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MECHANISMS AND PROCESSES OF LEGAL INITIATION:
Working Paper on the Executive-Bureaucratic Role in Law

Matthew Holden, Jr.*

INTRODUCTION: WHAT IS MISSING IN COMMON KNOWLEDGE?

This is a "working paper," which means it is a start, and not a finish. Its subject is the actual, not the ideal, executive-bureaucratic role in law.[1] The executive-bureaucratic role in law, which can also be thought as the politics of prosecution. It is a borderland subject (Allen, 196?) between the profession of law and the discipline of political science.

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[1]. Some of the material included in this working paper will also be found in a second working paper, "Pre-Judicial Decision-Making" and in a draft chapter, "The Executive-Bureaucratic Role in Law," written as part of The Practice of Power (to be published by the University of Oklahoma Press.

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The term "politics" is quite commonly thought to mean something that is "wrong" or, at the least "inappropriate" when "the justice system" or "the law" is mentioned. Such disesteem or discomfort with "politics" requires some discussion that cannot be given here. The concept "politics," which may be reduced to narrower forms, starts with a broad definition by Walton Hamilton, Yale law professor who never went to law school. Academic fame is quite fleeting, so it may be useful to note that Hamilton was trained first a medieval historian and student of literature. He then became an institutional economist. As a consultant on freight rates, he worked for the State of Georgia on the case of Georgia v. Penna. R. R. Co. (.) In the course of that association, so the present author has come to believe, Governor Ellis Gibbs Arnall exercised an archaic power he still possessed to make Hamilton a member of the Georgia bar.[2] After teaching at Yale Hamilton was a member of Arnold, Fortas, and Porter.

In 1957, he gave the William W. Cook Lecture in which he used the term "politics" (Hamilton, 1957, 6) "in the Aristotelian sense. Hamilton thus refers to the Greek philosopher Aristotle (382-322 B. C.) who, one might add, is reintroduced to the lay public by Richard

[2] This detail as to how Hamilton came to be a member of the bar remains to be verified. Charles Austin Wright confirmed, in correspondence with the author in the late 1970s, that Hamilton was not formally trained in law. He said that his best teacher at Yale was Fred Rodell, educated as a lawyer but who was not a member of the bar. His next best teacher was Hamilton, a member of the bar who had never gone to law school. (Wright, 1978?)

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Rubinstein. (Rubinstein, 2003, especially atn12-47.)

Aristotle's Politics still commands wide respect in the field of political theory. He is believed by some, including Rubinstein, to have compiled an early set of the constitutions of the Greek states. (Elster, 2004, 10-11, 13, 227.) The Aristotelian sense, as Hamilton reads it, took as "the usages and traditions, the arrangements and policies, by which (human beings are governed. . . and by which (human beings) attempt to shape destiny." (Hamilton, 1957, 6.)

Hamilton's concept of politics is more or less what is here adopted to frame the discussion of prosecution.

Political scientists have written a good deal about law and courts as political phenomena. The idea in this paper is to emphasize the prosecutorial aspects of law. Courts usually do not create their own agendas. They do not have much to do with deciding what will never be presented to them. (They also not have much control over enforcement.) The most extraordinary thing is that there is so little sustained discussion of decisions to initiate action in law, action that in other facets of political science would be called agenda-setting, or decisions to preclude actions that might go to court.

We have to remember that law is a substitute for combat, and in that sense also remember the vast array of dispute that is inherent in society. Most dispute is handled by custom,

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discussion, physical fighting or some other form of private exchange. Some of it is handled by more formalized non-governmental agreements or arrangements, such as the rules that govern basketball leagues, trade associations, and so on.

Ultimately, human beings come to the mechanisms and processes by which actions that are initiated, some of which go before courts for decision, some of which are presented to courts but are rejected or denied, and most of which are never presented to courts at all.

Such decisions are in the realm of the executive-bureaucratic process called "prosecution." The word is used most often to refer to criminal proceedings. But the word can have a broader meaning. "The term is also used respecting civil litigation, and includes every step in action, from its commencement to its final determination." (Black's Law Dictionary, Sixth Edition, 1221.) If it can include civil litigation, then it can also include all the advising process in government. Officials decide what they want to do, must do, or must not do. They receive–in relation to those decisions--interpretations from lawyers as to what their authorities, duties, and limitations are.

Carl B. Stokes, once Mayor of Cleveland, Ohio wrote:

> You have to keep in mind the great power of a county prosecutor. He can do almost anything from wiretapping to surveillance to the getting of records. And he can intimidate. He can get people indicted almost at will. A county grand jury relies almost

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> exclusively on the county prosecutor or his assistant for direction. Since the grand jury sits in secret and its procedures are never subsequently available to public scrutiny, the information given to the grand jury is whatever the prosecutor wants to present. (Stokes, 230.)

Stokes presents a number of specifications of actions by the county prosecutor's office that he says were not directed against Stokes's white adversaries, that were publicized during his Administration, but that disappeared without legal formalities once he was out of office.

From the point of view thus stated, we propose a serious new effort to study the capacity to initiate, the withhold from initiation, and drop the initiation of proceedings, in varying degrees criminal, civil, and advisory. This is a new effort, though not a fundamentally new concept. It has been advanced before and has been rejected, not explicitly but by recurring neglect.

THE REJECTION OF THE EXECUTIVE-BUREAUCRATIC ROLE AS A SUBJECT OF STUDY

1. Some Prior Approaches: Goodnow, Moley, Wallace, and Others

Three political scientists, from the first quarter of the 20th century, and all curiously from one university (Columbia), laid out some basic paths.

Frank J. Goodnow discussed the development of public prosecution, pushing out the private prosecution that had been allowed when the British still ruled the colonies in the 18th century. He also argued that the American system of authority in local-level prosecutors was an attempt to disaggregate the power of the colonial era attorneys general. (Goodnow, 1905,411-417).

Raymond Moley published a book on the local-level prosecutors (Moley, 1929) that was far ahead of its time. The prosecutor, Moley says ". . . is

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not subject to any important extent to the restraining influence of public and professional scrutiny.” (Moley, viii.)

One year later Moley, another Columbia professor, Schuyler Colfax Wallace published a study of what prosecutors said about their decision-making in response to a mail questionnaire (Wallace, 1930.) The Wallace survey had so low a response rate (10%) that it would now command no attention. But that is now unimportant. Methodologically, in political science/public administration this was almost the equivalent of flight before Kitty Hawk. Any result was impressive.

The answers were very important. He specifically quotes a district attorney who showed his sympathy for relatively poor people, in the Depression. That district attorney said he did not want to prosecute somebody for taking a small amount of heating coal from a railroad company dump. There was no doubt that the criminal statutes of the state forbade taking the coal. Thus Wallace showed prosecutorial discretion as a form of “nullification”by administrative decision.

