

# UC Berkeley

## California Journal of Politics and Policy

### Title

Immigration and Prosecutorial Discretion

### Permalink

<https://escholarship.org/uc/item/2288q2kw>

### Journal

California Journal of Politics and Policy, 5(2)

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### Publication Date

2013-04-02

### DOI

10.5070/P2GW23

Peer reviewed

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## Immigration and Prosecutorial Discretion

**Abstract:** Immigration has become an increasingly salient national issue in the US, and the Department of Justice recently increased federal efforts to prosecute immigration offenses. This shift, however, relies on the cooperation of US attorneys and their assistants. Traditionally federal prosecutors have enjoyed enormous discretion and have been responsive to local concerns. To consider how the centralized goal of immigration enforcement may have influenced federal prosecutors in regional offices, we review their prosecution of immigration offenses in California using over a decade's worth of data. Our findings suggest that although centralizing forces influence immigration prosecutions, individual US attorneys' offices retain distinct characteristics. Local factors influence federal prosecutors' behavior in different ways depending on the office. Contrary to expectations, unemployment rates did not affect prosecutors' willingness to pursue immigration offenses, nor did local popular opinion about illegal immigration.

**Keywords:** immigration; prosecution; California.

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## 1 Introduction

Since the 1980s, immigration in the US has become viewed as one of the most important issues facing the country (Espenshade and Hempstead 1996; Hood III and Morris 1998). Despite a hardening of attitudes toward immigrants and extensive research that describes this public opinion shift, there has been limited empirical research on how public opinion influences immigration policy (Hood III and Morris 1998). Although public opinion often affects legislation, particularly through the passage of state voter initiatives, ultimately immigration policy is largely a product of the US executive branch, enforced today through the investigative efforts of the Immigration and Customs Enforcement (ICE) and prosecuted by assistant US attorneys. This became especially true following the terrorist attacks of September 11th, 2001. The Department of Justice

identified immigration charges as a useful prophylactic in the War on Terror, and the response of federal prosecutors to this priority shift was dramatic. In 1996, 11% of federal prosecutions were immigration-related; after 2001, they increased steadily until in 2008, immigration prosecutions constituted the majority – 51% – of all federal criminal prosecutions (TRAC 2009a).

Legal and political science scholars maintain that American federal prosecutors traditionally have had a great deal of independent political authority. Although federal prosecutors serve at the pleasure of the president and are expected to “construe and implement the policy of the Department of Justice” (US Department of Justice 1997), prosecution in the US is highly decentralized and responsive to local influence (Davis 1969; Eisenstein 1978; Perry Jr. 1999). Over the past decade, however, radical changes in federal immigration caseloads suggest that federal prosecutors’ behavior may be becoming more responsive to centralized Department influence.

Although political and legal scholars theorize about whether federal prosecutors *should* respond to federal priorities, there are few empirical studies analyzing how prosecutors actually behave (Rabin 1972; Eisenstein 1978; Lochner 2002; Whitford and Yates 2003; Miller and Eisenstein 2005). Yet understanding the extent of individual discretion has become increasingly important given that the scope of federal criminal law has expanded greatly in the last 30 years. Beginning in the early 1980s, Congress increasingly criminalized behavior that previously was subject only to state law, expanding the universe of chargeable federal offenses (Richman 1999; Stuntz 2001). Shortly before the dramatic increase in immigration prosecutions, one researcher argued that, “[f]ar more than is true of local prosecutors, United States Attorneys’ offices, together with enforcement agencies like the FBI, have the power to set their own agendas, to decide what cases they wish to spend time on and what cases they wish to ignore” (Stuntz 2001). If federal prosecutors are becoming more responsive to Department of Justice directives, this change has serious implications not only for immigration policy but for the balance of power between national and local political values.

If federal prosecutors truly retain discretion over their caseload, it should be identifiable by observing patterns in their decisions to prosecute or decline (i.e., refuse to prosecute) referrals from investigative agencies such as ICE and the Federal Bureau of Investigation (FBI). Because federal prosecutorial resources have not grown at the same rate as federal charges, US attorneys do not prosecute every matter referred to them by federal investigative agencies. In fiscal year 2001, for example, federal prosecutors declined 27% of all suspects referred to them by federal and state investigative agencies (US Department of Justice 2002). It is this discretion that allows US attorneys to structure the boundaries of criminal conduct in their respective districts, and to respond to local concerns and values.

We review the extent of federal prosecutors' discretion by reviewing the most unlikely place it might be found: the recent immigration caseload in a single border state, California. We suspect that there will be very little difference in prosecution rates for immigration offenses between the four US attorneys' offices in California. First, as noted above, the Department of Justice's prioritization has created a massive shift in prosecutorial behavior, to the point that immigration prosecutions now make up more than half of all criminal prosecutions. Second, these cases are straightforward to prosecute. As an evidentiary matter, citizenship status can be determined comparatively easily. Similar to drug charges and weapons offenses, they are "quick and dirty" cases in which defendants are unlikely to have recourse to high-profile defense attorneys (Lochner 2002). This allows prosecutors to inflate statistics of successful prosecutions – an important indicator for perceived office competence (Eisenstein 1978). Third, unlike drug prosecutions for example, it is not possible to decline an immigration case for "stateside" prosecution, a common strategy of federal prosecutors who wish to focus their attention on other matters.

