

REALLOCATING INTERPRETIVE CRIMINAL-LAWMAKING POWER WITHIN THE EXECUTIVE BRANCH

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I

INTRODUCTION

The federal criminal-lawmaking system is commonly perceived to be out of control. Once content to leave the bulk of criminal lawmaking to the states, Congress now reacts convulsively to every species of wrongdoing that captures public attention, whether it be carjacking, child molestation, or celebrity stalking.¹ Courts, too, are viewed as having contributed to creeping federal criminalization by recklessly extending mail fraud and other broadly worded statutes to behavior traditionally subject only to private tort remedies.² Commentators have prescribed a variety of strong medicines for these pathologies, from renewed attention to “strict construction,” “void-for-vagueness,” and other legality related doctrines, to the revival of constitutionally grounded federalism limits on Congress’ criminal-lawmaking powers. Some headway has been made with these proposals, but not much.

I want to defend a very different kind of strategy for regaining control of federal criminal law: the reallocation of *interpretive* criminal-lawmaking power within the Executive Branch. By interpretive lawmaking power, I mean the authority to issue presumptively binding interpretations of ambiguous or generally worded regulatory statutes. This is a familiar incident of lawmaking power in domains in which Congress is understood to have delegated policy-making authority to administrative agencies. Right now, this incident of criminal-lawmaking power—the existence of which is barely even acknowledged by

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1. See 18 U.S.C. § 2119 (1994) (carjacking); 42 U.S.C. § 14071 (1994) (requiring reporting of information on individuals convicted of child molestation); Todd S. Purdum, *Two Senators Propose Anti-Paparazzi Law*, N.Y. TIMES, Feb. 18, 1998, at A16:

A bipartisan pair of high-powered Senators came to Hollywood today to promote legislation intended to curb the abuses of paparazzi who stalk celebrities. The bill would make it a Federal crime to chase someone in a way that risks bodily harm in an effort to photograph or record the person for commercial purposes.

2. See, e.g., John C. Coffee, Jr., *Does “Unlawful” Mean “Criminal”?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. REV. 193, 197-99 (1991).

commentators—currently resides largely in individual U.S. Attorneys, who wield it in a largely unmonitored and uncoordinated fashion. My proposal is that this power be centralized within the Department of Justice (“DOJ”).

This prescription reflects a distinctive diagnosis of what ails federal criminal lawmaking. Whereas most commentators blame Congress and the courts for making too much criminal law; I believe the problem is that they systematically make too little. Congress gets plenty of credit when it appears to react decisively to crime, but the marginal benefit it gets from addressing crime problems in a considered and thoroughgoing fashion is essentially nil. Not surprisingly, then, Congress tends to enact highly general criminal statutes, leaving the details of what those laws actually do and do not prohibit to be worked out in the course of application. However, the primary law applicers—the courts—usually balk at the task of limiting the reach of these open-ended statutes, on the ground that only Congress can legitimately make the policy choices that narrowing them entails. The result is a lawmaking void, which politically enterprising U.S. Attorneys necessarily fill by deciding for themselves just how far to stretch the incredibly elastic statutes that Congress enacts. And in their hands, those statutes are made to stretch much farther than they ought to under any sensible conception of the function of federal criminal law.

Formally investing DOJ with interpretive lawmaking power would go a long way to correcting this state of affairs. DOJ attorneys face less temptation to advance broad readings of federal criminal statutes than do individual U.S. Attorneys; they are also more responsive to the interests that such readings can undermine. These moderating tendencies could be reinforced, moreover, by subjecting the DOJ’s exercise of such power to the form of review that courts now apply to other agencies’ interpretive lawmaking.

My argument comprises the next three parts of this essay. Part II analyzes the political and legal dynamics that invest individual U.S. Attorneys with *de facto* interpretive criminal-lawmaking power. Part III advocates the transfer of such power to Main Justice. And Part IV examines the legal mechanisms by which such a reallocation could best be brought about.

