

“The U.S. Attorneys Scandal” and the Allocation of Prosecutorial Power

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I. INTRODUCTION

In 1940, Attorney General (and future Supreme Court Justice) Robert H. Jackson spoke to United States Attorneys about their duty not only to be “diligent, strict, and vigorous in law enforcement” but also “to be just” and to “protect the spirit as well as the letter of our civil liberties.”¹ His talk was dedicated mostly to the relationship between the Department of Justice (DOJ) and the U.S. Attorneys in their shared pursuit of justice. On one hand, he observed that “some measure of centralized control is necessary” to ensure consistent interpretations and applications of the law, to prevent the pursuit of “different conceptions of policy,” to promote performance standards, and to provide specialized assistance.² On the other hand, he acknowledged that a U.S. Attorney should rarely “be superseded in handling of litigation” and that it would be “an unusual case in which his judgment should be overruled.”³

Critics of George W. Bush’s administration have charged that the balance in federal law enforcement has tipped in the direction of too little prosecutorial independence and too much centralized control.⁴ One of their prime examples is the discharge of eight U.S. Attorneys in late 2006,⁵ which

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¹ Robert H. Jackson, *The Federal Prosecutor*, 31 J. CRIM. L. & CRIMINOLOGY 3, 4–6 (1940).

² *Id.* at 4.

³ *Id.*

⁴ See, e.g., Scott Horsley, *Gonzales Seeks Damage Repair with Prosecutors* (NPR, MORNING EDITION radio broadcast Mar. 23, 2007), available at <http://www.npr.org/templates/story/story.php?storyId=9096741> (last visited Apr. 6, 2008) (quoting Senator Sheldon Whitehouse as saying: “What happened in this case sends a signal [to U.S. Attorneys], really through intimidation by purge: Don’t quarrel with us any longer”); Charles Osgood, *The Osgood File* (CBS radio broadcast Mar. 20, 2007), available at <http://www.wcbs880.com/pages/312054.php?contentType=4&contented=380434> (last visited Apr. 6, 2008) (quoting legal analyst Andrew Cohen observing: “We . . . see a very controlling Justice Department with very centralized power, [and] obviously not a lot of tolerance for dissent.”).

⁵ A ninth was discharged early in 2006, but has not been associated with the

the media has labeled “The U.S. Attorneys Scandal.”⁶ The discharges have led to allegations that DOJ influenced U.S. Attorneys’ Offices to pursue the President’s partisan agenda by encouraging the overzealous pursuit of voting rights cases and government corruption cases against Democrats and by discharging individual U.S. Attorneys who resisted.⁷ The critics perceive the firings as evidence of DOJ’s overeagerness to serve White House political interests in derogation of the institution’s traditional commitment to the rule of law.⁸

The centralization of authority within DOJ that the recent firings exemplify can be seen as a mechanism that facilitates abuse of government power because it enables the Attorney General and other high-ranking DOJ officials to enforce prosecutorial decisions that promote partisan objectives, either out of sympathy for the President’s interests or in direct response to White House importuning.⁹ Under this view, the natural solution to the politicization of federal criminal prosecutions would be the development of institutional structures that would accord greater respect to DOJ’s independence from the President,¹⁰ U.S. Attorneys’ independence from the Attorney General’s Office,¹¹ and lower-level prosecutors’ independence

discharge controversy.

⁶ E.g., Ana Marie Cox, *Washington Memo: File Not Found*, TIME, Apr. 30, 2007, at 24 (“The U.S. Attorneys scandal has raised many more questions than it has answered . . .”); Margaret Talev & Marisa Taylor, *U.S. Attorneys Scandal: Senators Prepare for Gonzales Censure Vote*, MYRTLE BEACH SUN NEWS, May 18, 2007, at A3. Other examples offered to support the perceived centralization of control have included DOJ’s endorsement of torture as an investigative tool, wiretap surveillance of U.S. citizens without court authorization, and participation in the detention of suspected terrorists in Guantanamo.

⁷ The details of the controversy are discussed *infra* Part III.

⁸ See, e.g., Editorial, *Why This Scandal Matters*, N.Y. TIMES, May 21, 2007, at A18 (“Justice Department headquarters has become deeply partisan.”).

⁹ See, e.g., Michael Isikoff & Evan Thomas, *Bush’s Monica Problem*, NEWSWEEK, June 4, 2007, at 24, 27 (suggesting Monica Goodling’s practice of hiring Republican campaign contributors for non-political positions was “part of a . . . slow and stealthy erosion of the independence of the Justice Department”); Alexis Simendinger, *Presidency—Politics Squared*, NAT’L J., June 2, 2007, at 34, 39 (“The Bush White House continued to put partisan politics ahead of the interests of the American people when it fired U.S. attorneys and inserted politics into ongoing criminal prosecutions.” (quoting Howard Dean)).

¹⁰ See Simendinger, *supra* note 9 (discussing prior administrations’ “firewalls” between the President and DOJ that the Bush administration ignored); cf. Note, *Removing Politics from the Justice Department: Constitutional Problems with Institutional Reform*, 50 N.Y.U. L. REV. 366, 369–72 (1975) (discussing post-Watergate proposals to depoliticize DOJ).

¹¹ See Horsley, *supra* note 4 (quoting Senator Sheldon Whitehouse regarding the importance of preserving U.S. Attorneys’ independence from DOJ).

from all political appointees.¹²

A call to give lower-level prosecutors greater independence from higher ranked officials would be strikingly at odds with one of the primary themes of contemporary commentary on prosecutorial ethics. Prosecutorial misconduct traditionally is considered to be the product of too much independence,¹³ particularly on the part of rogue prosecutors on the front lines.¹⁴ A more contemporary insight is that even well-intentioned prosecutors are subject to biases that must be kept in check.¹⁵ Proposed solutions include the implementation of internal policies constraining individual prosecutors' discretion,¹⁶ increased oversight and decision making

¹² For example, before the Independent Counsel Act expired, some critics argued that it would be preferable to assign prosecutions of federal officials to career prosecutors because, functionally, they are least likely to act in a partisan fashion. *See, e.g.*, Julie O'Sullivan, *The Independent Counsel Statute: Bad Law, Bad Policy*, 33 AM. CRIM. L. REV. 463, 475 (1996) ("DOJ prosecutors, who have a necessarily broader focus and are privy to a store of institutional knowledge and experience, are better positioned to exercise their discretion in a professional and equitable manner, and are accountable if they do not.").

¹³ *See* Leonard R. Mellon et al., *The Prosecutor Constrained by his Environment: A New Look at Discretionary Justice in the United States*, 72 J. CRIM. L. & CRIMINOLOGY 52, 54 (1981) (identifying prosecutorial discretion as "the shibboleth of critics who question whether a system which handles like cases differently provides due process and equal protection to the defendant"). One of the criticisms leveled at truly independent counsel in government corruption cases has been that they expend too many resources and engage in overzealous pursuit of crimes that may not exist. *See, e.g.*, Abraham Dash, *The Office of the Independent Counsel and the Fatal Flaw: They are Left to Twist in the Wind*, 60 MD. L. REV. 26, 30–31 (2001) (discussing criticisms of Kenneth Starr and Lawrence Walsh).

¹⁴ *See, e.g.*, Felice F. Guerrieri, Comment, *Law and Order: Redefining the Relationship Between Prosecutors and the Police*, 25 S. ILL. U. L.J. 353, 374–75 (2001) (blaming "rogue prosecutors [in Illinois], or more specifically, overzealous prosecutors" who are "led by their desire for convictions over their desire for justice"); Barry Tarlow, *RICO Report: Hit'em Where it Hurts*, 27 CHAMPION 50, 59 (Apr. 2004) (endorsing legislation authorizing payment of defense attorneys' fees because of bad-faith federal prosecutions as forcing supervisors to "take notice when their office's budget suffers a major shortfall because of the behavior of a rogue prosecutor").

¹⁵ *See, e.g.*, Susan Bandes, *Loyalty to One's Convictions: The Prosecutor and Tunnel Vision*, 49 HOW. L.J. 475, 479 (2006) (discussing prosecutors' natural "tendency to develop a fierce loyalty to a particular version of events"); Alafair S. Burke, *Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science*, 47 WM. & MARY L. REV. 1587, 1593 (2006) ("[E]ven 'virtuous,' 'conscientious,' and 'prudent' prosecutors fall prey to cognitive failures."); Keith A. Findlay & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291, 295 (2006) (discussing the pervasiveness of "tunnel vision" in prosecutorial decision making).

¹⁶ *See, e.g.*, Laurie L. Levenson, *Working Outside the Rules: The Undefined Responsibilities of Federal Prosecutors*, 26 FORDHAM URB. L.J. 553, 569 (1999) ("It has

by supervisory personnel,¹⁷ and the dis-aggregation of decision-making authority.¹⁸

The notion that prosecutorial discretion should be constrained through supervisory oversight underlies the current distribution of authority in DOJ. For example, without authorization by the Attorney General or a high-ranking designee, a federal prosecutor may not subpoena a journalist,¹⁹ indict a defendant on RICO or tax charges,²⁰ or ask a corporation to waive attorney-client privilege.²¹ Other potentially controversial decisions, such as whether to seek the death penalty, are made on a centralized basis in Washington, D.C..²² The Attorney General's supervisory and decision-making role in these contexts was introduced as a way of formulating measured policy on the issues, implementing federal law uniformly, and checking overzealousness on the part of local U.S. Attorneys' offices and line prosecutors.²³

long been believed that maximum fairness will be achieved by neutral rules and standards to guide prosecutors' exercise of discretion.”).

¹⁷ See Burke, *supra* note 15, at 1621 (“Another possible method to mitigate the influence of cognitive bias on prosecutorial decision making is to involve additional, unbiased decisionmakers in the process.”); Findlay & Scott, *supra* note 15, at 388 (urging “[m]ultiple levels of case screening” to minimize tunnel vision by prosecutors).

¹⁸ See, e.g., H. Richard Uviller, *The Neutral Prosecutor: The Obligation of Dispassion in a Passionate Pursuit*, 68 FORDHAM L. REV. 1695, 1716 (2000) (arguing that separate prosecutors should make the quasi-adjudicative and advocacy-related decisions in each matter).

¹⁹ U.S. DEP'T OF JUST., UNITED STATES ATTORNEYS' MANUAL 9-13.400–9-13.410 (2d ed. 2004) (guidelines on the issuance of subpoenas to news media) [hereinafter “USAM”].

²⁰ *Id.* 9-110.101, 9-110.300–9-110.400 (guidelines for bringing RICO charges, including requirement of Criminal Division approval); 6-4.010–6-4.311 (guidelines for bringing tax charges).

²¹ Memorandum from Paul J. McNulty, Deputy Attorney General, to Heads of Department Components and U.S. Attorneys, available at http://lawprofessors.typepad.com/whitecollarcrime_blog/files/mcnulty_memo.pdf (last visited Apr. 6, 2008).

²² USAM 9-10.040 (requiring all death-penalty eligible cases to be referred to DOJ for the Attorney General's decision on whether to seek the death penalty); see generally Rory K. Little, *The Federal Death Penalty: History and Some Thoughts About the Department of Justice's Role*, 26 FORDHAM URB. L.J. 347 (1999).

²³ See Conference, *The Independent Counsel Process: Is it Broken and How Should it Be Fixed?*, 54 WASH. & LEE L. REV. 1515, 1546 (1997) (“[T]he whole purpose of [DOJ review procedures] is so that there can be a uniform, cohesive system of law enforcement . . . with the centralized control in Washington, to make sure that some Assistant or some U.S. Attorney isn't going off half-cocked in a way that would be detrimental to law enforcement in general.” (quoting former U.S. Attorney Robert Fiske)).

The events surrounding the recent firings of U.S. Attorneys offer an occasion for reconsidering conventional wisdom about how prosecutorial power should be allocated.²⁴ Who should make which discretionary decisions, and on what basis? In the federal context, authority must be allocated among line Assistants, U.S. Attorneys, the Department of Justice, and the President. With respect to state prosecutions, the issues are somewhat different, because state and local prosecutors ordinarily are independently elected and therefore do not serve at the pleasure of the state's chief executive.

Our goal in analyzing the allocation of authority in criminal prosecutions, particularly federal prosecutions, is not to resolve whether Attorney General Gonzales was justified in discharging his subordinates in 2006. That issue depends on facts not yet available, as well as controversial assumptions about the extent to which political considerations may affect high-level federal personnel decisions. Rather, by addressing the broader question of who should control federal prosecutorial discretion, we hope to develop a better understanding of the complicated and multi-faceted roles of the participants in the federal prosecutorial system.

The Attorney General and his immediate assistants must balance several imperatives. As a cabinet official, the Attorney General is expected to implement the President's law enforcement policy objectives, yet at the same time must resist improper political influences (whatever those may be)²⁵ and presidential attempts to interfere with the prosecutor's traditional obligation to do justice.²⁶ As the chief federal prosecutor and administrator responsible for all federal law enforcement, the Attorney General must set appropriate policies for prosecutions, attempt to ensure uniform application of the law throughout the United States, and supervise his subordinate U.S. Attorneys'

²⁴ This Article focuses on how prosecutorial power should be allocated among prosecutors within a single chain of command. It does not consider how legislatures should allocate authority among different prosecutorial entities. *See generally* James P. Fleissner, *The Future of the Independent Counsel Statute: Confronting the Dilemma of Allocating the Power of Prosecutorial Discretion*, 49 MERCER L. REV. 427 (1998) (discussing the relative merits of delegating power to an Attorney General or Independent Counsel in government corruption cases); Lawrence T. Kurlander & Valerie Friedlander, *Perilous Executive Power—Perspectives on Special Prosecutors in New York*, 16 HOFSTRA L. REV. 35, 42–45 (1987) (discussing the allocation of power between New York district attorneys and the state attorney general).

²⁵ *See* ELLIOTT RICHARDSON, *THE CREATIVE BALANCE* 27 (1976) (discussing presidential influence on DOJ and noting the distinction between the "proper role of the political process in the shaping of legal *policies* and the perversion of the legal *process* by political pressure").

²⁶ *See* NANCY V. BAKER, *CONFLICTING LOYALTIES* 2–4 (1992) (discussing the Attorney General's conflicting roles and ways various Attorneys General have balanced them).

performances, while not interfering unduly with individual U.S. Attorneys' own supervisory and administrative functions as heads of their offices. The Attorney General and U.S. Attorneys alike must be mindful of line Assistant U.S. Attorneys' familiarity with the facts of individual cases, their personal obligations to serve justice in those cases, and (often) superior experience in trying criminal cases. Each of these prosecutors technically is subordinate to someone else—the President is the Attorney General's boss, the Attorney General supervises the U.S. Attorneys, and the U.S. Attorneys are in charge of line prosecutors—but each also must resist pressures from their superiors that interfere with the exercise of discretion that logically should belong to them.

Exploring the issues raised by the recent firings concerning who should decide which questions and when it is appropriate for the superior officials to demand compliance with their viewpoints can help the various participants in the federal prosecution process (as well as observers) determine when insistence, compliance, or resistance is appropriate. Because the Attorney General performs multiple overlapping functions—as federal policy-maker, administrator of multiple law enforcement agencies, manager of prosecutorial and law enforcement resources, and supervisor of prosecutors making case-sensitive decisions in individual matters—it may be that no single set of answers is possible. In some situations, society may be served best through the exercise of discretion by individual prosecutors, in others through the exercise of individual discretion bounded by rules (such as those found in the U.S. Attorney's Manual), in yet others through the exercise of discretion reviewed in each case by supervisory authorities (e.g., DOJ), and finally in others through fully centralized decision making by the Attorney General. One's politics or view of law enforcement—how the balance should be struck between defendants' rights and the interest in convicting guilty defendants—inevitably will color one's assessment of the appropriate allocation of authority in particular cases.

At the outset, it is possible to identify some broad categories of questions relevant to the determination of who should control decision making. These include: (1) what is the nature of the issue to be decided? (2) who is best qualified to decide, by training, experience, or familiarity with the pertinent facts and issues? (3) when someone must exercise discretion, who is most likely to make biased or otherwise improperly-motivated decisions? (4) whose exercise of discretion does the public have reason to fear on other grounds? (5) who can be held accountable for an inappropriate decision? and (6) which decision-making process is most efficient?

This Article will explore these questions by analyzing three hypothetical scenarios loosely based on cases involved in the U.S. Attorney discharges and offering our intuitions about when particular considerations assume special significance. Unlike in the case of the U.S. Attorney firings, where

the Attorney General or his subordinates evidently made retrospective judgments about how the U.S. Attorneys functioned, the hypothetical cases are framed prospectively; we do not ask whether, in hindsight, one prosecutor “should have” brought particular charges but, rather, look forward to how the decision should be made. Nevertheless, the forward-looking inquiry inevitably informs one’s judgment on the backward-looking question of when it is appropriate for the Attorney General and his designees to second-guess the actions of their subordinates.

Part II of the Article provides an institutional analysis of how decision making ordinarily is, and should be, distributed among various prosecutors in state and federal agencies. Part III describes the recent U.S. Attorney discharges, and explains why the theory of centralizing prosecutorial decisions is critical to understanding and evaluating the propriety of the discharges. Parts IV through VI then analyze the three hypothetical scenarios, each of which highlights a generic problem that interferes with the implementation of ordinary theory about the best allocation of prosecutorial decision making. These problems are: (1) the fact that prosecutorial decisions often implicate multiple policy issues; (2) the difficulty in identifying whether particular decisions are illegitimate, either because of the nature of the decisions or the context in which they are made; and (3) the occasional need to respond to bias or intentional misconduct by individual prosecutors. Parts VII and VIII reach some conclusions about what the problems mean for the ordinary allocation of prosecutorial decision making and for assessing the U.S. Attorney discharge debate.

Much of this Article’s analysis applies equally to state and federal prosecutors’ offices. However, because the federal law enforcement scheme has unique additional characteristics,²⁷ the Article focuses on federal prosecutions.²⁸ State and federal prosecutors’ offices alike, however—as well as observers and students of the prosecutorial function—can usefully apply the basic structure and analysis the Article provides.

II. BACKGROUND: THE ALLOCATION OF DISCRETIONARY AUTHORITY IN CRIMINAL PROSECUTIONS

The structure of federal law enforcement, including prosecutions, is unique. At the lower level, however, local federal prosecutors’ offices

²⁷ Cf. Fred C. Zacharias & Bruce A. Green, *The Uniqueness of Federal Prosecutors*, 88 GEO. L.J. 207, 235–40 (2000) (discussing inherent differences between state and federal prosecutors).

²⁸ For an excellent, though somewhat outdated, organizational analysis of the federal prosecutorial regime and the interaction between DOJ and the U.S. Attorneys’ Offices, see JAMES EISENSTEIN, COUNSEL FOR THE UNITED STATES (1978).

resemble their state counterparts—with the exception that state district attorneys, unlike U.S. Attorneys, typically are elected officials.²⁹ Because most discussions of prosecutorial discretion and prosecutorial misconduct assume the paradigm of the traditional state district attorney's office, it is worth describing how such offices operate. That will enable us both to distinguish the federal scheme and to draw from our analysis lessons that are equally applicable to state prosecutions.

A. *The Structure of Decision Making in State Prosecutions*

Most criminal prosecutions in the United States are conducted at the state and local level, and are conducted by elected district, county, or city attorneys and their appointed assistants.³⁰ The structure of state prosecutors' offices varies with their size: a city such as New York or Los Angeles will have many assistant district attorneys and multiple offices and units. A county attorney in a rural area may have a small staff of part-time assistant prosecutors.³¹ In both cases, the final decision maker regarding the conduct of criminal prosecutions is the elected prosecutor. He ordinarily is independent of the governor, mayor, or other chief executive.

Elected state prosecutors can take various approaches to allocating decision-making authority.³² They can influence lower level prosecutors' decision making through the adoption of policies governing investigative, charging, and sentencing decisions and by instructing assistants who serve in supervisory roles. In a small prosecuting agency, the elected prosecutor can have input into all important decisions in every case, but that is impractical in large urban agencies.³³

The larger the agency, the more limited will be the proportion of decisions that the elected prosecutor can make personally, as will be the

²⁹ See Steven W. Perry, *Prosecutors in State Courts, 2005*, BUREAU JUST. STAT. BULL., July 2006, at 11 (compiling data showing that all but four states elect the chief local prosecutor).

³⁰ See *id.* at 6 (noting that state prosecutors closed almost ten million felony and misdemeanor cases in 2005).

