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RESPONSE

INSTITUTIONAL COMPETENCE AND ORGANIZATIONAL PROSECUTIONS

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THE business pages regularly provide graphic stories about corporate deferred prosecution agreements (“DPAs”). And commentators regularly fulminate about this alleged abuse of government power, quite confident (or willfully blind to the fact) that the removal of this non-nuclear option from the prosecutorial arsenal would substantially lessen the ability of prosecutors to obtain cooperation from firms and their employees. Yet this emerging practice has received all too little scholarly attention, and Professor Brandon Garrett has made an important contribution by carefully examining the available facts and creatively drawing on the structure reform literature to highlight questions it raises about legitimacy and institutional competence.¹

That Garrett raises more questions than he answers merely highlights the richness of the topic he has so nicely limned. It would indeed be troubling if a decentralized corps of unelected federal prosecutors, having cut their teeth on gun and drug cases, moved into the corporate arena and used the threat of criminal prosecu-

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¹ This essay is a response to Brandon L. Garrett, *Structural Reform Prosecution*, 93 Va. L. Rev. 853 (2007).

tion—often tantamount to corporate execution—to fiddle with corporate structures and goals. But prosecutors rarely act alone, and are unlikely to do so in a sustained white collar investigation.² Of the DPAs Garrett studied, sixty-six percent were reached explicitly in conjunction with regulatory agencies³—with the SEC leading the pack—and that figure might substantially understate agency involvement, since an agency extensively consulted by prosecutors might go unmentioned in the formal agreement.

To what extent did regulatory agencies shape the agreements that prosecutors obtained with their assistance? Garrett's uncertainty on this point is completely understandable, since an outside observer would be hard pressed to know. But one cannot assess the institutional competence issue without such data. To be sure, finding that, say, regulatory agencies were using the strong norm of prosecutorial discretion to circumvent political or legal restraints on their own power so as to, say, extract structural concessions that they would not themselves have been able to achieve through rulemaking or adjudication, would raise questions about legitimacy and accountability. The same sort of reservations one might have about state and local criminal enforcers bringing cases to federal prosecutors as a way around their state constitutions, sentencing limitations, or intentional fiscal constraints might apply here.⁴ For all the attention given to the supply side of the “overcriminalization” or “overfederalization” phenomenon that turns what are “really” civil cases into criminal cases and what are “really” state cases into federal cases,⁵ little attention has been given to the demand side. On the other hand, extensive agency involvement *would* address competency concerns. And one might

² See Daniel Richman, Prosecutors and Their Agents, Agents and Their Prosecutors, 103 Colum. L. Rev. 749, 767–78 (2003).

³ Garrett, *supra* note 1, at 896.

⁴ See Phyllis J. Newton et al., Investigation and Prosecution of Homicide Cases in the U.S.: The Process for Federal Involvement (2006), available at <http://www.ncjrs.gov/pdffiles1/nij/grants/214753.pdf>; Daniel Richman, The Past, Present, and Future of Violent Crime Federalism, 34 Crime & Just. 377, 401–02 (2006).

⁵ See John C. Coffee, Jr., Does “Unlawful” Mean “Criminal”? Reflections on the Disappearing Tort/Crime Distinction in American Law, 71 B.U. L. Rev. 193 (1991); Stuart P. Green, Why It’s a Crime to Tear the Tag Off a Mattress: Overcriminalization and the Moral Content of Regulatory Offenses, 46 Emory L.J. 1533 (1997); Erik Luna, The Overcriminalization Phenomenon, 54 Am. U. L. Rev. 703 (2005); William J. Stuntz, The Pathological Politics of Criminal Law, 100 Mich. L. Rev. 505 (2001).

even celebrate the measure of cost internalization (or is it “capture”?) that the agencies would bring to prosecutorial decision-making.⁶