II

LEGISLATORS WHO WON’T, JUDGES WHO CAN’T, AND PROSECUTORS WHO *DO*

What is wrong with federal criminal-lawmaking is just a specific instance of a general lawmaking pathology identified nearly four decades ago by Judge Friendly. In an essay entitled *The Gap in Lawmaking: Judges Who Can’t and Legislators Who Won’t*, Friendly described the regulatory disarray that results when Congress occupies a field with statutes that are sufficiently comprehensive to displace inventive common-lawmaking but insufficiently comprehensive

to resolve the problems that Congress is trying to regulate.³ Although Friendly did not apply it to criminal law, his framework fits it to a tee: 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.

Start with members of Congress who won't. It is axiomatic that "within our federal constitutional framework the legislative power, including the power to define criminal offenses, resides wholly with the Congress."⁴ But this axiom is also a rank fiction. Anyone who practices or studies federal criminal law knows that the highly general prohibitions that make up Title 18 of the United States Code supply only a trivial fraction of the effective legal rules; the rest are to be found in the case law applying those prohibitions to actual cases.

A few examples should suffice. "Fraud" is a legal concept that is incomplete by design, having been fashioned by equity courts as a general catchall for grossly wrongful or deceptive conduct that evades established common law norms.⁵ The concept of "property" also lacks a precise definition that applies across legal contexts.⁶ Thus, by incorporating these concepts into a host of important criminal statutes—including mail and wire fraud,⁷ conspiracy to defraud the United States,⁸ the National Stolen Property Act,⁹ and the federal theft provision¹⁰—Congress did not so much make law as create a demand for law to be made at some later date. And that is exactly what has happened as these statutes have gradually been extended to scores of discrete forms of wrongdoing—from title washing to insider trading, from misappropriation of confidential information (private and governmental) to public corruption—that no one believes Congress specifically had in mind when it enacted these laws.¹¹

The same story applies to statutes of more recent vintage, such as the Racketeer Influenced and Corrupt Organizations Act ("RICO").¹² Congress did little to spell out the forms of organized criminality that this offense is supposed to cover. For example, the statutory definition of "enterprise," which "includes any individual . . . and any union or group of individuals associated in fact,"¹³

3. See Henry J. Friendly, *The Gap in Lawmaking: Judges Who Can't and Legislators Who Won't*, 63 COLUM. L. REV. 787 (1963).

4. *Whalen v. United States*, 445 U.S. 684, 689 (1980).

5. See generally 1 JOSEPH STORY, EQUITY JURISPRUDENCE § 186 (10th ed. 1870); Milton D. Green, *Fraud, Undue Influence and Mental Incompetency*, 43 COLUM. L. REV. 176, 177-79 (1943).

6. See generally Thomas C. Grey, *The Disintegration of Property*, 22 NOMOS (PROPERTY) 69 (1980).

7. See 18 U.S.C. §§ 1341, 1343 (1994).

8. See *id.* § 371.

9. *Id.* § 2314.

10. See *id.* § 641.

11. See Dan M. Kahan, *Is Chevron Relevant to Federal Criminal Law?*, 110 HARV. L. REV. 469, 475-77 (1996).

12. See 18 U.S.C. §§ 1961-1968 (1994).

13. *Id.* § 1961(4).

literally excludes nothing from its scope. Other opaque but critical terms, such as “to conduct or participate . . . in the conduct of” the affairs of an enterprise, lack any statutory definition whatsoever.¹⁴ Congress apparently imagined that RICO would be directed at organized crime bosses and corrupt union chieftains, but the offense that this ill-defined statute has become now extends to violent political protestors,¹⁵ overreaching financiers,¹⁶ and dishonest politicians¹⁷ as well.

What accounts for Congress’ persistent failure to enact complete criminal prohibitions? The explanation is the convergence of two forces, both of which were described by Friendly. The first is political dissensus. In “highly controversial areas,” Friendly wrote, Congress may be deterred from legislating with specificity not by “lack of interest . . . but [by the] equivalence of conflicting pressures—in which the chessmen have been moved and moved but the game has been a draw.”¹⁸ Highly general or vague statutory language is the predictable outcome of a political stalemate of this sort, because it spares members of Congress from having to take definitive stands that could disappoint powerful constituencies.¹⁹ Congress settled on RICO’s nondefinition of “enterprise,” for example, only after attempts to specify what or who constituted “organized crime” in RICO provoked strong opposition by organized labor, civil libertarians, and other interest groups.²⁰

The second force that contributes to unspecific criminal legislation is the press of other legislative business. Just as members of Congress “are too driven to be able to attend to” mundane issues of regulatory policy,²¹ so they are too driven to attend to the mundane details of the federal criminal code. To convince the public that their representatives are getting “tough” on crime, it is enough for Congress to enact highly general, or even purely symbolic, legislation. Because they take relatively little time to enact, such highly general statutes leave Congress free to focus more attention on appropriations and other noncriminal programs valued by the organized interest groups on whose support members depend for reelection.²²

As Friendly’s account suggests, these dynamics are not peculiar to criminal law. Indeed, they also plausibly explain the low profile role that Congress

14. *Id.* § 1962(c).

