

AGAINST BEING AGAINST THE REVOLVING DOOR

*David Zaring**

The revolving door between jobs in the public and private sector supposedly incentivizes government regulators to regulate on behalf of the industry interests for whom they will eventually work. It is a critical building block of the critique of government solutions to modern problems, and has, in the last two years, been the subject of one of the Obama administration's first executive orders, made an appearance in financial regulatory reform legislation, and been blamed for the government's failure to prevent the Gulf oil spill.

But the revolving door's explanatory power is remarkably overstated, especially when the subject is law enforcement. Most government officials have plenty of reasons to do a good job, and sometimes a successful stint in the public sector enhances private sector earning potential, to say nothing of more immediate civil service prospects. The revolving door may also foster citizen participation in government. A study of the careers of a tranche of elite Manhattan prosecutors does not reveal any evidence of those who leave doing the bidding of those they regulate while in public service.

Moreover, as a legal matter, eliminating the revolving door would raise serious legal and even constitutional questions. The revolving door has become an overused shorthand for—at its worst—a toxic cynicism about government. It is time to deeply qualify the critique.

* Assistant Professor of Legal Studies and Business Ethics, The Wharton School of the University of Pennsylvania. Thanks to Stephanos Bibas, Amanda Frost, Bill Henderson, Amanda Leiter, Daniel Richman, Richard Shell, Robert Tsai, Chuck Wesselberg, and Kevin Werbach for comments, to Laura Kaufman, Olivia Jung, Anita Mukherjee, and Justin Simard for research assistance, and to the Dean's Research Fund at Wharton for support. The Article has benefited from presentations at the Academy of Legal Studies in Business, American University, Catholic University, and Wharton.

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“Bringing down a governor or another high-profile defendant is one of those career-defining moments for prosecutors and usually hastens their exit from public service.”¹

INTRODUCTION

It is an article of faith among many that government employees are motivated by the prospect of future employment in the private sector—particularly in the sector that they regulate. This revolving door, moreover, is supposed to be one of the most corrupting features of government service, and has been a capstone of the case against the regulatory enterprise by both libertarians generally opposed to government and progressives hoping to make it better.²

You could say about many bureaucracies, civil and criminal, what Professor John Coffee has said about one of them: “The revolving door is such a dominant fact about the S.E.C.’s culture You get people who go to Washington for one to three years and then go back to Wall

1. Ameet Sachdev, *Blagojevich Prosecutor to Step Down*, CHI. TRIB., Jan. 27, 2012, at 4.

2. See David Zaring, *Regulating by Repute*, 110 MICH. L. REV. 1003 (2012) (reviewing DANIEL CARPENTER, *REPUTATION AND POWER: ORGANIZATIONAL IMAGE AND PHARMACEUTICAL REGULATION AT THE FDA* (2010)).

Street.”³ This is viewed, moreover, as a bad thing. The revolving door has been blamed for the Securities and Exchange Commission’s (SEC) failure to catch Ponzi schemers such as Bernard Madoff and R. Allen Stanford, both of whom were represented by former SEC officials while they carried out their frauds.⁴ It has been cited as one of the reasons why oil regulators failed to prevent the Gulf oil spill,⁵ and why financial regulators were blinded to the risks taken by the financial institutions they oversaw.⁶ And the list of other government failures attributed to it is long.⁷

Responding to the revolving door as almost a definition of the sort of principal-agent problem that has animated many legal fields, is one of those challenges that provides the foundations for whole edifices of administrative law, criminal procedure, and professional responsibility.⁸ And so administrative law has created structures designed to mitigate the fact that the door revolves, such as through its rules about openness, ex parte communications, and bias.⁹ Criminal procedure has created a vari-

3. Andrew Ross Sorkin, *Revolving Door at S.E.C. Is Hurdle to Crisis Cleanup*, N.Y. TIMES DEALBOOK (Aug. 1, 2011, 9:54 PM), <http://dealbook.nytimes.com/2011/08/01/revolving-door-at-s-e-c-is-hurdle-to-crisis-cleanup/>.

4. David S. Hilzenrath, *Ex-SEC Official Fined for Ethics Violations*, WASH. POST, Jan. 14, 2012, at A12 (describing the charges brought against a former SEC official for “going through the revolving door and working for alleged Ponzi scheme mastermind Robert Allen Stanford after purportedly taking part in SEC decisions to not investigate Stanford”); see Peter J. Henning, *S.E.C.’s Revolving Door Draws More Scrutiny*, N.Y. TIMES DEALBOOK (June 18, 2010, 12:03 PM), <http://dealbook.nytimes.com/2010/06/18/s-e-c-s-revolving-door-draws-more-scrutiny/>. The revolving door is also blamed in part for a critique of the agency, suggesting that it enforces inequitably. See, e.g., Stavros Gadinis, *The SEC and the Financial Industry: Evidence from Enforcement Against Broker-Dealers*, 67 BUS. LAW. 679, 728 (2012) (arguing that the SEC’s enforcement decisions are affected by the size of the defendant, with bigger firms doing better).

5. Dan Eggen & Kimberly Kindy, *Most in Oil, Gas Lobbies Worked for Government*, WASH. POST, July 22, 2010, at A1; Editorial, *Round Up the Usual Lobbyists*, N.Y. TIMES, July 26, 2010, at A22 (“Three out of four lobbyists working for the oil and gas industry—a total of 432—arrived by way of Washington’s golden revolving door . . . They operate as special-interest pleaders with deep past experience as legislators, staffers and executive appointees who are better paid in the fields where they lobby.”).

6. See, e.g., SIMON JOHNSON & JAMES KWAK, 13 BANKERS: THE WALL STREET TAKEOVER AND THE NEXT FINANCIAL MELTDOWN 93–94 (2011) (listing the chief government policymakers preceding the financial crisis who were former Wall Street executives); Ctr. for Responsive Politics, *Report: Revolving Door Spins Quickly Between Congress, Wall Street*, OPENSECRETS.ORG (June 3, 2010, 6:00 AM), <http://opensecrets.org/news/2010/06/report-revolving-door-spins-quickly.html>.

7. See *infra* Part III.A.

8. In some ways, although one would not want to push the analogy too far, the revolving door is the counter-majoritarian difficulty of these fields—the impossible-to-eliminate basis for many an organizing theory of constitutional law. The seminal counter-majoritarian thesis is set forth in ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16–17 (1962) (“[J]udicial review is a counter-majoritarian force in our system . . . [W]hen the Supreme Court declares unconstitutional a legislative act . . . it thwarts the will of representatives of the actual people of the here and now . . .”). Barry Friedman has described it as an “academic obsession.” See Barry Friedman, *The Birth of an Academic Obsession: The History of the Counter-majoritarian Difficulty, Part Five*, 112 YALE L.J. 153 (2002). And, as Corinna Lain has observed, “Alexander Bickel coined the term almost fifty years ago, and scholars have not been able to stop talking about it since.” Corinna Barrett Lain, *The Unexceptionalism of “Evolving Standards”*, 57 UCLA L. REV. 365, 415 (2009).

9. One of the titans of early administrative law, Louis Brandeis, made this sort of link. LOUIS

ety of checks within the jurisprudence of the Fourth Amendment to deal with similar worries about prosecutors.¹⁰ And professional responsibility has developed its own set of doctrines meant to ensure that the revolving door does not preclude lawyers from zealously representing their clients.¹¹

Revolving door regulation has been as longstanding as it has been widespread. New Dealers such as Felix Frankfurter, James Landis, and Senator Paul Douglas (D-IL) decried the phenomenon—Douglas feared that officials who went through the door would make “final decisions [that] are, therefore, made in response to [] private friendships and loyalties rather than to the public good.”¹² Other critics of the regulatory state have alighted on the revolving door as a principal reason why it is usually “captured,” or beholden to, the industries that it regulates—George Stigler won the Nobel Prize in Economics in 1982 in part for his work on the argument.¹³

Congress, the White House, and the Supreme Court all have enacted rules to slow the revolving door, although they have never stopped it from turning at all.¹⁴ And whenever disaster happens—be it a devastat-

D. BRANDEIS, OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT 92 (Norman Hapgood ed., Frederick A. Stokes Co. 1914) (1913) (“Sunlight is said to be the best of disinfectants . . .”).

10. Among contemporary criminal procedure scholars, Rachel Barkow has been particularly worried about this issue. Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869, 871 (2009) (“In a government whose hallmark is supposed to be the separation of powers, federal prosecutors are a glaring and dangerous exception.”).

11. See, e.g., Catherine J. Lanctot, *The Duty of Zealous Advocacy and the Ethics of the Federal Government Lawyer: The Three Hardest Questions*, 64 S. CAL. L. REV. 951, 959 (1991) (“[T]he primary conflict is between the lawyer’s duty of zealous representation and the lawyer’s duties to the judicial system and to third parties.”); see also Note, *Rethinking the Professional Responsibilities of Federal Agency Lawyers*, 115 HARV. L. REV. 1170, 1173 (2002) (“[T]he ‘agency loyalty’ approach[] basically follows the dominant model in that it sharply limits the realm in which the lawyer may permissibly attempt to exert influence over the client.”).

12. Archibald Cox, Dollars and Democracy, Address at the Paul H. Douglas Ethics in Government Awards (Nov. 3, 1995), in ILL. ISSUES, Jan. 1996, at 23, available at <http://www.lib.niu.edu/1996/ii960122.html> (quoting Senator Douglas). Progressive Senator Burton Wheeler (D-MT) agreed, observing that “[i]t is an extremely bad practice, to say the least, for a man to step out of the Federal Radio Commission and then go before it and appear for private clients,” as Georgetown’s Daniel Ernst has recounted. Daniel R. Ernst, *The Revolving Door at the SEC*, HISTORY NEWS NETWORK (June 20, 2010, 4:14 PM), <http://www.hnn.us/articles/128107.html> (describing correspondence between Landis and Frankfurter related to whether the SEC ought to adopt the revolving door rules enacted by the Federal Communications Commission).

13. For information about Stigler’s Nobel Prize, see George J. Stigler, *Autobiography* (1982), NOBELPRIZE.ORG, http://nobelprize.org/nobel_prizes/economics/laureates/1982/stigler-bio.html (last visited Feb. 7, 2013). The most cited article articulating his work in this area is George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3 (1971) [hereinafter Stigler, *Economic Regulation*]. But others associated with the theory include MARVER H. BERNSTEIN, REGULATING BUSINESS BY INDEPENDENT COMMISSION (1955); see also Peter H. Shuck, *The Politics of Regulation*, 90 YALE L.J. 702, 707–10 (1981) (reviewing THE POLITICS OF REGULATION (James Q. Wilson ed., 1980)). But see PRESIDENT’S COMM’N ON FED. ETHICS LAW REFORM, TO SERVE WITH HONOR: REPORT AND RECOMMENDATIONS TO THE PRESIDENT 53 (1989) (acknowledging some benefits of revolving door); *infra* Parts III.E., V (discussing those benefits).

14. See *infra* Part III.B–C for discussions of congressional and executive efforts. The Supreme Court has enacted a concise rule limiting practice before it by those who had recently been in its employment. SUP. CT. R. 7.

ing oil spill or a crisis in the capital markets—the revolving door is trotted out as an indictment of the regulators responsible for the industry where it occurred.¹⁵ Indeed, *The New York Times* has created a “Revolving Door” tag for the stories in its business section reporting on the departure of government officials to the private sector.¹⁶

It would be naïve to argue that there is nothing to the revolving door critique. But all too often, the fact that government regulators leave their jobs for cognates in the private sector is presented as an unanswerable indictment of the regulatory process and a reason to blame government for problems created elsewhere.

In this Article, I argue that the revolving door’s harms are usually overstated, that the policy prescriptions usually derived from it are misguided, and that the benefits of the revolving door—and there are some—are overlooked. A more nuanced appreciation of how the revolving door works would recognize that the prospect of work in the private sector can improve performance in the public one. I offer evidence about the job histories of a cohort of elite prosecutors in the Southern District of New York (SDNY), for whom the revolving door revolves quickly and lucratively, to support the argument. I choose the Southern District because, in addition to being interesting in its own right, the revolving door would seem to be particularly worrisome when applied to lawyers charged with the power of imprisonment and the prospect of million-dollar paydays.¹⁷

Moreover, harsh regulation of the revolving door would pose serious constitutional problems and be inconsistent with the American embrace of the principle of free labor.¹⁸ Furthermore, the revolving door offers some advantages. It may improve the caliber of applicants for government jobs, for example, and it may incentivize them to perform

15. See *infra* notes 30–32 and accompanying text for a discussion of the revolving door in the context of the most recent financial crisis and the oil spill in the Gulf of Mexico.

16. Recent *Times* real estate has been given to the departure of a Treasury Department counselor, Jake Siewert, to lead public relations at Goldman Sachs, and the resignation of the federal prosecutor, Christopher Garcia, who led the insider trading investigations in New York, to a large Manhattan law firm. Susanne Craig, *Goldman Hires a New P.R. Chief*, N.Y. TIMES DEALBOOK (Mar. 13, 2012, 2:50 PM), <http://dealbook.nytimes.com/2012/03/13/goldman-hires-a-new-p-r-chief/>; Peter Lattman, *Prosecutor in Insider Crackdown Leaving U.S. Attorney’s Office*, N.Y. TIMES DEALBOOK (Feb. 7, 2012, 6:13 PM), <http://dealbook.nytimes.com/2012/02/07/prosecutor-in-insider-crackdown-is-leaving-u-s-attorneys-office/> (“Christopher L. Garcia, a federal prosecutor who helped lead the government’s widespread crackdown of insider trading on Wall Street, is leaving the Justice Department for the private sector.”). The *Times*’ revolving door coverage may be found at <http://dealbook.nytimes.com/category/series/revolving-door/>.

17. For discussion of the revolving door as applied to attorneys, see Sarah Ribstein, Note, *A Question of Costs: Considering Pressure on White-Collar Criminal Defendants*, 58 DUKE L.J. 857, 885 (2009) (“The public approval of successful prosecutions of corporate crime means that prosecutors often go through the ‘revolving door’ into lucrative private-practice careers.”); see also Brooke Parker, Comment, *Dangers of the “Revolving Door”: Disqualification of Attorneys Because of Prior Government Public Service*, 22 J. LEGAL PROF. 317 (1998) (offering general discussion of revolving door conflicts of interest).

18. See *infra* Part III.E.

well in their jobs to show off to future employers.¹⁹ It can salt the private sector with government alumni who have come to expect compliance with government requirements. And there are democratic reasons to embrace a regular rotation of citizens through government positions.²⁰

Part I describes the case made against the revolving door. Part II responds to the case by adumbrating the frequently overlooked reasons why the revolving door may either benefit or at least not harm government enterprises. Part III reviews some of the government's efforts to control the revolving door. The theme here is that one reason why government efforts to do something about the revolving door have failed—and none of the recently passed anti-revolving door legislation has substantially diminished the phenomenon—is structural, because of deep philosophical and legal protections of free labor in this country, including the labor provided by those who choose to take or leave government employment.

