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The U.S. Attorney: Fateful Powers Limited Essay.

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ESSAY

THE U.S. ATTORNEY: FATEFUL POWERS LIMITED

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I. INTRODUCTION

An intermittent trickle of water struggles along the 650-mile border between the Western District of Texas and Mexico. Nothing more separates the United States from some of history's most ruthless, technologically-advanced, resourceful, and corrupt enemies. These enemies, the Mexican drug syndicates, now funnel approximately 70% of all Columbian cocaine through Mexico.[1] This influx of drugs is without a doubt our number one crime problem.[2]

In spite of this crisis, the U.S. Attorney's Office, which is responsible for the enforcement of federal law in the courts of this immense district, has languished without a presidentially-appointed leader since the Branch Davidian nightmare.[3] Today's presidential, senatorial, and congressional candidates react to polls that reflect fear of crime as the voting public's key concern, and, therefore, campaign as if they were running for office as local sheriffs. Yet, ironically, at the same time, the most powerful federal crime-fighting position in the Western District of Texas remains filled by only a temporary appointee—due simply to political inertia.

Considering the historical influence of the U.S. Attorney's office, the current situation in the Western District of Texas is somewhat surprising. At one time, U.S. Attorneys exercised almost total discretion as to how the federal government impacted the lives of the powerful, such as prominent politicians and mafia chieftains, as well as the powerless, such as misguided government workers. Unfortunately, that discretionary power appears to have waned considerably. As the officer responsible for all federal criminal and

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1. *See Border Ranchers Losing War to Drug Smugglers: Authorities Don't Have Manpower to Protect Isolated Families*, SAN ANTONIO EXPRESS-NEWS, July 7, 1996, at A1 (reporting that Mexican drug gangs smuggle record quantities of drugs through cattle ranchers' property along border); *Drug Runners Buying Up U.S. Property Along River*, SAN ANTONIO EXPRESS-NEWS, July 7, 1996, at A1 (disclosing Mexican drug smugglers' plans to purchase border property in order to smuggle drugs from Mexico into United States).

2. *See* 131 CONG. REC. E1829, 1829 (daily ed. Apr. 30, 1985) (statement of Rep. Hyde) (quoting former F.B.I. Director William Webster, who called drug trafficking number one crime problem in United States); *Minneapolis Neighborhood Fights Urban Decay* (NPR radio broadcast, Mar. 23, 1996) (claiming that struggle to attain illegal drugs as primary problem plaguing American cities).

3. *See* Lee Hancock, *Siege Chronology Reveals Frustrations, Disagreements*, DALLAS MORNING NEWS, Oct. 9, 1993, at A27 (discussing Justice Department's report revealing conflicts and disagreements between government agencies in 1993 Branch Davidian standoff).

civil cases involving the United States[4] in an immense district, the U.S. Attorney for the Western District of Texas must once again be vested with significant authority. A permanent appointment to this position would represent a step in the right direction. However, even when the post is permanently filled, any attempt at assertive and focused leadership is likely to be stymied by current limitations that plague this once powerful office.

Using the Western District of Texas as a paradigm, this Essay provides insight into these limitations, which include a usurpation of the U.S. Attorney's decision-making power by the Department of Justice and other government agencies, overly large and unmanageable districts, and a closed, antiquated, spoils-system selection process. This Essay also suggests an approach for restoring meaningful authority to the office through measures such as granting greater prosecutorial discretion to the U.S. Attorneys, restructuring the federal districts of Texas into more compatible and manageable units, reforming the selection process, and encouraging community involvement by the U.S. Attorneys and Assistant U.S. Attorneys to enhance their effectiveness and public image. Implementing these proposals will go a long way toward reinstilling respect and significance to a position that has become so obscure that few lawyers could name the prior U.S. Attorneys,[5] much less de-

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4. *See* Sherry Scheel Matteucci, *Life After the Law Firm: What Does a U.S. Attorney Do?*, MONT. LAW., Feb. 1996, at 5, 6 (noting that there are few exceptions where U.S. Attorney does not represent United States).

5. The following is a list of the U.S. Attorneys who have served the Western District:

Name	*Term*
Hugh R. Robertson	August 1918 - July 1921
William R. Smith, Jr.	September 1933 - April 1941
Ben F. Foster	August 1941 - February 1944
William R. Smith, Jr.	February 1944 - January 1946
James McCollum Burnett	January 1946 - July 1947
Henry W. Moursund	July 1947 - July 1951
Charles F. Herring	July 1951 - January 1955
Russell B. Wine	January 1955 - July 1961
Ernest Morgan	July 1961 - January 1969
Marvin T. Butler	January 1969 - July 1969
Seagal V. Wheatley	July 1969 - August 1971
William S. Sessions	August 1971 - December 1974
Hugh P. Shovlin	December 1974 - March 1975
John E. Clark	March 1975 - May 1977
Jamie C. Boyd	June 1977 - March 1981
Edward C. Prado	March 1981 - April 1984

scribe the nature of the office.[6] If we are to prevail in our effort to save our communities from the threats of drugs, crime, and corruption, it is vital that the power of the office be restored and that the people share in the prerogatives of this power.

II. The Structure of the U.S. Attorney's Office

One of the primary obstacles to be overcome in restoring effective power to the U.S. Attorney rests in the structure of the office itself. Throughout the years, limitations on the authority of the U.S. Attorney have devolved out of the initial legislation that created and defined the office. Congress established the office of the U.S. Attorney with the Judiciary Act of 1789[7] in an attempt to bring the federal judicial system closer to the American public.[8] This legislation designated the U.S. Attorney as the entity respon-

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Helen M. Eversberg	April 1984 - November 1989
Ronald F. Ederer	November 1989 - May 1993
James H. DeAtley	May 1993 - April 1996
Bill Blagg	April 1996 - present

To obtain the foregoing list, I called the U.S. Attorney's Office for the Western District of Texas. Instead of offering me a well-documented listing of past U.S. Attorneys, the person on the other end of the phone had to copy the names of the former U.S. Attorneys from assorted plaques and pictures located in the hall. Disappointed by this lack of institutional memory, I interviewed many of the former U.S. Attorneys or their top assistants and furnished a more extensive version of this Essay to them for comment.

6. *See* 28 U.S.C. § 547 (1994) (itemizing U.S. Attorney duties). Unless the law provides otherwise, the duties currently assigned to each U.S. Attorney include the responsibility to "(1) prosecute for all offenses against the United States; (2) prosecute or defend, for the Government, all civil actions, suits or proceedings in which the United States is concerned; (3) appear in behalf of the defendants in all civil actions, suits or proceedings pending in his district against collectors, or other officers of the revenue or customs for any act done by them or for the recovery of any money exacted by or paid to these officers, and by them paid into the Treasury; (4) institute and prosecute proceedings for the collection of fines, penalties, and forfeitures incurred for violation of any revenue law, unless satisfied on investigation that justice does not require the proceedings; and (5) make such reports as the Attorney General may direct." *Id.*; *see also* Nadler v. Mann, 951 F.2d 301, 305 (11th Cir. 1992) (noting that, as highest federal official in law enforcement, absent any contrary law, U.S. Attorneys have duty to prosecute all crimes against United States committed within their respective districts); Dresser Indus. v. United States, 596 F.2d 1231, 1237 (5th Cir. 1979) (stating that cases in which United States is party to litigation, U.S. Attorneys have specific duty to prosecute all infractions against United States).

7. *See* Judiciary Act, ch. 20, § 35, 1 Stat. 73, 92–93 (1789) (calling for appointment of one U.S. Attorney for each judicial district).

8. *See* Sherry Scheel Matteucci, *Life After the Law Firm: What Does a U.S. Attorney Do?*, Mont. Law., Feb. 1996, at 5, 6 (identifying need for "citizens' perspective" at federal district level).

sible for all federal criminal and civil cases.[9] The Act also outlined the administrative structure of the office by vesting the power to partition the judicial districts with Congress, and allocating supervisory powers to the Attorney General.[10] Given the nature and number of players involved in the structuring of the office alone, one begins to understand the constraints currently facing the U.S. Attorney and the difficulties involved in reforming the office to achieve effective leadership.