15. *See* *NOW v. Scheidler*, 510 U.S. 249 (1994).

16. *See* Gerard E. Lynch, *RICO: The Crime of Being a Criminal: Parts I & II*, 87 COLUM. L. REV. 661, 748-58 (1987).

17. *See id.* at 741.

18. Friendly, *supra* note 3, at 801.

19. *See* CHARLES R. WISE, *THE DYNAMICS OF LEGISLATION* 178 (1991).

20. *See* *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 246-47 (1989) (recounting debate over scope of RICO); Lynch, *supra* note 16, at 685-88; John J. McClellan, *The Organized Crime Act (S. 30) or Its Critics: Which Threatens Civil Liberties?*, 46 NOTRE DAME L. REV. 55, 60-61 (1970) (responding to objections from civil libertarians, bar associations, and others).

21. *See* Friendly, *supra* note 3, at 801.

22. *See* MANCUR OLSON, JR., *THE LOGIC OF COLLECTIVE ACTION* (1965); *cf.* Frank H. Easterbrook, *Statutes’ Domains*, 50 U. CHI. L. REV. 533, 548 (1983) (discussing how the scarcity of time constrains legislative output).

chooses to play in fields such as labor law and antitrust. There, incompletely specified statutes are understood as implicit delegations of lawmaking power to courts, which have responded by developing robust bodies of “federal common law.”²³ It is tempting to view federal criminal law as a common law field of the same essential character.²⁴

What makes such a picture seem at least a bit distorted, however, is that federal judges themselves do not usually see their role this way. This is the “judges who can’t” side of the story. Notwithstanding Congress’ abdication of its criminal-lawmaking responsibilities, courts regularly take the position that they are powerless to read limiting principles into RICO and other broadly worded statutes on the ground that adopting them would infringe on Congress’ exclusive lawmaking prerogatives.²⁵ Abrams and Beale describe the recurring “pattern”:

Congress is presented with information suggesting that there is a type of large scale crime problem of sufficient magnitude and occurring on a national scale so as to warrant federal intervention through the legislating of a new federal crime. Congress proceeds to legislate a statute that is drafted in terms that extend more broadly than the kind of large scale criminal activity which was the perceived reason for the legislation. The legislative history is nevertheless replete with statements indicating that the purpose of the statute was to deal with the perceived kind of large scale criminal activity.

Subsequently, a prosecution is brought under the new statute, involving a mundane, local situation rather than the type of large scale criminal activity that was the perceived national crime problem. Because of the absence of limiting language in the statute, the prosecution appears to be a permissible invocation of the statute, and the defendant is convicted. The defendant appeals, claiming that the statute should be limited to the purposes behind the statute as delineated in the legislative history. The court upholds the broad interpretation of the statute, consistent with its actual language, concluding that while the statute was “primarily” aimed at the indicated large scale criminal activity, the plain meaning of its express language is controlling.²⁶

Implicit in this account, finally, is the role of individual “U.S. Attorneys who do.” They are the ones deciding to bring open-ended criminal statutes to bear on “mundane, local situation[s]” remote from the perceived exigency that prompted Congress to enact those laws. Because Congress systematically fails to specify the content of criminal statutes, and because courts routinely eschew the authority to give content to those statutes through policy-laden common-

23. See generally Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1 (1985).

24. See generally Dan M. Kahan, *Lenity and Federal Common Law Crimes*, 1994 SUP. CT. REV. 345.

25. See, e.g., *H.J. Inc.*, 492 U.S. at 249 (“[If the omission of an organized crime nexus in RICO] is a defect . . . it is one ‘inherent in the statute as written,’ and hence beyond our power to correct.” (quoting *Sedima, S.P.R.C. v. Imrex Co.*, 473 U.S. 479, 499 (1985)); see also *United States v. Culbert*, 435 U.S. 371, 374 (1978) (“Respondent . . . argues that we should read a racketeering requirement into the [Hobbs Act]. To do so, however, might create serious constitutional problems, in view of the absence of any definition of racketeering in the statute.”); *United States v. Pino-Perez*, 870 F.2d 1230, 1237 (7th Cir. 1989) (en banc) (professing to lack power to construct federal aiding and abetting statute in a manner that would prevent it from undermining graded punishment scheme reflected in drug “kingpin” statute).

