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# Separation of Prosecutors

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# THE YALE LAW JOURNAL

LESLIE B. ARFFA

## Separation of Prosecutors

**ABSTRACT.** A federal official's physical proximity to Washington often provides a rough approximation of his political authority. In this respect, our controversial and much-criticized system of federal criminal law is distinct. Within this domain, thousands of immensely empowered officials exercise enormous control despite being scattered across the country. Legal scholarship has generated volumes of criticisms of this system, with less attention devoted to how and why it developed in this manner and what might be said in its favor.

This Note offers a novel explanation and defense of the decentralized nature of the federal administration of justice. To do so, it first excavates the historical and contemporary dynamics surrounding the Department of Justice, demonstrating that this structure is a feature of congressional design rather than a bug of congressional abdication. While Presidents since the Founding have called for the centralization of criminal law enforcement, Congress has generally ignored or rebuffed those demands, instead choosing to disperse prosecutorial power in the hands of thousands of lower-level executive-branch officials. The story of federal criminal law therefore reveals that the rivalry between the branches persists in certain domains and that Congress can pursue its objectives by structuring relationships within the executive branch itself.

This Note argues that the significant authority delegated to individual federal prosecutors vis-à-vis Main Justice and the President has two undertheorized benefits. Decentralization places a practical check on presidential power in an area bereft of formal constraints. It also enables the creation of relationships between federal and state and local law enforcement officials, facilitating the incorporation of local enforcement priorities in a policy area that has always been considered of uniquely local interest. While defending the general contours of the federal administration of justice, this Note aims also to propose more realistic and productive reforms to the federal prosecutorial system that are responsive to the separation-of-powers dynamics at play.

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## INTRODUCTION

Once an almost trivial aspect of the federal government's role, federal criminal prosecution has now taken center stage, serving as the subject of constant controversy.<sup>1</sup> It should come as no surprise that questions regarding the direction of federal criminal law have grown.<sup>2</sup> There have never been more federal criminal laws on the books<sup>3</sup> or more prosecutors enforcing those statutes.<sup>4</sup> Times of potential transition present unique opportunities for taking stock. Given that the role of federal prosecutors within the American political system continues to grow more contentious, it is more important than ever to understand the legal and political dynamics that have contributed to the system's present form.<sup>5</sup>

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1. See, e.g., Michael Kruse, *Trump's Long War with Justice*, POLITICO (Aug. 23, 2018), <https://www.politico.com/magazine/story/2018/08/23/donald-trump-jeff-sessions-justice-department-war-219592> [<https://perma.cc/ASQ5-VTTJ>]; Kevin Liptak & Clare Foran, *Trump Says Jeff Sessions 'Never Took Control of the Justice Department'*, CNN (Aug. 23, 2018, 6:45 AM ET), <http://www.cnn.com/2018/08/23/politics/trump-jeff-sessions-justice-department> [<https://perma.cc/435D-AUX7>]; Philip Rucker & Matt Zapotosky, *Trump Breaches Boundaries by Saying DOJ Should Be 'Going After' Democrats*, WASH. POST (Nov. 3, 2017), [http://www.washingtonpost.com/politics/trump-breaches-boundaries-by-saying-doj-should-be-going-after-democrats/2017/11/03/1c157c08-coaa-11e7-97d9-bdab5a0ab381\\_story.html](http://www.washingtonpost.com/politics/trump-breaches-boundaries-by-saying-doj-should-be-going-after-democrats/2017/11/03/1c157c08-coaa-11e7-97d9-bdab5a0ab381_story.html) [<https://perma.cc/FUC9-ZENV>]; Benjamin Wittes, *'The Saddest Thing': President Trump Acknowledges Constraint*, LAWFARE (Nov. 3, 2017, 1:02 PM), <https://www.lawfareblog.com/saddest-thing-president-trump-acknowledges-constraint> [<https://perma.cc/L7Q3-5EC4>].
  2. See Sadie Gurman, *Rod Rosenstein Sees Crime-Fighting as Justice's Overlooked Strong Suit*, WALL ST. J. (Oct. 19, 2018, 5:46 PM ET), <https://www.wsj.com/articles/rod-rosenstein-sees-crime-fighting-as-justices-overlooked-strong-suit-1539985607> [<https://perma.cc/9TH4-3VSG>].
  3. See *infra* notes 91-98 and accompanying text.
  4. See U.S. Att'y's Office E. Dist. La., *Largest Increase in AUSAs in Decades Allocates Prosecutors to Focus on Violent Crime, Civil Enforcement, and Immigration Crimes*, U.S. DEP'T JUST. (June 4, 2018), <https://www.justice.gov/usao-edla/pr/largest-increase-ausas-decades-allocates-prosecutors-focus-violent-crime-civil> [<https://perma.cc/9F4E-7CRS>]. The number of personnel employed by U.S. Attorneys' Offices has risen substantially over time. Compare ROBERT F. BAIN ET AL., U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS STATISTICAL REPORT FISCAL YEAR 1960, at 5, [https://www.justice.gov/sites/default/files/usao/legacy/2009/07/31/STATISTICAL\\_REPORT\\_FISCAL\\_YEAR\\_1960.pdf](https://www.justice.gov/sites/default/files/usao/legacy/2009/07/31/STATISTICAL_REPORT_FISCAL_YEAR_1960.pdf) [<https://perma.cc/53ML-U4DZ>] (noting that "an average of 1613 employees were employed in United States Attorneys' offices" in 1960); with EXEC. OFFICE FOR U.S. ATT'YS, U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' ANNUAL STATISTICAL REPORT: FISCAL YEAR 2010, at 2, <https://www.justice.gov/sites/default/files/usao/legacy/2011/09/01/10statrpt.pdf> [<https://perma.cc/X6JV-4TGX>] (noting that "6,075 full time equivalent (FTE) attorneys and 5,799 FTE support employees" were employed in U.S. Attorneys' Offices in 2010).
  5. J. Richard Broughton, *Congressional Inquiry and the Federal Criminal Law*, 46 U. RICH. L. REV. 457, 458 (2012).

Despite the staggering expansion of federal criminal law over the last half century,<sup>6</sup> authority within federal law enforcement has remained remarkably dispersed. Since the Founding, federal prosecutors, armed with extraordinarily broad statutory authority, have been scattered throughout the country.<sup>7</sup> While formally operating within the executive-branch chain of command, these prosecutors today work in almost one hundred U.S. Attorneys' Offices (USAOs), each led by a presidential appointee with his or her own local power base.<sup>8</sup>

The dispersed nature of our system of federal law enforcement comes as a surprise given that the rest of our administrative apparatus has undergone far more dramatic centralization.<sup>9</sup> This structural anomaly remains of great practical import. As James Q. Wilson reminds us, "Organization matters . . . . The key difference between more and less successful bureaucracies . . . has less to do with finances, client populations, or legal arrangements than with organizational systems."<sup>10</sup> In 2017, U.S. Attorneys, operating with a great deal of autonomy, pursued pending cases against more than 100,000 criminal defendants.<sup>11</sup> These low-visibility prosecutorial decisions collectively form much of our public policy surrounding criminal law and enforcement.<sup>12</sup>

Rather than trying to explain how we got here, however, legal scholarship "takes the modern prosecutor's office as a given, a dragon that we find living in

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6. The "federalization" of crime has been well documented. See, e.g., Sara Sun Beale, *Federalizing Crime: Assessing the Impact on the Federal Courts*, 543 ANNALS AM. ACAD. POL. & SOC. SCI. 39, 41-44 (1996) (documenting the growth of federal criminal statutes); Rory K. Little, *Myths and Principles of Federalization*, 46 HASTINGS L.J. 1029, 1029-70 (1995) (reviewing the literature on the federalization debate); Daniel C. Richman & William J. Stuntz, *Al Capone's Revenge: An Essay on the Political Economy of Pretextual Prosecution*, 105 COLUM. L. REV. 583, 610-11 (2005) (discussing the growth of federal criminal legislation).
  7. See *infra* Section I.A.
  8. Sara Sun Beale, *Rethinking the Identity and Role of United States Attorneys*, 6 OHIO ST. J. CRIM. L. 369, 371-72 (2009).
  9. See generally Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001) (arguing that the executive branch became significantly more centralized under Presidents Reagan, Bush, and Clinton). Courts have also condoned this centralization. See David J. Barron & Elena Kagan, *Chevron's Nondelegation Doctrine*, 2001 SUP. CT. L. REV. 201, 241-45; see also *infra* Section I.C (comparing the Department of Justice with other agencies).
  10. JAMES Q. WILSON, BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT 23 (1989).
  11. U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' ANNUAL STATISTICAL REPORT: FISCAL YEAR 2017, at 4, <http://www.justice.gov/usao/page/file/1081801/download> [<https://perma.cc/6886-VD6E>].
  12. See JAMES EISENSTEIN, COUNSEL FOR THE UNITED STATES: U.S. ATTORNEYS IN THE POLITICAL AND LEGAL SYSTEMS 18 (1978).

our midst and wish to tame.”<sup>13</sup> As this language indicates, many consider the concentration of power in the hands of prosecutors – from the federal to the local – to be the “overriding evil” of American criminal justice.<sup>14</sup> Some have gone so far as to label federal criminal law specifically the domain of “prosecutorial administration,” the consequences of which “should concern anyone interested in a rational criminal justice regime.”<sup>15</sup> Given the large body of criticism, the lack of attention to the forces behind the dispersed nature of federal law enforcement seems glaring.

This Note draws on history and contemporary practice to offer a novel explanation and defense of the current decentralized structure of federal law enforcement. Many scholars frame proposals for limiting prosecutorial power as ways to compensate for congressional “abdication.”<sup>16</sup> This Note reveals, however, that the structure of federal criminal law is the result not of abdication but rather of confrontation: a centuries-long tug-of-war between Congress and the Executive for control over the Justice Department. Since the Founding, members

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13. David Alan Sklansky, *The Nature and Function of Prosecutorial Power*, 106 J. CRIM. L. & CRIMINOLOGY 473, 474 (2016).

14. Donald A. Dripps, *Reinventing Plea Bargaining*, in THE FUTURE OF CRIMINAL LAW: WORKING PAPERS FROM THE 2014 ANNUAL CONFERENCE OF THE ROBINA INSTITUTE OF CRIMINAL LAW AND CRIMINAL JUSTICE 55, 66 (Michelle Madden Dempsey et al. eds., 2014); see also James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1552 (1981) (“If we are truly concerned about compassion, we are less likely to achieve it through the hidden and unpredictable use of prosecutorial discretion than through encouraging the legislature to see and respond to the results of archaic or overly harsh laws.”). See generally Rachel E. Barkow, *Prosecutorial Administration: Prosecutor Bias and the Department of Justice*, 99 VA. L. REV. 271 (2013) [hereinafter Barkow, *Prosecutorial Administration*] (arguing that the current power afforded to federal prosecutors threatens the legitimacy of the American criminal system); Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989 (2006) (arguing for strict enforcement of separation of powers in the criminal law context).

15. Barkow, *Prosecutorial Administration*, *supra* note 14, at 274.

16. See Daniel C. Richman, *Federal Criminal Law, Congressional Delegation, and Enforcement Discretion*, 46 UCLA L. REV. 757, 757 (1999) [hereinafter Richman, *Federal Criminal Law*] (criticizing the fact that “[m]uch of the literature on federal criminal law bemoans the extent to which Congress has abdicated its legislative responsibilities and left enforcement decisions to prosecutorial discretion”); see also Daniel Richman, *Prosecutors and Their Agents, Agents and Their Prosecutors*, 103 COLUM. L. REV. 749, 795 (2003) [hereinafter Richman, *Prosecutors and Their Agents*] (noting that “the federal criminal ‘code’ may well be even broader than that of the states in the range of conduct it ostensibly covers”); Richman & Stuntz, *supra* note 6, at 629 (observing that the statutory scheme of federal crimes “amounts to an invitation to federal agents and prosecutors to look on federal crimes and sentences not as laws that define criminal conduct and its consequences but as a menu that defines prosecutors’ options”); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 545 (2001) (noting that “Congress is likely to give great weight to the demands of federal prosecutors, even though those demands may not advance goals the public cares about”).

of Congress have battled with the President over the proper allocation of prosecutorial autonomy within the executive branch, regardless of whether they were aligned with the President's political party or not.<sup>17</sup> In more recent years, even as the executive branch has more successfully centralized some control, Congress has continued to encourage and promote the autonomy of U.S. Attorneys scattered across the country, in some cases to a remarkable extent.<sup>18</sup>

In doing so, this Note enters into the debate regarding the contemporary accuracy of the Madisonian vision of separation of powers. Our tripartite scheme of government assumes that “the great security against a gradual concentration of several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others.”<sup>19</sup> Yet many have questioned the veracity of this motivating premise behind the separation of powers in American political life.<sup>20</sup> Daryl Levinson and Richard Pildes have offered the most prominent eulogy for the Madisonian vision. In their view, members of Congress do not maintain loyalty to Congress qua Congress, but rather maintain loyalty to party and, along with it, party members in competing branches.<sup>21</sup>

Rather than conceding the demise of the interbranch rivalry so crucial to the functioning of the separation of powers, this Note argues that with respect to federal criminal justice, the rivalry endures. It also provides evidence that the Founders crafted a system in which Congress “stood the first among equals” precisely because it retained the power to *structure* the other branches.<sup>22</sup> In other words, this Note identifies both the weapon (dispersion) and the target (criminal law) of congressional resistance in the interbranch conflict. If we want to

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17. See *infra* Part I.

18. See *infra* Part II.

19. THE FEDERALIST NO. 51, at 320 (James Madison) (Clinton Rossiter ed., 1961).

20. See, e.g., Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2312, 2316-29 (2006); see also Bruce Ackerman, 2006 *Oliver Wendell Holmes Lectures: The Living Constitution*, 120 HARV. L. REV. 1737, 1809 n.222 (2007) (agreeing with the assertions of Levinson and Pildes); Curtis A. Bradley & Trevor W. Morrison, *Presidential Power, Historical Practice, and Legal Constraint*, 113 COLUM. L. REV. 1097, 1101 (2013) (“If Congress is not as reliable a check on presidential power as Madison and others envisioned, there is arguably a greater need for other mechanisms of constraint in this area, including legal constraints. In the absence of judicial review, however, it is fair to ask how the legal constraints might operate.”); Jon D. Michaels, *An Enduring, Evolving Separation of Powers*, 115 COLUM. L. REV. 515, 530-40 (2015) (discussing the evolution of the balance of power from a system of branches to an internal administrative separation of powers).

21. Levinson & Pildes, *supra* note 20, at 2319.

22. AKHIL REED AMAR, *AMERICA'S CONSTITUTION: A BIOGRAPHY* 110-11 (2005).

revive the rivalry in other areas, we'll need to identify the reasons why this dynamic endures in this domain but not others. Only in desegregating these contexts can we envision a new scheme of separation of powers that takes into account *both* party and institutional loyalties.

This history also offers a cautionary tale for those eager to centralize the administrative apparatus surrounding federal criminal law. Scholars and pundits, for example, have called for the transfer of authority over criminal-enforcement priorities to the White House and Main Justice specifically.<sup>23</sup> This push can be situated within a larger current of advocacy for increased presidential control over enforcement priorities—both criminal and civil—across the administrative state.<sup>24</sup> Indeed, the modern trend has been a migration toward the centralization of the executive bureaucratic apparatus.<sup>25</sup> Many scholars and commentators have celebrated this movement.<sup>26</sup>

But the dispersed nature of the federal administration of justice is long overdue for a defense.<sup>27</sup> The history of federal criminal prosecution speaks to the underexplored benefits of an enforcement structure that lodges discretionary authority within actors at the periphery instead of those at the center. This Note suggests that the benefits of federal dispersion in this area are twofold. First, this structure allows multiple actors to exercise authority over criminal enforcement,

23. See, e.g., KENNETH CULP DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 188-214 (1969) (calling for the government to make prosecutorial decision-making more centralized); Rachel E. Barkow & Mark Osler, *Designed to Fail: The President's Deference to the Department of Justice in Advancing Criminal Justice Reform*, 59 WM. & MARY L. REV. 387, 459 (2017) (arguing for an independent commission to advise the President on criminal-enforcement policy); Dan M. Kahan, *Is Chevron Relevant to Federal Criminal Law?*, 110 HARV. L. REV. 469, 506-21 (1996) (arguing for the imposition of uniform interpretations of criminal statutes by Main Justice to be followed by all field offices).

24. See generally Kate Andrias, *The President's Enforcement Power*, 88 N.Y.U. L. REV. 1031 (2013) (detailing the President's use of the enforcement power to advance his objectives in civil contexts); Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law Redux*, 125 YALE L.J. 104 (2015) (defending the President's ability to institutionalize his enforcement priorities in the immigration law context); Kagan, *supra* note 9 (explaining and defending the rise of presidential control of the bureaucracy); Gillian E. Metzger, *The Constitutional Duty to Supervise*, 124 YALE L.J. 1836 (2015) (arguing that the Constitution imposes a duty on the Executive to supervise and centralize enforcement power).

