 2000" ("ENFORCE"),<sup>10</sup> which, according to McCarthy, would "establish partnerships between state and federal prosecutors to expand successful enforcement programs like Project Exile."<sup>11</sup>

The more casual observer of the gun control debate might not be particularly surprised by these expressions of the Clinton Administration and congressional Democrat favor. After all, Project Exile was developed under the aegis of a Democratic U.S. Attorney,<sup>12</sup> as part of Attorney General Janet Reno's Anti-Violent Crime Initiative. He might, however, be taken aback to find that the strongest praise has come from different quarters. In June 1999, Governor George W. Bush appeared in Richmond to endorse Exile and call for its implementation nationwide.<sup>13</sup> Bush's campaign web-site proclaimed that he "[s]upports stronger enforcement of existing gun laws, and [would] provide more funding for aggressive gun law enforcement programs such as Project Exile in Richmond, Virginia."<sup>14</sup> And in the debates between the two candidates, it was the Governor,

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8. See *Radio Address of the President to the Nation (Gun Violence)* (Mar. 20, 1999), available at <<http://ojjdp.ncjrs.org/about/press/ojp990320.html>>; see also Joe Lockhart, White House Press Briefing, at 4 (visited Mar. 14, 2000), available at <<http://www.pub.whitehouse.gov/uri-/oma.eop.gov.us/2000/3/14/8.txt.1>> (noting the Administration's support of Project Exile).

9. Remarks Prepared for Delivery by Vice President Al Gore, Boston, Mass., (visited June 7, 2000), available at <[http://www.algore2000/speeches/speeches\\_crime071299.html](http://www.algore2000/speeches/speeches_crime071299.html)>.

10. H.R. 4066, 106<sup>th</sup> Cong. (2000).

11. *News from Congresswoman Carolyn McCarthy* (Mar. 21, 2000), available at <<http://www.house.gov/carolynmccarthy/stmtgunsenforcebill.htm>>.

12. President Clinton appointed Helen F. Fahey to be U.S. Attorney for the Eastern District of Virginia after she was recommended to the post by Virginia's Democratic Senator, Charles S. Robb. Fahey, who at the time was Arlington County's Commonwealth's Attorney, was described as "a veteran prosecutor and longtime Democrat." Kent Jenkins, Jr. & Charles W. Hall, *Robb Picks Women for Legal Posts; 2 from N. Va. Tapped for Prosecutor, Judge*, WASH. POST, May 25, 1993, at C1.

13. R.H. Melton, *Bush Favors Va.-Style Gun Control; Candidate Has National Hopes for Program Penalizing Felons*, WASH. POST, June 23, 1999, at A8.

14. See *An Urban Agenda for the 21<sup>st</sup> Century*, [georgewbush.com](http://www.georgewbush.com) (June 12, 2000) <<http://www.georgewbush.com/news.asp?formMode=NR&ID=1606>>.

not the Vice President, who singled out Exile for special praise.<sup>15</sup> Support from congressional Republicans has, if anything, been stronger. In March 1999, Republican Senators held hearings extolling the project's virtues,<sup>16</sup> and in March 2000, Representative Bill McCollum (R-Fla.), along with House Majority Leader Dick Armey (R-Tex.) and others, sponsored "Project Exile: The Safe Streets and Neighborhoods Act of 2000,"<sup>17</sup> which sought to build on the "remarkable" success of the Richmond Project by offering block grants to "those states that ensure a mandatory five year prison sentence" to defendants of the sort targeted in Richmond.<sup>18</sup> The Republican National Committee's Platform for 2000 broadly promised: "Through programs like Project Exile, we will hold criminals individually accountable for their actions by strong enforcement of federal and state firearms law."<sup>19</sup>

The less casual observer would probably not be particularly surprised by this Republican enthusiasm for an ostensibly Democratic program. Project Exile is, after all, quite consistent with the notion that gun regulation should leave "law-abiding" folks alone and target only misbegotten "criminals" (not to be confused with people who merely violate firearms statutes that have criminal penalties).<sup>20</sup> Indeed, one of the star witnesses at House hearings on Exile in November 1999 was Charlton Heston, president of the National Rifle Association ("NRA"), who honored the "fearless prosecutors" who "employed the awesome simplicity of enforcing existing federal gun law" and thereby "cut gun homicides by one-half in just one year."<sup>21</sup> The NRA has not merely been commenting from the sidelines. It has funded Project Exile's educational program in the Richmond public schools and deployed its cartoon character "Eddie Eagle" on this sensitive mission.<sup>22</sup> Yet

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15. *Exchanges Between the Candidates in the Third Presidential Debate*, N.Y. TIMES, Oct. 18, 2000, at A26.

16. See generally *Firearm Prosecutions*, supra note 6; see also Senate Committee on the Judiciary (Majority Staff), *Crimes Committed with Firearms: A Report for Parents, Prosecutors, and Policy Makers* (Sept. 25, 1999), available at <<http://www.senate.gov/~judiciary/guns106.htm>>.

17. H.R. 4051, 106<sup>th</sup> Cong. (Mar. 22, 2000).

18. *Hearing on Project Exile Before the Subcommittee on Crime*, HOUSE JUDICIARY COMM. (Apr. 6, 2000), available at <<http://www.house.gov/judiciary/mcco0406.htm>> (statement by Chairman Bill McCollum).

19. *Excerpts from Platform Approved by Republican National Convention*, supra note 2, at A16.

20. See GARY KLECK, *TARGETING GUNS: FIREARMS AND THEIR CONTROL* 15 (1997).

21. Charlton Heston, *Congressional Testimony on Project Exile*, HOUSE GOVERNMENT REFORM SUBCOMM. (Nov. 4, 1999), available at <<http://www.nraaila.org/news/19991104-CrimeControlJustice-002.html>>; see also *Hearing Before the House Judiciary Comm. Subcomm. on Crime, Testimony of Wayne R. LaPierre, NRA Executive Vice-President* (May 27, 1999) available at <<http://www.house.gov/judiciary/lapierre.htm>> (noting NRA's support for Project Exile—"the fierce prosecution of federal gun laws that has cut crime rates overnight in the few places it's been tried").

22. See *Firearm Prosecutions*, supra note 6, at 40 (statement of Helen F. Fahey).

the NRA's nemesis, Sarah Brady, has also endorsed Exile on behalf of Handgun Control, Inc.<sup>23</sup>

What exactly is going on here? Part of the story, of course, is that no one wants to come out against the prosecution of violent criminals with guns and that politicians of all stripes believe that federal resources should be committed to that end. But the bipartisan unanimity on the virtues of Project Exile masks deep differences about its lessons. Indeed, the political saga of Exile has had more to do with the negative implications of an Exile-based strategy than with the project's obvious achievements. While the federal officials who established the program simply addressed a perceived local emergency, Exile has carried far more freight in the legislative arena, where the real issue has been whether federal firearms enforcement efforts should go *beyond* such programs.

The implications of Exile politics go beyond the gun control debate, for they may well mark a new stage in the devolution of federal enforcement power. An inevitable consequence of the now longstanding presidential interest in episodic (as opposed to organized) violent crime has been to shift control over federal enforcement assets from Washington to U.S. Attorneys' Offices—the entities best suited to assess and target local problems and to obtain the cooperation of local authorities in the effort. The devolution, however, has not gone much further than this, and the federal commitment of resources in this area has been highly discretionary, varying by district, and balanced against the needs of more national programs. Now comes Project Exile. Exile's institutional significance lies not as a particular enforcement program—the effort of one U.S. Attorney's Office to meet the needs of Richmond's residents—but rather in the legislative movement it has spawned—a movement that would encourage and institutionalize the elimination of federal prosecutorial gatekeeping.

The purpose of this article is to recount this saga, albeit somewhat impressionistically, and to pursue its implications. The story is far from complete—particularly now that Attorney General Ashcroft has proclaimed Exile-type programs to be one of his top priorities.<sup>24</sup> But I've tried to capture its flavor and highlights. Part II describes the origins of Project Exile in Richmond and tells how one district's response to a violent crime problem became a potent, but contested symbol in the gun control debate. For foes of the Clinton Administration's regulatory agenda, eager to restrict federal activity in the area to the prosecution of violent criminals, it became a sword. For the Clinton Administration and other advocates of increased regulation, however, Exile ultimately served as a shield, allowing them to trumpet the virtues of a larger federal enforcement presence in the area. Part III sets out to assess the policy implications of legislative efforts to make Exile a nationwide program and thereby to commit federal agents and prosecutors to what otherwise would be local violent crime cases. At first blush, the inquiry merely invites the recapitulation, in a more particularized form, of the usual complaints about the "over-federalization" of

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23. *Id.* at 43.

24. See *infra* notes 198–199 and accompanying text.

criminal law and the usual rejoinders.<sup>25</sup> This does occur, but, once one (for better or worse) takes federal targeting of gun violence as a political given, the question becomes whether federal enforcers can play a qualitatively different role from their state and local counterparts. And this question cannot be answered without taking a position on the degree to which access to guns, and their interstate movement, drives violent crime. Leaving this empirical conundrum unresolved, Part IV explores the consequences for the federal enforcement bureaucracy of legislative initiatives that threaten to irreversibly commit federal assets to the use or control of state and local authorities.

## II. PROJECT EXILE: ORIGINS, COMPONENTS, AND POLITICAL USES

### A. Triggerlock

In the Spring of 1991, the battle over the Brady Bill,<sup>26</sup> first introduced in Congress in February 1987, was heating up again.<sup>27</sup> Supporters could be encouraged by the unexpected endorsement on March 28, 1991, of former President Reagan who, in comments at the George Washington University Medical Center (where he had been treated after the attempt on his life) urged Congress to enact the bill "without delay."<sup>28</sup> The (first) Bush Administration, however, continued to oppose the legislation.<sup>29</sup>

It was against this backdrop that on April 10, 1991, Attorney General Richard Thornburgh, with much fanfare, announced "Project Triggerlock," which would use federal firearms statutes to "protect the public by putting the most dangerous offenders in prison for as long as the law allows."<sup>30</sup> The idea, Thornburgh had explained to U.S. Attorneys two weeks before, was to work with local police agencies to identify repeat and violent offenders who used guns and to prosecute them in federal court, where they would face "the full force of federal sentences with a commitment to no plea bargaining."<sup>31</sup> When pressed by reporters, one of Thornburgh's aides "denied that the order was an effort to blunt mounting support in Congress" for the Brady Bill.<sup>32</sup> A follow-up memorandum

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25. See NORMAN ABRAMS & SARA SUN BEALE, *FEDERAL CRIMINAL LAW AND ITS ENFORCEMENT* 64-72 (3d ed. 2000) (setting out positions in debate).

26. 107 Stat. 1536, Pub. L. 103-159 (1993). The Brady Bill, ultimately passed as the Brady Handgun Violence Prevention Act, imposed a system of background checks and waiting periods designed to ensure that people in prohibited classes, especially convicted felons, could not buy handguns.

27. See OSHA GRAY DAVIDSON, *UNDER FIRE: THE NRA AND THE BATTLE FOR GUN CONTROL* 247 (1998).

28. See *id.* at 248.

29. See ROBERT J. SPITZER, *THE POLITICS OF GUN CONTROL* 123 (2d ed. 1998).

30. Tracy Thompson, *Gun Crimes Targeted by Prosecutors: National Effort Seen As Partly Political*, WASH. POST, Apr. 11, 1991, at A14 (quoting Attorney General Richard Thornburgh).

31. *Thornburgh Orders Drive on Gun Violence*, N.Y. TIMES, Mar. 27, 1991, at A20 (quoting Attorney General Thornburgh).

32. *Id.*

from the head of the Criminal Division instructed each U.S. Attorney to appoint a Triggerlock task force involving federal, state, and local representatives to develop an enforcement strategy for the district and suggested that one such strategy would be to screen all state and local arrests with each district for cases involving predicate felons in possession of weapons or involving firearms offenses.<sup>33</sup>

Responding to Thornburgh's initiative, U.S. Attorneys' Offices throughout the nation began to devote additional resources to the prosecution of violent offenders under federal gun statutes.<sup>34</sup> Or, at least, those Offices endeavored to raise the visibility of their existing efforts in that regard.<sup>35</sup>

The then-U.S. Attorney in the Eastern District of Virginia, for example, noted that firearms violations had long been "a top priority" for his office, and that, for the past three years, he had "assigned a full-time assistant to gun-related cases."<sup>36</sup> Within the first six months after Triggerlock's announcement, 2651 defendants were charged nationwide.<sup>37</sup> Response to Triggerlock also came from the Bureau of Alcohol, Tobacco, and Firearms ("ATF"), which, in August 1992, announced "Operation Achilles Heel," an effort to work with state and local authorities to round up more than 600 "of this nation's most violent criminals."<sup>38</sup>

Project Triggerlock continued through the end of the Bush Administration and into the Clinton Administration.<sup>39</sup> The passage of the Brady Bill in November 1993 and the approaching congressional elections (in which the

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33. See ABRAMS & BEALE, *supra* note 25, at 109-10.

34. See Michael deCourcy Hinds, *Bush Aides Push State Gun Cases into U.S. Courts*, N.Y. TIMES, May 17, 1991, at A1.

35. A recent report on case filings suggests that the biggest increase in federal firearms prosecutions occurred before the announcement of Triggerlock. See Patrick Walker & Pragati Patrick, Administrative Office of the United States Courts, *Trends in Firearms Cases From Fiscal Year 1989 Through 1998, and the Workload Implications for the U.S. District Courts* (Apr. 4, 2000) <<http://www.uscourts.gov/firearms/firearms00.html>>.

For examples of the promotion of Triggerlock, see, e.g. 1992 U.S. ATT'Y'S OFFICE, S. DIST. OF N.Y., REP., at 3 (1992) (noting how, as part of Operation Triggerlock, the Office had developed a "close relationship" with the Bureau of Alcohol, Tobacco, and Firearms and "worked closely" with the New York City Police and Housing Police "to address the gun epidemic through select application of justifiably harsh federal penalties to repeat offenders carrying guns, illegal gun dealers, and those using guns in the course of drug crimes and crimes of violence"); Christopher Kilbourne, *Police Add Ammunition Against Gunmen: Cooperation Among Federal, State, Local Cops*, THE RECORDER (Bergen), Apr. 11, 1991, at A3 (explaining the goals of Triggerlock).

36. Thompson, *supra* note 30, at A14.

37. See ABRAMS & BEALE, *supra* note 25, at 110.

38. Press Conference of Stephen E. Higgins, Director, Bureau of Alcohol, Tobacco and Firearms (Aug. 22, 1991), available in LEXIS, Federal News Service file.

39. See Howard Mintz, *Heavy Artillery: In Project Triggerlock, the Justice Department Pulls Felons out of the State System and Subjects Them to Long Federal Sentences Under Tough Gun Laws. Defense Lawyers and Some Judges Say the Program Is a Cannon Where a Pistol Would Do*, THE RECORDER, Feb. 8, 1993, at 1 (containing a part of special report on Triggerlock in San Francisco); Judy Rokowsky, *Number of Guns Seized in Boston Decreases; Police Credit Law Enforcement Efforts*, BOSTON GLOBE, Dec. 8, 1994, at 31.



