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The Tainted Federal Prosecutor in an Overcriminalized Justice System

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I. Introduction

Prosecutors have enormous discretion in the criminal justice system. They decide whether to proceed with a prosecution and then select the charges filed against individuals accused of committing crimes. Their discretion is heightened by the fact that there are over four thousand federal criminal statutes. Federal prosecutors also play a crucial role in the plea bargaining process, a method that resolves approximately ninety-five

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2. See Wayte v. United States, 470 U.S. 598, 608 (1985) (stating that absent an impermissable standard such as race or religion, prosecutors have discretion to decide who will be charged with a crime).


4. See WAYNE R. LAFAVE ET AL., 4 CRIMINAL PROCEDURE § 13.2(a) (2d ed. 1999) (discussing the range of discretionary decisions afforded to prosecutors); James Vorenberg, Decent Restraint of Prosecutorial Power, 94 HARV. L. REV. 1521, 1523–60 (1981)
percent of the cases\(^5\) in the federal criminal justice system. The role of federal prosecutors in sentencing matters has varied over time,\(^6\) but here too they have a significant role, as only prosecutors can offer a sentencing reduction for cooperation.\(^7\) They also make sentencing recommendations to the court\(^8\) and select the initial charges against the accused\(^9\) that will ultimately serve as the basis for sentencing once a conviction is obtained.


6. Whether the adoption of the federal sentencing guidelines has increased or decreased prosecutorial power is uncertain. Some claim that prosecutors have increased power with sentencing guidelines as they have the ability to charge-bargain prior to issuing an indictment in order to control the sentence being given. \(\text{See Ilene H. Nagel \\& Stephen J. Shulhofer, A Tale of Three Cities: An Empirical Study of Charging and Bargaining Practices Under the Federal Sentencing Guidelines, 66 S. CAL. L. REV. 501, 502 (1992) (discussing how guidelines can decrease judicial discretion but increase prosecutorial ability to charge-bargain). Following a litany of Supreme Court decisions, such as United States v. Booker, 543 U.S. 220 (2005), federal sentencing guidelines have moved from being mandatory to advisory. See Kate Stith, The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion, 117 YALE L.J. 1420, 1476–96 (2008) (discussing how recent decisions restore discretion to judges and prosecutors).}\)

7. Prosecutors have the exclusive power to offer 5K1.1 reductions under the federal sentencing guidelines to those who cooperate. This motion asks the court to proceed in giving an accused a below-guidelines range sentence for their "substantial assistance to the government." U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 (2009). A 5K1.1 motion was particularly significant in the pre-Booker days when the sentencing guidelines were mandatory. This motion was one of very few ways that permitted courts to sentence outside the sentencing grid provided by the federal guidelines. The 5K1.1 motion carries less significance now that the federal guidelines are advisory. A 5K1.1 motion can, however, assure the defendant of support at sentencing from the prosecution. \(\text{See Ellen S. Podgor, The Ethics and Professionalism of Prosecutors in Discretionary Decisions, 68 FORDHAM L. REV. 1511, 1523–25 (2000) (discussing the importance of 5K1.1 motions as part of prosecutorial discretion).}\)

8. \(\text{See Robert L. Misner, Recasting Prosecutorial Discretion, 86 J. CRIM. L. \\& CRIMINOLOGY 716, 776 (1996) (stating that sentencing recommendations are among prosecutors' many roles).}\)

9. \(\text{See Bloom, supra note 1, at 1268 (stating that choosing what charges to bring is among the decisions within a prosecutor's discretion).}\)
Although the Constitution and federal statutes serve as limits, the discretion afforded to prosecutors is huge. They are guided by internal guidelines that provide advice on an array of substantive and procedural matters. Ethically they serve as "minister[s] of justice" in enforcing laws passed by Congress, as opposed to being mere advocates in the criminal justice system. And as federal employees they are non-political once they commence their role with the Department of Justice (DOJ).