More than thirty years passed during which there was little new political science or legal research on this area. itibefore Moley’s initial effort had much impact in political science. Herbert Jacob, a new scholar in the post 1950 Ph. D. generation, led in a revival of studies of prosecutorial decision-making in the 1960s.

Academic political science is underdeveloped on this executive-bureaucratic front. So is academic law. The lawyers’ concern is, of course, likely to be highly pragmatic. Martin Belsky shows this, in his review of a prosecution textbook. (Belsky, 1984, 1487) regarding Nissman and Hagen (1982).

Senator Arlen Specter worked for some years as prosecutor before himself holding the office of District Attorney, being first elected 1965 and defeated in 1973. (Specter, with Robbins, 147-253.) Senator Specter provides a snapshot of the “course [he taught]

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in prosecution at the University of Pennsylvania Law School, principally to help draft law students to help with DA issues."

Specter's illustrations, however pragmatic his purpose, involve issues of judgment and analytical technique that may not involve much that is uniquely legal. They have a kinship to much that is taught in political science and policy analysis. If Specter wanted students to review what the Pennsylvania courts had said, in order to reach conclusions about the statutory rape issues, then law students would be his natural resource. If, as appear on the face of it, the question was in large part philosophical or analytical, Ph. D. candidates political science (or some other disciplines, for that matter) would serve well. Intellectual value is often derived from serious attention to practical problems, so that practice itself becomes a means of enhancing theory. (McCormick and Teles (1997,)

The variety of efforts to be mentioned below, from Goodnow to the younger scholars of the last half decade (Lochner; Whitford), with different intellectual traditions and methodological techniques, has still not established deep roots in political science or in academic law.

The reason is that the executive role in law (or the politics of prosecution) has more or less been "rejected" by those who work in the judicial paradigm. I speculate that there are two reasons why people stay focused on appellate judges and away from prosecutors.

<u>The technology of the published law controls the research is the first reason</u>. Whatever they who study courts do, and whatever the conflicts about language and mathematical and statistical methods, all depend upon a single set of core data, their data come from the written opinions of the same set of judges about whom all students know or can be expected to learn. Students of "judicial process" may debate whether "institutional" or "attitudinal"

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approaches better explain what higher appellate judges, especially United States Supreme Court justices, do.

Even adjudication in trial courts is hard to study by this method. Decision-making about the vast realm of conflict that comes to the attention of the executive personnel is even more difficult. There is some diffuse or ill-defined wordage, such as that the prosecutor's job is not to secure convictions but to see that justice is done. But there is little clarity about what actions are consistent with those words, or under what conditions the actions are taken. Law professors and law students simulate being judges, but they have no criteria for simulating being preosecutors.

Emotional enchantment and repulsion is the second factor. Political scientists, like other people, prefer to study actions that do not disturb their psyches. It is possible to study judges and maintain high hopes of justice. Both lawyers and political scientists can maintain a belief that courts are, even when defective, always tending toward being unique vessels of justice. You can almost always find a Holmes or a Brandeis or other high quality human being writing elegant dissents. You can find a Marshall exercising statecraft, and you can even find a Warren – though critical scholars do not give him the same legal acumen. Many people can try to enter the minds of such justices, though there have been others into whose minds hardly anyone can imagine wishing to enter.

Realistic students of political science (or of law, for that matter) cannot, however, avoid inquiries into power, which necessarily means a good deal of action that is coercive, unpleasant, and sometimes other than ennobling. If one took the district attorney's office for a given locale, over the past twenty five years, the state attorney's general's office, or any office at the Department of Justice (whether the headquarters colloquially

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called "Main DOJ" or in the US Attorneys' Offices, it would be hard to imagine that all the action would have to study would be both effective and morally satisfying.

Where New Study of the Executive-Bureaucratic Role Could Begin?

From an idea of what knowledge is missing, and of what potential intellectual tradition can be drawn upon, we begin to identify where some new contribution can be made. Here we begin with the expectation that executive-bureaucratic decision-making by lawyers in Government is constrained within three sets of parameters: structure, recruitment, and latent pressures.

?For that purpose, the key year is 1927. Albert J. Langeluttig wrote a doctoral dissertation that covered in some detail the formal arrangements of the United States Department of Justice. (Since the Attorney General has been a significant figure in American government from the beginning, and the Department of Justice is accounted within what Thomas Cronin calls "the Inner Cabinet," it may regarded a significant knowledge gap that there is no major political science book on the department as such. [I return to this in some further comment on the Department of Justice as a working system below circa page 15 and after.)

Frank J. Goodnow, who had initiated writing on this subject while in New York, had moved from Columbia to Johns Hopkins as president in 1914, and continued to teach. In 1903, two years before the cited Goodnow book, one James S. Easby-Smith, apparently a lawyer. Easby-Smith presented a short study of the formal arrangements of the Department of Justice. (Easby-Smith, 1904.) (Langeluttig, like Easby-Smith, recited the formal details at described

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in the statutes. Langeluttig's work forms part of the source material for Baker's more recent paper (Baker, 1995, 31, 49, in Clayton, 1995) and in Herz's paper in the same volume (Herz, 1995, 160-161).

Homer S. Cummings, while Attorney General, and Carl McFarland produced a broad historical survey of the Department. In the foreword (?) Preface (?) Cummings extends the courtesy of thanks to Carl Brent Swisher (Johns Hopkins) for work on the organization of the Justice Department records which had previously been much less accessible. (Cummings and McFarland, .) Swisher, a constitutional law scholar at Johns Hopkins, also edited and published a collection of Cummings's speeches and papers, though he expressly said Cummings had no role in that project. (Cummings, 1939). Swisher also published a descriptive paper on the contest between attempts to centralize legal policy in the Department and attempts to maintain legal policy in the several agencies. (Swisher, 1939.) From about 1830 until the Civil War period, agency attorneys (solicitors) were created in six agencies.

The Department of Justice had been created in 1870 with the rationale being, in part, that too money was being spent on outside counsel (Congressional Globe,). This emphasis on retrenchment is my insertion and does not come from Swisher. The new department was also argued for in part on the argument that agency heads were getting the advice they wanted rather than good legal advice (Congressional Globe,)

While the departmental legislation was supposed to provide for more central control over Federal legal work, decentralization set in with the creation of the Interstate Commerce Commission, although World War I created incentives for centralization. Decentralization returned in the 1920s.

