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Congress and the Independence of Federal Law Enforcement

Andrew Kent

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Congress and the Independence of Federal Law Enforcement

Andrew Kent*

Not since the Nixon presidency has the issue of the professional neutrality and independence of federal law enforcement from White House interference or misuse been such a pressing issue. This Article describes the problem, details Congress's important role in responding to it during the 1970s, and makes specific recommendations for Congress today. As important background, this Article recounts the abuses of the Hoover era at the Federal Bureau of Investigation ("FBI"), and the ways the Nixon White House sought to both impede and corrupt the Department of Justice ("DOJ") and the FBI. It then describes what an engaged Congress looked like — the Congress of the 1970s — when it reacted to these abuses by helping to develop laws, structures, and norms of law enforcement independence and neutrality that served this country well for two generations. Drawing both on ideas floated in Congress post-Watergate, as well as institutional design features from independent regulatory agencies, this Article then suggests a menu of options for a future Congress, if it could move beyond gridlock and partisanship, to engage again with pressing issues about the White House's relationship to federal law enforcement. Most options I survey here are constitutionally uncontroversial. But two options, both of which were proposed by reformist senators soon after Watergate, are more aggressive and constitutionally problematic: statutory qualifications limiting the range of appointees for senior DOJ roles, and a statutory for-cause restriction on the President's ability to remove the FBI Director. After setting out arguments for the constitutionality of these proposals, I conclude with a menu of concrete policy recommendations for a future Congress that wishes to get off the sidelines and again play a constructive role in

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protecting the country from the abuse of our powerful and essential federal law enforcement institutions.

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INTRODUCTION

Law enforcement infected by political or personal agendas is, or should be, the stuff of our nightmares. Any reasonable conception of the rule of law requires that law be applied impartially and impersonally.¹ As the influential Massachusetts Constitution of 1780 put it, the ideal is “impartial . . . administration of justice,” and “a government of laws and not of men.”² Today, the mission statement of the U.S. Department of Justice (“DOJ” or “Justice Department”) promises “to ensure fair and impartial administration of justice.”³ In perhaps the most famous distillation of prosecutorial ethics, Attorney General Robert Jackson — later Justice Jackson — warned against “the most dangerous power of the prosecutor: that he will pick people that he thinks he should get, rather than pick cases that need to be prosecuted.”⁴ Law enforcement would then be simply “picking the man and then searching the law books, or putting investigators to work, to pin some offense on him.”⁵ “Picking the man” (or woman, or group) for personal, political, ideological, racial, or other invidious reasons, and then searching for a criminal charge to bring, is a favorite tool of all tyrannies.

For the past two generations, the United States has had a good — not perfect, but good — record at the federal level of avoiding this fate. Two important judicial institutions — federal courts staffed by judges with tenure during good behavior, and juries of citizens⁶ — have helped prevent the misuse of law federal enforcement. But given the amount of discretion that escapes external review during the investigative and prosecutorial stages, the executive branch itself must be structured, staffed, and led in ways that promote fair and impartial law enforcement.

¹ See Jeremy Waldron, *The Rule of Law*, STAN. ENCYCLOPEDIA PHIL. (June 22, 2016), <https://plato.stanford.edu/entries/rule-of-law/>.

² MASS. CONST. of 1780, pt. I, arts. XXIX, XXX.

³ *About DOJ*, U.S. DEP’T JUST., <https://www.justice.gov/about> (last visited Nov. 2, 2018).

⁴ Robert H. Jackson, Attorney Gen., Address at the Second Annual Conference of U.S. Attorneys: The Federal Prosecutor 4 (Apr. 1, 1940), www.justice.gov/sites/default/files/ag/legacy/2011/09/16/04-01-1940.pdf.

⁵ *Id.* at 5.

⁶ See U.S. CONST. art. III, §§ 1-2, cl. 3; *id.* amend. VI.

Especially in the last forty years, the most important federal law enforcement organizations, the DOJ and its components, the U.S. Attorneys' offices and the Federal Bureau of Investigation ("FBI" or "Bureau"), have developed very strong cultures stressing professionalism, fairness, impartiality, and nonpartisanship. A key part of ensuring that federal law enforcement is not tyrannical has been removing as far as possible the influence of political actors on the investigation and prosecution of specific cases.⁷ Thus independence, professionalism, and impartiality have been tightly linked.⁸ In the post-Watergate era, both Congress and the executive branch have played key roles in establishing and buttressing professionalism and impartiality by bolstering independence from the White House.

But independence of federal law enforcement from political control has never been absolute, and there has been wide agreement that it should not be. Ever since 1789, the U.S. Attorney General and U.S. Attorneys (the top federal prosecutor in each judicial district) have been appointed by the President, with the advice and consent of the Senate, without statutory limits on removal from office.⁹ The director of the FBI has also been an at-will employee, serving at the pleasure of the President.¹⁰

Some substantial degree of direct presidential control over the heads of the DOJ and the FBI has generally been thought to be required by the Constitution. Law enforcement is mentioned expressly in Article

⁷ See generally Bruce A. Green & Fred C. Zacharias, "The U.S. Attorneys Scandal" and the Allocation of Prosecutorial Power, 69 OHIO ST. L.J. 187, 187-89 (2008) (discussing the discharge of eight U.S. Attorneys in order to further the President's partisan agenda).

⁸ See *infra* notes 23-31 and accompanying text.

⁹ See Judiciary Act of 1789, ch. 20, § 35, 1 Stat. 73, 92; see also, e.g., 1 S. EXEC. JOURNAL, 1st Cong., 1st Sess. 29-32 (1789) (recording the Senate acting upon nominations for district attorney by President Washington). The creation of the DOJ in 1870, with the Attorney General at its head, did not change this. See Act to Establish the Department of Justice, ch. 150, § 1, 16 Stat. 162 (1870). Into the twentieth century, U.S. Attorneys were referred to as district attorneys or federal district attorneys.

¹⁰ It was not until 1966 that Congress specified that the Attorney General had the power to appoint the FBI Director. See Pub. L. No. 89-554, § 4(c), 80 Stat. 378, 616 (1966) (codified at 28 U.S.C. § 532 (2018)). Two years later, Congress gave the appointment to the President, with the advice and consent of the Senate, but said nothing about removal, leaving the director an at-will employee. See Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, § 1101, 82 Stat. 197, 236 (codified at 28 U.S.C. 532 note (2018)). Legislation in 1976 fixing the director's term at a non-renewable ten years did not speak to removal. See Crime Control Act of 1976, Pub. L. No. 94-503, tit. II, § 203, 90 Stat. 2407, 2427 (codified at 28 U.S.C. 532 note (2018)).

II, which enjoins the President to “take Care that the Laws be faithfully executed”¹¹ and vests “the executive Power” in the President.¹² Both provisions place law execution power in “the president,” not in any other institution or individual,¹³ but Article II also envisions a hierarchical structure with the President at the top, executing the laws and protecting the national security through subordinate officers and departments.¹⁴ It is assumed that the power and duty to execute must include an authority to investigate violations of the laws and to prosecute violations, civilly and criminally.¹⁵ By the Article II oath and the Take Care Clause, the President is bound to “faithfully execute” the office and the laws.¹⁶ New research suggests that the original meaning of these twin commands requires the President, among other things, to act in a diligent, careful, good faith, and impartial manner when executing the laws, for public-spirited rather than self-interested or corrupt purposes.¹⁷

The primary law enforcement institutions and actors — the Attorney General, DOJ attorneys, the FBI Director, and Bureau employees — also have important national security roles,¹⁸ and the

¹¹ U.S. CONST. art. II, § 3.

¹² *Id.* art. II, § 1, cl. 1.

¹³ *E.g.*, *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 499 (2010) (“The Constitution requires that a President chosen by the entire Nation oversee the execution of the laws.”); *Printz v. United States*, 521 U.S. 898, 922 (1997) (“The Constitution does not leave to speculation who is to administer the laws enacted by Congress.”).

¹⁴ The President shall nominate, and with the Senate’s advice and consent appoint, the principal “Officers of the United States,” and if Congress so provides, appoint “inferior Officers,” with or without Senate concurrence. U.S. CONST. art. II, § 2, cl. 2. The President “may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices.” *Id.* art. II, § 2, cl. 1.

¹⁵ *See, e.g.*, *United States v. Armstrong*, 517 U.S. 456, 465 (1996) (describing criminal prosecution as “a core executive constitutional function”); *Morrison v. Olson*, 487 U.S. 654, 691 (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.”); *Heckler v. Chaney*, 470 U.S. 821, 832 (1985) (stating that the exercise of prosecutorial discretion in criminal and civil cases is a constitutional power of the President); *Buckley v. Valeo*, 424 U.S. 1, 138-40 (1976) (stating that “conducting civil litigation in the courts of the United States for vindicating public rights” is a presidential prerogative under Article II).

¹⁶ U.S. CONST. art. II, § 1, cl. 8; *id.* art. II, § 3.

¹⁷ *See* Andrew Kent et al., *Faithful Execution and Article II*, 132 HARV. L. REV. (forthcoming 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3260593.

¹⁸ *See, e.g.*, Exec. Order No. 12,333, 46 Fed. Reg. 59,941 (Dec. 4, 1981), *amended* by Exec. Order No. 13,284 (2003); Exec. Order No. 13,355 (2004); *and* Exec. Order

President has very significant constitutional power to conduct the nation's foreign affairs and protect the national security, personally and through at-will subordinates.¹⁹ Notwithstanding — or because of — all of this presidential power, Congress is given authority under the Necessary and Proper Clause to implement — and hence regulate — the powers vested in the President and in the United States government as a whole.²⁰

But many specific questions remain unanswered by the constitutional text itself, including: Is some independence of law enforcement from presidential control constitutionally permissible? If so, how much, and what kind? Is some independence constitutionally mandatory? These and related questions were uncertain and controversial in 1789 and remain so today.

A. *Post-Watergate Norms of Law Enforcement Independence*

Reflecting constitutional uncertainties, it is difficult to precisely define the proper role for political oversight of federal law enforcement. Even very experienced and sophisticated commentators can fall back on generalities.²¹ But the scandals and debates of the Watergate era helped crystallize more specific ideas. Both the negative examples set by men like J. Edgar Hoover and Richard Nixon, and the positive, reformist efforts by Congress, the press, civil society groups, post-Nixon Presidents, and law enforcement leaders, generated more precise guidelines or norms that have attracted widespread and lasting agreement. Some of these guidelines have been partially embodied in law or executive branch orders. Others are norms or conventions that have become widely accepted among political and legal elites.²²

Although it could be supplemented, I think the following list of guidelines captures many widely-shared views about the presidency

No. 13,470 (2008).

¹⁹ See, e.g., *Nixon v. Fitzgerald*, 457 U.S. 731, 749-50 (1982); *Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 109 (1948).

²⁰ U.S. CONST. art. I, § 8, cl. 18.

²¹ See, e.g., ELLIOT RICHARDSON, *THE CREATIVE BALANCE* 27 (1976) (contrasting the “proper role of the political process in the shaping of legal *policies* and the perversion of the legal *process* by political pressure”); *Preserving Prosecutorial Independence: Is the Department of Justice Politicizing the Hiring and Firing of U.S. Attorneys?: Hearing on S. 110-10 Before the S. Comm. on the Judiciary, 110th Cong. 1* (2007) [hereinafter *Preserving Prosecutorial Independence*] (statement of Sen. Charles Schumer) (stating that federal prosecutors “must be seen to enforce the rule of law without fear or favor” and must be “apolitical”).

²² On the definition of norms or conventions, see *infra* notes 53–56 and accompanying text.

and federal law enforcement that crystallized in the 1970s. First, the politically-accountable head of the executive branch — the President — can and indeed should set out the broad parameters of legal and enforcement policy for DOJ prosecutors and law enforcement agencies like the FBI, because ultimately the President is accountable for the faithful execution of the law.²³ The Attorney General's job involves such a large element of sensitive policy — in areas ranging from civil litigation against the government to federal prison administration to immigration to law enforcement priorities — that he or she is properly an at-will employee of the President, and hence responsive to the public will as well.²⁴ The FBI Director should be much more insulated

²³ See, e.g., *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. 87 (1974) [hereinafter *Removing Politics Hearing*] (statement of Robert G. Dixon, Assistant Att'y Gen.) (“The people of this country are concerned properly about matters such as organized crime, civil rights, pornography, the death penalty, and enforcement of the antitrust laws. These and other areas are legitimate issues of public debate and legitimate issues in a Presidential campaign. The President should be able to set broad priorities in these and related areas.”). For other expressions of this norm, see *id.* at 17-18 (statement of Hon. Theodore C. Sorenson, Former Special Counsel to President Kennedy); *id.* at 202 (statement of Archibald Cox, Williston Professor of Law, Harvard University, and former Special Prosecutor in the Department of Justice); AM. BAR ASS'N SPECIAL COMM. TO STUDY FED. LAW ENF'T AGENCIES, PREVENTING IMPROPER INFLUENCE ON FEDERAL LAW ENFORCEMENT AGENCIES 37 (1976) [hereinafter ABA REPORT]; Rachel E. Barkow, *Clemency and Presidential Administration of Criminal Law*, 90 N.Y.U. L. REV. 802, 838-39 (2015); Griffin B. Bell, Attorney Gen., Address Before Department of Justice Lawyers 4-5 (Sept. 6, 1978), www.justice.gov/sites/default/files/ag/legacy/2011/08/23/09-06-1978b.pdf [hereinafter Bell Address].

²⁴ See, e.g., *Removing Politics Hearing*, *supra* note 23, at 18 (statement of Hon. Theodore C. Sorenson) (“[The Attorney General] not only enforces Federal law, investigates its violations, and prosecutes its violators, but also interprets it for the President and other agency heads, represents the government in civil as well as criminal cases, offers recommendations and reactions to the executive branch, drafts, presents, and reviews legislation, and is concerned with prisons, pardons, paroles, narcotics, juvenile delinquency, immigration, community relations, domestic security, and judicial vacancies.”). For other expressions of this norm, see *id.* at 152-53, 157 (statement of Hon. Nicholas deB. Katzenbach, former Att'y Gen.); ABA REPORT, *supra* note 23, at 33-34, 37; JAMES COMEY, A HIGHER LOYALTY: TRUTH, LIES, AND LEADERSHIP 106 (2018); Dahlia Lithwick & Jack Goldsmith, *Politics as Usual: Why the Justice Department Will Never Be Apolitical*, SLATE (Mar. 14, 2007, 6:46 PM), www.slate.com/articles/news_and_politics/jurisprudence/2007/03/politics_as_usual.html. For codification of this norm, see 28 U.S.C. § 503 (2018) (allowing the President, with the advice and consent of the Senate, to appoint the Attorney General, and neither stating a term of office nor placing restrictions on removal). Support for this norm can also be seen when reforms of the DOJ to protect independence and impartiality are proposed, but without any suggestion that the Attorney General should be anything but an at-will employee of the President. See, e.g., NAT'L TASK

from political control than the Attorney General, operating as independently as possible, but nevertheless “responsive[] to the broad policies of the Executive Branch.”²⁵ Partisan political considerations, personal vendettas or favoritism, financial gain, or self-protection or self-dealing should play no role in investigating or prosecuting cases, hiring or firing career officials, prosecutors, and law enforcement agents, and U.S. Attorneys and FBI Directors.²⁶ The senior leadership

FORCE ON RULE OF LAW & DEMOCRACY, PROPOSALS FOR REFORM 2-3 (2018), https://www.brennancenter.org/sites/default/files/publications/TaskForceReport_2018_09_.pdf [hereinafter NAT'L TASK FORCE]; *Roadmap for Renewal: Congressional Oversight and Legislation to Renew Our Democracy*, PROTECT DEMOCRACY, <https://protectdemocracy.org/roadmap-for-renewal/> (last visited Dec. 27, 2018).

²⁵ TEN-YEAR TERM FOR THE FBI DIRECTOR, S. REP. NO. 93-1213, at 2 (1974); see also *Confirmation Hearing on the Nomination of Robert S. Mueller, III to be Director of the Federal Bureau of Investigation: Hearing on S. 107-514 Before the S. Comm. on the Judiciary*, 107th Cong. 87 (2001) [hereinafter *Mueller Hearing*] (statement of Robert S. Mueller, III) (stating that the FBI must be “independent, to pursue its investigations without any favor to one political party or the other or to any particular individual, no matter how powerful” but that the director should be responsive to the Attorney General on “policy matters.”); *Nomination of Judge William Steele Sessions to be Director of the FBI: Hearing on S. 100-36 Before the S. Comm. on the Judiciary*, 100th Cong. 10 (1987) [hereinafter *Hon. William Sessions Hearing*] (statement of Sen. Leahy) (stating that an FBI Director has to “walk that fine line between responding to the Nation’s political leaders and pursuing the department’s very independent law enforcement mission.”); LOUIS J. FREEH, MY FBI: BRINGING DOWN THE MAFIA, INVESTIGATING BILL CLINTON, AND FIGHTING THE WAR ON TERROR 38 (2005) (“Integrity and independence make or break an FBI Director. The incumbent has to be able to say no to the attorney general or even the president if no is the right answer.”); Daphna Renan, *Presidential Norms and Article II*, 131 HARV. L. REV. 2187, 2207-14 (2018). For partial codification of this norm, see Crime Control Act of 1976, Pub. L. No. 94-503, § 203, 90 Stat. 2407, 2427 (codified at 28 U.S.C. § 532 note (2018)) (giving the FBI Director a ten-year term, chosen because it extended beyond any one President’s time in office).

²⁶ For general statements of this norm, see, for example, *Preserving Prosecutorial Independence*, *supra* note 21; *Removing Politics Hearing*, *supra* note 23, at 15-16 (statement of Hon. Theodore C. Sorenson); *id.* at 88 (statement of Robert Dixon); *id.* at 154 (statement of Hon. Nicholas deB. Katzenbach); ABA REPORT, *supra* note 23, at 44; NAT'L TASK FORCE, *supra* note 24, at 2; Bell Address, *supra* note 23, at 2-3. For partial codifications of this norm, see U.S. DEP'T OF JUSTICE, PRINCIPLES OF FEDERAL PROSECUTION § 9-27.260, <https://www.justice.gov/usam/usam-9-27000-principles-federal-prosecution> (“In determining whether to commence or recommend prosecution or take other action against a person, the attorney for the government should not be influenced by: 1) The person’s race, religion, gender, ethnicity, national origin, sexual orientation, or political association, activities, or beliefs; 2) The attorney’s own personal feelings concerning the person, the person’s associates, or the victim; or 3) The possible affect [sic] of the decision on the attorney’s own professional or personal circumstances.”).

of the DOJ should take no part in political campaigns.²⁷ The DOJ and FBI should never be used by the White House for partisan political information gathering or other personally-motivated operations.²⁸ Decisions about specific investigatory or prosecutorial steps in particular criminal cases are almost always best left to career officials operating free from political intervention, and supervised by political appointees based only on “law and merit” rather than improper considerations including “White House approval or influence.”²⁹ Investigations and prosecutions of senior White House or DOJ officials should be conducted so as to minimize conflicts of interest and the appearance of or actual improper interference.³⁰ And a President,

²⁷ See *Removing Politics Hearing*, *supra* note 23, at 59-60 (statement of Hon. Arthur J. Goldberg, former J., United States Supreme Court); *id.* at 170 (statement of Hon. Ramsey Clark, former Att’y Gen.); ABA REPORT, *supra* note 23, at 41; NAT’L ACAD. OF PUB. ADMIN., WATERGATE: ITS IMPLICATIONS FOR RESPONSIBLE GOVERNMENT 160-61 (1974) [hereinafter NAT’L ACADEMY REPORT]; Jackson, *supra* note 4, at 3-4.

²⁸ See, e.g., 119 CONG. REC. 40947 (1973) (statement of Sen. Ervin); *id.* at 11351 (statement of Sen. Byrd); *id.* at 14130 (statement of Sen. Schweiker); Bell Address, *supra* note 23, at 3. See generally FED. BUREAU OF INVESTIGATION, MANUAL OF ADMINISTRATIVE OPERATIONS AND PROCEDURES, pt. 1, § 1-18.3.2 (“The FBI, like all law enforcement agencies, must be perceived by the public as nonpartisan and apolitical.”).

²⁹ *Removing Politics Hearing*, *supra* note 23, at 16 (statement of Theodore C. Sorenson); see also Barack Obama, *The President’s Role in Advancing Criminal Justice Reform*, 130 HARV. L. REV. 811, 823 (2017) (“For good reason, particular 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.”); Madeline Conway, *Key Moments from Wray’s FBI Confirmation Hearing*, POLITICO (July 12, 2017, 11:31 AM EDT), www.politico.com/story/2017/07/12/christopher-wray-confirmation-hearing-key-moments-240452 (quoting Christopher Wray, nominee for FBI Director, stating at his confirmation hearing that “there certainly shouldn’t be any discussion between, one-on-one discussion between, the FBI Director and any president about how to conduct particular investigations or cases”). For other statements of this norm, see *Preserving Prosecutorial Independence*, *supra* note 21 (statement of Paul J. McNulty, Deputy Att’y Gen.); *Removing Politics Hearing*, *supra* note 23, at 154 (statement of Hon. Nicholas deB. Katzenbach); *id.* at 168-69 (statement of Ramsey Clark); ABA REPORT, *supra* note 23, at 69-73; COMEY, *supra* note 24, at 120, 179, 237, 246; NAT’L ACADEMY REPORT, *supra* note 27, at 160-61; Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2357-58 (2001); Barkow, *supra* note 23, at 833-34, 838; Bell Address, *supra* note 23, at 4-5; Jackson, *supra* note 4, at 2. For suggestions that Congress in 28 U.S.C. §§ 516, 547 (2018) has codified the rule that the Attorney General and U.S. Attorneys, rather than the President or the White House, direct criminal prosecutions, see *United States v. Armstrong*, 517 U.S. 456, 464-65 (1996) and *United States v. Nixon*, 418 U.S. 683, 693-94 (1974).