Republicans were to gain control of Congress) put the program in the spotlight once again in the spring of 1994, with Republicans charging that it had been abandoned by the new Administration.<sup>40</sup> At a September House hearing, convened at the request of Republican Steven Schiff (R-N.M.), Assistant Attorney General Jo Ann Harris, chief of the Criminal Division at the Department of Justice ("DOJ"), avowed that Triggerlock remained "in full force" as an "important component" of the Anti-Violent Crime Initiative that Vice President Gore and Attorney General Reno had announced on March 1, 1994.<sup>41</sup> She went on to note, however, that although "some very sincere observers have expressed concern over the small decline in the prosecutions under the federal firearms statutes in recent months," the Department believed that "it is a much wiser and more productive approach to focus our attention and resources on the quality of the investigations initiated and prosecutions undertaken to identify and target those armed and violent offenders responsible for the greatest amount of crime," particularly those connected with gangs.<sup>42</sup> Thus, while the number of Triggerlock prosecutions had somewhat declined, the average sentence in those cases was substantially higher in 1993, with a dramatic increase in the number of defendants sentenced to five years or more.<sup>43</sup> As for the other cases, Harris observed:

Many states, and localities, have been working to toughen their own firearm statutes thus lessening the need in many instances to bring certain cases in federal court. These new local prosecutions often are achieved with the cooperation and involvement of federal law enforcement and prosecution agencies consistent with the partnerships that have been developed in the Anti-Violent Crime Initiative.<sup>44</sup>

In any event, Harris testified, prosecutions alone would not solve the problem of violent crime: "[W]e all know that the best way to prevent crime with guns is to stop criminals before they get the guns."<sup>45</sup>

Harris's point about the need to focus on access to firearms and illegal firearms trafficking, as well as enforcing criminal use and possession statutes, was

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40. James A. Baker III, *Crime, Promises—Had Enough?*, HOUS. CHRON., Mar. 6, 1994, at Outlook 1; Joyce Price, *2 Faces of Gun Control at Justice? Congressman Says It Isn't Enforcing Key Anti-Crime Law*, WASH. TIMES, May 21, 1994, at A5.

41. See *Prosecution of Federal Gun Crimes, Hearing Before the Subcomm. on Crime and Criminal Justice of the House Judiciary Comm.*, 103rd Cong., 2nd Sess. 4 (1994) [hereinafter *Prosecution of Federal Gun Crimes*]; see also 1994 ANNUAL REPORT OF THE ATTORNEY GENERAL OF THE UNITED STATES 5–6, available at <[www.ussdoj.gov/ag/annualreports/ar94/finalag.txt](http://www.ussdoj.gov/ag/annualreports/ar94/finalag.txt)> (describing Initiative).

42. *Prosecution of Federal Gun Crimes*, supra note 41, at 4–5 (testimony of Jo Ann Harris).

43. See *id.* at 13; 14 n.1, 46 (statement of Jo Ann Harris). Although Assistant Attorney General Harris made no mention of the hiring freeze on Assistant U.S. Attorneys between April 1993 and September 1994, a recent Administrative Office study cites the freeze as the primary cause of the decrease in federal firearms cases during this period. See Walker & Patrick, supra note 35, at 3.

44. *Prosecution of Federal Gun Crimes*, supra note 41, at 5 (testimony of Jo Ann Harris).

45. *Id.*

reiterated at the hearing by ATF's Associate Director for Law Enforcement, who reported that ATF had designed its enforcement programs "to target the most prolific violent offenders and illegal firearms traffickers."<sup>46</sup> In addition to its "Achilles Program," aimed at "armed career offenders, convicted felons, and armed drug traffickers in cities across the nation,"<sup>47</sup> ATF had a "Juvenile Firearms Trace Initiative" "to identify and eliminate sources of firearms to juveniles."<sup>48</sup> Under questioning by then-Congressman Schumer, the ATF official spoke of the agency's need to "come up with a new strategy for gun shows and flea markets," the large "secondary market" that was substantially unregulated even after the passage of the Brady Bill.<sup>49</sup>

One can tease several policy strains out of the DOJ-ATF presentation at this hearing. While asserting a continued commitment to pursuing federal firearms prosecutions of predicate felons and violent offenders, Clinton Administration officials sought to expand the focus of federal enforcement activities to include trafficking violations and other regulatory activity. State and local enforcers were to pursue the use and possession cases whenever possible. In late 1994, officials in the Office of Management and Budget went so far as to propose a twenty-five percent reduction in ATF's agent workforce, with the savings to be spent on local and state police grants.<sup>50</sup> The proposal was soon abandoned, after considerable outcry from within the law enforcement community,<sup>51</sup> but the notion of wholesale federal adoption of firearms cases certainly seemed to be disfavored.

Triggerlock prosecutions continued into 1995, with U.S. Attorneys and ATF trumpeting each new push<sup>52</sup> and Republicans like freshman Senator Mike DeWine (R-Ohio) calling for the program's "resurrect[ion]."<sup>53</sup>

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46. *Id.* at 28 (statement of Charles Thompson, Associate Director Law Enforcement, ATF).

47. *Id.* at 29-30.

48. *Id.* at 35.

49. *Id.* at 43-44.

50. See *Why Pass Gun Laws, Then Fire the Enforcers?*, USA TODAY, Nov. 30, 1994, at 10A; see also *Firearm Prosecutions*, *supra* note 6, at 18 (testimony of Andrew L. Vita) (noting that certain OMB examiners had "considered the possibility that [Project] Achilles was a duplication of what state and local law enforcement should be doing, and that the federal program should be directed more at curtailing the flow of firearms [ ] into those communities").

51. See Pierre Thomas & Ann Devroy, *Treasury Official Blasts ATF Cuts; Rare Public Criticism Calls Plan "Out of Sync" with Policy*, WASH. POST, Dec. 17, 1994, at A1.

52. See, e.g., Kevin Bouffard, *Sebring Looks to Felon Program; Under the Federal "Operation Triggerlock," the City Will Be Able to Put Armed and Violent Career Criminals Behind Bars for at Least 15 Years*, TAMPA TRIB., Aug. 29, 1995, at Heartland 1; Jeri Row, *Officials Zero in on Armed Career Felons*, NEWS & REC. (Greensboro, N.C.), Sept. 4, 1995, at B1.

53. See Tom Diemer, *Dewine Bill Promises More Police*, PLAIN DEALER (Cleveland, Ohio), May 18, 1995, at 9A.

*B. Project Exile*

Although the DOJ Criminal Division chief spoke forcefully about Attorney General Reno's Anti-Violent Crime Initiative, she candidly admitted that the Initiative would have to be implemented by the U.S. Attorney in each district, and that these officials, responding to local problems and personalities, "must of necessity make their own policies with respect to where they put their resources."<sup>54</sup> In a way, this was something of an understatement. Although the extent of U.S. Attorneys' independence from Washington can vary considerably (with a direct relation between the size of a U.S. Attorney's Office and its independence),<sup>55</sup> most, if not all, have traditions of autonomy, fortified by the relationships between their leaders and the political powers within their respective districts.<sup>56</sup> This autonomy extends to every area of federal criminal enforcement but is particularly great when the federal government turns to violent street crime.

When federal enforcers pursue traditional organized crime investigations or patrol the securities markets or diplomatic community, they can develop and substantially rely on their own informational networks.<sup>57</sup> When their focus turns toward more episodic criminal activity, like street violence, they must depend to a considerable degree on local police departments, "the only entities whose tentacles reach every street corner."<sup>58</sup> "Main Justice" understandably recognized that the necessary cooperation of state and local officials with its anti-violence initiative could be achieved only through distinctive working arrangements that U.S. Attorneys negotiated district by district.

The peculiar status of U.S. Attorneys' Offices as local repositories of federal prosecuting authority was also well suited to an initiative that, quite self-consciously, plunged into an area of traditionally local responsibility. Equally well suited in this regard was the law enforcement agency that was to play a leading role in bringing firearms cases to prosecutors. These cases, of course, fell squarely within the statutory bailiwick of the ATF.<sup>59</sup> Moreover, perhaps more importantly, ATF had for some time responded to its political vulnerability in Washington by

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54. *Prosecution of Federal Gun Crimes*, *supra* note 41, at 47-48.

55. See JAMES EISENSTEIN, COUNSEL FOR THE UNITED STATES: U.S. ATTORNEYS IN THE POLITICAL AND LEGAL SYSTEMS 116-17 (1978).

56. See Daniel C. Richman, *Federal Criminal Law, Congressional Delegation, and Enforcement Discretion*, 46 UCLA L. REV. 757, 781, 785 (1999).

57. See *id.* at 785.

58. *Id.* at 786.

59. ATF was not, however, the only federal enforcement agency involved in anti-violence programs. The FBI had begun committing substantial resources to this area in the last year of the Bush Administration. See David Johnston, *F.B.I. to Shift from Cold War to Crime War*, N.Y. TIMES, Jan. 9, 1992, at A18; Daniel C. Richman, *The Changing Boundaries Between Federal and Local Law Enforcement*, in BOUNDARY CHANGES IN CRIMINAL JUSTICE ORGANIZATIONS, 2 CRIMINAL JUSTICE 2000 94 (National Institute of Justice, NCJ 182409, July 2000), available at <[http://www.ojp.usdoj.gov/nij/criminal\\_justice2000/vol2\\_2000.html](http://www.ojp.usdoj.gov/nij/criminal_justice2000/vol2_2000.html)>. That agency's efforts continued under the Clinton Administration, which deemed them a part of its Anti-Violent Crime Initiative. See 1994 ANNUAL REPORT, *supra* note 41, at 44.

working particularly hard on its relationships with local enforcers.<sup>60</sup> With the debacle at Waco still a lingering memory, ATF could be counted on to be particularly accommodating in this regard.<sup>61</sup>

From out of these political and institutional currents came Project Exile. In February 1997, responding to a plague of gun violence that gave Richmond one of the top five per capita murder rates in the country, the Eastern District of Virginia U.S. Attorney's Office announced its "aggressive, innovative, and creative approach to reducing the murder rate, by changing the culture of violence...through a comprehensive, multi-dimensional strategy" that included "law enforcement and prosecution components aimed at deterrence, as well as community outreach and education programs focusing on prevention."<sup>62</sup>

Exile's law enforcement component, initiated in coordination with the local Commonwealth's Attorney's Office, the Virginia Attorney General's Office, the Richmond Police Department, the Virginia State Police, ATF, and the FBI was quite straightforward: "When a police officer finds a gun during the officer's duties, the officer pages an ATF agent (twenty-four hours a day). They review the circumstances and determine whether a federal statute applies. If so, federal criminal prosecution is initiated."<sup>63</sup>

As a practical matter, this process generally required that criminal charges initially be brought against a suspect in state court, to be dropped if the case was taken federally.<sup>64</sup> One federal official "said that most of those arrested under the program might initially be released on bond by city magistrates, but 'we'll quickly scoop them up.'"<sup>65</sup>

The benefits of taking cases federally, according to the U.S. Attorney's Office, flowed from the federal bail statute, which allowed pre-trial detention on the ground of dangerousness; the federal system of mandatory minimums and sentencing guidelines, which limited sentencing discretion and resulted in predicable and substantial sentences, and the federal prison system, which made it

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60. See WILLIAM J. VIZZARD, *IN THE CROSS FIRE: A POLITICAL HISTORY OF THE BUREAU OF ALCOHOL, TOBACCO AND FIREARMS* 89 (1997); William A. Geller & Norval Morris, *Relations Between Federal and Local Police*, in 15 *MODERN POLICING* 231, 247 n.8 (Michael Tonry & Norval Morris eds., 1992); Richman, *supra* note 56, at 796.

61. See VIZZARD, *supra* note 60, at 189–207 (describing upheaval within ATF in wake of failed raid on Branch Davidian compound near Waco, Texas).

62. *Firearm Prosecutions*, *supra* note 6, at 36 (statement of Helen F. Fahey).

63. *Id.* at 5. James Comey, Managing Assistant U.S. Attorney and Chief Criminal Supervisor in Richmond—the "chief midwife" of Exile—has described Exile as "'Triggerlock on steroids.'" *Get Out of Town!: Richmond's Project Exile Stems a Spiral of Violence with Its Focus on Gun-Toting Felons*, *LAW ENFORCEMENT NEWS*, Dec. 15/31, 1999 (visited May 31, 2000), available at <[www.lib.jjay.cuny.edu/len/1999/12.30/](http://www.lib.jjay.cuny.edu/len/1999/12.30/)>.

64. See, e.g., *United States v. Jones*, 36 F. Supp. 2d 304, 307 (E.D. Va. 1999).

65. Tom Campbell & Gordon Hickey, *Project Exile Aims to Break Guns, Drugs Link; City Wants Federal Arrests, Stiff Sentences*, *RICHMOND TIMES DISPATCH*, Feb. 22, 1999, at B1.

likely that any sentence would be served "elsewhere in the country" (hence the idea of "exile").<sup>66</sup>

At its outset, Exile involved a considerable commitment of federal enforcement resources. The official at the U.S. Attorney's Office most involved in the program's initiation acknowledged that it "[wa]s going to be a big load" but one worth taking on because of its impact on violent crime in Richmond.<sup>67</sup> The staffing of prosecutions appears to have changed over time, however, because two years later the Office could tout the "relatively limited personnel resources" that the project required—just three prosecutors, some of whom had been detailed from state and local offices.<sup>68</sup>

Exile had an educational component as well. Initially, the U.S. Attorney's Office distributed cards for police officers to hand out on the beat—cards proclaiming the federal penalties for gun possession crimes and carrying the slogan: "Stop the Madness."<sup>69</sup> But with financial support from the "Project Exile Citizen Support Foundation," a "media outreach" effort soon made the message "An Illegal Gun Gets You Five Years in Federal Prison" ubiquitous—on billboards, TV commercials, supermarket bags, and a city bus.<sup>70</sup> Elementary school children received gun safety training. This program, "the Eddie Eagle Gun Safety Program," was obtained ready-made, however—a gift from the NRA.<sup>71</sup>

The effects of the Project were impressive (or, at least, were uniformly perceived as such).<sup>72</sup> Within two weeks of announcing Exile, the U.S. Attorney's Office, working with local authorities and the ATF, had obtained fifty-nine indictments under the project.<sup>73</sup> Firearms seizures by the Richmond Police Department were soon down by 48%.<sup>74</sup> By March 1999, the number of indictments had reached 438,<sup>75</sup> and the Office could give at least partial credit to

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66. See *Firearm Prosecutions*, *supra* note 6, at 38 (statement of Helen F. Fahey).

67. See *Campbell & Hickey*, *supra* note 65, at B1.

68. See *Firearm Prosecutions*, *supra* note 6, at 38–39 (statement of Helen F. Fahey).

69. See *Campbell & Hickey*, *supra* note 65, at B1.

70. See *Firearm Prosecutions*, *supra* note 6, at 39 (statement of Helen F. Fahey).

71. See *id.* at 40.

72. Determining the degree to which any drop in crime can fairly be attributed to policing tactics is frightfully difficult. See, e.g., Jeffrey Fagan, et al., *Declining Homicide in New York City: A Tale of Two Trends*, 88 J. CRIM. L. & CRIMINOLOGY 1277 (1998); Bernard E. Harcourt, *Reflecting on the Subject: A Critique of the Social Influence Conception of Deterrence, the Broken Windows Theory, and Order-Maintenance Policing New York Style*, 97 MICH. L. REV. 291 (1998); Ana Joanes, *Does the New York City Police Department Deserve Credit for the Decline in New York City's Homicide Rates? A Cross-City Comparison of Policing Strategies and Homicide Rates*, 33 COLUM. J.L. & SOC. PROBS. 265 (2000). This Article thus makes no such empirical claims about Exile.

73. See Tom Campbell, *Gun Users to Face Rigors of U.S. Case; 59 Are Indicted in Local-Federal Effort*, RICHMOND TIMES DISPATCH, Mar. 7, 1997, at B5.

74. See Tom Campbell, *An "Exile" for Firearms?; Some Gun-Toting Criminals Face Federal Prosecution*, RICHMOND TIMES DISPATCH, July 7, 1997, at A1.

