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Prosecutors in Robes

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Abstract. Criminal law enforcement is traditionally considered a core executive power. Yet federal district judges exercise this power tens of thousands of times a year by initiating proceedings to revoke probation and supervised release. "Prosecutors in robes" is an insult sometimes levied by criminal defense attorneys against judges who are allegedly biased in favor of the government. In this Article, however, I do not use the phrase to suggest that district judges are acting in bad faith. Instead, I mean it literally. When judges initiate revocation proceedings, they wield a prosecutor's power to enforce criminal law.

Drawing from the Constitution's text and structure, early practice, and a modern empirical analysis, I argue that judge-initiated revocation violates the form and function of the separation of powers. Formally, the initiation of a revocation proceeding is a form of criminal law enforcement, which is a power that the Constitution vests solely in the President. Moreover, criminal law enforcement was originally understood as an executive power. Functionally, my empirical analysis of federal sentencing data shows that initiating revocations aggrandizes the judiciary's role in the criminal justice system by weakening democratic accountability, undermining uniform policy, and compromising judicial impartiality.

While most legal scholars believe that a strong and independent judiciary is necessary to check prosecutorial overreach, I argue that judge-initiated revocation transforms federal district judges into "prosecutors in robes," who themselves must be checked by the executive branch. To restore the separation of powers to the criminal justice system, only prosecutors should be allowed to initiate revocation proceedings, while judges should be limited to adjudication and sentencing. This change would ensure that no single branch of government enjoys total authority to impose criminal punishment. Our Constitution separates powers to protect liberty and prevent tyranny. A prosecutor in a robe is a king.

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Table of Contents

Introduction 631

I. The Judicial Power to Initiate Revocation Proceedings 636
  A. Federal Community Supervision 637
  B. Probation and Pretrial Services 640
  C. Judge-Initiated Revocation 644

II. Problems with Judge-Initiated Revocation 648
  A. Formal Problems 649
    1. Criminal law enforcement 649
    2. Historical practice 656
    3. Alternative theories 662
  B. Functional Problems 667
    1. Democratic accountability 668
    2. Uniform policy 674
    3. Impartial decision-making 681

III. Separating the Powers of Revocation 686
  A. Judges as Prosecutors 687
  B. Initiate, Adjudicate, Sentence 690
  C. The States and Special Parole 693

Conclusion 696

Appendix 698

Introduction

> *Were the power of judging joined with . . . the executive power, the* judge *might behave with all the violence of an* oppressor.
>
> —THE FEDERALIST NO. 47 (James Madison)[1]

Criminal law enforcement is traditionally considered a "core executive power."[2] Yet federal district judges exercise this power tens of thousands of times a year by initiating proceedings to revoke probation and supervised release. "Prosecutors in robes" is an insult that criminal defense attorneys sometimes levy against judges who are allegedly "biased" in favor of the government.[3] In this Article, however, I do not use the phrase to suggest that district judges are acting in bad faith. Instead, I mean it literally. When judges initiate revocation proceedings, they wield a prosecutor's power to enforce criminal law.

Community supervision is a critical part of the American criminal justice system.[4] According to recent estimates, 3.6 million people in the United States are serving terms of probation or parole.[5] Estimates also suggest every year between 170,000 and 260,000 people have their supervision revoked for

1. THE FEDERALIST NO. 47 (James Madison), at 303 (Clinton Rossiter ed., 1961) (quoting 1 MONTESQUIEU, THE SPIRIT OF LAWS 182 (Thomas Nugent trans., Glasgow, David Niven 1793) (alteration in original)).

2. Seila Law LLC v. CFPB, 140 S. Ct. 2183, 2200 (2020); *see also* Myers v. United States, 272 U.S. 52, 132 (1926) (explaining that the executive branch is "responsible under the Constitution for the effective enforcement of the law").

3. Michael D. Cicchini, *Constraining* Strickland, 7 TEX. A&M L. REV. 351, 352 & n.3 (2020); *see also* Meryl Carver-Allmond, *Let's Talk About Your Experience as a Public Defender*, NAT'L ASS'N FOR PUB. DEF. (June 9, 2020), https://perma.cc/KP9X-FHNY (expressing "faith that most of our judges are good people just trying to do right by the law," and not "prosecutors-in-robes wielding hatchets"); Joe Tone, *Deporter in the Court*, DALL. OBSERVER (Apr. 10, 2014), https://perma.cc/TS58-7Z4B (quoting a "local immigration lawyer" who described a judge with a high rate of asylum denials as "a prosecutor in a robe"); Paul Wright, *Interview with Conrad Black, Former Federal Prisoner and Millionaire Media Magnate*, PRISON LEGAL NEWS (Sept. 15, 2012), https://perma.cc/F2YA-PRAZ ("[T]he joke is that the prosecutor is a cop in a suit and the judge is a prosecutor in a robe."). Some commentators have also used the phrase to criticize the appointments of former prosecutors to serve as judges. *See, e.g.*, Clark Neily & Devi Rao Neily, *We Need Far Fewer Prosecutors in Robes*, HOUS. CHRON. (July 22, 2021), https://perma.cc/J6KE-TV89 ("[W]e need more civil rights attorneys and public defenders on the bench and fewer prosecutors.").

4. *See* NEIL P. COHEN, THE LAW OF PROBATION AND PAROLE § 1:1 (West 2024).

5. DANIELLE KAEBLE, BUREAU OF JUST. STATS., U.S. DEP'T OF JUST., NCJ 308575, PROBATION AND PAROLE IN THE UNITED STATES, 2022, at 1 (rev. 2024), https://perma.cc/8KDX-5PMF.

violations, which accounts for approximately 40% of all prison admissions.[6] In the federal system alone, more than 120,000 people are currently under supervision,[7] and approximately 30% of these people are eventually sent to prison for violations.[8] Critics warn that "mass supervision" has become "overly burdensome, punitive and a driver of mass incarceration, especially for people of color."[9]

Most legal scholarship on community supervision is focused on the substance of the conditions and the procedures for punishing violations. Scholars have argued, for example, that conditions of supervision are so burdensome that they deprive people of their fundamental rights,[10] procedural protections in revocation hearings are too limited,[11] and punishments for violations are too harsh.[12] They also have proposed reforms to these aspects of community supervision, such as making conditions less restrictive and giving more rights to defendants in revocation hearings.[13] No legal scholar, however, has ever studied the *constitutional structure* of community supervision—the power that each branch of government exercises within the supervision system.[14]

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6. COUNCIL OF STATE GOV'TS JUST. CTR., NATIONAL REPORT, https://perma.cc/95U8-W2Y7 (archived Dec. 17, 2024).

7. *Table E-2—Federal Probation System Statistical Tables for the Federal Judiciary*, U.S. CTS., https://perma.cc/YYU8-G2LT (last updated Sept. 30, 2024) [hereinafter *Table E-2*].

8. *Just the Facts: Revocations for Failure to Comply with Supervision Conditions and Sentencing Outcomes*, U.S. CTS. (June 14, 2022), https://perma.cc/TV5D-CBVG.

9. *Our Vision*, EXIT: EXECS. TRANSFORMING PROB. & PAROLE, https://perma.cc/HZ5B-EM2A (archived Dec. 17, 2024).

10. *See, e.g.*, Kate Weisburd, *Punitive Surveillance*, 108 VA. L. REV. 147, 173-84 (2022).

11. *See, e.g.*, Fiona Doherty, *Indeterminate Sentencing Returns: The Invention of Supervised Release*, 88 N.Y.U. L. REV. 958, 1024-25 (2013).

12. *See, e.g.*, Cecelia Klingele, *Rethinking the Use of Community Supervision*, 103 J. CRIM. L. & CRIMINOLOGY 1015, 1047-65 (2013).

13. *See* Fiona Doherty, *Obey All Laws and Be Good: Probation and the Meaning of Recidivism*, 104 GEO. L.J. 291, 344-54 (2016). Scholars have also advocated retraining probation officers to focus on providing support over policing misconduct. *See* Edward J. Latessa & Myrinda Schweitzer, *Community Supervision and Violent Offenders: What the Research Tells Us and How to Improve Outcomes*, 103 MARQ. L. REV. 911, 932-36 (2020).

14. Fiona Doherty has argued that federal probation officers are structurally compromised because of their "privileged relationship" with "both [the executive and judicial] branches of government," but did not consider the powers of the executive and judicial branches themselves. Doherty, *supra* note 13, at 348. Several authors have also raised concerns about judges delegating their power to federal probation officers, but none have questioned the judges' own authority. *See generally* Mark Thomson, Note, *Who Are They to Judge?: The Constitutionality of Delegations by Courts to Probation Officers*, 96 MINN. L. REV. 306 (2011); Heather Barklage, Dane Miller & Gene Bonham, Jr., *Probation Conditions vs. Probation Officer Directives: Where the Twain Shall Meet*, FED. PROB., Dec. 2006, at 37. Similarly, some scholars have debated whether judges or executive

footnote continued on next page

In this Article, I offer the first analysis of the separation of powers in community supervision. The "separation of powers" is a concept "woven" into the structure of our Constitution,[15] which divides the federal government into three branches: a "vigorous Legislative Branch," a "separate and wholly independent Executive Branch," and an "equally independent" Judicial Branch.[16] This tripartite design is sometimes "clumsy, inefficient, and even unworkable,"[17] but it was deliberately chosen to "secure liberty"[18] and "check against tyranny."[19]

The separation of powers is especially important in criminal law. As Rachel Barkow explained, the Framers foresaw the "potential growth and abuse of federal criminal power" and "intended to place limits on it through the separation of powers."[20] Before the federal government can exercise criminal power against an individual, the Constitution requires all three branches to agree: "Congress must criminalize the conduct, the executive must decide to prosecute, and the judiciary (judges and juries) must agree to convict."[21] Dividing the government's authority in this way ensures that one branch's abuse of the criminal law can always be checked by the other two.

When federal district judges revoke probation or supervised release, however, they become *prosecutors in robes*, collapsing the separation between executive and judicial powers. Judges initiate revocation proceedings by issuing a summons for the defendant to appear, after which they determine whether the defendant violated their supervision and if so, what sentence to

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officials are better equipped to grant defendants early release from prison, but none have addressed the enforcement of supervision conditions *after* prison. *See* Owen Wilder Keiter, *Executive Revision of Minimum Sentences*, 84 ALB. L. REV. 665, 689-702 (2021); Mae C. Quinn, *Constitutionally Incapable: Parole Boards as Sentencing Courts*, 72 SMU L. REV. 565, 594-600 (2019); Jesse J. Norris, *The Earned Release Revolution: Early Assessments and State-Level Strategies*, 95 MARQ. L. REV. 1551, 1579-88 (2012); Cecelia Klingele, *Changing the Sentence Without Hiding the Truth: Judicial Sentence Modification as a Promising Method of Early Release*, 52 WM. & MARY L. REV. 465, 514-19 (2010). Finally, I previously noted that "[r]evocation of supervised release . . . blurs lines in the separation of powers," but I did not do a full constitutional analysis. Jacob Schuman, *Criminal Violations*, 108 VA. L. REV. 1817, 1867 (2022).

15. INS. v. Chadha, 462 U.S. 919, 946 (1983) (quoting Buckley v. Valeo, 424 U.S. 1, 124 (1976)).

16. Bowsher v. Synar, 478 U.S. 714, 722 (1986).

17. *Chadha*, 462 U.S. at 959.

18. *Bowsher*, 478 U.S. at 721 (quoting Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring in the judgment)).

19. *Id.* at 748 (Stevens, J., concurring in the judgment) (quoting *Buckley*, 424 U.S. at 121).

20. Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 1017 (2006) (footnote omitted).

21. *Id.* (footnotes omitted).

impose as punishment.[22] In other words, rather than the executive branch deciding to prosecute and the judiciary agreeing to convict, a single district judge wields unchecked authority to initiate the revocation, find the defendant in violation, and then sentence them to imprisonment. The idea of "a single individual with sole power to impose punishment" is what the Framers found "most frightening about consolidating criminal power," and what they sought to avoid by "diffusing ultimate political accountability for criminal justice between distinct institutions."[23] Yet the federal courts have repeatedly upheld judge-initiated revocations as a permissible exercise of the judiciary's "supervisory authority" over the defendant.[24] Even as the Supreme Court has recently adopted a stricter interpretation of the separation of powers,[25] federal district judges continue to initiate revocation proceedings against an average of "nearly 100 federal defendants . . . *every single day*."[26]

Drawing from the Constitution's text and structure, early practice, and a modern empirical analysis, this Article argues that judge-initiated revocation violates both the form and function of the separation of powers. Formally, initiating a revocation is a type of criminal law enforcement, which is an authority that the Constitution vests solely in the President and was originally understood as an executive power. Functionally, my empirical analysis of federal sentencing data shows that initiating revocations aggrandizes the judiciary's role in the criminal justice system by weakening democratic accountability, undermining uniform policy, and compromising judicial impartiality.

The constitutional problems this Article identifies are not mere technicalities. As described in further detail below, my empirical analysis of federal sentencing data shows that judge-initiated revocations account for

22. *See infra* Part I.C.

23. Daniel Epps, *Checks and Balances in the Criminal Law*, 74 VAND. L. REV. 1, 55 (2021); THE FEDERALIST NO. 47 (James Madison), *supra* note 1, at 301 ("The accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny."); *see also* Carissa Byrne Hessick, Response, *Separation of Powers Versus Checks and Balances in the Criminal Justice System: A Response to Professor Epps*, 74 VAND. L. REV. EN BANC 159, 166 (2021) (responding to Epps, *supra*) ("[T]yranny is used in the context of criminal law as a shorthand for the idea of the concentration of the *power to inflict punishment* into the hands of a single individual.").

24. United States v. Mejia-Sanchez, 172 F.3d 1172, 1175 (9th Cir. 1999); *see also infra* notes 166-68 and accompanying text.

25. *See* Andrea Scoseria Katz & Noah A. Rosenblum, *Becoming the Administrator-in-Chief:* Myers *and the Progressive Presidency*, 123 COLUM. L. REV. 2153, 2155-56 (2023); United States v. Arthrex, Inc., 141 S. Ct. 1970, 1985 (2021); Seila Law LLC v. CFPB, 140 S. Ct. 2183, 2199-200 (2020); Lucia v. SEC, 138 S. Ct. 2044, 2055 (2018).

26. Douglas A. Berman, *Tenth Circuit Deepens Split Over Considering Retribution in Revocation of Federal Supervised Release*, SENT'G L. & POL'Y (Mar. 29, 2023), https://perma.cc/K95L-ZV2Q.

almost *one-quarter* of all federal criminal proceedings and *one-half* of all proceedings against low-level misconduct,[27] reflecting a significant shift in power away from prosecutors and to the judiciary. The district courts have exercised this power to interfere with important executive branch initiatives involving prosecutorial discretion, federalism, and drug legalization.[28] In major respects, judge-initiated revocation contravenes the standard story that law students learn about the Constitution's separated powers. And this shift in power is widely felt: The revocation process has affected hundreds of thousands of people—not only defendants, but also their families, victims, and witnesses.[29]

This Article's structural analysis of community supervision also suggests a new way to reform the system. The conventional wisdom among legal scholars is that the criminal justice system is flawed because it gives too much power to prosecutors and too little to judges: a "one-sided" trend they describe as "prosecutorial adjudication."[30] For instance, the expansion of substantive criminal law, imposition of mandatory minimums, and rise in plea bargaining have limited the judiciary's role in the process while empowering prosecutors as "the sole judges of crime and punishment."[31] Accordingly, the typical scholarly solution to the "pathologies" of our criminal justice system is to increase the power of judges as a check on the executive.[32]

In this Article, however, I argue that judge-initiated revocations give too much power to judges and too little to prosecutors, reflecting an inverse trend of *judicial law enforcement*. My solution to the problems of federal community supervision, therefore, is to empower the executive branch as a check on the judiciary. To restore the separation of powers to the system, I contend that only prosecutors should be allowed to initiate revocation proceedings, while judges should be limited to adjudication and sentencing. This change would ensure that no single branch of government enjoys total power to impose criminal punishment.

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27. *See infra* Part II.B.1.

28. *See infra* Part II.B.1.

29. *See Table E-2*, *supra* note 7 (approximately 120,000 people under federal supervision); U.S. SENT'G COMM'N, FEDERAL PROBATION AND SUPERVISED RELEASE VIOLATIONS 14 & fig.1 (2020), https://perma.cc/5PCE-6EYP (approximately 20,000 federal revocations annually).

30. Erik Luna & Marianne Wade, *Prosecutors as Judges*, 67 WASH. & LEE L. REV. 1413, 1423 (2010) (quoting Máximo Langer, *Rethinking Plea Bargaining: The Practice and Reform of Prosecutorial Adjudication in American Criminal Procedure*, 33 AM. J. CRIM. L. 223, 225 (2006)); *see also* Langer, *supra*, at 225; William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 506, 528 (2001).

31. Luna & Wade, *supra* note 30, at 1422-23 & n.36.

32. *E.g.*, Stuntz, *supra* note 30, at 512, 587, 594-96.

Finally, my argument, like Barkow's, is subject to one significant limitation: "[I]t applies only to the federal government," not to the state governments.[33] The separation of powers at the state level may look different for each state, because it is determined by "state, not federal, constitutional law."[34] "In some states . . . , probation officers are part of the judicial branch," while "in others they are part of the executive branch."[35] The Supreme Court has specifically held that the distribution of authority in state supervision systems is "for the determination of the [s]tate."[36] Nevertheless, the federal and state governments all use the same basic tripartite structure,[37] so my analysis of the separation of powers under federal supervision remains relevant in states that allow judge-initiated revocation.

This Article proceeds in four Parts: Part I describes the judicial power to initiate revocation proceedings. Part II argues that judge-initiated revocations violate the form and function of the separation of powers. Part III proposes that only prosecutors should be allowed to initiate revocation proceedings, while judges should be limited to adjudication and sentencing. Finally, the Conclusion suggests that criminal justice reformers consider the role of judges as prosecutors.

I. The Judicial Power to Initiate Revocation Proceedings

In the federal criminal justice system, district judges supervise defendants on probation and supervised release with the help of federal probation officers, who are part of the judicial branch.[38] The probation officer monitors the defendant and reports alleged violations to the judge.[39] However, only the judge has authority to initiate revocation proceedings, which are then litigated by the U.S. Attorney's Office.[40]

33. Barkow, *supra* note 20, at 1050.

34. *Id.*

35. Smith v. Alaska Dep't of Corr., 872 P.2d 1218, 1227–28 (Alaska 1994); *see also* Morrissey v. Brewer, 408 U.S. 471, 480 (1972) ("Supervision is . . . by an administrative agency, which is sometimes an arm of the court and sometimes of the executive."); JOAN PETERSILIA, REFORMING PROBATION AND PAROLE IN THE 21ST CENTURY 37 (2002) (categorizing jurisdictional arrangements for adult probation in each state as "[s]tate executive," "[s]tate and local executive and local judicial," "[s]tate executive and local judicial," "[l]ocal executive," "[l]ocal executive and local judicial," "[s]tate judicial," and "[l]ocal judicial").

36. Dryer v. Illinois, 187 U.S. 71, 84 (1902).

37. Epps, *supra* note 23, at 20-21.

38. United States v. Davis, 151 F.3d 1304, 1306 (10th Cir. 1998).

39. *See infra* notes 69-70 and accompanying text.

40. *See infra* Part I.C.

A. Federal Community Supervision

The federal criminal justice system currently uses two forms of community supervision: probation and supervised release.[41] Probation is a term of supervision imposed instead of a term of imprisonment.[42] Supervised release is a term of supervision imposed to follow a term of imprisonment.[43] In other words, probation allows a defendant to *avoid* prison, while supervised release comes *after* prison.[44] Probation is typically reserved for minor offenders, whereas supervised release may be imposed on anyone convicted of a felony or class A misdemeanor.[45] Among the population under community supervision, approximately 10% are currently serving terms of probation, compared to 90% on supervised release.[46]

Probation evolved from an early nineteenth-century practice called "laying a case 'on file.'"[47] Beginning in the 1820s, judges would occasionally agree to delay a sympathetic defendant's sentencing hearing contingent on their good behavior.[48] If the defendant behaved for long enough, then the judge would dismiss their case.[49] But if the defendant misbehaved, then the judge would reconvene the delayed hearing and impose the original sentence.[50] In the Probation Act of 1925, Congress finally formalized this practice by officially authorizing district judges to suspend a prison sentence and "place the defendant upon probation" with such "conditions as they may deem best."[51] If the defendant violated a condition, then the judge could "revoke" their

41. *See* 18 U.S.C. §§ 3561, 3583.

42. *See id.* § 3561(a); U.S. SENT'G GUIDELINES MANUAL § 5B1.1 introductory cmt. (U.S. SENT'G COMM'N 2024).

43. *See* 18 U.S.C. § 3583(a), (c); U.S. SENT'G GUIDELINES MANUAL § 5D1.1 & cmt. n.1 (U.S. SENT'G COMM'N 2024).

44. *See* Johnson v. United States, 529 U.S. 694, 711-12 n.11 (2000).

45. *See* 18 U.S.C. §§ 3561(a), 3583(a); U.S. SENT'G GUIDELINES MANUAL §§ 5B1.1, 5D1.1 (U.S. SENT'G COMM'N 2024); U.S. SENT'G COMM'N, FEDERAL OFFENDERS SENTENCED TO SUPERVISED RELEASE 4 & n.16 (2010), https://perma.cc/EYL3-ZXT6.

46. *Table E-2*, *supra* note 7.

47. *See* Jacob Schuman, *Revocation at the Founding*, 122 MICH. L. REV. 1381, 1426 (2024) (quoting Fiona Doherty, *Testing Periods and Outcome Determination in Criminal Cases*, 103 MINN. L. REV. 1699, 1707-08 (2019)); *see also Ex parte* United States, 242 U.S. 27, 40 (1916) (describing this practice as having "prevailed in the United States courts . . . for many years").

48. Schuman, *supra* note 47, at 1426; Doherty, *supra* note 47, at 1707 n.23.

49. Schuman, *supra* note 47, at 1426.

50. *Id.*

51. Pub. L. No. 68-596, § 1, 43 Stat. 1259, 1259-60.

probation and "impose any sentence which might originally have been imposed."[52]

Supervised release developed from a distinct nineteenth century form of community supervision called "parole."[53] In the 1870s, penal reformers began advocating for the early release of prisoners conditioned on their good behavior.[54] Congress created the federal parole system with the Parole Act of 1910, which allowed prisoners who completed one-third of their sentences to apply to a "parole board" for early release.[55] Originally, federal parole boards were composed of prison officials,[56] but over time they were consolidated into a single U.S. Parole Commission, an executive agency in Washington, D.C., with members appointed by the President and confirmed by the Senate.[57] If the Commission found that a prisoner had "substantially observed the rules of the institution," then it could grant them early release on "such conditions . . . as are reasonable to protect the public welfare."[58] If a parolee violated a condition, then the Commission could "revoke" their parole and return them to prison to serve the rest of their original sentence.[59]

During the 1970s and 1980s, however, lawmakers lost faith in the ability of parole officials to accurately or fairly determine whether prisoners were ready for early release.[60] Studies revealed disturbing socioeconomic disparities in who was granted parole, and cast doubt as to whether incarceration was

52. *Id.* § 2. Today, this practice is prescribed by 18 U.S.C. § 3565.

53. Stefan R. Underhill & Grace E. Powell, Essay, *Expedient Imprisonment: How Federal Supervised Release Sentences Violate the Constitution*, 108 VA. L. REV. ONLINE 297, 299 (2022).

54. *See* Doherty, *supra* note 11, at 976-83.

55. Pub. L. No. 61-269, §§ 1, 3, 36 Stat. 819, 819-20.

56. *Id.* § 2.