US attorney's offices are present in every state, however, and not all of them have many immigration charges to prosecute or decline. The discovery that immigration prosecutions were more common in New Mexico than Kansas, for example, would likely indicate higher levels of immigration offenses rather than evidence that prosecutors were exercising discretion. This problem can be resolved by restricting focus to a single state with a substantial immigration caseload. Only two of the four states sharing a border with Mexico have multiple US attorney's offices: California and Texas. We chose to review immigration prosecutions in California, rather than Texas, because the US attorney's offices in California represent a wider range of local political values ("California v. Texas: America's future" 2009). These range from San Francisco – a "sanctuary city" that does not provide information on undocumented immigrants to federal authorities (Suddath 2008) – to strongly anti-immigrant enclaves in Orange County and San Diego.

Given the Department of Justice emphasis on immigration issues, there is little reason to expect that federal prosecutors exercise discretion in immigration prosecution. However, our study identifies significant differences in the ways that US attorney's offices in California prosecute immigration. Our findings suggest that even in the face of enormous pressure to increase prosecution of immigration offenses, federal prosecutors retain independent political authority.

## 2 Theory

A great deal of research considers why prosecutors make the choices they do (Eisenstein 1978; Stuntz 2001; Lochner 2002; Miller and Eisenstein 2005). Unlike most state and local prosecutors, US attorneys are appointed by the president to serve in one of the 93 US attorney's offices located throughout the country. This raises the question of why they would be politically responsive given the absence of direct electoral accountability. The answer is that US attorneys often harbor future political aspirations for which local political support is helpful (Eisenstein 1978; Perry Jr. 1999).

Recent research, however, suggests a national trend towards centralized influence. In 1978, Eisenstein noted that US attorneys enjoyed "a degree of autonomy and independence from the department [Department of Justice] perhaps unmatched by any other field service in the federal government" (Eisenstein 1978). Twenty-five years later, Whitford found that the organizational structure of the federal prosecutorial system allows for some degree of national political control (Whitford 2002). Also, research by Lochner suggested that US attorneys over the past 20 years have grown more responsive to Department of Justice priorities. This responsiveness reflects the Department of Justice's ability to supply US attorneys with resources and media coverage that allow federal prosecutors to pursue subsequent career opportunities (Lochner 2002).

In the 21st century the US Department of Justice has emphasized the prosecution of immigration offenses. Although many crimes are handled at the state or local level, immigration matters are exclusively subject to federal control, meaning that federal prosecutors cannot cede immigration offenses for prosecution by state and local law enforcement. Immigration violations can be administrative, civil, or criminal in character, ranging from a noncitizen seeking to enter the country illegally, to a legal immigrant overstaying a visa permit, to organized criminal efforts to produce counterfeit social security cards. Traditionally, most of these matters were handled administratively, without recourse to criminal courts: noncitizen wrongdoers were deported. Beginning in the 1980s, however, Congress expanded the scope of immigration law, making more immigration-related acts criminal and enhancing penalties (Stumpf 2006b). As a result, the federal government can now incarcerate non-citizen offenders first and then deport them.

More recently, immigration charges have been viewed as a useful tool in preventing terrorism. This confluence of immigration law and criminal law has been termed "cimmigration" (Stumpf 2006a), which reflects increasing emphasis on bringing charges against individual aliens rather than their employers. Almost 80% of immigration enforcement actions are handled administratively by the roughly 200 immigration judges employed by the Executive Office of Immigration

Review in the Justice Department (TRAC 2009b). Nonetheless, criminal immigration prosecutions have risen dramatically as a percentage of all federal prosecutions (TRAC 2009a).

Our study focuses on a single state: California. California has the largest undocumented population in the US, and public distress over the effects on health care, education, and social services prompted the 1994 passage of Proposition 187, a state ballot initiative to restrict immigrants' access to social services (Huber and Espenshade 1997; Burstein 2003). Public outcry against immigrants in California in the 1990s also led to significantly increased federal spending on border enforcement and security (Cornelius 2005). Nonetheless, California has substantial variations in attitudes about immigration. Capitalizing on this variance, we study the prosecution of immigration offenses in the four California US attorneys' offices from 1997 to 2007. This analysis allows us to determine the relative weight of centralized influences relative to local influences on the exercise of prosecutorial discretion in immigration offenses.

