



# Stanford Law Review

## INSTITUTIONAL DESIGN AND THE POLICING OF PROSECUTORS:

### LESSONS FROM ADMINISTRATIVE LAW

Rachel E. Barkow

# INSTITUTIONAL DESIGN AND THE POLICING OF PROSECUTORS: LESSONS FROM ADMINISTRATIVE LAW

Rachel E. Barkow\*

*Federal prosecutors wield enormous power. They have the authority to make charging decisions, enter cooperation agreements, accept pleas, and often dictate sentences or sentencing ranges. There are currently no effective legal checks in place to police the manner in which prosecutors exercise their discretion. As a result, in the current era dominated by pleas instead of trials, federal prosecutors are not merely law enforcers. They are the final adjudicators in the 95% of cases that are not tried before a federal judge or jury. In a government whose hallmark is supposed to be the separation of powers, federal prosecutors are a glaring and dangerous exception. They have the authority to take away liberty, yet they are often the final judges in their own cases. One need not be an expert in separation-of-powers theory to know that combining these powers in a single actor can lead to gross abuses. Indeed, the combination of law enforcement and adjudicative power in a single prosecutor is the most significant design flaw in the federal criminal system. Although scholars have made persuasive cases for greater external controls on prosecutors, these calls for reform are unrealistic in the current political climate. The solution must be sought elsewhere.*

*This Article looks within the prosecutor's office itself to identify a viable corrective on prosecutorial overreaching. In particular, by heeding lessons of institutional design from administrative law, this Article considers how federal prosecutors' offices could be designed to curb abuses of power through separation-of-functions requirements and greater attention to supervision. The problems posed by federal prosecutors' combination of adjudicative and enforcement functions are the very same issues raised by the administrative state—and the solutions fit equally well in both settings. In both instances, individuals who make investigative and advocacy decisions should be separated*

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\* Professor of Law, New York University School of Law. I thank the numerous federal prosecutors who agreed to speak to me about the policies in their offices. For helpful comments on this project, I thank Tony Barkow, Stephanos Bibas, Mariano-Florentino Cuéllar, Ron Goldstock, Jamal Greene, Michael Herz, Máximo Langer, Arden Rowell, Stephen Schulhofer, David Sklansky, Ron Wright, and the participants at the N.Y.U. Hoffinger Colloquium, the University of Chicago Law and Politics Workshop, and the Harvard Law School Faculty Workshop. I am grateful to Noam Haberman, David Carey, Nicholas Almendares, Julia Sheketoff, Kevin Medrano, and Derek Kershaw for research assistance.

*from those who make adjudicative decisions, the latter of which should be defined to include some of the most important prosecutorial decisions today, including charging, the acceptance of pleas, and the decision whether or not to file substantial assistance motions. Using this model from administrative law would not only be effective, it would also be more politically viable than the leading alternative proposals for curbing prosecutorial discretion.*

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## INTRODUCTION

It is hard to overstate the power of federal prosecutors. The number of federal criminal laws has exploded in recent decades,<sup>1</sup> and the punishments attached to those laws have increased markedly.<sup>2</sup> There are now approximately 200,000 federal prisoners,<sup>3</sup> making the federal prison system the largest in the country, eclipsing each and every state.<sup>4</sup>

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1. Of all federal criminal laws enacted since the Civil War, over 40% were created since 1970. TASK FORCE ON THE FEDERALIZATION OF CRIMINAL LAW, AM. BAR ASS'N, THE FEDERALIZATION OF CRIMINAL LAW 5-7 (1998).

2. Frank O. Bowman, III, *Beyond Band-Aids: A Proposal for Reconfiguring Federal Sentencing After Booker*, 2005 U. CHI. LEGAL F. 149, 165 ("Despite the modest retreat in mean sentence length . . . the mean sentence of imprisonment in 2002 remained more than double what it had been in 1984."); Doris Marie Provine, *Too Many Black Men: The Sentencing Judge's Dilemma*, 23 LAW & SOC. INQUIRY 823, 833 (1998) ("Average sentence length for federal crimes grew from 24 months in July 1984 to 46 months in June 1990.").

3. Press Release, Office of Justice Programs, Dep't of Justice, Largest Increase in Prison and Jail Inmate Populations Since Midyear 2000 (June 27, 2007), available at <http://www.ojp.usdoj.gov/newsroom/pressreleases/2007/BJS07033.htm> (noting there were 191,080 prisoners at midyear 2006).

4. WILLIAM J. SABOL ET AL., BUREAU OF JUSTICE STATISTICS, PRISON & JAIL INMATES AT MIDYEAR 2006, at 14 tbl.2 (2007), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/pjim06.pdf> (listing prisoners under the jurisdiction of state and federal correctional authorities as of June 30, 2006).

Federal prosecutors control the terms of confinement in this vast penal system because they have the authority to make charging decisions, enter cooperation agreements, accept pleas, and recommend sentences. In the current era dominated by pleas instead of trials, federal prosecutors are not merely law enforcers. They are the final adjudicators in the vast majority of cases.<sup>5</sup> It is only in the rare 5% of federal cases that go to trial that an independent actor reviews prosecutorial decisions.<sup>6</sup> In the 95% of cases that are not tried before a federal judge or jury, there are currently no effective legal checks in place to police the manner in which prosecutors exercise their discretion to bring charges, to negotiate pleas, or to set their office policies.<sup>7</sup> In a national government whose hallmark is supposed to be the separation of powers, federal prosecutors are a glaring and dangerous exception.<sup>8</sup> They have the authority to take away liberty, yet they are often the final judges in their own cases.<sup>9</sup>

One need not be an expert in separation-of-powers theory to know that combining these powers in a single actor can lead to gross abuses. Indeed, the combination of law enforcement and adjudicative power in a single prosecutor is the most significant design flaw in the federal criminal system. Standard judicial and legislative oversight has failed to correct this power grab by

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5. Máximo Langer, *Rethinking Plea Bargaining: The Practice and Reform of Prosecutorial Adjudication in American Criminal Procedure*, 33 AM. J. CRIM. L. 223, 248 (2006) (arguing that, when prosecutors use coercive plea proposals, they are the “sole de facto adjudicator of the criminal case”); Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117, 2149 (1998) (“[P]rosecutors, in their discretionary charging and plea bargaining decisions, are acting largely as administrative, quasi-judicial decision-makers.”); H. Richard Uviller, *The Neutral Prosecutor: The Obligation of Dispassion in a Passionate Pursuit*, 68 FORDHAM L. REV. 1695, 1699 (2000) (“[W]e would do well to pay greater attention to the problems of prosecutor as adjudicator.”).

6. Michael E. Horowitz & April Oliver, *Foreword: The State of Federal Prosecution*, 43 AM. CRIM. L. REV. 1033, 1034 (2006); Bureau of Justice Statistics, Federal Justice Statistics, Summary Findings, <http://ojp.usdoj.gov/bjs/fed.htm> (last modified Sept. 30, 2008).

7. See Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 1024-28 (2006) (explaining the lack of oversight on prosecutorial decision making).

8. See *id.* at 1049 (“A system where upwards of ninety-five percent of all convictions result from pleas and where prosecutors make all the key judgments does not fit comfortably with the separation of powers.”).

9. Given the broad wording of many federal criminal laws, one could argue that prosecutors possess legislative power as well.

Congress *won't* make law with sufficient specificity to resolve important issues of policy, and judges *can't* (or at least perceive that they can't) remedy this inattention with lawmaking of their own. This lawmaking gap is eventually filled by individual U.S. Attorneys who *do* effectively make law by adapting vaguely worded statutes to advance their own political interests.

Dan M. Kahan, *Reallocating Interpretive Criminal-Lawmaking Power Within the Executive Branch*, 61 LAW & CONTEMP. PROBS. 47, 49 (1998); see also Dan M. Kahan, *Is Chevron Relevant to Federal Criminal Law?*, 110 HARV. L. REV. 469, 486-87 (1996) (describing “the prosecutor’s contribution to delegated criminal law-making”).

prosecutors. Despite the arguments of scholars for greater judicial supervision,<sup>10</sup> federal judges continue to rubber stamp cooperation, charging, and plea decisions.<sup>11</sup> Similarly, although commentators have called on Congress to rein in prosecutorial discretion with federal criminal code reform<sup>12</sup> and the repeal of mandatory minimum sentences,<sup>13</sup> members of Congress lack

10. See *infra* notes 191-204 and accompanying text.

11. *United States v. Armstrong*, 517 U.S. 456, 464 (1996) (Court will operate under presumption that prosecutors have “properly discharged their official duties”) (internal quotation, citation omitted); *Wade v. United States*, 504 U.S. 181, 185-87 (1992) (holding that a prosecutor’s discretion over substantial assistance motions is similar to that over other decisions, and is only reviewable in very limited circumstances such as racial or religious bias); *Heckler v. Chaney*, 470 U.S. 821, 832 (1985) (referring to the prosecutor’s decision not to indict as “the special province of the Executive Branch”); *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978) (“In our system, so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.”).

12. See, e.g., Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. REV. 911, 962 (2006) (noting that “[c]riminal code reform could also make the definitions of crimes more transparent and so facilitate voters’ and legislators’ oversight of charging”); Julie R. O’Sullivan, *The Federal Criminal “Code” Is a Disgrace: Obstruction Statutes as a Case Study*, 96 J. CRIM. L. & CRIMINOLOGY 643 (2006) (noting that code reform could “if properly done, be the most effective in appropriately cabining prosecutorial discretion”).

13. Opponents of mandatory minimum sentences include leading criminal-justice organizations such as the Sentencing Commission, the Judicial Conference, and the American Bar Association. See, e.g., *Mandatory Minimum Sentencing Laws—The Issues: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 110th Cong. 46 (2007) (statement of Paul Cassell, Chair, Criminal Law Committee of the Judicial Conference); U.S. SENTENCING COMM’N, SPECIAL REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM (1991), available at [http://www.ussc.gov/r\\_congress/MANMIN.PDF](http://www.ussc.gov/r_congress/MANMIN.PDF); Letter from Karen J. Mathis, President, Am. Bar Ass’n, to Bobby Scott, Chair, H. Subcomm. on Crime, Terrorism and Homeland Security & Randy Forbes, Ranking Member, H. Subcomm. on Crime, Terrorism, and Homeland Security (July 3, 2007), available at [http://www.abanet.org/poladv/letters/crimlaw/2007jul03\\_minimumsenth\\_1.pdf](http://www.abanet.org/poladv/letters/crimlaw/2007jul03_minimumsenth_1.pdf).

Judges of all political stripes have also condemned mandatory minimum sentences. Chief Justice Rehnquist observed that “one of the best arguments against any more mandatory minimums, and perhaps against some of those that we already have, is that they frustrate the careful calibration of sentences.” *Drug Mandatory Minimums: Are They Working?: Hearing Before the Subcomm. on Criminal Justice, Drug Policy and Human Resources of the H. Comm. on Gov’t Reform*, 106th Cong. 50 (2000) (statement of John R. Steer, Member and Vice-Chair of the U.S. Sentencing Comm’n) (internal quotation marks omitted) (quoting William Rehnquist, Remarks at the Nat’l Symposium on Drugs and Violence in Am. 10 (June 18, 1993)). Justice Kennedy has stated that he “can accept neither the necessity nor the wisdom of federal mandatory minimum sentences.” Justice Anthony Kennedy, Address to the American Bar Association (Aug. 9, 2003), available at <http://www.supremecourtus.gov/publicinfo/speeches/sp-08-09-03.html>. Justice Breyer, the architect of the Sentencing Guidelines, has noted that “[m]andatory minimum statutes are fundamentally inconsistent with Congress’ simultaneous effort to create a fair, honest, and rational sentencing system through the use of Sentencing Guidelines.” *Harris v. United States*, 536 U.S. 545, 570 (2002) (Breyer, J., concurring in part and concurring in the

the incentives to enact these reforms as long as they reap political rewards for looking tough on crime.<sup>14</sup> Although scholars have made persuasive cases for these reforms, they are simply unrealistic in the current political climate. The solution must be sought elsewhere.

This Article looks within the prosecutor's office itself to identify a viable corrective on prosecutorial overreaching. In particular, by heeding lessons of institutional design from administrative law, this Article considers how federal prosecutors' offices could be designed to curb abuses of power through separation-of-functions requirements and greater attention to supervision.<sup>15</sup>

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judgment).

Even some politicians—including conservatives—have come out against mandatory minimums. Senator Orrin Hatch has expressed doubts that mandatory minimum sentences can be reconciled with the philosophy of the sentencing guidelines. Orrin G. Hatch, *The Role of Congress in Sentencing: The United States Sentencing Commission, Mandatory Minimum Sentences, and the Search for a Certain and Effective Sentencing System*, 28 WAKE FOREST L. REV. 185, 194-95 (1993).

14. For a detailed explanation of how political and interest-group dynamics create these incentives for politicians, see Rachel E. Barkow, *Administering Crime*, 52 UCLA L. REV. 715 (2005). Politicians view being tough on crime as a badge of honor that wins points with voters. *See, e.g.*, 153 CONG. REC. S6499-02, S6517 (2007) (Sen. Jeff Bingaman, D-NM, quoting and endorsing a statement by Chief Justice Rehnquist that “mandatory minimums are frequently the result of floor amendments to demonstrate emphatically that legislators want to ‘get tough on crime.’”); 151 CONG. REC. H3120-01, H3131 (2005) (Rep. Phil Gingrey, R-GA, in debate regarding the Gang Deterrence and Community Protection Act of 2005, arguing for a mandatory minimum bill and stating that “[m]andatory minimum sentencing . . . works to deter crime. Getting tough on crime requires tough and uniform enforcement.”); 145 CONG. REC. S5507-06, S5516 (1999) (Sen. Chuck Schumer, D-NY, stating that “I have been tough on crime—for mandatory minimum sentences, and for incarceration—my whole career.”); 140 CONG. REC. S13563-01, S13564 (1994) (Sen. Chuck Grassley, R-IA, arguing that “we . . . need to be tough by restoring tough Senate crime provisions . . . . We should include mandatory minimum sentences for those who sell illegal drugs to minors or who use minors in drug trafficking activities.”).

15. This Article focuses on the federal system and not on state prosecutors for several reasons. First, the federal system is important in its own right because of its size. The federal prison population is now larger than that of any state. And, as the national system, other jurisdictions often look to it for guidance. Second, any reform is more administrable in the federal system because of the relative uniformity of office structure and the offices' shared political oversight by the Department of Justice and Congress. As Stephanos Bibas has noted, “There is more centralized bureaucracy and oversight at the federal than the state level, which helps to keep far-flung federal offices in line.” Stephanos Bibas, *Regulating Local Variations in Federal Sentencing*, 58 STAN. L. REV. 137, 143 (2005). It also facilitates the implementation of the kind of structural reform advocated here. Third, the Administrative Procedure Act governs all federal agencies, so it also applies broadly and allows for a ready comparison with prosecutors' offices. The more than 2300 state prosecutor offices are far more varied than federal offices, and the politics of each office and each state are also distinct. STEVEN W. PERRY, BUREAU OF JUSTICE STATISTICS, PROSECUTORS IN STATE COURTS, 2005, at 1-3 (2006), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/psc05.pdf>. Some may lack enough full-time attorneys to separate functions. Others may resist any reform that adds even a minor layer of review because the office is already strained for time and money. State administrative law also varies. Thus, the translation of these ideas to state offices would require more contextual

The problems posed by federal prosecutors' combination of adjudicative and enforcement functions are the very same issues raised by the administrative state—and the solutions fit equally well in both settings. In both instances, individuals who make investigative and advocacy decisions should be separated from those who make adjudicative decisions, the latter of which should be defined to include some of the most important prosecutorial decisions today, including charging, the acceptance of pleas, and the decision whether or not to file substantial assistance motions. Using this model from administrative law is not only sensible, it is more politically viable than the leading alternative proposals for curbing prosecutorial discretion.

Part I begins by describing the combined law enforcement and adjudicative powers of federal prosecutors, thereby laying the groundwork for why an institutional check on prosecutorial power is needed. Part II explains that the dangers posed by the combination of law enforcement and adjudicative power are hardly new to the federal system; rather, as Part II describes, the very same risks are posed by traditional administrative agencies. A central mission of administrative law is to design checks on agency overreaching in light of these combined powers. Part III then explores how the traditional regulatory agency model of internal separation could be effectively and feasibly applied to the prosecutor's office. Part IV considers the administrative and political viability of using institutional design to check prosecutors and explains the advantages of using functional separation within the office over other means of checking prosecutorial power that have been the subject of scholarly attention.

## I. THE PROSECUTOR AS LEVIATHAN

Numerous scholars have chronicled and critiqued the expansion of federal criminal law.<sup>16</sup> Federal criminal laws govern a huge sweep of conduct,<sup>17</sup> and

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analysis.

16. See, e.g., Sara Sun Beale, *Too Many and Yet Too Few: New Principles to Define the Proper Limits for Federal Criminal Jurisdiction*, 46 HASTINGS L.J. 979, 979-90 (1995) (arguing against expansion of federal criminal law, based on capacity of federal courts and the proper balance of federal and state responsibility); Kathleen F. Brickey, *Criminal Mischief: The Federalization of American Criminal Law*, 46 HASTINGS L.J. 1135, 1136 (1995) (arguing against federalization of crime, based in part on Chief Justice Rehnquist's warning of the potentially overwhelming effect on federal courts); Sam J. Ervin, III, *The Federalization of State Crimes: Some Observations and Reflections*, 98 W. VA. L. REV. 761, 761-65 (1996) (providing an overview of the debate and endorsing limiting scope of certain federal criminal laws); Sanford H. Kadish, Comment, *The Folly of Overfederalization*, 46 HASTINGS L.J. 1247, 1247-50 (1995) (describing federalizing of criminal law as "subvert[ing] the values of a federal system"); Thomas M. Mengler, *The Sad Refrain of Tough on Crime: Some Thoughts on Saving the Federal Judiciary from the Federalization of State Crime*, 43 U. KAN. L. REV. 503, 516 (1995) (articulating the benefits of reserving criminal prosecution for state and local governments, specifically that they "are better able to focus on the unique impact that a problem may have on a relatively discrete geographical or socioeconomic region," that they "can frequently better provide opportunities for the expression of different social and cultural values," and that they may "try novel social and

the punishments are often severe.<sup>18</sup> In theory, federal prosecutors stand as the gatekeepers to ensure that these laws are properly applied and are used judiciously. That is, prosecutors working in United States Attorneys' Offices should ensure that no matter how broadly a criminal statute is worded, it is not applied except in those instances where a defendant is actually blameworthy. These prosecutors should also make sure that a law is not applied to a given case if the punishment dictated by the law would be excessive.<sup>19</sup> Federal prosecutors have an additional responsibility to ensure that federal involvement is the proper course and that a matter should not be pursued by state prosecutors instead.<sup>20</sup>

Unfortunately, as Subpart A explains, there is currently little to no oversight of federal prosecutors to ensure that these considerations are taken seriously. Subpart B takes up the question of why supervisory mechanisms have not been put in place.