57. *See* Parole Commission and Reorganization Act, Pub. L. No. 94-233, § 4202, 90 Stat. 219, 219-20 (1976) ("There is hereby established, as an independent agency in the Department of Justice, a United States Parole Commission which shall be comprised of nine members appointed by the President, by and with the advice and consent of the Senate."); An Act to Provide a System for the Treatment and Rehabilitation of Youth Offenders, to Improve the Administration of Criminal Justice, and for Other Purposes, Pub. L. No. 81-865, § 4201, 64 Stat. 1085, 1085 (1950) ("There is hereby created in the Department of Justice a Board of Parole to consist of eight members to be appointed by the President, by and with the advice and consent of the Senate."); An Act of May 13, 1930, Pub. L. No. 71-202, ch. 255, 46 Stat. 272 ("[T]here is hereby created a single Board of Parole to consist of three members to be appointed by the Attorney General . . . ."); *see also* Doherty, *supra* note 11, at 988; PETER B. HOFFMAN, U.S. PAROLE COMM'N, HISTORY OF THE FEDERAL PAROLE SYSTEM 1 (2003).

58. Parole Commission and Reorganization Act §§ 4206(a), 4209(a), 90 Stat. at 223, 225.

59. *Id.* § 4214(d)(5).

60. *See* S. REP. NO. 98-225, at 122 (1983), *as reprinted in* 1984 U.S.C.C.A.N. 3182, 3305; Schuman, *supra* note 14, at 1826.

reliably rehabilitative.[61] Lawmakers also came to believe that parole terms were irrational, because they depended on the "sheer accident" of how much time remained on the prisoner's sentence at the moment of early release, rather than their actual need for supervision.[62]

Subsequently, in the Sentencing Reform Act of 1984 (SRA), Congress abolished parole and replaced it with a new system called "supervised release."[63] The SRA required criminal defendants to serve their prison terms "in full," with no opportunity for early release on parole.[64] Instead of parole supervision, the law authorized sentencing judges to impose terms of "supervised release" to follow imprisonment, which they could "revoke" as punishment for violations.[65] "In effect," the legislative history explains, "the term of supervised release . . . takes the place of parole supervision," except "probation officers will only be supervising those releasees from prison who actually need supervision, and every releasee who does need supervision will receive it."[66] As the Supreme Court later observed, these changes also consolidated control over community supervision within the judiciary so that "the sentencing court, rather than the Parole Commission," would now "oversee the defendant's postconfinement monitoring."[67]

61. *See, e.g.*, Schuman, *supra* note 14, at 1826 & n.49; Jacob Schuman, *Supervised Release Is Not Parole*, 53 LOY. L.A. L. REV. 587, 600 (2020).

62. S. REP. NO. 98-225, at 124, *as reprinted in* 1984 U.S.C.C.A.N. at 3307.

63. Pub. L. No. 98-473, ch. 2, 98 Stat. 1987 (codified as amended in scattered sections of 18, 21, 49 U.S.C.); *see also* Doherty, *supra* note 11, at 995.

64. *See* Schuman, *supra* note 14, at 1827. The Bureau of Prisons (BOP) could also award a small amount of "good time" credit to prisoners, now equivalent to approximately 15% of their sentence. *See* SRA § 3624(b), 98 Stat. at 2008-09 (codified as amended at 18 U.S.C. § 3624(b)).

65. SRA § 3583(c), 98 Stat. at 1999 (codified as amended at 18 U.S.C. § 3583(c)). Originally, the SRA instructed judges to punish violations of supervised release as contempt of court, but two years later, Congress amended the statute to replace the contempt process with "revocation" proceedings. *See* Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, § 1006(a)(3)(D), 100 Stat. 3207, 3207-6 to -7 (codified as amended at 18 U.S.C. § 3583(e)(3)). The term "revoke" is arguably a misnomer as applied to supervised release, *see* United States v. Trotter, 321 F. Supp. 3d 337, 346-47 (E.D.N.Y. 2018), but I use it here for the sake of convention.

66. S. REP. NO. 98-225, at 125, *as reprinted in* 1984 U.S.C.C.A.N. at 3308.

67. Gozlon-Peretz v. United States, 498 U.S. 395, 400-01 (1991). The Parole Commission continues to make early release and revocation decisions for the few remaining federal prisoners sentenced under the old parole regime. *See* Charles D. Weisselberg & Linda Evans, *Saving the People Congress Forgot: It Is Time to Abolish the U.S. Parole Commission and Consider All "Old Law" Federal Prisoners for Release*, 35 FED. SENT'G REP. 106, 106-07 (2022).

B. Probation and Pretrial Services

Today, district judges supervise the defendants they sentence to probation and supervised release with the help of federal probation officers, who are part of the judicial branch.[68] Probation officers remain in contact with the defendant, assist in their transition to the community, and report on their conduct to the court.[69] Probation officers "play a dual role," which is "part law enforcement and part social work."[70] Reflecting this structural duality, the executive and judicial branches have spent decades fighting for control over the probation office, with the judiciary eventually winning total authority.[71]

Originally, Congress created two categories of officers to monitor defendants sentenced to community supervision, each managed by a different branch of government. First, the Parole Act of 1910 authorized "board[s] of parole," composed of executive officials to appoint "parole officers" to supervise defendants released on parole.[72] Second, the Probation Act of 1925 empowered "the judge of any United States court having original jurisdiction of criminal actions" to appoint "probation officers" to supervise defendants sentenced to probation.[73] This division of authority between the executive and judicial branches reflected the broader structure of the federal criminal justice system.[74] Prisons were run by the Department of Justice (DOJ), so parolees

68. *See, e.g.*, United States v. Davis, 151 F.3d 1304, 1306-07 (10th Cir. 1998) (explaining probation officers' current function); *see also Probation and Pretrial Services—Mission*, U.S. CTS., https://perma.cc/7QNL-VQHH (archived Dec. 17, 2024) (discussing contemporary practices).

69. *See* 18 U.S.C. §§ 3601, 3603; *see also* United States v. Mejia-Sanchez, 172 F.3d 1172, 1174 (9th Cir. 1999) (describing federal probation officers' responsibilities); *Probation and Pretrial Services—Mission*, *supra* note 68 (same). Some defense attorneys have argued that probation officers also exercise executive authority when they monitor and investigate criminal defendants suspected of misconduct. *See* United States v. Sczubelek, 402 F.3d 175, 189 (3d Cir. 2005) (rejecting the defendant's claim that the probation officer's role in collecting DNA samples violated the separation of powers). This Article, however, focuses solely on the initiation of revocation proceedings.

70. *Probation and Pretrial Services—Mission*, *supra* note 68; *see also* United States v. Jennings, No. 09-cr-00447, 2009 WL 4110852, at *3 (N.D.N.Y. Nov. 23, 2009) (explaining that a probation officer's supervisory duties "necessarily overlap some law enforcement duties").

71. Peter Graham Fish, *The Politics of Judicial Administration: Transfer of the Federal Probation System*, 23 W. POL. Q. 769, 769 (1970).

72. Pub. L. No. 61-269, §§ 2, 7, 36 Stat. 819, 820.

73. Pub. L. No. 68-596, §§ 3-4, 43 Stat. 1259, 1260-61.

74. *See* Fish, *supra* note 71, at 774-77; *see also Parole of United States Prisoners: Hearing on S. 870 and H.R. 23016 Before the Subcomm. No. 11 of the H. Comm. on the Judiciary*, 61st Cong. 3 (1910) (statement of Robert V. La Dow, Superintendent of Prisons & Prisoners) ("[A] probation bill is not within the jurisdiction of the Department of Justice, but rather comes within the jurisdiction of the judiciary, while the parole of United States prisoners is essentially within the jurisdiction of the Department of Justice.").

naturally fell under executive authority. By contrast, judges imposed probation in lieu of imprisonment, so probationers never left judicial control.

In 1930, Congress attempted to streamline this system by creating a single category of officers to supervise all defendants on probation and parole, subject to shared executive and judicial power. First, lawmakers voted to abolish parole officers and to make probation officers responsible for supervising *both* parolees *and* probationers.[75] Second, lawmakers gave the Attorney General the power to fix the salaries of probation officers and "formulate general rules for the proper conduct of the[ir] work."[76] The upshot of these changes was that federal probation officers now "answered to two authorities."[77] They were appointed by district judges, but their salary, expenses, and orders all came from the DOJ.[78]

Unfortunately, the probation officers themselves got lost in the shuffle. As the first "supervisor of probation" lamented: "Neither the courts nor the Department of Justice . . . exercised paternal responsibilities for . . . probation officer[s'] needs," forcing them "to shift pretty much for [themselves]."[79] When President Roosevelt announced an "executive reorganization campaign" in 1936,[80] one priority was reassigning responsibility for the probation office to a single authority.[81]

An interbranch struggle for power ensued. No less an authority than Supreme Court Chief Justice Charles Evans Hughes advocated for keeping probation within the judicial branch, believing that "probation officers, being appointed by courts and subject to their direction," should be "a part of the judicial establishment."[82] A poll of federal district judges revealed virtually unanimous support among respondents for judicial control over the probation department.[83] The DOJ, by contrast, argued that probation officers should be part of the executive branch because of "its unified direction of probation,

75. Act of May 13, 1930, Pub. L. No. 71-202, ch. 255, 46 Stat. 272.

76. An Act of June 6, 1930, Pub. L. No. 71-310, § 2, 46 Stat. 503, 503-04; *see also* Victor H. Evjen, *The Federal Probation System: The Struggle to Achieve It and Its First 25 Years*, FED. PROB., Dec. 2014, at 27, 30-31.

77. *Probation and Pretrial Services History*, U.S. CTS., https://perma.cc/87BU-L54P (archived Dec. 17, 2024).

78. *Id.*

79. Evjen, *supra* note 76, at 31.

80. Franklin D. Roosevelt, *Letters to Congressional Leaders Concerning Reorganization of the Executive Branch*, AM. PRESIDENCY PROJECT, https://perma.cc/25NS-V4FR (archived Feb. 11, 2025).

81. Fish, *supra* note 71, at 769-70; *see also* Jessica Bulman-Pozen, *Administrative States: Beyond Presidential Administration*, 98 TEX. L. REV. 265, 290-91 (2019).

82. Evjen, *supra* note 76, at 32.

83. Fish, *supra* note 71, at 775.

parole, and penal institutions."[84] The Director of the Bureau of Prisons similarly contended that probation officers were "most effectively administered" within the executive branch, which could provide "central direction" to "coordinate the[ir] work."[85]

Ultimately, the judges won. In 1939, Congress voted to create the Administrative Office of the U.S. Courts (AO), an agency within the judicial branch.[86] In 1940, lawmakers used the appropriations process to transfer total financial and administrative responsibility for the probation office to the AO.[87] Apparently, this resolution was reached after the Director of the AO personally promised the Director of the Bureau of Prisons that he would "coordinate the administration of probation still with the correctional methods that remain in the Department of Justice."[88]

Over the next several decades, the executive branch fought repeatedly to win back power over the probation office, but these efforts continually failed. In 1965, the Attorney General proposed a "series of bills" that would "transfer the Federal Probation System from the Federal judiciary to the Department of Justice."[89] This legislation, however, "aroused immediate opposition" from the district courts and probation offices, and it "died in Congress."[90] In 1990, the DOJ published a report arguing that the number of revocation hearings would "soon be substantial" and proposing that this responsibility be reassigned "from

84. *Id.* at 781.

85. PETER GRAHAM FISH, THE POLITICS OF FEDERAL JUDICIAL ADMINISTRATION 177-78 (1973) (quoting Letter from Henry P. Chandler, Dir., Bureau of Prisons, to Charles E. Hughes, C.J., U.S. Sup. Ct. (Jan. 6, 1940) (on file with the University of Virginia Small Special Collections Library)).

86. An Act of August 7, 1939, Pub L. No. 76-299, ch. 501, 53 Stat. 1223 (codified as amended at 28 U.S.C. §§ 332-333, 456, 601-610); Evjen, *supra* note 76, at 32; Fish, *supra* note 71, at 777-80; *see also* United States v. Siegel, 753 F.3d 705, 710 (7th Cir. 2014). The Director of the AO is appointed by the Chief Justice and works "under the supervision and direction" of the Judicial Conference of the United States. 28 U.S.C. §§ 601, 604(a); *see also* Harlington Wood, Jr., *Judiciary Reform: Recent Improvements in Federal Judicial Administration*, 44 AM. U. L. REV. 1557, 1562 (1995). The Judicial Conference, in turn, is composed of the Chief Justice, the chief judge of each judicial circuit, the Chief Judge of the Court of International Trade, and a district judge from each regional judicial circuit. 28 U.S.C. § 331; *see also About the Judicial Conference*, U.S. CTS., https://perma.cc/VT4U-QY2S (archived Dec. 17, 2024).

87. Evjen, *supra* note 76, at 32; Fish, *supra* note 71, at 782. Although the AO assumed control over the probation system, the DOJ continued to give instructions to probation officers with respect to the supervision of parolees. *See* Fish, *supra* note 71, at 778*; see also* 28 C.F.R. § 2.31 (1949) ("United States probation officers shall perform such duties with respect to persons on parole as the Attorney General shall request.").

88. Evjen, *supra* note 76, at 32.

89. Ben S. Meeker, *The Federal Probation System: The Second 25 Years, 1950-1975*, FED. PROB., June 2015, at 37, 39.

90. *Id.*

the federal courts to the [executive] Parole Commission or a successor agency."[91] The judiciary again lobbied in opposition, admonishing Congress that "any determination with respect to revocation of supervised release be made by the district court."[92] The proposal went nowhere.[93]

Today, the judiciary remains in full control of the probation office. District judges continue to appoint the probation officers for their districts, and if there are multiple probation officers in their district, these judges also appoint a "chief probation officer" who "direct[s] the work of all probation officers serving in the judicial district."[94] Probation officers are "employed by the United States Courts" and work "under the administrative control of the Director of the [AO]."[95] The Director has "delegated [this responsibility] to the Office of Probation and Pretrial Services."[96] Legally, probation officers are considered "extensions of the court,"[97] which means they "may communicate ex parte with the district court" and are "entitled to absolute immunity from suit in the performance of [their] judicially-related functions."[98] As one district judge put it, "[t]he probation office is not an agency like one of the investigative or police agencies, or like the United States Attorney's Office, that lies outside the court system and makes independent decisions," but rather "it is in place to assist the Court in performing judicial functions."[99]

91. NAT'L INST. OF JUST., U.S. DEP'T OF JUST., REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 66 (1990).

92. JUD. CONF. OF THE U.S., REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 71 (1990); *see also* David N. Adair, *Revocation of Supervised Release—A Judicial Function*, 6 FED. SENT'G REP. 190, 190 (1994) (explaining the Judicial Conference's position).

93. *See, e.g.*, Meeker, *supra* note 89, at 39 & n.15.

94. 18 U.S.C. § 3602(a), (c). There are currently probation offices in 93 of the 94 U.S. judicial districts. *Probation and Pretrial Services—Mission*, *supra* note 68 (noting that the Districts of the Northern Mariana Islands and Guam share a probation office).

95. Schroeder v. Polk, 842 F. Supp. 355, 356 (N.D. Ind. 1993).

96. *Probation and Pretrial Services—Mission*, *supra* note 68. The Office of Probation and Pretrial Services is responsible for supervising defendants granted pretrial release (bail) as well as defendants sentenced to community supervision. *See Probation and Pretrial Services, Officers and Officer Assistants*, U.S. CTS., https://perma.cc/XGV5-HWYQ (archived Dec. 17, 2024). Probation offices typically divide these duties between pretrial services officers and probation officers. *Id.* This Article focuses solely on probation officers.

97. United States v. Burnette, 980 F. Supp. 1429, 1437 (M.D. Ala. 1997).

98. United States v. Davis, 151 F.3d 1304, 1306 (10th Cir. 1998).

99. United States v. Wilson, 973 F. Supp. 1031, 1032 (W.D. Okla. 1997).

C. Judge-Initiated Revocation

When a probation officer informs a district judge that a defendant under their supervision has violated a condition of probation or supervised release, the judge must decide whether to initiate a revocation proceeding.[100] If the judge decides to initiate a revocation, then the U.S. Attorney's Office will litigate the case on behalf of the government.[101] Although both probation officers and U.S. Attorneys play a role in the process, only the judge has the power to decide whether to initiate revocation proceedings.[102]

Revocation proceedings typically begin with a probation officer filing a report with a district judge alleging that a defendant under their supervision has violated a condition and recommending a response.[103] There are three kinds of reports, designated "12A (report on offender under supervision), 12B (request for modifying the conditions or terms of supervision with consent of the offender), and 12C (petition for warrant or summons for offender under supervision)."[104] Despite these different labels, there are few legal distinctions between the reports, and the judge is not bound by the officer's recommendations.[105] The reports are not "accusatory instruments," but simply serve as means to "convey[] information" so that the judge can make an informed decision.[106]

100. *See infra* notes 103-12 and accompanying text.

101. *See infra* notes 113-17 and accompanying text.

102. *See infra* notes 120-24 and accompanying text.

103. United States v. Barry, 477 F. Supp. 2d 146, 148 (D.D.C.) (explaining that it is "the long-standing practice in this Court" to schedule probation revocation hearings "only upon the request of the United States Probation Office"), *rev'd*, No. 05-cr-00556, 2007 WL 1232189 (D.D.C. Apr. 26, 2007); United States v. Amatel, 346 F.3d 278, 279 (2d Cir. 2003) (per curiam) (finding the same in many district courts "both within this Circuit and across the country"); *Wilson*, 973 F. Supp. at 1032 (finding the same "in this district"); *see also* United States v. Burnette, 980 F. Supp. 1429, 1433-34 (M.D. Ala. 1997) (describing the process by which probation officers request revocation hearings).

104. *Burnette*, 980 F. Supp. at 1433; *see also* 8E ADMIN. OFF. OF THE U.S. CTS., GUIDE TO JUDICIARY POLICY §§ 630.30.40-630.30.60 (rev. 2010), https://perma.cc/FJ7R-FBUY (describing the different forms).

105. *See, e.g.*, *Wilson*, 973 F. Supp. at 1033.

106. *Amatel*, 346 F.3d at 280 (quoting United States v. Davis, 151 F.3d 1304, 1307 (10th Cir. 1998)). In some districts, the probation officer's recommendation to the judge remains confidential, while in others it is disclosed to the parties. *Compare* Order of Final Adoption of Amendments to Local Criminal Rules 132, 132.1, and 144, at 3, *In re* Adoption of Local Rules, No. 03-mc-00115 (D.P.R. Sept. 19, 2024), https://perma.cc/ZQS4-RD8X ("Probation Officers shall not disclose their sentencing recommendations for revocation proceedings to anyone other than the Court, unless authorized in a specific case by the presiding judge."), *with* LOCAL RULES OF THE DIST. CT. FOR THE DIST. OF ME. r. 132.1(a) (2024), https://perma.cc/JAU5-9BUY ("Unless otherwise ordered by the Court, the probation officer shall file in ECF a revocation report . . . . [T[he

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Whatever form the officer files, the three steps that follow delivery "are the same."[107] First, the judge "reviews the information pertaining to [the] alleged violation and the probation officer's recommendation, both of which are contained on the first part of the form."[108] Second, the judge completes a different part of the form containing "a number of choices (one of which is to be checked for appropriate court action) and a place for the court to execute the form."[109] The judge's choices include initiating a revocation proceeding, doing nothing, or taking some other action (for example, modifying the conditions of supervision).[110] In some cases, "the probation officer has already 'checked off' one of the choices," and other times, the officer "leaves all choices blank."[111] But in all cases, the judge makes an "independent selection—including x'ing out, if necessary, the probation officer's choice and making a separate choice" determining "what action is to be taken."[112]

If the judge decides to initiate a revocation proceeding, then they issue a summons for the defendant to report for a "revocation hearing."[113] To secure the defendant's appearance, the judge may also issue a warrant for their arrest.[114] Among other things, the defendant is entitled to "written notice of the alleged violation," "disclosure of the evidence against [them]," and "notice of [their] . . . right to retain counsel or to request that counsel be appointed if

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revocation report shall be disclosed to counsel for both parties by ECF and to the defendant.").

107. *Burnette*, 980 F. Supp. at 1433.

108. *Id.*

109. *Id.*

110. *Id.* at 1431; *see also* 18 U.S.C. § 3583(e).

111. *Burnette*, 980 F. Supp. at 1433.

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

113. FED. R. CRIM. P. 32.1(a)(2), (b). If the judge decides to take "no action," then the report is either added to the defendant's case file or returned to their probation officer, and the matter is dropped. *Burnette*, 980 F. Supp. at 1434 (explaining that Form 12A is "never entered as part of the case file and is returned to the probation officer," whereas Forms 12B and 12C become part of the defendant's case file).

114. 18 U.S.C. § 3606. If the defendant is arrested, then even before the revocation hearing, they must be taken before a judge for an "initial appearance," where they are "inform[ed]" of their rights, followed by a "preliminary hearing" to "determine whether there is probable cause to believe that a violation occurred." FED. R. CRIM. P. 32.1(a)(3), (b)(1); *see id.* r. 32.1 advisory committee's note to 2002 amendment (noting that courts may combine initial appearance with preliminary hearing). Although federal probation officers ostensibly have statutory authority to arrest supervisees without a warrant, warrantless arrests are "not authorized by the Judicial Conference Committee on Criminal Law," and therefore officers "must always use the warrant or summons process to commence revocation proceedings." 8E ADMIN. OFF. OF THE U.S. CTS., *supra* note 104, § 640.30; *see also* 18 U.S.C. § 3606.

[they] cannot obtain counsel."[115] At the revocation hearing, "the United States Attorney prosecutes the petition, that is, calls witnesses and presents evidence in support of the allegations of violation in the petitions,"[116] and the defendant has the "opportunity to appear, present evidence, and question any adverse witness."[117] According to the Supreme Court, the revocation hearing is not "part of a criminal prosecution" and therefore the defendant is not entitled to "the full panoply of rights," including a jury trial or proof beyond a reasonable doubt.[118] Instead, the judge decides by a preponderance of the evidence whether the defendant committed the alleged violation, and if so, may revoke their supervision and sentence them to imprisonment.[119]

Although probation officers report violations and U.S. Attorneys litigate on behalf of the government, only the judge has the power to initiate

115. FED. R. CRIM. P. 32.1(b)(2).

116. *Burnette*, 980 F. Supp. at 1434; *see also* United States v. Amatel, 346 F.3d 278, 279 (2d Cir. 2003) (per curiam) (explaining that the U.S. Attorney "represent[s] the government" in revocation proceedings). The probation officer, by contrast, is "limited to being a sworn witness" in the proceeding, *Burnette*, 980 F. Supp. at 1434, and "[a]s an arm of the court" is "not supposed to take an adversarial role," United States v. White, 868 F.3d 598, 604 (7th Cir. 2017).

117. FED. R. CRIM. P. 32.1(b)(2)(C).

118. Morrissey v. Brewer, 408 U.S. 471, 480 (1972) (discussing parole revocation); *see also* Gagnon v. Scarpelli, 411 U.S. 778, 782 (1973) (applying same rule to probation revocation). In 2019, the Supreme Court split 4-1-4 on whether the right to a jury trial applies to revocations of supervised release in all cases, but five justices agreed that the right did not apply to revocations as "typically understood." United States v. Haymond, 139 S. Ct. 2369, 2385-86 (2019) (Breyer, J., concurring in the judgment) (agreeing "that the role of the judge in a supervised-release proceeding is consistent with traditional parole," i.e., "as 'part of the penalty for the initial offense'" (quoting Johnson v. United States, 529 U.S. 694, 700 (2000))); *see also id.* at 2391 (Alito, J., dissenting) ("[T]he procedures that must be followed at a supervised-release revocation proceeding are the same that had to be followed at a parole revocation proceeding . . . . At a parole revocation hearing, the fundamental requisites of due process had to be observed, but a parolee did not have a right to jury trial.").

