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Eisenstein: Counsel for the United States: U.S. Attorneys in the Political and Legal Systems

R.H. Clark

BOOK REVIEW

COUNSEL FOR THE UNITED STATES: U.S. ATTORNEYS IN THE POLITICAL AND LEGAL SYSTEMS. By James Eisenstein.* Baltimore: John Hopkins University Press. 1978. Pp. xi, 264. $15.00.

Although more than fifty percent of the attorneys employed by the Department of Justice are assigned to the ninety three United States Attorneys' offices throughout the country, there has been a scarcity of scholarly analysis and literature devoted to their activities.[1] James Eisenstein, a political scientist long interested in studying U.S. Attorneys, has produced in this volume the first major extensive analysis of these Justice Department attorneys. Relying heavily upon his own (nearly 200) interviews with U. S. Attorneys, judges and others familiar with the work undertaken by U. S. Attorneys from 1965 to 1967 and from 1970 to 1971, as well as supplementary data acquired from mailed questionnaires, published sources of materials, and federal documents, Eisenstein has written a work that in itself goes a great distance toward filling this unfortunate gap in the literature.

Although the ninety three U.S. Attorneys' offices scattered across the country are charged with significant legal and public policy responsibilities, the activities are unfamiliar generally to all except those who regularly litigate in the federal courts. As members of the Department of Justice, U. S. Attorneys are supposed to implement a consistent national policy because they represent the federal government in its criminal and civil litigation. Yet U.S. Attorneys generally have strong local ties because they are residents of the district in which they serve and their selection is influenced by local political forces. Senators play a particularly significant role in this selection process. On the other hand, it is an unwritten principle in American politics that each new administration names its own corps of U.S. Attorneys, which almost always belongs to the President's party, and the job is therefore seen as being a temporary way station to either a further litigation career or promotion to the federal bench or other high political office. The interplay between these divergent influences, some from Washington, others from the district itself, produces a complex relationship which Eisenstein undertakes to unravel through the application of social science techniques.

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*Professor of Political Science, Pennsylvania State University.

**Trial Attorney, Antitrust Division, Justice Department, Washington, D.C.; A.B., University of California (Riverside), 1966; M.A., University of California (Santa Barbara), 1967; Ph.D., 1970; J.D., Capital University, 1977. The views expressed herein represent those of the author and not the Department of Justice.

1. Some helpful exceptions to this void in the literature are H. JACOB, JUSTICE IN AMERICA 75-79 (2d ed. 1972); W. SEYMOUR, UNITED STATES ATTORNEY (1975); Rabin, *Agency Criminal Referrals in the Federal System: An Empirical Study of Prosecutorial Discretion*, 24 STAN. L. REV. 1036 (1972); Schwartz, *Federal Criminal Jurisdiction and Prosecutors' Discretion*, 13 LAW & CONT. PROB. 64 (1948); J. EISENSTEIN, POLITICS AND THE LEGAL PROCESS 36-42, 143-70 (1973).

The most basic characteristic of U.S. Attorneys' offices is that they are divisions of the Department of Justice like the more familiar Civil, Criminal, Civil Rights and Antitrust Divisions. Although U.S. Attorneys were created by the Judiciary Act of 1789,[2] it was not until the formation of the Department of Justice in 1870 that the Attorney General had the resources to undertake careful supervision of their activities.[3] This long period of independence left a legacy of local autonomy which sustained efforts by the Department during the intervening century have only partially mitigated.[4] Eisenstein maintains that this situation has produced a tension which has been one of the critical factors influencing Department – U.S. Attorney relations, even though the United States Code vests undisputed authority to supervise U.S. Attorneys in the Attorney General.[5] Further, U.S. Attorneys are unique from other field personnel in the federal government in that they select their own personnel, structure their own offices, allocate their own manpower resources and may be removed only by the President.[6] In addition, the support of important officeholders such as U.S. Senators, coupled with prosecutorial discretion and close ties to the district,[7] produces a greater degree of freedom of action than in other field office heads. Nevertheless, there are significant limits on U.S. Attorney freedom of action, especially in terms of lack of staff, insufficient financial resources, and inexperienced assistants.

Eisenstein hypothesizes that there are five major areas in which U.S. Attorneys have their principal impact. One major dimension relates to the direction and effectiveness of federal law enforcement. Armed with discretion as is any other prosecutor, the U.S. Attorney determines the ground rules for federal prosecutions in that district by establishing internal policies concerning which violations will not be prosecuted, and which cases will be accorded high priority in the allocation of resources.[8] A second area of in-

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2. Currently, the statutory provisions relating to the office are found in 28 U.S.C. §§541-550 (1970).

