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Can the President Control the Department of Justice?

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Recommended Citation

Bruce A. Green, *Can the President Control the Department of Justice?*, 70 Ala. L. Rev. 1 (2018)
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Bruce A. Green & Rebecca Roiphe

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CAN THE PRESIDENT CONTROL THE DEPARTMENT OF JUSTICE?

Bruce A. Green & Rebecca Roiphe***

*As the investigation into President Trump's campaign ties to Russia grows increasingly intense, it is critical to understand how much control the President has over the Attorney General and the Department of Justice. Some critics claim that the President has absolute power to direct federal prosecutors and control their decisions. The President and his lawyers, joined by several scholars, take this claim one step further by arguing that the chief executive could not be guilty of obstruction of justice because his control over all prosecutorial decisions is absolute. This issue last arose during the Nixon Administration. The Department of Justice and the Special Prosecutor disagreed about whether the President, as head of the Executive Branch under Article II of the U.S. Constitution, could direct individual prosecutions if he so chose. The Supreme Court in *United States v. Nixon* left the issue unresolved and has never revisited it.*

This Article addresses the question of presidential power principally from a historical perspective. It argues that the Department of Justice is independent of the President, and its decisions in individual cases and investigations are largely immune from his interference or direction. This does not follow from any explicit constitutional or legislative mandate, but is based on an evolving understanding of prosecutorial independence and professional norms.

American democratic discourse has included the value of independent prosecutions from its inception, and scholars have debated how much this concept influenced the initial structure of American government. In the late eighteenth century, federal prosecutors enjoyed a significant degree of independence from the White House, both because of the diffuse local nature of federal prosecutions and the vague and overlapping lines of authority. As federal law grew in scope and complexity, there was an increased need to consolidate and rationalize the legal arm of the government. Ultimately, the Department of Justice assumed this function under the Executive Branch. In 1870, when it created the law department, Congress was not overly concerned that partisan politics would infiltrate and undermine the rule of law, because at the time, expertise, including professional norms for attorneys, was considered the ultimate protection against partisan corruption. In arguing that professional norms operated as an internal barrier between the Department of Justice and the remainder of the Executive Branch, this Article contributes to a growing debate about intra-branch checks and balances.

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We would like to thank the participants in the annual Legal Ethics Schmooze held at UCLA School of Law in July 2017. We would also like to thank Miriam Baer, Doni Gewirtzman, Peter Margulies, Ed Purcell, Jessica Roth, and Ellen Yaroshesky, who provided thoughtful suggestions and guidance on earlier drafts.

INTRODUCTION

As President Trump seeks to undermine the investigation into his campaign's ties to Russia, it is hard to ignore echoes of the Nixon Administration. When Trump fired FBI director James Comey, and again, after reports that he planned to fire Special Counsel Robert Mueller, journalists and critics compared the incidents to the "Saturday Night Massacre."¹ In 1973, President Nixon directed Attorney General Elliot Richardson and Deputy Attorney General William French Smith to fire Watergate Special Prosecutor Archibald Cox; Richardson and French Smith each in turn refused and resigned, leaving Solicitor General Robert F. Bork to follow the President's order.² Unlike Nixon, whose motive may have remained unspoken, President Trump admitted that he fired "nut job" Comey in order to slow the pace or even stall the investigation into his campaign's connection with Russia.³

In an interview with the New York Times, President Trump claimed, “I have absolute right to do what I want to do with the Justice Department,” and warned that he was only permitting the investigation to continue “for [the] purposes of hopefully thinking I’m going to be treated fairly.”⁴ Some insist that by attempting to derail a federal investigation in order to avoid criminal and political repercussions, Trump was guilty of obstruction of justice.⁵ But one of Trump’s supporters, former Speaker of the House Newt

1. David A. Graham, *The Saturday Night Massacre That Wasn't*, THE ATLANTIC (Jan. 25, 2018), <https://www.theatlantic.com/politics/archive/2018/01/the-saturday-night-massacre-that-wasnt/551543/>; Joe Sterling, *Comey Firing Draws Comparisons to Nixon's 'Saturday Night Massacre,'* CNN (May 10, 2017, 1:12 PM), <https://www.cnn.com/2017/05/09/politics/comey-saturday-night-massacre/index.html>.

2. See Graham, *supra* note 1; Sterling, *supra* note 1.

3. See Matt Apuzzo et al., *Trump Told Russians That Firing ‘Nut Job’ Comey Eased Pressure from Russia Investigation*, N.Y. TIMES (May 19, 2017), <https://www.nytimes.com/2017/05/19/us/politics/trump-russia-comey.html>.

4. *Excerpts from Trump's Interview with the Times*, N.Y. TIMES (Dec. 28, 2017), <https://www.nytimes.com/2017/12/28/us/politics/trump-interview-excerpts.html>. His lawyers have made a similar claim. See Letter of Marc E. Kasowitz, Counsel to the President, to Robert S. Mueller, Special Counsel (June 23, 2017), as reprinted and discussed in *The Trump Lawyers' Confidential Memo to Mueller Explained*, N.Y. TIMES (June 2, 2018), <https://www.nytimes.com/interactive/2018/06/02/us/politics/trump-legal-documents.html> (asserting that the Constitution gives the President “exclusive authority over the ultimate conduct and disposition of all criminal investigations and over those executive branch officials responsible for conducting those investigations”). The President’s spokesman and lawyer, Rudolph Giuliani, has echoed this theory, arguing that the President could shoot James Comey without being indicted. John Wagner, *Giuliani: Under Constitution Trump Could Shoot Comey and Not Be Indicted*, WASH. POST (June 4, 2018), https://www.washingtonpost.com/politics/giuliani-under-constitution-trump-could-shoot-comey-and-not-be-indicted/2018/06/04/8107ed96-67e2-11e8-bea7-c8eb28bc52b1_story.html?noredirect=on&utm_term=.26f6519875b4.

5. See *Can the President Obstruct Justice*, POLITICO MAG. (Dec. 4, 2017), <https://www.politico.com/magazine/story/2017/12/04/can-the-president-obstruct-justice-216008>; Laurence H. Tribe, *Opinion, Trump Must Be Impeached. Here's Why*, WASH. POST (May 13, 2017), https://www.washingtonpost.com/opinions/trump-must-be-impeached-heres-why/2017/05/13/82ce2ea4-4374d-11e7-b4ee-434bd6d506b37_story.html?utm_term=.0bdc9638175e.

Gingrich, argued that “the president of the United States cannot obstruct justice,” because as chief executive officer the President has full power to direct federal prosecutions and fire anyone who does not comply.⁶ The exchange reflects a fundamental disagreement about the structure of the Executive Branch.

This Article identifies and analyzes the flaws in the argument that the President controls federal prosecutors. Prosecutorial independence has become a cornerstone of American democracy, built into the way the country is governed. Although no constitutional provision or statute explicitly establishes prosecutorial independence, neither does any law expressly grant the President absolute power over federal prosecutions. It is Congress’s role to determine the extent of the President’s criminal-justice power, and Congress has acquiesced in the norm and practice of respecting prosecutors’ independence. Prosecutors’ professional obligation of federal independence, or “aloofness” as it is called in England, limits the President’s ability to control individual criminal investigations or prosecutorial decisions.⁷ The President retains the power to fire the Attorney General, but government lawyers must resist or resign if the President directs them to

6. Sumner Park, *Gingrich: A President ‘Cannot Obstruct Justice,’* THE HILL (June 16, 2017, 1:15 PM), <http://thehill.com/policy/national-security/338147-gingrich-a-president-cannot-obstruct-justice>. Alan Dershowitz made similar claims immediately after Trump fired Comey. *See, e.g.,* Alan Dershowitz, Opinion, *History, Precedent, and James Comey’s Opening Statement Show that Trump Did Not Obstruct Justice*, WASH. EXAMINER (June 8, 2017), <http://www.washingtonexaminer.com/alan-dershowitz-history-precedent-and-james-comeys-opening-statement-show-that-trump-did-not-obstruct-justice/article/2625318> (comparing Trump’s firing of Comey to President Bush’s pardon of Caspar Weinberger). Professor John Yoo, who is best known for authoring the so-called Torture Memos, has agreed with Dershowitz, arguing that Trump could be impeached for his acts but could not be indicted for obstruction of justice because of his position as chief executive. John Yoo & Saikrishna Prakash, Opinion, *Don’t Prosecute Trump. Impeach Him*, N.Y. TIMES (Dec. 4, 2017), <https://www.nytimes.com/2017/12/04/opinion/trump-impeach-constitution.html>.

7. For a discussion of the doctrine in England, see JOHN LL. J. EDWARDS, *THE ATTORNEY GENERAL, POLITICS, AND THE PUBLIC INTEREST* 67–74 (Wm. W. Gaunt & Sons, Inc. 1992) (1984). Even those who argue that the Attorney General in England does have a political role insist that political considerations ought not to affect him when he is supposed to act in an impartial or quasi-judicial manner. *Id.* at 68–69 (quoting Sir Elwyn Jones). For example, in 1924, after the Attorney General dropped charges against a Communist newspaper editor at Labor Party officials’ direction, he was censured over this incident, ultimately leading to the resignation of the entire Administration. Ben Heraghty, *Defender of the Faith? The Role of the Attorney-General in Defending the High Court*, 28 MONASH U. L. REV. 206, 214–15 (2002). In France, which has an inquisitorial model of prosecution, a recent law insulates prosecutors from interference by the ministry in individual cases. Loi 2013-669 du 25 juillet 2013, relative aux attributions du garde des sceaux et des magistrats du ministère public en matière de politique pénale et de mise en œuvre de l’action publique [Law 2013-669 of July 25, 2013 relative to the attributions of the keeper of the seals and the magistrates of the public ministry in matters of penal policy and implementation of public action] JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], July 26, 2014, p. 12441. For a discussion of the increasingly ambiguous role of the French prosecutor, see Jacqueline Hodgson and Laurène Soubise, *Prosecution in France*, in OXFORD HANDBOOKS ONLINE (Oxford U. Press 2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2980309 (follow “Open PDF in Brower”).

act contrary to the sound exercise of prosecutorial discretion⁸ because in criminal prosecutions—as in other contexts—the exercise of professional discretion is built into the structure of American government.⁹

As the American administrative state grew beginning in the late-nineteenth century, its architects took for granted that prosecutorial independence would serve as an important check on partisan politics. The Executive is not a monolith, but rather a myriad of agencies that enjoy degrees of independence from the President. The diffuse nature of the American Executive is not an accident. As the federal government grew, expert agencies served to limit presidential control. Prosecutors' professional norms, experience, and proximity to the facts of a case comprise one such check. These norms are vital to protect the democratic values of equality and fairness in the administration of the criminal law from the encroachment of partisan politics.¹⁰

By analyzing prosecutorial independence, this Article contributes to a scholarly conversation about the power of the Executive.¹¹ It adds to the voices of a growing number of scholars who see the Executive not as unitary, but as a complex whole, whose parts serve as checks on one

8. For an argument that government lawyers have a limited role in resisting presidential power, see W. Bradley Wendel, *Government Lawyers in the Trump Administration* (Jan. 31, 2017) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2906422 (follow "Open PDF in Browser").

9. For a defense of discretion, see H.L.A. Hart, *Discretion*, 127 HARV. L. REV. 652 (2013) (previously unpublished essay based on a talk given to the Legal Philosophy Discussion Group in November 1956). Many scholars have pointed to the dangers of prosecutorial discretion. See, e.g., Albert W. Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50 (1968) (discussing the dangers of prosecutorial discretion in plea bargaining); Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13, 20 (1998) (arguing that prosecutorial discretion leads to racial injustice); Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?*, 44 VAND. L. REV. 45, 47–52 (1991) (arguing that the duty to "do justice" is inadequate). Others recognize that discretion has a potentially powerful possibility to correct for errors in the criminal justice system. See, e.g., Bruce A. Green & Rebecca Roiphe, *Rethinking Prosecutors' Conflicts of Interest*, 58 B.C. L. REV. 463 (2017).

10. Politics has multiple meanings. For the purposes of this Article, when we refer to partisan politics, we are referring to the personal drive for power or the efforts of a particular party to manipulate the system to gain or maintain control of the government. Politics can also, obviously, be a good thing, as it is the foundation of a democratic state. Democratic accountability rests on a healthy political debate in which certain individuals and parties embrace particular ideological and policy objectives. The difficult balance in the relationship between the White House and the Department of Justice involves ensuring democratic accountability in the administration of criminal law while preventing partisan politics from distorting and undermining criminal justice in any case. For a discussion of the roles informal norms play in American democracy, see Daphna Renan, *Presidential Norms and Article II*, 131 HARV. L. REV. 2187 (2018).

11. Compare STEPHEN G. CALABRESI & CHRISTOPHER S. YOO, *THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH* 3–38 (2008) (advocating a unitary Executive Branch controlled by the President), with Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 YALE L.J. 2314 (2006) (arguing against the unitary view of the Executive), and Jon D. Michaels, *Of Constitutional Custodians and Regulatory Rivals: An Account of the Old and New Separation of Powers*, 91 N.Y.U. L. REV. 227 (2016) (explaining how the administrative branch is divided among three rivalrous parts).

another. Not only does it provide historical support for, and an example of, “intra-branch” separation of powers, it also further explains the meaning of the term by demonstrating how lawyers’ professional norms provide a basis for internal limits on the President’s power.¹² In order to ensure democratic accountability, the President’s legitimate policy agenda may shape prosecutorial priorities, but partisan politics and personal interest must play no role in determining the course of individual cases.

It is not always easy to distinguish between legitimate policy objectives reflecting the President’s platform and agenda and illegitimate interference with prosecutorial discretion. The democratic system has grown to rely on lawyers’ professional norms to distinguish between the two. Department of Justice (DOJ) policies reinforce this core requirement, making it clear that experienced prosecutors whose professional obligations require them to filter out impermissible considerations, control decision-making in individual cases.¹³ While this prophylactic is not a panacea, it helps to insulate prosecutors and protect against illegitimate incursions on discretion.

The Article proceeds in three parts. Part I surveys relevant law establishing that the President lacks enumerated or inherent constitutional power over individual prosecutions. This Part considers counterarguments based on the text of the Constitution, original understanding, and analogous executive powers, but concludes that, while prosecution is an executive function, Congress can restrict presidential control over individual prosecutions. Because federal legislation does not expressly allocate ultimate prosecutorial authority within the Executive Branch, one must look to Congress’s implied intent. The history of American prosecution and prosecutorial independence sheds light on this difficult task.

Part II discusses the history and development of the federal criminal justice system and the centrality of prosecutorial independence to it. This Part analyzes the role of prosecutorial independence in American democracy by examining the historical relationship between the President and federal prosecutors. In the early republic, Presidents at times exerted control over federal prosecutions, especially when the cases had implications for other federal policy objectives, but most prosecutors enjoyed substantial—if not complete—independence. By the end of the twentieth century, prosecutorial independence had grown from the inchoate reality of a diffuse nation into a central principle of federal prosecution.

Part III of the Article demonstrates that prosecutorial independence is

12. See, e.g., Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001); Katyal, *supra* note 11; Elizabeth Magill & Adrian Vermeule, *Allocating Power Within Agencies*, 120 YALE L.J. 1032 (2011); Michaels, *supra* note 11; Gillian E. Metzger, *The Interdependent Relationship Between Internal and External Separation of Powers*, 59 EMORY L.J. 423 (2009); Margo Schlanger, *Offices of Goodness: Influence Without Authority in Federal Agencies*, 36 CARDOZO L. REV. 53 (2014).

13. Green & Roiphe, *supra* note 9.

not only built into the structure of American government, but also is a desirable feature of American democracy. The effective and impartial administration of justice rests on a healthy distance between the President and prosecuting attorneys. Helping to ensure the fair and just administration of law, discretion preserves prosecutorial judgment based on knowledge of the law, facts, and a familiarity and respect for process. Professional independence helps ensure that prosecutors will be able to exercise that discretion and seek a fair and just administration of criminal law in individual cases, rather than sacrifice justice to further political ends.

I. LAW GOVERNING THE PRESIDENT'S ABILITY TO CONTROL INDIVIDUAL CRIMINAL PROSECUTIONS

Some scholars argue that a U.S. President can require the Attorney General or a subordinate federal prosecutor to initiate or dismiss a criminal prosecution and otherwise control the prosecutor's discretionary decisions.¹⁴ Others insist that the President has no such power and that, to the contrary, the prosecutor has a legal obligation to resist presidential control and to exercise independent professional judgment.¹⁵ This Part argues that the President does not have constitutional authority to conduct criminal prosecutions, and that it is for Congress to decide whether the Attorney General and subordinate prosecutors are subject to presidential control or must act independently of the President. The task remains to determine to whom Congress has allocated ultimate authority in criminal cases—a question on which historic practice and policy may offer guidance.

A. *Defining the Question of Presidential Criminal-Justice Authority*

The President has authority to set and promote criminal justice policy, to appoint and discharge the Attorney General, and to issue pardons.¹⁶ But whether the President may interfere in individual criminal prosecutions is a separate question that the Constitution does not expressly answer. Consider the following scenarios:

- ❖ The DOJ conducts a corruption investigation of a city mayor who has been highly critical of the President. The Attorney General briefs the President that there is probable cause to indict the Mayor, but that the prosecutors conducting the investigation do not intend to seek an indictment because they have

14. For a discussion of this view, see *infra* note 68; see also *infra* note 82 and accompanying text.

15. For a discussion of this view, see *infra* note 68.

16. U.S. CONST. art. II, § 2, cls. 1–2.

reasonable doubts and do not think they can secure a conviction. The President directs the DOJ to indict.

- ❖ The DOJ conducts a corruption investigation of the President's former campaign manager. The Attorney General briefs the President that there is compelling evidence of guilt, and that the prosecutors conducting the investigation intend to seek an indictment. The President directs the DOJ to drop the investigation.
- ❖ A foreign government arrests a U.S. citizen for espionage. The President directs the Attorney General to arrest a prominent citizen of the foreign country when he is in the U.S. for business so that the U.S. has a bargaining chip. The Attorney General believes that the foreign citizen has not committed any crime, but that the DOJ can pull together circumstantial evidence of a crime that will (barely) satisfy the test of probable cause.

Assume that in each of these scenarios the Attorney General protests that it would be unprofessional to follow the President's direction, or that doing so would be contrary to internal DOJ policy and guidelines and to long-held understandings about the exercise of prosecutorial power in the federal government. The President is undeterred and threatens to fire the Attorney General unless he complies. Is the Attorney General permitted, or even obliged, to follow the President's direction? If the Attorney General capitulates and directs lower level prosecutors to follow the President's orders, are they similarly required to obey?

In *Morrison v. Olson*, the Supreme Court held that federal criminal prosecution is an executive function under Article II of the Constitution, not a legislative or judicial function or a function that the Executive Branch shares with another government branch.¹⁷ But designating criminal prosecution an "executive" function does not necessarily determine who within the Executive Branch has authority to make particular prosecutorial decisions. Criminal prosecution is not among the presidential powers enumerated in Article II.¹⁸ Federal legislation creates a Department of Justice

17. 487 U.S. 654, 696–679, 692 (1988) ("There is no real dispute that the functions performed by the independent counsel are 'executive' in the sense that they are law enforcement functions that typically have been undertaken by officials within the Executive Branch."). While both the majority and dissent take this for granted, scholars have debated this point from a historical perspective, pointing to the fact that early federal prosecution was conducted largely by private parties and states. *E.g.*, Daniel N. Reisman, *Deconstructing Justice Scalia's Separation of Powers Jurisprudence: The Preeminent Executive*, 53 ALB. L. REV. 49, 56–57 (1988).

18. See U.S. CONST. art. II, § 2 ("The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; . . . he shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment. He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties . . .").

with subordinate prosecutors headed by the Attorney General who collectively have authority to conduct federal criminal prosecutions.¹⁹ The question remains whether the President's authority as chief executive,²⁰ which includes a constitutional responsibility to "take care" that subordinate officers faithfully carry out their law enforcement responsibilities,²¹ implies that the President has authority, if he chooses to exercise it, to make prosecutorial decisions within the bounds of the law. Even if the Constitution does not itself commit control of criminal prosecutions to the President, is this authority implicit in the statutory establishment of the DOJ headed by an Attorney General who serves at the President's will?

The President—as chief executive—clearly possesses some authority, including policymaking authority, with respect to federal criminal justice.²² As President Obama recently described,²³ the President may establish priorities for federal criminal law enforcement, and need not leave this responsibility entirely to the Attorney General.²⁴ The President's policy priorities—for instance, a decision to defer to state laws legalizing marijuana—may have implications for individual criminal cases, at least indirectly.

The President's only explicit constitutional role in individual criminal cases is to issue pardons,²⁵ a power used not only to grant clemency to convicted criminal defendants,²⁶ but also to forestall federal criminal prosecutions.²⁷ Congress has also granted the President authority to appoint

19. See Act to Establish the Department of Justice, ch. 150, 16 Stat. 162 (1870) (codified as amended at 28 U.S.C. §§ 501-599B (2012)).

20. U.S. CONST. art. II, § 1 ("The executive Power shall be vested in a President of the United States of America.").

21. U.S. CONST. art. II, § 3 (The President "shall take Care that the Laws be faithfully executed . . .").

22. See J. Richard Broughton, *Politics, Prosecutors, and the Presidency in the Shadows of Watergate*, 16 CHAP. L. REV. 161, 169–71 (2012). For a discussion of early federal prosecutors' deference to presidential policy, see Scott Ingram, *Representing the United States Government: Reconceiving the Federal Prosecutor's Role Through a Historical Lens*, 31 NOTRE DAME J.L. ETHICS & PUB. POL'Y 293 (2017).

23. Barack Obama, Commentary, *The President's Role in Advancing Criminal Justice Reform*, 130 HARV. L. REV. 811 (2017).

24. See, e.g., Eric Posner, *A (Very Reluctant) Defense of Trump's Firing of Comey*, ERIC POSNER BLOG, (May 11, 2017), <http://ericposner.com/a-very-reluctant-defense-of-trumps-firing-of-comey/> ("The president is the chief law enforcement officer; he determines law enforcement priorities and policies.").

25. U.S. CONST. art. II, § 2 ("The President . . . shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.").

26. See generally Rachel E. Barkow, *Clemency and Presidential Administration of Criminal Law*, 90 N.Y.U. L. REV. 802 (2015).

27. See Albert W. Alschuler, *Bill Clinton's Parting Pardon Party*, 100 J. CRIM. L. & CRIMINOLOGY 1131 (2010) (discussing Clinton's pardon of Marc Rich); Laura Kalman, *Gerald Ford, the Nixon Pardon, and the Rise of the Right*, 58 CLEV. ST. L. REV. 349 (2010) (discussing Ford's pardon of President Nixon). As originally understood, it does not appear that the pardon power could be used preemptively in this manner. See *The Jewels of the Princess of Orange*, 2 Op. Att'y Gen. 482, 485

and to discharge the Attorney General who heads the DOJ,²⁸ and this authority presumably has constitutional origins as well.²⁹ However, the power to hire and fire does not necessarily imply the power to instruct subordinate officials how to do their jobs.³⁰

The Court's characterization of criminal prosecution as an executive function does not mean that the Executive has exclusive authority in this area. In our system of checks and balances, the powers of individual branches are not always exclusive.³¹ In the criminal context, in particular, Congress and the Judiciary exercise significant authority to circumscribe and influence federal prosecutors' decision-making through procedural rules and statutes.³² Congress can also inquire into prosecutors' decision-making in individual cases.³³ Courts regulate prosecutors not only by interpreting and enforcing limits imposed by the Constitution, statutes, and rules, but by adopting rules of professional conduct and court rules governing the conduct of lawyers in criminal cases.³⁴ To be sure, federal

(1831) (opining that the President "can pardon or reprieve only when an offence against the law has been established by proof or the admissions of the party, and a penalty thereby incurred").

28. See 28 U.S.C. § 501 (2012) ("The Department of Justice is an executive department of the United States at the seat of Government."); 28 U.S.C. § 503 ("The President shall appoint, by and with the advice and consent of the Senate, an Attorney General of the United States. The Attorney General is the head of the Department of Justice.").

29. U.S. CONST. art. II, § 2 (the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments").

30. See *infra* notes 224–28 and accompanying text. The conclusion that the President is vested with "all" executive power involves an inference from the text that is not necessarily accurate. See Victoria F. Nourse, *Reclaiming the Constitutional Text from Originalism: The Case of Executive Power*, 106 CALIF. L. REV. 1, 22–24 (2018).

