The media, the political establishment, and the federal criminal justice community's focus on the compelling story of the firings is hardly surprising. The details emerged over a period of many months through leaks, internal Department of Justice (DOJ) emails, press releases, interviews, and dramatic congressional testimony. The media's focus on the firings obscured their deeper significance with regard to the nature of the relations between the DOJ and its ninety-three United States Attorneys' Offices (USAOs). This Article addresses this omission by looking at the consequences of these events for the balance struck between central control by Main Justice in Washington and autonomy for U.S. Attorneys in the field. The Article argues that the firings represent a departure from the historic balance of control as part of a broader effort by the DOJ to centralize operations and recapture some of the control Main Justice had lost over the past three decades.[2]

Part II of this Article begins by describing the arguments for central control by Main Justice and for field autonomy for USAOs as an aspect of a fundamental clash of values in American politics between the necessity for a strong central government and the value of local autonomy. Part III examines both the shared and conflicting attitudes toward the proper balance between central control and field autonomy that existed in the 1960s and early 1970s, the factors that determined where the balance

2. The descriptions of the relations between USAOs and the DOJ, as well as the descriptions of the traditional consensus that existed concerning them, are based upon the author's 1978 book on U.S. Attorneys: JAMES EISENSTEIN, COUNSEL FOR THE UNITED STATES: U.S. ATTORNEYS IN THE LEGAL AND POLITICAL SYSTEMS (The John Hopkins University Press, 1978) (1978). That book drew upon some 200 interviews conducted in 1965 and 1970–1971 with U.S. Attorneys, Assistant U.S. Attorneys, defense attorneys, U.S. District Court judges, probation officers, and federal investigative agents in thirteen districts of varying size and location, as well as with career attorneys and political appointees within the DOJ.

Throughout this Article, "political appointees" refers to DOJ officials requiring Senate confirmation (the Attorney General, Deputy Attorney General, and Assistant Attorneys General) and their appointed deputies and counselors who lack civil service protection. Career attorneys at Main Justice often refer to these officials as "the temporary help." Rather than clutter this Article with repeated citations to *Counsel for the United States*, readers should assume that unless otherwise noted, assertions about relations between the DOJ and U.S. Attorneys, and the attitudes that accompanied them are based on the research reported therein. Research on U.S. Attorneys (especially empirical social science research) published since *Counsel for the United States* is limited and does not provide much information describing developments since the early 1970s. However, after the 2006 firings, news reports, congressional hearings, and internal DOJ e-mails and documents made public provide useful insights into the relationship of the U.S. Attorneys with the DOJ; these sources will be relied upon heavily in this Article.

Finally, in 2002–2003, the author participated in a National Science Foundation-funded study titled, Uncharted Territory: A Qualitative and Quantitative Analysis of Inter-District Variation in the Federal Criminal Justice System) (unpublished study on file with the author) [hereinafter *Uncharted Territory Study*], that conducted over 300 interviews in seven districts. Though this research did not primarily focus on USAOs or their interactions with Main Justice, the research provides some useful information that updates the descriptions found in *Counsel for the United States*.

was struck in a district, and the patterns that resulted. Part III concludes with a summary of the consensus that then existed on when U.S. Attorneys could be fired. Part IV provides an update of the patterns that characterized relations between U.S. Attorneys and Main Justice four decades ago by examining the factors that have since enhanced both field autonomy and headquarters control. Part V describes the "strategy of centralization" pursued by the George W. Bush Administration, made evident by the firings of U.S. Attorneys, as well as its effects on USAOs. The Article concludes in Part VI with some thoughts on the factors that will determine where, in the aftermath of the firings in 2006, the balance between field autonomy and central control will be struck.

II. COMPETING PERSPECTIVES ON THE PROPER BALANCE BETWEEN U.S. ATTORNEY AUTONOMY AND MAIN JUSTICE CONTROL

The American political system embraces a number of valued principles which cannot be fully realized without creating conflict with other equally revered principles. Much of our political life involves a never-ending struggle over how to adjust the existing balance between such conflicting values. The conflict between the right to a fair trial and freedom of the press provides an important example. The firings of U.S. Attorneys in 2006 illustrate one of the most important, enduring, and difficult value clashes—the desire for an effective central government in Washington, D.C. versus the wish to preserve autonomy at the state and local level.

The problem of where to locate policy-making authority is particularly acute in the criminal justice system.[3] Federal criminal law poses an especially prickly and stubborn problem, as good arguments can be made both for central direction of policy from Main Justice and for autonomy for the nation's ninety-three USAOs.[4] The justifications for central control will be examined first, followed by the competing rationales for U.S. Attorney autonomy.[5]

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3. The same can be said for civil law. *Counsel for the United States* discusses field/headquarters conflicts in a number of aspects of federal civil law, including civil tax, land condemnation, and tort litigation. EISENSTEIN, supra note 2. Conflict in these areas continues—a point worth remembering given the focus of this Article on criminal justice.

4. There is a USAO for each of the ninety-four federal district courts, with the exceptions of the Districts of Guam and the Northern Mariana Islands, which are collectively served by a single USAO. Each state has at least one USAO, and in no case does the jurisdiction of a USAO extend beyond a state's boundaries. The remaining USAOs are in the District of Columbia, Puerto Rico, and the U.S. Virgin Islands.

5. The competing arguments for central control and local autonomy summarized in this and the following Part of this Article were expressed in numerous comments made by both DOJ attorneys and U.S. Attorneys and their assistants in interviews conducted for COUNSEL FOR THE UNITED STATES,

A. The Case for Central Control of Federal Criminal Justice Prosecution

The principal justification for central control of the USAOs from Washington is that the federal government has an obligation to pursue the same broad law enforcement goals everywhere in the nation. If different U.S. Attorneys emphasized the prosecution of different crimes, it would compromise the principle of equal justice and produce a hodgepodge of enforcement patterns. Similarly, if the ninety-three USAOs adopted starkly different prosecution policies toward, for example, bank robberies, drug possession, or gun crimes, people who committed the same federal crime in different districts would have very different outcomes, further undermining the principle of equal justice. If violators of federal criminal law are to be equally subject to prosecution and receive comparable sentences regardless of where they live, nationwide guidelines for initiating prosecution and for disposing of cases need to be established and uniformly implemented.

Furthermore, a democratically elected administration must decide how much to emphasize a variety of law enforcement goals and policies, such as fighting organized crime syndicates, pursuing the death penalty, reducing gun violence, enforcing immigration laws, prosecuting corporate crime, combating terrorism, or attacking healthcare fraud. Because an administration cannot pursue all goals equally, it must develop its own law enforcement policies based on the values of the President and Attorney General. If U.S. Attorneys do not adhere to these policies, the Administration's goals will not be realized.

Another reason for lodging decisions in the DOJ is that the Administration and the DOJ bear the responsibility of setting policies when new criminal statutes come into force. New criminal laws need to be interpreted and prosecuted uniformly if they are to be applied uniformly. Prosecution of weak cases in one district runs the risk of producing bad precedents that will affect litigation everywhere. Therefore, Main Justice needs to oversee the implementation of new laws closely. Similar arguments justify central control over what cases will be appealed, especially when there is a conflict between circuits. From Main Justice's perspective, although a USAO may feel strongly that a case should be appealed, the DOJ must see the bigger picture and assess how a precedent set by that case might jeopardize the outcome of similar cases everywhere.

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especially when the interviewees discussed relations between Main Justice and USAOs. *See* EISENSTEIN, *supra* note 2, at chs. 3–4, for more examples.

Other mechanisms of central control follow from the reasons just described. Main Justice needs to establish procedures and policies, such as those found in the *U.S. Attorneys' Manual*,[6] and to enforce adherence to them.[7] Enforcement requires monitoring USAO activities and performance through periodic inspections and mandated reporting systems. Moreover, Main Justice needs an extensive training program to induce its prosecutors to follow policies uniformly.

These arguments underlie the broad agreement that every new administration can select U.S. Attorneys who are committed to its law enforcement goals and who will faithfully implement them. Hardly anyone believes it is illegitimate for a new president to appoint his own U.S. Attorneys, to ask for the resignation of the previous administration's appointees, and to fire those who refuse to resign. Likewise, it stands to reason that an appointee who actively ignores or undermines Main Justice's policies can be asked to resign or, if necessary, be fired. Renegade U.S. Attorneys who pursue radically different policies from other U.S. Attorneys, who engage in questionable personal behavior, or who violate norms of professional integrity can be legitimately removed by the President to defend the integrity and image of the federal justice system.

B. The Case for Local Autonomy for USAOs

The mission statement of the DOJ explicitly recognizes the legitimacy and value of a U.S. Attorney's discretion.

> Each United States Attorney is the chief federal law enforcement officer of the United States within his or her particular jurisdiction . . . . Each United States Attorney exercises wide discretion in the use of his/her resources to further the priorities of the local jurisdictions and needs of their communities.[8]

As chief law enforcement officer for a federal district, typically encompassing numerous local jurisdictions and sometimes an entire state, a U.S. Attorney has an obligation to deal with crime problems that state and local officials either cannot or will not address. Sometimes, local

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6. EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS, UNITED STATES ATTORNEYS' MANUAL (2007) [hereinafter MANUAL], *available at* http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/.

7. *Id.* The MANUAL is a loose-leaf text designed as a quick and ready reference for United States Attorneys, Assistant United States Attorneys, and DOJ attorneys responsible for the prosecution of violations of federal law. It contains general policies and some procedures relevant to the work of the USAOs and to their relations with the legal divisions, investigative agencies, and other components within the DOJ. *Id.*

8. United States Attorneys' Mission Statement, http://www.usdoj.gov/usao/ (last visited Nov. 11, 2007).

prosecutors and judges lack the competence or motivation to deal with problems such as gun or gang violence. Sometimes, the magnitude of the problem or complexity of a prosecution overwhelms local resources. For example, drug traffickers, whose activities cross state and even international barriers, cannot be successfully dealt with by most local police and prosecutors. Large health care or corporate fraud conspiracies pose nearly insurmountable obstacles to local criminal justice systems. There is little incentive for local prosecutors to pursue cases involving police misconduct or corruption by local elected politicians. By the same token, crimes that receive vigorous prosecution due to local attitudes in some jurisdictions—for example, obscenity—are not regarded as serious enough to warrant much attention in others.

U.S. Attorneys have a unique competence because they typically possess an intimate understanding of their local communities, including the nature of social and economic problems. They also know many influential people, such as criminal justice system personnel, business and labor leaders, political officials, and other well-connected individuals. Furthermore, U.S. Attorneys have access to the impressive resources of the federal government, including federal law enforcement agencies, when addressing local crime problems. As such, only the local U.S. Attorney has a complete picture of all the crime problems each local district faces. U.S. Attorneys are generalists, responsible for the enforcement of the full range of federal criminal statutes.

At Main Justice, all but the very top leadership of the DOJ specializes in a narrow range of cases handled individually by its divisions and sections. Justice Department lawyers cannot assess the relative importance of either crime problems outside of their responsibility or other pending cases in the district. A case that Main Justice regards as vitally important and especially good may well appear less critical to a U.S. Attorney who knows the full scope of current litigation in the district. Because only a finite number of potential federal prosecutions and investigations can be undertaken, someone has to decide how to balance national priorities against pressing local needs. A U.S. Attorney has the best vantage point from which to make such judgments.

For example, to the question, "Who should decide how many gun or immigration cases should be initiated in a district?," proponents of central control answer, "Main Justice." Advocates of U.S. Attorney autonomy argue that such decisions should be delegated to the local U.S. Attorney who understands both the importance of national priorities and knows the local situation on the ground.[9]

9. Former Deputy Attorney General James Comey provided a good example of how knowledge of local conditions needs to be factored into judgments about what cases ought to be prosecuted. *A*

Another justification for local autonomy is that in a nation as politically, socially, economically, and culturally diverse as the United States, effective implementation of national policy requires knowledge of local problems, jury tendencies, attitudes of federal judges, and other factors that determine the success of prosecutions. A cookie-cutter, one-size-fits-all policy of enforcement is likely to create serious problems in many localities. U.S. Attorneys and their career Assistant U.S. Attorneys (AUSAs) are uniquely qualified to determine how national priorities can be translated into reality in each district.

Advocates of local autonomy also argue that striving for uniform practices in the United States is both unwise and impossible. It is unwise because it fails to respect the diversity of America and to accommodate its different cultures and peoples. It is impossible because the diversity found in local conditions will cause invariant policies to fail. For example, given differences in the nature and extent of the drug problem around the country, requiring prosecution of all drug seizures at a nationwide threshold would produce undesirable results.

Setting the threshold at a level that makes sense in Miami and other major cities would eliminate prosecution of most drug seizures in Vermont, Iowa, and Idaho. But a threshold appropriate in small districts would result in large USAOs prosecuting more cases than their current staff could handle. A "big" drug case in Omaha is small potatoes in Los Angeles. Similarly, mandating how U.S. Attorneys should deal with local law enforcement officials fails to recognize differences from district to district. One large USAO visited in 2002 counted 17 local police departments in its jurisdiction, whereas a middle-sized USAO had 750 police chiefs operating within its district.[10]

Hearing on the U.S. Attorney Firings Before the Subcomm. on Commercial and Administrative Law of the H. Judiciary Comm., 110th Cong. (2007) (statements of James Comey, former Deputy Att'y Gen. of the United States), *available at* http://www.washingtonpost.com/wp-dyn/content/article/2007/05/07/AR2007050701299.html. He testified that the number of gun prosecutions "tells you nothing in a vacuum." *Id.*

> But as I've explained to people a bunch of times, when I was running the U.S. Attorneys' Office in Richmond, Virginia, there was a real need for a federal impact on gun possession crimes. Because people weren't getting the kind of time they needed to reduce violent crime in the state system. When I moved to being U.S. Attorney in Manhattan, [Manhattan District Attorney] Bob Morgenthau and his office were all over gun possession crimes, and doing it very aggressively. So my approach changed.

Id. He later reiterated that by "just comparing my experience in Manhattan to my experience in Richmond, my gun numbers per capita dropped off dramatically when I became U.S. Attorney in Manhattan." *Id.* For a good general discussion of how USAOs' prosecutorial policies are formed, see Todd Lochner, *Strategic Behavior and Prosecutorial Agenda Setting in United States Attorneys' Offices: The Role of U.S. Attorneys and Their Assistants*, 23 JUST. SYS. J. 271 (2002).

10. *Uncharted Territory Study*, *supra* note 2.

Finally, a degree of autonomy and independence for USAOs can serve as a check on Main Justice if its leadership violates the principles of non-political equal justice. Just as there may be an occasional renegade U.S. Attorney who needs to be removed, there may also be renegade DOJ officials or even the entire leadership at Main Justice which may attempt to corrupt federal criminal justice for partisan or venal reasons. A system where U.S. Attorneys enjoy the discretion and a willingness to say "no" to the DOJ can provide an important check on improper or even illegal directives from Washington.