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FDR in 1933 was given authority to deal with the matter by executive order. The present author has not studied why this happened. His supposition, subject to check, is that this is authority that FDR wanted, not that it was foist upon him by Congress unwares. In any case:

> All Department of Justice control over the internal legal work of other government agencies was thereby apparently terminated. The control of litigation, on the other hand, was apparently confirmed in the Department of Justice . . . (Swisher, 980.)

Under the FDR executive order there was still a continuous and vigorous contest between the Department and other agencies, especially the Secretary of Interior administering controls over oil industry, the National Reconvert Administration, and the Agricultural Adjustment Administration (AAA). Jerome Frank, cited at the beginning of this working paper, was an active participant as general counsel of the AAA. Swisher described the agency demands for legal services with considerable sympathy for the DOJ. But he also took note that the various programs might demand more legal judgments than DOJ personnel could carry. Interior Secretary Harold L. Ickes emphatically set out the optional view that the Justice Department lawyers did not understand the oil issues nearly as well as his people did. Swisher commented,"Unfortunately, even within the Department of Justice coordination is difficult when the mass of litigation becomes too great."

Swisher's work is not theoretical, even in the manner that came to political science during the behavioral revolution. But it has a tone that anticipates Herbert Simon. Simon (1947,) has a discussion of the difficulties of finding a single criterion around which logically

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to assign administrative authority that is very similar to Swisher's earlier discussion of the difficulty of finding a single criterion around which to organize "legal" in view of the necessities of policy in administrative entities.

This substantive point also affects the discussion in Herz, although Herz relies upon Langelutting. Whether Herz, with legal education, a Court of Appeals clerkship, and a Supreme Court clerkship, was unfamiliar with the political science of Swisher or merely deemed it not necessary for his purposes is not clear.

Very few political scientists dealy with the Department of Justice for a long time after Swisher's first efforts. Swisher himself stayed with constitutional law and judicial biography.[4]

The Department of Justice comes again into political science as a study of field administration, executed by James Eisenstein, whose Counsel for the United States was undertaken as a study of assistant United States Attorneys. This study grew from a doctoral dissertation in public administration suggested by the model of Herbert Kaufman's study of forest rangers. sumakes

[4]. Holden (198?) contains a reasonable bibliography of such material in the 1980s, and the material of the subseuent years is somewhat more extensive, but not definitively so.

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itself known on lawyers' reading lists. John Elliff's study, in the context of the Department's approach to anti-war critics during the Viet-Nam War is almost wholly out of sight. [Elliff,].) Other works related to the Department of Justice are, on on the Solicitor General (Rebecca Salokar.) On the Solicitor General's Office there is work by Richard Pacelle), on United States Attorneys (Todd Lochner and Andrew Whitford) state attorneys general (as by David Winder (2000) and by Stephen Bragaw).

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I will set aside recruitment as it is too complicated to handle here and, on the whole, may be somewhat unproductive as a first step in forecasting what executive officers in law will do.

Frank W. Miller, et. al. summarize a view of prosecutorial decisions about making criminal charges as grounded in four considerations. "In deciding whether to bring formal charges against a suspect, a prosecutor considers a variety of factors including the strength of the evidence, the suspect's background and characteristics, the costs and benefits of obtaining a conviction, and the attitude of the community toward the offense the suspect is believed to have committed." (Miller, et. al., 795).

However, the following varied reactions should be noted. On a panel at a major public meeting, a United States Attorney took note in a manner that seemed intellectually serious, honest, and approving. In a variety of law review articles over many years, these criteria also appear. In a email discussion, one senior political scientists severely condemned these criteria, but did not show why, saying merely that it all depended on

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“circumstances.” He is a person to be taken seriously and we have not yet had the opportunity to resolve whether this is a terminological dispute only or a substantive difference. Finally, one lawyer who professes many years’ experience both as prosecutor and as defense counsel treated the criteria as worthless and said “prosecution is politics by another name.”

George Cole covered some of the same ground, but give more explicit emphasis to “exchanges” with other organizational entities in making the whole system work. In criminal courts, at the level with Cole was dealing, it was important to regulate the case load and important to avoid looking bad in the courtroom. (Cole, 173-174.)

In these terms, I now turn to some factors in prosecutorial decision-making. One of these is structure.

STRUCTURE AND DECISIONS

Structure is somewhat more malleable in this first inquiry, and has somewhat more obvious connections fo outcomes in decisions to withhold or to initiate. The actual exercise of authority in the Federal structure is by no means clear, nor are the norms that American government operates upon quite clear. What kind of engagement that takes place from the top of American Federal Government (the President) into the Department of Justice.

In American structure, the very top level is the Attorney General of the United States. In theory, the Attorney General heads the entire Department of Justice, and directs it or leads it though the associated complex of politically appointed officials (Deputy Attorney General, Associate Attorney General, Solicitor General, Assistant Attorneys General, etc.)

The aforementioned officials are in the Departmental headquarters (what

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some journalists call "Main DOJ,")in Washington, D. C.
In addition, there is the field administrative structure, embodied in the 93 United States Attorneys' offices in the 94 Federal judicial districts.[5] The United States Attorneys' Offices are the entities that were the subject of research by James Eisenstein already mentioned. These are the entities that also enter, in different ways, into the very recent research by Todd Lochner and by Andrew B. Whitford.

It is noteworthy that so large a department, with such crucial relationships, is virtually unexplored as an entity. What is the record and how should it be explained or evaluated? Surely, the Department is some kind of working system. By "the Department of Justice as a working system," I mean the variety of relationships and transactions between the "political" appointees and the career personnel, and between amongst Attorneys General, Deputy Attorneys General, and so forth.

A. The President and the Working System

There is, I think, a social prejudice, common to lawyers, journalists, and intellectuals, about the President of the United States with reference to the Department of Justice. David Burnham, once now an respected investigative reporter for The New York Times, symbolized this prejudice. He referred to cases where Presidential intervention produces inaction or termination of existing or projected actions. The matters that Burnham seems most to have

[5]. In the Pacific, two districts are combined under one office.

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emphasized involved antitrust cases (Burnham, 1996, especially 236-238) that were not prosecuted as vigorously as he thinks they should have been, because of Presidential intervention.

The President in question was Richard M. Nixon. Presumably, the reservations would have been expressed about actions that were taken because of Presidential intervention. The question is whether any empirical theory of decision-making could ever expect a result in which Presidents would never intervene on important matters. The question obviously is whether the actions were wrong in themselves because of their substance or wrong because the President acted.