³¹ See *id.* at 2 (finding that, in 2005, more than 25% of local prosecutors' offices had a part-time chief prosecutor and approximately 30% did not employ full-time assistant prosecutors).

³² See FRANK W. MILLER, PROSECUTION: THE DECISION TO CHARGE A SUSPECT WITH A CRIME 3 (1969); Norman Abrams, *Internal Policy: Guiding the Exercise of Prosecutorial Discretion*, 19 UCLA L. REV. 1 (1971); James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1523 (1981).

³³ See JOAN E. JACOBY, THE PROSECUTOR'S CHARGING DECISION: A POLICY PERSPECTIVE 38 (1977) ("As the size of the office grows, the need for clear enunciation of policy and techniques to see that it is actually being implemented increases.").

amount of information he can review in making decisions. In each office, therefore, the elected prosecutor must explicitly or implicitly determine the optimal level of discretion to assign to line prosecutors, the extent to which line prosecutors' discretion should be cabined by internal policies, and the extent to which decisions should be made by supervisory prosecutors who, while lacking each line prosecutor's detailed knowledge of case-specific facts, ordinarily have broader experience with, and a better understanding of, the office's policies and decision-making processes.

Centralization of authority can take three forms in state prosecutions: the District Attorney or supervisory prosecutors, acting individually or by committee, may make key decisions—including routine decisions (e.g., whether to commence an investigation, make an arrest, indict, or take a sentencing position)³⁴ or more limited specific decisions involving controversial or particularly weighty matters.³⁵ This is the most time-consuming form of centralization, because it requires the high-ranking prosecutors to consider all the relevant factual information about each case they review.

A simpler option for providing some supervision and centralized decision making is for the agency's upper echelon to provide oversight rather than decide each case itself; in other words, supervisors or section chiefs will review decisions proposed by line prosecutors and either authorize or veto the decisions. Under this approach, the line prosecutors have primary decision-making responsibility, with the supervisors providing a level of review that varies depending on the nature and significance of each decision, the line prosecutor's experience and trustworthiness, and other considerations. But at least some deference is given to the line prosecutor because of his familiarity with the facts, the office's interest in training junior attorneys to make independent decisions, and time constraints.

The third method of centralizing decision making is for a District Attorney, or high ranking designees, to establish policies that channel or

³⁴ See generally Mellon et. al., *supra* note 13 (presenting an empirical study describing practices in numerous prosecutors' offices and identifying ways organizational differences affect the outcome of decisions).

³⁵ For example, some prosecutors' offices employ committees of experienced prosecutors to make death penalty decisions. See Bob Doucette, *State May See More Death Sentences*, THE SUNDAY OKLAHOMAN, Feb. 16, 2003, at 3-A (referring to committees in two Oklahoma counties); Natalie Singer, *Maleng Applies Patient Method to 3 Tough Cases*, SEATTLE TIMES, Sept. 2, 2006, at A1 (referring to a 6-member death committee used in King County, Washington); cf. John A. Horowitz, *Prosecutorial Discretion and the Death Penalty: Creating a Committee to Decide Whether To Seek the Death Penalty*, 65 FORDHAM L. REV. 2571, 2600–01 (1997) (proposing an independent committee composed of appointees of the Governor, District Attorney, and the committee itself to decide whether the death penalty should be sought).

restrict line prosecutors' discretion. Such a policy might, for example, provide standards for plea offers in particular types of cases³⁶ or deem certain offenders ineligible for pretrial diversion.³⁷

Prosecution offices typically employ a combination of these options, establishing general policies, reviewing some cases fully, and providing limited oversight in others. Few District Attorneys would allow subordinate prosecutors to act entirely independently, without direction through internal policies (either formal or informal) and without supervision. But at the same time, except in an extremely small office, a District Attorney cannot assume responsibility for all decisions. The operative question therefore becomes how to strike an appropriate balance between centralized and decentralized decision making.

B. The Structure of Decision Making in Federal Prosecutions

If one were to consider only individual U.S. Attorneys' offices and only their criminal prosecution functions, the comparison with state district attorneys' offices would be fairly precise. As in state, county, and city prosecution agencies, each federal district contains three levels of prosecutors: the head U.S. Attorney, supervisory assistants, and line prosecutors who handle the day-to-day cases. Because U.S. Attorneys' offices range in size from medium to large,³⁸ U.S. Attorneys, as a practical matter, cannot review or handle each case themselves; some mix of centralization and grant of discretion to lower-level attorneys is necessary.

One significant difference between U.S. Attorneys offices and state agencies is that the U.S. Attorney in each district is appointed by,³⁹ and serves at the pleasure of, the President.⁴⁰ In contrast, the state district

³⁶ See, e.g., *State v. Brimage*, 706 A.2d 1096 (N.J. 1998) (noting a standard plea offer prescribed by the N.J. Attorney General for defendants charged with possessing drugs near schools).

³⁷ See, e.g., *State v. Greenlee*, 620 P.2d 1132, 1134 (Kan. 1980) (describing an office policy foreclosing diversion for narcotics offenders).

³⁸ There are 94 districts (with 93 U.S. Attorneys), typically headquartered in major metropolitan areas. U.S. Dep't of Just., United States Attorney's Office, <http://www.usdoj.gov/usao/> (last visited Apr. 6, 2008). Local offices employ up to 350, with only a few being very small. U.S. Dep't of Just., United States Attorney's Office for the District of Columbia, at http://www.usdoj.gov/usao/dc/About_Us/index.html (last visited Apr. 6, 2008) (noting that the District of Columbia has "the largest United States Attorney's Office with over 350 Assistant United States Attorneys"); see also DAVID BURNHAM, *ABOVE THE LAW* 90 (1996) (discussing DOJ staffing); U.S. Dep't of Just., United States Attorney's Office, <http://www.usdoj.gov/usao/offices/index.html> (last visited Apr. 6, 2008) (providing links to information about each district).

³⁹ 28 U.S.C. § 541(a) (2000).

⁴⁰ 28 U.S.C. § 541(c) (2000); cf. 28 U.S.C. § 546(a) (2000) (allowing the Attorney

attorney is accountable to the electorate—which may affect some of the policy decisions the district attorney makes. Although U.S. Attorneys are answerable to the President, they rarely communicate directly with the President. In that sense, they operate autonomously in making decisions regarding how criminal matters should be prosecuted by their offices.⁴¹

The most significant differences in the structure of federal and state prosecution regimes arise from the introduction of the Attorney General and the centralized DOJ into the picture. The Attorney General cannot be conceptualized simply as a super-district attorney or a super U.S. Attorney, because he serves multiple functions. The Attorney General is not limited in his activities to prosecuting criminal cases; he supervises all federal law enforcement (including the FBI and DEA), is active in federal civil litigation (some of which he delegates to U.S. Attorneys), serves on the President's cabinet, and advises the President concerning all legal matters and the intersection of law enforcement with other federal concerns.⁴² Moreover, in setting the direction of DOJ, which he controls, the Attorney General does far more than enforce criminal laws. DOJ has numerous departments and divisions that establish and enforce federal regulatory policy, for example regarding voting rights, civil rights, and immigration.⁴³ Even in the criminal field, DOJ has its own set of prosecutors working in specialized areas who sometimes take responsibility or share responsibility with Assistant U.S. Attorneys in particular matters.⁴⁴ The Attorney General, therefore, inevitably has broader policy responsibilities and objectives, and is subject to different kinds of political pressures and oversight, than U.S. Attorneys and their subordinates.

The Attorney General's place on the federal executive organizational chart—above the U.S. Attorneys, but answering to the President—is now taken for granted.⁴⁵ But this was not always the case.⁴⁶ The original

General to fill vacancies).

⁴¹ See Ross E. Wiener, *Inter-Branch Appointments After the Independent Counsel: Court Appointment of United States Attorneys*, 86 MINN. L. REV. 363, 379–80 (2001) (describing various reasons for U.S. Attorneys' relative autonomy).

⁴² See generally CORNELL W. CLAYTON, *THE POLITICS OF JUSTICE: THE ATTORNEY GENERAL AND THE MAKING OF LEGAL POLICY 12–80* (1992) (discussing the Attorney General's multiple roles).

⁴³ *Id.* at 25–36 (describing DOJ's functions).

⁴⁴ DOJ's Criminal Division alone, for example, currently has units dedicated to cases involving organized crime, narcotics, and computer crime, among others. See U.S. Dep't of Just., Criminal Division Organizational Chart, <http://www.usdoj.gov/criminal/links/orgchart.html> (last visited Apr. 6, 2008) (providing DOJ's organizational chart).

⁴⁵ In rare instances, when the President or officials close to the President become the subject of criminal investigations, attorneys have been appointed to serve independently from the Attorney General, either under an independent counsel statute or at the Attorney

understanding was that the Attorney General “would take orders from Congress, as well as the President, in representing the interests of the United States.”⁴⁷ Further, the position was conceived as “quasi-judicial,”⁴⁸ a conception that implies a degree of independence from other government officials.⁴⁹ Significantly, for our purposes, that conception is echoed in case law and legal ethics provisions that associate the prosecutor’s duty to “seek justice” with the quasi-judicial nature of the prosecutor’s role.⁵⁰

Equally interesting is the fact that the U.S. Attorneys originally served independently of the Attorney General. Congress established the independent position of “district attorney,” the antecedent of today’s U.S. Attorney, in 1789.⁵¹ The appointment of these attorneys was vested in the courts, rather than the Attorney General, and he had no control of them.⁵² Four decades later, supervisory authority over district attorneys was assigned to the newly established Solicitor of the Treasury, based on their primary function of defending the government in civil cases implicating the public fisc.⁵³ It was not until 1861 that Congress, now focusing on the criminal prosecutorial function, assigned the Attorney General authority to oversee district attorneys.⁵⁴ Congress ultimately established the Department of Justice in

General’s direction. *Cf. Morrison v. Olson*, 487 U.S. 654 (1988) (analyzing the constitutionality of the now-expired Independent Counsel Act).

⁴⁶ For historical accounts of the role of the Attorney General, see CLAYTON, *supra* note 42, at 3–9, 11–35; Wiener, *supra* note 41, at 373–76.

⁴⁷ Susan Low Bloch, *The Early Role of the Attorney General in Our Constitutional Scheme: In the Beginning There was Pragmatism*, 1989 DUKE L.J. 561, 581.

⁴⁸ James R. Harvey III, *Loyalty in Government Litigation: Department of Justice Representation of Agency Clients*, 37 WM. & MARY L. REV. 1569, 1578 (1996).

⁴⁹ See BURNHAM, *supra* note 38, at 26 (“[F]rom the very beginning, the attorney general was an unusual hybrid with inherently conflicting loyalties.”).

⁵⁰ See generally Bruce A. Green, *Why Should Prosecutors “Seek Justice?”*, 26 FORDHAM URB. L.J. 607, 612–18 (1999) (citing cases and ethics provisions).

⁵¹ Judiciary Act of 1789, ch. 20, § 35, 1 Stat. 73, 93; see Wiener, *supra* note 41, at 375–85 (discussing the development of the U.S. Attorney’s Office).

⁵² See Harvey, *supra* note 48, at 1578 & n.49 (citing An Act to Establish the Judicial Courts of the United States, ch. 30, § 35, 1 Stat. 73, 92 (1789)); *id.* at 1577–78 (“The attorney general had no control over the conduct of litigation for most of the federal government.”).

⁵³ Act of May 29, 1830, ch. 153, § 5, 4 Stat. 415 (authorizing the Solicitor of the Treasury “to instruct the district attorneys . . . in all matters and proceedings, appertaining to suits in which the United States is a party, or interested, and cause them . . . to report to him from time to time, any information he may require in relation to the same”).

⁵⁴ Act of Aug. 2, 1861, ch. 37, § 362, 12 Stat. 285 (charging the Attorney General “with the general superintendence and direction of the attorneys and marshals of all the districts in the United States and the Territories as to the manner of discharging their respective duties”).

1870, placing the Attorney General at its head,⁵⁵ designating U.S. Attorneys, and bringing them within DOJ's ambit.⁵⁶

Even after the establishment of DOJ, there were substantial practical limits on the ability of an Attorney General to influence the work of the U.S. Attorneys. The complexities of travel and communications made it difficult for an Attorney General to learn what U.S. Attorneys throughout the country were doing and to give them timely instructions.⁵⁷ Early U.S. Attorneys had to function relatively autonomously.⁵⁸ The primary oversight mechanism would have been the adoption of policies that individual U.S. Attorneys would have been responsible for implementing. But the adoption of a DOJ manual bringing together policies offering substantial guidance on discretionary decision making is a modern development.⁵⁹

Technically, however, the structure of DOJ did provide the Attorney General with the legal authority to supervise U.S. Attorneys, or to delegate supervisory authority to subordinate officials within the Department of Justice.⁶⁰ The practical barriers to DOJ's direct involvement in local decision making in the various districts disappeared with the advent of modern communication and travel. Today, computer technology enables the Department to receive, collect, and preserve massive amounts of information

⁵⁵ Act of June 22, 1870, ch. 150, 16 Stat. 162 ("Department of Justice Act").

⁵⁶ The Department of Justice Act gave the Attorney General ultimate authority to conduct or argue "any case in which the government is interested," to make rules and regulations for the Department, and to supervise "the conduct and proceedings" of the U.S. Attorneys. *Id.* at 163–64. That structural framework has continued since. *See* 28 U.S.C. §§ 501–530D.

⁵⁷ *Cf.* Harold J. Krent, *Executive Control Over Criminal Law Enforcement: Some Lessons from History*, 38 AM. U. L. REV. 275, 281 (1989) ("Congress for almost a century directed that criminal law enforcement responsibility be decentralized, entrusting the bulk of such efforts to part-time district attorneys who had little contact with the President and his subordinates in the nation's capital."); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 34–38, 70 (1994) ("[I]t made little sense to vest in the President centralized control over district attorneys, given their distance from the center, and it would be fully understandable that they would function relatively independently.").

⁵⁸ *See* MARTIN MAYER, EMORY BUCKNER 177 (1968) (recounting that, before becoming U.S. Attorney, Emory Buckner extracted a commitment that he could control prosecution and hiring decisions); Wiener, *supra* note 41, at 378–80 (describing how U.S. Attorneys operated without interference for 100 years).

⁵⁹ The earliest judicial reference to a USAM alludes to Attorney General Brownell's policy that federal prosecutors ordinarily not consent to *nolo contendere* pleas. *United States v. Jones*, 119 F. Supp. 288, 289 n.1 (S.D. Cal. 1954). Earlier decisions refer to DOJ policies that evidently were not yet formally collected. *See, e.g.,* *Screws v. United States*, 325 U.S. 91, 159 (1945) (Roberts, J., dissenting) (referring to a policy disfavoring civil rights prosecutions).

⁶⁰ 28 U.S.C. §§ 501–530D (2000).

from U.S. Attorneys' Offices, including filings and transcripts, and to respond quickly. The Attorney General thus can assume responsibility for aspects of decision making that traditionally would have been made by the local U.S. Attorney, supervisors in the U.S. Attorney's Office, or line assistants.

In practice, DOJ has exercised control fairly selectively through the adoption of internal rules and regulations. Some of these rules require U.S. Attorneys to cede categories of case-sensitive decisions to the Attorney General (or his designee)—for example, whether or not to seek the death penalty.⁶¹ Other regulations require U.S. Attorneys to obtain the approval of the Attorney General for specific types of decisions made in the course of investigating and charging defendants, including whether to immunize a witness, whether to subpoena certain witnesses (e.g., a defense lawyer, a journalist, or a family member of the target), or whether to bring certain charges (e.g., tax or racketeering charges).⁶²

The net result is that DOJ can operate, if the Attorney General so desires, more like a District Attorney's office and less like one aspect of a confederation of individual District Attorney's offices. The issue of how to allocate authority no longer is controlled by practical and technological considerations. It has become, instead, a matter of prosecutorial philosophy.

C. Centralization and the Structure of Prosecutors' Offices

In medium or large prosecution agencies, state and federal alike, some mix of centralized and line decision making is inevitable. Chief prosecutors cannot make all decisions, though they may be responsible for them. Conversely, line prosecutors should not be ceded unfettered discretion, because they are largely unaccountable and are not in a position to assure that policy matters are decided uniformly. In state district attorneys' offices and within local U.S. Attorneys' offices, the possible mechanisms for centralization are similar.⁶³

The issues become somewhat different in the federal system with the introduction of the Attorney General and DOJ for practical and substantive reasons. Even with full computerization, distance makes continuous review unwieldy; when time is of the essence, centralized decision making makes sense only if particular issues are flagged by DOJ as needing submission and approval. DOJ devotes only limited resources to overseeing local prosecutions. The Attorney General himself will not be interested in routine

⁶¹ See *supra* note 22; see also USAM 9-2.400 (listing other decisions requiring approval).

⁶² See *supra* notes 19–20.

⁶³ See *supra* text accompanying note 32.

criminal matters.

The nature of the supervisory review the DOJ attorneys engage in therefore differs from the supervision that occurs within the prosecution offices themselves—focusing less on the efficiency of the prosecutors they oversee or procedural justice in each case than on broad policy issues and visible or controversial political questions.

Centralization in decision making has obvious advantages and disadvantages. In state cases and to some extent in federal cases in which the Attorney General personally participates, involvement in decision making by the chief prosecutor and those closest to him promotes democratic ideals; it helps impose accountability on the person who answers most directly to the electorate. When centralized decision making involves experienced supervisory prosecutors, decisions will be made by those who have the greatest knowledge and expertise, the closest ties to the traditions of the prosecuting office, and the best understanding of the chief prosecutor's expectations. Centralization promotes neutrality in the sense of consistency, reducing the risk that similar cases will be decided differently in light of disparate personal philosophies, predilections, or biases of low-level prosecutors.⁶⁴ Insofar as higher-ranking prosecutors serve a supervisory role—reviewing issues with line prosecutors in charge of investigations or prosecutions and authorizing their decisions—they check abusive or overzealous conduct on the part of line attorneys; supervisors can restrain the impulse of prosecutors to pursue charges in unworthy cases because of cognitive biases or the desire to advance their careers.⁶⁵

In offices with low personnel turnover, however, line prosecutors will be relatively experienced, familiar with office traditions and policies, and trained in the exercise of sound judgment. In these offices, delegating authority to the trial attorneys is efficient. It reduces the demands on supervisory personnel and saves the time of prosecutors who would otherwise have to review routine cases with higher-ups.

⁶⁴ See Bruce A. Green & Fred C. Zacharias, *Prosecutorial Neutrality*, 2004 WIS. L. REV. 837, 843 (“Prosecutors’ offices, especially those that deal with a large volume of similar cases, often adopt policies in order to promote consistency and administrative efficiency.”).

⁶⁵ Some of these benefits of centralization can be achieved by hiring attorneys committed to good governance, honing their judgment, and according them discretion subject to modest supervision. Cf. R. Michael Cassidy, *Character and Context: What Virtue Theory Can Teach Us About a Prosecutor’s Ethical Duty to “Seek Justice,”* 82 NOTRE DAME L. REV. 635, 640 (2006) (arguing that prosecutorial discretion is best regulated “by focusing on what type of character traits prosecutors should possess or strive to acquire”). But that is easier said than done. Because prosecutors’ offices often pay far less than large law firms, they typically must hire inexperienced lawyers lacking a track record of sound decision making.

Perhaps more significantly, supervisory attorneys who are unfamiliar with the facts and history underlying individual cases ordinarily are not in the optimal position to make routine prosecutorial decisions; line prosecutors often have a better understanding of the strengths and deficiencies of their cases. Moreover, a prosecutor who interviews or questions witnesses may not be able to perfectly communicate to a supervisor his perceptions and intuitions about the witnesses' credibility. Likewise, prosecutors who have met and formed an impression of defendants may be unable to convey fully why they believe particular defendants are honestly contrite, on one hand, or remorseless, on the other. Thus, decision making by even inexperienced line prosecutors with personal knowledge of the facts sometimes is better informed than judgments by more senior supervisory lawyers who possess incomplete information.

In several respects, the question of how to allocate prosecutorial decision-making responsibility seems very different at the federal level than in state regimes. First, two types of centralization are in play in federal prosecutions: centralization of the decisions of line attorneys in individual cases and centralization of decisions by U.S. Attorneys and their offices as a whole. Attorneys General who exercise authority over, or try to influence, U.S. Attorneys typically do not do so because of superior trial experience or judgment; they instead impose policy decisions that may be driven by substantive concerns, a desire for uniformity, a desire to minimize abuses of discretion, or politics. The questions of which decisionmaker is more trustworthy or more likely to act for improper reasons becomes highly pertinent.