III. THE HISTORICAL BALANCE STRUCK BETWEEN CENTRAL CONTROL AND LOCAL AUTONOMY IN THE 1960S AND 1970S

Given the competing perspectives on what the balance between central control and field autonomy ought to be, what patterns actually emerged in practice four decades ago? To answer this question, this Article will first look at two factors: (1) What beliefs field and headquarters personnel shared about their relations with each other; and (2) the content of the significant disagreements that existed. Next, the factors that determined the actual degree of autonomy each U.S. Attorney exercised will be identified. Subsequently, the actual patterns of Main Justice and U.S. Attorney relations that emerged from the confluence of these factors will be described. Finally, the consensus on the tenure of U.S. Attorneys, especially concerning when they could be fired, will be summarized.

A. Shared and Competing Perspectives on Headquarters and Field Relations

The arguments for central control and local autonomy were familiar to Main Justice and USAO attorneys interviewed in 1965 and the early 1970s.[11] Indeed, at that time there was a widely shared consensus among both field and headquarters personnel regarding several central principles.[12] U.S. Attorneys serving four decades ago recognized the right of Main Justice to determine the general outlines of federal law enforcement policy and to oversee its implementation. Second, at that time both

11. *See generally* EISENSTEIN, *supra* note 2, at ch. 4.

12. In the aftermath of the firings, the statements of many current and former attorneys in the DOJ and USAOs show that the main elements of this consensus continue to the current day, as seen in the text and footnotes throughout this Article. Novelist Scott Turow, a former federal prosecutor, expressed two of the central tenets of this consensus, noting that a U.S. Attorney is "a figure of unique autonomy, whose right to pursue individual cases as she or he sees fit, with the framework of Washington's policy directives, has been largely unquestioned for generations and is rooted in the Office's local responsibilities." Scott Turow, *It's Up to Gonzales Now*, WASH. POST, Apr. 15, 2007, at B1.

career and political appointees at Main Justice accepted that U.S. Attorneys needed to exercise discretion in implementing DOJ policies. Of course, individual U.S. Attorneys tended to adhere more closely to those principles that favored their own position. But even the most independent-minded U.S. Attorneys and their assistants acknowledged, albeit begrudgingly, the necessity for central direction of policy. Likewise, attorneys in Washington understood that U.S. Attorneys needed some discretion in carrying out their duties.

The third and most significant element of the reigning consensus held that everyone should carry out their duties in a non-partisan, fair, and professional manner. The 2006 firings of U.S. Attorneys produced a number of expressions of this sentiment. In an Op-Ed piece in the *Los Angeles Times*, one of the fired U.S. Attorneys observed that "[a]ll federal prosecutors take a public oath when they assume office. . . . The oath is to the U.S. Constitution, not to the president or his cabinet."[13] The National Association of Former United States Attorneys (NAFUSA), in a letter to Attorney General Gonzales on February 1, 2007, observed, "[m]ost importantly, United States Attorneys have maintained a strong tradition of insuring that the laws of the Untied States are faithfully executed, without favor to anyone and without regard to any political consideration."[14]

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13. David C. Iglesias, *'Cowboy Up,' Alberto: A Fired U.S. Attorney Calls on the Attorney General to Serve the People, Not Politics*, LOS ANGELES TIMES, May 23, 2007, at 21. He also asserted that what was at stake was "the rule of law, the independence of the prosecutor and the apolitical calculus of who should be prosecuted." *Id.*

14. *Letter to Attorney General Gonzales*, NAFUSA Newsletter, (NAFUSA, Las Vegas, NV) Mar. 2007, at 3 [hereinafter NAFUSA Newsletter]. The NAFUSA letter also stated that, "[w]e are concerned that the role of the United States Attorneys may have been undermined by what may have been political considerations, which run counter to the proper administration of justice and the tradition of the DOJ." *Id.*

Among the many other statements demonstrating the depth and breadth of this consensus, two are especially noteworthy. The former U.S. Attorney in Los Angeles, Debra Yang, commented, "[t]he greatest travesty here is that you don't want to take away the independence of the U.S. Attorney's Office. The public relies on the impartiality of their prosecutions. To have it operate on anything less does a huge disservice to us as a nation." Jason McLure & T.R. Goldman, *Attorney Scandal Threatens Gonzales' Job*, LEGAL TIMES, Mar. 19, 2007, *available at* http://www.law.com/jsp/article.jsp?id=1174035822692. Senator Jeff Sessions (R-Ala.), a former U.S. Attorney, expressed similar sentiments on the Senate floor:

> So most of the people who are appointed have some sort of political heritage or background, but when you take that oath, when a person becomes a U.S. Attorney and they are asked to evaluate the merits of an existing case before them as to whether a person should be charged, as to what kind of plea bargain should be entered into in the course of a prosecution, they should follow the law, they should follow their personal integrity and do the right thing regardless of any politics, regardless of whether that defendant or the person involved in a civil lawsuit is a Republican, a Democrat, rich or poor, whatever. They have taken an oath to enforce the laws fairly against everyone.

It is important to avoid the temptation to view this period as a "golden age." It was not a perfect system. Not all U.S. Attorneys behaved in a non-partisan, apolitical way. Neither did every Attorney General, as the actions of John Mitchell during Watergate and Edwin Meese during the Iran-Contra affair demonstrate.[15] Furthermore, within the general confines of this consensus, significant differences emerged between field and headquarters personnel about where the balance between central control and local autonomy should be struck. Even here, the mix of opinions was complex. Differences existed both among U.S. Attorneys and DOJ personnel. The Main Justice attorneys most cognizant of the value of some autonomy for U.S. Attorneys did not go so far as most U.S. Attorneys, and most U.S. Attorneys told tales of "know it-all" Main Justice types directing them to do silly things.[16] These differences between field and headquarters personnel within the general consensus helped produce an undercurrent of tension, conflict, and mutual resentment that colored interactions between most (but not all) USAOs and the DOJ.

B. The Determinants of U.S. Attorney and DOJ Relations

In practice, how much autonomy did USAOs exert during the Kennedy, Johnson, and Nixon Administrations?[17] Part of the answer depends on *when* during the tenure of an administration the question is asked. When the Kennedy and Nixon Administrations came to power, the new set of inexperienced U.S. Attorneys that were appointed shared a sense of excitement and commitment to the President and Attorney General and their policy goals. Most, therefore, were predisposed to follow Main Justice's policies and instructions. At that time, in nearly all districts there were virtually no career assistants with experience in dealing with Washington. U.S. Attorneys had little understanding of how much discretion they might be able to exercise or how to do it. However, as

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Debate on the Preserving United States Attorneys' Independence Act of 2007, 110th Cong. (Mar. 19, 2007) *available at* http://sessions.senate.gov/pressapp/record.cfm?id=271208 [hereinafter *Preserving U.S. Attorneys' Independence*] (floor statement of Senator Sessions). At another point, referring to this obligation, Sessions observed, "[t]hat is a tradition which most of the public may not know but is deeply understood throughout the DOJ. *Id.*

15. A former Nixon Administration U.S. Attorney provided another example. He wrote in his book that in 1971 at the Annual Conference of U.S. Attorneys, then-Attorney General Richard Kliendienst said that it was "of the utmost importance to keep this Administration in power and you men must do everything you can to insure that result." WHITNEY NORTH SEYMOUR, UNITED STATES ATTORNEY 159 (1975).

16. EISENSTEIN, *supra* note 2. In a number of districts, attorneys described cases where the DOJ refused to authorize recommended settlements in civil cases that went to trial and resulted in higher awards against the government. *See id.*, *supra* note 2, at 68.

17. For a more detailed discussion of this question, see EISENSTEIN, *supra* note 2, at ch. 6.

they and the AUSAs they recruited gained experience, they better understood the possibilities for exercising discretion and increasingly wished to do so. U.S. Attorneys who replaced appointees who left office were less likely to partake of the camaraderie and excitement that characterized the first years of the Administration. A similar maturing and erosion of enthusiasm characterized the attitudes of political appointees at Main Justice. Consequently, U.S. Attorneys exerted more autonomy further into a president's term of office.

A number of district-level factors shaped the degree of control the DOJ exerted over the USAOs independent of the passage of time. The size of the office by far constituted the most important factor promoting autonomy. Larger offices had the flexibility and expertise needed to handle complex cases and were able to shift AUSAs' assignments, reducing the need to rely on Main Justice attorneys dispatched to the district to handle cases. Smaller offices lacked the resources and expertise to cope with complex or time consuming cases, and depended on DOJ attorneys to handle part of the case load.[18]

The ability of the U.S. Attorney and his assistants and their reputation in the DOJ also affected autonomy. Some U.S. Attorneys enjoyed a reputation for being smart and effective. Their arguments in disputes with Main Justice carried more weight, and their assertions that they could handle difficult cases were more credible. Others were known to be weak and unreliable, and they attracted closer scrutiny and control.

Additionally, the culture and traditions of the USAOs and the federal district court community, especially the judges, with respect to control from Washington also played a role. A few districts enjoyed a rich tradition of independence, a tradition sustained by judges and the network of former U.S. Attorneys and AUSAs practicing in the district. Most offices, however, lacked such traditions.

The stance of Main Justice's political leadership toward U.S. Attorney autonomy and its emphasis on controlling its field offices was also a key factor. Attorneys General, of course, typically adhere to the rationale for central control. Though the emphasis placed on establishing Main Justice's authority varied during the 1960s and early 1970, the differences were not great, and the efforts to exert central control were far less ambitious than during the Administration of George W. Bush.

Finally, the personality and inclinations of U.S. Attorneys toward direction and control from the DOJ varied substantially. Some regarded themselves as "field officers" of the DOJ whose duty was to faithfully carry out the DOJ's wishes. One such individual stated that "[t]he U.S.

18. For a more detailed discussion of the importance of district size, see EISENSTEIN, *supra* note 2, at 190–92.

Attorney is part of the executive branch. . . . Our home office is Washington . . . . I defer to them when they feel something should be handled by the Department. I do everything to accommodate them."[19]

At the opposite extreme, a few felt that they should be largely autonomous, and deliberately limited the conditions under which they would accept DOJ authority. They typically resisted, sometimes fiercely, attempts by the DOJ to dispatch attorneys from Washington to take over cases. One described flying to Washington to meet with the Attorney General after a fierce argument with an Assistant Attorney General over who would handle an important case. This attitude extended to some AUSAs. "If the Attorney General orders it, then all right," said one outspoken AUSA. "But I'm not going to do it just because some schmuck in the Tax Division thinks I ought to do it that way."[20] However, most U.S. Attorneys took a middle position, acknowledging the authority of the DOJ and a willingness to defer to Assistant Attorney Generals' decisions, while chafing at and occasionally fighting attempts by career attorneys at Main Justice to dictate how cases were handled.

C. The Patterns of Main Justice and U.S. Attorney Relations

The many factors identified as shaping the balance between central control and field autonomy suggest a complex and varied picture. Most interactions in most districts, most of the time, were characterized by cooperation, mutual influence, and negotiation of differences, albeit with an undercurrent of tension.[21] A minority involved conflict, confrontation, resistance, and sometimes coercion by the DOJ, and the outcome of these interactions colored the more frequent cooperative encounters. The

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19. EISENSTEIN, *supra* note 2, at 65.

20. *Id.* at 66. Similar views persist to this day. In 2002, a former U.S. Attorney in a large office interviewed for the *Unchartered Territory Study* observed: "I'm not in favor of a completely centralized, dictated-to office, and I think that everybody whose a real U.S. Attorney will tell you the same thing. There are some U.S. Attorneys that are not real U.S. Attorneys. They're, you know, they're company men." *See* EISENSTEIN, *supra* note 2.

21. In comments made on the Senate floor during consideration of the Preserving the Independence of U.S. Attorney's Act of 2007, Republican Jeff Sessions of Alabama described his relationship with the DOJ when he was a U.S. Attorney:

> My impression, my entire experience was that when faced with difficult choices, if I called the people in Washington and sought their advice or help or insight into how to handle a difficult matter, they were very respectful of my decision making process. They would provide support and advice, and they usually deferred to the decision of the prosecutor.

Preserving U.S. Attorneys' Independence, *supra* note 14. He also revealed an element of tension:

> [U.S. Attorneys] are not entitled to indict anyone they choose without any review within the Department of Justice, any oversight at all. A lot of us thought sometimes there was too much of that, but it was mainly a bureaucratic headache you had to go through with some cases.

Id.

degree of conflict was limited by the fact that the priorities of most USAOs and the DOJ coincided. U.S. Attorneys typically wanted to do what the DOJ wanted them to do with respect to broad policy.[22] When disputes arose, they usually involved how to proceed in specific cases within the agreed upon set of priorities or who should handle them.

Several features of the strategic environment during this period gave the DOJ an advantage in its efforts to control USAOs. By far the most important factor was that most offices were fairly small. In 1968, almost half of USAOs had four or fewer AUSAs; by 1975, more than half still had ten or fewer.[23] AUSAs were very poorly paid and stayed only as long as it took to get the federal trial experience that could propel them to a good job in the private sector. The lack of civil service protection meant that even AUSAs who wished to stay usually had to resign when party control of the presidency changed. As a result, most AUSAs lacked experience. The lack of manpower further hindered USAOs from handling difficult and time consuming cases. Indeed, the smallest offices sometimes had to request the dispatch of career attorneys from Main Justice to help them handle their caseloads. Career attorneys in Washington were generally very experienced and capable, with their abilities greatly exceeding those of most AUSAs in most districts. Complex, time-consuming, and specialized cases requiring expertise could not be handled by the generally inexperienced AUSAs who staffed USAOs.

The confluence of the multiple factors shaping headquarters and field interactions produced four distinct patterns: "normal," "controlled or ideal," "conflict," and "semi-autonomous." The most common district was the "normal" district.[24] These districts exhibited six characteristics in their dealings with Main Justice. First, the level of overt conflict and disagreement between the USAO and Main Justice was low. Second, when disputes arose, they were usually resolved through polite compromises. Third, the U.S. Attorneys enjoyed considerable discretion in the day to day exercise of their duties and the handling of routine cases. Fourth, when conflicts were not resolved through give and take negotiation, the USAO usually prevailed when the matter did not involve a

22. Field research conducted in 2002 confirmed that U.S. Attorneys continue to share the Administration's law enforcement goals. *Uncharted Territory Study*, *supra* note 2. As one official in a USAO put it, "[t]heir priorities are our priorities." USAOs generally pursued terrorism, gun violence, drugs, and immigration cases vigorously. Not all U.S. Attorneys shared all priorities, as disagreements over voter fraud prosecutions demonstrate.

23. EISENSTEIN, *supra* note 2, at 5 (citing 1968 U.S. ATT'Y GEN. ANN. REP 93–94).

24. *Id.* Because only thirteen districts were studied in detail, the frequency of these four patterns cannot be determined precisely. *See id.*, *supra* note 2, at app. A (describing methodology). The "normal" pattern probably predominated, though the presence of many small offices undoubtedly resulted in a number of "controlled" districts. Offices "in conflict" were likely rare. Of course, there was only one "semi-autonomous" district, the Southern District of New York.

major policy area or important case with high precedent value. Fifth, Main Justice would prevail on matters not involving major policy when it really wanted to, but the costs in time and resources of doing so limited the number of times it could insist on getting its way. For example, the DOJ could take a case away from the USAO and dispatch a career attorney from Washington to handle it; however, too many disputed cases existed to do so routinely. Finally, the DOJ nearly always prevailed on disputes involving major cases or policy areas. For instance, the DOJ exercised tight control over the prosecution of cases under new statutes (e.g., airplane bomb threats).

