

A model public-service organisation? The US Attorney's Office for the Southern District of New York

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In 2019, public-sector morale was on the decline in many countries, as it had been for several years. Civil servants globally were weighed down by bureaucracy, budget cuts and falling public trust in governments.¹ A recent Gallup survey showed that between 2009 and 2015, 71% of US state and local government employees were disengaged from their work.² This disengagement was estimated to cost the US government at least \$100 billion per year.³ A similar survey in the UK showed that in 2013, morale was at an all-time low for 70% of frontline staff and senior managers in the public sector.⁴ As governments around the world set up new agencies to tackle complex problems – the UK, for instance, planned to create 20 new agencies to manage the work arising from Brexit⁵ – reviewing the conditions that determined organisational success and employee motivation was both necessary and urgent.

The United States Attorney's Office (USAO) for the Southern District of New York (SDNY), one of the US's 94 district offices for federal prosecutions, stood out on several accounts as a public-service organisation with a reputation for excellence and a high-calibre workforce. SDNY attorneys typically hailed from the country's most elite law schools and came with prestigious work experience, often after forgoing lucrative private-sector jobs for an opportunity to serve there. Once hired, they demonstrated high success ratios in trials. The private sector highly valued the skills and experience that attorneys gained by working at the SDNY, and, somewhat atypically for government employees, it was the norm for SDNY prosecutors to leave the office after a few years to work at New York's top private law firms. Many returned to the public sector in key leadership positions at later stages in their careers. Some returned to the USAO SDNY itself in supervisory roles, others came back as judges and heads of government agencies, and a few others as elected politicians.

The USAO SDNY benefited from some unique and inimitable differentiating factors that likely contributed to its reputation for excellence. One was its long and storied history as the oldest legal jurisdiction in the country: the SDNY court was the first to sit under the US constitution, preceding the creation of the US Supreme Court.⁶ It was commonly referred to as America's 'mother court'.⁷ Furthermore, as its jurisdiction covered the important economic area of New York City, the SDNY court had been involved in the adjudication of landmark and precedent-setting cases on securities, financial fraud and terrorism. However, excellence at the USAO SDNY could also be attributed to certain operational practices. These practices included a rigorous and selective hiring process which resulted in a top calibre workforce (despite the relatively low pay); a tradition of giving young attorneys responsibility early in their careers; a strong culture of 'doing the right thing' that seemingly permeated all levels of the legal hierarchy; and a fierce reputation for political independence, a characteristic that earned it the nickname the 'Sovereign District of New York'.⁸

This document explores some of the noteworthy practices and norms at the USAO SDNY, with the aim of stimulating classroom discussion to help public leaders around the world as they

look at transforming existing government organisations or setting up new ones. The document draws on observations and insights made by several former SDNY prosecutors through informal meetings, as well as secondary sources.

US Attorneys

The somewhat awkwardly named position of 'US Attorney' was established under the Judiciary Act of the United States of 1789 to denote a senior prosecutor in the federal government, predating the formation of the US Department of Justice (DoJ) itself. The Judiciary Act provided for the President of the United States to appoint a 'person learned in the law to act as attorney for the United States' for each federal district in the country.⁹ At the time, US Attorneys worked in 'splendid isolation. . . Each was a king in his own domain, appointed by the president of the United States and directly answerable to him alone.'¹⁰

In the years following the US Civil War (1861-65) the federal government hired a number of attorneys to keep up with the growing body of legal work. In 1870, the US government established the DoJ within its executive branch, making it responsible for the enforcement of all US federal criminal and civil laws.^a All US Attorneys were transferred to the DoJ to serve under the US Attorney General, the senior-most lawyer for the US government who was appointed at the DoJ's helm.¹¹ (See **Exhibit 1** for the present-day organisational structure of the DoJ.)

Within the DoJ, 93 US Attorneys oversaw the 94 judicial districts that covered US territory.¹² Each US Attorney was the chief prosecutor and federal law enforcement officer in his or her district, except for one who was responsible for two districts.¹³ In litigating cases, US Attorneys were supported by a team of professional legal staff, known as Assistant US Attorneys (AUSAs). The size and composition of the teams varied across districts, from 12 AUSAs in the smallest office to 360 in the largest (as of 2008).¹⁴ As of 2015, there were approximately 5,500 AUSAs in the US as a whole.¹⁵ The US Attorney together with the AUSAs and other support staff in a federal judicial district constituted that district's US Attorney's Office (USAO).

Independence of US Attorneys

US Attorneys represented a unique bridge between the judiciary and the executive branch.¹⁶ As such, they were presidential appointees (appointed for four-year terms subject to US Senate approval) and served at the president's discretion.¹⁷ Employed by the DoJ, they were responsible for executing the department's federal law enforcement priorities, as ultimately laid down by the US president. However, once appointed, they were expected to play a 'critical and non-political, impartial role in the administration of justice,' said a former US Attorney.¹⁸ As one legal academic explained, 'Once selected. . . US Attorneys are expected to leave behind partisan politics, adhering to the norm of prosecutorial neutrality. In this context, prosecutorial neutrality means, at a minimum, that the decision whether and when to bring charges in individual cases should be made without regard to either the political affiliation of the individuals involved or the resulting benefit (or harm) to either political party.'¹⁹ Another legal professor suggested that federal prosecutors were agents of 'two masters' serving both 'the President and the law.'²⁰