We expected that centralizing authority would have substantial influence on the decision making of federal prosecutors. Consistent with historical expectations about the discretion of federal prosecutors, however, we also expected that prosecutors would be less likely to emphasize immigration prosecutions and will be less responsive to federal efforts to prioritize them in a liberal environment like San Francisco than in a conservative border region like San Diego. Because anti-immigrant attitudes typically increase as economic conditions worsen (Citrin et al. 1997; Lapinski et al. 1997; Borjas 1999), we expected that prosecutors will be more likely to pursue immigration offenses as the unemployment rate increases. Finally, we recognized that there are many different types of immigration offenses, and some, such as organized criminal conspiracies to create fraudulent Social Security cards, are more likely to be prosecuted than less serious offenses such as first-time improper entry. Our hypotheses are provided in Table 1.

**Table 1:** Tests of Hypothesis Concerning Federal Prosecution of Immigration Offenses.

| Centralizing influences on prosecution decisions         | Expected Direction |
|--|--------------------|
| After September 11th, 2001                               | Increase           |
| Change in U.S. Attorney General (USAG)                   | Varies             |
| # of USAG speeches emphasizing immigration               | Increase           |
| National unemployment rate                               | Increase           |
| Charge categories: Assaulting officer, detaining witness | Increase           |
| Local influences on prosecution decisions                |                    |
| Regional unemployment rate                               | Increase           |
| Regional concern about illegal immigration               | Increase           |
| District office location                                 | Varies             |

### 3 Data and Methods

To study the effects of public priorities on immigration prosecutions and declinations, we relied primarily on data collected and aggregated by the Transactional Records Access Clearinghouse (TRAC) at Syracuse University. TRAC generously provided data on all immigration matters considered by federal prosecutors in California between 1997 and 2007, a total of 38,011 matters that potentially could have been prosecuted.<sup>1</sup> We reviewed both TRAC data and background data collected by the authors to describe the nature of federal prosecutorial activity. Our dependent variable indicated whether or not a matter was prosecuted.

Our analysis included a range of variables. TRAC provided data on the *federal judicial district* where each matter appeared. There are four judicial districts in California:

- Central, based in Los Angeles;
- East, covering the Central Valley;
- North, based in San Francisco; and
- South, based in San Diego and encompassing the US border with Mexico.

TRAC provided information on the *disposition date* of each matter and the *outcome*: (1) closed without prosecution; (2) prosecuted but not convicted; or (3) prosecuted and convicted.

All four US attorney's offices in California today employ a "fast track" process for handling immigration offenses. Fast track programs were created by US attorneys based on their discretionary authority in order to streamline the handling of high-volume routine claims. Fast track programs are not judicially created, nor are they mandated by the Department of Justice, though following adoption of the PROTECT Act in 2003 the Attorney General had to explicitly authorize use of these programs (McClellan and Sands 2006). The Southern District of California office created the first immigration-oriented fast track program in 1993 (*United States v. Estrada Plata* 1995), and the Central District of California followed suit around 2001 (Written Testimony from Maria E. Stratton, Federal Public Defender for the Central District of California 2003). Both the Northern and Eastern Districts of California had a fast track program to handle immigration prosecutions no later than 2003 (*United States v. Krukowski* 2005). Whereas the Eastern District's fast track approach encourages plea bargains by guaranteeing downward departures under the Federal Sentencing Guidelines, the other three California offices use a "charge bargaining" strategy that allows defendants who would otherwise be subject to

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<sup>1</sup> TRAC made the authors Fellows of the program in 2008, and provided written permission to publish any findings based on our analysis of TRAC data in August 2009.

prosecution under the more draconian 8 USC Sec. 1326 (Reentry of Removed Alien) to plead guilty to 8 USC 1325 (Improper Entry by Alien) (McClellan and Sands 2006). Because the precise dates of when the Northern and Eastern Districts adopted this program are unknown, we cannot reliably integrate the presence of the fast track program into our multivariate analysis. We do, however, offer anecdotal analysis about the effect of fast track programs where appropriate.

Additional background data were collected by the authors and merged with the TRAC dataset. These include the *number of full time employee hours worked* in each district office, to control for the fact that district offices have different numbers of employees and thus have greater or fewer resources available to support prosecutions. Details of hours worked in district offices were drawn from the annual reports of the Executive Office for United States Attorneys (USDOJ). Using multivariate analysis, we were able to consider various predictors of *whether a matter was prosecuted* for all matters during this time period.

Our measures of centralizing influences included several markers of changes in US policy toward immigrants in the last decade. The first of these was a shift in perceptions of immigrants in the wake of the September 11th, 2001 attacks on the World Trade Center in New York City. As a result, we included a dummy variable indicating whether the disposition date was *after September 11th, 2001*. We also controlled for the identity of the *US Attorney General* (Reno, Ashcroft, or Gonzalez). Assuming that a USAG's priorities may change over time, we measured the *extent of references to immigration in speeches* of each of these Attorneys General over the course of a year, taken from transcripts of their complete speeches archived by the US Department of Justice. This variable was lagged by 1 year to reflect the expectation that a series of references would have to be made over time before prosecutors necessarily understood that a change in their behavior was expected. Finally, we included a measure for the annual national average *unemployment rate* for the civilian population 16 years of age and older drawn from the US Bureau of Labor Statistics (US Department of Labor 2008).