A determination that DPAs did not represent a collaboration between regulators and prosecutors would return us to the competence problem, but would not itself demand the reconsideration of our deferred prosecution practices. The answer—at least in those cases arising within the remit of a regulatory agency—might instead lie in the reconsideration of the institutional design choices and legal doctrines that keep criminal prosecutions and agency enforcement activity on separate (albeit parallel) tracks.⁷ Indeed, the New York Attorney General’s Office’s ability to shift seamlessly between criminal and civil tracks was critical to Eliot Spitzer’s effectiveness in that office.⁸ One need not embrace the elimination of the institutional civil/criminal divide to recognize the beneficial

⁶ In a recent Senate hearing, a former senior Justice Department official gave his recollection of internal discussions when, in the early 1990s, “an investigation produced substantial evidence that Salomon Brothers had miscondacted itself in connection with the U.S. Treasury long bond market and that the impropriety was sponsored at the highest levels of the company”:

A United States Attorney and his senior staff were highly desirous of undertaking a massive prosecution under the securities laws[,] a course of action that was not without legal merit but which also would have ended up depriving the company of most of its assets and employees and ultimately closing it down. That course had an analog in the earlier case of Drexel, Burnham. The Secretary of the Treasury, however, strongly believed that while the management of Salomon brothers had to be removed, sanctioned and replaced, an early settlement that would allow a restructured company to participate in the bond market, offering needed competition and financial stability, was greatly in the public interest. Ultimately this view prevailed, although the United States Attorney believed that his independence had been compromised.

Is the DOJ Politicizing the Hiring and Firing of U.S. Attorneys?: Hearing Before the S. Comm. on the Judiciary, 110th Cong. (2007) (prepared statement of the Hon. Stuart M. Gerson, Partner, Epstein Becker & Green), available at http://judiciary.senate.gov/testimony.cfm?id=2516&wit_id=6062.

⁷ See *United States v. Stringer*, 408 F. Supp. 2d 1083 (D. Or. 2006) (condemning the government for improperly using an SEC investigation to gather evidence for a criminal prosecution); *United States v. Scrushy*, 366 F. Supp. 2d 1134 (N.D. Ala. 2006) (same).

⁸ See Brooke A. Masters, *Spoiling for a Fight: The Rise of Eliot Spitzer* 49–50 (2006) (noting that under New York’s Martin Act, Spitzer’s office “could subpoena documents, haul brokers and investment bankers in for public questioning, and, unlike his federal counterparts at the SEC and the Justice Department, he didn’t have to specify up front whether he was going to seek criminal charges or file an easier-to-prove civil case”).

effects of tinkering with this traditional (and quite defensible) separation.

Understanding the institutional arrangements underlying DPAs might make us a lot more comfortable with the doctrinal lacunae within which such agreements operate. And the regulatory gap might not be as large as Garrett suggests.⁹ While it is true that DPAs explicitly leave the government with extraordinary discretion when it comes to judging whether an organization has complied, one would not expect prosecutors to act arbitrarily when alleging breach, at least if they would like future defendants to consider entering into such agreements. Although proof on this point is hard to come by, such reputational bonding seems to play an important role in ensuring that prosecutors do not arbitrarily renege on cooperation agreements with individuals.¹⁰ It likely plays an even bigger role in corporate prosecutions (or nonprosecutions) because of the cohesiveness of the white collar defense bar. Until we get a handle on the nature and extent of this restraint, I would hold off on Garrett's proposal for legislation allowing early judicial review of prosecutorial claims of breach.

A final institutional issue involves the role that Garrett envisions Washington playing vis-à-vis U.S. Attorneys' Offices. There is some evidence that the Justice Department's commitment to white collar enforcement has been flagging in recent days. Its leaders, particularly soon-to-be former Deputy Attorney General Paul McNulty, have made a sustained (but unappreciated) effort to mollify corporate critics of Department policies.¹¹ FBI agents reportedly have been transferred from white collar to counterterrorism and other programs.¹² And the emerging story of U.S. Attorney fir-

⁹ Garrett, *supra* note 1, at 930–31.

¹⁰ See Daniel Richman, *Cooperating Clients*, 56 Ohio St. L.J. 69, 109–10 (1995).