26. NORMAN ABRAMS & SARA SUN BEALE, *FEDERAL CRIMINAL LAW AND ITS ENFORCEMENT* 51 (2d ed. 1993).

lawmaking, U.S. Attorneys exercise effective criminal-lawmaking power by default.

For predictable reasons, U.S. Attorneys exercise that power in a way that pushes federal criminal law far beyond the scope of any genuinely federal concern. U.S. Attorneys are extraordinarily ambitious and routinely enter electoral politics after leaving office.²⁷ Consequently, while in office, they face significant incentives to advance imaginative readings of vague criminal offenses in order to please influential local interests.

Consider Rudolph Giuliani's notorious insider trading prosecutions. According to Daniel Fischel, Giuliani brought these cases in a self-conscious attempt to court the approval of established Wall Street firms, which were then being routed by Michael Milken and other financial innovators, and which ultimately did supply critical support to Giuliani when he later ran for Mayor of New York City.²⁸ Although Fischel's indictment of Giuliani is open to dispute, the key point is that Congress' and the courts' lawmaking abdication makes entrepreneurial behavior by U.S. Attorneys both plausible and predictable.

These dynamics make for law that is as bad in content as it is broad in form. The standard critique of how federal criminal law unfolds focuses on its disregard for notice and other "rule of law" values, a particularly legitimate concern when the law is being applied to *malum prohibitum* conduct. But giving *de facto* lawmaking power to individual U.S. Attorneys also undermines important systemic interests at stake in the criminalization of *malum prohibitum* and *malum in se* conduct alike. Too much federal criminal law can waste governmental resources, chill socially desirable conduct, divest state governments of political vitality, and distort the formation and expression of national moral ideals.²⁹ Individual U.S. Attorneys do not internalize these costs when they parley their power to enlarge the scope of federal criminal law into personal political benefits. As a result, a body of federal law constructed in large part by individual U.S. Attorneys is certain to disserve important national political interests.

III

JUSTICE DEPARTMENT ATTORNEYS WHO *SHOULD*

Fixing federal criminal law requires that federal criminal-lawmaking power be diverted away from individual U.S. Attorneys to some institution that will be more responsive to the interests that should inform the exercise of this power. But which institution fits that description?

The obvious answer might seem to be Congress. Through stricter enforcement of void-for-vagueness doctrine and the rule of lenity, courts could try to

27. See generally JAMES EISENSTEIN, COUNSEL FOR THE UNITED STATES: U.S. ATTORNEYS IN THE POLITICAL AND LEGAL SYSTEMS 230-31 (1978).

28. See DANIEL R. FISCHEL, PAYBACK 98, 111-12 (1995).

29. See generally Kahan, *supra* note 24.

pressure Congress to legislate with more specificity.³⁰ However, this is a dubious strategy. Congress' default of its lawmaking obligations is the product of powerful and long-standing institutional dynamics. In the face of these pressures, judicial attempts to force Congress to shoulder the entire burden of federal criminal lawmaking are likely to prove futile.³¹ Moreover, even if courts could force Congress itself to make more federal criminal law, it is not clear that doing so would fix the problems with federal criminal law. For reasons that critics of contemporary federal criminal law know full well, when Congress does legislate with specificity, it systematically overstates the benefits and understates the costs of excessively severe criminal law.³² If draconian mandatory minimums for minor drug offenders,³³ life sentences without parole for all individuals convicted of three felonies,³⁴ capital punishment for offenders who inadvertently kill postal inspectors,³⁵ and the like are any indication, forcing Congress to enact even more criminal law than it does now would hardly be an accomplishment worth applauding.