119. 18 U.S.C. §§ 3565(a)(2), 3583(e)(3); *see also id.* §§ 3565(b), 3583(g) (mandating revocation for drug- or gun-related violations). The Sentencing Guidelines provide recommendations to judges on whether to revoke supervision based on a violation and what sentence to impose as punishment, but they do not explain whether and when judges should *initiate* revocation proceedings. *See* U.S. SENT'G GUIDELINES MANUAL §§ 7B1.3(a) & cmt. n.1, 7B1.4 (U.S. SENT'G COMM'N 2024). In January 2025, the Sentencing Commission proposed amending the Guidelines to recommend that judges, "[u]pon receiving an allegation that the defendant is in non-compliance with a condition of supervised release," conduct "an individualized assessment to determine what response, if any, is appropriate," including "[c]ontinu[ing] the term of supervised release without modification," "[e]xtend[ing] the term of supervised release and/or modify[ing] the conditions," "[t]erminat[ing] the term of supervised release," or "[i]nitiat[ing] revocation proceedings." U.S. SENT'G GUIDELINES MANUAL § 7C1.3(a) (U.S. SENT'G COMM'N, Proposed Amendments 2025), https://perma.cc/ZP4E-B9EK.

revocation proceedings.[120] The probation officer's "recommendation . . . for the initiation of revocation proceedings is only that: a recommendation."[121] The judge is not bound by it, and even if the officer does not recommend revocation, the judge may "initiate revocation proceedings *sua sponte*."[122] Similarly, "[n]o attorney for the government . . . act[s] as a clearinghouse, a filter, or a gatekeeper" for the initiation of revocation proceedings.[123] Only after a judge decides to initiate a revocation does the U.S. Attorney's Office begin to litigate the case.[124]

There is even debate about whether U.S. Attorneys can simply *ask* district judges to initiate revocation proceedings, which apparently happens in "rare[]" cases.[125] In *United States v. Barry*, for example, a magistrate judge denied a motion by the U.S. Attorney's Office to revoke a defendant's supervision without the consent of the probation office.[126] The magistrate concluded that no statute or rule of criminal procedure "expressly allow[ed] the United States Attorney an opportunity to file [such] a motion."[127] The district court reversed, explaining that it was irrelevant who filed the motion because "the ultimate decision" to initiate revocation proceedings "remains with the court."[128] Accordingly, the court reasoned that either probation officers or prosecutors could allege that a defendant had violated their supervision, because only the judge actually had the power to decide whether to initiate a revocation proceeding.[129]

120. *See* United States v. Berger, 976 F. Supp. 947, 949 (N.D. Cal. 1997) ("[I]t was I as sentencing judge who initiated the revocation proceeding—not the probation officer.").

121. *Burnette*, 980 F. Supp. at 1439.

122. United States v. Amatel, 346 F.3d 278, 280 (2d Cir. 2003) (per curiam); *see also* United States v. Bermudez-Plaza, 221 F.3d 231, 234 (1st Cir. 2000); United States v. Mejia-Sanchez, 172 F.3d 1172, 1175 (9th Cir. 1999); United States v. Davis, 151 F.3d 1304, 1307 (10th Cir. 1998); United States v. Cofield, 233 F.3d 405, 409 (6th Cir. 2000).

123. United States v. Wilson, 973 F. Supp. 1031, 1033 (W.D. Okla. 1997); *Berger*, 976 F. Supp. at 949 (stating that "primary responsibility for such proceedings" lies "with the court," while the "role of the United States Attorney is secondary").

124. I could find no examples of prosecutors outright refusing to participate in revocation proceedings. When they have asserted more limited autonomy, judges have found other ways to assert their authority. *See, e.g.*, United States v. Foley, 946 F.3d 681, 684-85, 687-88 (5th Cir. 2020) (noting that the district judge revoked the defendant's probation based on violations withdrawn by prosecutor).

125. United States v. Barry, 616 F. Supp. 2d 102, 107-08 (D.D.C. 2009).

126. 477 F. Supp. 2d 146, 150 (D.D.C.), *rev'd*, No. 05-cr-00556, 2007 WL 1232189 (D.D.C. Apr. 26, 2007).

127. *Id.* at 149.

128. *Barry*, 2007 WL 1232189, at *3.

129. *See id.; see also* United States v. Feinberg, 631 F.2d 388, 390-91 (5th Cir. 1980) (per curiam) ("[T]here is no requirement that revocation proceedings be initiated by a particular officer of the government, or by any officer. Whenever the district court

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II. Problems with Judge-Initiated Revocation

Judge-initiated revocations violate the Constitution's separation of powers. The separation of powers can be conceptualized as formalist or functionalist, based on the court's methodology.[130] Formalism uses "bright-line rules" to cabin each branch of government "within its sphere of power."[131] Functionalism considers "a number of factors" to preserve a "practical" balance of powers between the branches.[132] Ilan Wurman explained the importance of both approaches to Supreme Court jurisprudence:

> The Supreme Court does not have a unified theory of the separation of powers. In some cases, the Court has adopted an approach that scholars describe as formalist: the Constitution recognizes only three kinds of power—legislative, executive, and judicial—and the Court's task is to identify the kind of power being exercised and ensure that the correct branch is exercising that power using its constitutionally mandated procedures . . . .
>
> In other cases, the Court has applied a functionalist approach, permitting deviations from the apparent constitutional requirements to ensure more workable and efficient government while preserving an overall balance among the competing branches.[133]

Judge-initiated revocation violates both the form and function of the separation of powers. Formally, initiating a revocation proceeding is a type of criminal law enforcement, which is authority that the Constitution vests solely in the President and was originally understood as an executive power. Functionally, my empirical analysis of federal sentencing data shows that initiating revocations aggrandizes the judiciary's role in the criminal justice system by weakening democratic accountability, undermining uniform policy, and compromising judicial impartiality.

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having jurisdiction over a probationer acquires knowledge from any source that a violation of the conditions of probation may have occurred, the court may then on its own volition inquire into the matter . . . ." (footnote omitted)). In *United States v. Jones*, Judge Eisele of the Eastern District of Arkansas held that only the U.S. Attorney's Office, and not the probation office, could file a revocation petition. 957 F. Supp. 1088, 1091 (E.D. Ark. 1997), *overruled by* United States v. Ahlemeier, 391 F.3d 915 (8th Cir. 2004). However, this reasoning has since been rejected by several other courts. *See* United States v. Waters, 158 F.3d 933, 945-46 (6th Cir. 1998) (collecting cases).

130. Barkow, *supra* note 20, at 997; *see also* Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?*, 72 CORNELL L. REV. 488, 489 (1987) (providing an overview of formalist and functionalist approaches).

131. Barkow, *supra* note 20, at 997.

132. *See id.* at 1000 (quoting Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 851 (1986)).

133. Ilan Wurman, *Nonexclusive Functions and Separation of Powers Law*, 107 MINN. L. REV. 735, 736-37 (2022) (footnote omitted).

A. Formal Problems

A formalist approach to the separation of powers asks "what type of power is at issue" and whether that "power is being exercised by the correct branch of government and in compliance with any constitutional requirements."[134] Judge-initiated revocation formally violates the separation of powers because initiating a revocation proceeding is a type of criminal law enforcement that the Constitution assigns to the executive branch, not to the judiciary. In the Founding Era and subsequent century, the closest equivalents to revocation proceedings were initiated by executive officials, with judge-initiated revocation not emerging until the twentieth century. While there are alternative ways to describe revocations other than as criminal law enforcement, they do not withstand scrutiny.

1. Criminal law enforcement

The Constitution separates the executive and judicial powers of the federal government into two branches. Article II, Section 1 vests the President with "the executive power" and Article II, Section 3 charges that he "take Care that the Laws be faithfully executed."[135] These provisions make criminal law enforcement a "core power[] of the Executive Branch,"[136] with the "exclusive authority and absolute discretion to decide whether to prosecute a case."[137] The President, "by the very nature of his office, is active; he must often take the initiative; he must begin operations."[138] By contrast, Article III, Sections 1 and 2, vests the Supreme Court and any lower courts established by Congress with "the judicial power" over "Cases" and "Controversies."[139] This language gives the judicial branch the authority to "adjudge the legal rights of litigants in actual controversies,"[140] including sentencing convicted defendants to

134. Barkow, *supra* note 20, at 997.

135. U.S. CONST. art. II, §§ 1, 3.

136. United States v. Armstrong, 517 U.S. 456, 467 (1996).

137. United States v. Nixon, 418 U.S. 683, 693 (1974); *see also* Trump v. United States, 144 S. Ct. 2312, 2335 (2024) ("Investigative and prosecutorial decisionmaking is 'the special province of the Executive Branch,' and the Constitution vests the entirety of the executive power in the President." (quoting Heckler v. Chaney, 470 U.S. 821, 832 (1985))).

138. Suspension of the Privilege of the Writ of Habeas Corpus, 10 Op. Att'y Gen. 74, 80 (1861).

139. U.S. CONST. art. III, §§ 1, 2.

140. Liverpool, N.Y. & Phila. S.S. Co. v. Comm'rs of Emigration, 113 U.S. 33, 39 (1885).

"punishment[s] provided by law,"[141] but it "does not generally include the power to prosecute crimes."[142]

> [The] judicial power is by its nature devoid of action; it must be put in motion in order to produce a result. When it is called upon to repress a crime, it punishes the criminal . . . but it does not pursue criminals, hunt out wrongs, or examine into evidence of its own accord.[143]

The separation of executive and judicial powers forbids the government from "unit[ing] the power to prosecute and the power to sentence within one Branch."[144] As the Supreme Court has explained, the "decision whether or not to prosecute, and what charge to file or bring" rests "entirely" with the executive branch.[145] That is because such decisions turn on the consideration of factors such 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," which "are not readily susceptible to the kind of analysis the courts are competent to undertake."[146] By contrast, the judicial power "does not include the power to seek out law violators in order to punish them," because that would be "quite incompatible with the task of neutral adjudication."[147] Although judges may exercise "nonadjudicatory functions that do not trench upon the prerogatives of another Branch and that are appropriate to [their] central mission," including the "administration of the entire probation service," the Court has urged "vigilance" against the danger that the judiciary not "be assigned []or allowed" executive "duties of a nonjudicial nature."[148]

These principles were famously invoked by the Second Circuit in the 1973 case of *Inmates of Attica Correctional Facility v. Rockefeller*.[149] After a prison revolt

141. *Ex parte* United States, 242 U.S. 27, 41-42 (1916).

142. Young v. United States *ex rel.* Vuitton et Fils S.A., 481 U.S. 787, 816 (1987) (Scalia, J., concurring in the judgment).

143. 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 93 (Henry Reeve trans., New York, George Adlard rev. ed. 1839) (1835); *see also* Cass R. Sunstein, *Separation of Powers Is a They, Not an It*, HARV. J.L. & PUB. POL'Y (forthcoming 2025) (manuscript at 12), https://perma.cc/PHN7-SLX7 ("Judges may not bring enforcement proceedings . . . .").

144. Mistretta v. United States, 488 U.S. 361, 391 n.17 (1989).

145. Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978).

146. Wayte v. United States, 470 U.S. 598, 607 (1985); *see also* Heckler v. Chaney, 470 U.S. 821, 831 (1985) ("[A]n agency's decision not to prosecute or enforce . . . is a decision generally committed to an agency's absolute discretion. This recognition of the existence of discretion is attributable in no small part to the general unsuitability for judicial review of agency decisions to refuse enforcement." (citations omitted)).

147. *Young*, 481 U.S. at 816 (Scalia, J., concurring in the judgment).

148. *Mistretta*, 488 U.S. at 383-85, 389-90 (quoting Morrison v. Olson, 487 U.S. 654, 677 (1988)).

149. 477 F.2d 375 (2d Cir. 1973).

was violently suppressed in New York, the State charged multiple prisoners with crimes related to the uprising but not any of the police officers or prison guards accused of torture and extrajudicial killings during the retaking of the facility.[150] The prisoners sued in federal district court, seeking an order to federal prosecutors to "investigate and prosecute" the accused officers.[151] The district court denied this request, and the court of appeals affirmed.[152] Despite recognizing the "serious questions" raised as to "the protection of the [inmates'] civil rights and . . . the fair administration of the criminal justice system," the appellate court affirmed based on the "traditional judicial aversion to compelling prosecutions."[153] Only "the executive department" had "discretion as to whether or not there shall be a prosecution in a particular case," the appellate court explained, and it "follows, as an incident of the constitutional separation of powers, that the courts are not to interfere with the free exercise of the discretionary powers of the attorneys of the United States in their control over criminal prosecutions."[154] The court refused to place judges "in the undesirable and injudicious posture of becoming 'superprosecutors.'"[155]

Despite their professed aversion to interfering with criminal law enforcement, federal district judges routinely enforce criminal law by initiating proceedings to revoke probation and supervised release. Conditions of supervision are law, authorized by statute and set forth in a criminal judgment form.[156] According to the Supreme Court, revocation is the "enforcement leverage that supports" these conditions via the threat to "return the [defendant] to prison" if they "fail[] to abide by the rules."[157] Although criminal judgments apply to specific defendants and not the public at large, enforcing them is still a "an executive function"[158] that is "not dissimilar from the power to prosecute."[159] As a DOJ official put it in 1940, revocation must be

150. *See id.* at 376-77. For a history of the Attica prison uprising, see HEATHER ANN THOMPSON, BLOOD IN THE WATER: THE ATTICA PRISON UPRISING OF 1971 AND ITS LEGACY (2016).

151. *Inmates of Attica*, 477 F.2d at 376.

152. *Id.* at 376.

153. *Id.* at 379.

154. *Id.* at 379-80 (quoting United States v. Cox, 342 F.2d 167, 171 (5th Cir. 1965) (en banc)).

155. *Id.* at 380; *see also Cox*, 342 F.2d at 171-73 (applying the same principles to reverse a judicial order to a federal prosecutor to file indictment for alleged perjury).

156. 18 U.S.C. § 3583(a); ADMIN. OFF. OF THE U.S. CTS., AO 245B, JUDGMENT IN A CRIMINAL CASE 5, 10 (rev. 2019), https://perma.cc/7MWY-AHDG.

157. Morrissey v. Brewer, 408 U.S. 471, 478-79 (1972).

158. United States v. Benz, 282 U.S. 304, 311 (1931).

159. United States v. Tom, 565 F.3d 497, 505 (8th Cir. 2009); *see also* United States v. Comstock, 560 U.S. 126, 173-74 n.12 (2010) (Thomas, J., dissenting) ("[F]ederal authority to exercise control over individuals serving terms of 'supervised release' . . . [derives]

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"an executive rather than a judicial function" because it involves "executing the judgment of a court."[160] Indeed, the "use or threat of force in the incarceration of prisoners" as a means to "forc[e] compliance or impos[e] sanctions on law violators" is an almost emblematic example of executive power.[161]

The decision to initiate a revocation proceeding involves exactly the same exercise of enforcement discretion as the decision to initiate a criminal prosecution. One district judge described the variety of factors he weighed when deciding what to do in response to an alleged supervision violation:

> The mere fact that conduct which, if true, would warrant revocation comes to the attention of a probation officer and is reported to the court does not, and should not, blindly lead to the initiation of revocation proceedings . . . . For example, if defendant's alleged conduct is already the subject of state criminal proceedings, the probation officer may recommend, and the federal court may agree . . . to wait and see what happens in state court . . . ; or, if the state charges are serious . . . the probation officer may recommend, and the court may agree, that a warrant be issued but only as a detainer pending resolution of the state proceedings. . . . [I]f the state proceedings are reasonably timely and terminate in defendant's favor, the probation officer [may] recommend[], and th[e] court [may] agree[], that no further action should be taken as to defendant's supervised release as well. . . .
>
> In other instances—in particular, instances where a defendant is charged with drug violations—the decision whether to authorize the issuance of an arrest warrant and initiate revocation proceedings may turn on whether the alleged violation is minor, whether it is a first or second alleged violation, and whether the defendant's conduct while under supervised release has otherwise been satisfactory.[162]

All these factors—the seriousness of the violation, the strength of the evidence, the defendant's history, the existence of collateral proceedings—require the same "balancing of innumerable legal and practical considerations"

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from the original criminal sentence itself. Supervised release thus serves to execute the enumerated power that justifies the defendant's statute of conviction . . . .").

160. Fish, *supra* note 71, at 781 (quoting Letter from James V. Bennett, Dir., Prison Bureau, to Henry P. Chandler, Dir., Admin. Off. of the U.S. Cts. (Jan. 20, 1940) (on file with the University of Virginia Small Special Collections Library)).

161. Dina Mishra, *An Executive-Power Non-Delegation Doctrine for the Private Administration of Federal Law*, 68 VAND. L. REV. 1509, 1545-46 (2015).

162. United States v. Burnette, 980 F. Supp. 1429, 1435 (M.D. Ala. 1997). Probation officers also exercise "a great deal of discretion" in deciding whether to report violations to the court. Stefan R. Underhill, *Everyday Sentencing Reform*, 87 UMKC L. REV. 159, 165 (2018). For example, the Sentencing Guidelines instruct that officers shall report "any alleged Grade A or B violation," as well as "any alleged Grade C violation unless the officer determines: (1) that such violation is minor, and not part of a continuing pattern of violations; and (2) that non-reporting will not present an undue risk to an individual or the public or be inconsistent with any directive of the court." U.S. SENT'G GUIDELINES MANUAL § 7B1.2 (U.S. SENT'G COMM'N 2024).

that are "the very essence of prosecutorial discretion."[163] Judges have explicitly described the decision whether to initiate a revocation as an "exercise [of] prosecutorial discretion,"[164] comparing it to United States Attorneys' "decisions on whether to bring informations and indictments."[165]

Nevertheless, the federal circuit courts of appeals have unanimously rejected separation-of-powers challenges to judge-initiated revocations. A leading example is the Ninth Circuit's 1999 decision in *United States v. Mejia-Sanchez*, which held that a "district court may *sua sponte* initiate revocation proceedings" based on the claim that "revocation proceedings are not criminal proceedings."[166] The Ninth Circuit also reasoned that a district court had "supervisory authority over . . . a defendant on supervised release," and indicated that "relegating this supervisory power to the United States Attorney 'would be tantamount to abdicating the Judiciary's sentencing responsibility to the Executive.'"[167] A number of other circuit courts have applied similar logic to uphold judge-initiated revocations.[168]

Both parts of the Ninth Circuit's analysis, however, are deeply flawed. First, *Mejia-Sanchez* asserted without explanation that revocation proceedings "are not criminal proceedings."[169] This assertion is blatantly inaccurate. The Supreme Court has held that whether "a statutory scheme is civil or criminal" is "a question of statutory construction."[170] The Court considers whether the statute's "text," "structure," and "[o]ther formal attributes," including "the manner of its codification or the enforcement procedures it establishes," show that "the legislature intended to punish."[171] Applying this analysis to revocation proceedings, they are clearly criminal, not civil. The statutes governing revocations[172] are codified in Title 18 of the U.S. Code, which addresses "crimes" and "criminal procedure."[173] The statutes are administered

163. Morrison v. Olson, 487 U.S. 654, 708 (1988) (Scalia, J., dissenting).

164. United States v. Wilson, 973 F. Supp. 1031, 1032 (W.D. Okla. 1997).

165. United States v. Burnette, 980 F. Supp. 1429, 1436 (M.D. Ala. 1997).

166. 172 F.3d 1172, 1175 (9th Cir. 1999) (quoting United States v. Davis, 151 F.3d 1304, 1307 (10th Cir. 1998)).

167. *Id.* (quoting *Davis*, 150 F.3d at 1308).

168. *See, e.g.*, *Davis*, 151 F.3d at 1307-08; United States v. Bermudez-Plaza, 221 F.3d 231, 234 (1st Cir. 2000); United States v. Amatel, 346 F.3d 278, 280 (2d Cir. 2003) (per curiam); *see also* United States v. Berger, 976 F. Supp. 947, 949 (N.D. Cal. 1997) (district court case using the same logic).

169. 172 F.3d at 1175 (quoting *Davis*, 151 F.3d at 1307).

170. Smith v. Doe, 538 U.S. 84, 92 (2003) (quoting Kansas v. Hendricks, 521 U.S. 346, 361 (1997)).

171. *Id.* at 92-94 (2003); *see also* Kennedy v. Mendoza–Martinez, 372 U.S. 144, 168-69 (1963).

172. *See* 18 U.S.C. §§ 3565, 3583.

173. 18 U.S.C. pts. I-II.

pursuant to the Federal Rules of Criminal Procedure, which "govern the procedure in all criminal proceedings,"[174] and the federal Sentencing Guidelines,[175] which set "sentencing policies and practices for the federal criminal justice system."[176] The statutes' method of enforcement, "incarceration in a federal prison or penitentiary," is "indistinguishable from the punishment imposed for committing a felony."[177] Even the revocation order itself is labeled a "judgment in a criminal case."[178] In every meaningful respect, revocation proceedings are criminal proceedings.[179]

A better defense of judge-initiated revocations would be that they are criminal proceedings, but not criminal *prosecutions*.[180] For example, the Supreme Court has held that the "full panoply of rights" guaranteed in a criminal prosecution does not apply in a revocation proceeding.[181] So too, one might argue that the full separation of powers should not apply to revocations. Yet even this more refined argument does not withstand scrutiny. Assuming that revocation proceedings are not "criminal prosecutions" subject to the Sixth Amendment, they are still a way to "execute[]" criminal law and therefore a form of executive power that the Constitution vests in the President, not the judiciary.[182] In other words, the distinction between

174. FED. R. CRIM. P. 1(a)(1).

175. U.S. SENT'G GUIDELINES MANUAL ch. 7, pt. A, cmt. n.1 (U.S. SENT'G COMM'N 2024); *see also* 18 U.S.C. § 3553(a)(5).

176. U.S. SENT'G GUIDELINES MANUAL ch. 1, pt. A.1, cmt. n.1 (U.S. SENT'G COMM'N 2024).

177. Underhill & Powell, *supra* note 53, at 311.

178. ADMIN. OFF. OF THE U.S. CTS., AO 245D, JUDGMENT IN A CRIMINAL CASE (FOR REVOCATION OF PROBATION OR SUPERVISED RELEASE) 1, https://perma.cc/RWS9-RHRC (last updated Sept. 2019) (capitalization altered).

179. If the statute is unclear as to whether a sanction is civil or criminal, then the Supreme Court will consider seven additional factors. *See* Kennedy v. Mendoza–Martinez, 372 U.S. 144, 168-69 (1963) (discussing whether the sanction imposes an affirmative disability or restraint, was historically regarded as punishment, requires a finding of scienter, promotes retribution and deterrence, applies to criminal behavior, has a nonpunitive purpose, and is excessive in relation to that purpose); Smith v. Doe, 538 U.S. 84, 97-106 (2003) (summarizing and applying these factors). Here, these factors also suggest that revocation proceedings are criminal. *Cf.* Underhill & Powell, *supra* note 53, at 309-11 (arguing that revocation proceedings punish "crimes" within the meaning of the Fifth Amendment); Jeremy Travis, *Back-End Sentencing: A Practice in Search of a Rationale*, 74 SOC. RSCH. INT'L Q. 631, 632 (2007) (comparing revocations to prosecutions because of "the conceptual and operational similarities between the two systems").

180. *See* United States v. Burnette, 980 F. Supp. 1429, 1438 (M.D. Ala. 1997) ("[T]he court is not beginning a prosecution with its decision to conduct a revocation hearing, but exercising a power firmly established in its sphere of authority—the power to supervise defendants under its supervision.").

181. Morrissey v. Brewer, 408 U.S. 471, 480 (1972).

182. U.S. CONST. art. II, §§ 1, 3. Even if revocation proceedings are not criminal, some forms of civil law enforcement arguably fall within the executive power. *See In re* Aiken

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revocations and prosecutions is only relevant to determining a defendant's *procedural* rights, not the *structural* limitations Articles II and III impose on the government.