³⁰ See, e.g., Ethics in Government Act of 1978, Pub. L. No. 95-521, tit. VI, § 601,

acting either directly or through aides, violates his oath of office and constitutional duty to faithfully execute the law if he seeks to obstruct or defeat duly authorized law enforcement inquiries into his own behavior or that of close associates.³¹

This post-Watergate elite consensus on principles of federal law enforcement independence and neutrality has endured through the present day, but is now under pressure. Among the many aspects of the candidacy and presidency of Donald Trump that have attracted widespread condemnation are his repeated attacks on this consensus. Starting from his time as a candidate, Trump has engaged in unprecedented and often highly personal attacks on the integrity, competence, and independence of the FBI, DOJ, FBI Directors, and Attorneys General.³² Starting soon upon taking office, Trump repeatedly pressured Attorney General Jefferson Sessions and three FBI Directors in highly inappropriate ways.³³ Trump fired FBI Director

92 Stat. 1824 (creating the process for appointing and monitoring an independent counsel).

³¹ See, e.g., AM. PRESIDENCY PROJECT, ARTICLES OF IMPEACHMENT ADOPTED BY THE HOUSE OF REPRESENTATIVES COMMITTEE ON THE JUDICIARY, art. I (1974), <https://www.presidency.ucsb.edu/documents/articles-impeachment-adopted-the-house-representatives-committee-the-judiciary>; *Law Professor Letter on President's Article II Powers*, PROTECT DEMOCRACY (June 4, 2018), <https://protectdemocracy.org/law-professor-article-ii/>.

³² Some of the voluminous evidence supporting this statement is compiled in NOAH BOOKBINDER ET AL., CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON, THE MOST UNETHICAL PRESIDENCY: YEAR ONE 11-12 (2018); Sharon LaFraniere et al., *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>.

³³ See, e.g., Devlin Barrett & Philip Rucker, *Tensions Swell Between Sessions and FBI over Senior Personnel from Comey Era*, WASH. POST (Jan. 22, 2018), https://www.washingtonpost.com/world/national-security/tensions-between-sessions-and-fbi-over-senior-personnel-from-comey-era/2018/01/22/c95fc2bc-ffeb-11e7-8acf-ad2991367d9d_story.html?utm_term=.f5e5acc14b35 ("FBI Director Christopher A. Wray has been resisting pressure from Attorney General Jeff Sessions to replace the bureau's deputy director, Andrew McCabe, a frequent target of criticism from President Trump."); Stephen Collinson et al., *James Comey Testimony: Trump Asked Me to Let Flynn Investigation Go*, CNN (June 8, 2017, 1:54 AM ET), cnn.com/2017/06/07/politics/james-comey-testimony-released/index.html (reporting former FBI Director James Comey's testimony to Congress that President Trump asked Comey for personal loyalty and soon afterwards asked him to drop an FBI investigation of Trump campaign advisor and former Trump national security adviser Michael Flynn); Ellen Nakashima et al., *Trump Asked the Acting FBI Director How He Voted During Oval Office Meeting*, WASH. POST (Jan. 23, 2018), https://www.washingtonpost.com/world/national-security/trump-asked-the-acting-fbi-director-whom-he-voted-for-during-oval-office-meeting/2018/01/23/2cb50818-0073-11e8-8acf-ad2991367d9d_story.html?noredirect=on&utm_term=.dae51fbc5762 (reporting that soon after Andrew McCabe became acting director of the FBI, Trump called McCabe

James Comey in an attempt to stop an investigation of Trump's campaign associates for possible collusion with Russia.³⁴ Trump pressured Attorney General Sessions to resign because Sessions followed the advice of career ethics officials at the DOJ and recused from the Russia-Trump probe, rather than stay in place and use his office to protect the President, his family, and associates.³⁵ Sessions did in fact resign at the request of President Trump on November 7, 2018.³⁶ And President Trump also repeatedly pressed the DOJ and the FBI to criminally investigate his campaign opponent, Hillary Clinton. Trump's announced view is that federal law enforcement should answer directly to him, protect him personally, and advance his personal and political agendas.³⁷

The responses by the 115th Congress to this norm flouting by the chief executive were minimal. After firing Comey, apparently for self-

to the Oval Office, asked him for whom he had voted in the presidential election, and "vented his anger at McCabe" about his wife's receipt of campaign money from a Clinton-connected governor during her 2015 race for a Virginia state legislative seat).

³⁴ See, e.g., Matt Apuzzo et al., *Trump Told Russians that Firing "Nut Job" Comey Eased Pressure from Investigation*, N.Y. TIMES (May 19, 2017), <https://www.nytimes.com/2017/05/19/us/politics/trump-russia-comey.html> (reporting that Trump told the Russian ambassador in a White House meeting: "I just fired the head of the F.B.I. He was crazy, a real nut job . . . I faced great pressure because of Russia. That's taken off."); Devlin Barrett & Philip Rucker, *Trump Said He Was Thinking of Russia Controversy When He Decided to Fire Comey*, WASH. POST (May 11, 2017), https://www.washingtonpost.com/world/national-security/trump-says-fbi-director-comey-told-him-three-times-he-wasnt-under-investigation-once-in-a-phone-call-initiated-by-the-president/2017/05/11/2b384c9a-3669-11e7-b4ee-434b6d506b37_story.html?utm_term=.4f5e0a07623b (reporting that President Trump said during a televised interview that he was "thinking of" the FBI's pending investigation of connections between the Trump campaign and Russian government interference with the presidential election when he fired FBI Director Comey).

³⁵ See, e.g., Peter Baker et al., *Jeff Sessions is Forced Out as Attorney General as Trump Installs Loyalist*, N.Y. TIMES (Nov. 7, 2018), <https://www.nytimes.com/2018/11/07/us/politics/sessions-resigns.html> [hereinafter *Jeff Sessions is Forced Out*].

³⁶ Resignation Letter from Jeff Sessions, Att'y Gen., to Donald J. Trump, President (Nov. 7, 2018, 4:08 PM ET), <https://www.cnn.com/2018/11/07/politics/sessions-resignation-letter/index.html>.

³⁷ See, e.g., Michael S. Schmidt & Michael D. Shear, *Trump Says Russia Inquiry Makes U.S. "Look Very Bad,"* N.Y. TIMES (Dec. 28, 2017), <https://www.nytimes.com/2017/12/28/us/politics/trump-interview-mueller-russia-china-north-korea.html> (Trump stated: "I have [the] absolute right to do what I want to do with the Justice Department."); see also Peter Baker, *"Very Frustrated" Trump Becomes Top Critic of Law Enforcement*, N.Y. TIMES (Nov. 3, 2017), <https://www.nytimes.com/2017/11/03/us/politics/trump-says-justice-dept-and-fbi-must-do-what-is-right-and-investigate-democrats.html> (Trump said, "You know, the saddest thing is that because I'm the president of the United States, I am not supposed to be involved with the Justice Department." and "I am not supposed to be involved with the F.B.I. I'm not supposed to be doing the kind of things that I would love to be doing. And I'm very frustrated by it.").

protective reasons, Trump nominated Christopher Wray, formerly a senior DOJ lawyer under George W. Bush, for the FBI directorship. In the Senate Judiciary Committee report from the 1970s explaining why a ten-year term with no removal restrictions for the FBI Director was chosen, the Committee stated that firing a director mid-term would be appropriate only due to “a substantial period of time [of] significant disagreement and inability to cooperate with the law enforcement policies [of] the Executive Branch.”³⁸ It would be improper, the Report warned, to fire a director “merely for the reason that a new President desires his ‘own man’ in the position” or for partisan or political reasons.³⁹

Yet the Republican-controlled Senate, during Wray’s confirmation hearings, did not approach the Wray confirmation hearing “with the gravity it deserved” given the circumstances that led to the vacancy at the top of the FBI.⁴⁰ The majority of the Senate appeared “willing to tolerate precisely the kind of abusive presidential interference with FBI independence that it promised not to tolerate in the aftermath of Watergate.”⁴¹

A bill to codify and strengthen the DOJ special counsel regulations⁴² under which Robert Mueller is currently investigating Russia’s election interference and connections to the Trump campaign, was passed out of the Senate Judiciary Committee,⁴³ but has been languishing with

³⁸ TEN-YEAR TERM FOR THE FBI DIRECTOR, S. REP. NO. 93-1213, at 7 (1974).

³⁹ *Id.*

⁴⁰ Benjamin Wittes, *Wray Does Well; the Senate Judiciary Committee Does Not*, LAWFARE (July 12, 2017, 4:58 PM), www.lawfareblog.com/wray-does-well-senate-judiciary-committee-does-not.

⁴¹ Andrew Kent, *Congress Should Reconsider Giving the FBI Director Independence from Presidential Control*, LAWFARE (July 14, 2017, 9:00 AM), www.lawfareblog.com/congress-should-reconsider-giving-fbi-director-independence-presidential-control [hereinafter *Congress Should Reconsider*]. It is true that before Wray’s selection, some senators as well as outside commentators did declare that partisan politicians — names floated by the White House included Rep. Trey Gowdy (R-S.C.) and Sen. John Cornyn (R-Tex.) — were unacceptable at the head of the FBI. See Jack Goldsmith & Benjamin Wittes, *Partisan Political Figures Cannot Run the FBI*, LAWFARE (May 15, 2017, 10:33 AM), www.lawfareblog.com/partisan-political-figures-cannot-run-fbi (quoting Sen. Lindsey Graham (R-S.C.)). And some Senators came to the defense of their former colleague, Attorney General Sessions, when President Trump insulted him publicly and repeatedly tried to pressure him to resign. See, e.g., Austin Wright, Seung Min Kim & Kyle Cheney, *Republicans Rush to Sessions’ Defense*, POLITICO (July 25, 2017, 10:48 AM EDT), www.politico.com/story/2017/07/25/lindsey-graham-jeff-sessions-trump-criticism-240935.

⁴² 28 C.F.R. § 600 (2018).

⁴³ See Nicholas Fandos, *In Warning to Trump, Senators Advance Bill to Protect Mueller*, N.Y. TIMES (Apr. 26, 2018), <https://www.nytimes.com/2018/04/26/us/politics/>

little prospect of a floor vote in the Senate. And little else was done by Congress during the first two years of Trump's presidency to protect or promote law enforcement independence and impartiality in the face of sustained, unprecedented assaults on these norms by the President. As this Article goes to press, control of the House of Representatives has shifted to the Democratic party, which will likely lead to invigorated oversight.

The muted and weak response to Trump by the 115th Congress contrasts sharply with the Congresses of the 1970s Watergate era. Congress then confronted widespread illegality and politicization of law enforcement by the White House. It spent much of the decade engaging in serious, thoughtful, and sustained oversight and regulatory reform, producing enduring legal structures and norms of law enforcement independence. The reforms have served the country well for two generations. Political scientists spoke of a "resurgence" of Congress.⁴⁴ (Some executive officials complained of a "tethered presidency."⁴⁵) The lessons and legacy of Congress's post-Watergate reforms have important implications for the present day.

B. Goals and Theoretical Frameworks

This Article has three inter-twined aims. First, the Article presents a descriptive account of how Congress responded to abuses during the 1970s, with the goal of showing how Congress helped instantiate norms of law enforcement independence and neutrality. Second, drawing on congressional proposals from the 1970s, as well as tools used by Congress to protect the independence of independent regulatory commissions, the Article makes proposals for congressional interventions that could respond to President Trump's words and actions. Third, the Article evaluates the constitutionality of these suggested options.

The Article works within three important theoretical frameworks in administrative law and political science scholarship. First, agency independence from the White House is not a simple or single phenomenon: there are a variety of structures and mechanisms

[senate-mueller-protection-bill.html](#).

⁴⁴ See generally JAMES L. SUNDQUIST, *THE DECLINE AND RESURGENCE OF CONGRESS* (1981) (discussing Congress's resurgence of power in the era following Nixon's presidency).

⁴⁵ See generally *THE TETHERED PRESIDENCY: CONGRESSIONAL RESTRAINTS ON EXECUTIVE POWER* (Thomas M. Franck ed., 1981) (analyzing the historical conflict between the legislative and executive branches and the resurgence of congressional power).

Congress uses to provide some agencies with some kinds of independence, and not all agencies commonly understood as “independent” have all of these features.⁴⁶ Kirti Datla and Richard Revesz have usefully suggested that agency independence be conceived not as polar but as existing on a continuum.⁴⁷ The legal or structural indicia of independence of agencies include: removal protection,⁴⁸ a multimember leadership structure,⁴⁹ specified terms in office, sometimes longer than a President’s,⁵⁰ partisan balance requirements,⁵¹ the use of the word “independent” in the agency’s authorizing statute,⁵² and others. While some of these features are inapplicable to single person-headed law enforcement agencies like DOJ and the FBI, the disaggregation of different independence mechanisms is a useful lens through which to understand any agency or department.

Second, Adrian Vermeule has rightly emphasized the powerful role that “conventions” — “political norms within relevant legal and political communities” whose violation is reasonably expected to impose costs on the violator — play in deeming some agencies to be

⁴⁶ See *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 547 (2010) (Breyer, J., dissenting) (discussing different indicia of agency independence); MARSHALL J. BREGER & GARY J. EDLES, *INDEPENDENT AGENCIES IN THE UNITED STATES: LAW, STRUCTURE, AND POLITICS* 4-5 (2015); Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 *TEX. L. REV.* 15, 26-41 (2010); Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 *CORNELL L. REV.* 769, 772 (2013).

⁴⁷ Datla & Revesz, *supra* note 46, at 825-27.

⁴⁸ See, e.g., 15 U.S.C. § 41 (2018) (providing that commissioners heading the Federal Trade Commission “may be removed by the President for inefficiency, neglect of duty, or malfeasance in office”); 29 U.S.C. § 153 (2018) (“Any member of the [National Labor Relations] Board may be removed by the President, upon notice and hearing, for neglect of duty or malfeasance in office, but for no other cause.”). These provisions contrast with the lack of any statement regarding removal of cabinet members such as the Secretary of Defense, Attorney General, Secretary of State, Secretary of Commerce, etc.

⁴⁹ See, e.g., 47 U.S.C. § 154(a) (2018) (providing that the Federal Communications Commission is headed by a five-member board of commissioners, one of whom is designed by the President as the chair).

⁵⁰ E.g., 15 U.S.C. § 78d(a) (2018) (granting the commissioners of the Securities and Exchange Commission (“SEC”) five-year terms).

⁵¹ E.g., 52 U.S.C. § 30106(a)(1), (5) (2018) (providing that, of the six voting members who head the Federal Election Commission, “[n]o more than 3 members . . . may be affiliated with the same political party,” and the chairman and vice chairman “shall not be affiliated with the same political party”).

⁵² E.g., 15 U.S.C. § 2053(a) (2018) (“An independent regulatory commission is hereby established, to be known as the Consumer Product Safety Commission.”).

more independent than others, irrespective of underlying statutory indicia of independence.⁵³ And as Vermeule, Daphna Renan, and others have observed, the independence of federal law enforcement from the White House, such as it is, has been largely a matter of conventions or norms rather than law.⁵⁴ For my purposes, I will use “norms” and “conventions” as interchangeable terms. Similar to Vermeule’s definition of conventions, Renan, for example, defines structural political norms as “unwritten or informal rules,” “informed by but not clearly characterized as the legal,” that “govern political behavior” because they are expected to be followed by important societal groups (sociological legitimacy) and thought by those groups to be normatively attractive or even compulsory.⁵⁵ Recognizing the role of conventions or norms means that responses to President Trump’s threats to independence could take the form of legislation, or could be less formal actions that signal displeasure and reproach by Congress or the public and otherwise seek to buttress valuable norms.⁵⁶

Third, congressional oversight works, in that it often affects how the executive branch carries out its responsibilities and functions,⁵⁷ and plays a critical role in defining and enforcing conventions or norms of agency independence.⁵⁸ Therefore, it is well worth thinking about how Congress can use the many levers it has to promote better practices in

⁵³ Adrian Vermeule, *Conventions of Agency Independence*, 113 COLUM. L. REV. 1163, 1165-66 (2013) [hereinafter *Conventions*]; see also *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 547 (2010) (Breyer, J., dissenting) (noting that the independence of SEC Commissioners is maintained in part by “a political environment, reflecting tradition and function, that would impose a heavy political cost upon any President who tried to remove a commissioner of the agency without cause”).

⁵⁴ See, e.g., Renan, *supra* note 25, at 2207-14 (arguing that a structural norm insulates certain types of law enforcement investigative decision-making from presidential control); Vermeule, *Conventions*, *supra* note 53, at 1201-03 (exploring how President George W. Bush and Attorney General Alberto Gonzales were politically penalized for violating a convention that U.S. Attorneys not to be replaced mid-term, even though statutory law and case law allowed at-will removal).

⁵⁵ Renan, *supra* note 25, at 2196.

⁵⁶ See, e.g., Vermeule, *Conventions*, *supra* note 53, at 1182 (discussing sanctions for breach of conventions).

⁵⁷ See generally LOUIS FISHER, *THE POLITICS OF SHARED POWER: CONGRESS AND THE EXECUTIVE* 68-176 (4th ed. 1998) (reviewing formal and informal techniques by which Congress and individual committees and members influence the executive branch’s administration of the laws); Jack M. Beerermann, *Congressional Administration*, 43 SAN DIEGO L. REV. 61 (2006) (reviewing how Congress oversees administration of the law “both formally and informally”).

⁵⁸ See BREGER & EDLES, *supra* note 46, at 4-5.

federal law enforcement. And it is useful now, when norms of law enforcement independence are being challenged by President Trump, to understand the enormously important role Congress played in the 1970s in shaping those norms.

The remainder of this Article is in four parts. Part I sets the stage for what follows. It briefly outlines the abusive practices of federal enforcement agencies, and the politicization of those agencies by the White House, that came to a head in the Watergate scandal. This Part then highlights congressional oversight and reform efforts in the 1970s. It closes with a description of the powers and responsibilities of the Attorney General and FBI Director today, after the lawmaking and norm-creating of the 1970s. Part II draws on reform proposals from the 1970s, among other sources, to suggest nine constitutionally uncontroversial ways that Congress could act to buttress federal law enforcement independence, neutrality, and professionalism. Part III addresses two constitutionally controversial, more aggressive possibilities: statutory restrictions on whom the President could appoint to head the DOJ and FBI and on the President's ability to remove those officials. A conclusion offers a menu of specific proposals that might be useful in the present environment.

I. BACKGROUND: POWERS, ABUSES, AND CONGRESSIONAL REFORM

This Part first briefly outlines abusive conduct by the DOJ, FBI, and Nixon White House that prompted widespread calls for reform in the 1970s. It then describes the highlights of the efforts by Congress to reform federal law enforcement in the 1970s, helping to create the norms of independence, nonpartisanship, and professionalism described above. This Part closes with a summary of the powers and responsibilities of the Attorney General and FBI Director today, to set the stage for the discussions of reforms in Parts III and IV.

A. *A Sketch of Abuses by DOJ, the FBI, and the Nixon White House*

J. Edgar Hoover's reign at the top of the FBI lasted from the creation of the Bureau's predecessor organization in 1924 until his death in 1972⁵⁹ — from President Coolidge to President Nixon. Under Hoover, the Bureau's many sins⁶⁰ included programs to monitor, harass,

⁵⁹ See, e.g., CURT GENTRY, J. EDGAR HOOVER: THE MAN AND THE SECRETS 32, 34 (1991).

⁶⁰ The following paragraph recounts information found in many sources which have exhaustively examined the abuses of Hoover-led FBI. See, e.g., SELECT COMM. TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, BOOK III:

disrupt, and discredit — with real and fabricated salacious information — supposedly subversive American political, religious, and social groups and individuals, including the Black Panther Party, the Southern Christian Leadership Conference (led by Martin Luther King, Jr.), anti-Vietnam War student groups, Earth Day environmental activities, Muhammad Ali, John Lennon, Malcolm X, and many others. The FBI surveilled, often illegally, and kept dossiers on thousands of other Americans, including writers and entertainers suspected of communist or radical views (e.g., Langston Hughes, Dorothy Parker, Charlie Chaplin, Arthur Miller). The abuses of McCarthyism were greatly furthered by Hoover and the FBI's penchant for exaggerating the communist threat. Several Presidents — Truman, Kennedy, and Nixon — are known to have considered firing Hoover, but feared to do so because of his political connections, popular support, and willingness to credibly threaten blackmail.

As it grew greatly in size and power over the course of Hoover's directorship, the FBI operated largely free from legal constraint.⁶¹ The organization lacked even a statutory charter.⁶² The Bureau was very lightly overseen by both the Justice Department leadership and Congress until the death of Hoover in the early 1970s.⁶³

Hoover allowed the FBI to be used by President Lyndon Johnson as a political intelligence service, for instance, by reporting on activities by civil rights groups and liberal Democrats at the 1964 Democratic Convention, and investigating and reporting on the backgrounds and

SUPPLEMENTARY DETAILED STAFF REPORTS ON INTELLIGENCE ACTIVITIES AND THE RIGHTS OF AMERICANS, S. REP. NO. 94-755, at 4 (1976); DAVID GARROW, *THE FBI AND MARTIN LUTHER KING, JR.* 12 (2006); ATHAN G. THEOHARIS & JOHN STUART COX, *THE BOSS: J. EDGAR HOOVER AND THE GREAT AMERICAN INQUISITION* 3-15 (1988); ATHAN G. THEOHARIS, *SPYING ON AMERICANS: POLITICAL SURVEILLANCE FROM HOOVER TO THE HUSTON PLAN* (1978) (describing various FBI domestic surveillance program); TIM WEINER, *ENEMIES: A HISTORY OF THE FBI* (2012) (providing examples of FBI investigations under Hoover into various public figures and political groups).

⁶¹ *FBI Statutory Charter: Hearings Before the S. Comm. of the Judiciary*, 95th Cong. 4 (1978) (statement of Hon. Griffin B. Bell, Att'y Gen.) ("Despite its long history, the Bureau has received very little statutory guidance. There are, basically, only three provisions defining its duties: [28 U.S.C. §§ 533-534 and 42 U.S.C. § 3744].").