Our measures of decentralizing influences focused on unemployment and public opinion. Our measure of the *local unemployment rate* was drawn from the US Bureau of Labor Statistics for each region of California. Our measure of *public opinion regarding immigration* was drawn from statistics reported by the California Field Poll, which surveys residents of the state approximately annually regarding the extent of their concern about illegal immigration. The percentage of people reporting that they were "extremely concerned" constituted our measure in each district. We considered survey responses as representative during the year of each survey and updated our measures with each subsequent statewide poll. The survey archive at the University of California, Berkeley (UC DATA) broke out survey results by region, defining each region to correspond to the federal judicial districts.



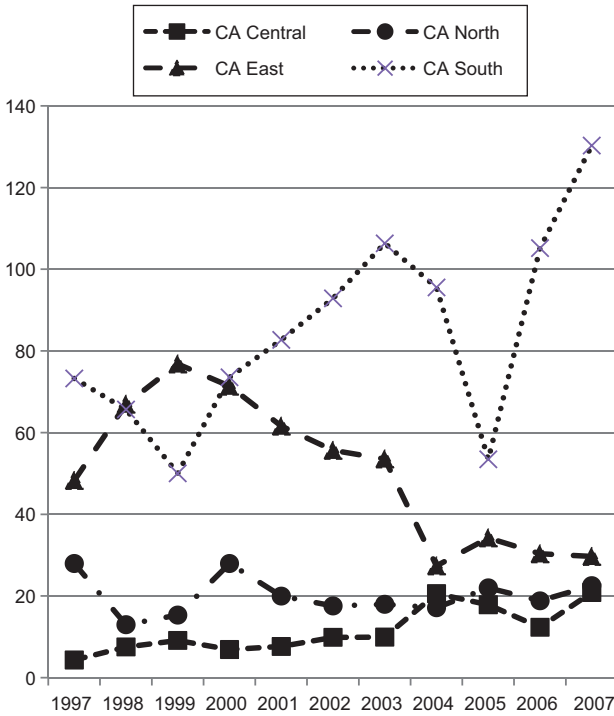
Finally, we classified the nature of the charges made to control for the possibility of different types of charges at different offices, which could have influenced prosecution rates. When federal prosecutors are first referred a matter for consideration, they must classify that matter according to the most serious chargeable offense, known as a “lead charge.” TRAC provided us with the lead charge information for each matter in our dataset. We classified these by the nature of the charge (e.g., improper entry by alien, forgery or fraudulent use of a passport, assaulting an officer, harboring an illegal alien). Ultimately we divided all lead charges into six categories: (1) *charges against the alien*, (2) *charges of harboring aliens*, (3) *fraud-based claims*, (4) *assaulting or resisting officers*, (5) *detention of material witnesses*, and (6) a residual *other* category. Our assignment of charges to each category, based on the US Code, is provided in the Appendix.

Our results combine descriptive and analytical methods. We plotted the number of matters considered and prosecution rates in each district, controlling for the hours worked in each office. In addition, we considered hypothesized predictors for the decision to prosecute in each district office.

## 4 Results

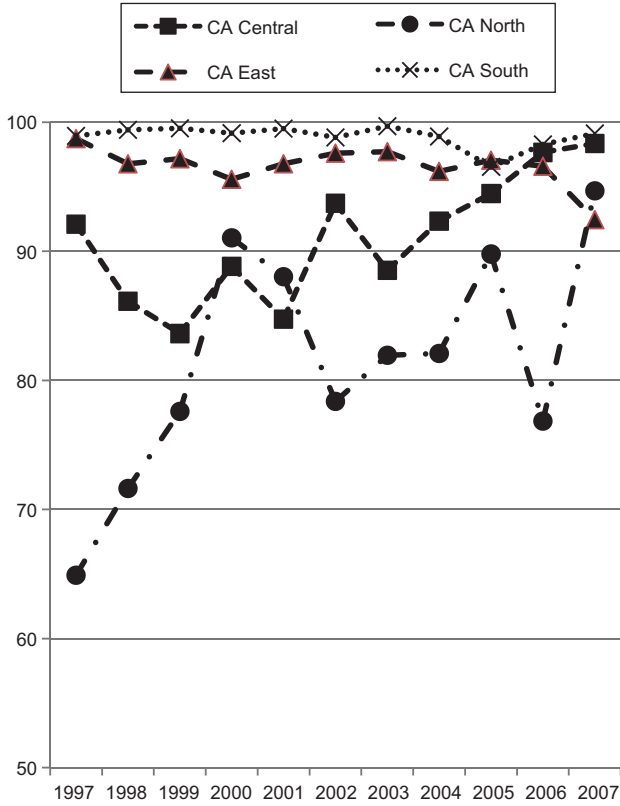
We first sought to identify whether the regional offices in California placed different emphasis on immigration prosecutions. To identify any differences in immigration caseloads across regional offices, we reviewed descriptive data regarding the number of immigration matters referred to federal prosecutors in each region. We controlled for the number of hours worked in each office to account for different staffing levels. The results, provided in Figure 1, reveal that immigration referrals are greatest in the California South office, which is based in San Diego and covers the US border with Mexico. Except for a pronounced drop between 2003 and 2005, immigration referrals from investigative agencies such as ICE and the FBI increased steadily in this office from 1999 to 2007. In contrast, immigration referrals in the California East office (covering the Central Valley, where much of California agriculture is based) decreased steadily over the same time period. In the California Central (Los Angeles) and California North (San Francisco) offices, the increases in immigration caseloads were relatively small. Overall, investigative referrals for immigration offenses vary substantially by office.