Consider three cases of Presidents and criminal decision-making. In each case, a President faced a situation where some major public matter, by his criteria, existed, and where the right course of action (by his criteria) would not be followed, except by his initiative. (Holden, 2005)

1. Presidents do act to protect themselves when they perceive themselves to be fundamentally challenged or imperiled.

This aacounts for some of the more extreme examples of intra-elite faction. On this phenomenon of intra-elite conflict, I think the most dramatic case was that between President Thomas Jefferson and former Vice President Aaron Burr at pages , below.) [The Jefferson-Burr conflict is the problem, that may have a generic existence in organizations, in organizations of conflict between Number One and Number Two.[6] This conflict between Number One and Number Two problem appears the best explanation of the conflict that broke out between President Thomas Jefferson and former Vice President Aaron Burr, two years after Burr left office. This may well be the best case in

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[6] .

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Kentucky might have been thought vulnerable, if Burr really meant to attempt a secession effort, though the secession case seems somewhat doubtful in any event.[7] It is true that United States District Attorney Daviess, John Marshall's brother in law, suspected Burr.[8] But he suspected almost everybody. Daviess got a grand jury and had Burr appear. The grand jury refused to indict. Whether grand juries in the early 1800s were normally more independent than they are now, or whether this particular grand jury was deviant is uncertain. What is not in doubt is that Burr's actions raised

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[7]. The secession plot has been assumed, but appears never to have been investigated closely. One reason may be that Jefferson is so much a national and intellectual hero, and because Burr so much a presumed villain, that the very inquiry would be hard to justify in most graduate schools. But the matter is deserving of much more close study without writing making the inquiry into an anti-Jefferson brief.

The concept that Burr was involved in a plot for western secession is open, as I suggest to some reconsideration.

There were but three "western" (trans-Appalachian) states: Ohio, Kentucky, and Tennessee. Ohio was such poor country for that purpose. The governor immediately sent out a militia, once some warning came from the President. Tennessee was also poor country for the purpose. Nothing indicates that anyone proposing to separate from the Union would have had any toleration from Andrew Jackson. No secession effort could have been successful without his help.

[8]. The reader should not be deceived. John Marshal's family network deserves some study. However, there is no evidence that Marshall and Daviess had anythingto do with each other on the Burr case.

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antagonism and suspicion in the mind of the President.

When Aaron Burr was arrested, near Natchez, Mississippi, the President was much involved. So were those in the reporting line to the President. Among these were the Attorney General of the United States, a member of the President's Cabinet (Langeluttig, 1927, 48, n, 5), though also a part-time officer.

Burr was conveyed to Virginia. Word went ahead to Attorney General Caesar Rodney made a strenuous night ride from Washington to Fredericksburg, in order that instructions should be given for Burr's being charged. Though Rodney was at hand for the purpose, he was not the central decision-maker for the case. Jefferson was. "Jefferson was the wheel of the prosecution," says Milton Lomask, (and the U. S. district attorney)" merely one of the spokes." The district attorney "wrote over fifty letters to the President during the trial and received almost as many in return." (Lomask, 234.)

The trial judge was Chief Justice John Marshall, performing his duty on the circuit. (Malone, 1974, 291-370; Warren, 1922. 1926, Vol. One, 301-316.) The acquittal was made necessary by the judge's instructions to jury. "As soon as the news reached (Jefferson) of Burr's acquittal, he ordered (the United States District Attorney) to press the indictment for misdemeanor - - *not for the purpose of convicting Burr, but of getting the evidence down in a form in which it would be available for impeachment proceedings against Marshall*." (Corwin, 1919, 1946, 1977, 113.)

Presidents act not only for themselves, as one hypothesizes in the discussion of the Jefferson-Burr case, but in defense of their essential supporting coalitions. This happens not merely in contemporary times, but is so fundamental that we ought to expect to find it in historical experience as well.

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Criminal prosecution is a means sometimes of coping with the challenge.[1] President Millard Fillmore's actions in the Christiana riot case are in point. In September 1851, a Maryland slaveholder, attempted to recapture certain persons who had voted with their feet. They had gone to the area of Lancaster, Pennsylvania. The escaped persons. They knew they were being sought, and had found refuge in the home of a free African American innkeeper. The Fugitive Slave Act of 1850, newly in effect, gave the slaveholder the procedural advantage. The slaveholder, accompanied by his own son and by the United States Marshal, approached the house. In the firing, the black persons killed the slaveholder and wounded his son.

The case produced great reaction in the slaveholding states. The Maryland governor sent an open letter to President Fillmore demanding "the most complete vindication of the laws and the fullest retribution upon the criminals" (Katz, 162.) The President's supporting coalition in was centered in the slaveholding South. This may be interpreted as providing the motivation for his response. (Katz, 161-163; Hensel, 1911, 1969; Remini, ; and, Robbins, 1970, 1852; Slaughter, 1991.)

The United States District Attorney was summoned to Washington for a meeting. The President was to be there. So was Secretary of State Daniel Webster. (Webster strongly supported the Fugitive Slave Act, which put active Federal authority into the catching of slaves and returning

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[1]. The same kind of problem can probably be found in various of the nation-states created since World War II.

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them. Webster "regularly intruded his presence to guarantee enforcement of the law in Massachusetts." (Remini, 696).

The third high person was the Attorney General, John J. Crittenden. Shortly thereafter, the United States District Attorney received a letter from Government approving a plan to proceed with the trial. (Katz, 163.) Two white men, who were associated with the blacks, but apparently were not physically present at the time, were charged with treason (Katz, 35). The U. S. District Attorney thought such a prosecution would fail. He followed his instructions to proceed. The trial was held in U. S. Circuit Court in Philadelphia, with Justice Robert Grier presiding. The prosecution did fail.(Katz,, 1974, 102-103 and 163-163.) In due course, the judge concluded that the actions did not constitute treason (Trefousse, 85), and the defendants were acquitted. (Katz, n. 36)

2. Presidents also defend society.

In the late 1920s, under the influence of Prohibition, the United States developed organized crime on a scale thither to unknown. President Herbert Hoover's attitude played some part. The President at one point to his Treasury Secretary, "I want that man in jail." (Bergreen, 1994, 322.) On another, he "lent the prestige of his office to [a] new campaign against Capone by inviting reporters to attend an off-the-record conversation" where he explained the Government's plans.(Bergreen, 368.)

The Christiana prosecution and the Capone prosecution, though far apart, suggest some capacity on the part of Presidents to engage themselves in the working system.

B. The Working System Within the DOJ

In addition to this Presidential perspective on the working system, there is need to study the working system from an intra-departmental perspective. In the most elementary way, recall the high level political appointees at the two

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top positions, the Attorney General of the United States and the Deputy Attorney General of the United States. As should be expected of a political scientist, Clayton does make explicit that point that the formal organizational chart does not actually reveal what the Attorney General can effectively do.