Part IV shows how the revolving door has affected prosecutors in the SDNY, the lawyers who ought to be quite corruptible, given that so many of them go on to private practice, but in fact reveal no such corruption. This empirical portion of this Article does not purport to establish a causal link between public sector performance and private sector lucre, but uncovered no evidence in support of the revolving door story positing rewards for lax regulation, and thus suggests that that story needs reconsideration. Moreover, for those interested simply in the way that elite public service relates to private sector gain, the career paths of these prosecutors are undeniably engaging. Part V argues that we should make peace with the revolving door because it offers some real benefits, in addition to the more modest story about its problems presented here. This Article then briefly concludes.

I. THE REVOLVING DOOR INDICTMENT

Before defending the revolving door, it is important to understand the criticism of it, which casts the exit from government service in quite extreme terms. The revolving door is essentially a bribe, paid through the prospect of lucrative future employment. The *quid pro quo* for the bribe is the promise to regulate lightly, or not at all.

Such undisguised venality might seem to be more the province of royal positions in early modern England (for officers in that government were essentially expected to use their positions to feather their own nests) rather than employees in the modern administrative state, with its civil service protections, sunshine provisions, and bureaucratic rationalization.²¹ But the revolving door remains a commonly told story about

19. See *infra* Part II.C.

20. See *infra* Part V.

21. See, e.g., JOHN OF SALISBURY, *POLICRATICUS: OF THE FRIVOLITIES OF COURTIER AND THE*

what is wrong with governance today.²² And it comes with powerful anecdotal certitude. The United States has had its share of secretaries of defense who leave office and join defense contractors, and senators who, after working on health care reform, become health care lobbyists upon leaving office.²³

And so, before critiquing it, the case for the revolving door should be made clearly. After all, the revolving door goes around and around for some of the most powerful government lawyers. Robert Khuzami, the most recent Director of the Division of Enforcement of the SEC, is an example. After clerking, and a stint at Cadwallader, Wickersham, & Taft, he prosecuted cases in the U.S. Attorney's Office in the SDNY for eleven years.²⁴ In 2002 he left to work for Deutsche Bank, serving as its Global Head of Litigation and Regulatory Investigations, and as General Counsel for the Americas.²⁵ He returned to government in 2009 when he was named the SEC's head of enforcement, which makes him the official who signs off on every enforcement action brought against financial intermediaries like Deutsche Bank.²⁶ And the future probably holds the prospect of a partnership in an elite law firm, as it has for the SEC's previous enforcement czars.²⁷

FOOTPRINTS OF PHILOSOPHERS 86–87 (Cary J. Nederman ed. & trans., 1990) (“But why is it that I protest about the venality of everything among courtiers when those things which cost nothing, such as the lack of some act, are subject to sale? . . . For indeed the tongues of lawyers are harmful unless, as it is customarily said, you bind them with cords of silver.”). For an academic discussion of officeholder venality in early modern England, see also David Stasavage, *Credible Commitment in Early Modern Europe: North and Weingast Revisited*, 18 J.L. ECON. & ORG. 155 (2002).

22. See *Developments in the Law: Conflicts of Interest in the Legal Profession*, 94 HARV. L. REV. 1244, 1428 (1981) (analyzing the phenomenon of “regulators one day, regulated the next, and regulators again the day after”). But see DANIEL CARPENTER, *REPUTATION AND POWER: ORGANIZATIONAL IMAGE AND PHARMACEUTICAL REGULATION AT THE FDA* (2010) (arguing that reputation motivates agency officials to perform their duties even against other incentives).

23. Christopher Lee, *Daschle Moving to K Street*, WASH. POST, Mar. 14, 2005, at A17 (“Former senator Thomas A. Daschle (D-S.D.), following a bipartisan path blazed by many prominent ex-members of Congress, has moved from Capitol Hill to K Street, joining Alston & Bird as a special adviser in the law firm’s legislative and public policy group.”); see Robert Bryce, *Cheney’s Multi-Million Dollar Revolving Door*, MOTHER JONES (Aug. 1, 2000, 11:00 PM), <http://www.motherjones.com/politics/2000/08/cheneys-multi-million-dollar-revolving-door> (“Between 1992 and 1999, the Pentagon paid BRS more than \$1.2 billion for its work in trouble spots around the globe. In May of 1999, the US Army Corps of Engineers re-enlisted the company’s help in the Balkans, giving it a new five-year contract worth \$731 million. To critics, this all adds up to classic revolving-door politics: Cheney’s work for Halliburton, they say, has allowed him to improperly profit off of actions he took and contacts he made while in government.”).

24. Ben Prosser, *Khuzami, S.E.C. Enforcement Chief Who Reinvigorated Unit, to Step Down*, N.Y. TIMES (Jan. 9, 2013), <http://dealbook.nytimes.com/2013/01/09/s-e-c-enforcement-chief-khuzami-steps-down/>; Press Release, Sec. & Exch. Comm’n, Robert Khuzami Named SEC Director of Enforcement (Feb. 19, 2009), available at <http://www.sec.gov/news/press/2009/2009-31.htm>.

25. *Id.*

26. See *id.*

27. Perhaps the previous two directors of enforcement, both of whom left the SEC to join large and prestigious law firms, may serve as examples. Linda Chatman Thomsen is now a partner at Davis Polk. *Linda Chatman Thomsen*, DAVIS POLK & WARDWELL LLP, <http://www.davispolk.com/lawyers/linda-thomsen/> (last visited Feb. 7, 2013). And before becoming the general counsel of JPMorgan Chase, Stephen M. Cutler left the SEC to become a partner at WilmerHale. Press Release, JPMorgan Chase & Co., Stephen M. Cutler to Become General Counsel of JPMorgan Chase (Dec. 12, 2006),

Nor is the SEC unique. A previous administration's Deputy General Counsel at the Environmental Protection Agency (EPA) in charge of enforcement from 2004–2006 now represents power company and petroleum refining industry groups as partner of a Washington, D.C. law firm (before that, he worked at another law firm, also representing potential polluters);²⁸ prior chiefs of enforcement at the EPA have also gone on to similar work at Washington law firms after leaving the agency.

These sorts of stories appear to make the bureaucracy look terribly conflicted. Moreover, career histories like those of SEC and EPA enforcement chiefs only constitute the tip of an iceberg of government entrance and exit. For lawyers in particular, government service tends to be part of a career, rather than all of it—and most of those who go into private practice do so in areas related to their government work.

Perhaps for this reason, Congress has taken up the problem of the revolving door again and again, even as it has been accused of being particularly susceptible to its charms.²⁹ The Dodd-Frank Wall Street Reform Act of 2010 provides for a study of whether the revolving door in the SEC led to the failure of oversight by that agency that contributed to the financial crisis.³⁰ Revolving door occurrences among financial regulators in the wake of the financial crisis have also been subjected to scrutiny.³¹ And blame for the Gulf oil spill has been leveled at the revolving door by both Congress and the media.³² The President and the courts have also gone on record decrying the revolving door, as we will see.³³

Legal scholars, for their part, have created an extensive literature positing revolving door corruptions in various aspects of the govern-

available at <http://investor.shareholder.com/jpmorganchase/releasedetail.cfm?releaseid=221763>.

28. *Chet M. Thompson*, CROWELL & MORING LLP, <http://www.crowell.com/Professionals/Chet-Thompson> (last visited Feb. 7, 2013); *Chet M. Thompson*, OPENSECRETS.ORG, http://www.opensecrets.org/revolving/rev_summary.php?id=74872 (last visited Feb. 7, 2013). Of course, this official, though an important one, is not alone. Open Secrets tracks, as of November 2012, 148 officials who have gone through the revolving door, many of whom had positions equally as prestigious. *See infra* note 51.

29. Editorial, *It's So Much Nicer on K Street*, N.Y. TIMES, June 6, 2008, at A20 (“More than 200 former members of Congress have crowded through the revolving door to lobby in recent years. More are lining up at the pay window. Congress's designated ethics monitors already are bending the rules to let incumbents job shop their private-sector value while still on the privileged elected perch.”).

30. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 968, 124 Stat. 1376, 1914 (2010).

31. Henning, *supra* note 4; *see* Franklin A. Gevurtz, *The Role of Corporate Law in Preventing a Financial Crisis: Reflections on In re Citigroup Inc. Shareholder Derivative Litigation*, 23 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 113, 153–54 (2010) (“Specifically, banking and other regulatory regimes are subject to industry capture resulting, among other factors, from the revolving door phenomenon of individuals moving from the regulated private sector to regulatory agencies and back to the regulated private sector again, and from campaign contributions to elected officials from the regulated firms.”); Tom C.W. Lin, *Too Big to Fail, Too Blind to See*, 80 MISS. L.J. 355, 374 (2010) (reviewing ANDREW ROSS SORKIN, *TOO BIG TO FAIL: THE INSIDE STORY OF HOW WALL STREET AND WASHINGTON FOUGHT TO SAVE THE FINANCIAL SYSTEM—AND THEMSELVES* (2009)) (“The regulators and the regulated often came from and traveled in the same circles.”).

32. *See supra* note 5 and accompanying text.

33. *See infra* Part III.A–B.

ment's regulatory remit.³⁴ William Buzbee has called the revolving door one of the “usual rewards of regulatory capture.”³⁵ And Richard C. Ausness and his co-authors have opined that it is a principal mechanism of government corruption—that “[t]he risk of agency capture is exacerbated by the ‘revolving door.’”³⁶ That anxiety, moreover, has led to some extraordinarily bold claims about the need to combat the problem.

Of these, perhaps none go further than Zephyr Teachout's recent work. Teachout believes that anti-revolving door principles are enshrined in the Constitution (if only in its structure, rather than in its plain text), and therefore cannot be waived and must be acted upon by all fed-

34. Consider some narrow examples in the legal literature alone. *See, e.g.*, REVOLVING DOOR WORKING GRP., A MATTER OF TRUST: HOW THE REVOLVING DOOR UNDERMINES PUBLIC CONFIDENCE IN GOVERNMENT—AND WHAT TO DO ABOUT IT 7 (2005) (“Yet money is not the only way business exercises its influence; it also relies on the movement of certain people into and out of key policymaking posts in the executive and legislative branches.”); Richard C. Ausness et al., *Providing a Safe Harbor for Those Who Play by the Rules: The Case for a Strong Regulatory Compliance Defense*, 2008 UTAH L. REV. 115, 139–40 (“The risk of agency capture is exacerbated by the ‘revolving door’ between regulatory agencies and private employers which encourage agency personnel to promote the interests of regulated industries in order to enhance their prospects of future employment in the private sector.”); Timothy A. Canova, *Financial Market Failure as a Crisis in the Rule of Law: From Market Fundamentalism to a New Keynesian Regulatory Model*, 3 HARV. L. & POL’Y REV. 369, 384 (2009) (“Several factors have contributed to the capture of key federal regulatory agencies by the nation’s financial services industry. One of these is the so-called ‘revolving door,’ the tendency of regulatory officials to leave their government posts for lucrative positions in the private financial industry. The movement of key personnel back and forth between regulators and regulated has become inescapable. Policy naturally comes to reflect the bargain of the moment between the most powerful private interests.”); Karl S. Coplan, *Ideological Plaintiffs, Administrative Lawmaking, Standing, and the Petition Clause*, 61 ME. L. REV. 377, 395 (2009) (“These revolving-door arrangements have also helped lead to the phenomenon of agency ‘capture,’ where agencies are substantially influenced by the very industries they are supposed to regulate.”); Mike Koehler & Ethan S. Burger, *Recent High-Level Department of Justice Departure Raises Recurring Questions That Require Prompt Action*, ACJS TODAY, Dec. 2010, at 1, 3–5 (recounting problems related to staff turnover at DOJ); Brendan S. Maher, *Understanding and Regulating the Sport of Mixed Martial Arts*, 32 HASTINGS COMM. & ENT. L.J. 209, 236–37 (2010) (discussing revolving door as threat to impartiality of mixed martial arts regulators); Stuart B. Nibley, *Jamming the Revolving Door, Making It More Efficient, or Simply Making It Spin Faster: How Is the Federal Acquisition Community Reacting to the Darleen Druyun and Other Recent Ethics Scandals?*, PROCUREMENT LAW., Summer 2006, at 1, 16–17 (listing examples of revolving door scandals); James S. Roberts, Jr., *The “Revolving Door”: Issues Related to the Hiring of Former Federal Government Employees*, 43 ALA. L. REV. 343, 343 (1992) (“Few areas invite as much controversy for federal contractors as the employment of former government employees. Almost every federal contractor would like to acquire the expertise of departing military personnel and civilian employees. Unfortunately, a few contractors want to hire departing government employees for illegal and improper reasons: They hope to unfairly influence future government contracting decisions. These few corrupt government contractors want the former government employees to put pressure on their colleagues in government to make biased decisions about solicitations, contract modifications, and other matters.”); Christopher Wansley, *The Revolving Door Between the Casino Industry and Its Regulating Agencies*, 7 GAMING L. REV. 215 (2003) (discussing revolving door problem in casino regulation).

35. William W. Buzbee, *Asymmetrical Regulation: Risk, Preemption, and the Floor/Ceiling Distinction*, 82 N.Y.U. L. REV. 1547, 1590–91 (2007).

36. Ausness et al., *supra* note 34, at 139; *see also* Richard Briffault, *Lobbying and Campaign Finance: Separate and Together*, 19 STAN. L. & POL’Y REV. 105 (2008) (focusing on the revolving door problem as it applies to Congress); Vincent R. Johnson, *Liberating Progress and the Free Market from the Specter of Tort Liability*, 83 NW. U. L. REV. 1026, 1051–52 (1989) (reviewing PETER W. HUBER, *LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES* (1988)).

eral officials.³⁷ In her view:

The Constitution carries within it an anti-corruption principle, much like the separation-of-powers principle, or federalism. It is a free-standing principle embedded in the Constitution's structure, and should be given independent weight, like these other principles, in deciding difficult questions concerning how we govern ourselves.³⁸

More coldly realist political scientists assume the phenomenon, and its corruptibility, and move on.³⁹ Their understanding is rooted in the popular account of public choice and regulatory capture; why, in light of all of the reasons to steal and shirk, would we presume anything but cupidity from government officials?⁴⁰ And economists have enshrined the corruption of public service, through the revolving door and other mechanisms, as one of the gospels of their discipline.⁴¹

II. THE REVOLVING DOOR IN CONTEXT

The revolving door in practice, however, works differently than it does in anecdote. The door revolves, of course, particularly for government lawyers, but the quid pro quos are frequently hard to identify. In fact, both intuition and evidence suggest that revolving door theorists may overlook the benefits of exit and the constraints on government employees while in service. For every dodgy story, there are thousands of government officials, even lawyers, for whom the revolving door simply does not apply. And those with the most mobile human capital—the ones, in other words, for whom private sector work is likely to be available and monetarily attractive—may find that the revolving door incentivizes them to perform in their job (let alone take it in the first place), rather than to shirk it.

The revolving door is open to very few government employees, and for many of those, the prospect of private sector work is unappealing. Moreover, while these bureaucrats are working for the government, displaying divided loyalties could plausibly hurt their prospects for advancement, raises, and respect. This is especially the case for lawyers such as prosecutors in the SDNY, and for those lawyers who view their government jobs as good but temporary training for the private sector—and there are many of these—a lax work ethic may do more harm than good when it comes to getting that choice nongovernment job. This Part

37. Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORNELL L. REV. 341, 342 (2009).

