

The Bureaucratic Afterlife of the Controlled Substances Act

Lauren M. Ouziel*

ABSTRACT

Fifty years after its enactment, it is clear that in key respects, the original aims of the Controlled Substances Act, and the larger statutory scheme of which it was a part, have not been realized. Intended to reduce demand through investments in treatment and prevention programs, demand-reduction expenditures instead trailed supply-reduction expenditures for decades. Designed to steer federal criminal enforcement towards high-level traffickers and kingpins, today's federal prisons are filled with non-violent, relatively lower-level offenders. What explains this divergence? This essay locates a contributing source in the organizational dynamics of federal agency advancement. Twelve different executive branch agencies are tasked with responsibility for reducing drug supply or demand (or both), and they operate under diverse constraints, incentives and pressures. Collectively, these dynamics have generated a political economy of federal drug control that values outputs over outcomes and rewards autonomous agency decision-making over collective action. In turn, that economy pushes federal drug control towards criminal enforcement and away from other potentially more effective methods. The essay concludes with suggestions for reform. More broadly, it offers an account of the interaction between federal drug legislation and the institutional actors who bring it to life—illuminating the many ways in which bureaucratic dynamics have, both intentionally and inadvertently, “made” federal drug control policy on the ground.

I. INTRODUCTION

The Controlled Substances Act¹ was one portion of a broader piece of federal drug legislation, The Comprehensive Drug Abuse Prevention and Control Act

* Associate Professor (with tenure), Temple University Beasley School of Law. Thanks to participants at the symposium on the Controlled Substance Act at 50 Years for helpful comments on a prior draft; the symposium's hosts, the Academy for Justice at Arizona State University School of Law and the Drug Law Policy Center at Ohio State University School of Law; and the editors at the Ohio State Journal of Criminal Law.

¹ Comprehensive Drug Abuse Prevention and Control Act of 1970, Title II, Pub. L. No. 91-513, Title II 84 Stat. 1236 (1970) (codified as amended at 21 U.S.C. §§ 801-904 (2018)).

(CDAPC) of 1970.² That Act had two principal ambitions. The first was organizational: it sought to coordinate federal drug control policy, replacing a disparate and disjointed array of federal drug laws with a single regulatory regime administered largely through the Department of Justice.³ The second was strategic: through appropriations, it sought to redirect greater resources towards demand-reduction (treatment and prevention) from supply reduction (interdiction and criminal enforcement);⁴ and through penalty changes, it sought to redirect criminal enforcement away from lower-level dealers and users towards the highest-level members of the drug trafficking trade.⁵

Fifty years after its enactment, the CDAPC's organizational vision has come to pass. Federal drug control is a largely centralized endeavor, in which a single executive branch office oversees and coordinates a massive federal drug control infrastructure. The legislation's larger strategy for reducing drug demand and supply, however, has been largely unrealized. For decades, demand-reduction expenditures trailed supply-reduction expenditures; and today, federal prisons are populated with mostly lower-level participants in the drug trafficking trade.⁶

In the pages that follow, I argue that these two seemingly disparate legacies of the Legislation—organizational success on the one hand and strategic failure on the other—are in fact linked. The Legislation's coordination and centralization of federal drug control birthed a political economy that prized supply reduction over demand reduction, and that ultimately shifted federal criminal enforcement to the lower rungs of the drug trafficking trade.

How, precisely, did this happen? Part I of this Essay offers an account of the bureaucratic dynamics the CDAPC helped to create, and the role those dynamics played in the evolution of federal drug policy. By centralizing federal drug enforcement, the CDAPC precipitated a political economy in which multiple federal agencies within a single policy space competed for autonomy and resources. The few federal agencies focused largely on a single mission of drug enforcement and interdiction (namely, the Drug Enforcement Administration (DEA) and the Bureau of Customs and Border Protection (CPB))⁷ naturally grew to displace the multiple,

² Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. 91-513, 84 Stat. 1236 (1970) (codified as amended at 21 U.S.C. §§ 801-971 (2018)) [hereinafter the "CDAPC," the "Act" or the "Legislation"].

³ See Comprehensive Drug Abuse Prevention and Control Act, Title II.

⁴ See Comprehensive Drug Abuse Prevention and Control Act, Title II & III.

⁵ See Comprehensive Drug Abuse Prevention and Control Act, Title II & III.

⁶ Lauren M. Ouziel, *Ambition and Fruition in Federal Criminal Law: A Case Study*, 103 VA. L. REV. 1077, 1091–1096 (2017).

⁷ By reference to the DEA and CBP, I include their respective predecessors, the Bureau of Narcotics and Dangerous Drugs and the United States Customs Service and United States Border Patrol.

mixed-mission federal agencies with overlapping authority over treatment and prevention. Moreover, agency incentives within the supply-reduction ecosystem have rewarded outputs (seizures, arrests and convictions) over outcomes (actual reduction in drug use), effectively depressing federal drug enforcement to the lower rungs of the drug-trafficking trade.

What can be done to remedy this imbalance? Part II considers the path forward—whether, and how, the legislation’s intended directives for federal drug policy are still attainable. More broadly, it argues for greater attention to the bureaucratic afterlife of penal legislation, and to the under-utilized tools that can help manage and direct it.

II. THE CDAPC AND ITS AFTERLIFE

This Part lays out the key provisions of the CDAPC and their purposes, and then charts the ways in which federal drug control policy ultimately both aligned with and departed from them. Section A briefly recounts the legislation’s history and animating purposes. Section B tells the story of the CDAPC’s self-defeat: how the legislation’s organizational achievements ultimately eroded its strategic vision.