31. As DOJ's Office of Legal Counsel observed in 1973, "there are few areas under the Constitution to which a single branch of the Government can claim a monopoly." Memorandum from Robert G. Dixon, Jr., Assistant Att'y Gen., Office of Legal Counsel, Dep't of Justice, Re: Amenability of the President, Vice President and other Civil Officers to Federal Criminal Prosecution While in Office 21 (Sept. 24, 1973) (first quoting *Springer v. Philippine Islands*, 277 U.S. 189, 209–10 (1928) (Holmes, J., dissenting); and then quoting *Myers v. United States*, 272 U.S. 52, 177 (1926) (Holmes, J., dissenting), *overruled in part by* *Humphrey's Ex'r v. United States*, 295 U.S. 602 (1935)), <https://fas.org/irp/agency/doj/olc/092473.pdf>.

32. See, e.g., 18 U.S.C. § 3500 (1975) (governing production of witness statements and reports); FED. R. CRIM. P. See generally Angela J. Davis, *The American Prosecutor: Independence, Power, and the Threat of Tyranny*, 86 IOWA L. REV. 393, 453–57 (2001) (arguing that constitutional history does not support federal prosecutors' independence from Congress and the Judiciary in exercising discretion).

33. See, e.g., Broughton, *supra* note 22; Bruce Green & Ellen Yaroshefsky, *Prosecutorial Accountability 2.0*, 92 NOTRE DAME L. REV. 51, 71 (2016) (discussing congressional inquiry into prosecution of Aaron Swartz).

34. See, e.g., *United States v. Hammad*, 858 F.2d 834 (2d Cir. 1988) (applying professional conduct rule to restrict a prosecutor's investigation); *United States v. Bagley*, 473 U.S. 667, 674–75 (1985) (recognizing federal prosecutors' due process disclosure obligation). Federal courts also exercise limited supervisory authority to regulate prosecutors. See generally Sara Sun Beale, *Reconsidering*

courts hesitate to interfere with prosecutors' charging decisions unless prosecutors have clearly violated a constitutional provision.³⁵ But, even in making charging and plea bargaining decisions, federal prosecutors act under some legislative and judicial constraints.³⁶

Congress and the Judiciary can, directly or indirectly, determine not only *how* prosecutors, as executive officials, make prosecutorial decisions, such as whether to bring or dismiss criminal charges, but also *who* within the Executive Branch can serve as a prosecutor and make prosecutorial decisions in a given case. For example, having vested prosecutorial authority in a law department, Congress might expressly or implicitly determine that prosecutorial authority must be exercised exclusively by the Attorney General and subordinates in that department and not by others within the Executive Branch. Likewise, pursuant to its inherent authority over judicial proceedings, the federal Judiciary might establish restrictions on the exercise of prosecutorial authority that have the effect of excluding the President from certain decision-making. For example, courts might rely on their supervisory powers or the Due Process clause of the Constitution to require prosecutorial discretion to be exercised by lawyers who are free of political influences.³⁷

At present, no federal law or court rule explicitly calls for federal prosecutors' independence from the President.³⁸ The concept might be so embedded in our understanding of criminal justice that both the Executive and Judiciary have implicitly accepted it in the way that they exercise their

Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Authority of the Federal Courts, 84 COLUM. L. REV. 1433 (1984).

35. See, e.g., *United States v. Redondo-Lemos*, 955 F.2d 1296 (9th Cir. 1992), *amended on denial of reh'g en banc* (May 11, 1992), *overruled by* *United States v. Armstrong*, 48 F.3d 1508 (9th Cir. 1995) (en banc); see also Darryl K. Brown, *Judicial Power to Regulate Plea Bargaining*, 57 WM. & MARY L. REV. 1225 (2016); Bruce A. Green & Samuel J. Levine, *Disciplinary Regulation of Prosecutors as a Remedy for Abuses of Prosecutorial Discretion: A Descriptive and Normative Analysis*, 14 OHIO ST. J. CRIM. L. 143, 166–69 (2016).

36. See, e.g., *United States v. Jacobo-Zavala*, 241 F.3d 1009 (8th Cir. 2001) (discussing federal court's authority under FED. R. CRIM. P. 48(a) to deny the government's motion to dismiss an indictment).

37. In *Young v. United States ex rel. Vuitton et Fils S.A.*, the Court exercised its supervisory authority to overturn a criminal contempt conviction because the district court appointed the victim's lawyer, who was not disinterested, to prosecute. 481 U.S. 787, 804–08 (1987). The Court left open whether there was a due process right to a disinterested prosecutor, but lower courts have found that there is, reasoning that prosecutorial discretion must be exercised by someone who is not obligated or loyal to third parties with interests in the prosecution. See, e.g., *Ganger v. Peyton*, 379 F.2d 709, 714–15 (4th Cir. 1967). See generally Green & Roiphe, *supra* note 9, at 490–91 (2017). One might argue that presidential control violates the defendant's right to a disinterested prosecutor, since the President is not professionally committed to exercising disinterested, politically-nonpartisan discretion.

38. Title 28 U.S.C. § 516 (2012) provides: "Except as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, and securing evidence therefor, is reserved to officers of the Department of Justice, under the direction of the Attorney General." The provision is not explicit that the Attorney General and DOJ officers must "conduct . . . litigation" independently from presidential control.

powers. Even if not, professional independence may be implicit in the work of contemporary prosecutors, as the courts and Congress—if not the DOJ—have come to understand it. The courts and Congress may have constructed the law around the premise of prosecutorial independence. Is this premise effectively woven into the fabric of the law, and if so, is it consistent with the President's Article II power?

B. The Originalist Argument

There is no clear historical basis on which to build an originalist argument that presidents have constitutional authority to direct criminal prosecutions and that Congress lacks authority to vest prosecutorial decision-making in independent subordinate officers. Early presidents occasionally directed federal district attorneys to initiate or dismiss prosecutions, but their authority was never tested and other individuals beyond presidential control also had authority to bring federal criminal prosecutions.

Many scholars who question the legality of internal limits on presidential power argue that the structure of government at the founding mandates a unitary Executive with full power residing in the chief executive.³⁹ Others insist that prosecutors enjoyed a significant degree of independence in the early years.⁴⁰ Without embracing the originalist approach to constitutional meaning, this Part concludes that the evidence from the early years of the republic is mixed, reflecting, among other things, a disagreement about the power of the Executive Branch.

Control of criminal prosecutions by a chief executive is not part of this country's received tradition: In England, before the American Revolution, most prosecutions were conducted by private individuals and prosecuting societies.⁴¹ Most colonial prosecutions were similarly initiated by private individuals.⁴² To the extent that public prosecutors investigated and prosecuted criminal cases in the colonies or—following the nation's founding—in the states, there is no evidence that gubernatorial control of

39. See, e.g., CALABRESI & YOO, *supra* note 11.

40. See, e.g., Harold J. Krent, *Executive Control Over Criminal Law Enforcement: Some Lessons From History*, 38 AM. U. L. REV. 275, 286 (1989) ("From an early period, Congress limited the Executive's effective control over criminal law enforcement 'affirmatively' by dispersing supervisory responsibility among various executive officials.").

41. LEON RADZINOWICZ, 2 A HISTORY OF THE ENGLISH CRIMINAL LAW AND ITS ADMINISTRATION FROM 1750, at 126–28 (1956); J.J. TOBIAS, CRIME AND POLICE IN ENGLAND 1700–1900, at 122–23 (1979).

42. William E. Nelson, *Emerging Notions of Modern Criminal Law in the Revolutionary Era: An Historical Perspective*, 42 N.Y.U. L. REV. 450, 467–68 (1967).

prosecutors was the norm.⁴³ Today, in most states, public prosecutors are independently elected and do not answer to the Governor.

In the early days of the republic, federal criminal jurisdiction was extremely limited. The Judiciary Act of 1789 provided for presidential appointment of private attorneys, who came to be called district attorneys, to prosecute federal criminal cases,⁴⁴ although an earlier Senate draft called for judicial appointment of prosecutors.⁴⁵ Even though prosecutors functioned independently of the Attorney General,⁴⁶ presidents did, at times, direct how district attorneys conducted at least certain individual criminal cases.⁴⁷ For example, President Washington both ordered the prosecution of participants in the Whiskey Rebellion and, a year later, ordered that prosecutions be dropped against two wrongly accused defendants.⁴⁸ President Adams ordered that prosecutions be filed under the Sedition Act,⁴⁹ while President Jefferson, considering the Act unconstitutional, ordered pending prosecutions to be dismissed.⁵⁰ Jefferson insisted that federal prosecutors decline to bring cases under libel laws and took an active role in the prosecution of his first Vice President, Aaron Burr.⁵¹ He also ordered a Connecticut district attorney to bring a federal common law criminal case against Federalist printers who had called the President immoral, but then ordered the district attorney to drop the case when it became clear that the defendants were planning to put on evidence that Jefferson seduced a woman.⁵²

Kate Andrias has called attention to an 1831 Attorney General opinion concluding that President Jackson had authority to direct a federal district attorney to dismiss a forfeiture action and to return the property in question

43. The public prosecutor's origin in the colonies has been called a "historical puzzle." W. Scott Van Alstyne, Jr., Comment, *The District Attorney—A Historical Puzzle*, 1952 WIS. L. REV. 125, 138 (1952) ("[T]he anomalous figure of the public prosecutor in the United States stands out in our Anglo-American system of criminal law as a historical challenge . . .").

44. Judiciary Act of 1789, ch. 20, § 35, 1 Stat. 73, 92; see Susan Low Bloch, *The Early Role of the Attorney General in Our Constitutional Scheme: In the Beginning There Was Pragmatism*, 1989 DUKE L.J. 561, 585–86 (1989).

45. Bloch, *supra* note 44, at 567 & n.24 (discussing the legislative history of the Judiciary Act of 1789).

46. See *id.* at 585–86.

47. Saikrishna Prakash, *The Chief Prosecutor*, 73 GEO. WASH. L. REV. 521, 553 (2005) ("Presidents Washington, Adams, and Jefferson believed that they had constitutional authority to direct federal district attorneys. In fact, each directed district attorneys to begin and cease prosecutions in . . . cases suffused with foreign affairs implications, cases involving the domestic political opposition, and even cases concerning the nation's territorial integrity.").

48. *Id.* at 553–54.

49. *Id.* at 559.

50. *Id.* at 561.

51. *Id.* at 561–62.

52. R.B. BERNSTEIN, *THOMAS JEFFERSON: THE REVOLUTION OF IDEAS* 189 (2004).

to the foreign royalty from whom it had been stolen.⁵³ Attorney General (and future Chief Justice) Roger B. Taney rejected the premise that the President's authority derived from the specific power to issue pardons and reprieves, but derived presidential authority to order the dismissal of prosecutions from the "Take Care" Clause of Article II. Taney maintained that it was necessary for the President to have this power, and he described possible scenarios illustrating the necessity.⁵⁴ For example, if pirates stole a foreign sovereign's property, the President should be able to order a forfeiture proceeding dismissed and the property returned, since "a [forfeiture] prosecution on the part of the United States might put to hazard the peace of the country."⁵⁵ And since this power was not specifically granted by the Constitution in cases of necessity, the opinion reasoned, it must derive from a general grant of authority that would apply equally whether the prosecution implicated national or only private interests, as long as "the public interest or the principles of justice required the President to act."⁵⁶ Likewise, the opinion reasoned, if a district attorney brought an unjust prosecution to oppress an individual, the most obvious way for the President to ensure the law's faithful execution would be to order the district attorney to dismiss it.⁵⁷ And in cases of significant importance, a district attorney might hesitate to move to dismiss the case, or a court might refuse to grant the district attorney's motion, without the President's direction.⁵⁸

Scholars have debated the constitutional significance of this history.⁵⁹ Given that early presidents asserted occasional control over individual prosecutions, Andrias and Prakash argue that the Founders understood that criminal prosecution is an executive power that a President may choose to control.⁶⁰ But early prosecutors never objected or tested the President's authority in court, and assuming that the early history reflects presidential

53. Kate Andrias, *The President's Enforcement Power*, 88 N.Y.U. L. REV. 1031, 1051–53 (2013) (discussing *The Jewels of the Princess of Orange*, 2 Op. Att'y Gen. 482 (1831)). Although the forfeiture action was technically a civil action, the opinion did not distinguish between civil and criminal cases.

54. *The Jewels of the Princess of Orange*, 2 Op. Att'y Gen. 482, 487 (1831) ("Cases readily suggest themselves which show the necessity of such a power to enable [the President] to discharge this duty.").

55. *Id.* at 488.

56. *Id.*

57. *Id.* at 489 ("[S]uch a prosecution would not be a faithful execution of the law; and upon the President being satisfied that the forms of law were abused for such a purpose, and being bound to take care that the law was faithfully executed, it would become his duty to take measures to correct the procedure. And the most natural and proper measure to accomplish that object would be, to order the district attorney to discontinue the prosecution.").

58. *Id.* at 490.

59. See, e.g., Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 70–71 (1994) (arguing that criminal prosecution was not exclusively a federal executive function).

60. See, e.g., Andrias, *supra* note 53, at 1051–53; Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 658–59 (1994).

authority to control federal prosecutors, one cannot say whether the authority was implicit in the Constitution or in legislation. Moreover, others note that, in the early years of the republic, criminal prosecutions were concurrently conducted by state prosecutors, private persons, and federal officials who functioned independently of the President, except in rare cases, which suggests that Congress may, if it chooses, vest prosecutorial authority in subordinate officials who are independent of the President.⁶¹ The early history might suggest an intermediate position. Although the early presidential involvement in criminal prosecution was justified as an exercise of authority to “take care” that federal laws are faithfully exercised,⁶² most of the reported examples seem to implicate other presidential powers and, in particular, the power to conduct foreign affairs.⁶³ One might argue that, rather than possessing plenary authority over criminal prosecutions, presidents could supersede ordinary prosecutorial independence only in cases where enumerated presidential powers were implicated.

C. The Contemporary Debate Over Presidential Criminal-Justice Authority

In modern times, as far as the public record reflects, contemporary U.S. presidents do not ordinarily seek to control or direct prosecutors’ conduct of individual federal criminal cases.⁶⁴ Attorneys general occasionally

61. See, e.g., Lessig & Sunstein, *supra* note 59, at 108 (“As we have seen, the framers did not believe that prosecutorial authority need be concentrated in the President operating through the Attorney General.”); *id.* at 118 (“With respect to implementation of the laws, history suggests that the framers understood Congress to have broad power to structure government arrangements as it saw fit. Many prosecutors, state as well as federal, were free from the control of the Attorney General and the President.”); Reisman, *supra* note 17, at 56–57; Charles Tiefer, *The Constitutionality of Independent Officers as Checks on Abuses of Executive Power*, 63 B.U. L. REV. 59, 91 (1983) (observing that “the Attorney General did not attain centralized control of litigation until the 1860’s, when the Department of Justice finally was created”); cf. Bloch, *supra* note 44, at 634 (“The early legislators do not appear to have been concerned with . . . strong presidential control over the Attorney General.”).

62. Calabresi & Prakash, *supra* note 60, at 553; see also John Yoo, *George Washington and the Executive Power*, 5 U. ST. THOMAS J. L. & PUB. POL’Y 1, 12 (2010).

63. See *supra* notes 46–54 and accompanying text.

64. See, e.g., Obama, *supra* note 23, at 823 (“[P]articular criminal matters are not directed by the President personally but are handled by career prosecutors and law enforcement officials who are dedicated to serving the public and promoting public safety. The President does not and should not decide who or what to investigate or prosecute or when an investigation or prosecution should happen.” (citing Kate Andrias, *The President’s Enforcement Power*, 88 N.Y.U. L. REV. 1031, 1051 (2013)); Theodore B. Olson, *The Advocate as Friend: The Solicitor General’s Stewardship Through the Example of Rex E. Lee*, 2003 BYU L. REV. 1, 146–47 (Seth Waxman observed that in “cases [that] may have appeared to the outside world as paradigmatically cases in which we would be hearing from the White House, or talking to the White House, . . . [no] effort [was] made by any political person to intrude in our decision-making policy”). Although President Trump has expressed a desire in speeches and on social media that the DOJ take various actions, as of this writing it does not appear that he has directly ordered the Attorney General or other DOJ officials to bring or end an investigation or

consult with the President regarding individual cases.⁶⁵ But, presidents do not, as a general matter, tell the FBI when to initiate or terminate particular investigations. Nor do they direct federal prosecutors whether charges against an individual should be presented to the grand jury or how pending charges should be prosecuted. In general, prosecutors' discretion to determine whether or not to pursue criminal charges—whether based on the extent of the evidence of guilt, on considerations of proportionality, or on other considerations—is considered to be a defining feature of their work.⁶⁶ While there are no universally accepted principles to guide prosecutorial discretion, there is a consensus that decisions should not take account of public officials' self-interest or partisan politics.⁶⁷

Ever since the 2016 presidential election, the question of who has power to direct criminal prosecutions has become critical. Responding to candidate Donald Trump's call to "lock up" his Democratic rival, Hillary Clinton, experts considered whether, if elected, Trump could order a prosecution to be initiated.⁶⁸ And in connection with discussions of whether President Trump's firing of FBI Director James Comey might have been an effort to obstruct the federal investigation of the administration's Russian

prosecution or to take other specific action in a matter. *See, e.g.*, Charlie Savage, *Trump Crosses a New Line*, N.Y. TIMES, May 21, 2018, at A14 (discussing President Trump's Twitter post: "I hereby demand, and will do so officially tomorrow, that the Department of Justice look into whether or not the FBI/DOJ infiltrated or surveilled the Trump Campaign for Political Purposes—and if any such demands or requests were made by people within the Obama Administration!").

65. *See, e.g.*, Lonnie T. Brown, Jr., *A Tale of Prosecutorial Indiscretion: Ramsey Clark and the Selective Non-Prosecution of Stokely Carmichael*, 62 S.C. L. REV. 1, 22–23 (2010) (describing a meeting at which President Johnson and his cabinet discussed the possibility of bringing conspiracy charges against black leaders for inciting urban riots).

66. On the origins of federal prosecutorial discretion, see Rebecca Krauss, *The Theory of Prosecutorial Discretion in Federal Law: Origins and Development*, 6 SETON HALL CIR. REV. 1, 13–26 (2009).

67. *See* Bruce A. Green & Fred C. Zacharias, *Prosecutorial Neutrality*, 2004 WIS. L. REV. 837, 856–59 (2004).

68. *Compare, e.g.*, Roger Parloff, *Could a President Donald Trump Prosecute Hillary Clinton?*, FORTUNE (Oct. 10, 2016), <http://fortune.com/2016/10/10/donald-trump-special-prosecutor-hillary-clinton/> ("[A] President Trump would not have legal authority to direct the Attorney General to appoint a special prosecutor to 'look into' Hillary Clinton's email situation or the Clinton Foundation or anything else. That's not within a President's power." (quoting Laurence Tribe)), *and id.* ("It is essential that the Department be apolitical with respect to its choice of law enforcement targets and to its exercise of prosecutorial discretion. And very improper if the president were to be making phone calls to the attorney general with respect to a particular target of investigation. . . . If it had been revealed to have happened in the past it would have been a scandal." (quoting Jim Jacobs)), *with FBI Investigators Will Go Public If Obama's Attorney General Does Not Indict Hillary Clinton*, INFOWARS (Jan. 25, 2016), <https://www.infowars.com/fbi-investigators-will-go-public-if-obamas-attorney-general-does-not-indict-hillary-clinton/> ("The fact is that the president can direct the attorney general not to bring charges. The attorney general works for the president and the president can order that" (quoting former Attorney General Michael Mukasey)); Neal Katyal, *Trump or Congress Can Still Block Robert Mueller. I Know. I Wrote the Rules.*, WASH. POST POSTEVERYTHING (May 19, 2017), https://www.washingtonpost.com/posteverything/wp/2017/05/19/politics-could-still-block-muellers-investigation-i-know-i-wrote-the-rules/?utm_term=.c3108a252ad6.

ties, several addressed whether the President's executive authority would extend to terminating the investigation altogether, were he to so desire.⁶⁹ Most recently, amidst rumors that the administration may try to discredit and ultimately order the dismissal of Special Counsel Robert Mueller, commentators disagree about whether this would amount to a criminal obstruction of justice, an illegitimate use of his power, or a lawful exercise of executive power.⁷⁰

To some experts, it seems obvious that presidents lack authority to make decisions such as these, and that if the President sought to direct prosecutors' conduct of individual criminal cases, the Attorney General and subordinate officials and prosecutors in the DOJ would have a responsibility to resist and to exercise independent professional judgment.⁷¹ Others, however, think it just as obvious that, as chief executive, presidents do have this power, even if they have good reason to refrain from using it.⁷² And yet others regard the question as simply unresolved.⁷³

The question of the President's authority as chief executive to make decisions in individual criminal cases arose prominently during the Watergate investigation. When Special Prosecutor Archibald Cox subpoenaed President Nixon for tapes and documents, the President's counsel moved to quash the subpoena, arguing, in part, that the Judiciary could not compel the President to produce evidence in a federal criminal

69. See, e.g., Frank O. Bowman, III, *Obstruction of Justice: Part 3—The mental state of acting 'corruptly,' IMPEACHABLE OFFENSES?* (July 2, 2017), <https://impeachableoffenses.net/2017/07/02/obstruction-of-justice-part-3-the-mental-state-of-acting-corruptly> ("Although there has arisen a well-understood norm that presidents should not directly intervene in criminal investigations or prosecutions, particularly if the case involves persons close to the president, that is a norm, not a rule. . . . [A]s a constitutional matter, it would appear that a president has the same authority as the Attorney General, the FBI Director, or any of their subordinates to decline even a legally meritorious prosecution.").

70. See Eric Columbus, *Could Trump Fire Mueller? It's Complicated.*, POLITICO (Aug. 3, 2017), <https://www.politico.com/magazine/story/2017/08/03/could-trump-fire-mueller-its-complicated-21545> 3. Firing the Special Prosecutor is more likely to be perceived as an act of obstruction if prosecutorial independence forecloses the President from directing criminal investigations and prosecutions.

71. See sources cited *supra* note 68.

72. See, e.g., Andrew C. McCarthy, *The President's Power to End a Criminal Investigation*, NAT'L REV. (May 20, 2017, 9:00 AM), <http://www.nationalreview.com/article/447801/president-trump-prosecutorial-discretion-obstruction-justice-fbi-director-james-comey-criminal-justice-system> ("A prudent president will not interfere in law-enforcement decisions. But that is because doing so would be counterproductive and politically damaging. It would not be unlawful."). A related argument might be that, absent a universal commitment to prosecutorial independence, a President can control government lawyers' work as a practical matter by hiring an Attorney General whose primary loyalty is to the Administration. See William P. Marshall, *Break Up the Presidency? Governors, State Attorneys General, and Lessons from the Divided Executive*, 115 YALE L.J. 2446, 2471 (2006) ("[B]y his power of appointment or otherwise, the President can assure that the Attorney General's and Department of Justice's primary fealty is to his administration and not to some abstract view of the law.").

73. See, e.g., Broughton, *supra* note 22.

investigation because the President had ultimate control over the conduct of such investigations.⁷⁴

The brief for the President began with the uncontroversial principle that the Attorney General has discretion over whom to charge and control over other prosecutorial decisions in federal criminal cases.⁷⁵ The brief then asserted that the Attorney General's authority was merely derivative of that of the President, who has constitutional authority under Article II to "take Care that the Laws be faithfully executed."⁷⁶ In support, the brief quoted various federal court decisions that made passing references to the President as "Chief Magistrate"⁷⁷ and to the Attorney General as "the President's surrogate"⁷⁸ and "the hand of the president."⁷⁹ It follows, the brief argued, that the President could in theory decide whether or not to prosecute a particular case, and in a grave enough case, such as one involving national security, the conduct of foreign policy or an interbranch dispute, a President might in fact exercise this authority.⁸⁰ By way of illustration, the brief cited a Civil War-era decision upholding the President's statutory authority to confiscate rebels' property.⁸¹ But the decision is plainly off point.⁸²

The next month Yale law professor Alexander Bickel published a

74. Reply Brief at 999–1000, *In re Subpoena to Nixon*, 360 F. Supp. 1 (D.D.C. 1973) (Misc. No. 47-73) [hereinafter Reply Brief], reprinted in 9 WKLY. COMPILATION OF PRESIDENTIAL DOCUMENTS 999.

75. *Id.*

76. U.S. CONST. art. II, § 3.

77. Reply Brief, *supra* note 74, at 1001–02 (first quoting *United States v. Burr*, 25 F. Cas. 30, 34 (C.C.D. Va. 1807) (14,692); and then quoting *United States v. Burr*, 25 F. Cas. 187, 190 (C.C.D. Va. 1807) (14, 694) (Marshall, C.J.)). The characterization in itself does not presuppose that all executive decision-making authority ultimately resides in the President. For example, President Taft, who appropriated the phrase for the title of one of his books, wrote that "Executive officers appointed by the President directly or indirectly are his subordinates, and yet Congress can undoubtedly pass laws definitely limiting their discretion and commanding a certain course by them which it is not within the power of the Executive to vary." WILLIAM H. TAFT, *OUR CHIEF MAGISTRATE AND HIS POWERS* 125 (1916).