38. *Id.*

39. William T. Gormley Jr., *A Test of the Revolving Door Hypothesis at the FCC*, 23 AM. J. POL. SCI. 665, 666, 681–82 (1979).

40. For general introductions of these theories, which pervade economic thinking about regulation, see CLIFFORD WINSTON, *GOVERNMENT FAILURE VERSUS MARKET FAILURE: MICROECONOMICS POLICY RESEARCH AND GOVERNMENT PERFORMANCE* (2006); Thomas Romer, *Nobel Laureate: On James Buchanan's Contributions to Public Economics*, 2 J. ECON. PERSP. 165 (1988).

41. See Stigler, *Economic Regulation*, *supra* note 13 and accompanying text.

of the Article reviews the many reasons government employees, and especially lawyers, have to enforce their mandates regardless of what, or whether, future work in the private sector might be a prospect.

A. *Shirking Is Costly*

The revolving door is, perhaps, most importantly mitigated by the incentives that government lawyers face *while* they are doing their jobs. These employees may choose to help the agency pursue its mission, or they may try to frustrate that mission, pursuing instead the goals that they perceive help regulate industry, on the theory that doing so will make them more attractive to future employers.⁴² But the former course is presumably more likely to result in professional advancement within the agency.⁴³ By the same token, agency supervisors are likely to promote and prefer employees who further the mission of the agency instead of those who try to frustrate it.⁴⁴

Moreover, from the sort of rational choice perspective that animates economists and political scientists, politician supervisors may have their own selfish reasons for requiring diligence from their subordinates. If they are prosecutors, they may insist on high conviction rates and urge their line attorneys to make headlines.⁴⁵

The list of former crusading chief prosecutors campaigning for higher office is something of a meme in U.S. politics, and these politicians often highlight the tough records of their offices when they campaign for other jobs.⁴⁶ Apparently tough New York prosecutors like Ru-

42. It is possible that agencies may conceive their mission to be to help the regulated industry, rather than to regulate it. Indeed, even enforcement and consumer protection agencies like financial regulators have suggested as much at times. For example, the Treasury Department has described its efforts to modernize financial regulation as due, in part, to “efforts to improve the competitiveness of the U.S. capital markets in the increasingly global marketplace.” Press Release, U.S. Dep’t of Treasury, Treasury Releases Blueprint for Stronger Regulatory Structure (Mar. 31, 2008), *available at* <http://www.treasury.gov/press-center/press-releases/Pages/hp896.aspx>. For our purposes, we can presume that in most cases, government regulation is created to force industry to internalize the costs of externalities that they would otherwise face. Because this often (but not always) raises the cost and reduces the profitability of industry, the relationship between regulators and the regulated may often be surmised to be adversarial.

43. Shirking may also result in censure from the referral agencies who play an important role in developing and presenting cases to prosecutors; in some cases, such as with the Southern and Eastern Districts of New York, the competition by prosecutors for cases can be quite strong. For a discussion of the prosecutor agency relationship, see Daniel Richman, *Prosecutors and Their Agents, Agents and Their Prosecutors*, 103 COLUM. L. REV. 749, 760 (2003); Michael L. Seigel & Christopher Slobogin, *Prosecuting Martha: Federal Prosecutorial Power and the Need for a Law of Counts*, 109 PENN ST. L. REV. 1107, 1109 (2005) (noting the power of agencies to urge prosecutors to pursue cases).

44. The fact that private sector advantages could await government employees who oversee lightly—if that is indeed how it works—is likely to be mitigated by the daily review of the work done by others motivated to perform the job with which the agency has been entrusted.

45. See Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 84 B.U. L. REV. 125, 134–35 (2004) (noting the attention paid to the win rates of prosecutors); Abbe Smith, *Can You Be a Good Person and a Good Prosecutor?*, 14 GEO. J. LEGAL ETHICS 355, 388–91 (2001) (bemoaning these pressures).

46. In the SDNY, the list includes two Republican presidential candidates, one of whom, Thom-

dolph Giuliani and Eliot Spitzer leveraged their anti-crime reputations to become powerful politicians.⁴⁷ We can assume that such supervisors are unlikely to prefer employees who kowtow to defense attorneys, instead of hanging tough with them.⁴⁸ More broadly, no political leader wants to be known as the supervisor of an agency that cannot deliver the services it is meant to provide.

In the same vein, even some political scientists have recognized that agency incentives do not always move toward laxity. As James Q. Wilson put it, many agencies “have, in general, chosen stricter and more costly standards over more lenient, less expensive ones,” in part because their motivations “cannot easily be summarized as serving the interests of either the regulated sector or the public at large.”⁴⁹ Daniel Carpenter characterizes this as a concern for the agency’s reputation, which rubs off on its employees, and which they have an interest, even a selfish interest, in maintaining.⁵⁰ The parsimonious revolving door theory is difficult to square with Wilson’s or Carpenter’s observations about the complexity of regulatory incentives. It might instead be best thought of as providing an interesting, but inexact, caution for lawyers, institution designers, and legal scholars—one that may have real explanatory bite at high levels of generality, and that is logically impressive, but less purchase when particular decisions by particular agency officials about whether to enforce particular legal rules are at stake.

B. *The Revolving Door Is Only Open to a Few*

Of course, if every bureaucrat, from supervisor to minion, was about to leave for regulated industry, one can imagine that shirking while in office would be winked upon. But the revolving door is not open to many government officials, even those with legal training.

Consider the EPA. Open Secrets, a non-profit organization that

as Dewey, won the party’s nomination. The other was Rudolph Giuliani. Elihu Root and Henry Stimson, both of whom served as Secretary of State, also spent time as the U.S. Attorney in the SDNY. For a brief history of SDNY, see Benjamin Weiser, *Manhattan Office Is a Breeding Ground for Top Legal Talent*, N.Y. TIMES, Jan. 30, 2009, at A27; *Office History*, U.S. DEP’T OF JUSTICE, <http://www.justice.gov/usao/nys/officehistory.html> (last visited Feb. 7, 2013).

47. See JAMES EISENSTEIN, COUNSEL FOR THE UNITED STATES: U.S. ATTORNEYS IN THE POLITICAL AND LEGAL SYSTEMS 174 (1978) (“Assistants recognize their reputation’s significance for their prospects in private practice and they shape their behavior accordingly.”).

48. And there is a long record of changes of enforcement practices being enacted when the leadership of an enforcement agency changes, regardless of which strategy might please regulated industry the most. After all, at the FCC, the staff implementing Michael Powell’s media ownership rules had to shift gears to implement Kevin Martin’s very different approach, and now they are loyal foot soldiers for Julius Genachowski’s third way. Joelle Tessler, *FCC Asks: Do Media Ownership Limits Make Sense?*, BOSTON.COM (June 20, 2010), http://www.boston.com/business/technology/articles/2010/06/20/fcc_asks_do_media_ownership_limits_make_sense/ (recounting the different approaches taken by the three most recent FCC chairmen on media ownership limits).

49. James Q. Wilson, *The Politics of Regulation*, in THE POLITICS OF REGULATION 357, 373 (James Q. Wilson ed., 1980).

50. CARPENTER, *supra* note 22, at 47–51, 727–29.

collects information on ties between the government and moneyed interests, lists, as of November 2012, no less than 148 officials who have gone through the revolving door there.⁵¹ I have already discussed the career of one Deputy General Counsel at the EPA who now represents potential polluters, as he did before he joined the agency.⁵² Other lawyers tracked by Open Secrets have exemplified this seeming fox-guarding-the-henhouse role as well. But the former officials tracked by Open Secrets amount to 148 out of more than 17,000 employees, as of the end of 2012.⁵³ And Open Secrets is counting as far back as the 1980s.⁵⁴

The vast majority of regulators, even legally trained regulators, do not have these sorts of private sector alternatives.⁵⁵ Moreover, those who do have such options spend much less time at agencies than those who do not. The average service length of those who resign from EPA, for example, is 6.51 years.⁵⁶ Those who transfer elsewhere in the government or are fired stay longer (7.55 and 8.62 years, respectively), and those who retire from the agency, or die “with their boots on,” serve much longer (23.72 and 17.54 years, respectively).⁵⁷ A great many agency officials have very long time horizons, and often those horizons do not include a private sector pot of gold at the end.⁵⁸ The federal government, all told, employs more than 30,000 lawyers, a huge number of which never go into private practice.⁵⁹

In addition, the prospect of private sector employment is not always

51. The search of Open Secrets’ data, as of January 8, 2013, may be replicated by visiting *Revolving Door: Search Results*, OPENSECRETS.ORG, http://www.opensecrets.org/revolving/search_result.php?agency=Environmental+Protection+Agency&id=EIEPA (last visited Feb. 7, 2013).

52. See *supra* note 28 and accompanying text.

53. ENVTL. PROT. AGENCY, FY 2013: EPA BUDGET IN BRIEF 11 (2012), available at <http://www.epa.gov/planandbudget/archive.html#BudgetSummary> (follow “FY 2013 Budget-in-Brief”). Some EPA officials, moreover, have revolved into environmental advocacy, for such captured industrial representatives as the Sierra Club.

54. See, e.g., *Employment History*, OPENSECRETS.ORG, http://www.opensecrets.org/revolving/rev_summary.php?id=6394 (last visited Feb. 7, 2013).

55. Though the tenure of government officials certainly does not preclude time in the private sector. According to data published in January 2012, average tenure of employees in the federal government is 9.5 years. *Economic News Release*, BUREAU OF LABOR STAT., <http://www.bls.gov/news.release/tenure.t05.htm> (last modified Sept. 18, 2012); see also JOHN P. HEINZ ET AL., THE HOLLOW CORE: PRIVATE INTERESTS IN NATIONAL POLICY MAKING 119 (1997) (vast majority (more than eighty percent) of those with federal government experience moved between government and private representative positions only a single time; didn’t “revolve” rather [they] walk[ed] through the door once”).

56. EPA data on file with author.

57. EPA data on file with author.

58. This is not true in all cases, of course. It may, for example, be the case that Pentagon procurement officers can glide into private sector jobs selling weapons to the Pentagon. It may also be the case that Hill staffers and former Congressmen find easy money waiting for them on K Street, where they can go lobby Hill staffers and current Congressmen about the areas in which they used to legislate and oversee. But they are the exception, rather than the rule, in federal employment.

59. *FedScope Employment Cubes*, U.S. OFFICE OF PERSONNEL MGMT., <http://www.fedscope.opm.gov/employment.asp> (follow “March 2012”) (last visited Feb. 7, 2013); *Occupational Employment Statistics*, BUREAU OF LABOR STAT., http://www.bls.gov/oes/current/naics4_999100.htm (last modified Mar. 27, 2012).

obviously an attractive alternative to the prospect of staying within the government, as any state-employed law professor, all of whom have given up the prospects of better paid work in practice, can attest.⁶⁰ The work hours may be shorter in government, the advancement prospects may be rosier, and the pay may even be similar in certain jurisdictions. Once again, the model for most government employees is not a multimillion-dollar K Street payday, but something a bit more prosaic.

C. *Working Hard Opens Doors*

What about those government employees for whom there is clearly an opportunity in the private sector that closely mirrors the job they are supposed to do in the public sector? In some cases, post-government employment might be enhanced by doing favors for regulated industry before switching jobs. But in many cases, that will not obviously be so.

The right way to signal worth to private prospective employers may be, among enforcement officials, at least, aggressive pursuit of wrongdoing while in the public sector.⁶¹ The lead prosecutors of the Enron task force went on to jobs at Wachtell Lipton, the most profitable law firm in the world, and Latham & Watkins, one of the largest.⁶² And one of the leaders of the government's new focus on the Foreign Corrupt Practices Act, Mark Mendelsohn, leveraged his lengthy anticorruption resume into a bidding war for his services so dramatic that it was covered by *The Wall Street Journal* (the plenty-prestigious Paul Weiss won the Mendelsohn auction).⁶³ There are, in short, many reasons to believe that government employees with one eye on the future have reasons to be tough when they regulate, rather than lax.⁶⁴ As Roberta Romano has argued in the

60. See Jeffrey M. Lipshaw, *Memo to Lawyers: How Not to "Retire and Teach,"* 30 N.C. CENT. L. REV. 151, 151 (2008) (describing the appeal of teaching to lawyers with substantial practice experience).

61. A number of legal scholars have surmised as much. See, e.g., Edward L. Glaeser et al., *What Do Prosecutors Maximize? An Analysis of the Federalization of Drug Crimes*, 2 AM. L. & ECON. REV. 259, 288 (2000) (assuming that prosecutors' incentive is the greatest return on their future employment, and that they will maximize that return by bringing cases); Christine Hurt, *The Undercivilization of Corporate Law*, 33 J. CORP. L. 361, 435 (2008) (speculating that bringing prosecutions might lead to lucrative private practice opportunities); see also Kathleen F. Brickey, *Enron's Legacy*, 8 BUFF. CRIM. L. REV. 221, 258-60 (2004) (describing in detail the high-profile post-*Enron* prosecutions).

62. The three prosecutors with courtroom roles in the trial of Jeffrey Skilling, for example, all went on to become partners at highly prestigious law firms. David Anders joined Wachtell Lipton. *David B. Anders*, WACHTELL, LIPTON, ROSEN & KATZ, <http://www.wlrk.com/DBAnders/> (last visited Feb. 7, 2013). Sean Berkowitz joined Latham and Watkins. *Sean M. Berkowitz*, LATHAM & WATKINS LLP, <http://www.lw.com/people/SeanMBerkowitz> (last visited Feb. 7, 2013). Kathryn Rummeler did as well, before returning for a political post in the Department of Justice. Amy Kolz, *Kathryn Rummeler Confirms That She's Headed to DOJ*, AMLAWDAILY (Jan. 20, 2009, 6:57 PM), <http://amlawdaily.typepad.com/amlawdaily/2009/01/kathryn-rummeler-move.html>.

63. Nathan Koppel, *Breaking: DOJ Stud Mark Mendelsohn Headed to Paul Weiss*, WALL ST. J. L. BLOG (Apr. 13, 2010, 3:45 PM), <http://blogs.wsj.com/law/2010/04/13/breaking-doj-stud-mark-mendelsohn-headed-to-paul-weiss/>.

64. The revolving door focuses on incentives, but employee quality varies widely as well; in any organization, some of the members do much of the work, and identifying which lawyers did a great

criminal law context: “[P]rosecutors bring high profile criminal cases either to further political careers or partnerships in top criminal defense firms.”⁶⁵

There are some profession-specific reasons for these hard work incentives. Acquiescent types may be unlikely to impress their former colleagues, in, say, plea deal negotiations; nor is it obvious that any networks of former officials would be likely to refer them work, which is an important means of generating business, at least in white-collar criminal defense. Former prosecutor Steven M. Cohen has said:

The criticism is that this is a club, and that if you have the credential [of government service], the credential becomes a kind of access that you otherwise wouldn’t get. But it’s not the credential that people are interested in, [i]t’s the experience and the knowledge—I know I’m going to get a very good lawyer.⁶⁶

And indeed, law firms often trumpet the tough prosecutions brought by the prosecutors who then join them. A look at the sales efforts of former prosecutors at the SDNY who have gone into private practice illustrates the point. One firm biography brags about its attorney’s role in the “investigation and prosecution” of “money laundering,” “corporate fraud,” and “wire fraud”—even trumpeting the large fines and extensive sentences its lawyer meted out.⁶⁷ Another boasts of its attorney’s “successful prosecutions of numerous criminal violations, including racketeering, money laundering, securities fraud, bank fraud, tax evasion, and healthcare fraud.”⁶⁸ These firms find former toughness to be good marketing, instead of a sign that future clients should punish these lawyers by eschewing their services. It is very difficult, by contrast, to find law firms that tout how inactive the former regulators who join them were when they served the government, though the revolving door might predict such announcements.

