Rebuilding the Safety Mechanism: Does 18 U.S.C. § 3553(e) Violate the Separation of Powers

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NOTES

REBUILDING THE SAFETY MECHANISM:
DOES 18 U.S.C. § 3553(e) VIOLATE THE SEPARATION OF POWERS?

Michael Buescher*

This Note examines the government motion requirement of 18 U.S.C. § 3553(e) and section 5K1.1 of the Federal Sentencing Guidelines from a separation of powers perspective. The issues discussed include whether requiring authorization from the prosecutor before a sentencing judge can consider a defendant’s cooperation when determining whether to grant a downward departure below a mandatory minimum sentence violates separation of powers. Building on the concerns of past commentators and recognizing that the Federal Sentencing Guidelines are likely here to stay, this Note proposes that, in order to protect the perception of integrity in the criminal justice system, Congress should revisit current sentencing policy and address perceived shortcomings in the allocation of sentencing power between judges and prosecutors.

INTRODUCTION

Imagine that Defendant Z is arrested in the Southern District of New York for possession of narcotics with intent to distribute. The amount of narcotics involved triggers a substantial mandatory minimum sentence. Based on the amount of narcotics and Defendant Z’s relevant sentencing factors as laid out in the Federal Sentencing Guidelines, the government then determines what to charge. The prosecutor presents Defendant Z with the following options: (1) go to trial, where Defendant Z will face the tough mandatory minimum, a likely conviction, and where the prosecutor will recommend the maximum sentence allowed by the Sentencing Guidelines, or (2) cooperate with the government by offering information on other criminals, possibly testifying at trial, and in some cases even returning to the street to work for the government, all in the hopes of receiving a coveted 5K1.1 letter for substantial assistance recommending

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that the judge impose a more lenient sentence.\(^1\) The only catch? The 5K1.1 letter is not guaranteed because the prosecutor determines when substantial assistance has been provided and will not disclose the information that he or she already has.\(^2\) Furthermore, the amount of cooperation that rises to the level of substantial assistance lacks uniformity across the U.S. courts of appeals and is undefined by the legislature. Indeed, absent the 5K1.1 letter, the sentencing judge has no authority to impose a sentence lower than that recommended by the Sentencing Guidelines based on Defendant Z's cooperation if the prosecutor does not authorize the downward departure.\(^3\) Finally, in the Southern District of New York, Defendant Z will also have to confess to all other crimes that he may have committed in the past, exposing himself to an even harsher sentence.\(^4\) So, Defendant Z, what will it be?

The Sentencing Guidelines are entrenched in our criminal justice system.\(^5\) These guidelines have created a sentencing system that places incredible emphasis on cooperation with the government.\(^6\) The executive branch's near total control under the current sentencing scheme—both to charge and determine the sentence of defendants in mandatory minimum cases involving cooperation—violates the separation of powers doctrine.\(^7\) When the executive branch is given virtually exclusive power to bring a charge that carries a mandatory minimum sentence and has the sole

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1. See Ellen Yaroshefsky, *Cooperation with Federal Prosecutors: Experiences of Truth Telling and Embellishment*, 68 Fordham L. Rev. 917, 919 (1999) (noting that "[e]very defendant or target of an investigation must contemplate cooperation with federal authorities"). Without such a letter, defendants, particularly in narcotics cases such as this, will be subject to lengthy incarceration and rigid mandatory minimum sentences. See id. at 926.

2. Id. at 928 (noting that "substantial assistance has come to be defined as giving the government information that it does not already possess").

3. Id. at 919 ("[l]t is particularly within the purview of the federal prosecutor to make a decision as to whether she will seek a downward departure based upon her determination that a defendant is deserving of the benefit that truthful cooperation provides.").

4. Id. at 928–29, 928 n.50 (indicating the extent to which the defendant places himself at the mercy of the sentencing judge's implicit understanding of the cooperation system).

5. See José A. Cabranes, *The U.S. Sentencing Guidelines: Where Do We Go from Here?*, 44 St. Louis U. L.J. 271, 271 (2000) ("The Guidelines have become deeply entrenched... In light of the entrenchment of the Guidelines, we should have no illusion that they will be easily discarded or supplanted in the near future. The question, therefore, is whether the present system should be modified or reformed to achieve greater coherence, consistency, accountability, and, ultimately, a higher level of justice. At stake here is the very legitimacy of our system of criminal justice."). Although Judge Cabranes's article was written five years before the U.S. Supreme Court's landmark decision in *United States v. Booker*, 543 U.S. 220 (2005), which invalidated the mandatory application of the Sentencing Guidelines, Justice Stephen Breyer's recent opinion in *Rita v. United States*, 127 S. Ct. 2456, 2463–64 (2007), reaffirming the validity of the Sentencing Guidelines as a proper reflection of statutory mandates, demonstrates the continuing validity of Judge Cabranes's commentary.

6. See Yaroshefsky, *supra* note 1, at 919 (noting that "[t]here is significantly more cooperation under the guidelines because greater stakes increase the incentives to cooperate with the government").

7. See *infra* Part III.A.
discretion to determine whether a judge may consider a defendant’s cooperation in order to grant a sentence below that mandatory minimum, there appears to be a plain violation of the separation of powers doctrine of the U.S. Constitution. The circuit courts, however, have overwhelmingly determined that because judges still have the power to determine the final sentence—even absent a downward departure for substantial assistance—there is no separation of powers violation.\(^8\) Past commentators have presented compelling arguments regarding the unfairness to criminal defendants and the threat to individual liberty inherent in a criminal justice system that sanctions a blending of powers in investigating, charging, and sentencing a crime.\(^9\) Unfortunately, as evidenced by the U.S. Court of Appeals for the Second Circuit’s recent decision in United States v. Vargas,\(^10\) and the subsequent denial of certiorari by the U.S. Supreme Court, courts appear unpersuaded by defendants’ arguments that as deference to prosecutorial discretion has increased and more defendants seek to cooperate, the practical effect of the current sentencing scheme that gives prosecutors the only key to downward departures for substantial assistance (cooperation) violates separation of powers.\(^11\)

In Mistretta v. United States,\(^12\) the Supreme Court noted in dicta that Congress’s potential assignment of judicial responsibilities to the executive branch would raise constitutional questions.\(^13\) At that time, however, the Court did not directly address whether executive control of sentencing in mandatory minimum cases would violate the separation of powers doctrine. Sixteen years later, in United States v. Booker,\(^14\) the Court recognized that a potential separation of powers problem could arise from excessive prosecutorial power over sentencing factors.\(^15\) It is admittedly difficult, absent a blatant constitutional violation, to square this language with a criminal justice system that does allow nearly unlimited prosecutorial discretion.\(^16\) Although the Supreme Court has recognized a potential problem with such discretion, ultimately the lower courts have determined that the solution lies with the legislature and not with the courts. As the

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8. See infra Part II.A.1–2.
11. See infra Part III.C.
13. Id. at 391 n.17.
15. Id. at 257 (explaining that prosecutors exercise a power vested in judges when they “decide, based on relevant information about the offense and the offender, which defendants merit heavier punishment”). The Court, however, did not reach the issue of whether mandatory guidelines violated the separation of powers doctrine.
16. See infra Part I.A.3. Selecting someone for prosecution based solely on her race is one example. Additionally, there are other areas of adjudication—such as grand jury procedure, which does not require the prosecutor to present potentially exculpatory evidence when seeking an indictment—that are universally accepted despite their superficial appearance of unfairness.
criminal justice system moves closer to operating as a strict system of contract law, where defendants bargain away rights in the hopes of receiving a lenient sentencing recommendation from the prosecutor, American society should be increasingly alarmed at the lack of due process afforded to criminal defendants. To put it another way, because most defendants will never go to trial, the only process they receive will be at the hands of the prosecutor. As previous commentators have noted, allowing an interested party to effectively determine a defendant’s sentence raises serious issues about the integrity of the criminal justice process. Indeed, it is doubtful whether this near total deference to the prosecutor—from investigating to charging to plea bargaining to sentencing—can be considered any process at all. In response to these concerns, it seems that Congress should be obligated to revisit sentencing policy and either correct the balance of power issues or, at the very least, reaffirm the current policy and offer justifications for what is currently perceived by some as an imbalance of sentencing power.

Currently, prosecutors continue to wield complete discretion to charge a defendant with a crime that carries a mandatory minimum sentence, and also enjoy nearly unchecked discretion to grant motions for substantial assistance under 18 U.S.C. § 3553(e) and section 5K1.1 of the Sentencing Guidelines. The government has asserted that this combination of power does not run afoul of the separation of powers doctrine. It seems more accurate to assert that in a strict separation of powers system, allowing the government to control both charging and sentencing should be a violation. This assertion, however, ignores the reality that in most areas of government, such as the administrative branch, there is a long tradition of blending powers. This Note proposes that while joining the power to control sentencing with the executive power to charge is unconstitutional and contrary to the framers’ intent, due to the courts’ historical deference to prosecutorial discretion and a functionalist blending of government powers in criminal law cases, this issue is more properly addressed by Congress. As a recent New York Times article suggests, unlike the Supreme Court, the now Democratic Congress may be more willing to revisit sentencing issues.

Part I of this Note discusses the history of sentencing in the United States, as well as the competing approaches to separation of powers analysis in the Supreme Court. This part also examines prosecutorial discretion to make a substantial assistance motion under 18 U.S.C. § 3553(e) and section 5K1.1 of the Sentencing Guidelines and the past legal

17. See infra Part II.B.5.
challenges to those provisions. Part II presents a recent argument revisiting the application of the separation of powers doctrine to the government motion requirement for substantial assistance. This part discusses recent cases in which defendants have argued that a prosecutor’s sole discretion both to charge and grant substantial assistance motions violates the separation of powers doctrine. This part also brings together academic support and objection to the use of the current sentencing scheme’s substantial assistance motion and the government’s triggering mechanism.

Finally, Part III of this Note suggests that a prosecutor’s unfettered discretion both to charge and control sentencing in mandatory minimum cases is a violation of the separation of powers doctrine, whether analyzed from a functionalist or a formalist constitutional framework. Part III asserts that continuing to allow a violation of the constitutional rights of criminal defendants in this subset of sentencing cases is no less of a violation simply because the prosecutor does not control sentences in all cases. This part, however, suggests that, while it would be appropriate for the courts to invalidate the current government motion requirement for substantial assistance as a violation of separation of powers, due to the courts’ valid concern for the integrity of the criminal justice process and the reality that prosecutorial discretion is deeply entrenched in the current system, it is more likely that the courts will ask Congress to reassess the government motion requirement for substantial assistance.

This Note suggests that in the interest of avoiding a fundamental violation of individual liberty by allowing the prosecutor, an interested party in the litigation, to both charge a criminal defendant and control her sentence, Congress should recast the government motion requirement to allow for input from both the prosecutor and the sentencing judge. This Note advocates heightened justification requirements for prosecutors who choose not to authorize a downward departure based on a defendant’s cooperation. Additionally, if Congress was to allow judges to consider a defendant’s cooperation as grounds for a downward departure, this Note advocates requiring the sentencing judge to describe with particularity why such a departure would be justified. Recasting the government motion requirement in this way would prevent the pooling of charging and sentencing power in the executive branch and return some or all sentencing discretion to the judiciary. Furthermore, as previous commentators have suggested, Congress should define with particularity what is required for a defendant to receive a downward departure for substantial assistance.

I. SENTENCING IN AMERICA AND SEPARATION OF POWERS
IN THE U.S. SUPREME COURT

Part I.A of this Note addresses the historical role of judges in sentencing and the development of sentencing reform leading to the current Sentencing

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23. It is not, however, the purpose of this Note to determine which framework is better.
Guidelines, including the creation of Guidelines section 5K1.1 and 18 U.S.C. § 3553(e), as well as the Supreme Court’s decision in *Booker v. United States* that invalidated mandatory sentencing guidelines. Part I.A also discusses past legal challenges to section 5K1.1 and the increased importance of cooperation in light of the deference to prosecutorial discretion. Part I.B of this Note introduces the two analytical frameworks—formalism and functionalism—employed by the Supreme Court when analyzing separation of powers cases.

A. Sentencing in American Criminal Law

Prior to the creation of the Sentencing Guidelines, judges exercised broad discretion in sentencing. Judges were “authorized to impose indeterminate sentences of any length” so long as they sentenced within statutory limitations. This flexibility in sentencing represented both an uncertainty about the purposes of criminal sanctions and the historical ideal of rehabilitating offenders. The judge’s task was to allocate punishment fairly based on each individual crime and each individual criminal. Critics complained of “disparity” in sentencing based on illegitimate considerations that influenced judicial discretion. In the early 1970s, Judge Marvin E. Frankel described judges’ sentencing discretion as “almost wholly unchecked and sweeping.”

In 1984, Congress enacted the Sentencing Reform Act in response to calls for reform. The Act created the Sentencing Commission, charged

27. *See* Stith & Cabranes, *supra* note 25, at 14 (discussing historical values that factored into criminal sentencing).
28. *Id.* The difficult question has always been defining proportionality. Depending on a judge’s perception of proportionality, sentences could vary based on the importance given both to blameworthiness and the amount of injury or harm. Under the Guidelines, judges frequently received information that illuminated a defendant’s reputation or character but had little to do with innocence or guilt. *Id.* at 14–15.
29. *Id.* at 31 (discussing criticisms of judicial discretion influenced by the temperament of the judges as well as the characteristics of the defendant); *see also* S. Rep. No. 98-225, at 41–50 (1983), reprinted in 1984 U.S.C.C.A.N. 3182, 3221-22 (complaining of sparse guidance in sentencing discretion).
32. *See* Proposal on 5K1.1, *supra* note 26, at 1505 n.14 (noting Judge Marvin Frankel’s arguments for reform); Marvin E. Frankel, *Lawlessness in Sentencing*, 41 U. Cin. L. Rev. 1, 51 (1972) (“I propose that there be established a National Commission charged with permanent responsibility for (1) the study of sentencing, corrections, and parole; (2) the formulation of laws and rules to which the results of such study may lead . . . .”).
with creating guidelines to structure sentencing while promoting uniformity by allowing judges minimal discretion to depart from the structure only for aggravating or mitigating circumstances not already considered by the Sentencing Commission. In an effort to meet these twin goals, the Sentencing Commission drafted the Sentencing Guidelines. In their basic form, the Sentencing Guidelines created a sentencing grid. On the y axis, similar offenses are grouped together and assigned similar sentencing values, creating the base offense level and providing the initial sentencing range. On the x axis, a defendant’s criminal history category, based on previous criminal activity and submitted in the presentencing report, then increases the defendant’s sentence within the initial range. Finally, the sentencing judge is asked to consider other limited, defendant-specific factors that might weigh on the final sentence. The end result is a computation of the appropriate Sentencing Guidelines range.

Two years later, in 28 U.S.C. § 994(n), Congress required the Sentencing Commission to create an additional basis for departure to account for a defendant’s substantial assistance to the prosecution. The result was section 5K1.1, a Federal Sentencing Guidelines policy statement that provides, “Upon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines.” Notably, however, this provision only allows for a

33. See 18 U.S.C. § 3553(b)(1) (“The court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described.”). Subsequently, in United States v. Booker, 543 U.S. 220, 226-27 (2005), the Supreme Court invalidated § 3553(b) and the mandatory status of the Guidelines as violating the Sixth Amendment right to a jury trial.


36. See id.

37. Id.

38. 28 U.S.C. § 994(n) (2000) (“The Commission shall assure that the guidelines reflect the general appropriateness of imposing a lower sentence than would otherwise be imposed, including a sentence that is lower than that established by statute as a minimum sentence, to take into account a defendant’s substantial assistance in the investigation or prosecution of another person who has committed an offense.”); see also Proposal on 5K1.1, supra note 26, at 1505.

39. U.S. Sentencing Guidelines Manual § 5K1.1 (2005). To determine the appropriate level of departure, the judge may consider the following factors that appear in the Guidelines manual:

(a) The appropriate reduction shall be determined by the court for reasons stated that may include, but are not limited to, consideration of the following:

(1) the court’s evaluation of the significance and usefulness of the defendant’s assistance, taking into consideration the government’s evaluation of the assistance rendered;
departure from the Guidelines range but does not authorize the court to depart below a statutory mandatory minimum. In order to depart from a mandatory minimum sentence, the government must move pursuant to 18 U.S.C. § 3553(e), which states, in pertinent part, "Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as a minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense."41

1. Substantial Assistance Departures

The government motion requirement for sentencing departures invests broad discretion in the prosecutor and represents a substantial shift in sentencing discretion from judges to prosecutors.42 While authorizing a district court to depart downward from a guideline range or mandatory minimum sentence, the Sentencing Commission did not define substantial assistance or provide for any review of the prosecutor's decision.43 The value of a substantial assistance motion to a defendant becomes increasingly apparent when viewed in light of the Sentencing Guidelines' narrow range of sentences and against the backdrop of Congress's statutory directions to the Sentencing Commission.44

(2) the truthfulness, completeness, and reliability of any information or testimony provided by the defendant;
(3) the nature and extent of the defendant's assistance;
(4) any injury suffered, or any danger or risk of injury to the defendant or his family resulting from his assistance;
(5) the timeliness of the defendant's assistance.

