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Toward an Independent Administration of Justice: Proposals to Insulate the Department of Justice from Improper Political Interference

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The rule of law is undermined when political and personal interests motivate criminal prosecutions. This report advances proposals for ensuring that the federal criminal justice system is administered uniformly based on the facts and the law. It recommends a law preventing the president from interfering in specific prosecutions, another law establishing responsibilities for prosecutors who receive improper orders, and new conflict of interest regulations for Department of Justice officials.

This report was researched and written during the 2018-2019 academic year by students in Fordham Law School's Democracy and the Constitution Clinic, which is focused on developing non-partisan recommendations to strengthen the nation's institutions and its democracy. The clinic's reports are available at law.fordham.edu/democracyreports.



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Editors: Daisy de Wolff & Kathleen McCullough

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THE SCHOOL OF LAW

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Acknowledgments:

We would like to express our gratitude to the esteemed experts who generously took time to share their knowledge and views with us: John O. Brennan, Rita M. Glavin, Bruce A. Green, Jed H. Shugerman, Mark H. Tuohey, William M. Treanor, and Laurence H. Tribe.

This report greatly benefited from Gail McDonald's research guidance. Judith Rew and Robert Yasharian designed the report.

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Executive Summary

The Department of Justice is not sufficiently insulated from political interference. Political intrusion on prosecutorial decision-making undermines independence in criminal law enforcement, the principle of the rule of law, and public confidence in our legal system. These values are at the core of our system of government. This report outlines a range of reforms to ensure that specific prosecutions are not unduly impacted by political considerations.

Even before President Trump faced accusations of obstructing the Department of Justice's investigation into his campaign's ties to Russia, other presidents improperly interfered with DOJ investigations and prosecutions. Questions about the degree to which the president may control the federal criminal law enforcement process reach back to the nation's earliest years. Orders from Presidents George Washington and Thomas Jefferson relating to certain criminal matters did not engender any controversy, but only decades later some attorneys general began asserting that prosecutors were independent actors whose primary obligation was to the law, not presidential directives. Congress created the modern DOJ in 1870, and norms and regulations have since developed to protect its independence, including policies to regulate communications between the White House and DOJ.

Perhaps the most notable example of presidential interference with the Department of Justice came during the Watergate scandal in the early 1970s when President Richard Nixon fired the special prosecutor investigating Nixon's 1972 presidential campaign. Nixon dismissed the special prosecutor after he subpoenaed tapes of Oval Office conversations.

In 2006, President George W. Bush's administration faced criticism that it dismissed seven U.S. attorneys for pursuing cases that did not advance the administration's agenda. The DOJ's independent watchdog concluded "there was significant evidence that political partisan considerations" impacted the firings.

Following the Watergate and Bush-era incidents, reform proposals called for additional measures to insulate the DOJ from political interference. Senator Sam Ervin, who chaired the committee that investigated Watergate, proposed legislation that would have limited the president's ability to remove the attorney general by establishing a six-year term for the position. But the idea encountered substantial resistance, largely on the basis that it would separate law enforcement from democratic accountability. More recently, some scholars have proposed electing the attorney general. The 2006 U.S. attorney dismissals prompted Congress to consider legislation to codify regulations of White House-DOJ communications.

Limitations on the president's control over the DOJ find support in the Constitution and principles that undergird that legal system. The Constitution's framers intended for the president to execute the laws in a manner consistent with the nation's interests—not his political or personal interests. They also subjected the president's powers to restrictions imposed by Congress. These principles are embodied in the Take Care Clause, which demands that the president "faithfully" execute the law, and the Executive Vesting Clause, which grants the president powers to carry out the responsibilities of his office. Additionally, the Necessary and Proper Clause gives Congress discretion to determine how the federal government's powers are exercised.

Other checks on the president's authority over the DOJ flow from prosecutors' obligations. Prosecutors must follow the law over the president's orders when the two come into conflict. The Supreme Court has held that prosecutors act as agents of the law—not of the president—when they act pursuant to authority Congress granted them, such as deciding whether to bring charges based on a criminal statute. Prosecutors have a quasi-judicial role, which means they must follow fair and neutral procedures. Furthermore, the Supreme Court has held that they have an obligation to act in the public interest.

We recommend three reforms to prevent the president and other White House officials from interfering in the neutral administration of the federal criminal justice system. Proposal 1 calls for legislation prohibiting the president and other White House personnel from influencing decisions related to the investigation or prosecution of any individual, except where a core executive function, such as defending against national security threats, is implicated. Because Congress granted the executive branch authority to handle prosecutions, it can regulate how that power is exercised. The proposed legislation would preserve the president's discretion to set general law enforcement priorities.

Proposal 2 aims to prohibit prosecutors from acting on improper directives from the White House. The first aspect of this proposal is a law codifying the guidelines in the DOJ's Justice Manual that instruct prosecutors on conducting investigations and prosecutions. The guidelines emphasize prosecutors' quasi-judicial role and their responsibility to neutrally seek justice. In addition to emphasizing prosecutors' responsibilities, codification of the guidelines could provide legal recourse to parties whose rights are violated by prosecutors pursuing political aims. The second aspect of Proposal 2 calls for legislation stating that prosecutors have a duty to not resign in the face of improper orders. Rather, prosecutors should

decline to take the improper action and report the directive to the DOJ's Inspector General.

Proposal 3 recommends allowing the Office of Government Ethics to use rulemaking and case-by-case adjudication to gradually establish non-financial guidelines for when prosecutors should recuse themselves from certain matters.

The OGE should have the authority to determine when prosecutors' non-financial interests pose a "significant risk" to the public interest such that recusal is required. The standard for what constitutes a "significant risk" would be determined over time through reference to the office's case-by-case determinations.

Introduction

President Donald Trump's attempts to influence the investigation of his campaign's ties to Russia¹ and his related assertion that he has "absolute" control over the Department of Justice ("DOJ")² have renewed questions about the degree to which the president can control the enforcement of criminal law. Similar questions have existed since George Washington's presidency. This report draws on history, case law, and ethical obligations to demonstrate why Trump's assertion that he has an absolute right to control DOJ investigations is wrong. The report then sets forth three proposals to strengthen the independent enforcement of criminal law at the federal level.

The United States Constitution reflects a set of carefully considered judgments about the allocation of institutional authority within the federal government. The framers provided for a diffuse power distribution among the three branches of government. The Constitution places some powers within the exclusive domain of one branch, while other powers, such as the War Powers, were to be shared among the branches. However, concerns exist that the framers' design has failed to prevent, and perhaps facilitated, the occurrence of their greatest fear: the concentration of governmental power in the executive branch.

Actions and statements by President Trump³ have caused legal scholars and lawmakers to once again evaluate whether the DOJ is sufficiently insulated from political interference.⁴ The DOJ's ability to function within the constitutional framework established by the framers is premised on a belief that decisions related to criminal law enforcement are based on fact and law.⁵

Respecting facts and the law is essential to preventing the exercise of government power for political purposes.⁶ Increasingly, however, partisanship and ideology challenge the norm of DOJ independence and the rule of law narrative that underlies support for the institution.⁷ If fact and law are displaced by political whims as the basis for DOJ decision making, the corresponding loss of faith in the rule of law principles will undermine the entirety of American democracy.⁸

To strengthen DOJ independence, principles of rule of law, and American democracy, this report brings to light the deficiencies and misunderstandings with respect to presidential control of the DOJ. This report also sets forth reforms aimed at curtailing the subtle, as well as brazen, abuses of DOJ power that have become increasingly common. Such abuses can undermine the values of independence in criminal law enforcement,⁹ the principle of the rule of law,¹⁰ and public confidence in our legal system.¹¹

This report is divided into three parts. Part I briefly describes the history of the Department of Justice, including past instances of presidential interference with criminal prosecution, and outlines significant past reform proposals to prevent improper political interference. Part II provides a framework for understanding the functions of the presidency and how those functions relate to other provisions of the Constitution. Part III then proposes a series of reforms. These proposals focus on prohibiting the president from interfering with DOJ processes; making it clear that prosecutors who receive improper orders must not resign and must report the improper command to the DOJ's inspector general; and gradually defining non-financial recusal guidelines for prosecutors. All three of these proposals have a narrow exception permitting limited presidential oversight on individual prosecutions that implicate core executive functions, including protecting the security of the United States from domestic and foreign threats.

1 See 2 ROBERT S. MUELLER, III, SPECIAL COUNSEL'S OFF., U.S. DEP'T OF JUST., REPORT ON THE INVESTIGATION INTO RUSSIAN INTERFERENCE IN THE 2016 PRESIDENTIAL ELECTION 4 (2019); Mark Mazzetti et al., *Intimidation, Pressure and Humiliation: Inside Trump's Two-Year War on the Investigations Encircling Him*, N.Y. TIMES, Feb. 19, 2019, <https://www.nytimes.com/2019/02/19/us/politics/trump-investigations.html>.

2 See 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>.

3 *Id.*; see generally MUELLER, *supra* note 1.

4 See PROTECT DEMOCRACY, *No "Absolute Right" to Control DOJ: Constitutional Limits on White House Interference with Law Enforcement Matters* (March 2018), <https://protectdemocracy.org/resource-library/document/no-absolute-right-control-doj/>; Bruce A. Green & Rebecca Roiphe, *Can The President Control The Department Of Justice?*, 70 ALA. L. REV. 1 (2018) [hereinafter *Can The President Control*]; Andrew McCanse Wright, *Justice Department Independence and White House Control* 27-28 (Feb. 18, 2018), <https://ssrn.com/abstract=3125848>; Jed Shugerman, *Think Matthew Whitaker is a hack? He's one of many*, WASH. POST (Nov. 16, 2018), https://www.washingtonpost.com/opinions/think-matthew-whitaker-is-a-hack-hes-one-of-many/2018/11/16/5efbf47c-e8f7-11e8-b8dc-66cca409c180_story.html.

5 See Erik Larson, *Sally Yates Calls Trump's Attempt to Undermine Faith in Institutions 'Dangerous'*, BLOOMBERG (Nov. 28, 2018), <https://www.bloomberg.com/news/articles/2018-11-28/trump-s-bid-to-sap-faith-in-institutions-dangerous-yates-says> (quoting Sally Yates, "The Department of Justice really can only function if the citizens of this country respect and believe that decisions are being based on the facts and the law and nothing else.").