25. See Cox & Rodríguez, *supra* note 24, at 135-42; Kathryn A. Watts, *Controlling Presidential Control*, 114 MICH. L. REV. 683, 688-706 (2016) (documenting the "entrenchment of presidential control" over the bureaucracy); see also Abbe R. Gluck et al., *Unorthodox Lawmaking, Unorthodox Rulemaking*, 115 COLUM. L. REV. 1789, 1845 (2015) ("It is the White House, often through OIRA, that now may direct the rulemaking process, instead of the agency . . .").

26. Kagan, *supra* note 9, at 2332; see also sources cited *supra* note 23.

27. For a notable exception in the context of sentencing reform, see Kate Stith, *The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion*, 117 YALE L.J. 1420, 1449 (2008).

diffusing power within the executive branch itself. Second, the dispersed structure of the federal criminal apparatus facilitates the creation of relationships between federal enforcement actors and their state and local counterparts, allowing for local participation – and accompanying variance – in federal policy making. In other words, the system promotes the values of federalism, transforming state and local actors from their oft-depicted role as “servants” to that of “partners” with their federal counterparts.<sup>28</sup>

This Note proceeds in three parts. Part I sketches the history of the enforcement of federal criminal law, which has always been defined by its decentralized nature. At the Founding, federal attorneys were spread throughout the country, subject to no statutorily defined chain of command within the executive branch, and they often lacked efficient means of communication with national officials.<sup>29</sup> Despite calls for placing the apparatus more firmly under presidential control, Congress maintained a decentralized criminal law regime where power was exercised on the periphery. Some scholars have examined this history to ascertain the constitutional boundaries of executive control of law enforcement.<sup>30</sup> This Note does not argue that this history conclusively settles the contours of executive power; instead, it relies on this history to show how Congress can, in practice, check presidential ambitions.

Turning to the present era, Part II examines the other side of the power struggle: executive-branch tools employed in the service of monitoring and centralizing law enforcement control. Part II reveals that these mechanisms by which the center could theoretically exert more authority over the periphery have achieved some successes but are often quite ineffective in practice, in part because of congressional opposition to centralization efforts. Yet clashes between the executive and legislative branches over policy decisions in this domain have served a valuable purpose in their own right – bringing to the forefront enforcement choices often shielded from public view.

This exploration of modern practice also reveals the benefits of our decentralized system, a point elaborated in Part III, which defends the decentralized

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28. Heather K. Gerken, *Of Sovereigns and Servants*, 115 *YALE L.J.* 2633, 2635 (2006) (“Unlike the sovereign, the servant lacks autonomy and, if push comes to shove, must cede to the higher authority. The power of the servant thus stems mainly from dependence . . . .”); Greg Brooker, U.S. Att’y for the Dist. of Minn., Remarks at the Department of Justice’s Human Trafficking Summit (Feb. 2, 2018), <http://www.justice.gov/opa/speech/us-attorney-district-minnesota-greg-brooker-delivers-remarks-department-justice-s-human> [https://perma.cc/FJH4-NBNJ] (speaking of the “strong partnerships . . . with local law enforcement partners”).

29. Beale, *supra* note 8, at 394; Susan Low Bloch, *The Early Role of the Attorney General in Our Constitutional Scheme: In the Beginning There Was Pragmatism*, 1989 *DUKE L.J.* 561, 567-68.

30. See sources cited *infra* notes 33-38 and accompanying text.

structure of federal criminal law as both a method of facilitating local participation and as a check on presidential power. In other words, the maintenance of the interbranch rivalry presents not merely an end itself, but a means to a more desirable constitutional end.<sup>31</sup> Commentators often associate state and local governments with the benefits of federalism, such as innovation and responsiveness.<sup>32</sup> But our federal criminal apparatus reveals that nationalization and centralization in Washington, D.C., are not one and the same. It is possible for the federal government to structure itself to be responsive to local conditions and preferences – but it will necessitate a more public debate over which policy positions should be truly national and which should allow for variation.

## I. FROM DISARRAY TO A DEPARTMENT OF JUSTICE

This Part draws on historical research to trace the development of our federal criminal apparatus from an almost insignificant, to a now nearly critical, aspect of the federal government's role. Along the way, it reveals not only the existence of a rivalry between the executive and legislative branches in this domain, but also how that rivalry contributed to federal criminal law's past and present structure.

### A. *Dispersion: Federal Criminal Law at the Founding*

Our Department of Justice (DOJ) emerged from modest beginnings. The Department did not exist until after the Civil War and has been almost completely decentralized for most of its history. A tour of early federal criminal law enforcement reveals a battle between the executive branch and Congress over the proper allocation of prosecutorial authority. Congress largely resisted executive demands to centralize the apparatus, until it began to fear that the apparatus was

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31. See David Fontana & Aziz Z. Huq, *Institutional Loyalties in Constitutional Law*, 85 U. CHI. L. REV. 1, 20 (2018) (making this case in the context of discussing institutional loyalties).

32. See, e.g., Richard B. Stewart, *Madison's Nightmare*, 57 U. CHI. L. REV. 335, 343 (1990) ("Bureaucrats in Washington simply cannot gather and process the vast amount of information needed to tailor regulations to the nation's many variations in circumstances and the constant changes in relevant conditions. In order to reduce decision making costs, national officials adopt uniform regulations that are inevitably procrustean in application."). For a critique of this position, see Dave Owen, *Regional Federal Administration*, 63 UCLA L. REV. 58, 65-70 (2016). See also Abbe R. Gluck & Nicole Huberfeld, *What Is Federalism in Healthcare for?*, 70 STAN. L. REV. 1689, 1695 (2018) (debunking this common presumption in arguing that "policy variation and experimentation – two oft-referenced federalism attributes – were generated as much in the various nationally run insurance exchanges as in the state-run exchanges").

falling out of *its* control—causing legislators to rethink the balance of power between the center and the periphery.

Unitary executives and pluralists alike have combed the pages of history to discern the permissible contours of presidential control of criminal law.<sup>33</sup> Yet this battle of competing archival documents might have considered the wrong question all along. The early history may not conclusively reveal the formal boundaries of executive power vis-à-vis the other branches, but it surely provides answers as to how and why the rivalry between the branches plays out in practice. As noted above, Madison predicted in selling the new structure of the federal government to the public that the “partition of power” would be maintained by “the interior structure of the government” because “its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places.”<sup>34</sup> This history reveals how, at least in the context of criminal law, the branches can keep one another in place, even as we continue to struggle to define what their proper places might be.

The Constitution’s text remains relatively circumspect regarding the contours of a potential system of federal criminal law enforcement. The Constitution vests the power to execute the law in the President and gives him the authority—some say the obligation—to “take Care that the Laws be faithfully executed.”<sup>35</sup> The Constitution also grants the pardon power to the President.<sup>36</sup> Taking these strands of constitutional authority together, it would seem that because prosecution is a vital means of executing the law, the executive power includes the right to control prosecutions.<sup>37</sup> Others counter that these constitutional clauses indicate precisely the opposite. The pardon power exists because the President *cannot* control prosecutions, and the Take Care Clause (read in con-

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33. Compare Saikrishna Prakash, *The Chief Prosecutor*, 73 GEO. WASH. L. REV. 521 (2005) (arguing that the history of federal criminal law enforcement and the text, history, and structure of the Constitution reveal that the President is the prosecutor in chief), with Bloch, *supra* note 29, at 563-618 (suggesting that the history is more mixed and the Founders likely did not intend to reproduce the English system, in which the king exercised expansive control over prosecutorial functions), and William B. Gwyn, *The Indeterminacy of the Separation of Powers and the Federal Courts*, 57 GEO. WASH. L. REV. 474, 484-502 (1989) (arguing that the Founding generation was divided over whether prosecution was exclusively an executive function).

34. THE FEDERALIST NO. 51, *supra* note 19, at 320.

35. U.S. CONST. art. II, § 1, cl. 1 (“[E]xecutive Power shall be vested in a President of the United States of America.”); *id.* art. II, § 3, cl. 5 (“[H]e shall take Care that the Laws be faithfully executed.”).

36. *Id.* art. II, § 2, cl. 1 (granting the President “Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment”).

37. See Prakash, *supra* note 33, at 551-52.

junction with Congress's authority under the Necessary and Proper Clause) requires the President to enforce whatever system Congress creates—including one that delegates prosecutorial discretion to a different official.<sup>38</sup>

In practice, Congress made the first move. Our national criminal apparatus has statutory roots. The Judiciary Act of 1789 created the position of District Attorney (now U.S. Attorney), who was to be a person “learned in the law” and whose duty it would be to “prosecute in [a] district all delinquents for crimes and offences, cognizable under the authority of the United States.”<sup>39</sup> The Attorney General was to “prosecute and conduct all suits in the Supreme Court in which the United States shall be concerned, and to give his advice and opinion upon questions of law when required by the President of the United States, or when requested by the heads of any of the departments.”<sup>40</sup> In other words, the Act cabined the Attorney General's role to that of litigator in the Supreme Court and counselor to the President and the District Attorneys.

The modesty of the Attorney General position in the early republic cannot be overstated. The first Attorney General, Edmund Randolph, renowned for his good looks and legal acumen,<sup>41</sup> found himself in a relatively undignified position bereft of any binding legal authority. Congress paid the Attorney General less than half the salary of the Secretary of the Treasury.<sup>42</sup> When Randolph sought authority to direct the District Attorneys, Congress rejected his request.<sup>43</sup> He was, in the words of one scholar, a “part-time attorney, with no staff and little power.”<sup>44</sup>

In the ensuing years, Congress took dispersion to a degree unthinkable in the modern era: it frequently delegated criminal law enforcement responsibility to individuals who were in no way subject to executive command, namely private

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38. See Harold J. Krent, *Executive Control Over Criminal Law Enforcement: Some Lessons from History*, 38 AM. U. L. REV. 275, 282 n.32 (1989); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 21, 69 (1994).

39. Judiciary Act of 1789, ch. 20, § 35, 1 Stat. 73, 93.

40. *Id.*

41. See HOMER CUMMINGS & CARL MCFARLAND, *FEDERAL JUSTICE: CHAPTERS IN THE HISTORY OF JUSTICE AND THE FEDERAL EXECUTIVE 18-19* (1937).

42. Compare Act of Sept. 23, 1789, ch. 18, § 1, 1 Stat. 72, 72 (setting compensation for the judiciary and the Attorney General), with Act of Sept. 11, 1789, ch. 13, § 1, 1 Stat. 67, 67 (setting the executive salaries).

43. See Letter from Edmund Randolph to George Washington (Dec. 26, 1791), in 1 AMERICAN STATE PAPERS: DOCUMENTS, LEGISLATIVE AND EXECUTIVE, OF THE CONGRESS OF THE UNITED STATES: MISCELLANEOUS 46, 46 (Walter Lowrie & Walter S. Franklin eds., Washington, D.C., Gales & Seaton 1834).

44. Bloch, *supra* note 29, at 571.

citizens and state officials. At the Founding, Congress allowed state officials to prosecute violations of federal law in state courts.<sup>45</sup> Private citizens could also either “contact[] [a] grand jury directly” or “appear before a . . . state judicial official and swear out a complaint against a suspected criminal.”<sup>46</sup> Further, Congress passed a variety of qui tam provisions, which directly authorized individuals to sue under criminal statutes to enforce the law.<sup>47</sup> Qui tam actions limited the Executive’s practical ability to control all law enforcement even as he enjoyed formal authority.<sup>48</sup>

Meanwhile, from 1800 to 1814, the Attorney General often played the role of “an absentee cabinet member.”<sup>49</sup> It was not until 1819 that the Attorney General even received a physical office.<sup>50</sup> Members of Congress opposed his receiving a clerk because to do so would countenance the creation of a Department of Law, “never intended certainly when th[e] office was established.”<sup>51</sup> Congress also viewed the Attorney General specifically as a personal aide to the President. One Senator noted in 1809 that of course the President supported enhancing the Attorney General’s position, in part, by raising the salary, because “[t]he President having a right to appoint an Attorney General, his opinion might be procured in favor of the application of the money.”<sup>52</sup> Despite executive complaints about the lack of coordination in the Department, Congress transferred supervision of the District Attorneys from the State Department to an agent of the Treasury Department, rather than giving more power to the Attorney General.<sup>53</sup> In 1820, Attorney General William Wirt complained to Congress that he had inherited an office bereft of any institutional memory (including the records and advice of his predecessors), and one that lacked the legal authority to truly command the District Attorneys throughout the country.<sup>54</sup> Wirt argued that this state of affairs

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45. See Krent, *supra* note 38, at 303-04.

46. *Id.* at 294.

47. See Act of Mar. 1, 1793, ch. 19, § 12, 2 Stat. 329, 331 (criminalizing specific types of trade with Indian Tribes and entitling the “informant” to half of the forfeitures accrued under the Act); Act of Mar. 3, 1791, ch. 15, § 44, 1 Stat. 199, 209 (criminalizing importation of liquor without paying duties, and allowing the person who first discovers a violation to collect half of the forfeiture).

48. See Krent, *supra* note 38, at 297-98.

49. CUMMINGS & MCFARLAND, *supra* note 41, at 78.

50. See Act of Mar. 3, 1819, ch. 54, 3 Stat. 496, 500 (appropriating funds to maintain the Attorney General’s office).

51. 30 ANNALS OF CONG. 61 (1817).

52. 19 ANNALS OF CONG. 1572 (1809) (statement of Sen. Rowan).

53. Krent, *supra* note 38, at 287-88.

54. 36 ANNALS OF CONG. 2463, 2464-65 (1820) (letter from the Attorney General’s Office).

likely explained the “frequent resignations of this office [that] have heretofore occurred.”<sup>55</sup>

Despite these expressions of frustration, for most of the nineteenth century, Congress continued to resist executive demands to centralize the law enforcement apparatus. In 1830, for example, the Senate debated but took no action on a “bill to organize the Attorney General’s department, and to erect it into an Executive office.”<sup>56</sup> Some senators bemoaned the “wretched” state of the “Law Department.”<sup>57</sup> They remained most concerned with “the incompetency of the United States’ District Attorneys” who had not been properly collecting revenue.<sup>58</sup> But most senators resisted centralization. One proclaimed that organizational innovation was “unnecessary,”<sup>59</sup> and another, Senator Daniel Webster, argued that no “good would result from the metamorphosis of the Attorney General into the head of a bureau.”<sup>60</sup> Senators expressed a fear that the Attorney General, who “should be engaged in studying his books of law,” would instead be distracted by administrative (i.e., supervisory) duties.<sup>61</sup>

The District Attorney position, meanwhile, enjoyed virtually unlimited independence. The attorneys lived and worked throughout the country. There was no formal chain of command within the executive branch. Furthermore, the attorneys often lacked a means of effective communication with national officials.<sup>62</sup> Even after Congress gave the Attorney General formal control over the District Attorneys, the Attorney General remained relatively powerless in practice. He advised the District Attorneys only on cases of “peculiar’ importance” and could not discipline misconduct.<sup>63</sup> The District Attorneys remained confused over whether they should report to the Attorney General or the Treasury Department, and many continued to get directions from other cabinet members as well.<sup>64</sup> Un-

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55. *Id.* at 2466.

56. 6 REG. DEB. 322 (1830) (description of bill); *id.* at 324 (statement of Sen. King) (asserting that “there was no probability that a final decision could be made at present on the bill before the Senate”).

57. *Id.* at 323 (statement of Sen. McKinley).

58. *Id.* at 276 (statement of Sen. Rowan).

59. *Id.* at 323 (statement of Sen. Holmes).

60. *Id.* at 324 (statement of Sen. Webster).

61. *Id.* at 277 (statement of Sen. Webster).

62. See Beale, *supra* note 8, at 394.

63. CUMMINGS & MCFARLAND, *supra* note 41, at 219 (quoting Attorney General Jeremiah Black).

64. *Id.*

til 1854, the various Attorneys General kept up significant private practices, and many of them did not even live in Washington, D.C.<sup>65</sup>

This state of affairs cannot be attributed to executive indifference on the subject. Congress continued to delegate oversight authority to the Treasury Department despite ardent calls for reform from Presidents James Madison, Andrew Jackson, and Franklin Pierce, among others.<sup>66</sup> In 1854, for example, President Pierce forwarded a letter to Congress from his Attorney General Caleb Cushing, appealing for more centralized authority within the Department as a means of enhancing executive authority. Cushing grounded his claims in “constitutional theory,” arguing that the “ultimate discretion, when the law does not speak, must reside, as to all executive matters, with the President who has the power to appoint and remove, and whose duty it is to take care that the laws be faithfully executed.”<sup>67</sup> He continued that “executive discretion . . . requires unity of executive action, and, of course, unity of executive decision.”<sup>68</sup> Whatever the merits of his constitutional arguments, Congress rejected them, and it would take a civil war before such pleas would fall on more sympathetic ears.<sup>69</sup>

#### *B. Congressional Centralization: The Creation of the Department of Justice*

Contrary to most scholarly depictions,<sup>70</sup> the creation of the Department of Justice did not represent a congressional concession to this almost century-long push by the executive branch for greater authority over the administration of justice. Nor did it serve as a culmination of congressional effort to more effectively enforce civil rights.<sup>71</sup> Instead, members of Congress themselves became

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65. Jed Handelsman Shugerman, *The Creation of the Department of Justice: Professionalization Without Civil Rights or Civil Service*, 66 STAN. L. REV. 121, 131 (2014).

66. *Id.* at 132-34.