Id.

41. 18 U.S.C. § 3553(e) ("Such sentence shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code.").
42. See United States v. Ming He, 94 F.3d 782, 787–89 (2d Cir. 1996) (analyzing the impact of the Sentencing Guidelines on defendant cooperation and noting that "[u]nder the Guidelines this sentencing power—of such great moment to a cooperating witness—was transferred from the sentencing court to the prosecutor"); see also Proposal on 5K1.1, supra note 26, at 1506 (noting in addition that the requirement of government motion was inserted unilaterally by the Sentencing Commission); Yaroshefsky, supra note 1, at 925–27 (explaining that the Sentencing Guidelines substantially increased the importance of defendant cooperation).
43. See Proposal on 5K1.1, supra note 26, at 1507.
44. See Yaroshefsky, supra note 1, at 925–26; see also Stith & Cabranes, supra note 25, at 52–53 (discussing Congress's intent to discourage individualized sentences and encourage sentencing severity through specific statutory directions). Because the Guidelines defined sentences with such particularity and severely limited the factors that a judge could consider
Today, substantial assistance departures constitute more than twenty percent of all Guideline sentence departures.\(^4\) A departing judge must state his or her reasons for departing on the record and either the government or the defendant may appeal any time the judge departs from an applicable Guideline range.\(^6\) Due to the government’s interests in uniform sentencing, the government regularly appeals sentences that are below the Guideline range unless they have been granted pursuant to section 5K1.1.

In 1998, the U.S. Sentencing Commission Substantial Assistance Staff Working Group (Working Group) published a study addressing some of the concerns about unequal application of the substantial assistance motion.\(^4\)\(^7\) The Working Group’s paper noted that the Sentencing Commission’s instructions regarding the section 5K1.1 substantial assistance policy statement were purposefully vague.\(^4\)\(^8\) The paper identified four issues that were raised but unanswered by the Guidelines policy statement: (1) the statement did not address the factors to be used by a prosecutor when determining whether substantial assistance was provided; (2) the statement did not address problems with the government triggering mechanism for substantial assistance; (3) the statement did not address issues as to whether a defendant’s information about himself qualifies as substantial assistance; and (4) the policy statement’s failure to specify how the magnitude of cooperation would affect the extent of the departure.\(^4\)\(^9\)

While the Working Group ultimately concluded that more research was required, the initial results of the study indicated that there was indeed an equity problem in the application of substantial assistance.\(^5\)\(^0\) The Working Group was unable to locate “direct correlations between type of cooperation when mitigating a defendant’s sentence, substantial assistance became the only probable means to secure a downward departure.

\(^{45}\) See U.S. Sentencing Comm’n, Annual Report 36 (2006) ("Of all cases sentenced in 2006, 24.6 percent were sentenced below the guideline range based upon a reason sponsored by the government. Most of these cases (14.4%) were sentenced pursuant to a motion...[for] substantial assistance..."); see also Cynthia K.Y. Lee, From Gatekeeper to Concierge: Reigning in the Federal Prosecutor's Expanding Power over Substantial Assistance Departures, 50 Rutgers L. Rev. 199, 205 n.24 (1997) (documenting the increase in substantial assistance departures from 1988 to 1995).

\(^{46}\) See 18 U.S.C. § 3742(a)-(b) (2000). However, it is understood that grants of substantial assistance based on a government motion are rarely appealed.


\(^{48}\) See id. at 3 (“The nature, extent, and significance of assistance can involve a broad spectrum of conduct that must be evaluated by the court on an individual basis. Latitude is, therefore, afforded the sentencing judge to reduce a sentence based on variable relevant factors, including those listed above.” (quoting U.S. Sentencing Guidelines Manual § 5K1.1 cmt. background (2004))).

\(^{49}\) Id. at 3–4. This Note is primarily concerned with the problems inherent in the first two factors.

\(^{50}\) Id. at 20. For a discussion of the merits of the U.S. Sentencing Commission Substantial Assistance Staff Working Group’s findings in the face of the challenge of evaluating substantial assistance across federal districts, see generally Daniel C. Richman, The Challenges of Investigating Section 5K1.1 in Practice, 11 Fed. Sent’g Rep. 75 (1998).
provided, type of benefit or result received by the government, the making of a §5K1.1 motion, and the extent of the substantial assistance departure received."51 Of note were the Working Group’s findings that “assistance to authorities was a common occurrence, independent of whether a substantial assistance departure was actually received."52 Additionally, the Working Group’s paper indicated that not only did federal districts regularly diverge from their own stated substantial assistance policies, but also that substantial assistance was not being applied equally across federal districts.53 This finding suggests that there is no standard for what activity merits a substantial assistance departure.54

Another finding of the Working Group indicated that although prosecutors are required to record their reasons for granting or withholding substantial assistance, there is no public access to that information.55 This finding corresponds with the public sentiment that prosecutors exercise too much discretion under the sentencing guidelines.56 Interestingly, the Working Group was unable to identify statistical evidence that supported the suggestion that a criminal’s relative position in a criminal organization increased his chances of receiving a substantial assistance departure.57

Finally, the Working Group raised the question of whether the Sentencing Commission needed to provide more guidance regarding the application of section 5K1.1.58 The paper concluded that “[t]he philosophical debate that addresses the assumptions and ramifications of the absolute versus proportional approach is long overdue.”59

2. Unsuccessful Legal Challenges to Section 5K1.1

A brief understanding of the legal challenges that have been brought against section 5K1.1 will be helpful in understanding the development of the most recent separation of powers argument.60 There have been three

51. See Maxfield & Kramer, supra note 47, at 20.
52. Id. at 9 (noting that while 67.5% of defendants provided assistance, only 38.6% received a substantial assistance departure).
53. See id. at 8–9 (noting that “at a minimum, 15.8 percent [of reporting districts] may have completely disregarded their review policies”); see also U.S. Sentencing Comm’n, Annual Report Sourcebook tbls.N–N-11 (indicating that nationally 14.4% of defendants received a downward departure for substantial assistance, but that the percentage of departures varied significantly between circuits).
54. Id. at 10 (indicating, however, that future research would be required).
55. See id. at 20.
56. Id. at 14 (pointing out that in a recent survey, “86 percent of respondents agreed (of this, 57% said ‘strongly agree’) that ‘sentencing guidelines give too much discretion to prosecutors’”). “Further, 74.9 percent of federal judges... thought that the prosecutor had the greatest influence on the final guideline sentence.” Id. at 15.
57. See id. at 12.
58. Id. at 21.
59. Id.
60. For the purposes of this Note and application in the courts, the legal analysis of section 5K1.1 is analogous to that of § 3553(e). The only difference is that § 3553(e)
distinct legal challenges to section 5K1.1.61 First, it has been argued that the statute was an impermissible delegation of judicial responsibility to the executive branch.62 Some courts determined that sentencing was not an entirely judicial function.63 As will be discussed below, however, these cases did not address whether combining all of the power to charge and sentence in the executive branch would violate the separation of powers.

Commentators have also argued that the government motion requirement violates the Due Process Clause.64 However, in Wade v. United States,65 the Supreme Court held that federal district courts have the authority to review a prosecutor’s refusal to file a substantial assistance motion only if the prosecutor’s restraint was based on unconstitutional motives.66 In Wade, Harold Ray Wade, Jr., appealed his conviction on drug possession and weapons charges.67 Wade later provided information to law enforcement officials that led to the arrest of another drug dealer.68 At his sentencing hearing, Wade’s counsel urged the court to sentence below the ten-year mandatory minimum in order to reward Wade for his assistance to the government.69 The lower court determined that it could not grant the reduced sentence because the prosecutor had not moved, pursuant to 18 U.S.C. § 3553(e), for a downward departure.70

In Wade, the defendant did not argue that the government motion requirement was unconstitutional,71 but argued instead that a prosecutor’s

61. For an excellent and more in-depth discussion of the various legal challenges brought against section 5K1.1, see Proposal on 5K1.1, supra note 26, at 1507–12.
62. See, e.g., United States v. Huerta, 878 F.2d 89, 91–92 (2d Cir. 1989) (summarizing the above argument and also holding that exercise of this power does not amount to “adjudication” because the ultimate power to decide the motion and pronounce the sentence remains with the court); see also Proposal on 5K1.1, supra note 26, at 1508. Huerta can be distinguished from the current argument because the U.S. Court of Appeals for the Second Circuit held only that sentencing was a shared function between the branches, and Congress had the power to create mandatory minimums. 878 F.2d at 91, 93.
63. Id. at 91–92; see also United States v. Spillman, 924 F.2d 721, 724–25 (7th Cir. 1991) (holding that the assertion that section 5K1.1 vests excessive power over the defendant’s sentence with the prosecutor is unpersuasive based on the traditional charging power of the executive branch). The connection between charging power and the power to sentence seems tenuous.
66. Id. at 185–86 (concluding that it is well within a prosecutor’s discretion to decide whether to file a section 5K1.1 motion and concluding that only a refusal to grant the motion based on unconstitutional motives is reviewable by the court).
67. Id. at 183–84.
68. Id. at 183.
69. Id.
70. Id.
71. Id. at 185 (conceding as a matter of statutory interpretation that § 3553(e) imposes a government motion requirement). The Court found this position consistent with its interpretation “that in both § 3553(e) and § 5K1.1 the condition limiting the court’s authority
discretion in exercising the power to depart was subject to constitutional limitations. The Court determined that there was no reason to treat a prosecutor's refusal to file a substantial assistance motion any differently than a prosecutor's other decisions. Accordingly, the Court held that a federal district court had the authority to review a prosecutor's failure to grant a substantial assistance motion only if the refusal was based on an unconstitutional motive.

Finally, it has been argued that section 5K1.1 violates the Equal Protection Clause. However, courts have concluded that application of section 5K1.1 does not discriminate on the basis of any suspect class, such as race, and so is only subject to rational basis review.

3. The Prosecutor's Role in Substantial Assistance

To better understand the implications of 18 U.S.C. § 3553(e), a brief explanation of the scope of prosecutorial discretion is necessary. Historically, courts have been extremely deferential to the prosecutor's decision not to charge a suspect. While a prosecutor is precluded from selecting people for prosecution based on race, sex, or other unconstitutional factors, the test for showing discrimination requires evidence of the government's intent to discriminate as well as a strong showing that others similarly situated were treated differently. Furthermore, prosecutors are free to charge a criminal with a lesser crime even if they suspect the criminal of engaging in more significant criminal
gives the Government a power, not a duty, to file a motion when a defendant has substantially assisted.” Id.

72. Id.
73. Id. In essence, the Court reasoned that the evaluation of substantial assistance was merely an extension of the executive's protected charging power. However, this assumption is troubling because it ignores the fact that substantial assistance motions are made long after the prosecutor has been deeply involved in the defendant's trial.

74. Id. at 185–86 (noting "that a claim that a defendant merely provided substantial assistance will not entitle a defendant to a remedy").

75. See Proposal on 5K1.1, supra note 26, at 1509; Stephen J. Schulhofer, Rethinking Mandatory Minimums, 28 Wake Forest L. Rev. 199, 212 (1993) (discussing how the disparity between the extent of criminal knowledge among criminals places the highly culpable criminal in a better position to receive a substantial assistance departure and provides a special guarantee to a more culpable defendant).

76. See United States v. Musser, 856 F.2d 1484, 1486–87 (11th Cir. 1988) (rejecting the above argument and applying a highly deferential standard of review because criminals are not a suspect class). Although all of these arguments have been rejected by courts, the number of challenges indicates the controversy surrounding the application of section 5K1.1. It is also important to note that none of these challenges addresses whether it is permissible to place all the sentencing power with the executive branch.

77. See, e.g., Inmates of Attica Corr. Facility v. Rockefeller, 477 F.2d 375 (2d Cir. 1973) (holding that, even in the face of statutory language that seems to require prosecution, the court has never considered the decision to charge to be outside prosecutorial discretion).

78. See, e.g., United States v. Armstrong, 517 U.S. 456 (1996) (holding that, given the defendant's failure to provide evidence that others similarly situated were not prosecuted, the Court did not find selective prosecution).
activity. In *United States v. Batchelder*, the Supreme Court held that a prosecutor was not required to charge the defendant with the more lenient crime when a defendant’s conduct violated two statutes with different punishments. Finally, in *Wade v. United States*, the Court determined that a prosecutor’s substantial assistance decision was protected by prosecutorial discretion and held that a defendant’s claim that he had provided substantial assistance did not entitle him to judicial review of the prosecution’s decision. Based on the Court’s historical deference to prosecutorial discretion, it seems clear that the prosecutor wields almost complete control over whether a defendant’s sentence should be reduced for substantial assistance.

4. *United States v. Booker*


79. See, e.g., *Brogan v. United States*, 522 U.S. 398 (1998) (holding that the plain language of the statute allowed the government to prosecute for a lesser crime in the absence of proof of the more serious crime). Similarly, prosecutors are not bound to charge a suspect at the earliest possible time and are free to indict at their discretion. See, e.g., *United States v. Lovasco*, 431 U.S. 783, 794 (1977) (giving significant weight to the government’s decision on how to allocate law enforcement resources and noting that “[t]he decision to file criminal charges, with the awesome consequences it entails, requires consideration of a wide range of factors in addition to the strength of the Government’s case, in order to determine whether prosecution would be in the public interest”).


82. See Yaroshefsky, supra note 1, at 927 (“[T]he sentencing guidelines vest the prosecutor with complete discretion as to whether the government will seek a downward departure based upon the defendant’s substantial assistance.”). While this Note in no way seeks to suggest that prosecutors should not wield the power to charge and investigate, the point is that prosecutors do control these aspects of the criminal process—specifically investigating and charging—from day one. This Note also accepts that people certainly act of their own free will and, for the most part, choose to engage in criminal conduct. However, as Professor Weinstein points out, the government’s near complete control over charging and sentencing does enable them to orchestrate criminal activity, especially in drug cases, in a way that highlights the true amount of power afforded to prosecutors. See Weinstein, supra note 80, discussed infra text accompanying note 326. But cf. Bruce A. Green & Fred C. Zacharias, *Regulating Federal Prosecutors’ Ethics*, 55 Vand. L. Rev. 381, 449 (2002) (suggesting that prosecutors’ desire to serve the public might translate into a desire to serve justice and noting that “[i]mplicit in any deference to prosecutorial decisionmaking is the notion that, at least sometimes, we can trust prosecutors to behave ethically”).

83. *United States v. Booker*, 543 U.S. 220 (2005). In the years before *Booker*, judges were bound to sentence a defendant within the appropriate Sentencing Guidelines range. *Booker* determined that the Sentencing Guidelines should be considered one of many factors in determining a defendant’s sentence.
Booker, the district judge found additional facts at the sentencing hearing and, based on a preponderance of the evidence, imposed a longer sentence than the Guidelines required as a result of the new information. On appeal, the court rejected the government's recommendation that the proposed Guidelines sentence was proper based on the additional facts, finding instead that under mandatory Guidelines any facts that increased a defendant's sentence beyond the statutory maximum must be submitted to a jury. In the first part of the Booker opinion, written by Justice John Paul Stevens, the Supreme Court affirmed the lower court's findings and determined that any fact necessary to support a sentence that exceeds the statutory maximum must be proved to a jury beyond a reasonable doubt. The Court determined that, while judges were not bound by the Guidelines, they must consult the relevant Guidelines factors when imposing a sentence. Finally, the Booker Court granted appellate review of sentencing under a reasonableness standard, finding that such a standard was consistent with Congress's intentions.

B. Separation of Powers Analysis in the U.S. Supreme Court

The framers of the Constitution deliberately divided power between the legislative, judicial, and executive branches. They recognized the need
for checks and balances in order to protect this power structure. Accordingly, the framers provided each branch with the “necessary constitutional means . . . to resist [the] encroachments of the others.” The judicial branch’s ability to decide constitutional issues has allowed it to enforce the separation of powers doctrine against the intrusions of the legislative branch. In order to dampen the “hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power,” even measures passed to “accomplish desirable objectives[] must be resisted.” To that end, laws are stricken “where the whole power of one department is exercised by the same hands which possess the whole power of another department.”

By intentionally dividing the power of the government into three separate branches, the framers hoped to avoid tyranny at the hands of the government. James Madison wrote, “In order to lay a due foundation for that separate and distinct exercise of the different powers of government . . . [that is] essential to the preservation of liberty . . . each department should have a will of its own.” Therefore, the framers created each branch of government with the “necessary constitutional means . . . to resist [the] encroachments of the others.”