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economic experiments without risk to the rest of the country'" (quoting *New York State Ice Co. v. Liebman*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)).

17. See, e.g., Gerard E. Lynch, *RICO: The Crime of Being a Criminal, Parts I & II*, 87 COLUM. L. REV. 661, 663 (1987) (describing the Racketeer-Influenced and Corrupt Organizations Act as a "weapon that could be used against virtually any kind of criminal behavior"); Daniel C. Richman & William J. Stuntz, *Al Capone's Revenge: An Essay on the Political Economy of Pretextual Prosecution*, 105 COLUM. L. REV. 583, 628-30 (2005) (noting the breadth of federal laws criminalizing fraud, false statements, extortion, and money laundering).

18. For example, the average prison sentence for drug trafficking in 2005 after the Supreme Court's decision in *Booker* was 81.7 months. U.S. SENTENCING COMM'N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, § 3 tbl.13 (2006), available at [http://www.ussc.gov/ANNRPT/2005/table13\\_post.pdf](http://www.ussc.gov/ANNRPT/2005/table13_post.pdf). The average length of imprisonment for RICO was 86.2 months in 2005. Andrew Weissman & Joshua A. Block, *White-Collar Defendants and White-Collar Crimes*, 116 YALE L.J. POCKET PART 286, 287 n.7 (2007), [http://thepocketpart.org/2007/02/21/weissmann\\_block.html](http://thepocketpart.org/2007/02/21/weissmann_block.html). A first-time offender possessing five or more grams of crack cocaine faces a mandatory minimum of five years in prison. 21 U.S.C. § 844(a) (2006).

19. The U.S. Attorney's Manual notes that prosecutors can select[] charges or enter[] into plea agreements on the basis of an individualized assessment of the extent to which particular charges fit the specific circumstances of the case, are consistent with the purposes of the Federal criminal code, and maximize the impact of Federal resources on crime. Thus, for example, in determining "the most serious offense that is consistent with the nature of the defendant's conduct that is likely to result in a sustainable conviction," it is appropriate that the attorney for the government consider, inter alia, such factors as the Sentencing Guideline range yielded by the charge, whether the penalty yielded by such sentencing range (or potential mandatory minimum charge, if applicable) is proportional to the seriousness of the defendant's conduct, and whether the charge achieves such purposes of the criminal law as punishment, protection of the public, specific and general deterrence, and rehabilitation.

U.S. ATTORNEY'S MANUAL, PRINCIPLES OF FEDERAL PROSECUTION § 9-27.300 (1997) available at [http://www.usdoj.gov/usao/eousa/foia\\_reading\\_room/usam/title9/27mcrn.htm#9-27.300](http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/27mcrn.htm#9-27.300); see also ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION AND DEFENSE FUNCTION § 3-3.9(b) (3d ed. 1993).

20. U.S. ATTORNEY'S MANUAL, *supra* note 19, § 9-27.230.



### A. *The Danger*

Federal prosecutors are the prototypical executive official.<sup>21</sup> There are ninety-three United States Attorneys, who are appointed by the President with confirmation by the Senate,<sup>22</sup> and they work with Assistant United States Attorneys, who are hired without Senate confirmation.<sup>23</sup> Each of these prosecutors is charged with investigating and enforcing federal criminal laws. Because there is discretion about whether and which charges to bring in a given case,<sup>24</sup> this law enforcement function carries enormous power over individuals' lives.<sup>25</sup>

If prosecutors exercised only this executive power, their authority would be broad, but, from a constitutional and governance perspective, unremarkable. Today, however, federal prosecutors' power goes beyond law enforcement. At the federal level, just as in the states, most criminal cases are resolved without ever going to trial.<sup>26</sup> Plea bargaining—whether over charges or sentences—is the norm.<sup>27</sup> This means that a prosecutor's decision about what charges to

21. *Morrison v. Olson*, 487 U.S. 654, 706 (1989) (Scalia, J., dissenting).

22. 28 U.S.C. § 541(a) (2006).

23. *Id.* § 542(a).

24. *See* *Wayte v. United States*, 470 U.S. 598, 607 (1985) (recognizing the prosecutors' power to decide what charges to bring).

25. Angela J. Davis, *The American Prosecutor: Independence, Power, and the Threat of Tyranny*, 86 IOWA L. REV. 393, 408 (2001) ("The charging decision is arguably the most important prosecutorial power and the strongest example of the influence and reach of prosecutorial discretion."); James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1523-37 (1981) [hereinafter Vorenberg, *Decent Restraint*] (describing prosecutorial discretion and its scope); James Vorenberg, *Narrowing the Discretion of Criminal Justice Officials*, 1976 DUKE L.J. 651, 678 (arguing that the charging decision is the "broadest discretionary power in criminal administration"). As Justice Jackson observed more than half a century ago—before plea bargaining was as prevalent as it is now, which has increased prosecutorial power still further—the prosecutor has "more control over life, liberty, and reputation than any other person in America." Robert H. Jackson, *The Federal Prosecutor*, 24 J. AM. JUDICATURE SOC'Y 18, 18 (1940).

26. *See supra* note 6 and accompanying text. "The proportion of guilty pleas has been moving steadily upward for over thirty years, and has seen a dramatic increase of over eleven percentage points" in the ten-year period from 1991 to 2001, when the rate of guilty pleas went from 85.4% to 96.6%. Ronald Wright & Marc Miller, *Honesty and Opacity in Charge Bargains*, 55 STAN. L. REV. 1409, 1415 (2003).

27. Although the Department of Justice attempts to control plea bargaining by prohibiting fact bargaining and insisting that line assistants "charge and pursue the most serious, readily provable offense or offenses that are supported by the facts of the case," Memorandum from Attorney General John Ashcroft on Department Policy Concerning Charging Criminal Offenses, Disposition of Charges, and Sentencing to All Federal Prosecutors (Sept. 22, 2003), available at <http://www.usdoj.gov/opa/pr/2003/September/03ag516.htm>, in reality, federal prosecutors engage in such bargaining. *See, e.g.,* *United States v. Kandirakis*, 441 F. Supp. 2d 282, 284-85 (D. Mass. 2006) (stating that those who deny the "sweeping . . . plea bargaining culture today" are sophists); Bowman, *supra* note 2, at 193 (indicating that there are reasons to believe "the Justice Department cannot meaningfully restrain local United States Attorney's Offices from adopting locally

bring and what plea to accept amounts to a final adjudication in most criminal cases. Because numerous federal laws govern similar behavior and are written broadly,<sup>28</sup> prosecutors often have a choice of charges, which often, in turn, means a choice of sentence as well.<sup>29</sup> With the prevalence of mandatory minimum laws, a prosecutor's decision to bring or not bring charges can dictate whether a defendant receives a mandatory five-, ten-, or twenty-year term, or whether he or she is sentenced far below that floor.<sup>30</sup> The United States Sentencing Guidelines, like mandatory minimums, have also increased prosecutorial leverage by curbing judicial sentencing discretion. They have prompted more pleas and fewer trials.<sup>31</sup> Although recent Supreme Court decisions have revamped federal sentencing law to relax the effect of the United States Sentencing Guidelines,<sup>32</sup> in the vast majority of cases judges continue to sentence according to the Guidelines or depart only with a

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convenient plea bargaining practices"); Stephen J. Schulhofer & Ilene H. Nagel, *Plea Negotiations Under the Federal Sentencing Guidelines: Guideline Circumvention and Its Dynamics in the Post-Mistretta Period*, 91 NW. U. L. REV. 1284, 1311-12 (1997) (finding circumvention of the Guidelines through bargaining).

28. Daniel Richman, *Prosecutors and Their Agents, Agents and Their Prosecutors*, 103 COLUM. L. REV. 749, 795 (2003) (noting that "the federal criminal 'code' may well be even broader than that of the states in the range of conduct it ostensibly covers").

29. Darryl K. Brown, *Democracy and Decriminalization*, 86 TEX. L. REV. 223, 269 (2007) (noting that the danger of selective prosecution and racial disparity is greatest at the federal level); Robert L. Misner, *Recasting Prosecutorial Discretion*, 86 J. CRIM. L. & CRIMINOLOGY 717, 742 (1996) ("[C]urrent criminal codes contain so many overlapping provisions that the choice of how to characterize conduct as criminal has passed to the prosecutor."); Richman & Stuntz, *supra* note 17, at 629-30 (describing how the broad nature 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"). This is a long-time feature of criminal law. As Justice Jackson noted in his classic speech on the power of federal prosecutors, "With the law books filled with a great assortment of crimes, a prosecutor stands a fair chance of finding at least a technical violation of some act on the part of almost anyone." Robert Jackson, *The Federal Prosecutor*, Address Delivered at the Second Annual Conference of United States Attorneys (Apr. 1, 1940), *reprinted as* Jackson, *supra* note 25.

30. For a review of empirical scholarship showing that prosecutors gain sentencing power after mandatory minimum sentencing laws are passed by choosing to charge or not charge conduct under such laws, see David Bjerk, *Making the Crime Fit the Penalty: The Role of Prosecutorial Discretion Under Mandatory Minimum Sentencing*, 48 J.L. & ECON. 591, 593-95 (2005).

31. Kate Stith, *The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion*, 117 YALE L.J. 1420, 1444, 1453-54 (2008).

32. Until the Supreme Court's decision in *United States v. Booker*, 543 U.S. 220 (2005), the Sentencing Guidelines were mandatory on all federal judges. In *Booker*, the Court concluded that the mandatory Guidelines regime was inconsistent with the Sixth Amendment jury guarantee. The Court therefore excised those portions of the Sentencing Reform Act that made the Guidelines mandatory and henceforth treated the Guidelines as advisory. A district court's determination whether or not to follow the Guidelines is now reviewed for reasonableness. See *Gall v. United States*, 128 S. Ct. 586 (2007); *Kimbrough v. United States*, 128 S. Ct. 558 (2007); *Rita v. United States*, 551 U.S. 338 (2007).

government motion,<sup>33</sup> the chief basis for a departure being that a defendant has provided substantial assistance to the government.<sup>34</sup> A claim of substantial assistance is also the only way for most defendants to avoid a mandatory minimum statutory term,<sup>35</sup> and that also requires a motion from the prosecutor.<sup>36</sup> In most cases, then, the prosecutor becomes the adjudicator—making the relevant factual findings, applying the law to the facts, and selecting the sentence or at least the sentencing range.<sup>37</sup>

If a defendant could costlessly take his or her case to trial, the prosecutor's role in charging and accepting pleas would be less remarkable. After all, if a defendant could exercise his or her jury trial rights without penalty, then all the charging and bargaining would take place in the shadow of that trial regime, and presumably the prosecutor's freedom would be bounded by the expected outcome at trial. Put another way, the prosecutor could not demand more than what the defendant would expect to receive at trial, so the real adjudicative power would remain with a court and with a jury.

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33. U.S. SENTENCING COMM'N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl.N (2007), available at <http://www.ussc.gov/ANNRPT/2007/TableN.pdf> (citing statistics from fiscal year 2007 that federal judges sentence within the Guideline range 60.8% of the time and that in an additional 25.6% of the cases, the departure is because of a government-sponsored motion). Thus, in over 85% of all cases, the defendant receives a Guideline sentence or a departure because of a government motion.

34. See *id.* fig.G, available at <http://www.ussc.gov/ANNRPT/2007/figg.pdf> (noting that the number one basis for departure is substantial assistance, both before and after the Supreme Court's decision in *Booker*).

35. There is a limited safety valve available only to offenders who are the least culpable participants in drug trafficking offenses and who do not have more than one criminal history point, which basically means either no criminal history or at most a conviction for a petty misdemeanor with a sentence of less than sixty days. 18 U.S.C. § 3553(f) (2006). Because this covers such a narrow class of defendants, all others must rely upon 18 U.S.C. § 3553(e) (2006), which allows but does not require a judge to depart from a statutory minimum sentence on the motion of the government that the defendant provided substantial assistance.

36. See, e.g., *United States v. Crawford*, 407 F.3d 1174, 1182 (11th Cir. 2005) (holding that, even after *Booker*, a district judge could not depart downward from the advisory guidelines range on the basis of substantial assistance in the absence of a government motion); *United States v. Robinson*, 404 F.3d 850, 862 (4th Cir. 2005) (noting that "*Booker* did nothing to alter the rule that judges cannot depart below a statutorily provided minimum sentence" in the absence of a motion from the government that the defendant provided substantial assistance). There is significant variation among the United States Attorneys' Offices in terms of how they define substantial assistance and the size of their recommended departures. Jeffery T. Ulmer, *The Localized Uses of Federal Sentencing Guidelines in Four U.S. District Courts: Evidence of Processual Order*, 28 SYMBOLIC INTERACTION 255, 263, 264 & tbl.1, 273 (2005) (finding variation in the four districts under study).

37. William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 509 (2001) ("As criminal law expands, both lawmaking and adjudication pass into the hands of police and prosecutors; law enforcers, not the law, determine who goes to prison and for how long.").

But going to trial is far from costless for defendants. As an initial matter, defendants face stiffer sentences—often significantly stiffer sentences—if they opt to go to trial instead of pleading guilty. In *Bordenkircher v. Hayes*,<sup>38</sup> the Supreme Court held that the Constitution does not prohibit prosecutors from threatening defendants with more serious charges if they exercise their trial rights. In that case, for example, the Court upheld a prosecutor’s decision to offer to recommend a five-year sentence to the judge if the defendant pleaded guilty but to bring charges subjecting the defendant to a mandatory life sentence if the defendant opted for trial.<sup>39</sup> Although this kind of threat would otherwise seem to impose an unconstitutional condition on the exercise of a defendant’s jury trial rights,<sup>40</sup> the Court accepted this coercive power because it believed that plea bargaining was an entrenched practice that was necessary to keep the courts from being overwhelmed with criminal cases.<sup>41</sup> The practical effect of the Court’s decision was to give prosecutors the ability to exact a heavy price on defendants who opt to take a case to trial in order to get them to plead guilty to the charge the prosecutor believes is the appropriate one. After *Bordenkircher*, “[p]rosecutors have a strong incentive to threaten charges that are excessive, even by the prosecutors’ own lights.”<sup>42</sup> And prosecutors have taken advantage of the opportunity.<sup>43</sup>

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38. 434 U.S. 357 (1978).

39. *Id.* at 358.

40. See Loftus E. Becker, Jr., *Plea Bargaining and the Supreme Court*, 21 LOY. L.A. L. REV. 757, 776-94, 829-32 (1988) (explaining that plea bargaining is in tension with the Court’s treatment of compelled confessions and the imposition of conditions on other constitutional rights); Jason Mazzone, *The Waiver Paradox*, 97 NW. U. L. REV. 801, 804-45 (2003) (arguing that the Court’s approach to unconstitutional conditions in criminal cases is inconsistent with its treatment of unconstitutional conditions in other contexts).

41. See *Santobello v. New York*, 404 U.S. 257, 260 (1971) (“If every criminal charge were subjected to a full-scale trial, the States and the Federal Government would need to multiply by many times the number of judges and court facilities.”). As a result, the Court stated that plea bargaining was to be “encouraged.” *Id.*

42. William J. Stuntz, *Bordenkircher v. Hayes: The Rise of Plea Bargaining and the Decline of the Rule of Law* 26 (Harvard Law Sch., Public Law Working Paper No. 120, 2005), available at <http://ssrn.com/abstract=854284>; see also Yue Ma, *Prosecutorial Discretion and Plea Bargaining in the United States, France, Germany, and Italy: A Comparative Perspective*, 12 INT’L CRIM. JUST. REV. 22, 26 (2002) (“[P]rosecutors may deliberately file charges that are not supported by probable cause as a bargaining strategy.”). This was true even before *Bordenkircher*. Al Alschuler, for example, found evidence of prosecutorial overcharging in the late 1960s. Albert W. Alschuler, *The Prosecutor’s Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 85-105 (1968).

43. Davis, *supra* note 25, at 413 (noting that “prosecutors frequently charge more and greater offenses than they can prove beyond a reasonable doubt” because “[t]his tactic offers the prosecutor more leverage during plea negotiations”). Máximo Langer points out that it is precisely when prosecutors employ these coercive plea proposals that they take on unilateral adjudicative power in a case. Langer, *supra* note 5, at 246 (explaining that a proposal is coercive “if it includes charges in which the evidence is weak, includes unfair trial sentences, or overcharges” and that prosecutors are adjudicators in cases only when they employ these coercive practices). When prosecutors do not engage in these coercive practices, then the

Congress, in turn, now legislates with precisely this framework of prosecutorial power over pleas in mind. Representatives from the Department of Justice and the various United States Attorneys' Offices often argue before Congress that legislation with inflated or mandatory punishments should be passed or retained because those laws give prosecutors the leverage they need to exact pleas and to obtain cooperation from defendants.<sup>44</sup> Congress continues to pass mandatory minimum sentencing laws even though there is uniform agreement by experts—including the United States Sentencing Commission—that these laws are unwise and lead to greater disparity in practice because of the power they vest in prosecutors.<sup>45</sup> Members of Congress support these laws because they do not want to be viewed as soft on crime or resistant to prosecution demands.

Congress therefore routinely passes laws with punishments greater than the facts of the offense would demand to allow prosecutors to use the excessive punishments as bargaining chips and to obtain what prosecutors and Congress would view as the more appropriate sentence via a plea instead of a trial.<sup>46</sup> Pleas and cooperation with the government are the preferred norm, not the exception. For example, although the criminal code has a range of mandatory minimum offenses, it also has a provision that allows prosecutors—and prosecutors alone—to exempt defendants from those mandatory punishments if the prosecutor concludes that the defendant has offered the government substantial assistance.<sup>47</sup> No one expects the maximum punishment established by statute to be imposed in the ordinary case, and even mandatory minimums can be altered by prosecutors through bargaining. As a leading casebook on criminal law has observed, “[c]riminal statutes now commonly permit (or purport to require) draconian punishments that no one expects to be imposed in

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bargain is, in Langer's words, a “bilateral adjudication” between prosecutors and defense lawyers. *Id.* at 247. When the bargain takes place without undue prosecutorial coercion, one can have greater confidence that the trial acts as a sufficient adjudicative check, though for reasons described below, it is possible that defense lawyers' interests are not perfectly aligned with their clients. *See infra* notes 53-58 and accompanying text. Moreover, as Langer points out, these bilateral agreements are far from the general rule; unilateral prosecutorial adjudication is not an exception but a “common phenomenon.” Langer, *supra* note 5, at 246.

44. *See* Barkow, *supra* note 14, at 728 & n.25 (citing examples of prosecutors' requests before Congress to have tougher sentencing laws so that those laws could be used to provide an incentive for defendants to cooperate). Stephen Schulhofer and Ilene Nagel found that charge bargaining occurs more frequently in the federal system when prosecutors have the option of charging a defendant under a statute with a mandatory minimum. Schulhofer & Nagel, *supra* note 27, at 1285, 1293.

45. *See supra* note 13 and accompanying text.