Second, *Mejia-Sanchez*'s claim that a district court's power to initiate revocation proceedings is a necessary part of its "sentencing responsibility" and "supervisory authority" over the defendant[183] misunderstands the separation of powers in criminal law. Although the judiciary and the executive branches both play a role in sentencing, their roles are "readily distinguishable."[184] As the Supreme Court explained, "[t]o render judgment is a judicial function," but "[t]o carry the judgment into effect is an executive function."[185] Because initiating a revocation is not rendering a sentence, but rather carrying that sentence into effect, it must be an executive power. The power to initiate revocations may be helpful to a judge's supervision of a defendant, yet under a formalist analysis, the "fact that a given law or procedure is efficient, convenient, and useful in facilitating the functions of government . . . will not save it if it is contrary to the Constitution."[186] When judges initiate revocation proceedings, they go beyond deciding "[c]ases" and "[c]ontroversies" and infringe on the President's sole authority to "execute[]" criminal law.[187]

Finally, judge-initiated revocations are not justifiable under the Supreme Court's 1988 decision in *Morrison v. Olson*.[188] In *Morrison*, the Court upheld a statute authorizing the judiciary to appoint independent counsels to investigate and prosecute crimes by high-level government officials.[189] The Court concluded that this arrangement did not violate the separation of powers because the independent counsel was "an inferior officer under the Appointments Clause, with limited jurisdiction and tenure and lacking

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Cnty., 725 F.3d 255, 264 n.9 (D.C. Cir. 2013) (Kavanaugh, J.) ("Because they are to some extent analogous to criminal prosecution decisions and stem from similar Article II roots, such civil enforcement decisions brought by the Federal Government are presumptively an exclusive Executive power."); Laufer v. Arpan LLC, 29 F.4th 1268, 1291 (11th Cir. 2022) (Newsom, J., concurring) ("[W]hile the Executive Branch's exclusive enforcement discretion may be most conspicuous in criminal prosecutions, it extends further to include civil-enforcement actions, as well."); *see also* Mishra, *supra* note 161, at 1550 ("Various Supreme Court opinions . . . have suggested that some types of civil suits . . . raise Article II concerns.").

183. United States v. Mejia-Sanchez, 172 F.3d 1172, 1175 (9th Cir. 1999) (quoting United States v. Davis, 151 F.3d 1304, 1308 (10th Cir. 1998)).

184. United States v. Benz, 282 U.S. 304, 311 (1931).

185. *Id.*

186. Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 499 (2010) (quoting Bowsher v. Synar, 478 U.S. 714, 736 (1986)).

187. U.S. CONST. art. II, § 3; *id.* art. III, §§ 1-2.

188. 487 U.S. 654 (1988).

189. *Id.* at 660, 696-97.

policymaking or significant administrative authority."[190] That logic, however, would not apply to judge-initiated revocations, because federal district judges are not inferior officers,[191] enjoy life tenure and broad jurisdiction,[192] and exercise significant policymaking and administrative authority through their management of the federal supervision system.[193] Furthermore, *Morrison* carries little weight with the current Court, which has "not even bother[ed] to cite it" in recent opinions.[194] Instead, the views expressed by Justice Scalia's famous dissent have been since "adopted by a majority" of the justices.[195] According to Justice Scalia, any statute "vest[ing] some purely executive power in a person who is not the President . . . is void."[196] Under this logic, because judge-initiated revocation is an exercise of executive power by a person who is not the President, it formally violates the separation of powers.

2. Historical practice

Formalist analyses of the separation of powers are often "rooted in Founding-era history and practice."[197] Unfortunately, it can be difficult to determine the original understanding of revocation proceedings because probation and parole were not developed until the mid-nineteenth century.[198] Nevertheless, legal authorities from the time the Constitution was ratified suggest that the closest analogues to initiating revocation proceedings were

190. *Id.* at 691.

191. Freytag v. Comm'r, 501 U.S. 868, 884 (1991) (describing "ambassadors, ministers, heads of departments, and judges" as "principal federal officers"); *see also* Edmond v. United States, 520 U.S. 651, 667 (1997) (Souter, J., concurring); Lucia v. SEC, 138 S. Ct. 2044, 2049, 2055 (2018).

192. *Types of Federal Judges*, U.S. CTS., https://perma.cc/528M-8NG3 (archived Dec. 21, 2024); ADMIN OFF. OF THE U.S. CTS., A JOURNALIST'S GUIDE TO THE FEDERAL COURTS 15 (n.d.), https://perma.cc/UU8D-HX3K (archived Dec. 17, 2024).

193. *See supra* Part I.B.

194. Jennifer Mascott & John F. Duffy, *Executive Decisions after* Arthrex, 2021 SUP. CT. REV. 225, 232 (2022) (noting that *Morrison* "seems ripe for overruling").

195. Blake Emerson, *The Binary Executive*, 132 YALE L.J.F. 756, 760-61 (2022). Justice Kagan remarked that Justice Scalia's *Morrison* dissent was "one of the greatest dissents ever written and every year it gets better." *Justice Kagan and Judges Srinivasan and Kethledge Offer Views from the Bench*, STAN. LAWYER (May 30, 2015), https://perma.cc/F9K5-UNVD.

196. Morrison v. Olson, 487 U.S. 654, 705 (1988) (Scalia, J., dissenting).

197. Laufer v. Arpan LLC, 29 F.4th 1268, 1292 (11th Cir. 2022) (Newsom, J., concurring); *see also* Seila Law LLC v. CFPB, 140 S. Ct. 2183, 2201 (2020) ("'Perhaps the most telling indication of [a] severe constitutional problem' with an executive entity 'is [a] lack of historical precedent' to support it.'" (brackets in original) (quoting Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 505 (2010)).

198. *See* Schuman, *supra* note 47, at 1385.

originally understood as types of law enforcement assigned to the executive branch, not the judiciary.

The Framers of the Constitution clearly distinguished between the judiciary's power to issue judgments and the executive's authority to enforce them.[199] As Alexander Hamilton wrote in *Federalist No. 78*: "The judiciary . . . can take no active resolution whatever. It may truly be said to have neither force nor will, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments."[200] Justice James Wilson said the same in 1790: "When the decisions of courts of justice are made, they must, it is true, be executed; but the power of executing them is ministerial, not judicial."[201]

The early federal criminal justice system reflected the same separation of executive and judicial powers. After the Constitution was ratified, district judges assumed authority to sentence convicted defendants,[202] but it was federal marshals, who were appointed and removable by the President,[203] that exercised responsibility for enforcing those judgments, for example, by carrying out executions, collecting fines, managing prisoners, and inflicting corporeal punishments.[204] The First Congress's "decision to assign the power

199. William Baude, *The Judgment Power*, 96 GEO. L.J. 1807, 1815 (2008). Although the enforcement of criminal judgments was originally understood as an executive power, there is significant scholarly debate over the original understanding of criminal prosecutions. *Compare* Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 660 (1994) (arguing that prosecutorial power was originally understood as inherently executive), *with* Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 15-18 (1994) (arguing that prosecutorial power was not originally understood as exclusively executive).

200. THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 1, at 465 (emphasis omitted).

201. 1 JAMES WILSON, *Of Government, in* COLLECTED WORKS OF JAMES WILSON 689, 703 (Kermit L. Hall & Mark David Hall eds., Indianapolis, Liberty Fund, Inc. 2007) (1790).

202. *See* Alleyne v. United States, 570 U.S. 99, 108 (2013) (citing 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 396 (1st ed. 1768)).

203. Cunningham v. Neagle, 135 U.S. 1, 63 (1890); *see also* Mishra, *supra* note 161, at 1546 n.164 (collecting sources). One minor caveat to the President's control over the federal marshals was that deputy marshals, who were appointed by marshals, were themselves removable by district judges. *See* James E. Pfander, *The Chief Justice, the Appointment of Inferior Officers, and the "Court of Law" Requirement*, 107 NW. U. L. REV. 1125, 1153 n.142 (2013). This arrangement may have given judges "some leverage over deputies in case the marshal were to leave the office in charge of a deputy that the judge deemed unfit." *Id.* Nevertheless, marshals were ultimately understood at the time as executive officials. According to one source, "[t]he courts in effect were the marshals' clients, for whom they performed a number of services, but it was the president for whom they worked." FREDERICK S. CALHOUN, THE LAWMEN: UNITED STATES MARSHALS AND THEIR DEPUTIES, 1789-1989, at 15 (1991).

204. *See* Dave Turk, *Historical Federal Executions*, U.S. MARSHALS SERV., https://perma.cc/RH9Z-VYRL (archived Dec. 17, 2024) (discussing that marshals carried out executions);
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to appoint (and remove) marshals to the President" may reflect the original understanding that "the execution of [criminal] judgments was a matter for the Executive Branch of government."[205] So too, the enforcement of criminal judgments via revocation proceedings would have been originally understood as an executive power.

Looking at specific Founding Era practices, Justice Alito has argued that the closest "historic analogues" to revocation proceedings was a common-law procedure called "forfeit[ure]" of a "recognizance[]."[206] A "recognizance" was an order imposed by a judge, often as part of the punishment for a crime that required the defendant to comply with a list of conditions, such as appearing in court, keeping the peace, or maintaining good behavior.[207] If the defendant violated a condition, then the government could "forfeit" their recognizance, which could result in financial penalties and even imprisonment.[208] Like modern-day community supervision, the recognizance was a term of conditional liberty in the community, imposed as part of the punishment for a crime, providing surveillance and reporting on the defendant's behavior, and with violations punishable by imprisonment.[209] Given the similarities between community supervision and the recognizance, the best way to determine how the original understanding of the separation of powers would apply to revocation proceedings today is to ask how it applied to recognizance forfeitures.[210]

The answer to that question is that during the Founding Era, recognizance forfeitures were always initiated by the executive branch, usually through a motion by the Attorney General.[211] Courts described the initiation of

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Ex parte Watkins, 32 U.S. (7 Pet.) 568, 571-72 (1833) (noting that marshals collected fines); 12 ANNALS OF CONG. 66 (1803) (statement of Sen. James Jackson) (suggesting that marshals inflicted corporal punishments). Although the federal government initially relied on state prisons to house defendants sentenced to imprisonment, the marshals still transported defendants to those facilities and ran federal jails. *See* David S. Turk, *A Brief Primer on the History of the U.S. Marshals Service*, FED. LAW., Aug. 2008, at 26, 26; PAUL W. KEVE, PRISONS AND THE AMERICAN CONSCIENCE: A HISTORY OF U.S. FEDERAL CORRECTIONS 10 (1991); *see also* United States v. Comstock, 560 U.S. 126, 156-57 (2010) (Alito, J., concurring in the judgment) ("The First Congress . . . gave United States marshals the responsibility of securing federal prisoners.").

205. Pfander, *supra* note 203, at 1153 n.145.

206. United States v. Haymond, 139 S. Ct. 2369, 2396 (2019) (Alito, J., dissenting).

207. Schuman, *supra* note 47, at 1420-34; *see also* United States v. Rahimi, 144 S. Ct. 1889, 1899-1900 (2024) (describing Founding Era surety laws).

208. Schuman, *supra* note 47, at 1421, 1432-34.

209. *Id.* at 1384.

210. *Cf. id.* at 1419-41 (using the same analogy to determine how original understanding of the jury right would apply to revocation proceedings).

211. *See* No. 3 Journal of the Supreme Court of the Territory of Michigan from November 19, 1819 to October 25, 1824, 4 Blume Sup. Ct. Trans. 201, 266-67 (Mich.

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recognizance forfeitures as an exercise of the court's "discretion" and equated it to the "power [of] the president to remove suspicious aliens."[212] As Judge Newsom of the Eleventh Circuit has explained, executive power at the Founding was understood as "the authority to bring legal actions on behalf of the community for remedies that accrued to the public generally," such as "imprisonment or a fine to be paid into the treasury."[213] Recognizance forfeitures fit comfortably within this definition, as proceedings in which "the public weal [wa]s materially interested."[214]

The clearest insight into the original understanding of the separation of powers in recognizance forfeitures comes from *United States v. Feely*, an 1813 opinion authored by Chief Justice John Marshall while he was riding circuit.[215] In *Feely*, an "attorney of the United States" moved to forfeit the recognizance of a defendant who had allegedly violated a condition by failing to appear in court on the "first day" of a particular term, instead appearing on the first day of the subsequent term.[216] The defendant claimed that he had a reasonable excuse for

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1824) ("On motion of the Attorney General, it is Ordered that a writ of Scire facias issue against the recognitor Henry Hudson to appear at the next term of this court and shew cause if any he has or knows of, why the recognizance shall not be forfeited . . . ."); Commonwealth v. Davies, 1 Binn. 97, 100-01 (Pa. 1804) ("[T]he defendants filed their petition that the court would moderate or remit [their recognizance] . . . [and] when the matter was called up, the attorney general questioned the authority of the court to interfere . . . ."); Respublica v. Cobbet, 3 Yeates 93, 93 (Pa. 1800) ("[T]his cause was moved for trial by Mr. M'Kean, the attorney general . . . ."); JULIUS GOEBEL JR. & T. RAYMOND NAUGHTON, LAW ENFORCEMENT IN COLONIAL NEW YORK: A STUDY IN CRIMINAL PROCEDURE (1664-1776), at 523-40 (1970) (describing recognizance forfeitures initiated by the Attorney General); *see also* State v. Hay, 7 La. 78, 79 (1834) ("The district attorney for the Third Judicial District, gave a written notice, before the commencement of the April term, 1832, of the court . . . to the defendants, who were sureties in a recognizance . . . that he should move for judgment against them, on the ground that the condition of the bond was broken, by the failure of the principal to appear at court, at the time mentioned therein."); Darling v. Hubbell, 9 Conn. 350, 350 (1832) ("The original action was debt on a recognizance, brought by Joseph Darling, Esq. treasurer of the county of New-Haven, against Charlotte Hubbell, as principal, and Own Reynolds, as surety."); King v. Monteith, 1723-1725 Va. Order Book 276, 276 (King George Cnty. Ct., Sept. 4, 1725) ("In the suit brought by our Sovereign Lord the King against Thomas Monteith for a breach of his Recognizance for the Peace and good Behaviour . . . ."), *reprinted in* VIRGINIA COUNTY COURT RECORDS: ORDER BOOK ABSTRACTS OF KING GEORGE COUNTY, VIRGINIA 1723-1725, at 97 (Ruth Sparacio & Sam Sparacio eds., 1992).

212. *Cobbet*, 3 Yeates at 99.

213. Sierra v. City of Hallandale Beach, 996 F.3d 1110, 1133-34 (11th Cir. 2021) (Newsom, J., concurring).

214. *Cobbet*, 3 Yeates at 93.

215. United States v. Feely, 25 F. Cas. 1055, 1056 (C.C.D. Va. 1813) (No. 15,081) (Marshall, Circuit Justice).

216. *Id.*

missing the original court date and asked the district judge to discharge him from the recognizance.[217] In opposition, the prosecutor argued that the judge had no power to discharge the recognizance, which "being forfeited, it ha[d] become a debt due to the United States, which is no more subject to the control of th[e] court, than a debt upon contract."[218]

Chief Justice Marshall ruled for the defendant, simultaneously asserting a role for the judiciary in recognizance forfeitures and acknowledging the executive's power to initiate the proceedings.[219] He based some of his analysis on an earlier English opinion in which the court "enlarged" the defendant's time to appear because he "was sick and unable to appear" at the prescribed date.[220] In doing so, the English court determined that it could not grant a "motion . . . to discharge the recognizance . . . notwithstanding the consent of the attorney for the crown."[221] This resolution was telling, Chief Justice Marshall explained, because the "officers of the crown are generally sufficiently attentive to its interests," so it was "somewhat extraordinary, that one of them should consent to release a debt, which debt was absolutely beyond the power of the court."[222] He concluded that although a district judge "could not discharge" a recognizance, they could "refuse to permit it to be estreated [collected], in order to be put in suit" to determine the "reasonableness . . . of the [defendant's] excuse, for not appearing on the day mentioned."[223]

The *Feely* opinion opens an extraordinary window into the original understanding of the separation of powers in recognizance forfeitures.[224] Although Chief Justice Marshall held that the judiciary had the power to *adjudicate* proceedings to forfeit a recognizance, he also took it for granted that the executive would be the branch to *initiate* those proceedings.[225] As he put it,

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217. *See id.* at 1057.

218. *Id.* at 1056.

219. *Id.* at 1057.

220. *Id.* at 1056 (citing R v. Drummond (1708) 88 Eng. Rep. 988).

221. *Id.* (citing *Drummond*, 88 Eng. Rep. at 988).

222. *Id.*

223. *Id.* at 1056-57; *see also Estreat*, BLACK'S LAW DICTIONARY (12th ed. 2024) (citing EDWARD BULLINGBROOKE, THE DUTY AND AUTHORITY OF JUSTICES OF THE PEACE AND PARISH OFFICERS FOR IRELAND 249 (James Goddard Butler ed., rev. ed. 1788)).

224. *Cf., e.g.*, Orin S. Kerr, *Decryption Originalism: The Lessons of* Burr, 134 HARV. L. REV. 905, 909 (2021) (describing Chief Justice Marshall's 1807 opinion in *United States v. Burr*, on the privilege against self-incrimination as "a fascinating lens for an originalist approach to compelled decryption. . . . [g]iven the date of the decision, the similarity of the facts to the present, and the prominence of John Marshall" (citing 25 F. Cas. 38 (C.C.D. Va. 1807) (No. 14,692e) (Marshall, Circuit Justice))).

225. *Feely* involved a recognizance taken to ensure the defendant's appearance at trial, which would arguably entitle him to more constitutional protection than a defendant who has been convicted of a crime. *See* United States v. Haymond, 139 S. Ct. 2369, 2392

footnote continued on next page

the violator owed a "debt" to the government, but one which was not "absolutely beyond the power of the court."[226] Despite the significance of the *Feely* opinion, however, it has never been appreciated for this structural analysis. According to Westlaw, the opinion has only been cited by four law review articles *ever*, none of which discussed the separation of powers.[227]

Over the course of the nineteenth century, the recognizance was gradually displaced by the practice of "laying cases on file," and later probation and parole.[228] Yet even under these new forms of community supervision, the executive was still responsible for initiating proceedings to punish violations. In the earliest litigated instance of a "case . . . put 'on file'" from 1830,[229] for example, the judge emphasized that it was "in the discretion of the *attorney for the commonwealth*," to "move for sentence" if the defendant committed a violation.[230] As late as 1913, the D.C. Circuit held that after an indictment was "laid on file," it was "within the power of the court . . . *upon the motion of either party*, to bring the case forward and pass any lawful order of judgment

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(2019) (Alito, J., dissenting) (arguing that only "accused," not "convicted," defendants have the right to a jury trial). However, this distinction is only relevant to the defendant's procedural rights. It makes no difference to the separation of powers, which is a matter of constitutional structure. *See supra* notes 134, 182 and accompanying text.

226. *Feely*, 25 F. Cas. at 1056.

227. A Westlaw search conducted on July 30, 2024 for law review articles directly citing United States v. Feely, 25 F. Cas. 1055 (C.C.D. Va. 1813), located Kellen R. Funk & Sandra G. Mayson, *Bail at the Founding*, 137 HARV. L. REV. 1816, 1885-86, 1891 & n.461 (2024), Jacob Schuman, *Revocation at the Founding*, 122 MICH. L. REV. 1381, 1384 & n.13 (2024), Jonathan Drimmer, *When Man Hunts Man: The Rights and Duties of Bounty Hunters in the American Criminal Justice System*, 33 HOUS. L. REV. 731, 749 & n.99 (1996), and Peggy M. Tobolowsky & James F. Quinn, *Pretrial Release in the 1990s: Texas Takes Another Look at Nonfinancial Release Conditions*, 19 NEW ENG. J. CRIM. & CIV. CONFINEMENT 267, 273 & n.35 (1993).

228. *See supra* Part I.A.

229. Doherty, *supra* note 47, at 1707, 1718-19.

230. Commonwealth v. Chase, Thacher's Crim. Cases 267, 267-69 (Bos. Mun. Ct. 1831) (emphasis added); *see also* State v. Crook, 20 S.E. 513, 514 (N.C. 1894) ("[H]is honor, R. W. Winston, judge presiding, upon motion of the solicitor, placed the defendant Leroy Crook in the custody of the sheriff of the said county of Union."); Commonwealth v. Dowdican's Bail, 115 Mass. 133, 134 (1874) ("The district attorney thereupon requested the presence of the defendant in court for the purpose of moving for sentence . . . ."); George Fisher, *Plea Bargaining's Triumph*, 109 YALE L.J. 857, 953 (2000) (observing that judges in the late nineteenth century had "no power to remove a case from the files without a motion from the prosecutor (or from the defendant, though it is hard to imagine why a defendant would move for sentence)"). In one case, private citizens apparently initiated the enforcement proceedings. Sylvester v. State, 20 A. 954, 954 (N.H. 1889) ("[A] petition, signed by 20 citizens . . . was presented to the court, reciting the record, averring Sylvester's continued violation . . . , and asking that the sentence be enforced.").

therein."[231] The Parole Act of 1910 assigned parole boards, staffed by executive officers, the power to initiate revocation proceedings.[232] Not until the Probation Act of 1925 did Congress finally give federal judges power to enforce conditions of community supervision on their own authority by initiating proceedings to revoke probation.[233]

To be clear: I could not find any opinions from the Founding Era or thereafter explicitly stating that courts *lacked* the power to initiate recognizance forfeitures. It is possible that judges at the time did exercise this authority. In practice, however, it would have been difficult for them to do so in many cases without the help of executive officials because there was no other way for them to obtain evidence of violations. Aside from failures to appear, which by definition were committed in the presence of the judge, all out-of-court violations required proof by "extrinsic evidence" that could only be provided by third parties.[234] Yet before the late nineteenth century, there were no state-run probation departments, let alone departments controlled by the judiciary.[235] Judge-initiated revocations therefore did not develop until the twentieth century and were inconsistent with the original understanding of the separation of powers.

3. Alternative theories

There are two alternative ways to describe revocation proceedings other than as a form of criminal law enforcement. First, revocation could be considered a prosecution for criminal contempt. Second, revocation could be seen as a modification of the defendant's sentence. Although both theories would avoid formal problems with the separation of powers, neither is consistent with federal law or practice.

Criminal Contempt.—If revocation proceedings were considered a kind of prosecution for criminal contempt, then judges could initiate them consistent with the separation of powers. The Supreme Court has held that the power to initiate a contempt prosecution is an inherent "part of the judicial function" because it is necessary to "vindicat[e] the authority of the court."[236] The Court has even held that judges can appoint private attorneys to prosecute contempt

231. Miller v. United States, 41 App. D.C. 52, 57-58 (D.C. Cir. 1913) (emphasis added) (quoting *Dowidican's Bail*, 115 Mass. at 136).

232. *See* Pub. L. No. 61-269, §§ 2, 4-6, 36 Stat. 819, 819-20.

233. Pub. L. No. 68-596, §§ 1-2, 43 Stat. 1259, 1259-60.

234. THOMAS CAMPBELL FOSTER, A TREATISE ON THE WRIT OF SCIRE FACIAS 295-301 (1851).

235. *See* Doherty, *supra* note 47, at 1710 (noting that a 1878 Massachusetts law creating the first government-run probation department gave power to the "mayor to appoint a paid probation officer to assist the courts").

236. Young v. United States *ex rel.* Vuitton et Fils S. A., 481 U.S. 787, 795, 799-800 (1987).

if the executive branch refuses to do so.[237] The cases recognizing this authority may be "in some tension with the Court's more recent . . . separation-of-powers jurisprudence,"[238] but they remain good law, at least for now.[239]

Nevertheless, no federal court has ever suggested that revocation proceedings are contempt prosecutions, and for good reason. Revocations are both legally and historically distinct from contempt. Legally, contempt prosecutions based on out-of-court conduct require a jury trial and proof beyond a reasonable doubt whenever the sentence imposed exceeds six months.[240] Neither of these protections are ever available in revocation proceedings.[241] These procedural differences have structural consequences, because a judge's "inherent power" to "institute contempt proceedings" is linked to the defendant's rights in those proceedings.[242] According to the Supreme Court, there is "little credence in the notion that the independence of the judiciary hangs on the power to try contempts summarily," and therefore "rejecting a demand for jury trial cannot be squared with . . . the desirability of vindicating the authority of the court."[243] In other words, judges only have the power to initiate contempt prosecutions if they provide the defendant with

237. *Id.* at 796, 801; *see also* Morrison v. Olson, 487 U.S. 654, 682 n.20 (1988).

