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# CASE NOTES AND COMMENTS

## NO POINTS FOR THE ASSIST? A CLOSER LOOK AT THE ROLE OF SPECIAL ASSISTANT UNITED STATES ATTORNEYS IN THE COOPERATIVE MODEL OF FEDERAL PROSECUTIONS

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## I. INTRODUCTION

In *United States v. Bernhardt*,<sup>1</sup> the State of Hawaii charged two defendants with conspiracy and misapplication of bank funds.<sup>2</sup> Just before the defendants won a dismissal from the state court on statute of limitations grounds, the State Deputy Attorney General who prosecuted the case contacted the U.S. Attorney for the District of Hawaii.<sup>3</sup> The federal office agreed to adopt the case if the state prosecutor would serve as uncompensated<sup>4</sup> lead counsel.<sup>5</sup> Accordingly, the state's attorney received a cross-designation as a Special Assistant U.S. Attorney and successfully indicted the defendants before a federal grand jury.<sup>6</sup>

The district court dismissed the indictment on double jeopardy grounds,<sup>7</sup> but the court of appeals reversed, finding that the dual sovereignty doctrine, which allows "the federal and state governments [to] both prosecute a person for a crime . . . if the person's act violated both jurisdictions' laws,"<sup>8</sup> prevented the defendant from prevailing on his double jeopardy claim.<sup>9</sup> The court reasoned that the federal government can *always* exert its "right to decide that a state prosecution has not vindicated a violation' of federal law."<sup>10</sup> However, the court expressed its concern that the U.S. Attorney only took the case at the behest of the Deputy Attorney General, who carried out both prosecutions with a paycheck from the State of Hawaii.<sup>11</sup>

This case illustrates how state-level attorneys can effectuate their personal agendas under the guise of Special Assistant U.S. Attorneys. This designation, among other consequences, can result in the successive prosecution of defendants. The court of appeals in *Bernhardt* suggested that it would not have harbored reservations about the legitimacy of the second prosecution if the federal government actually demonstrated an interest in the outcome of the case.<sup>12</sup> How much greater, then, is the danger of successive prosecutions where the federal government and the state team up to pursue a national agenda?

Federal law authorizes the appointment of Special Assistant U.S. Attorneys ("SAUSAs") to assist U.S. Attorneys in the preparation and prosecution of special

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1. 831 F.2d 181 (9th Cir. 1987).

2. *Bernhardt*, 831 F.2d at 181.

3. *Id.*

4. The attorneys agreed that the State of Hawaii would pay the Deputy's salary. *Id.* at 181–82.

5. *Id.*

6. *Id.* at 182.

7. *Id.*

8. BLACK'S LAW DICTIONARY 573 (9th ed. 2009). See *infra* notes 114–27 and accompanying text for a discussion of the dual sovereignty doctrine and how it relates to prosecutions involving Special Assistant U.S. Attorneys.

9. *Bernhardt*, 831 F.2d at 182.

10. *Id.* at 183 (quoting *Heath v. Alabama*, 474 U.S. 82, 93 (1985)).

11. *Id.* at 182–83.

12. See *id.* at 183 (describing federal government's tenuous connection to case as "troubling," but holding that "sufficient independent federal involvement" would override narrow exception to dual sovereignty doctrine).

cases.<sup>13</sup> SAUSAs run the gamut of legal professions, from prosecutors and military lawyers to agency counsel.<sup>14</sup> Once an attorney receives the transformative designation of SAUSA, she has the same power and authority as an Assistant U.S. Attorney.<sup>15</sup> The U.S. Attorney's Office may then appoint her to serve in a specific department, to assist with complex or technical litigation, or to coordinate one of the office's projects or initiatives.

Additionally, state prosecutors may be "cross-designated" as SAUSAs, allowing them to retain their positions while trying cases in federal court. These SAUSAs often work closely with the criminal divisions of the U.S. Attorney's Offices in their respective judicial districts pursuant to cooperative initiatives such as Project Safe Neighborhoods, a federal anti-gun crime initiative.<sup>16</sup> This Comment focuses on SAUSAs who serve in this special capacity as liaisons between their localities and federal prosecutors. It refers to this dynamic throughout as the "cooperative model." This model carries benefits and risks, which are explored at length in the Discussion.

Part II of this Comment provides the legislative and judicial authorization for the appointment of SAUSAs.<sup>17</sup> Specifically, it focuses on the language and interpretive case law of 28 U.S.C. § 543 (2006), which authorizes the Attorney General to appoint SAUSAs. Second, it provides an overview of the various roles and responsibilities of SAUSAs by discussing how U.S. Attorney's Offices across the country hire, place, and utilize these attorneys.<sup>18</sup> Third, Part II summarizes the scholarship and jurisprudence on the benefits and risks that flow from the involvement of SAUSAs in federal prosecutions.<sup>19</sup> The work product, expertise, and unique insight of SAUSAs are all benefits that accrue to the participating offices and result in higher conviction rates. However, federal prosecutions led by SAUSAs have generated defenses of vindictive prosecution, selective prosecution, and double jeopardy.

Part III discusses which of these benefits and risks are associated with the cooperative model. First, it argues that the cooperative model facilitates the successes of federal initiatives such as Project Safe Neighborhoods by providing the resources to dramatically increase federal prosecutions, a powerful deterrence mechanism.<sup>20</sup>

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13. U.S. DEP'T OF JUSTICE, U.S. ATTORNEYS' MANUAL 3-2.300, [http://www.justice.gov/usao/eousa/foia\\_reading\\_room/usam/title3/2musa.htm#3-2.300](http://www.justice.gov/usao/eousa/foia_reading_room/usam/title3/2musa.htm#3-2.300) (last visited Apr. 10, 2010).

14. See *infra* Part II.B and accompanying text for a discussion of the professional qualifications of SAUSAs.

15. Stephane Latour, *Prosecutor Cross-Designation*, SWIFT & CERTAIN (Nat'l Dist. Attorneys Ass'n/American Prosecutors Research Inst. Gun Violence Prosecution Program, Alexandria, V.A.), Vol. I, No. 2 (2002), [http://www.ndaa.org/publications/newsletters/swift\\_volume\\_1\\_number\\_2\\_2002.html](http://www.ndaa.org/publications/newsletters/swift_volume_1_number_2_2002.html).

16. Project Safe Neighborhoods is a federal initiative launched by the Bush administration in 2001. Its aim is to reduce the incidence of gun crimes by providing local law enforcement with federal resources, including access to U.S. Attorneys and enhanced federal penalties. Project Safe Neighborhoods: About Project Safe Neighborhoods, <http://www.psn.gov/about/index.html> (last visited Apr. 10, 2010).

17. See *infra* Part II.A for a discussion of the statutes that authorize the appointment of SAUSAs and the case law interpreting those statutes.

18. See *infra* Part II.B for a discussion of SAUSAs in practice.

19. See *infra* Parts II.C and D for a discussion of the benefits and risks that accompany SAUSA involvement in federal prosecutions.

20. See *infra* Part III.A for a discussion of how the cooperative model contributes to increased prosecutions under Project Safe Neighborhoods.

Second, it argues that successive prosecutions from state to federal court by the same attorney acting as a SAUSA complicate the elements needed to demonstrate vindictive prosecution.<sup>21</sup> Moreover, the cooperative model contains procedural and structural defects that may lead to selective prosecution.<sup>22</sup> Third, Part III discusses how the cooperative model quietly opens the door to dual or successive prosecutions.<sup>23</sup> Specifically, it argues that the cooperative model undermines the rationale behind the dual sovereignty doctrine when the same attorney prosecutes a defendant in both state and federal courts. Finally, it argues that the cooperative model renews concerns about maintaining the separation of powers between the federal government and the states.<sup>24</sup> Moreover, the strategy threatens to place significant burdens on state and local governments as well as the federal judiciary if it continues in force.<sup>25</sup>

The Discussion proposes solutions to mitigate the negative effects of the cooperative model. Specifically, it encourages Congress and the Justice Department to create uniform requirements for the designation of local prosecutors as SAUSAs. Additionally, it proposes that the courts reinstate the failed *Bartkus* exception<sup>26</sup> and apply it to cases in which a SAUSA who initially prosecuted a defendant in state court attempts a subsequent prosecution in federal court.

## II. OVERVIEW

### A. Appointment of SAUSAs

#### 1. Legislative Authorization for SAUSAs

Section 543 of the Judiciary and Judicial Procedure Act, enacted by Congress in 1948, authorizes the Attorney General to “appoint attorneys to assist United States attorneys when the public interest so requires.”<sup>27</sup> Attorneys appointed pursuant to § 543 may then “conduct any kind of legal proceeding, civil or criminal, including grand jury proceedings and proceedings before committing magistrate judges, which United States

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21. See *infra* Part III.B.1 for a discussion of how the cooperative model compromises the presumption of prosecutorial vindictiveness.

22. See *infra* Part III.B.2 for a discussion of the systemic considerations that lead to selective prosecution.

23. See *infra* Part III.C.1 for a discussion of how cooperative efforts between local, state, and federal prosecutors can result in dual or successive prosecutions.

24. See *infra* Part III.C.2 for a discussion of how the cooperative model contributes to the federalization of local crimes.

25. See *infra* Part III.C.2 for a discussion of the strategy’s impact on the judicial system.

26. The *Bartkus* exception is a judicially created and narrowly interpreted exception to the constitutionality of successive federal and state prosecutions based on the same transaction. In *Bartkus v. Illinois*, the Supreme Court held that the subsequent state prosecution of a defendant after a federal acquittal on robbery charges did not violate the Fifth Amendment because the prosecutions were conducted independently; the state was not “merely a tool of the federal authorities” and the second prosecution was not merely “a sham and a cover” for the first. 359 U.S. 121, 123–24 (1959) (emphasis added). See *infra* Part II.D.2 for a discussion of the *Bartkus* exception and how it applies to prosecutions by SAUSAs.

27. Act of June 25, 1948, Pub. L. No. 80-773, 62 Stat. 869, 909 (codified as amended at 28 U.S.C. § 543(a) (2006)).

attorneys are authorized by law to conduct.”<sup>28</sup> However, the Attorney General “shall supervise all litigation to which the United States, an agency, or officer thereof is a party, and shall direct all . . . special attorneys appointed under section 543 . . . in the discharge of their respective duties.”<sup>29</sup> Moreover, the Attorney General has the mandate to set the salaries of special assistants,<sup>30</sup> as well as the power to remove special attorneys appointed pursuant to § 543.<sup>31</sup>

## 2. Judicial Authorization for SAUSAs

In spite of—or perhaps because of—the dearth of statutory language and legislative history surrounding the appointment of special attorneys, the courts have consistently interpreted § 543 to confer broad authority on the Attorney General and his delegates<sup>32</sup> to dictate the scope and terms of employment for special assistants.<sup>33</sup> “Courts have often affirmed prosecutorial authority to cross-designate, declined to require specificity in the commissions of such designees, and welcomed the use of such coordinated activity of both prosecutorial and investigatory officials of state and federal courts.”<sup>34</sup>

Although some courts have expressed reservations about the qualifications of special assistants, they have generally adhered to the plain language of the Judiciary and Judicial Procedures Act.<sup>35</sup> As a result, the Attorney General and his delegates exercise a great deal of discretion in their appointments.<sup>36</sup> The SAUSAs, in turn, are

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28. 28 U.S.C. § 515(a).

29. *Id.* § 519.

30. *See id.* § 548 (instructing Attorney General to set SAUSA salaries to no more than that of base pay of Assistant Attorneys General).

31. *Id.* § 543(b).

32. The Attorney General has the power to delegate his authority to appoint special assistants to subordinates in the Justice Department. *See id.* § 510 (“The Attorney General may from time to time make such provisions as he considers appropriate authorizing the performance by any other officer, employee, or agency of the Department of Justice of any function of the Attorney General.”); *United States v. Plesinski*, 912 F.2d 1033, 1037 (9th Cir. 1990) (holding that Attorney General’s statutory authority to delegate appointment powers arises from 28 U.S.C. § 510).

33. *See, e.g., United States v. Allred*, 867 F.2d 856, 871 (5th Cir. 1989) (construing 28 U.S.C. §§ 515, 543 to confer broad authority on the Attorney General to appoint assistant attorneys).

34. Judith Resnik, *Afterword: Federalism’s Options*, 14 YALE L. & POL’Y REV. 465, 484 n.88 (1996).

35. One court expressed its reservations as follows:

While we are constrained by the language of the statute, we are concerned, as is the District Court, with the policy questions involved in this case. We share many of its apprehensions with respect to the widespread use of special attorneys; an apprehension that has not been lessened by the sometimes inept performance in recent years of special attorneys at the district and appellate levels of this Circuit. But we remain convinced that until Congress imposes limitations on the power of the Attorney General, we must accept his right to authorize, absent a violation of the Constitution, special attorneys to conduct any criminal proceeding in a designated judicial district which United States Attorneys are authorized to conduct.

*United States v. Wrigley*, 520 F.2d 362, 369–70 (8th Cir. 1975).

36. *See Allred*, 867 F.2d at 871 (noting that statutes authorizing Attorney General to appoint special assistants “exist[] as an indication of authority, not as a limitation” on it).

vested with a broad mandate to aggressively enforce the laws of the United States.<sup>37</sup> First, the courts have permitted Special Assistant U.S. Attorneys to serve indefinitely. In *United States v. Navarro*,<sup>38</sup> the Court of Appeals for the Ninth Circuit reviewed the district court's dismissal of an indictment and judgment against the defendant.<sup>39</sup> The district court vacated the judgment pursuant to the defendant's argument that the Intergovernmental Personnel Act<sup>40</sup> ("IPA") barred the government's attorney from prosecuting the case because he had served as a SAUSA for more than four years.<sup>41</sup> The appellate court held that the Attorney General may exceed the four-year limit on individual terms of appointment created by the IPA, reasoning that Congress provided the Attorney General with separate appointment authority pursuant to 28 U.S.C. § 543(a).<sup>42</sup>

Second, the courts have allowed Special Assistant U.S. Attorneys to represent the U.S. government at all levels of judicial proceedings. In *United States v. Hawthorne*,<sup>43</sup> for example, the defendant appealed his conviction on the basis that two SAUSAs impermissibly conducted the grand jury proceedings.<sup>44</sup> In a per curiam opinion, the Court of Appeals for the Ninth Circuit affirmed the district court's decision to validate the indictment.<sup>45</sup> The circuit court held that the SAUSAs were properly authorized to conduct the grand jury proceeding pursuant to 28 U.S.C. § 543 because they were appointed, directed, and supervised by the U.S. Attorney.<sup>46</sup> Moreover, as the court reasoned, nothing in the language of the statute requires that the Attorney General specifically authorize a SAUSA to appear on behalf of the government at a grand jury proceeding.<sup>47</sup>

Finally, the courts have allowed SAUSAs to receive salaries from jurisdictions other than the federal government. In *United States v. Smith*,<sup>48</sup> the defendant moved to dismiss a federal grand jury indictment against him, arguing that the SAUSA present at

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37. See *United States v. Tedesco*, 441 F. Supp. 1336, 1342 (M.D. Pa. 1977) (noting that attorneys authorized to conduct federal prosecutions succeed to "the same authority as the United States Attorney for that district").