6 See Daphna Renan, *Presidential Norms and Article II*, 131 HARV. L. REV. 2187, 2193 (2018).

7 See *id.* at 2240.

8 See *id.*

9 MUELLER, *supra* note 1, at 112; see Michael S. Schmidt & Maggie Haberman, *Trump Wanted to Order Justice Dept. to Prosecute Comey and Clinton*, N.Y. TIMES, Nov. 20, 2018, <https://www.nytimes.com/2018/11/20/us/politics/president-trump-justice-department.html> (noting that Trump's attempt to prosecute his political adversaries served as a "blatant" example of "how Mr. Trump views the typically independent Justice Department as a tool to be wielded against his political enemies").

10 See *id.* (noting that "Presidential meddling [in criminal cases] could undermine the legitimacy of prosecutions by attaching political overtones to investigations in which career law enforcement officials followed the evidence and the law.").

11 See *id.*

I. DOJ History, Presidential Interference, and Previous Reform Proposals

The Justice Department's structure and its approach to criminal prosecutions have evolved in significant ways over the course of the nation's history. Notable proposals for further change have come mostly in response to instances where presidents and politics improperly impacted law enforcement.

A. Debate Over the Relationship Between the President and DOJ

The early relationship between the president and federal prosecutors is the subject of debate in the legal community. As Griffith Bell, attorney general under President Jimmy Carter, noted, "From the inception of the Office of the Attorney General . . . there has been ambiguity about the role, and disagreement about the independence, of the Attorney General."¹² Some scholars, including Kate Andrias¹³ and Sai Prakash,¹⁴ identify particular historical interventions by presidents in federal prosecutions to support an unbounded conception of executive power over law enforcement.¹⁵ Others contend that the lack of a centralized agency for the nation's first 100 years supports a more limited conception of authority.¹⁶ For example, Bruce Green¹⁷ and Rebecca Roiphe¹⁸ suggest "rather than possessing plenary authority over criminal prosecution, presidents could supersede ordinary prosecutorial independence only in cases where enumerated presidential powers were implicated."¹⁹ Eric Posner,²⁰ in testimony before the Senate Judiciary Committee, identified two reasons "[t]he founders never believed that the president should be given 'complete control'

over law enforcement."²¹ The first reason Posner identified is the scattering of federal law enforcement "among many different agents, including federal officers who were not directly controlled by the president, state officials, and private citizens."²² Second, Posner identified provisions of the Constitution that do not support total control over law enforcement, including: "involving the Senate in appointments; giving budgetary authority to Congress, which it can use to influence law-enforcement priorities; and allowing Congress to define executive-branch offices."²³ The lack of clarity surrounding the permissible limits of presidential influence of DOJ activities has led to concerns about the permissible scope of presidential involvement in criminal prosecutions of specific individuals.

B. History of the DOJ

The modern Department of Justice did not come into existence until nearly a century after the nation's founding, when a far less centralized approach to criminal prosecutions was abandoned.

1. Attorney General in the Early Republic

The Judiciary Act of 1789 created the Office of the Attorney General as a largely judicial office with a far more limited mandate than the modern DOJ. Initially, the attorney general had only two duties: representing the United States as a party before the Supreme Court and answering legal questions submitted by the president or the heads of executive departments.²⁴ The Judiciary Act vested authority to prosecute suits on behalf of the United States in "[p]erson[s] learned in the law [appointed] to act as attorney for the United States" in each judicial district.²⁵ These positions were precursors of the modern U.S. attorneys but were not subject to attorney

12 Griffin B. Bell, *The Attorney General: The Federal Government's Chief Lawyer and Chief Litigator, or One Among Many?*, 46 *FORDHAM L. REV.* 1049, 1065 (1978).

13 Professor of Law, University of Michigan Law School.

14 James Monroe Distinguished Professor of Law and Paul G. Mahoney Research Professor of Law, University of Virginia School of Law.

15 Kate Andrias, *The President's Enforcement Power*, 88 *N.Y.U. L. REV.* 1031 (2013); Saikrishna Prakash, *The President's Power to Execute the Laws*, 104 *YALE L. J.* 541 (1994).

16 William B. Gwyn, *The Indeterminacy of the Separation of Powers and the Federal Courts*, 57 *GEO. WASH. L. REV.* 474, 490-94 (1989); Lawrence Lessig & Cass Sunstein, *The President and The Administration*, 94 *COLUM. L. REV.* 1, 14-22 (1994).

17 Louis Stein Chair of Law, Fordham University School of Law.

18 Professor of Law, New York Law School.

19 *Can The President Control*, *supra* note 4, at 15.

20 Kirkland & Ellis Distinguished Service Professor, University of Chicago Law School.

21 *Special Counsels and the Separation of Powers: Hearing Before the S. Comm. on the Judiciary*, 115th Cong. (2017) (statement of Eric Posner, Professor of Law, University of Chicago), <https://www.judiciary.senate.gov/imo/media/doc/09-26-17%20Posner%20Testimony.pdf>. Similarly, Protect Democracy, a non-partisan nonprofit formed to hold the executive branch accountable to law and longstanding democratic practice, also notes that "[i]ncluding the Opinions Clause would have made little sense if the Framers meant to grant the President full authority to reach into the Departments to direct their activities." See *PROTECT DEMOCRACY*, *supra* note 4, at 13.

22 *Special Counsels and the Separation of Powers*, *supra* note 21.

23 *Id.*

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

25 *Id.* During this period, private citizens and state officials were also empowered to enforce federal law in court. See Lessig & Sunstein, *supra* note 16, at 19 n. 76, 77 and accompanying text.

general control until 1861.²⁶ Congress likely neglected to provide a process for appointing the attorney general and district attorneys with the expectation that the appointment power would fall to the president as a result of the statute's silence on the point.

Presidential involvement in individual prosecutions was largely non-controversial in the early days of the Republic. For example, between 1792 and 1793, President George Washington ordered the prosecution of Whiskey Rebellion participants. Concluding that two defendants were wrongly accused, Washington ordered William Rawle, the U.S. Attorney for the District of Pennsylvania, to drop the prosecutions.²⁷ President Thomas Jefferson, who considered the Sedition Act of 1798 to be unconstitutional, also ordered pending prosecutions under its provisions to be dismissed.²⁸ Nevertheless, Jefferson simultaneously ordered a new prosecution against one of the defendants on alternative grounds to placate the Senate, which had sought the indictment.²⁹ In a letter, Jefferson laid out his justification for the prosecution:

The President is to have the laws executed. He may order an offence then to be prosecuted. If he sees a prosecution put into a train which is not lawful, he may order it to be discontinued and put into a legal train . . . There appears to be no weak part in any of these positions or inferences.³⁰

In 1831, while serving as President Andrew Jackson's attorney general, future Chief Justice Roger B. Taney concluded that Jackson possessed authority to direct a federal district attorney to dismiss a forfeiture action and to return the jewels in question to the foreign royalty from whom they had been stolen.³¹ But he noted:

The district attorney might refuse to obey the President's order; and if he did refuse, the prosecution, while he remained in office, would still go on; because the President himself could give no order to the court or to the clerk to make any particular entry. He could only act through his subordinate officer, the district attorney, who is responsible to him and who holds his office at his pleasure. And if that officer still continues a prosecution which the President is satisfied ought not to continue, the removal of the disobedient officer and the substitution of one more worthy in his place would enable the President through him faithfully to execute the law.³²

By the 1850s, the nature of the Office of the Attorney General began to transform. President Franklin Pierce's attorney general, Caleb Cushing, is credited as the first attorney general to recognize the evolution of the Office of Attorney General from an "quasi-judicial" office to an executive department. In an opinion, he acknowledged that "a sense of subordination has come to exist . . . with regard to the directory power of the President."³³ However, subsequent attorneys general, such as Edward Bates, who served under President Abraham Lincoln, did not view this subordination as absolute. Bates noted in his diary that the position was not "properly political, but strictly legal; and it [was his] duty above all other ministers of State to uphold the Law and to resist all encroachments, from whatever quarter, of mere will and power."³⁴

2. The Birth of the Modern DOJ

The motives behind the creation of the modern DOJ in 1870³⁵ are not clear. Robert Kaczowski³⁶ theorizes that the modern DOJ was created to help address the "workload crisis" from a "mushroom[ing]" post-Civil War federal court caseload, which necessitated the hiring of expensive private attorneys.³⁷ Alternatively, Norm Spaulding,³⁸ hypothesizes that the creation of the DOJ was intended to help enforce former slaves' civil

26 Act of Aug. 2, 1861, ch. 37, 12 Stat. 285. Previous suggestions to create attorney general supervision existed. For example, President Washington submitted a recommendation by Edmund Randolph to subject district attorneys to attorney general supervision in 1791 that was never enacted. 3 ANNALS OF CONG. 53, 289, 329-30 (1791). Similar recommendations by Presidents Jackson and Polk were rejected in 1830 and 1845. Andrew Jackson, Second Annual Message (Dec. 6, 1830), in 2 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789-1908, at 500, 527-28 (James D. Richardson ed., 1908); HOMER CUMMINGS & CARL MCFARLAND, FEDERAL JUSTICE: CHAPTERS IN THE HISTORY OF JUSTICE AND THE FEDERAL EXECUTIVE 147-48 (1937).

27 Sai Prakash, *The Chief Prosecutor*, 73 GEO. WASH. L. REV. 1701, 1738 (2005).

28 See, e.g., Letter from Thomas Jefferson to Wilson C. Nicholas (June 13, 1809), <https://founders.archives.gov/documents/Jefferson/03-01-02-0223>; Letter from Thomas Jefferson to Edward Livingston (Nov. 1, 1801), <https://founders.archives.gov/documents/Jefferson/01-35-02-0451>.

29 Prakash, *supra* note 27, at 1746.

30 Letter from Thomas Jefferson to Edward Livingston, *supra* note 28.

31 Andrias, *supra* note 15, at 1051-53.

32 The Jewels of the Princess of Orange, 2 Op. Att'y Gen. 482 (1831).

33 CORNELL W. CLAYTON, THE POLITICS OF JUSTICE: THE ATTORNEY GENERAL AND THE MAKING OF LEGAL POLICY 50 n. 16 (1992); Henry Barrett Learned, *The Attorney-General and the Cabinet*, 24 POL. SCI. Q. 444, 458 (1909). See 6 Op. Att'y Gen. 326, 332-33, 340-41 (1854) (stating the duties of the Office of the Attorney General following his first year in the role). "Cushing's exhaustive analysis of the origin and duties of his position has been accepted by the later incumbents as constituting the authoritative statement on the subject." 2 CLAUDE M. FUESS, LIFE OF CALEB CUSHING 182 (1923).