46. *See* Stuntz, *supra* note 42, at 32-33 (describing legislative incentives after *Bordenkircher* and using Congress's enactment of legislation creating the large sentencing disparity between crack and powder cocaine as an example of Congress passing a law with an excessive sentence on the view that most of these cases would not go to trial).

47. 18 U.S.C. § 3553(e) (2006).

the typical case” such that “[I]nienicy’ has therefore become not merely common but a systemic imperative.”<sup>48</sup>

The result of the Court’s rulings and Congress’s response is that prosecutors can exact such a high price on defendants who pursue their trial rights that the trial right becomes too costly to exercise. At the federal level, defendants who refuse to waive their right to a jury trial receive an average sentence three times longer than those who plead.<sup>49</sup> Although this might reflect, in part, substantive differences between the cases that go to trial and those that plead out, even conservative estimates of the acceptance of responsibility discount at the federal level show a roughly 35% sentence reduction for that factor alone.<sup>50</sup> As Ronald Wright has shown, districts where prosecutors make the greatest use of acceptance of responsibility and substantial assistance discounts have more guilty pleas and fewer acquittals than districts that do not use these mechanisms as frequently.<sup>51</sup> Thus, as he concludes, prosecutors use their leverage to “convince[] defendants to plead guilty and to opt out of trials that might have ended in acquittals.”<sup>52</sup> When prosecutors have this kind of leverage, considerable adjudicative power inevitably transfers from judges and juries to the prosecutors.

An additional factor further erodes the ability of defendants to take cases to trial. Defendants and their lawyers often have divergent interests when it comes to bargaining with prosecutors. The vast majority of federal criminal cases involve indigent defendants.<sup>53</sup> These defendants are often appointed counsel who are paid either “a flat fee per case, or a low hourly rate coupled with a ceiling on total compensation payable.”<sup>54</sup> Because the court-appointed lawyers are typically paid below-market rates for their services,<sup>55</sup> any time spent on an

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48. SANFORD H. KADISH ET AL., *CRIMINAL LAW AND ITS PROCESSES* 1006 (8th ed. 2007).

49. Jackie Gardina, *Compromising Liberty: A Structural Critique of the Sentencing Guidelines*, 38 U. MICH. J.L. REFORM 345, 347-48 (2005) (noting that defendants who waive the right to trial by jury “can be assured, on average, a sentence that is 300 percent lower than similarly situated defendants who exercise their Sixth Amendment right to trial by jury”).

50. Stephanos Bibas & Richard A. Bierschbach, *Integrating Remorse and Apology into Criminal Procedure*, 114 YALE L.J. 85, 93 n.19 (2004).

51. Ronald F. Wright, *Trial Distortion and the End of Innocence in Federal Criminal Justice*, 154 U. PA. L. REV. 79, 138-39 (2005).

52. *Id.*

53. Seventy-five percent of criminal defendants in federal cases are indigent. Tracey L. Meares, *Rewards for Good Behavior: Influencing Prosecutorial Discretion and Conduct with Financial Incentives*, 64 FORDHAM L. REV. 851, 879 (1995).

54. Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 YALE L.J. 1979, 1989 (1992); Richard Klein & Robert Spangenberg, *The Indigent Defense Crisis*, 1993 A.B.A. SEC. CRIM. JUST. 3-9.

55. Bruce Moyer, *FBA Urges Congress To Increase CJA Panel Attorney Rates*, FED. LAW., May 2007, at 10 (noting that court-appointed lawyers under the Criminal Justice Act receive a rate of \$92 per hour for noncapital cases, which “typically fail[s] to provide even enough to offset overhead costs” and has led the federal judiciary’s Judicial Conference to

indigent's defendant's case is less financially rewarding than time spent on the cases of paying clients. For lawyers with other client options, then, the faster the case involving the indigent client proceeds, the better off these lawyers are, so trials are not in their economic interest and there is a greater incentive to plead. For lawyers that rely on Criminal Justice Act (CJA) wages because they have few or no other clients, they may have more of an incentive to prolong cases to increase their fees, but they usually face a cap on overall wages that would not cover the full cost of a trial.<sup>56</sup> Some indigent defendants have public defenders as their counsel, and although the incentives between the lawyers and clients match more closely in that situation, even there they are not perfectly aligned. Public defender offices are woefully underfunded and understaffed,<sup>57</sup> so there is a limit on how many cases they can credibly threaten to take to trial. Finally, even when a defendant can afford to retain counsel, in most cases the lawyer is paid a flat fee in advance.<sup>58</sup> These lawyers therefore have an incentive to resolve the case as quickly as possible to maximize the financial return on their time, which may lead them to pursue a plea.

As a result of these pressures and costs of exercising trial rights, the trial is an insufficient check on prosecutorial power. With his or her power to choose from a range of federal criminal laws, to exercise significant leverage over defendants to obtain pleas and cooperation, and to control the sentence or

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request an increase from Congress).

56. See David Lynch, *The Impropriety of Plea Agreements: A Tale of Two Counties*, 19 LAW & SOC. INQUIRY 115, 123 (1994) (noting that "the attorney pushing for trials received no financial or professional rewards of any kind" and arguing that "the opposite was true" because "[d]efense attorneys all knew that if they brought too many cases to trial, they would be seen as either unreasonable and worthy of professional ostracism or as a fool who was too weak to achieve 'client control'").

The group of lawyers who might prefer the additional hourly earnings of a trial, even if capped and at below-market rates, often have that preference because they are not marketable to clients outside the CJA list because of their inexperience or relative lack of qualifications. A recent study found that defendants represented by CJA lawyers were more likely to be found guilty and received longer sentences than defendants represented by public defenders. See Radha Iyengar, *An Analysis of the Performance of Federal Indigent Defense Counsel* 28 (Nat'l Bureau of Econ. Research, Working Paper No. 13187, 2007), available at <http://www.nber.org/papers/w13187.pdf> (finding that federal public defenders obtain better results—measured by both conviction rates and sentence lengths—for their clients than private attorneys who are compensated on an hourly basis).

57. ABA STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, *GIDEON'S BROKEN PROMISE: AMERICA'S CONTINUING QUEST FOR EQUAL JUSTICE* 7-10 (2004), available at <http://www.abanet.org/legalser-vices/sclaid/defender/brokenpromise/fullreport.pdf>; Eve Brensike Primus, *Structural Reform in Criminal Defense: Relocating Ineffective Assistance of Counsel Claims*, 92 CORNELL L. REV. 679, 687-88 (2007) (noting that public defenders in some jurisdictions are responsible for well over one thousand cases per year). Indeed, many state public defenders' offices are refusing to take on new cases because of resource constraints. See Erik Eckholm, *Citing Workload, Public Lawyers Reject New Cases*, N.Y. TIMES, Nov. 9, 2008, at A1; see also Editorial, *Hard Times and the Right to Counsel*, N.Y. TIMES, Nov. 21, 2008, at A34.

58. Schulhofer, *supra* note 54, at 1988.

sentencing range through charging decisions, the prosecutor combines enforcement and adjudicative power.

This combination of power in one actor is troubling because it puts prosecutors in a position to judge their own cause—the classic threat to the rule of law. John Locke put it best: when people act as judges in their own case, they tend to be “partial to themselves and their friends” and to allow “ill-nature, passion and revenge [to] carry them too far in punishing others.”<sup>59</sup>

Prosecutors who investigate a case are poorly positioned to make a final assessment of guilt because they cannot view the facts impartially. After investing time and effort in pursuing a particular defendant, the prosecutor cannot view the facts as a neutral party. Indeed, to admit that the defendant is not culpable is to admit that all of the prosecutor’s efforts were wasteful. A prosecutor who will be the advocate for the government’s position at trial is similarly in a poor position to make adjudicative decisions about the defendant because those decisions will be colored by the prosecutor’s self-interest. Prosecutors may feel the need to be able to point to a record of convictions and long sentences if they want to be promoted or to land high-powered jobs outside the government,<sup>60</sup> and that will affect their assessment of a defendant’s case. If the prosecution wants to avoid what will be a difficult or long trial but keep up his or her conviction rate, he or she has an incentive to threaten defendants with inflated charges if they exercise their trial rights to extract a plea.

The consolidation of adjudicative and enforcement power in a single prosecutor is also troubling because it creates an opportunity for that actor’s prejudices and biases to dictate outcomes.<sup>61</sup> It is hard to ignore the racially skewed composition of the federal prison population. Nearly 40% of the federal prison population is black and almost a third is Hispanic.<sup>62</sup> One in every nine black males between the ages of 20 and 34 is incarcerated.<sup>63</sup> While a variety of

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59. JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT* 12 (C.B. Macpherson ed., Hackett Publ’g Co. 1980) (1690).

60. See W.H. HUMBERT, *THE PARDONING POWER OF THE PRESIDENT* 140 (1941) (noting that U.S. Attorneys “are often fired with a zeal to make a record by numerous convictions in order to secure further promotion” and observing that “[t]heir ardor may bring about a great number of convictions, some of which were unwarranted”).

61. *United States v. Armstrong*, 517 U.S. 456, 476 (1996) (Stevens, J., dissenting) (“[T]he possibility that political or racial animosity may infect a decision to institute criminal proceedings cannot be ignored.”); see also Richard H. McAdams, *Race and Selective Prosecution: Discovering the Pitfalls of Armstrong*, 73 CHI.-KENT L. REV. 605 (1998); Vorenberg, *Decent Restraint*, *supra* note 25, at 1555 (noting that standardless prosecutorial discretion raises the prospect that it will be exercised most harshly against “the least favored members of the community—racial and ethnic minorities, social outcasts, the poor”).

62. As of October 25, 2008, of the 201,758 people incarcerated in federal prisons, 79,755 individuals (39.5% of the total) were black and 64,081 (31.8%) were Hispanic. Federal Bureau of Prisons, *Quick Facts About the Bureau of Prisons*, <http://www.bop.gov/news/quick.jsp#1> (last visited Nov. 11, 2008).

63. THE PEW CENTER ON THE STATES, *ONE IN 100: BEHIND BARS IN AMERICA* 2008, at



factors likely have contributed to the disproportionate percentage of black men in federal prison, it is certainly possible that unchecked prosecutorial discretion over enforcement and adjudication could be a contributing cause. Indeed, researchers have found that, even after controlling for legally relevant factors, race and gender affect charging and sentencing decisions.<sup>64</sup> Consolidating all the important decisions in a criminal case with one actor who faces no outside check creates the risk that improper factors will enter the decision-making calculus without being exposed.

### B. *The Path to Unchecked Power*

Federal prosecutors have not always possessed such sweeping powers. As an initial matter, federal criminal law itself was a limited category for much of the nation's history. Federal criminal law barely existed prior to 1896. Indeed, there was no federal penitentiary before that date.<sup>65</sup> In the early years of federal criminal law, it was therefore reasonable to expect most cases to go to trial because that would not tax the system.<sup>66</sup> For many years, then, the criminal trial served as the vehicle for overseeing prosecutorial power, with independent life-tenured judges presiding and jurors drawn from the community rendering verdicts.

Over time, however, federal criminal law expanded. After the Civil War, Congress passed criminal laws prohibiting mail fraud and other crimes involving interstate commerce.<sup>67</sup> A much bigger increase in federal criminal jurisdiction occurred with the passage of the Eighteenth Amendment and Prohibition.<sup>68</sup> In 1929, the director of the Bureau of Prisons highlighted the "great increase in Federal crime" and "a transference of many offenses from the states to the Federal government."<sup>69</sup> The New Deal era saw another crop of newly enacted federal criminal laws, including the provision of criminal punishment for regulatory violations.<sup>70</sup> The largest boom in federal criminal

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34 (2008), available at <http://www.pewcenteronthestates.org/uploadedFiles/One%20in%20100.pdf>.

64. Ulmer, *supra* note 36, at 272 (finding "consistent and meaningful gender effects on imprisonment and length" and finding in one district that "Hispanics have more than twice the imprisonment odds of whites . . . and receive sentences that are nearly six months longer as well"); see also Meares, *supra* note 53, at 888-89 (noting empirical studies finding that the race of the defendant and victim affect charging decisions).

65. HUMBERT, *supra* note 60, at 111.

66. Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 55 STAN. L. REV. 29, 40 (2002) ("In early America, plea bargains were virtually unknown.").

67. Sara Sun Beale, *Federalizing Crime: Assessing the Impact on the Federal Courts*, 543 ANNALS AM. ACAD. POL. & SOC. SCI. 39, 41 (1996).

68. *Id.*

69. HUMBERT, *supra* note 60, at 113 (quoting SANFORD BATES, *Report of the Superintendent of Prisons*, in REPORT OF THE SUPERINTENDENT OF PRISONS, REPORT OF THE ATTORNEY GENERAL 79 (1929)).

70. Beale, *supra* note 67, at 41-42.

law is the most recent. Since the 1970s, federal criminal law has exploded. “More than 40% of the federal criminal provisions enacted since the Civil War have been enacted since 1970,” and “more than a quarter of the federal criminal provisions enacted since the Civil War have been enacted within a sixteen year period since 1980.”<sup>71</sup>

As federal criminal laws increased, so did the number of cases.<sup>72</sup> This put pressure on federal resources and led to cases being disposed of by pleas instead of trials.<sup>73</sup> Prohibition provides an obvious example. As Dan Richman has observed, it forced U.S. Attorneys “to scale up their operations” and “compromise[] cases at fire-sale prices.”<sup>74</sup>

As trials yielded to pleas in the face of resource pressures, some experts called attention to the power that vested in prosecutors. The Prohibition-era, post-World War I expansion, for instance, prompted some commentators to point out the changing role of prosecutors.<sup>75</sup> Thus in 1931, a report by the National Commission on Law Observance and Enforcement observed that “[i]n every way [the prosecutor] has much more power over the administration of criminal justice than judges, with much less public appreciation of his power. We have been . . . careless of the continual growth of the power in the prosecuting attorney.”<sup>76</sup> Thurman Arnold similarly argued that “[t]he idea that a prosecuting attorney should be permitted to use his discretion concerning the laws which he will enforce and those which he will disregard appears to the ordinary citizen to border on anarchy.”<sup>77</sup> The Wickersham Commission, created by the federal government to study criminal justice in the United States, likewise criticized the lack of meaningful checks on prosecutorial power and discretion.<sup>78</sup>

Despite these calls for reform, nothing was done to check this power either in Congress or on the Supreme Court. On the contrary, subsequent years

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71. TASK FORCE ON FEDERALIZATION OF CRIMINAL LAW, *supra* note 1, at 7 & n.9 (emphasis omitted in first quotation).

72. See Barkow, *supra* note 7, at 1018-19 (describing the increase in federal cases with each expansion of federal criminal jurisdiction).

73. Wright & Miller, *supra* note 66, at 40 (describing caseload pressures as the “primary engine behind the shift from trials to plea bargaining”).

74. Daniel Richman, *Federal Sentencing in 2007: The Supreme Court Holds—The Center Doesn’t*, 117 YALE L.J. 1374, 1398 (2008).

75. Misner, *supra* note 29, at 730.

76. NAT’L COMM’N ON LAW OBSERVANCE & ENFORCEMENT, REPORT ON PROSECUTION 11 (1931) [hereinafter REPORT ON PROSECUTION]; see also *id.* at 15-16 (observing that there were insufficient checks on the discretion of prosecutors, creating a situation that was “ideally adapted to misgovernment”).

77. Thurman W. Arnold, *Law Enforcement—An Attempt at Social Dissection*, 42 YALE L.J. 1, 7 (1932).

78. REPORT ON PROSECUTION, *supra* note 76, at 15. Most academic commentators, though, did not turn their attention to plea bargaining until the late 1960s. Wright & Miller, *supra* note 66, at 36 n.14.

“witnessed a dramatic expansion of the power and prestige of prosecutors”<sup>79</sup> without any corresponding checks. Congress, as noted, expanded prosecutorial discretion by passing additional criminal laws and enacting mandatory minimum penalties and the Sentencing Guidelines.<sup>80</sup>

Perhaps more surprising, though, was the Supreme Court’s reaction to the changing role of the prosecutor. As plea bargaining began to take over the federal criminal justice system, the Supreme Court all but ignored abuses associated with plea bargaining and focused instead on ensuring protections in trials. While the Warren and Burger Courts recognized expansive Fourth and Fifth Amendment rights,<sup>81</sup> they failed to establish protections for defendants who pleaded instead of taking a case to trial. *Santobello*<sup>82</sup> explicitly endorsed plea bargaining as a matter of administrative convenience.<sup>83</sup> Indeed, the Court believed plea bargaining should be “encouraged” as “an essential component of the administration of justice.”<sup>84</sup> That “encouragement” included the Court in *Bordenkircher* giving permission to prosecutors to threaten punishments orders of magnitude longer if a defendant exercised his or her trial rights.<sup>85</sup> Later, in *Armstrong*, the Court emboldened prosecutors still further by making claims of selective or discriminatory prosecution almost impossible to bring.<sup>86</sup>

The Supreme Court’s criminal procedure revolution, then, fell far short when it came to addressing the criminal justice system that had emerged by the 1960s and 1970s. The Court chose not to oversee coercive plea-bargaining tactics that made the defendant’s decision to exercise his or her trial right so

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79. Ma, *supra* note 42, at 23.

80. For a discussion of how the Sentencing Guidelines increased prosecutorial power, see Rachel E. Barkow, *Recharging the Jury: The Criminal Jury’s Constitutional Role in an Era of Mandatory Sentencing*, 152 U. PA. L. REV. 33, 96-100 (2003); see also Ronald F. Wright, *Sentencing Commissions as Provocateurs of Prosecutorial Self-Regulation*, 105 COLUM. L. REV. 1010, 1011-12 & n.5 (2005) (explaining that sentencing law is one mechanism that has increased the discretion of prosecutors and citing sources).

81. See, e.g., *Miranda v. Arizona*, 384 U.S. 436 (1966) (mandating that police officers warn suspects in custody of their right to an attorney and their right to remain silent); *Mapp v. Ohio*, 367 U.S. 643 (1961) (holding that evidence obtained in violation of the Fourth Amendment must be excluded in state criminal proceedings).

82. *Santobello v. New York*, 404 U.S. 257 (1971).

83. Barkow, *supra* note 7, at 1045.

84. *Santobello*, 404 U.S. at 260.

85. *Bordenkircher v. Hayes*, 434 U.S. 357, 363-65 (1978).