Other offices, usually but not always with four or fewer AUSAs, were effectively "controlled" by Main Justice, and operated as "ideal field offices." Disputes were rare, and the office consciously sought to adhere to DOJ policy. The U.S. Attorneys in these offices regarded the existence and application of uniform national policies as important. The offices avoided disputes with headquarters, did not appeal instructions they disagreed with to a higher level in the DOJ, and seldom pursued their own policy goals or local initiatives. Personnel in these offices regarded themselves as part of the DOJ, were proud of the many friends they had at headquarters, and revered the *U.S. Attorneys' Manual*.[25]

A few offices studied could be characterized as "in conflict" with Main Justice.[26] At these offices, the U.S. Attorneys actively sought autonomy, and the DOJ resisted it. Conflict, often quite heated, was frequent. In one such district, the DOJ wanted to fire the U.S. Attorney but could not do so because of the political power of his local political supporters, including a prominent mayor with close ties to the President. In routine cases, disputes often were resolved much as in "normal" districts. Overall, the USAO enjoyed more autonomy than in the normal district, but it was limited and came at a high cost in time, effort, and unpleasant encounters.

At the time the research for *Counsel for the United States* was conducted, the Southern District of New York, which was the largest USAO with nearly 70 AUSAs, achieved "semi-autonomous" status. It handled cases (for example, civil tax matters) that DOJ attorneys took in every other district, and it undertook a number of initiatives in bringing cases in new areas on its own. However, even there, major policies regarding the handling of cases followed national policy. Thus, even with the

25. Several U.S. Attorneys referred to the MANUAL as "the Bible," and one said he followed it "religiously." EISENSTEIN, *supra* note 2, at 66.

26. *Id.* Attitudes toward the MANUAL in these districts, and some "normal" districts, contrasted sharply with those found in "field offices." One former U.S. Attorney emphatically stated, "[i]n all my time there, I never did read the damn MANUAL." *Id.* at 67.

"semi-autonomous" status, the office was not completely autonomous and could not always freely pursue whatever policies it wished.[27]

D. The Consensus on the Tenure of U.S. Attorneys in the 1960s and Early 1970s

The controversy over the dismissal of seven U.S. Attorneys on December 7, 2006, prompted considerable public discussion of both of a president's authority to fire and whether these firings represented "business as usual" or something extraordinary. The nature of a fairly strong consensus regarding U.S. Attorneys' tenure in the time of the Kennedy, Johnson, and Nixon Administrations provides a useful perspective on this discussion.[28]

U.S. Attorneys traditionally did not expect to continue in office after a change in party control of the presidency.[29] When the presidency changed hands, U.S. Attorneys regarded resigning as "the thing to do." Occasionally, a U.S. Attorney refused to submit a resignation and was removed, usually without controversy.[30] Eisenhower replaced Truman's U.S. Attorneys, Kennedy replaced those of Eisenhower, Clinton replaced those of George H.W. Bush, and George W. Bush replaced Clinton's. Instances of an incumbent's refusal to resign were the rare exception.

Firings of his own U.S. Attorneys by a president were also extremely rare four decades ago,[31] and continued to be so afterwards. The Congressional Research Service (CRS) conducted a study of U.S. Attorneys who left office during a president's term and before their four year term expired between 1982 and December of 2006.[32] Fifty-four fell into

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27. The tradition is intact to this day. U.S. Attorney Mary Jo White, commenting on U.S. Attorney autonomy, said, "[t]he Southern District is the sovereign district of New York. You know how I come out on that." Adam Liptak, *For Federal Prosecutors, Politics Is Ever-Present,* N.Y. TIMES, Mar. 18, 2007, § 4. The Office is still routinely referred to this way within the DOJ and by U.S. Attorneys, though this overstates the Office's degree of autonomy from Main Justice.

28. EISENSTEIN *supra* note 2, at ch. 3.

29. Little is known about what happens when a new president of the same party assumes office. However, Senator Jeff Sessions (R-Ala.) recounted that President H.W. Bush asked all Reagan's hold-over U.S. Attorneys to resign, and many did so. Sessions asked to remain and was allowed to do so. *Preserving U.S. Attorneys' Independence*, *supra* note 14.

30. For example, the U.S. Attorney in the Eastern District of Philadelphia, David Marston, refused to resign after Jimmy Carter defeated Gerald Ford in the 1976 election, as did Philip VanDam in the Eastern District of Michigan. Federal District Judge Avern Cohn described both incidents in an Op-Ed piece. J. Avern Cohn, *Setting the Record Straight,* DETROIT LEGAL NEWS, May 7, 2007. Robert M. Morgenthau, appointed by Kennedy in the Southern District of New York, resisted the Nixon Administration's efforts to remove him, but resigned when according to him he received an "ultimatum" from the President. David Johnston, *Attorney General Seeks Resignations from Prosecutors*, N.Y. TIMES, Mar. 24, 1993, at A1.

31. EISENSTEIN, *supra* note 2, at 97–98.

32. KEVIN M. SCOTT, CONGRESSIONAL RESEARCH SERVICE, U.S. ATTORNEYS WHO HAVE SERVED LESS THAN FULL FOUR-YEAR TERMS 1981–2006 (2007).

this category, all but eight of whom left for reasons that appear to be unrelated to their conduct in office.[33] Only two of them could be confirmed as fired by the President.[34] The CRS found six others for whom no official information was available on why they left, though it found that three left their positions after questionable conduct became public.[35] However, the CRS study does not provide any information about the continued tenure of U.S. Attorneys who served more than four years, which was the case for each of the nine U.S. Attorneys fired in 2006.[36]

The reigning consensus in the late 1960s and early 1970s (and probably up to President Bush's second term) was that U.S. Attorneys could stay beyond the fourth anniversary of their appointment until the president left office unless they had engaged in improper professional or personal behavior. There was virtually complete agreement that it was improper to fire a U.S. Attorney for political reasons.[37] Thus, although the nine fired U.S. Attorneys had served more than four years, their firings were both unprecedented and counter to a long-standing and widespread consensus that they could expect to continue to serve until either they left voluntarily or resigned at the end of an administration.

IV. CHANGES IN THE BALANCE BETWEEN MAIN JUSTICE CONTROL AND LOCAL USAO AUTONOMY SINCE THE EARLY 1970S

How have the dynamics of the relationship between USAOs and Main Justice changed since the field research for *Counsel for the United States* was completed in the early 1970s? Unfortunately, no comparable research has been conducted that updates it. Indeed, social scientists, especially political scientists, have with few exceptions ignored U.S.

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33. Among these forty-six, seventeen became federal district or appellate judges, one became a U.S. magistrate judge, four sought elective office, two went to a position in state government, six took other positions in the executive branch, one died in office, and fifteen went into private practice. *Id.* at 5–6.

34. *Id.* at 6.

35. *Id.*

36. *Id.*

37. Some expressions of this consensus have appeared. In the letter sent to Attorney General Gonzales in spring of 2006, the NAFUSA noted that "the usual practice has been for United States Attorneys to be permitted to serve for the duration of the administration which appointed them." NAFUSA Newsletter, *supra* note 14. In testimony before the Senate Judiciary Committee in early 2007, Law Professor and former AUSA Laurie Levenson told the Senators:

> The Attorney General's actions [in asking for U.S. Attorneys' dismissals] at this time are unlike anything that has occurred before . . . . [W]e have never seen the type of turnover now in progress, where the Attorney General, not the President, is asking mid-term that demonstrably capable U.S. Attorneys submit their resignations so that Washington insiders may be appointed in their place.

Is the DOJ Politicizing the Hiring and Firing of U.S. Attorneys?, S. Comm. on the Judiciary, 110th Cong. (2007) (testimony of Laurie L. Levenson, Professor of Law, Loyola Law School), *available at* http://judiciary.senate.gov/testimony.cfm?id=2516&wit_id=6061.

Attorneys.[38] However, the same factors that determined the balance between central control and field autonomy continue to operate. It is possible to examine trends in some of these factors, especially the size of USAOs and the quality of their AUSAs. Little, if any, systematic research exists on the current status of other factors, for example, how vigorously the leadership of the DOJ seeks to control its field offices.[39] Fortunately, as the following discussion demonstrates, the firings of seven U.S. Attorneys in December 2006 triggered the publication of a good deal of anecdotal information about such factors. Enough information is available to identify both the changes that enhanced USAO autonomy and those that strengthened Main Justice's ability to control its field offices.

A. Factors Promoting U.S. Attorney Autonomy from Main Justice

Five interrelated developments since the early 1970s promoted the ability of U.S. Attorneys to act independently of central control from the DOJ, shifting the overall balance described above toward more autonomy. First, the number of AUSAs grew dramatically. Second, the position of AUSA was converted from a patronage position with no job protection to a quasi-civil service status that enabled the establishment of a career service in the field. Third, the emergence of a large group of career AUSAs led to the development of information networks among them that facilitated independence. Fourth, the establishment of the Attorney General's Advisory Committee of U.S. Attorneys provided a mechanism for bringing concerns from the field to the DOJ's top leadership. Finally, the vast increase in the scope of federal criminal jurisdiction, the "federalization of criminal justice," promoted greater field autonomy in the DOJ.

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38. Most research on U.S. Attorneys in the past three decades has been narrow in scope and published in article form. *But see* Todd Lochner, Dilemmas of Accountability: Prosecutorial Agenda-Setting in United States Attorneys' Office (2001) (unpublished Ph.D. dissertation, University of California, Berkeley) (on file with the Berkeley Library); *See also* Lochner, *supra* note 9, at 271–94. A handful of former AUSAs have written excellent articles on specific aspects of USAOs. *See, e.g.*, Bruce Green and Fred C. Zacharias, *The Uniqueness of Federal Prosecutors*, 88 GEO. L.J. 207 (2000); Michael O'Neill, *When Prosecutors Don't: Trends in Federal Prosecutorial Declinations*, 79 NOTRE DAME L. REV 221 (2003); H.W. Perry, *United States Attorneys—Whom Shall They Serve*, 61 LAW & CONTEMP. PROBS. 129 (1999); Daniel Richman, *Prosecutors and Their Agents, Agents and Their Prosecutors*, 103 COLUM. L. REV. 749 (2003); *Symposium: The Changing Role of the Federal Prosecutor*, 26 FORDHAM URB. L.J. 347 (1999).

39. The *Uncharted Territory Study*, *supra* note 2, focused on the criminal disposition process and differences among districts, not on USAO relations with Main Justice. Because this relationship was not a focus of the research, information obtained about it was limited.

The size of an office, more than anything, determined the ability of a USAO to resist domination by Main Justice. Other things being equal, the larger the office, the more robust its ability to develop the expertise to handle complex litigation itself rather than relying on career attorneys dispatched from Washington. Larger offices could shift AUSAs to cases demanding more resources, whereas smaller offices could be overwhelmed by several major pending cases, forcing them to ask headquarters to dispatch DOJ attorneys to handle the work.

As noted earlier, in the 1960s and 1970s most USAOs were small. With the expansion in the scope of federal criminal law, the number of AUSAs increased dramatically. There were 4,155 full time equivalent AUSA positions in fiscal year 1993,[40] and the number has grown slowly but steadily since then. By 2006, the DOJ reported that there were 5,673 full-time equivalent AUSA positions.[41] As a consequence, the number of very large offices has increased dramatically.[42]

The acquisition of quasi-civil service protection by AUSAs also significantly enhanced field autonomy. In the mid-1960s to early 1970s, the most serious problem in the representation of the federal government in U.S. district courts was the inexperience of AUSAs.[43] As previously noted, AUSAs typically left about the time they gained the experience to do their jobs well; positions with local law firms seeking attorneys with litigation experience in federal court paid far more than the modest salary AUSAs earned in government service. Even AUSAs who wished to stay typically had to leave when party control of the presidency changed.

This all changed dramatically when AUSAs were granted quasi-civil service protection in the 1970s and their compensation was

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40. U.S. DEP'T OF JUSTICE., EXECUTIVE OFFICE FOR U.S. ATT'YS, U.S. ATT'YS ANNUAL STATISTICAL REPORT: FISCAL YEAR 2002, at 3 (2002) [hereinafter U.S. ATT'YS ANNUAL STATISTICAL REPORT 2002] (Overview Chart 1—Full-Time Equivalent (FTE) Personnel). The 1528 new positions added between FY 1993 and FY 2006 represent an increase of over 36 percent.

41. EXECUTIVE OFFICE FOR U.S. ATT'YS, U.S. ATT'YS ANNUAL STATISTICAL REPORT: FISCAL YEAR 2006, at 3 (2006) [hereinafter U.S. ATT'YS ANNUAL STATISTICAL REPORT 2006] (Overview Chart 1:Full-Time Equivalent (FTE) Personnel).

42. EISENSTEIN *supra* note 2, at 5 (citing 1968 ATT'Y GEN. ANN. REP. 93–94). In 1968, only five USAOs had at least thirty-two Assistant U.S. Attorneys. The Southern District of New York had sixty-seven, the District of Columbia forty-six, the Eastern District of New York thirty-two, the Central District of California forty-three, and the Northern District of Illinois thirty-two. By contrast, in 2007, the average number of AUSAs per office was sixty-one. Some districts report the number of AUSAs on their websites. *See* Executive Office for U.S. Att'ys, *available at* http://www.usdoj.gov/usao/eousa/. In 2007, the Northern District of Illinois had 161 AUSAs, and the Eastern District of New York more than 145. The Western District of Michigan alone had thirty-seven AUSAs, more than either of those two districts had in 1968.

43. EISENSTEIN, *supra* note 2, at 208.

significantly raised.[44] Compared to prevailing incomes for lawyers in many jurisdictions, the pay for AUSAs was quite poor. But beginning in the mid-1970s, it has increased enough to attract a corps of career attorneys who stayed in the office.[45] Today, a significant percentage of AUSAs are career attorneys with considerable experience. In 2006, the DOJ reported AUSAs had served an average of eleven years.[46] Even in large districts (where the pay AUSAs can command if they leave the office far exceeds their salary), a significant corps of assistants remain. And the attractiveness of the position allows offices in such districts to seek a commitment from new hires to stay at least four years.[47]

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44. AUSAs were evidently never explicitly granted civil service status. In 1978, Congress passed Pub. L. No. 95-454, 92 Stat. 1111 (codified and amended as 5 U.S.C. § 1101), which in reforming the civil service laws, defined who was an "employee" entitled to a full set of protections. *See also* 5 U.S.C. § 7513 (2006) (requiring 30 days notice, the right to an attorney, and a written decision before they could be removed, suspended, or have their pay reduced). In *Hamlett v. Dep't of Justice*, 90 M.S.P.R. 674 (2002), the Merit Systems Protection Board ruled that Hamlett, an AUSA who was fired for misconduct, was entitled to the protections afforded civil service employees. *Id.*

45. Information on the pay of both U.S. Attorneys and AUSAs in public documents is surprisingly difficult to find. The DOJ's Office of Attorney Recruitment and Management states the pay of attorneys hired by the USAOs is determined administratively, but it does not reveal what the pay scale is. *See* U.S. Dep't of Justice, Office of Att'y Recruitment and Mgmt, *available at* http://www.usdoj.gov/oarm/arm/hp/hpsalary.htm (this web site states that "Attorneys hired by the U.S. Attorneys' Offices are compensated under an Administratively Determined (AD) pay scale authorized by Title 23, U.S. Code." The citation is probably in error, as Title 23 deals with highways.) The relevant provision of the U.S. Code, 28 U.S.C. § 548, specifies only that the Attorney General makes the determination. 28 U.S.C. § 548 on "Salaries" reads,

> [s]ubject to sections 5315 through 5317 of title 5, the Attorney General shall fix the annual salaries of United States attorneys, assistant United States attorneys, and attorneys appointed under section 543 of this title at rates of compensation not in excess of the rate of basic compensation provided for Executive Level IV of the Executive Schedule set forth in section 5315 of title 5, United States Code.