34 THE DIARY OF EDWARD BATES, 1859-1866, at 350 (Howard K. Beale, ed.).

35 Act to Establish the Department of Justice, ch. 150, 16 Stat. 162 (1870).

36 Professor of Law, Fordham Law School.

37 ROBERT J. KACZOWSKI, THE POLITICS OF JUDICIAL INTERPRETATION: THE FEDERAL COURTS, DEPARTMENT OF JUSTICE, AND CIVIL RIGHTS, 1866-1876 39-40 (2005).

38 Sweitzer Professor of Law, Stanford Law School.

rights during Reconstruction.³⁹ Jed Shugerman's view differs from Kaczorowski and Spaulding's conceptions. Shugerman instead suggests the modern DOJ was part of budget-cutting and anti-patronage retrenchment "to shrink and professionalize the federal government" and was a first step in "the rise of bureaucratic autonomy and expertise."⁴⁰ This theory presents the creation of the modern DOJ as a "structural reform aiming to protect professional independence and separate law from politics."⁴¹

However, Shugerman characterizes this structural reform and consolidation as a "false start towards independence."⁴² Even after the purported centralization of prosecutions, Congress continued to grant independent litigation authority to other agencies, including the Department of the Interior and Post Office Department in 1872,⁴³ the Department of Agriculture in 1889,⁴⁴ and the Department of Labor and the Department of Commerce in 1913.⁴⁵ In 1918, President Woodrow Wilson formally consolidated legal work within the DOJ,⁴⁶ but Congress still granted agencies, such as the Interstate Commerce Commission, independent representation authority.⁴⁷ Therefore, in 1933, President Franklin D. Roosevelt signed Executive Order 6166 which required, except as otherwise authorized by statute, that all claims brought by or against the United States be litigated by DOJ.⁴⁸ Congress enacted legislation in 1966 to codify Executive Order 6166.⁴⁹

C. Examples of Presidential Interference

One of the most infamous cases of presidential interference with the DOJ occurred during the Nixon administration.

During the Watergate scandal,⁵⁰ the appointed special prosecutor, Archibald Cox, was empowered to investigate "all offenses arising out of the 1972 election."⁵¹ Cox was granted sole discretion to decide "whether and to what extent he [would] inform or consult with the attorney general" on the investigation.⁵² Cox subpoenaed secretly recorded tapes from the White House, leading President Richard Nixon to order Attorney General Elliot Richardson to fire Cox.⁵³ This began a chain reaction known as "The Saturday Night Massacre."⁵⁴ Richardson refused the order and resigned.⁵⁵ Nixon then ordered Deputy Attorney General William Ruckelshaus to fire Cox. Ruckelshaus also refused and resigned.⁵⁶ Finally, Solicitor General Robert Bork, the third-ranking DOJ official, became acting attorney general and fired Cox.⁵⁷ Years later, Richardson and Ruckelshaus admitted that they urged Bork not to resign out of concern for DOJ continuity and fear that the chain reaction of resignations could end up with the "messenger service as Acting Attorney General."⁵⁸

Allegations of improper White House interference also engulfed President George W. Bush's administration. On December 7, 2006, the DOJ ordered the dismissal of seven U.S. attorneys,⁵⁹ a move considered atypical in the middle of a president's term.⁶⁰ In an op-ed published in *USA Today*, Attorney General

39 Norman W. Spaulding, *Independence and Experimentalism in the Department of Justice*, 63 STAN. L. REV. 409, 438 (2011).

40 Jed Handelsman Shugerman, *The Creation of the Department of Justice: Professionalization Without Civil Rights or Civil Service*, 66 STAN. L. REV. 121, 121-25 (2014).

41 *Id.* at 126.

42 *Id.* at 170 (noting that "[b]efore and after the passage of the DOJ Act, principal law officers were still protected by the Tenure of Office Act. It was no easier for the President to direct the far-flung U.S. Attorneys, and in reality, it was no easier for the President to direct other law officers who were still dispersed around Washington.").

43 Act of February 25, 1871, 16 Stat. 432; Act of June 8, 1872, 17 Stat. 284.

44 Act of Feb. 9, 1889, 25 Stat. 659.

45 Act of Mar. 4, 1913, ch. 141, 37 Stat. 736.

46 Exec. Order No. 2,877 (1918).

47 Transportation Act of 1920 § 3, ch. 250, 41 Stat. 92.

48 President Roosevelt acted pursuant to the provisions of the Economy Act of 1932, 31 U.S.C. § 1535 (2016).

49 Act of Sept. 6, 1966, 80 Stat. 613 (codified at 28 U.S.C. § 516).

50 The Watergate scandal began when men associated with the reelection campaign of President Nixon were caught breaking in to the Democratic National Committee headquarters at the Watergate building complex in Washington, DC. "Watergate" also now refers to various illegal and clandestine activities undertaken by the administration against political opponents spurring congressional inquiry and eventually the resignation of President Nixon prior to impeachment.

51 38 Fed. Reg. 14688 (June 4, 1973).

52 *Id.*

53 Carroll Kilpatrick, *Nixon Forces Firing of Cox; Richardson, Ruckelshaus Quit*, WASH. POST, Oct. 21, 1973, at A1.

54 *Id.*

55 *Id.*

56 *Id.*

57 *Id.*

58 See Kenneth B. Noble, *New Views Emerge of Bork's Role in Watergate Dismissals*, N.Y. TIMES, July 26, 1987, <https://www.nytimes.com/1987/07/26/us/new-views-emerge-of-bork-s-role-in-watergate-dismissals.html>.

59 It was later discovered that two additional U.S. attorneys were earlier relieved of their posts earlier under similarly controversial circumstances. U.S. DEP'T OF JUST. OFF. OF THE INSPECTOR GEN. & OFF. OF PROF. RESP., AN INVESTIGATION INTO THE REMOVAL OF NINE U.S. ATTORNEYS IN 2006 14 (Sept. 2008), <https://www.justice.gov/sites/default/files/opr/legacy/2008/09/30/us-att-firings-rpt092308.pdf>.

60 The request for resignation and termination of U.S. attorneys at the beginning of a president's tenure is the norm. See Leon Neyfakh, *Yes, Trump and Sessions Just Cleaned House at the DOJ. No, It's Not Shocking*, SLATE (Mar. 10, 2017, 6:53 PM), <https://slate.com/news-and-politics/2017/03/46-u-s-attorneys-are-asked-to-resign-as-trump-and-sessions-clean-house.html>.

Alberto Gonzalez⁶¹ contended that the dismissals were due to “performance, not to politics” and “reasons related to policy, priorities and management.”⁶² However, members of Congress suggested that the seven U.S. attorneys were terminated for pursuing cases that did not advance Bush’s agenda.⁶³

The dismissed U.S. attorneys were succeeded by interim replacements who were eligible to serve without Senate confirmation for an indefinite period because of a recent legal change. Previously, the appointment of an interim U.S. attorney expired after 120 days.⁶⁴ This move was attacked both as a Republican Party attempt to advance the careers of rising conservatives⁶⁵ and as an attempt to thwart meaningful congressional participation in appointment decisions. These allegations led to congressional,⁶⁶ departmental, and criminal⁶⁷ inquiries into whether the removals were intended to influence particular prosecutions. As part of these inquiries, the DOJ Inspector General and Office of Professional Responsibility,⁶⁸ completed a report in September 2008 that found the White House was involved in more than “merely approving” some of the dismissals.⁶⁹ The report determined “there was significant evidence that political partisan considerations were an important factor” in dismissal processes it described

61 80th Attorney General of the United States, appointed by President George W. Bush in February 2005.

62 Alberto R. Gonzales, *They Lost My Confidence*, USA TODAY, Mar. 7, 2007, at 10A. Gonzales further stated, “We have never asked a U.S. attorney to resign in an effort to retaliate against him or her or to inappropriately interfere with a public corruption case (or any other type of case, for that matter).” *Id.*

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

64 The replacements were not subject to the 120-day limit due to a provision of the USA PATRIOT Act Improvement and Reauthorization Act of 2005. Public Law No. 109-77 § 502 (amending 28 U.S.C. § 546).

65 David M. Driesen, *Firing U.S. Attorneys: An Essay*, 60 ADMIN. L. REV. 707, 726 (2008).

66 See *Preserving Prosecutorial Independence*, *supra* note 63.

67 See Letter from Assistant Attorney General Ronald Weichs to Judiciary Chairman John Conyers (July 21, 2010), <https://lawprofessors.typepad.com/files/assistant-ag-ronald-weichs-letter.pdf>. Attorney General Michael Mukasey appointed Nora R. Dannehy, the acting U.S. attorney in Connecticut, to lead a criminal probe that ended in 2010. That investigation, which was limited to the Iglesias termination, determined that while the circumstances “be[spoke] undue sensitivity to politics on the part of DOJ officials who should answer not to partisan politics but to principles of fairness and justice” and “the actions of DOJ leadership were contrary to DOJ principles,” no criminal charges were warranted. *Id.*

68 U.S. DEP’T OF JUST. OFF. OF THE INSPECTOR GEN. & OFF. OF PROF. RESP., *supra* note 59.

69 *Id.* at 337.

as “arbitrary” and “fundamentally flawed.”⁷⁰ Additionally, the report noted the controversy “raised doubts about the integrity of Department prosecution decisions.”⁷¹

D. Previous Proposals Regarding DOJ Structure and Communications Between DOJ and the White House

Proposals to insulate the DOJ from political interference have included structural changes and regulation of communications between the department and the White House.

1. Proposals for DOJ Structural Reform

In the wake of the Watergate scandal, Senator Sam Ervin, who chaired the select committee that investigated Watergate, proposed legislation to create an independent DOJ. The bill would have limited the president’s power to remove the attorney general. Under this proposal the president would appoint the attorney general to a six-year term, subject to removal only “for good cause.”⁷² The attorney general would then appoint the FBI director as well as the U.S. attorneys and U.S. marshals for each judicial district.⁷³

This proposal faced strong opposition, and 14 of 17 witnesses testified that separating the DOJ from presidential control would violate the separation of powers doctrine.⁷⁴ Former Supreme Court Justice Arthur Goldberg, who concurred in this assessment, opined that the greatest permissible protection

70 *Id.* at 325, 356.

71 *Id.* at 358. For example, the report found that U.S. Attorney for the District of New Mexico David Iglesias was dismissed because of a desire among New Mexico Republicans, including U.S. Senator Pete Domenici, “to influence voter fraud prosecutions in a closely divided state [and] affect the timing of a public corruption case against a prominent Democrat in order to influence the outcome of an election.” *Id.* at 197.