While not explicit in the Constitution, the importance of separation of powers can be derived from the Constitution’s clear statement that (1) “All legislative Powers herein granted shall be vested in a Congress of the United States”; (2) “The executive Power shall be vested in [the] President of the United States of America”; and (3) “The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”

92. See Mistretta, 488 U.S. at 381 (quoting The Federalist No. 51, at 349 (James Madison) (J. Cooke ed., 1961)); see also Flaherty, supra note 90, at 1802 (noting that “the Federalists defended the Constitution’s at times quirky division of powers as the surest way to achieve the elusive goal of balance”).
93. See Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 219–21 (1995) (explaining that the framers were particularly concerned with “legislative interference with the private-law judgments of the courts”).
95. See Mistretta, 488 U.S. at 381 (quoting The Federalist No. 47 (James Madison), supra note 92, at 325–26 (emphasis omitted)).
96. The Federalist No. 47 (James Madison), supra note 91, at 249–50 (discussing the need to keep the branches of the government separate in order to avoid tyranny).
97. See The Federalist No. 51 (James Madison), supra note 91, at 268. Madison believed that it was important to guard against the gradual concentration of powers in the same department. Id.
98. Id. (noting that “[a]mbition must be made to counteract ambition”). However, while discussing separation of powers, Madison does not offer any scheme for how courts can protect themselves. It is possible that Madison believed that the problem would take care of itself.
99. U.S. Const. art. I, § 1, art. II, § 1, art. III, § 1. As evidenced by the Federalist debates, to what degree these powers should be separated is what drives most modern discussions. See Flaherty, supra note 90, at 1803 (“Where the Federalists and Anti-
Traditionally, scholars have categorized Supreme Court separation of powers cases based on whether the Justices employed a functionalist or formalist methodology to decide the case. The formalist approach to separation of powers is characterized by the use of bright-line rules, executed rigidly to invalidate any system that does not keep each branch within its prescribed sphere of power. The formalist methodology requires the Court to characterize what kind of power is being exercised, and then to determine whether that power is within the proper branch in accordance with any constitutional requirements. In the following cases, the majority opinions utilize first formalist and then functionalist reasoning to reach their holdings. However, it is the strong dissenting opinions of Justice Byron White (championing functionalism) and then of Justice Antonin Scalia (championing formalism) that have galvanized the present understanding of these fundamental arguments about separation of powers analysis.

1. Formalism and Functionalism: The Stability of Division and the Need to Accommodate Change

a. INS v. Chadha

In INS v. Chadha, Chief Justice Warren Burger employed a formalist analysis to invalidate a law that permitted one house of Congress to veto an Immigration and Naturalization Service (INS) decision that would allow a deportable alien to remain in the United States. The Chief Justice wrote, “Explicit and unambiguous provisions of the Constitution prescribe and Federalists parted company was on the question of whether the Constitution’s approach to the doctrine [of separation of powers] struck the proper balance.” It was later held that prosecutors would be considered part of the executive. See generally Morrison v. Olson, 487 U.S. 654 (1988). Although Article III does not state explicitly what judicial power includes, the Supreme Court has recognized that there are powers that are inherently judicial. See Buckley v. Valeo, 424 U.S. 1, 120–21 (1976); see also Jessica S. Intermill & William E. Martin, Separation of Powers Doctrine and the Feeney Amendment: The Constitutional Case for Judicial Discretion in Sentencing, 27 Hamline L. Rev. 391, 414 (2004) (“The core function of courts is the exercise of discretion to decide individual cases fairly ... within the bounds of generalized rules.”).

100. For a description of the terms formalism and functionalism as they are used in the context of Supreme Court separation of powers analysis, see generally Peter L. Strauss, Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?, 72 Cornell L. Rev. 488 (1987); see also Flaherty, supra note 90, at 1734 n.34 (drawing a distinction between Strauss’s “functionalism”—referring to the functions of the government—and Professor Flaherty’s own “functionalism”—referring to the actual balance and functions of the government). This Note uses the latter meaning of functionalism.


103. Chadha, 462 U.S. at 959. In his concurrence, Justice Lewis Powell agreed with the formalist analysis but reached his decision based on what he perceived as Congress exercising unchecked judicial power. Id. at 963 n.4 (Powell, J., concurring).
define the respective functions of the Congress and of the Executive in the legislative process."104 He believed that Article I of the Constitution represented the framers’ decision that legislative power was part of a “single, finely wraught and exhaustively considered, procedure.”105 While noting that the powers of the three branches were not to be “hermetically” sealed from one another, the Chief Justice asserted that the delegated powers of the three branches are “functionally identifiable.”106

The Chief Justice then identified four explicit provisions in the Constitution by which one house of Congress could act alone and not be subject to the President’s veto: (1) the House alone could initiate impeachment; (2) the Senate alone could conduct trials following impeachment; (3) the Senate has final and unreviewable power to approve presidential appointments; and (4) the Senate has unreviewable power to ratify presidential treaties.107 Based on the presence of these explicit and narrow provisions, each specifically justified, the Chief Justice concluded that the constitutional design of the legislative branch did not permit the veto.108

In his dissent, Justice Byron White asserted his now famous modern formulation of the proper functionalist analysis for separation of powers. Noting that the legislative veto had become the primary means for Congress to secure the accountability of independent agencies and the executive, Justice White argued that without the security of the veto, Congress would either be forced to refrain from delegating authority and become entrenched in the “hopeless task of writing laws ... across the entire policy landscape, or in the alternative, [would] abdicate its lawmaking function to the Executive Branch and independent agencies.”109 Justice White indicated that the legislative veto was appropriate because Congress had not used it to aggrandize power to itself at the expense of the other branches, but instead as a needed defense to guarantee Congress’s ultimate law-making authority.110 Further, Justice White noted that the executive frequently agreed to legislative review in exchange for broader delegation authority.111 When addressing Chief Justice Burger's assertion that the legislative veto was invalid because it was not explicitly enumerated in the Constitution, Justice White argued that the absence was not surprising and should not be read to imply disapproval of the specific mechanism because the framers

104. Id. at 945.
105. Id. at 951. This language suggests that in the formalist analysis, there is no room for novel inventions to deal with the realities of running the government.
106. See id. at 951 (internal quotation marks omitted) (citing Buckley v. Valeo, 424 U.S. 1, 121 (1976)).
107. See id. at 955.
108. Id. at 956.
109. Id. at 968 (White, J., dissenting).
110. Id. at 974.
111. Id.
recognized that the government of the United States was an endeavor "far beyond . . . contemplation." 112

Justice White was determined to dissect the alleged threat posed by the legislative veto. He asserted that the legislative veto did not equal the power to write new laws absent presidential or bicameral approval. 113 Because the veto required statutory authorization and could only negate executive or independent agency proposals, Justice White argued that, analogous to the notion that the presidential veto did not allow the president to make laws, the legislative veto did not allow one house of Congress to make laws. 114

Justice White urged that the separation of powers included a history of "accommodation and practicality" focused on the effective working of the government as a whole. 115 Accordingly, the proper inquiry for determining whether a government act violates separation of powers should "focus[] on the extent to which [Congress’s legislation] prevents the Executive Branch from accomplishing its constitutionally assigned functions." 116 According to Justice White, the legislative veto survived that inquiry because it did not preclude the executive from performing its constitutionally assigned function. 117

b. Bowsher v. Synar

In Bowsher v. Synar, 118 the Supreme Court declared that the Balanced Budget and Emergency Deficit Control Act of 1985 violated the doctrine of separation of powers because Congress reserved to itself the power of removal of the comptroller general, an officer of the executive branch. 119 The Court held,

By placing the responsibility for execution of the . . . Act in the hands of an officer who is subject to removal only by itself, Congress in effect has retained control over the execution of the Act and has intruded into the executive function. The Constitution does not permit such intrusion. 120

Chief Justice Burger delivered the opinion of the Court, reiterating that "[t]he declared purpose of separating and dividing the powers of

112. Id. at 978 ("[T]he wisdom of the Framers was to anticipate that the Nation would grow and new problems of governance would require different solutions.").
113. See id. at 980.
114. Id.
115. See id. at 999 (noting that the Constitution did not contemplate complete separation of the three branches of government, and further reiterating that the Court’s holding ignores the fact that in our modern government powers are often delegated).
116. Id. at 1000 (citing Nixon v. Adm’r of Gen. Servs., 433 U.S. 425, 443 (1977)).
117. See id. However, Justice Byron White conceded that a hypothetical legislative check on an inherently executive function would pose a different question. Id. at 1002.
119. Id. at 726.
120. Id. at 734.
government . . . was to ‘diffus[e] power the better to secure liberty.’”

The Chief Justice noted that “[e]ven a cursory examination of the Constitution reveals . . . that checks and balances were the foundation of a structure of government that would protect liberty.”

Finally, Burger concluded that, while the system of separation of powers produces conflicts at times, “it was deliberately so structured to assure full, vigorous, and open debate on the great issues affecting the people and to provide avenues for the operation of checks on the exercise of governmental power.”

When addressing Justice White’s dissent, the Chief Justice argued that separation of powers arguments cannot be permitted to turn on judicial assessment of the practical results of the provision.

In his dissent, Justice White refined his argument for a functionalist approach, asserting that “formalistic and unbending rules in the area of separation of powers may unduly constrict Congress’ ability to take needed and innovative action pursuant to its Article I powers.” He argued that the majority holding ignored the twin aims of the Constitution to both secure liberty by diffusing power and to create a workable government by integrating those powers. Justice White emphasized that the focus should not be on establishing bright-line rules but instead on whether the potential disruption of power is justified by a valid congressional objective within its constitutional authority. Accordingly, Congress’s delegation of power to an officer independent from the President did not deprive the President of any executive power to which he was otherwise entitled, nor did it hinder the duties of his office. To illustrate this point, Justice White proposed that if Congress’s budget-cutting mechanism had required the responsible officer to exercise a significant amount of policy discretion, Congress may have been required to place such an officer within the power of the executive. Instead, Congress “created a precise and articulated set of criteria designed to minimize the degree of policy choice exercised by the officer,” which did not deprive the President of any rightful authority.

Justice White proceeded to question whether, realistically, the threat of removal of the comptroller general through a joint resolution that also required the signature of the President rendered the comptroller subservient to Congress. If so, did placing this “executive” power with the

121. Id. at 721 (quoting Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring)).
122. Id. at 722.
123. Id.
124. See id. at 730.
125. Id. at 763 (White, J., dissenting) (quoting Commodity Futures Trading Comm’n v. Schor, 478 U.S. 833, 851 (1986) (internal quotation marks omitted)).
126. Id. at 721 (citing Youngstown, 343 U.S. at 635 (Jackson, J., concurring)).
127. Id. at 762–63 (noting that while the inquiry would not be easy, the Court should focus on the extent to which the limitation prevents the executive from accomplishing its constitutional functions).
128. Id. at 723.
129. Id. at 764.
130. Id. at 769.
comptroller really amount to unlawful retention of executive power by Congress? Justice White believed that the removal provision posed no "genuine threat of 'encroachment or aggrandizement of one branch at the expense of the other.'” Furthermore, Justice White argued, the practical effect of the removal provision rendered the comptroller even more independent. He concluded by suggesting that the Court should limit its search to asking whether the present balance of authority among the branches “pose[s] a genuine threat to the basic division between the lawmaking power and the power to execute the law.”

2. Functionalism Returns in Criminal Law Cases

While the previous two cases illustrate instances where the Supreme Court utilized a formalist analysis, other recent separation of powers cases have also applied Justice White’s functionalist methodology. The functionalist approach represents adaptation and flexibility. A functionalist inquiry should ask whether, under a given statutory scheme, “one branch [of government] assumes a function that more properly is entrusted to another.” Additionally, the functional analysis should consider whether the statutory scheme “prevents [the impaired branch] from accomplishing its constitutionally assigned functions.” If so, the court should inquire whether “an overriding need to promote objectives within the constitutional authority of Congress” justifies the impairment. This functionalist analysis permits a blending of power among the branches so long as one branch does not aggrandize its power at the expense of another or inappropriately encroach on the central functions of another. It has been argued that functionalism provides the most potential for accommodating needed changes to the current system of government and criminal justice.

131. Id. at 770 (citing Buckley v. Valeo, 424 U.S. 1, 122 (1976)).
132. Id. at 773.
133. Id. at 776 (noting that he saw no such threat).
134. See generally Commodity Futures Trading Comm’n v. Schor, 478 U.S. 833 (1986) (finding that there was no aggrandizement of congressional power at the expense of a coordinate branch); see also Flaherty, supra note 90, at 1737-38 (discussing the Supreme Court cases utilizing a functionalist methodology).
135. See Strauss, supra note 100, at 513.
138. Id.
140. Cf Strauss, supra note 100, at 512 (noting that while both formalism and functionalism have positive attributes, making a resolution unlikely, the flexibility of functionalism may offer a better solution for the unique challenges facing modern government).
a. Morrison v. Olson

In *Morrison v. Olson,* the Court examined whether the Ethics in Government Act of 1978 authorizing the appointment of an independent counsel to investigate and prosecute criminal conduct by high-ranking government officials violated the separation of powers doctrine. Chief Justice William Rehnquist delivered the opinion of the Court. The Chief Justice noted that the Court has “never held that the Constitution requires that the three branches of government ‘operate with absolute independence.’” Rehnquist observed that the case did not involve an attempt by Congress to usurp power from the executive branch. The Court relaxed its approach to separation of powers, rejecting the more rigid formalist approach in favor of a balancing test that asked “whether [Congress’s] removal restrictions are of such a nature that they impede the President’s ability to perform his constitutional duty...” Chief Justice Rehnquist determined that the President’s desire to “control the exercise of... [the independent counsel’s] discretion” was not “so central to the functioning of the Executive Branch” so as to violate separation of powers. The Court concluded that the Ethics in Government Act did not violate the separation of powers doctrine because it did not impermissibly interfere with the functions of the executive branch.

Justice Antonin Scalia strongly dissented on both formalist and functionalist grounds, noting that “[i]t is the proud boast of our democracy that we have ‘a government of laws and not of men.’” Using a formalist analysis, Justice Scalia argued that Article II of the Constitution should be read as vesting “all of the executive power” in the President. He asserted that because criminal prosecution was a purely executive power and the statute at issue deprived the President of exclusive control of that power, the statute violated separation of powers. Justice Scalia maintained that investigating and prosecuting crimes constituted a purely executive power, and to remove that power was to take away a core...
According to Justice Scalia, the question of how much the statute reduced presidential control was irrelevant. As long as any power is removed from the executive, there is a separation of powers violation. Justice Scalia rejected the Court's use of a balancing test to determine whether the transferred executive function was "so central to the functioning of the Executive Branch as to require complete control." He argued that it was improper for the Court to determine how much purely executive power should remain fully within the President's control to avoid a violation, noting that "[t]he Constitution prescribes that they all are." Therefore, although strict separated powers may prevent the Court from remedying every wrong, this small cost is necessary to protect liberty.