3. On the formation of the Department of Justice, *see* L. HUSTON, THE DEPARTMENT OF JUSTICE 3-53 (1967). For some interesting analysis of the Department in recent decades, *see generally* J. ELLIFF, CRIME, DISSENT, AND THE ATTORNEY GENERAL: THE JUSTICE DEPARTMENT IN THE 1960's (1971); V. NAVASKY, KENNEDY JUSTICE (1971); R. HARRIS, JUSTICE: THE CRISIS OF LAW, ORDER AND FREEDOM IN AMERICA (1970).

4. In reference to exerting more centralized control over the U.S. Attorneys' prosecutorial responsibilities, *see* Heinberg, *Centralization in Federal Prosecutions*, 15 MO. L. REV. 244 (1950). For more general studies pertaining to the efforts of the Department to centralize federal legal responsibilities within its own hands, *see generally* H. CUMMINGS & C. MCFARLAND, FEDERAL JUSTICE (1937); Swisher, *Federal Organization of Legal Functions*, 33 AM. POL. SCI. REV. 973 (1939).

5. The author incorrectly cites 28 U.S.C. §507(b) (1970) as establishing this authority. J. EISENSTEIN, COUNSEL FOR THE UNITED STATES: U. S. ATTORNEYS IN THE POLITICAL AND LEGAL SYSTEMS 2 (1978) [hereinafter cited as EISENSTEIN]. However, this provision was revised in 1966 along with other sections of Title 28 relating to the Department of Justice. The Attorney General's grant of authority over U.S. Attorneys is now found in 28 U.S.C. §519 (1970).

6. 28 U.S.C. §541(c) (1970).

7. 28 U.S.C. §541(a) (1970).

8. For example, Eisenstein found great variation between districts as to the attention

fluence, of less significance, is in reference to federal civil cases. These cases which account for approximately forty percent of the workload of a U.S. Attorneys office, include categories such as torts, tax, land condemnation and debt collection – fields of little real policy impact. Far more significant is Eisenstein's third sphere, the "quality and public image of federal justice." As the primary federal law enforcement agency in the district, the U.S. Attorney's office embodies the professionalism and integrity of the federal government, which many U.S. Attorneys consider to be a primary responsibility. Eisenstein found that a fourth area of influence is upon local law enforcement agencies. Possessed of excellent information and prestige, some U.S. Attorneys consciously undertake the role of chief law enforcement official in their district and try to raise the quality of local criminal law enforcement. Finally, U.S. Attorneys can affect areas beyond the limits of the legal system *per se*. They may take public positions on important topics of policy, work closely to keep Senators informed of local developments, and even inject themselves into the policymaking process of client agencies, such as the Small Business Administration, which depend on their legal representation.

Eisenstein includes a very valuable discussion on the appointment process for U.S. Attorneys. Basic requirements include residence within the district, ability to withstand Senate scrutiny, and usually the sharing of party membership with the President. Four key variables interact to shape the appointment environment for an individual nominee: identity of Senators from the district's state, the point in the evolution of an administration when the appointment is to be made, the nature of the district itself, and any unique circumstances, such as a scandal having touched a predecessor, which may arise in reference to a particular district. Of these factors, timing is especially significant. Eisenstein maintains that the earlier in a new administration the appointment is made, the stronger the potential for using the appointment to discharge campaign patronage obligations; the older an administration becomes, the less influence this factor exerts. Influential figures in the appointment process include the Deputy Attorney General, local and state political actors, the nominees themselves, and federal judges. Federal judges can temporarily fill vacancies,[9] thereby strengthening the administration's hand in dealing with recalcitrant Senators. Additionally, it is absolutely essential that the nominee be capable of developing a good working relationship with federal judges in the district.

Eisenstein also directs his attention to the prior careers of the appointees and their activities after leaving office, considering U.S. Attorneys holding office between 1961 and 1973. He finds uniformity in certain modal characteristics such as being male, having a substantial record of prior political and governmental experience, and exhibiting a relatively high socioeconomic status. But interestingly enough, groups which are usually underrepresented in other bodies of political appointees, such as Catholics and Jews, were present more frequently than would be expected. In Eisenstein's survey of

and resources devoted to prosecution of interstate automobile theft under the Dyer Act. EISENSTEIN, *supra* note 5, at 21.