Over time, political norms had evolved to support the special role of US Attorneys. Custom dictated that the president set federal law-enforcement priorities, but US Attorneys and their teams of AUSAs exercised 'wide discretion' in how they advanced these priorities in their jurisdictions.²¹ Though not unconstitutional, it was somewhat 'unprecedented for the DoJ or the president to ask for the resignations of US Attorneys during an administration, except in rare

^a The US legal system consisted of federal, state and local laws. Federal laws stemmed from the authority granted to the federal government by the US Constitution and dealt with issues that pertained to the entire country, including civil liberties, immigration, national security, interstate commerce, bankruptcy and copyright, amongst others.

instances of misconduct or for other significant cause.¹²² This norm existed to discourage presidents from punishing federal prosecutors on political grounds.²³

Nevertheless, various US presidents throughout history, even including George Washington, had attempted to curb the independence of US Attorneys.²⁴ Political interference at the DoJ arguably peaked during the Watergate scandal under President Richard Nixon's administration (1969-74),²⁵ after which the DoJ first issued guidelines limiting the interactions between its prosecutors and the president.²⁶ However, political interference continued even thereafter. In 2006, the George W Bush Administration (2001-09) abruptly dismissed nine US Attorneys midterm, an action that subsequent investigations by Congress, the DoJ and the press found to be politically motivated.²⁷ More recently, President Donald Trump had been accused of repeatedly attempting to influence the DoJ.²⁸

The USAO for the SDNY

The USAO for the SDNY, often referred to as simply the SDNY, oversaw eight counties in New York State, including Manhattan and the Bronx. With a staff of 220 (as of 2018),²⁹ it was one of the biggest district offices in the country.³⁰ As with other federal prosecutorial offices, the SDNY had two divisions: civil and criminal. The civil division dealt with civil matters in all areas, including, for instance, healthcare and mortgage fraud and labour racketeering. The division enforced federal civil rights laws, environmental laws, and tax laws; represented government agencies such as the Central Intelligence Agency (CIA) and the Federal Bureau of Investigation (FBI); and defended government employees who had been sued.³¹ The criminal division handled violations of federal laws that resulted in criminal cases. Its wide-ranging caseload included white-collar crime; domestic and international terrorism; cybercrime; international and traditional organised crime including narcotics and drug trafficking; public corruption; and immigration fraud.³²

The SDNY stood out amongst federal prosecutorial offices for its independence from Washington, a characteristic corroborated by both the office's attorneys and independent observers. Robert Fiske, US Attorney of the SDNY between 1976 and 1980, reflected, 'The hallmark of my four years as US Attorney for the SDNY was the tradition. . . of total independence from politics.'³³ He added, 'In some other district offices, the politics of the office tended to change with changes in Washington. For example, in the 1970s, the US Attorney for Massachusetts could not make hiring decisions, even at the AUSA level, without Ted Kennedy's approval.'³⁴ (Kennedy was US Senator for Massachusetts at the time). Jed Rakoff, a federal district judge for the SDNY since 1996, and a former prosecutor in the office (1973-80), added, 'There's a tradition of independence in the Southern District. . . And that has often led to tension with the Justice Department.'³⁵ *The New York Times* noted that the office had a 'longstanding reputation for nonpartisanship and autonomy.'³⁶ Media observers further noted that the office's investigations of possible wrongdoings by current US President Trump was a testament to its independent streak.³⁷ Alumni of the office suggested that SDNY prosecutors might even attempt to overturn the DoJ's prevailing guidelines,³⁸ which prohibited the indictment of a sitting president.³⁹ Jon Sale, a former SDNY and Watergate prosecutor, opined, 'I'm thoroughly convinced the SDNY will make its own evaluation... They're [USAO SDNY] obviously looking at the president and I wouldn't rule out that they could decide you can indict a sitting president.'⁴⁰

SDNY insiders offered different views on how SDNY prosecutors kept Washington at bay. Some noted that as the agency's leader, the US Attorney, traditionally an important and credible figure in the legal world, played a pivotal role in retaining the independence of the office. Mary Jo White, the first and to-date only woman US Attorney of the SDNY (1993-2002), commented, 'The office values its autonomy and credibility with the courts to be apolitical and autonomous, particularly in civil cases where political interference is maximum. Past US Attorneys have successively and consistently fought to keep Washington out.'⁴¹ She highlighted how the US Attorney played a role in maintaining this autonomy: 'The culture of

independence is passed down from one US Attorney to the next. When I was appointed US Attorney, my predecessor gave me two pieces of advice: the first was to be prepared to resign a few times during my tenure and the second was to keep Washington out of the Second Circuit.^b As it happens, I did threaten to resign four times during my career, and three of those resignations were made to keep Washington out of SDNY cases.⁴² Bonnie Jonas, a former AUSA at the SDNY (1997-2016) who held a range of supervisory positions, concurred: 'The US Attorney is instrumental in shaping culture and protecting the SDNY from Washington's influence.'⁴³

Others noted that the office's culture of independence was institutionalised and ingrained across all levels of seniority, not just at the top with the US Attorney. Michael Garcia, Associate Judge at the New York Court of Appeals and former US Attorney (2005-08) of the SDNY, said, 'The US Attorney can only do so much. He can have a very positive effect, but he cannot change the entire culture of the organisation. The office is so much bigger than just one person. You need a critical mass of leadership. At the SDNY, the entire tradition and history of the office is steeped in independence and integrity.'⁴⁴ Reflecting on why the SDNY had this critical mass of great leadership he said, 'You are taking a career person and bringing them into the office. You aren't bringing in politicians. These people are trying to build careers as lawyers, not as politicians. It's a different pool of people.'⁴⁵

The SDNY's 'secret sauce'

Its independence from Washington was only one distinguishing characteristic of the SDNY. There were several other features that set it apart from other legal and prosecutorial offices and indeed from other government agencies.