This is not to say that we could not anticipate that in some cases the revolving door affects regulatory decisions. Surely it can. For congressional staffers, or Pentagon procurement officers, the theory may be a useful one.⁶⁹ And though the case for overt corruption even in these contexts is often oversold, there is little doubt that the revolving door can

deal of work in their prior employment sends a powerful signal about what may be expected from them in the future.

65. Roberta Romano, *Less Is More: Making Institutional Investor Activism a Valuable Mechanism of Corporate Governance*, 18 *YALE J. ON REG.* 174, 231 (2001).

66. Weiser, *supra* note 46, at A27.

67. Marcus A. Asher, ARNOLD & PORTER LLP, <http://www.arnoldporter.com/professionals.cfm?action=view&id=5314> (last visited Feb. 7, 2013).

68. Robert B. Buehler, HOGAN LOVELLS, <http://www.hoganlovells.com/robert-buehler/> (last visited Feb. 7, 2013).

69. It is a somewhat different dynamic, though, for regulated industries. It is true there are competing interest groups, but the division is not nearly so clean. And in areas like telecommunications regulation, the fights are often between two competing industry groups rather than business versus public interest non-profits. The regulator is not simply refereeing cases; it is shaping rules for entire industries. The role of staff on the inside and advocates on the outside is less clear-cut.

breed a degree of socialization and familiarity that makes it difficult to imagine life without a strong regulated industry beside you.⁷⁰ But for a great many cases involving legal matters, its merits are much less clear. Most government lawyers must care about their regulatory missions and what their civil service supervisors tell them to do. Most do not have attractive private exit options. And in those cases where they do, it will often be the case that their most venal incentives align with regulating the private sector intensely, rather than modestly.

III. THE CAMPAIGN AGAINST THE REVOLVING DOOR

The Washington establishment, though long full of enthusiastic practitioners of the revolving door, has often decried it, legislated against it, and otherwise sought to regulate it, while somehow never entirely managing to undo the institution. Probably, some hypocrisy is at work here. But comprehensive revolving door bans, applied to every government employee, would be difficult to design legally, and might even be unconstitutional. The U.S. commitment to relatively free labor, which has expressed itself in everything from the policy against lengthy restrictive covenants on employment contracts to the disappearance of forced labor institutions like indentured servitude and slavery, is, moreover, quite inconsistent with strong rules preventing government employees from ever working in the private sector. This Part, the legal analysis portion of the Article, reviews the efforts made by the government to do something about the revolving door, and the reasons why they have not yet—and are unlikely to—eliminate the practice of leveraging public experience for private gain.

A. *Revolving Door Agonistes*

There has been plenty of agonizing about the revolving door, including the widespread and volubly espoused concern that the movement of personnel between the private and public sectors “contributes to a cynicism about government—who is making policy and why, and who is making money off public service,” as *The Washington Post* has put it.⁷¹

Judges have noted the “revolving door of public corruption that occurs in government,”⁷² and regretted the “public’s impression that public

70. For a splash of nuance, see, e.g., Edna Earle Vass Johnson, *Agency “Capture”: The “Revolving Door” Between Regulated Industries and Their Regulating Agencies*, 18 U. RICH. L. REV. 95, 119 (1983) (discussing benefits and drawbacks of “revolving door” in context of professional and governmental regulations, calling for future study, and noting that “[e]ven with the absence of proof that the regulatory agencies have been ‘captured’ by the ‘revolving door’ phenomenon, it is reasonable to conclude that they are being influenced”).

71. Judy Sarasohn, *Under Bush, the Revolving Door Gains Speed*, WASH. POST, Oct. 27, 2005, at A25.

72. *United States v. Ediger*, 166 F. App’x 218, 226 (6th Cir. 2006) (quoting district court judge at hearing).

service is but a vehicle to enhance private gain and that a ‘revolving door’ exists between the private bar and government service.”⁷³

Few agencies have escaped critique. One court has observed:

The Forest Service is an agency that has experienced a high degree of the “revolving door” phenomenon between governmental and private interests. That is to say that the greatest market for government employees in private industry is with the large timber companies.⁷⁴

Another singled out special counsels, concluding that these investigators were capable of thinking more of their future employment prospects than their current mission to root out fraud.⁷⁵ And David Vladeck, a Georgetown professor and Federal Trade Commission official, has identified the Food and Drug Administration as corrupted by the revolving door: “The senior appointees at the FDA (many of whom have returned through the revolving door to represent the pharmaceutical industry) disregarded or marginalized the career scientists and policy experts who tried to get in their way.”⁷⁶

Law enforcement agencies have been singled out as particularly susceptible to the revolving door problem. With well-paid compliance and defense jobs awaiting them in the private sector, the temptation to enforce lackadaisically is often perceived to be high. Michael Perino has said that the revolving door partly explains supine SEC regulation.⁷⁷ Others believe that the fact that “prosecutors often go through the ‘revolving door’ into lucrative private-practice careers” means that they “have the incentive to enter deferred prosecution agreements rather than indict firms and risk destroying the companies, harming the economy, and drawing public disapproval.”⁷⁸

B. *The President Against the Revolving Door*

The agonizing has led to a number of very public efforts to do something about the revolving door, which often are a centerpiece of presidential political campaigns pledging to “clean up Washington.” For example, the Obama administration has prohibited most lobbyists from

73. United States v. Dorfman, 542 F. Supp. 402, 407 (N.D. Ill. 1982).

74. Sierra Club v. Lyng, 694 F. Supp. 1260, 1268 (E.D. Tex. 1988).

75. *In re Starr*, 986 F. Supp. 1144, 1154 (E.D. Ark. 1997) (“The problem appears to be somewhat akin to the old ‘revolving door’ problem: some individuals employed by governmental regulatory agencies would, in the middle of their government service, accept prospective job offers with the private companies which they regulated . . .”).

76. David C. Vladeck, *The FDA and Deference Lost: A Self-Inflicted Wound or the Product of a Wounded Agency? A Response to Professor O’Reilly*, 93 CORNELL L. REV. 981, 982 (2008).

77. Michael A. Perino, *SEC Enforcement of Attorney Up-The-Ladder Reporting Rules: An Analysis of Institutional Constraints, Norms and Biases*, 49 VILL. L. REV. 851, 858–65 (2004). *But see* Shivarajam Rajgopal et al., *Does the Revolving Door Affect the SEC’s Enforcement Outcomes?* 2 (Aug. 2012), available at <http://aaahq.org/newsroom/RajgopalDeHaanKediaKoh.pdf> (arguing that the revolving door incentivizes enforcement at the SEC).

78. Ribstein, *supra* note 17, at 885.

joining the government in political positions, in order, it is claimed, to help restore faith in public service.⁷⁹ There were claims that “most . . . Bush administration officials have cannily leveraged their time spent in the public sector” and “made a mint on the backs of American taxpayers.”⁸⁰

And such charges are nothing new: President Clinton, during his first campaign for the presidency, decried the revolving door, claiming that “[o]n streets where statesmen once strolled, a never-ending stream of money now changes hands—tying the hands of those elected to lead.”⁸¹ Clinton, like Obama, issued an early executive order designed to do something about the revolving door; in Clinton’s case, the executive order prohibited senior members of his Administration from lobbying former colleagues for five years after leaving office.⁸² Of course, Republican administrations have also campaigned against Washington and its revolving door.⁸³

C. *Legislating Away the Revolving Door*

Congress has also expressed its concern about the problem, and has repeatedly, since the 1970s, passed legislation designed to address it.⁸⁴ After President Jimmy Carter urged the legislature to enact legislation to “strengthen existing restrictions on the revolving door between government and private industry,” it responded, in 1978, with the Ethics in

79. Richard W. Painter, *President Obama’s Progress in Government Ethics*, 26 CONST. COMMENT. 195, 199–201 (2010); David D. Kirkpatrick, *Lobbyists March on the White House*, THE CAUCUS (Apr. 24, 2009, 8:51 PM), <http://thecaucus.blogs.nytimes.com/2009/04/24/lobbyists-march-on-the-white-house/>.

80. Greg Gordon, *Politics’ Revolving Door*, SEATTLE TIMES, Jan. 14, 2009 (quoting Melanie Sloan, executive director of the Citizens for Responsibility and Ethics in Washington).

81. BILL CLINTON & AL GORE, PUTTING PEOPLE FIRST: HOW WE CAN ALL CHANGE AMERICA 24 (1992).

82. See Exec. Order No. 12,834, 58 Fed. Reg. 5911 (Jan. 22, 1993). For a discussion, see George J. Church, *A Lobbyist’s Paradise*, TIME, Nov. 1, 1993, at 36. Although it involved a rather small sample size and features a somewhat surprising result, Raphael Gely and a co-author found that the Clinton anti-lobbying extension reduced the benefit for publicly traded firms represented by a lawyer appointed to the cabinet, using a stock price event study methodology. Rafael Gely & Asghar Zardkoohi, *Measuring the Effects of Post-Government-Employment Restrictions*, 3 AM. L. & ECON. REV. 288, 300 (2001). In a somewhat cynical move, Clinton revoked the executive order on December 28, 2000, just as his final policy team was preparing to leave office and, in many cases, move into the private sector. See Jason Peckenpaugh, *Clinton Lifts Lobbying Restrictions on Appointees*, GOV’T EXECUTIVE (Jan. 2, 2001), <http://www.govexec.com/federal-news/2001/01/clinton-lifts-lobbying-restrictions-on-appointees/8217/>.

83. See, e.g., Martin Kady II, *Diluted Lobbying Bill Sent to Conference*, 65 CQ WEEKLY 1559, 1601 (May 28, 2007) (describing Republican efforts to pass legislation to limit the “reverse revolving door,” whereby lobbyists take government positions in the agencies before which they lobbied).

84. The initial legislation creating a cooling-off period was the Bribery, Graft, and Conflicts of Interest Act of 1962, which provided for the first one-year cooling-off period. See 18 U.S.C. § 207(c) (2006). It is difficult to find legislators opposed to the problem in theory. David Boren, a former senator, for example, has urged legislation. David L. Boren, *A Recipe for the Reform of Congress*, 21 OKLA. CITY U. L. REV. 1, 14–15 (1996).

Government Act (EGA).⁸⁵ That statute first imposed limits on the ability of former employees to represent private parties before their old agency or on matters on which they worked.⁸⁶ It also created a government ethics agency to fill in the gaps of the ban and set forth disclosure requirements for high-ranking government officials.⁸⁷

The EGA was part of an era of legislative reform of administrative procedure. Congress enacted a number of other good government laws in the 1970s—the Watergate scandal is often named as the reason why—including the Privacy Act of 1974,⁸⁸ and the Government in the Sunshine Act of 1976,⁸⁹ to say nothing of campaign finance regulation,⁹⁰ but while it has revisited open government and campaign finance rarely since then, it has returned to the revolving door problem again and again.

In 1989, for example, Congress extended the post-employment restrictions on legislative and executive branch employees.⁹¹ In 1996, Congress passed the Procurement Integrity Act, limiting the ability of procurement officials to transition seamlessly into the private sector.⁹²

And in recent years, the interest in the matter has only grown. Congress repeatedly considered revolving door legislation between 2004 and 2007.⁹³ Then, President George W. Bush signed the Honest Leadership and Open Government Act (HLOGA) into law—something he had no choice but to do, given the strong majorities in the Senate and House for it.⁹⁴ HLOGA extended the time between the end of a critical em-

85. For a discussion, see *United States v. Nofziger*, 878 F.2d 442, 443–44 (D.C. Cir. 1989) (describing the provisions of the Ethics in Government Act of 1978); see also Thomas D. Morgan, *Appropriate Limits on Participation by a Former Agency Official in Matters Before an Agency*, 1980 DUKE L.J. 1, 18–21 (evaluating the statute); Robert H. Mundheim, *Conflict of Interest and the Former Government Employee: Rethinking the Revolving Door*, 14 CREIGHTON L. REV. 707, 712–15 (1981) (same).

86. Ethics in Government Act of 1978, Pub. L. No. 95-521, 92 Stat. 1824, 1864–67 (amending 18 U.S.C. § 207).

87. 5 U.S.C. app. §§ 101–11, 401–08 (2006). The GOP, for example, required Haley Barbour to resign his lobbying positions before assuming the chairmanship of the party in 1993. See Dan Morgan, *A Revolving Door Where Lobbying Rules Don't Apply*, WASH. POST, July 21, 1997, at A6 (“Before he took over as RNC chairman in 1993, Barbour promised to dissolve the law partnership he formed in 1991 with Alabaman Edward M. Rogers Jr. and end his lobbying activities.”).

88. 5 U.S.C. § 552 (2006) (protecting the privacy of individuals identified in certain government records).

89. *Id.* § 552b (requiring certain government meetings to be held publicly).

90. *Buckley v. Valeo*, 424 U.S. 1, 58–59, 143 (1976) (finding some limitations on campaign contributions to be unconstitutional on separation of powers and First Amendment grounds, but reaffirming others from the Federal Election Campaign Act of 1971).

91. For a discussion of the Ethics Reform Act, see *Williams v. United States*, 240 F.3d 1019, 1023 (Fed. Cir. 2001). It did so in energy-related positions in 42 U.S.C. § 7216 (repealed 1993). For a discussion, see *TRW Env'tl. Safety Sys., Inc. v. United States*, 18 Cl. Ct. 33, 37, 44 (Cl. Ct. 1989).

92. The Procurement Integrity Act prohibits a former government employee who participated in the source selection, program management, or payment decisions regarding a contract in excess of \$10 million from accepting a job, including a consulting job, with the contractor who was awarded that contract for one year after leaving government employ. 41 U.S.C. § 423(d).

93. For a discussion, see Brian A. Bannon & David A. Leib, *Slowing Down the Revolving Door*, MARINELINK.COM (Aug. 6, 2004), <http://www.marinelink.com/news/article/slowing-down-the-revolving-door/322229.aspx>.

94. Honest Leadership and Open Government Act of 2007, Pub. L. No. 110-81, 121 Stat. 735. The House voted 411 to 8 to pass the bill at the end of July 2007. 153 CONG. REC. H9210 (daily ed.

ployee's government tenure, and the time that that employee could take related private-sector positions; standard stuff, by 2007, but the large bipartisan majorities it occasioned in what has often been thought to have been a bitterly divided legislature suggests that the desire to gesture at the revolving door crosses party lines.⁹⁵

Since then, the revolving door has been blamed for contributing to the financial crisis, as one of many reasons why the SEC failed to regulate investment banks adequately.⁹⁶ Accordingly, in the Dodd-Frank Act, Congress required the Comptroller General to conduct a study to, among other things, "determine if the volume of employees of the Securities and Exchange Commission who are later employed by financial institutions has led to inefficiencies in enforcement."⁹⁷ The Senate has considered new legislation, Senate Bill 3272, titled the "Close the Revolving Door Act of 2010," that would further limit the ability of members of the government, particularly its legislative branch, to move in and out of lobbying positions.⁹⁸

Agencies are also part of this story, of course. In 2011, the SEC passed new revolving door regulations in the wake of the financial crisis.⁹⁹ And the SEC is not alone among the agencies in having a complicated set of revolving door regulations in place, in addition to those provided by the Department of Justice and Office of Special Counsel.