86. *United States v. Armstrong*, 517 U.S. 456, 463-64 (1996) (preventing discovery on discrimination claims unless a defendant can show that the government failed to prosecute similarly situated defendants and noting that there is a “‘background presumption’ that the showing necessary to obtain discovery should itself be a significant barrier to the litigation of insubstantial claims” (citation omitted)). The Court also ruled that prosecutors need not disclose exculpatory impeachment material under *Brady v. Maryland*, 373 U.S. 83, 87 (1963), prior to entering a plea agreement with a defendant. *United States v. Ruiz*, 536 U.S. 622, 625 (2002).

costly that adjudication effectively moved from the federal courthouse to the office of the U.S. Attorney.<sup>87</sup>

As a result, federal prosecutors now do not merely enforce the law, they make key adjudicative decisions as well. As Judge Gerard Lynch has observed, “[t]he substantive evaluation of the evidence and assessment of the defendant’s responsibility is not made in court at all, but within the executive branch, in the office of the prosecutor.”<sup>88</sup> Indeed, Ronald Wright and Marc Miller have pointed out that “[w]e now have not only an administrative criminal justice system, but one so dominant that trials take place in the shadow of guilty pleas.”<sup>89</sup>

## II. THE ADMINISTRATIVE LAW MODEL

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. Because the problem of combined powers was obvious from the birth of modern administrative agencies, administrative law devotes significant attention to the dangers of combining prosecutorial and adjudicative power. Although administrative law scholars tend to be preoccupied with judicial review as the governing check on agency behavior,<sup>90</sup> administrative agencies actually face a complex of additional checks on their behavior including institutional checks from within. As Jerry Mashaw has persuasively demonstrated, “the internal law of administration”—including structural separation and supervision within an agency—is a critically important means of checking agencies and holding bureaucrats accountable.<sup>91</sup>

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87. Vorenberg, *Decent Restraint*, *supra* note 25, at 1523 (stating that “the existence of trials cannot check prosecutorial powers not dependent on trial” including “the prosecutor’s wide discretion in making decisions about charging, plea bargaining, and allocating investigative resources”).

88. Lynch, *supra* note 5, at 2123; *see also* Gerard E. Lynch, *Screening Versus Plea Bargaining: Exactly What Are We Trading Off?*, 55 STAN. L. REV. 1399, 1403-04 (2003) (“Most plea negotiations, in fact, are primarily discussions of the merits of the case, in which defense attorneys point out legal, evidentiary, or practical weaknesses in the prosecutor’s case, or mitigating circumstances that merit mercy [presented] to a prosecutor, who assesses their factual accuracy and likely persuasiveness to a hypothetical judge or jury, and then decides the charge of which the defendant should be adjudged guilty.”).

89. Wright & Miller, *supra* note 26, at 1415.

90. Jerry L. Mashaw, *Recovering American Administrative Law: Federalist Foundations: 1787-1801*, 115 YALE L.J. 1256, 1258 (2006) (noting that “[t]he conventional conception of administrative law in the United States has long suffered from” the “misconception[] . . . that administrative law is the law of judicial review of administrative action”).

91. Jerry L. Mashaw, *Reluctant Nationalists: Federal Administration and Administrative Law in the Republican Era, 1801-1829*, 116 YALE L.J. 1636, 1737-40 (2007).

This Part describes how structural checks prevent biased decision making from the accumulation of adjudicative and prosecutorial powers in a single individual. It begins by discussing the separation-of-functions requirement in the Administrative Procedure Act (APA). Although this requirement does not apply to all agency actions, it is predominant in agency actions imposing penalties, with many agencies adopting separation even when the APA has not required it.<sup>92</sup> Moreover, in those pockets of decision making where separation does not exist, an alternative scheme aims to prevent bias.

### A. Internal Separation

One of the most important checks on combined prosecutorial and adjudicative power comes from the institutional design of the agency itself. The APA prohibits, in all cases of formal adjudication, “[a]n employee or agent engaged in the performance of investigative or prosecuting functions for an agency” from “participat[ing] or advis[ing] in the decisions, recommended decision, or agency review . . . except as witness or counsel in public proceedings.”<sup>93</sup> In other words, the APA sets up a bar between prosecutors and adjudicators. As Rebecca Brown has observed, this separation “compensate[s] for departures from the structural constitutional norms” that agencies present by otherwise combining executive and adjudicative power under one roof.<sup>94</sup>

This provision grew out of a decade-long debate between those, like the American Bar Association, who advocated for a separate entity of independent judges to preside over agency adjudications, and committed New Deal advocates who wanted investigation and adjudication to take place within the same agency to allow investigators to advise adjudicators so that the agency could set policies efficiently and with access to all the expertise within the agency.<sup>95</sup> But even the strongest New Deal supporters of agency flexibility conceded that an independent decision maker was critical in cases involving the accusation and penalizing of wrongdoers. They simply disagreed that such enforcement proceedings would make up a large measure of agency work.<sup>96</sup>

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92. See *infra* notes 118-24 and accompanying text.

93. 5 U.S.C. § 554(d) (2006).

94. Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513, 1557 (1991).

95. William F. Pedersen, Jr., *The Decline of Separation of Functions in Regulatory Agencies*, 64 VA. L. REV. 991, 998 (1978); Harvey J. Shulman, *Separation of Functions in Formal Licensing Adjudications*, 56 NOTRE DAME L. REV. 351, 355-56 (1981); see also Benjamin W. Mintz, *Administrative Separation of Functions: OSHA and the NLRB*, 47 CATH. U. L. REV. 877, 912 (1998) (noting that “agency efficiency depends in no small measure on the existence of a single policy-making authority, within the agency, and on the availability of the expertise and experience of the entire agency, to agency decision makers”).

96. Pedersen, *supra* note 95, at 998.

The Attorney General's Committee on Administrative Procedure, which was charged in 1939 with investigating existing agency procedures and suggesting reforms,<sup>97</sup> came up with a compromise position. The Committee was "in full agreement with the position that the same person should not be prosecutor and judge."<sup>98</sup> Although a minority of the Committee would have addressed that problem by having separate agencies for investigation and adjudication, a majority of the Committee agreed to combine functions within a single agency but proposed the internal-division-of-labor model that ultimately won adoption in the APA.

The Committee gave two reasons why separation was needed. First, "investigators, if allowed to participate, would be likely to interpolate facts and information discovered by them ex parte and not adduced at the hearing, where the testimony is sworn and subject to cross-examination and rebuttal."<sup>99</sup> Second, "[a] man who has buried himself on one side of an issue is disabled from bringing to [his] decision that dispassionate judgment which Anglo-American tradition demands of officials who decide questions."<sup>100</sup> The Committee believed that internal separation of functions addressed both of these dangers and there would be "substantially complete protection against the danger that impartiality of decision will be impaired by the personal precommitments of the investigator and the advocate."<sup>101</sup>

That compromise position won wide support. It was easy to find common ground in this debate because both sides conceded that impartial decision makers were needed "[w]hen connotations of legal wrongdoing are present."<sup>102</sup> The drafters and supporters of this provision shared the concern that those individuals involved in investigating and prosecuting a case would have a "will to win" that would make them inappropriately partial in making a decision on the merits of a case.<sup>103</sup> As one participant in the House hearings put it, "This

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97. Shulman, *supra* note 95, at 355 n.14.

98. *Federal Administrative Procedure: Hearing on H.R. 184, H.R. 339, H.R. 1117, H.R. 1203, H.R. 1206, and H.R. 2602 Before the H. Comm. on the Judiciary*, 79th Cong. 25 (1945) [hereinafter *House Hearings*] (quoting report of Attorney General's Committee on Administrative Procedure).

99. U.S. DEP'T OF JUSTICE, FINAL REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE 56 (1941).

100. *Id.*

101. ATTORNEY GEN.'S COMM. ON ADMIN. PROCEDURE, ADMINISTRATIVE PROCEDURE IN GOVERNMENT AGENCIES, S. DOC. NO. 77-8, at 57 (1st Sess. 1941).

102. Pedersen, *supra* note 95, at 999.

103. *Grolier, Inc. v. FTC*, 615 F.2d 1215, 1220 (9th Cir. 1980) (observing that Congress's desire to "preclud[e] from adjudicative functions those who have developed a 'will to win' is evident in the legislative history of the APA" and citing the Senate Judiciary Committee's concern with the "'man who has buried himself in one side of an issue'" (quoting STAFF OF S. COMM. ON THE JUDICIARY, 79TH CONG., REPORT (Comm. Print 1945), reprinted in 79TH CONG., ADMINISTRATIVE PROCEDURE ACT: LEGISLATIVE HISTORY, 1944-46, at 24 (1946))); see also Michael Asimow, *When the Curtain Falls: Separation of Functions in the Federal Administrative Agencies*, 81 COLUM. L. REV. 759, 772 (1981) (noting that the

provision about the separation of functions simply restates the law which the courts have been following for 1,000 years.”<sup>104</sup> The drafters believed “that those people who ascertain the facts ought to make the reports and ought to make reports that are matters of record and those reports ought not to be made at the suggestion, directly or indirectly, to any degree of those who finally have to sit in judgment to determine what ought to be done under the report.”<sup>105</sup>

The importance of a neutral decision maker, so central to the courts and notions of due process,<sup>106</sup> was therefore thought to be equally important in the context of agencies.<sup>107</sup> The APA set out to devise a structural separation within the agency that would protect against bias while at the same time maintaining the efficiency and expertise advantages of having the agency engaged in adjudication instead of involving a court. The resulting separation-of-functions language in § 554 was the compromise designed to “achieve impartiality without incurring the costs of complete separation.”<sup>108</sup>

The drafters of the APA expected this provision to cover those instances where an agency sought to impose a penalty or withdraw benefits because an individual violated a statute or regulation.<sup>109</sup> The concern was that those individuals at the agency conducting the investigation and bringing the prosecution would have a tendency to “develop the zeal of advocates” and lack “the proper state of mind for providing neutral and dispassionate advice to decisionmakers.”<sup>110</sup> The concern was heightened in accusatory proceedings where “there is a greater feeling of right and wrong, of a desire to punish a particular person and of doing justice.”<sup>111</sup>

The APA therefore aimed to cast a wide net in terms of which individuals were covered by the separation requirement, and courts have interpreted § 554(d) accordingly. For example, the Ninth Circuit has noted that

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“primary purpose” of the separation of functions was “to exclude staff members whose will to win makes them unsuitable to participate in decisionmaking”).

104. *House Hearings*, *supra* note 98, at 55-56.

105. *Id.* at 57.

106. The Constitution recognizes the importance of this as well in its treatment of impeachment proceedings. The power to prosecute is placed in the House, U.S. CONST. art. I, § 2, cl. 5, whereas the Senate is vested with the sole power to try impeachments, *id.* art. I, § 3, cl. 6.

107. See Daniel J. Gifford, *The Morgan Cases: A Retrospective View*, 30 ADMIN. L. REV. 237, 249-56, 270-76 (1978); see also *Wong Yang Sung v. McGrath*, 339 U.S. 33, 52 (1950).

108. Asimow, *supra* note 103, at 761; see also Pedersen, *supra* note 95, at 997 (describing separation of functions as a compromise that “seeks to restrict the influence of those whose quasi-prosecutorial stance may have biased their impressions of the case without simultaneously constraining the decisionmakers’ ability to tap the knowledge and expertise of others within the agency in analyzing what may be a complex and technical record”).

109. Shulman, *supra* note 95, at 364-65.

110. *Id.* at 358.

111. *Id.* at 397.

Congress intended to preclude from decisionmaking in a particular case not only individuals with the title of “investigator” or “prosecutor,” but all persons who had, in that or a factually related case, been involved with *ex parte* information, or who had developed, by prior involvement with the case, a “will to win.”<sup>112</sup>

Courts have held that this includes supervisors,<sup>113</sup> as well as individuals who initiate investigations and recommend filing charges; all of these individuals are engaged in investigation and prosecution for purposes of the statute.<sup>114</sup> The Third Circuit concluded that an adjudicator could not sit in judgment of a case where he had previously read investigative reports and recommended prosecution.<sup>115</sup> Agency heads are the only employees exempted from the isolation requirement,<sup>116</sup> and this is to allow agency heads to ensure unified agency policy making.<sup>117</sup>

Although § 554 governs formal adjudications and not informal ones, most agencies follow this framework of separation whenever they seek to impose punishment for violation of agency rules.<sup>118</sup> For example, the Nuclear Regulatory Commission separates functions in enforcement actions, as did the Civil Aeronautics Board in its accusatory, enforcement, or discipline cases.<sup>119</sup> The Federal Trade Commission prohibits communication between investigators and prosecutors and decision makers once a complaint issues.<sup>120</sup> The Food and Drug Administration likewise separates functions when it seeks to revoke clinical investigators’ rights to perform studies.<sup>121</sup> The Attorney General’s

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112. *Grolier, Inc. v. FTC*, 615 F.2d 1215, 1220 (9th Cir. 1980).

113. *Columbia Research Corp. v. Schaffer*, 256 F.2d 677 (2d Cir. 1958); *Oil Shale Corp. v. Morton*, 370 F. Supp. 108 (D. Colo. 1973).

114. *Amos Treat & Co. v. SEC*, 306 F.2d 260, 266 (D.C. Cir. 1962).

115. *Twigger v. Schultz*, 484 F.2d 856, 861 (3d Cir. 1973).

116. 5 U.S.C. § 554(d)(2)(C) (2006).

117. *Mintz*, *supra* note 95, at 913 (“The APA structural model gives primary emphasis to the need for unified agency policy making by assigning to the highest agency official authority to make the policy decisions involved in both prosecution and adjudication, and by limiting the separation of functions requirements to individuals in the agency staff.”). Although the Court has allowed agency heads to exercise both investigative and adjudicative functions, it recognized even in that context that “the combination of investigative and adjudicative functions necessarily create[d] unconstitutional risk of bias.” *Withrow v. Larkin*, 421 U.S. 35, 47 (1975).

118. *See Asimow*, *supra* note 103, at 804-20; *Pedersen*, *supra* note 95, at 1003 (“[I]n the years since passage of the APA, agencies gradually have adopted rules to bar those who take part in the hearing from playing any role in the preparation of the resulting decision, even when the APA would permit their involvement.”); *Shulman*, *supra* note 95, at 364-65 (noting that the “typical adjudication envisioned by the drafters of the APA separation of functions scheme involved an agency’s accusing a party of violating a statute or regulation . . . culminating in the imposition of a penalty or a withdrawal of benefits”).

119. *Asimow*, *supra* note 103, at 804, 814.

120. *Id.* at 812.

121. *Id.* at 808.



Manual on the APA<sup>122</sup> similarly emphasizes the importance of separation in cases where an individual is accused of wrongdoing.<sup>123</sup> Some agencies, moreover, are subject to even greater structural separation requirements than those set out in the APA, with separation occurring at an institutional level.<sup>124</sup>

If agencies want to pursue a criminal prosecution, the most extreme punitive measure for a rule violation, they must convince the Department of Justice to prosecute. They lack the authority to bring criminal prosecutions on their own. As Michael Herz has pointed out in the context of environmental actions, this separation of functions within the executive branch serves the same purpose as separating functions within an agency. An agency might be so zealously committed to the "single-minded pursuit of its particular mission" that it may be prone to prosecutorial overreaching if it were given independent authority over criminal matters after it conducted an investigation.<sup>125</sup>

Supreme Court due process cases similarly emphasize the importance of separation of functions when significant consequences are at stake. In *Morrissey v. Brewer*,<sup>126</sup> the Court concluded that a parole officer who often makes a recommendation to have a parolee arrested and detained could not also be the person who makes the decision of whether "there is probable cause or reasonable ground to believe that the arrested parolee has committed acts that would constitute a violation of probation conditions."<sup>127</sup> Instead, that decision had to be "made by someone not directly involved in the case" because "[t]he officer directly involved in making recommendations cannot always have

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122. The Supreme Court has given deference to the Attorney General's Manual on the APA as a guide to interpreting the APA itself. *See, e.g.,* *Darby v. Cisneros*, 509 U.S. 137, 148 n.10 (1993) (noting that the Court has "given some deference" to the Manual); *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 n.31 (1979) ("In prior cases we have given some weight to the Attorney General's Manual on the Administrative Procedure Act (1947), since the Justice Department was heavily involved in the legislative process that resulted in the Act's enactment in 1946."); *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 546 (1978) (noting that the Manual has been given some deference by the Court "because of the role played by the Department of Justice in drafting" the APA).

123. U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 51 (1947) (contrasting licensing, where separation is not required, with actions involving "accusatory and disciplinary factors" that do merit separation); *see also* Shulman, *supra* note 95, at 357-58 (explaining that Congress imposed separation for adjudication and not rulemaking because of "the accusatory nature of many adjudications and the customary dispute over evidentiary facts").

124. For a discussion of such separation requirements, see George Robert Johnson, Jr., *The Split-Enforcement Model: Some Conclusions from the OSHA and MSHA Experiences*, 39 ADMIN. L. REV. 315, 317-23 (1987); Mintz, *supra* note 95, at 886, 908-12 (describing separation of adjudication and prosecution in various contexts including OSHA, the federal mine safety and health program, and federal air safety).

125. Michael Herz, *Structures of Environmental Criminal Enforcement*, 7 FORDHAM ENVTL. L.J. 679, 706 (1996).

126. 408 U.S. 471 (1972).

127. *Id.* at 485.

complete objectivity in evaluating them.”<sup>128</sup> Another parole officer who was not involved in the case could perform this function, but not the same one who was involved in reporting the parole violations or recommending revocation.<sup>129</sup> In other words, the parole office had to split responsibility between those involved in the accusatory and investigative tasks and those who would make the adjudicative decision about whether probable cause existed that the conditions of parole had been violated.

There is, then, a consensus view among agencies and the Supreme Court that separation of functions is critical when an agency seeks to inflict a punishment on someone. The APA mandates this separation in the case of formal adjudications, the Due Process Clause requires it in some instances, and agencies voluntarily pursue this path as a matter of good government even when the law does not insist upon it.<sup>130</sup>

### B. Other Checks on Agency Power

Although separation is the dominant practice when agencies impose punitive measures and is required in the case of formal adjudications,<sup>131</sup> even where it is absent, there are alternative checks designed, in part, to serve some of the same purposes.<sup>132</sup> All agency actions are subject to judicial review under an arbitrary and capricious standard pursuant to the APA.<sup>133</sup> This review forces agencies to articulate legally acceptable reasons for their decisions, and agencies must explain any departure from past practice.<sup>134</sup> “Courts have forced agencies to take a ‘hard look’ at the questions presented on the merits and have scrutinized decisions closely for evidence of improper motives.”<sup>135</sup> This review therefore acts as a powerful check on biased and improper decision making.

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128. *Id.* at 485-86; *see also id.* at 497-98 (Douglas, J., dissenting in part) (“The hearing should not be before the parole officer, as he is the one who is making the charge and ‘there is inherent danger in combining the functions of judge and advocate.’” (quoting *Jones v. Rivers*, 338 F.2d 862, 877 (4th Cir. 1964) (Sobeloff, J., concurring))).

129. *Id.* at 486.

130. Private industry has used a similar corrective. The banking industry, for example, uses “separate workout groups—groups whose members were not personally responsible for the initial decision” as a “standard mechanism for dealing with nonperforming assets.” Jerry Ross, *Avoiding Captain Ahabs: Lessons from the Office of the Independent Counsel*, 35 ADMIN. & SOC’Y 334, 343 (2003).

131. 5 U.S.C. § 554(d) (2006).

132. Shulman, *supra* note 95, at 388-89 (noting that there are alternative safeguards).

133. 5 U.S.C. § 706(2)(A) (2006).

134. *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43, 52 (1983).