The reality, however, is that internal guidelines have no force at law and recently politics have improperly entered several areas within the DOJ. Three recent joint reports issued by the DOJ’s Office of Professional Responsibility (OPR) and Office of Inspector General (OIG) provide ample evidence of politicization in the DOJ. These reports, An Investigation of Allegations of Politicized Hiring by Monica Goodling and Other Staff in the Office of the Attorney General (Goodling Report), An Investigation of Allegations of Politicized Hiring in the Department of Justice Honors Program and Summer Law Intern Program (Honors Program/SLIP Report), and An Investigation of Allegations of Politicized Hiring and Other Improper Personnel Actions in the Civil Rights Division (Civil Rights

10. See KENNETH CULP DAVIS, DISCRETIONARY JUSTICE 188 (1969) (discussing the breadth of prosecutorial discretion).


13. See id. ("A prosecutor has the responsibility of a minister of justice and not simply that of an advocate.").

14. See infra notes 29–32 and accompanying text (describing the extent to which DOJ prosecutors are traditionally regarded as nonpolitical once in office).

15. See Podgor, supra note 11, at 175–77 (explaining the courts’ unwillingness to grant relief based solely on a violation of internal guidelines).


Report) all provide a sharp contrast to the history and tradition of a nonpolitical DOJ. Commentators and scholars have reflected on the infiltration of politics into the justice system with discussions that look at different solutions to the problem, such as removal of the Senate confirmation process for U.S. Attorneys, redefining the role of prosecutors in the federal system, and "restrictions on contact between U.S. Attorneys and political officials." Some have called for the indictments of those who engaged in political activity. Others have focused on the "firings" of U.S. Attorneys in examining the allocation of prosecutorial power.

This Article looks at politicization in the DOJ from a different angle. It focuses first on the importance of maintaining political neutrality in the DOJ.


24. See infra notes 61-66 and accompanying text (discussing the emphasis traditionally placed on the non-political nature of DOJ prosecutors).
Overcriminalization,25 the breadth of many criminal statutes,26 the increased absence of mens rea requirements in criminal offenses,27 and the ability of prosecutors to use "short-cut" offenses to proceed with charges with relatively little proof28 raise concerns when the individuals making the decisions may appear biased. Instead of focusing only on ways to alleviate politicization in the federal criminal justice system, the focus also needs to be on examining structural changes in the DOJ that will minimize the ability to have decisions that might be politicized or might suggest an appearance of being politicized. Conquering systemic problems accruing from an overcriminalized system will assure that decision-making is consistent and not a product of a prosecutor's personal preferences. Thus, even if politicization should again enter into the DOJ, limited power in decision-making would avoid any possible problems that might accrue from the appearance or reality of having politically connected decisionmakers.

II. Politics in the DOJ

It is hard to say that politics has no role in the DOJ. After all, the Attorney General is appointed by the President, who ran for political office. Additionally, the U.S. Attorneys that serve in the ninety-three offices across the United States29 are appointed to their positions by the President, and all face a legislative confirmation process.30 So it is clear that their initial

25. See infra notes 67-76 and accompanying text (describing the rapid growth of federal criminal statutes in recent years).

26. See infra notes 77-84 and accompanying text (discussing the breadth of federal criminal statutes)

27. See infra notes 90-94 and accompanying text (describing the decreasing mens rea requirements of federal crimes).

28. See infra notes 85-89 and accompanying text (describing the practice of and growing opportunities for prosecutors to charge lesser—but easier to prove—offenses in many instances).

29. See U.S. Dep't of Justice, United States Attorneys' Mission Statement, http://www.justice.gov/usao/offices/mission.html (last visited Nov. 15, 2010) (explaining that the ninety-three U.S. Attorneys, in offices "throughout the United States, Puerto Rico, the Virgin Islands, Guam, and the Northern Mariana Islands . . . are appointed by, and serve at the discretion of, the President of the United States, with advice and consent of the United States Senate") (on file with the Washington and Lee Law Review). "The United States Attorneys serve as the nation's principal litigators under the direction of the Attorney General." Id.

selection results from the acts of individuals involved in the political process. Many have noted, however, that once in office, U.S. Attorneys are considered to be non-political.