D. Implementation of Revolving Door Controls

The resulting regime regulating the turning of the revolving door, for most federal officials, has been elaborated upon by regulations and opinions issued by the Office of Government Ethics, and enforced by the Public Integrity Section of the Department of Justice, which can bring criminal cases for violations of the post-employment restrictions in the courts, or settle those matters and impose civil penalties.

Occasionally, the degree of enforcement of the ethics rules has been criticized as lax.¹⁰⁰ But it has led to a high-profile list of scalps too. Con-

July 31, 2007). Three days later, the Senate cleared it 83 to 14. 153 CONG. REC. S10,723–24 (daily ed. Aug. 2, 2007).

95. Specifically, it extends the current one-year restriction on post-employment contacts by "very senior" executive branch personnel to two years. See 18 U.S.C. § 207(d) (2006 & Supp. IV 2007).

96. See Steven M. Davidoff & David Zaring, *Regulation by Deal: The Government's Response to the Financial Crisis*, 61 ADMIN. L. REV. 463, 500–04 (2009).

97. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 968, 124 Stat. 1376, 1914 (2010).

98. See S. 3272, 111th Cong. (2d Sess. 2010) (the purpose set forth for the bill is "[t]o provide greater controls and restrictions on revolving door lobbying").

99. See Revolving Door Restriction on Former Officers of FINRA, Exchange Act Release No. 34-64841 (July 8, 2011), available at <http://www.sec.gov/rules/sro/finra/2011/34-64841.pdf>.

100. A Public Citizen study determined that many ex-lawmakers were able to avoid the prohibition on lobbying former colleagues within a year of leaving office by supervising other lobbyists. Aron Pilhofer, *Revolving Doors Spin Once Again*, N.Y. TIMES, Nov. 12, 2006, at 2. This Article will not analyze the efficacy of anti-revolving door problems in detail, but it is worth noting that many observers

flict-of-interest prosecutions reported by the Public Integrity Section of the Department of Justice to Congress show that between 1992 and 2006, there were thirty-eight such prosecutions of former federal employees, many of which were settled for civil fines; indeed, the largest number of these cases—thirteen of the thirty-eight cases—resulted in fines of exactly \$5000.¹⁰¹ These prosecutions have included Washington luminaries like Sandy Berger, the former national security advisor, and Bruce Babbitt, the former Secretary of the Interior.¹⁰² The enforcement risks, then, are modest fines, rather than criminal prosecution, and potentially very bad press.

Beyond these cases, the anti-revolving door regime essentially tries to put distance between government service and work in the private sector, ranging from outright, eternal, and absolute bans on some matters to one-year cooling-off periods for others. Government employees are now permanently barred from working on the very same matters in the private sector on which they personally worked while in government service.¹⁰³ They are barred for two years from working on matters that were under their supervision, but on which they did not personally work.¹⁰⁴ Senior employees are barred for one year from working on any matter involving their former agency.¹⁰⁵ And very senior employees now face a two-year cooling-off period.¹⁰⁶ In addition, senior and very senior employees may not represent foreign governments before any department or agency for one year.¹⁰⁷ All government employees are also subject to not quite post-employment restrictions under other authorities. One such is the Procurement Integrity Act, which limits the ability of government employees to enter into contracts with the government, or to be engaged with those doing so during the course of their employment.¹⁰⁸ Section 203 of the EGA prohibits compensation being paid to public employees representing others in matters affecting the United States (this provision could affect the ability of an employee to accept, for example, a signing bonus while in government service).¹⁰⁹ Section 205 of the EGA also sanctions current employees who lobby the government on behalf of private parties, which, again, can trip up those beginning private sector jobs before they have finished taking any remaining public

have found the prohibitions there to be very difficult to enforce. *See id.*

101. Data on file with author.

102. *See In re Babbitt*, 290 F.3d 386 (D.C. Cir. 2002); *see also* *United States ex rel. Siewick v. Jamieson Sci. & Eng'g, Inc.*, 214 F.3d 1372, 1377–78 (D.C. Cir. 2000) (leaving issue open of whether § 207 violation renders a contract voidable); *United States v. Nofziger*, 878 F.2d 442, 454 (D.C. Cir. 1989) (holding that knowledge is required under § 207).

103. *See* 18 U.S.C. § 207(a)(1) (2006).

104. *See id.* § 207(a)(2).

105. *See id.* § 207(c).

106. *See id.* § 207(d) (Supp. IV 2007).

107. *See id.* § 207(f). Relatedly, the one-year ban applies to those involved in certain trade or treaty negotiations. *See id.* § 207(b).

108. 41 U.S.C. § 423 (2006).

109. 18 U.S.C. § 203.

sector vacation days.¹¹⁰

Lawyers, for their part, must also comply with bar rules that sometimes contain other restrictions on employment following government service. The Model Rules of Professional Conduct, for example, contain their own cooling-off period.¹¹¹

E. The Legal Case for the Revolving Door

This rather complicated administrative regime seems to call for a cutting of the Gordian knot.¹¹² Why not just ban the revolving door, if the President, Congress, academics, and the press hate it so much?

Part of the answer surely lies in the fact that these critics do not hate the revolving door all the time, for there are some advantages to the revolving door—advantages that are genuine, and even patriotic, if your vision of patriotism embraces Cincinnatus returning to his farm after leading the Roman armies to victory.¹¹³ The vision of the amateur, occasional government official does not look so bad when couched in such terms and has been celebrated not just in the Roman republic, but in the U.S. one, with its presidential candidates calling for part-time legislatures, its local governments run by part-time officials, and its career poli-

110. 18 U.S.C. § 205 is a criminal statute which “precludes an officer or employee of the Government from acting as agent or attorney for anyone else before a department, agency or court in connection with any particular matter in which the United States is a party or has a direct and substantial interest.” Memorandum of Attorney General Robert F. Kennedy Regarding Conflict of Interest Provisions of Public Law 87-849, 28 Fed. Reg. 985, 987 (Feb. 1, 1963).

111. Many of the government lawyers tempted by the private sector must deal with the bar rules on the revolving door. One such rule is District of Columbia Rule of Professional Conduct 1.11(a), which provides:

A lawyer shall not accept other employment in connection with a matter which is the same as, or substantially related to, a matter in which the lawyer participated personally and substantially as a public officer or employee. Such participation includes acting on the merits of a matter in a judicial or other adjudicative capacity.

The rule is modeled on the American Bar Association’s Model Rule of Professional Conduct 1.11, which has been referred to as the “revolving door” or “side-switching” rule. *United States v. Philip Morris Inc.*, 312 F. Supp. 2d 27, 38 (D.D.C. 2004); *Brown v. D.C. Bd. of Zoning Adjustment*, 486 A.2d 37, 43 (D.C. 1984) (en banc) (considering a “revolving door” scenario where “a government attorney who leaves to join a private firm and begins to represent clients against, or before an agency of, the former government employer”). And, of course, the prospect of dealing with an ethics charge is no easy matter for a government employee. See, e.g., Kathleen Clark, *Paying the Price for Heightened Ethics Scrutiny: Legal Defense Funds and Other Ways That Government Officials Pay Their Lawyers*, 50 STAN. L. REV. 65 (1997) (noting some of the problems created by the prosecution of government employees for violations of EGA, such as the problem of retaining lawyers); Grant Dawson, *Working Guidelines for Successive Conflicts of Interest Involving Government and Private Employment*, 11 GEO. J. LEGAL ETHICS 329 (1998).

112. For a discussion of the Gordian knot, see Shon R. Hopwood, Note, *Slicing Through the Great Legal Gordian Knot: Ways to Assist Pro Se Litigants in Their Quest for Justice*, 80 FORDHAM L. REV. 1229, 1229 (2011) (“In Greek mythology, the Gordian Knot was a large intertwined rope that was impossible to untie.”).

113. Cincinnatus was a Roman war hero and the basis of the name of a prominent American city; George Washington, who retired to Mount Vernon a number of times between his bouts of service to the country, has often been described as the American Cincinnatus. See WILLIAM J. DUIKER & JACKSON J. SPIELVOGEL, *THE ESSENTIAL WORLD HISTORY* 97–98 (2006).

ticians looked upon with suspicion.¹¹⁴ This deeply held intuition has been enshrined in both law and legal culture, making it exceedingly difficult to force civil servants to remain as civil servants for the rest of their careers.

The legal limitations on the ability to restrict the revolving door have constitutional and common-law bases. Denying federal employees the opportunity to go work somewhere else essentially puts a restrictive covenant on their employment contracts, and these sorts of restrictive covenants have long been disfavored in the law.¹¹⁵ They would require government employees to commit to not compete with the government in the future by, for example, representing clients sued by it. That sort of requirement—to never go to work for a counterparty—is classically forbidden by contract law. As Michael Garrison and John Wendt have explained, “[a]s a matter of public policy, courts have traditionally looked upon agreements not to compete with disfavor,” though such agreements are now permitted if they are structured to protect trade secrets or to prevent an employee from taking advantage of an employer’s brand or goodwill, or, occasionally, if the employee is providing a unique service that will be difficult to duplicate.¹¹⁶ Many state legislatures have passed their own strict limits on noncompete agreements.¹¹⁷ The idea is that there should be sharp upper bounds on the duration of such covenants, if they are to be tolerated at all.

Part of this public policy is rooted in straightforward notions of judicial power—it is difficult to force someone to do work that they do not want to do.¹¹⁸ But the policy reason not to enforce broad restrictive covenants in employment is also rooted in the Anglo-American commitment to free labor. In both England and the United States, this ideological commitment led to social movements against restrictive labor cove-

114. For example, presidential candidate Rick Perry, the governor of Texas, pitched the idea of a part-time Congress during his campaign. Martha T. Moore, *Perry Pitches a Part-Time Congress in New Hampshire*, USA TODAY (Nov. 17, 2011, 9:29 PM), <http://www.usatoday.com/news/politics/story/2011-11-17/New-Hampshire-Rick-Perry-part-time-Congress/51276094/1>.

115. See, e.g., *Horner v. Graves*, [1831] 131 Eng. Rep. 284, 287 (“[C]onsidering whether the restraint is such only as to afford a fair protection to the interests of the party in favour of whom it is given, and not so large as to interfere with the interests of the public. Whatever restraint is larger than the necessary protection of the party, can be of no benefit to either, it can only be oppressive; and if oppressive, it is, in the eye of the law, unreasonable. Whatever is injurious to the interests of the public is void, on the grounds of public policy.”).

116. Michael J. Garrison & John T. Wendt, *The Evolving Law of Employee Noncompete Agreements: Recent Trends and an Alternative Policy Approach*, 45 AM. BUS. L.J. 107, 113 (2008); see also Milton Handler & Daniel E. Lazaroff, *Restraint of Trade and the Restatement (Second) of Contracts*, 57 N.Y.U. L. REV. 669, 727–31 (1982) (discussing goodwill and trade secrets); Ken Matheny & Marion Crain, *Disloyal Workers and the “Un-American” Labor Law*, 82 N.C. L. REV. 1705, 1721–22 (2004) (discussing popular sentiment in favor of free competition for workers); Kenneth R. Swift, *Void Agreements, Knocked-Out Terms, and Blue Pencils: Judicial and Legislative Handling of Unreasonable Terms in Noncompete Agreements*, 24 HOFSTRA LAB. & EMP. L.J. 223, 239 (2007) (discussing the unique services).

117. Garrison & Wendt, *supra* note 116, at 120–22.

118. See *Lumley v. Wagner*, [1852] 42 Eng. Rep. 687 (breach of employment contract case rejecting the remedy of forced performance, but enjoining the breaching party from any other contemporaneous performance).

nants—up to and including indentured servitude, and worse.¹¹⁹

The Thirteenth Amendment to the U.S. Constitution prohibits involuntary servitude.¹²⁰ Although this constitutional provision has been construed narrowly enough to permit “reasonable” restrictions on future employment, it is unlikely that total bans on future work in the private sector would pass constitutional muster.¹²¹ That would be the sort of lifetime ban that, if not impossible (lifetime bans for federal employees are possible), has been controversial when sought and has a low success rate.¹²²

And so there must be some sort of opportunities in private practice that, as a matter of law, must be permitted.

IV. THE REVOLVING DOORS FOR PROSECUTORS: A CASE STUDY

In this Part of the Article, I trace the careers of the 152 prosecutors who were members of the criminal division of the U.S. Attorney’s Office (USAO) in the SDNY in 2001. I followed their careers while in the office and examined where they are today. The results suggest that for these government employees, at least, correlating lax regulatory performance while in office with future benefits while out of office, which the revolving door theory would predict, if taken seriously, is difficult to establish.¹²³ And although lawyers are not like every kind of government employee, and prosecutors, in particular, have different relationships to white collar criminal defense firms than might, say, Capitol Hill staffers to lobbyists, prosecutors are particularly powerful government officials who go through the revolving door as vigorously as any line bureaucrat. Moreover, part of the reason to do such a study is to test the revolving

119. Eric Foner has written the classic work on this issue. See ERIC FONER, *FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR* 18–23 (1995) (arguing that the U.S. anti-slavery movement had much to do with an ideological commitment to capitalist organization, and a revulsion against quasi-feudal alternatives).

120. The Thirteenth Amendment states: “Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.” U.S. CONST. amend. XIII, § 1.

121. See, e.g., *Andrews v. Riggs Nat’l Bank of Washington, D.C.*, 80 F.3d 906, 912 (4th Cir. 1996) (“Although the Thirteenth Amendment prohibits a court from specifically enforcing a personal service contract, an agreement not to compete is specifically enforceable if it is reasonable.”); *Apperson v. Ampad Corp.*, 641 F. Supp. 747, 751 (N.D. Ill. 1986) (noting some limitation of Thirteenth Amendment claims in employment contract cases). But see *Calhoun v. Everman*, 242 S.W.2d 100, 103 (Ky. 1951) (“Contracts in restraint of employment or personal services are not favorites of the law and will not be enforced where they imperil individual rights which our fundamental laws have declared to be inalienable.”). For a discussion of the issue, see Greg T. Lembrich, Note, *Garden Leave: A Possible Solution to the Uncertain Enforceability of Restrictive Employment Covenants*, 102 COLUM. L. REV. 2291, 2317 n.133 (2002).

122. For a discussion of these problems, see Allen B. Coe, *18 U.S.C. § 207(a)(1) “Lifetime Representation Ban” Opinions: A Lifetime’s Work for Agency Ethics Officials and Advisors*, 63 A.F. L. REV. 129 (2009).

123. This portion of the Article, which applies administrative law concepts to criminal enforcement, takes an approach urged quite persuasively in Rachel E. Barkow, *Administering Crime*, 52 UCLA L. REV. 715 (2005).

door hypotheses, but at the same time to paint a picture of what the career paths for lawyers in elite prosecutorial positions look like.