Similarly, although U.S. Attorneys rarely assume direct personal responsibility for investigations and prosecutions, they are less removed from individual cases than DOJ personnel. The U.S. Attorneys are better able to track investigations and prosecutions on a day-to-day basis, more familiar with the capabilities of the line prosecutors, and therefore better informed about specific cases. If the issue potentially subject to centralized decision making relates to office efficiency or prosecution strategy, the U.S. Attorney is in a better position to evaluate the issues than the Attorney General.

Decision making at a subordinate level sometimes corrects for biases at the top of a prosecution agency. A District Attorney's, Attorney General's, or U.S. Attorney's⁶⁶ proximity to the electorate and other political arenas (e.g., Congress) is a double-edged sword.⁶⁷ The chief prosecutor may be

⁶⁶ U.S. Attorneys typically are politically active and may have personal political agendas, though often to a lesser extent than elected prosecutors or officials in Washington, D.C.

⁶⁷ See Green & Zacharias, *supra* note 64, at 890–92 (discussing tensions between accountability and prosecutorial neutrality).

influenced by an illegitimate self-interest in reelection or political advancement in situations where lower-level prosecutors would be less affected by those interests.⁶⁸

Nevertheless, the Attorney General, and by extension the President, are the policymakers responsible for making decisions regarding law enforcement writ large and for determining how federal law enforcement resources should be distributed.⁶⁹ Concern about politically-driven decision making can be misplaced if it assumes that politics—responding to what the electorate wants—is by definition irrelevant.⁷⁰ Although most students of the prosecution function would agree that prosecutors should not make decisions in individual cases according to what is popular, resource-allocation and other politically-controversial judgments (e.g., whether to prosecute marijuana use) can be informed by what citizens in the jurisdiction believe is appropriate. U.S. Attorneys have no immunity, and should have no immunity, from supervisory review regarding their implementation of the executive's view of proper public policy; indeed, they serve at the will of the President.⁷¹

The determination of when society is best served by centralized decision making, particularly in the federal sphere, is therefore complex. The best resolution necessarily varies from case to case, depending both on the reasons for centralization and, sometimes, on the motivation of the supervising prosecutors for centralizing authority. The following Parts set forth some of the explanations offered for the firings of the U.S. Attorneys in 2006 and then consider three hypothetical scenarios as vehicles for analyzing the issues.

⁶⁸ See N.Y.S. Bar Ass'n Comm. on Prof'l Ethics, Op. 683 (1996) (concluding that assistant prosecutors may not work on a District Attorney's reelection campaign because that would exacerbate the problem that "a District Attorney's partisan political activity unavoidably compromises the ability of his or her office to act, and appear to act, in a disinterested fashion").

⁶⁹ See DANIEL MEADOR, *THE PRESIDENT, THE ATTORNEY GENERAL, AND THE DEPARTMENT OF JUSTICE* 48 (1980) (arguing that the Attorney General's role inherently encompasses politics).

⁷⁰ See Daniel C. Richman, *Old Chief v. United States: Stipulating Away Prosecutorial Accountability?*, 83 VA. L. REV. 939, 960–61 (1997) ("[T]he idea that prosecutors should be broadly responsive to the concerns of their community . . . runs deep. Where reasonable minds might differ on how prosecutorial resources might be deployed, community preferences are thought to be critical.").

⁷¹ Susan Low Bloch has suggested, however, that the original understanding of the Attorney General's independent role is instructive on the question of whether the Attorney General is "the attorney for the United States or for the President." Bloch, *supra* note 47, at 625.

III. THE U.S. ATTORNEY FIRINGS

In December of 2006, DOJ forced eight U.S. Attorneys to resign and appointed replacements who, under a recent anti-terrorism law, could avoid Senate confirmation.⁷² Eventually the media took notice, questioning the motivation for the discharges. The Department initially characterized the firings as routine personnel matters,⁷³ but both houses of Congress, led by a Democratic majority, were skeptical and commenced investigation. To date, the propriety of the discharges has not been determined to Congress's satisfaction. Congress has not had complete access to potential evidence for various reasons. Witnesses have refused to testify publicly and under oath, asserting the Fifth Amendment⁷⁴ or executive privilege,⁷⁵ or have testified that they do not recall significant conversations.⁷⁶ Relevant documents have been withheld, again based on executive privilege.⁷⁷ Other documentary evidence has been deleted and not yet recovered.⁷⁸ The evidence has been emerging slowly and tortuously.

The explanations originally emanating from DOJ were that the U.S. Attorneys had been asked to resign because of deficiencies in their administrative or leadership abilities or because of inadequate commitment to official Department policy. Some discharged U.S. Attorneys allegedly failed

⁷² The U.S. Attorney discharge controversy is described in *Dismissal of U.S. attorneys controversy*, http://en.wikipedia.org/wiki/Dismissal_of_U.S._attorneys_controversy (last visited Apr. 6, 2008).

⁷³ See, e.g., Dan Eggen, *Prosecutor Firings Not Political, Gonzales Says*, WASH. POST, Jan. 19, 2007, at A2 ("Gonzales characterized the changes as routine personnel decisions based on evaluations of each prosecutor's performance.").

⁷⁴ See, e.g., Dan Eggen, *Aide to Gonzales Won't Testify*, WASH. POST, Mar. 27, 2007, at A3 (describing Monica Goodling's refusal to testify on Fifth Amendment grounds).

⁷⁵ See, e.g., Peter Baker & Dan Eggen, *New Privilege Claim by Bush Escalates Clash Over Firings*, WASH. POST, July 10, 2007, at A3 (reporting claim of executive privilege "regarding requested testimony by former counsel Harriet E. Miers and former political director Sara M. Taylor about the prosecutor firings").

⁷⁶ See, e.g., David Johnston & Eric Lipton, *Gonzales Endures Harsh Session with Senate Panel*, N.Y. TIMES, Apr. 20, 2007, at A1 (reporting Attorney General Alberto Gonzales "invoked a faulty memory more than 50 times" during Senate Judiciary Committee hearings).

⁷⁷ See, e.g., Sheryl Gay Stolberg, *Bush in Conflict with Lawmakers on Prosecutors*, N.Y. TIMES, Mar. 21, 2007, at A1 (predicting a "constitutional showdown over demands from Capitol Hill for internal White House documents").

⁷⁸ See Sheryl Gay Stolberg, *Missing E-mail May be Related to Prosecutors*, N.Y. TIMES, Apr. 13, 2007, at A1 (describing Republican National Committee accounts used by Karl Rove and 21 other White House Officials from which e-mails potentially related to the firings were deleted).

to vigorously pursue voter fraud cases, which had been established as a departmental priority.⁷⁹ Another allegedly did not adequately prosecute immigration cases.⁸⁰

Testimony from the fired U.S. Attorneys and other DOJ personnel cast doubt on these explanations,⁸¹ which some observers have dismissed as implausible.⁸²

Commentators have offered other possible explanations for the discharges. Some surmise that the underlying motivation was to replace prosecutors who had failed to ally themselves sufficiently with partisan Republican ends, either by investigating or charging Republican officials (or those with ties to them) for corruption⁸³ or by not prosecuting Democratic officials for alleged corruption⁸⁴ and other Democrats for alleged violations of voter registration laws.⁸⁵

⁷⁹ D. Kyle Sampson, Attorney General Gonzales' former chief of staff, testified that three prosecutors were fired because they failed to pursue voter fraud cases vigorously enough. See David Johnston & Eric Lipton, *Ex-Aide Disputes Gonzales Stand Over Dismissals*, N.Y. TIMES, Mar. 30, 2007, at A1.

⁸⁰ *Id.* (reporting testimony of D. Kyle Sampson that San Diego prosecutor Carol Lam's failure to vigorously prosecute illegal immigration cases played a role in her firing).

⁸¹ For example, James B. Comey, a Deputy Attorney General from 2003 to 2005, testified positively about the work of five of the discharged U.S. Attorneys (i.e., John McKay, Daniel Bogden, Paul Charlton, David Iglesias, and Carol Lam). He said that he knew nothing negative about two others (i.e., H. E. Cummins and Margaret Chiara) and opined that only one deserved to be ousted (i.e., Kevin Ryan). See David Johnston, *Ex-Justice Dept. Official Defends Ousted U.S. Attorneys*, N.Y. TIMES, May 4, 2007, at A18.

⁸² See, e.g., Editorial, *Gonzales v. Gonzales*, N.Y. TIMES, Apr. 20, 2007, at A22 (describing the Attorney General's testimony as "merely laughable"); Editorial, *The Fantasy Behind the Scandal*, N.Y. TIMES, Apr. 15, 2007, Sec. 4, at 13 (dismissing as "ludicrous" the claim that prosecutors were fired for failing to pursue legitimate voter-fraud prosecutions).

⁸³ Some have claimed Carol Lam of San Diego was fired because she secured the conviction of Republican Congressman Randy Cunningham in 2005, and "was in hot pursuit of defense contractors with administration connections." See Frank Rich, Editorial, *Iraq is the Ultimate Aphrodisiac*, N.Y. TIMES, Apr. 22, 2007, Sec. 4, at 13; David Johnston & Eric Lipton, *supra* note 79. Others have speculated that Nevada prosecutor Daniel Bogden was fired for investigating a Republican governor and Arkansas prosecutor H. E. Cummins for investigating the Republican governor of Missouri.

⁸⁴ It has been suggested that Arizona prosecutor Paul Charlton was fired for failing to bring charges against Democratic Congressman Rick Renzi before the November 2006 election. Editorial, *Another Dubious Firing*, N.Y. TIMES, Apr. 26, 2007, at A24.

⁸⁵ Editorial, *Still Waiting for Answers*, N.Y. TIMES, Apr. 29, 2007, Sec. 4, at 11 ("There is mounting evidence that many of the eight fired United States attorneys were punished for refusing to prosecute Democrats on phony election-fraud charges."); Adam

Other observers have speculated that the Bush administration sought to advance the careers of lawyers loyal to the administration by appointing them in the place of the discharged U.S. Attorneys.⁸⁶

Underlying many of the explanations offered by DOJ officials and critics alike are questions about the proper use of prosecutorial power and the proper allocation of authority to exercise that power. Discharging U.S. Attorneys, in practical effect, is a method for the President and Attorney General to impose their views on local U.S. Attorneys' offices; discharge serves both as a stick used against disobedient U.S. Attorneys and a carrot to others still in office. It is therefore important to analyze the issue of whether and when the central administration should be able to impose its will. An equally important secondary issue is, even when centralized decision making is appropriate, who should set the policies. Should the White House make determinations concerning whether and how zealously federal prosecutors pursue particular federal crimes (such as voter fraud or illegal immigration)? Should these law enforcement policy decisions instead be left to the Attorney General or professionals in DOJ? Or should they be ceded to the discretion of individual U.S. Attorneys or their Assistants? Perhaps more importantly, once centralized general policies have been adopted, should decisions about how to implement them be left to individual prosecutors' discretion, be overseen by U.S. Attorneys, or also be made by DOJ officials?

The charges of abuse in the recent U.S. Attorney firings leveled at White House officials, Attorney General Gonzales, and DOJ personnel effectively challenge conventional wisdom that decision making at the top serves as a check on abuses at the bottom. The justifications offered for the discharges,

Cohen, *A Woman Wrongly Convicted and a U.S. Attorney Who Kept His Job*, N.Y. TIMES, Apr. 16, 2007, at A18 (observing that "[m]ost of the eight dismissed prosecutors came from swing states, and Democrats suspect they may have been purged to make room for prosecutors who would help Republicans win close elections").

Commentators also have suggested that other U.S. Attorneys were retained specifically because of their willingness to use their power for political ends. For example, before the Wisconsin gubernatorial election, the U.S. Attorney in Milwaukee, Steven Biskupic, successfully prosecuted an official in the Democratic governor's administration while the governor was running for reelection. When the conviction was overturned for insufficient evidence, observers suggested that Biskupic had responded to pressure by "turn[ing] a flimsy case into a campaign issue that nearly helped Republicans win a pivotal governor's race." *Id.* Similarly, critics have suggested that New Jersey U.S. Attorney Christopher Christie escaped being discharged because he publicly investigated Senator Robert Menendez just before the election. See, e.g., Marisa Taylor & Margaret Talev, *Firings Show Encroaching Politics*, NEWS & OBSERVER, June 19, 2007, at A4.

⁸⁶ See, e.g., David Johnston & Eric Lipton, *White House Said to Prompt Firing of Prosecutors*, N.Y. TIMES, Mar. 13, 2007, at A1 ("Justice Department officials have said they removed the United States attorney in Arkansas earlier last year to make room for a Republican Party lawyer and onetime adviser to Mr. Rove [Timothy Griffin].").

involving both politically partisan and public policy objectives, also raise questions about what constitutes overreaching by supervisory officials. The following pages examine three hypothetical scenarios inspired by the current controversy that, together, demonstrate the complexity of the issues.

IV. THE INTRACTABLE PROBLEM OF IDENTIFYING THE DOMINANT POLICY ISSUE

One risk of addressing the proper allocation of authority in the context of matters prominent in the press is that the issues tend to become oversimplified. In the U.S. Attorney discharge cases, the media and Congressional overseers have tried to reduce the motivation of the central administration and the actions of the U.S. Attorneys to simple conflicts of will concerning a single policy to be implemented. Thus, critics allege that the U.S. Attorneys wished to pursue political corruption investigations wherever they led, while the White House wished federal prosecutors to skew their investigations. The U.S. Attorneys allegedly wished to pursue the most important crimes in their districts, while the central administration wished them to focus on voter fraud and immigration cases that would benefit the Republican Party or bolster the Party's political agenda.

Many situations in which a conflict develops between the central authority and the subordinate involve the appropriate method of balancing multiple, competing policies which all have validity. Depending on which is to be preferred, arguably different prosecutors should control their implementation. How the policies should be reconciled can present intractable issues that subordinate prosecutors and supervisory personnel need to work through carefully.

The following scenario provides a useful vehicle for considering this problem.

Scenario 1⁸⁷: FBI investigators arrest Sanchez, a Mexican national

⁸⁷ This scenario was based loosely on *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669 (2006) and *Medellin v. Dretke*, 544 U.S. 660 (2005); see also Mark J. Kadish & Charles C. Olson, *Sanchez-Llamas v. Oregon and Article 36 of the Vienna Convention on Consular Relations: The Supreme Court, The Right to Consul, and Remediation*, 27 MICH. J. INT'L L. 1185, 1186 (2006) (analyzing how the Vienna Convention affects foreign defendants' legal rights); Sara M. Ray, *Domesticating International Obligations: How to Ensure U.S. Compliance with the Vienna Convention on Consular Relations*, 91 CAL. L. REV. 1729, 1739 (2003) (discussing the case law concerning the Vienna Convention). Although these cases were not specifically mentioned in the U.S. Attorney discharge debate, prosecutions of illegal immigrants generally have been discussed.

The question raised by this scenario involves the obligation under the Vienna Convention on Consular Rights to inform foreign nationals upon arrest that they have the right to assistance from the consul of their own state. Recently, in *Medellin v. Texas*, 128 S. Ct. 1346 (2008), the Supreme Court held that in post-conviction proceedings, a state

illegally in the United States, for a gang-related murder that violates federal law. The Assistant U.S. Attorney assigned to the case participates in Sanchez's interrogation. He considers whether, in addition to giving Miranda warnings, he should advise Sanchez of his right to consult with Mexican counsel.

The Vienna Convention on Consular Relations, which both the United States and Mexico have signed, appears to require criminal prosecutors to advise foreign nationals of their right to consult counsel from their own country.⁸⁸ This is a recurring issue for prosecutors in this district, which is in a state bordering Mexico. The Assistant U.S. Attorney, recognizing that the issue implicates law enforcement and foreign policy concerns, consults the local U.S. Attorney, who in turn consults DOJ.

Should the Assistant U.S. Attorney give the additional warnings? Who should decide, and on what basis?

A. What is the Policy Issue?

At one level, Scenario 1 implicates traditional law enforcement policy questions that parallel the questions of whether to provide a suspect with *Miranda* warnings,⁸⁹ whether fairness militates in favor of providing warnings beyond those legally required, and whether to forego warnings that are required in order to achieve some other objective.⁹⁰ Initially, the prosecutor must consider the effects of giving Vienna Convention warnings on his ability to obtain a conviction of a guilty defendant. If this were a simple *Miranda* warning, the prosecutor would have no question about what to do. He would give the warning because it is constitutionally required, unless he is prepared to prosecute the case without the fruits of the interrogation.⁹¹ Here, however, the additional warnings may not be constitutionally required, so withholding them could, perhaps lawfully, increase the likelihood of a conviction.

The prosecutor might nonetheless see a reason to offer consular counsel,

was no required to enforce a decision of the International Court of Justice holding that the state had violated the convention.

⁸⁸ Vienna Convention on Consular Relations art. 36, Dec. 14, 1969, 21 U.S.T. 77, 100-01.

⁸⁹ *Miranda v. Arizona*, 396 U.S. 868 (1969) (requiring the giving of prophylactic warnings to defendants undergoing custodial interrogation).

⁹⁰ Statements obtained in violation of *Miranda* can, for example, be useful in locating victims, accumulating evidence against other suspects, and impeaching defendants who testify at trial.

⁹¹ In other words, the prosecutor might withhold the warnings in order to obtain information benefiting the government in ways other than its introduction in the prosecution's case in chief against this defendant.

rooted in his sense of procedural justice. Many foreign defendants do not understand the American justice system. The Convention reflects the notion that it is procedurally fair to provide access to a lawyer who is a compatriot, to rectify the informational deficiency and to assure this defendant and other foreign residents that the unfamiliar legal system will treat them evenhandedly. American prosecutors need not give criminal defendants warnings beyond *Miranda*, but they certainly *may* do so when they consider it necessary to serve justice. They may advise juveniles to wait for parents, self-destructive defendants that they should seek counsel, and less culpable co-defendants that it is in their interests to make a deal with investigators first. Ordinarily, whether to provide extra warnings is left to line prosecutors' discretion.

Depending on his view of the obligation to serve justice, the Assistant U.S. Attorney in Scenario 1 could even believe that this obligation *requires* him to give unnecessary warnings. A court might not exclude evidence obtained in violation of the Vienna Convention, but the United States has signed the Convention, and the warnings in at least that sense are legally mandated. The prosecutor may consider it a first principle that law enforcement personnel should comply with the law, regardless of how that affects the case.

Who, among the possible prosecution personnel, should reconcile these competing considerations? Some would argue that, because personal and fact-sensitive issues are in play, line prosecutors should be allowed to exercise discretion. But supervisory prosecutors or the U.S. Attorney would not be out of bounds in providing input into the decision or even establishing an office policy resolving the matter. Arguably, the central administration in Washington, D.C. could have input as well, perhaps by explaining how these situations should be addressed in the U.S. Attorneys' Manual.⁹²

But Scenario 1 is far more complex, because it implicates national law enforcement policy issues as well. Gang-related murder is a state and federal crime.⁹³ Federal prosecutors must decide whether to cede primary prosecuting authority to state prosecutors, on the one hand, or address the issue on a federal basis because state resources are inadequate to deal with gangs, on the other. The best answer to these questions may vary from district to district. The relative importance of successfully prosecuting gang-related crimes might influence the decision about whether to provide possibly unnecessary warnings.

How to address crimes by illegal immigrants is another pressing national

⁹² See *supra* text accompanying notes 19–22 (referring to USAM policies).

⁹³ See, e.g., Robert A. Destro, *The Hostages in the 'Hood*, 36 ARIZ. L. REV. 785 (1994) (discussing federal prosecutions of gangs under RICO and federal gun possession prohibitions).

law enforcement issue. There are many options, ranging from immediate deportation to creating a deterrent through maximum prosecution. Again, one might perceive the appropriate prosecutorial approach to warnings to be case-sensitive (in which event the decision seems personal to the individual Assistant U.S. Attorney), office-sensitive because it depends on the degree of illegal immigration and crime by foreign nationals in the district (in which case it falls into the purview of the U.S. Attorney making resource-allocation decisions), or part of the national immigration debate (in which case centralized decision making might be appropriate).