Today, it is becoming more and more apparent that our nation has "outgrown" the initial structure of the U.S. Attorney's office. Unfortunately, the initial legislation that created the office has not been updated to account for the growth or the changing needs of the many and varied regions of the United States. Nowhere is this more apparent than in the Western District of Texas. Perhaps the three most significant problems that have developed from this outdated legislative structure are: (1) the usurpation of the U.S. Attorneys' power by the Department of Justice and the Office of the Attorney General; (2) the explosive growth of large and unmanageable districts like the Western District of Texas; and (3) the partisan selection process which severely limits the number of qualified candidates for the office. Each of these problems is addressed below in the context of my proposed solutions.

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9. *Id.* While the Judiciary Act of 1789 created the position of the U.S. Attorney, it did not establish a supervising authority to oversee the U.S. Attorneys. JAMES EISENSTEIN, COUNSEL FOR THE UNITED STATES: U.S. ATTORNEYS IN THE POLITICAL AND LEGAL SYSTEMS 9 (1978). At that time, the U.S. Attorneys were permitted to continue private practice and represent the government when they wished. Elizabeth T. Lear, *Contemplating the Successive Prosecution Phenomenon in the Federal System*, 85 J. CRIM. L. & CRIMINOLOGY 625, 632 n.39 (1995). Congress did not place supervisory reins on the U.S. Attorneys until 1830. DANIEL J. MEADOR, THE PRESIDENT, THE ATTORNEY GENERAL, AND THE DEPARTMENT OF JUSTICE 7 (1980).

In 1830, Congress granted the Solicitor of the Treasury the authority to direct the U.S. Attorneys in all matters in which the United States was a party. Act of May 29, 1830, ch. 153, 4 Stat. 414 (1830); DANIEL J. MEADOR, THE PRESIDENT, THE ATTORNEY GENERAL, AND THE DEPARTMENT OF JUSTICE 7 (1980). However, the U.S. Attorneys remained independent of each other; there was no nationwide coordination among the U.S. Attorneys until the onset of the Civil War. Elizabeth T. Lear, *Contemplating the Successive Prosecution Phenomenon in the Federal System*, 85 J. CRIM. L. & CRIMINOLOGY 625, 632 n.39 (1995).

10. Judiciary Act, ch. 20, §§ 1, 35, 1 Stat. 73, 73, 92–93 (1789).

III. The Current Limitations Placed on the Office and Proposed Solutions

A. *The Usurpation of Power by the Department of Justice and the Attorney General*

Organizationally, the office of the U.S. Attorney falls under the Department of Justice's (DOJ) executive office for U.S. Attorneys, thereby making the U.S. Attorney a field representative for the Department of Justice.[11] As a result, the U.S. Attorney is under the supervision and control of the United States Attorney General.[12] As director of the Department of Justice and principal law enforcement officer for the federal government, the Attorney General is a major actor in American politics.[13] This national accountability to the Attorney General interferes with the power and discretion of the U.S. Attorney in several ways. For one, struggles between the Attorney General's attempts to execute a cohesive national policy and the U.S. Attorney's efforts to respond to the needs of the local communities often challenge, and in certain instances eliminate, a U.S. Attorney's prosecutorial discretion.[14] In

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11. *See* U.S. Dep't of Justice, Legal Activities 1995–1996, at 58 (1995) (explaining that U.S. Attorneys' Offices manage bulk of criminal prosecutions handled by Department of Justice).

12. *See* 28 U.S.C. § 503 (1994) (proclaiming Attorney General head of Department of Justice).

13. 28 U.S.C. § 503 (1994); U.S. Dep't of Justice, United States Attorneys' Manual 1–2.101 (1988); *see also* Marshall v. Gibson's Prods., Inc., 584 F.2d 668, 676 n.11 (5th Cir. 1978) (describing Attorney General as chief legal officer). The Attorney General can shape political policy by exercising discretion in the laws selected to be enforced. *See* Cornell W. Clayton, The Politics of Justice: The Attorney General and the Making of Legal Policy 194–97 (1992) (commenting on shaping of policy through nonenforcement strategy). U.S. Attorneys also have some direct access to the formulation of the Attorney General's policy through the Attorney General's Advisory Committee of U.S. Attorneys. *See* U.S. Dep't of Justice, Legal Activities 1995–1996, at 61 (1995). This committee consists of 15 U.S. Attorneys representing various geographic areas. U.S. Dep't of Justice, United States Attorneys' Manual 1–2.101, 1–3.520 (as amended Mar. 1, 1994). Furthermore, as the attorneys conducting most of the trial work in which the United States is a party, the U.S. Attorneys construe and implement the Department of Justice's policies. *Id.* at 1–3.140 (as amended Mar. 1, 1994).

14. In the past, this control caused one U.S. Attorney to be cited for contempt for refusing to obey a court order at the direction of the Attorney General. *See* United States v. Cox, 342 F.2d 167, 169–70 (5th Cir. 1965) (holding U.S. Attorney in civil contempt after he adhered to instructions of acting Attorney General to refrain from drafting or signing indictments from grand jury); *see also* Cornell W. Clayton, The Politics of Justice: The Attorney General and the Making of Legal Policy 78–80, 194–97 (1992) (explaining Department of Justice's policy of selective enforcement); Walter J. Kendall, III, *A*

addition, the Attorney General's authority to select Assistant U.S. Attorneys and to dispatch Special Attorneys to assist U.S. Attorneys in designated prosecutions[15] inhibits the U.S. Attorney's ability to control his or her office.[16] Furthermore, the Attorney General's ability to audit cases, coupled with the extensive reporting system which U.S. Attorneys are required to follow,[17] creates a stringent watchdog system which prevents the U.S. Attorney from exercising independent judgment.[18] Each of these restrictions or limitations is clearly imposed in furtherance of the Attorney General's efforts to centralize decision-making and to implement a national agenda.

Brief Argument for Greater Control of Litigation Discretion: The Public Interest and Public Choice Contexts, 23 J. MARSHALL L. REV. 215, 225–26 (1990) (discussing nature of struggle between U.S. Attorneys and Attorney General).

15. *See* 28 U.S.C. § 542 (1994) (granting Attorney General power to appoint Assistant U.S. Attorneys); *id.* § 543 (1994) (allowing Attorney General to appoint Special Attorneys to assist U.S. Attorneys).

16. *See* CORNELL W. CLAYTON, THE POLITICS OF JUSTICE: THE ATTORNEY GENERAL AND THE MAKING OF LEGAL POLICY 75 (1992) (discussing Executive Order 6166 which vested control of litigation in Department of Justice, under Attorney General's direction). Special Assistants are often appointed from other departments or agencies. U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL 1–3.300 (as amended Mar. 1, 1994). For example, in *In re Perlin*, the Director of the Division of Enforcement of the Commodity Futures Trading Commission suggested the appointment of a Commodities Futures Trading Commission attorney in Chicago to act as a Special Assistant U.S. Attorney to assist in the investigations of illegal transactions on the Chicago Board of Trade. 589 F.2d 260, 261–62 (7th Cir. 1978). Similarly, in *Wall v. United States*, an attorney for the Securities and Exchange Commission assisted in a prosecution for fraudulent sale of securities. 384 F.2d 758, 763 (10th Cir. 1967).

17. *See* 28 U.S.C. § 547(5) (1994) (calling for U.S. Attorney to file reports with Attorney General upon request).

18. *See* U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL 1–10.200 (as amended Oct. 1, 1990) (providing reporting system for U.S. Attorneys). The U.S. Attorneys' Manual states the reasons for such reports are: (1) consistency in litigating posture; (2) overall Executive Branch concerns; (3) budgetary impact of major litigation; and (4) coordination needs where case has multi-state impact. *Id.* Specific procedures have been adopted for new or pending "important" cases and cases involving a public figure or entity. *Id.* Important cases are defined as cases involving multi-agency efforts, large monetary liability, state or local governments, foreign relations and challenges to Presidential authority. *Id.* In addition, the Attorney General's office requires that it be kept abreast of any case where extensive news media coverage or Congressional interest is likely. *Id.* U.S. Attorneys are further required to issue Urgent Reports regarding sensitive criminal investigations, especially those involving public figures or entities. *Id.* The *United States Attorneys' Manual* even provides a format for such reporting. *Id.* at 1–10.231.