38. 160 F.3d 1254 (9th Cir. 1998).

39. *Navarro*, 160 F.3d at 1254.

40. The Intergovernmental Personnel Act states, in pertinent part, that:

On request from or with the concurrence of a State or local government, and with the consent of the employee concerned, the head of a Federal agency may arrange for the assignment of . . . an employee of a State or local government to his agency . . . . The period of an assignment under this subchapter may not exceed two years. However, the head of a Federal agency may extend the period of assignment for not more than two additional years. . . . This subchapter is authority for and applies to the assignment of . . . an employee of an other [sic] organization to a Federal agency.

5 U.S.C. § 3372 (2006).

41. *Navarro*, 160 F.3d at 1254.

42. *Id.* at 1256. Section 543(a) states that "[t]he Attorney General may appoint attorneys to assist United States attorneys when the public interest so requires." 28 U.S.C. § 543(a) (2006).

43. 626 F.2d 87 (9th Cir. 1980) (per curiam).

44. *Hawthorne*, 626 F.2d at 88.

45. *Id.* at 90.

46. *Id.*

47. *Id.* at 89-90.

48. 324 F.3d 922 (7th Cir. 2003).

the proceeding did not qualify as “an authorized ‘attorney[] for the government’” because the state of Wisconsin, not the federal government, paid his salary.<sup>49</sup> In support of his argument, the defendant pointed to 28 U.S.C. § 548,<sup>50</sup> which governs the salaries of special assistants.<sup>51</sup> The district court held that the SAUSA had the requisite authority, and the Court of Appeals for the Seventh Circuit affirmed, reasoning that nothing in the language of § 548 places a floor on the amount the Attorney General must pay a special assistant or precludes compensation from other sources.<sup>52</sup>

#### B. SAUSAs in Practice

SAUSAs span a variety of legal professions: military lawyers, counsel for administrative agencies, local and state prosecutors, and even private attorneys.<sup>53</sup> U.S. Attorney’s Offices appoint these individuals for a variety of reasons.<sup>54</sup> An office may, for example, hire SAUSAs to fill full-time positions.<sup>55</sup> Alternatively, an office may consult with and utilize the services of SAUSAs on an ad hoc basis, either because of their familiarity with a complex area of litigation or because they provide a nexus to state and local offices.<sup>56</sup> The Table in Appendix A contains examples of how each U.S. Attorney’s Office hires, places, and utilizes SAUSAs.<sup>57</sup>

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49. *Smith*, 324 F.3d at 924 (quoting FED. R. CRIM. P. 6(d)(1)).

50. Section 548 states, in pertinent part, that

the Attorney General shall fix the annual salaries of . . . attorneys appointed under section 543 of this title at rates of compensation not in excess of the rate of basic compensation provided for Executive Level IV of the Executive Schedule set forth in section 5315 of title 5, United States Code.

28 U.S.C. § 548 (2006).

51. *Smith*, 324 F.3d at 925.

52. *Id.* at 925–26.

53. *See, e.g.*, *United States v. Wooten*, 377 F.3d 1134, 1139 (10th Cir. 2004) (noting that full-time military officer prosecuted case as SAUSA); *United States v. Mady*, No. 04-80408, 2005 WL 2290712, at \*1 (E.D. Mich. Sept. 20, 2005) (noting that SAUSA prosecuting case had served as trial counsel for federal agency); *United States v. Belcher*, 762 F. Supp. 666, 668 (W.D. Va. 1991) (noting that commonwealth’s attorney prosecuted case as SAUSA).

54. *See, e.g.*, Larry Cunningham, Note, *Deputization of Indian Prosecutors: Protecting Indian Interests in Federal Court*, 88 GEO. L.J. 2187, 2188 (2000) (explaining that because military courts do not have jurisdiction over civilians, Department of Justice deputizes Judge Advocate General lawyers as SAUSAs to prosecute crimes against military by non-civilians).

55. The United States Attorney’s Office for the Southern District of California, for example, has three full-time SAUSAs. The United States Attorney’s Office, Southern District of California: Office History, <http://www.usdoj.gov/usao/cas/history/> (last visited Apr. 10, 2010).

56. The U.S. Attorney for the District of Columbia routinely employs attorneys from federal agencies, while the U.S. Attorney’s Office in the Eastern District of Pennsylvania cross-designates SAUSAs from federal agencies and state prosecutors’ offices to take on firearms cases. United States Attorney’s Office for the District of Columbia: Special Assistant U.S. Attorney Positions, [http://www.justice.gov/usao/dc/Employment/Special\\_AUSA/](http://www.justice.gov/usao/dc/Employment/Special_AUSA/) (last visited Apr. 10, 2010); The United States Attorney’s Office, Eastern District of Pennsylvania: About The Office, <http://www.justice.gov/usao/pae/about.html> (last visited Apr. 10, 2010).

57. *See infra* Appendix A for information relating to the use of SAUSAs from the official Department of Justice website for each U.S. Attorney’s Office. *See generally* The United States Department of Justice, United States Attorneys: United States Attorneys Mission Statement, <http://www.usdoj.gov/usao/> (last visited Apr. 10, 2010).

A district or state's attorney "cross-designated" as a SAUSA generally remains in his current position and provides uncompensated assistance to the U.S. Attorney's Office.<sup>58</sup> Under this "cooperative model," a SAUSA has assignments from and duties to the local and federal governments. His responsibilities with respect to the U.S. Attorney's Office generally include (1) screening local cases to determine which ones qualify for federal prosecution and (2) representing the United States during federal proceedings as the first or second chair<sup>59</sup> for the prosecution of those cases.<sup>60</sup> The Discussion revisits the cooperative model to consider some of its benefits and risks, and whether they reflect the benefits and risks attributed to SAUSAs generally.

### C. *Benefits to Having SAUSAs Prosecute Federal Cases*

There are numerous benefits to using SAUSAs to prosecute federal cases. SAUSAs alleviate a U.S. Attorney's caseload, provide the staffing for special projects, bring under-prosecuted offenses and under-represented victims to the national spotlight, and fill jurisdictional gaps where another court lacks the authority to adjudicate a case. This section discusses those benefits in turn. First, it focuses on the use of SAUSAs to implement national crime-reduction strategies like Project Safe Neighborhoods. Second, it discusses situations in which SAUSAs provide more than an extra pair of hands, lending their expertise and insight to U.S. Attorneys in federal prosecutions.

#### 1. *Helping Hands*

Special Assistant U.S. Attorneys alleviate budgetary pressure on federal agencies and provide a staffing solution for much-needed projects.<sup>61</sup> In the late 1990s, Richmond, Virginia ranked among the top five American cities for the highest per capita murder rates.<sup>62</sup> In an effort to reduce the prevalence of gun violence, the U.S. Attorney's Office for the Eastern District of Virginia implemented a new strategy called Project Exile.<sup>63</sup> Aggressive prosecution of gun arrests in federal courts became the cornerstone of the Project Exile regime.<sup>64</sup> As originally conceived, the project "involved a considerable commitment of federal enforcement resources," but by the

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58. See AM. PROSECUTORS RESEARCH INST., CROSS-DESIGNATION & FEDERAL FIREARMS LAWS: WHAT LOCAL PROSECUTORS NEED TO KNOW 5 (2003) (explaining chain of command of SAUSAs).

59. The "first chair" refers to the case's lead attorney, while the "second chair" assists in the prosecution. BLACK'S LAW DICTIONARY, *supra* note 8, at 710, 1472.

60. Latour, *supra* note 15.

61. See Steven C. Salch, *Choice of Forum in Tax Litigation*, in HOW TO HANDLE A TAX CONTROVERSY AT THE IRS AND IN COURT 441, 452 (A.L.I.-A.B.A. 2007) (noting that Internal Revenue Service and Justice Department responded to budgetary pressure by deputizing district attorneys as SAUSAs to litigate bankruptcy, tax, and summons cases).

62. Daniel C. Richman, "Project Exile" and the Allocation of Federal Law Enforcement Authority, 43 ARIZ. L. REV. 369, 379 (2001).

63. *Id.*

64. See *id.* at 370 (noting that original Project Exile aimed to prosecute defendants charged with crimes involving guns in federal court pursuant to federal firearms statutes).



end of its second year, “just three prosecutors, some of whom had been detailed from state and local offices,” handled Project Exile’s caseload.<sup>65</sup>

Capitalizing on the success of Project Exile, the Bush administration announced Project Safe Neighborhoods (“PSN”) in 2001—a political call-to-arms to take Project Exile’s strategy nationwide.<sup>66</sup> Since then, the federal government has contributed \$2 billion toward hiring new prosecutors, training personnel, and developing community outreach projects.<sup>67</sup> Some of the personnel hired with federal funds are SAUSAs.<sup>68</sup> These special attorneys staff PSN cases and act as liaisons between their local offices and the U.S. Attorney’s Offices in their corresponding districts, keeping the lines of communication open and facilitating joint investigations.<sup>69</sup> Their services have contributed to a dramatic increase in the number of federal charges since PSN’s inception.<sup>70</sup> In 2005, the Department of Justice (“Justice Department” or “DOJ”) reported a seventy-three percent increase in the number of firearms cases filed nationwide in federal courts in the five years since the federal government had launched the program.<sup>71</sup> The success rate of these prosecutions is also astounding. In the same year, over ninety-three percent of individuals charged with federal firearms offenses received prison sentences, with sixty-eight percent receiving sentences greater than or equal to three years.<sup>72</sup>

## 2. Expertise and Insight

Even if the U.S. Attorney’s Office has the manpower and resources to prosecute a case, a SAUSA may still be the best person for the job.<sup>73</sup> First, a SAUSA may have a better grasp on the case because the issues are closer to home.<sup>74</sup> For example, a state or

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65. *Id.* at 380.

66. Project Safe Neighborhoods: About Project Safe Neighborhoods, <http://www.psn.gov/about/index.html> (last visited Apr. 10, 2010).

67. *Id.*

68. *See* United States v. Nixon, 315 F. Supp. 2d 876, 879 n.1 (E.D. Mich. 2004) (observing that in some cases brought under Project Safe Neighborhoods, U.S. Attorneys hired state prosecutors with federal funds).

69. AM. PROSECUTORS RESEARCH INST., *supra* note 58, at 6 (noting that SAUSAs “ensure that the lines of communication between the state and federal prosecutors remain ‘hard-wired’”); *e.g.*, Press Release, U.S. Dep’t of Justice, Georgia Men Convicted on Federal Drug Charges (Feb. 11, 2008), <http://www.justice.gov/usao/tne/pr/2008/February/Jury%20Trial%20-%20Freeman%20and%20Russell.htm> (reporting that SAUSA was assigned to prosecute Project Safe Neighborhood cases arising in Johnson City, Tennessee in cooperation with Johnson City Police Department, District Attorney General, and U.S. Attorney’s Office).

70. *See* Project Safe Neighborhoods, Executive Summary (on file with author) (noting that in 2005, Justice Department prosecuted “a record number of 13,062 defendants for violations of federal gun crimes, an increase of more than 62 percent from FY 2000 figures”).

71. *Id.*

72. *Id.*

73. *See* Patrick E. Corbett, *Prosecuting the Internet Fraud Case Without Going Broke*, 76 MISS. L.J. 841, 864–65 (2007) (suggesting that federal authorities appoint state prosecutors as SAUSAs to prosecute internet fraud cases because of their ongoing involvement in investigations).

74. *See* United States v. All Assets of G.P.S. Auto. Corp., 66 F.3d 483, 496 (2d Cir. 1995) (noting that deputizing state prosecutor may be most efficient course for federal government considering prosecutor’s knowledge of case).

local prosecutor who participated from the very beginning in an investigation leading to a federal indictment probably has a handle on the strengths and weaknesses of the case, and has likely built up a rapport with potential witnesses. Second, a SAUSA with specialized knowledge, training, or experience is an asset to federal prosecutors in complex litigation. For example, an agency attorney with the Commodity Futures Trading Commission<sup>75</sup> may assist federal prosecutors in deciphering complicated facts and legal issues because of her background in finance and investment.<sup>76</sup> Finally, a SAUSA may fill a jurisdictional or motivational gap by prosecuting cases that are traditionally and routinely underrepresented in federal courts. Common examples include a military lawyer prosecuting a civilian who committed a crime on a military base,<sup>77</sup> or an American Indian tribal lawyer prosecuting a non-American Indian who committed a crime against an American Indian community.<sup>78</sup>

*D. Risks Accompanying the Use of SAUSAs to Prosecute Federal Cases*

As demonstrated above, Special Assistant U.S. Attorneys sometimes make the best federal prosecutors because of their general expertise or specific connections with particular cases or interests. However, these connections can transform a deputization from a routine designation to a conflict of interest, and allegiances can cause a SAUSA to skirt the line between zealous advocacy and vindictive prosecution.

The following section presents the risks associated with the use of SAUSAs in federal prosecutions. First, it explores the potential for conflicts of interest, selective prosecution, and vindictive prosecution, and provides examples of how the courts have dealt with these concerns. Second, it examines whether double jeopardy principles should preclude situations wherein a prosecutor uses his cross-designation to subject a defendant to a second trial.

1. Conflicts of Interest, Selective Prosecution, and Vindictive Prosecution

For some scholars, the appointment of prosecutors whose interests are aligned with other entities such as the U.S. military, a federal agency, or a state prosecutor's office to serve as SAUSAs poses serious concerns.<sup>79</sup> Moreover, an individual prosecutor's decision to charge a defendant with a federal violation as opposed to or

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75. The U.S. Commodity Futures Trading Commission ("CFTC") is an independent regulatory agency created by Congress in 1974 to encourage competition and prevent fraud in the commodity futures and option markets. U.S. Commodity Futures Trading Commission: Mission & Responsibilities, <http://www.cftc.gov/About/MissionResponsibilities/index.htm> (last visited Apr. 10, 2010).