1. Extreme selectivity... but bordering on elitism?

The SDNY was known for hiring some of the best and the brightest legal talent, and its AUSA recruitment process was extremely competitive and selective. AUSAs were typically hired three to eight years out of law school.⁴⁶ At the SDNY, they were often amongst the best students from the best law schools, including Columbia, Harvard, New York University, and Yale Law School (all generally ranked amongst the top five US law schools).⁴⁷ Many had clerked with federal court judges, including at the SDNY district court and the US Supreme Court.⁴⁸ Clerkships were one- to two-year apprenticeships in which law students worked as legal assistants for judges. Clerkship experience was considered valuable as it gave aspiring attorneys the opportunity to work on a wide range of cases, to gain significant practical legal knowledge, to gain insight into the court's perspective and an understanding of both sides of the law, and perhaps most significantly to build powerful connections in the legal world – credentials that were difficult to attain otherwise.⁴⁹ After clerking, candidates typically worked at private law firms or at other offices within the DoJ, hoping to become more attractive for an SDNY AUSA appointment.⁵⁰ Competition for such positions had become particularly fierce in the aftermath of the global financial crisis when the SDNY temporarily stopped hiring. Jonas explained, 'With the post-recession hiring freeze, people have been waiting for years to work here.'⁵¹

As most shortlisted AUSA candidates came with stellar academic credentials, strong clerkship and work experience, and good references, senior attorneys of the office typically used the interview process to filter for softer, yet equally important, qualities.

Senior attorneys highlighted personal fit and drive as two important filters. Garcia reflected, 'It is already a very steep cut in the first round. Everybody who comes is already fantastic on paper, with great references. What I look for is whether I want to be in the well of a courtroom

^b Second Circuit refers to one of the thirteen US appellate jurisdictions that comprises the states of Connecticut, New York and Vermont, and includes the SDNY.

with this person. I see how they interact. You get a sense from knowing the kind of people who have done well in this office.¹⁵² He added, 'The one thing I always told candidates was: "This job will give you whatever you want – the best white-collar case, the best securities case, the best terrorism case. You will get what you ask for. The only thing it asks for in return is everything." The kind of people who are up for this challenge are the kind that thrive here. They are achievers of the highest level.'¹⁵³

Senior leaders also looked for empathy. White said, 'All the candidates are spectacular on paper. The key question is how will they deal with the power they get at such a young age? Will it go to their head? Everything you do at the SDNY matters a lot. Someone's reputation will be gone, they may go to jail. The stakes are high. Some people cannot deal with the power, even [former] Supreme Court clerks.'¹⁵⁴ Jonas agreed, 'In public service, the mission is to give back to your country. Assistants need to be vested from Day 1 in what they are doing. Coming from big law firms, assistants go from no power to so much. There has to be a sense of responsibility that comes with the ability to take people's liberty away.'¹⁵⁵ She added, 'The office needs to screen for those who simply want power, to notch convictions, versus those who are truly interested in public service and want to give back. It has to vet for people who have an ethos of contributing to something bigger than themselves.'¹⁵⁶

As a result of its highly selective entry process and its reputation for attracting the best talent, the SDNY was perceived as being an 'elite' meritocracy. Fiske corroborated this perception: 'It's like being the Yankees [New York's storied baseball team]. Everybody wants to play for the Yankees.'¹⁵⁷ Media outlets such as *The New Yorker* and *The Financial Times* noted that there was also a sense of elitism associated with working in the office.¹⁵⁸ Preet Bharara, US Attorney of the office between 2009 and 2017, had been quoted as saying, 'Once you've been an AUSA – short of flying a plane without any training – you can do anything.'¹⁵⁹ A former SDNY AUSA reflected, 'Rightly or wrongly, there's a kind of arrogance that comes from being in the SDNY.... Most of these people [assistant attorneys] do not view themselves as being subservient to their clients. The client is free to accept or reject their advice. That's all I owe them. I'm not beholden to them.'¹⁶⁰ A journalist explained the elite status associated with working at the SDNY:

If you're not a lawyer, and you meet a quiet, studious-seeming person and ask him what he does for a living, you may hear, 'I'm an Assistant United States Attorney for the Southern District of New York.' Sounds dull, like 'I'm a tax preparer.' But the answer is a little like the one you get when you ask someone where he went to college and he says, 'Um, Yale?' What you were really meant to hear was: 'I'm a member of the Killer Elite, baby! I'm special ops. I'm strike force. Be very afraid!'¹⁶¹

Hiring the best and the brightest paid off, as AUSAs at the SDNY exhibited high success ratios in case work. More than 90% of criminal cases prosecuted by SDNY attorneys typically resulted in guilty verdicts.¹⁶² In addition, the SDNY consistently ranked among the top offices in prosecuting white-collar crime with three times more prosecutions than the national average in 2019.¹⁶³ SDNY prosecutors demonstrated particularly high success ratios (defined as the ratio of cases adjudicated in favour of the US vs. against the US) in civil cases in comparison with federal prosecutors from other district offices.¹⁶⁴ For example, in 2018, the SDNY exhibited the second highest civil trial success ratio of all 94 district offices.¹⁶⁵