72 *Removing Politics from the Administration of Justice: Hearings Before the Subcomm. on Separation of Powers of the S. Comm. on the Judiciary on S. 2803 and S. 2978*, 93rd Cong. 3 (1974) [hereinafter *Removing Politics*]. Years later, Judge Griffith Bell, President Carter’s first attorney general, prepared a memorandum advising on a definite term for the attorney general only removable only for malfeasance. In the memo he concluded the requested legislation was likely illegal and that “there is no method, short of a constitutional amendment, to separate the Attorney General from Presidential control.” *Proposals Regarding an Independent Attorney General*, 1 Op. O.L.C. 75 (1977).

73 *Removing Politics*, *supra* note 72.

74 *Id.* Witnesses included: Ted Sorenson, speechwriter and adviser to President John F. Kennedy; Nicholas Katzenbach, one of President Lyndon B. Johnson’s attorneys general; and former Supreme Court Justice Arthur Goldberg. *Id.* at III. The separation of powers doctrine reflects the constitutional distribution of political authority among the three branches of government: the legislative, the executive, and the judicial. JOHN C. KNECHTLE & CHRISTOPHER J. ROEDERER, *MASTERING CONSTITUTIONAL LAW* 28 (2d ed. 2015).

against improper presidential actions was to appoint attorneys general who are “capable of saying to a President, no, the law does not permit this; I will not permit this; and you must not engage in activities such as have been contemplated.”⁷⁵ Other critics of the proposal questioned whether it was desirable to have federal law enforcement removed from democratic control and whether it was possible to remove “politics from politics” to formulate and enforce a view of “the law” independent of policy considerations.⁷⁶ Voicing his disagreement with the legislation, Ted Sorenson, one of President Kennedy’s closest aides, argued:

Politics is necessarily tied up with policy, with one’s concept of the public interest and response to the public will. A president who campaigns on a “law and order” issue, or a narcotics or civil rights or organized crime issue, must not be confronted with an attorney general of sharply differing views appointed for a fixed term by his predecessor.⁷⁷

Other proposals also arose out of the Watergate scandal. For example, former Southern District of New York U.S. Attorney Whitney North Seymour, Jr. proposed to divide the DOJ by function.⁷⁸ To him, the DOJ was flawed because of the expectation that the attorney general “serve two masters, [the president and the law,] at the same time.” Seymour therefore proposed the creation of an Office of Chief Prosecutor, which would direct “all of the existing civil and criminal litigation and law enforcement functions in the Department of Justice.”⁷⁹ This new office would include the U.S. attorneys, and the president would retain the power to appoint them based on lists prepared by Circuit Nominating Commissions, comprised of appointees of the chief judges of the constituent courts.⁸⁰

75 *Removing Politics*, *supra* note 72, at 63.

76 CLAYTON, *supra* note 33, at 105.

77 *Removing Politics*, *supra* note 72, at 73. Sorenson further testified that “[l]aw enforcement faces enough problems today without responsibility for it at the federal level being divided between the president’s men and the attorney general’s. Do not fragment that responsibility—fix it, on the President, where it belongs. How else can a President be held responsible for his own Constitutional obligation to take care that the laws be faithfully executed?” *Id.* at 19.

78 *Id.* at 216.

79 *Id.*

80 *Id.* at 218.

Proposals to restructure the DOJ have persisted.⁸¹ For example, several commentators, including Bruce Einhorn⁸² and Garrett Epps,⁸³ have recently called for electing the attorney general. Many states already hold elections for their attorneys general.⁸⁴ Einhorn further proposed that the elected attorney general would appoint the FBI director and other officers, subject to the advice and consent of the Senate. Einhorn and Epps argue that such “independent stewardship of the Justice Department would act as a counterweight to any abuse of power by the president or his political appointees.”⁸⁵ While each of these proposals suggests that the solution to improper interference is to limit presidential authority by restructuring the DOJ, others have responded to these same concerns with less extreme proposals.

2. Proposals to Govern DOJ-White House Communications

As a result of Watergate and the special prosecutor investigation, White House and DOJ leadership since the Ford administration have promulgated rules governing contact regarding investigations and enforcement actions. All of these policies share a set of common features: establishing the White House Counsel’s Office and Office of the Attorney General as primary gatekeepers for initial contact; restricting communications based on function rather than personnel; and requiring information to be important *both* for performance of the president’s duties and appropriate from a law enforcement perspective before any communication is condoned.⁸⁶ The

81 Professor Jed Shugerman of Fordham Law School has proposed two alternative schemas for enhanced independence: (1) requiring all major departmental decisions be ratified by a commission comprised of both senior agency officials still appointed and removed at will by the president and independent directors of both parties with long statutory tenures only severable for cause or (2) formally converting quasi-judicial offices within the DOJ, like OLC, into independent agencies. Shugerman, *supra* note 4.

82 United States Immigration Judge, 1990-2007, Adjunct Professor of Law, Pepperdine University School of Law in Malibu, California.

83 Professor of Law, University of Baltimore School of Law. See Garrett Epps, *Why We Should Make Attorney General an Elective Office*, SALON (Mar. 7, 2007, 5:30 PM), https://www.salon.com/2007/03/09/attorney_general/; Garrett Epps, *Picking the People’s Lawyer*, SLATE (June 4, 2012, 5:01 PM), http://www.slate.com/articles/news_and_politics/the_hive/2012/06/fixing_the_constitution_electing_the_attorney_general_.html.

84 *State Attorneys Generals*, KAISER FAMILY FOUNDATION, <https://www.kff.org/other/state-indicator/state-attorney-generals>.

85 Bruce J. Einhorn, *Time to Let the American People Elect the US Attorney General*, HILL (June 20, 2017, 9:20 AM), <https://thehill.com/blogs/pundits-blog/the-administration/338536-its-time-we-let-the-american-people-elect-the-us>.

86 Wright, *supra* note 4, at 49.

number of parties permitted to communicate about pending investigations has increased and decreased with each administration.⁸⁷

During the George W. Bush administration, the Gonzalez op-ed and growing backlash against the 2006 U.S. attorney terminations led the Senate Judiciary Committee to consider legislation “to provide for limitations in certain communications between the Department of Justice and the White House Office relating to civil and criminal investigations.”⁸⁸ The initial Senate bill, Security from Political Interference in Justice Act of 2007, would have required communications about ongoing DOJ civil or criminal investigations to only include named senior Justice Department and White House officials or those they designate.⁸⁹ The House released its own version of the bill, creating a reporting requirement on communications between the DOJ and the White House and prohibiting communications by non-covered personnel.⁹⁰ The Senate committee subsequently adopted the House language but the bill never passed Congress.⁹¹

After the Security from Political Interference in Justice Act failed to pass Congress, Attorney General Michael Mukasey unilaterally issued revised guidelines in December 2007 that significantly narrowed the list of those permitted to communicate about ongoing matters.⁹² During the Obama administration, Attorney General Eric Holder further restricted

permissible “initial communications”⁹³ and reiterated that the DOJ would only advise the White House on “pending or contemplated criminal or civil investigations or cases when—but only when—it is important for the performance of the President’s duties and appropriate from a law enforcement perspective.”⁹⁴ A memorandum from Trump’s first White House counsel, Donald F. McGahn, II, continued the Obama-era restrictions “to ensure that DOJ exercises its investigatory and prosecutorial functions free from the fact or appearance of improper political influence.”⁹⁵

Support for various iterations of the Security from Political Interference in Justice Act has recently reemerged. For example, Protect Democracy proposed both codifying clear prohibitions on improper interference and requiring reporting of irregular contacts as priority interventions.⁹⁶ Citizens for Responsibility and Ethics in Washington (“CREW”) has also signaled support for mandated reporting on communication.⁹⁷ Finally, the Brennan Center Task Force on Democracy and the Rule of Law, which believes “Congress should not itself regulate how the executive branch deals with law enforcement,”⁹⁸ proposed requiring the White House to publish policies on who can contact agencies and to maintain a log of covered contacts.⁹⁹

3. Proposals to Insulate U.S. Attorneys

Proposals to insulate U.S. attorneys existed prior to the Watergate scandal and 2006 U.S. attorney dismissal incident. For example, proposals to remove principal officers within the DOJ from partisan politics and direct presidential control were

87 See Wright, *supra* note 4. During the George W. Bush Administration, Attorneys General John Ashcroft and Alberto Gonzalez largely expanded the list beyond prior limits. The Clinton-era policy only allowed seven people to have initial contacts about pending cases—the president, vice president, White House counsel, deputy White House counsel, attorney general, deputy attorney general and associate attorney general. See Letter from Attorney General Janet Reno to Lloyd N. Cutler, Special Counsel to the President (Sept. 29, 1994). Attorney General Ashcroft amended the policy in 2002 to permit the Offices of the Attorney General, Deputy Attorney General, Vice President, White House Counsel, National Security Council and the Office of Homeland Security in their entireties, at least 417 people at the White House and 42 DOJ officials, to communicate on non-national security related matters. See Memorandum from Attorney General John Ashcroft for Heads of Department Components and United States Attorneys (Apr. 15, 2002). Attorney General Gonzalez issued a new memorandum in 2006 adding the Office of Management and Budget as well as the Chief of Staff and Counsel to the Vice President to the list, swelling those permitted to communicate with the DOJ about pending investigations and cases to at least 895 people in the executive branch. See Memorandum from Attorney General Alberto Gonzales for Heads of Department Components and United States Attorneys (May 4, 2006).

88 S. 1845, 110th Cong. (2007).

89 *Id.*

90 See H.R. 3848, 110th Cong. § 3 (2007).

91 See S. 1845, 110th Cong. (2007); see also S. REP. NO. 110-203, at 7-8 (2007) (detailing legislative context).

92 Michael B. Mukasey, U.S. Attorney General, Remarks Before the American Bar Association (Aug. 12, 2008).

93 Initial communications were restricted to to the Attorney General and Deputy Attorney General at DOJ and the Counsel and Principal Deputy to the President, President and Vice President. Attorney General Eric Holder, *Communications with the White House and Congress*, Memorandum for Heads of Department Components & All U.S. Attorneys (May 11, 2009).

94 *Id.*; see also Memorandum from White House Counsel Kathryn Ruemmler for All White House Staff (Mar. 23, 2012).

95 Memorandum from White House Counsel Donald F. McGahn, II for All White House Staff (Jan. 27, 2017), <https://www.politico.com/f/?id=0000015a-dde8-d23c-a7ff-dfef4d530000>

96 PROTECT DEMOCRACY, *supra* note 4, at 31.

97 CITIZENS FOR RESPONSIBILITY & ETHICS IN WASHINGTON, TRUMP-PROOFING THE PRESIDENCY: A PLAN FOR EXECUTIVE BRANCH ETHICS REFORM 38 (2018), https://www.citizen.org/wp-content/uploads/migration/trump_proofing_the_presidency.pdf.