9. 28 U.S.C. §546 (1970).

subsequent careers, two findings are of particular interest: fully one eighth of U.S. Attorneys holding office between 1961 and 1973 became federal judges; seventeen percent went on to hold important political posts after their terms were concluded. Eisenstein cites this data as but another example of the close relationship between the office and the political process.

The real core of the volume deals with the mutual perceptions of U.S. Attorneys and the Department of Justice. A consistent theme of analysis is that U.S. Attorneys have substantially greater autonomy than other government employees in field office situations.[10] Given this condition, potential for conflict between the U.S. Attorney's offices and the Department of Justice arises, as each side tries to expand its own control and decrease the influence of the other. Eisenstein's insights are particularly valuable since they are drawn substantially from interviews with both sides. The interviews indicate that the Department believes there should be a national policy governing the U.S. Attorneys' offices as well as the rest of the Department, that the Department should formulate such policy and control litigation to insure uniformity, and although total control from Washington is not feasible, the Department's specialized divisions must be able to enforce adherence to their policies. Department attorneys see themselves as specialists, while perceiving the U.S. Attorneys offices as parochial and narrow in perspective. U.S. Attorneys cannot be fired by the Attorney General, although their assistants can,[11] and other means of central control are not as complete as the Department would like. Clearly, there is scepticism about whether the local offices will willingly implement central policy. The need for uniformity on the one hand, coupled with the suspicion of unenthusiastic cooperation on the other, can generate resentment on the part of Department attorneys.

Perceptions of the Department influence the behavior of U.S. Attorneys. While Eisenstein found general agreement with the proposition that a central policy must emanate from the Attorney General, there was substantial variation as to the appropriate extent of control to be exercised. Eisenstein suggests three models of U.S. Attorneys' offices: the "field office," representing close adherence to departmental policy, a middle position, and an autonomous model that seeks to diminish central direction as much as possible. Resentment stems from the efforts of the Department to control behavior through supervision and directives, the "bureaucratic" nature of the Department which dictates that time be wasted on paperwork, and the failure to keep the U.S. Attorney fully apprised of all departmental activities within his district.

Eisenstein develops a highly effective analysis encompassing the dynamics of and strategies affecting interaction between the Department and U.S. Attorneys. Very little of this interaction can be characterized as overt conflict, confrontation, or coercion. In fact, outright resistance and the airing of disputes in the press are infrequent. Rather, there appears to be a constant

10. For comparative studies of field office autonomy, *see* J. DAVIS & K. DOLBEARE, LITTLE GROUPS OF NEIGHBORS: THE SELECTIVE SERVICE SYSTEM (1968); H. KAUFMAN, THE FOREST RANGER, A STUDY IN ADMINISTRATIVE BEHAVIOR (1960).

11. 28 U.S.C. §542 (1970).

process where U.S. Attorneys seek to preserve through various strategies what they consider to be the proper degree of autonomy for their offices. Strategies which are employed include developing a reputation for competence and integrity, restricting the flow of information to the Department, preserving select areas as autonomous while allowing the Department greater control in others, and cultivating support among judges and other influential political figures. At the same time, the Department can seek to develop cooperation by reducing the isolation of U.S. Attorneys. It may reduce this isolation by inviting the U.S. Attorneys to conferences and advocacy institutes, maintaining contact through the Executive Office for U.S. Attorneys, and assigning Washington attorneys to work in local offices on a long-term basis. The *U.S. Attorney's Manual* outlines such procedures which the Department hopes will be uniformly followed. Although a certain amount of specialized litigation can be supervised from Washington, in situations of serious strain the Department can dispatch attorneys to assume control of litigation or simply wait for a recalcitrant appointee to leave office.

An intriguing question is why conflict does not develop more frequently between the Department and U.S. Attorneys. Furthermore, many appointees see the Department's assistance and involvement as being helpful, since their own resources are limited. Moreover, the Department can perform a buffer or "heat shield" function, taking the flak for U.S. Attorney actions which are highly unpopular in the district.[12] The Department may also boost the position of U.S. Attorneys by insisting that all matters relating to their districts be discussed first with them rather than with the Washington office. And of course, for U.S. Attorneys with further federal career ambitions, particularly those interested in federal judgeships, maintaining good relations with the Department is essential.[13] It also appears that the Department can be particularly successful in gaining cooperation if it can demonstrate how a particular decision implements an established national policy or that the weight of legal scholarship sustains its position. In short, many significant factors encourage cooperation rather than conflict.