Each of them has an office, a physical space as well as a certain authority.

When the Attorney General has a staff conference, who attends, what is said, and what is done in consequence? Public reporting on this is the height of vagueness. There is relatively little information as to what an Attorney Generaldoes, except in such a case as the after-the-fact repporting that Victor Navaksy did on Robert F. Kennedy. (Navasky, .) The reporting is even more vague on what is now commonly accepted as the important position of Deputy Attorney General. It is, of course, easy to find conclusory statements that the Deputy Attorney General "runs" the DOJ while the Attorney General does some other important things. But the existing literature is very vague on the subject.

The Deputy Attorney General is virtually unknown to the existing scholarly literature. Cornwell W. Clayton's book is an exception in that he does sketch the development of the office and some of the activities that have taken place there. (Clayton, 1992, 32, 34, 63, 100.) [This apparently was a phenomenon in the Department of Justice on at least part of Janet Reno's time, when there was a failure of meeting of the minds with Philip Heymann, if media reports are correct. This may, according to one source that, for the moment, must remain nameless, have been in the relationship between Homer S. Cummings and Robert H. Jackson.

One correspondent, who has held various positions in the Department, in at

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least two Democratic presidential administrations called attention to a study by Philip Heymann on segregated schools.

As another way of getting a clue, I searched JSTOR for all articles in which the term "Deputy Attorney General" even appeared in the ten year period 1995-2004. I got eight citations, most of which were perfunctory. Googlescholar offers little more. The business-oriented press, however, is by no means perfunctory. As an example, in late 2006, the business-oriented press was much more attentive to memoranda, and the process of their development, from one Deputy Attorney General (Paul McNulty) revising crucial provisions of a memorandum by a former Deputy AG of the same Administration (Larry Thompson).

When the Enron collapse occurred, with vast damage to middle class and wealthy people who had felt their futures were assured, and where the evidence was that cheating had caused the massive failure, "something" had to be done. The Thompson Memorandum was the name for the set of instructions that the Deputy Attorney General gave to the United States Attorneys as to how they could deal with corporations accused of various illegal practices.

The Thompson Memorandum came about during the time when public attention was the most focused Enron and its consequences. In that context, the Deputy Attorney General was motivated, by some considerations, to lay down the terms to guide transactions between U. S. Attorneys corporations that might come into litigation with the U. S. Government. By the middle of 2006, if not earlier, there was wide criticism that the DOJ was forcing corporations to surrender rights that should not be surrendered, as a for getting decisions that DOJ would not prosecute them. Most of the preceding discussion relates to the Federal system, but that is merely a convenience in preparing this working paper.

State and Local Mechanisms

Most executive-bureaucratic decision-making in law takes place in the state

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or local arenas, since that is where most legal action takes place. (Friedman, .)

Attorneys General. It is important to take note of the state attorneys' generals. There are a variety of approaches to those offices. In some respects, of course, the state attorneys' generals offices are rather similar, perhaps made even more so by the constant sharing of opinions and information through the National Association of Attorneys General. One factor to note was brought out by James Dickson, Jr., one of the small number of political scientists to have written about state attorneys general. (Dickson, 1961?) Dickson said "One way to accentuate the factors affecting legal work beyond the mundane routine is to study the cases and investigations that do *not have to be* initiagted and that *could be* ignored with little or no serious consequences." (Dickson, 63.)

In the Texas study, Dickson highlighted the characteristics of six successive attorneys general: Price Daniels whose most important issue was asserting state ownership to submerged oil lands (Dickson, 64); John Ben Shepperd, who emphasized attacks on those deemed "bad guys," people involved the insurance industry, some land scandals, and attacks upon trade unions said to be led by Communists; Will Wilson and racket-busting; Waggoner Carr as a conciliatory representative of the state agency clients; Crawford Martin and consumer protection (69) and John Hill (70-71) who emphasized the standards of lawyerly professionalism.

Some state attorneys general have an active role in criminal proceedings, as was the case of the Mississippi Attorney General in the 2006 trial and conviction of Edgar Killens. Killens was the Neshoba County businessman and preacher who, as leader of the Ku Klux Klan, was accused and convicted of orchestrating the killings of Chaney, Schwermer and Goodman, three civil rights volunteers in 1964. The same Attorney General, Jim Hood, had been a District

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Attorney before, and has taken an active interest in the prosecution of the Mayor of Jackson, Frank Melton.[2]

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[2]. In all of the cases involving Mayor Frank Melton he, and those with him, have either been acquitted or the penalties have been reduced to virtually nothing by judicial action. What is also notable is that the District Attorney of Hinds County, the pertinent jurisdiction, is now in an election contest, her opponent being the counsel for the police officers who had been defendants with Melton in one the cases.

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The most far-reaching action was that of several attorneys general, including Michael Moore, a previous Mississippi Attorney General, who brought suit against the tobacco industry, and got a master settlement agreement. Perhaps equally far reaching has been the litigatgion strategy of the New York Attorney General’s Office under Eliot Spitzer. Spitzer vigorously pursued various business practices that he alleged were illegal and unethical, and that were enough – combined with very bad publicity– to force firms to discharge executives, to hire other persons, to restructure themselves, and so on. The payoff, from the Attorney General’s perspective, was that he himself was elected Governor of[2] New York in 2006.

There is somewhat similar activity in California, the state with an economy and a population even larger than that of New York. The Attorney General has utilized investigative powers to reach whagt amounts to a plea agreement with a the J. Paul Getty Trust. (Wyatt and Kennedy, B1.)

The Attorney General, a friend of the former president of the institution, said that this former president, with the approval of the board, had “misspent trust money on his wife’s travel, used employees for personal errands, and made improper payments to a graduate student.” (Wyatt and Kennedy, B1.) None of this, he concluded, had resulted from fraud and the value of a settlement between the former president and the institution exceeded any losses. So he decided against any civil or criminal action against the Getty except that they wouldhave gtoagree to appoint an overseer for the next two years.

The person appointed overseer is another former Attorney Gneral of Caklifornia. The newspaper reported that “It is the first time
that the California attorney general has imposed an independent overseer in an

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enforcement action against a charitable trust, although the procedure has been used in consumer settlements, including one this year with Ameriquest Mortgage one this year with American Mortgage Company after an investigation of predatory lending practices." (Wyatt and Kennedy, B2.)