A review of the vast array of directives found in the *United States Attorneys' Manual*[19] reveals the extent of the DOJ's effort to "centralize" control of U.S. Attorneys by removing all possible discretion from local offices.[20] Such centralization, however, either results in the complete bypass of the U.S. Attorney or the conversion of the U.S. Attorney to nothing more than an on-site minion of the Department of Justice. When this centralization allows the prosecutorial judgment of a seasoned local prosecutor who understands his community's needs to be second-guessed by a Washington bureaucrat, resentment at the local level is practically assured.

To remedy this problem and restore power and prestige to the U.S. Attorney's office, future administrations must come to understand the value of appointing an innovative politician/lawyer who knows the community's needs well and is willing to be subservient to the DOJ without becoming a purely obedient administrator. Clearly, such a partnership will develop only if the department has absolute confidence in the new U.S. Attorney. And, naturally, each administration deserves the opportunity to install its programs. However, the DOJ, acting under the Attorney General's leadership, is pushing an increasingly progressive and centralized agenda without stopping to consider the adjustments necessary at the community level.[21] The Department's focus has become fixed exclusively on the administration's agenda, rather than on the facts of the particular cases, the applicable laws, and the necessary knowledge of the communities it ultimately serves. If DOJ executives are selected merely because they share an administration's agenda, it is all too likely that they will err in second-guessing local decisions and in initiating local prosecutions.

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19. U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL (1988).

20. *See* U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL 3–1.200 (1988) (listing actions that require prior approval, including such menial activities as photocopier rental and parking space requests). One example of the extremes to which the Attorney General has removed local discretion is in death penalty cases. Prior authorization of the Attorney General is required for a U.S. Attorney to seek the death penalty. *Id.* at 9–2.148, 9–10.020 (as amended July 1, 1992).

21. *See In re* Persico, 522 F.2d 41, 67 (2d Cir. 1975) (concluding that potential abuses of power by local U.S. Attorney cannot compare to those of national prosecution machine). The court stated, "[w]hile federal use of centralized criminal prosecutorial powers has been rare, the dangers are sufficient to give us pause before sanctioning its expansion." *Id.*

In other words, while U.S. Attorneys must be accountable to the Department of Justice, they also must be given greater prosecutorial discretion to enable them to respond to local community needs. A personal experience of mine highlights the necessity of bringing the U.S. Attorneys more "in tune" with local concerns. Recently, while in Mission, Texas,[22] I spoke with a group of young deputy sheriffs. One was also a local mayor, and all were very involved in their community. They all expressed outrage over the federal government's failure to help oust drug dealers from their communities. They explained that one need not do anything more than drive around town to spot the houses belonging to drug dealers.[23] They asked why the government doesn't bring net worth tax cases against the drug dealers to stop them while they build their empires, rather than waiting until after they retire, as in the case of Juan Garcia Abrego, commonly referred to as the "Cocaine King" of Mexico.[24]

Another vivid personal experience that illustrates the importance of giving U.S. Attorneys greater local discretion to prosecute occurred while I was serving as a special trial attorney for the Organized Crime and Racketeering Strike Force of the Department of Justice. I was assigned to indict the most influential mafia chieftain in the South, Carlos Marcello.[25] The U.S. Attorney flew into a screaming rage when it was announced that the Department of Justice decided to indict Marcello. As the local U.S. Attorney and a former politician, he could read our prosecutorial chances better than our isolated strike force team or the chiefs in Washington. After the chief witness was found to be a fraud, the prosecution

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22. *See* Neil Morgan, *Town, Gown Growing Up Together in San Diego*, SAN DIEGO UNION-TRIBUNE, Oct. 24, 1996, at A3 (explaining that Mission, Texas, is located at southern tip of Texas).

23. The deputies explained that the early phase drug dealer has a $35,000 truck in front of a colonias home surrounded by a high security fence born of paranoia, and the owner is weighted down with gaudy pawnshop jewelry. The advanced dealer has a more gaudy home with a $300,000 cinder block/plaster fence, a new boat or two, a new Jaguar, etc.

24. *See* Dane Shiller, *International Drug Lords' Money Trains Run Through Texas Banks*, SAN ANTONIO EXPRESS-NEWS, July 28, 1996, at A1 (describing Abrego as "Cocaine King" of Mexico).

25. *See* Michael Dorman, *My Friend, the Mobster*, NEWSDAY, Aug. 7, 1988, at 16 (describing Carlos Marcello as "the Mafia boss of the South and the most powerful man in Louisiana").

collapsed and Marcello and his entourage departed the courthouse in limousines with police escorts.[26]

Department of Justice overseers, sitting in Washington offices, do not have direct access to people such as the concerned deputies in Mission, or to the information these officers can impart. The Washington overseers also lack the keen understanding of local politics that was shown by the U.S. Attorney in the unsuccessful prosecution of Carlos Marcello. Unlike the DOJ supervisors, the U.S. Attorney has superior knowledge of his local community. The DOJ should grant him permission to set the office's priorities, as well as substantial prosecutorial discretion. Finally, the DOJ cannot exhort the U.S. Attorney to blaze new paths while simultaneously shackling their independence.

Combatting this usurpation of the U.S. Attorneys' power, however, will take more than just change on the part of the Department of Justice. Indeed, it will also require a change in the mindset of those who are appointed to fill the local U.S. Attorney positions. A U.S. Attorney must be forceful enough to resist surrendering local discretion. Prosecutorial discretion should not only be tempered by whether one can convict, but also by whether one should, in the interests of justice, convict. As Justice Douglas so eloquently stated years ago:

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in criminal prosecution is not that it shall win a case, but that justice shall be done.[27]

To ensure that justice is done, great deference, indeed sometimes final judgment, as to the advisability of bringing prosecutions in these communities should rest with the local U.S. Attorney's office because of their experience and knowledge of local affairs.

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26. A more successful example of the near total discretionary authority once exercised by U.S. Attorneys occurred in San Antonio, when I presented the U.S. Attorney with net-worth tax cases against fourteen local lawyers, who reported income in the teens while building mansions. Because of his understanding that the alleged offenses were not connected to organized crime, the U.S. Attorney correctly refused permission to indict.

27. Berger v. United States, 295 U.S. 78, 88 (1935).

B. *The Current Structure of the Federal Districts and a Proposed Restructuring*

A second reason for the decline in the power and prestige of the U.S. Attorney's office is the structure of the districts themselves. Under the initial 1789 legislation,[28] Congress has played an important role in the creation of the U.S. Attorney's office and in the arrangement of the federal judicial districts. Specifically, Congress possesses the authority to control the structure of the judicial districts within which each U.S. Attorney's office is housed.[29] In exercising the power to create these districts, Congress is restrained only by the provision that each state must have at least one district wholly contained within its boundaries.[30] In practice, the manner in which Congress has apportioned the multiple districts has severely limited the role of the U.S. Attorney's office in the community.[31]

Large modern-day districts, like the Western and Southern Districts of Texas, are too geographically expansive, too populous, and too culturally diverse for one U.S. Attorney to effectively coordinate without sacrificing his ability to understand and respond to each individual community's needs. As a practical matter, the current arrangement and size of these districts limits the U.S. Attorney's exposure to the local communities. In turn, this lack of exposure negatively influences the U.S. Attorney's ability to build authority and respect within the district as a whole.

Moreover, in such large districts, a U.S. Attorney's time is monopolized by overly burdensome administrative matters and by endless communications with other federal agencies. Weekly activities, such as supervision of offices and coordination with the Department of Justice, and monthly work with the Law Enforcement

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28. Judiciary Act, ch. 20, 1 Stat. 73 (1789).

29. *Cf.* U.S. CONST. art. III, § 1 (granting Congress power to establish lower courts).

30. *See* 28 U.S.C. §§ 81–131 (1994) (identifying composition of federal judicial districts among states); JAMES EISENSTEIN, COUNSEL FOR THE UNITED STATES: U.S. ATTORNEYS IN THE POLITICAL AND LEGAL SYSTEMS 11 (1978) (noting that Congress mandates number and size of districts). Four federal districts are located in Texas—the Northern, the Southern, the Eastern, and the Western Federal Districts. *List of United States Attorneys*, UNITED STATES ATTORNEYS' BULLETIN (Executive Office for United States Attorneys, Washington, D.C.), Aug. 15, 1994, at 334.

31. *See* JAMES EISENSTEIN, COUNSEL FOR THE UNITED STATES: U.S. ATTORNEYS IN THE POLITICAL AND LEGAL SYSTEMS 11–12 (1978) (stating that congressionally-defined districts impact structure and environment of the U.S. Attorney offices).