Another possibility would be to persuade courts to recognize that they possess the power to define criminal doctrines of defensible content through common-lawmaking. But this, too, is not a particularly realistic or sensible strategy. Powerful legal-cultural norms inhibit courts from openly acknowledging their criminal-lawmaking function. Moreover, even if courts did own up to their power, the sheer number of district court and court of appeals judges who participate in it—well over 700—would pose immense obstacles to its consistent and rational exercise.

The intractability of the “legislators who won’t, judges who can’t” problem led Judge Friendly to propose formation of an expert “law revision commission.”³⁶ I would like to propose something similar for criminal law: that the effective lawmaking power that U.S. Attorneys now exercise be formally trans-

30. See generally *id.*

31. As a case in point, consider *McNally v. United States*, 483 U.S. 350 (1987). In *McNally*, the Supreme Court boldly invoked lenity to invalidate the judicially constructed “intangible rights” theory of mail fraud; it did so, moreover, precisely because it viewed “setting standards of disclosure and good government for local and state officials” to be a congressional rather than a judicial task. *Id.* at 360. What was Congress’ response? It did thereafter enter the field of local corruption, but in a manner that completely side-stepped the leadership obligation that the Court tried to impose. Congress enacted 18 U.S.C. § 1346, which simply engrafts the “intangible right to honest services” standard onto the preexisting mail fraud statute. This amendment of existing law not only reinstated all the pre-*McNally* common law doctrine; it also put the Judiciary back into the business of defining standards of good government, because “intangible rights” is obviously another empty standard that depends on judge-made implementing doctrines. Congress would no doubt resist just as strongly, and ingeniously, were courts to attempt to force Congress to take the lead in other areas of criminal law.

32. See Sara Sun Beale, *What’s Law Got To Do With It? The Political, Social, Psychological and Other Non-Legal Factors Influencing the Development of (Federal) Criminal Law*, 1 BUFF. CRIM. L. REV. 23 (1997) (tracing pointlessly severe criminal laws to interaction of electoral politics and common cognitive biases).

33. See, e.g., 21 U.S.C. §§ 841(b), 844(a) (1994).

34. See Violent Crime Control and Law Enforcement Act of 1994 §§ 70001, 80001, Pub. L. No. 103-322, 108 Stat. 1796, 1982-86.

35. See *id.* § 60007, 108 Stat. at 1971.

36. See Friendly, *supra* note 3, at 804-07.

ferred to DOJ, whose reasonable, pre-litigation interpretations of vaguely worded criminal statutes would be binding on courts.

This would be an adaptation to federal criminal law of a lawmaking scheme familiar to administrative law. The same dynamics that lead Congress to enact incompletely specified criminal offenses lead it to enact incompletely specified regulatory statutes. Traditionally, courts bore the obligation to fill in these statutes in the course of reviewing the policies of agencies responsible for administering such laws. In the seminal case of *Chevron v. NRDC*,³⁷ however, the Supreme Court held that courts should instead defer to the agencies' interpretations so long as those readings satisfied the standards used to review agency lawmaking generally.³⁸ *Chevron* reflects the realist insight that statutory ambiguity and silence are best viewed as implicit delegations of lawmaking authority, and establishes a presumption that such authority should be exercised by agencies rather than courts because of the former's expertise and democratic accountability.³⁹

Giving *Chevron* deference to DOJ's readings of ambiguous or generally worded criminal statutes would produce the same benefits in criminal law. There, as elsewhere, applying *Chevron* would concentrate the lawmaking powers that Congress gives away in a politically accountable entity that has relevant expertise. In addition, under the so-called rule against "*post hoc* rationalizations," DOJ would be entitled to deference only if it announced its interpretations of ambiguous statutes before defending them in court, thus avoiding the unfair surprise sometimes associated with the innovative application of vaguely worded statutes.⁴⁰

Even more important, applying *Chevron* to DOJ interpretations could be expected to moderate the content of federal criminal law. *Chevron* would have this effect because of its impact on the way authority is allocated within the Executive Branch itself. At present, the Executive Branch influences the formation of federal criminal law almost entirely through the uncoordinated actions of individual U.S. Attorneys, who stubbornly resist direction from Washington.⁴¹ Under a *Chevron* regime, prosecutorial readings would be entitled to deference only if endorsed and defended in advance by DOJ itself. Distant and largely invisible bureaucrats within DOJ lack the incentive that individual U.S. Attorneys have to bend the law to serve purely local interests. In addition, because DOJ, through the President, is accountable to the national electorate, it is more likely to be responsive to interests hurt by adventurous readings

37. 467 U.S. 837 (1984).