In 2007, there has been an unusual experience in the State of North Carolina. In early April, after ___ investigation, the Attorney General of North Carolina announced the dismissal of all charges against xxx former lacrosse players at Duke University. The case had been brought, with a high degree of publicity, by the District Attorney of ----- County. The matter had attracted a high degree of attention because the reported victim was African American, the reported assailants white, the young men also students at Duke University and a good degree of publicity in the African American community based on the idea that a Southern pattern of white use of black females was here being repeated and ignored.[3]

There was little on the state attorneys general, DOJ was bypassed, and the innovative work of Moley and Wallace not followed for at least a generation. The revival of some work on executive-bureaucratic decision-making is in the writing of Herbert Jacob, an innovative contributor from the 1960s, showed awareness of Moley's work. Indeed, Jacob refers to Moley's book as a "good popularization" of "a series of brilliant investigations in the administration of justice conducted . . .[by] Felix Frankfurter, Raymond Moley, Hugh Fuller and Roscoe Pound [into] the actual operation of criminal justice." (Jacob, 1962, 77, n. 2.)

As to the district attorneys or the county-level prosecutor, Herbert Jacob,

[3]In June 2007, the District Attorney in question was disbarred. In addition, Duke University reached some agreement, the details of which are not yet public, financially to compensate at least some of the students who had been accused.

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in the early 1960s, then at Tulane, published a study of two successive district attorneys in New Orleans. (Jacob, 1963, 77-98) George F. Cole, as a doctoral candidate at the University of Washington, conducted a study of the district attorney's office in Seattle, in which he had the unusual opportunity of participant observation. Lief Carter did something similar almost a decade later in a California district attorney's office. (Carter, 1974.)

Apart from all other publicity, none of the evidence asserted by the prosecutor appeared to stand up. The young men were well defended and, in due course, the North Carolina bar brought ethics charges against the District Asttorney. The District Attorney himself modulated his initial claims, and the State Attorney General, exercising authority that seems quite unusual, took over investigation of the case and of the District Attorney's handling.

LATENT PRESSURES IN DECISION-MAKING

Political scientists, and academic lawyers for that matter, need to work out some concept of what are the actions that come to be seen as offenses, and what it is that makes people and groups into targets. What gets prosecutors moving? What makes conditions both necessary and ripe for some action?

The term "target" should be understood in two separable meanings. One is common sense and is the formal definition in the law, at least in Federal law.

In common sense speech, when you say somebody or something is a target, that merely means that somebody (or some group) is disliked or distrusted. Accordingly, somebody has the idea that "something should be done." The collective reaction, which is but the more active manifestation of the culture. From a pure content point of view, does the situation require that somebody act? If something has been done is it an "offense" that requires action? This is

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especially pertinent to the white collar crimes situation just mentioned above.

When one speaks of "targets," one raises the question of whether there are people (or groups) whom someone wants to Aget@? Prosecution depends upon the collective reaction to the intersection of an act deemed an offense (since there can be no crime without a prior law), the party by whom the act is committed (the offender), and the party against whom the act is committed (the victim). The important thing is whether the rest of the collectivity think this intersection demands reward, penalty, or neutrality.

This is linked to the problem of dealing with the "target" in the formal legal sense. The "target" in that case is the person who has been informed that he, she, or it is being investigated for possible indictment. The question of great importance is how the person, group, or other entity gets onto the dangerous designation of "target" in the legal sense.

Practice must vary widely. The states have so many differences between them. To convey some idea of gthe possible practice, I quote one authority on FederL practice.

> "The Department of Justice defines a 'target' of a grand jury investigation as follows: 'a person as to whom the prosecutor of the grand jury has substantial evidence linking him/her to the commission of a crime and who, in the judgment of the prosecutor, is a putative defendant.'
>
> "A 'subject' is defined as: 'a person whose conduct is within he scope of the grand

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> jury’s investigation.’” (Goldstein, 200, 5.03.)

The complexity of the terminology is revealed in a news story that a grand jury subpoena has been issued to the American Civil Liberties Union concerning some document mailed to it unsolicited in October. The subject of the grand jury investigation is not now known. However, “the A. C. L. U. said it had been told it was not a target of the investigation.” (Liptak, December 14, 2006, 1.)

In other words, the Government is not now investigating the ACLU with any expectation of indicting that organiztion or its officers. But the ACLU’s files, and thus access to information about persons in those files, are to be inspected under grand jury rules.

The nature of the possible offense is important, as it always is. You can think of this in terms of the kind of offense that might, even if suspected, cause some degree of injury to the person implicated. This can come at varous levels.

I find it useful to try to group activities by the degree of severity or repulsiveness that ordinary people probably will attach to them.

Ordinary crime is something community is likely to think that the individual should not have done, and which is punishable is not “out of this world” or does not “turn people’s stomachs.” Killing per se should not happen,

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but it does. So do the other major offenses, though their repulsiveness varies in degrees.

Repugnant deviancy is defined chiefly in terms of its moral offense to the community. Homosexual behavior used to have this quality, although the ground began to shift perhaps forty years ago, well before the formal expression of major gay rights claims. Some kinds of physical violence, such as the incident that a juvenile judge once described to me of a small child being punished by its parent by having a hot iron placed on the skin.

Organized crime is simply money making outside the law, with defiance of the ordinary law, including defiance of the public control of physical violence. J. P. Hoey, argues that one of the prosecutor's functions is to elicit public support for a campaign against organized crime. Yet there is reason to believe that organized crime may be deeply ingrained the society so that a campaign against it is likely to yield frustration.

Since 2001 "terrorism" has come be in an even more extreme category than organized crime, namely the crime that is worth no mercy.

D. Intra-elite factions

Intra-elite factions and factionalism may cover a variety of troubles.

The idea of law as a substitute for combat is brought to sharp realization as the factional advocates of one position are punished by the factional holders of the prosecutorial machinery. (Jones, above.) Prosecutorial discretion also requires struggle with a permanent human problem, namely what is corrupt and when does corruption exist? On one hand, the prosecutor is the social functionary designated to oppose corruption. On the other hand, corruption is something that largely can be practiced by people in privileged positions, such as the magistrates and local officials whom Specter emphasized he sought tp prosecute. (Specter, 173-183.)

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Investigations, indictments, and prosecutions of American public officials is a permanent area of prosecutorial discretion. Institutional shakeup as a function of publicly acknowledged corruption claims in local politics is a consequence that follows. Prosecutions that serve factional interests are not new, and students of politics may look as well to some famous cases in history. (Similar investigations and prosecutions of high level white collar crime occur, but are far less common.)

I have deferred until now a special example of intra-elite factionalism.

E. Intra-elite vendettas in states and localities

Intra-elite vendettas and factions and prosecutorial entanglement show up from time to time in state government. Criminal investigation, sometimes leading to actual prosecution in court, would not be surprising if we dealt with local politics in many parts of the United States.