Coordinating Committee, Operation Alliance, judges, and agency chiefs, require countless hours to be spent on administrative tasks.[32] These time constraints are magnified in the expansive Western and Southern Districts, in which the U.S. Attorney's effectiveness is impeded by the practical problem of having too many people with whom to communicate. Accordingly, the U.S. Attorney must be freed from a portion of the management and coordinating functions in order to properly focus on case selection and the management of those cases.

In addition, both the Western and Southern Districts of Texas have many micro-communities with distinctive personalities and problems. However, because the U.S. Attorneys for both districts are mired in management, they are too far removed from the local people and their concerns. For example, the U.S. Attorney's office for the Southern District of Texas, which is headquartered in Houston and includes 132 Assistant U.S. Attorneys, must understand not only the concerns of a large metropolis,[33] but also must be able to relate to the concerns of the culturally distinctive border communities, including Brownsville and Laredo.[34] If the U.S. Attorney is to regain prominence in the legal system, the current judicial districts should be redrawn to account for the workload of the U.S. Attorneys, the cultural differences within each district, and similar legal concerns of each district.[35] Otherwise, the U.S. Attorney in large districts will remain completely isolated from both individual as well as community concerns.

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32. *See id.* at 191 (stating that ratio of administrative duties is directly proportional to size of office and district); Sherry Scheel Matteucci, *Life After the Law Firm: What Does a U.S. Attorney Do?*, MONT. LAW., Feb. 1996, at 5, 8 (recognizing that significant amount of U.S. Attorneys' time is spent on administrative and ministerial duties).

33. ALMANAC OF THE 50 STATES: BASIC DATA PROFILES WITH COMPARATIVE TABLES 347 (1995) (Edith R. Hornor ed.) (citing Houston as largest city in Texas, with population of 1,631,000).

34. *See U.S. Attorneys: Jones Vows to Pursue Civil Rights Violations*, 4 No. 1 DOJ ALERT 9 (Jan. 3–17, 1994) (describing diversity of culture and demographics in Southern District of Texas).

35. *See* JAMES EISENSTEIN, COUNSEL FOR THE UNITED STATES: U.S. ATTORNEYS IN THE POLITICAL AND LEGAL SYSTEMS 6 (1978) (explaining propensity to prosecute defendants for similar crimes in particular districts). For example, the districts located in the southern border states prosecute the most defendants nationwide that are charged with illegally producing alcohol, while the federal judicial districts located in the northeast prosecute most of the corporate fraud litigation. *Id.*

In viewing the geographic distribution of the communities in Texas, one might conclude that Congress should create one border district stretching from El Paso to Brownsville. Because of the cultural similarities in these areas, such a district would allow the U.S. Attorney to formulate policies geared to their special needs and concerns. Specifically, the creation of a border district would allow the U.S. Attorney to focus on the unique immigration and drug problems that plague that region in the context of a single forum. This realignment would also eliminate complicated coordination efforts between the federal judicial districts and various government departments. However, a division of the Southern and Western Districts into four new districts is probably more advisable. In a four district system, Houston and its surrounding counties would be placed into one district where financial concerns would likely predominate. Additionally, a new Southern District, centered in either Corpus Christi or Brownsville, could include these two cities, as well as Laredo and Del Rio, while a new Western District could be centered in El Paso and would encompass the areas of Midland/Odessa, Pecos, and possibly Lubbock. Finally, a new Central District should be established to contain the Interstate 35 corridor, including San Antonio, Austin, and Waco. This proposed alignment would place U.S. Attorneys across the state in manageable regions with similar interests.

Unfortunately, this suggested realignment may not be politically achievable because of the "clout" a large district provides for local officials, such as the marshall, the chief judge, and the chief clerk.[36] In the current Western and Southern Districts of Texas, each of these officials, along with the U.S. Attorney, has one of the largest and, therefore, most powerful offices among the nation's districts. As a result, each may instinctively resist any diminishment of his or her influence over national issues. Previously, the inability of our federal officials to recognize the need to reduce these districts also has delayed reform. Recently, however, Senators Phil Gramm and Kay Bailey Hutchison forwarded suggestions for federal district realignment to the Senate Judiciary Committee for consideration.[37]

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36. *See id.* at 117 (revealing that "local political sponsors in large districts possess more potent political resources").

37. *See* Letter from Phil Gramm, Senator, United States Senate, to the Honorable Tom Rickhoff, Fourth Court of Appeals 1 (July 18, 1996) (on file with the *St. Mary's Law*

Therefore, it is possible that a joint committee could reach a consensus on restructuring the districts.

With or without redistricting, however, U.S. Attorneys must assist each community in its growth toward a healthy democracy by removing impediments such as corruption, drugs, illegal business practices, and the like. U.S. Attorneys must first care about the communities in which they serve, get to know those who reside therein, and be innovators within the communities. A reallotment of the districts would alleviate some of the burdens placed on the U.S. Attorneys and provide an opportunity for the U.S. Attorneys to learn about the needs of the people and the communities in which they are sworn to serve.

C. *The Ineffectiveness of the Partisan Selection Process*

A third reason for the U.S. Attorney's diminished power and prestige is the flawed selection process, which is permeated with partisan politics and secrecy. Urgent questions which are rarely considered and seldom discussed in public include: Who should be selected as U.S. Attorney? What attributes should a U.S. Attorney possess? Who can "blackball" a nominee? Should the community have input in the selection? To an extent, each of these questions is addressed below, and their answers reveal a multitude of problems that limit the U.S. Attorney's power.

1. Partisan Politics

The actual selection process of a U.S. Attorney is highly partisan and political.[38] Under the initial legislation, the president retains the authority to appoint the U.S. Attorney, subject to senatorial confirmation, and such appointments are subject to removal only by the president.[39] When a new administration is elected, the cur-

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Journal) (proposing to share district realignment suggestions with Judicial Conference of U.S. Courts and Senate Judiciary Committee); Letter from Kay Bailey Hutchison, Senator, United States Senate, to the Honorable Tom Rickhoff, Fourth Court of Appeals 1 (May 21, 1996) (on file with the *St. Mary's Law Journal*) (offering to forward district realignment proposals to Senate Judiciary Committee).

38. *See* JAMES EISENSTEIN, COUNSEL FOR THE UNITED STATES: U.S. ATTORNEYS IN THE POLITICAL AND LEGAL SYSTEMS 36-37 (1978) (describing role that politics have played in prior selections of U.S. Attorneys).

39. *See* 28 U.S.C. § 541 (1994) (explaining procedure for selection and removal of U.S. Attorneys).

rent U.S. Attorneys are expected to resign, making them one of the only groups of professionals removed strictly due to party affiliation.[40] Upon taking office, the newly elected president is then expected to fill the ninety or so vacancies created. Other than the statutory requirement that a U.S. Attorney be a lawyer who resides within the district to be served,[41] no specific criteria guide this selection process. The resulting ad hoc, unstructured partisan process that has evolved severely limits the number of qualified candidates who are available to fill the office. In the Western District of Texas, the shortcomings of this selection process have been eloquently demonstrated by the absence of a confirmed U.S. Attorney since 1993.

Even though the president, with the advice and permission of the Senate, appoints a U.S. Attorney to each judicial district for a four-year term, the sole decisionmaker in the selection process prior to the presidential appointment is the senior politician of the President's political party representing the district.[42] In the Western District of Texas, this decision would currently be made by Con-

40. *See* John Tackett, *Jobs of U.S. Attorney: Marshall Ripe for Appointments*, SAN ANTONIO LIGHT, Nov. 5, 1992, at A10 (reporting that Republican U.S. Attorney Ron Ederer and U.S. Marshall Bill Jonas were expected to lose their positions because of election of Democrat Bill Clinton); *see also* Bruce Davidson & Gary Martin, *Clinton Expected to Pick Local Lawyer for U.S. Attorney Spot*, SAN ANTONIO EXPRESS-NEWS, Sept. 7, 1995, at B6 (acknowledging that Republican majority in Senate hampered chances of Travis County Attorney Ken Oden receiving U.S. Attorney appointment); *San Antonio Lawyer Being Tapped for U.S. Attorney Position*, SAN ANTONIO EXPRESS-NEWS, Sept. 20, 1995, at B3 (stating that it was necessary for Democratic Congressman to make U.S. Attorney appointment recommendations to Democratic presidential administration); *Politicized Justice Department Must Change to Be Viable* (CNN television broadcast, Apr. 12, 1993) (noting that Justice Department was politicized operation).