78. Reply Brief, *supra* note 74, at 1000 (quoting *Smith v. United States*, 375 F.2d 243, 246–47 (5th Cir. 1967)).

79. *Id.* (first quoting *Ponzi v. Fessenden*, 258 U.S. 254, 262 (1922); and then quoting *United States v. Cox*, 342 F.2d 167, 171 (5th Cir. 1965)).

80. *Id.* (quoting *Cox*, 342 F.2d at 193).

81. *Id.* (citing *The Confiscation Cases*, 87 U.S. (20 Wall.) 92 (1873)).

82. The legislation specifically authorized the President to "cause" the seizure and confiscation of rebels' property. *The Confiscation Cases*, 87 U.S. (20 Wall.) at 109. The question for the Court was whether this required the President personally to order a seizure or whether subordinate officials could do so pursuant to the President's authority. The Court held that subordinates presumptively gave orders pursuant to presidential authority. Nothing in the decision presupposes that Congress was required to vest authority in the President or that the President would have had authority to make decisions even if responsibility had specifically been reposed in subordinate officers. Further, the decision has little bearing on the President's criminal justice authority, since the Court specifically recognized that the statutory authority in issue was not a criminal-justice power, *see id.* at 104 ("They are in no sense criminal proceedings. . . ."), and that the confiscation power grew out of the state of war, *id.* at 109.

magazine article endorsing the President's counsel's assumption that the President had authority to direct criminal prosecutors.⁸³ At around the same time, the DOJ's Office of Legal Counsel (OLC) did so as well, in an opinion on whether federal officials, including the President, could be criminally prosecuted while in office.⁸⁴ In concluding that a sitting President could not be prosecuted, the opinion observed that the federal prosecution of a sitting president would seem inconsistent with the President's constitutional status as chief criminal law enforcement administrator.⁸⁵ The opinion observed that "the Attorney General . . . serves at the pleasure and [is] normally subject to the direction of the President and the pardoning power vested in the President" and that one could therefore argue "that a President's status as defendant in a criminal case would be repugnant to his office of Chief Executive, which includes the power to oversee prosecutions."⁸⁶ The opinion cited the President's earlier brief and expressly referred to the cases it cited,⁸⁷ leaving the clear impression that the Office was not offering an objective opinion, but was putting a heavy thumb on the scale on the side of the sitting President's interest and his personal counsel's prior arguments.⁸⁸

In October 1973, in what came to be known as the "Saturday Night Massacre," Special Prosecutor Archibald Cox resisted President Nixon's instruction to withdraw the subpoena served on him. When the President instructed Attorney General Elliott Richardson and Deputy Attorney General William Ruckelshaus to fire Cox, each resigned in turn rather than comply. Solicitor General Robert Bork, who then became acting Attorney General, carried out President Nixon's instruction.⁸⁹ Bork had evidently concluded, contrary to Richardson and Ruckelshaus, either that the President had legal authority to fire Cox or that the President had legal

83. Alexander M. Bickel, *The Tapes, Cox, Nixon*, NEW REPUBLIC, Sept. 29, 1973, at 13–14.

84. Memorandum from Robert G. Dixon, Jr., Assistant Att'y Gen., Office of Legal Counsel, Dep't of Justice, Re: Amenability of the President, Vice President and Other Civil Officers to Fed. Criminal Prosecution While in Office 26 (Sept. 24, 1973).

85. *Id.*

86. *Id.*

87. *Id.*

88. OLC claims to provide "advice based on its best understanding of what the law requires—not simply an advocate's defense of the contemplated action or position proposed by an agency or the Administration." Memorandum from David J. Barron, Acting Assistant Att'y Gen., Office of Legal Counsel, Dep't of Justice to Att'ys of the Office, Re: Best Practices for OLC Legal Advice & Written Opinions 1 (Jul. 16, 2010), <http://www.justice.gov/olc/pdf/olc-legal-advice-opinions.pdf>. OLC's 2002 "torture memos" prompted skepticism. See, e.g., Avidan Y. Cover, *Supervisory Responsibility for the Office of Legal Counsel*, 25 GEO. J. LEGAL ETHICS 269, 277–81 (2012) (describing the memos' questionable reasoning).

89. See Carroll Kilpatrick, *Nixon Forces Firing of Cox; Richardson, Ruckelshaus Quit*, WASH. POST, Oct. 21, 1973, at A01.

authority to direct the Acting Attorney General to do so.⁹⁰ He later defended his choice based on an institutional interest in preserving a functioning DOJ.⁹¹

Leon Jaworski, whom Bork appointed to continue the Watergate investigation, followed Cox's lead by subpoenaing President Nixon. When the Supreme Court heard the case in *United States v. Nixon*,⁹² the principal question was whether the items were protected from disclosure by executive privilege. President Nixon, however, also questioned the Special Prosecutor's authority to issue the grand jury subpoena, and in that context, asserted the President's authority over federal criminal law enforcement. His brief argued that a federal prosecutor could not issue a subpoena against the President's will because the President has complete control over federal criminal investigations.⁹³ The Special Prosecutor countered that his appointment, pursuant to an arrangement established by the Executive Branch, eliminated whatever authority the President might otherwise have had to direct this particular criminal investigation.⁹⁴ However, the Special Prosecutor also questioned the DOJ's assertion that the President generally could control the conduct of individual federal criminal cases.⁹⁵ Jaworski's brief pointed out that prosecutors "have duties and responsibilities owed to the courts," and quoted from the Court's opinion in *Berger v. United States*⁹⁶ describing federal prosecutors' obligation to seek justice, which, it argued, was incompatible with presidential direction of prosecutorial discretion.⁹⁷ In unanimously upholding the subpoena, the Court acknowledged the President's claim to have control of all federal criminal

90. Bork later defended the lawfulness of his conduct, but it is hard to reconstruct his thinking at the time. There is some indication that the Justice Department thought that President Nixon had authority to fire Cox. See Kenneth B. Noble, *Bork Irked by Emphasis on His Role in Watergate*, N.Y. TIMES (July 2, 1987) (quoting Elliot Richardson), <http://www.nytimes.com/1987/07/02/us/bork-irked-by-emphasis-on-his-role-in-watergate.html>. But there is also an indication that Bork believed the President had the right to fire Cox because Cox wrongfully defied the President's direction to dismiss the subpoena. See Kenneth B. Noble, *New Views Emerge of Bork's Role in Watergate Dismissals*, N.Y. TIMES (July 16, 1987) (quoting Richardson), <http://www.nytimes.com/1987/07/26/us/new-views-emerge-of-bork-s-role-in-watergate-dismissals.html?pagewanted=all>.

91. Noble, *supra* note 90.

92. 418 U.S. 683 (1974).

93. Brief for the Respondent, Cross-Petitioner Richard M. Nixon, President of the United States, *United States v. Nixon*, 418 U.S. 683 (1974) (Nos. 73-1766, 73-1834), 1974 WL 174855, at *97 ("Since the President's powers include control over all federal prosecutions, it is hardly reasonable or sensible to consider the President subject to such [federal criminal] prosecution.").

94. Reply Brief for the United States, *United States v. Nixon*, 418 U.S. 683 (1974) (Nos. 73-1766, 73-1834), 1973 WL 159436 at *37-40 [hereinafter U.S. Reply Brief].

95. *Id.* at *38 n.21.

96. 295 U.S. 78 (1935).

97. U.S. Reply Brief, *supra* note 94, at *38 n.21 (quoting *Berger*, 295 U.S. at 88).

prosecutions,⁹⁸ but did not endorse it. The Court found that as long as the regulation authorizing the Special Prosecutor to act independently was extant, it had the force of law.⁹⁹ It did not matter that the Attorney General could repeal the law because he had not done so.¹⁰⁰ The Court did not comment on whether, but for the delegation of authority, the President could have directed the prosecutor to withdraw his subpoena.¹⁰¹

This unresolved debate was recalled a quarter century later in the context of Independent Counsel Ken Starr's investigation of President Clinton.¹⁰² In 2000, the OLC reconsidered and reaffirmed its 1973 memorandum, concluding that a sitting president could not be indicted and noting its earlier views regarding the President's law-enforcement role.¹⁰³ In 1981 and 1982, in congressional hearings on whether to renew the special prosecutor law, Rudolph Giuliani, on behalf of the DOJ, maintained that the law was at odds with presidential authority to control federal criminal prosecutions.¹⁰⁴ The question of presidential control of criminal prosecutions was posed again, albeit more vaguely, in 2007, when the second President Bush's Attorney General, Alberto Gonzalez, fired several United States Attorneys at once, ostensibly in order to promote the Administration's criminal-justice policy.¹⁰⁵ The vagueness of the explanation raised questions about whether some of the prosecutors were fired because of their refusal to accede to the White House's direction in specific cases, and this in turn led to discussion of whether the President had legal authority to give such direction.¹⁰⁶

98. *Nixon*, 418 U.S. at 693 (noting that the President argued that he had absolute authority to decide what evidence can be used in a federal criminal case, and therefore the issue before the Court was nonjusticiable).

99. *Id.* at 695.

100. *Id.* at 694–96.

101. *Id.* at 692–97 (concluding that the Executive Branch was bound by an Attorney General regulation giving the Special Prosecutor authority to prosecute on behalf of the United States).

102. See Linda Greenhouse, *The Nation; A Primer: Prosecuting the President*, N.Y. TIMES (Jan. 25, 1998), <http://www.nytimes.com/1998/01/25/weekinreview/the-nation-a-primer-prosecuting-a-president.html>. The issue arose during discussions of whether a sitting president could be indicted and prosecuted on federal charges. If the President controls the DOJ, it might seem anomalous for the DOJ to prosecute a sitting president. However, scholarly debate over whether a sitting president can be prosecuted has largely ignored this argument. See, e.g., Akhil Reed Amar & Brian C. Kalt, *The Presidential Privilege Against Prosecution* (1997), in FACULTY SCHOLARSHIP SERIES, Paper 940, http://digitalcommons.law.yale.edu/fss_papers/940/; Eric M. Freedman, *On Protecting Accountability*, 27 HOFSTRA L. REV. 677 (1999).

103. A Sitting President's Amenability to Indictment and Criminal Prosecution, 24 Op. O.L.C. 222 (2000).

104. Tiefer, *supra* note 61, at 61 n.13, 92 n.162 (citing Giuliani's congressional testimony).

105. See, e.g., *Preserving Prosecutorial Independence: Is the Justice Department Politicizing the Hiring and Firing of U.S. Attorneys?: Hearing Before the S. Comm. on the Judiciary*, 110th Cong. (2007).

106. See, e.g., David M. Driesen, *Firing U.S. Attorneys: An Essay*, 60 ADMIN. L. REV. 707 (2008) (arguing for DOJ independence based on the theory that the "take care" clause does not establish

Notwithstanding the DOJ's official position, Attorney General nominees since Watergate have endorsed the principle of prosecutorial independence from the President,¹⁰⁷ and Senators have regarded a commitment to independence from the President as an essential qualification for the position.¹⁰⁸ DOJ officials assume that prosecutorial decisions should not be influenced by partisan political considerations that may motivate the White House.¹⁰⁹ Internal DOJ policy likewise presupposes that prosecutors should be independent. Recognizing that prosecutors "must be insulated from influences that should not affect decisions in particular criminal . . . cases,"¹¹⁰ a 2009 Attorney General memorandum narrowly circumscribed communications between DOJ officials and the White House about "pending or contemplated criminal investigations or cases."¹¹¹ Earlier memoranda came to similar conclusions.¹¹² But attorneys general have not promised that the President will be shut out of prosecutorial decision-making in individual criminal cases or that DOJ officials should risk being fired rather than follow the President's commands.

the President's right to control subordinate executive-branch officials but only reposes a duty in the President).

107. See, e.g., *Nomination of Janet Reno to Be the Attorney General of the United States: Hearings Before the S. Comm. on the Judiciary*, 103d Cong., 47, 64–65 (1993) (Reno acknowledged being impressed with how a prosecution proceeded without any White House influence); *Confirmation Hearing on William French Smith, Nominee, to Be Attorney General: Hearings Before the S. Comm. on the Judiciary*, 97th Cong., 17, 34–35 (1981) (Smith acknowledged the importance of maintaining the DOJ's independence from the administration); *Nomination of Edward H. Levi to Be Attorney General of the U.S.: Hearings Before the S. Comm. on the Judiciary*, 94th Cong., 23 (1975) (Levi: "I'm going to call them as I see them. I cannot imagine why anyone, including the President of the United States, would think of asking me to take this office, if I am confirmed, except for my independent judgment as to the legality, which includes frequently a judgment as to the kinds of policies which are involved in the legality, and I would give my independent judgment.").

108. See, e.g., *Confirmation Hearings on Federal Appointments—William P. Barr: Hearings Before the S. Comm. on the Judiciary*, 102d Cong., 2 (1991) (Sen. Biden: "[W]hile working to serve the President, the Attorney General has the unique responsibility to the public that requires him to maintain independence from the President's personal and political interests."); see also Jack M. Beermann, *The Never-Ending Assault on the Administrative State*, 93 NOTRE DAME L. REV. 1599, 1614 (2018) (observing that "politically there seems to be a strong consensus rejecting [the] premise that the President should have control over investigations and prosecutions of executive branch officials" and that "[t]here is a long tradition of Justice Department independence from direct presidential supervision").

109. This premise follows not only from principles of prosecutorial independence but also from the rules governing attorney conduct. See MODEL RULES OF PROF'L CONDUCT r. 1.7(a)(2) (AM. BAR ASS'N 2016); see also Green & Roiphe, *supra* note 9, at 484–88.

110. Memorandum from the U.S. Att'y Gen. Eric Holder on Commc'ns with the White House & Cong. 1 (May 11, 2009), https://www.justice.gov/oip/foia/library/communications_with_the_white_house_and_congress_2009.pdf/download.

111. *Id.* at 2 (providing that, with the exception of criminal investigations relating to national security matters such as counter-terrorism and counter-espionage, initial communications "will involve only the Attorney General or the Deputy Attorney General" on the DOJ's side).

112. See, e.g., Memorandum from U.S. Att'y Gen. Benjamin R. Civiletti on Commc'n from the White House & Cong. To Heads of Offices, Bds., Bureaus, & Divs. 1 (Oct. 18, 1979) (reaffirming the principles previously announced by Attorney General Griffin Bell).

D. The Constitutional Arguments Regarding Presidential Authority

Leading up to *Morrison v. Olson*, several arguments were made that the Constitution authorizes the President to direct how federal prosecutors conduct criminal prosecutions. This Article has already addressed originalist arguments based on the early presidential history.¹¹³ This Subpart addresses three additional arguments that are equally unpersuasive: (1) the President's executive authority, including the authority to fire the Attorney General, necessarily implies the power to direct how the Attorney General and other subordinate DOJ officials do their work; (2) the President's explicit pardon power is merely illustrative and implies a general authority to direct how prosecutorial decisions are made; and (3) the nature of federal criminal prosecution necessitates presidential involvement.

1. Presidential Control

The principal arguments for presidential authority to direct decision-making in individual criminal cases were offered in the President's Watergate briefs, the OLC memoranda, and Bickel's article: (a) criminal prosecution is an executive function; (b) decision-making by the Attorney General and subordinate DOJ officials derives from the President as chief executive; and (c) the power to "take care" that the criminal law is faithfully executed implies not only the power to fire prosecutorial officials who fail to carry out their responsibilities but the power to direct how they exercise their responsibilities.

These arguments are unpersuasive for several reasons. Most importantly, the fact that the Constitution vests executive authority in the President and directs the President to "take care" that the law is faithfully executed does not invariably mean that the President has the power to direct subordinates' actions. While the President ordinarily acts through subordinate officials,¹¹⁴ it does not necessarily follow that all subordinate officials are subject to the President's direction.¹¹⁵ The DOJ itself recognized, in a 1937 opinion, that "when a statutory duty devolves primarily upon an officer other than the President, the latter's sole obligation is to see that the officer performs such duty or to replace him" and that the President's authority does not extend to correcting the

113. See *supra* Subparts I.A & I.B.

114. See, e.g., *Nat'l Treasury Emps. Union v. Nixon*, 492 F.2d 587, 613 (D.C. Cir. 1974) ("In most instances, the President speaks and acts through lower governmental officials.").

115. Nourse, *supra* note 30, at 22–24.

subordinates' ostensible misjudgments.¹¹⁶

To support this understanding, the 1937 opinion relied extensively on the lower court and Supreme Court opinions in *Kendall v. United States ex rel. Stokes*,¹¹⁷ involving the Postmaster General's refusal to perform a ministerial act required by federal legislation—namely, to credit individuals with amounts that the Solicitor of the Treasury determined they were owed. In this case, the Postmaster General credited mail deliverers with only part of what they were found to be owed, and even when the President directed him to make complete payment, he declined. In reviewing the petitioners' application for an order requiring full payment, the Court considered whether the President had authority to direct the Postmaster General to do his duty. The Court concluded that Congress could repose authority in Executive Branch officials to act independently of the President—that is, to answer to the law, not the President.¹¹⁸ The Court explained that the President cannot direct every executive officer:

There are certain political duties imposed upon many officers in the executive department, the discharge of which is under the direction of the President. But it would be an alarming doctrine, that congress cannot impose upon any executive officer any duty they may think proper, which is not repugnant to any rights secured and protected by the constitution; and in such cases, the duty and responsibility grow out of and are subject to the control of the law, and not to the direction of the President. And this is emphatically the case, where the duty enjoined is of a mere ministerial character.¹¹⁹

The Court in *Kendall* made clear that executive officials must fulfill their duties in accordance with their understanding of the law, not the President's orders.

Kendall is not obscure, forgotten, or discredited. Although it is most often cited for other points, neither the Court nor Congress has questioned its interpretation of presidential power or otherwise repudiated the general principle that Congress may authorize subordinate executive officials to act independently of the President. On the contrary, a 1973 congressional opinion recognized that *Kendall* "suggest[s] that the President may not intervene to defeat the execution of statutory duties vested in other Federal

116. Presidential Auth. to Direct Dep'ts & Agencies to Withhold Expenditures from Appropriations Made, 1 Op. O.L.C. Supp. 12, 12–14 (1937) (first quoting *The President & Accounting Officers*, 1 Op. Att'y Gen. 624, 625–26 (1823); then quoting *Power of the President Respecting Pension Cases*, 4 Op. Att'y Gen. 515, 516 (1846); and then quoting *Eight-Hour Law*, 19 Op. Att'y Gen. 685, 686–87 (1890)).

117. *Id.* at 14–15 (quoting *Kendall v. United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524, 610 (1838), *aff'g* 26 F. Cas. 702, 752–754 (C.C.D.C. 1837) (No. 15,517)).

118. *United States ex rel. Stokes v. Kendall*, 26 F. Cas. 702, 754 (C.C.D.C. 1837) (No. 15,517).

119. *Kendall*, 37 U.S. (12 Pet.) at 610.

officials.”¹²⁰ President Nixon’s Watergate briefs, as works of advocacy, understandably ignored this authority, but so did the OLC’s 1973 and 2000 memoranda in favor of an argument made by the President in a case where the Court ultimately ruled against him. The omission raises doubts about the reliability of the OLC’s understandings forged in the crucible of Watergate.

One might argue about whether *Kendall* reflects the Framers’ original understanding,¹²¹ or read *Kendall* to apply only where subordinate executive officials perform ministerial tasks, not, as in the case of criminal prosecution, when they exercise discretion. But by the mid-twentieth century, with the rise of the administrative state, these ships had sailed: the idea of a unitary Executive, in which *all* executive power vests in the President, had been soundly rejected by the courts and Congress.¹²² Although politicians and scholars, beginning in the 1980s, renewed the call for a presidency with full power over all executive function,¹²³ they have not persuaded the federal Judiciary.

The Supreme Court has rejected the idea that the President’s power to fire a subordinate official implies the power to specifically direct that official’s decision-making. While the President’s constitutional responsibility to “take care” that the law is faithfully executed presupposes the power to hire and fire certain federal officials,¹²⁴ it does not necessarily

120. Letter from U.S. Comp. Gen. Elmer B. Staats on the Legality of Exec. Impoundment of Appropriated Funds to Sen. Sam J. Ervin, Chairman, Subcomm. on Separation of Powers, S. Comm. on the Judiciary, at 28 (July 26, 1973), 1974 WL 8731.

121. Compare, e.g., Calabresi & Prakash, *supra* note 60, at 663 (1994) (“[S]ince the President’s grant of ‘the executive Power’ is exclusive, Congress may not create other entities independent of the President and let them exercise his ‘executive Power.’”), with Lessig & Sunstein, *supra* note 59, at 41 (“We believe that the framers wanted to constitutionalize just some of the array of power a constitution-maker must allocate, and as for the rest, the framers intended Congress (and posterity) to control as it saw fit.”).

122. See Lessig & Sunstein, *supra* note 59, at 97–98; *id.* at 106–07 (“[T]he constitutional assault on independent administration, at least in its broadest forms, has been decisively repudiated.”); Tiefer, *supra* note 61, at 103 (“[O]utside the areas of ‘political’ activity where officers in a strict chain of command carry out the President’s directions, Congress has utilized its powers to create a variety of bodies, some independent, some partly independent, some exercising delegated congressional investigative authority, and some enforcing the laws . . .”).

123. The renewed call for a unitary Executive corresponds with the birth of originalism, the theory that the Constitution’s meaning was set when it was drafted, which justifies ignoring or minimizing subsequent developments. See generally LAWRENCE B. SOLUM, WHAT IS ORIGINALISM?: A HISTORY OF CONTEMPORARY ORIGINALIST THEORY (2011); THE CHALLENGE OF ORIGINALISM: THEORIES OF CONSTITUTIONAL INTERPRETATION (Grant Huscroft & Bradley W. Miller eds., 2011). For a critique of originalism, see generally EDWARD A. PURCELL, JR., ORIGINALISM, FEDERALISM, AND THE AMERICAN CONSTITUTIONAL ENTERPRISE: A HISTORICAL INQUIRY (2007); Nourse, *supra* note 30; David A. Strauss, *Foreword: Does the Constitution Mean What It Says?*, 129 HARV. L. REV. 1 (2015). For a critique of originalism in the context of presidential control over law enforcement, see Reisman, *supra* note 17, at 56–57.

124. See, e.g., *Printz v. United States*, 521 U.S. 898, 922 (1997) (questioning whether “meaningful Presidential control is possible without the power to appoint and remove”). But see Wiener

follow that the President can tell those officials what to do. Chief Justice Taft made this point in *Myers v. United States*,¹²⁵ striking down a statute denying the President power to fire the Postmaster General. Taft's opinion recognized that the President can direct the conduct of some executive employees,¹²⁶ but not necessarily all:

[T]here may be duties so peculiarly and specifically committed to the discretion of a particular officer as to raise a question whether the President may overrule or revise the officer's interpretation of his statutory duty in a particular instance. Then there may be duties of a quasi-judicial character imposed on executive officers and members of executive tribunals whose decisions after hearing affect interests of individuals, the discharge of which the President can not in a particular case properly influence or control.¹²⁷

These federal officials may be subject to removal by the President for performing their work incompetently, but not to the President's direction.¹²⁸

Given the nature of criminal law enforcement, *Myers* suggests that Congress can, and almost certainly should, put prosecutors' day-to-day work beyond presidential control. Decisions about whether to initiate investigations, whether to ask a grand jury to indict, whether to dismiss charges or offer a plea bargain, whether to provide immunity in exchange for testimony, what sentence to recommend, and the like, are all discretionary, not ministerial. These decisions affect individual interests—indeed, individuals' liberty interest. In making these decisions, prosecutors' offices have been compared to administrative agencies.¹²⁹ And the prosecutors' work has long been described as “quasi-judicial”: in exercising discretion, prosecutors are expected to pursue “justice,” independent of partisan politics.¹³⁰

v. *United States*, 357 U.S. 349 (1958) (upholding statute denying the President's authority to remove a member of the War Claims Commission).

125. 272 U.S. 52 (1926), *overruled in part by* *Humphrey's Ex'r v. United States*, 295 U.S. 602 (1935).

126. *Id.* at 135 (“The ordinary duties of officers prescribed by statute come under the general administrative control of the President by virtue of the general grant to him of the executive power, and he may properly supervise and guide their construction of the statutes under which they act in order to secure that unitary and uniform execution of the laws which Article II of the Constitution evidently contemplated in vesting general executive power in the President alone.”).

127. *Id.*

128. *Id.*

129. See Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 *FORDHAM L. REV.* 2117 (1998).

130. See Green & Zacharias, *supra* note 67, at 839, 869–70.

2. Pardon Power

One might argue that the presidential pardon power is not exceptional but was meant to illustrate the President's ordinary power over federal criminal law enforcement. But even Roger Taney, a proponent of presidential authority over federal criminal law enforcement, declined to read this authority into the pardon power.¹³¹ Further, the only evidence in the constitutional debates is apparently to the contrary.¹³² If the Framers meant to ensure that presidents would have ultimate authority over criminal prosecutions, one might expect them to have given a more explicit sign, as they did with the war powers and other enumerated presidential powers.