The problem of which policy is implicated becomes even more complicated when one considers the foreign policy implications of observing, or not observing, the Vienna Convention. A refusal to obey may affect other countries' willingness to abide by the Convention's terms. Conversely, other countries, including Mexico, may already be violating the Convention; similar conduct by American prosecutors may be necessary to encourage their compliance. Alternatively, America's willingness to comply with the treaty provision, or non-compliance accompanied by a promise to potentially comply, can be a bargaining chip in negotiations with foreign countries about separate issues. Or, considered in the real world of foreign relations, this provision may simply be viewed by all signatories to the Convention as hortatory, meaning that signatories may comply or not as they see fit.

Whether U.S. prosecutors abide by the apparent requirements of the Vienna Convention can also affect the country's international standing. As with America's use of torture at Abu Ghraib and denial of fair process in Guantanamo, disregard of the Convention might brand the United States as an international scofflaw or undermine America's credibility when seeking to discourage other nations' violations of international law. Therefore, even if the line prosecutor correctly determines that American courts would not exclude evidence obtained in the absence of Convention warnings and that withholding warnings would serve justice, the national government's interest in maintaining appearances abroad might favor providing the warnings nonetheless.

The nature of the Vienna Convention provision and the country's interest in its enforcement, or non-enforcement, are issues that seem beyond the competence of the line prosecutor and his immediate superiors. Even the Attorney General may be out of his league, because such issues ordinarily are controlled by the President and the Secretary of State. But some or all of the prosecutors may have a role to play in considering whether law enforcement policies rather than foreign policy concerns should be emphasized in Scenario 1.

B. *Who is Best Able to Decide the Policy Issues?*

Several potential decisionmakers can claim expertise in deciding how the prosecuting attorney in Scenario 1 should accommodate the competing law enforcement interests. Before analyzing their relative competence *on this issue*, it seems appropriate to exclude one potential decisionmaker from the equation: the President.

Although both the Attorney General and the U.S. Attorney serve at the pleasure of the President, the President ordinarily does not involve himself in individual criminal prosecutions.

The fact that the Constitution gives the President pardon authority⁹⁴ suggests that he should not involve himself; if the President controlled prosecutions, there would be no need for the pardon authority, because the President could simply direct dismissal of a prosecution before a defendant is convicted. As a practical matter, Presidents historically have not interjected themselves into individual cases.⁹⁵ When they have attempted to do so, as with President Richard Nixon's instruction to Attorney General Elliot Richardson to discharge the special prosecutor investigating him, they have ended up denying any intention to control the criminal justice process.⁹⁶

The reasons for this practice of deferring to professional prosecutors are not obvious.⁹⁷ Foreign leaders influence prosecutions; indeed, our own presidents frequently negotiate with foreign leaders for the release of so-called "political prisoners" and defendants they perceive to be victims of "human rights violations."⁹⁸ And the President is the Chief Executive,

⁹⁴ U.S. CONST. art. II, § 2, cl. 1.

⁹⁵ See NANCY V. BAKER, GENERAL ASHCROFT 18 (2002) (describing a norm, before John Ashcroft's tenure, of no White House interference in cases and nonpartisan decision making by the Attorney General); Rory K. Little, *Prosecution Politics*, L.A. DAILY J., Mar. 22, 2007, at 8 (noting of the current scandal, "Only once before has it been seriously alleged that the White House sought to remove a federal prosecutor based on substantive unhappiness with his investigative decisions").

⁹⁶ See Michael J. Glennon, *Nine Ways to Avoid a Train Wreck: How Title 3 Should be Changed*, 23 CARDOZO L. REV. 1159, 1166 (2002) (detailing Nixon's Executive Order vowing not to remove the second Special Prosecutor assigned to investigate him, except for "extraordinary improprieties").

⁹⁷ For a good collection of arguments and authorities on the question of whether Presidents should involve themselves in law enforcement decisions, see Note, *supra* note 10, at 424-34.

⁹⁸ See Demetra K. Matsis, *Guestworker Policies and Apartheid: Does One Resemble the Other?*, 74 MARQ. L. REV. 525, 556 (1991) (discussing President George H. W. Bush's removal of economic sanctions against South Africa upon release of all political prisoners); see also John J. Bowling & Jeff A. Cohen, *When May a Sovereign Be Held Liable for the Acts of Her Instrumentalities Under the Foreign Sovereign Immunities Act? The Effect of the McKesson Decision*, 1 TULSA J. COMP. & INT'L L. 285, 286 (1994)

arguably in control of DOJ.

Nevertheless, the traditional presidential deference makes sense. Presidents are not always lawyers, so they cannot be expected to understand prosecutors' legal and ethical obligations.⁹⁹ Neither presidents individually, nor the office they occupy, have experience in reviewing criminal cases. Presidents are not in a position, because of the demands on their time, to personally learn the full details of even a single prosecution. Their familiarity with law enforcement policy typically is limited to the information the Attorney General provides.

Ordinarily, it is line prosecutors who are accorded discretion to implement case-sensitive law enforcement concerns. They know the facts best. They have first-hand knowledge regarding aspects of the case that cannot be documented, including observations of the defendants' and witnesses' sophistication and demeanor that might bear on how the prosecution should proceed. Most importantly, the line prosecutor must live with the consequences of his actions, particularly where, as here, he must consider whether his conduct (e.g., failing to give Vienna Convention warnings) would consist of a personal violation of the law.

In Scenario 1, many of the considerations relevant to the procedural justice issues are indeed fact-sensitive, including the defendant's sophistication, his language facility, and his familiarity with the American criminal justice system. The nature of the crime, the defendant's criminal history, and his personal attitude also might affect the calculus of whether providing borderline warnings is appropriate. These factors militate in favor of leaving the decision of how to proceed in the Assistant U.S. Attorney's hands.

However, because the issue of whether to provide Vienna Convention warnings will recur—both within the district and nationally—there may be grounds for the Attorney General or the U.S. Attorney to influence the line prosecutor's decision by adopting a policy governing all such cases. Centralizing the policy judgment has several benefits. Centralization assures that the outcome judged appropriate will be implemented uniformly, rather than being based on each Assistant U.S. Attorney's idiosyncratic notion of what is fair. A policy imposed by DOJ or the U.S. Attorney constrains misconduct by prosecutors who are too concerned with obtaining convictions. The policy also would educate inexperienced prosecutors, who may not understand the issues regarding foreign defendants. The instruction line prosecutors receive through the dissemination of a centralized regulation

(detailing the Algiers Accords under President Carter, which led to the release of Iranian hostages).

⁹⁹ There are significant exceptions, including William Howard Taft, a future U.S. Supreme Court chief justice. See BAKER, *supra* note 26, at 14–15 (discussing presidents' personal participation in legal decisions). President George W. Bush is not a lawyer.

enables them to inform other law enforcement personnel of the potential need for warnings, including investigators who otherwise might never consult an Assistant U.S. Attorney. To the extent that the ultimate decision of whether Vienna Convention warnings should be imparted depends on case-sensitive facts, the centralized policy need not be rigid; it can provide guidance by identifying relevant factors to be considered or can provide presumptions that may be overcome in individual cases.

In Scenario 1, there is another reason to allow DOJ to decide how law enforcement policies cut. One important issue is the nature of the Vienna Convention requirement—whether it is operative law and in what sense. Although Assistant U.S. Attorneys and U.S. Attorneys can research that legal question, they are not experts in international law. DOJ, in contrast, has offices specializing in such matters, including the Criminal Division's Office of International Affairs¹⁰⁰ and the Office of Legal Counsel that advises the President and Attorney General on the legal consequences of treaty agreements.¹⁰¹ Arguably, the expertise on the issue of whether prosecutors violate American law by withholding Vienna Convention warnings lies in DOJ.

DOJ, which includes the Solicitor General's Office, also has superior expertise in predicting how American courts will respond to the Convention's requirements. DOJ deals with American appellate courts on a routine basis.¹⁰² DOJ will be responsible for arguing the Vienna Convention issues before the U.S. Supreme Court, giving it an incentive to decide the issues correctly.¹⁰³ Because the Solicitor General ultimately must decide whether to even make the argument that withholding warnings is lawful, DOJ logically should be able to determine whether subordinate prosecutors

¹⁰⁰ See U.S. Dep't of Just., Criminal Division, Office of International Affairs, <http://www.usdoj.gov/criminal/links/oia.html> (last visited Apr. 6, 2008) (describing the Office of International Affairs).

¹⁰¹ See U.S. Dep't of Just., Office of Legal Counsel, <http://www.usdoj.gov/olc> (last visited Apr. 6, 2008) (describing the Office of Legal Counsel); cf. U.S. Department of Just., Office of Legal Counsel, Memorandum for James B. Comey, Deputy Attorney General (Feb. 18, 2008) (analyzing the affects of various treaties on the government's use of torture), available at <http://f11.findlaw.com/news.findlaw.com/hdocs/docs/terrorism/dojtorture123004mem.pdf>.

¹⁰² U.S. Attorneys' Offices handle their own appeals, but the Appellate Section of DOJ's Criminal Division reviews lower court decisions to determine in which cases to seek review, appears in some appellate cases, and assists the Solicitor General's office in preparing Supreme Court briefs. See U.S. Dep't of Just., Criminal Division, Appellate Section, <http://www.usdoj.gov/criminal/links/appellate.html> (last visited Apr. 6, 2008).

¹⁰³ For a full discussion of the Solicitor General's influence on DOJ decision making, see generally PETER N. UBERTACCIO III, *LEARNED IN THE LAW AND POLITICS* (2005).

may take that position.¹⁰⁴

More generally, when centralization of legal or policy decisions makes sense because the issues recur nationwide and geographic distinctions are irrelevant (or can be factored into the policy), the decisions should be made at the highest level of criminal law enforcement—by the Attorney General or his designees. In Scenario 1, for example, individual U.S. Attorneys have no relative advantage in determining whether, to receive fair process, foreign nationals must have access to consular attorneys. There is no reason to believe that DOJ officials will have biases for which U.S. Attorneys must correct. In evaluating the issue, DOJ also is in a position to obtain a wider range of input—including input from all ninety-four U.S. Attorneys. In contrast, when an issue recurs mainly within select districts, U.S. Attorneys within those districts may have greater interest in developing a sound policy, as well as superior expertise.

Should there be limits on the implementation of a central authority's judgment? More specifically, does it make sense to allow DOJ or the U.S. Attorney to adopt categorical internal regulations that deny line prosecutors discretion to be more protective of defendants' rights than the law requires?¹⁰⁵ Arguably the ethical obligation of prosecutors to "do justice" implies the presence of case-by-case discretion to act in a defense-oriented way.¹⁰⁶ Ensuring that line prosecutors are able to overrule categorical policies in the interests of justice can serve as a check on institutional overzealousness.

At some extreme, there must be some limit to supervisory authority. DOJ and the U.S. Attorney ought not be allowed to require line prosecutors to violate their own ethical responsibilities. Centralized policies, for example, may not legitimately instruct line attorneys to prosecute innocent defendants

¹⁰⁴ See EISENSTEIN, *supra* note 28, at 2 ("The solicitor general's office represents the federal government in the Supreme Court and determines whether unfavorable lower court decisions will be appealed.")

¹⁰⁵ In other words, in Scenario 1, must the centralized policy preserve the line prosecutor's discretion to give Vienna Convention warnings even in the absence of any legal requirement?

¹⁰⁶ See, e.g., Bennett L. Gershman, *The Prosecutor's Duty to Truth*, 14 GEO. J. LEGAL ETHICS 309, 328 (2001) (discussing prosecutors' ethical obligation to disclose potentially exculpatory evidence where discovery rules and constitutional law do not require disclosure); Jeffrey J. Pokorak, *Rape Victims and Prosecutors: The Inevitable Ethical Conflict of De Facto Client/Attorney Relationships*, 48 S. TEX. L. REV. 695, 706 (2007) ("Because the prosecutor's justice obligation requires the protection of the innocent as well as . . . punishment of the guilty, the defendant is also among 'the people' whom the prosecutor represents."); cf. Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?*, 44 VAND. L. REV. 45, 69 (1991) (concluding that sometimes prosecutors' duty to serve justice requires them to act in ways beneficial to defendants that are not legally mandated).

or routinely violate *Miranda*.¹⁰⁷ Similarly, a policy that constrains subordinate prosecutors' discretion too much may forbid the prosecutors from considering clearly relevant factors and thereby undermine the pursuit of justice. But that speaks only to categorical policies of an unusually stark type. DOJ policies typically are limited or presumptive rather than categorical, because Justice Department officials understand the benefits of prosecutorial discretion.¹⁰⁸ The choice between centralized and discretionary decision making ordinarily does not reflect a situation in which either the subordinate or supervising prosecutor advocates wrongdoing, but rather reflects a disagreement about who should control a decision when there are reasonable arguments on both sides.

Categorical rules—even categorical rules that foreclose benefits to some defendants—have their place, particularly when they depend on the superior ability of DOJ to make the policy judgment. In Scenario 1, other than an innate sympathy for defendants or inherent distrust of convictions, there is no reason to give line prosecutors a veto by concluding that their assessment of the Vienna Convention is superior to DOJ's and that "justice" therefore requires implementation of the Convention. A well-constructed policy or articulation of principles that reduces line prosecutors' discretion in individual cases promotes both uniformity and justice by reducing the risk that line prosecutors will consider arbitrary or inapplicable factors.¹⁰⁹

Thus far, we have addressed only the question of who is best able to develop and implement the narrow law enforcement policy that prosecutors should serve justice in their individual cases. As we have seen, however,

¹⁰⁷ Law enforcement personnel have no obligation to give *Miranda* warnings; they simply risk having resulting evidence excluded if they withhold warnings. The U.S. Supreme Court has, however, taken a dim view of efforts to circumvent *Miranda* based on manipulations of the law. See *Missouri v. Seibert*, 542 U.S. 600, 617 (2004) ("Strategists dedicated to draining the substance out of *Miranda* cannot accomplish by training instructions what *Dickerson* held Congress could not do by statute."). The issue of whether a supervisor may instruct a U.S. Attorney to violate *Miranda* in order to test the law is discussed *infra* text accompanying note 114.

¹⁰⁸ When DOJ declines to adopt a defendant-protective policy, it is not necessarily instructing prosecutors to withhold protections. The absence of DOJ policy may simply mean "the Attorney General leaves the issue to the U.S. Attorneys" or "the Attorney General does not believe special protections should be given, but others may disagree." Alternatively, it may be seen as a presumption that special protections (e.g., warnings) should not be provided, but one which recognizes the possibility of exceptions.

¹⁰⁹ See *Green & Zacharias*, *supra* note 64, at 853–59 (discussing impermissible considerations for prosecutors). Conversely, forbidding DOJ to control the decision through categorical instructions by definition would result in non-uniform decision making regarding the Convention, despite DOJ's assessment that a single correct approach exists. It is important to note that DOJ efforts to promote uniformity can benefit or disadvantage defendants.

national policy issues relating to law enforcement exist as well, including the interest in having federal authorities address gang violence in an appropriate way and national policy relating to crime by illegal immigrants. Is the process best served through line-attorney or centralized decision making?

Line prosecutors may have the clearest insights into whether, based on the facts, the defendants in their cases are guilty, deserve punishment, and how much. They may have some, but probably limited, knowledge of the nature of gang violence and the extent of crime by illegal immigrants in their districts. They will not, however, have studied the issues of gang violence or illegal immigration more broadly.

The question of whether federal prosecutorial resources should be devoted to prosecuting gang violence has several facets. The first is relevant to the line prosecutor's domain: did the particular defendant do something dangerous and illegal for which he should be prosecuted? The Assistant U.S. Attorney may be in the best position to make this assessment, but, if the U.S. Attorney or designated supervisors in the office wish to review the specific case, they can be brought up to speed.

The next set of issues relates to resource allocation, a subject about which the Assistant U.S. Attorney is unlikely to be well informed. Are state prosecutors already prosecuting the gang-related crimes the U.S. Attorney's office is addressing, or would they prosecute adequately if the U.S. Attorney's office did not do so? Do federal prosecutions that complement state prosecutions provide significant additional deterrence of gang violence? If the U.S. Attorney's Office did not focus on gang-related crimes, what would the freed-up investigative and prosecutorial resources be used for, and what is the better use? These are questions peculiarly within the expertise of the U.S. Attorney, who should be familiar with the scope of all prosecutions in his office, in contact with the local FBI concerning local crime, and capable of conferring with state law enforcement officials. DOJ *may* have expertise on this issue as well if one of its units has, for policy reasons, engaged in a national study of gang-related crime and the capacity of the federal government to ameliorate the problem. But if the Department has not become invested in the issue, the Attorney General ordinarily should rely on the U.S. Attorney's expertise.

The third set of issues is broader in nature. Is local gang-related criminal activity a legitimate federal concern? To what extent is federal intervention necessary to address the problem? Do state governments welcome federal intervention in this arena, or do they believe it violates notions of federalism?¹¹⁰ These are legal, sociological, and political issues which the

¹¹⁰ See generally *Gonzales v. Raich*, 545 U.S. 1 (2005) (federalism-based challenge to the federal government's use of federal narcotics prosecutions to nullify California's statute authorizing possession and distribution of marijuana for medical purposes); Printz

federal government should be deciding centrally and on the basis of extensive study. Neither the line attorney nor the U.S. Attorney can speak for anyone but himself in expressing an opinion on these issues.

What this suggests is that the Assistant U.S. Attorney's decision about how to proceed against Sanchez in Scenario 1—including whether to take extraordinary measures to convict him (e.g., by withholding Vienna Convention warnings)—may be correct on the basis of the narrow law enforcement concerns that line prosecutors typically consider in exercising discretion, yet inconsistent with the U.S. Attorney's administrative decision regarding the value of proceeding against gang defendants and/or the Attorney General's or President's policy judgment regarding the national government's role in the federal system.

The law enforcement policy issues relating to crime by illegal immigrants highlight the dichotomy even more starkly. At one level, prosecutors must decide whether criminal justice warrants prosecution, and in what way. On the specific warnings issue in Scenario 1, the fact that the defendant is in the country illegally (and that he joined a gang) seems to have little bearing on how the prosecutor should proceed in his investigation, because that factor does not affect the elements of the crime.

On a national level, however, how prosecutors address crimes involving illegal immigrants—and whether they choose to give warnings not legally required—can affect immigration policy. U.S. Attorneys in border states such as Texas and California, may consider it their function and obligation to their districts to help stem the tide of illegal immigration by forcefully prosecuting all such crimes, including providing only the mandatory procedural protections for defendants.¹¹¹ They may therefore agree with the line attorney's assessment of the factual imperatives underlying the individual case, but nevertheless encourage a different approach. For deterrent purposes, the Attorney General might take the same position with respect to all federal districts, even those in which the U.S. Attorney perceives no special problem caused by illegal immigration; here, the Attorney General in effect would be emphasizing the national policy implications over the resistant U.S. Attorney's assessment of the optimal allocation of resources in his district.

The reasons to prefer centralized decision making in these examples might be the same as those discussed in connection with the narrow law enforcement policy of achieving just results, but not necessarily. One might adopt an internal policy for immigration-related cases to achieve uniform

v. United States, 521 U.S. 898 (1997) (upholding a county sheriff's challenge to a federal law requiring state officials to enforce federal gun control procedures).

¹¹¹ See EISENSTEIN, *supra* note 28, at x (“[U]nlike most other field personnel implementing centrally determined policies . . . [U.S. Attorneys] identify with the community in which they serve.”).

decisions or implement the experts' legal judgment regarding Vienna Convention warnings. But one might also control lower-level decisions for reasons unrelated to the subordinate prosecutors' relative decision-making expertise. If the centralized authority (i.e., DOJ or the U.S. Attorney) is correct in its national policy judgment and if that factor—which an Assistant U.S. Attorney might not even consider—is a legitimate basis for prosecutorial decisions, there is every right to supersede the line prosecutor's decisions. The subordinate attorney may have an argument that the policies he wishes to effectuate are more important than, or should trump, the independent values being implemented by the central authority, but the subordinate has no argument that he is in the best position to make the decision.

This becomes even clearer when we consider the foreign policy implications of providing, or not providing, Vienna Convention warnings. The Assistant U.S. Attorney who gives Sanchez the warning in Scenario 1 may do so on the assumptions that the Convention binds American prosecutors and that it is in the federal government's interests for prosecutors to comply with the Convention. We have already mentioned that the line prosecutor or his U.S. Attorney might make the first assumption based on legal research in an area in which they have less expertise than DOJ. They have no basis at all for reaching the second conclusion, except for an intuition that laws are meant to be obeyed. In the international arena of negotiated obligations, however, that conclusion is not always true. Adhering to it may in fact undermine federal interests (and endanger American citizens in signatory countries that violate their obligations) in subsequent negotiations.