41. *See* 28 U.S.C. § 545(a) (1994). There are two exceptions to the residency requirement: (1) U.S. Attorneys for the District of Columbia, the Southern District of New York, and the Eastern District of New York may reside within 20 miles of the district; and (2) no residency requirement is imposed upon a U.S. Attorney appointed to serve the Northern Mariana Islands "who at the same time is serving in the same capacity in another district." 28 U.S.C. § 545 (1994). Although required to be lawyers, neither U.S. Attorneys nor Assistant U.S. Attorneys may engage in outside employment; however, pro bono work is permitted. U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL 1-4.320, 1-4.350 (1988).

42. *See* JAMES EISENSTEIN, COUNSEL FOR THE UNITED STATES: U.S. ATTORNEYS IN THE POLITICAL AND LEGAL SYSTEMS 36 (1978).

gressmen such as Henry B. Gonzalez and Frank Tejeda.[43] If a Republican president was elected, Senators Phil Gramm and Kay Bailey Hutchison (and the committee of prominent volunteer lawyers and community leaders who advise them) would select the U.S. Attorney.

In most instances, senatorial courtesy ensures the confirmation of the district senator's selection.[44] However, when partisan politics preempt senatorial courtesy, the U.S. Attorney's office is forced to languish without a confirmed leader. A recent example of this paralysis occurred in the Western District of Texas. Initially, the appointment of Kenneth Oden, a Travis County attorney, was rejected after Texas Senators Phil Gramm and Kay Bailey Hutchison opposed his confirmation.[45] Representative Gonzalez recommended Bill Blagg to President Clinton in December 1994. However, Mr. Blagg has yet to be named as the official U.S. Attorney for the Western District of Texas.[46] Indeed, we have not enjoyed an officially confirmed U.S. Attorney since Ron Ederer was relieved and then reinstated during the Branch Davidian disaster. If Mr. Blagg, the present nominee, has all of the qualities and characteristics necessary to serve as U.S. Attorney, then the bar should encourage his confirmation and not allow partisanship to prevent it.

Another example of the pernicious effect of partisan warfare on the selection process occurs when a new presidential administra-

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43. Frank Tejeda died on January 30, 1997. Bruce Davidson & Gary Martin, *U.S. Rep. Frank Tejeda Dies*, SAN ANTONIO EXPRESS-NEWS, Jan. 31, 1997, at A1. His replacement had not been named prior to the publication of this Essay.

44. *See* JAMES EISENSTEIN, COUNSEL FOR THE UNITED STATES: U.S. ATTORNEYS IN THE POLITICAL AND LEGAL SYSTEMS 42 (1978).

45. *See* U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL A-3.301 (Supp. 1994) (listing rejected nominee, Kenneth R. Oden, as current U.S. Attorney because approval of nominated candidates is usually automatic); *U.S. Attorneys: Administration Mum on Stalled Nominee*, 4 No. 13 DOJ ALERT 7 (July 18, 1994) (discussing opposition of Senators Gramm and Hutchison to President Clinton's nomination of Kenneth R. Oden as U.S. Attorney for Western District of Texas).

46. *See* Chris Bird, *Ex-Fed Prosecutor Blagg to Become U.S. Attorney*, SAN ANTONIO EXPRESS-NEWS, Mar. 27, 1996, at B3 (discussing Blagg's pending confirmation by Senate); Rick Casey, *U.S. Attorney Hopeful Has Troublesome Ties*, SAN ANTONIO EXPRESS-NEWS, June 4, 1995, at A2 (reporting that Blagg has already been approved by Senators Gramm and Hutchison); *San Antonio Lawyer Being Tapped for U.S. Attorney Position*, SAN ANTONIO EXPRESS-NEWS, Sept. 20, 1995, at B3 (announcing that U.S. Representative Henry B. Gonzalez, senior Democrat in district, nominated Blagg).

tion takes office. As previously discussed, all U.S. Attorneys in office at the time of any such transition are expected to resign, regardless of the actual date of their appointment's expiration and regardless of their individual "track record." The sole reason for these mass resignations is political affiliation. As a result, approximately ninety new U.S. Attorneys are supposed to be appointed within just a few months of each new administration's term.[47]

An example of the abuse that can arise from this partisan transition ritual occurred in 1993, when Attorney General Janet Reno summarily fired Ron Ederer, along with all of the hold-over Republican U.S. Attorneys, after only half of their resignations had been submitted.[48] Some suspected that this mass firing was an effort to retard planned prosecutions,[49] but whatever the reason, all ninety-three U.S. Attorneys should not have been terminated without ready replacements. Allowing the hold-over U.S. Attorneys to continue in their positions until suitable replacements were secured would likely have avoided the dilemma that currently faces the Western District of Texas. I am not suggesting that each administration does not deserve the opportunity to govern. However, when the selection process depends more on the influence a nominee enjoys with a major political figure than on the nominee's competence and experience, a long, directionless transition period, similar to the one being experienced in the Western District of Texas, may result.

Assuming that the pitfalls of this transition period are avoided, the newly appointed U.S. Attorney faces a series of new obstacles once in office. The new U.S. Attorney must strive to preserve the integrity of his or her position by resisting politicians' efforts to use the power of the office to serve their specific agendas or political goals. This abuse of the office is a danger inherent in the current selection process, for politicians are unlikely to appoint an independent U.S. Attorney who would flatly refuse to compromise

47. *See* JAMES EISENSTEIN, COUNSEL FOR THE UNITED STATES: U.S. ATTORNEYS IN THE POLITICAL AND LEGAL SYSTEMS 37 (1978).

48. *See Politicized Justice Department Must Change to Be Viable* (CNN television broadcast, Apr. 12, 1993) (indicating that while newly elected presidents replace other party's appointees, it is usually not in wholesale manner).

49. *See id.* (hinting that U.S. Attorneys were terminated to stall investigation of Democratic Congressman Dan Rostenkowski in order to protect him from prosecution for embezzlement of public funds).

the office's integrity for the sake of politicians' personal agendas. Should this political manipulation of the U.S. Attorney's power be made public, the credibility of the office would be irreparably damaged. In addition, such manipulations also reveal the politicians' complete ignorance of the legal restraints placed on the U.S. Attorney's authority. This should not be interpreted, however, as a statement that all politicians seek to use the office for venal purposes. For example, former Texas Senators John Tower and Lloyd Bentsen never involved themselves in setting office agendas or recommending prosecutions. Their restraint may help to explain the reason the office was able to function more effectively in the past.

2. The Closed Selection System

Although the president ultimately appoints the candidate to the Office of the U.S. Attorney, it is those with access to the selection process who have the actual power to advance or blackball a nomination. Unless the current selection process is stripped of its partisan character, and unless more citizens have a say in who is chosen as U.S. Attorney, appearances of cronyism are unavoidable.[50] Candidates will continue to be chosen for their perceived proximity to a senator's key supporter, rather than because they are established community leaders with prior governmental experience, significant courtroom ability, and administrative competence.[51] When candidates are chosen by a select group, those considered for the post are limited to candidates who are part of, and therefore share the views of, that select segment of society. The bar provides no organized, publicly acknowledged input to erase this impression. However, one can assume that the selection committee members assisting the senator or congressman make numerous confidential

50. *See U.S. Attorneys: Administration Mum on Stalled Nominee*, 4 No. 13 DOJ ALERT 7 (July 18, 1994) (noting that opposition to Oden's appointment by Texas Senators resulted in postponement of nomination); *San Antonio Lawyer Being Tapped for U.S. Attorney Position*, SAN ANTONIO EXPRESS-NEWS, Sept. 20, 1995, at B3 (reporting that Democratic Representative Henry B. Gonzalez suggested possible candidate for U.S. Attorney because Texas lacks Democratic senator to nominate candidate); *Politicized Justice Department Must Change to Be Viable* (CNN television broadcast, Apr. 12, 1993) (revealing that Janet Reno terminated every holdover-Republican U.S. Attorney across country).