38. See *id.* at 844.

39. See generally Cass R. Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071, 2085-91 (1990) (setting out *Chevron* rationale).

40. See Kahan, *supra* note 11, at 503-04.

41. See EISENSTEIN, *supra* note 27, at 54-100; Nancy V. Baker, *The Attorney General as a Legal Policy-Maker: Conflicting Loyalties*, in GOVERNMENT LAWYERS: THE FEDERAL LEGAL BUREAUCRACY AND PRESIDENTIAL POLITICS 31, 40 (Cornell W. Clayton ed., 1995); Charles F.C. Ruff, *Federal Prosecution of Local Corruption: A Case Study in the Making of Law Enforcement Policy*, 65 GEO. L.J. 1171, 1201-08 (1977).

(particularly readings that discourage socially desirable market activity) and more sensitive to the impact of such interpretations on the public fisc generally.

There is plenty of evidence to corroborate the moderation of DOJ relative to U.S. Attorneys. It is well known, for example, that the Reagan DOJ resented Giuliani's prosecution of technical tax violations as more serious RICO and mail fraud offenses, and it ultimately issued regulations prohibiting this practice.⁴² DOJ has shown similar moderation in the interpretation of common crimes, including the so-called drug kingpin statute.⁴³

Such dynamics have been even more thoroughly documented in antitrust enforcement. Empirical studies suggest that the nominally independent Federal Trade Commission is much more responsive to industry interests than is the presidentially controlled Antitrust Division of DOJ, which is guided more predictably by consumer welfare.⁴⁴ The reason the Antitrust Division is less susceptible to interest-group domination is not that the President typically has better motives than do agency heads; rather, the explanation is Madison's axiom that the influence of factions diminishes as they grow in number.⁴⁵ Because he or she is responsive to a large collection of unruly national constituencies, the President is less likely to be captured by any one of them than is a nominally independent agency, which typically oversees a relatively small number of industries that are well positioned to influence the relevant congressional oversight committee.⁴⁶ Likewise, we should expect DOJ to behave more moderately than individual U.S. Attorneys do in construing federal criminal statutes—not because DOJ is less subject to interest group pressures, but because it is subject to many more such pressures emanating from a greater variety of sources.

Indeed, a *Chevron* regime would likely create political and bureaucratic dynamics that magnify the effects of DOJ's relative conservatism. Under the existing common-lawmaking regime, U.S. Attorneys generally need not and do not seek DOJ approval for particular prosecutions. If DOJ objects to an adventurous reading, it can, in theory, force a U.S. Attorney to abandon it, but DOJ faces strong disincentives against doing so. If DOJ tries to call off a cru-

42. See FISCHER, *supra* note 28, at 123-26; UNITED STATES ATTORNEYS' MANUAL § 6-4.211(1) (1988).

43. See Brief for the United States in Opposition at 8-9, *Pino-Perez v. United States*, 493 U.S. 901 (1989) (No. 88-7142) (disavowing use of aiding and abetting theory to extend "drug kingpin" liability to minor participant, but opposing *certiorari* on ground that defendant was serving concurrent sentence of equal length on separate count).

44. See Frank H. Easterbrook, *The State of Madison's Vision of the State: A Public Choice Perspective*, 107 HARV. L. REV. 1328, 1341-42 (1994); William E. Kovacic, *Congress and the Federal Trade Commission*, 57 ANTITRUST L.J. 869, 897-99 (1989).

45. See THE FEDERALIST NO. 10, at 83 (James Madison) (Clinton Rossiter ed., 1961); ROBERT A. DAHL, A PREFACE TO DEMOCRATIC THEORY 16-17, 29-32 (1956).