A. *The Purpose and Aims of the CDAPC*

1. Organizational Goals

The CDAPC was the product of a major agency reorganization. In 1968, two federal agencies tasked with drug regulation and enforcement—the Bureau of Narcotics (housed in the Treasury Department) and the Bureau of Drug Abuse Control (housed in the Department of Health, Education and Welfare)—were combined into the Bureau of Narcotics and Dangerous Drugs (BNDD), to be housed in the Justice Department.⁸ But while administration of the federal drug laws had been consolidated in a single agency, the laws themselves remained disjointed and sometimes internally inconsistent. The need for a coherent statutory scheme, and a clear delineation of agency authority, became apparent.⁹

The CDAPC accomplished both these organizational objectives. With respect to coherence, the legislation classified substances subject to the Act into five different categories according to their potential for abuse and dependency and the

⁸ See Harry L. Hogan, *Federal Controlled Substances Act Summary and Legislative History* at 23–24 (Congressional Research Service April 9, 1980) (describing Reorganization Plan No. 1 (1968)).

⁹ See *id.* In addition, the CDAPC shifted the constitutional basis of Congress’ regulatory authority over drugs, from its taxing power to its power to regulate interstate commerce. See *id.* at 24 (explaining Congress’ belief that the shift put the legislation on firmer constitutional footing); Comprehensive Drug Abuse Prevention and Control Act § 101.

extent of their accepted medical use,¹⁰ and then delineated procedures for lawful manufacture, distribution and importation/exportation, and penalties for unlawful distribution and importation/exportation according to drug category.¹¹ With respect to agency authority, the legislation vested in the Attorney General authority to regulate and control the lawful manufacture and distribution of drugs;¹² to enforce the unlawful distribution of drugs;¹³ and, in consultation with the Secretary of Health Education and Welfare, to classify and reclassify drugs according to the abuse/dependency/medical use criteria set forth in the statute.¹⁴

2. Strategic Goals

The CDAPC sought not only to reorganize federal drug control, but also to shift its substantive focus—placing greater emphasis on demand-reduction through expenditures on treatment and prevention, while focusing criminal enforcement on higher-level traffickers and recidivists.

The Act's first Title was dedicated exclusively to demand-reduction. It nearly tripled expenditures on treatment and prevention programs, from \$105 million to \$294 million over the following three years,¹⁵ which included new expenditures on drug prevention educational programs and grants to public and private nonprofits for rehabilitation and treatment programs.¹⁶ It also expanded research of drug use, abuse and addiction and provided for the Secretary of Health, Education and Welfare to research and periodically report to Congress on best practices with respect to the medical treatment of drug addiction.¹⁷

A comparison between the Act's demand-reduction and supply-reduction appropriations is telling. The Act appropriated a mere \$6 million to pure supply-reduction, allocated for additional BNDD agents.¹⁸ The remainder of the Act's appropriations to the Department of Justice, \$220 million over three years, were to

¹⁰ Comprehensive Drug Abuse Prevention and Control Act § 202(b)(1)-(5).

¹¹ *Id.* §§ 301–309. (setting out procedures for lawful distribution); 401–411 (setting out penalties for unlawful distribution); 1000–1016 (setting out procedures for lawful importation/exportation, and penalties for unlawful importation/exportation).

¹² *Id.* §§ 301–309.

¹³ *Id.* §§ 401–411.

¹⁴ *Id.* §§ 201–202.

¹⁵ *Id.* § 1(b)(1) (providing for \$180 million in direct expenditures), § 1(c) (providing for \$29 million in educational funding on drug abuse prevention) and § 1(d) (providing for \$85 million in grant funding).

¹⁶ *Id.* § 1(c).

¹⁷ *Id.* § 4.

¹⁸ *Id.* § 103.

be used towards carrying out *all* of the DOJ's functions under the Act, including its new regulatory authority over the lawful manufacture, distribution, importation and exportation of drugs.¹⁹ The Act's effect on federal expenditures was marked: In fiscal year 1970 (the last fiscal year before the Act took effect), the federal government had expended \$43 million on enforcement and \$59 million on treatment, rehabilitation, education, prevention and training.²⁰ In fiscal year 1971 (the first full fiscal year following CDAPC's enactment), the government expended just under \$66 million on enforcement, and \$147 million on treatment, rehabilitation, education, prevention and training.²¹ The 91st Congress had effectively increased the expenditure differential four-fold in favor of demand reduction.

In addition to the Act's investments in demand-reduction initiatives, it also articulated a new strategy for supply-reduction, geared towards more discriminate enforcement and proportionate punishment. The Act accomplished this through a series of changes to existing offenses and penalties that collectively enhanced penalties for certain leaders of drug-trafficking organizations, lowered penalties for users, and gave judges greater discretion in sentencing lower-level traffickers. Among the key changes were:

- The creation of a new offense category, "continuing criminal enterprise" ("CCE") which proscribed a mandatory minimum term of ten years up to a maximum of life imprisonment for leaders of drug-trafficking organizations;²²
- The creation of a new penalty category, "dangerous drug offender," which enlarged the statutory maximum for certain recidivist traffickers;²³
- The elimination of all mandatory minimum penalties (with the exception of those applicable to the offense of engaging in a CCE);²⁴

¹⁹ By way of reference, BNDD expenditures from 1970 to 1972 totaled approximately \$138 million—about two thirds of the \$220 million DOJ appropriated under the Act. See Peter B. Goldberg & James V. DeLong, *Federal Expenditures on Drug-Abuse Control*, in *DEALING WITH DRUG ABUSE: A REPORT TO THE FORD FOUNDATION* 302, Table 5-1 (Patricia M. Wald and Peter Barton Hutt, Eds., 1972).

²⁰ See *id.* at 303–04, Table 5-2.

²¹ *Id.*

²² Comprehensive Drug Abuse Prevention and Control Act § 408. To be subject to the penalty enhancement, the conviction for a trafficking felony had to be part of a continuing series of trafficking offenses criminalized by the Act, conducted by five or more persons, with respect to whom the defendant served as an organizer, supervisor or some other management position, and from which the defendant derived substantial income or resources. See *id.* § 408 (b).

²³ *Id.* § 409.

²⁴ *Id.* §§ 401–411. For a comparison with prior penalties, see Hogan, *supra* note 9, at 31–33.