75. See *Firearm Prosecutions*, *supra* note 6, at 39 (statement of Helen F. Fahey).

the Project for a 33% reduction in the homicide rate between 1997 and 1998, giving Richmond its lowest rate since 1987.<sup>76</sup>

### *C. Political Responses to Project Exile*

Precisely how Project Exile has gained such prominence in national policy circles is difficult to determine. The program's advertising and educational components<sup>77</sup> ensured it a high profile in the region where it was implemented. And perhaps federal, state, and local authorities in Virginia were particularly assiduous in drawing national media attention to the program's (and their own) success. However, the main story lies elsewhere.

Counterfactuals are always hard. Yet one could easily imagine a scenario in which the Clinton Administration, while pursuing its gun control agenda of expanding the Brady regime and policing the gun markets, seized upon Project Exile—initiated by a Democratic appointee with the full support of federal agencies—as evidence of its continued commitment to Triggerlock's goal of getting armed criminals off the streets. The race to embrace Exile, however, was won by the Administration's opponents. And to them goes the lion's share of credit for Exile's place in gun control debates.

In June 1998, newly elected NRA president Charlton Heston touted Exile's success, and executive director Wayne R. LaPierre followed up, proclaiming that Exile "ought to be in every major city where there's a major gun problem."<sup>78</sup> To be sure, Sarah Brady, chairman of Handgun Control, also took care to publicly commend Exile.<sup>79</sup> The NRA ran up its banner more visibly, however, when, at the NRA's Philadelphia convention in June, it challenged the Administration to bring Exile to Philadelphia.<sup>80</sup> With the promise of dedicated funding—thanks to the efforts of Republican Senator Arlen Specter (R-Pa.)—Philadelphia's Democratic Mayor Edward Rendell (then courting the 2000 Republican National Convention)<sup>81</sup> joined the call for importing Exile.

The Clinton Justice Department even appeared willing to cede political control of Exile's symbolism to the Republicans. An August 31, 1998, *Wall Street Journal* article, quoting officials at the U.S. Attorney's Office, told of their lack of success at obtaining more prosecutors and agents from Washington.<sup>82</sup> And it

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76. See *id.* at 14; see also Michael Janofsky, *Fighting Crime by Making a Federal Case About Guns*, N.Y. TIMES, Feb. 10, 1999, at A12.

77. See *supra* notes 69–71 and accompanying text.

78. R.H. Melton, *Richmond Gun Project Praised: NRA Brady Group Laud Automatic Sentences for Armed Felons*, WASH. POST, June 18, 1998, at A13.

79. See *id.*

80. See *Philadelphia Volunteers to Be Test Case for NRA*, CHI. TRIB., June 20, 1998, at N14.

81. See Editorial, *Philly's Coup; Another Example of Bipartisan Teamwork*, PITTSBURGH POST-GAZETTE, Nov. 9, 1998, at A10 (commenting on announcement that 2000 Republican Convention would be in Philadelphia).

82. See David S. Cloud, *Prosecutor's Strategy Scrambles Gun-Control Alliances*, WALL ST. J., Aug. 31, 1998 at 20 (reprinted in *Firearm Prosecutions*, *supra* note 6, at 71–73).

reported that the person who until recently had been Attorney General Reno's "top aide on gun violence" had "dismiss[ed] Project Exile as 'assembly line' prosecutions that bleed resources from other law-enforcement priorities" and had doubted that there was "any empirical evidence that Richmond's falling murder rate is related to Project Exile."<sup>83</sup>

On the eve of the 1998 congressional elections, Senate Republicans tried to solidify their adoption effort. A Policy Committee release declared: "Instead of crime control with quick and certain prosecution for those criminals who use firearms in the commission of a crime, this Administration is bent on idealistic gun control replete with more hurdles and more delays for legal gun owners."<sup>84</sup> The "solution," according to the release, was Project Exile, "perhaps the most aggressive, innovative and creative crime control program ever initiated," which the Republicans proposed be extended to Philadelphia.<sup>85</sup> The Policy Committee also faulted the Administration for failing to prosecute convicted felons who had tried to purchase firearms since the passage of the Brady Act but had been turned down.<sup>86</sup>

If the Republican embrace were not enough, the new year presented the Clinton Administration with another strike against Exile, this time in the form of trenchant criticism from a three-judge panel of district judges in Richmond.<sup>87</sup> One effect of Exile (intended or otherwise, and there was some evidence of intent) was to change the likely racial composition of juries in gun cases, since the federal district court drew jurors from a broader geographic region.<sup>88</sup> Exile defendants, the vast majority of whom were African American, thus faced trial in front of juries in which African American representation was likely to be significantly lower than it would have been had the cases been prosecuted by the Commonwealth's Attorney in Richmond. While rejecting, on January 26, 1999, a constitutional challenge based on this fact, the panel opined at length on the extent to which Exile represented "a substantial federal incursion into a sovereign state's area of authority and responsibility," and an "abdication of responsibility for prosecuting local crime" on the part of the state and local authorities.<sup>89</sup> The judges noted that Virginia's bail law and gun statutes were not markedly different from the federal counterparts and even challenged the notion of "exile," pointing out that most defendants ended up at the federal facility in Petersburg, Virginia.<sup>90</sup>

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83. *Id.*

84. U.S. Senate Republican Policy Committee, Release, *Of Criminals and Guns: The 'Project Exile' Solution*, Sept 30, 1998, available at <[www.senate.gov/~rpc/releases/1998/Exile-kf.htm](http://www.senate.gov/~rpc/releases/1998/Exile-kf.htm)>.

85. *Id.*

86. *See id.*

87. *See United States v. Jones*, 36 F. Supp. 2d 304 (E.D. Va. 1999).

88. *See id.* at 307-08.

89. *Id.* at 316.

90. *Id.* (noting that majority of convicted Exile defendants had been placed in Petersburg, Virginia, facility, and observing that "[t]he Commonwealth of Virginia possess numerous facilities more geographically removed from the City of Richmond than is the federal facility in Petersburg").

Asked about the court's decision the day after it was handed down, Attorney General Reno was restrained in defending Exile, explaining:

There may be resource problems in some communities that require one approach. There may be problems with state laws in other communities that require a different approach. But, as I have suggested to you before, we have had great success in Boston, for example, where the U.S. Attorney and the local district attorney worked together, the local district attorney taking most of the gun cases, the U.S. Attorney, upon agreement, taking others.<sup>91</sup>

The Department's position—"let a thousand flowers bloom, but Boston may well be better"—would soon emerge at great length when, in February 1999, it released a 253-page tome, *Promising Strategies to Reduce Gun Violence*.<sup>92</sup> The aim of the publication, according to Attorney General Reno's introduction, was to create a "'toolbox' to provide law enforcement, state and local elected officials, prosecutors, judges, community organizations, and other policymakers with practical information about a range of strategies to reduce gun violence."<sup>93</sup> The book's organization, though, had a more prescriptive purpose, setting out the nature of the gun violence problem in its first section, then, in its second section, outlining the "steps for developing and implementing a comprehensive gun violence reduction plan."<sup>94</sup> The third section profiled "comprehensive gun violence reduction strategies" in eight cities, with significant attention to the "Boston Strategy to Prevent Youth Violence."<sup>95</sup>

The "Boston Strategy," the book related, had three law enforcement components. "Operation Ceasefire" targeted youth gangs, using probation and gang unit officers to spread the word that violence would no longer be tolerated and using "intensive order maintenance and enforcement tactics to quickly suppress flareups up firearm violence in emerging gang hotspots."<sup>96</sup> The "Boston Gun Project" used trace data from crime weapons to "discover sources of illegal weapons and gun-trafficking patterns....The Boston Police Department and ATF also conducted joint inspections of all federal firearms licensees [ ] in Boston," a tactic that drove eighty percent of these entities either to not renew or to give up their licenses.<sup>97</sup> "Operation Night Light" sent teams of probation and anti-gang police officers to make nighttime visits to "high-risk youth probationers."<sup>98</sup> The "Boston Strategy" also included "intervention and prevention initiatives" that helped gang members and at-risk youths get social services, job training, and

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91. Press Conference, Janet Reno, Attorney General, Jan. 28, 1999 (visited June 22, 2000), available at <[www.usdoj.gov/archive/ag/speeches/1999/jan2899.htm](http://www.usdoj.gov/archive/ag/speeches/1999/jan2899.htm)>.

92. See generally OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, OFFICE OF JUSTICE PROGRAMS, U.S. DEP'T OF JUSTICE, *PROMISING STRATEGIES TO REDUCE GUN VIOLENCE* (1999).

93. *Id.* at iii.

94. *Id.* at 11.

95. *Id.* at 15-68.

96. *Id.* at 29.

97. *Id.* at 30.

98. See *id.*



conflict-resolution training.<sup>99</sup> The Department of Justice report attributed Boston's dramatic decrease in homicides to the "cumulative impact of this comprehensive, multipronged approach."<sup>100</sup>

After profiling "comprehensive" solutions, the DOJ report turned to what it implicitly considered partial strategies, including: "strategies to interrupt sources of illegal guns,"<sup>101</sup> "strategies to deter illegal gun possession and carrying,"<sup>102</sup> "strategies to respond to illegal gun use," and "education initiative and alternative prevention strategies."<sup>103</sup> It was in the next-to-last of these that it gave a short description of Project Exile.<sup>104</sup>

The Clinton Administration's effort to downplay Exile's unique allure soon ran into difficulties, as its opponents' publicity campaign began to pay off. By the time the new Congress convened in early 1999, NRA and Republican attention had propelled Exile to even greater prominence, with glowing reviews in the *New York Times*,<sup>105</sup> *USA Today*,<sup>106</sup> and *U.S. News*<sup>107</sup> (to name a few). One reporter presciently set the scene:

With the administration posed to send a sweeping new crime bill to Congress, the National Rifle Association vows to wage a vigorous fight against the proposed legislation—using Project Exile as its main weapon. The NRA will try to persuade Congress that the administration should put its resources into federal prosecutions of gun crimes and not into new laws controlling the sale and possession of guns.

The irony is that Attorney General Janet Reno actually agrees with the NRA on Project Exile's promise—but not its exclusivity. She will soon issue a directive to federal prosecutors...urging them to consider implementing new programs in their district like Project Exile. But the administration's new crime package will include only \$5 million for such efforts. Among the other new provisions are background checks for buyers at gun shows, a lifetime ban on gun possession by juveniles convicted of certain violent crimes, and child safety locks on all guns.<sup>108</sup>

This report may have somewhat understated Reno's support for Exile. When she presented her budget request to a Senate Appropriations subcommittee on March 9, she made clear that the five million dollars the DOJ was seeking for "intensive firearms prosecution projects" would be spent only on new

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99. *See id.* at 31–32.

100. *Id.* at 32–33.

101. *Id.* at 65.

102. *Id.* at 85.

103. *Id.* at 167.

104. *Id.* at 145–47.

105. Michael Janofsky, *supra* note 76, at A12.

106. Gary Fields, *City Makes Federal Cases of Gun Crimes*, *USA TODAY*, Feb. 1, 1999, at A4.

107. Chitra Ragavan, *A New Gun Plan Triggers a War Between the Feds and the NRA*, *U.S. NEWS & WORLD REP.*, Mar. 1, 1999, at 18.

108. *Id.*

prosecutors.<sup>109</sup> The Administration was seeking other monies in other parts of the budget to fund state prosecutors and ATF agents in connection with its gun strategy.<sup>110</sup> And she noted that the five million dollars would be used to build “on the success achieved in reducing violent crime in Boston [] and Richmond.”<sup>111</sup>

President Clinton was less subtle. On March 20, 1999, just two days before a Senate Judiciary subcommittee hearing at which Republicans were expected to criticize the Administration’s record of gun prosecutions, the President sought to reclaim Exile. In his radio address, he announced that he had just directed Reno and Treasury Secretary Rubin to “use every available tool to increase the prosecution of gun criminals and shut down illegal gun markets.”<sup>112</sup> Yet while Clinton characteristically gave equal emphasis to trafficking enforcement, the only program he singled out for special mention was Exile (which lacked any significant trafficking component). Applauding the work that “federal prosecutors and the ATF are doing in Richmond,” he vowed: “My balanced budget will help to hire more federal prosecutors and ATF agents so we can crack down on even more gun criminals and illegal gun trafficking all across America.”<sup>113</sup>

While President Clinton had stolen a bit of their thunder, Senate Republicans still proceeded with the March 22 hearing. There, Senators Thurmond, Sessions, and Spector reminded everyone that Exile was really just an extension of the (first) Bush Administration’s “Triggerlock.”<sup>114</sup> They were “pleased” that the Administration was finally trying to extend Exile,<sup>115</sup> but the fact was that federal gun prosecutions had declined by forty-six percent between 1992 and 1998—a point they highlighted with testimony from a former U.S. Attorney from the Bush Administration and a retired ATF agent, who explained why the federal government needed to pursue street-level gun cases.<sup>116</sup>

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109. Hearing Before the Senate Comm. on Appropriations, Subcomm. on Commerce, Justice, and State, the Judiciary and Related Agencies (1999), available at <[www.usdoj.gov/archive/ag/testimony/1999/agappro03099.htm](http://www.usdoj.gov/archive/ag/testimony/1999/agappro03099.htm)> (visited June 22, 2000) (statement of Janet Reno, Attorney General of the United States).

110. *See id.*

111. *Id.*

112. Radio Address of the President to the Nation (Gun Violence) (Mar. 20, 1999) available at <[ojjdp.ncjrs.org/about/press/ojp990320.html](http://ojjdp.ncjrs.org/about/press/ojp990320.html)>.

113. *Id.*

114. *Firearm Prosecutions*, *supra* note 6, at 2–4.

115. *See id.* at 2 (statement of Senator Strom Thurmond).

116. *See id.* at 3. The TRAC project at Syracuse University has presented similar figures. *See New Findings on ATF Criminal Enforcement* (visited May 25, 2000) <[www.trac.syr.edu/tracatf/findings/aboutATF/newFindings.html](http://www.trac.syr.edu/tracatf/findings/aboutATF/newFindings.html)>.

A more textured story emerges from the recent report of the U.S. Court’s Administrative Office, which describes the fluctuations in federal gun filings between 1991 and 1998, and largely attributes decreases to, first, a hiring freeze on prosecutors and agents between April 1993 and September 1994 and, thereafter, to the Supreme Court’s December 1995 ruling in *Bailey v. United States*, 516 U.S. 137 (1995), which significantly restricted prosecutors’ ability to charge violations of 18 U.S.C. § 924(c). *See Walker & Patrick, supra* note 35, at 3–4.

No one from Main Justice testified at this hearing, but, in their testimony, U.S. Attorney Fahey and Boston's U.S. Attorney Donald K. Stern strove mightily to situate Exile within the broader departmental strategy. Having spoken of Project Exile's success in the particular context of Richmond, Fahey was careful to explain that while every community would benefit from a coordinated anti-violence strategy, such programs would not necessarily have to involve federal prosecutions of gun violations, which could be pursued by local authorities when they had the resources to do so.<sup>117</sup> Stern, too, noted that because of Massachusetts' strict gun laws, "we don't have to do every case federally,"<sup>118</sup> and he told of his district's efforts to go after gun traffickers and to promote violence prevention projects.<sup>119</sup> Fahey also deflected the suggestion that the Administration had failed to support Exile sufficiently.<sup>120</sup> ATF's Assistant Director for Field Operations, Andrew L. Vita, no doubt basking in rare (and somewhat misleading) bipartisan approval for his agency's work, emphasized the breadth and uniqueness of ATF's role:

*Unlike any other law enforcement agency, we have the combined jurisdiction, expertise, and experience necessary to most successfully investigate gun trafficking and gun violence. ATF's unique assets, together with our renowned partnerships and cooperation with law enforcement at every level makes this true. With ongoing cooperation and adequate resources, we can continue to build on our success.*<sup>121</sup>

Asked by Senator Thurmond, somewhat rhetorically, whether "it would be worthwhile" to spend more money than had been requested for Exile-type projects, Vita hewed to the Administration's line: "Although Exile was extremely successful in Richmond, I would be concerned about using it as a cookie-cutter response to [ ] violent crime in other cities."<sup>122</sup>

The shootings at Columbine High School, in Littleton, Colorado, on April 20, 1999,<sup>123</sup> gave the Administration and its congressional allies new momentum in their push for broader regulatory regimes. Within a week of the tragedy, the President had proposed legislation to, among other things, restrict the purchase of handguns to one per month, raise the minimum age for handgun possession, and require background checks for firearms purchases at gun shows.<sup>124</sup> While Republicans like Orrin Hatch, pointing to the decrease in Triggerlock prosecutions, suggested new laws would do little good if the Administration failed

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117. *Firearm Prosecutions*, *supra* note 6, at 65 (testimony of Helen F. Fahey).