238. United States v. Donziger, 38 F.4th 290, 303 (2d Cir. 2022).

239. *See* Donziger v. United States, 143 S. Ct. 868, 868, 870 (2023) (Gorsuch, J., dissenting from denial of certiorari) (noting that *Young* has been "met with considerable criticism" and urging "future courts weighing whether to appoint their own prosecutors" to "consider carefully . . . the limits of its reasoning"); *see also Young*, 481 U.S. at 817 (Scalia, J., concurring in the judgment) ("The Court asserts . . . that . . . prosecutions of criminal contempt . . . . [must] be prosecuted by the courts themselves . . . [or otherwise] efficaciousness of judicial judgments will be at the mercy of the Executive, an arrangement presumably too absurd to contemplate. Far from being absurd, however, it is a carefully designed and critical element of our system of Government. . . . Such dispersion of power was central to the scheme of forming a Government with enough power to serve the expansive purposes set forth in the preamble of the Constitution, yet one that would 'secure the blessings of liberty' rather than use its power tyrannically." (citation omitted)).

240. *See Young*, 481 U.S. at 798-99; Bloom v. Illinois, 391 U.S. 194, 198-200 (1968); Cheff v. Schnackenberg, 384 U.S. 373, 380 (1966). The same rule applies in criminal prosecutions. *See* Baldwin v. New York, 399 U.S. 66, 69 (1970) (plurality opinion).

241. *See* United States v. Woodrup, 86 F.3d 359, 361-62 (4th Cir. 1996); United States v. Soto-Olivas, 44 F.3d 788, 792 (9th Cir. 1995); Schuman, *supra* note 14, at 1840, 1862-63. The justification given for providing fewer rights in revocation proceedings is that revocation serves to punish the defendant's "breach of trust," whereas contempt punishes "the act constituting a violation." U.S. SENT'G GUIDELINES MANUAL ch. 7, pt. A, cmt. n.3(b) (U.S. SENT'G COMM'N 2024); *Soto-Olivas*, 44 F.3d at 790 & n.1, 792.

242. *Young*, 481 U.S. at 797 n.8; *see also id.* at 800.

243. *Id.* at 796-99 & n.8 (quoting *Bloom*, 391 U.S. at 208).

"normal adversary procedures."[244] Because revocations do not provide such procedures, they cannot be justified as criminal contempts.[245]

The legislative history of the supervised release system confirms that there is a distinction between revocation proceedings and criminal contempt. Originally, the Sentencing Reform Act of 1984 did not provide for revocation of supervised release, instead instructing district judges that they should punish violations as "contempt of court."[246] Lawmakers did not provide for revocation proceedings because they "intended that contempt of court" would be used only "after repeated or serious violations of the conditions of supervised release."[247] Almost immediately thereafter, however, the AO and the Parole Commission lobbied Congress to create a more "streamlined procedure for enforcing the conditions of supervised release."[248] The agencies complained that prosecutions for "contempt of court" provided defendants with the "protections afforded an ordinary criminal case, including the right to a trial by jury," which made it too "difficult and time consuming" to punish violations.[249] In the Anti-Drug Abuse Act of 1986, therefore, Congress voted to give judges the power to punish violation[250] through "revocation" proceedings, essentially "graft[ing] the revocation mechanism for probation onto supervised release."[251] Today, there are at most "a few hundred contempt prosecutions annually, compared to tens of thousands of revocations."[252] The revocation

244. *Id.* at 798 (quoting *Bloom*, 391 U.S. at 204).

245. *See* Eric S. Fish, *The Constitutional Limits of Criminal Supervision,* 108 CORNELL L. REV. 1375, 1410 (2023) ("Since the contempt power is constrained by defendants' constitutional rights, so too should be any contempt-adjacent power . . . . The contempt theory cannot explain the absence of constitutional rights in revocation hearings." (footnote omitted)); *see also* Doherty, *supra* note 11, at 1000 ("Criminal contempt [i]s a very different mechanism than revocation.").

246. Pub. L. No. 98-473, § 3583(e)(3), 98 Stat. 1987, 2000 (codified as amended at 18 U.S.C. § 3583(e)); *see also* S. REP. NO. 98-225, at 124-25 (1983) ("The court is also empowered by subsection (e)(3) to treat a violation of a condition of a term of supervised release as contempt of court . . . ."), *as reprinted in* 1984 U.S.C.C.A.N. 3182, 3307-08.

247. S. REP. NO. 98-225, at 125, *as reprinted in* 1984 U.S.C.C.A.N. at 3308.

248. 131 CONG. REC. 14,177 (1985).

249. *Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations for 1986: Hearings Before a Subcomm. of the H. Comm. on Appropriations,* 99th Cong. 64-66 (1985) (statement of Benjamin F. Baer, Chairman, U.S. Parole Commission).

250. Pub. L. No. 99-570, § 1006(a)(3)(D), 100 Stat. 3207, 3207-7 (codified as amended at 18 U.S.C. § 3583(e)(3)).

251. Doherty, *supra* note 11, at 1002.

252. Schuman, *supra* note 14, at 1867 n.292; *Table E-7A—Federal Probation System Statistical Tables for the Federal Judiciary*, U.S. CTS., https://perma.cc/F9QK-U7XN (archived Feb. 11, 2025).

power, in sum, was a *rejection* and *replacement* of the contempt power, not an extension of it.

Sentence Modification.—If revocation proceedings were considered as modifications of a defendant's sentence, then judges could also initiate them without violating the separation of powers. While district courts "do[] not have inherent authority to modify a previously imposed sentence,"[253] they may modify sentences so long as Congress has "expressly granted" them statutory authorization to do so.[254] Courts may even modify sentences in a manner that increases a defendant's total punishment,[255] although this rule has been met with serious criticism.[256]

The sentence modification theory of revocation finds some support in precedent. The Supreme Court, for example, has suggested that revoking probation does not constitute double jeopardy because "the offender has, by his own actions, triggered the condition that permits appropriate modification of the terms of confinement."[257] The Court has similarly said that "what the court is really doing" when it revokes supervised release "is adjusting the defendant's sentence for his original crime."[258] Finally, Justice Alito has argued in dissent that a revocation of supervised release should never be subject to the jury right because it is not a "criminal prosecution" but rather "[t]he *administration* of a sentence."[259] As he explained,

> a defendant sentenced to x years of imprisonment followed by y years of supervised release is really sentenced to a maximum punishment of x + y years of confinement, with the proviso that any time beyond x years will be excused if the defendant abides by the terms of supervised release.[260]

These descriptions of revocation proceedings are rhetorically persuasive, but legally inaccurate, for two reasons. First, there is no actual relationship between a defendant's term of probation or supervised release and the punishment imposed for revocations. Revoking *parole* might be considered a

253. United States v. Mendoza, 118 F.3d 707, 709 (10th Cir. 1997).

254. United States v. Blackwell, 81 F.3d 945, 947 (10th Cir. 1996); *see also* United States v. Addonizio, 442 U.S. 178, 189 n.16 (1979) ("Prior to the adoption of Rule [of Criminal Procedure] 35, the trial courts had no . . . authority [to modify a previously imposed sentence].").

255. *See* United States v. DiFrancesco, 449 U.S. 117, 138-39 (1980).

256. *See, e.g.*, Ralston v. Robinson, 454 U.S. 201, 224 & n.3 (1981) (Stevens, J., dissenting) ("Whether the well-settled rule prohibiting judges from increasing the severity of a sentence after it has become final is constitutionally mandated, it is unquestionably the sort of rule that judges may not disregard without express authorization from Congress." (footnote omitted)).

257. *Id.* at 220 n.14 (majority opinion).

258. United States v. Haymond, 139 S. Ct. 2369, 2380 n.5 (2019).

259. *Id.* at 2394 (Alito, J., dissenting).

260. *Id.* at 2390 (Alito, J., dissenting).

sentence modification because it required the defendant to spend the "remainder of the sentence originally imposed" in prison rather than under supervision.[261] But the same is not true for revoking *probation or supervised release*, which does not require the defendant to spend the remainder of their supervision sentence in prison. Instead, the defendant must serve a "new and additional" prison sentence[262] based on their original crime of conviction.[263] In other words, a defendant who violates a six-month term of probation or supervised release may be punished with a twelve-month prison sentence.[264] This is because, contrary to Justice Alito's claim, revocation of probation or supervised release does not simply modify a sentence of "y years" of supervision into an additional "y years" of imprisonment.[265] Instead, it imposes a new sentence of "z years" of imprisonment.

Second, the statutes governing probation and supervised release clearly distinguish between "modification" and "revocation."[266] "Modification" of supervision means changing the length of the term or the conditions that the defendant must follow.[267] By contrast, "revocation" of supervision means "resentenc[ing]" the defendant (in the case of probation) or "requir[ing] the defendant to serve in prison all or part of the term of supervised release

261. Parole Act of 1910, Pub. L. No. 61-269, § 6, 36 Stat. 819, 820.

262. *See Haymond*, 139 S. Ct. at 2380; *see also* United States v. Peguero, 34 F.4th 143, 175 (2d Cir. 2022) (Underhill, J., dissenting) ("'[R]evocation' of supervised release is nothing less than new punishment imposed by a court after finding an accused guilty of a new wrong . . . ."); United States v. Ka, 982 F.3d 219, 228 (4th Cir. 2020) (Gregory, J., dissenting) (same).

263. *See* 18 U.S.C. § 3565 (allowing a court to punish probation violations by resentencing a defendant for the original crime of conviction); *id.* § 3583(e)(3) (setting the maximum punishment for supervised release violations based on the original crime of conviction).

264. *Cf., e.g.*, United States v. Hampton, 633 F.3d 334, 339, 341 (5th Cir. 2011) ("If, instead of a two-year term of supervised release, [the defendant] had been sentenced to one year of supervised release initially, the revoking court was authorized to impose revocation imprisonment without reference to the amount of supervised release imposed by the original sentencing court . . . ."); United States v. Lamirand, 669 F.3d 1091, 1092 (10th Cir. 2012) ("After [the defendant] served his sentence, he violated the terms of his supervised release, and, in 2010, the district court revoked his supervised release and sentenced him to thirty days in prison."). A defendant who violates a term of supervised release can even end up with a sentence that "when aggregated with the sentence the defendant has already served," exceeds the statutory maximum of their original crime. *See* United States v. Henderson, 998 F.3d 1071, 1077 (9th Cir. 2021) (collecting cases).

265. *Haymond*, 139 S. Ct. at 2390, 2394 (Alito, J., dissenting).

266. *See* 18 U.S.C. § 3583(e); *see also id.* §§ 3563(c), 3565.

267. *Id.* § 3583(e)(2); *see also id.* § 3563(c).

authorized by statute for the offense" (in the case of supervised release).[268] The Senate Report for the SRA draws this same distinction, explaining that

> if a defendant violates a condition of probation the court may . . . either continue the defendant on the sentence of probation, subject to such *modifications of the term or conditions* of probation as it deems appropriate, or may *revoke* probation and impose any other sentence which could have been imposed at the time of the initial sentencing.[269]

The best interpretation of the statutory language is that revoking supervision does not modify the defendant's sentence, but instead "cancel[s]" it[270] and imposes a "fresh term of imprisonment."[271]

B. Functional Problems

A functionalist approach to the separation of powers focuses on the "practical consequences" of a particular exercise of power,[272] asking whether one branch of government is "aggrandiz[ing]" itself "at the expense of another."[273] Judge-initiated revocation functionally violates the separation of powers because it aggrandizes the judiciary's role in the criminal justice system at the expense of the executive branch. My empirical analysis of federal sentencing data shows that judge-initiated revocation upsets the constitutional balance of powers by weakening democratic accountability, undermining uniform policy, and compromising judicial impartiality.

To conduct my empirical analysis, I relied on three datasets. First, I used data on revocation proceedings collected by the Sentencing Commission between fiscal years 2013 and 2017 as part of a special report on probation and supervision violations.[274] Although this report is now several years old, it is

268. *Id.* §§ 3565(a)(2), 3583(e)(3).

269. S. REP. NO. 98-225, at 102 (1983), *as reprinted in* 1984 U.S.C.C.A.N. 3182, 3285 (emphasis added); *see also id.* at 124-25 (explaining that the SRA "permits the court . . . to extend the term of supervised release . . . ; or modify, reduce, or enlarge the conditions of supervised release; or to treat a violation of a condition of a term of supervised release as contempt of court"), *as reprinted in* 1984 U.S.C.C.A.N. at 3307-08.

270. *See* United States v. Wing, 682 F.3d 861, 868 (9th Cir. 2012). The Supreme Court previously adopted a different, "unconventional" interpretation of the word "revoke," which suggested that an "order of supervised release . . . that is 'revoked' continues to have some effect." Johnson v. United States, 529 U.S. 694, 705-07 & n.9 (2000). However, subsequent amendments to the statute have undermined that reading. *See Wing*, 682 F.3d at 868; *see also, e.g.*, Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 110505(2), 108 Stat. 1796, 2016-17 (codified as amended at 18 U.S.C. § 3583(e)).

271. *See* United States v. Thompson, 777 F.3d 368, 372 (7th Cir. 2015).

272. *See* Mistretta v. United States, 488 U.S. 361, 393 (1989).

273. Barkow, *supra* note 20, at 1000 (footnote omitted).

274. U.S. SENT'G COMM'N, *supra* note 29, at 12-13.

the only available data on the subject in the federal criminal justice system, as federal courts "do not use a standardized reporting system for sentences imposed following violations."[275] Second, I used data on sentencings for criminal convictions collected by the Sentencing Commission between 2013 and 2017 for its annual sentencing reports.[276] Finally, I used data on misdemeanor and petty offense cases terminated in federal district courts collected by the federal court system between 2013 and 2017 as part of its annual reports on judicial business.[277] I had to rely on federal court data for misdemeanors and petty offenses because the Sentencing Commission did not start collecting this information until 2018.[278] I explain my findings in detail below.

1. Democratic accountability

The first way that judge-initiated revocation functionally violates the separation of powers is by insulating the criminal justice system from democratic accountability. One reason the Constitution assigns prosecutorial power to the President is to ensure a political check on abusive or excessive criminal law enforcement.[279] My empirical analysis of federal sentencing data, however, shows that judge-initiated revocations now account for a quarter of

275. *Id.* at 12; *see also* LOU REEDT, COURTNEY SEMISCH & KEVIN BLACKWELL, OFF. OF RSCH. & DATA, U.S. SENT'G COMM'N, EFFECTIVE USE OF FEDERAL SENTENCE DATA 5 (2013), https://perma.cc/SJ6M-WSS5 (explaining that "[n]o data" is available for "probation violations/ supervised release revocations").

276. *See Commission Datafiles*, U.S. SENT'G COMM'N, https://perma.cc/F3RR-88K7 (archived Dec. 17, 2024); *see also* U.S. SENT'G COMM'N, VARIABLE CODEBOOK FOR INDIVIDUAL OFFENDERS: STANDARDIZED RESEARCH DATA DOCUMENTATION FOR FISCAL YEARS 1999-2021, at 1 (rev. 2022) https://perma.cc/N5NN-K58T [hereinafter VARIABLE CODEBOOK] ("The Commission collects several datafiles on a yearly basis.").

277. *See Table D-1—U.S. District Courts—Criminal Defendants Filed, Terminated, and Pending (Including Transfers), by Level of Offense—During the 12-Month Period Ending December 31, 2017*, U.S. CTS., https://perma.cc/RF83-QYDA (archived Dec. 17, 2024) (to view, click "Download"); *Table D-1—U.S. District Courts—Criminal Defendants Filed, Terminated, and Pending (Including Transfers), by Level of Offense—During the 12-Month Period Ending December 31, 2016*, U.S. CTS., https://perma.cc/UE3A-UULX (archived Dec. 17, 2024); *Table D-1—U.S. District Courts—Criminal Defendants Filed, Terminated, and Pending (Including Transfers), by Level of Offense—During the 12-Month period Ending December 31, 2015*, U.S. CTS., https://perma.cc/35RE-GDDG (archived Dec. 17, 2024); *Table D-1—U.S. District Courts—Criminal Defendants Filed, Terminated, and Pending (Including Transfers), by Level of Offense—During the 12-Month Period Ending December 31, 2014*, U.S. CTS., https://perma.cc/VH5D-LARF (archived Dec. 17, 2024); *Table D-1—U.S. District Courts—Criminal Defendants Filed, Terminated, and Pending (Including Transfers), by Level of Offense—During the 12-Month Period Ending December 31, 2013*, U.S. CTS., https://perma.cc/2J4S-FJ5R (archived Dec. 17, 2024).

278. *See* VARIABLE CODEBOOK, *supra* note 276, at 19.

279. *See* Morrison v. Olson, 487 U.S. 654, 727-29 (1988) (Scalia, J., dissenting).

all federal criminal proceedings and half of all proceedings against low-level misconduct, revealing a significant erosion in popular control.

Because the power to punish is among the most dangerous to liberty and democracy, the Constitution vests prosecutorial authority in the President, who is elected every four years by nationwide vote and therefore is "the most democratic and politically accountable official in Government."[280] Justice Scalia emphasized the significance of this design in his *Morrison v. Olson* dissent.[281] He explained that Article II gives the President the power to prosecute in order to "preserve individual freedom" by ensuring a political remedy for abuse:

Under our system of government, the primary check against prosecutorial abuse is a political one. The prosecutors who exercise this awesome discretion are selected and can be removed by the President, whom the people have trusted enough to elect. . . . If federal prosecutors [abuse their power] . . . , the unfairness will come home to roost in the Oval Office.[282]

Federal judges, by contrast, are not elected to fixed terms but rather nominated by the President and confirmed by the Senate to lifelong tenures in office, making them "unaccountable" to the people.[283] "[W]hile members of Congress and the executive branch can and often do publicly criticize the work of the courts, they cannot translate that criticism into tangible, targeted pressure as they can with agency heads."[284] As Martin Redish observed, this insulation from popular control means that judicial exercise of "executive power . . . may threaten fundamental democratic values by effectively allowing the one unrepresentative branch of government to perform the starkly political functions reserved for those branches most directly responsible to public will."[285]

Judge-initiated revocations present exactly this kind of threat to democratic values. Like the independent counsel investigation that Justice

280. Seila Law LLC v. CFPB, 140 S. Ct. 2183, 2203 (2020); *see also* U.S. CONST. art. II, § 1, cls. 1-3.

281. 487 U.S. at 728-29 (Scalia, J., dissenting).

282. *Id.* at 727-29 (Scalia, J., dissenting); *see also* Mishra, *supra* note 161, at 1534-35 ("[A] 'plurality in the Executive' would . . . 'tend[] to conceal faults and destroy responsibility' by creating a 'difficulty of detection' of transgressions and potential for confusing 'mutual accusations.'" (quoting THE FEDERALIST NO. 70 (Alexander Hamilton), *supra* note 1, at 423-24, 426-27).

283. Margaret H. Lemos, *The Other Delegate: Judicially Administered Statutes and the Nondelegation Doctrine*, 81 S. CAL. L. REV. 405, 426-27 (2008); *see also* U.S. CONST. art. II, § 2, cl. 2.

284. Lemos, *supra* note 283, at 450.

285. Martin. H. Redish, *Separation of Powers, Judicial Authority, and the Scope of Article III: The Troubling Cases of* Morrison *and* Mistretta, 39 DEPAUL L. REV. 299, 303 (1990).

Scalia condemned in *Morrison*, revocation proceedings are "commenced, not necessarily because the President or his authorized subordinates believe it is in the interest of the United States,"[286] but because a single district judge has decided that an alleged violation merits punishment. Removing the political check from decisions to initiate revocations not only endangers "individual freedom,"[287] but also drains time and effort from the U.S. Attorney's Office, which litigates the case on behalf of the government.[288] By initiating revocations, district judges commandeer prosecutorial resources away from popularly elected decisionmakers to serve their own unaccountable policy ends.

For an example of how judge-initiated revocation weakens democratic control over criminal justice, consider the debate over marijuana legalization. Recently, a political movement has emerged in favor of legalizing marijuana for medical and recreational use. This movement has included popular pressure on the federal government not to interfere with state-level legalization initiatives.[289] In 2013, the DOJ responded to that pressure by issuing the "Cole Memorandum," which instructed "[a]ll United States Attorneys" that "enforcement of state law by state and local law enforcement and regulatory bodies should remain the primary means of addressing marijuana-related activity" in states where marijuana was legal.[290] In other words, the DOJ instructed prosecutors not to prosecute state-legal marijuana activity.[291]

The Cole Memorandum marked a major change in federal policy, allowing for the development of a new industry in states that legalized marijuana use.[292] Nevertheless, the Memorandum was addressed only to U.S. Attorneys, not the courts. The DOJ could not have issued such an order to the courts, because the judiciary is a co-equal branch of government and not subject to executive authority. Even after 2013, therefore, federal district judges continued to initiate revocation proceedings against federal defendants who used marijuana in states where use was legal, on the ground that they

286. *See Morrison*, 487 U.S. at 703 (Scalia, J., dissenting).

287. *Id.* at 727 (Scalia, J., dissenting).

288. *See supra* notes 101-17 and accompanying text.

289. *See, e.g.*, David Stout & Solomon Moore, *U.S. Won't Prosecute in States that Allow Medical Marijuana*, N.Y. TIMES (Oct. 19, 2009), https://perma.cc/U2PV-47TW.

290. Memorandum on Guidance Regarding Marijuana Enforcement from James M. Cole, Deputy Att'y Gen., to U.S. Att'ys 3 (Aug. 29, 2013), https://perma.cc/4D5Y-5V4F.

291. *Id.* at 1-3. In 2018, the Trump Administration rescinded the Cole Memorandum. *See* Memorandum on Marijuana Enforcement from Jefferson B. Sessions, III, Att'y Gen., to U.S. Att'ys (Jan. 4, 2018), https://perma.cc/E3JT-MV8X.

292. *See* Bradley E. Markano, Note, *Enabling State Deregulation of Marijuana Through Executive Branch Nonenforcement*, 90 N.Y.U. L. REV. 289, 295-97 (2015).

were disobeying the conditions of supervision prohibiting them from using drugs or committing federal crimes.[293] In other words, although the executive branch responded to popular pressure by ending marijuana prosecutions in states where use had been legalized, federal judges, operating beyond electoral accountability, continued to punish state-authorized marijuana use through revocations.[294]

Convictions versus Revocations.—To demonstrate empirically how judge-initiated revocations undermine democratic control over the criminal justice system, I compared the number of criminal proceedings initiated by prosecutors each year to the number initiated by judges. I made two comparisons. First, I compared the number of sentencings for criminal convictions each year to the number of revocations. Second, I compared the number of cases terminated for misdemeanors and petty offenses each year to the number of revocations for Grade C violations (misdemeanors and technical violations). I chose these measures because sentencings for convictions and case terminations both result from criminal prosecutions, which are initiated by federal prosecutors.[295] By contrast, revocations are initiated by federal judges. Therefore, by comparing the number of sentencings and case terminations to the number of revocations, I could estimate how many criminal proceedings were initiated by democratically accountable prosecutors versus unelected judges.

Findings.—My analysis revealed that judge-initiated revocations accounted for a significant proportion of federal criminal proceedings, especially against low-level misconduct. Figure 1 shows that between 2013 and 2017, there were 361,489 sentencings for criminal convictions, compared to 108,115 revocations, with an average of 72,298 convictions and 21,623 revocations every year. In other words, prosecutors initiated approximately 77% of all federal criminal proceedings, while federal judges initiated 23% of such proceedings. The number of proceedings initiated by prosecutors and judges also changed at

293. *See, e.g.*, United States v. Tuyakbayev, No. 15-cr-00086, 2017 WL 3434089, at *2-3 & n.2 (N.D. Cal. Aug. 10, 2017); *see also* United States v. Johnson, 228 F. Supp. 3d 57, 62 (D.D.C. 2017).