- A reduction of all first-time simple possession offenses to the level of misdemeanor;²⁵
- For first-time offenders convicted of illegal possession, a deferral of the judgment of conviction in favor of a one-year probationary period, the successful completion of which would result in dismissal of the charge and, for those under 21, possible expungement of the record of arrest, charge and conviction.²⁶

These changes were significant. In the decades preceding the Act, federal drug penalties had grown progressively harsher.²⁷ The Act's marked break with past laws reflected Congress' distinct desire to change federal drug enforcement strategy—from a broad-brush, punitive approach towards a more focused and proportional one. The full weight of the federal penal sanction should be reserved for higher-level traffickers and recidivists, while greater penal flexibility would help steer lower-level traffickers and users away from the illegal drug trade.

B. *The CDAPC's Outcomes*

In the half-century since the CDAPC's enactment, the Act's strategic goals have largely gone unrealized. Beginning in 1978 until at least 2018, demand-reduction expenditures have trailed supply-reduction expenditures, often by a 2-to-1 margin.²⁸ And federal drug enforcement has resulted in the apprehension and

²⁵ Comprehensive Drug Abuse Prevention and Control Act § 404(a).

²⁶ *Id.* § 404(b)(1).

²⁷ See Hogan, *supra* n. 9, at 31–32; Rufus King, *The American System: Legal Sanctions to Repress Drug Abuse*, in 11 SAGE CRIM. JUST. SYS. ANN., DRUGS AND THE CRIMINAL JUSTICE SYS. (James A. Inciardi and Carl D. Chambers, eds. 1974).

²⁸ For a graphic overview of relative supply and demand reduction expenditures from 1970–2015, see The Federal Drug Control Budget, Drug Policy Alliance (Feb. 2015), https://www.drugpolicy.org/sites/default/files/DPA_Fact_sheet_Drug_War_Budget_Feb2015.pdf. For data based on White House budget summaries, see OVERSIGHT ON FEDERAL DRUG STRATEGY—1979, REPORT OF THE SELECT COMMITTEE ON NARCOTICS ABUSE AND CONTROL (1980) at 53 (showing drug control budgetary allocation by function from 1973 to 1979); NAT'L DRUG CONTROL STRATEGY, BUDGET SUMMARY (Feb. 4, 1991) at 2, 216–218 (covering expenditures from 1981 to 1991); DEPARTMENT OF JUSTICE DRUG DEMAND REDUCTION ACTIVITIES, OFF. OF THE INSPECTOR GEN. (Feb. 2003), at 11 (covering expenditures from 1987 to 2001); NAT'L DRUG CONTROL STRATEGY, FY 2009 BUDGET SUMMARY (Feb. 2008) at 13, Table 3 (covering expenditures from 2002 to 2009) NAT'L DRUG CONTROL STRATEGY, FY 2016 BUDGET SUMMARY (Nov. 2015) at 24, Table 3 (covering expenditures from 2007 to 2016); NAT'L DRUG CONTROL BUDGET, FY 2020 HIGHLIGHTS (Mar. 2019) at 14, Table 8 (covering expenditures from 2011 to 2019). Collectively, these budgetary summaries show that it was only in 2014 that spending on demand-reduction began to increase relative to spending on supply-reduction. See also STATEMENT OF DIANA C. MAURER, GOV'T ACCOUNTING OFF., BEFORE SENATE HOMELAND SECURITY COMMITTEE (May 17, 2016) at 14 Fig. 2 (showing same in graphic format). 2018 was the first year since 1977 that spending on supply and demand reduction equalized, and 2019 was the first year that spending on demand reduction outpaced that of supply reduction, likely a

conviction of mostly relatively lower-level, first-time participants in the drug trafficking trade.²⁹ At the same time, the Act's organizational aims have succeeded. In the years since the Act, federal drug control has steadily become more centralized. For decades, the White House's Office of National Drug Control Policy has directed federal drug control strategy, allocating resources and responsibilities among the many federal executive branch agencies that play some role in drug control. Moreover, an ever-shrinking group of those agencies has taken on the bulk of drug control efforts.

These mixed outcomes—failure on the one hand and success on the other—are neither inconsistent nor independent. To the contrary, the Act's strategic failure is, in part, a *result* of its organizational success. This Part shows why. It examines the institutional incentives and pressures within and across federal executive branch agencies tasked with implementing federal drug policy. And it shows how those dynamics have, collectively and over time, steered federal drug policy towards supply-reduction at the expense of demand-reduction; and towards harsher and less discriminate enforcement in lieu of the more tailored, proportionate aspirations embodied in the CDAPC.

Section 1 tells the story of the Act's organizational successes: how federal drug control centralized and, over time, became increasingly managed and implemented by just two federal agencies. Section 2 tells the story of its strategic failures: how, in the hands of those agencies, federal drug control emphasized supply reduction over demand reduction, and ultimately steered enforcement to the lower levels of the drug trafficking trade.

1. The Consolidation of Federal Drug Control

The CDAPC was not only a product of agency reorganization,³⁰ it was also a precipitant of it. Within three years of the CDAPC's enactment, a major agency reorganization consolidated power over the bulk of supply-reduction activities within the Justice Department. Reorganization Plan Number 2 of 1973³¹ replaced the BNDD with the newly-named Drug Enforcement Agency (DEA), and vested in it nearly exclusive control over domestic enforcement of the federal drug control laws. The Plan transferred nearly all of the Treasury Department's powers over drug enforcement (with the exception of border interdictions) to the Department of

consequence of a 2018 law, the Support for Patients and Communities Act, Pub. L. 115–271, which channeled significant investments in treatment and prevention of opioid abuse. (White House budget data for 2017 and 2018, it should be noted, did not comport with statutory certification requirements. See GOV'T ACCOUNTING OFF., THE OFF. OF NAT'L DRUG CONTROL POLICY SHOULD DEVELOP KEY PLANNING ELEMENTS TO MEET STATUTORY REQUIREMENTS 8–14 (Dec. 2019).).

²⁹ See Ouziel, *supra* note 6, at 1091–1096 (amassing evidence for this claim).

³⁰ See Hogan *supra* note 8, and accompanying text.