Any argument that the subordinate prosecutors should themselves decide whether to follow the Vienna Convention cannot be based on their superior expertise in making such decisions, their superiority in evaluating the facts, or their unique objectivity. Indeed, on some of the foreign relations issues, the President (acting with the State Department) is the optimal decisionmaker. He is best situated to identify international leaders' mutual understanding of the Vienna Convention. Only the President can anticipate future negotiations with Mexico and determine what approach to the Convention warnings puts the country in the best negotiating position. The President is best able to assess the likely affects of providing or withholding warnings on the country's standing in the international community.¹¹²

To put it more baldly, what should the subordinate prosecutor (i.e., the

¹¹² The decision of whether to seek extradition of a suspect or to allow extradition to particular countries often implicates similar foreign policy issues. The need for a uniform approach and for the government to act in a way the President is prepared to defend in the international arena suggest that the President sometimes should have a role in the decision making.

line prosecutor or the U.S. Attorney) do if the Secretary of State accompanies the Attorney General to a meeting in the prosecutor's office and together they say: "The President's position is that the United States will not follow the Vienna Convention until Mexico complies. So do not provide Convention warnings to Sanchez. While you're at it, do not provide *Miranda* warnings either." The subordinate prosecutors might reasonably respond that neither the President nor the Attorney General has authority to command a *Miranda* violation, because that contravenes the spirit, if not the letter, of American law.¹¹³ Yet unless the prosecutors are certain that the Vienna Convention reflects law of similar obligation, their response regarding consular counsel cannot be the same. The subordinate prosecutors may not have the wherewithal to make any judgment on the issue. If they do, and determine that treaty obligations are often deemed negotiable, the only possible justification for providing the warnings are that the law enforcement values they are charged with implementing somehow take precedence over the legitimate separate values that their superiors deem more important.

If we change the facts slightly, even the instruction to violate *Miranda* can not be so easily resolved. Suppose DOJ concludes, after study, that the new appointments to the U.S. Supreme Court make it likely that the Court would overrule *Miranda* in cases in which an un-Mirandized confession is voluntary.¹¹⁴ Believing *Miranda* to have an adverse impact on federal law enforcement, the Attorney General then issues an order forbidding federal prosecutors to give *Miranda* warnings in cases in which resulting confessions will be voluntary. May a line prosecutor demand the right to give *Miranda* warnings nonetheless, on the grounds that *Miranda* is still the law?

It would be "ethical" for the Assistant U.S. Attorney to obey the Attorney General's instruction; modern professional codes allow subordinate attorneys to act "in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty."¹¹⁵ Lawyers are permitted to make claims in court that contradict prevailing law when they have "a good faith argument for a . . . modification [or] reversal."¹¹⁶ If the federal government is ever going to be able to challenge *Miranda*, line prosecutors will have to preserve the claim at the trial level.

Although the dubious Assistant U.S. Attorney has a reasonable argument that doing justice requires giving the warning, his superiors have an equally

¹¹³ See *supra* note 107.

¹¹⁴ See Andrew E. Taslitz, *Temporal Adversarialism, Criminal Justice, and the Rehnquist Court: The Sluggish Life of Political Factfinding*, 94 GEO. L.J. 1589, 1590 n.1 (2006) ("[A]lthough the Court declined to overrule *Miranda v. Arizona* in *Dickerson v. United States*, it quickly followed *Dickerson* with cases sharply restricting *Miranda*'s scope." (citations omitted)).

¹¹⁵ MODEL RULES OF PROF'L CONDUCT R. 5.2 (2002).

¹¹⁶ *Id.* R. 3.1.

reasonable claim that they are ultimately responsible for the cases and may overrule his judgment. There is a benefit to having such jurisprudential policy judgments made at the central level, rather than by line prosecutors whose case-by-case decisions are not reviewed, because the central authority's determination will become public. When the centralized decision to challenge *Miranda* is announced, accountability for the decision becomes possible even before the cases reach the Supreme Court stage.

Suppose, however, that the President gives the command to challenge *Miranda*. Must the Assistant U.S. Attorney—or for that matter the Attorney General or U.S. Attorney—obey? Here one might conclude that the President overstepped his authority, or at least acted beyond his level of competence. Arguably, a *legal* judgment must be made, both on the merits of the challenge and the ethics of withholding the warning. The President, particularly a non-lawyer President, may need to leave those judgments to the legal professionals. Conversely, the line prosecutor who believes he has an ethical obligation to follow the existing law may not, under the prevailing legal ethics codes, take a contrary position in reliance on the judgment of a layperson—even a President who is technically his superior.

C. *Whom Do We Trust to Make the Decision?*

Having established that identifying the policy issues prosecutors must decide can be difficult and that cases often encompass multiple policy issues, it becomes hard to reach firm conclusions about when centralization of authority is appropriate. Sometimes our intuitions about the proper allocation of authority is colored by specific facts that give us a reason to distrust one decisionmaker or the other—because of bias, his reliance upon improper considerations, or special indications of untrustworthiness.¹¹⁷ Unlike many of the cases involved in the recent U.S. Attorney firings, however, Scenario 1 offers a relatively routine law enforcement problem, with no extraordinary motivational concerns. It simply highlights a variety of policy issues about which different participants in the system have varying levels of interest and expertise.

A few aspects of the scenario suggest potential grounds for questioning the neutrality of some of the possible decisionmakers. Let us assume that the answer to the legal question of whether the Vienna Convention binds prosecutors, and would be enforced by courts, is uncertain. One intuition might be that the decision of whether to give the warnings should be left to the Assistant U.S. Attorney because his obligations and reputation are on the line. His personal credibility with the courts, colleagues, and defense attorneys will be affected by how he responds to uncertainty in the law.

¹¹⁷ These considerations are discussed *infra* Part VI.

Arguably, no one should be able to tell a prosecutor to act in a way that he deems is, or might be, illegal.

An equally powerful intuition, however, militates in the opposite direction. Because the Assistant U.S. Attorney has a personal stake in the outcome, he has incentives to make an incorrect decision on the law. He may give warnings too readily, as a safe way to avoid potential criticism or disciplinary repercussions. He may also wish to avoid the potential impact on his own caseload if courts subsequently determine that warnings were required. On the other hand, the line prosecutor's psychological and career interests in earning convictions may cause him to withhold warnings too readily. On either view, supervisory review by the U.S. Attorney or the implementation of DOJ policies might be useful in ensuring that the balance between convicting the guilty and safeguarding defendants' rights is struck on the basis of appropriate considerations.

In choosing between centralized and line decision making here, it is important to note that if a line prosecutor makes a decision for the wrong reasons, little is likely to happen to him other than a reversal of a conviction.¹¹⁸ In contrast, if the decision to give or withhold warnings derives from a centralized regulation promulgated by DOJ or the U.S. Attorney, some accountability results. Pressure can be brought to bear, through the press and Congress, to counteract the decision. The U.S. Attorney or the Attorney General will need to defend it. This accountability creates pressure for the decisionmaker to get it right.

Observers who worry most about prosecutorial misconduct might argue that "justice" requires a one-way ratchet protecting defendants' rights. In other words, an Assistant U.S. Attorney must have leeway to give warnings he deems necessary and the central authority should be empowered to require the Assistant U.S. Attorney to give warnings even when he does not want to. Conversely, however, the Assistant U.S. Attorney should not be allowed to forgo the warnings in violation of a superior's command, nor should the central authority be permitted to demand a potentially unlawful withholding of warnings.

Although this approach is superficially appealing because it safeguards defendants' legal rights, it probably reads too much into prosecutors' obligation to serve justice. Prosecutors do not owe a duty to maximize procedural protections for defendants to the exclusion of other interests. To the contrary, implementing their obligation requires prosecutors to balance all the competing considerations objectively, including society's and the

¹¹⁸ See, e.g., Tracey L. Meares, *Rewards for Good Behavior: Influencing Prosecutorial Discretion and Conduct with Financial Incentives*, 64 *FORDHAM L. REV.* 851, 900 (1995) ("Reversal is not a true sanction, as it is not specifically directed towards punishing the prosecutor.").

victim's interest in obtaining convictions of the guilty.¹¹⁹ It is, therefore, wrong to assume that the concept of justice automatically mandates prophylactic measures tilting the balance in defendants' favor or that centralized judgments adverse to defendants necessarily are subject to veto by all actors in the process.

As will be discussed in Part V, the likelihood of illegitimate motivation on the part of a U.S. Attorney or Attorney General depends significantly on the issues involved. Scenario 1 suggests no facts that would cause the U.S. Attorney to reach decisions inconsistent with the natural exercise of his expertise. This conclusion might change, however, if the particular U.S. Attorney has political aspirations in the community in which he sits. Then, his allocation of office resources to fight gang violence, for example, might be colored by his political agenda; state law enforcement already addresses gang violence and the decision may simply cater to potential constituents. Even though the U.S. Attorney has the most expertise and the best information to make local resource-allocation decisions, it may therefore be appropriate for DOJ to intervene—at least for the purpose of performing a limited review.

One can say the same about the Attorney General's and DOJ's decision making. The officials in Washington, D.C. may not have a personal stake in whether Vienna Convention warnings are given, but the President and his party do have a political stake in appearing to combat illegal immigration. Depending on how visible the specific immigration issues in Scenario 1 are in the public press and depending on whether there is evidence of White House involvement in DOJ's decision making, there may be grounds to worry about DOJ's policy judgments. The problem, as in the recent discharge cases, is that it is difficult to identify political interference in DOJ decisions before those decisions are made.¹²⁰ More significantly, even if one suspects DOJ's motivation, the possible alternative decisionmakers (e.g., the U.S. Attorney and line Assistant U.S. Attorneys) may have limited or no expertise in evaluating the national law enforcement interests.

D. *Which Policy Considerations Should Trump?*

Reasonable minds will differ about the best outcome in Scenario 1. Some observers would emphasize the duty to assure procedural justice, others would focus on broader national law enforcement concerns, and yet others

¹¹⁹ See Zacharias, *supra* note 106, at 57 ("The prosecutor is simultaneously responsible for the community's protection, victims' desire for vengeance, defendants' entitlement to a fair opportunity for vindication, and the state's need for a criminal justice system that is efficient and appears fair.").

¹²⁰ Part VI addresses this problem.

would highlight the President's prerogative to control foreign affairs. Who will decide is at root a matter of naked power; the President can fire the Attorney General who fails to bend to his will, the Attorney General can set policies that bind subordinate attorneys at pain of discharge, the U.S. Attorney can supervise his staff, and the line Attorney can make his own decisions in individual cases and suffer the consequences if those decisions conflict with his superiors' commands.¹²¹ As a theoretical matter, however, for each issue in Scenario 1, there are both better and worse decisionmakers and varying levels of justification for centralization of authority. The intractable problem Scenario 1 presents is not who should decide the policy issues, but rather which policy issue should be treated as paramount.

The intuitions we have offered are nevertheless instructive. At one level, they suggest that decision making in federal criminal cases should not be allocated in an atomistic manner, simply by looking at the case presented and determining who has the power to, or who should, decide the case. It would often be wrong, for example, to conclude that a particular decision—say, whether to allow arrested foreign nationals access to consular attorneys—should be made by a particular player. It may be that several players should have a voice, depending on *why* the particular decision is being made. Even with respect to discrete aspects of the decision, optimal decision making may entail a process through which lower and higher ranking prosecutors have input.

Understanding the reasons why different members of the prosecution corps are in the best position to make particular types of decisions informs all participants regarding how to act. On the basic question of which policy issue is most important in Scenario 1, there should be some give and take. The Assistant U.S. Attorney must be able to discuss with his superiors his judgment that individualized justice concerns should trump more general concerns about immigration policy, yet the line prosecutor must also recognize that a broader perspective exists. Conversely, the U.S. Attorney should be prepared to explain his resource allocation decisions to the Assistant U.S. Attorney who wishes to pursue a violent gang member, but also acknowledge that he, like the Assistant U.S. Attorney, has an obligation as a prosecutor to do justice in the individual case.

In light of our conclusions, one would not expect the Attorney General or DOJ to implement centralized authority without consulting U.S. Attorneys and their staffs. This can provide an opportunity to flesh out the competing policy considerations and determine when the reasons for centralization are present and when local or case-specific concerns militate in favor of a different decision-making regime. If DOJ understands the underlying

¹²¹ Often, line prosecutors can disobey in ways that will escape their superiors' attention. This, of course, raises questions of accountability.

benefits *and costs* of centralization, it should become hesitant to impose categorical regulations unless the legitimate purposes of centralization truly will be furthered. Likewise, the U.S. Attorney who understands which sorts of considerations are best implemented centrally and when local or line evaluation of the issues makes the most sense will be in a better position to resist improper influence from DOJ and to explain his reasons for doing so.

The recent firings of U.S. Attorneys, of course, implicate many issues other than the intractable problem of identifying the dominant policy issues and reconciling the emphases of the various prosecutors. Most notably, the discharges raise questions about which policies prosecutorial officials may legitimately pursue. The discharges also call into question whether and when political considerations may influence the interaction between the President, Attorney General, and the rest of the prosecution corps. The following scenarios address these, and other, issues.

V. THE SEMANTIC AND SUBSTANTIVE PROBLEM OF DISTINGUISHING NEUTRAL PROSECUTIONS, POLITICS, AND PARTISAN POLITICS

The furor surrounding the U.S. Attorney discharges has been fueled in part by critics' perceptions that Attorney General Gonzales, acting at the behest of or in sympathy with the President and his political advisors, was trying to advance the Republican Party's partisan political agenda.¹²² The critics' view is that U.S. Attorneys forced to resign because of their lack of commitment to the agenda in fact acted consistently with the traditional prosecutorial obligation to promote justice: they were weeding out unworthy cases and allocating prosecutorial resources to the crimes they deemed most important.¹²³ In contrast, defenders of the Administration's position have argued that the Attorney General acted legitimately in adopting national criminal law enforcement policy and that, by resisting that policy, the discharged U.S. Attorneys failed to do their jobs.¹²⁴

The two perspectives surfaced sharply in connection with the Attorney General's apparent insistence that DOJ vigorously enforce laws against voter fraud. This policy might have been designed to maintain the integrity of the democratic process. Arguably, the choice was "political" only in the

¹²² See, e.g., Editorial, *supra* note 8 (opining that DOJ officials were pressured into pursuing partisan objectives).

¹²³ See, e.g., David Iglesias, Op-Ed., *Why I Was Fired*, N.Y. TIMES, Mar. 21, 2007, at A21 ("What the critics, who don't have any experience as prosecutors, have asserted is reprehensible—namely that I should have proceeded without having proof beyond a reasonable doubt.").

¹²⁴ See, e.g., Scott Darnell, Opinion, *Attorney Deserved to be Fired*, N.M. DAILY LOBO, Mar. 26, 2007, at 4 ("In this case, it was easy to fire Iglesias, because he didn't perform well on the job.").

legitimate sense of reflecting a judgment about the relative importance of pursuing voter fraud cases vis-à-vis other cases.¹²⁵ On the other hand, in the aftermath of the close Presidential elections of 2000 and 2004, the Attorney General's policy can just as easily be characterized as an attempt to promote illegitimate political objectives—namely, to discourage legitimate participation in the electoral process and to use federal law enforcement resources to bolster the political prospects of proposed federal legislation that would benefit Republican legislators and reduce the number of Democratic voters.¹²⁶ The conflicting perspectives highlight the difficulty of distinguishing—rhetorically and substantively—between legitimate and illegitimate rationales for prosecutors' investigative and charging decisions.

Part IV illustrated that many discretionary decisions are multi-faceted and call for a succession of judgments, some best made by one actor, some best made by another. This Part focuses on the reality that many of the decisions prosecutors make—including whether to commence an investigation, bring (or decline to bring) criminal charges, offer a plea bargain, or seek a particular sentence—can be characterized in a variety of ways. This reality develops, at least in part, because most discretionary decisions implicate multiple considerations. Viewed objectively, each of those considerations might be the justification for the result.

To be sure, identifying the rationales for decisions can be difficult. In the absence of judicial review of the exercise of prosecutorial discretion, prosecutors ordinarily need not justify their choices publicly. For decisions that prosecutors make unilaterally, typically no explanation is even articulated privately within DOJ or the U.S. Attorney's Office. When a prosecutor is influenced by unconscious biases, any rationale he does offer may be pretextual or inaccurate.¹²⁷

¹²⁵ *Hardball* (MSNBC News broadcast May 15, 2007), available at 2007 WLNR 9190841 (“Well, as I understand it, the so-called voter fraud problem was kind of the fire that lit everybody up. They really believed there was systemic voter fraud going on.” (quoting discharged U.S. Attorney David Iglesias)).

¹²⁶ Editorial, *Special Prosecutor, or . . . : Assault on Elections Needs Full Airing*, SACRAMENTO BEE, May 26, 2007, at B6 (“[I]t seems more and more apparent that behind the U.S. attorney scandal is a blatant effort of the Justice Department to tamper with the U.S. election process, trumping up voter fraud as an issue to intimidate voters and suppress voting in the United States.”). The proposed legislation to require voters to possess government-issued identifications was defeated in the Senate in 2007, after being characterized as “a modern day poll tax which could disenfranchise millions of Americans, specifically seniors, minorities, youth, urban and rural voters and persons with disabilities.” Press Release, Democratic Nat’l Comm., *Democrats Defeat Harmful Voter ID Amendment* (June 6, 2007), available at http://www.democrats.org/a/2007/06/democrats_defea.php.

¹²⁷ The problems associated with identifying prosecutors' motivations are explored in Part VI.

Even when it is possible to decipher a prosecutor's rationale for a decision, however, the question of whether the rationale is impermissibly political, permissibly political, or apolitical is sometimes debatable. How one resolves that issue in turn affects one's intuitions about whether the decision-making process and its outcome are legitimate. Similarly, how one characterizes the rationale, or rationales, for a decision—which considerations one assumes are, or should be, dominant in the decision-making process—can inform the determination of how best to allocate decision-making authority.

Consider our second scenario:

*Scenario 2*¹²⁸: *After a news report discloses that Prude voted in an election while on parole after a state criminal conviction, the FBI investigates and determines that the story is correct. Prude is a registered Democrat in a heavily Democratic city in a swing state. There is no direct evidence that Prude, an unsophisticated convict, intentionally misrepresented herself or knew that she was barred from voting. Although there is circumstantial evidence, the case will be hard to prove.*

The Republican administration is promoting federal legislation to make voter registration more difficult. Democrats charge that the proposed legislation is designed to eliminate potential Democratic voters in future elections. Republicans counter that voter fraud is rampant throughout the country and must be addressed. Although prosecutors could leave it to state authorities to decide whether to seek parole revocation, a federal prosecution and conviction of Prude and others like her could bolster the administration's public position on this issue.

The President's chief political advisor mentions the Prude story to the President, who in turn speaks to the Attorney General about it. The Attorney

¹²⁸ Scenario 2 is based loosely on a federal prosecution described in Eric Lipton & Ian Urbina, *In 5-year Effort, Scant Evidence of Voter Fraud*, N.Y. TIMES, Apr. 12, 2007, at A1. The subject of voter fraud prosecutions has been prominent in the U.S. Attorney discharge debate. *E.g.*, Johnston & Lipton, *supra* note 79. Critics charge that despite evidence disproving voter fraud as a serious problem, presidential strategist Karl Rove encouraged DOJ to make voter fraud prosecutions a high criminal-justice priority, particularly in Democratic strongholds. Besides potentially deterring Democratic voters, the prosecutions would have bolstered Republican opposition to proposed legislation liberalizing voter registration and supported Republican advocacy for "Voter ID" legislation that would disproportionately impede poor and unsophisticated voters likely to be Democrats. Some of the discharged U.S. Attorneys allegedly resisted pressure to bring these cases shortly before the 2006 election, either because there was insufficient evidence to justify prosecution or because their timing might be perceived as a misuse of prosecutorial power for partisan ends. *See, e.g.*, Dan Eggen, *Fired U.S. Attorney Says Lawmakers Pressured Him*, WASH. POST, Mar. 1, 2007, at A10 (reporting former U.S. Attorney David Iglesias's belief that he was fired for not succumbing to pressure to speed up probes of Democrats before the November 2006 election).