Justice Scalia then proceeded to apply his own balancing test to show that, even under the Court's misguided judgment, the Ethics in Government Act was still invalid. He argued that while the boldness of the President may not be hindered by the threat of congressional investigation, the President's high-level assistants who lack the support of a political base may be intimidated by the prospect of investigation. According to Justice Scalia, this would weaken the President by "reducing the zeal of his staff." Furthermore, Justice Scalia expressed concern that, in times when the President was at odds with Congress, a public investigation might be used as a political tool to erode his public support. Even under the balancing test, Justice Scalia argued that the Ethics in Government Act substantially deprived the President of prosecutorial control in a way that substantially affected the balance of power between the executive and legislative branches. Justice Scalia concluded by pronouncing, "A
government of laws means a government of rules.\textsuperscript{161} Because the Court’s decision fragmenting executive power was not governed by rules, Justice Scalia determined that it was “ungoverned by law.”\textsuperscript{162}

b. Mistretta v. United States

In \textit{Mistretta v. United States},\textsuperscript{163} the Court addressed the question of whether Congress could delegate the authority to create sentencing laws to an independent commission housed in the judicial branch and staffed by federal judges.\textsuperscript{164} The Court held that, because “sentencing has been and remains appropriate to the Judicial Branch, and the methodology of rulemaking . . . remains appropriate to that Branch,” Congress’s carefully considered delegation of this power to an independent commission located in the judicial branch did not violate separation of powers doctrines.\textsuperscript{165} Writing for the majority, Justice Harry Blackmun noted that the Constitution has never been thought to exclusively assign federal sentencing to any one of the three branches of government.\textsuperscript{166} In stating the Court’s “intelligible principle” test for determining the permissibility of Congress obtaining assistance from other branches, he noted that the Court’s delegation jurisprudence “has been driven by a practical understanding that in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives.”\textsuperscript{167}

In analyzing Congress’s delegation of authority to the Sentencing Commission, the Court first determined that although Congress’s delegation was broad, the instructions were “sufficiently specific and detailed to meet constitutional requirements.”\textsuperscript{168} Next, the Court examined the claim that the Sentencing Reform Act of 1984 violated the constitutional principle of separation of powers. Justice Blackmun began his discussion by reaffirming the framers’ judgment that separating governmental powers into three branches was “essential to the preservation of liberty.”\textsuperscript{169} He noted, however, that the framers rejected the idea that the three branches must be

\textsuperscript{161. Id. at 733.}
\textsuperscript{162. Id.}
\textsuperscript{163. 488 U.S. 361 (1989).}
\textsuperscript{164. The actual relationship of the Sentencing Commission to the judiciary is debatable. While the agency has judges as members, it is not under the control of a judicial body and does not decide controversies. See id. at 384–85.}
\textsuperscript{165. Id. at 396–97.}
\textsuperscript{166. Id. at 364.}
\textsuperscript{167. Id. at 372.}
\textsuperscript{168. Id. at 374. The Court determined that Congress had provided not only specific goals to the Sentencing Commission but had also included detailed instructions for determining sentencing parameters. While the Court conceded that the Commission exercised significant discretion in formulating guidelines, the Court concluded that delegations that included a need to exercise judgments on matters of policy were acceptable. See id. at 374–79.}
\textsuperscript{169. Id. at 380 (citing Morrison v. Olson, 487 U.S. 654, 685–96 (1988)).}
entirely separate and distinct.\textsuperscript{170} Quoting James Madison's \textit{Federalist No. 47}, Justice Blackmun acknowledged that separation of powers does not mean that the three branches cannot share power.\textsuperscript{171} Instead, constitutional problems arise only when all the power of one branch is exercised by the same branch that possesses all the power of another branch.\textsuperscript{172} Justice Blackmun noted that "[i]n adopting this flexible understanding of separation of powers . . . the greatest security against tyranny . . . lies not in a hermetic division among the Branches, but in a carefully crafted system of checked and balanced power within each Branch."\textsuperscript{173} Justice Blackmun emphasized, however, that the Court was willing to invalidate provisions of law that placed too much power in a single branch.\textsuperscript{174}

In cases focusing on the judicial branch, the Court identified two specific dangers: (1) that the judicial branch cannot be assigned tasks that are more appropriately performed by another branch, and (2) that provisions of law must maintain the integrity of the judicial branch.\textsuperscript{175} The Court again noted that it would only invalidate a statutory provision that had been approved by both houses of Congress and the President for ""the most compelling constitutional reasons.""\textsuperscript{176}

In his defense, Mistretta argued that the creation of the Sentencing Commission placed too much power within the judicial branch and undermined the judiciary's independence and integrity.\textsuperscript{177} The Court acknowledged that the express provisions of Article III limit judicial power to ""Cases"" and ""Controversies.""\textsuperscript{178} Nonetheless, the Court has long recognized significant exceptions to this general rule and has allowed the

\textsuperscript{170} Id.
\textsuperscript{171} Id. at 380–81 (quoting The Federalist No. 47 (James Madison), \textit{supra} note 92, at 325–26).
\textsuperscript{172} Id. at 381 (""[T]hat where the whole power of one department is exercised by the same hands which possess the whole power of another department, the fundamental principles of a free constitution, are subverted."" (quoting The Federalist No. 47 (James Madison), \textit{supra} note 92, at 325–26)). This is consistent with a functionalist approach to separation of powers issues.
\textsuperscript{173} Id. ""[T]he great[est] security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department, the necessary constitutional means . . . to resist encroachments of the others."" The Federalist No. 51 (James Madison), \textit{supra} note 91, at 268.
\textsuperscript{174} Mistretta v. United States, 488 U.S. 361, 382–83 (1989) (discussing cases in which the Court has invalidated attempts by Congress to exercise the power of other branches or realign powers vested by the Constitution in either the judicial or the executive branches).
\textsuperscript{175} Id. at 383; see also id. at 383 n.13 (adding that in cases where a potential disruption is present, the Court will ""determine 'whether [the] impact is justified by an overriding need to promote objectives within the constitutional authority of Congress'"" (quoting Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 443 (1977))).
\textsuperscript{176} Id. at 384 (quoting Bowsher v. Synar, 478 U.S. 714, 736 (1986) (Stevens, J., concurring)).
\textsuperscript{177} Id. at 383–84 (arguing that by placing the Sentencing Commission within the Judicial Branch, Congress was allowing Article III judges to exercise both judicial and legislative authority and subjecting those same judges to ""political whims").
\textsuperscript{178} Id. at 385; see also U.S. Const. art. III, § 2, cl. 1.
assumption of "nonadjudicatory activities by the Judicial Branch."179 Noting that "the sentencing function long has been a peculiarly shared responsibility among the Branches of Government,"180 the Court determined that vesting rule-making decisions with the judicial branch was consistent with the role that the judiciary "always has played, and continues to play, in sentencing."181 Holding that there was no constitutional violation, the Court emphasized that its separation of powers analysis focused on the "practical consequences" of the government-delegating scheme and not on the labeling of the activity.182

The Court, however, left open the possibility of whether a separation of powers problem would arise if Congress assigned judicial responsibility to the executive branch, noting, "[H]ad Congress decided to confer responsibility for promulgating sentencing guidelines on the Executive Branch, we might face the constitutional questions whether Congress unconstitutionally had assigned judicial responsibilities to the Executive or unconstitutionally had united the power to prosecute and the power to sentence within one Branch."183

In his dissent, Justice Scalia again employed a formalist analysis to object to the delegation of congressional law-making authority to an agency created for the sole purpose of making laws.184 Justice Scalia argued that, because the Sentencing Commission had no other responsibilities besides making laws, the commission amounted to a "junior-varsity Congress" that did not fit within the three branches of government identified by the Constitution.185 According to Justice Scalia, only the legislature should make policy decisions concerning government.186 Justice Scalia suggested that what is really at issue "is whether there has been any delegation of legislative power" and concluded that, "[s]trictly speaking, there is no acceptable delegation of legislative power."187 He reasoned that the Sentencing Commission’s law-making power was not ancillary to any enforcement powers and therefore was unconstitutional.188 Justice Scalia characterized the majority decision as "treat[ing] the Constitution as though

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179. Mistretta, 488 U.S. at 386 (discussing the "twilight area" in which the activities of the separate Branches merge" and allow for a sharing of power between the executive, legislative, and judicial branches).
180. Id. at 390.
181. Id. at 391.
182. Id. at 392.
183. Id. at 391 n.17.
184. See id. at 413 (Scalia, J., dissenting) (noting that calling the Sentencing Commission’s findings “Guidelines” did not preclude them from having the effect of law).
185. Id. at 427. Justice Scalia reasoned that the Court accepted the delegation not because Congress was permitted to assign its powers to another branch, but because it “inheres in most executive or judicial action.” Id. at 417.
186. See id. at 415.
187. Id. at 419. Justice Scalia, however, did not object to the creation of agencies where governmental power was not at issue. See id. at 423.
188. See id. at 420–21.
it were no more than a generalized prescription that the functions of the Branches should not be commingled too much.”189

To the contrary, Justice Scalia reiterated that the Constitution was not a suggestion but a prescribed structure and framework directing the conduct of government.190 He argued that the only acceptable commingling was “specifically provided for in the [constitutional] structure [the framers] had designed.”191 Ultimately, Justice Scalia argued, absent specific authorization in the Constitution, no commingling of power is acceptable.192

Part I.A of this Note presented a brief overview of U.S. sentencing history and discussed the government motion requirement for a downward departure for substantial assistance and the courts’ deference to the prosecutors’ discretion in substantial assistance determinations. This part also discussed the Supreme Court’s decision in Booker v. United States, which invalidated the mandatory application of the Sentencing Guidelines. Part I.B of this Note discussed the two analytical frameworks—formalism and functionalism—historically employed by the Supreme Court when adjudicating separation of powers questions, and the strong dissenting opinions that galvanized both frameworks. Part II of this Note discusses the current state of the law in the circuit courts concerning the validity of the government motion requirement for substantial assistance and academic arguments supporting and rejecting the current approach to the government motion requirement.

II. ARGUMENTS SUPPORTING AND CONTESTING THE GOVERNMENT MOTION REQUIREMENT FOR SUBSTANTIAL ASSISTANCE

Part II.A presents circuit cases that hold that the government motion requirement does not violate separation of powers doctrines, and also presents legal arguments supporting the functional blending of powers in the federal government and in the sentencing process. Part II.B of this Note discusses circuit holdings that have criticized the reasoning in cases that have held that the government motion requirement does not violate the separation of powers. This part also presents the most recent legal challenge to the government motion requirement—that placing all of the power to charge and sentence in the executive violates separation of powers. Finally, Part II.B discusses academic challenges both to the current functionalist approach employed by the Supreme Court in separation of

189. Id. at 426.
190. See id. (noting that the framers considered exactly when and how much government commingling was acceptable and provided for such specific instances in the Constitution).
191. Id. (discussing the presidential veto, the Senate’s confirmation of executive and judicial officers, ratification of treaties, and Congress’s impeachment power as the four specific provisions of the Constitution allowing for a commingling of power).
192. See id. at 427 (“[I]n the long run the improvisation of a constitutional structure on the basis of currently perceived utility will be disastrous.”).
powers cases involving criminal law, and to the exercise of potentially unchecked prosecutorial discretion.

A. The Government Triggering Mechanism of Section 5K1.1 Does Not Violate the Separation of Powers Doctrine

1. United States v. Huerta

In United States v. Huerta, the defendant was sentenced pursuant to a plea bargain to a mandatory minimum of five years under 21 U.S.C. § 841(b)(1)(B)(ii)(II). At sentencing, defendant Robert Huerta moved for a downward departure based on his cooperation, and the government argued that Huerta's purported cooperation fell below the level of substantial assistance. The district court concluded that because § 3553(e) requires a motion by the government as a prerequisite for a departure below the statutory minimum, the court "lacked authority to impose a sentence below such a minimum."

On appeal, Huerta argued that sentencing is a judicial prerogative that "necessarily includes the power to consider all relevant factors." He argued that a congressional sentencing scheme that "delegates to the prosecutorial arm of the Executive Branch the authority to control when a judge may consider cooperation" as a mitigating factor in sentencing "usurps a constitutionally assigned judicial function."

The Second Circuit began its analysis by reiterating that the Supreme Court has never required the three branches of the government to operate with complete independence. Instead, the Second Circuit explained, courts have employed a "flexible understanding of separation of powers." The court noted that statutes allowing some commingling of the functions of the branches are acceptable as long as they posed no danger of either aggrandizement or encroachment.

The court determined that § 3553(e) does not permit government "adjudication" and that the ultimate power to decide the motion and pronounce the sentence remained with the court. The court reasoned that the authority granted to the executive under § 3553(e) was considerably less

194. Id. While it appears that Robert Huerta desired to offer assistance, the Drug Enforcement Administration claimed that Huerta never revealed the identity of his drug supplier. Id.
195. Id.
196. Id.
197. Id.
198. Id. (citing Morrison v. Olson, 487 U.S. 654, 694 (1988)).
199. Id. at 92 (quoting Mistretta v. United States, 488 U.S. 361, 381 (1989)).
200. Id. (stating that "[t]he statute in question clearly passes muster").
201. Id.; see also United States v. Musser, 856 F.2d 1484, 1487 (11th Cir. 1988) (holding that the "only authority ‘delegated’ . . . is the authority to move the district court for a reduction in sentence" (citation omitted)).
than the acknowledged executive authority to decide whether to prosecute and what charges to bring. The Second Circuit held that § 3553(e) does not prevent judges from executing their constitutional duties or usurp an inherently judicial function. The court employed a flexible understanding of separation of powers and held that the judicial branch does not possess exclusive sentencing authority.

2. Other Circuits

There are a number of circuit cases that have followed the reasoning in Huerta. The courts have reasoned that because Congress has the power to legislate mandatory minimums, a prosecutor's use of substantial assistance is within his or her discretion. In United States v. Rexach, defendant Domingo Rexach was indicted for distributing three vials of cocaine near an elementary school. He entered into a cooperation agreement with the government that stated,

"[I]f it is determined by this Office that Domingo Rexach has made a good faith effort to provide substantial assistance in the investigation or prosecution of another person who has committed an offense, this Office will file a motion . . . so that the sentencing judge shall have the authority to impose a sentence below . . . a minimum sentence, and . . . pursuant to Section 5K1.1 of the Sentencing Guidelines."

Before sentencing, the government determined that Rexach had not made a good faith effort to provide substantial assistance. Rexach moved for specific performance or, in the alternative, recognition that the government motion requirement violated both due process and the separation of powers.

202. See Huerta, 878 F.2d at 92. Because the issue presented in this case was whether Congress’s enactment of the statute was an impermissible delegation of judicial authority, the court did not consider whether combining the acknowledged exclusive authority to prosecute with the power to determine sentence was a violation of separation of powers doctrines. The Second Circuit went on to note that “[t]he authority to decide whether or not to prosecute, and on what charges . . . is . . . far more intrusive on sentencing decisions than the limited power afforded by Section 3553(e).” Id.

203. Id. at 93 (noting that sentencing is a shared function among the branches and not inherently or exclusively judicial). Additionally, the court also indicated that Congress could, if it desired, eliminate all discretion in sentencing judges by establishing mandatory sentences. Id. Similarly, the court dispatched with Huerta’s due process argument by noting that “there is no right to individualized sentencing, and Congress may . . . constrain the exercise of judicial discretion . . . so long as such constraints have a rational basis.” Id. at 94 (citations omitted).

204. Id. at 93. The court noted that prosecutors are “uniquely fit” to decide whether substantial assistance has been given. Id.

205. 896 F.2d 710 (2d Cir. 1990).

206. Id. at 711.

207. Id. at 712 (quoting United States v. Rexach, 713 F. Supp. 126, 127–28 (S.D.N.Y. 1989)).

208. Id.
The court determined that the prosecutor had made a good faith determination that Rexach had not provided substantial assistance.\textsuperscript{210}

On appeal, the Second Circuit addressed whether cooperation agreements limit a prosecutor's discretion and whether a prosecutor's decision not to grant the departure is reviewable.\textsuperscript{211} Citing its recent decision in \textit{Huerta}, the Second Circuit held that evaluation of a defendant's effort in providing substantial assistance lies within the discretion of the prosecutor and may be reviewed only on a showing of prosecutorial misconduct or bad faith.\textsuperscript{212}

In \textit{United States v. Snell},\textsuperscript{213} the defendant was charged with attempt to possess and distribute one kilogram of cocaine.\textsuperscript{214} After receiving sentencing letters from both parties, the district court determined that 18 U.S.C. § 3553(e) and section 5K1.1 were unconstitutional because each provision violated the separation of powers doctrine.\textsuperscript{215} Although the government never filed a substantial assistance motion, the court held an evidentiary hearing and determined that Laura Snell had made a good faith effort to provide substantial assistance and sentenced her to only two years in prison.\textsuperscript{216} On appeal, the U.S. Court of Appeals for the Tenth Circuit held that the district court erred in holding 18 U.S.C. § 3553(e) and section 5K1.1 unconstitutional and vacated the sentence on the ground that the lower court had departed without authorization from the government.\textsuperscript{217}

In \textit{United States v. Severich},\textsuperscript{218} defendant Victoria Severich was charged with intent to distribute cocaine. She argued that the substantial assistance provision in the Guidelines placed an inherently judicial function in the executive in violation of the separation of powers doctrine.\textsuperscript{219} The U.S. District Court for the Southern District of Florida rejected defendant's analogy to \textit{Bowsher}, noting, "Neither \textit{Bowsher} nor any other cases relied

\begin{itemize}
\item \textsuperscript{209} Id.
\item \textsuperscript{210} Id.
\item \textsuperscript{211} Id. at 713.
\item \textsuperscript{212} Id. at 713–14. The court added, "[W]e see no significant danger arising from prosecutors' possibly misusing cooperation agreements and shirking their promises to make downward departure motions." Id. at 714 (noting that there are institutional incentives for the prosecutor to act in good faith). Judge Lawrence Pierce dissented based on the application of contract principles in the case. Id. at 715 (Pierce, J., dissenting) (emphasizing that, because Rexach supplied information that later led to three arrests, "[h]is assistance constitutes 'substantial assistance' within the meaning of the subject plea agreement").
\item \textsuperscript{213} 922 F.2d 588 (10th Cir. 1990).
\item \textsuperscript{214} Id. at 589. A conviction would carry with it a mandatory minimum sentence of five years.
\item \textsuperscript{215} Id. at 589–90.
\item \textsuperscript{216} Id.
\item \textsuperscript{217} See id. at 590–91 ("[T]he guideline did not violate due process and we stated that the additional argument that the guideline violated the separation of powers doctrine was merely a variant of the due process claim." (internal quotation marks omitted)); see also United States v. Oransky, 908 F.2d 307, 309 (8th Cir. 1990) (holding that the requirement of prosecutor authorization for downward departure does not violate separation of powers doctrines).
\item \textsuperscript{218} 676 F. Supp. 1209 (S.D. Fla. 1988).
\item \textsuperscript{219} Id. at 1212. The defendant did not, however, argue that all of the sentencing power had been placed with the prosecutor.
\end{itemize}
upon by defendant advance her proposition that the recommendation of the United States Attorney to impose a sentence below the minimum for a defendant who offered substantial assistance impermissibly permits executive interference in the sentencing process.”