98 NAT’L TASK FORCE ON RULE OF LAW & DEMOCRACY, BRENNAN CENTER FOR JUSTICE, PROPOSALS FOR REFORM 18 (2018).

99 *Id.*

initially introduced in 1924 by Assistant Attorney General John Crim during President Warren G. Harding's administration.¹⁰⁰

Following Watergate, Senator Lloyd Bentsen, a Democrat from Texas, also introduced legislation that would have prohibited any individual closely associated with the president, his or her

campaign, or the political party apparatus that had supported his or her candidacy from serving in DOJ appointed offices and made the attorney general responsible for appointment and removal of United States attorneys.¹⁰¹ Though it passed the Senate in 1977, this bill was defeated in the House.¹⁰²

Alternatively, many scholars, like Sara Sun Beale,¹⁰³ believe that the president should retain the authority to appoint individuals who share his or her priorities and remove those who fail to follow those priorities.¹⁰⁴

¹⁰⁰ *Hearings Before the Select Committee on Investigation of the Attorney General*, 68th Cong. (1924). These proposals were introduced in the wake of the Teapot Dome scandal, which led to the conviction of President Warren Harding's secretary of the interior after he took bribes to lease petroleum reserves at low rates. Attorney General Harry M. Daugherty was investigated by Congress for his failure to investigate or prosecute the individuals who bribed the interior secretary. CLAYTON, *supra* note 33, at 99. After the resignation of his predecessor James Howard McGrath, who was investigated for committing tax fraud, Truman's last attorney general, James McGranery, similarly recommended Congress remove U.S. attorneys and other subordinate DOJ officials from partisan politics by making them part of the civil service. *Investigation of the Department of Justice: Hearing Before the H. Comm. on the Judiciary*, 82d Cong. (1952-1953).

¹⁰¹ S. 3395, 93d Cong. (1975). See also 121 Cong. Rec. 33530 (1975).

¹⁰² S. 1682, 94th Cong. (1977).

¹⁰³ Charles L.B. Lowndes Professor, Duke Law School.

¹⁰⁴ Sara Sun Beale, *Rethinking the Identity and Role of United States Attorneys*, 6 OHIO ST. J. CRIM. L. 369, 431 (2009).

II. The Legality of Limiting Residential Influence Over Criminal Law Enforcement

The president's powers over the DOJ are rooted primarily in two provisions of the Constitution's Article II. The Executive Vesting Clause¹⁰⁵ is central to the president's administrative control over the DOJ while the Take Care Clause¹⁰⁶ provides the basis for limiting the president's undue influence over DOJ prosecutions and investigations by requiring the president act in good faith while executing the law.¹⁰⁷ Together, the clauses establish the president's preeminent role as the head of the executive branch of the federal government, granting the president the ability to shape law enforcement policies and supervise the conduct of other executive branch officials.¹⁰⁸ There is disagreement about how, if at all, Article II operates to limit the president's powers as chief executive.¹⁰⁹

The structure, history, and phrasing of the Take Care Clause support tying the president's exercise of presidential power directly to the duties of his office.¹¹⁰ Based on this interpretation, this report recommends three proposals to limit undue White House interference in DOJ investigations and federal criminal prosecutions. Parts II.A, II.B, and II.C provide a theoretical framework for the proposals recommended in Part III and make clear that these proposals are anchored in the structure, history, and phrasing of the Take Care Clause. Part A argues that Article II, through the Take Care Clause, provides the basis for limiting presidential interference in DOJ investigations and prosecutions. Part B explains that it is Congress, not the president, that may determine how to carry the law into effect. Part C makes clear that because prosecutors act quasi-judicially, they must perform investigations impartially and without partisan motives.

A. A Duty to Take Care Does Not Mean "Take Care of It Yourself"

The framers chose the language of the Take Care Clause to address concerns about the scope of presidential power, especially with respect to carrying out administrative functions. At the Constitutional Convention of 1787, Dr. James McClurg expressed concerns over a phrase used in the "resolution

respecting the national executive" ("the Resolution").¹¹¹ The Resolution proposed giving the president the "power to carry into execution the National Laws," and Dr. McClurg worried about the scope of implied powers that could be construed from the phrase.¹¹² He suggested it might be necessary for the Committee on Detail to "determine the means by which the executive is to carry the laws into effect, and to resist combinations [against the law]."¹¹³ The draft produced by the Committee on Detail addressed Dr. McClurg's concerns by replacing the phrase "power to carry into execution the National Laws" with the language found in the Take Care Clause, requiring the president to "take Care that the Laws be faithfully executed."¹¹⁴ By adopting the language of the Take Care Clause, the framers limited the scope of presidential power.¹¹⁵

The Take Care Clause was inspired by the history of the "faithful execution" of responsibilities by public and private officeholders.¹¹⁶ At the time of the Constitution's framing, public and private officers were bound to "faithfully execute" their responsibilities by a duty of fidelity.¹¹⁷ Historically, the imposition of a duty of fidelity through the language of "faithful execution" on officeholders served three basic purposes: first, to ensure "true, honest, diligent, due, skillful, careful, good faith, and impartial execution" of their responsibilities; second, to prevent the abuse of discretion for the purposes of misappropriating profits; and, third, to prevent officeholders from acting outside the scope of their legal powers.¹¹⁸ In using

105 The Executive Vesting Clause states, "[t]he executive Power shall be vested in a President of the United States of America." U.S. CONST. art. II, § 1.

106 The Take Care Clause states that the President "shall take Care that the Laws be faithfully executed." U.S. CONST. art. II, § 1.

107 COREY BRETTSCHEIDER, *THE OATH AND THE OFFICE* 16-18 (2018).

108 Wright, *supra* note 4, at 27-28.

109 Lessig & Sunstein, *supra* note 16, at 8.

110 *Id.*

111 *Id.* at 66.

112 *Id.*

113 *Id.*

114 *Id.*

115 U.S. CONST. art. II, § 2; Wright, *supra* note 4, at 29.

116 See Andrew Kent, Ethan J. Leib & Jed Handelsman Shugerman, *Faithful Execution and Article II*, 132 HARV. L. REV. 2111, 2140 [hereinafter *Faithful Execution*] (noting that Take Care Clause and Presidential Oath Clause both share an element of faithful execution). See also U.S. CONST. art. II, § 2, 3. The "faithful execution" language also appears in the Presidential Oath. U.S. CONST. art. I, § 1, cl. 8.

117 See *Faithful Execution*, *supra* note 116, at 2181 (noting that "the project of fiduciary constitutionalism" needs to be "revised to accommodate the fact that the fiduciary obligations entailed by the Faithful Execution Clauses flow at least as much from the law of public office as they do from inchoate private fiduciary law from England").

118 *Id.* at 2118 (explaining that the duty of fidelity had three basic components: (1) "faithful execution was repeatedly associated in statutes and other legal documents with true, honest, diligent, due, skillful, careful, good faith, and impartial execution of law or office"; (2) "the faithful execution duty was often imposed to prevent officeholders from misappropriating profits that the discretion inherent in their offices might afford them"; and (3) "the duty was imposed because of a concern that officers might act ultra vires").

the language of faithful execution in Article II, the framers incorporated the duty of fidelity¹¹⁹ into the Constitution so the president, in exercising his or her executive power, would have a constitutional obligation to eschew self-interested action,¹²⁰ including actions motivated by partisanship.¹²¹ Thus, the Constitution's command that the president "take Care that the Laws be faithfully executed" subordinates the president to the law¹²² and prevents him or her from acting beyond the scope of legal authority.¹²³

The structure of Article II suggests the Executive Vesting Clause limits the president's executive powers to carrying out the duties imposed on the president by the Take Care Clause.¹²⁴ The president's duty to "take Care that the Laws be faithfully executed" can only be carried out because the "executive power" was vested in the presidency.¹²⁵ The powers granted to the president exist solely for the purpose of executing his or her duties.¹²⁶ The placement of the Take Care Clause in Article II, Section 3 of the Constitution, among a variety of other presidential duties,¹²⁷ supports the understanding that the president's duty to "faithfully execute" the law imposes a limit on the president's executive authority by requiring the president act in good faith while carrying the law into execution.¹²⁸

119 See *id.* at 2188 (noting that the "substantive original meaning of faithful execution" comprised "a no self-dealing restriction; a subordination of the President to the laws, barring *ultra vires* action; and a requirement of affirmative diligence and good faith.")

120 See *id.* at 2120.

121 Admittedly, proving an individual's subjective intent will be difficult, and the distinction between actions motivated by self-interest and those motivated by the "right" reasons will not always be easy to apply. Yet, given that the president's faithful execution duties may, among others, include "no-bad faith, no self-dealing," and the "impartial discharge of the duties of office," the president's duty to refrain from self-interested action would encompass the duty to avoid actions motivated by private political interests. See *id.* at 9-10, 38.

122 U.S. CONST. art. II, §§ 2, 3.

123 Wright, *supra* note 4, at 30.

124 Brett Schneider, *supra* note 107, at 17.

125 *Id.*

126 *Id.*

127 "He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States." U.S. CONST. art. II, §§ 2, 3.

128 Article II, Section 2 articulates most of the president's powers. The Take Care Clause, however, is found in Article II, Section 3 alongside a variety of other presidential duties. Lessig & Sunstein, *supra* note 16, at 62.

B. Congress Can Set the Standard for "Faithful Execution"

While revising the language of the Take Care Clause, the framers also modified the language now found in the Necessary and Proper Clause to empower Congress, not the president, to supplement the powers of the federal government.¹²⁹ The Necessary and Proper Clause gives Congress the power to "make all laws which shall be necessary and proper for carrying into Execution" any of the powers vested in the U.S. government.¹³⁰ The framers conferred onto the legislative branch a power that was substantially similar to the "power to carry into execution the National Laws," a power that was deliberately not granted to the president at the Constitutional Convention of 1787.¹³¹ Thus, where a law is required to supplement the powers of the federal government, it is Congress, acting through the Necessary and Proper Clause, not the president, that supplements that power and determines how it is to be exercised.¹³²

Through the Necessary and Proper Clause, Congress plays a significant role in determining how the president can "faithfully execute" the laws. In *Marbury v. Madison*,¹³³ the Supreme Court discussed the degree to which Congress could control the executive's administrative function.¹³⁴ The controversy reviewed in *Marbury* arose when President Thomas Jefferson, shortly after entering office, ordered Secretary of State James Madison to withhold the judicial commission of William Marbury, a last-minute appointee of outgoing President John Adams.¹³⁵ In *Marbury*, the Court explained that executive officers can potentially act in two different capacities: as agents of the president and as agents of the law.¹³⁶ Executive officers who

129 *Id.*

130 U.S. CONST. art. I, § 8.

131 Lessig & Sunstein, *supra* note 16, at 62. James Madison, a proponent of the "carry into execution" language, believed the phrase would give the president the power to execute the laws as well as the implied power to define how the laws would be "carried into effect." *Id.* at 65.