General raises the issue with the U.S. Attorney in Prude's district. The district is one with a heavy caseload, including many investigations and potential indictments involving serious violent, white-collar, and narcotics crimes. Before his conversation with the Attorney General, the U.S. Attorney would not have become involved in the Prude matter; he would have allowed the FBI and the Assistant U.S. Attorney in charge of screening to determine whether the case warrants prosecution. But after his conversation, he discusses the matter with the line prosecutor.

Should the grand jury be asked to indict Prude? Who should decide, and how?

A. Characterizing Prosecutorial Decisions

Scenario 2, like the earlier scenario, implicates a host of law enforcement considerations. Some are highly abstract (such as the relative importance of bringing voter fraud cases), while others are case-specific (such as whether pursuing this case is appropriate given the potential difficulties of proof). In theory, a federal prosecutor might take all of these considerations into account. More likely, some or all of the considerations will be introduced by prosecutors at several different levels. Joint decision making can occur through a deliberative process among multiple prosecutors or through a combination of upper-level policy making and individual deliberation incorporating the policies.

Regardless of who makes the decision or by what process, any decision that accounts for a broad range of law enforcement considerations can be characterized in a variety of ways. Outside observers and even prosecutors who participate in the decision may perceive one consideration or another to have been dominant or, looking forward, may perceive that one consideration or the other should be dominant in this type of decision. As will be discussed presently, the characterization of the decision—how one explains the decision—may affect one's view of whether a result is legitimate, who should make (or should have made) the judgment in question, and in which context the judgment should be made.

In Scenario 2, a decision to indict Prude can be characterized as a partisan political decision. The reasoning process leading to the decision, directly or indirectly, seems to have taken into account the impact of an indictment on the President's legislative agenda. The various prosecutors are aware, and some are emphasizing, that prosecutions of suspects for even minor violations of the voting laws¹²⁹ will promote Republican-backed

¹²⁹ An ineligible voter's crime of voting can be viewed as far less significant than such voter fraud as stuffing ballot boxes, tampering with voting machines, registering ineligible voters, buying votes, or barring or intimidating eligible voters.

legislation and Republican electoral prospects at the expense of the opposing party.

Other characterizations are equally plausible, however. Arguably, for example, the decision is “political” in a more neutral sense; it reflects the President’s and/or the Attorney General’s view of the proper role of DOJ. Presidential candidates routinely promise to address narcotics crimes, illegal immigration, political corruption, environmental and corporate crime, or other legitimate targets of federal law enforcement. The electorate expects successful candidates to appoint Attorneys General comfortable with their vision and willing to change the emphasis of DOJ’s law enforcement efforts accordingly.¹³⁰

Thus, if the President here instructed the Attorney General to use the available law enforcement arsenal to target voter fraud, one can fairly characterize that decision as political, but non-partisan; it reflects a view of the significance of voter fraud as a national problem. Although a policy seeking the elimination of voter fraud may please political allies of the President and garner votes, that is because those allies are in sync with the administration’s policy and because the President is acting in an accountable manner. An instruction from the Attorney General to prosecutors down the chain might similarly be characterized as “political”—in a policy, but not partisan, sense. Even the imposition of a zero-tolerance policy by DOJ, which would radically alter line prosecutors’ approach to voter fraud cases, could in theory be justified as a legitimate tactical effort to maximize deterrence.

A related way to characterize the charging decision in Scenario 2 is that it is a national resource-allocation decision. The federal prosecution corps allocates its resources at both a national and local level. At the national level, support is divided among the various districts according to their needs. Because federal law enforcement agencies cannot investigate and prosecute all crimes, each must make choices about how to employ their resources—to

¹³⁰ This Article has not focused on the ability of the President or the Attorney General to influence decisions of their subordinates through the appointments process. It would not be surprising to learn that presidents have extracted promises or pre-commitments from Attorney General or U.S. Attorney candidates to behave in a certain way, perhaps even with respect to particular cases. There arguably is a difference between exploring shared political views and demanding compliance with a particular position in advance, because the latter prevents the subordinate from making an informed objective judgment on the issues when he needs to make a decision.

Many of the considerations discussed in this Article, including those relating to when the President (or Attorney General) is suited to controlling a particular decision apply equally to pre-appointment influence. Additional considerations include the importance of allowing the superiors to vet candidates fully and the impracticality of potential methods for preventing such influence. Because the subject warrants full and separate analysis, it will not be addressed directly here.

address the most serious crimes, to create maximum deterrence in the areas of most concern, to enforce the laws fairly, or to focus on areas of particular concern at that time in the country's history (e.g., drugs, corporate crime, or homeland security). DOJ implements those choices by organizing its Washington, D.C. units into areas of special need, focusing the efforts of those units, and instructing U.S. Attorneys regarding the administration's emphases. A decision to focus on voter fraud, and therefore to indict suspects for seemingly low-level violations, can be seen as one such resource-allocation decision.

Alternatively, the charging decision can be characterized as a local resource-allocation decision. U.S. Attorneys set priorities for their districts, advising the staff of the kinds of prosecutions the district should emphasize. When individual matters are brought to Assistant U.S. Attorneys for potential indictment, the Assistants screen the cases in light of the office's resource-allocation directives: marijuana possession cases may not merit prosecution and crimes that could just as easily be prosecuted under state law may be disfavored; in a period of zero tolerance for drugs and gang violence, even the marijuana cases may be pursued and simple assaults by gang members prosecuted. Depending on the facts, whether or not to indict Prude can be viewed either as a local resource-allocation decision directed by the U.S. Attorney or a resource-sensitive screening decision by the individual Assistant.

Finally, the decision of whether to proceed against Prude can be characterized as an ordinary screening decision, in which the prosecutor's office—usually through an Assistant U.S. Attorney—tries to achieve justice in the individual case. Ordinary screening decisions involve a plethora of considerations. These include the seriousness of the crime, defendant's criminal history and relative culpability,¹³¹ and the prosecutors' sense of proportionality.¹³²

The various characterizations bleed into each other. A "political" decision in the policy sense can simultaneously be a "partisan" decision, and the two features sometimes will be inseparable; the appeal of a policy position may be precisely that it wins favor with the administration's political constituency and thereby advances the party's prospects. Resource allocation decisions also may have "political" characteristics; they invariably take

¹³¹ That is, compared to other defendants charged with the same crime.

¹³² See Uviller, *supra* note 18, at 1696 (noting that charging decisions should, in part, be "a reflection of the customary level of punishment for crimes of the same category"); cf. Rory K. Little, *Proportionality As an Ethical Precept for Prosecutors in Their Investigative Role*, 68 *FORDHAM L. REV.* 723, 751 n.140 (1999) (proposing a proportionality requirement for prosecutorial decisions made during investigations and commenting that the "concept of proportionality would seem to be generally applicable in any area in which prosecutorial discretion is permitted").

account, from a policy perspective, of the importance of prosecuting particular kinds of criminal conduct.¹³³ A simple “screening” decision based on traditional concerns such as the strength of the evidence and the individual’s relative culpability is inevitably influenced by background considerations about resource allocation; instinctively, screening prosecutors emphasize more important cases.

The co-dependency of the rationales for prosecuting suggests that it often is foolhardy to even attempt to characterize decisions. It also suggests, however, that when viewed from the outside or from the perspectives of different prosecutors involved in the decision-making process, many discretionary decisions can be characterized in multiple ways, depending on where the person doing the characterizing places the emphasis. As the following pages illustrate, the differences in characterization matter.

B. Judging the Legitimacy of Differently-Characterized Decisions

How one characterizes a discretionary decision is significant for several reasons. It will influence one’s intuition about whether a particular decision is legitimate. It may also have implications for one’s intuition about who should make the decision and the context in which the decision should be made. When decision making appears to be illegitimate—because of its nature, because decision-making authority is mis-allocated, or because the decision has been made in an inappropriate context—prosecutors who disagree with the decision may be justified in objecting, and observers may be justified in criticizing.

1. Political decisions furthering partisan and legislative ends

In Scenario 2, the President, the Attorney General, and the U.S. Attorney each may have exerted some influence on their subordinates to proceed in the case against Prude, if only by taking the unusual step of discussing the case with the subordinate. The Attorney General, the U.S. Attorney, and the Assistant U.S. Attorney aware of their superiors must decide how to respond. Their conclusion on whether their superior was justified in exerting influence inevitably will depend on how they characterize the decision to indict Prude. The Attorney General, for example, might feel bound to resist suggestions from the President that Prude should be prosecuted if the Attorney General views the decision as reflecting partisan politics, but not if he deems it a law

¹³³ For example, a prosecutor cannot reasonably decide whether to use the office’s limited resources to pursue prosecutions for immigration violations, gang violence, or voter fraud without forming a judgment, or accepting another person’s judgment, about the relative significance of the criminal conduct.

enforcement policy decision. In turn, the U.S. Attorney might distinguish between efforts by the Attorney General to adopt and express views on the allocation of federal resources generally and an effort to control the district's allocation of its own resources. The line prosecutor might resist an effort by the U.S. Attorney to decide what fairness requires in the individual case, but comply with a directive concerning office priorities.

The various prosecutors' reactions to their superiors' instructions will depend both on their characterizations of their superiors' decisions and their view of the propriety of resolving issues on the characterized basis. For example, the first characterization of the decision to indict Prude—that it is an expression of partisan politics—leads to an intuition that an indictment would be illegitimate. No serious believer in the concept of prosecutorial neutrality would accept prosecutorial decisions based merely on whether the decisions help the prosecutor garner votes.¹³⁴ It seems equally improper for prosecutors at any level of DOJ to consider whether a charging, declination, or other decision will advance his party's electoral prospects. If one views the White House's or Attorney General's commitment to strict enforcement of voter fraud law as partisan, discharging U.S. Attorneys who do not join the project is an abuse of power.

One may have a different intuition, however, if the decision is re-characterized. For instance, the Attorney General may acknowledge that the President's desire to use prosecutions to advance his legislative agenda is partisan, and thus distasteful.¹³⁵ But the Attorney General may himself justify the legislative agenda in a more neutral way. Stricter voter registration laws, while incidentally favoring Republicans, will promote the valid law enforcement policy objective of deterring voter fraud. Regularly prosecuting low-level violators such as Prude in order to provide empirical support for the proposed legislation, though political in some sense, is not partisan; it furthers law enforcement policy.

Even as re-characterized, however, there is a good argument that such a decision is improper because, ultimately, prosecutions must serve justice in

¹³⁴ See Green & Zacharias, *supra* note 64, at 858, 869 (suggesting that prosecutorial neutrality may include “the notion that the prosecutor should not base decisions on party politics”); Beth Nolan, *Removing Conflicts from the Administration of Justice: Conflicts of Interest and Independent Counsels Under the Ethics in Government Act*, 79 GEO. L.J. 1, 4 (1990) (arguing that prosecutorial decisions “should be protected from political . . . interests”).

¹³⁵ Historians have suggested that the Framers' initial decision to decentralize law enforcement was based on the desire to limit the Attorney General's ability to serve the demands of an overly-powerful executive branch. *E.g.*, Bloch, *supra* note 47, at 578–79, 629; Griffin B. Bell, *The Attorney General: The Federal Government's Chief Lawyer and Chief Litigator, or One Among Many?*, 46 FORDHAM L. REV. 1049, 1051 (1978).

each case being prosecuted,¹³⁶ not simply serve as a means to a legislative end. That argument, however, must be analyzed in light of the fact that prosecutions often are used as means to an end. For example, some prosecutions are brought as leverage to obtain a minor defendant's testimony, when otherwise the prosecution would be declined. So long as the prosecutor does not seek the conviction of an innocent defendant, he ordinarily feels justified in considering all the practical benefits of the prosecution. Why not legislative benefits as well?

Our intuition is that practical benefits that are related to the particular case being prosecuted differ from legislative benefits. When a screening prosecutor indicts a less culpable defendant for the purpose of encouraging his cooperation against more dangerous targets, the prosecutor still attempts to produce individualized justice in the context of the whole case; ultimately, he intends the less culpable defendant to be treated more leniently than the more culpable defendants, and no innocent person will be sanctioned. In contrast, the most charitable view of prosecutors who emphasize legislative benefits is this: they might produce justice, but only long-term, and only if new laws are passed and they lead to good results. That seems too attenuated a concept.

To us, a decision to consider legislative benefits, therefore, is at best quasi-legitimate; the decision can be viewed as proper only if confined to the context of setting general policy that does not prevent prosecutors from deciding how to proceed in cases on an individualized basis. Stated another way, even the policymakers at DOJ (including the Attorney General) are prosecutors who must keep in mind their ultimate obligation to serve justice in individual matters. In Scenario 2, an Attorney General who perceives legislative law enforcement benefits of prosecuting voter fraud should not be willing to implement that judgment in a way that will interfere with fact-sensitive decision making. The U.S. Attorney and line prosecutors would be justified in resisting any suggestion to the contrary.

Of course, concluding that the decision to indict Prude would be illegitimate if characterized as a partisan political decision and would probably be illegitimate if characterized as a non-partisan legislative decision does not mean that the decision could not be justified if characterized differently. Even "political" judgments relating directly to law enforcement concerns may sometimes be appropriate—for example, a prosecutorial decision to crack down on voter fraud because the crime itself is particularly serious.

How can one differentiate between legitimate and illegitimate decisions

¹³⁶ Prosecutors are expected to avoid punishing innocent individuals, apply a sense of proportionality (i.e., the punishment should fit the crime), and treat all defendants with rough equality. See generally Green, *supra* note 50, at 634–36.

that implement priorities? There is no magical formula. As suggested below, however, what is legitimate seems to depend in part on how one characterizes the decision, in part on who implements it, and in part on the context in which the decision is made.

2. Decisions Characterized as Neutral Political, Resource-Allocation, and Screening Decisions

Prosecutors and observers sometimes have grounds to question the legitimacy even of decisions that rest on valid considerations. Concerns can arise because an inappropriate prosecutor is deciding. Alternatively, those questioning a decision may believe that decisions based on the particular considerations—or characterized in a certain way—should be implemented only in particular contexts.

In the abstract, it is clearly legitimate for some official in Scenario 2 to make a political judgment about federal law enforcement priorities and to decide where voter fraud fits into those priorities. However, characterizing that choice as a political decision about national priorities almost by definition suggests that the decision should be made centrally. The determination of federal priorities must be based at least in part on what the country needs at this time in its history and in part on what American citizens want. One can argue about whether the President or the Attorney General should make such national policy determinations. Previously, this Article noted reasons why the President often should defer to the Attorney General and lawyers at DOJ; arguably, they have a better grasp of what prosecutions entail and what can be accomplished through vigorous enforcement of federal criminal law. On the other hand, the elected President may be more in touch with the country's practical needs. Whichever high-level official controls, however, it seems clear that political decisions should be made centrally and implemented centrally as well.

If, instead, one characterizes the decision of whether to pursue voter fraud cases in Scenario 2 as a law enforcement resource-allocation decision, it seems that the decision should be made by DOJ, through a combination of central and local input. Among prosecutors, DOJ is best situated to identify national needs and priorities and to offer support to districts that pursue them.¹³⁷ Yet each district is unique; the districts vary in the number of crimes

¹³⁷ Various sections of DOJ's Criminal Division support U.S. Attorneys' Offices in particularly important or complex categories of cases. For example, the Organized Crime and Racketeering Section, in addition to prosecuting cases itself and reviewing RICO charges, offers assistance to U.S. Attorneys' Offices in their organized crime prosecutions. See U.S. Dep't of Just., Organized Crime and Racketeering Section, <http://www.usdoj.gov/criminal/links/ocrs.html> (last visited Apr. 6, 2008) (describing the Organized Crime and Racketeering Section). Other sections serve similar roles with

they must address, the nature of those crimes, and the effect of those crimes on the local communities. The U.S. Attorneys in each district arguably must have leeway to adjust the national resource allocation instructions to take into account local realities.

Given these intuitions about who should make particular types of decisions, the context in which a decision is implemented inevitably will affect how prosecutors and observers characterize it and their sense about its legitimacy. Suppose that, having adopted a strict policy on voter fraud prosecutions, the Attorney General (perhaps through a DOJ official) telephones the Assistant U.S. Attorney screening Prude's case and informs the Assistant U.S. Attorney that he must indict Prude because of the new policy. The Attorney General has now entered the world of screening; in context, the Assistant U.S. Attorney probably would characterize the decision he must make as a local resource-allocation or screening decision, rather than a political or national resource-allocation choice. He might reasonably resist the supervisor's instruction, not because of the illegitimacy of political or national resource-allocation decisions generally, but because in context that is not the kind of decision that must be rendered.

Viewed as a local resource-allocation decision, the core issue becomes whether a voter fraud case against Prude should be pursued in preference to other possible cases in the district. By its nature, this type of determination requires a familiarity with the range of cases that routinely are brought to the prosecutor's office, as well as an assessment of the relative seriousness of the crime and the deterrent effect that proceeding in this and similar cases will have. The case-specific factors must be evaluated in light of any general directives from the United States Attorney regarding district priorities. The decision, therefore, is one that can best be made by a prosecutor in the U.S. Attorney's Office who sees the facts of many cases and understands the flow of crime in the district. A line prosecutor or an experienced supervisor can play this role; because the U.S. Attorneys themselves typically have less hands-on involvement with cases, they may be less suited to the task.

Alternatively, when the decision to be made in Scenario 2 is characterized as a routine screening decision designed to achieve justice in the individual case, a peculiarly fact-sensitive inquiry is necessary. The question of Prude's indictment becomes one of fairness—should she be indicted and on what charge. The appropriate decisionmaker is the prosecutor who can delve into, and gain maximum familiarity with, the facts. Scenario 2 suggests, for example, that Prude might not have realized she was committing a crime by voting. Evaluating that factor requires the

respect to public integrity, narcotics, computer, and terrorism-related crimes, as well as child exploitation and obscenity. See U.S. Dep't of Justice, Criminal Division Organization Chart, <http://www.usdoj.gov/criminal/links/orgchart.html>.

decisionmaker to make a personal assessment of the credibility of Prude's denials after observing her demeanor. How to take that factor into account—both in the extent to which lack of knowledge diminishes Prude's culpability and the extent to which it might make conviction difficult—again requires individualized assessments. The latter consideration, in particular, depends on the line prosecutor's confidence in his own abilities to try the case.

The Attorney General does not know either the office's caseload and capabilities or the individual facts of Prude's case and therefore, prospectively, is in no position to evaluate the individualized considerations. From the U.S. Attorney's or line prosecutors' perspective, it seems illegitimate for DOJ to render a political or national resource-allocation decision in a context in which a local resource-allocation or screening decision must be made.¹³⁸

In short, the characterization of the decision matters to the assessment of whether the decision is proper, both in the abstract and in how it is enforced.

C. The Implications of How Decisions Are Characterized

As Scenario 2 illustrates, when different levels of prosecutors try to resolve the same issue—here, whether an ineligible voter should be indicted—their decisions can be viewed in various ways. Each characterization carries with it intuitions not only about which prosecutors can best make the decision but also about the form the decision should take and the context in which it should be implemented. Some varieties of decisions seem inherently suited to generalized central decision making, while others call for local, ad hoc decision making. As we have suggested, for example, political decisions should usually be made centrally, but also be implemented centrally—through policy directives telling subordinate attorneys what they must take into account. Central authorities should not, however, advert to those policies to supersede subordinates' implementation of their own decision-making expertise in the context of screening cases.

Conversely, decisions best characterized as screening decisions should be made at the line level because they are fact-sensitive.¹³⁹ But line

¹³⁸ Stated another way, the Assistant U.S. Attorney must make a screening decision, and it would be illegitimate for him to rely exclusively on political considerations to do that. As chief prosecutor, the Attorney General has authority to take responsibility for the screening decision from the subordinate prosecutor and make it on his own. But if he does, he must make it as a screening decision, using appropriate screening factors. Ordinarily, he will not be able to make such a decision well, because he is not familiar with the pertinent facts.

¹³⁹ Of course, DOJ may legitimately influence charging decisions—particularly decisions on recurring questions—through centralized supervision. Policies establishing the standards to be applied regarding sufficiency of the evidence and proportionality of

prosecutors making these decisions have no right to ignore other legitimate decisions that are designed to constrain their discretion—including political policy decisions by the Attorney General and resource-allocation decisions by the U.S. Attorney. Moreover, a line prosecutor should not make decisions at his level that are more properly made elsewhere. In other words, he should not, for example, indict Prude because of his own view of what DOJ's priorities should be. That would be making what we have characterized as a political decision. The line prosecutor's relative competence is in making screening, not political, determinations.