2. A strong, values-based culture... but fostering an exclusionary club?

Alumni of the SDNY commonly spoke about the office's strong culture based around a central mission: 'do the right thing'. This shared belief was not limited to a professional responsibility of delivering high quality work; it also included a moral and ethical obligation to be unbiased and just. Although its mission was both overarching and idealistic, attorneys of the office seemed to truly believe in it. Bharara reflected, 'When I assumed my position as the head of

that office in 2009, I sought to embrace the culture I inherited from my predecessors. There was only one admonition and it was constant: "Do the right thing, in the right way, for the right reason." And do only that. I repeated that to a generation of public servants as often as I could.⁶⁶ White added, 'Your job as US Attorney is to do the right thing. You're going after bad guys. You're doing something for society every day. You feel good about your job every day. It sounds hokey, but it's true.'⁶⁷ She explained, 'The mantra you deeply believe in "to your toes" is that you are here to do the right thing. It is pretty great to find a job where that's your mission. It is not typically hard to figure out what the right thing to do is, and once you figure that out, there is no choice. Everyone at the SDNY believes in its mission. The culture makes it easier.'⁶⁸ A former intern of the office corroborated the sentiment: 'From every attorney, paralegal, and investigator, we heard the same message: "Do the right thing. Charge defendants when you can prove their guilt. Drop cases where you can't. Conduct searches and investigations within the scope of the Constitution. Fight for justice, but do the right thing."⁶⁹

Working together towards such an explicit, commonly repeated, and deeply moral mission seemed to generate a strong and lasting sense of community amongst SDNY attorneys. Fiske reflected, 'If two former assistants of the office meet, they have an instant bond, even if they had never met before and regardless of the politics of the administration in which they served. "Club" is not the right word, but it is a very strong organisation. There is a sense of camaraderie....'⁷⁰ This strong sense of kinship continued to hold even in the private sector, with alumni of the office frequently referring cases to each other around the city. A former prosecutor explained, 'They do it [refer each other] because they like each other, know each other, and know that they will do a good job.'⁷¹ A former AUSA who had recently opened a private boutique law firm in New York concurred, 'I'm already getting calls for potential referrals through former assistants who are passing my name along.'⁷² Given its illustrious and close-knit alumni, *The New York Times* called the USAO SDNY 'one of [New York] city's most powerful clubs.'⁷³ Rakoff suggested that the perceived sense of nepotism amongst SDNY alumni was a natural extension of the close bonds between its prosecutors, commenting, '90% of my best friends are people that I met at the SDNY. It is a very close-knit community. Over the years, this translates into business.'⁷⁴

3. The independence to act... but were new hires really qualified for such responsibility?

Early on in their careers, AUSAs at the SDNY were given the opportunity to work independently on complex cases and to be in the courtroom often. Garcia reflected, 'When you come here, the wave is going to come in and knock you over. It's about how fast you are able to get up. You can always ask for advice, there are always people willing to help you. But you are the one who really has to perform. There is a sense of pride in being thrown in the tank. It's the pride of working in the best prosecutor's office in the world.'⁷⁵ This experience was rarely available at other government agencies or at leading private law firms, Jonas explained: 'I understood that as a young prosecutor you were entrusted with a tremendous amount of responsibility that junior lawyers are rarely given at law firms.'⁷⁶ She added, 'My experience is that other government agencies do not give new lawyers the same degree of responsibility.'⁷⁷ David Kennedy, Civil Rights Co-Chief at the SDNY, reflected, 'I am one of the people who interviews applicants for AUSA positions, and I am constantly amazed at how attorneys I interview have had so few litigation opportunities. Applicants often proudly claim that in their years at the firm they took or defended a few depositions, had an oral argument, or wrote an appeal brief, all things we do about once a month.'⁷⁸

This work experience was further enhanced by the complexity and diversity of the caseload and the quality of the defense counsels whom SDNY prosecutors could expect to face. This was one of the reasons that AUSAs described working at the office as 'unparalleled' and as the 'best job you ever have'.⁷⁹ Fiske explained, 'The SDNY tries cases in the public domain every single day. Its civil division has some of the most important cases in the country. In my four years as US Attorney, five cases that our Civil Division handled went to the US Supreme

Court because the issues were so important. Young lawyers get the opportunity to work on precedent-setting cases against some of the best lawyers in New York. This is great experience. The kind of responsibility you get at the SDNY at a young age is unmatched.¹⁸⁰

However, there were concerns whether AUSAs were experienced and qualified enough to have so much responsibility so early in their careers. As early as 1978 Professor James Eisenstein of Pennsylvania State University noted in his study on US prosecutorial service that 'by far the most serious problem I discovered rests in the inexperience of assistant US Attorneys,'¹⁸¹ adding that AUSAs tended to be far less experienced than the defense attorneys they were up against in trials.¹⁸² The National Association of AUSAs (NAAUSA), an organisation which represented around one-third of all AUSAs, stated in 2010 that 'the sheer size, length, and complexity of litigation performed by AUSAs has grown exponentially over the past 20 years. . .' and given this context, 'the federal government can no longer afford to assign these complex cases to relatively inexperienced attorneys.'¹⁸³ These concerns were further heightened at the SDNY, where AUSAs tended to work on some of the most far-reaching cases in the US given the office's jurisdiction over one of the country's key economic areas.