67. CALEB CUSHING, A REPORT OF THE ATTORNEY GENERAL, SUGGESTING MODIFICATIONS IN THE MANNER OF CONDUCTING THE LEGAL BUSINESS OF THE GOVERNMENT: MESSAGE FROM THE PRESIDENT OF THE UNITED STATES, H.R. EXEC. DOC. NO. 33-95, at 11-12 (1854).

68. *Id.* at 12.

69. See Shugerman, *supra* note 65, at 134.

70. See, e.g., Norman W. Spaulding, *Independence and Experimentalism in the Department of Justice*, 63 STAN. L. REV. 409, 438 (2011) (giving one such scholarly depiction of the Department of Justice as a concession to “centralized control”).

71. Compare Seth P. Waxman, *Twins at Birth: Civil Rights and the Role of the Solicitor General*, 75 IND. L.J. 1297, 1297, 1300-01 (2000) (describing the conventional view that Congress, through establishment of the first Solicitor General, hoped to enforce the Civil War Amendments), with Shugerman, *supra* note 65, at 148-64 (offering a persuasive rebuke of this “conventional explanation”).

concerned with the independence of the District Attorneys and the difficulties of controlling their financial expenditures. In other words, they feared that the administration of justice was spiraling out of *their* control, and they acquiesced to the creation of a Department with more formal fiscal constraints prescribed by Congress.

Congress became increasingly concerned with fiscal efficiency and promoting uniformity of the legal advice given to various actors within the federal government. On the financial side of the equation, members of Congress evinced great alarm over the fees being sent to outside counsel by District Attorneys.<sup>72</sup> By 1867, the government was spending over \$100,000 a year on outside counsel.<sup>73</sup> In some cases, the amount paid to a single outside attorney exceeded the salary of the Attorney General.<sup>74</sup> Monitoring these disparate lawyers proved impossible. Representative Thomas Jenckes, a sponsor of the bill to create the Department, noted that in one instance the government sent \$10,000 to retain an “eminent lawyer” in New York, “but we cannot find that he ever did anything.”<sup>75</sup> The Senate also evinced concern with these fiscal issues, passing a formal resolution requesting that Attorney General Henry Stanbery inform the Senate the “amount . . . paid by the United States for special counsel” and whether “the present force in the Attorney General’s office is sufficient.”<sup>76</sup> Stanberry responded that “[t]he present force in the office of the Attorney General is not sufficient for the proper business of that office.”<sup>77</sup>

Another concern reflected in congressional debates was the sheer number of disparate legal opinions proliferating around the various agencies and branches of government. The “bill is necessary . . . to secure uniformity in the legal advice given to the President . . . and [other] officers,” noted one representative.<sup>78</sup> “We have now this great anomaly,” explained another, “[whereby] the Attorney General is bound to conduct all the cases of the United States in the Supreme Court of the United States; yet in the majority of instances he never hears of the cases

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72. See CONG. GLOBE, 41st Cong., 2d Sess. 3034-40 (1870) (debating the Department of Justice).

73. *Id.* at 3036 (statement of Rep. Jenckes).

74. *Id.* at 3035.

75. *Id.* at 3036.

76. S. EXEC. DOC. NO. 13, at 1-2 (1867) (Letter from Attorney General Henry Stanbery to the Senate Comm. on the Judiciary), [https://congressional.proquest.com/congressional/result/pqpresultpage.gispdfhitspanel.pdflink/\\$2fapp-bin\\$2fgis-serialset\\$2fc\\$2ff\\$2fo\\$2f1\\$2f1316\\_sexdoc13\\_from\\_1\\_to\\_2.pdf/entitlementkeys=1234%7Capp-gis%7Cserialset%7C1316\\_s.exdoc.13](https://congressional.proquest.com/congressional/result/pqpresultpage.gispdfhitspanel.pdflink/$2fapp-bin$2fgis-serialset$2fc$2ff$2fo$2f1$2f1316_sexdoc13_from_1_to_2.pdf/entitlementkeys=1234%7Capp-gis%7Cserialset%7C1316_s.exdoc.13) [https://perma.cc/U7Z5-WYDY].

77. *Id.* at 2.

78. CONG. GLOBE, 41st Cong., 2d Sess. 3038 (statement of Rep. Lawrence).

until the printed record is in his hands.”<sup>79</sup> On paper, the Act to Establish the Department of Justice enhanced the Attorney General’s authority by granting him more supervisory authority. The Act also created a new position, the Solicitor General, who would try cases in the Supreme Court.<sup>80</sup> In other words, even in centralizing authority, Congress divided that authority at the center itself.

The resulting Department further bears out the fiscal rather than political motivations behind its creation. Little changed, as a practical matter, as the various prosecutors scattered across the nation after the formal creation of the DOJ in 1870. Congress continued to promote the relative independence of U.S. Attorneys in myriad ways. For example, Congress did not initially give the new Department an office. The Department’s members remained ensconced in various federal agencies.<sup>81</sup> The dispersion of authority down the chain of command continued despite the fact that Congress and the executive remained aligned on party lines.<sup>82</sup>

This is not to say that in this interbranch struggle the Executive always ceded to congressional demands. As the executive and legislative branches fought for control over prosecution, the two branches also clashed over the law enforcement agencies that would support that system. At the turn of the century, federal prosecutors relied on Secret Service agents within the Treasury Department for investigatory services.<sup>83</sup> During the tenure of President Teddy Roosevelt, these agents began targeting members of Congress in a series of fraud investigations.<sup>84</sup> Congress then “struck back,” passing a bill prohibiting the appropriation of funds for this Secret Service loan program.<sup>85</sup> In response, President Roosevelt’s Attorney General began hiring agents of his own—these agents would soon comprise what we now know of as the Federal Bureau of Investigation.<sup>86</sup>

Yet the decentralized structure of federal criminal law endured—a structure that Congress continued to promote. For example, Congress enacted a significant change in the organization of the Department that further promoted prosecutorial discretion: its compensation scheme. By supplying prosecutor salaries on an annual rather than a “per case” basis (as was done previously), Congress

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79. *Id.* at 3036 (statement of Rep. Jenckes).

80. Act to Establish the Department of Justice, ch. 150, §§ 1-5, 16 Stat. 162, 162 (1870).

81. CUMMINGS & MCFARLAND, *supra* note 41, at 228.

82. Congress was dominated by Republicans, and the Presidency was occupied by Republican Ulysses S. Grant.

83. RONALD KESSLER, *THE BUREAU: THE SECRET HISTORY OF THE FBI* 9 (2003).

84. DANIEL C. RICHMAN, KATE STITH & WILLIAM J. STUNTZ, *DEFINING FEDERAL CRIMES* 4 (2018).

85. *Id.*; *see also* Act of May 27, 1908, Pub. L. No. 60-141, 35 Stat. 317, 328.

86. RICHMAN, STITH & STUNTZ, *supra* note 84, at 4.

directly encouraged the exercise of prosecutorial discretion.<sup>87</sup> It was not until 1870 that the Attorney General finally wrested full control of the District Attorneys from the Treasury Department,<sup>88</sup> and not until 1919 that the Criminal Division was established.<sup>89</sup> District Attorney dispersion and discretion, meanwhile, continued unabated.<sup>90</sup>

### C. Into the Modern Era

Not only did prosecutorial dispersion survive bureaucratic attempts at centralization, it also persisted in the face of the rapid proliferation of federal criminal statutes. From its ignoble beginnings, the reach of the Justice Department has expanded a great deal in the modern era. Congress can, in part, claim responsibility for this growth. During the twentieth century, Congress began asserting its control over federal criminal prosecution in a more traditional way—by passing an enormous number of statutes.<sup>91</sup> As the Supreme Court embraced an expanded understanding of the Commerce Clause power, Congress flooded the law books with “a steady progression of statutes targeting criminal behavior that had long been the exclusive province of state and local enforcers.”<sup>92</sup>

The pace at which Congress has passed federal criminal laws has increased spectacularly since 1900, particularly since 1970.<sup>93</sup> Many of the earlier statutes stemmed from congressional concern over national moral crusades, such as prohibition.<sup>94</sup> By the 1960s and 70s, public concern with organized crime resulted in a deluge of federal criminal statutes.<sup>95</sup> And the 1980s and 90s brought additional attention to violent crime, including firearm offenses.<sup>96</sup> By the mid-90s,

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87. NICHOLAS R. PARRILLO, *AGAINST THE PROFIT MOTIVE: THE SALARY REVOLUTION IN AMERICAN GOVERNMENT, 1780-1940*, at 277 (2013) (arguing that desire for forbearance motivated the change in compensation scheme).

88. Shugerman, *supra* note 65, at 132.

89. *About the Criminal Division: History*, U.S. DEP'T JUST. (Feb. 3, 2016), <https://www.justice.gov/criminal/history> [<https://perma.cc/5F8F-TQX6>].

90. PETER H. IRONS, *THE NEW DEAL LAWYERS* 41 (1982) (“Local U.S. attorneys . . . [maintained] an independent political base and a tenuous institutional loyalty to the Justice Department . . .”).

91. RICHMAN, STITH & STUNTZ, *supra* note 84, at 4.

92. *Id.* at 5.

93. *Id.* at 6-7.

94. Beale, *supra* note 6, at 41.

95. *Id.* at 42.

96. *Id.* at 43.

there were more than 3,000 federal crimes,<sup>97</sup> and today there are approximately 4,000.<sup>98</sup>

Yet the congressional “scale-up” of the late twentieth century did not precipitate a significant change in the DOJ’s organization and indeed directly contributed to its currently decentralized nature.<sup>99</sup> Consider the way this system functions today. There are 5,800 federal prosecutors, managing approximately 70,000 cases per year, located in the 94 disparate USAOs.<sup>100</sup> This system does not operate in a vacuum. As will be outlined below, U.S. Attorneys have their own local power bases and are often also accountable to local political leaders. And, federal prosecutors necessarily form relationships with all levels of law enforcement. Cases are brought to each office by a variety of federal and local enforcement bureaus.<sup>101</sup> For most crimes, a local, state, or federal prosecutor has the power to bring criminal charges.<sup>102</sup> The vast majority of federal criminal

97. *Id.* at 44.

98. The precise number of federal crimes is impossible to know, but estimates today range around 4,000. John S. Baker, Jr. & Dale E. Bennett, *Measuring the Explosive Growth of Federal Criminal Legislation*, FEDERALIST SOC’Y 8 (2004), <http://fedsoc.server326.com/Publications/practicegroupnewsletters/criminallaw/crimreportfinal.pdf> [https://perma.cc/7LD9-MVMT]; see also Gary Fields & John R. Emshwiller, *As Criminal Laws Proliferate, More Are Ensnared*, WALL ST. J. (July 23, 2011), <https://www.wsj.com/articles/SB10001424052748703749504576172714184601654> [https://perma.cc/5JJK-FNEC] (noting that the number is “impossible to count” but that the ABA concluded that, in the 1990s, the number was well over 3,000). The story of the growth of federal criminal law is most effectively conveyed in RICHMAN, STITH & STUNTZ, *supra* note 84, at 1-10.

99. Daniel Richman, *Federal Sentencing in 2007: The Supreme Court Holds—the Center Doesn’t*, 117 YALE L.J. 1374, 1400 (2008).

100. OFFICE OF THE INSPECTOR GEN., U.S. DEP’T OF JUSTICE, RESOURCE MANAGEMENT OF UNITED STATES ATTORNEY’S OFFICE (Nov. 2008), <https://oig.justice.gov/reports/EOUSA/a0903/final.pdf> [https://perma.cc/7VE9-9AWV]; Rachel E. Barkow, *Clemency and Presidential Administration of Criminal Law*, 90 N.Y.U. L. REV. 802, 851 (2015); see also Memorandum from the Att’y Gen., U.S. Dep’t of Justice, to the U.S. Att’ys and Assistant Att’y Gen. for the Criminal Div. 1 (Aug. 12, 2013), <http://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/ag-memo-department-policyon-charging-mandatory-minimum-sentences-recidivist-enhancements-in-certain-drugcases.pdf> [https://perma.cc/33NE-9EVY] (“When making these individualized assessments, prosecutors must take into account numerous factors, such as . . . the needs of communities [they] serve.”); Robert A. Mikos, *A Critical Appraisal of the Department of Justice’s New Approach to Medical Marijuana*, 22 STAN L. & POL’Y REV. 633, 643 (2011) (noting the “DOJ is a fragmented agency, one in which several autonomous decision-makers help shape enforcement policy,” and in which U.S. Attorneys “have tremendous power over federal criminal law enforcement and a great deal of independence from the DOJ in Washington”).

101. Richman, *supra* note 99, at 1379.

102. Rachel E. Barkow, *Federalism and Criminal Law: What the Feds Can Learn from the States*, 109 MICH. L. REV. 519, 521 (2011).

cases involve federal statutes with state or local counterparts.<sup>103</sup> Operating in overlapping jurisdictions requires careful coordination so as to avoid conflict and to promote the sharing of experiences and resources.<sup>104</sup>

Take, for example, a New York police officer who uncovers a narcotics conspiracy running from Brooklyn to Manhattan. This officer could, at a minimum, bring the case to the Manhattan District Attorney, the Brooklyn District Attorney, the New York State Attorney General, the U.S. Attorney for the Southern District of New York, or the U.S. Attorney for the Eastern District of New York. This means that federal officials must compete and cooperate with local officials and with one another for cases and that they interact on a constant basis.<sup>105</sup> Each office necessarily varies in its structure, staff, and workload, making uniform oversight impossible.<sup>106</sup> Today's Attorney General cannot possibly be relied upon to control all these moving pieces. Prosecuting criminal law is but one task among many delegated to the DOJ. The Attorney General also oversees most federal law enforcement from the FBI to the Drug Enforcement Agency, along with a huge variety of civil litigation matters, serves on the President's Cabinet, and acts as one of the President's legal advisors.<sup>107</sup> Moreover, an increase in resources in Main Justice has also corresponded with a concurrent shift in the USAOs, which now have larger, more experienced staffs.<sup>108</sup>

The preceding history is crucial for understanding the decentralized nature of the DOJ in the face of rapid administrative centralization in almost all other areas. Whereas most federal agencies began with a strong organization in Washington and gradually delegated responsibilities to "field offices," the Department of Justice evolved in precisely the opposite direction.<sup>109</sup> U.S. Attorneys operated independently of centralized control for almost a century.<sup>110</sup> According to many scholars, this pedigree produced a "degree of autonomy and independence from

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103. See Lisa L. Miller & James Eisenstein, *The Federal/State Criminal Prosecution Nexus: A Case Study in Cooperation and Discretion*, 30 LAW & SOC. INQUIRY 239, 244 (2005) ("In 1997, only about 5% of all federal criminal cases involved federal statutes with no local or state counterpart.").

104. *Id.*

105. See Richman, *Prosecutors and Their Agents*, *supra* note 16, at 760-61.

106. *Id.*

107. Bruce A. Green & Fred C. Zacharias, "The U.S. Attorneys Scandal" and the Allocation of Prosecutorial Power, 69 OHIO ST. L.J. 187, 197 (2008).

108. Todd Lochner, *Strategic Behavior and Prosecutorial Agenda Setting in United States Attorneys' Offices: The Role of U.S. Attorneys and Their Assistants*, 23 JUST. SYS. J. 271, 282, 288 (2002).

109. JAMES W. FESLER, AREA AND ADMINISTRATION 64 (1949).

110. EISENSTEIN, *supra* note 12, at 11.

the department perhaps unmatched by any other field service in the federal government.”<sup>111</sup> While the field offices of long-centralized agencies remained under the close scrutiny of their supervisors in Washington, the Attorney General never came close to exerting the same level of control over federal prosecutors. Legislators, for their part, continued to be “surprisingly loath to enlist Washington to manage field operations” in the criminal-justice sphere.<sup>112</sup> All of these forces combined to form a system in which commentators agree that “[n]o government official in America has as much unreviewable power and discretion as the prosecutor.”<sup>113</sup>

Congressional desire for a decentralized structure has been manifest throughout the history recounted above. Indeed, evidence abounds of congressional desire to retain criminal-enforcement authority at the periphery even in more recent years. Consider how Congress has wielded its power of the purse. As Dan Richman has noted, legislators have recommended moving decision-making power away from Main Justice and toward the local USAOs.<sup>114</sup> Congress has capped the number of personnel that could work in Main Justice, without similarly limiting hiring in USAOs. In the late 1990s, legislators proposed transferring personnel from Main Justice to the districts.<sup>115</sup> Subsequently, Congress passed the 21st Century Department of Justice Appropriations Act, which directed the Attorney General to move two hundred federal prosecutors from Main Justice to the various USAOs, while also authorizing the hiring of ninety-four additional Assistant U.S. Attorneys.<sup>116</sup> In other words, not only has Congress considered and rejected centralizing authority within the DOJ, it has taken active measures to send *more* power (in the form of resources and broad statutes) away from Main Justice.

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111. *Id.*

112. Daniel Richman, *Political Control of Federal Prosecutions: Looking Back and Looking Forward*, 58 DUKE L.J. 2087, 2094 (2009).

113. Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959, 960 (2009).

114. Richman, *Federal Criminal Law*, *supra* note 16, at 806 (quoting Theodora Galacatos, Note, *The United States Department of Justice Environmental Crimes Section: A Case Study of Inter- and Intra-branch Conflict over Congressional Oversight and the Exercise of Prosecutorial Discretion*, 64 FORDHAM L. REV. 587, 659 (1995)).