Even though there is a political component to the selection and retention of the Attorney General and U.S. Attorneys, the same cannot be said for non-political appointees who serve as Assistant U.S. Attorneys or participate in the Department's Summer Honors Program. These individuals are non-political appointees and serve in roles that are supposed to be immune from political consequences. As career civil servants working in the criminal division, they are controlled by the Hatch Act, in the further restricted category that precludes engaging "in partisan political management or partisan political campaigns."

Despite these restrictions on politics, three OPR/OIG investigations produced reports that demonstrate the infiltration of politics into DOJ. A fourth report, pertaining to allegations of politics in what has been termed

(a) The President shall appoint, by and with the advice and consent of the Senate, a United States attorney for each judicial district.
(b) Each United States attorney shall be appointed for a term of four years. On the expiration of his term, a United States attorney shall continue to perform the duties of his office until his successor is appointed and qualifies.
(c) Each United States attorney is subject to removal by the President.

Id.

31. See Beale, supra note 21, at 370–71 (describing the broad power of certain individuals in hiring prosecutors).

32. See, e.g., id. at 370 (stating that DOJ prosecutors are expected to abandon political and ideological leanings after starting a career at the DOJ); Bruce A. Green & Fred C. Zacharias, Prosecutorial Neutrality, 2004 Wis. L. REV. 837, 837–52 (2004) (discussing prosecutorial neutrality generally).


34. See id. at 227–28 (noting a broad consensus that DOJ prosecutors should conduct their work in a manner divorced from partisanship and ideology).


37. See supra notes 16–18 and accompanying text (describing three investigative reports discussing politicization at the DOJ).
the "firings" of nine U.S. Attorneys, also resulted in an OPR/OIG investigation.\textsuperscript{38} In this case, a career prosecutor was appointed to investigate whether criminal charges should be filed as a result of activities surrounding the "firings" of these U.S. Attorneys.\textsuperscript{39} A July 21, 2010 letter from Assistant Attorney General Ronald Weich to Representative John Conyers, Jr., chair of the Judiciary Committee, found that criminal charges were not warranted.\textsuperscript{40} The letter did state that "[t]he Attorney General remains deeply dismayed by the OIG/OPR findings related to politicization of the Department's actions, and has taken steps to ensure those mistakes will not be repeated."\textsuperscript{41}

A June 24, 2008 OIG/OPR report, the \textit{Honors Program/SLIP Report}, examined hiring in the "highly competitive hiring program for entry-level attorneys\textsuperscript{42} at the DOJ. The investigation covered the years 2002–2006 and focused on whether "political or ideological affiliations" entered into hiring decisions.\textsuperscript{43} The investigation elicited evidence of politicization in the Department, namely, "that political or ideological affiliations were used to deselect candidates from the Honors Program and SLIP."\textsuperscript{44} It noted how the process had changed in 2002 when the Attorney General's Working Group set up "a Screening Committee composed primarily of politically appointed employees from the Department's leadership offices,\textsuperscript{45} which approved individuals for the Honors Program and SLIP.\textsuperscript{46} Although there were no political deselections found for the years 2003–2005, in 2006, problems can be seen.\textsuperscript{47} Changes were eventually made in 2007, including

\begin{itemize}
\item \textsuperscript{38} \textit{See REMOVAL OF NINE}, supra note 19, at 1–4 (describing the investigation of the removal of nine U.S. Attorneys).
\item \textsuperscript{39} \textit{See id.} at 356–58 (discussing whether the impropriety of the attorneys' removal rose to the level of crime).
\item \textsuperscript{40} \textit{See Letter of Ronald Weich, Assistant Attorney General, to Hon. John Conyers, Jr., Chair, Committee on the Judiciary 5–6 (July 21, 2010), available at http://lawprofessors.typepad.com/files/assistant-ag-ronald-weichs-letter.pdf (concluding that criminal charges were not warranted based on the results of the investigation).}
\item \textsuperscript{41} \textit{Id. at 6.}
\item \textsuperscript{42} \textit{HONORS PROGRAM/SLIP REPORT, supra note 17, at 1.}
\item \textsuperscript{43} \textit{Id.}
\item \textsuperscript{44} \textit{Id. at 92.} The report describes detailed findings with respect to individuals working in DOJ, finding some using improper criteria and others not. \textit{Id.} at 98–102.
\item \textsuperscript{45} \textit{Id. at 98.}
\item \textsuperscript{46} \textit{See id. (describing the selection process for the DOJ Honors Program and SLIP).}
\item \textsuperscript{47} \textit{See id.} ("[W]e found that in 2006 the Screening Committee used political and ideological considerations to deselect many candidates. We determined that a disproportionate number of the deselected Honors Program and SLIP candidates had liberal affiliations as compared to the candidates with conservative affiliations.").
\end{itemize}
a memorandum issued by Attorney General Mukasey "requiring all political appointees to acknowledge that they have read the Department regulations that hiring must be merit based and that political affiliations cannot be considered."48