Problems arise when prosecutors try to assume decision-making responsibility for an aspect of a prosecution which they are not well-suited to control. In supervising subordinates and resisting superiors, prosecutors at all levels need to engage in a measure of introspection. When the Attorney General in Scenario 2 exerts influence on the U.S. Attorney, he should be thinking about his proper role. One way to accomplish that is by considering the nature of the decision he himself is making; is it a political judgment, a national resource-allocation decision, or something else—perhaps more akin to a screening decision in an individual case? Given our analysis of who is best able to make the different kinds of decisions, the Attorney General's characterization should inform him of whether he is exerting appropriate influence. At some extremes, he should even come to the conclusion that a particular kind of a decision is fundamentally illegitimate.

Similarly, when subordinate attorneys—like the recently discharged U.S. Attorneys—are pressured to follow a particular course, their characterization of the decision being influenced can help them decide whether to obey. It may, for instance, be appropriate for an Attorney General to expect a U.S. Attorney to obey a national resource-allocation decision that makes voter fraud cases a priority, yet inappropriate to expect the U.S. Attorney in a specific district rife with political corruption to emphasize voter fraud cases to the exclusion of political corruption cases; the latter is a local resource-allocation decision in which the U.S. Attorneys have greater expertise. Fairly characterizing the decision to be made can help both the superior and subordinate better understand their roles and help them work out their differences. It can also inform the subordinate about when to take a stand and when obedience to a superior's prerogative is the better course.

Scenario 2 teaches a final lesson that is significant for those observing, and criticizing, prosecutorial decision making; namely, that accurately

punishment, for example, reasonably narrow the range of charging discretion. Centralized guidelines can promote neutrality, transparency, consistency, and accountability. *See generally* JACOBY, *supra* note 33 (arguing in favor of consistent screening policies). Typically, these will be developed by seasoned career DOJ personnel with an understanding of the traditions of federal criminal law enforcement and the theoretical policy issues relating to the exercise of charging discretion.

characterizing particular prosecutorial decisions can be a difficult endeavor. The line between partisan political decisions, legitimate political decisions, and national resource-allocation decisions often is blurred. That is why labeling the Attorney General's actions with respect to the U.S. Attorney discharges as "political" does not resolve the issues. Some kinds of judgments that implicate controversial national policies are legitimate, while others are not, and yet others are legitimate only in some contexts. Observers, to be fair, must characterize carefully and acknowledge the difficulty in drawing the lines.

VI. THE DIFFICULTY OF ACCOUNTING FOR PROBLEMS OF BIAS, CORRUPTION, AND EXCESSIVE ZEAL

Parts IV and V have suggested that, if one can overcome the problem of identifying and reconciling competing policy issues and the difficulty in accurately characterizing the nature of particular decisions, then in theory there *are* better and worse decisionmakers for each matter. Some issues lend themselves to centralized decision making because of the expertise, experience, or competence of the prosecutors who populate the central administration. Centralized control can promote accountability, transparency, and consistency in the decision-making process. Other issues, however, especially those involving fact-sensitive determinations pertinent to the implementation of individualized justice, are better suited to decision making at a line level, or at a line level subject to review by local supervisors who can become familiar with the facts.

Sometimes, however, the theory breaks down. That is because focusing on the competencies of the actors does not take into account prosecutors who act on personal biases¹⁴⁰ or engage in intentional misconduct.¹⁴¹ The issue of bias lies at the core of at least one set of cases prominent in the U.S. Attorney firing controversy—those involving prosecutions for government corruption.

Whenever prosecutors in one administration target an official belonging to the party out of power, or refrain from prosecuting their own party's officials, accusations will surface that political appointees participating in the decisions have acted for partisan ends. But if political appointees forgo personal involvement, they leave the field to subordinate prosecutors who

¹⁴⁰ Various kinds of prosecutorial biases are discussed in Green & Zacharias, *supra* note 64, at 852–59.

¹⁴¹ As discussed in Part II, supervisory controls of various types—including the imposition of centralized rules, the transfer of decision making regarding particular issues to a higher level in DOJ, and routine review of line prosecutors' actions—can serve to counteract unconscious bias and unintentional prosecutorial misconduct. But when a line prosecutor is determined to act in disregard of supervisory guidance, a more direct method of control may be required.

may be driven, if not by their own partisan leanings, by other biases—including the interest in publicity that comes from prosecuting high-profile cases. Particularly in such cases, prosecutors at all levels may consciously reach decisions based on impermissible considerations, abuse their power unconsciously, or simply appear to engage in misconduct. Other prosecutors may respond to apparent instances of biased decision making by pushing back.¹⁴² Some observers inevitably will criticize any result as being partisan,¹⁴³ as may the target and others who would exploit the controversy.¹⁴⁴

The following scenario helps illustrate that merely determining who is in the best position to make particular decisions does not provide a full answer to the question of who should make them. Any analysis of prosecutorial decision making and any framework for allocating prosecutorial authority must also address the potential for improperly motivated behavior.

*Scenario 3*¹⁴⁵: *A U.S. Attorney establishes political corruption cases as a*

¹⁴² Subordinate attorneys cannot control their supervisors' abuses in the same way that the supervisors regulate subordinates, but they have several options for resisting supervisory influence—including ignoring an instruction, challenging it, or bringing the issue to someone higher in the chain of command. This Article does not address the issue of when, if ever, it is appropriate for prosecutors to reinforce their independence by going to the press or reporting other prosecutors' actions to outside authorities (e.g., professional disciplinary agencies or the courts).

¹⁴³ FRANCIS BIDDLE, IN BRIEF AUTHORITY 266 (1962) (“[Had I indicted the Congressman,] [t]he papers would have applauded my fortitude . . . or called my action vindictive . . . depending on their political slant.”).

¹⁴⁴ See H. Geoffrey Moulton, Jr. & Daniel C. Richman, *Of Prosecutors and Special Prosecutors: An Organizational Perspective*, 5 WIDENER L. SYMP. J. 79, 97 (2000) (explaining the impossibility of “get[ting] partisan politics out of the criminal investigation of high administration officials”).

¹⁴⁵ Scenario 3 is based on an amalgam of cases discussed in the course of the recent U.S. Attorney firings. These include the corruption investigation of Republican Congressman Jerry Lewis by U.S. Attorney Debra Yang, who resigned during the investigation, see Adam Cohen, *The U.S. Attorney, the G.O.P. Congressman and the Timely Job Offer*, N.Y. TIMES, May 4, 2007, at A22; the conviction of Republican Congressman Randy Cunningham by U.S. Attorney Carol Lam, who was subsequently discharged, see *id.*; an investigation, undertaken by later-discharged U.S. Attorney David Iglesias, of an alleged kickback scheme involving Democratic officials in New Mexico that did not result in indictments prior to the 2006 elections, see Editorial, *supra* note 84; the prosecution of an administrator working for Wisconsin's Democratic governor, which culminated in the reversal of her conviction for insufficient evidence, see Cohen, *supra* note 85; an investigation of New Jersey's Democratic Governor that became a campaign issue, see Editorial, *Another Layer of Scandal*, N.Y. TIMES, Apr. 9, 2007, at A16; and the prosecution of Alabama's Democratic governor, see Editorial, *Questions About a Governor's Fall*, N.Y. TIMES, June 30, 2007, at A16. See also Dan Eggen, *Former attorney general alleges prosecution politically motivated*, SAN DIEGO UNION TRIB., Oct. 24, 2007, at A16 (reporting allegations that the U.S. Attorney in Pittsburgh targeted

high priority for his district. The Office manages to convict a federal lobbyist of improperly influencing governmental officials in violation of federal law. Using his testimony as a cooperating witness, the Office obtains guilty pleas from a Republican congressman and obtains indictments against other lobbyists and campaign contributors to Republican causes. The Office has successfully prosecuted several Republican state judges and city officials in the past.

The press has repeatedly reported that the government of the city in which the United States Attorney's Office is located is rife with corruption. The city government includes high-level officers belonging to the Republican and Democratic Parties. No Democrats have been charged in connection with any political corruption case in the recent past.

The U.S. Attorney is a Republican. The Assistant U.S. Attorney in charge of the district's political corruption unit is a Democrat. The prosecutions of the defendants in the corruption cases have been very aggressive in both the investigative methods and trial tactics used. They have indicted some officials based on a novel and expansive reading of federal law and have used their subpoena power and granted immunity to potential witnesses liberally.

After discussions with representatives of the White House, the Attorney General meets with the U.S. Attorney. He advises the U.S. Attorney that the White House is disappointed that DOJ has been targeting Republican supporters of the administration. The Attorney General also expresses his own concern that no Democratic officials have been indicted. Finally, the Attorney General asks the U.S. Attorney to look into the question of whether his subordinate prosecutors have been overzealous or engaged in prosecutorial misconduct in pursuing the corruption cases.

Are these concerns legitimate, and how should they be addressed?

A. The Difficulty of Reconciling Supervisory Concerns with the Exercise of Legitimate Prosecutorial Discretion

From the President's and Attorney General's perspective, Scenario 3 may reflect lower-level prosecutors running amok. The devotion of prosecutorial resources to corruption cases may seem excessive to them. Even acknowledging the validity of indicting corrupt federal legislators, the relentless pursuit of campaign contributors and lobbyists arguably is not the wisest priority when it means that other important types of prosecution are set aside.

The indictment of only Republican officials also may signal potential bias to the President and Attorney General. In a city rife with corruption, the

absence of a single indictment against a Democrat suggests illegitimate partisan decision making of the kind discussed in connection with Scenario 2. The fact that the prosecutor in charge of the corruption unit is a member of the Democratic Party supports those concerns.

The reports of overzealous prosecution tactics, including potential misconduct by line prosecutors in judging the sufficiency of the evidence and in offering inducements to witnesses, is troubling. Quite apart from partisan concerns, overzealousness undermines public confidence in federal prosecutorial neutrality. It offends the ethic of objective prosecutorial decision making, which considers fairness to defendants as well as the public.

In the absence of these concerns, the well-intentioned Attorney General might see no reason for DOJ to become involved in the matter. Ordinarily, the Attorney General would advise the districts of the administration's national priorities, but leave local resource-allocation decisions to the U.S. Attorneys. In Scenario 3, the fact that the city in question is reportedly beset by corrupt leaders seems to justify the Office's emphasis on corruption cases. Nevertheless, the Office's single-minded focus is troubling, and may give short shrift to DOJ's national law enforcement program. How should the Attorney General resolve his dilemma?

Equally important, how should the Attorney General address his concerns relating to bias in the prosecutions? DOJ is not in a good position to evaluate the motivations of the lawyers who choose which cases to pursue; here, the statistics raise concern, but they might be explained and justified by the evidence that the FBI and line prosecutors have collected. Ordinarily, supervision designed to control individual prosecutors' biases is best accomplished through direct review of case decisions by immediate superiors. Nevertheless, in Scenario 3, the Attorney General knows that the local supervisors are well aware of the trend and have, to his knowledge, made no adjustments.

The Attorney General typically would not even conceive of reviewing tactical decisions by individual line prosecutors to determine whether they have exhibited excessive zeal or engaged in misconduct. He would leave that to the U.S. Attorney or to others in DOJ. The Attorney General has no time to review line prosecutors' practices, and little expertise in doing so. When ordinary supervisory oversight is insufficient, the favored method of preventing abuses of discretion centrally is to develop regulations that guide line decision making; DOJ already has some regulations governing prosecutors' evaluations of the sufficiency of the evidence and the granting of immunity.¹⁴⁶ For particular tactics especially prone to abuse, including the

¹⁴⁶ See, e.g., USAM 9-2.010 (guidelines on investigation and charging discretion); 9-23.100-9-23.400 (guidelines on granting witnesses immunity).

misuse of subpoena power, DOJ sometimes establishes mechanisms for reviewing the use of those tactics by every prosecutor in every case.¹⁴⁷ But the subpoenas in Scenario 3 do not fall within the parameters of the existing regulations.

Our point here is not to determine what the Attorney General should do in this instance, but rather to illustrate the reasonableness of his impulse to intervene. The actions of the local U.S. Attorney's Office are happening on his watch. The instinct of any superior who perceives improprieties by his subordinates is to rectify the situation (including, potentially, by discharging the subordinate). Presumably, as chief prosecutor, the Attorney General, like his subordinate prosecutors, has the obligation to see that justice is done, even if he ordinarily pursues that goal in a centralized manner. This case seems to require a departure from typical remedies or the supervisory procedures that are already in place.

B. The Difficulty of Reconciling Deference to Superiors with Potential Supervisory Abuse

In connection with Scenario 2, this Article preliminarily noted the uncomfortable position in which subordinates find themselves when they believe a superior is implementing a partisan political decision. The subordinates must first determine whether the decision is legitimate and then must select an appropriate response. Scenario 3 highlights the difficulty of making these assessments.

The Attorney General's unusual step of personally discussing the U.S. Attorney's allocation of resources to corruption investigations cannot help but raise a red flag. The U.S. Attorney presumably can respect the Attorney General's desire to encourage prosecutions consistent with pre-established DOJ policy. The Attorney General, after all, is the U.S. Attorney's direct superior and clearly has authority to review his decisions. When the Attorney General mentions the President's concern for party loyalists, however, the inquiry smacks of bias. No U.S. Attorney who takes seriously the notion of impartial decision making would listen to a plea for leniency by a defendant's well-connected friends.

Any suggestion by the Attorney General that Democrats should be prosecuted would worsen the U.S. Attorney's dilemma. The foundation of prosecutorial screening discretion is that prosecutors should make determinations based on evidence that investigators present, rather than a political agenda. The U.S. Attorney in Scenario 3 knows that it would be inappropriate for him to instruct his own subordinates to "find a Democrat to prosecute," or to target a particular Democratic official for investigation.

¹⁴⁷ See *supra* text accompanying note 62.

From the U.S. Attorney's perspective, while it might have been appropriate for the Attorney General to request that the U.S. Attorney exercise his own supervisory authority to review the motivations of his staff, the couching of such a request in partisan terms is grounds for suspicion.

Misconduct or overzealousness by line prosecutors is a subject that U.S. Attorneys must address as part of their direct supervisory responsibility. Typically, they delegate that task to the intermediate supervisors or unit chiefs, who have personal experience in prosecutions that enables them to identify misconduct. In potentially egregious cases, or ones like Scenario 3 in which the conduct of a unit chief himself is questioned, a U.S. Attorney might take the time to review the facts personally. Nevertheless, the fact that the Attorney General's allegation of misconduct is accompanied by partisan rhetoric may cause the U.S. Attorney to doubt his superior's good faith.

C. Reasons for the Conundrum of Unascertainable Motives

Thus far, we have simply illustrated that, in Scenario 3, the various prosecutors' suspicions concerning the propriety of other prosecutors' motivations justifiably trouble them. The suspicions give both the superior and subordinate prosecutors reasons to consider departing from the normal procedures they would follow and their normal assumptions about how to interact. But Scenario 3 highlights something much more significant. Namely, that particular kinds of cases *inevitably* will present issues that make routine decision making, and the question of who within DOJ should decide which matters, unusually complicated.

Investigative and charging decisions in government corruption cases, for example, have an inherently partisan effect. When an indictment is brought against a federal official or someone who has solicited an improper official act, the indictment almost by definition has partisan consequences; publicity surrounding the indictment helps or hurts the current administration's party. Any action by administration officials that might influence the charging decision, however proper, will be perceived by some (including the subordinates being influenced) as being politically motivated. Conversely, any action by the U.S. Attorney's Office that damages the governing party will be perceived by party loyalists as unnecessary or a poor use of law enforcement resources. Cases involved in the recent U.S. Attorney discharges provide examples in both directions.¹⁴⁸

¹⁴⁸ In the discharge debate, U.S. Attorney's Offices in various districts have been viewed as overzealous or underzealous in pursuing government corruption cases. *See supra* text accompanying note 83 and note 145. Quite apart from the merits of the allegations of partisan influence in these cases, it is clear that whatever action the U.S. Attorneys took would have been perceived by members of one party or the other as illegitimate.

In Scenario 3, the suspicions of the U.S. Attorney are triggered not only by the Attorney General's intervention but also by his frank reference to the White House's concerns.¹⁴⁹ In reality, however, the nature of the underlying corruption cases alone might have provided a foundation for the U.S. Attorney's suspicions about the Attorney General's motivation. The party affiliations of each member of the prosecution corps color how their actions are perceived by other prosecutors and observers of the prosecutions. The fact that sophisticated participants typically avoid expressing improper motivations makes it all the more difficult to respond.

Consider, for example, the relationship among the U.S. Attorney and the lower-level prosecutors in Scenario 3. If the Republican U.S. Attorney reviews the work of the Democratic unit chief—conducting supervision that may be fully appropriate because of the controversial and highly-publicized nature of the prosecutions—the unit chief may suspect partisan interference. Conversely, in light of the pattern of prosecutions, the U.S. Attorney may worry about partisanship on the part of the Democratic unit chief (or perhaps his subordinates). The suspicion arises because corruption cases are inherently political in nature.

Promoting partisan political interests is only one of several clearly illegitimate bases for prosecutorial conduct. Others include self-interest, prejudice, and religious zeal.¹⁵⁰ In many cases, the suspicion that a prosecutor is implementing these motivations stems from particular conduct, or particular characteristics, of the prosecutor himself. But there are instances other than corruption cases, especially matters involving controversial issues such as race, abortion, and immigration, in which the nature of a case itself is likely to engender suspicion.

Scenario 3 highlights more generally the difficulty of crafting appropriate supervisory responses to actions by subordinate attorneys that may be driven by improper motivation. The ordinary criteria for supervisory controls rest on the assumption that prosecutors at each level of DOJ will at least try to perform their functions in accordance with their obligations to seek justice. The supervisory controls therefore are (or should in theory be) designed on the basis of who is in the best position to make particular decisions. Routine review of fact-sensitive decision making ordinarily is conducted at a relatively low level, by experienced supervisors who are in a position to familiarize themselves with individualized considerations relevant to the specific cases. Centralized controls are used to establish general

¹⁴⁹ Even where an Attorney General's rhetoric is superficially non-partisan, illegitimate intentions may be implied or left unspoken.

¹⁵⁰ See Green & Zacharias, *supra* note 64, at 852–53 (“[I]t may seem axiomatic that prosecutors should not rely on criteria such as race and gender, self-interest, idiosyncratic personal beliefs, or partisan politics in exercising their discretion.”).

policies that guide and harmonize all prosecutors' choices or impose appropriate systemic constraints on the discretion that can be exercised.

When the assumption of well-intentioned decision making is removed, however, the ability to rely on ordinary controls disappears. From the top-down perspective, a subordinate prosecutor who would consciously make decisions based on improper considerations will not easily be influenced by general centralized policies. Extraordinary methods may be necessary to prevent deliberate misconduct that is not counteracted by the immediate supervisors' routine review. From the bottom-up perspective, when supervisors seem willing to act on partisan or other improper motives, the reasons for deferring to the supervisors disappear. The subordinate prosecutor must resist the supervisory influence if he is to fulfill his personal obligations.

The problem in cases like Scenario 3 is that actual motivation is difficult to ascertain by anyone other than the actor himself. Even after the fact, it can rarely be proven. The Attorney General's intentions in Scenario 3, for example, can simultaneously be interpreted as corrupt (i.e., encouraging prosecutions of disfavored persons—Democrats—regardless of their guilt), biased (i.e., interfering with valid prosecutions against Republicans), and perfectly legitimate (i.e., addressing excessive zeal and prosecutorial misconduct at the lower levels of the U.S. Attorneys' office). While the subordinate prosecutors responding to the Attorney General or the U.S. Attorney may have no choice but to judge the motivations of their superiors, they can not be sure of their assessments.

Likewise, the U.S. Attorney and his staff, or individual members of his staff, may well be exercising their discretion consistently with the Office's tradition of acting upon the evidence. Yet it is possible that some of them are pursuing illegitimate (e.g., partisan or glory-seeking) objectives. And even if the subordinate prosecutors are acting without improper motivation but are engaging in tactical misconduct or exercising too much zeal, higher authorities should intervene.

D. Some Ramifications of the Conundrum

Scenario 3 challenges our earlier intuitions about the proper allocation of decision-making authority in prosecutors' offices. The potential for intentional misconduct and improperly-motivated prosecutorial decision making by both superior and subordinate prosecutors undermines the various actors' willingness and ability to rely upon centralized regulation or the ordinary logic of a chain of command. The problem of who should decide particular questions can no longer be resolved by resort to standard organizational theory—which is based on the various actors' typical incentives and relative expertise.