While differences in referral rates may speak to the underlying incidence of crime, or the discretionary activities of criminal investigators in choosing what to investigate, they serve as a baseline from which to evaluate prosecutorial discretion. For example, the California South office based in San Diego could be referred



**Figure 1:** Matters Referred (per 1000 h) Over Time Differed by District. Source: Data collected by TRAC and the authors.

more matters yet prosecute fewer, because its border location means that it deals with less serious cases that are not worth prosecuting. Conversely, it might be the case that the California North and California Central offices are referred comparatively fewer cases, but prosecute almost all of them. In reality, the percentage of immigration matters prosecuted is very high overall; our TRAC data indicate that 96.5% of immigration matters ultimately are prosecuted, consistent with expectations of centralization. Of these prosecutions, 86% result in pleas. Yet the percentage of matters prosecuted does in fact vary substantially by district. We show the percentage of immigration matters prosecuted in each region in Figure 2. The offices with the lowest caseload, California Central (Los Angeles) and California North (San Francisco), are also the offices *least likely* to prosecute, and their prosecution rates vary substantially over time. By contrast, prosecutors in the California South (San Diego) office, who received the most referrals, consistently prosecuted nearly every immigration matter referred to them between 1997 and 2007. We conclude from these data that the regional offices have significant discretion in their decisions to prosecute, and that each office makes different decisions.



**Figure 2:** Percentage of Immigration Matters Prosecuted Differed by District. Source: Data collected by TRAC and the authors.

Results are mixed in assessing the presence of “fast track” programs. California South had fast track throughout our study, though the office’s extremely high prosecution rate itself likely explains the program’s presence. California Central adopted fast track around 2001, and the program coincided with a slightly higher rate of prosecution. Both California North and California East had fast track at least since 2003, with no consistent observable impacts in either office.

In addition to examining overall prosecution rates, we also analyzed each office’s prosecution rates across lead charge area. Results are offered in Table 2. Some types of immigration offenses, such as harboring or fraud claims, are more resource intensive than most garden-variety claims of illegal entry. Although there is no objectively correct balance – does one prosecute a greater number of easy cases or fewer resource intensive cases – decisions to pursue more challenging cases have sometimes come under scrutiny, as was the case with Carol

**Table 2:** Percentage of Matters Prosecuted, by District and Lead Charge.

|          | Resisting |           |       |        |           |       |
|----------|-----------|-----------|-------|--------|-----------|-------|
|          | Entry     | Harboring | Fraud | Arrest | Detention | Other |
| Central  | 88%       | 92%       | 81%   | 100%   | N/A       | 98%   |
| Eastern  | 98%       | 73%       | 87%   | 100%   | 100%      | 98%   |
| Northern | 85%       | 54%       | 63%   | N/A    | 100%      | 56%   |
| Southern | 99%       | 97%       | 99%   | 100%   | 100%      | 99%   |

Lam, the US attorney for the Southern District of California (Office of the Inspector General 2008). In fact, California South prosecuted almost every type of claim in every lead charge area, and was more aggressive in prosecuting entry cases, as well as the more complex harboring and fraud cases, than any other office. Not surprisingly, California North was less likely to prosecute in almost every lead charge area, and had dramatically lower rates for prosecuting harboring offenses. Every office prosecuted detention and resisting arrest referrals, though the absolute numbers of such matters were extremely small.

To better identify the relationship between centralizing and decentralizing variables that influence prosecutorial discretion in immigration matters, we investigated the decision to prosecute using multivariate analysis. We estimated relative weights using a hierarchical linear model, with the variables proposed as predictors of prosecutorial behavior estimated as fixed effects. Our primary interest was in the role of local discretion, so our measure of district was included as a random effect, allowing us to predict prosecution rates for each district. Our dependent variable was the decision to prosecute an immigration matter, and the results are provided in Table 3.