4. A stepping stone to the best opportunities... but feeding the revolving door?

AUSAs typically worked at the SDNY for a few years before leaving for the private sector. A study that traced the careers of 152 AUSAs employed at the SDNY beginning in 2001 found that within a decade more than 60% had moved to the private sector, a majority of whom had become partners at private law firms.¹⁸⁴ The study's author David Zaring, a professor at the University of Pennsylvania's Wharton School, reflected, 'The story of a job in the SDNY is largely a story of a revolving door into private practice – not to business, and not to academia, but to law firms, with a minority remaining in the government....'¹⁸⁵ He added that 'my guess is that a gig in the Southern District is the greatest path to wealth maximization in the federal government that there is.'¹⁸⁶ The SDNY's securities division, which oversaw prosecution of many financial crimes, was referred to as its 'departure lounge,' an allusion to the fact that experience in this department was of particular interest to private law firms.¹⁸⁷ Credentialing was less common in other prosecutors' offices and government agencies, where the typical employee tended to be a careerist. Garcia observed, 'Working at the SDNY is alluring because of what it will enable you to do in the future. It is a public-service job, but it opens up different career paths. When you go to Washington you see examples of so many people who tend to lose their bearings. The SDNY gives AUSAs a solid compass to steer by.'¹⁸⁸

Many AUSAs returned to the office at later stages of their careers.¹⁸⁹ In fact, private sector experience was almost considered to be a rite of passage to attain the most coveted senior positions at the SDNY.¹⁹⁰ Insiders explained that the US Attorney was traditionally someone who served as an AUSA at the SDNY, but then established themselves in the wider legal profession.¹⁹¹ Once appointed, the new leader typically reached back into the pool of SDNY alumni to fill key positions of their executive staff, like the chief of the criminal division and the chief counsel position. Jonas explained, 'The most senior jobs at the SDNY are typically reserved for those who have left. This is different from other district offices where the top positions go to insiders.'¹⁹² Others returned to public service in different senior positions. Former SDNY prosecutors had become judges of the US Supreme Court and the US Court of Appeals for the Second Circuit (the federal appellate court with jurisdiction over New York), heads of agencies such as the FBI and the Securities and Exchange Commission (SEC), members of Congress, cabinet secretaries, the Mayor of New York City, and the Governor of New York State.¹⁹³

The verdict on the impact of the revolving door on the delivery of justice was mixed.

Proponents of the revolving door from the SDNY felt that it did not compromise attorney independence. Some noted that the revolving door was so commonplace and routine at the SDNY that it was simply a sign of stability.¹⁹⁴ Garcia commented, 'AUSAs go from being the most aggressive defense lawyers to the toughest prosecutors. Nobody even thinks about the

transition [through the revolving door].⁹⁵ Others noted that AUSAs did not have to concern themselves with going soft on corporates so as not to antagonize future clients because they knew that a multitude of great opportunities would be open to them when they decided to leave prosecutorial service.⁹⁶ They also noted that private law firms were more concerned with the experience and success ratios of AUSAs rather than with any perceived sense of affiliation with corporates. In the context of senior private lawyers revolving back to leadership roles at the SDNY, some noted that private sector experience in fact heightened independence at the office. White explained, 'It is easier to threaten to resign [in the face of political pressure from Washington] if you have worked in the private sector and can return. It is harder for career attorneys to threaten to resign as their livelihood depends on the job. Bringing in people from outside helps maintain the independence of the office, as you know that they can go back.'⁹⁷

Furthermore, proponents of the revolving door from among the SDNY alumni noted that private sector experience improved AUSA performance, giving them a broader perspective, which ultimately enabled better and more effective prosecution. White said, 'Generally speaking, the experience of working in both the public and private sector is a good thing. From a public interest point of view, it is a good thing to have people go in and out. I was a better US Attorney because I had worked in the private sector for many years. I knew how defense attorneys operated and this made me more effective.'⁹⁸

Other SDNY insiders even suggested that having former AUSAs in the private sector served as a check on the discretionary power of federal prosecutors, as it provided a counterbalance to the concentration of the 'best and the brightest' attorneys in federal prosecution.⁹⁹ A former prosecutor from the 1950s reflected, 'We have too much power in the hands of prosecutors. By having this revolving door, you have well-trained lawyers out there keeping the government honest.'¹⁰⁰

However, others from outside the office were not so sanguine on the effects of the revolving door. Harvard and Stanford University researchers hypothesised that it distorted the incentives of federal prosecutors, encouraging them to take on complex and high-profile cases and to demonstrate excessive assertiveness to signal their worth to future private sector employers.¹⁰¹ A Columbia Law School professor noted that the USAOs were 'often way stations for lawyers seeking to advance their careers with conspicuous litigation victories against well-represented targets.'¹⁰² Zaring of The Wharton School further observed that '[Private] law firms often trumpet the tough prosecutions brought by the prosecutors who then join them,' and that 'these firms find former toughness to be good marketing....'¹⁰³

Other media outlets such as *The Financial Times* asked whether the close relationship between the SDNY and New York's corporate community had led to weaker prosecution against corporate bigwigs, especially against bankers during and after the global financial crisis.¹⁰⁴ Politician Bernie Sanders said, 'It is an obscenity that people in this country are getting arrested at near record rates for smoking marijuana, but not one Wall Street CEO has been prosecuted for triggering the Great Recession in 2008....'¹⁰⁵ Ben Bernanke, former Chairman of the Federal Reserve, agreed that more Wall Street executives should have gone to jail. He said, 'The Fed [Federal Reserve] is not a law-enforcement agency. The DoJ and others are responsible for that, and a lot of their efforts have been to indict or threaten to indict financial firms. Now a financial firm is of course a legal fiction; it's not a person. You can't put a financial firm in jail.'¹⁰⁶ He added, 'It would have been my preference to have more investigation of individual actions because obviously everything that went wrong or was illegal was done by some individual, not by an abstract firm.'¹⁰⁷ In their defense, prosecutors at the SDNY argued that the lack of indictments was reflective of the high burden of evidence required to hold individuals criminally liable for the global financial crisis rather than a symptom of close relations between the city's financial sector and the office.¹⁰⁸

Organisational challenges

Despite its many positive differentiating characteristics, the SDNY was, as of 2019, grappling with some organisational challenges.