115. H.R. REP. NO. 105-526, at 4 (1998) (proposing allowing the Attorney General to appoint two hundred new Assistant U.S. Attorneys from the ranks of Main Justice, with each position in Washington terminated upon the appointment of its incumbent to a U.S. Attorney’s Office).

116. 21st Century Department of Justice Appropriations Act, Pub. L. No. 107-273, §§ 103-104, 116 Stat. 1758, 1766 (2002).

## II. PRESENT-DAY PROSECUTORS: THE EXECUTIVE STRIKES BACK?

The history of congressional efforts to protect prosecutorial dispersion does not mean that the Executive has no tools for centralizing authority, nor that the DOJ has not achieved any centralized control. Indeed, one anticipating a robust interbranch struggle would expect no less. A number of tools have gained particular resonance, among them the U.S. Attorney selection process and directives from Main Justice, including Attorney General guidance memos and the Justice Manual.<sup>117</sup> A discussion of those tools, however, reveals the way in which the structure of the DOJ frustrates many top-down initiatives to assert control. To this day, across a variety of salient policy areas, U.S. Attorneys and their line assistants have varied enforcement priorities depending on the preferences of their districts, sometimes in direct contravention of Main Justice directives.

This discussion also demonstrates the forces that might cause members of Congress and their respective U.S. Attorneys to push back against executive top-down directives. In turn, these motivations begin to reveal the benefits of a decentralized structure from a separation-of-powers perspective. When accusations of politicization proliferate and executive policy priorities conflict with state and local law enforcement priorities, Congress is likely to resist the Executive because of popular distaste for politicization of agency functions and support from their own constituents for state and local priorities. Even as this study defends the dispersed structure of federal criminal law, however, the discussion below also highlights the benefits of *both* Congress and the Executive forcefully competing for control of the federal criminal system. This discussion highlights one salient benefit: the interbranch struggle over various policies related to federal criminal law publicizes controversial enforcement choices, promoting transparency within a relatively opaque system.

### A. U.S. Attorney Selection and Removal

The primary formal presidential mechanism of control over the Attorney General and U.S. Attorneys is the mandate that they serve by law at the pleasure of the President and are appointed via the advice and consent of the Senate.<sup>118</sup>

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117. In recent years, the President and Main Justice have, for example, asserted formal authority over all federal civil litigation and succeeded in prohibiting U.S. Attorneys and assistants from engaging in private practice. See, e.g., OFFICE OF THE U.S. ATT'YS, U.S. DEP'T OF JUSTICE, JUSTICE MANUAL § 4.1.100, <https://www.justice.gov/usam> [<https://perma.cc/Z4R5-JCWR>] (listing Justice Department policies); see also Barkow, *supra* note 102, at 525 (commenting on the mechanisms by which the DOJ has been centralized over the past few decades).

118. See 28 U.S.C. § 541 (2018).

The President maintains a great deal of discretion in appointing his Attorney General, but senators serve a critical advisory role in the selection of U.S. Attorneys.<sup>119</sup> Some senators are more interested in U.S. Attorney selection than others, but all nominees remain subject to a “blue slip” process whereby senators can effectively veto a potential nomination.<sup>120</sup> A survey of U.S. Attorneys from the 1970s notes that because U.S. Attorneys owe their appointments to their home senators, they can have a “divided or ambiguous sense of allegiance.”<sup>121</sup>

The character of the U.S. Attorney nomination process, which is district specific, serves to enhance Congress’s influence. Members of Congress all acting at once face severe collective-action problems vis-à-vis the President. Yet when those same members delegate their authority to the representatives of one state by agreeing to defer to those representatives’ preferences, they can wield their power more effectively. To provide a more concrete example, pursuant to a custom known as senatorial courtesies, senators collectively agree to oppose nominees who are opposed by the senators from the state where they will serve.<sup>122</sup> This custom allows the Senate to “significantly constrain[] the President’s decision making.”<sup>123</sup> Senators have historically been more successful in influencing presidential nominations when the nominee is to serve in one state as opposed to nominees that will serve in the Cabinet or oversee a program in many states.<sup>124</sup> Congress recognizes this dynamic. Senators have “refused to give up control over regional appointments . . . [of] U.S. Attorneys . . . because those persons would set policy regionally in a way that was sensitive to the needs of a members’ [sic] reelection coalition.”<sup>125</sup> Their authority over their U.S. Attorneys, including their selections, causes legislators to value district autonomy because it provides a potential source of personal leverage and localized benefits to their constituents.<sup>126</sup>

The character and conduct of the U.S. Attorneys further illustrate congressional influence. The U.S. Attorneys enjoy stronger relationships with their home states and their members of Congress than do Main Justice appointees.

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119. See Beale, *supra* note 8, at 409-10.

120. Michael J. Nelson & Ian Ostrander, *Keeping Appointments: The Politics of Confirming United States Attorneys*, 37 JUST. SYS. J. 211, 211 (2016).

121. Griffin B. Bell & Daniel J. Meador, *Appointing United States Attorneys*, 9 J.L. & POL. 247, 248-49 (1993).

122. MITCHEL A. SOLLENBERGER, *THE PRESIDENT SHALL NOMINATE* 23-31 (2008).

123. Saikrishna B. Prakash, *Fragmented Features of the Constitution’s Unitary Executive*, 45 WILLAMETTE L. REV. 701, 706 (2009).

124. See AMAR, *supra* note 22, at 566 n.44 (2005) (providing one example).

125. DAVID E. LEWIS, *THE POLITICS OF PRESIDENTIAL APPOINTMENTS: POLITICAL CONTROL AND BUREAUCRATIC PERFORMANCE* 65 (2008).

126. Richman, *Federal Criminal Law*, *supra* note 16, at 805-10.

Indeed, when President Clinton assumed office, several senators picked their respective U.S. Attorneys themselves.<sup>127</sup> From 1981 to 2015, across the federal government, nearly thirty percent of political appointees lived in the Washington metropolitan area at the time of their nomination.<sup>128</sup> U.S. Attorneys provide an exception: they are generally drawn from the district in which they serve.<sup>129</sup> Instead of being Washington insiders, sent to various districts to enforce criminal laws, U.S. Attorneys often either live in or did live in their districts for a significant period at the time of their nomination. Furthermore, Justice Department documents indicate sustained efforts by representatives to monitor U.S. Attorneys beyond the confirmation process. For example, the U.S. Attorney firing scandal revealed that representatives in western states have urged their U.S. Attorneys to pursue specific categories of prosecutions.<sup>130</sup>

The President's ability to unilaterally remove any U.S. Attorney has meanwhile not generally proved meaningful in practice. The Supreme Court has long recognized that the President has the authority to fire U.S. Attorneys at will, even if they are technically given a statutory term of four years.<sup>131</sup> But, as Adrian Vermeule has shown, Presidents usually observe a set of "conventions" regarding U.S. Attorney tenure that strike a balance between presidential control, congressional influence, and prosecutorial independence.<sup>132</sup> Generally, when a new President assumes office, all U.S. Attorneys submit their resignations, but if a President wins reelection, they remain in office beyond their original term expiration date.<sup>133</sup>

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127. See, e.g., Stephen Labaton, *A Woman and a Black Proposed as U.S. Attorneys in New York*, N.Y. TIMES (Mar. 31, 1993), <https://www.nytimes.com/1993/03/31/nyregion/a-woman-and-a-black-proposed-as-us-attorneys-in-new-york.html> [<https://perma.cc/JGL4-WTCY>] (noting that Senator Moynihan recommended the appointment of Mary Jo White to be U.S. Attorney in Manhattan and Zachary Carter to be U.S. Attorney for Brooklyn—both of whom were subsequently appointed by Clinton).

128. Anne Joseph O'Connell, *Shortening Agency and Judicial Vacancies Through Filibuster Reform? An Examination of Confirmation Rates and Delays from 1981 to 2014*, 64 DUKE L.J. 1645, 1691 (2015).

129. Beale, *supra* note 8, at 422-23.

130. E-mail from Carol Lam, U.S. Att'y, S. Dist. Cal., to Rebecca Seidel, Deputy Ass't Att'y Gen., U.S. Dep't of Justice (Aug. 2, 2006, 6:50 PM), [https://www.npr.org/documents/2007/mar/doj\\_senate/lam\\_fine.pdf](https://www.npr.org/documents/2007/mar/doj_senate/lam_fine.pdf) [<https://perma.cc/LTH8-PCFE>] (detailing the attempts of Representatives Darrell Issa and F. James Sensenbrenner, Jr. to monitor Lam).

131. *Parsons v. United States*, 167 U.S. 324, 343 (1897).

132. Adrian Vermeule, *Conventions of Agency Independence*, 113 COLUM. L. REV. 1163, 1202 (2013).

133. OFFICE OF THE INSPECTOR GEN. & OFFICE OF PROF'L RESPONSIBILITY, U.S. DEP'T OF JUSTICE, AN INVESTIGATION INTO THE REMOVAL OF NINE U.S. ATTORNEYS IN 2006, at 1 (2008) [hereinafter INSPECTOR GEN. REPORT], <http://www.usdoj.gov/oig/special/so809a/final.pdf>

The interbranch struggle for control of federal criminal prosecution revealed itself quite forcefully during the George W. Bush Administration, which allegedly attempted to use U.S. Attorney selection and removal as a means of centralizing political control over the entire DOJ. The DOJ began not only enforcing “rigid” uniformities in certain policy areas, but also appointing U.S. Attorneys from posts within the Administration who lacked strong ties to their districts. According to the *Washington Post*, by 2007, almost four dozen new U.S. Attorneys had been selected, with one-third of them “trusted administration insiders.”<sup>134</sup>

Most significant for our purposes, President Bush made unprecedented efforts to wield his appointment and removal power with unilateral force. The Bush Administration called on a congressional staffer to insert a provision into the Patriot Act Reauthorization Bill allowing the White House to fill a U.S. Attorney vacancy indefinitely without Senate confirmation.<sup>135</sup> An internal memo written by the Chief of Staff to Attorney General Alberto Gonzales made the goal of outflanking Congress explicit: “By not going the PAS [Senate confirmation] route, we can give far less deference to home-State Senators and thereby get (1) our preferred person appointed and (2) do it far faster and more efficiently, at less political cost to the White House.”<sup>136</sup>

This attempt to bypass Congress, however, ultimately met a disastrous fate. In 2006, President Bush violated the “convention” of U.S. Attorney tenure by firing nine of his U.S. Attorneys midterm.<sup>137</sup> Many believed the firings were related to specific criminal-prosecution decisions and that the entire Department was being “politicized.”<sup>138</sup> Some suggested, for example, that U.S. Attorneys were fired for the way they handled public-corruption cases involving Demo-

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[<https://perma.cc/49MC-UX8D>] (explaining that “in late 2006 and early 2007,” nine U.S. Attorneys were directed by senior Justice Department officials to resign, causing “members of Congress . . . to raise questions and concerns about the reasons for the removals, including whether they were intended to influence certain prosecutions”). Viewed in this context, the firing of U.S. Attorneys at the onset of the Trump Administration provided the rule rather than the exception. See Erica Orden & Nicole Hong, *U.S. Attorney Preet Bharara Fired After Refusing Justice Department Request to Quit*, WALL ST. J. (Mar. 11, 2017, 7:12 PM ET), <https://www.wsj.com/articles/u-s-attorney-preet-bharara-defies-trump-request-to-resign-1489261404> [<https://perma.cc/D58Z-3SN4>].

134. Amy Goldstein & Dan Eggen, *Prosecutor Posts Go to Bush Insiders*, WASH. POST (Apr. 1, 2007), <http://www.washingtonpost.com/wp-dyn/content/article/2007/03/31/AR2007033101158.html> [<https://perma.cc/9B8V-HJLQ>].

135. Richman, *supra* note 112, at 2106.

136. INSPECTOR GEN. REPORT, *supra* note 133, at 36.

137. *See id.*

138. Vermeule, *supra* note 132, at 1202.

crats.<sup>139</sup> The congressional backlash was vociferous and bipartisan. Certainly, Democratic members of Congress were more vocal in their condemnation, but members of both parties criticized the President's decision.<sup>140</sup> Hearings and an investigation by the Justice Department's Inspector General quickly ensued. Members of Congress "excoriated" the Justice Department's political leadership during these hearings.<sup>141</sup> Attorney General Gonzales soon resigned.

The congressional response to the U.S. Attorney firings is notable when compared to similar firings of other Bush-era executive-branch officials. Whereas the U.S. Attorney firings generated hearings, an Inspector General report, and massive media coverage, the demotion and reassignment of attorneys within the Civil Rights Division received scant attention.<sup>142</sup> By the end of Bush's term, the dynamic between Congress and the President regarding the U.S. Attorney position returned to "normal."<sup>143</sup> Legislators remained committed to decentralized enforcement authority and "celebrate[d] the independence of U.S. Attorneys' offices."<sup>144</sup>

### B. Directives from Main Justice

Once a U.S. Attorney has been appointed, the Executive and more-closely aligned officials at Main Justice have other ways of exercising control beyond simply removing him or her. These control mechanisms—most prominent

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139. See INSPECTOR GEN. REPORT, *supra* note 133, at 158-200; David C. Iglesias, Opinion, *Why I Was Fired*, N.Y. TIMES (Mar. 21, 2007), <http://www.nytimes.com/2007/03/21/opinion/21iglesias.html> [<https://perma.cc/ZC4Q-WNEX>].

140. *GOP Senator Calls for Gonzales's Head*, CNN (Mar. 15, 2007, 3:14 AM), <http://www.cnn.com/2007/POLITICS/03/14/fired.attorneys/index.html> [<https://perma.cc/RPK4-ZVCD>].

141. Richman, *supra* note 112, at 2108 (citing *Preserving Prosecutorial Independence: Is the Department of Justice Politicizing the Hiring and Firing of U.S. Attorneys?: Hearings Before the S. Comm. on the Judiciary*, 110th Cong. 495 (2007) (testimony of J. Scott Jennings, Special Assistant to the President); and *United States Department of Justice: Hearing Before the H. Comm. on the Judiciary*, 110th Cong. 33-38 (2007) (statement of Sen. John Conyers, Jr., Chairman, H. Comm. on the Judiciary)).

142. Beale, *supra* note 8, at 420; see also *Oversight of the Civil Rights Division: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 30-32 (2006) [hereinafter *Oversight of the Civil Rights Division*] (statement of Joseph Rich, Lawyers' Committee for Civil Rights Under Law) (describing how longtime career supervisors in the Civil Rights Division who were considered to have views that differed from those of the political appointees in the Bush Administration were reassigned or stripped of major responsibilities, resulting in loss of morale and a large number of attorney resignations).

143. Richman, *supra* note 112, at 2116.

144. *Id.*; see also Barkow, *supra* note 100, at 852 ("[P]residential removal authority over prosecutors has grown limited as a matter of practice.").

among them the Justice Manual (previously known as the U.S. Attorneys' Manual) and DOJ guidance memoranda – have proliferated and grown more effective in recent decades. But they continue, at least at this juncture, to provide an imperfect means of enforcing top-down directives. Historically, they have successfully signaled administration priorities, but the imposition of anything close to federal “uniformity” in the domain of criminal enforcement remains elusive.

The President and the Attorney General can most swiftly implement enforcement policies via the issuance of memoranda sent from the Attorney General and addressed to all active U.S. Attorneys. These memoranda touch on a range of subjects, from settlement payments to third parties and discovery-related issues to the most controversial criminal-enforcement issues of the era.<sup>145</sup> These directives cannot be found in the Code of Federal Regulations, nor do they carry any legislative authority. Not surprisingly then, U.S. Attorneys and Assistant U.S. Attorneys have historically expressed varying levels of compliance with them. “In all my time there,” reported one former U.S. Attorney, “I never did read the damn *Manual*.”<sup>146</sup> As Rachel Barkow noted more recently, “While the DOJ can produce guiding memos and principles, it is simply not possible for it to police how each U.S. Attorney proceeds.”<sup>147</sup>

These directives do serve two important purposes beyond providing general guidance. First, they signal Main Justice priorities. For example, former Attorney General Sessions used a public memorandum to announce an important shift in the Department’s pursuit of mandatory-minimum sentences.<sup>148</sup> Soon thereafter, the Department updated the Manual to note that “the ultimate measure of the potential for effective prosecution . . . is the sentence . . . that is likely to be imposed if the person is convicted.”<sup>149</sup>

Second, Washington exerts direct control by imposing requirements for Main Justice approval of certain prosecutions and appeals. Areas now formally requiring approval include civil rights crimes, terrorism matters, death penalty

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145. See, e.g., Memorandum from Att’y Gen., U.S. Dep’t of Justice, to All Component Heads & U.S. Att’ys (June 5, 2017), <https://www.justice.gov/opa/press-release/file/971826/download> [<https://perma.cc/M44D-336L>] (discussing settlement guidance); Memorandum from David W. Ogden, Deputy Att’y Gen., U.S. Dep’t of Justice, to Dep’t Prosecutors (Jan. 4, 2010), <https://www.justice.gov/archives/dag/memorandum-department-prosecutors> [<https://perma.cc/UFF3-TDEM>] (discussing discovery guidance).