A July 2, 2008 OIG/OPR report, the Civil Rights Report, looked at "allegations that political or ideological affiliations were considered in hiring, transferring, and assigning cases to career attorneys in the Civil Rights Division" of the DOJ.49 Included as part of this investigation was "whether the Division’s senior management failed to recognize and correct any improper consideration of political or ideological affiliations in the hiring and treatment of career attorneys."50 As with the prior reports, the findings demonstrated politicization in the office.51 Specifically, one of the findings was that "the Civil Rights Division improperly used political or ideological affiliations in assessing applicants for career attorney positions, including hiring for both experienced attorneys and entry-level attorneys through the Honors Program."52 The report also found that "political or ideological affiliations resulted in other personnel actions that affected career attorneys in the Division, such as attorney transfers and attorney case assignments."53

An additional report issued by OIG/OPR, the Goodling Report, looked at specific persons within DOJ, most notably Monica Goodling, to determine whether there was truth to allegations "that in 2006 several United States Attorneys were forced to resign for improper reasons, including improper political purposes."54 The investigation also examined whether "Goodling inappropriately used political or ideological affiliations in the hiring process for career Department employees."55 This report, like the others, found political improprieties.56 It included as a finding that "Goodling improperly subjected candidates for certain career positions to

48. Id. at 101.
49. CIVIL RIGHTS REPORT, supra note 18, at 1.
50. Id.
51. See id. at 64 (concluding that ideological and political factors were considered in hiring and other management decisions at the DOJ).
52. Id.
53. Id.
54. GOODLING REPORT, supra note 16, at 1.
55. Id.
56. See id. at 135 (finding evidence of discrimination in hiring for career positions on the basis of political affiliations at the DOJ).
the same politically based evaluation she used on candidates for political positions, in violation of federal law and Department policy." 57

Each of these three reports recommends changes to correct problems and to assure that improper political decisions will not occur in the future. For example, in the Honors Program/SLIP Report, one of the recommendations is to strengthen "the briefing currently provided to political appointees about the merit system principles." 58 The Civil Rights Report recommends that "the Department consider issuing periodic statements to all employees about what constitutes prohibited personnel practices under federal law, regulations, and Department policy." 59 Finally, the Goodling Report states as one of the recommended changes "that the Department clarify its policies regarding the use of political or ideological affiliations to select career attorney candidates for temporary details within the Department." 60

The transparency following discovery of politicization in DOJ will certainly serve to avoid repetition of this conduct. The fact that OIG and OPR did four separate reports on various aspects of the entry of politics into DOJ will also serve as a deterrent. It remains to be seen whether punishment or additional repercussions, such as criminal charges, will come from review of individuals’ conduct within the DOJ. It also remains to be seen whether new measures put into place, such as additional training, will provide security that these events will not happen again. But certainty of no further transgressions, of course, can never be guaranteed.