28 U.S.C. § 548. However, the Office of Attorney Recruitment and Management does provide information on the pay of DOJ attorneys not hired by USAOs. A rough indication of current AUSA pay can be obtained by assuming the two scales are roughly equivalent. Beginning DOJ attorneys with just one year or less of experience begin at Grade GS-11. In 2007, GS-11 newcomers pay began at $46,974, with an upper limit of $61,068. The maximum salary for GS-15 attorneys at step 10 was $120,981. *See* U.S. OFFICE OF PERSONNEL MGMT, FEDERAL CIVILIAN WORKFORCE STATISTICS, PAY STRUCTURE OF THE FEDERAL CIVIL SERVICE AS OF MARCH 31ST, 1997, SALARY TABLE 2007-GS, *available at* http://www.opm.gov/oca/07tables/html/gs.asp. *See also* Lochner, *supra* note 9, at 23, (citing a DOJ official's estimate that in 1998, the average AUSA salary, including cost of living supplements, was $88,244).

46. U.S. ATT'YS ANNUAL STATISTICAL REPORT, *supra* note 40, at 3; *see also* Todd Lochner, *Assistant U.S. Attorney Careerism and the Possibility of Agenda-Setting*, (The Am. Political Sci. Ass'n, Washington, D.C.) Winter 2000, at 7 (reporting that he calculated the average tenure of AUSAs in the 1960s at about three years, rising to six years by the 1980s, and to over eight years in the mid-1990s).

47. *Uncharted Territory Study*, *supra* note 2. The comments of an AUSA in a very large district interviewed in the study are instructive. When asked if he would consider making a career out of federal prosecution, he replied:

Communication among U.S. Attorneys and AUSAs expanded with the increase in office size and AUSAs length of service. Interviews with U.S. Attorneys in the mid-1960s and early 1970s revealed differences in their understanding of how much discretion they could exercise and of what recourse they had when they disagreed with Main Justice's directives.[48] As U.S. Attorneys came to know one another during an administration, especially at the annual conference of U.S. Attorneys in Washington, they began to share experience and tactics in dealing with the DOJ. However, contact between U.S. Attorneys was infrequent, and AUSAs from different districts rarely came to know one another. The federalization of criminal law increased the need for meetings of field personnel in order to deal with the multiple issues involving enforcement of expanded federal criminal jurisdiction.

Moreover, the prosecution of criminal enterprises stretching across many states necessitated the formation of multidistrict prosecution teams. The DOJ began to call conferences of First Assistant U.S. Attorneys and other supervisors in specialized areas (for example, terrorism and white collar fraud).[49] In 1998, the DOJ established its National Advocacy Center in Columbia, South Carolina, where the Executive Office for U.S. Attorneys and the Office of Legal Education run a number of training programs for AUSAs.[50] The course descriptions for many of these programs indicate that they bring together AUSAs annually.[51]

> No. No, in fact, this office requires people to sign on to a four year commitment. My four years is coming up just a month and a half away and I am starting to think about other career options. . . . [F]rankly, my view is that the time period you are here, an assistant should just commit him or herself entirely to the job. That means that you have to understand going in that you are going to be giving up a lot. There is a huge amount of sacrifice.

Id.

48. EISENSTEIN, *supra* note 2, at 64–67.

49. *Uncharted Territory Study*, *supra* note 2. AUSAs occasionally mentioned these meetings in interviews conducted as part of the study.

50. For a brief description of the National Advocacy Center, see Office of Legal Educ. http://www.usdoj.gov/usao/eousa/ole/ (last visited Nov. 15, 2007). This site reports that the National District Attorneys Association uses the facilities to train state and local prosecutors, and that some 10,000 prosecutors attend the NAC each year. *Id.*

51. *See* Course Descriptions: Advanced Money Laundering Seminar, http://www.usdoj.gov/usao/eousa/ole/ole_course_calendar/descript.html (last visited Nov. 15, 2007). The course description reads:

> This seminar is designed for Assistant United States Attorneys (AUSAs) and Federal Investigative Agents with extensive experience in money laundering/asset forfeiture cases, who are actively involved in the investigation and prosecution of money laundering/asset forfeiture cases. This is an annual conference, designed to to [sic] provide the latest developments in the law, new agency initiatives, the banking and FinCen perspectives, and international money laundering. AUSAs are encouraged to nominate an investigating agent who will be involved in future investigations to attend this seminar.

Id.

These contacts allowed communication networks and friendships among AUSAs to develop across districts.[52] Some AUSAs acquire national reputations for expertise in their area, a development recognized by the DOJ when it draws upon experienced career assistants to make training videos and to teach seminars at the National Advocacy Institute.[53] Assistants participating in training seminars at the National Advocacy Center inevitably become acquainted with those leading the seminars as well as with their fellow participants from other districts, and can seek advice and information from them rather than relying exclusively on attorneys at Main Justice. These networks both reduce the need to rely on Main Justice for help and provide channels to discuss other topics, including DOJ efforts to control the discretion of attorneys in the field.[54]

The development of a cohort of experienced capable career AUSAs stands in sharp contrast to the inexperience of AUSAs four decades ago. Their level of expertise now very likely equals or exceeds that found in Main Justice. Indeed, several interviewees in 2002 claimed that young attorneys in the DOJ sought to become AUSAs to gain experience,[55] something that was virtually unheard of in earlier times. Civil service protection also makes it possible for AUSAs to transfer from one district to another, strengthening ties between districts and enriching knowledge of how districts deal with Main Justice.[56] The presence of career

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52. *Uncharted Territory Study*, *supra* note 2. Interviewees mentioned these contacts, and occasionally received calls from people in other districts during the interviews. Communication between districts has also been facilitated by the AUSAs who move from one district to another, a practice unheard of in the past.

53. *See* Videotape, Ethics Training for Attorneys: Hard Drives and Hard Lessons (the National Advocacy Center, Justice Television Network 2004) (describing the video as "AUSAs Edwin Kelly and Eric Klumb explore the ethical issues surrounding the use of computers in litigation and investigations. (For DOJ Attorneys Only!)"). *See also* Videotape, Ethics, (the National Advocacy Center, Justice Television Network) (featuring two AUSAs, one from the Middle District of Pennsylvania, and one from Eastern District of Wisconsin). *available at* http://www.usdoj.gov/usao/eousa/ole/video_info/video_descript.html#V00148.

54. *See* U.S. ATT'YS ANNUAL STATISTICAL REPORT 2002, *supra* note 40, at 3; U.S. ATT'YS ANNUAL STATISTICAL REPORT 2006, *supra* note 41, at 3. It is also worth nothing that Main Justice's ability to oversee AUSAs has in relative terms declined as the number of AUSAs increased faster than the number of attorneys working in Washington. In FY 2002, 53% of the DOJ's attorneys and 67% of those whose duties involved prosecution or litigation served in USAOs; by FY 2006, these numbers were 56% and 70% respectively.

55. *Uncharted Territory Study*, *supra* note 2.

56. Id. Several AUSAs interviewed in 2002 had served in other districts, and provided good insight into how offices differed. The career of Ronald Tenpas illustrates these new patterns nicely. *See Featured Madisonian: Ronald J. Tenpas, Alumnus*, James Madison College at Mich. State University, http://www.jmc.msu.edu/mom/showmom.asp?id=22, (last visited Aug. 27, 2007); United States Department of Justice, Environment and Natural Resources Division, http://www.usdoj.gov/enrd/ (last visited Aug. 27, 2007). Tenpas was an AUSA in the Middle District of Florida, an AUSA and a Branch Chief in Maryland, and United States Attorney for the Southern District of Illinois. He then became Associate Deputy Attorney General, and finally be-

attorneys who take pride in their skills, regard themselves as at least as knowledgeable and experienced as attorneys at Main Justice, and adhere to their offices' traditions of independence, all promote autonomy from DOJ control.[57] Put simply, most USAOs have the means, motives, and opportunity to make their own decisions about what cases to bring and how to handle them.

The Attorney General's Advisory Committee of U.S. Attorneys has also contributed to greater autonomy. Prior to 1973, no regular mechanism existed for U.S. Attorneys to bring their concerns directly to the top leadership of the DOJ. The Executive Office for United States Attorneys had a responsibility to transmit concerns from the field to Main Justice.[58] But U.S. Attorneys had to take it upon themselves if they wanted to discuss policy and practices with either the Attorney General or Deputy Attorney General. That changed when Attorney General Elliot Richarson announced the formation of the Attorney General's Advisory Committee (AGAC).[59] The seventeen members of the AGAC, appointed by the Attorney General to be representative of the diversity among offices, provide an opportunity to voice opinions about policy and offer advice to the Attorney General.[60] This access provided a counterweight

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came Acting Assistant Attorney General in charge of the Environment and Natural Resources Division. *Id.*

57. The degree of pride federal prosecutors express in the quality of their office is striking. Attorneys in three large districts asserted that they were the premier office in the country, providing ample grounds for not automatically deferring to judgments and directives from Main Justice. *Uncharted Territory Study*, *supra* note 2. Sometimes, office pride is revealed in USAOs' websites. The Northern District of Illinois (Chicago and vicinity) web site proclaims:

> The United States Attorney's Office for the Northern District of Illinois is one of the premier federal prosecutors' offices in the country. Its outstanding reputation and tradition of excellence is based, in part, on famous undercover investigations and prosecutions of public corruption in Chicago and Cook County, such as Operation Greylord and Operation Gambat, which targeted judicial corruption, and, more recently, Operation Haunted Hall, Operation Silver Shovel and Operation Safe Road, which focused on political corruption.

See United States Attorney's Office, Northern District of Illinois, http://www.usdoj.gov/usao/iln/aboutus/index.html (last visited Aug. 26, 2007). The development of a core of career Assistants adds a potentially significant complicating factor in assessing Main Justice/U.S. Attorney relations that is not addressed in this Article. *See* Lochner, *supra* note 9, at 287 (quoting a former U.S. Attorney regarding how prosecutorial policies are set: "We have seen a move towards more cohesiveness between U.S. attorneys and the higher-ups at Justice. The real tension oftentimes isn't between the offices and Main Justice, but rather Main Justice and the U.S. Attorneys on the one hand and career assistants on the other.").

58. For a discussion of the ambiguous and uncomfortable role the Executive Office for U.S. Attorneys played in the relationship between the DOJ's field offices and headquarters see EISENSTEIN, *supra* note 2, at 92–93.

59. For a description of the history, composition, and functions of the AGAC, see MANUAL, *supra* note 6, at 3-2.000

60. MANUAL, *supra* note 6, at 3-2.250, 3-2.530.

to their frequent rivals, the Assistant Attorneys General who enjoy easy access to the Attorney General and Deputy Attorney General.

Finally, the vast expansion in the scope of crimes falling within the jurisdiction of the federal criminal justice system, a development termed "the federalization of criminal law," both promoted the increase in the number of AUSAs and expanded opportunities for USAOs to exercise discretion. Over the past thirty years, the American criminal justice system has gradually but steadily been transformed from one in which the states determined the content of almost all criminal law and had jurisdiction over the prosecution of the crimes defined under it, to an increasingly federalized system.[61] The growth in federal criminal jurisdiction necessitated hiring additional AUSAs. The federalization of criminal law meant that with few exceptions, crimes that were traditionally only subject to state jurisdiction became federal offenses as well. The number of cases handled by USAOs consequently rose. In 1965, approximately 31,000 criminal cases were filed.[62] By 2005, almost 69,000 federal criminal cases were filed, more than double the 1965 figure. The quantum leap in the overlap between federal and state jurisdiction required U.S. Attorneys to develop closer ties to state and local law enforcement.[63] It also increased the scope of discretion in deciding what cases to prosecute. The result was additional responsibility for U.S. Attorneys in the district, responsibilities that had to be fulfilled by people working in the district.

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61. For a useful overview of these developments, see JAMES A. STRAZELLA, THE FEDERALIZATION OF CRIMINAL LAW, (A.B.A. Crim. Just. Sec.) (1998); *see also* Gerald G. Ashdown, *Federalism, Federalization, and the Politics of Crime*, 98 W. VA. L. REV. 789, 789–813 (1996); Sara Sun Beale, *Reporter's Draft for the Working Group on Principles to Use When Considering the Federalization of Criminal Law*, 46 HASTINGS L.J. 1277, 1277–1304 (1995); Charles D. Bonner, *The Federalization of Crime: Too Much of a Good Thing?*, 32 U. RICH. L. REV. 905, 905–38 (1998); Kathleen F. Brickey, *Criminal Mischief: The Federalization of American Criminal Law*, 46 HASTINGS L.J. 1135, 1135–74 (1995); Steven D. Clymer, *Unequal Justice: The Federalization of Criminal Law*, 70 S. CAL. L. REV. 643, 643–735 (1997); Zachary W. Carter, et al. *Panel Discussion: The Prosecutor's Role in Light of Expanding Federal Criminal Jurisdiction*, 26 FORDHAM URB. L.J. 657, 657–77 (1999); Daniel C. Richman, *The Changing Boundaries Between Federal and Local Law Enforcement*, *in* BOUNDARY CHANGES IN CRIMINAL JUSTICE ORGANIZATIONS 81–111 (Charles M. Friel ed., 2000).

62. Source Book of Criminal Justice Statistics Online, http://www.albany.edu/sourcebook/pdf/t592005.pdf, table 5.9.2005 (last visited Aug. 26, 2007). The number stayed in the range of 30,000 to 33,500 through 1969. It jumped to over 38,000 in 1970, and ranged between 28,000 and 47,000 until 1986, when it consistently topped 40,000. *Id.*

63. For an example of the nature of these ties, see Lisa L. Miller and James Eisenstein, *The Federal/State Criminal Prosecution Nexus: A Case Study in Cooperation and Discretion*, 30 LAW & SOC. INQUIRY 239, 239–68 (2005).