Low salaries

AUSAs received relatively low salaries in comparison not only with private-sector attorneys (which was somewhat unsurprising) but also with lawyers in comparable government agencies. Unlike the salaries of most US civil servants which followed the federal General Schedule (GS) pay scale, AUSA salaries followed the more discretionary Administratively Determined (AD) scale.¹⁰⁹ Salaries of AUSAs were determined initially by years of professional experience and thereafter by performance, and ranged from a minimum of around \$54,000 for 0-2 years of experience to a maximum of around \$141,000 for 9+ years of experience.¹¹⁰ AUSAs in supervisory, executive or managerial positions were eligible for higher salaries that ranged from \$108,000 to \$166,500.¹¹¹ AUSAs also received locality pay, a supplemental percentage rate adjustment that was reflective of private sector salary levels in their geographic areas.¹¹² In 2019, the locality pay in New York was around 33%, among the highest in the US; this brought the minimum starting AUSA salary to around \$71,600 per year. Nevertheless, even including locality pay supplements, AUSA pay was capped at a maximum of \$166,500 per annum.¹¹³

The NAAUSA had consistently championed the need to reform the AD pay scale. The organisation sought to align salary levels of AUSAs more closely with those of other DoJ attorneys, and ultimately to shift AUSA pay to the GS salary system.¹¹⁴ The NAAUSA noted that following the AD scale put AUSAs at a disadvantage in at least two ways.

First, though there were certain rules and guidelines surrounding pay increases under the AD system, increments were ultimately discretionary and determined by each US Attorney depending on his/her budget and decisions on resource allocation. Under the GS system, rules surrounding increments were much stricter. For example, a GS-scale DoJ attorney with a 'satisfactory' performance rating mandatorily received an increase in pay, while an 'outstanding' rated AD-scale AUSA was not guaranteed any raise.^{c,115}

Second, as a result of structural differences between the AD and GS scales, the AD scale had a greater number of pay levels with broader pay ranges than the GS scale.¹¹⁶ Consequently, AUSAs tended to spend longer at lower pay levels than their DoJ counterparts.¹¹⁷ According to DoJ statistics for FY17, the average salary for a DoJ criminal division trial attorney with five years of experience was \$115,456, while the average salary for an AUSA with five years of experience was \$84,435.¹¹⁸ This disparity continued even at 20 years of experience, with a civil division DoJ trial attorney earning \$11,177 more than an AUSA.¹¹⁹ Based on 2019 salary scales,¹²⁰ it would take an AUSA in New York nine years of professional experience to reach the highest non-supervisory pay grade, in contrast to two years for a DoJ attorney.¹²¹ Even at these comparable levels, a DoJ attorney earned around \$10,000 more a year than an AUSA (See **Exhibit 2**).¹²² Ultimately, AUSAs and DoJ officials reached the same salary cap of \$166,500 in managerial and supervisory positions, but it arguably took AUSAs considerably longer than their DoJ counterparts.

The discrepancy between AUSA and private-sector pay was particularly marked at the SDNY as New York City law firms paid some of the highest salaries in the country. Entry-level associates at the biggest elite law firms were paid base salaries of up to \$190,000 per annum,¹²³ with bonuses ranging between \$15,000 and \$100,000, depending on years of experience.¹²⁴ SDNY's Civil Rights Co-Chief David Kennedy reflected, 'Some graduates contemplating a public service career might be dissuaded by the fact that I probably made only half or a third

^c The performance rating scale for US civil servants had three levels: Outstanding, Satisfactory, and Unsatisfactory.

of what I'd be making at a big law firm. Now that I've reached my salary cap, I'm probably making an even smaller percentage than that. It is not always easy to raise a family (my wife and I have two boys) in New York City on a government salary....'¹²⁵ Though AUSAs almost consistently described working at the SDNY as the 'best job', low salaries were likely an important contributor to the revolving door. White explained, 'It is hard financially to keep the best and the brightest for long in New York. When the second child arrives, you know they are out.'¹²⁶

Rising tenures

An increasingly visible trend in the USAO SDNY (one seemingly at odds with the issue of low salaries) was that of longer terms of service amongst AUSAs. Average tenure across all USAOs had increased from three years in the 1950s to eight years in the late 1990s (see **Exhibit 3**).¹²⁷ Though average AUSA tenure rates at the SDNY were thought to be lower than at other USAOs, they had also been trending upwards.¹²⁸ Traditionally, AUSAs worked at the SDNY for four to five years, but increasingly they were staying longer.¹²⁹ Indeed, the average length of service for New York state's public sector attorneys rose from 8 years in 1998 to 10.5 in 2014, stabilizing around 9.5 years by 2018.¹³⁰ Garcia reflected, 'Earlier, you were considered senior if you had been at the SDNY for three to four years. Now you need to have been there at least eight years.'¹³¹