The presidential pardon power, like the executive clemency power of state governors, is more easily understood as distinct from the work of criminal prosecution. Although criminal prosecutors may decline to bring charges against individuals who violated the criminal law, the crux of their work involves determining whether the evidence establishes guilt. While a pardon may be issued to correct a miscarriage of justice, the traditional use is to render mercy—to free a guilty person from prison. A constitutional preference for assigning this authority to the President does not presuppose that the Framers meant the President to control criminal prosecution in its entirety. Just as plausibly, the pardon was meant as a small, exceptional check on prosecutors' work.¹³³

Though a president can now pardon someone even before charges are brought, it does not follow that the President can achieve comparable results by directing prosecutors to refrain from bringing charges or to move to dismiss charges.¹³⁴ The pardon power is circumscribed.¹³⁵ Presidential influence on prosecutors' charging decisions would not necessarily be evident, whereas a pardon entails a public proclamation, making the President accountable for his decision.¹³⁶ Many believe that President Ford

131. See *supra* notes 53–59 and accompanying text.

132. See Reply Brief of Appellant Alexia Morrison at 22–23, *Morrison v. Olson*, 487 U.S. 654 (1987) (No. 87-1279) (“In the debates of the National Convention, of the ratifying conventions, and in contemporary comments, including *The Federalist*, we have come across no reference to the Chief Executive controlling the prosecutors. On the contrary, the objections to the pardon power as potentially shielding the guilty confederates of the President suggest that at least some of the Framers thought he could not accomplish the same end merely by directing the government’s attorney.”) (citing 3 YALE UNIV., THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 218 (Max Farrand ed., 1911)).

133. See Stephanie A.J. Dangel, Note, *Is Prosecution a Core Executive Function?* *Morrison v. Olson and the Framers’ Intent*, 99 YALE L.J. 1069, 1078–80 (1990) (“Both the colonial heritage and the Framers’ discussions of the pardon power show that the Founding Fathers did not intend that the President use his pardon power to achieve unfettered prosecutorial discretion.”).

134. See Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671, 698–700 (2014) (distinguishing clemency from non-enforcement).

135. Lessig & Sunstein, *supra* note 59, at 21.

136. See Harold J. Krent, *Conditioning the President’s Conditional Pardon Power*, 89 CALIF. L. REV. 1665, 1702 (2001).

lost to Jimmy Carter because of the unpopularity of his pardon of Richard Nixon. Likewise, one could expect political fallout if President Trump were to pardon campaign aides, family members, or other associates who came within the ambit of a federal criminal investigation. Concern about political consequences serves as a check on the abuse of the pardon power.¹³⁷ Limiting presidential authority in the criminal arena to public acts promotes accountability and curbs abuse.

Even more obviously, the power to relieve someone of a conviction through a presidential pardon does not imply the power to achieve a very different end by directing prosecutors to initiate criminal charges. The Framers may not have worried about presidents abusing clemency. But, the harm is much greater if, out of partisanship or other improper motivations, presidents initiate prosecutions. Prosecuting political foes is worse than pardoning political allies.

3. *Necessity*

As previously described, Roger Taney considered it necessary for the President to be able to control criminal prosecutions because some criminal cases implicate foreign affairs, the war power, or other federal policy on which the President has ultimate constitutional authority.¹³⁸ Further, as discussed, the early instances in which presidents intervened in individual criminal cases, in fact, for the most part implicated international considerations. Especially with the expansion of federal criminal law, few federal cases implicate international or military concerns. It does not follow that the Constitution authorizes the President to control all federal criminal cases because there is a plausible presidential interest in a few.

Even when a president might legitimately take an interest, there is no constitutional necessity for him to make the ultimate call. The alternative is for the President to make his views known to the Attorney General. In a case involving foreign affairs, for example, the Attorney General might consult with the President, others in the Administration, or both, and consider the broader implications of a criminal case and others' preferences. But the Attorney General might still have the last word to ensure that decision-making is consistent with criminal justice policy and not only with foreign or other national policy.

Lonnie Brown has discussed an example from Lyndon Johnson's administration.¹³⁹ President Johnson and his cabinet pressured Attorney

137. Charles D. Berger, *The Effect of Presidential Pardons on Disclosure of Information: Is Our Cynicism Justified?*, 52 OKLA. L. REV. 163, 188 (1999) ("A President seeking reelection has a strong disincentive to grant pardons that would be perceived as attempts to hide information.").

138. See *supra* notes 53–59 and accompanying text.

139. Brown, *supra* note 65.

General Ramsay Clark to prosecute black activists for conspiring to incite urban riots, based on their public addresses. Clark resisted, apparently believing that pursuing a prosecution would be a misuse of prosecutorial discretion in light of DOJ policies and traditions. It is doubtful that the President and the rest of the cabinet would be equally faithful to the DOJ's policies and traditions. Clark's assertion of ultimate decision-making responsibility ensured that, while other policy considerations would be weighed, criminal-justice considerations would have their due.

The necessity argument also overlooks that the Constitution reserves most criminal enforcement power to the states, with the result that most criminal cases are, and always have been, brought in state court. State criminal cases, over which the President has no power, are as likely as federal ones to implicate foreign policy and other national policy.¹⁴⁰ If presidential control is not a constitutional necessity in state criminal cases, there is no reason why it would be in federal cases. Finally, the necessity argument ignores countervailing policy considerations, addressed in Part III.

E. Morrison v. Olson

The Supreme Court decision in *Morrison v. Olson*¹⁴¹ strongly suggests that Congress may authorize federal prosecutors to act independently of the President's direction in exercising discretion in particular cases.

Thirty years ago, in *Morrison*, the Supreme Court upheld a federal statutory scheme that explicitly established certain federal prosecutors' independence from the control of the Attorney General and the President. The special prosecutor provisions of the Ethics in Government Act of 1978 provided that, on application of the Attorney General, a judicial panel could appoint a lawyer as Special Prosecutor to investigate and prosecute federal crimes by certain high-ranking federal officials.¹⁴² The Independent Counsel had all the investigative and prosecutorial power of the DOJ and the Attorney General; was subject to DOJ policies wherever possible; and could be removed by the Attorney General only for good cause, physical disability, mental incapacity, or a similar condition that impaired her performance.¹⁴³ Olson, a subject of Independent Counsel Morrison's investigation, moved to quash a subpoena on the ground that the Act was unconstitutional. The Court rejected Olson's constitutional challenge.¹⁴⁴

140. See, e.g., *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 337–40 (2006) (addressing the admissibility of statements taken in violation of an international treaty requiring consular notification).

141. 487 U.S. 654 (1988).

142. Pub. L. No. 95-521, 92 Stat. 1824 (codified as amended at 28 U.S.C. §§ 591–599 (2012)).

143. *Morrison*, 487 U.S. at 660–65 (describing the independent counsel provisions).

144. *Id.* at 665–68 (describing the case's factual background).

Chief Justice Rehnquist's majority opinion rejected Olson's argument that all executive power, including federal prosecutorial power, "is vested in a unitary President required to take care that the laws are faithfully executed."¹⁴⁵ Only Justice Scalia, the lone dissenter, adopted this argument.¹⁴⁶ The Court took it for granted that executive power is not unitary—that officials wielding executive power could be authorized to act independently of presidential control.¹⁴⁷

The Court focused on whether limiting the President's grounds for discharging independent prosecutors unduly encroached on the President's power to "take care" that the law is faithfully executed. The Court relied on two earlier Supreme Court decisions: the 1935 decision in *Humphrey's Executor v. United States*,¹⁴⁸ upholding a statute that limited presidential power to discharge FTC commissioners to cases of inefficiency, malfeasance, and neglect, and the 1958 decision in *Wiener v. United States*,¹⁴⁹ holding that the President did not have authority to fire members of a War Crimes Commission at will.¹⁵⁰ The Court disagreed with Justice Scalia's assertion that Congress could make executive officials independent from presidential control only when they performed quasi-legislative or quasi-judicial functions, as in the two prior cases.¹⁵¹ While "there are some 'purely executive' officials who must be removable by the President at will if he is to be able to accomplish his constitutional role," said the Court, independent prosecutors are not among them because they have "limited

145. Brief of Appellee Theodore B. Olson, *Morrison v. Olson*, 487 U.S. 654 (1988) (No. 87-1279), 1988 U.S. S. Ct. Briefs LEXIS 983, at *37. This was also the Government's primary argument as amicus curiae. See Brief for the United States as Amicus Curiae Supporting Appellees, *Morrison v. Olson*, 487 U.S. 654 (1988) (No. 82-1279), 1988 U.S. S. Ct. Briefs LEXIS 980, at *16–34.

146. *Morrison*, 487 U.S. at 705–10 (Scalia, J., dissenting). For a critique of Justice Scalia's reasoning, see Nourse, *supra* note 30, at 23 (arguing that Justice Scalia "enriches" the text by reading the word "all" into executive power).

147. As the Senate's amicus brief in *Morrison* pointed out, since *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), the Court has recognized Congress's power to establish Executive Branch officers who answer to the law, not the President, because their duties are not political and implicate individual rights. Brief of U.S. Senate as Amicus Curiae, *Morrison v. Olson*, 487 U.S. 654 (1988) (No. 82-1279), 1988 U.S. S. Ct. Briefs LEXIS 982, at *27–28 (first citing *Marbury*, 5 U.S. (1 Cranch) at 166; and then citing *Kendall v. United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524, 610 (1838)); see also *Marbury*, 5 U.S. (1 Cranch) at 166 ("[W]hen the legislature proceeds to impose on that officer other duties; when he is directed peremptorily to perform certain acts; when the rights of individuals are dependent on the performance of those acts; he is so far the officer of the law."); *Kendall*, 37 U.S. (12 Pet.) at 610 (rejecting the premise "that every [Executive Branch] officer. . . is under the exclusive direction of the President," and observing that Congress may assign executive duties that "grow out of and are subject to the control of the law, and not to the direction of the President.").

148. 295 U.S. 602 (1935).

149. 357 U.S. 349 (1958).

150. *Id.* at 356.

151. *Morrison*, 487 U.S. at 687–93.

jurisdiction and tenure and lack[] policymaking or significant administrative authority.”¹⁵²

The Court acknowledged that an independent counsel “exercises no small amount of discretion and judgment in deciding how to carry out his or her duties under the Act,” but did not regard “the President’s need to control the exercise of that discretion [as being] so central to the functioning of the Executive Branch as to require as a matter of constitutional law that the counsel be terminable at will by the President.”¹⁵³ Presidential responsibility to ensure that the Independent Counsel performed competently was sufficiently exercised through the indirect power (through the Attorney General) to fire the Independent Counsel for cause.¹⁵⁴ In other words, Article II power does not imply the power to terminate all subordinate officers, much less to direct their conduct. Subordinate executive officials—except for those in “policymaking or significant administrative authority”¹⁵⁵—may be given independence from presidential direction and control as long as the President retains direct or indirect authority to fire them for good reasons, such as incompetence or malfeasance.

Further, the Court found that the independent counsel provisions did not violate separation-of-powers principles as a whole by encroaching on presidential authority.¹⁵⁶ The Court emphasized that the law did not remove significant power from the Executive to Congress or to the Judiciary, which could not control the independent counsel’s work.¹⁵⁷ Congress simply moved power from one place in the Executive Branch to another.¹⁵⁸

Finally, the Court dismissed an argument, most fully elaborated in an amicus brief on behalf of three former Attorneys General,¹⁵⁹ that the statute isolated the Independent Counsel from the Executive Branch, and particularly from the DOJ, with its institutional wisdom, experience, traditions, and other checks. The Court observed that the Independent Counsel was appointed only upon application by the Attorney General, was subject to discharge for cause by the Attorney General, and was obligated to follow

152. *Id.* at 690–91.

153. *Id.* at 691.

154. *Id.* at 692, 695–96.

155. *Id.* at 691.

156. *Id.* at 693–95.

157. *Id.* at 693–97.

158. *Id.* at 694–95.

159. Brief for Edward H. Levi, Griffin B. Bell, & William French Smith as Amici Curiae in Support of Appellees, *Morrison v. Olson*, 487 U.S. 654 (1988) (No. 87-1279), 1988 U.S. S. Ct. Briefs LEXIS 981, at *28–32. The brief suggested other “ways to protect the independence of a criminal investigation from political interference,” such as by establishing a special prosecutor with a fixed term covering different presidential administrations. *Id.* at *42.

DOJ policy where possible,¹⁶⁰ and it concluded that “these features of the Act give the Executive Branch sufficient control over the independent counsel to ensure that the President is able to perform his constitutionally assigned duties.”¹⁶¹

Along the way, the Court rejected Justice Scalia’s assumption that federal prosecution by its nature was not just an executive power but also a presidential power.¹⁶² Justice Scalia wrote that “[a]lmost all investigative and prosecutorial decisions—including the ultimate decision whether, after a technical violation of the law has been found, prosecution is warranted—involve the balancing of innumerable legal and practical considerations,” and gave as examples situations involving subpoenaing a former ambassador and whether to use classified information in a prosecution.¹⁶³ He concluded that “the balancing of various legal, practical, and political considerations, none of which is absolute, is the very essence of prosecutorial discretion,” and that “[t]o take this away is to remove the core of the prosecutorial function, and not merely ‘some’ presidential control.”¹⁶⁴ The Court did not dispute Justice Scalia’s description of prosecutorial decision-making, but nevertheless considered it inessential for the President to be the ultimate arbiter, even on occasions when nonpartisan political considerations and foreign policy considerations were implicated. The Court was satisfied that Congress could delegate this type of executive decision-making to court-appointed lawyers governed by DOJ policy and subject to termination for incompetence.

Morrison strongly suggests that Congress can make any or all federal prosecutors independent from presidential direction.¹⁶⁵ The Court did not consider federal prosecutorial decision-making a core presidential function,

160. *Morrison*, 487 U.S. at 696. A century earlier, *United States v. Perkins*, 116 U.S. 483 (1886), established Congress’s authority to limit the grounds on which the President may discharge certain subordinate officials.

161. *Morrison*, 487 U.S. at 696.

162. *See id.*

163. *Id.* at 707–708 (Scalia, J., dissenting).

164. *Id.* at 707–08.

165. *See, e.g.,* Lessig & Sunstein, *supra* note 59, at 110 (“[A]fter *Morrison v. Olson*, execution of the laws can be split off from the President if the splitting does not prevent the President from performing his ‘constitutionally appointed functions.’” (quoting *Morrison*, 487 U.S. at 685)). An earlier example was the establishment of a Special Prosecutor to investigate the Teapot Dome scandal. Act of Feb. 8, 1924, ch. 16, 43 Stat. 5, 5–6 (1924). In recent years, many scholars have been sympathetic to Justice Scalia’s dissent in *Morrison*. *See, e.g.,* *Counsels and the Separation of Powers*, Hearing Before the S. Comm. on the Judiciary, 115th Cong. 5 (2017) (statement of Akhil Reed Amar), <https://www.judiciary.senate.gov/imo/media/doc/09-26-17%20Amar%20Testimony.pdf> (asserting that “[t]he lion’s share of the constitutional law scholars who are most expert and most surefooted on this particular topic now believe that *Morrison* was wrongly decided and/or that the case is no longer ‘good law’ that can be relied upon as a sturdy guidepost to what the current Court would and should do”). But many others are less so, and the fact remains that, whatever individual Justices may have said before being confirmed, the Supreme Court itself has not given any indication that it would reexamine *Morrison* or that the Court’s decision in *Morrison* is not good law.

one that Congress cannot place elsewhere in the Executive Branch—and little wonder, since modern presidents rarely seek to assert this power, and as we discuss below, the tradition of prosecutorial independence has grown into a permanent feature of American government. Given that understanding, Congress could presumably create a corps of federal prosecutors hired and subject to firing by the Attorney General, but not otherwise subject to the Attorney General's direction or the centralized control of the DOJ or, indirectly, the President. Nothing in *Morrison* suggests why Congress could not just as legitimately establish independent counsel to investigate and prosecute crimes other than those by high-ranking federal officials.

The harder question is whether Congress has in fact required or authorized federal prosecutors to ignore presidential direction and, if not, whether that expectation has some other legal basis. Or, put differently, the question is whether the law regulating federal prosecutorial decision-making presupposes that prosecutors will not defer to third parties' direction, not even to that of the President. In past confirmation hearings, some senators and attorney general nominees seemingly assumed that the Attorney General may not defer to the President in individual criminal cases, but the source of that assumption is unclear.

Morrison involved a statute that explicitly removed the Independent Counsel from the direction of the President or the Attorney General. The statutory scheme establishing the Attorney General, the DOJ, United States Attorneys, and subordinate federal prosecutors is quite different. It does not expressly authorize or require the Attorney General or lower-ranked prosecutors to make decisions independently of the President. That the Attorney General serves at the will of the President might be taken to mean that the Attorney General must follow the President's lawful directions not only as to certain matters, such as those involving broad policy, but as to all matters, including the conduct of individual criminal prosecutions and investigations and civil lawsuits. That United States Attorneys serve at the will of the Attorney General, and lower ranked federal prosecutors serve subject to supervision of United States Attorneys or higher ranked DOJ officials, might imply that they must follow all lawful directions of the Attorney General, including those originating with the President.

On the other hand, requiring the Attorney General to ignore presidential directions regarding specific criminal cases, and to insulate lower-level prosecutors from presidential influence in such cases, would be a modest delegation of executive power as compared with the independent counsel provisions that the Court upheld. Prosecutions would remain under DOJ control, unlike those conducted by independent counsel, pursuant to the Ethics in Government Act. And, prosecutorial independence from the

President would largely accord with contemporary practice and expectations.

The *Morrison* Court had no reason to determine how prosecutorial power is allocated within the Executive Branch as a general matter. Any hints *Morrison* may have dropped are of little significance thirty years later, given that none of the Justices who decided *Morrison* are still active members of the Court.¹⁶⁶ And, while Congress ultimately allowed the independent counsel provisions to sunset, that was not an endorsement of Justice Scalia's dissenting view that the President should have the last word on criminal prosecutions generally, much less in cases involving Executive Branch officials. At most, it reflected confidence that career prosecutors or special prosecutors appointed by the DOJ could perform this work as independently as court-appointed counsel.

F. Concluding Thoughts

There is a scholarly debate over the extent of presidential authority in the administrative state: which non-enumerated powers must, as a constitutional matter, remain within the President's control and which may be allocated to lesser officials, subject only to presidential oversight and dismissal power.¹⁶⁷ This Article does not enter that debate as a general matter, but focuses on the specific question of whether federal criminal prosecution is vested in the President. After *Morrison*, we think it is hard to argue that the Constitution necessarily assigns criminal law enforcement authority to the President. Although prosecution is an executive power, Congress may delegate certain executive powers to federal officers who act independently of the President—who, although subject to termination by the President or the Attorney General, are required to make legal decisions on their own. As the independent counsel provisions illustrated, prosecutors may be asked to answer to the law, not the President.

The difficult question is the statutory one—whether Congress has authorized the President to direct federal prosecutions or, alternatively, has authorized the Attorney General and subordinate federal prosecutors to do so independently of the President.¹⁶⁸ The question, which was largely academic from the Ford through Obama administrations, is critical now

166. Justice Kennedy, having recently joined the Court, did not participate in the decision.

167. See, e.g., Abner S. Greene, *Checks and Balances in an Era of Presidential Lawmaking*, 61 U. CHI. L. REV. 123 (1994); Lessig & Sunstein, *supra* note 59.

168. See Norman W. Spaulding, *Professional Independence in the Office of the Attorney General*, 60 STAN. L. REV. 1931, 1968–69 (2008) (inquiring, given that “centralized control and political influence were equally significant factors” in attorneys generals’ failings, “What then are we to make of the fact that no major structural guarantees of independence have been implemented in the office of the Attorney General?”).

because of reports that the current President has attempted, or at least might attempt, to direct the Attorney General to bring charges against a political foe or to drop an investigation or charge against a political ally or personal associate.¹⁶⁹ Should this occur, the Attorney General or a subordinate prosecutor would have to decide whether there is a legal obligation to comply or, alternatively, to exercise prosecutorial discretion without regard to presidential direction. A federal court might conceivably confront the question if, for example, a subordinate prosecutor challenges adverse employment action for disobeying a presidential directive, or a defendant moves to dismiss criminal charges brought in obedience to a presidential directive. A federal court might also determine how prosecutorial authority is allocated within the federal Executive Branch in the course of resolving another legal question, such as whether presidential interference in a criminal case might comprise obstruction of justice, or whether a sitting president can be indicted.

The statutory-interpretation question essentially has two parts—whether the Attorney General can direct the conduct of subordinate prosecutors, and if so, whether the President can dictate how the Attorney General conducts criminal prosecutions or directs subordinate prosecutors. The relevant legislation provides no explicit answer to the second part of the question.

As to the first part, federal law reserves the conduct of litigation, including criminal prosecutions, to “officers of the Department of Justice, under the direction of the Attorney General,” except where the law provides otherwise.¹⁷⁰ This is conventionally taken to mean that United States Attorneys and other subordinate DOJ lawyers are, in theory, subject to the Attorney General’s specific direction,¹⁷¹ although, as a practical matter, subordinate prosecutors maintain substantial autonomy: it would be a rare criminal case where, consistent with DOJ policy, an attorney general made the ultimate decision. It should be noted, however, that the current regime of attorney general control, sparingly exercised, was not always the understanding, and owes something to historic practice. The Judiciary Act of 1789 gave the Attorney General no control or direction over federal prosecutors.¹⁷² Federal prosecutors (then “district attorneys”) were first

169. *See supra* notes 4–5.

170. 28 U.S.C. § 516 (2012); *see also supra* note 38 (quoting 28 U.S.C. § 516). Section 519 provides: “Except as otherwise authorized by law, the Attorney General shall supervise all litigation to which the United States, an agency, or officer thereof is a party, and shall direct all United States attorneys, assistant United States attorneys, and special attorneys . . . in the discharge of their respective duties.” *Id.* § 519.

171. *See* *United States v. Wrigley*, 520 F.2d 362, 368 (8th Cir. 1975).

172. The Act provided that “there shall be appointed in each district a meet person learned in the law to act as attorney for the United States in such district, who shall be sworn or affirmed to the faithful execution of his office, whose duty it shall be to prosecute in such district all delinquents for

placed expressly under the Attorney General's oversight in 1861.¹⁷³ This might have been read to mean simply that the Attorney General had authority to hire and fire and to prescribe general policy, and the uncertainty was exacerbated by later legislation, including an act "requiring the Commissioner of Internal Revenue to establish regulations for the guidance of United States attorneys."¹⁷⁴ In 1869, the Supreme Court simply assumed that district attorneys were subject to the Attorney General's "superintendence and direction," whether as a matter of "the usage of the government," federal legislation, or the Court's own decisions.¹⁷⁵ The 1870 legislation creating the DOJ, while making it clear that the Attorney General headed the agency, was also not explicit that prosecutors were intended to answer to the Attorney General,¹⁷⁶ and the legislative history is ambiguous.¹⁷⁷ Internal DOJ guidance takes the view that the Attorney General possesses plenary authority over subordinates, which is "rooted historically in our common law and tradition,"¹⁷⁸ though based in legislation since 1870.¹⁷⁹ The legislation itself is less clear than the DOJ's guidance suggests.

crimes and offences, cognizable under the authority of the United States," and that "there shall also be appointed a meet person, learned in the law, to act as attorney-general for the United States, who shall be sworn or affirmed to a faithful execution of his office; whose duty it shall be to prosecute and conduct all suits in the Supreme Court in which the United States shall be concerned, and to give his advice and opinion upon questions of law when required by the President of the United States, or when requested by the heads of any of the departments, touching any matters that may concern their departments." The Judiciary Act of 1789, ch. 20, § 35, 1 Stat. 73, 92–93.

173. Act of Aug. 2, 1861, ch. 37, § 1, 12 Stat. 285, 285; see *Confiscation Cases*, 74 U.S. (7 Wall.) 454, 457 (1868).

174. Sewall Key, *The Legal Work of the Federal Government*, 25 VA. L. REV. 165, 180–81 (1938) (citing Act of March 2, 1867, ch. 169, § 3, 14 Stat. 471); accord Griffin B. Bell, *The Attorney General: The Federal Government's Chief Lawyer and Chief Litigator, or One Among Many?*, 46 FORDHAM L. REV. 1049, 1054 (1978) ("Congress was exhibiting a curious ambivalence about the role of the Attorney General and the Department of Justice . . .").

175. *Confiscation Cases*, 74 U.S. (7 Wall.) at 458–59.