B. Factors Promoting Main Justice Control of USAOs

Though developments since the 1970s generally promoted greater autonomy for USAOs, some forces acted to counter this general trend. As described in greater detail below, the Senate seemed less inclined to exert its traditional prerogatives in the appointment and removal of U.S. Attorneys. The DOJ increased its demands on USAOs for reports on their activities. The implementation of the Federal Sentencing Guidelines prompted Main Justice to establish national standards regarding their application, including the Thornburgh Memo, which regulated charging decisions.[64] The increased attention to law and order issues, including the death penalty, the war on drugs, and other crimes (for example, carjacking) both promoted the federalization of criminal law and increased the DOJ's efforts under both Democratic and Republican administrations alike to undertake nationwide initiatives to deal with these crimes.

After the election of George W. Bush, several significant developments strengthened the factors that favored greater control of U.S. Attorneys by Main Justice.[65] One such development consisted of successful attempts to change the type of people who headed USAOs. Efforts by the DOJ to reduce the role the Senate played in the appointment of U.S. Attorneys were a second. Third, the political leadership of the DOJ exhibited less deference to the value of U.S. Attorney autonomy. Finally, several other developments, including the terrorist attacks of September 11, 2001 and policies toward death penalty cases, resulted in greater central control.

1. Changes in Who Became U.S. Attorneys

The Bush Administration, especially under Alberto Gonzales, undertook an unprecedented, determined, and multi-faceted effort to appoint U.S. Attorneys who identified with Main Justice's goals, accepted its authority, and actively sought to implement its policies and directives. Support for President Bush appears to have been salient both in determining who should be fired and who hired. The *New York Times* reported that Attorney General Gonzales' Deputy Chief of Staff, Kyle Sampson, sent a ranking of U.S. Attorneys to White House Counsel Harriet Miers in March 2005, which recommended retaining "strong" U.S.

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64. *See infra*, note 98 and accompanying text for a further discussion of the Thornburgh Memo.

65. Efforts at enhanced control by Main Justice predated the Bush Administration. Norman Abrams and Sara Sun Beale claimed that Main Justice was seeking to "exercise greater supervisory control over decision-making by United States Attorneys in the field, with a view to making federal prosecutive policy more uniform nationwide." NORMAN ABRAMS & SARA SUN BEALE, FEDERAL CRIMINAL LAW AND ITS ENFORCEMENT 8 (2d ed. 1993).

Attorneys who "have produced, managed well, and exhibited loyalty to the President and Attorney General," and firing "weak U.S. Attorneys who had been ineffectual managers and prosecutors, chafed against administration initiatives, etc."[66] The *New York Times* later reported that he also produced a chart of possible nominees that included a category for membership in the conservative Federalist Society, for work on Republican campaigns, and for serving as a delegate to the GOP's Convention.[67] In replying to a string of emails that discussed why all U.S. Attorneys should not be removed, Sampson said, "we would like to replace 15–20% of the current U.S. Attorneys—the underperforming ones . . . . The vast majority of U.S. Attorneys, 80–85%, I would guess, are doing a great job, are loyal Bushies, etc., etc."[68]

A number of newspaper articles claimed that many new U.S. Attorneys in 2006 lacked either prosecutorial experience or strong ties to the district to which they were appointed. One newspaper report drawing on e-mail messages provided to Congress reported that Kyle Sampson proposed thirty-three-year-old Rachel Brand as the replacement for Margaret Chiara, the U.S. Attorney in Western Michigan, despite the fact that Brand had no prosecutorial experience.[69] Brand headed the DOJ's Office of Legal Policy and had been active in the Federalist Society, and though born in Michigan, grew up in Iowa.[70] Although a newcomer to the district, Deborah Rhoades, an appointed U.S. Attorney in the Southern District of Alabama, was an experienced prosecutor who served as a trial attorney for the Philadelphia Organized Crime Strike Force and an AUSA in San Diego before moving to Main Justice as Counselor to the Assistant Attorney General for the Criminal Division.[71] Others, such as Bradley J. Schlozman, appointed as interim head of the Western District

66. David Johnston & Eric Lipton, *'Loyalty' to Bush and Gonzales Was Factor in Prosecutors' Firings, E-Mail Shows*, N. Y. TIMES, Mar. 14, 2007, at A18.

67. *Id.*

68. Dan Eggen & Paul Kane, *Justice Dept. Would Have Kept 'Loyal' Prosecutors; Aide Recommended Retaining 'Bushies' And Top Performers*, WASH. POST, Mar. 16, 2007, at A2. According to a Talking Points Memo, "U.S. Attorney Purge Timeline," Sampson stated: "In my e-mails, by referring to loyal Bushies or loyalty to the President or the Attorney General, I meant loyalty to their policies and the priorities they had laid out for US Attorneys." *U.S. Attorney Purge Timeline*, TALKING POINTS MEMO, http://www.talkingpointsmemo.com/usa-timeline.php (last visited Nov. 12, 2007).

69. Scott Shane, *Political Resume, Not Court, Stood Out for a Contender*, N. Y. TIMES, Apr. 14, 2007, at A10. Brand ultimately declined to accept the nomination.

70. *Id.*

71. This information is from the official biography on the U.S. Attorney's Office's web site, http://www.usdoj.gov/usao/als/usattorney/index.html (last visited Aug. 17, 2007).

of Missouri and his replacement, John Wood, had never served as a prosecutor.[72]

The *Washington Post* reported in 2007 that after Bush's re-election in 2004, almost four dozen new U.S. Attorneys had been selected, with nearly one-third of them "trusted Administration insiders."[73] Twenty came to office as interim appointees who, thanks to a provision of an amendment to the Patriot Act inspired by the DOJ in 2006,[74] could serve indefinitely without the need for the President to submit a nominee to the Senate for confirmation. Consequently, over 40% (twenty of forty-eight) of U.S. Attorneys who came to office after Bush's 2004 election were interim appointees.[75]

Thus, a significant number of U.S. Attorneys serving in 2007 either came from posts within the Administration in Washington, D.C. or lacked strong ties to their districts and the prestige accruing to individuals formally nominated by the President and confirmed by the Senate.[76] Their willingness to devote resources to prosecutions for crimes not a priority for Washington and their ability and inclination to resist efforts to reduce district autonomy coming from Main Justice were both impaired compared to U.S. Attorneys with permanent appointments, strong ties to their districts, and prosecutorial experience.[77]

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72. Wood's prior experience included serving as Deputy Associate Attorney General and as a Counselor to Attorney General John D. Ashcroft, Deputy General Counsel for the Office of Management and Budget, and Chief of Staff for the U.S. Department of Homeland Security. He was born in Missouri and served as an aide to Republican Senator John Danforth. U.S. Attorney's Office, http://www.usdoj.gov/usao/mow/aboutus/usattorney.html (last visited Aug. 17, 2007). Schlozman was Acting Assistant Attorney in the voting rights section of the Civil Rights Division.

73. Amy Goldstein & Dan Eggen, *Prosecutor Posts Go To Bush Insiders: Less Preference Shown for Locals, Senators' Choices*, WASH. POST, Apr. 1, 2007, at A1. The vacancies resulted both from firings and natural turnover and included twenty interim appointments made by the DOJ along with nominees submitted to the Senate for confirmation. The article reports the appointees included ten people who served as senior aides to Gonzales as well as several from the White House and other federal agencies. Some of the appointees lacked prosecutorial experience, ties to the district, or both. They included Bradley Schlozman, interim USA in the Western District of Missouri, who was a deputy in the Civil Rights Division; John Wood, nominated to replace Schlozman while a counselor to then-Deputy Attorney General Paul McNulty; Rachel Paulose, Senior Counselor to McNulty; and three close associates of John Ashcroft. *Id.*

74. *See infra* note 86.

75. Amy Goldstein & Dan Eggen, *Prosecutor Posts Go To Bush Insiders; Less Preference Shown for Locals, Senators' Choices*, WASH. POST, Apr. 1, 2007 at A1.

76. The field research for *Counsel for the United States* found that acting U.S. Attorneys suffered several disadvantages in running their offices. They found it difficult to undertake major initiatives or reorganization of the office because everyone was waiting for the permanent appointee to assume control. The cachet of being a presidential appointee provided intangible but important prestige that enhanced their ability to lead, something interim or acting U.S. Attorneys lacked. EISENSTEIN, *supra* note 2.

77. In some districts, counter-pressures to assert district autonomy might be at work, especially in USAOs with a vibrant office culture embraced by a strong core of career AUSAs that extols inde-

This increased reliance on political loyalty and service to the Administration does not mean that all or even most nominees lacked prosecutorial experience or ties to their districts, or that their political loyalty was their principal qualification. Indeed, according to two reporters who studied the characteristics of nominees, "the majority of the U.S. attorneys named since 2005 have been relatively traditional choices, such as career prosecutors who moved up to the top job in the district in which they worked."[78] But the use of political criteria and service in Washington in selecting U.S. Attorneys in the Bush Administration is unprecedented in the modern era.[79]

2. Diminished Deference to the Senate in U.S. Attorney Appointments

The Administration's expanded use of political criteria in choosing U.S. Attorneys indicates that it was less inclined to defer to senators in the appointment process.[80] Hints that this was the case emerged from documents released as a result of congressional inquiries into the November 2006 firings of U.S. Attorneys. In e-mails, the Attorney General's Deputy Chief of Staff, Kyle Sampson, listed the names of possible replacements for U.S. Attorneys being considered for dismissal instead of waiting for senators' or state party officials' recommendations.[81] In 2001, the District Court in Maine appointed Paula Silsby as Acting U.S. Attorney. The President failed to submit a nominee to the Senate, despite Republican Senator Olympia Snowe's recommendation that Silsby be appointed.[82] While senators and other political figures still play a

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pendence from Washington, and in districts where the federal court community as a whole values local autonomy and distrusts Washington.

78. Goldstein & Eggen, *supra* note 73.

79. For example, the *Washington Post* quoted former Clinton Administration Deputy Attorney General Jamie Gorelick as saying that Justice Department officials only rarely became U.S. Attorneys. "These jobs are serious prosecutorial jobs that require judgment and an understanding of the laws that are to be enforced. They are not meant to be stepping-stones, or to give people turns at political jobs." Goldstein & Eggen, *supra* note 73.

80. In e-mails released by the DOJ, the Attorney General's Chief of Staff, Kyle Sampson, was explicit on this point: "I am in favor of executing on a plan to push some USAs out. . . . I strongly recommend that as a matter of administration, we utilize the new statutory provisions that authorize the AG to make USA appointments." Sampson further said that by avoiding Senate confirmation, "we can give far less deference to home state senators and thereby get (1) our preferred person appointed and (2) do it far faster and more efficiently at less political costs to the White House. Talking Points Memo, U.S. Attorney Purge Timeline, May 14, 2007, http://www.talkingpointsmemo.com/usa-timeline.php. For a description of the considerable influence senators exerted on the appointment of U.S. Attorneys in the 1960s and 1970s, see EISENSTEIN, *supra* note 2, at 41–45.

81. ABRAMS & BEALE, *supra* note 65.

82. Dan Eggen & Amy Goldstein, *Justice Weighted Firing 1 in 4*, WASH. POST, May 17, 2007, at A1. Silsby continued to serve as acting U.S. Attorney into 2007.

significant role in the appointment and retention of U.S. Attorneys, the actual influence of the Senate in the selection of U.S. Attorneys seems to have declined.

Fewer senators now seem to have a sense of entitlement in influencing who becomes U.S. Attorney.[83] The frequency with which individuals without strong ties to their districts have been nominated and confirmed suggests an erosion of the traditional, widely shared understanding that U.S. Attorneys should be well known and respected in their districts, and knowledgeable about them. We can therefore infer that senators are less willing to assert their traditional prerogative to participate meaningfully in the appointment process. The same may be said of what apparently are the relatively muted protests of Republican senators from the states where U.S. Attorneys have been fired.[84] It would be incorrect to conclude that senators and other politicians now play only minor roles

83. Alabama's two Republican Senators, Jeff Sessions and Richard Shelby, reportedly had someone else in mind for the Southern District of Alabama, but agreed to support Deborah Rhodes, who had served as counselor in Main Justice's criminal division, even though they had never met or heard of her. *See* Goldstein & Eggen, *supra* note 73. In August 2006, the DOJ appointed as Interim U.S. Attorney for Alaska an AUSA from Pittsburgh without input from its two Republican Senators. Senator Murkowski, who recommended the first Assistant in Anchorage, reported that the DOJ said that they were still working on it when asked about the status of her recommendation; she then stated that the picks "were not acceptable by the White House." Finally, upon hearing the news of the interim appointment she declared, "[y]ou just think, it can't be, wait. There was no consulting, nor process, no nothing. That's where I was certainly caught blindsided." Richard Mauer, *U.S. Scandal Threatens Alaska's Prosecutor*, ANCHORAGE DAILY NEWS, Apr. 22, 2007, *available at* http://www.adn.com/news/alaska/story/8816351p-8717151c.html. Ted Stevens, the longest serving Republican in the Senate and considered one of the most powerful senators in Washington, was quoted as saying, "I am just furious at the way the attorney general handled this." *Id.*

84. Though five of the nine fired U.S. Attorneys served in states with two Democratic senators (Lam and Ryan in California, McKay in Washington, Cummins in Arkansas, and Chiara in Michigan), three had one Republican Senator (Graves in Missouri, Bogden in Nevada, and Iglesias in New Mexico), and one (Charlton in Arizona) had two Republican Senators. David Johnston and Eric Lipton reported that Senator Ensign (R-NV) was very unhappy about the decision to fire Bogden. Johnson & Lipton, *supra* note 66. Reacting to emails released by the DOJ stating Senator Kyl was upset at the firing of Paul Charlton, a Kyl spokesman told the Associated Press, "Kyl was not at all pleased with the way the Justice Department conducted its dismissal of several U.S. Attorneys, including Paul Charlton from Arizona. Kyl supported Mr. Charlton's nomination. And when informed of the DOJ's decision to dismiss him, Kyl requested that the Justice Department reconsider its decision." The Associated Press, *E-mails: Kyl 'Upset' Over Prosecutor Firing*, TUCSON CITIZEN, Aug. 3, 2007, *available at* http://www.tucsoncitizen.com/ss/local/59120.php.

Neither Ensign nor Kyl spoke out publicly about the firings. It is interesting that Senator Domenici, who recommended David Iglesias be appointed U.S. Attorney in New Mexico, also played a role in his firing, complaining about Iglesias' failure to prosecute voter fraud cases in three phone calls to the Attorney General, and eventually calling Iglesias at home to ask about charges in a corruption case involving a Democrat. Christopher Drew & Eric Lipton, *Anger of Swing State Republicans Eased U.S. Attorney Toward Exit*, N.Y. TIMES, Mar. 18, 2007, at 1.

in the appointment and retention of U.S. Attorneys.[85] But the likelihood that their role has declined is intriguing and, if true, important.