118. *Id.* (testimony of Donald K. Stern).

119. *See id.* at 65-66.

120. *See id.* at 62 (testimony of Helen F. Fahey).

121. *Id.* at 14 (written statement of Andrew L. Vita) (emphasis in original).

122. *Id.* at 16 (testimony of Andrew L. Vita).

123. *See James Brooke, 2 Students in Colorado School Said to Gun Down As Many As 23 and Kill Themselves in a Siege*, N.Y. TIMES, Apr. 21, 1999, at A1.

124. *See Katharine Q. Seelye, Terror in Littleton: The President's Plea; Clinton Asks Hunters to Back His Proposals Curbing Guns*, N.Y. TIMES, Apr. 28, 1999, at A26.

to enforce them,<sup>125</sup> a greater receptivity to at least some new regulation<sup>126</sup> moved Exile off center stage of the gun debate in the Senate.<sup>127</sup> Ultimately, after fits and starts—which included the initial defeat of the Democrats' gun show provision, the introduction of a somewhat similar Republican proposal the next day,<sup>128</sup> its defeat, and the ultimate passage of the original Democratic proposal with help from the Vice President's tie-breaking vote<sup>129</sup>—the Senate passed regulatory measures that, while falling far short of the Clinton Administration's proposals, were enough to put the issue to rest, at least for the moment.<sup>130</sup>

While acceding to certain regulatory proposals, Senate Republicans (including Senator John Ashcroft (R-Mo.)) made sure that the compromise legislation also enshrined Exile in the "Criminal Use of Firearms by Felons (CUFF) Act."<sup>131</sup> After applauding Triggerlock, bemoaning the decline in federal firearms prosecutions between 1993 and 1998, and celebrating the success of Exile in Richmond, the bill laid out the terms of a CUFF program. In twenty-five high crime jurisdictions,<sup>132</sup> the Attorney General and Secretary of the Treasury were to:

- (1) provide for coordination with state and local law enforcement officials in the identification of violations of federal firearms laws;
- (2) provide for the establishment of agreements with state and local law enforcement officials for the referral to the ATF and the United States Attorney for prosecution of persons arrested for violations of [various firearms offenses];

125. See *Hearing on Justice Dep't Oversight Before the Senate Judiciary Comm.* 95<sup>th</sup> Cong. 31 (May 5, 1999) (statement of Sen. Orrin Hatch).

126. Frank Bruni, *Democrats in Senate Offer Measures to Control Guns*, N.Y. TIMES, May 7, 1999, at A24.

127. See Fox Butterfield, *Small-Print Provisions of Gun Bill Please Federal Officials Most*, N.Y. TIMES, May 22, 1999, at A10 (noting that the Senate bill's Exile provisions "did not figure prominently in the debate on gun shows").

128. See Frank Bruni, *Reversing Stance, Republicans Urge a Gun-Sale Curb*, N.Y. TIMES, May 14, 1999, at A1; Frank Bruni, *Senate Narrowly Rejects Plan to Restrict Gun-Show Sales*, N.Y. TIMES, May 13, 1999, at A1.

129. See Frank Bruni, *Guns and Schools: The Legislation; Senate Votes Gun Curbs, Hours After School Shooting*, N.Y. TIMES, May 21, 1999, at A1.

130. See S. 254, 106th Cong., 1st Sess. (passed May 20, 1999); Alison Mitchell, *Guns and Schools: The Politics; Democrats Gain Ground, An Inch, on Gun Control*, N.Y. TIMES, May 21, 1999, at A23.

131. S. 254, 106th Cong., 1st Sess., tit. VIII, subtit. A (1999).

132. See *id.* § 803(d). The programs were to be established in:

- (1) the 10 jurisdictions with a population equal to or greater than 100,000 persons that had the highest total number of violent crimes according to the FBI Uniform Crime Report for 1998; (2) the 15 jurisdictions with such a population, other than the jurisdictions covered by paragraph (1), with the highest per capita rate of violent crime according to the FBI Uniform Crime Report for 1998.

- (3) require that the United States Attorney designate not less than one Assistant United States Attorney to prosecute violations of federal firearms laws;
- (4) provide for the hiring of agents for the ATF to investigate violations of [designated firearms offenses]; and
- (5) ensure that each person referred to the United States Attorney under paragraph (2) be charged with a violation of the most serious federal firearm offense consistent with the act committed.<sup>133</sup>

The bill required the Attorney General to submit annual reports as to the number of assistants hired<sup>134</sup> and the number and nature of prosecutions brought under the program. It also authorized the appropriation of forty million dollars to pay for assistants prosecuting CUFF cases and ATF agents investigating them, and ten million dollars to fund an education program like that used in Richmond.<sup>135</sup>

The action then moved to the House, where a juvenile crime bill proposed by Rep. Bill McCollum (R-Fla.), the chairman of the House Judiciary Committee's Crime subcommittee, was thought (by Democrats at least) to be the "likely vehicle" for any new gun regulatory measures.<sup>136</sup> McCollum, however, responded by holding hearings on May 27, 1999, on "gun violence and the enforcement of the federal firearm laws."<sup>137</sup> There, in addition to calling for tougher juvenile sanctions, he called attention to the "significant drop-off" in federal gun prosecutions.<sup>138</sup> The Administration's witnesses, Deputy Attorney General Eric H. Holder, Jr. and Treasury Under Secretary (Enforcement) James E. Johnson, replied by asserting that its "strategy of increased collaboration among federal, state, and local law enforcement" had resulted in a sharp rise in the "combined number of federal *and state* firearms convictions" since 1992, and a twenty-five percent increase in the number of *federal* cases in which an offender received five or more years imprisonment.<sup>139</sup> And they focused on the breadth of ATF's "overall enforcement strategy": ATF "attacks armed violent crime through direct intervention, arresting criminals who misuse firearms"; "attacks violent crime on the supply side, by identifying individuals who illegally supply firearms to criminals and juveniles," and "seeks to forestall criminal diversion from the legal to the illegal market through regulatory enforcement measures."<sup>140</sup> After making the by-now obligatory references to the successes in Boston and

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133. *Id.* § 803.

134. *See id.* § 804.

135. *See id.* § 805.

136. Frank Bruni, *House Democrats Press Early Vote on Firearms Bill*, N.Y. TIMES, May 22, 1999, at A1.

137. *Hearing on Project Exile Before the Subcommittee on Crime*, HOUSE JUDICIARY COMM. (visited June 2, 2000) <[www.house.gov/judiciary/mcco0527.htm](http://www.house.gov/judiciary/mcco0527.htm)> (statement of Crime Subcomm. Chairman Bill McCollum).

138. *Id.*

139. *Hearing Before the Subcomm. on Crime, House Judiciary Comm.*, 106<sup>th</sup> Cong. 3 (May 27, 1999) (joint statement of Deputy Attorney General Eric H. Holder, Jr. and Treasury Under Secretary for Enforcement James E. Johnson) (first emphasis added).

140. *Id.* at 20.

Richmond (described at length in accompanying statements), the Administration's testimony noted that its strategy was based on the fact that "the vast majority of the violent crime in our country falls within the jurisdiction of state and local governments."<sup>141</sup> "Indeed," they warned:

[A]ny effort that does not consider the appropriate roles of the respective levels of government runs the risk of shifting cases that can be handled effectively at the local and state level to the federal level, with significant opportunity and financial costs. Substantial opportunity costs are incurred when federal resources that could be used to combat uniquely federal crimes—like interstate gun trafficking—are used instead on cases that could be handled effectively by state and local authorities.<sup>142</sup>

Among the witnesses who followed was the NRA's LaPierre, who faulted the Justice Department for claiming that federal gun laws "are for the states to enforce" and reiterated his organization's support for Project Exile.<sup>143</sup>

On June 18, 1999, fresh from passing a tough juvenile justice bill the day before (a bill that included one provision that allowed the Ten Commandments to be displayed in public settings and another that criticized the entertainment media for gratuitous violence), the House rejected an already weakened package of the Clinton Administration's regulatory proposals, including the gun-show background check provision.<sup>144</sup> No action was taken on it, though. The passage of the juvenile justice provision left room for a House-Senate conference to consider regulatory measures, but, as summer approached, the action moved from Capital Hill to the hustings.<sup>145</sup>

Exile remained on center stage, however—especially after Governor George W. Bush went to Richmond on June 22 to "embrace" the program and tell how it should be adopted nationwide.<sup>146</sup> And the venue for Vice President Gore's response a few weeks later? Readers who have gotten into the spirit of the debate

141. *Id.* at 23.

142. *Id.* at 23–24.

143. *Testimony of Wayne R. LaPierre Before the House Judiciary Subcomm. on Crime*, May 27, 1999 (visited June 2, 2000) <[www.house.gov/judiciary/lapierre.htm](http://www.house.gov/judiciary/lapierre.htm)>.

144. See Dan Carney, *Beyond Guns and Violence: A Battle for House Control*, CONG. Q. WEEKLY, (June 19, 1999), available at <[http://libraryipcq.com/search97cgi/s97\\_cqi?action=FormGen&template=weeklyHome.fts](http://libraryipcq.com/search97cgi/s97_cqi?action=FormGen&template=weeklyHome.fts)>.

On June 10, 1999, three Republican Representatives introduced a resolution indicating the House's full support of Exile and urging the Justice Department "to prosecute all criminal violations of federal firearms laws." H. Res. 205, 106th Cong., 1st Sess. (1999).

145. Dan Carney & Gebe Martinez, *With Crime Bill Ready for Conference, Gun Control Issue Still Hovers and Democrats Try to Regroup*, CONG. Q. WEEKLY, (June 26, 1999) available at <[http://libraryipcq.com/search97cgi/s97\\_cqi?action=FormGen&template=weeklyHome.fts](http://libraryipcq.com/search97cgi/s97_cqi?action=FormGen&template=weeklyHome.fts)>.

146. Melton, *supra* note 13, at A8. On August 27, 1999, Bush noted his support for certain regulatory measures, including background checks at gun shows (as long as they could be done within 24 hours). See Dan Carney, *Lawmakers Rethink Assumptions About Politics of Gun Control*, CONG. Q. WEEKLY, Sept. 4, 1999, available at <[http://libraryipcq.com/search97cgi/s97\\_cqi?action=FormGen&Template=weeklyHome.fts](http://libraryipcq.com/search97cgi/s97_cqi?action=FormGen&Template=weeklyHome.fts)>.

should be able to figure it out. Surrounded by Boston police officers, Gore called for gun control measures, like photo licenses, that "[went] beyond anything President Clinton has proposed."<sup>147</sup> But he stayed with the Administration's theme of discretionary federal enforcement, supporting longer sentences for gun crimes and pledging "to work with states that want to stop plea bargaining on crimes committed with guns."<sup>148</sup>

When Congress returned from recess, its leaders made little progress in reconciling House and Senate gun legislation. Republicans kept the spotlight on Exile though. In the Senate, Judiciary Chairman Hatch's staff released a report "for parents, prosecutors, and policy makers" that (once again) criticized the Clinton Administration for the decline in federal firearms prosecutions and took credit for any recent improvement: "When Congress presented evidence of the successes of Project Triggerlock and Project Exile, the Administration, to its credit, finally and slowly began to reverse course."<sup>149</sup> Continuing a Republican theme, the report also took the Administration to task for prosecuting only one of the "approximately 100,000" instances in which a convicted felon or otherwise disqualified person had tried to buy a firearm but had been turned down."<sup>150</sup> Meanwhile the House Government Reform Subcommittee, chaired by Congressman Dan Burton (R-Ind.) heard testimony from Charlton Heston, celebrating the "fearless prosecutors" in Richmond who "employed the awesome simplicity of enforcing existing federal gun law" in Project Exile and thereby saved lives.<sup>151</sup>

Democrats had their own uses for "Exile" during the late summer and fall of 1999. In Colorado, the U.S. Attorney, subtly (or maybe not so subtly) borrowed the name for a program in Denver and Colorado Springs more in keeping with the Administration's gun policy. In *this* "Project Exile," federal gun prosecutions increased, but state prosecutions were expected to play an equal part.<sup>152</sup> In upstate New York, Senator Schumer announced that he had obtained funding for Exiles in Buffalo and Rochester, but, in doing so, noted that some of the money would be "used to intensify federal records checks on guns that wind up in the hands of criminals and surveillance efforts."<sup>153</sup> Moreover, in Rochester, teams of state and federal prosecutors jointly "screen[ed] every gun case and decide[d] which court,

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147. Melinda Henneberger, *Gore Unveils Crime-Fighting Plan, From Right and Left*, N.Y. TIMES, July 13, 1999, at A10.

148. *Id.*

149. Senate Committee on the Judiciary, *supra* note 16.

150. *Id.*

151. House Government Reform Subcommittee, Nov. 4, 1999 (visited May 31, 2000) <[www.nraila.org/news/19991104-CrimeCriminalJustice-002.shtml](http://www.nraila.org/news/19991104-CrimeCriminalJustice-002.shtml)> (testimony of Charlton Heston).

152. See Mike Soraghan, *Clinton Will Push to Enforce Gun Laws; Colo. Implements Own "Project Exile,"* DENVER POST, Jan. 18, 2000, at A1 (noting that, compared to Richmond's Exile, "[t]he Colorado version is more a team approach with local police and prosecutors"); U.S. Attorney's Office, D. Colo., *Project Exile Overview*, (visited Apr. 6, 2001) <[www.du.edu/usaoco/EXILEINFOFrame1Source1.htm](http://www.du.edu/usaoco/EXILEINFOFrame1Source1.htm)>.

153. Lou Michel, *Federal Funds Boost Project to Remove Illegal Guns*, BUFFALO NEWS, Aug. 10, 1999, at B4.

state or federal, would result in a more likely conviction and longer sentence.”<sup>154</sup> And in Buffalo, the U.S. Attorney and local district attorney voiced hopes that the “venture [would] lead to more pretrial pleas and longer sentences for gun cases prosecuted in the state courts.”<sup>155</sup>

“Gridlock” on gun legislation continued into the new year,<sup>156</sup> enhancing the issue’s allure as a focal point for public debate (or, the cynics might say, campaign rhetoric). On January 18, 2000, President Clinton announced his “National Gun Enforcement Initiative”<sup>157</sup> (in Boston, of course, not Richmond). There was nothing radically new here, but the initiative marked a more concerted effort to use street-crime enforcement programs as a vehicle for selling a far broader firearms strategy, including a call for 500 new ATF agents *and inspectors* to “help us crack down on violent gun criminals, illegal gun traffickers, and bad-apple dealers.”<sup>158</sup> The President mentioned Richmond once, but only in passing, and coupled with a reference to Boston, when he spoke of grants for anti-violence media campaigns.<sup>159</sup>

The Clinton Administration’s aggressive championing of ATF’s broader mission continued in February 2000, with the President himself announcing a new program to crack down on corrupt gun dealers.<sup>160</sup> Having been criticized by Congress for seeking new legislation instead of enforcing existing gun laws, the Administration, according to presidential domestic policy advisor Bruce Reed, was “giving Congress a chance to put its money where its mouth is.”<sup>161</sup> ATF, for its part, highlighted its regulatory enforcement programs by simultaneously issuing a statistics-packed report on *Commerce in Firearms in the United States*.<sup>162</sup> And when, in March, Treasury Under Secretary Johnson formally presented the Administration’s budget requests, he gracefully put Exile to work. Treasury sought funding for 600 ATF agents, inspectors and “other” personnel,

to support local intensive prosecution projects like Project Ceasefire in Boston and Project Exile in Richmond. These local strategic

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154. Michael Beebe, *Going After Guns; Project Exile Aims to Take Criminals off the Street*, BUFFALO NEWS, Sept. 18, 1999, at A1.