132 *Id.* at 67; see also *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 588 (1952) (noting that "[t]he President's order does not direct that a congressional policy be executed in a manner prescribed by Congress—it directs that a presidential policy be executed in a manner prescribed by the President."). In his concurrence, Justice Frankfurter noted that "unenumerated powers do not mean undefined powers. The separation of powers built into our Constitution gives essential content to undefined provisions in the frame of our government." *Id.* at 610 (Frankfurter, J., concurring).

133 5 U.S. (1 Cranch) 137 (1803).

134 *Id.*

135 *Id.*

136 Lessig & Sunstein, *supra* note 16, at 56.

exercise power legally vested in the president by law (i.e., by the Constitution or Congress), either at the president's command or on his behalf, act as agents of the president.¹³⁷ When executive officers act pursuant to authority granted to them by Congress, they act as agents of the law.¹³⁸ Thus, an executive officer adhering to statutorily created responsibilities, such as a prosecutor deciding whether to commence a prosecution against an individual based on legal criteria established by Congress, acts as an agent of the law, and must do as the law commands, the president's direction notwithstanding.¹³⁹ A prosecutor must, therefore, exercise prosecutorial discretion on an individual basis independent of any direct presidential command.

C. Prosecutors Are Controlled Only by the Law

Prosecutors, who act "quasi-judicially," must engage in objective and non-partisan decision-making. The work of prosecutors has been described as "quasi-judicial" because prosecutors are expected to pursue justice independent of political concerns.¹⁴⁰ In a series of cases, the Supreme Court has recognized that when executive officers have a duty to make decisions that affect the liberty interests of individuals, the discharge of that duty takes on a quasi-judicial character.¹⁴¹ Further, when the liberty interests of an individual are at stake, due process requires the government to follow fair and neutral procedures.¹⁴² For example, decisions made by criminal law enforcement officials related to initiating investigations, seeking grand jury indictments, dismissing or filing of charges, and offering plea bargains require the government to follow fair and neutral

procedures.¹⁴³ These discretionary decisions affect individual liberty interests and are made only after the prosecutor has heard or reviewed relevant evidence and arguments.¹⁴⁴

Because of the individual liberty interest at stake, the DOJ has established a series of guidelines on prosecutorial discretion to "promote the reasoned exercise of prosecutorial authority and contribute to the fair, evenhanded administration of the federal criminal laws."¹⁴⁵ The DOJ published these guidelines recognizing that "the consequences for those accused of criminal wrongdoing, crime victims, and their families whether or not a conviction ultimately results."¹⁴⁶ These guidelines divide the prosecutorial process into several stages, each of which is governed by a unique set of criteria.¹⁴⁷ For example, Title 9-27 of the DOJ Guidelines sets forth the requirements for conducting an investigation,¹⁴⁸ grounds for commencing prosecution,¹⁴⁹ the standards for pursuing charges,¹⁵⁰ and the importance

137 *Marbury*, 5 U.S. at 165-66; Lessig & Sunstein, *supra* note 16, at 57.

138 *Id.* As used here, "an agent of the law" carries the same meaning as "officer of the law" (the terminology originally used in *Marbury*). *Marbury*, 5 U.S. at 166. We altered the terminology to avoid confusion, as in the modern lexicon "officer of the law" is closely associated with police officers.

139 Lessig & Sunstein, *supra* note 16, at 55-57. In *Kendall v. United States*, the Supreme Court held that Congress could vest executive officials with the power to act independently of the president—Congress may require executive officials to answer to the law rather than the president: "There are certain political duties imposed upon many officers in the executive department, the discharge of which is under the direction of the President. But it would be an alarming doctrine, that congress cannot impose upon any executive officer any duty they may think proper, which is not repugnant to any rights secured and protected by the constitution; and in such cases, the duty and responsibility grow out of and are subject to the control of the law, and not to the direction of the President. And this is emphatically the case, where the duty enjoined is of a mere ministerial character." *Kendall v. United States ex rel. Stokes*, 37 U.S. 524, 610 (1838).

140 *Can the President Control*, *supra* note 4, at 23.

141 See *Myers v. United States*, 272 U.S. 52, 135 (1926); see generally *Goldberg v. Kelley*, 397 U.S. 254 (1970); *Mathews v. Eldridge* 424 U.S. 319 (1976).

142 See generally *Goldberg*, 397 U.S. 254.

143 *Can The President Control*, *supra* note 4, at 23.

144 *Id.*; Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 *FORDHAM L. REV.* 2117, 2125 (1998).

145 DEP'T OF JUST., *JUSTICE MANUAL* § 9-27.001, <https://www.justice.gov/jm/jm-9-27000-principles-federal-prosecution>.

146 *Id.*

147 *Id.* at § 9-27.

148 *Id.* at § 9-27.200 ("If the attorney for the government concludes that there is probable cause to believe that a person has committed a federal offense within his/her jurisdiction, he/she should consider whether to: (1) Request or conduct further investigation; (2) Commence or recommend prosecution; (3) Decline prosecution and refer the matter for prosecutorial consideration in another jurisdiction; (4) Decline prosecution and commence or recommend pretrial diversion or other non-criminal disposition; or (5) Decline prosecution without taking other action.").

149 *Id.* at § 9-27.220 ("The attorney for the government should commence or recommend federal prosecution if he/she believes that the person's conduct constitutes a federal offense, and that the admissible evidence will probably be sufficient to obtain and sustain a conviction, unless (1) the prosecution would serve no substantial federal interest; (2) the person is subject to effective prosecution in another jurisdiction; or (3) there exists an adequate non-criminal alternative to prosecution.").

150 *Id.* at § 9-27.230 ("In determining whether a prosecution would serve a substantial federal interest, the attorney for the government should weigh all relevant considerations, including: (1) Federal law enforcement priorities, including any federal law enforcement initiatives or operations aimed at accomplishing those priorities; (2) The nature and seriousness of the offense; (3) The deterrent effect of prosecution; (4) The person's culpability in connection with the offense; (5) The person's history with respect to criminal activity; (6) The person's willingness to cooperate in the investigation or prosecution of others; (7) The person's personal circumstances; (8) The interests of any victims; and (9) The probable sentence or other consequences if the person is convicted."); *id.* at § 9-27.260 ("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 of the decision on the attorney's own professional or personal circumstances.").

of maintaining disinterestedness throughout the process.¹⁵¹ The DOJ Guidelines show that decisions related to criminal law enforcement are the culmination of an agency decision making process, which has immediate and appreciable legal consequences.¹⁵² An individual's due process rights therefore limit the ability of government officials, even the president, to interfere with the objective decision-making processes associated with enforcement of criminal laws.¹⁵³

Prosecutors are bound by their oath, even when multiple duties come into conflict with one another. The laws, regulations, and rules of professional conduct require federal prosecutors to act as advocates for the executive branch, while also imposing a duty to "seek justice."¹⁵⁴ This duty requires prosecutors to ensure that defendants have fair and impartial trials.¹⁵⁵

In contrast to a lawyer practicing in the private sector, a prosecutor must take into account the public interest,¹⁵⁶ while simultaneously zealously advocating¹⁵⁷ on behalf of the executive branch.¹⁵⁸ A significant tension may arise if federal prosecutors are ordered by White House officials—including the president—to act in a manner that is contrary to the public interest. DOJ prosecutors may turn to their oath of office to resolve this tension because, while they must act as advocates for the executive branch, prosecutors cannot violate their own oath to "support and defend the Constitution" and to "faithfully discharge the duties of the office."¹⁵⁹

151 *Id.* at § 9-27.001.

152 See generally *Bennett v. Spear*, 520 U.S. 154 (1997).

153 PROTECT DEMOCRACY, *supra* note 4, at 17.

154 See MODEL RULES OF PROF'L CONDUCT R. 3.8 CMT. 1; Bruce A. Green, *Why Should Prosecutors "Seek Justice"?*, 26 FORDHAM URB. L.J. 607, 625 (1999) [hereinafter *Seek Justice*] (explaining that justifications for the duty to seek justice could be rooted in the prosecutor's power or the prosecutor's professional role as representative of the sovereign).

155 *Berger v. United States*, 295 U.S. 78, 88 (1935) ("The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereign whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt should not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."). See, e.g., *People v. Lee Chuck*, 78 Cal. 317, 330 (Cal. 1889); *Seek Justice*, *supra* note 154, at 613-14.

156 See *Berger*, 295 U.S. at 88, *Seek Justice*, *supra* note 154, at 614.

157 See MODEL RULES OF PROF'L CONDUCT pmbl. 2 ("As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system").

158 Michael I. Krauss, *The Lawyer as Limo: A Brief History of the Hired Gun*, 8 U. CHI. L. SCH. ROUNDTABLE 325 (2001). The identity of the government lawyer's client is contested. See Note, *Rethinking the Professional Responsibilities of Federal Agency Lawyers*, 115 HARV. L. REV. 1170, 1180-81 (2002) (noting that to the question of who the government lawyer's client is, "legitimate potential answers" are "the government generally, the agency, the President, the public interest—each of which describes a part of the government lawyer's role" and that the "identity of the client is inherently indeterminate"); *Seek Justice*, *supra* note 154, at 633 ("A lawyer serving in the role as criminal prosecutor is distinguished by the identity of the client, the amount of authority delegated to the lawyer to act on behalf of the client and the nature of the client's interests and ends in the criminal context.").

159 5 U.S.C. § 3331 (2016).

III. Reform Proposals

The following three proposals are designed to prohibit actions motivated by personal animus or self-interest that are aimed at influencing decisions related to the criminal law enforcement process.¹⁶⁰ The proposals are not intended to impede the president's right to set enforcement priorities and to intervene in matters relating to core executive functions, such as protecting the security of the United States from foreign threats.