The strongest evidence for both the Bush Administration's diminished regard for the role of the Senate and the Senate's acceptance of a lesser role rests in the changes made in provisions for the appointment of interim U.S. Attorneys in the Patriot Act Reauthorization Bill signed into law by President Bush in March 2006. At the behest of the Administration during Conference Committee deliberations on the bill, a Republican Senate Judiciary Committee staffer inserted a provision that changed the long standing requirement that an interim U.S. Attorney selected by the DOJ could not serve for more than 120 days.[86] Under the new provision, interim U.S. Attorneys could continue to serve indefinitely. This meant that the DOJ could unilaterally determine who would replace a departing U.S. Attorney and bypass the Senate entirely. After the controversy over

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85. Writing on the website TRUTHOUT.org, Michael Winship speculated that the reason Steven Biskupic, the U.S. Attorney in Eastern Wisconsin, one of the places identified as a voter-fraud "hot spot," survived was due to the Administration's fear of angering the then-Chair of the House Judiciary Committee, James Sensenbrenner. U.S. Attorneys in Pennsylvania, another state where the there were GOP allegations of voter fraud, also stayed in office, perhaps due to the influence of Senator Arlen Specter, the Senate Judiciary Chair in 2006. Michael Winship, *Keep Out the Vote*, TRUTHOUT, May 15, 2007, http://www.truthout.org/docs_2006/051507D.shtml. The *L.A. Times* described the little known bi-partisan "California Commission" headed by a wealthy Bush ally (Gerald L. Parsky) which was created in a deal between the Administration and California's two Democratic senators to recommend candidates for U.S. Attorney positions and federal judgeships. Richard B. Schmitt, *Goodling: A Power Player Behind the Scenes at the Justice Dept.*, L.A. TIMES, May 23, 2007. When Kyle Sampson and Monica Goodling sought to end-run the Commission by finding their own candidates, Parksy complained. *Id.*

86. The relevant portion of the bill reads:

> SEC. 502. INTERIM APPOINTMENT OF UNITED STATES ATTORNEYS. Section 546 of title 28, United States Code, is amended by striking subsections c) and d) and inserting the following new subsection: c) A person appointed as United States attorney under this section may serve until the qualification of a United States Attorney for such district appointed by the President under section 541 of this title.

Pub. L. No. 109-177, § 502, 120 Stat. 192 (2006). Senator Specter, Judiciary Committee Chairman when the change was made, claimed he did not know about the provision:

> I then contacted my very able chief counsel, Michael O'Neill, to find out exactly what had happened. And Mr. O'Neill advised me that the requested change had come from the Department of Justice, that it had been handled by Brett Tolman, who is now the U.S. attorney for Utah, and that the change had been requested by the Department of Justice . . .

Dahlia Lithwick, *U.S. Attorney Scandal Update: Who's to Blame for Those Alarming Patriot Act Revisions?*, SLATE, Mar. 5, 2007. The 120-day limit on the term of acting U.S. Attorneys dates from 1986. According to Judiciary Committee Chair Senator Patrick Leahy, "[b]efore 1986, 28 U.S.C. § 546, the law governing the appointment of United States Attorneys, authorized the district court where a vacancy exists to appoint a person to serve until the President appointed a person to fill that vacancy with the advice and consent of the Senate." *Preserving United States Attorney Independence Act of 2007: Hearing Before the S. Judiciary Comm. on S. 214*, 110th Cong. (Feb. 8, 2007) (statement of Sen. Patrick Leahy), *available at* http://leahy.senate.gov/press/200702/020807.html.

the firings of nine U.S. Attorneys erupted, Congress repealed this provision in 2007.[87] However, by then, approximately twenty interim U.S. Attorneys had been selected by the DOJ.[88]

Increasing the DOJ's control over who becomes a U.S. Attorney to ensure responsiveness to Main Justice's priorities and directives greatly enhances its ability to reduce local autonomy. The success the DOJ had in increasing its role in determining who headed USAOs, especially in the Gonzales era, likely meant fewer U.S. Attorneys sought a degree of autonomy, and more of them consciously strived to follow Main Justice's lead faithfully. This change is particularly significant because it occurred in the middle of the Administration's second term, a period where U.S. Attorneys' autonomy typically rose.

3. Main Justice's Reduced Acceptance of U.S. Attorney Autonomy

Attitudes in Main Justice toward the degree of autonomy that U.S. Attorneys rightfully ought to exercise shifted. Information that came to light as the controversy over the firings grew suggests political appointees in the Bush Administration's DOJ may not have adhered as strongly to the pre-existing consensus that a degree of U.S. Attorney autonomy was necessary and desirable.[89] Likewise, the desire to preside over a

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87. The Senate passed the Preserving United States Attorney Independence Act of 2007 by a vote of 94–2, and the House by 306–144. *See* http://thomas.loc.gov/cgi-bin/bdquery/z?d110:SN00214:@@@R (last visited Aug. 31, 2007). President Bush signed it into law on June 14, 2007, as announced in a two sentence White House News Release. *See* http://www.whitehouse.gov/news/releases/2007/06/20070614-6.html. As a result, the interim U.S. Attorneys already in office became subject to the 120-day limit.

88. This was not the only provision in the Patriot Act Reauthorization strengthening the DOJ's ability to influence who served as U.S. Attorneys. According to the *Washington Post*, the U.S. Attorney for Montana, William Mercer, raised the ire of the Chief District Judge in Billings, Donald W. Molloy, because Mercer was spending most of his time in Washington D.C. as an aide to Attorney General Gonzales. Judge Molloy claimed that because Mercer was living in Washington, he was no longer a Montana resident, in violation of federal law. Mercer asked the counsel to Judiciary Committee Chair Arlen Specter to insert a provision in the law allowing federal prosecutors to reside outside of their districts if they have "dual or additional" responsibilities. Dan Eggen, *Residency Clause Adds Fuel to Dispute Over U.S. Attorneys*, WASH. POST, May 2, 2007, at A3. The article claims that "about a half-dozen" U.S. Attorneys worked in Washington, an ironic fact given the DOJ's contention that one reason David Iglesias was fired as New Mexico's U.S. Attorney was because he was absent from his district too often and that Mercer spent an average of three days a month in Montana. *Id.*

89. One indication of attitudes within Main Justice came in an e-mail that one official, Bill Mercer, wrote in response to a colleague who said he was "sad." David Johnson & John M. Broder, *New E-Mail Gives Details on Attorney Dismissals*, N.Y. TIMES, Mar. 20, 2007, at A2. Mercer suggested some reasons to be sad:

> That Carol Lam (the fired U.S. Attorney in San Diego) can't meet a deadline or that you'll need to interact with her in the coming weeks or that she won't just say: Okay.

unified DOJ with U.S. Attorneys following its policy initiatives may have been more central to Bush's top appointees. Historically, comprehensive reviews of U.S. Attorneys' performance to determine who should be fired have probably never been conducted. When Main Justice did just that, it constituted an extraordinary break with past practice. In an Op-Ed piece in the *New York Times*, Attorney General Gonzales referred to this review as a "management review process," suggesting that such reviews were no longer out of the ordinary in the eyes of Main Justice.[90] Together, these changes in attitudes reinforced a belief within the DOJ that failure to obey its instructions in specific cases provides sufficient grounds for firing.[91]

Further evidence of the determination of Main Justice to control the U.S. Attorneys rests in the unprecedented firings themselves and what the emails that were subsequently released revealed about the attitude in Main Justice toward the tenure of U.S. Attorneys. They suggest that consideration of removal of U.S. Attorneys was a routine topic of discussion. Talk of U.S. Attorneys who might be fired, unlike past practice, was not confined to a single individual or office as problems arose, but rather was a discussion initiated within the DOJ by political appointees with close ties to the White House, and perhaps involving White House officials themselves.[92] At one time or another, Kyle Sampson considered some twenty-six U.S. Attorneys for dismissal.[93]

> You got me. You're right, I've ignored national priorities and obvious local needs. Shoot, more production is more hideous than I realized.

Id.

90. Alberto Gonzales, *'Nothing Improper'*, N.Y. TIMES, Apr. 15, 2007, at B7. Gonzales also said that "[w]hat began as a well-intentioned management effort to identify where, among the ninety-three U.S. attorneys, changes in leadership might benefit the Department, and therefore the American people, has become an unintended public controversy." *Id.*

91. David Johnston and Eric Lipton reported some of the reasons for the firings given by Kyle Sampson, the Attorney General's Deputy Chief of Staff, in the e-mails. Johnston & Lipton, *supra* note 66. The e-mails contained criticism of Paul Charlton (Arizona) and Daniel Bogden (Nevada) for being "unwilling to take good cases we have presented to them." *Id.* Of Charlton, the memos also cited "[r]epeated instances of insubordination, actions taken contrary to instructions, and actions that were clearly unauthorized." *Memo Tries to Justify Attorney Firings*, UPI, Mar. 21, 2007, http://www.upi.com/NewsTrack/Top_News/2007/03/21/memo_tries_to_justify_attorney_firings/7641/. Traditionally, DOJ officials did not believe they should dictate what cases U.S. Attorneys brought. According to John R. Schmidt, a Clinton Administration Department Official, "[t]he fundamental difference should be the difference between policy and anything that relates to prosecution of individual cases." Liptak, *supra* note 27.

92. For example, Kyle Sampson wrote in an e-mail to the White House about a "real problem we have right now with Carol Lam [U.S. Attorney in San Diego]" and urged that a search for a replacement begin. Dan Eggen, *Prosecutor's Firing Was Urged During Probe*, WASH. POST, Mar. 19, 2007, at A3.

93. *See* Dan Eggen & Amy Goldstein, *Justice Weighed Firing 1 in 4: 26 Prosecutors Were Listed As Candidates*, WASH. POST, May 17, 2007, at A1. For a list of the twenty-six, see *Memos Suggested DOJ fire 26 U.S. Attorneys*, Staff Reports, WASH. POST, May 17, 2007, at A1.

4. Other Developments Promoting Central Control

The government's response to the September 11, 2001 terrorist attacks provided a major impetus for central coordination of anti-terrorism investigations and prosecutions.[94] USAOs recognized the need for coordination of investigations and prosecutions that spanned district boundaries and very likely reduced resistance to increased scrutiny and control in terrorism cases that would have met with strong resentment in other areas of law enforcement prior to September 11.[95] But the need for Main Justice to be involved in the investigation and prosecution of other crimes that increasingly involved defendants operating across district (and even international) boundaries in the past three decades also likely led to increased efforts at central control and field acceptance of that control. Unlike the situation in the early 1970s, many drug manufacturing and distribution networks, juvenile gang activities, and health care fraud schemes (among others) now extend across multiple districts. Prosecuting such crimes requires tight coordination of investigations and indictments in multiple districts.

A second development increased central control. Beginning with John Ashcroft, Main Justice sought and largely achieved significant centralization in death penalty cases. All death penalty eligible cases had to be forwarded to Washington D.C., regardless of whether the USAO wished to seek the death penalty or not.[96] Furthermore, the final

94. Law Professor Peter S. Margulies of Roger Williams University observed, "[a] crisis like the Sept. 11 attacks creates the occasion for a monolithic model for law enforcement and national security. It creates a lot of pressure for a top-down model. That includes even traditionally autonomous actors like U.S. attorneys." Liptak, *supra* note 27.

95. As September 11 receded in time, the emphasis on terrorism investigations also declined from the peak it reached in 2002. According to one study,

> [i]n the twelve months immediately after 9/11, the prosecution of individuals the government classified as international terrorists surged sharply higher than in the previous year. But timely data show that five years later, in the latest available period, the total number of these prosecutions has returned to roughly what they were just before the attacks.

Criminal Terrorism Enforcement in the United States During the Five Years Since the 9/11/01 Attacks, TRAC REPORTS, http://www.trac.syr.edu/tracreports/terrorism/169/ (last visited Sept. 9, 2007). The study found that the number of prosecutions rose from 55 to 355 from 2001 to 2002, but dropped back to 66 by 2003. *Id.* The decline in terrorism prosecutions may have reduced the contribution the oversight of terrorism investigations made to the overall degree of central control of USAOs.

96. The U.S. ATTORNEYS' MANUAL, § 9-10.040: General Process Leading to the Attorney General's Determination reads:

> In all cases subject to the provisions of this Chapter, the Attorney General will make the final decision about whether to seek the death penalty. The Attorney General will convey the final decision to the United States Attorney in a letter authorizing him or her to seek or not to seek the death penalty.

MANUAL, *supra* note 6. Previously, U.S. Attorneys only needed approval if they wanted to seek the death penalty.

decision on whether to seek death or not was reserved for the DOJ. For example, Paul Charlton, the fired U.S. Attorney in Arizona, claimed in an interview that he was "ordered" to seek the death penalty in the case of a methamphetamine dealer named Rios Rico.[97] This policy resulted in a major centralization of authority in a highly visible and important area of criminal law. We do not know the extent to which the DOJ, from Carter through Clinton, expanded its scope of control over prosecutorial decisions. We do know that with the implementation of the Federal Sentencing Guidelines in 1987, the DOJ sought to standardize charging decisions in criminal cases. Under the Thornburgh Memo, USAOs were instructed to charge the most serious provable offense in order to minimize inter-district variation in the implementation of the Sentencing Guidelines.[98] This reduced a USAO's discretion in filing charges.[99]

A final development favoring central control consisted of efforts by both Congress and the DOJ to restrict the way USAOs allocated their AUSAs by tying the allocation of new positions to the prosecution of specific crimes.[100] Receiving additional AUSA slots was contingent on

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97. Jason Leopold, *Former US Attorney Wary of Gonzales's New Powers*, Aug. 15, 2007, *available at* http://www.truthout.org/docs_2006/081507J.shtml. Charlton asked to talk to the Attorney General about the case, but was refused.

98. Then-Attorney General Richard Thornburgh, himself a former U.S. Attorney, issued the memo on June 8, 1989, in preparation for the Sentencing Guidelines taking effect. The original memo has been superseded several times since then. For example, John Ashcroft distributed a memo to U.S. Attorneys on September 22, 2003, to update policy regarding charging decisions in light of passage of the PROTECT Act earlier that year. Its key provision, which preserves the policy established by Thornburgh reads as follows:

> Department Policy Concerning Charging and Prosecution of Criminal Offenses. A. General Duty to Charge and to Pursue the Most Serious, Readily Provable Offense in All Federal Prosecutions. It is the policy of the Department of Justice that, in all federal criminal cases, federal proscutors must charge and pursue the most serious, readily provable offense or offenses that are supported by the facts of the case, except as authorized by an Assistant Attorney General, United States Attorney, or designated supervisory attorney in the limited circumstances described below. The most serious offense or offenses are those that generate the most substantial sentence under the Sentencing Guidelines, unless a mandatory minimum sentence or count requiring a consecutive sentence would generate a longer sentence. A charge is not "readily provable" if the prosecutor has a good faith doubt, for legal or evidentiary reasons, as to the Government's ability readily to prove a charge at trial. Thus, charges should not be filed simply to exert leverage to induce a plea. Once filed, the most serious readily provable charges may not be dismissed except to the extent permitted in Section B.

Memorandum from Attorney General John Ashcroft to the U.S. Attorneys on the Federal Sentencing Guidelines (Sept. 22, 2003), *available at* http://www.usdoj.gov/opa/pr/2003/September/03_ag_516.htm.

99. Field interviews in USAOs in seven districts in the study cited in the *Uncharted Territory Study*, *supra* note 2, found that these offices were strongly committed to adhere to the requirement that the most serious provable offense be charged.