51. *See* Letter from Henry B. Gonzalez, Member of Congress, United States House of Representatives, to the Honorable Tom Rickhoff, Fourth Court of Appeals 1 (May 17, 1996) (on file with the *St. Mary's Law Journal*) (stating that "confirmations are far more affected by politics than the qualifications of the nominees").

inquiries of bar members, and are also inundated with unsolicited advice from such members.[52] When the advisor, either solicited or unsolicited, attempts to advance a friend or to retard the appointment of someone who offended her, such advice is obviously pernicious. Moreover, because each committee member's assessment of the candidates is naturally a function of his or her own socialization and particular political agenda, the selection process is nothing more than a closed system.[53] This closed selection system is another reason for the current crisis in the Western District.[54]

In addition to the confidential committee members' assessment, federal judges can essentially blackball a nominee or select their own appointee when a vacancy lingers, thereby substantially influencing the selection process.[55] Because the Department of Justice has an obvious interest in maintaining good relations with the judiciary, the judges can choose to quietly, but effectively, voice their approval of or their opposition to proposed appointees.

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52. *See* JAMES EISENSTEIN, COUNSEL FOR THE UNITED STATES: U.S. ATTORNEYS IN THE POLITICAL AND LEGAL SYSTEMS 38–39 (1978) (explaining that some bar members develop common agendas with regard to U.S. Attorney's Office).

53. *See id.* at 43 (indicating that "indirect tactics" are often relied upon if nominee is deemed to be unacceptable). The ability of nearly anyone to blackball a nominee by gossip is a primary defect of the process. As a former prime member of a cabal that sabotaged a U.S. Senator's federal nominee, I know how easily this can be done. A U.S. Attorney is then selected from the limited pool of candidates that no one blackballed. These are generally people that keep such a low profile that they draw no criticism. Could someone this inactive be expected to be an aggressive prosecutor? What reasons are given for blackballing a potential nominee? The other day, I explained this to a major community lawyer who exclaimed, "We don't want someone [like former Bexar County District Attorney Fred Rodriguez] who might indict us!" (Source requested anonymity.) His glib candor was most revealing. That is, the very people who feel they could be subject to charges for white-collar crime can call on influential friends and generate a campaign to select a "safe" nominee.

54. Despite my efforts to determine how Democratic administrations select their candidates, the process remains a mystery to me. To the uninitiated, including a Democratic friend pained by my suggestion that the Democrats had no process, the Republican selection process could appear to be "a secret, smoke-filled-room gathering of primarily wealthy WASP male lawyers divvying up political spoils to their cronies." (Source requested anonymity.) As a one-time outsider, now intimate with the process, I know that the chosen gatekeepers are dedicated and that the impression of elitism is unnecessary. Nevertheless, many outstanding candidates wrongly believe that they are wasting their time and energy in applying because some politically connected candidate fosters the impression that only those with a political sponsor will make the final cut.

55. *See* 28 U.S.C. § 546(d) (1994) (explaining that in some circumstances, district court may appoint replacement U.S. Attorney to serve until vacancy is filled).

In my view, those citizens most challenged by the evils that a U.S. Attorney could realistically eliminate should have access to the selection process, as well as a voice in setting the priorities of the office. Currently, public housing residents, small business owners, welfare mothers, teachers, recovering addicts, and impoverished Americans are not involved in the selection process, even though these people are in dire need of the U.S. Attorney's help. While some may perceive the substitution of the views of a recovering addict for the experience and judgment of a learned attorney as an extreme measure, such involvement is appropriate if the nominee is to respond to the needs of the entire community. Those who fall prey to drug dealers, or who stand in line with illegal immigrants for food stamps, have unique opinions regarding the qualities that a U.S. Attorney should possess. For a U.S. Attorney to be effective, these views should be heard.

3. Recommended Qualities of a U.S. Attorney

The personal characteristics of a typical selectee can also limit the effectiveness of the U.S. Attorney's office. The closed and conservative selection process makes it less likely that an independent, innovative, and forceful person will be appointed over a "safer" choice of equal competence. In other words, the present selection process obviously limits the type of nominee selected.

On the positive side, this conservative, or "safe," process probably delivers an honest U.S. Attorney who is unlikely to generate any major scandals. However, if the process delivers a safe, meek, obsequious, obscure figurehead, he or she may never venture a public comment on social issues or make any effort to mold public opinion. Such a U.S. Attorney, who may misunderstand or fear the media, would likely never appear before business, religious, civic or governmental institutions, and would thus have little or no effect on the community. Additionally, such a U.S. Attorney likely would not have a well-defined plan upon taking office, and would probably surrender authority to the Department of Justice, the investigative agencies, or the judiciary, rather than establishing independent priorities and objectives.[56] Because such an attorney

56. *See* Matt Flores, *Hidalgo Trial Shows Witness Hazards*, SAN ANTONIO EXPRESS-NEWS, May 6, 1996, at A1 (discussing U.S. Attorney's use of government informant, Moises Perez, at insistence of Federal Bureau of Investigation, which resulted in U.S. Attorney

would, in effect, become a technocrat for the Department of Justice, he or she would give little thought to serving the people. At a time when our district is faced with aggressive, brutal, amoral drug dealers (such as the recently convicted drug lord, Juan Garcia Abrego), an assertive and aggressive U.S. Attorney must be appointed before more South Texas towns are lost to crime and violence.

Moreover, because the many demands placed on a U.S. Attorney require a proper balance between law and politics, the arbiter of this balance must be an experienced trial lawyer, a respected politician and a competent administrator.[57] Successful U.S. Attorneys who possess these qualities have managed to be effective decision-makers, even though some may have been consumed by ambition and concerned primarily with their political futures. In addition to administrative skills, political savvy, and proven legal experience, particularly in the area of prosecutions, the U.S. Attorney should thoroughly understand the effectiveness of the local law enforcement community throughout the district and the impact of crime within the district.[58] This knowledge is best acquired by someone living and serving in a community located within the district.

The ideal nominee is one who possesses and combines all the best strengths of previous U.S. Attorneys and Assistant U.S. Attorneys.[59] The Western District community leaders should help re-

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dropping charges against defendants because of informant's questionable background); Stephen Power, *Scales of Justice: Supporters Call New Courthouse Overdue; Critics Say It's a $19.6 Million Boondoggle*, DALLAS MORNING NEWS, Dec. 17, 1996, at A45 (reporting on construction of $19.6-million courthouse in Pecos, Texas at request of U.S. district judge even though case load has dwindled in recent years, and U.S. Attorney did not plan to assign any Assistant U.S. Attorney to courthouse due to scarcity of cases).

57. *See* JAMES EISENSTEIN, COUNSEL FOR THE UNITED STATES: U.S. ATTORNEYS IN THE POLITICAL AND LEGAL SYSTEMS 49–50 (1978) (quoting statistics that indicate that majority of U.S. Attorneys are involved in politics at some point in their legal careers).

58. *See id.* at 28–30 (discussing U.S. Attorney's involvement with local law enforcement agencies and local prosecutors). The need for greater cooperation with, and understanding of, the local law enforcement community was recognized by the establishment of Law Enforcement Coordinating Committees within each federal judicial district. U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL 1–11.100 (as amended Mar. 1, 1994).

59. For example, former Bexar County District Attorney, Fred Rodriguez, not only knew that lowering the amount of cocaine on the street could save at least one life, but also genuinely cared about each member of his community. John Clark, a superb organizer (and writer), knew every legitimate vote in Duval County required federal protection.

cruit a dynamic U.S. Attorney who has shown, through past performance, a combination of these qualities and a deep commitment to improving the lives of the district's citizens. In addition, the selection committee should function more openly to attract the best candidates. For example, the committee should introduce itself to the public, select a spokesperson, and publicize its assessment of the state of the office. The committee should also recruit candidates, conduct public interviews, and solicit the views of the organized bar. Because the work of the selection committee is vital to the district, the dedication of its members should be openly recognized. Moreover, such publicity would serve to engender community goodwill and respect for the process, as well as for the U.S. Attorney selected.

In conclusion, instituting reform of the selection process will be a difficult task. This long interval without a U.S. Attorney in the Western District of Texas demonstrates the serious consequences of politicians who are unwilling or unable to work together. Reforming the selection process, however, is but one step in restoring the power of the U.S. Attorney's office. A more difficult problem to overcome is posed by the unmanageable number of actors who set the priorities of the office.