³¹ Law Enforcement in Illicit Drug Activities, 38 F.R. 15932, 87 Stat. 1091 (1973).

Justice; granted the DOJ (by way of the DEA) authority to coordinate all federal drug law enforcement functions; and vested DEA leadership with the authority granted by virtue of Presidential appointment and Senate Confirmation.

Over the next several decades, Congress and the Executive Branch continued to centralize federal drug control. In 1984, Congress established within the executive branch a National Drug Enforcement Policy Board chaired by the Attorney General, tasked with developing, implementing and enforcing federal drug control policy.³² Congress then replaced it in 1988 with the Office of National Drug Control Policy (ONDCP), tasked with setting a national drug-control strategy and coordinating, overseeing, and certifying the budgets and activities of executive branch agencies to further that strategy.³³

But the story of centralization is more than a story of federal agency creation and reorganization. It is more fundamentally a story of agency self-advancement. As the public administration literature teaches, government bureaucracies advance themselves through successful accomplishment along three measures. The first is *mission*—the government agency’s ability to achieve agreement on its primary existential purpose, and to define and then perform its purpose-critical tasks.³⁴ The second is *external support* for the agency, both political and financial.³⁵ And the third is *organizational autonomy*, often defined as the freedom from extra-agency constraints.³⁶ These three measures collectively create a set of incentives and pressures on agencies within a given policy space that can end up redefining national policy. This is, to a degree, what has happened with federal drug control.

Federal drug control has always been an extremely crowded policy space: over fifty executive branch departments and agencies have some role in it.³⁷ Each has a different mission; some will align more closely with the national drug control strategy, others less so. And because an agency’s interests lie in keeping on the proverbial “mission-critical path,” agencies whose core mission falls outside drug

³² National Narcotics Act of 1984, Pub. L. No. 98–473, Chap. XIII (1984).

³³ See Anti-Drug Abuse Act of 1988, Pub. L. No. 100–690 (1988); see also GOV’T ACCOUNTING OFF., GAO/GGD-90-104, DEVELOPING A FEDERAL DRUG BUDGET: IMPLEMENTING THE ANTI-DRUG ABUSE ACT OF 1988 2–3 (1990) (describing the tasks of ONDCP).

³⁴ See JAMES Q. WILSON, BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT 25–26 (1989).

³⁵ See *id.* at 48–49 (describing the need of government agencies “to acquire and maintain external support” as “so great as to divert all but the ablest and most energetic executives from careful task definition”).

³⁶ See PATRICIA RACHAL, FEDERAL NARCOTICS ENFORCEMENT: REORGANIZATION AND REFORM 40 (1982).

³⁷ This was true in the earliest years that ONDCP first kept track of the departments and agencies, see OFF. OF NAT’L DRUG CONTROL POL’Y, NAT’L DRUG CONTROL STRATEGY, BUDGET SUMMARY 8–9 (1991) (hereinafter 1991 DRUG BUDGET), and remains true today. See OFF. OF NAT’L DRUG CONTROL POL’Y, NAT’L DRUG CONTROL BUDGET 12–13, Table 7 (March 2019).

control are incentivized to de-emphasize drug control activities, in turn creating space for those agencies whose core mission more clearly encompasses them.³⁸ In a zero-sum budgeting process, moreover—in which each agency must maneuver within a finite appropriations amount—agencies will seek to maximize resources in core mission areas and minimize expenditures on fringe pursuits. And, by demonstrating success in its pursuits, an agency can both carve out greater autonomy and ensure continued support. This set of dynamics is at the heart of the movement of non-enforcement agencies away from the drug control space, and enforcement agencies towards it.

Consider the example of supply reduction in source countries, long part of federal drug control strategy.³⁹ Source country initiatives—crop eradication, agricultural assistance for non-illicit crops and drug-oriented diplomacy have received far less attention and resources than criminal enforcement, notwithstanding their supply-reduction potential.⁴⁰ Mission in part explains this disconnect. While the Justice Department (through the DEA), the Defense Department (DOD) and the State Department (DOS) each have authority in these areas, none would claim them within their core mission. The DEA’s authority over crop eradication falls outside its core law enforcement mission,⁴¹ while drug-oriented activities are not among the top priorities of DOD and DOS.⁴² This dynamic was perfectly captured in a Government Accounting Office audit of the drug budgeting process, which revealed a dispute between ONDCP and DOD over additional budgetary allocations for supply-reduction initiatives in Mexico and the Andes—with ONDCP demanding that DOD increase its budgetary request for those initiatives and complaining that

³⁸ See WILSON, *supra* note 34, at 101 (noting that a typical government agency “will resist taking on new tasks that seem incompatible with its dominant culture”).

³⁹ See TONY PAYAN, *COPS, SOLDIERS, AND DIPLOMATS: EXPLAINING AGENCY BEHAVIOR IN THE WAR ON DRUGS* 74–80 (2006). See also, e.g., NAT’L DRUG CONTROL STRATEGY (1989) at 12 (“Supply reduction . . . involves overseas crop eradication and associated foreign policy initiatives; interdiction of foreign-manufactured drugs at our national borders; and domestic law enforcement.”)

⁴⁰ *Id.*

⁴¹ The DEA defines its mission as to enforce the controlled substances laws and regulations of the United States and bring to the criminal and civil justice system of the United States, or any other competent jurisdiction, those organizations and principal members of organizations, involved in the growing, manufacture, or distribution of controlled substances appearing in or destined for illicit traffic in the United States; and to recommend and support non-enforcement programs aimed at reducing the availability of illicit controlled substances on the domestic and international markets.

Drug Enforcement Agency, DEA Mission Statement, <https://www.dea.gov/about/mission.shtml>. Notably, the secondary, non-enforcement aspect of the DEA’s mission has been overshadowed by the primary enforcement aspect. See *infra* note 60 and accompanying text.

⁴² See PAYAN, *supra* note 39 (describing the disinterest of the DEA, State and Defense Departments in these source country supply reduction initiatives as all falling outside the agencies’ core mission and priorities).