76. See *United States v. Mady*, No. 04-80408, 2005 WL 2290712, at \*2 (E.D. Mich. Sept. 20, 2005) (determining that SAUSA was appointed to provide assistance to federal prosecutors with respect to complex financial and investing issues in litigation).

77. Sean J. O'Hara, Comment, *The Posse Comitatus Act Applied to the Prosecution of Civilians*, 53 U. KAN. L. REV. 767, 768 (2005) (noting that U.S. Attorneys appoint Judge Advocate General officers as SAUSAs to prosecute civilian-defendants for criminal acts committed on military bases).

78. See Cunningham, *supra* note 54, at 2208-10 (suggesting deputization of American Indian lawyers as SAUSAs to alleviate burden on U.S. Attorneys offices and ensure vindication of non-American Indian against American Indian offenses).

79. E.g., O'Hara, *supra* note 77, at 768 (noting that appointment of military lawyers as SAUSAs undermines principles of Posse Comitatus Act).

subsequent to instituting state charges sometimes implicates issues of selective and vindictive prosecution.<sup>80</sup> Nevertheless, the courts have overwhelmingly upheld the principle of prosecutorial discretion, and have generally abstained from inquiring into the personal motives of prosecutors.<sup>81</sup>

The courts have refrained from scrutinizing SAUSAs for conflicts of interest. In *United States v. Mady*,<sup>82</sup> for example, the defendant moved for a dismissal of his indictment on the basis of the prosecutor's apparent conflict of interest.<sup>83</sup> The prosecutor had previously negotiated a Consent Order with the defendant while serving as trial counsel for the federal Commodity Futures Trading Commission ("CFTC"),<sup>84</sup> and language from this order had been incorporated into the indictment.<sup>85</sup> The district court denied the motion inasmuch as it related to the SAUSA's involvement, finding sufficient evidence that the U.S. Attorney's Office orchestrated the appointment solely because of the CFTC attorney's experience in the areas of finance and investment.<sup>86</sup> The court further noted that the U.S. Attorney's Office acted as the decision maker throughout the indictment process.<sup>87</sup>

Similarly, the courts have not invalidated cross-designations because of the prior or contemporaneous affiliations of SAUSAs. In *United States v. Wooten*,<sup>88</sup> the defendant-civilian challenged his conviction, arguing that the prosecution violated the Posse Comitatus Act<sup>89</sup> ("PCA") when they appointed a full-time military officer as a

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80. See Gene Healy, *There Goes the Neighborhood: The Bush-Ashcroft Plan to "Help" Localities Fight Gun Crime*, in GO DIRECTLY TO JAIL: THE CRIMINALIZATION OF ALMOST EVERYTHING 93, 108 (Gene Healy ed., 2004) (predicting "more miscarriages of justice" if offices hire attorneys to prosecute firearms offenses on full-time basis). Selective prosecution, which concerns an individual attorney's choice to prosecute a defendant, "violates the Equal Protection Clause of the Fourteenth Amendment if a defendant is singled out for prosecution when others similarly situated have not been prosecuted and the prosecutor's reasons for doing so are impermissible." BLACK'S LAW DICTIONARY, *supra* note 8, at 1481. Vindictive prosecution occurs when an attorney singles out a defendant for prosecution because "the [defendant] has exercised a constitutionally protected right." *Id.* at 1341.

81. See Healy, *supra* note 80, at 109 (noting that court interpreted prosecutor's statement about trying to avoid Richmond juries, which one might construe as trying to avoid African American jurors, by applying "presumption of regularity afforded prosecutorial discretion" (quoting *United States v. Jones*, 36 F. Supp. 2d 304, 313 (E.D. Va. 1999)) (internal quotation marks omitted)).

82. No. 04-80408, 2005 WL 2290712, at \*1 (E.D. Mich. Sept. 20, 2005).

83. *Mady*, 2005 WL 2290712, at \*1.

84. See *supra* note 75 for the origin and functions of the CFTC.

85. *Mady*, 2005 WL 2290712, at \*1.

86. *Id.* at \*2.

87. *Id.*

88. 377 F.3d 1134 (10th Cir. 2004).

89. The Posse Comitatus Act provides that:

Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined under this title or imprisoned not more than two years, or both.

The Posse Comitatus Act, ch. 263, § 15, 20 Stat. 152 (1878) (codified as amended at 18 U.S.C. § 1385 (2006)). A *posse comitatus*, literally translated from Latin as "power of the county," refers to "[a] group of citizens who are called together to help the sheriff keep the peace or conduct rescue operations." BLACK'S LAW DICTIONARY, *supra* note 8, at 1281. The PCA prohibits the military's direct participation "in civilian law-enforcement operations, as by making arrests, conducting searches, or seizing evidence." *Id.*

SAUSA to prosecute the case.<sup>90</sup> On appeal, the Tenth Circuit conceded that the appointment of a military officer presented “a significant legal issue” for the defendant, but, finding no appreciable prejudice, declined to reverse his convictions.<sup>91</sup> Notably, the Tenth Circuit declined to resolve the issue of whether the officer’s appointment and participation in the lawsuit fell within the exception to the PCA for “‘circumstances expressly authorized by . . . Act of Congress.’”<sup>92</sup>

Moreover, the courts have required defendants to meet the difficult burden of proving the elements of selective and vindictive prosecution, even though evidence supporting these claims is unlikely to appear on the record. In *United States v. Belcher*,<sup>93</sup> a state prosecutor drafted a federal indictment against two defendants in his capacity as a SAUSA after unsuccessfully prosecuting them on drug and firearms charges in state court.<sup>94</sup> The defendants moved to dismiss the indictment based, in part, on theories of selective and vindictive prosecution.<sup>95</sup> The district court rejected the selective prosecution theory, holding that continued prosecution in a separate forum does not render the prosecution selective.<sup>96</sup> Instead, the court reasoned, a defendant must demonstrate both a discriminatory motive and a prejudicial effect.<sup>97</sup> The court allowed one of the defendants to proceed on the vindictive prosecution claim because the prosecutor filed new, more severe federal charges based on the same transaction *after* the defendant successfully appealed his state conviction.<sup>98</sup>

Scholars who are critical of the judicial presumption of regularity<sup>99</sup> argue that prosecutorial misconduct persists, pointing specifically to cases where political initiatives such as Project Safe Neighborhoods and its precursor Project Exile inadvertently incentivize discriminatory practices.<sup>100</sup> In her article *Separate and Unequal: Federal Tough-on-Guns Program Targets Minority Communities for Selective Enforcement*,<sup>101</sup> Professor Bonita Gardner, a former Executive Assistant U.S. Attorney, highlights the case of *United States v. Jones*<sup>102</sup> as a particularly egregious example of judicial deference to prosecutorial discretion in the face of convincing

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90. *Wooten*, 377 F.3d at 1139.

91. *Id.* at 1141.

92. *Id.* at 1140 (quoting 18 U.S.C. § 1385).

93. 762 F. Supp. 666 (W.D. Va. 1991).

94. *Belcher*, 762 F. Supp. at 668.

95. *Id.* at 669.

96. *Id.*

97. *Id.*

98. *Id.* at 669–70.

99. See *supra* note 81 and accompanying text for an illustration of how courts defer to prosecutorial discretion.

100. *E.g.*, Bonita R. Gardner, *Separate and Unequal: Federal Tough-on-Guns Program Targets Minority Communities for Selective Enforcement*, 12 MICH. J. RACE & L. 305, 318 (2007) (arguing that stringent standard for selective prosecution challenges should not apply to federal government programs that “knowingly target[] minority communities”); Healy, *supra* note 80, at 94 (arguing that initiatives like Project Safe Neighborhoods permit prosecutors to forum shop based on racial composition of prospective juries).

101. Gardner, *supra* note 100, at 305.

102. 36 F. Supp. 2d 304 (E.D. Va. 1999).

evidence of selective prosecution and forum shopping.<sup>103</sup> In *Jones*, not only did the prosecution stipulate that “as many as ninety percent of defendants prosecuted under Project Exile were African American,”<sup>104</sup> but the defense produced statements by an Assistant U.S. Attorney to the effect that “one goal of Project Exile is to avoid ‘Richmond juries.’”<sup>105</sup> Despite this evidence, the district court held that the defendant “failed to demonstrate a prima facie case of selective prosecution.”<sup>106</sup>

## 2. Dual and Successive Prosecution

In his article *Prosecutor Misconduct, Convictions, and Double Jeopardy: Case Studies in an Emerging Jurisprudence*, Kenneth Rosenthal observes:

No public official has a greater direct impact on the individual citizen than the prosecutor in a criminal case: in the decision to charge and what to charge; in the control of vast governmental resources in investigating and preparing a case; in the plea bargaining process for the majority of cases that are resolved without trial; and in the deference and authority the prosecution commands before juries in those cases that are tried to a conclusion.<sup>107</sup>

Rosenthal notes that the Double Jeopardy Clause stands as a check against this authority.<sup>108</sup>

The Double Jeopardy Clause refers to the Fifth Amendment provision which mandates that “[n]o person shall be . . . subject for the same offence to be twice put in jeopardy of life or limb.”<sup>109</sup> Accordingly, the Fifth Amendment ensures that a prosecutor does not initiate subsequent criminal proceedings against a defendant based on the same charges after an acquittal.<sup>110</sup> However, as Rosenthal explains, some prosecutors have succeeded in avoiding acquittal through prosecutorial misconduct that provokes a mistrial or by procuring a conviction through improper means.<sup>111</sup> Even where the conviction is overturned, a prosecutor might initiate a second trial.<sup>112</sup> A defendant will not prevail on a double jeopardy claim unless the prosecutor

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103. “Forum-shopping” is “[t]he practice of choosing the most favorable jurisdiction or court in which a claim might be heard.” BLACK’S LAW DICTIONARY, *supra* note 8, at 726. The defendant in *Jones* alleged that the prosecution opted to indict him in federal court in order to avoid the predominately African American jury pool in Richmond. Gardner, *supra* note 100, at 329.

104. Gardner, *supra* note 100, at 329.

105. *Jones*, 36 F. Supp. 2d at 308. By “Richmond juries,” the prosecutor may have been making a statement about African American jurors. Some prosecutors believed that juries in Richmond would be more sympathetic to African American defendants, and thus sought to prosecute cases involving African American defendants in federal court. *See id.* at 307–08 (discussing racial composition of differing jury pools).

106. *Id.* at 312.

107. Kenneth Rosenthal, *Prosecutor Misconduct, Convictions, and Double Jeopardy: Case Studies in an Emerging Jurisprudence*, 71 TEMP. L. REV. 887, 887 (1998).

108. *Id.* at 890.

109. U.S. CONST. amend. V.

110. Rosenthal, *supra* note 107, at 891, 897.

111. *Id.* at 892, 900.

112. *Id.* at 899–900.

demonstrated the requisite intent “to prevent an acquittal that the prosecutor believed at the time was likely to occur in the absence of his misconduct.”<sup>113</sup>

The dual sovereignty doctrine, the principle that “the federal and state governments may both prosecute [someone] for a crime without violating the constitutional protection against double jeopardy, if the person’s act violated both jurisdictions’ laws,”<sup>114</sup> stands as a counterbalance to the Double Jeopardy Clause.

The seminal case on dual sovereignty in the successive prosecution context is *Heath v. Alabama*.<sup>115</sup> In *Heath*, the defendant pled guilty in a Georgia trial court to “malice murder” for arranging the kidnapping and murder of his wife.<sup>116</sup> Because the kidnapping took place at the victim’s home in Alabama, authorities from that state also sought to prosecute the defendant and secured an indictment against him for a capital offense.<sup>117</sup> The defendant protested that his conviction in Georgia precluded the Alabama prosecution based on the same conduct.<sup>118</sup> The trial and appellate courts of Alabama all rejected the defendant’s double jeopardy claims, reasoning that two states may lawfully prosecute a defendant for the same acts.<sup>119</sup> The Supreme Court of the United States affirmed the judgment of Alabama’s highest court, and in so doing, reasoned that the determination turns on “whether the two entities that seek successively to prosecute a defendant for the same course of conduct can be termed separate sovereigns;” that is, “whether the two entities draw their authority to punish the offender from distinct sources of power.”<sup>120</sup>

American jurisprudence has long treated the state and federal governments as distinct sovereigns. In *Bartkus v. Illinois*,<sup>121</sup> the Supreme Court reviewed the constitutionality of the successive state prosecution of a defendant for bank robbery, where the defendant had just won an acquittal in federal court.<sup>122</sup> The Court held that the State of Illinois did not deprive the defendant of due process,<sup>123</sup> reasoning that the state prosecutors exercised their legitimate discretion in pursuing an indictment for a crime in their jurisdiction.<sup>124</sup>

Given the treatment of federal and state governments as distinct entities, the dual sovereignty doctrine provides another means by which prosecutors can, in theory, circumvent the Double Jeopardy Clause.<sup>125</sup> Suppose a prosecutor representing the U.S.

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113. *Id.* at 900 (quoting *United States v. Wallach*, 979 F.2d 912, 916 (2d Cir. 1992)).

114. BLACK’S LAW DICTIONARY, *supra* note 8, at 573.

115. 474 U.S. 82 (1985). *See generally* Robert Matz, Note, *Dual Sovereignty and the Double Jeopardy Clause: If at First You Don’t Convict, Try, Try Again*, 24 FORDHAM URB. L.J. 353, 366 n.79 (1997).

116. *Heath*, 474 U.S. at 84.

117. *Id.* at 84–85.

118. *Id.* at 85.

119. *Id.* at 85–86.

120. *Id.* at 88, 94.

121. 359 U.S. 121 (1959).

122. *Bartkus*, 359 U.S. at 122.

123. *Id.* at 139.

124. *Id.* at 123.