What this data shows, in addition to showing that SDNY prosecutors are quite white, male, and elite, is that prosecutorial performance, measured by cases brought, prison sentences imposed, or even litigation that made the newspaper, was not correlated with the corruption posited by the revolving door—timid prosecutors did not appear to be rewarded for their laxity on regulated industry. It also showed that the best predictors of the choice to go through the revolving door were demographic ones: maleness, in the broadest possible analysis of the cohort, and whiteness, for the portion of the cohort where race could be determined to a certainty.

A. Data

The SDNY USAO is an agency that, as *The New York Times* has put it, has “catapulted so many former prosecutors into other premier jobs that it has become, in a sense, one of the city’s most powerful clubs.”¹²⁴ It has employed two prosecutors who would go on to run for President,¹²⁵ and two who would serve on the Supreme Court.¹²⁶ The Clinton administration’s FBI director, Louis Freeh, was a former assistant; Bush administration Attorney General Michael Mukasey is also an alumnus of the office.¹²⁷ But most of the lawyers employed by the office, including both of the presidential candidates, Freeh, and Mukasey, ultimately ended up in private practice, frequently representing clients in matters against their former colleagues in the office. Does this fact affect their work?

To answer these questions, a list of all the prosecutors employed by the SDNY was obtained from a *New York Law Journal* story publishing the post-9/11 temporary telephone numbers of the employees of the office.¹²⁸ Demographic and professional information was then obtained for each prosecutor through a variety of publicly available means. The law schools they attended, their current employers, and the years they were admitted to the New York Bar were obtained by searching the Unified New York State Attorney Search database.¹²⁹ Those law schools were then sorted by rank with reference to the *U.S. News and World Report* rankings.¹³⁰ The undergraduate institution attended and clerkships ob-

124. Weiser, *supra* note 46, at A27.

125. Rudolph Giuliani and Thomas Dewey did so. *Id.*

126. Felix Frankfurter and the younger John M. Harlan were Southern District prosecutors. *Id.*

127. *Id.*

128. *Contact Numbers for Federal Court, U.S. Attorneys*, N.Y. L.J., Sept. 27, 2001, at 7. The list of telephone numbers was needed because the attacks of September 11, 2001, rendered the ordinary offices of the SDNY USAO, in downtown New York City, uninhabitable.

129. *Attorney Search*, N.Y. ST. UNIFIED CT. SYS., <https://iapps.courts.state.ny.us/attorney/AttorneySearch> (last visited Feb. 7, 2013).

130. The 2010 rankings were used. *Best Law Schools*, U.S. NEWS & WORLD REP., <http://web>.

tained by the attorneys were obtained by reviewing their law firm web sites or other publicly available information when either could be identified.¹³¹ Demographic information on the ethnicity and gender of the attorneys was obtained to the extent possible, though I treat these data points cautiously because of a paucity of publicly available data.

Information on the performance of the prosecutors while at the USAO was obtained, and cross-checked, from a variety of sources. I relied on data that showed the cases brought and sentences imposed by each prosecutor on an annualized basis. The number of criminal cases that each attorney worked and the length of the prison sentences imposed in the cases in which they were involved were obtained via TRACFed, a Syracuse University database that keeps track of federal prosecution decisions, from intake to post-appellate collateral litigation.¹³² I compared that performance data to two other sorts of information—the number of cases in which the assistant was listed as the principal attorney for the United States in Westlaw’s pleadings database, and the number of times the assistant’s name appeared in cases that were sufficiently high profile to warrant a story in the *New York Law Journal*, the newspaper of the bar. Tracking when the prosecutors started being listed as lead prosecutors and when they stopped also showed how long these prosecutors served on the line, rather than in management, or as a second chair.¹³³ The number of cases in the Westlaw pleadings database and the number of *New York Law Journal* mentions are highly correlated (greater than ninety percent over the window of observation), so, if anything, serve more as a robustness check than anything else.

Evaluating their current outcomes, based on the employment the members of the New York Bar reported to the New York court system, was done both descriptively and quantitatively.

archive.org/web/20090426052426/http://grad-schools.usnews.rankingsandreviews.com/best-graduate-schools/top-law-schools/rankings (archived Apr. 26, 2009).

131. Most of the lawyers in firms had relatively fulsome biographical information available on their firm websites; for other members of the SDNY class of 2001, the not completely reliable method of a Google search was used. Accordingly, the undergraduate and clerkship data is not complete and was employed cautiously in this study, more for descriptive interest than posited as complete.

132. TRACFED, <http://tracfed.syr.edu/> (last visited Feb. 7, 2013). As TRACFed has explained, “Tracking of criminal matters starts at the point of referral from a federal, state, or local investigatory agency recommending federal criminal prosecution and follows the referral through to ultimate disposition. Referrals which federal prosecutors decline to prosecute, as well as referrals which are prosecuted, are covered. . . . The main source for this series is the case management system maintained by the Executive Office for United States Attorneys (EOUSA) of the U.S. Justice Department. . . . This central source is used for responding to requests for statistical information from Congress, OMB, as well as from the Attorney General.” *About the Data: Federal Prosecutor Database*, TRAC, <http://trac.syr.edu/data/jus/eousaDataHistorical.html> (last visited Feb. 7, 2013). TRACFed also keeps track of declination, but because those declinations would not be obvious to a potential hirer of the prosecutors (unless the hirer was a counterparty to the declination), they were left out of the analysis. For a study of declinations, see Hurt, *supra* note 61, at 434–36.

133. These analyses were conducted comparing both the TRACFed data and the Westlaw data. One difference between these datasets is that the average number of years of observation for each Assistant U.S. Attorney (AUSA) is 6.3 years in the Westlaw data and 8.8 years in the TRACFed data.

The choices of those who went into private practice were evaluated by assessing the profits per partner and prestige of the firms they joined. Profits-per-partner figures were obtained and ranked by *The American Lawyer 200* 2009 revenue-per-lawyer measure. The 2010 Vault ranking of firm prestige was used.¹³⁴ For robustness, the 2010 Vault ranking was compared with at least one other ranking, and there was a high level of correlation (about eighty percent) between these two measures. It is no surprise that the 2010 Vault ranking is a highly significant predictor of the firm's rank in revenue per lawyer: each additional firm rank (recall that firms with high rankings are "worse") is associated with about eight additional ranks in revenue per lawyer.¹³⁵

Each attorney who was in private practice was coded as either an associate, a partner, or a counsel. Most were partners, but for those seven attorneys who were counsels or associates, a distinction was made in the analysis. In addition, some other variables were collected to see if they were correlated with employment outcomes. One of the alumni of the SDNY, for example, has gone on to become a conservative political pundit. Because assessments of ideology are often employed when conducting empirical work on lawyers, be they judges, academics, or prosecutors, Democratic and Republican Party donations were obtained with reference to the Federal Election Commission's web site.¹³⁶

Each lawyer's current occupation was obtained, again through a search of publicly available information, that was checked with the address of each attorney on file with the New York court system database.

Based on these efforts, comprehensive data on current employment was obtained for 151 of the 152 prosecutors listed as members of the SDNY USAO in late 2001. Nonetheless, some caveats for this hand-collected data are in order. It was easier to find information about attorneys who moved to law firms than it was for other alumni. TRACFed and Westlaw's pleadings databases purport to be comprehensive but could easily err in identifying the involvement or results of certain attorneys in certain cases (for example, where one prosecutor was substituted for another one during the prosecution of the case). The USAO refused to respond to Freedom of Information Act requests for the agency's press releases before 2003, on the grounds that doing so would invade the privacy of individuals mentioned in the press releases—the fact that the office has made these releases available on the Internet after 2003 makes this argument ludicrous—depriving us of a possible confirmation

134. The 2009 Vault rankings were also collected, but as they differed only slightly from the 2010 rankings, they may be thought of, perhaps, as a robustness check of this measure.

135. This result is based on an ordinary least squares regression of the 2010 Vault ranking on revenue per lawyer. A word of caution in interpreting this result is that only 69 observations (out of 152) could be used due to missing data on revenue per lawyer for most AUSAs.

136. *Advanced Individual Search*, FED. ELECTION COMMISSION, <http://www.fec.gov/finance/disclosure/advindsea.shtml> (last visited Feb. 7, 2013) (searched by individual first and last name, and narrowed to New York if the name was relatively common).

of the accuracy of the other performance measures.¹³⁷

And finally, the performance measures I did obtain measure somewhat different aspects of performance. *New York Law Journal* reports go to the prominence of the cases handled by each prosecutor, Westlaw and TRACFed data identifies the number of these cases, and TRACFed's prison sentences imposed goes—roughly—to the successfulness of the prosecution. Luckily, these measures are positively correlated with each other. But they are each imperfect measures.

Moreover, the sample size of these attorneys is small, and evaluating them based on their performance is not easy. As an example, David Anders may have been an excellent attorney among many others in the office, but he happened to be the one who was assigned to the Enron Task Force trial team, the successful prosecution of which was followed by his move to private practice and a partnership position at Wachtell Lipton, the law firm with the highest profits per partner in the world.¹³⁸ It is possible that Anders was given the case because of his high quality, because he was available at the time, or some combination of other factors.

Moreover, even the Enron case itself, where prosecutors like Anders took a very tough line on some defendants, could have been a story of going for chief executive officer and chairman of the board scalps at the cost of prosecutions of much wider conduct. Or Enron could have been a scapegoat used by the prosecutors at the expense of a wider inquiry that could have been applied to other energy companies. It is impossible to know based entirely on the record of cases handled, prosecutions declined, and convictions won. The data does not, unfortunately, show with how much effort any attorney prosecuted any particular case.

The data was collected to test, among other things, what might be called the “sell-out hypothesis.” It posits that the employment prospects of the Assistant United States Attorneys (AUSAs) are more closely related to their ability to cultivate the people who will pay their bills in private practice. Most baldly, this could take the form of corruption—a job in the future at a fancy law firm, provided that current clients are not subjected to harsh treatment by prosecutors. Or, the defense bar could reward prosecutors who do not do too much with a luxurious sinecure in private practice. Along these lines, prosecutors who in contrast take

137. Mentions of each attorney in press releases issued by the USAO could be obtained by going through the online 2003 collection of those releases. Each release, as a matter of form, named the prosecutor responsible for an indictment or conviction in the penultimate paragraph of the release, permitting a link between the cases that the USAO thought were worthy of a release with the prosecutors who handled them. In this sample, 102 of the 152 AUSAs had at least one press release in 2003: the mean number of mentions is 2.4 and the number varies from 1 to 7. The 2003 press releases are much more lowly correlated with these measures (4% with annualized *New York Law Journal* mentions and 1% with number of cases in Westlaw pleadings database). This is not surprising given that the press releases are available only for 2003, and there is substantial variation across years in these performance measures.

138. See *The 2012 Global 100: Profits per Partner*, AM. LAW., <http://www.americanlawyer.com/PubArticleTAL.jsp?id=1202571229443> (last visited Feb. 7, 2013); *supra* note 62.

stern, puritanical positions against defendants could be presumed to be different from the kind of people that would be wanted in well-paid private practice jobs.¹³⁹

This hypothesis is hard to rule out based on the information gathered for this Article, but it can be made to look unlikely.

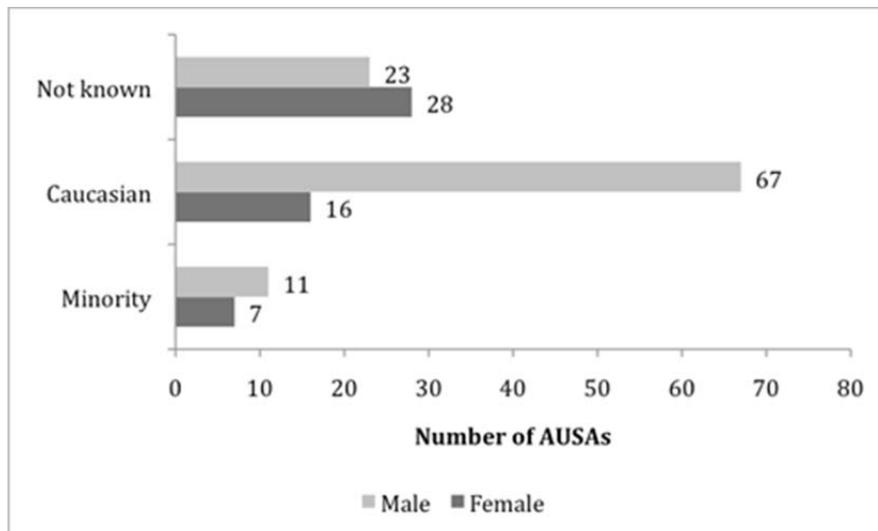
B. Describing the SDNY Class of 2001

This study suggests becoming an AUSA, at least in New York City, is a very good way to accrue substantial personal wealth, and perhaps unsurprisingly (and likely relatedly), it is a job that attracts very talented lawyers. It is also a job that—at least in some ways—is used differently by men and women.

The AUSAs who worked in the office in 2001 were overwhelmingly male and largely white. Two-thirds of the prosecutors in harness in 2001 were men (101 out of the 152). An informal survey of the ethnicity of the prosecutors (in which, because it was by no means systematic, much stock should not be put), suggested 5 of the approximately 100 prosecutors who could be identified were African American, while 83 were Caucasian, and 9 were of East Asian, South Asian, and Near Eastern descent. Figure 1 below illustrates the breakdown of AUSAs by ethnicity and gender.

139. Though it is hard, of course, to know whether their demeanor precludes them from *getting* those jobs, as opposed to *wanting* those jobs.

FIGURE 1: BREAKDOWN OF AUSAS BY ETHNICITY AND GENDER



Continuing with the gender analysis, it is interesting to note that the female AUSAs come from slightly better-ranked law schools than do the male AUSAs: the average law school rank for the males is fifteen but for the females is twelve.¹⁴⁰

The law schools that both males and females came from were elite ones. The five largest providers of U.S. attorneys by far were Columbia Law School, Harvard Law School, NYU Law School, Yale Law School, and Fordham Law School, Fordham being the smallest of the providing institutions, with 9 of the approximately 150 attorneys receiving a law degree from that law school. Harvard graduates comprised 28 of the AUSAs and Columbia graduates 30. NYU had 21 while Yale had 11.

Moreover, the prosecutors appear to have been among the very best students at these excellent schools. A large number of these prosecutors clerked for federal judges, often in the SDNY itself, before joining the office: at least sixty-eight of the attorneys had identifiable prior clerkship experience (a number that probably undercounts the actual total), including five who clerked on the U.S. Supreme Court, the most prestigious clerkship of all. That forty-five percent clerkship total—which, again, probably understates the total—compares favorably with the federal court clerkships per class percentages enjoyed by the 2008 iterations

140. Females also end up at slightly better ranked firms, according to the Vault 2010 rankings: females work, on average, at a rank thirty firm while males work, on average, at a rank thirty-eight firm. These results, however, are based on very few observations: ten for females and forty-five for males, due to the number of boutique firms (hence unranked by Vault) in the sample.

of the five feeder law schools to the Southern District: Yale (31.4%), Harvard (15.5%), Columbia (11%), NYU (8.5%), and Fordham (2.8%).¹⁴¹

Table 1 below lists the number of AUSAs by law school attended.