⁶² *See id.*

⁶³ *See, e.g., id.* at 2 (statement of Sen. Edward Kennedy) ("Congress and the executive branch must share responsibility with the Bureau for the fact that the FBI has never before been truly accountable to anyone for anything. The Bureau, for decades, operated with independence from any day-to-day accountability within the Justice Department or the executive branch. Congress only recently has exercised its own responsibility to question the overall directions, the underlying policies, and the basic program decisions of the Bureau.").

contacts of anti-Vietnam War groups and individuals.⁶⁴ The pattern continued under Nixon. The Nixon White House used the FBI to investigate those they considered political opponents, which included wiretapping sitting members of Congress and journalists.⁶⁵ In addition, Nixon had the FBI tap the telephones of members of the National Security Council and journalists who he thought were involved in leaks related to the war in Vietnam.⁶⁶

For Attorney General, Nixon in 1969 had chosen John Mitchell, the new President's friend, former law partner, and manager of his presidential campaign.⁶⁷ Mitchell served as a close political adviser to Nixon during the first term, and began working on the re-election campaign well before he stepped down from the Attorney General's job in March 1972 to formally take charge of the Committee to Re-Elect the President (soon dubbed "CREEP" by Nixon critics).⁶⁸ As head of the re-election campaign, Mitchell approved plans for illegal bugging of the Democratic National Committee ("DNC") headquarters and other campaign dirty tricks, suggested by White House and campaign aides.⁶⁹ Mitchell was succeeded as Attorney General by Richard Kleindienst, who came from a thoroughly political

⁶⁴ See ATHAN G. THEOHARIS, *THE FBI AND AMERICAN DEMOCRACY: A BRIEF CRITICAL HISTORY* 126-27 (2004) [hereinafter *CRITICAL HISTORY*].

⁶⁵ See *id.* at 128; see also STANLEY I. KUTLER, *THE WARS OF WATERGATE: THE LAST CRISIS OF RICHARD NIXON* 180, 233, 367 (1990).

⁶⁶ See ARTHUR M. SCHLESINGER, JR., *THE IMPERIAL PRESIDENCY* 256-57 (1973). At that time, the legality of "national security"-related wiretaps was unclear. Congress in 1968 had regulated wiretapping for criminal investigations, imposing strict judicial oversight, but a proviso in the law disclaimed an intent to outlaw national security wiretapping pursuant to the President's constitutional authorities. See Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, tit. III, 82 Stat. 197, 211-14. The so-called "national security" proviso was found at 18 U.S.C. § 2511(3). It was not until near the end of Nixon's first term — after a lot of non-statutory wiretapping supposedly for national security purposes had already occurred — that the Supreme Court made clear that wiretapping of "domestic" threats to national security must proceed with judicial pre-approval, whether under the 1968 statute or a new one. See *United States v. U.S. Dist. Court for E. Dist. of Mich.*, 407 U.S. 297, 313-21 (1972). The Court left open the question of the nature of the President's constitutional powers, and the Fourth Amendment restrictions on, purely executive wiretapping aimed at "foreign" security threats. See *id.* at 309, 321-22. Wiretaps of domestic individuals and organizations done for political purposes and installed by the executive without judicial approval were quite obviously illegal.

⁶⁷ NANCY V. BAKER, *CONFLICTING LOYALTIES: LAW AND POLITICS IN THE ATTORNEY GENERAL'S OFFICE, 1789-1990*, at 120-21 (1992) [hereinafter *CONFLICTING LOYALTIES*].

⁶⁸ *Id.* at 121-23.

⁶⁹ See *id.* at 122-25.

background in Arizona.⁷⁰ While in office, Kleindienst frequently seemed to mix campaign activities, including fundraising, with prosecutorial decisions.⁷¹

Somewhat ironically, given his decades of illegal and abusive harassment and surveillance of suspected subversives, Hoover refused to allow the FBI to participate in a radical, wide-ranging plan by Nixon staffers to use the FBI and the Central Intelligence Agency (“CIA”) for a broad campaign of illegal surveillance, breaking and entering, and undercover infiltration aimed at student groups, journalists, and other perceived opponents of the regime. Hoover’s refusal led Nixon to create an in-house operation, dubbed the White House “plumbers.”⁷² It was some of these plumbers who later carried out the Watergate burglary.

After Hoover died in office, in May 1972 President Nixon appointed a DOJ official, L. Patrick Gray, to be acting director of the FBI. Nixon believed that Gray would be pliable and loyal. The President had known Gray since 1947, and Gray worked on Nixon’s 1960 presidential campaign.⁷³ Soon after his acting appointment as head of the FBI, Gray gave a campaign speech for the President in the battleground state of Ohio.⁷⁴

In the early morning of June 17, 1972, five men were caught breaking into the DNC headquarters in the Watergate building in Washington DC, carrying burglary tools and surveillance equipment. Two were former FBI agents — Gordon Liddy and James McCord — now working for Nixon’s re-election campaign. When an FBI supervisor learned about the burglary, the Bureau opened an investigation under the federal criminal statute banning unauthorized wiretapping. A senior White House aide, John Ehrlichman, called the FBI and stated: “I have a mandate from the President of the United

⁷⁰ *Removing Politics Hearing*, *supra* note 23, at 70 (statement of Hon. Richard G. Kleindienst, former Att’y Gen.) (noting that Kleindienst had chaired the Arizona Republican State Committee, served in the Arizona legislature, run for governor, was National Director of Field Operations for Nixon’s 1968 presidential campaign, and had served as general counsel of the Republican National Committee).

⁷¹ *See, e.g.,* RICHARD BEN-VENISTE, *THE EMPEROR’S NEW CLOTHES: EXPOSING THE TRUTH FROM WATERGATE TO 9/11*, at 35 (2011) (recounting an instance in which Kleindienst seemed willfully blind to the appearance of campaign funds being used as a bribe).

⁷² SCHLESINGER, *supra* note 66, at 260-61; *see* THEOHARIS, *CRITICAL HISTORY*, *supra* note 64, at 128-30.

⁷³ KUTLER, *supra* note 65, at 266.

⁷⁴ *Id.* at 267.

States The FBI is to terminate the investigation of the break-in.”⁷⁵ After the supervisor who took the call refused, Ehrlichman threatened that his career was “doomed.”⁷⁶

Nixon then sent a top CIA official, a longtime friend, to falsely warn the FBI that national security would be compromised if it did not drop the investigation.⁷⁷ Gray initially acceded to the request, but was convinced by his top deputies that the FBI must continue to investigate the matter, and do it as impartially as possible. “The FBI is not under control, because Gray doesn’t exactly know how to control them,” White House chief of staff H.R. Haldeman lamented to Nixon.⁷⁸

Attorney General Kleindienst ordered Gray to keep the White House, via White House counsel John Dean, fully briefed on the FBI investigation of the Watergate burglary and related events.⁷⁹ Kleindienst also promised White House staff that he personally would keep them informed.⁸⁰ Henry Petersen, the Assistant Attorney General for the Criminal Division, tried to keep the Watergate investigation narrow, and frequently reported on its progress to Dean.⁸¹ At the request of Dean, Petersen tried to discourage a congressional committee from investigating.⁸² Contrary to all protocol, Gray let Dean sit in on FBI interviews of witnesses and suspects, and gave raw FBI investigative materials to Dean.⁸³ Dean bragged to Nixon during the cover-up, “I was totally aware of what the Bureau was doing at all times. I was totally aware of what the Grand Jury was doing.”⁸⁴ Dean used information from Gray and Petersen to coach witnesses to lie to the grand jury.⁸⁵ Even as the investigation had reached very close to the Oval Office, Petersen and Kleindienst repeatedly briefed Nixon about proceedings before the grand jury and likely indictments.⁸⁶

⁷⁵ WEINER, *supra* note 60, at 309.

⁷⁶ *Id.* at 309-10.

⁷⁷ *Id.* at 310-11; *see also* KUTLER, *supra* note 65, at 218-21.

⁷⁸ WEINER, *supra* note 60, at 310.

⁷⁹ *See* KEITH W. OLSON, WATERGATE: THE PRESIDENTIAL SCANDAL THAT SHOOK AMERICA 48 (2016); Karlyn Barker & Walter Pincus, *Watergate Revisited; 20 Years After the Break-In, The Story Continues to Unfold*, WASH. POST (June 14, 1992), https://www.washingtonpost.com/politics/watergate-revisited-20-years-after-the-break-in-the-story-continues-to-unfold/2012/06/04/gjQAKaAqIV_story.html?utm_term=.31e20c60fd3b.

⁸⁰ OLSON, *supra* note 79, at 48.

⁸¹ *Id.* at 49, 56.

⁸² *Id.* at 66.

⁸³ *Id.* at 72.

⁸⁴ *Id.* at 58.

⁸⁵ *Id.* at 57.

⁸⁶ *Id.* at 78-79.

Mitchell actively participated in the Watergate cover-up, conspiring with Dean and other White House staffers to destroy documents held by CREEP and the White House.⁸⁷ Mitchell also publicly lied about the break-in.⁸⁸

At his confirmation hearings, after being nominated by Nixon for the FBI Directorship, Acting Director Gray admitted to the access into the FBI investigation he had given to Dean.⁸⁹ During the proceedings, it also emerged that Gray had concealed and destroyed evidence of wrongdoing from a White House safe belonging to one of Nixon's dirty tricks operatives.⁹⁰

Gray resigned, and his nomination to be the confirmed FBI Director was withdrawn. Mitchell eventually admitted that he had been involved in planning the bugging and dirty tricks operations.⁹¹ He was convicted by a jury of five counts related to Watergate perjury and obstruction of justice.⁹² Kleindienst had to resign because of his close professional and personal relationships with many people being investigated, and press and congressional suspicion that he was involved in the cover-up.⁹³ It soon emerged that in 1971, while Deputy Attorney General, Kleindienst had complied with a request from Nixon to favorably settle an antitrust suit against ITT, a large U.S.-based conglomerate; ITT was a big campaign donor to the Republican National Convention. Kleindienst had denied having done this during his confirmation hearings, and subsequently pled guilty to contempt of Congress for having given false testimony.⁹⁴ A third Nixon Attorney General, Elliott Richardson, resigned in October 1973, only a few months after succeeding Kleindienst, after refusing Nixon's direction to fire special counsel Archibald Cox who was investigating Watergate.⁹⁵

⁸⁷ *Id.* at 48-49.

⁸⁸ *Id.* at 50-51.

⁸⁹ KUTLER, *supra* note 65, at 267-68.

⁹⁰ OLSON, *supra* note 79, at 50, 82.

⁹¹ *Id.* at 81.

⁹² See *Mitchell v. Ass'n of Bar of N.Y.*, 40 N.Y.2d 153, 155 (1976) (sustaining disbarment of Mitchell and noting that he was convicted in federal court of conspiracy, obstruction of justice, false statements to a grand jury, and perjury before the Senate, all in connection with Watergate).

⁹³ OLSON, *supra* note 79, at 84.

⁹⁴ *Id.* at 120, 127; BAKER, *CONFLICTING LOYALTIES*, *supra* note 67, at 140; E.W. Kenworthy, *The Extraordinary I.T.T. Affair*, N.Y. TIMES (Dec. 16, 1973), <https://www.nytimes.com/1973/12/16/archives/whats-good-for-a-corporate-giant-may-not-be-good-for-everybody-else.html>.

⁹⁵ Neil A. Lewis, *Elliot Richardson Dies at 79; Stood Up to Nixon and Resigned in*

B. Congress's Burst of Reformist Zeal

The size and scope of activities of the executive branch grew enormously during the mid-twentieth century, during the presidencies of Franklin D. Roosevelt through Lyndon Johnson. This growth in resources at the president's disposal, combined with the centralizing pressures of the World War II and the Cold War, led to an enormous "concentration of authority in the Presidency."⁹⁶ In 1973, historian Arthur Schlesinger famously described an "imperial Presidency."⁹⁷

By the early 1970s, Congress had started pushing back. Disillusionment with the war in Indochina and revulsion at the criminality of the Nixon administration fueled a drive by Congress to investigate and reform the executive branch. Congress used all of its tools — prominently the investigative and oversight powers, its authority to legislate, and the Senate's gate-keeper role with nominations for senior executive officials — to push a comprehensive reform agenda.

Congressional committee hearings unearthed and publicized scandalous executive branch behavior. The Senate Watergate Committee (officially the Select Committee on Presidential Campaign Activities⁹⁸), chaired by Senator Sam Ervin of North Carolina, a conservative Democrat, aggressively investigated the Nixon's administration's cover-ups, lies, and abuse of FBI and DOJ processes.⁹⁹ The House Judiciary Committee adopted impeachment resolutions against Nixon that prominently featured charges of political abuse of, and interference with, DOJ and FBI investigative functions.¹⁰⁰ Nixon resigned soon thereafter.¹⁰¹ Congress also delved into FBI abuses of Hoover's tenure, most famously during the Church Committee hearings in 1975, that also addressed misuse of the CIA and military to spy on Americans.¹⁰² The Senate insisted during confirmation hearings

"Saturday Night Massacre," N.Y. TIMES (Jan. 1, 2000), <https://www.nytimes.com/2000/01/01/us/elliott-richardson-dies-79-stood-up-nixon-resigned-saturday-night-massacre.html>.

⁹⁶ See SCHLESINGER, *supra* note 66, at viii-ix (1973).

⁹⁷ *Id.*

⁹⁸ S. Res. 60, 93d Cong. (1973) (enacted).

⁹⁹ For an account by the committee's chief counsel, see SAMUEL DASH, CHIEF COUNSEL: INSIDE THE ERVIN COMMITTEE — THE UNTOLD STORY OF WATERGATE 3-14 (1976).

¹⁰⁰ See *infra* notes 159–61 and accompanying text.

¹⁰¹ OLSON, *supra* note 79, at 164-66.

¹⁰² See SELECT COMM. TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, BOOK III: SUPPLEMENTARY DETAILED STAFF REPORTS ON INTELLIGENCE ACTIVITIES AND THE RIGHTS OF AMERICANS, S. REP. NO. 94-755, *passim* (1976); LOCH K. JOHNSON, A SEASON OF INQUIRY REVISITED: THE CHURCH COMMITTEE

on nominees for top DOJ and FBI posts that they pledge to be independent and nonpartisan.¹⁰³ And numerous hearings were held on ways to protect and bolster the independence, integrity, and apolitical nature of federal law enforcement, as well as the civil liberties of Americans who might be investigated.¹⁰⁴

Some important statutory reforms directly responded to abuses of the Hoover and Nixon eras — the secret wiretaps for thin or pretextual “national security” reasons, the compilation and distribution of derogatory dossiers on the American citizens, and the inability of citizens to know what the government was saying about them. To respond to this, Congress:

- protected Americans against misuse of their personal information by the government through the Privacy Act¹⁰⁵ and the Right to Financial Privacy Act;¹⁰⁶
- imposed judicial review and privacy protections on the executive’s surveillance aimed for foreign intelligence purposes, when conducted in the United States or targeted at U.S. persons abroad;¹⁰⁷ and
- strengthened the Freedom of Information Act.¹⁰⁸

An energized Congress ranged well beyond law enforcement reform, into a broad array of areas where it perceived executive overreach or abuse. In retrospect, we can see that the 1970s were watershed years for the executive branch and the rule of law, as Congress, over a number of years, enacted a large number of important statutes to address past executive abuses and prevent future ones. Among other things, Congress in the 1970s:

CONFRONTS AMERICA’S SPY AGENCIES, at xiv (2015).

¹⁰³ See, e.g., *Nomination of Clarence M. Kelley to be Director of the Federal Bureau of Investigation: Hearings Before the S. Comm. on the Judiciary*, 93d Cong. 25-26, 37-38 (1973) (colloquies between senators and Clarence M. Kelley).

¹⁰⁴ See, e.g., *FBI Statutory Charter: Hearings Before the S. Comm. on the Judiciary*, 95th Cong. 4 (1978); *Removing Politics Hearing*, *supra* note 23.

¹⁰⁵ Privacy Act of 1974, Pub. L. No. 93-579, 88 Stat. 1896 (codified as amended at 5 U.S.C. § 552a (2018)).

¹⁰⁶ Right to Financial Privacy Act of 1978, Pub. L. No. 95-630, 92 Stat. 3697.

¹⁰⁷ Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1783.

¹⁰⁸ Freedom of Information Act and Amendments of 1974, Pub. L. No. 93-502, 88 Stat. 1561 (amending Freedom of Information Act of 1966, Pub. L. No. 88-554, 80 Stat. 383). For a review of the changes made in 1974, see Benjamin R. Civiletti, *Post-Watergate Legislation in Retrospect*, 34 Sw. L.J. 1043, 1045-48 (1981).

- created an independent counsel mechanism to investigate wrongdoing in the upper reaches of the executive branch;¹⁰⁹
- imposed financial disclosure obligations on members of Congress and their staffs, executive branch officials, including the President, and federal judges;¹¹⁰
- installed largely independent inspectors general in executive agencies to monitor for fraud and abuse and report to Congress;¹¹¹
- created permanent select committees in both houses of Congress to oversee the intelligence community;¹¹²
- required a specific presidential finding and the briefing of Congress for CIA covert actions;¹¹³
- imposed strict limitations on the distribution and use of tax returns to law enforcement and other government entities;¹¹⁴
- reformed the civil service to protect and promote professionalism;¹¹⁵
- strengthened campaign finance laws;¹¹⁶

¹⁰⁹ Ethics in Government Act of 1978, Pub. L. No. 95-521, tit. VI, § 601, 92 Stat. 1824, 1867-73. For affirmation of the constitutionality of the independent counsel provisions, see *Morrison v. Olson*, 487 U.S. 654, 659-60 (1988).

¹¹⁰ Ethics in Government Act, tit. I-III, 92 Stat. at 1824-61.

¹¹¹ Inspector General Act of 1978, Pub. L. No. 95-452, 92 Stat. 1101, 1101 (codified as amended at 5 U.S.C. app. §§ 1-13 (2018)).

¹¹² See, e.g., H.R. Res. 658, 95th Cong. (as passed by the House of Representatives, July 14, 1977) (enacted as House Rule XLVIII) (creating the House Permanent Select Committee on Intelligence); S. Res. 400, 94th Cong. (as passed by Senate, May 19, 1976) (creating the Senate Select Committee on Intelligence). For overviews of congressional oversight of the intelligence community, see generally FRANK J. SMIST, JR., CONGRESS OVERSEES THE UNITED STATES INTELLIGENCE COMMUNITY (2d ed. 1994); L. BRITT SNIDER, THE AGENCY AND THE HILL: CIA'S RELATIONSHIP WITH CONGRESS, 1946-2004 (2008).

¹¹³ Hughes-Ryan Amendment to the Foreign Assistance Act of 1974, Pub. L. No. 93-559, sec. 32, § 662, 88 Stat. 1795, 1804-05.

¹¹⁴ See Tax Reform Act of 1976, Pub. L. No. 94-455, tit. XII, § 1202(a), 90 Stat. 1520, 1667-68 (codified as amended at 26 U.S.C. § 6103 (2018)). A later-enacted provision barred the White House from influencing IRS audits. See 26 U.S.C. § 7217 (2018).

¹¹⁵ See Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111, 1112-13.

¹¹⁶ See Federal Election Campaign Act of 1974, Pub. L. No. 93-443, 88 Stat. 1263, 1263-304. The 1974 Act amended the Federal Election Campaign Act of 1971, Pub. L.

- repealed the Emergency Detention Act, which had been used by the FBI to investigate allegedly subversive individuals and organizations, in preparation for their non-criminal detention during a national security crisis;¹¹⁷ and
- attempted to regulate unilateral presidential war-making in the War Powers Resolution.¹¹⁸

Amid this period of dramatic reform and restructuring of the executive branch, Congress debated fundamental changes to the structure of the DOJ and FBI. For instance, leading senators proposed shielding both the Attorney General and FBI Director from presidential control with a good-cause removal requirement.¹¹⁹ But ultimately there was little structural reform of federal law enforcement by Congress. Congress rejected any attempts to define binding qualifications for the appointment of the FBI Director;¹²⁰ rejected a legislative charter for the Bureau that would have included statutory protections for independence and civil liberties;¹²¹ rejected proposals to move the FBI out from under the supervision and control of the Attorney General; declined to take selection of U.S. Attorneys away from the President; and rejected bills proposing that the FBI Director and Attorney General could be fired only for good cause. The one structural reform adopted was a 1976 law giving the FBI Director a non-renewable ten-year term in office, but with no restriction on removal.¹²²

Some legislative reforms were headed off by self-regulatory initiatives of the executive branch. For instance, Attorney General

No. 92-225, 86 Stat. 3, which had been greatly abused during the 1972 elections. J. Skelly Wright, *Politics and the Constitution: Is Money Speech?*, 85 *YALE L.J.* 1001, 1003 (1976) (“Congress passed these provisions in response to political abuses which culminated in the 1972 presidential campaign and its aftermath . . .”).

¹¹⁷ See Non-Detention Act of 1971, Pub. L. No. 92-128, 85 Stat. 347, 347-48 (codified at 18 U.S.C. § 4001(a) (2018)).

¹¹⁸ See War Powers Resolution, Pub. L. No. 93-148, 87 Stat. 555, 555-60 (codified at 50 U.S.C. §§ 1541-49 (2018)). On the background of this legislation, see generally SUNDQUIST, *supra* note 44, at 238-60.

¹¹⁹ See, e.g., Federal Bureau of Investigation Reorganization and Reform Act, S. 1502, 93d Cong. § 6, CONG. REC. 11353 (1973) (introduced by Sen. Henry M. Jackson).

¹²⁰ See *supra* note 10; *infra* notes 275–93 and accompanying text.

¹²¹ Several comprehensive charters for the FBI were proposed in the 1970s, but none adopted. See, e.g., Federal Bureau of Investigation Charter Act, S. 2928, 96th Cong., 126 CONG. REC. 18559 (1980); Federal Bureau of Investigation Charter Act of 1979, S. 1612, 96th Cong., 125 CONG. REC. 21507 (1979).

¹²² See *supra* note 10 and accompanying text.

Edward Levi in 1976 adopted guidelines for FBI domestic intelligence agencies that sought to prevent any repeat of the abuses of the Hoover era.¹²³ Attorney General Griffin Bell in 1978 adopted rules that dramatically restricted White House contacts with the DOJ and FBI.¹²⁴ Presidents Carter and Ford, seeking to clean off the stains of the Nixon years, appointed senior law enforcement officials who were committed to independence, integrity, and nonpartisanship.