46. See Easterbrook, *supra* note 44, at 1341-42; Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 105-06 (1994); see also Edward A. Zelinsky, *James Madison and Public Choice at Gucci Gulch: A Procedural Defense of Tax Expenditures and Tax Institutions*, 102 YALE L.J. 1165, 1177-78 (1993) (defending tax subsidies over direct spending programs on the ground that the IRS is influenced by a greater number of competing interests than are congressional committees that appropriate money for programs).

sading U.S. Attorney's prosecutions of greedy "insider traders," then it opens itself up to charges of favoritism or corruption; if it voluntarily disarms a successful field marshal in the war against drugs, it risks being branded an appeaser. Inaction is the likely result, leaving the lawmaking field open to enterprising U.S. Attorneys even when they are moderately opposed by DOJ.⁴⁷

Administrative law principles, however, would shift the burden of bureaucratic persuasion to the U.S. Attorney. Unless her reading is officially and publicly approved in advance by DOJ, a court would be obliged to reject it. Thus, the U.S. Attorney would be forced to petition DOJ for permission before advancing a novel reading of a federal criminal statute. In the absence of a well-publicized and sensational prosecution, vetoing the U.S. Attorney's request—most likely through silence—is unlikely to generate significant public interest, much less significant public opposition.

Consider the Clinton DOJ's recent misadventure with the federal child pornography statute.⁴⁸ DOJ initially confessed error before the Supreme Court in a case in which the court of appeals had construed the statute to apply to images of fully dressed minors.⁴⁹ DOJ's action provoked intense political opposition.⁵⁰ Attempting to defuse the controversy, the White House initially proposed new child pornography legislation. When even this peace offering failed to quiet the issue, DOJ caved in entirely, successfully opposing *certiorari* after the lower court reaffirmed its broad reading on remand.⁵¹

This was a game in which the sequence of moves clearly determined the winner. An individual U.S. Attorney made the initial decision to seek an expanded interpretation of the child pornography statute, and by so doing he created a political climate in which it was impossible for DOJ to disavow this understanding of the statute. Had DOJ been in a position to abort this reading of the statute prior to its birth, however, it is exceedingly unlikely that anyone would have objected. Indeed, prosecutors had long read the child pornography statute to cover only images of undressed minors without generating controversy. By thus making DOJ approval a precondition of adventurous readings of federal criminal statutes, *Chevron* should substantially reduce the political cost of moderation.

47. See EISENSTEIN, *supra* note 27, at 196; Ruff, *supra* note 41, at 1208 ("Once an indictment is returned, the Department is unlikely to order its dismissal simply because the United States attorney's policy judgment or interpretation of the law was at odds with that of the Criminal Division.").

48. See generally *Knox v. United States*, 510 U.S. 939 (1993).

49. See Brief for the United States at 8-9, *Knox v. United States*, 510 U.S. 939 (1993) (No. 92-1183).

50. See Joan Biskupic, *Politics Still Plays a Role in Solicitor General's Office*, WASH. POST, Feb. 22, 1994, at A1; Neil A. Lewis, *The White House's Pre-emptive Move on Child Pornography*, N.Y. TIMES, Nov. 13, 1993, at 11.

51. See *Knox v. United States*, 513 U.S. 1109 (1995); Brief for the United States in Opposition at 9, *id.* (No. 94-413); Linda Greenhouse, *Court Rejects Appeal of Man Convicted in Child Smut Case with Political Overtones*, N.Y. TIMES, Jan. 18, 1995, at D20.

IV

MECHANISMS FOR REFORM: LEGISLATORS AND ADMINISTRATORS WHO
WON'T, JUDGES WHO CAN

So far I have defended the reallocation of interpretive lawmaking from individual U.S. Attorneys to DOJ. I now want to take up the issue of how the power to bring about such a reform should be allocated. In particular, I will briefly explain why I believe that the courts through the *Chevron* doctrine, rather than the Executive Branch through internal regulations or Congress through statutes, should take the lead.

In theory, DOJ could on its own divest individual U.S. Attorneys of interpretive lawmaking power even without *Chevron*. DOJ could issue internal regulations prohibiting prosecutions based on novel theories unless approved in advance by the Criminal Division. Indeed, DOJ has come close to doing this on a limited basis by requiring U.S. Attorneys to obtain authorization before indicting under certain statutes.⁵²

The prospect that DOJ would implement such oversight on a global basis, however, is exceedingly remote—not because such a reform would be undesirable, but because the political incentives to undertake it are too small. The benefits of centralizing interpretive authority, while substantial, would accrue to DOJ as an institution only over the long term, but the steep political cost of ending U.S. Attorneys' historical independence would be borne immediately and entirely by the Attorney General who initiated such a regime. This misalignment of incentives suggests that the reallocation of interpretive authority within DOJ is likely to occur only if imposed from without.