The court held that the prosecutor’s discretion to determine the extent of substantial assistance did not impermissibly interfere with judicial sentencing.

3. Fifteen Years Later, a Revised Argument Returns

In United States v. Vargas, the defendant William Vargas pled guilty to conspiracy to distribute one kilogram of heroin. As a result, Vargas was sentenced to a mandatory minimum term of 120 months’ incarceration followed by five years’ supervised release. Vargas appealed only his sentence on the ground that imposition of the mandatory minimum violated the separation of powers doctrine “by vesting excessive sentencing power in the Executive Branch of government . . . .” The district judge dismissed Vargas’s complaints as “questions of policy and not of constitutional law.”

220. Id. at 1213. Instead, relying on previous decisions regarding the validity of a court’s exclusive parole determinations pursuant to 21 U.S.C. 2841, the district court concluded that “the sentencing function is not exclusively judicial.” Id. at 1213 & n.3. The defendant argued that allowing the executive to file the motion for substantial assistance placed the power with an executive officer who would be answerable to Congress, effectively preserving control for Congress over both the power to determine the laws and the sentence. The court was not persuaded and instead chose to rely on previous cases that allowed the judiciary to exercise unrestricted power in determining a defendant’s parole. Id. at 1212–13.

221. Id. at 1213 (“[T]he sentencing function is not exclusively judicial and represents potential influence of other branches.”); see also United States v. Spillman, 924 F.2d 721, 724 (7th Cir. 1991) (holding that section 5K1.1 does not delegate judicial authority to the executive branch, and further noting that Congress has the power to restrict or expand factors affecting the length of sentences, rendering moot, in the eyes of the court, the separation of powers argument); United States v. Ayarza, 874 F.2d 647, 653 (9th Cir. 1989) (holding that sentencing was not an inherently judicial function and that the government’s authority to recommend a reduced sentence “was not impermissibly intrusive” and emphasizing that there is no constitutional right to substantial assistance); United States v. Francois, 889 F.2d 1341, 1344 (4th Cir. 1989) (citing United States v. Musser, 856 F.2d 1484, 1487 (11th Cir. 1989)) (holding that because the district court has the ultimate authority to grant a downward variance, separation of powers was not violated).


223. Id.

224. Id. This functionalist argument accepts that some blending of powers is inherent in the sentencing process, but expresses alarm at the extent of sentencing power that has been transferred to the prosecutor. Interestingly, this paraphrase in the court’s opinion is an inaccurate description of what William Vargas actually argued. Vargas argued that due to the government motion requirement to authorize a departure for substantial assistance, it was a violation of the separation of powers doctrine for the executive to exercise all sentencing power and act as de facto judges. See infra Part II.B.3.b (discussing Vargas’s petition for rehearing en banc and the distinctions between Vargas and Huerta).

On appeal, the Second Circuit held that Vargas’s separation of powers argument was foreclosed by the court’s previous decision in Huerta. While Vargas argued that Huerta did not control his appeal because that case held only that the usurpation of some judicial discretion does not violate the separation of powers doctrine, the Second Circuit determined that “[t]he distinction between usurpation of such discretion and the accretion of power in one branch . . . is one without a difference.” The court was not persuaded by Vargas’s assertion that criticisms of mandatory minimums had reached a “critical mass.” Once again, the court simply reiterated that the ability to create mandatory minimums is well within the legislative power of Congress. The Second Circuit held that, absent an intervening decision by the Supreme Court, one panel of the court could not overturn another.

4. Functionalism Creates Balance and Efficiency

A functionalist approach would seem to favor the Huerta line of decisions. Over the years, both courts and academics have employed various arguments to justify a functionalist approach to the separation of powers. Perhaps the most famous justification for a functionalist approach comes from Justice Robert H. Jackson, who said, “While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity.” Under the functionalist framework, some blending of powers is permissible as long as the core function of one branch is not usurped by another.

226. Id.
227. Id. at *2. It is important to note that while the court believed it was foreclosed by Huerta from hearing the argument, this Note asserts that there is a significant distinction between some sharing of judicial power and Vargas’s assertion that the executive was in control of all sentencing discretion. The court’s failure to recognize a distinction represents one of the ongoing problems with separation of powers cases in the criminal law. Courts assume that the separation of powers argument will be the same as previous cases. See infra Part II.B.3 (discussing the Vargas court’s assumptions regarding separation of powers arguments).
228. Vargas, 2006 WL 3228787, at *2 (agreeing with the district court that this was a matter of policy and not constitutional law).
229. Id. This argument, however, ignores the reality that Congress has created a different sentencing scheme. For more on this idea, see supra Part II.B.3.b discussing in more detail Vargas’s petition for rehearing en banc.
230. Id.
231. See supra Part I.B.2.a–b (discussing Morrison and Mistretta and the Court’s functionalist analysis).
233. See supra Part I.B.2.a (discussing the Court’s decision in Morrison).
Professor Paul Conkin writes that Madison’s idea of balance in government required something other than complete separation. He suggests that Madison’s now familiar idea of checks and balances between branches of government was a hybrid of evolving eighteenth-century ideas of separation of powers attributed most prominently to philosophers Montesquieu, John Locke, and even libertarian theory. Montesquieu adopted the classifications of legislative, executive, and judicial. Professor Conkin emphasizes that while Montesquieu wanted different persons to exercise different functions of government in an effort to avoid tyranny, “he never embraced an absolute form of separation and always blended ideas of separation with ideas of balance.” Accordingly, Madison’s conception was not of total branch isolation but rather of independence in functioning. In order to allow for push and pull, each branch was given specific checks that provided the power to push back against the other branches.

Professor Peter L. Strauss provides important insight into the dichotomy between formalism and functionalism in analyzing Supreme Court separation of powers cases. Professor Strauss suggests that both formalism and functionalism offer peculiar benefits to the Supreme Court when it confronts separation of powers issues. Formalism, according to Professor Strauss, offers stability, clear rules, and the “assurance that conduct can and will be governed by law.” However, formalism also presents two problems: (1) inflexibility in the face of change, and (2) the

234. See Paul K. Conkin, Self-Evident Truths 158 (1974). “[Balance in government] is an active, functional principle, not a geometric one.” Id.; see also Flaherty, supra note 90, at 1802 n.407 (clarifying that while Federalists did not necessarily argue in favor of the modern construct of balancing powers, the Federalist arguments for the Constitution “better comport with modern functionalism than formalism”).

235. See Conkin, supra note 234, at 154–56 (discussing the development of separation of powers ideas as a reaction to the Puritan Revolution and the subsequent ascendancy of a single assembly that dissolved the former mix of interests in government in favor of one government body). The philosopher John Locke divided government into three branches: “legislative, executive (including judicial), and federative (primarily foreign policy).” Id. at 155. He was concerned that if the men who made the laws were also the enforcers, “the temptation to exploit laws for private advantage would be overwhelming.” Id. The Whigs, prominent players in American Revolutionary thought, also rallied against members of Parliament who traded their independence for royal favors. Id. However, even the Whigs combined ideas of separation with balance, “valuing balance and independence more than isolation.” Id. at 156.

236. See id. at 156.

237. Id.

238. Id. at 158–59. However, this role of checking the power of other branches is not the primary role of each branch. Id. at 159.

239. See Strauss, supra note 100, at 488–89 (discussing how the Supreme Court has attempted to accommodate the complex structure of the federal government).

240. Id. at 511–12 (questioning whether “aggrandizement” of one branch’s power at the expense of another is the key to triggering a formalist analysis).

241. Id. at 512.
invitation to evade the rules because they are so clear.\textsuperscript{242} Functionalism, on the other hand, provides a holistic approach that addresses the particular circumstances of a specific dispute.\textsuperscript{243} The functionalist approach provides (1) the possibility of accommodating needed change, and (2) a response to the formalist problem of evasion of specific rules.\textsuperscript{244} Particularly in cases involving judicial power in the constitutional scheme, the modern Court seems committed to functionalism.\textsuperscript{245} While accepting that functionalism has its dangers, Professor Strauss asserts that formalism is incapable of describing the modern U.S. government.\textsuperscript{246}

5. Sentencing Power Has Not Shifted to Prosecutors

Some commentators seek to moderate the claim that under the Guidelines sentencing power has shifted to the prosecutor. Professor Frank O. Bowman believes that the shift in power is not as great as some people would suggest.\textsuperscript{247} He suggests that “in order to really control sentences . . . a prosecutor must be willing to hide facts from the court.”\textsuperscript{248} Former U.S. Attorney James B. Burns, Assistant U.S. Attorney Barry Rand Elden, and former Assistant U.S. Attorney Brian W. Blanchard argue that the shift in power due to the Guidelines has not been from the judiciary to the executive but rather from the judiciary to Congress.\textsuperscript{249} Burns et al. assert that the prosecutor’s power at sentencing has not been substantially altered by the Guidelines.\textsuperscript{250} Instead, these authors believe that the apparent increase in the prosecutor’s power only exists when viewed relative to the

\textsuperscript{242} Id. (“[T]he drafters or interpreters of a Constitution . . . could easily foresee a corresponding difficulty arising out of the attempt to specify permitted allocations.”).
\textsuperscript{243} Id.
\textsuperscript{244} Id. However, these approaches also give rise to questions about the legitimacy of judicial action. Further, Professor Peter Strauss acknowledges that “from a practical perspective, . . . [the] functional standard has only short-term advantages in dealing with the evasion theme.”\textsuperscript{Id.} Interestingly, Professor Strauss does not seem to think that there will be a resolution between formalism and functionalism in the Supreme Court’s jurisprudence, and that in fact judges will require both techniques. See id.
\textsuperscript{245} Id. at 515 (“[T]he Court has unmistakably chosen a functional approach over a formal approach . . .”).
\textsuperscript{246} Id. at 511–12 (“The government we have built and now live with has attained a complexity and intermarriage of function that beggars the rationalistic tripartite schemes of the eighteenth century.”). According to Professor Strauss, formalism serves as a proxy for justices who are “unwilling to trust their inheritors—or even themselves.” Id. at 526.
\textsuperscript{247} See Frank O. Bowman III, The Quality of Mercy Must Be Restrained, and Other Lessons in Learning to Love the Federal Sentencing Guidelines, 1996 Wis. L. Rev. 679, 724–26. Professor Bowman explains that while the Sentencing Guidelines may restrict the facts that a judge can consider in setting a sentence, the prosecutor has discretion “only to the degree that she is free to choose either to present or to withhold inculpatory facts.” Id. at 726.
\textsuperscript{248} Id. at 729. Once again, this suggests that because prosecutors are inherently ethical people, there is little chance that prosecutors could control sentencing.
\textsuperscript{249} See James B. Burns et al., We Make the Better Target (But the Guidelines Shifted Power from the Judiciary to Congress, Not from the Judiciary to the Prosecution), 91 Nw. U. L. Rev. 1317, 1318 (1997).
\textsuperscript{250} See id.
By designating the factors to be considered in sentencing and the weight they should be afforded, the Sentencing Guidelines may have drastically reduced the judiciary’s power, but they did not increase the prosecutor’s power.252

B. The Government's Sole Discretion to Move for a Downward Departure for Substantial Assistance Violates the Separation of Powers Doctrine

1. United States v. Federico

In United States v. Federico, a drug dealer pled guilty to possession with intent to distribute cocaine.253 Dennis Federico argued that 18 U.S.C. § 3553(e) impermissibly placed judicial power with the prosecutor by requiring a government motion before a judge could grant a downward departure for substantial assistance.254 The court held that the statutory clause requiring a government motion to trigger a downward departure for substantial assistance violated the constitutional requirement of separation of judicial and prosecutorial powers.255 Noting that the triggering clause forced the prosecutor directly into the judicial sentencing role, the court determined that the clause impermissibly gave the prosecutor a veto power over the judge’s sentencing discretion.256 While the government argued that in instances where the prosecutor moved for a downward departure the judge was the final decision maker, the court held that the prosecutor was the final decision maker when he did not move for a downward departure.257 Furthermore, the court noted that, while Congress could eliminate substantial assistance, once Congress determined that the right existed, the clause was subject to separation of powers restrictions.258

251. Id. (suggesting that the prosecutor’s power only appears to have increased due to the loss of power in the judiciary).
252. Id. Even if this is true and prosecutors have not seen an increase in power, by diminishing the power of the judiciary to check the executive, it still seems that the overall effect is to increase the power of the prosecution in sentencing.
253. United States v. Federico, 732 F. Supp. 1008, 1009 (N.D. Cal. 1988) (effectively limited to its facts by United States v. Ayarza, 874 F.2d 647 (9th Cir. 1989) (holding that sentencing is not an inherently judicial function)).
254. Id. at 1009–10.
255. See id. at 1013.
256. Id. at 1013–14.
257. See id. at 1011.
258. Id. It should be noted that one year later, in United States v. Ayarza, the U.S. Court of Appeals for the Ninth Circuit held that sentencing was not an inherently judicial function and that as then utilized the government motion requirement did not violate separation of powers. 874 F.2d 647. While Ayarza did not cite to Federico or directly overrule it, the language of Federico appears to be an anomaly.
In *United States v. Ming He*, defendant Ming He pled guilty to racketeering and subsequently entered into a cooperation agreement with the government. In return for Ming He’s cooperation, the government agreed to file a motion pursuant to section 5K1.1 acknowledging his cooperation and requesting a reduced sentence. In the end, the government was not happy with Ming He’s assistance and, while still making a motion under section 5K1.1, “disparaged [his] assistance.”

In his opinion, Judge Richard Cardamone analyzed the impact of the 5K1.1 motions on sentencing. The judge noted that, absent a motion from the prosecutor, the court was unable to “consider such factors as the usefulness, truthfulness, timeliness, and extent of the cooperating witness’s assistance.” Judge Cardamone noted that prior to the Sentencing Guidelines and section 5K1.1, district judges had the discretion to determine whether to reduce a defendant’s sentence based on his assistance. Judge Cardamone explained that, while the Sentencing Guidelines transferred this discretion from the judges to the prosecutors, “it is equally true that a sentencing court is particularly well-positioned—because of its experience—to evaluate the moral worthiness, contrition, and rehabilitation of a defendant.” Judge Cardamone acknowledged that the substantial assistance motion has been a useful tool in managing a prosecutor’s heavy caseload, but was particularly troubled by the transfer of power coupled with a lack of any visible standards.

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259. 94 F.3d 782 (2d Cir. 1996).
260. *Id.* at 785–86.
261. *Id.* at 786.
262. *Id.* The 5K1.1 letter detailed Ming He’s reluctance to acknowledge his role in a murder conspiracy and his attempts to minimize his role in criminal activity. *Id.*
263. *Id.* at 788 (noting that “a § 5K1.1 letter allows the district court one of the few opportunities it has to depart downwardly from the Sentencing Guidelines’ somewhat rigid grid”).
264. *Id.* (noting that the factors are then weighed by the sentencing judge to determine the “appropriate reduction” in sentence).
265. *Id.*
266. *Id.* (noting that prosecutors are “uniquely fit” to determine whether substantial assistance has occurred).
267. *Id.* (citing *United States v. Gonzalez*, 970 F.2d 1095, 1103 (2d Cir. 1992)) (reiterating that a court may not depart from the guidelines sua sponte).
268. *Id.* (“[T]he absence of any ‘visible standards to guide the prosecutor’s exercise of discretion’… has made the transfer of authority from judges to prosecutors especially troubling.” (internal citations omitted)). Judge Richard Cardamone went on to determine that in order to balance the prosecutor’s broad discretion in the area of substantial assistance, courts “must be especially vigilant to preserve a cooperating witness’s procedural rights.” *Id.* at 789.
3. Vargas Brief and Petition for Rehearing En Banc

a. Brief of Appellant

It is important to discuss the Vargas brief and petition for rehearing en banc separately because Vargas argues that the Second Circuit’s original opinion misconstrues Vargas’s separation of powers argument. Vargas argued that because prosecutors select both the charge and “hold the key to unlock the judge’s ability to depart downwards . . . below the mandatory minimum[,]” the cumulative effect of executive control “has led to the ‘unit[ing] [of] the power to prosecute and the power to sentence within one Branch.’” Vargas conceded that Congress has the power to create mandatory minimums, but argued that it does not have “the power to give the Executive Branch exclusive sentencing discretion.” Vargas postulated that, “[i]n a system where over 95 percent of defendants plead guilty, prosecutors consequently act as de facto judges” in potential violation of the separation of powers doctrine.