But coming out of the 1970s, nothing in binding law sought to mandate that the heads of the DOJ or FBI possess and abide by these ideals. Norms, not law, were left to do this work.¹²⁵

C. Powers of the Attorney General and FBI Director Today

To set the stage for the legal analysis that follows, it is important to understand the allocation and extent of legal powers over law enforcement as they exist today, after the reforms of previous decades. The Attorney General, appointed by the President with the Senate's advice and consent,¹²⁶ heads the DOJ and is authorized to exercise all authorities delegated to the DOJ or any of its components by Congress, and to subdelegate to his or her subordinates.¹²⁷ DOJ components supervised by the Attorney General include the FBI; Drug Enforcement Administration; Bureau of Alcohol, Tobacco, Firearms and Explosives; Bureau of Prisons; Office of Justice Programs; and the U.S. Attorneys and U.S. Marshals Service.¹²⁸ Except as authorized by statute, all litigation for the United States government, "and securing evidence therefor, is reserved to officers of the Department of Justice, under the direction of the Attorney General."¹²⁹ Among other things, the Attorney General oversees the enforcement in court of all federal criminal laws and, unless specifically provided otherwise by statute,

¹²³ See John T. Elliff, *The Attorney General's Guidelines for FBI Investigations*, 69 CORNELL L. REV. 785, 793-94 (1984).

¹²⁴ See Bell Address, *supra* note 23 at 3-10.

¹²⁵ See Kent, *Congress Should Reconsider*, *supra* note 41.

¹²⁶ 28 U.S.C. § 503 (2018) ("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.").

¹²⁷ *Id.* §§ 503, 509, 510 (2018).

¹²⁸ *Organization, Mission & Functions Manual: Attorney General, Deputy and Associate*, DEP'T OF JUSTICE (Sept. 9, 2014), <http://www.justice.gov/jmd/organization-mission-and-functions-manual-attorney-general> [hereinafter *Organization, Mission & Functions*]; see also 28 C.F.R. § 0.5 (2018) (outlining the duties of the Attorney General).

¹²⁹ 28 U.S.C. § 516 (2018).

civil statutes as well. By executive order, the Attorney General provides oversight of the domestic intelligence gathering of federal agencies.¹³⁰ Other functions of the Attorney General include “[f]urnish[ing] advice and opinions, formal and informal, on legal matters to the President and the Cabinet and to the heads of the executive departments and agencies of the government,” “[m]ak[ing] recommendations to the President concerning appointments to federal judicial positions and to positions within the Department, including U.S. Attorneys and U.S. Marshals,” and “[r]epresent[ing] or supervis[ing] the representation of the United States Government in the Supreme Court of the United States and all other courts, foreign and domestic, in which the United States is a party or has an interest as may be deemed appropriate.”¹³¹

Primary responsibility for “prosecut[ing] . . . all offenses against the United States” is given by statute to U.S. Attorneys, within their respective districts.¹³² These U.S. Attorneys are appointed by the President with the advice and consent of the Senate, for a four-year term,¹³³ housed within the DOJ, hierarchically under the Attorney General,¹³⁴ and are expressly subject to removal by the President.¹³⁵

Since 1968, the FBI Director has been appointed by the President with the advice and consent of the Senate.¹³⁶ The FBI, headed by the director, is the primary federal law enforcement agency and the lead domestic intelligence agency. Exercising delegated authority from the Attorney General, the FBI Director “shall . . . [i]nvestigate violations of the laws . . . of the United States and collect evidence in cases in which the United States” is involved or interested, unless such responsibility to exclusively assigned to another agency.¹³⁷ The FBI is the lead agency to investigate a wide variety of federal crimes, including those in highly salient and sensitive areas such as terrorism, espionage and foreign counterintelligence, foreign sabotage, arms and technology smuggling, domestic political and political campaign corruption, mishandling or leaking of protected government information, and intentional interference with voting rights and civil rights.

¹³⁰ See Exec. Order No. 12,333, 46 Fed. Reg. 59,941 (Dec. 4, 1981), Part 2 (as amended). For the amendment history of the executive order, see *supra* note 18.

¹³¹ See *Organization, Mission & Functions*, *supra* note 128.

¹³² 28 U.S.C. § 547 (2018).

¹³³ *Id.* § 541(a)-(b).

¹³⁴ 28 C.F.R. § 0.5(a) (2018).

¹³⁵ 28 U.S.C. § 541(c).

¹³⁶ See *supra* note 10.

¹³⁷ 28 C.F.R. § 0.85(a).

The FBI is also the lead domestic intelligence agency. As such it exercises powers delegated by both the President and Congress to investigate discrete intelligence matters and engages in “broader analytic and planning functions.”¹³⁸ To protect the liberties of Americans, the CIA — an entity not schooled in due process — is barred from exercising any “police, subpoena, law enforcement powers or internal security functions.”¹³⁹ No intelligence community entity except the FBI is allowed to engage within the United States in “foreign intelligence collection . . . for the purpose of acquiring information concerning the domestic activities of United States persons.”¹⁴⁰ The FBI’s other major functions are to provide investigative assistance to other federal law enforcement agencies, as well as state, local, tribal, and foreign entities; and to retain, analyze, and share law enforcement relevant information,¹⁴¹ such as biomarkers like fingerprints.

DOJ regulations require the FBI Director to “report to the Attorney General on all . . . activities” of the FBI.¹⁴² In its intelligence community capacity, the FBI is also placed under the “supervision” of the Attorney General and subject to the coordinating, information collecting, and tasking authorities of the Director of National Intelligence.¹⁴³

FBI special agents have delegated authority, subject to the direction and control of the director, to investigate violations of criminal and civil laws of the United States; gather evidence for court cases; make arrests; serve and execute arrest warrants; serve judicial subpoenas; execute warrants to seize property; serve administrative subpoenas in certain circumstances (investigations of drug programs, health care fraud, and child exploitation); serve National Security Letters (similar to administrative subpoenas) to obtain banking, credit, consumer and related records; and carry firearms.¹⁴⁴ Guidelines issued by the Attorney General govern the opening of FBI investigations and then

¹³⁸ FED. BUREAU OF INVESTIGATION, DOMESTIC INVESTIGATIONS AND OPERATIONS GUIDE § 2.3 (2013) [hereinafter DOMESTIC INVESTIGATIONS AND OPERATIONS GUIDE].

¹³⁹ 50 U.S.C. § 3036(d)(1).

¹⁴⁰ Exec. Order No. 12,333, 46 Fed. Reg. 59,941 (Dec. 4, 1981), § 2.3(b).

¹⁴¹ See *Indian County Crime*, FED. BUREAU OF INVESTIGATION, <http://www.fbi.gov/investigate/violent-crime/indian-country-crime> (last visited Feb. 18, 2019); *Law Enforcement*, FED. BUREAU OF INVESTIGATION, <http://www.fbi.gov/resources/law-enforcement> (last visited Feb. 18, 2019).

¹⁴² 28 C.F.R. § 0.85a.

¹⁴³ See Exec. Order No. 12,333, §§ 1.3, 1.5, 1.7(g), § 1.14.

¹⁴⁴ See DOMESTIC INVESTIGATIONS AND OPERATIONS GUIDE, *supra* note 138, §§ 2.4.5, 18.6.4.3.1, 18.6.6.

investigative steps that may be used.¹⁴⁵ As greater investigative powers are granted, higher level supervisory approval and more stringent factual and legal predicates are required. Attorney General guidelines and an executive order require that all investigations and intelligence gathering by the FBI must occur by the “least intrusive” means or method possible, based on the circumstances.¹⁴⁶

The involvement of DOJ prosecutors and often, the judiciary, is legally required for the most intrusive measures. FBI agents can seek to obtain information through federal grand jury subpoenas only by requesting a U.S. Attorney’s Office to do so.¹⁴⁷ By statute and executive branch rules, wiretaps can be sought by the FBI only with concurrence of DOJ attorneys, and applications must be granted by a judicial officer. No criminal prosecution may be initiated by the FBI acting alone; only DOJ attorneys are authorized to take this step.¹⁴⁸

II. A MENU OF OPTIONS FOR CONGRESS, PART ONE: THE LESS CONSTITUTIONALLY CONTROVERSIAL

This Part presents a number of options for a Congress which desires to bolster the fraying norms of law enforcement independence and impartiality. More constitutionally doubtful options are saved for Part IV.

A. *The Advice and Consent Function*

All principal officers of the United States — in the executive branch, think heads of departments and agencies — must be nominated and appointed by the President, with the advice and consent of the Senate.¹⁴⁹ This is also the default mode of appointment for so-called inferior officers — persons exercising significant power pursuant to the laws of the United States but under the supervision of a principal officer.¹⁵⁰ The most important offices in federal law enforcement all

¹⁴⁵ See *id.* § 4.4.1.

¹⁴⁶ See *id.*

¹⁴⁷ *Id.* §§ 18.5.9.1, 18.5.9.3, 18.6.5.3.2.

¹⁴⁸ See DEP’T OF JUSTICE, U.S. ATTORNEY’S MANUAL § 9-2.030 (2018) (“The United States Attorney is authorized to initiate prosecution by filing a complaint, requesting an indictment from the grand jury, and when permitted by law, by filing an information in any case which, in his or her judgment, warrants such action . . .”).

¹⁴⁹ U.S. CONST. art. II, § 2, cl. 2.

¹⁵⁰ *Id.* For the definition of an “officer of the United States,” see *Lucia v. SEC*, 138 S. Ct. 2044, 2051 (2018) (stating that officers have “continuing and permanent” as opposed to “occasional and temporary” duties (quoting *United States v. Germaine*, 99 U.S. 508, 511-12 (1879))); *Edmond v. United States*, 520 U.S. 651, 662 (1997) (“The exercise of ‘significant authority pursuant to the laws of the United States’ marks . . .

require Senate advice and consent, giving the Senate a very important role to play in preserving law enforcement independence. These offices — for example, Attorney General, Deputy Attorney General, U.S. Attorney, FBI Director — wield enormous powers, for good or ill, making essential Senatorial attention to the character, integrity, and experience of nominees.

Since Hoover's death, every confirmation hearing for a permanent FBI Director has featured Senators and the nominee insisting that the FBI remain an independent, professional, nonpartisan agency.¹⁵¹ Frequently, nominees have stated that they sought and received assurances from the President and Attorney General, before agreeing to take the job, that they would have substantial independence.¹⁵² In advance of hearings, senators might tell nominees that they will seek a public record of such assurances, thereby incentivizing nominees to

the line between officer and nonofficer.” (quoting *Buckley v. Valeo*, 424 U.S. 1, 126 (1976))). On the distinction between inferior and principal officers, see *id.* at 663 (“[I]n the context of a Clause designed to preserve political accountability relative to important Government assignments, we think it evident that ‘inferior officers’ are officers whose work is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate.”).

¹⁵¹ See, e.g., *Confirmation Hearing on the Nomination of James B. Comey, Jr., to be Director of the Federal Bureau of Investigation: Hearing Before the S. Comm. on the Judiciary*, 113th Cong. 2, 7, 9, 118 (2013) (statements of Sen. Leahy, Sen. Blumenthal and nominee Comey); *Mueller Hearing*, *supra* note 25, at 3, 61, 87, 132 (statements of Sen. Leahy, Sen. Biden and nominee Mueller); *Nomination of Louis J. Freeh to be Director of the Federal Bureau of Investigation: Hearing Before the S. Comm. on the Judiciary*, 103d Cong. 24-25, 32 (1995) [hereinafter *Freeh Hearing*] (statements of Sen. Hatch, Sen. Grassley and nominee Louis J. Freeh); *Hon. William Sessions Hearing*, *supra* note 25, at 10, 27-28 (statements of Sen. Leahy and nominee Jeff Sessions); *Nomination of William H. Webster, of Missouri, to be Director of the Federal Bureau of Investigation: Hearing Before the S. Comm. on the Judiciary*, 95th Cong. 19, 71-72, 75 (1978) [hereinafter *Webster Hearing*] (statements of Sen. Wallop, nominee William H. Webster); *Nomination of Clarence M. Kelley to be Director of the Federal Bureau of Investigation: Hearing Before the S. Comm. on the Judiciary*, 93d Cong. 14, 25-26, 36-37 (1973) (statements of Sen. Hruska, Sen. Hart, Sen. Kennedy and nominee Clarence M. Kelley); *Full Committee Hearing on the Nomination of Christopher Wray to be Director of the FBI*, FED. NEWS SERV. (July 12, 2017).

¹⁵² See *Freeh Hearing*, *supra* note 151, at 32 (nominee Freeh stating that he had “a frank discussion with both the President and the Attorney General” about “use [of] the FBI for political purposes or political interference” and “I am confident that they are committed to an independent FBI Director”); *Hon. William Sessions Hearing*, *supra* note 25, at 27-28 (nominee Sessions stating that he confirmed with the Attorney General a commitment to an independent FBI free from political influence and that he views direct White House contact with the FBI as “improper”); *Webster Hearing*, *supra* note 151, at 19, 72 (nominee Webster stating “assurances” from the President and Attorney General of “independence in the conduct of criminal investigations” and “hands off politically”).

have conversations about independence with the President and Attorney General. Even without such conversations, a public pledge, under oath, of a commitment to independence is useful. It pre-commits the nominee, and provides a focal point for later oversight hearings if the commitment does not appear to have been honored.

To ensure that nominees have bipartisan support, the Senate might consider bringing back the filibuster for confirmation of officials like the Attorney General, FBI Director, or U.S. Attorneys. Academics have debated the constitutionality of filibuster,¹⁵³ but there is essentially no way for a legal challenge to be made justiciable, meaning that the Senate will have a free hand to act by internal rule.

B. *Congressional Hearings*

Congress has very wide powers to conduct oversight of the executive branch,¹⁵⁴ and essentially unlimited power to holding hearings to publicly air the opinions of members of Congress or third parties. “Agency officials can be noticeably influenced by the knowledge and expectation that they will be called before a congressional committee regularly to account for the activities of their agencies.”¹⁵⁵ There is much that Congress, via one or more of its committees, could do to bolster law enforcement independence through hearings that would be entirely uncontroversial from a constitutional perspective. Two obvious possibilities are: (1) hearings on the importance of law enforcement independence and non-partisanship, featuring respected former government officials, academics, and other authorities, and (2) oversight hearings at which officials like the Attorney General and the FBI Director are questioned closely about any instances of White House interference, and asked to

¹⁵³ See, e.g., Josh Chafetz, *The Unconstitutionality of the Filibuster*, 43 CONN. L. REV. 1003 (2011); Catherine Fisk & Erwin Chemerinsky, *The Filibuster*, 49 STAN. L. REV. 181 (1997); Michael J. Gerhardt, *The Constitutionality of the Filibuster*, 21 CONST. COMMENT. 445 (2004); Tonja Jacobi & Jeff VanDam, *The Filibuster and Reconciliation: The Future of Majoritarian Lawmaking in the U.S. Senate*, 47 UC DAVIS L. REV. 261, 317-20 (2013).

¹⁵⁴ See generally *Barenblatt v. United States*, 360 U.S. 109, 111-12 (1959) (discussing the use and extent of Congress’s ability to conduct oversight of the other branches of the federal government); *McGrain v. Daugherty*, 273 U.S. 135, 160-74 (1927) (discussing the limits of Congress’s investigative powers); Andrew McCanse Wright, *Constitutional Conflict and Congressional Oversight*, 98 MARQ. L. REV. 881, 893-98 (2014) (outlining the extent to which the Constitution permits congressional oversight of the Executive Branch).

¹⁵⁵ ALISSA M. DOLAN ET AL., CONG. RESEARCH SERV., CONGRESSIONAL OVERSIGHT MANUAL 72 (2014), <http://fas.org/sgp/crs/misc/RL30240.pdf> [hereinafter CRS MANUAL].

publicly articulate the importance of norms of independence. Congress's aggressive use of oversight hearings in the 1970s was a useful tool for inculcating norms of law enforcement independence.¹⁵⁶

C. Censure

Congress has the power to pass resolutions of censure against executive officials, including the President. These simple or concurrent resolutions do not have binding legal effect,¹⁵⁷ but do “express a particular moral judgment and may have both symbolic as well as political implications.”¹⁵⁸ At least four times, a chamber of the Congress has adopted a censure resolution directed at a President.¹⁵⁹ And many more have been introduced but not acted on.

These formally non-binding resolutions — which are not subject to disapproval by the President — are often not worth the paper they are written on. But in some contexts, a statement of policy or principle — especially if enacted by both houses, and/or on a bipartisan basis — can have important political and communicative effects. As Jacob Gersen and Eric Posner have argued, these kinds of “soft statutes” can have two primary effects. “First, Congress . . . uses soft law to convey information about future intentions to enact hard law, allowing people to adjust their behavior in advance of binding statutes and in some cases avoiding constitutional requirements that apply to hard law.”¹⁶⁰ And “[s]econd, Congress uses soft law to convey information about its beliefs about the state of the world — both factual and normative.”¹⁶¹

¹⁵⁶ See, e.g., *Removing Politics Hearing*, *supra* note 23, at 23 (collecting press coverage of congressional hearings on the need for law enforcement independence).

¹⁵⁷ See JANE A. HUDIBURG & CHRISTOPHER M. DAVIS, CONG. RESEARCH SERV., RESOLUTIONS TO CENSURE THE PRESIDENT: PROCEDURE AND HISTORY 1 (2018), <http://fas.org/sgp/crs/misc/R45087.pdf>. Simple resolutions are passed by a majority of one house and concurrent resolutions by a majority of both houses, and may declare the policy or “sense” of Congress. See JACK MASKELL & RICHARD S. BETH, CONG. RESEARCH SERV., CONGRESSIONAL CENSURE AND “NO CONFIDENCE” VOTES REGARDING PUBLIC OFFICIALS 2 (2016), <http://fas.org/sgp/crs/misc/R45087.pdf>.

¹⁵⁸ MASKELL & BETH, *supra* note 157, at Summary.

¹⁵⁹ Jane A. Hudiburg, *Resolutions Censuring the President: History and Context, 1st-114th Congresses*, CONG. RESEARCH SERVICE (Sept. 14, 2017), <https://fas.org/sgp/crs/misc/IN10775.pdf>.

¹⁶⁰ Jacob E. Gersen & Eric A. Posner, *Soft Law: Lessons from Congressional Practice*, 61 STAN. L. REV. 573, 586 (2008).

¹⁶¹ *Id.* at 587.

Congress or either house of it could use this power to publicize their disagreement with actions by Presidents which undermine norms of law enforcement independence and neutrality.

D. Impeachment

By a majority vote, the House of Representatives may impeach the President or other executive or judicial officers of the United States; If two-thirds of the Senate convicts, the official is removed from office.¹⁶² In July 1974, the Judiciary Committee of the House, by a bipartisan vote, approved three articles of impeachment against President Nixon. Because of the seeming inevitability of impeachment by the House and removal by the Senate, Nixon resigned a few weeks later.

Two of the articles enunciated important principles about the independence of federal law enforcement from the White House. Article I charged Nixon with violation of his oath and obstruction of justice by, among other things, lying and causing others to lie to federal criminal investigators, withholding material evidence, and “interfering or endeavouring to interfere with the conduct of investigations by the Department of Justice of the United States, the Federal Bureau of Investigation, [and] the office of Watergate Special Prosecution Force”¹⁶³ The Judiciary Committee thus announced, after lengthy debate and extensive hearings, that a President violates a core responsibility of the office if he or she seeks to mislead, obstruct, or defeat a criminal investigation for self-interested or self-protective reasons.¹⁶⁴ Article II charged Nixon with violating his oath, failure to faithfully execute the laws, and impairing “the due and proper administration of justice” by, among other wrongful acts, “knowingly misus[ing] the executive power by interfering with agencies of the executive branch, including the Federal Bureau of Investigation, the Criminal Division, and the Office of Watergate Special Prosecution Force, of the Department of Justice,” and by directing federal law enforcement agencies to spy on and gather information about American citizens for purposes other than bona fide national security or criminal investigative reasons.¹⁶⁵ In this article, the Judiciary Committee announced the important principle that federal executive agencies must have good faith and public interest reasons to gather

¹⁶² U.S. CONST. art. I, § 2, cl. 5; *id.* art. I, § 3, cl. 7; *id.* art. II, § 4.

¹⁶³ IMPEACHMENT OF RICHARD M. NIXON PRESIDENT OF THE UNITED STATES, H.R. REP. NO. 93-1305, at 2 (1974).

¹⁶⁴ *See id.* at 1-2.

¹⁶⁵ *Id.* at 3-4.

information on Americans, and cannot be used as political or personal spies for the President.

Without going into too much detail, I think it is fair to say that President Trump's time in office will prove fertile ground if the House of Representatives investigates whether impeachment may be warranted. Special focus on his interference with and attempts to misuse federal law enforcement institutions would be appropriate.

E. Government Accountability Office Investigations

The Government Accountability Office ("GAO") (formerly the General Accounting Office) is a congressional agency tasked with auditing, investigating, and reporting on the executive branch.¹⁶⁶ GAO can be tasked to perform investigations or other oversight activities by congressional committees or subcommittees or public laws.¹⁶⁷

In addition to broad authorization to audit the spending of money, GAO has statutory authority to "evaluate the results of a program or activity the Government carries out under existing law. . . ."¹⁶⁸ The executive branch has taken the position that the reference to "under existing law" only covers executive activities to carry out statutory programs, not executive activities authorized solely by the President's constitutional powers.¹⁶⁹ Since criminal law enforcement functions of the DOJ and FBI involve at their core the carrying out of a statutory program — embodied in the statutes criminalizing certain conduct and tasking specific executive agencies with investigating and prosecuting violations — GAO would seem to have sufficient statutory authority to carry out broad-ranging investigations of the

¹⁶⁶ GAO's *Mission, Responsibilities, Strategies, and Means: Mission Statement*, U.S. GOV'T ACCOUNTABILITY OFF., <http://www.gao.gov/dsp/3mission.html> (last visited Feb. 18, 2019) ("GAO works to continuously improve the economy, efficiency, and effectiveness of the federal government by conducting financial audits, program reviews and evaluations, policy analyses, legal opinions, investigations, and other services. GAO's activities are designed to ensure the executive branch's accountability to the Congress under the Constitution and the federal government's accountability to the American people."); see 31 U.S.C. § 702(a) (2018) ("The Government Accountability Office is an instrumentality of the United States Government independent of the executive departments.").