135. Pedersen, *supra* note 95, at 1030-31.

Other laws impose similar checks against improper decision making and bias. The Freedom of Information Act (FOIA)<sup>136</sup> and the Federal Advisory Committee Act (FACA)<sup>137</sup> “grant the public additional access to information about the agency decision-making process, which provides further protection against arbitrary agency action or agency decisions based on improper influences.”<sup>138</sup> Private individuals, the media, and political actors can use these open government laws to search for evidence of biased decision making and bring those problems to the surface.

In formal proceedings, separation of functions is not the only check against a “will to win” and the importation of improper factors into the decision-making process. The APA requires that these formal proceedings be “conducted in an impartial manner” and provides means by which presiding officials or employees can be disqualified.<sup>139</sup> The APA specifically prohibits anyone involved in the decision-making process at the agency from having an “ex parte communication relevant to the merits of the proceeding” with anyone outside the agency.<sup>140</sup> And the agency must make its decision on the record and give the parties the opportunity to address the evidence upon which the agency relies.<sup>141</sup>

The perceived need for separation therefore may be diminished somewhat where agency processes have become more open, where agencies have allowed greater participation by interested parties to give their views on the record, and where judicial review of the record and agency decisions has expanded.<sup>142</sup>

Although these alternative mechanisms police agency bias just as structural protections do, they are not foolproof. Consider, for example, the Federal Trade Commission (FTC). The FTC is subject to the traditional means of judicial and political oversight. But, its commissioners play a direct role in both prosecution decisions and adjudicative decisions. The commissioners vote on whether the FTC should issue a complaint (i.e., commence what is in effect a prosecution).<sup>143</sup> The case then proceeds before an administrative law judge

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136. 5 U.S.C. § 552 (2006).

137. *Id.* app. § 2.

138. Barkow, *supra* note 7, at 1023.

139. 5 U.S.C. § 556(b)(3) (2006) (noting that “[a] presiding or participating employee may at any time disqualify himself” and that “[o]n the filing in good faith of a timely and sufficient affidavit of personal bias or other disqualification of a presiding or participating employee, the agency shall determine the matter as part of the record and decision in the case”).

140. 5 U.S.C. § 557(d)(1)(B) (2006).

141. 5 U.S.C. §§ 556 (d)-(e), 557(c) (2006).

142. Pedersen, *supra* note 95, at 1031 (explaining that more aggressive judicial review and the growth in openness and outside participation have alleviated the need to split up the agency internally to reduce bias).

143. Malcolm B. Coate & Andrew N. Kleit, *Does it Matter that the Prosecutor Is Also the Judge? The Administrative Complaint Process at the Federal Trade Commission*, 19 MANAGERIAL & DECISION ECON. 1, 2 (1998).

(ALJ), but the ALJ's decision is typically appealed to the FTC, giving the commissioners the opportunity to vote on the merits of the same case in which they made a decision to prosecute.<sup>144</sup> Richard Posner and others had long hypothesized that the commissioners were likely to be biased in favor of the FTC in cases in which they voted to prosecute because of this dual role.<sup>145</sup> Recent empirical research now confirms this view.<sup>146</sup> The alternative mechanisms of oversight have not, in other words, fully checked the operation of bias that results when one actor has both prosecutorial and adjudicatory functions.

The preferred mechanism for checking the bias that comes from combining adjudicative and enforcement powers is therefore oversight coupled with the separation of functions, particularly in cases where punishment is imposed. Judicial review alone is a second-best alternative. And certainly having no check in place is the worst alternative of all.

Prosecutors' offices fall outside both of these models. There is neither a separation requirement nor alternative administrative law checks. While we have long recognized that prosecutors are exercising executive powers,<sup>147</sup> we have not confronted what should be done now that they exercise adjudicative powers as well. As a result, there are neither separation requirements nor any of the alternative mechanisms to control their consolidation of power.<sup>148</sup>

### III. REDESIGNING THE PROSECUTOR'S OFFICE

Although prosecutors' offices are not typically viewed through the lens of administrative law, mechanisms used to check agencies that accumulate executive and adjudicative power under one roof would translate well to federal prosecutors who share the same set of powers. In both situations, the threat is similar: having the same actor charged with investigating and enforcing the law also responsible for making a final determination on the merits. Whether an individual is bringing a prosecution under a regulatory statute or a criminal provision, that "prosecutor may perceive the issues through a lens that distorts his perceptions in the state's favor" because he has "committed himself

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144. *Id.*

145. See Richard A. Posner, *The Federal Trade Commission*, 37 U. CHI. L. REV. 47, 53 (1969); see also Philip Elman, *Administrative Reform of the Federal Trade Commission*, 59 GEO. L.J. 777, 810-11 (1971).

146. Coate & Kleit, *supra* note 143, at 7 ("[C]ommissions are more likely to vote for administrative complaints if they were members of the commission that chose to prosecute those cases. Thus, it appears to matter if Commsisioners act as both prosecutors and judges.").

147. "Governmental investigation and prosecution of crimes is a quintessentially executive function." *Morrison v. Olson*, 487 U.S. 654, 706 (1988) (Scalia, J., dissenting) (citing cases).

148. See Barkow, *supra* note 7, at 1024, 1027 (noting that these protections are absent in the case of criminal prosecutors).

intellectually and psychologically, as well as having committed institutional resources to the prosecution.”<sup>149</sup> The prosecutor in both contexts may develop the “will to win” that biases his or her adjudicative decision making.<sup>150</sup> As Dan Richman has observed, “prosecutors who have helped call the shots in an investigation will be hard pressed to retain their magisterial perspective not just about the tactics used in the investigation, but about whether charges should be pursued thereafter.”<sup>151</sup> The prosecutor who has already invested himself or herself in a case might reach a biased and erroneous conclusion, which both undermines the agency’s function and subjects individuals to decisions that do not adhere to the rule of law. Similarly, as Richard Uviller has noted, an individual who is charged with serving as an advocate for one side of the case is not in an ideal position to make adjudicative decisions.<sup>152</sup> A prosecutor preparing for or anticipating the possibility of a trial is not in the best position to make neutral adjudicative decisions along the way.

In the case of agencies, the law mandates structural separation within the agency itself or aggressive judicial review of the record to ensure unbiased decision making. In the case of U.S. Attorneys’ Offices, no check has yet been put in place. But a corrective modeled along the lines of the APA’s separation requirement would be feasible and desirable in the case of federal prosecutors’ offices. Separation is the preferred alternative because prosecutors are imposing punishment, and, as noted above, separation is a proven structural solution when agencies take punitive action. Moreover, as discussed in greater detail in Part IV, this solution, unlike aggressive judicial review, is politically viable.

The key reform for checking the consolidation of enforcement and adjudicative power in the same actor is to split those powers among two or more individuals just as the APA splits prosecutors and investigators from adjudicators. Just as a neutral decision maker is critical in the agency context when it imposes punishment, so, too, it is necessary in the criminal context. Indeed, it is even more important to have an unbiased decision maker in criminal cases.<sup>153</sup> The stakes are higher, and because of the individualized

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149. Asimow, *supra* note 103, at 789.

150. Management theorists have also long recognized the danger of having individuals who were personally responsible for a failing course of action then make additional decisions about that action; they have repeatedly found that these individuals are often unable to admit their errors and continue to invest in failing projects. Ross, *supra* note 130, at 337-38.

151. Richman, *supra* note 28, at 803.

152. Uviller, *supra* note 5, at 1716.

153. Even critics of the separation-of-functions requirement at the agency level admit that there is a greater need for separation in accusatory proceedings. *See* Pedersen, *supra* note 95, at 991-92 (arguing that separation “can hinder efficient agency operation and lower the quality of final administrative decisions” and advocating the elimination of separation-of-functions requirements in all nonaccusatory agency proceedings, but acknowledging that “a separation-of-functions rule has its place in an ‘accusatory’ proceeding”).

nature of the inquiry, it is even easier for bias to infect the decision.<sup>154</sup> The nature of a criminal investigation is such that a prosecutor might devote a great deal of time and energy pursuing a particular defendant. Moreover, in the course of that investigation, prosecutors may readily learn facts about defendants that are irrelevant to the legal standard at issue, such as details about a defendant's past or character that have nothing to do with the suspected crime and would be inadmissible in the adjudication.<sup>155</sup> Once a prosecutor makes those efforts to investigate a case or learns about such facts, it is difficult for the prosecutor to remain objective about the defendant's guilt or the sentence he or she deserves because the prosecutor is likely to have the "will to win" that so concerned the drafters of the APA. Similarly, a prosecutor who knows he or she will be responsible for representing the government's position in court will make adjudicative decisions with his or her self-interest in mind. Prosecutors want high conviction rates—they want to win—so they will be prone to make decisions not based solely on objective facts but also on what is most likely to yield a conviction. That might mean threatening significant charges if a defendant opts to go to trial but giving a big discount if the defendant pleads guilty.<sup>156</sup>

The question becomes how to implement structural separation in a prosecutor's office. Because everything a prosecutor does is traditionally seen as prosecutorial, the key is to redefine those tasks that occur in a prosecutor's office that instead should be labeled adjudicative and performed by someone not otherwise involved in the case. The fundamental aim is to prevent people who develop a will to win or who will be exposed to legally irrelevant information about a defendant from making key determinations about the defendant's guilt and what punishment he or she deserves.<sup>157</sup>

In labeling investigative and prosecutorial tasks, then, the key is to decide when a prosecutor is likely to feel invested in a case such that an objective

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154. See U.S. DEP'T OF JUSTICE, *supra* note 99, at 56 (noting that investigators would be prone to use facts they discovered on their own); Asimow, *supra* note 103, at 792 ("Since specific, individualized facts must usually be found [in accusatory cases], it may be peculiarly difficult for a decisionmaker to discount advice to take account of the adviser's bias.").

155. See Asimow, *supra* note 103, at 789-90 (noting that judges in criminal matters are not permitted to consider inappropriate criteria of which prosecutors might be aware).

156. Lynch, *supra* note 56, at 132-33 (observing that "many prosecutors are loath to risk losing a case at trial" and as a result will make plea offers that are "outrageous[ly] gener[ous]" in comparison to the "typically outrageous penalty" facing a defendant if he or she goes to trial and loses).

157. The model advocated here therefore rejects so-called vertical prosecution, in which one prosecutor handles a case from start to finish, in favor of a form of horizontal prosecution that divides responsibilities according to tasks. For an argument advocating similar horizontal separation among investigators, adjudicators, and trial attorneys and noting that many district attorney offices employ this structure, see Langer, *supra* note 5, at 296. See also Wright & Miller, *supra* note 66 (describing the New Orleans office structure, which had a separate unit responsible for charging cases).

observer could reasonably doubt that the prosecutor is neutral about how the defendant should be treated. Using that benchmark, prosecutors who are involved with the investigation of a case—including involvement in any decision about a case that is made pre-indictment, such as decisions to seek warrants or to bring someone before a grand jury—should be prevented from making adjudicative decisions.<sup>158</sup> Similarly, if a prosecutor obtains information about the defendant in a proffer or some other setting (such as a conversation with an investigative agent) that is irrelevant to the legal merits of the defendant's case, that prosecutor should be prevented from making adjudicative decisions about that defendant. And if a prosecutor will be responsible for representing the government at trial or in pretrial proceedings before a judge or grand jury, he or she should also be seen as having the mindset of an advocate, not a neutral adjudicator.<sup>159</sup>

The more difficult question is what counts as an adjudicative decision for these purposes. Here the key is to capture those decisions that effectively amount to a decision on the merits about a defendant's guilt and what punishment he or she deserves. Using that benchmark, adjudicative decisions should include decisions whether to offer or accept a deal if a defendant pleads guilty because these decisions amount to a final resolution for the defendants who plead guilty and certainly reflect the prosecutor's view of the merits of the case.

Charging decisions, either the initial decision or later decisions to supersede or dismiss an indictment, should similarly be treated as adjudicative. Deciding what charges to bring is traditionally viewed as the core task of a prosecutor. But this traditional view ignores the importance of making a

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158. For a description of some of a prosecutor's investigative tasks, see Richman, *supra* note 28, at 779-80.

159. Professor Uviller would segregate prosecutors serving investigative functions from those serving adversary roles, but he would allow investigators and adjudicators to be the same person. Uviller, *supra* note 5, at 1716-18. As explained above, however, investigators are poorly positioned to adjudicate because, despite Professor Uviller's demand that they remain neutral, they inevitably form judgments about cases based on the facts that emerge (whether those facts are admissible at trial or not). This Article therefore follows the administrative model that separates investigators from adjudicators. It similarly follows administrative law in conceiving of the prosecutor's investigative role as tied to the advocacy role because so much of investigation is tied to how to make a case at trial (or, in terms of the proposal here, how to make a case before the adjudicating attorney). Professor Uviller makes sound arguments for why investigators should be different attorneys from the ones who advocate, *id.* at 1705-13, but his arguments are based on a reconception of what the grand jury should be doing and what the prosecutor's discovery obligations should be. Those factors, while important, are beyond the scope of this Article. Moreover, to accept Professor Uviller's additional separation requirement in addition to the one advocated here would require more office personnel than would be feasible in some offices because it would require three attorneys for each case—an investigating prosecutor, an adjudicator, and an advocate for court proceedings. This Article therefore focuses on separation where it is most needed—creating a wall between the lawyers who make adjudicative decisions and everyone else.

charging decision in a world where more than 95% of cases never go to trial. In a world of guilty pleas, the charging instrument is more than a charge; it is a verdict. Like the decision to accept or offer a plea deal, it similarly reflects the prosecutor's decision about the defendant's conduct and the merits of the case. Treating the charging decision functionally, it becomes clear that it should be treated as adjudicative for purposes of separating functions in the office.

The toughest decisions to categorize are whether to sign up a defendant as a cooperator and the related question of whether to file a substantial assistance motion. There is a strong argument that the decision to offer the defendant a deal for cooperating—either immunity, reduced charges, or a substantial assistance motion—should be couched as investigative because the value of the defendant to the case or a related case is a core prosecutorial decision. On the other hand, in the federal system at least, the decision to sign up a defendant as a cooperator is often a *de facto* adjudication in the same way charging and plea decisions are: it will dictate a defendant's sentence. The only difference is that it is not a decision that goes to the merits of the charged conduct; instead, it goes to the value of a defendant in an investigation.

Although cooperation decisions could be characterized either way for these reasons, one approach that balances both aspects of cooperation decisions would be to treat the initial decision to enlist the defendant as a cooperator as investigative and to characterize the decision of whether the defendant has fulfilled his or her obligations as a cooperator, and the benefit he or she should receive for performing those functions, as adjudicative. This balance concedes that the initial decision to use the defendant as a cooperator goes to the core of the prosecutor's investigation functions while at the same time recognizing that the benefit a defendant receives for cooperating falls on the adjudication side of the line because it is a determination of whether the defendant met his or her end of the deal and about what a defendant deserves for such behavior. As noted,<sup>160</sup> substantial assistance motions are the number one basis for a downward departure from a Guidelines sentence,<sup>161</sup> and they are one of only two bases for avoiding the consequences of a statutory mandatory minimum.<sup>162</sup> The prosecutor's decision to file such a motion constitutes a "unilateral government decision" that "is not subject to challenge by the defense and is not reviewable by the court (unless constitutional grounds are cited)."<sup>163</sup>

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160. See *supra* note 34 and accompanying text.

161. The amount of the departure can be quite significant, particularly when the defendant is facing a long sentence. For example, the mean substantial assistance departure for a defendant facing a drug trafficking charge was more than five years. LINDA DRAZGA MAXFIELD & JOHN H. KRAMER, SUBSTANTIAL ASSISTANCE: AN EMPIRICAL YARDSTICK GAUGING EQUITY IN CURRENT FEDERAL POLICY AND PRACTICE 18, 33 exhibit 11 (1998). And the mean substantial assistance departure for all offenses was 50.8 months. *Id.* at 33 exhibit 11.

162. The second mechanism, as noted above, *supra* note 35, is a limited safety valve for minor drug offenders with clean or near-perfect criminal records.

163. MAXFIELD & KRAMER, *supra* note 161, at 3; see also *id.* at 5 n.11 ("While the



Even if a defendant provides substantial assistance, there is a risk that a biased prosecutor might withhold the motions so that a defendant receives a longer sentence, either because the prosecutor has learned extrajudicial facts about the defendant that make him or her dislike the defendant or because the prosecutor decides it is in the prosecutor's interest to get a longer sentence in the case despite the initial agreement. The empirical evidence on the filing of these motions lends credibility to this concern. Offices differ in their standards for giving these motions,<sup>164</sup> and the motion is often withheld even when there is evidence that a defendant has provided assistance.<sup>165</sup> Indeed, 14.3% of individuals who testify do not receive a substantial assistance motion, and one-third of those who "provided tangible evidence" also did not receive a departure.<sup>166</sup> To be sure, these numbers alone do not provide an answer as to whether biased decision making is occurring because the decisions not to file the motion could be based on reasonable factors, such as finding that the defendant was untruthful or not completely forthcoming. But additional evidence casts doubt on the notion that all the withheld motions are being denied defendants for objectively reasonable reasons. First, there is empirical evidence that "personal characteristics" including race and gender "remained significant predictors of who received substantial-assistance departures."<sup>167</sup> Second, a survey of judges and probation officers found that the vast majority—59% of judges and 55% of probation officers—stated that "they personally had cases in which they believed that the defendant had provided 'substantial assistance' but the prosecutor did not make a §5K1.1 motion."<sup>168</sup> This additional evidence provides a reason to doubt that every instance where a motion is denied is for objective and legally appropriate reasons. In light of this risk and the importance of the decision, it should also be classified as an adjudicative determination for the separation requirement while treating the initial decision to sign up cooperators as investigative.

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court does not have to grant a § 5K1.1 motion filed by the prosecution, information obtained by the Commission indicates that the vast majority of motions are granted as a matter of course.").

164. *Id.* at 5, 8 (noting "inconsistencies in how substantial assistance departures were being applied nationally" and that "districts frequently diverged from their stated policy"); Frank O. Bowman, III, *Departing is Such Sweet Sorrow: A Year of Judicial Revolt on "Substantial Assistance" Departures Follows a Decade of Prosecutorial Indiscipline*, 29 STETSON L. REV. 7, 58-59 (1999) (noting that one office filed such motions for 47.5% of all defendants, whereas other offices filed those motions on behalf of less than 8% of defendants).

165. One study found that, although roughly two-thirds of defendants provided "some form of assistance," only 38.6% of defendants received the departure. MAXFIELD & KRAMER, *supra* note 161, at 9-10.

166. *Id.* at 10.

167. *Id.* at 13-14, 31 exhibit 9. It should be noted that legally irrelevant factors such as race and gender also play a role in the judicial decision of how much to depart on the basis of substantial assistance. *Id.* at 19, 34 exhibit 12.

168. *Id.* at 15.