DOD's drug control activities were "consistently underfunded," and DOD countering that it did not want any additional money allocated for those activities, or drug control reduction generally.⁴³ More money out of DOD's budget allocated for drug control meant less money allocated to DOD priorities.⁴⁴

The same dynamic has occurred with respect to demand-reduction strategies. The agencies primarily responsible for demand-reduction efforts—the Department of Health and Human Services (HHS) and the Department of Education (DOE)—have missions distant from drug control.⁴⁵ The consistent funding disparities between supply and demand reduction can be attributed in part to the priorities of these agencies, which make decisions about drug control expenditures in the context of budgetary tradeoffs.⁴⁶ One former White House budgeting examiner for ONDCP reported that during the last three years of the Bush Administration, HHS opposed ONDCP's request for increased drug treatment funding.⁴⁷ The GAO reported on a similar dynamic in its audit of the drug budgeting process, describing a back-and-forth between HHS and ONDCP in which HHS tried to reduce funding for drug treatment while ONDCP sought to enlarge it.⁴⁸ Such budgetary pushbacks, moreover, are difficult to manage away. Even when ONDCP tries, whether by way of aggressive negotiation (as was done in response to HHS) or budget decertification (as was done in response to DOD's pushback on funding for Latin American drug control initiatives), agencies find ways to redirect drug control-allocated funds towards their own priorities. The DOD, for example, has on occasion sought to pay for non-drug control activities with drug control-allocated moneys.⁴⁹ Likewise, the Alcohol, Drug Abuse and Mental Health Administration (a now-defunct part of

⁴³ See U.S. GEN. ACCOUNTING OFF., GAO-GGD-99-80, DRUG CONTROL: ONDCP EFFORTS TO MANAGE THE DRUG CONTROL BUDGET 15–18 (1999) [hereinafter 1999 GAO REPORT].

⁴⁴ See Patrick Murphy, *Keeping Score: The Frailties of the Drug Control Budget* (RAND Drug Policy Research Center, Jan. 1984) https://www.rand.org/pubs/issue_papers/IP138.html at 5 ("The ONDCP's review of each agency's drug control efforts takes place in the context of the larger budget process. Agencies must weigh increased funding for antidrug efforts that may come at the expense of additional resources for other programs. As a result, ONDCP can become an advocate for funding increases that the potential recipient opposes.")

⁴⁵ The mission of HHS is to "enhance the health and well-being of all Americans, by providing for effective health and human services and by fostering sound, sustained advances in the sciences underlying medicine, public health, and social services." See *Mission Statement*, U.S. Dep't of Human Health Serv., <https://www.hhs.gov/about/strategic-plan/introduction/index.html>. The mission of DOE, to "promote student achievement and preparation for global competitiveness by fostering educational excellence and ensuring equal access," is even further removed from drug control. See *Mission*, U.S. Dep't of Educ. <https://www2.ed.gov/about/overview/mission/mission.html>.

⁴⁶ See Murphy, *supra* note 44.

⁴⁷ *Id.* at 5.

⁴⁸ See 1999 GAO REPORT, *supra* note 43, at 13–15.

⁴⁹ See Murphy, *supra* note 44, at 3.

HHS's predecessor agency) used drug-control treatment funds to pay for alcohol abuse treatment.⁵⁰

Mission, moreover, is only one piece of the incentive story. The pressure of performance measurement is another. The facility with which an agency can demonstrate success in implementing budgetary directives—a key ingredient of both support and autonomy—impacts the agency's desire for those directed dollars. Because measuring the effectiveness of drug control efforts is notoriously difficult,⁵¹ budgetary overseers use measurement proxies.⁵² For supply reduction, the key proxies are criminal justice *outputs*: arrests and seizures.⁵³ While some demand-reduction proxies are *outputs* (for example, the percentage of completed drug treatment plans, or the percentage of health care centers offering substance abuse services), the bulk are *outcomes*: the percentage of persons using illicit drugs or prescription drugs non-medically; the average age of illicit drug use initiation; young people's reported perceptions of the risks of drug use.⁵⁴ An agency has far less control over outcomes than outputs. Moreover, even the output measures for demand reduction are relatively less subject to agency control, because they involve outputs of external actors (health care centers and patients).

These disparities in performance measurement may well account for the seemingly greater effectiveness of supply-reduction efforts relative to demand

⁵⁰ *Id.*

⁵¹ Drug use and trafficking is a covert enterprise. Resource limitations, reliance on users' self-reporting, and traffickers' efforts to hide reliable supply measures (such as crop cultivation) impede accurate estimates. See OFF. OF NAT'L DRUG CONTROL POL'Y, NAT'L DRUG CONTROL STRATEGY PERFORMANCE REPORTING SYS. REP. 9 (2015) (describing "the inadequacy of data on the outcomes of drug control activities" as "[o]ne of the greatest impediments to acquiring a clear understanding of drug trends"); OFF. OF NAT'L DRUG CONTROL POL'Y, DRUG AVAILABILITY ESTIMATES IN THE UNITED STATES 2 (2012).

⁵² See OFF. OF NAT'L DRUG CONTROL POL'Y, NAT'L DRUG CONTROL STRATEGY PERFORMANCE REPORTING SYS. REP. 5 (2012) (hereafter PRS 2012 REPORT) ("The lack of nationally representative data has limited ONDCP's ability to assess demand and supply efforts . . . The [Performance Reporting System] development process resulted in the selection of measures that were supported by the best data available. In cases where optimal measures were not useable because of the lack of data, proxy measures were used.").