155. Matt Gryta, *War on Armed Criminals Declared in County*, BUFFALO NEWS, Dec. 16, 1999, at B5.

156. See Peter Wallsten, *Gun Laws Gain Prominence in Campaigns As Democrats Seek to Regain Control of Congress*, CONG. Q. WEEKLY, Mar. 18, 2000 (visited May 25, 2000), available at <[http://libraryipcq.com/search97cgi/s97\\_cqi?action=FormGen&template=weeklyHome.htm](http://libraryipcq.com/search97cgi/s97_cqi?action=FormGen&template=weeklyHome.htm)>.

157. *Remarks by the President at Announcement of National Gun Enforcement Initiative*, (Jan. 18, 2000) (visited June 2, 2000) <[www.pub.whitehouse.gov/uri.../oma/eop.us/2000/1/19/1.text.1](http://www.pub.whitehouse.gov/uri.../oma/eop.us/2000/1/19/1.text.1)>.

158. *Id.*

159. See *id.*

160. See Michael Romano, *Clinton Moves to Disarm Select Few Gun Dealers*, PLAIN DEALER (Cleveland, Ohio), Feb. 5, 2000, at A8.

161. Fox Butterfield, *Firearms Agency Intensifies Scrutiny of Suspect Dealers*, N.Y. TIMES, Feb. 4, 2000, at A12; Editorial, *An Ironic NRA “Victory”: Clinton Accepts Its Advice to Enforce Existing Gun Laws*, PITTSBURGH POST-GAZETTE, Feb. 14, 2000, at A18.

162. See DEP’T OF THE TREASURY, BUREAU OF ALCOHOL, TOBACCO, AND FIREARMS, *COMMERCE IN FIREARMS IN THE UNITED STATES* (Feb. 2000).



projects encompass investigations of armed criminals and illegal traffickers, and inspections of firearms dealers that are sources of firearms to criminals, as well as those illegally attempting to acquire or illegally possessing firearms.<sup>163</sup>

A few days later, when asked what the White House thought about Project Exile, the President's press secretary kept on message, avowing the Administration's support for Exile *and* Ceasefire in Boston and touting its record for providing such innovative programs with "government resources."<sup>164</sup>

The task the House Republicans now faced was somewhat harder than before: It was not enough simply to tout Exile-like programs as a substitute for new gun legislation,<sup>165</sup> since the Administration was now using Exile's success as an argument for increasing ATF's budget. Congressman McCollum, backed by the House Republican leadership, had a ready answer, however: a bill, introduced March 22, that focused attention on the rigors of existing federal firearms laws but that steered funding for enforcement programs to state enforcers (not ATF). This was H.R. 4051, "Project Exile: The Safe Streets and Neighborhood Act of 2000,"<sup>166</sup> which provided for one hundred million dollars in block grants over five years to states that enacted firearms sentencing laws with five-year mandatory terms for use of a gun during a violent felony or serious drug crime and/or for possession of a firearm by a predicate felon.<sup>167</sup> A state without such laws could also obtain grant money by entering into "an equivalent federal prosecution agreement" that committed the state to refer such cases to federal prosecuting authorities.<sup>168</sup> No monies were specifically provided to fund the federal enforcement efforts that would be spurred by the bill.<sup>169</sup> Hearings on the legislation, which Chairman McCollum held soon after, gave the Republican

163. Press Release, Statement of Under Secretary for Enforcement James E. Johnson, Subcomm. on Treasury, Postal Service, and General Government, House Comm. On Appropriations (Mar. 9, 2000) <[www.treas.gov/press/releases/ps448.htm](http://www.treas.gov/press/releases/ps448.htm)>.

164. See Press Briefing by Joe Lockhart, Office of the Press Secretary (Mar. 14, 2000) (visited June 6, 2000) <[www.pub.whitehouse.gov/uri\\_.../oma.eop.gov.us/2000/3/14/8.text.1](http://www.pub.whitehouse.gov/uri_.../oma.eop.gov.us/2000/3/14/8.text.1)>.

165. This is not to say that Republicans did not continue to do so. Rep. Robert Ehrlich (R-Md.) told constituents on February 16, 2000, that Maryland would do better to adopt "a complete Exile type program," instead of the local U.S. Attorney's "weaker program of selective enforcement." He then noted:

Unfortunately, the political establishment in Maryland, led by the Attorney General [J. Joseph Curran, Jr.], seeks to push more gun control during a time the newspapers are full of stories re how we are unable to enforce our existing gun laws. Unfortunately, while this may comport with the Curran-[Maryland Governor Parris N.] Glendening-[Lt. Governor Kathleen Kennedy] Townsend mind set on gun control, it does not enhance our ability to implement programs that work—like Exile.

*Project Exile: Rep. Robert Ehrlich (R-Md.)*, [Washingtonpost.com:Live Online—OnPolitics](http://Washingtonpost.com:Live Online—OnPolitics) "Free Media," Feb. 16, 2000 (visited May 31, 2000) <[washingtonpost.com/wp-srv/l...itics/freemedia021600\\_ehrlich.htm](http://washingtonpost.com/wp-srv/l...itics/freemedia021600_ehrlich.htm)>.

166. 106 H.R. 4051, 106<sup>th</sup> Cong. (March 22, 2000).

167. See *id.*

168. *Id.*

169. *Id.*

Governor of Virginia, James Gilmore III, a chance to tell how, in July 1999, his state had instituted "Virginia Exile."<sup>170</sup> By passing sentencing and bail statutes similar to the federal provisions, this program had "enhance[d] the sovereignty of the state in prosecuting gun crimes, and reliev[ed] it of the need to refer cases to federal courts."<sup>171</sup> A representative of Texas' Attorney General also appeared and told of "Texas Exile."<sup>172</sup> Texas did not have gun laws like those proposed in McCollum's bill, but it was "considering the option" and, in any event, would be eligible for funding because it had entered into a "cooperative agreement with all four U.S. Attorneys to prosecute those criminals under federal law where appropriate."<sup>173</sup>

It was the Texas approach that most troubled the Justice Department's witness at McCollum's hearings, U.S. Attorney Walter Holton, from the Middle District of North Carolina.<sup>174</sup> His mere presence emphasizing the decentralized nature of the Department's own strategy (and/or the strained relations between the Department and Congress), Holton asserted that "[c]reating incentives that could result in the indiscriminate federalization of specific types of gun crimes might significantly hamper the ability of state, local, and federal prosecutors to combat the violent crime problem in their own communities most effectively."<sup>175</sup> He also urged Congress "not to create incentives that might lead to wholesale federal adoption of local gun prosecutions, which would significantly hinder the ability of federal authorities to enforce the other important federal laws and overwhelm the federal courts."<sup>176</sup>

Congressional Democrats had an even more immediate response to McCollum's "Exile" bill in their ENFORCE Act.<sup>177</sup> Following through on the Administration's proposals, the bill provided for 600 new ATF agents and inspectors, 114 new federal prosecutors to bring federal gun cases, grants for local prosecutors, and also would have given ATF increased authority to inspect licensed firearms dealers, established a forensic ballistics test-firing program, and funded "smart gun technology."<sup>178</sup> Lest the point be missed, Democrats posed the measure as their challenge to the NRA's calls for more enforcement.<sup>179</sup>

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170. *Project Exile: The Safe Streets and Neighborhoods Act of 2000: Hearings on H.R. 4051 Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 106<sup>th</sup> Cong. 41-73 (2000) (statement of Hon. James S. Gilmore III, Governor of Virginia).

171. *See id.*

172. *See id.* at 152-56 (statement of Michael T. McCaul).

173. *Id.*

174. *See id.* at 74-125 (statement of Walter Holton, Jr., U.S. Attorney for the Middle District of North Carolina).

175. *Id.*

176. *Id.*

177. Act for Effective National Firearms Objectives for Responsible, Common-Sense Enforcement of 2000, 106 H.R. 4066 (2000).

178. *Id.*

179. *See Senator Charles E. Schumer: Statement on Schumer-Conyers-McCarthy Gun Legislation* (Mar. 21, 2000), available at <[http://schumer.senate.gov/html/schumer-conyers-mccarthy\\_gun\\_1.html](http://schumer.senate.gov/html/schumer-conyers-mccarthy_gun_1.html)>; William Raspberry, *The NRA Wants Enforcement?*, WASH. POST., Mar. 24, 2000, at A23; *House Republicans Introduce Bill to Encourage Gun*

House Republicans had the votes, though. After their leadership raced the bill to the floor in only two weeks—to have it ready before the anniversary of the Columbine High School shootings—it passed on April 11, 358 to 60.<sup>180</sup> Senator Mike DeWine (R-Ohio) introduced an identical bill in the Senate immediately thereafter,<sup>181</sup> giving Republican Senators another opportunity to tout the virtues of “this basic crime-fighting approach” (as opposed to the Clinton Administration’s proposed regulatory measures).<sup>182</sup>

For the Clinton Administration and its allies, the legislative setback provided yet another occasion to proclaim the need for a more comprehensive strategy. The day of the vote, President Clinton went to Annapolis, Maryland, to mark that state’s passage of a law mandating built-in safety locks on handguns.<sup>183</sup> Later, at the end of June, Treasury Secretary Summers and other officials promoted wide coverage of an ATF report on gun trafficking.<sup>184</sup> The report, *Following the Gun: Enforcing Federal Laws Against Firearms Traffickers*, trumpeted ATF’s success in more than 1500 ATF investigations and stressed the need for even more enforcement activity in this area.<sup>185</sup> “Gun traffickers,” it avowed, “play a critical and deadly role in the chain of violence.”<sup>186</sup> At the same time, the report called attention to the inadequacies of the current regulatory scheme, particularly for gun show sales and of the penalties for violation of existing laws.<sup>187</sup>

Clinton Administration allies also continued to push for a greater state role in gun enforcement. In May, some House Democrats introduced the “Community Gun Prosecutor Act of 2000,” which would have designated 150 million dollars for state and local prosecutors to bring state gun cases.<sup>188</sup> If the Republicans thought existing gun laws were sufficient, one sponsor challenged, why not fund the enforcement of the state laws (as well as the federal ones) on the

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*Crime Prosecutions; Dems Seek to Beef up ATF As Gun Control Rhetoric Continues* (Mar. 22, 2000), available at <cn.com/2000/ALLPOLITICS/stories/03/22/gop.guns/>.

180. See Sean Scully, *House Passes Bill Getting Tough on Guns; Measure Urges Mandatory Terms for Related Crimes*, WASH. TIMES, Apr. 12, 2000, at A1; see also Elizabeth A. Palmer, *House Passes Incentives for States to Strengthen Penalties for Gun Crimes*, CONG. Q. WEEKLY, Apr. 15, 2000, at 902.

181. See *id.*

182. See Sen. Jeff Sessions, *Guns: What Works, What Doesn't*, WASH. TIMES, May 15, 2000, at A16.

183. Eric Schmitt, *As Columbine Anniversary Nears, G.O.P. Leaders Push Through Gun-Crime Bill*, N.Y. TIMES, Apr. 12, 2000, at A24.

184. *Study Says Gun Traffickers Arm Criminals*, N.Y. TIMES, June 25, 2000, at A22.

185. U.S. TREASURY DEP'T, BUREAU OF ALCOHOL, TOBACCO & FIREARMS, FOLLOWING THE GUN: ENFORCING FEDERAL LAWS AGAINST FIREARMS TRAFFICKERS xii (visited Apr. 7, 2001), available at <[http://www.atf.treas.gov/pub/fire-explo\\_pub/pdf/following/followingthegunindex.htm](http://www.atf.treas.gov/pub/fire-explo_pub/pdf/following/followingthegunindex.htm)>.

186. *Id.*

187. *Id.* at xi.

188. H.R. 4456, 106th Cong., 2d Sess. (2000).

books.<sup>189</sup> Indeed, when Senator Schumer went to Buffalo on July 11 to announce new funding for that city's Exile, the Niagara County District Attorney "emphasized that his office has prosecuted 'scores and scores' of cases" under the program's guidelines.<sup>190</sup>

But few could rival the President in his effort to put states out in front (and to make up for lost time on the race to capture "Exile"). At a June 2000 press conference, Clinton noted that a House appropriations committee was "on the verge" of rejecting his Administration's "proposal for the largest gun enforcement initiative in history" and chided Republicans:

Incomprehensible though it may be, their bill fails to provide any funding at all to hire 1000 new state and local gun prosecutors to help take gun criminals out of our communities and put them behind bars. It undermines our efforts to replicate the success of Richmond's Project Exile, another key initiative the Republicans have always said they support. And it fails to provide funding to expand research development of smart gun technology.

I ask the Republican leadership to reverse the current course, to live up to the rhetoric, to fully fund the national gun enforcement initiative.<sup>191</sup>

During the summer, each side (to its credit) enshrined its position on these issues in its platform. The Republicans, though "oppos[ing] federal licensing of law-abiding gun owners and national gun registration as a violation of the Second Amendment and an invasion of privacy of honest citizens," promised, "[t]hrough programs like Project Exile," to "hold criminals individually accountable for their actions by strong enforcement of federal and state firearm laws."<sup>192</sup> The Democrats, taking credit for the twenty-two percent increase in "federal, state and local gun crime prosecution" since 1992, called for "mandatory child safety locks," photo license IDs, and "a full background check and gun safety test" for purchasers.<sup>193</sup> They went on to "support more federal gun prosecutors, ATF agents and inspectors and giving states and communities another 10,000 prosecutors to fight gun crime."<sup>194</sup>

In part because neither Governor Bush nor Vice President Gore found it advantageous to press their positions, and in part because no major gun tragedies required them to do so, gun control rhetoric ended up being rather muted in post-

189. 146 CONG. REC. H5017 (June 22, 2000) (statement of Rep. Carolyn McCarthy (D-NY)).

190. Robert J. McCarthy, *Gun-Toting Criminals Faced with Disarming Sign*, BUFFALO NEWS, July 11, 2000, at B1 (quoting District Attorney Matthew J. Murphy III).

191. *Remarks by the President on Prescription Drug Benefit*, FDCH FEDERAL DEP'T & AGENCY DOCUMENTS (June 14, 2000), available at <[www.incongress.com/issues/article.cfm?ArticleID+716](http://www.incongress.com/issues/article.cfm?ArticleID+716)>.

192. *Excerpts from Platform Approved by Republican National Convention*, *supra* note 2.

193. *Id.*

194. *Id.*

convention campaigning.<sup>195</sup> With Governor Bush's victory, however, the battle over Exile, and over gun policy generally, promises to resume. In its final days, the Clinton Administration did what it could to preserve its integrated supply-side and demand-side strategy. In late December 2000, Clinton signed budget legislation that provided the nearly 200 million dollars that he had sought in his Gun Enforcement Initiative to fund 500 ATF agents and inspectors and more than 600 federal, state, and local prosecutors.<sup>196</sup> And in the very last days of the Clinton Administration, the Treasury and Justice Departments issued their "National Integrated Firearms Violence Reduction Strategy,"<sup>197</sup> which celebrated the comprehensive nature of the Administration's gun policies and the diversity of approaches to gun violence that had been taken in federal districts across the nation. While more muted than some of the Clinton Administration's other final salvos, the report put down clear markers, from which retrogression could more easily be measured.