Nearly all of the variables we considered were significant. As we had expected, immigration matters after September 11th, 2001 were significantly more likely to be prosecuted. Immigration prosecutions were also significantly less likely under Attorney General Gonzalez than under Reno and significantly more likely under Ashcroft, independent of the post-September 11th effect. Speeches made by US Attorney Generals emphasizing the problem of illegal immigration, which we lagged by 1 year to allow time for them to affect prosecutorial behavior, were positively correlated with the decision to prosecute. This finding suggests that federal prosecutors are responsive to the publicly-stated priorities of the Attorney General. As we also anticipated, the nature of lead charge was significantly correlated with the likelihood of prosecution, demonstrating that prosecutors make distinctions between different types of immigration offenses.

Contrary to our initial expectations, prosecutions decreased as national and local unemployment rates increased. It is possible that the negative social effects

**Table 3:** Total Prosecution Rates were Affected by both Centralizing and Local Factors.

|   | Coefficient | S.E.  |    |
|---|-------------|-------|----|
| Fixed effects                                 |             |       |    |
| Intercept                                     | 0.970       | 0.050 | ** |
| After September 11, 2001                      | 0.023       | 0.007 | ** |
| Ashcroft (relative to Reno)                   | 0.018       | 0.005 | ** |
| Gonzalez (relative to Reno)                   | -0.018      | 0.005 | ** |
| Speeches (lagged)                             | 0.371       | 0.082 | ** |
| Unemployment rate (national)                  | -1.661      | 0.568 | ** |
| Unemployment rate (district)                  | -1.594      | 0.280 | ** |
| Percentage “extremely concerned” (district)   | 0.033       | 0.019 |    |
| Hours worked in district (in 1000s)           | -0.002      | 0.000 | ** |
| Charge made against alien                     | 0.121       | 0.010 | ** |
| Charge of harboring alien                     | 0.103       | 0.010 | ** |
| Fraud-based claim                             | 0.094       | 0.010 | ** |
| Assaulting or resisting officer               | 0.133       | 0.038 | ** |
| Detention of material witness                 | 0.131       | 0.018 | ** |
| Random effects (district)                     |             |       |    |
| Intercept                                     | 0.008       | 0.007 |    |
| Residual                                      | 0.031       | 0.000 |    |
| N   | 38,011      |       |    |
| Number of groups                              | 4           |       |    |
| Fitted predicted probabilities of prosecution |             |       |    |
| California Central                            | 91%         |       |    |
| California East                               | 97%         |       |    |
| California North                              | 81%         |       |    |
| California South                              | 99%         |       |    |

\*\* p<0.01.

Source: Data collected by TRAC and the authors.

of higher unemployment, in the form of increased crimes such as drug dealing, bank robbery and the like, may have redirected the attention of prosecutors. In addition, as the number of office hours increased, prosecutions declined. We suspect that this dynamic is due to the increased hiring of assistant US attorneys in other areas of criminal prosecution, such as drug and weapons offenses.<sup>2</sup>

<sup>2</sup> The Department of Justice often can choose where to place new assistant US attorneys, but sometimes congress adopts a strategy of “targeted funding.” Under this strategy, when congress passes a new anti-crime bill, it will allocate money in that bill for assistant US attorneys who may only prosecute that type of crime. This strategy was used in the Violent Crime Control Act of 1994. Similarly, congress sometimes specifies the area of practice for new assistants in the Department’s annual funding itself, as was done with Project Exile funding in the Department’s Fiscal Year 1999 appropriations. Any expansion of assistant US attorneys in other criminal areas would drive down the office-hours-to-immigration-prosecution ratio.

Most important, however, is the fact that measures of local public concern about illegal immigration at the district level were *uncorrelated* with prosecution rates. There are many ways to measure political and cultural preferences of course, and the lack of prosecutorial responsiveness here does not necessarily mean that federal prosecutors are unresponsive to other types of local political pressure besides public opinion. And although public policy scholars might expect such outcomes, the lack of relationship between public attitudes on illegal immigration and the willingness of US attorneys to take those attitudes into account is puzzling and problematic for those scholars who study prosecutorial discretion.

Immigration offenses overwhelmingly lead to prosecution by US attorneys, a finding that makes sense given the uniquely federal nature of these crimes. Nonetheless, our data reveal that California district offices differed substantially in the extent to which they prosecuted immigration matters referred to them. Even though these crimes now constitute a majority of the federal criminal caseload, and even though US attorneys were responsive to the publicly-stated priorities of their Attorneys General, the predicted probabilities of prosecution varied from 81% to 99% depending on the US attorney's office. Strangely, this variance cannot be explained by reference to local public attitudes about illegal immigrants.

## 5 Discussion

In order to analyze the tension between localized and centralized influences on prosecutorial decision-making, we focused on an area of law – immigration prosecution – where we expected a high degree of similarity between US attorneys' offices. We also limited our analysis to a single border state with multiple US attorneys' offices located in regions with significantly different political culture. This approach has limitations, of course. Because our research was designed around a case where we hypothesized that local concerns were least likely to influence federal prosecutors, we cannot estimate an upper bound of localized influence on other issues and in other states. As expected, a number of centralizing characteristics common across all district offices, including the effects of the September 11th, 2001 terrorist attacks and the attention paid by USAGs to the issue, were significantly correlated with the decision to prosecute. However, regional offices were in fact influenced by district effects. Even where one might least expect to see it, localized influence on prosecutorial discretion matters to some degree, and three dynamics of this relationship merit particular attention.