From assessing these patterns of interaction, Eisenstein concludes that there are four basic district models. The "normal" district manifests low conflict with the Department, vests a large degree of discretion in the U.S. Attorney, but leaves to the Department control over major policy areas. The "controlled" and "field office" patterns display much greater levels of deference to and control by the Department. Finally, the "office in conflict" represents the situation of bitter dissention and continued confrontation with the Department.[14] Eisenstein identifies three key variables as providing an

12. A prime example of this phenomenon was civil rights cases in the South. For an effective analysis of federal enforcement in one Mississippi county, *see* F. WIRT, POLITICS OF SOUTHERN EQUALITY 72-116 (1970).

13. On federal judicial selection, *see* H. CHASE, FEDERAL JUDGES: THE APPOINTMENT PROCESS (1972); J. PELTASON, FEDERAL COURTS IN THE POLITICAL PROCESS 29-42 (1955).

14. Eisenstein suggests that for a number of unique reasons, the U.S. Attorney's office for the Southern District of New York constitutes its own individual "semi-autonomous" district. EISENSTEIN, *supra* note 5, at 108.

explanation for the variation between districts. First, the personality and objectives of the appointee are significant in determining relations with the Department. Eisenstein's research indicates that egotistical, iron-willed and policy-oriented appointees are prime candidates for resisting departmental control. A second important factor is the amount of support an appointee has from significant political and legal officials, such as Senators and judges. Finally, the single most significant variable appears to be the size of the office; the larger it is, the more likely it will achieve autonomy. The greater resources of a larger office and the need to devote full attention to administration, make the appointee more conscious of policy and more sensitive to maintaining autonomy. Eisenstein suggests that these variations between districts and the overall level of autonomy, are greater for the U.S. Attorney than for any other field office situation in the federal government. He hypothesizes that further gains in Department control will come very slowly and with great difficulty.

Eisenstein devotes a chapter to the critical relationship between U.S. Attorneys and judges. Three models are suggested: partnership, dominated, and the standard pattern, exemplified by moderation on both sides. Many of the same variables that relate to Department – U.S. Attorney relations play a role here: personality, career goals, and expectations toward the proper role of each party. Most U.S. Attorneys seek to maintain good relations by establishing credibility and expertise, being cooperative and helpful, and manifesting professionalism. A particularly important factor is that federal judges are very frequently former U.S. Attorneys. But again, the single most important variable is the size of the district. The larger it is, the more judges compose the bench and thus, the power of any single judge is correspondingly diluted.

While Eisenstein concludes that judges dominate in their interaction with the appointees, U.S. Attorneys are not without significant influence of their own. In suits for writs of mandamus and other litigation directed against the judge, the U.S. Attorney defends the action. In addition, as the largest single litigator in a district court, the U.S. Attorney can aid the judge in keeping his docket current. Every case settled is one less requiring trial. However, it is also evident that judges' preferences affect which cases will be brought; cases that a judge believes unworthy of attention result in minimal prosecution. Judges control vital decisions such as motions, scheduling, and sentencing which affects management of the U.S. Attorney's office workload. Obviously sentencing patterns also influence the kind of plea bargaining that occurs.

Eisenstein also discusses interaction between U.S. Attorneys and investigative agencies, client agencies, and opposing counsel. Like any prosecutor, the U.S. Attorney sits at the center of a web of such mutual relationships. The U.S. Attorney relies upon investigative agencies, such as the FBI, much like any local prosecutor depends upon police investigation. These agencies in turn need the U.S. Attorney to prosecute the cases they develop.[15] Eisenstein

15. For seminal work employing this "exchange model" to explain behavior at the local police and prosecutorial level, *see* G. COLE, POLITICS AND THE ADMINISTRATION OF

describes the tactics and strategies whereby each side in turn influences the other. The most important consideration, however, is the need to win cases; thus, maintaining good relations is crucial. With civil client agencies, Eisenstein found less significant interaction than with the investigative units, because generally the Department has a much greater role than the U.S. Attorney in civil litigation. Eisenstein also examines the U.S. Attorneys' relationships with private attorneys. Particularly important here is the role played by the local bar in establishing the reputation of the U.S. Attorney's office. This reputation affects the office's success in litigation and its credibility in negotiating settlements and pleas. Especially if future judicial appointment is an objective, the U.S. Attorney must effectively demonstrate his competence and at the same time avoid alienating leaders of the local bar.