125. *See Heath*, 474 U.S. at 88 (holding that “successive prosecutions by two States for the same conduct are not barred by the Double Jeopardy Clause”). Surry County Commonwealth’s Attorney Gerald Poindexter relied on the dual sovereignty doctrine when he pursued an indictment in state court against former

government fails to procure a conviction in federal court. If the prosecutor can demonstrate that the defendant committed crimes against two sovereigns (i.e. the United States *and* the state where the crime occurred), he can coordinate with state prosecutors to secure a subsequent indictment in state court. Similarly, if a local prosecutor is dissatisfied with the outcome of a plea bargain or the sentence imposed on a defendant under state law, the Double Jeopardy Clause does not technically preclude him from convincing the U.S. Attorney in his judicial district to take the case federally.<sup>126</sup> The same prosecutor might even apply for cross-designation as a SAUSA in order to prosecute the defendant personally.<sup>127</sup>

Although the law tacitly allows for such strategies, considerations such as conservation of resources and finality inform the federal government's policies on subsequent prosecutions. The Justice Department, for example, has promulgated guidelines for dual and successive prosecution in its "Petite Policy."<sup>128</sup>

In order to insure the most efficient use of law enforcement resources, whenever a matter involves overlapping federal and state jurisdiction, federal prosecutors should, as soon as possible, consult with their state counterparts to determine the most appropriate single forum in which to proceed to satisfy the substantial federal and state interests involved, and, if possible, to resolve all criminal liability for the acts in question.<sup>129</sup>

The DOJ further notes that the policy remains in effect "even where a prior state prosecution would not legally bar a subsequent federal prosecution under the Double Jeopardy Clause because of the doctrine of dual sovereignty."<sup>130</sup> Individual states have also enacted statutes prohibiting successive prosecutions for the same conduct,<sup>131</sup> but

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Atlanta Falcons quarterback Michael Vick. See Posting of Peter Lattman to WSJ Law Blog, <http://blogs.wsj.com/law/2007/09/25/michael-vick-the-dual-sovereignty-doctrine/> (Sept. 25, 2007, 16:59 EST) (reporting that county attorney "told the media . . . that he pursued the case because 'crimes that were not prosecuted were committed in Surry County'"). Vick had previously pled guilty to federal conspiracy charges for his involvement in a dog fighting ring. ESPN.com, Vick Faces Prison Time After Agreeing to Plead Guilty, <http://sports.espn.go.com/nfl/news/story?id=2983121> (last visited Apr. 10, 2010).

126. See *United States v. All Assets of G.P.S. Auto. Corp.*, 66 F.3d 483, 495 (2d Cir. 1995) (noting that circuit courts agree that cross-designation of state district attorney as SAUSA "to assist or even to conduct a federal prosecution" does not per se violate dual sovereignty doctrine); *United States v. Harrison*, 918 F.2d 469, 475 (5th Cir. 1990) (reasoning that defendant's constitutional rights are not violated by successive prosecution in federal court if federal agents did not participate in state court plea bargain process).

127. See *supra* notes 1–11 and accompanying text for an example of a situation where a state-level attorney used his cross-designation to federally prosecute a defendant whose case was dismissed from state court.

128. U.S. DEP'T OF JUSTICE, U.S. ATTORNEYS' MANUAL 9-2.031, [http://www.justice.gov/usao/eousa/foia\\_reading\\_room/usam/title9/2mcrm.htm#9-2.031](http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/2mcrm.htm#9-2.031) [hereinafter PETITE POLICY]; see also Elizabeth T. Lear, *Contemplating the Successive Prosecution Phenomenon in the Federal System*, 85 J. CRIM. L. & CRIMINOLOGY 625, 629–30 (1995) (noting that Justice Department policy is called "Petite Policy" because it originated in *Petite v. United States*).

129. PETITE POLICY, *supra* note 128, at 9-2.031(A).

130. *Id.* at 9-2.031(B).

131. See *Bartkus v. Illinois*, 359 U.S. 121, 138 n.27 (1959) (noting that approximately fifteen states enacted statutes prohibiting second prosecution based on similar offense).

“the majority . . . operate with only nominal restrictions on the successive prosecution power.”<sup>132</sup>

Unconvinced of the protections afforded by state statutes and the DOJ’s internal code of conduct, some defendants have tried to invoke a narrowly circumscribed exception to the dual sovereignty doctrine called the *Bartkus* exception.<sup>133</sup> Recall that in *Bartkus*,<sup>134</sup> Illinois authorities prosecuted the defendant for bank robbery after his acquittal in federal district court.<sup>135</sup> Although the Supreme Court upheld the state conviction, characterizing the cooperation between federal officials and state authorities as routine, it suggested that due process concerns are implicated where the state acts as a “[mere] tool of the federal authorities” or the successive prosecution amounts to nothing more than “a sham and a cover” for the first.<sup>136</sup> This reservation in the Court’s opinion constitutes the controversial *Bartkus* exception.

Notably, the courts have rarely overturned a federal indictment on the basis of the *Bartkus* exception.<sup>137</sup> In *United States v. Alamilla*,<sup>138</sup> for example, the defendant filed a motion for a bill of particulars in order to determine whether double jeopardy precluded his federal prosecution where he had previously received a conviction in state court based on the same conduct.<sup>139</sup> Specifically, the defendant attempted to invoke the *Bartkus* exception to the dual sovereignty doctrine, arguing that the SAUSA’s position as an attorney in the originating county presented an opportunity for collusion that would render the two sovereigns indistinguishable.<sup>140</sup> The district court declined to grant the defendant’s motion, reasoning that “[c]ooperation between local and federal law enforcement officers does not in itself affect the identity of the prosecuting sovereign.”<sup>141</sup>

However, a minority of courts have allowed a defendant to prevail on the *Bartkus* exception where a district attorney acting as a SAUSA commenced both state and federal prosecutions based on the same transaction. The *Belcher* defendants,<sup>142</sup> for example, raised a third claim based on principles of collateral estoppel, arguing that the state prosecutor’s pursuit of a federal trial under the guise of a SAUSA amounted to double jeopardy.<sup>143</sup> Although the court hesitated to frame the defendant’s claim in

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132. *Lear*, *supra* note 128, at 652.

133. *See generally Bartkus*, 359 U.S. 121.

134. *See supra* notes 121–24 and accompanying text for a brief summary of the *Bartkus* case.

135. *Bartkus*, 359 U.S. at 121–22.

136. *Id.* at 123–24.

137. *See United States v. Trammell*, 133 F.3d 1343, 1350 (10th Cir. 1998) (noting sole application of *Bartkus* exception in federal court since its inception in 1959).

138. No. 4:06CR3156, 2007 WL 766357 (D. Neb. Mar. 8, 2007).

139. *Alamilla*, 2007 WL 766357, at \*1.

140. *Id.* at \*1–2.

141. *Id.* at \*2 (quoting *United States v. Johnson*, 169 F.3d 1092, 1096 (8th Cir. 1999)). *But see United States v. All Assets of G.P.S. Auto. Corp.*, 66 F.3d 483, 495–96 (2d Cir. 1995) (determining that, although *Bartkus* exception is ordinarily not applicable, unique circumstances of forfeiture case in which state district attorney was cross-designated as federal prosecutor and state set to receive large percentage of proceeds from federal action might make *Bartkus* exception applicable).

142. *See supra* notes 93–98 and accompanying text for a brief summary of the *Belcher* case.

143. *United States v. Belcher*, 762 F. Supp. 666, 668–69 (W.D. Va. 1991).



terms of double jeopardy, it nonetheless took issue with the prosecutor's expansive powers, holding that collateral estoppel barred the second prosecution because it amounted to nothing more than "a sham and a cover" for the first one.<sup>144</sup> The court further reasoned that the prosecutor's dual powers were "inconsistent with the concepts of federalism implicit in the Constitution."<sup>145</sup>

### III. DISCUSSION

On February 16, 2006, the U.S. Attorney for the District of Connecticut announced the sentencing of twenty-year-old George Gaston for illegal trafficking in firearms.<sup>146</sup> Touting the efforts of the joint prosecution team—an Assistant U.S. Attorney and an Assistant State's Attorney serving as a Special Assistant U.S. Attorney—the U.S. Attorney asserted: "[T]his prosecution should serve as a model as to how joint local, state and federal law enforcement cooperation can effectively combat the illegal gun trade and resulting violence in our cities."<sup>147</sup> Indeed, it does.

This discussion focuses on what I have termed the "cooperative model" of federal prosecutions, whereby a U.S. Attorney's Office appoints a SAUSA from a state attorney's office<sup>148</sup> to handle specific offenses in conjunction with a task force or federal initiative.<sup>149</sup> Project Safe Neighborhoods<sup>150</sup> is the paramount example of the cooperative model, and it is used throughout this discussion to illustrate the benefits and risks of employing SAUSAs in this manner.

First, this discussion demonstrates how the cooperative model maximizes the benefits previously discussed. Specifically, it argues that the model produces benefits for both the local and federal offices. Next, it discusses which risks accompany the cooperative model. The model creates a systemic problem of selective prosecution, and the risks of dual and successive prosecution are particularly acute. Finally, this discussion proposes solutions to mitigate some of the problems created by the cooperative model.

#### A. *The Cooperative Model Alleviates Budgetary Pressure on U.S. Attorney's Offices and Results in Increased Prosecutions*

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144. *Id.* at 671 (quoting *Bartkus v. Illinois*, 359 U.S. 121, 124 (1959)) (internal quotation marks omitted).

145. *Id.* at 670–71.

146. Press Release, U.S. Attorney's Office, Dist. of Conn., Project Safe Neighborhoods: Waterbury Man Sentenced to Federal Prison for Illegally Dealing Firearms (Feb. 16, 2006) (on file with author).

147. *Id.* (internal quotation marks omitted).

148. For purposes of this discussion, the term "state attorney's office" applies to any nonfederal prosecutor's office, however named, such as district attorney's offices and commonwealth attorney's offices.

149. *See, e.g.*, The United States Attorney's Office, Eastern District of Texas: Criminal Division, <http://www.usdoj.gov/usao/txe/criminal/> (last visited Apr. 10, 2010) (noting that U.S. Attorney's Office works with two SAUSAs from Beaumont and Lufkin offices to prosecute federal gun crimes, specifically targeting felons in possession of firearms and dealers who furnish firearms to prohibited individuals).

150. *See supra* note 16 and accompanying text for a brief description of Project Safe Neighborhoods, a federal anti-gun crime initiative.

The cooperative model has greatly contributed to the success of federal initiatives such as Project Safe Neighborhoods (“PSN”). Not only does it provide a staffing solution that allows the program to dramatically increase federal prosecutions, but it also results in prevention and deterrence measures that are tailored to the needs of the locality.<sup>151</sup> Special Assistant U.S. Attorneys fit nicely into the cooperative strategy envisioned by PSN and its progeny,<sup>152</sup> and are often used to staff PSN cases.<sup>153</sup> The U.S. Attorney’s Office for the Eastern District of Pennsylvania, for example, assigns approximately fifty-one SAUSAs from other federal agencies and state offices to prosecute firearms offenses.<sup>154</sup> These SAUSAs present a remarkable staffing solution for a Criminal Division of only ninety-three Assistant U.S. Attorneys, in an office that represents one of the country’s largest districts.<sup>155</sup>

Additionally, the extra hands afforded by SAUSAs have allowed Baltimore to dramatically increase the number of federal prosecutions for gun-related offenses. In a 2008 press release, the U.S. Attorney’s Office for the District of Maryland noted that its Project Exile-based strategy resulted in a sixty percent increase in the number of gun charges filed in federal court since the program’s inception.<sup>156</sup> The office attributes this result to the “coordinated efforts of local, state and federal law enforcement,” including the efforts of various assistant state’s attorneys who helped prosecute the cases.<sup>157</sup>

*B. The Cooperative Model Complicates the Presumption of Prosecutorial Vindictiveness and Creates Incentives for Selective Prosecution*

Is there a downside to more federal prosecutions if they do, in fact, make our communities safer? At what costs will we pursue them? This section discusses the

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151. See Project Safe Neighborhoods: Frequently Asked Questions, [www.psn.gov/about/faqs.html](http://www.psn.gov/about/faqs.html) (last visited Apr. 10, 2010) (noting that “heightened coordination” between local and federal government results in program “contoured to fit the unique gun crime problem in that district”).

152. Cities across the country have modeled their anti-gun violence initiatives after Project Exile and Project Safe Neighborhoods. *E.g.*, Press Release, U.S. Attorney’s Office, Dist. of Md., Baltimore EXILE Partners Announce 60% Increase in Violent Defendants Charged Federally Since 2005 (Feb. 20, 2008), [http://www.usdoj.gov/usao/md/Public-Affairs/press\\_releases/press08/BaltimoreEXILEPartnersAnnounce60IncreaseinViolentDefendantsChargedFederallySince2005.html](http://www.usdoj.gov/usao/md/Public-Affairs/press_releases/press08/BaltimoreEXILEPartnersAnnounce60IncreaseinViolentDefendantsChargedFederallySince2005.html) [hereinafter Baltimore EXILE] (discussing success of Baltimore’s program).

153. See *infra* Appendix A for examples of districts that use SAUSAs to prosecute firearms cases brought under Project Safe Neighborhoods.

154. The United States Attorney’s Office, Eastern District of Pennsylvania: About the Office, <http://www.usdoj.gov/usao/pae/about.html> (last visited Apr. 10, 2010).

155. *Id.*; The United States Attorney’s Office, Eastern District of Pennsylvania: Welcome to the United States Attorneys’ Office—Eastern District of Pennsylvania, <http://www.justice.gov/usao/pae/> (last visited Apr. 10, 2010).

156. Baltimore EXILE, *supra* note 152.

157. Press Release, U.S. Attorney’s Office, Dist. of Md., Seven Defendants Indicted on Gun and Drug Charges This Week as Part of the Maryland EXILE Program (Oct. 19, 2007), [http://www.usdoj.gov/usao/md/Public-Affairs/press\\_releases/press07/SevenDefendantsIndictedonGunandDrugChargesthisWeekasPartoftheMarylandExileProgram.html](http://www.usdoj.gov/usao/md/Public-Affairs/press_releases/press07/SevenDefendantsIndictedonGunandDrugChargesthisWeekasPartoftheMarylandExileProgram.html).

pitfalls of the aggressive prosecution tactics and “body count approach”<sup>158</sup> envisioned by the cooperative model. It first examines how the strategy makes it more difficult for a defendant to recover on a theory of vindictive prosecution. Second, it exposes the procedural and structural defects of the model that could lead to selective prosecution.

### 1. Vindictive Prosecution

Recall from the opening anecdote that the Special Assistant U.S. Attorney in *United States v. Bernhardt*<sup>159</sup> prosecuted the defendants on multiple federal charges after the state court dismissed the case on statute of limitations grounds.<sup>160</sup> The defendants moved to dismiss the federal indictment against them based, in part, on a theory of vindictive prosecution, but the district court denied their motion on this ground.<sup>161</sup> The prosecutor’s conduct may have seemed persistent and the resulting prosecution unfair, but it was not “vindictive” in the legal sense. “The presumption of prosecutorial vindictiveness applies only postconviction” when “a prosecuting attorney [attempts to] marshal more numerous or severe charges against the defendant as punishment for availing herself or himself of appropriate remedies or discouraging future defendants from a similar exercise of their rights.”<sup>162</sup>

The designation of SAUSA complicates this presumption. Even if the defendants in *Bernhardt* had been convicted at the state level, they would not likely prevail on a claim for vindictive prosecution because, as the Ninth Circuit reaffirmed in *Bernhardt*, “successive prosecutions based on the same conduct are permissible if brought by separate sovereigns.”<sup>163</sup> Thus, under the modified *Bernhardt* hypothetical, the designation of SAUSA permits an attorney to proceed with what the courts would otherwise presume to be a vindictive prosecution.