146. EISENSTEIN, *supra* note 12, at 67.

147. Barkow, *supra* note 100, at 853-54.

148. Memorandum from Att’y Gen., U.S. Dep’t Justice, to All Fed. Prosecutors (May 10, 2017), <https://www.justice.gov/opa/press-release/file/965896/download> [<https://perma.cc/UR2N-NQJA>].

149. OFFICE OF THE U.S. ATT’YS, *supra* note 117, § 9-27.240.

cases, and the “arrest of foreign nationals.”<sup>150</sup> Bringing any criminal appeal remains subject to Main Justice approval, and often entails either central oversight or direct intervention, a process outlined in detail in the Justice Manual.<sup>151</sup> Additionally, pursuant to the federal electronic-surveillance statutes, Assistant U.S. Attorneys must seek DOJ approval for the use of certain investigative techniques, such as wiretaps.<sup>152</sup> Another successful initiative to date promoted by Main Justice and incorporated into the Manual has been Main Justice oversight of the federal death penalty. The “Death Penalty Protocol,” first issued by Attorney General Janet Reno, requires notification of the Attorney General of the existence of a “death-eligible” case, regardless of whether the prosecutor plans to seek the death penalty.<sup>153</sup> The Bush DOJ embraced this new procedure and began overriding local decisions in the death penalty area with a more forceful hand.<sup>154</sup>

Yet even conceding these pockets of Main Justice control, USAOs retain a remarkable degree of autonomy. Indeed, given the current structure of the DOJ, capital cases are one of the few areas that the Department can effectively monitor because such prosecutions arise so infrequently. As of July 2017, only two percent of the nation’s death row prisoners were sentenced in federal court.<sup>155</sup> Furthermore, in areas such as the appeals process, the benefits of imposing a uniform oversight policy and the ability to effectively monitor align. Put differently, it makes good sense for Main Justice to intervene when an appeal risks generating precedent that will affect multiple USAOs. As they currently stand, however, many Main Justice directives still suffer both procedurally, from their lack of enforcement mechanisms, and substantively, from their intentional vagueness. The directives are usually imprecise because “they need to speak to all possible cases that can be brought” and seek to over- rather than underdeter unlawful conduct.<sup>156</sup> The DOJ has ultimately issued only a “small handful of memos on particular laws [that] do not address how resources should be prioritized in the

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150. See *id.* §§ 9-2.400 (prior approvals chart), 9-110.101, 9-110.300 to 9-110.400.

151. *Id.* § 2.200.

152. *Id.* § 9-7.00.

153. *Id.* §§ 9-10.020, 9-10.080. Previously, written authorization was only required for those instances where a prosecutor sought the death penalty.

154. Richman, *supra* note 99, at 1393.

155. NAACP Legal Def. & Educ. Fund, Inc., *Death Row U.S.A.: Summer 2017*, DEATH PENALTY INFO. CTR. 38-39 (2017), <http://deathpenaltyinfo.org/files/pdf/DRUSASummer2017.pdf> [<https://perma.cc/V5HS-R35X>].

156. Barkow, *supra* note 100, at 855.

context of the thousands of the other federal criminal statutes for which there are no such DOJ memos.”<sup>157</sup>

The issuance of memoranda concerning two of the most salient policy areas for DOJ guidance—sentencing and marijuana regulation—reveals the way that the DOJ’s structure frustrates the current means of imposing top-down policy directives. First, guidance memoranda regarding sentencing have proliferated over the last few administrations.<sup>158</sup> While sentencing remains theoretically in the hands of the judge, given the existence of the Sentencing Guidelines and various mandatory-minimum provisions, a prosecutor’s decisions whether to charge a defendant and what types of charges to bring are far more determinative of the sentence than any other factor.<sup>159</sup>

Beginning with Attorney General Richard Thornburgh, the DOJ has issued a series of directives with more prescriptive and specific language regarding plea bargaining and sentencing.<sup>160</sup> Attorney General John Ashcroft continued this practice, dictating that prosecutors were to “charge and pursue the most serious, readily provable offense or offenses that are supported by the facts of the case.”<sup>161</sup> Subsequent administrations have continued the battle of the sentencing memoranda. The famous “Holder Memo” issued by one of President Obama’s Attorneys General, Eric Holder, urged that the most “severe mandatory minimum[s]” should be “reserved for serious, high-level, or violent drug traffickers.”<sup>162</sup> It outlined specific criteria prosecutors should consider when deciding which drug-

157. *Id.* at 860.

158. See, e.g., Memorandum from Eric H. Holder, Jr., Att’y Gen., U.S. Dep’t of Justice, to All Fed. Prosecutors 3 (May 19, 2010), <https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/holder-memo-charging-sentencing.pdf> [<https://perma.cc/VL22-958C>] (“This memorandum supersedes previous Department guidance on charging and sentencing including the September 22, 2003 memorandum issued by Attorney General John Ashcroft . . . the July 2, 2004 memorandum issued by Deputy Attorney General James Comey . . . and the January 28, 2005 memorandum issued by Deputy Attorney General James Comey . . .”).

159. Alexander Bunin, *Reducing Sentencing Disparity by Increasing Judicial Discretion*, 22 FED. SENT’G REP. 81, 81 (2009).

160. Stith, *supra* note 27, at 1441.

161. Memorandum from John Ashcroft, Att’y Gen., U.S. Dep’t of Justice, to All Fed. Prosecutors (Sept. 22, 2003), [http://www.usdoj.gov/opa/pr/2003/September/03\\_ag\\_516.htm](http://www.usdoj.gov/opa/pr/2003/September/03_ag_516.htm) [<https://perma.cc/Y23E-VFA7>].

162. Memorandum from Eric H. Holder, Jr., Att’y Gen., U.S. Dep’t of Justice, to all U.S. Att’ys & Assistant Att’y Gen. for the Criminal Div. 1 (Aug. 12, 2013), <http://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/ag-memo-department-policy-on-charging-mandatory-minimum-sentences-recidivist-enhancements-in-certain-drug-cases.pdf> [<https://perma.cc/U3UT-3663>].

related charges to bring.<sup>163</sup> The Trump Administration reversed course. “[P]rosecutors,” urged then-Attorney General Sessions, “should charge and pursue the most serious, readily provable offense.”<sup>164</sup>

As Kate Stith argues, these memoranda seek to centralize the exercise of prosecutorial power by delegitimizing the exercise of prosecutorial discretion.<sup>165</sup> But they also pose practical problems. They offer no mechanism by which to monitor the exercise of discretion by individual line prosecutors. Indeed, the Holder Memo actually condoned sentencing variation, noting that “[w]hen making these individualized assessments, prosecutors must take into account numerous factors, such as . . . the needs of communities [they] serve.”<sup>166</sup> As Stith concluded in 2008, “There may well come a day when Main Justice fully takes control of all charging discretion, but that day has not yet come.”<sup>167</sup>

Ten years later, that day has still not come: variance pervades the system. Districts vary widely in their policies about which cases to prosecute, what kinds of plea agreements to offer, and when and how to move for departure from the Sentencing Guidelines.<sup>168</sup> For example, according to a study by the Sentencing Commission, in the District of Connecticut, around 27% of defendants received a sentence within the Guidelines range, and 33% received a sentence below the Guidelines range. In the Eastern District of Kentucky, 60% of defendants received a sentence in the Guidelines range, and 21% received a sentence below the Guidelines range.<sup>169</sup> Congress has also passed legislation allowing for community-based considerations in sentencing, noting that “community norms concerning particular criminal behavior might be justification for increasing or decreasing the recommended penalties for the offense.”<sup>170</sup>

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163. *Id.* at 2.

164. Memorandum from Jefferson B. Sessions III, Att’y Gen., U.S. Dep’t of Justice, to All Fed. Prosecutors (May 10, 2017), <https://www.justice.gov/opa/press-release/file/965896/download> [<https://perma.cc/UC2P-L69T>].

165. Stith, *supra* note 27, at 1442.

166. Memorandum from Eric H. Holder, Jr. to all U.S. Att’ys & Assistant Att’y Gen. for the Criminal Div., *supra* note 162, at 1.

167. Stith, *supra* note 27, at 1450.

168. *Statistical Information Packet: Fiscal Year 2016, Second Circuit*, U.S. SENT’G COMMISSION 12-17 tbl.9 (2017), <http://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/state-district-circuit/2016/2c16.pdf> [<https://perma.cc/9DSX-5CJK>].

169. *Id.*

170. S. REP. NO. 98-225, at 170 (1983); *see* 28 U.S.C. § 994(c)(4)-(5) (2018) (mandating that the Sentencing Commission take community norms into account in creating the Sentencing Guidelines).

These variations reveal that U.S. Attorneys have differed in their responses to Main Justice directives, and they have been aided by Congress in their resistance efforts. As the above statistics bear out, discretionary authority is not always to the benefit of criminal defendants, depending on the district and issue in question. In 2014, when the Department, through the Attorney General, urged legislative reforms to mandatory-minimum sentencing laws, an organization of Assistant U.S. Attorneys sent a letter to Congress objecting to those reforms because they would, in their opinion, diminish their discretionary enforcement authority.<sup>171</sup>

In another prominent example of resistance to Main Justice directives, several members of Congress and U.S. Attorneys refused to follow former Attorney General Sessions's memorandum directing more sustained enforcement of statutes criminalizing marijuana possession and distribution. Upon assuming office, Sessions rescinded the "Cole Memo," which had announced that the DOJ would not challenge the states' marijuana legalization initiatives.<sup>172</sup> After the release of Sessions's memo, several senators and representatives spoke out against Main Justice's shift in policy. "Colorado had every right to legalize marijuana, and I will do everything I can to protect that right against the power of an overreaching federal government," Republican Representative Mike Coffman of Colorado asserted.<sup>173</sup> Colorado Senators Michael Bennet (D) and Cory Gardner (R) united in their efforts to confront the Justice Department.<sup>174</sup>

Many U.S. Attorneys followed Congress's lead rather than the Attorney General's command. For example, Colorado U.S. Attorney Bob Troyer announced that his office would not modify how it prosecuted marijuana-related offenses despite the shift in federal guidance.<sup>175</sup> In Pennsylvania (where marijuana use

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171. Robert Gay Guthrie, *NAAUSA Letter to Senate Judiciary Committee Regarding Mandatory Minimum Sentencing*, 26 FED. SENT'G REP. 233, 233 (2014) ("[W]idespread public satisfaction with the decline in crime corresponds to the use of increased incarceration.").

172. See Memorandum from Jefferson B. Sessions III, Att'y Gen., U.S. Dep't of Justice, to All U.S. Atty's (Jan. 4, 2018), <https://www.justice.gov/opa/press-release/file/1022196/download> [<https://perma.cc/2H22-YAH2>].

173. Mike Coffman (@RepMikeCoffman), TWITTER (Jan. 4, 2018, 8:17 AM), <https://twitter.com/RepMikeCoffman/status/948951609257668618/photo/1> [<https://perma.cc/V8MG-BAYB>].

174. See Alana Abramson, *Colorado Lawmakers Are Not Happy About Jeff Sessions' New Marijuana Restrictions*, TIME (Jan. 4, 2018), <http://time.com/5088589/colorado-lawmakers-reactions-jeff-sessions-marijuana-restrictions> [<https://perma.cc/2HPD-SX66>].

175. Max Greenwood, *Colorado: No Immediate Change in Marijuana Prosecutions*, HILL (Jan. 4, 2018, 2:03 PM), <http://thehill.com/homenews/state-watch/367454-us-attorney-in-colorado-says-there-will-not-be-immediate-change-in> [<https://perma.cc/8FYA-FG7A>]. During his last few months in office, Troyer expressed some second thoughts about reining back marijuana

has been legalized for medical purposes), U.S. Attorney David Freed met with Pennsylvania's congressional representatives and announced that "my office has no intention of disrupting Pennsylvania's medical marijuana program or related financial transactions."<sup>176</sup> David C. Weiss, the U.S. Attorney for Delaware, responded that taking action against his state's medical marijuana industry was "certainly not a priority."<sup>177</sup> He made this statement four days after Delaware Senator Chris Coons noted that prosecuting legal marijuana industries would be a "poor allocation of federal time, money, and manpower that should be focused on more important things, such as combatting crime on our streets."<sup>178</sup>

Members of Congress successfully backed up their rhetoric with action in this area. First, Congress renewed an appropriations rider barring the DOJ from enforcing the federal marijuana ban against medical marijuana activities in forty-six states.<sup>179</sup> Senator Gardner also took the more dramatic step of preventing more than ten Justice Department nominees from getting a Senate floor vote.<sup>180</sup> Gardner refused to change course until the White House assured the Senator that "despite the DOJ memo, the marijuana industry in Colorado will not be

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enforcement. See Bob Troyer, Opinion, *It's High Time We Took a Breath from Marijuana Commercialization*, DENV. POST (Sept. 28, 2018, 4:51 PM), <https://www.denverpost.com/2018/09/28/colorado-marijuana-commercialization> [<https://perma.cc/3K6S-9X4D>]. The Senate has now confirmed a replacement for Troyer, Jason Dunn, whose position on this issue is unknown as of this writing. See Monica Vendituoli, *U.S. Senate Confirms Jason Dunn as Next U.S. Attorney for Colorado*, DENV. BUS. J. (Oct. 12, 2018, 10:50 AM), <https://www.bizjournals.com/denver/news/2018/10/12/jason-dunn-us-attorney-for-colorado.html> [<https://perma.cc/8FRZ-JFCS>].

176. Rick Lee, *Pa. Medical Marijuana: Governor 'Will Not Stand for Backwards Attacks' amid Federal Changes*, YORK DAILY REC. (Jan. 4, 2018, 3:16 PM), <https://www.ydr.com/story/news/2018/01/04/sessions-rescinds-federal-hands-off-policy-toward-marijuana/1003497001> [<https://perma.cc/FK93-H27C>].

177. Scott Goss, *Crackdown on State-Legalized Marijuana Unlikely in Delaware*, DEL. ONLINE (Jan. 8, 2018, 10:00 PM), <http://www.delawareonline.com/story/news/local/2018/01/09/crackdown-state-legalized-marijuana-unlikely-delaware/1013476001> [<https://perma.cc/YZL7-8FXL>].

178. Scott Goss, *New Federal Weed Policy Could Snuff out Delaware Legalization Bill*, DEL. ONLINE (Jan. 4, 2018, 5:14 PM), <https://www.delawareonline.com/story/news/politics/2018/01/04/new-federal-weed-policy-could-snuff-out-delaware-legalization-bill/1003067001> [<https://perma.cc/PNE7-TQXN>].

179. Consolidated Appropriations Act of 2018, Pub. L. No. 115-141, § 538, 132 Stat. 348, 444-45.

180. Mark K. Matthews, *Corey Gardner's Siege of the Justice Department over Marijuana Enters Second Month*, DENV. POST. (Feb. 7, 2018, 8:21 AM), <https://www.denverpost.com/2018/02/07/cory-gardner-marijuana-fight-jeff-sessions> [<https://perma.cc/LEG7-4XZT>].

targeted.”<sup>181</sup> President Trump then stated he would “probably” support a bill that would honor states’ decisions on legalizing marijuana.<sup>182</sup>

These public disputes over politically targeted prosecutions, sentencing, and drug enforcement can play a healthy role in a democratic society, heightening awareness of the choices being made in disparate USAOs around the country. Indeed, public debates about sentencing and drug enforcement have promoted legislative action in an era of remarkably low congressional activity.<sup>183</sup> And, while it is difficult to state with confidence the motivations of a diffuse, multimember body,<sup>184</sup> the above analysis reveals that Congress has played a direct role in the structural development of the DOJ. This comes as no surprise given members’ political incentives. Members of Congress benefit from the delegation of authority further down the executive-branch chain of command toward the U.S. Attorneys—officials over whom they exert far greater control. Moreover, because members of Congress answer first and foremost to their local constituents, it follows that they would be wary of supporting a scheme that allows federal enforcement priorities to intrude on state and local concerns, especially in areas as sensitive as criminal law enforcement.<sup>185</sup>

### C. A New Direction?

The Main Justice directives regarding sentencing and marijuana enforcement remain in flux as of this writing, as is the executive branch’s relationship with the DOJ. President Trump’s attempts to publicly influence the DOJ and

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181. Seung Min Kim, *Trump, Gardner Strike Deal on Legalized Marijuana, Ending Standoff over Justice Nominees*, WASH. POST (Apr. 13, 2018), [http://www.washingtonpost.com/politics/trump-gardner-strike-deal-on-legalized-marijuana-ending-standoff-over-justice-nominees/2018/04/13/2ac3b35a-3f3a-11e8-912d-16c9e9b37800\\_story.html](http://www.washingtonpost.com/politics/trump-gardner-strike-deal-on-legalized-marijuana-ending-standoff-over-justice-nominees/2018/04/13/2ac3b35a-3f3a-11e8-912d-16c9e9b37800_story.html) [https://perma.cc/U2NL-RB49].
182. Aris Folley, *Trump Says He’ll Likely Support Bill Letting States Set Their Own Marijuana Policies*, HILL (June 8, 2018, 12:23 PM), <http://thehill.com/blogs/blog-briefing-room/news/391371-trump-says-hell-likely-support-bill-letting-states-set-their> [https://perma.cc/VT2U-FX8Y].
183. Nicholas Fandos, *Senate Passes Bipartisan Criminal Justice Bill*, N.Y. TIMES (Dec. 18, 2018), <https://www.nytimes.com/2018/12/18/us/politics/senate-criminal-justice-bill.html> [https://perma.cc/DV5U-N7E8].
184. See, e.g., Frank H. Easterbrook, *Statutes’ Domain*, 50 U. CHI. L. REV. 533, 547 (1983) (“Because legislatures comprise many members, they do not have ‘intents’ or ‘designs,’ hidden yet discoverable.”).
185. See Susan R. Klein, *Independent-Norm Federalism in Criminal Law*, 90 CALIF. L. REV. 1541, 1556 (2002) (arguing that federal criminal law only presents a threat when it impedes local experimentation and documenting pushback against such efforts).

various U.S. Attorneys have provoked renewed calls to protect the Department's independence from executive-branch interference.<sup>186</sup> Many of those demands have emanated from within Congress itself. Senator Chuck Schumer publicly condemned President Trump for firing the U.S. Attorney for the Southern District of New York, Preet Bharara, noting that he was "extremely surprised and disappointed" by the decision.<sup>187</sup> His Republican colleague Bob Corker joined him in denouncing the President for his "political interference" with the justice system, which he labeled "totally inappropriate."<sup>188</sup> Placed in historical context, this exchange represents merely one instance among several in the back-and-forth between Congress and the President regarding the boundaries of control over the U.S. Attorney position.<sup>189</sup>

Reflecting the ineffectiveness of the U.S. Attorneys' Manual and Memos, Main Justice has now embarked on a process of transforming its means of communicating with all Department officials. On September 25, 2018, the Justice Department announced the revised edition of its U.S. Attorneys' Manual, now known as the "Justice Manual."<sup>190</sup> The Justice Department cited the need to update the Manual to reflect current law, noting that its outdatedness "diminished the Manual's effectiveness as an internal Department resource, and reduced its value as a source of transparency and accountability to the public."<sup>191</sup> Furthermore, Assistant Attorney General Rod Rosenstein cited the need to integrate Department guidance found in memos into the Manual itself, claiming publicly that

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186. See, e.g., Bob Bauer, *The Survival of Norms: The Department of Justice and the President's 'Absolute Rights'*, LAWFARE (Jan. 1, 2018, 10:00 AM EST), <https://www.lawfareblog.com/survival-norms-department-justice-and-presidents-absolute-rights> [https://perma.cc/4PJV-G668] ("One of the norms most clearly at risk is that which serves to safeguard the independence of federal law enforcement.").