Had Gore become President, Clinton's budget victories might well have reduced the effect of Exile politics upon overall federal policy, giving ATF resources to pursue both supply-side cases and violent use and possession cases. But, of course, had Gore become President, there might not have been such budget victories. In any event, the election of George W. Bush, and his selection of another leading Exile supporter, John Ashcroft,<sup>198</sup> as Attorney General, vastly raises the likelihood that Exile-type programs will become the primary focus of federal gun enforcement efforts<sup>199</sup> and that most of the newly obtained federal resources will be deployed in this direction.<sup>200</sup>

195. See Eiperin & Edsall, *supra* note 2, at A1 ("[M]any House and Senate Democrats have found that gun control is not resonating in many key contests like other issues, such as prescription drugs."); see also Dao, *supra* note 2, at A23.

196. See Consolidated Appropriation Act, 2001, Pub. L. 106-554, 114 Stat. 2763 (Dec. 21, 2000); *The White House: President Clinton: Expanding the Circle of Opportunity—Enacting a Budget That Invests in Education, Health Care, and America's New Markets*, M2 PRESSWIRE, Dec. 28, 2000.

197. U.S. Dep't of Justice & U.S. Dep't of the Treasury, *National Integrated Firearms Violence Reduction Strategy*, (visited May 17, 2001), available at <<http://www.usdoj.gov/opd/gunviolence.htm>>.

198. See Time Bryant, *Ashcroft Would Boost Efforts Here to Fight Illegal Guns*, ST. LOUIS POST-DISPATCH, Mar. 4, 2000, at 8 (reporting that Ashcroft "says more federal prosecutors are needed in St. Louis to convict and imprison those who use guns illegally"); Steve Kraske, *Senate Rivalry Deepens: Issue of Crime Comes to Forefront in Missouri Contest*, KANSAS CITY STAR, July 5, 2000, at A1 (following criticism by his opponent in the senate election for consistently opposing gun control measures, Ashcroft maintained that he had "zero tolerance" for gun violence and supported Project Exile).

199. At his confirmation hearing, Ashcroft noted:

I think the context of the gun purchase requirements are very important. And in a technical sense, those are against the law and they are criminal acts. But people who actually perpetrate crimes using guns obviously need to be a focus of our enforcement effort. And the most famous of these is the Project Exile—at least best known for me.

*Day II, Morning Session of a Hearing of the Senate Judiciary Committee: Nomination for Attorney General; Witness, John Ashcroft*, at 35 available in LEXIS, Federal News Service file; see also Michael J. Sniffen, *John Ashcroft Blasts Clinton*, SALON (Feb. 8, 2001),

### III. ASSESSING EXILE

Is Project Exile a good idea? In some ways, this is an easy question. People can quarrel over the value of the war on drugs, over what business practices should be deemed fraud, even over whether perjury in a civil case should be pursued criminally. But there is near unanimity that gun-toting drug traffickers or robbers ought to be prosecuted, and substantial agreement that a convicted felon should face charges for possessing a firearm.<sup>201</sup> Indeed, it is this consensus that has made Exile seem one of the few free spaces in the complicated "game" of gun control politics.

In other ways, Project Exile raises some extremely difficult policy questions. Exile's targets undoubtedly should be charged. But why federally? When Richmond police officers arrest an armed drug dealer or robber, or find that the person they've just frisked has both a gun and a prior felony conviction, why can't they just take the case to the Commonwealth's Attorney? This is the issue that has attracted so much attention in recent years.<sup>202</sup> One need not invoke constitutional absolutes to make a good case for leaving state and local authorities primarily responsible for street crime.<sup>203</sup> To be sure, federal enforcers may have a more powerful arsenal: tougher bail statutes, higher effective sentences, fewer cases per prosecutor, etc. But, as many opponents of "over-federalization" have pointed out, federal intervention in this area may allow state and local authorities to dodge their responsibilities.<sup>204</sup>

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available at <<http://www.salon.com/politics/wire/2001/02/08/ashcroft/index.html>> (reporting that in his first interview as Attorney General, Ashcroft said he "wanted to expand a federal antigun effort used in Virginia known as Project Exile").

200. See Bob Kemper, *Bush Launches Strategy to Combat Gun Violence; Plan Would Push Prosecutions into the Federal Courts*, CHI. TRIBUNE, May 15, 2001, at 7 ("Taking a local Virginia gun-control program and expanding it into a national strategy to combat violence, President Bush on Monday pledged to spend more than \$550 million over the next two years to prosecute local gun crimes in federal court.").

201. The breadth of the felon-in-possession statute could make for some sympathetic cases, however. See Daniel C. Richman, *Old Chief v. United States: Stipulating Away Prosecutorial Accountability?*, 83 VA. L. REV. 939, 953 n.50 (1997).

202. Task Force on the Federalization of Criminal Law, American Bar Association, Criminal Justice Section, *The Federalization of Criminal Law*, at 7 (1998); Sara Sun Beale, *Federalizing Crime: Assessing the Impact on the Federal Courts*, 543 ANNALS AM. ACAD. POL. & SOC. SCI. 39, 40 (1996).

203. See Kathleen F. Brickey, *Criminal Mischief: The Federalization of American Criminal Law*, 46 HASTINGS L.J. 1135 (1995); Richman, *supra* note 59, at 96-99.

204. See *New York v. United States*, 505 U.S. 144, 169 (1992) (noting that accountability diminishes when citizens cannot easily determine which level of government is responsible for a particular regulatory decision); see also Barry Friedman, *Valuing Federalism*, 82 MINN. L. REV. 317, 394-97 (1997); Richman, *supra* note 56, at 783-84; Ben Tinsley, *Program Punishes Firearms Offenders; Prosecutor Set on Getting Criminals More Jail Time*, DALLAS MORNING NEWS, Nov. 23, 2000, at A1 (commenting on Exile, a Wise County, Texas, district attorney noted: "Your state government is hiring prosecutors to take cases away from the local elected district attorneys and route them to the federal prosecutors and federal judges who do not answer to the voters. This should scare you to death.").

Is this what happened in Richmond? It's hard to say. After all, it did not take very long for Virginia to change its bail laws, increase its sentences, and commit significant police and prosecutorial resources to Exile-type cases.<sup>205</sup> Perhaps state officials might have acted earlier, if left to their own devices, or, alternatively, have been fittingly faulted for inaction in the face of Richmond's devastating homicide rate. But one can equally argue that the U.S. Attorney's Office simply piloted a project whose success catalyzed state processes—not a particularly egregious role for the federal government to play. In the face of a spiraling homicide rate that threatened the very fabric of a hard-pressed community, federal officials, lacking any direct political accountability but still tied to local power structures,<sup>206</sup> simply drew on the strategic reserve that discretionary enforcement has traditionally allowed them to amass.<sup>207</sup> As soon as possible, they shifted responsibility for the program to the state. One can also argue that regardless of the moral hazard that federal intervention creates for state and local enforcers, the apportioning of federal versus state responsibilities should not be done on the backs of a besieged citizenry (particularly when they are urban residents of a primarily suburban or rural state).

The policy conundrum is not merely one about the federal-state divide, either. Even if one assumes that Project Exile is an appropriate exercise in "cooperative federalism,"<sup>208</sup> it still raises hard questions about federal firearms enforcement policy. Programmatic commitments always have opportunity costs, both in political attention and in enforcement resources. And once one gets by the code words, the politics of Exile have really been about the project's negative implications. The paeans to Exile are not just to the idea of locking up gun-toting criminals, but to the idea that such a strategy should be the primary (even exclusive) means by which federal enforcers target violent crime, as opposed to, say, new legislation affecting gun shows, requiring safety locks, or other regulatory measures.

The appeal of Exile-type programs for many of their loudest champions is probably not limited to the belief that calls for enforcing existing laws can provide an acceptable political alternative to passing new ones. Equally important is the effect that such programs have on ATF's ability to enforce existing laws against targets other than street-level criminals. As of 1998, ATF had only 1779 criminal investigators, fourteen percent fewer than the agency had in 1992, when it had 2072.<sup>209</sup> This decline is symptomatic of ATF's political weakness. Saddled with a portfolio that includes none of the sacred cows (like national security or presidential protection) that sister agencies like the FBI and Secret Service glory in, charged with enforcing gun and alcohol laws that many Americans consider a

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205. See *supra* note 170 and accompanying text.

206. See Richman, *supra* note 56, at 785.

207. See Elizabeth Glazer, *Thinking Strategically: How Federal Prosecutors Can Reduce Violent Crime*, 26 FORDHAM URB. L.J. 573 (1999).

208. See Daniel A. Braun, *Praying to False Sovereigns: The Rule Permitting Successive Prosecutions in the Age of Cooperative Federalism*, 20 AM. J. CRIM. L. 1 (1992); Sandra Guerra, *The Myth of Dual Sovereignty: Multijurisdictional Drug Law Enforcement and Double Jeopardy*, 73 N.C. L. REV. 1159 (1995).

209. See *New Findings on ATF Criminal Enforcement*, *supra* note 116.

threat to their very way of life, and housed in a Cabinet department in which law enforcement concerns are inevitably secondary, ATF has always come up short in the budgetary process.<sup>210</sup> Indeed, the agency may owe its continued existence to this intended weakness. Although opponents of gun regulation and proponents of government streamlining have regularly called for its elimination,<sup>211</sup> ATF has survived, in large part because opponents of its enforcement work have feared that, at its demise, such functions would be transferred to a less vulnerable agency.<sup>212</sup>

ATF has, from time to time, chafed at the operational restraints with which it has been bound by statute and budget. Although (despite some reports), there is no reason to believe that it was planned as some sort of publicity stunt, the February 28, 1993, raid on the Branch Davidian compound was a quite self-conscious demonstration of the agency's ability to mount a large-scale tactical operation and of its interest in firearms violations by separatist groups.<sup>213</sup> The debacle at Waco, of course, only increased the agency's political vulnerability thereafter.

For the most part, ATF has adapted to its political environment. And one of its principal adaptive mechanisms has been its readiness to work with state and local enforcers in combating street crime.<sup>214</sup> By providing firearms tracing and ballistics as well as street-level support to local enforcers in this area, ATF (at least until recently) could simultaneously win valuable allies and stay away from the trafficking cases most likely to arouse legislative ire.<sup>215</sup> This strategy explains the agency's eagerness (particularly under Republican Administrations) to embrace the Justice Department's Triggerlock and its own Project Achilles.<sup>216</sup>

Against this backdrop, the celebration of Project Exile by the NRA and many opponents of the Clinton Administration must be read as an effort to encourage, even force, the agency to continue or expand its focus on street

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210. See Wendy L. Martinek, et al., *Jackboots or Lace Panties? The Bureau of Alcohol, Tobacco, and Firearms*, in *THE CHANGING POLITICS OF GUN CONTROL* 17, 24–25 (John M. Bruce & Clyde Wilcox eds., 1998).

211. See Vice President Albert Gore's National Performance Review, *Cutting Back to Basics*, at 21–22 (Sept. 1993), available at <[www.npr.gov/library/nprpt/redtpe93/2272.html](http://www.npr.gov/library/nprpt/redtpe93/2272.html)> (proposing that ATF's law enforcement functions be transferred to the FBI); Helen Dewar, *Treasury's Firearms Bureau Is Targeted for Elimination*, WASH. POST, Sept. 19, 1981, at A1; Richman, *supra* note 56, at 796.

212. See VIZZARD, *supra* note 60, at 81; Richman, *supra* note 56, at 796.

213. See VIZZARD, *supra* note 60, at 154–88; *Report of the Dep't of Treasury on the Bureau of Alcohol, Tobacco, and Firearms Investigation of Vernon Wayne Howell, also known as David Koresh* (Sept. 1993), available at <[http://www.constitution.org/waco/treads\\_trpt\\_g/txt](http://www.constitution.org/waco/treads_trpt_g/txt)>.

214. See VIZZARD, *supra* note 60, at 89; see also Geller & Morris, *supra* note 60, at 247 n.8 (noting ATF's reputation in this regard among local police); *Message from ATF Director John W. Magaw*, in 1996 HIGHLIGHTS OF THE BUREAU OF ALCOHOL, TOBACCO AND FIREARMS 1 (1997) ("Our success in investigating crimes has traditionally been built on a partnership with state and local police.").

215. See Fox Butterfield, *Limits on Power and Zeal Hamper Firearms Agency*, N.Y. TIMES, July 22, 1999, at A1.

216. See *supra* note 38 and accompanying text.



violence. The unstated corollary of this encouragement, given ATF's limited resources, is to discourage the agency from targeting gun dealers and pursuing firearms cases against those whose only criminality lay in the "technicalities" of the firearms laws. This strategy also appears to lie behind Republican demands that ATF and the Justice Department commit more resources to pursuing convicted felons who have attempted unsuccessfully to purchase a firearm.

An agency as politically vulnerable as ATF can be quite susceptible to legislative encouragement. Even the FBI has been known to heed such signals.<sup>217</sup> (Indeed, its present power may in part be a tribute to the skill with which the FBI has responded to legislative pressure.) The elegance of the Project Exile approach for advocates of minimalist gun regulation, however, is that it does not rely simply on legislative fiat or suasion. The chief challenge Congress faces when trying to set enforcement priorities (or delegate authority in any area) is how to monitor agency compliance.<sup>218</sup> This is particularly true in the criminal area, where agency operations are often shrouded in secrecy, where there are traditions of legislative non-interference, and where complaints are rarely heard when cases are not brought.<sup>219</sup> Exile provides the perfect monitoring mechanism in the form of state and local authorities. At least under the Richmond version of Exile, state and local police generate the cases and consequently have a good sense of whether federal authorities are following through on their commitment to pursue them. And given that a state has a strong and independent motive to shunt enforcement costs over to the federal government,<sup>220</sup> one would expect that its officials would be quick to complain to their local representatives if the feds reneged.

This all explains the delicate dance that ATF officials have had to perform while Exile is under scrutiny. Positive coverage of agency operations has been all too rare in recent years, and the temptation to bask in favorable coverage from traditionally hostile or unsympathetic corners has surely been great. But were Project Exile to be used as a template for nationwide anti-violence programs, the agency's ability to pursue large aspects of what it believes to be its core mission would be severely limited.

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217. See JAMES Q. WILSON, *THE INVESTIGATORS: MANAGING FBI AND NARCOTICS AGENTS* 166 (1978).

218. 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).

219. See Richman, *supra* note 56, at 776-78.

220. *United States v. Jones*, 36 F. Supp. 2d 304, 309 n.6 (E.D. Va. 1999). The judges noted:

The Federal Bureau of Prisons leases space in the Northern Neck Regional Jail from the Commonwealth of Virginia to incarcerate Project Exile defendants prior to trial. Thus the Commonwealth's prisons benefit not only from a lower occupancy rate once defendants are convicted under Project Exile and are incarcerated in a federal facility, but also by generating revenue for housing defendants while they await trial in the federal system. This is another cost borne by federal taxpayers, the benefit of which inures exclusively to residents of the Commonwealth.

*Id.*

The Clinton Administration and pro-control legislators like Senator Schumer and Representative McCarthy have shared these concerns. The constant references to “Boston” instead of, or at least in addition to, “Richmond”; the focus on state, not just federal, gun crime prosecutions; the efforts to highlight ATF’s gun trafficking and rogue dealer prosecutions—the theme running through all of these is that federal firearms enforcement must address the supply as well as the demand side, and that ATF must be allowed to strategically use its limited resources, special expertise, and unique national scope to work both sides of the market.<sup>221</sup> The goals have been both to promote ATF’s pursuit of supply-side cases, and (in the same vein) to prevent the wholesale legislative commitment of ATF assets to street-level possession and use cases. And if ATF had to be saddled with nationwide Exile-type programs, the agency needed more manpower. Hence the 2000 budget request, which (in brilliant judo fashion) used such programs to justify a massive expansion of the beleaguered agency.