Beyond the intra-elite, self-oriented conflicts, there are social conflict is actually the conflict of persistent factions, each contesting both the material interests and the revered symbols of the other.

Groups and person then were prosecuted, sometimes only for the named offenses in a technical sense, as factional advocates.

The combined effect of "costs and benefits," and of "attitude of the community," is illustrated in Stephen Cressell's work on 19th century Federal prosecutions, though he does not use thoese words. Cresswell's book includes historical data on anti-Klan prosecutions in Northern Mississippi. U. S. Attorneys, when there were Republican presidents, tried to enforce Reconstruction laws protecting the rights of the freed African Americans. (Cresswell, 1991, 1-78.) The U.S. Attorneys, for a period of years, did not say it cost to much. Nor they altogether yield to the attitude of the community. The "community" in question really means that portion of the population capable of expressing an attitude to

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which the officeholding portion feels the need to be responsive. When a Democratic Administration (that of Grover Cleveland) came to power, the U. S. Attorney stopped bringing cases.

In the 1930s and 1940s, for instance, the attempts of trade unions to organize in Memphis were objectionable to business interests and to the political machine that controlled the election system. The police were used to coerce union organizers, and the United States Attorney was on the same side. When groups elsewhere in the nation complained to he Federal Government, their complaints were transmitted to the Department of Justice, which investigated by sending representatives to ask the United States Attorney. (Honey.)

In this, as in nearly ever other aspect of prosecution, the available data do not allow us to verify what may be plausible hypotheses and to decide which options afre so ridiculous that they should be discarded. This merely means that the political science, the academic law, or the history or other social science inquiry has not been conducted.

CIVIL LITIGATION AND THE ADVISORY PROCESS

Although our thinking about "prosecution" is dominated by criminal issues, the analytical criteria are similar for civil litigation conductedn by government. The question of the "strength of the evidence" is if there is enough of a basis to warrant any further discussion. The term "suspect" is pejorative, but the question really is "does the person in question or the organization in question have some experience or pattern that catches attention?"

Very similar issues appear when the question is "costs and benefits." Is it worth it to the economy or the society? Finally, the question of the "attitude of the community" is virtually on all fours.

Essentially the same is true for the advisory process. In the advisory

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process, the task is ostensiby to deal with issues more than with personalities or groups. The "community" is also taken into account, as should have been expected, by state attorneys general in the South who found no means to advise local school boards of religious practices that came to village what the Supreme Court was deciding. (Abraham and Benedetti,) The same was also true regarding Supreme Court decisions on civil rights in the height of that movement. (Krislov, .)

These advisory determinations reach to Federal rights, both constitutional and statutory, to state constitutional determinations (Abraham and Benedetti; Jones and Deardourff, 1994, .), to the applications of state statutory law, and to participation in the state administrative process as adviser and counsel to state agencies.

Advisory decision-making can be about quite routine matters. (See Dickson, .) It can be about other conflict that is important, but not deep to the same degree, as are conflicts about the anti-trust laws and their modes of implementation. There are, in these situations, also decisions of interpretation when the most sensitive values are changing.

IMPERATIVE LOYALTIES

In any of the foregoing, we should expect that study will show, in these matters, prosecutors' offices are responsive to at least four sets of influences, some of which will have been internalized by prosecutors and some of which will be received only as external demands. We may call these "imperative loyalties" for they refer to loyalties which, in one degree of another, some tribute must be paid.

1. Lawyer relationships. The prosecutor *is* a lawyer, and deals with other lawyers all the time, and has his/her respect and practical future tied up with what the Bar thinks. Most of his or her professional associates in private

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practice will be sitting in judgement as lawyers. Their judgments will influence both the distribution of contempt and esteem. They will also influence the opportunity for material gain.

2. Party/group relationships

There is a subculture of the politicians. Within this there are the specific political organization or clique with which he or she is associated. As a "political" official in more limited sense, he/she probably is somewhat responsive to both.

These are the relationships that Janet Reno and Kenneth Starr equally were denying when they said their decisions were not "political." These also are the relationships that lawyers are trained to believe that they should not have.

3. Media and Other Pressures

Pritchard's study of how prosecutors deal with family victim and abuse cases, in light of publicity and without it, may be regarded as the test of media effects. (Newt Gingrich, Panel at American Political Science Association, 2000) commented on the independent counsel/special prosecutor matter perceptively. He said it was too much to expect that a special prosecutor, with high intensity publicity, having spent millions of dollars, would quit with "nothing to show for it." (Gingrich, 2000.)

Harriger ([2000] Revised) deals with how the mass public and elites deal with the publicity, but less clearly with what publicity has to do with Special Counsel decision-making. The reference to the Thompson Memorandum-McNulty Memorandum situation above is also about adverse media pressure and its contribution to legislative pressure. (Financial Times, December 20, 20006, editorial.)

4. Inter-organizational/Coercion Management Network

As a participant in the management of coercion, the prosecutor is probably

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responsive to criteria of administration and of the necessity to work with other participants in the coercive machinery.

Torture as official policy post 9/11

The general point was made as of the 1940s by Judge Frank in 1950. "The 'third degree' is widely employed by our police, too often with the tacit approval of prosecutors, to extort confessions which, obtained by physical or mental torture, are not infrequently untrue." (Frank, 99-100).

Frank obviously means that the prosecutors are going along with practices that are wrong and in efficient as well, since they produce a lot of false confessions. Thus, the prosecutor may be expected somewhat to adopt the criteria of the police (among others) in assessing the nature and direction of his or her work.

Perhaps there is enough evidence, from more recent social science inquiries, to bring some precision to statements on the subject. Eisenstein, Flemming, Nardulli on court communities) surely are pertinent, though their evidence is not directed to this point particularly.

Those who enunciate the most respected norms for the legal profession champion the "quasi-judicial" role. Homer S. Cummings, when a prosecutor in Connecticut, became convinced that a confessed murder had not done the deed. He was at one time highly praised for having gone into the case in some detail, and having taken all the steps necessary to remove the man from the jeopardy. But the case has passed from the folklore of legal reporting. The relatively small amount of material points does suggest that the quasi-judicial role is largely myth. As I have noted above, very little Cummings-like activity reaches scholarly or journalistic reporting. At the least, it is an *important* empirical question as to whether those holding prosecutorial authority act on this basis a great deal of the time, just some of the time, or very little of the time.

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Specter reports some version of this at a higher or policy level, rather in reversing course on the actual evidence of a particular case. The state of the law was that women were given indeterminate sentences. In a particular appeal, Specter went against the presumption of constitutionality of statutes, the normal role for a district attorney. In the particular case, the state supreme court agreed with his position, and abolished open sentences. (Specter, with Robbins, 169-170.)