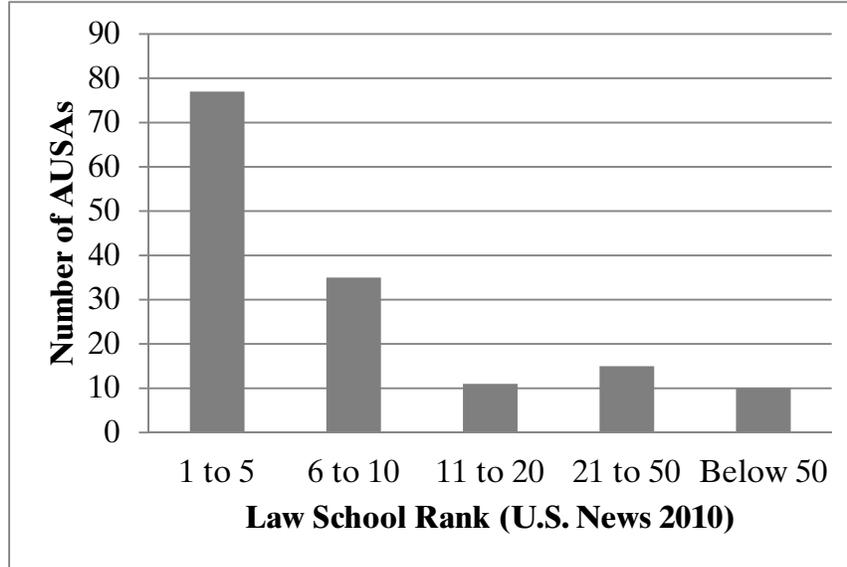
TABLE 1: NUMBER OF ALUMNI IN SAMPLE BY LAW SCHOOL ATTENDED

Law School	Number of Alumni
Columbia	30
Harvard	28
NYU	21
Yale	11
Fordham	9
Stanford	6
Georgetown	5
Michigan	4
University of Virginia	4
Penn	3
Brooklyn	3
American University	2
Boston University	2
Cornell	2
George Washington	2
New York Law School	2
University of Chicago	2
Other	16
Total	152

Another way to think about the origins of these prosecutors is to think about how they were distributed along the law school rankings. As shown in Figure 2, almost half of the lawyers in the office went to a school ranked in the top 5 by *U.S. News*; the slightly larger 21–50 cohort was swelled in particular by the ranks of Fordham law alumni, who graduated from a school with a traditionally close relationship with the SDNY USAO.

141. To discern this information, two tables were consulted. *Best Law Schools: Whose 2008 Graduates Are Most Likely to Be Employed as Federal Judicial Clerks with Article III Federal Judges?*, U.S. NEWS & WORLD REP., http://web.archive.org/web/20100524070113/http://grad-schools.usnews.rankingsandreviews.com/best-graduate-schools/top-law-schools/article_iii_clerks (archived May 24, 2010); see Paul L. Caron, *U.S. News Law School Rankings: Judicial Clerkships*, TAXPROF BLOG (May 7, 2010), http://taxprof.typepad.com/taxprof_blog/2010/05/us-news-.html.

FIGURE 2: NUMBER OF 2001 SDNY AUSAS BY 2010 LAW SCHOOL RANK



The undergraduate institutions were also quite elite, if slightly more dispersed, with the leading undergraduate providers being Harvard, Cornell, Princeton, Columbia, Georgetown, Penn, and Yale. The table below lists the number of AUSAs by undergraduate institution attended.

TABLE 2: NUMBER OF ALUMNI IN SAMPLE BY COLLEGE ATTENDED

College	Number of alumni
Harvard	13
Cornell	10
Princeton	8
Columbia	7
Georgetown	7
Penn	7
Yale	7
Michigan	4
Barnard	3
Brown	3
Dartmouth	3
SUNY Binghamton	3
Stanford	3
Colgate	2

Continued on next page

TABLE 2—CONTINUED

College of William and Mary	2
University of Wisconsin-Madison	2
Vanderbilt	2
Wellesley	2
William and Mary	2
Williams College	2
Other/Not listed	60
Total	152

The prosecutors have been substantially more likely to contribute to Democratic, rather than Republican campaigns—perhaps slightly surprising, given that Republicans like former New York mayor and presidential candidate Rudolph Giuliani and former Attorney General Michael Mukasey had ties to the office. Table 3 below summarizes the mean amount of donations to each political party by the AUSAs in the dataset. Note, however, that less than half of all AUSAs (63 out of 152) in the dataset are observed to donate any amount to either party. On average, fewer females than males appear to donate to federal campaigns, but these differences are not statistically significant.

TABLE 3: SUMMARY OF FEDERAL CAMPAIGN DONATIONS
BY POLITICAL PARTY

	Democratic	Republican
Total Donations	\$ 243,368	\$ 27,438
Average Donations	\$ 4230	\$ 4573
Number of Female Donors	16	1
Number of Male Donors	41	5
Number of Donors	57	6

C. *Employment Outcomes*

The story of a job in the SDNY is largely a story of a revolving door into private practice—not to business, and not to academia, but to law firms, with a minority remaining in the government, in some cases at the USAO but in others ascending to attractive new public sector opportunities. The job appears to be a good one for resume builders whose tastes lean towards either the public or the private sector—as long as they want to be lawyers.

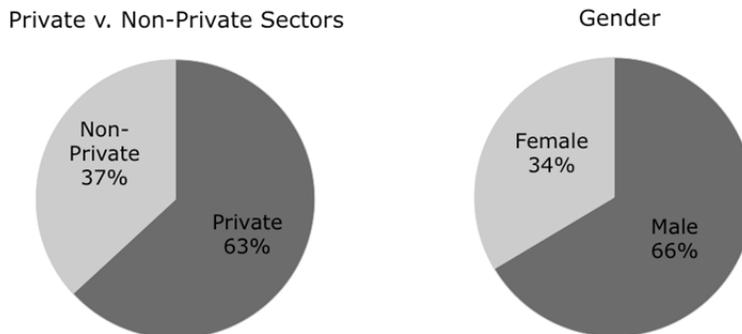
The overwhelming majority of these prosecutors were still practicing law by the end of the decade. Usually, if they left government service, the law they practiced was at law firms, either large or boutique.

Seventy-three of the alumni moved into law firms. Ninety-six of the prosecutors, in sum, had moved to the private sector by 2010, seventy-six percent to a firm. Only fifty-six of the prosecutors of 2001 remained in the government; sixty-six, by contrast, were partners at firms, while most of the rest at firms were counsels. The alumni have spread across the New York private bar, with three joining Quinn Emanuel, three joining the now-shuttered Dewey & LeBoeuf, and a number of other firms taking two former prosecutors. David Anders, as previously noted, became a full partner at Wachtell Lipton, the most lucrative law firm in the world,¹⁴² while Mary Jo White, then the U.S. Attorney for the SDNY, became a partner at Debevoise & Plimpton, a quintessential New York white-shoe law firm. Figures 3 and 4 below show some of these descriptive results.

This was not the case for every alumnus of the office, however. In some cases, the lawyers moved in house, and to jobs that did not only call upon their legal and investigatory skills, 11.8% to be precise. For example, one prosecutor rose to become Managing Counsel at the Bank of New York Mellon. Another AUSA moved to Moody's. A third joined the National Basketball Association, two others moved to Goldman Sachs as compliance officers, and a sixth went to General Electric.

Four, or 2.6%, went into academia, two as tenure track professors and two as clinical professors, all in the New York area—the tenure-track professors went to Hofstra and Brooklyn, the clinical professors to Columbia and Fordham. Figures 3 and 4 below show the breakdown of AUSAs by sector and also show the gender distribution within these sectors.

FIGURE 3: SECTOR AND GENDER DISTRIBUTION OF AUSAS



142. See *supra* notes 62, 138.

FIGURE 4: GENDER DISTRIBUTION WITHIN SECTOR OF AUSAS

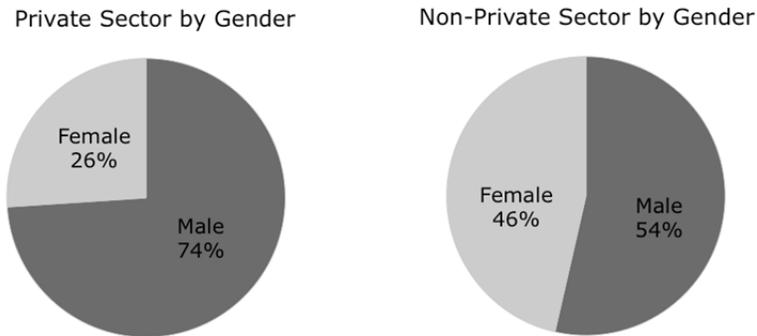
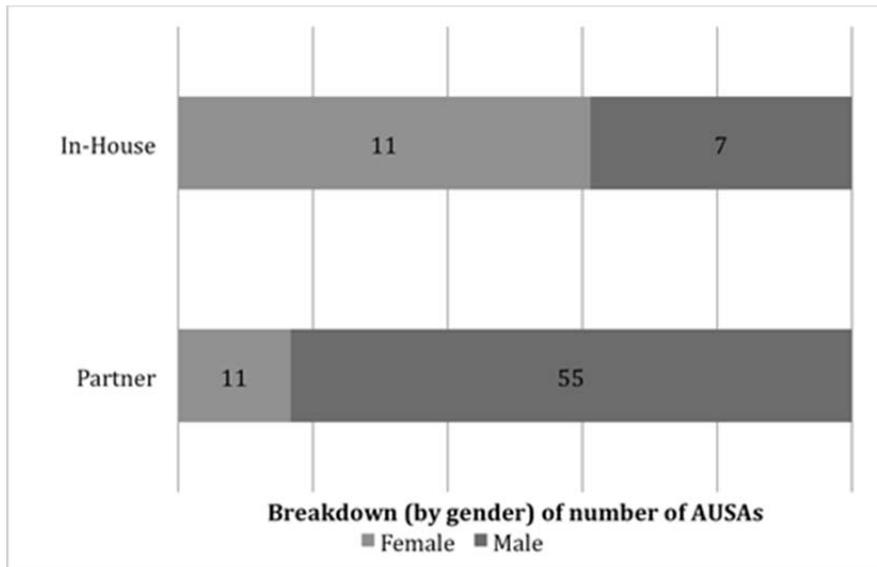


Figure 5 gives a breakdown of whether the AUSA works in house, as a partner, or as a counsel by gender. For example, eleven females work in house compared to seven males; these numbers represent over twenty percent of all females and slightly less than seven percent of all males.

FIGURE 5: BREAKDOWN (BY GENDER) OF AUSAS BY JOB TYPE¹⁴³



The law-focused futures of these elite prosecutors is one-sided enough to bear repeated emphasis. White-collar litigators rarely became anything other than lawyers, even after they leave government service.

143. Recall that there are 51 females and 101 males in this sample.

So while many an incoming law student has heard that “with a law degree, you can do anything,” at the elite ranks in the SDNY, those who had top law degrees and did very well in law school do not find the world to be their oyster, but instead find attractive private-practice or in-house opportunities within the profession.¹⁴⁴

Gender appears to play a role in the employment outcomes of these prosecutors, at least as a descriptive matter. Figure 1 showed and Table 4 below shows further summary statistics by gender.

TABLE 4: SELECTED SUMMARY STATISTICS BY GENDER

	Male	Female
Average number of cases (Westlaw pleadings)	13	16
Average annual prison sentences (months)	38	33
Average number of total criminal cases	65	51
Average law school rank	15	12
Average Vault 2010 rank	38	30
Average revenue-per-lawyer rank	8	9

The career opportunities of AUSAs in this sample tended to be with AmLaw 200 law firms, that is, the two hundred largest law firms in the country, by revenue. Some seventeen went to boutiques in New York, often boutiques with fine reputations, like Kobre & Kim (which was founded by two of the members of the 2001 associate class) and Morvillo Abramowitz.¹⁴⁵ But of the private practice crowd, the rest joined name-brand, large firms, almost all in New York City itself (that other old saw, that if you start in New York, you can go anywhere, is also worth examining closely for this reason). In fact, only seventeen of the prosecutors had left New York by 2010, and although alumni could be found as far afield as Pittsburgh, Miami, Hawaii, and the Ukraine, ten of the seventeen had moved to Washington, D.C., most to do white collar

144. Two of the former AUSAs in private practice appeared to have family connections to the job. Chris Morvillo joined his father’s firm, Morvillo Abramowitz, although he has recently moved on, while Marc Mukasey also prospered in private practice but had good dynastic connections with both the USAO and the New York bar. His father was a judge in the SDNY and became the Attorney General of the United States in the Bush administration. These heirs formed a small number of the large number of lawyers who, having joined the USAO, moved on to private practice on the basis of something other than family ties. And if anything, they appear to be outliers, as few observers I spoke to characterize the office as a dynastic enterprise. But, perhaps in some cases, connections matter.

145. These boutiques are an interesting phenomenon in their own right. For more on the incentives that AUSAs considering founding them face, see Justin Scheck, *Partners in Crime*, RECORDER (Nov. 18, 2005), <http://www.ramsey-ehrllich.com/Recorder%20Article%20-%20Color%20with%20Contact%20Info.pdf> (discussing a startup firm consisting of a criminal prosecutor and a section chief) (“Like several assistant U.S. attorneys who’ve preceded [them] out the door of the Northern District office in recent years, [they] could probably get a high-paying partnership at a big firm”); see also William-Arthur Haynes, *Life After Prosecuting for the Feds: Opening a Private Practice*, S.F. DAILY J. (Aug. 10, 2006), <http://www.ramsey-ehrllich.com/Daily%20Journal.Color.pdf> (describing the choice to open a boutique after time in the U.S. Attorney’s Office).

criminal defense for law firms in the city.

Those who stayed in government service fell into two categories. We might call one, with all due respect, placeholders, while the other became stars of government service. Three of the members of the USAO of 2001 had become judges by 2009: Richard Sullivan, Kenneth Karas, and Joseph Bianco. Others who stayed in the government sector also took enviable jobs. George Canellos became the Director for the SEC's regional district sited in New York and, since then, Deputy Director of the Division of Enforcement at the SEC. Neil Barofsky became the Special Inspector General for the Troubled Assets Relief Program (TARP), created by the bailout of most large financial institutions in 2009. The two of the thirty-six prosecutors who remained in the Department of Justice who went on to become U.S. Attorneys themselves—one in Chicago (Patrick Fitzgerald), one in the SDNY (Preet Bharara)—could also be characterized as stars, as could Robert Khuzami, who became the SEC's enforcement chief.¹⁴⁶

Those who remained as AUSAs are a bit more difficult to categorize. The rest of the thirty-six prosecutors who remained in DOJ either ascended to management positions—fourteen of the 2001 prosecutors appear on the 2010 masthead of the office—or remained as trial attorneys.¹⁴⁷ A total of fifty-six of the prosecutors remained in some kind of government position in 2010.