### 2. Selective Prosecution

Selective prosecution concerns have two sources in the cooperative model: (1) the motivations of individual SAUSAs and (2) systemic considerations. With respect to the first classification, a state prosecutor may accept a cross-designation as a SAUSA to act as a liaison between his office and the U.S. Attorney under the rubric of Project Safe Neighborhoods. As Gene Healy points out in his article *There Goes the Neighborhood: The Bush-Ashcroft Plan to “Help” Localities Fight Gun Crime*, “a job as a full-time gun prosecutor is likely to appeal disproportionately to attorneys with an ideological hostility toward gun ownership.”<sup>164</sup> Even where a prosecutor does not self-elect, the system envisions selective prosecution.

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158. Healy, *supra* note 80, at 105 (quoting Mark Fazlollah & Peter Nicholas, *U.S. Overstates Arrests in Terrorism*, PHILA. INQUIRER, Dec. 16, 2001, at A1) (internal quotation marks omitted).

159. 831 F.2d 181 (9th Cir. 1987). See *supra* notes 1–11 and accompanying text for a discussion of the case.

160. *Bernhardt*, 831 F.2d at 181–82.

161. *Id.* at 182.

162. 63C AM. JUR. 2D *Public Officers and Employees* § 25 (1997).

163. *Bernhardt*, 831 F.2d at 182.

164. Healy, *supra* note 80, at 108.

Unlike an ordinary prosecutor, whose bailiwick covers the gamut of criminal law, a Safe Neighborhoods prosecutor is limited to only one category of criminal charges. Whereas other prosecutors are able to shift their focus to other categories of crime once they have charged the most dangerous defendants in a given category of offense, Safe Neighborhoods prosecutors will be expected to continue prosecuting violations of gun laws. . . . The incentive structure that Safe Neighborhoods sets up will lead to the proliferation of “garbage” gun charges—technical violations of firearms statutes on which no sensible prosecutor would expend his energy.<sup>165</sup>

Healy fails to acknowledge that prosecutors are often assigned to units where they focus on specific crimes—attorneys are rarely generalists.<sup>166</sup> However, he expresses a legitimate concern about “the body count approach”<sup>167</sup> advocated by Project Safe Neighborhoods and facilitated by the cooperative model.<sup>168</sup> After all, Project Safe Neighborhoods is a federal political initiative and provides significant resources to hire prosecutors for the express purpose of increasing the number of gun-related charges and convictions at both the state and federal levels.<sup>169</sup>

Not only is the cooperative model built around a specific category of offenses (gun crimes, drug crimes, etc.), but it also encourages prosecutors to target specific offenders. The American Prosecutors Research Institute, the research and development branch of the National District Attorneys Association, noted that prosecutors involved in “gun violence reduction initiatives” predominately deal with § 922 and § 924 violations.<sup>170</sup> These statutes encompass the commonly litigated offenses of felon in possession and possessing a firearm in furtherance of a drug trafficking crime.<sup>171</sup> In her article *Separate and Unequal: Federal Tough-on-Guns Program Targets Minority Communities for Selective Enforcement*, Professor Bonita Gardner argues that, by

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165. *Id.* at 105.

166. *See, e.g.*, PHILA. DIST. ATTORNEY’S OFFICE, NEW ORGANIZATIONAL CHART (2007), <http://www.phila.gov/districtattorney/PDFs/NewOrganizationalChartJuly2007.pdf> (providing organizational chart of various divisions and subdivisions of office including insurance fraud, repeat offenders, and numerous task forces).

167. Healy, *supra* note 80, at 105 (quoting Mark Fazlollah & Peter Nicholas, *U.S. Overstates Arrests in Terrorism*, PHILA. INQUIRER, Dec. 16, 2001, at A1) (internal quotation marks omitted).

168. *See, e.g.*, Baltimore EXILE, *supra* note 152 (attributing increase in charges to partnership with state and federal law enforcement); Project Safe Neighborhoods: Frequently Asked Questions, <http://www.psn.gov/about/faqs.html> (last visited Apr. 10, 2010) (reporting significant increase in number of federal firearms prosecutions and noting that administration provided over a billion dollars to hire and train new prosecutors).

169. *See* Project Safe Neighborhoods: Frequently Asked Questions, <http://www.psn.gov/about/faqs.html> (last visited Apr. 10, 2010) (noting that federal government dedicated \$1.5 billion in first four years of “[t]he offensive” to, among other things, hire and train new federal and state prosecutors).

170. AM. PROSECUTORS RESEARCH INST., *supra* note 58, at 7; *see also* 18 U.S.C. § 922(g) (2006) (defining criminal firearm possession and distribution violations); *id.* § 924 (imposing sentence enhancement).

171. AM. PROSECUTORS RESEARCH INST., *supra* note 58, at 21, 24; *see also* 18 U.S.C. § 922(g)(1) (proscribing firearm possession by individual previously convicted of crime punishable by prison term exceeding one year); *id.* § 924(c) (providing penalties for possession of firearm in furtherance of drug trafficking crime).

enforcing only two of the twenty federal gun laws on the books,<sup>172</sup> federal prosecutors “target street-level gun-toters” as opposed to investigating gun traffickers and dealers.<sup>173</sup> Gardner not only finds this approach duplicative of state efforts,<sup>174</sup> but she also argues that it discriminates on the basis of race.<sup>175</sup> Gardner notes that “[m]ost United States Attorneys offices that implement the Project Safe Neighborhoods program do so in cooperation with only a select few communities within their districts[,] . . . target[ing] communities in which African Americans are disproportionately concentrated.”<sup>176</sup>

To some degree, “[a]ll prosecution is selective.”<sup>177</sup> The problem arises when similarly situated defendants receive completely different sentences because of an institutional defect. A major deficiency in the cooperative model is its inconsistency—the fact that each U.S. Attorney’s Office subscribes to it at varying levels, creating its own rendition of cooperation.<sup>178</sup> There are virtually no standards to determine which cases get selected for federal prosecution.<sup>179</sup> As a result, the cooperative model poses a substantial risk of “selective federalization on the basis of race” or other equally arbitrary criteria.<sup>180</sup>

For this reason, the DOJ should create and promulgate uniform standards for the U.S. Attorney’s Offices to follow in deciding which cases to prosecute federally. For example, the DOJ could impose a requirement that U.S. Attorneys only seek to prosecute career offenders<sup>181</sup> or cases that arise as a result of “ongoing federal investigation[s].”<sup>182</sup> Furthermore, Congress should place limitations on how U.S. Attorneys appoint and use special assistants.<sup>183</sup> Imposing a term limit on a SAUSA’s service could minimize the risk of selective or vindictive prosecution, but it requires the U.S. Attorney’s Office to invest considerable resources in training subsequent appointees to litigate in the federal system.

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172. Gardner notes that these two charges alone comprised eighty-seven percent of federal firearms cases in 2003. Gardner, *supra* note 100, at 312.

173. *Id.* at 313.

174. *See id.* at 314 (suggesting that federal government could better employ its resources by fighting major criminals).

175. *See id.* at 315–16 (arguing that enforcement occurs primarily in African American neighborhoods).

176. *Id.* at 315. The cooperative model may be responsible for the disproportionate impact on some citizens. For example, a U.S. Attorney’s Office that only cross-designates a handful of district attorneys as SAUSAs but does not independently prosecute street-level federal gun offenses effectively exposes only defendants from the SAUSAs’ districts to federal mandatory sentences.

177. Shannon Frank Edelstone, Comment, *Filial Responsibility: Can the Legal Duty to Support Our Parents Be Effectively Enforced?*, 36 FAM. L.Q. 501, 510 (2002).

178. *See infra* Appendix A for examples of how each U.S. Attorney’s Office uses SAUSAs.

179. *See* Healy, *supra* note 80, at 109 (noting that *Jones* court lamented lack of “discernable or judicially reviewable standards governing when a case should be assigned to federal rather than state court”).

180. *Id.*

181. “Career offender” is a designation given to a defendant based on his or her prior record which carries enhanced sentences in federal court. *See* United States v. Berry, 164 F.3d 844, 845–46 (3d Cir. 1999) (noting that career offender status is part of federal selection criteria).

182. *Id.* at 846.

183. *See* Corbett, *supra* note 73, at 866 (noting that U.S. Attorneys generally have sole discretion in conferring SAUSA status in their districts).

Finally, the cooperative model opens the door to forum shopping.<sup>184</sup> A local prosecutor who wants to avoid a jury of the defendant's peers in a particular community can petition the U.S. Attorney's Office for a cross-designation as a SAUSA to prosecute the case federally. As Gene Healy notes, "in some cases, federal prosecutors have deliberately used Project Exile to secure a jury with a different racial composition than would otherwise be available at the state level."<sup>185</sup> Unfortunately, the courts have declined to scrutinize cases for jury bias in forum selection. Even where a prosecutor makes a statement indicative of bias on the record, the courts have refused to lend it a "nefarious construction."<sup>186</sup>

*C. The Cooperative Model Is Incompatible with the Dual Sovereignty Doctrine and Traditional Notions of Federalism*

The cooperative model of federal prosecutions cannot coexist with the doctrine of dual sovereignty. This section examines whether to dispense with the employment of Special Assistant U.S. Attorneys in the cooperative context or to modify the legal framework in which they operate. It suggests that where successive prosecutions are concerned, the doctrine must give way to ensure that defendants are not twice put in jeopardy. Additionally, this section examines how the cooperative model, in light of the increasing federalization of criminal law, deconstructs traditional notions of federalism, and it concludes by maintaining that the cooperative model cannot efficiently allocate the nation's caseload without procedural protections. These inefficiencies result in a tremendous burden on local and state prosecutor's and public defender's offices, as well as constraints on the federal judiciary.

1. Dual and Successive Prosecutions

Perhaps the most alarming loophole in the cooperative model is the ease with which the joint efforts of local, state, and federal prosecutors can result in dual or successive prosecutions. On the one hand, such cooperation reduces transaction costs and facilitates the decision of the single best forum.<sup>187</sup> On the other, there are few procedural protections in place to ensure that a prosecutor faced with an adverse ruling at the state level will not exploit her contacts to obtain a cross-designation as a SAUSA and initiate a subsequent federal proceeding.<sup>188</sup> Is this a risk that we, as a country, are

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184. See *supra* note 103 and accompanying text for an explanation of forum shopping.

185. Healy, *supra* note 80, at 108.

186. See *id.* at 109 (noting that court in *United States v. Jones* determined that prosecutor's statement of his "'desire to avoid Richmond juries' could be given 'a less nefarious construction': 'A Richmond jury could simply be one bound by the laws of the Commonwealth of Virginia.'" (quoting *United States v. Jones*, 36 F. Supp. 2d 304, 313 (E.D. Va. 1999))).

187. See *United States v. Nixon*, 315 F. Supp. 2d 876, 879 n.1 (E.D. Mich. 2004) (noting that in some cases initiated under Project Safe Neighborhoods, federal and state prosecutors collaborated to select best forum).

188. The Petite Policy of the Department of Justice reads more like an internal code of conduct than an enforcement mechanism against dual prosecutions:

This policy has been promulgated solely for the purpose of internal Department of Justice guidance. It is not intended to, does not, and may not be relied upon to create any rights, substantive or

willing to take in order to achieve our national goals in the war on drugs and gun violence?

Dismantling the cooperative model is not the answer.<sup>189</sup> Instead, the courts must reevaluate the merits of the dual sovereignty doctrine in light of the model's proliferation.<sup>190</sup> The state and federal governments draw their authority to prosecute from distinct sources of power.<sup>191</sup> Project Safe Neighborhoods, for example, deals with two separate, albeit duplicative, sets of statutes: state and federal.<sup>192</sup> Yet, when a local prosecutor receives a cross-designation as a SAUSA in order to "take a second bite at the apple,"<sup>193</sup> is the SAUSA really exercising the right of the federal government as a sovereign entity to vindicate the wrongs against it?<sup>194</sup> In these situations, the *Bartkus* exception should apply.

Judge Calabresi's concurrence<sup>195</sup> in *United States v. All Assets of G.P.S. Automotive Corp.*<sup>196</sup> is instructive on this point. He argued that "the [*Bartkus*] exception's narrowness combines with significant developments both in substantive federal criminal law and in criminal law enforcement to indicate that the entire dual sovereignty doctrine is in need of serious reconsideration."<sup>197</sup> Judge Calabresi correctly pointed to the expansion of criminal law, the increase in federal statutes that duplicate state offenses, and the cooperation among local, state, and federal officials as factors

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procedural, that are enforceable at law by any party in any matter, civil or criminal, nor does it place any limitations on otherwise lawful litigative prerogatives of the Department of Justice.

PETITE POLICY, *supra* note 128, at 9-2.031(F).

189. *Bernhardt* demonstrates that successive prosecution can and does occur outside the cooperative model. *See United States v. Bernhardt*, 831 F.2d 181, 182-83 (9th Cir. 1987) (relaying district court's finding that federal government never considered case prior to Deputy Attorney General's call).

190. A minority of courts have evaluated, albeit in dicta, whether the doctrine still applies. *E.g.*, *United States v. All Assets of G.P.S. Auto. Corp.*, 66 F.3d 483, 497 (2d Cir. 1995) (Calabresi, J., concurring) (arguing that "developments both in substantive federal criminal law and in criminal law enforcement" require reevaluation of doctrine of dual sovereignty).

191. *See supra* Part II.D.2 for a discussion of the dual sovereignty doctrine.

192. *Compare* 18 U.S.C. § 922(g) (2006) (stating that "[i]t shall be unlawful for any person . . . who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year . . . to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce"), *with* 18 PA. CONS. STAT. § 6105(a) (2000) (stating that "[a] person who has been convicted of [one of the felony offenses] enumerated in subsection (b), within or without this Commonwealth . . . shall not possess, use, control, sell, transfer or manufacture or obtain a license to possess, use, control, sell, transfer or manufacture a firearm in this Commonwealth").

193. *G.P.S. Auto. Corp.*, 66 F.3d at 498 (Calabresi, J., concurring).