A similar misalignment of incentives makes it unlikely that such a reallocation would be imposed from without by Congress. The transfer of interpretive lawmaking authority from individual U.S. Attorneys to DOJ would benefit the nation as a whole. But because that benefit would be distributed diffusely across the states, no member of Congress would be likely to be rewarded by his or her constituents for bringing about such a transfer. At the same time, such a reform would definitely reduce the opportunities that individual members of Congress have to influence the exercise of federal prosecutorial power in a way that would please powerful interests. As Neal Devins and Michael Herz have shown in the context of environmental crimes,⁵³ individual members of Congress believe they are more likely to be able to influence individual U.S. Attorneys than members of DOJ. Under these circumstances, no member of Congress has a strong incentive to support transferring interpretive lawmaking power to DOJ, and plenty have strong incentive to oppose it, notwithstanding its likely public benefits.

52. See, e.g., UNITED STATES ATTORNEYS' MANUAL, *supra* note 42, § 9-2.133 (various statutes), *id.* § 9-2.135 (Foreign Corrupt Practices Act); *id.* § 9-110.101 (RICO).

53. Neal Devins & Michael Herz, *The Battle That Never Was: Congress, the White House, and Agency Litigation Authority*, 61 LAW & CONTEMP. PROBS. 205 (Winter 1998).

Which leaves the courts. Whereas practical and political dynamics make both the legislative and executive branches unlikely sponsors of the reallocation of interpretive lawmaking authority within the Executive Branch, no such forces constrain the judiciary. Nor would the judiciary be constrained from carrying out this function by norms of judicial competence. Indeed, to bring about the transfer of interpretive lawmaking power to DOJ, courts need do no more than alternate their application of two established canons of statutory interpretation: the *Chevron* doctrine itself, which courts should use to uphold statutory constructions formally defended by DOJ in advance of prosecution, and the rule of lenity, which courts should use to compel narrow interpretations in all other cases.

Lenity, of course, is the rule that directs courts to adopt the narrower of two or more reasonable interpretations of ambiguous criminal statutes.⁵⁴ Courts apply it with notorious selectivity.⁵⁵ They would continue to apply it selectively under the regime described here, reserving it only for cases in which the broad reading being advanced by the prosecution has not been formally articulated and justified in advance by DOJ, and hence is not entitled to deference under *Chevron*. This application of lenity would create appropriate institutional incentives for DOJ to engage in reasoned elaboration of criminal statutes and, equally important, foreclose the usurpation of DOJ's role by either courts or individual U.S. Attorneys.

V

CONCLUSION

Reallocating power from individual U.S. Attorneys to Main Justice, I have argued, is the reform best calculated to counteract the dynamics that currently distort federal criminal-lawmaking. Congress won't enact complete criminal statutes, because doing so is politically hazardous and diverts Congress from programs more highly valued by influential constituencies. Judges can't complete those statutes for Congress, because they labor under the burden of a legal ideology that treats that task as exclusively legislative in origin. Individual U.S. Attorneys do exploit this lawmaking gap to make bad law, because they can get away with it, and because doing so yields predictable political benefits for them. Transferring this power to DOJ by giving *Chevron* deference to its interpretations of vague criminal statutes is a reform that respects the limited criminal-lawmaking capacities of Congress, and that capitalizes on the superior political incentives that DOJ has to make sensible law.

This proposal is admittedly innovative, but, I would argue, not unrealistically so. We have already come to terms with the legitimacy of executive branch lawmaking as an alternative to full legislative specification. Proof of this is *Chevron* itself, which worked a reconceptualization of lawmaking re-

54. See generally Kahan, *supra* note 24.

55. See generally *id.*

sponsibilities across a much wider expanse of regulatory law than I am proposing here. In this sense, *Chevron* points the way for federal criminal law not just by furnishing a doctrinal framework that can be profitably brought to bear on that area of the law, but by furnishing an example of how substantially the law can be reformed by a single innovative opinion.