With these various functions defined, it is possible to state the principle of separation that should apply to prosecutors' offices to avoid the danger of bias and to keep the focus on legally relevant information: Neither the Assistant U.S. Attorney (AUSA) responsible for investigating or overseeing the investigation of a case or for representing the United States in court (either at trial or in pretrial proceedings) nor any individual who has directly supervised the AUSA in the investigation or courtroom decisions should be the same individual who makes the final determination of what charges to bring, what plea to accept, or whether an individual has cooperated sufficiently to merit a lesser sentence on the basis of giving substantial assistance to the government.<sup>169</sup> Rather, a different prosecutor or panel of prosecutors who were not involved in the investigation (as either a line attorney or a supervisor) should make these adjudicative decisions. A panel is preferred because it has the benefit of bringing a range of viewpoints, but resource constraints in smaller offices might dictate that a single attorney make the adjudicative decision.

The basic model of having at least a single attorney not involved in the investigation or advocacy of the case making adjudicative decisions is feasible with the personnel in all U.S. Attorneys' Offices. Even the smallest office—with eleven AUSAs—has enough people to arrange the office in this manner.<sup>170</sup> In addition, every office already has enough supervisors to separate those responsible for investigations and overseeing court decisions from those who make adjudicative decisions because there are at least two high-level supervisors in every office and typically more.<sup>171</sup> To be sure, the mere presence of these supervisors might overstate the available hours they have to engage in this oversight if offices are otherwise understaffed for the workload. And there may be occasional periods when this decision-making structure is not possible in the smallest offices because of leaves of absence. But in the vast run of cases in all United States Attorneys' Offices, this model should be workable by using experienced attorneys or supervisors to make final adjudicative decisions and relying on the assistants in the office, as now, to perform all other tasks.

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169. The APA's separation-of-functions requirement similarly covers supervisors who are involved in decisions about litigating a case. U.S. DEP'T. OF JUSTICE, *supra* note 123, at 58 (explaining when supervisors are covered); Asimow, *supra* note 103, at 774.

170. Letter from Marie A. O'Rourke, Assistant Dir., Executive Office for U.S. Attorneys to author (Mar. 4, 2005) (on file with author) (stating in response to a Freedom of Information Act request the number of AUSAs in each office).

171. Almost all U.S. Attorneys' Offices have a First U.S. Attorney or Deputy U.S. Attorney as well a Criminal Chief. In the offices that do not have both a First U.S. Attorney and a Criminal Chief, there is at least one or the other plus an additional unit chief who serves in a supervisory role in every office except for Guam and Wyoming. United States Attorneys Office Key Personnel, <http://www.usdoj.gov/usao/offices/personnel/index.html> (last visited Feb. 18, 2009).

The United States Attorney's role would remain the same as it is now, so he or she could be involved in all decisions. This parallels the APA, which exempts agency heads from the separation-of-functions requirement,<sup>172</sup> and it rests on the same rationale. Just as the "agency heads exception" assures that agency heads can supervise policy-making decisions wherever they occur (i.e., in investigations or adjudications or rulemakings),<sup>173</sup> the U.S. Attorney exception would allow him or her to do the same. The U.S. Attorney is the political appointee who is accountable to the President and therefore most accountable to the public, and he or she is charged with ensuring that decisions within his or her district reflect the law enforcement objectives of the administration. He or she therefore must be permitted to participate at all stages of a case without limit because important policy-making decisions may be implicated at all stages. As a practical matter, however, in most cases, the U.S. Attorney will not be involved at either stage, and supervisors or line attorneys will be the ones to make the critical decisions.<sup>174</sup>

The fundamental limitation on this proposal is that there is no guarantee that this model will prevent biased decision making because the adjudication will still be conducted by a prosecutor who sometimes performs the role of investigator or advocate, even though he or she will not have worked on the particular case to that point and will not be the advocate for the government's position should that specific case go before a judge or jury.<sup>175</sup> In an ideal

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172. 5 U.S.C. § 554(d) (2006); *see also* *Hortonville Joint Sch. Dist. v. Hortonville Educ. Ass'n*, 426 U.S. 482, 489-491 (1976) (distinguishing the case before it involving agency heads from *Morrissey v. Brewer*, 408 U.S. 471 (1972), in which the Court required separation of officials involved in investigating and deciding parole revocations); *Withrow v. Larkin*, 421 U.S. 35 (1975) (permitting a state medical-licensing agency to investigate misconduct and adjudicate license revocations); *FTC v. Cement Inst.*, 333 U.S. 683 (1948).

173. Asimow, *supra* note 103, at 766; *see also* Mintz, *supra* note 95, at 913 ("In order to assure that the Agency head would ultimately be responsible for all critical policymaking, it was therefore necessary to maintain the unitary model, with the Agency head the ultimate adjudicative decision maker.").

174. In my interviews with former AUSAs, it was clear that the U.S. Attorney did not get involved in the overwhelming majority of cases unless they were high profile or raised a significant policy issue.

175. One bias that should be controlled is the bias to go to trial to get the experience that the private bar finds valuable. Because the adjudicator will not be the same person who has to try the case, he or she should not have an incentive to offer less favorable plea deals for the sake of trial experience. *See* 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, 273-74 (2002) (summarizing research that assistants "took complex, high-profile cases that they felt would assist their future careers in private practice" and might have an incentive to prosecute high-status individuals because of what it would mean to a future private-sector career). Another bias that is checked by having a separate adjudicator make a decision about the disposition of the case is the incentive of attorneys who do not plan on leaving the office to avoid trials. *Id.* at 285-87 (observing that "careerists" are often seen as "deadwood" because they resist complicated cases and seek to avoid time-consuming trials). By vesting that decision with someone who does not need to conduct the trial, the work-shirking bias is also checked.

scenario, the attorneys selected to make final decisions about the charges to bring should be people who are not prone to biased judgments regardless of their positions as prosecutors. The question is how to select those individuals. One possible check would be to have individuals who have worked for a long time in the office make the decision. Every office has experienced attorneys to perform the adjudicative task. The average length of service for an AUSA in every district but four is over ten years, and even in the four that fall below this number, the lowest average length of service is seven years.<sup>176</sup> Longevity of service is valuable because it makes it less likely—though does not completely eliminate the risk—that the attorney’s decision will be colored by how the decision will look to prospective future employers. If an attorney is hoping to obtain a political appointment, for example, he or she may have a greater incentive to appear tough on crime.<sup>177</sup> The longer an attorney has served in an office, the less important any given decision is to his or her overall record. Moreover, those who have been in the office for longer periods of time are more likely to be influenced by what some commentators have called “career prosecutorial culture,”<sup>178</sup> where a desire to “do the right thing”—rather than merely to win cases—is paramount.<sup>179</sup> In most cases, supervisors will have this length of service because those selected for these positions tend to have served for longer periods of time.

Admittedly, longer service can have problems of its own, but requiring that the adjudication decision be performed by at least one person in a supervisory position can help to check those problems. Specifically, some researchers have found that career prosecutors develop a preference for avoiding complex cases and that some careerists resist following changes in office policies because of a view that they “know better” than the U.S. Attorney what the office’s prosecutorial priorities should be.<sup>180</sup> But a requirement that the individual in the office making the adjudicative decision be a supervisor can check both of these concerns. The decision to promote an individual to a supervisor position is for the U.S. Attorney to make, and presumably the U.S. Attorney will choose

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176. Letter from Marie A. O’Rourke, *supra* note 170 (listing the Central District of California, the District of New Jersey, the Eastern District of New York, and the Southern District of New York as the offices with AUSAs serving an average term of less than ten years). Because these four districts are among the largest offices, there are undoubtedly plenty of experienced AUSAs in them who can perform the adjudicative task.

177. Some empirical research bears this out. Using a sample of U.S. Attorneys from 1969 to 2000, Richard Boylan found that the length of prison sentences obtained by U.S. Attorneys was positively related to subsequent favorable career outcomes, such as becoming a federal judge or obtaining partnership in a large law firm. Richard T. Boylan, *What Do Prosecutors Maximize? Evidence from the Careers of U.S. Attorneys*, 7 AM. L. & ECON. REV. 379, 389-91 (2005).

178. Mary Patrice Brown & Steven E. Bunnell, *Negotiating Justice: Prosecutorial Perspectives on Federal Plea Bargaining in the District of Columbia*, 43 AM. CRIM. L. REV. 1063, 1079-80 (2006).

179. *Id.* at 1080.

180. Lochner, *supra* note 175, at 282, 286-87.

individuals who will adhere to the policies of the U.S. Attorney and who are hardworking. Moreover, because the person who makes the adjudicative decision is not the same person who will ultimately try the case, workload concerns should not factor into the decision.

Even a long-serving supervisor may have biases, however. Indeed, it is possible that individuals with a great deal of experience may be biased precisely because their time in the office has colored their judgment.<sup>181</sup> They may develop views about particular cases or defendants that are based on generalizations without a sufficiently open mind about the case at hand. It is for this reason that a panel of adjudicative decision makers is preferred. Insisting on majority approval from a panel of three or five attorneys would help check against individual biases. But the more individuals required for the adjudication, the less feasible the model becomes, at least in the smallest offices.<sup>182</sup>

Moreover, whether a panel or a single adjudicator is used, the risk of some forms of bias will still not disappear with this model for at least two reasons. First, the investigating prosecutor will be the main source of information for the prosecutor or panel of prosecutors making the decision. Although tough questioning by the deciding prosecutors might reveal weaknesses in the case that were otherwise not brought forth by the investigators, there is a risk that these decision makers will simply defer to the judgment of the investigators because they are supplying all the important facts. Second, there is the risk that prosecutors will defer to one another because of office cohesion. Because the American system is still viewed as adversarial, prosecutors may see themselves on one side and on the same team, and they may not be prone to the kind of self-criticism that would be necessary to discover errors in the government's case. In that sense, they may all have the same will to win.

Without minimizing the risk that some bias will remain, however, it is important to note that this measure would go some distance to checking that. As an initial matter, the exercise of presenting a case to another attorney may have a disciplining effect. Prosecutors may resist presenting facts that are legally irrelevant or inflammatory and could not be presented to a jury because the adjudicating prosecutors would not find those facts to be relevant to the merits.<sup>183</sup> Moreover, it is possible and perhaps even likely that, over time, the

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181. As G.K. Chesterton once noted, the danger of serving in this position for too long is that prosecutors may lose sight of the importance of what is at stake for the defendant because they "have got used to it. Strictly they do not see the prisoner in the dock; all they see is the usual man in the usual place. They do not see the awful court of judgment; they only see their own workshop." G.K. CHESTERTON, *TREMENDOUS TRIFLES* 86 (Dodd, Mead & Co. 1929) (1909).

182. See Letter from Marie A. O'Rourke, *supra* note 170.

183. See Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PA. L. REV. (forthcoming 2009) (manuscript at 117, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1313215](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1313215)) ("Simply having to explain and justify one's decisions disciplines prosecutors."). To take one infamous example, a

“adjudicating” prosecutors will develop a culture of taking their task seriously. As Judge Gerard Lynch has posited, “Justice is much better served when prosecutors determining whether to indict or making plea offers see themselves as quasi-judicial decision makers, obligated to reach the fairest possible results, rather than as partisan negotiators.”<sup>184</sup> The best way to facilitate that mindset is to create a separate group of adjudicators. Indeed, in the San Diego U.S. Attorney’s Office, there is a review mechanism of indictments similar to what is being advocated here, and that review is substantive and not merely cursory rubber-stamping of the line assistant.<sup>185</sup>

If the doubts of bias remain sufficiently grave, it is possible that in some offices, additional measures of protection could be put in place. One possible check on this risk is to adopt a structural reform along the lines of the administrative-law-inspired proposal of Judge Lynch that would give defense lawyers an opportunity to be heard before prosecutorial decisions are made.<sup>186</sup> The investigators and defense lawyers could present their views of the case to the attorney or attorneys in the office responsible for making the final decision. To avoid having the defense tailor witnesses or testimony, this should probably be done in a context where the defendant presents his or her version of the case, but is not present when the line assistant presents his or her arguments. This allows the line assistant’s wealth of information to get a full airing without fear of jeopardizing the case should it go to trial, while at the same time giving the defense lawyer an opportunity to present his or her client’s case to someone in the U.S. Attorney’s Office who has not yet made up his or her mind about how the case should be resolved. By allowing both sides to present their case before a neutral arbitrator, this structure would mimic the general adversarial system that takes place at trial, which aims to expose falsehoods by subjecting claims of either party to criticism and refutation.<sup>187</sup>

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former Criminal Division Chief in the Northern District of Illinois criticized the report of Independent Counsel Kenneth Starr, noting that, “If I had received a prosecution memorandum like this, with details about the guy’s marriage and all, I probably would have sent it back to the assistant who wrote it and said, ‘What are you doing?’” John Gibeaut, *In Whitewater’s Wake: Lurid Details Aside, Is It a Crime?*, A.B.A. J., Nov. 1998, at 41.

184. Lynch, *supra* note 5, at 2136.

185. See *infra* note 229 and accompanying text (describing the review in the San Diego U.S. Attorney’s Office).

186. Lynch, *supra* note 5, at 2147-49. James Vorenberg called for a similar reform when he advocated “screening conferences” in which prosecutors and defense lawyers could discuss the charging decision. Vorenberg, *Decent Restraint*, *supra* note 25, at 1565; see also Langer, *supra* note 5, at 293 (“[P]rosecutorial guidelines and ethical rules should include a duty for the prosecutor to meet with the defense and listen to it if the defense makes that request.”).

187. Asimow, *supra* note 103, at 790. This model would not, however, mimic the discovery obligations at trial. Currently, many if not most defense lawyers are unable to assess the strength of the prosecutor’s case against their clients because prosecutors do not have an obligation to reveal their evidence. See Ma, *supra* note 42, at 26. And unlike many states, the federal government has not moved toward a broader discovery regime or an open-file policy. Langer, *supra* note 5, at 275. Some scholars have advocated broader discovery at

This measure has the additional benefit of allowing defense lawyers to learn more about what arguments are most persuasive to decision makers in the office. These lawyers, in turn, can make it known to the public and political overseers how the offices make decisions. With a trial model, this function is performed by the fact that trials are open.<sup>188</sup> But in a system dominated by pleas that takes place behind the closed doors of the prosecutor's office, a new mechanism is necessary, and this may well fit the bill.<sup>189</sup>

Whether or not a defense lawyer is given a role in the adjudicative process that takes place in the prosecutor's office, office relationships and allegiances will prevent the lawyer or lawyers making the final decision from being completely neutral.<sup>190</sup> But in the absence of a neutral decision maker outside the office, this might provide the most realistic solution.

Like employing a panel of adjudicators instead of a single adjudicator or a supervisor instead of a senior line assistant, however, the cost of this additional structural check is that it will use up more office resources, which may make it less likely to be adopted. The simplest model of a single adjudicator with a number of years of experience may not be the most protective, but it may be the most feasible. And that feasibility is no small matter. Any proposal for checking prosecutors must be measured against its likelihood of implementation because there have been decades of calls for reform with no action. The next Part considers whether this proposal is different. In all of its forms, it is.

#### IV. THE POLITICS OF REFORM

Reforming the structural design of a prosecutor's office is not, of course, the only mechanism that could check the dangers posed by the combined

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the plea-bargaining stage to improve the adjudication that takes place there. *Id.* The viability of defense participation in the manner suggested above is already on shaky ground because it is more resource intensive than the simple structural separation model. If prosecutors were also under greater discovery obligations, it is almost impossible to imagine them endorsing such a proposal and keeping it politically viable.

188. *Gannett Co. v. DePasquale*, 443 U.S. 368, 428 (1979) (Blackmun, J., concurring in part and dissenting in part) ("Open trials also enable the public to scrutinize the performance of police and prosecutors in the conduct of public judicial business.").

189. "Sunlight is said to be the best of disinfectants; electric light the most efficient policeman." LOUIS D. BRANDEIS, *OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT* 92 (Frederick A. Stokes Co. 1914) (1913); see also Cass R. Sunstein, *Informational Regulation and Informational Standing: Akins and Beyond*, 147 U. PA. L. REV. 613, 622-26 (1999) (describing how information disclosure serves as a regulatory tool).

190. In his definitive study of separation of functions in the agency context, Michael Asimow has observed this danger in explaining why all prosecutors in agencies should be removed from the decision-making process: "An uninvolved prosecutor who furnishes advice favorable to the defendant might undermine the esprit de corps of the office, might feel uncomfortable in socializing with the active prosecutor, or might fear that the active prosecutor would retaliate in future cases." Asimow, *supra* note 103, at 789 n.151.

executive and adjudicative powers of prosecutors. There are numerous other possibilities for achieving the same result, some of which in theory provide a more robust check on prosecutorial bias. This Part briefly sketches the main alternatives presented in the literature and then explains why a change in institutional design is the most politically viable option.

#### *A. Other Mechanisms for Checking Prosecutorial Power*

The problem of expansive prosecutorial power could be addressed by a number of means. This Subpart describes the major approaches advanced in the literature and explains why these protections, while strong in theory, fall short in reality.

##### *1. Judicial oversight*

Perhaps the most common suggestion for controlling prosecutorial abuses is to have greater federal court oversight over plea bargaining, charging, and cooperation decisions.<sup>191</sup> This has been the administrative law model that has most interested commentators, and it could be done in a variety of ways. Some experts and scholars have argued that prosecutors, like agencies, should state reasons for their decisions to bring or not bring charges, and courts should review them to ensure they are not arbitrary and capricious.<sup>192</sup> Other scholars have pressed more moderate means of judicial review. Professor William Stuntz, for example, argues that in reviewing pleas, courts could require the government to “point to some reasonable number of factually similar cases in which the threatened sentence had actually been imposed, not just threatened.”<sup>193</sup> Alternatively, the court could review the sentence the prosecutor threatened to induce the plea to make sure that it “was fair and proportionate given the defendant’s criminal conduct.”<sup>194</sup>

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191. See, e.g., KENNETH CULP DAVIS, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY* 207-14 (1969); Norman Abrams, *Internal Policy: Guiding the Exercise of Prosecutorial Discretion*, 19 UCLA L. REV. 1, 35, 50-53 (1971); Stuntz, *supra* note 42, at 26-28; Robert Heller, Comment, *Selective Prosecution and the Federalization of Criminal Law: The Need for Meaningful Judicial Review of Prosecutorial Discretion*, 145 U. PA. L. REV. 1309, 1314-15 (1997).

192. For a classic statement of this argument, see, for example, DAVIS, *supra* note 191, at 203-05 (advocating that the Antitrust Division should adopt a general practice of “accompany[ing] all significant decisions of substantive policy with statements of findings and reasoned opinions” (emphasis omitted)). See also Leland E. Beck, *The Administrative Law of Criminal Prosecution: The Development of Prosecutorial Policy*, 27 AM. U. L. REV. 310, 312 & n.5 (1978) (citing scholars and commissions in favor of this view).

193. Stuntz, *supra* note 42, at 27.

194. *Id.* at 28. James Vorenberg argued for capping plea discounts at 10-20%. Vorenberg, *Decent Restraint*, *supra* note 25, at 1560-61.