194. *See id.* at 496 (majority opinion) (postulating that deputizing state prosecutor as SAUSA may demonstrate "lack of federal interest and a willingness to let the state effectuate its purposes and get the possible gains . . . so long as it is willing to bear the costs and risks" of lawsuit).

195. Judge Calabresi wrote the majority opinion, but his section on "Rethinking the Dual Sovereignty Doctrine" constitutes dicta "in the nature of a separate concurrence." *Id.* at 496, 497 n.13 (Calabresi, J., concurring).

196. 66 F.3d 483 (2d Cir. 1995).

197. *G.P.S. Auto. Corp.*, 66 F.3d at 497 (Calabresi, J., concurring).

that warrant reconsideration of the principles underlying the dual sovereignty doctrine.<sup>198</sup>

The doctrine of dual sovereignty cannot coexist in its present state with the cooperative model of federal prosecutions, but its wholesale abrogation cannot be the solution. In order to balance the constitutional rights of defendants with the prerogative of the federal government and each of the states to vindicate its interests, cases prosecuted contemporaneously or successively by the same prosecutor acting as a SAUSA should trigger heightened judicial scrutiny. Factors for the courts' consideration may include: (1) whether the two sovereigns attempted to select the single best forum per the Justice Department's Petite Policy,<sup>199</sup> (2) whether jeopardy attached in the first prosecution,<sup>200</sup> (3) whether the state stands to benefit monetarily from the outcome of the federal litigation,<sup>201</sup> and (4) whether the state or federal government financed the litigation. The last factor is perhaps the most instructive. If the same sovereign financed both litigations, then the interests of the free-riding sovereign seem less compelling.

The courts, in their fact-finding role, should not have the burden to investigate the motivations of each sovereign. Neither should they subject the defendant to extensive discovery proceedings in order to invoke the *Bartkus* exception. Instead, the courts should create a rebuttable presumption that a case prosecuted at the federal level by a SAUSA previously involved in the state prosecution would fall within the *Bartkus* exception. The federal government may then overcome this presumption by demonstrating, for example, that the U.S. Attorney's Office initiated and financed the federal litigation, or that the SAUSA was just one attorney on a team of federal prosecutors and had a subordinate role in the litigation.

## 2. Impact on Federalism and the Judicial System

The success of the cooperative model in increasing the number of federal prosecutions of targeted crimes suggests that this trend will not end with Project Safe Neighborhoods.<sup>202</sup> As Gene Healy noted, "[t]he program stands as an open invitation

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198. *Id.* at 498–99

199. See PETITE POLICY, *supra* note 128, at 9-2.031(A) (stating that federal prosecutors should promptly consult state prosecutors on matters with overlapping jurisdiction to determine best single forum "to satisfy the substantial federal and state interests involved, and, if possible, to resolve all criminal liability for the acts in question").

200. As a general rule, "jeopardy does not *attach* until, in a jury trial, the jury is impaneled and sworn, or in a bench trial, the court begins hearing evidence." 8 AM. JUR. 2D *Automobiles and Highway Traffic* § 973 (2007) (emphasis added). If jeopardy attached during the original proceeding, presumably a court would look upon a second prosecution by the same sovereign operating under the auspices of another as more egregious.

201. See, e.g., U.S. DEP'T OF JUSTICE, GUIDE TO EQUITABLE SHARING FOR STATE AND LOCAL LAW ENFORCEMENT AGENCIES 5 (2009) ("The Department will authorize sharing of up to five percent of the total net forfeiture proceeds with local prosecutors who cross-designate attorneys to handle adoptive and/or joint forfeiture cases in federal court as Special Assistant United States Attorneys. That sharing amount will be deducted from the Federal Government's share.").

202. E.g., The United States Department of Justice, Welcome to the District of Kansas: Criminal Division, <http://www.justice.gov/usao/ks/crim.html> (last visited Apr. 10, 2010) (comparing High Intensity Drug Trafficking Area project, which utilizes "federal-state-local law enforcement and prosecution cooperation," to Project Safe Neighborhoods).



for special interest groups to push their own ‘prosecution-stimulus’ initiatives.”<sup>203</sup> Additionally, the American Bar Association’s Task Force on the Federalization of Criminal Law found that “shifting federal Executive Branch priorities” determine the propensity of U.S. Attorneys to enforce federal laws that codify traditionally local offenses, and surmised that these statutes “may well be used more frequently in the future.”<sup>204</sup> Is it possible to reverse this trend—to close the door on the federalization of criminal law?<sup>205</sup> Moreover, do we want to?

Although assigning federal cases to local and state prosecutors cross-designated as SAUSAs may seem like a good way to spread the workload around a U.S. Attorney’s district, it has demonstrable repercussions in local offices. The ABA Task Force on the Federalization of Criminal Law cautioned that “inappropriately federalized crimes threaten fundamental allocations of responsibility between state and federal authorities.”<sup>206</sup> Furthermore, as the Task Force noted, they can have “a detrimental impact on the state courts, state prosecutors, attorneys, and state investigating agents who bear the overwhelming share of responsibility for criminal law enforcement.”<sup>207</sup>

Often omitted from the calculus is the corresponding impact on the nation’s defense attorneys. When the federal government effectively subsidizes the prosecution of local crimes, it presents a windfall to district attorneys, but leaves no money for public defenders. *The New York Times* reported that public defenders’ offices are beginning to sue to limit the number of new cases thrust upon them.<sup>208</sup> Lawyers and legal scholars alike are legitimately concerned about the harried consultations between public defenders and indigent clients, and whether qualified defense attorneys will persevere in an era of “assembly line” justice.<sup>209</sup>

Meanwhile, the judicial system struggles under the weight of heavy dockets. Gene Healy argued that the “federalization of crime will distract the federal courts by greatly exacerbating the strain on the federal court system.”<sup>210</sup> Remember Baltimore?<sup>211</sup> Healy reported that the chief judge of the U.S. District Court for the District of Maryland in Baltimore commented that if gun possession cases continued to “flood the federal courts,” the effect could be “devastating” on the federal judicial system.<sup>212</sup>

The cooperative model has arguably contributed to the collapse of the “structural protections of liberty” erected by the Constitution between the states and the federal

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203. Healy, *supra* note 80, at 104.

204. JAMES A. STRAZZELLA, AM. BAR ASS’N, *THE FEDERALIZATION OF CRIMINAL LAW* 49 (1998).

205. *See id.* at 51 (arguing that “opportunity to limit the excessive federalization of local crimes rests entirely with Congress”).

206. *Id.* at 50.

207. *Id.*

208. Erik Eckholm, *Citing Workload, Public Lawyers Reject New Cases*, N.Y. TIMES, Nov. 9, 2008, at A1.

209. *Id.* at A28 (referring to plea bargain process in New York).

210. Healy, *supra* note 80, at 103.

211. *See supra* notes 156–57 and accompanying text for a discussion of how Baltimore’s Project EXILE dramatically increased the number of federal firearms prosecutions in that city.

212. Healy, *supra* note 80, at 103 (quoting Chief Judge Fred Motz) (internal quotation marks omitted).

government.<sup>213</sup> It commingles state and federal resources, personnel, and funding,<sup>214</sup> and contemplates that prosecutions will occur in the single best forum.<sup>215</sup> Moreover, the outsourcing of federal cases to local prosecutors exposes the entire concept of dual sovereignty—the idea that the federal government has interests separate and distinct from those of the states and reserves its right to vindicate those interests itself—to judicial scrutiny.<sup>216</sup> Congress and the courts can only begin to minimize the negative effects of the cooperative model once they acknowledge its existence.

#### IV. CONCLUSION

Special Assistant United States Attorneys across the country are helping to wage the war on drugs, gun violence, fraud, and a host of other crimes that plague our society. Their successes have cemented their place in the cooperative model of federal prosecutions. From a micro-perspective, the appointment of SAUSAs to represent the federal government poses no particular threat to the judicial system. Their expertise and assistance provides a necessary resource for U.S. Attorney's Offices, and prosecutors at all levels exercise discretion in their cases. Nevertheless, the widespread use of SAUSAs begs the question of whether Congress envisioned them having such a prominent and permanent role in the federal system.

The courts have hesitated to limit the scope and terms of employment for special assistants, given their broad statutory authorization.<sup>217</sup> As a result, the federal government has implicitly sanctioned and, in some cases, outright funded the employment of SAUSAs to prosecute discrete categories of offenses occurring in designated communities in federal court. This concerted effort on the part of local, state, and federal agencies raises issues of selective prosecution<sup>218</sup> and undermines the rationale behind the dual sovereignty doctrine.<sup>219</sup> In order to minimize these concerns, the Department of Justice should promulgate standards defining the permissible roles

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213. *Id.* at 101 (quoting *Printz v. United States*, 521 U.S. 898, 921 (1997)) (internal quotation marks omitted).

214. See *United States v. All Assets of G.P.S. Auto. Corp.*, 66 F.3d 483, 498–99 (2d Cir. 1995) (Calabresi, J., concurring) (noting that prior to 1960, overlap of federal and state criminal jurisdiction was very small, but now cooperation between state and federal governments has achieved “unparalleled levels”).

215. See PETITE POLICY, *supra* note 128, at 9-2.031(A) (encouraging prosecutors to select “the most appropriate single forum in which to proceed to satisfy the substantial federal and state interests involved”).

216. Consider the court's view in *United States v. Belcher*:

[I]t seems to the court that if the same prosecutor simultaneously derives power from both a State and the federal government, then the whole underpinning of federalism is destroyed. The fact that the two sovereigns have essentially pooled their powers in one prosecutor strongly suggests to the court that in reality there are no longer two sovereigns at work. Instead, the pooling of prosecutorial power effectively creates one “super sovereign,” i.e., a unitary government. Thus, a central government is actually at work here, not a federal government.

762 F. Supp. 666, 671 (W.D. Va. 1991).

217. See *supra* Part II.A.2 for a discussion of the judiciary's interpretation of 28 U.S.C. § 543 (2006).

218. See *supra* Part III.B.2 for a discussion of selective prosecution in the context of the cooperative model.

219. See *supra* Part III.C.1 for a discussion of dual and successive prosecutions as enabled by the cooperative model.

of SAUSAs in federal criminal prosecutions and create a mechanism for oversight of their activities. Additionally, the courts should reinstitute the *Bartkus* exception and apply it as a rebuttable presumption when a prosecutor uses his cross-designation as a SAUSA to conduct successive prosecutions.

The federalization of criminal law has opened doors to new and effective mechanisms to combat old crimes. Now it is time to adapt the legal system to encourage the benefits of these trends and minimize their risks. It is not only time to recognize the contributions of SAUSAs as individuals, but also to critically examine their aggregate impact to determine how best to promote justice in this adversarial system.

*Victoria L. Killion\**

APPENDIX A: SAUSA INVOLVEMENT WITH U.S. ATTORNEY'S OFFICES

| <b>District</b>   | <b>Description</b>  |
|-------------------|---|
| Alabama, Middle   | The Middle District of Alabama most likely hires or works with SAUSAs because the office has a dedicated administrative assistant for SAUSA contacts. <sup>220</sup>    |
| Alabama, Northern | A SAUSA assisted in the prosecution of federal criminal cases in conjunction with the Alabama 'ICE' (Isolate the Criminal Element) project. <sup>221</sup>              |
| Alabama, Southern | No information. <sup>222</sup>  |
| Alaska            | This office designates agency counsel as SAUSAs to assist Civil Division attorneys in filing summary judgment motions for social security litigation. <sup>223</sup>    |
| Arizona           | A SAUSA from the Phoenix district is slated to assist four Assistant U.S. Attorneys in the prosecution of five defendants arising out of a Ponzi scheme. <sup>224</sup> |

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220. The United States Attorney's Office, Middle District of Alabama: Administrative Division, <http://www.justice.gov/usao/alm/divisions/admin.html> (last visited May 3, 2010).

221. Press Release, U.S. Dep't of Justice, Alabama Ice Kicks Off in Tuscaloosa County with Ten Arrests (June 5, 2007) (on file with author).

222. "No information" means that the official website for the U.S. Attorney's Office for that particular district did not include any information about its employment or use of SAUSAs at the time of this Comment. The summaries are based on information generated from searching for "SAUSA" and "Special Assistant" from the home page of each office's website.

223. The United States Attorney's Office, District of Alaska: Civil Division, <http://www.justice.gov/usao/ak/civil/> (last visited Apr. 10, 2010).

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| Arkansas, Eastern    | A SAUSA prosecuted gun violations and organized Project Safe Neighborhoods in Little Rock. <sup>225</sup>  |
| Arkansas, Western    | No information.  |
| California, Central  | This office assigned a senior Deputy City Attorney from the Gang Unit of the Los Angeles City Attorney's Office to prosecute gun offenses in conjunction with Project Safe Neighborhoods. <sup>226</sup>   |
| California, Eastern  | No information.  |
| California, Northern | This office hires an unspecified number of candidates with at least two years of post-J.D. experience as uncompensated SAUSAs to work in the Criminal Division. <sup>227</sup>   |
| California, Southern | This office has three full-time and thirty-eight part-time SAUSAs, in addition to 120 Assistant U.S. Attorneys. <sup>228</sup> One SAUSA helped to secure a conviction for a violation of asbestos work practice standards. <sup>229</sup> Another led the prosecution of a bank employee for embezzlement. <sup>230</sup> |
| Colorado             | This office employs two SAUSAs in its Major Crimes unit and one in its Economic Crimes unit. <sup>231</sup>  |
| Connecticut          | An Assistant States Attorney who was cross-designated as a SAUSA helped to prosecute a case involving the illegal trafficking of firearms pursuant to Operation Spring Gun, under the directive of Project Safe Neighborhoods. <sup>232</sup>  |
| Delaware             | No information.  |
| District of Columbia | This office routinely employs attorneys from federal agencies as SAUSAs to assist the Superior Court Division  |

224. Press Release, U.S. Attorney's Office, Dist. of Ariz., Mathon Principals Indicted in \$160 Million Ponzi Scheme (Dec. 10, 2009), [http://www.justice.gov/usao/az/press\\_releases/2009/2009-385\(Slade%20et%20al\).pdf](http://www.justice.gov/usao/az/press_releases/2009/2009-385(Slade%20et%20al).pdf).

225. Press Release, U.S. Dep't of Justice, Justice Department Announces Appointment of J. Timothy Griffin as Interim United States Attorney for the Eastern District of Arkansas (Dec. 15, 2006), [http://www.justice.gov/usao/are/news\\_releases/PDFs\\_2006News\\_Releases/december/12152006.pdf](http://www.justice.gov/usao/are/news_releases/PDFs_2006News_Releases/december/12152006.pdf).