III. Importance of Political Neutrality in DOJ

Federal prosecutors serve in a unique enforcement role in the criminal justice system. In many instances, like drug and immigration prosecutions, the cases are prepared and brought to them by federal agencies such as the Drug Enforcement Agency (DEA) 61 or Immigration and Customs

57. Id.
58. HONORS PROGRAM/SLIP REPORT, supra note 17, at 102.
59. CIVIL RIGHTS REPORT, supra note 18, at 65.
60. GOODLING REPORT, supra note 16, at 139.
The agencies investigate the crimes and perpetrators and then proceed to the DOJ's Criminal Division in order to proceed with a prosecution. Agency involvement may be more closely aligned with the investigation in white-collar matters, where the grand jury may be examining documents to determine whether to issue an indictment. Whether it is a street crime or white-collar case in this process, federal prosecutors have a wealth of criminal statutes to consider and many tools within their arsenal in determining whether to use their discretionary power to proceed with a prosecution. In addition to the constantly increasing number of applicable statutes, the breadth of many federal criminal statutes and the lack of *mens rea* or reduced *mens rea* in some of these statutes afford prosecutors significant power in their prosecution role.

There are over four thousand criminal statutes that can be used by prosecutors. These statutes are scattered throughout the United States Code as opposed to being limited to the criminal code. One finds criminal statutes in tax, securities, environmental, health, and an array of other places in the United States Code. The failure to have a single location for

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65. See infra notes 67–76 (discussing the number of federal criminal statutes).

66. See infra notes 90–94 (discussing *mens rea* requirements of certain federal statutes).


68. See, e.g., 26 U.S.C. § 7201 (2006) (creating criminal penalties for tax evasion); id. § 7203 (creating criminal penalties for the failure to file taxes); id. § 7206 (creating criminal penalties for the filing or aiding and assisting in the filing of a false tax return).


72. One finds crimes related to banking in Title 31, such as crimes related to the filing
all criminal statutes is intensified by the enormous number of available statutes that can be used by federal prosecutors. In 1998, the American Bar Association appointed a task force to examine the increased number of federal statutes and issued a report, *The Federalization of Criminal Law.* The task force was chaired by Edwin Meese, III and William W. Taylor, III, and the report stressed the "dramatic increase in the number and variety of federal crimes." The report notes that "of all federal crimes enacted since 1865, over forty percent [were] created since 1970."

In addition to the number of federal statutes, prosecutorial discretion is heightened by the breadth of many statutes that allow a wide array of conduct to be subject to criminal prosecution. Prosecutors' broad discretionary powers are not limited to deciding who will be charged with criminal offenses and what charges will be brought. Many statutes allow a wide array of conduct to be the subject of prosecution. For example, the mail fraud statute allows prosecutors to proceed when there is a material deprivation of money or property. The mailing is no longer confined to postal mailings and now includes an interstate carrier. A statute that was originally focused on frauds on the Post Office has become a statute that

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73. See *The Federalization of Criminal Law, Task Force on the Federalization of Criminal Law, Criminal Justice Section, Am. Bar Ass'n* 2 (James A. Strazzella rep. 1998) (addressing concern about the increasing number of new federal crimes).
74. *Id.* at 4.
75. *Id.* at 2.
76. *Id.*
looks at frauds that might have a tangential connection to mailing. It is now a fraud that just happens to use a mailing as one "step in the plot." In many instances, multiple statutes can be used to criminalize the same criminal conduct. For example, two mail frauds that occur as part of a pattern of racketeering activity may also result in a RICO charge, a statute that carries a higher penalty than mail fraud.

Prosecutors often use short-cut offenses like perjury, obstruction of justice, or false statements, as it is relatively easy to prosecute these offenses. This is particularly true in large document driven white-collar cases where a conviction can be obtained more easily by proceeding under a statute that requires significantly less proof than might be necessary to show an accounting fraud.

Many federal statutes do not require a mens rea element or have very low levels of mens rea required. A recent report of the National

80. See Ellen S. Podgor, Mail Fraud: Opening Letters, 43 S.C. L. REV. 223, 224 (1992) [hereinafter Podgor, Mail Fraud] ("[T]he emphasis of the offense has shifted, drastically reducing the focus on the use of the postal system.").

81. Badders v. United States, 240 U.S. 391, 394 (1916). In Badders v. United States, the Supreme Court found that mailing of letters in execution of a scheme to defraud could be made a criminal offense, if criminal intent was present. Id.