176. Act of June 22, 1870, ch. 150, 16 Stat. 162. The 1870 legislation creating the DOJ authorized the Attorney General to appoint special assistants to conduct litigation that district attorneys could not conduct, but the law did not specifically authorize the Attorney General to direct the district attorneys' work. *Id.*

177. Compare Key, *supra* note 174, at 182 & n.66 (citing legislative statements suggesting the Attorney General was meant to control federal prosecutors), with Bell, *supra* note 174, at 1054 (citing contemporaneous legislation showing that "Congress . . . had not been serious about centralizing all legal activity under the Attorney General"). At least with respect to the federal government's civil litigation, *United States v. San Jacinto Tin Co.*, 125 U.S. 273 (1888), has been taken to establish the centralization of authority in the Attorney General. Key, *supra* note 174, at 186–87.

178. The Att'y Gen.'s Role as Chief Litigator for the U.S., 6 Op. O.L.C. 47, 48 (1982) (first citing *Confiscation Cases*, 7 U.S. (7 Wall.) at 458–59; and then citing *The Gray Jacket*, 72 U.S. (5 Wall.) 370 (1866)).

179. *Id.* ("Such authority . . . , since 1870, has been given a statutory basis.") (citing 5 U.S.C. § 3106 (2012) and 28 U.S.C. §§ 516, 519 (2012)). For a discussion of how decision-making should be allocated in the DOJ between the Attorney General, United States attorneys, and subordinate prosecutors, see Bruce A. Green & Fred C. Zacharias, "The U.S. Attorneys Scandal" and the Allocation of Prosecutorial Power, 69 OHIO ST. L.J. 187 (2008).

If the division of authority between the Attorney General and subordinate DOJ lawyers is relatively settled, particularly to the satisfaction of the DOJ and its lawyers, the division of authority between the President and the Attorney General with regard to criminal prosecutions is not. The law is silent. On one hand, legislation does not explicitly make the Attorney General and the DOJ independent of the President, as it has done with some other executive agencies and officials.¹⁸⁰ As a cabinet officer and presidential advisor, the Attorney General plainly answers to the President as to certain matters, and one might assume that absent an express limitation on presidential power, the President may control the Attorney General as to all matters. On the other hand, federal legislation has never explicitly authorized the President to make decisions in criminal investigations and prosecutions or to direct the decisions of the Attorney General, United States Attorneys, or other prosecutors. Statutes leave it uncertain whether there is a particular aspect of the Attorney General's work—criminal investigation and prosecution—as to which the Attorney General, and through him, subordinate government lawyers, have ultimate decision-making authority and must answer to the law, not the President.

In situations such as this one, where legislation is silent, courts look to Congress's implicit intent. Implicit legislative intent regarding the division or allocation of power may be reflected not only in the structure and purpose of legislation but in conduct, and attendant understandings, over time—in other words, historical practice. Just as historical practice plays a role in constitutional interpretation,¹⁸¹ courses of conduct and understandings developed over time help answer statutory interpretation questions about the scope of presidential power.¹⁸² Congressional silence in response to sustained or repeated conduct may express congressional acquiescence in the exercise of authority.¹⁸³ In particular, implied under-

180. See, e.g., 29 U.S.C. § 153 (2012) (“There shall be a General Counsel of the [National Labor Relations] Board who shall be appointed by the President, by and with the advice and consent of the Senate, for a term of four years. The General Counsel . . . shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints . . . , and in respect of the prosecution of such complaints before the Board. . . .”).

181. See, e.g., *NLRB v. Canning*, 134 S. Ct. 2550, 2559–60 (2014) (“[I]n interpreting the [Recess Appointments] Clause, we put significant weight upon historical practice.” (emphasis omitted)); *The Pocket Veto Case*, 279 U.S. 655, 689 (1929) (“Long settled and established practice is a consideration of great weight in a proper interpretation of constitutional provisions.”).

182. See *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring) (“Deeply embedded traditional ways of conducting government cannot supplant the Constitution or legislation, but they give meaning to the words of a text or supply them.”), quoted in *Mistretta v. United States*, 488 U.S. 361, 400–01 (1989). While *Youngstown* addressed presidential power vis-à-vis Congress, the principle of interpretation applies equally to presidential power vis-à-vis executive agencies and officials.

183. See, e.g., *Dames & Moore v. Regan*, 453 U.S. 654, 678–79 (1981) (perceiving “a history of congressional acquiescence in conduct of the sort engaged in by the President”); *id.* at 686; *United States v. Midwest Oil Co.*, 236 U.S. 459, 474–75 (1914) (inferring congressional intent from “long-

standings reflected in a course of conduct may inform questions about the allocation of authority within the Executive Branch itself. As noted, the Supreme Court's earliest understanding regarding the allocation of power between the Attorney General and district attorneys was not derived from statutory language but from the course of dealings within the Executive Branch.¹⁸⁴

The next part of this Article shows that prosecutorial independence is so clearly a part of our democratic system that Congress's failure to authorize presidential control shows acquiescence or implicit endorsement. While the concept of congressional acquiescence has been challenged when it comes to questions about the allocation of power between Congress and the President,¹⁸⁵ the concept should be far less controversial with regard to the division of authority within the Executive Branch. Congress meant for someone within the Executive Branch to have the last word on the conduct of criminal cases—either the President or the Attorney General. If the law is uncertain, there is no reason to presume which should possess this authority. Congressional intent must be sought wherever it can be found. Whether or not historic practice is dispositive, it can surely weigh heavily in the balance. Because the Constitution, while providing pardon power, does not otherwise authorize the President to act in criminal cases, the President's authority would be “at its lowest ebb” in the criminal context unless, in a particular case, one could argue that an enumerated presidential power was implicated.¹⁸⁶

II. HISTORY OF PROSECUTORIAL INDEPENDENCE

A. Overview

We turn to history at the invitation of Supreme Court cases as a means to assess congressional intent.¹⁸⁷ Even absent such an invitation, history is critical in understanding the meaning of contemporary law and the structure of democratic institutions. History is often contradictory. If done

continued practice, known to and acquiesced in by Congress”). See generally Shalev Roisman, *Constitutional Acquiescence*, 84 GEO. WASH. L. REV. 668 (2016).

184. See *supra* notes 175–79 and accompanying text.

185. See, e.g., Matthew Baker, *The Sound of Congressional Silence: Judicial Distortion of the Legislative-Executive Balance of Power*, 2009 B.Y.U. L. REV. 225, 229–30 (2009) (citing skeptical scholarship and Justices); William N. Eskridge, Jr., *Interpreting Legislative Inaction*, 87 MICH. L. REV. 67 (1988); John C. Grabow, *Congressional Silence and the Search for Legislative Intent: A Venture into “Speculative Unrealities,”* 64 B.U. L. REV. 737 (1984).

186. Cf. *Steel Seizure*, 343 U.S. at 637 (Jackson, J., concurring) (“When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers . . .”).

187. See *supra* notes 181–84 and accompanying text.

well, it can confuse rather than simplify.¹⁸⁸ While even originalists acknowledge the shortcomings of historical analysis, they argue that the intent of the Founders ought to govern our interpretation of the Constitution. Judges ought to be constrained in how they read the law, and originalism, albeit imperfect, prevents them from drawing on their own ideological or idiosyncratic views.¹⁸⁹

This Part turns to history for a different, competing reason. The law changes as society evolves, and if we don't understand how and why, we will be at a distinct disadvantage in untangling its present meaning. This Part is designed to track the development of a concept, how it changed in both meaning and purpose. Given the importance of balance of power in our democracy, it is critical that we recognize how the system and structure of government have changed to adapt to new circumstances while keeping those core values intact. Once these subtle changes in government structure become clearer, we can recognize and preserve this balance.

The relationship between the President and the DOJ, the Attorney General, and the United States Attorneys is not static. As the federal criminal justice system expanded, the pieces of that system evolved and shifted in relation to each other. Punctuated by scandals and moments of rapid growth, federal law enforcement changed from the job of a single part-time employee to a massive organization with multiple departments, over 10,000 lawyers, and myriad responsibilities.

This Part does not describe linear progress or consensus, but rather points to one theme that has developed consistently as the organ of law enforcement expanded and consolidated under the Executive Department. Just as expertise formed the cornerstone of the administrative state, so too professional independence became the defining characteristic of the DOJ. Professional independence does not have a fixed meaning. It grew to denote a distance from both the changing tide of popular opinion and the ambitions of partisan politics. In the wake of the Watergate scandal, the debate over how to foster and ensure independence culminated in the explicit articulation of the separation of the DOJ from presidential control.¹⁹⁰

Throughout the twentieth century, the professional identity of the lawyers in the DOJ grew increasingly important in defining the mission of

188. The postmodern critique of history undermined the integrity of the discipline by arguing that the past is in the eye of the beholder. The inquiry is necessarily determined by the biases and beliefs of each historian. *See generally* JOYCE APPLEBY ET AL., *TELLING THE TRUTH ABOUT HISTORY* (1994) (summarizing this literature). In the wake of this critique, others have acknowledged the impossibility of objectivity, but have argued that history is critical nonetheless. PETER NOVICK, *THAT NOBLE DREAM: THE "OBJECTIVITY QUESTION" AND THE AMERICAN HISTORICAL PROFESSION* (1988).

189. For a critique of originalism and textualism, see Nourse, *supra* note 30, at 101–07.

190. For a different interpretation of the evolving definition of prosecutorial independence, see Spaulding, *supra* note 168.

the office and its relationship to the Executive Branch. Legislators, courts, and DOJ lawyers pointed to professional norms as the key to determining the role of the Attorney General and federal prosecutors, and their interactions with the President. The balance of powers in the Constitution was designed to protect individual liberty and the rule of law. As the nature of government changed, the meaning and importance of prosecutorial independence evolved to preserve these central values.

As prosecutorial independence grew more central to the structure of American criminal justice, its meaning shifted. Prosecutorial independence in its older iteration rested on the distinction between law and politics. In earlier understanding, the meaning was relatively unproblematic. The Attorney General was independent from the President because of his allegiance to the law, a clearly discernible body of edicts separate from political inclination. In other words, critics assumed that the Attorney General applied the law in a disinterested way. His discretion was limited, not by political accountability, but by the determinate meaning of the law he enforced. Independence, in this context, came with the job. By reading the law accurately, the Attorney General was doing something different from politicians, and as long as he did it well, he would necessarily be independent from them.

In the late-nineteenth and early-twentieth centuries, however, the distinction between law and politics began to collapse. Legal realists argued that law was not a clearly discernible set of rules that yielded a discrete answer when applied to different sets of facts. Instead, they reduced law to the choices those in power make, choices that are clearly formed by moral and ideological beliefs. As jurists and critics began to accept this critique of the distinction between law and politics, prosecutorial independence grew more precarious. It had to rest on either a distinct legal approach to solving problems or the personal integrity of the lawyer. As the latter two definitions prevailed, the isolation of DOJ lawyers grew increasingly important both to preserve their personal character from corruption and to hone their distinct skills and craft.

B. The Attorney General in the Beginning

As discussed above, the significance of early federal criminal practice is mixed.¹⁹¹ To frame the history of prosecutorial independence, it is

191. See *supra* Subpart I.B. These scholars use originalism as an approach to statutory or constitutional interpretation. In other words, they purport to use history to ascertain the meaning of law at a particular time, assuming that the contemporary understanding ought to reflect that original public meaning. For a critique of the way many academics have used history to support their ideological commitments in legal scholarship, see Martin S. Flaherty, *History "Lite" in Modern American Constitutionalism*, 95 COLUM. L. REV. 523, 523–29 (1995).

important to understand that the notion of prosecutorial independence animated early criminal practice as it does today. Federal criminal prosecutions were rare, and responsibility for enforcing laws was dispersed largely among local actors. Prosecutorial independence was a function of this reality as much as it was a product of theoretical commitment.

When Congress created the office of the Attorney General in 1789,¹⁹² the office was weak, perhaps intentionally so.¹⁹³ Underfunded and poorly staffed, the Attorney General lacked office space and supplies. The salary was low relative to other offices created by the First Congress, and it soon became clear that it was only a part-time job.¹⁹⁴ Lawyers were expected to continue in private practice, and the remuneration was, in part, the prestige that would come from the post.¹⁹⁵ Other than representing the government in the Supreme Court and giving opinions on the law, the duties were vague. The Judiciary Act perpetuated a system of district attorneys, “learned in the law,” who would prosecute “all delinquents for crimes and offenses, cognizable under the authority of the United States, and all civil actions in which the United States shall be concerned” but gave the Attorney General no supervisory power over these prosecutors, who worked in the lower courts throughout the country.¹⁹⁶

Original drafts of the Judiciary Act, which empowered district courts to appoint local prosecutors and the Supreme Court to select the Attorney General, suggest that prosecutors were viewed, at least by some, as judicial officers, clearly immune from presidential control.¹⁹⁷ Sensitive to the debate over the power of the federal government, the final draft of the

192. The Judiciary Act of 1789, ch. 20, § 35, 1 Stat. 73, 92–93. The office of the Attorney General was modeled in part on the English predecessor but the colonies had created attorneys general as well. LUTHER A. HUSTON, *THE DEPARTMENT OF JUSTICE* 6 (Ernest S. Griffith & Hugh Langdon Elsbree eds., 1967).

193. Legislators in the First Congress were reluctant to create a strong wing of federal law enforcement, fearful of the cost of centralization to liberty. HUSTON, *supra* note 192, at 4–5. The Act itself was a compromise, designed to unite those in favor of strong federal government and those fearful of its potential dangers. 1 JULIUS GOEBEL, JR., *HISTORY OF THE SUPREME COURT OF THE UNITED STATES* 458 (Paul A. Freund ed., 1971); Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 109 (1923).

194. CORNELL W. CLAYTON, *THE POLITICS OF JUSTICE: THE ATTORNEY GENERAL AND THE MAKING OF LEGAL POLICY* 16–17 (Routledge 2015) (1992); The position did not become full-time until 1853 when Caleb Cushing assumed the post and pushed for greater support. HUSTON, *supra* note 192, at 9–11.

195. President Washington informed his Attorney General, Edmund Randolph, that the position would “confer pre-eminence” which would serve as an advantage in his private practice. Luther A. Huston, *History of the Office of the Attorney General*, in *ROLES OF THE ATTORNEY GENERAL OF THE UNITED STATES* 6 (1968).

196. Judiciary Act of 1789, ch. 20, 1 Stat. 73, 92–93. The district attorneys did not answer directly to anyone until 1830, at which point Congress put the Secretary of Treasury in charge of their operations. It wasn’t until 1861 that district attorneys officially reported to the Attorney General.

197. NANCY V. BAKER, *CONFLICTING LOYALTIES: LAW AND POLITICS IN THE ATTORNEY GENERAL’S OFFICE, 1789–1990*, at 46–47 (1992); Warren, *supra* note 193, at 109.

statute was silent on the matter.¹⁹⁸ Despite the fear of a strong federal government, the President quickly assumed the task of appointing the Attorney General, asking the Senate for advice and consent, which soon became the norm.¹⁹⁹ The President's ability to appoint the Attorney General was not mandated by the law or Constitution but rather a matter of practice.

The trappings of the Attorney General's post were slim and the tasks poorly defined. The first attorneys general occupied themselves mostly by giving opinions on the law, because federal criminal law was sparse and there were few cases in the Supreme Court in the early years. The statute was silent about the relationship between the Attorney General and the Legislature, but attorneys general regularly responded to Congress's request for opinions on the legality of proposed legislation. In practice, in the early years, the Attorney General occupied a position in between all three branches of government.

The legislative history of the Judiciary Act and early practice can support either strong presidential control or a more diffuse notion of prosecution.²⁰⁰ This ambiguity is unsurprising given the fact that the Judiciary Act itself was a compromise, designed to unite those in favor of strong federal government and those fearful of its potential dangers.²⁰¹

The nature of criminal law enforcement in the new republic, which mostly occurred at the local level, made it difficult, if not impossible, for the President to exert power even if he were so inclined. Oddly, states and private citizens were just as likely to institute proceedings against an individual for federal criminal offenses as federal prosecutors, which made it even harder for the President to exert his influence.²⁰² The law and reality of federal prosecution meant that district attorneys were largely autonomous.²⁰³

Federal criminal law at the time was far less expansive than it is now. Many doubted and resisted the federal government's power to prosecute crimes at all.²⁰⁴ The isolated acts of early presidents notwithstanding, the Executive did not exercise centralized control over criminal justice.²⁰⁵ Federal prosecutions tended to implicate other core executive functions because the federal criminal law itself was confined to only a few offenses

198. Warren, *supra* note 193, at 107–09. For a discussion of how problematic originalism is, in part due to the contradictory impulses and complex compromises that led to the provisions of the Constitution, see PURCELL, JR., *supra* note 123, at 3–17.

199. HOMER CUMMINGS & CARL MCFARLAND, *FEDERAL JUSTICE* 17–18 (1937); Bloch, *supra* note 44, at 568.

200. See *supra* Subpart I.B.

201. GOEBEL, *supra* note 193, at 458 (1971); Warren, *supra* note 193, at 107–09.

202. Krent, *supra* note 136, at 304–07; Lessig & Sunstein, *supra* note 59, at 19–20.

203. Lessig & Sunstein, *supra* note 59, at 16.

204. ELIZABETH DALE, *CRIMINAL JUSTICE IN THE UNITED STATES, 1789–1938*, at 17 (2011).

205. *Id.* at 20.

with strong implications for national interests. Most of the prosecutions in which presidents chose to interfere involved interests that were even more fundamental to the new nation than most federal criminal proceedings.²⁰⁶ This is not to say that there is no evidence of the early concept of executive control over prosecutorial decisions but rather that such control is far less remarkable than it would be today. Interfering in these particular cases was a way of ensuring policy objectives in areas of central national concern.

The ambiguity in the Judiciary Act may have appeased concerns about a strong federal Judiciary and law enforcement power. The narrow scope and infrequent application of federal criminal law most likely made presidents' interference seem less of a threat to the principles of Anti-Federalists.

In the first decades of the new republic, individuals could be prosecuted under federal common law as well as statutory edicts. It was not until 1812 that the Court put an end to this practice, holding that individuals could not be federally prosecuted unless Congress had declared their conduct criminal.²⁰⁷ The controversy over the federal common law of crimes shows how contested federal criminal prosecutions were. The Court's decision in 1812 demonstrated a growing willingness and desire to limit the executive power over criminal law enforcement by eliminating this entire set of unwritten criminal offenses.²⁰⁸ Unlike in England, written law rather than traditions would define the scope of government power. In this context, the idea that federal executive control over prosecution was settled is a bit nonsensical. The nature of prosecution, along with the power of the federal government to convict individuals of crimes against the sovereignty, was itself in dispute. If anything, in 1812, the vision of limited federal control over prosecution prevailed.

The failure of the Treasury in collecting debts after the War of 1812 led President Jackson to propose greater central control over federal criminal law enforcement.²⁰⁹ Daniel Webster led the charge against the bill, arguing that it would create a monster: "A half accountant, a half lawyer, a half clerk—in fine, a half of every thing, and not much of any thing."²¹⁰ In essence, Webster worried that the Attorney General's professional status

206. CUMMINGS & MCFARLAND, *supra* note 199, at 143.

207. Gary D. Rowe, *The Sound of Silence: United States v. Hudson & Godwin, The Jeffersonian Ascendancy, and the Abolition of Federal Common Law Crimes*, 101 YALE L.J. 919, 919–21 (1992). For a general discussion of the debate over federal common law of crimes, see G. EDWARD WHITE, 1 LAW IN AMERICAN HISTORY 230–32 (2012).

208. Rowe, *supra* note 207, at 922. In 1837, the Supreme Court again expressed concern about federal criminal law enforcement power, suggesting that general police powers belonged to the states. *See City of New York v. Miln*, 36 U.S. 102, 133 (1837).

209. CUMMINGS & MCFARLAND, *supra* note 199, at 144–45. A resolution proposing similar control over federal law enforcement had been introduced in 1819 but did not pass. *Id.*

210. *Twenty-First Congress – 1st Session*, 38 NILES' WEEKLY REGISTER 115, 115 (1830).

would grow meaningless if such an array of obligations were assigned to him. It would distract him from “studying his books of law.”²¹¹ Ultimately, Webster proposed a new position, Solicitor of the Treasury: a lawyer to supervise the district attorneys.²¹²

The early attorneys general had different views on the nature of their job and the power of the President to direct law enforcement decisions. William Wirt, Attorney General to James Monroe and John Quincy Adams, insisted that the President had no power to second-guess the decisions of executive officials. The President’s job was to see to it that they faithfully executed the laws but not to manage particular decisions.²¹³ The distinction between the two seemed fairly unproblematic to Wirt. Taking care that the law was faithfully executed did not imply the ability to direct or control particular decisions. To the contrary, to fulfill his job under the “Take Care” clause, the President had to defer to prosecutors’ knowledge and expertise.

Expressing faith in professional expertise, Wirt explained that it was not the responsibility of the Attorney General, or the Secretary or Comptroller of the Treasury, to instruct the district attorneys in the discharge of their duties. The Judiciary Act, according to Wirt, required that district attorneys be persons “learned in the law” so that they can interpret and apply the law wisely: “It could never have been considered, therefore, as among the duties of [the President], that he should instruct and direct the district attorneys *as to the mere technicalities of their profession.*”²¹⁴ Respecting spheres of knowledge and expertise, Wirt understood that the President would not necessarily be so “learned.” In order to fulfill his obligations, the President had to rely on the legal expertise of those around him. In other words, Wirt respected the professional status of prosecutors at all levels and required government officials to defer to their expertise and professional judgment. He read the ambiguity of the Judiciary Act with professional norms in mind, concluding that the drafters must have intended to leave “technical and professional” details to the discretion of lawyers.²¹⁵ Writing about presidential control over accounting officers, Wirt similarly concluded that the duty of the President to take care that the laws be faithfully executed does not mean that he is

211. *Id.*

212. Act of May 29, 1830, ch. 153, 4 Stat. 414, 414–16.

213. The President & Accounting Officers, 1 Op. Att’y Gen. 624, 624 (1823).

214. Att’y Gen. & Dist. Atty’s, 1 Op. Att’y Gen. 608, 611 (1823). Wirt explained that the Secretary of the Treasury and the Comptroller can similarly do their jobs, but they cannot interfere with the pleadings, which ought to be left to the “law-officer intrusted [sic] with that peculiar duty.” *Id.* Wirt viewed the obligation to supervise as the duty to ensure that the official was doing his job with “vigilance, industry, and integrity” but not to manage particular decisions. *Id.* at 612.

215. *Id.* at 613.

“required to execute them himself.”²¹⁶ As long as the officers “discharge their duties faithfully, the President has no authority to interfere.”²¹⁷

But Wirt’s view was not universal. Roger Taney, Attorney General from 1831 to 1833, concluded that the President could order a district attorney to discontinue a suit to forfeit stolen jewels belonging to the King of the Netherlands. The jewels had been stolen from the royal family and smuggled illegally into the United States. The President wanted to return the jewels to their owner who had not violated the law. Deriving the authority from the President’s duty to take care that the laws are faithfully executed, Taney wrote, “I think the President does possess the power. The interest of the country and the purposes of justice manifestly require that he should possess it.”²¹⁸ Taney’s view clearly diverged from Wirt’s, but he was tentative in his conclusion and the case was one that directly implicated foreign relations, another core executive interest. He qualified his conclusion by insisting that in this instance justice required the President’s intervention. The President’s power was not absolute or limitless but rather used sparingly for the sake of justice. Even Taney, who, at the time, defended the Jacksonian view of strong executive power, agreed with Wirt that the exercise of that power had to further communal goals.²¹⁹

Scholars who trace the unitary Executive to the early republic recount an incident during President Jackson’s administration. During the controversy over the United States Bank, Attorney General Taney expressed some reservations about the legality of depositing United States funds in state banks, at which point President Jackson reportedly replied: “Sir, you must find a law authorizing the act or I will appoint an Attorney General who will.”²²⁰ To proponents of a strong executive, this episode shows that the Attorney General was never truly a check on presidential power. But it also illustrates that attorneys general, even those who, like Taney, were committed to a strong executive, viewed their job as

216. *Id.*

217. *The President & Accounting Officers*, 1 Op. Atty. Gen. at 624.

218. *The Jewels of the Princess of Orange*, 2 Op. Atty. Gen. 482, 487 (1831). Wirt did not consider representing the government in lower courts as part of his job: “I do not consider myself as the advocate of the government . . . but as a judge, called to decide a question of law with the impartiality and integrity which characterizes the judician.” CUMMINGS & MCFARLAND, *supra* note 199, at 90.

219. As Attorney General, Roger Taney had helped President Jackson close the Second Bank of the United States over the strong objection of members of Senate and Congress. ARTHUR M. SCHLESINGER, JR., *THE AGE OF JACKSON* 88–102 (1945). During his tenure as Chief Justice, when Lincoln was President, Taney’s position on the power of the Executive shifted dramatically. JAMES F. SIMON, *LINCOLN AND CHIEF JUSTICE TANEY: SLAVERY, SECESSION, AND THE PRESIDENT’S WAR* 193 (2006). This biographical fact illustrates that attitudes toward presidential power are, at least to a certain extent, motivated by politics.