⁵³ See 1999 GAO REPORT, *supra* note 43, at 72 ("Over the years, DEA has used arrest and seizure data (drugs and assets) along with examples of significant enforcement accomplishments, such as descriptions of successful operations, to demonstrate its effectiveness in carrying out its enforcement programs and initiatives."); see also, *e.g.*, PRS 2012 REPORT, *supra* note 52, at 20–21 (identifying and explaining use of proxies chosen for supply-reduction measurement). The proxy used, dismantlement and disruption of target drug trafficking organizations, is in essence an arrest and seizure proxy. See DEP'T OF JUSTICE, OFF. OF INSPECTOR GEN., THE DRUG ENFORCEMENT ADMIN.'S IMPLEMENTATION OF THE GOV'T PERFORMANCE AND RESULTS ACT 13–14 (2003) (discussing the use of arrests and seizures as proxies for disruption and dismantlement). For an extended discussion of the limited diagnosticity of these proxies and their devaluation over time, see Ouziel, *supra* note 6, at 1111–16.

⁵⁴ PRS 2012 REPORT, *supra* note 52, at 12–18.

reduction.⁵⁵ And for an agency, that matters: the ability to demonstrate successful achievement of proxy measures dictates the level of support they will receive and the degree of autonomy they will have. Agencies are therefore incentivized towards activities over which they have greater control in “meeting the measure.”

Collectively, these incentives and pressures on executive branch agencies—to stick to their core mission, maximize support for that mission, and demonstrate success at achieving it—have tended to pull agencies responsible for supply-reduction towards the drug control space while pushing agencies responsible for demand-reduction away from it. The DEA, whose primary mission is reducing drug supply through criminal enforcement of federal drug laws, is incentivized to increase those activities. Likewise, the Bureau of Customs and Border Patrol (CPB) is incentivized to increase the money allocated for border interdictions, which fall squarely within its primary missions of protecting America’s borders “from dangerous people and materials.”⁵⁶ Unlike agencies such as DOD and HHS, which have demonstrated a lack of interest in expanding their role in the drug war, DEA and CPB have embraced it—to the point that they have repeatedly sparred with each other over jurisdiction in drug investigations.⁵⁷ It is perhaps not surprising, then, that the DEA has seen its appropriations increase nearly 5000% (non-inflation-adjusted) from its founding;⁵⁸ that by the end of the Reagan Administration, DOJ amassed 40% of the overall national drug control budget; and that, by the end of the Obama administration, DEA and CBP alone accounted for nearly a fifth of a total federal drug budget distributed across fifty different agencies—and their parent Departments, DOJ and DHS, collectively amassed nearly half of that budget, vastly outpacing the eleven other executive branch Departments in the drug control space.⁵⁹

2. From Consolidation to Strategic Failure

As federal drug policy increasingly consolidated in two primary agencies, it increasingly focused on criminal enforcement. And criminal enforcement, in turn,

⁵⁵ See, e.g., NAT’L DRUG CONTROL STRATEGY, PERFORMANCE REPORTING SYS. REP. 2015 5–7 (showing demand-reduction target measures not met) and 8 (showing most supply-reduction target measures met).

⁵⁶ See *About CBP*, U.S. CUSTOMS & BORDER PROT., (Sept. 18, 2019), <https://www.cbp.gov/about> (“CBP exists . . . [t]o safeguard America’s borders thereby protecting the public from dangerous people and materials while enhancing the Nation’s global economic competitiveness by enabling legitimate trade and travel.”).

⁵⁷ See Ouziel, *supra* note 6, at 1109 (discussing the history of DEA/CPB sparring and its effect on drug investigations).

⁵⁸ See *Drug Enf’t Admin. Staffing and Budget*, DEA.GOV, <https://www.dea.gov/staffing-and-budget> (last visited May 2, 2020).

⁵⁹ See 1991 DRUG BUDGET, *supra* note 37; OFF. OF NAT’L DRUG CONTROL POL’Y, FY 2016 BUDGET AND PERFORMANCE SUMMARY (2015).

has skewed heavily towards the relatively lower rungs of the drug trafficking trade. How did these two features of modern federal drug policy, so at odds with its enabling statute, come to be?

The criminal enforcement focus is, in large part, a result of consolidation. This has happened in two ways. First, as discussed above, attention to mission, resources, and autonomy enlarged the drug control activities of the two agencies with the most to gain from them while minimizing the drug control activities of the rest. And the agencies with the most to gain were those whose drug control activities culminate in the criminal process—DOJ and DHS—while the agencies most responsible for treatment and prevention were less incentivized to carve out a larger drug control role. To the extent the enforcement-oriented agencies took responsibility for non-enforcement drug control activities, moreover, they were incentivized to minimize those activities in favor of their core law enforcement mission, diverting those resources for law enforcement tasks. These incentives have played out in the DOJ's over-reporting of its demand-reduction activities to budgeting masters at ONDCP, as well as in the DEA's reluctance to devote more than a token amount of resources to demand-reduction.⁶⁰

The other way in which consolidation has steered federal drug policy towards criminal enforcement is via the lawmaking process. Subsequent amendments to the CDAPC have undermined the Act's original strategic aims of focusing on demand-reduction and curtailing the scope and degree of penal sanction. Among other things, these amendments swelled law enforcement budgets;⁶¹ imposed harsh mandatory minimum penalties;⁶² tethered those penalties to drug weights, easily met through strategic charging of a trafficking conspiracy;⁶³ and gave prosecutors discretion to increase mandatory penalties for certain recidivist offenders, granting them enormous plea-bargaining leverage.⁶⁴ Throughout the amendment process, lawmakers remained wedded to the ideal of limited federal criminal enforcement, focused on the highest levels and most dangerous elements of the drug trafficking trade.⁶⁵ Nevertheless, the amendments, like much federal penal legislation, left ample room for less discriminate enforcement.

⁶⁰ These failings were revealed in a 2003 audit by the DOJ Inspector General. See DEP'T OF JUSTICE, OFF. OF THE INSPECTOR GEN., AUDIT REP.: DEPARTMENT OF JUSTICE DRUG DEMAND ACTIVITIES 13 (2003) (describing how DOJ over-represented its demand-reduction activities by \$173 million—more than half of its total demand-reduction budget of \$336 million—and how DEA allocated just .2% of its total funding to demand-reduction activities).

⁶¹ See Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570 (1986) Title I, Subtitles J & K; Title XIV; Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690 (1988), Titles I, VI.