187. *Schumer 'Disappointed' After U.S. Attorney Bharara Removed from Office*, CBS N.Y. (Mar. 12, 2017, 2:03 PM EST), <http://newyork.cbslocal.com/2017/03/12/schumer-preet-bharara> [https://perma.cc/J5TE-MTNS].

188. Philip Rucker & Matt Zapposky, *Trump Breaches Boundaries by Saying DOJ Should Be 'Going After' Democrats*, WASH. POST (Nov. 3, 2017), [https://www.washingtonpost.com/politics/trump-breaches-boundaries-by-saying-doj-should-be-going-after-democrats/2017/11/03/1c157c08-coaa-11e7-97d9-bdab5a0ab381\\_story.html](https://www.washingtonpost.com/politics/trump-breaches-boundaries-by-saying-doj-should-be-going-after-democrats/2017/11/03/1c157c08-coaa-11e7-97d9-bdab5a0ab381_story.html) [https://perma.cc/A9B3-GA8W].

189. President Trump himself has referred to his Department of Justice as a "deep state." Catherine Lucey & Darlene Superville, *Trump Accuses Department of Justice of Being Part of 'Deep State'*, PBS (Jan. 2, 2018, 10:40 AM EST), <http://www.pbs.org/newshour/politics/trump-accuses-justice-department-of-being-part-of-deep-state> [https://perma.cc/HA39-3U6P].

190. *Department of Justice Announces the Rollout of an Updated United States Attorneys' Manual*, U.S. DEP'T JUST. (Sept. 25, 2018), <https://www.justice.gov/opa/pr/department-justice-announces-rollout-updated-united-states-attorneys-manual> [https://perma.cc/J232-EU3K].

191. *Id.*

“[m]anagement-by-memo is an inefficient and often ineffective method of enforcing government policies.”<sup>192</sup> The new Manual includes some updates on high profile issues, including additional policies related to “religious liberty litigation” and “disclosure of foreign influence operations.”<sup>193</sup>

The name change alone reflects a greater effort by Main Justice to exert its influence. Rosenstein declared that the name “U.S. Attorneys’ Manual” was “misleading” because the Manual “applies to *all* components of the Department of Justice,” (from the Main Justice Civil Rights Division to the Office of Legal Counsel) not just the USAOs.<sup>194</sup> These efforts likely reflect a newfound push for centralization by Main Justice. Yet as Main Justice has stepped up its efforts to exert control over USAOs in some ways, individual USAOs have continued to pursue prosecutions that directly implicate executive-branch officials and associates of the President.<sup>195</sup> It remains too soon to report how the latest inter- and intrabranch struggle for control will unfold, but many media outlets have reported prosecutorial obstruction of Main Justice priorities.<sup>196</sup>

The permissible bounds of executive control are beyond the scope of this Note. If prosecutors can in practice ignore the head of the executive branch – and indeed, can actively pursue criminal investigations directly implicating the Executive – it is only because of the decentralized structure that Congress has created and propagated.

Ultimately this Note offers a reminder of the valuable role Congress can continue to play in promoting a decentralized regime, arguing that the benefits of our current system from both a federalism and separation-of-powers perspective are manifold. Even as this Note ultimately argues in favor of a dispersed regime, however, it does not suggest that the Executive (or Main Justice) should simply

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192. Rod Rosenstein, Deputy Att’y Gen., U.S. Dep’t of Justice, Address on Corporate Enforcement Policy Before NYU Program on Corporate Compliance and Enforcement (Oct. 6, 2017), [https://wp.nyu.edu/compliance\\_enforcement/2017/10/06/nyu-program-on-corporate-compliance-enforcement-keynote-address-october-6-2017](https://wp.nyu.edu/compliance_enforcement/2017/10/06/nyu-program-on-corporate-compliance-enforcement-keynote-address-october-6-2017) [https://perma.cc/L55X-TS22].

193. George Khoury, *DOJ Unveils the Justice Manual*, FINDLAW: STRATEGIST (Sept. 27, 2018, 6:00 AM), <https://blogs.findlaw.com/strategist/2018/09/doj-unveils-the-justice-manual.html> [https://perma.cc/9FHW-NDK6].

194. Rosenstein, *supra* note 192.

195. The most prominent examples include the President’s former lawyer, Michael Cohen, *see* Steve Reilly & Brad Heath, *Five Things to Know About Michael Cohen’s Guilty Plea*, USA TODAY (Aug. 21, 2018, 9:29 PM EST), <https://www.usatoday.com/story/news/politics/2018/08/21/michael-cohen-what-know-charges-he-pleaded-guilty/1058164002> [https://perma.cc/TY4A-9Y43], and his former campaign manager, Paul Manafort, *see* Aruna Viswanatha, *Former Trump Campaign Manager Paul Manafort to Be Sentenced in February*, WALL ST. J. (Oct. 19, 2018, 3:55 PM EST), <https://www.wsj.com/articles/former-trump-campaign-manager-paul-manafort-to-be-sentenced-in-february-1539978915> [https://perma.cc/E4GY-U35J].

196. *See* Lucey & Superville, *supra* note 189.

accede to all of Congress's demands. Not only are there some policy areas more amenable to centralized control (such as the appeals process or defense of civil nationwide regulatory programs), but the process of negotiating the boundaries between Main Justice and the USAOs produces benefits in its own right. Most notably it brings debates about criminal-enforcement choices – from sentencing to drug enforcement – into public light, providing much needed transparency in a system full of decisions notoriously hidden from public scrutiny.

#### *D. Contributing Forces*

The above discussion has highlighted how conflict between Congress and the Executive over the organization and direction of federal criminal law has generated our current, decentralized law enforcement system. It is undeniably true, of course, that there is more than one factor at play in contributing to the ability of U.S. Attorneys and their line prosecutors to operate with autonomy. As I outline below, however, while these factors may contribute to decentralization's sticking power, Congress deserves much of the credit for the structure of federal criminal law.

First, with regard to culture, the Department has developed strong norms of professional independence over the course of its history.<sup>197</sup> As with other administrative positions, entrenchment within the bureaucracy has enhanced individual autonomy. According to one survey of Assistant U.S. Attorneys conducted in 2002, most assistants will “outlive” the present political regime and “their longevity as federal prosecutors tends to reinforce their view that they, rather than the department or the U.S. Attorney, are in the best position to set an office's prosecutorial agenda.”<sup>198</sup> But it should be emphasized that this culture is a result, not a cause, of the autonomy given to prosecutors in the first place. Culture may contribute to decentralization's sticking power, but it does not account for its existence. The decentralized enforcement *structure* that surrounds criminal law remains of great significance. As outlined above, the power struggle between Congress and the President over this structure has been consistent and vociferous. At many points, Congress could have ceded to executive centralization demands, yet it has refused to do so.

Certainly, the DOJ's decentralized structure with regard to criminal enforcement may in part be the result of the nature of enforcement itself. After all, nearly

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197. See Neal Devins & Saikrishna Prakash, *The Indefensible Duty to Defend*, 112 COLUM. L. REV. 507, 540 (2012) (quoting Maureen Mahoney et. al., *Solicitors General Panel on the Legacy of the Rehnquist Court*, 74 GEO. WASH. L. REV. 1171, 1180 (2006) (comments of Walter E. Dellinger)); Shugerman, *supra* note 65, at 170.

198. Lochner, *supra* note 108, at 288.

any enforcement action requires interaction with on-the-ground officials, witnesses, and targets of investigation. Perhaps, then, the needs of an enforcement apparatus dictate the present-day structure of the DOJ. Strong evidence suggests, however, that the DOJ's development cannot be attributed to mere path dependence. A comparison of the DOJ with other agencies vested with enforcement powers provides evidence to refute the path-dependency argument. Scholars have previously documented the rapid centralization of the administrative state since the Reagan Era, including at many agencies with enforcement authority.<sup>199</sup> Generally, "presidential control over administration has increased."<sup>200</sup> Yet the DOJ has not witnessed such centralization. Even among agencies vested with enforcement discretion, the DOJ stands apart.

The DOJ has a large number of field offices, each one headed by a presidential appointee confirmed by the Senate (a powerful political figure in his or her own right). No other agency has this amount of political firepower scattered across the country. Some federal agencies operate with around ten regional offices (and many others operate with fewer than ten).<sup>201</sup> The Justice Department oversees four times as many offices.<sup>202</sup> A regional (as opposed to state) approach necessarily undercuts both congressional influence and state and local input because each regional office is responsible for multiple states.<sup>203</sup> Indeed, as one commentator has argued, President Richard Nixon implemented the "regional approach" to "standardize federal regions, thereby facilitating interagency coordination and presidential supervision."<sup>204</sup>

Consider the Occupational Safety and Health Administration (OSHA), an enforcement agency located within the Department of Labor that promulgates standards under the Occupational Safety and Health Act to enhance workplace safety. OSHA's main office in Washington issues a "targeting list" that compels local offices to inspect specific workplaces.<sup>205</sup> In fact, the "vast majority of the agency's planned inspections are conducted from numbered lists distributed

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199. See generally Kagan, *supra* note 9 (celebrating the rise of "Presidential Administration").

200. Jessica Bulman-Pozen, *Federalism as a Safeguard of the Separation of Powers*, 112 COLUM. L. REV. 459, 467 (2012).

201. See Jessica Bulman-Pozen, *Our Regionalism*, 166 U. PA. L. REV. 377, 389-91 (2018).

202. See EISENSTEIN, *supra* note 12, at 12.

203. Cf. AMAR, *supra* note 22, at 110-11 (discussing Congress's horizontal powers across the executive and judicial branches of the federal government, including its authority to constitute regional inferior courts as well as the custom of senatorial courtesy).

204. Bulman-Pozen, *supra* note 201, at 389-90.

205. GREGORY A. HUBER, *THE CRAFT OF BUREAUCRATIC NEUTRALITY: INTERESTS AND INFLUENCE IN GOVERNMENTAL REGULATION OF OCCUPATIONAL SAFETY* 111 (2007).

from Washington.”<sup>206</sup> Officials local to an area “choose neither which workplaces to inspect nor *the order in which to visit them*.”<sup>207</sup> Furthermore, the agency promulgates regulations with regard to the appropriate response to all formal written complaints by an employee alleging a workplace hazard, which generally entails scheduling an inspection.<sup>208</sup> The process is almost entirely centrally controlled, and field agents retain little discretion in the enforcement process. According to the most prominent study of the agency, “there is little evidence of any direct concern for local political conditions on the part of OSHA officials in the national or regional offices.”<sup>209</sup>

One agency that may come close to the DOJ in terms of discretion permitted at the field office level is the Environmental Protection Agency (EPA). Although the EPA maintains only ten regional offices, they are headed by presidential appointees (although they are not confirmed by the Senate).<sup>210</sup> There is some evidence that the agency has varied enforcement priorities by region.<sup>211</sup> The EPA’s enforcement discretion, however, is ultimately more constrained than that of the DOJ. This is in part due to regulations the agency itself has promulgated to maintain more uniform standards. For example, the EPA’s Clean Air Act regulations direct the agency to “[a]ssure fair and uniform application by all Regional Offices” and “[p]rovide mechanisms for identifying and correcting inconsistencies by standardizing criteria, procedures, and policies being employed by Regional Office employees.”<sup>212</sup> The regulations also provide that officials in the regional offices “shall *assure* that actions taken under the act . . . [a]re as consistent as reasonably possible with the activities of other Regional Offices.”<sup>213</sup> Federal courts have enforced these regulations guaranteeing uniform policies by punishing variation of EPA enforcement at the regional level.<sup>214</sup>

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206. *Id.*

207. *Id.* (emphasis added).

208. *Id.* at 115.

209. *Id.* at 152.

210. See *EPA Organization Chart*, U.S. ENVTL. PROTECTION AGENCY, <https://www.epa.gov/aboutepa/epa-organization-chart> [<https://perma.cc/8XDG-MXBN>]; *The Presidential Transition at EPA: Ten Things You Should Know*, U.S. ENVTL. PROTECTION AGENCY, [https://www.eenews.net/assets/2016/11/28/document\\_pm\\_04.pdf](https://www.eenews.net/assets/2016/11/28/document_pm_04.pdf) [<https://perma.cc/R2CN-CMHX>].

211. See JOEL A. MINTZ, ENFORCEMENT AT THE EPA: HIGH STAKES AND HARD CHOICES 77-78 (2012).

212. 40 C.F.R. § 56.3 (2018).

213. *Id.* § 56.5(a)(2) (emphasis added).

214. See, e.g., *Nat’l Env’tl. Dev. Ass’n’s Clean Air Project v. EPA*, 752 F.3d 999 (D.C. Cir. 2014).

Despite these differences, the EPA's structure does allow for *some* discretionary enforcement.<sup>215</sup> While the environmental context requires more study, below I suggest that variation may not be a cause for concern. If we think of enforcement agencies on a spectrum from considerable discretion (DOJ) to almost none (OSHA), the EPA likely lies somewhere in the middle. Although I argue below that decentralization in the criminal context is on-balance beneficial, it remains for further study to consider whether these factors might point in the opposite direction for other agencies. The dynamics at play here could be at work in other agencies, many of which maintain some measure of decentralized enforcement, albeit less than the DOJ. This Note initiates that project, but it marks the beginning, not the end, of the discussion.

### III. THE BENEFITS AND PERILS OF DECENTRALIZATION

Many—on both sides of the aisle—who have observed decentralization and discretion within a federal scheme have lamented it.<sup>216</sup> This Part takes the opposite view. The delegation of authority to lower-level executive-branch officials is not itself a cause for concern. First, dispersion allows for multiple actors to wield authority in federal criminal law enforcement, spreading power within the executive branch. Second, it necessarily leads to the formation of relationships between federal enforcement officials and state and local actors, which facilitates the incorporation of local needs and preferences into enforcement priorities. Furthermore, these forces *interact*. Given the centrality of the role of federal prosecutors beholden to local forces in executing criminal law, Congress has empowered them to provide the sort of check on executive power that it is often unable to provide directly.<sup>217</sup> This is not to suggest that federal law enforcement is perfect (or even close to it), but a better understanding of the dynamics at play can inform more realistic and productive proposals for reforming the agency's institutional design.

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215. J.R. DeShazo & Jody Freeman, *The Congressional Competition to Control Delegated Power*, 81 TEX. L. REV. 1443 (2003) (uncovering variation in EPA enforcement practices).

216. See sources cited *supra* notes 24-26; see also Broughton, *supra* note 5, at 458 (“Though academics and commentators across the spectrum of law and politics rarely find general agreement when it comes to federal power, there actually appears to be relatively broad agreement these days that some things about federal criminal law are *not* quite right. In particular, the issue has brought together minds from both the political left and the political right.”).

217. For an observation of similar forces in the cooperative-federalism context, see Bulman-Pozen, *supra* note 200, at 462.