294. Legislators in at least one state (Pennsylvania) specifically intended to legalize medical marijuana for people on probation and parole. *See, e.g.*, Daylin Leach, *Some on Probation and Parole Are Being Told They Can't Use Medical Cannabis; Leach Asks President Judges to Change Policy*, STATE SENATOR DAYLIN LEACH (Nov. 1, 2018), https://perma.cc/RQ6K-JUKL.

295. This correlation is not perfect, because not all criminal prosecutions result in convictions and sentencings. Some end in dismissals or acquittals, which do not appear in my data. Nevertheless, the conviction rate for federal prosecutions is over 90%, so the difference here is likely very small. *See* John Gramlich, *Only 2% of Federal Criminal Defendants go to Trial, and Most Who Do Were Found Guilty*, PEW RSCH. CTR. (June 11, 2019), https://perma.cc/Z7PM-53ZU.

different rates. Between 2013 and 2017, the number of convictions fell by approximately 16.5%, whereas the number of revocations increased by 12%.

Figure 1
Convictions v. Revocations
(U.S. District Courts, 2013-2017)

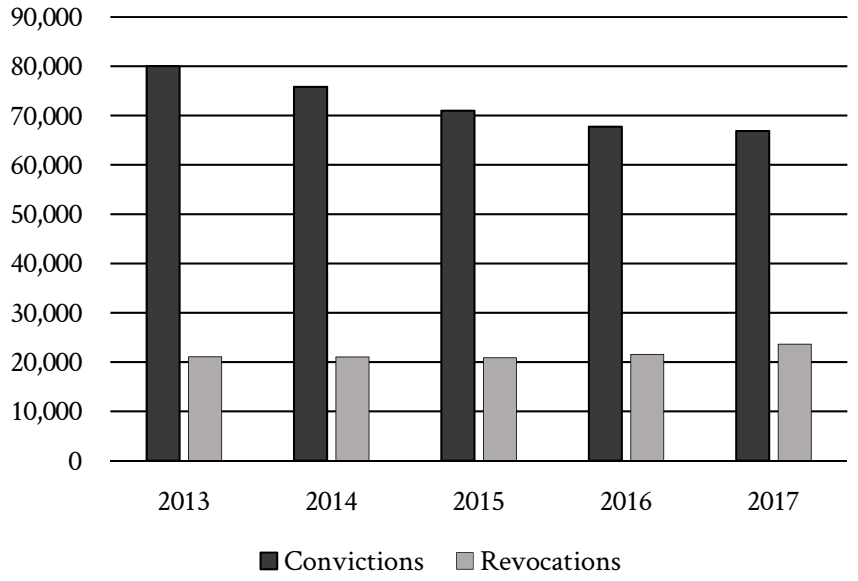
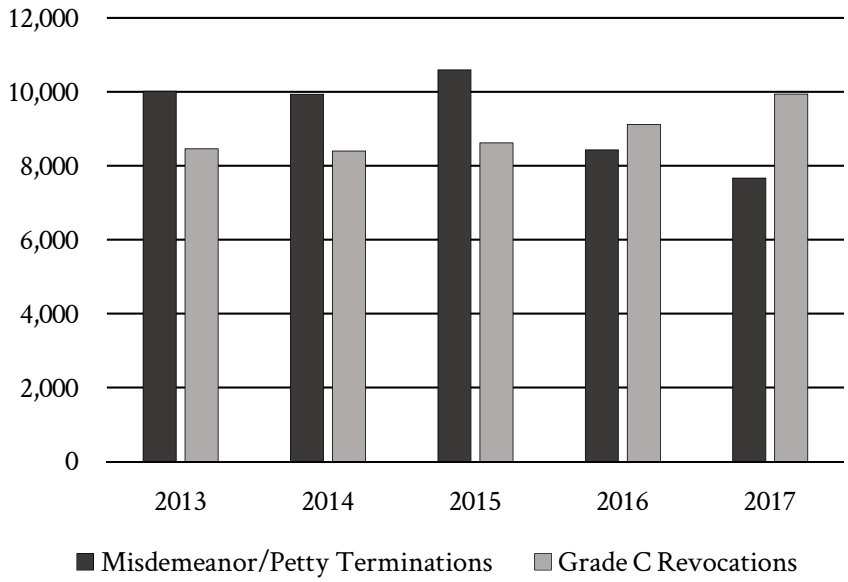


Figure 2 focuses on low-level criminal activity, showing that between 2013 and 2017, there were 46,647 cases terminated for misdemeanors and petty offenses, compared to 44,538 revocations for Grade C violations, with an average of 9,329 misdemeanors and petty offenses versus 8,908 Grade C violations every year. In other words, prosecutors initiated approximately half of all criminal proceedings against low-level misconduct, while judges initiated the other half. The proportion of proceedings initiated by prosecutors versus those initiated by judges also changed at different rates, with terminations for misdemeanor and petty offenses falling by 23.5% and Grade C revocations rising by 17.5%.

Figure 2
Misdemeanor/Petty Terminations v. Grade C Revocations
(U.S. District Courts, 2013-2017)



My results reveal a significant erosion in popular control over the federal criminal justice system. They show that unelected district judges initiate approximately one-quarter of all federal criminal proceedings and one-half of all proceedings against low-level criminal conduct. In 2017, judges actually initiated *30% more proceedings* than federal prosecutors against low-level crimes. The high rate of judge-initiated revocations against minor misconduct is a particular blow to democratic values because the proper response to such behavior has recently become the topic of vigorous political debate.[296]

Of course, to some extent, the outcome here is unsurprising since defendants sentenced to community supervision are subject to enhanced surveillance and therefore more likely to get caught committing a crime.[297] These defendants also by definition have criminal records, which may make

296. *See, e.g.*, Katie Glueck & Ashley Southall, *As Adams Toughens on Crime, Some Fear a Return to '90s Era Policing*, N.Y. TIMES (Mar. 26, 2022), https://perma.cc/ZU7T-NLSZ; Jon Hurdle & Jonah E. Bromwich, *Victory in Philadelphia Buoys Supporters of Progressive District Attorney*, N.Y. TIMES (updated May 20, 2021), https://perma.cc/5WY7-KSMJ; Steph Solis, *'This is Precisely What Suffolk County Wants;' DA Rachael Rollins Stands Behind Pledge Not to Prosecute Low-Level Crimes*, MASSLIVE (updated Apr. 5, 2019, 9:43 PM), https://perma.cc/APV8-AYTZ.

297. *See* Jacob Schuman, *Drug Supervision*, 19 OHIO STATE J. CRIM. L. 431, 434 (2022).

judges less tolerant of misbehavior. Nevertheless, the substantial role that judges now play in initiating revocation proceedings reflects a meaningful loss of democratic accountability in criminal justice.

2. Uniform policy

The second way that judge-initiated revocations functionally violate the separation of powers is by undermining uniformity in the criminal justice system. One reason the Constitution gives prosecutorial power to the President is to enable the nationwide coordination of criminal law enforcement activities.[298] My empirical analysis of federal sentencing data, however, reveals significant and inexplicable geographic disparities in the number of revocation proceedings, suggesting that there are unjustified inconsistencies in whether and when judges decide to initiate revocation proceedings.

The Constitution assigns executive power to the President to ensure that federal prosecutorial decisions are based on national policy, not individual or local proclivities. As Justice Scalia explained in his *Morrison* dissent, the "unifying influence of the Justice Department" provides a "mechanism" to "achieve a more uniform application of the law."[299] For example, the DOJ's power to issue "guidance and approval requirements" to U.S. Attorneys' Offices may serve as an "internal check" that encourages "coordinated decisions in line with office policy objectives."[300] Similarly, the "centralized leadership, hierarchy, and monitoring" of prosecutors' offices "promot[e] consistent enforcement" of the law.[301] By encouraging consistency in criminal law enforcement, the Constitution ensures fairness both to individual defendants and to the public at large.[302]

298. *See* Morrison v. Olson, 487 U.S. 654, 732 (1988) (Scalia, J., dissenting).

299. *Id.*; *see also* THE FEDERALIST NO. 70 (Alexander Hamilton), *supra* note 1, at 423-24 (arguing that "unity" in the executive promotes "steady administration of the laws").

300. Shima Baradaran Baughman, *Subconstitutional Checks*, 92 NOTRE DAME L. REV. 1071, 1122-23 (2017).

301. *See* Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959, 1000-01 (2009).

302. *Cf.* S. REP. NO. 98-225, at 45-46 (1983) ("Sentencing disparities that are not justified by differences among offenses or offenders are unfair both to offenders and to the public. A sentence that is unjustifiably high compared to sentences for similarly situated offenders is clearly unfair to the offender; a sentence that is unjustifiably low is just as plainly unfair to the public. Such sentences are unfair in more subtle ways as well. Sentences that are disproportionate to the seriousness of the offense create a disrespect for the law. Sentences that are too severe create unnecessary tensions among inmates and add to disciplinary problems in the prisons."), *as reprinted in* 1984 U.S.C.C.A.N. 3182, 3228-29.

The judiciary, by contrast, is "plural" rather than unitary, and is therefore harder to organize in service of a national policy agenda.[303] Rather than "a concentration of judicial authority in a single office, held by a single person, Article III disperses and divides judicial authority,"[304] which turns the courts into "something of a photographic negative image of the executive branch."[305] This plural structure is also reflected in the federal probation system, where there is significant "[d]ecentralization of personnel and financial management" to the district level.[306] "Unlike 'headquarters' offices in the executive branch, which are hierarchical and bureaucratic in structure,"[307] neither the AO nor the Office of Probation and Pretrial Services hold "operational authority over the various Chief Probation Officers."[308] The Judicial Conference publishes a *Guide to Judiciary Policy* that provides non-binding "guidance to U.S. probation offices,"[309] but the officers ultimately "report to their Chief Probation Officer, who in turn serves the Chief District Judge."[310] Federal probation officers are therefore "unique to other federal law enforcement agencies in that they are regionally aligned to their geographical districts, rather than a single headquarters element."[311]

The judiciary's "balkanized structure"[312] makes it difficult, if not impossible, to set "a single, national standard" for initiating revocations proceedings.[313] Although there is appellate review of legal errors in revocation proceedings, there is no central authority to advise district judges on when and whether to initiate revocations in the first place. Instead, judges make these decisions based on their own judgments about which alleged violations deserve punishment.[314] Because there is no "coherent set of policy goals . . . about the

303. Ronald J. Krotoszynski, Jr., *The Unitary Executive and the Plural Judiciary: On the Potential Virtues of Decentralized Judicial Power*, 89 NOTRE DAME L. REV. 1021, 1024-26 (2014).

304. *Id.* at 1034.

305. *Id.* at 1025.

306. John M. Hughes & Karen S. Henkel, *The Federal Probation and Pretrial Services System Since 1975: An Era of Growth and Change*, FED. PROB., Mar. 1997, at 103, 103.

307. Wood, *supra* note 86, at 1564.

308. *See History of U.S. Probation,* U.S. PROB. OFF. S. DIST. CAL., https://perma.cc/JN2D-LJPQ (archived Dec. 17, 2024).

309. *E.g.*, 8E ADMIN. OFF. OF THE U.S. CTS., *supra* note 104, § 110.

310. *E.g.*, *History of Probation and Pretrial Services*, PROB. & PRETRIAL SERVS. OFF. N. DIST. ALA., https://perma.cc/AVH8-RREJ (archived Dec. 17, 2024).

311. *Id.*

312. Scott Anders & Jay Whetzel, *The Reconstruction of Federal Reentry*, 34 FED. SENT'G REP. 282, 285 (2022) (capitalization altered).

313. *See* Krotoszynski, *supra* note 303, at 1048-49.

314. *See* FED. R. CRIM. P. 32.1(b)(1)(C) ("If the judge finds probable cause, the judge must conduct a revocation hearing."). The Sentencing Guidelines provide no guidance for

footnote continued on next page

purposes [that revocation] sanctions are to serve," judges are "free to adopt or reject an active enforcement policy for their [supervised release] cases, as workload and local policy may dictate," leading to "reports of considerable disparity among federal judges in handling difficulties with supervised releasees."[315] The director of the BOP was prescient in the 1940s when he argued that probation and parole would be "most effectively administered" within the executive branch, which could provide "central direction" and "coordinat[ion]."[316]

Revocations as a Percentage of Convictions.—To demonstrate empirically how judge-initiated revocations undermine uniformity, I compared the number of revocations in each district as a percentage of the number of convictions in that district.[317] I chose this measure because districts vary in size, location, and crime rate, so even if judges across the country were perfectly consistent in their approach to initiating revocations, we still would expect to find natural geographic disparities in their rates of revocations. As Victor H. Evjen, a former assistant federal probation chief, explained, "[i]n any assessment of violation rates, it should be kept in mind they seldom are comparable from district to district," due to "[v]arying conditions and circumstances from district to district and from one year to another, such as unemployment, social unrest, changes in criminal statutes, etc."[318] Nevertheless, it is also possible that

judges to determine whether they should initiate revocation proceedings based on alleged violations; rather, the Guidelines provide recommendations only if judges find that a defendant *committed* a violation. *See* U.S. SENT'G GUIDELINES MANUAL § 7B1.3(a) (U.S. SENT'G COMM'N 2024).

315. Michael A. Stover, *The Future of Supervised Release*, 6 FED. SENT'G REP. 195, 196 (1994); *cf.* Norris, *supra* note 14, at 1584 ("[A]dministrative decision-makers would most likely grant earned release with much less geographic disparity than judges, because these statewide actors would apply the same considerations and methodology to inmates regardless of location.").

316. FISH, *supra* note 85, at 177-78 (quoting Letter from Henry P. Chandler to Charles E. Hughes, *supra* note 85).

317. Although the Sentencing Commission data does not indicate which district court initiated each revocation, I assumed for purposes of my analysis that it was the same district court that originally sentenced the defendant. *See* VARIABLE CODEBOOK, *supra* note 276, at 4, 22, 26, 39. This assumption should be generally accurate because, by default, revocation proceedings must be initiated by the court that sentenced the defendant. *See* 18 U.S.C. § 3583(a), (e)(3) (authorizing judge who imposed supervised release to revoke it); 18 U.S.C. §§ 3562(b), 3565(a) (same for probation); *see also* United States v. Ceballos-Santa Cruz, 756 F.3d 635, 637-38 (8th Cir. 2014) (per curiam) (holding that the District Court of Nebraska did not abuse its discretion in revoking a defendant's sentence that had been issued by the District Court of Nebraska, despite the defendant committing his violation in the District of Arizona). Although it is possible for a court to transfer jurisdiction over a defendant to a different district, *see* 18 U.S.C. § 3605, the transfer rate is very low and therefore should not have a significant effect on my results. *See* U.S. SENT'G COMM'N, *supra* note 45, at 61 & n.261.

318. Evjen, *supra* note 76, at 35.

geographic disparities are due to differences in judicial attitudes toward initiating revocation proceedings. As Evjen himself recognized, the "'when to revoke' policy may differ among probation officers and among judges," because "[s]ome courts may revoke probation for a technical infraction of the probation conditions while others do so only for violation of law."[319]

To measure geographic disparities in revocation rates while also controlling for natural sources of interdistrict variability, I calculated each district's ratio of total revocations to convictions, expressed as a percentage, between 2013 and 2017.[320] I chose this measurement based on the assumption that any natural sources of variation affecting the number of revocations in each district would also affect the number of convictions in that district. For example, I assumed that larger districts with higher crime rates would have higher numbers of *both* revocations *and* convictions. Therefore, comparing districts based on their number of revocations as a percentage of convictions allows me to compare how frequently judges in each district initiated revocations. If judges were perfectly uniform in their approach to initiating revocations, the rate of revocations per convictions should be a roughly consistent across the country.

Findings.—My analysis revealed significant geographic disparities in how frequently judges initiated revocation proceedings. Figure 3 shows that the percentage of revocations per convictions in each district ranged from less than 20% to over 100%, with a national average of 29.91%. Approximately one-sixth of all districts had a rate of less than 20%, while one-tenth of all districts had a rate of more than 60%. One district (Minnesota) had over 100%, meaning that there were more revocations than convictions in that district during the relevant time period.

319. *Id.*

320. For this part of my analysis, I excluded the Central District of California, which did not submit violation documents to the Sentencing Commission for most of the relevant time period, "despite consistently having the second highest number of offenders under supervision." U.S. SENT'G COMM'N, *supra* note 29, at 16.

Figure 3
Distribution of Districts by Revocations as Percentage of Convictions
(U.S. District Courts, 2013-2017)

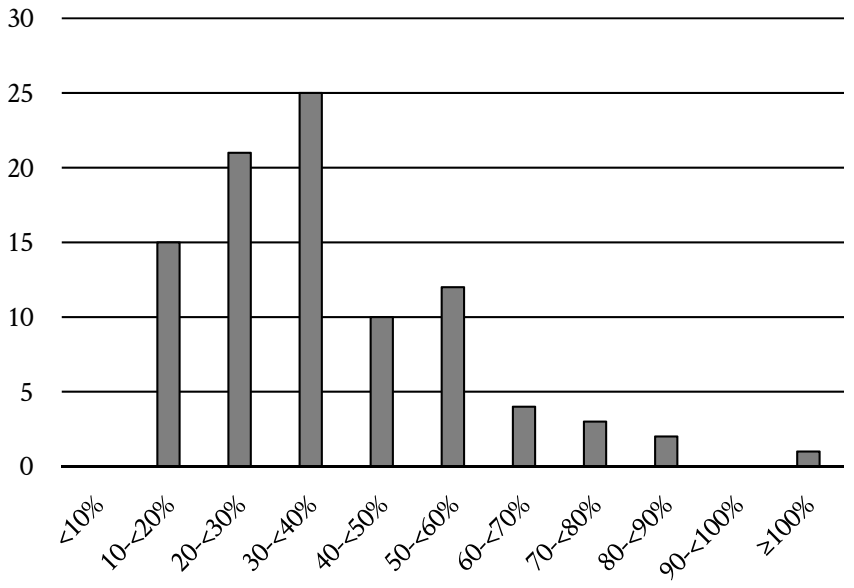
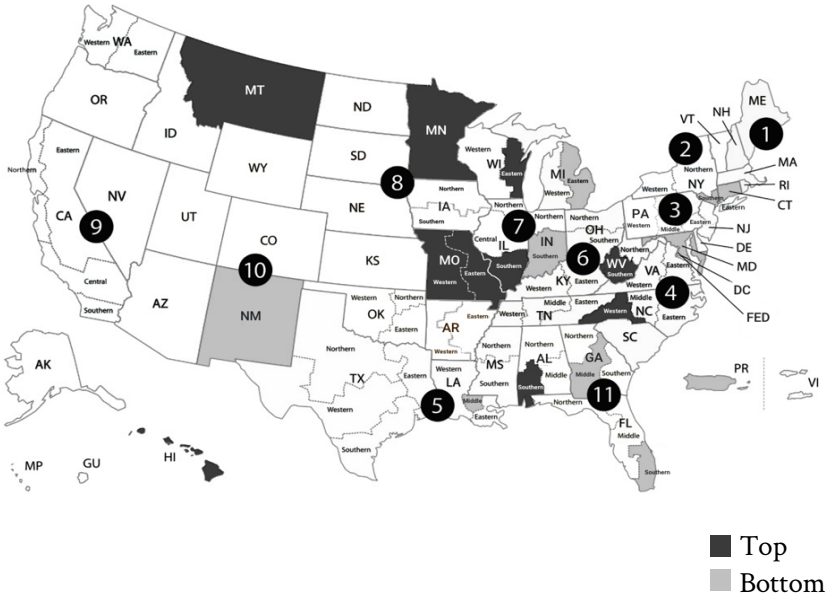


Figure 4 displays a map of the top and bottom ten districts for revocations as a percentage of convictions (the Appendix provides data for all ninety-four federal judicial districts). The top ten districts were: (1) Minnesota (103.91%), (2) Missouri-East (89.59%), (3) Montana (81.75%), (4) Wisconsin-East (77.05%), (5) Missouri-West (75.56%), (6) Hawaii (71.65%), (7) West Virginia-South (68.50%), (8) North Carolina-West (65.89%), (9) Alabama-South (60.91%), (10) Illinois-South (60.27%). The bottom ten were: (1) New Mexico (10.93%), (2) Puerto Rico (11.75%), (3) Florida-South (15.20%), (4) Georgia-Middle (15.85%), (5) Michigan-East (16.10%), (6) New York-South (16.78%), (7) Connecticut (17.28%), (8) Indiana-South (17.93%) (9) Louisiana-Middle (18.17%), and (10) Maryland (18.33%).

Figure 4
Top and Bottom Ten Districts for Revocations as Percentage of Convictions
(U.S. District Courts, 2013-2017)



These results reflect significant geographic disparities in how frequently judges in each district initiated revocation proceedings. Far from a consistent rate of revocations per convictions, the top ten districts had a rate above 60% and the bottom ten below 20%. Accordingly, the degree of geographical variation for judge-initiated revocations appears to be even greater than disparities in charging decisions by federal prosecutors.[321] The reason for these disparities, however, is unclear. Among the top ten districts for revocations, several were in the Upper Midwest (Minnesota, Montana, and Wisconsin), which might suggest that revocations were more frequent in states with large

321. *See* Brian D. Johnson, Nat'l Inst. Of Just., The Missing Link: Examining Prosecutorial Decision-Making Across Federal District Courts 75, 77-79 & tbl.13 (Mar. 1, 2014) (unpublished DOJ-funded report) (made publicly available by the National Criminal Justice Reference Center), https://perma.cc/C5MR-Y6MG (describing a study on federal prosecutors' charging decisions with results suggesting that "most districts have declination rates between 5% and 22%," with the geographical variation likely attributable to "the size of the U.S. Attorney's office," district demographics, "caseload pressure of the district," and whether districts were "socioeconomically disadvantaged").

Indian reservations.[322] This correlation would make some sense, because Indian reservations are subject to broad federal criminal jurisdiction[323] and have reduced access to reentry services, which can increase the number of violations.[324] Nevertheless, several other districts with large Indian reservations, such as Nevada, Arizona, and New Mexico,[325] were much lower ranked for revocations (sixty-sixth, eightieth, and ninety-third, respectively), so I do not find this interpretation of the data persuasive. There are also no obvious patterns among the bottom ten districts for revocations.

Instead, I believe the best explanation for the geographic disparities I discovered is the simplest one: They are arbitrary. Because there is no single authority to set national policy on when and whether district judges should initiate revocation proceedings, they must do so based on their own individual proclivities and local preferences, which vary widely. The districts with the highest and lowest revocation rates just happen to be the ones with the judges who adopted the most or least aggressive approaches to initiating revocations. Many of these districts are small, so a few outlier judges could have had a large effect on their overall revocation rates. Of course, some of the variation I observed may also be due to differences in how *probation officers* decided to report violations, rather than whether *judges* decided to initiate revocations.[326] Indeed, a study of four districts found "significant disparit[ies]" in reporting practices by probation officers "between districts, between units in the same district, and between officers in the same unit."[327] Nevertheless, probation

322. *Cf.* U.S. DEP'T OF JUST., REPORT ON RESOURCES AND DEMOGRAPHIC DATA FOR INDIVIDUALS ON FEDERAL PROBATION OR SUPERVISED RELEASE 15 (2023), https://perma.cc/H6L7-RJ4N (reporting that, together, "American Indians and Alaska Natives" had the "highest revocation rates" in 2021 and 2022); *Native American Reservations by State 2024*, WORLD POPULATION REV., https://perma.cc/XJV2-65PC (archived Dec. 17, 2024) (listing the ten states with largest Indian reservation populations as Arizona, Washington, Montana, New Mexico, California, Oklahoma, Minnesota, Wisconsin, Michigan, and North Dakota).

323. *See* Negonsott v. Samuels, 507 U.S. 99, 102-03 (1993).

324. *See* Abaki Beck, *Parole Requirements Stack the Odds Against Indigenous People*, TALKPOVERTY (Mar. 3, 2022), https://perma.cc/7LUW-FEZT.