To make matters more complicated, Scenario 3 illustrates that the various actors in the process ordinarily must respond without being certain of the motivations of the others.¹⁵¹ Thus, even when improper motivation of a supervisor or subordinate might call for a response that departs from the norm, the supervisor or subordinate can rarely be secure in the knowledge that a departure is justified. Typically, the subordinate will be acting on suspicion and gut feeling alone. That is particularly troubling because, in cases like Scenario 3, the nature of the case alone gives rise to suspicion.

At one level, the conundrum created by the potential for improper motivation simply suggests that no account of the appropriate allocation of prosecutorial decision making should rely exclusively on notions of efficiency and institutional competencies. The human factor must be filtered in. At a second level, the conundrum suggests that prosecutorial agencies, like DOJ, should institutionalize procedures and practices that help minimize those departures from normal decision making that are necessary. The agencies can do so both by encouraging dialogue between supervisors and subordinates and creating opportunities for joint decision making through which the reasons for prosecutors' actions become more transparent, at least internally within DOJ and the U.S. Attorney's Office. Transparency, in turn, often will increase accountability.

Thus, DOJ might begin by identifying categories of cases, such as corruption cases, in which participants are most likely to act, or appear to act, on improper motivations. Initially, some of the potential problems can be limited by adopting policies *ex ante* that decide some of the controversial issues that have to be made in these cases. For example, there is some dispute among federal prosecutors about the level of proof prosecutors should possess before indicting elected officials, particularly high-level officials such as the President.¹⁵² There is a question of whether the charging standard should be different for the indictment of state officials because of federalism concerns and state prosecutors' concurrent jurisdiction. The issue of when it is appropriate to indict an official who is in the process of running for office also is controversial, because the indictment might influence elections. By deciding these issues centrally and in advance—behind a veil of ignorance as to whether the policy will apply to Democratic or Republican targets—DOJ

¹⁵¹ See EISENSTEIN, *supra* note 28, at 54–75 (discussing mutual perceptions of U.S. Attorneys and DOJ).

¹⁵² See Philip B. Heymann, *Four Unresolved Questions About the Responsibilities of an Independent Counsel*, 86 GEO. L.J. 2119, 2127 (1998) (“There is one exception to the rule that the same discretionary factors should be applied equally to all defendants An independent counsel faced with the question of whether to indict the President of the United States should apply a higher standard . . . because an indictment of the President raises very serious constitutional and practical concerns . . . [including] international repercussions.”).

can reduce the likelihood that individual prosecutors who follow the pre-existing policy will be suspected of improper motives.

Centralized policies regarding the allocation of decision-making authority also can anticipate issues that arise because of individual prosecutors' personal characteristics. DOJ could require that any investigation into political corruption involve prosecutors of both political parties. Recusal policies or rules specifying special supervision might regulate the participation of prosecutors in cases that implicate their strongly held philosophical, political, or religious beliefs (e.g., death penalty or assisted suicide cases).

It would, of course, be impossible to predict and resolve in advance all issues that might implicate partisanship, bias, or other improper motives. Prosecution agencies therefore should develop procedures to minimize the effects of the conundrum of unascertainable motives. As a general matter, the greater the number of prosecutors who are involved in a particular decision and the more that prosecutors from different levels of the agency participate, the less likely it is that a single prosecutor's improper motivation will drive the decision. Collaborative decision making also improves the quality of prosecutorial decisions because prosecutors at different levels have special attributes that they bring to the table. For example, an investigating Assistant U.S. Attorney knows the facts; supervisors within the U.S. Attorney's Office serve as a check on the Assistant's zeal; the U.S. Attorney and his executive assistants often have familiarity with the capabilities of local prosecutors and an overview of resource allocation within the office; DOJ personnel can provide insights into the meaning of DOJ policy. Although the Attorney General's participation in decisions may tend to skew the decisions, the Attorney General's official participation also will limit his partisanship by increasing his accountability.

We do not suggest that all these DOJ actors should participate in all decision making. That would be unworkable. The pressured line prosecutor has no time to consult regarding every decision. A universal practice of collaboration would tend to intimidate line prosecutors and retard the development of their own ability to make reasoned judgments. And prosecutorial resource limitations simply do not permit the participation of multiple prosecutors in too many matters.

Nevertheless, it would be possible for the agency to develop a policy or practice of encouraging deliberative collaboration in specific decisions in categories of controversial cases. Presumably an Attorney General would be personally involved in only a few decisions even within the limited number of federal corruption cases; these might include the initial decision to indict and any subsequent decisions to dismiss a case. Alternatively, to reduce concerns about partisanship, the Attorney General (who is closest to the White House and so most commonly identified as a partisan player) might

adopt a policy to abstain altogether from involvement in individual corruption cases, delegating his authority to career prosecutors in DOJ. Conversely, Assistant U.S. Attorneys handling a particular matter would need to participate in most discussions because of their familiarity with the facts. Other prosecutors would be involved as appropriate.

The key is that the participation of multiple prosecutors in the conversation requires prosecutors to state the reason for their positions and make a case for them when a dispute arises. The presence of peers will limit each prosecutor's willingness to take inappropriate stances. It will also require prosecutors to express their orientation publicly and take responsibility for it.

Collaborative decision making can develop spontaneously, but there are reasons to formalize the practice. First, too much collaborative decision making will hamstring the prosecuting agency's work; not all prosecutors can be involved in all decisions. A policy judgment therefore may be required regarding the categories of cases and types of decisions within those cases that implicate the concerns mandating collaborative deliberation. Second, it is valuable to identify in advance which prosecutors should be involved in particular decisions, because the selection process itself might otherwise be grounds to suspect improper motivation. Third, collaborative decision making loses its value if, as a practical matter, it becomes a venue in which higher-level prosecutors simply dictate results to subordinates. Guidance therefore must be provided to all the participants regarding which considerations are legitimate and who the optimal decisionmakers are with respect to different aspects of a decision.¹⁵³ Constraining the collaborative discussion through policies, regulations, and practice can help the participants judge each others' positions and make each hesitant to over-exert his influence.

Thus far, we have suggested ways in which Scenario 3 is useful for understanding the proper allocation of prosecutorial decision making. With respect to the U.S. Attorney firings, however, Scenario 3 also helps with a different inquiry. It explains how even well-meaning critics and defenders of the administration's actions can so vociferously maintain their opposing positions.

From the perspective of the administration's defenders, the discharges were clearly appropriate. The Attorney General was exercising a routine supervisory function. He had set law enforcement priorities, indisputably his

¹⁵³ Thus, for example, the Attorney General, U.S. Attorney, line prosecutor, and others in the room all should be advised that, when they discuss whether to indict, considerations of partisan politics are out of bounds. They also should be made to understand that the U.S. Attorney and Assistant working on the case are most familiar with the facts and thus in the best position to resolve evidentiary issues relating to the indictment decision.

prerogative, and some of the U.S. Attorneys did not effectively implement them. From the critics' perspective, the Attorney General sought to pursue partisan objectives. The discharged U.S. Attorneys, to do their jobs, had no choice but to resist. From an objective viewpoint, on the current state of facts, one cannot tell which account is correct.

As an aside, we note that had our suggested procedures for collaborative decision making been in place for the categories of cases involved in the firings, the impasse between many of the U.S. Attorneys and the Attorney General might have been avoided. Indeed, it appears that at least some of the U.S. Attorneys did not even know that their decisions were being questioned. Even a simple dialogue could have prevented that happenstance.

More formalized collaborative decision making would have forced the Attorney General to go on the record at an earlier stage, albeit internally within DOJ. That would have required him either to take accountability for opposing the U.S. Attorneys' prosecution choices or to effectively foreclose himself from criticizing the choices after the fact. At the level below the Attorney General, collaborative decision making in all probability would have preempted at least some of the differences between the local U.S. Attorneys' Offices and DOJ. At a minimum, the positions and motivations of the various participants in the decisions would have been clarified, obviating the uncertainty that has produced the attacks and counterattacks in the discharge debate.

Participants in the debate, however, can draw more personal lessons from our analysis. First and foremost, it is inappropriate for observers of the prosecutorial function to jump to conclusions about prosecutors' motives. Scenario 3 illustrates how difficult it is to identify motive objectively. Viewed realistically, the issues underlying the discharges at root may have had less to do with improper motivation than with a conflict between the Attorney General's and U.S. Attorneys' beliefs on who should control particular decisions. Concerns about improper motivations in the discharge debate may have served only to muddy the issues.

The question of who should have been in control cannot be resolved mechanically, either on the basis that the Attorney General was the U.S. Attorneys' superior or on the basis that the U.S. Attorney and his staff had an obligation to serve justice in the case they were handling. As we have seen, the overall prosecution function requires the distribution of decision making throughout DOJ, leaving each prosecutor to make the decisions which he is equipped to make. But as we have also seen, characterizing decisions accurately in order to allocate decision-making responsibility properly is difficult. Scenario 3 suggests that even when we can accomplish these tasks, problems of motivation may undermine our confidence in the allocations that result.

That said, the willingness of the participants in the discharge debate to

skip the step of determining the appropriate allocation of decision making and rush to competing allegations regarding the motivation of the various prosecutors is short-sighted. To the extent the discharges in fact represented an effort by Attorney General Gonzales to exercise power over indictments, one should first determine whether the indictments should have been subject to his control in the ordinary course of events. If not, one would then need to consider whether the specific decisions in question called for a departure from the norm of local control of the indictment process, guided by centralized policy (but not case-by-case) review.

We would be remiss, on the specific issue of bias raised by the discharge debate, if we did not hazard some conclusions about who is most likely to be affected by improper motivations in government corruption cases. The appearance of partisanship is most pronounced when the Attorney General asserts his authority, because he is most susceptible to influence by the White House and lobbyists and the spokesperson for the current administration on law enforcement issues. The U.S. Attorney, however, also is a political appointee. He may view successful corruption cases against the opposing party, or declinations in cases against his own party, as a route to political advancement. Conversely he can advance his public persona by prosecuting members of his party and appearing to be uncommonly objective. On the surface, lower level prosecutors and line assistants seem least likely to be partisan. Yet if they will be responsible for trying the corruption case, they may be trigger-happy; successful prosecutions of high-profile cases can help their careers.

If the goal were solely to minimize the potential for, and appearance of, misconduct in such cases, the most appropriate approach might be to divide charging and trial decision making.¹⁵⁴ DOJ could assign joint responsibility or oversight responsibility for charging decisions to career prosecutors less likely to have partisan interests. If these career-prosecutor supervisors are foreclosed from conducting the trials, they are unlikely to be affected by considerations of career advancement. Such personnel would be in the best position to impartially implement preexisting DOJ policy governing charging in corruption cases, while at the same time giving weight to the investigating prosecutors' understanding of the facts. Joint decision making of this type, in theory, might serve as a workable check on partisanship and other forms of bias.

¹⁵⁴ See Uviller, *supra* note 18, at 1716 ("I believe that for the office of prosecutor faithfully to discharge the incompatible roles of advocate and arbiter, the investigators and adjudicators should be segregated from the advocates.").

VII. LESSONS FOR PROSECUTORS

This Article's analysis of decision making in federal prosecutors' offices leads to some conclusions that are applicable to federal and state prosecutors alike. Some of the conclusions are predictable, others surprising. The analysis confirms the need for a mix of internal policies, individualized decision making, and supervision. It has identified factors that help determine how decision making should, in theory, be allocated. Case-specific considerations, however, sometimes affect that calculus. How to achieve the right mix is a complex question, and failing to answer it can lead to both internal tensions and public skepticism.

There will not always be a single optimal decisionmaker for a particular question. Prosecutorial decisions often raise a host of issues touching on criminal justice policy, non-criminal domestic or international policy, the allocation of limited resources on both national and local levels, and case-specific considerations that bear on the obligation to achieve individualized justice. Actors at different levels of the process—in the federal system, the Attorney General, career DOJ personnel, U.S. Attorneys, and line assistants—each may have a superior claim to resolving some of these issues because of their accountability, expertise, or likely objectivity. The fact that decisions can be characterized in multiple ways also gives rise to varying intuitions about the level at which the decisions should be made. Finally, the potential for biased or partisan decision making suggests that no single actor, unchecked, can be wholly trusted. While conventional wisdom may correctly assume that a top-down structure will check rogue prosecutors and compensate for well-meaning line prosecutors' unconscious biases, decision making at the top introduces problems of its own. The right question will not always be "who should decide?" Often, it will be, "by what multilateral process should different actors' voices be heard on different aspects of a decision to ensure that the best decision is made?"

For the federal system, our analysis highlights the consequences of the Attorney General's multiple roles as policy-maker, administrator, and supervisor. State District Attorneys share these functions, but their policy visions typically will be more narrowly tailored to state criminal prosecutions. One's initial intuition might be that, as the most accountable actor in the prosecutorial decision-making process, the chief prosecutor should maximize his involvement in matters implicating his roles. But perhaps not. The greater the chief prosecutor's participation in allocating resources based on considerations of criminal justice and other policy (in the Attorney General's case, national policy), the more likely it becomes that the chief prosecutor will be perceived to be pursuing illegitimate objectives. That perception, in turn, can be reduced by eliminating his (and other political appointees') participation in screening and day-to-day decision making in

individual cases. When high level supervision is important, that might better be left to non-partisan career prosecutors.

This Article's evaluation of its three scenarios has illustrated the importance of transparency in decision making. Prosecutors tend to guard the confidentiality of decision making in individual cases for good reason. Doing so maintains the effectiveness of ongoing investigations and prosecutions and protects the privacy and reputations of witnesses, suspects, and targets. And there already is some measure of transparency regarding prosecutorial policies (particularly DOJ policies) and their implementation, as well as public information about the distribution of personnel and funding. Nevertheless, many policies concerning special categories of cases, if they exist at all, are too shrouded in secrecy. For example, what internal regulations dictate which public corruption cases will be prosecuted, and when? When will supervisory personnel intervene in, or oversee, individual public corruption cases? Absent public answers to questions such as these, observers have no basis to determine whether existing procedures have been followed, whether the procedures have been improvised to fit a particular case, and whether the procedures make sense. The secrecy of internal policies fuels public skepticism and undermines accountability.¹⁵⁵

Little wonder, then, that some label the recent discharge of U.S. Attorneys as a scandal.¹⁵⁶ High-ranking DOJ officials, in effect, have said "trust us." How and why should the public do so? Given the lack of transparency, and the evident absence of a public pre-commitment to objective internal decision-making processes, it is understandable that the administration's critics perceive the administration's political appointees to have been acting from partisan motives in an attempt to contravene U.S. Attorneys' and their Assistants' authority to allocate resources prudently within their districts.

This Article's analysis also suggests several especially interesting challenges for local prosecutors. In the context of federal criminal prosecutions, we have acknowledged the relevance of extra-criminal domestic and foreign policy and the importance of national uniformity. Thus, on certain questions, the Attorney General becomes the optimal decisionmaker because of his access to the President and other national

¹⁵⁵ The publication of prosecutorial policies is controversial, however. Compare Abrams, *supra* note 32, at 25–31 (advocating publication of internal policy) and Vorenberg, *supra* note 32, at 1558–59 (“[T]he lack of either a pre-announced set of rules or after-the-fact accountability for exercise of discretionary power is inconsistent with political accountability.”), with William T. Pizzi, *Understanding Prosecutorial Discretion in the United States: The Limits of Comparative Criminal Procedure as an Instrument of Reform*, 54 OHIO ST. L.J. 1325, 1364–67 (1993) (identifying four reasons to keep internal guidelines confidential).

¹⁵⁶ See *supra* text accompanying note 6.

policymakers. What, however, is the appropriate approach in state prosecutions that implicate the same national policy considerations? State prosecutors' decisions about how to treat non-citizens, for example—including the decision of whether to implement the Vienna Convention discussed in Scenario 1—have as much bearing on foreign policy as federal prosecutors' decisions on the issue. Similarly, applications of one state's criminal justice policy can create significant, potentially unfair disparity with other jurisdictions' approaches.¹⁵⁷

High-level federal prosecutors have a comparative advantage in rendering national policy directives and minimizing national dis-uniformity because they can obtain information and guidance from the whole executive branch. It is unclear on what basis state prosecutors should address national policy issues. Federal authorities might seek to influence state prosecutors—for example, through persuasion by DOJ or congressional exercises of spending authority—but that is a relatively rare occurrence. State legislators can give direction to state and local prosecutors about how to further policy objectives other than law enforcement (e.g., foreign relations). But one would expect them to do so infrequently because external limitations on prosecutorial discretion tend to interfere with the norm of pursuing individualized justice.

Ultimately, each elected District Attorney is a world unto himself. The group of elected prosecutors might seek to develop and implement collective understandings. But there is no history or routine of communication and reciprocal influence among district attorneys within a state or nationally. Moreover, joint decision making can undermine each elected prosecutor's accountability to his or her individual constituencies. One district in a state may elect a prosecutor precisely because of his measured approach to charging and sentencing, while another may elect a prosecutor who pledges to be as tough on crime as possible.

Thus, state prosecutors face a host of issues that are harder for them to address than for federal prosecutors. To what extent should state prosecutors express or implement policies that are not purely about criminal law enforcement? What should be the source of those policies? To what extent should various prosecutors within the state seek a unified state position, and when should they respond to the issues based exclusively on the expectations, social conditions, and resources in their limited districts? If uniformity is important, how can it be achieved?

State prosecutors in small local agencies are at a particular disadvantage in developing policy, institutional culture and history, and internal decision-making structures that provide checks on partisanship and other misuses or

¹⁵⁷ See Mellon et al., *supra* note 13, at 52 (analyzing differences among local prosecutors "which affect the uniformity, the quality, and the equality of justice").

abuses of authority.¹⁵⁸ Imagine, for example, an elected county prosecutor in a one-lawyer office who is politically ambitious and beholden to party leaders. This prosecutor's office is accountable to the electorate, and certainly the easiest to administer. But it is perhaps the hardest one in which to check the biases of the individual prosecutor. Consider again the decision of whether to bring public corruption charges, perhaps against a county official. A U.S. Attorney's Office can reduce appearances of partisanship through a combination of neutral, pre-established policies regarding charging and a distribution of decision making that includes nonpartisan prosecutors. These options are unavailable to the rural district attorney. The difficulty of preserving the public trust illustrated by the recent "U.S. Attorneys scandal" is magnified for the single-lawyer or small prosecutorial agency.

VIII. CONCLUSION

The public outcry over the recent U.S. Attorney discharges is not surprising. The actions of the administration, and the cases that apparently precipitated its actions, were, at least on the surface, inherently partisan. Naturally, Democrats and Republicans disagree about the import and significance of what occurred.

Nevertheless, the U.S. Attorney scandal, as many call it, teaches us a great deal both about the appropriate allocation of authority in both federal and state prosecutors' offices and about the way allegedly improper prosecutorial decision making should be evaluated. Critics and proponents of the administration's position have tended to discuss the issues in oversimplified, black and white terms. This Article's analysis suggests that the issues are far more complex.

Any assessment of the distribution of authority within a prosecutorial agency requires an understanding of both the relative competencies of the prosecutors at each level of the agency and the benefits and costs of centralized decision making. This Article's inquiry has been designed, in part, to further those understandings. Equally important is the recognition that the complexities of prosecutorial decision making illustrated by our three scenarios foreclose a mechanical allocation of authority. These complexities are all implicated in the U.S. Attorneys scandal and must be considered before assigning blame. On a forward-looking basis, the best response to these complexities will often involve some form of joint, or collaborative, decision making.

¹⁵⁸ Office culture is not always considered an unalloyed good. See JOHN ASHCROFT, NEVER AGAIN: SECURING AMERICA AND RESTORING JUSTICE 90 (Center Street 2006) (viewing institutional culture not as the product of hard-won experience, but rather as "the process of fighting the last war, which is the bane of losing generals").

In the end, this Article has not attempted to determine whether Attorney General Gonzales acted properly in dismissing the eight U.S. Attorneys in 2006. But its analysis explains why the issues are more complicated than they seem at first glance. The analysis may inform future debate about the scandal. More importantly, however, it should provide a basis for prosecutors of all stripes to think more deeply about the distribution of decision making within their offices. That, in turn, should help them begin the process of allocating authority in a coherent way.