It would thus be a mistake to read the Democratic calls for increased state and local firearms enforcement activity simply as representing some grand commitment to principles of federalism and state responsibility. The calls also arise out of a recognition that, absent such local efforts, the pressure on federal authorities to divert resources to the most heinous criminals—the violent, armed felons—would be impossible to resist and would leave the Administration in control of fewer resources available for use in less localized trafficking cases.<sup>222</sup> Or, to put it somewhat differently, there would be fewer federal resources for Washington to deploy against targets that only Washington had the means (and possibly the inclination) to pursue.

Once one recognizes the likely, and intended, consequences of the Republican efforts to establish Exile nationwide, the question becomes whether this is good firearms policy. Yet at this crucial juncture in my story I have the least to say. The extent to which such end-use enforcement programs should dominate our national anti-violence strategy is of course *the* critical issue in the gun debate—an issue over which the conflict often seems as much over expressive norms<sup>223</sup> as

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221. Support for the Administration’s position has also come from local officials who support a supply-side gun strategy. See *Firearm Prosecutions*, *supra* note 6, at 58 (statement of John F. Timoney, Philadelphia Police Commissioner). Timoney stated:

It is important and appropriate that the federal government plays a role in the fight against gun violence. It is well recognized that there is an unmistakable interstate nature to gun trafficking and gun violence. Gun supply cannot be controlled in an individual state solely by legislation in that state....States with lenient gun purchase laws thus become the source for illegal guns used in states that have tried to limit guns through strong legislation.

*Id.*

222. See generally U.S. BUREAU OF ALCOHOL, TOBACCO, AND FIREARMS, FOLLOWING THE GUN (2000).

223. See Dan M. Kahan, *Is Gun Control Illiberal* (unpublished manuscript 2001) (on file with Author); Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 HARV. L. REV. 413, 451–62 (1999).

over empirical evidence.<sup>224</sup> And I will restrict myself to the understatement that this is a point on which reasonable minds differ.

#### IV. EXILE POLITICS AND THE CONTROL OF FEDERAL ENFORCEMENT ASSETS

Not taking a position on the broad firearms policy debate does not preclude one from exploring and critiquing the implications of Exile politics for the federal enforcement bureaucracy. On this score, the focus of the analysis is less on the need for Exile-type programs than on the role Congress has or should play in mandating them.

The story of federal criminal legislation in the twentieth century has been one of steady encroachment into areas that once were the exclusive province of state and local enforcers.<sup>225</sup> And the pace has only increased in recent years, notwithstanding strong criticism of this "over-federalization" trend by numerous judges and scholars.<sup>226</sup> Yet while Congress has been quite aggressive in passing statutes that ignore, or even eliminate, traditional enforcement boundaries,<sup>227</sup> legislators have been remarkably passive in dictating the actual terms of interaction between federal enforcers and state and local authorities. Congress, for example, may have been quick to pass federal carjacking legislation in the wake of a widely publicized Maryland case in which an auto-theft victim was dragged to her death,<sup>228</sup> but, to the extent it had any purpose other than an expression of federal outrage, the statute was more a grant of authority than a demand for federal jurisdiction. It certainly did not preempt local police from pursuing such crimes, and neither required, nor even expected, that federal agencies would take the bulk of such cases.

This is not to say that Congress has played a minimal role in structuring the boundaries between federal enforcers and their state and local counterparts. The principal constraint on federal intervention—the minuscule size of the enforcement bureaucracy relative to the number of crimes that potentially could be charged federally—is undoubtedly a reflection of Congress's belief that the primary responsibility for fighting crime, particularly street crime, remains with the States.<sup>229</sup> Legislators also bring their influence to bear on federal enforcement

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224. See, e.g., PHILIP J. COOK & JENS LUDWIG, *GUN VIOLENCE: THE REAL COSTS* (2000); KLECK, *supra* note 20; JOHN R. LOTT, JR., *MORE GUNS, LESS CRIME: UNDERSTANDING CRIME AND GUN CONTROL LAWS* (2d ed. 2000); JAMES D. WRIGHT ET AL., *UNDER THE GUN: WEAPONS, CRIME, AND VIOLENCE IN AMERICA* (1983); James B. Jacobs & Kimberly Potter, *Keeping Guns out of the Wrong Hands*, 86 J. CRIM. L. & CRIMINOLOGY 93 (1995).

225. See Richman, *supra* note 59, at 83–91; see also *supra* note 202 and sources cited within.

226. See Richman, *supra* note 59, at 89–91.

227. The high-water mark of this trend may have been Senator D'Amato's unsuccessful effort to make just about any crime committed with a gun into a federal offense. See Naftali Bendavid, *Reading Crime Bill's Fine Print; Overlooked Amendments Draw Fire As Unconstitutional, Overly Harsh*, LEGAL TIMES, Mar. 7, 1994, at 1.

228. Richman, *supra* note 56, at 773; see also 18 U.S.C. § 2119 (1994).

229. Richman, *supra* note 59, at 91–92.

policy in their respective districts by exercising substantial control over the selection of U.S. Attorneys.<sup>230</sup>

Outside of setting these structural parameters, however, Congress has generally let federal enforcers negotiate explicit or tacit understandings with their counterparts about divisions of labor.<sup>231</sup> Each element of the federal apparatus has thus played a part in setting the federal agenda. Administrations have had national priorities, with Triggerlock being a prime example.<sup>232</sup> So have enforcement agencies, though, as in the case of Achilles, agency initiatives usually have been synchronized with Administration policy. But the decentralization of federal prosecutorial authority has given U.S. Attorneys considerable discretion in implementing these priorities, and considerable ability to pursue initiatives of their own—like Rudolph Giuliani's "Federal Day"<sup>233</sup> or the Eastern District of Virginia's Project Exile.<sup>234</sup>

There are real advantages to letting federal, state, and local enforcers in each district negotiate the boundaries of their interaction without legislative interference. Without the formality of statutes, the *modus vivendi* within a district can respond to changing local conditions, and the expertise of those on the scene.<sup>235</sup> The potential for friction is of course present, and turf wars do occur. But "[g]iven the degree of statutory overlap between the state and federal systems, and the absence of any formal division of authority, [] what is remarkable is not the occurrence of such disputes but their relative infrequency."<sup>236</sup> At the end of the day, federal enforcers are well aware that only local authorities can provide the corner-by-corner informational network needed to pursue the kinds of crime for which local police have always been responsible.<sup>237</sup> And they will have to cooperate with the locals to gain access to this resource.

Yet there are also real disadvantages. For one thing, "a system of low-visibility negotiated boundaries diminishes the accountability of the system's actors."<sup>238</sup> State and local officials can circumvent their jurisdictions' evidentiary rules, sentencing provisions, or forfeiture procedures by handing cases over to federal authorities. Local police can avoid the political controls ordinarily imposed by their need to take cases to locally elected prosecutors. State legislators can avoid being held responsible for the inadequacies of their enactments. U.S. Attorneys, for their part, can gain even more independence from Washington (and thus diminish their political accountability) by relying on state and local enforcers

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230. *Id.* at 92–93.

231. *Id.* at 91–96.

232. *See supra* Part II.A.

233. *See United States v. Aguilar*, 779 F.2d 123, 125 (2d Cir. 1985) (complaining that program converted "garden-variety state law drug offenses into federal offenses"); *see also* Stephen Labaton, *New Tactics in the War on Drugs Tilt Scales of Justice off Balance*, N.Y. TIMES, Dec. 29, 1989, A18.

234. *See Richman, supra* note 59, at 94–95.

235. *Id.* at 95.

236. *Id.* at 96.

237. *Id.* at 93.

238. *Id.* at 97; *see also* John S. Baker, Jr., *State Police Powers and the Federalization of Local Crime*, 72 TEMPLE L. REV. 673, 702–07 (1999).

instead of highly centralized federal enforcement agencies. U.S. Attorneys and their assistants may self-deal by selecting those cases that best further their careers.<sup>239</sup>

How then does one strike the appropriate balance between these advantages and disadvantages? Although many, including a majority of the Supreme Court,<sup>240</sup> think otherwise, it is futile and unnecessary to look for some a priori constitutional divide that, for example, puts street crime outside federal bounds.<sup>241</sup> The best we can do is to increase transparency and accountability. These two values are well served by increasing the legislative involvement in line-drawing, encouraging Congress not merely to authorize federal enforcement activity but also to play a bigger role in setting enforcement priorities in this sensitive area.

Without taking a position on the wisdom of the particular policies embodied in the Republican proposals to export Project Exile nationwide, one can thus make good arguments for more congressional involvement in the deployment of federal enforcement assets in areas of traditional state and local authority.<sup>242</sup> On the other hand, the politics of Exile also highlight the institutional costs of extensive legislative involvement in these matters.

Direct political accountability is not an unalloyed good in law enforcement. With primary responsibility for public safety within clear geographically defined bounds, local authorities will often be hard pressed to save up resources for strategic use. Undoubtedly some strategic deployment will be possible, and local officials often trumpet the importance of one program or another. But imagine the consequences if a police force stopped patrolling one neighborhood so as to better focus on crime in another. Yet this is precisely what federal enforcers—with the “luxury” of resources so plainly inadequate for addressing every crime on their “beat”—regularly do.<sup>243</sup> At its best, the federal

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239. See Richman, *supra* note 59, at 102. For some empirical support of this point, see Edward L. Glaeser et al., *What Do Prosecutors Maximize? An Analysis of the Federalization of Drug Crimes*, 2 AM. L. & ECON. REV. 259, 272–73 (2000). The value of this study, however, is diminished by its failure to recognize the critical role that federal enforcement agencies play in case selection.

240. See *United States v. Morrison*, 120 S. Ct. 1740 (2000) (invalidating the Violence Against Women Act’s tort remedy); *United States v. Lopez*, 514 U.S. 549 (1995) (invalidating the Gun Free School Zones Act of 1990).

241. So long as street crime is economically motivated, or involves the use of a weapon, like a gun, that invariably will have moved at some time in interstate commerce, even *Morrison*’s restrictive reading of the Commerce Clause powers gives Congress ample authority to act in this area. See *United States v. Santiago*, 238 F.3d 213 (2d Cir. 2001) (rejecting post-*Morrison* constitutional challenge to 18 U.S.C. § 922(g), the felon-in-possession statute).

242. See Richman, *supra* note 59, at 101–03.

243. Richman, *supra* note 56, at 765–66. When OMB proposed the elimination of over 550 ATF positions, with the savings to go to local and state police grants, one editorial condemned the “absurdity”:

Rookie cops can’t replace veteran federal firearms agents. They can’t conduct interstate gun trafficking investigations. They don’t have access to gun dealer records and international databanks. And they can’t spend

enforcement bureaucracy thus complements state and local systems nicely by providing the strategic reserve that local officials do not ostensibly control (and therefore lack political responsibility for), but that they can draw on when significant investigative (or adjudicative) investments are needed.<sup>244</sup>

The keys to this system, though, are discretionary gatekeeping by federal officials and the delicate balance between local and national federal authority. Against sometimes parochial local needs, a U.S. Attorney must consider broader national priorities, usually conveyed by Main Justice or expressed by the referrals of highly centralized enforcement agencies (of which the FBI is the best, because most centralized, example).<sup>245</sup> One need not subscribe to an Administration's particular national priorities to see how the dynamic equilibrium between local and national demands is perhaps the best guarantee that the strategic federal reserve will not quickly be dissipated into the bottomless pit of local needs.

Viewed from this perspective, legislative efforts to implement Exile nationwide—by directing pressuring federal enforcers to adopt such programs and encouraging state authorities to extract commitments from U.S. Attorneys to this end—are a troubling challenge to the notion of the federal government as a strategic resource. In the current political climate, in which politicians at the national level from both parties strive to outdo one another in targeting violence, it is inevitable (however regrettable to the Supreme Court and others) that federal enforcers will take cases that traditionally fell within the province of state and local governments. What Exile's champions would do, however, is to make U.S. Attorneys' Offices the prosecutors of first resort in a broad range of these cases and to do so in a way that will be hard to reverse. As a technical matter, an Office would not be obliged to commit itself to an Exile-type arrangement. But a U.S. Attorney would be hard pressed to resist the calls of local officials for such a program, especially where violence was at a high level and federal grants proffered. Given that a critical source of her autonomy lies in the counterbalance that her ties to local officials and her district's congressional delegation provides to Washington's authority, the combination of these two forces would be potent.<sup>246</sup>

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as much time tracking violent offenders because of local priorities from traffic enforcement to burglaries.

Editorial, *Why Pass Gun Laws, Then Fire the Law Enforcers*, USA TODAY, Nov. 30, 1994, at A10.

244. Explaining the appeal of Exile, Erie County (N.Y.) District Attorney Frank J. Clark (a former federal prosecutor) noted: "It gives us more flexibility....It brings in the FBI, ATF, more resources....Let's face it...[t]he feds need the grist for the mill. We're the grist. They need the street level crimes. They provide the resources, the extra jurisdiction." Beebe, *supra* note 154, at 1A.

245. Richman, *supra* note 59, at 94–95.

246. Even without the Republican legislation, calls by local officials for Exile-type federal intervention can be quite forceful. See, e.g., Daryl Nerl, *Project Exile Aims to Bring Tough Gun Crime Sentences; Federal Prosecutors Come in to City When They Are Called, Often Resulting in Stiffer Penalties*, THE MORNING CALL (Allentown, Pa.), July 18, 2000, at B3 (describing efforts of City Council's Public Safety Committee Chairman to bring Exile to Allentown); Larry Alexander, *Mendoza Pushes Project Cease Fire; Councilman Will Make Presentations to Local, State, Federal Officials*, INTELLIGENCER J.

Anyone who doubts this potency only need look at the parade of new Exile-type programs during the Summer of 2000, since the passage of the Republican Exile legislation (even in the absence of an actual statute).<sup>247</sup> And the pressure on U.S. Attorneys, even in the absence of legislation, will only increase now that two of Exile's biggest boosters have become President and Attorney General.<sup>248</sup>

This is not to say that state and local authorities will always demand such a program. Just as state regulatory minimalists have led the cheers for Exile, so might a state's leadership find Exile somewhat incompatible with (or at least not a desirable part of) an activist regulatory program.<sup>249</sup> Exile politics in Maryland are instructive. There, where Governor Parris N. Glendening and Lieutenant Governor Kathleen Kennedy Townsend won congratulations from President Clinton in April 2000 for the passage of internal safety-lock legislation, and have vigorously supported broad regulatory measures,<sup>250</sup> and where city officials presided over a federally funded project of "community-based anticrime strategies,"<sup>251</sup> U.S. Attorney Lynne A. Battaglia apparently felt no need to institute an Exile-type program. Although the number of firearms prosecutions dramatically increased under her "Project DISARM,"<sup>252</sup> her office declined to pursue "every gun offender eligible for federal prosecution."<sup>253</sup> Battaglia even declined to rely on ATF agents

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(Lancaster, Pa.), July 10, 2000, at A1 (describing efforts of city councilman and mayor to bring Exile to Lancaster).

247. See, e.g., Jeff Jones, *Guns' Last Blast Is Best*, ALBUQUERQUE J., Sept. 1, 2000, at D1 (describing Albuquerque's Project Exile); James Zambroski, *U.S. Attorney Will Review Gun Crimes; Jefferson Officials May Defer to Get Harsher Penalties*, COURIER-J. (Louisville, Ky.), Aug. 23, 2000, at A1 (describing "Project Backfire" and noting that "[u]nlike some other states, Kentucky law has no special punishment for crimes involving a gun").

248. See, e.g., James Brosnan, *4 in Pool for U.S. Atty. Coleman's Job; Western District Contenders Made Names in Public Service, Practice*, COMMERCIAL APPEAL (Memphis, Tenn.), Jan. 28, 2001, A1 (reporting that state district attorney general "wants the U.S. attorney [in western Tennessee] to try even more federal gun law violations because Tennessee laws 'just don't have much teeth'").