The first point concerns the relationship between economic conditions and immigration policy enforcement. Contrary to expectations, unemployment

rates were negatively correlated with the decision to prosecute an immigration offense. Why might this be? Insofar as rising unemployment often results in increased criminal behavior (Freeman 1996; Gould et al. 2002; Machin and Meghir 2004), federal prosecutors may find themselves confronted with other types of serious crimes that merit attention – from bank robbery to embezzlement to weapons violations – encouraging prosecutors to decline less serious criminal immigration referrals in favor of federal administrative deportation proceedings. The only official recession during the period of our study occurred in fiscal years 2001–2002, during which time federal prosecutors did expand their focus on drugs and weapons prosecutions.<sup>3</sup> Conversely, it may be that political elites such as federal prosecutors conceptualize the relationship between economic conditions and undocumented workers differently due to the white-collar status of their jobs, and behave accordingly. Federal prosecutors may not view the presence of undocumented immigrants as being related to either national or local trends in unemployment rates. This tendency for white-collar workers to eschew economic nativism finds support in the literature (Huber and Espenshade 1997; Borjas 1999). Finally, it also is possible that our findings are an artifact of limiting our study to a single state, and cannot be generalized. Further research is warranted on this issue, as it is possible that the relationship between higher unemployment rates and immigration prosecutions would be stronger in areas of the country with relatively low proportions of racial minorities who are citizens, such as the Midwest. It may be easier to make political choices based on economic nativist motivations in regions with a nearly all-white citizenry, rather than more diverse communities such as those in California.

The second important finding concerns the relationship between local offices and referring agencies. The relationship between US attorneys and investigative agencies is complex, with each actor enjoying resources that can be used to influence the behavior of the other (Eisenstein 1978; Richman 2003). Even though federal prosecutors have the ability to decline agency referrals, it is possible that district variation is due partly to the behavior of investigative agencies – a “supply-side” dynamic in which prosecutors prosecute whatever FBI agents refer them. If this were true, district variance may have less to do with the discretionary decisions of prosecutors, and more with the discretionary decisions of investigative

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<sup>3</sup> In fiscal year 1997, federal prosecutors nationally prosecuted 3789 weapons offenses; this number increased consistently until reaching a peak of 11,015 in fiscal year 2004 before declining to 8919 in fiscal year 2007. In fiscal year 1997 there were 26,945 drug prosecutions nationally, which plateaued around 33,000 for fiscal years 2001–2004, before decreasing to 27,353 in fiscal year 2007 (TRAC 2012).

agents. One would expect to see this dynamic particularly in the types of offense categories, such as immigration violations, that do not require coordinated and complex discovery or sting operations. We found little evidence of this supply-side dynamic, at least with regard to immigration referrals themselves. Consider the California South and East offices. Even during the sizeable drop in immigration referrals to the California South office between 2003 and 2005, or the more extended decrease in referrals to the California East office between 1999 and 2004, prosecution rates remained largely unchanged. It is not the case that investigative agencies could pull back the frequency of immigration referrals and thereby alter the behavior of federal prosecutors. Rather, it appears that the California South and East offices had a generalized policy, independent of the influence of individual US attorneys or the rate of agency referral, that immigration referrals would always be prosecuted. Also, prosecutors in the California North office did not appear to have their decision making affected by this supply-side influence – numbers of agency referrals were fairly steady over time, whereas prosecution rates for immigration offenses showed the most variance of any office.

It is possible, of course, that agency referrals in *non-immigration* criminal categories could affect the prosecution of immigration matters. Politically powerful agencies such as the FBI might be able to shape office agendas by referring either a huge volume of routine drug and weapons offense claims, or by referring a smaller number of investigations that require significant office resources to prosecute. Although almost certainly true in other areas, we are unsure of how significant this “crowd-out” effect would be in affecting immigration caseloads, for two reasons. First, the crowd-out effect would be greatest when an agency with jurisdiction over a wide variety of criminal conduct elects to change the nature of its own referrals. If the FBI stopped referring bank robberies and increased obscenity referrals, an office’s prosecution rates would have to be affected. But many immigration matters are referred by ICE, which, while it might change the types of immigration matters it refers, will not realistically stop all immigration referrals. Second, a crowd-out effect due to the referral of resource-intensive matters likely will result in a concomitant reduction in other types of prosecutions – but most likely those types of matters that federal prosecutors can decline for stateside prosecution. This strategy is not possible with immigration offenses, so we suspect that these offenses are less likely to be crowded out than drug or weapons cases. Still, this is speculation on our part. Future research might examine whether this supply-side dynamic occurs in these offices for other types of prosecutions, such as drugs and weapons violations, as well as for less common types of prosecutions such as those involving regulatory offenses.