100. For example, a press release from Alabama Homeland Security in 2006 announced that the DOJ was adding twenty AUSAs to border districts to "prosecute only immigration-related of-

USAOs devoting their efforts to prosecuting child pornography, gun crimes, immigration, or drug cases.[101] As the number of AUSAs increased, so did the number of training programs for them. Supervisors, especially First Assistant U.S. Attorneys, as well as other AUSAs now meet together, providing the DOJ with opportunities to extol the virtues of uniform national policy. Furthermore, as noted earlier, many assistants attend the DOJ's training school at the National Advocacy Center in South Carolina, creating another opportunity for indoctrination by Main Justice.[102] Finally, the DOJ remains "statistics happy." The DOJ, through the auspices of the Executive Office for United States Attorneys, requires USAOs to submit numerous reports. It also conducts field audits. An obvious strategy for enhancing central control is to increase the number and detail of such reports. A former AUSA with twenty years of experience asserted that while the DOJ traditionally required "a frustratingly large number of reports," the Bush Administration "tripled those requirements, mandating weekly, monthly, yearly, and sometimes even daily reports on every conceivable category of prosecution."[103]

Much less information about changes promoting Main Justice control of U.S. Attorneys exists from between the early 1970s and the present Bush Administration. The firings of U.S. Attorneys in the Bush Administration, however, have provided a good deal of knowledge about current practices. It appears that the developments described above enhancing the ability of Main Justice to reduce U.S. Attorneys' autonomy accelerated existing trends toward centralization during the Bush

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fences." *Twenty-Five Federal Prosecutors to be Added to U.S./Mexico Border Districts*, Alabama Homeland Security, (July 31, 2006), *available at* http://www.homelandsecurity.alabama.gov/headlines/press%20release%207-31-2006.htm.
For an excellent overview of four "mechanisms of control" over federal law enforcement discretion, including designating the crimes additional AUSA slots must prosecute, see Daniel C. Richman, *Federal Criminal Law, Congressional Delegation, and Enforcement Discretion*, 46 U.C.L.A. L. REV. 757, 757–814 (1999).

101. The effectiveness of designating AUSA slots for specific crimes as a means of limiting USAO discretion in the allocation of resources may be compromised by counter-measures undertaken in the field. In the *Uncharted Territory Study*, we interviewed a supervisor in a large office who said:

> We teach people to make sure that if they're working on a case that arguably falls into one of these areas for which we've been given a designated slot, you book all of your time, every single second to that program category so DOJ understands that we really care about what they're doing [in setting priorities by designating slots].

Id.

102. Of course, as discussed above, such programs also facilitate friendships and networks of field personnel who can then communicate with one another independent of the DOJ.

103. Elizabeth de la Vega, Editorial, *The Problem with Alberto*, TRUTHOUT, Apr. 22, 2007, http://www.truthout.org/docs_2006/042207A.shtml. The *Uncharted Territory Study* found confirmation when a supervisory AUSA asserted that the DOJ uses statistics as "a weapon" to try to assert control.

Administration, particularly after Alberto Gonzales replaced John Ashcroft as Attorney General.

V. MAIN JUSTICE'S STRATEGY OF CENTRALIZATION AND ITS EFFECTS ON USAOS

The relationship between the office of United States Attorney and the Attorney General of the United States has, with one exception, evolved with few defining events. The one exception came in 1870 when Congress created the DOJ.[104] Before, U.S. Attorneys generally operated independently of the Attorney General, though the limited scope of federal criminal jurisdiction meant that the potential for conflict over criminal cases was low.[105] After 1870, the DOJ gradually increased its control over USAOs to the point described in Part IV of this Article. Sometime after 1970, the gradual movement to increased centralization over the past century reversed. The fundamental changes described above in the size of USAOs, the development of a corps of career AUSAs, and the federalization of criminal justice all worked to the benefit of greater autonomy from Main Justice. Thus, a modest shift in the balance of control toward the field characterizes the modern era. Compared to the mid-1960s and early 1970s, U.S. Attorneys today possess more autonomy from Main Justice.

While the fundamental changes that contributed to greater U.S. Attorney autonomy unfolded gradually, most of the factors described above that enhanced Main Justice's ability to control its field offices resulted from quite recent decisions made in the presidency of George W. Bush, especially under Attorney General Alberto Gonzales. The simultaneous firings of seven U.S. Attorneys, the departure at Main Justice from the existing consensus on U.S. Attorneys' tenure that led to the firings, and the emphasis on selecting U.S. Attorneys with strong ties to the political leadership at Main Justice constitute an unprecedented and extraordinary set of developments. Indeed, a strong case can be made that Main Justice, during the second term of George W. Bush's Administration, set about designing and trying to implement a "Strategy of Centralization." This Part describes the major components of this strategy. It then examines the effects of the turmoil that ensued after the firings of U.S. Attorneys on the functioning of and the morale at the DOJ. Finally, Part V concludes by looking at the damage done to USAOs.

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104. Act to Establish the Dep't of Justice, 16 Stat. 162 (1870). The Act took effect July 1, 1870.

105. For a history of the DOJ, see ALBERT LANGELUTTIG, THE DEP'T OF JUSTICE OF THE UNITED STATES (1927) and HOMER CUMMINGS & CARL MCFARLAND, FEDERAL JUSTICE (1937).

The concerted effort to curb U.S. Attorneys autonomy constitutes an extraordinary event in the history of DOJ and U.S. Attorney relations, the most significant development since the establishment of the DOJ in 1870. The elements of the campaign to reduce USAO autonomy can be derived from the description of Main Justice's departures from past practices. First, appoint "loyal Bushies" as U.S. Attorneys whenever possible, preferably by picking political officials at Main Justice. The ability to succeed in doing this was substantially aided by the success in inserting the above-discussed new provision into the Patriot Act in 2006, giving the ability to appoint Interim U.S. Attorneys who could serve indefinitely without requiring Senate confirmation. Second, winnow out U.S. Attorneys insufficiently responsive to Main Justice's directives and policy by encouraging some to resign and by firing others. The firings would send a strong signal to less responsive incumbent U.S. Attorneys to change their ways. If successful, this strategy would result in a significant centralization of decision-making in the federal criminal justice system.

It is too soon to ascertain the reasons for Gonzalez' attempt to acquire more control over U.S. Attorneys. However, regardless of the motives, the effects of the effort to do so can be examined. Considerable temporary and perhaps long-lasting damage has been done to the ability of both the DOJ and its USAOs to enforce federal law, as well as to the federal criminal justice system generally.

Although most federal executive agencies experience a loss of top leadership in the last year of an administration, the DOJ experienced a mass exodus in the aftermath of its firing of U.S. Attorneys and was operating without permanent officials in many of its top positions. On August 27, 2007, the day that Attorney General Gonzales announced his resignation, the positions of both Deputy Attorney General and Associate Attorney General were held by "acting" appointees, and the Acting Associate Attorney General had withdrawn his nomination for the post in June.[106] Deputy Attorney General Paul McNulty announced in May that he would resign; his Chief of Staff, Michael Elston, resigned in June.[107] The Executive Director of the Executive Office for U.S. Attorneys (EOUSA), Michael Battle, resigned in February; the Counsel to the

106. *See* Paul Kiel, *Justice Department Resignation Roll Call*, TPM MUCKRAKER, Aug. 27, 2007, http://www.tpmmuckraker.com/archives/004012.php.

107. *Id.*

Director of EOUSA, Barry Scholzman, resigned in August 2007; and Gonzales' Chief of Staff, Kyle Sampson, resigned in March.[108]

At the same time, the heads of the Office of Legislative Affairs (Richard A. Hertling), the Office of Legal Policy (Brett C. Gerry), and the Environment and Natural Resources Division (Ronald J. Tenpas) were all "acting."[109] Wan J. Kim, Assistant Attorney General at the Civil Rights Division, resigned August 24, 2007, creating another vacancy. The Solicitor General, Paul Clement, was a presidential appointee, but was slated to become acting Attorney General when Attorney General Gonzales left. In 2007, the DOJ exhibited the attributes of a bureaucratic agency in disarray. In light of this turnover in its top leadership, the capacity of Main Justice to exert strong leadership of federal law enforcement must have been severely compromised.[110]

In his farewell address to the DOJ, former Deputy Attorney General James Comey talked about the "amazing gift" that DOJ attorneys enjoy in the form of trust in their integrity:

> That gift—the gift that makes possible so much of the good we accomplish—is a reservoir of trust and credibility, a reservoir built for us, and filled for us by those who went before. . . . Our obligation—as the recipients of that great gift—is to protect that reservoir, to pass it to those that follow.[111]

The information that emerged in the aftermath of the firings suggests that the DOJ had departed from its traditions of non-partisanship, one of the foundations of its good reputation. The DOJ's White House Liaison, Monica Goodling, testified to the Senate Judiciary Committee under a grant of immunity from prosecution, stating, "I do acknowledge that I may have gone too far in asking political questions of applicants for

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108. *Id.* Schlozman was acting assistant attorney general for the Civil Rights Division before replacing the fired U.S. Attorney in Kansas City, Todd Graves, and returned to Main Justice after leaving the Kansas City post amid controversy over his performance.

109. U.S. Dep't of Justice, http://www.usdoj.gov/02organizations/02_1.html, (last visited Aug. 27, 2007).

110. *See* Karen Tumulty, *Is the Noose Tightening on Gonzales*, TIME, May 15, 2007, *available at* http://www.time.com/time/nation/article/0,8599,1621147,00.html. In that article, Tumulty quoted one senior Justice Official as saying in May, "[t]here's a war going on between the DAG's [Deputy Attorney General] office and the AG's [Attorney General] office. The thing that is 100% clear is that there's really no leadership. Both the DAG and the AG are so compromised, there's no one running the Department." *Id.*

111. James Comey, Farewell Address at the Great Hall of the Dep't of Justice (Aug. 15, 2005), *available at* http:www.usdoj.gov/dag/speech/2005/dagfarewell.htm.

career positions, and I may have taken inappropriate political considerations into account on some occasions, and I regret those mistakes."[112]

Goodling also testified that in her previous position in the Executive Office for U.S. Attorneys she participated in the hiring of AUSAs in offices with acting or interim U.S. Attorneys and she continued to do so when she left to work in the Attorney General's Office.[113] She admitted trying to stop the appointment of an AUSA in the Washington, D.C. office who she learned was a liberal Democrat.[114] She also acknowledged delaying other appointments on the grounds that when a confirmed nominee was soon to replace an interim U.S. Attorney, she was unsure of whether the new hire would be the person the new U.S. Attorney would want to employ:

> There were cases when I looked at resumes and I thought, you know, I don't know if this is the—I don't know if this is the person the new U.S. attorney would want to hire. Why don't we just wait and let them take a look at the request, and if they want to hire them when they get there then they can?[115]

Goodling also admitted to checking the political activities of candidates for other civil service positions.[116] In his testimony, former Deputy Attorney General Comey, referring to the possibility that the political affiliation of applicants for career positions was being used in hiring, stated, "[i]f that was going on, that strikes at the core of what the Department of Justice is."[117] Given the substance of Goodling's testimony

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112. David Stout, *Ex-Gonzales Aide Testifies She 'Crossed the Line'*, N.Y. TIMES, May 23, 2007, *available at* http://www.nytimes.com/2007/05/23/washington/23cnd-monica.html?ex=1188705600&en=73b0d8218f2c6f06&ei=5070.

113. The approximately twenty interim U.S. Attorneys serving in the first half of 2007 did not have as much authority to hire AUSAs as their colleagues who had been nominated by the President and confirmed by the Senate.

114. According to one news report, a Justice Department employee claimed that Goodling told the U.S. Attorney in the District of Columbia that the prospective AUSA "appeared, based on his resume, to be a liberal Democrat." Eric Lipton, *Colleagues Cite Partisan Focus by Justice Official*, N.Y. TIMES, May 12, 2007, at A1.

115. Goodling's testimony can be read at http://www.washingtonpost.com/wp-srv/politics/transcripts/goodling_testimony_052307.html (last visited Aug. 31, 2007).

116. Testimony of Monica Goodling before the S. Judiciary Comm., May 23, 2007, *available at* http://www.washingtonpost.com/wp-srv/politics/transcripts/goodling_testimony_052307.html.

Representative Sherman to Goodling: "[t]here are, also, though, some particular Web sites that just focus on people's political contributions. In looking at nonpolitical appointments, did you ever look at FACTUM or TRE.com (ph) or any of the other sites that are pretty much focused on political giving?" *Id.* Goodling replied, "Occasionally. Not terribly often. It frankly wasn't very common to find people in the law enforcement area that were active on that site. But, yes, we did in some cases check those records." *Id.*

117. *That Strikes at the Core*, WASH. POST, May 24, 2007, at A30.

In his farewell address, Comey suggested why he would be so concerned about allegations of political hiring:

and the attention it received, the erosion of trust in the integrity of the DOJ that Comey feared may well have begun.

The controversy over the firings and their aftermath had a powerful impact on morale among career attorneys in the DOJ. At the Senate Judiciary Committee hearings on June 24, 2007, ranking Republican Arlen Specter in his opening statement said to Attorney General Gonzales, "[t]he issues relating to the resignations of the U.S. attorneys has placed a very heavy cloud over the Department. There is evidence of low morale—very low morale . . . ."[118] And in his closing statement, Specter said, "[t]he consensus appears to be that the morale is at an all-time low from what has happened."[119] Professor Laurie Levenson of Loyola Law School, a former AUSA who keeps in contact with federal prosecutors nationwide, testified before the Senate Judiciary Committee that "the perceived purging of qualified U.S. Attorneys is having a devastating impact on the morale of Assistant United States Attorneys."[120] Daniel Metcalfe, a career attorney who spent thirty-four years with the DOJ, said in an interview that "morale among the career ranks, especially the more experienced folks, is as low as you would expect it to be."[121] Other former DOJ attorneys and former U.S. Attorneys were reported to hold much the same view.[122] Though low morale would not affect the day-to-day handling of routine litigation, it could accelerate the departure of experienced attorneys.

> The problem with reservoirs [referring to the reservoir of trust] is that it takes tremendous time and effort to fill them, but one hole in a dam can drain them. The protection of that reservoir requires vigilance, an unerring commitment to truth, and a recognition that the actions of one may affect the priceless gift that benefits all.

Id.

118. *Hearing on the Oversight of the Dep't of Justice Before the S. Comm. on the Judiciary*, 110th Cong. (July 24, 2007) (testimony of U.S. Attorney General Alberto Gonzales), *available at* http://www.washingtonpost.com/wp-srv/politics/documents/gonzalez_transcript_072407.html.

119. *Id.*

120. *Is the DOJ Politicizing the Hiring and Firing of U.S. Attorneys?: Hearing before S. Comm. on the Judiciary*, 110th Cong. (Feb. 6, 2007) (testimony of Laurie L. Levenson, Professor of Law, Loyola Law School), *available at* http://judiciary.senate.gov/testimony.cfm?id=2516&wit_id=6061.