82. See generally Ellen S. Podgor, Tax Fraud-Mail Fraud: Synonymous, Cumulative or Diverse?, 57 U. Cin. L. REV. 903 (1989) (discussing the overlap between mail fraud and tax fraud).

83. See Podgor, Mail Fraud, supra note 80, at 263 (explaining that RICO requires the commission of two or more predicate acts, which may include mail and wire fraud).

84. See id. at 265 (noting how RICO sentences can be more severe than mail fraud sentences).


86. See id. § 1503 (creating criminal penalties for attempting to influence or intimidate a juror or officer of the court). There are many other obstruction of justice statutes that are used by the government. See id. § 1505 (creating criminal penalties for obstruction of proceedings before departments, agencies, and committees); id. § 1512 (creating criminal penalties for tampering with a witness, victim, or an informant).

87. See id. § 1001 (creating criminal penalties for making false statements within the jurisdiction of the executive, legislative, or judicial branch of the federal government).

88. See Ellen S. Podgor, Arthur Andersen, LLP and Martha Stewart: Should Materiality Be an Element of Obstruction of Justice?, 44 WASHBURN L.J. 583, 601 (2005) (noting that in certain cases "prosecutors proceeded with obstruction charges that allowed them to obtain convictions without the need to further investigate or prosecute the underlying conduct that they were originally pursuing").


90. See, e.g., United States v. Hoflin, 880 F.2d 1033, 1039 (9th Cir. 1989) (holding
Association of Criminal Defense Lawyers (NACDL) and the Heritage Foundation, *Without Intent: How Congress Is Eroding the Criminal Intent Requirement in Federal Criminal Law*, noted that "offenses with inadequate mens rea requirements are ubiquitous at all stages of the legislative process." This study focused on non-violent offenses in a two-year congressional period. The authors concluded that "[o]ver 57 percent of the offenses introduced, and 64 percent of those enacted into law, contained inadequate mens rea requirements, putting the innocent at risk of criminal punishment."

Oftentimes internal guidelines in the DOJ serve as a check on prosecutorial discretion. These guidelines, found in the U.S. Attorneys Manual, provide guidance, especially to new attorneys, as well as those who have been in the Department for lengthy periods of time. Unfortunately, however, these are merely guidelines and cannot be relied upon to check prosecutorial discretion in all cases. In addition to the guidelines stating that they are solely for internal use, courts have continually held that they are unenforceable at law by third parties. Despite clear failures to abide by DOJ guidelines, it is seldom that a court will use its supervisory powers to rectify the situation.

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92. *Id.* at x.


94. *Id.*


96. *See Podgor, Department of Justice, supra* note 11, at 191 ("[M]ost decisions maintain that internal policies of the Department of Justice are unenforceable at law.").

97. *See id.* at 189–94 (noting that most courts maintain that internal policies of the Department of Justice are unenforceable at law and therefore do not rectify DOJ actions that fall outside of the DOJ’s internal guidelines).
Political neutrality is particularly important in the DOJ because of the enormous power provided to federal prosecutors.\textsuperscript{98} It is also important from both a rhetorical and symbolic perspective.\textsuperscript{99} Irrespective of whether prosecutors actually abuse their power for political reasons, the possibility or appearance that this might occur taints the criminal justice system.

\textbf{IV. Moderated Discretion}

Prosecutors have recently issued a harsh statement to the U.S. Sentencing Commission, calling for review of certain cases and judicial actions because the judges did not conform to the lines drawn by the U.S. Sentencing Guidelines.\textsuperscript{100} Concerned about "trust and confidence" in the criminal justice system, Jonathan J. Wroblewski, Director of Policy and Legislation, wrote in a letter\textsuperscript{101} to the U.S. Sentencing Commission that ".[t]o the extent that federal sentencing is an ongoing source of discord, disunity, and criticism, the reputation of the federal courts will be seriously damaged and the effectiveness of the federal criminal justice will be compromised."

