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Comments on the Symposium: Expanding Research Opportunities on the Federal Criminal Justice System

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COMMENTS

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Lacking a political science background, I come primarily as a consumer of your work, and offer comments on my reading of (some of) the political science literature.

A full understanding of how the federal enforcement bureaucracy will elude us without a rich understanding of what makes prosecutors (or agents) tick. However, I suspect that the best way to reach that goal is not to start with this ultimate question. After all, to look closer to home, what do professors “maximize” when they grade papers? Progress is much more likely to be made if we follow Jim Eisenstein and focus on, first, identifying the most salient features of the bureaucratic environment, and, second, getting a handle on their relative influences.

Quantitative work can help ensure that anecdote does not substitute for analysis. Its contributions will be limited, however, or even negative, if pursued without considerable sensitivity to the institutions being studied. In an area where data about bureaucratic decision making is hard to obtain, it would be foolhardy, for example, to ignore statistics about declination rates. The challenge lies in interpreting them. As I note in an all-too-impressionistic draft on about agent-prosecutor dynamics:

High declination rates for an agency can suggest a serious disjunction between the agency’s agenda and those of the U.S. Attorney’s Offices. But they are equally consistent with a managerial strategy of seeking political insulation, using prosecutors to monitor insufficiently supervised field offices, or impressing funders. Or with an agency strategy of regretfully bowing to prosecutorial gatekeeping authority. Or some combination of these, with variation over districts or regions. Put differently, the fact that the FBI had a declination rate of 43% in 1998-99, compared to a DEA rate of 18.3% says something. But from the outside, we can’t be sure about what. (“Prosecutors and Their Agents, Agents and Their Prosecutors,” draft 2002).

Sharper analytical tools should be brought to bear on declination rates. But if those tools work only by ignoring institutional factors, their explanatory power will be limited.

In a world where agencies like to keep their work secret, and nearly every available statistic is a bureaucratic artifact, information is indeed limited. But not as limited as many

scholars think. More attention, for example, needs to be paid to the increasing number of internal or external inquiries that are launched when something goes (or is loudly alleged to have gone) wrong in the federal criminal justice system. In their exploration of the extraordinary, reports by the Justice Department Inspector General, the General Accounting Office, congressional committees, and other government entities frequently shed light on the ordinary.

There needs to be more of an effort to integrate legal and institutional frameworks. Some points do not require deep legal knowledge. One need not, for example, pore over the federal criminal “code” to figure out the most important truth about federal substantive law: It covers just about everything. (A slight overstatement, but one that even Chief Justice Rehnquist would find all too slight.) The law that probably has more of an influence on enforcement choices is procedural law, which does much to set the price of information and may even designate a purchasing agent. The use of grand jury subpoenas as the dominant means of investigating corporate crime, for example, correlates with the greater role that prosecutors play in those investigations.

This is a fascinating time to study the federal enforcement bureaucracy, as so many fundamental institutional features are being reconsidered in the wake of the September 11 attacks. Although the political debate about the Homeland Security department has primarily been about conditions of employment, the Administration’s proposal raises important questions about the interaction between institutional structure and agenda. How, for example, will placement within the new department affect the Secret Service’s white-collar caseload? How does an agency like the FBI that places a high premium on centralized control of sensitive cases accommodate political pressure to free field offices from bureaucratic handcuffs? These questions are just permutations of age-old bureaucratic issues. But the heightened political interest in them promises both to shake more information free from institutions that generally avoid sustained scrutiny and in increasing the value of (and market for) the work you all do.