249. Local officials may have other concerns as well. Soon after Triggerlock was announced, Delaware's Attorney General denounced the program as "just one more chance for the federal government to stomp on the prerogatives of his office and ensnare him in bureaucratic red tape." Tom Watson, *Project Triggerlock Takes Unfriendly Fire*, LEGAL TIMES, Aug. 26, 1991, at 8.

250. Maryland has, for some time, been ahead of most states in enacting gun regulatory measures. See James G. Gimpel & Robin M. Wolpert, *The Structure of Public Support for Gun Control: The 1988 Battle over Question 3 in Maryland*, in CHANGING POLITICS, *supra*, note 210, at 111, 111-12.

251. *Promising Strategies to Reduce Gun Violence*, *supra* note 92, at 19-25.

252. See National Integrated Firearms Violence Reduction Strategy, *supra* note 197, app. A ("Project 'DISARM' is a federal, state and local comprehensive plan to reduce gun-related violence by seeking federal prosecution for gun-carrying felons, based on a collaborative case referral and screening process."); *Promising Strategies to Reduce Gun Violence*, *supra* note 92, at 142.

253. Gail Gibson, *Md. Gun Crimes Effort Debated; City Should Follow "Exile" Program in Va., Ehrlich Says; Battaglia Defends "Disarm"*, BALTIMORE SUN, Sept. 28, 2000, at B1; Jefferson M. Gray, *Editorial: Project Disarm Poses Problems*, BALTIMORE SUN, Dec. 27, 2000, at A13.

to screen local gun arrests, preferring instead to have the police deal directly with her assistants.<sup>254</sup> The principal opposition to her policies came not from local enforcers, but from the state's Republican opposition<sup>255</sup> and from Republican Rep. Robert L. Ehrlich (a critic of the Maryland gun measures<sup>256</sup> and possible gubernatorial candidate<sup>257</sup>). The only novel twist in the political line-up here was that local ATF officials publicly declared their unhappiness with Battaglia's screening arrangements,<sup>258</sup> which according to Ehrlich had occurred after the officials provided him with statistics "that Battaglia thought underrepresented [her] program's success."<sup>259</sup> With the election of George W. Bush, Ehrlich and other state Republicans now look forward to the adoption of an Exile-type program.<sup>260</sup>

Once an Exile-type program is in place, need the maximal federal commitment be permanent? Not necessarily. Virginia itself shows the possibility of progress, with the Commonwealth dramatically moving to take more responsibility for gun cases through its "Virginia Exile" program. By the summer of 2000, according to one report, more than half of Richmond's gun cases over the past year had been prosecuted in state court.<sup>261</sup> But even here federal withdrawal promises to be difficult, as reports of state inadequacies emerge. The conviction rate for defendants prosecuted under Virginia Exile between July 1, 1999 (when the program became law) and May 31, 2000, was forty percent, compared to an

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254. Gail Gibson, *Ehrlich Reloads ATF Debate; He Asks Justice Dept. to Overrule Md. on Who Can Screen Gun Cases*, BALTIMORE SUN, June 30, 2000, at B1.

255. Martin G. Madden, Editorial, *Democratic Excess in 2000 Assembly*, BALTIMORE SUN, May 1, 2000, at A11 (noting that state Senate Republican leaders claim that "a bipartisan bill to replicate this success [of Exile in Richmond] enjoyed unanimous Republican support, but was watered down by the Democrat leadership"); David F. Tufaro, Letter to the Editor, *Richmond's Approach Could Help Baltimore Stop the Violence*, BALTIMORE SUN, May 13, 2000, at A10 (commenting that 1999 Republican nominee for mayor of Baltimore urges adoption of Exile).

256. See *supra* note 164.

257. Gail Gibson, *Probe of U.S. Lawyer Sought; Federal Prosecutor Accused of Excluding ATF from Gun Cases*, BALTIMORE SUN, July 21, 2000, at B1.

258. See *id.*

259. Gail Gibson, *supra* note 254, at 1B; see also Margie Hyslop, *ATF Agents Seen As Caught in Cross-Fire*, WASH. TIMES, Sept. 13, 2000, at C3; Daniel LeDuc, *Md. Attorney Accused of Threats to ATF; Official Livid over Release of Crime Data, Agent Says*, WASH. POST, Sept. 21, 2000, at B1.

260. See Gail Gibson, *6 Considered for Federal Post in Md.; Bush Assembling List of GOP Possibilities for U.S. Attorney; Battaglia to Be Replaced; 3 Former Assistants, 3 County Prosecutors Are Leading Candidates*, BALTIMORE SUN, Dec. 31, 2000, at B1; Gregory Kane, *GOP Takes to the 'Hood to Unveil Anti-Crime Plan*, BALTIMORE SUN, Jan. 24, 2001, at B1.

261. Frank Main, *Virginia Gun Program Cuts Street Violence*, CHI. SUN-TIMES, July 30, 2000, at 32. In May 2000, South Carolina's Attorney General called for "Palmetto Exile," and proposed legislation providing for harsh mandatory penalties for gun possession offenses. See Pat Willis, *Official Touts Benefits of Gun Program; Attorney General Says Palmetto Exile Would Be Effective in Locking up Criminals Who Carry Firearms*, AUGUSTA CHRONICLE (Ga.), May 12, 2000, at C2.



eighty percent conviction rate for the Exile cases taken to federal court.<sup>262</sup> The Richmond Commonwealth's Attorney has blamed Governor Gilmore and the Virginia General Assembly for this poor showing, complaining that Virginia Exile was "politically motivated" and haphazardly implemented.<sup>263</sup> U.S. Attorney Fahey noted her disappointment.<sup>264</sup> The question remains, though, what her successor will do in the face of this record, and whether a politically acceptable exit strategy is even possible.

The point is more general. In Richmond, and elsewhere, unilateral federal withdrawal would be hard even in the absence of the Republicans' proposed Exile legislation. The U.S. Attorney would invariably face the prospect of yet another horrendous shooting that cries out for the same harsh treatment given to previous shootings.<sup>265</sup> Federal enforcers will always have to consider the needs (and capabilities) of local enforcers on whose cooperation they must depend in other contexts. And legislators have never been shy about demanding federal cooperation with the state and local authorities in their home districts.<sup>266</sup> But any difficulties that a U.S. Attorney would already face in phasing out an Exile-type program would surely be magnified by intensive congressional supervision of the sorts now being proposed. And the ultimate effect of congressional efforts to institutionalize Exile would be to give state and local authorities a virtual blank check on a range of federal enforcement assets and to shift control of these assets away from Washington.

To be sure, Exile's champions have sought to alleviate some of the drain on the strategic federal reserve. Early on, Republicans made clear that they would support additional funding for U.S. Attorneys' Offices,<sup>267</sup> and, although the drain on ATF's resources may have been one of Exile's greatest attractions for them, they even agreed to substantial outlays in the 2001 budget for that agency as well.<sup>268</sup> Moreover, state and local authorities in Virginia and elsewhere have stood ready to second their own prosecutors as Special Assistant U.S. Attorneys to relieve the pressure on those offices (and perhaps to ensure continued federal interest).<sup>269</sup> Had Gore become President, his administration might thus have been able to continue the Clinton Administration's comprehensive anti-violence

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262. Tom Campbell & Gordon Hickey, *Va. Exile Program Falls Short of Intent; Prosecutor Laments 40% Conviction Rate*, RICHMOND TIMES DISPATCH, Aug. 7, 2000, at A1; see also Arlo Wagner, *Get-Tough Program Lowers Richmond Homicide Rate; But Conviction Figures Are "Very Bad"*; *Official Says Evidence Often Is Lacking*, WASH. TIMES, Aug. 9, 2000, at C1.

263. Campbell & Hickey, *supra* note 262, at A1.

264. *Id.*

265. See, e.g., Brett Lovelace, *U.S. Attorney Won't Prosecute Shootout Suspect*, INTELLIGENCER J. (Lancaster, Pa.), June 29, 2000, at A1.

266. Richman, *supra* note 56, at 785.

267. See *supra* notes 133-135 and accompanying text.

268. See *supra* note 196 and accompanying text (discussing the 2001 budget).

269. In Fort Worth, Texas, local prosecutors serving as Special Assistant U.S. Attorneys appear to be in charge of deciding which cases get pursued federally. See Toni Heizl, *Making The City Safe; Program Steers Felon Suspects Toward Federal Prosecution to Secure Longer Sentences*, FORT WORTH STAR-TELEGRAM, Aug. 14, 2000, at 1.

strategy, committing agents to trafficking crimes as well as violent crime enforcement.

What then are the institutional costs of Exile proliferation, if any? One quick answer is that these measures do not address the burden that an enlarged federal criminal docket places on the courts. This problem is one frequently cited by critics of "over-federalization," who have charged that "the increasing criminal caselaw threatens to impair the quality of justice meted out in criminal cases and significantly impairs federal judges' ability to perform their core constitutional functions in civil cases."<sup>270</sup>

One need not rest on such generalizations. A recent Administrative Office study found not just a broad increase in federal firearms cases between 1989 and 1998, but a marked increase in the criminal justice resources required to deal with each case:

In comparison to 1989, a firearms case filed in 1998 was more likely to involve multiple defendants, more likely to take longer between filing and disposition of the case, more likely than other types of crimes to result in a jury trial, and more likely to result in a longer prison sentence for the defendant(s).<sup>271</sup>

The harsh criticism that the Eastern District of Virginia district judges leveled at Project Exile<sup>272</sup> is thus not surprising.<sup>273</sup>

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270. Sara Sun Beale, *Too Many and Yet Too Few: New Principles to Define the Proper Limits for Federal Criminal Jurisdiction*, 46 HASTINGS L.J. 979, 983 (1995); see also Brickey, *supra* note 203, at 1168-69.

271. Walker & Patrick, *supra* note 35, at 6.

272. See *United States v. Jones*, 36 F.Supp.2d 304 (E.D. Va. 1999). One senior district judge noted in a letter to Chief Justice Rehnquist that Exile was transforming his court "into a minor-grade police court." Tom Campbell, *Bull's Eye or Wasted Shots? Federal Judges Not Among Gun Program's Supporters*, RICHMOND TIMES-DISPATCH, Jan. 22, 1999, at A1 (quoting letter from Senior U.S. District Judge Richard L. Williams); see also Baker, *supra* note 238, at 687-90.

273. This Article will not address costs that principally fall outside the system, like the sentencing unfairness occasioned when defendants who otherwise would be prosecuted locally face federal sentences. See Beale, *supra* note 270, at 997; Steven D. Clymer, *Unequal Justice: The Federalization of Criminal Law*, 70 S. CAL. L. REV. 643 (1997). It should be noted that a policy of maximal federal prosecution tends to reduce horizontal inequities, at least within an Exile jurisdiction, by making it more likely that similar situated gun defendants will receive similar treatment. Yet the disparity between the harsh federal treatment of the mostly African American defendants charged in Richmond, and the more lenient sentences imposed on defendants in the outlying areas, "who are more likely to be Caucasian," has attracted considerable fire. *Jones*, 36 F. Supp. 2d at 312; see Peter Hardin, *Allen Discusses Fighting Crime; He's Also Asked Views on Race and Justice*, RICHMOND TIMES DISPATCH, May 15, 2000, at B1 (reporting pointed questioning of former Virginia Governor Allen at congressional hearing by Rep. Elijah Cummings (D-Md.) concerning Exile's disproportionate focus on African Americans); Donny Ray Williams, Jr., *Project: "Exile Black Men,"* (visited May 31, 2000) <[www.politicallyblack.com/x111899.htm](http://www.politicallyblack.com/x111899.htm)> (calling Project Exile "a poison pill to the black community," and comparing it unfavorably with Boston's "Ceasefire," which, with its job placement component, "goes further to create real change in the community").

The longer (and less certain) answer is that, though their origins lie in a tug of war with the Administration over gun enforcement assets, congressional Exile proposals may not be so easily cabined. Perhaps Exile politics will become more muted, under a President and Attorney General who have long championed Exile and can be counted on to promote it as a matter of executive policy. Even so, the real risk is that the congressional proposals raise the bar for showing legislative outrage at criminal activity in areas of traditional state responsibility. Until now, Congress spoke almost exclusively in the language of substantive law—hence the carjacking statute, the domestic violence statute (whose criminal provision remains unaffected by *Morrison*, as it has an element of interstate travel<sup>274</sup>), and proposed hate crime legislation.<sup>275</sup> Yet it was understood, and probably intended, that enforcement of these provisions be highly discretionary. Perhaps the gun debate is unique—because regulatory minimalists feel they lack sufficient substantive outlets for expressing their condemnation of gun violence<sup>276</sup>—but the key development in Exile politics is that the language of condemnation has become a promise of maximal federal enforcement. Should legislators, with the encouragement of local officials interested in shifting costs and responsibilities to the federal government,<sup>277</sup> begin to make such promises with the same alacrity that they enacted substantive criminal provisions, they will severely threaten the continued vitality of federal criminal institutions.

## V. CONCLUSION

In the end, the political saga of Project Exile may not make for a particularly significant chapter in the long gun control debate. The atmospherics may be a little different, but the story is the usual one: Gun control minimalists support offender-specific criminal enforcement as an alternative to broader regulation of trafficking and access. And advocates of broader regulation embrace such enforcement programs as well, both as a shield against minimalist criticism and because their regulatory scheme naturally includes this sort of criminal enforcement.

As a milestone in the accelerated devolution of centralized federal criminal enforcement power, the saga of Exile may prove quite important, though.

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274. See 18 U.S.C. § 2261(a)(1) (1994); *United States v. Morrison*, 529 U.S. 598, 609 (2000); *United States v. Gluzman*, 154 F.3d 49 (2d Cir. 1998), *cert. denied*, 526 U.S. 1020 (1999).

275. See Sara Sun Beale, *Federalizing Hate Crimes: Symbolic Politics, Expressive Law, or Tool for Criminal Enforcement?*, 80 B.U. L. REV. 1227 (2000).

276. But see Sean Scully, *Casualties Feared As Clinton, NRA Spar; GOP Lawmakers Avoid Skirmish*, WASH. TIMES, Mar. 15, 2000, at A1 (noting Republican leaders' support for "measures aimed at combating violence in the culture, including authorizing a federal study of media violence and allowing states to post the Ten Commandments in public buildings, such as schools").

277. See Aaron Chambers, *Lawmakers Eye Fed Muscle on Gun Crimes*, CHI. DAILY LAW BULL., Nov. 13, 2000, at 1 (urging state legislators to adopt measures requiring the state police to encourage federal prosecutions, one Republican legislator noted "that Project Exile should not cost the state any money because Congress was supposed to provide grants for Illinois and other states to fund the projects").

Only time will tell whether Exile politics are just a peculiar brand of gun control rhetoric or whether they mark a new phase in efforts of legislators to put federal enforcement resources at the disposal of state and local authorities. If the latter proves true, then the legacy of Project Exile—itsself an innovative federal initiative—may be a serious challenge to the idea of federal enforcement policy in the areas where federal, state, and local authority most overlap.

For nearly a half-century, policy-makers, courts, and academics have wrestled with the general question: what role should the federal government play in criminal enforcement? Or more particularly, to what extent should federal enforcers be supporting state and local authorities, as opposed to vindicating peculiarly federal interests or operating in areas where they have a comparative advantage? The politics of Exile are a reminder that for a great many policy-makers, the answers to these broad allocation questions will often, and perhaps inevitably, be driven more by preferences about which laws should be enforced (and to what degree) than by considerations of who should do the enforcing. However, while legislators may seek to deploy firearms enforcement resources based upon their conceptions of what gun control policy ought to be, their decisions may have lasting implications for federal criminal enforcement more generally.