¹¹ See DOJ's McNulty: Level of Waiver Requests Doesn't Justify Bill to Limit Agency Discretion, 81 Crim. L. Rep. (BNA) 86 (Apr. 25, 2007); Jessica Guynn, *Feds Reduce Pressure in White-Collar Probes: Now Companies Will Often be Able to Offer Counsel*, S.F. Chron., Dec. 13, 2006, at D2.

¹² Jason McLure, *White Collar Prosecutions Dropping: The Wave of White-Collar Prosecutions May Have Crested*, Legal Times, July 17, 2006 (“[B]y some measures the crackdown on corporate criminals has stalled”); Paul Shukovsky et al., *The FBI's Terrorism Trade-Off: Focus on National Security After 9/11 Means that the Agency has Turned its Back on Thousands of White-Collar Crimes*, Seattle Post-Intelligencer, Apr. 11, 2007, at A1; but see Audit Div., U.S. Dep't of Justice, *Audit Report 05-37, The External Effects of the Federal Bureau of Investigation's Reprioritization Efforts*

ings suggest that high-ranking Department officials were far more likely to question, or punish, U.S. Attorneys for insufficient efforts in firearm, immigration, drug, and obscenity cases than for any slack in the white collar area.¹³ With memories of Enron fading, and the political gains from a sustained commitment in corporate crime always uncertain, some variant of these developments might well have happened in any of the recent administrations. Those who prefer a fair degree of zeal in white collar enforcement should therefore think twice before counseling more centralized control over DPAs and, for that matter, corporate privilege waivers.¹⁴

I suppose that in theory, one could envision the Justice Department presiding over a lovely experimentalist regime in which the “informal exchange of information amongst independent monitors, prosecutors, regulators, and industry experts will, over time, create a narrowed set of accepted best remedial practices.”¹⁵ Figuring out what “works”—that is, how to measure compliance—is not just a technical challenge here, however. It is a fundamental confounding problem in the whole area of white collar enforcement.¹⁶ Should a whistleblower, victim, or other source tell us of new misconduct in a firm with what was thought to have been a rigorous (or lax) compliance regime, we will have some data. Should a trusted monitor

53 (2005), available at <http://www.usdoj.gov/oig/reports/FBI/a0537/final.pdf> (noting that the “FBI designated corporate fraud as its top national priority for financial crimes and has increased the number of agents handling those matters between [fiscal years] 2000 and 2004. Case management data from the [U.S. Attorneys’ Offices] also demonstrated the FBI’s increased emphasis on corporate fraud matters, showing that the FBI had referred more matters to [those Offices] during [fiscal year] 2004 than it had during [] 2000.”).

¹³ See Kelly Thornton & Onell R. Soto, Lam is asked to step down; Job performance said to be behind White House firing, *San Diego Union-Tribune*, Jan. 12, 2007, at A1 (suggesting that San Diego U.S. Attorney was asked to resign because of her focus on white collar and public corruption cases at the expense of immigration and gun cases).

¹⁴ See Daniel Richman, *Decisions About Coercion: The Corporate Attorney-Client Privilege Waiver Problem*, 57 *DePaul L. Rev.* (forthcoming 2007), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=968469.

¹⁵ Garrett, *supra* note 1, at 935.

¹⁶ See Corporate Fraud Task Force, *Second Year Report to the President* (2004), available at http://www.usdoj.gov/dag/cftf/2nd_yr_fraud_report.pdf; see also Daniel C. Richman & William J. Stuntz, *Al Capone’s Revenge: An Essay on the Political Economy of Pretextual Prosecution*, 105 *Colum. L. Rev.* 583, 613–14 (2005) (discussing challenge of finding adequate performance measures for federal white collar enforcement efforts).

tell us that no misconduct has occurred on her beat, we would have more, but not much certainty about its quality. We will certainly hear from firms about compliance's heavy costs and of their consequent loss of competitiveness. But they have every reason to overestimate both of these. Finding appropriate performance metrics is hard enough for those engaged in (or opposing) structural reform in prisons, schools, or other such institutions. In the white collar area, the challenge may be insurmountable. Garrett is quite right, though, to suggest that we try a lot harder. And perhaps we can even hope that a robust compliance market—involving law firms, compliance firms, and the like—will emerge that is more than window dressing or a protection racket.

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