220. Senator George H. Williams recounted this exchange, but most consider it apocryphal. CUMMINGS & MCFARLAND, *supra* note 199, at 109.

significant. Interpreting the law for the President was not merely an act of advocacy but rather a professional exercise distinct from politics. Either way, the fate of the bank, like the crown jewels prosecution, was central to national economic policy, and the story, while dramatic, is considered by most apocryphal.

The position of attorneys general shifted depending on the issues at hand. There was no consensus about the power of the President and attitudes changed with practical and political tides. John Crittenden, Attorney General during Millard Fillmore's Presidency, reaffirmed Wirt's modest understanding of presidential power, arguing that the President has no power to direct district marshals. He wrote that while it is the duty of the President to take care that the federal law is faithfully executed, "it is not, in general, judicious for him to interfere with the functions of subordinate officers further than to remove them for any neglect or abuse of their official trust."²²¹ The opinion, responding to a New York marshal's request to hire counsel at public expense to defend him in fugitive slave law cases, may well have reflected a desire to avoid direct intervention in such a contentious issue, but it nonetheless affirmed the independence of subordinate federal officials.²²²

As the duties of federal prosecutors expanded along with the scope and reach of federal criminal law, the attorneys general were at least sensitive to the practical necessity of official discretion. In 1855, Caleb Cushing explained that the Executive is vested in one man with the understanding that he cannot perform all the tasks on his own but concluded that no head of department could directly defy the President because otherwise Congress could subvert executive power by dividing it into independent pieces.²²³

Unsurprisingly, opinions of the early attorneys general do not reflect a consensus on the relationship between the President and federal prosecutors. Political exigencies tend to affect views on the power of the Executive in general and the President in particular. To the extent that there is a uniting thread, it is that where the prosecution concerns an issue that otherwise affects the President's core functions; his ability to interfere is at its highest. A president who directs his attorney general ought to do so only when it is necessary to promote justice. But there ought to be a respect and deference, at the least, to professional prosecutors and other officials, who

221. Duty of the President Respecting Dist. Marshals, 5 Op. Att'y Gen. 287, 287 (1851).

222. *Id.* Crittenden wrote, "[I]t appears to me most judicious for the President, as well as more consistent with the form and spirit of our institutions, to forbear from interference with the functions of subordinate public officers, and to leave them to discharge of their proper duties under all their legal responsibilities, and subject, also, to removal from office for every neglect or abuse of their official trust." *Id.* at 288.

223. Relation of the President to the Exec. Dep'ts, 7 Op. Att'y Gen. 453, 469–70 (1855). Edward Bates expressed a similar opinion about the practical impossibility of actual supervision. Relation of the President to the Exec. Dep'ts, 10 Op. Att'y Gen. 527, 528 (1868).

have developed expertise in applying the law, and professional norms regarding what sort of motivations are appropriate.

*C. The Civil War and Changing Understandings
of Federal Law Enforcement*

As the country moved toward the Civil War, the scope of federal criminal law expanded to accommodate the increasingly complex nature of the country's problems. The Attorney General spent a greater portion of his time on criminal law enforcement, and the nature of the problems proved not only complex but also divisive. To cope with the political and legal questions of the day, Attorney General had become a full-time cabinet position.²²⁴

Up until this point, the Attorney General exerted minimal control over district attorneys in individual criminal cases.²²⁵ Recognizing that he needed a greater degree of power as the nation moved toward war, Attorney General Bates urged the Legislature to consider putting the district attorneys under his supervision. Congress ultimately enacted a statute granting the Attorney General authority over district attorneys²²⁶ and enabling him to employ special assistants to help in individual prosecutions.²²⁷ The Supreme Court held nonetheless that, while the Attorney General had general supervisory authority, it was the sole duty of local district attorneys to represent the United States in civil and criminal cases.²²⁸

Edward Bates, Attorney General for President Lincoln, was controversial, and history has not been entirely kind to him. Among other things, he issued an opinion supporting Lincoln's decision to suspend habeas rights, which most legal scholars have considered illegal.²²⁹ Given this criticism, his professed view of the office as independent from the President might seem ironic. He wrote, "The office I hold is not properly *political*, but strictly *legal*; and it is my duty above all other ministers of

224. Baker, *supra* note 185, at 59.

225. See Att'y General & Dist. Attorneys, 1 Op. Att'y Gen. 608, 611 (1823); The Jewels of the Princess of Orange, 2 Op. Att'y Gen. 482, 491–92 (1831); Office & Duties of the Att'y Gen., 6 Op. Att'y Gen. 326, 338 (1854). Cushing insisted that it was wrong to interfere in individual cases. Gov't Suits, 8 Op. Att'y Gen. 465 (1855).

226. Act of Aug. 2, 1861, ch. 37, § 1, 12 Stat. 285, 285. Congress quickly passed an explanatory act, noting that the Solicitor of the Treasury still retained control over the district attorneys. Act of Aug. 6, 1861, ch. 65, 12 Stat. 327, 327.

227. *Id.* § 2, 12 Stat. at 285.

228. Confiscation Cases, 74 U.S. 454, 457 (1868).

229. See AMANDA L. TYLER, HABEAS CORPUS IN WARTIME: FROM THE TOWER OF LONDON TO GUANTANAMO BAY 185–199 (2017) (criticizing Lincoln's suspension of habeas during the Civil War); see also *Boumediene v. Bush*, 553 U.S. 723 (2007) (extending habeas protection to enemy combatants detained in Guantanamo Bay).

State to uphold the Law and to resist all encroachments, from whatever quarter, of mere will and power.”²³⁰ The irony, however, reflects the reality that political and practical pressures tend to motivate presidents and their attorneys general. Despite these exigencies, actors for the most part have not lost sight of the ideal of independence that ran from Wirt’s tenure through the mid-nineteenth century, despite the changes in the nature of the job.

Even by mid-century, it was unclear who, if anyone, controlled district attorneys’ decision-making. The early controversies over the Whiskey Rebellion and similar prosecutions with national implications were no longer the norm. The President was otherwise occupied. The tradition of prosecutorial independence, in part, grew out of this practical reality. But as the economic and social life of the nation grew more complex, the system of independent local federal law officers proved chaotic, leaving the application of federal law inconsistent and unpredictable.²³¹ Attorney General Randolph sought control over local law enforcement officers in 1791, but it was not until 1850 that his demands seemed pressing.²³² The move toward centralization thus had little to do with presidential power and more to do with coordination and even-handed justice. One could have tried to ensure consistency by centralizing control, but instead, Congress sought to minimize vagaries and injustice by professionalizing the job.

While bills were being introduced to formalize the law department, the Attorney General was gradually taking responsibility for more tasks, as the scope and complexity of criminal law continued to grow. Attorney General Caleb Cushing pushed for greater official control over the law business of the country, explaining that, while the executive power is vested in the President, he could not perform all executive duties by himself, and many responsibilities had to be delegated.²³³ Cushing further explained that when the President delegates duties to officials, their work must be their own rather than the President’s.²³⁴ Despite his understanding of official discretion, Cushing concluded that the department heads could not “lawfully perform an *official* act against the will of the President.”²³⁵

As the nation neared the Civil War, the stakes of the legal questions were higher. District attorneys reached out to Attorney General Bates for

230. Arthur Selwyn Miller, *The Attorney General as the President’s Lawyer*, in ROLES OF THE ATTORNEY GENERAL OF THE UNITED STATES 41, 51 (1968).

231. See ROBERT J. KACZOROWSKI, *THE POLITICS OF JUDICIAL INTERPRETATION: THE FEDERAL COURTS, DEPARTMENT OF JUSTICE AND CIVIL RIGHTS, 1866–1876*, at 81 (1985).

232. CUMMINGS & MCFARLAND, *supra* note 199, at 142; see *supra* notes 210–12 (discussing earlier attempts by Webster to centralize the law department).

233. Relationship of the President to the Exec. Dep’ts, 7 Op. Att’y Gen. 453, 460 (1855).

234. *Id.* at 463.

235. *Id.* at 469–70.

direction in how to apply federal criminal law during the mounting insurrection. Controlled chaos reigned as members of the military sometimes took matters into their own hands. The necessity for centralized control grew increasingly obvious and elusive at the same time.²³⁶ After Lincoln was assassinated, Bates criticized his successor, Attorney General James Speed, insisting that he was a political hack, not a real professional, “with not much reputation as a lawyer, and perhaps, no strong confidence in his own opinions, he was caressed and courted . . . and sank . . . into a mere tool—to give such opinions as were wanted.”²³⁷ The President was involved in decisions about whether to try leaders of the Confederacy, and district attorneys deferred despite pressure from Congress.²³⁸ Bates expressed concern that a weak and unprincipled attorney general would not stand up to a president. The rule of law would cave if he did not insist on the legality of the President’s actions. Bates was sure that, to resist improper pressure, a lawyer needed professional knowledge and confidence, qualities lacking in his successor.

D. The Creation of the Department of Justice in 1870

The Civil War left numerous legal problems in its wake. The most obvious—the civil rights of the newly emancipated slaves—were not necessarily considered the most pressing. There were issues of land ownership, debt, and taxes. The DOJ was finally created amidst this chaos, if not entirely because of it.²³⁹ Jed Shugarman has argued that the statute creating the DOJ and consolidating its power under the Executive was not established to increase the power of the federal government or to protect the civil rights of newly emancipated black citizens, but rather as an effort to cut budgets and trim excessive spending.²⁴⁰ The DOJ did not grow out of a concerted campaign to build the federal government in the wake of the Civil War, but it did reflect a trend toward professionalization.²⁴¹ This Subpart argues that the two are not inconsistent. The effort to install professional lawyers and rationalize an increasingly splintered system provided a way to justify, or at least address, concerns about the increase in power at the executive level.²⁴²

236. See generally CUMMINGS & MCFARLAND, *supra* note 199, at 188–217.

237. *Id.* at 204.

238. *Id.* at 207–08.

239. Jed Handelsman Shugarman, *The Creation of the Department of Justice: Professionalization Without Civil Rights or Civil Service*, 66 STAN. L. REV. 121, 122–23 (2014).

240. *Id.* at 123.

241. *Id.*

242. The Civil War and Reconstruction gave birth to the modern American state. Regulatory agencies and civil service reform were central to the consolidation of federal power. RICHARD

As Stephen Skowronek and other historians have argued, the birth of the administrative state during the last decades of the nineteenth century coincided with a new faith in professionalism and expertise to combat the degenerative nature of party politics and the corrosive effects of capitalism. Professional associations emerged, along with the research university, at the end of the century with a mission, not only to bring rationalization and order to the federal government, but also to promote expertise, study, and professionalism as mechanisms to combat corruption, waste, and the excesses of a capitalist economy.²⁴³ Historians have traced this civil service reform impulse to post-war movements, which were eventually led by the Mugwumps and, later, Progressive-era reformers.²⁴⁴ Prior to the Pendleton Act of 1883, which reformed the bureaucracy and created the Civil Service Commission, civil service members largely were aspiring politicians who owed allegiance only to the party members who appointed them. Reform changed both the nature of the job and the social class of those who filled it.

Civil service reform itself was part of an effort to check the corrupt accumulation of power with a body of experts, who were career employees with particular expertise and no direct ties to the party in power. Some scholars argue that when the Tenure in Office Act,²⁴⁵ which allowed the Senate to reject the President's choice to remove a department head, was repealed in 1869, the notion of a unitary Executive was affirmed.²⁴⁶ This argument overlooks the fact that professional norms of government lawyers were seen as an important check on presidential power even if the chief executive retained the sole authority to remove officers. While the Revised Tenure in Office Act did consolidate most removal power in the White House, it "block[ed] [the President's] power to fire U.S. Attorneys and

FRANKLIN BENSEL, *YANKEE LEVIATHAN: THE ORIGINS OF CENTRAL STATE AUTHORITY IN AMERICA, 1859–1877*, at 341–42, 421–24 (1990).

243. SAMUEL HABER, *EFFICIENCY AND UPLIFT: SCIENTIFIC MANAGEMENT IN THE PROGRESSIVE ERA 1890–1920*, at 105 (1964); THOMAS L. HASKELL, *THE EMERGENCE OF PROFESSIONAL SOCIAL SCIENCE: THE AMERICAN SOCIAL SCIENCE ASSOCIATION AND THE NINETEENTH-CENTURY CRISIS OF AUTHORITY* (1977); MAGALI SARFATTI LARSON, *THE RISE OF PROFESSIONALISM: A SOCIOLOGICAL ANALYSIS* 138–47 (1977); DOROTHY ROSS, *THE ORIGINS OF AMERICAN SOCIAL SCIENCE* (1991); STEPHEN SKOWRONEK, *BUILDING A NEW AMERICAN STATE: THE EXPANSION OF NATIONAL ADMINISTRATIVE CAPACITIES, 1877–1920* (1982). It was during this period that Charles Francis Adams conceived of an independent commission staffed by experts to govern railroads. Charles F. Adams, *The Railroad System*, in *CHAPTERS OF ERIE AND OTHER ESSAYS* 333, 426–29 (N.Y.C., HENRY HOLT & CO. 1886) (1871).

244. RICHARD HOFSTADTER, *THE AGE OF REFORM 164–68* (1955); Lee J. Alston et al., *Who Should Govern Congress? Access to Power and the Salary Grab of 1873*, 66 J. ECON. HIST. 674, 676 (2006) (pointing to 1873 legislation to increase congressional salaries as part of a sustained anticorruption reform movement).

245. Christopher S. Yoo, Steven G. Calabresi & Laurence D. Nee, *The Unitary Executive During the Third Half-Century, 1889–1945*, 80 NOTRE DAME L. REV. 1, 18–50 (2004).

246. *Id.*

other principal officers,” limiting his control over federal prosecution.²⁴⁷ It created a permanent corps of civil servants whose positions rested on merit rather than spoils. This contributed to a shift from parochial politics to nationalism, but it did so not simply by expanding executive power, but by altering and in some ways limiting the political power of the President and appointed department heads within the Executive.²⁴⁸ In other words, the diffuse nature of governance was not eliminated but rather imported into the structure of the administrative state.

Like the growth of the administrative state, the consolidation of the government’s legal work within the DOJ was designed to preserve professional norms as both a check on executive power and an antidote to local corruption.²⁴⁹ While attorneys general over the past century had disagreed over the relationship between the President and his law enforcement officers and often acted to increase the power of the incumbent President, they all, to some degree or another, subscribed to Wirt’s understanding of the profession and its role in government.

In discussing the proposed act to create a law department, legislators expressed a desire to regulate the abuse of party patronage. As Senator James A. Bayard explained, “[t]he object of the bill is the prevention of what I may call the sporadic system of paying fees to persons, not to speak disrespectfully of them, who may be called departmental favorites.”²⁵⁰ The bill, as one legislator explained, “takes care, then, that these officers shall be well informed on legal questions.”²⁵¹ While some expressed concern that the bill would increase the size and the expense of government, its proponents assured them that it was designed to create efficiency. The professional nature of a legal department would prevent both error and waste.²⁵² Skill, expertise, and knowledge would create efficiency, which in turn would ensure fairness.²⁵³

A centralized law department would not only preserve quality and efficiency, but also prevent cronyism and draw on professionalism to prevent both political and personal incentives from perverting criminal

247. Shugarman, *supra* note 239, at 150.

248. See Ari Hoogenboom, *The Pendleton Act and the Civil Service*, 64 AM. HIST. REV. 301, 317–18 (1959).

249. *A Department of Justice*, 8 ALB. L.J. 274, 274 (1873) (arguing that the competence, skill, and efficiency of a bureau staffed by professionals will combat waste and corruption).

250. CONG. GLOBE, 41st Cong., 2d Sess. 4490 (1870).

251. CONG. GLOBE, 41st Cong., 2d Sess. 3065 (1870).

252. CONG. GLOBE, 41st Cong., 2d Sess. 3034–35 (1870).

253. Its author explained that “[o]ne of the objects of this bill is to establish a staff of law officers sufficiently numerous and of sufficient ability to transact this law business of the Government in all parts of the United States.” CONG. GLOBE, 41st Cong., 2d Sess. 3035 (1870).

justice.²⁵⁴ Representative Thomas Jenckes, who introduced the bill and ushered it through Congress, explained:

We have found, too, that these law officers, being subject to the control of the heads of the Departments, in some instances give advice which seems to have been instigated by the heads of the Department, or at least advice which seems designed to strengthen the resolution to which the head of the Department may have come in a particular instance.²⁵⁵

District attorneys and their paid assistants in the West often acted in their own interest or corruptly helped themselves and their allies. Paid by the case or fine, they pursued cases that had little merit.²⁵⁶ By consolidating all legal personnel under the Attorney General, the authors of the bill hoped to remove the taint of this sort of cronyism and promote independence by creating a purely professional branch of government. Prosecutors would serve the law rather than the highest bidder or a partisan political master.

Jenckes was concerned not only with legislative overreach, but also with the ability of the Executive to use patronage as a way of circumventing political checks.²⁵⁷ President Johnson had appointed friends and allies to halt the progress of Radical Republicans in Congress.²⁵⁸ Civil service reform, in general, and the DOJ in particular, would curb executive and congressional abuses by ensuring an “independent administration of affairs.”²⁵⁹ Jenckes explained: “The humblest servant of the Government should not be at the mercy or the caprice of the most distinguished politician. Let every man who may receive a commission from the United States know that he holds it from the people, in service of the people.”²⁶⁰ Jenckes held up the military as an example of independent professional pride in service, which acts as a break on partisan politics.

While Jenckes acknowledged that attorneys general had in the past issued opinions just to suit the political view of the Administration, he labeled it “a misfortune” and insisted that the consolidation of all legal work in one department would reduce such deviations from the pure practice of law.²⁶¹ Like his predecessors, he expressed faith in the clearly

254. The expulsion of many Democratic politicians after the Civil War led to an increase in corruption and cronyism in politics, which fueled the Mugwumps’ reform movement. In addition, weaknesses in American bureaucracy grew more apparent as wartime demands increased.

255. CONG. GLOBE, 41st Cong., 2d Sess. 3036 (1870).

256. CUMMINGS & MCFARLAND, *supra* note 199, at 250–71.

257. Ari Hoogenboom, *Thomas A. Jenckes and Civil Service Reform*, 47 MISS. VALLEY HIST. REV. 636, 637 (1961).

258. *Id.* at 640.

259. *Address of Hon. Thos. A. Jenckes, of Rhode Island, Before the American Social Science Association in Boston*, BOS. POST, Dec. 31, 1868, *reprinted in* N.Y. TIMES, Jan. 3, 1869. In this speech, Jenckes discussed the value of his proposal for civil service reform, which had similar animating principles as his bill to create a law department. *Id.*

260. *Id.*

261. CONG. GLOBE, 41st Cong., 2d Sess. 3036 (1870).

distinguishable realms of law and politics. When confronted with the anecdote about President Jackson ordering his Attorney General to write an opinion justifying the deposit of federal funds, Jenckes replied: “I have heard such anecdotes. It is true that the head of a Department or the President may act on his own responsibility, but he cannot in such a case shelter himself behind the opinion of a solicitor.”²⁶² In other words, the consolidation of federal legal work in the DOJ would render purely political decisions transparent because the legal advice would inevitably be professional and shielded from the taint of political expediency.

The new statutes enacted to preserve civil rights in the South tested the new department, thrusting it into the business of criminal law enforcement on an unprecedented scale.²⁶³ Federal prosecutors called for assistance in interpreting the Fourteenth Amendment and the criminal provisions in the statutes known as the Enforcement and Ku Klux Klan Acts amidst strong resistance in the South. Witnesses who feared for their lives appealed directly to the President for assistance.²⁶⁴ Up until the Civil War, state prosecutors were responsible for most criminal prosecutions. The structure of the federal criminal justice system was still so diffuse that it was difficult for the Attorney General to exert control over federal prosecution.²⁶⁵

During early Reconstruction, the Attorney General struggled to control local federal prosecutors. Local law enforcement was either too weak or disinclined to prosecute the Ku Klux Klan, and Attorney General Ackerman “issued a circular to all United States Attorneys” and Marshals to enforce the new laws.²⁶⁶ For several years, the Administration and Attorney General tried to use the central structure of the DOJ to ensure that federal policy priorities were honored. Despite the effort, there were few enforcement actions, proving how stubborn and persistent the local, diffuse nature of criminal law enforcement was.²⁶⁷ In 1871, Ackerman suddenly resigned.²⁶⁸ Despite his resignation, the DOJ continued its vigorous enforcement through 1873. The DOJ grew in both size and power to meet these demands. As political parties warred over the nature of civil rights, the future of the DOJ lay in large part in criminal law enforcement, and the DOJ lawyers were more overt about their political commitments and party loyalty.²⁶⁹

262. CONG. GLOBE, 41st Cong., 2d Sess. 3036 (1870).

263. The end of the Civil War marked a radical shift in American politics where even moderate Republicans grew to expect that Congress would help secure civil rights. *See generally* KACZOROWSKI, *supra* note 231, at 56–57.

264. CUMMINGS & MCFARLAND, *supra* note 199, at 238.

265. *See* KACZOROWSKI, *supra* note 231, at 81.

266. *Id.* at 81.

267. *Id.* at 81–83.

268. *Id.* at 92.

269. *Id.* at 65.

Increasingly, disagreement over Reconstruction policies in the DOJ focused on the independence of the agency. As in the early cases, in which presidents felt the need to intervene, the national interests were high. Criminal cases coincided with national policy. By 1873, the political inclination to enforce the civil rights laws had ebbed. One journalist complained in *The Nation* of the “inflation” of federal law enforcement power: “[T]he Attorney-General’s office has become a kind of political bureau.”²⁷⁰ The article noted that the Attorney General was not directly politically accountable. This might be tolerable, but he had “not displayed any talent either legal or political He is, moreover, acting as the servant of a President who treats his ministers as members of his staff.”²⁷¹ The author took for granted that prosecutors are not the same as staff members subject to any direct order.

The progressive faith in expertise and training spurred civil service reform in this period. The work of governing required merit, training, and education. Far from serving these ends, short terms of service and elections led to a corrupt system of patronage. Woodrow Wilson published a book in 1885 arguing for a merit system, which would leave much of the work of government to experts.²⁷² In making his argument, Wilson explained that the Executive was divided between elected officials who make policy and those who govern through learning and experience. “The President is not all of the Executive. He cannot get along without the men whom he appoints . . . and they are really integral parts of that branch of the government which he titularly contains in his one single person.”²⁷³ Cabinet heads “were always recognized units in the system, never mere ciphers to the Presidential figure which led them. Their wills counted as independent wills.”²⁷⁴ Quoting MacMillan’s magazine, Wilson wrote that “[e]ach cabinet officer . . . controls his own department pretty much as he pleases,”²⁷⁵ and that the Executive itself is made up of a number of different individuals who retain independence, power, and control.²⁷⁶ Critical of the inefficiency that came with the separation of powers, Wilson posited a permanent and powerfully trained civil service, which would retain a good deal of control over the business of governing.²⁷⁷

While the intention was clear, the statute did not rid the federal system

270. *The Inflation of the Attorney-General*, 19 THE NATION 214, 214 (Oct. 1, 1874), reprinted in THE NATION (Jan. 12, 2005), <https://www.thenation.com/article/inflation-attorney-general>.

271. *Id.*

272. WOODROW WILSON, CONGRESSIONAL GOVERNMENT 290 (1885).

273. *Id.* at 257.

274. *Id.*

275. *Id.* at 258 (quoting Joseph Lemuel Chester, *The Washington Cabinet and the American Secretaryship of State*, 7 MACMILLAN’S 62, 67 (1862)).

276. *Id.* at 248–300.

277. *Id.*

of its decentralized nature, and old reporting lines and allegiances remained.²⁷⁸ The professionalization of the DOJ required isolation from the business of administration. Theodore Roosevelt explained that politicians also needed to respect attorneys' obligations. He wrote to his Attorney General:

Of all the officers of the Government, those of the Department of Justice should be kept most free from any suspicion of improper action on partisan or factional grounds . . . so that there shall be gradually a growth . . . in the knowledge that the Federal courts and the representatives of the Federal Department of Justice insist on meting out even-handed justice²⁷⁹

Once again, even-handed justice seemed a relatively unproblematic term, an accessible norm, as long as prosecutors and other government attorneys were insulated from political control.

The DOJ was thus designed as an insular arena where lawyer professionals could thrive. Merit, standards of practice, and a common approach to legal problems would lend both quality and uniformity to federal law enforcement. Professionalism was designed to combat political pressure; therefore, presidential or other political control of prosecutors was inconsistent with the vision behind the law department.