¹⁶⁷ See 31 U.S.C. § 717(d)(1); *About GAO*, U.S. GOV'T ACCOUNTABILITY OFF., <http://www.gao.gov/about/index.html> (last visited Feb. 18, 2019); *The Report Process*, U.S. GOV'T ACCOUNTABILITY OFF., <http://www.gao.gov/about/what-gao-does/reports-testimonies/> (last visited Feb. 18, 2019).

¹⁶⁸ 31 U.S.C. § 717(b).

¹⁶⁹ *Investigative Auth. of the Gen. Accounting Office*, 12 Op. O.L.C. 171, 172 (1988).

politicization of law enforcement. So a Congress or congressional committee or subcommittee interested in investigating — and hence disincentivizing — partisan law enforcement and improper White House interference could set GAO loose to investigate. One possibility: GAO could be asked to determine under what circumstances and for what reasons the DOJ and the FBI decided to re-open closed investigations of Hillary Clinton, after President Trump publicly called for that action.

F. Mission Statements or Job Descriptions Emphasizing Apolitical, Impartial Norms

Congress sometimes formally articulates the mission of agencies or offices. The Department of Homeland Security, to take one example, has a statutory mission that includes affirmative areas of responsibility — including to “prevent terrorist attacks within the United States” — as well as guidance on how responsibilities should be carried out — to “ensure that the civil rights and civil liberties of persons are not diminished by efforts, activities, and programs aimed at securing the homeland.”¹⁷⁰ Congress can also use statutory mission statements to emphasize the independence of an independent agency.¹⁷¹ Either or both of DOJ and the FBI could be given statutory mission statements of this kind, emphasizing the need for impartial, apolitical law enforcement.

Similarly, when Congress creates an office, it often describes the responsibilities and authorities of that office. Congress can use this as an opportunity to emphasize important norms. For example, Congress has specified that the Director of National Intelligence must provide to the President, heads of executive departments, and Congress “national intelligence” that is “timely, objective, independent of political considerations, and based upon all sources available to the intelligence community.”¹⁷² Using this statute as a drafting example, Congress could specify the law enforcement and national security functions of the Attorney General, FBI Director, or both, and state that they should be carried out in an objective, independent manner that is free from political considerations.

¹⁷⁰ 6 U.S.C. § 111(b)(1)(E).

¹⁷¹ See, e.g., 42 U.S.C. § 2286a(a) (“The mission of the [Defense Nuclear Facilities Safety] Board shall be to provide independent analysis, advice, and recommendations to the Secretary of Energy to inform the Secretary . . . in providing adequate protection of public health and safety at such defense nuclear facilities.”).

¹⁷² 50 U.S.C. § 3024(a)(1)-(2).

Would such a statutory mission statement or norm-based job description be simply useless “cheap talk”¹⁷³ by Congress? Without overselling the effects of such a move, congressional statements of this kind could plausibly have a number of benefits. It would communicate expectations to leadership and staff at the FBI about independence and impartiality, helping further inculcate those values in the culture, and giving a concrete statutory reference to help them push back against improper requests or contacts by, say, the White House. It could be a useful focal point for overseeing and measuring the performance of the FBI by Congress, the press, and the public. It would also put the White House on notice about congressional expectations, in the same way a “sense of Congress” resolution discussed above would.

G. *Codifying a Policy on White House-DOJ Contacts*

President Carter and his first Attorney General, Griffin Bell, were both committed to separating the DOJ’s investigative and prosecutorial functions from any White House interference. In a major policy speech in 1978, Bell conceded that “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.”¹⁷⁴ To ensure that, in reality and appearance, DOJ lawyers could exercise their independent professional judgments free from pressure or politics, Bell announced that henceforth:

[A]ll communications about particular [civil or criminal] cases, from Members of Congress or their staffs, or members of the White House staff, should be referred to my office, or the offices of the Deputy or the Associate Attorney General. It will be our job to screen these communications to insure that any improper attempts to influence a decision do not reach division heads,¹⁷⁵

much less their subordinates.

When Benjamin Civiletti replaced Bell as Attorney General later in Carter’s term, he distilled the Bell policies into a more succinct

¹⁷³ This is a term from game theory, meaning communication that imposes no direct cost on the sender or receiver. See, e.g., Joseph Farrell & Matthew Rabin, *Cheap Talk*, 10 J. ECON. PERSP. 103, 104 (1996).

¹⁷⁴ Bell Address, *supra* note 23, at 3.

¹⁷⁵ *Id.* at 7.

memorandum.¹⁷⁶ White Houses have had their own policies too, which strictly limit the number of people authorized to contact the DOJ about pending or impending matters. These policies were followed during the Reagan, George H.W. Bush, and Clinton presidencies.

White House-DOJ coordination on policy matters is basically always appropriate, and not covered by these policies. In addition, the policies allowed contacts, where necessary to carrying out the President's constitutional responsibilities and occurring through appropriate channels.¹⁷⁷ As a recent study explained,

For example, the White House Counsel might discuss a pending Supreme Court case with the Solicitor General, request a formal legal opinion from the Office of Legal Counsel, or discuss clemency matters with the Pardon Attorney. Similarly, on national security matters, it is expected that the FBI will be in regular contact with the National Security Advisor and his staff on matters of national security, which could include information about ongoing investigations.¹⁷⁸

During the George W. Bush administration, both the DOJ and the White House significantly relaxed their policies. The number of White House officials allowed to contact the DOJ on non-national security matters increased from four to 417, and eventually to 895.¹⁷⁹ A scandal about politicization of law enforcement was the predictable result. Attorney General Alberto Gonzales ended up resigning after the fallout from the highly unusual mid-term removal of nine U.S. Attorneys, in contexts in which politics seemed plausibly to be involved.¹⁸⁰ Bush's final attorney general, Michael Mukasey, reinstated stricter controls,¹⁸¹

¹⁷⁶ See Memorandum from Benjamin R. Civiletti, Att'y Gen., to Heads of Offices, Bds., Bureaus and Divs. 1 (Oct. 18, 1979), <http://www.justice.gov/ag/aghistorical/civiletti/1979/10-18-1979.pdf>.

¹⁷⁷ See *White House Communications with the DOJ and FBI*, PROTECT DEMOCRACY (Mar. 8, 2017), <http://protectdemocracy.org/agencycontacts/>.

¹⁷⁸ *Id.*

¹⁷⁹ Jane Chong, *White House Interference with Justice Department Investigations? That 2009 Holder Memo*, LAWFARE (Feb. 22, 2017, 4:12 PM), <http://www.lawfareblog.com/white-house-interference-justice-department-investigations-2009-holder-memo>.

¹⁸⁰ See *id.*; see also OFFICE OF THE INSPECTOR GEN. & OFFICE OF PROF'L RESPONSIBILITY, U.S. DEP'T OF JUSTICE, AN INVESTIGATION INTO THE REMOVAL OF NINE U.S. ATTORNEYS IN 2006 1 (2008), <http://oig.justice.gov/special/s0809a/final.pdf> [hereinafter IG & OPR REPORT].

¹⁸¹ See Memorandum from Michael Mukasey, Att'y Gen., to Heads of Dep't

which were reiterated during President Obama's tenure.¹⁸² Vermeule cites this as an example of conventional agency independence — U.S. Attorneys, in theory, are at-will employees of the President, but a strong norm had developed which protected them from mid-term firing, especially for political reasons.¹⁸³

The Trump administration started to flagrantly violate these policies within days of taking office.¹⁸⁴ Given the bipartisan agreement that these norms about White House-DOJ contacts and interference are necessary and appropriate,¹⁸⁵ Congress could usefully intervene here to strengthen them. Rather than dictating the precise content of a policy, it might be wiser for Congress to legislate a requirement that the Attorney General promulgate regulations via a notice-and-comment process. This would allow public involvement in deliberations about the appropriate rules, and would give greater flexibility to change them as appropriate in the future. Congress could, however, require that any such regulations take as their overriding goal the protection of DOJ (including FBI) neutrality, non-partisanship, and independence from White House and congressional interference on pending or impending civil or criminal matters — with appropriate exceptions for instances of the type noted above (e.g., discussions with the Solicitor General about matters of legal policy in a case pending in the Supreme Court). Especially if the statutory delegation included a statement that the regulations allow sufficient flexibility for the President to carry out his or her constitutional responsibilities, it is hard to see how this type of congressional intervention could be criticized on constitutional grounds. Congress might also specify that violations of the regulations must be reported to relevant committees of Congress and the Department of Justice Inspector General. A useful bill embodying this requirement was introduced in the Senate in 2007.¹⁸⁶

Components & All U.S. Attorneys 1-2 (Dec. 19, 2007), <http://www.justsecurity.org/wp-content/uploads/2017/06/AG-2007-Memo-Communications-with-White-House.pdf>.

¹⁸² Memorandum from Eric Holder, Att'y Gen., to Heads of Dep't Components and All U.S. Attorneys 1, 4 (May 11, 2009), http://www.justice.gov/oip/foia-library/communications_with_the_white_house_and_congress_2009.pdf.

¹⁸³ Vermeule, *Conventions*, *supra* note 53, at 1201-03.

¹⁸⁴ See, e.g., *White House Communications with the DOJ and FBI*, *supra* note 177.

¹⁸⁵ In addition to adopting policies by White Houses and Attorneys General of both parties, consider the recent recommendations of a bipartisan group convened by the Brennan Center. See NAT'L TASK FORCE, *supra* note 24, at 1, 17-20.

¹⁸⁶ See S. REP. NO. 110-203, at 1, 7 (2007) (describing how the bill would impose on the Department of Justice and White House a semi-annual reporting requirement).

H. *Added Duties for DOJ Inspector General*

One of the important congressional reforms of the 1970s was to install inspectors general in many executive agencies, tasked with investigating and reporting to both Congress and agency heads on fraud, waste, abuse, and employee misconduct.¹⁸⁷ Additional inspectors general were added over time.¹⁸⁸ These are powerful offices. Except with respect to certain very sensitive issues — for example, ongoing criminal investigations within DOJ — agency heads may not prevent inspectors general from carrying out any investigative or auditing function which the inspector has deemed appropriate.¹⁸⁹ Reporting to Congress is mandatory,¹⁹⁰ making inspectors general a uniquely-positioned oversight tool for the legislature.¹⁹¹

The DOJ Inspector General is already empowered to investigate politicization of law enforcement, and related issues about independence and impartiality.¹⁹² For example, when senior political leadership at DOJ ordered the firing of nine U.S. Attorneys in 2006 — a highly unusual move, because U.S. Attorneys by tradition are replaced at the beginning of a President’s term and then remain in office for the duration — the Inspector General, along with the DOJ Office of Personnel Management, conducted a comprehensive investigation. The investigation focused on “whether [the U.S. Attorneys] were removed for partisan political purposes, or to influence an investigation or prosecution, or to retaliate for their actions in any specific investigation or prosecution.”¹⁹³

¹⁸⁷ See Inspector General Act of 1978, Pub. L. No. 95-452, 92 Stat. 1101 (codified as amended at 5 U.S.C. app. §§ 1-13 (2018)). The core duties of inspectors general are found in 5 U.S.C. App. § 4(a). Congress acted because of concern about corruption and waste in federal government operations, and the belief that existing audit and investigative functions were inadequately structured because they reported to the officials whom they were supposed to investigate. See S. REP. NO. 95-1071, at 4-6 (1978); H.R. REP. NO. 95-584, at 5 (1977).

¹⁸⁸ See, e.g., Inspector General Act Amendments of 1988, Pub. L. No. 100-504, § 102(c), 102 Stat. 2515, 2515-16 (creating an office of inspector general for the Department of Justice).

¹⁸⁹ 5 U.S.C. app. § 3(a) (2018) (general rule); 5 U.S.C. app. § 8E(a) (special rules for certain sensitive DOJ functions).

¹⁹⁰ 5 U.S.C. app. § 5(a).

¹⁹¹ On the constitutionality of Congress requiring that executive branch officials provide information to Congress, see Vicki Divoll, *The “Full Access Doctrine”: Congress’s Constitutional Entitlement to National Security Information from the Executive*, 34 HARV. J.L. & PUB. POL’Y 493, 513-18 (2011).

¹⁹² For regulations governing the DOJ Inspector General, see 28 C.F.R. §§ 0.29-0.29j (2018).

¹⁹³ IG & OPR REPORT, *supra* note 180, at 1.

Congress could consider confirming that law enforcement independence is and should remain an important part of the remit of the DOJ Inspector General through a statutory amendment. The inspector general of DOJ already has qualified access to investigative and prosecutorial documents and testimony,¹⁹⁴ and any new legislation touching this area should be sensitive to legitimate executive concerns about privilege and confidentiality.

I. *Ensure that a Senate-Confirmed Officer Always Heads the DOJ*

After President Trump forced the resignation of Attorney General Jeff Sessions, Trump invoked the Federal Vacancies Reform Act (“FVRA”) to install Matthew Whitaker, who had been serving as chief of staff to Sessions, as the Acting Attorney General.¹⁹⁵ Whitaker’s post had not required Senate confirmation. Based on Whitaker’s public statements prior to taking the job and other sources, it was widely assumed that President Trump chose Whitaker to rein in the special counsel probe of Trump-Russia collusion headed by Robert Mueller.¹⁹⁶ Whitaker’s thin resume exacerbates the concerns about the reasons for the appointment. As Alexander Hamilton explained in *The Federalist*, the requirement of the Senate’s concurrence was designed to prevent the President from appointing to significant offices a person “in some way or other personally allied to him, or of possessing the necessary insignificance and pliancy to render them the obsequious instruments of his pleasure.”¹⁹⁷ Congress should consider amending the FVRA to clarify that it does not displace a DOJ-specific statute currently on the books, which establishes a line of succession for an absent Attorney General involving only Senate-confirmed DOJ officials.¹⁹⁸

¹⁹⁴ See Memorandum from Karl Thompson, Principal Deputy Assistant Att’y Gen., Office of Legal Counsel, to James M. Cole, Deputy Att’y Gen. 3 (July 20, 2015), 2015 WL 8042627.

¹⁹⁵ Baker et al., *Jeff Sessions is Forced Out*, *supra* note 35; John E. Bies, *Matthew Whitaker’s Appointment as Acting Attorney General: Three Lingering Questions*, LAWFARE (Nov. 8, 2018, 10:04 AM), <https://www.lawfareblog.com/matthew-whitakers-appointment-acting-attorney-general-three-lingering-questions>.

¹⁹⁶ See e.g., Baker et al., *Jeff Sessions is Forced Out*, *supra* note 35; John Kruzell, *Is Donald Trump’s Pick of Matthew Whitaker for Acting Attorney General Legal?*, POLITIFACT (Nov. 15, 2018 12:15 PM), <https://www.politifact.com/truth-o-meter/article/2018/nov/15/donald-trumps-pick-matthew-whitaker-acting-attorne/>.

¹⁹⁷ THE FEDERALIST NO. 76, at 458 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

¹⁹⁸ See 28 U.S.C. § 508 (2018) (“Vacancies. (a) In case of a vacancy in the office of Attorney General, or of his absence or disability, the Deputy Attorney General may exercise all the duties of that office (b) When [. . .] neither the Attorney General

III. PART TWO OF THE MENU: MORE CONSTITUTIONALLY AGGRESSIVE
OPTIONS FOR CONGRESS

This Part analyzes the constitutionality of two kinds of measures for Congress that would likely have more “bite” than the ones in Part II: statutory qualifications for senior DOJ officials and statutory requirement that the FBI Director may only be removed by the President for good cause. I have omitted a treatment of potential legislation to supplement DOJ special counsel regulations and further protect a special counsel from unjustified removal because bills have already been introduced and the constitutional issues have already been ably covered by other commentators.¹⁹⁹

A. *Appointment: Statutory Qualifications or Eligibility Rules for Senior DOJ Roles*

One way that Congress could attempt to protect the independence and impartiality of the DOJ and FBI is by setting qualifications or eligibility rules for the persons whom the President may select for agency leadership. Currently, the Attorney General, Deputy Attorney General, Associate Attorney General, Solicitor General, Assistant Attorneys General, U.S. Attorneys, and FBI Director are selected by the President with the advice and consent of the Senate. None of the offices currently have any statutory qualifications or eligibility rules for nominees.

Congress has very broad authority to prescribe the qualifications or rules of eligibility for executive office-holders, and has exercised this power frequently since the beginning of government under the Constitution.²⁰⁰ The Judiciary Act of 1789 required that the Attorney

nor the Deputy Attorney General is available to exercise the duties of the office of Attorney General, the Associate Attorney General shall act as Attorney General. The Attorney General may designate the Solicitor General and the Assistant Attorneys General, in further order of succession, to act as Attorney General.”). For the statutes requiring that these named officials be confirmed by the Senate, see 28 U.S.C. §§ 504-06 (2018).

¹⁹⁹ See, e.g., Letter from Professors Eric Posner & Stephen Vladeck, to Senators Charles Grassley & Dianne Feinstein (Apr. 24, 2018), <http://www.justsecurity.org/wp-content/uploads/2018/04/Posner-Vladeck-Letter-on-S2644.pdf>; Richard H. Pildes, *Could Congress Simply Codify the DOJ Special Counsel Regulations?*, LAWFARE (Aug. 3, 2017, 8:30 AM), <http://lawfareblog.com/could-congress-simply-codify-doj-special-counsel-regulations>; Steve Vladeck, *It’s Time for Congress to Pass the Mueller Protection Bills*, LAWFARE (Mar. 19, 2018, 8:30 AM), <http://lawfareblog.com/its-time-congress-pass-mueller-protection-bills>.

²⁰⁰ See, e.g., *Myers v. United States*, 272 U.S. 52, 265-74 (1926) (Brandeis, J., dissenting) (listing dozens of examples of qualifications or eligibility rules covering

General be a “meet” person, meaning qualified or appropriate for the job, “learned in the law.”²⁰¹

Statutory qualifications or rules of eligibility take many different forms, serving different purposes. Congress frequently specifies qualifications for the heads of independent regulatory agencies or bureaus, who are appointed by the President with Senate advice and consent. Partisan balance requirements for multi-member commissions or boards were noted above.²⁰² Inspectors general must be appointed “without regard to political affiliation.”²⁰³ Congress often dictates that nominees have certain skills or experience.²⁰⁴ Sometimes Congress requires that nominees not be current holders of any other office under the United States.²⁰⁵ Sometimes it requires good character.²⁰⁶ Sometimes a certain attitude toward the agency mission is

both inferior and principal officers).

²⁰¹ Judiciary Act of 1789, ch. 20, § 35, 1 Stat. 73, 93.

²⁰² See, e.g., 52 U.S.C. § 30106(a)(1), (5) (2018) (providing that, of the six voting members who head the Federal Election Commission, “[n]o more than 3 members . . . may be affiliated with the same political party,” and the chairman and vice chairman “shall not be affiliated with the same political party”).

²⁰³ 5 U.S.C. app. § 3(a) (Appointment must be made “without regard to political affiliation and solely on the basis of integrity and demonstrated ability in accounting, auditing, financial analysis, law, management analysis, public administration, or investigations.”).

²⁰⁴ See, e.g., 5 U.S.C. § 1201 (“The members of the [Merit System Protection Board] shall be individuals who, by demonstrated ability, background, training, or experience are especially qualified to carry out the functions of the Board.”); 12 U.S.C. § 4512(b)(1) (“The Director [of the Federal Housing Finance Agency] shall be appointed by the President, by and with the advice and consent of the Senate, from among individuals who are citizens of the United States, have a demonstrated understanding of financial management or oversight, and have a demonstrated understanding of capital markets, including the mortgage securities markets and housing finance.”); 15 U.S.C. § 2053(a) (“In making such appointments [to be commissioners of the Consumer Products Safety Commission], the President shall consider individuals who, by reason of their background and expertise in areas related to consumer products and protection of the public from risks to safety, are qualified to serve as members of the Commission.”).

²⁰⁵ See, e.g., 52 U.S.C. § 30106(a)(3) (“Members [of the Federal Election Commission] . . . shall be individuals who, at the time appointed to the Commission, are not elected or appointed officers or employees in the executive, legislative, or judicial branch of the Federal Government.”).

²⁰⁶ 5 U.S.C. app. § 3(a) (requiring that inspector general appointments be made “without regard to political affiliation and solely on the basis of integrity and demonstrated ability in accounting, auditing, financial analysis, law, management analysis, public administration, or investigations”); see, e.g., 52 U.S.C. § 30106(a)(3) (requiring that members of the FEC “be chosen on the basis of their experience, integrity, impartiality, and good judgment”).

prescribed.²⁰⁷ Geographic and industry-background requirements are sometimes imposed on multi-member agency heads.²⁰⁸

Even the heads of some purely executive agencies have qualifications prescribed by Congress. The Secretary of Defense must be “appointed from civilian life by the President,” and be at least seven years removed from active duty in the armed forces.²⁰⁹ The Director of National Intelligence “shall have extensive national security expertise.”²¹⁰ The U.S. Trade Representative, whose office is located within the Executive Office of the President, may not have previously represented or advised a foreign entity in a trade dispute with the United States.²¹¹ The head of the Federal Aviation Administration must be “a civilian; and . . . have experience in a field directly related to aviation.”²¹² And a number of offices just below the top of purely executive agencies also have statutory qualifications or eligibility rules. For instance, the general counsels of the Central Intelligence Agency and Department of Defense must be “appointed from civilian life.”²¹³

The constitutional law on statutory qualifications for executive officers is generous toward congressional regulation. Appointments to federal executive office are, in the first instance, governed by the Appointments Clause of the Constitution. The Clause provides:

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

²⁰⁷ See, e.g., 15 U.S.C. § 633(b)(1) (“The management of the [Small Business] Administration shall be vested in an Administrator who shall be appointed from civilian life by the President, by and with the advice and consent of the Senate, and who shall be a person of outstanding qualifications known to be familiar and sympathetic with small-business needs and problems.”).