⁶² Pub. L. No. 99-570 Title I, Subtitles A, F, G & I; Pub. L. No. 100-690, Title VI.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ See Ouziel, *supra* note 6, at 1081.

Throughout the decades of amendments to the Act, the DOJ was no bystander. To the contrary, it was an active participant—advising Congressional committees on, for instance, the ideal drug weights that should trigger mandatory minimum penalties; the need for greater resources in drug enforcement; the need for more potent tools to target recidivists.⁶⁶ The DOJ had, of course, advised Congress in the lead-up to the CDAPC, a role that surely helped DOJ consolidate its power over drug regulation.⁶⁷ But by the time of subsequent drug legislation, DOJ's role had changed: it was now the de facto lead agency in the drug war. As such, its opinions received enormous deference. And, consistent with bureaucratic pressures and incentives, the opinions DOJ offered advanced its own institutional interests: providing greater resources for criminal enforcement, in the form of money and penal tools.⁶⁸

To be sure, DOJ's self-interest was not the primary driver of the Act's turn away from demand-reduction towards harsh and indiscriminate criminal enforcement. Much of that direction, during the Reagan and Bush administrations, was a political response to (or perhaps leveraging of) public sentiment at the time.⁶⁹ Still, though, DOJ was the professionalized face of that political turn—the agency that could package the White House's crime control initiatives in an appealing assemblage of hard-earned experience and apolitical expertise.⁷⁰ That the White House's political goals aligned with the DOJ's institutional self-interest only increased the pressures on, and incentives for, the DOJ to guide Congress towards criminal enforcement.

⁶⁶ See, e.g., *Comprehensive Drug Penalty Act: Hearing on H.R. 3272, H.R. 3299, and H.R. 3725 Before the Subcomm. on Crime, the Comm. on the Judiciary House of Representatives*, 98th Cong. (1983); *Federal Drug Law Enforcement and Interdiction: Hearing Before the Select Comm. on Narcotics Abuse and Control*, 98th Cong. (1984).

⁶⁷ See, e.g., *Controlled Dangerous Substances, Narcotics and Drug Control Laws: Hearing Before the Comm. on Ways and Means*, 91st Cong. (1970).

⁶⁸ See LISA L. MILLER, *THE PERILS OF FEDERALISM: RACE, POVERTY AND THE POLITICS OF CRIME CONTROL* 71 (2008) (describing federal penal lawmaking as “a feedback process” that “has generated a kind of symbiotic environment in which the groups already at the table [referring to criminal justice agencies] can generate problem definitions and policy solutions in ways that reinforce their organizational missions.”). Miller found that criminal justice agencies had an outsized presence in the penal lawmaking process generally in the last decades of the 20th century (comprising 42% of witnesses at Congressional hearings on crime and justice from 1981–2002) and particularly in the arena of drug lawmaking, where they constituted more than half of hearing witnesses. See *id.* at Table 3.3, 71. For a broader discussion of criminal justice agencies' expanding presence in the penal lawmaking process in the post-war era, see *id.* at 62–75.

⁶⁹ See LISA L. MILLER, *THE MYTH OF MOB RULE: VIOLENT CRIME AND DEMOCRATIC POLITICS* (2016); MARIE GOTTSCHALK, *CAUGHT: THE PRISON STATE AND THE LOCKDOWN OF AMERICAN POLITICS* (2014).

⁷⁰ See Bernard Harcourt, *The Systems Fallacy: A Genealogy and Critique of Public Policy and Cost-Benefit Analysis*, 47 J. LEG. STUD. 419, 421, 428–30 (2018) (describing how political choices can be disguised within seemingly apolitical expertise, offering criminal justice policy as an example).

Finally, performance measurement has played a role not only in pushing criminal justice agencies towards the drug control space,⁷¹ but also in steering them towards precisely the lower-level traffickers that Congress, in the CDAPC and subsequent amendments, had sought to deemphasize. Elsewhere I have discussed the many complex dynamics behind this disconnect.⁷² For now, I wish simply to highlight the relationship between agency control over performance metrics and federal drug enforcement outcomes. The natural pull towards endeavors the successful performance of which an agency can control⁷³ in turn permits—and incentivizes—agency control over the measurement process. Criminal enforcement is a prime example of this: a law enforcement agency’s degree of control over arrest and seizure volume in turn incentivizes that agency to value, demand, and ultimately accumulate more arrests and seizures. And because the drug trafficking trade is pyramidal—with most traffickers working for a far smaller group of leaders—additional criminal justice outputs will naturally replicate the hierarchy of the trade itself: more at the bottom, fewer at the top.

III. THE PATH FORWARD

All of this, in turn, raises the question: what can be done? Here, I sketch out two alternative proposals. Both seek to shift the dynamics that have led to centralization of drug control within the Departments of Justice and Homeland Security. One would accomplish this through creation of a new drug control agency; the other, through smaller-scale reorganization and incentive-shifting.

The first proposal would revamp the entire agency structure of drug control. Rather than task existing agencies with implementing the various pieces of it—a structure that has consolidated drug control largely within the enforcement agencies incentivized to take it on—a single agency could instead be tasked with accomplishing both supply and demand reduction. This is, in effect, the purpose of the Office of National Drug Control Policy. But a White House office lacking cabinet-level authority has proven unequipped to coordinate executive branch agencies with varying degrees of interest in and inclination towards drug control activities. Rather than being relegated to oversight and management, ONDCP could become a Cabinet-level executive branch agency. Budgetary dollars for drug control currently allocated among different agencies could instead be appropriated directly to ONDCP. ONDCP’s mission would be to reduce drug abuse and its attendant harms through prevention and treatment, as well as the curtailing of drug supply.

With demand and supply reduction efforts thus consolidated under a single agency, there would be a more thoughtful allocation of resources between the two. ONDCP could decide how much money to allocate to its criminal investigators and

⁷¹ See *supra* nn. 52–55 and accompanying text.

⁷² See generally Ouziel, *supra* note 6.