In his reply brief, Vargas noted that while the government claimed that Vargas’s challenge has “essentially” been addressed, Huerta held only that sentencing is not solely a judicial prerogative and “that the Judicial Branch does not possess exclusive sentencing authority.” Vargas reiterated that “Huerta does not reach the different challenge . . . to the current accretion of de facto sentencing power by the Executive.” Vargas asserted that Huerta “has no connection to reality today.” He noted that “[t]oday, every participant in the federal criminal justice system . . . knows that in cases where the mandatory minimum is present securing [a Guidelines section 5K1.1] motion from the Executive Branch is the single path to a chance of a manageable sentence.”

269. See supra Part II.A.3 (discussing the Second Circuit’s Vargas opinion).
271. Id. at 4 n.3.
272. Id. at 4 (citing U.S. Sentencing Comm’n, Sourcebook of Federal Sentencing Statistics fig.C (2003), available at http://www.ussc.gov/ANNRPT/2003/Fig-c.PDF) (showing the guilty plea rate from 1999 to 2003)).
274. Id. (noting that because Huerta was decided only twenty months after the implementation of the Sentencing Guidelines, the court was unable to anticipate the growth in the government’s de facto sentencing power).
275. Id. (emphasizing that in Huerta, the court believed that a prosecutor’s decision of what to charge was “far more intrusive” than the limited power of § 3553(e)).
276. Id. (noting additionally that the substantial assistance motion has become “the coin of the realm within our system”).
b. Vargas Petition for Rehearing En Banc: The Attack Refined

In his petition for rehearing en banc, Vargas first argued that the Second Circuit incorrectly held that *Huerta* had previously decided the issues presented in his case.\(^{277}\) He argued that the Second Circuit's assertion that any differences between the two cases were "a distinction . . . without a difference" was incorrect.\(^{278}\) To the contrary, Vargas insisted that "[t]he distinction is one with an enormous difference."\(^{279}\) While *Huerta* held that the sentencing function was shared between all three branches of government and that Congress did not violate the separation of powers by creating mandatory minimums, Vargas argued that "the current accretion of sentencing power in the Executive Branch in mandatory minimum cases violates the Separation of Powers doctrine because it combines the power to charge and the absolute and unreviewable power to control sentence in one branch."\(^{280}\)

Vargas then further refined his separation of powers argument. He asserted that, "if Congress required the Judiciary to abide by prosecutors' sentencing recommendations," a separation of powers violation would exist.\(^{281}\) The analysis does not change simply "because § 3553(e) applies only to a subset of [cases]."\(^ {282}\) Accordingly, if uniting the power to charge and sentence in one branch is a violation, "it is no less so merely because the Executive does not possess this power to control all sentences."\(^{283}\)

4. Do Criminal Law Cases Require a Different Separation of Powers Analysis?

As this Note has previously indicated, scholars regularly debate whether a functionalist or formalist approach is more appropriate when analyzing a separation of powers issue.\(^{284}\) In her article *Separation of Powers and the Criminal Law*, Professor Rachel E. Barkow notes that these arguments are generally based on the merits of the analysis and do not focus on the type of case.\(^{285}\) Professor Barkow suggests that the Supreme Court should apply a formalist analysis to criminal law separation of powers cases, which would

\(^{277}\) Petition for Appellant at 4, United States v. Vargas, No. 05-4627-CR, 2006 WL 3228787 (2d Cir. Nov. 21, 2006).

\(^{278}\) Id. (internal quotation marks omitted).

\(^{279}\) Id. at 5.

\(^{280}\) Id. It should be noted that the power is not completely unreviewable. *See* Wade v. United States, 504 U.S. 181, 184 (1992); *see also* supra notes 65–74 and accompanying text.

\(^{281}\) Petition for Appellant, *supra* note 277, at 5.

\(^{282}\) Id. (alteration in original).

\(^{283}\) Id.

\(^{284}\) *See infra* Part I.B (discussing the Supreme Court's various approaches to analyzing separation of powers problems).

\(^{285}\) Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 Stan. L. Rev. 989, 993 (2006) (noting that "[c]riminal cases are not distinguished from administrative law cases").
drastically change the outcome of Mistretta and Booker.\textsuperscript{286} She argues that the existing functional approach to separation of powers in the criminal law "cannot be squared with constitutional theory or sound institutional design."\textsuperscript{287} Professor Barkow suggests that there are three possible ways to treat separation of powers issues in a criminal action.\textsuperscript{288} The first approach would be to treat criminal cases no differently than administrative law cases.\textsuperscript{289} This would entail some blending of powers to allow the government to better respond to criminal matters.\textsuperscript{290} Following the administrative model, other checks would be put in place to ensure that the government does not abuse its power.\textsuperscript{291}

The second approach identified by Professor Barkow would be to distinguish separation of powers analysis between criminal law and administrative law.\textsuperscript{292} Conceding that state power is at its apex in criminal matters, this view would require strict adherence to the separation of powers doctrine in criminal matters.\textsuperscript{293}

Finally, Professor Barkow identifies a third and current approach in which criminal matters are not distinguished from administrative law cases. Here, the Court has been even more permissive in the criminal context than it has been in civil cases.\textsuperscript{294} While administrative agencies must adhere to specific structural and process restrictions and remain subject to judicial review, these institutional checks are severely lacking in criminal matters.\textsuperscript{295} Professor Barkow notes,

> The current arrangement therefore takes the worst possible approach to separation of powers in the criminal law. The protection provided by the separation of powers is relaxed, but nothing takes its place. As a result, the potential for government abuse is . . . higher in the criminal context than in other regulatory spheres.\textsuperscript{296}

\textsuperscript{286} \textit{Id.} at 1041–44 (explaining that a separation of powers analysis would have exposed the expansion of legislative and executive power without a sufficient judicial check). Professor Rachel Barkow also argues that the Sentencing Reform Act operates to transfer significant discretionary power from the judicial branch to Congress and the executive. \textit{Id.} at 1042. Similarly, she argues that the Supreme Court’s failure to focus on separation of powers and to “overlook completely the constitutional problems with mandatory minimum sentences” has produced confusion in the Court’s analysis. \textit{Id.} at 1043.

\textsuperscript{287} \textit{Id.} at 993.

\textsuperscript{288} \textit{Id.} at 992.

\textsuperscript{289} \textit{Id.}

\textsuperscript{290} \textit{Id.}

\textsuperscript{291} \textit{Id.}

\textsuperscript{292} \textit{Id.}

\textsuperscript{293} \textit{See id.} at 992–93. This would be the formalist approach. This scenario assumes that in criminal matters, an individual’s liberty or life are at stake. This view would allow for blending in civil matters but not in criminal matters. \textit{Id.}

\textsuperscript{294} \textit{Id.} at 993.

\textsuperscript{295} \textit{Id.} Unlike the checks provided by the Administrative Procedure Act, the only safeguards in criminal matters come from constitutional individual rights provisions. Professor Barkow believes that these provisions provide inadequate protection against structural abuses in criminal matters. \textit{Id.}

\textsuperscript{296} \textit{Id.}
The structural protections present in the administrative context that can justify some flexibility are absent in the criminal context.\textsuperscript{297} Acknowledging that the Supreme Court does not divide separation of powers cases along substantive lines, Professor Barkow argues that due to the individual rights at stake in criminal law, the Court should differentiate between criminal and administrative law when analyzing separation of powers issues.\textsuperscript{298} She begins by returning to the structure and text of the Constitution.\textsuperscript{299} According to Professor Barkow, the framers were particularly focused on the potential for legislative encroachment to the judicial power over crime.\textsuperscript{300} Thus, Article I places “express limits on legislative exercise of judicial power.”\textsuperscript{301} By establishing the judiciary as a key check on the legislative process, separation of powers attempts to monitor the threat of discriminatory enforcement of laws.\textsuperscript{302}

Professor Barkow notes that in addition to separating the legislature from the judiciary, Article III also provides that all criminal matters must be tried by a jury.\textsuperscript{303} The jury’s unreviewable power to acquit has historically served as a final check on both the legislature and the judiciary.\textsuperscript{304} Accordingly, each branch must agree before criminal action can be taken against an individual.\textsuperscript{305}

Due to prosecutorial control over plea bargaining and the operation of a broad federal criminal code, Professor Barkow indicates that “the only process . . . that most defendants receive comes from the prosecutor.”\textsuperscript{306} However, prosecutors operate with little oversight.\textsuperscript{307} Even more troubling, the prosecutor investigates the case, decides what to charge and, in a plea

\textsuperscript{297.} Id. at 994.
\textsuperscript{298.} See id. at 1011–12.
\textsuperscript{299.} Id. at 1012.
\textsuperscript{300.} Id. ("The Framers were well acquainted with the danger of subjecting the determination of the rights of one person to the ‘tyranny of shifting majorities.’") (quoting INS v. Chadha, 462 U.S. 919, 961 (1983) (Powell, J., concurring)).
\textsuperscript{301.} Id. at 1013–14 (discussing the prohibition against bills of attainder and ex post facto laws, prohibitions against suspending habeas corpus, and deterring legislative interference with judicial functions).
\textsuperscript{302.} Id. at 1014; see also Commodity Futures Trading Comm’n v. Schor, 478 U.S. 833, 860 (1986) (Brennan, J., dissenting) (noting that protection of individual litigants from legislators susceptible to “majoritarian pressures” was a principle benefit of separating judicial and legislative powers).
\textsuperscript{303.} See Barkow, supra note 285, at 1015. This was the basis for the Supreme Court’s recent decision to render the Sentencing Guidelines advisory. See supra Part I.A.4 (discussing Booker).
\textsuperscript{304.} Barkow, supra note 285, at 1015 (noting that because a jury must be unanimous, this in effect requires all members of the community to agree before politicians can impose criminal punishment).
\textsuperscript{305.} Id. (discussing the framers’ decision to weigh the need for government efficiency against the potential for abuse when the government exercises its criminal power and favoring limits on federal criminal power).
\textsuperscript{306.} Id. at 1024 (referring to the now-advisory Sentencing Guidelines and their expanding effect on prosecutorial discretion).
\textsuperscript{307.} Id.
bargaining scenario, decides what plea to accept. Unlike administrative agencies that are subject to a judicial review, prosecutors operate with a "presumption of regularity" with nearly nonexistent judicial review of their decisions.

Separation of powers guards against the accumulation of too much power in one branch. While suggesting that the Court's complacency in this area of criminal law may be due to its over-reliance on individual rights protections, Professor Barkow argues that these rights protections, while guarding individuals from some police or government abuse, "do not guard against the same structural abuses as the separation of powers." Thus, the current individual rights approach has done nothing to stop the accumulation of judicial power by the executive.

Professor Barkow concludes that criminal law merits greater separation of powers protection than administrative law and suggests a bright-line rule analysis similar to the holding in Chadha as a solution. This would effectively reestablish judicial oversight of the criminal process and provide a remedy for the current blending of powers, which results in a lack of significant checks in criminal matters.

5. Further Criticism of the Federal Prosecutor's Expanding Power over Substantial Assistance

Other commentators have criticized the Guidelines on the ground that they transfer discretionary power to influence sentencing from the judiciary to the prosecutor. Professor Ellen Yaroshefsky alleges that the Guidelines represent a significant transfer of discretion from judge to prosecutor.

308. Id. at 1025. This scenario is analogous to mandatory minimum drug cases in which the Drug Enforcement Administration sets up a drug bust for a specific amount triggering the mandatory minimum, the prosecutor determines what charge to bring, also triggering mandatory sentences, and then the prosecutor is the only actor who can trigger a downward departure from the chosen mandatory minimum.

309. Id. at 1015; see also Wade v. United States, 504 U.S. 181, 185 (1992) ("[W]e see no reason why courts should treat a prosecutor's refusal to file a substantial-assistance motion differently from a prosecutor's other decisions... "); Wayte v. United States, 470 U.S. 598, 608 (1985) (noting that courts are "properly hesitant to examine the decision whether to prosecute").

310. See Barkow, supra note 285, at 1032-33.

311. Id. at 1032 (suggesting that the Court's willingness to allow a blending of powers may stem from its confidence in the protection of rights provisions).

312. Id. at 1033.

313. See id. 1036-39 (noting the danger of subtle shifts in judicial authority that have the effect of limiting judicial authority and discussing the judiciary's lack of perspective due to desensitization to a criminal system run by prosecutors).

314. See id. at 1053-54 (arguing that this approach would provide protection for defendants while still allowing Congress the freedom to adapt criminal laws and sentences as necessary).

315. See, e.g., Yaroshefsky, supra note 1, at 925 (noting the perception that the Sentencing Guidelines have shifted sentencing authority from the courts to prosecutors).
Professor Cynthia Lee argues that the prosecutor's power over substantial assistance is greater than originally perceived. Professor Lee suggests that requiring two separate motions, one for departing below the Guidelines and another for departing below the mandatory minimum, poses serious policy questions about who gets to decide how substantial the assistance was. Professor Lee notes that while the motion requirement may have been intended by Congress to act as a check on judicial discretion and a method to control backdoor sentencing to avoid the Guidelines, there are opposing considerations.

First, the prosecutor is not a neutral party. His "interests as advocate and adversary may conflict with Congress' interests in promoting uniformity and reducing unwarranted sentencing disparity." Second, while a prosecutor may be capable of independence at the inception of trial, the process of trial may make it more difficult for a prosecutor to maintain neutrality. Third, there are no uniform standards for determining the extent of a sentencing departure. Allowing the prosecutor to determine whether a departure is warranted "reintroduces the problem of disparity into the sentencing process." As the Supreme Court has previously noted, most prosecutorial charging and bargaining decisions are not subject to review. Finally, due to the private nature of prosecutorial discretion, Professor Lee asserts that, unlike judicial decisions, there is no check on the prosecutor's decision absent a gross constitutional violation.

Narcotics cases in particular provide an illustration of the enormous increase in prosecutorial power. Professor Ian Weinstein identifies accelerating over-criminalization, increased use of mandatory minimums, and harsh penalties as three trends that give prosecutors significantly more

316. See Lee, supra note 45, at 234 ("[T]he prosecutor not only controls whether or not a departure can be granted, but also, through its power to withhold a second substantial assistance motion, the extent of the departure.").

317. Id. (arguing that the judge and not the prosecutor should determine to what extent a defendant's cooperation should be reflected in the sentence).

318. Id. at 236.

319. Id.

320. Id. (noting that prosecutors will use plea bargains to manipulate a Guidelines sentence, particularly in the case of sympathetic defendants).

321. Id. at 236–37 (asserting that because a prosecutor is so close to the trial process, the judge may be better equipped to act with neutrality in determining the departure).

322. Id. at 237 (noting that different U.S. Attorneys' Offices utilize varying criteria to determine whether substantial assistance has been given).

323. Id.


325. See Lee, supra note 45, at 237–38 (explaining that the prosecutor's charging and bargaining decisions are not subject to judicial review and noting that, to the contrary, judicial decisions are "aired in open court where the judge must state her reasons for the sentence imposed" and any decision to depart from a Guideline range is subject to appellate review); see also Jonathan D. Lupkin, Note, 5K1.1 and Substantial Assistance Departure: The Illusory Carrot of the Federal Sentencing Guidelines, 91 Colum. L. Rev. 1519, 1544 (1991) (noting that "by allowing the prosecutor to make the threshold determination as to whether cooperation is substantial, the Commission creates the danger of coupling subjectivity with one party's understandable desire to further its own interests").
control over sentencing in narcotics cases. By combining these factors, "[t]he bottom line is that a federal prosecutor has the practical power to select among a wide range of sentences." To clarify his point, Professor Weinstein crafts an illustrative hypothetical:

Consider Mr. X, a defendant arrested in Manhattan for possession of five grams of crack cocaine. Assume that Mr. X has a prior state conviction for sale of a small amount of heroin and that his co-defendant Mr. Y kept a gun in a drawer in the kitchen of the apartment in which the two were arrested. Suppose the government alleges that Mr. X was a courier for Mr. Y and that Mr. Y had been observed at the arrest location for six months and is believed to sell about fifty grams of crack a week.

According to Professor Weinstein, "Mr. X could be charged under three different subsections of 21 U.S.C. § 841, which prohibits narcotics trafficking." Each would have a different guidelines sentence and a possible mandatory minimum, the application of which would increase pressure on the defendant to cooperate in order to mitigate his sentence. In this example, the prosecutor's discretion appears to create the power to control the defendant's sentence.