²⁰⁸ See, e.g., 12 U.S.C. § 241 (“In selecting the members of the [Federal Reserve] Board, not more than one of whom shall be selected from any one Federal Reserve district, the President shall have due regard to a fair representation of the financial, agricultural, industrial, and commercial interests, and geographical divisions of the country.”).

²⁰⁹ 10 U.S.C. § 113(a).

²¹⁰ 50 U.S.C. § 3023(a)(1).

²¹¹ 19 U.S.C. § 2171(a), (b)(4).

²¹² 49 U.S.C. § 106(c)(2)-(3).

²¹³ 10 U.S.C. § 140(a); 50 U.S.C. § 3520(a).

think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.²¹⁴

All officials who “exercis[e] significant authority pursuant to the laws of the United States” are Officers of the United States “and must, therefore, be appointed in the manner prescribed by” the Appointments Clause.²¹⁵

The Clause makes a distinction between “inferior officers” and what are called principal officers. “By vesting the President with the exclusive power to select the principal (noninferior) officers of the United States, the Appointments Clause prevents congressional encroachment upon the Executive and Judicial Branches.”²¹⁶ The check of Senate advice and consent “serves both to curb Executive abuses of the appointment power, and ‘to promote a judicious choice of [persons] for filling the offices of the union.’”²¹⁷

Modern doctrine on appointment qualifications appears to be that, while Congress may not give itself a direct role in appointing executive officials who will be wielding executive power,²¹⁸ reasonable and relevant statutory qualifications or eligibility for senior executive officers, whether principal or inferior, are constitutional. The Supreme Court does not have a merits holding on the issue.²¹⁹ So “[t]here is no settled constitutional rule that determines how . . . the power of the Congress to prescribe qualifications and the power of the President to

²¹⁴ U.S. CONST. art. II, § 2, cl. 2.

²¹⁵ *Weiss v. United States*, 510 U.S. 163, 169-70 (1994) (quoting *Buckley v. Valeo*, 424 U.S. 1, 126 (1976)).

²¹⁶ *Edmond v. United States*, 520 U.S. 651, 659 (1997).

²¹⁷ *Id.* (quoting THE FEDERALIST No. 76, at 386-87 (Alexander Hamilton) (M. Beloff ed., 1987)). The Court has not always been very clear about where the line between principal and inferior officers lies. *See id.* at 661 (“Our cases have not set forth an exclusive criterion for distinguishing between principal and inferior officers for Appointments Clause purposes.”). This line is most important if Congress has provided a means of appointment other than by the President with Senate advice and consent — this is unconstitutional unless the officer is inferior. In addition to looking at the jurisdiction, powers, and tenure of an officer, *see Morrison v. Olson*, 487 U.S. 654, 671-72 (1988), the Court has also announced that the primary marker of inferior officer status is subordination: “[W]e think it evident that ‘inferior officers’ are officers whose work is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate.” *Edmond*, 520 U.S. at 663.

²¹⁸ *See, e.g., Buckley v. Valeo*, 424 U.S. 1, 126 (1976).

²¹⁹ *See* Matthew A. Samberg, Note, “Established by Law”: Saving Statutory Limitations on Presidential Appointments from Unconstitutionality, 85 N.Y.U. L. REV. 1735, 1737 (2010) (“[T]he Supreme Court has never examined the practice of restricting by statute the President’s choice of nominees for federal offices . . .”).

appoint . . . are to be reconciled.”²²⁰ But in *Myers v. United States*, one of its most formalist, pro-executive decisions on separation of powers and presidential control over senior executive officials, the Court noted in dicta:

To Congress under its legislative power is given the establishment of offices, the determination of their functions and jurisdiction, the prescribing of reasonable and relevant qualifications and rules of eligibility of appointees, and the fixing of the term for which they are to be appointed . . . all except as otherwise provided by the Constitution.²²¹

The only limitation — besides reasonableness and relevance — that the *Myers* Court indicated was that the qualifications and rules of eligibility “do not so limit selection and so trench upon executive choice as to be in effect legislative designation.”²²²

More recently, Justice Scalia’s famous dissent in the independent counsel case did not take issue with Congress having prescribed qualifications for the office.²²³ And a concurring opinion by Justice Stevens in another major separation of powers case drew no objection from other justices when it stated that “it is entirely proper for Congress to specify the qualifications for an office that it has created.”²²⁴

²²⁰ Judges — Appointment — Age Factor, 3 Op. O.L.C. 388, 389 (1979).

²²¹ *Myers v. United States*, 272 U.S. 52, 129 (1926).

²²² *Id.* at 126.

²²³ See e.g., *Morrison v. Olson*, 487 U.S. 654, 706-07 (1988) (Scalia, J., dissenting). For the statutory language at issue in *Morrison*, see 28 U.S.C. § 593(b)(2) (expired 1999) (“The division of the court shall appoint as independent counsel an individual who has appropriate experience and who will conduct the investigation and any prosecution in a prompt, responsible, and cost-effective manner. . . . The division of the court may not appoint as an independent counsel any person who holds any office of profit or trust under the United States.”).

²²⁴ *Bowsher v. Synar*, 478 U.S. 714, 740 (1986) (Stevens, J., concurring). There are a few sources perhaps hinting at exclusivity of presidential control over appointments, but which do not address the question in the context of congressional regulation. See, e.g., *Pub. Citizen v. U.S. Dep’t of Justice*, 491 U.S. 440, 483 (1989) (Kennedy, J., concurring) (“No role whatsoever is given either to the Senate or to Congress as a whole in the process of choosing the person who will be nominated for appointment.”); *THE FEDERALIST* No. 76, at 456-57 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (“In the act of nomination, [the President’s] judgment alone would be exercised; and as it would be his sole duty to point out the man who, with the approbation of the Senate, should fill an office, his responsibility would be as complete as if he were to make the final appointment.”); James Monroe, Message to the Senate of the United States (Apr. 13, 1822), in 2 *A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS* 698, 701 (James D. Richardson ed., 1908) (“[A]s a

In separation of powers cases, the Court often gives weight to well-entrenched practices accepted by both Presidents and Congresses.²²⁵ There have now been over two centuries of practice in which Congress has imposed a very wide range of qualifications and rules of eligibility on executive appointments and the executive branch has, with very few exceptions, complied with them, starting in 1789. Precedents established by the first Congress have been found highly persuasive on the original understanding of the Constitution “since many of the Members of the First Congress had taken part in framing that instrument.”²²⁶ The Court has also applied this principle to other early Congresses.²²⁷

Notwithstanding the strong doctrinal and customary case for constitutionality, the modern executive branch and some scholars have questioned the constitutionality of some or all qualifications or eligibility rules for executive officials, whether principal or inferior. Some Office of Legal Counsel (“OLC”) or Attorney General opinions have conceded the constitutionality of qualifications so long as they are reasonable and relevant and do not “rul[e] out a large portion of those persons best qualified by experience and knowledge to fill a particular office.”²²⁸ President Clinton and his OLC objected to the statutory qualification for the appointment of a U.S. trade representative — never having represented a foreign entity in a trade dispute against the United States — because it ruled out a large

general principle . . . Congress ha[s] no right under the Constitution to impose any restraint by law on the power granted to the President so as to prevent his making a free selection of proper persons for these offices from the whole body of his fellow citizens.”).

²²⁵ See, e.g., *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2559 (2014) (“Long settled and established practice is a consideration of great weight in a proper interpretation of constitutional provisions regulating the relationship between Congress and the President.”); *Mistretta v. United States*, 488 U.S. 361, 401 (1989) (“[T]raditional ways of conducting government . . . give meaning’ to the Constitution.” (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring))).

²²⁶ *Bowsher*, 478 U.S. at 723-24; accord *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 492 (2010).

²²⁷ See, e.g., *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 401 (1819); *Stuart v. Laird*, 5 U.S. (1 Cranch) 299, 309 (1803).

²²⁸ Presidential Statement on Signing the Department of Homeland Security Appropriations Act 2007, 42 WEEKLY COMP. PRES. DOC. 1742, 1742-43 (Oct. 4, 2006); *Constitutionality of Statute Governing Appointment of U.S. Trade Representative*, 20 Op. O.L.C. 279, 280 (1996); see also *Military Acad. — Appointment — Statutory Construction*, 25 Op. Att’y Gen. 341, 343 (1905); *Civil Serv. Comm’n*, 13 Op. Att’y Gen. 516, 520-21, 525 (1871).

number of otherwise-desirable candidates.²²⁹ And both the executive branch and some scholars have questioned the constitutionality of partisan balance requirements for multi-member commissions or boards heading independent agencies.²³⁰

Sometimes the executive has taken a harder line on all qualifications for executive officers. During the Carter administration, OLC “question[ed] the validity of the requirement” in a bill establishing inspectors general in executive agencies “that the President appoint each Inspector General ‘without regard to political affiliation’” because “[t]his implies some limitation on the appointment power in addition to the advice and consent of the Senate.”²³¹ The implication that *any* limitation on the appointment power is unconstitutional is, frankly, hard to take seriously. OLC reiterated this extreme view during the George H.W. Bush administration.²³²

A few commentators join these executive opinions in finding some exclusive and illimitable power in the Appointments Clause for the President to choose any candidate he or she desires. But these arguments contradict constitutional practice since 1789, and furthermore do not agree on key issues such as whether their theory of total presidential discretion applies to appointment of principal officers, inferior officers, or both.²³³ In my estimation, there is very wide room for Congress to prescribe qualifications or rules of eligibility without crossing the line of unconstitutionality.²³⁴

Building on proposals made during the 1970s reform period, and language in some current statutes, I suggest a number of different statutory provisions and the comment on their likely constitutionality.

²²⁹ See Statute Governing Appointment, 20 Op. O.L.C. at 279-80; Presidential Statement on Signing the Lobbying Disclosure Act of 1995, 2 PUB. PAPERS 1907, 1907 (Dec. 19, 1995).

²³⁰ BREGER & EDLES, *supra* note 46, at 96-97.

²³¹ Inspector Gen. Legislation, 1 Op. O.L.C. 16, 18 n.3 (1977), 1977 WL 18011.

²³² See Common Legislative Encroachments on Exec. Branch Authority, 13 Op. O.L.C. 248, 250 (1989), 1989 WL 595833.

²³³ Compare Hanah Metchis Volokh, *The Two Appointments Clauses: Statutory Qualifications for Federal Officers*, 10 U. PA. J. CONST. L. 745, 746 (2008) (arguing “that statutory requirements are unconstitutional for all appointments that require the advice and consent of the Senate”), with Michael J. Gerhardt, *Toward a Comprehensive Understanding of the Federal Appointments Process*, 21 HARV. J.L. & PUB. POLY 467, 534-35 (1998) (arguing that statutory qualifications for inferior officers are unconstitutional, and that statutory qualifications for principal officers are sometimes unconstitutional and sometimes not).

²³⁴ See also E. Garrett West, Note, *Congressional Power Over Office Creation*, 128 YALE L.J. 166, 201-05 (2018) (arguing primarily on textual and structural grounds for very broad authority of Congress to prescribe qualifications for offices).

1. Good Character

Similar to provisions for the Federal Election Commission and inspectors general within agencies, Congress could require that the most senior DOJ officials — the Attorney General, Deputy Attorney General, Associate Attorney General, Solicitor General, FBI Director, or U.S. Attorneys — have demonstrated “integrity, impartiality, and good judgment.” I cannot imagine a valid constitutional objection to such a statute. It certainly might be objected that such qualifications are so vague as to be useless. I will not argue that the proposal would be significantly impactful, but it does seem plausible to say that it would give the Senate during confirmation hearings, as well as the press and public, a useful — if admittedly very vague — measuring stick with which to interrogate the character and career of nominees.

2. Law Enforcement Experience

The officials who head DOJ and the U.S. Attorneys offices have jobs which range beyond criminal law enforcement, and so a rigid requirement that they possess law enforcement experience would be unwise. But the FBI directorship is different. Law enforcement is a primary mission, alongside the intelligence functions. Requiring *some* law enforcement experience seems relevant and reasonable.

In 1973, Senator Henry “Scoop” Jackson proposed a bill that would have required the FBI Director to have “extensive professional experience in the field of law enforcement of and at least 10 years of experience in a responsible position with the FBI itself.”²³⁵ This seems too rigid to me, both as a policy matter and under the relevant constitutional test, because it would drastically restrict the pool of candidates the President could choose from. No FBI Director in history, acting or permanent, met Jackson’s requirement of ten years’ prior experience at a senior level of the Bureau.

But a statute that, for example, required “experience in the field of criminal justice” seems reasonable and almost certainly constitutional. In theory, it reduces the President’s pool of potential candidates significantly, but in reality the limitation is very mild. All acting and confirmed Bureau directors in the post-Hoover era — totaling fifteen people — met the qualification I proposed, through service either in law enforcement, as a prosecutor or Department of Justice supervisor, or as a judge with criminal jurisdiction. So looking at the pool a President would (or should) be actually choosing from, there is not

²³⁵ 119 CONG. REC. 11353 (1973).

much restriction at all. In that case, it might be superfluous to pass a statute requiring something that modern Presidents have always done voluntarily. My response is the same as above: it would not hurt and it might help. Since the FBI has dramatically increased its intelligence mission since 9/11, it probably also would make sense for Congress to stipulate that the Bureau's director have national security experience as well.

3. Appointment Without Regard to Political Affiliation

I suggested above that one of the norms which emerged from the 1970s was that the job of Attorney General involves such a large element of policy choice that it is appropriate for Presidents to select someone who will reflect their own policy views.²³⁶ For that reason, I will not propose that the DOJ's senior leadership should be required to be chosen without regard to their political affiliation.

But the cases of the FBI Director and, arguably, U.S. Attorneys are different. While it is proper for the President to want an FBI Director who will be "responsive[] to the broad policies of the Executive Branch,"²³⁷ Congress's decision to set a ten-year term on the office — longer than any one President may serve — clearly indicates the congressional view that the Director has "non-political . . . responsibilities" and is "not an ordinary Cabinet appointment which is usually considered a politically oriented member of the President's 'team.'"²³⁸ This norm has widespread support.²³⁹ Given this choice, which was acquiesced in by the executive branch from 1976 until the Trump presidency, Congress could consider going one step further and directing that, like inspectors general already, the FBI Director be appointed "without regard to political affiliation." Cross-partisan appointments of FBI Directors have historically been a very strong signal of presidential commitment to law enforcement independence.²⁴⁰ Requiring cross-partisanship by statute might go too far in constraining the President's choices, but requiring that the holder of an inherently

²³⁶ See *supra* note 24 and accompanying text.

²³⁷ See S. REP. NO. 93-1213, at 2 (1974).

²³⁸ *Id.* at 2-3.

²³⁹ See *supra* note 25 and accompanying text.

²⁴⁰ Bill Clinton appointed Republican Louis Freeh to be FBI Director in 1993. Barack Obama appointed two Republicans to the Bureau, first by seeking congressional approval for extending the term of Robert Mueller, who had been first appointed by President George W. Bush, and second by appointing James Comey.

nonpolitical job be selected without regard to politics is likely to be found a reasonable and relevant qualification, and hence constitutional.

U.S. Attorneys may be a somewhat harder case. Congress has recognized the right of Presidents to have their preferred nominees in that job by giving them a four-year term in office to match the Presidents and by expressly providing that “[e]ach United States attorney is subject to removal by the President.”²⁴¹ But, unlike DOJ leadership in Washington, the core job of U.S. Attorneys is to prosecute and defend specific criminal and civil cases.²⁴² As discussed above, the norm is that specific-party matters should always be conducted in an apolitical and impartial manner, and nearly always in a way that is independent of the White House or other politically-responsive actors. In my view, required non-partisan appointment of U.S. Attorneys would likely be constitutional.

4. Barring Cronies or Politically Active Persons from Senior DOJ Roles

Responding to the perceived politicization of the DOJ, some 1970s reformers proposed barring persons who had worked on presidential campaigns from serving in senior leadership roles in the Department.²⁴³ For years there had been grumbling that senior presidential campaign aides and longstanding political or personal friends of the President — for example, Homer Cummings for President Roosevelt, Howard McGrath for President Truman, Herbert Brownell, Jr., for President Eisenhower, and Robert Kennedy for President Kennedy — were being given the extremely sensitive and important job of Attorney General of the United States.²⁴⁴ The Watergate experience and criminal conviction of Nixon’s first two Attorneys General, Joseph Mitchell and Richard Kleindienst, crystallized these complaints. Both had heavily political backgrounds, and Mitchell was also a longstanding friend and law partner of the President he served.

It was not unnoticed that a number of the more respected Attorneys General during this era — Robert Jackson, Francis Biddle, Tom Clark, William Rogers, and Nicholas Katzenbach — tended to have much more minimal experience in electoral politics and less close,

²⁴¹ 28 U.S.C. § 541(b)-(c) (2018).

²⁴² 28 U.S.C. § 547.

²⁴³ See 121 CONG. REC. 13303 (1975) (introduced by Sen. Bentsen).

²⁴⁴ See, e.g., 121 CONG. REC. 13302 (1975) (statement of Sen. Bentsen); *Removing Politics Hearing*, *supra* note 23, at 2-3 (opening statement of Sen. Ervin).

confidential relationships with the President before coming into the office.

In 1967, responding to the Kennedy experience, Congress enacted an anti-nepotism statute which bars the President (and other officials) from appointing relatives “to a civilian position in [an] agency” which the appointing official serves in, controls, or has jurisdiction over.²⁴⁵ Executive agencies and departments, and independent regulatory agencies, are covered by the statute.²⁴⁶ More limits on appointments, specifically at the DOJ, were also proposed in the aftermath of Watergate.

In 1975, the final report of the Watergate Special Prosecution Force recommended that the Attorney General and other senior DOJ appointees not be confirmed by the Senate if the nominee had served “as a President’s campaign manager or in a similar high-level campaign role.”²⁴⁷ A special committee of the American Bar Association, tasked with studying how to remove improper political influence on federal law enforcement, made a similar proposal, stating that Congress should legislate to prevent a person who had held “the position of campaign manager [for the President-elect], chairman of the finance committee, chairman of the national political party, or other high level campaign role involved in electing the President” from serving as AG or DAG.²⁴⁸

Senator Lloyd Bentsen (Democrat from Texas) in 1975 introduced the Justice Department Reform Act. Lamenting that the trend of President’s appointing senior political campaign advisers “contributes to a growing perception of the Justice Department as a political instrument,”²⁴⁹ he proposed barring people who held senior positions on the presidential campaign staff or in state or national political party organizations be banned from nomination by the President they served

²⁴⁵ 5 U.S.C. § 3110(b).

²⁴⁶ *Id.* § 3110(a)(1)(A) (defining “agency” as an “Executive agency”); 5 U.S.C. § 105 (“For the purpose of this title, ‘Executive agency’ means an Executive department, a Government corporation, and an independent establishment.”). The White House, supported by the Office of Legal Counsel in the DOJ, has taken the position, as a matter of statutory construction, that appointments to the White House staff are not covered by this statute. See Application of the Anti-Nepotism Statute to a Presidential Appointment in the White House Office, Op. O.L.C. (Jan. 20, 2017), 2017 WL 5653623. To my knowledge the statute’s constitutionality has not been questioned.

²⁴⁷ U.S. WATERGATE SPECIAL PROSECUTION FORCE, REPORT 136 (1975).

²⁴⁸ ABA REPORT, *supra* note 23, at 38.

²⁴⁹ 121 CONG. REC. 13303 (1975) (statement of Sen. Bentsen).

for Attorney General, Deputy Attorney General, Associate Attorney General, and Solicitor General.²⁵⁰

This bill did not make it out of the Judiciary Committee, but Bentsen kept pushing the concept as amendments to other legislation.²⁵¹ Eventually the Senate, with bipartisan approval and no need for a roll call, adopted a revised version as an amendment to what became the Ethics in Government Act of 1978.²⁵²

Although the Bentsen amendment dealt with a Senate prerogative — consideration of executive nominations — the House stripped it out during the House-Senate conference process.²⁵³ It may well have been thought by some members of Congress that, for good or ill, Presidents needed to be free to choose their own person for such an important role as Attorney General.²⁵⁴ Likely some momentum in favor of the Bentsen reform was lost because since Watergate, President Ford had appointed the universally-respected, apolitical, and independent Edward Levi, president of the University of Chicago, to be his attorney general,²⁵⁵ and President Carter had appointed a well-respected former judge, Griffin Bell.²⁵⁶ During the 1976 campaign, candidate Carter promised an “independent” DOJ, going so far as to propose that Attorneys General serve a five-year term, so that it not be coterminous with the President’s.²⁵⁷ It probably seemed that the lesson had been

²⁵⁰ *Id.* (statement of Sen. Bentsen).

²⁵¹ *See, e.g.*, 122 CONG. REC. 6195-98 (1976) (debate on Sen. Bentsen’s proposed amendment to Federal Employees Political Activity Act).

²⁵² *See* 123 CONG. REC. 20974 (1977) (The Senate adopted the following amendment: “An individual who has played a leading partisan role in the election of a President shall not be appointed Attorney General or Deputy Attorney General. Individuals holding the position of national campaign manager, national chairman of the finance committee, chairman of the national political party, or other comparable high-level campaign role involved in electing the President should be those considered to have played a leading partisan role.”).

²⁵³ *See Nomination of Edwin Meese III to be Attorney General of the United States: Hearings Before the S. Comm. on the Judiciary*, 98th Cong. 7-8 (1985) [hereinafter *Nomination of Edwin Meese III*] (opening statement of Sen. Howard Metzenbaum recounting this history).

²⁵⁴ *See, e.g.*, 122 CONG. REC. 6197 (1976) (making this point during debate of a similar Bentsen amendment).

²⁵⁵ *See generally* Larry D. Kramer, *Foreword* to *RESTORING JUSTICE: THE SPEECHES OF ATTORNEY GENERAL EDWARD H. LEVI*, at xii-xiii (Jack Fuller ed., 2013) (discussing Levi’s role in restoring credibility and independence to the DOJ after the nadir of Watergate).