A. *Dispersion as a Means of Checking Presidential Power*

The diffusion of power within the Department of Justice as it regards criminal prosecution provides a practical constraint on presidential power, frustrating attempts at asserting formal control over the apparatus. As canvassed above, a debate continues to rage about the appropriate level of executive influence over federal criminal law enforcement.<sup>218</sup> Some argue that the Executive maintains the constitutional prerogative to direct any and all prosecutions as part of his duty to “take Care that the Laws be faithfully executed.”<sup>219</sup> Others argue that prosecution remains a quasi-judicial or quasi-legislative function.<sup>220</sup> Despite the considerable firepower employed, it is a debate that shows no signs of abating.

This Note does not seek to resolve the debate over the constitutional bounds of presidential influence, but rather to ground it in a more realistic assessment of the dynamics at play. The discussion above reveals a subtler answer to questions of executive control. Contrary to the fears raised by those who oppose executive-branch control of criminal law,<sup>221</sup> a recognition of executive authority in theory does not mean that Congress cannot raise its own obstacles in practice. The Founders crafted a system in which Congress “stood first among equals” precisely because it retains the power to *structure* the other branches.<sup>222</sup> From appointments to appropriations to office creation, Congress can constrain the executive branch in myriad ways. Therefore, Congress itself can facilitate an “internal separation of powers” by providing a much-needed checking mechanism on presidential power within the executive branch itself.<sup>223</sup>

The history and contemporary dynamics related above therefore highlight the difference between executive-branch power and presidential power. The expansion of the executive branch across the country may limit the scope of the President’s (and upper-level cabinet officials’) power. Justice Stevens warned in his dissent in *Printz v. United States* that by limiting the ability of the federal government to enlist state officers, the Court “create[d] incentives for the National Government to aggrandize itself. In the name of State’s rights, the majority

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218. See *supra* notes 33–38 and accompanying text.

219. Prakash, *supra* note 33, at 532.

220. See *supra* note 38 and accompanying text.

221. Daniel Hemel & Eric Posner, Opinion, *A Better Way to Protect Mueller*, N.Y. TIMES (Aug. 7, 2017), <https://www.nytimes.com/2017/08/07/opinion/robert-mueller-tillis-coons-bill.html> [<https://perma.cc/9GV9-RRA8>].

222. AMAR, *supra* note 22, at 110–11.

223. Neal Kumar Katyal, *Internal Separation of Powers: Checking Today’s Most Dangerous Branch from Within*, 115 YALE L.J. 2314, 2319–22 (2006); see also Gillian E. Metzger, *The Interdependent Relationship Between Internal and External Separation of Powers*, 59 EMORY L.J. 423, 427–34 (2009).

would have the Federal Government create vast national bureaucracies to implement its policies.”<sup>224</sup> But while “vast national bureaucracies” may expand the reach of the executive branch, to do so they necessarily reduce the President’s ability to monitor these moving pieces. Furthermore, these disparate actors form relationships with more proximate state and local officials who influence their enforcement decisions.

The dispersion of power in the criminal domain specifically guards against the politicization of law enforcement. Political scientists have long demonstrated that centralization and politicization are related and even substitutable strategies for an administration trying to maximize presidential power.<sup>225</sup> Events from Watergate to the U.S. Attorney firings bear out such predictions in practice and demonstrate that when Presidents attempt to exert control over law enforcement, they often do so for explicitly political reasons. Take, for example, the second Bush Administration’s attempts to centralize control over criminal law enforcement. Main Justice placed U.S. Attorneys on “removal lists” for failing to investigate certain Democratic politicians or for failing to meet Department guideline statistics for gun and immigration crimes.<sup>226</sup> The Administration also populated Main Justice not with career prosecutors, but with Administration insiders.<sup>227</sup> To quote from the Inspector General Report, “Department leaders abdicated their responsibility to ensure that prosecutorial decisions would be based on the law . . . rather than political pressure.”<sup>228</sup>

The balance between political control and politicization remains a fine one. Many express discomfort with a “deep state” bureaucracy openly opposed to executive control, but many others voice fears over precisely this sort of politicization of law enforcement.<sup>229</sup> These moves may frustrate the President’s constitu-

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224. 521 U.S. 898, 959 (1997) (Stevens, J., dissenting).

225. See, e.g., Terry M. Moe & Scott A. Wilson, *Presidents and the Politics of Structure*, 57 LAW & CONTEMP. PROBS. 1, 11-13 (1994); Andrew Rudalevige & David E. Lewis, *Parsing the Politicized Presidency: Centralization and Politicization as Presidential Strategies for Bureaucratic Control* (2005) (manuscript at 8-9) (on file with author).

226. INSPECTOR GEN. REPORT, *supra* note 133, at 15-52 (“Development of U.S. Attorney Removal Lists”).

227. Eric Lichtblau, *Tension Builds Between F.B.I. and Congress*, N.Y. TIMES (Aug. 15, 2005), <https://www.nytimes.com/2005/08/15/politics/tension-builds-betweenfbi-and-congress.html> [<https://perma.cc/979A-DF8K>].

228. INSPECTOR GEN. REPORT, *supra* note 133, at 333.

229. FREDERICK MOSHER, *DEMOCRACY AND THE PUBLIC SERVICE* 230 (2d ed. 1982) (arguing that government decisions were heavily influenced by unelected administrative officials who were in danger of gradually marginalizing the “general interest”); B. Guy Peters, *Politicization: What Is It and Why Should We Care?*, in *CIVIL SERVANTS AND POLITICS: A DELICATE BALANCE* 12, 12 (Christine Neuhold et al. eds., 2013) (evaluating the relationship between “civil servants

tional mandate to execute the law.<sup>230</sup> As some have noted in the immigration law context, “[w]ithout control of the bureaucracy, it can be difficult, if not impossible, for a modern administration to implement its agenda.”<sup>231</sup>

This Note suggests that a *practical* check on executive authority over enforcement in an area devoid of *formal* legal constraints should be viewed in a positive light. As former White House Counsel Bob Bauer has written, when Presidents exert control over the DOJ, “[o]ne of the norms most clearly at risk is that which serves to safeguard the independence of federal law enforcement.”<sup>232</sup> The perception of independence remains crucial for the Department’s ability to enjoy public confidence and attract talent. Following the U.S. Attorney firings, the perceived loss of independence led to the deterioration of morale and widespread resignations throughout the Department.<sup>233</sup> Popular distaste for presidential influence over the Department of Justice reflects a norm of agency independence with a long heritage of societal approval.<sup>234</sup> The ways in which Congress frustrates presidential influence can thus be seen as a constitutional feature, not a bug.

Commentators often argue that a notable counterweight to presidential power can be found in an insulated, independent civil service.<sup>235</sup> The DOJ, populated with presidentially appointed officials vested with a great deal of autonomy, might provide an effective middle ground. Its bureaucratic strength gains more democratic legitimacy through the combination of presidential appointment and a level of autonomy that is encouraged and reinforced by congressionally imposed mechanisms.

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and their political masters,” including normative claims for the policy making roles of political leaders and the public bureaucracy).

230. See Steven G. Calabresi & Saikrishna B. Prakash, *The President’s Power to Execute the Laws*, 104 YALE L.J. 541, 594-96 (1994).

231. Cox & Rodríguez, *supra* note 24, at 135.

232. Bob Bauer, *The Survival of Norms: The Department of Justice and the President’s ‘Absolute Rights,’* LAWFARE (Jan. 1, 2018, 10:00 AM), <http://www.lawfareblog.com/survival-norms-department-justice-and-presidents-absolute-rights> [https://perma.cc/TU44-F85A].

233. *Oversight of the Civil Rights Division*, *supra* note 142, at 31-32 (statement of Joseph Rich, Lawyers’ Committee for Civil Rights Under Law) (describing loss of morale and a large number of attorney resignations).

234. See sources cited *supra* note 1.

235. See, e.g., Michaels, *supra* note 20, at 541-42. Michaels, notably, does not expand his discussion to criminal law.

*B. Dispersion as a Means of Facilitating Local Participation*

The current structure of federal criminal law constrains national, including presidential, power in another underappreciated way: it encourages significant interactions between federal enforcement officials and state and local forces, integrating the latter's preferences into the scheme. In other words, the structure perpetuates an internal separation of powers within the agency, whereby line prosecutors balance (and often prioritize) the opinions of local stakeholders against Main Justice directives. In , local participation promotes federalism values within the federal administration of justice. Interactions between members of Congress and federal law enforcement give prosecutors the political capital to resist Main Justice priorities, while the relationships between federal and local law enforcement allow for the incorporation of local preferences.

As the discussion above has revealed, differing priorities between Main Justice and the USAOs are borne out in highly salient policy areas such as drug policy and sentencing. To take another example, federal prosecutors vary a great deal in how they charge statutes that criminalize the use of certain firearms, including those that criminalize employment of a firearm in relation to a drug trafficking felony or crime of violence.<sup>236</sup> Again, U.S. Attorneys have justified this variation by citing local law enforcement priorities, community concerns, and congressional mandates. The Sentencing Commission has concluded that “different regions and prosecutors have varying practices in this regard.”<sup>237</sup> Local law enforcement seeking to enlist a USAO to take on a firearms-trafficking case will tailor their “pitch” to the needs of the district. In the words of one agent from the federal Bureau of Alcohol, Tobacco, Firearms and Explosives in Wisconsin, local authorities think about “marketing with the federal prosecutor’s office to convince them that smaller straw purchasing cases, like what we get in Wisconsin, should have some priority with their office.”<sup>238</sup>

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236. *Mandatory Minimum Penalties for Firearms Offenses in the Federal Criminal Justice System*, U.S. SENT’G COMMISSION 22 (Mar. 2018), [https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2018/20180315\\_Firearms-Mand-Min.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2018/20180315_Firearms-Mand-Min.pdf) [https://perma.cc/V9FP-FRM7].

237. *Sentencing for the Possession or Use of Firearms During a Crime*, U.S. SENT’G COMMISSION 17 (Jan. 6, 2000), <http://www.ussc.gov/sites/default/files/pdf/research-and-publications/working-group-reports/firearms/20000106-use-firearms-during-crime/firearms.pdf> [https://perma.cc/4GXF-QG2V]; see also Paul J. Hofer, *Federal Sentencing for Violent and Drug Trafficking Crimes Involving Firearms: Recent Changes and Prospects for Improvement*, 37 AM. CRIM. L. REV. 41, 69-70 (2000) (discussing prosecutorial discretion in the application of mandatory firearm-sentencing enhancements).

238. *Guns and Crime: Breaking New Ground by Focusing on the Local Impact*, POLICE EXECUTIVE RES. F. 16 (May 2010), [http://www.policeforum.org/assets/docs/Critical\\_Issues\\_Series/guns](http://www.policeforum.org/assets/docs/Critical_Issues_Series/guns)

According to many local police chiefs, because local gun control laws are generally weak, “their best option for handling serious gun offenders is to work with ATF and their U.S. Attorney to obtain federal charges.”<sup>239</sup> But where local law enforcement is more successful in prosecuting gun crimes, federal prosecutors have dialed back their efforts. When testifying before the Senate Judiciary Committee, James Comey, a former U.S. Attorney for Manhattan and Managing Assistant U.S. Attorney in Richmond, Virginia, made the following statement:

As I have explained to people a bunch of times, when I was running the U.S. Attorney’s Office in Richmond, Virginia, there was a real need for a Federal impact on gun possession crimes. Because people weren’t getting the kind of time they needed to reduce violent crime in the State system. When I moved to being U.S. attorney in Manhattan, [Manhattan District Attorney] Bob Morgenthau and his office were all over gun possession crimes, and doing it very aggressively. So my approach changed . . . . [J]ust comparing my experience in Manhattan to my experience in Richmond, my gun numbers per capita dropped off dramatically when I became U.S. attorney in Manhattan.<sup>240</sup>

In other words, a U.S. Attorney “changed his approach” not in response to a Main Justice directive, but to local law enforcement. Those who have worked within prosecutors’ offices also attest that enforcement variations reflect the differing priorities of U.S. Attorneys and their proximate local officials. They structure these priorities based on such factors as “the coordination between state and federal law enforcement, a district’s proximity to an international border, peculiarities within different prosecutors’ offices, and whether the population of a given area is urban or rural.”<sup>241</sup> As Sarah Sun Beale has noted, sentencing statistics indicate that each district “has its own character, which reflects not only the law enforcement situation in the district, but also the attitudes and practices of . . . the U.S. Attorneys Office.”<sup>242</sup>

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<https://perma.cc/2MJX-P2MY>.  
%20and%20crime%20-%20breaking%20new%20ground%20by%20focusing%20on%20the%20local%20impact%202010.pdf [https://perma.cc/2MJX-P2MY].

239. *Id.* at iv.

240. *Continuing Investigation into the U.S. Attorneys Controversy: Hearing Before the Subcomm. on Commercial & Admin. Law of the H. Comm. on the Judiciary*, 110th Cong. 13 (2007) (testimony of James B. Comey, former Deputy Att’y Gen. of the U.S.).

241. Bunin, *supra* note 159, at 81.

242. Beale, *supra* note 8, at 425.

The variation of enforcement priorities depending on the district in question has much to be said in its favor. First, temporarily setting aside normative reasons for internalizing community considerations, federal officials have to take into account state preferences for the simple reason that they rely on local law enforcement. For instance, local law enforcement provides “a lion’s share of the personnel and street-level intelligence necessary in order to implement federal drug policies.”<sup>243</sup> The structure of federal criminal law facilitates the creation of relationships that cross jurisdictional boundaries, necessarily allowing local preferences to permeate the system. As outlined above, federal prosecutors interact with a variety of state and local law enforcement officials because of their statutory overlap and physical proximity.<sup>244</sup>

Federal prosecutors must necessarily cooperate with state and local forces because they are quite clearly outnumbered. There are almost 5,000 Assistant U.S. Attorneys prosecuting criminal cases across the country. Meanwhile, there are 500 Assistant District Attorneys in Manhattan alone and approximately 25,000 nationwide.<sup>245</sup> And when the time comes to find investigators to bring cases, consider the fact that there are 120,000 federal officers scattered across the country, but 765,000 full-time state and local officers (36,023 in New York City alone).<sup>246</sup> This strength in numbers, as well as the “effective elimination of the boundary between federal and state substantive law,”<sup>247</sup> means that federal prosecutors could not ignore local enforcement priorities even if they wanted to.

Sensitivity to local problems therefore begets more effective enforcement. Each district has a distinct set of judges, juries, and enforcement officials.<sup>248</sup> U.S. Attorneys and their assistants can use their knowledge of these local factors to determine the best enforcement strategy.<sup>249</sup> Moreover, some USAOs interact with seventeen local police departments, some with over 750 police chiefs.<sup>250</sup> Setting a nationwide policy requiring prosecutions of all drug seizures at a certain threshold that could be rationally applied to Miami would entirely eliminate prosecution of drug seizures in states ranging from Vermont to Idaho. A thresh-

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243. Michael M. O’Hear, *Federalism and Drug Control*, 57 VAND. L. REV. 783, 846 (2004).

244. See *supra* Section I.C.

245. RICHMAN, STITH & STUNTZ, *supra* note 84, at 2.

246. *Id.* at 1.

247. *Id.* at 6.

248. James Eisenstein, *The U.S. Attorney Firings of 2006: Main Justice’s Centralization Efforts in Context*, 31 SEATTLE U. L. REV. 219, 225 (2008).

249. John Gleeson, *The Sentencing Commission and Prosecutorial Discretion: The Role of the Courts in Policing Sentence Bargains*, 36 HOFSTRA L. REV. 639, 656 n.66 (2008).

250. Eisenstein, *supra* note 248, at 225.

old appropriate for Vermont and Idaho, in turn, could not feasibly be applied to more highly populated states with more drugs.<sup>251</sup>

In the words of Vincent Broderick, “[l]ocal variations are important because of the wide spectrum of conditions, attitudes and expectations spanning the nation. Overcentralization can produce a rigidity engendering hostility and causing diminution of respect for the national government.”<sup>252</sup> Criminal law specifically is uniquely suited for such community-based considerations. Indeed, many arguments offered in the interest of uniformity in the implementation of federal programs and initiatives speak more to an interest in top-down control over the *civil* rather than *criminal* division of the DOJ. Our system of criminal law has always been particularly concerned with “community-based considerations.”<sup>253</sup> Most criminal activity, particularly violent criminal activity, does not cross over state lines.<sup>254</sup> The respect for crime as a domain of local concern is reflected in federal courts’ doctrine on the subject. The Supreme Court often has strained to interpret federal statutes such that they do not target purely local conduct.<sup>255</sup>

The courts of appeals have voiced their approval of such tailoring of enforcement decisions to community norms. For example, they have allowed federal judges in sentencing to take into consideration “community-based and geographic factors.”<sup>256</sup> The Second Circuit sitting en banc has held that a federal judge can issue an upward deviation from the Sentencing Guidelines to reflect the need to more severely punish gun trafficking in New York City.<sup>257</sup> The First Circuit has agreed with that reasoning, holding that a judge in sentencing can take into account the prevalence of violent crime in the district.<sup>258</sup> “Community-based considerations are inextricably intertwined with deterrence,” the Court explained, “which aims to ‘prevent[ ] criminal behavior by the population at

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251. *Id.*

252. Vincent L. Broderick, *Local Factors in Sentencing*, 5 FED. SENT’G REP. 314, 314 (1993).

253. See RICHMAN, STITH & STUNZ, *supra* note 84, at 9-12.

254. See Barkow, *supra* note 102, at 522.

255. See, e.g., *McDonnell v. United States*, 136 S. Ct. 2355, 2373 (2016) (“[W]e decline to ‘construe the statute in a manner that leaves its outer boundaries ambiguous and involves the Federal Government in setting standards’ of ‘good government for local and state officials.’” (quoting *McNally v. United States*, 483 U.S. 350, 360 (1987))); *United States v. Enmons*, 410 U.S. 396, 410-11 (1973) (rejecting a “broad concept of extortion” that would lead to “an unprecedented incursion into the criminal jurisdiction of the States”).