325. *See Native American Reservations by State 2024*, *supra* note 322.

326. *See* U.S. DEP'T OF JUST., *supra* note 322, at 3-4 ("Although U.S. Probation and Pretrial Services officers share a mission and operate under national policies, various aspects of the work and procedure implementation differ across the 93 districts. For example, the number of officers in each district depends on the district's workload, and officer workload is not the same in every district. Increases in arrests generated by law enforcement priorities or operations can significantly increase criminal filings in a given district, impacting the workload of both judges and probation officers." (footnotes omitted)).

327. Sam Torres, *Early Termination: Outdated Concept in an Era of Punitiveness*, FED. PROB., June 1999, at 35, 40.

officers are themselves judicial officers, accountable to the chief judges of their districts. The conclusion is therefore the same: Judiciary-initiated revocation makes national coordination more difficult, resulting in inconsistent policy.

3. Impartial decision-making

The third way that judge-initiated revocations functionally violate the separation of powers is by giving judges a stake in the proceedings that compromises their ability to remain impartial. One reason the Constitution assigns the President the power to prosecute is so that judges can adjudicate criminal proceedings free from bias. My empirical analysis of federal sentencing data, however, shows that judges sentence defendants more harshly when they initiate revocation proceedings, especially for highly discretionary Grade C violations, which calls their neutrality into question.

The Constitution vests the President with the power to prosecute in part to ensure that the judiciary can act as impartial decisionmakers. As James Madison put it: "No man is allowed to be a judge in his own cause, because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity."[328] In *Williams v. Pennsylvania*, for example, the Supreme Court held that a state supreme court justice should have recused himself from an appeal in a post-conviction proceeding where, over twenty years prior, he had served as a district attorney and given permission to seek the death penalty in the defendant's case. [329] The Court explained that when a judge had "significant, personal involvement as a prosecutor in a critical decision regarding the defendant's case," including "what charges to bring," a "serious question arises as to whether the judge" may have become "'so psychologically wedded' to his or her previous position as a prosecutor that [they] 'would consciously or unconsciously avoid the appearance of having erred or changed position,'" creating "an impermissible risk of actual bias."[330]

Although *Williams* was decided based on the right to due process,[331] the same principle of judicial impartiality sounds in the separation of powers.[332] As Paul Verkuil explained, the "notion that no man can be a judge in his own

328. THE FEDERALIST NO. 10 (James Madison), *supra* note 1, at 55-56.

329. 579 U.S. 1, 5-8 (2016).

330. *Id.* at 8-11 (quoting Withrow v. Larkin, 421 U.S. 35, 57 (1975)); *see also In re* Murchison, 349 U.S. 133, 137 (1955) (holding that a judge cannot "act as a grand jury and then try the very persons accused as a result of his investigations" in cases of criminal contempt).

331. *Williams*, 579 U.S. at 8.

332. *Cf.* Nathan S. Chapman & Michael W. McConnell, Essay, *Due Process as Separation of Powers*, 121 YALE L.J. 1672, 1677-78 (2012) (arguing that the original understanding of due process was to protect the separation of powers).

cause" was a foundational "rationale for separation of powers" and for protecting "the independence that is the hallmark of the judiciary."[333] Sir William Blackstone, for example, described the "independence and uprightness of the judges, as essential to the impartial administration of justice," remarking that it would be an "absurdity, if the king personally sate in judgment" of "criminal proceedings, or prosecutions for offences," because "in regard to these he appears in another capacity, that of *prosecutor*."[334] In *Morrison v. Olson*, the Supreme Court similarly voted to uphold the independent counsel statute over Justice Scalia's dissent in part because the court that appointed the independent counsel "itself [had] no power to review any of the actions of the independent counsel," so there was "no risk of partisan or biased adjudication of claims regarding the independent counsel by that court."[335]

Under the logic of *Williams* and *Morrison*, judge-initiated revocation gives the judge a stake in the proceedings that undermines their ability to remain impartial. Because initiating a revocation requires the judge to make a "critical decision" about "what charges to bring" against the defendant, they obtain a "significant, personal involvement" in the case that creates "an impermissible risk of actual bias."[336] Indeed, the Supreme Court has held that defendants have a qualified right to counsel in revocation proceedings due to "the modification in attitude which is likely to take place once [a probation] officer has decided to recommend revocation," after which "his role as counsellor to the probationer or parolee is . . . surely compromised."[337] In the same way, a judge's role as an impartial adjudicator is comprised once they have taken a public stance on the defendant's culpability by initiating a revocation proceeding.

Relationship to the Guidelines Range.—To demonstrate empirically how judge-initiated revocations undermine judicial impartiality, I compared how frequently judges imposed sentences within, above, or below the recommended Sentencing Guidelines range for convictions versus revocations. I chose this measure because variation in the lengths of the sentences imposed for a conviction and a revocation may be due to differences in the underlying facts, not differences in the judges' attitudes toward the proceedings. For example,

333. Paul R. Verkuil, *Separation of Powers, the Rule of Law and the Idea of Independence*, 30 WM. & MARY L. REV. 301, 305-06 (1989).

334. 1 BLACKSTONE, *supra* note 202, at 258.

335. 487 U.S. 654, 683 (1988).

336. *See Williams*, 579 U.S. at 8, 11; *see also Morrison*, 487 U.S. at 682-83.

337. Gagnon v. Scarpelli, 411 U.S. 778, 785, 788 (1973); *see also* United States v. Jones, 957 F. Supp. 1088, 1091 (E.D. Ark. 1997) ("[A]llowing the probation office to petition the Court seems to magnify the unfortunate tendency of probation officers . . . to be advocates not for their probationers but for 'the People.'").

convictions generally receive longer sentences than revocations,[338] while defendants in revocation proceedings are more likely to have "serious criminal histories" than those "whose original sentence was probation or included a term of supervised release."[339]

To compare sentencing outcomes for convictions versus revocations while also controlling for differences in the underlying facts, I analyzed sentencing outcomes in each type of proceeding based on their relationship to the recommended Sentencing Guidelines range. In other words, I compared how frequently judges sentenced defendants for convictions versus revocations within, above, or below the sentencing range recommended by the Guidelines. Judges are required to consider the Guidelines range as the "lodestone" in their sentencing analyses but ultimately remain free to sentence above or below them.[340] The Guidelines also include separate tables for convictions and revocations, which take into account the defendant's conduct and criminal history when recommending a sentencing range.[341] By comparing how frequently judges sentenced defendants within, above, or below the range recommended by the Guidelines, I could compare their attitudes towards punishing convictions versus revocations.

Findings.—My analysis revealed that judges sentenced criminal defendants more harshly in revocation proceedings, especially for highly discretionary Grade C violations. Figure 5 shows that judges imposed sentences for convictions within the Guidelines range 48.46% of the time, above the range 2.37% of the time, and below the range 49.17% of the time. By contrast, they sentenced revocations within the Guidelines range 59.81% of the time, above the range 11.09% of the time, and below the range 29.10% of the time. In other words, judges sentenced defendants above the Guidelines range about five times more frequently for revocations than for convictions, and below the range about half as frequently.

338. The average prison term imposed for a federal criminal conviction is forty-eight months, while the average term imposed for a violation of supervision is eleven months. *Compare* U.S. SENT'G COMM'N, 2021 ANNUAL REPORT AND SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 81 tbl.27 (2022), https://perma.cc/GL7T-CQE8 (showing a mean of forty-eight months for sentences in criminal convictions), *and* Memorandum from Thomas H. Cohen & Vanessa L. Starr, Soc. Sci. Analysts, Probation & Pretrial Servs. Off., Off., Admin. Off. of the U.S. Cts., to Kathryn A. Robinette, Senior Counsel, Off. of Legal Pol'y, U.S. Dep't of Just., at 6 (Dec. 12, 2022), https://perma.cc/6BRS-VY2G ("Half of persons with revocations were sentenced to incarceration terms of 6 or 7 months or more.), *with* U.S. SENT'G COMM'N, *supra* note 29, at 34 ("[T]he average term of imprisonment imposed at violation hearings was 11 months.").

339. U.S. SENT'G COMM'N, *supra* note 29, at 4.

340. Peugh v. United States, 569 U.S. 530, 544 (2013).

341. U.S. SENT'G GUIDELINES MANUAL ch. 5, pt. A, sentencing table (U.S. SENT'G COMM'N 2024).

Figure 5
Sentencing Convictions v. Revocations Relative to Guidelines Range
(U.S. District Courts, 2013-2017)

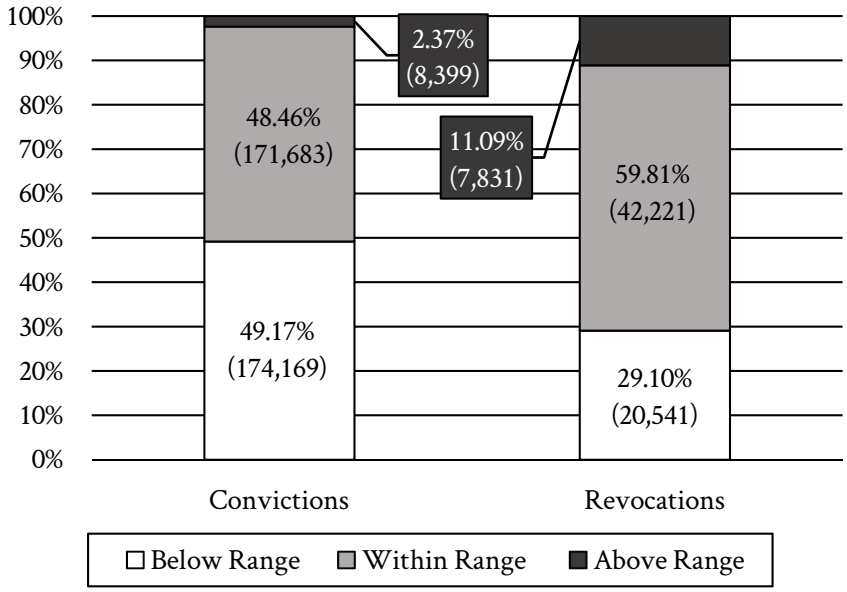
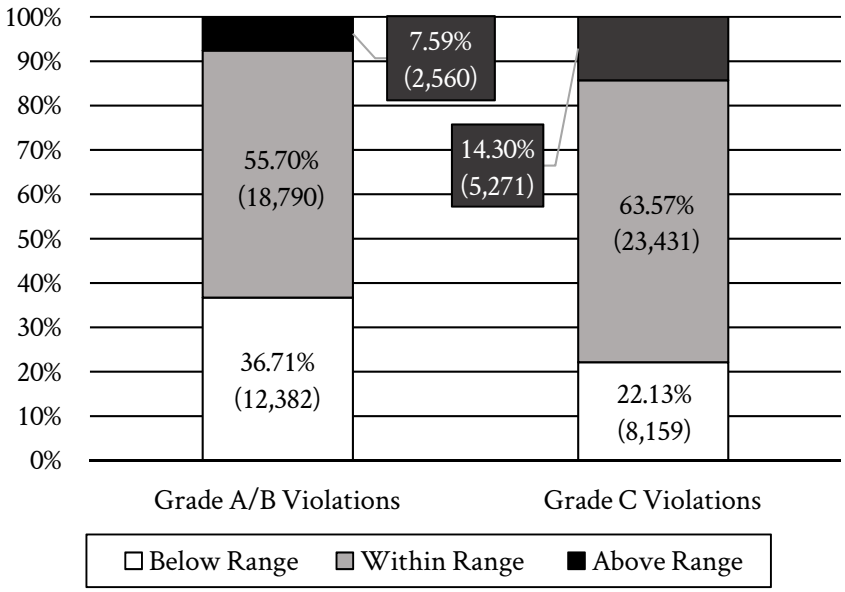


Figure 6 focuses on revocation proceedings, showing that judges sentenced defendants for Grade A and B violations (felony conduct) within the Guidelines range 55.70% of the time, above the range 7.59% of the time, and below the range 36.71% of the time. By contrast, they sentenced defendants for Grade C violations (misdemeanors and non-criminal conduct) within the Guidelines range 63.57% of the time, above the range 14.30% of the time, and below the range only 22.13% of the time. In other words, judges sentenced defendants above the Guidelines range roughly twice as often for Grade C violations than for Grade A and B violations, and below the range one-third less often.

Figure 6
Sentencing Grade A/B v. C Violations Relative to Guidelines Range
(U.S. District Courts, 2013-2017)



These results are statistically significant yet counterintuitive.[342] If convictions are more serious than revocations, then why were judges more likely to sentence revocations above the Guidelines range? Similarly, if Grade A and B violations are more serious than Grade C violations, then why did judges tend to sentence Grade C violations more harshly? One possible explanation could be that defendants in revocation proceedings are in a worse position to ask the Government for a below-Guidelines sentence in exchange for cooperating or pleading guilty.[343] Or the Sentencing Guidelines for revocations may simply be (or be viewed as) too lenient, leading judges to vary upward more frequently. However, these theories would only explain the differences in sentencing outcomes between convictions and revocations. Neither can explain why judges are harder on Grade C violations than Grade A and B violations.

342. For convictions versus revocations, the difference in sentencing outcomes was statistically significant, X^2 (2, N = 424,844) = 18,399.32, p < .001. For Grade A/B versus Grade C violations, the difference was also statistically significant, X^2 (2, N = 70,593) = 2,182.46, p < .001.

343. *See* U.S. SENT'G GUIDELINES MANUAL §§ 3E1.1, 5K1.1 (U.S. SENT'G COMM'N 2024).

Instead, I believe the better explanation for these results is that the judge's view of the appropriate sentence for a violation influences their decision of whether to initiate a revocation proceeding in the first place. In other words, judges are more likely to initiate revocation proceedings when they view the defendant's misconduct as more serious and therefore deserving of harsher punishment. If a judge thinks that a violation warrants punishment, then they will likely initiate a revocation. But if they do not believe that a violation merits punishment, then they may not initiate a revocation at all. The judge's discretion in making this choice is especially vast when it comes to Grade C violations, which include a wide variety of low-level crimes and non-criminal conduct. As a result, revocations will tend to result in longer sentences than convictions, and Grade C violations will result in longer sentences than Grade A and B violations.

These judgments, however, are never entirely objective, nor are they made in a vacuum. Having publicly announced their belief that the defendant deserves to be punished for a violation, the judge is likely to feel "psychologically wedded" to that position and may "consciously or unconsciously avoid the appearance of having erred."[344] The judge will not want to backtrack from their decision to initiate a revocation proceeding and may be less receptive to the defendant's evidence that they did not commit the alleged violation or that their misconduct was less aggravated than it first seemed. As a result, the judge will be more likely to find the defendant in violation and to impose a harsher punishment at sentencing. The judge's conflict of interest therefore creates a risk of actual bias that "demeans the reputation and integrity not just of one jurist, but of the larger institution of which he or she is a part."[345] Initiating revocations gives judges a stake in the proceedings that undermines their ability to remain impartial.

III. Separating the Powers of Revocation

While most scholars of criminal law believe that a strong and independent judiciary is necessary to push back against prosecutorial overreach, the primary threat to liberty under federal community supervision comes not from the U.S. Attorney's Office but from district judges, who wield unchecked power to punish through revocation proceedings. To restore the separation of powers to the criminal justice system, only prosecutors should be allowed to initiate revocations, while judges should be limited to adjudication and sentencing. This proposal might seem counterintuitive, even radical, yet it

344. Williams v. Pennsylvania, 579 U.S. 1, 9 (2016) (quoting Withrow v. Larkin, 421 U.S. 35, 57 (1975)).

345. *Id.* at 15.

would not require striking down or even amending any statute. Moreover, this proposal is supported by both state and federal precedents.

A. Judges as Prosecutors

The conventional wisdom about the separation of powers in criminal law is that the judiciary serves as an important check against overly aggressive law enforcement by the executive branch.[346] Although this narrative describes important aspects of the modern criminal justice system, it overlooks the way that district judges themselves now exercise law-enforcement power by initiating revocation proceedings. Just as scholars of administrative law have begun to criticize judicial aggrandizement in federal regulatory policy,[347] so too should scholars of criminal law recognize the danger of judges becoming prosecutors.

Most scholars of criminal law believe that the criminal justice system suffers from a "concentration of power in the prosecution," and an "emasculation of judges."[348] They argue that the use of "coercive plea bargaining tactics" and "expansion of crimes and punishments" has encouraged a "one-sided" trend toward "prosecutorial adjudication," whereby prosecutors have become "the sole judges of crime and punishment."[349] Rachel Barkow, for example, described the rise of plea bargaining as "a systemic failing in which prosecutors make the key decisions in criminal matters without a judicial check," creating "an administrative system where the prosecutor combines both executive and judicial power."[350] Similarly, Bill Stuntz warned against the broadening of criminal law via the "tacit cooperation between prosecutors and legislators, each of whom benefits from more and broader crimes," versus the "growing marginalization of judges, who alone are likely to opt for narrower liability rules rather than broader ones."[351] Stuntz argued that the "best"

346. *See infra* notes 348-53 and accompanying text.

347. *See infra* notes 354-56 and accompanying text.

348. *See* Luna & Wade, *supra* note 30, at 1422-23 (collecting views). A notable exception to the scholarly consensus in favor of judicial power are prison abolitionists, who have called for "abolishing criminal courts as sites of coercion, violence, and exploitation and replacing them with other social institutions, such as community-based restorative justice and peacemaking programs, while investing in the robust provision of social, political, and economic resources in marginalized communities." *E.g.*, Matthew Clair & Amanda Woog, *Courts and the Abolition Movement*, 110 CALIF. L. REV. 1, 7 (2022). While I appreciate this skepticism toward the judicial role, the abolitionist critique is ultimately beyond the scope of my legal analysis.

349. Luna & Wade, *supra* note 30, at 1423 (quoting Langer, *supra* note 30, at 225-26).

350. Barkow, *supra* note 20, at 997, 1048; *see also* Hessick, *supra* note 23, at 176 ("[P]lea bargaining has largely given prosecutors the 'judicial power' of conviction and imposing sentence.").

351. Stuntz, *supra* note 30, at 509-10.

solution to the "pathologies" of our criminal justice system is to "increase judicial power over criminal law."[352] As Carisa Byrne Hessick suggested, judges are more likely than prosecutors to stand up against "tough on crime" policies because of their "professional identity . . . *as judges*," as well as their position as judges, which "itself comes with different formal rules," including "guarantees about neutral decision-making."[353]

Against this chorus in praise of the judiciary, however, a few scholars of administrative law have begun to criticize the encroachment of federal courts on executive power. Blake Emerson, for example, argued that the Supreme Court's post-2016 decisions invalidating agency actions on public health, the environment, the census, and immigration "wrest[ed] away the policymaking discretion that Congress has delegated to executive agencies," transforming the Court into "the President's cochief of the federal government."[354] By "intensifying judicial review of regulatory action" through "second-guessing an exercise of enforcement discretion," he explained, the Court "*itself* exercises executive power."[355] As a result, the justices now "make highly visible and consequential decisions without the electoral mandate, professional expertise, or public input that ordinarily accompany administrative action."[356]

Although Emerson described judicial aggrandizement in administrative law as a "recent" phenomenon,[357] the history of community supervision shows that judges have been fighting for nearly a century to enforce criminal law through revocation proceedings. Originally, Congress divided authority over parole and probation between the executive and judicial branches.[358] By 1940, however, the judiciary successfully lobbied for total control over the probation office.[359] By the 1980s, judges won exclusive authority to initiate revocation proceedings.[360] In the decades since, the courts defeated efforts by the DOJ to

352. *See, e.g.*, *id.* at 512, 587.

353. Hessick, *supra* note 23, at 178-79.

354. Emerson, *supra* note 195, at 757, 764; *see also* Josh Chafetz, *The New Judicial Power Grab*, 67 ST. LOUIS U. L.J. 635, 648-52 (2023) (arguing that recent Supreme Court decisions on administrative law aggrandize the judiciary at the expensive of the executive). *See generally* Adam Crews, *The Executive Power of the Federal Courts*, 56 ARIZ. ST. L.J. 695 (2024) (arguing that judicial review of agency action may be a form of executive power).

355. Emerson, *supra* note 195, at 757, 761-64.

356. *Id.* at 758.

357. *Id.* at 757.

358. *See supra* notes 72-74 and accompanying text.

359. *See supra* notes 86-88 and accompanying text.

360. *See supra* Parts I.B, II.A.3.

win back control over the supervision system,[361] while simultaneously rejecting separation-of-powers challenges to their authority.[362]

Rather than "prosecutorial adjudication,"[363] federal community supervision suffers from the inverse trend of *judicial law enforcement*. By initiating revocation proceedings, federal district judges act as the President's co-prosecutors, making the extremely visible and consequential decision of whether to enforce conditions of supervision.[364] In contrast to the Executive, district judges exercise this law-enforcement authority without the electoral validation or institutional competence of the executive branch.[365] Far from "marginaliz[ed]," judges sit "at the center" of federal community supervision,[366] controlling a vast "administrative system" through which they exercise "both executive and judicial power."[367] The structure of the Constitution has collapsed before our very eyes, yet it has gone unnoticed because the walls were broken down by federal judges, not the President.[368]

Scholars of criminal law should not remain innocent to the dangers of judicial aggrandizement. The romantic vision of judges as checks on prosecutors is only partially accurate, overlooking the threat to liberty posed by judge-initiated revocations. District judges play an important and even honorable role in the federal criminal justice system, but they should not be idealized. They are mortals, not "angels," vulnerable to the same "ambition[s]" and "abuses" of power as people in other branches of government.[369] Given their role in enforcing criminal law by initiating revocations, they should be

361. *See supra* notes 82-99 and accompanying text.

362. *See supra* Part II.A.1.

363. Luna & Wade, *supra* note 30, at 1423 (quoting Langer, *supra* note 30, at 225-26).

364. *Cf.* Emerson, *supra* note 195, at 758 ("[The Court] make[s] highly visible and consequential decisions without the electoral mandate, professional expertise, or public input that ordinarily accompany administrative action.").

365. *Cf. id.* (discussing the Supreme Court's administrative law jurisprudence).

366. Jacob Schuman, *Revocation and Retribution*, 96 WASH. L. REV. 881, 933 (2021) (emphasis omitted).

367. *Cf.* Barkow, *supra* note 20, at 1047-48 (discussing the collapse of executive and judicial functions in the power of federal prosecutors in the plea bargaining context).

368. Although the DOJ eventually acquiesced to the judiciary's claim of revocation authority, the separation of powers "exists for the protection of individual liberty," and therefore "its vitality 'does not depend' on 'whether the encroached-upon branch approves the encroachment.'" NLRB v. Canning, 573 U.S. 513, 571 (2014) (Scalia, J., concurring in the judgment) (quoting Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 497 (2010)).

369. *See* THE FEDERALIST NO. 51 (James Madison), *supra* note 1, at 322.

held to the same skeptical, hard-headed analysis as federal prosecutors. A "judge, even a merciful judge, is no object of love."[370]

B. Initiate, Adjudicate, Sentence

To restore the separation of powers to revocation proceedings, only prosecutors should be allowed to initiate them, while judges should be limited to adjudication and sentencing. This change would not require invalidating or even amending any law. Although advocates for criminal defendants might fear that prosecutors would enforce conditions of supervision more aggressively than district judges, their professional incentives make that outcome unlikely. Instead, prosecutor-initiated revocations would provide more protection for criminal defendants by ensuring a check on the power to punish.

Federal criminal prosecutions "generally unfold in three discrete phases,"[371] with responsibilities divided between the executive and judicial branches. First, the U.S. Attorney's Office engages in an investigation to determine whether to initiate a prosecution against an individual.[372] Next, the U.S. Attorney's Office initiates the prosecution by obtaining an indictment from a grand jury, and a district judge adjudicates the case.[373] In this second step, if the defendant has not pleaded guilty, the judge presides over a trial where a petit jury decides whether the defendant is guilty beyond a reasonable doubt. Finally, if the jury convicts the defendant, the judge imposes sentence.[374]

Revocation proceedings, by contrast, give power over all three of these stages to the judiciary. First, probation officers monitor defendants, providing district judges with information about potential violations of probation or supervised release that the judge uses to determine whether to initiate a revocation proceeding.[375] Next, the judge initiates the proceedings by issuing a

370. 3 FRIEDRICH NIETZSCHE, THE GAY SCIENCE: WITH A PRELUDE IN RHYMES AND AN APPENDIX OF SONGS 190 (Walter Kaufmann trans., Vintage Books 1974) (1882).