IV. Limitations on Setting Priorities

I have long wondered why certain types of cases are absent from federal prosecution in the Western District. Is there no institutionalized fraud in the oil and gas industry? Why do state authorities, instead of federal postal inspectors, seem to bust mail-fraud operations in San Antonio? Why were there so few local convictions stemming from the massive savings and loan scandal, and so few defendants charged with health care fraud? I have concluded that these cases are not prosecuted because too many actors are involved in setting the priorities of the U.S. Attorney.

Helen Eversberg, though from the Houston U.S. Attorney's Office, was an effective Assistant U.S. Attorney and enthusiastically first engaged this community by fostering crime preventative programs later adopted by the Department of Justice. Her boss, Judge Ed Prado, was a careful administrator and most likeable communicator. Ron Ederer worked hard to coordinate border projects with Mexico. Seagal Wheatley, Bill Sessions and John Clark are all consummate politicians, highly capable lawyers and representatives of the types who should be tempted to serve as U.S. Attorney by the call of duty.

As previously noted, the Attorney General attempts to set the U.S. Attorney's priorities based on the current administration's national agenda. Attorney General Janet Reno, for example, first said that U.S. Attorneys should concentrate on violent criminals, major drug traffickers, and white-collar thugs.[60] She later added environmental violators and health care defrauders to this list before recognizing the confusion she was creating.[61] She then reassigned the prevention of violence as her number one priority.[62]

Congress is another "actor" who influences the priorities of the U.S. Attorney's office. Recognizing the public's concerns about violent crime, Congress has adopted a "crime de jure" approach. As a result of this approach, state crimes, such as car hijacking[63] and the possession of guns within a school zone,[64] have been labeled federal offenses. Unfortunately, enacting this type of legislation is exceedingly inefficient, confusing, and a complete waste of federal resources. For example, consider a doctor in the small Texas town of Uvalde who drops off his child at school before he goes hunting. Did Congress mean for him to be charged with violating the Gun Fee School Zone Act of 1990? Or did they draft this legislation without considering the way of life in many of the nation's rural communities? By enacting such laws, which are not tailored to conditions like those found in Uvalde and other small communi-

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60. *See Attorney General Announces New Initiatives to Remove Criminal Aliens*, U.S. NEWSWIRE, May 22, 1995, *available in* 1995 WL 6618058 (proclaiming removal of criminal aliens as one of highest priorities of Administration); Gary Fields & Kevin Johnson, *Drug Lord Extraditions Have Tie to Foreign Aid*, USA TODAY, Jan. 19, 1996, at 3A (stressing that elimination of drug trafficking is one of Administration's highest priorities); *Preserve the Ban: Assault Weapons Should Be Kept Off Our Streets*, SAN DIEGO UNION TRIB., Feb. 12, 1995, at G2 (proclaiming goal of keeping assault weapons off nation's streets as top priority of Administration); Jerry Seper, *Reno Brags on Crime Programs*, WASH. TIMES, Mar. 28, 1995, at A6 (allocating additional $15 million to U.S. Attorneys to focus on violent crime control).

61. *See Health Care Fraud Penalties at Record High*, PATRIOT LEDGER (Quincy, Mass.), Mar. 3, 1995, at 2 (affirming health care fraud as top priority); Greta Shankle, *Local Health Care Industry Could Face More Scrutiny*, INDIANAPOLIS BUS. J., Jan. 2, 1995, at 3 (listing environmental crime as top priority).

62. *See* Harvey Berkman, *Prosecutors Get with the Program*, NAT'L L.J., July 17, 1995, at A12 (ranking violent crimes and health care fraud as country's first and second top law enforcement priorities).

63. *See* Anti Car Theft Act of 1992 § 101, 18 U.S.C. § 2119 (1994) (providing for criminal sanctions for carjacking).

64. *See* Gun-Free School Zones Act of 1990 § 1702, 18 U.S.C. § 922(q) (1994) (designating possession of firearm within school zone as federal crime).

ties, Congress creates a further source of confusion as to the U.S. Attorney's priorities. Pursuing an action against the Uvalde doctor is pointless, especially when it drains resources needed to pursue the drug dealers and other criminals who are actually influencing and corrupting high school students.

A third group that affects the U.S. Attorney's priorities is comprised of the investigative agencies, such as the Federal Bureau of Investigation. If the FBI pursues a major investigative foray, the U.S. Attorney is expected to prosecute. However, the agency generally ignores U.S. Attorney-based agendas that conflict with the agency's priorities, thereby impeding their implementation.

To overcome the often conflicting and jumbled priorities of these numerous actors, the U.S. Attorney must do more than prosecute guilty pleas that boost agency statistics, while passively following agents' directives to decline others. New areas of investigation should be opened as deemed necessary by the U.S. Attorney, and the investigative agencies must learn to cooperate with these efforts. Further, the U.S. Attorney must recognize that both violent crimes and routine drug cases must remain with local prosecutors if a strong and effective law enforcement capability is to be maintained. Finally, the U.S. Attorney must be a gatekeeper who weighs federal policy goals, local needs, and court resources, and then establishes independent priorities based on this assessment. Allowing the Attorney General, Congress, and the investigative agencies to assign priorities to a wide and ever-changing variety of criminal offenses has diluted the U.S. Attorney's power to set a definitive agenda. Regaining this power requires an innovative and insightful U.S. Attorney who commands the power and respect necessary to shape and direct a consensus, and who acts with the ultimate goal of effectively serving the people.

V. Other Suggestions for Rejuvenating the Office

While the aforementioned discussion recommends ways from within the government to alleviate some of the limitations placed on the U.S. Attorneys, this section offers suggestions for rejuvenating the office that originates outside of the rigidly structured government bureaucracy. If the office of the U.S. Attorney is to regain prominence as a powerful and distinguished actor in the federal judicial system, it is essential for the individual U.S. Attorneys to foster a close connection with the people they are selected to

serve. Through an active grand jury system, expanded media coverage, coordination with judges, and increased community participation, the beneficial work and prosecutorial efforts of the U.S. Attorney can be show-cased to the people in the communities in which the U.S. Attorney was selected to serve.

1. Increasing the Use of the Grand Jury

The relationship between a U.S. Attorney's office and the grand jury provides one avenue through which the U.S. Attorney can discover the concerns of the community. Bill Lynch, a former supervisor at the Organized Crime and Racketeering Strike Force, once described the power gained through the use of an investigatory grand jury as follows:

> [A] grand jury is awesome. The right of subpoena vests it with power that no detective or agent can legitimately wield. The threat of perjury prosecutions can cajole timid witnesses into giving information which would otherwise remain hidden. When a witness is immunized, under a proper statute, he can be coerced into telling all he knows with the threat of contempt proceedings. Perhaps most importantly, the psychological effect of being called before the grand jury, of being summoned to answer questions in solemn surroundings before ordinary citizens—this can unnerve the most hardened capo in La Cosa Nostra.[65]

Unfortunately, many of the grand jury's valuable resources have gone untapped, because the grand jury traditionally has been used as little more than a prosecutor's tool.[66] By using the grand jury in this way, the entire process becomes a one-way street: the U.S. Attorney, on behalf of the Department of Justice, persuades the

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65. Remarks of William S. Lynch to Law Enforcement Assistance Administration of the Department of Justice Conference, Norman, Okla., Mar. 1, 1970; *see also* JOHN E. CLARK, THE FALL OF THE DUKE OF DUVAL: A PROSECUTOR'S JOURNAL 127 (1995) (recounting powerful use of grand jury to further investigations).

66. *See* JOHN E. CLARK, THE FALL OF THE DUKE OF DUVAL: A PROSECUTOR'S JOURNAL 127–28 (1995) (describing function of grand jury as: (1) to determine whether government's case meets "probable cause" requirement, and (2) to serve in investigative manner). As a young prosecutor, it was a real rush to excuse a subpoenaed gambler's lawyer and usher the gambler before the citizens composing the grand jury all equipped with ear phones ready to listen to court-authorized wire-taps containing statements made by the gambler. As a result, the subpoenaed gambler generally pled and/or cooperated. Using this method, we brought down the largest bookmaking racket in the country. As a result, many of the Dallas and San Antonio gamblers pled, retired, and graduated to better careers.

grand jury to provide indictments in even the weakest of cases, but the grand jury has no equivalent influence with the U.S. Attorney.