But is the DOJ willing to have the same uniformity imposed upon them in their decision-making process as they call for the Sentencing Commission to have for judges? Strict sentencing guidelines fail to account for the individual in determining the amount of time and money that should be the appropriate punishment. Likewise, prosecutors need some discretion in selecting charges to use against a defendant. Mere violation of a statute fails to account for the individual circumstances that may warrant a lesser-included offense, a deferred prosecution, or no prosecution. We are not a system of mathematical formulas or computerized charging. It is always important to remember that both

\textsuperscript{98} See supra notes 1–9 and accompanying text (discussing the powers and importance of federal prosecutors).


\textsuperscript{100} See Marcia Coyle, Justice Department Calls for Probe of Federal Sentencing Patterns, Nat’l L.J., July 19, 2010, at 21 (reporting that the DOJ is concerned that "widely disparate sentences don’t make sense, ignore federal sentencing guidelines and are a sign of a potentially very big problem").


\textsuperscript{102} Id. at 2.
sentencing and charging involves real people, from the perpetrators of crimes, to their families, and to the victims of these crimes.

Just as judges need some discretion in sentencing, so too do prosecutors in their charging capacity. It is not advocated here that prosecutors should have all discretion removed, as discretion clearly serves an important role in achieving goals of restorative justice and rehabilitation. But realigning criminal statutes and tailoring overly broad statutes could offer a moderated discretion to the current system. Removal of repetitive statutes and statutes that allow for haphazard application also offers consistency within the system.

The House of Representatives recently passed the National Criminal Justice Commission Act of 2010, and it is conceivable that the Senate will move in a similar direction. This Commission would provide a perfect home for examining overcriminalization and remedies that might alleviate potential future occurrences that could taint prosecutors. There have been unsuccessful movements in the past, including the Brown Commission, that looked to redesign the federal criminal justice system. But starting with a


104. Presently under consideration is Senate Bill 714. This bill has comparable language to the House bill that created a Criminal Justice Commission Act, but to date it has not passed. See S. 714, 111th Cong. (2010) (creating a commission to undertake a comprehensive review of all areas of the criminal justice system).

105. The aim of the Commission is to "undertake a comprehensive review of the criminal justice system." H.R. 5143, 111th Cong. § 2 (2010). The last comprehensive study was in 1965, when the President's Commission on Law Enforcement and Administration and Justice studied criminal justice and produced a written report, The Challenge of Crime in a Free Society. Id. The report provided "200 specific recommendations on all aspects of the criminal justice system involving Federal, State, tribal, and local governments, civic organizations, religious institutions, business groups, and individual citizens." Id.


107. See generally Paul H. Robinson & Marcus D. Dubber, The American Model Penal
foundation that has a legislative impetus provides a stronger likelihood for its eventual passage.

V. Conclusion

Others have called for internal and external efforts to restrict politicization in the office. And although we have not seen a repeated occurrence of political hiring, the real problem continues—the extraordinary power of prosecutors. As long as prosecutors have over four thousand criminal statutes that they can use in charging criminal conduct, and as long as prosecutors have close to unbridled discretion in ninety-five percent of the cases—those settled via the plea bargaining process—the problems of the past can be repeated.

A change in Attorney General, albeit not a change in political party, was a key impetus here in reviewing the politicization that had occurred in DOJ. Absent this transparency, it is uncertain as to the length of time it would have taken for the public to become aware of problems within the DOJ. With the current check on prosecutorial misconduct minimized as a result of a diminishing press, oversight is weakened. But improvement to our

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108. See Beale, supra note 21, at 435 (arguing for scrutiny of the contacts between the U.S. Attorneys and various political actors).


110. See supra notes 29–60 and accompanying text (discussing the influence of politics in the DOJ).


criminal justice system should not merely be through increased oversight of politics in the DOJ but also through examination of the structural foundation that allows improper conduct to thrive.

Finding the appropriate balance in discretionary decisions is important. Having a system that imposes few boundaries, fails to allow enforcement of internal guidelines, and has no legal oversight is a system that can become the subject of political whims of a prosecutor. But it is also important to have a system that allows for adjustment of individual factors to assure that charging, plea bargaining, sentencing, and other criminal justice decisions are decisions that correlate to the individual person that is being processed in the criminal justice system.