In theory, greater judicial involvement would be the ideal corrective measure because it would interject a truly independent actor—an Article III judge—to curb the abuses outlined above. Judges are certainly less biased than a fellow prosecutor. As Kenneth Culp Davis pointed out in his classic statement advocating for more judicial review of prosecutors, “[t]he reasons for a judicial check of prosecutors’ discretion are stronger than for such a check of other administrative discretion that is now traditionally reviewable” because the stakes are high, abuses are common, and “much injustice could be corrected.”<sup>195</sup> Thus, in theory, the case for controlling prosecutorial discretion through a judicial check is even stronger than the case for controlling agency discretion through a judicial check.

The problem with this type of reform is that it has not shown itself to be viable. Professor Davis called for these reforms in 1971, and many similarly illustrious academicians have followed with like arguments. But just as suggestions in the middle of the century for the development of independent adjudicative bodies separate from administrative agencies were rejected, so were these calls for judicial oversight of pleas and cooperation and decisions not to bring charges.<sup>196</sup> And the reasons are similar. In both cases, the reform is too costly, too inefficient, and not sufficiently deferential to what are perceived to be experts in the field.

Consider the arguments about cost and efficiency. Criminal cases make up 21% of the crowded federal docket,<sup>197</sup> and scrutinizing each criminal plea and cooperation agreement would place an enormous strain on already thin resources. Indeed, it is precisely because of a heavy workload that judges have been complicit in the development of plea bargaining in the first place.<sup>198</sup>

Resistance is also based on a concern about the judiciary’s role in law enforcement. As the Court noted in *Armstrong*, “Such factors as the strength of the case, the prosecution’s general deterrence value, the Government’s enforcement priorities, and the case’s relationship to the Government’s overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake.”<sup>199</sup> Even Professor Davis, who generally dismissed the rationale that the judiciary is unsuited to the task of reviewing criminal prosecutorial decisions as inconsistent with review of the

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195. DAVIS, *supra* note 191, at 211-12 (emphasis omitted).

196. Misner, *supra* note 29, at 736 (noting that “attempts to impose any sort of judicial or administrative review on the great majority of the decisions of [prosecutors] have been grandly unsuccessful”).

197. As of September 30, 2007, there were 265,082 civil cases and 72,478 criminal cases pending in the U.S. district courts. See ADMIN. OFFICE OF THE U.S. COURTS, 2007 ANNUAL REPORT OF THE DIRECTOR: JUDICIAL BUSINESS OF THE UNITED STATES COURTS 13 (2008), available at <http://www.uscourts.gov/judbus2007/JudicialBusinesspdfversion.pdf>.

198. GEORGE FISHER, PLEA BARGAINING’S TRIUMPH 15-16 (2003).

199. *United States v. Armstrong*, 517 U.S. 456, 465 (1996) (quoting *Wayte v. United States*, 470 U.S. 598, 607 (1985)).

administrative state,<sup>200</sup> conceded that “many considerations that enter into a decision to prosecute or not to prosecute may properly be kept secret.”<sup>201</sup> He acknowledged, for example, that if the prosecutor has an enforcement strategy that will play out in multiple steps, the prosecutor should not have to make that strategy known.<sup>202</sup> Similarly, if the prosecutor declines to bring a case because the evidence is too expensive or because a witness is recalcitrant, Davis acknowledged that secrecy might be appropriate in those instances as well.<sup>203</sup> Once exceptions for these reasons are accepted, though, it becomes difficult to justify judicial review. For in almost every case, a prosecutor can root his or her decisions in reasons of strategy or budget limitations. Thus, it may well be the rare case that is based on—or acknowledged to be based on—a “determination[] of substantive law or policy,”<sup>204</sup> as opposed to these strategic and pragmatic factors. If that is true, then the Supreme Court’s general hands-off policy begins to make sense. Certainly the prospects for overriding this hands-off view of the courts appear slim.

## 2. *Limiting plea bargaining or charging discretion*

Another option for correcting prosecutorial abuse would be to prohibit prosecutors from adjudicating disputes. The most commonly targeted adjudication for attack is the decision to plea bargain, with many scholars advocating for the elimination or curtailment of plea bargaining. These proposals take many forms, from outright elimination of plea bargaining<sup>205</sup> to streamlined trials to discourage bargaining.<sup>206</sup>

These proposals suffer from two flaws that make their implementation either unlikely or unsuccessful in limiting prosecutorial abuses. First, many of these arguments simply move prosecutorial adjudication to a different point in the process. For example, if plea bargaining were abolished or discouraged, the bargaining would likely move to an earlier stage, giving prosecutors the same leverage.<sup>207</sup> As long as prosecutors retain the discretion over the initial

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200. DAVIS, *supra* note 191, at 210 (“[I] could cite a hundred Supreme Court decisions stating that it is the function of the judiciary to review the exercise of executive discretion . . .”).

201. *Id.* at 204.

202. *Id.*

203. *Id.*

204. *Id.*

205. *See, e.g.,* U.S. NAT’L ADVISORY COMM’N ON CRIMINAL JUSTICE STANDARDS & GOALS, STANDARD 3.1, at Ct.-42 (1973) (proposing the abolition of plea negotiations); Schulhofer, *supra* note 54, at 2009 (“Plea bargaining is a disaster [that] can be, and should be, abolished.”).

206. *See, e.g.,* Albert W. Alschuler, *Implementing the Criminal Defendant’s Right to Trial: Alternatives to the Plea Bargaining System*, 50 U. CHI. L. REV. 931, 969-70 (1983); Stephen J. Schulhofer, *Is Plea Bargaining Inevitable?*, 97 HARV. L. REV. 1037 (1984).

207. [P]rosecutors can avoid plea bargaining restrictions in a number of ways: defendants thought likely to demand trial can be charged with more serious or more numerous offenses;

decision to bring charges, this reform would do little to cabin prosecutorial abuse. If charging discretion exists, so does the power to adjudicate.<sup>208</sup>

Second, to the extent these proposals rely on streamlining trials, they face either constitutional or political impediments. Many of the reasons trials are costly and therefore avoided are embedded in the Constitution. The right to a jury and the many evidentiary rules that have developed alongside it slow down the processing of a criminal case. While defendants could be asked to waive their rights in favor of a more streamlined process, that is, in effect, what plea bargaining does. A jurisdiction would therefore need to be convinced that it should offer defendants more process than they currently do in the world of abundant plea bargaining.

In this political climate, that is a tough sell. Jurisdictions rarely vest defendants with greater procedural protections that cost more unless the Supreme Court forces their hands through constitutional rulings. This brute political fact explains why so few jurisdictions have followed the streamlined-trial model that Steve Schulhofer described in Philadelphia that allowed for such a dramatic reduction in plea bargaining there.<sup>209</sup> Unless and until the political climate undergoes a significant change, it is unlikely that a jurisdiction would opt to spend more money on process as long as plea bargaining is accepted by the courts. And, as noted above, the courts appear to be willing participants in the world of plea bargaining.

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prosecutors can substitute "pretrial diversion bargaining," at least in cases suitable for probation sentences; and "uncooperative" defendants (and their attorneys) who insist on trials can receive less favorable treatment in subsequent cases, or on other pending charges.

Richard S. Frase, *The Decision to File Federal Criminal Charges: A Quantitative Study of Prosecutorial Discretion*, 47 U. CHI. L. REV. 246, 302 (1980).

208. One possible check on this dynamic is suggested by Ronald Wright and Marc Miller. They contend that plea bargaining could be limited without increasing charge bargaining if jurisdictions were to employ more aggressive screening of cases in the first instance, to limit bargaining before charges were brought, and to discourage changes in charging decisions after the initial charges were filed. Wright & Miller, *supra* note 66. But it is unclear whether this proposal would translate well to the federal system or other systems where charge bargaining is not limited by the absence of a defense lawyer before charges are brought as it is in New Orleans, the jurisdiction that Wright and Miller studied. *Id.* at 78. In fact, Wright and Miller find that, despite aggressive screening in the federal system, there is abundant pre-charge bargaining. *Id.* Moreover, Professors Wright and Miller also note that, even in New Orleans, prosecutors retain similar power through their ability to decide unilaterally whether to file for enhanced sentences under the state's multiple bill law. *Id.* at 81-82. As they acknowledge, "This unilateral feature of multiple bill negotiation makes it just as potent and dangerous as charge bargaining." *Id.* at 82. To the extent prosecutorial adjudication is taking place at any of these points, then, it is valuable to consider a structural reform along the lines proposed here.

209. Schulhofer, *supra* note 206, at 1062-86 (describing the Philadelphia system and pointing out its viability as an alternative to plea bargaining).

### 3. *Greater legislative or public oversight*

A third option for checking the combined adjudicative/investigative power of prosecutors would be to place greater oversight responsibility with legislators or the public. This, too, could take many forms. Although Congress cannot oversee prosecutorial conduct in each individual case, it could hold hearings on prosecutorial practices or pass legislation that cabins prosecutorial discretion, perhaps through code reform.<sup>210</sup> Or, legislators could place oversight in other bodies. For example, Professor Angela Davis has proposed the use of prosecution review boards, which would review complaints brought by the public and also conduct random reviews of routine prosecution decisions.<sup>211</sup>

Again, while options along these lines sound promising on paper, they cannot serve as a realistic check in today's political climate. The political process overwhelmingly favors prosecutors.<sup>212</sup> Any oversight by Congress would serve largely to make sure that prosecutors are being sufficiently tough. It is unlikely that congressional oversight would check systematic biases that might prompt innocent defendants to plead guilty or that lead defendants to plead guilty to more serious charges than the ones they have actually committed. Prosecutors would likely resist any attempt at a civilian or agency review board, and politicians in Congress have no incentive to battle prosecutors on this point unless there is sufficient mobilization for greater control. While Congress might be willing to subject prosecutors to greater oversight by victims,<sup>213</sup> it is hard to imagine a scenario where Congress would put in place an oversight scheme that would offer greater protection for defendants. And because protections for defendants are a pressing problem with prosecutorial discretion, this oversight would do little to get to the heart of a fundamental issue raised by prosecutorial power.

### 4. *Prosecutorial guidelines or open processes*

Some advocates for prosecutorial reform have suggested that published prosecutorial guidelines should be adopted to control the exercise of prosecutorial discretion.<sup>214</sup> While this suggestion, like the others, is promising

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210. See, e.g., Richman & Stuntz, *supra* note 17, at 630-31 (2005) (discussing criminal code reform as a tool for checking prosecutorial discretion); Vorenberg, *Decent Restraint*, *supra* note 25, at 1567 (advocating code reform and oversight hearings).

211. Davis, *supra* note 25, at 463.

212. See Stuntz, *supra* note 37, at 546-57.

213. See, e.g., Crime Victims' Rights Act (CVRA), 18 U.S.C. § 3771 (2006).

214. See, e.g., PRESIDENT'S COMM'N ON LAW ENFORCEMENT & ADMIN. OF CRIMINAL JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 134 (1967); Abrams, *supra* note 191, at 57 (arguing in favor of guidelines); Beck, *supra* note 192, at 375-76 (advocating that the Department of Justice should issue policy statements on its enforcement priorities and make those positions known to Congress); David C. James, *The Prosecutor's Discretionary*

in theory, in reality, a requirement such as this could prove to be more worrisome than the problem it is trying to solve.

As an initial matter, publishing detailed guidelines could undermine law enforcement goals. If prosecutors announce, for example, enforcement thresholds, deterrence could be compromised.<sup>215</sup> There is also a concern that detailed guidelines could prompt litigation challenging prosecutorial decisions that do not comport with them, which leads to the problems associated with judicial review discussed above. And, of course, putting every relevant detail into guidelines is a difficult if not impossible task given the complexity of fact scenarios involved in criminal behavior.<sup>216</sup> For these reasons,<sup>217</sup> the law enforcement community has generally not embraced guidelines voluntarily. On the rare occasions prosecutors have accepted guidelines, they have been relatively short on details. If broader guidelines are adopted, there is a risk that they will be so broad as to be meaningless checks on the exercise of discretion.<sup>218</sup> Thus, feasibility is again a concern.

But even if guidelines were adopted, there is an additional substantive concern from the standpoint of defendants. If the politics of crime were rational, transparency would be nothing to fear. But, the political process suffers from numerous cognitive shortcomings when it comes to crime. Thus, the problem with making prosecutorial decisions more transparent is that the politics of crime might push those guidelines in a decidedly antidefendant direction. Indeed, Ronald Wright, one of the advocates for greater transparency, concedes that “consistent rules for prosecutors might only give us more equal injustice for all, hamstringing prosecutors who might occasionally offer more favorable terms to some defendants.”<sup>219</sup>

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*Screening and Charging Authority*, 29 APR PROSECUTOR 22, 23 (1995) (arguing in favor of guidelines); Misner, *supra* note 29, at 767-69 (same); Vorenberg, *Decent Restraint*, *supra* note 25, at 1562-64 (same); Wright, *supra* note 80, at 1013 (arguing that “[p]rosecutorial guidelines can produce more visible and consistent decisions within offices”).

215. Frase, *supra* note 207, at 297 (“[P]ublication would reduce the legitimate deterrent and moralizing effects of the criminal law . . .”).

216. Herz, *supra* note 125, at 689 (noting that “[t]he author of the guideline cannot think of everything” and that specifying too many details without room for exceptions can “stand in the way of allowing unlike cases to be treated differently”).

217. There are additional reasons as well. See Wright, *supra* note 80, at 1019-22 (giving overview of other reasons why prosecutorial guidelines have not been adopted).

218. For a discussion of these issues in the context of Washington’s prosecutorial guidelines, see *id.* at 1023-27. Although, as Ronald Wright has pointed out, New Jersey has had some success with prosecutorial guidelines, it is unclear whether the circumstances there would translate to the federal system. New Jersey’s guidelines were mandated by a state court decision that found that restrictions on judicial sentencing, coupled with prosecutorial discretion, created a separation-of-powers violation under state law. *Id.* at 1030-31. There is nothing in the federal case law to indicate a similar ruling by the federal judiciary on the horizon.

219. *Id.* at 1013.

All of these mechanisms, then, fall short of addressing the problem of biased prosecutorial adjudication without compromising the interests of the defendant facing criminal charges. It is not because they lack theoretical bite. They are important theories, and perhaps under other political circumstances they would hold promise. But in today's tough-on-crime political climate and with criminal cases at record highs, they are unlikely to succeed.<sup>220</sup>

A more viable alternative for change, as Professors Ronald Wright and Marc Miller have emphasized in their work on reforming prosecutorial screening decisions, is to consider how the prosecutor's office could be reformed from within.<sup>221</sup>

### B. *The Benefits of Using Internal Separation*

What makes institutional reform—and more particularly, the structural separation solution offered here—more viable in today's political climate? The key is that, unlike the other proposals discussed above, this one offers something to prosecutors themselves. In particular, structural separation should appeal to the most important prosecutors, namely the Attorney General and the United States Attorneys. These head prosecutors should embrace this reform because it maintains order within the U.S. Attorneys' Offices and allows supervisors and other trusted attorneys in the office to exercise oversight over the line assistants. Although it may slow down the processing of a case slightly because the same supervisor can no longer oversee investigations and advocacy decisions and make these adjudicatory decisions—a cost in efficiency that will vary based on which permutation of the model is adopted (i.e., whether it includes a presentation by the defense attorney or a panel of adjudicators)—the benefits are considerable.<sup>222</sup>

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220. Ronald Wright and Marc Miller have summed it up best: "Experience here is telling: It has proven almost impossible to convince judges or legislatures to create meaningful limits" on prosecutorial discretion. Wright & Miller, *supra* note 66, at 53.

221. *Id.* at 55; *see also id.* at 117 ("Scholars should see that internal executive branch rules and policies are genuine parts of the legal system, and far more important to daily practice and decisionmaking, than the abstract and rarely applied constraints of federal and state constitutions."). Professors Wright and Miller offer two reasons for scholars' failure to consider internal design changes as a solution to prosecutorial abuses. First, they note that scholars are predisposed to constitutional and judge-based solutions. *Id.* at 55. Second, getting information on the actual workings of a prosecutor's office is difficult. *Id.*

222. Because prosecutors themselves—and particularly high-level prosecutors—might ultimately decide these reforms are in their interest, the proposal here might be applied more broadly than the federal system to cover the many and varied state prosecutors as well. Indeed, the current draft of the ABA Standards for Criminal Justice includes as one of its general principles that "[g]enerally, the prosecutor engaged in an investigation should not be the sole decision-maker regarding the decision to prosecute matters arising out of that investigation." STANDARDS FOR CRIMINAL JUSTICE: INVESTIGATIVE STANDARDS FOR THE PROSECUTOR Standard 1.2(e) (Draft 2007) (on file with author).

Consider first the incentives of the Attorney General. He or she has an interest in having Assistant United States Attorneys follow the policies of the Department of Justice.<sup>223</sup> That is why there are a variety of directives from Main Justice about how cases should be prosecuted and the standards that should be used.<sup>224</sup> A structural reform along the lines suggested here would be on par with these other directives. It would put trusted personnel in a position to make the most important decisions in a case without having their judgment skewed by prior exposure to the investigation. These attorneys will typically be supervisors or experienced prosecutors who have demonstrated allegiance to the U.S. Attorney's policies; therefore they are more likely than a line assistant to have views that correspond with the Attorney General's. That is because the Attorney General and the United States Attorneys are appointed by the President and likely share the President's goals or else face removal. AUSAs, in contrast, hold their positions for longer and may not share the views of the sitting President.

Although some Justice Department directives are met in practice with more resistance than others, a command from Main Justice to United States Attorneys to restructure offices along the lines recommended here should be embraced by every United States Attorney as good management—or at least not resisted as too cumbersome. Every United States Attorney has the incentive to ensure that his or her prosecutors are following his or her enforcement priorities and policies. As offices have grown in size and more attorneys decide to stay with the government for longer periods, U.S. Attorneys have realized that they have a harder time controlling their line assistants.<sup>225</sup> As a result of these factors, most U.S. Attorneys have “created more formal and structured office hierarchies.”<sup>226</sup> Most offices are now set up to have separate criminal and civil divisions, and the larger offices further divide based on substantive areas, such as narcotics, violent crime, or white collar cases.<sup>227</sup> There is typically a first assistant or deputy to the U.S. Attorney, as well as a chief of the criminal and civil divisions, and all of these supervisors are charged with monitoring the line attorneys to make sure they are complying with office policies.<sup>228</sup>

Once such hierarchies are established, separating functions is a small additional step and one unlikely to provoke resistance by either the line assistants or the U.S. Attorneys. After all, the approach proposed here would

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223. See Richman, *supra* note 74.

224. The Attorney General has the authority to control AUSAs pursuant to 28 U.S.C. § 519 (2006), which gives the Attorney General the authority to “direct all United States Attorneys . . . in the discharge of their respective duties.”

225. See Lochner, *supra* note 175, at 288.

226. *Id.*

227. *Id.* at 289.

228. *Id.* Other offices go further and have written office policies on when to decline to bring cases. *Id.*

assist U.S. Attorneys in achieving greater control of their attorneys, in getting unbiased decision making, and in policing attorneys seeking to shirk work and avoid trial—all results that U.S. Attorneys should favor. The benefits of exercising greater control and making sure attorneys do not compromise office values to avoid work at trial are obvious. But the value of unbiased decision making should be equally plain. Objective decision making is most likely to result in the best deployment of office resources.