Political scientists might, if they were now to investigate the matter closely, keep in mind the view of Samuel Earl Hobbs's (Hobbs, 1949, 40-60.) emphasis on psychological basis of "prosecutor bias."

Specter does not say very much about how his office evaluated the quality of the police evidence. He does make three other related points. There was a lot of police brutality. He, as District Attorney, sought to act against it. In the end he was not very successful because the general public approved of it and juries would not convict.

CONCRETE EXAMPLES OF INTER-ORGANIZATIONAL TRANSACTIONS

There can be the many negotiations and the making and breaking of inter-agency "treaties" discussed in inter-agency arrangements. (Holden, 1966, 943-951.)

The inter-organizational issues become quite complex. Inter-organizational relations are notable for there are relatively few important matters that do not involve more than one department. (Heymann, 1996.) This is inherent in government, not merely in the contemporary situation, as the Christiana episode shows. (Above, .)

Two rather different situations, both involving inter-organizational transactions, might be noted.

1. A local district attorney splits from the FBI

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This case some degree of conflict between a local level (county) district attorney, whose office had been in some agreement with the FBI. All that we have is the mass media report. The FBI and the local District Attorney had a joint task force to investigate corruption. But something had gone awry. In this case, the District Attorney asked that "conspiracy, mail fraud and false pretense charges be dropped against [X]" be dropped. According to the reports, this prosecutor had "insist(ed) for weeks" that this person be prosecuted. The FBI had been objecting to the prosecution,

This arose from a case where land was valued at $Y, sold for $5Y and the man in question had somehow participated in the transaction and had shared half the gain of the sale at the higher figure.

Someone else had been convicted and given a jail sentence, but this man [X] had cooperated with the FBI. The FBI had allegedly had told [X] he would not be prosecuted. But FBI would not give the District Attorney a letter asking that [X] not be prosecuted. Rather, the FBI agent said the judicial process should run its course. The District Attorney asked now that the FBI should start some action to recover some of the money. The District Attorney said he no longer trusted the FBI agent.

One can only infer that the District Attorney felt that he was taking the burden for the prosecution of a defendant to whom the FBI had made promises, and whom he would be criticized for not prosecuting unless there was the protective cover of a letter from the FBI. Evidently, there was also a fear that someone, with a claim to having been cheated, would be critical of the District Attorney for not making an effort to get some of money back, while the FBI presumably would have much greater leverage in forcing someone to disgorge these improper gains.

2. The FBI and the US Attorney

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There is a different kind of inter-organizational problem where the FBI appears to have been forced into action against Mayor Marion Barry, contrary to its will. Oliver G. "Buck" Revell says that the initiator was the United States Attorney for the District of Columbia, Jay Stephens. He says such matters did not normally come under FBI jurisdiction. The agents assigned to corruption matters did not want the case.

The case came to Revell, and escalated to the Director's level. Among other things, what seemed to activate Revell was the fear that the United States Attorney would, if the FBI did not back him, "use investigators from the IRS, who were examining a number of Barry's tax transactions." (Revell, 1998, 408-412.) Here is a high DOJ bureaucrat (in the FBI), first seeking to sure his boss did not a become victim of criticism from his boss the AG. The person who could generate the criticism was another DOJ official, the US Attorney, who would turn against the FBI the work of Treasury agents (IRS).

3. Successful challenge to the Department

Griffin Bell has commented, with some acidulousness, on the engagement of others in the Carter Administration's debates over the Bakke case. Bell made a good deal, in his book after he left office, of the power centers (notably the White House staff) who would intervene in what he deemed Justice Department's proper business. Bell mentions not only the White House staff but the Secretary of Health, Education, and Welfare. The Department of HEW, Bell recognized, "share(d) school desegregation enforcement with the Justice Department [and] met with [the Solicitor General] to express concern over any legal brief that would advocate admitting Bakke." This was one several "attempts to pressure us." (Bell, 31) What this omits is the intensity of the HEW concern and the reasons for that intensity.(Califano, 236-237).

The reader would never know that Bell himself was profoundly distrusted by

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the African American part of the civil rights community. He was a Georgia lawyer and a Georgia judge who had, in their view, been hostile or opaque about their interests when they came before him.

4. There is also an illustration of an unsuccessful challenge to the Department's autonomy. The issue lies in William B. Gould's almost bitter attack on the Solicitor General. Gould was chair of the National Labor Relations Board during the Clinton Administration and a professor of law at Stanford. He had views, which apparently were shared by the agency, as to how the anti-trust laws should apply to baseball. He accuses the Solicitor General of refusing to take account of the NLRB's views of how antitrust litigation against baseball owners should be handled. Basically, Gould says, the Solicitor General ignored a letter that he personally delivered to the Deputy Solicitor General (the well reputed Larry Wallace). Instead, the SG said that the NLRB as a labor board did not have expertise on antitrust issues, and misrepresented the situation when four justices asked about it at oral argument. (Gould, 138-141.)

SUMMARY

The foregoing working paper is meant to suggest how some new lines of work need to be done, and can be done, on the law-politics relationship. The suggested emphasis on the executive-bureaucratic side. In identifying where some new contribution can be made, we specify structure, recruitment, and latent pressures. In the United States, at the Federal level, one high priority need is study of the Department of Justice as working system, This should apply both in relation to the President and in relation to the internal mechanisms. This emphasis on DOJ is not meant to downplay state attorneys general and local-level prosecutors, in whose domains most legal action takes place.

Political scientists may also proceed to see how prosecutors operationalize the ways that prosecutors use certain key concepts: they themselves cite, at least as to criminal charges; strength of the evidence, the suspect's background

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and characteristics, costs and benefits of obtaining a conviction, and the attitude of the community. (Miller, et. al., 795) As to latent pressures, we suggest that it may be worthwhile to begin with a concept of the types of actions, in criminal decision-making, that will force action the most rapidly and the most forcefully.

We should expect that study will show, in these matters, prosecutors' offices are responsive to at least four sets of influences:, some of which will have been internalized by prosecutors and some of which will be received only as external demands. These imperatives are (1) lawyer relationships. As a lawyer re From my central assumptions the executive-bureaucratic role ("prosecution" in the broadest sense) is fundamental. This view is based on the assumption that power is central and that the continual exercise of discretion about information, money, and force governs the organization of power.

There are big knowledge gaps. The question of reducing knowledge gaps is a question of meeting the demands upon political science as an intellectual realm, rather than upon the claims of the organizational realm. (Holden, 1996.) In this borderland of English-speaking political science and law there is need for fundamental attention to the actual executive-bureaucratic role in law.

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