²⁵⁶ *See* B. Drummond Ayres, Jr., *Griffin Boyette Bell*, N.Y. TIMES (Dec. 21, 1976), <https://www.nytimes.com/1976/12/21/archives/griffin-boyette-bell.html> (discussing Bell’s biography).

²⁵⁷ GRIFFIN B. BELL & RONALD J. OSTROW, *TAKING CARE OF THE LAW* 28 (1982).

learned and a new, positive norm of Attorney General independence from politics and the White House instantiated.²⁵⁸

But in retrospect, the new direction of independence for Attorneys General from politics and White House influence was short-lived. For example, William French Smith, Reagan's first attorney general, was the personal lawyer, business advisor, and close political confidante of Reagan dating back to the early 1960s.²⁵⁹ Edwin Meese, who replaced Smith in 1985, had served in political roles for Governor Reagan from 1967–1974, and was chief of staff of the 1980 presidential campaign, “counselor to the president” during the first term, and was a close friend of Reagan.²⁶⁰ Senate Democrats opposed Meese for a variety of reasons, including violation of the principle of the Bentsen amendment, which had been agreed to by senators by both parties only seven years previously.²⁶¹

Since then, some Attorneys General have been partisan political figures or presidential cronies (for example, Alberto Gonzales, Jefferson Beauregard Sessions III), while others have had more independent and apolitical biographies prior to assuming the office (for example, Janet Reno and Loretta Lynch).²⁶² The record of Attorneys General with partisan backgrounds is somewhat mixed, because some demonstrated real independence in office (for example, John Ashcroft). Cronies — such as Mitchell or Meese — seem to have been more likely to be disappointing in office.

It would be useful for Congress to debate and consider a version of the Bentsen amendment for the Attorney General and perhaps Deputy and Associate Attorneys General also; I will not prejudge where that debate should end up.

I see the FBI Director as being differently situated, however. Compared to the Attorney General's job, the FBI Directorship has been and should remain substantially less political and less tied to the

²⁵⁸ See Joseph Kraft, *The Rising of Lowered Expectations*, N.Y. TIMES (Aug. 3, 1975), <https://www.nytimes.com/1975/08/03/archives/the-rising-of-lowered-expectations-one-year-of-ford-ford.html> (noting that Levi was “the first Attorney General in 50 years who does not come from a heavily political background”).

²⁵⁹ CORNELL W. CLAYTON, *THE POLITICS OF JUSTICE: THE ATTORNEY GENERAL AND THE MAKING OF LEGAL POLICY* 51-52 (1992); Edward J. Boyer, *William French Smith, 73, Dies; Reagan Adviser and Atty. Gen.*, L.A. TIMES (Oct. 30, 1990), http://articles.latimes.com/1990-10-30/local/me-3410_1_william-french-smith.

²⁶⁰ See CLAYTON, *supra* note 259, at 51-52.

²⁶¹ See *Nomination of Edwin Meese III*, *supra* note 253, at 7.

²⁶² See *Attorneys General of the United States*, U.S. DEP'T JUST., <https://www.justice.gov/ag/historical-bios> (providing brief biographies of attorneys general).

White House. Precluding political campaign aides or recently-active politicians from heading the Bureau seems highly relevant to reducing the possibility for actual or perceived politicization of law enforcement. No Senate confirmed FBI Director in history would have been excluded from consideration by such a rule. No permanent director of the FBI has ever held elective office, been a senior aide on a presidential campaign, or a close friend or confidante of the appointing President. Two acting directors had brief careers in state legislatures long before their temporary service at the head of the Bureau. The disgraced Patrick Gray, acting FBI Director under Nixon, had worked on Nixon's 1968 campaign and been rewarded with appointment as Assistant Attorney General for the Civil Division.²⁶³ This record strikes me as good evidence that the suggested qualifications would not be unduly restrictive but could screen out people who have no business being FBI Director.

B. Removal: Good-Cause Limitation on the President's Power to Remove the FBI Director

The Supreme Court and most scholars agree that at-will tenure at the President's pleasure makes agency heads and other senior executive officials more susceptible to White House direction and control,²⁶⁴ and that the converse is also true — limiting the President's power to dismiss is an effective check on White House direction and control.²⁶⁵ There are many ways Congress can limit the President's ability to remove senior executive officials. The most effective and aggressive technique is to specify by statute a for-cause requirement before removal may occur, like the provision in the organic statutes of many independent agencies.²⁶⁶ A common formulation recites that

²⁶³ RICHARD GID POWERS, *BROKEN: THE TROUBLED PAST AND UNCERTAIN FUTURE OF THE FBI* 298 (2004).

²⁶⁴ See *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 483 (2010) (stating that at-will removal power allows the President to keep executive officers "accountable" to him); *Wiener v. United States*, 357 U.S. 349, 356 (1958) (discussing "the Damocles' sword of removal by the President"); *Humphrey's Ex'r v. United States*, 295 U.S. 602, 629 (1935) ("[I]t is quite evident that one who holds his office only during the pleasure of another cannot be depended upon to maintain an attitude of independence against the latter's will.").

²⁶⁵ See *Free Enter. Fund*, 561 U.S. at 501, 513-14; cf. *Bowsher v. Synar*, 478 U.S. 714, 726 (1986) ("Once an officer is appointed, it is only the authority that can remove him, and not the authority that appointed him, that he must fear and, in the performance of his functions, obey.").

²⁶⁶ E.g., 15 U.S.C. § 41 (2018) (concerning commissioners of the Federal Trade Commission).

agency heads may not be removed by the President except for “inefficiency, neglect of duty, or malfeasance in office.”²⁶⁷ This directly confronts the President with a congressional restriction on his constitutional powers over the executive branch personnel. This kind of statutory restriction on removal is frequently said to be the most important marker of agency independence.²⁶⁸

A second possibility is a wrinkle on the first: for Congress to require notice and a hearing, either administrative or judicial, on whether good cause for removal is present before removal may occur.²⁶⁹ A milder version of this — a third possibility — is to require, upon removal, a public statement of reasons.²⁷⁰ This requirement is obviously intended to disincentivize removals other than for publicly-acceptable good causes.

A fourth possibility is exemplified by the now-lapsed independent counsel provisions of the Ethics in Government Act of 1978. Congress there provided that the Attorney General, not the President, could remove the independent counsel and “only for good cause, physical or mental disability . . . or any other condition that substantially impairs the performance of such independent counsel’s duties.”²⁷¹ A fifth option is to specify a term of years for which the official may hold the office. Early on, it was thought that such a statutory term precluded the President from removing the official prior to the term’s expiration.²⁷² (Note that impeachment and removal by Congress is always an option for removing an executive officer.) But later in the nineteenth century, the Court held that only “very clear and explicit language” in a statute limiting removal could overcome the presumption that the President’s constitutional power to remove at-

²⁶⁷ See, e.g., *id.*

²⁶⁸ Vermeule, *Conventions*, *supra* note 53, at 1165, 1168 (citing examples).

²⁶⁹ See, e.g., 29 U.S.C. § 153 (“Any member of the [National Labor Relations] Board may be removed by the President, upon notice and hearing, for neglect of duty or malfeasance in office, but for no other cause.”).

²⁷⁰ See, e.g., 5 U.S.C. app. 3, § 3(b) (“An Inspector General may be removed from office by the President. If an Inspector General is removed from office or is transferred to another position or location within an establishment, the President shall communicate in writing the reasons for any such removal or transfer to both Houses of Congress, not later than 30 days before the removal or transfer.”).

²⁷¹ 28 U.S.C. § 596(a)(1) (lapsed 1999).

²⁷² See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 162 (1803) (implying that the five-year statutory term of a Washington DC justice of the peace made the official unremovable by the President); see also JOSH CHAFETZ, *CONGRESS’S CONSTITUTION: LEGISLATIVE AUTHORITY AND THE SEPARATION OF POWERS* 105-06 (2017) (noting that the *Marbury* Court’s claim did not appear to have been contemporaneously disputed).

will was unimpaired.²⁷³ Even if a term of years is not a legal impediment to removal, it can be part of a sixth congressional strategy: to signal to the President that removal except for good cause would be disfavored, and could lead to costly political backlash, such as difficulty confirming a successor, without imposing any legal bar on removal. This was how Congress approached the position of the FBI Director in the 1970s;²⁷⁴ Congress's un-enacted policy preference stuck until 2017, when President Trump decided to fire FBI Director Comey.

In the following subsections, I review congressional debates and proposals in the 1970s about how to preserve independence of the FBI Director, and then evaluate the constitutionality of a requirement that the FBI Director may be fired by the President only for good cause.

1. Congressional Debates in the 1970s About FBI Director Independence

Congress considered statutory reform of the FBI starting in 1973. Reformers focused on lengthening the tenure of the FBI Director and imposing statutory removal restrictions. A lengthy but definite term would allow the director to accumulate experience, without perpetuating him- or herself in office the way Hoover did as Director. A term longer than that which any President might serve would both symbolically and practically remove the director somewhat from political whirlwinds.²⁷⁵

In April 1973, Senator Robert Byrd, the Democratic Majority Whip, introduced The Federal Bureau of Investigation Improvement Act.²⁷⁶ The bill established the FBI “as an independent establishment of the

²⁷³ *Shurtleff v. United States*, 189 U.S. 311, 315-16 (1903); *see also Keim v. United States*, 177 U.S. 290, 293-94 (1900) (“In the absence of a specific provision to the contrary, the power of removal is incident to the power of appointment.”); *Parsons v. United States*, 167 U.S. 324, 327-28, 342 (1897) (declining, because it would raise constitutional issues, to read a statutory four-year term for a U.S. Attorney to limit the President’s power to remove mid-term).

²⁷⁴ *See, e.g., S. REP. NO. 93-1213*, at 6 (1974) (proposing a ten-year term for the FBI Director and stating that “[t]he bill is a cautionary message to the President to the effect that whereas his power to remove a Director of the FBI is formally unlimited, nevertheless, by virtue of its power to ratify the appointment of a successor, the Senate retains a large measure of influence over this removal power and will tolerate its exercise for good reason only”).

²⁷⁵ *See id.* at 2, 4; *Ten-Year Term for FBI Director: Hearing Before the Subcomm. on FBI Oversight of the S. Comm. on the Judiciary*, 93d Cong. 3 (Mar. 18, 1974) (statement of Sen. Byrd).

²⁷⁶ 119 CONG. REC. 11351-52 (1973).

executive branch,” headed by a Director who was appointed by the President with the advice and consent of the Senate to a non-renewable seven-year term.²⁷⁷ Nothing was said about removal. Byrd’s bill would have taken the director out from under the supervision of the Attorney General.²⁷⁸

The same day as Byrd acted Democratic Senator Henry “Scoop” Jackson of Washington, introduced a bill that left the FBI as a component of the DOJ, and granted the director a non-renewable fifteen-year term, after being appointed by the President with advice and consent of the Senate.²⁷⁹ The Jackson bill provided that the President could remove the director “for only the following reasons: permanent incapacity, neglect of duty, malfeasance in office, any felony or conduct involving moral turpitude.”²⁸⁰

The next month, Senator Richard Schweiker, a progressive Pennsylvania Republican, introduced a third FBI reform bill. Like Byrd’s bill, it too made the FBI a separate “independent” agency.²⁸¹ Like Jackson’s, it restricted removal.²⁸² The removal section had a proviso that “[f]ailure to follow a directive from any member of the executive branch or legislative branch shall not constitute grounds for removal from office unless such failure constitutes a dereliction of the lawful duties of the Director or Deputy Director.”²⁸³ Appointment was by the President with Senate advice and consent. Splitting the difference between Byrd’s seven years and Jackson’s fifteen, Schweiker proposed that the director serve a non-renewable ten-year term.²⁸⁴

The Senate Judiciary Committee rejected these proposals, however, except for the idea of giving the director a single, lengthy, non-renewable term. There were two prominent reasons why it was reluctant to directly insulate the director from removal. One was the desire to prevent another Hoover — an effectively unremovable director who amassed power over time and abused the office.²⁸⁵ The Constitution was a second reason that a statutory limit on the

²⁷⁷ *Id.*

²⁷⁸ *Id.*

²⁷⁹ *Id.* at 11353.

²⁸⁰ *Id.*

²⁸¹ 119 CONG. REC. 14131-32 (1973).

²⁸² *Id.* at 14131 (“The President shall remove the Director or Deputy Director from office, prior to the expiration of their respective terms, for malfeasance in office, neglect of their duties, or permanent incapacity.”).

²⁸³ *Id.*

²⁸⁴ *Id.*

²⁸⁵ See S. REP. NO. 93-1213, at 2 (1974).

President's removal authority was rejected by the Senate. Under Supreme Court precedent, the Committee thought it "highly likely" that the FBI Director was "within the class of officials subject to the President's illimitable power of removal."²⁸⁶ The *Myers* case from 1926 rejected any congressional participation in the removal of high-ranking executive officers as unconstitutional restraints on the "executive power" granted by Article II.²⁸⁷ And the *Humphrey's Executor* case from 1935 only partially qualified that rule. It upheld good-cause removal restrictions for the commissioners heading the Federal Trade Commission, which had "quasi-legislative" (rule-making) and "quasi-judicial" (adjudicative) powers, in addition to powers to investigate and prosecute civilly violations of federal law.²⁸⁸ But the Court held that Congress could not restrict the President's right to remove any "purely executive" officers.²⁸⁹ Believing that the FBI Director exercised "purely executive" powers, Congress gave the FBI Director a non-renewable ten-year term but did not attempt to legislate any removal restrictions.²⁹⁰ It was thought that the long term in office, spanning more years than a single President could serve, would sufficiently insulate the FBI Director from too much White House control.²⁹¹

Statutory restrictions on the removal of the FBI Director continued to be proposed through the end of the Carter presidency, but none became law. For instance, in 1980 Senate Republicans, including Orrin Hatch of Utah and Paul Laxalt of Nevada, introduced a bill to establish a legislative charter for the FBI, which would have created a comprehensive set of rules governing what the FBI could and could

²⁸⁶ *Id.* at 6.

²⁸⁷ *Myers v. United States*, 272 U.S. 52, 163-64 (1926). The statute at issue provided: "Postmasters of the first, second and third classes shall be appointed and may be removed by the President by and with the advice and consent of the Senate, and shall hold their offices for four years unless sooner removed or suspended according to law." *Id.* at 107.

²⁸⁸ *Humphrey's Ex'r v. United States*, 295 U.S. 602, 628-29 (1935).

²⁸⁹ *Id.* at 628, 631-32.

²⁹⁰ See Andrew Kent, Susan Hennessey & Matthew Kahn, *Why Did Congress Set a Ten-Year Term for the FBI Director?*, LAWFARE (May 17, 2017, 4:45 PM), www.lawfareblog.com/why-did-congress-set-ten-year-term-fbi-director [hereinafter *Why Did Congress Set a Ten-Year Term*]; see also Crime Control Act of 1976, Pub. L. No. 94-503, § 203, 90 Stat. 2407, 2427 ("[T]he term of service of the Director of the Federal Bureau of Investigation shall be ten years. A Director may not serve more than one ten-year term.").

²⁹¹ See Kent, Hennessey & Kahn, *Why Did Congress Set a Ten-Year Term*, *supra* note 290.

not do.²⁹² The bill left the director to be appointed to a ten-year term by the President with advice and consent of the Senate, but specified that removal could occur “only for gross neglect of the duties of the office or malfeasance in office.”²⁹³

As a result of the decision by Congress in the 1970s not to impose removal restrictions, it has been only norms of FBI independence that have prevented Presidents from treating the director like an at-will employee.²⁹⁴

2. Constitutionality of Removal Restrictions

If Congress wanted to take dramatic action to protect the FBI from White House interference, it could adopt a version of the Jackson, Schweiker or Hatch/Laxalt proposals — barring the President from removing the director except for good cause. Was the Senate Judiciary Committee in the 1970s correct that this would be unconstitutional? There is a vast literature on presidential versus congressional control over removal of senior executive officials. This Article will not attempt a comprehensive resolution of this debate, but will instead sketch an argument for the constitutionality of a removal restriction, while noting places where the contrary argument is strongest.

I will address the following components of constitutional argument: text and original understanding, customary practice of the government over time, and Supreme Court doctrine.

a. Text and Original Understanding

Besides the impeachment mechanism, there is no express provision in the Constitution granting a power to remove executive officers. Removal of executive officials was not discussed during the Philadelphia Convention,²⁹⁵ but received extensive consideration early in the First Congress, in a great debate later known later as the “Decision of 1789.”²⁹⁶ The variety of views expressed was wide —

²⁹² 126 CONG. REC. 18558-62 (1980).

²⁹³ *Id.* at 18559.

²⁹⁴ *Cf.* COMEY, *supra* note 24, at 236-37 (recounting a conversation with President Trump in which the President implied that Comey retaining his job as FBI Director required a pledge of personal loyalty to Trump).

²⁹⁵ *Myers v. United States*, 272 U.S. 52, 109-10 (1926) (noting that the “removal of executive officials was not discussed during the Philadelphia Convention”).

²⁹⁶ *Id.* at 111-36, 149 (recounting the 1789 debate behind the decision to “strick[e] out . . . the clause recognizing and affirming the unrestricted power of the President to remove” in detail).

ranging from total presidential control, to shared power between the President and Senate, to congressional control via the Necessary and Proper Clause.²⁹⁷ Ultimately, by narrow margins in both Houses, a bill was passed which has been commonly — but not universally — understood to express the view that the default power to remove executive officials lies with the President, not the Senate nor the President plus Senate acting jointly. All agreed that removal is also possible by impeachment.²⁹⁸ No definitive view was expressed on Congress's ability to qualify or limit removal. In the antebellum period, the Supreme Court noted the “great diversity of opinion” expressed during the 1789 debate, and accepted Congress's “practical construction of the Constitution” holding that the power to remove (except via impeachment) executive officers appointed by the President with the advice and consent of the Senate is “vested in the President alone.”²⁹⁹

Some scholars, including Steven Calabresi, Christopher Yoo, and Saikrishna Prakash, have advanced a view of the text, structure, and original understanding of the Constitution that is called the “unitary executive” theory. As Gillian Metzger recently explained, “[u]nitary executive scholars claim that Article II's hierarchy requires broad presidential authority to control all executive-branch decisionmaking or at least at-will presidential removal power over those executing federal law.”³⁰⁰ As noted above, this view was by no means universally held among members of the Founding generation.

Some scholars opposed to the unitary executive view, including Cass Sunstein, Larry Lessig, and Harold Krent, have contended that federal criminal prosecutions in the early Republic were not under the hierarchical control of the President.³⁰¹ Unitary executive scholarship

²⁹⁷ Gerhard Casper, *An Essay in Separation of Powers: Some Early Versions and Practices*, 30 WM. & MARY L. REV. 211, 234-35 (1989).

²⁹⁸ U.S. CONST. art. I, § 2, cl. 5; *id.* art. I, § 3, cl. 6.

²⁹⁹ *In re Hennen*, 38 U.S. 230, 259 (1839).

³⁰⁰ Gillian E. Metzger, *The Constitutional Duty to Supervise*, 124 YALE L.J. 1836, 1880 (2015). For leading academic accounts of unitary executive theory, see, for example, STEVEN G. CALABRESI & CHRISTOPHER S. YOO, *THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH* 3-4 (2008); SAIKRISHNA B. PRAKASH, *IMPERIAL FROM THE BEGINNING: THE CONSTITUTION OF THE ORIGINAL EXECUTIVE* 35-42, 61, 66-68 (2015); Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power To Execute the Laws*, 104 YALE L.J. 541 *passim* (1994); Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1165-68 (1992); Steven G. Calabresi & Gary Lawson, *The Unitary Executive, Jurisdiction Stripping, and the Hamdan Opinions: A Textualist Response to Justice Scalia*, 107 COLUM. L. REV. 1002, 1003, 1006 (2007).

³⁰¹ See Harold J. Krent, *Executive Control over Criminal Law Enforcement: Some*

has rebutted this to some extent, showing that Presidents Washington, Adams, and Jefferson expressed and acted on a belief that federal criminal prosecutors (federal district attorneys) answered to them, were removable from office at will, and could have their prosecutorial discretion overridden by the President.³⁰² This practical construction of the Constitution by early Presidents is certainly entitled to great weight in assessing the original understanding. Out of deference to this history, as well as for reasons of policy,³⁰³ this Article does not propose any restrictions on the President's power to remove the Attorney General or U.S. Attorneys.

But the FBI Director has no power to prosecute, and thus may be differently situated as a constitutional matter. The FBI investigates crimes and gathers intelligence. No scholar has comprehensively examined whether the criminal investigation function was understood by the Founding generation to be within the illimitable control of the President. Following Justice Scalia, the leading proponent of unitary executive views, the assumption has been that investigation has the same constitutional status as prosecution. Scalia's famous dissent in the independent counsel case, *Morrison v. Olson*, stated that "the conduct of a criminal prosecution (and of an investigation to decide whether to prosecute)" is an exercise of "purely" and "quintessentially executive activity."³⁰⁴ Those functions, he wrote, had "always and everywhere — if conducted by government at all — been conducted never by the legislature, never by the courts, and always by the executive."³⁰⁵

As to criminal *investigation*, at least, Justice Scalia was mistaken. In England, the American colonies, and the American states post-1776, criminal investigation functions were performed by a mix of private individuals, grand juries (private individuals serving temporarily under judicial supervision), judicial officers, and traditional law

Lessons from History, 38 AM. U. L. REV. 275, 286 (1989); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 15-16 (1994); Daniel N. Reisman, *Deconstructing Justice Scalia's Separation of Powers Jurisprudence: The Preeminent Executive*, 53 ALB. L. REV. 49, 56-60 (1988); see also 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, 563 (1989); William B. Gwyn, *The Indeterminacy of the Separation of Powers and the Federal Courts*, 57 GEO. WASH. L. REV. 474, 476, 492-93 (1989).

³⁰² Saikrishna Prakash, *The Chief Prosecutor*, 73 GEO. WASH. L. REV. 521, 527, 552-63 (2005).