6. Historically, Separating Powers Promoted Efficiency

Historian Ann Stuart Anderson, in her essay A 1787 Perspective on Separation of Powers, asserts that separation of powers has been misunderstood to express a desire to fragment government power and sacrifice the capacity to govern in favor of individual liberty. Instead, Anderson suggests that separation of powers was intended both to secure liberty and ensure competent government. According to Anderson, powers were divided to effectuate their use and to prevent government deadlock. The framers' purpose in providing separated powers was to create more possibilities for the use of government powers, not to thwart

327. See id. at 112.
328. Id. at 108.
329. Id.
330. See id. at 108–10.
332. Id. at 144; see also Flaherty, supra note 90, at 1805 ("[F]ederalism] seeks more than gridlock. For all that it promoted balance and expanded accountability, separation of powers was also intended to ensure that government had enough energy to do what it had to do once it did decide to act.").
333. See Anderson, supra note 331, at 144 (suggesting that although separation of powers assumes the framers' awareness of the dangers of too little government, they did not intend for all three branches to be equal in power). "[T]he preference for the separation of powers structure was not only to preserve liberty but also to design a government for effective legislation and 'well-administered' laws." Id. 145.
them. Anderson asserts that the purpose of the check is to promote efficiency by allowing government to continue once all the checks have been exhausted. Anderson believes that the separation of powers was the framers' attempt to minimize the historical drawbacks of incompetence and destruction of liberty inherent in democracy. In response to criticisms that separation of powers is archaic and prevents effective dealing with modern problems, Anderson poses the question, "What free government today deals effectively with modern problems? It is in the nature of freedom that there is a cost." Anderson concludes that separation of powers, now more than ever, is essential to efficient government.

Part II of this Note described the circuit court cases that have addressed whether the government motion requirement violates the separation of powers doctrine, and the most recent separation of powers challenge to the government motion requirement for substantial assistance. Part II also discussed academic arguments both supporting and opposing the current government motion requirement for substantial assistance and presented challenges to the Supreme Court's current separation of powers analytical framework in criminal law cases. This Note now turns to a discussion of possible solutions to the separation of powers problem by examining potential judicial and congressional responses to the problem.

III. RECasting THE GOVERNMENT MOTION REQUIREMENT

Part III of this Note argues that the government motion requirement of 18 U.S.C. § 3553(e) violates the separation of powers doctrine by allowing the executive to control both charging and sentencing in mandatory minimum cases. This Note concedes, however, that due to concerns regarding prosecutorial discretion and judicial efficiency, courts appear unready to reexamine the separation of powers violation this Note argues is inherent in the statute. Therefore, Part III of this Note contends that, while it would be appropriate for courts to invalidate the government motion requirement for substantial assistance, in the absence of such judicial action, Congress should eliminate the government motion requirement for substantial assistance and instead require both judicial and executive input with respect to determining whether a defendant has provided substantial assistance. Additionally, this Note agrees with past commentators that, as part of the solution to repair the substantial assistance mechanism, Congress should

334. Id. at 145 (noting that this is contrary to the popular idea that separation of powers was designed to thwart the use of government powers).
335. See Id. at 153.
336. Id. at 153–54 (discussing how a system without checks would result in angry deadlock in a scenario where the legislative and executive branches disagreed, but noting that the checks provided to each branch allow for compromise and effective government).
337. Id. at 142.
338. Id. at 161.
define with particularity what constitutes substantial assistance in the interest of reducing sentencing disparity and correcting the separation of powers problems embedded in the current government motion requirement.

A. The Government Motion Requirement Violates the Separation of Powers Doctrine Under Both Formalist and Functionalist Frameworks

This Note argues that giving the executive exclusive power to trigger a downward departure for substantial assistance in mandatory minimum cases violates the separation of powers doctrine. According to Justice Scalia’s formalist reasoning, articulated in his dissents in *Morrison* and *Mistretta*, any commingling of government power that is not specifically provided for by the text of the Constitution is impermissible.339 Under this formalist framework, which requires strict division of power between the three branches of government, placing sentencing power in the executive branch is a clear usurpation of judicial power.340 For Justice Scalia, it is the commingling itself that violates the Constitution and threatens liberty.341 No matter what the end result, Justice Scalia argues that any unenumerated commingling of power, even if it results in a novel rearrangement of power that on its face appears beneficial to the working government, is absolutely unacceptable.342 Both Justice Scalia and Professor Barkow assert that specific rules of law may be the best way to protect individual liberty in criminal cases.343 For Justice Scalia, adhering to the enumerated text of the Constitution grounds the rules in laws that can be logically articulated.344 For Professor Barkow, a formalist division of power is the best means to reestablish judicial oversight and meaningful checks on executive power in the criminal process where individual liberty is most at risk.345 Both of these arguments are compelling. Assuming that sentencing is an inherently judicial power, placing that power in the hands of the executive, regardless of the practical outcome, is a clear violation of separation of powers.

One difficulty, however, with advocating a strict division of power in criminal law is that such division may actually hinder the defense counsel’s ability to act in the best interests of her clients. Sentencing is traditionally a shared function, insofar as Congress legislates, the executive charges, and the judge sentences. While there are significant problems with the amount of power the current substantial assistance triggering mechanism provides to the prosecutor, cooperation in general is seen as desirable and is often the only means available to a defendant to receive a reduced sentence. Part of

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339. See supra notes 148–62 and accompanying text; see also supra notes 184–92 and accompanying text.
340. Cf supra notes 190–92 and accompanying text (indicating that the Constitution was a prescribed structure).
341. See supra notes 187–92 and accompanying text.
342. See supra note 192 and accompanying text.
343. See supra notes 149, 293 and accompanying text.
344. See supra note 161 and accompanying text.
345. See supra notes 313–14 and accompanying text.
ensuring effective cooperation entails an ongoing dialogue between the prosecutor and the judge. It seems reasonable to allow the prosecutor to have some input regarding the usefulness of a defendant’s cooperation when the defendant is sentenced. What is unreasonable, and arguably unnecessary, is to allow the prosecutor exclusive power to control whether the judge may consider a defendant’s cooperation when imposing a sentence.

The formalist argument may also be vulnerable to the Court’s re-characterization of the power to grant substantial assistance. While any unenumerated commingling of power is a violation of separation of powers, finding a violation assumes that granting a downward departure for substantial assistance is a judicial power inherent in the judiciary’s traditional control over the sentencing process. In Wade, however, the Court protected the prosecutor’s decision to refuse substantial assistance as part of prosecutorial discretion. While the issue was not reached in Wade, it is conceivable that the Court might characterize substantial assistance motions and cooperation in general as an extension of the prosecutor’s charging power or as a necessary tool to carry out a recognized executive power.

There are, however, reasons to assume that sentencing power is inherently a judicial function. In Mistretta, the Court noted that “substantive judgment in the field of sentencing [is] appropriate to the Judicial Branch.” Furthermore, the Supreme Court has acknowledged that, “[f]or more than a century, federal judges have enjoyed wide discretion to determine the appropriate sentence in individual cases.” Similarly, in Booker, the Court emphasized the importance of judicial discretion, the judiciary’s unique ability to consider all relevant factors in sentencing, and the dangers of expanding executive power. While the legislative branch has instituted mandatory minimum sentencing schemes since early in American history, it is true that the power to determine the extent of punishment in criminal sentences has never been expressly given to any one branch of government. Nevertheless, Mistretta’s language

346. But see supra notes 65–74 and accompanying text.
347. See supra notes 65–74 and accompanying text.
348. Cf. supra Part I.A.3 (identifying the courts’ deference to prosecutorial discretion). But see supra notes 319–23 and accompanying text (arguing that a prosecutor’s involvement in the adversarial process mitigates against characterizing substantial assistance as an extension of charging power).
350. See Mistretta, 488 U.S. at 390; see also supra Part I.A (discussing the historical role of judges in the sentencing process).
352. See U.S. Const. arts. I–III; see also supra note 203 and accompanying text.
suggests that the judicial branch's power inherently includes its discretion to create individualized sentences in criminal cases.\textsuperscript{353} Maintaining the integrity of the judiciary is essential to protecting parties from legislative and executive pressure.\textsuperscript{354}

While it seems that some commingling of power is accepted among branches of the government,\textsuperscript{355} never has the Constitution or the Supreme Court allowed for the combining of all the power to charge and control sentencing in one branch.\textsuperscript{356} By granting the executive the sole triggering mechanism that allows the judge to consider a defendant's cooperation and insulating the prosecutor's substantial assistance decisions from judicial scrutiny under the guise of prosecutorial discretion, the central judicial function of acting as a check on the executive branch has been usurped.\textsuperscript{357}

As the Court in \textit{Mistretta} indicated, placing all the power in one branch should surely amount to a violation of the separation of powers.\textsuperscript{358}

This Note proposes that while adopting a formalist approach in criminal law matters is an appealing solution, in the case of substantial assistance the formalist analysis is unnecessary to prove a violation. The reality is that the Supreme Court appears comfortable utilizing a functional analysis in criminal law separation of powers cases.\textsuperscript{359} However, as noted above, even under the functionalist approach where some commingling of powers is acceptable in the interests of efficiency and the larger goal of a workable government, giving the executive the sole power to trigger downward departures for substantial assistance is a violation.\textsuperscript{360} As \textit{Vargas} noted, it is not necessary to determine to what degree sentencing is a core judiciary function because in the case of substantial assistance in mandatory

\textsuperscript{353} \textit{See Mistretta}, 488 U.S. at 390; \textit{see also} U.S. Const. art. III, § 2, cl. 1; Intermill & Martin, \textit{supra} note 99, at 414 ("The core function of courts is the exercise of discretion to decide individual cases fairly.").

\textsuperscript{354} \textit{See Commodity Futures Trading Comm'n v. Schor}, 478 U.S. 833, 848 (1986) (noting that an independent judiciary protects parties from legislative and executive pressure on judicial decision making); \textit{see also} Antonin Scalia, \textit{The Rule of Law as a Law of Rules}, 56 U. Chi. L. Rev. 1175, 1180 (1989) (explaining that "[t]he[] most significant role[]" for judges is "to protect the individual criminal defendant against the occasional excesses of the popular will, and to preserve the checks and balances within our constitutional system that are precisely designed to prohibit swift and complete accomplishment of that popular will").

\textsuperscript{355} \textit{See supra} Part I.B.2 (discussing the Supreme Court's use of a functionalist analysis allowing for some blending of power between branches of government).

\textsuperscript{356} \textit{Cf.} U.S. Const. arts. I–III; \textit{see also supra} notes 99, 191 and accompanying text.

\textsuperscript{357} This raises the issues of jurisdiction stripping and the power of Article III courts, both of which are beyond the scope of this Note.

\textsuperscript{358} \textit{Cf.} Mistretta v. United States, 488 U.S. 361, 391 n.17 (1989); \textit{see also supra} Part I.B.2.b (discussing \textit{Mistretta} and the potential constitutional issues inherent in placing too much power in one branch).

\textsuperscript{359} \textit{See supra} Part I.B.2.

\textsuperscript{360} \textit{See supra} Part I.B (discussing the Supreme Court's separation of powers jurisprudence).
minimum cases the judiciary has been stripped of all power. Even accepting arguendo that sentencing is a shared function among Congress, the executive, and the judiciary, this would still not justify the current government motion requirement that places all the power to charge and sentence with the executive.

Assuming that there is a violation, according to Justices Jackson and White's functionalist formulations, the Court would still be required to balance the interests of the government in maintaining absolute control over the triggering mechanism with the defendant's personal liberty interests. It is first important to note that cooperation can be, and often is, provided outside of the mandatory minimum context. In non-mandatory minimum cases, the government regularly offers evidence of the defendant's cooperation to be considered by the judge at sentencing. The statutory triggering mechanism is not required to induce a defendant's cooperation. Therefore, there must be some reason beyond simply inducing cooperation that justifies the government's triggering mechanism.

This Note proposes that the most compelling reason is prosecutorial leverage over a defendant. It seems likely that the government would argue that the triggering mechanism is necessary to assist in efficient law enforcement. Controlling the triggering mechanism gives the prosecution significant leverage that allows it to apprehend low-level criminals, to turn them against their criminal associates, and to apprehend people higher up the criminal food chain. While cooperation is an important part of modern law enforcement, it is not so clear that the heavy leverage provided by allowing the government to control the triggering mechanism is necessary. Are there really so many cases where this heavy leverage plays a significant role in apprehending criminals? Judging by the number of non-mandatory minimum cases where cooperation is considered at sentencing, it is clear that defendants are perfectly willing to cooperate if doing so will reduce their sentences.

Another argument might be that providing such heavy leverage to the prosecution enables it to enlist more quasi-law enforcement officers who will make cases for agents. It could be argued that commandeering criminals to investigate their friends requires less effort on the part of actual law enforcement officials. It is possible that utilizing these quasi-law enforcement officers allows for less risk to real police officers and,

361. Cf. supra Part II.B.3 (noting that separation of powers would be violated if all the power of one branch was wielded by the same hands that possessed all the power of another branch).
362. Interestingly, Professor Strauss's query as to whether "aggrandizement" triggers a formalist analysis would also support defendant Vargas's argument. See supra note 240 and accompanying text. In the case of substantial assistance, the executive, not an agency, has upset the tripartite balance by assuming sentencing power at the expense of the judiciary.
366. See supra Part I.A.1.
specifically, undercover agents. Furthermore, because these agents are not tied down directing low-level criminal activity, this option allows for more effective use of law enforcement resources to apprehend upper-level criminals. While all of these benefits seem reasonable, it is still unclear why the government requires such heavy leverage. Law enforcement officials readily admit that, when a criminal defendant is asked to cooperate, rarely is the answer no.367

There is arguably another cost to this commandeering of quasi-law enforcement officers. Because they are criminals and not trained law enforcement officers, there is a much greater risk that the rules will not be followed. These quasi-agents are largely unsupervised, and it seems that their quasi-law enforcement activities run a significant risk of ensnaring otherwise innocent defendants. Ultimately, rules are rules. While not definitive, the fact that these quasi-agents operate with little or no supervision seems to cut against allowing the government to wield such heavy leverage.

Another problem with allowing the government to utilize such heavy leverage is that it significantly diminishes the autonomy of the criminal defendant. It seems clear that, for the most part, defendants want to cooperate. However, giving the government such heavy leverage allows prosecutors to demand levels of cooperation that may place the defendant unfairly at risk. While there is no easy way to evaluate how much risk a defendant would be willing to assume absent the government’s leverage, given the defendant’s desire to cooperate and receive a reduced sentence, he may place himself in greater danger for fear that the government will not grant him a 5K1.1 letter. Additionally, although the defendant may place himself at great risk in response to the government’s heavy leverage, the only guarantee a defendant has that his cooperation will be rewarded is the good faith of the prosecutor.368 While prosecutorial good faith is not addressed here, it is important to note that application of section 5K1.1 is irregular across districts.369 This is not to say that prosecutors act in bad faith, but only to point out that discretion varies when exercised by different people. While impossible to explore, it seems likely that the same set of facts would result in substantially different assistance outcomes depending on whose discretion is applied.370

All of these considerations must then be weighed against the defendant’s strong interest in his personal liberty.371 Criminal cases have the highest cost for defendants.372 A defendant’s failure to receive a downward departure for substantial assistance can result in a significant increase in jail

367. See supra Part I.A.1.
368. See supra Part I.A.1.
369. See supra Part I.A.1.
370. See supra Part I.A.1.
371. Cf supra note 160 and accompanying text (discussing Justice Scalia’s application of an alternate balancing test).
372. See supra note 298 and accompanying text.
time. Given that undue incarceration is the ultimate loss of liberty (next to the death penalty), it seems difficult to square this with the government’s need to maintain heavy leverage over cooperating defendants. This Note argues that even under a functionalist balancing test that accepts judicial deference to prosecutorial discretion, maintaining the government triggering mechanism seems unnecessary and unfair.

B. Courts Would Be Justified in Invalidating the Government Motion Requirement

Unfortunately, it may not be enough for courts simply to call this issue a policy question for Congress. When there is a blatant violation of the Constitution, the courts should act as a check on the legislature and the executive. While the courts may not be able to craft a solution, it is essential that the Supreme Court signal to the legislature that the current government motion requirement is impermissible. Sentencing is an area where the judiciary has unique experience, and by invalidating the substantial assistance motion, the Supreme Court could protect individual liberty while also performing its own role as an important check on executive power.

If the Court is going to effectively spearhead the development of a lasting solution to the separation of powers problem inherent in allowing the executive to both charge and sentence, the Court might go one step further and suggest a means for both the prosecutor and the judiciary to participate in the substantial assistance process. One possibility is to allow a forum similar to a safety-valve hearing to determine the appropriate departure for a defendant’s substantial assistance. Unfortunately, this would present two new problems: (1) allowing judges to interfere with what is currently the domain of prosecutors would present its own separation of powers problems; and (2) inevitably, the solution to a separation of powers problem seems to be to create more process. However, in this case the substantial assistance motion, including arguments in the safety-valve hearing, or even in sentencing letters, seems like a minimal addition of process. Regrettably, neither of these solutions is possible as long as substantial assistance decisions remain protected by prosecutorial discretion.