226. Press Release, U.S. Attorney's Office, Cent. Dist. of Cal., Two Linked to Compton Gun Store Arrested on Federal Charges of Knowingly Selling Ammo to Felons (Mar. 22, 2007), <http://www.justice.gov/usao/cac/pressroom/pr2007/042.html>.

227. The United States Attorney's Office, Northern District of California: Employment, <http://www.justice.gov/usao/can/employ/attorney.html> (last visited Apr. 10, 2010).

228. The United States Attorney's Office, Southern District of California: Office History, <http://www.justice.gov/usao/cas/history/> (last visited Apr. 10, 2010).

229. Press Release, Office of the U.S. Attorney, S. Dist. of Cal., News Release Summary (July 13, 2007), <http://www.justice.gov/usao/cas/press/cas70713-SDGEVerdict.pdf>.

230. Press Release, Office of the U.S. Attorney, S. Dist. of Cal., News Release Summary (Apr. 30, 2008), <http://www.justice.gov/usao/cas/press/cas80430-Rubalcava.pdf>.

231. The United States Attorney's Office, District of Colorado: Criminal Division, [http://www.justice.gov/usao/co/contact\\_info/criminal\\_division/](http://www.justice.gov/usao/co/contact_info/criminal_division/) (last visited May 3, 2010).

232. Press Release, U.S. Attorney's Office, Dist. of Conn., *supra* note 146.

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|---------------------------------|---|
|                                 | or the Civil Division; candidates must occupy a position with the federal government in order to qualify. <sup>233</sup>  |
| Florida, Middle                 | Two Assistant State Attorneys, designated as SAUSAs, secured a defendant's conviction for numerous drug trafficking and firearms offenses. <sup>234</sup>   |
| Florida, Northern               | A SAUSA helped prosecute a defense contractor for conflict of interest, obstruction of justice, perjury, and related crimes. <sup>235</sup>   |
| Florida, Southern               | A SAUSA assisted in the prosecution of a securities fraud case. <sup>236</sup>  |
| Georgia, Middle                 | No information.   |
| Georgia, Northern               | This office employs thirty SAUSAs to assist its eighty attorneys, <sup>237</sup> and appointed three of those SAUSAs to the Atlanta High Intensity Drug Trafficking Area task force. <sup>238</sup> Another SAUSA assisted in the prosecution of five defendants involved in a conspiracy to possess and transfer fraudulent identification documents. <sup>239</sup> |
| Georgia, Southern               | No information.   |
| Guam & Northern Mariana Islands | No information.   |
| Hawaii                          | Two SAUSAs successfully prosecuted a defendant who assaulted and threatened two U.S. Army police officers. <sup>240</sup> The office appointed a SAUSA to represent the U.S. Attorney on the "Weed and Seed" team, a crime-reduction initiative comprised of "law enforcement, community  |

233. United States Attorney's Office for the District of Columbia: Special Assistant U.S. Attorney Positions, [http://www.justice.gov/usao/dc/Employment/Special\\_AUSA/](http://www.justice.gov/usao/dc/Employment/Special_AUSA/) (last visited Apr. 10, 2010).

234. Press Release, U.S. Dep't of Justice, Cocoa Crack Dealer Sentenced to Life Plus Thirty Years for Drug and Gun Charges (Aug. 4, 2008), [http://www.justice.gov/usao/flm/pr/2008/August/20080804\\_McCurryOrIPNSent.pdf](http://www.justice.gov/usao/flm/pr/2008/August/20080804_McCurryOrIPNSent.pdf).

235. Press Release, U.S. Attorney's Office, N. Dist. of Fla., Defense Contractor Convicted for Conflict of Interest-Related Crimes (Jul. 31, 2009), <http://www.justice.gov/usao/fln/press%20releases/2009/jul/schaller.html>.

236. Press Release, U.S. Attorney's Office, S. Dist. of Fla., MBC Managers Plead Guilty to Role in \$830 Million Securities Fraud (Feb. 27, 2007), <http://www.justice.gov/usao/fls/VictimWitness/MBCInvestors/20070227.PR.TrainaWigginsGuiltyPlea.pdf>.

237. The United States Attorney's Office, Northern District of Georgia: Office Information, <http://www.justice.gov/usao/gan/about/officeinfo.html> (last visited Apr. 10, 2010).

238. The United States Attorney's Office, Northern District of Georgia: Divisions, <http://www.justice.gov/usao/gan/divisions/criminal.html> (last visited Apr. 10, 2010).

239. Press Release, U.S. Dep't of Justice, Five Defendants Sentenced to Federal Prison for Manufacturing Fake Documents (Feb. 14, 2008), <http://www.justice.gov/usao/gan/press/2008/02-14-08.pdf>.

240. Press Release, U.S. Dep't of Justice (Dec. 3, 2007), <http://www.justice.gov/usao/hi/pressreleases/0712harrison.html>.

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|                    | leaders, businesses, educators, faith based organizations, [and] volunteers.” <sup>241</sup>   |
| Idaho              | The Idaho State Police and the Treasure Valley Partnership (“a group of elected officials in southeast Idaho”) hired a SAUSA to prosecute “gang crimes.” <sup>242</sup>  |
| Illinois, Central  | This office appointed a local prosecutor to serve as a SAUSA in the successful prosecution of a money laundering conspiracy, which resulted in federal prison terms and nearly \$5 million in restitution to the fraud victims. <sup>243</sup>   |
| Illinois, Northern | An Assistant State’s Attorney, appointed as a SAUSA, helped secure the conviction of a former police chief and six officers and employees involved in a racketeering scandal. <sup>244</sup> Prior to that, an attorney with the Social Security Administration’s Office of General Counsel prosecuted a social security fraud case as a SAUSA. <sup>245</sup> |
| Illinois, Southern | A trial attorney with the U.S. Department of Justice’s Office of the United States Trustee in Peoria assisted in securing an indictment of two defendants for bankruptcy fraud and mail fraud. <sup>246</sup>  |
| Indiana, Northern  | A SAUSA successfully indicted two defendants on charges of possession with intent to distribute crack cocaine. <sup>247</sup>  |
| Indiana, Southern  | A SAUSA working with the Indiana Inter-Agency Environmental Crimes Task Force helped to secure a guilty plea from an Indiana businessman for three felony  |

241. Ed Kubo, Grant Announcement from U.S. Attorney Ed Kubo at Hawaii County Council Chambers, Pahoehoe Weed and Seed (Aug. 28, 2006), <http://www.justice.gov/usao/hi/media/pod14.pdf>.

242. Press Release, U.S. Attorney’s Office, Dist. of Idaho, Caldwell Gang Member Sentenced for Gun Crime (Feb. 10, 2010), [http://www.justice.gov/usao/id/public\\_info/pr10/feb/garza02102010.html](http://www.justice.gov/usao/id/public_info/pr10/feb/garza02102010.html).

243. Press Release, U.S. Attorney’s Office, Cent. Dist. of Ill., Iroquois County Couple Sentenced to Federal Prison Terms (Sept. 21, 2009), <http://www.justice.gov/usao/ilc/press/2009/09September/21Freeman.html>.

244. Press Release, U.S. Dep’t of Justice, Former Melrose Park Police Chief Vito Scavo and Six Others Indicted in Alleged Private Security Business Fraud Scheme (July 19, 2007), [http://www.justice.gov/usao/iln/pr/chicago/2007/pr0719\\_03.pdf](http://www.justice.gov/usao/iln/pr/chicago/2007/pr0719_03.pdf).

245. Press Release, U.S. Dep’t of Justice, Area Woman Indicted for Collecting \$29,000 in Social Security Benefits While Concealing Brother’s Death for Four Years (Oct. 22, 2002), [http://www.justice.gov/usao/iln/pr/chicago/2002/pr1022\\_01.pdf](http://www.justice.gov/usao/iln/pr/chicago/2002/pr1022_01.pdf).

246. Press Release, Office of the U.S. Attorney, S. Dist. of Ill., Glen Carbon Couple Indicted on Bankruptcy and Unemployment Benefit Fraud Charges (July 24, 2008), [http://www.justice.gov/usao/ils/press/2008/July/07242008\\_Gary\\_press%20release.htm](http://www.justice.gov/usao/ils/press/2008/July/07242008_Gary_press%20release.htm).

247. Press Release, U.S. Attorney Joseph S. Van Bokkelen, N. Dist. of Ind., Federal Grand Jury Returns Eight Indictments (Mar. 24, 2006), [http://www.justice.gov/usao/inn/press\\_release/documents/2006/March\\_06/Press\\_release\\_march\\_06%20gj.htm](http://www.justice.gov/usao/inn/press_release/documents/2006/March_06/Press_release_march_06%20gj.htm).

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|                    | violations of the federal Resource Conservation and Recovery Act. <sup>248</sup>   |
| Iowa, Northern     | After the Office of National Drug Control Policy included counties in Iowa in the High Intensity Drug Trafficking Area (HIDTA), it allocated funding for the state to hire three SAUSAs. <sup>249</sup> These SAUSAs, whose sole duty is to prosecute methamphetamine traffickers, are appointed by the Iowa Attorney General and paid through federal HIDTA funds. <sup>250</sup>   |
| Iowa, Southern     | This office ostensibly hires SAUSAs because its website contains an employment link with a SAUSA Pre-Employment Security Form. <sup>251</sup>  |
| Kansas             | The Criminal Division of this office contains twenty-five Assistant U.S. Attorneys and two SAUSAs. <sup>252</sup> Although the office participates in both the Project Safe Neighborhoods and the High Intensity Drug Trafficking Area (“HIDTA”) initiatives, it utilizes the two SAUSAs exclusively for the latter project. <sup>253</sup> Like the U.S. Attorney’s Office for the Northern District of Iowa, this office receives funding to cover the employment of the two SAUSAs from the federal HIDTA program. <sup>254</sup> |
| Kentucky, Eastern  | A SAUSA represented the United States at the sentencing of a Lexington resident under the federal Armed Career Criminal Act. <sup>255</sup>  |
| Kentucky, Western  | An unspecified number of SAUSAs work for “a limited amount of time” at offices in Fort Campbell and Fort Knox. <sup>256</sup>  |
| Louisiana, Eastern | This office cross-designated a Deputy Attorney General to assist in the prosecution of a former Deputy City Attorney   |

248. Press Release, U.S. Dep’t of Justice, Muncie Businessman Pleads Guilty to Environmental Crimes (May 8, 2008), <http://indianapolis.fbi.gov/dojpressrel/pressrel08/envirocrimes050808.htm>.

249. The United States Attorney’s Office, Northern District of Iowa: Criminal Division, <http://www.justice.gov/usao/ian/divisions/criminal.html> (last visited Apr. 10, 2010).

250. *Id.*

251. The United States Attorney’s Office, Southern District of Iowa: Special Assistant United States Attorney (SAUSA), <http://www.justice.gov/usao/ias/Employment/SAUSA.html> (last visited Apr. 10, 2010).

252. The United States Department of Justice, Welcome to the District of Kansas: Criminal Division, <http://www.justice.gov/usao/ks/crim.html> (last visited Apr. 10, 2010).

253. *Id.*

254. *Id.*

255. Press Release, U.S. Attorney’s Office, E. Dist. Ky. (Dec. 11, 2009), [http://www.justice.gov/usao/kye/press/december/prather\\_gregory\\_sent.html](http://www.justice.gov/usao/kye/press/december/prather_gregory_sent.html).

256. The United States Attorney’s Office, Western District of Kentucky: Office Overview, [http://www.justice.gov/usao/kyw/office\\_overview/index.html](http://www.justice.gov/usao/kyw/office_overview/index.html) (last visited Apr. 10, 2010).

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|                       | for two counts of deprivation of rights under color of law. <sup>257</sup>  |
| Louisiana, Middle     | No information.   |
| Louisiana, Western    | No information.   |
| Maine                 | No information.   |
| Maryland              | This office assigns Baltimore City Assistant State's Attorneys, cross-designated as SAUSAs, to cases arising under its anti-gun crime program, "Maryland EXILE." <sup>258</sup>   |
| Massachusetts         | No information.   |
| Michigan, Eastern     | Senior Assistant Chief Counsel for U.S. Immigration and Customs Enforcement, cross-designated as a SAUSA, assisted in the prosecution of a naturalization fraud case. <sup>259</sup> Another SAUSA from the Coast Guard assisted in the prosecution of a coast guard official for bribery and extortion. <sup>260</sup> |
| Michigan, Western     | No information.   |
| Minnesota             | A SAUSA prosecuted a company for export violations. <sup>261</sup>  |
| Mississippi, Northern | No information.   |
| Mississippi, Southern | No information.   |
| Missouri, Eastern     | No information.   |
| Missouri, Western     | This office received federal funding from the Public Housing Safety Initiative to hire a SAUSA "to prosecute crimes occurring within federally-assisted housing areas." <sup>262</sup> Its anti-crime initiative, "Project Ceasefire," also utilizes SAUSAs. <sup>263</sup>   |
| Montana               | This office assigned a SAUSA to prosecute a defendant   |

257. Press Release, U.S. Attorney's Office, E. Dist. of La., Federal Appeals Court Upholds Conviction of Henry A. Dillon, Former Deputy City Attorney (June 24, 2008), [http://www.justice.gov/usao/lae/press/2008/2008\\_06\\_24\\_henry\\_dillon\\_appeal.html](http://www.justice.gov/usao/lae/press/2008/2008_06_24_henry_dillon_appeal.html).

258. Press Release, U.S. Dep't of Justice, December Marks the Most Productive Month in History of Maryland EXILE Program (Dec. 26, 2007), [http://www.justice.gov/usao/md/Public-Affairs/press\\_releases/press07/DecemberMarkstheMostProductiveMonthinHistoryofMarylandExileProgram.html](http://www.justice.gov/usao/md/Public-Affairs/press_releases/press07/DecemberMarkstheMostProductiveMonthinHistoryofMarylandExileProgram.html). See *supra* notes 156-57 and accompanying text for more information on Maryland EXILE.

259. Press Release, U.S. Dep't of Justice, Wife of Lashish Owner and Sister of Former CIA/FBI Employee Sentenced on Naturalization Fraud Charges (Feb. 26, 2008), <http://www.justice.gov/usao/mie/press/2008/2008-2-25-eaouar.pdf>.

260. Press Release, U.S. Dep't of Justice, U.S. Coast Guard Official Charged with Bribery and Extortion (Apr. 17, 2008), [http://www.justice.gov/usao/mie/press/2008/2008-4-17\\_bbostic.pdf](http://www.justice.gov/usao/mie/press/2008/2008-4-17_bbostic.pdf).