Eisenstein's brief discussion of plea bargaining is an especially valuable contribution.[16] In contrast with local law enforcement, the focus of nearly all existing studies,[17] plea bargaining on the federal level is rare. Ironically, the major bargaining device is the reduction of the number of counts, which is the device least utilized on the local level. As to why attorneys accept such minimal advantage in return for guilty pleas, Eisenstein suggests that likely motives are fear of consecutive rather than concurrent sentences, suspicion that judges may impose harsher sentences upon those demanding a full trial, or desire to plead out of a hopeless case. It is significant that the typical federal case is far stronger and better prepared than most local cases, which encourages bargaining. In contrast to the local prosecutor, the U.S. Attorney cannot recommend sentences. However, he is not under intense pressure as is the local prosecutor to reduce his backlog of cases, and therefore, can afford to make generous bargains. Hopefully, this suggestive work by Eisenstein will cause more attention to be given to federal plea bargaining than has been given in the past.

Eisenstein devotes his concluding chapter to a summary and assessment of his research. One of the most striking aspects is the documentation of the very close ties between the U.S. Attorney and the local district. In many ways, U.S. Attorneys are like federal judges in the South during the civil rights revolution — so integrated with the district that it is somewhat ironic to vest in them the responsibility for implementing national policy.[18] Eisenstein is extremely hesitant to draw any firm conclusions about the impact of the various pressures upon U.S. Attorneys. His "impressionistic data" leads to the conclusion that the vast preponderance of cases are routine and do not

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JUSTICE (1973). *See also* Clark, *Legal and Judicial Studies: Some Areas of Current Interest*, 8 POLITY 580, 585-88 (1976).

16. *See also* S. GOLDMAN & T. JAHNIGE, THE FEDERAL COURTS AS A POLITICAL SYSTEM 120-28 (1971). For probably the best brief discussion on federal prosecutorial discretion and the considerations that guide its exercise, *see generally* Kaplan, *The Prosecutorial Discretion — A Comment*, 60 NW. U. L. REV. 174 (1965). For an outstanding book-length study, *see* F. MILLER, PROSECUTION: THE DECISION TO CHARGE A SUSPECT WITH A CRIME (1969).

17. For an effective introduction to the complexities of plea bargaining and the contrasting values involved, *see* J. KAPLAN, CRIMINAL JUSTICE 388-437 (1973).

18. *See* Vines, *Federal District Judges and Race Relations Cases in the South*, 28 J. POL. 337 (1964).

generate conflicting pressures. Partisan considerations are most apt to develop in cases involving either prominent individuals, such as Patty Hearst, or matters that "affect the political fortunes of officials and political parties,"[19] as in the case of Spiro Agnew.[20]

The greatest single problem facing U.S. Attorneys is the lack of experience and constant turnover of their staff. Eisenstein rejects the frequently made proposal to place these offices under career civil service, suggesting that the disadvantage of permanent installation of the mediocre would more than offset any advantage resulting from continuity of service by the competent. Extracting commitments to remain with the Department four or five years, a highly unrealistic proposal which would undoubtedly result in discouraging most potential applicants from considering such service, and better salaries, are suggested as more attractive alternatives.

Professor Eisenstein has written a book of significant value for lawyers, social scientists and others who desire to probe into the critical role played by U.S. Attorneys. While the author has not undertaken to assess the performance of U.S. Attorneys, his book sets forth some provocative theories about how U.S. Attorneys discharge their responsibilities, interact with other significant legal and political figures, and direct the operation of their offices. Hopefully, others will build upon Eisenstein's pioneering work by undertaking their own studies of U.S. Attorneys. There are some problems with the book such as the heavy reliance on interview data gathered from 1965 to 1967 and 1970 to 1971, manifesting some degree of "staleness." Eisenstein also has a tendency to be wordy; more economy of language would have been highly beneficial. He also seems overly cautious occasionally in drawing conclusions.[21] Nonetheless, Eisenstein has written a volume which employs fundamental social science techniques and is not obscured by mysterious jargon or complicated mathematics, a book which is nearly as easy for lawyers to understand as for social scientists. This is no minor achievement, given the continuing need to promote cross-disciplinary interaction between lawyers and social scientists. The work stands as the first sustained analysis of U.S. Attorneys, full of perceptive insights and thoughtful conclusions, clearly written, based in large measure upon significant original research, and suggesting some most interesting theories about the reasons behind the manner in which U.S. Attorneys' offices function.

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19. EISENSTEIN, *supra* note 5, at 206.

20. *See* R. COHEN & J. WITCOVER, A HEARTBEAT AWAY: THE INVESTIGATION AND RESIGNATION OF VICE PRESIDENT SPIRO T. AGNEW (1974).

21. Unfortunately, like many other publishers, Johns Hopkins University Press has elected to place the extremely valuable footnotes at the end of the volume, thereby seriously diminishing the opportunity to integrate them into the reading of each chapter.