Proposal 1 recommends that Congress enact legislation clearly stating the president and White House officials cannot exercise influence over any decision related to the investigation or prosecution of any individual, except where a core executive function is implicated. Proposal 2(a) recommends that Congress enact legislation codifying the DOJ's Justice Manual guidelines related to investigations, prosecutions, and charging decisions in order to emphasize that prosecutors must follow the law above all else. Proposal 2(b) recommends Congress create duties for prosecutors in situations where the president or other White House officials order them to contravene their statutory duties. In those situations, prosecutors should have duties to not resign and to report the unlawful order. Proposal 3 recommends Congress empower the Office of Government Ethics to gradually define the parameters of non-financial conflicts of interest that require recusal of DOJ employees from certain matters.

Reform Proposal 1: Specifically prohibit the president from interfering in the law enforcement function of the DOJ.

Congress should enact legislation prohibiting White House officials, including the president, from requesting or demanding, either directly or indirectly, any officer or employee of the DOJ to commence, terminate, or otherwise influence any investigation, prosecution, or charging decision related to the criminal liability of a particular person, except where the discharge of core executive functions, such as defending against national security threats, makes such actions permissible. The legislation should make clear that while non-DOJ officials may not direct or interfere with any criminal law enforcement process, such officials may refer matters to the DOJ for investigation and, if necessary, participate in DOJ prosecutions as witnesses.¹⁶¹

160 Preventing actions motivated by self-interest is consistent with the president's duty to see that the laws are "faithfully executed" as this encompasses the principles of good faith and that, under the rule of law "no man should be his own judge." See generally *United States v. Armstrong*, 517 U.S. 456 (1996).

161 This proposal is influenced by and substantially similar to a proposal put forward by the organization Protect Democracy. See PROTECT DEMOCRACY, *supra* note 4, at 31.

Proposal 1 specifically focuses on preventing White House personnel from exercising any undue influence in the criminal law enforcement process. Focusing on the acquired executive function of criminal law enforcement, Proposal 1 creates a clear line that the president and other White House officials cannot cross. The proposal only targets the acquired functions granted to the executive by Congress. Therefore, Congress can direct how the president is to carry those functions into effect.¹⁶² This proposal also preserves the president's ability to set law enforcement priorities.¹⁶³ As the chief executive, the president plays a legitimate role in prioritizing certain categories of criminal law enforcement as a matter of public policy.¹⁶⁴ In setting enforcement priorities, the president weighs a number of factors, such as resource constraints, conflicting congressional mandates, and deterrence.¹⁶⁵ But Congress may appropriately limit the president's ability to determine the outcome of individual cases so long as the president's power to set enforcement priorities is retained.

While the president may continue to set enforcement priorities, he may not interfere with federal investigations or criminal prosecutions of specific individuals. In *Morrison v. Olson*, the Supreme Court considered the validity of an independent prosecutor appointed, pursuant to the Ethics in Government Act of 1978, to investigate, and, if necessary, prosecute government officials for their roles in the Iran-Contra affair.¹⁶⁶ The Court determined the Ethics in Government Act did not violate the separation of powers doctrine because it did not interfere with the core functions of the executive branch and did not diminish the power of the executive branch.¹⁶⁷ The Supreme Court did not regard prosecutorial decision-making as a core executive function. Instead, it supported the proposition that prosecutorial decision-making is an acquired executive function.¹⁶⁸ A congressional mandate explicitly prohibiting presidential and White House interference in specific criminal

162 See *supra* note 141.

163 See generally *Armstrong*, 517 U.S. 456.

164 See *The President Control*, *supra* note 4, at 6.

165 Enforcement of Immigration Law provides an illustrative example. Immigration agencies have the ability to pursue approximately 400,000 deportation cases a year, roughly 4% of the undocumented population in the U.S. While the law provides that persons without documentation are subject to deportation, Congress has also mandated that certain classes of aliens, such as those who have committed violent crimes, be prioritized for deportation. See Memorandum from Jeh Johnson, Homeland Security Secretary, to Leon Rodriguez, Director U.S. Citizenship and Immigration Services, Thomas S. Winkowski, Acting Director U.S. Immigration and Customs Enforcement, and R. Gil Kerlikowske, Commissioner U.S. Customs and Border Protection (Nov. 20, 2014).

166 See *Morrison v. Olson*, 487 U.S. 654 (1998).

167 *Id.* at 679, 691; *Can the President Control*, *supra* note 4, at 6.

168 See generally *Morrison*, 487 U.S. 654 (1998).

prosecutions is consistent with the holding in *Morrison*, so long as the mandate does not prevent the president from performing his or her core executive functions.¹⁶⁹

The legislation should be modeled after 26 U.S.C. § 7217, which was enacted in response to President Nixon’s use of the Internal Revenue Service to target his political enemies. Section 7217 prohibits certain executive branch officials, including the president, vice president, and members of their staffs from “request[ing], directly or indirectly, any officer or employee of the Internal Revenue Service to conduct or terminate an audit or other investigation of any particular taxpayer with respect to the tax liability of such taxpayer.”¹⁷⁰ The legislation, however, should permit non-DOJ officials to refer matters to the DOJ for possible investigation. If it is determined that the matter referred to the DOJ warrants criminal investigation, the DOJ may call upon the official who made the referral to testify as a witness during the investigation or prosecution.

Proposal 1 could raise concerns related to democratic accountability and uniform enforcement of the law. Democratic accountability concerns are raised whenever individuals within the federal government are put beyond the control of elected officeholders.¹⁷¹ Uniform enforcement concerns might arise if prosecutors pursue different enforcement priorities.¹⁷² Both concerns are accounted for in Proposal 1. Democratic accountability is preserved under Proposal 1 because the proposal does not affect the president’s ability to remove prosecutors.¹⁷³

The president’s ability to set uniform enforcement priorities or shift enforcement priorities in response to changing circumstances would also be unaffected under Proposal 1. By focusing on the process of prosecution rather than the policies of prosecution, prosecutors would remain bound to follow the president’s general enforcement directives.¹⁷⁴ The president’s ability to set enforcement priorities will allow him or her to continue to “supervise and guide [the] construction of the statutes under which [the DOJ] act[s] in order to secure that unitary and uniform execution of the laws.”¹⁷⁵

169 *Id.*

170 26 U.S.C. § 7217; PROTECT DEMOCRACY, *supra* note 4, at 31.

171 See *generally* Free Enterprise Fund v. PCAOB, 561 U.S. 477 (2010).

172 PROTECT DEMOCRACY, *supra* note 4, at 24.

173 See *generally* Free Enterprise Fund, 561 U.S. 477.

174 See ELLIOT RICHARDSON, THE CREATIVE BALANCE 27 (1976) (noting the distinction between the “proper role of the political process in the shaping of legal policies and the perversion of the legal process by political pressure”).

175 *Myers v. United States*, 272 U.S. 52, 135 (1926); see also *Can the President Control*, *supra* note 4, at 53.

Reform Proposal 2: Prohibit prosecutors from acting on undue White House directives related to specific criminal matters and create a duty for prosecutors not to resign in the face of unlawful White House interference and to report any such interference.

- (a) Congress should enact legislation that codifies DOJ Justice Manual guidelines related to investigations, prosecutions, and charging decisions. The statutory expansion must reinforce the prosecutor’s duty to faithfully execute the laws by specifically stating that prosecutors, when making decisions or exercising discretion related to specific criminal prosecutions, are agents of the law and must do as the law commands, instructions from the president or other White House officials notwithstanding.¹⁷⁶
- (b) The congressional enactment should also clarify that prosecutors have an affirmative duty not to resign if the president or another White House official demands the prosecutor take action that would violate his or her duties under the law. Any prosecutor who receives an improper command under this law must also report the command to the DOJ’s Inspector General.

Proposal 2 aims to address instances in which a president or another White House official issues orders or instructions that put the prosecutor’s responsibility to advocate for the executive into conflict with the prosecutor’s duty to “seek justice.”¹⁷⁷ In such instances, Proposal 2(a) clarifies that prosecutors cannot consider the order or instruction when making decisions related to any phase of the criminal law enforcement process.

Title 9-27 of the DOJ’s Justice Manual recognizes several unique stages of the criminal law enforcement process and provides specific criteria to guide decisions related to

176 This reform would rely on the distinction made in *Marbury*, which the Court further elaborated on in *Kendall*, where it stated,

But it by no means follows, that every officer in every branch of that department is under the exclusive direction of the president. Such a principle, we apprehend, is not, and certainly cannot be claimed by the president. There are certain political duties imposed upon many officers in the executive department, the discharge of which is under the direction of the president. But it would be an alarming doctrine, that congress cannot impose upon any executive officer any duty they may think proper, which is not repugnant to any rights secured and protected by the Constitution; and in such cases, the duty and responsibility grow out of and are subject to the control of the law, and not to the direction of the president.

Kendall, 37 U.S. at 610 (1838).

177 See *supra* Part II.

investigations, prosecutions, and the charging of offenses.¹⁷⁸ This listing in the Justice Manual, and the Justice Manual as a whole, are notable because they lend support to the proposition that prosecutors execute a quasi-judicial function.¹⁷⁹ This proposition is further supported by the Justice Manual's preamble, where it notes that the commencement of criminal enforcement proceedings against an individual can have severe consequences on that individual's liberty interests.¹⁸⁰ Yet, courts have held that violations of DOJ guidelines bear little legal significance.¹⁸¹ Because the Justice Manual specifically provides that it "does not create substantive or procedural rights enforceable by others," persons who fall victim to guideline violations are left without judicial recourse.¹⁸² A congressional enactment based on Proposal 2(a), that codifies the factors specified in Title 9-27 of the Justice Manual,¹⁸³ would link the prosecutor's quasi-judicial responsibilities to the statutory powers of their office, thereby giving legal recourse to persons who are improperly subjected to criminal law enforcement processes.

Currently, 28 U.S.C. § 516 vests the power to conduct investigations and litigation in officers of the DOJ, subject to the direction of the attorney general. While the statute empowers the DOJ to conduct investigations and litigation on behalf of the federal government, it does not explicitly state that DOJ officers and the attorney general must exercise these powers independently of the president. Codifying the criteria specified in Title 9-27 of the Justice Manual will clarify that DOJ officials function as agents of the law when making decisions related to the criminal law enforcement process and must therefore do as the law commands, even if this means defying a presidential directive.¹⁸⁴

Proposal 2(b) calls for the attorney general and prosecutors, as agents of the law, to refuse to uphold orders from White House officials that seek to impede, influence, or interfere with a

criminal investigation.¹⁸⁵ In the absence of a clear congressional mandate, refusing to uphold an order could present a dilemma for the attorney general or prosecutor. He or she may view an attorney general's or a prosecutor's role as an agent of the law as being in conflict with their role as an advocate for the executive branch.¹⁸⁶ The attorney general or prosecutor may even be pressured into resigning if he or she refuses to obey a presidential command.¹⁸⁷ Congress must make clear that in instances where an attorney general or prosecutor is ordered to obstruct, impede, or interfere with a criminal investigation, the attorney general or prosecutor has an affirmative duty not to resign and must refuse to uphold the order.¹⁸⁸ Furthermore, the attorney general or prosecutor receiving the order should be required to detail the matter in writing and explain why he or she believes the president violated the duty to faithfully execute the law. The attorney general or prosecutor must then transmit the explanation to the DOJ's inspector general, and possibly to Congress, for an investigation.