256. *United States v. Flores-Machicote*, 706 F.3d 16, 22-23 (1st Cir. 2013).

257. *United States v. Cavera*, 550 F.3d 180, 196 (2d Cir. 2008) (en banc).

258. *Flores-Machicote*, 706 F.3d at 23.

large and, therefore, incorporates some consideration of persons beyond the defendant.”<sup>259</sup>

While jurists and scholars have long associated federalism with the values of experimentation and variation, they are only beginning to explore the wide degree of variance within federal implementation schemes.<sup>260</sup> Federal criminal enforcement evinces a remarkable degree of variation within a national enforcement regime. It therefore provides one example of the ways in which, as Abbe Gluck has written, “[t]he modern federal regulatory apparatus is increasingly attendant to questions of the state-federal allocation of responsibility, and also is dependent on state actors, in ways both practical and political.”<sup>261</sup>

In the context of federal criminal law, federalism and separation of powers serve to reinforce one another,<sup>262</sup> but the organization of federal criminal law adds another dimension to the analysis, as federal agents physically dispersed across the country remain subject to local influence. U.S. Attorneys often speak of the importance of forming “strong partnerships with . . . local law enforcement partners.”<sup>263</sup> The dispersed federal bureaucracy therefore turns locals into the law enforcement “partners” of federal officials, rather than relegating them to the role of “servant” that they often play in the federalism literature.<sup>264</sup> And a partner quite clearly has more voice than a servant.

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259. *Id.* (quoting *United States v. Politano*, 522 F.3d 69, 74 (1st Cir. 2008)).

260. See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”), *abrogated by* *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937). *But see* Gluck & Huberfeld, *supra* note 32 (challenging traditional conceptions of federalism); Owen, *supra* note 32 (discussing the federal government’s geographic decentralization in relation to traditional assumptions of federalism).

261. Abbe R. Gluck, *Our [National] Federalism*, 123 *YALE L.J.* 1996, 1997 (2014).

262. See Bulman-Pozen, *supra* note 200, at 461 (“Federalism safeguards the separation of powers.”); see also Heather K. Gerken, *The Supreme Court, 2009 Term – Foreword: Federalism All the Way Down*, 124 *HARV. L. REV.* 4, 34 (2010) (“[W]e continue to emphasize the hierarchical dimensions of federalism rather than imagining federal-state relations as we do the relations between the three branches—as a system that mixes conflict and cooperation to produce governance.”).

263. See, e.g., *U.S. Attorney for the District of Minnesota Greg Brooker Delivers Remarks at the Department of Justice’s Human Trafficking Summit*, U.S. DEP’T. JUST. (Feb. 2, 2018), <https://www.justice.gov/opa/speech/us-attorney-district-minnesota-greg-brooker-delivers-remarks-department-justice-s-human> [<https://perma.cc/L4DN-TVX7>].

264. See Gerken, *supra* note 28, at 2634; see also Abbe R. Gluck, *Intrastatutory Federalism and Statutory Interpretation: State Implementation of Federal Law in Health Reform and Beyond*, 121 *YALE L.J.* 534, 550 (2011) (“[M]ost of the existing federalism literature has considered federalism

### C. *The Perils of Decentralization*

It is possible, of course, that the federal government has an obligation to pursue the same law enforcement goals everywhere. The emphasis on prosecution of different crimes in different districts could threaten the principle of equal justice before the law and produce seemingly arbitrary enforcement patterns. It might seem categorically unfair for a person who committed a particular crime to be subject to a starkly different punishment than a similarly situated person in a different district. As Adam Cox and Cristina Rodríguez have written, “[i]f we think that low-level marijuana possession by a person with no other criminal record should not be punished, then we should hope that judgment applies to all cases, not to a random subset of violators.”<sup>265</sup>

Yet perhaps more important from the perspective of those seeking criminal-justice reform, the rare prior attempts at more fully centralizing criminal enforcement have been an unmitigated disaster, resulting in more draconian penalties for criminal defendants. Presidential attempts at centralization are often deeply politicized, tainting public perceptions of the entire apparatus.<sup>266</sup> Congressional forays into centralization have proven no better. The most prominent example is provided by the congressional creation of the Sentencing Commission to the Sentencing Guidelines. The Guidelines were politically and legally problematic from the beginning. The Supreme Court ultimately struck down the mandatory provisions, which had resulted in the creation of a remarkably severe set of penalties for criminal offenses.<sup>267</sup> This should not be taken to suggest that we cannot pursue means by which to oversee and regulate prosecutorial conduct, but rather that the above analysis points us in more viable and productive directions.

Indeed, even as this Note promotes the general structure of our federal administration of justice, we should not view this system through rose-colored glasses. There are undeniable costs to the status quo. Congress has not permitted complete executive centralization, but neither has it taken complete responsibil-

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from the perspective of the states.”); cf. JERRY L. MASHAW, BUREAUCRATIC JUSTICE: MANAGING SOCIAL SECURITY DISABILITY CLAIMS 146 (1983) (“Ideally, regional offices might be viewed as necessary communication links between federal and state cultures, translating the former into a vernacular that is useful and effective in the latter.”).

265. Cox & Rodríguez, *supra* note 24, at 204.

266. See *supra* notes 225-234 and accompanying text; see also Iglesias, *supra* note 139 (noting that it “seems clear that politics played a role in the ousters” of some U.S. Attorneys in 2007).

267. The Sentencing Reform Act of 1984, Pub. L. No. 98-473, §§ 211-39, 98 Stat. 1837, 1987-2040 (1984) (codified at 18 U.S.C. §§ 3661-3672 (2018)). See *United States v. Booker*, 543 U.S. 220, 258-59 (2005); see also Amy Baron-Evans & Kate Stith, *Booker Rules*, 160 U. PA. L. REV. 1631, 1632 (2012) (“The mandatory guidelines system *Booker* replaced was badly out of balance in ways never contemplated by the framers of the Sentencing Reform Act of 1984 . . .”).

ity for the criminal apparatus itself.<sup>268</sup> The decentralized nature of the criminal law regime necessarily leads to a lack of transparency within the justice system, granting individual prosecutors a level of power perhaps unparalleled across federal enforcement systems.

Problems inherent in the abundance of broad criminal statutes, enabling an enormous amount of prosecutorial discretion (when wielded by any member of the executive branch) and a resulting lack of transparency, have been well documented. Over ninety-seven percent of federal criminal convictions are achieved by a guilty plea.<sup>269</sup> Plea bargaining— which occurs in secret backrooms and over private telephone conversations rather than public courtrooms— “reduce[s] juries’ roles and . . . hide[s] cases from public scrutiny.”<sup>270</sup> Prosecution by guilty plea becomes a “low-visibility process about which the public has poor information and little right to participate.”<sup>271</sup> Prosecutors rarely justify their decisions to bring charges and almost never explain a decision *not* to enforce a law in a particular case. As former Assistant Attorney General Phillip Heymann once said in a public hearing, “we can’t talk very much about our declinations . . . [s]o the public is often not given any detailed information on the reason for a declination.”<sup>272</sup>

Proposals to date aimed at reining in prosecutorial discretion and increasing transparency, however, fail to acknowledge the dynamics at play. Arguments for legislation to abolish plea bargaining or to revise broadly written criminal statutes may be attractive in theory, but have little chance of success in practice.<sup>273</sup> And while *ex ante* regulation by distant and relatively inactive legislatures is either inadvisable or unobtainable, *ex post* supervision by judges has been cate-

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268. Richman, *Federal Criminal Law*, *supra* note 16, at 807-09.

269. See Hindelang Criminal Justice Research Ctr., *Sourcebook of Criminal Justice Statistics Online*, U. ALB. tbl.5.22.2010, <http://www.albany.edu/sourcebook/pdf/t5222010.pdf> [<https://perma.cc/CLL8-FD43>].

270. Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. REV. 911, 921 (2006).

271. Bibas, *supra* note 113, at 961.

272. See *Department of Justice Authorization and Oversight, 1981: Hearings Before the S. Comm. on the Judiciary*, 96th Cong. 1046 (1980) (statement of Philip B. Heymann, Assistant Att’y Gen. of the U.S.).

273. See Albert W. Alschuler, *The Prosecutor’s Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 52, 105-12 (1968) (arguing that plea bargaining should be abolished); Vorenberg, *supra* note 14, at 1560-61 (proposing that legislatures should revise the criminal code and peg sentencing discounts at ten or twenty percent).

gorically rejected by that branch. The judiciary has completely shielded discretionary decisions of prosecutors from legal review.<sup>274</sup>

Institutional design may provide a more promising avenue than legal regulation. As many political scientists have observed, it is far easier for Congress to pass institutional-design reforms than substantive policy changes because design reforms cut across interest groups and their effects on constituencies are harder to assess.<sup>275</sup> But most scholarship on institutional design focuses on administrative agencies, segregating them from criminal law enforcement.<sup>276</sup> The story of federal criminal law, however, reveals that members of Congress have consistently opted for institutional-design reforms over policy change in this area.

Given that members of Congress prefer delegation at the U.S. Attorney level, it is possible that centralization and transparency initiatives can best be achieved within each USAO. Reforms in this area would have the added benefit of tailoring local-federal enforcement priorities to the realities on the ground. Heightened authority for U.S. Attorneys to institutionalize their enforcement authority, via the congressionally mandated publication of office enforcement priorities, or the creation of a district-specific U.S. Attorneys' Manual, might supply an effective middle ground.

A more open chronicling of priorities and the choices made by each district would allow for clearer, more comprehensive, and more meaningful oversight. As newly appointed federal Judge Stephanos Bibas has documented, “[t]he public calls for raising sentences because it systematically underestimates average penalties; if it understood penalties better, it would think them high enough.”<sup>277</sup> But the public (or their representatives) cannot understand and influence enforcement priorities if the information is unavailable to them. Further, although there are good reasons to promote variation across USAOs, those benefits are extinguished within any individual office. A more public and internally enforceable set of policies would go a long way toward ensuring office-wide consistency.

The goal of transparency can also be served by promoting the interbranch rivalry documented above. It is precisely through clashes between Main Justice

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274. See *United States v. Batchelder*, 442 U.S. 114, 123-26 (1979) (holding that discretionary decisions of prosecutors in determining what charges to file when criminal acts violate more than one statute are not a subject of judicial review).

275. See Katyal, *supra* note 223, at 2323 (citing James M. Lindsay, *Congress, Foreign Policy, and the New Institutionalism*, 38 INT'L STUD. Q. 281, 282 (1994)).

276. See Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors*, 61 STAN. L. REV. 869, 887 (2010) (“Contrast the largely stealth accumulation of adjudicative and executive powers in the prosecutor’s office with the outward and obsessive concern about the consolidation of power in administrative agencies.”).

277. See Bibas, *supra* note 113, at 991.

and the USAOs – from the battle over marijuana enforcement and sentencing to the controversy over the U.S. Attorney firings – that important policy decisions in the criminal arena are brought to public attention. While this Note has argued in favor of maintaining our current equilibrium, it does not argue that either entity should remain inactive. In this way, transparency is further served by the process of ambition counteracting ambition both within and without the executive branch.

#### *D. Implications*

In recent years, the Madisonian vision of legislative/executive separation of powers has been labeled “clearly anachronistic”<sup>278</sup> and “bunk.”<sup>279</sup> Many have highlighted how Congress has abandoned responsibility in a variety of areas from immigration to foreign policy to administrative law.<sup>280</sup> Pildes and Levinson have made the most forceful and persuasive case that Congress has essentially ceased to play its role in the constitutional plan. They note that the Madisonian “vision of competitive branches balancing and checking one another has dominated constitutional thought,” but remains hopelessly outdated.<sup>281</sup> Most fatally, Madison “never provided a mechanism by which the interests of actual public officials would be channeled into maintaining the proper role for their respective branches.”<sup>282</sup>

This Note contradicts the pessimists and argues that all hope is not lost. Madison himself conceded that it was “not possible to give to each department an equal power of self-defense.”<sup>283</sup> In many domains, the Executive enjoys the practical power of the initiative and the constitutional power of ultimate control. Criminal law is one such area. But the above study reveals a more competitive interplay than previously acknowledged. Individual interests of members of Congress can diverge from party interests, motivating a desire for personal control that directly opposes presidential power. Some have commented that Presi-

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<sup>278</sup>. Levinson & Pildes, *supra* note 20, at 2313.

<sup>279</sup>. Katyal, *supra* note 223, at 2316.

<sup>280</sup>. See Bradley & Morrison, *supra* note 20, at 1098-99 (cataloguing the critiques); Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 HARV. L. REV. 915, 954 (2005) (“[C]ongressional abdication of legislative power to the executive is at least as much of a problem as congressional self-aggrandizement.”).

<sup>281</sup>. Levinson & Pildes, *supra* note 20, at 2317.

<sup>282</sup>. *Id.*

<sup>283</sup>. THE FEDERALIST NO. 51, *supra* note 19, at 322.

dents have to broker differences within their own party to pass legislation,<sup>284</sup> but there are also policy domains that are more or less susceptible to interbranch contests. By disaggregating the contexts that are more susceptible to interbranch rivalry, we can promote competition and adapt legal regimes to compensate for those areas that are decidedly not.

This argument suggests some limitations to the Levinson and Pildes theory as well as some possible mechanisms by which we might fill in the gaps Madison left for us. Levinson and Pildes themselves concede in passing that there is a possibility for branch affiliation where political interests do not track party affiliation, such as pork spending (e.g., highway bills).<sup>285</sup> The history of the DOJ reveals a sustained interbranch rivalry over a huge variety of salient criminal-enforcement issues rather than a discrete appropriations project. The struggle also indicates that the power granted to Congress to structure the executive branch provides a counterweight to complete presidential control. By structuring federal law enforcement such that the locus of authority remains largely within each USAO, Congress has thus far effectively stymied Main Justice efforts to exercise complete control over the apparatus.

Furthermore, Congress has confronted the Executive most forcefully when presidential priorities have conflicted with local initiatives. In other words, the answer to the puzzle posed by Madison in *Federalist 51* about how ambition can be made to “counteract ambition”<sup>286</sup> might be found in another of his papers: *The Federalist No. 10*. There, Madison outlined the value of another prized theory: federal decentralization.<sup>287</sup> Madison explained that a notable benefit of America’s geographic expanse was the inevitability of conflicting place-based factions.<sup>288</sup> Dispersing power geographically carried numerous benefits, among them that “local situation[s]” would produce geographical ideological variation.<sup>289</sup> With regard to federal criminal law, dispersion and decentralization have borne out that vision. Prosecutors scattered across the country vary enforcement policies based on the preferences and demands of their districts, and they provide a notable counterweight to D.C. dominance.

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284. See Richard A. Epstein, *Why Parties and Powers Both Matter: A Separationist Response to Levinson and Pildes*, 119 HARV. L. REV. F. 210, 213 (2006).

285. See Levinson & Pildes, *supra* note 20, at 2324.

286. THE FEDERALIST No. 51, *supra* note 19, at 322.

287. See David Fontana, *Federal Decentralization*, 104 VA. L. REV. 727, 737-38 (2018).

288. See THE FEDERALIST No. 10, *supra* note 19, at 83 (James Madison).

289. *Id.* at 81-83.

**CONCLUSION**

While scholars remain unable to let the prosecutorial power debate “rest in peace,”<sup>290</sup> they have reached a consensus that congressional power is stuck permanently six feet under. Yet Congress has promoted the decentralized structure of the Department of Justice against the wishes of the Executive since the Founding. Even in the face of more sustained centralization efforts in the modern era, the USAOs continue to operate with a remarkable amount of autonomy. Regardless of what one hopes for the future of federal criminal law, with a variety of enforcement agencies at the President’s and Congress’s disposal, we would do well to learn from the benefits and drawbacks of the structure of the contemporary DOJ.

This Note has argued that the dispersed nature of federal criminal law has several advantages. First, this structure places a practical check on presidential control, which facilitates the depoliticization of the apparatus. Second, it allows for variation within the national enforcement scheme, permitting stakeholders at the state and local levels to play a significant role as they influence their more proximate federal counterparts. At the same time, the Executive has its own role to play in maintaining the interbranch struggle. Not only are some areas of the enforcement process more amenable to centralization, but the process of interbranch conflict yields benefits in its own right, bringing controversial enforcement policies into public view. Rather than giving up on the rivalry between the branches, then, this Note hopes to promote a focus on the branches’ “relationships and interconnections, on maintaining the conditions in which the intended struggle at the apex may continue.”<sup>291</sup>

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290. Prakash, *supra* note 33, at 526.

291. Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 578 (1984).