E. Early Twentieth Century

Despite the new law establishing the DOJ, the legal work of the country remained decentralized. Lines of reporting were weak and department heads retained control of legal work.²⁸⁰ Early twentieth-century treatises similarly embraced a presidency balanced and checked by administration, rather than a hierarchical bureaucracy controlled entirely by the President.

In the United States it was undoubtedly intended that the President should be little more than a political chief; that is to say, one whose functions should, in the main, consist in the performance of those political duties which are not subject to judicial control. It is quite clear that it was intended that he should not, except as to these political matters, be the administrative head of the government, with general power of directing and controlling the acts of subordinate federal administrative agents.²⁸¹

278. CUMMINGS & MCFARLAND, *supra* note 199, at 488.

279. Letter from President Theodore Roosevelt to Att'y Gen. Moody (Aug. 9, 1904) (quoted in CUMMINGS & MCFARLAND, *supra* note 199, at 500).

280. Key, *supra* note 174, at 190–91.

281. 2 WESTEL WOODBURY WILLOUGHBY, 2 THE CONSTITUTIONAL LAW OF THE UNITED STATES 1156 (1910).

The treatise continued, however, that the need for efficiency in an increasingly complex world had led to a growingly centralized power. The author insisted that while a president could not directly control the decisions of a district attorney, the power of removal leant him that indirect authority.²⁸²

In the beginning of the twentieth century, the federal regulatory state was transforming. There was less antipathy to large government as reformers increasingly turned to legislatures and administrative bodies to temper the effects of the modern industrial economy.²⁸³ The fight against corruption joined forces with the Progressive search for efficiency and economy. Expert centralized control was seen as the antidote to local, disorganized, corrupt party politics. By 1920, Congress had successfully resisted the executive effort to consolidate control over the federal bureaucracy.²⁸⁴ Congress established connection with administrative agencies and career civil servants.

By 1908, Wilson, who had initially suggested that the Legislature retain the greatest amount of power, had recognized the value of a strong Executive, but he still noted the importance of a permanent, trained, expert civil service as a check on partisan excess.²⁸⁵ The desire for coordination, efficiency, and organic energy led him to favor consolidation of power, but it also fed his faith in expertise and experience in the bureaucratic management as a way to prevent the abuse of that power.

As the administrative state expanded and consolidated, the President was not the clear winner. When the army and bureaucracy grew out of necessity to meet the demands of World War I, agencies maintained significant independence. In 1918, now-President Wilson issued an executive order calling for the consolidation of all legal work under the DOJ.²⁸⁶ Despite President Wilson's edict, Congress continued to disperse control of the legal work of the government.²⁸⁷ The Attorney General complained as late as 1928 about the DOJ's lack of centralized control.²⁸⁸

The American state itself was born and grew to maturity as a bulwark against despotism.²⁸⁹ Thus, as the demands of the modern world grew more complex, the checks and balances within government grew more numer-

282. *Id.* at 1166.

283. SKOWRONEK, *supra* note 243, at 4.

284. *Id.*

285. WOODROW WILSON, CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES 215 (Colum. Paperback ed. 1961) (1908).

286. W.P.A. HISTORICAL RECORDS SURVEY, NEW YORK CITY, PRESIDENTIAL EXECUTIVE ORDERS 242 (Clifford L. Lord ed., 1944) (citing Exec. Order No. 2877 (1918)).

287. Key, *supra* note 174, at 190–91.

288. 1928 ATT'Y. GEN. ANN. REP. 1, at 1–2, 343–50.

289. William J. Novak, *The Myth of the "Weak" American State*, 113 AM. HIST. REV. 752, 763 (2008).

ous.²⁹⁰ Organized governance and power dispersed. Civil service reform and the DOJ were part of this process. The larger and more powerful the state became, the more it developed multiple creative checks on its power.

This centrifugal force continued to disperse power among local district attorneys and other government lawyers.²⁹¹ Even though the DOJ was more centralized than its precursor, it was still vast, and power still resided in relatively autonomous local units.²⁹² Far from a clear consolidation of executive power under the President, the professionalization of prosecution maintained the diffuse authority that characterized the origins of American criminal justice. As a result, the expansion of national power did not necessarily risk the consolidation of power.

Justice Southerland explained how professionalism worked to retain the diffuse nature of power in the context of independent commissions:

The commission is to be non-partisan; and it must, from the very nature of its duties, act with entire impartiality. It is charged with the enforcement of no policy except the policy of the law. Its duties are neither political nor executive, but predominantly quasi-judicial and quasi-legislative. [I]ts members are called upon to exercise the trained judgment of a body of experts appointed by law and informed by experience.²⁹³

Respect for law and the traditions of the agency itself would govern the commission. Independence was a product of isolation, expertise, and historical respect for the nature of its work. The DOJ was created in this model.

During the Progressive Era and the New Deal, most lawmakers and policy experts grew more comfortable with the idea of an active state, involved in solving both social and economic problems.²⁹⁴ Those disillusioned with party politics gravitated to expertise, organizational efficiency, and professionalism. It is understandable in this context that the DOJ drew fewer critics. A department filled with professionals would withstand the inappropriate pressures of partisan and personal interest. Meanwhile, federal criminal law expanded. Prohibition, labor unrest, and organized crime led to a proliferation of federal criminal statutes and law enforcement personnel.²⁹⁵

Some have argued that during this time the Attorney General took on a

290. *Id.*

291. CLAYTON, *supra* note 194, at 3.

292. Novak, *supra* note 289, at 765–66.

293. *Humphrey's Ex'r v. United States*, 295 U.S. 602, 624 (1935).

294. Proponents of a unitary Executive point to increased federal and presidential power as evidence of the historical pedigree of their theory. See Yoo et al., *supra* note 245, at 10–93. It seems unsurprising that during this period of economic and social consolidation, presidents sought to exert their power and control. What is more notable is how the government adjusted to resist the impulse and preserve the values of balance inherent in the separation of powers.

295. CUMMINGS & MCFARLAND, *supra* note 199, at 480–81.

more directly political role. As the economy grew, even independent and strong-willed attorneys general consulted the President on some cases, especially antitrust cases that had important implications for national economic development. Theodore Roosevelt's Attorney General, Philander Knox, for example, deferred to the President on individual antitrust cases.²⁹⁶ Born of a generation of reformers, however, President Roosevelt respected prosecutorial independence, insisting on bipartisan commissions to investigate political corruption.²⁹⁷ Knox's successor, George W. Wickersham, at times, argued for instituting criminal prosecutions in individual cases, but President Taft disagreed, urging civil action first. Wickersham, like Knox, ultimately deferred to the President and declined to bring criminal charges.²⁹⁸

In the famous Ballinger–Pinchot controversy in 1909, the Bar Association and the public recoiled at the President's interference with a criminal investigation. President Taft appointed an anticonservationist, Richard Ballinger, to serve as Secretary of the Interior. Gifford Pinchot, a strong conservationist who had been appointed by William McKinley as head of the Department of Forestry, accused Ballinger of corruptly interfering with investigations out of his own personal interest in the corporate targets.²⁹⁹ Despite evidence that this may in fact have occurred, President Taft, relying on what he claimed were Attorney General Wickersham's investigation and recommendation, exonerated Ballinger and fired Pinchot. President Taft himself later admitted that the Wickersham letter was backdated to appear as if it had been prepared before the firing when it was actually written after the fact. He relied instead on the findings of an official within the Department of the Interior, who was a political ally of Ballinger.³⁰⁰ While Taft admitted to rejecting the legal opinion of the Assistant Attorney General, he insisted that the Attorney General shared his view of the merits of the case.³⁰¹ The President had essentially used the Attorney General to undercut the normal criminal justice process, which would have led to greater transparency at least.³⁰²

Some grew concerned at the growing power of the Attorney General,

296. LEWIS L. GOULD, *THE PRESIDENCY OF THEODORE ROOSEVELT* 218 (1991).

297. *Id.* at 113.

298. CUMMINGS & MCFARLAND, *supra* note 199, at 343–44.

299. Christopher Yoo, a proponent of the unitary Executive, relies on this incident to support his view. Christopher Yoo et al., *supra* note 245, at 43–44 (2004). Opposition to the incident, however, is just as strong an indication of abiding faith in prosecutorial independence. Presidents at times favored a docile and compliant Department of Justice, but the tradition of independence persisted.

300. President William Howard Taft to Sen. Knute Nelson (May 15, 1910), *as reprinted in Taft Wrote Ballinger Letter*, S.F. CALL, May 16, 1910, at 1.

301. *Id.*

302. *Short Talks on Current Events of Interest to Young Men*, 18 LAW STUDENT'S HELPER 39, 39 (2010); *Shreds of Suspicion*, COLLIER'S, May 28, 1910, at 9–10.

unchecked by the normal political processes. Philander Knox wrote, “The consideration of the probable ultimate effect of the establishment of such power in the hands of an administrative, non-judicial officer should give rise to grave concern.”³⁰³ But, others remained sanguine that the separation of the legal department from the business of administration would ensure that the law remained unsullied and that the lawyers would fulfill their semijudicial function “and gauge the temper of the courts.”³⁰⁴ The 1912 Attorney General Annual Report argued for greater consolidation of power within the DOJ, suggesting that other departments with administrative responsibilities threatened to corrupt the professional judgment of their lawyers.³⁰⁵ Homer Cummings, Attorney General from 1933 to 1939, felt it was a necessity for the DOJ to be independent and free from the “problems of administrative expediency.”³⁰⁶

The battle over removal power stretched over years, with presidents seeking to exert control over executive officers. The dispute culminated in the Supreme Court decision *Myers v. United States* discussed above. Critics worried that vesting removal power with the President would undermine official independence.³⁰⁷ Edward Corwin, for instance, argued that it was increasingly important to protect expert appointments and commissions from political manipulation.³⁰⁸ The scientific idea of government, like the scientific idea of law in vogue at the time, required individuals to resolve complex problems by understanding and applying scientific research methods to the facts.³⁰⁹ To promote this, Corwin echoed the Supreme Court’s decision in *Myers*, by proposing that political appointees direct policy but leave it to the permanent skilled professional class of bureaucrats to administer it.³¹⁰

The battle over court administration marked an interbranch competition over power, with the Attorney General at the center. In 1922, Congress passed the Judicial Conference Act, a compromise between the nationalists, who advocated greater centralization and coordination of the Judiciary, and

303. Letter from William A. Day to Philander C. Knox (Jan. 13, 1914), in KNOX PAPERS (cited in CUMMINGS & MCFARLAND, *supra* note 199, at 345).

304. CUMMINGS & MCFARLAND, *supra* note 199, at 490-91.

305. 1912 ATT’Y GEN. ANN. REP. 57 (discussing objections to the Interstate Commerce Commission having both the legal responsibility of assessing the scope of its jurisdiction and then becoming a litigant in the proceedings).

306. CUMMINGS & MCFARLAND, *supra* note 199, at 518.

307. EDWARD S. CORWIN, THE PRESIDENT’S REMOVAL POWER UNDER THE CONSTITUTION v–vii (1927); James Hart, *The Bearing of Myers v. United States Upon the Independence of Federal Administrative Tribunals*, 23 AM. POL. SCI. REV. 637, 657–58 (1929).

308. CORWIN, *supra* note 307, at vii.

309. *Id.*

310. *Id.* at viii.

their adversaries, who were wary of the concentration of power.³¹¹ The Attorney General was given the task of reporting on the business of the federal courts and making recommendations.³¹² President Taft used the Attorney General to try to exert control over the federal Judiciary and Congress. But Congress was resistant, and when President Roosevelt tried to control the Judiciary with the famous court-packing plan, Congress passed a new act removing the Attorney General from the judicial administrative scheme.³¹³ By eliminating the role of the Attorney General, the Administrative Office Act of 1939 was designed to remove the courts from presidential control and return power to the various circuit courts.³¹⁴

Despite the persistent effort by presidents to use their attorneys general to manage the courts, the position remained mostly insulated from political disputes.³¹⁵ The norm of loyalty battled with the norm of independence, but neither receded entirely. Amidst the struggle for control over the Attorney General, in reality, the DOJ still retained the legacy of its early diffuse structure. United States Attorneys still retained a great deal of independence from “main justice,” often eluding the control of the Attorney General.³¹⁶

The New Deal and the political climate of the 1930s posed a series of challenges to the nature of law and legal structures. The financial collapse required greater central control over law, as well as other aspects of governance.³¹⁷ President Franklin Roosevelt issued an executive order asserting the DOJ’s control over United States Attorneys and marshals.³¹⁸ The growing complexity of the law coincided with threats of fascism from Germany and communism from the Soviet Union. Amidst these minefields, the United States had to find a way to legitimate an expansive administrative state in a pluralistic society.³¹⁹ The Process School did so, in part, by asking who ought to make decisions and which institutional structures would prove optimal for each decision.³²⁰ Essentially, as H.L.A. Hart

311. PETER GRAHAM FISH, *THE POLITICS OF FEDERAL JUDICIAL ADMINISTRATION* 32–39 (1973).

312. *Id.* at 35–76.

313. *Id.* at 122–25.

314. *Id.* at 146.

315. CLAYTON, *supra* note 194, at 3–4.

316. BAKER, *supra* note 197, at 63–64; JAMES EISENSTEIN, *COUNSEL FOR THE UNITED STATES: U.S. ATTORNEYS IN THE POLITICAL AND LEGAL SYSTEMS* 10 (1978).

317. Key, *supra* note 174, at 197.

318. Exec. Order 6166, § 5 (1933), www.dol.gov/sol/images/ExecutiveOrder6166.pdf.

319. See William N. Eskridge, Jr., & Philip P. Frickey, *Commentary, The Making of The Legal Process*, 107 HARV. L. REV. 2031, 2047–48 (1994); Edward A. Purcell, Jr., *American Jurisprudence Between the Wars: Legal Realism and the Crisis of Democratic Theory*, 75 AM. HIST. REV. 424, 443–446 (1969).

320. Akhil Reed Amar, *Law Story*, 102 HARV. L. REV. 688, 691 (1989) (reviewing PAUL M. BATER ET AL., *HART & WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* (1988)); Guido

would later explain, officials will always have to resolve indeterminacy in the law. The key is choosing the officials and institutions that are best situated to make reasoned choices.³²¹

It is in this context that Attorney General Robert Jackson explained to a room full of United States Attorneys that the political accountability that comes with appointment and removal is not enough to assure justice. He explained, “Your responsibility in your several districts for law enforcement and for its methods cannot be wholly surrendered to Washington, and ought not to be assumed by a centralized Department of Justice.”³²² He explained that Washington should rarely direct United States Attorneys, who are best situated to ensure that justice is done.³²³ The DOJ may have a role in establishing policy priorities and ensuring uniformity in federal law but ought not manage individual cases. This decentralized system of justice helps insulate prosecutors from the corrosive effects of partisan politics.³²⁴ Their independence, not only from political actors but also from mob sentiment, helps ensure that justice is done despite times of fear or hysteria.

During World War II, President Roosevelt relied on his attorneys general to help justify his political agenda. Attorney General Robert Jackson, for instance, issued an opinion concluding that the United States could sell ships to Great Britain before entering the war, without the Senate’s approval.³²⁵ His successor, Attorney General Frances Biddle, expressed initial reservations about the legality of Japanese internment camps but ultimately went along with Roosevelt’s plan. Just months later, Roosevelt instructed Biddle, against Biddle’s initial judgment, to try Nazi saboteurs in military court where they could be executed.³²⁶ While presidents increasingly sought to use their attorneys general to help further political ends, the DOJ itself maintained its identity as an independent agency. Despite his own actions, Biddle expressed concern about the

Calabresi, *An Introduction to Legal Thought: Four Approaches to Law and to the Allocation of Body Parts*, 55 STAN. L. REV. 2113, 2123 (2003).

321. See Hart, *supra* note 9.

322. Robert H. Jackson, *The Federal Prosecutor*, 31 J. CRIM. L. & CRIMINOLOGY 3, 3 (1940).

323. *Id.* at 3–4.

324. *Id.* at 4. Many argued that politics were corrupting prosecution on both the federal and local level. Standards for character and excellence were being replaced by partisan concerns that interfered with the administration of justice. See, e.g., George E.Q. Johnson, *Investigation and Detection of Crime from the Prosecutor’s Viewpoint*, 40 COM. L.J. 123, 125 (1940); Lloyd W. Kennedy, *Local Politics vs. Prosecuting Attorney*, 23 J. AM. JUDICATURE SOC’Y 180, 181 (1940). Tenure in office and removal from politics were seen as the remedy. *What is a Department of Justice?*, 19 J. AM. JUDICATURE SOC’Y 74, 76 (1935).

325. William R. Casto, *Attorney General Robert Jackson’s Brief Encounter with the Notion of Preclusive Presidential Power*, 30 PACE L. REV. 364, 365–66 (2010).

326. David J. Danelski, *The Saboteurs’ Case*, 21 J. SUP. CT. HIST. no. 1 1996, at 61, 65.

political pressures to become a tool for partisan ends.³²⁷

F. Watergate and the Role of Professional Norms

Until recent events, the Saturday Night Massacre was the most public assault on prosecutorial independence in American history. A less well-known controversy during the Nixon administration also launched a debate about the centrality of the independence of the DOJ to American democracy. International Telephone and Telegraph Corporation (IT&T) donated \$400,000 for the 1972 Republican National Convention to be held in San Diego. At the time, IT&T's future was dependent on federal law enforcement authorities. It needed DOJ approval to merge with Hartford Fire Insurance, and it was in the midst of settling several other antitrust cases as well. The White House tapes ultimately revealed that President Nixon ordered then-Deputy Attorney General Richard Kleindienst to tell Richard McLaren, the Assistant Attorney General in charge of Antitrust, to drop the IT&T appeal:

Nixon: I want something clearly understood, and, if it is not understood, McLaren's ass is to be out within one hour. The IT & T thing—stay the hell out of it. Is that clear? That's an order. . . .

Kleindienst: Okay.³²⁸

Attorney General John Mitchell tried to intervene to prevent Nixon from undermining the independent antitrust enforcement. He later told Kleindienst, "By the way . . . your friend at the White House says that you can handle your fucking antitrust cases any way you want."³²⁹ Nixon criticized Mitchell for clinging to professional norms: "Mitchell . . . didn't want to be political."³³⁰ In a memorandum to Haldeman, Nixon wrote: "[W]hen Mitchell leaves as attorney general, we're going to be better off in my view John is just too damn good a lawyer, you know. He's a good, strong lawyer. It just repels him to do these horrible things, but they've got to be done."³³¹

327. See, e.g., Dennis J. Hutchinson, *Justice Jackson and the Nuremberg Trials*, 21 J. SUP. CT. HIST. no. 1, 1996, at 105, 110.

328. IMPEACHMENT INQUIRY STAFF FOR THE H. COMM. ON THE JUDICIARY, 93D CONG., Transcript of a Recording of a Meeting Among the President, John Ehrlichman, and George Schultz on April 19, 1971 from 3:03 to 3:34, https://www.nixonlibrary.gov/forresearchers/find/tapes/watergate/wspf/482-017_482-018.pdf. Kleindienst was later nominated to be Attorney General. In his confirmation hearings, he denied that the White House had interfered in the IT&T case. He later plead guilty for failing to give truthful testimony in this exchange. JAMES ROSEN, *THE STRONG MAN* 186–220 (2008).

329. ROSEN, *supra* note 328, at 195.

330. *Id.* at 76 (alteration in original).

331. *Id.*

Nixon acknowledged and dismissed the role of professional independence in one breath. Before the President's true motive was revealed, the White House had defended itself on the ground that it interfered in the antitrust case because the DOJ's positions were inconsistent with the Administration's policy that bigness is not necessarily unlawful.³³² McLaren testified that he pursued the case because he felt that he had an obligation to advance "the public interest."³³³ Others in the DOJ agreed that the appeal would have promoted the public interest in effectively enforcing the antitrust laws.³³⁴ Without the benefit of the taped conversations, it is hard for any third party to untangle proper policy motivations from improper political or personal ones.

The Watergate scandal shocked the legal and political communities and led them to examine the relationship between the White House and government lawyers. While Part I explored the legal ramifications of the scandal, this Part describes the formal articulation of professional values that followed, as well as the structural changes that were designed to preserve them. If the DOJ was born, in part, to protect prosecutorial independence from the infiltration of partisan motives, it had fallen far short of these expectations. As they debated different solutions, lawmakers for the most part agreed that prosecutorial independence and professional norms offered the best bulwark against the political appropriation of the DOJ.

Ultimately, lawmakers concluded that it was impossible to enact laws to prevent partisan corruption without simultaneously undermining the political accountability of the chief prosecutor. Unwilling to sacrifice accountability for independence, scholars and legislators returned to professionalism to protect against corruption. Ironically, this sentiment came at a time when scholars and politicians were growing increasingly skeptical of the ability of expertise and professionalism to preserve the integrity of government process, and the country had just witnessed perhaps the greatest failure of ethical norms to guide government actors. The respect for expertise that had given rise to the administrative state was waning. Far from the perfect antidote to corruption, experts and professionals, it seemed, were motivated by the same personal, private interests as politicians.³³⁵ Lawmakers, nonetheless, invoked an older ideal of professionalism and a faith that law and politics could be separated. In this context,

332. Nicholas Gage, *Nixon Reported to Have Ordered I.T.T. Settlement*, N.Y. TIMES (Oct. 30, 1973), <http://www.nytimes.com/1973/10/30/archives/nixon-reported-to-have-ordered-itt-settlement-kleindienst-said-to.html>.

333. *Id.*

334. *Id.*

335. See, e.g., Scott L. Cummings, *Movement Lawyering*, 2017 U. ILL. L. REV. 1645, 1660–89; Rebecca Roiphe, *The Decline of Professionalism*, 29 GEO. J. LEGAL ETHICS 649, 665–68 (2016).

professional independence took on a new valence. Rather than denoting a devotion to legal norms, it more closely resembled personal integrity and a respect for process.

In the wake of the scandal, Senator Sam Ervin proposed a law that would have made the DOJ independent from the Executive Branch.³³⁶ Another less radical bill introduced at the same time proposed a permanent special counsel insulated from executive control.³³⁷ The discussion surrounding these bills amplified a chorus that had been building through-out American history about the role of professional norms and expertise within the Executive. Ultimately, legislators agreed to preserve the Executive Branch's control over government lawyers, but its power had to be limited by professional norms. The changes in internal DOJ regulations similarly reflected this respect for prosecutorial discretion and ethical obligations as a limit on presidential power.

The hearings were full of eloquent statements about the rule of law and lamentations about how politics had infiltrated the DOJ. As Senator Alan Cranston explained, "[a]s the petty and gross misdeeds of Watergate continue to come to light, we see more clearly the need for some machinery independent of the executive which will ferret out and prosecute corruption and wrongdoing in high levels of government."³³⁸ He went on to qualify that the Attorney General's role as a prosecutor should form an important restraint on presidential power: the Attorney General's "client is not only the President of the United States but includes the people."³³⁹ The position of the Attorney General, he lamented, had become a tool of the Administration, corrupted by power and politics, and the key was to restore the professional independent role.³⁴⁰

Ervin's bill was met with resistance. Even Senator Cranston, who shared Ervin's concerns, was hesitant to remove the Attorney General from the political process. Accountability is perhaps the most fundamental check on the abuse of power. But accountability alone had proven ineffective. As Theodore Sorensen, former Special Counsel to President Kennedy explained, the Attorney General should not become a "mere political arm of the White House, motivated principally by partisan considerations, its

336. *Removing Politics from the Administration of Justice*: Hearings on S. 2803 and S. 2978 Before the Subcomm. on Separation of Powers of the S. Comm. on the Judiciary, 93d Cong. 1-3 (1974) (statement of Sen. Sam Ervin).

337. Senator Alan Cranston introduced a more modest bill that would have created a permanent special prosecutor. *Id.*

338. *Id.* at 6 (statement of Sen. Alan Cranston).

339. *Id.*

340. *Id.*

powers exploited for political ends.”³⁴¹ But Sorensen hesitated to endorse either bill:

An Attorney General of the caliber of Francis Biddle or Elliot Richardson who recognizes that he is an officer of the court as well as a member of the Cabinet, and that his client is the Nation as well as the President, will have sufficient fidelity to both his professional and his public obligations to resist improper White House intrusion without any change in the existing statutory or institutional arrangement.³⁴²

Professional training and norms must resolve the conflict between political accountability and professional independence. Ervin summarized, “So in the last analysis, in your judgment, the thing comes down to the man.”³⁴³ Independence had grown synonymous with character and personal integrity.