The rise in tenure rates was creating a bottleneck at the top of the SDNY, and, as a result, younger AUSAs were having to wait longer to earn relevant and valuable experience. For instance, AUSAs reportedly needed to wait longer to work in the sought-after securities division. Jonas said, 'People used to get to work in securities after three years. And then things changed – working in securities required that AUSAs first work in a senior unit, and then possibly make another commitment.'¹³² Supervisory roles were also opening up less frequently than before. AUSAs needed to wait longer to obtain coveted roles like the Chief of Securities, for example. Anecdotal evidence further suggested that while traditionally AUSAs would work on 12 to 15 trials in their first years at the office, they now worked on an average of only two.¹³³ This was likely due to a combination both of older and more experienced AUSAs staying at the office longer as well as fewer cases going to trial overall. Rakoff explained, 'Until 1985, 15-20% of all federal criminal cases went to trial. But with harsher punishments and, in particular, the raising of mandatory minimum sentences, it has become too risky for defendants to go to trial. A large proportion of cases are now settled out of court. AUSAs will get it [trial experience] eventually, but they have to stick around.'¹³⁴

There were mixed views amongst SDNY alumni as to whether rising tenures were a cause for concern.

Some SDNY insiders felt that long-term careerism was good for the office. They argued that it would enable young attorneys to build experience that was necessary to keep pace with skilled and tenured defense lawyers. This was increasingly important as white-collar crime had become more complex. Further, it enabled AUSAs to train and 'supply' new assistants with experience.¹³⁵ Finally, it aligned the incentives and motivations of assistants more closely with those of the organisation. Jonas, who had worked at the SDNY for nearly 20 years, added that 'If people only have a short window at the SDNY, they are not as interested in investigating longer-term cases. AUSAs who have been around longer have a sense of commitment, and do not leave until their cases are done. The AUSA role is a public service one, it needs people who are committed to the cause. It is not fair to the prosecution if people leave in the middle of a case.'¹³⁶

Other insiders felt that long-term careerism (beyond an upper limit of around 8 years) would hamper productivity, objectivity and motivation at the office.¹³⁷ Rakoff reflected, 'If you are in any job for too long, you start seeing things from only one point of view. With turnover, you get more balanced views.'¹³⁸ Fiske added, 'What really differentiates this office is that you have

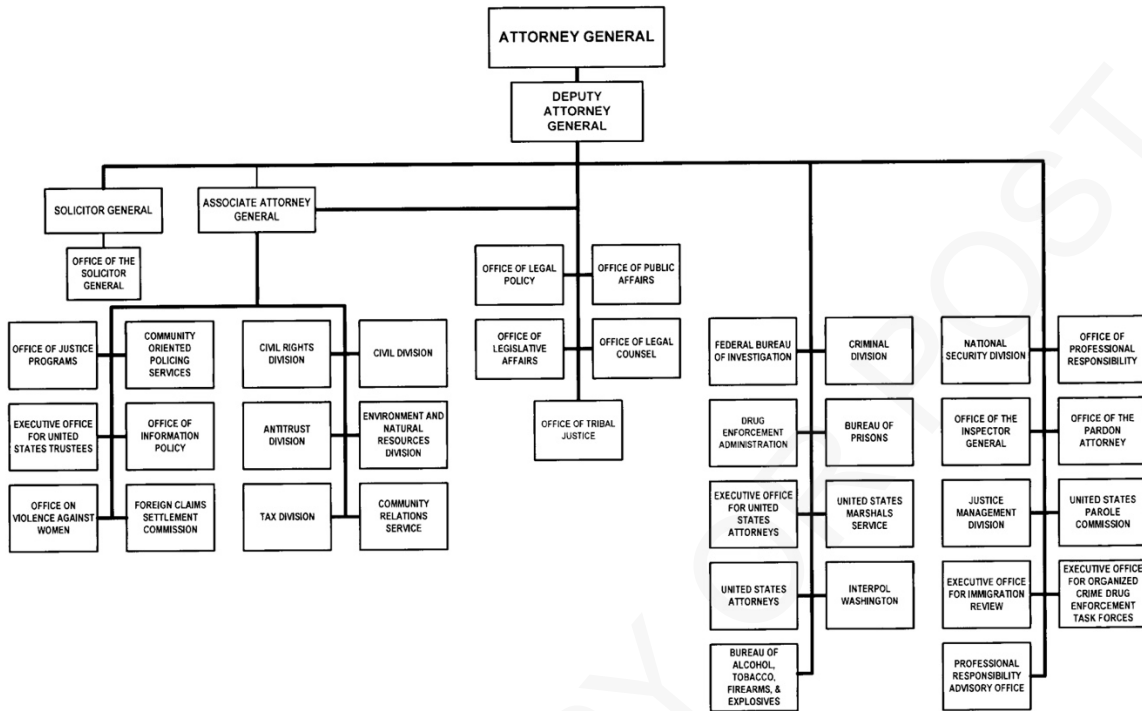
young blood coming in all the time, enthusiastic assistants with lots of energy.¹³⁹ Corroborating this view, a study that tracked the careers of AUSAs at the SDNY found that prosecutors who stayed at the office longer – excluding management – tended to be less productive than those who left for the private sector.¹⁴⁰ The data also suggested that those who stayed longer also tended to be graduates of less prestigious law schools.¹⁴¹