The final and most important facet of our findings relates to how we think about and measure localized influences on federal prosecutorial discretion. The California North office located in San Francisco was least likely to pursue immigration offenses, just as the California South office was most likely to pursue them – a finding that maps intuitively with each district’s respective political culture. Yet the decision to prosecute immigration offenses was uncorrelated with local public attitudes about illegal immigrants. This finding likely comes as no surprise to scholars who study the relationship between public opinion and immigration policy. Both in comparative political studies (Freeman and Birrell 2001; Howard 2009) and American political studies (Citrin et al. 1990), researchers consistently have noted the gap between popular (often nativist) opinion on immigration matters and the actual policies implemented by elites in the US and other countries.

The lack of relationship between local public attitudes and prosecutorial behavior is, however, problematic and puzzling for those who study federal prosecutors. It is problematic because the entire institutional framework of federal prosecution is premised on the normative assumption that US attorneys should be and will be responsive to their local communities. Unlike most countries to which one would compare the United States (the UK, Germany, France, Japan, etc.), our federal prosecutorial system is decentralized, with the Department of Justice historically exercising comparatively little influence on US attorneys. This local responsiveness is purchased at the expense of other political values, such as the uniform national application of federal law. Certainly, scholars have documented recent effects of centralized presidential and Department influence (Lochner 2002; Whitford and Yates 2003). And given that U.S. attorneys frequently have political ambition (Perry Jr. 1999), our finding may reflect these attorneys’ expectations about who will influence their electoral fortunes. But if it is not the case that local citizen attitudes affect prosecutorial prioritization in immigration matters, one is left to wonder what other types of prosecutions are also unaffected by popular opinion—and whether federal prosecutors are far less influenced by localized influence than many presently assume.

Perhaps, however, prosecutors’ lack of responsiveness to local popular opinion is less a wholesale indictment of the decentralized system of federal prosecution, and more a puzzling issue of how we should go about measuring and understanding localized influence. This alternative explanation would note the variance between the California North and California South offices in terms of prosecution rates, and argue that federal prosecutors do in fact respond to local political and cultural influences, just not influences that are

manifested in popular opinion polls. That is, US attorneys who are politically ambitious may seek to impress local political elites, such as members of Congress, mayors, governors and local party leaders, rather than local voters. If true, one of two dynamics could be occurring. First, maybe localized citizen opinion may work by proxy via these local elites, similar to the common cue theory in voting. Second, maybe citizen opinion simply does not itself matter to federal prosecutors, who only care about the preferences of local political elites. Whatever the case, researchers need to find more subtle and more systematic ways of measuring different types of local influence on federal prosecutors. Further research could illuminate the linkages between prosecutorial ambitions and localized norms and politics by determining: (1) the relationship between local attitudes and immigration prosecution in other states, particularly those with a smaller percentage of racial minority voters, (2) the relationship between local attitudes and prosecutions in other policy areas (e.g., drug offenses, white collar crime, etc.) in California, and (3) the relationship between a US attorney's priorities and those of local political leaders across a variety of policy areas.

Although the question of to whom federal prosecutors should be accountable is a normative one, researchers should continue empirical investigations into how US attorneys' offices actually function. Federal prosecutorial institutions, and the lawyers who staff them, are subjected to both centralizing and decentralizing forces of influence. Our research indicates that while centralizing forces are critical in structuring decision making in US attorneys' offices, local forces of influence play a significant role as well, even in an issue area such as immigration where Department of Justice priorities would be expected to swamp local influences. Our focus on a single state, California, should have made it even less likely to find local discretion exercised, and our findings therefore suggest the lowest level of prosecutorial discretion that could be expected in any state or office. Local forces do not affect all offices similarly, however, even within a single state. To the extent that local political concerns drive US attorney behavior, it does not appear that US attorneys respond to local public opinion in immigration matters. A better understanding of how these forces influence decision making could increase the understanding of how federal prosecutors are made politically accountable for their decisions, and provide insight into the politics of immigration policy.

## 6 Appendix. Lead Charge Categories for Immigration Offenses

1. Charges against alien
  - 08 U.S. Code 1325 Improper entry by alien
  - 08 U.S. Code 1326 Reentry of removed alien
2. Charges against those who harbor aliens
  - 08 U.S. Code 1324 Harboring illegal aliens
3. Fraud-based claims
  - 18 U.S. Code 0371 Conspiracy to defraud the United States
  - 18 U.S. Code 1542 False statement in application and use of passport
  - 18 U.S. Code 1543 Forgery or false use of passport
  - 18 U.S. Code 1544 Misuse of passport
  - 18 U.S. Code 1546 Fraud and misuse of visas
  - 18 U.S. Code 1001 False statements in government matter
  - 18 U.S. Code 1028 Production or possession of false documents
  - 18 U.S. Code 0911 False representation of citizenship
4. Assaulting, resisting, or impeding officers (18 U.S. Code 0111)
5. Detention of material witness (18 U.S. Code 3144)
6. Other (everything else)

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