371. Betterman v. Montana, 578 U.S. 437, 441 (2016).

372. *See id.*

373. *See id.* The jury is often described as a procedural protection for the defendant, but it is also a part of the judiciary and a "key component of the separation of powers in the criminal law." Barkow, *supra* note 20, at 1015; *see also* Rachel E. Barkow, *Recharging the Jury: The Criminal Jury's Constitutional Role in an Era of Mandatory Sentencing*, 152 U. PA. L. REV. 33, 63 (2003) ("Just as the division of Congress into a House and Senate serves the interests of two different (though possibly overlapping) constituencies and checks state abuse of power, so, too, does the division of the judiciary among jury and judge.").

374. *See Betterman*, 578 U.S. at 441.

375. *See supra* note 35 and accompanying text; Parts I.B-.C.

summons for the defendant's appearance.[376] In this stage, the judge adjudicates the revocation hearing and decides whether the defendant committed the violation.[377] Finally, the judge imposes a sentence.[378] This concentration of authority gives the district judge unchecked power to deprive a defendant of their liberty, thereby "unconstitutionally . . . unit[ing] the power to prosecute and the power to sentence within one Branch."[379]

Under a proper separation of powers, district judges should not initiate revocation proceedings, just as they do not initiate prosecutions.[380] Instead, U.S. Attorneys should initiate revocation proceedings, while judges should be limited to adjudication and sentencing. Probation officers may still inform judges about the conduct of defendants they sentenced to supervision, but if the officers believe that revocation is warranted, then they should make that recommendation to the U.S. Attorney's Office. Thereafter, prosecutors should decide based on their independent review of the facts whether to enforce the conditions of supervision by filing a motion for revocation. Providing "overlapping jurisdiction" between the executive and judicial branches in revocation proceedings would ensure more protection for criminal defendants by adding a "veto gate[]" to the process.[381] Both prosecutor and judge would have to concur in order to revoke a defendant's supervision, guaranteeing that no single person has the sole power to impose criminal punishment.

This change would also be perfectly consistent with current law. No legislation, rule of criminal procedure, or Sentencing Guideline expressly requires judges to initiate revocation proceedings. Instead, they specify only that judges should revoke supervision using certain procedures and then impose certain punishments; in other words, they should *adjudicate* and *sentence* violations.[382] Nothing states which branch should *initiate* revocation

376. *See supra* Part I.C.

377. *See supra* Part I.C.

378. *See supra* Part I.C.

379. Mistretta v. United States, 488 U.S. 361, 391 n.17 (1989).

380. *See supra* Part II.A.1.

381. Epps, *supra* note 23, at 70.

382. 18 U.S.C. § 3583(e) (providing that the court may modify or revoke conditions of supervised release); *id.* § 3565(a) (same for parole); FED. R. CRIM. P. 32.1 (laying out the procedures for revoking or modifying probation or supervised release); U.S. GUIDELINES MANUAL §§ 7B1.3, 7B1.4 (U.S. SENT'G COMM'N 2024) (explaining when courts must or have discretion to revoke probation or supervised release and providing sentence ranges); *see also* United States v. Barry, 477 F. Supp. 2d 146, 149 (D.D.C.) ("[T]he prerogative of the government to file a motion to revoke probation is not addressed at all in [Federal Rule of Criminal Procedure 32.1]; rather, that rule prescribes the rights of the probationer with respect to proceedings to revoke or modify probation or supervised release, and the manner in which a court must conduct preliminary,
footnote continued on next page

proceedings in the first place. Indeed, the governing statute requires that probation officers report violations "not only to the Court but also to the U.S. Attorney," making it "reasonable to assume" that it "envisions" revocations initiated by prosecutors.[383]

Advocates for criminal defendants might fear that prosecutors would be more aggressive than judges in enforcing conditions of supervision, but I believe that outcome is unlikely for three reasons. First, federal prosecutors have a broad mandate focused on serious criminal behavior, which gives them "the perspective that multiple responsibilities provide."[384] In light of the competing demands on their attention, time, and resources, prosecutors are less likely to initiate revocations for low-level misconduct. By contrast, initiating revocations is a district judge's only law-enforcement responsibility, so "[w]hat would normally be regarded as a technical violation . . . may in his or her small world assume the proportions of an indictable offense."[385] Second, as Stuntz observed, federal prosecutors have an incentive to pursue cases that further their "own professional development," particularly complex litigation that offers "valuable litigation experience and advanc[ed] professional reputation."[386] Revocation proceedings do not fit within this description, so they are unlikely to become a priority. Finally, prosecutors, unlike judges, are not responsible for sentencing defendants to supervision. As a result, they do not have the same "personal" interest in punishing violations to vindicate their own authority.[387]

Even if prosecutors initiate revocations at the same rate that judges do currently, that still would be an improvement on the status quo for criminal defendants because it would allow judges to better serve their checking functions at the adjudication and sentencing stages. Social science has demonstrated the "effect of professionals' role identity on their decision-making," which means that lawyers often change their perspectives as their role in the legal system changes.[388] Justice Sotomayor, for example, became a stronger advocate for the rights of criminal defendants after she changed her

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revocation and modification hearings."), *rev'd*, No. 05-cr-00556, 2007 WL 1232189 (D.D.C. Apr. 26, 2007).

383. United States v. Jones, 957 F. Supp. 1088, 1091 (E.D. Ark. 1997); 18 U.S.C. § 3603(8)(B) ("A probation officer shall . . . immediately report any violation of the conditions of release to the court *and to the Attorney General* . . . ." (emphasis added)).

384. Morrison v. Olson, 487 U.S. 654, 732 (1988) (Scalia, J., dissenting).

385. *Id.*

386. *See* Stuntz, *supra* note 30, at 543.

387. Schuman, *supra* note 14, at 1867-68.

388. Hessick, *supra* note 23, at 179-81 & n.104.

role from prosecutor to judge.[389] So too, once judges give up their power to initiate revocations and return to their traditional roles of adjudicating allegations and imposing punishments, they may find themselves feeling more protective of criminal defendants. A core tenet of the Constitution's separation of powers is that abuses of criminal punishment by one branch of government should always be checked by another.[390] Separating the powers of revocation would bring such proceedings back in line with this basic principle.[391]

C. The States and Special Parole

Requiring prosecutors rather than judges to initiate revocation proceedings would be a significant change from the current system. However, there are several precedents supporting this proposal, both at the state level and in an older form of federal supervision called "special parole."[392] These real-world examples underscore how judge-initiated revocation violates the separation of powers and show that prosecutor-initiated revocation would be a feasible alternative.

The States.—Several state courts have held that judge-initiated revocation violates their state constitutions' separation of powers. In 2010, the Kentucky Supreme Court's *Jones v. Commonwealth* decision relied on a formalist analysis to hold that a state law giving judges authority to revoke post-release supervision violated the "separation of powers doctrine" of the Kentucky Constitution by "impermissibly confer[ring] an executive power to revoke a post-incarceration or post-parole conditional release upon the judiciary."[393] "Once a prisoner is turned over to the Department of Corrections for

389. *Id.* at 180-81. *But see id.* at 181 n.111 (discussing Justice Alito, who was also a federal prosecutor before he became a federal judge).

390. Barkow, *supra* note 20, at 1017.

391. My argument that judge-initiated revocation violates the separation of powers raises the reciprocal question of whether the Bureau of Prisons (an executive agency) infringes on judicial authority by adjudicating cases of prison discipline. *See* 18 U.S.C. § 4042(a)(3) (explaining that the BOP "shall . . . provide for the protection, instruction, and discipline of all persons" charged or convicted of federal offenses); *see also* United States v. Haymond, 139 S. Ct. 2369, 2396-97 (2019) (Alito, J., dissenting) (comparing revocation proceedings to prison discipline). I believe the answer to that question is no. Formally, when a judge issues a criminal judgment imposing a term of incarceration, that judgment also includes a mandate for the executive to both imprison the defendant for a term of years and, by implication, compel them to comply with prison rules for the duration. By disciplining prisoners, the BOP simply executes this part of the court's judgment. *See* Mishra, *supra* note 161, at 1546-47. Functionally, the use of administrative proceedings within the confines of a prison poses little practical threat to judicial authority as a whole.

392. *See infra* notes 399-406 and accompanying text.

393. 319 S.W.3d 295, 296, 299-300 (Ky. 2010).

execution of the sentence," the court explained, "the power to determine the period of incarceration passes to the executive branch," and "[o]nly on appeal . . . should the judicial branch become involved in the executive branch's legitimate exercise of its power to execute sentences."[394] In response, the Kentucky legislature amended the offending statute "to provide for Parole Board, rather than judicial, oversight of revocations."[395]

The Illinois Court of Appeals took a more functionalist approach in 1992's *In re J.K.*, which held that a trial judge could not order a prosecutor to file a revocation petition because that would make it "impossible" for the judge to remain "impartial" in the proceedings.[396] The court emphasized that the judge had "violated the principle of separation of powers between the executive and judicial branches" by "assum[ing] the role of the prosecutor and determin[ing] which criminal offenses shall be charged." [397] Similarly, in 2023, the Colorado Court of Appeals' *People v. Karwacki* decision reversed a revocation on the ground that the trial judge's order to the probation office to "file a complaint to revoke probation" would "cause a reasonable observer to have doubts about the judge's impartiality, believing that he had already determined that [the defendant] had violated the conditions of his probation."[398] These state-court decisions confirm that judge-initiated revocation violates both the form and the function of the separation of powers.

Special Parole.—Between 1970 and 1987, the federal government used a unique form of community supervision called "special parole."[399] Special parole was "akin to supervised release" because it was imposed by a judge at sentencing, but it was also similar to parole because revocations were initiated by the Parole Commission.[400] While the federal courts have argued that initiating revocations is a necessary part of their "sentencing responsibility,"[401] the history of special parole shows that judges are perfectly capable of imposing terms of supervision without the power to initiate revocations.

394. *Id.* at 300.

395. McDaniel v. Commonwealth, 495 S.W.3d 115, 120 (Ky. 2016).

396. 594 N.E.2d 433, 436-37 (Ill. 1992).

397. *Id.*

398. 528 P.3d 198, 203 (Colo. App. 2023).

399. *See* Evans v. U.S. Parole Comm'n, 78 F.3d 262, 264 (7th Cir. 1996); *see also* Janet Schmidt Sherman, *Special Parole: Challenges to the Imposition of Special Punishment for Drug Law Violators*, 3 CRIM. JUST. J. 55, 56-57 (1979) (describing special parole).

400. Johnson v. United States, 529 U.S. 694, 726 n.7 (2000) (Scalia, J., dissenting); *see also* U.S. GUIDELINES MANUAL ch. 7, pt. A, introductory cmt.2(b) (U.S. SENT'G COMM'N 2024) ("[S]upervised release is more analogous to the additional 'special parole term' previously authorized for certain drug offenses."); *infra* notes 404-05 and accompanying text.

401. United States v. Davis, 151 F.3d 1304, 1307-08 (10th Cir. 1998) (quoting United States v. Berger, 976 F. Supp. 947, 950 (N.D. Cal. 1997)).

Congress created special parole as part of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (CDAPCA),[402] which aimed to combat the "growing menace of drug abuse in the United States."[403] Among other changes, the CDAPCA increased punishments for drug offenders by requiring judges to sentence them to at least a three-year term of "special parole" in "addition to any prison term."[404] Although special parole was imposed by judges, it was still administered by the Parole Commission,[405] making it a transitional stage between parole and supervised release.[406]

The CDAPCA, like the SRA, did not state explicitly which branch of government had the power to initiate revocation proceedings. One Fifth Circuit decision from 1973 observed that "Congress ha[d] failed to clearly provide an agency to oversee felons sentenced under the special parole provisions," but offered the "tentative opinion" that the power to initiate revocations was assigned to the Parole Commission rather than the sentencing court.[407] When the system finally went into effect, revocation authority was in fact assumed by the Parole Commission.[408]

Just over a decade later, the SRA abolished both parole and special parole, "substituting the words 'supervised release' for 'special parole' throughout the United States Code."[409] During the years that special parole was in effect, however, the courts apparently had no "trouble leaving the special parole terms they impose[d] to the Parole Commission to enforce."[410] A few

402. Pub. L. No. 91-513, 84 Stat. 1236 (codified as amended in scattered sections of the U.S. Code).

403. Sherman, *supra* note 399, at 55 (quoting H.R. REP. NO. 91-1444 (1970), at 1, *as reprinted in* 1970 U.S.C.C.A.N. 4566, 4567).

404. *Id.* at 56-57.

405. *See, e.g.*, Evans v. U.S. Parole Comm'n, 78 F.3d 262, 263 (7th Cir. 1996); Manso v. Fed. Det. Ctr., 182 F.3d 814, 815 (11th Cir. 1999).

406. The justifications offered for special parole also foreshadowed the ones that lawmakers gave fourteen years later when creating supervised release. *Compare* Sherman, *supra* note 399, at 59-60 (explaining that special parole is based on "the length of the sentence initially imposed, rather than by the date of release from prison"), *with* S. REP. NO. 98-225, at 123-24 (1983) (arguing that supervised release will be based on "whether the judge concludes that [the defendant] needs supervision, rather than on . . . whether a particular amount of his term of imprisonment remains"), *as reprinted in* 1984 U.S.C.C.A.N. 3182, 3306-07.

407. United States v. Simpson, 481 F.2d 582, 583-84 (5th Cir. 1973).

408. *See* 28 C.F.R. §§ 2.44, 2.52 (1992); Gozlon-Peretz v. United States, 498 U.S. 395, 399 (1991) (noting that special parole was "administered by the United States Parole Commission"); *see also* Sherman, *supra* note 399, at 91-92 (arguing that as of 1979 it remained unclear "whether in fact Congress even intended those on special parole to be supervised by the Parole Commission rather than the District Courts").

409. *Evans*, 78 F.3d at 264; *see also supra* notes 63-67 and accompanying text.

410. Stover, *supra* note 315, at 195-96.

defendants raised (unsuccessful) separation-of-powers challenges to the CDAPCA, but their arguments all focused on Congress's failure to set a statutory maximum term for special parole terms.[411] No one questioned the executive's authority to enforce conditions of supervision imposed by sentencing courts.[412]

I am not the first to find inspiration in special parole. In 1994, the general counsel of the U.S. Parole Commission published an article arguing that revocations of supervised release had created "burdensome caseloads" for district judges, who were "confus[ed]" by the "remedial and incapacitative, rather than punitive" goals of the system.[413] As a solution, he proposed transferring control over revocations back to the Parole Commission, citing special parole as a "model."[414] Although he did not make a constitutional argument, his observations about the relative capacities and competencies of district judges versus executive officials also sounded perfectly in the separation of powers.

Conclusion

When federal district judges initiate revocation proceedings, they become prosecutors in robes, infringing on the President's sole authority to enforce criminal law and undermining democracy, uniformity, and impartiality in the criminal justice system. Just as legal scholars have recently criticized judicial encroachment on executive power in regulatory affairs, so too should we recognize the danger of judicial aggrandizement on prosecutorial power. To restore the separation of powers to the system, I propose that only prosecutors should be allowed to initiate revocation proceedings, while judges should be limited to adjudication and sentencing. This change would provide more protection for individual liberty and be consistent with current law and past practice.

Recently, a movement has emerged to end mass incarceration by electing district attorneys who promise to limit prosecutions and reform their

411. *See* United States v. Bridges, 760 F.2d 151, 153 (7th Cir. 1985) (collecting cases).

412. To be sure, the Parole Commission's role in *adjudicating* revocations of special parole may have presented procedural concerns. *See* Schuman, *supra* note 47, at 1437-39 (arguing that the original understanding of the jury right requires a jury trial for revocations of penalty-structured supervision). However, the Commission's authority to *initiate* revocation proceedings was consistent with understandings of the separation of powers dating back to the Founding Era. *See supra* Part II.A.2.

413. Stover, *supra* note 315, at 195-96.

414. *Id.* at 196.

offices.[415] Yet changing policy and personnel within the executive branch will not affect community supervision in jurisdictions where *judges* initiate revocation proceedings. In these systems, advocates for criminal justice reform must recognize the role of judges as prosecutors. At the federal level, this means that district court nominees should be evaluated not only for their legal views, but also for how they will wield their law-enforcement powers via revocation proceedings. In states that elect judges, it means that revocation should be treated as a campaign issue.

Although modern legal scholars place their faith in the judiciary as a check on prosecutors, the Framers were alert to the danger that judges might seek their own power to enforce criminal law. In the *Federalist Papers*, both Madison and Hamilton quoted Montesquieu in stressing the importance of separating the "power of judging" from the "executive" authority.[416] Montesquieu himself condemned the combination of judicial and executive powers as the "government of a single person," using a royal epithet to describe the judge-as-prosecutor: "[I]t is the master-piece of legislation to know where to place properly the judiciary power. But it could not be in worse hands than in those of the person to whom the executive power had been already committed. *From that very instant the monarch became terrible.*"[417] Our Constitution separates powers to "prevent tyranny and protect liberty."[418] A prosecutor in a robe is a king.

415. *See generally, e.g.*, Rachel E. Barkow, Review, *Can Prosecutors Help to End Mass Incarceration?*, 119 MICH. L. REV. 1365, 1365-72 (2021) (reviewing EMILY BAZELON, CHARGED: THE NEW MOVEMENT TO TRANSFORM AMERICAN PROSECUTION AND END MASS INCARCERATION (2019)) ("[B]y electing prosecutors concerned about mass incarceration, we can start to shift course away from tough-on-crime rhetoric that in reality does a poor job keeping people safe and move toward policies that actually work.").

416. THE FEDERALIST NO. 47 (James Madison), *supra* note 1, at 302 (quoting 1 MONTESQUIEU, *supra* note 1, at 181); THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 1, at 465-66 & n.* (quoting 1 MONTESQUIEU, *supra* note 1, at 186 (alteration in original)).

417. 1 MONTESQUIEU, THE COMPLETE WORKS OF M. DE MONTESQUIEU 216-17 (London, T. Evans & W. Davis 1777) (emphasis added).

418. *See* Barkow, *supra* note 20, at 990.

Appendix

U.S. District Courts, 2013-2017

District	#	Convictions	Revocations	Misdemeanors, Petty Offenses	Grade Cs	Revocations % of Convictions
Total	-	361489	108115	46647	44538	29.91%
Average Per District	-	3845.63	1150.16	496.24	473.81	37.15%
2013 Only	-	80035	21057	10019	8461	26.31%
2014 Only	-	75836	21035	9936	8399	27.74%
2015 Only	-	71003	20857	10594	8621	29.37%
2016 Only	-	67742	21555	8428	9116	31.82%
2017 Only	-	66873	23611	7670	9941	35.31%
DC	1	1426	350	33	162	24.54%
ME	2	1025	609	21	319	59.41%
MA	3	2468	774	23	476	31.36%
NH	4	849	377	14	132	44.41%
PR	5	6509	765	144	419	11.75%
RI	6	634	335	8	89	52.84%
CT	7	1759	304	42	114	17.28%
NY-E	8	4204	1192	89	502	28.35%
NY-N	9	1942	735	579	466	37.85%
NY-S	10	7699	1292	219	762	16.78%
NY-W	11	2590	733	146	426	28.30%
VT	12	971	367	19	143	37.80%
DE	13	445	131	8	57	29.44%
NJ	14	3419	823	779	434	24.07%
PA-E	15	3598	1118	65	550	31.07%
PA-M	16	1895	632	65	298	33.35%
PA-W	17	2177	635	32	221	29.17%

VI	18	306	66	14	33	21.57%
MD	19	3927	720	4201	208	18.33%
NC-E	20	3369	1274	3324	446	37.82%
NC-M	21	2271	879	24	165	38.71%
NC-W	22	3149	2075	98	862	65.89%
SC	23	3543	1763	103	715	49.76%
VA-E	24	7392	2074	6334	450	28.06%
VA-W	25	1837	763	46	314	41.54%
WV-N	26	1667	888	77	262	53.27%
WV-S	27	1254	859	81	183	68.50%
LA-E	28	1723	428	210	145	24.84%
LA-M	29	875	159	43	47	18.17%
LA-W	30	1394	366	235	127	26.26%
MS-N	31	911	304	21	174	33.37%
MS-S	32	1429	581	103	145	40.66%
TX-E	33	4522	1450	64	131	32.07%
TX-N	34	6625	1300	187	670	19.62%
TX-S	35	32718	7767	93	2889	23.74%
TX-W	36	33859	8873	2895	3768	26.21%
KY-E	37	2386	1255	39	396	52.60%
KY-W	38	1635	365	1183	123	22.32%
MI-E	39	4477	721	134	198	16.10%
MI-W	40	1903	663	75	268	34.84%
OH-N	41	3479	1411	70	676	40.56%
OH-S	42	2869	887	286	415	30.92%
TN-E	43	3687	1877	33	791	50.91%
TN-M	44	1348	396	35	232	29.38%
TN-W	45	2522	1010	55	317	40.05%
IL-C	46	1623	826	243	138	50.89%
IL-N	47	3747	705	130	240	18.82%
IL-S	48	1787	1077	22	139	60.27%
IN-N	49	1661	520	51	213	31.31%

IN-S	50	1907	342	25	63	17.93%
WI-E	51	1647	1269	40	535	77.05%
WI-W	52	665	283	31	132	42.56%
AR-E	53	1930	572	145	314	29.64%
AR-W	54	1392	273	100	131	19.61%
IA-N	55	1826	816	14	593	44.69%
IA-S	56	1780	565	22	55	31.74%
MN	57	1891	1965	20	586	103.91%
MO-E	58	3325	2979	260	654	89.59%
MO-W	59	4050	3060	91	959	75.56%
NE	60	2890	1147	101	601	39.69%
ND	61	1777	616	105	322	34.67%
SD	62	2453	1247	350	1082	50.84%
AK	63	882	310	108	223	35.15%
AZ	64	30872	6100	9166	3232	19.76%
CA-C*	65	6006	340	580	118	5.66%
CA-E	66	3833	774	158	464	20.19%
CA-N	67	2958	992	322	483	33.54%
CA-S	68	17948	5639	1771	2546	31.42%
GU	69	380	103	94	77	27.11%
HI	70	1051	753	218	44	71.65%
ID	71	1501	451	89	291	30.05%
MT	72	1666	1362	51	55	81.75%
NV	73	2581	719	54	454	27.86%
NMI	74	94	28	8	24	29.79%
OR	75	2733	1587	153	676	58.07%
WA-E	76	1782	618	79	378	34.68%
WA-W	77	2953	1517	2654	67	51.37%
CO	78	2485	890	137	475	35.81%
KS	79	3029	1581	486	362	52.20%
NM	80	21367	2336	267	1380	10.93%
OK-E	81	511	191	21	98	37.38%

OK-N	82	1068	448	42	203	41.95%
OK-W	83	1706	961	954	313	56.33%
UT	84	3362	1573	752	829	46.79%
WY	85	1209	631	274	469	52.19%
AL-M	86	1020	242	115	119	23.73%
AL-N	87	2096	639	308	355	30.49%
AL-S	88	1727	1052	23	367	60.91%
FL-M	89	7297	1664	140	893	22.80%
FL-N	90	1475	466	758	241	31.59%
FL-S	91	11503	1748	78	967	15.20%
GA-M	92	2227	353	831	198	15.85%
GA-N	93	2788	557	92	164	19.98%
GA-S	94	2341	882	1765	496	37.68%
*CA-C data incomplete. *See* U.S. SENT'G COMM'N, *supra* note 29, at 16.						