261. Press Release, U.S. Attorney's Office, Dist. of Minn., Eden Prairie Company Fined \$400,000 for Export Violations (Mar. 13, 2008), <http://www.bis.doc.gov/pdf/031308.mts-plea.pdf>.

262. Press Release, Office of the U.S. Attorney, W. Dist. of Mo., Public Housing Safety Initiative: KC Man Sentenced for Crack Cocaine (Jan. 12, 2007), <http://www.justice.gov/usao/mow/news2007/dawkins.sen.htm>.

263. Press Release, Office of the U.S. Attorney, W. Dist. of Mo., Project Ceasefire: Nine Men Indicted for Illegal Firearms (Feb. 28, 2007), <http://www.justice.gov/usao/mow/news2007/taff.ind.htm>.



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|                    | for two firearms-related offenses after a joint investigation by the local police department and the Bureau of Alcohol, Tobacco, Firearms and Explosives. <sup>264</sup>   |
| Nebraska           | Fourteen attorneys from various agencies and offices, including “the Nebraska Attorney General’s Office, Internal Revenue Service, Social Security Administration, Small Business Administration, and Judge Advocate General’s Office,” handle criminal and civil litigation in this district under the designation of SAUSAs. <sup>265</sup>              |
| Nevada             | No information.  |
| New Hampshire      | This office hired a federally funded gun crime prosecutor in 2004. <sup>266</sup> The prosecutor serves as an Assistant County Attorney and a SAUSA for Project Safe Neighborhoods. <sup>267</sup> Additionally, a SAUSA from the U.S. Food and Drug Administration is prosecuting a defendant indicted for smuggling and money laundering. <sup>268</sup> |
| New Jersey         | This office is staffed, in part, by sixteen SAUSAs, <sup>269</sup> including one who handled a fraud case for the government. <sup>270</sup>   |
| New Mexico         | No information.  |
| New York, Eastern  | In addition to its thirty-nine Assistant U.S. Attorneys, the Eastern District’s Brooklyn office is staffed, in part, by four SAUSAs from other agencies. <sup>271</sup>  |
| New York, Northern | The State Attorney General appointed an Assistant Attorney General as a SAUSA to federally prosecute cases involving the sexual exploitation of children. <sup>272</sup>   |
| New York, Southern | A SAUSA assisted in obtaining a guilty plea in a securities fraud case. <sup>273</sup>   |

264. Press Release, U.S. Dep’t of Justice, Dist. of Mont., Informational: Federal Court Arraignments (Feb. 25, 2010), <http://www.justice.gov/usao/mt/pressreleases/20100225153657.html>.

265. U.S. ATT’YS OFF. DIST. OF NEB., 2008 ANN. REP. 1, 6 (2008), <http://www.justice.gov/usao/ne/2008%20Annual%20Report%20LOW%20RES.pdf>.

266. U.S. ATT’YS OFF. DIST. OF N.H., 2006 ANN. REP. 1, 17 (2006), <http://www.justice.gov/usao/nh/Annual%20Report/ANNUAL%20REPORT%20rev%2003-12-07.pdf>.

267. *Id.*

268. Press Release, U.S. Attorney’s Office, Dist of N.H., Former Hooksett Resident Indicted for Smuggling Diet Pills (May 7, 2009), [http://www.justice.gov/usao/nh/press/may09/CG\\_Garcia.html](http://www.justice.gov/usao/nh/press/may09/CG_Garcia.html).

269. The United States Attorney’s Office, District of New Jersey: Civil Division, <http://www.justice.gov/usao/nj/about/civil.html> (last visited Apr. 10, 2010).

270. Press Release, U.S. Dep’t of Justice, Former Appraiser Admits Role in Multi-Million Dollar Mortgage Fraud (Mar. 13, 2007), <http://www.justice.gov/usao/nj/press/files/pdf/meeh0313rel.pdf>.

271. The United States Attorney’s Office, Eastern District of New York: Civil Division, <http://www.justice.gov/usao/nye/divisions/civil/civil.html> (last visited Apr. 10, 2010).

272. Press Release, U.S. Dep’t of Justice, State Inmate Sent Sexually Explicit Materials to a Child (Jan. 14, 2010), <http://www.justice.gov/usao/nyn/NewsReleases/Attachments/151-145-2063786880.pdf>.

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| New York, Western       | A SAUSA assisted in the prosecution of three former federal employees for stealing prescription drugs. <sup>274</sup>  |
| North Carolina, Eastern | Two SAUSAs secured a federal prison term for a father who assaulted his child. <sup>275</sup>  |
| North Carolina, Middle  | No information.  |
| North Carolina, Western | No information.  |
| North Dakota            | No information.  |
| Ohio, Northern          | No information.  |
| Ohio, Southern          | No information.  |
| Oklahoma, Eastern       | No information.  |
| Oklahoma, Northern      | A lawyer from the Securities and Exchange Commission served as a SAUSA during the prosecution of five defendants for a multi-million dollar stock manipulation scheme. <sup>276</sup>  |
| Oklahoma, Western       | No information.  |
| Oregon                  | A SAUSA helped to negotiate a settlement to recover funds from a physician who improperly billed Medicare and Medicaid. <sup>277</sup>   |
| Pennsylvania, Eastern   | The Criminal Division of this office includes approximately fifty-one SAUSAs from various federal agencies and local prosecutor's offices who prosecute firearms and related offenses. <sup>278</sup> Additionally, the office occasionally supplements the staff of its Organized Crime |

273. Press Release, U.S. Attorney, S. Dist. of N.Y., Defendant Indicted in 1992 Pleads Guilty to Securities Fraud Charges After Being Located in Costa Rica and Extradited to the United States (Nov. 5, 2007), <http://www.justice.gov/usao/nys/pressreleases/November07/stonepleapr.pdf>.

274. Press Release, U.S. Dep't of Justice, Former Federal Employees Plead Guilty to Stealing Prescription Medication (Jan. 6, 2009), [http://www.justice.gov/usao/nyw/press/press\\_releases/Employees\\_Plea.pdf](http://www.justice.gov/usao/nyw/press/press_releases/Employees_Plea.pdf).

275. Press Release, U.S. Attorney's Office, E. Dist. of N.C., Husband of Fort Bragg Soldier Receives Federal Sentence for Assault (Apr. 29, 2010), [http://www.justice.gov/usao/nce/press/2010-apr-19\\_4.html](http://www.justice.gov/usao/nce/press/2010-apr-19_4.html).

276. Press Release, U.S. Dep't of Justice, Five Indicted for Devising and Participating in Multi-Million Dollar Stock Manipulation (Feb. 10, 2009), [http://www.justice.gov/usao/okn/press/Gordon\\_David\\_indictment.pdf](http://www.justice.gov/usao/okn/press/Gordon_David_indictment.pdf).

277. Press Release, U.S. Attorney's Office, Dist. of Or., United States Attorney's Office Recovers Improper Payment from Federally Funded Health Care Programs from Local Physician (Nov. 9, 2004), [http://www.justice.gov/usao/or/PressReleases/20041109\\_dr\\_kiser.htm](http://www.justice.gov/usao/or/PressReleases/20041109_dr_kiser.htm).

278. The United States Attorney's Office, Eastern District of Pennsylvania: About the Office, <http://www.justice.gov/usao/pae/about.html> (last visited Apr. 10, 2010).

279. *Id.*

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|                       | Team with SAUSAs. <sup>279</sup>   |
| Pennsylvania, Middle  | An Assistant District Attorney assisted as a SAUSA in the prosecution of a defendant for gun and drug law violations. <sup>280</sup>             |
| Pennsylvania, Western | No information.  |
| Puerto Rico           | No information.  |
| Rhode Island          | No information.  |
| South Carolina        | An Assistant U.S. Attorney for the Southern District of Georgia, acting as a SAUSA, prosecuted a case involving investment fraud. <sup>281</sup> |
| South Dakota          | A SAUSA is prosecuting a defendant for possessing a stolen firearm and being a drug user in possession of a firearm. <sup>282</sup>              |
| Tennessee, Eastern    | This office assigns a SAUSA to prosecute offenses that occur in Johnson City and arise under Project Safe Neighborhoods. <sup>283</sup>          |
| Tennessee, Middle     | The U.S. Attorney in this district may appoint SAUSAs, but “they are not employees” of the office. <sup>284</sup>                                |
| Tennessee, Western    | No information.  |
| Texas, Eastern        | This office’s Criminal Division works with two Project Exile SAUSAs to prosecute federal firearms violations. <sup>285</sup>                     |
| Texas, Northern       | SAUSAs in this district have “specific prosecutorial responsibility in certain program areas.” <sup>286</sup>                                    |
| Texas, Southern       | A SAUSA participated in the prosecution of a support technician at a web-hosting company for computer intrusion. <sup>287</sup>                  |
| Texas, Western        | No information.  |
| Utah                  | This office employs SAUSAs in its narcotics division. <sup>288</sup>   |

280. Press Release, U.S. Dep’t of Justice, Federal Grand Jury Indicts Scranton Man on Drug and Gun Offenses (Nov. 14, 2006), [http://www.justice.gov/usao/pam/press\\_releases/Isom\\_11\\_14\\_06.htm](http://www.justice.gov/usao/pam/press_releases/Isom_11_14_06.htm).

281. Press Release, U.S. Attorney, Dist. of S.C., Former Charleston Professor Parish Sentenced to 24 Years in Prison (June 27, 2008), <http://www.justice.gov/usao/sc/LivePressReleases/parish%20sentencing.pdf>.

282. Press Release, Office of the U.S. Attorney, Dist. of S.D., Pierre Eagle Butte Man Pled Not Guilty to Possession of a Stolen Firearm and Drug User in Possession of a Firearm (Apr. 23, 2010), [http://www.justice.gov/usao/sd/media\\_news/Pierre-04-26-10-Garreau.html](http://www.justice.gov/usao/sd/media_news/Pierre-04-26-10-Garreau.html).

283. Press Release, U.S. Dep’t of Justice, Kingsport Man Pleads Guilty to Drug and Gun Charges (Feb. 19, 2008), <http://www.justice.gov/usao/tne/pr/2008/February/Lopez%20Elliot%20Ellis%20-%20Plea.htm>.

284. The United States Attorney’s Office, Middle District of Tennessee: Our Staff, [http://www.justice.gov/usao/tmm/about\\_us/](http://www.justice.gov/usao/tmm/about_us/) (last visited Apr. 10, 2010).

285. The United States Attorney’s Office, Eastern District of Texas: Criminal Division, <http://www.justice.gov/usao/txe/criminal/> (last visited Apr. 10, 2010).

286. The United States Attorney’s Office, Northern District of Texas, <http://www.justice.gov/usao/txn/> (last visited Apr. 10, 2010).

287. Press Release, U.S. Dep’t of Justice, Ex-Hostgator.com Employee Sentenced for Computer Intrusion (Jan. 26, 2009), [http://www.justice.gov/usao/txs/releases/January%202009/012609Wade\\_print.htm](http://www.justice.gov/usao/txs/releases/January%202009/012609Wade_print.htm).

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| Vermont             | Prosecutors from the New York State Attorney General's Office, cross-designated as SAUSAs, assisted in procuring a forty-count indictment against five defendants for conspiracy to commit mail and wire fraud in conjunction with a misappropriation scheme conducted through the defendants' New York and Vermont-based business. <sup>289</sup>   |
| Virgin Islands      | No information.  |
| Virginia, Eastern   | The Eastern District's Alexandria Office employs nearly sixty SAUSAs "on detail from a variety of military, state, and federal agencies" to handle cases involving "drug trafficking, money-laundering, firearms and other violent offenses, white-collar, immigration, and environmental crimes, as well as misdemeanor offenses occurring on federal property." <sup>290</sup> This office also offers a position funded by the High Intensity Drug Trafficking Area program whereby the U.S. Attorney will cross-designate an Assistant Attorney General as a SAUSA to work out of the Alexandria Office on narcotics cases. <sup>291</sup> |
| Virginia, Western   | In 2008, this office swore in an Assistant U.S. Attorney who previously served as a SAUSA for the Western District for three years. <sup>292</sup>   |
| Washington, Eastern | No information.  |
| Washington, Western | A SAUSA, Deputy King County Prosecutor "specially designated to handle gun cases in federal court," prosecuted a repeat offender for multiple gun and drug-related crimes. <sup>293</sup>  |

288. The United States Attorney's Office, District of Utah: Criminal Division, <http://www.justice.gov/usao/ut/division.html> (last visited Apr. 10, 2010).

289. Press Release, U.S. Dep't of Justice, Burlington, Vermont (Mar. 10, 2003), [http://www.justice.gov/usao/vt/case\\_information/03102003.pdf](http://www.justice.gov/usao/vt/case_information/03102003.pdf).

290. Assistant Attorney General, Office of the Attorney General of Virginia and Special Assistant United States Attorney, United States Attorney's Office Eastern District of Virginia, Alexandria Office, [http://www.justice.gov/usao/vae/employment/20070611sausea\\_narcotics.html](http://www.justice.gov/usao/vae/employment/20070611sausea_narcotics.html) (last visited Apr. 10, 2010).

291. *Id.*

292. The United States Attorney's Office, Western District of Virginia: Charlene Day, Assistant United States Attorney, [http://www.justice.gov/usao/vaw/assistant\\_us\\_attorney/bio/day\\_bio.html](http://www.justice.gov/usao/vaw/assistant_us_attorney/bio/day_bio.html) (last visited Apr. 10, 2010).

293. Press Release, U.S. Attorney's Office, W. Dist. of Wash., Repeat Offender Sentenced to 11+ Years in Prison for Gun and Drug Crimes (June 13, 2008), <http://www.justice.gov/usao/waw/press/2008/jun/martin.html>.

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| West Virginia, Northern | No information.  |
| West Virginia, Southern | A SAUSA handled the prosecution of a West Virginia business owner who plead guilty to illegal storage of hazardous waste. <sup>294</sup> |
| Wisconsin, Eastern      | No information.  |
| Wisconsin, Western      | No information.  |
| Wyoming                 | No information.  |

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294. Press Release, U.S. Attorney's Office, S. Dist. of W. Va., Wyoming County Business Owner Pleads Guilty to Illegally Storing Hazardous Waste (Jan. 6, 2009), [http://www.justice.gov/usao/wvs/press\\_releases/2009/jan09/010609a.html](http://www.justice.gov/usao/wvs/press_releases/2009/jan09/010609a.html).