Proposal 2 is likely to raise concerns about democratic accountability and the president's ability to respond to widespread criminal conduct by changing enforcement priorities. However, Proposal 2 maintains democratic accountability by preserving the president's ability to remove prosecutors.¹⁸⁹

178 See generally JUSTICE MANUAL, *supra* note 145.

179 Lynch, *supra* note 144.

180 See JUSTICE MANUAL, *supra* note 145.

181 See *United States v. Lee*, 274 F.3d 484, 493 (8th Cir. 2001). See generally *Nichols v. Reno*, 124 F.3d 1376 (10th Cir. 1997); *United States v. Busher*, 817 F.2d 1409, 1411-12 (9th Cir. 1987). Cf. *United States v. Craveiro*, 907 F.2d 260, 264 (1st Cir. 1990).

182 See JUSTICE MANUAL, *supra* note 145, at § 1-1.200.

183 See *supra* Part II.C.

184 See *supra* Part II.B.

185 See *id.* ("As defined by statute and precedent, the crime of obstruction occurs when an individual 'corruptly' endeavors to impede or influence an investigation or other proceeding, and the word 'corruptly' is understood to mean 'with an improper purpose.'").

186 See *supra* Part II.C.

187 See *supra* notes 49-52.

188 See *Faithful Execution*, *supra* note 116, at 65 ("The seemingly discretionary pardon power in Section 2 may similarly be curtailed by the duty of faithful execution, prohibiting (at least) self-pardons. And it may also restrict the President's power to dismiss officials for primarily self-protective purposes against the public interest, especially given that removal power is not explicitly mentioned in the text while the requirement of faithful execution is, doubly."). Sally Yates, who considered President Trump's ban on travel from certain majority-Muslim nations to be illegal, wrote to DOJ attorneys stating,

I am responsible for ensuring that the positions we take in court remain consistent with this institution's solemn obligation to always seek justice and stand for what is right. At present, I am not convinced that the defense of the Executive Order is consistent with these responsibilities nor am I convinced that the Executive Order is lawful. Consequently, for as long as I am the Acting Attorney general, the Department of Justice will not present arguments in defense of the Executive Order, unless and until I become convinced that it is appropriate to do so.

Letter from Sally Yates, Acting Attorney General (Jan. 30, 2017), <https://www.nytimes.com/interactive/2017/01/30/us/document-Letter-From-Sally-Yates.html>.

189 See *Free Enterprise Fund*, 561 U.S. at 697-98.

Additionally, Proposal 2 does not interfere with the president's ability to direct resources for criminal investigations. It is not unreasonable to assume that situations may arise where widespread criminal conduct may lead a president to request that the attorney general take legitimate, robust action.¹⁹⁰ For this reason, Proposal 2 is designed to protect prosecutors from undue influence only when they are making criminal law enforcement decisions related to specific individuals. As such, Proposal 2 maintains the president's power to shift general enforcement priorities in response to changing circumstances and requests proactive investigatory action from the DOJ when it relates to widespread criminal activity.¹⁹¹

Reform Proposal 3: Mandatory recusal for DOJ employees and officials where private and personal considerations conflict with the public interest.

Congress should enact legislation mandating DOJ officials report to the Office of Governmental Ethics ("OGE") all personal or private interests that might conflict with the public interest when they are involved with any aspect of the criminal law enforcement process. Further, the legislation should mandate that DOJ officials must recuse themselves from all aspects of a relevant case when the OGE has determined personal or private interests pose a "significant risk" to public interest. Congress should permit the OGE to interpret the term "significant risk."

Proposal 3 is designed to allow the OGE to gradually determine what type of non-financial conflicts of interest might interfere with the prosecutor's duty to the public interest. Prosecutors are required to support and defend the Constitution while also seeking justice in an impartial fashion.¹⁹² Because prosecutors

make decisions that affect defendants while also accounting for the public interest, a prosecutor may be deemed to have a fiduciary duty to the public.¹⁹³ Adhering to their duty to the public requires prosecutors to neither further their own personal interests nor to further the private interests of others.¹⁹⁴ Thus, in instances when a prosecutor is acting pursuant to a presidential order and commences a criminal proceeding against the president's political adversaries, not only does the president violate his or her fiduciary duty for ordering such a prosecution,¹⁹⁵ the prosecutor also violates his or her duty to seek justice in a disinterested fashion.¹⁹⁶ In such an instance, the prosecutor violates his or her duty to the public interest because the law enforcement process was motivated by the private interests of the president.¹⁹⁷

The American Bar Association's Model Rules of Professional Conduct state that a conflict of interest exists where there is a "significant risk" that a lawyer's ability to consider, recommend, or carry out an appropriate course of action for his or her client will be "materially limited" as a result of the lawyer's other responsibilities or interests.¹⁹⁸ The Commentary on the Model Rules states that determining what constitutes a "significant risk" is not dependent on "[t]he mere possibility of subsequent harm" to the lawyer's client. Instead, the focus is on "the likelihood that a difference in interests will eventuate" and whether those interests will "materially interfere with the lawyer's independent professional judgment" in considering alternatives or pursuing reasonable courses of action on behalf of the client.

Defining non-financial conflicts of interest that pose a "significant risk" to prosecutors' ability to act in the public interest does present some difficulties. Because prosecutors function within a bureaucratic governmental institution, a prosecutor's conflict could arise out of "any personal belief, ambition or institutional interest" that undermines the prosecutor's ability to conduct prosecution in a disinterested manner.¹⁹⁹ At the federal level, conflict of interest guidelines have rarely ventured beyond defining the scope of financial

190 See *Can The President Control*, *supra* note 4, at 13. See also Barack Obama, *The President's Role in Advancing Criminal Justice Reform*, 130 HARV. L. REV. 811, 823 (2017) ("[P]articulate 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.").

191 See Barack Obama, President, United States of America, State of the Union Address (Jan. 24, 2012) ("I'm asking my Attorney General to create a special unit of federal prosecutors and leading state attorneys general to expand our investigations into the abusive lending and packaging of risky mortgages that led to the housing crisis").

192 See, e.g., *Young v. United States ex. rel. Vuitton et Fils S.A.*, 481 U.S. 787, 814 (1987); Bruce A. Green & Rebecca Roiphe, *Rethinking Prosecutors' Conflicts of Interest*, 58 B.C. L. REV. 463, 471 (2017) [hereinafter *Rethinking Prosecutors' Conflicts*].

193 See *supra* Part II.C.

194 See *Rethinking Prosecutors' Conflicts*, *supra* note 192, at 471-72.

195 See *Faithful Execution*, *supra* note 116, at 9-10.

196 See *Rethinking Prosecutors' Conflicts*, *supra* note 192, at 471-72.

197 *Id.*

198 See MODEL RULES OF PROF'L CONDUCT r. 1.7 cmt.

199 See *id.*

and legal conflicts of interest.²⁰⁰ Additionally, disciplinary authorities at both the state and federal level have been unwilling to directly address what amounts to a non-financial or institutional conflict of interest.²⁰¹ For example, a federal appeals court rejected a grievance filed against Independent Counsel Kenneth Starr alleging that Starr's ties to conservative Republicans compromised his ability to remain disinterested while investigating Democratic President Bill Clinton's role in the Whitewater scandal.²⁰² In rejecting the claim, a concurring

200 See Sadie Gurman & Aruna Viswanatha, *Matthew Whitaker, a Critic of the Mueller Investigation, Now Oversees It*, WALL ST. J. (Nov. 8, 2018, 7:02 PM), <https://www.wsj.com/articles/washington-gets-ready-for-matthew-whitaker-at-justice-department-1541699792> ("Federal ethics regulations governing the Justice Department are more generally focused on financial or legal conflicts of interest, rather than past commentary.").

201 See *In re Members of State Bar of Ariz., v. Thomas*, PDJ-2011-9002, No. 09-2293 (Ariz. Apr. 10, 2011); *Rethinking Prosecutors' Conflicts*, *supra* note 192, at 485-87 (noting that other than a disciplinary proceeding against a county attorney and his deputy for a conflict of interest arising from personal animosity, "it is uncertain whether any prosecutors other than these two in Arizona have ever been publicly disciplined for prosecuting a case on the ground that purely subjective motivations such as antipathy toward a political rival may have undermined disinterestedness").

202 See *Starr v. Mandanici*, 152 F.3d 741, 743 (8th Cir. 1998); *Rethinking Prosecutors' Conflicts*, *supra* note 192, at 485-88; David Jackson, *Complaint Against Starr is Sent to Judge*, CHI. TRIB., Mar. 9, 1997.

judge noted that a court's application of "vague standards such as political conflict of interest" would result in politicization of the judiciary and further "weaken legitimate efforts to weed out" misconduct in the government.

Despite these difficulties, Congress should enact legislation requiring all DOJ officials to report any personal or private interests that might conflict with the public interest when they are involved with any aspect of criminal law enforcement. The legislation should mandate that any person whose interests are deemed to be a "significant risk" by the OGE must recuse himself or herself from involvement with the case at hand. The OGE should define "significant risk" through rulemaking and case-by-case adjudication. Allowing the OGE to define "significant risk" through rulemaking and adjudications will allow the agency to develop appropriate standards over time while also permitting the agency to adjust the definition as needed.²⁰³

203 See generally *S.E.C. v. Chenery Corp.*, 332 U.S. 194 (1947) (finding that if given the proper statutory authority, agencies may adopt new standards through individual orders based on individual adjudications).

Conclusion

The Watergate scandal led to the downfall of President Nixon, but not America's constitutional democracy. Instead, Watergate initiated a series of reforms that not only strengthened our institutions, but also established new norms designed to guide the ethical judgments of government actors. The current moment, which has drawn comparisons to the Watergate era, presents another opportunity for exploring the deficiencies and clarifying misunderstandings in the law.

The reforms in this report would strengthen our nation's institutions and the obligations of legal professionals to serve as a check on the president's powers. It is not unusual for a president to attempt to expand the boundary of executive power. However, when a president attempts to expand his or her executive power, scholars and the public should evaluate whether such an increase in executive power is in the best interest of the nation.



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