121. Tony Mauro, *Justice Department's Independence "Shattered," says Former DOJ Attorney*, LEGAL TIMES, Apr. 16, 2007, *available at* http://www.law.com/jsp/law/LawArticleFriendly.jsp?id=1176455062969.

122. *See* John S. Koppel, *Bush Justice is a National Disgrace*, DENVER POST, July 5, 2007, *available at* http:www.truthout.org/docs_2006/070907N.shtml. In the article, Koppel, a Main Justice career attorney, wrote a stinging critique of the DOJ under Gonzales in which he said:

> I can honestly say that I have never been as ashamed of the Department and government that I serve as I am at this time. . . . I am confident that I am speaking on behalf of countless thousands of honorable public servants, at Justice and elsewhere, who take their responsibilities seriously and share these views.

Id. See also Liptak, *supra* note 26; Philip Shenon & Jim Rutenberg, *Justice Department Morale at Low Point Over Gonzales*, S.F. CHRONICLE, July 28, 2007.

The firings and the fallout from them also damaged USAOs and affected the morale of the U.S. Attorneys who headed them.[123] It was especially likely to do so in offices where the U.S. Attorney was dismissed and an interim head appointed. As former AUSA Levenson observed, "[t]here's always some disruption. But this is greater disruption because of what has happened. . . . It is nerve-wracking, and it will be difficult. They won't be sure who to get approval from or what their priorities are."[124] If the President nominates U.S. Attorneys after the summer of 2007, by the time the Senate confirms them, they will have little time before being replaced by the new president in 2009.

"The reality is that the new U.S. Attorneys will have virtually no time and no likely impact on the actual cases in these offices," said George Washington University Law School Professor Jonathan Turley. "They will become a placeholder for the next U.S. Attorney appointed by the next president. And so these offices will go from an interim U.S. Attorney to a lame-duck U.S. Attorney."[125]

One striking example of disruption in an office occurred in Minnesota, where the First Assistant U.S. Attorney and the chiefs of the civil and criminal divisions all resigned their supervisory positions when the nomination of the interim U.S. Attorney, Rachel Paulose, was confirmed.[126] Paulose was a top aide to Deputy Attorney General Paul McNulty before her appointment as interim U.S. Attorney in 2006.[127] As discussed above, it is especially difficult for interim U.S. Attorneys who do not enjoy the prestige of Presidential nomination and Senate confirmation to exercise strong leadership; over twenty USAOs had interim leadership in 2007.[128] To the extent that the firings increased the

123. David Johnston & Neil A. Lewis, *Senate Democrats Plan a Resolution on Gonzales,* N.Y. TIMES, May 18, 2007, at A16. The U.S. Attorney in New Jersey was quoted as saying, "[t]his has been a very difficult time for all of the U.S. Attorneys. Those of us who have been around awhile have become close. I'd say there is a palpable sense of sadness among us now." *Id.*

124. Amanda Bronstad, *Who'd Want This Job, Anyway?*, NAT'L., Apr. 10, 2007, http://www.law.com/jsp/law/careercenter/lawArticleCareerCenter.jsp?id=1176122644397&rss=newswire (quoting former AUSA Laurie Levenson). Bronstad also quotes potential candidates to replace fired U.S. Attorneys in several districts about the difficulties of heading at office for a short period after the U.S. Attorney was fired. For example, someone mentioned to assume the job in New Mexico told Bronstad, "[a]ny time there's a change, there's disturbance and people jockeying for position and not having direction. That's very difficult for government agencies." *Id.*

125. *Id.*

126. David Johnson, *Deputies to a U.S. Attorney Step Down*, N.Y. TIMES, Apr. 7, 2007, at A9. These three positions are the most important in any office, and the simultaneous resignation of all three would create turmoil in any USAO. The article stated that "[s]everal of their associates described the action as a protest over what the three deputies regarded as Ms. Paulose's ideologically driven and dictatorial managerial style. *Id.*

127. *Id.*

128. *See* Goldstein & Eggan, *supra* note 71. *See also* Carl Tobias, *Stopping the Downward Spiral at the Department of Justice*, FINDLAW, July 30, 2007, *available at*

resignation rate of experienced AUSAs, it reduced the capacity of USAOs to take on major cases that require experienced prosecutors and the support of a strong office head. A field office might also experience turmoil that weakens its effectiveness when a U.S. Attorney committed to Main Justice neglects local priorities in favor of national priorities.[129]

It is too early to assess how lasting the damage has been to the reputation of Main Justice and federal criminal justice in general. The perception that the DOJ has been politicized and that the traditions of non-partisanship and fairness in the administration of justice have been severely compromised, even if only temporarily, is, by itself, troubling.

VI. CONCLUSION: THE FUTURE OF U.S. ATTORNEY AND MAIN JUSTICE RELATIONS

The degree of autonomy USAOs will be able to exercise in the future hangs in the balance. In this Part, the historical significance of the effort to centralize control is briefly assessed before examining what the future holds. While it is impossible to predict with any certainty how much U.S. Attorney autonomy will be preserved in the coming years, the factors that will determine such autonomy will be identified. The factors include the extent to which the value of autonomy is recognized and supported, beliefs concerning what reasons legitimately justify firing a U.S. Attorney, the degree to which the political leadership at Main Justice in the next few years accepts or rejects field autonomy, and the role the Senate will choose to play in the appointment and removal of U.S. Attorneys.

The concerted effort to increase Main Justice's control over U.S. Attorneys, which the unprecedented firings of U.S. Attorneys in 2006 laid bare, represents a signal event in the nearly 220-year history of relations between the center and the field. Only the formation of the DOJ in 1870 rivals this effort in significance, but even its establishment was much less dramatic and its importance less obvious. The relationship between U.S. Attorneys and Main Justice in future decades will be

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http://writ.news.findlaw.com/commentary/20070730_tobias.html. Tobias comes to a similar conclusion, noting that twenty-four of the ninety-three U.S. Attorneys were either acting or interim, and that only six persons had been nominated to fill these vacancies.

129. Writing in the *Daily Business Review*, Julie Kay reported that the interim U.S. Attorney in Southern Florida, Alex Acosta, told "stunned" FBI supervisors in his first meeting with them that pornography featuring consenting adults would be a top priority of his. "His own prosecutors have warned Acosta that prioritizing adult porn would reduce resources for prosecuting other crimes, including porn involving children. According to high level sources who did not want to be identified, Acosta has assigned prosecutors porn cases over their objections." *U.S. Attorney's Porn Fight Gets Bad Reviews*, DAILY BUSINESS REVIEW, Aug. 30, 2005, *available at* http://www.law.com/jsp/article.jsp?id=1125318960389.

profoundly shaped by developments that will unfold in the next few years. The stakes are high. Though the balance struck in the competition between central control and field autonomy will continue to fluctuate, the complete subordination of U.S. Attorneys by Main Justice would represent a major change in the American political system. Unless some autonomy for U.S. Attorneys is preserved, the benefits such independence provides will disappear. Will they?

One important determinant will be the extent to which the values embedded in U.S. Attorney autonomy are recognized and promoted. From at least 2005 to 2007, the values associated with central control have been ascendant, while the equally valid reasons for field autonomy discussed in Part I of this Article have been in decline. Ironically, the attack on the U.S. Attorney autonomy by Main Justice's assault may in the end serve to strengthen the very values its efforts at centralization imperiled. Thurman Arnold identified the mechanism that would lead to this result over seventy years ago in his book *The Symbols of Government.*[130] Citing the obvious unfairness of the Scottsboro case, he observed that:

> [T]he cultural value of the ideal of a fair trial is advanced as much by its failure as it is by its success. Any violation of the symbol of a ceremonial trial rouses persons who would be left unmoved by an ordinary non-ceremonial injustice. Thus, the Scottsboro Case gained nation-wide attention. . . . [T]he cause of justice has been dramatized in a way no one will quite forget.[131]

The Attorney General and the President's violation of the consensus about the circumstances that warrant the firing of U.S. Attorneys attracted nationwide attention and roused those who adhered to the values encompassed by that consensus.[132] As the extent of the effort to centralize control of U.S. Attorneys in Washington was revealed, the scope of criticism broadened to include defenses of autonomy.[133]

Whether this renewed recognition of the value of U.S. Attorney autonomy will be sufficient to sustain such autonomy is unclear. Prior to the Attorney General Gonzales' tenure, the tradition was that U.S. Attorneys could be fired only for personal or professional misconduct or incompetence. They were not removed because they did not follow the DOJ's directives on what specific cases to bring or how to handle specific cases, nor were they removed for being insufficiently responsive to Main Justice or loyal to the President. Unless the tradition of secure

130. THURMAN W. ARNOLD, THE SYMBOLS OF GOVERNMENT 142 (1935).

131. *Id.*

132. *Turrow*, *supra* note 12.

133. *Iglesias*, *supra* note 13.

tenure for U.S. Attorneys is restored, the prospects for their retaining some autonomy are not good. The constant, credible fear of being fired for not toeing the line is incompatible with the exercise of independent judgment.

Based on many public statements about the President's authority to fire U.S. Attorneys, this tradition of secure tenure is in trouble. President Bush apparently recognizes no limits to his ability to fire. He made his position clear in a briefing to the press on March 20, 2007:

> As you know, I have broad discretion to replace political appointees throughout the government, including U.S. attorneys. And in this case, I appointed these U.S. attorneys and they served four-year terms. . . . Listen, first of all, these U.S. attorneys serve at the pleasure of the President. I named them all. And the Justice Department made recommendations, which the White House accepted, that eight of the 93 would no longer serve.[134]

It is not surprising that he and his political appointees would take this position. But others who one would expect would voice limits on the power to fire have not done so. Former Clinton Administration Department Official Rory Little told the *New York Times* that a U.S. Attorney position "has always been a patronage position. Can the president fire a U.S. attorney for any reason at all? The answer is yes."[135] Even one of the fired U.S. Attorneys, Bud Cummins, wrote, "[t]he President had an absolute right to fire us. We served at his pleasure, and that meant we could be dismissed for any reason or for no reason. And we all accepted that fact without complaint."[136]

The assertion that U.S. Attorneys can be fired for any reason, which in essence transforms the clause "at the pleasure of the President" to "at the whim of the President," is problematical on two grounds. First, some reasons for firing a U.S. Attorney would be illegal. This would occur, for example, if the purpose of the firing was to interfere with an ongoing prosecution.[137] Second, it substitutes a technical narrow legalistic view

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134. White House Press Briefing (Mar. 20, 2007), *available at* http://www.whitehouse.gov/news/releases/2007/03/20070320-8.html.

135. Liptak, *supra* note 27. Liptak also reports that Reagan Administration Solicitor General Charles Fried said U.S. Attorneys should be disciplined and dismissed for failing to carry out the administration's policies and priorities. *Id.* In practice, U.S. Attorneys traditionally were rarely if ever fired for this reason. *See* discussion, *supra* note 30, on the existing consensus on U.S. Attorneys and the more detailed discussion of past practices in firing U.S. Attorneys in *Counsel for the United States*, EISENSTEIN, *supra* note 2.

136. Bud Cummins, *How Bush's Justice Department has "Blown It,"* SALON, Mar. 31, 2007, http://www.salon.com/opinion/feature/2007/03/31/cummins/.

137. *See* 18 U.S.C. § 1503 (2006). *See also* Adam Cohen, *Editorial Observer: It Wasn't Just a Bad Idea. It May Have Been Against the Law*, N.Y. TIMES, Mar. 19, 2007, *available at* http://select.nytimes.com/search/restricted/article?res=F60710F93D540C7A8DDDAA0894DF40442

of what a president could conceivably do for what presidents for decades have in fact done.[138] Presidents hardly ever fired U.S. Attorneys and certainly not for the reasons given as justification for the 2006 firings. As discussed above, only personal or professional misconduct resulted in removal, and only rarely did firing for such reasons occur. Indeed, presidents permitted U.S. Attorneys whose four year terms expired to continue to serve as long as they wished. The absence of vigorous and visible rebuttals to assertions of a president's unfettered right to fire U.S. Attorneys does not bode well for the survival of the traditional limits on the power of removal. As a result, one of the principle foundations upon which U.S. Attorneys' ability and willingness to make independent judgments in carrying out their duties is being seriously eroded.

The attitudes and behavior of the political leadership at Main Justice, particularly of the next few Attorneys General and Deputy Attorneys General, will also play a major role in determining how much autonomy U.S. Attorneys retain. To what extent will they acknowledge the value of such autonomy and restore limits on the circumstances under which they will seek to remove U.S. attorneys? The answer depends both on what kind of people presidents choose to nominate to these posts and on how extensively the Senate Judiciary Committee questions nominees for Attorney General and Deputy Attorney General about their views of the circumstances under which U.S. Attorneys can be fired and the answers they give. What kind of people will they recommend to the president for appointment as U.S. Attorneys? Will they seek out people of integrity with solid standing in and knowledge of their districts? Will they return to the traditional level of deference to Senators in the choice of U.S. Attorneys?

Finally, both the characteristics of U.S. Attorney nominees and the circumstances under which successful candidates can be fired depend upon whether United States Senators, particularly those from the President's party, reassert their traditional prerogatives. In the past, the DOJ often had to pay a steep price when they fired a U.S. Attorney if

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(discussing this and other possible violations of law arising from the 2006 U.S. Attorney firings and their aftermath).

138. In the operation of the American, and every democratic political system, countless actions that are technically legal are in practice avoided. Legislators have the right to break their commitments to their colleagues at any time, but both tradition and self-interest prevent them from doing so. Attorneys in many jurisdictions have the legal right to object to opponents requests for postponements due to vacation plans or family emergencies, but long-standing informal practice dictates the routine granting of such requests. Indeed, it is impossible to specify in any set of written roles what should be done in every circumstance, including when U.S. Attorneys can be fired. One of the most ambitious efforts to control behavior by specifying a comprehensive set of rules to guide behavior, the federal sentencing guidelines, has failed to achieve its goal of eliminating "unwarranted disparity" in federal sentences.

their Senators strongly objected.[139] Unless the Senate reclaims its traditional role, one of the major sources of U.S. Attorneys' willingness and ability to stand up to Main Justice, Senatorial support, will be undermined.

Could the interplay of the factors that will determine how much autonomy U.S. Attorneys retain result in achieving the central control sought under Attorney General Gonzales' leadership? The reaction to his attempt to do so suggests that future efforts to continue the trend toward greater centralization will encounter resistance, and perhaps even result in greater U.S. Attorney autonomy. If Attorney General Mukasey and his successors recognize the value of local autonomy, revert to previous practices in deciding when to fire U.S. Attorneys, seek nominees with integrity and ties to their districts, and defer more to the Senate in selecting U.S. Attorneys, the balance between central control and field autonomy will return to what existed prior to 2001. But, regardless of whether U.S. autonomy is restored, expanded, or abolished, the way the federal criminal justice system operates will be profoundly affected.

139. A former Attorney General, when asked if he had fired any U.S. Attorneys, replied that he had removed several, but continued, "[w]e kept some we wouldn't have kept just because we couldn't take the pressure from the senator. Nine times out of ten the U.S. attorney gets backing from the senators. It's a costly move to fire them." EISENSTEIN, *supra* note 2, at 98.