Expressing a stronger faith in the ability to distinguish law and politics, Mitchell Rogovin, formerly an Assistant Attorney General explained:

While there may be a Republican way to conduct foreign policy which is “politically and philosophically” different from the Democratic way, there should be no acceptable difference in the manner in which a tax evasion trial is conducted or a civil rights desegregation order is implemented. Justice is not only blind, but she must also be nonpartisan.³⁴⁴

Some voiced a strong commitment to the power of the Executive, but even they saw the law and professional norms as a restraint on presidential control. Robert Dixon, a former Assistant Attorney General and scholar, explained:

One aspect which the Framers never foresaw is the role of the bureaucracy. The Department is heavily staffed with lawyers of long experience below the paper-thin political level. As a rule cases work their way up through the Department with facts and law developed to the point that political appointees could not make them disappear and go away, even if they were so inclined.³⁴⁵

Despite his strong unitary view of the President’s power, Dixon conceded that a prosecutor’s professional duty makes it inappropriate and impossible for the President or any other political operative to interfere with criminal cases.³⁴⁶ Emphasizing the practical reality of America’s

341. *Id.* at 15–16 (statement of Theodore C. Sorensen).

342. *Id.* at 16.

343. *Id.* at 22. Arthur Goldberg, former Justice of the Supreme Court, similarly opined: “Let us appoint eminent Attorneys General, and let them be men who are capable of saying to a President, no, the law does not permit this; I will not permit this; and you must not engage in activities such as have been contemplated.” *Id.* at 63 (statement of Arthur Goldberg).

344. *Id.* at 41 (statement of Mitchell Rogovin).

345. *Id.* at 88 (statement of Richard G. Dixon, Jr.).

346. *Id.* at 103. Burke Marshall, the Deputy Dean of Yale Law School, and Arthur Miller, professor at Harvard, had a similar exchange about the independence of professional lawyers. Marshall

criminal justice system, he insisted that the diffuse nature of federal prosecution ensures that those responsible for daily decisions are insulated from illegitimate partisan concerns.³⁴⁷

Grappling with the difficulty in distinguishing proper policy motives from partisan or personal interest, Watergate prompted a return to the notion of professionalism.³⁴⁸ Professionalism and devotion to ethics theoretically provide immunity from capture. As former Attorney General Ramsey Clark explained, “[t]he U.S. Department of Justice . . . is peopled in the main by Americans devoted to the rule of law and to justice.”³⁴⁹ Independence, in this formulation, is a personal trait rather than a natural byproduct of the unique nature of the law. Former Solicitor General Archibald Cox, who also served as Watergate special prosecutor until he was fired, invoked norms of legal practice to explain the role of Attorney General:

[I]t is every lawyer’s duty to give his client advice that the client may not like to hear, to tell him what his obligations are under the law. That obligation rests upon an Attorney General in dealing with his client, the President, just as it does on all other lawyers.³⁵⁰

Just as the lawyer is not the client, so too the Attorney General is not the President. In the modern political system, he will likely be a political ally of the President, but he is not a servant. What distinguishes between the two is the ethical obligation to apply the law in a fair, even-handed, and disinterested way. While Cox may have overstated the equivalence between a civil lawyer and the Attorney General, since the President is not the prosecutor’s client, he nonetheless insisted on independence through professional norms.

Although Ervin’s bill never passed, the sentiment behind it made its way into departmental policies. The desire to preserve and nurture independence translated into a set of institutional rules. President Carter campaigned in part on the promise to take politics out of the administration of justice, and his Attorney General, Griffin Bell, attempted to implement that promise.³⁵¹ In a speech to DOJ lawyers, he affirmed his faith in the professional expertise of his audience:

I believe that our primary mission is to serve the Government as professionals, to exercise our independent judgment and to do our duty as we

commented, “The fact that people are appointed by a President because they agree with the President on policy, does not mean that they are not professional nor that they are not competent.” *Id.* at 124.

347. *Id.* at 96–97.

348. *Id.* at 149 (statement of Charles E. Goodell); *id.* at 153 (statement of Nicholas Katzenbach).

349. *Id.* at 168 (statement of Ramsey Clark).

350. *Id.* at 199 (statement of Archibald Cox).

351. The Honorable Griffin B. Bell, U.S. Att’y Gen, Address before Department of Justice Lawyers 4 (Sept. 6, 1978) (transcript available at <https://www.justice.gov/sites/default/files/ag/legacy/2011/08/23/09-06-1978b.pdf>).

see it. But the partisan activities of some Attorneys General in this century, combined with the unfortunate legacy of Watergate, have given rise to an understandable public concern that some decisions at Justice may be the products of favor, or pressure, or politics.³⁵²

He continued:

I believe that we in the Department are faithful to a high standard of professionalism. I know from personal observation that the lawyers at Justice are fiercely professional, steadfastly independent in their legal judgment, regardless of outside pressures or controversy.³⁵³

With these inspirational thoughts in mind, he proposed several new policies to preserve the independence of DOJ lawyers. First, he suggested that all communications about particular cases from Congress or the White House should be filtered through the Attorney General or his immediate subordinates. Any disagreements between prosecutors and their supervisors should be memorialized and reported. Benjamin Civiletti, who took over from Bell in 1979, memorialized Bell's policy suggestions.³⁵⁴

The Bar responded to revelations of the Watergate scandal with increased commitment to ethics. It convened a new committee to study and make recommendations on how to protect law enforcement from political influence.³⁵⁵ Remarking that violations of ethical norms were so blatant, the President of the American Bar Association, Robert Meserve, commented that the solution was not a revision of the rules but rather a renewed commitment to independence: "The first lesson of Watergate for [lawyers] may be that we must constantly preserve our professional independence and detachment—not only from the over-zealous *client* who seeks what is improper, but from the urgings of our *own* ambition and self-interest."³⁵⁶ Again, observers conflate professional independence with personal integrity. Analyzing how so many lawyers could have participated in illegal conduct, Meserve speculated that exposure to politics may have led them to forget the professional detachment that accompanies law practice.³⁵⁷ Praising former Attorney General Elliot Richardson, the incoming President of the Bar insisted on professional independence. He rooted this obligation not in the distinct nature of law but rather in the "traditions of

352. *Id.* at 3.

353. *Id.* at 4.

354. Memorandum from Benjamin R. Civiletti, U.S. Att'y Gen., to Heads of Offices, Bds., Bureaus, & Divs. (Oct. 18, 1979), <https://www.justice.gov/sites/default/files/ag/legacy/2011/08/23/10-18-1979.pdf>.

355. Robert W. Meserve, *Action 1972–73—American Bar Association*, 59 A.B.A. J. 986, 986 (1973).

356. *Watergate Is Focus of Attention at the Annual Meeting*, 18 A.B.A. NEWS, Sept. 1973, at 4 (alteration in original).

357. Robert W. Meserve, *Watergate: Lessons and Challenges for the Legal Profession*, 59 A.B.A. J. 681, 681 (1973).

the legal profession.”³⁵⁸ Insofar as independence denoted something distinct from character, it was rooted in the nature of a lawyer’s job and the routines of practice.

G. After Watergate

In the scandals that comprise recent history, the concept of prosecutorial independence forms both the basis for outrage and the solution. In the aftermath of Watergate, the term has evolved to denote, primarily, independence from presidential control. Congress toyed with whether court-appointed special prosecutors are necessary to protect prosecutorial independence, and in 1978, it experimented with the Ethics in Government Act, which mandated such a solution. But when it allowed the law to sunset, Congress recognized the cost that the Act had to political accountability. While how best to attain it remained in dispute, there was little controversy over the goal: preserving professional discretion from the power of interested executive officials. The solution for conflicts of interest in government officials was prosecutorial independence, rather than a separate independent agency.

The tides rise and fall, and by the time President Reagan took office, the alarm prompted by Watergate had subsided. President Reagan sought to increase the power of the Executive and consolidate control over it. Edwin Meese, President Reagan’s loyal supporter and Attorney General from 1983 to 1987, allegedly tipped off the White House about an investigation into the Iran–Contra controversy.³⁵⁹

But throughout this period in which the President exercised strong executive control, prosecutorial independence remained an important check—a tradition and norm that assumed, and deserves, a more permanent, unmalleable role in the law.³⁶⁰ In December 2006, President George W. Bush tried to fire seven United States Attorneys at once.³⁶¹ Critics recoiled at the targeted removal of individual prosecutors in the middle of the President’s term.³⁶² Members of both parties criticized what

358. *Smith: Restore the Prosecutor*, 18 AM. BAR. NEWS, Nov. 1973, at 12.

359. HOUSE SELECT COMM. TO INVESTIGATE COVERT ARMS, TRANSACTIONS WITH IRAN & SENATE SELECT COMM. ON SECRET MILITARY ASSISTANCE TO IRAN & THE NICARAGUAN OPPOSITION, REPORT OF THE CONG. COMMS. INVESTIGATING THE IRAN–CONTRA AFFAIR, H.R. REP. NO. 100-433, at 305 (1987).

360. In arguing that certain government officials can be removed by the President despite their work for quasi-judicial entities, the Office of Legal Counsel has reaffirmed the notion that prosecutorial independence is sufficient to protect against corruption. *See* Presidential Appointees—Removal Power—Civil Serv. Reform Act—Constitutional Law (Article II, § 2, cl. 2), 2 Op. O.L.C. 120, 121 (1978).

361. Adrian Vermeule, *Conventions of Agency Independence*, 113 COLUM. L. REV. 1163, 1202 (2013).

362. *Id.*

seemed like a failure to respect the nonpartisan character of local prosecutors' offices, and after extensive hearings, Attorney General Alberto Gonzales was forced to resign.³⁶³ Replacing many United States Attorneys as an incoming president remains common practice—a means of ensuring that administration priorities are honored.³⁶⁴ But when a president fires individual prosecutors at later points, it is suspect, largely because it seems as if the President is infusing impermissible partisan concerns into individual cases.³⁶⁵ As Adrian Vermeule argues with regard to agencies, the convention of prosecutorial independence has become a part of the structure of American government.³⁶⁶

III. POLICY REASONS FOR PROSECUTORIAL INDEPENDENCE

The tradition of prosecutorial independence has evolved from the inchoate reality of prosecution in the early republic into a way to protect against partisan corruption and, finally, as a check on presidential power. The values behind the separation of powers were buttressed by the norm of prosecutorial independence as the reality of criminal law enforcement changed.³⁶⁷ Prosecutorial independence is essential to protect those values by preserving individual liberty and preventing the accumulation of power.

The structure of American government is so vastly different now than it was at the founding that we cannot protect liberty and avoid tyranny without accounting for the historical development of our institutions. Prosecutorial independence has evolved to prevent any individual or group from amassing too much power—the goal of the separation-of-powers doctrine.³⁶⁸ Allowing a President to control the investigation and prosecution of members of his own Administration, for instance, epitomizes just the sort of accumulation of power that James Madison and others hoped to thwart.³⁶⁹ Although proponents of the unitary Executive claim that political accountability will provide a meaningful check on federal enforcement

363. *Id.*

364. *Id.* at 1201–02.

365. *Id.* at 1202–03.

366. *Id.* at 1201–03.

367. For a discussion of the importance of unwritten norms, see *id.* at 1218–32. For an argument that the Madisonian goal of avoiding tyranny at the heart of the separation-of-powers doctrine ought to inform the Supreme Court's analysis of any issue involving the structure of government, see Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513, 1516 (1991).

368. See generally Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725 (1996) (explaining the policy goal of the separation-of-powers doctrine was to prevent the accumulation of power and arguing that checks on executive power fulfill those original goals).

369. In *Federalist* 47, James Madison wrote, “The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.” THE FEDERALIST NO. 47, at 313 (James Madison) (Modern Library ed. 1937).

power,³⁷⁰ prosecutors cannot generally be held politically accountable because their discretionary decisions are rarely publicly justified and often entirely opaque. It is even harder to hold a politician politically accountable for the acts of prosecutors.

The historical evidence in Part II suggests that the unitary theory of the Executive does not have as long a pedigree as its proponents argue, at least with regard to criminal law enforcement.³⁷¹ Of course, Christopher Yoo, Steven Calabresi, and others have recounted important incidents where presidents exerted their control over the federal bureaucracy, but that is unsurprising. What is more notable is that these efforts failed. There were pockets of independence and separate fiefdoms of power. Because of the decentralized nature of their work, early federal prosecutors, attorneys general, and later DOJ lawyers were among those who resisted presidential control. Far from being consolidated under presidential control, most federal criminal prosecution in the early republic was local, and many cases were brought by state actors and private individuals.

Scholarship on the allocation of power within the Executive recognizes that checks and balances come, not only from competition between the three branches, but from the competing structures and actors within each branch. Administrative law seeks to exploit this division of power.³⁷² By allocating responsibility to different professionals, experts, career civil servants, and political appointees, administrative law recognizes the potential for those with expertise and experience to counteract partisan incentives, while preserving political accountability. Particularly, knowledge and experience are central to the impartial exposition of facts. And facts, in turn, are critical to the transparency needed to ensure true political accountability.

Official discretion may pose a cost to efficiency, but it is one we are willing to make to ensure the public interest. Justice Brandeis explained in his dissent in *Myers*,

The doctrine of the separation of powers was adopted by the Convention of 1787 not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy.³⁷³

370. Andrias, *supra* note 53, at 1108–09; Calabresi & Prakash, *supra* note 121, at 543–50; CALABRESI & YOO, *supra* note 11, at 3.

371. Mark Tushnet, *A Political Perspective on the Theory of the Unitary Executive*, 12 U. PA. J. CONST. L. 313, 314, 318–23 (2010).

372. Elizabeth Magill & Adrian Vermeule, *Allocating Power Within Agencies*, 120 YALE L.J. 1032 (2011); Michaels, *supra* note 11.

373. *Myers v. United States*, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting).

The discretion of United States Attorneys and line prosecutors promotes the fair and even-handed administration of justice.³⁷⁴ Albeit imperfect, professional judgment provides the strongest protection for the value of impartial justice. Prosecutors wield massive power. We expect them to sort through facts and judge the credibility of witnesses. Their job demands that they exercise their discretion based on these facts, free from all bias, including partisan interest. To preserve a fair criminal justice system, prosecutors are trained to be consistent across cases and to exercise their judgment in light of broad principles, such as proportionality. This is not an easy task; American prosecutors sometimes fail;³⁷⁵ but presidential influence over individual cases would only make matters worse.³⁷⁶

As H.L.A. Hart explained in a recently discovered essay, official discretion is not the same as whim.³⁷⁷ Discretion involves practical wisdom, the effort to do something wise or sound, and drawing on experience and expertise to solve a problem. Having made similar choices repeatedly under the same conditions and institutional restraints, certain individuals are trained to make thoughtful decisions with a careful eye toward potential hazards.³⁷⁸ Discretion, Hart argues, is not a threat to the rule of law but rather both necessary to and consistent with it.³⁷⁹ But it has to rest with the actors who are best situated to draw on experience and expertise to make principled decisions in light of particular sets of facts. Institutions and structures of government can promote this kind of reasoned decision-making by dispersing responsibility among the appropriate actors.³⁸⁰ Hart's essay provides a jurisprudential defense of intra-branch checks and balances.³⁸¹

Prosecutors enjoy vast discretion. In determining what justice requires, prosecutors must identify and prioritize societal aims, like safety,

374. Green & Roiphe, *supra* note 9.

375. Angela Davis has argued that the problem with prosecutors is their lack of accountability. Davis, *supra* note 32, at 395–400. But even she proposes transparency as the solution rather than executive control over decision-making. *Id.* at 460–64.

376. Social media has allowed the President an unprecedented influence, even absent a mandate to direct individual cases. By repeatedly calling the investigation into Russian meddling in the 2016 election a “witch hunt” on social media, the President has asserted his political influence. By tweeting a demand for an investigation into whether the FBI and DOJ “infiltrated” his campaign, *see* Donald Trump (@realdonaldtrump), TWITTER (May 20, 2018, 11:13 AM), <https://twitter.com/realdonaldtrump/status/998256454590193665?lang=en>, President Trump has all but attempted to take over the legal department. While there is no proof that individual investigators or prosecutors have been influenced by these public declarations, it is a clear violation of the DOJ regulations designed to insulate individual prosecutors from partisan influence.

377. *See* Hart, *supra* note 9, at 656–64.

378. *Id.* at 657.

379. *Id.*

380. Geoffrey C. Shaw, *H.L.A. Hart's Lost Essay: Discretion and the Legal Process School*, 127 HARV. L. REV. 666, 706–07 (2013).

381. *Id.* at 674–75.

individual liberty, the preservation of government resources, deterrence, retribution, and rehabilitation. In addition, they have to determine whether certain conduct fits within a criminal statute. Our system vests this discretion in prosecutors because, in theory, their experience, expertise, and proximity to the facts situate them well to make these determinations. While they often disappoint,³⁸² others might well do worse. The more focused an individual is on personal or political gain, the more likely that this exercise of discretion will be distorted, priorities warped, and factual determinations skewed.³⁸³

Prosecutors are trained to exercise their discretion in a disinterested way, but conflicts of interest threaten to undermine this impartial decision-making. Partisan political interests create conflicts by infusing impermissible personal and political ambitions into decisions that ought to be made in the public interest. As Lloyd Cutler noted during the hearings on Senator Ervin's proposal to create an independent law department after Watergate, it makes little sense to interpret the separation-of-powers doctrine to "force us to tolerate conflicts of interest on the part of the President, the Attorney General and their immediate assistants that we cannot and do not tolerate in ordinary judges and lawyers."³⁸⁴

The President and his political appointees are more susceptible than prosecutors to illegitimate political motivations. Allocating responsibility for decisions in individual cases to career prosecutors who are lower down in the hierarchy helps achieve the fair and disinterested administration of criminal justice by making these sorts of conflicts less likely. The DOJ regulations developed in the aftermath of Watergate similarly serve as prophylactics, protecting United States Attorneys and their assistants from political pressure.³⁸⁵

The traditional view of separation of powers evolved as the administrative state changed. The role of experts and professionals within government complicates the initial understanding. There are several

382. The literature on the damage wrought by prosecutors is vast. See, e.g., Green & Yaroshefsky, *supra* note 33, at 656–72 (discussing the new rhetoric about prosecutorial wrongdoing).

383. Green & Roiphe, *supra* note 9, at 472.

384. *Removing Politics from the Admin. of Justice: Hearings Before the Subcomm. on Separation of Powers of the S. Comm. on the Judiciary*, 93d Cong. 241 (1974).

385. For instance, former FBI Director James Comey chose not to widely circulate his memorialized conversation with President Trump, in which the President asked him to back off the Michael Flynn investigation, within the office because he was concerned about impermissible political considerations infiltrating the FBI and United States attorneys' offices. *Open Hearing with Former FBI Director James Comey: Hearing Before S. Select Comm. on Intelligence*, 115th Cong. 19 (2017). He saw his role, in part, as gatekeeper, preventing partisan concerns from drifting down into individual decisions that ought to be made for other reasons. See *id.* Rod Rosenstein, similarly, has defended Special Counsel Robert Mueller. Spencer Ackerman, *Mueller's Boss Pledges to Protect Russia Probe Against GOP: 'I Would Not' Fire Him*, THE DAILY BEAST (Dec. 13, 2017), <https://www.thedailybeast.com/rod-rosenstein-pledges-to-protect-muellers-russia-probe-against-gop-i-would-not-fire-him>.

problems with the argument for a unitary Executive, in addition to its inconsistency with the historical tradition of prosecutorial independence discussed in Part II. Traditional checks and balances do not always work. The idea behind three coequal branches was, essentially, to create different zones of power, each competing for authority and checking the others along the way. But, as scholars have argued, Congress has grown increasingly passive, especially after the 9/11 terrorist attacks. In an age of partisan politics, Congress is even more likely to abdicate its power when the same party controls both Congress and the Executive Branch. Without effective legislative and judicial checks, there is an even greater need to police political actors to ensure that they comply with the law. Lawyers can and do serve this role. They (along with other experts in the administrative state) have evolved into a separate zone of power. Courts and legislators should read the law and design the structure of government to protect this role.

The history of the prosecutorial independence in Part II suggests that this is not an accidental twist. The American state has always been diffuse, and the myriad zones of power have always comprised substantial and important checks on power.³⁸⁶ The three separate branches were designed to balance accountability with checks on potential abuses of power. Since the founding, but particularly since 1870, lawmakers viewed prosecutorial discretion as a piece of this puzzle. In creating the DOJ, Congress believed that the consolidation of prosecutorial power under the Executive would foster professional values, which, in turn, would prevent the abuses of personal and partisan interest.

The effort to exert total control over the DOJ is part of a larger pattern in which the current President has undermined the institutions of democracy and the rule of law by insisting that all decisions with which he does not agree are motivated by political animus and whim. He attacked the credibility of Judge Gonzalo Curiel, who presided over the class action lawsuits against Trump University.³⁸⁷ He criticized judges who overruled his travel ban³⁸⁸ and has repeatedly attacked the FBI and other law enforcement agencies.³⁸⁹ Faith in the fair administration of justice is critical to the rule of law and democracy. Preserving prosecutorial independence is

386. Novak, *supra* note 289.

387. Nina Totenberg, *Who is Judge Gonzalo Curiel, The Man Trump Attacked for His Mexican Ancestry?*, NPR (June 7, 2016, 7:20 PM), <https://www.npr.org/2016/06/07/481140881/who-is-judge-gonzalo-curiel-the-man-trump-attacked-for-his-mexican-ancestry>.

388. Josh Gerstein & Eli Stokols, *Trump Lashes Out at Judge Who Put His Travel Ban on Ice*, POLITICO, <https://www.politico.com/story/2017/02/trump-travel-ban-legal-win-234634> (last updated Feb. 4, 2017, 9:16 PM).

389. Sharon LaFraniere, Katie Benner & Peter Baker, *Trump's Unparalleled War on a Pillar of Society: Law Enforcement*, N.Y. TIMES (Feb. 3, 2018), <https://www.nytimes.com/2018/02/03/us/politics/trump-fbi-justice.html>.

one way to ensure the disinterested and even-handed application of criminal law.

CONCLUSION

The history of the American administrative state in general and federal prosecution in particular includes competing themes. Since the founding, proponents of a strong consolidated Executive have vied with those who advocate significant checks on executive power. Politics and expediency often propelled that debate. As this central disagreement made its way into the twentieth century, however, official independence, expertise, and professionalism took on an increasingly important role.

At the beginning, prosecutorial independence was almost taken for granted, a product of the scattered, local nature of federal prosecution. While individual presidents did interfere in prosecutions, their ability to do so was limited. As federal criminal law grew more complex, legislators and critics recognized the need for national organization to combat waste, inefficiency, and corruption. The professional expert nature of the DOJ was critical to its mission from its inception. As the New Deal government expanded, the allocation of power among units within the Executive became vital to preserve the legitimacy of the system. Prosecutorial independence developed as a central norm during this period. In the aftermath of Watergate, legislators elaborated on the notion of professional independence as a fundamental check on presidential power.

Congress has acknowledged and acquiesced in the DOJ's independence. DOJ regulations articulated by Bell and implemented by Civiletti are more than mere etiquette. These professional norms of practice are a fundamental component of a functioning democracy and a key check on the accumulation of power.

As politicians, scholars, and lawyers concluded in the hearings after the Watergate scandal, fully isolating the DOJ from the Executive might diminish political accountability. But political accountability is meaningless unless investigators and prosecutors are independent of politics, free to find and publicize facts according to a strict process and without the distortion and spin of politics. Respect for prosecutorial independence and professional norms deserves significant weight in interpreting the law governing the allocation of criminal justice power between the President, the Attorney General, and other federal prosecutors.

As the criminal justice system changed throughout the twentieth century, the meaning of prosecutorial independence shifted as well, growing to denote personal integrity and a method of thinking critically about certain kinds of problems. While prosecutors sometimes fail to live up to expectations, they are better situated than the President to make sound,

disinterested prosecutorial decisions in individual cases in light of the evidence and prosecutorial policies and traditions.

The history and policy strongly suggest that, as a general matter, the Attorney General and subordinate prosecutors may not accept direction from the President but must make the ultimate decisions about how to conduct individual investigations and prosecutions, even at the risk of being fired for disobeying the President. The Constitution does not determine whether ultimate authority rests with the President or the prosecutors, leaving Congress to decide. Congress has not explicitly answered the question, but its silence since the late nineteenth century in the face of the evolving importance of prosecutorial independence suggests that Congress has acquiesced in a relationship in which the President may express views to the Attorney General, but the ultimate authority rests with the Attorney General or with subordinate prosecutors to whom the Attorney General delegates authority.

In the first two hypotheticals posed by Part I, the Attorney General must disregard and disobey the President's direction to indict a political opponent or to dismiss charges against a political ally because the President's motivations are partisan and because conventional prosecutorial norms and policies dictate a different result. The hard question, which we leave for another day, is posed by the last hypothetical, in which the President, pursuing legitimate foreign policy objectives, directs prosecutors to file espionage charges that are weak but supported by probable cause. This scenario creates a tension between the President's enumerated power under the Constitution and the Attorney General's implied authority under legislation. Here, some perceive, presidential preeminence is a necessity. Perhaps so. But absent such a powerful presidential claim of constitutional authority, history and policy suggest that prosecutors must answer to the law, not the President.