³⁰³ See *supra* note 24 and accompanying text.

³⁰⁴ *Morrison v. Olson*, 487 U.S. 654, 705-06 (1988) (Scalia, J., dissenting).

³⁰⁵ *Id.* at 706 (Scalia, J., dissenting).

enforcement officers who would be considered “executive.”³⁰⁶ The executive officers were probably the least important of the bunch in terms of investigative functions. Nothing resembling a modern police agency existed. Thus, when the Constitution conveyed “executive power” to the President, it is unlikely that this was understood by the Founding generation to grant the President comprehensive, illimitable authority over all persons investigating federal crimes. And in fact, the English-colonial model continued for some time under the new federal government. In the early Republic period, a mix of private individuals (witnesses, crime victims, or relatives of crime victims), grand jurors, federal and state judges, qui tam relators, and state and federal executive officers participated in the investigation of federal crimes.³⁰⁷ Only federal executive officers were removable by the President, or by someone who was an at-will employee of the President.

b. Customary Practice

Since its creation, the head of the FBI has been removable at-will — as a formal legal matter — by first the Attorney General and now the President.³⁰⁸ What constitutional weight this longstanding practice has is somewhat uncertain, however. Because notwithstanding the formal ability to fire for any reason, in practice Presidents have been greatly constrained in their ability to remove the director. Director Hoover was insulated in office by his popularity with the public and his perceived possession of derogatory information on Presidents, members of Congress, and others and his perceived willingness to blackmail.³⁰⁹ Since Hoover, a different type of independence has pertained. As noted above, a strong norm has developed that the FBI Director should be responsive to broad policy priorities of the President and Attorney General but independent when carrying out specific functions of the Bureau.³¹⁰ Freedom from partisan political direction has gone without saying in the years since Watergate.

Since Hoover’s death, every confirmation hearing for a permanent FBI Director has featured Senators and the nominees insisting that the FBI remain an independent, professional, nonpartisan agency.³¹¹

³⁰⁶ See Andrew Kent, *Investigation of Crime and the Original Meaning of Executive Power* (working paper).

³⁰⁷ See *id.*

³⁰⁸ See *supra* note 10 and accompanying text.

³⁰⁹ See, e.g., RONALD KESSLER, *THE SECRETS OF THE FBI* (2012).

³¹⁰ See *supra* note 25 and accompanying text.

³¹¹ See *supra* note 151 and accompanying text.

Frequently, nominees have stated that they sought and received assurances from the President and Attorney General, before agreeing to take the job, that they would have substantial independence.³¹² At one FBI Director confirmation hearing, a senator suggested that the director was so independent of the President that he “cannot be removed except for cause.”³¹³

Prior to President Trump removing Comey, only one Senate-confirmed director had been removed from office. After an extensive administrative investigation initiated by the DOJ under President H.W. Bush, President Clinton fired William Sessions because of accusations of financial impropriety.³¹⁴

Moreover, notwithstanding formal legal freedom to nominate anyone they want for the job, Presidents since Nixon have selected widely-respected, nonpartisan figures with substantial backgrounds in law enforcement, as prosecutors or on the bench.³¹⁵

All of this, as well as the backlash to the Comey firing, suggests that political elites are broadly comfortable with the idea that the FBI be headed by a director who is substantially independent from presidential control. Whether or not this norm should, as a formal matter, influence the analysis of the constitutionality of a statutory for-cause removal restriction,³¹⁶ as a practical matter judges seem likely to be influenced by such a widespread norm.

³¹² See *supra* note 152 and accompanying text.

³¹³ See *Mueller Hearing*, *supra* note 25, at 71 (statement of Sen. Specter).

³¹⁴ See David Johnston, *Defiant FBI Chief Removed from Job by the President*, N.Y. TIMES (July 20, 1993), <https://www.nytimes.com/1993/07/20/us/defiant-fbi-chief-removed-from-job-by-the-president.html>.

³¹⁵ For biographies of Directors Clarence Kelley (1973–1978), William Webster (1978–1987), William Sessions (1987–1993), and Louis Freeh (1993–2001), see THE FBI: A COMPREHENSIVE REFERENCE GUIDE 327, 336–37, 352–53, 358–59 (Athan G. Theoharis et al. eds., 1999). For the biography of Robert Mueller (2001–2013), see *Robert S. Mueller, III, September 4, 2001–September 4, 2013*, FBI, <https://www.fbi.gov/history/directors/robert-s-mueller-iii> (last visited Dec. 8, 2018). For the biography of James Comey (2013–2017), see *James B. Comey, September 4, 2013–May 9, 2017*, FBI, <https://www.fbi.gov/history/directors/james-b-comey> (last visited Dec. 8, 2018). For the biography of Christopher Wray (2017–), see *Christopher Wray, August 2, 2017–Present*, FBI, <https://www.fbi.gov/history/directors/christopher-wray> (last visited Dec. 8, 2018).

³¹⁶ See Vermeule, *Conventions*, *supra* note 53, *passim* (examining the role conventions that may play in judicial reasoning).

c. *Supreme Court Doctrine*

During the 1970s, it appeared clear that Supreme Court precedent would have barred a statutory for-cause restriction on removing the FBI Director. As described above, the doctrine of the *Myers* and *Humphrey's Executor* cases appeared to be that the removal of "purely executive" officials cannot be restricted by Congress, but that Congress could require good-cause for the removal of the heads of independent regulatory commissions exercising quasi-legislative, quasi-judicial, and executive powers.³¹⁷ The Court's reasoning for this distinction was somewhat obscure. *Myers* had emphasized the President's duty to take care that the laws be faithfully executed, and his or her need for accountability and control over subordinates who assisted in law execution.³¹⁸

Over the twentieth century, the powers delegated to independent regulatory agencies continued to grow. Agencies with for-cause removal protections for their heads have come to exercise significant powers of investigation and civil prosecution.³¹⁹ It has remained conceptually unclear why conjoining law execution with rule-making and adjudication functions within the same agency should diminish the President's removal power. *Humphrey's Executor* did not purport to explain this. And since the Constitution does not make any distinction in Article II between civil and criminal law execution, the precedent of these independent regulatory agencies — and the widespread view by political and legal elites of their constitutionality³²⁰ — supports an argument that there could be some for-cause removal protection for an agency head with criminal investigative jurisdiction.

A half-century after *Humphrey's Executor*, the Court in *Morrison v. Olson* moved away from congressional intent to create a "quasi-legislative" or "quasi-judicial" agency as the touchstone for the

³¹⁷ See *supra* notes 287–89 and accompanying text.

³¹⁸ *Myers v. United States*, 272 U.S. 52, 132-33 (1926).

³¹⁹ See, e.g., 15 U.S.C. §§ 2053(a), 2054(a)(2), 2061(a) & 2069 (2018) (providing that commissioners of the Consumer Product Safety Commission have for-cause removal protection and that the Commission may "conduct such . . . investigations of deaths, injuries, diseases, other health impairments, and economic losses resulting from accidents involving consumer products as it deems necessary" and represent itself in court in civil enforcement actions); 42 U.S.C. § 7171(b)(1), (g) & (i) (providing that commissioners of the Federal Energy Regulatory Commission have for-cause removal protection and that the Commission may hold "hearings, sign and issue subpoenas [sic], administer oaths, examine witnesses, and receive evidence" and represent itself in court in civil enforcement actions).

³²⁰ See, e.g., Adrian Vermeule, *No*, 93 TEX. L. REV. 1547, 1564-66 (2015) (reviewing PHILIP HAMBURGER, *IS ADMINISTRATIVE LAW UNLAWFUL?* (2014)).

constitutionality of removal restrictions. *Morrison* challenged the constitutionality of the independent counsel provisions of the Ethics in Government Act of 1978.³²¹ This act was passed to address Nixon's interference with the Watergate criminal investigation.³²² His interference included the infamous Saturday Night Massacre, in which Nixon fired the Attorney General and his deputy in order to find a DOJ official (third in line Robert Bork) who was willing to fire special counsel Archibald Cox. Cox had been appointed by the Attorney General under newly-created DOJ regulations to oversee the criminal investigation.³²³

The 1978 Act provided for the appointment of an independent counsel to investigate and, if deemed necessary, prosecute high-ranking government officials — the President, Vice President, many executive agency heads, senior White House and DOJ officials — credibly accused of federal criminal wrongdoing.³²⁴ The Attorney General was required by the Act to conduct a preliminary investigation and, if he or she found “reasonable grounds” for additional investigation or prosecution, refer the matter to a specially-constituted panel of judges of the U.S. Court of Appeals for the District of Columbia Circuit, who would appoint and define the jurisdiction of an independent counsel.³²⁵ This independent counsel would then have the full statutory authority of the Attorney General and DOJ with regard to the matters within his or her jurisdiction.³²⁶ The counsel could be removed “only” by impeachment or “by the personal action of the Attorney General and only for good cause, physical or mental disability . . . or any other condition that substantially impairs the performance of such independent counsel's duties.”³²⁷ Judicial review of removal by the Attorney General was authorized.³²⁸

³²¹ *Morrison v. Olson*, 487 U.S. 654, 659 (1988).

³²² Constance O’Keefe & Peter Safirstein, Note, *Fallen Angels, Separation of Powers, and the Saturday Night Massacre: An Examination of the Practical, Constitutional, and Political Tensions in the Special Prosecutor Provisions of the Ethics in Government Act*, 49 *BROOK. L. REV.* 113, 116-17 (1982).

³²³ See, e.g., *id.* at 116-18; KUTLER, *supra* note 65, at 406-14; OLSON, *supra* note 79, at 117-19.

³²⁴ 28 U.S.C. § 591(b) (1994), *sunsetting* by 28 U.S.C. § 599 (2018) (setting an expiration date for 28 U.S.C. § 591 et seq. on June 30, 1999 except for matters then pending before an independent counsel).

³²⁵ *Id.* §§ 591-93 (lapsed 1999).

³²⁶ *Id.* § 594(a) (lapsed 1999).

³²⁷ *Id.* § 596(a)(1) (lapsed 1999).

³²⁸ *Id.* § 596(a)(3) (repealed 1999).

The Court by a vote of 7–1, with Justice Kennedy not participating and Justice Scalia dissenting, upheld this statutory scheme in the face of a variety of constitutional challenges on separation of powers grounds. The Court upheld the appointment by reasoning that the independent counsel was an inferior officer who, under the Appointments Clause, could be appointed by either a department head or by “the Courts of Law.”³²⁹ The counsel’s inferior officer status was shown by, inter alia, being “subject to removal by a higher Executive Branch official,” having only “certain, limited duties,” “limited in jurisdiction,” “limited in tenure,” and no “authority to formulate policy for the Government or the Executive Branch.”³³⁰

The statute’s prevention of the President from having any supervisory role or removal authority required more discussion. All justices assumed that investigating and prosecuting violations of federal crimes were core “executive” functions.³³¹ The *Morrison* Court then simply rejected the apparent holding of *Humphrey’s Executor* that only officials exercising “quasi-legislative” or “quasi-judicial” functions could be protected by statutory good-cause removal rules.³³² The test, the Court held, should be instead whether good-cause removal limitations for an official, even one exercising “purely executive” powers, would still allow the President “to accomplish his constitutional role.”³³³ According to the Court, “the real question is whether the removal restrictions are of such a nature that they impede the President’s ability to perform his constitutional duty” to faithfully execute the law.³³⁴ Several considerations were mentioned to support the judgment that the statute was not unconstitutional: the limited powers, jurisdiction, and tenure of the independent counsel; the fact that the Attorney General, who could remove the independent counsel for good cause, was an at-will employee of the President; and the fact that the Court had long tolerated under *Humphrey’s Executor* independent agency “exercise [of] civil enforcement powers that are analogous to the prosecutorial powers wielded by an independent counsel.”³³⁵ Looming in the background for many justices must have

³²⁹ *Morrison v. Olson*, 487 U.S. 654, 670-72 (1988) (discussing U.S. CONST. art. II, § 2, cl. 2).

³³⁰ *Id.* at 671-72.

³³¹ *Id.* at 688-89, 692, 705-06 (Scalia, J., dissenting).

³³² *Id.* at 689.

³³³ *Id.* at 690.

³³⁴ *Id.* at 691-92.

³³⁵ *Id.* at 691-92, 692 n.31.

been the judgment that Congress's motives were reasonable and even laudable in light of the experiences of Watergate.

On the question whether the limits on the President's supervision of an inferior officer exercising purely executive functions violated the separation of powers, the Court placed great weight on the fact that Congress was not here trying to "increase its own powers at the expense of the Executive Branch."³³⁶ Framing the question as whether the President's power to execute the laws was "unduly interfer[ed]" with by the Act, the Court answered no. High-level executive branch superintendence was still available through the Attorney General, and indirectly by the President via his authority over the Attorney General.³³⁷

Justice Scalia's famous dissent argued that "the conduct of a criminal prosecution (and of an investigation to decide whether to prosecute)" is an exercise of "purely" and "quintessentially executive activity."³³⁸ (As noted above, this is historically incorrect with regard to criminal investigation and, perhaps, prosecution also.) The President's Article II power and duty to execute the law could not be partially delegated away by Congress, wrote Scalia — the President must have "all of the executive power," not "some of the executive power."³³⁹

Scalia also warned against the dangers posed by prosecutors with great resources being free from the political accountability. He thought it particularly likely that, as structured, an independent counsel might commit the great sin that Attorney General Jackson famously warned against: picking a defendant first and then searching for legal violations to charge, rather than neutrally looking at all legal violations and choosing the only most important and deserving to prosecute.³⁴⁰

The Court has decided only one other removal case since *Morrison*. That decision, *Free Enterprise Fund v. Public Company Accounting Oversight Board*, suggests greater formalism and commitment to unitary control of the executive branch by the President than seen in *Morrison* or *Humphrey's Executor*, though the Court was careful to note that it was not reconsidering those decisions.³⁴¹ In brief, *Free Enterprise Fund* involved the constitutionality of a double good-cause

³³⁶ *Id.* at 694.

³³⁷ *Id.* at 693-96.

³³⁸ *Id.* at 705-06 (Scalia, J., dissenting).

³³⁹ *Id.* at 705 (Scalia, J., dissenting).

³⁴⁰ See Jackson, *supra* note 4, at 4-5.

³⁴¹ *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 483 (2010).

removal structure. The Public Company Accounting Oversight Board (“PCAOB”), created by the Sarbanes-Oxley Act, was an agency housed within the Securities and Exchange Commission (“SEC”), and given law execution, rule-making, and adjudicate authorities.³⁴² Members of the Board governing PCAOB could only be removed by the SEC, and only then for willful violations of law or unreasonable failure to carry out Board duties.³⁴³ The litigating parties and the United States as amicus curiae all assumed that, although SEC commissioners lack statutory good-cause removal protection, the SEC was intended by Congress to be independent of presidential control and hence that good-cause removal restrictions should be implied.³⁴⁴ The Court accepted that assumption.³⁴⁵

But this dual insulation from the President was fatal to the constitutionality of the removal restrictions on the Board.³⁴⁶ The Court stressed that the ability to remove subordinates was crucial to the President’s constitutional duty to execute the laws.³⁴⁷ The dual good-cause structure prevented “[t]he President [from] hold[ing] the [Securities and Exchange] Commission fully accountable for the [Accounting] Board’s conduct [because he lacks] . . . the ability to oversee the Board, or to attribute the Board’s failings to those whom he can oversee.”³⁴⁸ The majority scoffed at Justice Breyer’s suggestion in dissent that there remained many practical means by which the SEC could effectively supervise and control the Board, and that this was sufficient to satisfy Article II’s requirements of presidential supervision of law execution.³⁴⁹

Many commentators noticed the centrality the *Free Enterprise Fund* Court gave to the removal power as the key to presidential law execution power.³⁵⁰ Some have speculated that the majority was planting the seeds for future cutting-back of the leeway given to Congress by *Morrison* and *Humphrey’s Executor*.³⁵¹

The constitutionality of for-cause removal protection for the FBI Director is uncertain. If *Morrison* is good law, a functional approach

³⁴² *Id.* at 485-86.

³⁴³ *Id.* at 486.

³⁴⁴ *Id.* at 487.

³⁴⁵ *See id.* at 485.

³⁴⁶ *Id.* at 492.

³⁴⁷ *Id.* at 503-04.

³⁴⁸ *Id.* at 496.

³⁴⁹ *Id.* at 527-30 (Breyer, J., dissenting).

³⁵⁰ *See, e.g., Metzger, supra* note 300, at 1880.

³⁵¹ Vermeule, *Conventions, supra* note 53, at 1173.

would be used, looking at whether the restriction unduly interfered with the President's authority to take care to faithfully execute the laws. Since FBI Directors have operated for the last two generations with very substantial independence from the White House,³⁵² and few major problems as a result, the answer might well be 'no.'

But *Morrison* emphasized the independent counsel's "limited duties," "limited in jurisdiction," and "limited in tenure"³⁵³ in upholding the removal restriction for an investigative and prosecutorial official. By contrast, the FBI Director has broad and important duties, a very wide jurisdiction, and (absent removal or impeachment) a ten-year tenure. FBI Directors have enormous power to do harm, and it could be argued that political accountability — via the elected President's removal ability — is essential to keeping that power from being abused.

In addition, *Morrison* might no longer be good law. Important scholars assert that it is not, and that Justice Scalia's dissent has come to represent the best view of the law.³⁵⁴ At the risk of being overly reductionist, I think the major factor that has shifted opinions about *Morrison* is not necessarily any increased sympathy for strict unitary executive formalism, but rather the lived experience of Kenneth Starr-Whitewater-Lewinsky, and other sprawling independent counsel investigations that seemed to have made proverbial mountains out of mole hills. Those experiences of Javert-like independent prosecutors in the 1980s and 1990s have eclipsed the memory of Watergate and the Saturday Night Massacre. Scalia's warning about a prosecutor divorced from political accountability came to seem prescient. That is likely why Congress let the independent counsel statute lapse in 1999. But new experiences under President Trump will also shape — and are now shaping — the views of any judges who might decide in the future on the constitutionality of a statutory restriction on removal of the FBI Director. My guess is that the Trump experience will lead the

³⁵² See *supra* Part IV.

³⁵³ *Morrison v. Olson*, 487 U.S. 654, 671-72 (1988).

³⁵⁴ See *Special Counsels and the Separation of Powers: Hearing on S. 1735 & S. 1741 Before the S. Comm. on the Judiciary*, 115th Cong. 1 (2017) (statement of Akhil Reed Amar, Sterling Professor of Law And Political Science, Yale Law School) (describing *Morrison* as "now-discredited" and stating that "Outside the Court, Justice Scalia's *Morrison* dissent has carried the day in legal and expert-opinion circles left, right, and center"); Adrian Vermeule, *Morrison v. Olson is Bad Law*, *LAWFARE* (June 9, 2017, 8:14 PM), www.lawfareblog.com/morrison-v-olson-bad-law ("In anything but the most nominal sense, *Morrison* is probably no longer good law. Indeed, the best understanding is that it has long since become anticanonical.").

judiciary to be more tolerant of future congressional restrictions than it might have been otherwise.

Congress might reduce concerns about an FBI Director being too independent of the President by reducing the term of office from the current ten years to something shorter, such as seven years — long enough to allow a director to learn the agency and implement programs and reforms, longer than any one presidential term, and an odd number of years so that an opening will be unlikely to coincide with a presidential election.

CONCLUSION

The options presented above are meant to be a menu to choose from à la carte, not a comprehensive program. Reasonable people can differ about what, if anything, Congress should do to bolster norms of law enforcement independence and neutrality that President Trump has assailed. Having spent a fair amount of time examining debates about this issue from the 1970s through the present, I thought I would close by suggesting what measures I think would be useful:

- A pledge by the Senate that it will not approve nominees for FBI Director unless they make specific commitments on the record that they have been promised investigative independence by the President and Attorney General, and that they would reject as improper any attempts by the White House to interfere with FBI functions;
- Congressional hearings and GAO investigation on whether the DOJ and FBI have improperly re-initiated criminally investigating Hillary Clinton or otherwise acted on improper partisan motives during the Trump administration;
- Serious consideration of censuring or impeaching President Trump for obstructing justice in connection with the investigations of Michael Flynn, connections between Russia and the Trump campaign, and the firing of FBI Director Comey;
- A statutory directive that the Attorney General promulgate regulations on White House-DOJ contacts that ensure, as far as possible, impartiality and independence of law enforcement;
- Added duties for the DOJ Inspector General to investigate politicization of the Department;

- Statutory clarification that anyone serving as acting Attorney General must have previously been Senate-confirmed;
- A statutory requirement that the Attorney General, Deputy Attorney General, U.S. Attorneys, and FBI Director have demonstrated “integrity, impartiality, and good judgment”;
- A statutory requirement that the FBI Director and perhaps U.S. Attorneys also be appointed “without regard to political affiliation”;
- A statutory requirement embodying something similar to the Bentsen amendment — barring political campaign aides and cronies of the President from serving as Attorney General or FBI Director; and
- A statutory requirement that the President may not remove the FBI Director from office except for “good cause,” and shall transmit in writing a description of the good cause to House and Senate leaders within forty-eight hours, combined with reducing the term of office from ten to seven years.

The normative desirability of some of these proposals, such as the removal restrictions for the FBI Director, turn on complex judgments about law, politics, and policy.³⁵⁵ As I said, reasonable people can differ on whether these or other measures by Congress would be advantageous. But I would hope there would be broad consensus that the independence and neutrality of federal law enforcement are values worth preserving, and that Congress should play a central role in articulating and protecting those values.

³⁵⁵ See, e.g., Robert Litt, *FBI Independence — Too Much of a Good Thing?*, LAWFARE (July 17, 2017, 10:00 AM), www.lawfareblog.com/fbi-independence%E2%80%94too-much-good-thing (former general counsel for the Director of National Intelligence criticizing an article in which I raised the possibility of removal restrictions for the FBI Director). For my (brief) response, see Andrew Kent, *FBI Independence: Some Thoughts in Response to Robert Litt*, LAWFARE (July 18, 2017, 1:30 PM), www.lawfareblog.com/fbi-independence-some-thoughts-response-robert-litt.