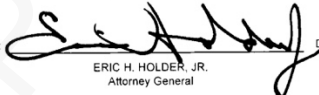
Conclusion

Several operating characteristics made the SDNY an interesting model for public-service organisations: its ability to attract top-tier talent despite its relatively low pay; its strong moral code of 'doing the right thing' that generated lasting bonds amongst employees and alumni; the complex and high-profile work entrusted to young employees, who reciprocated by devoting long hours and delivering high success ratios; and its culture of encouraging its best attorneys to leave the office for the top private-sector opportunities. Perhaps the biggest testament to the office's success lay in its alumni's enduring adoration. Garcia encapsulated this sentiment when he said, 'I have had a number of different jobs that I have loved [including as head of US immigration and customs enforcement and head of a special committee investigating corruption at football's governing body, FIFA], but being an assistant at the SDNY is the best job I have ever had. I would look at the clock and it would be midnight and I would think – "I would work in this job for free."¹⁴²

Exhibit 1 Department of Justice Organisational Structure, 2019

U.S. DEPARTMENT OF JUSTICE



Approved by  Date: 11/26/12
 ERIC H. HOLDER, JR.
 Attorney General

Source: United States Department of Justice website, <https://www.justice.gov/sites/default/files/jmd/legacy/2014/06/23/dojorg.pdf>, accessed November 2019.

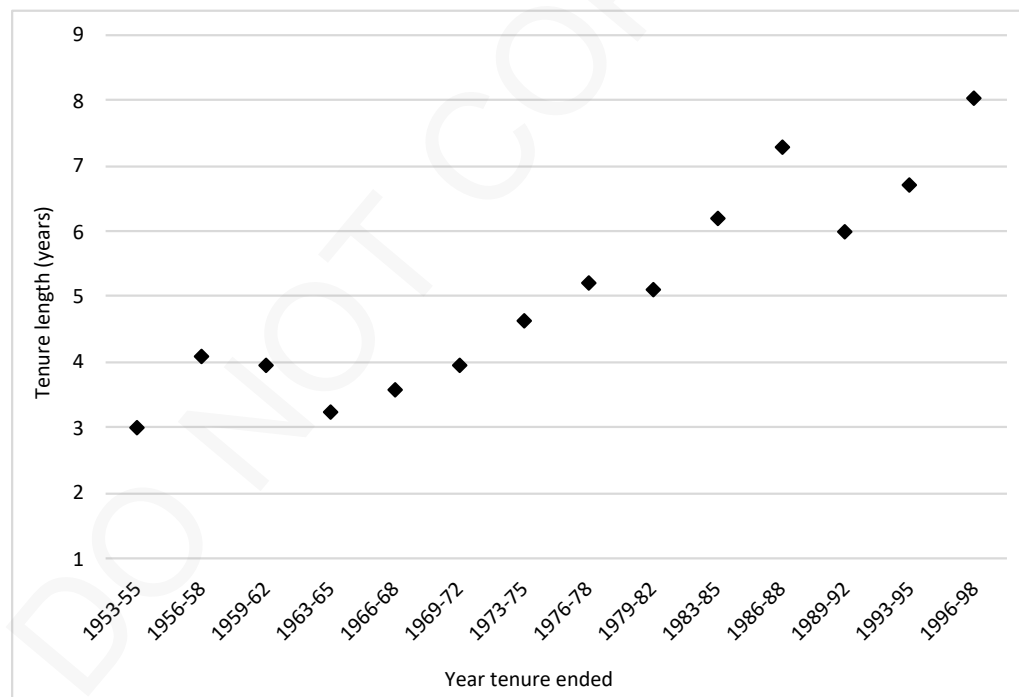
Exhibit 2 Career advancement and salary comparison for DoJ attorneys and AUSAs for non-supervisory positions, New York City region, 2019

DoJ attorneys			AUSAs		
Grade level	Years of experience	Minimum salary including locality pay	Grade level	Years of experience	Minimum salary including locality pay
GS-11	0-2	\$71,600	AD-21	0-2	\$71,600
GS-12	0.5-2.5	\$85,800	AD-23	3-4	\$77,000
GS-13	1-3	\$102,000	AD-25	5	\$82,700
GS-14	2-4	\$120,600	AD-26	6	\$88,800
			AD-27	7	\$95,500
			AD-28	8	\$102,500
			AD-29	9+	\$110,200

Source: Data compiled by case writer based on 'Administratively Determined Pay Plan Charts,' Offices of the United States Attorneys, United States Department of Justice website, 31 May 2019, <https://www.justice.gov/usao/career-center/salary-information/administratively-determined-pay-plan-charts>, accessed November 2019; 'Entry-level (honors program) and experienced attorneys – attorney salaries, promotions, and benefits,' United States Department of Justice website, 5 August 2015, <https://www.justice.gov/legal-careers/attorney-salaries-promotions-and-benefits>, accessed November 2019; '2019 General Schedule (GS) Pay Tables,' United States Office of Personnel Management website, <https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/2019/general-schedule/>, accessed November 2019.

Note: The next pay grade on the DoJ pay scale, GS-15, is typically reserved for supervisory positions, high-level technical roles, or top professionals with advanced degrees, as per 'GS-15 Pay Scale – General Schedule 2019,' FederalPay.org, 2019, available at <https://www.federalpay.org/gs/2019/GS-15>, accessed November 2019.

Exhibit 3 Average tenure for Assistant US Attorneys, 1950s to 1990s



Source: Adapted from Todd Lochner, 'Strategic Behaviour and Prosecutorial Agenda Setting in United States Attorneys' Offices: The Role of U.S. Attorneys and Their Assistants,' *Justice System Journal*, vol. 23, no. 3, 2002, p. 283.

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