⁷³ See *supra* nn. 52–55 and accompanying text.

prosecutors, its health researchers, clinicians, and other treatment professionals. It alone could award grants to state and local health centers, schools, and law enforcement institutions. Reorganization of drug control would, in this way, obviate the inter-agency dynamics that have skewed federal drug control policy towards criminal enforcement and away from treatment and prevention.

While such an approach is ambitious, there have been similarly ambitious agency reorganizations at times of compelling need. The creation of the Department of Homeland Security in the wake of 9/11 is a recent example. The current opioid crisis and the exponential rise in drug-related deaths over the past several decades⁷⁴ should spur a similarly robust federal organizational response.

A less ambitious alternative would combine smaller-scale reorganization with incentive-shifting to limit the footprint of enforcement agencies in the drug control space while expanding that of agencies involved in treatment and prevention. On the reorganization front, classification of drugs and regulation of medical-use drugs could be moved from DOJ to HHS (that is, from DEA to, for instance, the Food and Drug Administration). Criminal penalties are determined in part on a drug's classification and the weight involved; those determinants should not be influenced primarily by the agency that utilizes them towards enforcement aims.

On the incentive front, greater attention could be paid to performance measures and the perverse incentives they can create. If enforcement agencies need only meet output targets within their control, while agencies tasked with treatment and prevention activities must produce outcomes over which they have little control, the budgetary playing field is rigged—and it should hardly surprise that agencies at a disadvantage would prefer not to play on it.

Ideally, then, all drug control measurement proxies should rely on outcomes rather than outputs.⁷⁵ Currently used demand-reduction proxies are sensible.⁷⁶ For supply reduction, such proxies might include, for instance, the rate of drug-related violent crimes; or, for a given neighborhood or area, the number of public spaces without open-air drug markets. In its latest national drug control strategy, the ONDCP recently added as a strategic goal increasing the price per pure gram of cocaine, heroin, methamphetamine and fentanyl, under the reasoning that increased prices reflect diminishing drug supply.⁷⁷ This is a welcome shift to an outcome goal of supply reduction (though it remains accompanied by continued use of output

⁷⁴ See Laura Dwyer-Lindgren et. al., *Trends and Patterns of Geographic Variation in Mortality From Substance Use Disorders and Intentional Injuries Among US Counties, 1980–2014*, 319 JAMA 1013, 1013 (2018) (calculating 542,501 drug-related deaths between 1980 and 2014, and a 618% rise in drug-related deaths over that time).

⁷⁵ For a discussion of the benefits of outcome over output measures, see WILSON, *supra* n. 34, at 158–75.

⁷⁶ See NAT'L DRUG CONTROL STRATEGY, *supra* note 55 and accompanying text.

⁷⁷ OFF. OF NAT'L DRUG CONTROL POL'Y, NAT'L DRUG CONTROL STRATEGY: PERFORMANCE REPORTING SYS. 2020 23–25 (2020).

measures such as seizures and number of investigations).⁷⁸ But the proxies used to measure agency performance in reducing domestic drug supply remain the same under the Trump Administration that they were under the Obama Administration (and those before): arrests, investigations and seizures.⁷⁹

Finally, greater attention must be given to the role of agency mission in incentivizing an agency's attention to drug control endeavors. Where there is agency overlap in a particular area, the endeavor should be assigned exclusively to the agency for which there is the closest alignment with mission. The DEA, for instance, should not be tasked with demand-reduction activities when those activities more naturally fit within the core competencies of an agency such as HHS. Neither should DEA take on international efforts better suited to DOD or DOS. Those agencies, moreover, should be incentivized to take on international drug control efforts by, for instance, enabling access to additional funding for drug control activities outside the standard appropriations process. The use of such funding streams in the domestic enforcement context (the High Intensity Drug Trafficking Area and Organized Crime and Drug Enforcement Task Force funding programs) have proven successful levers in generating desired agency activity.⁸⁰ Similar programs could be used more broadly outside the criminal enforcement context.

IV. CONCLUSION

It is difficult to reconcile the last half-century of federal drug policy with its statutory origin. The CDAPC emphasized treatment and prevention over criminal enforcement, and it sought to tailor enforcement to the highest levels of the drug trade. Federal drug policy has in many ways unfolded in reverse—emphasizing criminal enforcement over treatment and prevention, and leveraging enforcement across the full breadth of the trafficking trade. On another level, though, the last half-century of federal drug policy reflects its founding statutory charter: federal drug control has increasingly centralized and consolidated.

⁷⁸ *Id.* at 22–23.

⁷⁹ See OFF. OF NAT'L DRUG CONTROL POL'Y, FY 2018 ACCOUNTING OF DRUG CONTROL FUNDS AND PERFORMANCE SUMMARY at Table I.

⁸⁰ HIDTA and OCDETF funds are administered by ONDCP and awarded as additional funding to qualifying enforcement agencies and investigations; both condition funding on, among other things, enforcement agencies' demonstrated commitment to certain drug enforcement activities. See Office of National Drug Control Reauthorization Act of 2006 (Pub. L. No. 109-469); 21 U.S.C. § 1706(d) (conditioning regional HIDTA designation on, in part, a region's law enforcement agencies having "committed resources to respond to the drug trafficking problem in the area, thereby indicating a determination to respond aggressively to the problem"); U.S. DEP'T OF JUSTICE, ORGANIZED CRIME DRUG ENF'T TASK FORCES, FY2020 INTERAGENCY CRIME AND DRUG ENFORCEMENT PRESIDENT'S BUDGET at 2 (describing how OCDETF funding is allocated to "efforts targeting the highest priority organized drug trafficking, money laundering, and transnational criminal organizations").

This Essay has offered one potential explanation for this seeming divergence. The CDAPC's coordination and centralization of federal drug control birthed a political economy that emphasized supply reduction over demand reduction, and that ultimately shifted federal criminal enforcement to the lower rungs of the drug trafficking trade. Changing that economy, then, will require greater attention to the bureaucratic dynamics that perpetuate it. It will require looking beyond federal drug legislation, to the institutions and actors that make federal drug policy on the ground—and the incentives and pressures that influence how they make it.