That would explain why some U.S. Attorneys already have put in place a decision-making model that is not far from what is being suggested here. Although it is exceedingly difficult to get information on the inner workings of all U.S. Attorneys' Offices because of a traditional resistance in the federal government to share any information about criminal prosecution, interviews and published accounts shed light on some office practices.

One office that follows a model close to the one advocated here is the U.S. Attorney's Office for the Southern District of California (San Diego Office).<sup>229</sup> The San Diego Office employs what it calls "indictment review" in all investigatory cases. The line assistant who works on the investigation of the case must write a prosecution memo, which is forwarded to the Chief of the Criminal Division and the First Assistant, as well as to every other line assistant in the section. The distribution to line assistants in the relevant section (e.g., Major Frauds or General Crimes) allows other AUSAs to check for consistency with similar cases. The memo contains a summary of the facts and the evidence, whether the prosecutor anticipates an indictment, the anticipated sentence, and any weaknesses in the case. Although the supervisors who receive the prosecution memo might be involved in the investigation as well, they typically are not unless the investigation involves a Title III wiretap. To be sure, the views of the line assistant who investigates the case typically receive deference, but the supervisors also ask tough questions and will send the case back to the line assistant for revisions if they are not happy with the answers. The San Diego Office therefore employs a variation of the model here: a separate team of adjudicators will review the charges and second-guess the attorney who has investigated the case. And because that separate team includes the Chief of the Criminal Division and the First Assistant, its members have the final say in how the case should be charged.

Other offices follow another variant of the model proposed here by allowing a defendant to appeal up the chain of command if he or she does not like the line prosecutor's decisions. In white-collar cases in the Southern District of New York, for example, defense lawyers actively make their case to the line assistant working on the case, but "[t]he presentations are not limited to the prosecutor in charge of the matter; if the line prosecutor rejects the defense's contentions, counsel may seek 'appellate review' by the prosecutor's

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229. This information was obtained through a conversation with someone familiar with the process in the office.



supervisors, at ascending levels of prosecutorial bureaucracy, from unit chief to criminal division chief, to the United States Attorney.”<sup>230</sup> The U.S. Attorney’s Office for the District of Columbia similarly has a policy whereby defense lawyers can seek a meeting with an AUSA’s supervisor to review the terms of a plea offer.<sup>231</sup> It is unclear whether this supervisor will have also advised the attorney at the earlier investigative stage of the case, in which case he or she may share biases of the line assistant. But further appeals up the chain of command are also available on a discretionary basis, depending on

whether the case is high-profile, sensitive, or unusually significant, whether defense counsel has raised policy concerns that have implications beyond the case at issue, whether there has been a split of opinion at lower levels, and whether the line prosecutor and lower-level decision makers believe the defense counsel’s concerns merit higher-level decision-making.<sup>232</sup>

The District of Columbia also has a separation policy involving departure motions. In particular, AUSA decisions about whether or not to seek a departure under the Sentencing Guidelines, including a departure based on substantial assistance to the government, must be approved by a special committee.<sup>233</sup> This committee consists of six attorneys, three of whom are supervisors and three of whom are senior line assistants from different sections of the Criminal Division.<sup>234</sup> This structure therefore mirrors the proposal here, in that a separate body, including individuals who were not part of the investigation or decision to prosecute, must approve a final adjudicatory decision about substantial assistance and sentencing.

Quite a few U.S. Attorneys follow some sort of structural separation for substantial assistance motions. One study commissioned by the United States Sentencing Commission found that more than two-thirds of the districts required at least approval by a supervisor assistant before a § 5K1.1 motion could be filed, and most of these used additional review procedures as well.<sup>235</sup> A full quarter of the U.S. Attorney Offices employ a substantial assistance committee, with Criminal Division Chiefs, Unit Chiefs, and other AUSAs “frequently” among the membership.<sup>236</sup> Although compliance with these procedures is not entirely consistent,<sup>237</sup> and some of the supervisors on committees may have also been involved in investigatory decisions, the fact

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230. Lynch, *supra* note 5, at 2126.

231. Brown & Bunnell, *supra* note 178, at 1082.

232. *Id.* at 1082-83.

233. *Id.* at 1073.

234. *Id.*

235. MAXFIELD & KRAMER, *supra* note 161, at 7 n.18; *see also* Bibas, *supra* note 183, at 124 (noting that “[m]ost U.S. Attorney’s offices have written policies requiring approval by the U.S. Attorney, a supervisory assistant, a review committee, or some combination of these” for entering cooperation agreements).

236. MAXFIELD & KRAMER, *supra* note 161, at 7 n.18.

237. The Maxfield and Kramer study found a compliance rate of 41.2% for review committees. *Id.* at 8.

that these mechanisms are in place demonstrates both their attraction to U.S. Attorneys and their feasibility. Adjusting these structures to ensure that individuals involved in the investigation are not among the membership would be a relatively minor modification, and one that is likely to be accepted once the benefits of objectivity are pointed out.

Where resistance to this reform is likely to be greatest is in smaller offices, where supervision tends to be less intense and where U.S. Attorneys might be of the view that oversight can be achieved more informally by getting to know each attorney and his or her capacity for wise decision making.<sup>238</sup> Although these offices might have a preference for a more informal model, it is unlikely they would resist a Justice Department directive to restructure their offices along these lines. It is a relatively costless alteration in practice, and most U.S. Attorneys should see the benefits of less biased decision making.

But even if some offices resist in practice, many others should embrace this proposal. And even if only the largest offices readjust their internal workings, that would still be a vast improvement over the status quo.

One might well ask at this point why the Department of Justice has not yet mandated the structural separation outlined here if it is so beneficial. Path dependence and an inability to recognize the adjudicative nature of prosecution provide at least part and maybe all of the answer. To see the benefits of the structural separation recommended here requires, as a first step, that one acknowledge that prosecutors are combining two types of powers: enforcement and adjudicative. Prosecutors rarely see their jobs in these terms. Everything they do is, to them, part of the prosecutorial function. Thus, envisioning an office restructuring that separates adjudicative functions from all other aspects of the job cuts against the view prosecutors have of themselves. While it is standard to do this in regulatory agencies, it is not the approach most prosecutors—or scholars, for that matter—take. But once the office is seen in that light, the benefits of structural separation should sell themselves.

What will prompt prosecutors to change the view they have of themselves? A new administration with a new outlook on prosecutorial power might lead to a rethinking of how prosecutors do their jobs.

Congress and certain defense interests could also play a role. Although Congress has yet to regulate prosecutors in any significant way, it occasionally steps in, when urged by a sufficiently powerful interest. The number of individuals facing federal criminal charges in the past few decades has grown dramatically.<sup>239</sup> And although the list is dominated by poor people who are disadvantaged in the political process, it also includes plenty of powerful

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238. Bibas, *supra* note 15, at 144 (noting that larger urban offices have more supervisory oversight).

239. See Michael E. Horowitz & April Oliver, *Foreword: The State of Federal Prosecution*, 43 AM. CRIM. L. REV. 1033, 1040 (2006) (“[T]he number of federal criminal cases has exploded, from approximately 38,000 in 1995 to nearly 70,000 [in 2006].”).

members of society, including corporate titans.<sup>240</sup> The experience of these high-profile and high-status offenders with prosecutors' offices has drawn attention to some of the troublesome practices in these offices and has even led to reforms.

The most informative recent example involves Justice Department guidelines for prosecuting corporate criminal offenders. The Department had set out its guidelines in a document referred to as the Thompson Memo.<sup>241</sup> Corporations cannot commit crimes without individuals acting unlawfully, so the Thompson Memo required corporations seeking to avoid prosecution to identify individual wrongdoers within the company and created powerful incentives for corporations to cease paying the attorneys' fees of those wrongdoers. The memo, which was implemented in 2003, also provided incentives to companies to waive their attorney-client privilege at the government's request so that culpable individuals could be identified. The government adopted these positions in response to gross corporate frauds like Enron. The approach drew criticism from the white-collar defense bar and at least one federal judge because they viewed it as unduly coercive.<sup>242</sup>

It just took a few weeks of orchestrated campaigning by big business interests to change the Department's position. In early September 2006, former high-level government officials—who are now in private practice representing companies and white-collar defendants—asked the Department to modify its practices.<sup>243</sup> These same forces also persuaded Senator Arlen Specter to propose legislation, the Attorney-Client Privilege Protection Act, that would bar prosecutors from assessing a company's cooperation on the basis of whether or not there was a privilege waiver.<sup>244</sup> The Justice Department, seeking to avert the proposed legislation and appease these corporate

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240. Federal defendants in general are more likely than state defendants to be "white, married, richer, better educated, more likely to hire an attorney, less likely to break the rules, and less likely to have prior offenses." Edward L. Glaeser et al., *What Do Prosecutors Maximize? An Analysis of the Federalization of Drug Crimes*, 2 AM. LAW & ECON. REV. 259, 273 (2000). A look at major white-collar cases over the past few years should prove the point. From Martha Stewart to William Lerach to Bernie Ebbers, corporate leaders have found themselves ensnared in the criminal justice system. See *United States v. Stewart*, 433 F.3d 273 (2d Cir. 2006); *In re WorldCom, Inc. Sec. Litig.*, 388 F. Supp. 2d 319 (S.D.N.Y. 2005); Michael Parrish, *Leading Class-Action Lawyer Pleads Guilty to Conspiracy*, N.Y. TIMES, Oct. 30, 2007, at C9.

241. Memorandum from Larry D. Thompson, U.S. Deputy Attorney Gen., on Principles of Federal Prosecution of Business Organizations (Jan. 20, 2003), available at [http://www.usdoj.gov/dag/cftf/corporate\\_guidelines.htm](http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm).

242. *United States v. Stein*, 495 F. Supp. 2d 390 (S.D.N.Y. 2007); John J. Falvey, Jr. & Janet E. Taylor, *Federal Prosecutors and Advancement of Legal Defense Fees: Don't Ask, Don't Tell*, 52 BOSTON BAR J. 14, 16 (2008) (discussing the "outcry by bar groups and private industry against the Thompson Memorandum").

243. Letter from Griffin B. Bell, U.S. Attorney Gen. (1977-79), et al. to Alberto Gonzales, U.S. Attorney Gen., Dep't of Justice (Sept. 5, 2006), available at [http://www.abanet.org/media/docs/ag\\_sept52006.pdf](http://www.abanet.org/media/docs/ag_sept52006.pdf).

244. Attorney-Client Privilege Protection Act of 2006, S. 30, 109th Cong. (2006).

interests,<sup>245</sup> issued a memo, known as the McNulty Memo, that allowed corporations to bankroll the attorneys' fees of top executives except in "extremely rare cases" that were to be defined by political appointees in Washington.<sup>246</sup> The McNulty Memo required approval from these same DC-based political appointees before federal prosecutors could seek a waiver of the attorney-client privilege from corporations, and the memo prohibited federal prosecutors from considering a company's refusal to agree to a waiver of privilege in deciding whether to indict the corporation, effectively eliminating any negative pressure on corporations to waive the privilege. In August of 2008, the Department replaced the McNulty Memo with the Filip Memo and provided the powerful white collar defense interests with still further concessions, explicitly emphasizing that "[e]ligibility for cooperation credit is not predicated upon the waiver of attorney-client privilege or work product" and that "prosecutors should not ask for such waivers."<sup>247</sup>

These same high-status defendants may ultimately urge permanent structural reforms along the lines recommended here. To be sure, the reforms in the McNulty and Filip memos improved only the lot of corporate defendants because the reforms are specific to them. Moreover, these white collar defendants are the same defendants who already typically get the kind of supervisory, impartial review suggested here,<sup>248</sup> which thereby decreases their incentive to lobby for it. But "typically" is not the same as always or consistently, and the uncertainty may lead many of them to seek permanent reforms that would make the structural protections advocated here available in the future and not doled out on a discretionary, case-by-case basis. It is noteworthy in this respect that the protections for separated functions in the APA—which ultimately benefit all individuals facing formal adjudications by agencies—were spearheaded by the powerful regulated entities.<sup>249</sup> As federal

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245. Mark J. Stein & Joshua A. Levine, *The Filip Memorandum: Does It Go Far Enough?*, N.Y. L.J., Sept. 11, 2008, <http://www.law.com/jsp/PubArticle.jsp?id=1202424426861> (last visited Feb. 18, 2009).

246. Memorandum from Paul J. McNulty, Deputy Attorney Gen., to Heads of Dep't Components & U.S. Attorneys on Principles of Federal Prosecution of Business Organizations 11 n.3 (Dec. 12, 2006), *available at* [http://www.usdoj.gov/dag/speeches/2006/mcnulty\\_memo.pdf](http://www.usdoj.gov/dag/speeches/2006/mcnulty_memo.pdf).

247. Memorandum from Mark R. Filip, Deputy Attorney Gen., to Heads of Dep't Components & U.S. Attorneys on Principles of Federal Prosecution of Business Organizations 9 (Aug. 28, 2008), *available at* <http://www.usdoj.gov/opa/documents/corpccharging-guidelines.pdf>.

248. Lynch, *supra* note 5, at 2126.

249. Asimow, *supra* note 103, at 798 ("[S]eparation of functions is obligatory in a practical sense; outsiders litigating with an agency will not tolerate their adversaries whispering in the ears of decisionmakers. Acceptability of procedures by affected persons is indispensable for a smoothly functioning administrative process."). Regulated entities and the bar have similarly pressured agencies to follow this model in those areas where the APA does not require separation. Pedersen, *supra* note 95, at 1003. The instances of even greater institutional separation, such as the separation of adjudication and prosecution under the

corporate criminal law expands, these same groups may see the need for greater protection of their interests on the criminal side.<sup>250</sup> The procedural and structural reforms they obtain may then inure to the benefit of all defendants. The proposal here, for example, does not bias the system in favor of a particular class of offender. High-status offenders should therefore support it, and if that is what an important number of their constituents want, the political agents should want it, too. Thus, just as the threat of congressional interference prompted changes to the Thompson Memo, that same threat could prompt internal structural changes in U.S. Attorneys' Offices.<sup>251</sup>

The political climate seems particularly well suited for this reform because it helps ensure that resources are used most effectively. Although cost pressures do not operate as significant restraints on the federal government in the same way they do on the states,<sup>252</sup> cost pressures have led the federal government to cease providing funding of U.S. Attorneys' Offices that keeps up with the rate of inflation.<sup>253</sup> As the fiscal crisis deepens, it is likely these de facto cuts in funding will continue. There is thus a greater need to ensure that prosecutors are selecting the right cases for federal intervention.

Yet another reason why political circumstances are ripe for this suggestion is that greater attention is now being paid to the gross racial disparities that exist in criminal law enforcement practices. The Sentencing Commission recently decided to limit the disparity between sentences for crack and powder

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Occupational Safety and Health Act (OSHA) between two separate agencies, were also the end product of powerful lobbying. *See* Mintz, *supra* note 95, at 884-85 (describing the push by the business community to have a separate agency outside of the Department of Labor adjudicate disputes under OSHA).

250. This might therefore be an area like policing where William Stuntz has pointed out that legislators may have an incentive to put fundamental checks in place because enough interested citizens are stopped by the police. William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 780, 795 (2006). In the same vein, "historically, legislatures have been a good deal quicker to expand criminal procedure protections than to contract criminal liability." *Id.* at 796.

251. William Stuntz's work on accountable policing suggests that this is an area where Congress may decide to act because legislatures are more likely to pass laws relating to criminal procedure in areas in which the courts have not already staked out legal rules. *See* William J. Stuntz, *Accountable Policing* 34 (Harvard Pub. Law Working Paper No. 130, 2006), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=886170](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=886170) ("It seems the surest way to promote legislative action is for the Supreme Court to deem legal protection unnecessary."). Because internal oversight of these decisions is an area where courts have done nothing, Congress could step in with a relatively modest rule and still have a big impact. As Professor Stuntz explains, when the courts stay out of regulating a field of criminal procedure, it leaves legislators ample opportunity to make a big impact with relatively inexpensive regulations because any regulation of this area would be a vast improvement over the status quo. *Id.*

252. Rachel E. Barkow, *Federalism and the Politics of Sentencing*, 105 COLUM. L. REV. 1276 (2005).

253. *See* Scot J. Paltrow, *Budget Crunch Hits U.S. Attorneys' Offices*, WALL ST. J., Aug. 31, 2007, at A1.

cocaine and to apply those changes retroactively.<sup>254</sup> The Supreme Court held that district courts may take that disparity into account as a matter of sentencing discretion.<sup>255</sup> And President Obama has announced his support for these reforms,<sup>256</sup> signaling that there is some room for national politicians to support improvements in criminal justice. Because this proposal is a check on all arbitrary and discriminatory decision making by line prosecutors, it can help curb racial discrimination in federal law enforcement.

Finally, because this reform involves structural changes as opposed to substantive policy shifts, it is less likely to face resistance. As Neal Kumar Katyal recently observed in advocating internal checks on the executive branch's foreign affairs decisions, "sometimes broad design choices are easier to impose by fiat than are specific policies."<sup>257</sup> While they may attract less attention, structural reforms are potent and can allow political actors to control their agents.<sup>258</sup>

## CONCLUSION

Controlling prosecutorial discretion has troubled criminal law scholars for decades. But despite consistent calls for reform, very little has changed. Indeed, what has changed, if anything, is that prosecutors now have even more power. Guilty pleas are up, trials are down, and mandatory punishments allow prosecutors to set the terms of a sentence.

Scholars have looked almost everywhere for the solution other than within the prosecutor's office itself. Administrative law has long used institutional design to control the abuse of discretion in agencies. Applying that same insight to prosecutors' offices, it is possible to construct a check on prosecutorial abuse that is effective and politically viable.

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254. News Release, U.S. Sentencing Comm'n, U.S. Sentencing Commission Votes Unanimously to Apply Amendment Retroactively for Crack Cocaine Offenses (Dec. 11, 2007), available at <http://www.ussc.gov/PRESS/rel121107.htm>.

255. *Kimbrough v. United States*, 128 S. Ct. 558 (2007).

256. See The Agenda, Civil Rights, [http://www.whitehouse.gov/agenda/civil\\_rights/](http://www.whitehouse.gov/agenda/civil_rights/) (last visited Feb. 17, 2009) ("President Obama and Vice President Biden believe the disparity between sentencing crack and powder-based cocaine is wrong and should be completely eliminated."). President Obama supported these reforms during his presidential campaign as well. See Bob Egelko, *Where They Stand on Crime, Death Penalty*, S.F. CHRON., Feb. 10, 2008, at E6.

257. Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 YALE L.J. 2314, 2324 (2006).

258. See Terry M. Moe, *The Politics of Bureaucratic Structure*, in CAN THE GOVERNMENT GOVERN? (John E. Chubb & Paul E. Peterson eds., 1989); Andrew B. Whitford, *Bureaucratic Discretion, Agency Structure, and Democratic Responsiveness: The Case of the United States Attorneys*, 12 J. PUB. ADMIN. RES. & THEORY 3, 8 (2002).