To avoid this stigma and instill greater popular respect for grand jury indictments, the U.S. Attorney should instruct the jurors to conscientiously perform their traditional role:

> Historically, [the grand jury] has been regarded as a primary security to the innocent against hasty, malicious and oppressive prosecution; it serves the invaluable function in our society of standing between the accuser and the accused . . . to determine whether a charge is founded upon reason or was dictated by an intimidating power or by malice and personal ill will.[67]

In addition, a federal grand jury should be convened annually in each major community to serve as the "conscience" of the community by suggesting investigative priorities. If a grand jury is concerned with environmental hazards resulting from base closures, dereliction of public duties, the influx of drugs, or immigration violations, then it should enjoy the opportunity to speak for its community. In this small way, grand juries would help tailor federal priorities, which are now established exclusively by federal agencies and the Department of Justice under the direction of the president.[68] While this somewhat controversial proposal is not consistent with the classic role of a grand jury, including the grand jury in this process would help ensure that the executive department's decisions are made democratically. Finally, this inclusion also would serve to strengthen the U.S. Attorneys' relationships with the communities they serve.[69] In a culture that seeks its legiti-

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67. Taylor v. State, 735 S.W.2d 930, 946 (Tex. App.—Dallas 1987, no pet.), *rev'd on other grounds sub nom.* Arnold v. State, 786 S.W.2d 295 (Tex. Crim. App. 1990).

68. *See* Walter J. Kendall, III, *A Brief Argument for Greater Control of Litigation Discretion—The Public Interest and Public Choice Contexts*, 23 J. MARSHALL L. REV. 215, 226 (1990) (presenting brief account of one U.S. Attorney's interaction with community in order to pursue community concerns).

69. *See* United States v. Cox, 342 F.2d 167, 179–80 (5th Cir. 1965) (Rives, Gewin, Bell, JJ., concurring in part and dissenting in part) (recognizing use of grand jury as arm of democratic process).

> Public policy may in some instances require that a case not be prosecuted. Such consideration of public policy may be submitted to and acted on by the grand jury. As well said by Colonel E. R. Mattoon in an article entitled "The Lawyer as a Social Force," 15 Ala. Law, 55, 64 (1954): ". . . [T]he jury system calls on the lawyer to have faith in the common man—that the average citizen can be relied on, when given an adequate explanation, to understand a problem, apply reason to it, and arrive at a wise

macy through the consent of the governed, it seems only just to have genuine contributions from the grand jury.

2. Improving Relations with the Media

Another crucial link between the U.S. Attorney's office and the community is the media. In today's age of communications, the media obviously wields significant influence. Therefore, the U.S. Attorney should cultivate the media for three important reasons: (1) to dissuade citizens from involving themselves in criminal activities; (2) to promote the reputation of the office and its policies; and (3) to provide a means by which to hold the U.S. Attorney accountable to the people in the communities the office serves.

It takes experience, time, and years of correct decisions for a politician to build a solid relationship with the press. However, this type of relationship is absolutely necessary, because it can provide the means by which a savvy U.S. Attorney can influence public opinion and ultimately persuade the public into believing that this institution works in the community's best interest. Introducing the U.S. Attorney's office to the community through the media may generate renewed support for efforts made by the U.S. Attorney to target previously identified problems within the community. More importantly, media coverage would provide the public with the opportunity to *see* the tangible results of its government officials in action.

Furthermore, publicity concerning convictions and the office's anticipated priorities might have a deterrent effect on crime if the goals of the office are well-publicized within the community.[70] For example, when there is a seizure of a drug dealer's South Texas estate, media coverage of the event would convey the dual message that the U.S. Attorney is working successfully to serve the community, and that crime most definitely does not pay.

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solution. This faith in the common man to solve his problems by his own reason is of the essence of a democracy."

Id.

70. In my first week as an Assistant U.S. Attorney in San Antonio, we held a press conference and announced that we would wire-tap gamblers and pursue doctors on Medicare/Medicaid fraud. Because the U.S. Attorney's office did not have an established reputation in the community, the announcement did not deter these individuals. We later brought plenty of these cases to trial.

For all of these reasons, the U.S. Attorney should invite media attention that spotlights successful crime-fighting efforts and reinforces positive community values. In doing so, the U.S. Attorney will employ a powerful modern tool in the effort to generate and restore respect for the office.

3. Coordinating Federal Resources with the Courts

Increased community involvement is one way that the U.S. Attorney's power can be legitimized, but to restore the power completely will also require the cooperation of the federal judiciary. Judges and prosecutors are destined to work together so that they may use federal resources wisely. Unlike U.S. Attorneys, federal judges have few career goals outside the judiciary and, as a result, are more insulated from partisan pressures. Federal judges are generally more relaxed and predictable, and tend to be more concerned with tending their dockets than with promoting an agenda. Contrary to Attorney General Reno's agenda favoring prevention of violent crime, I believe violent crime should be the concern of the local district attorney. Major drug offenses, and uniquely federal offenses, such as the misuse of federal funds, as well as other offenses that have a major impact on communities, are the only appropriate cases for the limited federal dockets. In sum, U.S. Attorneys and the judiciary must come together to reach a consensus on this issue so that federal resources can be used efficiently and effectively.

4. Internal Improvements

Another way to rejuvenate the office of the U.S. Attorney is to enhance the U.S. Attorney's ability to use Assistant U.S. Attorneys more effectively. The relatively stable pool of career Assistant U.S. Attorneys can be a great asset, assuming these attorneys possess the institutional knowledge necessary to evaluate and try cases.[71] The U.S. Attorney can use these experienced and gifted

71. One example is prosecutor Ray Jahn, who is affectionately referred to with his wife, LeRay, as "the Jahn," is designated as a Senior Litigation Counselor. He is available to the Department of Justice for special assignment. At the time of this writing, he is assigned to the "Whitewater Team." *See* Jerry Seper, *McDougal Loses Plea to Be Freed; Judge: 'All She Has to Do Is Tell* [the] *Truth'*, WASH. TIMES, Sept. 14, 1996, at A1 (identifying Ray Jahn as prosecutor in Whitewater case).

prosecutors to preserve institutional knowledge, guide new Assistant U.S. Attorneys, and lead important prosecution teams.

Long ago, there was a healthy amount of turnover in the ranks of the Assistant U.S. Attorneys. With the recent decline of job opportunities in the legal profession, however, some Assistants are electing to stay in office for their entire professional lives. To prevent bureaucratic inertia from frustrating the goals of an incoming U.S. Attorney, top Assistants brought on board with the former U.S. Attorney should resign and allow the new administration's agenda to prevail with the new team.

Further, the U.S. Attorney should encourage Assistant U.S. Attorneys to become more involved in the community. A lawyer who once ran the U.S. Attorney's office told me that many Assistant U.S. Attorneys are willing to "toil in virtual anonymity for twenty years; but for them, the toil of four cases a year makes one a workaholic. They go up the stairs at nine and down at five, but they go nowhere else. They ostracize themselves and preclude any meaningful interaction between the office and the community."[72] To prevent this attitude from continuing, the U.S. Attorney could assign veteran Assistant U.S. Attorneys to specific subdistricts and charge them with meeting local community leaders and the press to explain the services their office provides. Such community meetings also would allow these community leaders to voice their views on important issues.[73] However, should Assistant U.S. Attorneys refuse to become involved with the individual communities in South and West Texas, a U.S. Attorney will face an uphill struggle in gaining the necessary assistance to battle the many problems in urgent need of attention. Therefore, while there remains a strong base of adaptable Assistant U.S. Attorneys, a lingering passive-aggressive inertia, if left unchecked, can chain the U.S. Attorney's office to bureaucratic tasks.

VI. CONCLUSION

The office of the U.S. Attorney was once considered to be a powerful and distinguished position within the federal government. Unfortunately, the encroachment of government bureaucracies,

72. Source requested anonymity.

73. One former U.S. Attorney found conducting joint continuing legal education sessions on federal issues of mutual interest with the local bar to be helpful.

like the Department of Justice, has tarnished this once-respected position. Through the restructuring of the federal districts to adequately provide for the needs of the communities, the elimination of the partisan selection process, and the establishment of better communications with the various organizations that have the capacity to limit or affect the U.S. Attorneys' ability to perform their duties, the office can be restored to a position of respect and authority within the federal government, as well as within the communities it serves. Restoring the office in such a manner will enable the U.S. Attorney to establish priorities and take valuable, noticeable steps to save our borders, streets, and children from the increasingly powerful lure of drugs and crime.