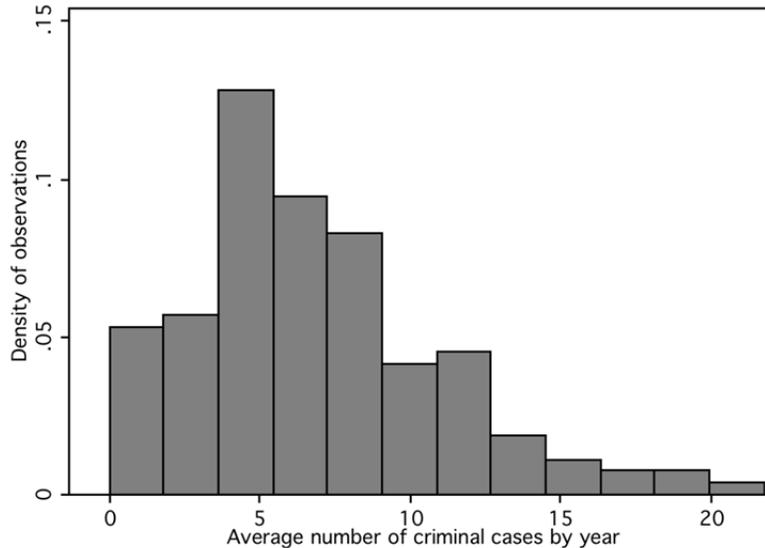
As for those that stayed in the USAO, while some did so surely because they loved the work, on average, these prosecutors were less productive than their peers—excluding the management. They also attended a broader and less prestigious range of law schools.

The number of criminal cases handled annually ranged from zero to twenty-two, but the average prosecutor during his tenure, according to TRACFed, handled about seven cases each year over the process. For each individual AUSA, the total number of criminal cases handled over the entire tenure tracked by the database ranged from 0 (the sign of a manager) to 273. The average AUSA is in the TRACFed dataset for nine years, but the window of observation for each AUSA ranges from three years to sixteen years. And, as Figure 6 demonstrates, most prosecutors handled about five cases per year, on average, though some high-performing attorneys went further.

146. See *supra* notes 24–26 and accompanying text.

147. The 2010 masthead of the office may be found at *Key Personnel in United States Attorney's Offices*, SDNY (Nov. 28, 2010), <http://web.archive.org/web/20101128072118/http://www.justice.gov/usao/offices/personnel/NYS.html> (archived Aug. 28, 2010). Three of these fourteen were also in management positions at around the start of the study, in 2003, as can be seen from the masthead. *Key Personnel in United States Attorney's Offices*, SDNY (Dec. 24, 2003), <http://web.archive.org/web/20031224054912/http://www.justice.gov/usao/offices/personnel/NYS.html> (Jan. 16, 2004).

FIGURE 6: HISTOGRAM OF AVERAGE NUMBER OF ANNUAL CRIMINAL CASES



The purpose of this exercise has been largely descriptive. It is interesting (albeit somewhat gossipy) to see what the careers of elite prosecutors look like, and the mere fact that the revolving door so fundamentally characterizes the SDNY—usually thought to be among the best government lawyers in the country—suggests that the all-too-often assumed relationship between private sector opportunities and public sector laxity or corruption needs to be rethought. But any multivariable data collection effort would be incomplete without some effort to establish causation (or in the case of a dataset like this, correlation—as there are no experiments, instruments, or discontinuities exploited here).

Moreover, the revolving door story about government regulation offers a readily testable hypothesis: prosecutors who evinced a militant attitude toward defendants ought to have been punished when they joined the private sector, with less lucrative employment opportunities being offered to them by the law firms forced to put up with their tough-minded government service.

To test this concept empirically, regression analysis was conducted to test whether an AUSA's performance measures (e.g., average number of criminal cases, "harshness" as measured by linear and squared terms¹⁴⁸

148. Including a squared term for the variable *average length of the prison sentence imposed* allows the regression to fit a nonlinear (i.e., parabolic) term to the model. I included this term in order to consider the possibility that two strategies may lead to getting a more lucrative post-SDNY job: (1) imposing light sentences and therefore "playing nice" with the financial services, and (2) imposing heavy sentences and therefore demonstrating a high level of skill and ability. The fact that this term is

of the average number of prison months given out, and mentions in the *New York Law Journal*), controlling for demographic characteristics (ethnicity and gender) predict whether the AUSA will be in the private or governmental sector.

Results using both linear probability and probit regressions suggest that at least three variables are of statistical significance, but none definitively support the sell-out hypothesis. Instead, each are related to the race and gender of the prosecutors—although only one offers a strong finding, and it is related to race, rather than to the revolving door.

Two job-related findings are small and rather contradictory. Each average annual criminal case appears to reduce the probability of an AUSA entering the private sector by 4% (N=93, p-value < 5%), suggesting that busyness, measured annually, reduces the likelihood of exit, while the number of pleadings mentioned in Westlaw increases the probability of entering the private sector by 3% (N=93, p-value < 1%), suggesting that career-long busyness marginally increases it. But the other work-related measures were uncorrelated with the decision to move to the private sector. It is the demographics that make a difference, hard though it is to parse. Caucasian AUSAs are about 27% more likely to enter the private sector compared to minorities (p-value < 1%). The adjusted R-squared value for this final regression is 27%. The final regression results are robust across a variety of functional forms (e.g., adding polynomial terms of the independent variables). Interaction terms for variables such as gender and ethnicity were also tested but not found to be significant.

An interesting observation is that gender is not important in predicting whether an AUSA enters the private sector, despite the descriptive gender disparities suggested by the work histories of the AUSA in our cohort. In a univariate regression of whether an AUSA enters the private sector predicted by gender, gender is significant (N=101, p-value < 1%) and suggests that males are 21% more likely to enter the private sector. Once an indicator for whether the AUSA is Caucasian is added, however, the significance of gender disappears: only the Caucasian indicator is significant (N=101, p-value < 5%) and suggests that Caucasians are 25% more likely to enter the private sector. The adjusted R-squared for the first regression is 4% and for the second regression is 7%.

As a robustness check, OLS step-wise regressions and decision tree analyses were performed with essentially identical results.¹⁴⁹

not significant means there is no statistically significant evidence that this is the case.

149. Stepwise regressions might be thought of as regressions in search of a model, as they add variables one at a time, and discard any that do not improve the model. The decision tree approach asked, based on the binary question as to whether the prosecutors that had moved into the private sector by 2010, if any 2001 variables might have helped predict the move. The results were only suggestive (R-squared = 17%). But they are interesting: the best predictor of whether someone would remain in the government between 2001 and 2010, or go into private practice, was gender. Men were much more likely to leave government service than were women, who were split evenly between gov-

These regressions are not definitive, but they do not support the sell-out hypothesis. There is no evidence that a cohort of SDNY prosecutors was rewarded for going lightly on industry, and there are theoretical reasons to think that toughness would be rewarded both within government, and, ultimately, upon the leaving of it.

V. LEARNING TO LIVE WITH THE REVOLVING DOOR

For those enraptured by capture and public choice theory, the revolving door is the epitome of the problem with regulation and government more generally. But, as we have seen, this case relies on an abstract view of the world.

Moreover, there are positive aspects to the revolving door. The regular rotation of citizens to government posts may have democratic and public spirited advantages that a caste-like bureaucratic system, for which the door would not revolve, would present.

But these are not the only reasons to rethink the drumbeat of criticism of the revolving door, which is why this Article concludes with a call to make peace with the revolving door, rather than to constantly decry it, either through symbolic legislation or econometric analysis. The revolving door makes it easier for more citizens to participate in government, probably promotes law abidingness in the private sector by salting it with former public officials, and broadens the quality of the bureaucratic applicant pool. The alternative—a caste-like professional and permanent bureaucracy—is not unheard of in other countries, but is inconsistent with the current, largely celebrated, U.S. model.

In fact, Cincinnatus, the Roman war hero who repeatedly retired to his farm between bouts of saving the republic, was a favorite government official of the Framers of the Constitution; they deemed George Washington to be their American Cincinnatus.¹⁵⁰ The part-time government official is something of a long-cherished U.S. ideal; one that has, to be sure, struggled with the professionalization of the bureaucracy, but that retains its own deep-seated hold on the public, who are regularly presented with, say, political candidates who promise to keep on working as doctors, dentists, or what-have-you, and to live part time in Washington.¹⁵¹

ernment and private practice in 2010. After gender, the decision tree analysis identified performance variables as helpful, but the performance variables do not tell a particularly clear story. Men who tried a high number of average criminal cases per year were more likely to stay in their government jobs than those who tried less. But women who managed to impose prison sentences longer than six months on their defendants on average—the tough customers—were more likely to turn to private practice than those who imposed lower sentences. The decision tree algorithm suggests that the more important issue for prosecutors deciding whether to enter private practice turned on a factor unrelated to their job performance, though, again, the correlations are only suggestive.

150. See *supra* note 113 and accompanying text.

151. For a discussion of this phenomenon, see Elizabeth Garrett, *Term Limitations and the Myth of the Citizen-Legislator*, 81 CORNELL L. REV. 623 (1996).

Part-time public service, when it means pretending to hold two jobs at once, may appear a bit silly, but when thought of as the sort of careers enjoyed by Washington and Cincinnatus, it becomes a good deal more resonant. Periodic changings of the bureaucratic guard will appeal to anyone interested in ensuring broad—indeed, even democratic—access to the levers of power of both government and governance. And given that the alternative to ensuring that people move into and out of government jobs would require turning government officials into a wholly separate caste entirely apart from, and necessarily unfamiliar with, the private sector, one can see how a revolving door starts to look much better indeed. As Beth Nolan has said, “Citizen governance requires that people move in and out of government.”¹⁵² The revolving door permits exactly that.

Nor need good-governance types despair over the revolving door, for capture theory works both ways. When government employees leave their jobs and take positions in the private sector, they may eschew the paradigm where they teach their new industrial employers how to evade government regulation and instead adopt a more virtuous one, where they teach their new industrial employers how to comply with government regulation. In this way, the revolving door might not lead to law evasion in the private sector but rather to more law abidingness. In fact, this vision of an instillation of virtue is one of the reasons why the U.S. military devotes so many resources to training their allies in the developing world; it is accordingly not a benefit with which the government is unfamiliar.¹⁵³ And in addition to those lawyers who leave prosecutors’ offices to counsel their clients at law firms and represent them before the government, there are some who are hired by business to, at least potentially, assist in the process of implementing regulations. For example, the fifteen AUSAs who left the SDNY to move in house overwhelmingly held positions as compliance officials in their new firms. It is possible that these compliance officers spend most of their time working on regulatory evasion. But it is more likely that at least some of their work is devoted to preventing their employers from engaging in the sorts of criminal activities that they prosecuted in the past.

Edward Glaeser and his co-authors have concluded that the complex interplay between federal and state officials deciding where to bring drug cases is designed in part to help prosecutors “further their careers, in both the private and the public sector. For example, prosecutors may seek to try ‘high profile’ criminals . . . to develop their legal skills and

152. Beth Nolan, *Public Interest, Private Income: Conflicts and Control Limits on the Outside Income of Government Officials*, 87 NW. U. L. REV. 57, 84 (1992).

153. The Departments of Defense and State file an annual report listing various of these benefits. U.S. DEP’T OF DEFENSE & U.S. DEP’T OF STATE, FOREIGN MILITARY TRAINING IN FISCAL YEARS 2009 AND 2010 JOINT REPORT TO CONGRESS, available at <http://www.state.gov/documents/organization/155982.pdf>.

connections in the private sector”¹⁵⁴ Richard Boylan and Cheryl Long studied the career outcomes of a nationwide sample of federal prosecutors and concluded that “lawyers seek nonprofit employment . . . to obtain [in part] experience valuable in the private sector.”¹⁵⁵ And Shivaram Rajgopal and his co-authors have found that SEC enforcement officials are unharmed by the revolving door.¹⁵⁶ There are, accordingly, reasons to believe that even public choice enthusiasts might be able to find reasons why the revolving door need not doom law enforcement to ineffectualism.

Finally, the prospect of private-sector riches may improve the quality of the applicant pool for government work. Indeed, this concern led James Landis to worry about imposing revolving door restrictions on the New Deal SEC.¹⁵⁷ One can easily imagine, for example, that the prosecutors in the SDNY who currently enjoy the revolving door model have better resumes than they would if the position was a lifetime appointment without the possibility of parole. Instead, the fact that almost all of them can, and a majority of these prosecutors do, leave government employment for lucrative opportunities in the private sector makes the government job all the more appealing. In turn, that can attract a broader array of candidates. Indeed, the mere fact that a high-quality office like the SDNY USAO has obtained its lofty reputation compared to other government outfits, while participating exuberantly in the revolving door, suggests that those who claim corruption whenever the possibility of private-sector exit for public employees is available need to think a bit more carefully about which public-sector employees are being corrupted—and whether the revolving door is more of an oversimplification than it needs to be, and more often a propaganda tool than it should be.

CONCLUSION

As we have seen, it is an article of faith among many that government employees are motivated by their future employment prospects elsewhere. That simple, intuitive idea has made the revolving door theory one of the building blocks of the rational choice critique of regulation.

154. Glaeser et al., *supra* note 61, at 261.

155. Richard T. Boylan & Cheryl X. Long, *Salaries, Plea Rates, and the Career Objectives of Federal Prosecutors*, 48 J.L. & ECON. 627, 629 (2005). Boylan concluded in another study that the chief federal prosecutors in every judicial district maximized their incomes by maximizing the length of prison sentences imposed on defendants. See Richard T. Boylan, *What Do Prosecutors Maximize? Evidence from the Careers of U.S. Attorneys*, 7 AM. L. & ECON. REV. 379, 379 (2005); see also Rebecca Hollander-Blumoff, *Getting to “Guilty”: Plea Bargaining as Negotiation*, 2 HARV. NEGOT. L. REV. 115 (1997) (also proffering the human capital accumulation hypothesis for the decision to join the government).

156. Rajgopal et al., *supra* note 77, at 5 (“The existence of revolving doors that allow capable lawyers to work at the SEC before they move to other opportunities is not detrimental to the SEC’s enforcement efforts.”).

157. See *supra* note 12 and accompanying text (Landis told Frankfurter that without implementing such a regulation, the agency’s mission would be compromised).

This theory, however useful in broad brush, has never recognized the incentives of reputation, effectiveness, and mission fulfillment that might distract bureaucrats from pursuing their self-interest, and it has almost always identified those interests monetarily, without recognizing the investments that effective public service may make in future careers.

Accordingly, the parsimonious, even crabbed, reading of the motivations of law enforcement officials, although clean, deserves some complication, and a study of a cohort of elite prosecutors in the SDNY underscores the complexity of the story. The data suggests that employment outcomes of prosecutors are determined not by how lightly they go on defendants, or on capital markets participants. And it is easy to come up with theoretical reasons why the revolving door phenomenon might actually encourage aggressive regulatory oversight, rather than the lax sort.

The efforts of all three branches of government have failed to prevent the revolving door from revolving lucratively, and often in unobjectionable ways, for judicial law clerks, executive branch prosecutors, and congressional staffers—indeed if they succeeded, constitutional and other questions about the free movement of labor would be raised. It is worth learning to live with the revolving door, and reflecting on its easily overlooked positive attributes, and it is time to make peace with the revolving door, rather than decrying it at every opportunity.