373. See supra Part II.B.3 (describing the need to petition the legislature on issues of policy).
374. Cf. Stith & Cabranes, supra note 25, at 173–74 (noting the failure of the judiciary to actively engage in discussion with the sentencing reform movement during the formation of the Sentencing Guidelines, and how this failure was unfortunate because “there is no group better able—by virtue of training, experience, and disinterestedness—to forge a structure for criminal sentencing that is both workable and fair”).
375. If judicial efficiency is truly a concern, the courts might simply allow for evidence of substantial assistance to be presented at the already in-place safety-valve hearing.
C. Hightened Deference to Prosecutorial Discretion Increases the Risks to Defendants but Precludes a Judicial Solution

Courts have misconstrued defendants’ arguments against requiring a government motion for substantial assistance. In Vargas, the defendant William Vargas made it very clear that he was not challenging Congress’s power to legislate mandatory minimums or the executive’s power to charge. Instead, he solely challenged the accretion of all sentencing and charging power in the executive branch. He specifically distinguished his argument from previous arguments asserting that sentencing was a core function of the judicial branch, noting that while it is certainly true that sentencing power has been shared between the executive and the judiciary, never had the Court permitted all of the power to charge and sentence to be consolidated in the hands of one branch of the government. However, the Second Circuit chose to disregard this new distinction.

Unfortunately, this response seems to be indicative of the prevailing judicial attitude, favoring a further pooling of charging and sentencing power in the executive branch. While it is unclear why the courts are willing to accept their now significantly diminished role in sentencing, the reality is that in the system of criminal justice the prosecutor continues to exercise broad discretion to investigate and charge, and courts are content to allow continued incursions into their sentencing power.

In Vargas, the Second Circuit also reasoned that because Congress has the power to eliminate the substantial assistance motion when legislating mandatory minimums, executing the statute in a way that offends the separation of powers doctrine is ultimately acceptable. While the simplicity of this logic is appealing, this argument assumes that the voters

376. See supra Part II.B.3 (discussing the court’s misrepresentation of Vargas’s argument). In this case, the court incorrectly viewed Huerta as already addressing Vargas’s arguments. See United States v. Vargas, 05-4627-CR, 2006 WL 3228787, at *3 (2d Cir. 2006). In Huerta, the court merely held that moving some sentencing discretion from the judiciary to the executive did not violate separation of powers or interfere with a core function of the judiciary. See United States v. Huerta, 878 F.2d 89, 91–94 (2d Cir. 1989) (holding that the executive authority to determine when a judge can consider substantial assistance as a mitigating factor does not violate separation of powers). Vargas, however, argued that the current allocation of nearly all the sentencing power in the executive branch violates the separation of powers because it combines both the power to charge and sentence in one branch of the government. See Brief for the Appellant, supra note 270, at 3.

377. See Brief for the Appellant, supra note 270, at 4 n.3; supra notes 157–63 and accompanying text.

378. See supra Part II.B.3.

379. See supra Part II.A.3.

380. See supra Part I.A (discussing the history of sentencing and the division of sentencing power among the branches of government).

381. See supra note 227 and accompanying text (“The distinction... is one without a difference.”).

382. See supra Part II.A.1, II.A.4.

383. See supra Part II.A.1.

384. See supra Part II.B.3 (discussing the Vargas court’s rationale that, because Congress could legislate a different system, the abuse of power under this system is permissible).
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would support such a revision to sentencing statutes. It is a long road from suggesting a revision to actually enacting new legislation. The reality is that there is a different system in place. The courts must address separation of powers within the current sentencing scheme, not within a hypothetical alternative sentencing universe. And, under the current sentencing scheme, the charging and sentencing powers are united in the executive branch.

“A Separation of Powers violation would surely exist if Congress required the Judiciary to abide by prosecutors’ sentence recommendations.” As Vargas indicates, this hypothetical illuminates the separation of powers violation inherent in the current sentencing scheme. Uniting the power to charge and sentence in one branch is a violation of separation of powers. The violation is not validated simply because the current argument against § 3553(e) applies only to the executive’s power to sentence in the subset of mandatory minimum cases. Within this subset, executive control of sentencing is absolute. “If uniting the power to control sentence and charge is a violation of Separation of Powers, it is no less so merely because the Executive does not possess this power to control all sentences.” Unfortunately, the courts seem perfectly comfortable drawing arbitrary lines defining when a branch exercises too much power. By characterizing the recent objections to the rule as “distinction[s] without a difference,” the court avoided having to provide a reason for upholding the current sentencing practice. Although this Note maintains that there is a separation of powers violation, it seems clear that absent legislative intervention, the courts are unwilling to revisit the government motion requirement.

Critics have argued that the “gatekeeper” role of prosecutors is particularly problematic because there is no significant check on the prosecutor’s decision not to file a substantial assistance motion. Under

385. See supra note 41 and accompanying text (defining § 3553(e) and describing the government motion requirement for substantial assistance).
386. It is also true that Congress could theoretically eliminate all lower federal courts and leave only the Supreme Court in place. This surely does not imply that lower courts should not decide the cases before them because the system could be structured differently.
387. See supra Part II.B.3.b.
388. See Petition for Appellant, supra note 277, at 5 (internal quotation marks omitted); see also supra Part II.B.3.b.
389. See supra Part II.B.3.
390. See supra Part II.B.3.
391. See Petition for Appellant, supra note 277, at 5; see also supra Part II.B.3.b.
392. See supra Part II.A.3 (discussing the court’s holding in Vargas and indicating that the court is unwilling to reinvestigate the separation of powers arguments).
393. See United States v. Vargas, No. 05-4627-CR, 2006 WL 3228787, at *2 (2d Cir. 2006). The court’s rationale in Vargas is a clear example of this behavior. The court claimed that Vargas’s argument was a distinction “without a difference.” Id. It seems, to the contrary, that the distinction between Vargas and Huerta is one with a significant difference. Vargas made it very clear that his argument was not about the incursion on judicial discretion. See Petition for Appellant, supra note 277; see also supra Part II.B.3.b.
394. See supra Part II.B.5; see also Proposal on 5K1.1, supra note 26, at 1522.
18 U.S.C. § 3553(e), a judge may not sentence below the mandatory minimum absent permission from the prosecutor. As noted earlier, courts may only review a prosecutor’s refusal to file a substantial assistance motion if the refusal was based on unconstitutional motives or if the government breached a plea agreement. Because defendants are not entitled to an evidentiary hearing or discovery as to whether the refusal to file a motion for substantial assistance was fair, the prosecutor’s decision to file a substantial assistance motion is final. As Professor Lee notes, “If the prosecutor’s assessment of the defendant’s assistance—as insubstantial and thus not deserving of a substantial assistance motion—is incorrect, there are no procedural mechanisms to check the correctness of this decision.”

Assuming, however, that there was some way to demonstrate unconstitutional motives on the part of the prosecution, the hurdles for proving a selective prosecution claim remain immense. This protection is quite weak and charges are notoriously difficult to prove. As Professor Barkow noted, “If the Court focused on the structural relationship among branches instead of on individual defendants, it would see that there

395. See, e.g., United States v. Orozco, 160 F.3d 1309, 1315–16 (11th Cir. 1998) (noting that the power to move for a reduction in sentence is reserved to the prosecutor, who is in a position to determine the “truthfulness and usefulness of [the defendant’s] information”).

396. See supra Part I.A.2 (discussing the fact that the Wade court’s holding that a district court may only review a prosecutor’s failure to grant a substantial assistance motion was based on unconstitutional reasons). As the Court in Wade v. United States recognized, the substantial assistance motion “gives the Government a power, not a duty, to file a motion when a defendant has substantially assisted.” 504 U.S. 181, 185 (1992).

397. See Lee, supra note 64, at 173 (explaining that a prosecutor’s motion is for the most part beyond the scope of review). And further, how will a court ever know if there is a violation if it is not allowed to investigate the circumstances surrounding a prosecutor’s refusal to grant a substantial assistance motion? As Vargas noted in his petition for rehearing, this is an “impossible burden.” See Petition for Appellant, supra note 277, at 7.

398. See Lee, supra note 64, at 173.

399. Again, this Note does not seek to imply that prosecutors act with bad intentions. To the contrary, this Note assumes that prosecutors perform their duties with the utmost respect for the law and the criminal justice system. The point is simply to reiterate that in order to satisfy the general public that the criminal justice system, and sentencing in particular, is fair, the legal community needs to step back and assess how the current allocation of sentencing power might be perceived by an outsider. More importantly, how are they perceived by the defendants? If the current system does not promote a sense of justice, then it will continue to undermine any hope of actual faith in the criminal justice system.


401. Id. (explaining the Court’s hesitation to examine the decision to prosecute and noting that “[s]uch factors as the strength of the case, the prosecution’s general deterrence value, the Government’s enforcement priorities, and the case’s relationship to the Government’s overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake.” (internal quotation marks omitted)). In essence, a defendant is left complaining that his word should be believed over that of the prosecutor. This would seem to be a nearly impossible argument to make.
is currently no check at all."402 Allowing the current system of government motion requirements to continue unchecked violates the very principle separation of powers was designed to protect—tyranny at the hands of the government.403

D. Congress Should Reevaluate the Costs of the Government Triggering Motion, Recast the § 3553(e) Government Motion Requirement, and Define Substantial Assistance with Particularity

This Note argues that the current government motion requirement for substantial assistance violates the separation of powers. However, as the Second Circuit’s reluctance in Vargas to revisit separation of powers arguments indicates,404 the most likely source for change is a petition to the legislature. As prior commentators suggested more than ten years ago,405 in order to correct the substantial assistance mechanism, Congress should eliminate the government motion requirement and define with particularity what behavior is required in order for a defendant to qualify for substantial assistance.406 Given the recent change in control of Congress407 and the Court’s recent Sixth Amendment jurisprudence, it seems that these proposals were before their time. Under the current regime, the gate controlling substantial assistance departures is closed until the prosecutor releases the latch. While this Note certainly respects the specific insight that prosecutors can give as to whether substantial assistance has been provided, this Note also asserts that judges are equally qualified to balance all relevant factors when determining a defendant’s sentence. Indeed, it is certainly true that prosecutors possess unique insight into the usefulness of a defendant’s substantial assistance as well as a collective knowledge across cases of the validity of a given defendant’s specific assistance. But the fact remains that sometimes prosecutors get it wrong. A system that gets it right ninety-five percent of the time may be efficiently allocating resources, but that same system still requires an impartial mechanism to catch the remaining five percent. The simple fact that the prosecutor is an interested party makes it nearly impossible for her to police her own decisions.

402. See Barkow, supra note 285, at 1049 (suggesting that separation of powers is supposed to prevent such unbridled prosecutorial discretion).
403. See The Federalist No. 47 (James Madison), supra note 91, at 252 ("Were [the power to judge] joined to the executive power, the judge might behave with all the violence of an oppressor.").
404. See supra Part II.A.3.
405. See supra Part II.B.5.
406. See Lee, supra note 45, at 239–51 (suggesting an elimination of the government motion requirement, returning sentencing discretion to judges, or in the alternative, crafting nationwide prosecutorial guidelines); see also Proposal on 5K1.1, supra note 26, at 1531–35 (discussing a revision of section 5K1.1 that would allow the court to depart on either a motion of the defendant or the government in cases where a defendant has substantially assisted).
407. See Clemetson, supra note 22 (describing the recent shift in congressional control).
Our sentencing system accepts (although begrudgingly at times) the judge as an impartial fact finder, and in cases where there is a question about a prosecutor’s evaluation of the extent of a defendant’s substantial assistance, the judge should be allowed to evaluate the substantial assistance. Furthermore, in response to concerns that judges might use this mechanism as a means to circumvent mandatory minimums, the judges’ decisions will still be subject to appellate review. Accordingly, in cases where the prosecutor’s decision is in doubt, Congress should not preclude the judge from weighing a defendant’s substantial assistance simply because the prosecutor declines to make the motion. Instead, as Justice Breyer’s language in *Rita v. United States* seems to support, in situations where she believes that a downward departure based on a defendant’s substantial assistance is appropriate, the judge should be required to describe with particularity her rationale for granting the departure.

To assist the judge in her decision-making process, Congress should allow the substantial assistance gate to remain open and afford the prosecutor and the defense the opportunity, possibly in sentencing letters, to describe to the judge why the gate should or should not be closed. A reasonable solution should balance prosecutor recommendations with sentencing judge evaluations to determine whether substantial assistance was provided and if a subsequent departure is appropriate. At the very least, the prosecutor should be required to justify with particularity his or her decision not to provide the defendant with a 5K1.1 letter for substantial assistance. Because the prosecutor is deeply involved in the adversarial process by the time substantial assistance recommendations are proffered, allowing the judge to entertain justifications for and against a departure for substantial assistance will provide the necessary balance to ensure a just sentence.

This Note concedes that it may be necessary to limit the circumstances under which a defendant may move for a downward departure, or even those under which to afford the prosecutor’s recommendation significantly more weight. Tipping the scales in favor of the government is nothing new. While not ideal, either of these solutions would still be better than the current system that requires no justification for a prosecutor’s decision and

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408. See Lee, supra note 64, at 178 (acknowledging the need for limitations on the judge’s power to depart based on substantial assistance in order to avoid “backdoor” sentencing). However, unlike Professor Cynthia Lee’s initial proposal, which would have limited the extent to which judges might depart, this Note argues that requiring full disclosure of the sentencing judge’s rationale for departure will act as the appropriate check on the judge’s departure discretion.

409. See *Rita v. United States*, 127 S. Ct. 2456, 2468 (2007) (noting that the amount of detail in a judge’s decision depends on the specific circumstances, but that “[t]he sentencing judge should set forth enough to satisfy the appellate court that he has considered the parties’ arguments and has a reasoned basis for exercising his own legal decisionmaking authority”).

410. See *Mistretta v. United States*, 488 U.S. 361, 390 (1989) (“[T]he sentencing function long has been a peculiarly shared responsibility among the Branches of Government and has never been thought of as the exclusive constitutional province of any one Branch.”); see also supra Part I.B.2.b.
precludes any judicial review of a defendant's level of cooperation absent the government motion. Once again, it is important to note that the idea is not to provide a back door for the judiciary to sentence below a mandatory minimum absent compelling reasons, but instead to compel both parties to justify why a downward departure for substantial assistance is or is not appropriate.

In order to provide guidance to the judiciary in evaluating substantial assistance, Congress should define with particularity under what circumstances a judge may consider a defendant's substantial assistance. Defining substantial assistance would at the very least promote the idea of sentencing regularity (one of the original goals of the Sentencing Guidelines) and would also satisfy detractors who fear the reassertion of unbridled judicial discretion. While this solution has its own problems—namely more process and the fine line of protecting decisions that properly fall within prosecutorial discretion—defining what constitutes substantial assistance would still be a vast improvement over the unmonitored, prosecutor-controlled system currently in place. As the recent New York Times article Judges Look to New Congress for Changes in Mandatory Sentencing Laws indicates, judges and politicians are expressing dismay at the results of the current sentencing system. With the shift in congressional control from Republicans to Democrats, now may be the appropriate time to revisit who controls sentencing and how to allocate that great responsibility in order to best protect the individual liberty of criminal defendants.

CONCLUSION

This Note asserts that the current government motion requirement of 18 U.S.C. § 3553(e) violates the separation of powers doctrine, from a formalist or functionalist position. Due to the high stakes of criminal sentencing for the defendant, it seems wholly unconstitutional and contrary to the federal system of government to allow the executive branch—an interested party—to both charge and control the sentence of the defendant. Placing all the power to trigger a downward departure for cooperation, and so by default placing nearly total power to sentence in this subset of mandatory minimum cases, in the hands of prosecutors and the executive branch violates the fundamental principles of a free constitution by allowing "the whole power of one department [to be] exercised by the same hands which possess the whole power of another department." This Note advocates heightened disclosure requirements both for prosecutors and judges during the sentencing process. Requiring prosecutors to submit concrete reasons for denying a defendant a 5K1.1 letter will increase
scrutiny of a prosecutor's decision making but will also serve to restore some of the trust in the sentencing system.

Courts, however, may be unable to address the problem inherent in allowing the prosecutor to control when a defendant can receive a downward departure for substantial assistance. While the courts' reluctance is disappointing, it is understandable given the prominent role that prosecutorial discretion has achieved in the currently overloaded criminal justice system. But even absent judicial intervention, it remains possible for Congress to reexamine sentencing policy. Congress should recognize the danger to individual liberty inherent in allowing the prosecutor, an interested party, to choose the charge and determine the sentence of a criminal defendant. Congress should excise the government motion requirement for substantial assistance from the Sentencing Guidelines. This will eliminate the unconstitutional joining of all the power to charge and sentence and return some or all sentencing discretion to the judiciary. At the very least, Congress should recast the government motion requirement to allow for input from both the prosecutor and the sentencing judge and should require concrete rationales for a prosecutor's refusal to seek a downward departure for substantial assistance. Furthermore, as numerous commentators have previously suggested, Congress should define with particularity what constitutes a defendant's substantial assistance. This will promote not only the original Sentencing Guidelines' goal of sentencing regularity, but, as Professor Barkow so aptly pointed out, will also serve to protect individual liberty when it is most vulnerable—during criminal proceedings that could ultimately result in a permanent loss of that liberty.

413. See supra Part II.B.
414. See supra Part II.B.4.